

IN THE COURT OF APPEALS
THE SECOND APPELLATE DISTRICT OF TEXAS

TXI TRANSPORTATION COMPANY,
RICHARDO REYNA RODRIGUEZ, AND
AURELIO MELENDEZ

VS.

NO. 02-04-00242-CV

RANDY HUGHES, INDIVIDUALLY AND
AS PERSONAL REPRESENTATIVE OF
THE ESTATE OF SHILOH HUGHES;
CLINT ROYSE, INDIVIDUALLY AND
NEXT FRIEND OF JAGR ROYSE AND
AS PERSONAL REPRESENTATIVE FOR
THE ESTATE OF AFTON HUGHES
ROYSE, ET AL

R E P O R T E R ' S R E C O R D
(TRIAL DAY NO. 6, May 12, 2004)
(VOLUME 10 OF 15)

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On the 12th day of May, 2004, the following
proceedings came on to be heard in the above-entitled and
numbered cause before the Honorable John H. Fostel, Judge
presiding, held in Decatur, Wise County, Texas:

Proceedings reported by Computerized
Stenographic Method and Computer Aided Transcription.

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NO. 03-05-379

RANDY HUGHES, Individually)
and as Personal Representative)
for the ESTATE OF SHILOH)
HUGHES; CLINT ROYSE,)
Individually and as Personal)
Representative for the ESTATE)
OF AFTON HUGHES ROYSE; and as)
Next Friend of JAGR ROYSE;)
WILLIE WATKINS; Individually)
and as Personal Representative)
for the ESTATE OF JOYCE)
WATKINS; SHIRLEY RITCHEY;)
CAROLYN LARGENT; BETTY GENTRY)
and JOHNNY WATKINS)
Plaintiffs,)

IN THE DISTRICT COURT

OF WISE COUNTY, TEXAS

VS.)
TXI TRANSPORTATION COMPANY;)
AURELIO MELENDEZ; and RICARDO)
REYNA RODRIGUEZ)
VS.)
WILLIE WATKINS, Individually)
and as Personal Representative)
for the ESTATE OF KIMBERLY)
WATKINS HUGHES)

271st JUDICIAL DISTRICT

(TRIAL DAY NO. 6, May 12, 2004)

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Proceedings reported by Computerized Stenographic
Method.

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8

9 "Uh-huh" is an affirmative response while

10 "Huh-uh" is a negative one.

11 Words, phrases and/or spellings are underscored

12 to emphasize that, while they may be incorrect as they are

13 transcribed in their underscored state, the Court Reporter has

14 transcribed them exactly as the speaker uttered them.

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1 P R O C E E D I N G S

2 (Proceedings continued on the
3 12th day of May, 2005.)

4 -----
5 (Discussion off the record.)

6 -----
7 (Proceedings held outside presence and/or
8 hearing of the jury.)

9 MR. STRADLEY: Your Honor, if I may lead
10 off. We have a private investigator by the name of Alex
11 Hewitt, who has been timely disclosed, produced for
12 deposition -- two depositions, and we -- under the
13 motion in limine, No. 39, we were asked not to disclose
14 his testimony about the subject unless we approached the
15 bench.

16 Mr. Hewitt is a private investigator who
17 met with Mr. Simpson in his office in December 2002, a
18 couple of weeks after the accident. He will testify
19 that there was no --

20 In fact, if I could just read a very brief
21 excerpt, page 13 of his deposition, line 15, question by
22 Mr. Simpson.

23 (Reading.)

24 "QUESTION: Okay. What do you intend to
25 testify to about -- on the December 27th, 2002 meeting

1 with me?

2 "ANSWER: Our conversation.

3 "QUESTION: Okay. And tell me what our
4 conversation was, as you understood it.

5 "ANSWER: I came to your office, spoke with
6 you in reference to the case. You stated that you had
7 some --

8 "You were pursuing maybe a tire case --
9 going after the tire company in reference to this. And
10 that --

11 "We presented each other with cards, and
12 then we left.

13 "QUESTION: And you intend to testify in
14 court, you think it's relevant, and you intend to
15 testify in court that I told you that we were pursuing a
16 tire case, and you want to tell the jury that?

17 "ANSWER: If I'm asked that question, yes,
18 sir."

19 Ending page 14, line six.

20 We believe that this is relevant. We have
21 him here to testify live. They have opened the door to
22 this testimony by repeatedly asserting that the tractor
23 trailer, and specifically, the clearance pole were not
24 made available for inspection in a reasonable time after
25 the accident, and this is evidence to rebut that, and we

1 would ask that the Court allow it.

2 THE COURT: Your offer is denied.

3 Next?

4 MR. HURD: Yes, sir, your Honor.

5 In addition to that, Defendants would
6 offer, for the jury's consideration, Defendant's
7 Exhibit 423, which reflects a net worth figure as of May
8 31, 2003. This number was taken off of a -- an
9 accounting balance sheet. The backup documents are
10 available, but because the only figure that's admissible
11 before the jury on the issue of punitive damages is net
12 worth, this number has been taken from the balance
13 sheet, as a whole, so that we can offer the net worth
14 figure only for the jury's consideration, if they should
15 get to the issue of punitive damages.

16 And as I say, the backup documents are
17 available, and Jonathan Kennemer if called to testify on
18 this issue, would testify that he obtained the backup
19 documents and this figure in the ordinary course of
20 business from TXI Transportation Company accounting.

21 And if the Court sees fit to not allow this
22 in evidence, then we offer Defendant's Exhibit 423 as a
23 bill of exceptions.

24 THE COURT: Response?

25 MR. BOYD: Your Honor, our response is

1 there's no predicate been laid for the bill that they've
2 put in.

3 Number two, if the net worth was not
4 submitted, it wouldn't be relevant to punitive damages
5 anyway. We've not had a witness identified for this,
6 and there's --

7 I guess I've already said, that there's no
8 predicate laid for Exhibit 423, your Honor.

9 MR. HURD: Well, I mentioned that the
10 backup figures are available, and Mr. Kennemer, if
11 called to testify on this, would -- would testify that
12 the accounting sheet, the balance sheet in which this
13 figure is taken is kept in the ordinary course of
14 business and is a business record.

15 MR. BOYD: Well, I don't think he's been
16 identified as a person with knowledge of relevant facts
17 in accounting, your Honor. He's identified as the
18 safety director and corporate rep.

19 Secondly, your Honor, the -- the public
20 information that's been pulled from TXI that's been
21 filed with the documents, disagrees with this \$7 million
22 figure. What it looks they've done is they've pulled
23 money out up to the parent company. The parent company
24 has a much more significant net worth figure that if
25 they would put that in, we would have to contradict

1 Exhibit 423, we would be compelled to put in that type
2 of evidence, and then -- then you've got an issue going
3 to the jury that I don't think they're going to be asked
4 about.

5 THE COURT: I'm going to deny your offer.

6 MR. HURD: All right. Your Honor, next, I
7 believe during the Plaintiff --

8 THE COURT: What I'm denying is that
9 exhibit.

10 What's the exhibit number?

11 MR. HURD: The exhibit number is --

12 THE COURT REPORTER: 423.

13 MR. HURD: -- 423.

14 THE COURT: All right. What's next?

15 MR. HURD: Next, earlier in the case, your
16 Honor, I had cited the Court to page 131, and 132 of
17 Kurt Marshek's deposition, for purposes of making a
18 bill, relative to his interest in seeing cell phone
19 records, and the effect cell phone records -- records
20 information in and the cell phone records might have on
21 his opinions.

22 And specifically, Defendants' Exhibit 570,
23 is page 131, line two through 16, and page 132, line two
24 through eight, which completes the record on my -- my
25 bill relating to what his testimony on cell phone

1 records would be, and I offer that now for purposes of
2 the record.

3 THE COURT: Response?

4 MR. BOYD: Your Honor, for the same
5 reasons, we object to the cell phone testimony.
6 Throughout there's no reasonable connection between the
7 cell phone and the accident, and therefore, we would
8 object to it on that basis.

9 Further, your Honor, Mr. Marshek's
10 testimony, we haven't seen any cell phone records, so
11 that couldn't be the basis of his opinion, so we would
12 object to it for that reason, as well.

13 And I believe the record will reflect this
14 was brought up earlier and we made objections earlier.

15 THE COURT: I think it's been brought
16 about -- well, in the record it's been brought up about
17 20 times pending the motion in limine, and both sides
18 have argued what the testimony will be, and the Court
19 has accepted that argument as to what the testimony
20 would be, but if you think there's anything else
21 that hadn't been in the record --

22 MR. BOYD: No.

23 THE COURT: -- you need to, put it in
24 there.

25 MR. BOYD: That's what I was doing. For

1 purposes of this bill was incorporating those previous
2 objections, your Honor.

3 THE COURT: All right. Next?

4 MR. HURD: Next, your Honor, the Court has
5 previously excluded a redacted version of the police
6 report from which the -- all of the opinions on how the
7 accident happened has been previously excluded. I
8 believe that's Defendants' Exhibit 426.

9 And at this time, your Honor, I would like
10 to offer pertinent pages from the police report that
11 contain those opinions, which I believe is admissible
12 under the McCrea versus Echols case, which your Honor
13 will recall was in our pretrial brief on -- on this
14 issue.

15 And Defendants' Exhibit 430 does contain
16 the investigating police officer's opinions as to how
17 the accident happened, which we would -- we would offer
18 as a -- as an official accident report of the DPS and is
19 admissible under McCrea versus Echols.

20 In addition to that, your Honor, had
21 Trooper Raney been permitted to testify as to what her
22 opinions were, under the Tervartanian versus R&R Freight
23 Company case, if I can take about 30 seconds here, your
24 Honor, I'd like to read for the record this portion of
25 the police report.

1 THE COURT: That's --

2 Why do you need to read, if that's on the
3 document?

4 MR. HURD: All right. Then --

5 THE COURT: Just refer to that portion.

6 MR. HURD: All right. Her testimony, your
7 Honor, would have been as reflected on the Defendants'
8 Exhibit 550, as to investigator's narrative opinion of
9 what happened; that her opinion testimony would have
10 been as reflected therein on Defendants' Exhibit 550.

11 MR. BOYD: We renew our objections, your
12 Honor, that we discussed in pretrial. Further, there
13 was no testimony in any of the offers that any of her
14 opinions were based upon reasonable probability, so we
15 include that objection, as well.

16 And as I recall this was taken up at the
17 pretrial, basically testimony from the experts about the
18 predicate for --

19 Their own expert laid out the predicate for
20 their testimony.

21 THE COURT: All right. Denied.

22 MR. HURD: All right, sir. That's all I
23 have.

24 And where do we stand on our --

25 I forget now where we stand on Ms. Battles.

1 MR. FORBIS: Yes, your Honor, at this time
2 the Defendants would request to make an offer of proof
3 in question and answer format, the testimony of Tonya
4 Battles, the representative from Cingular Wireless
5 concerning the cell phone records, and to make a proof
6 that the Plaintiffs keep requesting that we do, that it
7 makes a reasonable connection between the cell phones
8 that were in the car and the cell phone of Randy Hughes,
9 that was elicited from the testimony off the record
10 during our previous offer of proof.

11 Ms. Battles will testify concerning the
12 records of the Plaintiffs that were provided to us by
13 Plaintiffs' Counsel, and can connect up the concept that
14 the records indicated that there was an actual completed
15 call approximately 1:56 p.m., which is, in our opinion,
16 the exact time of the accident, and we feel that makes
17 the reasonable connection that the Court has, I believe,
18 recognized as a test for circumstantial evidence such as
19 this.

20 THE COURT: Mr. Boyd?

21 MR. BOYD: Your Honor, we have previously
22 objected, and we will renew our objection in the record.
23 This witness was never designated. She was designated
24 April 30th as a fact witness, but they've now made a
25 speaking objection that they intend to offer expert

1 opinions to interpret the -- what the phone records mean
2 would be beyond the normal knowledge of a lay person.

3 These --

4 They've never designated her in response to
5 Section F, professional disclosure and expert witness,
6 so we would object on that basis. We would renew our
7 objections on the cell phone, that was previously made
8 on the record, because there is no connection, and even
9 her -- her testimony still would not connect the cell
10 phones to the driver.

11 The testimony that would have been offered
12 in response to that, is that all the phone calls on
13 this -- on the record were made by the person in the
14 back seat, so she couldn't connect it by any expert
15 opinion.

16 And then, lastly, your Honor, I believe as
17 we've told the Court previously on the record, there
18 were two-minute phone calls, for example, on those
19 bills, where the next phone call would start one minute
20 after that two-minute phone call supposedly began, so we
21 don't believe the two-minute phone call just stands for
22 what they are saying.

23 For those -- For those reasons, your Honor,
24 we would object to her testifying.

25 THE COURT: Mr. Forbis?

1 MR. FORBIS: Just briefly in response, your
2 Honor. That's also what Ms. Battles will testify to as
3 to the billing increments and what's --

4 THE COURT: That might be real interesting
5 as far as how they bill their calls and everything,
6 but --

7 I was just making a comment on it.

8 What else?

9 MR. FORBIS: We would request to make that
10 offer of proof in question and answer form.

11 THE COURT: I'm going to sustain your
12 objection to the witness -- that the witness has not
13 been timely designated.

14 MR. FORBIS: Your Honor, we will object to
15 the Court's failure to allow us to make the proper proof
16 in question and answer format and submit numerous
17 exhibits here that we presume will be excluded, as well.

18 THE COURT: I'm going to --

19 I've excluded her on that basis, on the
20 basis -- the other basis -- on other bases that on its
21 face the testimony as to the 2:00 o'clock by one witness
22 and everything else that there is.

23 This is all over the board on that.

24 Just, basically, from a Daubert's
25 standpoint, as to the evidence -- as it would apply to

1 this as the evidence that the Court has heard and seen
2 regarding cell phone, plus, no connection to the driver
3 of this telephone by any other witness in the case.

4 But I'm going to let you call your witness
5 and ask some questions. Please keep it brief and to the
6 point.

7 MR. FORBIS: Thank you, your Honor.

8 That will be done off the record, but on
9 the record -- but off -- out of the present of the jury?

10 THE COURT: On the record, for purposes of
11 this bill.

12 MR. FORBIS: And when will we do that?

13 THE COURT: Right now.

14 (A brief interruption occurred.)

15 (Proceedings held outside presence and/or
16 hearing of the jury.)

17 THE COURT: Mr. Forbis, you may call your
18 next witness.

19 MR. FORBIS: Your Honor, the Defendants
20 would call Tonya Battles.

21 THE COURT: All right. Ms. Battles, if
22 you'd raise your right hand for me, I'll swear you in.

23 THE WITNESS: (The Witness complied.)

24 THE COURT: Do you swear to tell the truth,
25 the whole truth, and nothing but the truth?

1 THE WITNESS: Yes.

2 THE COURT: Have a seat.

3 THE WITNESS: (The Witness complied.)

4 Thank you.

5 TONYA BATTLES,

6 having being first duly sworn, testified as follows:

7 DIRECT EXAMINATION

8 BY MR. FORBIS:

9 Q. Ms. Battles, would you state your name for the
10 record.

11 A. Tonya Battles.

12 Q. And by whom are you employed?

13 A. Cingular Wireless.

14 Q. And how long have you been employed by Cingular
15 Wireless?

16 A. Five years.

17 Q. And tell the Court your position at Cingular
18 Wireless, please?

19 A. I'm senior revenue assurance manager.

20 Q. And how long have you had that position?

21 A. Five years.

22 Q. And what did you previously do --

23 What did you do previous to working at
24 Cingular Wireless?

25 A. I worked with a paging company, Page Hart for

1 two years.

2 Q. So you've been in the paging and cellular
3 telephone business for approximately seven years?

4 A. Uh-huh. Yes.

5 Q. And tell me in your job what your function is?

6 A. I am responsible for the validation of proper
7 rating of home records for the Texas State -- or the
8 State of Texas, so I validate records that come in off
9 our switches, all the way through billing to customer's
10 bill and I validate the accuracy and the timeliness of
11 those calls.

12 Q. All right. So you're very familiar with the
13 billing procedure, records, and the date that's used in
14 the billing; is that correct?

15 A. Yes, sir.

16 Q. Now, you were here pursuant to subpoena; is
17 that correct?

18 A. I am.

19 Q. And were you requested to review and obtain
20 certain records of cellular telephone numbers that I
21 provided you in the subpoena?

22 A. Yes.

23 Q. And have you done so?

24 A. Yes.

25 MR. FORBIS: Your Honor, may I approach?

1 THE COURT: Yes, you may.

2 (Defendants' Exhibit No. 441

3 marked for identification.)

4 Q. (BY MR. FORBIS) I'm going to hand you what's
5 been marked as Defendants' Exhibit 441, and ask you if
6 you recognize the cellular telephone bills that are
7 contained therein?

8 A. Yes.

9 Q. And have you reviewed the records of Cingular
10 Wireless to determine whether those are true and correct
11 copies of the bills for those particular telephone
12 numbers?

13 A. Yes.

14 Q. And in --

15 Would you say that those records contain a
16 memorandum record, report or other compilation of data?

17 A. I'm sorry?

18 Q. Do those records indicate that they are a
19 memorandum report or other compilation of data?

20 A. Yes.

21 Q. And you are a custodian of those records?

22 A. I am.

23 Q. As part of your job you regularly access,
24 maintain, and deal with those types of records, do you
25 not?

1 A. Yes.

2 Q. And were those records made by a person with
3 knowledge of relevant facts at the time?

4 A. Yes.

5 Q. And were the records and the reports made at or
6 near the time of the events contained therein?

7 A. Yes.

8 Q. And is the record that you're looking at made
9 as part of the regular practice of the business activity
10 of Cingular Wireless?

11 A. Yes, it is.

12 Q. And there further, the records are also kept in
13 the regular course of their business activities?

14 A. Yes, it is.

15 Q. Now, I'm going to ask you to look at some
16 particular calls in those records.

17 Can you find a page in there indicating the
18 records for telephone number that is 3 -- 940-393-1303?
19 Can you find that page of the records?

20 A. (The Witness complied.)

21 Q. Okay. Now, do you see a call placed on -- from
22 that phone at 1:57 p.m.?

23 A. Yes.

24 Q. And what's the duration of that call?

25 A. At 1:57, the duration of that call was one

1 minute.

2 Q. And what's the telephone number called at that
3 time?

4 A. 490-389-3696.

5 Q. And would you review the records for the
6 389-3696 records to see if that call shows up on the
7 bill for 389-3696, please?

8 A. No, it -- it does not.

9 Q. Okay. And what does that indicate to you that
10 the bill indicates in one-minute out-going call from one
11 number, and does not show up as incoming call on the
12 other number?

13 A. That the other number did not pick up the call.
14 It was not a completed call.

15 Q. Not a completed call.

16 I would also ask you to look at another
17 call from the same two numbers at 1:58 p.m. Do you see
18 a similar one-minute call that was made, but not
19 answered by the 3696 number?

20 A. Yes, I do. It's one minute when you go to the
21 bill with the 3696. The call does not show it
22 indicating that it was an incomplete call.

23 Q. All right. Now, let me ask you about the one
24 minute. Does that mean that the out-going call lasted
25 exactly one minute?

1 A. Not necessarily. Cingular, what we do is we
2 round our calls to the nearest minutes, so if it was a
3 61-minute call, we round that up to two minutes.

4 Q. Okay.

5 A. So this could've been anywhere from zero to 60
6 minutes.

7 Q. Or seconds, I believe you mean?

8 A. Excuse me. Seconds.

9 Q. All right. Now, let me ask you, similarly,
10 with the call at 1:28 p.m., that's placed from the
11 389-2351 number, can you find that page in the bill?

12 A. What was the time again?

13 I'm sorry.

14 Q. That would be 1:28 p.m.

15 A. Yes.

16 Q. Is that --

17 What was the duration of that call?

18 A. There was a call made at 1:28 for two minutes.

19 Q. And what's the number that was called?

20 A. They called 940-389-3696.

21 Q. And can you check the number that was called
22 and see if that number shows up as a received or
23 completed call?

24 A. No, it does not.

25 Q. All right. So does that indicate to you

1 anything different than the one-minute calls, in terms
2 of the completed call?

3 A. (No audible response.)

4 Q. You need to answer out loud.

5 A. I'm sorry.

6 No.

7 Q. Okay. Now, I will now turn your attention to
8 the call placed 1:55 p.m. from the 393-1303 to the
9 389-3696.

10 A. 1303, what was the time of call?

11 Q. 1:55 p.m..

12 A. Yes.

13 Q. And the duration of that call?

14 A. That's an outgoing call for two minutes to the
15 940-389-3696.

16 Q. And would you look at that 3696, and see if
17 that is a received and completed call?

18 A. There is an incomplete call at 1:55 for the
19 3696 from 1303 for two minutes.

20 Q. And because it shows on both bills, is that a
21 completed call?

22 A. It is.

23 Q. Does that indicate to you that not only was
24 that call placed by the outgoing call telephone, but
25 that someone on the other end with the receiving

1 telephone pressed the button and was able to make a
2 connection on that call?

3 A. Yes.

4 MR. SIMPSON: Objection; leading, your
5 Honor.

6 THE COURT: Sustained.

7 Q. (BY MR. FORBIS) The fact that the two-minute
8 call shows up on both bills, indicates what?

9 A. The time that it is showing as an outgoing call
10 on the 1303, and for the same time an incoming call on
11 the 3696, it shows that that is a completed call between
12 these two phones, and that these two phones connected
13 with the same call.

14 Q. Now, could that be reaching voice mail?

15 A. It --

16 Because it's incoming, it shows that the
17 3696 picked up the call so, no, it does not indicate to
18 me that would be voice mail.

19 Q. Now, let me ask you about the times that are
20 indicated on the bills.

21 Tell the Court how those times are kept?
22 Is that something that Cingular does itself?

23 A. No, our --

24 The time of calls are actually captured by
25 switches, and the switches are not owned --

1 Well, they're owned by Cingular, but
2 because they're maintained by the companies that have
3 the switches, all the switches are synchronized through
4 satellite. They all have the same time. All those
5 times are synchronized.

6 Whether it be a Cingular switch, or the
7 T-Mobile switch within the State of Texas all of the
8 switches in Texas, no matter what the carrier is,
9 they're synchronized through satellite, all have the
10 same times.

11 MR. FORBIS: May I approach, your Honor?

12 THE COURT: Yes, you may.

13 (Defendants' Exhibit No. 420
14 marked for identification.)

15 Q. (BY MR. FORBIS) I'm going to hand you what's
16 been marked as Defendants' Exhibit 420. Can you, by
17 looking at that, determine what that document is?

18 A. It appears to be phone records.

19 Q. Do you see a call on those phone records --
20 What company is that phone records for?

21 Pardon me.

22 A. It doesn't say on here.

23 Q. Okay. Would it appear to be Cingular?

24 A. Is it not Cingular?

25 Q. But because of what you told us earlier, the

1 times shown on that bill are going to be consistent with
2 the time shown on a Cingular bill; is that correct?

3 MR. BOYD: Objection; leading, your Honor.

4 THE COURT: Sustained.

5 Q. (BY MR. FORBIS) The times that are indicated
6 on that bill, do you have any idea whether they would
7 coordinate with Cingular's timing shown on its billing?

8 A. In looking at the calls, these are calls made
9 in Texas.

10 MR. BOYD: Your Honor, we would object.
11 This calls for an undesignated, opinion testimony. They
12 never designated those opinions.

13 THE COURT: Sustained.

14 I think that's covered within my previous
15 ruling that she's not designated.

16 MR. BOYD: Okay.

17 THE COURT: This is specifically for
18 purposes of the bill.

19 MR. BOYD: Sorry, your Honor.

20 THE COURT: You don't have to make that
21 objection as to any of this testimony.

22 Q. (BY MR. FORBIS) Do you see a call made?

23 MR. BOYD: Sorry, your Honor.

24 THE COURT: Go ahead.

25 Q. (BY MR. FORBIS) Do you see a call made at

1 approximately 1:56 p.m. to the emergency 911 on that
2 billing?

3 A. What date?

4 THE COURT: And let me clear something up,
5 in case I've misled --

6 Any other objections you've got, may or may
7 not have --

8 You need to make that right now.

9 Q. (BY MR. FORBIS) On 12/17/02?

10 A. I'm sorry. Yes, I do.

11 Q. What's the time shown for that?

12 A. Okay. There's a call at 12/17/02 to emergency
13 911 at 1:56 p.m.

14 Q. Based on your understanding on how the billing
15 process works, would that call be made at approximately
16 the same time as a cellular call made on Cingular at
17 1:56 p.m.?

18 MR. BOYD: We object to any testimony from
19 this witness as a Cingular representative as to records
20 that are not Cingular.

21 THE COURT: Sustain the objection.

22 Q. (BY MR. FORBIS) Ms. Battles, does the source
23 of your records make any difference to you about what
24 time is shown on those records, as far as Cingular -- or
25 as far as long distance or cellular telephones?

1 MR. BOYD: Same objection, your Honor;
2 still testimony about records that aren't Cingular.

3 THE COURT: Sustained.

4 MR. FORBIS: Your Honor, I'm attempting to
5 establish foundation that she is familiar with and has
6 knowledge of that.

7 THE COURT: And I sustain the objection.

8 Go on.

9 Q. (BY MR. FORBIS) Did Cingular acquire
10 Southwestern Bell Mobile Systems?

11 A. Are we --

12 We are a part of Southwestern Bell Mobile
13 Systems, yes.

14 MR. FORBIS: I'll pass the witness, your
15 Honor.

16 -----

17 THE COURT: Mr. Boyd.

18 MR. BOYD: Just a couple of things, your
19 Honor.

20 CROSS EXAMINATION

21 BY MR. BOYD:

22 Q. Good morning, ma'am. How are you doing?

23 I'm going to show you --

24 I don't think it's part of the record; but
25 if not, I will make it for the purposes of the bill

1 only.

2 Do you see this is a page four of 17 from a
3 Cingular statement for Randy Hughes? That's the same
4 phone number we were talking about; correct?

5 Or one of them; is that correct?

6 A. Yes.

7 Q. Do you see down there there's a phone call at
8 11:08 p.m. to Springtown?

9 A. Yes.

10 Q. How long did that phone call last, according to
11 the records?

12 A. Two minutes.

13 Q. So a two-minute phone call at 11:08.

14 What's the next phone call on the record?

15 A. 11:09.

16 Q. So one minute later after a two-minute phone
17 call, there was a phone call on the records; correct?

18 A. Right.

19 Q. And I --

20 Go ahead.

21 Is that correct?

22 A. It's correct, but I can explain why.

23 Q. Right. And I think if I understood your
24 explanation was that if a phone call is 60 seconds, it
25 will show up as one minute.

1 For example, if it's 61 seconds, it will
2 show as two minutes; correct?

3 A. Yes.

4 Q. Two and one don't really tell us anything about
5 that, it just tell us that it's either the 60 or 61,
6 that's where it went over to the next minute?

7 A. I would not be concerned with this.

8 Q. Okay.

9 A. This is very common.

10 Q. Okay. Now, can you give any opinions or
11 testimony in any way as to who talked to who on any of
12 these phone calls?

13 A. Absolutely not. I can only tell you that these
14 phone numbers connected.

15 Q. And can you give us any connection, for
16 example, as to the driver of the exact -- of this
17 accident at all? You're not here to do that; correct?

18 A. No, sir. I'm only here to validate records
19 between phones.

20 MR. BOYD: Your Honor, that's all the
21 questions we have, your Honor.

22 THE COURT: All right. Mr. Forbis?

23 -----

24 REDIRECT EXAMINATION

25 BY MR. FORBIS:

1 Q. Ms. Battles, you have a two-minute call that
2 shows up on the bill, and your testimony is that there
3 is at least some physical act of pushing a button on the
4 phone that happened on the receiving call; is that
5 correct?

6 MR. BOYD: Objection. Objection; leading,
7 your Honor?

8 THE COURT: Sustained.

9 Q. (BY MR. FORBIS) Is there any way a connected
10 call can be made without someone pushing a button on
11 that cell phone?

12 MR. BOYD: Objection, leading.

13 THE COURT: Sustained.

14 Q. (BY MR. FORBIS) How is a call connected
15 between phones?

16 A. If you have an outgoing call --

17 Let's say, I'm calling you. I dial your
18 number. I push send, and the minute I push send that
19 starts the timer of a phone of a call.

20 Your phone rings and then the minute you
21 press -- press-- send is also receive. You press the
22 button to answer the call, that is a connected call.

23 MR. BOYD: Objection to the non-responsive
24 question, your Honor.

25 THE COURT: Sustained as to the

1 nonresponsive portion.

2 MR. FORBIS: What is the nonresponsive
3 portion, your Honor?

4 If I could ask him to clarify which portion
5 he deemed nonresponsive.

6 MR. BOYD: Your Honor, there was --

7 The question was: How is a phone picked
8 up.

9 The answer went into timing and all of
10 that, your Honor.

11 MR. FORBIS: The question was not how a
12 call is picked up. The answer was --

13 The question was about how a completed call
14 is connected between two phones, and that's exactly the
15 question she answered.

16 THE COURT: Move along.

17 Sustain the objection as to the
18 nonresponsive portion.

19 You may proceed, Mr. Forbis.

20 If you need to make a -- an objection or
21 argument to the Court, please stand.

22 Q. (BY MR. FORBIS) Is there any way for a
23 completed call to occur short of the person on the
24 receiving end pushing that button on the call?

25 MR. BOYD: Objection; leading, your Honor.

1 THE COURT: Overruled.

2 A. (BY THE WITNESS) Can I answer?

3 Q. Yes.

4 A. Unless someone picks up their phone and presses
5 a button to answer their call, it is not a completed
6 call.

7 Does that answer your question?

8 Q. Yes.

9 Thank you, Ms. Battles.

10 MR. FORBIS: Nothing further, your Honor,
11 other than tendering some other exhibits as part of the
12 offer.

13 -----

14 MR. BOYD: Nothing further, your Honor,
15 other than tender the Plaintiffs' Exhibit Bill No. 1,
16 which is the document that I asked her about on the
17 phone call -- two-minute -- the two-minute -- the 11:08
18 and 11:09 phone call; showed the one call for two
19 minutes and the next call one minute later.

20 (Discussion off the record.)

21 THE COURT: Anything further from this
22 witness?

23 MR. FORBIS: Nothing from the witness, your
24 Honor, as part as of our bill.

25 -----

1 MR. BOYD: Nothing from the witness, your
2 Honor.

3 -----

4 THE COURT: Thank you. You may step down.

5 MR. FORBIS: We would submit at this
6 time -- resubmit Defendants' Exhibit 441, cell phone
7 records, for purposes of the bill.

8 THE COURT: All right. It's admitted for
9 the purposes of the bill.

10 MR. FORBIS: Secondly, the April 21st, 2004
11 videotaped deposition of Clint Royse, Defendants'
12 Exhibit 605.

13 Thirdly, the April 21st, 2004 video
14 deposition of Ashton Quinn, Defendants' 606; Defendants'
15 eighth supplemental response to Plaintiffs' request for
16 disclosure is Defendants' Exhibit 607, and Plaintiffs--
17 third-party Plaintiffs' responses to Ricardo Reyna
18 Rodriguez' third request for production as Defendants'
19 Exhibit 609.

20 MR. STRADLEY: Did you call out that one?
21 It was stuck to it --

22 MR. FORBIS: And Plaintiffs' tenth
23 supplemental response as to Plaintiffs' request for
24 disclosure, Defendants' 608.

25 THE COURT: Anything else?

1 MR. FORBIS: Again, we tender this evidence
2 and ask the jury be allowed to hear it.

3 MR. BOYD: We have nothing further, your
4 Honor.

5 THE COURT: Very well.
6 I've already ruled on that about 10 times,
7 Mr. Forbis.

8 MR. FORBIS: Thank you, your Honor.

9 Do we have 12?

10 THE BAILIFF: We do, your Honor.

11 THE COURT: All right. Let's take a short
12 break.

13 (A brief interruption occurred.)

14 MR. STRADLEY: Your Honor, I have one
15 15-second matter. I promise it won't take long.

16 THE COURT: All right.

17 MR. STRADLEY: I understand the Court has
18 sustained the Plaintiffs' objection to the cell phone
19 issue, but for the purposes of the bill only, we've made
20 offers of Exhibits 441, 605 -- 605, 606, 607, 608, and
21 609, and we ask that those exhibits be admitted for the
22 purposes of the bill.

23 THE COURT: They are admitted for purposes
24 of the bill.

25 MR. STRADLEY: Thank you, your Honor.

1 THE COURT: All right. Bring in the jury.

2 (Open court, jury present.)

3 THE COURT: All right. The Defense may
4 call its next witness at this time.

5 MR. HURD: May it please the Court, the
6 Defendants rest.

7 THE COURT: Mr. Simpson?

8 MR. SIMPSON: Your Honor, the Hughes,
9 Royse, and Watkins families closes.

10 MR. HURD: And, your Honor, the Defense
11 closes.

12 THE COURT: All right. Very well.

13 Ladies and gentlemen of the jury, you have
14 now heard and seen all of the evidence in this case.

15 However, you have not heard the reading of
16 the Charge or the final arguments.

17 Now, let me just say that these attorneys
18 have been working very hard on this Charge for a
19 literally months. They have submitted it at least in
20 somewhat final form, pending a couple of weeks ago.
21 We've been working on it during trial. It is
22 substantially complete.

23 It is necessary, however, to take us -- for
24 us to take a break at this time off -- out of the
25 presence of the jury to allow them to pursue legal

1 matters with regard to the Charge.

2 And, therefore, I am going to excuse you
3 for --

4 Just be back in the jury room at 10:00
5 o'clock.

6 I'm usually overly optimistic, but I think
7 that we can be substantially ready at 10:00 o'clock; if
8 not, I'll just have you relax in place in there.

9 This is --

10 I feel compelled at this time to, again,
11 admonish you, you cannot discuss the case yet. Don't
12 talk to anyone else about the case. Don't stay within
13 the hearing of anyone that is, in fact, talking about
14 the case.

15 When we get through with the reading of the
16 Charge, the final arguments at that time, you will
17 accompany the Bailiff to the jury room and only at such
18 time as all of you are present in the jury room will you
19 be allowed to talk about this case.

20 See you back in the jury room at 10:00
21 o'clock.

22 Thank you.

23 (Recess.)

24 THE COURT: Mr. Taylor.

25 MR. TAYLOR: Your Honor, Ben Taylor here

1 for the Defendants, with Mr. Steindorf, Mr. Hurd, and
2 Mr. Stradley.

3 At this time, outside the presence of the
4 jury, we have several tendered questions, definitions,
5 and instructions. I'm going to refer to each of them
6 briefly and submit them and request their inclusion in
7 the Court's Charge.

8 THE COURT: All right.

9 MR. TAYLOR: First, your Honor, is
10 Defendants' Request No. 1. This has to do with the
11 alleged occurrence in question, and we're asking for a
12 question specifically on whether the accident occurred
13 as alleged with Mr. Rodriguez in the wrong lane shortly
14 before the accident. We request that be submitted in
15 the Charge.

16 THE COURT: All right. Your tender is
17 denied or refused.

18 MR. TAYLOR: I see the Court has circled
19 its refusal and signed its signature.

20 Your Honor, next, we tender an alternative,
21 1(A) that would be a definition of the occurrence in
22 question, in the same basic idea, defining it to mean
23 the -- the wrong lane situation.

24 THE COURT: And that is refused.

25 MR. TAYLOR: I see the Court has circled

1 "Refused," and signed the requested definition.

2 Your Honor, next, is No. 2. This is a
3 request for instruction about certain theories we
4 believe are not properly in the case: The using
5 fraudulent information to obtain a driver's license and
6 providing false information on the employment
7 application.

8 I think the Court has ruled against us on
9 this repeatedly, but we are requesting that instruction
10 in the Charge.

11 I see the Court has circled its refusal and
12 signed that request.

13 THE COURT: That is correct.

14 MR. TAYLOR: Your Honor, next is
15 Defendants' requested Request No. 3. This is on
16 percentage of responsibility and we're asking the Court
17 only include Ricardo Reyna Rodriguez and Kimberly
18 Watkins Hughes, and not include Mr. Melendez or TXI in
19 the -- and excuse me -- that's the negligence question.

20 The basic negligence question, we ask that
21 only Mr. Rodriguez and Kimberly Watkins Hughes be
22 included.

23 3(A), your Honor, correspondingly, requests
24 that only those two persons be in the percentage of
25 responsibility.

1 This is something we argued about.

2 THE COURT: All right. It's my
3 understanding that on the primary question that
4 Mr. Melendez is being removed from that from the Charge;
5 is that correct?

6 MR. TAYLOR: Upon information and belief,
7 that's what we understand and what -- We'll verify
8 that.

9 We still request that only Mr. Rodriguez
10 and Mrs. Hughes be included in percentage of
11 responsibility. It's our view that under the Rosell
12 case out Dallas it's --

13 THE COURT: I understand.

14 MR. SIMPSON: Your Honor, if I could, he is
15 included on the comparative, because the second issue is
16 whether there was negligent entrustment.

17 THE COURT: I understand that.

18 MR. SIMPSON: Okay. And so he was --

19 THE COURT: I don't believe you were here
20 when we argued this.

21 MR. SIMPSON: Okay.

22 THE COURT: He's removed on the initial
23 question.

24 MR. SIMPSON: You're correct on negligence,
25 but not on apportionment --

1 THE COURT: Mr. Taylor, is that correct?

2 MR. TAYLOR: I'm waiting to see it, your
3 Honor. That's what I'm informed is going to happen.

4 THE COURT: All right. So to that extent
5 on the initial question, it's granted.

6 MR. SIMPSON: You're correct, your Honor.

7 On the initial question it was not
8 submitted, just on the apportionment percentage.

9 THE COURT: And on the apportionment
10 question, he's still included, so to that extent you're
11 refused, so it's --

12 MR. TAYLOR: And may I have --

13 THE COURT: It's modified.

14 MR. TAYLOR: May I see what the Court has
15 marked on that for my record?

16 THE COURT: 3(A)?

17 MR. TAYLOR: Right.

18 THE COURT: I refused that one.

19 MR. TAYLOR: All right, your Honor. And
20 when we make our formal objections we will want to
21 emphasize the point that it is undisputed, and TXI and
22 Mr. Melendez are stipulating that at the actual damages
23 level, compensatory damages, there is vicarious
24 liability, if -- if Mr. Rodriguez was, in fact, at fault
25 in causing this accident.

1 THE COURT: All right.

2 MR. TAYLOR: Your Honor, next, we tender
3 our Request No. 4. This is the unavoidable accident
4 instruction. I haven't heard all the evidence, but I do
5 believe that Mr. Gold's testimony, at a minimum, raised
6 this inferential rebuttal theory and Defendants
7 respectfully requests its submission in the Charge.

8 THE COURT: It's refused.

9 MR. TAYLOR: I see the Court has signed its
10 refusal.

11 Your Honor, next is No. 5. This is a
12 request for --

13 We actually are not all that desirous of
14 having this submitted, but this includes all of the
15 elements we say of a negligent hiring retention claim,
16 and we do not believe that the submission that will go
17 to the jury includes all the requested elements.

18 I see the Court has signed its refusal.

19 THE COURT: You're correct.

20 MR. TAYLOR: Your Honor, next is No. 6.
21 This is the negligent entrustment, and it is our
22 alternative to what's being submitted, and we request
23 that that be submitted in the Charge in the alternative
24 to what is currently being submitted.

25 I see the Court --

1 THE COURT: I'm going to go ahead and
2 refuse that.

3 MR. TAYLOR: -- has refused No. 6.
4 No. 7, your Honor --

5 THE COURT: All right.

6 MR. TAYLOR: -- this is not something we
7 want submitted in the Charge, but we believe it's a
8 predicate for any possible punitive damages claim on
9 negligent entrustment. It's under an El Paso case
10 called McElroy versus Fitts, and we -- we are preserving
11 our record on that, your Honor.

12 I see the Court signed its refusal on
13 Request No. 7.

14 Request No. 8, your Honor, this is -- this
15 has to do with the unborn children and the twin -- the
16 unborn twins.

17 We respectfully disagree with the Fort
18 Worth cases, but it's our view those cases require
19 evidence and a finding of a viable fetus, if in fact,
20 those case were correctly cited, which we respectfully
21 dispute; therefore, subject to our objections, we
22 request the Court to include Request No. 8 in the
23 submitted Charge.

24 THE COURT: So you're --

25 All right. You're objecting to the

1 submission --

2 MR. TAYLOR: I haven't yet made --

3 THE COURT: -- at all?

4 MR. TAYLOR: -- I haven't made my objection
5 yet to the submitted question --

6 THE COURT: But you're going to?

7 MR. TAYLOR: I'm going to.

8 THE COURT: Even though Mr. Hurd said he
9 would be very upset if they decided not to submit it.

10 You weren't here.

11 So I'm going to refuse this.

12 MR. TAYLOR: I see the Court has signed its
13 refusal on Request No. 8.

14 Request No. 9, your Honor, is a requested
15 instruction regarding vice principal. We're going to
16 have a lot of objections to their punitive damages
17 submission regarding TXI and their gross neglect
18 question regarding TXI.

19 We submit respectfully Request No. 9,
20 regarding consideration of only vice principal conduct
21 for gross neglect.

22 THE COURT: Refused.

23 MR. TAYLOR: I see the Court has signed its
24 refusal.

25 Your Honor, Request No. 10, this is pushing

1 the law for House Bill 4, the 2003 tort reform. We're
2 requesting instructions that would require the jury to
3 be unanimous for any predicate for punitive damages and
4 for the amount of punitive damages. That law we concede
5 is not applicable to this case, because this case is
6 before September 1st, 2003, but we believe that the
7 Equal Protection Clause requires that if the Court is
8 going to apply post 09/01, 2003 law in favor of the
9 Plaintiffs, that that should cut both ways.

10 Your Honor, I see the Court has refused
11 Request No. 10.

12 Request No. 11, your Honor, would also be
13 refused if the Court ruled consistently, that would have
14 to do with the predicates, which we say is malice
15 instead of the gross negligent, and we believe that
16 should be unanimous, if anything.

17 I see the Court has signed its refusal on
18 Request 11.

19 Request 12, your Honor, would also be
20 refused if the Court ruled consistently, and that has to
21 do with the -- the amounts of exemplary damages, and we
22 respectfully request the Court instruct the jury that
23 has to be unanimous.

24 And, your Honor, there are only two more.
25 There's 13 and 14, and they're just alternative

1 submissions.

2 Did you answer unanimously, so that at
3 least if -- if this issue were going to be considered
4 later, we could get a finding by the jury or an answer
5 on whether, in fact, any verdict award of punitive
6 damages was unanimous.

7 I see the Court has signed its refusal on
8 13 and 14.

9 Your Honor, our request would be that each
10 of these refused requested instructions, definitions be
11 filed with the clerk, and if possible, I might see if I
12 could prevail on Mr. Goodwyn for some assistance in
13 getting -- getting a copy of them after they're filed
14 stamped, but that's all the tenders I believe we're
15 going to have, your Honor.

16 THE COURT: Jeff, can you do that for him?

17 THE COURT REPORTER: Yes, sir.

18 THE COURT: All right. You got it.

19 MR. TAYLOR: What I want to caution
20 everybody about. I'm -- I'm working on the oversight
21 committee. We -- We are having just major problems with
22 the boiler plate, because the boiler plate says the same
23 10 or more, and so I tendered "except as otherwise
24 instructed."

25 There's one certificate that has the

1 presiding juror, if it's unanimous, or the same 10 or
2 more if it's not.

3 And so I don't want to pretend that this is
4 not a tricky issue inserted in the Charge. We've been
5 working very hard on it, and the Legislature has now
6 hoisted this on us.

7 MR. BOYD: In light of that confusion, your
8 Honor, we would renew our position and just let them
9 make their objection on the record and not submit it is
10 our position.

11 MR. TAYLOR: We've made our respectful
12 request --

13 THE COURT: Because the critical thing here
14 is, how would you submit it?

15 MR. BOYD: That's right.

16 MR. TAYLOR: Right.

17 THE COURT: What you're warning of us is
18 that --

19 MR. TAYLOR: Yeah.

20 THE COURT: -- the consensus, even on the
21 committee as to how to submit it?

22 MR. TAYLOR: Well, there is going to be a
23 uniform submission that's coming out in the 2004
24 versions of the green book, the red book, and the blue
25 book, and everybody on the committee recognizes that

1 there are some uncertainties about the proper manner of
2 submission.

3 Rule 226A and the order promulgated under
4 226A have not yet been amended.

5 I think that to do it, you have to amend
6 the boiler plate to say "except as otherwise instructed,
7 you may render your verdict on the vote of any 10 or
8 more jurors." You have to change that, and you have to
9 have some sort of certificate that deals with the
10 problem.

11 Now, we have candidly conceded this law
12 does not apply to this case.

13 At the same time, we have -- we have had
14 arguments against us presented successfully, based on
15 amendments of the wrongful death act, that do not apply
16 to this case, and so we respectfully urge our position.

17 MR. BOYD: I think in light of the fact
18 there's any confusion on the committee -- to avoid any
19 confusion, the jury in this case, we can go ahead with
20 as it's prepared would be our position.

21 THE COURT: All right, sir.

22 MR. TAYLOR: Our objections will be made
23 and our requests have been refused already.

24 THE COURT: Anything further?

25 MR. BOYD: I don't think so.

1 I think the copies are being made.

2 (A brief recess was taken.)

3 THE COURT: All right. Back on record in
4 this cause.

5 The Court has prepared a Charge and
6 provided it to the attorneys for examination. At this
7 time, Mr. Boyd, does the Plaintiff have any objections
8 to the Charge?

9 MR. BOYD: Your Honor, the Plaintiff has no
10 objections to the Charge.

11 THE COURT: Mr. Taylor, does the Defendant
12 have any objections to the Charge?

13 MR. TAYLOR: We do, your Honor, and may --
14 may I affirm that the Charge has been signed by the
15 Court and filed?

16 THE COURT: It hasn't been signed yet, but
17 I've stamped it with "Original," and that's the one I
18 will sign after I've read it.

19 MR. TAYLOR: Your Honor, then, with that
20 assurance we have now the Charge -- what we understand
21 to be the Charge of the Court consisting of pages one
22 through 25.

23 I'm making these objections on behalf of
24 the Defendants, TXI Transportation Company, Ricardo
25 Reyna Rodriguez, and Aurelio Melendez.

1 I'm making these objections, your Honor, in
2 the presence of the Court, opposing counsel, and the
3 Court Reporter, and before the Court's Charge has been
4 read to the jury.

5 Your Honor, on page two of the Charge I
6 object to Paragraph 6, of the numbered instructions
7 insofar as they authorize the jury to find gross neglect
8 and assess punitive or exemplary damages upon the vote
9 of any 10 or more jurors.

10 Texas law does or should require the jury
11 to be unanimous in regard to finding liability for and
12 amounts of punitive or exemplary damages.

13 Although not applicable by its terms to
14 this case, Section 13.04 of House Bill 4, which became
15 effective September 1st, 2003, should be judicially
16 adopted as part of the substantive law of this state,
17 and the jury should be required to reach unanimous
18 verdicts regarding liability for and amounts of
19 exemplary damages, if any.

20 Your Honor, Plaintiffs' summary judgment
21 response regarding Clint Royse's unborn children urge
22 this Court to apply amendments of the Texas Wrongful
23 Death Act that are not applicable by their terms,
24 because any cause of action for the loss of Clint
25 Royse's unborn children accrued before September 1 of

1 2003. With respect, it is an unconstitutional denial of
2 the equal protection of the laws for this Court to apply
3 post-09-01-2003 statutory changes, when they favor
4 Plaintiffs, but not when they favor Defendants.

5 Apart from these objections, I have
6 tendered proposed instructions that would require
7 unanimous decisions by the jurors before they could find
8 gross neglect and assess any amounts for punitive
9 damages.

10 Your Honor, on page three of the Charge, I
11 object to the Court's refusal to submit an "unavoidable
12 accident" instruction. Defendants have both pleading
13 and evidence to support submission of an "unavoidable
14 accident" instruction.

15 Apart from these objections, I've tendered
16 an appropriate unavoidable accident instruction, which
17 the Court has refused to submit.

18 Also, on page three, your Honor, I object
19 to Question 1 including TXI Transportation Company, who
20 is Mr. Rodriguez' statutory employer. As a matter of
21 law, all theories of liability against Mr. Melendez and
22 TXI Transportation Company are derivative of and must
23 necessarily depend upon the jury finding negligence and
24 proximate cause against Mr. Rodriguez.

25 It is undisputed, and TXI and Mr. Melendez

1 have stipulated they are vicariously liable for
2 compensatory damages, if Mr. Rodriguez was at fault in
3 causing this accident.

4 Therefore, your Honor, the general
5 negligence question should not include TXI
6 Transportation Company or Mr. Melendez.

7 There is not any legally valid negligent
8 activity theory against either Mr. Melendez or TXI
9 Transportation Company, because the deaths and injuries
10 in this case did not occur as a contemporaneous result
11 of any of the conducts -- of any of the conduct
12 Plaintiffs allege against Mr. Melendez and TXI
13 Transportation Company.

14 There's also not a valid negligence per se
15 theory against either Mr. Melendez or TXI
16 Transportation. The Plaintiffs acknowledge this,
17 because they have failed to request negligence per se
18 questions or instructions.

19 Out of an abundance of caution, I object to
20 the omission of questions inquiring whether the
21 Defendants failed to comply with any applicable state or
22 federal safety regulations, which clearly define
23 required conduct, and whether the deaths and injuries in
24 this case resulted directly, rather than indirectly,
25 from a violation of any applicable safety regulations.

1 Moreover, your Honor, it is not feasible to
2 submit Question 1 broadly in this case, because
3 Plaintiffs have pleaded and apparently tend to argue TXI
4 Transportation Company and Mr. Melendez were negligent,
5 because they allegedly failed to investigate whether
6 Mr. Rodriguez may have obtained his commercial driver's
7 license by fraudulent means.

8 As a matter of law, neither TXI
9 Transportation Company, nor Mr. Melendez, had any
10 authority, nor owed any legal duty to second guess the
11 Texas Department of Transportation's licensing
12 decisions.

13 The inclusion of Mr. --

14 The inclusion of TXI Transportation Company
15 in Question 1 and its broad-form submission are
16 reversible error under the Casteel case, because the
17 Plaintiffs' liability theory against the employers is
18 legally invalid, and neither the parties, this court,
19 nor the appellate court, would be able to say with
20 certainty that the jury did not base any "yes" answer to
21 Question 1 on the legally invalid theory.

22 For all these reasons, TXI Transportation
23 Company should be deleted from Question 1.

24 Finally, regarding Question 1 and Question
25 2, also, your Honor, I object to the omission of

1 questions directly inquiring whether immediately prior
2 to the impact between the Yukon XL being operated by
3 Kimberly Watkins Hughes, and the tractor trailer being
4 operated by Ricardo Reyna Rodriguez on December 17,
5 2002, "Was the tractor trailer in Kimberly Watkins
6 Hughes' westbound lane of Highway 114, and did the
7 tractor trailer strike the Yukon as it attempted to move
8 back into the eastbound lane of travel?"

9 The Defendants respectfully assert that
10 under the Court's evidentiary rulings this key issue is
11 in -- this is a key issue in dispute and an essential
12 factual element on which Plaintiffs must prevail and on
13 which Defendants are constitutionally entitled to a jury
14 finding.

15 The Court is submitting questions about the
16 occurrence in question, but there is no definition of
17 "occurrence in question," and there is no question
18 directly inquiring whether Mr. Rodriguez was, in fact,
19 driving in the wrong lane of traffic immediately prior
20 to the impact between the tractor trailer he was
21 driving, and the Yukon vehicle Kimberly Watkins Hughes
22 was driving.

23 It is not feasible to submit Questions 1
24 and 2 broadly, and without defining the occurrence in
25 question, and without asking the jury to find whether

1 Mr. Rodriguez had, in fact, been driving in the wrong
2 lane.

3 I note, your Honor, that the instructions
4 under Question 2 inject the undefined word "collision."

5 Your Honor, I also object to the
6 instructions under Question 2 concerning negligent
7 entrustment, and specifically, to the inclusion of
8 Plaintiffs' theory that Mr. Rodriguez was an unlicensed
9 driver. There is no evidence that Mr. Rodriguez was an
10 unlicensed driver before or at the time of the
11 occurrence in question; nor is there evidence that
12 Mr. Rodriguez was an incompetent or reckless driver.

13 The inclusion of the unlicensed driver
14 alternative in Question 2, and its broad form submission
15 are reversible error under the Casteel and Harris County
16 verus Smith cases, because there is no evidence that
17 Mr. Rodriguez was unlicensed, and because the
18 Plaintiffs' invalid license theory is legally
19 unsustainable.

20 The evidence conclusively establishes that
21 Mr. Rodriguez had a commercial driver's license from the
22 appropriate licensing authority, and it is valid and in
23 effect through 2005.

24 Moreover, neither TXI Transportation
25 Company, nor Mr. Melendez had any authority nor owed any

1 duty -- any legal duty to second guess the Texas
2 Department of Transportation's licensing decisions.

3 Neither the parties, this Court, nor the
4 appellant court would be able to say with certainty that
5 the jury did not base any "Yes" answers against
6 Mr. Melendez, and/or TXI Transportation Company on the
7 unlicensed driver theory, which is unsupported by
8 evidence and which is also an invalid -- legally invalid
9 theory.

10 Your Honor, I object to the second sentence
11 of the instructions under Question 2, which reads, "Such
12 negligence is a proximate cause of a collision if the
13 negligence of the driver to whom the vehicle was
14 entrusted is a proximate cause of the collision."

15 This sentence misstates the law and lessens
16 the Plaintiffs' burden of proof under governing
17 substantive law, because it omits the required element
18 of proximate cause between the conduct of Mr. Melendez
19 and the occurrence in question.

20 I also object to the omission of a
21 proximate cause definition under Question 2, including
22 the substantial factors "but for causation and
23 foreseeability elements."

24 I also object to the omission of an
25 instruction stating that the jury cannot find proximate

1 cause if the risk that caused the entrustment to be
2 negligent did not cause the collision.

3 And just one example, your Honor, the Court
4 has permitted evidence about Mr. Rodriguez' immigration
5 difficulties, and Plaintiffs intend to blend that
6 evidence with their legally invalid theory that
7 Mr. Melendez and TXI Transportation Company owed a duty
8 to investigate Mr. Rodriguez' immigration status, and
9 whether he may have misrepresented facts to the
10 immigration authorities or other authorities.

11 The jury may believe Mr. Melendez and/or
12 TXI Transportation Company negligently entrusted the
13 tractor/trailer to Mr. Rodriguez based on an
14 understandable, but legally irrelevant view that illegal
15 aliens should not be permitted to drive 18-wheelers in
16 Texas.

17 Those issues have nothing to do with
18 whether Mr. Rodriguez was, in fact, unlicensed,
19 incompetent or reckless.

20 Moreover, even assuming Plaintiffs were
21 correct in their theory that Mr. Rodriguez' commercial
22 driver's license was invalid, that would be because of a
23 misrepresentation by Mr. Rodriguez that has nothing to
24 do with whether he was or was not driving the tractor
25 trailer in the wrong lane of travel immediately before

1 the question --

2 Excuse me.

3 -- immediately before the collision, which
4 is a question the Court is not even submitting to the
5 jury directly.

6 Mr. Melendez and TXI Transportation Company
7 will likely be harmed by the immigration evidence
8 without the protection of an instruction from the Court
9 stating there can be no proximate cause if the risk that
10 caused the entrustment to be negligent did not cause the
11 collision.

12 For all these reasons, I object to the
13 submission of Question 2 and its accompanying
14 instructions.

15 Your Honor, on Page 4, Question 3, I
16 also -- I object to the inclusion of Mr. Melendez and
17 TXI Transportation Company in the percentage of
18 responsibility question.

19 Again, that's Question 3: Because the
20 liability, if any, of Mr. Melendez and TXI
21 Transportation Company is derivative of, and dependent
22 on the jury finding that Mr. Rodriguez was negligent and
23 proximately caused the occurrence in question. There
24 should be only two answer blanks, and the only two
25 persons who should be submitted in the percentage of

1 responsibility question are Mr. Rodriguez and Kimberly
2 Watkins Hughes. That's from the Rosell case out of
3 Dallas in 2002.

4 I object to the improper inclusion of
5 Mr. Melendez and TXI Transportation Company. The
6 Court's single combined percentage of responsibility
7 question is improper, and it's calculated not only to
8 dilute the percentage of responsibility attributed to
9 Kimberly Watkins Hughes, but also to prevent the
10 Defendant from making a proper presentation of their
11 liability challenges in the event of any appeal.

12 Your Honor, on page five, I object to the
13 predicating instruction before Questions 4 through 18,
14 because Questions 1 and 2 concerning negligence and
15 negligent entrustment are defective and immaterial
16 predicates that could not lawfully support the judgment
17 awarding any damages the jury might find in answers to
18 Questions 4 through 18.

19 Your Honor, I object to the submission of
20 Question 4, and specifically, parts C and D, concerning
21 Jagr -- I think that's Jagr Royse's past and future
22 mental anguish, resulting from the occurrence in
23 question.

24 I object to the omission of questions
25 inquiring whether any physical injuries Jagr Royse

1 sustained in the accident caused him to suffer mental
2 anguish; and if so, what sums of money would fairly and
3 reasonably compensate Jagr Royse for such mental anguish
4 in the past and the future.

5 I also object to parts C and D under
6 Question 4, if based on any bystander theory, because as
7 a matter of law and fact, Jagr Royse was too young to be
8 legally capable of sustaining pleaded bystander damages
9 for mental anguish.

10 I also object to the omission of a question
11 inquiring whether Jagr Royse did or will suffer mental
12 anguish as a result of actually and contemporaneously
13 perceiving a negligently inflicted serious injury to, or
14 death of -- or the death of his mother, Afton Hughes
15 Royse.

16 I further object to preserve the issue,
17 your Honor, that Texas law does not and should not
18 recognize any separate bystander cause of action for
19 mental anguish damages, when, as here, the claimant
20 already has a statutory wrongful death cause of action.

21 Parts C and D under Question 4 are
22 defective and immaterial and are calculated to result in
23 overlapping damages and/or double recovery; particularly
24 in light of Question 5 in Parts E and F submitting
25 mental anguish resulting from the death of Jagr Royse's

1 mother, Afton Hughes Royse.

2 Moving on, your Honor, to pages 9 through
3 11, I object to submission of Questions 8 and 9
4 concerning Clint Royse's claim for the wrongful death of
5 his unborn children, who are now referred to in the
6 Charge as Twin A and Twin B.

7 Questions 8 and 9 are immaterial and should
8 not be submitted, because the Texas Wrongful Death Act
9 did not recognize an unborn fetus as an individual in
10 December of 2002, when the events at issue in this case
11 occurred, nor in May of 2003 when Clint Royse filed his
12 lawsuit.

13 There's no evidence that Clint Royse's
14 alleged cause of action for the wrongful death of his
15 unborn children accrued on or after September 1, 2003.

16 Moreover, the summary judgment evidence was
17 that Afton was six weeks pregnant when the accident
18 happened on December 17 of 2002. Consequently, the 2003
19 statutory amendments Plaintiffs cited in their summary
20 judgment response cannot be applied, and the prior law
21 is continued in effect for Cline Royse's alleged cause
22 of action.

23 With respect, the Court's allowance of this
24 unrecognized and emotionally charged claim has tainted
25 the entire trial and is calculated to deny the

1 Defendants their constitutional right to a fair trial of
2 the hotly disputed liability issues in this case.

3 Your Honor, I also object to the omission
4 of a question or questions inquiring whether the unborn
5 twins were viable fetuses, as would be required by the
6 Fort Worth decisions, including the Reese case, which is
7 petition for review granted in the Texas Supreme Court.

8 There's not even any evidence that the
9 unborn twins were viable, as defined in Fort Worth Court
10 of Appeals case law, or the Texas Health and Safety
11 Code.

12 Finally, your Honor, I object that Clint
13 Royse has no timely pleading to raise the Fourteenth
14 Amendment Equal Protection Challenge sustained in the
15 Fort Worth court's Reese and Parvin versus Dean
16 decisions.

17 The Fourteenth Amendment Equal Protection
18 Challenge was first pleaded on page seven of Plaintiffs'
19 Fourth Amended Petition, which was filed on April 13th,
20 2004, but which was not furnished to Counsel for the
21 Defendants a full 14 days before the final pretrial
22 hearing on April 27th, 2004.

23 Consequently, Plaintiffs' Third Amended
24 Petition should be treated as a live pleading on which
25 Clint Royse and the other Plaintiffs commenced this

1 trial, and he has no Fourteenth Amendment Equal
2 Protection claim timely and properly before the Court.

3 Your Honor, I object to submission of
4 Questions 21 through 24, which submit purported
5 predicates for, amounts of, and apportionment of
6 exemplary damages. There is no evidence, nor any clear
7 and convincing evidence that the harm for which recovery
8 of damages is sought resulted from malice or gross
9 neglect attributable to any of the Defendants.

10 Moreover, the predicate, negligence,
11 proximate cause, and percentage of responsibility
12 questions are defective and immaterial for the reasons
13 I've previously stated.

14 Question 21 and all the rest of the
15 questions in the Charge should not be submitted and they
16 are immaterial.

17 I also object to submission of Questions 21
18 through 24 on due process and fair notice grounds, and
19 because Plaintiffs have chosen not to comply with the
20 Court's order on special exceptions under Rule 47, and
21 to plead the maximum amounts they were requesting for
22 punitive or exemplary damages.

23 Plaintiffs also did not claim gross
24 negligence or malice, or punitive or exemplary damages
25 in their request for disclosure response No. C.

1 Consequently, Plaintiffs are not entitled
2 to submit any questions on punitive for exemplary
3 damages. For these reasons, also, Questions 21 through
4 24 should not be submitted and they're immaterial.

5 Your Honor, also, in connection with 21 --
6 that's Questions 21 through 24, I object to submitting,
7 "gross neglect," as the predicate for punitive or
8 exemplary damages.

9 Gross neglect is not the proper predicate
10 for punitive or exemplary damages, because Plaintiffs
11 did not file this lawsuit under a statute enacted
12 pursuant to Section 26, Article 16 of the Texas
13 Constitution.

14 Plaintiffs are not suing under the Labor
15 Code; instead the Plaintiffs are suing under the Texas
16 Wrongful Death Act, which is not a statute enacted
17 pursuant to Section 26, Article 16 of the Texas
18 Constitution.

19 Consequently, the required standard for
20 punitive or exemplary damages is malice, which the
21 Plaintiffs have not even pleaded.

22 Your Honor, I acknowledge the definitions
23 are the same, but even with the same definition, I
24 submit that it is harder for Plaintiffs to persuade the
25 jury to find by clear and convincing evidence that a

1 person's death resulted from "malice," than from "gross
2 neglect."

3 The effect of submitting "gross neglect" is
4 to impermissibly lessen Plaintiffs' burdens of proof and
5 persuasion under governing substantive law.

6 I object to Question 21 as defective and
7 immaterial, and cannot serve as a lawful predicate for
8 awarding any punitive or exemplary damages in this case.

9 Your Honor, I object to Question 21
10 omitting to inquire whether the jury finds by clear and
11 convincing evidence that the death of Afton Hughes Royse
12 resulted from malice or even gross neglect by Ricardo
13 Reyna Rodriguez.

14 It is the Plaintiffs' burden to obtain
15 affirmative answers to jury questions as to the
16 necessary elements of their cause of action, even if the
17 standard were correctly gross neglect, as opposed to
18 malice, Plaintiffs have the burden to obtain affirmative
19 answers to the jury questions establishing the requisite
20 conduct and mental state by a defendant, and the
21 defendant's name must also be included in any such
22 question before it might arguably be material.

23 Plaintiffs have waived any right to recover
24 exemplary damages against Ricardo Reyna Rodriguez --
25 Ricardo Reyna Rodriguez, and against Mr. Melendez, as

1 well.

2 I object to Questions 21 and 22 regarding
3 gross neglect, as defective and immaterial, because the
4 jury does not require unanimous answers, in the event
5 the jury finds gross neglect, but instead permits a
6 verdict by as few as 10 jurors agreeing to the answers.

7 I object to Question 23 regarding exemplary
8 damages, because the predicate questions are defective
9 and immaterial, and because the Charge does not require
10 unanimous answers in the event the jury finds gross
11 neglect, but instead permits a verdict by as few as 10
12 jurors agreeing to the answers.

13 All of the apportionment -- or at least --

14 Excuse me.

15 The -- the one apportionment of exemplary
16 damages questions is also consequently immaterial.

17 Your Honor, I object to the instructions
18 under Question 21 as improper, because they wrongly
19 conflate TXI Transportation Company and --

20 THE COURT: What?

21 MR. TAYLOR: -- they treat TXI
22 Transportation Company and Ricardo Reyna Rodriguez as
23 one in the same.

24 THE COURT: All right.

25 MR. TAYLOR: Your Honor, the instructions

1 wrongly conflate TXI Transportation Company and Ricardo
2 Reyna Rodriguez.

3 They're also improper because they wrongly
4 attribute Ricardo Reyna Rodriguez' alleged gross neglect
5 to TXI, and because they wrongly treat Ricardo Reyna
6 Rodriguez as an employee of TXI for punitive damages
7 purposes. TXI has admitted Mr. Rodriguez is a statutory
8 employee under Federal Motor Safety Carrier Regulations
9 for compensatory damages purposes, but Mr. Rodriguez is
10 not TXI Transportation Company's employee for punitive
11 damages purposes.

12 As a matter of law, TXI Transportation
13 Company is not liable for exemplary damages for conduct
14 by Mr. Rodriguez, and particularly any alleged criminal
15 conduct.

16 I object to the omission of questions
17 inquiring whether Ricardo Reyna Rodriguez was an
18 employee of TXI for punitive damages purposes, whether
19 Ricardo Reyna Rodriguez caused harm through malice or
20 gross neglect, whether Ricardo Reyna Rodriguez committed
21 any criminal act, whether TXI acted with malice in
22 supposedly employing Ricardo Reyna Rodriguez, and
23 whether the Plaintiffs' action, in fact, arises from or
24 was caused by any criminal act of Ricardo Reyna
25 Rodriguez.

1 I also object to the second alternative in
2 the instructions which states: "TXI or a manager of TXI
3 approved the act." That is an impermissible direct
4 comment on the weight of the evidence, because prior
5 questions inquire only about an act or omission by
6 Mr. Rodriguez, rather than an affirmative act.

7 I object, your Honor, to the submission of
8 Question 22 as an improper double submission of gross
9 neglect against TXI. I also object to the omission of a
10 question inquiring whether the harm for which recovery
11 of damages is sought, resulting from malice or even
12 gross neglect by any corporate vice principal of TXI
13 Transportation Company.

14 Your Honor, I object to the predicating
15 instruction before Questions 23 and 24, because a "Yes"
16 answer to either Question 21 or 22 would not be a lawful
17 predicate for punitive or exemplary damages against TXI
18 Transportation Company.

19 I further object to the omission of
20 questions inquiring whether Ricardo Reyna Rodriguez was
21 an incompetent or a habitually reckless driver; and if
22 so, did TXI Transportation Company know or should it
23 have known that TXI --

24 Excuse me.

25 -- that Ricardo Reyna Rodriguez was an

1 incompetent or habitually reckless driver.

2 Under the McElroy versus Fitts decision, no
3 punitive or exemplary damages could properly be awarded
4 against TXI Transportation Company, even assuming
5 Plaintiffs had pleaded negligent entrustment against TXI
6 Transportation Company, which they did not.

7 Your Honor, I acknowledge that they have
8 moved TXI out of the negligent entrustment, but I want
9 to make this objection because I have a feeling they're
10 later going to argue negligent entrustment against TXI
11 Transportation Company.

12 Your Honor, I object to Questions 21
13 through 23 submitting exemplary damages to any extent,
14 based on Ricardo Reyna Rodriguez' conduct because the
15 predicated questions do not limit the jury to
16 considering a properly actionable negligent activity, if
17 any, that contemporaneously and approximately caused the
18 occurrence in question.

19 The jury has heard prejudicial evidence
20 about, among other things, Mr. Rodriguez' immigration
21 troubles, and possible misrepresentations, but as a
22 matter of law, such conduct did not, at the time it
23 occurred, involve any extreme risk of which
24 Mr. Rodriguez or TXI Transportation Company or
25 Mr. Melendez was actually and subjectively aware.

1 I again object to the omission of a
2 question inquiring whether the jury finds by clear and
3 convincing evidence that Mr. Rodriguez caused Afton
4 Hughes Royse's death through a conduct amounting to
5 malice or gross neglect.

6 Plaintiffs know they could not persuade a
7 jury to so find. They instead hope the jury will find
8 gross neglect against TXI Transportation Company, even
9 though the jury is not being properly asked to find, nor
10 will it find that Mr. Rodriguez himself was guilty of
11 gross neglect; that's improper and I object to it.

12 Finally, your Honor, I object to Question
13 23 regarding exemplary damages as immaterial to the
14 extent of any amount the jury may find in excess of the
15 statutory cap on exemplary damages provided in Section
16 41.008 of the Texas Civil Practices & Remedies Code.

17 Plaintiffs have pleaded capbusting, but
18 they have not presented evidence, nor requested a
19 submission on whether any of the Defendants knowingly or
20 intentionally engaged in conduct in violation of any of
21 the Texas Penal Code sections listed in Section
22 41.008(c) of the Texas Civil Practices and Remedies
23 Code.

24 I don't think the evidence raises any such
25 violation. Nevertheless, out of an abundance of

1 caution, and to preclude any argument for express or
2 deemed judicial findings, I object to the omission of
3 questions inquiring whether the Defendants knowingly or
4 intentionally engaged in conduct in violation of any
5 particular provision of the Texas Penal Code; and if so,
6 whether Plaintiffs' action is, in fact, based upon and
7 was caused by any such violation of the Texas Penal
8 Code.

9 I respectfully object that exemplary
10 damages, if any should be awarded in this case, are
11 capped by a statute.

12 Your Honor, that completes the Defendants'
13 objections to the Court's Charge, and I would
14 respectfully request a ruling on those objections.

15 THE COURT: Your objections are overruled.

16 MR. STEINDORF: Your Honor, could I bend
17 your ear a little bit on this -- on the closing?

18 We got our case put on in one day, and I'm
19 thinking I could -- I could maybe get the job done in 40
20 minutes; but in 30 minutes, I'm afraid I'm going to get
21 tongue-tied. Would the Court consider giving us 40
22 minutes a side to close instead of 30?

23 THE COURT: No.

24 MR. STEINDORF: All right. Well, I bent
25 your ear. Thank you, anyway.

1 MR. BOYD: Your Honor, we have just one
2 thing in light of Mr. Stradley's opening statement, the
3 implying that the DPS has agreed with them and rejected
4 our theory. We would renew our supplemental motion in
5 limine that no such arguments be made in closing
6 argument to suggest that DPS agrees with one side or the
7 other, rejecting our theory.

8 MR. STEINDORF: I'm sorry --

9 MR. BOYD: We're renewing our limine that
10 you not make any arguments that the DPS agrees with one
11 side is at fault or disagrees with one side's theory.

12 MR. STEINDORF: We're not going to say
13 that.

14 MR. BOYD: Okay. If that's agreed, then
15 that's no problem.

16 -----

17 (END OF PROCEEDINGS)

18 -----

19 Go to page 68, not 62

20 THE COURT: Mr. Taylor.

21 MR. TAYLOR: Your Honor, Ben Taylor here
22 for the Defendants, with Mr. Steindorf, Mr. Hurd, and
23 Mr. Stradley.

24 At this time, outside the presence of the
25 jury, we have several tendered questions, definitions,

1 and instructions. I'm going to refer to each of them
2 briefly and submit them and request their inclusion in
3 the Court's Charge.

4 THE COURT: All right.

5 MR. TAYLOR: First, your Honor, is
6 Defendants' Request No. 1. This has to do with the
7 alleged occurrence in question, and we're asking for a
8 question specifically on whether the accident occurred
9 as alleged with Mr. Rodriguez in the wrong lane shortly
10 before the accident. We request that be submitted in
11 the Charge.

12 THE COURT: All right. Your tender is
13 denied or refused.

14 MR. TAYLOR: I see the Court has circled
15 its refusal and signed its signature.

16 Your Honor, next, we tender an alternative,
17 1(A) that would be a definition of the occurrence in
18 question, in the same basic idea, defining it to mean
19 the -- the wrong lane situation.

20 THE COURT: And that is refused.

21 MR. TAYLOR: I see the Court has circled
22 "Refused," and signed the requested definition.

23 Your Honor, next, is No. 2. This is a
24 request for instruction about certain theories we
25 believe are not properly in the case: The using

1 fraudulent information to obtain a driver's license and
2 providing false information on the employment
3 application.

4 I think the Court has ruled against us on
5 this repeatedly, but we are requesting that instruction
6 in the Charge.

7 I see the Court has circled its refusal and
8 signed that request.

9 THE COURT: That is correct.

10 MR. TAYLOR: Your Honor, next is
11 Defendants' requested Request No. 3. This is on
12 percentage of responsibility and we're asking the Court
13 only include Ricardo Reyna Rodriguez and Kimberly
14 Watkins Hughes, and not include Mr. Melendez or TXI in
15 the -- and excuse me -- that's the negligence question.

16 The basic negligence question, we ask that
17 only Mr. Rodriguez and Kimberly Watkins Hughes be
18 included.

19 3(A), your Honor, correspondingly, requests
20 that only those two persons be in the percentage of
21 responsibility.

22 This is something we argued about.

23 THE COURT: All right. It's my
24 understanding that on the primary question that
25 Mr. Melendez is being removed from that from the Charge;

1 is that correct?

2 MR. TAYLOR: Upon information and belief,
3 that's what we understand and what -- We'll verify
4 that.

5 We still request that only Mr. Rodriguez
6 and Mrs. Hughes be included in percentage of
7 responsibility. It's our view that under the Rosell
8 case out Dallas it's --

9 THE COURT: I understand.

10 MR. SIMPSON: Your Honor, if I could, he is
11 included on the comparative, because the second issue is
12 whether there was negligent entrustment.

13 THE COURT: I understand that.

14 MR. SIMPSON: Okay. And so he was --

15 THE COURT: I don't believe you were here
16 when we argued this.

17 MR. SIMPSON: Okay.

18 THE COURT: He's removed on the initial
19 question.

20 MR. SIMPSON: You're correct on negligence,
21 but not on apportionment --

22 THE COURT: Mr. Taylor, is that correct?

23 MR. TAYLOR: I'm waiting to see it, your
24 Honor. That's what I'm informed is going to happen.

25 THE COURT: All right. So to that extent

1 on the initial question, it's granted.

2 MR. SIMPSON: You're correct, your Honor.

3 On the initial question it was not
4 submitted, just on the apportionment percentage.

5 THE COURT: And on the apportionment
6 question, he's still included, so to that extent you're
7 refused, so it's --

8 MR. TAYLOR: And may I have --

9 THE COURT: It's modified.

10 MR. TAYLOR: May I see what the Court has
11 marked on that for my record?

12 THE COURT: 3(A)?

13 MR. TAYLOR: Right.

14 THE COURT: I refused that one.

15 MR. TAYLOR: All right, your Honor. And
16 when we make our formal objections we will want to
17 emphasize the point that it is undisputed, and TXI and
18 Mr. Melendez are stipulating that at the actual damages
19 level, compensatory damages, there is vicarious
20 liability, if -- if Mr. Rodriguez was, in fact, at fault
21 in causing this accident.

22 THE COURT: All right.

23 MR. TAYLOR: Your Honor, next, we tender
24 our Request No. 4. This is the unavoidable accident
25 instruction. I haven't heard all the evidence, but I do

1 believe that Mr. Gold's testimony, at a minimum, raised
2 this inferential rebuttal theory and Defendants
3 respectfully requests its submission in the Charge.

4 THE COURT: It's refused.

5 MR. TAYLOR: I see the Court has signed its
6 refusal.

7 Your Honor, next is No. 5. This is a
8 request for --

9 We actually are not all that desirous of
10 having this submitted, but this includes all of the
11 elements we say of a negligent hiring retention claim,
12 and we do not believe that the submission that will go
13 to the jury includes all the requested elements.

14 I see the Court has signed its refusal.

15 THE COURT: You're correct.

16 MR. TAYLOR: Your Honor, next is No. 6.
17 This is the negligent entrustment, and it is our
18 alternative to what's being submitted, and we request
19 that that be submitted in the Charge in the alternative
20 to what is currently being submitted.

21 I see the Court --

22 THE COURT: I'm going to go ahead and
23 refuse that.

24 MR. TAYLOR: -- has refused No. 6.

25 No. 7, your Honor --

1 THE COURT: All right.

2 MR. TAYLOR: -- this is not something we
3 want submitted in the Charge, but we believe it's a
4 predicate for any possible punitive damages claim on
5 negligent entrustment. It's under an El Paso case
6 called McElroy versus Fitts, and we -- we are preserving
7 our record on that, your Honor.

8 I see the Court signed its refusal on
9 Request No. 7.

10 Request No. 8, your Honor, this is -- this
11 has to do with the unborn children and the twin -- the
12 unborn twins.

13 We respectfully disagree with the Fort
14 Worth cases, but it's our view those cases require
15 evidence and a finding of a viable fetus, if in fact,
16 those case were correctly cited, which we respectfully
17 dispute; therefore, subject to our objections, we
18 request the Court to include Request No. 8 in the
19 submitted Charge.

20 THE COURT: So you're --

21 All right. You're objecting to the
22 submission --

23 MR. TAYLOR: I haven't yet made --

24 THE COURT: -- at all?

25 MR. TAYLOR: -- I haven't made my objection

1 yet to the submitted question --

2 THE COURT: But you're going to?

3 MR. TAYLOR: I'm going to.

4 THE COURT: Even though Mr. Hurd said he
5 would be very upset if they decided not to submit it.

6 You weren't here.

7 So I'm going to refuse this.

8 MR. TAYLOR: I see the Court has signed its
9 refusal on Request No. 8.

10 Request No. 9, your Honor, is a requested
11 instruction regarding vice principal. We're going to
12 have a lot of objections to their punitive damages
13 submission regarding TXI and their gross neglect
14 question regarding TXI.

15 We submit respectfully Request No. 9,
16 regarding consideration of only vice principal conduct
17 for gross neglect.

18 THE COURT: Refused.

19 MR. TAYLOR: I see the Court has signed its
20 refusal.

21 Your Honor, Request No. 10, this is pushing
22 the law for House Bill 4, the 2003 tort reform. We're
23 requesting instructions that would require the jury to
24 be unanimous for any predicate for punitive damages and
25 for the amount of punitive damages. That law we concede

1 is not applicable to this case, because this case is
2 before September 1st, 2003, but we believe that the
3 Equal Protection Clause requires that if the Court is
4 going to apply post 09/01, 2003 law in favor of the
5 Plaintiffs, that that should cut both ways.

6 Your Honor, I see the Court has refused
7 Request No. 10.

8 Request No. 11, your Honor, would also be
9 refused if the Court ruled consistently, that would have
10 to do with the predicates, which we say is malice
11 instead of the gross negligent, and we believe that
12 should be unanimous, if anything.

13 I see the Court has signed its refusal on
14 Request 11.

15 Request 12, your Honor, would also be
16 refused if the Court ruled consistently, and that has to
17 do with the -- the amounts of exemplary damages, and we
18 respectfully request the Court instruct the jury that
19 has to be unanimous.

20 And, your Honor, there are only two more.
21 There's 13 and 14, and they're just alternative
22 submissions.

23 Did you answer unanimously, so that at
24 least if -- if this issue were going to be considered
25 later, we could get a finding by the jury or an answer

1 on whether, in fact, any verdict award of punitive
2 damages was unanimous.

3 I see the Court has signed its refusal on
4 13 and 14.

5 Your Honor, our request would be that each
6 of these refused requested instructions, definitions be
7 filed with the clerk, and if possible, I might see if I
8 could prevail on Mr. Goodwyn for some assistance in
9 getting -- getting a copy of them after they're filed
10 stamped, but that's all the tenders I believe we're
11 going to have, your Honor.

12 THE COURT: Jeff, can you do that for him?

13 THE COURT REPORTER: Yes, sir.

14 THE COURT: All right. You got it.

15 MR. TAYLOR: What I want to caution
16 everybody about. I'm -- I'm working on the oversight
17 committee. We -- We are having just major problems with
18 the boiler plate, because the boiler plate says the same
19 10 or more, and so I tendered "except as otherwise
20 instructed."

21 There's one certificate that has the
22 presiding juror, if it's unanimous, or the same 10 or
23 more if it's not.

24 And so I don't want to pretend that this is
25 not a tricky issue inserted in the Charge. We've been

1 working very hard on it, and the Legislature has now
2 hoisted this on us.

3 MR. BOYD: In light of that confusion, your
4 Honor, we would renew our position and just let them
5 make their objection on the record and not submit it is
6 our position.

7 MR. TAYLOR: We've made our respectful
8 request --

9 THE COURT: Because the critical thing here
10 is, how would you submit it?

11 MR. BOYD: That's right.

12 MR. TAYLOR: Right.

13 THE COURT: What you're warning of us is
14 that --

15 MR. TAYLOR: Yeah.

16 THE COURT: -- the consensus, even on the
17 committee as to how to submit it?

18 MR. TAYLOR: Well, there is going to be a
19 uniform submission that's coming out in the 2004
20 versions of the green book, the red book, and the blue
21 book, and everybody on the committee recognizes that
22 there are some uncertainties about the proper manner of
23 submission.

24 Rule 226A and the order promulgated under
25 226A have not yet been amended.

1 I think that to do it, you have to amend
2 the boiler plate to say "except as otherwise instructed,
3 you may render your verdict on the vote of any 10 or
4 more jurors." You have to change that, and you have to
5 have some sort of certificate that deals with the
6 problem.

7 Now, we have candidly conceded this law
8 does not apply to this case.

9 At the same time, we have -- we have had
10 arguments against us presented successfully, based on
11 amendments of the wrongful death act, that do not apply
12 to this case, and so we respectfully urge our position.

13 MR. BOYD: I think in light of the fact
14 there's any confusion on the committee -- to avoid any
15 confusion, the jury in this case, we can go ahead with
16 as it's prepared would be our position.

17 THE COURT: All right, sir.

18 MR. TAYLOR: Our objections will be made
19 and our requests have been refused already.

20 THE COURT: Anything further?

21 MR. BOYD: I don't think so.

22 I think the copies are being made.

23 (A brief recess was taken.)

24 THE COURT: All right. Back on record in
25 this cause.

1 The Court has prepared a Charge and
2 provided it to the attorneys for examination. At this
3 time, Mr. Boyd, does the Plaintiff have any objections
4 to the Charge?

5 MR. BOYD: Your Honor, the Plaintiff has no
6 objections to the Charge.

7 THE COURT: Mr. Taylor, does the Defendant
8 have any objections to the Charge?

9 MR. TAYLOR: We do, your Honor, and may --
10 may I affirm that the Charge has been signed by the
11 Court and filed?

12 THE COURT: It hasn't been signed yet, but
13 I've stamped it with "Original," and that's the one I
14 will sign after I've read it.

15 MR. TAYLOR: Your Honor, then, with that
16 assurance we have now the Charge -- what we understand
17 to be the Charge of the Court consisting of pages one
18 through 25.

19 I'm making these objections on behalf of
20 the Defendants, TXI Transportation Company, Ricardo
21 Reyna Rodriguez, and Aurelio Melendez.

22 I'm making these objections, your Honor, in
23 the presence of the Court, opposing counsel, and the
24 Court Reporter, and before the Court's Charge has been
25 read to the jury.

1 Your Honor, on page two of the Charge I
2 object to Paragraph 6, of the numbered instructions
3 insofar as they authorize the jury to find gross neglect
4 and assess punitive or exemplary damages upon the vote
5 of any 10 or more jurors.

6 Texas law does or should require the jury
7 to be unanimous in regard to finding liability for and
8 amounts of punitive or exemplary damages.

9 Although not applicable by its terms to
10 this case, Section 13.04 of House Bill 4, which became
11 effective September 1st, 2003, should be judicially
12 adopted as part of the substantive law of this state,
13 and the jury should be required to reach unanimous
14 verdicts regarding liability for and amounts of
15 exemplary damages, if any.

16 Your Honor, Plaintiffs' summary judgment
17 response regarding Clint Royse's unborn children urge
18 this Court to apply amendments of the Texas Wrongful
19 Death Act that are not applicable by their terms,
20 because any cause of action for the loss of Clint
21 Royse's unborn children accrued before September 1 of
22 2003. With respect, it is an unconstitutional denial of
23 the equal protection of the laws for this Court to apply
24 post-09-01-2003 statutory changes, when they favor
25 Plaintiffs, but not when they favor Defendants.

1 Apart from these objections, I have
2 tendered proposed instructions that would require
3 unanimous decisions by the jurors before they could find
4 gross neglect and assess any amounts for punitive
5 damages.

6 Your Honor, on page three of the Charge, I
7 object to the Court's refusal to submit an "unavoidable
8 accident" instruction. Defendants have both pleading
9 and evidence to support submission of an "unavoidable
10 accident" instruction.

11 Apart from these objections, I've tendered
12 an appropriate unavoidable accident instruction, which
13 the Court has refused to submit.

14 Also, on page three, your Honor, I object
15 to Question 1 including TXI Transportation Company, who
16 is Mr. Rodriguez' statutory employer. As a matter of
17 law, all theories of liability against Mr. Melendez and
18 TXI Transportation Company are derivative of and must
19 necessarily depend upon the jury finding negligence and
20 proximate cause against Mr. Rodriguez.

21 It is undisputed, and TXI and Mr. Melendez
22 have stipulated they are vicariously liable for
23 compensatory damages, if Mr. Rodriguez was at fault in
24 causing this accident.

25 Therefore, your Honor, the general

1 negligence question should not include TXI
2 Transportation Company or Mr. Melendez.

3 There is not any legally valid negligent
4 activity theory against either Mr. Melendez or TXI
5 Transportation Company, because the deaths and injuries
6 in this case did not occur as a contemporaneous result
7 of any of the conducts -- of any of the conduct
8 Plaintiffs allege against Mr. Melendez and TXI
9 Transportation Company.

10 There's also not a valid negligence per se
11 theory against either Mr. Melendez or TXI
12 Transportation. The Plaintiffs acknowledge this,
13 because they have failed to request negligence per se
14 questions or instructions.

15 Out of an abundance of caution, I object to
16 the omission of questions inquiring whether the
17 Defendants failed to comply with any applicable state or
18 federal safety regulations, which clearly define
19 required conduct, and whether the deaths and injuries in
20 this case resulted directly, rather than indirectly,
21 from a violation of any applicable safety regulations.

22 Moreover, your Honor, it is not feasible to
23 submit Question 1 broadly in this case, because
24 Plaintiffs have pleaded and apparently tend to argue TXI
25 Transportation Company and Mr. Melendez were negligent,

1 because they allegedly failed to investigate whether
2 Mr. Rodriguez may have obtained his commercial driver's
3 license by fraudulent means.

4 As a matter of law, neither TXI
5 Transportation Company, nor Mr. Melendez, had any
6 authority, nor owed any legal duty to second guess the
7 Texas Department of Transportation's licensing
8 decisions.

9 The inclusion of Mr. --

10 The inclusion of TXI Transportation Company
11 in Question 1 and its broad-form submission are
12 reversible error under the Casteel case, because the
13 Plaintiffs' liability theory against the employers is
14 legally invalid, and neither the parties, this court,
15 nor the appellate court, would be able to say with
16 certainty that the jury did not base any "yes" answer to
17 Question 1 on the legally invalid theory.

18 For all these reasons, TXI Transportation
19 Company should be deleted from Question 1.

20 Finally, regarding Question 1 and Question
21 2, also, your Honor, I object to the omission of
22 questions directly inquiring whether immediately prior
23 to the impact between the Yukon XL being operated by
24 Kimberly Watkins Hughes, and the tractor trailer being
25 operated by Ricardo Reyna Rodriguez on December 17,

1 2002, "Was the tractor trailer in Kimberly Watkins
2 Hughes' westbound lane of Highway 114, and did the
3 tractor trailer strike the Yukon as it attempted to move
4 back into the eastbound lane of travel?"

5 The Defendants respectfully assert that
6 under the Court's evidentiary rulings this key issue is
7 in -- this is a key issue in dispute and an essential
8 factual element on which Plaintiffs must prevail and on
9 which Defendants are constitutionally entitled to a jury
10 finding.

11 The Court is submitting questions about the
12 occurrence in question, but there is no definition of
13 "occurrence in question," and there is no question
14 directly inquiring whether Mr. Rodriguez was, in fact,
15 driving in the wrong lane of traffic immediately prior
16 to the impact between the tractor trailer he was
17 driving, and the Yukon vehicle Kimberly Watkins Hughes
18 was driving.

19 It is not feasible to submit Questions 1
20 and 2 broadly, and without defining the occurrence in
21 question, and without asking the jury to find whether
22 Mr. Rodriguez had, in fact, been driving in the wrong
23 lane.

24 I note, your Honor, that the instructions
25 under Question 2 inject the undefined word "collision."

1 Your Honor, I also object to the
2 instructions under Question 2 concerning negligent
3 entrustment, and specifically, to the inclusion of
4 Plaintiffs' theory that Mr. Rodriguez was an unlicensed
5 driver. There is no evidence that Mr. Rodriguez was an
6 unlicensed driver before or at the time of the
7 occurrence in question; nor is there evidence that
8 Mr. Rodriguez was an incompetent or reckless driver.

9 The inclusion of the unlicensed driver
10 alternative in Question 2, and its broad form submission
11 are reversible error under the Casteel and Harris County
12 verus Smith cases, because there is no evidence that
13 Mr. Rodriguez was unlicensed, and because the
14 Plaintiffs' invalid license theory is legally
15 unsustainable.

16 The evidence conclusively establishes that
17 Mr. Rodriguez had a commercial driver's license from the
18 appropriate licensing authority, and it is valid and in
19 effect through 2005.

20 Moreover, neither TXI Transportation
21 Company, nor Mr. Melendez had any authority nor owed any
22 duty -- any legal duty to second guess the Texas
23 Department of Transportation's licensing decisions.

24 Neither the parties, this Court, nor the
25 appellant court would be able to say with certainty that

1 the jury did not base any "Yes" answers against
2 Mr. Melendez, and/or TXI Transportation Company on the
3 unlicensed driver theory, which is unsupported by
4 evidence and which is also an invalid -- legally invalid
5 theory.

6 Your Honor, I object to the second sentence
7 of the instructions under Question 2, which reads, "Such
8 negligence is a proximate cause of a collision if the
9 negligence of the driver to whom the vehicle was
10 entrusted is a proximate cause of the collision."

11 This sentence misstates the law and lessens
12 the Plaintiffs' burden of proof under governing
13 substantive law, because it omits the required element
14 of proximate cause between the conduct of Mr. Melendez
15 and the occurrence in question.

16 I also object to the omission of a
17 proximate cause definition under Question 2, including
18 the substantial factors "but for causation and
19 foreseeability elements."

20 I also object to the omission of an
21 instruction stating that the jury cannot find proximate
22 cause if the risk that caused the entrustment to be
23 negligent did not cause the collision.

24 And just one example, your Honor, the Court
25 has permitted evidence about Mr. Rodriguez' immigration

1 difficulties, and Plaintiffs intend to blend that
2 evidence with their legally invalid theory that
3 Mr. Melendez and TXI Transportation Company owed a duty
4 to investigate Mr. Rodriguez' immigration status, and
5 whether he may have misrepresented facts to the
6 immigration authorities or other authorities.

7 The jury may believe Mr. Melendez and/or
8 TXI Transportation Company negligently entrusted the
9 tractor/trailer to Mr. Rodriguez based on an
10 understandable, but legally irrelevant view that illegal
11 aliens should not be permitted to drive 18-wheelers in
12 Texas.

13 Those issues have nothing to do with
14 whether Mr. Rodriguez was, in fact, unlicensed,
15 incompetent or reckless.

16 Moreover, even assuming Plaintiffs were
17 correct in their theory that Mr. Rodriguez' commercial
18 driver's license was invalid, that would be because of a
19 misrepresentation by Mr. Rodriguez that has nothing to
20 do with whether he was or was not driving the tractor
21 trailer in the wrong lane of travel immediately before
22 the question --

23 Excuse me.

24 -- immediately before the collision, which
25 is a question the Court is not even submitting to the

1 jury directly.

2 Mr. Melendez and TXI Transportation Company
3 will likely be harmed by the immigration evidence
4 without the protection of an instruction from the Court
5 stating there can be no proximate cause if the risk that
6 caused the entrustment to be negligent did not cause the
7 collision.

8 For all these reasons, I object to the
9 submission of Question 2 and its accompanying
10 instructions.

11 Your Honor, on Page 4, Question 3, I
12 also -- I object to the inclusion of Mr. Melendez and
13 TXI Transportation Company in the percentage of
14 responsibility question.

15 Again, that's Question 3: Because the
16 liability, if any, of Mr. Melendez and TXI
17 Transportation Company is derivative of, and dependent
18 on the jury finding that Mr. Rodriguez was negligent and
19 proximately caused the occurrence in question. There
20 should be only two answer blanks, and the only two
21 persons who should be submitted in the percentage of
22 responsibility question are Mr. Rodriguez and Kimberly
23 Watkins Hughes. That's from the Rosell case out of
24 Dallas in 2002.

25 I object to the improper inclusion of

1 Mr. Melendez and TXI Transportation Company. The
2 Court's single combined percentage of responsibility
3 question is improper, and it's calculated not only to
4 dilute the percentage of responsibility attributed to
5 Kimberly Watkins Hughes, but also to prevent the
6 Defendant from making a proper presentation of their
7 liability challenges in the event of any appeal.

8 Your Honor, on page five, I object to the
9 predicating instruction before Questions 4 through 18,
10 because Questions 1 and 2 concerning negligence and
11 negligent entrustment are defective and immaterial
12 predicates that could not lawfully support the judgment
13 awarding any damages the jury might find in answers to
14 Questions 4 through 18.

15 Your Honor, I object to the submission of
16 Question 4, and specifically, parts C and D, concerning
17 Jagr -- I think that's Jagr Royse's past and future
18 mental anguish, resulting from the occurrence in
19 question.

20 I object to the omission of questions
21 inquiring whether any physical injuries Jagr Royse
22 sustained in the accident caused him to suffer mental
23 anguish; and if so, what sums of money would fairly and
24 reasonably compensate Jagr Royse for such mental anguish
25 in the past and the future.

1 I also object to parts C and D under
2 Question 4, if based on any bystander theory, because as
3 a matter of law and fact, Jagr Royse was too young to be
4 legally capable of sustaining pleaded bystander damages
5 for mental anguish.

6 I also object to the omission of a question
7 inquiring whether Jagr Royse did or will suffer mental
8 anguish as a result of actually and contemporaneously
9 perceiving a negligently inflicted serious injury to, or
10 death of -- or the death of his mother, Afton Hughes
11 Royse.

12 I further object to preserve the issue,
13 your Honor, that Texas law does not and should not
14 recognize any separate bystander cause of action for
15 mental anguish damages, when, as here, the claimant
16 already has a statutory wrongful death cause of action.

17 Parts C and D under Question 4 are
18 defective and immaterial and are calculated to result in
19 overlapping damages and/or double recovery; particularly
20 in light of Question 5 in Parts E and F submitting
21 mental anguish resulting from the death of Jagr Royse's
22 mother, Afton Hughes Royse.

23 Moving on, your Honor, to pages 9 through
24 11, I object to submission of Questions 8 and 9
25 concerning Clint Royse's claim for the wrongful death of

1 his unborn children, who are now referred to in the
2 Charge as Twin A and Twin B.

3 Questions 8 and 9 are immaterial and should
4 not be submitted, because the Texas Wrongful Death Act
5 did not recognize an unborn fetus as an individual in
6 December of 2002, when the events at issue in this case
7 occurred, nor in May of 2003 when Clint Royse filed his
8 lawsuit.

9 There's no evidence that Clint Royse's
10 alleged cause of action for the wrongful death of his
11 unborn children accrued on or after September 1, 2003.

12 Moreover, the summary judgment evidence was
13 that Afton was six weeks pregnant when the accident
14 happened on December 17 of 2002. Consequently, the 2003
15 statutory amendments Plaintiffs cited in their summary
16 judgment response cannot be applied, and the prior law
17 is continued in effect for Cline Royse's alleged cause
18 of action.

19 With respect, the Court's allowance of this
20 unrecognized and emotionally charged claim has tainted
21 the entire trial and is calculated to deny the
22 Defendants their constitutional right to a fair trial of
23 the hotly disputed liability issues in this case.

24 Your Honor, I also object to the omission
25 of a question or questions inquiring whether the unborn

1 twins were viable fetuses, as would be required by the
2 Fort Worth decisions, including the Reese case, which is
3 petition for review granted in the Texas Supreme Court.

4 There's not even any evidence that the
5 unborn twins were viable, as defined in Fort Worth Court
6 of Appeals case law, or the Texas Health and Safety
7 Code.

8 Finally, your Honor, I object that Clint
9 Royse has no timely pleading to raise the Fourteenth
10 Amendment Equal Protection Challenge sustained in the
11 Fort Worth court's Reese and Parvin versus Dean
12 decisions.

13 The Fourteenth Amendment Equal Protection
14 Challenge was first pleaded on page seven of Plaintiffs'
15 Fourth Amended Petition, which was filed on April 13th,
16 2004, but which was not furnished to Counsel for the
17 Defendants a full 14 days before the final pretrial
18 hearing on April 27th, 2004.

19 Consequently, Plaintiffs' Third Amended
20 Petition should be treated as a live pleading on which
21 Clint Royse and the other Plaintiffs commenced this
22 trial, and he has no Fourteenth Amendment Equal
23 Protection claim timely and properly before the Court.

24 Your Honor, I object to submission of
25 Questions 21 through 24, which submit purported

1 predicates for, amounts of, and apportionment of
2 exemplary damages. There is no evidence, nor any clear
3 and convincing evidence that the harm for which recovery
4 of damages is sought resulted from malice or gross
5 neglect attributable to any of the Defendants.

6 Moreover, the predicate, negligence,
7 proximate cause, and percentage of responsibility
8 questions are defective and immaterial for the reasons
9 I've previously stated.

10 Question 21 and all the rest of the
11 questions in the Charge should not be submitted and they
12 are immaterial.

13 I also object to submission of Questions 21
14 through 24 on due process and fair notice grounds, and
15 because Plaintiffs have chosen not to comply with the
16 Court's order on special exceptions under Rule 47, and
17 to plead the maximum amounts they were requesting for
18 punitive or exemplary damages.

19 Plaintiffs also did not claim gross
20 negligence or malice, or punitive or exemplary damages
21 in their request for disclosure response No. C.

22 Consequently, Plaintiffs are not entitled
23 to submit any questions on punitive for exemplary
24 damages. For these reasons, also, Questions 21 through
25 24 should not be submitted and they're immaterial.

1 Your Honor, also, in connection with 21 --
2 that's Questions 21 through 24, I object to submitting,
3 "gross neglect," as the predicate for punitive or
4 exemplary damages.

5 Gross neglect is not the proper predicate
6 for punitive or exemplary damages, because Plaintiffs
7 did not file this lawsuit under a statute enacted
8 pursuant to Section 26, Article 16 of the Texas
9 Constitution.

10 Plaintiffs are not suing under the Labor
11 Code; instead the Plaintiffs are suing under the Texas
12 Wrongful Death Act, which is not a statute enacted
13 pursuant to Section 26, Article 16 of the Texas
14 Constitution.

15 Consequently, the required standard for
16 punitive or exemplary damages is malice, which the
17 Plaintiffs have not even pleaded.

18 Your Honor, I acknowledge the definitions
19 are the same, but even with the same definition, I
20 submit that it is harder for Plaintiffs to persuade the
21 jury to find by clear and convincing evidence that a
22 person's death resulted from "malice," than from "gross
23 neglect."

24 The effect of submitting "gross neglect" is
25 to impermissibly lessen Plaintiffs' burdens of proof and

1 persuasion under governing substantive law.

2 I object to Question 21 as defective and
3 immaterial, and cannot serve as a lawful predicate for
4 awarding any punitive or exemplary damages in this case.

5 Your Honor, I object to Question 21
6 omitting to inquire whether the jury finds by clear and
7 convincing evidence that the death of Afton Hughes Royse
8 resulted from malice or even gross neglect by Ricardo
9 Reyna Rodriguez.

10 It is the Plaintiffs' burden to obtain
11 affirmative answers to jury questions as to the
12 necessary elements of their cause of action, even if the
13 standard were correctly gross neglect, as opposed to
14 malice, Plaintiffs have the burden to obtain affirmative
15 answers to the jury questions establishing the requisite
16 conduct and mental state by a defendant, and the
17 defendant's name must also be included in any such
18 question before it might arguably be material.

19 Plaintiffs have waived any right to recover
20 exemplary damages against Ricardo Reyna Rodriguez --
21 Ricardo Reyna Rodriguez, and against Mr. Melendez, as
22 well.

23 I object to Questions 21 and 22 regarding
24 gross neglect, as defective and immaterial, because the
25 jury does not require unanimous answers, in the event

1 the jury finds gross neglect, but instead permits a
2 verdict by as few as 10 jurors agreeing to the answers.

3 I object to Question 23 regarding exemplary
4 damages, because the predicate questions are defective
5 and immaterial, and because the Charge does not require
6 unanimous answers in the event the jury finds gross
7 neglect, but instead permits a verdict by as few as 10
8 jurors agreeing to the answers.

9 All of the apportionment -- or at least --

10 Excuse me.

11 The -- the one apportionment of exemplary
12 damages questions is also consequently immaterial.

13 Your Honor, I object to the instructions
14 under Question 21 as improper, because they wrongly
15 conflate TXI Transportation Company and --

16 THE COURT: What?

17 MR. TAYLOR: -- they treat TXI
18 Transportation Company and Ricardo Reyna Rodriguez as
19 one in the same.

20 THE COURT: All right.

21 MR. TAYLOR: Your Honor, the instructions
22 wrongly conflate TXI Transportation Company and Ricardo
23 Reyna Rodriguez.

24 They're also improper because they wrongly
25 attribute Ricardo Reyna Rodriguez' alleged gross neglect

1 to TXI, and because they wrongly treat Ricardo Reyna
2 Rodriguez as an employee of TXI for punitive damages
3 purposes. TXI has admitted Mr. Rodriguez is a statutory
4 employee under Federal Motor Safety Carrier Regulations
5 for compensatory damages purposes, but Mr. Rodriguez is
6 not TXI Transportation Company's employee for punitive
7 damages purposes.

8 As a matter of law, TXI Transportation
9 Company is not liable for exemplary damages for conduct
10 by Mr. Rodriguez, and particularly any alleged criminal
11 conduct.

12 I object to the omission of questions
13 inquiring whether Ricardo Reyna Rodriguez was an
14 employee of TXI for punitive damages purposes, whether
15 Ricardo Reyna Rodriguez caused harm through malice or
16 gross neglect, whether Ricardo Reyna Rodriguez committed
17 any criminal act, whether TXI acted with malice in
18 supposedly employing Ricardo Reyna Rodriguez, and
19 whether the Plaintiffs' action, in fact, arises from or
20 was caused by any criminal act of Ricardo Reyna
21 Rodriguez.

22 I also object to the second alternative in
23 the instructions which states: "TXI or a manager of TXI
24 approved the act." That is an impermissible direct
25 comment on the weight of the evidence, because prior

1 questions inquire only about an act or omission by
2 Mr. Rodriguez, rather than an affirmative act.

3 I object, your Honor, to the submission of
4 Question 22 as an improper double submission of gross
5 neglect against TXI. I also object to the omission of a
6 question inquiring whether the harm for which recovery
7 of damages is sought, resulting from malice or even
8 gross neglect by any corporate vice principal of TXI
9 Transportation Company.

10 Your Honor, I object to the predicating
11 instruction before Questions 23 and 24, because a "Yes"
12 answer to either Question 21 or 22 would not be a lawful
13 predicate for punitive or exemplary damages against TXI
14 Transportation Company.

15 I further object to the omission of
16 questions inquiring whether Ricardo Reyna Rodriguez was
17 an incompetent or a habitually reckless driver; and if
18 so, did TXI Transportation Company know or should it
19 have known that TXI --

20 Excuse me.

21 -- that Ricardo Reyna Rodriguez was an
22 incompetent or habitually reckless driver.

23 Under the McElroy versus Fitts decision, no
24 punitive or exemplary damages could properly be awarded
25 against TXI Transportation Company, even assuming

1 Plaintiffs had pleaded negligent entrustment against TXI
2 Transportation Company, which they did not.

3 Your Honor, I acknowledge that they have
4 moved TXI out of the negligent entrustment, but I want
5 to make this objection because I have a feeling they're
6 later going to argue negligent entrustment against TXI
7 Transportation Company.

8 Your Honor, I object to Questions 21
9 through 23 submitting exemplary damages to any extent,
10 based on Ricardo Reyna Rodriguez' conduct because the
11 predicated questions do not limit the jury to
12 considering a properly actionable negligent activity, if
13 any, that contemporaneously and approximately caused the
14 occurrence in question.

15 The jury has heard prejudicial evidence
16 about, among other things, Mr. Rodriguez' immigration
17 troubles, and possible misrepresentations, but as a
18 matter of law, such conduct did not, at the time it
19 occurred, involve any extreme risk of which
20 Mr. Rodriguez or TXI Transportation Company or
21 Mr. Melendez was actually and subjectively aware.

22 I again object to the omission of a
23 question inquiring whether the jury finds by clear and
24 convincing evidence that Mr. Rodriguez caused Afton
25 Hughes Royse's death through a conduct amounting to

1 malice or gross neglect.

2 Plaintiffs know they could not persuade a
3 jury to so find. They instead hope the jury will find
4 gross neglect against TXI Transportation Company, even
5 though the jury is not being properly asked to find, nor
6 will it find that Mr. Rodriguez himself was guilty of
7 gross neglect; that's improper and I object to it.

8 Finally, your Honor, I object to Question
9 23 regarding exemplary damages as immaterial to the
10 extent of any amount the jury may find in excess of the
11 statutory cap on exemplary damages provided in Section
12 41.008 of the Texas Civil Practices & Remedies Code.

13 Plaintiffs have pleaded capbusting, but
14 they have not presented evidence, nor requested a
15 submission on whether any of the Defendants knowingly or
16 intentionally engaged in conduct in violation of any of
17 the Texas Penal Code sections listed in Section
18 41.008(c) of the Texas Civil Practices and Remedies
19 Code.

20 I don't think the evidence raises any such
21 violation. Nevertheless, out of an abundance of
22 caution, and to preclude any argument for express or
23 deemed judicial findings, I object to the omission of
24 questions inquiring whether the Defendants knowingly or
25 intentionally engaged in conduct in violation of any

1 particular provision of the Texas Penal Code; and if so,
2 whether Plaintiffs' action is, in fact, based upon and
3 was caused by any such violation of the Texas Penal
4 Code.

5 I respectfully object that exemplary
6 damages, if any should be awarded in this case, are
7 capped by a statute.

8 Your Honor, that completes the Defendants'
9 objections to the Court's Charge, and I would
10 respectfully request a ruling on those objections.

11 THE COURT: Your objections are overruled.

12 MR. STEINDORF: Your Honor, could I bend
13 your ear a little bit on this -- on the closing?

14 We got our case put on in one day, and I'm
15 thinking I could -- I could maybe get the job done in 40
16 minutes; but in 30 minutes, I'm afraid I'm going to get
17 tongue-tied. Would the Court consider giving us 40
18 minutes a side to close instead of 30?

19 THE COURT: No.

20 MR. STEINDORF: All right. Well, I bent
21 your ear. Thank you, anyway.

22 MR. BOYD: Your Honor, we have just one
23 thing in light of Mr. Stradley's opening statement, the
24 implying that the DPS has agreed with them and rejected
25 our theory. We would renew our supplemental motion in

1 limine that no such arguments be made in closing
2 argument to suggest that DPS agrees with one side or the
3 other, rejecting our theory.

4 MR. STEINDORF: I'm sorry --

5 MR. BOYD: We're renewing our limine that
6 you not make any arguments that the DPS agrees with one
7 side is at fault or disagrees with one side's theory.

8 MR. STEINDORF: We're not going to say
9 that.

10 MR. BOYD: Okay. If that's agreed, then
11 that's no problem.

12 THE COURT: Anything further?

13 MR. BOYD: No, your Honor.

14 (Open court, jury present.)

15 THE COURT: All right. Ladies and
16 gentlemen of the jury, let the record reflect first that
17 the Plaintiffs and their attorneys are present in the
18 courtroom. The Defendant is present in the courtroom,
19 as well as the Defendants' attorneys.

20 The jury is seated in the jury box.

21 At this time, ladies and gentlemen, the
22 Court has prepared a Charge that it will read for you.
23 I have put a separate copy of the Charge in your seat.
24 And what I'm going to ask you to do is read along with
25 me as we go on this Charge, because the Charge itself

1 will be submitted to you, the one that I give to you, as
2 the original.

3 And it will also be the one that I have
4 signed in blue ink. So your copy, you can take it to
5 the jury room with you so that during your deliberations
6 if you refer to certain parts, each of you will have a
7 copy so that you can read along, basically for your
8 convenience.

9 Just insure that the original is the one
10 that is eventually filled out and signed by the Foreman
11 and returned to the Court.

12 Also, there will be an instruction at some
13 point in there that says the first thing that you do
14 when you go to the jury room is to have this Charge read
15 to you aloud by the Foreman. Since you're reading it
16 along with me, you don't have to do that; you can if you
17 want to.

18 I will now read the Charge.

19 -----

20 CHARGE OF THE COURT

21 THE COURT: (Reading.)

22 "Ladies and gentlemen of the jury: This
23 case is submitted to you by asking questions about the
24 facts, which you may -- must decide from the evidence
25 you have heard in this trial.

1 You are the sole judges of the credibility
2 of the witnesses and the weight to be given their
3 testimony, but in matters of law, you must be governed
4 by the instructions in this charge. In discharging your
5 responsibility on this jury, you will observe all the
6 instructions which have previously been given to you. I
7 shall now give you additional instructions which you
8 should carefully and strictly follow during your
9 deliberations.

10 1. Do not let bias, prejudice or sympathy
11 play any part in your deliberations.

12 2. In arriving at your answers, consider
13 only the evidence introduced here under oath and such
14 exhibits, if any, as have been introduced for your
15 consideration under the rulings of the court, that is,
16 what you have seen and heard in this courtroom, together
17 with the law as given to you by the court. In your
18 deliberations, you will not consider or discuss anything
19 that is not represented by the evidence in the case.

20 3. Since every answer that is required by
21 the charge is important, no juror should state or
22 consider that any required answer is not important.

23 4. You must not decide who you think
24 should win, and then try to answer the questions
25 accordingly. Simply answer the questions, and do not

1 discuss nor concern yourselves with the effect of your
2 answers.

3 5. You will not decide the answer to a
4 question by lot or by drawing straws, or by any other
5 method of chance. Do not return a quotient verdict. A
6 quotient verdict means that the jurors agree to abide by
7 the result to be reached by adding together each juror's
8 figures and dividing by the number of jurors to get an
9 average. Do not do any trading on your answers, that
10 is, one juror should not agree to answer a certain
11 question one way if others will agree to answer another
12 question another way.

13 6. You may render your verdict upon the
14 vote of ten or more members of the jury. The same ten
15 or more of you must agree upon all of the answers made
16 and to the entire verdict. You will not, therefore,
17 enter into an agreement to be bound by a majority of any
18 other vote of less than ten jurors. If the verdict and
19 all of the answers therein are reached by unanimous
20 agreement, the presiding juror shall sign the verdict
21 for the entire jury. If any juror disagrees as to any
22 answer made by the verdict, those jurors who agree to
23 all findings shall each sign the verdict.

24 These instructions are given to you because
25 your conduct is subject to review the same as that of

1 the witnesses, parties, attorneys and the judge. If it
2 should be found that you have disregarded any of these
3 instructions, it will be jury misconduct and it may
4 require another trial by another jury; then all of our
5 time will have been wasted.

6 The presiding juror or any other who
7 observes a violation of the court's instructions shall
8 immediately warn the one who is violating the same and
9 caution the juror not to do so again.

10 When words are used in this charge in a
11 sense which varies from the meaning commonly understood,
12 you are given a proper legal definition, which you are
13 bound to accept in place of any other meaning.

14 Answer "Yes" or "No" to all questions
15 unless otherwise instructed. A "Yes" must be based on a
16 preponderance of the evidence unless otherwise
17 instructed. If you do not find that a preponderance of
18 the evidence supports a "Yes" answer, then answer "No."
19 Whenever a question requires an answer other than "Yes"
20 or "No", your answer must be based on a preponderance of
21 the evidence, unless otherwise instructed.

22 "Preponderance of the evidence" means the
23 greater weight and degree of credible evidence admitted
24 in this case.

25 A fact may be established by direct

1 evidence or by circumstantial evidence or both. A fact
2 is established by direct evidence when proved by
3 documentary evidence or by witnesses who saw the act
4 done or heard the words spoken. A fact is established
5 by circumstantial evidence when it may fairly and
6 reasonably be inferred from other facts proved.

7 QUESTION 1.

8 Did the negligence, if any, of those named
9 below proximately cause the occurrence in question?

10 For purposes of this question, "Negligence"
11 means failure to use ordinary care, that is, failing to
12 do that which a person of ordinary prudence would have
13 done under the same or similar circumstances or doing
14 that which a person of ordinary prudence would not have
15 done under the same or similar circumstances.

16 "Ordinary care" means that degree of care
17 that would be used by a person of ordinary prudence
18 under the same or similar circumstances.

19 "Proximate cause" means that cause which,
20 in a natural and continuous sequence, produces an event,
21 and without which cause such event would not have
22 occurred. In order to be a proximate cause, the act or
23 omission complained of must be such that a person using
24 ordinary care would have foreseen that the event, or
25 some similar event, might reasonably result therefrom.

1 There may be more than one proximate cause of an event.

2 If a person is confronted by an "emergency"
3 arising suddenly and unexpectedly, which was not
4 proximately caused by any negligence on his or her part
5 and which, to a reasonable person, requires immediate
6 action without time for deliberation, his or her conduct
7 in such an emergency is not negligence or failure to use
8 ordinary care if, after such emergency arises, he or she
9 acts as a person of ordinary prudence would have acted
10 under the same or similar circumstances.

11 Answer "Yes" or "No" for each of the
12 following:

13 A. Ricardo Reyna Rodriguez_____.

14 B. TXI Transportation Company_____.

15 D. Kimberly Watkins Hughes_____.

16 Answer Question 2 and Question 3 only if
17 you have answered "Yes" to Question 1 for Ricardo Reyna
18 Rodriguez. Otherwise, do not answer Question 2 or
19 Question 3.

20 QUESTION 2

21 Did the negligence, if any, of those named
22 below proximately cause the occurrence in question?

23 For purposes of this question, "Negligence"
24 means entrusting a vehicle to an unlicensed or
25 incompetent or reckless driver if the entrustor knew or

1 should have known that the driver was unlicensed, or
 2 incompetent. Such negligence is a proximate cause of a
 3 collision if the negligence of the driver to whom the
 4 vehicle was entrusted is a proximate cause of the
 5 collision.

6 Answer "Yes" or "No" for each of the
 7 following:

8 A. Aurelio Melendez _____.

9 The percentages you find must total 100
 10 percent. The percentages must be expressed in whole
 11 numbers. The percentage of causation attributable to a
 12 person or company is not necessarily measured by the
 13 number of acts or omissions found. The percentage
 14 attributable to a person or company need not be the same
 15 percentage attributed to that person or entity in
 16 answering another question.

17 QUESTION 3.

18 For each person or company found by you to
 19 have caused the occurrence in question, find the
 20 percentage caused by:

21 A. Ricardo Reyna Rodriguez _____%.

22 B. Aurelio Melendez _____%.

23 C. TXI Transportation Company _____%.

24 D. Kimberly Watkins Hughes _____%

25 Total 100%

1 Answer Questions 4, 5, 6, 7, 8, 9, 10, 11,
2 12, 13, 14, 15, 16, 17 and 18 if you have answered "Yes"
3 to Question 1 for Rodriguez.

4 Otherwise, do not answer Questions 4, 5, 6,
5 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 or 18.

6 QUESTION 4.

7 What sum of money, if paid now in cash,
8 would fairly and reasonably compensate Jagr Royse for
9 his injuries, if any, resulting from the occurrence in
10 question?

11 Consider the elements of damages listed
12 below and none other. Consider each element separately.
13 In answering this question you shall not award any sum
14 of money on any element if you have otherwise, under
15 some other element, awarded a sum of money for the same
16 loss, that is, do not compensate twice for the same
17 loss. Do not include interest on any amount of damages
18 you may find.

19 Do not reduce the amounts, if any, in your
20 answers because of the negligence, if any, of Kimberly
21 Watkins Hughes.

22 Answer separately, in dollars and cents,
23 for damages, if any.

24 A. Reasonable expenses of necessary
25 medical care in the past.

1 Answer: \$_____.

2 B. Physical pain sustained in the past.

3 Answer: \$_____.

4 C. Mental anguish sustained in the
5 past.

6 Answer: \$_____.

7 D. Mental anguish that, in reasonable
8 probability, Jagr Royse will sustain in the future.

9 Answer: \$_____.

10 QUESTION 5.

11 What sum of money, if paid now in cash,
12 would fairly and reasonably compensate Jagr Royse for
13 his damages, if any, resulting from the death of his
14 mother, Afton Hughes Royse?

15 Consider the elements of damages listed
16 below and none other. Consider each element separately.
17 In answering this question you shall not award any sum
18 of money on any element if you have otherwise, under
19 some other element, awarded a sum of money for the same
20 loss, that is, do not compensate twice for the same
21 loss. Do not include interest on any amount of damages
22 you find. Do not reduce the amounts, if any, in your
23 answers because of the negligence, if any, of Kimberly
24 Watkins Hughes.

25 Pecuniary loss. ôPecuniary lossö means the

1 loss of the care, maintenance, support, services,
2 advice, counsel, and reasonable contributions of a
3 pecuniary value, that Jagr Royse, in reasonable
4 probability, would have received from Afton Hughes Royse
5 had she lived.

6 Loss of companionship and society. ôLoss
7 of companionship and societyö means the loss of the
8 positive benefits flowing from the love, comfort,
9 companionship, and society that Jagr Royse, in
10 reasonable probability, would have received from Afton
11 Hughes Royse had she lived.

12 Mental anguish. ôMental anguishö means the
13 emotional pain, torment, and suffering experienced by
14 Jagr Royse because of the death of Afton Hughes Royse.

15 In determining damages for loss of
16 companionship and society and mental anguish, you may
17 consider the relationship between Jagr Royse and Afton
18 Hughes Royse, their living arrangements, any extended
19 absences from one another, the harmony of their family
20 relations, and their common interests and activities.
21 You are reminded that loss of companionship and society
22 and mental anguish, like the other elements of damages,
23 are separate, and in awarding damages for one element,
24 you shall not include damages for the other.

25 Answer, with respect to the elements listed

1 above, in dollars and cents for each of the following:

2 (A) pecuniary loss sustained in the
3 past.

4 \$_____.

5 (B) pecuniary loss that in reasonable
6 probability will be sustained in the future.

7 \$_____.

8 (C) loss of companionship and society
9 sustained in the past.

10 \$_____.

11 (D) loss of companionship and society that
12 in reasonable probability will be sustained in the
13 future.

14 \$_____.

15 (E) mental anguish sustained in the
16 past.

17 \$_____.

18 (F) mental anguish that in reasonable
19 probability will be sustained in the future.

20 \$_____.

21 QUESTION 6.

22 What sum of money, if paid now in cash,
23 would have fairly and reasonably compensated Afton
24 Hughes Royse for her damages, if any, as a result of the
25 occurrence in question?

1 Consider the elements of damages listed
2 below and none other. Consider each element separately.
3 In answering this question you shall not award any sum
4 of money on any element if you have otherwise, under
5 some other element, awarded a sum of money for the same
6 loss, that is, do not compensate twice for the same
7 loss. Do not include interest on any amount of damages
8 you find.

9 Do not reduce the amounts, if any, in your
10 answers because of the negligence, if any, of Kimberly
11 Watkins Hughes.

12 Medical expenses. "Medical expenses" means
13 the reasonable expense of the necessary medical and
14 hospital care received by Afton Hughes Royse for
15 treatment of injuries sustained by her as a result of
16 the occurrence in question.

17 Funeral and burial expenses.

18 "Funeral and burial expenses" means the
19 reasonable amount of expenses for funeral and burial for
20 Afton Hughes Royse reasonably suitable to her station in
21 life.

22 Pain and mental anguish.

23 "Pain and mental anguish" means the
24 conscious physical pain and emotional pain, torment, and
25 suffering experienced by Afton Hughes Royse before her

1 death as a result of the occurrence in question.

2 Answer, with respect to the elements listed
3 above, in dollars and cents for each of the following:

4 (A) Medical expenses.

5 \$_____.

6 (B) Funeral and burial expenses.

7 \$_____

8 (C) Pain and mental anguish.

9 \$_____

10 QUESTION 7.

11 What sum of money, if paid now in cash,
12 would fairly and reasonably compensate Clint Royse for
13 his damages, if any, resulting from the death of his
14 wife, Afton Hughes Royse?

15 Consider the elements of damages listed
16 below and none other. Consider each element separately.
17 In answering this question you shall not award any sum
18 of money on any element if you have otherwise, under
19 some other element, awarded a sum of money for the same
20 loss, that is, do not compensate twice for the same
21 loss. Do not include interest on any amount of damages
22 you find.

23 Do not reduce the amounts, if any, in your
24 answers because of the negligence, if any, of Kimberly
25 Watkins Hughes.

1 Pecuniary loss. ôPecuniary lossö means the
2 loss of the care, maintenance, support, services,
3 advice, counsel, and reasonable contributions of a
4 pecuniary value, that Clint Royse, in reasonable
5 probability, would have received from Afton Hughes Royse
6 had she lived.

7 Loss of companionship and society. ôLoss
8 of companionship and societyö means the loss of the
9 positive benefits flowing from the love, comfort,
10 companionship, and society that Clint Royse, in
11 reasonable probability, would have received from Afton
12 Hughes Royse had she lived.

13 Mental anguish. ôMental anguishö means the
14 emotional pain, torment, and suffering experienced by
15 Clint Royse because of the death of Afton Hughes Royse.
16 In determining damages for loss of companionship and
17 society and mental anguish, you may consider the
18 relationship between Clint Royse and Afton Hughes Royse,
19 their living arrangements, any extended absences from
20 one another, the harmony of their family relations, and
21 their common interests and activities. You are reminded
22 that loss of companionship and society and mental
23 anguish, like the other elements of damages, are
24 separate, and in awarding damages for one element, you
25 shall not include damages for the other.

1 Answer, with respect to the elements listed
2 above, in dollars and cents for each of the following:

3 (A) pecuniary loss sustained in the
4 past .

5 \$_____.

6 (B) pecuniary loss that in reasonable
7 probability will be sustained in the future.

8 \$_____.

9 (C) loss of companionship and society
10 sustained in the past.

11 \$_____.

12 (D) loss of companionship and society that
13 in reasonable probability will be sustained in the
14 future.

15 \$_____.

16 (E) mental anguish sustained in the
17 past.

18 \$_____.

19 (F) mental anguish that in reasonable
20 probability will be sustained in the future.

21 \$_____.

22 QUESTION 8

23 What sum of money, if paid now in cash,
24 would fairly and reasonably compensate Clint Royse for
25 his damages, if any, resulting from the death of his

1 unborn child, Twin A?

2 Consider the elements of damages listed
3 below and none other. Consider each element separately.
4 In answering this question you shall not award any sum
5 of money on any element if you have otherwise, under
6 some other element, awarded a sum of money for the same
7 loss, that is, do not compensate twice for the same
8 loss. Do not include interest on any amount of damages
9 you find.

10 Do not reduce the amounts, if any, in your
11 answers because of the negligence, if any, of Kimberly
12 Watkins Hughes.

13 Loss of companionship and society.

14 ôLoss of companionship and societyö means
15 the loss of the positive benefits flowing from the love,
16 comfort, companionship, and society that Clint Royse, in
17 reasonable probability, would have received from his
18 unborn child, Twin A, had it lived.

19 Mental anguish.

20 ôMental anguishö means the emotional pain,
21 torment, and suffering experienced by Clint Royse
22 because of the death of his unborn child, Twin A.

23 In determining damages for loss of
24 companionship and society and mental anguish, you may
25 consider the relationship between Clint Royse and his

1 unborn child, Twin A, their living arrangements, any
2 extended absences from one another, the harmony of their
3 family relations, and their common interests and
4 activities. You are reminded that loss of companionship
5 and society and mental anguish, like the other elements
6 of damages, are separate, and in awarding damages for
7 one element, you shall not include damages for the
8 other.

9 Answer, with respect to the elements listed
10 above, in dollars and cents for each of the following:

11 (A) loss of companionship and society
12 sustained in the past.

13 \$_____.

14 (B) loss of companionship and society that
15 in reasonable probability will be sustained in the
16 future.

17 \$_____.

18 (C) mental anguish sustained in the past.

19 \$_____.

20 (D) mental anguish that in reasonable
21 probability will be sustained in the future.

22 \$_____.

23 QUESTION 9.

24 What sum of money, if paid now in cash,
25 would fairly and reasonably compensate Clint Royse for

1 his damages, if any, resulting from the death of his
2 unborn child, Twin B?

3 Consider the elements of damages listed
4 below and none other. Consider each element separately.
5 In answering this question you shall not award any sum
6 of money on any element if you have otherwise, under
7 some other element, awarded a sum of money for the same
8 loss, that is, do not compensate twice for the same
9 loss. Do not include interest on any amount of damages
10 you find.

11 Do not reduce the amounts, if any, in your
12 answers because of the negligence, if any, of Kimberly
13 Watkins Hughes.

14 Loss of companionship and society.

15 ôLoss of companionship and societyö means
16 the loss of the positive benefits flowing from the love,
17 comfort, companionship, and society that Clint Royse, in
18 reasonable probability, would have received from his
19 unborn child, Twin B, had it lived.

20 Mental anguish.

21 ôMental anguishö means the emotional pain,
22 torment, and suffering experienced by Clint Royse
23 because of the death of his unborn child, Twin B.

24 In determining damages for loss of
25 companionship and society and mental anguish, you may

1 would have fairly and reasonably compensated Shiloh
2 Hughes for his damages, if any, as a result of the
3 occurrence in question?

4 Consider the elements of damages listed
5 below and none other. Consider each element separately.
6 In answering this question you shall not award any sum
7 of money on any element if you have otherwise, under
8 some other element, awarded a sum of money for the same
9 loss, that is, do not compensate twice for the same
10 loss. Do not include interest on any amount of damages
11 you find.

12 Do not reduce the amounts, if any, in your
13 answers because of the negligence, if any, of Kimberly
14 Watkins Hughes.

15 Funeral and burial expenses.

16 "Funeral and burial expenses" means the
17 reasonable amount of expenses for funeral and burial for
18 Shiloh Hughes reasonably suitable to his station in
19 life.

20 Pain and mental anguish.

21 "Pain and mental anguish" means the
22 conscious physical pain and emotional pain, torment, and
23 suffering experienced by Shiloh Hughes before his death
24 as a result of the occurrence in question.

25 Answer, with respect to the elements listed

1 above, in dollars and cents for each of the following:

2 (A) Funeral and burial expenses.

3 \$_____.

4 (B) Pain and mental anguish.

5 \$_____.

6 QUESTION 11.

7 What sum of money, if paid now in cash,
8 would fairly and reasonably compensate Randy Hughes for
9 his damages, if any, resulting from the death of his
10 son, Shiloh Hughes?

11 Consider the elements of damages listed
12 below and none other. Consider each element separately.
13 In answering this question you shall not award any sum
14 of money on any element if you have otherwise, under
15 some other element, awarded a sum of money for the same
16 loss, that is, do not compensate twice for the same
17 loss. Do not include interest on any amount of damages
18 you find.

19 Do not reduce the amounts, if any, in your
20 answers because of the negligence, if any, of Kimberly
21 Watkins Hughes.

22 Loss of companionship and society.

23 ôLoss of companionship and societyö means
24 the loss of the positive benefits flowing from the love,
25 comfort, companionship, and society that Randy Hughes,

1 in reasonable probability, would have received from
2 Shiloh Hughes had he lived.

3 Mental anguish.

4 “Mental anguish” means the emotional pain,
5 torment, and suffering experienced by Randy Hughes
6 because of the death of Shiloh Hughes.

7 In determining damages for loss of
8 companionship and society and mental anguish, you may
9 consider the relationship between Randy Hughes and
10 Shiloh Hughes, their living arrangements, any extended
11 absences from one another, the harmony of their family
12 relations, and their common interests and activities.
13 You are reminded that loss of companionship and society
14 and mental anguish, like the other elements of damages,
15 are separate, and in awarding damages for one element,
16 you shall not include damages for the other.

17 Answer, with respect to the elements listed
18 above, in dollars and cents for each of the following:

19 (A) loss of companionship and society
20 sustained in the past.

21 \$_____.

22 (B) loss of companionship and society that
23 in reasonable probability will be sustained in the
24 future.

25 \$_____.

1 (C) mental anguish sustained in the past.

2 \$_____.

3 (D) mental anguish that in reasonable
4 probability will be sustained in the future.

5 \$_____.

6 QUESTION 12.

7 What sum of money, if paid now in cash,
8 would fairly and reasonably compensate Randy Hughes for
9 his damages, if any, resulting from the death of his
10 daughter, Afton Hughes Royse?

11 Consider the elements of damages listed
12 below and none other. Consider each element separately.
13 In answering this question you shall not award any sum
14 of money on any element if you have otherwise, under
15 some other element, awarded a sum of money for the same
16 loss, that is, do not compensate twice for the same
17 loss. Do not include interest on any amount of damages
18 you find.

19 Do not reduce the amounts, if any, in your
20 answers because of the negligence, if any, of Kimberly
21 Watkins Hughes.

22 Loss of companionship and society.

23 ôLoss of companionship and societyö means
24 the loss of the positive benefits flowing from the love,
25 comfort, companionship, and society that Randy Hughes,

1 in reasonable probability, would have received from
2 Afton Hughes Royse had she lived.

3 Mental anguish.

4 “Mental anguish” means the emotional pain,
5 torment, and suffering experienced by Randy Hughes
6 because of the death of Afton Hughes Royse.

7 In determining damages for loss of
8 companionship and society and mental anguish, you may
9 consider the relationship between Randy Hughes and Afton
10 Hughes Royse, their living arrangements, any extended
11 absences from one another, the harmony of their family
12 relations, and their common interests and activities.
13 You are reminded that loss of companionship and society
14 and mental anguish, like the other elements of damages,
15 are separate, and in awarding damages for one element,
16 you shall not include damages for the other.

17 Answer, with respect to the elements listed
18 above, in dollars and cents for each of the following:

19 (A) loss of companionship and society
20 sustained in the past.

21 \$_____.

22 (B) loss of companionship and society that
23 in reasonable probability will be sustained in the
24 future.

25 \$_____.

1 (C) mental anguish sustained in the past.

2 \$_____.

3 (D) mental anguish that in reasonable
4 probability will be sustained in the future.

5 \$_____

6 QUESTION 13.

7 What sum of money, if paid now in cash,
8 would have fairly and reasonably compensated Joyce
9 Watkins for her damages, if any, as a result of the
10 occurrence in question?

11 Consider the elements of damages listed
12 below and none other. Consider each element separately.
13 In answering this question you shall not award any sum
14 of money on any element if you have otherwise, under
15 some other element, awarded a sum of money for the same
16 loss, that is, do not compensate twice for the same
17 loss. Do not include interest on any amount of damages
18 you find.

19 Do not reduce the amounts, if any, in your
20 answers because of the negligence, if any, of Kimberly
21 Watkins Hughes.

22 Funeral and burial expenses.

23 "Funeral and burial expenses" means the
24 reasonable amount of expenses for funeral and burial for
25 Joyce Watkins reasonably suitable to her station in

1 life.

2 Pain and mental anguish.

3 "Pain and mental anguish" means the
4 conscious physical pain and emotional pain, torment, and
5 suffering experienced by Joyce Watkins before her death
6 as a result of the occurrence in question.

7 Answer, with respect to the elements listed
8 above, in dollars and cents for each of the following:

9 (A) Funeral and burial expenses.

10 \$_____.

11 (B) Pain and mental anguish.

12 \$_____.

13 QUESTION 14.

14 What sum of money, if paid now in cash,
15 would fairly and reasonably compensate Willie Watkins
16 for his damages, if any, resulting from the death of his
17 wife, Joyce Watkins?

18 Consider the elements of damages listed
19 below and none other. Consider each element separately.
20 In answering this question you shall not award any sum
21 of money on any element if you have otherwise, under
22 some other element, awarded a sum of money for the same
23 loss, that is, do not compensate twice for the same
24 loss. Do not include interest on any amount of damages
25 you find.

1 Do not reduce the amounts, if any, in your
2 answers because of the negligence, if any, of Kimberly
3 Watkins Hughes.

4 Pecuniary loss.

5 ôPecuniary lossö means the loss of the
6 care, maintenance, support, services, advice, counsel,
7 and reasonable contributions of a pecuniary value, that
8 Willie Watkins, in reasonable probability, would have
9 received from Joyce Watkins had she lived.

10 Loss of companionship and society.

11 ôLoss of companionship and societyö means
12 the loss of the positive benefits flowing from the love,
13 comfort, companionship, and society that Willie Watkins,
14 in reasonable probability, would have received from
15 Joyce Watkins had she lived.

16 Mental anguish.

17 ôMental anguishö means the emotional pain,
18 torment, and suffering experienced by Willie Watkins
19 because of the death of Joyce Watkins.

20 In determining damages for loss of
21 companionship and society and mental anguish, you may
22 consider the relationship between Willie Watkins and
23 Joyce Watkins, their living arrangements, any extended
24 absences from one another, the harmony of their family
25 relations, and their common interests and activities.

1 You are reminded that loss of companionship and society
2 and mental anguish, like the other elements of damages,
3 are separate, and in awarding damages for one element,
4 you shall not include damages for the other.

5 Answer, with respect to the elements listed
6 above, in dollars and cents for each of the following:

7 (A) pecuniary loss sustained in the past.

8 \$_____.

9 (B) pecuniary loss that in reasonable
10 probability will be sustained in the future.

11 \$_____.

12 (C) loss of companionship and society
13 sustained in the past.

14 \$_____.

15 (D) loss of companionship and society that
16 in reasonable probability will be sustained in the
17 future.

18 \$_____.

19 (E) mental anguish sustained in the past.

20 \$_____.

21 (F) mental anguish that in reasonable
22 probability will be sustained in the future.

23 \$_____.

24 QUESTION 15.

25 What sum of money, if paid now in cash,

1 would fairly and reasonably compensate Shirley Ritchey
2 for her damages, if any, resulting from the death of her
3 mother, Joyce Watkins?

4 Consider the elements of damages listed
5 below and none other. Consider each element separately.
6 In answering this question you shall not award any sum
7 of money on any element if you have otherwise, under
8 some other element, awarded a sum of money for the same
9 loss, that is, do not compensate twice for the same
10 loss. Do not include interest on any amount of damages
11 you find.

12 Do not reduce the amounts, if any, in your
13 answers because of the negligence, if any, of Kimberly
14 Watkins Hughes.

15 Loss of companionship and society.

16 ôLoss of companionship and societyö means
17 the loss of the positive benefits flowing from the love,
18 comfort, companionship, and society that Shirley
19 Ritchey, in reasonable probability, would have received
20 from Joyce Watkins had she lived.

21 Mental anguish.

22 ôMental anguishö means the emotional pain,
23 torment, and suffering experienced by Shirley Ritchey
24 because of the death of Joyce Watkins.

25 In determining damages for loss of

1 would fairly and reasonably compensate Carolyn Largent
2 for her damages, if any, resulting from the death of her
3 mother, Joyce Watkins?

4 Consider the elements of damages listed
5 below and none other. Consider each element separately.
6 In answering this question you shall not award any sum
7 of money on any element if you have otherwise, under
8 some other element, awarded a sum of money for the same
9 loss, that is, do not compensate twice for the same
10 loss. Do not include interest on any amount of damages
11 you find.

12 Do not reduce the amounts, if any, in your
13 answers because of the negligence, if any, of Kimberly
14 Watkins Hughes.

15 Loss of companionship and society.

16 ôLoss of companionship and societyö means
17 the loss of the positive benefits flowing from the love,
18 comfort, companionship, and society that Carolyn
19 Largent, in reasonable probability, would have received
20 from Joyce Watkins had she lived.

21 Mental anguish.

22 ôMental anguishö means the emotional pain,
23 torment, and suffering experienced by Carolyn Largent
24 because of the death of Joyce Watkins.

25 In determining damages for loss of

1 would fairly and reasonably compensate Betty Gentry for
2 her damages, if any, resulting from the death of her
3 mother, Joyce Watkins?

4 Consider the elements of damages listed
5 below and none other. Consider each element separately.
6 In answering this question you shall not award any sum
7 of money on any element if you have otherwise, under
8 some other element, awarded a sum of money for the same
9 loss, that is, do not compensate twice for the same
10 loss. Do not include interest on any amount of damages
11 you find.

12 Do not reduce the amounts, if any, in your
13 answers because of the negligence, if any, of Kimberly
14 Watkins Hughes.

15 Loss of companionship and society.

16 ôLoss of companionship and societyö means
17 the loss of the positive benefits flowing from the love,
18 comfort, companionship, and society that Betty Gentry,
19 in reasonable probability, would have received from
20 Joyce Watkins had she lived.

21 Mental anguish.

22 ôMental anguishö means the emotional pain,
23 torment, and suffering experienced by Betty Gentry
24 because of the death of Joyce Watkins. In determining
25 damages for loss of companionship and society and mental

1 would fairly and reasonably compensate Johnny Watkins
2 for his damages, if any, resulting from the death of his
3 mother, Joyce Watkins?

4 Consider the elements of damages listed
5 below and none other. Consider each element separately.
6 In answering this question you shall not award any sum
7 of money on any element if you have otherwise, under
8 some other element, awarded a sum of money for the same
9 loss, that is, do not compensate twice for the same
10 loss. Do not include interest on any amount of damages
11 you find.

12 Do not reduce the amounts, if any, in your
13 answers because of the negligence, if any, of Kimberly
14 Watkins Hughes.

15 Loss of companionship and society.

16 ôLoss of companionship and societyö means
17 the loss of the positive benefits flowing from the love,
18 comfort, companionship, and society that Johnny Watkins,
19 in reasonable probability, would have received from
20 Joyce Watkins had she lived.

21 Mental anguish.

22 ôMental anguishö means the emotional pain,
23 torment, and suffering experienced by Johnny Watkins
24 because of the death of Joyce Watkins.

25 In determining damages for loss of

1 companionship and society and mental anguish, you may
2 consider the relationship between Johnny Watkins and
3 Joyce Watkins, their living arrangements, any extended
4 absences from one another, the harmony of their family
5 relations, and their common interests and activities.
6 You are reminded that loss of companionship and society
7 and mental anguish, like the other elements of damages,
8 are separate, and in awarding damages for one element,
9 you shall not include damages for the other.

10 Answer, with respect to the elements listed
11 above, in dollars and cents for each of the following:

12 (A) loss of companionship and society
13 sustained in the past.

14 \$_____.

15 (B) loss of companionship and society that
16 in reasonable probability will be sustained in the
17 future.

18 \$_____.

19 (C) mental anguish sustained in the past.

20 \$_____.

21 (D) mental anguish that in reasonable
22 probability will be sustained in the future.

23 \$_____.

24 Answer Questions 19 and 20 if you have
25 answered "Yes" to Question 1 for Rodriguez, and

1 answered: (1) "No" for Kimberly Watkins Hughes in
2 response to Question 1; or (2) 50 percent or less for
3 Kimberly Watkins Hughes in response to Question 3.

4 Otherwise, do not answer Question 19 or 20.

5 QUESTION 19.

6 What sum of money, if paid now in cash,
7 would have fairly and reasonably compensated Kimberly
8 Watkins Hughes for her damages, if any, as a result of
9 the occurrence in question?

10 Consider the elements of damages listed
11 below and none other. Consider each element separately.
12 In answering this question you shall not award any sum
13 of money on any element if you have otherwise, under
14 some other element, awarded a sum of money for the same
15 loss, that is, do not compensate twice for the same
16 loss. Do not include interest on any amount of damages
17 you find.

18 Do not reduce the amounts, if any, in your
19 answers because of the negligence, if any, of Kimberly
20 Watkins Hughes.

21 Medical expenses.

22 "Medical expenses" means the reasonable
23 expense of the necessary medical and hospital care
24 received by Kimberly Watkins Hughes for treatment of
25 injuries sustained by her as a result of the occurrence

1 in question.

2 Funeral and burial expenses.

3 "Funeral and burial expenses" means the
4 reasonable amount of expenses for funeral and burial for
5 Kimberly Watkins Hughes reasonably suitable to her
6 station in life.

7 Pain and mental anguish.

8 "Pain and mental anguish" means the
9 conscious physical pain and emotional pain, torment, and
10 suffering experienced by Kimberly Watkins Hughes before
11 her death as a result of the occurrence in question.

12 Answer, with respect to the elements listed
13 above, in dollars and cents for each of the following:

14 (A) Medical expenses.

15 \$_____.

16 (B) Funeral and burial expenses.

17 \$_____.

18 (C) Pain and mental anguish.

19 \$_____.

20 QUESTION 20.

21 What sum of money, if paid now in cash,
22 would fairly and reasonably compensate Willie Watkins
23 for his damages, if any, resulting from the death of his
24 daughter, Kimberly Watkins Hughes?

25 Consider the elements of damages listed

1 below and none other. Consider each element separately.
2 In answering this question you shall not award any sum
3 of money on any element if you have otherwise, under
4 some other element, awarded a sum of money for the same
5 loss, that is, do not compensate twice for the same
6 loss. Do not include interest on any amount of damages
7 you find.

8 Do not reduce the amounts, if any, in your
9 answers because of the negligence, if any, of Kimberly
10 Watkins Hughes.

11 Loss of companionship and society.

12 ôLoss of companionship and societyö means
13 the loss of the positive benefits flowing from the love,
14 comfort, companionship, and society that Willie Watkins,
15 in reasonable probability, would have received from
16 Kimberly Watkins Hughes had she lived.

17 Mental anguish.

18 ôMental anguishö means the emotional pain,
19 torment, and suffering experienced by Willie Watkins
20 because of the death of Kimberly Watkins Hughes.

21 In determining damages for loss of
22 companionship and society and mental anguish, you may
23 consider the relationship between Willie Watkins and
24 Kimberly Watkins Hughes, their living arrangements, any
25 extended absences from one another, the harmony of their

1 family relations, and their common interests and
2 activities. You are reminded that loss of companionship
3 and society and mental anguish, like the other elements
4 of damages, are separate, and in awarding damages for
5 one element, you shall not include damages for the
6 other.

7 Answer, with respect to the elements listed
8 above, in dollars and cents for each of the following:

9 (A) loss of companionship and society
10 sustained in the past.

11 \$_____.

12 (B) loss of companionship and society that
13 in reasonable probability will be sustained in the
14 future.

15 \$_____.

16 (C) mental anguish sustained in the past.

17 \$_____.

18 (D) mental anguish that in reasonable
19 probability will be sustained in the future.

20 \$_____.

21 If you have answered "Yes" as to Ricardo
22 Reyna Rodriguez in response to Question 1, and you have
23 inserted a sum of money in answer to Question 5 or
24 Question 7, then answer Question 21.

25 Otherwise, do not answer Question 21.

1 QUESTION 21.

2 Do you find by clear and convincing
3 evidence that the death of Afton Hughes Royse resulted
4 from gross neglect attributable to TXI?

5 "Clear and convincing evidence" means the
6 measure or degree of proof that produces a firm belief
7 or conviction of the truth of the allegations sought to
8 be established.

9 "Gross neglect" means an act or omission by
10 Ricardo Reyna Rodriguez, which, when viewed objectively
11 from the standpoint of Ricardo Reyna Rodriguez at the
12 time of its occurrence, involved an extreme degree of
13 risk, considering the probability and magnitude of the
14 potential harm to others; and of which Ricardo Reyna
15 Rodriguez had actual, subjective awareness of the risk
16 involved, but nevertheless proceeded with conscious
17 indifference to the rights, safety, or welfare of
18 others.

19 You are further instructed that in order
20 for gross neglect to be attributable to TXI, you must
21 find (1) that Ricardo Rodriguez was unfit and TXI acted
22 with gross neglect in employing or retaining him; or (2)
23 TXI or a manager of TXI ratified or approved the act.

24 Answer "Yes" or "No":_____.

25 If you have answered "Yes" as to TXI in

1 response to Question 1 or Question 2, and you have
2 inserted a sum of money in answer to Question 5 or
3 Question 7, then answer Question 22.

4 Otherwise, do not answer Question 22.

5 QUESTION 22.

6 Do you find by clear and convincing
7 evidence that the death of Afton Hughes Royse resulted
8 from gross neglect?

9 “Clear and convincing evidence” means the
10 measure or degree of proof that produces a firm belief
11 or conviction of the truth of the allegations sought to
12 be established.

13 “Gross neglect” means an act or omission by
14 TXI, which, when viewed objectively from the standpoint
15 of TXI at the time of its occurrence, involved an
16 extreme degree of risk, considering the probability and
17 magnitude of the potential harm to others; and of which
18 TXI had actual, subjective awareness of the risk
19 involved, but nevertheless proceeded with conscious
20 indifference to the rights, safety, or welfare of
21 others.

22 Answer “Yes” or “No”:_____.

23 If you have answered “Yes” in response to
24 Question 21 or Question 22, then answer Question 23.

25 Otherwise, do not answer Question 23.

1 QUESTION 23.

2 What sum of money, if any, should be
3 assessed against TXI and awarded to Clint and Jagr Royse
4 as exemplary damages for the death of Afton Hughes
5 Royse.

6 "Exemplary damages" means any damages
7 awarded as a penalty or by way of punishment. Exemplary
8 damages includes punitive damages. In determining the
9 amount of exemplary damages, you shall consider
10 evidence, if any, relating to -

11 A. The nature of the wrong.

12 B. The character of the conduct involved.

13 C. The degree of culpability of the
14 wrongdoer.

15 D. The situation and sensibilities of the
16 parties concerned.

17 E. The extent to which such conduct
18 offends a public sense of justice and propriety.

19 F. The net worth of TXI.

20 Answer in dollars and cents, if any:

21 \$_____.

22 If, in your answer to Question 23, you have
23 entered any amount of exemplary damages, then answer
24 Question 24.

25 Otherwise, do not answer Question 24.

1 QUESTION 24.

2 How do you apportion the exemplary damages
3 between Clint Royse and Jagr Royse?

4 Answer by stating a percentage for each
5 person named below. The percentages you find must total
6 100 percent.

7 A. Clint Royse _____%.

8 B. Jagr Royse _____%.

9 Total 100%.

10 After you retire to the jury room, you will
11 select your own presiding juror. The first thing the
12 presiding juror will do is to have this complete charge
13 read aloud and then you will deliberate upon your
14 answers to the questions asked.

15 It is the duty of the presiding juror:

16 1. To preside during your deliberations;

17 2. To see than your deliberations are

18 conducted in an orderly manner and in accordance with

19 the instructions in this charge;

20 3. To write out and hand to the bailiff

21 any communications concerning the case that you desire

22 to have delivered to the judge;

23 4. To vote on the questions;

24 5. To write your answers to the questions

25 in the spaces provided; and

1 6. To certify to your verdict in the
2 space provided for the presiding juror's signature or to
3 obtain the signatures of all the jurors who agree with
4 the verdict if your verdict is less than unanimous.

5 You should not discuss the case with
6 anyone, not even with other members of the jury, unless
7 all of you are present and assembled in the jury room.
8 Should anyone attempt to talk to you about the case
9 before the verdict is returned, whether at the
10 courthouse, at your home, or elsewhere, please inform
11 the judge of this fact.

12 When you have answered all the questions
13 you are required to answer under the instructions of the
14 judge and your presiding juror has placed your answers
15 in the spaces provided and signed the verdict as
16 presiding juror or obtained the signatures, you will
17 inform the bailiff at the door of the jury room that you
18 have reached a verdict, and then you will return into
19 court with your verdict.

20 Signed John H. Fostel, Presiding Judge.
21 Again, that's the one signed in blue ink.

22 Then there's a certificate page to be
23 signed by the Presiding Juror if you're -- if all of
24 your answers to each question are unanimous, are to be
25 signed by those rendering the verdict, as described in

1 the paragraph six back where we read earlier, if not
2 unanimous.

3 At this time it would be proper for the
4 Plaintiff to make final argument. Mr. Boyd, you may
5 proceed.

6 MR. BOYD: Thank you, your Honor.

7 -----

8 CLOSING STATEMENT

9 BY MR. BOYD: May it please the Court.

10 Ricardo Rodriguez begins to pull away from
11 the four-way stop there in Paradise, shifting his gears
12 to build up speed, to highway speed at 114, he begins
13 and proceeds down the road. He comes to the crest of --
14 that begins the slight decline to where this accident
15 occurred, having built up his speed to that point.

16 Coming off that crest ahead of him in the
17 roadway is a Trans Am slowing down, moving from the lane
18 of travel that he is in, sliding over to the shoulder to
19 begin a right-hand turn into the driveway.

20 He does what you see done all the time. He
21 moves to his left to give some cushion as he begins to
22 go around this vehicle, crossing the center stripe.

23 When he does, ahead of him in the roadway
24 coming at him he sees a Yukon. He begins to move right
25 to get back into his lane. At the same time the Yukon,

1 seeing what is happening in front of her takes evasive
2 action.

3 A collision occurs, and we'll go through
4 the physical evidence in a minute, but a collision
5 occurs in the center of the roadway at the angle of that
6 gouge mark.

7 The left portion of the Yukon is here. The
8 main portion of the Yukon is still in her lane. The
9 rock truck is at this angle, as he begins to move right
10 trying to get back into his lane. (Indicating.)

11 That's the evidence you've heard, ladies
12 and gentlemen, and under that evidence, clearly, the
13 rock truck is the responsible party. The first harmful
14 event was him crossing over and moving into the lane
15 that Kim Hughes was traveling that caused this event.

16 The Court has given you the Charge. Now,
17 what I'm going to do in my time this morning is go
18 through this Charge. I know it's lengthy, and we just
19 went through a long process of reading it, and summarize
20 some of the evidence that you've heard that I believe
21 supports the answers to this charge that the evidence
22 supports.

23 On page two of the Court's Charge, next to
24 the last, I've highlighted -- there's the definition of
25 preponderance of the evidence. You recall we talked at

1 the very beginning of this trial the scales of justice,
2 what the preponderance of evidence is, and if it's
3 tilted ever so slightly, that has proven the case by a
4 preponderance of the evidence. And we're going to go
5 through some of that evidence with you this morning.

6 Page three is Question No. 1. That's been
7 the question from the start, ladies and gentlemen, and
8 they knew that was the question from the start, because
9 they know if Mr. Rodriguez is over the center line, and
10 that's the first harmful event, that under the Court's
11 definition of "negligence" that is a failure to use
12 ordinary care to cross the center line when you're not
13 supposed to.

14 They knew that was the question from the
15 start, that's why they changed experts. That's why
16 they've had Mr. Rodriguez change his testimony. That's
17 why they've called witnesses that they claim are
18 eyewitnesses, who came here and testified, I didn't see
19 anything.

20 That's why they've done all those things,
21 ladies and gentlemen, because they know if Mr. Rodriguez
22 was over the center line, then he's the primary cause
23 for failing to use ordinary care.

24 Some of the evidence you have heard during
25 this trial, testimony about the gouge mark being the

1 point of impact. Lee Jackson, TXI's first expert: "Do
2 you know if the gouge marks represent the point of
3 impact between the Yukon and the TXI rock truck?"

4 "ANSWER: I believe so."

5 Kurt Marshek's testimony, the accident
6 reconstruction expert from the University of Texas in
7 Austin.

8 (Reading.)

9 "QUESTION: Is your opinion as to how this
10 accident happened consistent with the gouge mark at the
11 center line being the point of impact?

12 "ANSWER: The gouge mark one foot off the
13 center line, yes."

14 Trooper Raney, her testimony, and so what
15 I'm asking you is: From the physical evidence in the
16 roadway, the marks on the road tells us that the impact
17 between the TXI tractor trailer and the GMC Yukon would
18 have been most likely --

19 Remember the definition of preponderance of
20 the evidence.

21 -- would have been most likely right where
22 these gouge marks are indicated just inside the
23 eastbound lane?

24 Her answer: "True."

25 On the next line, Trooper Raney also

1 testified as follows:

2 (Reading.)

3 "QUESTION: Now, what I'm asking you is:

4 Do you have any markings on the roadway that indicate
5 any area of impact further in the eastbound lane than
6 where these gouge marks started?

7 "ANSWER: No."

8 "QUESTION: On the paint chips, what I'm
9 envisioning is that at the impact these paint chips
10 would have come off and been scattered because of the
11 impact; correct?"

12 Her answer: "Yes, sir."

13 "QUESTION: I mean, we can't look at a
14 paint chip and say, well, that's exactly where the car
15 was."

16 Her answer: "Exactly."

17 The people that were at the scene and saw
18 the marks, Mr. Jackson, Doctor Marshek, Trooper Raney,
19 testified the point of impact is the gouge mark.

20 Go to the next one.

21 Lee Jackson, went even further, their first
22 expert.

23 (Reading.)

24 "QUESTION: Now, when you shot the gouge
25 marks, it showed the gouge marks moving at an angle to

1 the center line?

2 "ANSWER: Yes."

3 Later he testified on page 67, his
4 deposition that was read in this case: "If that truck
5 is at an angle, of course, it would have been over the
6 center line."

7 Enter John Painter, their new expert.

8 Let's go to the next one, please.

9 Mr. Painter who had different opinions, but
10 as we said, Mr. Painter never saw those marks on the
11 road. The closest he got was that photograph that you
12 have seen in this case.

13 He testified that his theory was based on
14 some marks on the cab that he saw, but when he first
15 inspected the rock truck, December 19 of 2003, he didn't
16 even see those marks.

17 That was the phone call he got from the
18 lawyers after Doctor Marshek's deposition, come look at
19 this.

20 And then he testified the mirror, remember,
21 that was the one that made the impact with those marks.
22 But when he did his inspection December 17 of 2003, you
23 saw his photograph with the caption below it. No
24 evidence of impact in the area of the mirror.

25 Don't you know, ladies and gentlemen, as

1 you remember, this -- this clearance pole was found and
2 located two days after Doctor Marshek's deposition. A
3 phone call from Mr. Stradley to Mr. Painter, hey, we've
4 got some marks to come look at. We have found the
5 clearance pole, and his whole theory is now based on
6 that.

7 Don't you know if we had never seen that
8 clearance pole, unless they'd gone to Doctor Marshek's
9 testimony and came away with two things: What this guy
10 makes sense --

11 What this guy says makes sense, and what
12 this guy says lines up with the testimony that we're
13 going to go through in a minute of Mr. Rodriguez moving
14 right and of Mr. Wilton, who said he couldn't see the
15 Yukon because he was blocked by the trailer.

16 Enter their new expert, ladies and
17 gentlemen.

18 Go to the next one.

19 Well, first of all -- first of all, on --

20 One more thing on Mr. Painter. You
21 remember he testified there was bounce in his theory
22 from the Yukon and the rock truck.

23 That Mr. Jackson, when he testified on the
24 stand, remember he testified he wasn't comfortable with
25 the term "bounce." In fact, he testified they remained

1 parallel or somewhat parallel, talking about the Yukon
2 and the rock truck.

3 "QUESTION: All the way through impact?"

4 "ANSWER: Yes."

5 Go to the next slide, please.

6 Enter their next expert, Charles Gold, who
7 did not come here to testify, but they put in opinions
8 that somehow this was a tire failure, even though
9 Jackson and Painter agreed there's no evidence on the
10 roadway of any tire failure to support that theory.

11 And, in fact, Mr. Gold agreed with the same
12 thing.

13 (Reading.)

14 "QUESTION: You can't point me to any
15 evidence of debris or marks in the road before impact
16 between the Yukon and the rock truck?

17 "ANSWER: Apparently not.

18 "QUESTION: You can point us to no evidence
19 of any object in the roadway that the Yukon impacted
20 before it hit the rock truck; true?

21 "ANSWER: That's true."

22 An opinion, ladies and gentlemen, with no
23 evidence is not credible under the definition of
24 preponderance of the evidence. Mr. Gold's opinion is
25 just another issue that they have brought to try to

1 throw in here to cloud this case, because this case --
2 they don't want it to come down to what their truck
3 driver said, and that is, I was moving right before
4 impact.

5 If we go to the next slide, please.

6 Well, this is just Mr. Jackson's testimony
7 where he agreed he didn't see any evidence to indicate a
8 tire failure.

9 Could we go to the next slide, please?

10 Mr. Rodriguez testified, first two to three
11 seconds he was moving right. Then they changed it. I
12 was moving right for one second.

13 The testimony from Doctor Marshek and their
14 experts pretty much agree. You're moving right for one
15 to one-and-a-half seconds you're going to move five to
16 seven feet to the right. Five to seven feet to the
17 right, ladies and gentlemen, and we show this and every
18 witness that was asked this question agreed, five to
19 seven feet to the right from this gouge mark would put
20 Mr. Rodriguez over the center line.

21 Ladies and gentlemen, they want now to,
22 argue well, this really isn't impact. Mr. Painter is
23 talking about the paint chips now being impacted.

24 How far are the paint chips from the yellow
25 line?

1 Even if you put impact where Mr. Painter
2 wants it to be --

3 THE COURT: Mr. Boyd, you've used 10
4 minutes.

5 MR. BOYD: Thank you, your Honor.

6 Even if you put impact where he wants it to
7 be, five to seven feet to the right, still puts the back
8 end of that trailer and that -- most of that rock truck
9 over the center line, as it comes in at an angle.

10 But, ladies and gentlemen, the testimony
11 that Mr. Rodriguez was moving right is supported by the
12 physical evidence, and they can't change it. They can
13 invent Social Security numbers maybe to let him drive,
14 but they cannot uninvent his testimony that he was
15 moving right before impact; that puts him in the wrong
16 lane.

17 And then angle of the gouge.

18 Go to the next one, please.

19 "When we shot the gouge marks, again,
20 Mr. Jackson, they were at an angle?

21 "Yes."

22 Doctor Marshek --

23 Just go ahead and leave it black.

24 "And do the gouge marks run parallel to the
25 center line? Do they run at an angle?"

1 "They run at an angle to the center line."

2 Wanda Raney.

3 "You would agree with me that the gouge
4 mark that we're talking about, if we're going from
5 eastbound to the westbound lane, sort of slants towards
6 at an angle towards the westbound lane; correct?"

7 "Yes, sir. As you're looking at the
8 photograph, yes, sir."

9 Let's go to the next one, please.

10 So then what do we have?

11 We have people that they call that they say
12 are witnesses.

13 Ladies and gentlemen, these witnesses, they
14 didn't see anything. Mr. Jobe --

15 Remember Mr. Hurd when asking the experts
16 kept asking to assume Mr. Jobe says this or assume
17 Mr. Jobe says that. Let's look at what he said.

18 "When you looked back in the rearview
19 mirror and saw the 18-wheeler back behind you, did you
20 form an impression as to whether he was on the right
21 side of the road or the wrong side of the road?"

22 "No, I didn't. I just took a quick glance,
23 looked back to see if anybody was back there, and pulled
24 in my driveway."

25 That's not an eyewitness, ladies and

1 gentlemen.

2 Let's go to the next question, next slide.

3 This is the statement of Michelle Wyndham,
4 you heard her come and testify. "Never saw a rock truck
5 before impact. Never saw the rock truck."

6 That's not an eyewitness.

7 And then Mr. Larance, the next one. Who
8 six times in his deposition --

9 Go to the next one, Craig.

10 Who six times in his deposition said
11 something like this, and this is just one example. "You
12 don't know what either vehicle was doing before you
13 heard the noise?"

14 "No." And repeated his answer. "No."

15 They brought them to try to suggest, well,
16 they would've seen something, if something had happened.

17 Well, ladies and gentlemen, let's think
18 about that. There was also an accident in front of
19 them, a collision at-- two vehicles moving 60 miles an
20 hour, debris from that collision.

21 Don't you think these people would have
22 also seen a collision, if they were witnesses?

23 They testified they didn't see it.

24 Cody Jobe never saw a collision.

25 Michelle Wyndham never saw that collision.

1 Jerry Larance never saw that collision.

2 They can't use the fact that they didn't
3 see anything to prove something that they want to
4 happen. They're not witnesses.

5 The only person that actually saw anything
6 was George Wilton. Now, let's look at what his
7 testimony was on the stand. You remember George Wilton
8 was the passenger in the Ford pickup truck?

9 "QUESTION: Using your words here, whenever
10 the Yukon to my visibility past the end of the rock
11 truck, the Yukon was not on the wrong side of the road?

12 "ANSWER: Correct.

13 "QUESTION: So as it came off the end of
14 the truck when you saw the Yukon, the Yukon would have
15 been in its lane; correct?

16 "ANSWER: It was.

17 "QUESTION: Now, we asked you what was
18 blocking your view, and on two different occasions you
19 said, 'I couldn't see the Yukon because of the trailer.'

20 Is that true.

21 "ANSWER: Right."

22 And then the testimony about in his mind's
23 eye, you remember he saw the rock truck taking a curve,
24 even though it was a straight piece of road?

25 If the rock truck is coming here, and he

1 sees the Yukon coming off the end of the rock truck, and
2 it's in its lane, where's the back end of that trailer?

3 It's in its lane, as well; it's got to be.
4 It's got to be.

5 So Mr. Wilton's testimony, if it does
6 anything, supports the accident reconstruction analysis
7 that Doctor Marshek provided, and that supports the fact
8 that the rock truck would have been in the wrong lane
9 before impact.

10 Ladies and gentlemen, just one more point
11 on this.

12 You remember the testimony -- their,
13 testimony as well, the point of impact with the truck
14 was the clearance pole now. Even though Mr. Rodriguez
15 on three different occasions at the scene told people I
16 got hit in the back of my truck, the second or third
17 axle.

18 They've also now said it's a shallow angle
19 impact, and you remember the testimony about that.

20 And they had Mr. Rodriguez draw that, a
21 very straight -- you remember that drawing, a very
22 straight, shallow angle coming in?

23 Again, it's another change in the testimony
24 they made. You have these exhibits in evidence,
25 Plaintiffs' Exhibits 40 and 41, the drawings that

1 Mr. Rodriguez did before Mr. Painter got involved.

2 Look at the angle, a sharp angle.

3 It's another change in the testimony that
4 they had to make to try convince you that he is not
5 responsible.

6 Ladies and gentlemen, all of this evidence
7 in response to Question 1, based on a preponderance of
8 the evidence, supports a "Yes" answer to the Question 1
9 for Ricardo Rodriguez.

10 I want to talk about the question for Kim
11 Hughes just a second. You have the instruction above
12 there called "sudden emergency." You remember I asked
13 Doctor Marshek and gave him that instruction.

14 "QUESTION: Do you believe she was
15 confronted with a sudden emergency?

16 "ANSWER: Yes, she was."

17 Notice they didn't ask any of their experts
18 about that definition. Notice they didn't ask any of
19 their experts whether Mr. Rodriguez was confronted with
20 a sudden emergency.

21 You remember the testimony we read from --
22 or from the evidence we read from Mr. Painter's textbook
23 that that situation that Kim Hughes faced is the one of
24 the most difficult you face in driving. Which way do
25 you go? She has to make a split-second decision. Creek

1 bed on her right, trees on her right.

2 The article that Mr. Painter provided
3 that's in evidence. She got faked left by the rock
4 truck's move across the center line.

5 I would submit to you, ladies and
6 gentlemen, that based on the sudden emergency
7 instruction that the Court has given you as the law of
8 the State of Texas, the answer for Kim Hughes in
9 Question 1 is "No."

10 Let's talk very briefly about the rest of
11 the Charge.

12 You're going to have Question 1 about TXI,
13 about whether they're negligent in hiring or qualifying
14 Mr. Rodriguez.

15 You heard the testimony of Arthur
16 Bensmiller, an expert on trucking regulations. His
17 testimony of Mr. Rodriguez was unqualified. You saw the
18 false information in the application. You know the
19 evidence now that he obtained his license using a false
20 Social Security number. You know about his skills and
21 knowledge test performance. They didn't road test him.
22 They relied upon what the State did, and you saw his
23 performance on that.

24 Ladies and gentlemen, that evidence
25 supports a "yes" answer as to TXI in Question 1 on

1 negligent hiring.

2 Question 2, for Mr. Melendez. Negligent
3 entrustment of the -- of the vehicle that he owned to an
4 unlicensed or incompetent driver. You have the evidence
5 concerning his license, and how it was obtained by
6 fraud. We believe in answer to Question 2 is also
7 "Yes."

8 And just one thing on that. We found out
9 all this information about Mr. Rodriguez as part of this
10 case.

11 Wouldn't you expect a trucking company,
12 before they're going to put him behind the wheel of an
13 80,000-pound rock truck on the highways of Wise County
14 to do this kind of check, especially when they get
15 conflicting information on the application that said --
16 where he says one thing and they get evidence that shows
17 another.

18 And even now that they know that, what are
19 they doing about it?

20 He's still driving. He's still driving for
21 them, ladies and gentlemen.

22 The answer Question 2 for Mr. Melendez is
23 "Yes," and then you will answer Question 3 concerning
24 percentages of responsibility, and you will allocate the
25 percentages, we believe among Mr. Rodriguez, Mr.

1 Melendez, and TXI.

2 We believe the answer for Kim Hughes on
3 Question No. 3, again, is zero because we do not believe
4 she was negligent under the Court's sudden emergency
5 law.

6 And then you get to damages, and I know
7 there's a lot of testimony about damages. It was
8 unchallenged by the Defendants.

9 Mr. Simpson is going to touch on that more
10 in his part when he gets up, but you heard testimony
11 that the most compelling testimony, you know, what Jagr
12 faces the rest of life. To suggest that he doesn't know
13 what has happened, ladies and gentlemen, that's not the
14 face right there of a little boy that doesn't know
15 something has happened.

16 When he turns his head every time a door
17 opens looking for his mother, that's not the evidence of
18 someone that doesn't know what -- what has happened.
19 And as he goes on through his life, when he's 14, when
20 he's 16, those times he needs a mother around, he's not
21 going to be able to come back in here and tell you what
22 that meant to him. This is the -- This is the time to
23 provide that compensation, what the law provides, and
24 the Court has given you the instruction for those
25 damages.

1 The evidence of damages, again, was
2 compelling as to the remaining -- as to everybody else.
3 Clint Royse, for example: What do I tell my son?

4 You heard the testimony from Professor
5 Abbott about what kind of person Afton was. About she's
6 the kind of person that makes you want to be a better
7 person. She had that effect on Clint. You've heard
8 testimony from his friends that have come in about the
9 changes in him.

10 Randy, he just wanted to do what's best for
11 the whole family.

12 You heard testimony, unchallenged
13 testimony, about the remarkable relationship between
14 Randy and his son, Shiloh. You heard testimony from
15 Ashton Quinn, Shiloh's friend about what kind of person
16 he was.

17 And then about Willie, you heard testimony
18 from his kids about how he has lost his life's
19 companion. What a person -- what kind of a person Joyce
20 was.

21 You have a lot of questions to answer about
22 damages, and I just want to cover real briefly with you,
23 the way we would suggest, the way we would submit they
24 be answered. We have to do that because the Defendants
25 would make us open on that, and so, I'm going to take

1 these as categories, rather than go through all those
2 questions and try to do this as briefly as possible.

3 Funeral bills. You're going to be asked
4 questions about funeral bills.

5 You have Plaintiffs Exhibits 57 through 60
6 that you can take back with you into the room that have
7 the funeral --

8 THE COURT: You're at 20 minutes, Mr. Boyd.

9 MR. BOYD: Thank you, your Honor.

10 Medical bills, you have Plaintiffs'
11 Exhibits 46, 47, and 48 concerning the medical bills,
12 and you'll be able to take that back with you into the
13 jury room for your answer.

14 Pecuniary loss. There's three questions
15 for pecuniary loss. One for Clint and Jagr as to-- for
16 the loss of Afton, and one for Willie for the loss of
17 Joyce.

18 You heard the testimony of Doctor Needham,
19 the economist, of how he computed that, that was
20 unchallenged. They didn't call an economist to
21 challenge those -- those damages.

22 \$1,800,000.00 for Afton, which we submit to
23 be divided between Clint and Jagr.

24 And \$150,000.00 for Joyce, which we submit
25 will go into Mr. Watkins -- Willie Watkins' damage blank

1 on here.

2 And then you get to loss of companionship,
3 and the Court has read you the definition.

4 How do you begin to measure that loss? How
5 do you begin to measure this loss that lasts a lifetime.
6 The law provides it as damages. Let me submit to you an
7 example.

8 They pay Mr. Rodriguez \$1,400.00 every two
9 weeks to drive their truck. They've got 550 of those
10 trucks. To this company, it's worth \$770,000.00 every
11 two weeks to have these drivers on the road.

12 We would submit to you, ladies and
13 gentlemen, that for adult children, for Carolyn, for
14 Shirley, for Betty, for Johnny, that at least two weeks
15 worth. Surely, it's --

16 We're not saying it's equal, but, surely,
17 that's a measure of reasonable compensation.

18 For Willie, a month, to double that.

19 You -- You will decide the damages.

20 This family will accept your verdict as to
21 the damages. You do not answer the damage questions as
22 the condition tells you on page five, unless you answer
23 "Yes" to Question 1 for Mr. Rodriguez, but you will
24 decide the damages.

25 I submit to you for Randy and Clint, three

1 months.

2 And, of course, Jagr, whose lost was the
3 greatest of all, five months. Where do you begin?

4 Again, we give this as a suggestion for
5 you, that you will decide the damages. And then you'll
6 be asked damages about mental anguish, pain and
7 suffering, we would submit half of these numbers.

8 Certainly that companionship, the loss of the companion
9 that this family had is the loss that is the greatest.
10 We would submit that some -- some fraction, some -- half
11 of those numbers for mental anguish.

12 And then at the end, ladies and gentlemen,
13 the last questions, Question 21, 22, 23, and 24 are
14 questions concerning gross neglect of this company. You
15 have the definitions there.

16 We would submit to you that the answer to
17 Question 21 is "Yes."

18 That the answer to Question 22 is "Yes,"
19 based upon the evidence. You have heard the most clear
20 and convincing thing you've heard in this case is that
21 Mr. Rodriguez should not have been driving in the first
22 place.

23 And then Question 23, the amount of
24 exemplary damages. You have the factors there that the
25 Court has given you. We leave that to your discretion

1 to determine what you believe should go in that blank.

2 Now, on Question 24, an apportionment of
3 those damages; 50 percent to Clint, 50 percent to Jagr.

4 Ladies and gentlemen, one thing before I
5 sit down. That's a lot of money. That's a lot of
6 money. We know that. I'm not naive enough to think
7 that somebody when you get back there in that room is
8 going to think, these people didn't have that kind of
9 money before; why should they get it now?

10 If that's raised back there --

11 And I don't get to go back there with you,
12 but if that's raised back there, this would be my
13 response.

14 Before December 17th of 2002, ladies and
15 gentlemen, this family sitting out here was a lot richer
16 than this. They were a lot richer than this. They had
17 Afton. They had Shiloh. They had Joyce. They had Kim.
18 They had those two babies on the way.

19 Jagr, has lost the most of all.

20 In closing, ladies and gentlemen, I turn
21 you back to the very first instruction that the Court
22 gave you on page one. Do not let bias, prejudice, or
23 sympathy play any part of your deliberations, and I'm
24 here to tell you on behalf of every single member of
25 this family, absolutely, we agree with that. Absolutely

1 we agree with that. This family has had sympathy. This
2 family has had comfort. They've had counseling.
3 They've had all those things.

4 They come to this jury for the one thing
5 that you can give them that nobody else can, and that's
6 justice.

7 Thank you, ladies and gentlemen.

8 Appreciate it.

9 -----

10 THE COURT: Mr. Steindorf.

11 -----

12 CLOSING STATEMENT

13 BY MR. STEINDORF: May it please the Court,
14 Counsel, ladies and gentlemen of the jury.

15 When in the closing minutes of a trial
16 that's lasted more than a week, you begin to see the
17 staggering amounts of money being suggested. You can
18 then understand why it's so important to pay attention
19 to what the Judge has said in connection with the
20 deliberations that you're about to undertake.

21 So what I'd like to do, if I might, is take
22 you back to how we started this proceeding, and say some
23 things out loud that I think you already know.

24 You have not been watching this trial like
25 you would watch a television show. You haven't been

1 watching this trial like you would watch a play. You're
2 not casual observers. You are part of the judicial
3 process.

4 But it's not enough just to say that you've
5 agreed to pay close attention, and I've seen you paying
6 close attention. You did more than that. You took an
7 oath administered not by me, not by the Plaintiffs, but
8 by his Honor, Judge Fostel. And you agreed to give
9 truthful answers when you were asked questions at the
10 very beginning of this trial.

11 You were asked questions about sympathy,
12 and bias, and prejudice. I know you remember that. You
13 12 men and women are on this jury only because you
14 agreed not to let an appeal to your sympathy, and your
15 bias, and your prejudice sway you. That's why you're on
16 this jury.

17 You're on this jury because you swore an
18 oath to answer truthful questions, and you're on this
19 jury because you promised and committed that you would
20 not respond to that. You would not respond to that.

21 Now, the evidence that's been brought
22 before you, concerns a traffic accident that happened in
23 a blink of an eye in a matter of seconds, even though
24 we've spent the better part of a week, more than a week
25 going through this evidence, this is our opportunity to

1 talk about that.

2 Let me tell you something that's very
3 important. I'll guarantee you 12 people don't ever hear
4 the same thing the same way. You all are about to go
5 back into the jury room and begin your deliberations,
6 and I'll promise you, something that you heard very
7 clearly, someone else down at this end is going to have
8 heard differently. And you're going to be sitting back
9 there haggling about now, who -- who said what.

10 Take advantage of the opportunity that I'm
11 now going to give you to see what the fact witnesses,
12 what the eyewitnesses, what the people that aren't
13 affiliated with either side, what the people that lived
14 in this part of the State of Texas, saw on December
15 17th, 2002.

16 You may remember that we called Cody Jobe.
17 Our position is that --

18 I'm reading you now --

19 I'm going to be showing you now testimony
20 that was given in this courtroom, and we say that the --
21 that the Plaintiffs have taken a few liberties with what
22 Mr. Jobe said. You heard Counsel say that, well, sure
23 enough, the reason that the truck guided over to the
24 left was because Cody Jobe was pulling into his
25 driveway. Never heard that before today.

1 But let's see what Mr. Jobe says about
2 that. Here's what he says: "I was pulling into my
3 driveway. I looked back and I saw the driver about a
4 half a mile behind me."

5 Taking a few liberties with the facts.
6 Taking a few liberties with the evidence.

7 Nobody says that they saw the truck guiding
8 over into the left-hand lane. And what does your
9 driving common sense tell you?

10 Who's going to do that when you're half a
11 mile behind somebody that's pulling a Trans Am into the
12 driveway?

13 Here's some more of what Cody Jobe said.

14 I'm a big believer that what the witness
15 has said is more than -- more important than what I have
16 said, so let me give you a minute to read that.

17 This is a young man who's describing what
18 Ricardo Rodriguez said to him right after it happened,
19 and take a look at what it says.

20 It says, answer on line 19. He says he
21 heard a loud boom and he just assumed it was a blowout,
22 and hit him. It makes it sound like he heard something
23 before the impact, doesn't it?

24 What's another fact witness that we called,
25 ladies and gentlemen?

1 I believe it's Mr. Don --

2 Excuse me.

3 -- Mr. Larance. Let me show you some
4 testimony that he gave in this courtroom.

5 I'll give you a chance to read that.

6 I don't think anybody is going to have much
7 trouble remembering that the driver of the blue, Ford
8 pickup did not see the rock truck in the wrong lane
9 ever. He did not see the driver of the rock truck do
10 anything wrong. I believe you remember that, but that's
11 what was said from the witness stand in front of you.

12 He was cross examined vigorously, but
13 here's what he said when he was cross examined
14 vigorously.

15 "I mean, I wasn't sleeping driving down the
16 road."

17 Was does your common sense tell you about
18 what Mr. Larance, who has no particular connection to
19 either side in this case, saw?

20 Now, Mr. Larance, I'm sure quite by
21 accident, may have said the final word about this
22 traffic accident that we've been hearing about. And I
23 don't know that a -- that a lawyer, any lawyer, could
24 say it more eloquently. "It don't take a rocket
25 scientist to know that the truck was in its lane."

1 That's what a person who was there, right behind the
2 truck, had to say.

3 And what about his passenger, Mr. Wilton?

4 This is what Mr. Wilton said after being
5 sworn in by Judge Fostel to tell the whole truth, and he
6 said it right in front of you; virtually the same thing
7 that Mr. Larance said, although in different words.

8 Now, you folks will remember that when we
9 did the voir dire examination, one of the things I said
10 was, it's crucial to listen carefully, deliberately, to
11 what's said, and here's why.

12 What the Plaintiffs attempted do in this
13 case, was to bring in a line, or a word, or a phrase,
14 where a witness had used a certain way of expressing
15 themselves in a statement or in a deposition, and they
16 tried to hold them to that without giving you folks the
17 context in which the statement was made.

18 May I show you an example of that, that we
19 specifically discussed in voir dire?

20 Time and again, throughout this trial, a
21 question on paper has been about whether you saw
22 something. When, in fairness, the question should have
23 been: Did you notice something?

24 You may remember there was a gentleman,
25 sitting right where this young lady was sitting, named

1 Mar -- Mr. Martinez, and I asked him, sir, what highway
2 were you on when you drive up here?

3 And I think he said 287.

4 But the point I was asking him about is:
5 Do you remember what the color of the vehicle was when
6 you got on the lane?

7 I think if memory serves me right, this --
8 he -- he happened to remember they were all white. So
9 then I went down to where he got on the highway.

10 And the point was made and every -- every
11 one of you agreed with it, that there's a huge
12 difference between saying, I didn't see something, in
13 the sense that I was incapable of visualizing it in my
14 line of sight, versus, I just didn't notice it --
15 versus, I just didn't notice it.

16 And, again, why would you notice it? Why
17 would you notice a -- a truck that's up ahead of you in
18 its proper lane of traffic?

19 Mr. Larance says dead in the middle of the
20 eastbound lane. That's what he said in front of you.
21 Again, ladies and gentlemen, this is a witness that the
22 Defendants called live.

23 Finally, I would like to focus your
24 attention on the testimony given by Michelle Wyndham.
25 Now, this young lady had a car full of kids and was

1 running late to a doctor's appointment. And she
2 conceded that she was about to make a passing maneuver
3 to pass the Ford pickup truck.

4 And I believe everybody will remember her
5 testimony.

6 She's pulling -- or guiding over to the
7 left to pass this blue pickup truck. And did she see
8 the maneuver that the Plaintiffs hinged their whole case
9 on?

10 No, she did not see that.

11 And she would have seen it, too. You can't
12 tell me that a mother with three kids in the car, maybe
13 four, who has got the presence of mind to turn around
14 and make sure they're buckled in, is then going to pull
15 in to the oncoming lane of traffic when there's
16 something right in front of her. That's just not
17 reasonable. That's just not reasonable.

18 So now you've seen testimony, ladies and
19 gentlemen, given right here in front of you. And in
20 case there's any doubt about whether she could see that
21 clearly, let's just see what she said.

22 I believe the testimony was: "I could see
23 everything in the front of me clearly."

24 Now, the -- the --

25 There's no evidence that any of these

1 people had any kind of ax to grind in this case one way
2 or the other. There's no evidence that any of these
3 people knew my clients, much less would have come in
4 here in front of you and in front of that flag and tried
5 to misrepresent something. What for? What for?

6 That's credibility. Credibility is
7 something juries can determine.

8 Now, you may have noticed something so far
9 in my remarks, and let me tell you what is, and that I
10 did it on purpose.

11 I haven't said a word about Ricardo
12 Rodriguez' testimony. Let me tell you why. I believe
13 everything he said about this accident. All right. I
14 believe everything he said about this accident. I
15 believe that he was absolutely truthful.

16 But you know what the bottom line is: You
17 can answer every question that Judge Fostel has to ask
18 you without paying any attention to what Ricardo
19 Rodriguez had to say. This case and your answers don't
20 depend on the credibility of Ricardo Rodriguez.

21 Let me tell you why. How many hours of
22 testimony did we sit through where the topic was whether
23 or not he turned to the right for two or three seconds?

24 And then, as if that wasn't enough, we sat
25 through hour after hour of testimony about whether he

1 had a valid Social Security number, about whether he had
2 a valid driver's license. Why do you suppose that was?

3 Let me tell you why that was.

4 Plaintiffs were attempting to call into
5 doubt his credibility, and that's what they would have
6 you believe. You can't believe him when he says two or
7 three seconds. You can't believe the man when he says
8 he's moving to the right that far.

9 But is that really why they introduced the
10 evidence about the lack of his Social Security number,
11 or was it to appeal to your bias and your prejudice, and
12 imply that he's an illegal alien, and that he's driving
13 without a valid driver's license.

14 And then, I guess, that Trooper Raney who
15 said, yeah, he had a valid driver's license is in on it,
16 too. That doesn't make any sense, ladies and gentlemen.

17 And at the end of the day, you know what
18 else, Kurt Marshek said, right there in front of you, I
19 think he was going to the right for maybe one second.

20 So this whole effort to impeach my client's
21 credibility over the lack of Social Security number, in
22 order to challenge his testimony about how he says the
23 accident happened, is a red herring. Red herring being
24 you all follow this smelly thing, and don't focus on
25 what the actual facts of the case are.

1 Now, let me tell you what I believe the
2 evidence shows. I believe the evidence shows that this
3 was a sideswiped collision. I don't think it takes a
4 rocket scientist or any expert to answer that. You know
5 what, a collision between a Yukon and a rock hauler that
6 isn't a sideswipe is called a head-on, and they don't
7 look like this. This was undeniably a sideswiped
8 collision.

9 And what else is undeniable is that
10 Mr. Rodriguez was moving to the right. He was driving
11 down the eastbound lane in his lane of traffic, and he
12 was moving to the right within his lane of traffic over
13 onto that right-hand shoulder. You saw the skidmarks.

14 What my client described, and has always
15 described is, I saw this lady -- or saw this Yukon. I
16 started turning to the right. The major impact was back
17 here on the fourth axle, and that's what he talks about
18 when he talks about the impact. That's what he felt.

19 Now, by the time that happened, he's
20 already moving to the right. If he hadn't already been
21 moving to the right, it would've been a head-on
22 collision in his lane.

23 Let me talk a little bit if I could about
24 Mr. Marshek, since the Plaintiffs' whole case depends
25 upon -- really depends upon you believing this

1 gentlemen.

2 I've given myself a little outline of what
3 I'm going to tell you, so I don't forget to cover
4 anything.

5 The purpose of Mr. Marshek was quite
6 simple. It was to come up with an explanation for why
7 the Yukon was in the wrong lane, but the key requirement
8 is that explanation had to also put the truck in the
9 wrong lane. That's the reason that he used reverse
10 engineering in a non-scientific way to get to this
11 result.

12 Let me tell you what I have in mind there.

13 The reverse engineering is this: The
14 notion that somebody can go back in July of 2003, and
15 say anything intelligent about how an accident happened
16 the preceding December, I think is kind of far fetched.
17 This is all he had to go on, looking at a road, and some
18 gouge marks on the road.

19 Reverse engineering might be if I had a
20 broken chair, and I handed it to Jeff here, and I say,
21 Jeff, can you put the chair back together from these
22 pieces, or maybe I hand it to Mr. Hurd over there and
23 say, they might put the chair together in a little
24 different way, but, you know, at the end of the day
25 maybe they could come up with a chair. But by putting

1 the chair together, could you then say anything about
2 what the person looked like that was sitting in it?
3 Could you then say anything about what the room looked
4 like that the chair was sitting in before it got broke?

5 No. This isn't reverse engineering. It's
6 reverse engineering run amuck, and it's not scientific
7 either.

8 The biggest problem I have with what this
9 Mr. Marshek said, is that he spent most of his time
10 talking about what witnesses had said; that's not
11 scientific. That's what-- for you all to hear. That's
12 for you all to decide.

13 So much of Mr. Marshek's testimony was
14 basically him talking about what Larance saw or didn't
15 see. Him talking about what Michelle Wyndham saw or
16 didn't see, or Cody Jobe or what he saw or didn't see.

17 Science is supposed to be, hey, you go back
18 to where the thing happened and you take it all the way
19 back, and he didn't do that. He didn't go back to where
20 the collision was between the Ford and the Yukon and
21 work it all the way back.

22 Think back to -- Think back to high school
23 science, the scientific method. The scientific method
24 is supposed to be, you come up with a hypothesis; and
25 then you rule out other things that might have been the

1 cause to see if the hypothesis you've come up with is
2 right.

3 Is that what Mr. Marshek did? Did he rule
4 out all the other possibilities? Why do you suppose,
5 folks, that the angle of the impact was such a hotly
6 disputed topic in this case? Why do you suppose that
7 was?

8 Let me tell you why it was. The greater
9 the angle, the more Mr. Marshek could make it look like
10 the Yukon was moving left. Now, why would they want to
11 do that? Why did we spend all that time wrangling about
12 the angle of impact?

13 Well, it's because it's only by a sharp
14 move to the left that we can make the argument that the
15 Yukon is taking some evasive action. To the extent that
16 this angle becomes more shallow, well, then all of a
17 sudden it doesn't believe -- it doesn't look like the
18 Yukon is moving to the left anymore. It begins to look
19 like the Yukon is pretty much moving straight, and don't
20 you know, that's exactly what Plaintiffs' Exhibit 33
21 shows.

22 I saw the looks --

23 One of the advantages I have is, I can see
24 the looks on your faces. And when Mr. Hurd was cross
25 examining Mr. Marshek about this angle of impact, I

1 could tell immediately, some of you immediately
2 understood the significance of this, and so I'm speaking
3 to you, and also those that I didn't get the sense that
4 you immediately understood it.

5 But what happened is, Mr. Hurd finally got
6 Mr. Marshek to say, yeah, it could have been a slight
7 angle, maybe two to five degrees.

8 And then Mr. Hurd said, well, then, by
9 golly, why don't you get up and come over here and just
10 draw that for the jury, and he got as far as the corner
11 of that and stopped, and said, well, no, no, I can't --
12 I can't really do that, but I'll show you a drawing.

13 This is the drawing. (Indicating.)

14 Ladies and gentlemen, look -- look by
15 Mr. Marshek's own drawing at which direction the Yukon
16 is going, when you have a two-degree angle. You see,
17 this shallow angle, which it plainly was, this shallow
18 angle and the contact up here at the front of the truck,
19 what that means -- and the reason the Plaintiffs are
20 trying so hard to resist it, is that it means the Yukon
21 wasn't making a left-hand, evasive maneuver. What it
22 means is the Yukon was basically going straight, or if
23 anything, was angled a little bit back toward the
24 westbound lane.

25 And that throws everything else off, ladies

1 and gentlemen. It throws off the location about where
2 the -- the accident happened. It throws off whether the
3 gouge marks mean anything.

4 The fight about the guide pole damage and
5 the marks on the cab was a fight about this shallow
6 angle. At the end of the day, Mr. Marshek finally
7 agreed.

8 First, he said, well, he must have dummied
9 up the photographs. You may have remembered him --

10 And that's -- that's kind of -- when an
11 expert witness is confronted with something that doesn't
12 make any sense which exposes him, and shows the fact
13 that he ignored it, the only thing he could come up with
14 on the fly was, well, you all may have doctored those
15 digital photographs.

16 When he talked about the guide pole, the
17 only thing he could come up with was, well, you know, I
18 don't really know where that's been ever since it was
19 taken off the truck.

20 But at the end of the day, what he does is
21 he concedes that it's a shallow angle impact and he
22 prepared this drawing right here, not us. So we spent a
23 lot of time arguing about angle impact, and I wanted to
24 talk a little bit about why I think that was.

25 Now, the marks on the cab that the DPS saw

1 and that they wrote in their report, Mr. Marshek said
2 they were mud.

3 Let's talk a little bit about the angle,
4 the -- what part of the vehicle got hit.

5 Another place where Mr. Marshek messed up
6 is he thought that second wheel was steel. You may
7 remember that.

8 And, of course, you heard from Mr. Painter,
9 and also from Mr. Melendez that it was aluminum.

10 One of the things that Marshek said was,
11 well, I just don't see how so much damage could have
12 been caused unless the impact was on that particular
13 axle, but then he said, well, I think -- I think the
14 wheel, it's made out of steel, and it's not, it's
15 aluminum.

16 You saw the picture of the front left of
17 the -- of the truck. I don't know if I've got time to
18 find it, but at any rate, front left of the Yukon
19 there's a dent on the fender. The reason there's a dent
20 on the fender is that the first impact was more of a
21 bump against that aluminum wheel that was on the -- that
22 was on the second axle. The vehicle then goes into that
23 fourth axle, and that's where the big hit was.

24 And here's why that -- that big hit was
25 important, if I can find a book to show or illustrate.

1 You may remember --

2 Excuse me, Derrick.

3 -- that one of the things Mr. Painter
4 showed was that at the time of the impact with the
5 first -- first axle, he figured the center of mass of
6 this body, and he showed that if there's an impact here,
7 like there was, where that main damage is on the fourth
8 axle, that it's going to cause a counter-clockwise
9 movement of the vehicle.

10 That's exactly the opposite of what Marshek
11 said. Marshek said, the impact caused a clockwise
12 movement of the vehicle. Remember? He said it wraps --
13 it wraps into the vehicle.

14 Why did he say that?

15 Well, because what they're trying to do is
16 to make the back of the truck line up with these gouge
17 marks. And they're willing to sacrifice the rules of
18 physics to get to that result. But what do we see from
19 the evidence?

20 Well, if as Mr. Painter said, there's input
21 here, which causes the Yukon to pivot like this, well,
22 don't you know that's exactly what Michelle Wyndham
23 described. That movement puts the Yukon into this
24 position, doesn't it?

25 The other movement puts the Yukon into this

1 position. The Yukon didn't go heading off down the
2 right westbound lane and into the ditch, did it?

3 Instead, the fact witness says, what I saw
4 was the Yukon moving sideways like this, which is
5 exactly the position it would be in if it had just
6 pivoted.

7 Now, time is short, ladies and gentlemen,
8 and I don't want to belabor Mr. Marshek's report any
9 longer.

10 How much time do I have?

11 THE COURT: You've got five minutes.

12 MR. STEINDORF: So let me -- let me --

13 I guess let me turn next to the -- to the
14 Charge.

15 Ladies and gentlemen, these questions are
16 given to you by Judge Fostel. These are questions he
17 thinks that are important in this case.

18 This is Question No. 1.

19 I believe the answer that you should give,
20 based on the evidence you've heard is "No," "No," and
21 "Yes."

22 I don't know why the Yukon was in our lane
23 of traffic.

24 There's testimony from an expert that's
25 examined hundreds of tires that says it might have been

1 a blowout.

2 There's testimony from Cody Jobe about
3 things said by Ricardo Rodriguez right after the
4 accident that suggests it might have been a blowout.

5 I couldn't help but notice that there's a
6 big cut on the back left tire that you can see, and
7 there's photographs of the right tire, the front --

8 Excuse me.

9 -- the front left tire that you will also
10 see that have a big cut in them.

11 If the contact with the left -- with the
12 fourth axle is the blowout that people heard, that
13 caused the cut on the front left tire, where did this
14 cut come from?

15 This is an explanation based on some expert
16 witness testimony that might explain why the Yukon was
17 in the wrong lane.

18 Can I -- Can I say that that's conclusive?

19 No. It's some evidence.

20 On the other side of the coin, you've got
21 no evidence about why she's in the wrong lane.

22 Now, if I could turn quickly to the most
23 important -- the second most important thing in this
24 Charge is at the top of the next page. It says, "You
25 only answer Question 2 and 3, if you've answered "Yes"

1 to Question No. 1."

2 I, therefore, do not believe, ladies and
3 gentlemen, under the evidence that you will get to
4 Question 2 or 3. But if you do, if I'm wrong, and you
5 don't see the evidence like I believe it came out, I
6 believe the answer here is "No." I believe there's no
7 evidence that would indicate Aurelio Melendez is at
8 fault in this.

9 I believe that if you get to Question
10 No. 3, the proper -- which you will only do if you have
11 found both the Yukon and Mr. Rodriguez negligent, I
12 believe that the proper answer would be five percent and
13 95 percent.

14 And I believe that starting at the top of
15 the next page, you will find an instruction which His
16 Honor read, which basically makes reference to many of
17 these damage issues.

18 Notice -- Notice carefully, that will you
19 not reach many of these damage issues, unless you have
20 answered Question No. 1 in the affirmative. Pay
21 attention to those instructions very, very carefully.

22 I believe you will not reach many of the
23 damage questions, but I do want to go -- I want to skip
24 from Question 4, and I'll come back to the damages in
25 just a minute when I -- when I talk about this chart

1 over here.

2 If you go back to the very back of this to
3 Question No. 19, you come to the first question that
4 isn't covered by that instruction, and basically, it's a
5 question about what would be fair compensation to the
6 driver of the Yukon, Kim Hughes.

7 Then you have Question No. 20, which would
8 ask about compensation to Mr. Watkins, who we did not
9 hear from.

10 I want to take your attention next to
11 Question No. 21, where they ask about gross neglect.
12 Read carefully the definition of "gross neglect." What
13 you will find is that none of the evidence in this case
14 supports the idea that anybody on the defense side had
15 actual subjective awareness of anything, and then
16 proceeded with conscious indifference. That means we
17 knew an accident was about to happen, and consciously
18 engaged in it. That doesn't even make sense. There's
19 no evidence of that at all.

20 Question No. 21, if you get to it, should
21 be answered, "No."

22 Question No. 22, is this gross negligence
23 question. It should be answered, "No."

24 And I believe you, therefore, won't get to
25 Questions 23 and 24 asking about punitive damages.

1 How much time do I have?

2 THE COURT: You've got two minutes.

3 MR. STEINDORF: All right. Thank you, your
4 Honor.

5 All I'm going to say about these numbers,
6 they're based on nothing having to do really with this
7 family. The numbers that are written up here are based
8 on the economics of how the Defendants do business. But
9 those numbers have anger and venom, and I'll just leave
10 it there. Those numbers are outrageous and are filled
11 with anger and venom, which has no place.

12 Fair compensation under the facts of these
13 cases, it'd be up -- it'd be up to you to decide, but
14 whatever number you write in there, it needs to be based
15 on careful deliberation about what you heard.

16 These folks were up there for a few minutes
17 apiece. And the number that you write in needs to not
18 be motivated by bias and sympathy and prejudice, and
19 those numbers are, which we didn't hear -- we never
20 heard anywhere in this case until a few minutes ago.

21 Now, finally, ladies and gentlemen, don't
22 forget what Doctor Flynn said, the psychologist. Some
23 of you may be thinking, well, gosh, you know, it would
24 be a hard thing to go back into that jury room and
25 conclude that the Yukon caused the accident. I can -- I

1 can understand that. I can see that.

2 Nevertheless, you're not watching this like
3 a television show or a play. Your job is job of
4 factfinders, but I want you to know that even Randy
5 Hughes, himself, had a lot of questions about how this
6 accident happened, and you may remember he told these
7 questions to Doctor Flynn.

8 Randy Hughes disclosed that the family
9 itself is in some conflict about this.

10 Ladies and gentlemen, it's a reasonable
11 inference based on what Randy Hughes told his
12 psychologist in the -- in the confines of their own
13 office with nobody around, that made it into Doctor
14 Flynn's testimony, that the family hasn't got any more
15 idea of what caused this accident than Randy Hughes and
16 Randy Hughes hadn't got any idea of what caused this
17 accident.

18 Your verdict is going to bring closure to
19 this. And a verdict that the Yukon caused the accident
20 is going to be accepted by this family. They're a
21 strong family.

22 The patriarch of the family didn't testify,
23 but he's a strong man. Those women are strong women.

24 What happened is hard. It's a hard thing,
25 but it doesn't have anything to do with my clients.

1 One last -- One last thing. On the
2 afternoon of December 17th, shortly before 2:00 p.m.,
3 Ricardo Rodriguez, who gets up early in the morning and
4 drives a truck to support his family of American citizen
5 children, by working hard every day, was driving
6 eastbound in the proper lane, in the proper lane.

7 He avoided a head-on collision because he
8 was paying attention. The same Ricardo Rodriguez that
9 may not have had a valid Social Security number, but has
10 MVR records sitting on this desk right here, that say
11 clear driving record, clear driving record, clear
12 driving record, that man avoided a head-on collision.

13 How different this would be if that blue
14 Ford pickup hadn't happened to be following along
15 behind. I believe the evidence suggests that this
16 family might have survived the sideswiped impact with
17 the 18-wheeler. I believe --

18 I don't live in Wise County, but if I did,
19 I would want rock truck drivers like Ricardo Rodriguez,
20 who even if their own lane of traffic, are paying close
21 enough attention to avoid a head-on collision. Think
22 about that.

23 Ladies and gentlemen, we appreciate your
24 attention. I know that you take your role very
25 seriously. We have taken presenting this case to you

1 very seriously. This isn't a contest.

2 The last thing I'm going to say to you
3 before I sit down is, there are no winners. There are
4 no winners. This isn't a dispute like a football game
5 or something like that, where -- where --

6 Everybody loses here. Everybody loses
7 here.

8 But your job is to find the truth. The
9 truth of this matter has been laid out in abundance
10 before you. It's been set out pretty clearly. You can
11 see the truth. Now, you need to do the truth.

12 Thank you.

13 -----

14 THE COURT: Mr. Simpson.

15 MR. SIMPSON: Your Honor, will you give me
16 when one minute is left, please?

17 THE COURT: All right. You've got five.

18 CLOSING STATEMENT

19 BY MR. SIMPSON: Ladies and gentlemen, Mr.
20 Steindorf referred to family. If you'll look at the
21 Watkins family, they will tell you that Ricardo
22 Rodriguez crossed the center line and killed their
23 family, and that's why they are here.

24 Why else would they go through what they've
25 been through in the last week, ladies and gentlemen?

1 Ladies and gentlemen, if you believe what
2 Mr. Rodriguez' attorneys have cooked up, you have to
3 believe that this mother, Kim Hughes, the mother of
4 Afton, Shiloh, Jagr, and the daughter of Joyce Watkins,
5 went head-on into that truck on December 17th, 2002, and
6 killed everybody that was important to her. They have
7 no explanation for that, ladies and gentlemen, and you
8 know why?

9 Mr. Rodriguez crossed the center line.

10 Ladies and gentlemen, at the gouge mark he
11 was seven feet -- five to seven feet inside of Kim
12 Hughes' lane. At the debris he was five to seven feet
13 inside Kim Hughes' lane.

14 At the "H" mark that they made such a big
15 deal about, if you go from there seven feet, he was
16 inside Kim Hughes' lane. You go all the way down here.

17 Ladies and gentlemen, it doesn't make any
18 difference. He turned right five to seven feet. He was
19 in Kim Hughes' lane. That's what the Watkins family
20 thinks.

21 What has it done to this family?

22 Ladies and gentlemen, you have heard the
23 evidence of it. I've represented this family, Willie,
24 for about 27 years, and you probably saw me get a little
25 emotional, and I apologize. I know lawyers aren't

1 supposed to get emotional, but when you've represented a
2 family for 27 years, you get involved with the family.
3 You get to know them.

4 When I first heard about Randy singing that
5 lullaby in my office, I got down on my knees, and you
6 know what?

7 I prayed that it didn't happen to one of my
8 children. I have three daughters. You know, if it was
9 one of my daughters here, that sum right there would be
10 small.

11 Ladies and gentlemen, we pay athletes
12 \$15,000,000.00 to \$20,000,000.00 a year. We pay
13 actresses \$5,000,000.00 to \$10,000,000.00 a year. We
14 buy art for \$5,000,000.00 to \$10,000,000.00 to
15 \$20,000,000.00 a year. It's for sale for those amounts.
16 Nobody thinks a thing about it.

17 Ladies and gentlemen, I'll submit to you,
18 of my three daughters, if I lost one, that daughter
19 would be worth much more than \$10,000,000.00 to me, much
20 more than \$10,000,000.00.

21 The law provides for damages.

22 At the beginning of this case, we spent a
23 considerable amount of time talking to you about what we
24 thought was the law in the State of Texas.

25 We talked about the areas of the law. Each

1 one of you under oath said, if you bring the evidence
2 that supports the damages, we can award the damages at
3 as set out in Texas law.

4 Ladies and gentlemen, what you've read,
5 your Charge, we didn't make that up, that's Texas law.
6 You know that now. Judge Fostel has instructed you in
7 the law in the State of Texas.

8 We brought you the evidence. We did
9 shortcut the evidence, ladies and gentlemen. Sometimes
10 I thought maybe I shortcutted it too much, because it
11 was getting me, and I figured it was getting my clients,
12 but I had to put the evidence on because I had to let
13 you know what this family lost.

14 Ladies and gentlemen, Jagr lost a mother.

15 Ladies and gentlemen, when Jesus was
16 crucified 2,000 years ago, do you know the last person
17 on earth he asked to talk to?

18 His mother.

19 Can you imagine day after day not smelling
20 and hearing the voice of the women in his life, not only
21 his mother, but his grandmother, and his great
22 grandmother?

23 You know, ladies and gentlemen, that just
24 didn't occur the week after, or the month after. It
25 still occurs. You can't tell me that little boy does

1 not know-- have a memory of his mother, and does
2 not feel a loss.

3 THE COURT: Counsel, you have one minute,
4 Mr. Simpson.

5 MR. SIMPSON: Ladies and gentlemen, I will
6 go home after this case. These lawyers here, they'll go
7 to the next county trying a lawsuit. The Judge, he'll
8 go to the next case. Everybody will go back to what
9 they were doing before. You, as jurors, will go back to
10 your family and your homes, but ladies and gentlemen,
11 Randy Hughes, Clint Royse, Willie Watkins, and these
12 kids, will not go home to the people that they love
13 anymore.

14 Ladies and gentlemen, you see things in
15 life that you don't like. You say, we should change
16 them. We shouldn't let people drive with invalid
17 driver's license. We should make trucking companies pay
18 more attention to the drivers they hire, and make sure
19 they follow the rules. You say I wish we could change
20 those things. You know, ladies and gentlemen, you are
21 the law here today, and you can change things.

22 And you know how to change things?

23 Change where it hurts the worst, in the
24 pocketbook.

25 Ladies and gentlemen, thank you very much.

1 We appreciate your time.

2 -----

3 THE COURT: Thank you.

4 Ladies and gentlemen, you have had to wait
5 on us several times here in the past week. We will now
6 wait on you.

7 If you'll accompany the Bailiff --

8 Are you going upstairs?

9 Mr. Wood, is the jury room upstairs open?

10 THE BAILIFF: Yes, your Honor.

11 THE COURT: Your jury room for deliberation
12 will be upstairs, it's larger and more comfortable.

13 Now, let me tell you this: Probably, I
14 would guess you're ready to go to lunch, or may want to,
15 and that's fine. That's going to be entirely up to you.

16 I would suggest that you go ahead and elect
17 your foreman, and then when you're ready to go to lunch,
18 you will advise the bailiff.

19 We will arrange for lunch probably over at
20 Mattie's for you.

21 Thank you very much.

22 Accompany the Bailiff.

23 (The Jury retired to deliberate.)

24 MR. HURD: If I may, Judge, I would like to
25 reopen for the limited purpose of offering Exhibit 3,

1 which is a tape which the jury has already seen.

2 MR. BOYD: We would oppose, your Honor.

3 MR. SIMPSON : Maybe --

4 How badly do we--

5 MR. BOYD: Well, I'm fine where those were
6 admitted. I will rest on the record on those. And if
7 the record says, no; then, no.

8 THE COURT REPORTER: Let the Judge rule on
9 this one.

10 MR. BOYD: Oh, sorry.

11 THE COURT REPORTER: It was shown to the
12 jury and Charlie acknowledged it.

13 THE COURT: I understand, but it wasn't
14 offered and admitted.

15 THE COURT REPORTER: Right.

16 THE COURT: I'm going to deny that.

17 (Recess.)

18 THE COURT: All right. Back on the record
19 in this case. Attorneys are present from both sides in
20 the courtroom. The jury is not present.

21 (Jury Note No. 1 marked for
22 identification.)

23 THE COURT: The Bailiff has handed to the
24 Court the first note from this jury since they've been
25 in deliberation, and which the Court has instructed the

1 Court Reporter to mark as Note No. 1, and the note says:

2 MR. HURD: "Economist -- Economist video or
3 written deposition."

4 THE COURT: And signed by Laticia or --

5 MR. HURD: Latricia Holquin.

6 THE COURT: -- Latricia Holquin, to which
7 the Court has prepared the following response, which I
8 will allow the attorneys for both sides to look at the
9 same time.

10 (A brief interruption occurred.)

11 THE COURT: Does the Plaintiff have any
12 objection to the response prepared by the Court.

13 MR. BOYD: No, objection, your Honor.

14 THE COURT: Does the Defense have any
15 objection to the response?

16 MR. HURD: None, your Honor.

17 THE COURT: Very well. Then the Court is
18 going to send this response, by the way of the Bailiff,
19 to the jury room.

20 The jury is on break right now; is that
21 correct.

22 THE BAILIFF: Yes, sir.

23 THE COURT: They're on break.

24 Keep it in your possession until all the
25 jurors are present in the jury room, and ready to go

1 back to their deliberations.

2 (The Jury continued to deliberate.)

3 -----

4 (Open court, jury present.)

5 THE COURT: All right. Thank you.

6 Ladies and gentlemen, it's my understanding
7 that you all are going to break for the evening at this
8 time.

9 And you need to return in the morning at
10 8:30 to continue with your deliberations.

11 I brought you down, not because I think
12 that anybody would talk about it, but because I need to
13 put on the record that I told you not to; okay?

14 Obviously, you've been talking about it for
15 hours. It's on your mind. It's fresh on your mind and
16 it would be very easy to -- with absolutely no intent to
17 do so, talk about the case. So don't talk about it
18 until you're back here in the morning at 8:30, and all
19 of you are in the jury room together, and then and only
20 then can you continue your deliberations.

21 I doubt seriously if there's anything in
22 the newspaper or the Update tomorrow, but there could
23 be. Don't read anything.

24 Have a good evening. See you in the
25 morning. Thank you.

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(END OF VOLUME 10)
(CONTINUED IN VOLUME 11)

1 STATE OF TEXAS)

2 COUNTY OF WISE)

3 I, Jeffery M. Goodwyn, Official Court Reporter
4 in and for the 271st District Court of Wise County,
5 State of Texas, do hereby certify that the above and
6 foregoing contains a true and correct transcription of
7 all portions of evidence and other proceedings requested
8 in writing by counsel for the parties to be included in
9 this volume of the Reporter's Record, in the
10 above-styled and numbered cause, all of which occurred
11 in open court or in chambers and were reported by me.

12 I further certify that this Reporter's Record
13 of the proceedings truly and correctly reflects the
14 exhibits, if any, offered by the respective parties.

15 *I further certify that the total cost for the
16 preparation of this Reporter's Record is \$ _____ and
17 was paid/will be paid by _____.

18 WITNESS MY OFFICIAL HAND this the _____ day
19 of _____, _____.

20

21

22 _____
JEFFERY M. GOODWYN, Texas CSR #1283
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23 Official Court Reporter, 271st District Court
Wise County, Texas
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