

We're going to be putting into evidence, that the odometer statement was simply drafted off the odometer reading on the car. And Mr. Powell, of course, as I've indicated, received the car showing higher miles. Mr. Benigno didn't ask Mr. Powell, "Are the miles right?" They didn't sit around and discuss this point.

So we're going to be putting in evidence that the very best, even from Mr. Benigno's point of view, even from Hilltop's point of view, the very best they can say is that they closed their eyes to a thousand indications that what they were getting was a rolled back or wrecked car or heaven only knows what, and they turned around and covered it up. And that's the nature of the business, of an industry, and it takes dealers like Hilltop to support that industry.

Now, the damages that we're going to be putting in evidence about, as I mentioned, the Delongs bought the car for thirteen thousand dollars. And they had finance charges of a thousand dollars approximately, and they had taxes, and they had all kinds of problems running around. They resold the car for eleven thousand three hundred dollars. But that was, of course, before they knew about the rollback.

Now, the judge will be instructing you at the close of the case as to how you calculate what their loss is. And the instructions, we'll be putting in evidence that the car actually at the time that they bought it was not worth thirteen thousand dollars. It was worthless, being from an auction. But it was worth a whole lot less when you knew it had been tampered with and had a rolled back odometer. That difference in value from thirteen thousand dollars down to perhaps half that value, eight thousand, seven thousand, with a rolled back odometer, what was that car worth.

We're going to be putting in evidence that with a rolled back odometer and coming from an auction, that car was worth a whole heck of a lot less than the Delongs paid for it. That's going to be what the Delongs actual damages are, what I will ask you to award or compensate them for their loss, in addition to the other incidental charges, their time, the finance charges, this kind of thing.

But again, there's a different issue in this case that is much broader. That is the question of punitive damages. Now, punitive damages we'll be asking for. And they are to punish. They are for three basic purposes. To punish, to deter this person, any one of these people from doing this kind of conduct again, and third, to deter other people.

And we're going to put into evidence that we think will show you that in order to punish an appropriate amount, it would take something substantial, because there's so much profit involved. Second, in order to deter any one of these dealers who can, as a business practice, make so much money, it's going to take a lot of money to deter. And third, it would take an awful lot of money to deter other people in this industry, this industry-wide problem, to do something about this practice. So ultimately we are going to ask for substantial punitive damages to punish, deter these defendants, and to deter other defendants. Thank you.

G.3 Sample Closing Argument³

MR. BROWN: May it please the Court, ladies and gentlemen of the jury, we appreciate your patience and tolerance as this process bumps and grinds along and we trot up to the sidebar. It's a privilege for me to have an opportunity to address you on a case especially of this kind. And we trust that the privilege of being on a jury is something that perhaps sets off the pain of going through a week of waiting around.

I have first a couple of housekeeping things, little practical things that I want to explain about how this all works.

First of all, remember, this is not a criminal case. In a criminal case, you would be familiar with the idea that one has to prove guilt beyond a reasonable doubt. Make sure you understand that the instructions show you all the plaintiffs have to do is cause you to believe the facts, as they say them, to be true. That's not proof beyond a reasonable doubt.

If you think as if there were a balance scale, if there were questions where you're trying to decide who was correct, as long as the plaintiffs have more evidence in their side of the balance scale, as long as it tips and your belief is stronger on one side than the other, that is sufficient. So you don't have to worry about finding guilt beyond a reasonable doubt.

Now, a second thing. The exhibits, we've not yet passed them to you. You can ask for the exhibits. I'm going to be referring to them here. But you can ask for the exhibits when you go to the jury room. And I would encourage you to do that. If you have any doubts about anything, have the exhibits in front of you. You'll be able to look over whatever you want. Some of the exhibits might take a little bit of study. We refer to them.

But, for example, the records from McCullagh Leasing, showing checks and amounts and dates. Vehicle identification numbers. Compared with the sales invoices, you might have to look at them a little bit to see clearly for yourself.

Now, one other thing, when you go to the jury room, you don't have to leave your common sense here. As representative members of the public trusted with the position of being jurors, you can take your own concepts, your own sense, your own insights with you into the jury room. All of your experience, all of your background, you can use that. You don't have to go in there and act as though you have no background at all. Your collective experience is what helps you to be jurors. Don't leave your common sense back here.

About reading the instructions, I will go through the instructions a little bit later on. They go quite awhile. You'll want to take your time and look at them fairly carefully. It may take you awhile to read them. But you will find that they do break down to be pretty simple.

For example, the instructions that the Judge has just read to you, this is what it takes for the plaintiffs to prove fraud against

³ This closing statement to the jury in a trial for violation of the federal Odometer Act and related claims is intended solely for purposes of demonstration. The statements are adapted from *Delong v. Hilltop Lincoln-Mercury, Inc.*, No. 552408 (Cir. Ct. Cty. of St. Louis, Mo., 1989), a successful case for the plaintiffs argued by Bernard F. Brown, an attorney in Kansas City, Missouri. The appeal is reprinted at 812 S.W.2d 834 (Mo. Ct. App. 1991).

Hilltop. There's another instruction immediately following it saying the plaintiffs have to prove all of those things in order to find against Hilltop. You'll find repetitions like that. It's two very similar instructions. You'll see this throughout the jury instructions.

Take your time to wade through them, and I suggest you'll find that they are fairly straightforward, that they are often saying very much the same thing. The plaintiffs have to prove their case, and the defense wins if the plaintiffs haven't proven their case. You'll find that pattern throughout the instructions.

When I started in the opening statement, I used the analogy of looking through a porthole. And we hope that we've helped you look through a porthole. And we hope that it's become a little clearer why we're talking about it as if you're looking through a porthole. You undoubtedly didn't know what you now know about the industry, and about this kind of operation.

We submit to you that the evidence has shown that the defendants here have attempted in every way, as a matter of practice, as a matter of industry norm, to cover up the porthole to the general public, to keep most people from seeing through the porthole.

They cover it up with things like federal odometer statements. They cover it up with concealment, misrepresentations about where the cars come from, to keep you from finding out about the history of a car.

Our case has been about getting these things that may be common knowledge somewhere else in front of you. And we hope that you now have enough of a glimpse through the porthole that you have a good idea of a whole lot of other things beyond—that you still haven't seen specifically, but enough insight that you can see beyond and you can see past the concealment.

The case has several ways in which it's one side or the other. The position of the defendants is, oh, there's no such thing as a bad reputation for Western Kentucky cars. Well, that's pretty radically different; that's totally different from what the plaintiffs' witnesses are saying. It's even totally different from what Mr. Powell was admitting, one of the defendants.

But there are several ways you'll see from the evidence that it's one way or the other. And you are really forced to confront the question, "Well, which side do I believe?" There isn't much of a middle ground.

Either you find people like Mr. Benigno credible, when he says, "Oh, no, the reputation was great. It's perfect." He didn't say, "Well, yes, there were some problem cars every now and then." He says it was practically perfect.

And the alternative is, it was so bad that some dealers wouldn't go, and law enforcement people heard all about it. And fifty percent of the cars were rolled back at the auctions or from Western Kentucky.

Now, you look at that, and I submit to you that there isn't an in-between. It must be one or the other. The distinction is so far gone that we submit that when the defendants take the position that there was no reputation at all, then that's false. That they know it's false. That it's actually—and their extreme position helps show you what they are hiding from how bad it really was.

Specifically, let me go back through the particular evidence on particular claims. Now, the plaintiffs have two claims against

each defendant. A claim called fraudulent misrepresentation and a claim called violation of federal odometer law. They are very similar. And I'll mention to you now, that there are two different theories, reasons why the plaintiffs could recover against each defendant, but that plaintiffs will not get damages—actual damages twice against any one defendant.

If you find in favor of the plaintiffs against Hilltop on fraud and on federal odometer law, which we submit is practically the same thing, the plaintiffs will end up—later on, after your verdict is over with, the plaintiffs will have to choose one or the other. So there won't be an overlap. There won't be two recoveries against any one defendant. You needn't worry about that.

Let's go back to the basics here of some of the more obvious things. Mr. Powell. The plaintiffs have claimed fraud against Mr. Powell. The plaintiffs claimed that Mr. Powell represented the miles on this vehicle were correct when he sold them at the auction. And that he either knew—as the instruction says, he either knew that the miles were false, or he did not know whether they were true or false.

If you concluded, as we think you should, that of course he either actually knew it for a fact, or at the very best, he did not know whether the miles were right. If you conclude that, then we submit that everything else falls into place. He made a representation, as the instruction will tell you, that was material. It was important. It was false, he knew it was false or did not know whether it was true or false. It's a fairly straightforward proposition when you get to that point. Do you find that he either knew it was false or did not know if it was true or false.

In fact, we all know it was false, we all know the miles were rolled back. There isn't anything left. So it's a pretty simple claim against Powell.

You heard him say, "I didn't know the miles were wrong. I wasn't standing there when they rolled it back." Well, this is perhaps the reason why the jury instructions don't make you—you don't have to conclude that Mr. Powell knew that the miles were false. It's sufficient if he didn't know whether they were true or false.

But he said, "Yes, I know they are true." That's fraudulent misrepresentation right there.

Now, I don't think I'll spend too much time rehashing the evidence that shows Mr. Powell handled this rolled back car and, in fact, knew. The vehicle was bought in the name of Powell's Cars. All the money came from his bank account. The money for the sale went into his bank account.

And then, of course, the fact of the matter is, when you look through these additional documents that we just introduced today, there are two other rollbacks. There were four cars he bought on this one day. And we've got documents that these other two cars were sold, one of them was sold on the same day as the Delongs'. The other was sold the week before. They were all rolled back. I believe the mileage rollbacks, if you look at them, are on the order of forty thousand miles. A pretty standard number. And if you look through the numbers, you'll see he's making about the same profit on each one. \$850, around in there. The fourth car, we don't have documents on.

It's obvious. His pattern and practice is perfectly clear. And you needn't—there isn't much of anything to stumble over about this. If it looks obvious, that's exactly what it is.

I'll say just one last thing. I think it probably captures it all. Mr. Powell's statement, something to the effect of, "I didn't do it, and this is the first time I've been caught."

We take the position that it's obvious it was a fraudulent misrepresentation of mileage at the auction. And you will find when you look at the instructions that that's also a breach of federal odometer law.

About Mr. Benigno and Hilltop. Let's go over again some of the basics here. There is pretty much a split in the testimony between the Delongs and Mr. McGoogan. We start there.

Now, remember, too, the fraud claim against Hilltop includes not just that they made a representation of mileage that they either knew was false or didn't know whether it was true or false. But also that they made representations that the car was a locally owned trade-in, or that the car was not an auction car. Any of those representations is a basis for fraud. And you'll see the jury instruction says if you find that Hilltop said it was a trade-in, or they said it was not an auction car, or they said the miles were correct, and if they didn't know whether it was true or false, that's sufficient for fraud.

So there's not just one reason for fraud, not one particular ground for fraud against Hilltop. There are three. The miles was wrong, that they said it was a locally owned trade-in, and that it was not an auction car.

All right. Mr. McGoogan, while he waffled, obviously his position was, oh, no, he hadn't specifically told them that it was not an auction car. You may recall—actually, I suppose his testimony was probably the best example you could give of what the Delongs were dealing with. We submit to you that Mr. McGoogan was actually waffling a great deal, stumbled very hard when he was trying to answer some of these questions. And, in fact, admitted quite a bit at some points about, well, he may have.

His formal position was, "No, I didn't tell them this. They didn't ask me any more about it. When they bought the car, I didn't tell them it wasn't an auction car." But his position when we went on with the testimony was, he very possibly said something to the effect that it was a trade-in.

So let's go a step further with Mr. McGoogan. I read you his deposition testimony, hopefully not too tediously. In his testimony there were some confirming remarks. It came across that he usually represented a car as being a trade-in car. And he may have offered some excuses, like, well, maybe he thought they were trade-in cars. But the fact of the matter is that Mr. McGoogan's testimony, while he starts out denying everything, it ends up being that he was pretty much acknowledging a pattern, a standard practice of misrepresenting the cars. And that the Delongs' car was only one example.

Cars come rolling in on Fridays. Mr. McGoogan sells them as trade-ins on Saturdays. Go through some other particular backup representations. Now what about this Mr. McGoogan, the conversation about the engine being clean? Mr. McGoogan offered the suggestion that sophisticated St. Louis folk, not like Jeff City folk, may dealer-prepare their cars. It was called to his attention. It was pointed out to him.

Even if you were to try to give him the benefit of the doubt and say, well, he didn't know specifically it was an auction car,

what did he think when it was dealer prepped? He thought it was a trade? No, of course not. Mr. McGoogan, everything points to—the circumstances point back that he knew perfectly well it was an auction car.

That's a particular circumstance that shows he would have known it was a dealer car. He would have known perfectly well he was lying when he said it was a trade-in car.

There are other things that are real misrepresentations that were made. All of this is part of a concealment. Mr. McGoogan said—let's see,—how bad were the problems with the car? How bad were the problems? Mr. McGoogan said at one point, insignificant? Insignificant? This car had real problems. Again, Mr. McGoogan has every reason to—every motive to cover up how bad the problems were.

How much would it take to fix that computer? How much would it take to fix that car dying? The defendant's own testimony, the testimony that they brought in, shows you it was a bad problem.

So he's covering up where the car came from. Actually lying about it. He's cutting off the opportunity of the Delongs to find out for themselves just how sordid the history of the car is. He's covering it up by saying the car wasn't dealer-prepped by anybody but a local owner. He's cutting it off by saying there are not real problems with the car. The car is okay. It's simple.

Anything to move the car off the lot. Anything to get a buck. It boils down to, can you make money by passing it on? Yeah, you can make money. If you want to lie, if you've got a position where people would trust you and they will take your word for it, then you can make a buck real fast. That's what we submit Mr. McGoogan was doing, pure and simple.

And it wasn't just Mr. McGoogan. Did Sal Benigno supervise this man and not have any idea what was going on? Did Sal Benigno supervise Mr. Barnes and not have any idea that he likewise was, apparently as a matter of practice, saying cars were trade-in cars?

Again, you don't have to leave your common sense behind. These folks were family. If nothing else has been shown, Hilltop has shown themselves as being a fairly tightknit family, haven't they? They worked quite well among themselves. They all come in and back each other up. They all knew what was going on.

Mr. Benigno supervised these people. They were part and parcel of the same deal. Don't tell us, and don't let them tell you that Mr. Benigno was ignorant of what Mr. McGoogan was doing and that Mr. McGoogan didn't know that he was handling auction car after auction car with false representations to move them along.

Now, obviously a lot of this case gets to a broader question of an industry. And that is something that you've heard quite a bit of specific testimony about, about what the reputation was, about traveling cutters in Western Kentucky, and things like this.

But remember you've only seen the tip of the iceberg. And your reasoning can tell you that for every one of these specific facts you've seen that indicates something out there, one rock's been turned over. It can lead you to see that there is a whole lot more than has been shown to you so far.

For example, these folks, Mr. Benigno, pretends he goes to the auction, and the reputation is clean. Now, we've got peo-

ple saying the reputation is anything but, but he goes to the auction, and he doesn't ask anything about the car. Nothing.

Now, we submit that that fact says a whole lot to you. Think about what that means. To use an old tried and true question, "Would you buy a used car from this man?" Mr. Powell? Not to pour any particular abuse on Mr. Powell. But practically speaking, would you go to an auction with a guy like Mr. Powell representing the car, not ask a question, say yes, I mean, "I'll buy his car, I believe every word he tells me, that the miles are right."

In fact, most people probably would choose a dealer they would go to pretty carefully in the first place in this town. And then a lot of people say, "I want a mechanic to check this car out. I want to know something about it." That's an individual.

Would an expert, a dealer like Mr. Benigno with thirty years in the business, go to the auction, not ask a question, not do any checking. Not check out reputation. He doesn't buy reputation, he told you. And just take that car and believe what he's told? We submit to you that if a dealer takes a position that he does that, he's got his choice. He's either a fool, or he's up to something very obvious. Well, we submit it's obvious what he was up to.

This leads to the conclusion, they are making money. They are there because they can buy cheap and sell high. And that's exactly what they did with this car. And this is exactly what they did as a standard policy.

Thirty-five hundred dollars difference in selling price between when the car was sold at auction and the car was sold to the DeLongs. The car was sold at auction for ninety-five hundred dollars, and the car was sold to the DeLongs for thirteen thousand dollars. Thirty-five hundred dollars difference overnight. Buy on Friday for ninety-five hundred. Sell on Saturday for thirteen thousand.

The motivation is overwhelming. It's pretty darn easy to see why this game would be played. And it's pretty easy to see why he would be satisfied if he got a federal odometer statement.

And then one other major thing. Nobody would ever find out. Nobody would ever find out. And if nobody figures it out, where are they? A consumer buys a car and has problem after problem with this car, they never know that it's rolled back. The DeLongs never found out until there was a tip given to them, an attorney who was familiar with this industry said, "Hey, check it out. This is a Kentucky car at an auction? You better check the mileage." Sure enough.

Most people, even after they consulted an attorney, wouldn't have known to check the mileage. The industry works so well.

Let's go through a couple of other singular things about the practices of Mr. Benigno and Mr. McGoogan, compare them with what an honest dealer did when the DeLongs went to another dealership and were looking at a car and asked, "well, now, is this a trade-in car?" No. They were told it was a dealer car. There are honest dealers out there, happily. That's a big difference between what was going on in this case—exactly the difference. That is exactly why this car ended up being in the DeLongs' hands.

Now, let's go through another example, again comparing Benigno. How did the DeLongs buy a car? You know, I think it's fair to say the DeLongs did everything right. The DeLongs, to buy a car, they started asking questions of somebody who knows the business. "Now, you know the business, what should

I do, where should I look for a car?" "Don't get an auction car. don't get one of those dealer cars. Stay away from those things."

They checked. They went to dealers that appeared to them to be reputable. First they asked around and found out about the business, educated themselves.

Second, they go to apparently reputable dealers that they have no reason to believe would have anything other than trade-in cars.

Third, they ask when they are looking at the cars.

Fourth, they do ask about the problems, and they are specifically told the miles are okay.

Every single one of those things is totally different from what Mr. Benigno, an expert in the business, did. And they are individuals. It's his business to know. It is Hilltop's business to know. They know people trust them. They know people think they have trade-in cars there. It's their business.

You've heard the testimony from the trooper, who wasn't just talking about some isolated instances, obviously. He also talked about his fellow troopers working on this problem. It paints a picture of law enforcement being kind of overwhelmed, and not being about to stem this tide.

Well, that makes sense; they have people in Kentucky with operations with traveling odometer cutters returning around flooding the market with cars. Law enforcement in our country has plenty to do. They have drug problems to deal with. They have armed robberies to deal with. They have murder, rape, and every kind of heinous crime to deal with. They can't stop all of this.

What you heard from the trooper was a frustrating, limited glimpse of our good people in law enforcement being unable to do very much at all. He knew perfectly well what was going on. Obviously it didn't stop this problem.

Okay. I'm going to go through the instructions a little bit, with a little bit more particularity. Remember that in the instruction on fraud against Hilltop, it starts out by saying, you'll find in favor of the plaintiffs and against Hilltop if you believe—there are three representations mentioned. If you believe that they represented it was a locally owned trade-in car. Or if you believe that they represented it was not an auction car. Or if you believe that they represented the miles to be correct. If you believe any of those things and you believe that they either knew that that representation was false, or didn't know whether it was true or false, that leads to a conclusion in this case, and everything else will fall in place for you. That's fraud. That's sufficient for you to come to the conclusion on fraud.

With respect to Mr. Benigno, and with respect to Mr. Powell, it's only a question of mileage. The question is whether you believe they represented the miles to be correct, and they knew it was false or didn't know whether it was true or false.

The federal odometer claim instructions use slightly different language. They refer to whether the defendant has a quote-unquote, "specific intent to deceive or cheat." Called an intent to defraud. We submit to you, for practical purposes, this same evidence leads to the very same conclusion. Violating the federal odometer law is another way, it's another remedy for the same kind of conduct. There's a federal statute, a federal law that is so concerned about the mileage problems. You'll find the same kind of evidence will lead you to the same conclusion.

There are no tricks. These instructions are not written to be—don't look for hidden tricks. It's not the way they are done. Sometimes jurors might think, "Well, I'm getting a hint there." No, just read them as they are. Put common English to them. That's the way they are supposed to be.

THE COURT: You have three minutes, Mr. Brown.

Mr. BROWN: In filling out the verdict forms, there's a place to write the plaintiffs' name. It's kind of cramped. There's a place for both names. It's cramped. Sometimes there can even be questions about filling it out, if you find in favor of the plaintiffs, you would write out both of their names in the blank where it says plaintiffs.

And here's another important thing. The actual damages. The actual damages that the plaintiffs are seeking, that's defined in the instruction very specifically. And it would be the same for all of them. It might be a little worse for Hilltop. But recognize the actual damages anywhere should be pretty much the same. And that is the difference in value of the car on the day it was bought as it was represented,—it was represented to be a pretty much wonderful car, of course—and what was it actually worth the day it was sold? The plaintiffs bought the car for thirteen thousand. Their evidence is the car was worth perhaps half that with a rolled back odometer.

Remember, not just inaccurate mileage, but it was a car that had been tampered with. If you tried to sell that car and told the truth, at fair market, perhaps half. That's the plaintiffs' suggestion as to what their actual damages were.

But there's a much bigger issue in this case. And this is what we're doing here today. And that's what makes this case worth six years of toil and trouble. Punitive damages.

The punitive damages instruction asks, was the conduct of the defendants outrageous? Did they exercise reckless disregard for the rights of others? If you reach the conclusion that their conduct was that way, then you give punitive damages for three reasons; to punish a defendant, to deter the same defendant from doing it again, and to deter others from doing it.

In this case, a quick calculation gives you an idea what's going on. Hilltop was making thirty-five hundred dollars on a car. Fifteen cars a month, Mr. Benigno talked about. What kind of profit were they making? Fifteen times three thousand a month. Forty-five thousand a month profit.

We submit that you should consider the figure against Hilltop, for example, forty-five thousand a month profit times twelve months. Take one year's profit alone, just one year's profit from them. Something like that is the kind of figure we have in mind.

Now, remember that they went through these calculations. We're making this a business proposition like they did. Remember that they don't—some of us work hard and don't earn very much money for many years. And five thousand dollars is a lot of money. They work with huge sums of money. Six million dollars—

THE COURT: Mr. Brown, your time in your first segment is over.