

IN THE SUPREME COURT OF OHIO

MICHAEL E. CULLEN

Plaintiff-Appellee

v.

STATE FARM MUTUAL
AUTOMOBILE INSURANCE
COMPANY

Defendant-Appellant

Case No. 2012-0535

On Appeal From the
Cuyahoga County Court
of Appeals, Eighth
Appellate District,
Case No. 10-095925

**MOTION OF APPELLANT STATE FARM MUTUAL AUTOMOBILE INSURANCE
COMPANY TO SUPPLEMENT THE RECORD WITH FILED DOCUMENTS NOT
TRANSMITTED BY THE CUYAHOGA COUNTY CLERK OF COURTS**

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SUPREME COURT OF OHIO

MOTION OF APPELLANT STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY TO SUPPLEMENT THE RECORD WITH FILED DOCUMENTS NOT TRANSMITTED BY THE CUYAHOGA COUNTY CLERK OF COURTS

Appellant State Farm Mutual Automobile Insurance Company (“State Farm”) moves to supplement the record to include State Farm’s (1) Motion to Exclude the Testimony and Reports of Craig Carmody and Gary Derian, and (2) Motion to Exclude the Testimony and Report of Peter J. Hildebrand, along with exhibits to same, both filed in the above case with the Cuyahoga County Court of Common Pleas on February 24, 2010. Copies of these two motions bearing date stamps of the clerk of courts are attached as exhibits 1 and 2.

Both of these motions were filed in the trial court on February 24, 2010, and are identified on the trial court’s docket at numbers 122 and 123:

02/24/2010	D1	MO	D1 STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY MOTION OF DEFT. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY TO EXCLUDE THE TESTIMONY AND REPORTS OF CRAIG CARMODY AND GARY DERIAN MICHAEL K FARRELL 0040941 12/16/2010 - MOOT
02/24/2010	D1	MO	D1 STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY MOTION OF DEFT TO EXCLUDE THE TESTIMONY AND REPORT OF PETER J HILDEBRAND MICHAEL K FARRELL 0040941 12/16/2010 - MOOT

Additionally, Plaintiff responded by combined memorandum in opposition to both motions on April 20, 2010 (docket no. 139).

However, a search of the record transmitted to this Court by the Clerk of Courts for Cuyahoga County revealed that these two motions were not contained in the transmitted record. The Clerk of Courts for Cuyahoga County has confirmed to this Court that it was unable to locate these previously filed motions that are missing from the transmitted files. A copy of a

June 28, 2012 letter to this effect from the Cuyahoga County Clerk's office is attached as Exhibit 3. Thus, the trial court's docket and the attached Exhibits 1-3 clearly show that the two motions to exclude were filed in this matter with the Cuyahoga County Clerk's office, but are now absent from the complete record transmitted to this Court.

As such, State Farm respectfully requests that this Court order that copies of State Farm's two motions to exclude, with exhibits, which are attached as Exhibits 1 and 2, be added to and made a part of the record on appeal that has been transmitted to this Court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Motion to Supplement was served upon the following by first class U. S. mail, postage prepaid, this 2nd day of August, 2012:

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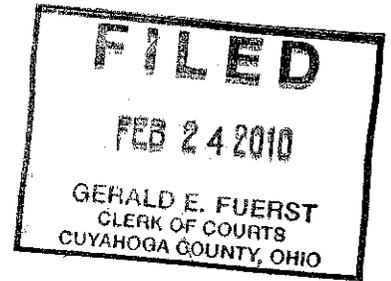
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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO



MICHAEL E. CULLEN, *et al.*

Plaintiffs,

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant.

CASE NO. 555183

JUDGE DAVID T. MATIA

**MOTION OF DEFENDANT STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY TO EXCLUDE THE
TESTIMONY AND REPORTS OF CRAIG CARMODY AND GARY DERIAN**

State Farm Mutual Automobile Insurance Company ("State Farm") moves to exclude the testimony of Plaintiff's proposed experts, Craig Carmody and Gary Derian. State Farm moves to exclude Mr. Carmody's testimony and report for the following reasons:

- First, his conclusion - that a repaired windshield is "capable" of initiating "failure" that "can" expose people to hazards - is not based on "reliable scientific, technical, or other specialized information." Evid. R. 702.
- Second, his conclusion that a repair does not restore a windshield to its "original condition" is irrelevant and, in any event, he admittedly did not know the original condition of Plaintiff's windshield, and thus it is also inadmissible under Evid. R. 402.
- Third, Mr. Carmody's opinions regarding what State Farm "knew" about windshield repair and that State Farm "misled" insureds are impermissible legal conclusions about which he is not competent to testify.
- Fourth, all of Mr. Carmody's opinions relate solely to the merits of Plaintiff's claims, and not to class certification. Because class

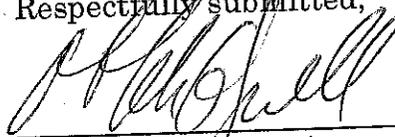
certification must be decided independent of the perceived merits of Plaintiff's claims, his opinions are irrelevant at this stage of the litigation.

State Farm moves to exclude the testimony and report of Mr. Derian on the following three grounds:

- First, his conclusions that a repaired windshield does not possess the mechanical properties of a replacement windshield and "*may*" fail to meet (inapplicable) safety standards are not based on "reliable scientific, technical, or other specialized information." Evid. R. 702.
- Second, his opinions regarding what a windshield "*might or might not do*" do not make any fact of consequence more or less probable; thus, his opinions do not satisfy the threshold requirement of relevance under Evid. R. 402.
- Third, contrary to Evid. R. 703, Mr. Derian improperly bases his testimony on Mr. Carmody's opinions, which are likewise inadmissible.

For these reasons, as well as those outlined in the attached memorandum in support, Mr. Derian's and Mr. Carmody's testimony and reports should be excluded.

Respectfully submitted,



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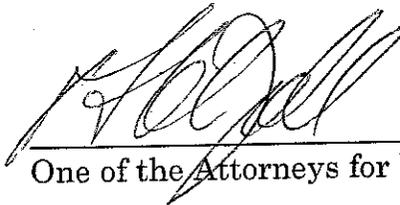
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and accurate copies of the foregoing were served upon the following by email and by hand-delivery this 24th day of February, 2010 on:

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

MICHAEL E. CULLEN, *et al.*

Plaintiffs,

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant.

CASE NO. 555183

JUDGE DAVID T. MATIA

**MEMORANDUM IN SUPPORT OF DEFENDANT STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY'S MOTION TO EXCLUDE THE
TESTIMONY AND REPORTS OF CRAIG CARMODY AND GARY DERIAN**

I. INTRODUCTION

This is a putative class action in which Plaintiff alleges that Defendant State Farm Mutual Automobile Insurance Company ("State Farm") breached its insurance contracts with Plaintiff and the putative class members by paying for the repair of their damaged windshields, rather than paying to replace the windshields or giving them a cash payment equal to the replacement cost (regardless of whether a windshield was repaired or replaced). Plaintiff chose to repair his windshield, but now complains that his repair was not adequate, or that he did not know what his policy says.

Plaintiff offers the opinion of Craig Carmody as a purported expert witness regarding whether (i) Plaintiff's repaired windshield was restored to its "original condition," and (ii) repaired windshields are defective in a manner "capable" of

"initiating failure" and exposing people to hazards. See Report of Craig Carmody ("Carmody Report") at 1, attached as Exhibit A. Mr. Carmody also offers opinions as to State Farm's claim handling practices and State Farm's contractual obligations under the terms of its insurance policies (notwithstanding his admitted total lack of experience or expertise in that area). Mr. Derian, relying upon Mr. Carmody's flawed and inadmissible report, offers his opinion as to the "safety hazards" purportedly posed by repaired windshields. Both Mr. Carmody and Mr. Derian admit that they are aware of not even a single instance of a physical injury ever caused by a repaired windshield.

State Farm moves to exclude the testimony and reports of Mr. Carmody and Mr. Derian under Rules of Evidence 702 and 402 as unreliable and irrelevant. In addition, Mr. Carmody's opinions as to State Farm's contractual obligations and claims handling are impermissible legal conclusions and entirely outside any expertise Mr. Carmody claims to have.

A. Mr. Carmody

First, Mr. Carmody's conclusion that a repaired windshield is "capable" of "initiating failure" that can expose people to hazards (*id.* at 9) is not based on "reliable scientific, technical, or other specialized information," as required by Rule 702. For example, in concluding that windshield repair is not safe, Mr. Carmody relied upon a 1993 study by the National Glass Association ("NGA"), which he termed "the most current" information he could find.¹ The NGA 1993 study did not

¹ Deposition of Craig Carmody ("Carmody Dep.") at 211. Copies of the pages of Mr. Carmody's deposition that are cited herein are attached as Exhibit B.

conclude that windshield repair was unsafe or should not be done. To the contrary, the 1993 study concluded that "guidelines" for windshield repairs would be "appropriate and recommended." Moreover, just three months after that study, the NGA issued its own guidelines for windshield repair, which Mr. Carmody wholly ignored. Likewise, Mr. Carmody relied upon the American National Standards Institute ("ANSI") standard for the *manufacture* of windshields (which is irrelevant here), but was completely unaware even of the existence of the ANSI standard for *repair* of windshields. Mr. Carmody could name no government agency that agrees with his conclusions or any state that prohibits windshield repair or requires insurers to pay for windshield replacement rather than repair. Because of these and other equally significant deficiencies discussed below, Mr. Carmody's opinions do not meet the standards of admissibility under Rule 702 and should not be considered for purposes of class certification or for any other purpose in this case.

Second, Mr. Carmody's conclusion that a repair does not restore a windshield to its "original condition" is irrelevant. Mr. Carmody purports to opine that State Farm's policies require that a policyholder's repaired windshield be returned to its original (*i.e.*, pre-loss) condition by the repair – an inadmissible (and incorrect) legal conclusion and one that Mr. Carmody in any case is not competent to give. In fact, State Farm's policies do not require that repair return a windshield to its *pre-loss* condition. Under the policies, pre-loss condition is the standard only when a written estimate is used, in which case the written estimate must specify replacement parts sufficient to return a car to its pre-loss condition – a provision

that is completely inapplicable to Plaintiff's and the putative class members' claims. In any case, Mr. Carmody admittedly did not know the condition of Plaintiff's windshield before it was damaged and repaired and thus has no basis, scientific or otherwise, for stating that the windshield was not restored to its pre-loss condition.

Third, Mr. Carmody's opinions regarding what State Farm "knew" about windshield repair and that State Farm "misled" insureds are impermissible legal conclusions as well as matters about which Mr. Carmody, a ceramic engineer, has no expertise or knowledge.

B. Mr. Derian

Plaintiff offers the opinion of Mr. Derian as a purported expert witness "to determine potential safety hazards caused by a cracked windshield that has been repaired." See Report of Gary Derian ("Derian Report") at 1, § A, attached as Exhibit C. Like Mr. Carmody, Mr. Derian declares that every windshield repair ever performed in the United States is a *de facto* unsafe condition.

The basic premise for Mr. Derian's opinions is that repaired windshields do not perform adequately and are unsafe. Mr. Derian has no expertise in or specialized knowledge of auto glass and windshield repair that would allow him to reach that conclusion on his own. Rather, for that basic premise, he relies upon Mr. Carmody's report. Because Mr. Carmody's report itself does not constitute and is not based upon "reliable scientific, technical, or other specialized information" (R. Evid. 702), Mr. Derian's report and testimony also do not meet the test for admissibility under Rule 702. Moreover, to the extent that Mr. Derian relies upon his own subjective beliefs that repaired windshields are not safe, his proffered

opinions are inadmissible speculation.

Relying on Mr. Carmody, Mr. Derian concludes that a repaired windshield does not possess the mechanical properties of a replacement windshield and "may" fail to meet federal motor vehicle standards for manufacturers (which are inapplicable and irrelevant to windshield repair). Mr. Derian's opinions regarding whether a windshield "may" or "may not"² meet irrelevant federal standards do not make any fact of consequence more or less probable. Thus, his opinions do not satisfy the threshold requirement of relevance under Evid. R. 402.

For these reasons, and those set forth below, the Court should exclude the testimony and reports of Mr. Carmody and Mr. Derian.

II. LEGAL STANDARD

Evidence Rule 702 governs the admissibility of expert testimony, stating:

A witness may testify as an expert if *all* of the following apply:

(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

(C) The witness' testimony is *based on reliable scientific, technical, or other specialized information.*

Ohio R. Evid. 702 (emphasis added). Further, "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing." Ohio R. Evid. 703.

In determining whether a proposed expert's testimony is reliable, the inquiry should focus on whether the principles and methods employed to reach the opinion are reliable, not whether the conclusions are correct. *Miller v. Bike Athletic Co.* (1998), 80 Ohio St.3d 607, 611 (citing Staff Notes to Evid. R. 702). Further, "to be admissible, the expert testimony must assist the trier of fact in determining a fact issue or understanding the evidence." *Id.* (citing Staff Notes to Evid. R. 702); *State v. Boston* (1989), 46 Ohio St.3d 108; *State v. Bidinost* (1994), 71 Ohio St.3d 449).

To be "reliable," an expert's "opinion must be based on scientific methodology rather than on subjective belief or unsupported speculation." *Adams v. Pro Transp., Inc.* (D. Neb. Jan. 9, 2002), No. 8:00CV558, 2002 U.S. Dist. LEXIS 6088, at *11. In analyzing whether a proposed expert's opinion is reliable, Ohio courts have looked to the standard employed by the United States Supreme Court in *Daubert v. Merrell Dow Pharm.* (1993), 509 U.S. 579. *See, e.g., Miller*, 80 Ohio St.3d at 611 ("To determine reliability, the *Daubert* court stated that a court must assess whether the reasoning or methodology underlying the testimony is scientifically valid."). In *Daubert*, the Court listed several factors a court should consider when evaluating the reliability of scientific³ evidence: (1) whether the theory or technique has been tested; (2) whether it has been subject to peer review; (3) whether there is a known or potential rate of error; and (4) whether the methodology has gained general acceptance. *Daubert*, 509 U.S. at 594. While this list may aid the court in

² Deposition of Gary Derian ("Derian Dep.") at 139. Copies of the pages of Mr. Derian's deposition that are cited herein are attached as Exhibit D.

³ *Daubert* applies to all types of expert opinion, not merely to scientific evidence. *Kumho Tire Co. v. Carmichael* (1999), 526 U.S. 137, 151.

determining reliability, the inquiry is flexible. *Id.*; see also *Kumho Tire Co. v. Carmichael* (1999), 526 U.S. 137, 150 (*Daubert* factors do not constitute a "definitive checklist or test"). It is "imperative for a trial court, as gatekeeper, to examine the principles and methodology that underlie an expert's opinion." *Valentine v. Conrad* (2006), 110 Ohio St.3d 42, 44. "A reliable opinion must be based on scientific methodology rather than on subjective belief or unsupported speculation." *Id.*

Further, determining the relevance and admissibility of expert opinion at the class certification stage can and should be performed before reaching a decision on class certification. *In re Hydrogen Peroxide Antitrust Litig.* (C.A.3, 2008), 552 F.3d 305, 323 ("Weighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands."); *Bell v. Ascendant Solutions, Inc.* (C.A.5, 2005), 422 F.3d 307, 314 n.13 (court should at least consider reliability of expert testimony on class certification issues); *Blades v. Monsanto Co.* (C.A.8, 2005), 400 F.3d 562, 575 (court may need to resolve expert disputes on evidence at the class certification stage).

III. MR. CARMODY'S REPORT AND TESTIMONY SHOULD BE EXCLUDED

Mr. Carmody is a ceramic engineer whose primary background lies in the design of glass furnaces and the manufacture of glass. Mr. Carmody has no direct experience with automobiles, auto glass, windshields (which are formed by a plastic interlayer between two layers of glass), windshield repair, or windshield replacement. He has never provided testimony regarding windshield repair or

windshields. Additionally, while he claims to know "a great deal" about windshield repair, he has never spoken to anyone that performs windshield repairs (Carmody Dep. at 81), never performed a windshield repair (*id.* at 77), has only witnessed one windshield repair (*id.* at 77-78), admits only being "involved in this type of investigation for a short period of time" (*id.* at 193-94), and admits not being an expert in the polymers and resins used to repair windshields. (*Id.* at 75).

Mr. Carmody purports to offer opinions regarding (i) whether Plaintiff's repaired windshield was restored to its "original condition" (Carmody Report at 9 (finding no. 1)); (ii) whether repaired windshields are defective in a manner "capable" of "initiating failure" and exposing people to hazards and fail to meet government safety standard ANSI Z26.1 (*id.* (findings nos. 2-4)); and (iii) what State Farm "knew" about windshield repair and how State Farm "misled" its insureds. (*Id.* (findings nos. 5-9)).

As shown below, Mr. Carmody's report and testimony do not meet the standards for admissibility under the Ohio Rules of Evidence and should be excluded.

A. Mr. Carmody's Opinion That Plaintiff's Repaired Windshield Was Not Restored To Its "Original Condition" Is Speculative, Irrelevant, And Inadmissible.

Mr. Carmody opines that State Farm's policies require that a windshield repair return the windshield to its "original condition" and that the "[e]xamination of the Cullen windshield revealed that it was not restored to its original condition."⁴

⁴ In his deposition, Mr. Carmody defines "original condition" to mean "the condition that the windshield was in prior to the damage that occurred to it." (Carmody Dep. at 128).

(Carmody Report at 9). Yet, Mr. Carmody admits not knowing the condition of the windshield prior to it being damaged:

Q Did you do anything to find out what the condition of Mr. Cullen's windshield was immediately before the chip occurred?

A There would have been no way I could have determined that.

(Carmody Dep. at 129). While Mr. Carmody opines that the repaired windshield was not restored to pre-loss condition, he has no idea of the condition of the windshield before the damage occurred. Clearly, then, his opinions on this issue are wholly speculative and unreliable.

Moreover, whether a windshield is restored to its "original condition" has no relevance whatsoever to Plaintiff's causes of action because the policy provisions applicable to Plaintiff's windshield repair do not contain a pre-loss condition standard. *See Hall v. State Farm Mut. Auto. Ins. Co.* (C.A.6, Jan. 29, 2007), No. 05-2530, 2007 U.S. App. LEXIS 2072, at *19 (under State Farm's auto policies, pre-loss condition standard applies only when State Farm exercises its right to determine cost of repair by a written estimate, which must be based upon replacement parts sufficient to return the car to its pre-loss condition).⁵ Therefore, Mr. Carmody's assertions on this point do not make any "fact of consequence" to the class certification decision (or any other issue in this case) more or less probable. *See* Evid. R. 401.

Accordingly, Mr. Carmody's opinion that Cullen's windshield was not restored to its original condition is inadmissible and should not be considered by the

⁵ The pertinent contractual provisions in State Farm's policies are discussed at pages 34-35 of Defendant's Memorandum in Opposition to Plaintiff's Motion for Class Certification.

Court for purposes of class certification or for any other purpose.

B. Mr. Carmody's Opinion That Every Repaired Windshield Is "Defective" Is Inadmissible.

Expert testimony, whether "experience-based" or "scientific," must satisfy the standards of reliability under Evid. R. 702 and *Daubert*. *Kuhmo Tire*, 526 U.S. at 151. All proffered expert testimony must meet "exacting standards of reliability." *Weisgram v. Marley Co.* (2000), 528 U.S. 440, 442.

In his deposition and report, Mr. Carmody claimed that "no [windshield chip or crack] can be repaired" (Carmody Dep. at 154), that a repaired windshield is a "defect" "capable" (under the right circumstances) of "initiating failure," and that a repaired windshield "can" expose people to hazards. (Carmody Report at 1, 9). Mr. Carmody believes that "you cannot restore a windshield to its original condition by any method other than remelting the glass and restoring it to its original glass condition." (Carmody Dep. at 255).

Thus, according to Mr. Carmody, every one of the thousands if not millions of windshield repairs performed in the United States over the last 20 years, and paid for by virtually every insurer across the country, are "defective" and "hazard[ous]" – despite the fact that out of all these windshield repairs Mr. Carmody knows of *no* instance in which a windshield repair has resulted in injury to anybody.

Mr. Carmody's sweeping declaration lacks evidence, support, or any indicia of reliability whatsoever. Not only are Mr. Carmody's conclusions unreliable, he relies on inapplicable and irrelevant materials to reach those conclusions. For example, Mr. Carmody references ANSI Z26.1 as a standard that repaired windshields all

supposedly should meet but all supposedly fail. (Carmody Report at 9, finding no. 4). However, at his deposition, Mr. Carmody admitted that this standard applies to glass *manufacturers*. (Carmody Dep. at 227). Moreover, Mr. Carmody admitted that he was not aware of the relevant ANSI standard for windshield repair, the "Repair of Laminated Automotive Glass Standard" ("ROLAGS"). (*Id.* at 200; *see also* Carmody Report at 10). This is the recognized industry standard for windshield repair, promulgated by ANSI and sponsored by the NGA. *See* ANSI/NGA R1.1-2007, "ROLAGS" (Exhibit 27 to State Farm's Appendix of Exhibits in Opposition to Motion for Class Certification ("Appendix")).⁶

Mr. Carmody did not know the actual failure rates of repaired windshields *or even if they fail at all*. (Carmody Dep. at 185). He acknowledged that there is no "verified" testing of repaired windshields. (*Id.* at 255). He also admitted that every repaired windshield that he has inspected had not, in fact, suffered his undefined "catastrophic failure." (*Id.* at 159).

Mr. Carmody did not follow any accepted methodology in evaluating the repair of Mr. Cullen's windshield. Mr. Carmody's evaluation was limited to examining the repaired chip under a 60 power microscope. Even this magnified viewing, as Carmody admitted, revealed *no* degradation of the repair, which had been performed more than three years before his inspection. (*Id.* at 165). While Mr.

⁶ While ANSI did not officially adopt the ROLAGS industry standard regarding windshield repair until 2007, it was readily available in draft format at the time Mr. Carmody issued his report and was deposed. Yet, his report contains not even a mention of it.

Carmody noted that the repair was "almost opaque,"⁷ he admitted that the entire repair area is approximately one-tenth of an inch in size (*id.* at 180-81) and near the bottom edge of the windshield. Moreover, while he wrote about so-called "multiple crack tip extensions" which form the basis for future fractal failure, he admitted not finding any actual fractal failure or any indication that the extensions had expanded at all during the three years *since the repair.* (*Id.*)

Mr. Carmody also inspected a second repaired windshield, which had been provided by Plaintiff's counsel. Mr. Carmody did not know who owned the vehicle, whether the vehicle belonged to a State Farm insured, when the windshield had been repaired (or even if it was repaired properly), or whether the windshield would have even qualified for a repair under State Farm's criteria. (*Id.* at 169-70). Mr. Carmody's description of this inspection is telling:

Q What, if anything, were you told when you were asked to look at the second windshield?

A I was told to use it sort of as an exemplar, sort of as a damaged and repaired windshield.

* * *

Q Was the damage to the second windshield similar in size and scope to what occurred with Mr. Cullen's?

A No. The other defect was extreme. It was a very large, very visible defect. It was a significant impact.

(*Id.*) (emphasis added). Mr. Carmody also examined (without his microscope) about "15 to 20" other windshields, mainly on vehicles located in the parking lot of Robson Forensic, Mr. Carmody's former employer. (*Id.* at 81-83).

In short, Mr. Carmody's own investigations into windshield repair boil down

⁷ Mr. Carmody is colorblind. (Carmody Dep. at 166). Consequently, his characterization of the clarity of the repair is also unreliable.

to his looking at Plaintiff's windshield and another windshield that Plaintiff's counsel told him to use as an exemplar with an "extreme" defect," and then looking at with his naked, color-blind eyes "15 to 20" other windshields that he happened to notice in parking lots. From this, Mr. Carmody somehow makes sweeping generalizations about thousands of windshield repairs performed across the nation over the past 19 years – and deems them all to be "defective" and "hazardous." Assuming that Mr. Carmody's windshield inspections can be said to have resulted in "data," the enormous gap between the extremely limited "data" gathered by Mr. Carmody and the sweeping conclusion he draws from that "data," with only his "experience as a ceramic engineer" (*id.* at 202) to support it, is a hallmark of unreliable expert testimony. *Kumho Tire*, 526 U.S. at 157; *Nelson v. Tennessee Gas Pipeline Co.* (C.A.6, 2001), 243 F.3d 244, 254 (expert testimony excluded because there was "too great an analytical gap between the data and the opinion proffered."). "[N]othing in either *Daubert* or the . . . Rules of Evidence requires a [trial] court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. . . . [T]here is simply too great an analytical gap between the data and the opinion proffered." *Gen. Elec. Co. v. Joiner* (1997), 522 U.S. 136, 146.

Mr. Carmody at his deposition repeatedly referred to the resins and polymers used to perform windshield repairs and asserted that he "consider[s] polymer[s] to be inferior to glass and incapable of restoring the windshield to its original condition." (Carmody Dep. at 175–76). Mr. Carmody, however, has little experience with them and admits not being an expert in polymers or resins. (*Id.* at 75).

Indeed, he could not even say whether repair technology or the resins used to repair windshields had improved since 1998 – eight years before his deposition. (*Id.* at 203).

Furthermore, Mr. Carmody's opinion that his examination of Plaintiff's windshield revealed "defects capable of initiating failure under future conditions" and "capable of exposing people to safety hazards" has no basis. (*See Carmody Report at 9 (findings nos. 2–3)*). While Mr. Carmody opined – without support – that a repaired windshield will fail *at some point*, he admitted he cannot determine when that will happen, or even whether it will be in five years, 50 years, or even when Plaintiff's car is still in use:

- Q Let's start with if. It's your testimony that it's a certainty that at some point in time, those four factors will combine in a way that leads to a failure?
- A Yes.
- Q Can you testify with certainty that that will occur while the car is still being used?
- A I don't know how long the car will be in use.
- Q So the answer is no, you can't testify to that with a reasonable degree of scientific certainty?
- A Correct.

(Carmody Dep. at 141). Simply put, Mr. Carmody's "conclusion" that Plaintiff's windshield will fail "eventually" (*id.* at 139) is meaningless and therefore unreliable; *everything* fails "eventually." As one court observed in excluding an expert witness, "[t]he general information given by [the expert]. . . did not present any theory or methodology that could be tested or otherwise scrutinized for reliability [The expert's] theory has too many unanswered questions and, therefore, fails to support any reliable conclusions." *State v. Wooden* (9th Dist.), 2008 Ohio 3629, at ¶124. The

same holds true for Mr. Carmody.

Mr. Carmody's opinions also fail to meet the *Daubert* reliability factor that the known or potential rate of error for his conclusion be known. *See Daubert*, 509 U.S. at 594. The known or potential rate of error for Mr. Carmody's opinion cannot be determined because Mr. Carmody simply proclaimed all repaired windshields everywhere and at all times "defective" – an undefined term in the engineering field that Mr. Carmody interpreted as meaning that the windshield "can and will lead to failure under the right conditions" or capable of "expos[ing] people to hazards" (Carmody Dep. at 135, 146). Mr. Carmody did not back up this theory with test data or real world data or even a single example of a windshield repair that failed. *See Asbury v. Key Mobility Servs., Ltd.* (2d Dist.), 2008 Ohio 3609, at ¶90 ("[E]xpert's testimony did not comply with Evid. R. 702(C), because his theories were not objectively verifiable and the tests, to the extent any tests were performed, did not reliably implement his theories and were not conducted in a way that would yield an accurate result.").

Moreover, despite acknowledging the need for "as much information from as many sources as possible" and the need to rely on "current" and "complete" information (Carmody Dep. at 34–35), Mr. Carmody admitted relying solely on materials that Plaintiff's counsel chose to give him, while ignoring an industry standard applicable to windshield repair – ANSI's ROLAGS standard – and much testing data that contradicts his conclusions. (*Id.* at 100, 200; Appendix, Exhibit 27). Additionally, despite admitting the need to stay "current," Mr. Carmody relied

on outdated information – a 1993 NGA study that long ago was supplanted by the NGA's own windshield repair guidelines:

Q Is it generally your practice to rely on 12 year-old information?

A I rely on the information that's available, and this was the most current that I could find.

Q Okay. Would you agree with me that repair technology has evolved dramatically in the last few years?

MR. PALOMBO: Objection.

A I haven't evaluated it.

(Carmody Dep. at 211). Furthermore, the conclusions that Mr. Carmody purported to draw from the 1993 NGA study are contradicted by the fact that the study itself did not conclude that windshield repair was unsafe or should not be done. Indeed, the 1993 study concluded that "guidelines" for windshield repairs would be "appropriate and recommended." (Exhibit E at 2). In addition, only three months after the study, the NGA issued its own windshield repair guidelines. Mr. Carmody's reliance on the 1993 study and failure to consider more recent and directly relevant materials underscores the unreliability of his opinions.⁸

Had Mr. Carmody sought current and complete information during his investigation, he would have known that ANSI, a nationally recognized standards organization that he referenced in other respects, had already published a proposed ROLAGS windshield repair standard for public comment. These standards were formally adopted in 2007, under sponsorship of the NGA. ANSI/NGA R1.1-2007, "Repair of Laminated Automotive Glass Standard" (Appendix, Exhibit 27). The existence of these nationally recognized windshield repair standards cannot be

reconciled with Mr. Carmody's opinion that all windshield repairs are somehow defective.

Other indicia also exist that Mr. Carmody's opinion has a high probability of error, including the fact that Mr. Carmody is unaware of any government agency state or federal that agrees with him:

Q [A]re you aware of any Government agency that has issued an opinion agreeing with --

A No.

(Carmody Dep. at 231).

Q Okay. Would you agree with me that as of today, repairing windshields is an accepted practice in the United States?

A Making it acceptable doesn't make it safe.

Q Okay. Are you aware of any state that prohibits the practice of repairing windshields?

A I believe that there are some states who have imposed guidelines and restrictions, but, again, that -- I did not fully investigate that.

Q What states do you believe have such guidelines or restrictions?

A I cannot recall the name of the state. It might have been Minnesota.

Q Are you aware of any State Department of Insurance that prohibits insurance companies from paying for repairs to windshields?

A No. I did not investigate that.

(*Id.* at 237-38).

With respect to a report from the United States Testing Company (*id.*, Exhibit Q), an entity Mr. Carmody acknowledged is officially recognized by the United States Department of Labor (Carmody Dep. at 240), which states repairs can

⁸ Included in the information Mr. Carmody failed to consider is a letter from the NGA dated August 28, 2008, recognizing and endorsing ROLAGS as the industry standard for

actually strengthen a window, he dismissed it as "without technical merit" and asserted that it should be "discounted," based upon his own experience, knowledge, and training (which, as discussed above, is sorely lacking in the field of windshields and windshield repair). (See Carmody Report at 7; Carmody Dep. at 244).

As noted above, Mr. Carmody was not aware of a single incident in which a repaired windshield failed because of a repair, let alone caused injury:

Q Now, you are aware, are you not, that windshield repairs have been being done in the United States for at least 20 years?

A Yes.

Q Okay. Based on your experience in the field of ceramics, do you find it significant that you're not aware of any such event, given that span of time?

MR. PALOMBO: Objection.

A No, I don't find it significant. I've only been involved in this type of investigation for a short period of time, and I had not been looking at the issue.

(Carmody Dep. at 193-94). While he is "sure" that such a failure has occurred, he did not research the validity of his assumption. (*Id.* at 269-70).

General acceptance of an expert's methodology "can be an important factor in ruling particular evidence admissible, and a known technique which has been able to attract only minimal support within the community may properly be viewed with skepticism." *Daubert*, 509 U.S. at 594. Mr. Carmody's opinion does not satisfy the final *Daubert* element – whether the methodology or conclusion has gained general acceptance – because Mr. Carmody's approach lacks *any* methodology and his conclusions were not rendered by following any formalized or approved methodology. *Cf. Gilmore v. Vill. Green Mgmt. Co.* (8th Dist. 2008), 178 Ohio windshield repair. (Syfko Report at Ex. 10) (attached as Exhibit 12 to Appendix).

App.3d 294, 300 (Expert could testify because his conclusions were based on "deductive reasoning cited" in an approved investigation manual.). In fact, there does not appear to be *any* support for Mr. Carmody's opinions.

Mr. Carmody did not point to any standard, engineering or otherwise, that would permit him to reach wide-ranging conclusions about the structural integrity of all repaired windshields based on simply looking at a few. Similarly, he did not identify that he followed any approved methodology in reaching his opinions. While he referenced a "fault tree analysis," he admitted not following such an analysis. (Carmody Dep. at 123). Mr. Carmody's opinion, which is at best "based on nebulous methodology[,] is unhelpful to the trier of fact, . . . [and] has no place in [a] court[] of law." *Valentine v. Conrad* (2006), 110 Ohio St.3d 42, 45. *See also Turker v. Ford Motor Co.* (8th Dist.), 2007 Ohio 985, at ¶25 (excluding expert opinion that was not "based on a reliable scientific foundation," lacked "evidence showing a reliable connection between this data and the opinion proffered," and was not shown to be "generally accepted by the scientific community").

C. Mr. Carmody's Opinions Regarding What State Farm "Knew" About Windshield Repair And That State Farm "Misled" Its Insureds Are Impermissible Legal Conclusions.

The bulk of Mr. Carmody's report is devoted to assertions as to what State Farm allegedly "knew" and that State Farm "misled" its insureds. Mr. Carmody's opinions on these issues are impermissible legal conclusions. *See, e.g., Wesley v. Northeast State Reg'l Sewer Dist.* (Feb. 22, 1996), 8th Dist. No. 69008, 1996 Ohio App. LEXIS 627, at *13 (expert's affidavit "replete with conclusory statements regarding [plaintiff's] knowledge" excluded); *Warren v. Libbey Glass, Inc.* (6th

Dist.), 2009 Ohio 6686, at ¶23 (expert "may not testify, as an ultimate issue, to a defendant's knowledge or awareness . . .").

Such opinions also are entirely outside any area of expertise Mr. Carmody claims to have and manifest his patent lack of objectivity. Indeed, at his deposition, Mr. Carmody admitted that his areas of expertise are limited only to glass:

Q And you felt that your opinions should be limited to glass issues because that's the thing that you're an expert in, correct?

A Correct.

(Carmody Dep. at 73).

In addition, Mr. Carmody's opinions that State Farm "knew" of problems and "misled" its insureds assume that there were, in fact, problems. As demonstrated above, there is no basis for this opinion. Mr. Carmody's conclusions regarding State Farm's knowledge are premised on two items – a 1998 State Farm long crack report and deposition testimony acknowledging that flying glass is a safety concern. (Carmody Report at 4–7). As Mr. Carmody acknowledged, however, Mr. Cullen's windshield was not a long crack repair (crack longer than six inches). (Carmody Dep. at 201). The windshield had only a very small chip of one-tenth of an inch. Long cracks, such as were addressed in the 1998 report, do not meet State Farm's repair criteria.⁹ The 1998 report raised possible concerns about the appearance and durability of long crack repairs. (See Appendix, Exhibit 38.) As the 1998 report demonstrates, State Farm's primary concern was policyholder satisfaction,¹⁰

⁹ See Affidavit of Robert Bischoff at ¶ 32 (Appendix, Exhibit 1).

¹⁰ See *Campfield v. State Farm Mut. Auto. Ins. Co.* (10th Cir. 2008), 532 F.3d 1111, 1121-25 (affirming summary judgment for State Farm on tortious interference and consumer

contradicting Plaintiff's assertion that State Farm was "aggressively pushing" policyholders to choose windshield repair.¹¹ Finally, although Plaintiff's counsel has stressed that State Farm witnesses (in response to narrow questions from Plaintiff's counsel) have testified that flying glass is a safety concern, these witnesses have *never* testified that windshield repairs will lead to flying glass. Thus, Mr. Carmody's conclusions are simply not supported by such testimony or by the long crack study.

Likewise, Mr. Carmody's conclusory characterizations of selected portions of the training materials for Lynx telephone operators as misleading or improper are not admissible expert opinions. Nothing in Mr. Carmody's background makes him competent to render this opinion, as an expert or otherwise, about whether policyholders were "misled." (*See Carmody Dep.* at 93). Moreover, these matters and the materials upon which Mr. Carmody bases these opinions are well within the knowledge of a layman, and Mr. Carmody's opinions on them do not qualify under Evid. R. 702(A).

Accordingly, Mr. Carmody's report and testimony are not admissible and should be excluded.

IV. MR. DERIAN'S REPORT AND TESTIMONY SHOULD BE EXCLUDED

Mr. Derian is a mechanical engineer with expertise in accident protection claims, dismissing antitrust claims). In *Campfield*, State Farm was sued by a glass repairer who objected to State Farm's policy of not recommending long crack repairs. The Tenth Circuit's opinion in *Campfield* describes State Farm's practices regarding windshield repair and replacement and specifically notes State Farm's concerns regarding the durability and appearance of repairs to long cracks in excess of six inches. *Id.* at 1121-22.

reconstruction, tire engineering, and the design of electric, hydraulic, and pneumatic power systems. While he averred in this affidavit that he is a ceramic engineer, during his deposition he admitted that he is not a ceramic engineer. (Derian Dep. at 9).¹² Also, while he states that he has "quite a lot of experience with glass," such as its "brittle nature" (*id.* at 10, 40), he does not have any special expertise with glass or ceramics (*id.* at 10), and his experience is limited to overseeing the purchase and installation of windshields for a motor vehicle manufacturer for a three-year period over 20 years ago. (*Id.* at 34-35). Mr. Derian has never testified about glass, ceramics, windshields, or windshield repair. (*Id.* at 39) and has no experience in windshield repair. (*Id.* at 212). Additionally, he has never received any professional training on any facet of windshield repair. (*Id.* at 37). Indeed, Mr. Derian is not even aware of any developments in the last 10 years concerning windshield repair. (*Id.* at 164).

As shown below, Mr. Derian's report and testimony do not meet the Ohio standards for admissibility of expert evidence and should be excluded.

A. Mr. Derian's Testimony and Report Are Inadmissible Because They Rely Upon Mr. Carmody's Report and Testimony.

Mr. Derian's report and testimony are inadmissible first and foremost because Mr. Derian premises his opinions on Mr. Carmody's unreliable and inadmissible conclusion that repaired windshields are unsafe. Mr. Derian testified at his deposition that his opinions "have to do with the automotive safety aspect of a

¹¹ See Plaintiff's Supplement to Motion for Class Certification at 35.

¹² Mr. Derian's affidavit was also not signed before a notary, despite the notary's averment to the contrary. (Derian Dep. at 29).

repaired windshield versus a replaced windshield," specifically, the "potential safety hazards" of a repaired windshield. (Derian Dep. at 74, 87). His proffered opinion that "[a] repaired windshield does not possess the mechanical properties of a replacement windshield" (Derian Report at 2-3 (finding no. 1)) is directly premised upon Mr. Carmody's conclusions. Mr. Derian's additional purported opinions are speculation as to potential safety hazards and have no validity because the underlying premise as supplied by Mr. Carmody is invalid and inadmissible.¹³ It is clear that Mr. Derian himself has no basis for an opinion that there is or may be a reduced level of safety in a repaired windshield. Mr. Derian simply accepted as true Mr. Carmody's (incorrect) conclusions regarding the "weak[ness]" of repaired glass, and then offered his opinion on how weak glass would/could impact a car's safety:

Q. What did your investigation of this matter entail?

A. Mr. Carmody's opinions that a repaired glass was weaker than non-repaired glass was one basis. And then I applied that to the areas of automotive safety that rely on the strength of a windshield.

(Derian Dep. at 81; *see also id.* at 70 (stating that he "rel[ie]d" on documents, including Mr. Carmody's report); *id.* at 78-79 ("Craig was doing a lot of the research and a lot of the glass-oriented work. And after that was more or less determined,

¹³ *See, e.g.*, Derian Report at 3 (finding no. 6: "[v]ehicles with repaired windshields *may* fail to meet Federal Motor Vehicle Standards [applicable to motor vehicle manufacturers]") (emphasis added); *id.* at 1 ("[a] repaired windshield is compromised in several ways that *may* impact the ability of a vehicle to meet these standards") (emphasis added); *id.* at 2 ("[t]he ability of a vehicle with a repaired windshield to meet FMVSS 205 is unknown and such a vehicle *may* be in violation of that standard") (emphasis added). Mr. Derian's other "findings," nos. 2-5, on page 3 of his report, are platitudes regarding the safety role of a motor vehicle windshield and safety standards in general, which have no direct impact or relevance to this matter.

then I applied that work to automobile safety.").¹⁴ In other words, Mr. Derian based his report and testimony on Mr. Carmody's report, which as shown above is unreliable and inadmissible.

Under Rule 703, Mr. Derian's report and testimony do not have a proper basis. Rule 703 provides that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing." Evid. R. 703. "Expert opinions may not be based upon other opinions and may not be based upon hearsay evidence which has not been admitted." *Azzano v. O'Malley-Clements* (8th Dist. 1998), 126 Ohio App.3d 368, 373 (internal quotation and citation omitted); *see also Swarze v. Divers Supply* (5th Dist.), 2002 Ohio 3945, at ¶39 (citing *Azzano*); *Prakash v. Copley Township* (9th Dist.), 2003 Ohio 642, at ¶34 ("An expert may not rely on statements of others as a basis for his expert testimony when the statements have not been admitted into evidence.").

As shown above, the opinions offered by Mr. Carmody do not satisfy the reliability requirements of *Daubert* or Rule 702. Mr. Derian's opinions, which rely

¹⁴ Later in his deposition, Mr. Derian clarified that he did not rely on Mr. Carmody for *all* of his opinions. (Derian Dep. at 173-74) ("Well, I didn't really rely on Mr. Carmody's opinions for my opinions. . . . He's the glass guy and I'm the car guy, but I have a lot of glass experience myself, as we talked about. So I think I explained I was comfortable with his opinions because I was familiar with the technology that he was talking about."). As shown below (*see* Point IV.B *infra*), to the extent Mr. Derian relies upon his own "experience" and subjective belief as to the efficacy of repaired windshields, his proffered opinions are inadmissible speculation.

on Mr. Carmody's,¹⁵ are therefore also unreliable and inadmissible. If this Court excludes the testimony of Mr. Carmody and his expert report, under Rule 703, then Mr. Derian's testimony and expert report must be excluded as well.

B. Mr. Derian's Opinion That A Repaired Windshield Is "Defective" Is Inadmissible Under *Daubert*.

Relying upon Mr. Carmody's conclusions, Mr. Derian failed to consider (and was not even aware of) any testing or studies that support or refute his conclusions:

Q. Are you aware of any tests that have been performed on repaired windshields or repaired glass?

* * *

A. There is a long crack repair performed by State Farm. And in that report, I believe there was some reference to the ANSI penetration standard in another portion of that standard. But the ANSI standard has other areas besides those two.

Q. Okay.

A. That's the only information that I have.

(Derian Dep. at 132-33).

Q. Am I correct . . . that you made no effort and did not research to find out if any testing had actually been done on repaired windshields by people other than you and Mr. Carmody to see if they met the [safety] standards that you were referring to?

A. I haven't found any such data.

(*Id.* at 133; *see also id.* at 134 ("I have not found any independent research on the performance of repaired windshields."); *id.* at 177-78 ("I was not able to find documents to describe the strength and performance of repaired windshields.")).

Yet, there were readily available to Mr. Derian a number of reports prepared by independent testing companies following tests on repaired windshields which

¹⁵ *E.g.*, Derian Dep. at 78-79 ("Craig was doing a lot of the research and a lot of the glass-oriented work. And after that was more or less determined, then I applied that work to automobile safety.").

conclude that there are no safety concerns about repaired windshields. Thus, Mr. Derian's report does not mention the 1993 testing performed by Twin City Testing Corp., which concluded that there were no safety concerns with windshield repair in relation to moisture intrusion, or the 1998 report of the Insurance Institute for Highway Safety, which found that there is no increased risk of spalling from windshield repair. That Mr. Derian ignored or failed to locate these and other reports underscores the unreliability of his opinions.

Instead of considering all of the available literature regarding the safety of windshield repair, it is clear from Mr. Derian's testimony that his conclusions are based solely only on his purported "experience" and "knowledge":

- Q And that opinion that [safety] would be reduced, that its performance would be reduced, is not based on the actual tests that you and Mr. Carmody have done or that you have seen?
- A It's based on a knowledge of the important nature of a windshield to the performance [of the automobile].

(*Id.* at 140-41).

- Q. And when you say that the performance [of repaired glass] would not be consistent [with an undamaged windshield], is that based on any actual test results that you're aware of?
- A. As I explained, I have a lot of experience in the chemistry and the trouble it takes to properly bond glass. . . .

(*Id.* at 130).

- A. [T]he presence of a crack in a windshield severely weakens that glass. And I know that from personal experience. That would tell me that whatever happens — whether or not it passes [safety standards] — the presence of a cracked or repaired windshield would create a less safe condition than a replaced windshield.

(*Id.* at 137). And despite his failure to consider established reports proving there

are no safety problems with properly performed windshield repair, Mr. Derian asserted conclusorily that other (unidentified) mechanical engineers would agree with his conclusions:

- Q. Okay. And would a mechanical engineer having your background . . . reach the same conclusions?
- A. Yes.
- Q. In all cases?
- A. I believe so, yes.
- Q. But you're not aware of anyone who has actually done that and reached the same conclusions . . . ?
- A. [Other than Mr. Carmody] That is correct.

(*Id.* at 177).

Mr. Derian believed that he did not need to test or otherwise corroborate his theories by performing a comprehensive literature review because, in his own mind, his experience was enough:

- Q. And you didn't feel you needed to . . . corroborate your opinions in this case; is that correct?
- A. I didn't. Because like I said, my own experience

(*Id.* at 134).

Mr. Derian continued to cling to his own opinions despite the fact that he was unable to identify a single instance where a repair led to a windshield failure.

- Q. Are you aware of any instance in which the reduced strength that you opined a repair leads to has led to either a failure of a windshield? * * *
- A. No.
- Q. Are you aware of any situation in which, again, the reduction in safety that you've opined occurs has led to an injury that wouldn't otherwise have occurred?
- A. I don't know. I have not found such a case.

* * *

Q Do you think if [a windshield repair had caused injury] happened[,] it would have been in the research you did; it would have popped up?

MR. BASHEIN: Objection.

A I thought so when I was doing the research.

Q Okay. Is the absence of that kind of information in the course of your research something you consider to be significant?

MR. BASHEIN: Objection.

A No.

(*Id.* at 185-86).

Mr. Derian's belief in his own so-called knowledge and experience does not satisfy Rule 702. The word "knowledge" connotes "more than subjective belief or unsupported speculation." *Daubert*, 509 U.S. at 590. And "nothing in either *Daubert* or the . . . Rules of Evidence requires a [trial] court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. . . ." *Gen. Elec. Co.*, 522 U.S. at 146.

It hardly need be said that Mr. Derian's reliance upon Mr. Carmody and his own subjective beliefs that repaired windshields are not safe does not constitute a generally accepted methodology for purposes of the Rule 702 analysis. General acceptance "can be an important factor in ruling particular evidence admissible, and a known technique which has been able to attract only minimal support within the community may properly be viewed with skepticism." *Daubert*, 509 U.S. at 594. Mr. Derian, however, followed no accepted methodology, or any methodology whatsoever.

Mr. Derian himself defines "scientific investigation" as follows:

[O]pinions . . . based on scientific fact, which means we have -- I don't know. There's a list of this stuff in the Federal Rules of Evidence . . . ,

hypothesis testing, that sort of thing, ruling out alternate causes, another expert with the same facts would have the same opinions we would, things like that, repeatability.

(Derian Dep. at 23-24). As shown above, in every respect, Mr. Derian fails his own definition of a scientific investigation. While Mr. Carmody repeatedly asserted that "it is well known" or his opinions are "generally accepted," Mr. Derian fails to identify a single source in support of these "well-known" or "generally accepted" principles (other than Mr. Carmody). (*Id.* at 79). Moreover, Mr. Derian was not even aware of the nationally recognized standards for windshield repair adopted by ANSI:

- Q. Are you aware of any organizations that either set standards or criteria for windshield repair?
- A. I suspect that there is.

(*Id.* at 182).

In short, Mr. Derian's "methodology" amounted to reviewing Mr. Carmody's report and preparing opinions based on that report and upon his own subjective beliefs regarding the efficacy of windshield repair, while at the same time either purposefully ignoring or failing to locate the available data indicating that windshield repair is safe. The lack of an accepted methodology means that Mr. Derian's testimony and report, like Mr. Carmody's, lack reliability and should be excluded. *See Finley v. First Realty Prop. Mgmt.* (9th Dist.), 2009 Ohio 6797, at ¶19. Indeed, it is axiomatic that such "mere theoretical speculations lacking a basis in the record" are not admissible. *Bailey PVS Oxide, L.L.C. v. Plas-Tank Indus.* (N.D. Ohio 2004), 330 F.Supp.2d 930, 931 (parallel citation omitted). Mr.

Derian's opinion, which is at best "based on nebulous methodology[,] is unhelpful to the trier of fact, . . . [and] has no place in [a] court[] of law." *Valentine v. Conrad* (2006), 110 Ohio St.3d 42, 45.

C. Mr. Derian's Opinion That Repaired Windshields *May* Fail To Meet Safety Standards Is Irrelevant.

Expert testimony, like any other form of evidence, must be relevant to be admissible. *Miller*, 80 Ohio St.3d at 611. Relevant evidence is that which has the "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid. R. 401.

Mr. Derian testified at his deposition that "a repaired windshield, . . . *may* cause that vehicle to fail motor vehicle safety standards, *it may not*." (Derian Dep. at 139) (emphasis added). Likewise, Mr. Derian opined in his report that "[v]ehicles with repaired windshields *may* fail to meet Federal Motor Vehicle Standards [applicable to motor vehicle manufacturers]." (Derian Report at 3, finding no. 6 (emphasis added)). That something may or may not happen is an irrelevant tautology – anything may or may not fail. Moreover, that something may or may not fail is not a concept "beyond the knowledge or experience" of lay persons. Evid. R. 702(A).

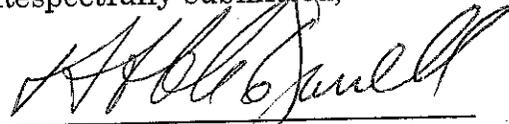
By its nature, testimony that a windshield "may" or "may not" fail does not make anything "more or less" probable – the threshold for relevance under Evid. R. 401. Similarly, that something may or may not be true is a concept well within the grasp of laypersons – it is not proper expert testimony under Evid. R. 702(A).

Either way, Mr. Derian's opinions on what may or may not be are inadmissible. *See Van Beusecum v. Continental Builders* (Dec. 27, 2004), 5th Dist. No. 04-CAE-01-008, 2004 WL 3090232, at *24 ("[C]ourts deal with probabilities, not possibilities"); *Magical Farms, Inc. v. Land O'Lakes, Inc.* (N.D. Ohio Mar. 8, 2007), No. 1:03CV2054, 2007 WL 4727225, at *3 ("[The expert's] opinion clearly fails to satisfy the requirement that he speak to probabilities and not possibilities"); *cf. Stinson v. England* (1994), 69 Ohio St.3d 451, 456 (expert opinion regarding a causative event, including alternative causes, must be expressed in terms of probability).

CONCLUSION

For all the foregoing reasons, State Farm requests that Mr. Carmody's and Mr. Derian's reports and testimony be excluded.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the following, by email and hand-delivery on this 24th day of February, 2010.

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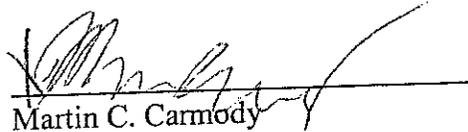
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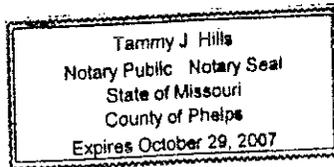
Martin C. Carmody, being first duly sworn according to law, deposes and says:

1. Exhibit "1" appended hereto is a true and exact copy of a report I prepared dated November 3, 2006. The findings and opinions expressed therein are based upon my investigation of this matter and my knowledge, training, and experience as a ceramic engineer. The opinions have all been expressed within a reasonable degree of professional certainty.
2. Exhibit "2" appended hereto is a true and exact copy of my Curriculum Vitae.

Further affiant sayeth naught.


Martin C. Carmody

SWORN TO BEFORE ME and subscribed to in my presence this ^{10th} day of November, 2006.




NOTARY PUBLIC



ENGINEER'S REPORT
of the
CULLEN WINDSHIELD REPAIR INVESTIGATION

By:

Craig Carmody

November 3, 2006



Robson Forensic
INCORPORATED

EXHIBIT

A-1

CULLEN INVESTIGATION

ENGINEER'S REPORT

November 2006

A. INTRODUCTION

Michael Cullen (Cullen) purchased a State Farm motor vehicle policy on October 18, 2002. The insurance policy stated that State Farm would be required, in the event of damage to the vehicle, to either pay the insured for the actual cash value of the covered vehicle, or, when the vehicle was not a total loss, the cost of repairs or replacements needed to return the vehicle to its pre-loss condition. In March, 2003, Cullen's windshield was struck by an object and damaged while driving on Interstate 480 in the city of Maple Heights, Ohio. Cullen contacted his agent and his vehicle was recommended as a candidate for windshield repair.

The purpose of this investigation is to determine if the subject repair restored Cullen's windshield to its original condition, if the repaired windshield is defective in a manner capable of initiating failure, and if the repaired windshield is defective in a manner that can expose people to hazards.

B. MATERIALS AVAILABLE FOR REVIEW

1. Cullen Insurance Policy
2. NGA Report on Windshield Repair
3. United States Testing Report on Windshield Repair
4. Plaintiff's First Set of Interrogatories Profounded Upon Defendant
5. Plaintiff's Request for Production of Documents Profounded Upon Defendant
6. Deposition of Bob Bischoff
7. Glass Central Program Documents
8. Ultra-Bond Patents
9. Deposition of Brian Carol
10. Deposition of Joanne Guerra
11. Class Action Complaint
12. Letter from NWRA Technical Consultant Ed Tingley to John Neilans, Visteon Glass
13. State Farm Windshield Repair Training Documents and Scripts from LYNX
5. ANSI Z26.1a-1980

C. BACKGROUND INFORMATION

Until spring of 2006, State Farm had a longstanding policy of recommending to their insured that damaged windshields be repaired and not replaced. The repair industry, while touting the benefits of the repair process, acknowledges that the repair technique does not restore the windshield to its original condition. State Farm also expressed concerns regarding the windshield repair process. The National Glass Association, a leading organization in the glass industry, issued a report that strongly criticized windshield repair.

D. SITE CONDITIONS

The Cullen windshield was examined February 14th, 2006 in Cleveland, Ohio. A digital optical microscope was used to examine the damaged area and the repair features. The repair displayed many of the problems that are typically seen in repaired windshields. The repair is optically almost opaque, and shows signs of multiple crack tip extensions which form the basis for future fracture failure as the resin degrades and the repair is subject to UV light, heat and mechanical stress, as well as chemical or physical degradation under normal driving conditions. It also appears that the interlayer was exposed to the outside via crack surface.

Figure 1: Cullen Impact Damage: Note penetration to PVB inter-layer

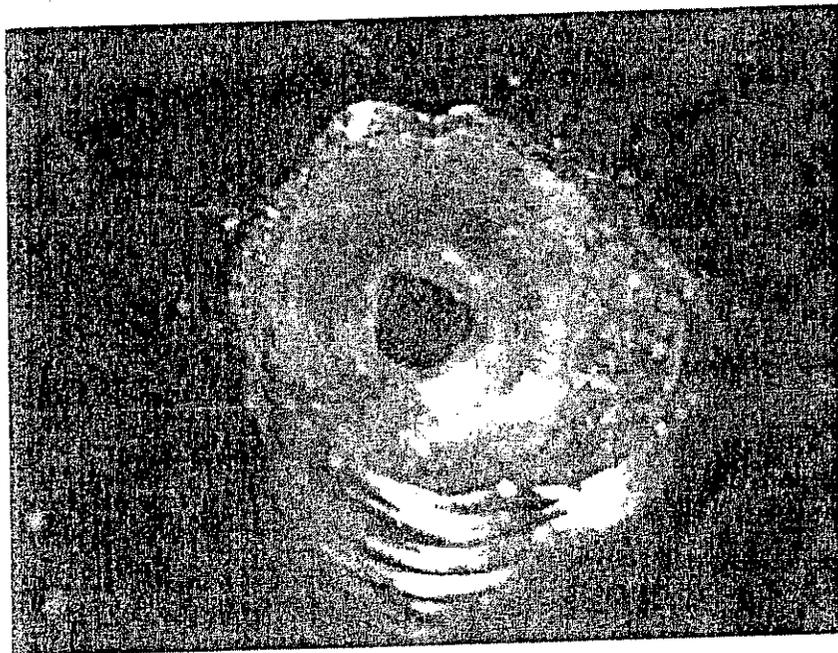
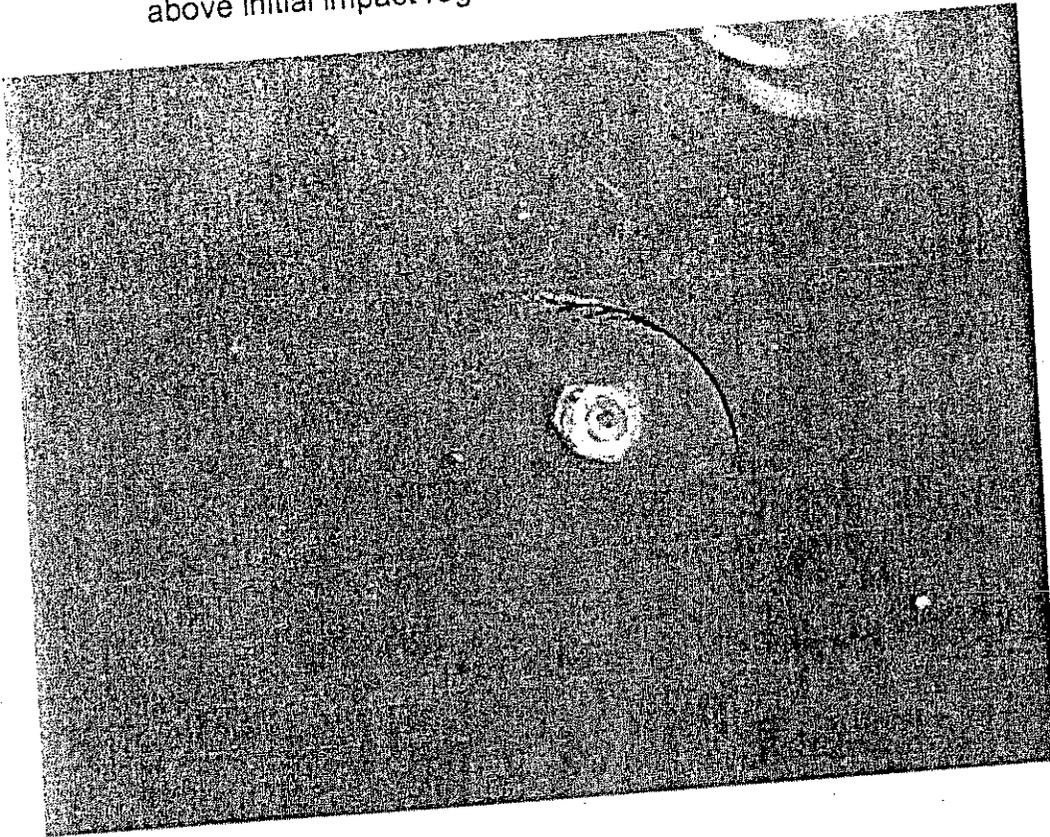


Figure 2: Wide View of Cullen Damaged Windshield:
Note the multiple forking crack tip extensions at the upper half-moon crack
above initial impact region.



E. ANALYSIS

E.1 Glass Windshield Design

An automotive glass windshield is a composite structure comprised of two layers of glass with a layer of clear plastic interlayer bonded to both sides. The purpose of this layer is to retain both glass sheets in place despite their failure in the event of breakage, such as in an auto accident. Among the important features of a well manufactured windshield that meets OEM specifications is high strength, a high degree of optical clarity, and durability over the course of the vehicle's use on the road. Glass is increasingly used in greater percentages of overall vehicle surface area and is considered a critical engineering material to the vehicle engineers. Customers also expect the window to be aesthetically pleasing and add an attractive look to their vehicle.

Strength of glass is a function of many variables, however the factors that degrade strength in any brittle material have been known to material engineers since as early as 1916, when V.D. Frechette wrote:

Processes of degradation take place at exposed surfaces, and it is for this reason that the surfaces of homogeneous brittle materials are so vulnerable to crack initiation. A discontinuity in the form of a notch, a groove, a micro-crack, or simply an atomically weak site acts as a stress concentrator or "stress raiser," that is, it acts to concentrate applied stresses at its boundary and these concentrated stresses can initiate failure.¹

In the manufacturing of both flat glass and later in the process of manufacturing laminated auto windshields, great care is taken to inspect the products multiple times to detect the presence of any gross defects in the form of cracks, checks, impact marks, abrasions, or other discontinuities that will act as stress concentrators and eventually cause failure of the product under foreseeable tensile stress loads. When these defects are detected, the windshield is determined to be unreasonably flawed and it is rejected. There is no acceptable standard for repairing gross and permanent surface damage to a windshield applied by any of the major windshield manufacturing companies.

E.2 STATE FARM Knew of the Problems with Windshield Repair

There are a wide variety of different techniques, tools, and materials used to repair automotive windshields. STATE FARM undertook their own internal study and invited major companies to demonstrate their techniques and discuss features and capabilities. The purpose of the study was to investigate long crack repair. However, during the course of the study, many concerns that apply equally to all repairs became evident.

STATE FARM issued their own internal report on windshield repair on March 9, 1998. STATE FARM writes:

- 1) *ANSI tests of repaired windshields have demonstrated that penetration and spalling performance is similar to new laminated glass; however, **standardized testing protocols do not exist for long term durability, shrinkage, external contamination, and edge stresses.***
- 2) *Some glass repair companies (several that visited the lab) are so uncomfortable with the unknowns of long crack repairs that they won't do edge crack repairs and some even limit the length of the crack that the technicians can repair.*
- 3) *Repair processes, resins, basic technical knowledge, and final repair quality was very inconsistent between the different glass repair companies that we met with.*
- 4) *All of the inconsistencies recognized during the meetings created more confusion over whether or not long crack repair provides a good long-term solution.*
- 5) ***One company out of the seven that visited the Lab made what I would consider a decent cosmetically pleasing repair. Keep in mind that all the repairs done on fresh cracks with no contaminants to***



complicate the repair process. **These are by far the best repairs we can expect to see in the actual marketplace.**

- 6) Most of the resins that are in use by the glass repair companies are cured by UV light. This becomes an issue when an edge crack is repaired and the molding can't be removed to cure the resin at the edge of the crack. Only one company had a good answer to this, they use a two part catalyzed resin that does not rely on a UV source to cure.
- 7) **There have been numerous independent tests performed in a lab environment, however this does not take into account real world concerns for long term durability.** (e.g. how will that repair look or perform 1,2, or 4 years down the road?)
- 8) How well will an edge crack hold up if a windshield needs to be R&I'd for a subsequent repair?²

STATE FARM goes on to conclude:

We should carefully consider if repairing long cracks to automotive windshields is a viable repair option.²

Based upon the materials reviewed, it is readily apparent that STATE FARM knew of the numerous problems and the controversy over windshield repair, and yet continued to attempt to convince their insured through LYNX (STATE FARM's third party administrator, and a subsidiary of PPG Industries), to pursue the repair option.

In January, 1994 STATE FARM received a report from the National Glass Association (NGA) Windshield Repair Subcommittee. The NGA is a well regarded consortium of glass companies and Bob Bischoff, National Glass Manager for STATE FARM, had previously attended their conferences. The report summary states:

After conducting a number of tests at four separate facilities, the subcommittee held a second meeting at NGA. Based on the test results presented at this meeting, the technical subcommittee reached the following conclusions:

- A. **Test results demonstrate that samples of broken and repaired glass were not as strong as undamaged laminated glass.**
- B. **Test results demonstrate that samples of broken and repaired annealed glass were not as strong as undamaged annealed glass.**
- C. **Test results demonstrate that moisture which penetrates a defect in a laminated glass lite and reaches the interlayer can adversely affect the glass/interlayer adhesion. This condition could result in excessive fragments dislodging from the glass on the side opposite the impact. This raises the concern that a motor vehicle's driver and/or passengers could be subjected to excessive "flying" pieces of glass should an**



impact occur on the exterior side of the windshield in the area of the defect.

- D. The test results noted in item C above also raise the concern about the adverse effects that repair materials may have on a windshield's interlayer when a defect extends through the glass to the interlayer. Included among the effects to be considered are reductions in glass/interlayer adhesion and in interlayer strength. The subcommittee did not perform any tests at this time to evaluate this situation.
- E. Test results demonstrate that samples of annealed glass coated with a cured film of repair material were adversely affected by a 24 hour exposure at room temperature to water and isopropyl alcohol. **These results lead the subcommittee to be concerned about the resistance of repair materials to weather, cleaning solvents, and the windshield washing fluids and the effect of long-term exposure.**

Based on the tests performed, the subcommittee notes the following:

- 1. The test data does not demonstrate that a repaired windshield would be equivalent in performance to one that was undamaged.**
- 2. For a windshield with a defect that extends to the interlayer, a potential risk due to glass spalling exists to the vehicles occupants should the area around the defect be impacted. Repair of the defect does not eliminate the risk.**
3. No tests were performed to study the visual acuity or the long-term integrity of a repaired windshield. The decision to not investigate these two areas was based on factors other than importance. The testing of these two areas is recommended.
4. From the nature and extent of the tests conducted, the subcommittee could not draw a direct correlation to the actual degree of safety performance of a repaired windshield in a motor vehicle.³

STATE FARM knew of the serious concerns expressed in this report as early as 2004. In deposition Bob Bischoff, National Glass Manager for STATE FARM was asked:

Q: *Would you call excessive flying glass inside a vehicle a safety concern?*
A: *Definitely.*⁴

Ed Tingley, a technical consultant to the National Windshield Replacement Association, wrote in a memo to the Technology Manager of Visteon Glass Systems:

It has never been the intention of the NWRA to comply with ANSI Z26.1 (Safety Code for Glazing Materials for Motor Vehicles Operating on Land Highways), nor do we believe that it applies to the repair industry.⁵



As the defining quality document used to ensure safe and proper glazing selections by automotive glass manufacturing companies (such as PPG Industries), ANSI Z26.1 is mandated by the U.S. government to guarantee safety of motor vehicle occupants. By dealing with a subsidiary of PPG (LYNX) STATE FARM should have known that they were failing to provide their insured with the level of safety and protection mandated by the federal government.

Ultra-Bond, a manufacturer and supplier of windshield repair equipment and materials, has consistently advocated windshield repair. In 1993, they commissioned the United States Testing Company to perform testing that has since been cited by the National Windshield Repair Association as evidence that, in some case, repaired windshields are actually stronger than the original windshield in per-loss condition.

This test relied upon impact and penetration testing according to ANSI Z26.1. For the test, samples of unbroken and repaired glass were subjected to point impacts from steel darts and balls. The specimens were also tested for flexural strength.

This test regime does not address many of the known problems with windshield repair. It does not measure or report the degradation in optical properties of the repaired glass. It does not address any issues of delamination due to possible elemental exposure of the windshield interlayer. It does not address issues of contamination of the cracks prior to repair. It does not study or measure the longevity of a repair under UV light exposure, physical abrasion, or chemical attack on the road. It does not measure the effects of thermal heating on the glass from the vehicle heating system, which is one of the most common failure modes in a repaired windshield.

Analysis of test results shows anomalies and raises questions about the test methodology. The repaired glass marked 6" failed more easily with the repaired crack in compression than in tension. This is difficult to explain since compression tends to retard crack growth and glass always fails in tension. The assertion that glass could be made stronger by repair is not consistent with established material science. The tests by United States Testing Company were performed on ideal samples under controlled laboratory conditions, without any reflection of "real" field conditions. STATE FARM expressed their belief that real field tests were not available in their own internal study of windshield repair. From a scientific viewpoint, the test cited as evidence of the "strength" of repaired glass is too narrow and controlled to recreate the actual conditions a repaired windshield is exposed to. It is without technical merit and should be discounted.

E.3 STATE FARM Misled Their Insured About Problems with the Repairs

STATE FARM issued instructions to their third party administrator, LYNX, to actively promote the practice of windshield repair over replacement. Copies of the LYNX

"Leaders Guide" list the following objectives for customer service representatives during their training:

- Describe a repair.
- Explain the difference between a repair and a replacement.
- List the benefits of a repair.
- Qualify windshield damage to determine if it is repairable under insurance company guidelines.
- Describe key "selling techniques".
- Explain the importance of repair ratio to LYNX.
- Understand repair guidelines⁶

These selling techniques included script language that steers insured policy holders away from choosing replacement, even in cases where the insured had a zero deductible and were therefore entitled to full replacement at no cost. These selling techniques did not mention any of the known problems with windshield repair.

One important issue that LYNX failed to discuss with customers was the length of time from the original damage to the time of repair. This is one of the most important issues because the bond strength of the repair resin is severely reduced over time from contamination and reactions that take place over time as the damaged area is exposed to various chemical agents, such as salt, present on motor highways. This fact was acknowledged by STATE FARM in their training documents, but never disclosed to their policy holders.

If a repair is caught early within days of the damage occurring, it has the best chance of being successfully repaired. The longer the damage goes unrepaired the more chance it has of cracking further and becoming contaminated with dirt and pollutants. Pollutants make it more difficult to repair successfully.⁷

In the deposition of Bob Bischoff, he is asked:

Q: *And you've been aware of this since you've held your job?*

A: Yes.⁸

Yet, in the deposition, Bischoff admits STATE FARM failed to inquire about the length of time or inform the insured about concerns about repair when more than a "few days" had elapsed.

Q: *You don't tell your insureds about that in the script, do you?*

A: No, we do not.⁹

STATE FARM also mentioned the environmental benefits of glass repair, claiming that windshields cannot be recycled. Dlubak Glass had recycled windshields, including windshields from PPG Industries, since as early as 1994.

STATE FARM knew that windshield repair was not sufficient to restore the strength, aesthetic properties or optical clarity of a damaged windshield. They knew that there were concerns about longevity of the repair. They knew that repaired windshields did not meet federal standards. They knew that there were safety concerns for laceration injuries due to delamination if the inner layer was penetrated by water. They knew that the technique of repair would always leave a visible "blemish." None of these concerns were disclosed to STATE FARM policy holders in the scripted materials I reviewed.

G. FINDINGS

Within the bounds of reasonable scientific certainty, and subject to change if additional information becomes available, it is my professional opinion that:

1. Examination of the Cullen windshield revealed that it was not restored to its original condition.
2. Examination of the Cullen windshield revealed defects capable of initiating failure under future conditions.
3. Examination of the Cullen windshield revealed defects capable of exposing people to safety hazards.
4. Repaired windshields fail to meet the government mandated safety standard ANSI Z26.1 Safety Code for Glazing Materials for Motor Vehicles Operating on Land Highways.
5. By misleading consumers towards the repair option and away from the replacement option, STATE FARM deprived consumers of the protection afforded by the government mandated Safety Code.
6. The senior management of STATE FARM knew of the problems with windshield repair, and failed to inform their insured of the known hazards.
7. The windshield repair industry has acknowledged that windshield repair is not capable of restoring the windshield to original condition. After repair there is still an open and obvious defect in the windshield.
8. STATE FARM instructed their third party administrator, LYNX, to use a training and customer support system that emphasized selling techniques in order to increase the percentage of windshield repairs. This system instructed the customer service representative to discuss the benefits of repairs while failing to inform the customer of the known problems and hazards.
9. As a result of their actions, STATE FARM misled their insured, and deprived them of the right to restore the damaged glass to original, pre-loss condition. This exposed the insured to a hazard due to reductions in strength, potential for laceration, and loss of optical clarity. This deprived them of the full features and protection of an original windshield.



REFERENCES

1. "Failure Analysis of Brittle Materials," V.D. Frechette, 1916, page 7
2. STATE FARM internal report, page 3.
3. Report by NGA Windshield Report Group Technical SubCommittee, Summary
4. Deposition of Bob Bischoff, page 102
5. Letter from NWRA Technical Consultant Ed Tingley to John Neilans, Visteon Glass
6. STATE FARM Windshield Repair, Leaders Guide, page 1.
7. STATE FARM windshield Repair, Leaders Guide
8. Deposition of Bob Bischoff, page 129
9. Deposition of Bob Bischoff, page 129

Craig Carmody
Robson Forensic



Robson Forensic
INCORPORATED



Robson Forensic

INCORPORATED

CRAIG CARMODY

Material Engineer/Manufacturing Process Systems

PROFESSIONAL EXPERIENCE

2004 to present **Robson Forensic, Inc.**
Associate

Provide technical investigations, analysis, reports, and testimony towards the resolution of litigation involving:

- Failure of materials
- Fractology examinations
- Glass and plastic
- Chemical processing
- Industrial production equipment
- Ceramic and glass biomaterials
- Industrial furnaces
- Combustion systems
- Bulk material handling equipment
- Industrial gases.

1999 to 2004 **Thermotec Systems, LLC**
Manufacturing Consultant

Provided research and development services for glass, ceramic, chemical, and industrial gas manufacturing companies. Designed and built industrial combustion systems and burners. Furnace design and construction. Designed and built systems for producing coatings, material handling, chemical processing, and melting and forming of glass and non-ferrous metals.

Research Staff Consultant to Departments of Ceramic and Nuclear Engineering, University of Missouri- Rolla.

Design Consultant to Department of Mechanical Engineering, University of Missouri- Columbia. Worked with manufacturers in the fiberglass, float glass, and specialty glass industries to develop and commercialize new products.

1997 to 1999 **Flex-O-Lite, Inc.**
Plant Engineer

Developed new glass products for reflective safety products for traffic markings, airports, and personal safety equipment. Responsible for company-wide combustion engineering, capital project management, and furnace design and operations. Supervised plant engineering and maintenance, safety, and manufacturing operations. Managed raw material handling and batching operations.



CRAIG CARMODY

Material Engineer/Manufacturing Process Systems

- 1995 to 1997 **MO-SCI Corporation**
Senior Project Engineer
Supervised production and managed research projects for a high-technology glass company specializing in microspheres, fibers, and glass powders for Defense, Medical, Nuclear, and Electronic applications. Supervised commercialization of Therasphere™ radiation treatment microspheres for treatment of inoperable liver cancer. Developed new methods and materials for nuclear waste vitrification for U.S. Department of Energy. Designed production process to manufacture bio-medical glasses for use in human bone implants and prostheses. Worked with U.S. federal law enforcement to utilize glass materials as explosive identification "taggants". Developed special glass composition for radar decoy chaff for the Naval Research Facility at China Lake, California. Responsible for plant systems including bulk material handling, piping systems, flow controls, PLC controls, process equipment, grinders and classifying equipment.
- 1994 **PPG Industries**
Production Engineer
Supervised bulk material handling and batch house operations for a float glass facility producing 1000 tons/day of automotive and architectural flat glass. Special projects to improve combustion systems and furnace operations.
- 1992 to 1994 **Combustion Tec, Inc.**
Research and Development Engineer
Performed R&D and supervised installation and start-up of new processes for glass, chemical, and non-ferrous metal production. Designed new oxygen and air combustion burners that are currently in use in over 300 furnaces worldwide. Designed liquid and gas flow controls and fuel systems. Heat exchangers and furnaces for glass, ceramic, and non-ferrous metals processing.
- 1991 to 1992 **AFG Industries**
Technical Development Engineer
Responsible for project management of large-scale plant improvements and maintenance activities. Supervised repair and installation of new equipment and supervised development projects. Designed five working inventions related to flat glass manufacturing now employed in over ten furnaces worldwide. Supervised waste management issues and developed unique strategies to reduce environmental impact and waste material disposal costs.



Robson Forensic

INCORPORATED

CRAIG CARMODY

Material Engineer/Manufacturing Process Systems

EDUCATION

B.S. Ceramic Engineering, University of Missouri- Rolla, 1991

Seminars:

Industrial heating equipment training, IHEA, 1992

Ergonomics Training Seminar, University of Michigan Extension Program, 1994

PROFESSIONAL MEMBERSHIPS

American Ceramic Society, member, 1986 – present

Missouri Chapter of ACS, member, active in the promotion and support of Missouri thermal industries, 1996 – present

Research Staff Consultant, University of Missouri- Rolla

PUBLICATIONS

“Refractory Corrosion in Oxy/Fuel Systems,” Ceramic Industry Magazine, December 1999, Page 61.

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

MICHAEL E. CULLEN,
ET AL.,

Plaintiff(s),

vs.

STATE FARM MUTUAL
AUTOMOBILE INSURANCE
COMPANY,

Defendant(s).

Case No.
CV-05-555183

DEPOSITION OF CRAIG CARMODY
Wednesday, January 24, 2007

Deposition of CRAIG CARMODY, a Witness
herein, called by the Defendant for
examination under the Ohio Rules of Civil
Procedure, taken before me, the undersigned,
Cheryl L. Richter, Registered Professional
Reporter and Notary Public in and for the State
of Ohio, at the offices of Baker & Hostetler,
1900 East 9th Street, Suite 3200, Cleveland, Ohio
44114, commencing at 9:24 a.m. the day and date
set forth.

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Craig Carmody

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FEB 4 2007

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1 Q Okay.

2 A It's something I've been aware of since

3 college days.

4 Q Would scientific investigation involve

5 repeating things that people had told you?

6 A If those things were established scientific

7 fact independently verified.

8 Q And what is a scientific fact as opposed to

9 another kind of fact?

10 A A scientific fact would be a fact that was

11 based on principles of science.

12 Q Okay. Now, when you go about conducting a

13 scientific analysis -- excuse me -- a scientific

14 investigation or this fault tree analysis you

15 referred to earlier, how do you select or decide

16 upon the group of materials you'll look at or the

17 set of information you'll look at?

18 A You look at the data that's available, and

19 you attempt to find all data that you believe

20 would help you come to a conclusion.

21 Q Okay. Is objectivity a goal in a scientific

22 investigation?

23 A The goal in a scientific investigation is to

24 from it find the true answer.

25 Q Okay. And that would also be the same goal

1 in fault tree analysis, correct?

2 A Well, the goal in fault tree analysis is to

3 identify factors that could cause a failure.

4 Q Okay. But to do so, as you say, in a true

5 factual method, not with a predetermined outcome;

6 am I correct?

7 A Correct.

8 Q And given that goal of objectivity, you would

9 want, in doing a scientific investigation, as

10 much information from as many sources as

11 possible; am I correct?

12 A Yes.

13 Q Okay. And if there were debate or

14 disagreement about a subject or topic, you would

15 want to look at both sides of that information,

16 correct?

17 A Yes, as long as the information was

18 scientific.

19 Q Okay. And as a general matter, you would

20 focus on the current state of the science or the

21 current information rather than older

22 information, correct?

23 A Where available, yes.

24 Q Okay. When someone of your knowledge or

25 qualifications sets out to do a scientific

1 investigation, whose responsibility should it be

2 to decide if they have enough information?

3 A Could you repeat that question?

4 Q I'll rephrase it.

5 As an engineer doing the scientific

6 investigation, you would want the most complete

7 information, as we already talked about, that you

8 could get your hands on, correct?

9 A Correct.

10 Q And as the engineer, you're the one who has

11 to make that determination, correct?

12 A Yes.

13 Q Okay. Now, is there any difference between

14 the term technical investigation and scientific

15 investigation?

16 A Not in my mind.

17 Q Okay. With regard to your personal

18 consulting work through Robson, how much of it

19 was litigation as opposed to consulting for the

20 insurance industry?

21 A I would say that the breakdown -- I need to

22 clarify that I also did engineering work through

23 Robson Forensic. They have a division, Fournier

24 Robson & Associates, which does pure engineering

25 consulting. About 20 percent of my work was for

1 Fournier Robson, about 20 percent was insurance,

2 and the remainder would have been litigation.

3 Q So it would be 20/20/60?

4 A And those are rough estimates.

5 Q I understand. But that would be of the 50 or

6 so engagements you had through Robson?

7 A Yes.

8 Q 20 percent of those would be neither

9 litigation nor insurance?

10 A Correct.

11 Q They would be straight insurance -- excuse

12 me -- engineering?

13 A Correct.

14 Q Of the times that you were retained in

15 litigation, how many times did you actually give

16 testimony in the form of either an affidavit, a

17 deposition or actual live trial testimony?

18 MR. PALOMBO: Objection;

19 form.

20 A Yeah. You're talking about reports?

21 Q I'm talking about sworn testimony.

22 MR. PALOMBO: Well, you

23 said, "affidavits." Are you

24 talking about reports?

25 Q Affidavits is sworn testimony.

1 motor vehicle standards that Mr. Derian later
 2 opined about in his report; is that correct?
 3 A I felt that my opinions should stop at the
 4 glass-related issues and how they affected the
 5 structural integrity of the windshield itself but
 6 not how this relates to the overall vehicle.
 7 Q And you felt that your opinions should be
 8 limited to glass issues because that's the thing
 9 that you're an expert in, correct?
 10 A Correct.
 11 Q Okay. And you are not in this case
 12 purporting to be an expert on anything other than
 13 glass engineering; am I correct?

14 MR. PALOMBO: Objection.

15 A I don't know what that means. I'm an expert
16 at glass and many factors that glass affects in
17 terms of product liability.

18 Q Okay.

19 -----
 20 (Defendant's Exhibit Carmody C
 21 marked for identification.)
 22 -----

23 Q Mr. Carmody, Cheryl has handed you what we've
 24 marked as Exhibit C, which is a copy of an
 25 affidavit that you've submitted in this case?

1 A Yes.
 2 Q That affidavit states that the findings and
 3 opinions expressed in the report that was
 4 attached to the affidavit are based upon your
 5 investigation of this matter and your knowledge,
 6 training and experience as a ceramic engineer.
 7 Is that still true?
 8 A Yes.
 9 Q Okay. Can you define for me ceramic? What
 10 is a ceramic?
 11 A A ceramic is an inorganic solid which is
 12 composed of one or more oxides which has been
 13 fused at a temperature to produce a body. And a
 14 ceramic could also be an unfired product that has
 15 not yet been subjected to the thermal treatment
 16 that will later densify it.
 17 Q Could you repeat the last sentence that you
 18 just said? I'm not sure I caught it.
 19 A A ceramic is an inorganic material which is
 20 comprised of oxides. And it is considered a
 21 ceramic from the point at which it's formed. But
 22 when I think of a ceramic product, I think of to
 23 densify those oxides, to give it the final end
 24 use properties.
 25 Q And glass would be a ceramic?

1 A Glass falls under the heading of ceramic, but
 2 the ASTM definition of glass is it's an inorganic
 3 solid -- it's an inorganic material that has
 4 cooled to a solid state without crystallizing.
 5 Q What is the ASTM?
 6 A American Society for Testing and Materials.
 7 Q So am I correct that ASTM does not consider
 8 glass a ceramic or that it does?
 9 A I'm not sure of the answer to that question.
 10 I would consider glass to be a subset of the
 11 ceramic material groups.
 12 Q Would the ceramic material groups include
 13 resins?
 14 A No.
 15 Q What material group would resins fall into?
 16 A Resins would be polymers, although there's a
 17 distinct commonality between polymers and glass
 18 in that they're both amorphous solids.
 19 Q Do you consider yourself a polymer engineer?
 20 A I'm not a polymer engineer, but I have a lot
 21 of familiarity with polymers as they relate to
 22 bonding with glass systems.
 23 Q Do you consider yourself an expert in
 24 polymers and resins?
 25 A No.

1 Q Do you have any specialized training,
 2 education or experience in fields other than
 3 ceramic engineer?
 4 A As a result of over 15 years working in heavy
 5 industry, I have a bewildering amount of
 6 experience in mechanical systems, conveyors,
 7 combustion equipment, inspection systems, control
 8 systems, that -- part of designing and building a
 9 turnkey factory is understanding every element in
 10 a manufacturing facility from the ground up. So
 11 I have a lot of broad experience in
 12 manufacturing.
 13 Q Okay. Would you consider yourself to be an
 14 expert in those fields you've just described?
 15 A I don't work as an expert in those fields.
 16 I've never been called. I would have to consider
 17 the answer to that question if someone is to call
 18 me. But I choose not to work in litigation in
 19 those areas.
 20 Q Do you consider yourself to be an expert in
 21 any field outside of the manufacturing realm?
 22 A Yes.
 23 Q Okay. What field would that be?
 24 A Fractology. Fractology is the study of how
 25 things break and why.

1 Q Leaving aside fractology for a moment, are
 2 there any other fields outside of manufacturing
 3 that you consider yourself to be an expert in?
 4 A I believe that my peers would say that I'm an
 5 internationally known expert in combustion.
 6 Q Anything else?
 7 A Not that comes to mind.
 8 Q Have you ever actually repaired a windshield?
 9 A No.
 10 Q Have you ever actually watched anyone repair
 11 a windshield?
 12 A Yes.
 13 Q Where did you watch that occur?
 14 A I had a friend who had her windshield
 15 repaired about five years ago.
 16 Q Okay. Did that occur in Missouri?
 17 A Yes.
 18 Q Did you watch that process closely?
 19 A Not with a technical eye but with a
 20 professional curiosity I was observing.
 21 Q Okay. How was it that you came to be with
 22 your friend at the glass shop?
 23 A I just happened to be along for the ride.
 24 Q And did you ever tell him -- he or she they
 25 shouldn't have that repair done?

1 A At the time, I remember discussing the fact
 2 that the windshield was damaged, and I was
 3 curious from my professional perspective how they
 4 would go about repairing the windshield. I
 5 really hadn't thought about it up to that point.
 6 And I expressed at the time that I felt that that
 7 repair would not be permanent.
 8 Q Okay. And did your friend -- I take it since
 9 the repair was done, your friend disregarded or
 10 wasn't concerned about that?
 11 A I don't know what they were thinking.
 12 Q Okay. Does this person have a name?
 13 A Yes.
 14 Q I'm tired of referring to him or --
 15 A Jerilynn.
 16 Q Did Mr. Lynn say anything when you told him
 17 you didn't think it would be permanent?
 18 A First name Jerilynn.
 19 Q Did Jerilynn say anything?
 20 A I don't think it seemed important to her at
 21 the time.
 22 Q And beyond making the comment you told me,
 23 did you go any further in attempting to talk her
 24 out of this?
 25 A Not at the time.

1 Q So I take it that you thought that whether or
 2 not she had that done was a decision that she
 3 should make, since it was her car?
 4 A Yes. I remember that I was very displeased
 5 with the aesthetics of the repair. It looked
 6 terrible.
 7 Q Did Jerilynn share your displeasure?
 8 A I think at the time, from her perspective,
 9 she was glad not to have to pay her deductible.
 10 Q Did you think that was a foolish decision on
 11 her part?
 12 MR. PALOMBO: Objection.
 13 A I thought that repairing a windshield like
 14 that was not going to make that windshield an
 15 original windshield. If you call that foolish, I
 16 don't know that I would have called it foolish.
 17 Q Okay. And you expressed that opinion and she
 18 went ahead and had the repair done anyway,
 19 correct?
 20 A Yes.
 21 Q How long ago was this?
 22 A I believe it would have been -- I don't
 23 remember the exact year. It's been several years
 24 ago. It was prior to this case.
 25 Q Okay. Are you still in touch with Jerilynn?

1 A Yes.
 2 Q Okay. Does she still have that windshield?
 3 A I think she has a different vehicle now.
 4 Q Okay. Did you and she ever discuss the
 5 repair again after it was done?
 6 A No. It didn't come up.
 7 Q Okay. To your knowledge, did anything happen
 8 to it? Did it fail? Did she ever express any
 9 displeasure about it?
 10 A I wasn't paying attention. I don't know.
 11 Q How long elapsed between the repair and her
 12 no longer having that vehicle?
 13 A I just know she's driving a different vehicle
 14 now. I'm not sure when she got rid of it.
 15 Q Does Jerilynn have a last name, and what it?
 16 A Cibulka.
 17 Q Can you spell that?
 18 A C-i-b-u-l-k-a.
 19 Q Does Ms. Cibulka live in Missouri?
 20 A Yes.
 21 Q Where at?
 22 A Pacific.
 23 Q Do you know who her insurance company was?
 24 A No.
 25 Q Other than the repair we just talked about,

1 have you ever watched a repair being done?
 2 A No.
 3 Q Have you had any substantive discussions with
 4 anybody who has done repairs or who does them for
 5 a living?
 6 A No.
 7 Q Other than what you've already told me about
 8 Jerilynn's windshield and your examination of
 9 Mr. Cullen's windshield, which we'll talk about
 10 in a moment, have you ever inspected any other
 11 windshield that's been repaired?
 12 A Yes.
 13 Q And how did that come about?
 14 A As a result of this case, I've begun
 15 observing repairs anywhere that I can see them
 16 evident.
 17 Q Okay. And by observing, am I correct that if
 18 in the course of your normal life you happen to
 19 notice that a windshield has been repaired or
 20 learned that it's been repaired, you stop and
 21 take a look at it? Is that fair?
 22 A Yes. I went out and inspected several
 23 vehicles in the Robson parking lot that had been
 24 repaired.
 25 Q Is that the extent of what we're talking

1 about here, the ones you looked at in the Robson
 2 parking lot?
 3 A No. I've looked at other windshields in open
 4 lots.
 5 Q How many other windshields do you believe
 6 you've looked at in this manner?
 7 A In the range of 15 to 20.
 8 Q Okay. And did you examine any of these
 9 windshields beyond looking at them visually,
 10 where they were sitting?
 11 A I should mention that at the inspection, I
 12 also did inspect microscopically a second damaged
 13 windshield on the day of the Cullen inspection.
 14 Q We'll get to that in a moment. I appreciate
 15 your candor.
 16 But getting back to this observing in the
 17 course of your daily life, beyond looking at them
 18 sort of in passing, did you take pictures of any
 19 of them, make notes about any of them, try to
 20 find out who owned any of those vehicles?
 21 A No. I just verified that in every case, I
 22 saw the same tendencies toward the windshields
 23 being repaired that was in a manner not restored
 24 to its original condition.
 25 Q Do you know the names of these owners or

1 lessors of any of these vehicles?
 2 A No.
 3 Q And I take it you wouldn't know if any of
 4 these people are insured or have ever been
 5 insured by State Farm?
 6 A That would be correct.
 7 Q Okay. Beyond what you've already told me,
 8 can you tell me anything specific about what you
 9 observed as to any one of these windshields?
 10 MR. PALOMBO: Other than
 11 the ones he specifically
 12 inspected?
 13 MR. FARRELL: Trust me.
 14 We'll get to talk about the
 15 inspection.
 16 MR. PALOMBO: I just want
 17 to make sure he's clear.
 18 A I lost you somewhere there.
 19 Q You've testified that what I will call in the
 20 course of your normal life, you've stopped and
 21 looked at 15 to 20 windshields that you didn't
 22 inspect as part of this case; is that correct?
 23 A Correct.
 24 Q Okay. You already testified that you
 25 observed that they all had the qualities -- I

1 assume the qualities you referred to in your
 2 report?
 3 A Yes.
 4 Q My question was, beyond making that
 5 observation, can you tell me anything specific
 6 about any one of those windshields?
 7 A You want me to just pick one and discuss it?
 8 I mean, I can recall various ones in my mind and
 9 what they looked like. They come in a variety of
 10 different break patterns, and all of them shared
 11 in common the characteristic that they had been
 12 filled with a polymer material that showed a
 13 discontinuity in the glass structure. I can
 14 remember one that was particularly hideous and
 15 looked to me like a real candidate for breakage
 16 just in situ just because of the quality of the
 17 repair.
 18 Q Let me ask you this: I take it you don't
 19 know who performed any of the repairs on these
 20 vehicles; am I correct?
 21 A Correct, other than the ones in this case.
 22 Q The two we're going to talk about. Can you
 23 remember the make or model of any of the cars?
 24 A No.
 25 Q Okay. Can you remember the date that you

1 Q And that wasn't something you wanted to
 2 happen to your vehicle, correct?
 3 A Correct.
 4 Q Was there anything else that you observed or
 5 that you and the installer discussed?
 6 A No.
 7 Q Was that the only replacement of a windshield
 8 that you've actually witnessed?
 9 A Yes.
 10 Q In the course of doing your work for this
 11 case, did you -- strike that.
 12 Does your training or experience as a ceramic
 13 engineer or in manufacturing give you any
 14 specialized knowledge or expertise in contract
 15 law?
 16 A No.
 17 Q How about in contract interpretation?
 18 A No.
 19 Q Does your experience as a ceramic engineer or
 20 in manufacturing give you any particular
 21 expertise in interpreting insurance policies?
 22 A No.
 23 Q Do you have any particular expertise in
 24 determining what a person does or doesn't
 25 understand following a conversation?

1 MR. PALOMBO: Objection.
 2 A I don't know how to answer that question.
 3 Q We talked earlier at some length about the
 4 things you have specialized knowledge or
 5 expertise in, ceramics, manufacturing, the things
 6 you talked about. Does any of that experience
 7 give you any special ability to determine what
 8 somebody understands after a conversation?
 9 A I think only the individual would understand
 10 what they understand from a conversation.
 11 Perhaps a psychologist could comment on why they
 12 think why they do.
 13 Q So if we want to understand what somebody
 14 understands after they were told something, we'd
 15 have to ask each of those people, correct?
 16 A Yes.
 17 Q Does any of your education, training or
 18 experience give you any particular expertise in
 19 assessing what the car buying public wants or
 20 expects?
 21 A I don't think so.
 22 Q Okay. Does any of your specialized training
 23 or experience give you any special ability to
 24 read documents that are provided to you?
 25 A Reading documents is a fundamental part of my

1 professional life.
 2 Q With regard to nontechnical or non-scientific
 3 documents, does your training as a ceramic
 4 engineer enable you to read non-scientific
 5 documents better than anyone else?
 6 A Better than anyone else?
 7 Q It's a poorly-phrased question, sure.
 8 Your specialized training is in ceramic
 9 engineering, and you have experience in
 10 manufacturing, correct?
 11 A Yes.
 12 Q If I were to give you a document that didn't
 13 touch on either of those fields, would you be any
 14 better able to determine what it means than
 15 anybody else?
 16 A I would be able to read it for its content
 17 and comment on what it said.
 18 Q Okay. Does any of your specialized
 19 education, training or experience allow you to
 20 make an assessment as to what people do or don't
 21 want when they make an insurance claim?
 22 A I'll answer that like I did the other
 23 question. I don't know what goes on in other
 24 people's heads.
 25 Q Okay. One of the statements in your

1 affidavit, Mr. Carmody, is that the opinions
 2 you've expressed in this case are made to a
 3 reasonable degree of professional certainty. Can
 4 you tell me what that phrase means?
 5 A I think reasonable certainty might be
 6 explained slightly different by different
 7 experts. To me what that means is that my
 8 opinion is very solid and very certain based on
 9 the evidence and the facts that I've been
 10 presented with to date in the case.
 11 Q Okay. And if there was evidence that wasn't
 12 presented to you or which you were unaware of,
 13 that would affect or could affect the validity of
 14 your opinions, correct, or the solidness of your
 15 opinions?
 16 A I would have to review those facts in order
 17 to make a conclusion.
 18 Q In your mind, is there any difference between
 19 a reasonable degree of professional certainty and
 20 a scientific certainty?
 21 MR. PALOMBO: I'll object.
 22 If he can answer the question --
 23 A I'm going to let you rephrase that.
 24 Q Okay. At various points either in your
 25 report or in your affidavit, you've used the

1 terms reasonable degree of professional
 2 certainty, scientific certainty. Certainly those
 3 two terms. Is there any difference in those two
 4 terms in your mind?
 5 A For me, they would be relatively synonymous,
 6 because I use science as part of my profession.
 7 Q What about the term technical certainty?
 8 Would that also be synonymous in your mind or
 9 not?
 10 A Yes.
 11 Q Are you familiar with an organization known
 12 as the National Glass Association?
 13 A Yes.
 14 Q Are you a member of that?
 15 A No.
 16 Q Your report refers to that as one of the more
 17 respected organizations in the field. Do you
 18 stand by that?
 19 A Yes.
 20 Q Would it be fair to describe NGA as one of
 21 the leading if not the leading organization?
 22 A In what they do.
 23 Q Are you familiar with or subscribe to any
 24 publications either sponsored by or published by
 25 NGA?

1 A I don't subscribe, but I have read -- I don't
 2 remember the name of it. It might be Glass
 3 Industry, Glass Magazine, it might be.
 4 Q Do you consider that publication or those
 5 publications to be reputable?
 6 A Yeah. It's something you'll find in almost
 7 every flat glass plant in America in the lobby.
 8 Q Have you ever read or subscribed to Auto
 9 Glass magazine?
 10 A I've read it.
 11 Q Would you describe it in the same way we just
 12 described Glass Industry, as an often referred to
 13 source or periodical in the field?
 14 A Yes.
 15 Q Do you subscribe to any other what I would
 16 call professional publications?
 17 A I don't personally. I have access to them.
 18 Q Does Robson subscribe to any of those?
 19 A Not to the best of my knowledge.
 20 Q I take it then you have access to them
 21 through your work?
 22 A Yes.
 23 Q Does Glass Strand subscribe to any, and if
 24 so, what are they?
 25 A I don't think Glass Strand subscribes to any

1 of those journals at this point.
 2 Q How is it then that you have access to them?
 3 A Travels, consulting trips, lobbies of glass
 4 plants.
 5 Q It's not an ongoing access?
 6 A Right.
 7 -----
 8 (Defendant's Exhibit Carmody D
 9 marked for identification.)
 10 -----
 11 Q For the record, Mr. Carmody, I've just handed
 12 you what we've marked as Exhibit D, which is a
 13 copy of the report you've submitted in this
 14 case. My first question is, have any of your
 15 opinions changed since the date of your report?
 16 A No.
 17 Q Have you been asked to supplement, add to or
 18 clarify those opinions?
 19 A No.
 20 Q Do you anticipate doing any of those things?
 21 A This is an ongoing matter, so it's very
 22 possible that I could be presented with more
 23 discovery, and, therefore --
 24 Q You haven't been presented with anything more
 25 or asked to do anything more?

1 A That's correct.
 2 (Brief recess taken.)
 3 Q Page 1 of your report, which is actually the
 4 second page I've handed you, you've listed the
 5 materials for your review. Am I correct this is
 6 what you meant, these were provided to you but
 7 you didn't necessarily rely on all of them?
 8 A Yes, they were provided to me.
 9 Q And does this list include everything that
 10 you either reviewed or relied upon in reaching
 11 your conclusions?
 12 A I believe so.
 13 Q And who determined what materials you
 14 received?
 15 A I was sent materials that were provided in
 16 discovery by Mr. Bashein.
 17 Q Okay. Did you ask him initially for a list
 18 of things you thought you needed or did he make
 19 that decision in the first instance?
 20 A I talked a little bit about the things that I
 21 thought were important in order for me to analyze
 22 the case.
 23 Q Okay. And do you recall anything more than
 24 that about that conversation?
 25 A No.

1 Q Did all of these things, the 13 items listed
 2 on page 1, come in a single packet?
 3 A No. I believe that there were two or three
 4 shipments of packets.
 5 Q Let me ask you this: Are they listed in the
 6 chronological order in which you received them?
 7 A No, I don't believe so.
 8 Q Is there any way you could recreate for us
 9 when you received what?
 10 A I would doubt it because I was at the time
 11 shuttling back and forth between two offices, and
 12 these things were sent to either one of the two
 13 offices, so I just accumulated them.
 14 Q Did you feel that you needed any additional
 15 information beyond what is listed here to issue
 16 your opinions?
 17 A Just some of the research that I did.
 18 Q Okay. And which you did not retain, correct?
 19 A Correct.
 20 Q Did you ever ask for anything -- strike
 21 that.
 22 Did you only have one conversation with
 23 Mr. Bashein about what he should send you?
 24 A Yes. And then there was a packet of
 25 information -- a lot of the State Farm things

1 that came forth that I didn't ask for, they came.
 2 Q Okay. So is it fair to say that you had one
 3 conversation in which you identified the things
 4 that you thought you might need, and that
 5 thereafter, things would arrive in the mail
 6 apparently based on Mr. Bashein's decision that
 7 you should look at them?
 8 MR. PALOMBO: Objection.
 9 A Yes.
 10 Q If you were to look at items 1 through 13,
 11 can you tell me which ones were a result of your
 12 initial conversation and which ones were just
 13 later simply sent to you or could you not do
 14 that?
 15 A I can recall that he had requested that I
 16 read all the depositions. I could probably say
 17 the legal things, interrogatories, production of
 18 documents, those are things attorneys always send
 19 me, and I read them.
 20 Q Whether you ask for them or not?
 21 A I don't always understand them.
 22 Q Do you recall in this case whether you asked
 23 for those or those were just sent to you?
 24 A I believe they were sent with some other
 25 information that I had asked for.

1 Q Is there anything else that you can
 2 specifically tell me whether you asked for it or
 3 it was just sent?
 4 A No.
 5 Q Is it your recollection that when Mr. Bashein
 6 sent you things, there was generally a cover
 7 letter with it?
 8 A I can't remember -- I remember there were a
 9 couple cover letters. I'm not sure if they all
 10 had cover letters. I think I may have been faxed
 11 some things at one point, too.
 12 Q Can you go down this list and -- well, strike
 13 that.
 14 I'd like to go down this list and I'd like
 15 you to tell me whether you read the document in
 16 its entirety or just glanced at it, and what
 17 level of review did you give it. Do you
 18 understand my question?
 19 A I do. And I can save you some time by
 20 telling you I always read everything in its
 21 entirety.
 22 Q Okay. Now, based on looking at this list, am
 23 I correct that at the time you issued your
 24 report, you had not read Mr. Cullen's deposition;
 25 is that correct?

1 A Mr. Cullen?
 2 Q Yes.
 3 A At the time that I issued the report, I had
 4 not --
 5 Q It's not listed, so I take it you hadn't read
 6 it; is that correct?
 7 A I believe I did read it, sir. I think I may
 8 have omitted that in the report.
 9 Q Okay. Beyond reading his deposition, have
 10 you ever spoken to him?
 11 A No.
 12 Q Was he not present when you inspected his
 13 car?
 14 A He was not present.
 15 Q Did you ever read the deposition of
 16 Peter Cole?
 17 A Yes.
 18 Q That's not listed either, if I'm correct?
 19 A Okay.
 20 Q Is it possible that you read Mr. Cullen and
 21 Mr. Cole's depositions after you prepared your
 22 report?
 23 A No. I know I read them both prior.
 24 Q Okay.
 25 A Prior to preparing my report.

1 A That probably should be plural. It should be
 2 windshields. That was meant to just cover sort
 3 of this general fact-finding investigation
 4 portion of my investigation where I was looking
 5 at windshields of various types.
 6 Q So during the month of July, you charged
 7 Mr. Bashein two and a half hours of time for what
 8 you described as looking at windshields in
 9 parking lots, correct?
 10 A Yeah. We discussed that, and we just sort of
 11 lumped it all together in that category.
 12 Q Was that something he had asked you to do or
 13 that you just took upon yourself?
 14 A It was something I took upon myself and he
 15 agreed to.
 16 Q With regard to the entries that are grouped
 17 under "Review Case Documents," am I correct that
 18 you couldn't tell me which documents on which
 19 days?
 20 A You're correct.
 21 Q Okay. Evidence we already talked about and
 22 analysis you already described for me, correct?
 23 A Yes.
 24 Q Do you know what the second page of this
 25 document would have been? It says, "Page 1 of

1 2."
 2 A No. Probably -- I do not know.
 3 Q Okay.
 4 -----
 5 (Defendant's Exhibit Carmody H
 6 marked for identification.)
 7 -----
 8 Q Mr. Carmody, Exhibit H is another copy of an
 9 invoice. This one is dated August 30th. There's
 10 an entry for August 18th, 2006 that reads,
 11 "Analyze testing protocols for windshield
 12 strength and compare test results." Do you
 13 recall what that specifically refers to?
 14 A Yes. I was looking at the NGA report versus
 15 the one by the United States Testing Laboratory
 16 and evaluating the results of those two reports
 17 and the test methods used.
 18 Q And that took an hour, correct?
 19 A Yes.
 20 Q And am I correct that the entries grouped
 21 under "Report" are time you actually spent
 22 writing your report?
 23 A Yes. Early drafts, I think.
 24 Q When were you first asked to prepare a
 25 report?

1 A I believe that he told me when I was retained
 2 that ultimately a report would be generated. And
 3 what I will typically do is early on in the
 4 process, as I begin to get materials, I'll begin
 5 outlining my report and laying it out. So it was
 6 from the beginning the understanding was the
 7 report would be the product of my investigation.
 8 Q At what point did Mr. Bashein actually
 9 contact you and say I need your report by a
 10 specific date? When did that first occur?
 11 A I believe he contacted me with a sense of
 12 urgency sometime in November, perhaps. Not too
 13 long before that report that you see signed was
 14 issued.
 15 Q And by "not too long," would you mean less
 16 than two weeks or two weeks?
 17 A I would say looking at the report date, that
 18 it was probably about two weeks prior to that.
 19 -----
 20 (Defendant's Exhibit Carmody I
 21 marked for identification.)
 22 -----
 23 Q My only question about Exhibit I is simply to
 24 ask you to confirm that that's an invoice sent by
 25 Robson for work that you did?

1 A Yes.
 2 -----
 3 (Defendant's Exhibit Carmody J
 4 marked for identification.)
 5 -----
 6 Q I would have the same question as to
 7 Exhibit J.
 8 A Yes.
 9 Q Okay.
 10 -----
 11 (Defendant's Exhibit Carmody K
 12 marked for identification.)
 13 -----
 14 Q Mr. Carmody, Carmody Deposition Exhibit K is
 15 the November 13th, 2006 invoice from Robson?
 16 A Right.
 17 Q There's an entry for Mr. Ehrlich's time
 18 entitled, "File review." Do you believe that
 19 that covers the peer review that we discussed
 20 earlier that you said he did?
 21 A I think so.
 22 Q Okay. Do you have any reason to believe that
 23 he actually spent more time than that on the
 24 matter?
 25 A You would have to ask Harry.

1 Q Okay. And is the quarter of an hour
 2 immediately under that that you billed to peer
 3 review, would that be discussing his changes with
 4 him?
 5 A I think so. I've never seen this invoice
 6 prior to this, so --
 7 Q Okay. Do you recall any other peer review
 8 activities that this could apply to that we
 9 haven't talked about today?
 10 A No.
 11 Q Now, you have time entries -- this entire
 12 invoice pertains to time entries beginning
 13 November 6th.
 14 A The dates don't make sense. I will try the
 15 best to answer your questions, but this was a
 16 document that was generated in Lancaster, and I
 17 believe probably the Lancaster people are
 18 probably going to know the answers to some of
 19 these questions.
 20 Q But you don't recall that you actually
 21 reviewed the Bischoff deposition after reviewing
 22 the report?
 23 A No. I definitely reviewed the Bischoff
 24 deposition last summer. So there's something not
 25 right with this date.

1 Q If you look at the invoice, the time entries
 2 themselves have dates. Do you recall that you
 3 reviewed Mr. Bischoff's deposition on
 4 November 2nd?
 5 A No.
 6 Q Do you believe you reviewed the memorandum
 7 against summary judgment on November 7th?
 8 A No.
 9 Q Am I correct, based on what you've already
 10 told me, that these dates do not make any sense
 11 in comparison to your memory?
 12 A Yes, that is correct.
 13 Q Am I also correct that there are no other
 14 records from which we could recreate when you
 15 actually did any of these tasks?
 16 A Other than my memory, which I would have to
 17 jog to go back and recall.
 18 Q And you can't do that, as you sit here today?
 19 A No.
 20 Q Am I correct that the opinions you've
 21 expressed in your report are your opinions and
 22 yours alone?
 23 A Unless I cited someone else in the report.
 24 Q Okay. And with the exception of what we've
 25 discussed with Mr. Ehrlich, nobody helped you in

1 doing research or anything else involved in this
 2 report?
 3 A No.
 4 MR. FARRELL: Off the
 5 record.
 6 (Discussion off the record.)
 7 Q Mr. Carmody, you titled your report an
 8 "Engineer's Report." Does that mean anything
 9 beyond that it's your report and you're an
 10 engineer?
 11 A No.
 12 Q There's no special meaning to that term?
 13 A No.
 14 Q Okay. And you refer in the title of the
 15 report to the Cullen windshield repair
 16 investigation. Based on reading your report, am
 17 I correct that your investigation entailed
 18 reading the materials you've identified and
 19 examining Mr. Cullen's windshield?
 20 A Yes.
 21 Q Okay. Am I also then correct that you didn't
 22 in this case do a fault tree analysis?
 23 A No. I -- that was the technique that I used
 24 in order to identify all the specific variables
 25 that could lead up to a failed windshield, which

1 was the topic of the investigation.
 2 Q Okay. When you say, "a failed windshield,"
 3 what do you mean by "failed"?
 4 A A windshield that would ultimately -- the
 5 crack would propagate in a manner that would
 6 cause it to be destroyed.
 7 Q So your use of the term failure means the
 8 windshield is actually destroyed?
 9 A Well --
 10 MR. PALOMBO: Objection. I
 11 don't think that's what he means.
 12 MR. FARRELL: That's why I
 13 asked.
 14 A In the case of the Cullen matter, the failure
 15 was simply a windshield which they use the term
 16 repair. The technique that they used in order to
 17 address the damage to the windshield did not
 18 restore it to its original condition, and I would
 19 consider that a failure.
 20 Q You examined Mr. Cullen's windshield with a
 21 microscope, correct?
 22 A Yes.
 23 Q Beyond that, did you do any physical or
 24 chemical tests on his windshield or on the repair
 25 to the windshield?

1 A I wouldn't have been able to. Those would
2 have been -- not catastrophic. They would have
3 been destructive tests. And I was instructed not
4 to do any destructive testing because of the fear
5 of spallation or other issues.

6 Q Not all the tests that could be done would be
7 destructive; is that correct?

8 A Potentially some tests could be conducted
9 that would not be destructive but they would
10 involve the removal of the windshield from the
11 vehicle, which could be interpreted to be
12 destructive.

13 Q Getting back to my question, looking at it
14 with a microscope, you did no testing?

15 A That's correct. The microscope was the test,
16 non-destructive test.

17 Q Was it a test or observation technique?

18 A No. I would consider it a test.

19 Q Did you rely on any of Mr. Derian's
20 conclusions in reaching any of your conclusions?

21 A No.

22 Q Turning to the third page, which is actually
23 page 1, there's a paragraph entitled,
24 "Introduction." Am I correct, Mr. Carmody, that
25 nothing in that paragraph involves ceramic

1 engineering or manufacturing?

2 A No. That's just the introduction. It states
3 the background of the investigation.

4 Q Okay. What did you base your observations in
5 your report about what the insurance policy means
6 or requires? What did you base your opinions on?

7 A I based that on -- I'm sorry. Please repeat
8 the question.

9 Q Sure. In your report, you make various
10 statements about what the insurance policy
11 requires or what it means; is that correct?

12 A Could you specifically tell me which section
13 of the report that you're referring to?

14 Q Okay. I'll withdraw the question for the
15 moment.

16 If you were incorrect about what the
17 insurance policy meant or required, would that
18 change any of your opinions or would I have to
19 ask you a specific question?

20 A You would have to ask me which opinion are
21 you referring to.

22 Q In paragraph 1, you make the statement that
23 it was recommended as a candidate for a repair.

24 Were you using the word "recommended" in its
25 normal sense, its normal English meaning?

1 A Yes.

2 Q And that means it was a recommendation that
3 Mr. Cullen was free to accept or reject, correct?

4 A I'm sorry. Please repeat again.

5 Q Okay. When you stated that it was
6 recommended as a candidate for repair, that means
7 Mr. Cullen had the choice to accept or decline
8 that recommendation; is that correct?

9 MR. PALOMBO: Object to the
10 question.

11 A As I stated earlier, what Mr. Cullen thinks
12 I'm not qualified to comment on.

13 Q Okay. And that would be true of anyone else
14 who was presented with the question of whether to
15 repair or replace a windshield, correct?

16 MR. PALOMBO: Objection.

17 A The decisions that the people would make
18 based on recommendations would be their own
19 decisions based on the information they were
20 presented by the insurance company.

21 Q Okay. Now, the following paragraph begins
22 with the clause, "The purpose of this
23 investigation," and then you list three things.
24 My first question is, who came up with those
25 three questions or purposes that you've

1 identified?

2 A Those are typically the way that I will go
3 about a products liability investigation. I'll
4 look at -- how to answer this -- the short answer
5 is Craig Bashein asked me to perform the
6 investigation along those guidelines.

7 Q So Mr. Bashein asked you to look at those
8 three questions that are outlined in that
9 paragraph; am I correct?

10 A Along with any other matters that might arise
11 during the course of my investigation.

12 Q And to your knowledge, are any of those
13 questions or standards based upon any actual
14 language in the insurance policy?

15 MR. PALOMBO: Objection.

16 A I don't know.

17 Q The first issue you've identified is, quote,
18 "to determine if the subject repair restored
19 Cullen's windshield to its original condition."
20 What do you mean by "original condition"?

21 A I mean the condition that the windshield was
22 in prior to the damage that occurred to it.

23 Q And the damage in this case would be the chip
24 in the lower left portion, correct?

25 A Yes, right.

1 Q And you don't know whether or not that term
 2 actually appears in the insurance policy?
 3 A I don't know.
 4 MR. PALOMBO: What term are
 5 you talking about?
 6 MR. FARRELL: The term
 7 original condition.
 8 MR. PALOMBO: Okay. I just
 9 wanted to make sure.
 10 Q Did you do anything to find out what the
 11 condition of Mr. Cullen's windshield was
 12 immediately before the chip occurred?
 13 A There would have been no way I could have
 14 determined that.
 15 Q Okay. Why would there be no way you could
 16 determine that?
 17 A I'm certain that Mr. Cullen nor anyone else
 18 was documenting the condition of that windshield
 19 prior to them noticing the damage.
 20 Q Based on your experience, would you be able
 21 to, by looking at a vehicle, be able to determine
 22 if the windshield had been replaced previously?
 23 A I would not have that skill.
 24 Q Okay. Did you make any inquiry to find out
 25 whether Mr. Cullen's windshield had been impacted

1 by any objects prior to this?
 2 A Prior to the damage event?
 3 Q Prior to the chip in question.
 4 A I examined the windshield and did not note
 5 any significant defects at the time of my
 6 inspection on an open lot.
 7 Q Okay. Now, with regard to windshield glass,
 8 is it possible for windshield glass to be
 9 stressed but not -- or damaged without that
 10 damage or stress being visible to the naked eye?
 11 A Glass begins to degrade from the moment it
 12 leaves the factory. But it's important to
 13 distinguish -- the theoretic strength of glass is
 14 enormously high. As engineers, it's easy to get
 15 excited about materials. But like all materials,
 16 it begins to degrade the minute you touch it.
 17 However, those degradations from very minor
 18 to very small, minor events, do not determine its
 19 engineering range, which is 4 to 5,000 PSI. So
 20 you have to qualify from a technical perspective
 21 what you mean.
 22 Anything on a microscopic level is not going
 23 to be utterly pristine and perfect. But these
 24 significant damage events, like the impact to
 25 Cullen's windshield, these are the things that

1 degrade it below the engineering range.
 2 Q Let me ask you this question: It is possible
 3 to damage glass by twisting or breaking it --
 4 excuse me -- by twisting or bending it?
 5 A If you twist or bend glass to the degree --
 6 you can initiate a fracture event.
 7 Q Can you damage it to the point where a
 8 fracture event -- by twisting or bending it, can
 9 you twist it or bend it to the point where it's
 10 more likely but doesn't occur?
 11 A Any time you apply stress to a brittle
 12 material, you begin to propagate defects. And
 13 those defects may not immediately result in a
 14 catastrophic failure.
 15 Q As an example, if when the installers were
 16 installing your replacement windshield the two
 17 technicians had bent it, that could have caused a
 18 degradation that no one could see until it
 19 actually resulted in a crack or something; is
 20 that correct?
 21 A It might propagate small edge cracks or other
 22 defects. But as soon as those stresses were
 23 removed, the cracks would not advance until other
 24 stresses were advanced into the glass.
 25 Q I understand edge cracks. Could twisting a

1 windshield lead to a defect that could propagate
 2 failure but that doesn't initially manifest
 3 itself in a visible crack?
 4 A Twisting would not create a defect. It would
 5 cause a twisting defect to propagate.
 6 Q Okay. Can cars be manufactured with twisting
 7 defects?
 8 A Yes, but not ones that degrade their strength
 9 below that range. A company would reject a
 10 windshield that would be significantly flawed.
 11 Q And by "significantly flawed," what do you
 12 mean? Visibly flawed?
 13 A Flawed to the degree that the strength would
 14 be degraded below that engineering range of 4 to
 15 5,000 PSI where things could break under normal,
 16 foreseeable conditions of use.
 17 Q And do the windshield manufacturers expose or
 18 subject each windshield to stresses like that
 19 before they're shipped?
 20 A No. Those stresses would be stresses that
 21 the windshield would see after it was used. I'm
 22 sure -- could you please repeat the question?
 23 Q Yes. You mentioned testing that there
 24 wouldn't be any invisible defects in a
 25 manufactured windshield that would degrade it if

1 Q Right. And in determining whether the right
2 conditions have or will occur, under the category
3 of the nature of the stress, that's the forces to
4 which the windshield is exposed, correct?

5 A Yes.

6 Q So that would range everywhere from gravity
7 to a full frontal impact, correct?

8 A Sure. That's the range of forces in the
9 physical world.

10 Q And whether or not that stress is sufficient
11 to lead to an actual failure will depend on, I
12 think you said the next factor was the nature of
13 the defect?

14 A Correct.

15 Q By "nature of the defect," do you mean the
16 size of the chip or the damage?

17 A As well as its geometry.

18 Q Okay. By "geometry," do you mean the shape?

19 A The shape and the characteristics of the
20 crack front that's expanding from the defect.

21 Q What are the possible characteristics of the
22 crack front?

23 A I don't want to give you an entire four-hour
24 lecture in fractology, but you have, from any
25 impact or damage, you will have one or more crack

1 extensions. And these are points at which you've
2 now broken the molecule of the windshield. It is
3 a continuous molecule. Those crack fronts will
4 want to continue advancing under stress
5 conditions propagating according to the stresses
6 that are applied.

7 Q Okay. And whether or how much that happens
8 depends on the nature of the size and the
9 geometry of the initial chip or crack, correct?

10 A Correct.

11 Q Okay. How does location affect whether or
12 not a fail will actually occur?

13 A Location is important in -- where you compare
14 where the stresses are applied so you can analyze
15 the stress gradient at that point.

16 Q And the material factor would simply be what
17 it is you're talking about?

18 A Correct.

19 Q In this case, laminated windshield glass?

20 A Correct.

21 Q So all those things we just talked about I
22 would have to know before you could say that or
23 when a windshield would actually fail?

24 A If I had to predict it, yes, it would be a
25 sophisticated model.

1 Q Okay. And am I also correct that unless and
2 until the proper combination of those factors
3 actually occurs, there may never be a failure?

4 A Is this related to a repair or unrepaired
5 defect?

6 Q Let's start with an unrepaired defect.

7 A Okay. Either one will eventually fail. It's
8 a question of time and the stress that's applied.

9 Q But there is no way for you to predict or
10 testify within a scientific or professional
11 certainty when that would occur for Mr. Cullen's
12 windshield or any other windshield; am I correct?

13 A I'd have to know the future. I'd have to
14 know what was going to happen.

15 Q Okay. And it could -- when you say,
16 "eventually," you mean eventually, correct, not
17 necessarily within 5 years, not necessarily
18 within 10 years; is that correct?

19 A I can't say chronologically when.

20 Q Can you say with certainty, scientific
21 certainty that the four factors you identified,
22 that the proper combination will ever actually
23 occur to lead to a failure?

24 A Again, I don't know the future. The
25 circumstances are common certainly in an

1 automobile's application.

2 Q Common but not certain? Would that be fair?

3 A Yes.

4 Q Okay. If I were to ask you -- strike that.

5 With regard to a repaired defect, and let's
6 say a chip, does any of the explanation you just
7 gave me about the four factors change?

8 A Can you read them back to me, please.

9 Q Sure. The nature of the stress, the nature
10 of the defect, the location of the defect, and
11 the material.

12 A Yes.

13 Q Okay. With regard to a -- we'll use a chip
14 again -- a chip that has been repaired, in order
15 for a failure to later occur, you still need the
16 right combination of those four factors, as you
17 testified earlier, correct?

18 A Yes.

19 Q And it's your opinion that it is a certainty
20 that those four factors will occur in the right
21 combination some day, eventually, but you can't
22 testify with scientific certainty that that will
23 be within 5 years, 10 years or at any specific
24 point in time, correct?

25 A Correct.

1 Q Okay. And in order to make that prediction
2 or make that statement with scientific certainty,
3 that a failure is going to occur, you would need
4 to be able to predict the future as to at least
5 three of those factors, correct, because you'd
6 know the material?

7 MR. PALOMBO: To predict
8 when it's going to occur, not if
9 it's going to occur?

10 A Are we talking about if or when?

11 Q Let's start with if. It's your testimony
12 that it's a certainty that at some point in time,
13 those four factors will combine in a way that
14 leads to a failure?

15 A Yes.

16 Q Can you testify with certainty that that will
17 occur while the car is still being used?

18 A I don't know how long the car will be in use.

19 Q So the answer is no, you can't testify to
20 that with a reasonable degree of scientific
21 certainty?

22 A Correct.

23 Q Can you testify with a reasonable degree of
24 scientific certainty that a failure will occur
25 during any specific period of time, one year, two

1 years, three years, any specific period of time?

2 MR. PALOMBO: Objection;
3 asked and answered about four
4 different times.

5 Q Your counsel, or plaintiffs' counsel, has
6 objected. Am I correct that the answer to that
7 question would be no, that you can't make that
8 statement to a reasonable degree of scientific
9 certainty?

10 A Correct.

11 Q Now, the defects we've been talking about,
12 those are, in the first instance, caused by the
13 chip?

14 A Yes.

15 Q And the changes in the composition and the
16 performance of glass that you've alluded to and
17 discussed earlier today and in your report, those
18 happened because of the chip, correct?

19 A I'm sorry. Can you please rephrase that?

20 Q Sure. When a rock hits a windshield, that
21 creates a defect, correct, if there's a chip?

22 A Yes.

23 Q Okay. That defect has been created and
24 exists whether or not that windshield is
25 repaired, correct?

1 A Yes. It's a permanent defect.

2 Q Okay.

3 MR. FARRELL: Why don't we
4 take a break.
5 (Luncheon recess taken.)
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AFTERNOON SESSION
(1:09 p.m.)

MR. FARRELL: We're back on
the record after our lunch break.

BY MR. FARRELL:

Q Mr. Carmody, I assume you understand we're
still under oath.

A Yes.

Q Is there any of your testimony from this
morning that you wish to retract or change?

A No.

Q Before we broke for lunch, we were discussing
failure of a windshield. How do you define the
term or the word "failure" in this context?

MR. PALOMBO: In the
context of this case?

Q In the context you've been using it.

A Failure is -- failure begins to occur -- it's
a process. The first step in failure is the
initiation of the defect in the windshield.

Q Okay. Then what's the next step?

A Failure will progress as the crack propagates
throughout the windshield until it reaches a
point where the windshield is destroyed.

Q Okay. So as you use the term failure is

1 that you recall?
 2 A The length of the crack.
 3 Q Mr. Cullen's windshield was not initially
 4 cracked; am I correct? It was chipped?
 5 A Technically, the definition of crack or chip,
 6 there are many cracks in a chip, so to me,
 7 they're interchangeable. They're both gross
 8 defects that are capable of initiating failure.
 9 Q Are you aware of any other organizations that
 10 approve of or sanction the repair of windshields?
 11 MR. PALOMBO: You mean
 12 professional organizations?
 13 MR. FARRELL: Yes.
 14 A Yes. It's my understanding that there are a
 15 number of companies which have gotten into the
 16 repair business who also manufacture
 17 windshields. But sanctioning a defect does not
 18 make the defect go away.
 19 Q And those entities or companies have also
 20 established criteria to identify those situations
 21 they believe would be appropriate or
 22 inappropriate for repair; is that correct?
 23 A I have not evaluated their criteria.
 24 Q Okay. Now, as you understood the Lynx script
 25 that you read, you would have to look at a lot of

1 different things to know whether State Farm would
 2 even deem damage to a windshield to be eligible
 3 for repair; is that correct?
 4 A I would have to --
 5 Q A person.
 6 A Which person?
 7 Q Is it your understanding, Mr. Carmody, that
 8 there are certain types of chips or cracks in a
 9 windshield that the script excludes as being
 10 candidates for a repair?
 11 MR. PALOMBO: Objection.
 12 A There are certain defects that they,
 13 according to their own internal criteria, which
 14 does not appear to be based on any engineering
 15 practice, they say can't be repaired. But no
 16 defect can be repaired.
 17 Q Okay. And with regard to what State Farm and
 18 the script Lynx uses with State Farm's insureds
 19 actually says is there are certain locations and
 20 kinds of damage that State Farm deems ineligible
 21 for repair; true or false?
 22 A True.
 23 MR. PALOMBO: You're
 24 talking about the script?
 25 A The script. True.

1 Q And true or false, to know whether a given
 2 chip would be eligible or ineligible for a repair
 3 under the script, you'd have to look at a lot of
 4 different factors, including location of the
 5 chip, correct?
 6 A Yes. The critical viewing area was one of
 7 the internal criteria that State Farm used in
 8 recommending repair.
 9 Q And one of the other criteria was size,
 10 correct, of the damage?
 11 A Right.
 12 Q Looking back at your report, page 2, the
 13 second sentence in Section C, you make a
 14 reference to the repair industry. What repair
 15 industry are you referring to?
 16 A I'm referring to the windshield repair
 17 industry.
 18 Q Are you referring to any specific statement
 19 by any specific company?
 20 A Yes.
 21 Q And what would that be?
 22 A There is a letter in the -- a Bates stamped
 23 letter written by a representative from the
 24 repair industry acknowledging my statement that
 25 it does not restore the windshield to its

1 original condition.
 2 Q And that's a letter you reference later in
 3 your report?
 4 A I don't know that I cited that letter
 5 specifically in this report.
 6 Q Is there anything that you base that
 7 statement on other than that single letter from
 8 that single person?
 9 A The repair -- the fact that it doesn't
 10 restore it to 100 percent optical clarity is
 11 present in much of the evidence in this case.
 12 Q My question, Mr. Carmody, was you make the
 13 statement that, "The repair industry, while
 14 touting the benefits of the repair process,
 15 acknowledges that the repair techniques does not
 16 restore the windshield to its original
 17 condition."
 18 My question is, other than the letter you
 19 just referred to, do you have any basis for that
 20 statement about what the repair industry touts or
 21 acknowledges?
 22 A No.
 23 Q And you're not certain whether that letter is
 24 referenced in your report or not?
 25 A Correct.

1 Q Okay. Now, with regard to the next sentence,
2 where you state that, "State Farm also expressed
3 concerns regarding the windshield repair
4 process," is that statement based on anything
5 that is not reflected in your report?

6 A It's based on the State Farm long crack
7 repair.

8 Q Which is referenced later in your report?

9 A Yes.

10 Q And, again, with regard to your basis for the
11 statements about what the National Glass
12 Association has done or issued, whatever basis
13 you have for making that statement is also
14 mentioned later in your report; am I correct?

15 A Yes.

16 Q Are you familiar with the definitions or
17 categories of windshield damage, the terminology
18 used?

19 A I'm not intimately familiar with their own
20 terminology regarding the nomenclature of what
21 they term the different defects to be.

22 Q Okay. Do you know whether or not within the
23 windshield or windshield repair industry there is
24 a generally accepted or generally used set of
25 definitions or categories of windshield damage?

1 A Yes. They do have their own words for the
2 visual appearance of different types of impact
3 damages.

4 Q But those aren't terms that you, yourself,
5 are familiar with or use?

6 A No.

7 Q Now, earlier you referenced the size and
8 geometry of damage to a windshield?

9 A Yes.

10 Q Do different sizes and geometry of damage
11 behave differently?

12 A Yes.

13 Q How?

14 A In general terms, the larger a defect, the
15 more it will degrade the engineering strength of
16 the glass material.

17 Q Okay. Do they behave differently -- are
18 there any other factors that would answer my
19 question?

20 A Yes. The longer a crack grows, the faster a
21 crack grows, which is why you start off with a
22 small crack and suddenly, in the wintertime,
23 you'll see it just jump across the windshield.

24 Q Longer in terms of time?

25 A No. In distance. As the crack grows longer,

1 the stress of the tip increases, and at some
2 point it reaches catastrophic failure.

3 Q Mr. Cullen's windshield as of the last time
4 you saw it hadn't suffered catastrophic failure,
5 had it?

6 A As of February 14th, it had not.

7 Q And had any of the other windshields you
8 looked at in your informal survey suffered
9 catastrophic failure?

10 A None of them had propagated beyond the area
11 of the crack repair except for one I did notice
12 had extended to what appeared to be the resin.
13 But I did not have the tools at the time to do a
14 complete examination.

15 Q With regard to the second windshield that you
16 examined in February of 2006, had that windshield
17 experienced catastrophic failure?

18 A No, not at that time.

19 Q And when you use the term catastrophic
20 failure, what do you mean? That the windshield
21 actually collapses?

22 A As a fractologist, I would say the definition
23 of that term would be an instant propagation of
24 the crack in such a manner the crack travels a
25 significant distance and either terminates

1 because it hits a barrier or change in material
2 or it runs out of energy and stops. So it would
3 be a very large fracture that may extend in
4 multiple directions.

5 Q How large is very large, as you just used it?

6 A Catastrophic failure to me means that the
7 crack travels far beyond the boundary -- there's
8 no real scientific definition of the word. It's
9 a general term that means a sudden and
10 instantaneous propagation of a crack.

11 Q And is it a -- are you using catastrophic in
12 a relative sense? In other words, if a 1
13 millimeter crack doubled, that would be
14 catastrophic, in your mind?

15 A No. I would consider that to be a crack
16 which is propagating slowly.

17 Q Okay. If it went from 1 millimeter to
18 2 millimeters in an instant, would that be
19 catastrophic?

20 A No.

21 Q Is it a function of percentage of the
22 original damage that gets it to catastrophic? In
23 other words, if it triples, is that catastrophic?

24 A Again, there is no accepted engineering
25 definition of the word.

1 windshield was actually done?
 2 A No.
 3 Q So the length of time between the repair and
 4 when you looked at it wasn't important in forming
 5 your opinions?
 6 A It would have been important had I noticed
 7 significant deterioration of the repair. And
 8 what I saw was a repair which, to the naked eye
 9 and to this level of magnification, did not
 10 appear to be degraded, but that is the thing on a
 11 microscopic level. Had I seen significant
 12 macroscopic damage, then I would have asked when
 13 it had been repaired.
 14 Q Am I correct that with the -- and I'll get it
 15 wrong but I'll try -- the digital optical
 16 microscope you looked at it with on Valentine's
 17 Day 2006, you couldn't notice any degradation
 18 with that instrument, correct?
 19 A At that level of magnification, correct.
 20 Q What was the level?
 21 A I believe it was 60 power.
 22 Q I take it if you couldn't see it with 60
 23 power, you couldn't observe any degradation with
 24 your naked eye?
 25 A That's correct.

1 Q And I'm asking you personally,
 2 Craig Carmody.
 3 A Yes. I don't know that you could have
 4 perceived it without a destructive test,
 5 actually.
 6 Q You certainly didn't observe any visible
 7 yellowing or peeling of the repair; is that
 8 correct?
 9 A I saw opacity, which may have been present
 10 from the time of the repair or may have been a
 11 consequence of UV exposure.
 12 Q And you saw the opacity with your naked eye,
 13 correct?
 14 A Yes.
 15 Q So if it was present at the time of the
 16 repair, it would have been present to the naked
 17 eye at that time, correct?
 18 A I'm sorry. Could you repeat that?
 19 Q Sure. You were able to see it with your
 20 naked eye in February of 2006?
 21 A Yes.
 22 Q And you then stated that you don't know if it
 23 had always been that opaque, correct?
 24 A That is correct. And I could not have said
 25 if it was yellow, because I'm colorblind.

1 Q Okay. And if it was as opaque as it was when
 2 you saw it the day the repair was made, that
 3 would have been visible to someone of normal
 4 vision, correct?
 5 A Yes.
 6 Q Okay. Has anyone ever told you or provided
 7 you with any information indicating that the way
 8 that repair looked had changed since the day it
 9 was done until the day you looked at it?
 10 A No.
 11 Q And I take it you were not provided with any
 12 earlier photographs of that repair?
 13 A No.
 14 Q And just to close the loop, I also take it
 15 you weren't provided with any photographs of the
 16 unrepaired initial damage?
 17 A That is correct.
 18 Q Now, what is the difference between a digital
 19 optical microscope and what I understand to be a
 20 microscope?
 21 A A standard microscope would utilize optics,
 22 and it would transmit that image directly to your
 23 eye. In this case, the image is presented on a
 24 computer screen.
 25 Q So it's simply a microscope that reproduces

1 that image in a way that could be saved or looked
 2 at digitally?
 3 A Correct.
 4 Q Now, is the microscopic examination something
 5 that's normally done in your work as a ceramic
 6 engineer?
 7 A It's fundamental. It's the pillar of doing
 8 fractology, which is the study of a broken,
 9 brittle material.
 10 Q When you examined the windshields -- strike
 11 that.
 12 With regard to Mr. Cullen's windshield, you
 13 looked at it, had a brief conversation with
 14 Mr. Bashein, looked at it with the microscope and
 15 took some pictures through the microscope,
 16 correct?
 17 A Yes.
 18 Q How does that physically work? Do you hold
 19 it up to the windshield?
 20 A Yes.
 21 Q Okay.
 22 A The microscope has a detachable head that you
 23 can hold with your hand.
 24 Q Is there a cord that goes back to the rest of
 25 it?

1 A Yes, to the computer.
 2 Q Now, the second windshield that you looked at
 3 that day, was it also chipped?
 4 A Yes.
 5 Q Where was the chip within that windshield?
 6 A It was on the passenger side.
 7 Q Okay. Can you be more specific than that?
 8 A If you were to divide the windshield into two
 9 quadrants and define from the forward-facing view
 10 one quadrant to be the driver side and the
 11 passenger side, it would have been located a
 12 little bit off-center, fairly centered in the
 13 passenger's quadrant but towards your left-hand
 14 side as you view the vehicle head on.
 15 Q So toward the passenger's right-hand side?
 16 A Correct.
 17 Q Okay.
 18 A That would have been an easier way to say
 19 it.
 20 Q The second windshield that you looked at, do
 21 you have any information about how it was
 22 damaged, where it came from or who it belonged to
 23 or whether there's a State Farm insured?
 24 A No, I do not know.
 25 Q Okay. What, if anything, were you told when

1 you were asked to look at the second windshield?
 2 A I was told to use it sort of as an exemplar,
 3 sort of as a damaged and repaired windshield.
 4 Q And I take it you don't know who had repaired
 5 that windshield and when it had been repaired?
 6 A Correct.
 7 Q Was the damage to the second windshield
 8 similar in size and scope to what occurred with
 9 Mr. Cullen's?
 10 A No. The other defect was extreme. It was a
 11 very large, very visible defect. It was a
 12 significant impact.
 13 Q Okay. By "very large, very visible," larger
 14 than six inches?
 15 A No. I did not at the time measure the size
 16 of the defect, but it was approximately, in order
 17 of magnitude, larger than the other defect, 10
 18 times larger in overall area.
 19 Q Than what had occurred with Mr. Cullen's?
 20 A Yes.
 21 Q Do you have any opinion about whether the
 22 defect in the second windshield you looked at was
 23 large enough that it would have been ineligible
 24 even for consideration of repair under the State
 25 Farm guidelines?

1 A I do not know how State Farm would have
 2 categorized that defect.
 3 Q Okay. And your examination of the second
 4 windshield, where was that done?
 5 A It was on another open lot, walking distance
 6 down from the first inspection.
 7 Q Okay. So that windshield was still in that
 8 car as well?
 9 A Yes.
 10 Q With regard to the second windshield and car
 11 that you looked at, did it appear to be parked
 12 while the owner was at work? Was that your
 13 understanding?
 14 A I don't know where the owner was.
 15 Q Okay. Do you know whether or not that car
 16 was brought to you specifically for you to look
 17 at or it just happened to be there?
 18 A As I recall, the car was moved by someone to
 19 that lot prior to it being inspected.
 20 Q Do you think it was the same person who moved
 21 Mr. Cullen's car to the lot?
 22 A I think it was someone different.
 23 Q Do you think that the people who move these
 24 cars around work for or with Mr. Bashein or his
 25 firm?

1 A I don't know.
 2 Q There are no measurements in your report?
 3 A Yes.
 4 Q Did you take any measurements at the time you
 5 looked at either windshield?
 6 A Measurements of --
 7 Q Of the damage or the repair area.
 8 A No. Once I attributed that both of them
 9 would have been defined as gross defects capable
 10 of causing failure of a windshield, I did not
 11 measure them.
 12 Q So you would have no measurements to compare
 13 it against to see if the damage had expanded
 14 already, the cracks had lengthened?
 15 A I have visual. I could do more microscope
 16 photos and do an experimental analysis.
 17 Q But you haven't been asked to do that; am I
 18 correct?
 19 A Not at this point.
 20 Q And is that the sum and substance of your
 21 examination of the two windshields? Have we
 22 covered it all?
 23 A Yes.
 24 Q So I'm correct then that you didn't do any
 25 tests to see if any moisture had been absorbed

1 into the inner layers?
 2 A There was no way to do that at that time.
 3 Q Such tests exist, though; is that correct?
 4 A Yes.
 5 Q And as you allude to later in your report,
 6 you believe that whether or not moisture gets in
 7 and how much are important factors, correct?
 8 A That's correct.
 9 Q Okay. Did you do any tests to determine
 10 whether the lamination or the adhesive qualities
 11 of the inner layer would have been damaged?
 12 A No. Those would have been destructive
 13 tests. I wouldn't have been permitted to do them
 14 at that time.
 15 Q But such tests do exist, correct?
 16 A Yes.
 17 Q And as alluded to in your report, those are
 18 factors that you, as a ceramic engineer, think
 19 would be important to know, correct?
 20 A Yes.
 21 Q Based on your earlier testimony, am I correct
 22 that you did no tests on the actual structural
 23 integrity of Mr. Cullen's repaired windshield or
 24 his roof as a whole?
 25 A I did not. It would have been necessary to

1 break the windshield in order to do that.
 2 Q Those tests do exist, though, correct?
 3 A Yes.
 4 Q And again, as alluded to later in your
 5 report, those kinds of things or issues are
 6 things that you, as a ceramic engineer, consider
 7 to be important?
 8 A Yes.
 9 Q And you also did not perform any tests on
 10 Mr. Cullen's or the other unnamed party's
 11 windshield regarding what I will call
 12 environmental factors, heat, cold, solvents,
 13 those kinds of things; am I correct?
 14 A The presence of them --
 15 Q Or the effect that they had or might have on
 16 the repaired windshields?
 17 A Again, that would be a destructive test.
 18 Q Okay. And would the answers be the same if I
 19 were to ask you about any impact testing of any
 20 of the windshields, the two windshields you
 21 looked at?
 22 A I'm sure Mr. Cullen didn't want me to break
 23 his windshield that day.
 24 Q Did you do any tests to identify or determine
 25 what kind of resin had been used or how it had

1 been cured?
 2 A No.
 3 Q Did you make any inquiry either at that time
 4 or before or since into how the repair was
 5 actually done or the equipment or the resin that
 6 had been used?
 7 A No. I did not feel it was an issue.
 8 Q Would it change any of your opinions if
 9 testing had been done on repaired glass and shown
 10 that the structural integrity or lamination had
 11 not been affected?
 12 A Repaired glass of -- I'm sorry. Please --
 13 Q I'll withdraw it.
 14 Do you know whether or not there is more than
 15 one kind of resin to use to repair windshields?
 16 A I'm certain there are a variety of resins.
 17 Q Are you aware of any of the variations in the
 18 quality or the property of those resins?
 19 A I know there is a significant difference in
 20 the viscosity of resins, and different companies
 21 have different claims as to the role and the
 22 viscosity and repair.
 23 Q But you didn't think that would be a --
 24 A No. Because I consider polymer to be
 25 inferior to glass and incapable of restoring the

1 windshield to its original condition.
 2 Q Do you believe that the polymer used is
 3 capable of preventing the failures we were
 4 talking about earlier?
 5 A I believe it is capable at best of mitigating
 6 or reducing the rate at which the failure
 7 occurs.
 8 Q Would I be correct in saying that you can't
 9 testify to a reasonable degree of scientific
 10 certainty how much or how little it might
 11 mitigate the rate at which that occurs?
 12 A Correct.
 13 Q And just so we're understanding each other,
 14 when you say, "mitigate," you mean it could put
 15 off or prevent for some period of time --
 16 A In some cases. In some cases, it may
 17 actually cause the windshield to fail sooner.
 18 Q Okay. And there would be no way for you to
 19 answer whether or not that was going to happen
 20 without looking, at the very least, at the
 21 windshield and the repair in question, correct?
 22 A And most importantly, understanding what
 23 stresses would be present and their gradients.
 24 Q Now, your report states that, "The repair
 25 displayed many of the problems that are typically

1 seen in repaired windshields." Do you base your
2 use of the word "typically" on what we've already
3 talked about today, which is these two
4 windshields and the 15 or 20 you've already
5 looked at?

6 A In addition, many of the statements State
7 Farm made in their long crack repair study.

8 Q Anything beyond what you've just told me that
9 forms the basis for that statement?

10 A No.

11 Q Mr. Carmody, you used the phrase we just
12 talked about, "many of the problems that are
13 typically seen." My question is, did you
14 identify in your report all the problems you saw
15 with that repair?

16 A I believe, according to that wording, I did
17 not specify the problems. I listed some of them.

18 Q The first problem I believe you identified is
19 that it's "optically almost opaque."

20 Am I correct that when you look at it, it's
21 almost hazy or foggy?

22 A It means it would be less than the value
23 specified in ANSI Z26.1.

24 Q And if a repair could satisfy that 70 percent
25 requirement as to opacity, you would have no

1 problem with it on that point, correct?

2 MR. PALOMBO: Objection.

3 A I'm not an expert at human factors and how
4 optical distortion could affect a driver's
5 ability to drive.

6 Q Could you tell us what ANSI is?

7 A American National Standards Institute.

8 Q Okay. And it sets up a standard and testing
9 to see if materials and vehicles meet those
10 standards, correct?

11 A Yes.

12 Q And one of those standards you just referred
13 to as the -- I believe it's the luminescence
14 test? Is that what it's referring to?

15 A Percentage of transmitted light.

16 Q And 70 percent is the ANSI standard, correct?

17 A Yes.

18 Q Now, when you say it's "optically almost
19 opaque," was that an observation you made with
20 your naked eye or with the microscope?

21 A It was an observation that was evident both
22 with the naked eye and with the microscope.

23 Q And as we talked about earlier, you don't
24 know if it looked that way the day the repair was
25 done or it had somehow become more opaque over

1 time, correct?

2 A That's right.

3 Q Do you know what caused that opacity?

4 A I do not. I would speculate that it could
5 have been abrasion by the windshield wipers or it
6 could have been crystallization of the polymer.

7 Q But those are just possible causes?

8 A Those are hypotheses.

9 Q Now, how large was the area that you've
10 described as being optically almost opaque?

11 A It was the entire body of the repaired
12 defect. And the resin may have extended a little
13 beyond the borders of that defect.

14 Q In inches or fractions of an inch?

15 A I would say it was on the order of one-tenth
16 of an inch, but that's an approximation.

17 Q Now, the next thing you point out in your
18 report is that it shows that the damaged area,
19 quote, "shows signs of multiple crack tip
20 extensions."

21 My first question is, is a crack tip
22 extension what we referred to earlier as there's
23 the initial crack caused when the object impacts
24 the windshield, correct?

25 A Right.

1 Q And then a crack tip extension would be one
2 of those expanding a bit, correct?

3 A Yes.

4 Q Given that you've just testified that this
5 entire area was roughly a 10th of an inch, how
6 big are these crack tip extensions that you
7 believe you saw?

8 A I would have to measure them with the optical
9 microscope to answer that question accurately,
10 but they're much smaller than the initial defect.

11 Q And when you use the phraseology, "shows
12 signs of multiple crack tip extensions," does
13 that mean that you believe those are crack tip
14 extensions to a reasonable degree of scientific
15 certainty or that you simply can't say how big
16 the initial damage was?

17 A The initial damage is the photo that's
18 shown. The crack tip extensions radiate outward
19 from it. And their size is -- I'm not
20 speculating on them. I could view them under the
21 microscope.

22 Q I want to make sure I understood you. These
23 crack tip extensions, are they within or without
24 the roughly 1/10th of an area you described
25 earlier?

1 A They extend outward from the central initial
 2 impact.
 3 Q Do they extend outward beyond the area of
 4 resin you observed?
 5 A It was difficult that level of magnification
 6 to determine whether they had been penetrated by
 7 the resin or not. This is an important issue.
 8 The resin has a viscosity, and it can only
 9 penetrate a crack of a certain width, at which
 10 point it will stop. Even water will not flow
 11 through a hole of a certain size.
 12 Q Am I correct then that you couldn't, using
 13 your 60 X magnification microscope, tell whether
 14 those cracks were there to begin with or it
 15 occurred after the repair?
 16 A I know with 100 percent certainty because of
 17 my background as a fractologist that those cracks
 18 were initiated by the initial impact event.
 19 Q So they had not expanded over time?
 20 A They had not -- I do not know if they had
 21 expanded or not. I only know that day.
 22 Q And on the day you did your inspection with
 23 the microscope, you couldn't determine they
 24 expanded beyond the area of resin applied to the
 25 repair; is that correct?

1 A Right.
 2 Q And the area of resin is the roughly 1/10th
 3 of an inch we discussed?
 4 A Yes.
 5 Q Does your training and expertise allow you to
 6 look at damage or repaired damage to a windshield
 7 and determine what kind of object hit it? Do you
 8 understand my question?
 9 A No.
 10 Q No, you don't understand my question or the
 11 answer to my question is no?
 12 A The answer to the question is that I would
 13 probably not be able to determine what kind of
 14 object it was except I could tell you the object
 15 was harder than the glass, in most cases.
 16 Q Let me make sure I understand your last
 17 answer. Are you saying that in most cases where
 18 a windshield is chipped, that's because it's been
 19 hit by an object that's harder than glass or are
 20 you telling me that when you look at damage to a
 21 windshield, you can tell whether or not the
 22 object that hit it is harder than glass?
 23 A I think the best way to put it is that the
 24 object had enough energy in the object and enough
 25 rigidity that it was able to initiate a defect in

1 a brittle material.
 2 Q For example, a lacrosse ball is not as hard
 3 as glass.
 4 A Yes.
 5 Q But I can tell you they can break
 6 windshields.
 7 A Yes.
 8 MR. PALOMBO: Basketballs,
 9 too.
 10 Q Later in that sentence, you used the phrase
 11 future fracture failure. Is that what we've
 12 already talked about?
 13 A Yes.
 14 Q And when you say, "form the basis for,"
 15 that's the uncertainty that we already talked
 16 about, which is --
 17 A I'm sorry. You're going to have to --
 18 Q Sure. You state that -- we just talked about
 19 the multiple crack tip extensions, and then you
 20 say, "Which form the basis for."
 21 MR. PALOMBO: Where are we,
 22 Mike?
 23 MR. FARRELL: I'm under
 24 Site Conditions, fourth line.
 25 MR. PALOMBO: Okay.

1 Q When you use the phrase form the basis for,
 2 does that mean might cause?
 3 A No. Under the conditions that would allow it
 4 to fracture it will cause. It's inevitable.
 5 Brittle material will fail at the site of a gross
 6 defect that is subject to sufficient stress that
 7 will subject it to failure.
 8 Q And that's the four factors and what we
 9 talked about before lunch -- we've been through
 10 that, correct?
 11 A Yes.
 12 Q At the time you looked at it, Mr. Cullen's
 13 windshield had suffered no fracture failure,
 14 correct?
 15 A No. There was the fracture. It was the
 16 additional impact event.
 17 Q But no additional fracture since that?
 18 A The cracks were beginning to extend. But I
 19 don't know if they were grown or they were from
 20 the initial event.
 21 Q And the answer would be the same with regard
 22 to the other windshield you examined that day,
 23 which is you don't know if they had grown from
 24 the initial event or not?
 25 A Not yet.

1 Q When you say, "not yet," not yet they hadn't
2 grown?

3 A Right.

4 Q Am I correct that in reaching your
5 conclusions and writing your report, you did not
6 review any statistics, studies or reports about
7 the actual failure or failure rates of repaired
8 windshields?

9 A No.

10 Q Okay. No, I'm not correct or no, you didn't
11 look at those statistics?

12 A I recall somewhere on the Internet reading
13 that less than 10 percent of repaired windshields
14 would fail, on one of the websites. But that was
15 not time qualified.

16 Q With regard to the resin degradation that you
17 have alluded to in your report, and forgive me if
18 I asked you this earlier, you said you didn't
19 observe that either with your eyes or with your
20 microscope, correct?

21 A I was referring to the bond between the resin
22 and the glass. The opacity may have implied that
23 there was ultraviolet light degrading the resin.

24 Q But as we talked about earlier, that is a
25 hypothesis?

1 A That is a hypothesis.

2 Q Are there chemical or other tests you could
3 have done to determine whether the resin had
4 actually degraded over time?

5 A Not without interfering with or destroying
6 the appearance.

7 Q In your report, you refer to mechanical
8 stresses. Those would be in the second category
9 that we discussed before lunch, correct?

10 A You would have to repeat what that second
11 category --

12 Q I knew you were going to ask me that.

13 You identified the nature of stress, the
14 nature of defect, location of the defect, and the
15 material. So mechanical stresses would fall
16 within the nature of the stress, correct?

17 A Yes.

18 Q And mechanical stresses would include things
19 like hitting chuckholes; am I correct?

20 A Yes.

21 Q Bending the windshield while it's being
22 installed?

23 A I don't believe -- no, that wouldn't have
24 been something I would have been thinking of when
25 I wrote this report. This windshield was already

1 installed.

2 Q How about driving the vehicle on an uneven
3 surface with two wheels on a curb and two wheels
4 off, would that put a mechanical stress on it?

5 A I don't know the design of the vehicle. That
6 would be more of a question for Gary Derian.

7 Q Okay. What did you have in mind when you
8 were mentioning mechanical stress?

9 A I was thinking of potentially at the extreme
10 worst case of rollover accident, and at the lower
11 end the thermomechanical stresses that are caused
12 by when you turn your defrost on and your
13 windshield is cold.

14 Q Okay.

15 A So it's a range of stresses.

16 Q You also opine that, quote, "It also appears
17 that the interlayer was exposed to the outside
18 via crack surface." Am I correct that because it
19 also appears that, you're not sure if that's true
20 or not, based on your exam?

21 A I'm almost certain, because when you look at
22 the picture, you can see a relief area in the
23 crater. That is an area where the glass actually
24 was completely removed down to the PVB
25 underlayer. And prior to repair, this layer

1 would have been the PVB underlayer.

2 MR. PALOMBO: For the
3 record, he's pointing to Figure 1
4 in his report.

5 Q I don't mean to be flip. For the record, the
6 Xerox copy of those photographs, I couldn't tell
7 what you were pointing to.

8 You don't have the originals with you, do
9 you?

10 A No.

11 Q Okay. How much of the 1/10th of an inch is
12 in that area you just described?

13 A This small area. (Indicating.)

14 Q Yes.

15 A Just looking at this graphical analysis from
16 the photo, it appears to be roughly 1/4th of the
17 impact total width.

18 Q So 1/4th of 1/10th, roughly?

19 A And I'd have to get out a calculator to --

20 Q If I could do math, I wouldn't have gone to
21 law school.

22 And beyond that observation, you have no
23 opinion whether the interlayer or its qualities
24 were affected by that penetration, correct?

25 A Without that additional destructive testing

1 of glass flying around the passenger compartment
 2 and other types of injuries.
 3 Q Are you aware of any circumstance where a
 4 repair actually caused that to happen?
 5 A No.
 6 Q Okay.
 7 A But lack of injury does not take away the
 8 defect.
 9 Q Okay. Are you aware of any report indicating
 10 that that kind of event happened that would not
 11 otherwise have happened involving a repaired
 12 windshield?
 13 A No.
 14 Q Now, you are aware, are you not, that
 15 windshield repairs have been being done in the
 16 United States for at least 20 years?
 17 A Yes.
 18 Q Okay. Based on your experience in the field
 19 of ceramics, do you find it significant that
 20 you're not aware of any such event, given that
 21 span of time?
 22 MR. PALOMBO: Objection.
 23 A No, I don't find it significant. I've only
 24 been involved in this type of investigation for a
 25 short period of time, and I had not been looking

1 at the issue.
 2 Q Certainly that didn't happen to Mr. Cullen or
 3 Mr. Cullen's car, that you're aware of, correct?
 4 A Yes.
 5 Q And it didn't happen to the other windshield
 6 that you looked at in the parking lot that day,
 7 correct?
 8 A Correct.
 9 Q Nor had it happened to any of the 15 or 20
 10 other windshields that you looked at in the
 11 course of what we already talked about, correct?
 12 A Not at the moment in time that I inspected
 13 them.
 14 Q Okay. And you're unaware of any windshield
 15 failing in that manner, any repaired windshield
 16 failing in that manner at any point in time,
 17 correct?
 18 A What do you mean by "that manner"?
 19 Q The glass flying around the passenger
 20 compartment you referred to earlier and that you
 21 refer to in your report.
 22 A I did not investigate as to accident
 23 statistics. I would have left that to
 24 Mr. Derian.
 25 Q And if another entity had done that research

1 and had been unable to find any such incident,
 2 would that change any of your opinions?
 3 A I would have to review that entity's
 4 information.
 5 Q Okay. But if that information existed, that
 6 would be something that you would at least
 7 consider significant enough to look at?
 8 A Yes, I would review it.
 9 Q Earlier, you told me that glass, like all
 10 ceramics, begins to degrade -- it's always
 11 degrading; is that correct?
 12 A Like everything in our world.
 13 Q Okay. Am I also therefore correct that even
 14 an undamaged windshield will, as you told me
 15 before lunch, eventually, if the right
 16 combination of those four factors occur, it will
 17 fail, too?
 18 A Yes. But without a gross defect at
 19 significantly higher stresses.
 20 Q And can you measure in any way how much
 21 higher you mean by "significantly higher"?
 22 A I can just set a threshold and say that under
 23 normal wear and tear, without an impact or gross
 24 defect, a windshield is designed and engineered
 25 that it can take stresses above the engineering

1 range that is defined as 4 to 5 PSI by four to
 2 five people.
 3 Q Do you have any knowledge or information
 4 about how a repaired windshield would fare; what
 5 stresses it would hold up to?
 6 A I have some of the testing that was done by
 7 the National Glass Association and others. But
 8 that is not -- that is merely representational
 9 testing. It does not represent field conditions.
 10 Q And by "field conditions," you mean the real
 11 world?
 12 A That's correct.
 13 Q And that's the real world in which you're
 14 unaware of any failure like we just talked about,
 15 correct?
 16 MR. PALOMBO: Objection.
 17 A No. The failure -- how do you define
 18 failure? The failure occurs at the moment the
 19 gross defect occurs.
 20 Q And that's when the chip happens?
 21 A That's right.
 22 Q Okay. What is your definition of a gross
 23 defect?
 24 A I would define a gross defect in engineering
 25 terms as one that degrades the strength below

1 that engineering range. In common sense
 2 practical terms that you can view with your eye,
 3 I would say a gross defect is one serious enough
 4 that you report it to State Farm to have your
 5 windshield fixed.
 6 Q Okay. And so under your second definition
 7 what a gross defect is would be something that
 8 would vary based on what people are willing to
 9 tolerate in their windshield, correct?
 10 A No. The definition, according to the way I
 11 gave it, would be an engineering definition that
 12 has to do with the stress the glass can take.
 13 What somebody can tolerate or not has no impact
 14 on the actual strength of the glass.
 15 Q I thought you told me that your common sense,
 16 everyday definition of gross defect would be one
 17 that was serious enough that one would report it
 18 to their insurer?
 19 A There's a strong correlation between what you
 20 would report and what I would consider bad enough
 21 it lowers the strength of the glass below
 22 engineering range.
 23 Q What do you base that statement that there is
 24 a strong correlation?
 25 A Years and years of looking at broken glass.

1 Q Anything else?
 2 A Just my experience and knowledge.
 3 Q Okay. At page 4 of your report, you make the
 4 statement that "There is no acceptable standard
 5 for repairing gross and permanent surface damage
 6 to a windshield applied by any of the major
 7 windshield manufacturing companies."
 8 A Yes.
 9 Q What's your basis for that statement?
 10 A Experience in the industry as well as
 11 discussion with many of my peers who are in the
 12 industry. I have not been able to locate a
 13 company that would repair a windshield and sell
 14 it and it look anything like these repaired
 15 windshields that I viewed.
 16 Q Okay. Is that what you mean by "acceptable,"
 17 that they would resell it?
 18 A Yes.
 19 Q Okay. Are you aware that the NGA has
 20 participated in and endorsed a series of
 21 windshield repair standards?
 22 A Yes.
 23 Q And I take it then that you understand that
 24 the NGA has set forth situations in which it
 25 believes windshield repair is appropriate?

1 A I don't know that I would use the word
 2 "appropriate". They appear to be responding to
 3 market pressure in trying to find the best
 4 possible repair solution.
 5 Q And that's just your observation of what you
 6 think prompted NGA to come out with those
 7 standards?
 8 A Yes.
 9 Q The major windshield manufacturing companies
 10 that you've alluded to earlier today, do they
 11 participate in NGA; do you know?
 12 A I believe some of them do.
 13 Q Do you know whether any of them also
 14 participated in the formulation of the windshield
 15 repair standards?
 16 A I do not know.
 17 Q Would your opinion about what is acceptable
 18 to those companies change if they had
 19 participated in issuing those standards?
 20 A I'm sorry. Would you repeat that?
 21 Q Sure. You've stated that you don't believe
 22 there's any repair that would be acceptable to
 23 the manufacturers. Do you recall that?
 24 A No. I stated that there was no repair that
 25 would be acceptable to the manufacturers as if

1 they manufactured a windshield with that damage,
 2 they would not repair it and sell it to the end
 3 user. That's the meaning of that statement.
 4 Q And it doesn't go beyond that?
 5 A That's right.
 6 Q Okay. In addition to the NGA, there are
 7 several other organizations that have issued
 8 windshield repair guidelines; is that correct?
 9 A I'm not aware of them.
 10 Q Okay. Is there any damage to a windshield
 11 that you believe is appropriate or an appropriate
 12 candidate to be repaired or do you believe that
 13 any damage requires replacement?
 14 A I believe that any damage should not be
 15 repaired with a polymer resin, because it cannot
 16 restore the glass to its original condition.
 17 Q Are you aware of any other manner of
 18 repairing glass, windshield glass?
 19 A Not windshield glass.
 20 Q Okay. Mr. Carmody, if you could take a look
 21 at Section E.2 of your report.
 22 A Yes.
 23 Q And beginning with the all capped statement,
 24 "STATE FARM issued," and continuing until the
 25 middle of the following page, am I correct that

1 that is simply your quoting from or paraphrasing
 2 from a document that was provided to you?
 3 A Yes.
 4 Q Okay. And that kind of paraphrasing or
 5 quoting doesn't reflect any testing or analysis
 6 that you've done, correct?
 7 A It reflects the testing or analysis that
 8 State Farm performed.
 9 Q Okay. Now, what you're referring to
 10 beginning on page 4 is a 1998 report about long
 11 cracks; is that correct?
 12 A That is correct.
 13 Q And that report is titled, "Long Crack
 14 Repair," correct?
 15 A That is correct.
 16 Q And the definition of long crack as used in
 17 that study is a crack over six inches, correct?
 18 A I don't recall the limitation.
 19 Q Okay. Certainly Mr. Cullen's windshield did
 20 not and does not have a long crack; is that
 21 correct?
 22 A That is correct.
 23 Q And this report is dated five years before
 24 Mr. Cullen's car was repaired; is that correct?
 25 A Yes.

1 Q And it is dated seven years before you issued
 2 your report; is that correct?
 3 A Yes.
 4 Q You make the statement in your report that
 5 "Many concerns that apply equally to all repairs
 6 became evident"?
 7 A Yes.
 8 Q What's your basis for that statement?
 9 A It's just based on my experience as a ceramic
 10 engineer, my observation of what their concerns
 11 are, and the fact that I believe that these
 12 concerns apply equally with different magnitude
 13 but equally to all types of defects introduced to
 14 glass that are repaired with polymer resins.
 15 -----
 16 (Defendant's Exhibit L marked for
 17 identification.)
 18 -----
 19 Q Mr. Carmody, is Exhibit L the long crack
 20 study we've been referring to?
 21 A Yes.
 22 Q And that report notes but you don't reflect
 23 it in your report that in the time period leading
 24 up to 1998, there had been improvements in repair
 25 processes. Do you recall reading that?

1 A Yes.
 2 Q Do you believe that repair technology and the
 3 resins used has continued to improve since 1998?
 4 A I don't know if it has improved or not
 5 improved.
 6 Q And you made no effort to find that out as
 7 part of your work; is that correct?
 8 A It appears to me if you define improved by
 9 some of the claims made by some of the
 10 manufacturers. I just had no chance to evaluate
 11 that on a technical basis. I see claims it has
 12 improved. I did not myself verify that
 13 scientifically.
 14 Q Okay. The first thing you quote from this
 15 report is that the ANSI tests show that
 16 penetration and spalling performance is similar
 17 to new laminated glass. Now, what is spalling?
 18 A Spalling would be defined as the separation
 19 of the composite layers and individual sections.
 20 Q Would penetration be used in its normal
 21 sense, which is whether or not an object gets
 22 through the windshield?
 23 A That's correct.
 24 Q One of the things this reports indicates is
 25 repaired glass and new laminated glass are

1 similar in this regard?
 2 A Only similar as in the way State Farm
 3 performed the tests on a newly repaired
 4 windshield. They go on in bold caps, I stress,
 5 that the long-term effects were not studied. And
 6 that was a concern to State Farm.
 7 Q And when tests don't exist, that means you
 8 simply don't know, correct?
 9 A No. When tests don't exist, it's not that
 10 you don't know. It's that you can't confirm.
 11 You can definitely infer based on your experience
 12 and knowledge.
 13 Q Are you aware whether any such testing
 14 protocols for durability and the other things
 15 listed occur today?
 16 A I am not aware.
 17 Q Did you make any attempt to find that out in
 18 the course of doing your work in this case?
 19 A I did.
 20 Q And you were --
 21 A I just did not locate anything.
 22 Q Okay. What do you think is meant by the use
 23 of long term here?
 24 A I cannot speculate on what they meant when
 25 they wrote it up.

1 windshield was repaired, correct, or whether it
2 was repaired; because he didn't have a long
3 crack, correct?

4 A The issues that were raised in the long crack
5 report, I believe, as an ceramic engineer, are
6 pertinent to all repairs. Had State Farm looked
7 with a ceramic engineering viewpoint at what
8 their own discoveries were, they should have
9 raised a critical eye towards their whole
10 practice of repairing windshields.

11 -----
12 (Defendant's Exhibit M marked for
13 identification.)
14 -----

15 Q Mr. Carmody, the next document referenced in
16 your report is the 1994 National Glass
17 Association Subcommittee Report. Is that what
18 we've marked as Exhibit M?

19 A Yes.

20 Q Okay. And, again, what appears in your
21 report from the middle of page 5, the paragraph
22 beginning, "In January," until the Item No. 4 in
23 the middle of page 6 is simply a paraphrase from
24 that document; is that correct?

25 A That's correct.

1 Q Okay. Do you know how this committee was
2 formed -- or subcommittee, I should say?

3 A No, I do not know.

4 Q Do you know who was on it or what their
5 qualifications were?

6 A No.

7 Q Do you know what companies they represented?

8 A No.

9 Q Do you know what tests they actually did or
10 what the results were?

11 A Yes.

12 Q And that's in a separate document, correct?

13 A It's -- actually, I don't believe this is the
14 complete report. I think this is just the
15 summary.

16 Q Okay. Do you know anything about the
17 Windshield Repair Work Group Technical
18 Subcommittee that isn't stated in this document
19 or the summary report of the tests?

20 A I'm sorry.

21 Q Sure. Let's just do it this way.

22 A Perhaps you could show it to me.

23 -----
24 (Defendant's Exhibit N marked for
25 identification.)

1 -----
2 Q Mr. Carmody, is the exhibit we've marked as
3 Carmody Deposition Exhibit N, as in Nancy, which
4 is entitled, "Windshield Repair Tests: Summary
5 Report," is that the information you had about
6 the tests that were done and the results?

7 A Yes.

8 Q Those two documents, Exhibit M and N, taken
9 together, that is the source of all of your
10 information about this subcommittee's work; am I
11 correct?

12 A Yes.

13 Q Both of those documents are dated in 1994, am I
14 correct, or late 1993?

15 A I don't see the date -- yes, 1993.

16 Q Is it generally your practice to rely on
17 12 year-old information?

18 A I rely on the information that's available,
19 and this was the most current that I could find.

20 Q Okay. Would you agree with me that repair
21 technology has evolved dramatically in the last
22 few years?

23 MR. PALOMBO: Objection.

24 A I haven't evaluated it.

25 Q Can't opine about that?

1 A Yes.

2 Q Whether or not you would be comfortable
3 relying on 12 year-old information, does that
4 depend on whether it's a developing field or not?

5 A I don't understand the question.

6 Q You would agree with me that developments in
7 computer technology have been rapid?

8 A Yes.

9 Q And can you identify a field for me where the
10 technology hasn't changed that much or as
11 rapidly?

12 A The glass industry.

13 Q Okay. Would you be less comfortable relying
14 on 12 year-old information with regard to
15 computers than glass?

16 MR. PALOMBO: Objection.

17 A That's a hard question to answer. Could you
18 restate it in a different way?

19 Q Would you agree with me that it is more
20 important to have current information in a field
21 that is rapidly changing than it is to have
22 current information in a field that, like the
23 glass industry, is changing less rapidly?

24 A Current information is always desirable when
25 it's available.

1 they could have done it. I would need to see
 2 that reference in order to describe the test
 3 mechanism.
 4 Q What is a butt-joined repair?
 5 A That means that the crack was joined together
 6 face-to-face.
 7 Q Flat side to flat side?
 8 A Yes.
 9 Q Okay. Was that what was done with
 10 Mr. Cullen's windshield?
 11 A No.
 12 Q What's a lap-shear repair?
 13 A I'm not sure. I'm not sure exactly what
 14 they're referring to. I couldn't draw a picture
 15 without additional information about the layout
 16 of that test.
 17 Q So you couldn't tell me if that has any
 18 connection to the repair done to Mr. Cullen's car
 19 or not, that particular -- the lap-shear repair?
 20 A I can tell you if Mr. Cullen's repaired
 21 windshield was subjected to these types of tests,
 22 then we would have some indication of how it
 23 performed.
 24 Q Am I correct what you just told me is if you
 25 did this test, whatever it is, to Mr. Cullen's

1 windshield, you would find out how it performed
 2 under this test that's referred to in this
 3 document? I don't mean to be flip.
 4 A Putting it another way, if Mr. Cullen's
 5 windshield was damaged and repaired similar to
 6 how this test describes and subjected to stress
 7 in the same regime that it was in this test, then
 8 you can draw correlations as to how it would
 9 perform under those conditions.
 10 Q Did you do any, beyond reading what was in
 11 this report, did you do any investigation or
 12 calculations to try and verify the validity of
 13 these results or did you accept that the tests
 14 were done properly and the results were what they
 15 are as stated?
 16 A I did not test. I did analyze. And I
 17 believed that the results were consistent with
 18 what I expect from a piece of broken glass that
 19 had been adhered using polymer.
 20 -----
 21 (Defendant's Exhibit P marked for
 22 identification.)
 23 -----
 24 Q Let me know when you're ready, Mr. Carmody.
 25 A Go ahead.

1 Q With regard to Carmody Exhibit P, which is an
 2 undated letter to a John Neilans from an
 3 Ed Tingley, neither of those gentlemen work for
 4 State Farm; is that correct?
 5 MR. PALOMBO: Objection.
 6 A I don't know.
 7 Q You have no reason to believe that they do?
 8 A Not according to this memo.
 9 Q And this letter is undated. Do you have any
 10 idea of when it was sent or received?
 11 A No.
 12 Q Okay. Now, the Z26.1 standard, that's issued
 13 by ANSI, which you already told me about,
 14 correct?
 15 A Yes.
 16 Q And what does that apply to?
 17 A I'm sorry?
 18 Q Who does the Z26.1 standard apply to? It
 19 applies to manufacturers, correct?
 20 A Yes, it would apply to manufacturers. And
 21 it's a minimum standard that establishes safety
 22 practices in the marketplace.
 23 Q Okay. And as I read the point of
 24 Mr. Tingley's letter to Mr. Neilans, is that
 25 Mr. Tingley is of the opinion that Z26.1 should

1 not apply to repairs. Is that your understanding
 2 of this letter?
 3 A That is what he states.
 4 Q Why did you choose to quote from this letter
 5 in your report?
 6 A Because it shows that the repair industry has
 7 no intention of meeting those minimum safety
 8 guidelines that were established by ANSI in their
 9 procedures for repair.
 10 Q And because they're not manufacturers, those
 11 guidelines do not apply to them; is that correct?
 12 A No, I do not believe that is correct. I
 13 think the National Safety Council has established
 14 when there's a minimum standard that's present in
 15 a manufacturer, that's to keep people safe, and
 16 that persons downstream of that commerce should
 17 try to adhere to those standards.
 18 Q And the ANSI standard with regard to glazing
 19 materials, what does glazing materials refer to?
 20 What does it apply to?
 21 A In this case, Z26.1, it refers to all manner
 22 of glazing being glass. In this case, it's the
 23 only approved material for use in motor vehicles.
 24 Q And you reference the National Safety
 25 Council. Were you referring to a written

1 pronouncement or policy or something that has
 2 been issued by that body?
 3 A Yes. I have access to that information.
 4 It's based on my experience. And I do not have a
 5 copy of it with me today.
 6 Q Okay. And was your earlier answer on that
 7 subject your best recollection of what the
 8 National Safety Council has announced,
 9 pronounced, whatever it did on that topic?
 10 A That is not a verbatim quote.
 11 Q That was my question.
 12 A It's based on my understanding and experience
 13 in products liability that responsibility
 14 continues and liability continues. If someone
 15 has knowledge that they're creating an unsafe
 16 condition, then they can be held liable.
 17 Q And if we wanted to know what the National
 18 Safety Council has actually stated, we would have
 19 to look that up somewhere, correct?
 20 A Correct.
 21 Q Do you have any opinion as to whether a
 22 repaired windshield could ever comply with Z26.1?
 23 A Yes. I do not believe a repaired
 24 windshield -- I believe any windshield which has
 25 been repaired would violate some of the

1 to check. You should have a Bates stamped reply
 2 to this letter or at some point in this
 3 correspondence there's a letter from Visteon
 4 stating that they believe that it is not only
 5 improper but illegal because of visual
 6 transmittance. I believe that letter should be
 7 in your file.
 8 Q Okay. Beyond that letter, are you aware of
 9 any Government agency that has issued an opinion
 10 agreeing with --
 11 A No.
 12 Q Are you aware of any engineer other than
 13 yourself and Mr. Derian who has expressed that
 14 opinion?
 15 A Yes.
 16 Q Who would that be?
 17 A I discussed this at length with several of my
 18 peers that are ceramic engineers.
 19 Q And who are those gentlemen or women? Are
 20 any of them employed at Robson?
 21 A No.
 22 Q What are their names?
 23 A Dr. Tony Longobardo.
 24 Q Where does Dr. Longobardo work or reside?
 25 A He is the former technical director of

1 requirements of ANSI Z26.1.
 2 Q Which requirements?
 3 A It would depend on the repair and the
 4 windshield. But specifically abrasion
 5 resistance, minimum transmission value, chemical
 6 resistance.
 7 Q Okay. Any others?
 8 A It would depend, again, on the repair. Each
 9 of them could potentially be compromised
 10 depending on the repair.
 11 Q So it's your opinion that all repaired
 12 windshields may violate one of those three
 13 portions of Z26.1?
 14 A Not may. Do.
 15 Q Okay. In what way would be a windshield by
 16 windshield determination; is that correct?
 17 A That's correct. As an example, the Cullen
 18 windshield clearly violates the visual
 19 transmission light requirement because of the
 20 opacity of the repair.
 21 Q With regard to your opinion that no repaired
 22 windshield can meet the standards you've referred
 23 to, are you aware of anyone that agrees with
 24 that, besides Mr. Derian?
 25 A I believe there's a reply, and I would have

1 Guardian Industries.
 2 MR. PALOMBO: Do you want
 3 to try to spell that?
 4 A We just call him Tony bag of donuts.
 5 L-o-n-g-o-b-a-r-d-o.
 6 Q And where does Dr. Longobardo reside?
 7 A His residence, I believe, is in Michigan, in
 8 the Detroit area, but he has recently taken a new
 9 position in South Carolina somewhere.
 10 Q Did anything in your conversation with
 11 Dr. Longobardo cause you to reach or cause you to
 12 change any of the conclusions you've expressed in
 13 your report?
 14 A No.
 15 Q Do you recall any other conversation you've
 16 had with people who agree with you on this topic?
 17 A Yes.
 18 Q Who would that be?
 19 A Mr. Michael Eudy, E-u-d-y.
 20 Q And where does Mr. Eudy work and reside?
 21 A Mr. Eudy is an independent consultant, and he
 22 resides in Union, Missouri.
 23 Q How is it you came to discuss this issue with
 24 Dr. Longobardo and Mr. Eudy?
 25 A They're long-time associates and peers. We

1 A I don't know --

2 MR. PALOMBO: Objection.

3 A I don't know that it's never actually

4 occurred.

5 Q Okay. Do you have any reason to doubt

6 Mr. Tingley's statement that as of the date he

7 wrote that letter, his organization, the National

8 Windshield Repair organization, was unaware of

9 such an instance?

10 A That is what he stated.

11 Q And assuming that his statement is accurate,

12 you don't believe that has any significance; am I

13 correct?

14 MR. PALOMBO: Significance

15 to what?

16 A Well, it states here that the committee is

17 not aware of one instance. The committee is

18 composed of a few individual members. I do not

19 know that they're speaking for every member and

20 every knowledgeable person in the National Glass

21 Association when they refer to the committee.

22 Q Okay. Would you agree with me that as of

23 today, repairing windshields is an accepted

24 practice in the United States?

25 A Making it acceptable doesn't make it safe.

1 Q Okay. Are you aware of any insurance company

2 that will not pay for windshield repair as a

3 matter of practice or policy?

4 A I did not investigate, so I'm not aware.

5 Q Okay. Are you aware of any state that

6 prohibits the practice of repairing windshields?

7 A I believe that there are some states who have

8 imposed guidelines and restrictions, but, again,

9 that -- I did not fully investigate that.

10 Q What states do you believe have such

11 guidelines or restrictions?

12 A I cannot recall the name of the state. It

13 might have been Minnesota.

14 Q It was not Ohio, I take it?

15 A I do not believe it was Ohio.

16 Q Are you aware of any State Department of

17 Insurance that prohibits insurance companies from

18 paying for repairs to windshields?

19 A No. I did not investigate that.

20 Q What did you mean in your report when you

21 made the statement, "By dealing with a subsidiary

22 of PPG, State Farm should have known" -- let me

23 rephrase my question.

24 Mr. Carmody, I'd like to direct your

25 attention to the statement you make in the last

1 sentence of the first paragraph on page 7, which

2 reads, quote, "By dealing with a subsidiary of

3 PPG, State Farm should have known that they were

4 failing to provide their insured with the level

5 of safety and protection mandated by the

6 federal government."

7 Is what State Farm should have known a matter

8 of ceramic engineering?

9 A It is a matter of this forensic

10 investigation, not ceramic engineering.

11 Q And you didn't apply any scientific or test

12 or principle in making that statement, correct?

13 A I applied my observation of the facts in the

14 case.

15 -----

16 (Defendant's Exhibit Q marked for

17 identification.)

18 -----

19 Q Mr. Carmody, we've now marked as Exhibit Q a

20 copy of a Report of Test from the United States

21 Testing Company. Is this something you reviewed

22 in writing your report?

23 A Yes.

24 Q Okay. And this report reflects the results

25 of tests done by the United States Testing

1 Company; is that correct?

2 A Yes.

3 Q And they were asked to do those tests by a

4 company called Ultra Bond?

5 A That is correct.

6 Q Are you familiar with United States Testing

7 Company, Inc.?

8 A Just vaguely.

9 Q Okay. Do you believe that to be a reputable

10 company or testing lab?

11 A I can't deduce that from my knowledge of

12 Googling them.

13 Q In the course of your Google research, did

14 you find out that they were recognized by the

15 U.S. Government, specifically the Department of

16 Labor, as a nationally recognized testing lab?

17 A Yes, I saw that.

18 Q Are you personally recognized in that way by

19 the Federal Government at any level?

20 A No.

21 Q Is Robson Forensic?

22 A I'm not aware if they are or not.

23 Q And the NGA subcommittee we referred to

24 earlier isn't certified in that way, as far as

25 you're aware; is that correct?

1 A I saw no information stating one way or the
 2 other.
 3 Q Okay. Now, the test performed by the United
 4 States Testing Service -- the test they did show
 5 that the repaired glass was as strong or stronger
 6 than unrepaired glass, uncracked and unrepaired
 7 glass. Is that a correct description of the test
 8 results?
 9 A No. I believe the heading says it is
 10 stronger, Ultra Bond is stronger than glass.
 11 Q And they did impact and penetration testing
 12 under ANSI Z26.1, correct?
 13 A Yes. They did some of the ANSI Z26.1 tests.
 14 Q And these test results were also amongst the
 15 materials from State Farm's files that were
 16 provided to you, correct?
 17 A Yes.
 18 Q So in the same way State Farm was aware of
 19 its long crack study, they are aware of these
 20 test results, too, correct?
 21 A Yes.
 22 Q Okay. Why then didn't you make it a point to
 23 mention in your report that State Farm was aware
 24 of these test results in the way you made them
 25 aware of the long crack study?

1 A I talked about the anomalies and some of the
 2 statistical problems I had with this particular
 3 study.
 4 Q Did you subject the NGA test results to the
 5 same kind of scrutiny you subjected these test
 6 results to?
 7 A I did.
 8 Q Did you find any anomalies in the NGA test
 9 results?
 10 A I did not find the same type of anomalies.
 11 Q The NGA report itself points out some
 12 anomalies and scatter?
 13 A Anomaly and scatter would mean two different
 14 things to me as an engineer.
 15 Q And the anomalies that you referred to, are
 16 those the ones referenced in your report?
 17 A Yes.
 18 Q Now, one of the statements you make in your
 19 report is that you allege these tests don't
 20 address known problems with windshield repair.
 21 Are those anything different than what we've
 22 talked about today? That's a terrible question.
 23 Let me withdraw it.
 24 At page 7 of your report, you state that "The
 25 test regime," by the USTC, "does not address many

1 of the known problems with windshield repair"?
 2 A Yes.
 3 Q And then you go on to mention optical
 4 properties. When you mentioned optical
 5 properties in this paragraph, did you mean
 6 anything that we haven't already discussed today?
 7 A No.
 8 Q Okay. With regard to delamination, did you
 9 mean anything that we haven't already discussed
 10 today?
 11 A No.
 12 Q With regard to the contamination mentioned in
 13 the next sentence, did you mean to refer to
 14 anything that we haven't already discussed today?
 15 A No.
 16 Q Same question with regard to the longevity
 17 under UV light exposure, physical abrasion, or
 18 chemical attack on the road.
 19 A No.
 20 Q And your reference to the thermal heating
 21 from the vehicle heating system, we've already
 22 talked about what you meant to refer to there?
 23 A Yes.
 24 Q Okay. Now, your conclusion is that these
 25 test results should be completely discounted; is

1 that correct?
 2 A My conclusion is that these test results need
 3 to be supplemented with additional testing in
 4 order to reap any of the valid information and
 5 compare and contrast it to the overall test
 6 conditions.
 7 Q And you reached that conclusion about these
 8 test results based on your specialized knowledge
 9 and training and your analysis of the report
 10 itself, correct?
 11 A That is correct.
 12 Q Now, with regard to the items that you
 13 reference it not measuring or not -- strike
 14 that.
 15 With regard to items that you state this
 16 report doesn't measure, you're criticizing them
 17 for not testing those things, correct?
 18 A Yes.
 19 Q Okay. Do you know whether those tests were
 20 ever conducted and they simply weren't in State
 21 Farm's files?
 22 A I would not know that based on the discovery
 23 I received so far.
 24 Q Okay. If the United States Testing Company
 25 had conducted the transmission tests we talked

1 A Yes.

2 Q Beyond it being difficult to explain, you

3 don't dispute that's what the test showed, do

4 you?

5 A No. I see results that show that. I

6 question the validity of the method, the

7 apparatus. I would want much more information

8 about this test than is presented in the report

9 in order to understand why those results are

10 there. They're anomalous to me.

11 Q And when you make the assertion that "glass

12 could be made stronger by repair is not

13 consistent with established material science," is

14 the established material science anything other

15 than what we've discussed up to today?

16 A That would be -- the short answer is no.

17 Q Okay. Now, in both the NGA subcommittee

18 tests and the USTC tests, those were both done in

19 labs under what you referred to as controlled lab

20 conditions, correct?

21 A Yes. Although I feel the United States

22 Testing Company were more controlled because they

23 did not reflect a variation in number of

24 laboratories, variation in resins. And even

25 though they tested more samples, they conducted

1 fewer tests overall.

2 Q Did you and Mr. Bashein ever discuss whether

3 you should look closely at how the tests either

4 by the NGA subcommittee or United States Testing

5 Company were done --

6 MR. PALOMBO: Objection.

7 Q -- or did you come up with that idea on your

8 own?

9 A I did that because I'm an engineer and I

10 analyze reports.

11 Q Now, one of your criticisms, and I assume it

12 would apply to both, is that they did not reflect

13 real field conditions, which would be, I suppose,

14 what cars are exposed to in the real world?

15 A That is correct.

16 Q Do you think that statistics or actual data

17 about real world events involving repaired

18 windshields would be a better reflection of the

19 issues we've been discussing today?

20 A Depending on how the data was generated, the

21 scientific methods that generated it, yes.

22 Q Would it be fair to say that you accepted the

23 results of the NGA subcommittee test at face

24 value but totally discounted the test results

25 reflected in Exhibit Q, the USTC tests?

1 MR. PALOMBO: Objection.

2 That's not what he testified to.

3 A No. I have -- as we just stated, I see a

4 real need for field verified testing of repaired

5 windshields. But all that is in intention is to

6 verify what I already know as a ceramic engineer

7 is you cannot restore a windshield to its

8 original condition by any method other than

9 remelting the glass and restoring it to its

10 original glass condition.

11 Q And whether the difference between a repaired

12 windshield and what you've described as the

13 original condition leads to any failure event is

14 dependent on that four factor analysis or

15 interplay that we discussed before today; is that

16 correct?

17 A The eventuality of the failure will depend on

18 which of those four variables are applied at what

19 time.

20 Q Mr. Carmody, you titled Section E.3 of your

21 report "State Farm Misled Their Insured About

22 Problems with the Repairs."

23 Is whether or not someone has been misled a

24 matter of ceramic engineering?

25 A When it applies to a case that I'm

1 investigating and that misleading event leads

2 that person being exposed to a hazard, then my

3 experience and background would apply.

4 Q Okay. Was ceramic engineering discussed

5 anywhere in the script, that you recall?

6 A The word "ceramic engineering" was never

7 used, but the principles that apply are basic to

8 ceramic engineering.

9 Q I take it from your earlier testimony that

10 you're not offering any opinion as to whether

11 Mr. Cullen himself was actually misled; is that

12 correct?

13 A I believe Mr. Cullen offered that opinion in

14 his deposition.

15 Q But as I think you said earlier, you don't

16 know what he actually thought at that moment,

17 correct?

18 A No, sir.

19 Q And you don't have an opinion or know what

20 any other State Farm insured thought at the

21 moment they made their claim, correct?

22 A No. All I could do is read the script and

23 think what I would think subjected to the same

24 script.

25 Q And am I correct that either I or Mr. Palombo

1 A No.

2 Q Okay. Are you aware of any person suffering

3 an injury that they wouldn't otherwise have

4 suffered as a result of any of the issues we've

5 discussed today?

6 A Could you please rephrase that question?

7 Q Sure. You've identified various issues or

8 concerns that you have with repairs. Are you

9 aware of any of those issues or concerns actually

10 leading to an injury to a person that would not

11 have occurred if their windshield had not been

12 repaired?

13 A No. But the National Safety Council has

14 ruled that lack of injury does not eliminate the

15 defect. If you play Russian roulette and don't

16 get shot, that doesn't mean you weren't exposed

17 to a risk.

18 Q If a risk you had been exposed to was

19 significant, would you expect it to manifest

20 itself over a period of 20 years in some real

21 world example?

22 A Yes. I'm sure it has.

23 Q But you can't point to any statistic, report,

24 anecdote, anything of an actual incident in which

25 that's actually happened; is that correct?

1 Q Of Exhibit R. I'm sorry. These are notes

2 from the deposition of Mr. Bischoff, correct?

3 A Yes. It's the Cullen matter.

4 Q Yes. And the numbers on the left-hand side

5 columns would be the page numbers of the

6 deposition?

7 A Yes.

8 Q And there's a notation two-thirds of the way

9 down the page in big cap letters that says,

10 "GD." Does that mean that was something you

11 wanted to bring to Mr. Derian's attention?

12 A Yes.

13 Q Do you recall if that was something you

14 wanted to bring to his attention or something you

15 wanted to ask him about?

16 A It was something I wanted to ask him about.

17 I was curious about the critical viewing area,

18 what it was for my information.

19 Q And did you ever discuss that with him?

20 A Yes, I believe we did.

21 Q And did he tell you how this was calculated

22 with the angles and those kinds of things?

23 A I did discover that and read his report and

24 the exercise in geometry, and he said he would

25 look into it.

1 MR. PALOMBO: Objection;

2 asked and answered.

3 A I did not conduct that investigation.

4 Q Okay.

5 MR. FARRELL: Tell you

6 what, why don't we take 10

7 minutes, because I'm very close.

8 (Brief recess taken.)

9 -----

10 (Defendant's Exhibit R marked for

11 identification.)

12 -----

13 Q Mr. Carmody, I've just handed you a five-page

14 document we've marked as Exhibit R. Is that a

15 copy of the notes we discussed briefly earlier

16 today?

17 MR. PALOMBO: For the

18 record, they're already attached

19 to Exhibit E.

20 MR. FARRELL: Right. It's

21 just a separate set.

22 Q Am I correct that everything that appears on

23 the first page are simply your notes with page

24 references from Mr. Cullen's deposition?

25 A First page?

1 Q Did you receive his report before completing

2 your report? You couldn't have, correct?

3 A No.

4 Q Down in the bottom right-hand side corner of

5 that first page, am I correct that the little

6 math problem there is you calculating the time

7 you spent, 1.25, 4.25, 5.5?

8 A Yeah. I'm not sure what those scribbles

9 are. I don't know if they even relate to this

10 case or not, to be honest with you.

11 Q Do you know what 22837366 means?

12 A Yeah. I think it was a serial number for an

13 order I was placing to McMaster-Carr. I think I

14 was multi-tasking.

15 Q Related --

16 A Unrelated to this case.

17 Q Moving to the second page, are those your

18 notes from the deposition of Mr. Cole?

19 A Actually, I believe that's mislabeled. I

20 need to check my file. I believe that's a

21 continuation of the Bischoff.

22 Q And the notation for page 63 says,

23 "Contradiction, major contradiction. They do

24 share repair." Do you know what that means?

25 A No. I would have to read the deposition just

1 to see -- to jog my memory. Oh, yeah. Let me
 2 read it in context, and I will make my
 3 statement. Yes. That references earlier notes
 4 that I had reviewed from this deposition which
 5 indicated -- well, what it states is that to my
 6 knowledge, from other information that I had
 7 reviewed, State Farm and Lynx did share repair
 8 statistics back and forth between the two
 9 companies.
 10 Q Okay. Where did that other information come
 11 from?
 12 A I'm not sure.
 13 Q Is it --
 14 A I would need to review it.
 15 Q Would I be correct if I stated that the
 16 contradiction -- do you believe Mr. Bischoff
 17 contradicted something he had said earlier in his
 18 deposition or something that you were somehow
 19 aware of?
 20 A He contradicted something I was aware of.
 21 And I cannot recall from these notes without
 22 careful review whether it was in this deposition
 23 or whether it was from some other evidence in the
 24 case.
 25 Q And you believe that had something to do with

1 the repair statistics and whether that
 2 information was shared between Lynx and State
 3 Farm?
 4 A That is correct.
 5 Q Those statistics played no role in your
 6 opinions in this case, correct?
 7 A Correct.
 8 Q Okay. Moving down to page -- the notation
 9 for page 77, it states, "Policyholders decision
 10 is important." Why did you make that notation?
 11 A I need a minute to review, please.
 12 I'm not sure what my thought pattern was when
 13 I made that note on 77.
 14 Q Your notation for page 110 states, "They hope
 15 they are repaired but it is the decision of the
 16 policyholder to decide." Is that a paraphrase of
 17 something -- is most of this a paraphrase of what
 18 Mr. Bischoff said, these points?
 19 A Yes.
 20 Q Turning to the next page, those are, again,
 21 your notes from the deposition of Mr. Karol?
 22 A Correct.
 23 Q I believe the next page is a result of you
 24 multi-tasking again, am I correct, the Flynn
 25 deposition? Because if there's been a Flynn

1 deposited in this case, I'm unaware of it.
 2 MR. PALOMBO: Maybe there's
 3 a lawyer named Flynn.
 4 Q This seems to involve a valve, throw valve.
 5 A Yes. So you can strike that from these
 6 records.
 7 Q Okay. And then the final page of this
 8 Exhibit are your notes from the deposition of
 9 Joanne Guerra?
 10 A Yes.
 11 Q Mr. Carmody, I've placed in front of you two
 12 documents, one entitled, "Windshield Repair,
 13 Protects & Preserves, The Federal Motor Vehicle
 14 Safety Standards," and the other entitled,
 15 "United States Windshield Repair Guidelines." Am
 16 I correct that these were documents amongst the
 17 group that were produced to me earlier this week?
 18 A Yes.
 19 Q And am I also correct that these were
 20 materials that were in your file but that you did
 21 not rely upon and that did not impact the
 22 opinions that you expressed in your report that
 23 we've discussed at some length today?
 24 A Correct.
 25 Q Okay. And those were, again, a part of

1 Exhibit -- what was it, Tony? The larger set?
 2 What did we mark that as -- a previously marked
 3 Exhibit.
 4 MR. FARRELL: That's all
 5 the questions I have for you at
 6 this point in time, Mr. Carmody.
 7 MR. PALOMBO: For the
 8 record, that was Exhibit E.
 9 MR. FARRELL: Thank you,
 10 Tony.
 11 During Mr. Derian's
 12 deposition -- and I know you
 13 weren't here, Tony -- Craig and I
 14 had a discussion and agreed to
 15 disagree about whether I was bound
 16 to only one deposition on
 17 Mr. Cullen's claim. I will
 18 reserve the right in the same
 19 manner I did during Mr. Derian's
 20 deposition if it becomes
 21 appropriate.
 22 MR. PALOMBO: We'll reserve
 23 our right to object to it.
 24 Obviously, we'll have to fight
 25 that out another day.

MR. FARRELL: Perhaps.

MR. PALOMBO: Obviously, you'll have the right to read the deposition. I'm sure it's going to be ordered. It's your right, so you can -- do you want to read it? She'll contact you and make arrangements for that. If not, you can just waive.

MR. FARRELL: And let me suggest that we make sure that Cheryl has the best way to contact Mr. Carmody, since from recent experience, that isn't always easy.

MR. PALOMBO: I would suggest you read. Can you mail it to him if he's out of state?

Off the record.

(Signature not waived.)

(Deposition concluded at 5:30 p.m.)

Craig Carmody

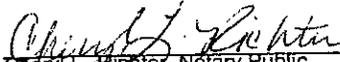
The State of Ohio,)
) SS: CERTIFICATE
County of Cuyahoga.)

I, Cheryl L. Richter, Notary Public within and for the State of Ohio, duly commissioned and qualified, do hereby certify that the within-named CRAIG CARMODY, was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid; that the testimony then given by him/her was by me reduced to stenotypy in the presence of said witness, afterwards transcribed on a computer, and that the foregoing is a true and correct transcript of the testimony so given by him/her as aforesaid.

I do further certify that this deposition was taken at the time and place in the foregoing caption specified and was completed without adjournment.

I do further certify that I am not a relative, employee of, or attorney for any of the parties in the above-captioned action; I am not a relative or employee of an attorney for any of the parties in the above-captioned action; I am not financially interested in the action; I am not, nor is the court reporting firm with which I am affiliated, under a contract as defined in Civil Rule 28(D); nor am I otherwise interested in the event of this action.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my seal of office at Cleveland, Ohio, on this 29th day of January, 2007.


Cheryl L. Richter, Notary Public
in and for the State of Ohio,
My Commission expires October 10, 2010

State of Ohio)
) SS AFFIDAVIT
County of Franklin)

Gary A. Derian, being first duly sworn according to law, deposes and says:

1. Exhibit "1" appended hereto is a true and exact copy of a report I prepared dated November 13, 2006. The findings and opinions expressed therein are based upon my investigation of this matter and my knowledge, training, and experience as a ceramic engineer. The opinions have all been expressed within a reasonable degree of professional certainty.

2. Exhibit "2" appended hereto is a true and exact copy of my Curriculum Vitae.

Further affiant sayeth naught.

Gary A. Derian

Gary A. Derian

SWORN TO BEFORE ME and subscribed to in my presence this 13th day of November, 2006.

Rebecca W. Weiffenbach

NOTARY PUBLIC



REBECCA W. WEIFFENBACH
Notary Public, State of Ohio
My Commission Expires
1-3-2011

**PRELIMINARY
ENGINEER'S REPORT**
of the
CULLEN WINDSHIELD REPAIR INVESTIGATION

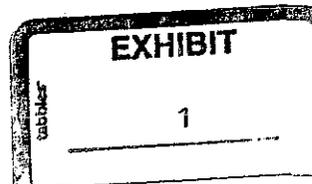
By:

Gary A. Derian

November 13, 2006

CULLEN INVESTIGATION

ENGINEER'S PRELIMINARY REPORT
November 13, 2006



A. INTRODUCTION

Michael Cullen (Cullen) purchased a State Farm motor vehicle policy on October 18, 2002. In March, 2003, Cullen's windshield was struck by an object and damaged while driving on Interstate 480 in the city of Maple Heights, Ohio. Cullen contacted his agent and his vehicle was recommended as a candidate for windshield repair.

The purpose of this investigation is to determine potential safety hazards caused by a cracked windshield that has been repaired.

B. MATERIALS AVAILABLE FOR REVIEW

1. Report of expert Craig Carmody.
2. State Farm Windshield Repair Training Documents and Scripts from LYNX.
3. Various discovery documents, Bates stamped Cullen 79 thru 113 and 1591 thru 1688.
4. Federal Motor Vehicle Safety Standards, 49 CFR 571.

C. ANALYSIS

Automotive windshields provide many services for the occupants of a passenger vehicle. Besides the obvious function of keeping wind and dirt out of the passenger compartment, the glass windshield is a highly engineered component that has many additional functions.

Several Federal Motor Vehicle Safety Standards (49 CFR 571) address these functions of a windshield. In every case, vehicle manufacturers certify their vehicles to meet these standards with new and non-repaired windshield glass. A repaired windshield is compromised in several ways that may impact the ability of a vehicle to meet these standards.

The applicable standards are:

- 1 Standard No. 104; Windshield wiping and washing systems.
- 2 Standard No. 205, Glazing materials.
- 3 Standard No. 208; Occupant crash protection.
- 4 Standard No. 212; Windshield mounting.
- 5 Standard No. 216; Roof crush resistance.

Standard No. 104 addresses the critical viewing zones of a windshield. This zone is defined by the Society of Automotive Engineers in SAE Recommended Practice J902 which was developed back in the 1960s. The Critical Viewing Zone is defined by angles up, down, left and right from the driver's eyes. For most cars, these angles are 5 degrees up, one degree down, 8 degrees to the left and 10 degrees to the right. When projected onto a typical windshield, these angles describe an area 13 to 15 inches wide.

This is wider than the zone defined in State Farm's training documents and if State Farm's documents are followed, repairs can be made to the critical viewing zone as used to establish FMVSS 104. Cars repaired using the State Farm document to define a critical viewing zone may be in violation of that standard.

Standard 205 addresses injuries caused by vehicle occupants impacting the windshield. High penetration resistance glass has been adopted into windshields. This new

technology has improved the safety of vehicles and reduced injuries. In 1985, the NHTSA Publication DOT HS 806 693 stated:

The High Penetration Resistant windshield doubled the impact velocity needed for the occupant's head to penetrate the windshield, reducing serious facial lacerations by 74 percent, preventing 39,000 serious lacerations and 8,000 facial fractures per year. Adhesive bonding of the windshield halved the incidence of bond separation and occupant ejection through the windshield portal in crashes, saving 105 lives per year.

Any time a windshield is repaired, it is no longer a continuous material and its performance when impacted by occupants in a crash would not be consistent. Therefore the ability for a vehicle with a repaired windshield to meet FMVSS 205 is unknown and such a vehicle may be in violation of that standard.

Standard 208 addresses the protection of vehicle occupants in a crash. The windshield of a vehicle is an integral part of the safety cage of a vehicle as described in other sections of this report and Federal motor Vehicle Safety Standards. Therefore the ability for a vehicle with a repaired windshield to meet FMVSS 208 is unknown and such a vehicle may be in violation of that standard.

Standard 212 addresses the mounting of a windshield to the body of a passenger vehicle. The performance of a windshield is recognized as part of the occupant restraint system of a vehicle. This standard requires that a certain portion of the windshield remain attached to the vehicle when it is tested according to the crash tests set forth in standard 208. Windshield cracks, particularly long cracks that run to the edge of the glass and into the urethane bond, will affect the strength of that bond. Therefore the ability for a vehicle with a repaired windshield to meet FMVSS 212 is unknown and such a vehicle may be in violation of that standard.

Standard 216 addresses the strength of the roof of a vehicle. Bonded windshields have been shown to contribute greatly to the strength of the roof of a vehicle, particularly in the region near the heads of the front seat occupants. In some tests, the bonded windshield has been shown to increase roof strength more than 30%.

In 1985, the NHTSA Publication DOT HS 807 489 stated:

The shift from hardtops to pillared cars with stronger roof support, in response to FMVSS 216, saves an estimated 110 lives per year.

Any time a windshield is repaired, it is no longer a continuous material and its performance when impacted by occupants in a crash would not be consistent. Therefore the ability for a vehicle with a repaired windshield to meet FMVSS 216 is unknown and such a vehicle may be in violation of that standard.

D. FINDINGS

Within the bounds of reasonable scientific certainty, and subject to change if additional information becomes available, it is my professional opinion that:

1. A repaired windshield does not possess the mechanical properties of a

- replacement windshield.
2. The mechanical properties of a windshield are designed into the body structure of passenger vehicles.
 3. The mechanical properties of a windshield contribute to the structural strength and occupant protection designed into a passenger vehicle.
 4. Vehicle manufacturers depend on the mechanical properties of a windshield for their passenger vehicles to meet Federal Motor Vehicle Safety Standards.
 5. The safety standards in which windshield glass contributes to include but are not limited to standard 104, 205, 208, 212 and 216.
 6. Vehicles with repaired windshields may fail to meet Federal Motor Vehicle Standards 104, 205, 208, 212 and 216.

Gary A. Derian
Robson Forensic



Robson Forensic

INCORPORATED

GARY A. DERIAN, P.E.
Mechanical Engineer

Tire Engineering:

Designed high performance passenger and light truck tires for on and off road use. Tread design for water drainage and stability, carcass construction and wheel interaction to optimize performance. Wet and dry traction performance. Developed constructions with fail safe characteristics to maintain vehicle control. Developed passenger tires for use in endurance racing. Experience in all phases of tire manufacture. Mold and bladder designs to improve material flow during curing process and improve tire quality.

Vehicle Crash Reconstruction:

Analysis of vehicle crashes to determine speeds and positions of vehicles before and during impact. Effectiveness of safety systems. Vehicle dynamics. Traction capability of road surfaces. Failure analysis of vehicle systems.

Vehicle Engineering:

Design Experience. Includes engine, suspension, fuel systems (both carburetor and fuel injection), vehicle dynamics, tires, wheels, brakes, steering, electrical systems, air conditioning and heating systems. Development includes compliance with safety standards, body strength, glass bonding, and wiper systems. Considerable development of vehicle dynamics and safe handling characteristics. Occupant protection includes both seat belts and air bags. Control systems include electronic fuel injection, anti-skid brakes, air bags and body electronics.

Manufacturing and Industry:

Designed electric, hydraulic and pneumatic power systems for industrial manufacturing applications. Designed and specified power units and their control systems and includes man-machine interface. Hydraulic and pneumatic design including flow and pressure control, metering systems, adhesive spray systems, seals and packings. Special consideration and design experience for abrasive materials and VOCs. Systems included process capability and statistical process control and integrated into complete automation cells. Wrote instruction manuals and warnings for both end users and service personnel. Designed for safety standards to include pinch point guards, fences and cages for robotic equipment, ladders and scaffolds, travel limits for machinery. Developed to meet ISO and QS standards for design and function. System design to meet and exceed OSHA and CE standards for operator safety.

Driving:

Developed training programs and instructed police and fire personnel in proper driving techniques for safe handling of vehicles under severe driving conditions. Participate in track and off-road racing events.

EXHIBIT

2



Robson Forensic

INCORPORATED

GARY A. DERIAN, P.E.
Mechanical Engineer

PROFESSIONAL EXPERIENCE

- 1990 to present **Robson Forensic, Inc.**
Associate
Provide technical investigations, analysis, reports, and testimony for failure analysis and towards the resolution of commercial and personal injury litigation involving crashes, defects, product failure, automotive and industrial safety; vehicular crash reconstruction, vehicle engineering and crash-worthiness; tire design and failure analysis.
- 1990 to present **Dunlop Tire Co.** Tire Fitment Guide
Consultant
Create the tire fitment guide for all passenger cars and light trucks sold in the US.
- 1989 to 2000 **Nordson Corp.** Product Design and Development
Project Engineer; Consultant
Design and produce dispensing systems for the application of sealants and adhesives using spray and extrude methods. Disciplines include hydraulic, pneumatic and electric power, flow control, seals and packings, computer controls, robotic applications, industrial safety, OSHA, CE, QS and ISO standards. Wrote manuals, warnings and performed training sessions for customers.
- 1987 to 1989 **Avanti Automotive Co.** Automobile Engineering
Chief Engineer
Responsible for engineering and manufacturing the Avanti automobile. Performed major design work in the body, chassis, interior, suspension, electrical components and hardware to meet performance, manufacturability, and FMVSS regulations.
- 1986 to 1988 **National Academy for Professional Driving** Human Factors in Driving
Director of Engineering; Consultant
Created technical department to develop scientifically based drivers training programs for police, fire and ambulance drivers. Performed engineering consulting in the areas of tire testing, accident reconstruction, high performance engine systems and high performance suspension tuning. Wrote articles for industry personnel and auto enthusiast magazines.
- 1974 to 1986 **The BFGoodrich Co.** Tire Engineering
Product Engineer/Tire Engineer/Product Manager
Designed and developed the first US built passenger tire capable of 170+ mph. Developed new testing techniques for this new generation high performance tire which included vehicle dynamics studies and the interaction of tire properties with vehicle handling. Directed worldwide racing support programs where passenger tires were used in racing. Delivered technical and marketing presentations to consumer



Robson Forensic

INCORPORATED

GARY A. DERIAN, P.E.
Mechanical Engineer

and trade organizations. Designed aircraft escape slides and inflation systems for them using high-pressure nitrogen and carbon monoxide.

EDUCATION

B.S. Mechanical Engineering, Case Western Reserve University, 1974

SAE Congress, Crash Safety and Reconstruction, 1999, 2000
SAE Crash Reconstruction Course, 1999

PROFESSIONAL REGISTRATION

Professional Engineer, State of Ohio, #47211, 1982

PROFESSIONAL AFFILIATION

Society of Automotive Engineers, Member Grade

PATENTS

2 patents for tire designs
3 patents for hydraulic systems, flow detection, and dispensing
1 patent for hydraulic seal design

IN THE COURT OF COMMON PLEAS
 CUYAHOGA COUNTY, OHIO

MICHAEL E. CULLEN,
 ET AL.,

Plaintiff(s),

vs.

Case No.
 CV-05-555183

STATE FARM MUTUAL
 AUTOMOBILE INSURANCE
 COMPANY,

Defendant(s).

DEPOSITION OF GARY A. DERIAN, P.E.
 Monday, January 15, 2007

Deposition of GARY A. DERIAN, P.E., a Witness
 herein, called by the Defendant for
 examination under the Ohio Rules of Civil
 Procedure, taken before me, the undersigned,
 Cheryl L. Richter, Registered Professional
 Reporter and Notary Public in and for the State
 of Ohio, at the offices of Baker & Hostetter,
 1900 East 9th Street, Suite 3200, Cleveland, Ohio
 44114, commencing at 9:45 a.m. the day and date
 set forth.

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APPEARANCES:

On Behalf of the Plaintiff:

W. Craig Bashein, Esq.
 Bashein & Bashein Co., L.P.A.
 Terminal Tower - 35th Floor
 50 Public Square
 Cleveland, OH 44113
 216-771-3239
 cbashein@basheinlaw.com

On Behalf of the Defendant:

Michael K. Farrell, Esq.
 Baker Hostetter
 3200 National City Center
 1900 East Ninth Street
 Cleveland, OH 44114
 216-861-7610

RECEIVED

JAN 24 2007

MAJ

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1 Worthington, Ohio.
 2 Q Are you taking any medication or suffering
 3 from any other condition that would prevent you
 4 from giving truthful or accurate testimony today?
 5 A No.
 6 Q You have a BS from Case Western; is that
 7 correct?
 8 A Correct.
 9 Q And is that the highest level of education
 10 that you've achieved?
 11 A Yes.
 12 Q And that degree is in mechanical engineering,
 13 correct?
 14 A Yes.
 15 Q What is mechanical engineering?
 16 A It's a fairly broad range. It deals with
 17 structures, mechanisms, heat and fluid flow.
 18 It's -- it can be used in all sorts of
 19 applications.
 20 Q Okay. Do you consider yourself a mechanical
 21 engineer? Is that how you would refer to
 22 yourself?
 23 A Yes.
 24 Q Okay. And do you consider yourself a ceramic
 25 engineer?

1 A No.
 2 Q Okay. Can you tell me what the differences
 3 are between the two disciplines or the two
 4 qualifications between a mechanical engineer and
 5 a ceramic engineer?
 6 A Well, I would consider a ceramic engineer to
 7 be more of a chemist. I mean, I deal with
 8 ceramics, I understand that, and I can design
 9 products using ceramics. But when you say,
 10 "ceramic engineer," that, to me, is somebody who
 11 creates ceramics.
 12 Q And in your course of study to become a
 13 mechanical engineer, did you receive any or do
 14 any coursework or receive any specialized
 15 training in glass or ceramics?
 16 A I never had an actual course in ceramics.
 17 Q And did you ever have an actual course in
 18 glass or would that have been within a ceramics
 19 course in the engineering area?
 20 A You know, at the time I got my degree, I did
 21 not have a special course or a separate course in
 22 glass, although I did have a course in product
 23 failure, and that did include some work in
 24 glass. And I've had quite a lot of experience in
 25 glass over the years.

1 -----
 2 (Defendant's Exhibit A marked for
 3 identification.)
 4 -----
 5 Q Mr. Derian, I've just handed you a copy of an
 6 affidavit and report that you have submitted in
 7 this case. Can you just confirm that that's what
 8 I've handed you, please.
 9 A Yes.
 10 Q Now, turning towards the back of that
 11 document, there's your resume and CV. And I'm
 12 just going to direct your attention to that,
 13 because I want to ask you a couple questions
 14 about that. After your college degree, on your
 15 resume is a listing for an SAE Congress, Crash
 16 Safety and Reconstruction. Can you tell me what
 17 that is?
 18 A Every year the SAE has what they call a
 19 Congress. And it's -- and vendors come and
 20 display the latest technological items that they
 21 have, and a lot of papers are given in various
 22 automotive subjects. And I am particularly
 23 interested in the crash and safety reconstruction
 24 aspects of that. So I go and listen to papers.
 25 And even in the years I didn't go, I still

1 oftentimes buy the papers that are interesting.
 2 Q Okay. Would it be fair to describe the SAE
 3 Congress as a convention or a conference?
 4 A Yes.
 5 Q And how many days does it last or generally
 6 last?
 7 A I think it's about four days.
 8 Q And I take it it's in probably Las Vegas or
 9 some other convention center?
 10 A Well, it's in Detroit. It's in Cobo Hall,
 11 which is their big downtown hall.
 12 Q And you've actually attended that in 1999 and
 13 2000?
 14 A Yeah. I probably have attended other years
 15 besides those. I try to go every year, but I
 16 don't get to it every single year.
 17 Q Have you ever presented at that Congress?
 18 A No.
 19 Q In any of the years that you attended that
 20 Congress or for which you purchased a paper, as
 21 you referred to earlier, did any of the talks you
 22 attended or the papers you purchased deal
 23 specifically with windshield glass, glass in
 24 general, or ceramics?
 25 A I don't remember.

1 A There is a bonus plan based on billed hours.
 2 Q And when you are hired through Robson, is
 3 Robson paid and then from that comes your
 4 salary? Is that how that system works?
 5 A Well, I get a salary regardless if Robson
 6 gets paid or not. But obviously, if there's a
 7 great disconnect, then the process falls apart.
 8 Q But with regard to a specific engagement,
 9 there is no, for lack of a better term,
 10 splitting? In other words, part of the money
 11 goes to Robson and part would go to you? Your
 12 salary stays the same, notwithstanding the bonus,
 13 regardless of how many times you're engaged; is
 14 that correct?
 15 A That's correct.
 16 Q Is the bonus tied directly to the amount of
 17 hours or the amount of income that you generate
 18 for Robson?
 19 A Yes.
 20 Q Can you tell me how that works?
 21 A We get \$105 an hour for every hour beyond 20
 22 hours a week billable for a 13-week average. So
 23 in other words, if you have one big week, you
 24 don't get a bonus. You have to average above
 25 that for -- actually, it's 22 hours now for 13

1 weeks, and then it kicks in.
 2 Q And then you would receive an hourly bonus --
 3 A Yes.
 4 Q -- for hours over that.
 5 And is the hourly bonus the same for
 6 everyone? Is it always 105 or --
 7 A Yes.
 8 Q And is that the sole calculation in the
 9 bonus, what you just described?
 10 A Yes. Well, if we do bad work and our clients
 11 refuse to pay our bill, then that is deducted.
 12 But that doesn't happen. It hasn't happened for
 13 me.
 14 Q That would be sort of what I would call a
 15 realization analysis, something like that?
 16 A Something like that.
 17 Q Now, as I understand it, Robson's business is
 18 primarily to provide expert either consultation
 19 or testimony to the legal profession and also
 20 insurance. Is that consistent with your
 21 understanding?
 22 A Yes.
 23 Q Can you tell me how much of that is legal and
 24 how much of it is insurance?
 25 A I would say -- you mean direct insurance? Is

1 probably 20 to 30 percent.
 2 Q So 70 to 80 percent of Robson's work is
 3 directly for lawyers in litigation or potential
 4 litigation?
 5 A Yes.
 6 Q Okay. Now, the Robson website refers to
 7 scientific investigation. Is that a term of art?
 8 MR. BASHEIN: Objection.
 9 Go ahead.
 10 A I guess it is. I mean, our investigations
 11 are scientific, which means based on science; not
 12 based on guesses or, you know -- it meets the
 13 Rules of Evidence, Federal Rules of Evidence.
 14 Q Okay. Let me ask you this: Is there an
 15 accepted definition of the term scientific
 16 investigation in the engineering field? In other
 17 words, is there a published description or
 18 definition of what is and isn't a scientific
 19 investigation, that you're aware of?
 20 A Yes, yes, there is.
 21 Q And where would I find that if I wanted to
 22 read it?
 23 A Gosh, the easiest way would be to Google it.
 24 But it has a certain meaning, and that is our
 25 opinions are based on scientific fact, which

1 means we have -- I don't know. There's a list of
 2 this stuff in the Federal Rules of Evidence that
 3 we -- as part of what we base our work on,
 4 hypothesis testing, that sort of thing, ruling
 5 out alternate causes, another expert with the
 6 same facts would have the same opinions we would,
 7 things like that, repeatability.
 8 Q Would simply repeating something you'd been
 9 told fall into your definition of a scientific
 10 investigation?
 11 MR. BASHEIN: Objection.
 12 Go ahead.
 13 A Simply repeating something I've been told,
 14 that would not be scientific.
 15 Q What about simply identifying things that you
 16 couldn't determine?
 17 A Well, that could be part of a scientific
 18 investigation.
 19 Q Okay. Would it be fair to describe that as a
 20 dead end within a scientific investigation?
 21 MR. BASHEIN: Objection.
 22 A No, I wouldn't call it a dead end.
 23 Q Okay. Could you explain for me how Robson
 24 would interact with the insurance industry as
 25 opposed to the way it interacts with legal

1 A In detail they differ, but the basic premises
2 are pretty much the way I described them earlier.

3 Q Okay. If you would turn to the first page of
4 what we've marked as Exhibit A there, which is
5 your affidavit, can you tell me how that
6 affidavit was physically prepared?

7 A Mr. Bashein's office prepared the actual
8 affidavit, which basically -- you know what it
9 says.

10 Q Okay. You're not a ceramic engineer,
11 correct?

12 A That's what I said, yes.

13 MR. BASHEIN: Sorry for
14 that typo.

15 Q Can you tell me who Ms. Weiffenbach is? Does
16 she work for Robson?

17 A Yes, she does. I was out of town, and this
18 was prepared and faxed to my office. And I
19 instructed Ms. Weiffenbach to put in my signature
20 and notarize it.

21 My understanding, this just basically says
22 this is my report. This doesn't actually state
23 any opinions. So that's what happened.

24 Q Okay. In your resume, particularly under the
25 Robson entry, you referred to technical

1 investigations. Is that the same as a scientific
2 investigation or is that something different?

3 A No. It's the same.

4 Q Okay. Beyond what you've already described
5 for me, did any of those investigations
6 involve -- strike that.

7 Now, during the same period of time you've
8 been employed by Robson, you're also acting as a
9 consultant for Dunlop Tires; is that correct?

10 A Yes. Let me clarify, though. I stopped that
11 work about the year 2000. Goodyear bought Dunlop
12 then, and they decided they no longer needed a
13 tire fitment guide, which is the work I was
14 doing.

15 Q During the time that you were consulting for
16 Dunlop, and I think you were about to get to
17 this, what were you doing for them?

18 A I was just -- what I said, creating a tire
19 fitment guide. It's an 8 and a half by 11
20 softbound book, about 150 pages. And it went
21 to -- we printed about 5,000 of them -- and
22 they'd go to all their tire dealers, and they
23 would use it to assist in selecting tires for
24 customers.

25 Q So fitment means what tires would fit what

1 trucks or vehicles for --

2 A Yes.

3 Q -- specific uses and models, all that?

4 A Yes. You would look up the vehicle, the
5 customer's vehicle, and then it would offer
6 choices, good, better, best, high-performance,
7 traction, whatever.

8 Q Okay. And would that be exclusive to
9 Dunlop's products or would you also include in it
10 other tire companies' products?

11 A No. This was specific Dunlop replacement
12 tires, which Dunlop replacement tires are
13 suitable for every vehicle.

14 Q Am I correct that that work for Dunlop didn't
15 involve windshields, glass, ceramics, any of
16 those issues?

17 A That's correct.

18 Q Just to close that loop, during the time that
19 you were consulting for Dunlop, was that an every
20 couple of months? How much time was it and how
21 frequently?

22 A It was once a year. It probably took me
23 three months to do it. So I would start in
24 September and basically get them the copy in
25 January and the books in March.

1 Q And that was the only consulting work you did
2 for Dunlop during the period in question?

3 A Yes.

4 Q Now, you've also on your resume identified
5 Nordson Corp. as somebody you consulted for. Are
6 the dates there still accurate in terms of 1989
7 through 2000?

8 A Yes.

9 Q Okay.

10 A I quit my full-time job in 1999 when I went
11 full-time with Robson, but I continued to do a
12 little bit of consulting work with Nordson into
13 the year 2000, which is why there's that overlap.

14 Q Were you employed by Nordson at a time and
15 then went into a consulting role or were you a
16 consultant through the entire 11 years listed?

17 A No. I was an employee at Nordson. After I
18 quit, they still needed my expertise, so I
19 consulted for a short time.

20 Q Can you describe for us what Nordson, what
21 its business is?

22 A I worked in the automotive group at Nordson.
23 And the business I was involved in dealt with
24 dispensing sealants and adhesives for use in
25 automobile manufacturing.

1 Q And again, as we touched on earlier, Nordson
 2 would make the machinery but not the adhesives
 3 and sealants themselves, correct?
 4 A Correct. We would work closely with the
 5 adhesive and sealant suppliers because our
 6 equipment had to be compatible with the chemistry
 7 of the materials we were dispensing. But we did
 8 not design or manufacture the sealants or
 9 adhesives.
 10 Q And it's also true that Nordson and you did
 11 not design the glass or windshields themselves,
 12 correct?
 13 A That's correct.
 14 Q Avanti Automotive Company, that's the Avanti
 15 car that I'm familiar with, correct? They
 16 actually manufacture that?
 17 A I'm not sure what you're familiar with, but I
 18 think so, yeah.
 19 Q The one with the odd headlights?
 20 A Yes. It was originally made by Studebaker in
 21 the early 60's, and then Studebaker went out of
 22 business and Avanti continued making the Avanti.
 23 Q Are they still making them today?
 24 A No, they're not.
 25 Q Where are they located or where were they

1 located?
 2 A When I worked for them, they were in
 3 Youngstown.
 4 Q As I understand your resume, the work you did
 5 while at Avanti did not involve designing the
 6 glass or the adhesives, is that correct, the
 7 windshield glass or adhesives?
 8 A I was responsible for the installation of the
 9 windshield as well as every other aspect of the
 10 car. But I didn't actually design -- well, I
 11 mean, we worked with the glass suppliers to make
 12 sure we got windshields that would meet Federal
 13 Safety Standards.
 14 Q And those are the standards you referred to
 15 in your report that we'll be talking about later?
 16 A Yes.
 17 Q As chief engineer, would I be correct in
 18 concluding that you had responsibility for all
 19 these subgroups within the manufacture of the
 20 car?
 21 A Yes.
 22 Q So you wouldn't be directly in charge of any
 23 one piece of it, but you had overall
 24 responsibility?
 25 A Well, Avanti is a small company, so I was

1 directly involved with all of it.
 2 Q During the time you were with Avanti, did it
 3 purchase its glass from a third-party supplier or
 4 suppliers?
 5 A Yes.
 6 Q Do you recall who those were?
 7 A I believe we got our windshields from PPG.
 8 Q Exclusively the whole time you were there?
 9 A Yes.
 10 Q Why was it you left Avanti?
 11 A Well, actually, I was fired. And I was fired
 12 because -- well, I was not -- I felt they weren't
 13 building a car as well as they should. And I was
 14 trying to make a lot of changes, and the
 15 management found me troublesome.
 16 Q Is that your assessment of that situation
 17 or -- what were their stated reasons?
 18 A They never had any stated reasons.
 19 Q Prior to that, the National Academy for
 20 Professional Driving. Am I correct that that, as
 21 I understand it from reading your resume, didn't
 22 have -- well, what, if anything, did that have to
 23 do with windshields, windshield glass or glass in
 24 general?
 25 A Nothing.

1 Q And why did you leave the National Academy of
 2 Professional Driving?
 3 A I did a little consulting for Avanti while I
 4 was an employee at the National Academy for
 5 Professional Driving. Then I went to work
 6 full-time with Avanti. It looked like a better
 7 opportunity.
 8 Q With regard to B.F. Goodrich, again, based on
 9 my reading of that, it doesn't appear to me that
 10 that touches on the manufacture or installation
 11 of windshields or windshield glass; is that
 12 correct?
 13 A That's correct.
 14 Q That was purely on the tire side of business?
 15 A Yes.
 16 Q Back when B.F. Goodrich still made tires?
 17 A Yes. They're currently owned by Michelin.
 18 But yes.
 19 Q And, again, what were the circumstances of
 20 your departure from B.F. Goodrich?
 21 A I left there because at that time, the
 22 National Academy for Professional Driving looked
 23 like a better opportunity.
 24 Q So your departure was voluntary?
 25 A Yes.

1 Q At any point during any of your jobs, did you
 2 do any impact testing or actual chemical testing,
 3 any other actual testing on windshields or
 4 windshield glass or, for that matter, glass of
 5 any kind?
 6 A I never performed impact tests like that upon
 7 glass.
 8 Q You are aware that those tests exist, though,
 9 correct?
 10 A Yes. And I'm very familiar with the Motor
 11 Vehicle Safety Standards for my work at Avanti,
 12 plus the work at Nordson, involving bonding the
 13 glass. That was a substantial part of it.
 14 Q And those are standards that manufacturers
 15 have to meet, correct?
 16 A Yes.
 17 Q Have you ever received any professional
 18 training or attended a seminar about windshield
 19 repair or the machinery or products used in doing
 20 that repair?
 21 A No.
 22 MR. FARRELL: Let's go off
 23 the record for a second.
 24 (Brief recess taken.)
 25 MR. FARRELL: We're back on

1 the record.
 2 Q Mr. Derian, earlier you told me that you've
 3 been deposed 50 times, at least. How many times
 4 do you believe you've been retained by an
 5 attorney to be an expert in litigation? I assume
 6 that it's something greater than 50?
 7 A Yes. I don't know. 500.
 8 Q Okay.
 9 A That's a guess. Or it's an estimate, I
 10 should say.
 11 Q Do you keep a list somewhere of matters in
 12 which you've testified?
 13 A Yes. I have a Rule 26 list.
 14 Q And that would be the list that you're
 15 required to provide in Federal Court?
 16 A Yes.
 17 Q And that only goes back four years, if memory
 18 serves, correct?
 19 A Yes. I haven't purged mine yet, so it
 20 actually goes back a little farther.
 21 Q You just keep adding them?
 22 A Yes.
 23 Q Did you ever provide that list to Mr. Bashein
 24 or anybody at his firm?
 25 A Actually, I had one faxed up this morning.

1 Q Okay. Faxed to Mr. Bashein's, because I
 2 didn't get it?
 3 A Yes.
 4 Q Is that the first time you provided that to
 5 Mr. Bashein?
 6 A I don't know. It might have been.
 7 Q Okay. Did any of those other engagements,
 8 and I want to separate reconstructing accidents
 9 out of this, actually involve windshield glass
 10 but not the reconstruction of an accident?
 11 A All my glass work is in conjunction with
 12 crash reconstruction.
 13 Q Okay. And have you ever --
 14 A I'm sorry. Or automotive safety issues. But
 15 I've never done -- I've never been hired to do
 16 glass only work.
 17 Q Okay. Until this case, correct?
 18 A Yes.
 19 Q Okay. And that answer would also be true
 20 with regard to the repair of a chip or crack in
 21 windshield glass, correct?
 22 A Yes.
 23 Q With regard to the glass itself, do you
 24 consider yourself a glass expert?
 25 A I am an expert in certain aspects of glass.

1 Q Okay. And what aspects of glass do you
 2 consider yourself to be an expert?
 3 A Well, I understand the brittle nature of the
 4 glass. I have done some analyses of fracture
 5 patterns. And in conjunction with the crash
 6 reconstruction work, every single one of those
 7 includes inspection of the windshields and side
 8 windows, looking at fracture patterns.
 9 Q By "fracture patterns," am I correct that
 10 you're referring to the shape or pattern of
 11 cracks in the windshield or damage to the
 12 windshield; is that correct?
 13 A Yes.
 14 Q And you would look at that with an eye
 15 towards trying to reconstruct how an accident or
 16 crash had occurred, correct?
 17 A Well, that's one aspect of it. Another
 18 aspect is to evaluate the crashworthiness of the
 19 vehicle. The glass plays a part in the
 20 structural integrity of a vehicle. And one would
 21 look at that to see how that performed. And, of
 22 course, I'm familiar with the safety regulation
 23 that requires a windshield remain bonded in a
 24 frontal crash. And sometimes there may be a
 25 problem with that.

1 me, but --

2 Q Okay. And what caused you to go through and

3 make those clarifications or additional notes?

4 A Well, I had a discussion this morning with

5 Mr. Bashein about the detail of the case and my

6 opinions. And he suggested that I clarify some

7 of those.

8 Q And you did that this morning?

9 A Yes.

10 Q And that's the last page of the notes you

11 provided to me?

12 A Yes.

13 Q Were the rest of those notes also made this

14 morning?

15 A No. Those were made over the last week.

16 Q So we'll have to go back and go through those

17 and try to put the dates on each page; am I

18 correct?

19 A Okay. I mean, it's, like I said, within the

20 last week.

21 Q Did you ever express either to Mr. Carmody or

22 to Mr. Bashein any opinions that aren't either in

23 your report or on the last page of the notes you

24 provided today?

25 A I don't think so. I mean, I may have

1 mentioned something. But in terms of have we

2 withheld any opinions? No. There's been no

3 conscious effort to withhold any opinions.

4 Q Okay. Turning to the second page of your

5 report for a moment, you've identified four

6 things as materials that were available for

7 review. Does that mean that you actually relied

8 upon them or that you had access to them at the

9 time you wrote your report?

10 A Well, I had access to them, and -- I mean, I

11 did rely on them.

12 Q Okay. And the manner in which you relied

13 upon them should be reflected elsewhere in your

14 report, correct?

15 A Yes.

16 Q Okay. And would it be fair to say that if

17 one of these four items is not mentioned

18 elsewhere in your report, it didn't play a role

19 in your opinions?

20 MR. BASHEIN: Objection.

21 A Not necessarily. I guess we'd have to go

22 item by item and then try to extract the various

23 percentages, if you want.

24 Q Okay. Does this list encompass everything

25 that was available to you at the time you wrote

1 your report?

2 MR. BASHEIN: Other than

3 the research he referred to,

4 Mike?

5 A You know, there's a lot that's available to

6 me, you know, including my discussions with

7 Craig Carmody. But these are the specific items

8 that I used to write my report.

9 Q Okay. Did you read everything on this list

10 cover to cover, for lack of a better term?

11 A I can't say that I read -- I looked at every

12 page of everything on the list. But that doesn't

13 mean I read every single word of every page.

14 Q Okay. Prior to completing your report, did

15 you ever ask either Mr. Bashein or Mr. Carmody

16 for any additional information?

17 A I did not.

18 Q Okay. Now, going down the list, you

19 explained to me earlier that you got the report

20 of Mr. Carmody directly from Mr. Carmody; is that

21 correct?

22 A Yes.

23 Q Did you also get a copy of that from

24 Mr. Bashein or not?

25 A No.

1 Q Did you ask Mr. Carmody for his report or did

2 he volunteer it or did somebody else suggest that

3 you rely upon that?

4 MR. BASHEIN: Objection to

5 form. Go ahead.

6 Q Do you understand my question? I understand

7 it was a bit compound.

8 A Well, he volunteered it.

9 Q Mr. Carmody did?

10 A Mr. Carmody volunteered it.

11 Q Do you know why Mr. Carmody volunteered to

12 provide you with a copy of his report?

13 A Well, I'm working on the same case with him,

14 and he would have done that.

15 Q And did he provide you with a draft or did he

16 give it to you once he was finished?

17 A I only saw it once it was finished.

18 Q So you would have received that at some point

19 after whatever date Mr. Carmody's report is

20 dated, correct?

21 A Yes.

22 Q And beyond the fact that you were working on

23 the same case, you and Mr. Carmody never had a

24 discussion about why he thought you should have a

25 copy of his report?

1 MR. BASHEIN: Objection.
 2 A No.
 3 Q And you hadn't asked for it prior to his
 4 volunteering it?
 5 A Not in so many words.
 6 Q What do you mean by "not in so many words"?
 7 A I didn't have to ask for it because he gave
 8 it to me. We regularly give each other reports
 9 in our company, especially if we're working on
 10 the same case together.
 11 Q Did you provide him with a copy of your
 12 report when it was finished?
 13 A Yes.
 14 Q With regard to Item 2, the training
 15 documents, did you ask for those documents or
 16 were they simply provided to you?
 17 A They were provided to me.
 18 Q Okay. Your field of expertise is not in
 19 training, correct?
 20 A That's correct.
 21 Q Okay. And it's not --
 22 A Well, I am an expert in some aspects of
 23 training, but I'm not opining on training issues
 24 in this case.
 25 Q Okay. And those materials would have been

1 provided to you by Mr. Bashein or Mr. Bashein's
 2 office; am I correct?
 3 A Yes.
 4 Q With regard to the Item 3, the discovery
 5 documents, and the Bates stamps are listed, were
 6 those also materials that were provided to you
 7 and that you didn't ask for?
 8 A That's correct. I didn't know all the
 9 information that was available. And Mr. Bashein
 10 sent these to me early on.
 11 Q And with regard to Items 2 and 3, you never
 12 felt the need to ask Mr. Bashein for any
 13 additional materials from the case in order to
 14 issue your opinions, correct?
 15 A That's correct. My opinions have to do with
 16 the automotive safety aspect of a repaired versus
 17 replaced windshield. And I didn't feel like I
 18 was lacking any information with which to do
 19 that.
 20 Q Okay. And with regard to Item 4, the Federal
 21 Standards, I assume that you either had or had
 22 access to those at your office?
 23 A Yes.
 24 Q And with regard to the ones that you chose to
 25 focus on, was that your judgment or Mr. Carmody's

1 or a suggestion from somebody else?
 2 A No. That was my judgment.
 3 Q Did someone suggest to you that you look at
 4 those standards or was that your idea?
 5 A It was my idea.
 6 Q Okay. And I take it that if you thought you
 7 needed additional information from either
 8 Mr. Carmody or Mr. Bashein, you would have asked
 9 for it and it would have been listed as something
 10 you reviewed or was available to you, correct?
 11 A Yes.
 12 Q And with the exception of the sort of
 13 preliminary research we discussed earlier,
 14 there's nothing that you reviewed that isn't
 15 listed here?
 16 A That's correct.
 17 Q Okay.
 18 A Well, other than incidental things. You
 19 know, my years of experience and all that sort of
 20 thing. But in terms of documents that were
 21 gathered for the purposes of this report,
 22 everything I used is listed here.
 23 Q And if you had looked at something on the
 24 Internet and specifically referred to it, you
 25 would have listed it here if you could have

1 recalled it, correct?
 2 A Yes.
 3 Q How was your report physically prepared? I
 4 mean, who actually did the typing?
 5 A I did.
 6 Q And did you prepare any drafts?
 7 A Well, sure. I mean, it's kind of a
 8 continuous process until I'm satisfied with it.
 9 Oftentimes we -- I give them to other experts in
 10 the office just to review and sometimes
 11 non-experts just to look at from a grammatical
 12 and linear thought process.
 13 Q Okay. With regard to this particular report,
 14 were there any drafts that were saved or printed
 15 out during that process?
 16 A No. I don't have any other copies other than
 17 this one.
 18 Q Okay. And did anyone besides you edit or
 19 review this report? And I'll start with inside
 20 Robson.
 21 A No one -- well, probably. I likely had
 22 passed this to someone else in the office to look
 23 at. Oftentimes a rigorous review will show up in
 24 the billings. But whatever was done in this case
 25 was apparently minor enough that it didn't

1 warrant a separate billing.
 2 Q Am I correct from your previous answers that
 3 you believe you had somebody else review or edit
 4 this but you can't remember if you did?
 5 A Well, it's our standard policy to do that.
 6 And I don't specifically recall what happened in
 7 this case. I happened to be out of town while I
 8 was finishing this case. So maybe that process
 9 was a little bit disrupted.
 10 Q And am I also correct that the kind of review
 11 you've just been discussing would be a
 12 substantive review rather than a proofreading for
 13 grammar and spelling review?
 14 A I don't recall what was done in this case.
 15 Q Do you recall if Mr. Carmody reviewed it or
 16 not?
 17 A He did not.
 18 Q Is it a policy of Robson that somebody else
 19 internally looks at all reports or is that simply
 20 a practice that is usually done?
 21 A It's a policy.
 22 Q Is that written down somewhere?
 23 A I don't know.
 24 Q But that's a policy that's set by Robson?
 25 A Yes.

1 Q And has been throughout the entire time
 2 you've been associated with that firm; is that
 3 correct?
 4 A Yes.
 5 Q Beyond what you've already told me today, did
 6 Mr. Bashein or any other of Plaintiffs' counsel
 7 review your report?
 8 A Mr. Bashein did look at it, and we had some
 9 discussion about it. But honestly, I don't
 10 remember what we did about it, what happened. I
 11 mean, if any changes were made. Certainly no
 12 opinions of mine were changed, and nothing was
 13 withheld, because I just don't do that sort of
 14 thing. But I don't remember.
 15 Q Now, based on the contract we looked at
 16 earlier, Robson was hired in July of 2005.
 17 Actually, you were brought into the case in July
 18 of 2005. Why is it that you didn't begin writing
 19 your report until November of 2006?
 20 A No report was needed until then.
 21 Q Okay. Is that the only reason that you
 22 weren't asked to start on it until that point in
 23 time?
 24 A That's right. Craig was doing a lot of the
 25 research and a lot of the glass-oriented work.

1 And after that was more or less determined, then
 2 I applied that work to automobile safety.
 3 Q Okay. So in the gap between your time
 4 entries in March of '06 and November, you were
 5 simply waiting for somebody to give you the
 6 go-ahead to write your report?
 7 A Yes. I have a lot of cases in process that
 8 don't get worked on until some deadline
 9 approaches.
 10 Q Was it always the contemplation that you
 11 would use Mr. Carmody's report as a basis for
 12 your report?
 13 MR. BASHEIN: Objection.
 14 Q And by "always," I mean always after you knew
 15 you'd be involved in the case?
 16 MR. BASHEIN: Objection.
 17 Q Plainly when you were 15 you didn't
 18 contemplate that.
 19 MR. BASHEIN: Objection as
 20 to form and misstates facts.
 21 Go ahead.
 22 A Craig and I, Craig Carmody and I had agreed
 23 that he would do the glass analysis and that I
 24 would apply those results to automobile safety
 25 issues. And that's how we did it.

1 Q On the occasions when Mr. Bashein or his
 2 office provided you with materials, did it always
 3 come with a cover letter?
 4 A Usually. I mean, I would expect so.
 5 Q With the exception of Mr. Carmody, did you
 6 speak with or consult with anybody else at Robson
 7 or elsewhere about your opinions?
 8 A No.
 9 Q And, again, other than to the extent your
 10 report references Mr. Carmody's opinions, the
 11 opinions in there are yours and yours alone,
 12 correct?
 13 A Yes.
 14 Q Now, you've titled your report a "Preliminary
 15 Engineer's Report." And, again, is that a term
 16 or a phrase that has a specific defined meaning
 17 in your field?
 18 A I use the word "preliminary" when I think
 19 there's a reasonable chance that I may supplement
 20 the report at a later point in time.
 21 Q And what made you think that at the time you
 22 were writing this report?
 23 A Mr. Carmody titled his preliminary, and I
 24 sort of agreed with him that I would do the same,
 25 just for the reasons I stated. But I didn't have

1 any specific knowledge that I would be doing
 2 additional work.
 3 Q Okay. And, again, you've explained where
 4 preliminary came from. Is there a specific
 5 definition of what an engineer's report is or
 6 isn't or is that simply your phrase for the
 7 report that you, as an engineer, issued?
 8 A It's just like that. I'm an engineer and
 9 it's a report I wrote.
 10 Q In your affidavit, which is the first page of
 11 that document, you state that your opinions are
 12 based in part on your investigation of the
 13 matter. What did your investigation of this
 14 matter entail?
 15 A Mr. Carmody's opinions that a repaired glass
 16 was weaker than non-repaired glass was one
 17 basis. And then I applied that to the areas of
 18 automotive safety that rely on the strength of a
 19 windshield.
 20 Q So am I correct that your investigation
 21 consisted of reviewing Mr. Carmody's report and
 22 the other materials we've already talked about,
 23 and then reaching your conclusions about the
 24 standards that you discussed? Is that a fair
 25 description?

1 A Yeah. That's the simplest description. As
 2 we discussed, I have quite a bit of automobile
 3 windshield experience and some knowledge of the
 4 difficulty of bonding to glass. And that did
 5 form some basis for my opinions that, you know,
 6 when I read Mr. Carmody's opinions and some of
 7 the other materials, I understood the science
 8 behind it and made me more confident in those.
 9 Q But, again, in terms of the actual work
 10 specific to this case, that's reflected in your
 11 invoices, and it was reviewing the materials
 12 identified, including Mr. Carmody's report, and
 13 writing the report, correct?
 14 A Yes.
 15 Q So you did no actual inspection of the car or
 16 windshield; is that correct?
 17 A That's correct.
 18 Q No testing?
 19 A That's correct.
 20 Q Mr. Carmody did no testing of his own. Is
 21 that your understanding?
 22 A Honestly, I don't know what testing he may or
 23 may not have done. I don't think he did. He
 24 would have talked about it in his report.
 25 Q Am I correct that your understanding of what

1 Mr. Carmody did is based on large part about what
 2 he wrote in his report?
 3 A Yes.
 4 Q Okay. And you certainly didn't suggest to
 5 Mr. Carmody anything that you thought he should
 6 or shouldn't do before issuing his opinions; is
 7 that correct?
 8 A Well, we probably talked about lots of
 9 things. I don't recall anything specific.
 10 Q Okay. And with regard to the areas about
 11 which Mr. Carmody opined, you relied on his
 12 expertise in those areas, correct?
 13 A Yes.
 14 Q And you didn't check his work or check his
 15 sources or anything of that nature; am I correct?
 16 A I didn't independently do that. But in the
 17 course of doing my work, I read some of the same
 18 materials he did. And as I said, my own
 19 experience with glass made me comfortable with
 20 the work he's done.
 21 Q Based on your description of the work that
 22 you just did, the review of the materials
 23 provided to you and issuing your opinions, would
 24 that fall within your definition of a scientific
 25 investigation?

1 A Yes.
 2 Q In the course of your I think you said 500
 3 engagements -- you thought, at least?
 4 A Something like that.
 5 Q -- is it normal practice for you to rely on
 6 another expert's work?
 7 A Most of the --
 8 MR. BASHEIN: Objection.
 9 A Most of the time, I don't. But once in a
 10 while, when two or more experts work on a case,
 11 then we rely on each other's work.
 12 Q Okay. And out of the ballpark 500 times
 13 you've been retained as an expert, how many times
 14 do you think you've relied on another expert's
 15 work in the way you relied on Mr. Carmody's here?
 16 A Most of the cases in which I rely on another
 17 expert involve a biomechanical engineer in
 18 dealing with an automobile crash. I would say
 19 out of 500, maybe 20.
 20 Q So it's a small percentage?
 21 A Yes.
 22 MR. BASHEIN: Can you pick
 23 a spot to take a break?
 24 MR. FARRELL: You just
 25 did.

(Brief recess taken.)

Q Mr. Derian, I'd like you to open your report, if you would, to the first page of actual text. And I'll be asking you some questions about that.

My first question is the first paragraph of information in the introduction section there, where did that information come from?

A This information came from Craig Carmody. I did not have an incident report or deposition at that time.

Q Okay. So I should ask Mr. Carmody where he got it?

A Yes.

Q The next paragraph, which is a single sentence, you describe the purpose of your investigation. Was that the purpose that you and Mr. Carmody came up with in that discussion we already talked about?

MR. BASHEIN: Objection.

A I mean, I guess Mr. Carmody and I had discussed our aspects of the case. But this is what I knew that I would be doing.

Q Okay. And did you know that from Mr. Carmody or from Mr. Bashein or some other way?

A No. I more or less directed the division of labor. I mean, this is my area of expertise, so this is the area that I discussed.

Q So am I correct that you got a description of the issues in the case from Mr. Carmody, and then you determined what part of your expertise you thought could be helpful in that context?

A No. The issues of the case were in our initial contact forms, and pretty well laid out in the discovery documents. I think Mr. Carmody and I each separately knew the issues in the case. But the purpose of my investigation was as stated, to determine the potential safety hazards.

Q I understand that. My question was, who determined that that would be your purpose?

A I did.

Q Okay. Now, when you came up with that purpose, was that connected to any engineering or other standard, that you're aware of?

A Besides the ones I listed?

Q Mr. Derian, I'm not sure -- let me rephrase the question. Strike that.

Is potential safety hazards a term that actually appears in any of the standards you've

cited?

A I don't believe it does.

Q Is that a term, as far as you're aware, that appears in Mr. Cullen's insurance policy?

A I don't believe it does.

Q Okay. As far as you know, is that a legal term or part of one of Mr. Cullen's claims in this lawsuit?

A I think the reduction in safety offered to occupants of the vehicle with a repaired windshield compared to the safety of a non-repaired or replaced windshield is a major issue in the case.

Q And based upon that, you came up with -- as you said earlier, you made the decision to focus your investigation on determining potential safety hazards based upon the standards you refer to; am I correct?

A Yes, basically. My conclusion was there are hazards caused by this process.

Q And in your opinion, would those hazards, whatever you feel they are or aren't, be greater or lesser with a windshield that is damaged but not repaired or a windshield that's repaired?

A I think -- well, I guess I don't know. I

really don't know.

Q Do you have an opinion, Mr. Derian, about whether it's possible for a windshield to be damaged in a way that's not visible to the naked eye or would that be a question for Mr. Carmody?

A That would be a question for Mr. Carmody.

Q Can other materials be stressed in a way that's not visible to the naked eye, or weakened?

A Usually stress like to a metal that weakens it is visible. You say to the naked eye. Maybe you need a straight edge or something, but it's generally visible.

Q Am I correct that whatever information you had about how Mr. Cullen's windshield was damaged, the circumstances before and after that came from Mr. Carmody?

A We never really discussed that.

Q Okay.

A My understanding is that he had a damaged windshield. And I didn't really know exactly how it was damaged.

Q Did you or, to your knowledge, did Mr. Carmody look into how that windshield was installed?

1 of the angle. The next column to the right is
 2 the distance. That would be the X dimension in
 3 trigonometry. And the height would be the
 4 projected height from the center line onto a
 5 vertical or onto a perpendicular surface.
 6 Q So let me see if I understand this
 7 correctly. Just using the 10-degree angle -- let
 8 me back up for a second.
 9 When you say, "tangent of the angle," what
 10 does that mean in layman's terms?
 11 A That's a precisely defined trig function. It
 12 would be the opposite over the base; the Y
 13 dimension over the X dimension.
 14 Q Okay. Now, am I correct that what your
 15 calculation showed that using -- assuming an
 16 angle of 10 degrees, the .176944 tangent -- the
 17 30-inch distance from the windshield you already
 18 told me about, correct?
 19 A Yes.
 20 Q This zone with be 5.3 something inches high;
 21 is that correct?
 22 A Yes.
 23 Q Okay. And then that second set of numbers
 24 off to the right there is just using larger
 25 angles, right?

1 A Yes. That's -- I think that's a 55-inch
 2 distance.
 3 Q Distance from the windshield?
 4 A I think so. I don't remember now, to be
 5 honest with you.
 6 Q And it also appears on the right-hand side to
 7 always assume the same or always use the same
 8 tangent. Do you know why that would be?
 9 A Well, all the angles are the same. I think
 10 1.75, that seems to be consistent with a
 11 55-degree angle. And I think that had to do with
 12 the slope of a windshield. Many windshields are
 13 sloped about 55 degrees. So that would be -- if
 14 you laid a piece of paper on the glass, the 8 and
 15 a half-inch dimension of that paper would be
 16 reduced by dividing it by 1.75 because of that
 17 angle.
 18 Q Because of the angle of the windshield
 19 itself?
 20 A Yes.
 21 Q Okay.
 22 -----
 23 (Defendant's Exhibit J marked for
 24 identification.)
 25 -----

1 Q I've handed you a two-page document that I've
 2 marked as Exhibit J. Can you tell me what --
 3 first of all, do those two pages go together, as
 4 I surmised?
 5 A Yes.
 6 Q And what are those?
 7 A These are notes, things that I saw on the Web
 8 that I copied to use in the report. These --
 9 like, first one, 1985, "An Evaluation of
 10 Windshield Glazing and Installation Methods for
 11 Passenger Cars," this is just a highlight of a
 12 NHTSA publication, as specified there, in the
 13 highlighted paragraph from that. And this was
 14 taken from the NHTSA website.
 15 Q That first entry under 1985?
 16 A Yes.
 17 Q Okay. In 1989, would that, again, have been
 18 something -- looks like -- these are your notes
 19 from the NHTSA site, am I correct, or are these
 20 actually copied straight off?
 21 A Yes, these are copied straight off.
 22 Q So this is their description of the reports?
 23 A Yes. I quote them in my report, which is why
 24 I have them copied here directly. Basically, I'm
 25 showing that the standards have been shown to

1 save lives. So by failing to meet standards,
 2 then the conclusion is that lives will be lost.
 3 Q Okay. Now, the first standard you referenced
 4 is a "High Penetration Resistant windshield."
 5 That was a requirement as to the actual nature of
 6 the glass itself, correct?
 7 A Yes. That's talking about the glass itself.
 8 Q Okay. And 1989 is talking about door latch
 9 improvements between 1963 and 1968, correct?
 10 A It talks about that in addition to the next
 11 part of that talks about FMVSS 216, which is the
 12 roof crush resistance.
 13 Q And again, those two things don't really
 14 apply to the windshield at all, correct?
 15 A Well, no. The roof crush resistance does
 16 apply to the windshield. I talked about it.
 17 Q But the door latch improvements there didn't
 18 change or require anything as to windshields?
 19 A No.
 20 Q And the shift from a hardtop to a pillared
 21 car is part of the metal structure, not the
 22 glass, correct?
 23 A But that's part of the trend towards meeting
 24 that FMVSS 216. And bonding the windshield is
 25 tied to meeting that standard.

1 black border. And almost all cars have that
 2 these days. It hides that bonded line. It
 3 provides a nice little trim, dark border around
 4 the glass. Sometimes these frits have little
 5 patterns built into them for them to transition
 6 from the clear area to the blacked-out area.
 7 It's an integral part of the bonding area.
 8 Q And what purpose does the frit serve?
 9 A Partly it's cosmetic, and also it blocks the
 10 ultraviolet radiation from the urethane to glass
 11 bond.
 12 Q Okay. Is that black ceramic frit required by
 13 the FMV Standards?
 14 A No. The FMVSS standards are performance
 15 standards, not design standards.
 16 Q Now, after quoting from the NHTSA publication
 17 that we already talked about, you make the
 18 statement that, "Any time a windshield is
 19 repaired, it is no longer a continuous material
 20 and its performance when impacted would not be
 21 consistent."
 22 Now, in the first instance, Mr. Derian, am I
 23 correct that what causes -- strike that.
 24 What do you mean by "not continuous"?
 25 A Well, rather than having a solid sheet of

1 glass on the surface of the windshield to the
 2 outside of the PVB layer, it would be, say, in
 3 the area of repair, there would be a transition
 4 from glass to the repair resin and then back to
 5 glass. So this is no longer a continuous sheet
 6 of glass but a breached sheet, and that won't
 7 have the same integrity as a complete sheet.
 8 Q And the breach in the continuity that you
 9 just referred to, in the first instance, caused
 10 by the chip or crack itself, correct?
 11 A Yes.
 12 Q And when you say that the performance would
 13 not be consistent, is that based on any actual
 14 test results that you're aware of?
 15 A As I explained, I have a lot of experience in
 16 the chemistry and the trouble it takes to
 17 properly bond glass. And my opinion is that a
 18 resin filled chip would not have the same
 19 consistency as a solid piece of glass.
 20 And, in fact, in Mr. Cullen's case, his chip
 21 is not only -- sorry -- his repair spot is not
 22 only yellowed, but it's detaching itself from the
 23 glass.
 24 Q And that's based on your conversations or
 25 your reading with Mr. Carmody or your reading of

1 his report, correct?
 2 A Yes. That was right. I didn't -- as you
 3 know, I haven't seen his myself at this point,
 4 his car.
 5 Q Have you seen any photographs of Mr. Cullen's
 6 windshield?
 7 A The photographs that are in Mr. Carmody's
 8 report.
 9 Q Have you seen the originals of those
 10 photographs?
 11 A No.
 12 Q Now, in your report, you state that Standard
 13 205 addresses keeping occupants inside the cars;
 14 is that correct?
 15 A I think that's in Standard 208.
 16 Q Okay.
 17 A Sorry. 212 addresses the perimeter, the
 18 portion of a perimeter that remains intact when
 19 running the 208 test.
 20 Q Okay. So with regard to the standard --
 21 getting back to my question, it is your opinion
 22 that the ability to meet the standard would be
 23 affected, but you did no test to confirm or
 24 refute that; is that correct?
 25 A That's correct.

1 Q And Mr. Carmody did no tests to confirm or
 2 refute that; is that correct?
 3 A That's correct. And the State Farm research
 4 paper acknowledges the same issues. And State
 5 Farm has done no testing to -- or PPG, for that
 6 matter -- to determine that repaired windshields
 7 are not -- don't affect performance in these
 8 tests.
 9 Q Are you aware of any tests that have been
 10 performed on repaired windshields or repaired
 11 glass?
 12 MR. BASHEIN: For what
 13 purpose? What's the test you're
 14 asking about, Mike?
 15 MR. FARRELL: I'll let
 16 Mr. Derian tell me what he's aware
 17 of.
 18 MR. BASHEIN: Objection to
 19 the question. Go ahead.
 20 A There is a long crack repair study performed
 21 by State Farm. And in that report, I believe
 22 there was some reference to the ANSI penetration
 23 standard in another portion of that standard.
 24 But the ANSI standard has other areas besides
 25 those two.

1 Q Okay.

2 A That's the only information that I have.

3 And, of course, in that report, I think they say

4 it passed those tests. But that doesn't

5 address -- that's not the condition of a

6 windshield mounted in a car. And it doesn't

7 address issues of the protection of the

8 occupants.

9 Q Okay. Am I correct, based on your last

10 answer, that you made no effort and did no

11 research to find out if any testing had actually

12 been done on repaired windshields by people other

13 than you and Mr. Carmody to see if they met the

14 standards that you were referring to?

15 A I haven't found any such data. My

16 understanding is that kind of information was

17 asked for in the discovery process. And since it

18 wasn't produced, I'm going to -- one conclusion

19 to that would be that it doesn't exist.

20 Q Okay. Am I correct that you never looked to

21 see if anyone had actually -- whether or not such

22 information was in State Farm's possession,

23 whether anyone had done such testing; is that

24 correct?

25 A I don't have any way to look into State

1 Farm's records to see that sort of thing.

2 Q I think you misunderstood my question.

3 Leaving aside what State Farm may have had in

4 its possession or what it may have produced

5 during discovery, did you, Gary Derian, do any

6 research to find out if anyone had done any

7 actual testing to see if the actual test results

8 agreed with your hypotheses or your opinions?

9 MR. BASHEIN: Objection to

10 form.

11 A I have not found any independent research on

12 the performance of repaired windshields.

13 Q Okay. Are you aware of any research that you

14 don't consider to be independent?

15 A The only research I know of is the long crack

16 study, research study, by State Farm in which

17 they question the repairing of windshields.

18 Q Okay. And you didn't feel you needed to find

19 that research to either refute or corroborate

20 your opinions in this case; is that correct?

21 A I didn't. Because like I said, my own

22 experience with bonding of glass tells me that

23 whenever you have a discontinuous surface like

24 that -- plus the mechanics of brittle materials

25 and stress concentrations tells me that a

1 breached windshield will not have the same

2 mechanical properties of a continuous one.

3 Q Okay. And leaving aside whether or not --

4 strike that.

5 So it's your belief that it won't be the

6 same, correct?

7 A Correct.

8 Q But you can't say whether or not that

9 difference that you believe exists would cause it

10 not to meet Standard 205, correct?

11 A Like he said, some aspects of a repaired

12 windshield are certain to fail. I'm going to

13 restate that. Some aspects of a repaired

14 windshield are certain to fail safety standards.

15 Other aspects may or may not, depending on the

16 type of repair and the amount of original damage

17 and the vehicle structure.

18 Q And with regard to Standard 205, what you

19 said in your report was that whether or not a

20 repaired windshield met that standard was

21 unknown, using that term in its normal sense,

22 correct?

23 A Yes. They don't know. I mean, they're doing

24 these repairs and they don't know what effect it

25 would have.

1 Q Okay. And is there anything short of

2 actually doing the tests required by Standard 205

3 that you could do to learn that answer?

4 MR. BASHEIN: You're

5 relating to the ones that would

6 vary repair by repair versus the

7 ones he's expressed an opinion

8 that all repairs fail?

9 MR. FARRELL: I'm asking

10 about Standard 205 and

11 particularly Mr. Derian's

12 statement that it is unknown

13 whether a repaired windshield

14 could meet that standard.

15 Q What would you need to know to answer that

16 question, Mr. Derian?

17 MR. BASHEIN: He's

18 qualified that.

19 MR. FARRELL: Mr. Derian

20 can testify for himself, Craig.

21 A I think I'm talking about 208 Standard there.

22 Q No. I'm looking at the paragraph directly

23 above it.

24 A Okay. Well, if I were charged with running a

25 test program, I would perhaps start with the full

1 gamut of the ANSI standards just to understand.
2 But I can tell you, having handled windshields
3 and having removed and installed windshields
4 personally, the tiniest little crack will cause
5 the whole windshield to crack when you're
6 handling it compared to a non-cracked glass.

7 In other words, the presence of a crack in a
8 windshield severely weakens that glass. And I
9 know that from personal experience. That would
10 tell me that whatever happens -- whether or not
11 it passes 205, the presence of a cracked or
12 repaired windshield would create a less safe
13 condition than a replaced windshield.

14 Q Okay. And as opposed to a cracked or chipped
15 windshield that was not repaired, what is your
16 opinion?

17 A I don't know.

18 Q You have no opinion about whether a given
19 person would be better off doing nothing or
20 having a chip repaired?

21 A I haven't actually researched that to be able
22 to give you a definite. But I would suspect it
23 to be very little effect on the performance of
24 the glass due to a repair.

25 Q If actual tests had been performed that

1 showed that repairs greatly improve those tests,
2 would that change your opinion?

3 A I'd have to see those test results and
4 analyze them. But probably not.

5 Q But you didn't look for any such test results
6 and didn't analyze any, correct?

7 A Correct.

8 Q To your knowledge, did Mr. Carmody look at
9 any test results like that?

10 A I don't know what he looked at.

11 Q Okay. Am I correct, Mr. Carmody, that you
12 used the phrase --

13 A I'm Mr. Derian.

14 Q I'm sorry. You knew it was going to happen
15 once today.

16 A That's okay.

17 Q If it's any consolation, I had a witness call
18 me Mark all day Friday.

19 MR. BASHEIN: You look like
20 a Mark.

21 Q Am I correct that as to those things where
22 you used the term "unknown" or "may," you
23 couldn't get to the reasonable degree of
24 professional certainty that you needed to
25 actually offer an opinion, correct?

1 MR. BASHEIN: Subject to
2 the additional opinions he's
3 rendering, Mike, or are you asking
4 him to ignore this?

5 MR. FARRELL: We'll get to
6 those in a moment. I'm asking the
7 question I asked.

8 MR. BASHEIN: Objection.
9 Fail to include the additional
10 opinions that he has today.

11 MR. FARRELL: Provided this
12 morning, so we're clear.

13 A No. I mean, all my opinions are to a
14 reasonable degree of engineering certainty. And
15 what I'm saying in these paragraphs is you take a
16 repaired windshield, it may cause that vehicle to
17 fail motor vehicle safety standards, it may not.
18 But in every case, it creates a reduced level of
19 safety compared to a replacement windshield.

20 Q With regard to Standard 208, that's a
21 crashworthiness test, correct?

22 A Yes.

23 Q And it sets up tests for active and passive
24 restraint, which is seat belts and air bags,
25 correct?

1 A Yes, the whole gamut.

2 Q So Standard 208 doesn't specifically apply to
3 windshields or glass, correct?

4 A It's not specific to windshields, but
5 windshield bonding and windshield performance are
6 part of the performance of Standard 208. It's
7 integral with the vehicle designed that affects
8 the ability of that vehicle to pass that
9 standard.

10 Q Okay. And with regard to the repair to
11 Mr. Cullen's car, did that repair, in your
12 opinion, have any effect whatsoever on the seat
13 belts or air bags?

14 A I would expect that the seat belt and air bag
15 would not be affected but the ability of that car
16 to meet Standard 208 might be. And whatever its
17 performance in the 208 test would be reduced with
18 the broken windshield and repaired windshield
19 than would be with a windshield.

20 Q And that opinion that it would be reduced,
21 that its performance would be reduced, is not
22 based on the actual tests that you and
23 Mr. Carmody have done or that you have seen?

24 A It's based on a knowledge of the important
25 nature of a windshield to the performance of

1 passing the 208 test. For example, windshields
2 sometimes deflect the deployment of an air bag.
3 So with less strength in the windshield, you
4 could have a situation where the air bag may
5 deploy improperly.

6 Q Has that actually happened in any case that
7 you're actually aware of?

8 A I'm not aware of a case, no.

9 Q And it certainly, to your knowledge, didn't
10 happen in Mr. Cullen's case, correct?

11 A No. There was no crash in Mr. Cullen's case.

12 Q And, again, whatever compromise happens to
13 what you referred to as the safety cage, that's
14 actually caused by the damage to the windshield
15 in the first instance. It's not caused by the
16 repair, correct?

17 A That's probably correct.

18 Q And in your opinion, with regard to Section
19 208, would a person be better off to drive around
20 with an unrepaired crack or a repaired chip or
21 crack?

22 MR. BASHEIN: Objection.

23 That's not his option under the
24 policy.

25 Q Do you have any opinions, Mr. Derian, about

1 what the policy requires or doesn't require?

2 A My understanding is the policy requires that
3 State Farm indemnify the owner.

4 Q Okay. And you understand that
5 indemnification is a payment of money, correct?

6 A Yes, in this case.

7 Q And having testified that you dealt with
8 insurance companies as much as you have, I assume
9 you also understand that once the repair is made,
10 the insured may or may not get the car repaired;
11 is that correct?

12 A That's correct.

13 Q In that situation, in your opinion, would the
14 insured be better off leaving the chip unrepaired
15 or to get it repaired?

16 A I'd have to look at the car and see.

17 Q Okay. And what would you want to look at?

18 A Well, I guess I'd want to look at the chip to
19 determine if the windshield would need to be
20 replaced -- should be replaced.

21 Q And what would you look at in the chip to
22 decide whether or not the chip was severe enough
23 to decide if the windshield should be replaced?

24 A Well, I'd look at all the aspects, the
25 location, the depth, the size of it, the presence

1 of cracks radiating away, proximity to the edge.

2 Q Am I correct that even -- that in your
3 opinion, there are situations where a chip
4 wouldn't warrant replacing the windshield?

5 MR. BASHEIN: Objection.

6 A It is possible that some chip may not warrant
7 replacement of a windshield.

8 Q Okay. And to know whether that would fit
9 within your definition, you'd have to look at it?

10 A I would.

11 Q In your opinion, do chips change over time?

12 MR. BASHEIN: Talking about
13 original damage versus repair,
14 Mike?

15 MR. FARRELL: Yes.

16 Q Leaving aside whether -- I'll rephrase the
17 question.

18 If a windshield is chipped on day 1, can that
19 chip grow or change in nature over time?

20 A Yes.

21 Q And what would affect whether or not that
22 happened?

23 A Well, I think it always happens. It may
24 grow. Cracks may radiate from it and grow based
25 on the stresses in the glass. The chip becomes

1 contaminated from elements, rendering -- well,
2 causing the bonding of a repair to be affected.
3 Materials can get into the -- I say materials,
4 dirt, water, salt can get into the PVB layer and
5 cause a delamination and loss of strength there.
6 Lot of things can happen.

7 Q Now, with regard to stresses, what would
8 cause stresses that could cause a growth of a
9 chip or occurrence of a crack?

10 A It could be a thermal stress or could be body
11 flex.

12 Q Thermal stress, in my terms, would be
13 temperature, correct?

14 A Yes.

15 Q So that's going to differ based on where the
16 car is, Arizona versus Minnesota, correct?

17 A Yes.

18 Q And with regard to -- did you use the term
19 body flex?

20 A I think I did.

21 Q Okay. Am I correct that that would include
22 things like whether or not you hit a lot of
23 chuckholes?

24 A Yes, or put a wheel up on a curb or things
25 like that.

1 that these are factually inaccurate benefits, and
2 I had those in my notes before I spoke with him.
3 And then based on our conversation and our review
4 of my notes, he suggested that I add that to my
5 opinions.

6 Q Okay. And the script that you referred to,
7 you had that at the time you wrote the report
8 itself, correct?

9 A I did have parts of that. I think these
10 sections here does include script.

11 Q But at the time you and Mr. Carmody discussed
12 what opinions you would be providing, you chose
13 not to say anything about the script; is that
14 correct?

15 A That's correct.

16 Q Okay. And why did you make that decision
17 then and why did you change your mind either last
18 week -- excuse me -- earlier this week or this
19 morning?

20 MR. BASHEIN: Objection to
21 change his mind.

22 Q Am I correct, Mr. Derian, that you decided
23 what to include in your report in November?

24 A I did.

25 Q And you did not include anything about the

1 Q I apologize.

2 A The Lynx employees use the script when
3 discussing windshield repairs with an insured.

4 Q And do you know whether Mr. Cullen actually
5 spoke to Lynx?

6 A I guess I don't remember that part. I didn't
7 make a note of it in my notes of his deposition.

8 He may have actually spoken with his agent's
9 office.

10 MR. BASHEIN: Objection;
11 move to strike.

12 Q With regard to Item 5 on the last page of
13 your notes, Mr. Derian, that's a reference to the
14 discussion you and I already had about abrasion;
15 is that correct?

16 A Yes.

17 Q Is there anything signified in addition to
18 what we've already discussed in Item 5?

19 A No.

20 Q Would you describe that as an additional
21 opinion or a clarification of an opinion?

22 A Which? No. 5?

23 Q No. 5.

24 A That's a clarification.

25 Q Okay. And, again, it's a clarification you

1 script, correct?

2 A I did not.

3 Q And that was a conscious decision on your
4 part, correct?

5 A Yes. I was limiting my opinions to the
6 automotive side, automotive safety issues.

7 Q Which is your expertise, correct?

8 A Yes.

9 Q And you do not have any specialized training
10 or knowledge about scripts; is that correct?

11 MR. BASHEIN: He knows when
12 they're not truthful.

13 MR. FARRELL: Move to
14 strike.

15 A I am capable of reading the script and
16 determining if it is a fair representation or
17 not.

18 Q And do you know whether any portion of the
19 script was, in fact, read to Mr. Cullen or --

20 A I don't remember.

21 Q What's your understanding about how the
22 script is used or who uses the script?

23 A The Lynx employees uses it.

24 MR. BASHEIN: He's not
25 done.

1 decided to make after your conversation with
2 Mr. Bashein this morning?

3 A Yes.

4 Q Okay. With regard to Item 6, it states,
5 "Time sensitive repair." Again, would you
6 describe that as an additional opinion or a
7 clarification?

8 A This would be an additional opinion.

9 Q And is that additional opinion what we've
10 already discussed not so long ago today?

11 A Yes. It is a time sensitive repair, and
12 there is no time limitation when qualifying a
13 crack.

14 Q Okay. And, again, that's an opinion you
15 decided to offer after speaking with Mr. Bashein
16 this morning?

17 A Yes.

18 Q Mr. Derian, are you aware of any developments
19 in the products or technologies used to repair
20 car windshields over the last 8 to 10 years?

21 A No.

22 Q Are you aware whether there have been any or
23 just not aware of the details?

24 A I'm just not aware of what they might be.

25 Q Do you recall the date of the long crack

1 Q Am I correct, Mr. Derian, that none of your
2 opinions is specific to Mr. Cullen's car or to
3 the repair to his windshield?

4 MR. BASHEIN: Objection.

5 It's not what he said.

6 A No. Several of my opinions apply directly to
7 Mr. Cullen's car.

8 Q How often did you talk to Mr. Carmody during
9 the course of his or your work in this case?

10 A Three or four times.

11 Q And if those conversations were more than a
12 few minutes, they should be reflected in one or
13 more of your time changes; is that correct?

14 A Unless they're included in something else,
15 like write report or do research. I can't say
16 that I always record every phone conversation.

17 Q Okay. Was it important to you how
18 Mr. Carmody reached his opinions or only what
19 they were?

20 A Well, I didn't really rely on Mr. Carmody's
21 opinions for my opinions. We talked about
22 things. He's the glass guy and I'm the car guy,
23 but I have a lot of glass experience myself, as
24 we talked about. So I think I explained I was
25 comfortable with his opinions because I was

1 familiar with the technology that he was talking
2 about.

3 Q Okay. I know that you were aware that
4 Mr. Carmody examined the windshield in
5 February -- excuse me -- last year, and you only
6 saw the pictures that were attached to his
7 report, correct?

8 A Yes.

9 Q Do you know whether he took any other
10 photographs or anyone else did?

11 A I don't know.

12 Q Did he provide you with any notes from that
13 exam?

14 A No.

15 Q Do you know where or when that examination
16 took place? You know when. But where?

17 A I think it was up here in Cleveland.

18 Q Okay. Do you know how long between -- how
19 long elapsed between the repair of Mr. Cullen's
20 windshield and Mr. Carmody looking at it?

21 A Almost three years.

22 Q And as far as you know, is the February
23 examination of the car by Mr. Carmody the first
24 time he looked at it?

25 A I believe so, but I don't know for sure.

1 Q And forgive me if I'm repeating myself, but I
2 believe you testified that it's your
3 understanding the windshield was still in the car
4 at that time?

5 A That's my understanding.

6 Q Do you know who, if anyone else, was with
7 Mr. Carmody when he inspected the windshield?

8 A I don't know.

9 Q Okay. Do you have any reason to believe that
10 anyone else, any other expert or technical person
11 has inspected Mr. Cullen's windshield besides
12 Mr. Carmody?

13 A I don't know.

14 Q Okay.

15 MR. FARRELL: I'll tell you
16 what, Craig, I referenced taking a
17 short but not lunch break. This
18 would be probably the right time
19 to do that.

20 MR. BASHEIN: You've got to
21 be kidding.

22 MR. FARRELL: No. I'm
23 almost done.

24 (Brief recess taken.)

25 Q Mr. Derian, in doing your work in this case,

1 did you follow a set of procedures or guidelines
2 or anything that is set forth in a text or
3 anywhere or did you just do it from your own
4 methods?

5 MR. BASHEIN: Objection as
6 to his own methods. Go ahead.

7 A I follow what is considered the scientific
8 process.

9 Q And considered by whom?

10 A The scientific community.

11 Q I'm sorry. Go ahead.

12 A Well, it's hypothesis testing, ruling out
13 alternate causes, and something -- I think we
14 talked about it earlier today -- something that's
15 repeatable.

16 Q Okay. What testing did you do in reaching
17 your conclusions here?

18 A I didn't do any physical testing of
19 windshields.

20 Q Okay. Did you do any other kind of testing?

21 A Well, I applied my experience, and I applied
22 the standards, and I applied my knowledge of
23 mechanical structures, including brittle
24 material, such as glass, to form my opinions.

25 Q Okay. Is there any way to test for another

1 mechanical engineer, such as yourself, to test or
 2 validate the work you did here?
 3 A Yes. I think that engineer could look at my
 4 report and my notes and understand exactly how I
 5 came to my opinions.
 6 Q Okay. And would a mechanical engineer having
 7 your background, your educational qualifications,
 8 who reviewed the same materials that you reviewed
 9 reach the same conclusions?
 10 A Yes.
 11 Q In all cases?
 12 A I believe so, yes.
 13 Q But you're not aware of anyone who has
 14 actually done that and reached the same
 15 conclusions you have; is that correct?
 16 A In this case?
 17 Q Yes.
 18 A No, I'm not -- well --
 19 Q Excluding Mr. Carmody's piece of this?
 20 A That's correct.
 21 Q Okay. Is it also correct that you did no
 22 research to try and find out whether anyone else
 23 had agreed or disagreed with your conclusions?
 24 A I was not able to find documents to describe
 25 the strength and performance of repaired

1 Q Do you understand my question, Mr. Derian?
 2 A No. I think the reduction in strength can be
 3 tested.
 4 Q But neither you nor Mr. Carmody did that?
 5 A That's right. There's -- you can test
 6 individual glass. You can test the whole
 7 vehicle. And, of course, every fracture pattern
 8 has a different result. But every one of those
 9 tests will show a reduction in strength compared
 10 to a replacement windshield.
 11 Q Okay. And beyond stating some, that it will
 12 cause some reduction in strength, as you sit here
 13 today, you can't measure in magnitude what that
 14 reduction would be or tell us what implications
 15 it would actually have?
 16 A Well, I think I've described the
 17 implications.
 18 MR. BASHEIN: Objection.
 19 Q In your report, you mean?
 20 MR. BASHEIN: We've been in
 21 deposition here six hours. He's
 22 done it here, too.
 23 Q Is there anything that you haven't told me
 24 that you think covers that other than what we've
 25 discussed today?

1 windshields. I did some research on that, and I
 2 think it was even in the billing. But I was not
 3 able to find anything other than the documents
 4 that were supplied by State Farm.
 5 Q Okay. Beyond what you've already told me, is
 6 there any way to empirically test your
 7 conclusions or would that be performing the full
 8 gamut of tests we talked about earlier?
 9 A I think anyone who has handled glass,
 10 particularly windshields, would agree that the
 11 presence of a crack degrades the strength of that
 12 material. So I guess it would be relatively easy
 13 to confirm that.
 14 Q Okay. And do you think that all of those
 15 people -- you don't know any specific people.
 16 But, again, do you think that all of those people
 17 would also agree with you that you can't measure
 18 that reduction in strength?
 19 MR. BASHEIN: Objection.
 20 He didn't say that. He said you
 21 can measure it. It just hasn't
 22 been tested.
 23 MR. FARRELL: I don't want
 24 to argue with you about earlier
 25 testimony, Mr. Bashein.

1 A No. I think we discussed it thoroughly.
 2 Q What understanding do you have, Mr. Derian,
 3 about what would have happened if Mr. Cullen
 4 didn't want his windshield repaired?
 5 A You mean had it replaced or just not had it
 6 repaired?
 7 Q Either.
 8 A If he didn't want it repaired, he would not
 9 have even called his agent. If he wanted it
 10 replaced -- Mr. Cullen says he was not given the
 11 opportunity of replacing it. He didn't believe
 12 he even had that choice.
 13 Q And you don't know whether any other State
 14 Farm policy owner knew or believed they had that
 15 choice; is that fair?
 16 A I haven't analyzed any other case.
 17 Q And you would have to talk to all those
 18 people, correct?
 19 MR. BASHEIN: Objection.
 20 A Yeah, or gather some information.
 21 Q Are you aware of any failure in Mr. Cullen's
 22 windshield since it was repaired?
 23 A I believe the repair failed. It had
 24 delaminated and turned yellow.
 25 Q And you already told me about that earlier,

1 correct?
 2 A Yes.
 3 Q And that's the only failure you're aware of?
 4 A Yes.
 5 Q Okay. And, again, you don't know if that has
 6 happened with regard to any other windshield
 7 repair pursuant to a State Farm policy, correct?
 8 A Well, it would be pretty clear to me that
 9 other similar repairs would have failed in
 10 similar ways.
 11 Q Okay. And when you say, "similar," do you
 12 mean similar in the type of resin used?
 13 A Yes. Similar to the resin and the
 14 environment and all those things would fail in
 15 similar ways. And then other resins would fail
 16 in other ways.
 17 Q In your opinion, are there any resins that
 18 won't degrade in the way you believe Mr. Cullen's
 19 windshield degraded -- or the resin degraded?
 20 A I believe there is no resin that would match
 21 the performance of a glass windshield. Other
 22 resins may degrade in different manners. But
 23 there is no plastic resin that will match a glass
 24 windshield.
 25 Q Will the degree of degradation vary from

1 resin to resin and based upon conditions?
 2 A Sure. The resins are different. I would
 3 imagine they would perform in some different
 4 manner.
 5 Q And would the manner in which the repair is
 6 performed affect that, in your opinion?
 7 A It could, sure.
 8 Q Would the conditions under which it was
 9 performed vary?
 10 A Sure. Temperature, humidity, cleanliness,
 11 preparation.
 12 Q Do you have any information as to when or
 13 under what conditions Mr. Cullen -- the resin --
 14 the repair to Mr. Cullen's windshield began to
 15 change color?
 16 A He said something in his deposition about
 17 that. I don't recall.
 18 Q But the only information you would have would
 19 be from his deposition?
 20 A Yes.
 21 Q Okay. Are you aware of any organizations
 22 that either set standards or criteria for
 23 windshield repair?
 24 A I suspect that there is.
 25 Q But you didn't look into that, and you

1 couldn't tell me what any of those are or
 2 anything about those standards or criteria, as
 3 you sit here today; is that correct?
 4 A That's correct.
 5 Q Are you familiar with the National Glass
 6 Association?
 7 A Only from the depositions I read.
 8 Q Okay. That wouldn't be an organization you
 9 would deal with as part of your normal work; is
 10 that correct?
 11 A That's correct.
 12 Q Mr. Derian, you seemed to put some
 13 significance on the concerns raised in some of
 14 the documents that were in State Farm's
 15 possession. Would you place equal significance
 16 on documents that were available or in State
 17 Farm's possession that showed good test results?
 18 MR. BASHEIN: Objection to
 19 form.
 20 A I would have to review those documents to
 21 see.
 22 Q Okay. And am I correct from your last answer
 23 that no such documents were provided to you or at
 24 least that as you sit here today, you don't
 25 recall seeing any, as such?

1 A That's correct.
 2 Q Okay. Who are the major windshield
 3 manufacturing companies?
 4 A Well, gosh, there's PPG, there's LOF.
 5 Q LOF?
 6 A LOF, Libby Owens Ford. There's Pilkington,
 7 who is a European-based company, but I think they
 8 have some operations in the U.S, Guardian Glass.
 9 I think Glasurit is a German --
 10 Q Glasurit?
 11 A Glasurit, G-l-a-s-u-r-i-t.
 12 Q What about Safelite?
 13 A Okay.
 14 Q Would that be one of them?
 15 A Yeah, it would. I forgot about Safelite.
 16 Q Would it affect any of your opinions if any
 17 of those major windshield manufacturers
 18 sanctioned windshield repair?
 19 A No. I'd have to see the tests and the
 20 results on which those sanctions were based
 21 before I could even begin to change my opinion.
 22 Q Okay. Would it be significant to your
 23 opinion if any of those companies had set forth
 24 criteria for the situations in which they felt it
 25 would be appropriate to replace a windshield?

1 A Again, I'd have to study that before I change
 2 my opinions or come up with new opinions.
 3 Q Would it be something you'd want to look at
 4 if it existed?
 5 A Like I said, I like having more information,
 6 so I would like to see that.
 7 Q Okay. But as you sit here today, you're not
 8 aware of any such criteria or sanctioning or
 9 approval; is that correct?
 10 A Correct.
 11 Q Were you finished listing what you consider
 12 to be the major auto glass manufacturers?
 13 A Yes.
 14 Q Okay. Are you aware of any instance in which
 15 the reduced strength that you've opined a repair
 16 leads to has led to either the failure of a
 17 windshield? I'll just ask it that way. And when
 18 I say, "failure," the collapse or breaking of a
 19 windshield.
 20 A No.
 21 Q Are you aware of any situation in which,
 22 again, the reduction in safety that you've opined
 23 occurs has led to an injury that wouldn't
 24 otherwise have occurred?
 25 A I don't know. I haven't found such a case.

1 Q Did you attempt to find out instances in
 2 which either of those two things had actually
 3 happened?
 4 A The research work I did didn't turn up
 5 anything like that.
 6 Q Do you think if that had happened it would
 7 have been in the research you did; it would have
 8 popped up?
 9 MR. BASHEIN: Objection.
 10 A I thought so when I was doing the research.
 11 Q Okay. Is the absence of that kind of
 12 information in the course of your research
 13 something you consider to be significant?
 14 MR. BASHEIN: Objection.
 15 A No.
 16 Q Okay. So the actual -- strike that.
 17 So the strength of your opinion doesn't turn
 18 on whether or not -- strike that.
 19 Did you ever tell Mr. Cullen that he
 20 shouldn't drive his car?
 21 A No.
 22 Q Did Mr. Carmody ever tell him that?
 23 A I don't know.
 24 MR. BASHEIN: Objection.
 25 He's testified he never spoke with

1 Mr. Cullen.
 2 Q Did you ever suggest to Mr. Bashein or
 3 Mr. Cullen's other lawyers that they should tell
 4 Mr. Cullen not to drive his car with his
 5 windshield repaired?
 6 A No.
 7 Q If you thought there was an actual risk to
 8 Mr. Cullen, would you have communicated that risk
 9 to Mr. Cullen?
 10 MR. BASHEIN: Objection.
 11 A When I find a risk, I'm ethically bound to
 12 disclose that.
 13 Q And in this case, you did not advise anyone
 14 that Mr. Cullen shouldn't drive his car?
 15 MR. BASHEIN: Objection.
 16 He did disclose the risk in his
 17 report. Go ahead.
 18 A Like I said, I never talked to Mr. Cullen,
 19 and so I didn't specifically verbally, besides
 20 what was in my report, disclose that.
 21 Q If in the course of doing your work as an
 22 expert, which we know you've done a lot of, you
 23 discovered something that you thought posed an
 24 actual risk to a person, would you immediately
 25 alert the person to move out of the house, don't

1 drive the car; whatever you thought would be
 2 appropriate?
 3 A Yes.
 4 Q Okay. And you did not do anything like that
 5 in this case, correct?
 6 A I did not.
 7 Q Okay. To your knowledge, did Mr. Carmody?
 8 A I don't know.
 9 Q Okay. And would Mr. Carmody be bound by
 10 those same ethical obligations you just referred
 11 to?
 12 MR. BASHEIN: Objection as
 13 to ethical obligation. Go ahead.
 14 A I don't know if Mr. Carmody is a P.E. or not.
 15 Q I think you said you'd be ethically bound?
 16 A Yes.
 17 Q And those ethics, based on your last answer,
 18 stem from your status as a professional engineer?
 19 A Yes.
 20 Q How long have you known Mr. Carmody? I know
 21 you told me.
 22 A About a year -- well, maybe two years.
 23 Q Based on knowing him for the period of time
 24 that you've known him, do you think that if he
 25 thought there were an actual risk, he would have

1 Q Which is almost a three-and-a-half-year
 2 period, correct?
 3 A Yes.
 4 Q And you're also aware, based on your
 5 experience, that peoples' ownership of
 6 automobiles changes, correct?
 7 A Yes. I think it was less than three years.
 8 Q And it is possible, if not likely, that
 9 assuming you're correct and eventually
 10 degradation will occur, that the person who owned
 11 the car on the date of the repair might not own
 12 it later; is that correct?

13 MR. BASHEIN: Objection.

14 A Well, that's possible. I guess it's like
 15 putting sawdust in your transmission to quiet it
 16 and then quick trade it in. That's not really an
 17 ethical thing to do, but --
 18 Q Mr. Bashein asked you several questions about
 19 what is generally accepted or well-known or
 20 beyond dispute, all of which you answered yes to,
 21 more or less.

22 In any of those answers, were you referring
 23 to anything that you haven't already told me
 24 today?

25 A I don't believe he covered new ground but

1 simply was trying to clarify some points.

2 Q Okay. So there is no other study or anything
 3 else that you were referring to in answering any
 4 of those questions?

5 A No. I'm not withholding any information from
 6 you.

7 Q Okay. Now, earlier, you stated that you were
 8 aware of no valid basis upon which anyone could
 9 opine or state that a repair would make a
 10 windshield safer. My first question is, does the
 11 script say it's safer than a replacement or safer
 12 than no repair, or do you remember?

13 A I'd want to look at the script.

14 Q And in your opinion, if there were test
 15 results done under an appropriate standard that
 16 showed that in some cases repairs strengthen
 17 glass, would that be a valid basis for making
 18 that statement?

19 A Depends on the time frame. I'd have to look
 20 at those studies to make a determination, because
 21 there's a lot of factors that are generally not
 22 revealed in studies like that.

23 Q You made no attempt to find out what
 24 information that statement was based on in the
 25 script or what studies were available to whoever

1 wrote that script; is that correct?

2 A I didn't have any of those studies myself.

3 Q Nor did you ask Mr. Bashein for them or look
 4 for them anywhere else, correct?

5 A I did some research, as I explained, and I
 6 didn't find any studies to indicate that.

7 Q Is it your opinion, Mr. Derian, that an
 8 improperly replaced windshield would always be
 9 safer than a repaired windshield?

10 A No, that's not my opinion.

11 Q Okay. So in making the determination of
 12 whether a windshield that was replaced is safer
 13 than one that was repaired, you'd have to know
 14 the conditions and whether or not the replacement
 15 was done correctly; am I correct?

16 A Well, I think if you compare a proper
 17 replacement to a proper repair, all my opinions
 18 stand as I've explained.

19 Q And in the real world, that's not true in
 20 either case, is it?

21 MR. BASHEIN: Objection.

22 A Well, like I said, would you not buy tires
 23 because you thought the guy would screw up your
 24 tire, or would you not have your brakes repaired
 25 because you were afraid the mechanic would do an

1 improper job? That's not a good reason to not
 2 follow through with a repair.

3 Q My question, Mr. Derian, was based on your
 4 experience, is it true or not true that
 5 replacements are done improperly? That does
 6 happen?

7 A I don't have experience in the windshield
 8 replacement business.

9 Q Or in the repair business, correct?

10 A Well, I am involved in a lot of automotive
 11 repair work --

12 Q I meant windshield repair.

13 A Yes, that's correct.

14 Q So you have experience neither in windshield
 15 replacement nor in windshield repair, because we
 16 were talking over each other?

17 A Well, in those businesses. Like I've said,
 18 I've done windshield replacements myself. And it
 19 is -- it's always possible that a replacement
 20 windshield is improperly installed. I think that
 21 would be a different case, though, than the case
 22 we're working on.

23 Q And do you think it's possible that there are
 24 some State Farm -- strike that.

25 MR. FARRELL: That's all I

NATIONAL GLASS ASSOCIATION

WINDSHIELD REPAIR WORK GROUP TECHNICAL SUBCOMMITTEE

REPORT TO NGA WINDSHIELD REPAIR WORK GROUP

A technical subcommittee was formed by the members of the NGA Windshield Repair Work Group to develop and implement a short term testing program that investigates the integrity of windshield repairs.

The technical subcommittee consists of technical representatives from four companies involved in the auto glass industry. Each representative has experience in auto glass testing and had his/her company's laboratory available to accomplish the subcommittee's goal.

An initial meeting was held at NGA to discuss the subcommittee's charter and to formulate a plan to meet it. The subcommittee decided to concentrate on the issue of cracked windshields with a focus on structural integrity while considering the durability and visual acuity of the repair material. They also decided to perform "distinguishing" tests - tests that would compare the properties of unbroken and unrepaired glass - independently of each other based on their own laboratory's abilities.

After conducting some tests at their facilities, the subcommittee held a second meeting at NGA. Based on the test results presented at this meeting, the technical subcommittee reached the following conclusions:

- A. Test results demonstrated that samples of broken and repaired laminated glass were not as strong as undamaged laminated glass.
- B. Test results demonstrated that samples of broken and repaired annealed glass were not as strong as undamaged annealed glass.
- C. Test results demonstrated that moisture which penetrates a defect in a laminated glass lite and reaches the interlayer can adversely affect the glass/interlayer adhesion. This condition could result in excessive fragments dislodging from the glass on the side opposite an impact. This raises the concern that a motor vehicle's driver and/or passengers could be subjected to excessive "flying" pieces of glass should an impact occur on the exterior side of the windshield.

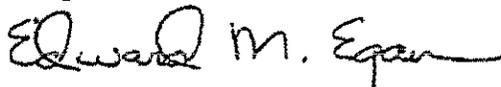
- D. The test results noted in item C above also raise the concern about any adverse effects that repair materials may have on a windshield's interlayer when a defect extends through the glass to the interlayer. Included among the effects to be considered are reductions in interlayer strength and in glass/interlayer adhesion. The subcommittee did not perform any tests at this time to evaluate this situation, but various members have agreed to in the near future.
- E. Test results demonstrated that samples of annealed glass coated with a cured film of repair material were adversely affected by a 24-hour exposure at room temperature to water and isopropanol. These results lead the subcommittee to be concerned about the resistance of repair materials to weather, cleaning solvents, and windshield washing fluids and the effects of long-term exposure.

Based on the tests performed, the subcommittee notes the following:

1. The test data does not demonstrate that a repaired windshield would be equivalent in performance to one that was undamaged.
2. No tests were performed to study the visual acuity or the long-term integrity of a repaired windshield. The decision to not investigate these two areas was based on factors other than their importance. The subcommittee recommends the testing of these two areas be performed.
3. From the nature and extent of the tests conducted, the technical subcommittee could not draw a direct correlation to the actual safety performance of a repaired windshield in a motor vehicle.

Finally, the subcommittee concludes from its testing and deliberations that a standard or policy regarding windshield repairs is appropriate and recommended.

Respectively submitted,



Edward M. Egan, P.E.
Technical Engineer

March 1, 1993

WINDSHIELD REPAIR TESTS: SUMMARY REPORT

This report briefly summarizes tests conducted at four independent, participating laboratories as a basis for discussions regarding the safety implications of windshield repair.

Individual reports and methods are included, where appropriate.

I. Impact Resistance - Laminates

Objective:

Compare penetration resistance of repaired, broken and unbroken laminates.

Discussion:

A number of 12 in. x 12 in. specimens, cut from standard windshields, were collected for testing. Samples were unbroken, cracked one-side and one-side cracked then repaired. Five-pound ball impact tests were conducted under conditions described in ANSI Z26.1-1990 (Test 26) except that a staircase method was used to determine mean break height. Samples were tested with the break or repair on the impacted side (inboard) as well as on the side opposite impact (outboard).

Results:

<u>Sample</u>	<u>MBH (FT.)</u>
Control (no break)	21.6
Break (outboard side)	20.7
Repair (outboard side)	20.4
Break (inboard)	19.7
Repair (inboard)	21.2

Conclusions:

Results indicate no practical difference in impact performance of unbroken, broken or repaired samples when measured by the falling five-pound ball test.

II. Strength Test - Laminates

Objective:

Compare the compressive/flexural strength of cracked and cracked then repaired laminates vs. undamaged controls.

Discussion:

Between two independent laboratories, three tests were conducted to measure and compare the strength to rupture of various laminate samples.

Three types of laboratory prepared laminates were tested: undamaged controls, samples cracked on one or both sides and samples which were cracked and then repaired. The cracks were made to run from edge to edge, at the midpoint of the sample. In one case, two different repair resins were employed, each handled and cured according to the manufacturer's instructions.

Two of the three tests conducted used the concentric ring test (as described in ASTM C-158-84); one lab testing 6 x 6 in. and the other 12 x 12 in. samples. Samples which were one-side cracked or cracked and repaired were tested in the damaged side up (compression) as well as the damaged side down (tension) orientation.

In a modification of the above method, one lab also tested 6 x 12 in. samples which were clamped on one end while a force was applied to the opposite, extended (6 in.), free edge. The crack or repair was positioned approximately 1/2 in. from the edge of the clamped position.

Results:

Sample	Break Force (Lbs.)		
	Ring 6"x6"	Ring 12"x12"	Free-Edge 6"x12"
Control (unbroken)	596	157.5	55.9
Broken (1-side/up)	571	168.3	27.8
Repaired (1-side/up)	554/489*	178.6	29.1
Broken (1-side/down)	437	165.7	44.3
Repaired (1-side/down)	510/578*	110.5	28.0
Broken (2-sides)	255	4.6	1.6
Repaired (2-sides)	317/297*	1.3	1.6

(* Two repair resins used)

Conclusions:

Scatter in the individual data does not allow absolute comparisons to be drawn. In some cases, broken samples test better than unbroken controls. However, it appears clear from the results of the 2-side damaged/repaired samples, and others when viewed in general, that there is no indication that repair restores laminate strength and integrity.

III. Strength Tests - Glass

Objective:

Compare the strength of unbroken and repaired glass specimens by tensile and lap shear methods.

Discussion:

To obtain a direct indication of the strength of a repaired bond, tensile tests were conducted on unbroken and repaired glass samples. Two types of repaired samples were prepared; butt-joined and lap-shear.

Butt-joined samples were produced by scoring and breaking a 0.090 in. thick x 1 in. wide x 6 in. long glass into two pieces. Repair resin was placed on the crack surface and the two halves were pushed together and bonded in their original position.

The lap-shear samples were produced using two 0.090 in. x 1 in. x 3 in. pieces of clean, demin. water rinsed glass. These pieces were overlapped, with air side facing, and bonded together with a 1/8 in. bead of repair resin.

Samples of each of 4 different repair resins were used, following as closely as possible the manufacturer's recommended procedure.

The samples were then placed in an Instron tester and the tensile strength to break was measured for the repaired samples and an undamaged control.

Results:

Method - Tensile Strength - Butt-joined Samples
.090" x 1" Glass Bond

<u>Sample</u>	<u>Repair Resin</u>	<u>Break Lbs.</u>
1	None	5361
2	A	2017
3	B	2375
4	C	1460
5	D	1574

Method - Lap Shear Strength
.090" Glass with 1" x 0.125" Lab Jt.

<u>Sample</u>	<u>Repair Resin</u>	<u>Break Lbs.</u>
1	None	(5361)
2	A	1624
3	B	1084
4	C	1599
5	D	513

Conclusions:

The tensile strength of the repaired samples varied with repair resin used. All samples measured less than 50% that of the control.

IV. Repaired Glass - Environmental Effects

Objective:

Evaluate the resistance of repaired glass samples to end-use exposure.

Discussion:

An evaluation of repair resins was not a focus of this study, but questions were raised regarding the retention of bonding performance under end-use conditions. Although a variety of tests such as thermal and humidity cycling and weathering would be of interest, a simple solvent exposure test was conducted.

A thin film of each of 6 available repair resins were cast and cured on the clean, air side surface of 1 x 3 in. pieces of glass. The glass/resin samples were then immersed to a depth of 1/2 inch in a test liquid for 24 hours at room temperature. The three test liquids selected were; water, iso-propanol (a constituent of window washer solution) and pentane (a component of gasoline). After immersion, the samples were removed and examined.

Conclusions:

Results are reported in Table IV A (attached). Photographs of the film surfaces are included as Exhibits I -- VI. All resins appear to be affected to some degree by this solvent exposure test.

TABLE IV A

EFFECT OF SOLVENT IMMERSION FOR 24 HOURS AT AMBIENT TEMPERATURE
POLYMERIZED THIN FILM ON TIN SIDE OF DENIN WASHED GLASS

<u>ADHESIVE</u>	<u>CHECK</u>	<u>WATER</u>	<u>2-PROPANOL</u>	<u>TOLUENE</u>
A	APPEARANCE TISSUE LIFT OFF	small globules or gel-like inclusions peels yes	swollen edges peels and rolls up yes	swollen edges wipes off yes
B	APPEARANCE TISSUE LIFT OFF	cloudy peels and tears yes	slightly cloudy tears yes	swollen edge peels and tears yes
C	APPEARANCE TISSUE LIFT OFF	orange peel ok yes	swollen edge tears yes	swollen edge small globules yes
D	APPEARANCE TISSUE LIFT OFF	swollen edge peels off yes	slightly swollen edge ok yes	swollen and peeled back edge ok yes
E	APPEARANCE TISSUE LIFT OFF	slightly cloudy ok yes	ok ok with effort	swollen and peeled back edge tears yes
F	APPEARANCE TISSUE LIFT OFF	slightly cloudy ok with effort	ok ok with effort	ok ok ok

NOTES

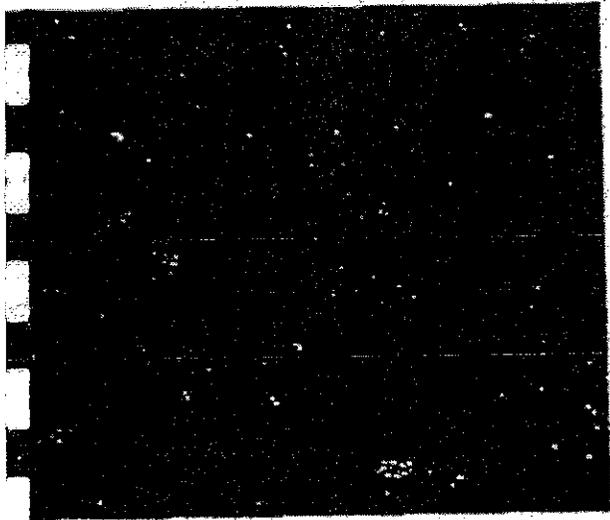
For APPEARANCE comments are for a visual look at the coating and noting what was seen.

For TISSUE a "Scotties" facial tissue was pressed on both sides of the glass with thumb and fore finger and a single wipe down the glass from no coating thru the coating to the end of the glass. Comments noted.

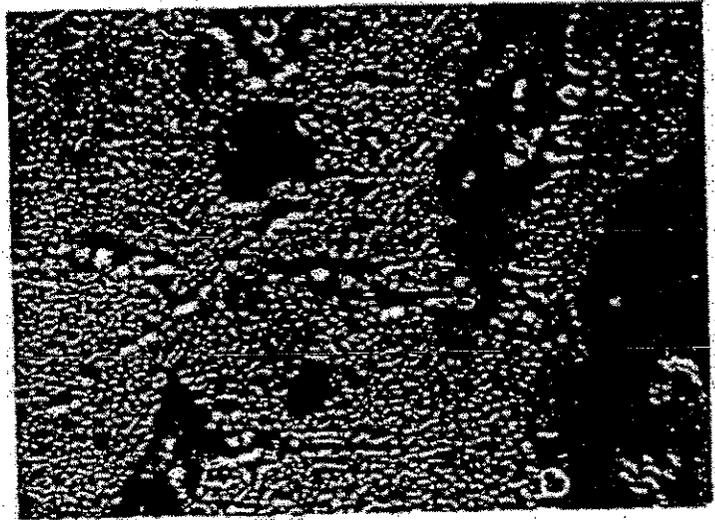
For LIFT OFF the index finger was rubbed at about a 45 degree angle relative to the coated side, attempting to "lift" off the coating. "With effort" indicates more force and more attempts were required.

24 hour immersion test
Photomicrograph (100X)

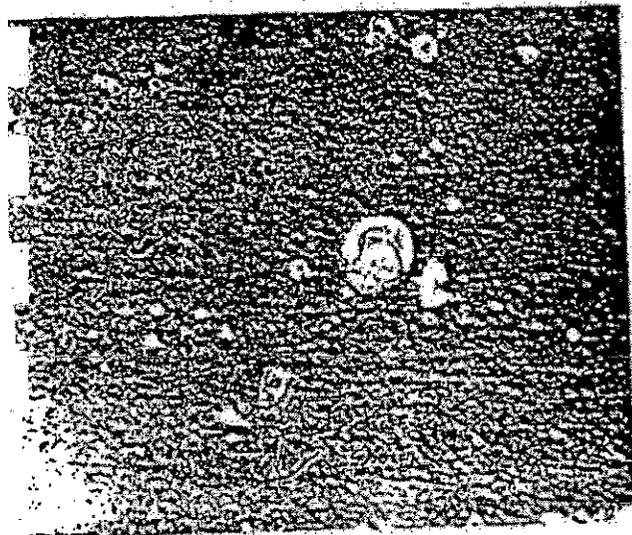
Control



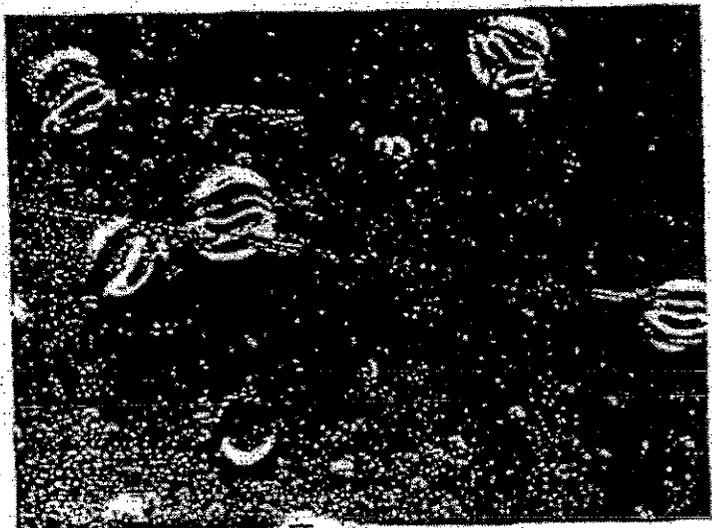
Water



Isopropanol



Toluene

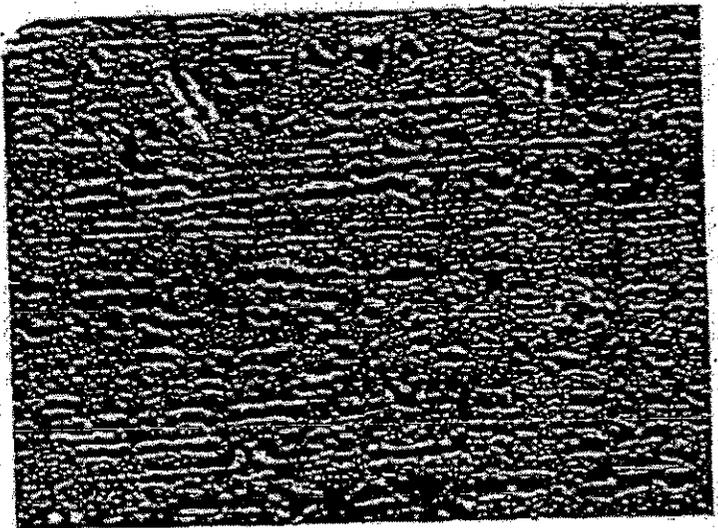


24 hour immersion test
Photomicrograph (100X)

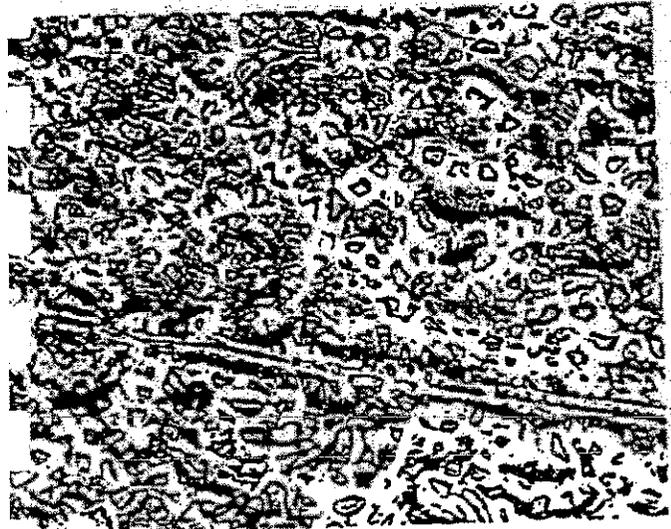
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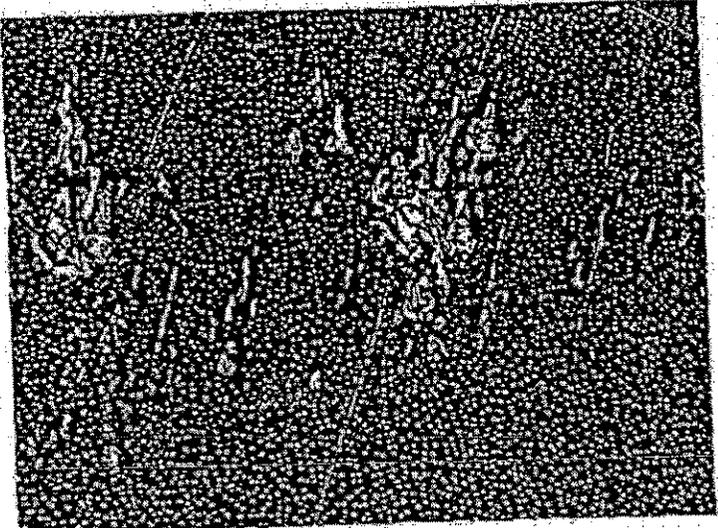
Water



Isopropanol

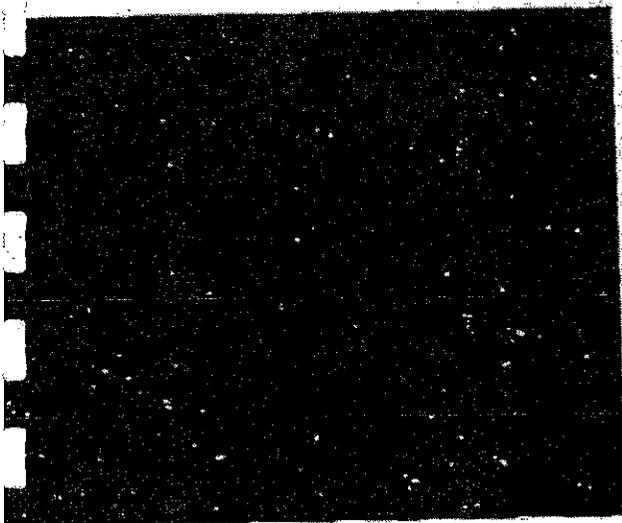


Toluene



24 hour immersion test
Photomicrograph (100X)

Control



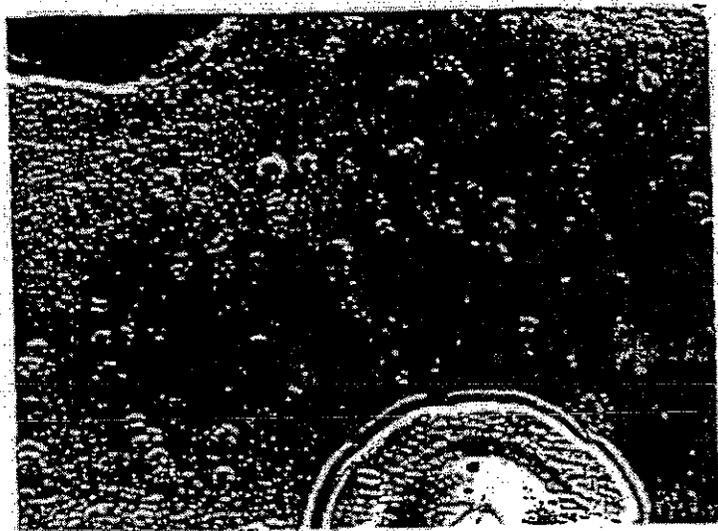
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Isopropanol



Toluene

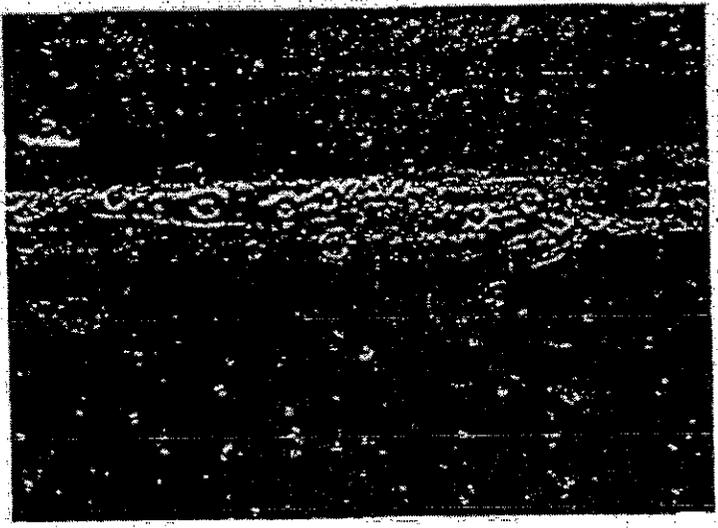


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Photomicrograph (100X)

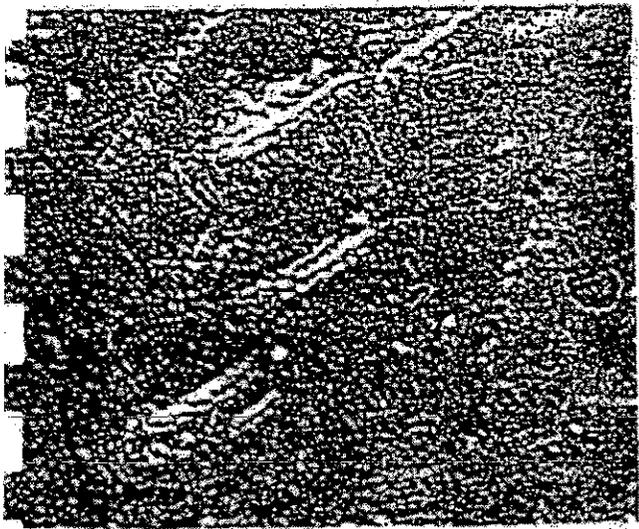
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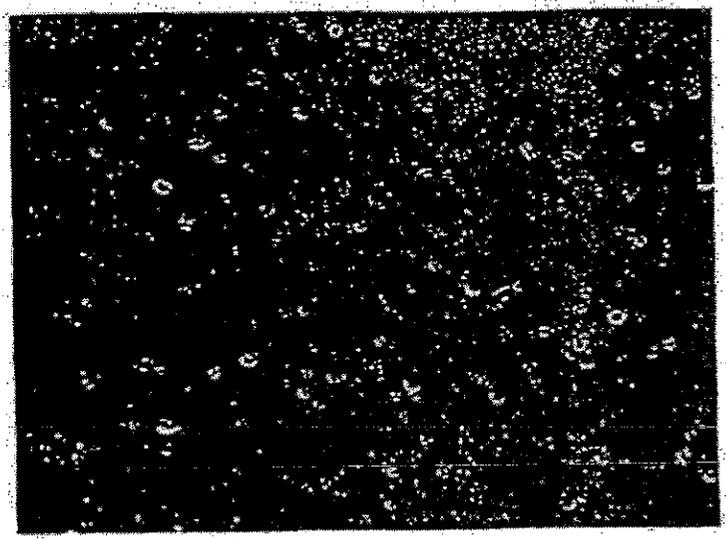
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sopropanol

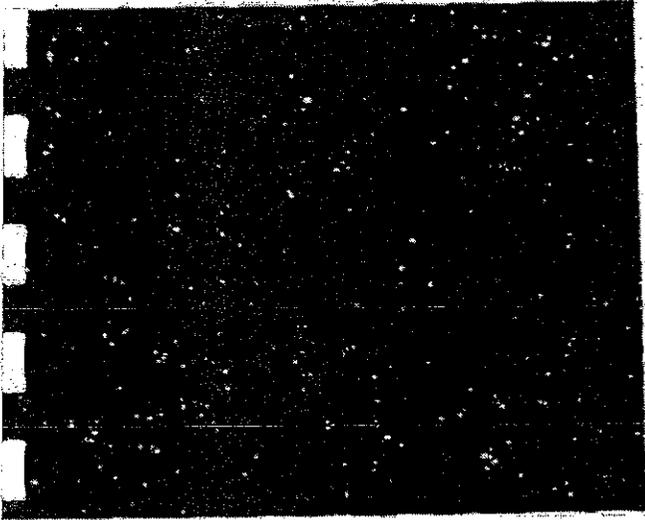


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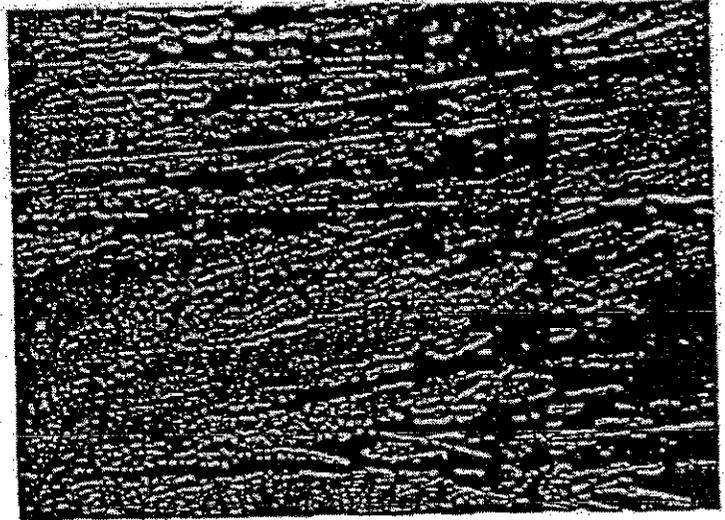


24 hour immersion test
Photomicrograph (100X)

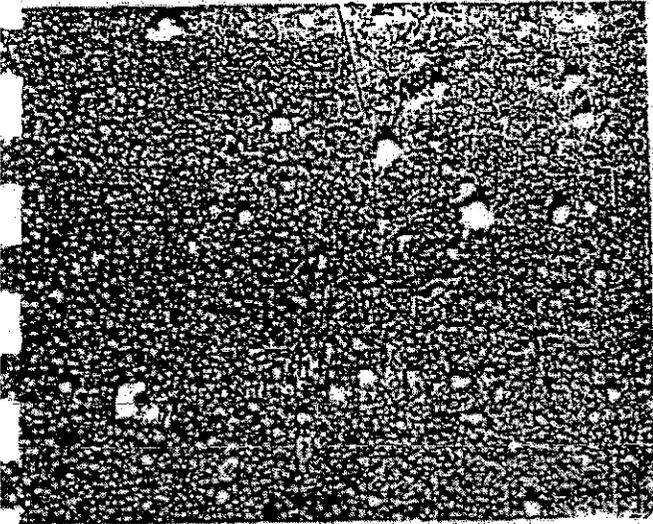
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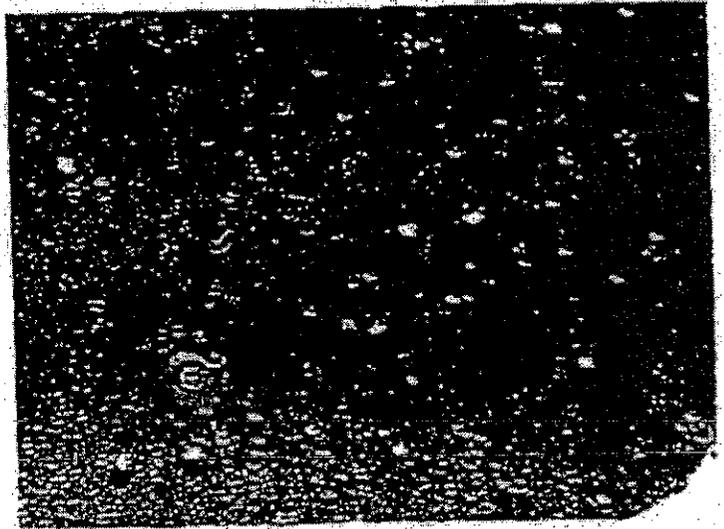
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Isopropanol

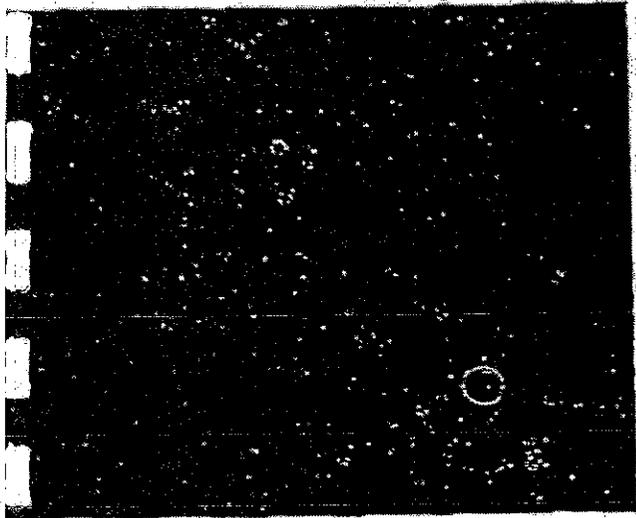


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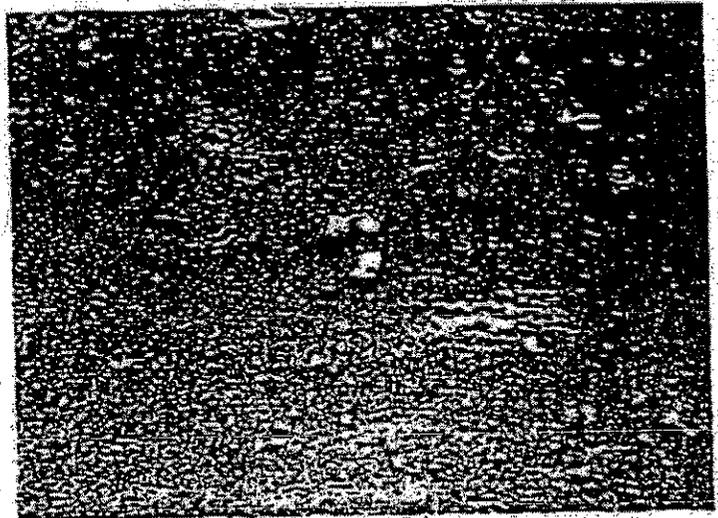


24 hour immersion test
Photomicrograph (100X)

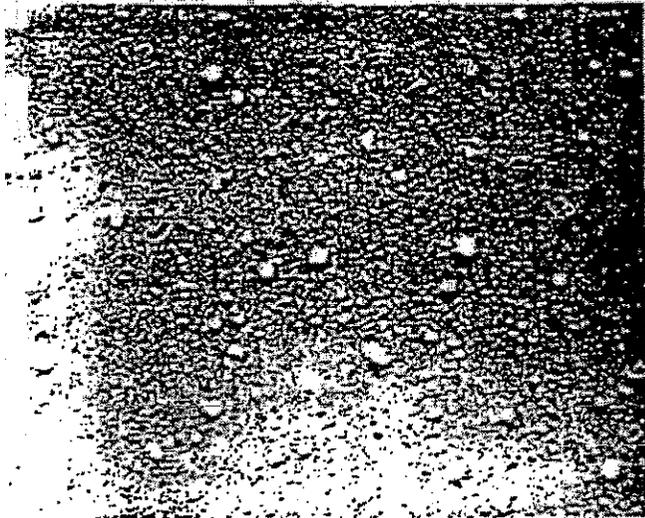
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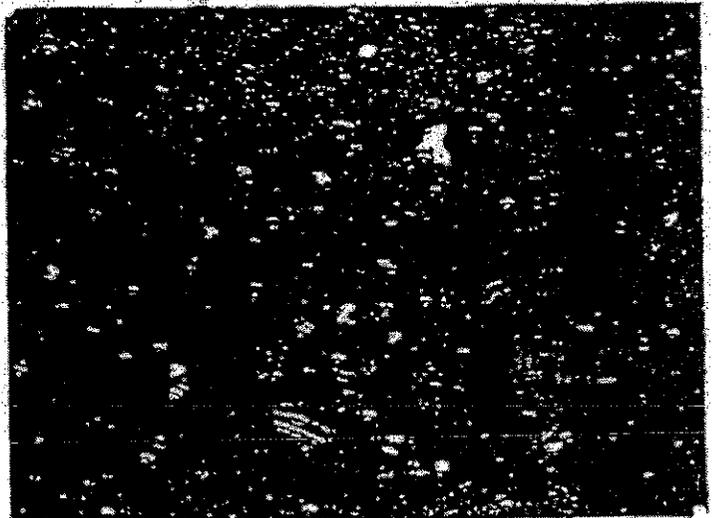
Water



Isopropanol



Toluene



V. Repaired Glass - Humidity Effect

Objective:

Evaluate retention of repaired glass bond strength after exposure to heat and humidity.

Discussion:

Based on the solvent immersion tests described above, it is of interest to determine what effect heat and humidity might have on resin bond strength.

Two resin samples were selected from among the six available (Table IV A) and were used to produce butt-joined repaired glass pieces as described in Section III. Repaired samples were then subjected to coffin (52°C, 95%RH) exposure for 24 hours and then tensile tested to failure.

Results:

V. Strength Tests - Repaired Glass

Method: Tensile Strength - Butt-joined Breaks
.090" x 1" Repaired Bond
24 Hr. Humidity Exposure

<u>Sample</u>	<u>Repair Resin</u>	<u>Exposure</u>		<u>Average Break Lbs.</u>
		<u>Temp. °C</u>	<u>RH%</u>	
1	None			(5361)
2	A	Ambient 52	95	3183 2485
3	E	Ambient 52	95	3136 2292

Conclusions:

After exposure to high temperature and humidity, tensile strength of the repaired samples tested were reduced by 20-30% after only 24 hours. Additional exposure testing would be appropriate.

VI. WS REPAIR: MOISTURE INTRUSION/GLASS RETENTION

Objective:

Conduct tests to demonstrate the effect that moisture intrusion through a cracked windshield - where the break extends to the plastic (PVB) interlayer - would have on glass/interlayer adhesion and the potential for glass dislodgement on impact.

Discussion:

PVB interlayer has the unique ability, due in part to its moisture sensitive nature, to provide a windshield with a moderate and controlled level of adhesion to glass. This controlled interlayer/glass adhesion is low enough to give the windshield its' energy-absorbing, high penetration resistant properties and high enough to avoid delamination and glass dislodgement on impact. Moisture is carefully controlled during windshield assembly to obtain the proper windshield adhesion level. Should the interlayer be exposed to high humidity or moisture through a crack or break in the windshield, the interlayer/glass adhesion level could decrease and delamination or glass dislodgement could occur.

To demonstrate the effect of moisture on windshield performance, a series of laminates were prepared in the laboratory with interlayers that had been exposed over a range of relative humidities.

Laminates were impacted at +22°C and -20°C with a 1/2 pound ball from 30 feet by the method described in ANSI Z26.1-1990 (Test 5.12). Glass dislodged from the side opposite impact was collected and weighed. Laminate moistures and adhesion (pummel) were measured and recorded.

Results:

EXPOSURE % RH	INTERLAYER % H2O	PUMMEL	GLASS DISLODGED (GMS.)	
			+22°C	-20°C
10	0.22	9/9	2.01	2.19
22	0.49	6/6	1.70	0.81
34	0.78	3/3	1.98	1.87
42	0.95	4/3	2.20	1.45
50	1.40	2/2	3.71	2.23
65	2.01	0/0	46.5	151.4
80	3.84	0/0	23.8	138.7

Conclusions:

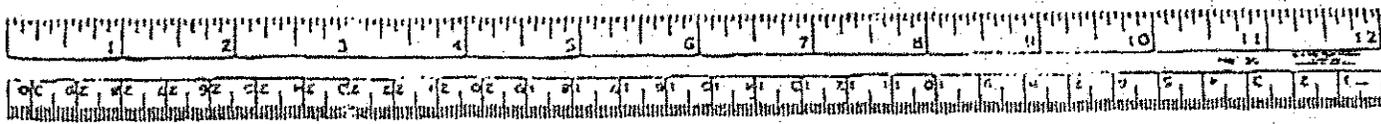
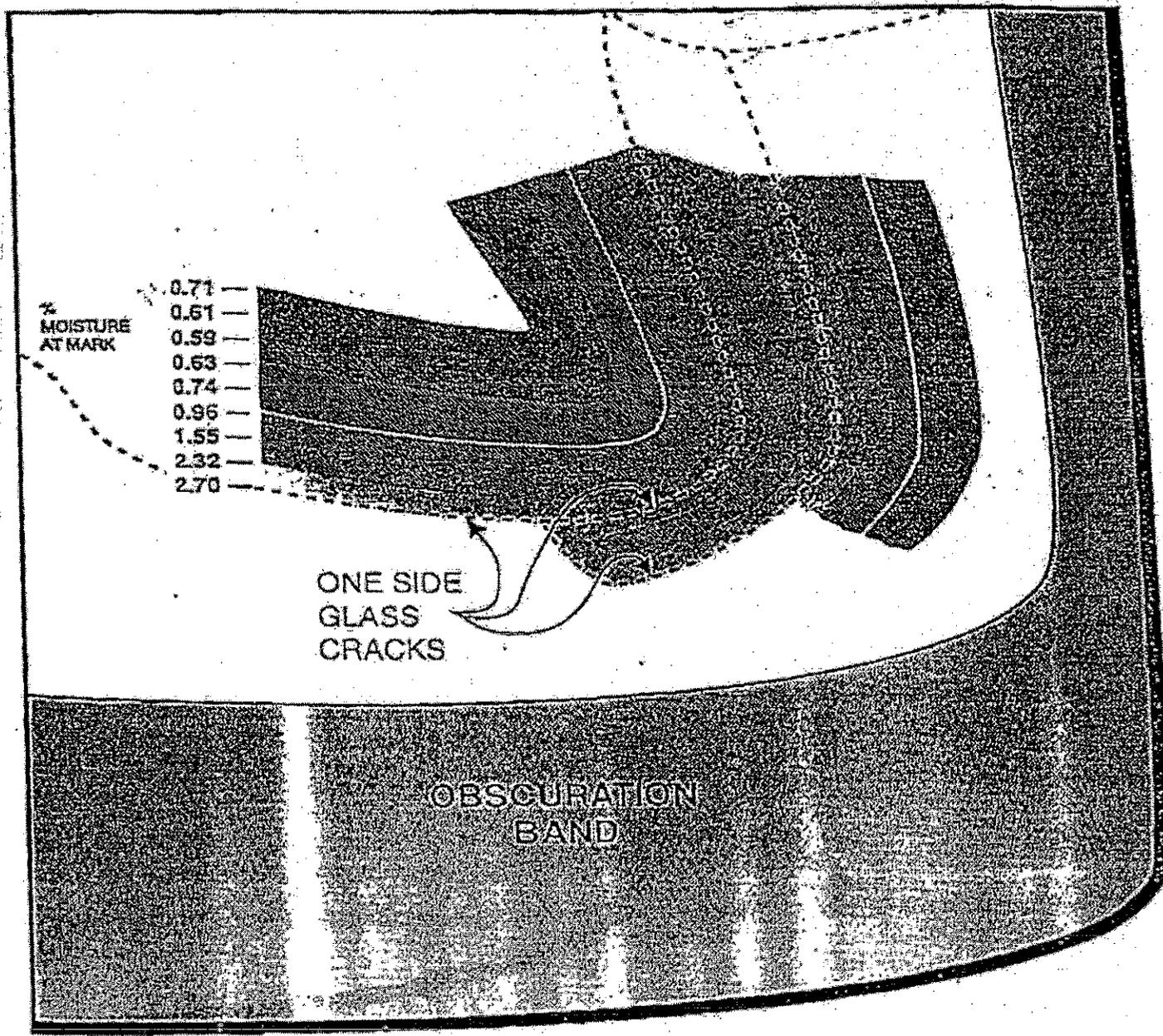
When exposed to greater than 50% relative humidity, interlayer moistures can increase to 1% or more with an accompanying drop in interlayer/glass adhesion. In such cases, a large increase in the amount of glass dislodgement on impact can occur.

To illustrate the extent of interlayer moisture pickup that can occur prior to repair, a cracked windshield sample was subjected to a 2-week exposure at 53°C, 100% RH followed by 1 week of dry-out at 22°C, 30%RH. This cycle was repeated three times and laminate moisture was measured by standard IR spectral technique. The results of this exposure, a "moisture map", is shown in Figure VI A (attached). As can be seen, the area with moisture high enough (low adhesion) to lead to glass dislodgement on impact extends nearly 1 inch inward from the crack line. (Although it is not a point of issue here, the ANSI Z26.1 (test 5.12) limits bare interlayer to 1 in² opposite impact and 3 in² total).

FIGURE - CRACKED WINDSHIELD/MOISTURE INTRUSION
VIA

TEST CONDITIONS:

- 2- WEEK COFFIN @ 53°C; 100% RH
- 1- WEEK DRY OUT @ 22°C; 30% RH
- 3 CYCLES



Farrell, Michael

From: Tucker, Robert J.
Sent: Tuesday, February 23, 2010 4:17 PM
To: Farrell, Michael; Ezzie, Joseph E.
Subject: Carmody/Derian MIL
Attachments: NGA Test.PDF

Mike and Joe,

I just spoke with Doug and the exhibits have been revised for the Carmody/Derian Motion. Here is how they should be:

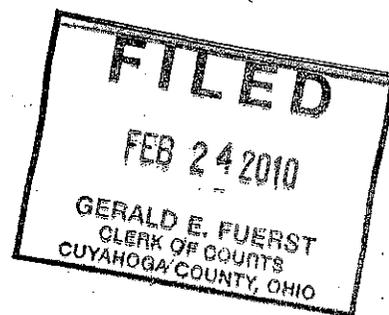
- A - Carmody Report
- B - Carmody Deposition Excerpts
- C - Derian Report
- D - Derian Deposition Excerpts
- E - NGA Test (the full document is attached)

We have removed the ROLAGS document as an exhibit and merely referred back to the Appendix for it. Therefore, it can be removed from the exhibits Joe is bringing up with him. The exhibits for the Hildebrand motion remain the same. I will do an acc (accuracy for you Mike) check for the depo cites in the Carmody/Derian motion and let you know if there are any changes.

Rob

2/23/2010

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO



MICHAEL E. CULLEN, *et al.*

Plaintiffs,

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant.

CASE NO. 555183

JUDGE DAVID T. MATIA

MOTION OF DEFENDANT STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY TO EXCLUDE THE
TESTIMONY AND REPORT OF PETER J. HILDEBRAND

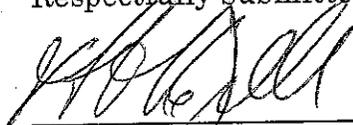
State Farm Mutual Automobile Insurance Company ("State Farm") moves to exclude the testimony of Plaintiff's proposed expert Peter J. Hildebrand. In the guise of an insurance "claims professional," Mr. Hildebrand provides testimony that merely mimics Plaintiff's interpretation of the insurance contract, Plaintiff's view of the facts, and Plaintiff's desired legal conclusions. Mr. Hildebrand's testimony should be barred by the Court for the following primary reasons:

- Mr. Hildebrand's interpretation of State Farm's contractual duties is a judicial, not expert, function.
- Mr. Hildebrand's interpretation of Ohio law and his opinions that State Farm acted "contrary" to its legal duties are impermissible legal and ultimate conclusions.
- Mr. Hildebrand's opinions do not satisfy Evid. R. 702 because he does not opine on matters beyond the knowledge of a lay person and because his testimony is not helpful to the trier of fact.
- Mr. Hildebrand's opinions, in "implying" duties not found in the insurance contract, violate the parol evidence rule.

Mr. Hildebrand's testimony is also generally unreliable because it passes judgment on other persons' knowledge and state of mind and because it rests on the inadmissible testimony of Plaintiff's other proposed experts.

Mr. Hildebrand is literally a lawyer-advocate in expert's clothing - his sole purpose is to say that State Farm "did" everything Plaintiff alleges. Mr. Hildebrand's testimony and report should be excluded.

Respectfully submitted,



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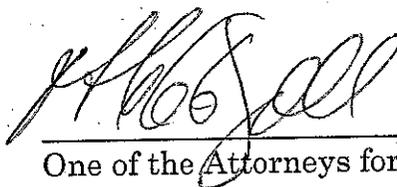
Attorneys for Defendant State Farm
Mutual Automobile Insurance Company

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and accurate copies of the foregoing were served upon the following by email and by hand-delivery this 24th day of February, 2010 on:

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One of the Attorneys for Defendant

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

MICHAEL E. CULLEN, *et al.*

Plaintiffs,

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant.

CASE NO. 555183

JUDGE DAVID T. MATIA

**MEMORANDUM IN SUPPORT OF DEFENDANT STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY'S MOTION TO EXCLUDE THE
TESTIMONY AND REPORT OF PETER J. HILDEBRAND**

I. INTRODUCTION

State Farm Mutual Automobile Insurance Company ("State Farm") moves to exclude the testimony of Plaintiff's proposed expert Peter J. Hildebrand. In the guise of an insurance "claims professional," Mr. Hildebrand, who is an attorney, provides testimony that merely parrots Plaintiff's counsel's various arguments but he does not offer any opinion that is the proper subject of expert testimony under Ohio law. Mr. Hildebrand's testimony should be barred by the Court for the following primary reasons:

- Mr. Hildebrand's interpretation of State Farm's contractual duties is a judicial, not expert, function.
- Mr. Hildebrand's interpretation of Ohio law and his opinions that State Farm acted "contrary" to its legal duties are impermissible (and incorrect) legal and ultimate conclusions.
- Mr. Hildebrand's opinions do not satisfy Evid. R. 702 because he does not opine on matters beyond the knowledge of a lay person and because his testimony is not helpful to the trier of fact.
- Mr. Hildebrand's opinions, in "implying" duties not found in the insurance

contact, violate the parol evidence rule.

Mr. Hildebrand's testimony is also generally unreliable because it is belied by his experience, it passes judgment on other persons' knowledge and state of mind, and because it rests on the unreliable and inadmissible testimony of Plaintiff's other proposed experts.

In short, Mr. Hildebrand is literally a lawyer-advocate in expert's clothing – his sole purpose is to say that State Farm “did” everything that Plaintiff alleges. Mr. Hildebrand's testimony should not be allowed.

II. BACKGROUND

A. Mr. Hildebrand

Mr. Hildebrand is a Wisconsin attorney who operates an expert consulting business in Marietta, Georgia. Mr. Hildebrand has self-proclaimed expertise in claims and legal issues relating to coverage, claim handling, and bad faith.

B. Mr. Hildebrand's Report and Testimony

In the guise of what some undefined “claims professional” “would conclude,” Mr. Hildebrand renders an opinion on literally every disputed issue of fact and law in this matter in his 28-page, single-spaced report. The sole basis for Mr. Hildebrand's testimony is his experience in the insurance industry, yet his report differs little in tone and substance from Plaintiff's filings in this matter, such as Plaintiff's merits-focused “Supplement to Motion for Class Certification.”

While Mr. Hildebrand's opinions are many, he issues five broad or core opinions, which are no more than his subjective interpretations of Plaintiff's insurance contract, deposition testimony, opinions on ultimate issues (including State Farm's “knowledge”), legal conclusions, or some combination thereof. These opinions are:

1. State Farm's insurance policy allegedly requires payment to policyholders for windshield replacement, subject to the deductible, regardless of the extent of damage, and notwithstanding the windshield repair provision in the policies. Moreover, State Farm is allegedly obligated to pay to restore vehicles to pre-loss condition in all situations, notwithstanding the policy provisions to the contrary.
2. The policy allegedly provides a "cash out" option permitting policyholders to simply take a check, instead of limiting State Farm's contractual liability to payment to actually repair or replace a damaged windshield; (E.g., Report of Peter J. Hildebrand ("Hildebrand Report") at 16, attached as Exhibit A).
3. Because of the alleged deficiencies concerning windshield repairs, and their alleged inability to restore the vehicle to its pre-loss condition, State Farm improperly handled claims under its policies.
4. Through its scripting, State Farm allegedly undertook a program to sell insureds on the repair option under the Car Policy and concealed information pertinent to the use of policy benefits all to allegedly save State Farm money.
5. State Farm's systematic and uniform claims handling approach that allegedly pushed policyholders towards a less costly windshield repair option without explanation of the full policy benefits was contrary to its duty of good faith and fair dealing and its fiduciary duties.

(Hildebrand Report at 15 - 27).

Mr. Hildebrand's Report and testimony are facially improper. They do not bear on whether common questions predominate under Rule 23(B)(3), the class certification inquiry now facing the Court. Mr. Hildebrand's opinions, instead, focus solely on whether Plaintiff should prevail on his claims, a premature question that is not at issue with regard to Plaintiff's motion for class certification.

Moreover, once exposed to scrutiny, Mr. Hildebrand's opinions, all of which lack any support or foundation, are exposed as little more than a repackaging of Plaintiff's claims covered with the thin veneer of what a "claim professional" "would conclude." For example, his report thunders over the "\$30,000,000 in [national] savings" that

State Farm achieved in its “blatant disregard of their [sic] insured’s rights” and the “institution-wide obsession with the profit motive” (Hildebrand Report at 27). But under questioning, Mr. Hildebrand admits that he is not a damages expert and that he just “review[ed] *some* of the documents which reflected *some* of the *average* paid numbers . . . on *some* of the documents that were produced to *just give some sample indications.*” (Deposition of Peter J. Hildebrand (“Hildebrand Dep.”) at 207, excerpts attached as Exhibit B) (emphasis added). He also bases much of his report on the alleged fact that repairs are unsafe (e.g., Hildebrand Report at 13) and do not restore vehicles to their pre-loss condition (e.g., *id.* at 15), but admits that this is “technical” information outside his expertise (Hildebrand Dep. at 122), and that he relied upon Plaintiff’s other experts – Mr. Carmody and Mr. Derian – in reaching this conclusion. (Hildebrand Report at 13)

Mr. Hildebrand’s deposition is primarily a series of prolonged soliloquys where he tries to avoid answering questions, punctuated by approximately 420 objections – basically one for every question asked – from Plaintiff’s counsel. Mr. Hildebrand’s efforts to avoid answering questions during his deposition were impressive. For example, the question - “As a mutual company, doesn’t State Farm have a responsibility to all of its policyholders to manage costs?” – generated a four-page back and forth where Mr. Hildebrand tried to avoid and then ultimately **refused** to answer the question. (Hildebrand Dep. at 201-04). In fact, while Mr. Hildebrand would often avoid answering probing questions about the actual content of the insurance contract by repeated stating “the contract speaks for itself” (Hildebrand Dep. at 10), he showed no hesitation to speak for the contract when it suited his purposes. (Hildebrand Dep. at 24-27) (finding “inherent,” yet unstated, obligations that are implied in the contact). Every

indication is that Mr. Hildebrand's inadmissible opinions are not reliable expert testimony, but simply a product tailored to Plaintiff's case theories.

III. LAW AND ANALYSIS

As with all evidence, "trial courts have been deemed 'gatekeepers' tasked with screening" expert opinions "for relevancy and reliability." *Natoli v. Massillon Cmty. Hosp.* (5th Dist. 2008), 179 Ohio App.3d 783, 790.

Evidence Rule 702 governs the admissibility of expert testimony, stating:

A witness may testify as an expert if all of the following apply:

(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

(C) The witness' testimony is ***based on reliable scientific, technical, or other specialized information.***

Ohio R. Evid. 702 (emphasis added). "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing." Ohio R. Evid. 703. Further, "to be admissible, the expert testimony must assist the trier of fact in determining a fact issue or understanding the evidence." *Id.* (citing Staff Notes to Evid. R. 702); *State v. Boston* (1989), 46 Ohio St.3d 108; *State v. Bidinost* (1994), 71 Ohio St.3d 449).

Determining the relevance and admissibility of expert opinion at the class certification stage can and should be performed before reaching a decision on class certification. *In re Hydrogen Peroxide Antitrust Litig.* (C.A.3, 2008), 552 F.3d 305, 323 ("Weighing conflicting expert testimony at the certification stage is not only permissible;

it may be integral to the rigorous analysis Rule 23 demands.”); *Bell v. Ascendant Solutions, Inc.* (C.A.5, 2005), 422 F.3d 307, 314 n.13 (court should at least consider reliability of expert testimony on class certification issues); *Blades v. Monsanto Co.* (C.A.8, 2005), 400 F.3d 562, 575 (court may need to resolve expert disputes at the class certification stage).

A. Mr. Hildebrand’s Opinions Are Inadmissible.

1. Interpreting State Farm’s Duties Under The Insurance Contract Is A Judicial Function Outside The Province Of Expert Testimony.

Mr. Hildebrand’s opinions are rife with references to State Farm’s “obligations” under the insurance policy. Insurance policies, however, are contracts and their interpretation is a matter of law for the court. *E.g., Sharonville v. Am. Employers Ins. Co.* (2006), 109 Ohio St.3d 186, 187. Thus, State Farm’s contractual obligations are for the Court, not Mr. Hildebrand, to decide. Mr. Hildebrand – who is neither licensed to practice law in Ohio nor knowledgeable about Ohio law (Hildebrand Dep. at 13) – may not pass judgment on the meaning of terms in the insurance contract.

“[T]he construction of unambiguous contract terms is **strictly** a judicial function; the opinions of percipient or expert witnesses regarding the meaning(s) of contractual provisions are irrelevant and hence inadmissible.” *Ruschel v. Nestle Holdings, Inc.*, 8th Dist. No. CV-488932, 2008 Ohio 2035, at ¶26 (emphasis added), citing *Sheet Metal Workers, Local Union No. 24 v. Architectural Metal Works, Inc.* (C.A.6, 2001), 259 F.3d 418, 424; *Wells v. C.J. Mahan Const. Co.*, 10th Dist. Nos. 05AP-180 & 183, 2006 Ohio 1831, at ¶22-23 (“Appellee argues that since she is not attempting to vary the terms of the contract, her expert testimony is admissible. However, where the terms of the agreement are clear and unambiguous, this court has specifically held

that expert testimony interpreting those terms is improper.”); *Nicholson v. Turner/Cargile* (10th Dist. 1995), 107 Ohio App.3d 797, 803 (“Plaintiffs . . . rely on their expert engineer who interprets the contracts to impose such a duty on defendants. The contract terms, however, are unambiguous and control; any expert opinion interpreting them has no effect.”).

All of Mr. Hildebrandt's opinions are based, in whole or part, on *his* interpretation of the insurance contract:

- [I]nsurance policies issued by State Farm include coverage for the full payment of a windshield replacement regardless of the extent of damage to the windshield[,] . . . State Farm's claims handling[,] whereby they [*sic*] failed to pay to restore vehicles to their pre-loss condition[,] is contrary to their [*sic*] contractual obligations[,]” (Hildebrand Report at 15);
- The policy provides a cash out option permitting policyholders to simply take a check, contrary to the language of the policy that limits State Farm's liability to pay to repair or pay to replace damaged property; (*E.g., id.* at 16);
- [State Farm's] unilateral approach to arrange for "patching" of repaired windshields was inconsistent with their claim handling duties under the policy. (*Id.* at 17);
- State Farm intentionally undertook a program to sell insureds on the repair option under the Car Policy and in effect concealed information pertinent to the use of policy benefits. (*Id.* at 21);
- [P]olicyholders[] . . . were not fully compensated under the insurance policies. (*Id.* at 25).

As stated by the Eighth District, explanation of contractual terms is a “matter of law for the Court and ‘expert’ explanation is unnecessary and unwarranted.” *Ruschel*, 2008 Ohio 2035, at ¶26. Therefore, Mr. Hildebrand's opinions regarding State Farm's contractual obligations as to, among others, pre-loss condition and payment in cash to policyholders for the cost of replacement less their deductible – pages 15, 17, 21, and 25 of his Report – should be stricken.

2. Interpreting Ohio Law And Rendering Opinions That State Farm Acted "Contrary" To Its Legal Duties Are Impermissible Legal and Ultimate Conclusions.

"[A]n expert's interpretation of the law should not be permitted, as that is within the sole province of the court." *Wagenheim v. Alexander Grant & Co.* (10th Dist. 1983), 19 Ohio App.3d 7, 19 (emphasis added). Despite this axiom, Mr. Hildebrand repeatedly opines on the purported existence of contractual duties based solely on his interpretation of the insurance policy. These are impermissible legal conclusions solely within the Court's province. And not only does Mr. Hildebrand improperly opine on the existence of contractual duties, he further opines that State Farm failed to meet these made-up duties. These ultimate conclusions are also improper because they are premised on Mr. Hildebrand's improper legal conclusions, and on his opinions on the state of mind of State Farm and others. See Section III(B).

Mr. Hildebrand's report is rife with legal and ultimate conclusions:

- "State Farm did not disclose all provisions of the insurance contract pertinent to [Plaintiff's] claim [contrary to the OAC 3901-1-54(E), (1)]." (Hildebrand Report at 20).
- "State Farm failed to meet the minimum standards for handling claims as representative by the Ohio Administrative Code." (*Id.* at 21).
- "State Farm [acted] . . . contrary to the requirements of the [sic] Section 3901 of the Ohio Administrative Code." (*Id.* at 22).
- (*Id.* at 26) (identifying eight different instances where State Farm's "wrongful practices" allegedly violated OAC 3901).
- "[N]o reasonable person would deny that most of these transgressions [of OAC 3901] . . . were knowingly committed . . . as to indicate a general business practice," (*Id.* at 23).
- "These violations of Ohio law would have occurred . . . for the entire class." (*Id.* at 24).

- “State Farm’s concealment of information was unreasonable and in reckless disregard of their insureds’ interests.” (*Id.* at 26).
- “State Farm’s conduct was knowing, deliberate, willful, wanton, and in conscious and reckless disregard of the interests of [Plaintiff] individually and the class members.” (*Id.*).
- State Farm “violat[ed] [its] duty of good faith and fair dealing and their fiduciary duties towards [its] insureds.” (*Id.* at 27).

Whether a duty exists, however, is a matter of law for the Court – not for an expert. *Douglass v. Salem Cmty. Hosp.* (7th Dist.), 2003 Ohio 4006, at ¶37 (“[M]any of [plaintiff’s expert’s] statements appear to be crafted in such a way as to create some sort of duty on the part of the [defendant]. **This is, of course, improper** as the existence of a legal duty is a question of law, not of fact.”) (emphasis added).

Just as the court found in *State Nat’l Ins. Co.*, Mr. Hildebrand’s testimony encroaches on matters for “the jury to decide, and conclusions as to the ultimate issues are better reserved for closing arguments.” *State Nat’l Ins. Co. v. Access General Agency Inc.* (N.D.Ga. Aug. 23, 2007), No. 1:04-cv-02594, Slip. Op. at 4-6 (copy attached as Exhibit C); see also, *Wagenheim*, 19 Ohio App.3d at 19 (“[The expert’s] testimony as to the existence and breach of a duty owed . . . , was an opinion relating to the law and was prejudicial to the rights of the defendant. Therefore, the trial court erred in allowing such testimony to be admitted.”).

3. **Mr. Hildebrand’s Opinions Do Not Satisfy Evid. R. 702.**

Mr. Hildebrand’s opinions and testimony do not relate to matters outside the knowledge of a fact finder and his opinions are not helpful to the trier of fact. Therefore, Mr. Hildebrand’s testimony should be excluded under Evid. R. 702.

Evid. R. 702(A) requires that expert witness testimony “either relates to matters

beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons.” Contract terms, however, are to be given their plain and ordinary meaning. *Miller v. Geico Indem. Co.*, 8th Dist. No. 89603, 2008 Ohio 791, ¶15. And insurance coverage is determined by reasonably construing the contract “according to the ordinary and commonly understood meaning of the language used.” *King*, 35 Ohio St.3d at 211; accord *Miller v. Geico Indem. Co.*, 8th Dist. No. 89603, 2008 Ohio 791, ¶15 (“It is well established that when the language in an insurance policy is clear and unambiguous, the court must enforce the contract as written and give the words their plain and ordinary meaning.”).

Unsurprisingly, it does not take an expert to opine on the “plain or ordinary meaning” of words or the “ordinary and commonly understood meaning of the language used.” The ordinary or commonly understood is not beyond the knowledge or experience of lay persons; thus, Mr. Hildebrand’s testimony fails to satisfy Evid. R. 702(A).

Moreover, Mr. Hildebrand’s testimony is not helpful to the factfinder. Instead, its sole purpose is to render opinions on the ultimate issues to be decided - this can “hardly be viewed as helpful to the [fact finder].” *Woods v. Lecureux*, 110 F.3d 1215, 1221 (C.A.6, 1997). Moreover, Mr. Hildebrand’s opinions rest on his impermissible and incorrect interpretations of the contract and his admittedly uninformed (and incorrect) interpretations of Ohio law and the states of mind of others. Thus his opinions, which rest on these incorrect premises, are fundamentally flawed and even less helpful to the fact finder.

The Staff Note to Evid. R. 704, which provides that opinion evidence on an ultimate issue is not excludable *per se*, states, in relevant part, as follows:

[Evid. R. 704] The rule must be read in conjunction with Rule 701 and Rule 702, each of which requires that opinion testimony be helpful to, or assist, the trier of the fact in the determination of a factual issue. Opinion testimony on an ultimate issue is admissible if it assists the trier of fact, otherwise it is not admissible.

Mr. Hildebrand's testimony, which opines about the existence of a duty (*e.g.*, Hildebrand Report at 15) and that State Farm breached the duty (*id.*), renders an opinion on what State Farm knew (*id.* at 17), opines that State Farm's conduct was misleading (*id.*, at 22), and that State Farm knowingly committed illegal acts as a general business practice (*id.* at 23), to name just a few, is not helpful to any fact finder. *Woods*, 110 F.3d at 1221. It does not provide facts from which a fact finder can reach a conclusion. Instead, it is the conclusion. "Testimony such as [Mr. Hildebrand's], which attempts to tell the jury what result to reach and which runs the risk of interfering with a [] court's jury instructions, hardly can be viewed as being helpful to the jury." *Id.*; accord *Cook ex rel. Estate of Tessier v. Sheriff of Monroe County, Florida*, 402 F.3d 1092, 1111 (C.A.11, 2005) ("Proffered expert testimony generally will not help the trier of fact when it offers nothing more than what lawyers for the parties can argue in closing arguments.").

Mr. Hildebrand's testimony opining that State Farm had a duty, breached that duty, and did so knowingly, is even more egregious as it "stack[s] inference upon inference" and thus is "more likely to be unhelpful to the trier of fact." *Woods*, 110 F.3d at 1221. ("[B]y expressing the opinion that [the defendant] was deliberately indifferent, [the expert] gives the false impression that he knows the answer to this inquiry, which depends on [the defendant's] mental state. For a witness to stack inference upon inference and then state an opinion regarding the ultimate issue is even more likely to be unhelpful to the trier of fact.").

As stated by the Ohio Supreme Court, "it is within the sound discretion of a trial court to refuse to admit the testimony of an expert witness on an ultimate issue where such testimony is not **essential** to the jury's understanding of the issue and the jury is capable of coming to a correct conclusion without it." *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 148-149 (emphasis added) (upholding the exclusion of expert witness on the ultimate issue because the fact finder "was quite capable of understanding the instructions and of reaching a correct conclusion without the assistance of . . . [the] expert.").

Mr. Hildebrand's testimony is not helpful. A fact finder is perfectly capable of reaching the same conclusions, based on his or her own direct review of the admissible evidence and the plain and ordinary meaning of the words in the contract. The pointed gloss of Mr. Hildebrand's opinions is unnecessary.

4. "Implying" Contractual Duties Not Found In The Contract Constitutes Impermissible Parol Evidence.

The terms of Plaintiff's insurance coverage were spelled out in a written insurance policy. "Where the terms of an insurance policy are clear and unambiguous, parol evidence is inadmissible to interpret its terms." *Currier v. Penn-Ohio Logistics*, (11th Dist.), 2010 Ohio 195, at ¶35. Mr. Hildebrand repeatedly stated throughout his deposition that "the contract speaks for itself." (*E.g.*, Hildebrand Dep. at 10). Because the contract speaks for itself, Mr. Hildebrand's testimony interpreting the contract is unnecessary and improper.

Mr. Hildebrand not only takes great liberty in adding his own gloss to policy terms, in violation of the parol evidence rule, he also invents and implies terms that simply are not in the contract:

Q. You do not find the words "pre-loss condition" under cost of repair determined by agreement or by competitive bid, do you?

MR. HURST: Objection.

A. Well, I think **it's inherent from the policy** that a competitive bid or a cost of repair is to restore the vehicle to its pre-loss condition, so the specific wording is under 3, but it's inherent from 1 and 2 that the wording should apply as well.

Q. **Are you telling the court the words "pre-loss condition" appear under 1 and 2?**

A. **No, I didn't say that.**

Q. Okay. You're saying it's inherent. The words should be implied under 1 and 2?

A. Well, when you're agreeing to a cost to repair based upon a number, you have to -- **the repair itself inherently should be to the pre-loss condition.**

(Hildebrand Dep. at 25-26; *see also id.* at 29) ("A reasonable interpretation of that would be they're going to return it to the pre-loss condition.")

Mr. Hildebrand not only finds unspoken or "inherent" obligations hidden in the contract, he also implies obligations based on what **he** believes to be the nature of an indemnity contract:

Q. If a policyholder requested or asked for a check for the value of a replacement windshield, is it your opinion that State Farm would be required under the policy to give that policyholder a check without replacing the windshield?

A. Yes.

Q. And what do you base that upon?

A. Because it's a policy of indemnity. It's a first party indemnity contract, which means that the policyholder as a general rule has the right to be indemnified for the replacement cost.

Q. Does the policy anywhere state that State Farm must pay for the cost of replacing a damaged part such as a windshield that is not actually replaced?

MR. HURST: Objection. You can answer.

A. Well, it says right there replace the property or part. It doesn't say it has to be -- you pay to replace the property or part. It doesn't say that they have to replace the part. You have to pay the cost of that property or part.

Q. **That's your interpretation of pay to repair or pay to replace?**

A. **Right, because it's an indemnity contract.**

(Hildebrand Dep. at 41-42) (emphasis added). Mr. Hildebrand opines that State Farm is, at all times and under all circumstances, obligated to provide their policyholders with cash sufficient to cover the *value* of a windshield replacement based only on his view of the nature of indemnity contracts, and notwithstanding the fact that he cannot identify any provision in Plaintiff's insurance policy requiring such payments.

As Mr. Hildebrand declared, "the contract speaks for itself." (*E.g.*, Hildebrand Dep. at 10). Thus, his testimony interpreting the contract is unnecessary. Mr. Hildebrand's various interpretations of the insurance contract, which vary the contract's terms and admittedly imply terms and obligations not actually found in the contract, violates the parol evidence rule. His opinions and testimony regarding implied contractual duties should be stricken.

B. Mr. Hildebrand Improperly Renders Opinions On The State Of Mind Of State Farm And Others.

Mr. Hildebrand is not a behaviorist. He has no insight into the motivations or thought processes of others. (*See* Hildebrand Dep. at 91) ("I couldn't testify as to common knowledge of people . . ."). Despite this, his testimony is riddled with baseless speculation regarding other persons' states of mind.

A. Well, if you have the right to replace your windshield and you have no waiver of deductible provision to apply, **I think a reasonable policyholder would opt to get a replacement.**

(Hildebrand Dep. at 88) (emphasis added).

A. Well, because this particular report was a report that was known to State Farm's national glass manager. **He was aware of its content and, therefore, he would have been aware of the material** in that report.

(Hildebrand Dep. at 111) (emphasis added).

A. I mean if you have a choice between repairing a windshield and getting

a brand new windshield that's not going to cost you anything, **commonsense would say that's a no brainer to get it replaced**, but there's no explanation on here to the policyholders that, hey, look, you can get this replaced for nothing.

Q: Well, you ignored policyholder convenience when you said it's a no brainer, didn't you?

MR. HURST: Objection; form, misstatement, mischaracterization.

A: Oh, you think it's more convenient and that's a rationale not to take a new windshield worth \$350 or more as opposed to getting it repaired for \$50? **I think with a full explanation, that the policyholder is going to take his new windshield if he's aware of it.**

(Hildebrand Dep. at 268-69) (emphasis added).

Q: Doesn't paragraph 1 of the policy, what you just read, tell the policyholder that you have an option to either repair or replace the vehicle -- or the windshield?

MR. HURST: Objection.

A: You know, it **doesn't say specifically we will pay for loss to your car windshield**, but only for the amount -- it just says generically we'll pay the loss for your car. **Even if the policyholder read this, it is very possible that the policyholder would not understand** that option unless it was properly explained to them.

(Hildebrand Dep. at 57-58) (emphasis added).

Mr. Hildebrand may not speculate as to what others might or might not know, and his testimony should be excluded in this regard.

C. Mr. Hildebrand's Testimony Relies Upon Unreliable and Inadmissible Testimony.

Much of Mr. Hildebrand's report and testimony are predicated upon the reports and testimony of Plaintiff's proposed glass expert (Mr. Craig Carmody) and Plaintiff's proposed motor vehicle safety expert (Mr. Gary Derian). For example, all of Mr. Hildebrand's testimony regarding restoring to pre-loss condition, the safety implications, and "problems" with windshield repair rest on Mr. Carmody's and Mr. Derian's opinions regarding windshield repair. He has no basis to make these assertions based on his own knowledge:

Q. Is it your opinion that windshield repairs do not restore a windshield to its pre-loss condition?

A. Well, I'm not a windshield repair expert, but based upon all the materials that I've read in this particular case, it appears pretty conclusive that windshield repair will not return a windshield to its pre-loss condition

.....

(Hildebrand Dep. at 28).

I am not an expert in glass repair and glass replacement from a technical glass point of view . . . I would have to rely upon the conclusions and this and other documents of the people who drafted them.

(Hildebrand Dep. at 138-39; *see also id.* at 85) ("Again, I'm not an expert on windshield repair; but based upon the materials of what I've seen . . ."). Despite his lack of knowledge, he asserts, based on "all the materials" that "it's basically irrefutable that there are problems that exist" with windshield repairs. (Hildebrand Dep. at 115).

Rule 703 states "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing." Evid. R. 703. Expert opinions may not be based upon other opinions and may not be based upon hearsay evidence which has not been admitted." *Azzano v. O'Malley-Clements* (8th Dist. 1998), 126 Ohio App.3d 368, 373 (internal quotation and citation omitted); *see also Scwarze v. Divers Supply* (5th Dist.), 2002 Ohio 3945, at ¶39 (citing *Azzano*); *Prakash v. Copley Township* (9th Dist.), 2003 Ohio 642, at ¶34 ("An expert may not rely on statements of others as a basis for his expert testimony when the statements have not been admitted into evidence.").

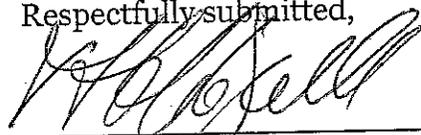
As demonstrated by State Farm's memorandums in support of the motions to exclude the testimony of Mr. Carmody and Mr. Derian, the opinions offered by Mr. Carmody and Mr. Derian do not satisfy the reliability requirements of *Daubert* or Evid. R. 702. Mr. Hildebrand's opinions, which rely heavily on Mr. Carmody's, and Mr.

Derian's opinions, are thus inadmissible. If this Court excludes the testimony of either Mr. Carmody or Mr. Derian under Rule 703, then Mr. Hildebrand's testimony and report must be excluded as well.

IV. CONCLUSION

For the foregoing reasons, State Farm requests that the testimony and report of Mr. Hildebrand be excluded.

Respectfully submitted,



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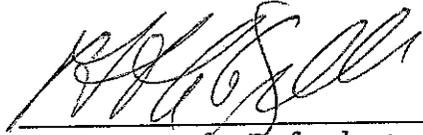
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the following, by email and by hand-delivery this 24th day of February, 2010.

W. Craig Bashein Bashein and Bashein Co., L.P.A. Terminal Tower, 35th Floor 50 Public Square Cleveland, Ohio 44113-2216	Paul W. Flowers Paul W. Flowers Co., L.P.A. Terminal Tower, 35th Floor 50 Public Square Cleveland, Ohio 44113
	Shawn M. Mallamad Shawn M. Mallamad Co., L.P.A. 2963 Corydon Road Cleveland Heights, Ohio 44118



An Attorney for Defendant

State of Georgia)
)
 County of Cobb) SS AFFIDAVIT

Peter J. Hildebrand, being first duly sworn on oath and in accordance with law, deposes and states as follows:

1. Exhibit #1 appended hereto is a true and exact copy of an expert report that I personally prepared. The findings and opinions contained therein are based upon my investigation of the matter captioned Michael E. Cullen vs State Farm Mutual Automobile Insurance Company, Case # CV 05 555183, filed in the Court of Common Pleas, Cuyahoga County, Ohio. The findings and opinions expressed therein are based upon my knowledge, training and experience as a claim professional, licensed property and casualty insurance counselor and former senior claim executive. The opinions contained therein are all expressed to a reasonable degree of professional certainty.
2. Exhibit #2 appended hereto is a true and correct copy of my current Curriculum Vitae highlighting my background, employment positions, and education.
3. Exhibit #3 appended hereto is a true and correct listing of Materials Reviewed and relied upon to form the opinions contained in my expert report.

Further affiant sayeth naught.


 Peter J. Hildebrand, JD & CPCU
 Peter Hildebrand LLC
 Insurance & Reinsurance Counselor

Subscribed and sworn before me this 27 day of November 2009.

Seal




 Notary Public

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11/16/09

EXHIBIT A

EXPERT REPORT OF PETER J. HILDEBRAND

IN THE MATTER OF MICHAEL E. CULLEN VS STATE FARM MUTUAL
INSURANCE COMPANY
CUYAHOGA COUNTY COURT OF COMMON PLEAS
CASE # CV- 05-555183

TO THE HONORABLE COURT:

I, Peter J. Hildebrand, offer the following report containing a statement of my opinions and the bases and reasons for those opinions, the data or other information considered in forming the opinions, my qualifications, including a list of any publications or papers authored by me within the preceding ten years and the compensation I am to be paid.

I have also attached as Exhibit "B", my current curriculum vitae, and as Exhibit "C" a list of documents reviewed and considered in preparation for this report.

QUALIFICATIONS

My full name is Peter Jerome Hildebrand. I received a Bachelor of Arts degree in Economics (Honors Program) from the University of Wisconsin- Madison, summa cum laude, and was awarded membership in Phi Beta Kappa and various other honor fraternities. I continued my studies at University of Wisconsin Law School, where I received a Juris Doctor degree three years later. I was admitted to the State Bar

Association of Wisconsin where I remain licensed and in good standing. I have worked in the insurance industry full time since 1976. For the last twenty-five years of my corporate career, I was a member of senior claims management in four different insurance companies. In addition to my past education, employment and experience, I am currently a Licensed Insurance Counselor in the State of Georgia.

After completing several years as a trial lawyer in private practice, I took a position as an Associate Counsel with the Milwaukee Insurance Company (MIC). My responsibilities included supervising outside counsel in their defense of policyholders or the company relative to lawsuits involving all the coverages provided under a personal auto policy, providing coverage opinions on insurance issues, filing and litigating lawsuits, and providing legal advice to the claim handlers on the proper handling and settlement of auto claims.

In the latter years of my career at MIC, I served as the General Counsel and head of the Claims Legal Department. As part of my duties, I was personally involved in MIC's initiation and implementation of claims handling protocols relative to glass and other physical damage claims. I personally reviewed contracts related to all MIC vendors and supervised all matters involved with MIC's alleged failure to comply with its duty of good faith and fair dealing and fair claim settlement practices acts, including matters in the State of Ohio.

After leaving MIC, I joined the home office claims department for Great American Insurance Company (GAI) in Cincinnati, Ohio, where I served as the claim officer in charge of casualty claims nationwide. As part of my duties, I helped establish claim handling standards, performed quality control audits on field claim offices and instituted GAI's litigation management and ADR programs. My staff in the home office was responsible for the direction of field claim offices in their handling of all serious injury claims nationwide, including contractual claims involving coverage, alleged bad faith and unfair claim practice violations, including numerous matters in Ohio. I personally audited other insurance companies in conjunction with merger and acquisition activity by GAI and became familiar with claims administration by other insurers including their handling of auto material damage claims including glass claims and windshield claims.

Half way through my career at GAI, I took a position as Regional VP of Claims for the Mid-Atlantic, Southern and Texas regions of the company. My offices handled among other things, all claims presented against GAI under auto policies including glass and other auto material damage claims. During my management of these offices, my offices received numerous awards for excellence in claims handling. While at GAI, I completed my certification as a CPCU (Chartered Property & Casualty Underwriter), which required the completion and successful passing of exams over ten property and casualty courses, including the study of personal automobile insurance coverage.

For the next three years of my insurance company career, I managed the Vesta claims and regulatory departments. While at Vesta, we handled a good volume of auto claims throughout the East Coast and Midwest including glass and auto material damage claims.

Vesta acquired Anthem Casualty located in Shelby, Ohio. Anthem had a substantial book of personal auto claims in Ohio, including a high volume of glass related claims. As part of my duties as Claims VP, I was responsible for the consolidation of their programs into Vesta, including administration of the glass program. I personally met with and arranged agreements with glass vendors and monitored the performance of our glass program as part of my management duties. Vesta also reinsured a substantial book of automobile business and I was involved in the bi-annual audits of the managing general agents (MGA's) that handled those claims. I personally handled or supervised all claims alleging violation of the duty of good faith and fair dealing and unfair claim practice violations, including claims venued in Ohio. As head of the Regulatory Department, I also reviewed and approved all new form filings including forms involving automobile coverages.

During the next seven years of my career, I worked for American Safety Insurance Group (ASI), as the Claims VP and later as the VP of Claims Legal. During my tenure at ASI, I was responsible for building the claims operation and implementing claims standards and procedures for the expanding claims department. I was also responsible for proper administration of outsourced claims handled by MGA's or their third party administrators (TPA's), including bi-annual audits of standard and non-standard auto claims handling. I personally handled or supervised all claims involving alleged violation of the duty of good faith and fair dealing at ASI.

In each of the senior management positions held for the above four carriers, I was personally involved in the development, implementation, revision and enforcement of the company claim policies and claim handling procedures and either implemented or administered a claims training program in that regard. I have personally made numerous training presentations to claims personnel on my staff and for other offices or claim handling entities. I have taught The Legal Environment of Insurance for the CPCU Society and am currently a member of the Education Committee for the Atlanta Claims Association.

Presently, I am operating Peter Hildebrand, LLC, an insurance and reinsurance consulting business that I started in January, 2006. I am a member of the Defense Research Institute (DRI), the Wisconsin State Bar Association, The American Bar Association (ABA) and its Torts, Trial & Insurance Practice Section and its Mediation and Arbitration Section. I am an associate member of the American Association of Justice and a member of ARIAS, the industry leader in providing qualified arbitrators on reinsurance disputes. In addition to my CPCU membership, I am a member of the Society of Risk Management Consultants. Please refer to Exhibit "A" for more detail on my background and experience.

TESTIMONY

I have testified as an expert in approximately 20-25 depositions and or trials in the past four years, including matters in Ohio and throughout the country. A listing of cases can be provided upon request. The U.S. District Court for the Northern District of Georgia

has determined that I am a qualified expert witness on claim handling practices and procedures on a case involving an auto liability claim. I have written and presented a paper entitled "*Reinsurance Basics for the Claims Professional Relative to Bad Faith Claims.*" Since starting my consulting business in 2006, I have regularly consulted and/or testified on issues involving claims administration, claim handling practices and procedures, personal auto coverage and claim handling, claims compliance with the duty of good faith and fair dealing, and fair claim practice statutes and regulations.

BACKGROUND

I have been asked by the Plaintiff's attorney to review the materials listed in Exhibit C and provide to the Court my opinions on the claim handling programs used by State Farm Mutual Insurance Company (State Farm) relative to the handling of windshield glass claims. More particularly, I will address the following issues:

1. Whether a claim professional would conclude that the insurance policies issued by State Farm include coverage for the full payment of windshield replacement regardless of the extent of the damage to the windshield subject to the deductible and thus whether State Farm's claims handling whereby they failed to pay to restore vehicles to their pre-loss condition is contrary to their contractual obligations?
2. Whether a claim professional relying upon the science and other documents that repair techniques do not return the windshield to its pre-loss or pre-accident condition, would conclude that State Farm's glass claim programs generally and their unilateral approach to arrange for "patching" of repaired windshields were inconsistent with their claim handling duties under the policy?
3. Whether a claim professional after reviewing State Farm's Glass Claims Program and particularly their scripting practices would conclude that State Farm intentionally undertook a program to sell insureds on the repair option under the Car Policy and in effect concealed information pertinent to the knowing use of policy benefits in an attempt to save the insurer the substantial difference in cost between repair and replacement of windshields to the detriment of the policyholder?
4. Whether a claim professional would conclude that State Farm's glass claim programs and their systematic and uniform claims handling approach that pushed policyholders towards a less costly windshield repair option without explanation of the full policy benefits was contrary to its duty of good faith and fair dealing and its fiduciary duties which resulted in a failure to provide equal consideration to the interests of its policyholders, who were not fully compensated under their insurance policies?

Whether specifically referenced or not, all opinions which follow are based upon the custom and practice and/or standards and practices within the insurance industry for handling claims to a reasonable degree of professional certainty. Of course, these standards and practices within the industry are a reflection of the industry's understanding of statutes, case law, policy interpretation and any other legal requirements which impact claims handling and include contractual duties that arise from the insurance policy. These standards and practices generally will comply with the applicable fair claim practice acts and regulations, including the Ohio Administrative Code, as well as any model acts, consumer legislation and regulations. *All opinions rendered in this report are intended to apply to both Cullen and the class members unless there is specific reference limiting or clarifying same.*

My opinions as a claim professional are solely meant to assist the Court and trier of fact in addressing the issues in this case based upon a claim professional's analysis, and in no way are they intended to invade the province of the Court and/or trier of fact in rendering their decisions on questions of law or fact. In addition to basing my opinions on my past experience and education as outlined in the Qualifications section of this report, the opinions will also be premised upon various books, references and other publications related to claim handling, insurance bad faith and/or unfair claim practice statutes and regulations, as well as texts and materials referenced in Exhibit C attached to this report.

STATEMENT OF FACTS

(1) A Brief Description of the Accident, the Repair and the Nature of the Class Action

On or about 03/24/03, Michael Cullen (Cullen) was operating his 2001 VW Jetta at or around Interstate 480 in Maple Heights, Ohio when its windshield was damaged from a stone either kicked up or thrown off of a semi truck (Cullen Depo p. 27). Cullen submitted his claim to his State Farm agent. Cullen was advised that he should take his vehicle to a conveniently located glass repair company for repair and that State Farm would handle the repair. Cullen took his vehicle to Twinsberg Glass and Mirror, which performed the windshield repair by shooting some resin into the hole. (Cullen Depo. pp. 29, 39)

Cullen was not offered the choice between the repair or replacement of his windshield (Depo. p.32, 45). He was never informed or advised that his policy provided coverage that would pay, reimburse or indemnify him for costs to replace his windshield less the deductible, in order to return the vehicle to its pre-loss or pre-accident condition. (Interrogatory Answer #9) Twinsburg Glass and Mirror submitted an estimate for \$52.88 for the patching of Cullen's windshield, which apparently was paid by State Farm. (See Defendant's Exhibit # 6) Cullen became bothered by the fraying that occurred after the repair and the lack of aesthetics of the repair, which could affect the resale value of the vehicle (Depo. p.48). The vehicle was not returned to its pre-accident condition.

Cullen brings this suit on behalf of himself and a Class defined as follows:

All Ohio residents who submitted claims to State Farm for cracked, chipped or damaged windshields under their motor vehicle physical damage coverage which were approved by the insurer but who only received a chemical filler or patch instead of payment sufficient to cover the repair/replacements necessary to restore the windshields to their pre-loss condition. (See Class Action Complaint - Paragraph 21)

State Farm arranged for the handling of the windshield only claims for both Cullen and the Class primarily through a third party administrator. The Class does not include individuals with claims arising prior to 02/18/1990.

(2) The State Farm Insurance Car Policy Language Related to Comprehensive Coverage for Windshield Claims and the Waiver of Deductible on Windshield Repairs

Cullen testified that he was insured with State Farm continuously since 1988 (Depo. p. 11). On the date of the accident, State Farm had in effect a Car Policy issued to Michael Cullen (Policy # 661 3686-D18-351) with a policy term from 10/18/02 to 04/18/03. The Car Policy provided by State Farm under Section IV - Physical Damage Coverages includes the following terms:

Loss - means, when used in this section, each direct and accidental loss of or damage to; (1) *your car ...*

Under the COMPREHENSIVE - COVERAGE D, You have this coverage for:

1. Loss to Your Car. We will pay for *loss to your car EXCEPT LOSS CAUSED BY COLLISION* but only for the amount of each such *loss* in excess of the deductible amount, if any. If we offer to pay for the repair of damaged windshield glass instead of the replacement of the windshield and you agree to have such repair made, we will pay the full cost of repairing the windshield glass regardless of your deductible. (Underlining emphasis added)

Under Limit of Liability - Comprehensive and Collision Coverages, the company agrees to pay for loss to property or any part of it based on the lower of:

1. the actual cash value; or
2. the cost of repair or replacement. The cost of repair or replacement does not include any reduction in value of the property after it has been repaired, as compared to its value before it was damaged. (Underlining emphasis added)

The policy contains a further provision clarifying the cost of repair or replacement as follows:

The cost of repair or replacement is based upon one of the following:

1. the cost of repair or replacement agreed upon by *you* and us;
2. a competitive bid approved by us; or
3. an estimate written based upon the prevailing competitive price. The prevailing competitive price means prices charged by a majority of the repair market in the area where the *car* is to be repaired as determined by a survey made by us. If *you* ask, we will identify some facilities that will perform the repairs at the prevailing competitive price. We will include in the estimate parts sufficient to restore the vehicle to its pre-loss condition. Such parts may include either parts furnished by the vehicle's original manufacturer or parts from other sources including non-original equipment manufacturers. (Underlining emphasis added)

Any deductible amount that applies is then subtracted. (See Car Policy at p.18)

Under the Settlement of Loss provisions, State Farm must pay for the loss to a part of the covered vehicle, such as a windshield, by either paying the agreed upon actual cash value or by paying to repair or replace the damaged property or part.

In summary, State Farm offers to waive the deductible, if any, in return for the insured's agreement to have a windshield repaired. In adjusting the loss, the cost of repair must include in the estimate "parts sufficient to restore the vehicle to its pre-loss condition." A windshield is certainly a part capable of replacement to pre-loss condition, but any windshield repair must bring the vehicle to its pre-loss or pre-accident condition. Consistent with their contractual duties, State Farm clearly documents their Motor Vehicle Repair Cost Policy in their internal policies and procedures as follows:

State Farm will pay claims based upon reasonable, competitive prices for all repairs necessary to restore a vehicle to pre-loss condition relative to safety, function and appearance. The policy contract and law of damages will assist us in determining whether certain operations are payable. Collision estimating guide allowances, prevailing competitive process as documented through the repair facility survey process, and agreed charges for specific procedures on some repair jobs should be used to determine reasonable repair costs. (See General Claims Memo #439 dated 02/02/98 - Emphasis added)

State Farm's Glass Manager confirms the company's obligations to their insured customers as follows:

Our obligation generally, since we have not qualified the location or the period, is to restore the consumer to their pre-loss condition, and in essence paying claims

which are owed under the policy of insurance that we hold with that customer.
(See Williams Depo. of 05/05/05 at p.142 - emphasis added)

Therefore, based upon the language in the Cullen policy and the State Farm Guidelines applied to State Farm auto policies, the insurer is required to pay to repair the damaged windshield to its pre-loss condition or to replace the windshield. The above observations are based upon the wording for the Comprehensive Coverage in the Cullen Car Policy and can be applied equally to all Class members with policy form 9835A or policies with substantially the same language.

Given the time frame covered by the class action, State Farm presumably has issued a number of policy forms with variations on the wording of their Comprehensive coverage generally and the waiver of deductible on windshield repairs in particular. Based upon the forms and endorsements provided for my review, the content of these other State Farm policy forms as to language material to my opinions is substantially similar. For example, policy forms 8356 and 8357 have substantially the same language including reference to estimates to restore the vehicle to pre-loss condition except they do not contain the deductible waiver related to windshield repair. (See Cullenm 00001519-1520 and 1546-1547, et seq.) Subsequent opinions related to the Cullen Car Policy would also apply to the Class members with these policy forms or substantially similar forms *provided* that the opinion makes no specific reference to the deductible waiver.

Policy Form 6038AF entitled Amendment of Defined Words, Physical Damage Coverage and Conditions adds the following language to COMPREHENSIVE COVERAGE D:

If we offer to pay for the repair of damaged windshield glass instead of replacement of the windshield and you agree to have such repair made, we will pay the full cost of repairing the windshield glass regardless of your deductible.
(See 6038A - Cullenm00001476)

Policy Form 6126Q entitled Amendment of Section IV - Physical Damage Coverages adds the following language:

If we offer to pay for the repair of damaged glass instead of the replacement of the windshield and you agree to have such repair made, we will pay the full cost of repairing the windshield glass regardless of your deductible. (See 6126BQ - Cullenm00001477)

If State Farm endorsed policy forms 8356, 8357 or other substantially similar forms without the waiver of deductible provision related to glass repair with policy form 6038AF, 6126Q or other substantially similar endorsements, then the previous *proviso* related to my opinions would not apply, for such endorsed policies would contain substantially similar terms and conditions on the deductible waiver on windshield repairs.

For purposes of my expert analysis and for the sake of simplification, I will assume that the Class has State Farm policies with substantially similar terms, conditions, limitations

and definitions, including policies issued by a variety of State Farm companies. The opinions which follow will apply equally to claims for Class members. To the extent that other State Farm policies contain language different from the above, I reserve the right to readdress the policy language that is in variance to the above. State Farm did remove the waiver of deductible provision after commencement of this suit.

(3) State Farm's Glass Central Program for Handling Glass Only Claims

For many years, the typical approach to adjustment of glass claims in the insurance industry was to have glass claims paid by the policyholder's insurance agent. State Farm departed from that industry practice when it established its Glass Central Program in 1997 to outsource the handling of glass only claims. State Farm identified a glass claim TPA (Third Party Administrator) and contracted with LYNX Services (Lynx) to administer its glass claim program beginning 07/01/97. Lynx is a subsidiary of PPG, one of the leading manufacturers of glass windshields in the country. The vast majority of the windshield claims were adjusted at this time by replacing the windshield. The Auto Glass Central Program is outlined in more detail in the Glass Central Leader's Guide. (Cullen M Z0040 - 0055)

State Farm has produced a Glass Manual which indicates that Lynx became responsible for coverage verification, claim reporting, invoicing and payments on a fee per claim basis on all glass only auto claims. (See Glass Manual dated 12/05/05 at 1383) The actual procedures required a claims representative from Glass Central to handle any coverage disputes. Another aspect of the glass program was to enlist shops that perform windshield repair and replacement into their Offer and Acceptance Program (O&A). Lynx agreed to work with State Farm in their dealings with current O & A vendors and all glass facilities. (See Plaintiff's Exhibit 1 - Outsourcing Agreement dated 08/20/96). Given the volume of its business, State Farm was able to leverage these member repair shops as "approved" vendors for more favorable O & A pricing with a direct pay benefit. (Hardt Depo. p.155) The National Glass Manager estimated that there were in excess of 19,000 O & A Shops back in 2005. (Williams Depo. 05/05/05 - p.46)

State Farm gave Lynx the insurer's scripts or "word tracks" to utilize in the program. (Ferraro Depo. pp.63, 66) Lynx began using State Farm scripts from the inception of the program and any changes were authored by either State Farm or Lynx. (Bischoff Depo. p.20) State Farm's agent testified that his agency handled glass claims without a script prior to their consolidation for handling by an administrator and he was unaware that they were even using scripts. (Karol Depo. pp 38-39) In fact, State Farm was contractually obligated to have all glass only claims go through Lynx, such that agents were not to use their draft authority. (Williams Depo 3 - pp. 353-354)

On several occasions, the initial National Glass Manager visited the Lynx facilities to view the operation and the 450 CSR's handling calls on the State Farm Glass Program. (Ferraro Depo. pp. 33-37) He listened in on phone calls both during his visit and from his offices, and later delegated that responsibility to staff members. One purpose of the monitoring was to verify that the CSR's were following the scripts. Ferraro even took the

head of claims to visit Lynx and further confirmed that his superiors all the way up to the head of claims tracked the glass program and had definite knowledge on its progress. (Ferraro Depo. pp. 42-44) State Farm closely monitored their actions at Lynx partially because of their concerns that a vendor handling their claims could act in bad faith. (Ferraro Depo. p.65)

The Lynx scripts were drafted in a way to emphasize the benefits of windshield repair. For example, see Plaintiff's Exhibit 2 dated 11/17/04, which is a sample script that mentions that (1) the original factory shield is maintained; (2) repairs take 30-45 minutes, while replacement may take several hours; and (3) an environmental benefit exists because windshields cannot be recycled. (See Cullenm/Lynx 90000005) There is no mention of the factors and unknowns which would weigh against windshield repair, such as long term durability, shrinkage, external contamination, edge stress and loss of aesthetic appearance, among others. At one point in time, the numerous policyholder and agent complaints related to "failed repairs" resulted in a request to change the scripting language on that topic. (See Exhibit 24 - Fossett Memo dated 03/26/99)

State Farm developed the scripting used by Lynx and retained authority to change the script. (Williams Depo. p.66-67) According to the National Glass Manager, Lynx involvement would have been in an editorial-type capacity, while "The script, the guidelines, the information was created by State Farm and provided to Lynx Services." (Williams Depo. 05/05/05 at p.151) State Farm not only requested changes to the scripts, they also reviewed and approved any Lynx requests for changes as noted in various other discovery documents. (See Cullenm00010956-957)

State Farm had a written procedure instructing Glass Central personnel on how to monitor the phone calls between Lynx and policyholders and a form to assist them in that regard. (See Fossett Email of 10/19/99 - Cullenm00065011-12 and 00065017) The form was converted to an on-line form, but I have seen no copies of the completed electronic forms which apparently State Farm has not produced in discovery. (Kem Depo - pp. 54-56) It is clear that State Farm not only had the capability of monitoring the telephone discussions had between Lynx and the insureds, but they actually did listen to calls which utilized the scripts they developed (Williams Depo 3 - pp.359-363) In fact, the National Glass Manager advised his supervisor in a memo dated 05/01/02 that State Farm needed "to review and revise *our training and scripts at Lynx Services* to ensure we are making the most of our customer contact." (Cullenm00063798 - 63804) At least one Insurance Department required State Farm to change the scripting it was using in their state because of anti-steering laws related to repair facilities. (See Williams Depo. pp 21) Relative to the scripting used by Lynx on its glass claims, State Farm ultimately maintained total control over what was to be in the scripts. (Williams Depo 05/05/05 at p. 160)

It was State Farm's policy to replace windshields with cracks exceeding six inches or within the critical viewing area. (Bischoff Depo. pp. 32, 36) State Farm's Research Lab published an internal paper that concluded that "repair processes, resins, basic technical knowledge, and final repair quality was very inconsistent between different glass repair companies." (Evaluation of Windshield - Long Crack Repair dated 03/9/98) The State

Farm researchers raised numerous concerns about the viability of the repair option on longer cracks. After State Farm conducted a review of the Glass Repair Criteria, the insurer maintained the six inch aspect of their criteria, while relaxing other aspects of its glass repair criteria (See Williams' Notice to O & A Program Participants - Cullenm 000157). Some of the same problems identified with long cracks discussed in the report would also be common with cracks less than six inches. (Bischoff depo. p.120)

Despite internally developed information describing problems and issues with windshield repair, neither State Farm nor its authorized TPA included this information in their scripts or routinely provided the information to the insureds with windshield claims. This is also despite the admission of the National Glass Manager that State Farm requires their vendors to "return the vehicle to its original specifications per the factory guidelines." (Williams Depo. of 05/05/05 at p.41 - Cullenm00073739) He further testified that the vendors requirement was "broader" than merely retaining the original factory seal, but "It's the requirement for the vendors to return the vehicle to its *pre-loss condition*." (Id. p. 43 - emphasis added)

(4) Lynx training on the State Farm Windshield Repair Program to "Sell! Sell! Sell!" the Repair Process.

Lynx developed a training module for State Farm Windshield Repair (See Cole Depo Exhibit #5 - dated 02/26/03). Lynx used this module to train the claim service representatives (CSR's) who handled the glass claims for State Farm. The document entitled "Participant Guide" outlined seven stated training objectives: (1) Describe a repair; (2) Explain the difference between a repair and a replacement; (3) *List the benefits of repair*; (4) Qualify windshield damage to determine if it is repairable under insurance company guidelines; (5) *Describe key "selling techniques"*; (6) *Explain the importance of repair ratio to LYNX*; and (7) Understand repair guidelines. (Exhibit #3 at p.1 - emphasis added). The Participant's Guide was approved by State Farm. (Cole Depo. p.121) The participants were provided with the following "OVERVIEW":

A major benefit for insurance companies contracting with LYNX to handle their auto glass claims is our ability to qualify windshield damage to determine if it is repairable. The more repairs that LYNX dispatches, the greater cost savings to State Farm. Be proactive in qualifying windshield damage to ensure that each and every opportunity to qualify damage is pursued to its fullest extent. Exhibit #5 at p.2 - no emphasis added).

Participants were therefore trained to take every opportunity to convince the insured not to replace the windshield because of the cost savings to State Farm. Likewise, the TPA was promoting its services by suggesting that Lynx had a special ability to qualify windshield damage and increase the number of repairs. The National Glass Manager testified that this document was approved by State Farm. (Bischoff Depo. pp.46-47)

The Participant's Guide contained additional information which is not shared with the insured, such as the following:

- (a) The longer the damage goes unrepaired, the more chance it has of cracking further and becoming contaminated (p.3)
- (b) Repairs can typically restore only 75% to 95% of the optical clarity, the repair will never be truly invisible and there will always be a blemish (p.3)
- (c) "For State Farm: they save money because repairs on average cost \$50, while replacements on average cost \$375 . ." (p.4)
- (d) Each CSR is required to adhere to the qualifying process and make every effort to keep the "Repair ratio" at a high level. Team leaders will receive a daily report on the team's repair statistics. (p.5)

Not only were the CSR's trained on the significant financial gain that State Farm will achieve by pushing repairs over replacement, but they were monitored and measured for their performance by "Scoring Criteria" required for the CSR to take ownership of the of the claim. (See Cullenm00010933) State Farm monitored Lynx's results at increasing the percentage of repaired windshields through daily repair statistics and the repair ratio. State Farm tracked the percentage of windshield repairs versus replacements. (Williams Depo. p.85) Their National Glass Manager admitted that the guide never mentions the benefits of replacement. He outlines the "cons" to replacement that constitute detriments to repair in his testimony (Bischoff depo. pp. 47-48)

The Participant Guide specifically trained the attendees to "Sell! Sell! Sell!" Consistent with the previous script example, the participants are trained to sell the repair with the following four benefits:

- (1) **Windshield repair is quicker:** An average repair takes 30 to 45 minutes. A replacement takes an hour or more, plus the policyholder will have to wait hours longer for the urethane to properly cure.
- (2) **The original windshield is retained:** The "weather seal" is not broken for a repair. Also, any stickers the policyholder has on the windshield will not need to be replaced, which can be a cost-saver as well.
- (3) **Repairs Pose less of a Safety Risk:** The car is safe to drive immediately following a repair. For a replacement, the policyholder needs to wait until the urethane is fully cured before they can be assured the windshield is structurally bonded to the car and is safe to drive.
- (4) **Repairs are better for our environment:** Because windshields have a vinyl layer in-between the glass, they cannot be recycled. Therefore, all windshields removed from cars end up in landfills. (Participant Guide, p.7)

There is no question that the CSR's were instructed that their role was to sell the repair option over replacement. The Reminder section of the Participant Guide specifically states "sell the repair". In fact, they are reminded that repair guidelines are "guidelines only. Not absolute rules," thus encouraging the CSR's to stretch the rules in favor of increasing the "Repair Ratio." The CSR's are further instructed "do not push the replacement" even in situations where the policyholder has a "zero deductible."

(Participant Guide, p.8) Under "Selling Tips", participants are specifically told to "Stress the benefits of a windshield repair." (Participant Guide, p.5)

In the testimony of the VP of Operations for Lynx, he admits that the CSR is being told to sell benefits of repairs consistent with instructions from State Farm. (Cole Depo. pp 75-76) In fact, there was a formal sign-off process whereby State Farm approved the Lynx approach to selling repairs versus replacement (Cole Depo. p.81)

*(5) Windshield Repair Cannot Return the Windshield to its Pre-Loss Condition -
The Science of Windshield Repair*

Plaintiffs' experts go into great detail on the problems associated with windshield repair and the knowledge possessed by State Farm relative to those problems. Rather than repeat that information, I will incorporate their respective reports and opinions by reference. I will however highlight some of the findings in those reports.

Carmody concluded that *the Cullen windshield was not restored to its original condition and had defects capable of initiating failure under future conditions and exposing people to safety hazards.* In fact, the windshield repair industry has acknowledged that windshield repair is not capable of restoring the windshield to its original condition, for even after repair there is still "an open and obvious defect in the windshield." (Carmody Report at p.9)

Carmody also concluded that repaired windshields fail to meet government mandated safety standards and that senior management at State Farm knew of the problems with windshield repair and failed to inform their insureds of the known hazards. Carmody referenced The Report of the National Glass Association (NGA) Windshield Repair Subcommittee from January, 1994 and the internal report on long crack windshield repair dated 03/09/98 to demonstrate that State Farm management knew of the problems. Carmody also disputed State Farm's contention that replaced windshields could not be recycled, citing PPG Industries use of Dlubak Glass to recycle windshields since 1994.

Derian concluded that *a repaired windshield does not possess the mechanical properties of a replacement windshield* and these mechanical properties, which are designed into the body structure of a vehicle, contribute to the structural strength and occupational protection designed in a passenger vehicle. He further opined that vehicles with repaired windshields may fail to meet the following Federal Motor Vehicle Standards: (1) Standard 104: Windshield Wiping and Washing Systems; (2) Standard 205: Glazing Materials; (3) Standard 208 Occupant Crash Protection; (4) Standard 212: Windshield Mounting; and (5) Standard 216: Roof Crush Resistance.

Regardless of whether you agree with each and every opinion rendered by the Plaintiff experts, it is basically irrefutable that there are problems that exist with windshield repair and that noone at State Farm or Lynx cared to share those problems with their insureds when adjusting their windshield claims. State Farm's National Glass Manager

acknowledged the awareness of the existence of the NGA's concerns and that policyholders are *not* warned of issues such as (1) Tensile strength; (2) Moisture impact on inner glass adhesion; (3) Damage to the PVB layer; (4) Failed repairs; and (5) other problems. (Bischoff Depo. pp.88 - 110) Lynx never advised policyholders of potential problems with patch repairs. (Cole Depo. P.86)

The National Glass Manager admitted that he did *not* address the glass repair of cracks in excess of six inches because of the "customer satisfaction challenges based on the *visual aspect* of the long crack repair." (Williams depo. 05/05/05 at p.180) In fact, State Farm did not share information with Lynx related to potential problems with repairs as to long term durability, shrinkage, stability of a repaired windshield, shear or tensile strength or time period for repairs. (Cole Depo. pp. 89-92) Absent this information, Lynx was basically limited to sharing information favorable to the repair decision without full disclosure to the insured of all information necessary to make an informed decision relative to returning the vehicle to pre-accident condition.

(6) The Financial Motive behind State Farm's Initiative to Increase the Percentage of Windshields Repaired

Consistent with the instructions to CSR's to "Sell! Sell! Sell!" repairs, State Farm increased their repair percentages from 26.4% in 1998 to 28.9% in 2001. The number of windshield repairs increased from 359,414 to 467,459 during that period with average cost of repair only increasing from \$55.83 to \$56.30 while average cost of replacement increased from \$358.46 to \$367.63. (See Exhibit 18 to Williams Depo - Chart B) The National Glass Manager estimated the average repair to be in the \$50-70 range, while the average replacement was around \$342 per claim. (Bischoff Depo. p.90) By 2001 the savings per repair over replacement was \$311.33 per repair, which far exceeds those estimates.

If one applies the \$311.33 savings per repair to the glass claim volume of 1,619,000 in 2001, it results in a savings for State Farm of \$5,025,000 for each 1% increase in the Repair Ratio. The National Glass Manager verified that for every 1% increase in State Farm's windshield repair percentage, they realize a savings of \$5,000,000. (Williams Depo. 3 - p.388) Given the repair percentage increased by 2.5% since 1998, State Farm saved over \$12.5 Million in 2001 alone by pushing repairs. A nearly commensurate savings was achieved in 1999 with 28.2 % repairs and 2000 with 28.6% repairs, resulting in a savings exceeding \$30 Million in just three years.

Given just this minimal financial information, it is not surprising that State Farm launched a "Repair Campaign" to communicate the need to promote repairs over replacement to its agents and their staff at a cost of \$83,000. (Williams Depo. pp.32, 37) I saw nothing in the materials to indicate that the "Repair Campaign" changed the way State Farm communicated with its insureds and continued to use scripts focused on selling the repair process. In fact, when State Farm launched the "Repair Campaign",

Lynx was using training documents dated 02/26/03 and 12/16/03 which contained language encouraging their CSR's to sell repairs. (Kern Depo. pp. 178-180)

The National Glass Manager issued a memo suggesting a number of ways for Glass Central to improve glass claim results "to positively impact State Farm's average costs," in which he states that State Farm "must increase the repair percentage" and be aggressive in managing severity. (See Williams Memo - Analysis of Auto Glass Breakage Average dated 04/29/02). Regardless of any testimony to the contrary, it is clear that State Farm was attempting to achieve a per claim savings in excess of \$300 per windshield repair, even though the insured has the right to take the replacement amount and go get it repaired for the lower amount. (Thomas Depo. pp. 56-57) The National Glass Manager pushed a National Glass Repair Program in 2002 to focus their agents on promoting "THINK REPAIR FIRST," using national publications and local management (Williams Depo 3 at pp 330-344) With an admitted a more than \$300 per repair average savings nationwide, the financial benefit to State Farm as outlined above is undeniable and substantial even for an insurance company the size of State Farm, especially given the volume of glass claims involved. As previously noted, senior claims management at State Farm was regularly kept advised of the statistical results of these programs to increase repair ratios and even visited Lynx locations.

OPINIONS

- 1. A claim professional would conclude that the insurance policies issued by State Farm include coverage for the full payment of windshield replacement regardless of the extent of the damage to the windshield subject to the deductible and that State Farm's claims handling whereby they failed to pay to restore vehicles to their pre-loss condition is contrary to their contractual obligations.*

Based upon the file materials which I have reviewed to date, I did not see any indication that there is any dispute that glass claims caused by missiles or other objects would be covered under the State Farm Car Policy issued to Cullen under the Comprehensive Coverage for physical damage to a vehicle. This is consistent with coverage provided by Personal Auto Policies issued in the industry and policy forms issued by other insurers or provided by the Insurance Services Office (ISO). However, State Farm drafts and issues its own policies with their own unique policy language and such manuscript policies must be viewed within the context of their specific terms, conditions, limitations and exclusions.

Under sub-section (2) of the Statement of Facts, there is a thorough description of the specific terms in the Cullen policy which apply to glass claims. Under "Loss to Your Car", State Farm agrees to waive the deductible for the repair of damaged windshield

glass and pay the full cost of repair. Other policies are endorsed with substantially similar language. The Limit of Liability is based upon either the actual cash value or the cost to repair or replace. The latter is based upon (1) an agreed cost of repair or replacement; (2) competitive bids; or (3) an estimate based upon the prevailing competitive price. The estimate must include parts sufficient to restore the vehicle to its *pre-loss condition*. The estimate for repair of the windshield was \$52.88. There was no estimate in the materials as to the cost of replacement, but considering the claim payment information previously outlined, it is reasonable to assume that it would exceed the \$367.63 average replacement cost from two years earlier in 2001.

Some glass companies would offer their customers a waiver of their deductible if they replaced their windshields at their facility. Contrary to the best interests of its insureds, State Farm contractually precluded this option in the terms of their standard Offer and Acceptance Agreement. As part of its commitment, the glass company under subsection (M) must "not give or offer any gifts or gratuities or other incentives *including deductible waivers* to State Farm customers, agents or employees." (State Farm National Offer and Acceptance Agreement - Cullenm00010903) Therefore, based upon the Car Policy language, a State Farm claims adjuster could offer the following settlement options to Cullen:

- (1) Issue a check to the replacement facility for \$117.63 with Cullen issuing a check for his \$250.00 comprehensive deductible; Here Cullen gets a new windshield which returns his vehicle to its pre-loss or pre-accident condition;
- (2) Issue Cullen a check for the cost of replacement of the Windshield based upon the estimate less the deductible (\$117.63) and allow Cullen to arrange the windshield repair at a cost of \$52.88; Here Cullen can pocket around \$64.75 and still have his windshield repaired.
- (3) Issue Cullen a check for the cost of replacement of the Windshield based upon the estimate less the deductible (\$117.63) and allow Cullen to decide not to repair the windshield; Here Cullen pockets the full \$117.63.
- (4) Issue a check for repair of \$52.88 and waive any deductible payment by Cullen. Here Cullen gets a repaired windshield that does not return the vehicle to its pre-loss or pre-accident condition, while State Farm achieves an approximate savings \$64.75.

State Farm established the criteria for measuring the effectiveness of the Lynx CSR's handling of glass claim phone communications. (See "Scoring Criteria" - Cullenm 00010933-34) Under "One Call Resolution", the CSR is measured on providing *completeness and thoroughness by "asking probing questions" and providing "options to the customer"* prior to asking for a callback. Per Cullen's testimony, he was never offered the choice between repair and replacement. *State Farm proceeded under the option most favorable to the insurer* which is Option (4), without providing Cullen with a choice of the option to which he was contractually entitled. In my opinion, a claims professional would conclude that the Car Policy clearly provided Cullen with the option

glass and pay the full cost of repair. Other policies are endorsed with substantially similar language. The Limit of Liability is based upon either the actual cash value or the cost to repair or replace. The latter is based upon (1) an agreed cost of repair or replacement; (2) competitive bids; or (3) an estimate based upon the prevailing competitive price. The estimate must include parts sufficient to restore the vehicle to its *pre-loss condition*. The estimate for repair of the windshield was \$52.88. There was no estimate in the materials as to the cost of replacement, but considering the claim payment information previously outlined, it is reasonable to assume that it would exceed the \$367.63 average replacement cost from two years earlier in 2001.

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to replace the windshield and State Farm with a contractual obligation to do so on Cullen's claim. In my opinion, the Class would have the same options under substantially similar policy language and for those policies without the waiver of deductible provision the only difference would be to delete option (4). Relative to the Class, the average deductible was substantially less than Cullen's deductible and Class members would have the option of pocketing even larger sums than those stated in the example.

In my opinion, a claim professional would interpret the State Farm Car Policy as requiring them to pay the full cost of the windshield replacement regardless of the extent of damage subject to the comprehensive deductible. In my opinion, State Farm failed to provide Cullen with an explanation of the options available under his coverage and in particular failed to offer Cullen a more favorable option while proceeding under the option most favorable to State Farm. In fact, the "Scoring Criteria" utilized by State Farm graded down CSR's that failed to accomplish one call resolution by providing a complete and thorough explanation of "options" to the customer, which is an acknowledgement by State Farm of the need to address fully options afforded by policy coverage.

In my opinion, State Farm designed its O&A Program to preclude its vendors from waiving deductibles and thus eliminate a viable option for the insureds to more reasonably obtain windshield replacements, pushing them towards the repair option more favorable to State Farm's corporate interests. These opinions would also apply to members of the Class with policies whether they do or don't contain the waiver of deductible provisions.

2. *A claim professional relying upon the science and other documents that repair techniques do not return the windshield to its pre-loss or pre-accident condition, would conclude that State Farm's glass claim programs generally and their unilateral approach to arrange for "patching" of repaired windshields was inconsistent with their claim handling duties under the policy.*

(a) *State Farm clearly had actual knowledge of technical glass repair material which confirmed that a repair did not return a windshield to its pre-loss condition.*

Based upon the reports produced by Plaintiffs' experts, the internal reports of State Farm and industry reports provided to State Farm, it is clear that a windshield repair does not return the vehicle to its pre-accident condition. This is explored in some detail earlier in this report under sub-section (5) of the Statement of Facts. This is true as to the Cullen vehicle and as to vehicles with windshield repairs in general, and as such, would apply to the Class members as well.

Of course, State Farm has a manuscripted policy which requires an estimate based upon the prevailing competitive price which must include *parts sufficient to restore the vehicle to its pre-loss condition*. The glass windshield as a *part* of the vehicle cannot be repaired to its pre-loss condition. Corporately, State Farm had actual knowledge of many of the problems with windshield repairs as outlined in the Long Crack Repair Report dated

03/09/98, which was prepared by State Farm's own Research Lab. Highlights of the conclusions of that report include the following:

- (i). Standardized testing protocols do not exist for long term durability, shrinkage, external contamination and edge stresses on repaired windshields. (p.3)
- (ii). Repair processes, resins, basic technical knowledge, and final repair quality was very inconsistent between different glass repair companies. (p.3)
- (iii). UV light becomes an issue when an edge crack is repaired and the molding can't be removed to cure the resin at the edge of the crack (p.3)
- (iv). Inconsistencies exist as to the technical positions on certain key issues such as choice of resins, cosmetics of a final repair, length of a crack capable of successful repair, structural integrity of a repair, among others (p.4)
- (v). Technicians have varying skill levels (p.6)
- (vi). No real world testing, as opposed to lab testing, on damage that has not been immediately repaired and may be contaminated (p.6)

State Farm as noted by its National Glass Manager was aware of the content of the "Report to NGA Windshield Repair Work Group" prepared by the NGA's Technical Subcommittee on 03/01/93. (See Bischoff Depo. p. 100) The subcommittee found that *test data did not demonstrate that a repaired windshield would be equivalent in performance to one that was undamaged.* The subcommittee also found that there is a potential risk to the safety of vehicle occupants upon impact from the repair of a windshield defect which extends to the interlayer.

In my opinion, State Farm clearly had actual knowledge of technical glass repair material which confirmed that a repair did not return a windshield to its pre-loss condition. Their National Glass Managers and their corporate superiors were privy to this and other information in that regard.

- (b) *State Farm knew or should have known that it was not complying with its policy provisions allowing the insured to require a replacement when a repair could not bring the windshield back to its pre-loss condition.*

In February, 1998, State Farm issued a General Claims Memo on their claims policy which specifically states with respect to auto damage repair as follows:

Whichever method is used, the resulting estimate should reflect the repair operations necessary to restore the damaged vehicle to its pre-loss condition relative to *safety, function and appearance...*

State Farm will pay claims based upon reasonable, competitive prices for all repairs necessary to restore a vehicle to *pre-loss condition relative to safety, function and appearance.*" (See Hardt Depo Exhibit 2 - emphasis added)

The State Farm AVP to whom the National Glass Manager reported, either directly or indirectly, confirmed that this was State Farm's contractual obligation in Ohio and included windshield repair. (Hardt Depo. pp 32-33)

Cullen expressed concerns with the fraying that occurred after repair and the aesthetics, which were visibly apparent on his vehicle. Just on a visual basis, a claim professional in my opinion could look at a windshield and cosmetically identify the repair area, even on the smaller repairs. *In other words, the "appearance" of the repaired windshield has not been brought back to its pre-loss condition.* Some technical materials indicate that the use of a chemical compound when patching is only temporary and not entirely translucent, which therefore makes the process incapable of restoring the windshield to its pre-loss condition. A bulletin published by the Windshield Repair Association confirms that "after a repair is completed, the appearance of the broken area improves, but it does not disappear from sight. There is scarring where the break is filled, and usually can be seen by looking at the glass and focusing on the repair area." (Hardt Depo. at p. 129 -- referencing Exhibit 17) The Lynx Leader's Guide also stated that "there will always be a blemish." (Hardt Depo. pp 132-133 referencing Exhibit 18)

In my opinion, even a non-expert could visually confirm that the windshield was not returned to its pre-loss or pre-accident condition. Combining the visual confirmation of a layperson with the actual knowledge possessed by State Farm, industry publications, and the expert opinions of Carmody and Derian, a claim professional would conclude that State Farm knew or should have known that it was not complying with its policy provisions allowing the insured to require a replacement when a repair could not bring the windshield back to its pre-loss condition. State Farm management confirms that contractually they must return the vehicle to pre-loss condition as to safety, function and *appearance*. Their AVP stood by his published comments about windshield repair in the National Glass Magazine that "if I can see the vestiges of that repair, it is not acceptable." (Hardt Depo. p.27) Putting aside the expert opinions, it is my opinion that a claims professional would conclude that State Farm's own documents and testimony confirm that they were contractually obligated to return the vehicle to its pre-loss condition as to safety, function and *especially appearance*, and that windshield repair cannot meet this contractual duty. It is my further opinion that these opinions apply equally to Cullen and his personal claim and to the claims of the Class members as well.

- (c) *State Farm failed to meet industry standards for claim handling by failing to disclose all relevant benefits, coverages and other provisions under which Cullen and the Class submitted their claims.*

For purposes of ascertaining whether the claims handling conduct on glass claims meets industry standards, I will group the conduct of State Farm and Lynx under State Farm's centralized Auto Glass Program. State Farm contracted with Lynx as a TPA to handle glass only claims for the insurer nationwide. From the perspective of the insured, Lynx was operating on behalf of State Farm and potentially as an agent of State Farm, such that any conduct of Lynx personnel would be imputed to State Farm as their principal. State Farm provided the actual scripting, controlled the scripting content and any changes

related thereto, established the repair or replacement guidelines and monitored phone calls and Lynx compliance with the Windshield Glass Program.

The minimum standards for claim handling in the insurance industry were promulgated by the Model Unfair Claims Settlement Practices Act in 1973 and adopted by the National Association of Insurance Commissioners (NAIC) in 1990. The State of Ohio has its own adaptation of the Model Act in the Ohio Administrative Code, Section 3901. Some of the pertinent provisions of the Administrative Code include the following:

- a. The insurer has an affirmative duty to disclose all provisions of an insurance contract pertinent to a claim fully. Sec 3901-1-54(E), (1)
- b. Insurer must fully disclose all pertinent benefits, coverages, or other provisions of an insurance contract under which a claim is presented. Sec 3901-1-54(E), (1)
- c. No agent shall willfully conceal pertinent benefits, coverages or other provisions. Sec 3901-1-54(E), (2)
- d. An insurer that elects to repair and designates a specific repair shop shall, in a reasonable period of time, cause the automobile to be restored to its condition prior to the loss. Sec 3901-1-54(H)
- e. When partial losses will be settled on the basis of a written estimate, the insurer shall provide the claimant with a copy of the estimate. Sec 3901-1-54(H)

(See Unfair Insurance Practices: A Compendium of State Law – Ohio at pp. 113-116 – Published by the DRI – 2008)

Likewise there are Defined Unfair Trade Practices under Sec 3901-1-07 (C) as follows:

It shall be deemed an unfair or deceptive practice to commit or perform with such frequency as to indicate a general business practice any of the following:
 (1) knowingly misrepresenting to claimants pertinent facts or policy provisions relating to coverage at issue; (a) *misrepresenting a pertinent policy provision by making any payment, settlement or offer of first party benefits, which, without explanation, does not include all amounts which should be included according to the claim filed by the first party claimant and investigated by the insurer; ... (Emphasis added)*

In my opinion, a claims professional would conclude that State Farm did not disclose all provisions of the insurance contract pertinent to Cullen's claim. Per Cullen's testimony, he was never offered the choice between repair and replacement. As previously noted, *State Farm proceeded under the option most favorable to the insurer without providing Cullen with a choice of the other options to which he was contractually entitled.* This opinion applies also to the Class.

In my further opinion, it is clear that State Farm did not disclose all the pertinent benefits, coverages and other provisions of the insurance contract relative to repair/replacement

options to Cullen or to other Class members through the scripts utilized by Lynx in adjusting glass claims. By failing to explain to Cullen and other class members the various options available for them under the Car Policy, State Farm effectively prevented their insureds from making a knowledgeable decision. In my opinion, State Farm's scripting approach resulted in payment of 1st Party benefits that did not include "all amounts" to which Cullen or the Class members were entitled and basically State Farm misrepresented the options to which Cullen and the class were entitled, contrary to the Unfair Trade Practices Act. State Farm's National Glass Program established this approach as a business practice which existed for years and impacted millions of dollars of "savings" on dollars not rightfully paid to their insureds.

In my opinion, a claim professional would conclude that State Farm failed to meet even the minimum standards for handling claims as represented by the Ohio Administrative Code by their failure to explain the policy benefits to the class member insureds on glass-only windshield claims. In my opinion, State Farm's Glass Program failed to meet insurance industry custom and practice in regard to compliance with the above referenced provisions of the Administrative Code which provides just the *minimum* standards as they apply to the claim handling on glass claims generally for the class and individually for Cullen.

3. *A claim professional after reviewing State Farm's Glass Claims Program and particularly their scripting practices would conclude that State Farm intentionally undertook a program to sell insureds on the repair option under the Car Policy and in effect concealed information pertinent to the use of policy benefits in an attempt to save the insurer the substantial difference in cost between repair and replacement of windshields to the detriment of the policyholder.*

State Farm considered the handling of glass claims to be important enough to establish Glass Central and to centralize the handling of auto "glass only" claims. In developing their program, they removed the handling of glass claims from their agents and their claims adjusters to ultimately rest with a TPA specialized in handling glass claims. Lynx promoted themselves based upon its "ability to qualify windshield damage to determine if it is repairable" as specifically mentioned in the Overview to the Participant's Guide and as further demonstrated by the repair scripts they used and their other training materials. Lynx became responsible for coverage verification, claim reporting, invoicing and payments on a fee per claim basis.

- (a) *State Farm through its scripting did not provide their insureds with full and accurate information.*

State Farm and Lynx authored the scripts and State Farm authorized their usage and any changes to their content. State Farm monitored the effectiveness of Lynx and their telephone adjusters in handling glass claims. In fact, the "Scoring Criteria" requires the CSR to take "ownership" of the claim as follows:

Do what's right for the customer. Give full and accurate information, avoid repeat calls. Follow steps to resolve issues, proper use of mobile guidelines. Remind the installer about VIN/Dispatch number. (See Cullenm00010933 - Emphasis added)

I have reviewed numerous scripts provided in discovery. Despite instructions to provide full and accurate information, the standard repair scripts do nothing to fully inform the insured. For example, see the scripts from Plaintiff's Exhibit 2 dated 11/17/04 or from 11/08/02. (Cullenm00061012) These scripts were drafted in a way to emphasize the benefits of windshield repair by mentioning only factors favoring repair as follows: (1) the original factory shield is maintained; (2) repairs take 30-45 minutes, while replacement may take several hours; and (3) an environmental benefit exists because windshields cannot be recycled. (See Cullenm/lynx 90000005)

There is no mention of the factors and unknowns which would weigh against windshield repair, such as long term durability, shrinkage, external contamination, edge stress and loss of aesthetic appearance, among others. There is no mention of the multitude of issues and problems outlined by the experts and by testimony of State Farm's own National Glass Managers outlined previously in Section (5) and elsewhere in the Statement of Facts. There is no mention of the problems outlined by State Farm's own Research Lab or in industry publications and reports within the insurer's possession.

In my opinion, State Farm through its scripting was not providing full and accurate information to Cullen or the Class, even though it was measuring the CSR's on such criteria. In fact, the Plaintiff's experts indicate that replaced windshields were being recycled and that the replacement windshield had an equivalent seal to that of the original manufacturer, which would indicate that State Farm's script was either misleading or outright inaccurate. To the extent the insureds were advised that repair was less of a safety risk, this is refuted by the technical materials as well.

In my opinion, a claim professional would conclude that State Farm did not provide its insureds with full and accurate information to allow them to make a knowledgeable decision on whether to repair or replace the windshield. In my opinion, this is contrary to the requirements of the Section 3901 of the Ohio Administrative Code and industry custom and practice to disclose all pertinent benefits, coverages and material policy provisions. In my opinion, a claim professional would conclude that State Farm did not intend to provide a balanced presentation of the favorable and unfavorable factors impacting the repair-replace decision and in fact concealed information material to that decision in order to increase the repair ratio. In my opinion, such willful concealment of pertinent benefits, coverages and other provisions is contrary to Section 3901 and insurance industry custom and practice. In my further opinion, to the extent that State Farm's script contained misleading or inaccurate information, such misrepresentations are clearly misconduct contrary to industry custom and practice and indicative a conscious disregard of the rights of the insured Class members.

Given that the claim handling approaches referenced throughout this report were applied across the board on all the "glass-only" claims handled by Lynx, it is my further opinion that State Farm's Glass Program had in place an established pattern and practice in violating not only the minimum standards of Section 3901 and the Model Unfair Claim Settlement Practices Act, but also insurance industry standards and practices for handling claims generally and glass claims in particular both as to Cullen and the Class. In my opinion, no reasonable person would deny that most of these transgressions warrant corrective action and were knowingly committed or performed with such frequency as to indicate a general business practice. (See Casualty Insurance Claims, 4th Ed - Megarick and Brownlee)

(b) State Farm sanctioned the use of Lynx CSR's without requiring and confirming that the CSR's were properly licensed to handle claims under Ohio law.

Relative to the Lynx CSR's handling State Farm glass claims, I saw nothing in the materials to confirm that they were properly trained on claim handling practices or that they were properly licensed to even handle claims. To the extent claims handlers at Lynx were not properly trained on the unfair claim settlement practices and that Lynx claim handlers were not properly licensed, that would be further indication in my opinion of State Farm's failure to abide by legal and insurance industry standards for claims handling. State Farm has produced a Glass Manual which indicates that Lynx became responsible for coverage verification, claim reporting, invoicing and payments on a fee per claim basis on all glass only auto claims.

The Lynx adjusters provide explanation of benefits under the policy, the negotiation of payments with the windshield service providers, arrangement of the actual claims payment and amount thereof and referral of subrogation if applicable. By arranging for the repairs, obtaining the necessary repair estimate and then paying for windshield claims, the Lynx CSR's fit within the definition of "Settlement of Claims" as defined in OAC Section 3901-1.07 (17) (c) which states as follows:

(c) "Settlement of Claims" shall mean all activities of the company related directly or indirectly to the determination of the extent of damages due under coverages afforded by the policy. This shall include, but not be limited to, requiring or preparing of repair invoices.

The activities of the Lynx CSR's fall within the tasks necessary for determination of damages and explanation of benefits including the requirement of repair estimates and their payment. From deposition testimony of various claims personnel, it appears that State Farm has taken the position that Lynx CSR's are not adjusting claims. However, the Claims AVP confirmed that State Farm reassigned 250 claims handlers in the regions as a by-product of the Lynx contract and the centralization of glass claims. (Hardt depo. pp. 117-118) The Lynx CSR's in my opinion perform the functions handled by claims adjusters, including the settlement of claims, which requires adjuster licensing therefore

under Ohio law (See ORC 3951.01A). These violations of Ohio law would have occurred on claims they handled for the entire class of plaintiffs in this case.

(c) State Farm's clearly intended objective was to "Sell Sell Sell" the repair process for Windshield Glass Repairs and thereby place their interests ahead of the interests of the insured.

State Farm's intent is more fully disclosed by the training provided to CSR's through the Participant's Guide which is thoroughly outlined in Section (4) of the Statement of Facts. Not only does Lynx expressly train the attendees to "Sell Sell Sell", but they even actually explain the importance of the "repair ratio" as part of the training. The objectives include the listing of benefits of repair without listing the benefits of replacement or the detriments of repair. CSR's are trained to "be proactive in qualifying windshield damage to ensure that each and every opportunity to qualify damage is pursued to the fullest", because "the more repairs that LYNX dispatches, the greater cost Savings to State Farm." The Participant's Guide contained additional information related to the timing of repairs, optical clarity and the savings achieved by State Farm with a \$50 repair in lieu of a \$375 replacement, none of which is shared with the insured as part of the scripting process. The Reminder section of the Participant Guide specifically states "sell the repair". The clarity of the message and State Farm's intent cannot be denied.

The initial National Glass Manager testified that he would not have told Lynx to "sell the repairs" and that wasn't something that "Lynx was supposed to do." (Ferraro depo. p.83) Yet a subsequent National Glass Manager assembled a National Windshield Repair Program in or around 2000 in which Glass Central developed a "THINK REPAIR FIRST" promotion to encourage their agents to push windshield repairs over replacement. (Williams Depo 3 - pp.327-335) In fact, the company "average repair ratio" increased, partially as a result of the program (Williams Depo. p 342-343) His memo of 03/15/02 memorialized the need to use local management and national State Farm publications to focus the agents on the "Repair First" option, for the average savings was \$300.00 per repair nationwide.(Cullenm 00063823-63825). State Farm agents were not supposed to use their draft authority on glass only claims for it may violate the Lynx contract and limit the savings attributed to glass claims in the national glass program as opposed to handling outside the program. (Williams Depo. 3 - pp. 351-354)

In my opinion, there is no question that the CSR's were instructed that their role was to sell the repair option over replacement, because of the significant savings achieved by State Farm. The impropriety of "selling glass repair" is acknowledged by Ferraro as something he would not have had Lynx do, for they were just supposed to follow the script provided by State Farm. (Ferraro Depo. pp. 83-83) In my opinion, State Farm was not attempting to do "what is right for the customer" as described in their scoring criteria for the CSR's and "selling repairs" was both inappropriate and contrary to industry standards and practices, as well as State Farm's "Our Commitment to Our

Policyholders". (See Auto Claim Management Course Instructor's Manual at pp.7-10) By not presenting balanced information on the repair/replacement decision, State Farm was clearly intending to push the option most financially favorable to the insurer to the detriment of the insureds. State Farm did not explain the option allowing the insured to take a check less the deductible and then repair the vehicle for \$50 while pocketing the difference. In my opinion, this certainly would be a more favorable result to the insured, as they not only get a repaired windshield, but they also get a check for additional dollars. In my opinion, a claim professional would conclude that State Farm concealed from the insureds this more favorable option, contrary to industry custom and practice to disclose all possible coverage benefits.

In my opinion, State Farm designed their Glass Program with the intent to maximize their savings, as they profess in the training materials, without regard to the best interests of their insureds, whether it is Cullen individually or the class as a whole. In fact, CSR's are reminded that repair guidelines are "guidelines only. Not absolute rules," thus in my opinion encouraging the CSR's to stretch the rules in favor of increasing the "Repair Ratio." In order to accomplish this savings, State Farm took glass claims out of the agent's draft authority (ADA) and instead promoted "THINK REPAIR FIRST" with their agency force.

Probably the most blatant example of State Farm's placing its own corporate interests over that of the insureds is reflected by the training instructions to the Lynx CSR's related to glass claims on policies with no deductible under the Comprehensive coverage. *The CSR's are further instructed "do not push the replacement" even in situations where the policyholder has a "zero deductible."* (Participant Guide, p.8) In other words, the CSR's are trained to not explain the replacement option even when there is no reduction in the amount of the claim by a deductible. The insured should be presented with the option to take a brand new windshield replacement as opposed to a repair of the old damaged windshield with absolutely no payment under either scenario! State Farm approved the training of Lynx's CSR's not to present the option and to continue to encourage the insured to repair the windshield to the insured's obvious detriment. In my opinion, State Farm is clearly placing its corporate interests over and above those of its insureds by this practice, and this blatant example of self dealing by State Farm supports the previous opinions outlined above relative to a failure to disclose and actual concealment of policy benefits. In my opinion, such willful concealment of pertinent benefits, coverages and other provisions is contrary to Section 3901 and insurance industry custom and practice.

4. *A claim professional would conclude that State Farm's glass claims program and their systematic and uniform claims handling approach that pushed policyholders towards a less costly windshield repair option without explanation of the full policy benefits was contrary to its duty of good faith and fair dealing and its fiduciary duties which resulted in a failure to give equal consideration to the interests of its policyholders, who were not fully compensated under their insurance policies.*

State Farm's conduct and wrongful practices in handling glass claims are substantially addressed in the previous sections of this report. Those failures to comply with insurance industry claim handling standards and practices as well Section 3901 are too numerous to completely restate and I will incorporate them by reference for sake of brevity. In my opinion, they clearly support the following opinions:

- (1) State Farm failed to fully disclose all known facts and circumstances to Cullen or the class contrary to the insurer's fiduciary duties;
- (2) State Farm's conduct was unreasonable in attempting to convince insureds to take the option most favorable to the insurer relative to repair/replacement under the guise of saving money through waiver of the deductible;
- (3) State Farm continually misrepresented the terms of its first-party physical damage coverage and in particular failed to disclose the failure of glass repair to return a windshield to its pre-loss or pre-accident condition;
- (4) State Farm's interpretation of its Car Policy and its practices through the script in not fully presenting coverage options was an attempt to unilaterally modify the insurance contract contrary to insurance industry practice, regulation and legal requirements related thereto;
- (5) State Farm established a clear business pattern and practice of placing its interests above those of their insureds;
- (6) State Farm failed to give the insured's interests equal consideration by failing to accurately settle claims and provide the insureds with full and accurate explanation for the manner in which claims are settled;
- (7) State Farm's concealment of information was unreasonable and in reckless disregard of their insureds' interests. The insurer knew of the problems with the repair option, failed to communicate that information to the insured, failed to communicate much of that technical information to Lynx and the CSR's handling their claims and persisted in selling the benefits of repair over replacement despite the insurer's superior specialized knowledge; and
- (8) State Farm's internal documents related to their Glass Program and the testimony from the various employees from insurer and their TPA when considered as a whole would indicate to a claim professional that State Farm's conduct was knowing, deliberate, willful, wanton, and in conscious and reckless disregard of the interests of Cullen individually and the class members.

Based upon the above, it is my opinion that State Farm's handling of glass claims during the time period asserted in this case was clearly violative of their duty of good faith and fair dealing and their fiduciary duties towards their insureds. In its own internal documents, State Farm states as follows:

State Farm claim representatives must understand the need to advise the insured of all coverages available under the contract. Claim representatives will demonstrate ethical behavior and take affirmative steps to inform the insured of all applicable contract benefits available under the policy contract, thus fulfilling our promise to the policyholders.

For the insurer to fulfill its obligation not to impair the right of the insured to receive the benefits of the agreement, *the insurer must give, at least, as much consideration to the insured's interests as it does its own...* The above principles apply to all first party coverages. Our obligation to disclose coverages available applies, regardless of whether or not the insured is represented by counsel. (Hardt Depo. - Exhibit 5 - Emphasis added)

State Farm's institutional conduct as outlined above and throughout this report reflects not only violation of minimum claim handling standards, but also a failure to comply with their own espoused policy to demonstrate ethical behavior and provide equal consideration to its insureds. State Farm's "Sell! Sell! Sell!" approach helped them achieve an approximate \$30,000,000 in savings in just three short years at the expense of their insureds. State Farm documents in writing that CSR's are further instructed "do not push the replacement" even in situations where the policyholder has a "zero deductible." This attitude reflects how blatant their activities were in disregard of their insureds rights and interests and the institution-wide obsession with the profit motive and savings over policyholder interests. State Farm's failure to adhere to its own espoused policies further demonstrates that the claim handling done pursuant to their Glass Claim Program was done so in violation of the duty of good faith and fair dealing to both Cullen and the Class.

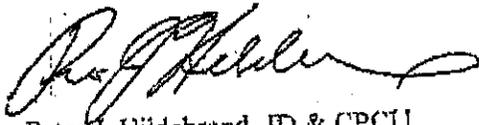
State Farm even failed to disclose many of the problems associated with repair to Lynx and the CSR's, yet required them to "Do what's right for the customer. Give them full and accurate information." State Farm did not do what was right for customer and did not provide full and accurate information. Even the problems disclosed in the Lynx training materials were not communicated to the insureds by the CSR's. In my opinion, a claims professional would conclude that State Farm's claim handling practices relative to glass claims reflected knowing, deliberate, willful, wanton, and conscious and reckless disregard of the interests of Cullen individually and the Class members.

CONCLUSION

CONCLUSION

This completes my report based upon the opinions I have been asked to render in this matter to date. All the opinions contained in this report are made to a reasonable degree of professional certainty based upon insurance industry standards and insurance industry custom and practice. It is my understanding that additional discovery may exist that I may need to review and that defendant has yet to produce reports from their experts. I reserve the right to supplement or modify this report as necessary upon receipt of those additional materials or if requested to do so by counsel.

Respectfully submitted,



Peter J. Hildebrand, JD & CPCU

EXHIBIT B

EXPERT REPORT OF PETER J. HILDEBRAND

**IN THE MATTER OF MICHAEL E. CULLEN VS STATE FARM MUTUAL
INSURANCE COMPANY
CUYAHOGA COUNTY COURT OF COMMON PLEAS
CASE # CV- 05-555183**

CURRICULUM VITAE

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Overview: As president of Peter Hildebrand, LLC, Mr. Hildebrand relies on more than 25 years of insurance, reinsurance, management and legal experience to provide consulting services throughout the United States. As both an attorney and licensed insurance consultant with a CPCU, Mr. Hildebrand provides a unique blend of professional background that can be applied to a myriad of insurance and reinsurance matters. Mr. Hildebrand qualifies as an expert in insurance coverage, claims handling, claims management, dispute resolution, employment issues and a wide variety of other legal and insurance related fields. Mr. Hildebrand has extensive experience in handling reinsurance matters including dispute resolution, commutations, audits and contract interpretation. Mr. Hildebrand also has extensive experience in the handling of claims involving issues related to good faith and fair dealing, unfair claim practice violations, and fair trade practice insurance regulations.

EXPERIENCE

12-05 TO PRESENT: PETER HILDEBRAND, LLC - ATLANTA, GA

- Insurance and reinsurance consultant providing expert opinions on insurance coverage, good faith claim handling, unfair claim practice violations, claims administration and procedures, reinsurance contract interpretation, employment practices, fee bill review and other related insurance issues.

- Mediator and Arbitrator of disputes involving coverage, claim handling, reinsurance, employment, fee mediation and all sorts of tort litigation.
- Claims evaluation and negotiation in cases of significant complexity or severity.
- Auditor of insurance or reinsurance claims, claims handling practices, claims administration, attorney fee bills and financial transactions.
- Drafting and implementing specialized claim handling programs and procedures for insurers, claim handling companies and self insured corporations

6-99 TO 12-05: AMERICAN SAFETY INSURANCE SERVICES (ASIS) – ATLANTA, GA

VICE PRESIDENT – CLAIMS LEGAL DEPT (02-04 TO 12-05)

- Established a new department that specialized in addressing the largest most complicated environmental and E&S claims within the company.
- Directly managed all multi-million dollar cases with numerous defense verdicts and favorable settlements.
- Managed all claims in litigation involving allegations of a breach of the duty of good faith and fair dealing or similar allegations.
- Handled all reinsurance reporting, audits and dispute resolution.
- Supervised all ceded reinsurance claims and saved the company several million dollars through my coverage analysis and interpretation.
- Drafted complex coverage opinions and letters based upon interpretation of commercial lines policies, manuscript policies and endorsements.
- Managed outside panel counsel including the implementation of our Outside Counsel Monitoring and Litigation Management Programs.
- Spearheaded the identification of a state of the art automated litigation management program and directed the implementation team.
- Provided claims and coverage training to company personnel and TPA claims personnel and provided legal advice to units outside of Claims.

VICE PRESIDENT – CLAIMS DEPT (06-99 TO 02-04)

- Built the ASIS Claims area to a full service Claims Department as the company grew from \$30MM to \$250MM in premium.
- Managed all aspects of the claims function for ASIS including supervision of the Claims Department and the claims quality and contract compliance of outsourced claims being handled by Third Party Administrators (TPA's).
- Led multiple teams to complete revision of our Environmental and E&S coverage forms and endorsements including the drafting of manuscript exclusionary endorsements relating to Y2K, mold, total prior works, and Montrose continuing occurrence language.
- Guided the Claims Dept implementation of Genius, Heron (Surety System) and Apollo (WC System).
- Managed the audit and control of our Program partners and their TPA's, including such lines of business as legal professional, construction; taxi cab liability; pest control; various

WC Programs including PEO business, and NY General Liability and Labor Law programs.

- Assumed and personally resolved book transfers on claims involving personal auto, AD&D, construction defect and environmental claims.
- Completed claims due diligence on several corporate acquisitions including evaluation of claims handling and reserves.
- Headed the Senior Managers Group responsible for addressing issues related to management of daily company operations during the growth years.
- Led the Strategic Planning Process for the company for two consecutive years with resultant establishment of all departmental goals and objectives.
- Selected by the Executive Board to head the Technical Services team which accomplished implementation of the following: Corporate Disaster Recovery Plan; New Employee Orientation Program; Performance Management Program; Streamlining corporate methods and procedures; and Corporate Training Program.
- Originated and led the Claims-Underwriting- Loss Control monthly meetings to review claims and loss control issues and assess renewals.
- Personally handled or supervised all claims of major exposure or complexity, both primary and excess, as well as claims involving alleged bad faith.

6-96 TO 6-99 VESTA-SHELBY INSURANCE COMPANIES - BIRMINGHAM, AL

VICE-PRESIDENT OF CLAIMS/REGULATORY & COMPLIANCE

- Managed two departments for a company that grew from \$350MM to nearly \$900MM in premium before it experienced financial problems.
- Personally handled or supervised all claims of major exposure or complexity, both personal lines and commercial lines.
- Managed all claims in litigation involving allegations of a breach of the duty of good faith and fair dealing or similar allegations.
- Cost effectively reengineered the Vesta Claims Department
- Implemented quality control standards and performed audits for MGA's handling non-standard auto claims through Vesta's County Mutual in Texas.
- Consolidated the Shelby Claims Department of 256 employees into Vesta Claims achieving efficiencies of scale.
- Implemented significant Cost Savings Measures to the combined operations maintaining claims quality while eliminating six offices
- Redesigned the entire Regulatory Department and brought company into compliance in both personal and commercial lines filings.
- Handled resolution of numerous reinsurance claims and participated in the commutation of several treaties with economically troubled reinsurers.

12-86 to 6-88 GREAT AMERICAN INSURANCE COMPANY- Cincinnati, OH

10-80 to 6-96 Regional Claims Vice President - Raleigh, NC

- Managed all the offices in the Mid-Atlantic, Southeast & Texas regions.
- Realigned claims personnel resulting in exceptional goal performance in all offices.
- Spearheaded the reorganization of offices after the company divisionalized.
- Personally handled or supervised all claims of major exposure or complexity, both primary and excess.
- The Raleigh claims operation was twice recognized as the best claims office in the Division.
- Recognized personally with the highest claims management award in the Commercial Division - The Claims MVP
- Developed technical materials for the handling of claims generated by our Optometry Professional Liability Program

12-86 to 10-90 Assistant Vice President - Home Office Liability Claims

- Directed the CAO Liability Staff with responsibility for all major claims litigation and reinsurance reporting.
- Managed the supervision of all umbrella and excess claims at GAI, as well as all claims involving alleged bad faith and unfair claim practice violations.
- Personally handled or supervised all claims of major exposure or complexity, both primary and excess.
- Handled and resolved all major reinsurance disputes with our over 100 reinsurers.
- Organized the consolidation of environmental claims into a specialized home office unit.
- Designed and implemented the programs for litigation management, structured settlements and ADR on a companywide basis.
- Developed and implemented an audit program for House Counsel Office operations.
- Implemented the Outside Counsel Monitoring Program and the Fee Bill Review Program.

9-76 to 12-86 Milwaukee Insurance Company - Milwaukee, WI

1/82 to 12/88 Vice President and General Counsel

- Responsible for all claims litigation and claim legal matters, as well as reporting to our reinsurers.
- Supervised staff attorneys responsible for claims litigation and personally supervised or handled claims involving bad faith.
- Established and managed MIC's house counsel operation
- Managed all subrogation and collection matters for the company.
- Implemented claim standards and procedures for Milwaukee Safeguard, the non-standard auto subsidiary.
- Advised human resources department on employee matters and ultimately assumed responsibility for all corporate legal matters.
- Participated on the life insurance committee, investment committee and pension committee and provided advice to same.
- Provided advice to Milwaukee Life on contract and coverage matters and participated in handling claims under their life products.

- Corporate representative to the Wisconsin Insurance Alliance and the Conference of Mutual Casualty Companies.

9/76 to 1/82 Assistant General Counsel/Associate Counsel

- Responsible for the supervision of litigation on cases pending nationwide, including coverage analysis, investigation, defense, settlement evaluation and ultimate resolution of all assigned matters.
- Responsible for the assignment of defense and working with defense counsel on litigated claims.
- Performed defense work including discovery and trial work on cases in Southeastern Wisconsin.
- Prepared filings and responses for Inter-company Arbitration and served on the local arbitration panels.
- Handled collection of subrogation against other insurance companies and uninsured drivers including filing collection suits.
- Provided coverage advice and/or legal opinions to claim handlers on non-litigated claims.

1/75 to 9/76 Trial Attorney – Private Practice of Law

EDUCATION:

UNIVERSITY OF WISCONSIN – MADISON

B.A. Degree – Economics (Honors Program)

Phi Beta Kappa, Phi Kappa Phi, Phi Eta Sigma, Evans Scholar, Rhodes Scholar Nominee

UNIVERSITY OF WISCONSIN LAW SCHOOL – MADISON

J.D. Degree – Admitted to Wisconsin State Bar; Eastern/Western Federal District Courts, Appellate Advocacy, Legal Aid Society, Evans Law Scholarship, Law Clerk

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Publications: REINSURANCE BASICS FOR THE CLAIMS PROFESSIONAL RELATIVE TO BAD FAITH CLAIMS (2006)

EXHIBIT C

MATERIALS REVIEWED FOR HILDEBRAND EXPERT REPORT

This Exhibit C contains the documents reviewed for the Expert Report of Peter J. Hildebrand in the matter of

MICHAEL E. CULLEN VS STATE FARM MUTUAL INSURANCE COMPANY,
CUYAHOGA COUNTY COURT OF COMMON PLEAS
CASE # CV-05-555183

1. Copies of pleadings related to the above captioned case including the following:

- A. Plaintiffs' Class Action Complaint - Cullen vs State Farm
- B. State Farm's Answer
- C. Various Other Discovery Responses, Notices and Court Documents

2. Claims Materials:

- A. Certified Copy of State Farm's Policy issued to Michael Cullen for 10/18/02 to 04/18/03 - Policy # 661 3686-D18-351
- B. Declarations Page - State Farm Policy issued to Cullen for 10/18/01 to 04/18/02.
- C. Various Other Policy Forms used by State Farm during the Class Term
- D. Estimate - Windshield Repair - Twinsberg Glass and Mirror
- E. Versions of scripting used in the State Farm Glass Program produced in this matter
- F. Various Communications between State Farm and LYNX
- G. Select Portions of State Farm's Glass Manual
- H. Versions of the Leader's Guide produced in this matter
- I. Versions of the Participant's Guide - CSR Training at Lynx
- J. State Farm Scoring Criteria
- K. Various National Glass Program Claim Statistical Reports
- L. Deloitte Project Materials - Auto Glass Pricing for State Farm
- M. National Glass Association - Windshield Repair Work Group Subcommittee Report
- N. State Farm Internal Report on Long Crack Repair
- O. State Farm Windshield Repair Campaign Materials
- P. Various Other Materials Provided by State Farm in Discovery

3 Deposition Transcripts and Exhibits from the following:

- A. Deposition of Bob Bischoff
- B. Deposition of Peter Cole
- C. Deposition of Michael Cullen
- D. Deposition of Brian Karol
- E. Deposition of David Williams I
- F. Deposition of David Williams II
- G. Deposition of David Williams III
- H. Deposition of David Williams - Campfield Suit
- I. Deposition of Joanne Guerra
- J. Deposition of Gary Derian including Expert Report
- K. Deposition of Eric Thomas
- L. Deposition of Craig Carmody with Expert Report, Attached Documents and Glass Industry Report
- M. Deposition of Melissa Kern I
- N. Deposition of Melissa Kern II
- O. Deposition of Anthony Ferraro
- P. Deposition of William Hardt

4. Reference Materials:

- *Insurance Bad Faith, A Compendium of State Law*, DRI Defense Library Series, (2006), and legal references cited therein.
- *Unfair Insurance Practices: A Compendium of State Law*, DRI Defense Lawyer Series, (2008) and Administrative Code Sections cited therein
- *Ohio Revised Code* 3901-1-07 and 3901-1-54 - Unfair Trade practices and Unfair Property/Casualty Claims Settlement Practices
- *Casualty Insurance Claims, 4th Ed.*, Pat Magarick & Ken Brownlee (2006)
- *Insurance Law, A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices*, Robert Keeton & Alan Widiss (1988)
- *CPCU Handbook of Insurance Policies*, 6th Edition (2005)
- Ohio Revised Code 3951.01(A) - Adjuster Licensing Requirements
- Adjuster Licensing Requirements by State - Property & Casualty Insurers Association of America (2005)
- Various Ohio Cases

COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

MICHAEL E. CULLEN, ET	:
AL.,	:
	:
PLAINTIFFS,	:
	:
vs.	: CASE NO. 555183
	:
STATE FARM MUTUAL	:
AUTOMOBILE INSURANCE	:
COMPANY, ET AL.,	:
	:
DEFENDANTS.	:

Deposition of PETER J. HILDEBRAND, a Witness
herein, called by the Defendants for
cross-examination under the applicable Ohio Rules of
Civil Procedure, taken before Carol A. Kirk, a
Registered Merit Reporter and Notary Public in and
for the State of Ohio, by agreement of counsel and
without notice or other legal formality at the
Offices of Baker & Hostetler, 3200 National City
Center, 1900 East 9th Street, Cleveland, Ohio
44114-3485 commencing on Wednesday, February 3, 2010
at 10:58 a.m.

Page 2	Page 4
1 DEPOSITION OF PETER J. HILDEBRAND	1 DEPOSITION OF PETER J. HILDEBRAND
2 APPEARANCES	2 INDEX TO EXAMINATION
3 ---	3 WITNESS PAGE
4 W. CRAIG BASHEIN, ESQUIRE	4 PETER HILDEBRAND
5 BASHEIN & BASHEIN	5 CROSS-EXAMINATION BY MR. JOHNSON: 7
6 50 Pubic Square	6 DIRECT EXAMINATION BY MR. HURST: 287
7 Cleveland, Ohio 44113	7
8 (216) 771-3239	8
9 On behalf of the Plaintiffs.	9
10 MARK A. JOHNSON, ESQUIRE	10
11 BAKER & HOSTETLER	11
12 65 East State Street	12
13 Suite 2100	13
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15 (216) 621-0200	15
16 and	16
17	17
18 ROBERT H. SCHULTZ, JR., ESQUIRE	18
19 HEYL, ROYSTER, VOELKER & ALLEN	19
20 105 West Vandalia Street	20
21 Edwardsville, Illinois 62025	21
22 (618) 656-4646	22
23 On behalf of the Defendants.	23
24	24
17 ALSO PRESENT:	
18 Robert M. Kluchin, State Farm	
19 Evan Newman, Arlington Video	
20 ---	
21	
22	
23	
24	
Page 3	Page 5
1 Wednesday Morning Session	1 DEPOSITION OF PETER J. HILDEBRAND
2 February 3, 2010	2 INDEX TO EXHIBITS
3 10:58 a.m.	3 HILDEBRAND DESCRIPTION PAGE
4 ---	4 1 STATE FARM INSURANCE POLICY 661 17
5 STIPULATIONS	5 3686-D18-351 ISSUED TO MICHAEL
6 It is stipulated by and among counsel for the	6 CULLEN
7 respective parties that the deposition of PETER J.	7 2 TWINSBURG GLASS AND MIRROR 32
8 HILDEBRAND, a Witness herein, called by the Defendants	8 INVOICE
9 under the applicable Ohio Rules of Civil Procedure, may	9 3 AFFIDAVIT AND REPORT OF PETER 44
10 be taken at this time in stenotype by the Notary, by	10 J. HILDEBRAND
11 agreement of counsel and without notice or other legal	11 4 DOCUMENT ENTITLED "IMPORTANT 60
12 formality; that said deposition may thereafter be	12 NOTICE ABOUT A CHANGE TO YOUR
13 transcribed by the Notary out of the presence of the	13 POLICY"
14 witness; that proof of the official character and	14 5 DOCUMENT ENTITLED "YOUR STATE 63
15 qualification of the Notary is waived; that the witness	15 FARM CAR POLICY HAS BEEN,
16 may sign the transcript of his deposition before a	16 REVISED"
17 Notary other than the Notary taking his deposition;	17 6 DOCUMENT ENTITLED "IMPORTANT 64
18 said deposition to have the same force and effect as	18 NOTICE REGARDING CHANGES TO
19 though signed before the Notary taking it.	19 YOUR CAR POLICY"
20 ---	20 7 OHIO DEPARTMENT OF INSURANCE 93
21	21 PROPERTY-CASUALTY FILING
22	22 TRANSMITTAL FORM
23	23 8 OHIO DOCUMENT ENTITLED "OHIO 94
24	24 MOTOR VEHICLE POLICY"
	25 9 OHIO DEPARTMENT OF INSURANCE 95
	26 PROPERTY-CASUALTY FILING
	27 TRANSMITTAL FORM FOR ALLSTATE
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	29 10 LETTER FROM NHTSA TO NGA, 4 115
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1 expert witness?
2 A. Yes.
3 Q. You're not serving as an advocate in this
4 case, are you?
5 MR. HURST: Objection.
6 A. As an advocate? No. I'm testifying as an
7 expert witness. I'm here as an expert witness to
8 assist the court and the tryer of fact in this case.
9 Q. Okay. Even though you're an attorney, you're
10 not here as counsel for Mr. Cullen, are you?
11 A. I am an attorney, but I don't practice law.
12 Q. Even though you're an attorney, you're not
13 here as counsel for Mr. Cullen, are you?
14 A. Well, if I don't practice law, I'm not here
15 as counsel for anybody.
16 Q. So the answer to my question is yes, correct?
17 A. I'm not here as counsel for Mr. Cullen.
18 Q. Thank you.
19 You understand that your role as a witness is
20 to respond to questions as best as you're able?
21 A. I will do the best I can.
22 Q. Thank you.
23 If you don't hear or understand a question,
24 will you please tell me?

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1 PETER J. HILDEBRAND
2 being by me first duly sworn, as hereinafter certified,
3 deposes and says as follows:
4 CROSS-EXAMINATION
5 BY MR. JOHNSON:
6 Q. Good morning, Mr. Hildebrand.
7 A. Good morning.
8 Q. I'm Mark Johnson, counsel for State Farm in
9 this case. Could you state your full name for the
10 record, please.
11 A. Peter Jerome Hildebrand.
12 Q. Your business address, sir?
13 A. 3418 Woodshire Crossing, Marietta, Georgia.
14 Q. Thank you.
15 We're here to take your deposition and ask
16 you questions. Of course, you're familiar with that
17 process. If at any time you wish to take a break,
18 please speak up and we'll take one so long as there's
19 not a question pending. Is that okay?
20 A. Fine with me.
21 Q. You submitted an expert report in this case
22 on behalf of the Plaintiff; is that correct?
23 A. Yes.
24 Q. And you understand your role here is as an

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1 A. Absolutely.
2 Q. And if you don't, I'll assume that you've
3 understood and heard my question, okay?
4 A. That's up to you.
5 Q. Okay. You understand that assumption,
6 though?
7 A. Well, I understand you're stating you're
8 going to assume that.
9 Q. Okay. And I will do so, sir.
10 A contractual relationship between State Farm
11 and its policyholders is determined by the policy of
12 insurance, isn't it?
13 MR. HURST: Objection.
14 A. Partially.
15 Q. What else could define the contractual
16 relationship between State Farm and its policyholders
17 other than the policy of insurance?
18 A. Well, you have your contractual duties and
19 your extracontractual duties of good faith and fair
20 dealing.
21 Q. Okay. Those are extracontractual duties,
22 though, correct?
23 A. Yes, but they're inherent from the insurance
24 contract.

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1 Q. In defining their responsibility under the
 2 contract itself, the contractual duties, that's defined
 3 by the policy of insurance, isn't it?
 4 MR. HURST: Objection.
 5 A. Well, the policy of insurance is a contract,
 6 and it speaks for itself.
 7 Q. Okay. So it is defined -- the policy of
 8 insurance does define the obligations of State Farm
 9 under that contract, correct?
 10 MR. HURST: Objection.
 11 A. Yes, some of them.
 12 Q. Pardon me?
 13 A. I said some of them.
 14 Q. Okay. Where else would one find other
 15 obligations, contractual obligations, that aren't
 16 written in the four corners of the policy of insurance?
 17 A. Well, you're assuming that if it's not in the
 18 four corners, it's not contractual. On that basis,
 19 you're excluding things such as claim handling
 20 practices and procedures.
 21 Q. And those would relate to extracontractual
 22 duties, though; would they not?
 23 A. I think they relate to issues relating to
 24 whether they're complying with the terms of the

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1 contract as well.
 2 Q. Okay. In defining the terms of the contract,
 3 those are expressed in the policy of insurance; are
 4 they not?
 5 A. Well, the policy of insurance speaks for
 6 itself, as do its terms.
 7 Q. The answer is yes, they are defined in the
 8 policy of insurance; are they not?
 9 A. Well, I believe some of them are defined.
 10 Q. In the policy of insurance, sir?
 11 A. I answered your question.
 12 Q. No, you didn't, sir.
 13 A. I sure did.
 14 Q. Let's start again. The terms of the policy
 15 of insurance, the terms of the contractual
 16 relationship, are defined in the policy of insurance;
 17 are they not?
 18 A. And the contract speaks for itself.
 19 Q. The answer is yes?
 20 A. The answer is the contract speaks for itself.
 21 Q. Sir, why won't you answer my question?
 22 A. I just did.
 23 Q. No, you didn't.
 24 A. That's your opinion.

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1 Q. Is it you don't like my question?
 2 MR. BASHEIN: Objection.
 3 A. I answered your question.
 4 Q. Pardon me?
 5 A. I answered your question.
 6 Q. You're refusing to answer the question?
 7 A. No. I answered your question.
 8 Q. Okay. Well, let's move on. We can come back
 9 to this in a little bit more concrete fashion, if
 10 that's okay.
 11 MR. BASHEIN: No, it's not okay. He's
 12 answered your question. Don't badger him.
 13 MR. JOHNSON: I'm not badgering him, Craig.
 14 Q. Am I badging you, sir?
 15 MR. BASHEIN: I disagree.
 16 A. Maybe you're trying to, but it's not working.
 17 Q. I don't mean to badger you, and I apologize
 18 if you perceive that I'm doing that.
 19 A. I accept your sincerity.
 20 Q. Is the interpretation of the policy of
 21 insurance a question of law?
 22 A. Generally, yes.
 23 Q. Generally. When would it not be a question
 24 of law?

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1 A. Well, when you interpret a policy, certain
 2 terms and conditions in the policy are a state of art
 3 that require explanation from actual practice;
 4 therefore, it's not strictly limited to just a question
 5 of law.
 6 Q. Is that your conclusion that Ohio -- under
 7 Ohio law, sir? I'm sorry. I didn't say that very
 8 well. Does your response apply under Ohio law?
 9 A. I haven't researched Ohio law.
 10 Q. So you're not sure whether or not your
 11 response is accurate under Ohio law?
 12 A. I haven't researched Ohio law, so I can't
 13 answer your question.
 14 Q. Okay. The answer is you're not sure your
 15 response is accurate under Ohio law then?
 16 A. The answer is I haven't researched Ohio law.
 17 Q. So you don't know whether the answer -- I'm
 18 sorry. We seem to keep going around, Mr. Hildebrand.
 19 I'm not sure why you won't just answer yes when that's
 20 apparent.
 21 MR. HURST: Objection.
 22 A. I answered your question.
 23 MR. JOHNSON: Could you restate the question,
 24 please?

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1 unresponsive.
 2 Could you repeat the question to
 3 Mr. Hildebrand, please?
 4 MR. BASHEIN: It was responsive. That was
 5 his answer.
 6 (Record read back as requested.)
 7 THE WITNESS: Could you read back my answer,
 8 please?
 9 (Record read back as requested.)
 10 BY MR. JOHNSON:
 11 Q. Sir, could you point to in this Exhibit 1 the
 12 language that you were referencing here where it says
 13 something about in the event you decide not to fix the
 14 vehicle?
 15 MR. HURST: Are we talking about the entire
 16 policy, Mark?
 17 MR. JOHNSON: No. Right now I'm asking him
 18 the limit of liability, how he was defining that.
 19 A. Okay. So you're just referencing just this
 20 particular provision?
 21 Q. Right now. We'll pass on and move on to some
 22 other provisions later that may give you that
 23 opportunity. Right now under limit of liability, if
 24 you could identify the language that you're relying

Page 23

1 upon.
 2 A. Well, the language that says, "Limit of our
 3 liability for loss to property or any other part of it
 4 is the lower of the actual cash value or the cost of
 5 repair or replacement."
 6 Q. Okay. Let's take a hypothetical. If the
 7 cost to replace a windshield is \$350 and the value of
 8 the vehicle is \$3,000, what is the limit of State
 9 Farm's liability under the policy of insurance?
 10 MR. HURST: Objection.
 11 THE WITNESS: Could you read that back for me
 12 again, please.
 13 (Record read back as requested.)
 14 MR. HURST: Repeat the objection.
 15 A. Well, the cost of replacement is \$3,000.
 16 That would be the ultimate limit.
 17 Q. You find that \$3,000 is the lower of \$3,000
 18 and \$350?
 19 MR. HURST: Objection.
 20 A. Well, if the -- well, obviously \$3,000 is
 21 more than \$350, but --
 22 MR. HURST: Mark, can you have the court
 23 reporter repeat the question?
 24 MR. JOHNSON: Sure. I wasn't sure --

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1 Q. I thought you were still concluding your
 2 response, sir.
 3 A. Oh, no. I thought we had already finished.
 4 Q. No. You were tailed off, and I didn't want
 5 to interrupt you.
 6 A. Oh, I'm sorry.
 7 MR. HURST: Then it's not necessary.
 8 MR. JOHNSON: Could you repeat the question
 9 then?
 10 (Record read back as requested.)
 11 THE WITNESS: What was my answer?
 12 (Record read back as requested.)
 13 BY MR. JOHNSON:
 14 Q. Were you concluded with your answer, sir?
 15 A. Yes.
 16 Q. Okay. What does the word "lower of" in the
 17 phrase "lower of actual cash value and cost of repair
 18 or replacement" mean in limit of liability under your
 19 view?
 20 A. Well, the lower of would be the lesser of the
 21 two numbers.
 22 Q. Okay. The lesser of actual cash value of
 23 cost of repair or replacement, correct?
 24 A. The lower of either 1 or 2, either actual

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1 cash value or cost of repair or replacement.
 2 Q. Thank you.
 3 How under the policy is the cost of repair or
 4 replacement determined?
 5 MR. HURST: Objection.
 6 A. Well, it's determined by either the cost of
 7 repair or replacement agreed upon by the insured and
 8 the insurer or some sort of approved competitive bid or
 9 by an estimate based upon the prevailing competitive
 10 prices, as long as they restore the vehicle to its
 11 pre-loss condition.
 12 Q. Okay. Where do the words "pre-loss
 13 condition" appear under those three methods of
 14 determining the cost of repair or replacement?
 15 A. Well, on page 18 of the policy, in Subsection.
 16 3 where it relates to estimates written based upon the
 17 prevailing competitive price.
 18 Q. You do not find the words "pre-loss
 19 condition" under cost of repair determined by agreement
 20 or by competitive bid, do you?
 21 MR. HURST: Objection.
 22 A. Well, I think it's inherent from the policy
 23 that a competitive bid or a cost of repair is to
 24 restore the vehicle to its pre-loss condition, so the

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1 specific wording is under 3, but it's inherent from 1
 2 and 2 that the wording should apply as well.
 3 Q. Are you telling the court the words "pre-loss
 4 condition" appear under 1 and 2?
 5 A. No, I didn't say that.
 6 Q. Okay. You're saying it's inherent. The
 7 words should be implied under 1 and 2?
 8 A. Well, when you're agreeing to a cost to
 9 repair based upon a number, you have to -- the repair
 10 itself inherently should be to the pre-loss condition.
 11 When you're getting a competitive bid, the idea is to
 12 return the policyholder to their pre-loss condition,
 13 and not only that, in State Farm's own materials, they
 14 say that these are intended to -- the cost of repair is
 15 intended to bring the vehicle back to its pre-loss
 16 condition. So, as I said before, it's specific under
 17 No. 3, it's inherent from 1 or 2 --
 18 Q. Okay.
 19 A. -- and it's also addressed in my report.
 20 Q. I apologize. I didn't mean to interrupt you.
 21 Were you done with your answer, sir?
 22 A. Well, now you've distracted me, and I can't
 23 remember what else I was going to say, but I'm sure
 24 that you'll ask me something that --

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1 Q. I'm sure we'll give you an opportunity to
 2 come back to that.
 3 You would agree with me that the words
 4 "pre-loss condition" are not expressed under number 1
 5 and 2, are they?
 6 MR. HURST: Objection.
 7 A. I think you asked that question already, and
 8 I already answered it.
 9 Q. Do you see the words under 1 and 2?
 10 A. You know, counsel, this will go a lot faster
 11 if you don't repeat your questions when I give you an
 12 answer.
 13 Q. Mr. Hildebrand, I'm sorry. Were you done?
 14 A. The answer to your question is it's found
 15 under No. 3 and it's inherent under 1 and 2. The
 16 specific wording is not specific. You list it in No. 1
 17 or No. 2.
 18 Q. Thank you.
 19 A. But it's inherent under those and from State
 20 Farm's own policies and procedures.
 21 Q. Thank you.
 22 When you say inherent, what do you mean?
 23 A. I think I described what I meant by inherent
 24 three or four answers ago. Basically the cost of

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1 repair, the purpose of the repair is to return a part
 2 or a vehicle to its pre-loss condition. The idea of
 3 repair is to fix it. So, you know, there's no
 4 definition of repair in the policy. The same thing
 5 about a competitive bid. The competitive bid is to
 6 repair the vehicle to its pre-loss condition. That's
 7 the whole idea. So it's inherent when you say cost of
 8 repair or competitive bid that you're returning the
 9 vehicle by that repair or by that bid to its pre-loss
 10 condition.
 11 Q. Have you ever read the Hall decision of the
 12 Sixth Circuit Court of Appeals, sir?
 13 MR. HURST: Objection.
 14 A. Sixth Circuit? No.
 15 Q. Is it your opinion that windshield repairs do
 16 not restore a windshield to its pre-loss condition?
 17 A. Well, I'm not a windshield repair expert, but
 18 based upon all the materials that I've read in this
 19 particular case, it appears pretty conclusive that
 20 windshield repair will not return a windshield to its
 21 pre-loss condition even under the most simple repair,
 22 because there will remain a blemish or some other
 23 disfiguration apparent in the windshield.
 24 Q. And what materials are you basing that on?

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1 A. Well -- excuse me while I pull my report.
 2 Q. Mr. Hildebrand, I'll withdraw the question,
 3 because we'll come back to it with your report.
 4 A. Sure.
 5 Q. We'll have a chance to go through that as
 6 well.
 7 So I understand, is it your position it
 8 doesn't matter how the cost of repair is determined,
 9 the standard of pre-loss condition applies no matter
 10 what? Is that your -- am I understanding your opinion?
 11 MR. HURST: Objection.
 12 A. As it applies to windshield claims, that
 13 would be pretty accurate; but, you know, if you gave me
 14 a specific scenario, I could address it more
 15 specifically.
 16 Q. Well, would your logic also apply to any type
 17 of estimatics claim regardless, whether it's windshield
 18 repair or not?
 19 MR. HURST: Objection.
 20 A. Well, the language in the State Farm policy
 21 in returning -- restoring the vehicle to its pre-loss
 22 condition is something State Farm put in there. A
 23 reasonable interpretation of that would be they're
 24 going to return it to the pre-loss condition. So, you

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1 MR. HURST: Objection.
 2 A. Well, it speaks for itself. There's right to
 3 settle a loss claim which is followed by three
 4 paragraphs, and one paragraph has two subsections if
 5 that's what you're getting at.
 6 Q. I am. And the "we" at the beginning, that's
 7 State Farm, isn't it?
 8 A. "We" is State Farm.
 9 Q. The fourth option there, which is paragraph
 10 3, return stolen property, that doesn't apply here or
 11 generally in connection with a glass only claim, does
 12 it?
 13 A. Well, it's possible. I mean I've seen enough
 14 claims in my life and those glass claims to know that
 15 sometimes people have stolen a car and it's been
 16 returned with a broken windshield and that's the only
 17 damage to it. Therefore, you know, the answer to your
 18 question is that's not necessarily correct, but I
 19 wouldn't consider it to be material to this particular
 20 case --
 21 Q. Okay. Fair enough.
 22 A. -- what you're getting at.
 23 Q. I am. No. 1 says pay the actual cash value
 24 of the property at the time of loss in exchange for the

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1 damaged property. Do you consider that method of
 2 settling a loss to generally apply to glass only
 3 claims?
 4 MR. HURST: Objection.
 5 A. That's a provision that applies generally to
 6 total loss claims.
 7 Q. That's my understanding as well. So it
 8 doesn't apply to glass only claims generally unless in
 9 the unusual situation if the cost to repair or replace
 10 exceeds the value of the vehicle, would that be your
 11 understanding?
 12 MR. HURST: Objection.
 13 THE WITNESS: I'm sorry. Go ahead. State
 14 your objection.
 15 MR. HURST: Objection.
 16 A. It could apply to glass only claims, because
 17 it doesn't limit it to just the vehicle. It says to
 18 the value of the property.
 19 Q. Doesn't it also require an exchange for the
 20 property?
 21 A. Well, if you're going to pay for the actual
 22 cash value of the property and the insurance company
 23 wants you to return the damaged property, I guess you
 24 can get it back.

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1 Q. That's what it says, correct?
 2 A. Well, it says what it says, you know. I
 3 think I explained it in general terms.
 4 Q. All right. It also under Subsection 2 or
 5 subparagraph 2 has two subparagraphs as you noted,
 6 correct?
 7 A. I don't understand your question.
 8 Q. I'm looking at No. 2.
 9 A. I'm looking at No. 2, too.
 10 Q. Okay. Fair enough. It says State Farm may
 11 pay to repair or pay to replace the damaged property or
 12 part, doesn't it?
 13 A. It says, "pay to: A. repair the damaged
 14 property or part, or b. replace the property or part.
 15 If the repair or replacement results in betterment, you
 16 must pay for the amount of betterment."
 17 Q. Is it your opinion that State Farm is
 18 contractually required to pay the value of a
 19 replacement windshield in lieu of the actual cost to
 20 replace a windshield?
 21 MR. HURST: Would you repeat the question,
 22 please.
 23 (Record read back as requested.)
 24 MR. HURST: Object to the question.

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1 A. So your question relates to whether it's
 2 value versus cost? Is that the essence of your
 3 question? I'm not sure I understand your question. Is
 4 that what the essence of your question is?
 5 Q. What part of it didn't you understand, the
 6 use of value and cost?
 7 A. I'm asking you, is that what you question
 8 relates to, the difference between value and cost? Is
 9 that what you're referencing?
 10 Q. To start with, yes.
 11 A. Okay. Well, it says here, it says, "pay to:
 12 repair the damaged property or part, or replace the
 13 property or part." It doesn't reference value or cost
 14 in the provision, per se.
 15 Q. Under No. 2, that's pay to repair or pay to
 16 replace, correct?
 17 A. Pay to repair the damaged property or part or
 18 replace the property or part.
 19 Q. If a policyholder requested or asked for a
 20 check for the value of a replacement windshield, is it
 21 your opinion that State Farm would be required under
 22 the policy to give that policyholder a check without
 23 replacing the windshield?
 24 A. Yes.

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1 Q. And what do you base that upon?

2 A. Because it's a policy of indemnity. It's a

3 first party indemnity contract, which means that the

4 policyholder as a general rule has the right to be

5 indemnified for the replacement cost.

6 Q. Does the policy anywhere state that State

7 Farm must pay for the cost of replacing a damaged part

8 such as a windshield that is not actually replaced?

9 MR. HURST: Objection.

10 You can answer.

11 A. Well, it says right there replace the

12 property or part. It doesn't say it has to be -- you

13 pay to replace the property or part. It doesn't say

14 that they have to replace the part. You have to pay

15 the cost of that property or part.

16 Q. That's your interpretation of pay to repair

17 or pay to replace?

18 A. Right, because it's an indemnity contract.

19 They're paying -- insurance companies across the board

20 for the 30 some years I've been in this business will

21 pay the insured that money; or if the insured asks for

22 the money, the insurance companies will pay the money.

23 That's a very simple practice. It's consistent with

24 the way it's been forever, and it's still being done.

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1 I think it's consistent with the testimony of many of

2 the State Farm employees in this case.

3 Q. I'm really focusing on the policy language

4 itself, though, and what it contractually requires as

5 opposed to what may be common practice or procedure in

6 the industry.

7 A. Yes, and I think you're probably aware that

8 your State Farm people are supposed to know that as

9 well.

10 Q. Do you understand or are you familiar with

11 Ohio law on indemnity insurance policies?

12 A. I haven't researched Ohio law on indemnity

13 policies.

14 Q. So you're not familiar under standard Ohio

15 law on indemnity insurance requires that an insured

16 actually incur the cost of replacing damaged property

17 before an indemnity obligation arises?

18 MR. HURST: Objection.

19 THE WITNESS: Could you read that back,

20 please.

21 (Record read back as requested.)

22 MR. HURST: Repeat the objection.

23 A. Excuse me for a minute. I want to look at

24 something.

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1 Q. Take your time.

2 A. It was my understanding that the obligation

3 to indemnify occurs not just with the payment of the

4 money, but it also can be triggered by the obligation

5 to pay the money.

6 Q. Without the policyholder having incurred the

7 cost of replacing a damaged part?

8 A. As I said, the obligation to pay the money or

9 the actual payment by the policyholder to pay the

10 money, either would trigger indemnity.

11 ---

12 AFFIDAVIT AND REPORT OF PETER J.

13 HILDEBRAND WAS MARKED AS EXHIBIT 3.

14 ---

15 Q. Let me hand you what is identified as

16 Deposition Exhibit 3, and perhaps this will save you

17 the effort of going through your notebook. Could you

18 identify that for the record, please.

19 A. Yes. This is my Affidavit dated November 27,

20 2009 with my attached expert report and CV, and Exhibit

21 C are materials reviewed for preparation of my report.

22 Q. Could you turn to page 16 of your report of

23 Exhibit 3. Sir, I really need you to look at the

24 record copy. You're more than welcome to have your

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1 copy open; but for purposes of the record, you do need

2 to have the exhibit.

3 A. Counsel can I ask you a question?

4 Q. Please.

5 A. Did you change the report?

6 Q. No.

7 A. Nobody changed the report, so my copy of the

8 report is the same --

9 Q. Sir, You're going to have to open Exhibit 3

10 and turn to page 16. You're certainly welcome to also

11 open page 16 or whatever other pages of your copy of

12 your report to confirm that no changes were made, but

13 that is the exhibit that's part of the court record, so

14 that's what we need to refer to.

15 Are you there?

16 A. I have page 16 in front of me.

17 Q. Thank you.

18 You list four options here on page 16 with

19 respect to Mr. Cullen's claim, settlement options, that

20 is, don't you?

21 A. There are four possibilities there that are

22 listed, yes.

23 Q. You say "A claims adjuster could offer the

24 following settlement options." Those are the words in

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1 replacement of the windshield to Cullen and --
2 actually, No. 2, if the creditor -- which we have no
3 indication there is a creditor -- could be on the check
4 and Cullen could get them to sign off on the check and
5 he could keep it, and you could do the same under 3.
6 But, again, there's no indication there is a creditor,
7 so all this is superfluous in my opinion.
8 Q. Well, with respect to all class members whose
9 vehicles were financed and their declarations page show
10 that their vehicles were financed, under your
11 interpretation of the policy, State Farm would be
12 required only to issue a check for the cost of a
13 replacement windshield that was also payable to a
14 repair shop, correct?
15 MR. HURST: Objection.
16 MR. BASHEIN: Objection. That's not what he
17 said.
18 THE WITNESS: Do you want to read it back?
19 (Record read back as requested.)
20 A. I don't understand the question.
21 Q. What part of it don't you understand?
22 A. Well, on the one side you're talking about
23 finance, then you're talking about repair shop. I
24 didn't understand your question.

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1 Q. Okay.
2 A. Do you want to rephrase it?
3 Q. Yes, let me.
4 A. Actually, can we take a break?
5 Q. Sure. I'd be happy to.
6 (Short recess taken.)
7 BY MR. JOHNSON:
8 Q. Mr. Hildebrand, I draw your attention to page
9 17 of Exhibit 1, Mr. Cullen's policy of insurance.
10 A. I have it in front of me.
11 Q. Does it not authorize windshield repair with
12 the policyholder's agreement?
13 MR. HURST: Objection, including form.
14 A. Well, the provision Sub 1 under
15 "Comprehensive - Coverage D" says as to loss to your
16 car, that "We will pay for loss to your car except loss
17 caused by collision" -- which is covered elsewhere --
18 "but only for the amount of each such loss in excess of
19 the deductible amount, if any." Then it adds in that
20 "If we offer to pay for the repair of damaged
21 windshield glass instead of the replacement of the
22 windshield and you agree to have such repair made, we
23 will pay the full cost of repairing the windshield
24 glass regardless of your deductible."

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1 Q. Is it your belief the policy authorizes
2 payment for windshield repair if the policyholder has
3 agreed?
4 MR. HURST: Objection, including form.
5 A. Well, I believe if the policyholder -- I
6 believe the policyholder has to have a knowing
7 agreement as to their options under the policy, such
8 that they would know that they have the option to
9 repair or to replace, replace being subject to
10 deductible and go out and repair it themselves. So
11 it's not that simple, but the policy language is as I
12 read it.
13 Q. All right. This language also refers to both
14 repair and replacement of windshields as options; does
15 it not?
16 MR. HURST: Which language are you talking
17 about?
18 MR. JOHNSON: The same one he just quoted.
19 A. Are you talking about Subsection 1?
20 Q. Yes, correct.
21 A. It says, "If we offer to pay for the repair
22 of damaged windshield glass instead of the replacement
23 of the windshield and you agree to have the repair
24 made, we will pay the full cost of repairing the

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1 windshield glass regardless of your deductible."
2 Q. Does whether or not payment of windshield --
3 strike that.
4 Does the determination of whether or not
5 payment for windshield repairs was contractually
6 authorized depend on whether the policyholder has
7 agreed to windshield repairs?
8 MR. HURST: Objection.
9 A. Well, the policy says that you have to agree
10 to have such repair made; but, again, it's premised
11 upon the fact that the policyholder is making a knowing
12 agreement, so that would mean -- a knowing agreement
13 would mean that they would have to know that they have
14 the option to repair or replace and the replacement
15 subject to deductible and be able to understand, as I
16 said before, that if they're going to replace subject
17 to deductible, they could take the money and go repair
18 it themselves. So I'm talking about a knowing and
19 understanding agreement contrary to what the LYNX
20 scripts reflected.
21 Q. Doesn't paragraph 1 of the policy, what you
22 just read, tell the policyholder that you have an
23 option to either repair or replace the vehicle -- or
24 the windshield?

1 MR. HURST: Objection.
 2 A. You know, it doesn't say specifically we will
 3 pay for loss to your car windshield, but only for the
 4 amount -- it just says generically we'll pay the loss
 5 for your car. Even if the policyholder read this, it
 6 is very possible that the policyholder would not
 7 understand that option unless it was properly explained
 8 to them.
 9 Q. Would some policyholders understand that
 10 option upon reading this language?
 11 MR. HURST: Objection, including form.
 12 A. I don't know.
 13 Q. Is the option of windshield repair, if I
 14 understand this wording correctly, is only if State
 15 Farm has offered to pay for the repair of a damaged
 16 windshield, correct?
 17 MR. HURST: Objection.
 18 A. Well, it says if we offered to pay for the
 19 repair of a damaged windshield glass, so that would
 20 imply that they would be offering to pay the cost of
 21 repair; and premised upon our other reading of the
 22 language in here under limit of liability, that repair
 23 would have to restore the vehicle to its pre-loss
 24 condition.

1 ABOUT A CHANGE TO YOUR POLICY" WAS
 2 MARKED AS EXHIBIT 4.
 3 ---
 4 Q. Okay. Mr. Hildebrand, I'm going to hand you
 5 what has been identified as Exhibit 4, a notice that
 6 had been sent to Ohio policyholders in March of 1998.
 7 Have you seen that document before?
 8 A. Yes.
 9 Q. Could you read for the court and the jury the
 10 language in the first paragraph on the first page of
 11 this notice sent to Ohio policyholders?
 12 A. Are you talking about the second page? In
 13 looking at the document, is this the first page and
 14 this is the second page?
 15 Q. I'm literally speaking this exhibit, the
 16 one-page document, on the right-hand side of the first
 17 page below the caption "Important Notice About a Change
 18 to Your Policy," just the first paragraph, please.
 19 A. Fine. "We've added language to your State
 20 Farm Car Policy under Comprehensive and Collision
 21 Coverages. The new language states that if we offer to
 22 pay for the repair of damaged windshield glass instead
 23 of the replacement of the windshield and you agree to
 24 have the repair made, we will pay the full cost of

1 Q. Wouldn't a windshield repair be advantageous
 2 to those policyholders who didn't want to pay a
 3 deductible?
 4 MR. HURST: Objection.
 5 A. I guess the answer to that is that the
 6 policyholder needs to be able to make a knowing and
 7 intelligent decision as to whether it would be or not;
 8 and if you don't give them the two options, you can't
 9 really answer that question yes or no.
 10 Q. Would that depend on whether or not the
 11 policyholder understood the existence of those two
 12 options?
 13 A. Well, the policyholder can't make a knowing
 14 and understanding decision unless it's explained to
 15 them one way or another.
 16 Q. So if the policyholder already knew of the
 17 existence of the options, you're telling me that it
 18 doesn't matter, there still has to be a knowing
 19 explanation of the existence of the two options?
 20 MR. HURST: Objection, including form.
 21 A. I'm saying a prerequisite to making the
 22 decision is knowing and understanding. So if --
 23 ---
 24 DOCUMENT ENTITLED "IMPORTANT NOTICE

1 repairing the windshield regardless of the deductible
 2 that applies to your coverage. If the windshield is
 3 replaced, you will continue to be responsible for any
 4 deductible that you selected to apply to your
 5 coverage."
 6 Q. The second page of this exhibit also contains
 7 an endorsement making this policy change, in fact, that
 8 same policy language that we talked -- or you read
 9 earlier, doesn't it?
 10 A. Second page is a "6126BQ Amendment of Section
 11 IV - Physical Damage Coverages."
 12 Q. Do you think this document, Exhibit 4, is a
 13 reasonable method of communicating this policy change
 14 to policyholders?
 15 MR. HURST: Objection, including form.
 16 A. I think it provides notice of a policy
 17 change, but I'm not sure that a policyholder would
 18 understand that they would be able to cash out a claim
 19 using the replacement costs and go back and repair the
 20 windshield themselves based upon this notice; and from
 21 that point of view, to a great extent merely restates
 22 what the policy language says.
 23 Q. Would a reasonable policyholder reading
 24 Exhibit 4 understand that both replacement and repair

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1 A. I was at Vesta from 1996 to 1999.
2 Q. In either of those cases, did you agree to --
3 strike that.
4 Did American Safety Insurance for whom you
5 also worked pay for windshield repairs?
6 MR. HURST: Objection.
7 You may answer.
8 A. I don't believe so.
9 Q. Did Vesta Shelby pay for windshield repairs?
10 MR. HURST: Objection.
11 You may answer.
12 A. Vesta Shelby -- I believe that prior to our
13 acquisition of Anthem Casualty, which included Shelby,
14 Federal Kemper, that they had an agent program where
15 agents may have been able to pay for a repair; however,
16 it would have been a very rare circumstance, because
17 they had to get approval from the home office glass
18 claims people who were handling those claims, and the
19 agents as a general rule replaced nearly everything.
20 Q. This is from 1996 to 1999?
21 A. This would have been about 1997.
22 Q. And glass only claims at Vesta Shelby were
23 handled by agents?
24 A. Yes.

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1 Q. Were those exclusive or nonexclusive agents?
2 A. Nonexclusive.
3 MR. HURST: Objection, including form.
4 Q. What about at Great American, did it pay for
5 repair of windshields?
6 MR. HURST: Objection, including form.
7 A. I don't believe so. I believe that was --
8 those claims were handled again under their AAP
9 program, the agents adjustment program, and agents were
10 paid to handle those claims and agents routinely paid
11 for replacement of windshields. Basically the reason
12 they did that was because it was a great way to satisfy
13 your customer. You could get it done promptly and
14 quickly, and the customer was always happy because they
15 got a new windshield. It was a customer service
16 approach to the handling of glass claims.
17 Q. Does Great American today pay for repair of
18 windshields?
19 MR. HURST: Objection.
20 A. I have no idea.
21 Q. Doesn't the test of pre-loss condition
22 require an understanding of a comparison of the
23 windshield before and after the damage?
24 MR. HURST: Objection.

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1 A. I think you already asked that question.
2 Q. A variation. Can you please answer this?
3 MR. HURST: Objection; asked and answered.
4 A. I think, as I said before, that once a claim
5 is presented, it is your first opportunity to examine
6 the windshield; therefore, that's your first
7 opportunity to ascertain what pre-loss condition would
8 have been, and you can do that through inspection. So
9 you can't inspect a vehicle for pre-loss condition
10 before the claim occurs as a general practice.
11 Although, some insurance companies have gone out and
12 photographed vehicles and done things like that when
13 they insure the vehicles, but that's -- to my
14 knowledge, from a claims perspective, your first
15 opportunity is after the windshield damage has
16 occurred.
17 Q. Isn't it true that a replacement windshield
18 won't be the same as an original windshield already on
19 the vehicle?
20 MR. HURST: Objection, including form.
21 A. I couldn't hear the end of your question.
22 Q. Isn't it true that a replacement windshield
23 won't be the same as an original windshield already on
24 the vehicle?

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1 MR. HURST: Repeat objection.
2 A. I think generally that's not true. It's
3 possible.
4 Q. Well, it won't have the factory seal on the
5 windshield, will it?
6 MR. HURST: Objection.
7 A. Well, it won't have the factory seal; but if
8 properly replaced, the new seal should be the same as
9 the factory seal.
10 Q. I'm sorry?
11 A. Again, I'm not an expert on windshield
12 repair; but based upon the materials of what I've seen,
13 if you properly replaced the windshield, you can return
14 it to the same level of sealing as was on there before
15 to allow for the same types of safety and protection
16 that you need from a windshield.
17 Q. Except for a visible blemish, won't a
18 properly performed windshield repair also do the same
19 for a windshield?
20 MR. HURST: Objection. He's not an expert in
21 windshield repair. He's testified to this.
22 A. Again, there's material in here that will
23 support the fact that a repaired windshield would never
24 be the equivalent of the undamaged windshield that was

1 there to begin with.
 2 Q. All right. We'll turn to that in a moment.
 3 Can we take a second? I'd like to take a
 4 break.
 5 (Short recess taken.)
 6 BY MR. JOHNSON:
 7 Q. Mr. Hildebrand, if I understand your
 8 testimony before we went off the record, it was Vesta
 9 Shelby and Milwaukee that may have paid for original
 10 repairs for policyholders; is that correct?
 11 MR. HURST: Objection.
 12 A. My testimony was that the repair industry
 13 came around to Milwaukee Insurance and demonstrated on
 14 actual vehicles in the parking lot, including my own,
 15 their repairability. I didn't say that Milwaukee
 16 Insurance paid to repair vehicles.
 17 Q. Okay. Did they?
 18 A. I don't believe so.
 19 Q. Okay. And what about with respect to Great
 20 American, did they pay for windshield repairs?
 21 A. I think what I said before was that Great
 22 American handled the small auto claims, including glass
 23 claims, through their AAP program; and by knowledge,
 24 the agents basically paid for replacement. If there

1 replacement?
 2 MR. HURST: Objection, including form.
 3 A. Are you talking about Shelby now?
 4 Q. Yes, I thought we did. I'm sorry. I thought
 5 my question did say Shelby.
 6 A. Okay. You know, again, I don't really recall
 7 specifically what was communicated to the policyholder
 8 other than the fact that they had replacement cost
 9 coverage. I don't believe the Shelby policies had a
 10 waiver of deductible provision in them at that time.
 11 Q. That wouldn't -- I'm sorry. Were you
 12 finished?
 13 A. Yes.
 14 Q. That wouldn't necessarily foreclose the
 15 payment for windshield repairs, though, would it?
 16 MR. HURST: Objection.
 17 A. Well, if you have the right to replace your
 18 windshield and you have no waiver of deductible
 19 provision to apply, I think a reasonable policyholder
 20 would opt to get a replacement. I mean in general
 21 without that provision, people were replacing their
 22 windshields.
 23 Q. As you sit here today, though, you don't
 24 recall whether or not any windshields were paid to be

1 was an occasional repair paid, I don't remember that.
 2 It's possible.
 3 Q. You mentioned something about home office
 4 approval for payment of a repair; is that correct?
 5 A. What question are you referencing my home
 6 office approval answer?
 7 Q. Well, I'm trying to recall which company you
 8 were talking in reference to. Was it Great American,
 9 Vesta Shelby, ASIS or Milwaukee?
 10 A. That would have been Shelby.
 11 Q. Okay.
 12 A. Shelby had their own glass unit.
 13 Q. What do you mean its own glass unit?
 14 A. That means that glass claims were handled by
 15 people in the glass unit working with the agents.
 16 Q. And under what circumstances would Shelby pay
 17 for windshield repairs?
 18 MR. HURST: Objection, including form.
 19 A. You know, I don't recall Shelby paying for
 20 windshield repairs. It's possible that an agent might
 21 do that, but the general rule was that the agent would
 22 pay for replacement.
 23 Q. What was communicated to the policyholders of
 24 Shelby with respect to windshield repair or

1 repaired by Vesta Shelby?
 2 MR. HURST: Objection.
 3 A. As I said before, it is possible, but the
 4 general rule of thumb is that they replaced the
 5 windshields through the agents.
 6 Q. The agents at Vesta Shelby who handled glass
 7 claims, that was pursuant to a draft authority?
 8 A. At Shelby, the agents did have a draft
 9 authority on auto material damage claims, yes.
 10 Q. So that would have applied for the glass only
 11 claims handled by agents?
 12 A. That would have applied to any small auto
 13 material damage claims, including glass claims.
 14 Q. And that draft authority is the company's
 15 money paying glass claims, correct?
 16 MR. HURST: Objection as to form.
 17 A. Well, whenever you pay a claim, you're paying
 18 it with the company's money. The agent is not paying
 19 it out of his own pocket.
 20 Q. I understand.
 21 Before a windshield repair, the only way to
 22 resolve a windshield damage claim was to replace the
 23 windshield, wasn't it?
 24 MR. HURST: Objection.

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1 A. Before a windshield repair?
 2 Q. Yes.
 3 A. I don't know if it was the only way, but it
 4 was the standard approach.
 5 Q. Based on your 30-plus years of claims
 6 experience, do you believe that most policyholders
 7 understood that replacing a windshield was a means to
 8 resolve a windshield damage claim?
 9 MR. HURST: Objection, including form.
 10 A. Well, windshield repair was a predominant way
 11 of handling windshield -- I'm sorry. Strike that.
 12 Windshield replacement was the predominant
 13 way of resolving windshield claims. So it would be a
 14 way to do it. I'm not sure where that question is
 15 coming from.
 16 THE WITNESS: Could you repeat the question?
 17 (Record read back as requested.)
 18 MR. HURST: Repeat the objection.
 19 A. Would a policyholder have understood -- I'm
 20 not sure I can testify to that, but certainly
 21 replacement is an option or actually was the option
 22 early on in my career for resolving windshield claims.
 23 Q. Were windshield repairs as well-known to
 24 either the insurance industry or policyholders as

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1 replacements in 1991?
 2 MR. HURST: Objection, including form.
 3 THE WITNESS: Could you repeat that again,
 4 please.
 5 (Record read back as requested.)
 6 A. That would require a subjective answer, and
 7 really I couldn't testify as to common knowledge of
 8 people, but certainly replacement would be I think
 9 something that would fit into the more common knowledge
 10 than repair, if that answers your question. I can't
 11 really answer your question.
 12 Q. Okay. Is it your experience that many
 13 insurance companies today pay for windshield repairs?
 14 MR. HURST: Objection, including form.
 15 A. I believe there are -- some of the bigger
 16 players in the industry are repairing now, windshields
 17 right now.
 18 Q. Have you looked at any Ohio policies other
 19 than State Farm's to determine how many insurers in
 20 Ohio pay to repair windshields and, in fact, will waive
 21 deductibles for windshield repairs?
 22 A. I haven't personally reviewed Ohio policies
 23 of other insurance companies, but I believe that as
 24 part of their study Deloitte did, at least they looked

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1 at policies generally and identified some that had
 2 waiver of deductible provisions and some that didn't.
 3 Q. Do you agree that payment for windshield
 4 repairs are common in the insurance industry today?
 5 MR. HURST: Objection, including form.
 6 A. Well, you know, whether it's right or not is
 7 a different issue, but the fact that some companies do
 8 it that way now and some companies don't -- I guess
 9 State Farm isn't waiving their deductible anymore. So
 10 I guess there is -- there are quite a few claims that
 11 are made on a repair basis and settled on a repair
 12 basis; but whether it's done right or not, I can't tell
 13 you, or whether they're appropriately doing it is
 14 another thing. I haven't studied other insurance
 15 companies in regard to their current practices.
 16 Q. Okay. All questions I didn't ask, though. I
 17 asked whether or not it is common in the insurance
 18 industry to pay for windshield repairs today.
 19 MR. HURST: Objection, including form.
 20 A. Well, I believe that it is more common to pay
 21 for replacements, but that there are a significant
 22 percentage of claims that are paid for on a repair
 23 basis.
 24 ---

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1 OHIO DEPARTMENT OF INSURANCE
 2 PROPERTY-CASUALTY FILING
 3 TRANSMITTAL FORM WAS MARKED AS
 4 EXHIBIT 7.
 5 ---
 6 Q. I'm going to hand you what has been marked as
 7 Exhibit 7, Mr. Hildebrand, which is a Nationwide policy
 8 filed with the Ohio Department of Insurance. You're
 9 free to look at all -- whatever you wish, but I'd like
 10 to draw your attention to page P1 of the document which
 11 describes comprehensive coverage.
 12 A. I'm on page P1.
 13 Q. Okay. In particular, under paragraph 1,
 14 subsection b(2), the last paragraph actually of that
 15 subsection, the Nationwide policy also includes an
 16 offer to waive a deductible if they have an offer to
 17 repair a windshield in lieu of replacement, don't they?
 18 MR. HURST: Objection.
 19 A. Well, it says, "For damage to your auto's
 20 windshield, we may offer to have it repaired in lieu of
 21 replacement. We will not apply a deductible to the
 22 repair of the windshield. However, if the repair is
 23 not satisfactory, we will replace the windshield
 24 subject to your deductible."

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1 any document that's not mentioned in the text of your
 2 report was not material to your opinions?
 3 MR. HURST: Objection as to -- objection.
 4 A. No, I think that my opinions are premised
 5 upon documents referenced therein and also by any
 6 documents in Exhibit C and documents that were exhibits
 7 in the depositions.
 8 Q. How did you choose to list or not list a
 9 document in a specific text of your report? And by
 10 report, I'm referring to Exhibit 1, the text itself,
 11 not attachments, not appendices.
 12 A. You know, in drafting the report, I read
 13 through my file and took out specific highlights as to
 14 some of the issues. I didn't intend the report to be
 15 all-inclusive as to every exhibit and every document;
 16 and given the fact that I've got four binders of
 17 depositions with exhibits and another three binders of
 18 material here, that would make the report much longer
 19 than I think would be necessary. So I picked and chose
 20 the ones that could highlight some of the points
 21 without redundantly restating every one of them.
 22 Q. Why did you list and, in fact, quote from the
 23 1993 NGA report in your opinion?
 24 A. What page are you on?

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1 Q. Well, it will be either between 13 and 14 or
 2 17 and 18, of your report, that is.
 3 A. Okay. You're talking page 18 where I quote
 4 that the subcommittee found that test data did not
 5 demonstrate that a repaired windshield would be
 6 equivalent in performance to one that was undamaged?
 7 Is that the quote you're talking about?
 8 Q. The question is, why did you choose to
 9 reference the NGA report in your report and, in fact,
 10 to selectively quote from the NGA report?
 11 MR. HURST: Objection as to form.
 12 A. Well, because this particular report was a
 13 report that was known to State Farm's national glass
 14 manager. He was aware of its content and, therefore,
 15 he would have been aware of the material in that report
 16 and one of the salient points that the subcommittee
 17 found was that the test data did not demonstrate that a
 18 repaired windshield would be equivalent in performance
 19 to one that was undamaged, which in my view if that's
 20 true, and I presume it's true, would mean that the
 21 windshield would not be restored to its pre-loss
 22 equivalent.
 23 Q. Before I pass, you said -- there's a couple
 24 clean-up items I'd like to address before we keep

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1 moving on. You switched to Liberty -- is that Liberty
 2 Mutual Insurance Company is your current insurance
 3 carrier?
 4 A. One of their companies.
 5 Q. Okay. It's one of the Liberty Mutual family
 6 of companies?
 7 A. Yes.
 8 Q. Was Milwaukee Insurance acquired by Liberty?
 9 A. No.
 10 Q. The crack that you had in your windshield
 11 some 30 years ago, 25 years ago, how long had that
 12 crack been in your windshield?
 13 A. I don't recall.
 14 Q. How long did the crack remain in your
 15 windshield after the attempted repair of it?
 16 A. Well, the repaired crack remained in the
 17 windshield until I disposed of the vehicle obviously,
 18 but I have no idea how long I hung on to the vehicle.
 19 I mean this is 30 years ago. I mean where were you 30
 20 years ago?
 21 Q. Probably in a room just like this.
 22 A. I'm just telling you, you're talking about 30
 23 years ago.
 24 Q. In a room just like this.

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1 Do you recall how long you had kept the
 2 vehicle after that?
 3 A. I don't even recall which vehicle it was.
 4 Q. You didn't replace the windshield after the
 5 crack had been repaired?
 6 MR. HURST: Objection.
 7 Q. I'm sorry. Let me restate that. You didn't
 8 replace the windshield after the crack had been
 9 repaired?
 10 MR. HURST: Objection.
 11 A. I don't recall.
 12 Q. Page 13 of your report, you rely on the
 13 Carmody and Derian opinions that windshield repair does
 14 not meet Federal Motor Vehicle Standards, don't you?
 15 MR. HURST: Objection.
 16 A. Carmody also concluded that the repair failed
 17 to meet government mandated safety standards and that
 18 senior management at State Farm knew of the problems
 19 with windshield repair and failed to inform their
 20 insureds of the known hazards. Carmody referenced The
 21 Report of the National Glass Association from January
 22 of 1994 and the internal long crack report.
 23 Derian concluded that a repaired windshield
 24 does not possess the mechanical properties of a

1 replacement windshield, and he further references
2 certain Federal Motor Vehicle Standards. I'm not an
3 expert in motor vehicle standards. To some extent, I
4 would be relying upon Carmody and Derian; but
5 regardless of that, I relied more upon the problems
6 that did exist in windshield repair from a lot of these
7 other documents that have been produced in this
8 litigation.

9 Q. My question simply was, you're relying at
10 least in part on Carmody and Derian opinions that
11 repair doesn't meet Federal Motor Vehicle Standards,
12 correct?

13 MR. HURST: Objection.

14 A. Well, I think to some degree I'm relying upon
15 their opinions that the Cullen windshield was not
16 restored to its original condition; and if to some
17 degree they don't meet federal standards, that's a
18 technical issue for them to decide.

19 Q. But your report says that, doesn't it?

20 A. I'm telling you what they concluded, yes.

21 Q. Right, yeah. You say, "He further opined
22 that vehicles with repaired windshields may fail to
23 meet the following Federal Motor Vehicle Standards,"
24 correct?

1 A. Tongue-tied.

2 Q. Sorry.

3 A. That's okay.

4 Q. Long day here.

5 A. But I also say regardless of whether you
6 agree with each and every opinion rendered by these
7 experts, it's basically irrefutable that there are
8 problems that exist. I'm not saying that there aren't
9 two sides to the issue, but there are definitely
10 problems that exist with windshield repair.

11 Q. Okay. What governmental agency administers
12 and applies Federal Motor Vehicle Standards?

13 MR. HURST: Objection.

14 A. The National Highway Traffic Safety whatever.
15 Do you want to know the exact?

16 Q. National Highway Traffic Safety
17 Administration?

18 A. Yes. Excuse me.

19 Q. That's all right.

20 ---

21 LETTER FROM NHTSA TO NGA, 4 PAGES
22 WAS MARKED AS EXHIBIT 10.

23 ---

24 Q. This may give you a bit of guidance. Let me

1 hand you what is marked as Exhibit 10. Have you before
2 seen something similar to this, a letter from NHTSA to
3 the National Glass Association?

4 MR. HURST: Mark, was this something that was
5 produced in discovery?

6 MR. JOHNSON: No.

7 MR. HURST: Why not?

8 MR. JOHNSON: Because I printed it off the
9 Internet.

10 MR. HURST: When?

11 MR. JOHNSON: February 1st of 2010 is what
12 the footer on this document indicates.

13 MR. HURST: Okay.

14 MR. JOHNSON: I've never seen this document
15 in State Farm records.

16 A. The question was have I ever seen this
17 document before or something equivalent?

18 Q. Yes.

19 A. The answer is no.

20 Q. So you're not aware of the NHTSA's position
21 that Federal Motor Vehicle Standards do not apply with
22 respect to windshield repairs?

23 MR. HURST: Objection to form of the question
24 and objection to the question.

1 A. Okay. I'm not aware of their position in any
2 regard.

3 Q. Had you been aware of that, would it have
4 impacted the opinions you've rendered in your report
5 here?

6 MR. HURST: Objection.

7 A. Probably not.

8 Q. Would that have impacted your reference to
9 and reliance upon Mr. Carmody and Derian's reference
10 to -- or opining that repair of windshields may fail to
11 meet Federal Motor Vehicle Standards?

12 MR. HURST: Objection, including form.

13 THE WITNESS: Could you please read that
14 back? I lost it halfway through the question.

15 MR. JOHNSON: That was a long question.
16 (Record read back as requested.)

17 A. I can't really tell you yes or no, because
18 I'm not familiar enough with your document there and
19 their response to that document, if there would be any.
20 So the answer is I can't answer that question.

21 ---

22 NGA WINDSHIELD REPAIR WORK GROUP
23 TECHNICAL SUBCOMMITTEE REPORT TO
24 NGA WINDSHIELD REPAIR WORK GROUP

1 - recall seeing information from State Farm where they
2 developed information that showed that this report was
3 inaccurate as to some or all of the findings. So to
4 answer your question, absent that information, I would
5 think that they would have presented a fair and
6 balanced presentation to the policyholders so they
7 could exercise their choice.

8 Q. And I think I understood your testimony that
9 you did no independent study or research to determine
10 whether or not the conclusions in this report, Exhibit
11 11, were accurate or had been subsequently discredited?

12 A. Again, I'm not an expert on glass repair or
13 replacement from a technical side, and I have to rely
14 upon the information that the experts and also that
15 these reports and that the industry has produced from
16 both sides and many of the documents that have been
17 produced in this litigation to determine some of my
18 opinions.

19 I didn't do an independent technical analysis
20 as to the accuracy of this report, no, I did not;
21 however, I did not see any information in all those
22 documents produced to say that if somebody had done
23 something to discredit this report; and if you have
24 some information in that regard that you'd like me to

1 look at, I'd be happy to do that.

2 Q. If, in fact, this report and the study had
3 been determined to either be inaccurate or discredited
4 as unrepresentative, would that affect you or change
5 your conclusions with respect to the safety of
6 windshield repairs?

7 MR. HURST: Objection, including form.

8 A. Well, you know, without knowing the specific
9 discrediting information, I couldn't answer that yes or
10 no.

11 Q. Fair enough. Let's look at a few items in
12 here. Your report at page 18 references a safety
13 concern if a repair to windshield damage goes to the
14 plastic interlayer. I think it's at page 18 of your
15 report.

16 A. I'm on page 18 of my report now. Where are
17 you?

18 Q. Right after the quote, the end of that
19 sentence ends with what the NGA subcommittee found with
20 respect to repair of a windshield defect which extends
21 to the interlayer.

22 MR. HURST: I'm sorry, Mark. I don't see
23 where you're at.

24 MR. JOHNSON: Pain 18.

1 A. Bottom of the first complete paragraph. I
2 see the reference, yes. What is your question?

3 Q. I haven't got there yet. And I think you're
4 relying upon the NGA, page 2, the conclusion No. 2 on
5 page 2 which references a windshield with defects that
6 extend to the interlayer. That is, in fact, what
7 you're referencing in your report, isn't it?

8 MR. HURST: Objection.

9 A. Well, I'd have to go back and read the entire
10 report, but that certainly would be reasonable to
11 assume that it could have been one of the things I
12 referenced in that report. I'd have to read the whole
13 report to tell you if that was the only source of that
14 comment.

15 Q. Well, a windshield that's been damaged to the
16 plastic interlayer, though, doesn't meet State Farm's
17 criteria for repair, does it?

18 MR. HURST: Objection.

19 A. Well, you know, if the interlayer is damaged
20 and the scripting does not turn up the existence of
21 damage to the interlayer because of the tests that were
22 applied by the investigation of the LYNX claims person
23 such that, you know, perhaps the defect that extended
24 into that layer would fit underneath a dollar bill if

1 it were a crack or if it were a blemish that went
2 deeper than a normal blemish that would fit under a
3 quarter. You know, to answer your question, using the
4 criteria that LYNX was using, I'm not certain that you
5 would be able to necessarily in the investigation
6 determine that it reached the interlayer or not.

7 Q. LYNX doesn't look at the windshield at that
8 time when the policyholder calls, do they?

9 MR. HURST: Objection.

10 A. LYNX asks questions of the policyholder.
11 They never look at the windshield.

12 MR. HURST: Including to form.

13 Q. The first professional or the person, if you
14 will, aside from the agent that looks at a damaged
15 windshield in that process is the glass shop, correct?

16 MR. HURST: Objection, including form.

17 A. Well, I presume the glass shop looks at it at
18 some point in time.

19 Q. And a glass shop would be able to determine
20 whether or not -- a qualified glass shop would be able
21 to determine whether or not damage had penetrated to
22 the plastic interlayer, couldn't they?

23 MR. HURST: Objection, including form.

24 A. Well, they may or they may not.

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1 on the loss date of March 24, 2003, taken from my file
 2 which corresponds to your Exhibit 1, except to the
 3 extent that I may have put some markings on it.
 4 Q. Okay. Very good. And as soon as we copy
 5 that, we'll get that back to you and remark it.
 6 Let me return to, if we can, Exhibit 11 for a
 7 few more passages. My next question relates to Bates
 8 page 1617, "III. Strength Tests - Glass." Are you
 9 there?
 10 A. I am there.
 11 Q. Drawing your attention in particular to the
 12 second paragraph of the discussion, do you, in fact,
 13 consider or know whether it's realistic to determine
 14 the strength of repairs of windshields by literally
 15 breaking the glass in two separate pieces?
 16 MR. HURST: Objection, including form.
 17 A. Well, you know, just like I answered the
 18 other questions prior to this, I am not an expert in
 19 glass repair and glass replacement from a technical
 20 glass point of view; therefore, I can't answer the
 21 question one way or another; and to the extent that
 22 there's a decision -- or discussion in here relating to
 23 that, I would have to rely upon the conclusions and
 24 this and other documents of the people who drafted

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1 them.
 2 Q. During your time as a claims professional,
 3 had you ever seen or heard of a windshield repaired
 4 that had been broken in two separate pieces?
 5 MR. HURST: Objection.
 6 A. I don't recall.
 7 Q. Would you --
 8 A. Are you talking about testing?
 9 Q. I'm talking about for any purpose; in
 10 particular, for claims handling purposes and --
 11 MR. HURST: Objection.
 12 Q. -- resolution of a policy of first claim?
 13 MR. HURST: Objection.
 14 A. I really don't recall.
 15 Q. If your windshield was broken in two separate
 16 pieces, would you repair it or replace it?
 17 MR. HURST: Objection, including form.
 18 A. Well, to tell you the truth, when it comes to
 19 windshields, I'd probably replace the windshield across
 20 the board. So under any of those scenarios, I'd
 21 replace it.
 22 Q. Do you know whether or not State Farm's
 23 repair criteria -- strike that.
 24 Let me find a better way to say this.

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1 Wouldn't State Farm's repair criteria not recommend the
 2 repair of a windshield that had been broken in two
 3 separate pieces?
 4 MR. HURST: Objection, including form.
 5 A. Are you talking about the repair guidelines
 6 in the O&A agreement? Is that what you're talking
 7 about?
 8 Q. Actually it's in the auto claims manual you
 9 referenced, Exhibit 12, in one location.
 10 A. I don't recall that.
 11 Q. All right. Do you have any information other
 12 than what is listed in this document, Exhibit 11, how
 13 the samples were created that were used in the NGA
 14 study?
 15 A. Well, again, I'm not a repair or replacement
 16 expert glass technician type person; therefore, I
 17 wouldn't be able to address a question like that from
 18 that perspective.
 19 Q. Well, actually, this is pure factual
 20 knowledge. Do you know other than reading this
 21 document how they created the samples in this NGA
 22 study?
 23 A. I don't recall reading that. If I did, it
 24 would have been a long time ago.

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1 Q. Okay. Are you aware that these samples that
 2 the NGA used for the purposes of this study were
 3 created by glueing two pieces of glass to the plastic
 4 interlayer after it had been submerged in water for 48
 5 hours?
 6 MR. HURST: Objection, including form.
 7 A. Again, I don't know any of the technical
 8 testing issues relating to these tests. All I know is
 9 that the conclusions were rendered by people who
 10 drafted this report.
 11 Q. Well, my question really wasn't necessarily
 12 related to the technical conclusions. It was how the
 13 samples were created. Were you aware samples were
 14 created by submerging the plastic interlayer for 40
 15 hours in water?
 16 MR. HURST: Objection, including form.
 17 A. Again, that would be something to do with the
 18 testing. It wouldn't be something that I would recall
 19 at all.
 20 Q. You don't know?
 21 A. I don't know that at all, no, I don't.
 22 Q. Okay. If you were, in fact, advised by
 23 somebody with credible evidence, irrefutable evidence
 24 that, in fact, those samples were created by submerging

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1 A. Well, I guess if there's no way for me to
 2 know what they said, I wasn't listening to their
 3 conversations, I could not tell you what they
 4 specifically said, no, I couldn't.
 5 Q. Conversations that State Farm agents had with
 6 policyholders weren't scripted, were they?
 7 MR. HURST: Objection.
 8 A. Well, the agent for Mr. Cullen said he was
 9 unaware of any scripting in his deposition.
 10 Q. So the answer to my question --
 11 A. Let me finish my answer, please. I didn't
 12 even get a chance to breathe, and you interrupted me,
 13 okay? If you want this to get over with more quickly,
 14 I will tell you that there was some sort of agency
 15 script that existed out there for agents. It's been
 16 produced in discovery.
 17 Q. Are you done, sir?
 18 A. Yes.
 19 Q. Let's take that between two different time
 20 periods. Before 1997, before the LYNX program and the
 21 O&A program began, were you aware whether or not State
 22 Farm agents when speaking with policyholders used a
 23 script?
 24 MR. HURST: Objection.

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1 THE WITNESS: Could you read the question
 2 back, please?
 3 A. Okay. From the materials that I've reviewed,
 4 the testimony of the agent in this particular case was
 5 that he was unaware of any scripts; however, in one of
 6 State Farm's employee's depositions, Mr. Burk, there
 7 was an agent service text-auto document produced which
 8 outlined basically what the agent was supposed to say.
 9 Now, whether you consider that an outline or
 10 a script to the same detail of what LYNX was using,
 11 they are a little different, but I think it serves a
 12 purpose of telling the agent these are the questions
 13 you need to do and this is the procedure that's going
 14 to be followed.
 15 Q. What an agent says to a policyholder, though,
 16 may change and vary, can't it?
 17 MR. HURST: Objection.
 18 A. What an agent says to a policyholder may
 19 change and vary? Well, I don't know what State Farm
 20 agents said to the policyholder, so I can't really
 21 answer that.
 22 Q. You understand State Farm is a mutual
 23 company?
 24 A. Yes, it is. It also owns some stock

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1 companies.
 2 Q. What does that mean, a mutual company?
 3 A. A mutual company? Well, you know, mutual
 4 companies are purportedly owned by their policyholders.
 5 Structurally that's the way it's set up, but I don't
 6 know how many millions of policyholders State Farm has;
 7 but even though it's a mutual company, it basically
 8 operates in such the same regulations as stock
 9 companies when it comes to claim handling practices and
 10 procedures.
 11 Q. It has no shareholders, does it?
 12 A. State Farm Mutual doesn't, no. It has
 13 members, as I recall. Isn't it members? I believe.
 14 Milwaukee Mutual was a company that I worked for, so we
 15 were in the same situation.
 16 Q. You were familiar with the operation of a
 17 mutual company?
 18 A. Yes.
 19 Q. Neither Milwaukee Mutual nor State Farm had
 20 profits to distribute to the shareholders, did they?
 21 MR. HURST: Objection.
 22 A. Well, you know, there are a lot of corporate
 23 ways to distribute money. If you don't have
 24 shareholders, you're not going to see that particular

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1 company distributing dividends to those shareholders,
 2 but it is possible that they could distribute it
 3 equivalent of a dividend to a member in addition to all
 4 the executive bonuses that they dole out and things
 5 like that.
 6 Q. There's no line item in State Farm's
 7 financials for State Farm Mutual for profit, is there?
 8 MR. HURST: Objection; lack of foundation,
 9 form.
 10 A. I haven't seen State Farm's financials
 11 produced in this case, at least to me; and for that
 12 matter, I'm not an expert in analysis of accounting
 13 documents and filings in regard to things like that
 14 relative to profit and loss. So the answer to your
 15 question is I don't know.
 16 Q. As a mutual company, doesn't State Farm have
 17 a responsibility to all of its policyholders to manage
 18 costs?
 19 MR. HURST: Objection.
 20 A. State Farm has a responsibility to all of its
 21 insureds that have a loss to pay them the benefits that
 22 they're entitled to under the policy. They may have a
 23 responsibility to all members, but they also have a
 24 responsibility to those people who have submitted those

1 claims to see that they treat them fairly and provide
2 them with a full explanation of their benefits, and
3 it's not to their detriment that State Farm saves money
4 for all their members.

5 MR. JOHNSON: Can you repeat my question,
6 please.

7 (Record read back as requested.)

8 MR. HURST: Repeat objection, including form.

9 Q. Could you answer the question, please.

10 MR. HURST: Asked and answered.

11 A. I already answered it, but the answer is that
12 you don't save your costs for all your members by not
13 providing the benefits to the members with the claims.

14 Q. I realize that you wish to continue and add
15 on to your answer, sir. Yes or no? State Farm has a
16 responsibility as a mutual company to manage costs and
17 that responsibility extends to all policyholders, yes
18 or no?

19 MR. HURST: Objection, including form and
20 lack of foundation.

21 A. Same answer.

22 MR. JOHNSON: Instruct the witness to answer
23 the question, please.

24 THE NOTARY: You are so instructed.

1 A. Same answer.

2 Q. Are you refusing to answer the question?

3 A. No. I already answered the question. I'll
4 repeat the same answer I had before.

5 Q. Why won't you answer yes or no, sir?

6 MR. HURST: He did answer the question.
7 You're asking and answering the same question over and
8 over again. He answered.

9 Q. You gave a speech about your position, sir,
10 but you didn't answer the question.

11 MR. HURST: He did. I disagree.

12 Object to the badgering of the witness.

13 A. I've answered your question.

14 Q. You won't answer yes or no?

15 A. No. I've already answered your question.

16 Q. You won't answer yes or no?

17 MR. HURST: Repeat the question. Let's
18 repeat the question.

19 A. You know, it's not a yes or no answer. It's
20 an answer that I gave. That's my answer.

21 Q. It's not yes or no as to whether or not State
22 Farm has that responsibility to all policyholders? You
23 can't answer yes or no to that question?

24 A. No, I can't. I already answered your

1 question.

2 Q. Most current policyholders will be future
3 policyholders of State Farm, won't they?

4 A. I'm sorry?

5 Q. Most current policyholders of State Farm will
6 be future policyholders, won't they?

7 MR. HURST: Objection; lack of foundation,
8 form.

9 A. Well, I guess assuming they renew more than
10 50 percent of their policies, that's a possibility, but
11 I have no fact basis to say yes or no, but it's a
12 possibility.

13 Q. You don't know what State Farm's auto
14 retention rate is?

15 A. No.

16 Q. The evidence shows that it is at or above
17 90 percent. That would reflect far more policyholders
18 who are current policyholders will be future
19 policyholders, doesn't it?

20 MR. HURST: Objection; lack of foundation,
21 form.

22 A. Well, if I can believe what you're saying,
23 then 90 percent of the present policyholders will
24 remain policyholders, and I don't think that they're

1 necessarily future policyholders, they're continuously
2 policyholders, but you can phrase it any way you want
3 it. They renew more than 50 percent of their policies,
4 fine.

5 Q. And as members of a mutual company, they may
6 stand to benefit from prudent cost management in the
7 future, wouldn't they, through lower premiums or
8 potentially dividends, correct?

9 MR. HURST: Objection; lack of foundation,
10 form.

11 A. That's speculative on my part. I couldn't
12 answer that question.

13 Q. When you were in claims management at Great
14 American, did you participate in any decision to use
15 Colossus to estimate BI claims?

16 MR. HURST: Objection.

17 Go ahead and answer.

18 A. No.

19 Q. Are you familiar with the implementation of
20 Colossus to estimate BI claims at Great American?

21 MR. HURST: Objection.

22 A. I don't recall that they implemented Colossus
23 when I was there. They may have. It wasn't a decision
24 of mine.

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1 Q. I see. At American Safety, what claims were
 2 outsourced to a third-party administrator during your
 3 tenure?
 4 A. We had a variety of program business,
 5 including some Texas Auto MGAs, four of them. We had
 6 programs in a variety of different businesses, whether
 7 they were commercial, auto, taxicabs, personal auto.
 8 We had one homeowner's program. We had real estate E&O
 9 programs, lawyers professional programs. We had a
 10 variety of program business that was all handled by
 11 MGAs and TPAs. Of course, that was over a seven-year
 12 period of time.
 13 Q. When you say program business, are you
 14 talking about all claims that would derive or come out
 15 of a line of business? I'm trying to understand.
 16 A. Well, if you're familiar with managing
 17 general agencies, managing general agencies generally
 18 come to you with a program that they specialize in,
 19 whether it's a personal auto program, a non-standard
 20 auto program, a homeowner's program or a wide variety
 21 of some of the commercial programs I just listed, and
 22 they will say, We have this business. We'd like to
 23 write it on your paper. We would be the MGA. We'll
 24 execute an agreement with you. We'll hire a TPA to

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1 handle the claims. And then either you agree or
 2 disagree, and you move forward in handling that
 3 business, and my role as claims VP would have been to
 4 manage the claims side of that particular operation.
 5 Q. Did you find that it saved money to outsource
 6 to TPAs in that manner?
 7 MR. HURST: Objection; form.
 8 A. I don't believe that we made calculations as
 9 to whether the TPA cost us more than whether we did it
 10 internally. So I couldn't answer that we saved money
 11 or didn't save money. I can't say one way or another
 12 whether it saved money. It handled the claims, which
 13 was the goal.
 14 Q. To be clear, sir, you have not done a damages
 15 analysis for the alleged class in this case, have you?
 16 A. I haven't done a formal damages analysis as
 17 to the damages in this case, no. I did review some of
 18 the documents which reflected some of the average paid
 19 numbers as between repair and replace on some of the
 20 documents that were produced to just give some sample
 21 indications of savings that State Farm was happy to
 22 pocket as a result of this, but I have not done a
 23 formal damage analysis, and I haven't been asked to do
 24 that.

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1 Q. Could you turn to page 27 of your report. I
 2 have a question about just that estimate that you made.
 3 A. Yes.
 4 Q. And, in fact, you mentioned as you just
 5 testified \$30 million in savings. That's not based on
 6 Ohio windshield repair claims, is it?
 7 MR. HURST: Objection.
 8 A. I don't believe I said it was based on Ohio,
 9 no.
 10 Q. Okay. Didn't say you did, sir. I just
 11 wanted to make sure that --
 12 A. No. I think if you reference the documents
 13 going back to page 14, I assume those are nationwide
 14 figures.
 15 Q. Okay. Before State Farm implemented the O&A
 16 program in 1997, what was your understanding of how
 17 glass only claims were handled?
 18 MR. HURST: Objection.
 19 A. To the best of my recollection, State Farm
 20 had what I would call small claim units -- I don't
 21 remember exactly what they would call them -- separated
 22 out around the country that handled small claims,
 23 including glass claims, a likewise agency handled some
 24 of the claims, too. So it was some combination between

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1 that. I don't believe the testimony is real clear on
 2 that.
 3 I do know that they were able to -- I believe
 4 the number was 250 employees or something or more like
 5 that that were doing -- that no longer had to do it
 6 once they contracted with LYNX. It was a large number.
 7 Don't hold me to the 250. So those employees that
 8 previously were doing that apparently were either
 9 reassigned or doing something else or left.
 10 Q. Just so I understand and we don't repeat this
 11 and go through this process again, before the O&A
 12 program began, agents didn't have a script to speak
 13 with policyholders? Is that your understanding from
 14 Mr. Karol's deposition?
 15 MR. HURST: Are we talking about Ohio, Mark?
 16 MR. JOHNSON: Yes, just Ohio.
 17 A. I don't know the answer to that question one
 18 way or another. All I know is that Mr. Karol did not
 19 have a script that he was aware of. I don't believe
 20 there were any other agents' depositions that I read or
 21 anybody who addressed that issue in their depositions.
 22 Q. Was it Mr. Karol's reference to no script
 23 during or with respect to the O&A period as opposed to
 24 prior to the O&A period?

1 you read that sentence for the court as well?
 2 A. "The policyholder will make the final choice
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 4 Q. Did you consider those statements in the LYNX
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MICHAEL MCMENAMIN,

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CIVIL CASE NO.
1:04-CV-2594-JTC

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Pending before the Court is Plaintiffs' motion to exclude expert testimony [#116]. Defendants offer the testimony and reports of two experts, Peter Jerome Hildebrand and Tim Cody Ryles. Plaintiffs argue that the expert testimony is unreliable and will not be helpful to the trier of fact.

I. Expert Testimony

The admission of expert evidence is governed by Federal Rule of Evidence 702, as explained by Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2786 (1993), and its progeny. Under Rule 702 and Daubert, district courts must act as "gatekeepers" which admit expert testimony only if it is both reliable and relevant. See Daubert, 509 U.S. at 589, 113 S. Ct. at

2795. Rule 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

District courts must engage in a rigorous inquiry to determine whether: “(1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in Daubert; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.” City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 562 (11th Cir. 1998) (footnote omitted). “The burden of laying the proper foundation for the admission of the expert testimony is on the party offering the expert, and admissibility must be shown by a preponderance of the evidence.” Allison v. McGhan Med. Corp., 184 F.3d 1300, 1306 (11th Cir. 1999).

As to assisting the trier of fact, “expert testimony is admissible if it concerns matters that are beyond the understanding of the average lay

person. Proffered expert testimony generally will not help the trier of fact when it offers nothing more than what lawyers for the parties can argue in closing arguments.” United States v. Frazier, 387 F.3d 1244, 1262-63 (11th Cir. 2004) (en banc) (citation omitted); see also id. at 1266 (observing that an expert’s “imprecise opinion easily could serve to confuse the jury, and might well have misled it”).

Tim Ryles

The Court finds that Ryles’s testimony and report would not be helpful to the jury. Ryles’s analysis consists of a review of time periods in Georgia statutes related to insurance, none of which are applicable to this case. From those statutes, Ryles extracts by implication a ten-day “window of opportunity” for evaluation of and response to demand letters. Allowing Ryles to testify concerning time periods set out in statutes unrelated to this case “could easily serve to confuse” or mislead the jury regarding the existence of a statutory time frame. Frazier, 387 F.3d at 1266. To the contrary, there is no bright-line time frame for demand letters and responses; reasonableness is the only standard. Therefore, the Court **GRANTS** Plaintiffs’ motion as to Ryles’s testimony and report.

Peter Hildebrand

The Court finds that some of Hildebrand’s testimony may assist the

jury. Hildebrand's most helpful and relevant testimony concerns his experience with the processing of insurance claims and procedures for responding to demand letters. The issues to be tried in this case concern when Defendants received the demand letter, how long they had to respond to it, and whether they acted reasonably in not responding to the letter within the time limits imposed on its face. While these are not necessarily complicated or complex matters beyond the understanding of the average juror, Hildebrand's testimony will assist the jury in understanding such matters as what documents an insurance adjustor might need to adjust a claim and how long an adjustor might take to assess and respond to a claim or demand for payment. To the extent Hildebrand will testify concerning those matters, his testimony is admissible, and Plaintiffs will have the opportunity to cross-examine him.

However, Hildebrand's testimony is not admissible as to the other matters discussed in his report. Hildebrand may not opine as to the number of days with which Defendants had to respond to the demand letter or whether Defendants' actions in this case were reasonable. Those matters are for the jury to decide, and conclusions as to the ultimate issues are better reserved for closing arguments. See Frazier, 387 F.3d at 1262-63.

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mitigation of damages, specifically, their decision regarding certiorari from the Georgia Supreme Court. Testimony on that issue is better provided by individuals with personal knowledge of the reasons for that decision, which will allow the jury to assess its reasonableness. Therefore, the Court **GRANTS in part and DENIES in part** Plaintiffs' motion as to Hildebrand's testimony and report.

II. Trial Date

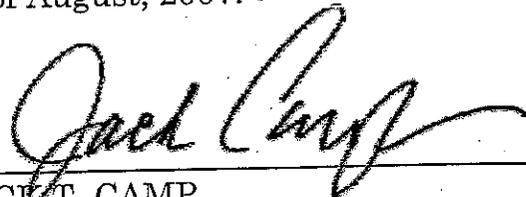
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III. Conclusion

For the reasons above, the Court **DENIES in part and GRANTS in**

part Plaintiffs' motion to exclude [#116]. The Court DENIES the motion as to Peter Hildebrand's testimony regarding matters related to the adjusting and processing of insurance claims and demand letters. The Court GRANTS the motion as to the testimony and report of Tim Ryles and the testimony and report of Peter Hildebrand to the extent it exceeds the limits described above.

SO ORDERED, this 22nd day of August, 2007.



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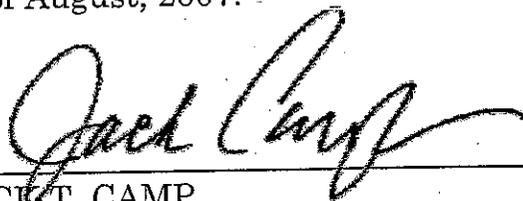
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GERALD E. FUERST

CLERK OF THE COURT OF COMMON PLEAS
COURT OF APPEALS
COUNTY OF CUYAHOGA
1200 ONTARIO STREET
CLEVELAND, OHIO 44113-1664

KEITH M. HURLEY
CHIEF DEPUTY

JUNE 28th, 2012

STEVE KAHLER, RECORDS SPECIALIST

RE: MICHAEL CULLEN -vs- STATE FARM MUTUAL INS CO.

STEVE,

I AM WRITING TO LET YOU KNOW THAT I WAS UNABLE TO LOCATE 4 DOCUMENTS THAT ARE MISSING FROM THE COMMON PLEAS COURT FILE. THEY ARE # 15, 122, 123, AND 135. IF I AM ABLE TO LOCATE THEM OR HAVE THE ATTORNEY SEND ME COPIES, I WILL FORWARD THEM TO YOU ASAP!!

THANK YOU,

SHELLEY BURR