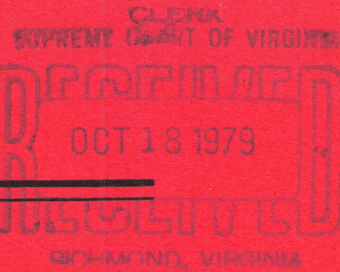


221VA1133



IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 790530

PEACOCK BUICK, INC.

Appellant

v.

JANE ENID DURKIN

Appellee

JOINT APPENDIX

Zachery B. Cotner, Esq.
Attorney at Law
311 Park Avenue
Falls Church, Virginia 22046

Counsel for Appellant

H. Wise Kelly, III, Esq.
KELLY, LOUK, LAWSON & KELLY
4103 Chain Bridge Road
Fairfax, Virginia 22030

Counsel for Appellee

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MOTION FOR JUDGMENT

COMES NOW Jane Enid Durkin and respectfully moves this Honorable Court for judgment and award of execution against Peacock Buick, Inc., and Russ Creekmore, jointly and severally, and in support thereof states as follows:

1. The Defendant, Peacock Buick, Inc., is a Virginia corporation engaged in the sale of automobiles at 8590 Leesburg Pike, Vienna, Virginia;
2. The Defendant, Russ Creekmore at all times pertinent hereto was the agent or employee of Peacock Buick, Inc.;
3. On January 6, 1978, the Plaintiff entered into a contract with Peacock Buick, Inc., for the purchase of a 1978 Buick Coupe, with legal title to be in the name of her mother, Enid B. Durkin;
4. A copy of said contract is attached hereto as Exhibit A;
5. Said contract was prepared by Jack Glasser, as agent of Peacock Buick, Inc.;
6. As originally prepared by Jack Glasser, the contract called for a balance due on deliver of \$3,412.54;
7. The figure of \$3,427.00, shown on said contract, was added by Russ Creekmore at a later time under the circumstances hereinafter alleged;
8. At the time of executing said contract, the Plaintiff made a deposit to Peacock Buick, Inc., of \$100.00;

9. On February 21, 1978, in response to a telephone call with Jack Glasser, agent of Peacock Buick, Inc., the Plaintiff went to Peacock Buick, Inc., to accept delivery of the said 1978 Buick, to deliver her automobile as a trade-in as called for in the contract, and to pay the balance due on delivery;

10. On February 21, 1978, the Defendant, Russ Creekmore, reviewed the contract and changed the "Balance Due" figure from \$3,412.54 to \$3,427.00 and stated that the change was to pay a freight charge;

11. The Plaintiff delivered to a Mr. Bell as agent to Peacock Buick, Inc., her check in the amount of \$3,427.00 payable to Peacock Buick for the balance due on delivery;

12. The Plaintiff further delivered the trade-in called for in the contract together with a valid title to said vehicle;

13. The Plaintiff further delivered to Mr. Bell, agent of Peacock Buick, Inc., a check in the amount of \$125.00 payable to Peacock Buick for an additional warranty on the vehicle she purchased;

14. Mr. Bell completed all necessary paperwork for the delivery of the new automobile which was signed and executed by the Plaintiff and Mr. Bell as agent for Peacock Buick, Inc.;

15. The Defendant, Russ Creekmore, as agent for Peacock Buick, Inc., took possession of the Plaintiff's trade-in, affixed a Peacock Buick windshield sticker on said trade-in, and removed its tags;

16. Mr. Bell, as agent of Peacock Buick, Inc., delivered the Plaintiff's copies of the completed paperwork to the Plaintiff with the keys to the automobile which she had purchased;

17. The Plaintiff entered her new automobile with her completed paperwork and proceeded to drive from Peacock Buick premises;

18. Before leaving said premises, the Plaintiff noticed that the gasoline gauge on her new car read "empty";

19. The Plaintiff stopped the automobile and told Russ Creekmore, agent of Peacock Buick, Inc., of the lack of gas;

20. Russ Creekmore had the automobile taken by another employee of Peacock Buick, Inc., to a gas station for ten gallons of gas;

21. While waiting for the return of her automobile, the Plaintiff was approached by Russ Creekmore, who stated that her trade-in allowance should have been \$2,500 instead of the \$3,500 as stated in the contract;

22. Russ Creekmore, as agent of Peacock Buick, Inc., refused to return the Plaintiff's new automobile to her unless she paid an additional \$1,000;

23. The Plaintiff refused to pay the additional \$1,000 and demanded the return of her new car;

24. The new car had been taken some place unknown with all of the Plaintiff's copies of her paperwork inside and inaccessible to her.

25. The Defendants then returned the Plaintiff's tags, trade-in, check for \$3,427, check for \$125, and title to her trade-in;

26. Having no other form of transportation, and still demanding her new automobile, the Plaintiff took her trade-in and drove from the Defendant's premises;

27. The Defendants refuse to return the Plaintiff's new automobile to her;

28. The Defendant, Peacock Buick, Inc., held the Plaintiff's said \$100 deposit until March 9, 1978;

29. The representation by the Defendant, Russ Creekmore, that the Plaintiff's increased balance due was because of a freight charge was false, fraudulent, willful, wanton, and in reckless disregard of the Plaintiff's rights, said extra charge being for a cassette at a price above that called for in the said contract;

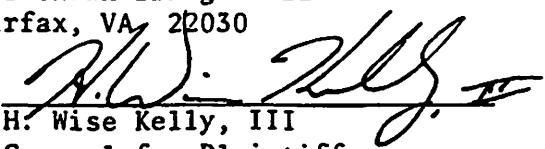
30. The Defendants' taking of the Plaintiff's automobile was willful, wanton, and in reckless disregard of the Plaintiff's rights;

WHEREFORE, the Plaintiff respectfully moves for judgment and award of execution against the Defendants, jointly and severally, in the amount of Seven Thousand Eleven and 54/100 Dollars (\$7,011.54) compensatory damages and Forty Thousand Dollars (\$40,000) punitive damages.

JANE ENID DURKIN,
By Counsel

KELLY, LOUK, LAWSON & KELLY
4101 Chain Bridge Road
Fairfax, VA, 22030

BY:


H. Wise Kelly, III
Counsel for Plaintiff

ANSWER

COMES NOW, the Defendant, Peacock Buick, Inc., by Counsel, and in Answer to the Motion for Judgment filed in the above cause states as follows:

1. Paragraphs numbered one, two, three, five, six, eight, eleven, twelve, thirteen, fifteen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, twenty-five, and twenty-six, of said Motion for Judgment are admitted except insofar as they refer to the existence of a "contract" which allegation is denied.

2. Paragraphs numbered four, seven, nine, ten, fourteen, sixteen, seventeen, twenty-four, twenty-seven, twenty-eight, twenty-nine, and thirty are denied.

3. By way of affirmative defense, Defendant Peacock Buick asserts that negotiations between the parties resulted in a \$2,500.00 trade-in allowance for Plaintiff's used car; that this figure was known and agreed to by the Plaintiff and Defendant; that the figure \$3,500.00 appears by mutual mistake on the document referred to by Plaintiff as a "contract", when in fact it does not represent the agreement of the parties.

PEACOCK BUICK, INC.
By Counsel

MATTHEWS, COTNER & ROBEY, LTD.
311 Park Avenue
Falls Church, Virginia
Telephone: 532-0700

By: _____
Zachary B. Cotner
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed, first class and postage prepaid to Wise Kelly, III, Esq., 4101 Chain Bridge Road, Fairfax, Virginia 22030, Counsel for Plaintiff, this ____ day of April, 1978.

MOTION FOR SUMMARY JUDGMENT

COMES NOW the defendant, by Counsel, and moves this Honorable Court to enter Summary Judgment for the defendant pursuant to Rule 3:18 of the Rules of the Supreme Court of Virginia. As grounds for this Motion the defendant states as follows:

1. That the plaintiff herein has no standing to assert a claim. The pleadings reveal that she never held title to the vehicle in question, nor did she intend to hold title to said vehicle;

2. That even if plaintiff has standing to assert a claim for conversion, the pleadings reveal that she suffered no damages.

PEACOCK BUICK, INC.
By Counsel

MATTHEWS, COTNER & ROBEY, LTD.
311 Park Avenue
Falls Church, Virginia 22046

By: _____
Zachary B. Cotner
Attorney for Defendant

CERTIFICATE OF SERVICE


I hereby certify that a true copy of the foregoing Motion was mailed, postage prepaid, this 18th day of October, 1978, to H. Wise Kelly, III, Esq., 4103 Chain Bridge Road, Fairfax, Virginia 22030.

Zachary B. Cotner

Damages are of two types: (1) Compensatory Damages; which are awarded as compensation for pecuniary loss and recompense for the injury suffered; (2) Punitive Damages; which are something in addition to full compensation, not given as the plaintiff's due, but as punishment to the defendant and as a warning and example to deter him and others from committing like wrongs.

And if from the evidence and the other instructions of the Court you find your verdict in favor of the plaintiff, then in addition to compensatory damages, if you believe from a preponderance of the evidence that the defendant acted wantonly, oppressively, or with such recklessness as evinced a conscious disregard of the rights of others, or with such malice as implied a spirit of mischief, or criminal indifference to civil obligations, you may award the plaintiff such additional sum as punitive damages as in your own opinion are called for by the circumstances of the case.

And if the jury do award punitive damages, they shall state in their verdict what amount they allow as compensatory damages and what amount as punitive damages.



4

A "Willful" act is an act intentionally done, or omitted, in disregard of another's rights.

A "Wanton" act is a reckless indifference to the consequences of an act or omission, where the party acting or failing to act is conscious of his conduct and, without any actual intent to injure, is aware, from his knowledge of existing circumstances and conditions, that his conduct will inevitably or probably result in injury to another.

am

INSTRUCTION NO. A

[REDACTED]

The burden is on the plaintiff to prove by a preponderance of the evidence that the [REDACTED] conduct of the defendant was willful, wanton or vindictive), and unless you believe from a preponderance of the evidence that the defendant [REDACTED] conduct was willful, wanton or vindictive), you shall find your verdict in favor of the defendant.

gm

INSTRUCTION NO. G

[REDACTED]

Even though you may believe from a preponderance of the evidence and the other instructions of the Court that the plaintiff is entitled to compensatory damages, and even though you believe from such evidence that the defendant, *conduct* [REDACTED]

[REDACTED] showed an utter disregard of prudence amounting to complete *an utter and disregard* [REDACTED]

the rights of the plaintiff ~~such~~ such as to be shocking to reasonable men, unless you believe from a preponderance of the evidence that the

defendant acted wantonly, oppressively or with such recklessness [REDACTED] as evinced a conscious disregard of the *rights* [REDACTED]

[REDACTED] of the plaintiff, or with such malice as implied a spirit of mischief or criminal indifference to civil obligation, you cannot award punitive damages as defined in another instruction of the Court.

for

INSTRUCTION NO. H

[REDACTED]

Exemplary or punitive or vindictive damages involves the blending of the interests of society in general with those of the aggrieved individual in particular. Such damages are awarded by way of punishment to the offender and as a warning to others or by way of example. In order to recover exemplary damages or punitive damages, there must be actual damage shown. In other words, you would have to first determine that there had been general damage or compensatory damage before you would be entitled to return a judgment for punitive damages. In order to warrant a recovery for exemplary damages, there must be some element of malice. [REDACTED]

[REDACTED]

Where an act has been done in good faith although it may result in serious injury to the other party, there can be no recovery for exemplary damages. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

FINAL ORDER

THIS MATTER came on to be heard the 5th day of December, 1978, upon the motion for judgment filed herein; upon the responsive answers of the Defendant, and upon the other papers filed herein; and after the calling of thirteen (13) jurors, there being no challenges for cause; and upon the three (3) respective pre-emptory strikes of Counsel; and after the jury having been duly empaneled and sworn, upon the evidence offered by the Plaintiff; upon the Defendant's motion to strike the Plaintiff's evidence, said motion being denied by the Court; upon the evidence offered by the Defendant; and upon argument of counsel; the jury retired, and after their deliberation, returned as their unanimous verdict the sums of Two Thousand Five Hundred Dollars (\$2,500.00) compensatory damages and Seven Thousand Five Hundred Dollars (\$7,500.00) punitive damages against the Defendant, Peacock Buick, Inc., there being no objection to the form of the verdict by counsel, and upon motion of the Defendant to set aside the verdict as being contrary to the law and the evidence; upon the acceptance without objection by the Plaintiff of an amendment to the compensatory damage award, reducing it to Two Thousand One Hundred Dollars (\$2,100.00), the Court denying the Defendant's motion to set aside in all other respects, exception being duly taken by counsel for the Defendant; and after being duly considered by the Court, it is hereby

ADJUDGED AND ORDERED that the jury's verdict be affirmed as amended and that judgment against the Defendant, Peacock Buick, Inc., be and hereby is entered in the amount of Two Thousand One Hundred Dollars (\$2,100.00) compensatory damages and Seven Thousand Five Hundred Dollars (\$7,500.00) punitive

damages, for a total of Nine Thousand Six Hundred Dollars (\$9,600.00), interest from December 5, 1978, and costs.

AND THIS ORDER IS FINAL.

Entered this _____ day of December, 1978.

Judge

SEEN:

KELLY, LOUK, LAWSON & KELLY
4103 Chain Bridge Road
Fairfax, Virginia 22030

By: _____

H. Wise Kelly, III
H. Wise Kelly, III
Counsel for Plaintiff

MATTHEWS, COTNER & ROBEY, LTD.
311 Park Avenue
Falls Church, Virginia 22046

By: _____

Zachary B. Cotner
Zachary B. Cotner,
Counsel for Defendant

ASSIGNMENT OF ERROR

- I. The Court erred in allowing testimony into evidence, over Petitioners objection, as to unfair business practices in the retail automobile business in general, absent either a proffer of evidence or actual evidence that the Petitioner had actually engaged in such practices.
- II. The Court erred in refusing Petitioner's request for a curative instruction to the jury to disregard the testimony as to unfair business practices in the retail automobile business in general, after the evidence had failed to reveal such practices by the Petitioner.
- III. The Court erred in denying Petitioner's Motion to Strike and Motion for Summary Judgment based upon the uncontroverted fact that title to the automobile in question was never in Plaintiff.
- IV. The Court erred in refusing to allow Defendant's Counsel to question Plaintiff regarding acts tending to show intent of Defendant.
- V. The Court erred in denying Petitioner's Motion to Strike based upon Plaintiff's failure prove actual malice.
- VI. The Court erred in granting Plaintiff's Instruction Number 3 on the issue of punitive damages.
- VII. The Court erred in allowing the jury to consider the issue of punitive damages.
- VIII. The Court erred in not allowing Petitioner's proffered Instruction Letter H, in its entirety, relative to the issue of punitive damages.
- IX. The Court erred in denying Petitioner's Motion for Judgment N.O.V., or in the alternative, Motion for a New Trial, relative to the issue of punitive damages.
- X. The Court erred in denying Petitioner's Motion for a New Trial based upon the irrelevant and inflammatory evidence of unfair business practices within the retail automobile industry in general.
- XI. The Court erred in interpreting the law and in applying that law to the facts.
- XII. The Court erred in applying the facts to the law.

Ape: 10/1

1 Q What is your occupation?

2 A I am a teacher.

3 Q What do you teach?

4 A Phys ed and health.

5 Q What age are your students?

6 A Eighth, ninth and tenth grade girls.

7 Q How long have you been teaching?

8 A This is my second year of teaching.

9 Q Did there come a time that you were looking
10 for an automobile at the beginning of this year?

11 A Yes, there did.

12 ✓ Q And, there came a time that you went to Peacock
13 Buick?

14 A Uh-huh.

15 Q Who did you see at Peacock?

16 A Mr. Glasser.

17 Q And, when you saw Mr. Glasser, did you all
18 discuss what you were looking for?

19 A Yes, we did. I came into the showroom, and
20 there was a Buick Regal right there in front of the
21 door, and I was walking around looking at it and kind
22 of admiring it, and he came over and began to help me,
23 telling me all about the car and the good aspects of it.

1 Q Did you all go on to discuss any prices, or
2 anything like that?

3 A Well, this was the first car dealer I'd ever
4 been in, so we did go over, and we sat down, and I said
5 I'd like to know, in the rough, the price of a car with
6 all the options that I wanted on it.

7 Q Did there come a time when he eventually gave
8 you some figures?

9 A Yes, we sat down; and he wrote down all the
10 options that I wanted and gave me a total on the car.

11 Q Do you remember him saying anything to you
12 about the quality of the deal he was offering?

13 A Yeah. Well, when I left, he looked at me and
14 said: Miss Durkin, you won't be able to beat this deal
15 anywhere. You know, I'm giving you the best price.

16 Q Did you enter into a contract at that time?

17 A No, I did not.

18 Q What did you do?

19 A I left the showroom and went on down the road.
20 I wanted to go to a couple more car dealers since he
21 ✓was the first one I'd been to.

22 Q Which other car dealers did you go to?

23 A I went to the JKY Chevrolet

1 Q How did those prices come out?

2 A At the Volvo dealer? I'm not real sure. I
3 think somewhere around \$2,500.00.

4 Q How did those Volvo prices fit into your
5 budget?

6 A Too expensive.

7 Q Did you go anyplace after the Volvo?

8 A No, I didn't. At that time -- I started shopping
9 around 2:00 o'clock, and by that time it was around 4:30,
10 so I turned around and came back Route 7 to come home.

11 Q Did you go on home?

12 A Well, I did stop back in the Peacock Buick
13 on the way home because I wanted to get another glimpse
14 of the car, at the Regal, because I liked it so much.

15 Q Once you got on home, what did you do?

16 A I got on home, and I called my dad up, and I
17 said: I've been to a few car dealers, and I wanted you
18 to give me your opinion about what you thought about
19 the car that I really want to buy which is the Regal.

20 Q After you talked to your father about that,
21 did you later have an occasion to return to Peacock Buick?

22 A Yes, I did.

23 Q When was that?

1 A. I believe it was the next day or two that I
2 went back to him.

3 Q. When you went back, who did you see?

4 A. I saw Mr. Glasser.

5 Q. Did you have an occasion to enter into a contract
6 with him?

7 A. Yes, I did. At that time, I went back, and
8 I sat down, and I said, you know, this is the best deal.
9 And, my dad said he thought it was okay, and it's okay
10 with me, so let's sit down. Why don't we write it up,
11 and I'll get the car ordered.

12 MR. KELLY: Would you mark this for identification?

13 (The document referred to
14 below was marked Plaintiff's
15 Exhibit No. 1 for identification.)

16 BY MR. KELLY:

17 Q. I want to show you a document marked for
18 identification as Plaintiff's No. 1, and ask if you can
19 identify it?

20 A. Yes, that's the contract that was made up that
21 evening with Mr. Glasser.

22 Q. Looking at it, I see that it appears to be
23 a carbon, that there's a penned X and a penned figure at

1 the bottom which is higher than what was originally there.

2 A. Uh-huh.

3 Q. How did that come to be there?

4 A. Well, the carbon figure at the bottom, that's
5 the figure they gave me the day I went in to order the
6 car, and I crossed it out at the time I picked up the
7 car because it ended up to be more than it was on the
8 carbon, the price was higher.

9 Q. With the exception of those two notations,
10 how does that contract compare to what was originally
11 signed?

12 A. That's the exact. That's my copy of the
13 contract.

14 Q. How did this contract compare to the figures
15 you had discussed with Mr. Glasser?

16 A. Exactly the same.

17 Q. Did that include the trade-in?

18 A. Yes, it did.

19 Q. At the time you entered into the contract with
20 Mr. Glasser, was there any money involved in cash?

21 A. Yes. When we wrote up the contract, he said
22 they could not order the car until I gave them a check for
23 \$100.00 for the deposit.

1 Q Did you do that?

2 A Yes. I then wrote him a check for \$100.00.

3 Q Who was to order the car?

4 A I was assuming that Mr. Glasser was going to
5 order it for me.

6 Q Was there any discussion about any problem with
7 the order, or anything further being required from you
8 for the car to be ordered?

9 A No, not at the time. He said everything was
10 fine; and when the car came in, he would give me a call.

11 Q Was there any estimate as to how long it would
12 take that car to arrive?

13 A I think I remembered he said like four weeks
14 or five weeks.

15 Q Was there any discussion with Mr. Glasser as
16 to whether or not this contract was binding, or whether
17 or not it had to be reviewed, or whether there were any
18 problems with it?

19 A No, he didn't tell me about anything. I just
20 figured I gave him the deposit, and it was valid.

21 Q How were you to find out that this car would
22 be available for delivery?

23 A He said he would give me a phone call as soon

1 as the car was in.

2 Q At the time you entered into this contract,
3 was it reviewed by anybody?

4 A I really don't know.

5 Q Did you see Mr. Glasser take it off anywhere
6 or go anywhere with it to have it checked?

7 A I don't remember seeing it.

8 Q Do you remember when, finally, the car was
9 ready?

10 A Yes, I do.

11 Q Approximately when was that?

12 A I think some two months, by the end of February.

13 Q Let me show you a couple of documents and ask
14 if that refreshes your recollection as to the date.

15 A February 21st, yes.

16 Q Between January 6th and February 21st, did
17 you have any occasion to try to obtain your car or have
18 it available to you?

19 A Yes, I did. Well, I called Mr. Glasser once
20 to change -- I was going to have a tape deck put in the
21 car, and I had it changed to a cassette deck.

22 And, he said: Oh, no problem. Same price.

23 They'll just put the order in.

1 Q Were there any other efforts made to get your
2 car, or find out about it, or anything like that?

3 A After, I think, they said my car would be in
4 around the 7th or 14th of February, and, I did; I called
5 them once to twice to say, "Is it in yet?", because I
6 was anxious.

7 Q Who did you speak to on those occasions?

8 A I think I spoke to Mr. Glasser once, and he
9 said: No, Jane, I'm sorry. It isn't in yet.

10 And, then, I guess I was kind of a pain. I
11 called back and talked to a couple of salesmen, and said
12 can you check and see if it's in yet because I thought,
13 maybe, he had slipped up and forgotten to call me.

14 And, they would say: Hold on a minute.

15 And, about five minutes later they would come
16 back and say: No, Jane, it is not in yet.

17 Q How much time did you say elapsed between the
18 time they said they'd check and when they came back?

19 A About five minutes.

20 Q Eventually, there came a time when you found
21 that the car was ready?

22 A Uh-huh.

23 Q Would you describe, please, how you found out

1 that the car was ready?

2 A Well, after calling Mr. Glasser a couple of
3 times, he realized I was a little anxious to get it. So,
4 finally, he did call me on, I think it was, a Thursday
5 afternoon. And, he said: Your car is ready. You can
6 come pick it up in half-an-hour.

7 Q What did you do?

8 A I said, "Fine." I was thrilled. I was going
9 out for the weekend, and I knew I would have my new
10 ✓ car to bring up to college with me.

11 Q Where were you going for the weekend?

12 MR. COTNER: Objection, Your Honor. I fail
13 to see the relevancy of where she was going for the
14 weekend.

15 THE COURT: Sustained.

16 BY MR. KELLY:

17 ✓ Q Did you have any conversation with Mr. Glasser
18 about where you were going?

19 A Yes. I told him that I kind of would like
20 to have the car to go away to college for homecoming.

21 Q Did you have any discussion about when you
22 were going away, or when you might need the car?

23 A I told him if it could be ready by Friday

1 afternoon, it would be a big help cause that's when I
2 had to leave because it's an eight-hour drive.

3 Q So, you spoke to him on Thursday, and he said
4 half-an-hour. Then, what happened on Thursday?

5 A Then, when I hung up, and I was just getting
6 my stuff together, getting ready to go over to Peacock
7 Buick, and the phone rang about five minutes later, and
8 he said: Oh, Miss Durkin, I'm so sorry, but, actually,
9 the car just got off the truck, and it's not ready for
10 delivery yet. I has to go through some preparation before
11 you can get it, so you can't pick it up today. However,
12 you could pick it up Saturday morning.

13 At that time, I said: Well, you know I'm going
14 away for the weekend, and Saturday morning doesn't help
15 me. I need it Friday afternoon.

16 And, he said: Well, I'm sorry it can't be
17 ready.

18 Q So, did anything happen on Friday?

19 A No, Friday I left early in the day to go away
20 for the weekend, took my old car.

21 Q What was the next contact you had with Peacock
22 Buick?

23 A I guess it was Tuesday when I went to pick up

1 the car.

2 Q Did you have any plans, or had you made any
3 arrangements, or had arrangements made for you, to try
4 to pickup the car earlier?

5 A Uh-huh. I had a friend of mine try to call
6 Peacock and ask if I could pick it up Sunday night
7 because I thought we were driving down from Ithaca, and
8 I thought we might get in in the afternoon, and if we did, we
9 could go and pick it up on the way home.

10 Q Where were you at the time you were making the
11 arrangements?

12 A I was up in Ithaca, New York.

13 Q When were you planning on coming back from
14 Ithaca?

15 A We were going to drive down Sunday afternoon.

16 Q What happened Sunday afternoon, Sunday night?

17 A Well, Sunday afternoon, we tried to get an
18 early start, but we got delayed at my roommate's house,
19 and we got caught in traffic, so we didn't get in till
20 late Sunday night. So, I ended up not being able to pick-
21 up the car.

22 Q What happened to Monday?

23 A Well, Monday I have a part-time job at Blooming-

1 dale's, and I was working, so I knew that there just

2 wouldn't be enough time for me to go pick the car up.

3 Q. What did you do during the day that Monday?

4 A. I went to school, to teach.

5 Q. To teach?

6 A. Uh-huh.

7 Q. And, the part-time job was when on Monday?

8 A. Monday evening I work, usually, 6:00 to 9:30 -

9 9:45.

10 Q. So, then came Tuesday.

11 A. Uh-huh.

12 Q. Could you tell the jury what happened, please,
13 on Tuesday?

14 A. I got home from school on Tuesday. I got home
15 about 4:00, a little early; and I thought -- I teach a
16 class, a religion class on Tuesdays at 5:00; and, I thought,
17 well, I have an hour to run over to Peacock, pickup the
18 car. And, I assumed that since I was supposed to pick
19 it up two days before, I figured that they'd have all the
20 paperwork done ahead of time, you know, since they were
21 expecting me.

22 And, I thought all I'd have to do is go in,
23 sign the papers, give them my checks, and drive off with

1 my car, so that's what I did: I went, then, to Peacock.

2 Q When you got to Peacock, whom did you see?

3 A Well, when I walked in the door, I guess,
4 maybe, I saw Mr. Creekmore, and I asked if Mr. Glasser
5 was there, and he said, no, he was not in this afternoon.

6 Q Did you all discuss whether or not you could
7 take the car at that time?

8 A He said there was no problem, and he then
9 assigned me to Mr. Bell who was going to handle the whole
10 transaction for me since Mr. Glasser wasn't there.

11 Q You eventually sat down with Mr. Bell?

12 A Uh-huh.

13 Q What did you all do?

14 A Well, Mr. Bell got out all the papers that
15 were necessary for me to sign, and went about signing
16 about ump-teen number of papers that I had to do to
17 take possession of my car.

18 Q Was there any discussion as to any of the
19 figures that you were to pay, or any figures that were in
20 the contract?

21 A Well, when we did sit down, we finally got
22 to this paper, and we got to the total on my car. I had
23 the check already made out on the amount on my contract, so

1 I was just going to hand him that check that I wrote out.

2 Well, we got to the bottom, and he said:

3 I'm really sorry, but there's a freight charge that was
4 added in, and it's an extra \$15.00 or so.

5 And, he said: You'll have to pay that also.

6 Q What was your response?

7 A Well, I said: I don't understand why I have
8 to pay this freight charge; you know, you didn't tell me
9 about this at the time I ordered the car, and I have
10 the check made out, and it's the total down at the bottom
11 of my contract. I don't understand why I should have to
12 pay freight. Peacock Buick should pay for the trans-
13 portation of their own cars, and I just think that it's
14 very unfair that you told me this on the day of delivery,
15 and not when I ordered the car, that there would be an
16 extra \$15.00 added on.

17 Q What was Mr. Bell's response?

18 A Mr. Bell said: I'm very sorry, but that's
19 just something that Peacock Buick has charged, and you're
20 just going to have to pay it.

21 Q Did there come a time when he brought somebody
22 else over?

23 A Yes. He then went and said: I'll get Mr.

1 Creekmore, our salesmanager, and he'll come over and
2 explain the freight charge to you again, which he did.

3 Q In discussing this extra charge, was there
4 anything other than freight that was discussed that was
5 forming the basis for this extra charge?

6 A No. Mr. Creekmore came over and said, reiterated,
7 the same thing Mr. Bell had said: I'm sorry, Miss Durkin. This
8 \$15.00 here is freight, and it was charged to us, and
9 you'll just have to pay it. And, I'm sorry, but that's
10 the way it is. You'll have to write out another check,
11 give us another balance.

12 Q Did you all discuss what would happen if
13 you didn't write the check for the extra money?

14 A He said that they couldn't -- You know, I'd
15 have to pay it. Otherwise, I couldn't have my car.

16 Q Other than that, while you were dealing with
17 Mr. Bell, or while you were filling out the paperwork
18 with Mr. Bell, you had this one contact with Mr. Creekmore.
19 Did you have another contact with him in relation to
20 any problem with the car itself?

21 A Yes. Mr. Creekmore came over and said: Miss
22 Durkin, I want to take you out and show you that the
23 back of your car -- There's something defective. There's

1 a light out or something.

2 So, we got up, and we walked out, and he walked
3 me around to the back and said: See? The little light
4 is -- I don't know. Just defective.

5 It was slanted down. He said: We've ordered
6 the part, and it will come in. When it does, we'll
7 give you a loaner car for the time that you're inconvenienced.

8 Q I show you this document which I'll ask
9 to be identified as Plaintiff's 1 -- 2, excuse me.

10 (The documents referred to were
11 marked Plaintiff's Exhibits No.
2 and 3 for identification.)

12 BY MR. KELLY:

13 Q I show you what has been marked Plaintiff's 2
14 for identification, and ask if you can identify it.

15 A That's the second check that I wrote to Peacock
16 Buick for the balance of the car with the freight charge
17 added.

18 Q I want to show you another check and ask if
19 you can identify it. This has been marked as No. 3.

20 A I wanted to get an extra year-and-a-half
21 warranty for the car. Everybody said it was a good idea,
22 so I paid them extra to get warranty over and above what
23 they give you when you buy the car.

1 Q Who did you deal with to get the extra warranty?

2 A I dealt with Mr. Bell.

3 Q Once you had written these checks out, what
4 did you do with them?

5 A I gave them to Mr. Bell.

6 MR. COTNER: No objection, Your Honor.

7 THE COURT: They will be admitted.

8 (The documents heretofore
9 marked Plaintiff's Exhibits
10 No. 1, 2 and 3 for identification were received in
evidence.)

11 BY MR. KELLY:

12 Q There was a trade-in called for in this contract,
13 is that correct?

14 A Yes, it is.

15 Q Where was the trade-in while you were dealing
16 with Mr. Bell and Mr. Creekmore?

17 A Well, as soon as I started dealing with Mr.
18 Bell, I gave him the key and the title to my old car, and
19 they drove it off, and parked it, like, in the front of
20 the lot.

21 Q Where was the title to the trade-in?

22 A I'm pretty sure that I gave it to him when I
23 gave him the key to the Monza.

1 THE COURT: Had you signed the title at that
2 time?

3 THE WITNESS: Had I signed the title to the
4 new car?

5 THE COURT: To the trade-in?

6 THE WITNESS: Had I signed the title of the
7 trade-in?

8 BY MR. KELLY:

9 Q Whose name was the title in?

10 A It was in my mother's.

11 Q Had she signed it? Was it prepared to be
12 signed over?

13 A I guess, yes.

14 Q Once you completed this paperwork and delivering
15 the checks and the title and all, was there any discussion
16 with anyone about anything further remaining to be done?

17 A No. After we talked about the taillight, I
18 gave him my checks. I had signed all the papers, and
19 Mr. Bell put them in a little white envelope for me because
20 there were so many of them so I could keep them all
21 together and not lose them.

22 Q These were your copies?

23 A Yes.

1 Q How about keys to the new car?

2 A That was when they gave me the set of keys
3 to the new car.

4 Q Was there any attempt made to reappraise your
5 trade-in?

6 A No, there was not.

7 Q What was done about tags?

8 A Well, since --

9 Q License plates?

10 A They were taken off my old car and put on my
11 new car.

12 Q After you got the keys to the car from Mr.
13 Bell, what did you do?

14 A I picked up my papers, and I walked out to the
15 car, and I, you know, sat in it, looked around, just to
16 check and see all the options that I ordered were on it.

17 Then, I noticed that the floormats that I
18 ordered to match the carpeting were missing in the car.

19 Q What did you do?

20 A I went back in, and Mr. Bell was still sitting
21 at his desk, and I said: Mr. Bell, I can't seem to find
22 the floormats that I ordered.

23 So, he got up and came out to the car, and said:

1 Well, sometimes they put them in the trunk of the car
2 before they put them on the floor.

3 And, they opened the trunk, and they were in
4 the trunk, and I took them and put them in the car.

5 Q Once you had your floormats, then what happened?

6 A Then everything seemed in order to me, and
7 I started the car. And, it was like backed into the
8 side of the lot, so I to like three-point turn, and I
9 started to drive out of the lot.

10 Q How far did you get?

11 A I got to, like, the little -- down the driveway
12 into this little service road. And, I looked at the
13 gas gauge and saw that the gas gauge said empty.

14 Q Having seen the word "empty", then what happened?

15 A Well, see, it was on E, and I had about a
16 ten minute drive. I was afraid that I wouldn't get to
17 where I was going without any gas, so I put the car in
18 reverse and backed it up around to the front of the
19 showroom, and I put it in park, and went back in the front
20 door.

21 Q When you went back in, who did you see?

22 A I guess I first went over to Mr. Bell, and
23 said: Mr. Bell, I looked at the gas gauge as I was driving

1 out, and I'm afraid there's not enough gas for me to get
2 home, and I think usually you get ten gallons of gas or
3 so with a new car.

4 And, he said: Oh, yes.

5 And, he went over to get Mr. Creekmore.

6 Q I assume he got Mr. Creekmore?

7 A Yes. Mr. Creekmore came over then, and I
8 explained the problem again to him, that there wasn't
9 any gas. So, he went over, and he said, oh, no problem,
10 and he picked up a little slip like they use in a gas
11 station, like, for credit cards.

12 And, he started to fill that out for the ten
13 gallons of gas for my car.

14 Q What did he do with that slip?

15 A Well, he had it in his hand as he was filling
16 it out, and I assume he was going to give it to me to
17 go out. There was a gas station, he was explaining to
18 me how to get there. It was a Citco or something.

19 Q He was giving directions to the gas station?

20 A Yes.

21 Q Did he ever hand you that slip?

22 A No, he never did.

23 Q While he was preparing this slip, was there

1 anything that occurred?

2 A Yeah, while he was filling out the little
3 gas slip, the phone rang, and it was for Mr. Creekmore.
4 So, he picked up the extension that was on the floor,
5 and he spoke on the phone for a few minutes, and then
6 he hung up the telephone.

7 Q Did you hear that conversation?

8 A No, I did not.

9 Q After the phone conversation, what was done
10 about the gas slip?

11 A Well, after he'd hung up the phone, he said:
12 Oh, the mechanic just called. He absolutely forgot to
13 put any gas in the car at all, and, so, what I'll do is
14 he'll come up and he'll take your car so it doesn't
15 run out of gas. He'll take it up the street and get
16 gas for you.

17 Q Did the mechanic eventually come up?

18 A Uh-huh.

19 Q Did you see him?

20 A Yeah. The mechanic came over, and I guess I
21 gave him the keys to the car.

22 Q Did you have any understanding of what purpose
23 he was using the car for?

1 A. Yeah, I thought he was going to drive up to
2 the gas station and bring the car back to me.

3 Q. Were you given any other reason he might take
4 the car other than to get gas?

5 A. No. No, sir.

6 Q. Did you give them any kind of permission other
7 than to get gas in taking that car?

8 A. No, I did not.

9 Q. Did you ever see that car again?

10 A. No, I did not.

11 Q. After this mechanic went out for the gas,
12 what happened next?

13 A. Well, I walked around the showroom for a couple
14 of minutes, and I was just glancing at the new Regal
15 and the cars on the floor, and, then, I was getting a
16 little anxious. It was getting, like, I think, quarter
17 of five, and I realized I would be late for my class.

18 And, my students get dropped off at my apartment,
19 and sometimes they get there at quarter of five. So, I
20 was a little anxious that they were all waiting at my door.

21 So, I walked out of the showroom, and I was
22 in the front showroom lot looking at the new cars with
23 the stickers on them.

1 Q While you were looking at these cars, what
2 happened?

3 A Well, as I was strolling around, looking at
4 the new cars, Mr. Bell opened the side door where my car
5 was originally parked, and he leaned out and he said:
6 Miss Durkin, Mr. Creekmore would like to speak to you
7 a minute. Will you please come in.

8 Q What did you do?

9 A Then I turned around, and I walked back in
10 the showroom, and went to Mr. Creekmore's office.

11 Q Can you please tell the jury what happened
12 when you got to Mr. Creekmore's office?

13 A Well, Mr. Bell sort of showed me into Mr.
14 Creekmore's office, and Mr. Bell left, and I looked at
15 Mr. Creekmore, and I said: What's the problem?

16 And, he looked up at me, and he was kind of
17 frantic, and he was filing through all the papers, the
18 papers on his desk, and he said: Miss Durkin, there
19 seems to be a mistake here. There's \$1,000.00 missing,
20 and I can't find out where.

21 And, I didn't know what to do. I said: Well,
22 I don't understand.

23 And, so he just kept filing through, and he

1 finally started with his adding machine, and he was
2 adding things up.

3 And, he said: There's definitely \$1,000.00
4 missing in this deal somewhere here. And, I think it's
5 on your trade-in value. And, I think that we actually
6 allotted you \$2,500.00 for your trade-in, and here
7 it's written down \$3,500.00, and it's a mistake, and
8 I don't know what to do about it.

9 Q What was your response?

10 A Well, I said -- By this time, it's now about
11 five to five; and I said: Well, Mr. Creekmore, I'm
12 really sorry, but, you know, I'll come back tomorrow,
13 and we can sit down and talk about it, but I just have
14 to get back. My kids are all waiting at my door, and
15 I'm supposed to start my CCD class at 5:00.

16 I know there's no one home, and I know they're
17 waiting for me, and I'll come back tomorrow, and we'll
18 talk about it.

19 Q What did he say?

20 A Well, he looked at me over that desk, and he
21 said: Miss Durkin, I can't give you the keys to this
22 car back until you write me a check for \$1,000.00.

23 Q What did you do?

1 A. I sat and looked at him, and I said: Mr.
2 Creekmore, even if I wanted to, I couldn't write you a
3 check for \$1,000.00. I don't have \$1,000.00.

4 And, he said: Miss Durkin, I know that, but
5 there's a mistake here, and we're missing \$1,000.00, and
6 Peacock Buick is going to be out \$1,000.00 if you don't
7 write us a check.

8 Q. When was the first time that you had heard of
9 any kind of a mistake?

10 A. Right there, when I walked in Mr. Creekmore's
11 office.

12 Q. While you were talking to Mr. Creekmore, and
13 he was looking through the papers and telling you about
14 the \$1,000.00 and the trade-in, and all of that, what
15 were your feelings and what was your conduct?

16 A. Well, I walked in, and as he was trying to
17 explain it to me, and I was kind of remaining -- trying to
18 remain calm, and then when he looked at me and said, "I
19 can't give you your keys back until you write me a check
20 for \$1,000.00.", then I thought -- He started to get
21 angry with me, and at that point I started to get upset
22 because I realized that something was wrong.

23 And, here I'd written the check for my car, and

1 had the papers, and had driven it out the lot, and here
2 they were going to turn around and take my car away from
3 me, and you just panic.

4 I was just upset.

5 Q Do you think it was apparent? Was there any
6 manifestation?

7 A Oh, yeah. I think they knew I was pretty upset.

8 Q Did you cry?

9 A Well, I was trying to stay cool, calm and
10 collected; but, yeah, I did cry.

11 Q Did there eventually come a time when Mr.
12 Creekmore called somebody else in?

13 A Well, Mr. Creekmore was trying to talk to me
14 and trying to calm me down, and he realized that I was
15 definitely upset, and he was getting -- We were getting
16 nowhere with each other, he said: Miss Durkin, I'll go
17 get Mr. Peacock.

18 And, I was so upset I just felt like I was
19 just all by myself, and I said: Excuse me, can I go
20 make a phone call?

21 And, he said: Yes.

22 And, so, I went over to Mr. Bell's desk, and I
23 asked if I could use their phone, and I tried to call my

1 mom and dad in Jersey. And, there was no answer. And,
2 I tried to call a couple of friends and there was no
3 answer.

4 Q And, then, what happened?

5 A Then I went back into Mr. Creekmore's office,
6 and he had brought Mr. Peacock in. And, Mr. Peacock
7 looked at me and said: Miss Durkin, we're very sorry
8 about this whole thing; and it's just been a mistake.
9 And, Peacock Buick is out \$1,000.00, and you just don't
10 realize that we cannot afford to lose \$1,000.00 on this
11 deal.

12 Q How did that statement compare with Mr. Creekmore's
13 position about not being able to lose \$1,000.00 on the
14 deal?

15 A They were both throwing -- Mr. Peacock threw
16 the same thing in my face that Mr. Creekmore did, that
17 it was \$1,000.00, and it was just something that they
18 absolutely could not afford to lose.

19 And, they weren't making any money on the car
20 as it was, and \$1,000.00 was a lot of money.

21 Q Do you remember any other parts of your con-
22 versation with Mr. Peacock?

23 A Yeah. At one point, I -- He looked at me, and I

1 was so upset, and I realized that I was just hysterical.
2 And, finally, I calmed down for a second, and I looked
3 at him, and I said: I know that this is illegal, and I
4 know that you can't do this. And, I'm just going to
5 go home, and I'm going to call my lawyer.

6 Q What was his response to that?

7 A He looked at me, and for the first time I
8 thought I saw him panic a little bit, and he said to me:
9 Don't go getting a lawyer. By the time you get a lawyer,
10 it'll be two years; and by the time it gets to court, it'll
11 cost you more than it's worth.

12 Q So, what did you do?

13 A Well, then, I calmed down a little bit, you
14 know, because I realized that he was, in fact, getting
15 nervous, and I felt like I really had been done wrong.

16 And, I realized that there was something I
17 could possibly do, you know, to get myself out of this
18 situation there I felt was wrong.

19 Q What was done about your getting home?

20 A Well, after Mr. Peacock and Mr. Creekmore
21 realized that they couldn't get anywhere with me, and it
22 was causing a big scene in the showroom, and customers
23 were starting to turn around and seeing this hysterical

1 girl, so they said: Miss Durkin, why don't we give you
2 back the keys to your car. We'll put the plates back
3 on your old car. You can have your trade-in back; and
4 when you go home and calm down, you'll realize that
5 we really are right, and this \$1,000.00 really is a mis-
6 take, and you will come back, and you'll pay us the
7 extra \$1,000.00.

8 Q Was there any discussion as to your preference
9 as to which car you would drive home?

10 A Well, it was obvious they were not going to
11 give me the keys. When the mechanic came in from getting
12 the gas with the keys, Mr. Creekmore got right up and
13 took the keys away from the mechanic. So, it was obvious
14 I was not going to drive my new car home unless I ran
15 out and had a physical brawl in the parking lot with him.

16 Q I gather you eventually went out to your car?

17 A Yes.

18 Q Your trade-in?

19 A Yeah.

20 Q Did anybody go with you?

21 A Mr. Creekmore walked out with me, yes.

22 Q When you got there, were there any other
23 employees of Peacock Buick?

1 A. Yes. There was, I guess, it was a mechanic.
2 He was putting the plates from the new car now back onto
3 the old car.

4 Q. While you were at your trade-in, was there
5 any discussion with Mr. Creekmore about papers?

6 A. Yeah, I had the two checks in my hand that
7 he had given me back; and, as I was getting in the car,
8 there was a slip on top of the warranty check.

9 Q. With reference to that slip, let me show you
10 Exhibit 3, and ask if you can --

11 A. Yes, that was the slip that was attached to
12 the check, and he wanted to know if he could have that white
13 slip on top of the check back.

14 Q. At the time, did you have any other papers
15 that pertained to this deal?

16 A. No, I did not.

17 Q. Did he give you any reason for wanting that
18 white slip back?

19 A. Well, he looked at me, and he said: You might
20 as well give me that white slip back. You won't be
21 needing it now, and I gave you your checks back. So, just
22 rip that off the top of the check and give it to me.

23 Q. During this time that you were talking to Mr.

1 Creekmore about the mistake, and Mr. Peacock, can you
2 describe their demeanor? How were they acting?

3 A I thought Mr. Creekmore was fairly calm until
4 I asked him if we could come back and discuss this tomorrow.
5 Then I felt that he got a little angry with me, with the
6 fact that I wasn't going to write the check for \$1,000.00.

7 And, so, he was trying to explain to me that
8 they were losing all this money, and I just had to write
9 them a check. So, I guess he was getting frustrated and
10 angry, and that's when he brought in Mr. Peacock.

11 MR. COTNER: Your Honor, I won't object to any-
12 thing that's factual in nature, but speculation as to
13 what was in their minds --

14 THE COURT: The Court will overrule the ob-
15 jection. She can testify to her personal observation,
16 about how she felt. With reference to that, the Court
17 would sustain it.

18 BY MR. KELLY:

19 Q Could you describe what you observed in Mr.
20 Peacock, as to his demeanor?

21 A Well, Mr. Creekmore then went to get Mr.
22 Peacock while I was on the telephone. And, when he came
23 in, Mr. Peacock was the same way: He started out very

1 calm. He said: Miss Durkin, there's been a mistake
2 here. And, I'm sorry. But, you know, there's nothing
3 we can do. We'd lose too much money, and it's just --
4 To the effect, "It's too bad and you're not going to
5 get your car back unless you write us a check for \$1,000.00."

6 (The document referred to below
7 was marked Plaintiff's Exhibit
8 No. 4 for identification.)

9 BY MR. KELLY:

10 Q I am going to show you what has been marked
11 as Plaintiff's No. 4 for identification, and ask if you
12 can identify it?

13 A Yes. This was in the right, front window of
14 the Monza, my trade-in, when I got back in the car.

15 Q Was it there when you drove into Peacock Buick?

16 A No, it was not, not when I traded the car in.

17 Q And, when you left, it was there?

18 A Yes.

19 MR. COTNER: No objection, Your Honor.

20 THE COURT: It will be admitted.

21 (The document heretofore marked
22 Plaintiff's Exhibit No. 4 for
23 identification was received
in evidence.)

1 BY MR. KELLY:

2 Q As you were leaving, you mentioned that you
3 had what has been marked as Exhibit 2 and 3. Of course,
4 you have Exhibit 1, which is the contract. So, you had
5 the contract and the two checks, and then you have
6 Exhibit 4 which is your sticker?

7 A Uh-huh.

8 Q I gather that they returned the title to the
9 trade-in?

10 A Yeah, when they gave me the keys.

11 Q How about your deposit, the \$100.00?

12 A Well, they gave me the checks back, the checks
13 I wrote that day; but they didn't give me my \$100.00
14 deposit back.

15 Q Did there eventually come a time when they gave
16 you that deposit back?

17 A Yes. I think I got it like a month after the
18 day that I left Peacock. They finally sent it to me in
19 the mail.

20 Q Between the time that you left Peacock Buick
21 on February 21st and the time that this check eventually
22 came back to you, do you know if there was any contact
23 made on your behalf with Peacock Buick regarding this deal?

1 A. No, there was not.

2 Q. You don't know of your own knowledge?

3 A. I never called them back.

4 Q. Between February 21st and the time this check
5 came back, did you have an occasion to see an attorney
6 about this?

7 A. Yes, I did.

8 ✓ Q. Has Peacock Buick made any effort to give you
9 this new car at all to your knowledge?

10 A. No, they never did, not since I wouldn't write
11 them a check for the additional money.

12 Q. Has Peacock Buick made any effort to apologize
13 to you in any way or contact you regarding the incident?

14 A. No.

15 Q. Until you saw Mr. Creekmore on the 21st, was
16 there any reference to any mistake whatsoever?

17 A. No, there was not.

18 Q. One last thing: Looking at the contract, at
19 the top of it, it has the name Enid B. Durkin.

20 A. Uh-huh.

21 Q. And, then, at the bottom, it has Jane Enid
22 Durkin.

23 A. Uh-huh.

1 Q Looking at Jane Enid Durkin, who signed that?

2 A I did.

3 Q That's your signature?

4 A Uh-huh.

5 Q Who is Enid B. Durkin?

6 A That's my mom.

7 Q Where did she live?

8 A She lives with my dad in New Jersey.

9 Q Where did you intend the title of this new
10 vehicle to be placed? Whose name was it going to be in?

11 A We were going to title it in my mom's name.

12 Q Why were you going to do that?

13 A Well, my parents have been paying for my insurance
14 since I started driving, and they just told me until I
15 was 25 that they would keep me on their insurance, and it
16 would be a big break for me financially since I can hardly
17 afford to buy a car, never mind pay for the insurance.

18 Q Who was paying for this new car? Who was
19 providing the money for this new car?

20 A I was paying for it. My parents were loaning
21 me some of the money, and I was going to pay them back.

22 Q Were there any arrangements made to that effect,
23 for paying back the money?

1 A. Oh, yeah. They told me how much they would
2 lend me, and I called them and said how much I would need.

3 And, then, we made arrangements that I would
4 pay them back \$100.00 a month for the car.

5 Q In terms of the control of this vehicle, who
6 was to have the control of it?

7 MR. COTNER: Your Honor, I am going to object
8 to that. That would require the testimony of the person
9 who was to be the owner of the car.

10 THE COURT: Overrule the objection.

11 BY MR. KELLY:

12 Q Who was to have control of that vehicle?

13 A It was my car. I was going to drive it.

14 MR. COTNER: For the record, Your Honor, I
15 would like the record to reflect an objection to this as
16 based on a hearsay response.

17 BY MR. KELLY:

18 Q To your knowledge, were there any plans for
19 your mother to exercise any control of this automobile?

20 A No, there was not. They have their own car.

21 Q As you understood it, in your own mind, whose
22 car was this to be?

23 A It was my car. I negotiated it. I signed all

1 the papers. I wrote the check. They came from my
2 account. That, under my assumption, is my car.

3 MR. COTNER: I object. It's irrelevant.

4 THE COURT: I overrule your objection.

5 ✓ THE WITNESS: I thought it was my car.

6 MR. KELLY: I have no further questions.

7 THE COURT: Cross examine.

8 CROSS EXAMINATION

9 BY MR. COTNER:

10 Q Miss Durkin, prior to going to Peacock Buick
11 the very first time, had you been car shopping?

12 A No, I had not.

13 Q How long prior to going to Peacock had you
14 formulated an intent to get a new car?

15 A Well, my school has a two-and-a-half week
16 Christmas break; and when I was home, I discussed with
17 my parents that I would shop when I got back to Virginia,
18 and, hopefully, buy a new car.

19 Q You had been on vacation, had you?

20 A Yeah.

21 Q Where had you been?

22 A I went home to spend Christmas with my parents.

23 Q In New Jersey?

1 Q Do you remember if you mentioned, specifically,
2 the \$3,500.00 figure with anyone that you discussed the
3 deal with?

4 A I probably mentioned it to my dad on the phone.

5 Q Did he feel that was unusual?

6 A No, he said it was a reasonable deal to him.

7 Q The following day you returned to Peacock
8 Buick, is that correct?

9 A Yes. I think it was the next day or two, uh-huh.

10 Q At that time you and Mr. Glasser got together
11 and drew up a purchase order?

12 A Uh-huh.

13 Q At that time you stated: And, my trade-in is
14 \$3,500.00, did you not?

15 A Yes, I did, as he was writing up the order.

16 Q He said, yes, and you watched him write that
17 figure down, is that correct?

18 A Uh-huh.

19 ✓ Q Prior to the drawing up of the purchase order,
20 some figures had been written down on a piece of scratch
21 paper?

22 A Uh-huh.

23 Q That would have been the day before, correct?

1 A Yeah, the first time I went in.

2 Q That was for your benefit in comparing deals?

3 A Well, see, I didn't know anything. While we
4 were talking about all the options, I said to him: Would
5 you mind kind of jotting it all down on a piece of paper
6 so I can have something to remember of the transaction?

7 And, he said: Sure. And, he went over and
8 he jotted it down on a pad for me, and gave it to me to
9 take along.

10 And, he said: This is the best deal you'll find.

11 Q Where is that piece of paper?

12 A Well, it's probably with all my literature.
13 You know, I picked all the literature up while I was in
14 the showroom. I think I had it all just in a pile in my
15 room.

16 Q You don't have it now?

17 A No. Well, when it came down to the end of the
18 deal with Peacock, you know, I gave my \$100.00, I figured
19 everything was fine; and, so, I threw all the literature
20 out.

21 Q Did you have it the following day when the
22 purchase order was drawn up?

23 A I don't remember. I'm sure it was home in the

1 apartment somewhere.

2 Q Do you recall what figure was placed on that
3 paper for the trade-in?

4 A I recall \$3,500.00.

5 Q Is that an independent recollection, or has your
6 memory been swayed by what is obviously written on the
7 purchase order that's been entered in evidence?

8 ✓ A Mr. Cotner, that's the way I remember it.

9 Q On Sunday, in February, you got back late from
10 a trip, is that correct?

11 A Uh-huh.

12 Q By the time you got back, the Peacock dealership
13 was closed?

14 A Yes. We planned to get home earlier, but we
15 just got delayed and there was a lot of traffic. And,
16 we got home at, like, 10:00 - 10:30 - 11:00, something.

17 Q Then you didn't do anything that next Monday?

18 A No. I had to be at school the next day, and
19 then I worked Monday night.

20 Q And, on Tuesday, you decided to pick up the
21 car?

22 A Yeah, Tuesday afternoon. I told you I got home
23 from school early, and I figured --

BENCH CONFERENCE

1 ✓
2 THE COURT: In this case, we're getting into
3 the deal and so forth. Is that really material? Has
4 not title passed when they delivered the vehicle, signed
5 the titles?

6 And, if there was mistake -- And, here, where
7 there was an intentional taking of the property by the
8 defendant, another person's property, an intentional
9 tort; and, whatever happened in arriving at this, you see,
10 would be a cause of action by Peacock Buick to set the
11 deal aside, rather than taking the property that belonged
12 to someone else.

13 Isn't that the way the case develops?

14 MR. COTNER: I don't believe, Your Honor, that
15 plaintiff alleges that all actions done were done willfully
16 and wantonly.

17 THE COURT: That's the taking of property.

18 MR. COTNER: In addition to which, Your Honor,
19 he's alleging that the charges made -- the additional
20 charges of, I think they figured out to be, \$14.46, that
21 those were fraudulent, false, and were willfully and
22 wantonly made. Certainly, we are under an obligation on
23 behalf of my client to disprove that.

1 In paragraph two, that I'm about to bring
2 out, gives the dealer the right to pass on charges passed
3 on to him from the manufacturer.

4 THE COURT: What I'm getting at, though, Mr.
5 Kelly, are the negotiations and so forth leading up to
6 this transaction, are they material as to your theory
7 of the case? Isn't your theory of the case the unlawful
8 taking of property of the plaintiff?

9 MR. KELLY: Yes, sir.

10 THE COURT: The seizing of the property of
11 hers?

12 MR. KELLY: Where I think the period of January
13 6th to February 21st is relevant is that it shows how
14 she was treated up to the time of delivery.

15 THE COURT: Is that going to punitive damages?

16 MR. KELLY: Yes, sir.

17 MR. COTNER: This is very -- And, since he's
18 on punitive damages, I'd have to agree that anything that
19 transpired between the parties is relevant.

20 THE COURT: As far as the title is concerned,
21 I think title passed. The car was delivered. The papers
22 were all executed. Unless you can show that they were
23 not executed.

1 MR. COTNER: Begging the Court's indulgence,
2 the title, by all admissions, was to be in the name of --

3 THE COURT: I think that's immaterial. I've
4 given a lot of thought to that. I heard your motion for
5 summary judgment, and I heard your objection, and your
6 exception. And, I don't think that's material to the
7 case.

8 On the intentional tort --

9 MR. COTNER: The application had been filled
10 out then. Title thereby passes, is that correct?

11 THE COURT: And, delivery of the automobile.

12 MR. COTNER: We would allege an incomplete
13 delivery.

14 THE COURT: I don't think you can. I think
15 once the papers are executed, then, from then on, I
16 think the vehicle belonged to her because all of the
17 papers had been executed, or title had been executed to them.
18 They take delivery of it. I think it was her vehicle.

19 And, if she elects to take it in someone else's
20 name, that's her choice. You can pay for it and have the
21 title in anyone's name, a corporation, a partnership.

22 MR. COTNER: The title, as a physical matter,
23 hadn't actually passed. The title was not issued by DMV.

1 THE COURT: I don't think that's material.
2 They had an adequate remedy at law if they made a mistake
3 by setting the deal aside; but they would rather not
4 go through a court of law to set it aside. They elected
5 to seize the property and take the consequences.

6 And, since this was brought up on direct, I'll
7 let you go into it, but it seems to me like we're reworking
8 the whole deal. Unlawful seizure of someone else's
9 property is a tort.

10 MR. COTNER: Assuming, without admitting, the
11 truth of Your Honor's position, would it not be relevant
12 to determine what went on between January 5th and the
13 date of this delivery for purposes of punitive damages?

14 THE COURT: With reference to their attitudes
15 and so forth?

16 MR. COTNER: And actions?

17 THE COURT: Such as?

18 MR. COTNER: Such as whether they had a contractual
19 basis for making additional charges at the time of delivery.

20 THE COURT: You can go into this, but with
21 reference to the appraisals and so forth, I think that is
22 completely immaterial, the \$2,500.00 and \$3,500.00.

23 Because if there was a mistake by Peacock Buick,

1 they had an adequate remedy at law even after delivery
2 rather than to seize the property after it has been
3 delivered and say: We made a mistake. Because this is
4 not a suit to recind, and they had a cause of action for
5 rescision which they did not pursue.

6 They took it upon themselves to go their way.

7 MR. COTNER: It was at that point they had
8 the car, and, acting under what they thought was a claim
9 of right. They had possession. They had the title.

10 THE COURT: They can't set themselves up as
11 judge, jury and everyone else because they had already
12 made the delivery. Frankly, he's lucky he didn't get hit
13 with criminal charges, but that's neither here nor there.

14 But, if he hadn't made delivery -- I think
15 he knew when he got those keys back what he was going to
16 do, but that's up to the jury.

17 MR. COTNER: Very well.

18 THE COURT: All right. Let's go ahead. You
19 ✓do it because of the punitive damages.

20 MR. KELLY: Your Honor, I have Miss Durkin's
21 parents outside as witnesses. Her mother is here just
22 to collaborate that she didn't intend to control the
23 vehicle. I take, from the Court's ruling, that Miss Durkin

1 THE COURT: You may give it to the jury if
2 you'd like, Mr. Cotner.

3 MR. COTNER: I would ask the jury to look at
4 paragraphs two and three and read them, briefly.

5 THE COURT: You may go ahead.

6 BY MR. COTNER:

7 ✓ Q Subsequent to the filling out of that purchase
8 order, sometime between January 6th and delivery, did you
9 request a cassette player?

10 A. Uh-huh, yes, instead of an eight-track.

11 Q Do you remember who you spoke to that day?

12 A. I think it was Mr. Glasser.

13 Q Are you sure?

14 A. I'm not positive, but I'm pretty sure cause
15 he was the one that wrote up the contract for my car.

16 Q Do you recall the exact substance of that
17 conversation?

18 A. Yes. I was a little concerned. I called up,
19 and I said: Look, I know this is going to be a big pain,
20 but I kind of wanted to get a cassette player put in
21 the car instead of an eight-track.

22 And, he said: Oh, Miss Durkin, no problem
23 at all.

1 And, I said: Well, is it going to cost more
2 money?

3 And, he said: Oh, no. It's exactly the same
4 price for an eight-track as a cassette, and I'll put
5 the order in. And, there's absolutely no problem about
6 the switch.

7 And, I was a little relieved, and that was
8 about all we talked about.

9 Q When you saw a figure on the final contract
10 different from that which was on the purchase order, was it
11 explained to you that part of that difference was because
12 of the cassette player?

13 A No. That's what I don't understand. It wasn't.
14 It was just --

15 Q Are you sure that it wasn't explained?

16 A I'm positive. It would have seemed a little
17 bit more logical than \$15.00 for freight. I couldn't
18 understand why I had to pay that. At least it would have
19 been something concrete if I knew it was for the cassette.

20 ✓ But, it was never explained to me.

21 Q Now, you'd had some small problems with the
22 car prior to the dispute on the \$1,000.00, is that correct?
23 You'd had a taillight and the floormats?

1 A. Uh-huh.

2 Q. Up until the dispute over the \$1,000.00, had
3 anyone treated you discourteously at Peacock Buick?

4 A. No.

5 Q. Had they, in fact, treated you courteously?

6 A. Up until that point where I was called back
7 into the showroom, yes. You could say it was courteous.

8 ✓ Q. What, specifically, did they do or say that
9 was rude with respect to the \$1,000.00 difference?

10 A. Well, I guess because when Mr. Creekmore
11 tried to explain it to me, I guess, he just didn't do
12 a good enough job, and when he saw that I was getting
13 upset, it seemed to upset him.

14 And, then, he seemed to get a little angry with
15 me, and I guess I was even more upset for the fact I
16 was late, and I knew the kids were waiting outside my
17 door, and there would be no one there to let them in.

18 Q. Did he say anything objectionable, or was
19 he polite throughout?

20 A. Well, I guess when I really felt animosity
21 from him was when he looked at me and said: Miss Durkin,
22 we cannot give you the keys back to your car until you
23 write us a check for \$1,000.00.

1 And, that's when I started to get upset. And,
2 that's not really, see, to make me cry.

3 Q But he never called you any names; he never
4 tried to inferred that you were trying to beat him out
5 of \$1,000.00; he never did anything rude or objectionable,
6 did he?

7 A Yes. He said to me: You knew that car wasn't worth
8 \$3,500.00.

9 And, I said: No, I --

10 Q Do you recall him saying that to you, specifically?

11 A Yes, I do.

12 Q Is that the only thing he did or said that
13 was rude?

14 A I think I felt just his manners, that when I
15 started to get upset, he did not -- He didn't stay cool,
16 calm and collected as I thought he should have. I thought
17 he got very upset and angry with me that I wasn't accepting
18 the fact.

19 I felt he just wanted me to write this check
20 for \$1,000.00. That's what really upset me, that I just
21 couldn't believe that they thought they were going to
22 tell me, "I'm sorry, Miss Durkin. Write us a check.", and
23 I was going to get out my checkbook and write away, you know?

1 Q In point of fact, they never did tell you
2 that, did they? In fact, they told you that what they'd
3 like you to do is to take your car back and to check
4 prices, and to determine whether or not they were correct,
5 and that a mistake had been made, and then it would be
6 your option as to whether or not you wanted to purchase
7 the Regal, or whether you wanted to keep your old car,
8 isn't that what really happened?

9 A No, that's not what happened. It wasn't until
10 I got very upset. In the beginning, I'm convinced they
11 would have taken my check for \$1,000.00. But, it wasn't
12 until I got upset and hysterical and was making a scene
13 in the showroom that they realized that they weren't
14 getting anywhere with me.

15 And, finally, they said: Well, Miss Durkin,
16 we'll give you your keys back. We'll give you your checks
17 back. You go home and calm down, and you'll realize that
18 we're right, and that you do owe us \$1,000.00 on this
19 deal.

20 Q When you say you were getting hysterical in
21 the showroom, in point of fact, you were in a small office
22 room off the showroom with an open door, isn't that correct?

23 A Well, at the point where Mr. Creekmore felt

1 he couldn't talk to me any longer, and he went to get
2 Mr. Peacock, I said: Can I use the telephone?

3 And, I was hysterical by that point. So, I
4 went out to the showroom, and I went down to Mr. Bell's
5 desk and asked if I could use his phone, and I was trying
6 to call my parents and a couple of friends and have
7 somebody come to the showroom and help me.

8 You know, and there were people shopping around
9 the showroom, and, I mean, I was sobbing, and they
10 ✓ were looking, like, what's wrong with that girl.

11 Q Once again for the Court and jury, would you
12 please tell us precisely what was said that you contend
13 was either rude --

14 THE COURT: I think we've been over this about
15 three times, Mr. Cotner.

16 BY MR. COTNER:

17 Q Would you tell us what acts you contend they
18 did, or acts that they admitted which were reckless or
19 willful or wanton?

20 MR. KELLY: I object, Your Honor. He's asking
21 for a legal conclusion.

22 THE COURT: Sustained.
23

1 BY MR. COTNER:

2 ✓ Q Do you have any reason to believe that any
3 of the actions of any of the agents of Peacock were
4 the result of a plot or scheme to make you pay an extra
5 ✓ \$1,000.00?

6 MR. KELLY: I believe he's asking for specu-
7 lation.

8 MR. COTNER: I'm asking if she has any facts
9 to sustain that.

10 THE COURT: From their actions or statements.
11 Go ahead.

12 ✓ THE WITNESS: I thought it was odd, you know.
13 When he called me back in, I looked at him, and I said:
14 Mr. Creekmore, you've had six to eight weeks to look at
15 this contract. That's been here in your file. I gave
16 you \$100.00. You've had all this time to review this
17 contract. It's not like I walked in, bought a car and
18 drove it off the lot.

19 It was ordered, so they had plenty of time.
20 ✓ I just can't believe all this time went past.

21 BY MR. COTNER:

22 Q Thank you for the open-ended statement. Do
23 you have any facts that you can cite to support a conspiracy

1 theory?

2 MR. KELLY: I think --

3 THE COURT: Sustained.

4 BY MR. COTNER:

5 Q Did you ever demand the car from Peacock Buick?

6 A No, I did not.

7 Q Not before or after?

8 A You mean, after they told me about the mistake?

9 Q Correct.

10 A Well, I guess I realized when they took the

11 keys that there was noway that I was going to get my car.

12 Q Neither you nor your attorney demanded the
13 return of the car subsequent?

14 MR. KELLY: I am going to object as to the
15 "attorney". I think it would be hearsay, and, too, I
16 think it's reaching into privilege.

17 MR. COTNER: If I may be heard, Your Honor?

18 THE COURT: Sure.

19 MR. COTNER: I think the plaintiff, of course,
20 is responsible for the acts of her attorney. If the
21 attorney wants to supplement it by means of a proffer,
22 I'd be --

23 THE COURT: She can testify as to what she did.

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BY MR. COTNER:

Q Is it not correct, Miss Durkin, that all checks that you wrote to Peacock Buick were subsequently returned?

A. Eventually, yes.

Q Did you demand the \$100.00 deposit check on the day that delivery was to have been made?

A. No, I didn't. I was so upset. I probably should have, but I forgot.

Q Do you recall anyone saying they would hold the Regal for you until you had had the opportunity to think about the case?

A. No, I don't.

MR. COTNER: I have nothing further, Your Honor.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MR. KELLY:

Q Miss Durkin, after talking to Mr. Creekmore and talking to Michael Peacock, did you have an impression, or would you describe, your mental feelings as to what would have happened had you demanded the car?

MR. COTNER: Objection, Your Honor.

THE COURT: Sustain the objection.

MR. KELLY: Withdraw the question, Your Honor, and

1 I have no further questions.

2 THE COURT: You may step down.

3 Would the bailiff take the jury to the jury
4 room, and we'll all take a ten minute recess.

5 [Brief recess.]

6 THE BAILIFF: Remain seated, please.

7 THE COURT: Ready for the jury?

8 MR. KELLY: Yes, sir.

9 (The jury returned to the courtroom and resumed
10 their place in the jury box.)

11 THE COURT: Call your next witness.

12 MR. KELLY: Your Honor, I call Mrs. Durkin.

13 Whereupon,

14 ENID B. DURKIN,
15 a witness, was called for examination by counsel on
16 behalf of the plaintiff, and, after having been duly
17 sworn, was examined and testified as follows:

18 DIRECT EXAMINATION

19 BY MR. KELLY:

20 ✓ Q Would you state your name and address, please,
21 ma'am?

22 A Yes. Mrs. Enid B. Durkin, 17 Hillview Terrace,
23 Glen Rock, New Jersey.

1 Q What is your relationship to Miss Jane Durkin?

2 A I'm her mother.

3 Q Regarding automobiles that would be titled in
4 your name, both the trade-in and the new car, what control,
5 if any, did you intend to exercise, or feel you could
6 exercise, over those vehicles?

7 A Well, the car was just in my name, but it was
8 daughter's car.

9 Q What control would you exercise, if any?

10 A Well, none, really.

11 Q Under this arrangement, who did you consider
12 to be the owner of those vehicles?

13 A My daughter, Jane.

14 Q Why were these cars put in your name?

15 A Well, it was solely for insurance purposes
16 because she couldn't afford to have a car in her name.
17 She'd have to have insurance on her own. So, for insurance,
18 and it was just to save her money and be on the family
19 policy. It would be a little less expensive for her.

20 Q Regarding the money to be paid and that was
21 paid as the difference between the trade-in and the total
22 purchase price of the new car, where did that money come
23 from?

1 A. Well, half of it was Jane's money that was in
2 trust for her in a small account, and the other half
3 my husband and I paid for. She was going to pay us back.

4 Q. Who was?

5 A. She was going to pay us back, Jane.

6 Q. Was that the understanding in January of 1978,
7 that she was to pay that back?

8 A. Yes.

9 MR. KELLY: I have no further questions.

10 THE COURT: Cross examine.

11 CROSS EXAMINATION

12 BY MR. COTNER:

13 Q. Just one question. Was legal title of the car
14 to be in your name?

15 MR. KELLY: I am going to object to the phrase
16 "legal title", if he's asking for a legal conclusion.

17 THE COURT: You mean evidence of title?

18 BY MR. COTNER:

19 Q. Was the certificate of title to be in your name,
20 ma'am?

21 A. Well, the car is in my name. I don't understand
22 what you mean by "legal title".

23 Q. The car was to be in your name?

1 ✓ A. Yes, it was in my name.

2 Q. Have you ever received any evidence of ownership
3 of that car, or have you ever received any evidence of
4 ownership of that car?

5 A. Yes.

6 Q. You have?

7 A. I don't understand what you mean. I don't
8 understand the question.

9 Q. Did you ever receive a title to the car?

10 A. Yes. The title -- The car is in my name.

11 Q. Do you have that title to the car?

12 A. You mean the car in question? No.

13 MR. COTNER: Nothing further, Your Honor.

14 THE WITNESS: I don't understand the question.

15 MR. KELLY: I have nothing further.

16 THE COURT: You may step down.

17 MR. KELLY: Your Honor, may Mrs. Durkin be
18 excused?

19 THE COURT: Sure. You're free to go if you
20 wish.

21 [Witness excused.]

22 MR. KELLY: Your Honor, I call Mr. Durkin.

23

1 Whereupon,

2 JACK GLASSER,

3 a witness, was called for examination by counsel on
4 behalf of the plaintiff, and, after having been duly
5 sworn, was examined and testified as follows:

6 DIRECT EXAMINATION

7 BY MR. KELLY:

8 ✓ Q Would you state your name and address, please,
9 sir?

10 A Jack Glasser, 4100 Parkedge Lane, Annandale,
11 Virginia.

12 Q Where are you employed?

13 A Peacock Buick.

14 Q How long have you been employed there?

15 A 15 years.

16 Q In January and February of 1978, were you also
17 employed there?

18 A Yes.

19 Q There came a time in early January that you
20 had an occasion to meet Miss Durkin, isn't that correct?

21 A Yes.

22 Q And, she came in shopping for a cars, correct?

23 A [Nodding head.]

1 Q And, you had an occasion to quote her a price
2 on a new Buick Regal?

3 A [Nodding head.]

4 THE COURT: You'll have to respond in words
5 so the court reporter can take it down.

6 THE WITNESS: All right. Yes.

7 BY MR. KELLY:

8 Q At the time you quoted her the price, you
9 had her proposed trade-in appraised, isn't that correct?

10 A Yes.

11 Q Who was it you had appraise it?

12 A The salesmanager.

13 Q That would be Russell Creechmore?

14 A Yes, sir.

15 Q And, based on that appraisal, you came up with
16 a proposed figure for Miss Durkin?

17 A I did.

18 Q You explained to her that no one would be able
19 to do any better, didn't you?

20 A Yes.

21 Q Now, Miss Durkin came back to you the next
22 day, didn't she?

23 A I believe she did.

1 Q And, she said, in effect: You're right. Nobody
2 did come up with anything better. Isn't that correct?

3 A Yes, sir.

4 Q You still had the appraisal available at that
5 time, isn't that correct?

6 A Right.

7 Q You undertook to write up a contract?

8 A I did.

9 (The document referred to was
10 marked Plaintiff's Exhibit No.
5 for identification.)

11 BY MR. KELLY:

12 Q I show you what has been marked as Plaintiff's
13 Exhibit No. 1 for identification, and with the exception of
14 where it's been penned in with the X and with the figure
15 \$3,427, that is a copy of the contract that you drew up, is it not?

16 A That's correct.

17 Q I show you what has been marked as Plaintiff's
18 No. 5 for identification. Isn't that a copy of the
19 appraisal that Mr. Creekmore prepared?

20 A Yes, it is.

21 Q And, it formed the basis of your figures in
22 determining what to allow by way of trade-in, isn't that
23 correct?

1 A. Yes, that's correct.

2 MR. KELLY: I move that as Plaintiff's No. 5.

3 THE COURT: It will be admitted.

4 (The document heretofore marked
5 Plaintiff's Exhibit No. 5 for
6 identification was received in
7 evidence.)

8 BY MR. KELLY:

9 Q. Is it correct, sir, that you don't, specifically,
10 remember writing this order up, isn't that true?

11 A. It would be hard not to remember.

12 Q. I mean, specifically, writing the contract up?

13 A. I can't understand the question, why I would
14 not remember writing the contract.

15 Q. Do you remember being at Mr. Cotner's office
16 for a deposition on September 15th?

17 A. I do.

18 Q. Please take a look at page 12, specifically,
19 lines 4 and 5, and I ask if that refreshes your recollection?

20 A. I have to remember writing the order, but I
21 don't remember the exact dates. I can't remember -- I did
22 write the order, though, but it's pretty hard because we
23 sell a lot of cars. You can't remember every particular
date.

1 Q I understand that, but my question to you was:
2 Do you remember writing this order up?

3 What was your response? It's written right
4 there [indicating]. Could you tell us what that says?

5 A I remember writing the order, yes; but I
6 can't remember the exact date.

7 Q What does this state?

8 A "Not really."

9 Q Once you wrote this order up, you had Miss
10 Durkin sign it?

11 A I did.

12 Q And, you signed it?

13 A I did.

14 Q And, you put that contract, or whatever it is,
15 Exhibit No. 1, in a folder, isn't that correct?

16 A That's right.

17 Q And, then, you took it to your salesmanager,
18 Mr. Creekmore, isn't that correct?

19 A I did.

20 Q At the time this contract was written up, you
21 also took \$100.00 deposit from Miss Durkin?

22 A That's right.

23 Q And, you took that to the office and you got

1 a receipt for it?

2 A. That's correct.

3 Q. At no time did you try to seek any sort of
4 approval from Mr. Creekmore or anyone else at Peacock
5 Buick above you, isn't that correct?

6 A. That's correct.

7 Q. If you were to be checked, under the procedures
8 of Peacock Buick, it would be Mr. Creekmore that would
9 check your deals, isn't that correct?

10 A. That's right.

11 Q. But, in January and February, Mr. Creekmore
12 never checked your deals, did he?

13 A. We don't normally check them until the car
14 is ready for delivery.

15 Q. Not until the car is ready for delivery?

16 A. Usually on an order car; but when we're delivering
17 the car immediately, we do check it a little closer.

18 This was an order car, and it would take at
19 least four to six weeks to come in.

20 Q. So, it would be at least four to six weeks
21 before anybody bothered to check it?

22 A. Right.

23 Q. Even though something like Exhibit No. 1 was

1 signed by both parties?

2 A. We're supposed to be professional salesmen,
3 and usually know what we're doing.

4 Q. Even though something like Exhibit No. 1 has
5 been signed, nobody checks it or anything like that?

6 A. It's not necessary, really.

7 Q. Under your procedure, it is not necessary, isn't
8 that right?

9 A. That's right.

10 Q. This is true even if someone is giving you a
11 deposit of as much as \$100.00?

12 A. Right.

13 Q. On these checks, one thing that Mr. Creekmore
14 is looking for is the profit in the deal, isn't that
15 correct?

16 A. He does.

17 Q. He never checked yours to find out exactly
18 what your profits were because you generally held a pretty
19 good profit, isn't that correct?

20 A. I do.

21 Q. So, then, at the time this mistake was made
22 in drawing up the contract by you, apparently there was
23 no one around, or there was nothing in your procedure

1 whereby it had to be checked?

2 A. Not really.

3 Q Looking at this Exhibit 1, the line down here
4 where it says "Approved", on your deals, Peacock Buick
5 never filled that in, isn't that correct?

6 A. As far as I can see, it was not.

7 Q But, as a matter of procedure, they generally --
8 It was generally not filled in, isn't that correct?

9 A. That's right.

10 Q After the deal was made, or after this Exhibit
11 was entered into, you received some phone calls from Miss
12 Durkin, isn't that correct?

13 A. Yes, I did.

14 Q And, she was calling because she wanted her
15 car, isn't that right?

16 A. That's right.

17 Q And, when she called, asking for her car, it
18 would be necessary for you to go check her file to
19 find out what the status of that car was, isn't that
20 correct?

21 A. Yes, sir.

22 Q And, the dealer has a copy of that Exhibit 1
23 in that file?

1 A. Yes, sir.

2 Q. It would be available to you?

3 A. That's right.

4 Q. During her phone calls to you about the status
5 of her car, you never reviewed that contract, isn't that
6 correct?

7 A. It wasn't necessary to review the contract.
8 She was making a change -- We don't go to the contract
9 over a radio change.

10 Q. Under your procedure, it wasn't necessary?

11 A. It wasn't necessary, no.

12 Q. When you were checking on the status of the car
13 to see whether it had come in yet, or where it stood in
14 ability to deliver, you had access to the file, isn't
15 that correct?

16 A. We never go into the file. It's on top of the
17 file.

18 Q. You had access to it?

19 A. I did.

20 Q. But, you never checked it?

21 A. No, sir.

22 Q. During this period, that file, including the
23 dealer's copy of Exhibit 1, was kept in Mr. Creekmore's

1 office, isn't that correct?

2 A. Yes, sir.

3 Q. Would this also be a fair representation of
4 Peacock Buick's procedures, that Mr. Creekmore would not
5 be reviewing that contract until delivery?

6 A. That's procedure. We don't bother the contracts
7 until the car actually gets in our premises, ready for
8 delivery.

9 Q. But, being in Mr. Creekmore's filing cabinet,
10 he could have checked it at any time during this period
11 from January 6th to February 21st?

12 A. The problem is, you've got a lot of cars ordered,
13 and he can't take the time to look at every file, every
14 deal. There's so many deals coming through, it's hard to,
15 for the salesmanager to go through every file when you've
16 got 60 or 70 orders coming in. It would be pretty hard.

17 Q. I appreciate the volume and the burden on Mr.
18 Creekmore, but he could have? There was nothing to prevent
19 him from doing it?

20 A. He could have, but it's --

21 Q. But, because of the volume, your procedure is
22 set-up such that he does not check all these files, either
23 at the time of contracting, or ordering, or during the

1 waiting period, but waits until delivery to check it?

2 A. Usually we wait until delivery.

3 Q. That's the normal procedure at Peacock?

4 A. It has been.

5 Q. Miss Durkin also called you up about a change
6 from eight-track to a cassette, or cassette to an eight-
7 track, isn't that correct?

8 A. She did.

9 Q. As a result of that telephone call, you went
10 to Mr. Creekmore, isn't that correct?

11 A. I did.

12 Q. And, he told you there would have to be an
13 extra charge for it?

14 A. He did.

15 Q. But, you never got back to Miss Durkin to tell
16 her about that extra charge, did you?

17 A. It was such a small charge that I didn't think
18 it was necessary. It was \$10.00. I didn't think she would
19 object. She knew that there would be an extra charge,
20 but she knew it wouldn't be very much.

21 Q. You never got back to her to tell her what it
22 would be, or anything like that, because it was so small?

23 A. Right.

1 Q During this period, the freight cost went up,
2 isn't that correct?

3 A It did.

4 Q And, Mr. Creekmore told you to charge extra
5 for freight?

6 A That's correct.

7 Q And, you never told Miss Durkin that there was
8 going to be an increase in freight?

9 A Again, it was such a small -- It was \$5.00 or
10 \$6.00. I didn't think that would make that much difference.
11 We're not talking about a lot of money, you know?

12 Q At the time that you and Mr. Creekmore were
13 discussing the increased charge for a cassette over an
14 eight-track, or whatever it was in the change, you knew
15 that there was going to be an extra charge?

16 A I did.

17 Q Did you review your copy of Exhibit 1 to find
18 out how much extra should be charged?

19 A I knew it was \$10.00, the charge over the
20 difference.

21 Q But, you didn't refer to Exhibit 1 to see what
22 had been written up in the contract, to see what to charge
23 her extra?

1 A. The reason being, the car hadn't been -- Wasn't
2 arrived. And, we wait until it gets there, and then we
3 make the change, so it was not necessary to make the
4 change until the car came to the dealership.

5 Q. So, I take it, when you were going to increase
6 the charge because of the shift in accessories ordered,
7 you didn't check Exhibit 1? You didn't check the contract?

8 A. Didn't have to.

9 Q. Didn't have to. Was that normal procedure at
10 Peacock?

11 A. [Nodding head.]

12 Q. Is that, "Yes."?

13 A. Yes.

14 Q. Regarding the freight charge, you didn't compare
15 what was being charged her on the contract with what
16 you thought would be the total cost, is that correct?

17 A. I didn't know the freight charge was really
18 there until the car had arrived. There was no reason
19 to tell Miss Durkin because we didn't know until the car
20 arrived that there was a freight increase.

21 Q. At the time the car arrived, you called her to
22 tell her the car was ready, didn't you?

23 A. Right.

1 Q You didn't tell her about the freight charge
2 at that time?

3 A I figured when she came in, we could explain
4 that to her.

5 Q You didn't tell her, or you didn't compare the
6 actual freight charge with what may have been in the
7 contract, isn't that correct?

8 A Right.

9 Q Now, there is only one check, one review, of
10 the terms of the contract, as I understand your testimony.

11 A Yes, sir.

12 Q And, that is at the time of delivery, which
13 may be four or six weeks after the contract?

14 A Right.

15 Q You never explained that to Miss Durkin, right?
16 At least, not until delivery?

17 A The question being -- You're speaking of the
18 difference in the equipment, and the freight?

19 Q I am talking about you never let Miss Durkin
20 know that the procedure of Peacock Buick is not to review
21 a contract until the time of delivery, is that correct?

22 A No, I never went into that at all.

23 Q It is the salesmanager that is responsible for

1 that check, isn't that correct?

2 A Yes, sir.

3 Q When you dealt with Miss Durkin, it was your
4 impression from talking to her that she never knew what
5 her car was actually worth, isn't that correct? What
6 her trade-in was actually worth?

7 A I don't think she really knew, no.

8 Q All she knew was what you were going to give
9 her?

10 A Right.

11 Q And, she didn't know what the appraised cash
12 value was that Mr. Creekmore had come up with in Exhibit 5?

13 A So, you came up in writing with the \$3,500.00
14 figure, correct?

15 A I did.

16 Q And, your mistake was in not making that a
17 \$2,500.00 figure?

18 A Exactly right.

19 Q Now, the difference between what you did, what
20 you wish you had done, and this appraised value of
21 \$1,400.00, I take to be \$1,100.00, correct?

22 A It should have been \$2,500.00, right, sir.

23 Q You arrived at that \$1,100.00 by a discount off

1 the new car?

2 A. That's correct.

3 Q. There is nothing in that contract that says
4 anything about a discount, is there?

5 A. No, sir.

6 Q. Instead, the discount is tacked onto the trade-
7 in value?

8 A. Exactly.

9 Q. As to a Buick Regal, there is a 17 percent
10 discount that you were figuring, isn't there?

11 A. There is, profit to the dealer.

12 Q. That's based on the fact that a Regal is an
13 A body-type car, if I understand what you're saying.

14 A. Correct.

15 Q. Miss Durkin didn't know what an A body car
16 was the whole time she talked with you, did she?

17 A. I don't think so.

18 Q. Looking at this Exhibit 1, you have model or
19 series: HA 47. It's the A in that model or series that
20 tells you what style body it is, isn't it?

21 A. Yes, sir.

22 Q. You didn't explain to her that if you checked
23 out HA 47, she might find out it was an A style body?

A. I don't know if that would make any difference.

1 Q. You didn't explain to her that, if you checked
2 out HA 47, she might find it was an A style body?

3 A. I don't know whether that would make any
4 difference. She wasn't making a Regal. What difference
5 does it make?

6 Q. You didn't explain that to her?

7 A. We don't anybody. That's something that's
8 just a code for the dealer. It's not necessary to explain
9 that.

10 Q. You didn't explain to her that an A style
11 body entitled her to a 17 percent discount, did you?

12 A. I don't understand the question. How can a
13 person be entitled to something, you know? The dealer
14 has to make a profit. That's what we're here for.

15 Q. Let me word it differently. Don't let me
16 put words in your mouth.

17 You didn't explain to her than an A style
18 body might involve a 17 percent discount, did you?

19 A. No, sir.

20 Q. When you figured the 17 percent discount, you
21 based that on -- You don't base that on an invoice, do
22 you?

23 A. No, sir. On the total amount of the car plus

1 equipment.

2 Q So, it would be the retail price rather than
3 the price to the dealer based on the invoice?

4 A Exactly.

5 Q You didn't tell her that the 17 percent, if
6 you got the 17 percent, would be based on the retail value,
7 not the invoice? You didn't explain any of that to her?

8 A I've been selling cars 15 years, and I never
9 explained it to any customer, about the 17 percent, or
10 what she's entitled to. We just sell cars and try to make
11 a profit. That's what it's all about.

12 It's like going in a clothing store. You pay
13 \$100.00 for a suit. You don't ask: How much profit do
14 you have? You don't ask the clothier how much profit
15 he's making.

16 Q Stay with me, please.

17 A I'm trying to.

18 THE COURT: Just try and answer the questions.
19 No commentary, Mr. Glasser.

20 BY MR. KELLY:

21 Q This 17 percent, based on the A body, the way
22 you know that 17 percent is the maximum discount that
23 can be allowed is based on what you call factory price

1 sheets, isn't that correct?

2 A. Yes, sir.

3 Q. You didn't show her any factory price sheets,
4 did you?

5 A. No, sir.

6 Q. Now, a salesman can also determine a body style
7 and a discount from what you all call an inventory card,
8 isn't that correct?

9 A. Yes, sir.

10 Q. And, it's written on the back of an inventory
11 card, isn't that correct?

12 A. That's correct.

13 Q. But, you don't show the customer the back of
14 the inventory card. That's a normal practice, isn't that
15 correct?

16 A. That's correct.

17 Q. In fact, in this deal, there was no inventory
18 card because there wasn't even a car, isn't that correct?

19 A. Right.

20 Q. So, you take the \$1,400.00 appraised value
21 and then you take your 17 percent based on the A style
22 body because it's HA 47 and the factory price sheet with
23 no invoice card, and apply that to the retail value and

1 add whatever you come up with to the \$1,400.00, and that's
2 what you're going to allow as a trade-in?

3 A. Plus a profit to the dealer.

4 Q. You did not tell the customer about any of
5 that, isn't that correct?

6 A. That's not our practice to. I mean --

7 Q. You just add it on to the trade-in value and
8 there you go.

9 And, in the course of all this figuring, you
10 made a mistake?

11 A. I did.

12 Q. What did that do to the profit in that car?

13 A. It wasn't much to begin with, sir. It had to
14 take it all and plus. I was figuring about \$100.00 deal
15 to the company when I sold Miss Durkin her car.

16 Q. What do you mean "\$100.00 deal"?

17 A. Over our cost. Profit to the dealer.

18 Q. When you called Miss Durkin to tell her the car
19 was ready and all, you had to arrange to have all the
20 paperwork done up, isn't that correct?

21 A. To be honest with you, we didn't know when
22 Miss Durkin was coming in. We were going to wait until
23 she arrived and then do the papers because we had several

1 arrangements to come get the car. Each time, it was
2 some sort of -- She couldn't make it. She was out-of-
3 town. The last time, she was out-of-town.

4 I did call her on two or three occasions to
5 tell her, and she said --

6 Q I am not asking you where she was when.

7 A I am just letting you know that --

8 Q The paperwork.

9 A We never did the paperwork because we never knew
10 when she was coming.

11 Q The paperwork never was done?

12 A We waited until she wanted to do it.

13 Q You expected her to arrive sometime in the
14 evening on Sunday, isn't that correct?

15 A It was on a Friday evening was when she was
16 supposed to arrive the last time.

17 Q Are you sure you didn't stay late on Sunday?

18 A She said she'd be there at 8:30 and I said,
19 well, I'll wait until 9:00. I'll even wait until 9:30.

20 And, she says, well, I'll be there before
21 then.

22 And, she never arrived.

23 Q You waited until 9:30 at night?

1 A. I did.

2 Q. Some days prior to the time she actually picked
3 the car up?

4 A. Because she was in New Jersey.

5 Q. Just some days prior to the --

6 A. Pardon?

7 Q. You waited for her to pick the car up some days
8 prior to the day she actually picked the car up, isn't
9 that correct?

10 A. I did. I was waiting. Right.

11 Q. You waited until 9:00 - 9:30 at night?

12 A. That evening, yes, sir.

13 Q. While you were waiting, the paperwork was ready,
14 wasn't it?

15 A. What I'm trying to say is: I didn't know whether
16 she was coming.

17 Q. While you were waiting for her, the paperwork
18 was ready, wasn't it?

19 A. As far as I knew, yes, it was.

20 Q. Your title people, your typists, get off at
21 5:00 o'clock in the afternoon, isn't that correct?

22 A. That is correct.

23 Q. And, there you are at 9:00 - 9:30 at night

1 waiting for Miss Durkin to pick up her car?

2 A. Right.

3 Q. And, you aren't going to let her have her car
4 unless she fills out the papers?

5 A. Yeah, but we don't do all the paperwork sometimes.
6 We just stash it and do it ourselves. So, it really
7 wasn't, officially, as far as I know, made up.

8 And, that's the way we do. We have spot deliveries
9 sometimes at night. At 8:00 o'clock at night, no one's
10 there and we have to stash the papers on delivery.

11 And, then, send the invoice on the following day.

12 Q. The paper stashing is once you have signed
13 everything in blank and then you fill it in?

14 A. She has the copy of the order there, and that's
15 the same we're going to give her on delivery.

16 Q. My question is this: On a deal when you've
17 got somebody coming in late, and you have to stash the
18 paper, you have them sign it in blank, and then you fill
19 it in later?

20 A. The next day, exactly.

21 Q. And, this night, you didn't know whether the
22 paperwork was ready, or maybe ready, or --

23 A. It maybe ready. I honestly didn't know. As far

1 as I knew, we were going to stash it because we didn't
2 know ~~when~~ she was coming.

3 Q What's a lowball?

4 MR. COTNER: I'm going to object. I fail to
5 see the relevancy of this.

6 THE COURT: Approach the Bench.

7 BENCH CONFERENCE

8 THE COURT: What would be the relevancy?

9 MR. KELLY: There is a practice called lowballing
10 and highballing where a dealer will quote someone a
11 trade-in value that is higher than what they can possibly
12 do; and, then, by that, they'll allow the person to go
13 shopping around at other dealers, and the other dealers --

14 THE COURT: What difference does it make
15 in this case? Isn't this a conversion?

16 MR. KELLY: Yes, sir. But, on that --

17 THE COURT: You're getting into, you know, all
18 the negotiations and so forth. I think it's completely
19 immaterial.

20 MR. KELLY: What I'm saying is that I think
21 that the only way that a jury can tell the difference
22 between what he claims is a mistake --

23 THE COURT: I don't think a mistake is a defense

1 to this.

2 MR. KELLY: But, I think toward mitigation
3 he's claiming a mistake.

4 MR. COTNER: Certainly mitigation. Toward
5 damages, we're claiming a mistake. In fact, Mr. Kelly
6 on occasions has characterized what happened as a mistake
7 himself.

8 Now, absent some kind of proffer that lowballing
9 was what was going on here, I don't think he's entitled
10 to introduce evidence as to what it is. It's irrelevant.

11 THE COURT: As far as the Court is concerned,
12 a mistake is not a defense in this case. It's a mistake
13 that Peacock has to live with and, unless you proffer to the
14 Court where it would be material -- If you had a deal
15 that was made, if you have a delivery of a vehicle and
16 then Peacock, under guise of getting this signed, took
17 it back without any rights --

18 MR. KELLY: My proffer would be this: That,
19 contrary to the mitigating circumstances, the mistake
20 that Peacock Buick might claim, I would submit that a
21 lowball and a highball and a bump, it's called in the
22 trade, are no different than what appears on the face of
23 this contract. The only way to tell the difference is

1 to pry into the mind of the person who did it.

2 I think, given --

3 THE COURT: How is that going to help the jury?

4 MR. KELLY: I think they can tell --

5 MR. COTNER: It's going to inflame them, Your
6 Honor. That's our point to it. It's going to inflame
7 them, and we are alleging that the mistake was all that
8 was made. The proof is all in that direction.

9 THE COURT: If you're going to allow a mistake
10 for mitigation, then I think you can go into it to show
11 it was not a mistake.

12 MR. COTNER: But, there has been no proffer.
13 There's not a scintilla of evidence that this was anything
14 other than a mistake.

15 All this is designed to do is inflame the jury,
16 Your Honor.

17 THE COURT: I think if your defense in
18 mitigation is a mistake, then he has the right to cover
19 all the avenues on that.

20 But, if you're not going to ask for mitigation
21 on mistake, then, of course, I would not let him go into
22 it.

23 MR. COTNER: It would be a mitigation on punitive

1 damages only. As far as the evidence, the evidence of
2 mistake is admissible.

3 THE COURT: It's not a defense to the charge.

4 MR. COTNER: Not to the conversion itself.

5 THE COURT: You can argue mitigation, but to
6 show there was no mistake -- I can't cut Mr. Kelly off
7 in going down all the avenues that he has.

8 So, the Court would let him do it, but if it
9 becomes apparent that he's on a fishing expedition, then --

10 MR. COTNER: For the record, I would like to
11 make my objection now: That there's been no proffer
12 that there is any evidence to support a theory that a
13 lowball or a highball or a bump was performed in this case.

14 And, in the absence of such proffer, I am
15 making my objection on the basis that any evidence regarding
16 those business practices is totally irrelevant and is
17 immaterial, and is inflammatory.

18 THE COURT: If he is unable to prove anything,
19 if it's highly prejudicial to your client, you may make
20 a motion at the time.

21 MR. COTNER: Thank you, Your Honor.
22
23

1 OPEN COURT

2 BY MR. KELLY:

3 Q Mr. Glasser, in the business of selling cars,
4 there is a phrase called a lowball, isn't there?5 A I've heard that expression, yes, sir. I don't
6 use that practice.7 Q And, that practice consists -- Well, it's also
8 related to a highball, isn't it?

9 A Yes, sir.

10 Q The practice of lowballing or highballing
11 consists of quoting a trade-in value above that which
12 you should, or could, isn't that correct?

13 A Yes, sir.

14 Q And, one of the advantages gained by someone
15 who quotes a trade-in price higher than they can, or will,
16 perform, is that they are said to be taken -- Or the
17 customer is said to be taken out of the market, isn't it?

18 A More or less, I would say.

19 Q And, by "taken out of the market" what you
20 mean is, as that customer shops around, they have a price
21 from the highballer or the lowballer that no other dealer
22 can compete with, isn't that right?

23 A That's right.

1 Q Consequently, these other dealers are wasting
2 their time talking to this person with the inflated trade-
3 in value, isn't that correct?

4 A Yes, sir.

5 Q And, once the customer comes back to the high-
6 baller or lowballer, in any number of ways they are
7 "bumped", isn't that the phrase that's used?

8 A Yes, sir.

9 Q And, the bump, or the amount of the bump, is
10 the amount that the highballer or lowballer says he
11 errored in computing the trade-in value, isn't that correct?

12 A That's correct.

13 Q And, the highballer or lowballer claims an
14 error, isn't that correct?

15 A Yes, sir.

16 Q And, all this is in hopes that the customer,
17 having been everywhere else, will finally land back where
18 he started, having been out in the market, and will go
19 ahead and deal with the highballer or lowballer, is that
20 correct?

21 A Yes, sir.

22 Q Looking at a proposal, or looking at a contract,
23 that contained a highball in it, there's noway -- or lowball --

1 There's noway to tell from the face of that contract
2 unless you are familiar with the trade and how it works
3 and what goes on in the trade and the discounts and
4 all that, there is noway to tell from the face of that
5 contract whether there was a mistake or whether there
6 was a highball or lowball, isn't that correct?

7 A. Yes, sir.

8 Q If I remember correctly, you told Miss Durkin
9 as she left Peacock Buick, when you gave her her quote,
10 that she wouldn't find a better deal anywhere else,
11 isn't that correct?

12 A. Yes, sir.

13 Q And, you knew, after she left, after you gave
14 her that price quote, that she was going to be shopping
15 around, isn't that correct?

16 A. I think I told her to.

17 Q The only way the jury or anyone else, from
18 the face of that contract and the circumstances known
19 to you in this case, could tell whether this was a mistake
20 or a highball or a lowball would be based on what you
21 say, isn't that correct?

22 A. That's true.

23 Q In the highball - lowball practice, it's normally

1 essential, isn't it, that the person who threw the high-
2 ball or the lowball be the one that bumps the customer?

3 A. Yes, sir.

4 Q. If I remember -- Strike that.

5 You waited for Miss Durkin until 9:00 to 9:30
6 at night?

7 A. I did.

8 Q. Isn't it true that you didn't understand why
9 somebody went ahead and delivered this car to her without
10 your being present?

11 A. Because we were in contact with each other
12 a lot of times. And, I didn't understand how she could
13 come in without calling me. She stood my up Friday night;
14 and all of a sudden, she's in there taking delivery of
15 the car. It didn't add up to me, why she'd do that after
16 spending so many different calls about this and that,
17 and she had a friend come by.

18 And, I couldn't understand how she'd come in
19 there without calling.

20 Q. At no time, until after delivery, and the time
21 that she was talking to Mr. Creekmore and Mr. Peacock,
22 did you tell her that there was a mistake?

23 A. I had no idea that there was a mistake, to be honest.

1 Q At no time did you tell her about the freight
2 charge, and at no time did you tell her --

3 A I was going to explain about that when she
4 came in on delivery. She knew there'd be an increase in
5 the price of the radio. She was aware of that.

6 She must have been because she wanted the
7 change, and we told her it would be an increase.

8 MR. KELLY: I have no further questions.

9 THE COURT: Do you have any questions of the
10 witness at this time?

11 MR. COTNER: One or two, Your Honor.

12 At this time, I would ask for the motion.

13 THE COURT: Court would deny the motion.

14 CROSS EXAMINATION

15 BY MR. COTNER:

16 Q Was a highball, lowball or bump involved here?

17 A No, it wasn't. I don't practice selling that
18 way. I don't have to. I mean, there are --

19 Q Have you ever done a highball or a lowball?

20 A Never in my life have I highballed or lowballed a
21 customer.

22 Q Was Jane Durkin the intended victim of a highball
23 or lowball or bump?

1 A. I told her it was going to be \$100.00 over
2 cost, and that's a very close deal. I let her shop
3 that. Not many dealers will sell a car for \$100.00
4 over cost unless you go to United Buyers, and that's what
5 they're set up for.

6 Most of the dealers do make a little more profit.

7 Q. About what you know about highballs and lowballs,
8 would \$1,000.00 be a reasonable figure?

9 A. That would be exorbitant. They will highball
10 a customer \$200.00 or \$300.00 as a rule, but not \$1,000.00.

11 Q. Why do you say it would be exorbitant?

12 A. A thousand dollars is ridiculous, really.

13 Q. Is it easily detectible?

14 A. Easily, because it's just out of the question
15 to ball a person \$1,000.00. There isn't that much profit
16 in a car to begin with. So, roughly, you're speaking
17 of an impossible.

18 Q. There was no highball or lowball or bump in-
19 volved here?

20 A. I've never done that selling cars. I don't
21 practice that.

22 ✓ MR. COTNER: Nothing further.

23 THE COURT: Any further questions?

AFTERNOON SESSION

(The Court reconvened at 2:00 o'clock p.m.)

THE BAILIFF: This Honorable Court is now in session. Please be seated and come to order.

THE COURT: How many more witnesses do we have?

MR. KELLY: Altogether?

THE COURT: Ready for the jury?

MR. KELLY: Yes, sir.

(The jury returned to the courtroom and resumed their place in the jury box.)

THE COURT: Call your next witness.

MR. KELLY: Your Honor, I call Mr. Creekmore.

Whereupon,

RUSSELL CREEKMORE,

a witness, was called for examination by counsel on behalf of the plaintiff, and, after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KELLY:

Q Would you state your name and address, please?

A Russell Creekmore, 6819 Toll Bridge Place,
Annandale, Virginia.

Q You are the salesmanager for Peacock Buick?

1 A. Correct.

2 Q. You held that position in January and February
3 of 1978?

4 A. Yes, sir.

5 Q. The first time you saw Miss Durkin, sir, was on
6 January 5th, sir, wasn't it? The day before --

7 A. If that was the time of the appraisal, yes.

8 Q. Let me show you Plaintiff's Exhibit 5, and
9 ask if January 5th sounds right to you.

10 A. January 6th.

11 Q. At that time, Miss Durkin was dealing with
12 Jack Glasser for the purchase of a new car?

13 A. Yes.

14 Q. You entered into the transaction for the purpose
15 of appraising a used car?

16 A. Yes.

17 Q. Is that your normal responsibility at Peacock
18 Buick?

19 A. One of them, yes.

20 Q. How long have you been appraising cars there?

21 A. At Peacock Buick?

22 Q. Yes, sir.

23 A. Almost four years. Three years, nine months.

1 Q How long have you been appraising cars altogether?

2 A 15 years, sir.

3 Q Do you have any idea of how many cars you've
4 appraised over that period of time?

5 A None whatsoever, sir.

6 Q Is that because it's so many?

7 A Yes.

8 MR. KELLY: Your Honor, I would offer him as
9 an expert in appraising used cars.

10 THE COURT: Any questions as to his expertise?

11 MR. COTNER: No questions, Your Honor. We'll
12 stipulate.

13 BY MR. KELLY:

14 Q You appraised this used car at the cash value
15 of \$1,400.00, isn't that correct?

16 A That's correct.

17 Q That's what the car itself was worth to Peacock
18 Buick, isn't that correct?

19 A Correct.

20 Q And, that was the price that Peacock Buick
21 was willing to pay for the car itself, exclusive of any
22 discounts or anything like that that might be thrown in?

23 A Correct.

1 Q After you did this appraisal, Mr. Glasser took
2 over and proceeded to negotiate the deal, isn't that
3 correct?

4 A That's correct.

5 Q After he negotiated that deal, he did not bring
6 that contract to you for approval, did he?

7 A No, sir.

8 Q Isn't that the policy of Peacock Buick, not
9 to require approval of the contract when you're going to
10 order a new car, isn't that true?

11 A In some instances, yes.

12 Q It would be true in most instances, wouldn't it?

13 A 50 - 50, yes.

14 Q The practice is that you don't really check
15 deals until delivery?

16 A With a fine-tooth comb. Yes, at the time of
17 delivery.

18 Q Between the time of contracting and the time
19 of delivery, it is possible, there is nothing to prevent,
20 anyone at Peacock Buick from reviewing one of those
21 contracts, is there?

22 A That's correct.

23 Q With this review coming up, after the contract

1 is signed by the purchaser, after the purchaser has put
2 up a deposit, and after the car is ordered, and you have
3 a four to six week delay, I gather?

4 A. Yes, sir.

5 Q Under your practice, it is possible, or can
6 occur, that the deal that is ultimately consummated at
7 the time of delivery, is at variance, by your procedure,
8 by what was contracted for?

9 A. Correct.

10 Q This is true, even though the purchaser has
11 put up a deposit at the time of contracting?

12 A. Correct.

13 Q It is correct, isn't it, that during this
14 waiting period, during the time of contracting and time
15 of delivery, there are five people at Peacock Buick that
16 have the authority to review these deals in this contacts,
17 isn't that true?

18 A. Four or five, yes.

19 Q Do you remember my taking your deposition on
20 September 15th in Mr. Cotner's office? Do you remember
21 I took your deposition?

22 A. Yes.

23 Q Looking at lines 17 through 19 and 20, does that

1 refresh your recollection?

2 A. Fine.

3 Q. How many people could review?

4 A. Five people.

5 Q. During the periods in this case, not one of
6 those five people, to your knowledge, reviewed this
7 particular contract, isn't that correct?

8 A. Correct.

9 Q. And, there was nothing to prevent any one of
10 these five people from reviewing this contract?

11 A. Correct.

12 Q. It was pursuant to the practice of Peacock
13 Buick of not reviewing contracts until delivery that these
14 five people didn't bother reviewing them, isn't that
15 correct?

16 A. Correct.

17 Q. Mr. Creekmore, if I understand correctly, you
18 claim as soon as you saw this contract, Exhibit 1, you
19 spotted the mistake?

20 A. As soon as I saw it at time of delivery, I
21 spotted the mistake.

22 Q. Just by looking at it? Just by --

23 A. There were other things involved.

1 Q What other things were involved?

2 A When I subtracted the appraised value of the
3 used car from the allowance, total allowance, then I knew
4 that there had been a mistake.

5 Q You say that you first saw this contract,
6 though, approximately January 7th when you ordered the
7 car, isn't that correct?

8 A Yes.

9 Q And, to order the car, you had to have your
10 copy of Exhibit 1 before you, isn't that correct?

11 A Correct.

12 Q At that time, when you were ordering the car,
13 you didn't spot this problem with the trade-in?

14 A No, sir, I did not.

15 Q After you ordered the vehicle, you kept your
16 copy of Exhibit 1 in the file?

17 A Correct.

18 Q Which was in your office?

19 A Correct.

20 Q And, it's accessible to you and the other people
21 who can review contracts; it's also accessible to salesmen?

22 A Correct.

23 Q To your knowledge, during this waiting period,

1 at no time did anyone bother to review that file or that
2 contract?

3 A. Correct.

4 Q. Under the policy, you didn't plan to have it
5 reviewed until delivery?

6 A. Correct.

7 Q. A file could be reviewed if a customer called
8 to find out when her car would be in, isn't that correct?

9 A. Not necessarily, no, sir.

10 Q. But, it could be reviewed at that time?

11 A. It could be, but it's not necessary.

12 Q. It is necessary for whoever checks on the status
13 of that vehicle to pull that file itself?

14 A. Just to know the order number of the vehicle
15 that's ordered.

16 Q. Pull the file itself, and that file would contain
17 the contract?

18 A. On the outside of the contract, it would have
19 the order number.

20 Q. To your knowledge, if there were any inquiries
21 received by Peacock Buick about the status of this car,
22 no one, when they pulled the file to check the on the status,
23 bothered to look at the contract?

1 A. No, sir.

2 Q. You didn't?

3 A. No, sir.

4 Q. Now, Miss Durkin did not pick up her new car
5 on the night that it had been arranged, isn't that correct?

6 A. That's correct.

7 Q. And, normally, before a car is picked up, the
8 paperwork is prepared that day, isn't that true?

9 A. Correct.

10 Q. Now, the paperwork would move from your office
11 to someplace to be typed?

12 A. Correct.

13 Q. Do you move it?

14 A. Sometimes.

15 Q. Do you know whether you moved this particular
16 contract?

17 A. I do not know, sir.

18 Q. Before you have the deal typed up, do you review
19 the file as to what has to be typed to make sure --

20 A. Sometimes. Sometimes not.

21 Q. You didn't review this one?

22 A. No, sir.

23 Q. Once it is typed, it is put in what you all call

1 a rack, isn't it?

2 A. Correct.

3 Q. Nobody checks to make sure that the typist has
4 typed up the deal that's in the contract, isn't that
5 correct?

6 A. No, sir.

7 Q. They do not check?

8 A. They do not.

9 Q. You do not check it yourself?

10 A. No, sir.

11 Q. And, this particular instance, you didn't check
12 it either, did you?

13 A. No, sir.

14 Q. Once it's placed in the rack, it's available.
15 for the salesman to pick up, isn't that correct?

16 A. That's correct.

17 Q. It's also accessible to you?

18 A. Correct.

19 Q. Or any other salesman, really?

20 A. Correct.

21 Q. And, to your knowledge, neither you nor anybody
22 else reviewed the paperwork that was prepared under this
23 contract while the file sat in the rack?

1 A. No, sir.

2 Q Do you know, in fact, whether this paperwork
3 was ready on the scheduled day for Miss Durkin to pick
4 her car up?

5 A. No, sir. I would say it was not.

6 Q The paperwork was not ready on the day she
7 was to pick it up?

8 A. On the day she was scheduled to pick it up.

9 Q You heard Mr. Glasser talk about "stash", and
10 have them sign blank papers, and fill it out later; is
11 that the procedure that would have to be followed?

12 A. Once more?

13 Q You heard Mr. Glasser, I think, testify as to
14 "stash", and signing papers in blank, later to be typed
15 in?

16 A. I heard that, yes.

17 Q Is that the procedure to be followed, then?

18 A. Not at all times, no, sir.

19 Q Eventually, there did come a time when Miss
20 Durkin's paperwork was prepared?

21 A. Correct.

22 Q And, it was ready on the day she actually did
23 pick it up?

1 A. Yes.

2 Q. And, between the time that it was typed and
3 the time that she actually picked it up, to your knowledge,
4 no one reviewed the typing or the contract?

5 A. That is correct.

6 Q. Now, Miss Durkin spoke to you when she came
7 to pick her car up?

8 A. Yes.

9 Q. Did you pick up her file?

10 A. No, sir.

11 Q. You had Mr. Bell do it?

12 A. I had Mr. Bell deliver the car.

13 Q. In delivering it to Mr. Bell, you didn't
14 expect Mr. Bell to review it, did you?

15 A. No, sir.

16 Q. And, you knew that when Mr. Bell was through,
17 he was going to put her in that car, isn't that correct?

18 A. Correct.

19 Q. So, you knew that this file had not been
20 reviewed at all?

21 A. Correct.

22 Q. And, without having reviewed it at all, you
23 were going to allow Mr. Bell to let her go in that car

1 based on the paperwork that you had not reviewed?

2 A. Correct.

3 Q. After the car is delivered, or the deal is
4 delivered, the salesman that is responsible places that
5 file on your desk, isn't that correct?

6 A. Correct.

7 Q. And, at that point, you would expect the
8 purchaser or the customer to be gone?

9 A. Under normal conditions, yes.

10 Q. Or on their way out?

11 A. Under normal conditions, yes.

12 Q. Not having reviewed this file, you didn't ask
13 Miss Durkin to stay around?

14 A. No.

15 Q. And, didn't expect her to stay around?

16 A. No, sir.

17 Q. Once you undertook to review that file, you
18 weren't aware of any paperwork that was required of Miss
19 Durkin to consummate this deal that she had not completed,
20 are you?

21 A. I find that out at the time I review the deal.

22 Q. When you reviewed this file, all the paperwork
23 that she was required to do was done?

1 A. It was done.

2 Q. And, she had paid all the money that she was
3 obligated to pay?

4 A. Correct.

5 Q. And, she had delivered the title to the trade-in?

6 A. Correct.

7 Q. In the course of Mr. Bell working on this
8 paper with Miss Durkin, you had occasion to talk to her
9 about a problem -- Was it bumper or taillight?

10 A. Yes.

11 Q. While you were talking to her about the bumper
12 or taillight, you didn't mention any review of the papers,
13 or try to review the papers at all yourself?

14 A. No, sir.

15 Q. While you were pointing out the bumper problem,
16 or the taillight problem, you didn't direct Mr. Bell
17 to review them while you all were outside looking at this
18 car, did you?

19 A. No, sir.

20 Q. In getting Mr. Bell ready to deal with Miss
21 Durkin, you told him to charge extra for the cassette
22 and the freight, isn't that correct?

23 A. Correct.

1 Q In doing so, you didn't check Exhibit 1, or
2 your copy of Exhibit 1, to find out what she was charged
3 for an eight-track, did you?

4 A Sir?

5 Q On the contract --

6 A I knew the difference.

7 Q Based on information available to you from the
8 manufacturer?

9 A Correct.

10 Q But you didn't know what the charge actually
11 made to her was on the contract, did you?

12 A Mr. Bell told me. He called me over to the
13 desk.

14 Q He called you over to the desk?

15 A Called me over to the desk, and asked the
16 difference in the \$15.00.

17 Q But, prior to giving Mr. Bell the file, or
18 having him take the file, and you were telling him to
19 charge extra for the cassette and the freight, you didn't
20 compare with the contract, right?

21 A No, sir.

22 Q Now, of course, when Miss Durkin and Mr. Bell
23 were discussing the price that she had to pay and the extra

1 approximately \$15.00 that she was to be charged, you
2 were called in to explain it to her, isn't that correct?

3 A. Correct.

4 Q. And, the contract was there?

5 A. Correct.

6 Q. And, you explained to her the cost difference
7 between the cassette and the eight-track that was called
8 for in the contract?

9 A. Yes.

10 Q. You explained the freight charge?

11 A. Yes.

12 Q. And, why you felt you were entitled to that?

13 A. Yes.

14 Q. At that time, you didn't review the contract?

15 A. No, sir.

16 Q. And, you didn't spot the \$3,500.00 error, or
17 the error in the \$3,500.00 figure right away?

18 A. No, sir.

19 Q. Eventually -- You didn't see her any more
20 regarding the paperwork after your explanation to her
21 as to the cassette and freight?

22 A. No.

23 Q. At that point, you assumed that she left with

1 the car?

2 A. Yep. Yes.

3 Q. And, then, Mr. Bell came to you, and he said
4 there was a problem with the gas?

5 A. Correct.

6 Q. And, the gauge was reading "Empty", right?

7 A. Correct.

8 Q. And, at that time, the file was on your desk?

9 A. Correct.

10 Q. It had been since the time Mr. Bell completed
11 the paperwork with Miss Durkin?

12 A. Very possible.

13 Q. Until the time he approached you with the gas
14 problem?

15 A. Correct.

16 Q. Of course, during that time, you expected her
17 to be leaving the premises?

18 A. Correct.

19 Q. But, you still didn't check?

20 A. No, sir.

21 Q. Now, you decided that she should have some
22 gasoline?

23 A. Yes, sir.

1 Q And, you gave her directions to the gas station?

2 A Yes, sir.

3 Q Do you remember the phone call that she mentioned?

4 A No, sir.

5 Q But, eventually, you decided to send one of
6 lot boys off to get the gas rather than Miss Durkin?

7 A Correct.

8 Q So, you changed your mind from giving her
9 directions and sending her off to having somebody else do
10 it?

11 A Correct.

12 Q Did you ask Miss Durkin to stay in your office
13 or anything while you reviewed the file or anything like
14 that?

15 A No, I did not.

16 Q You allowed her to go on her way?

17 A Yes.

18 Q And, at that point, you expected that somebody
19 would come back with the car and the gas or whatever it
20 was that she needed, and she'd drive off and be gone?

21 A Correct.

22 Q It was at this time, for the first time since
23 January of 1978, that you checked this deal?

1 A. Correct.

2 Q. And, you say you spotted it right away?

3 A. Yes, sir.

4 Q. You called Miss Durkin in?

5 A. Yes.

6 Q. And, she said that you were working on your
7 adding machine and trying to find the \$1,000.00.

8 A. Double-checking, proving my own theory.

9 Q. At that point, you had her brought in, or you
10 asked her to come in?

11 A. Yes, sir.

12 Q. And, she came in, and at that point you told
13 her that you couldn't let her have that car unless she
14 gave you \$1,000.00?

15 A. I told her I could not deliver the car because
16 we were \$1,000.00 under cost, and I had just found the
17 mistake.

18 Q. And, there was going to be a loss on that car
19 if you all went through with the deal?

20 A. It would be a loss on the deal, yes.

21 Q. Now, prior to that time, or at that time, you
22 explained or tried to explain to her what was going on
23 by way of the mistake, isn't that correct?

1 A. Correct.

2 Q. But, to your knowledge, prior to the conver-
3 sation with you, when you were telling her she had to
4 pay an extra \$1,000.00, or had to pay \$1,000.00 to get
5 the car, no one had explained appraised value, to your
6 knowledge, had they?

7 A. To Miss Durkin?

8 Q. Yes, sir.

9 A. No, sir.

10 Q. In fact, she, in all likelihood under your pro-
11 cedures, wouldn't have even seen that appraisal slip,
12 isn't that correct?

13 A. She could have. A lot of customers do.

14 Q. It's not normal, though; or it's not expected
15 that they will be shown?

16 A. 50 - 50.

17 Q. To your knowledge, no one had explained discount
18 to her?

19 A. No, sir.

20 Q. And, to your knowledge, no one had explained
21 the 17 percent discount?

22 A. 17 percent mark-up.

23 Q. No one had explained that?

1 A No, sir.

2 Q And, whether or not it was based on invoice
3 or list?

4 A No, sir.

5 Q And the fact that the discount was really added
6 to the trade-in allowance?

7 A No, sir.

8 Q No one explained about an A body car?

9 A Not that I know of, no, sir.

10 Q No one explained about an inventory card?

11 A No, sir.

12 Q And, when you came up with this appraised value,
13 you might have used a couple of books, a black book or
14 NADA, isn't that correct?

15 A Yes.

16 Q To your knowledge, no one up until that time
17 had explained the black book or NADA to her, is that correct?

18 A Correct.

19 Q You undertook, at that point, to explain it
20 to her?

21 A Yes, sir.

22 Q That was after you told her she had to pay
23 another \$1,000.00?

1 A. Yes, sir.

2 THE COURT: Did you explain both books, or
3 the black book --

4 MR. COTNER: Your Honor, that was --

5 THE WITNESS: We use the black book, and I
6 tried to explain to her why, telling her that it was
7 \$1,000.00, trying to explain to her exactly why, how we
8 do it.

9 THE COURT: Did you use the NADA book also?

10 THE WITNESS: No, sir. We use the black book.
11 It's a weekly publication.

12 MR. COTNER: I am going to object to Mr. Kelly's
13 characterizing his statement that he had required her to
14 pay \$1,000.00 before she could get the car. That was not
15 his testimony.

16 THE COURT: I think his testimony was that he
17 would not deliver until it was paid.

18 MR. COTNER: Begging the Court's indulgence,
19 I believe, if the record could be recalled, that has never
20 been his testimony. That has been the allegation of Mr.
21 Kelly, Mr. Kelly's statement of Miss Durkin's.

22 THE COURT: The jury will have to rely on their
23 own memory.

1 BY MR. KELLY:

2 Q Throughout the day of delivery, Mr. Creekmore,
3 there was no intention at all, to your knowledge, of anyone
4 on the part of Peacock Buick to reappraise her used car,
5 was there?

6 A No, sir.

7 Q In fact, it was not reappraised?

8 A No, sir, it was not.

9 Q While you were explaining to her that you couldn't
10 deliver the car -- Well, you were explaining to her that
11 you couldn't deliver the car minus the \$900.00 or \$1,000.00
12 profit, isn't that correct?

13 A Correct.

14 Q While you were explaining this, she got upset?

15 A Yes.

16 Q And, she started crying?

17 A Yes.

18 Q And, you weren't getting through to her?

19 A Evidently not.

20 Q Eventually the lot boy came back with the car?

21 A Correct.

22 Q And, of course, he didn't know that you had
23 asked Miss Durkin to come back in your office and discuss

1 this deal, and that you were going to ask for another
2 \$1,000.00?

3 A. No, sir.

4 Q. So, he tried to return the keys to her, isn't
5 that correct?

6 A. I don't remember that instant, if he returned
7 them to her or to me, no, sir.

8 Q. You wound up with the keys?

9 A. Yes, sir.

10 Q. And, you had no intention of giving those to
11 Miss Durkin?

12 A. No, sir.

13 Q. If she would have given you \$1,000.00, you
14 would have given her the keys?

15 A. Yes, sir.

16 Q. While she was upset and crying and you weren't
17 getting through, you called in Michael Peacock, isn't
18 that correct?

19 A. Correct.

20 Q. He is President of Peacock Buick?

21 A. Correct.

22 Q. At that time, how long did it take you to
23 explain to him what the situation was?

1 A. Just a matter of a minute, very quickly.

2 Q. You didn't explain to him that these papers
3 had never even been reviewed?

4 A. No, sir.

5 Q. Did you explain to him that she had driven that
6 car out to the street and brought it back?

7 A. No, sir.

8 Q. Did he ask about it?

9 A. No, sir.

10 Q. Did he ask if it was reviewed, if the deal was
11 reviewed?

12 A. No, sir.

13 Q. He told Miss Durkin that he couldn't deliver
14 that car to her with \$1,000.00 loss on it, isn't that
15 correct?

16 A. Correct.

17 Q. Nothing was able to be worked out whereby you
18 would be willing to give Miss Durkin the automobile unless
19 she gave you \$1,000.00, right?

20 A. Correct.

21 Q. So, then, it was decided by someone or the other
22 that she should drive back in her trade-in?

23 A. Correct.

1 Q Who decided that?

2 A Mr. Peacock and myself.

3 Q Who took her out to the car?

4 A I did.

5 Q Did you take the tags out to be changed?

6 A Yes.

7 Q Who directed that?

8 A I did.

9 Q Were the tags, in fact, changed?

10 A Yes.

11 Q While you were out there with Miss Durkin,
12 did you ask her to give you her papers?

13 A Her copies, correct.

14 Q And, you wanted anything that Peacock Buick
15 had given her, didn't you?

16 A Only the tag papers, her copy of the bill of
17 sale.

18 Q Let me show you page 54 of your deposition.
19 This might refresh your recollection. I direct your
20 attention to lines 17 through 23, and at the top of
21 page 55.

22 A Yes, that's correct.

23 Q So, it was anything that she had gotten by way

1 of paperwork from Peacock Buick?

2 A. Correct.

3 Q. The reason you wanted the paperwork, as I
4 understand it, was just as a matter of practice; you
5 don't know why?

6 A. They were no good to her, and I voided the deal.

7 Q. You voided the deal?

8 A. After the papers came back, and I got the
9 envelope, I voided the deal and authorized the return of
10 her deposit.

11 Q. You did that? You, Russell Creekmore, did
12 that?

13 A. Yes, sir.

14 Q. Because it was going to be \$1,000.00 loss if
15 Peacock Buick went through with that contract as written?

16 A. Correct.

17 Q. In asking for those papers back, it being a
18 matter of practice, and they weren't any good to her, you
19 can't think of any other reason that you wanted those
20 papers back?

21 A. No, sir.

22 Q. You weren't trying to hide anything?

23 A. Not one iota, no, sir.

1 Q They weren't of any value to Peacock Buick,
2 though, were they?

3 A No, sir.

4 Q And, you are saying that you went out to this
5 car with an upset lady, who was crying, distraught, and
6 she wasn't going to get a new car, this deal you'd just
7 voided, and you go on to ask her for paper back as a matter
8 of practice because they were no good to her even though
9 they weren't of any good to Peacock Buick?

10 A That is correct.

11 Q Once you saw, once you realized, there had been
12 an error, it was your definite intention to get that
13 car back, wasn't it?

14 A Or reach an agreement with Miss Durkin.

15 Q A thousand dollar agreement?

16 A Correct.

17 Q Otherwise, you intended to get that car back?

18 A Yes, sir.

19 Q And, that was at Mr. Peacock's direction?

20 A Correct.

21 Q That's the President of Peacock Buick?

22 ✓ A Correct.

23 ~~MR. KELLY: I have no further questions.~~

DIRECT EXAMINATION

BY MR. KELLY:

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✓ Q Would you state your name and address, please?

A Robert E. Bell, Route 3, Box 205E, Harpers
Ferry, West Virginia.

Q Where are you employed?

A Peacock Buick.

Q Were you employed there in January and February,
1978?

A Yes.

Q As a salesman?

A Yes.

Q The first contact you had with Miss Durkin was
on February 21st of '78, isn't that correct?

A I believe that's the date.

Q The day that she came in to pick up her car?

A Yes.

Q On that day, Mr. Creekmore selected you to
make the delivery because the salesman that had made
the deal was not there?

A That's correct.

Q And, the way that is determined is there is there
what is called an up-rack on which the salesmen's names are

1 listed in order as to who gets the next deal?

2 A. That's correct.

3 Q. And, you were at the bottom of the up-rack?

4 A. Correct.

5 Q. You had only been at Peacock Buick for a
6 month at that time, hadn't you?

7 A. That's right.

8 Q. And, so, Mr. Creekmore selected you, he gave
9 you the folder?

10 A. Yes.

11 Q. Did he go over the folder with you at all?

12 A. No. It was normal procedure that, merely, he
13 would hand the folder, all the necessary papers were
14 contained therein, and we would just go from there.

15 Q. It was your responsibility to go ahead and
16 deliver the car, complete the paperwork and deliver the car?

17 A. That's correct.

18 Q. To your knowledge, those papers had not been
19 reviewed at all before you received them, isn't that
20 correct?

21 A. I wasn't aware of them being reviewed or anything
22 of that nature.

23 Q. You didn't review them yourself?

1 A. No, unh-unh.

2 Q. You didn't review the contract itself?

3 A. Not really, no.

4 Q. You didn't spot anything in the contract that
5 caused you any alarm, isn't that correct?

6 A. No.

7 Q. And, you expected any review of these documents
8 to take place after you had given Miss Durkin the car,
9 isn't that correct?

10 A. You say I was what now?

11 Q. You expected any review of these documents to
12 take place after you had given Miss Durkin the car, isn't
13 that correct?

14 A. Expected whatever the procedures were in his
15 area. I wasn't aware of it.

16 Q. In going over this paperwork with Miss Durkin,
17 to your knowledge, were there any papers that were
18 necessary to be signed that were not?

19 A. Not to my knowledge. Not to my recollection,
20 let me put it that way.

21 Q. To your recollection, there was no payment
22 due that wasn't made?

23 A. Whatever the figures that were indicated on the

1 invoice. I merely collected that amount of money.

2 Q So, whatever was called for, she paid?

3 A That's correct.

4 Q Or whatever had to be delivered, she delivered?

5 A That's correct.

6 Q Now, in addition to what was called for there,
7 you sold an extended warranty, didn't you?

8 A I'm quite sure that's correct, yes.

9 Q You also collected an amount over and above
10 what was called for in that contract?

11 A In the sum of the extended warranty.

12 Q You had to collect some additional charges,
13 isn't that correct?

14 A Whatever was written on the paper. I don't
15 recall precisely the exact amount.

16 Q Let me show you Exhibit 2 and Exhibit 1, and
17 I am going to ask you to compare the amount of Exhibit 2
18 with the carbon amount at the bottom of Exhibit 1.

19 A Yes.

20 Q Exhibit 2 is the check you received, isn't it?

21 A I'm sure that's right.

22 Q And, Exhibit 1 is the copy of the contract under
23 which you were operating, isn't that correct?

1 A. I'm sure that's right.

2 Q. And, you collected an amount over and above
3 what was called for in the contract?

4 A. Whatever the check was, and whatever it said
5 on the bottomline there is what I collected, yes.

6 Q. Do you recall any discussion of freight charges
7 or eight-track tape or cassette?

8 A. I didn't get involved in that at all.

9 Q. Not at all?

10 A. I didn't get involved in that.

11 Q. Do you call Mr. Creekmore over to get involved
12 in it, as you recall?

13 A. Not to my recollection.

14 Q. At the time you were going through this paper-
15 work with Miss Durkin, do you know where her used car was?

16 A. I honestly didn't know, but I assumed it
17 would be right out in front where most of our customers
18 put their car prior to delivery of their new one.

19 Q. You didn't intend to reappraise it, or have it
20 reappraised?

21 A. No, that wasn't in my area.

22 Q. To your knowledge, no one else intended to
23 reappraise it, did they?

1 A. Not to my knowledge.

2 Q. When you sat down with this paperwork to be
3 completed, you had a contract with no signature down
4 where it says, "Approved"?

5 A. Yes.

6 Q. It's normal that Peacock Buick not have a
7 signature down there, isn't that correct?

8 A. I would say yes to that.

9 Q. After you got through with all of this paperwork,
10 and you turned this back over to Mr. Creekmore, the
11 salesmanager --

12 A. Yes.

13 Q. -- And, you went on your way?

14 A. That's correct.

15 Q. Do you remember any problems with floormats,
16 do you remember that at all?

17 A. No, I don't.

18 Q. Do you remember any problem with taillights?

19 A. No, I didn't get involved in that.

20 Q. Do you remember any interruption during the
21 course of all of this when taillights were discussed?

22 A. No, I don't.

23 Q. When you had completed this paperwork, you gave

1 Miss Durkin the keys, isn't that correct?

2 A. Yes.

3 Q. And, you gave her copies of all of the documents?

4 A. That's correct.

5 Q. And, you expected her to drive off?

6 A. That's the normal procedure, yes.

7 Q. Not to be seen again?

8 A. That's generally the way it is, yes.

9 Q. In the course of doing this paperwork, you
10 made out a sticker, didn't you?

11 A. Yes.

12 Q. And, I show you Plaintiff's Exhibit No. 4, and
13 ask if you can identify that?

14 A. That's to identify the trade-in, the car that's
15 due into us, and it's assigned a stock number for that car.

16 Q. A stock number?

17 A. Yes, which is the top figure there.

18 Q. That's for Peacock Buick's inventory control?

19 A. Yes.

20 Q. Did you cause this sticker to be placed on
21 her used car?

22 A. I normally do this, yes. This is normal proce-
23 dure. I assume I did.

1 Q Physically, with that car there, and with that
2 sticker on it, that car was taken into Peacock Buick's
3 inventory, isn't that correct, used car inventory?

4 A This is where it normally goes.

5 Q If anything else is left to be done, it's just
6 internal paperwork, isn't that correct?

7 A That would be correct, uh-huh.

8 Q Then, eventually, Miss Durkin came back to
9 you and there was a problem with the gas?

10 A That is correct.

11 Q And, you went to Mr. Creekmore and told him
12 about the problem?

13 A That's correct.

14 Q Between the time you laid that file, with all
15 of the completed paperwork and the contract on Mr. Creekmore's
16 desk and the time that you went back to him about a
17 problem over gas, approximately ten or fifteen minutes had
18 elapsed, hadn't they?

19 A I don't think it could have been that much,
20 really.

21 Q Let me show you page --

22 A I'm not sure. It's hard to recall exact,
23 precise, times. I'm not sure.

1 Q Do you remember your deposition on November 20th?

2 A Yes.

3 Q Let me show you page 15, lines 13 through 17.

4 A Uh-huh.

5 Q And, ask you if that helps your recollection.

6 Just take your time.

7 A Without question, I said this. I said ten to
8 fifteen minutes, is what I said in the deposition. So,
9 I assume it was in that same area.

10 Q During that ten to fifteen minute period, you
11 aren't aware of any review that was conducted by Mr.
12 Creekmore, is that correct?

13 A No.

14 Q Were you aware of any reason, during that
15 ten to fifteen minute period, he could not have reviewed it?

16 A I have no idea, really.

17 Q Would it be fair to say, Mr. Bell, that you
18 are aware of no procedure at Peacock Buick to pick-up
19 mistakes in addition, appraised values, trade-ins or
20 trade-in allowances?

21 A I don't quite understand.

22 Q Let me repeat it, and you can tell me where
23 your problem is. Wouldn't it be fair to say that you are

1 aware of no procedure at Peacock Buick to pick-up mistakes
2 in addition, appraised values, trade-ins or trade-in
3 allowances on contracts written up?

4 A. That I would be to pick them up and notice
5 an error, is that what you're saying?

6 Q. Yes, sir. Are you aware of any procedure
7 that would pick those things up?

8 A. The only thing I would know is on the review
9 of the deal, as we refer to it as.

10 Q. This is after delivery?

11 ✓ A. Uh-huh.

12 MR. KELLY: I have no further questions.

13 THE COURT: Any questions at this time, Mr.
14 Cotner?

15 MR. COTNER: Yes, sir.

16 CROSS EXAMINATION

17 BY MR. COTNER:

18 Q. Mr. Bell, how long have you been working for
19 Peacock Buick?

20 A. To this date?

21 Q. At the time.

22 A. I started on January the 19th, was my first
23 day of employment.

1 THE COURT: Any further questions?

2 MR. KELLY: Not of this witness, no, Your Honor.

3 THE COURT: You may step down.

4 MR. COTNER: May this witness be excused? I
5 am not going to recall him.

6 THE COURT: Do you wish to have him remain?

7 MR. KELLY: I don't wish to recall him.

8 THE COURT: You're free to go.

9 [Witness excused.]

10 MR. KELLY: May we approach the Bench?

11 THE COURT: Sure.

12 BENCH CONFERENCE

13 MR. KELLY: Your Honor, at this point, it would
14 be my intention to introduce financial information.

15 I suspect there's three cases under which I'm
16 entitled to do that. I suspect that Mr. Cotner is going
17 to have some sort of objection.

18 THE COURT: Are you going to object?

19 MR. COTNER: Yes, Your Honor.

20 THE COURT: I think, under case law, you're
21 entitled to go into the financial worth in questions of
22 punitive damages, are you not? Because what may be punitive
23 to one person may not be punitive to someone else.

1 MR. COTNER: I think the critical question
2 is whether their punitive damage instruction is -- Whether
3 on the basis of plaintiff's prima facie case, whether
4 they would even be entitled to a punitive damage instruc-
5 tion; and, of course, I would contend that he is not.

6 And, that, based upon that, that this evidence
7 would have no relevance, and I would object to its coming
8 in. Once, again, it would be inflammatory if there is
9 no relevance to its being in evidence.

10 THE COURT: As far as the Court is concerned,
11 and from the evidence its heard, I think he's entitled
12 to -- I think he's made out a jury case issue to go
13 into it.

14 I don't know how far you want to go into it. It
15 does seem to me like it's the type case that you need
16 financial worth of someone like this because of their
17 inventory. And, I don't know if you're talking about a
18 \$200 or \$300 punitive damage case, or a \$1,000.00, but --

19 MR. KELLY: I think my presentation would be
20 brief on something like that. What we have would be a
21 stipulation. It comes out of a deposition of Michael
22 Peacock as to the net worth of the corporation. The
23 net income, annually, of the corporation; and the monthly

1 advertising expenses of the corporation. Those are the
2 only figures I want to get into. I don't think we
3 can claim any right to details, for example, of tax
4 returns or anything like that.

5 THE COURT: You have the right to go into
6 the financial worth of a defendant on the question of
7 punitive damages solely because \$50.00 might be punitive
8 to me, but would not be to Peacock Buick.

9 But, I think there has been sufficient evidence
10 to permit you to do it, but I would like you to exercise
11 some degree of restraint in going into it.

12 MR. KELLY: What I would hope to do -- I think
13 we've got three figures, and I think we're going to
14 stipulate to those, and if they could just be read,
15 that's all I would do.

16 THE COURT: Is that agreeable over your ob-
17 jection?

18 MR. COTNER: Yes. As long as my objection is
19 a matter of record. I don't believe there has been a
20 prima facie case justifying a punitive damage instruction;
21 but if the punitive damage instruction, if you believe
22 that a prima facie case has been made out, and the evidence
23 is to be admitted, then I will also stipulate.

1 THE COURT: Then you may give those figures
2 to the jury. Then read them.

3 MR. KELLY: Would you like me to read them to
4 them?

5 ✓ THE COURT: Yes, by stipulation.

6 OPEN COURT

7 MR. KELLY: ~~Mr. Cotner~~ and I will -- Just a
8 ~~second~~, make sure we're agreed on them.

9 Would you like for me to read this to the jury?

10 THE COURT: Yes, read them to the jury.

11 MR. KELLY: Ladies and gentlemen, the approximate
12 net worth of Peacock Buick, Inc., is \$700,000.00.

13 The approximate net annual income of Peacock
14 Buick is about \$200,000.00.

15 And, the approximate advertising expense per
16 month of Peacock Buick, Inc. is \$10,000.00 a month.

17 THE COURT: Call your next witness.

18 MR. KELLY: Your Honor, that is the plaintiff's
19 case.

20 THE COURT: Mr. Cotner.

21 MR. COTNER: Your Honor, I do have a motion
22 to make. Perhaps it would be better made --

23 THE COURT: Would you take the jury to the

1 jury room, please?

2 (The jury retired from the courtroom.)

3 THE COURT: All right, Mr. Cotner.

4 ✓ MR. COTNER: Your Honor, I have a number of
5 grounds for a motion to strike the plaintiff's evidence.
6 I have one that I am sure you would consider completely
7 spurious so I would save the Court from that one.

8 THE COURT: On any one that you've argued at
9 the Bench, or any other time, the Court would not change
10 it's position.

11 MR. COTNER: For the record, I would like to
12 point out that the case of Lawrence versus McFarlane and
13 Smoot versus Cook, at 3 W.Va. 172, which is our sister
14 state, and in the absence of a controlling case from
15 Virginia, I would submit would be of a highly persuasive
16 authority.

17 That case stands for the proposition that
18 even though the defendant is not claiming privity with
19 the party who actually holds title to the automobile,
20 it is nevertheless competent to set-up title in a third
21 party to defeat the claim of the plaintiff where the
22 plaintiff has no title.

23 THE COURT: These are the same matters that

1 you argued on motion for summary judgment, was it not?

2 MR. COTNER: It was one of the matters that
3 was argued on summary judgment, Your Honor.

4 THE COURT: The Court would stand by its
5 original ruling on your argument for the motion for
6 summary judgment to save you time in repeating yourself
7 on that argument.

8 MR. COTNER: That's the first issue, Your
9 Honor, is lack of standing.

10 The second issue is that the plaintiff has
11 presented no evidence on the issue of fair market value
12 on the property converted.

13 Now, the cases a legion which stand for the
14 proposition that the measure of plaintiff's damages is
15 the fair market value of the property converted.

16 THE COURT: Would not the contract be indicative
17 as being in evidence as to the fair market value because
18 it was unused. It had not been used. And, at that was the
19 time that the sale was struck.

20 MR. COTNER: There was no expert testimony
21 regarding the fair market value.

22 THE COURT: Do you need expert testimony when
23 you have a contract entered into at arm's length between

1 as to that?

2 THE COURT: I would hear Mr. Kelly's argument
3 on that, but go ahead and conclude all of your argument.

4 ✓ MR. COTNER: The third ground, Your Honor, is
5 I do not believe the plaintiff has made out a prima facie
6 case, (A), as to the existence of actual malice in this
7 case as I believe is required by Jordan versus Sauve,
8 which is number 770352 of the advance sheets cited in
9 ✓ the Continuing Legal Education Bulletin put out on --

10 THE COURT: That's not the Koons Ford case,
11 is it?

12 MR. COTNER: No, it's not. It's not.

13 THE COURT: Have you read that case?

14 MR. COTNER: Quite thoroughly, Your Honor.
15 I don't know that a decision has been reached on the
16 motion to set aside yet.

17 THE COURT: From the Supreme Court.

18 MR. COTNER: I hadn't been aware that it had
19 been decided by the Supreme Court.

20 THE COURT: There was a recent case
21 where Judge Morris was reversed in striking a punitive
22 damage question.

23 MR. KELLY: I think Mr. Cotner is confusing

1 two of our firms many lawsuits.

2 THE COURT: This is a case just decided by
3 the Supreme Court from Judge Morris where he struck
4 the question of punitive damages, and he was reversed
5 on it, and it had to be tried over again.

6 ✓ MR. COTNER: It's my contention whether one
7 applies the standard of actual malice or one applies
8 the standard of reckless, willful and wanton activity,
9 that there has been no prima facie case by the plaintiff.

10 In fact, the plaintiff has consistently referred
11 to what happened as a mistake.

12 Now, I will concede for the sake of the argu-
13 ment that it's possible to interpret the actions of
14 the defendant as being intentional in that they deliberately
15 took the car back.

16 THE COURT: It was an intentional tort.

17 MR. COTNER: But, a deliberate act made under
18 a claim of right does not amount to either actual or
19 implied malice, nor does it necessarily imply reckless
20 or willful or wanton activities.

21 THE COURT: Where does that claim of right
22 come in?

23 MR. COTNER: Their claim of right would be that

1 they felt that the property was still theirs. They did
2 not feel, from a layman's point of view, that title
3 to the property had passed.

4 I would submit, Your Honor, that the plaintiff
5 is making out a reasonable case for a demand for damages
6 caused by negligent acts of the defendant; however, the
7 pleadings are devoid of any request for damages caused
8 by negligent acts of the defendant.

9 They request damages in two instances: One, for
10 fraudulent, willful, wanton and reckless activity; and, in
11 the second instance, from willful, wanton and reckless
12 activity by the defendant. And, I submit to the Court
13 that there has been no showing of fraudulent, willful,
14 wanton, or reckless activity in acts by the defendant.

15 And, finally, Your Honor, the final point
16 I'd like to make is it's my understanding that, in
17 Virginia, title is evidence of ownership; and that
18 ownership is required to maintain an action for conversion.

19 And, as a matter of record, I would like the
20 Court to know that I am opposing, or I am asking for a
21 motion to strike plaintiff's evidence, based upon the
22 fact that it is uncontested that title was in someone
23 ✓ other than the plaintiff.

1 who has been to the stand, other than Miss Durkin's
2 parents, is that in this bargain, somebody was coming
3 up \$1,000.00 short. So, anybody who got stuck with the
4 used car and the checks, who was stuck on that side of
5 the deal, came up \$1,000.00 short.

6 In addition to that, Your Honor, we have a
7 question of interest. Now, I admit that the interest on
8 \$100.00 for a month is what the testimony was; that
9 deposit of \$100.00 was not returned until approximately
10 a month after this incident on February 21st.

11 I think the law is of an Am Jur citation here
12 that, when you have a conversion, and property is returned,
13 the person who makes the claim for that conversion is
14 normally not entitled to interest because they are entitled
15 to loss of use.

16 But, where you're not making a claim for loss
17 of use, you're entitled to interest. So, I am looking
18 at an eight percent for \$100.00 for 30 days, which, I
19 admit, is not the biggest amount ever seen, but that is
20 also in evidence.

21 ✓ On the question of standing, I don't believe
22 that the law in Virginia is such that a person is required
23 to have title and the certificate of title to maintain an

1 action for conversion.

2 I would direct the Court's attention, first
3 of all, to a distinction between Section 46.1-87 and
4 46.1-52. I think Mr. Cotner is referring to, when he's
5 talking about the necessity for a certificate of title,
6 he's referring to the Storm case, 200 Va 526, which was
7 based on 46.1-87. I have a copy of it here rather than
8 expecting you to have 46.1 memorized, Your Honor.

9 That Code section pertains to the situation
10 where the purchaser is buying a used vehicle. The under-
11 lined portion of what I'm showing the Court shows that
12 when someone is transferring a vehicle registered under
13 this, I believe, article --

14 THE COURT: This Chapter?

15 MR. KELLY: Chapter. This vehicle was not
16 registered. It was in a dealer's inventory. There was no
17 title to transfer. So, I think, relying on Storm, and
18 expecting something that doesn't exist to be transferred,
19 is inaccurate.

20 I think that what we have instead is a situation
21 under Section 46.1-52 which contemplates no title because
22 when you apply for the title you have to say who sold
23 it to you. Obviously, DMV has no way of knowing if there

1 is no existing title.

2 Furthermore, in terms of registration, I would
3 point to the Court that Miss Durkin's mother is from
4 New Jersey, and I have 46.1 -- two Sections, as to need
5 for her to register the vehicle.

6 In terms of the case law on it, you look at the
7 Storm case, Nationwide Insurance Company versus Storm.

8 Most people, I think, take that to mean that: File
9 that certificate of title, and if you don't have that certi-
10 ficate of title, then you might as well forget it.

11 At page 528 of that case, Your Honor, there
12 is a section where you can see that the mother, in whose
13 name title stood, was aware of her child's claiming
14 to sell his vehicle to a prospective purchaser. That money
15 was paid, everything was done, but the mother said, no, I'm
16 not going to give him that title for a couple of days. She
17 exercised control. It was an assertion of a right that
18 was inconsistent with her son's claim of ownership.

19 I think that you have a certificate of title
20 as being prima facie evidence of ownership, and if you
21 have actions that go with it to collaborate that prima
22 facie evidence, that certificate of title is binding.

23 To show how my distinction is, I think anyway,

1 valid, I direct the Court's attention to United States
2 Casualty Company against Bain, 191 Va 717. There the
3 Court ruled that the title certificate was not conclusive
4 of ownership, but only prima facie.

5 And, they go on to show how the title was
6 put in someone's name solely for purposes of convenience.
7 I think that's what we have here. Of course, that was
8 was prior to the Storm case. You have 193 Va, which is
9 Painter versus Lingon, and there they're talking about
10 control -- Control, control -- as between husband and
11 wife.

12 THE COURT: All of this is on the question of
13 ownership, and I think that was fully explored on the
14 motion for summary judgment. And, the Court overruled
15 the motion. The Court does not need further argument
16 on that point.

17 MR. KELLY: In terms of the claim for punitive damage
18 Your Honor, one element that is required is a criminal
19 indifference for the rights of others; and, I think
20 this case -- Just one incident in this case shows a criminal
21 indifference to the rights of others, and that is the
22 taking itself.

23 There is no question it was willful. It was at

1 the President's direction. Mr. Creekmore did it willfully,
2 deliberately. I think everybody's evidence is that they
3 did it willfully and deliberately, knowing that she had
4 already left the lot. Or, if they didn't know it for
5 sure, they certainly did expect it.

6 The evidence is that Mr. Peacock didn't want
7 to know how the whole thing managed to get balled-up;
8 he just wanted that car back. There were no questions
9 about how did this get fouled-up. All he looked at was
10 his profit, and said: I want that car back.

11 I think, in a technical sense -- I wouldn't
12 want to say a Grand Jury would do anything, but I
13 think in a technical sense, this is larceny. I honestly
14 do. And, I certainly think that is criminal, the indifference
15 to the rights of others.

16 I think it is a criminal act. It would probably
17 be per se indifference to the rights of others.

18 And, then, you throw that in with the testimony
19 of the entire operation of Peacock Buick: Yeah, get
20 their money, get their contract, but don't pay any attention
21 to the contract, don't review the contract, we'll just
22 shift gears six weeks down the road.

23 I mean, what they've done is they have taken

1 people's money. They have held them up from four to six
2 weeks. They don't tell them, all during this time, that
3 we could shift gears on you, that we might even take your
4 car after we deliver it to you under our policy. Nothing
5 like that. Is that deference to the rights of others
6 under that contract?

7 What they have every right to believe is a
8 valid contract.

9 That is the entire policy of the corporation.
10 Every one of the people from Peacock Buick testified that
11 that is their normal procedure: Get the contract. Get
12 the money. Wait six weeks, and then talk about it.

13 Then you heard Mr. Creekmore testify as to
14 how he, Mr. Creekmore, voided the deal after he's got
15 somebody out on the street in a vehicle. He voided the
16 deal.

17 Your Honor, in that situation, it's up to a
18 Court to void the deal. It isn't up to somebody at Peacock
19 Buick, be he salesmanager, be he a salesman, be he the
20 President, or be he hovering ten feet over their building,
21 to say: I void this deal; therefore, you suffer because
22 we made a mistake, even though you paid us your money and
23 waited six weeks. That, I think, is criminal indifference.

1 Now, the Sauve case also referred to the
2 Lee case. It was a situation where, I believe -- I don't
3 have the case right in front of me. I believe it was the
4 Seven Eleven, the Southland Corporation, was being sued
5 for malicious prosecution, where they charged a kid with
6 destruction of private property for kicking in the door.

7 And, the sole purpose was to get money.

8 They set out such a judicial process in action
9 just for the recovery of the money for a door.

10 I think this case is similar to it. That was
11 enough to show actual malice. Now, it certainly shows
12 lack of probable cause and legal malice, but the Court
13 says that shows actual malice. That's what we have here.

14 All we have, or the only evidence before us
15 right now, is that the reason that this man took the law
16 into his own hands -- I think, the reason he committed,
17 I think, a technical larceny -- was because of the profit.
18 He couldn't afford it, he says. We can't let you have
19 this car with a minus \$900.00 or \$1,000.00. We can't
20 let you have it with \$1,000.00 loss.

21 It was just a profit motive that entered into
22 what I think was a technical larceny. I think that also
23 is criminal indifference.

1 Now, they have to say, they go on to say
2 mischievous. I guess that's a euphemism for criminal
3 indifference. "We come up short." Certainly, this could
4 be said to be mischievous.

5 Then we have rudeness. Miss Durkin has testified
6 that there was rudeness, and, in specific, she wasn't
7 that good. She was upset. She was crying. Certainly,
8 her actions indicate that there was something going
9 there by way of rudeness; and in terms of specific words,
10 I don't think there were any specific words.

11 Maybe nobody called her any names, as Mr.
12 Cotner brought out. The only rudeness is from the demeanor
13 of the way you do things, I think in a lot of instances.
14 How did he say it? She characterizes it as "angry".

15 Another characterization was "animosity".
16 That, I think, shows a rudeness.

17 Another element that goes into the showing of
18 actual malice is oppression. And, if this isn't oppression,
19 I don't know. It's a larceny. If that isn't oppressive,
20 I don't know what is.

21 So, I think that several elements, any one
22 of which, I believe, are sufficient to show actual malice.
23 We have several of them here.

1 And, for that reason, I think we've made out
2 a prima facie case on the punitive damage claim.

3 So, in summary, I think we've shown the value,
4 certainly, of a \$2,100.00 loss; the loss of interest; and,
5 I think we've certainly shown a prima facie case as to
6 actual malice that would entitle us to a punitive damage
7 instruction; and I think we do have sufficient ownership
8 interest and sufficient property in the vehicle to have
9 standing.

10 THE COURT: Well, the Court will deny the motion
11 ✓ for strike.

12 How many witnesses will you have, Mr. Cotner?

13 MR. COTNER: Your Honor, I will put on Jack
14 Glasser and Mr. Creekmore, and they will be brief.

15 THE COURT: The Court will take a ten minute
16 recess before we start with the testimony.

17 [Brief recess.]

18 THE COURT: Ready for the jury, gentlemen?

19 MR. COTNER: Yes, Your Honor.

20 (The jury returned to the courtroom and resumed
21 their place in the jury box.)

22 THE COURT: Call your first witness.

23 MR. COTNER: Jack Glasser, Your Honor.

1 that point?

2 A. Well, she was extremely disappointed. She
3 just couldn't understand how this could happen.

4 Q. How would you characterize your attitude at
5 that point?

6 A. I was upset a little bit myself because for
7 one of my salesmen to make a mathematical error such as
8 that --

9 Q. Were you angry?

10 A. I wouldn't say I was angry, no. I don't get
11 angry at all.

12 Q. Did you ever raise your voice at Jane Durkin?

13 A. Of course not intentionally. If I raised it
14 because of emotion, that was something; but never inten-
15 tionally, no, sir, never.

16 Q. Did you deliberately say anything harsh, rude, in-
17 timidating or threatening?

18 A. Absolutely not, under no circumstances.

19 ✓ Q. What, if anything, did you suggest that she do?

20 A. I suggested that she went home and think about
21 it. And, maybe take her car around and get a couple of
22 appraisals to try and prove to herself that there had been
23 a \$1,000.00 error made, that we would hold the car, which

1 we did; we did.

2 We kept the car. I took it out of inventory
3 so that it could not be sold until we gave her ample time
4 to get back with us which we never heard from her.

5 Q Now, at the moment you so informed Miss Durkin
6 of that, and that you took the keys back, who did you
7 think owned the Regal?

8 A Well, I was under the impression that Peacock
9 Buick still owned the Regal because we had never transferred
10 the CO, the certificate of origin we receive from the
11 factory made to Peacock Buick. We had never transferred,
12 sent the papers, to the Division of Motor Vehicles to
13 transfer registration.

14 We had never given title to her; and as far as
15 I was concerned, it was still the property of Peacock
16 Buick.

17 Q Where was the car at that time?

18 A The car was parked -- Well, either the front
19 or side of the building. That was the only parking area
20 that we have.

21 Q Was it on the property of Peacock Buick?

22 A Oh, yes.

23 Q From what you observed, did Michael Peacock

1 ✓ Any objection to No. 3, except with reference
2 to your continuing objection on punitive damages?

3 [INSTRUCTION NO. 3

4 Damages are of two types: (1) Compensatory
5 Damages; which are awarded as compensation for pecuniary
6 loss and recompense for the injury suffered; (2) Punitive
7 Damages; which are something in addition to full compen-
8 sation, not given as the plaintiff's due, but as punish-
9 ment to the defendant and as a warning and example to
10 deter him and others from committing like wrongs.

11 And if from the evidence and the other instruc-
12 tions of the Court you find your verdict in favor of the
13 plaintiff, then in addition to compensatory damages, if
14 you believe from a preponderance of the evidence that
15 the defendant acted wantonly, oppressively, or with such
16 recklessness as evinced a conscious disregard of the
17 rights of others, or with such malice as implied a spirit of
18 mischief, or criminal indifference to civil obligations,
19 you may award the plaintiff such additional sum as punitive
20 damages as in your own opinion are called for by the
21 circumstances of the case.

22 And if the jury do award punitive damages, they
23 shall state in their verdict what amount they allow as

1 compensatory damages and what amount as punitive damages.]

2 MR. COTNER: Well, Your Honor, I have an
3 alternative instruction.

4 MR. KELLY: Your Honor, I was looking over
5 here, I think we have some confusion on numbering. Does
6 No. 2 refer to willful and wanton?

7 THE COURT: No. 2 is the principal being
8 liable for the wrongful acts of the agent.

9 MR. COTNER: I have no objection to that.

10 THE COURT: No. 3 is your definition of
11 compensatory-punitive damages.

12 MR. COTNER: I would submit that 23.09, which
13 is what this instruction is from, out of Doubles, is
14 a general damage instruction. Inasmuch as there was no
15 damage instruction that I could find out of a Virginia
16 case of conversion, I found a case as close as possible,
17 on all fours with this, from the State of Oregon.

18 And, that would be proposed Instruction C.

19 THE COURT: You're referring to gross
20 negligence, and we no longer have gross negligence here,
21 do we? No. H is your exemplary, punitive or vindictive
22 damages.

23 MR. COTNER: Right. No. H, Your Honor, came

1 from an Oregon case involving a conversion of an automobile.

2 And, I have a copy of that case with me if
3 the Court would like to look at it. I would submit that
4 it is a better punitive damage instruction because the
5 law, as I could ascertain, in Oregon is the same as the
6 law here.

7 And, that instruction pertains to a conversion
8 suit for an automobile as opposed to a general damage
9 instruction; and, if the Court would be so inclined, I
10 will glad to give you a copy of that case.

11 THE COURT: The Court will admit 3, and then
12 we'll consider yours at the appropriate time.

13 MR. COTNER: Thank you, Your Honor.

14 THE COURT: Any objection to 4?

15 [INSTRUCTION NO. 4

16 A "Willful" act is an act intentionally done,
17 or omitted, in disregard of another's rights.

18 A "Wanton" act is a reckless indifference to
19 the consequences of an act or omission, where the party
20 acting or failing to act is conscious of his conduct and,
21 without any actual intent to injure, is aware, from his
22 knowledge of existing circumstances and conditions, that
23 his conduct will inevitably or probably result in injury

1 to another.]

2 MR. COTNER: No objection, Your Honor.

3 ✓ THE COURT: 4 is admitted.

4 Any objection to 5?

5 [INSTRUCTION NO. 5

6 The jury are the sole judges of the weight of
7 the evidence and of the credibility of the witnesses, and
8 the jury has the right to discard or accept the testimony
9 or any part thereof of any witness which the jury regards
10 proper to discard or accept, when considered in connection
11 with the whole evidence in the case, but the jury has
12 no right arbitrarily to disregard the credible testimony
13 of a witness. And in ascertaining the preponderance
14 of the evidence and the credibility of witnesses, the jury
15 may take into consideration the demeanor of the witness
16 on the witness stand; his apparent candor or fairness;
17 his bias, if any; his intelligence; his interest, or lack
18 of it, in the outcome of the case; his opportunity, or lack
19 of it, for knowing the truth and for having observed the
20 facts to which he testifies; any prior inconsistent
21 statements by the witness if proven by the evidence; and
22 from all these and taking into consideration all the facts
23 and circumstances of the witnesses and the preponderance

1 THE COURT: If there's no objection.

2 MR. KELLY: No objection.

3 THE COURT: G is admitted as amended.

4 ✓ Any objection to H?

5 [INSTRUCTION II

6 Exemplary or punitive or vindictive damages

7 involves the blending of the interests of society in general
8 with those of the aggrieved individual in particular.

9 Such damages are awarded by way of punishment to the
10 offender and as a warning to others or by way of example.

11 In order to recover exemplary damages or punitive damages,
12 there must be actual damage shown. In other words, you

13 would have to first determine that there had been general
14 damage or compensatory damage before you would be entitled

15 to return a judgment for punitive damages. In order

16 to warrant a recovery for exemplary damages, there must

17 be some element of malice. A guilty intent on the part

18 of the defendant is essential to charge it with exemplary

19 or punitive damages. Where an act has been done in good

20 faith although it may result in serious injury to the

21 other party, there can be no recovery for exemplary damages.

22 If the defendant acted under a mistaken sense of duty

23 and without an evil intent it is not a case of exemplary

1 damages. You may presume a malicious and guilty intent
2 from the deliberate commission of an unlawful act for
3 the purpose of injuring another.]

4 MR. KELLY: I have a problem with that, in
5 that I think it's covered by No. 3.

6 THE COURT: But, it's not covered by No. 3.
7 I think that this points out that you cannot have punitive
8 or exemplary damages without having actual damage. The
9 jury could not come back with a judgment verdict only
10 for punitive damages.

11 MR. KELLY: I would go down and -- One, two,
12 three, four, five, six, seven, eight, nine lines, and
13 I have no problem getting there, where the sentence
14 ends, "entitled to return a judgment for punitive damages."

15 The next sentence I think we've already covered
16 in 3. Maybe we could pick it up -- Or, where I get
17 particularly upset and concerned is from there on out,
18 we're talking about "guilty intent", "mistaken sense of
19 duty and without an evil intent".

20 THE COURT: I think this points out to the
21 jury, to award punitive damages, would have to find
22 malice. And, I don't think that's necessary, is it; to
23 find malice for punitive damages?

1 MR. KELLY: As I read Sauve, Your Honor, the
2 Supreme Court has not yet ruled that actual malice has
3 to be proven in a conversion case.

4 I think it covers the other area where everyone
5 presumes legal malice so fast that you might need a
6 little more protection.

7 I am unaware of any authority in Virginia that
8 requires actual malice.

9 MR. COTNER: My understanding was that the
10 Sauve case stood for the proposition that actual malice
11 was required in a conversion case. That's why I say I
12 think this is an accurate statement of the law and since
13 it's the only instruction I was able to find pertaining
14 particularly to conversions.

15 There is --

16 THE COURT: The Court is going to admit it.

17 MR. COTNER: Thank you, Your Honor.

18 MR. KELLY: To make sure I'm clear as to what
19 my problem is, may I speak to the record, please, to be
20 sure I'm clear?

21 THE COURT: Sure.

22 MR. KELLY: The problems I have are references
23 to "guilty intent", "evil intent", and, "last sentence, "malicious

1 and guilty intent". I am not aware of any Virginia
2 authority talking about "evil intent".

3 I hope that it doesn't throw them into a
4 criminal arena. I don't believe that we have to show
5 intent. I think that all we have to show is reckless
6 disregard, a criminal disregard.

7 I see that this case comes from a Pacific
8 Reporter, and I'm afraid we're picking up the language
9 of another jurisdiction. It might have some meaning
10 surrounding it that I really don't understand.

11 I am unaware of "guilty intent" or "evil intent"
12 or "malicious intent" being proper to consider in Virginia.

13 THE COURT: Do you have any other authority
14 for "evil intent", or language --

15 MR. COTNER: Your Honor --

16 THE COURT: This goes a little further than
17 malice, doesn't it? Evil intent?

18 MR. COTNER: "Evil intent", may. "Guilty intent",
19 I don't believe does.

20 THE COURT: What the Court is going to do is,
21 the Court is going to strike after the words "exemplary
22 damages."

23 "If the defendant acted under a mistaken sense

1 of duty and without an evil intent it is not a case of
2 exemplary damages."

3 MR. COTNER: I have no objection to that,
4 Your Honor.

5 THE COURT: I am going to strike the balance
6 of the instruction because I think we're getting into a
7 new area from another state that has not been considered
8 by the Commonwealth of Virginia.

9 MR. KELLY: That would be the last one, two,
10 three, four, five lines, Your Honor?

11 THE COURT: It would be -- The end would be,
12 "there can be no recovery for exemplary damages."

13 MR. KELLY: May we --

14 THE COURT: I'm striking out the last two
15 sentences.

16 MR. KELLY: May we delete -- I'm sorry to bother
17 you, Your Honor, but -- or to be a pain -- But, we have
18 "Where an act has been done in good faith". I believe
19 that is the last sentence the Court has left in.

20 Just prior to that sentence, we have "A guilty
21 intent on the part of the defendant is essential to charge
22 it with exemplary or punitive damages."

23 I would ask that we strike that sentence as well.

1 THE COURT: After "there must be some element
2 of malice"?

3 MR. KELLY: Yes, sir. And, strike the next
4 sentence. I think the "Where an act has been done in
5 good faith although it may result in serious injury", I
6 think that is a correct statement of the law.

7 THE COURT: Mr. Cotner?

8 MR. COTNER: Your Honor, I can understand the
9 objection as to "evil intent". It may readily be mis-
10 construed; but a "guilty intent". If the element of
11 malice is, as Your Honor has pointed out, correct, then
12 "guilty intent", obviously, would have to be there.

13 And, I think the jury is entitled to know
14 that it would have to be there. Consequently, I would
15 ask the Court to leave that statement in.

16 THE COURT: Could the word "guilty" be taken
17 out and the word "malicious" put in?

18 MR. COTNER: I have no objection to that, Your
19 Honor.

20 THE COURT: Mr. Kelly?

21 MR. KELLY: Your Honor, I think that puts too
22 big a standard on us, in that it has to require that we
23 have to show an intent, and all we have to show is disregard

1 or criminal indifference.

2 "Intent", I think, would certainly get us there,
3 but when we're saying intent is essential to a charge
4 of exemplary or punitive damages, I think that we're putting
5 too high a burden on the plaintiff.

6 THE COURT: I have no authority one way or
7 the other on it in Virginia, if you have to show malice
8 or do not have to show malice.

9 MR. KELLY: I think we have to show, at a
10 minimum, legal malice.

11 I am aware of no authority in Virginia that
12 goes as far as Sauve and Lee saying we have to show actual
13 malice.

14 What I am concerned about is that, as I under-
15 stand Sauve and Lee both, even when you're showing actual
16 malice, the two areas where you do not reach intent, one
17 would be where you're talking about indifference, and,
18 two, is reckless disregard.

19 If we're telling them that the intent is
20 essential, I think we're overlooking those two elements,
21 which I think, given the circumstantial nature of malice,
22 fine. It can throw us way off the track.

23 THE COURT: No. 11 would be contradictory to No. 3.

1 MR. COTNER: That is correct.

2 THE COURT: I don't think I can give contra-
3 dictory instructions. If I gave this, then they would
4 have to disregard a part of No. 3, or they could find
5 that the defendant acted wantonly, oppressively, or with
6 such recklessness as evinced a conscious disregard
7 to the rights of others.

8 MR. COTNER: That's why I brought up H at
9 the time No. 3 was being discussed and offered.

10 THE COURT: I think 3 is the law in Virginia,
11 and I think it can be in the alternative, "or with such
12 malice as implied a spirit of mischief".

13 MR. COTNER: Once, again, Your Honor, this is
14 a general damage instruction, No. 3 is as opposed to
15 a damage instruction relating to conversion.

16 THE COURT: I think No. 3, the general damage
17 instruction, would be applicable to a conversion or
18 damage to property rights because this is -- And, I think
19 you go back to your general law of negligence. Then
20 that would be the only instance in which you could recover
21 punitive damages.

22 In yours, you're narrowing it down and putting
23 a burden upon the plaintiff to show malice, and unless

1 malice is shown, you have no right to punitive damages.

2 And, I'm not willing to go that far.

3 MR. COTNER: For the record, I would submit
4 that is the law in Virginia. If the Court is otherwise
5 going to deny --

6 THE COURT: Give me your case on that.

7 MR. COTNER: The Sauve case.

8 THE COURT: Is this taken from Sauve?

9 MR. COTNER: It is not taken from Sauve.
10 I feel that it represents an accurate statement of the
11 law in Virginia, and, inasmuch as it is the only damage
12 instruction I could find peculiar to an actual case of
13 conversion, I felt that it would be better than an instruc-
14 tion relating to general damages.

15 However, I would say this, Your Honor. If the
16 choice is either to scrap II altogether or to delete the
17 sentence "A guilty intent on the part of the defendant
18 is essential to charge it with exemplary or punitive
19 damages.", if that is the election, then I would be more
20 than happy to delete that reference in order to save the
21 rest of the instruction.

22 THE COURT: I think the Court would have to
23 delete it. Otherwise, we're getting into inconsistent

1 positions in instructions, and I think --

2 MR. COTNER: The choice is to deny 3, Your Honor.

3 THE COURT: No, I think that's the law in Virginia.
4 So, the Court would strike "A guilty intent on the part of the
5 defendant is essential to charge it with exemplary or punitive
6 damages." Any other objections?

7 MR. KELLY: No, sir.

8 ✓ THE COURT: The Court will admit II as amended.

9 Isn't this the same as you damage instruction, No. I?

10 [INSTRUCTION I

11 You are instructed that from all the evidence if
12 you believe the plaintiff became the owner of the vehicle here
13 in question, or was entitled to the possession and use of said
14 vehicle by one who had become the owner, and if you believe that
15 said vehicle was subsequently converted to the use of the
16 defendant, then your verdict shall be for the plaintiff in an
17 amount equal to the fair market value of said automobile at the
18 time of said conversion, less any amount due the defendant
19 under the contract for the sale of the automobile and less the
20 fair market value of the trade-in automobile.]

21 MR. KELLY: Oh, I lost one here, Your Honor.

22 Not exactly. Where I got lost, and frankly, Your Honor at
23 the end where he's talking about "fair market value" "at the

1 today. Return on your next assignment day.

2 (The jury was excused at 6:53 o'clock p.m.)

3 THE COURT: Motions?

4 MR. COTNER: Your Honor, I have a motion for
5 judgment N.O.V., a motion to set aside the verdict.

6 If the Court, please, I would certainly like
7 to argue that on another day, perhaps by submitting a
8 brief on it.

9 THE COURT: It will not be necessary. I think every-
10 one is as familiar with the case right now as they
11 ever will be. All the evidence is fresh in my mind, in
12 counsel's as well as the Court's.

13 So, I'll be glad to hear your argument now.

14 ✓ MR. COTNER: Your Honor, well, once, again,
15 I do not believe that the plaintiff ever presented evidence
16 to entitle them to any money for punitive damages.

17 Certainly, there was no showing of actual
18 malice. I don't think the evidence rose to the level
19 of reckless or willful or wanton activity.

20 I would contend on the one-hand that actual
21 malice is what is required by the case laws that exist
22 in Virginia; and, even if that is not the case law, the
23 evidence didn't rise to the standard that Mr. Kelly maintained

1 he would show in order to be awarded punitive damages.

2 Furthermore, Your Honor, I would submit on the
3 issue of actual damages, that figure of \$2,500.00 is not
4 a figure that could be arrived at by any reasonable
5 logic applied to the case.

6 The instructions in the case told the jury
7 to subtract from the purchase price of the automobile
8 the amounts paid and were subsequently returned to the
9 plaintiff in the form of checks, and the fair market
10 value of the car.

11 Now, there were only two values of the car
12 discussed; one being \$1,400.00, and the other being
13 \$2,500.00. That leads you to a result of either \$2,100.00
14 or \$1,000.00, as the actual damages in this case.

15 And, I see noway that any other verdict could
16 be arrived at.

17 ✓ Finally, Your Honor, I would say that this
18 case has been irrevocably prejudiced by an allowance by
19 the Court of testimony of business practices called low-
20 balling and highballing or bumping which have absolutely
21 no relevance to this case whatsoever.

22 I requested a proffer. There was none, nor was
23 there evidence forthcoming by way of testimony or other

1 direct evidence that this practice was ever used.

2 And, I submitted to the Court, prior to the
3 receiving of that evidence, that that was inflammatory
4 and irrelevant and requested a proffer. I stick by that
5 statement, that that was, in fact, prejudicial to the
6 defendant's case.

7 And, based upon that, I would ask the Court
8 to strike the plaintiff's evidence as to the actual
9 damages and the punitive damages, and to award judgment
10 N.O.V. for the defendant; or, in the alternative, to
11 award a new trial to the defendant.

12 THE COURT: Mr. Kelly.

13 MR. KELLY: First of all, as to the inflammatory
14 nature of the highballing and lowballing, I think that,
15 certainly, a mistake was brought out as to mitigation of
16 punitive. I think that, certainly, we would be entitled
17 to show that it may well have been deliberate.

18 As Mr. Glasser, himself, testified, the only
19 way to tell the difference is by what he, in his mind,
20 did. And, I think it was fair for the jury to have it
21 laid out to them as to which of two things could possibly
22 occur.

23 And, based on Mr. Glasser's testimony, his

1 demeanor, his credibility, to determine whether or not
2 he did what he did deliberately or whether it was an
3 honest mistake.

4 Granted, throughout the trial I have used the
5 word "mistake". I don't think that anyone was bound by
6 my terminology, and I think it would be inflammatory for
7 me to call it deliberate all the way through.

8 As to the punitive damages, as we argued on
9 the motion to strike, and I think I argued to the jury,
10 I think we have something like four or five elements,
11 under the Sauve test even, showing actual malice.

12 I am not so sure that that is the test that is
13 to be applied here, but whether it is or not, I think
14 we've reached it. I think there's evidence on four or
15 ✓five counts.

16 In terms of the compensatory damages allowed,
17 certainly I assume that within that \$2,500.00 would be
18 a \$2,100.00 figure for the discount that was lost. In
19 addition to that, they awarded interest. I don't know
20 what portion they figured as interest. Was it \$400.00?
21 I don't know.

22 And, in interpreting that contract, I don't
23 know that they were misled or how they figured it, really.

1 But, I can't say that \$2,500.00 is out of the realm
2 of the real. And, then with the difference of interest,
3 I'm not so sure that we can even figure out whether
4 they allowed more than the \$2,100.00 anyway.

5 THE COURT: Well, on the question of interest,
6 I think your argument on interest was on the \$100.00,
7 is that not right? On the check that was kept for a month?
8 Are you saying that to award \$400.00 interest on a \$100.00
9 check for a month --

10 MR. KELLY: I'm having trouble getting from
11 \$2,100.00 to \$2,500.00, Your Honor. I'm trying to think --

12 THE COURT: Any objection to the Court amending
13 the verdict to \$2,100.00 compensatory?

14 MR. KELLY: No, Your Honor.

15 MR. COTNER: No, Your Honor.

16 THE COURT: All right. The Court would amend
17 the jury verdict to \$2,100.00 compensatory.

18 ✓ On the other motion by counsel for the defendant
19 with reference to the prejudicial evidence of highballing,
20 lowballing and bumping, I think it was a jury issue from
21 Mr. Glasser's testimony. He explained to the jury what
22 highballing, lowballing and bumping in the trade meant.

23 And, here, I think it was a question for the

1 jury, if he did participate in such activity. That the
2 trade-in allowance, he said, should have been \$2,500.00,
3 but by error, it was \$3,500.00.

4 And, by the credible testimony of the plaintiff
5 in this case, that he told her when she left the shop
6 that she could not find a better deal anywhere. And, then,
7 she came back, and, as far as the Court is concerned, if
8 Mr. Glasser would have been there, I think the bumping
9 would have started at that point, saying that a mistake
10 had been made.

11 So, it's a question; it's a jury question, if
12 Mr. Glasser made a mistake or he participated in highballing,
13 lowballing and bumping in the case.

14 And, I let it go to the jury on that, and,
15 evidently, the jury thought he participated. And, he
16 said that it was a mistake, and it was an issue for the
17 jury to decide: If they believed Mr. Glasser or if they
18 believed the plaintiff in the case from the evidence.

19 The Court would enter judgment in the verdict,
20 but the verdict would be amended to \$2,100.00 compensatory
21 ✓ and left standing at \$7,500.00 punitive.

22 MR. KELLY: Yes, sir.

23 MR. COTNER: Thank you, Your Honor.



PEACOCK BUICK, INC.

8590 LEESE 3 PIKE
TYSON'S CORNER
VIENNA, VIRGINIA 22180
PHONE 790-0000



STOCK NO.

PURCHASER'S NAME

NAME (PRINT OR TYPE)

SOCIAL SEC. NO. 711-16-5483

SOCIAL SEC. NO. (PRINT OR TYPE) DATE Jan 6 78

PLEASE ENTER MY ORDER FOR ONE ☒ NEW ☐ USED ☐ DEMONSTRATOR AS FOLLOWS:

YEAR	MAKE	MODEL OR SERIES	BODY TYPE	COLOR	TRIM
1978	Buick	AJ 47	Cpe	Saffron	Orth Tan
MVI OR SERIAL NO.	MILEAGE	TO BE DELIVERED ON OR ABOUT	A S A P 1978		
152.00	5047	54	P. Vies		
341.00	190.00	447	Sters 8 Truck		
39.00	544.00		W. Vies		
18.00	20.00		H. May		
10.00	40.00		Head 1.00		
11.00	62.00		V. K. Neb		
100.00	28.00		V. K. Neb		
	33.00		V. K. Neb		
	307.00		V. K. Neb		
	69.00		V. K. Neb		

CASH PRICE OF CAR 1011.54

1011.54	TOTAL				
1011.54	TAX				
1.00	TAG FEE				
1012.54	TOTAL CASH DELIVERED PRICE				

NO LIABILITY INSURANCE INCLUDED

LIMITED WARRANTY SEE REVERSE SIDE FOR CONDITIONS.

100.00	CASH DEPOSIT SUBMITTED WITH ORDER				
3500	ALLOWANCE FOR TRADE-IN AS APPRAISED				
3427.54	LESS BALANCE OWING TO				
3427.54	NET EQUITY				
3412.54	BALANCE DUE ON DELIVERY				

USED MOTOR VEHICLE ONLY LIMITED WARRANTY

THE FRONT AND BACK OF THIS ORDER COMPRISE THE ENTIRE AGREEMENT AFFECTING THIS PURCHASE AND NO OTHER AGREEMENT OR UNDERSTANDING OF ANY NATURE CONCERNING SAME HAS BEEN MADE OR ENTERED INTO, OR WILL BE RECOGNIZED.

THIS ORDER IS NOT VALID UNLESS SIGNED AND ACCEPTED BY DEALER OR HIS AUTHORIZED REPRESENTATIVE

APPROVED: DEALER OR AUTHORIZED REPRESENTATIVE

185

PLAINTIFF'S EXH. 1


JANE ENID DURKIN
1530 Northgate Sq., No. 121
Reston, Va. 22090

125
68-107
560

2/21/78

Pay to the order of North Hill Buick \$ 347.00

Three thousand four hundred twenty seven and no/100 Dollars

 **United Virginia Bank**
Alexandria-Manassas-Arlington
Fairfax-Prince William, Virginia

Memo: final payment

Jane Durkin
EX

⑆0560⑉0107⑆ 129 904 87 656⑈

Pl. # 2
Jan 4 2077 1245178

PLAINTIFF'S EXH. 2

PLEASE HOLD MY PERSON'S CHECK IN THE AMOUNT OF \$ 125.00

THIS CHECK WILL BE REPLACED WITH same ON 2/31/78

OR DEPOSITED ON 2/31/78 MANAGERS APPROVAL

CUSTOMER'S SIGNATURE

DO NOT DEPOSIT
WARRANTY SOLD BY BELL

Alexandria-Manassas-Arlington
Fairfax-Prince William, Virginia

Memo 2 yr. Warranty

0560 01071 130-904-87-658

John D. [unclear]
2/21/78

PLAINTIFF'S EXH. 3

STOCK #	1474A
YEAR	CHEV
MAKE	MONZA
MODEL	
COLOR	BLUE
SERIAL	1975
CODE	
OPTIONS	
Pl ^{EX} 10-#4 12/57 4213378	

PLAINTIFF'S EXH. 4

USED CAR APPRAISAL REF. 11-1			
OWNER'S NAME <i>James Parker</i>		DATE <i>Jan 10-79</i>	
ADDRESS <i>1530 1st St. S.W. 178</i>			
INTERESTED IN <i>Religion</i>			
MAKE OF CAR <i>Chrysler</i>	TYPE <i>242</i>	YEAR <i>1975</i>	
SERIAL NO.	MOTOR NO.	LICENSE NO.	
MILEAGE <i>44,000</i>	SALESMAN <i>James</i>		
FINISH <i>A35-9653</i>	CONDITION	COST REPAIRS	
BODY AND TOP			
FENDERS	<i>Blue</i>		
TIRES			
STARTER			
BATTERY	<i>44,088</i>		
MOTOR			
TRANSMISSION			
REAR AXLE			
INTERIOR	<i>272</i>		
JACK			
POWER — <input type="checkbox"/> BRAKES	<i>NO A/C</i>		
<input type="checkbox"/> STEERING			
POWER — <input type="checkbox"/> SEATS	<i>NO P.S.T.</i>		
<input type="checkbox"/> WINDOWS			
AIR CONDITIONING			
TOTAL COST REPAIRS		\$	
APPRAISED BY <i>CV 14100</i> <i>mm</i>	USED CAR AVERAGE VALUE		
	DEDUCTION FOR RECONDITIONING		
	ALLOWANCE		
	<i>12/578</i>		

PLAINTIFF'S EXH. 5