

REPORTER'S RECORD  
TRIAL COURT CAUSE NO. 75576-CV

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3	TYLER LEE AND LEIGH ANN LEE,	) IN THE DISTRICT COURT OF
	INDIVIDUALLY AND AS NEXT	)
4	FRIEND OF SYDNEY ROSE LEE,	)
	MINOR	)
5		)
	vs.	) BRAZORIA COUNTY, TEXAS
6		)
	BERKEL & COMPANY,	)
7	CONTRACTORS, INC.	)
	MAXIM CRANE WORKS, L.P.,	)
8	DIXON EQUIPMENT SERVICES, INC.,	)
	FLOYD DIXON, ISAAC DOLAN,	)
9	JAMES DAVIDSON, ANDREW BENNETT,	)
	AND LINK-BELT CONSTRUCTION	)
10	EQUIPMENT CO.	) 149TH JUDICIAL DISTRICT
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**CLOSING ARGUMENTS**

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On the 5th day of May, 2015, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Terri Holder, Judge presiding, held in Angleton, Brazoria County, Texas.

Proceedings reported by computerized stenotype machine.

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**PROCEEDINGS**

*(Beginning of requested excerpt)*

THE COURT: Plaintiff ready to open?

MR. ARNOLD: Yes, Your Honor. Can I have a couple of minutes to --

THE COURT: Sure.

MR. ARNOLD: -- set everything up?

THE COURT: You may.

MR. ARNOLD: Thank you.

Almost ready, Judge.

MR. DIAMOND: Your Honor, may I move?

THE COURT: You may move wherever --

MR. DIAMOND: Thank you.

THE COURT: -- you need to to see.

MR. DIAMOND: Thank you so much.

THE COURT: If you can find some place to go.

MR. DIAMOND: Exactly.

THE COURT: Sorry. The courtroom is small.

MR. DIAMOND: I'll just go sit with them.

THE COURT: I may not let you do that.

MR. ARNOLD: All right. Judge, I think I'm ready.

THE COURT: All right. You may proceed.

MR. ARNOLD: May it please the Court?

THE COURT: Thank you.

1 MR. ARNOLD: Thank you, Judge.

2 Good morning.

3 UNIDENTIFIED JURORS: Good morning.

4 MR. ARNOLD: Ladies and gentlemen of the jury,  
5 I want to thank you. I want to thank each and every one of  
6 you on behalf of Tyler and Leigh Ann for helping us in this  
7 case. I will tell you that I'm actually jealous of each one  
8 of you today because today you have an awesome power. You  
9 have a power to hold companies accountable. You have a power  
10 to listen and actually render. You have a power that I don't  
11 have or none of these lawyers have. You have the power to  
12 decide a family's future for 50 years. Think about that. How  
13 often do you have power like that? Collectively, as a  
14 community, you're here. We want you to exercise that power.

15 Let me tell you a little bit about where I'm  
16 going. Closing arguments. In some ways I have a tough job.  
17 You've heard two weeks of testimony. We've got 20 witnesses,  
18 cast of characters; and I've got two hours to do it, okay?  
19 But in some ways I've got an easy job. I represent a terrific  
20 family who's been tremendously injured as a result of clear  
21 evidence of defendants' conduct.

22 The evidence is overwhelming in this case.  
23 This is not a close call, and so that makes my job a little  
24 bit easier. But I want you to remember one thing as we talk  
25 throughout this case, is I ask you to exercise this power and

1 it -- because I want you to remember after you render your  
2 verdict, the Judge will call the next case; the defense  
3 lawyers will go on defending other clients, other cases;  
4 you'll go back to your everyday life. But there's one family  
5 that lives with what you decide; and that's not just today,  
6 that's 50 years that they live with your choice.

7           And so when you consider the power that you  
8 have, I ask that you consider the impact that you will have on  
9 this family for 50 years. On -- I ask that you consider the  
10 power that you'll have on defendants' conduct, about how they  
11 conduct business on their job sites and what you have to say.

12           Now, I want to do something. I want to tell  
13 you where I'm going. I'm going to talk for about an hour and  
14 a half, and then I'm going to -- it goes to the other side.  
15 And then I've got about 20 or 30 minutes at the end where I  
16 get to rebut some of the things that they say. But I want to  
17 go where you're going to go, which is this jury charge; and I  
18 want to talk about some of the questions that you are going to  
19 be asked and talk about the evidence that supports it.

20           And so I want to go where you'll start, and  
21 kind of where we started this trial. We talked about  
22 preponderance of the evidence, right? You might remember voir  
23 dire. Back when I was first asking you questions, I asked you  
24 a lot of questions about preponderance of the evidence, which  
25 means for a fact to be proved true, it's just more likely than

1 not, 51/49. Do you remember when I put the two reams of paper  
2 and I put that you have to put one sheet?

3 Okay. Clearly I think we've done far beyond  
4 that; but I want you to remember though, that that standard  
5 applies to all damages, too. It applies to when you have to  
6 consider the next 50 years of damages, is preponderance of the  
7 evidence. And when we talk about things like pain and  
8 suffering, mental anguish, impairment -- okay -- those are big  
9 things to Tyler Lee and his family. And so the law says that  
10 we must only prove our case by a preponderance of the  
11 evidence.

12 Now, Question 1, liability. I want to talk a  
13 little bit about the charge and what it says. "Berkel" means  
14 its employees, okay? Because companies are responsible for  
15 their employees' actions. This is not talking about, you  
16 know, the CEO has to do something. This means Berkel and  
17 Maxim are responsible for their employees' actions.

18 Negligence. People would throw that term  
19 around a little bit. It just basically means that someone, no  
20 one special, but they didn't take ordinary care under the same  
21 or similar circumstances, that they should have exercised just  
22 a degree of care of ordinary prudence, okay? It's just  
23 something that is common sense. That's the best way to sum it  
24 up.

25 And then last thing before we start talking

1 about evidence, proximate cause. Substantial factor in  
2 bringing about an event. There may be more than one proximate  
3 cause of an event, right? And that's what happened in this  
4 case. In this case, lots of bad decisions caused this  
5 accident, right? Lots of bad decisions by multiple companies  
6 caused this accident. And I want to start back; and let's go  
7 in time, in order, of evidence, all right?

8           So when we start back, I want you to think  
9 about what we learned. Andrew Bennett, right? He's the crane  
10 operator. I couldn't fit all these boards up, so I'm just  
11 going to have to hold this one, all right? What did we learn  
12 about Andrew Bennett operating this 200-ton crane beforehand?  
13 He was 21. He had never operated it before. He never looked  
14 at the operator's manual. Berkel gave him no training. He  
15 had no idea how to use the crane computer. Bennett relied on  
16 the crane computer to tell if overloaded. Important. Could  
17 not see the crane computer. And he had no lift plan, right?  
18 What's important about that?

19           This is not -- I've heard rental car analogies  
20 and Hertz rental car and, you know, you go and you just show  
21 your driver's license. I want to be clear: This is not Hertz  
22 rental car. That is a 200-ton crane on a job site that if you  
23 don't use it the right way, you're going to hurt somebody, all  
24 right? Does anybody seriously think that it -- that Andrew  
25 Bennett should have been operating this crane? I'm not saying



1 he couldn't have done some other smaller cranes, right? But  
2 he had no experience. He had no idea how to work the crane  
3 computer, but he was relying on that crane computer to tell  
4 him if he was overloaded. All right. Think about that.

5           Why is that important? Because that's a joint  
6 responsibility. Maxim could have taken five minutes,  
7 according to Mr. Merrill, and determined whether or not  
8 someone's qualified to operate a crane, right? They don't --  
9 they -- operating a crane is -- it's Maxim's crane. So when  
10 they bring the crane to site, it would only take you five  
11 minutes to ask him the questions of "Have you ever done this  
12 before? Have you run this crane before? Have -- do you know  
13 how to use this computer? Have you looked at the operator's  
14 manual?"

15           And no one did anything, right? Berkel clearly  
16 didn't do anything because they didn't do any training for  
17 him. Everybody says, "Well, the superintendent should have  
18 made sure that Berkel trained Mr. Bennett"; but in fact, they  
19 didn't do any training for him. They had no idea.

20           So before he's operating a 200-ton crane -- the  
21 reality is, is that Mr. Bennett -- okay -- should not have  
22 been operating this crane; and both sides had an opportunity  
23 to prevent it. Clearly Berkel did. They employ him. But  
24 also, Maxim had control of its crane; and we've heard over and  
25 over again that they didn't relinquish control until it's

1 assembled. Well, at that point in time, if they had asked  
2 five minutes of questions, they would have learned that they  
3 should not turn this crane over. No one can seriously argue  
4 that Mr. Bennett should have been operating this piece of  
5 machinery. He could do smaller cranes -- okay -- but he had  
6 never done it before.

7           Second, if we walk through time, we talked  
8 about this requirement about -- you've heard a lot about it.  
9 Where's my model?

10           Okay. Y'all are probably sick of looking at  
11 this model. Berkel added this power pack (indicating) to the  
12 back -- right -- which affects the center of gravity because  
13 they didn't take off the -- this extra weight here  
14 (indicating). They added these hydraulic hoses (indicating),  
15 right? Berkel -- or excuse me, Maxim knew that Berkel was  
16 going to do that because that's how Berkel sets up their  
17 cranes, right?

18           Why is that so important? Well, let's talk  
19 about it, okay? Maxim has got a OSHA responsibility  
20 post-assembly. It says, Upon completion of the assembly, the  
21 equipment must be inspected by a qualified person to assure  
22 that it's configured in accordance with the manufacturer  
23 equipment criteria.

24           Very important because the manufacturer -- do  
25 you remember Stephanie Wood? Let's see if I have a picture of

1 her here in a second. I don't. I'll get to it in just a  
2 second.

3 Stephanie Wood said that Link-Belt does not  
4 allow this configuration. Remember I've asked all these  
5 witnesses, "Was there any evidence that Link-Belt allowed you  
6 to do it?" And what'd they say?

7 "No."

8 Why? Because it affects the integrity of the  
9 crane during its operations, okay? Think about this: You've  
10 heard from two mechanical engineers, okay? Remember the  
11 expert that we called, Eric Van Iderstine? I butchered his  
12 name just now, but remember? He said -- and he was talking  
13 about how they made the different additions to the crane,  
14 right? And the 2500 pounds of hoses that they had hanging on  
15 the boom and they asked him, "Are you critical of this  
16 configuration in terms of a causal factor of the boom  
17 collapse?"

18 And he says, "Absolutely."

19 "Are you critical of both Berkel and Maxim in  
20 that respect?"

21 "Yes."

22 He was the very first witness.

23 Okay. Well, why is that? There are multiple  
24 hoses that were attached. They weigh over a ton; and based  
25 upon the evidence, you can see that Link-Belt did not approve

1 this happening. Why? Because if you remember -- do you  
2 remember Mickey Disotell on the video, how he's talking about  
3 how it lined up at 1:00 o'clock? And what happened, he was  
4 talking about a side load -- okay -- and he was doing his arm  
5 back and forth and explaining how it swung back around. It  
6 was side loaded; and those hoses, when they're bouncing  
7 violently back and forth, that's what caused the collapse,  
8 right?

9                   It was severely overloaded, but the straw that  
10 broke the camel's back was these hoses being attached. And  
11 you -- if you remember the analogy he used here, you can see  
12 it right here. He took a Coke can; and he says, If you stand  
13 on a Coke can but it's full cylinder, you can't smash it,  
14 right? And so when you stand on it -- because it's  
15 structurally -- the integrity is there. But if you take your  
16 pencil and you touch it on the side, it smashes. And that's  
17 what happened here. And it wasn't just Eric Van Iderstine  
18 that said this. And you can see here he said, "The boom was  
19 severely overloaded during the course of trying to extract the  
20 auger, and the hydraulic lines whipping around are going to  
21 put side loads into a boom. Again, the boom is being pushed  
22 on tremendously. And right in the middle of the boom, we have  
23 hydraulic lines mounted to it that are jerking on it; and that  
24 is precisely where the boom failed."

25                   The boom failed at the exact point that the

1 hoses were attached, right?

2           You don't have to just talk about Eric Van  
3 Iderstine. We took the deposition of Stephanie Wood. Do you  
4 remember her by video? It was about 20 minutes. In talking  
5 about the way the crane was configured, she said they should  
6 not have done that.

7           "I would guess no, they shouldn't. They should  
8 ask questions and determine what's -- what's happening."

9           And as the manufacturer and designer of the  
10 boom of the crane, you would not want your cranes to be  
11 operated with heavy hydraulic lines hooked to the boom  
12 structure, correct?

13           "Correct."

14           Okay. And what'd she say about whether that  
15 caused the accident in this case?

16           "What is your opinion about whether attaching  
17 the hydraulic lines to the boom section as they were attached  
18 contributed to this accident?"

19           Okay. This is Link-Belt talking about its  
20 crane.

21           "Well, any time you add anything to the boom  
22 that it wasn't designed for can cause stress, additional  
23 stress than what it was designed to handle," right?

24           So you've only heard from two engineers in this  
25 case, both of which said that the -- that attaching these

1 hoses to the boom is ultimately what caused it to collapse.

2 Why is that important? It's a joint responsibility, right?

3 It's a Maxim and a Berkel responsibility.

4 Now, similarly -- I want to go back in time and  
5 talk about what Berkel knew, right? Because this isn't the  
6 first crane collapse dealing with Chris Miller, right? Back  
7 in 2009, if we go back in time, there was another crane  
8 collapse. Fortunately no one was killed; but they put  
9 together a root cause analysis, unlike they did in this case,  
10 right? They put together a root cause analysis so they'd  
11 prevent it in the future; and we're going to talk about this  
12 when we talk about whether or not Berkel learned its lesson in  
13 this case, all right?

14 This crane collapse was the same  
15 superintendent, Chris Miller. And what did they say back in  
16 2009 in that root cause analysis? It's a safety issue, that  
17 the Berkel crew is required to do a job safety analysis and  
18 review the stuck auger policy.

19 Did they do that in this case? No.

20 That Berkel management is required to ensure  
21 the operator is trained and knows how to work with the LMI  
22 system, the crane computer.

23 Did they do that in this case? No.

24 That the purpose is to prevent overloads and  
25 crane collapses, and that they need to barricade so persons

1 are not in the zone of danger.

2 Did they do that in this case? No.

3 They didn't learn their lesson. So let's talk  
4 about it. All right? Now, we're leading up to the days of  
5 the accident. The accident is September 30th. Leading up to  
6 the days of the accident, Mr. Miller has threatened to fire  
7 everybody on that job so many times that his boss has to tell  
8 him, Get ahold of yourself, pulled him aside. Do you remember  
9 Bruce Beaman, by video, telling him multiple times?

10 Mr. Miller, that's how he runs his crew. He intimidates them.  
11 Leading up to the day of the accident, he had threatened to  
12 fire every single crew member multiple times; and we're  
13 talking about two weeks' worth of work, okay?

14 If -- when you think about the day of the  
15 accident, I want you to think about how many bad decisions  
16 were made, right? Go through it in time. Chris Miller knows  
17 that you're not supposed to start pumping the piling until  
18 there's sufficient grout on site. He says do it anyways to  
19 save 3- or 400 dollars' worth of grout. Why? He wanted to  
20 save 3- or \$400, and they were behind. They were behind  
21 schedule.

22 Remember Mark Stacy telling them that they had  
23 been behind for the delays, and you saw the delays from the  
24 previous week. It was contrary to Berkel's policy, contrary  
25 to Skanska policy; and everybody told him not to do it. And

1 he did it anyways, and he knew better. And what happened as a  
2 result? The auger got stuck in the old grout, right? You  
3 don't violate that policy, that auger doesn't get stuck. And  
4 so his conscious decision to violate the policy led to the  
5 auger getting stuck, which led to the crane collapse.

6 All right. Fast forward. Now, we are moving  
7 along in -- to what happened right before the day of the -- or  
8 the accident, right? He comes back; and he is pissed, right?  
9 That was clear from his testimony as we all heard, right? And  
10 he comes up. He doesn't follow all the steps that he had  
11 learned from the prior crane collapse. Instead, what does he  
12 do? Tells Mark Stacy, Get the F out of the way, right? Do  
13 you remember that testimony? Get the F out of the way -- and  
14 he says it was a discussion, I don't think that's really what  
15 I call a discussion -- and he takes over.

16 Stacy gets mad, walks off site, right? And I  
17 want you to think about the next 40 minutes, about how many  
18 opportunities they had to stop this job and prevent this  
19 accident. 40 minutes. I want you to imagine the scene. Oil  
20 is shooting out of the seams of hoses. It is raining oil on  
21 the entire crew. Every crew member says they have never seen  
22 anything like it, with the exception of Chris Miller, right?  
23 Every crew member says that the hoses were dancing so  
24 violently that everybody was watching them. Every crew member  
25 said that the boom was flexing up. Do you remember that



1 testimony from Mickey Disotell and Chris Prestridge, right?

2 Five times a 21-year-old crane operator gets  
3 out and says, I want to stop the job. This is not safe.

4 Five times, right? Think about that. Five  
5 times he says, I don't want to go forward anymore.

6 When you're trying to unstick an auger for 40  
7 minutes, imagine how long that is, all right? This is not 40  
8 minutes of watching, you know, TV or something like that.  
9 It's 40 minutes of putting the crane in a bind, right?  
10 What -- what does Chris Miller do? First he said he doesn't  
11 even remember, like he had amnesia, right? He didn't remember  
12 a lot from that day, except when it's convenient to him.  
13 Chris Miller ignored him.

14 You should never ignore the crane operator.  
15 Mr. Bennett was trying to do the right thing, right? He was  
16 trying to. Frankly, I wish if he'd have had a little bit more  
17 experience, he probably would have just said, I'm not going to  
18 do it anymore, right? That's probably true.

19 During this time, Mickey Disotell talks about  
20 he literally is trying to figure out where he's going to jump  
21 and hide; and of course what do we know? That crane is  
22 starting to rock. I want you to talk -- think about it. You  
23 remember Mickey Disotell's video and he would describe and he  
24 would kind of go back and forth talking about how the crane  
25 was rocking and -- as he described it. Those tracks were

1 coming off the ground, and what do we know if the tracks are  
2 coming off the ground? It's overloaded, right?

3 Those tracks were coming off the ground despite  
4 the fact that they had 17,000 pounds additional power pack  
5 putting off the back. That crane was in a bind. It was  
6 stressed. And all of the evidence, and we don't need to go  
7 through it all, but the crane tipping. Remember Mr. Bennett  
8 said he had no idea what his load was? Because you can't know  
9 what your load is if you are pulling on a stuck object in the  
10 ground because it's only supposed to be freely suspended.

11 He had no idea what his load was. He had no  
12 idea how to use the crane computer. All he knows is that his  
13 boom is flexing and it's coming off the ground -- right --  
14 because of a severe overload. And eventually when you're  
15 doing all of this, something's got to give, right? That's  
16 what happened. At some point you pull on something long  
17 enough, it's going to break. And what happened, and all of  
18 the evidence that we talked about, we've got -- you've got the  
19 structural evidence. You've got pictures of how the Rotek  
20 bearing was messed up afterwards -- right -- because it had  
21 slammed back down like Mr. Merrill had said on the stand.

22 All the evidence says it. It's overloaded.  
23 Cranes do not collapse on their own. And I want -- I want to  
24 be real clear about what Mr. Bennett said. This is his trial  
25 testimony. The court reporter helped us and has been working

1 at night trying to get all of the various things typed up and  
2 written.

3 This is what he was thinking immediately prior  
4 to the crane collapse, okay? And this is very important.  
5 This shows that he was nervous about the safety. And I asked  
6 him, And what were you thinking prior to that -- oh, excuse  
7 me.

8 And you thought -- your concern was that the  
9 auger would snap, correct?

10 "Yeah."

11 "And that's what you were thinking prior to  
12 this, true?"

13 "Correct."

14 "So that means that prior to the collapse, you  
15 were worried about the auger snapping. And if the auger  
16 snaps, it could be propelled one way or the other?"

17 "Well, it depends if I had tension on there or  
18 not."

19 "But that's what you were thinking prior to the  
20 collapse?"

21 "Yeah."

22 Okay. "And if it did snap prior to the  
23 collapse, it could either shoot backward into the boom" -- and  
24 he says, "The top of it."

25 "Yeah, because, you know, you got two cables

1 running off the end of the boom, one's holding the auger, and  
2 one's holding the leads. You have boom deflection. That  
3 means when you put more weight on the boom, the boom deflects  
4 down." "And if the auger would have broke, it would have --  
5 the boom would have then went back and brought the top of the  
6 leads into the boom," right?

7 So you were worried about the auger snapping --  
8 you were worried about the auger snapping immediately before  
9 the collapse, true?

10 "Yes, sir."

11 And you were worrying about the auger snapping  
12 because if it did, it could cause the boom to hammer back,  
13 correct?

14 "Correct."

15 So by worrying about the auger snapping, that  
16 would have been the first step of the boom collapse, right?

17 Well, why is that important? Okay.

18 Mr. McKinney has said all along that this wasn't a safety  
19 concern, it was an operational concern. That's not right,  
20 right? That's not true. He was worried. He was worried this  
21 was going to snap and was going to cause everything to go back  
22 and hammer back over it. And when you look at the pictures,  
23 when you go back into the jury room, that's exactly what  
24 happened. The boom is bent over backwards.

25 Now, he might not have foreseen exactly how it

1 was going to collapse, but he was worried about the crane  
2 collapsing prior to this accident. So that makes sense,  
3 right? You have him get out five times and tell him he wants  
4 to stop. And these aren't just getting out like, "Mr. Miller,  
5 can we stop now, please? I need to go to the restroom. I  
6 need to take a break."

7           They're screaming at each other, right? Do you  
8 remember Mr. Bennett's testimony that he could hear Miller  
9 screaming back and he said everybody in Houston heard it, I  
10 think was what he said. Think about the dynamics of a  
11 21-year-old crane operator screaming at his superintendent  
12 telling him to stop. It's because he was worried about a  
13 crane collapse.

14           So I want to talk to you about the next  
15 question, okay? And we'll talk a little bit more about the  
16 evidence because I think it's relevant to it, okay? So on  
17 Question 1, it's yes to Berkel, and yes to Maxim. Now, I  
18 forgot to tell you a couple of other things -- not that y'all  
19 want anymore boards because Lord knows we've used enough in  
20 this trial. Y'all are probably sick of boards, right?  
21 Candidly, I'm kind of sick of them, too. You can't take these  
22 boards back with you, okay? So if we've written up evidence  
23 or things like that, I can't give it back to you in the jury  
24 room, okay?

25           So the next question. All right. This

1 question, the way it's worded, okay -- this question is just  
2 as important as the first question, okay? Do not pass over it  
3 just because it's kind of dealing with the same thing. Ready?  
4 The question says, "was substantially certain to result from  
5 his conduct on the date in question."

6           You've heard me ask some of those questions,  
7 "Was it substantially certain." Remember I asked the crane  
8 operator, you know, "If you do this, is it substantially  
9 certain" -- you've probably heard that testimony. And it  
10 says, An employer is responsible for the actions of its  
11 employees that are closely connected with the employee's  
12 authorized duties, okay? So the question is, is did Berkel  
13 know that something bad was about to happen, okay? Did they  
14 know, by their conduct, that they were getting ready to cause  
15 harm?

16           Now, I'm going to flip over here, if I don't  
17 trip this up. I asked -- this board, if you recall, because  
18 it's a little puny board, this is early on in the case. This  
19 is -- I asked Mr. Bennett, "When you're operating" and "is  
20 substantially certain to cause serious injury or death," okay?  
21 What are the circumstances? Do you remember that? I wrote  
22 this up on the board, Operating at 180 or 200 percent  
23 overload. And then I said, Operating "overload probable to  
24 cause," right? Or if you're operating and you know your  
25 rollers are coming off the back of the ground, right?

1                   Why was I asking these questions? Because if  
2 you're operating a crane and you know it's overloaded and you  
3 know it's tipping, you know something bad's getting ready to  
4 happen, right? You don't have to foresee, for example, that  
5 it's going to happen to Tyler Lee; but you have to -- but you  
6 know when you get to that point something bad is about to  
7 happen, right?

8                   So let's talk about it. Mickey Disotell.  
9 Mr. Disotell's testimony -- I don't know if everybody can see.  
10 Okay. This is important because him and Chris Prestridge are  
11 communicating to Andrew and are communicating to -- they're  
12 communicating what they're seeing, right? And Mickey Disotell  
13 is a crane operator with more experience, right? So he knows  
14 what happens -- what's going on with the crane, okay?

15                   So leading up to the failure, this is talking  
16 about when Mr. Miller is taking over operations. He says, it  
17 "was communicated several times through everybody, the  
18 operator, the people next to the crane" -- because remember he  
19 was 5 feet from the crane, Mickey was -- "and Chris."

20                   That was Chris Prestridge. He says -- I said,  
21 "Okay. I'm talking about you communicating to Andrew that you  
22 think the boom was overloaded." And what does he say? How  
23 important is this? "I can only tell him so many times. He  
24 knows it. He gets out of the crane. Tells Chris that he's  
25 overloaded and he doesn't want to do it. So, yes. Multiple

1 times everyone brings up that they don't feel safe doing it.  
2 And because -- it's overloaded and it's stupid," right?

3 So if Mr. Miller says, I have no memory --  
4 okay -- the reason he has no memory is because they told him  
5 it was going to happen, right?

6 Mr. Disotell, again -- And you could see the  
7 crane was going light or tipping, and everyone knew that was a  
8 sign it was being overloaded.

9 Answer: Right.

10 "Do you think Chris Miller knew that?"

11 "Oh, yes, ma'am."

12 That was in response to Ms. Knight's questions.

13 "Okay."

14 "He was communicating with Andrew, you know."

15 "So it's pretty common knowledge that if you  
16 see the crane going light at the back, everyone's going to  
17 know that's a sign it's being overloaded, true?"

18 "Yes."

19 And then I asked specifically, Mr. Disotell.

20 He said, "The auger should have been cut. We should have  
21 moved on. The crane was obviously in severe stress, but Chris  
22 Miller was giving Bennett the signals to keep going."

23 "By doing so, it was substantially certain that  
24 the crane would fail and somebody would get hurt,  
25 unfortunately it was Tyler Lee?"



1                   Answer: Yes.

2                   Now, why'd I ask him that question? Because I  
3 knew we were going to be talking about it, right?

4                   Mr. Disotell is actually one of the most  
5 important witnesses because he is a crane operator and he  
6 knows the importance of what's happening to the crane, but it  
7 wasn't just Mr. Disotell that told him. Chris Prestridge, do  
8 you remember him? He was kind of early in the case. And  
9 what's he say in the back? Chris' testimony is important  
10 because he was back there working underneath the crane. Do  
11 you remember he said he was hooking up the hoses and he said  
12 it was bobbing above his head and I think he called it a death  
13 trap, right? Because the crane was going up and down  
14 depending upon when they were trying to pull up.

15                   And what'd he say? I saw a lot of sunlight  
16 underneath those tracks. Because they were up, you could see  
17 sunlight, right? So he knew it was tipping.

18                   He said, "I was right underneath here. You  
19 know a load -- it had so much load on the crane "all of these  
20 rollers back here, which would be these two, were off the  
21 tracks, you know, off the ground, overloaded." And, "It was  
22 bobbing," and "that's why I called it a death trap. You know,  
23 that thing was tip-toeing when I was underneath it."

24                   Okay. And then he says, It means they weren't  
25 touching nothing no more.

1                   That crane was up on its toes. Again,  
2 Mr. Bennett, did he ever tell Mr. Miller that he didn't think  
3 it was safe?

4                   Answer: I mean, yeah. When he stopped and got  
5 out, he told him. Yeah, definitely said it.

6                   "In your view, Mr. Bennett clearly communicated  
7 to everybody that he didn't want to continue?"

8                   "Yes, sir."

9                   "And that he didn't want to continue because he  
10 didn't think the crane was being operated in a safe shape?"

11                   Yes. He knew "it was light and it wasn't going  
12 to come out. It wasn't safe."

13                   All right. This was some of the -- I think  
14 this is the thing that I think is kind of the most common  
15 sense. What does he say? I knew something -- something had  
16 to give. You've got -- you've got rollers off the ground.  
17 There's a weak link somewhere in there, and something is going  
18 to give. "It's going to find a weak link." And the "cable is  
19 going to break, the boom is going to break, the auger is going  
20 to break, the bolt is going to pull out..." And he was  
21 thinking that he could be injured, right?

22                   So why is that all important? You now have the  
23 crane operator. You've got Mr. Disotell. You've got  
24 Mr. Prestridge -- right -- and they're all telling Chris  
25 Miller, Hey, something's going to break. Something's got to

1 give.

2           The -- I think something's got to give is maybe  
3 the best way to say it, right? It's going to happen if we  
4 keep doing this. It's unsafe. All of those things are being  
5 communicated to the man in charge of the job site, right? And  
6 he pushed anyways. And he pushed further and further and  
7 further, and he pushed until it all broke. So the question  
8 is: Was it substantially certain to result from its conduct?

9           Yeah. He didn't have to wake up that morning  
10 and say, I want to hurt Tyler Lee; but everybody told him, If  
11 you keep doing this, something's going to give, something's  
12 going to break, something's unsafe, right?

13           So answer "yes" to this question, okay? It's  
14 just as important as the first question. This is slightly  
15 different, okay? You're going to see this question a couple  
16 times, once later, and so I'm going to try to hit it now and  
17 then spend less time with it later on. It's a -- this  
18 question is a different number, but it's also in the back of  
19 your charge, okay?

20           Question: They're saying if you said "yes" to  
21 2 -- right? It's got the instruction at the top -- they want  
22 to know if that person that pushed it beyond capacity was  
23 what's called a vice principal or a manager, okay? This is  
24 asking about Chris Miller. No surprise, right? And you are  
25 considered a vice principal or a manager -- and I want to

1 point out a few things before we start talking about it.  
2 Ready? There's a lot of "ors" here, okay? We don't have to  
3 prove all those "ors." We've just got to prove one of them,  
4 all right?

5 A person has the authority to employ, direct  
6 and discharge an employee of the company, right? If you find  
7 that Chris Miller is in charge of the job site -- okay -- has  
8 the power to run people off or request additional people, you  
9 answer "yes" to this question, right? Every witness -- and  
10 Mary, do you have that?

11 I'll go this way. All right. Everybody,  
12 everybody -- this man right here, Mickey Disotell; this man  
13 right here, Andrew Bennett, Chris Prestridge, Joe Riojas -- he  
14 was the very first witness, remember him -- Mark Stacy, all  
15 these people are his crew, right? And what'd they all say?  
16 Did Miller have the right to fire? Yes. Right? He had the  
17 right to fire and he had the right to hire and that he was in  
18 charge of the job site, okay? Mark Stacy said he had the  
19 right to fire. Let's be clear: He's threatened to fire every  
20 one of them, right?

21 Now, not until we get up here, Mr. Blum, is the  
22 first time you heard any evidence about, Well, he didn't  
23 really have the right to fire anybody. He has to go through  
24 Kansas, right? You remember that? Let's be clear: That's  
25 not what this question is asking. This question is asking

1 who's in charge of the job site, who has the power to order  
2 equipment, who has the power to direct activities, right?

3 Mr. Miller has the power because he controls  
4 when the grout trucks come; he orders the equipment. He can  
5 run off the crew. He has the power to start, stop, as he did  
6 in this case. We know this. He is -- you see this, direct  
7 and discharge the employee of the company. So he is a vice  
8 principal; or he's otherwise considered what's called a  
9 manager, okay? So check yes to this question.

10 Don't let Mr. Blum come up here and say, Well,  
11 it had to go through HR. Mr. Miller could run somebody off.  
12 Now, they might have checked it off in HR to close out the  
13 system; but make no mistake that he had the power and the  
14 ability to do this.

15 All right. Question 4. I'm not going to spend  
16 as much time on this, all right? You're going to have to  
17 decide -- there's only two causes here of Mr. Lee's accident,  
18 right? It's either Maxim, or it's Berkel. Y'all have seen  
19 that. You've seen them back and forth through trial going  
20 after each other because there's only two possible causes, and  
21 it's got to add up to a hundred percent.

22 I'm not going to suggest to you percentages.  
23 Candidly, I think Berkel's conduct is egregious. It's  
24 egregious enough that I think it justifies a punitive finding,  
25 okay? I really do. Only one time other have I seen a

1 punitive finding in a case and this should be the second time,  
2 but we'll talk about that later. Berkel's conduct is  
3 egregious, but I want to stop right there.

4 Maxim is sophisticated. Maxim is the largest  
5 crane company in the country. Maxim had a responsibility  
6 under OSHA to ensure that it was set up consistent with what  
7 Link-Belt said, and Link-Belt already said that the way they  
8 set it up was not appropriate. Maxim had the opportunity to  
9 say, "Wait a minute. You're not going to be running my  
10 2-million-dollar crane, not with this gentleman because he  
11 doesn't have enough experience on this crane."

12 If they had done their five minutes of asking  
13 the right questions -- right -- the due diligence, the common  
14 sense questions -- "Have you ever run a crane like this? Do  
15 you know what this is? Do you know what this crane computer  
16 is? Do you know how" -- then ask yourself: Would we be here,  
17 right? So I'm not going to ask a percentage, but I want you  
18 to know that both of them deserve responsibility.

19 All right. Let's talk about a different topic.  
20 We've been talking about liability, right? We've been talking  
21 about damages. These are the various -- and I'll get all of  
22 my boards up here real quick while I transition here.

23 Damages. We talked a little bit about this in  
24 the beginning. Do you remember back -- now, I can't remember.  
25 Opening statements we talked about this, the law, right?

1           So when someone, a company, causes harm to  
2 somebody, the law says you have to pay for it, right? Not  
3 just part of it, all of it. So when we're thinking about what  
4 that looks like, the Lees are a family. They're not just  
5 medical bills. We agree? So the law says you've got  
6 different elements of damages -- and my circle's not all that  
7 good, okay?

8           Over here you have medical damages. Over here  
9 you have what's called physical impairment, and we'll talk  
10 more about it. Over here you've got pain and suffering,  
11 mental anguish, you saw that in the jury charge. And then  
12 you've got disfigurement, loss of earnings, things like that,  
13 okay? Now, we've talked a lot about it. I'm going to talk  
14 about damages over here. But what the law says is when you,  
15 as a company, hurt somebody, catastrophically, you have to pay  
16 for it, okay? You don't have to just pay for part of it.  
17 You've got to pay for the damages caused to the family; and  
18 here's the other thing, you ready? You don't just have to pay  
19 for what you've caused in the past. You've got to pay for the  
20 damage that you've caused to them in the future, right?

21           I asked you a lot of these questions in voir  
22 dire because some people said that they couldn't award  
23 significant sums for things like this -- okay -- but you did  
24 because that's what the law allows. So let's get to talking  
25 about the specifics, okay? Medical care expenses actually

1 paid in the past. There's no disagreement about this.  
2 They'll agree to it, too. It's \$192,000. It's like a hundred  
3 dollars one way or the other, but that's in evidence.

4 Okay. And I can write these things down, but I  
5 can't give you all of these things to take back. So to the  
6 extent that you want to remember from a board, you might need  
7 to write it down. The medical care expenses and reasonable  
8 probability that Tyler will sustain in the future. All right.  
9 And we're talking about 48 years, true? 48 years is what his  
10 average life expectancy is going to be. Let's talk about  
11 future medical care, okay? You heard a lot of different  
12 testimony about it and I want you to think about what you  
13 heard and I'm going to come over here because we wrote on some  
14 of these boards.

15 If I -- Mary, you can take that cast of  
16 characters down.

17 Medical care. Does anybody disagree that Tyler  
18 Lee deserves the best medical care? Right? Every witness.  
19 Every witness that talked in this case -- his doctors, even  
20 the defense expert -- what'd he say? Deserves the best  
21 medical care. Does anybody disagree with that? No.

22 Next question, state of the art prosthetics.  
23 Every witness said, including their doctors, that Mr. Lee  
24 should get the benefit of improvements in the future, right?  
25 Why shouldn't he? He should not be stuck with the technology



1 of today in the next 50 years. That's not fair. It's not  
2 right, true? Absolutely.

3           So who did we hear from? Well, we heard from  
4 Mr. Kistenberg -- right -- which, you remember, from Georgia  
5 Tech? And he put the schedule up on the board and he talked  
6 about -- late into the night, I'm sure everybody remembers  
7 that, or maybe they don't because it was too late. But  
8 Mr. Kistenberg, in my view, was maybe one of the most  
9 impressive witnesses in this entire trial -- right -- talking  
10 about his knowledge, his skill, his expertise.

11           Well, Mr. Kistenberg talked about all of the  
12 different things that aren't 50 years away, but that are right  
13 on the horizon. Things like making legs weigh less, batteries  
14 longer, processors up. You heard all of the different various  
15 doctors talk about this osseointegration -- right -- the  
16 attachments, the things that they're doing in Europe right now  
17 and have been doing successfully.

18           We heard about how in the future -- he said in  
19 the next ten years, you're going to be able to communicate  
20 through your nervous system -- right -- and talked about  
21 biofeedback. And you heard him talk about powered knees and  
22 things of that sort. He said technology has got to work some  
23 of it out. It's kind of noisy, kind of clanky; but it's  
24 getting there, right? Tyler Lee deserves that. Tyler Lee  
25 needs you to allow him to receive that, right?

1           Now, we talked a little bit about the purpose  
2 of a life care plan, okay? And before I get to that, I want  
3 to talk to you a little bit about -- well, let's go to the  
4 life care plan. Why do we do life care plans, right? Because  
5 you need a road map to what somebody's going to go through in  
6 the future so that you can account for it. The goal of a life  
7 care plan is to return to optimal care, is to reduce  
8 complications, reduce pain, and improve function and mobility,  
9 right? You remember Ms. Vinett when she came to testify?

10           Now -- and that -- what does that do? That  
11 increases quality of life. Now, what happens if you don't set  
12 it aside? What happens in the future? He doesn't get optimal  
13 care. He's more likely to have complications. He's going to  
14 have more pain because he's not getting the care that he  
15 needs; and he'll be less mobile and less functional, right?  
16 That's the decision that you have to decide, is what does  
17 Tyler deserve?

18           Now, Ms. Vinett, I want to talk about that.  
19 Ms. Vinett, I want to compare and contrast a little bit. She  
20 put together a plan in today's dollars, right? And I'm going  
21 to compare and contrast a little bit about what you heard from  
22 Berkel's expert.

23           THE COURT: You have 45 minutes, Counsel.

24           MR. ARNOLD: Thank you, Judge.

25           45 minutes. The -- I'm going to start with

1 Ms. Vinett first. So even though I pulled this aside, let's  
2 talk about Ms. Vinett. Ms. Vinett is a nurse who is a case  
3 manager and follows amputees all the time. She has done --  
4 she has helped over a thousand amputees in the last 30 years,  
5 and that is her job. That's what she does for a living is to  
6 go and see what care needs people who have been  
7 catastrophically injured need, right? And she has been  
8 working on her plan, if you remember, for over a year; and she  
9 refined it and refined it and refined it and refined it and  
10 refined it, right?

11 And what did she do? I want you to compare and  
12 contrast this. She went and met with Tyler Lee and Leigh Ann.  
13 She went to TIRR -- right -- where he's being treated. She  
14 talked to John Holmes, and she spent a lot of time talking  
15 with Mr. Kistenberg and you can see -- you'll remember how  
16 they went into a real specific schedule about what it is that  
17 Tyler was going to need. And remember Mr. Kistenberg putting  
18 it up, like, okay it's not necessarily just every two years  
19 because you're going to get one every six and he went through  
20 a very specific schedule. I don't have enough time to go  
21 through all of those things.

22 Now, what did we hear from Berkel's expert,  
23 right? Think about that. Despite being the  
24 5-million-dollar-man over here, he had only had a report for  
25 six weeks. Think about this: March 11th, 2015. He had

1 already changed his mind April 7th, 2015; and then the night  
2 before trial, changed his mind again, right? This is  
3 important. He's never certified in life care planning nor was  
4 his nurse, right? They weren't certified life care planning;  
5 and he is not a specialist in amputees, all right?

6 Now, I want you to compare Ms. Vinett, who has  
7 treated over a thousand amputees and followed them as a nurse  
8 case manager -- okay -- or Dr. Meier, who's got more  
9 experience than anybody in the country, or Rob Kistenberg, who  
10 does this every day and is a prostheticist -- some day I'm  
11 going to pronounce that the right way, okay -- versus the guy  
12 that's got paid 5 million bucks over the last, roughly, ten  
13 years to come down to court and try to hold damages down,  
14 right? Not a specialist, not certified. He didn't meet with  
15 the Lees, remember that? Berkel didn't ask for him to meet  
16 with the Lees; and he didn't talk to anybody, right?

17 So compare and contrast the -- I thought I  
18 heard something. Never mind. I'm moving too fast.

19 UNIDENTIFIED JUROR: Hearing things.

20 MR. ARNOLD: Compare and contrast the  
21 credibility between these two. Think about it. Why would  
22 they have somebody that's not specialized in amputees come  
23 down here and testify, who's not a life care planner, a  
24 certified life care planner? That doesn't make sense, right?

25 We know why, because everybody agrees that he

1 deserves the best care and everybody agrees he deserves the  
2 state-of-the-art care; but you've got to find somebody to come  
3 down here and say something different than what Ms. Vinett  
4 said. We are talking about, literally, up until the night  
5 before trial, a man had put together less than \$420 for future  
6 medications.

7           Now, you can argue about whether one has one  
8 complication or another; but you should still allow for it,  
9 right? He's taken them in the past. He's -- he has chronic  
10 pain. Remember I asked him about that, phantom pain? And if  
11 it's beyond six months, it's considered permanent. He took it  
12 for a year -- okay -- and he might have stopped a couple  
13 months ago, but should you not allow for that?

14           He's got future surgeries in the future, right?  
15 In the life care plan, revisions to his stump and all the  
16 different things like that. And up until the night before  
17 trial, literally, he had less than 30 minutes of his testimony  
18 set aside for Mr. Lee and his family. It's not right. So I  
19 don't think their expert had a lot of credibility. So I ask  
20 that you set it aside, okay?

21           Now, Dr. McCoin. What did he do? Remember  
22 Dr. McCoin, Ken McCoin? He looked at the individual items and  
23 he looked back for the past 30 years at the growth rates,  
24 right? Because if you remember at medical, if we go back to  
25 that big picture, we all know that medical's increased faster

1 than inflation in the past 30 long years, right? Medical  
2 costs are going up, not down, right? I think we can all agree  
3 on that.

4                   So what he did -- if you remember, I put up  
5 that chart and I went through each category and item and  
6 looked at the growth rate for the past 30 years. So if it's  
7 something that's considered -- like, crutches, we gave it the  
8 rate that crutches had been growing at the past 30 years. If  
9 it's medications, we gave it the rate that the medications  
10 have grown in the past 30 years, the growth rate, okay?

11                   But there is nothing for -- there's no similar  
12 kind of index for prosthetics, right? So what do we do? We  
13 look at how fast they've grown over the past 20 years, right?  
14 You heard Dr. Meier say it, in his lifetime it's grown  
15 tremendously, and Mr. Holmes said it. Everybody said it. And  
16 then you discount it to the present value, right? And what  
17 that means is, is we understand that's going to -- we're going  
18 the take it aside and put it in investments to earn interest;  
19 and so we'll reduce down the total amount, right? So when we  
20 talk about funding Tyler's future medical care, this is the  
21 cost: 11,601,006. So I ask that you put \$11,000,601 -- I  
22 think I might have said that wrong. \$11,601,006. That's a  
23 zero, okay?

24                   Now, Mr. McKinney will stand up and say that  
25 that's big. That's a big number, okay? And what's it going

1 to cost 48 years from now? It's important that you consider  
2 the next 50 years. Remember I talked about the cost of Cokes  
3 with Dr. McCoin? I'm sure when Dr. McCoin was 16 years old  
4 and a Coke cost a nickel that everybody would have laughed at  
5 him and if he said it was going to cost a dollar fifty, right?  
6 Because you don't think about it.

7           There is no doubt that this new technology, the  
8 prosthetics, the price is going up, no doubt, right? He  
9 should be afforded the very best medical care. He should be  
10 afforded the opportunity to choose the best medical care. It  
11 is not the defendant's choice. It's Tyler's choice. And for  
12 you to do that, you need to set aside the necessary funds  
13 because what you decide today will literally make -- be the  
14 driving force to the decisions that Tyler has to make for the  
15 next 50 years. All right. That's how important it is.

16           I want you to write or think about 48 years  
17 next to that because I want it to be reminded when someone  
18 says that's too much. I want to hear you say, "Did you hear  
19 any evidence to the contrary?" All right. And I want to talk  
20 just briefly about this life care plan that Dr. Valena kept  
21 going back and forth on. Remember when I had Dr. Valena on  
22 the stand and we were talking about he tried to reduce the  
23 plan to take into account what Mr. Holmes had said in his  
24 deposition? Remember Mr. Holmes wasn't at his office. He  
25 didn't have his book of all his invoices and things like that.

1 He would say things off the top of his head and he said, I'll  
2 just throw out 1,000 to 2,000.

3           So they would reduce 2500 to 2,000, you know,  
4 or whatever they would do. Remember I asked Dr. Valena, Well,  
5 how much is your invoice for coming down here and testifying?  
6 He said, Well, I don't know. I'm not at the office. All  
7 right? He's like, I'll just throw something out, okay? They  
8 want to try to nickel and dime everything -- okay -- but the  
9 reality is they could have gone out and got a -- talked to  
10 somebody like Mr. Kitsenberg and they chose not to, okay?  
11 It's -- instead, they take bits and pieces where they can try  
12 to nickel and dime and try to somehow work it down.

13           All right. Now, one more thing on this and  
14 then we'll move on to the next topic. Dr. Helen Reynolds.  
15 Last Friday she was the last witness, if you recall. If  
16 Valena is not credible, you throw out her plan. Remember I  
17 asked that question? She didn't do an analysis of what  
18 Ms. Vinett did. So if you -- when you're considering this  
19 question, if you think that Dr. Valena, Berkel's expert, is  
20 not credible, well, then everything she said you should also  
21 throw away, right?

22           But what did she do? I want to talk about what  
23 she agreed with first. She said Rob, this is Mr. Kistenberg,  
24 his numbers had integrity, his methodology had integrity, they  
25 were accurate, they were relevant, they were important to the



1 jury, and they had no criticism, right? So their own expert  
2 admits that what he did has credibility. She, however, did  
3 not talk to real-world prosthetists to do any kind of  
4 different analysis, right?

5 Now, she talked about the idea that old  
6 technology, once it's out, grows at approximately 2 percent,  
7 right? That's not relevant because we're not here to talk  
8 about old technology, remember? Instead, what she did -- you  
9 know I had to do this, right?

10 UNIDENTIFIED JUROR: Shame on you.

11 MR. ARNOLD: The bedpan plan, okay? Because  
12 she knew that prostheses were growing at such a great rate --  
13 right -- and that the historical numbers do not lie, she just  
14 reclassified it and put it as the same as a commodity like a  
15 bedpan or a crutch. Bedpans and crutches have not changed  
16 much since World War II. As a result, they haven't really  
17 cost a lot more. Comparing prostheses to what Tyler has, is  
18 an X3, is a joke. It's a joke. It should offend you. It  
19 offends me. We are not talking about bedpans. We are talking  
20 about this man's future. We're talking about 48 years.  
21 Because we know what happens when you believe Dr. Reynolds,  
22 right? Remember this? Last Friday cross-examination of  
23 Dr. Reynolds?

24 We know these numbers. If Tyler Lee -- I call  
25 it the time machine. We go back 20 years. You go back 20

1 years, and we're all sitting here. It's 1994 -- right -- and  
2 Tyler Lee is sitting at that table and the Judge is sitting  
3 right there. And you believe Dr. Reynolds and that at that  
4 time the prosthetic cost 13,800 and you believed her and you  
5 believed the bedpan plan, today Tyler Lee would have 22,896.  
6 Remember what she said?

7 I said he's not going to get an X3. She said,  
8 Oh, he ain't going to get a C-Leg. We're bumping him way  
9 down, okay? I mean, we're going to give him old generation,  
10 old technology. Same thing, again, 1999. You're impaneled as  
11 a jury to decide. The Judge is right there. The defense  
12 lawyers are right there. Tyler Lee is sitting at that table.  
13 If you believed Dr. Reynolds and the bedpan plan, he would  
14 have \$36,000 today to get the right technology, right? Why do  
15 they do that? Try to keep the numbers down.

16 When you go back and consider his future care,  
17 if you believe them, these numbers are going to change. We're  
18 not going to be able to come back. It's going to be 2020.  
19 Tyler Lee goes to the doctor. What's his choices? It's going  
20 to be 2025. It's going to be 2030. It's going to be 2035;  
21 and every five years you will be depriving Tyler Lee of the  
22 best medical care and the state-of-the-art technology, okay?  
23 She didn't do analysis. She did it just based on Dr. Valena's  
24 plan. You can throw it out.

25 All right. Damages. There's lots of different

1 damages. I'm going to try to talk about them; but before I  
2 do, y'all have seen this picture, okay? I actually -- Tyler  
3 and Leigh Ann, this is a picture of them. You can tell she's  
4 pregnant with their first child, right? And I want you to  
5 remember the words of Leigh Ann, "I felt like I was on top of  
6 the world." Tyler was the youngest superintendent in the  
7 company history. I want you to look at their faces; and I  
8 want you to look at how strong they look, right? This is real  
9 life. These are real people.

10 This accident caused this family a lot of harm,  
11 all right? And when you cause a lot of harm, you've got to  
12 pay for it. Because it doesn't -- when you make really bad  
13 decisions over and over again and you hurt somebody and you  
14 hurt their family -- because let's be clear, it affects the  
15 family. I think every one of you knows that -- you don't get  
16 to come to court and say, "Well, we caused a lot of harm, but  
17 really don't want to pay for it," right? You don't have the  
18 credibility to come down here and say, "Well, let's just give  
19 them medical bills. Let's not give them everything else."

20 That would not be fair to Tyler because the law  
21 says that he's a person, and the law says that you should  
22 consider all of the elements of damages. You should consider  
23 what he's going through for the next 50 years as a result of  
24 this injury, right? Not partial. Because what the defense  
25 did in this case, it's pretty -- it's pretty common, right?

1           First they draw a line in the sand. Remember  
2 opening statements, "We did nothing wrong," right? You  
3 remember that? "We're going to prove to you we did nothing  
4 wrong." Then they draw a line in the sand, stepped back and  
5 said, "Well, we did a little bit wrong; but it's really the  
6 other guys' fault," right? Then we draw another line in the  
7 sand once it looks like it's not going their way and they say,  
8 "Okay, maybe we're wrong; but don't give him all his medical  
9 damages. Give him the -- let's just give him this little plan  
10 we came up with over here," right?

11           And when that doesn't look like it's working,  
12 draw another line in the sand, "Okay, maybe give him his  
13 medical damages; but all this damages over here, it's too  
14 much. It's too speculative," whatever -- whatever words they  
15 say. And I am telling you that in this case, they don't get  
16 that luxury to come down and try to pick at damages and say  
17 it's too much. I will tell you that the physical impairment,  
18 the mental anguish, the pain and suffering, all of these  
19 things that Tyler Lee has to go through for the next 50 years,  
20 it's a lot. It's a lot.

21           I'm struck -- my friend recently has crutches  
22 and has been on crutches the last six weeks and complains  
23 about it a lot. All right? Mr. Lee does not get a day off  
24 from his disability. All right? He does not get a day off or  
25 an hour off where he doesn't have to plan his entire day

1 around walking. He told me, "I used to think about work when  
2 I was at work all day, and now I think about walking all day,"  
3 right?

4                   How awful would it be every night when you come  
5 home and take a shower because you're dirty, that the rest of  
6 the night, you're on crutches. All right? He doesn't take a  
7 day off. He doesn't heal up. He doesn't get to give them  
8 back in six weeks. It's either going to be crutches or a  
9 wheelchair at night. When he's got to play with his little  
10 girls -- right -- if he's got his leg on, it's not all that  
11 easy when he's got to chase them in the street, when he's got  
12 to take care of his family.

13                   One thing should be clear to you is that Tyler  
14 Lee is tough. Tyler Lee doesn't complain; but do you not know  
15 how real it is to this family and how real it is for the next  
16 48 years, okay? Whatever you decide -- and we trust you to do  
17 the right thing -- Tyler Lee would give it all back tomorrow  
18 if he could have his leg. Look at that picture. Look how  
19 strong he looks, right? He had the whole world ahead of him.  
20 Now, I'm not saying it's all taken away; but golly, crutches  
21 every single night? Making dinner, playing with your kids,  
22 come home from work, you take a shower and then he says he's  
23 on crutches. That is awful.

24                   So -- and it's a long time; and I think it  
25 justifies a large award, okay? So when we talk about what --

1 what it is that Tyler Lee deserves, I want you to think about  
2 the various elements, okay? I'm going to suggest to you a  
3 number based upon my own experience, okay? You're free to go  
4 higher. You're free to disagree. You're free to go lower,  
5 okay? But I want to circle a couple things; and I want you to  
6 do a couple things with we me, too.

7           When we talk about future, I want you to write  
8 24 times 365 times 48. I want you to think about that because  
9 I want you -- when you are deliberating and somebody says  
10 that's too much, say, "Wait a minute, we're dealing with  
11 nearly 50 years," right? I want you to write on your verdict  
12 form so that when someone says, "No, we shouldn't," you say,  
13 "Yes, we should. They caused it. They don't get the break.  
14 They don't get to short them." All right? They lost the  
15 right to come down here and short Tyler and his family.

16           And I want to circle certain things because I  
17 think certain things are more and certain things are less.  
18 Physical impairment in the future, crutches -- right -- at  
19 night, 50 years. I think this is the biggest element:  
20 Physical pain and mental anguish in the past. They're  
21 different; and you're going to see this in a lot of different  
22 elements, okay?

23           Let me give you an example. Physical pain and  
24 mental anguish in the past. If he -- a lot of these elements,  
25 there's going to be an intensity and there'll be a duration

1 element. All right? Think about that. Pain and suffering.  
2 Tyler did not lose consciousness for the entire time his leg  
3 was pinned, and it was guillotined through surgery. And what  
4 he had to go through to learn how to walk and all of those  
5 various things again. That is intense. The pain, the  
6 frequency is intense. All right?

7           But when we talk about physical pain and  
8 anguish sustained in the future, the pain is not as intense;  
9 but the duration is much longer. See what I mean? His  
10 pain -- and look, I don't know if they're going to stand up  
11 and say, "Well, he only reported a one here or reported a two  
12 here," that's nonsense, okay? That's nonsense because Tyler  
13 Lee is a tough dude that is back to work in two weeks on  
14 crutches. I can't even imagine. All right? All that stuff,  
15 nonsense.

16           So again, like physical impairment sustained in  
17 the past, shorter duration, right? That's learning how to  
18 walk again, not being able to jog, not being able to do all  
19 the things that he loves to do, waiting on a leg. Put  
20 \$1 million.

21           Okay. Now, here's the deal. Now, it's more  
22 intense in the past; but now we've got to deal with 50 years,  
23 right? Depriving Tyler of all the things that we all take for  
24 granted every single day when we just walk about our life.  
25 This, I think, is the biggest element. I'll tell you that.

1 You might disagree. You might think disfigurement, right?  
2 You might think him going to the store and kids pointing at  
3 him might be worse; but to me, to me, being deprived of being  
4 able to walk around and act like everybody else in this  
5 courtroom that we all take for granted, being able to run  
6 marathons, being able to jog, being able to chase your little  
7 girls, being able to play with them, all those things. I  
8 think this is the biggest element.

9 I ask that you award \$10 million, okay? And  
10 when someone says, "We think that's too much," I want you to  
11 say, "50 years. 50 years." He didn't ask for this. He  
12 doesn't want it. Look at him. Tyler Lee don't want to be in  
13 this courtroom.

14 Physical pain and mental anguish in the past,  
15 having your leg cut off. I want you to go back to where Tyler  
16 was at, begging the crew to call his wife so that he could  
17 talk to her one last time, thinking about his one-month little  
18 girl and wondering if he was going to ever see her. All of  
19 the things that he suffered in the hospital; and look when you  
20 go to your exhibits to the first few pages, you can see what  
21 he suffered. It's intense. I ask that you award \$3 million,  
22 okay?

23 Physical pain and suffering, reasonable  
24 probability that he'll sustain in the future. This is a  
25 different pain. This is different. This is all -- it's two



1 things. You heard testimony about he works all day; and let's  
2 be clear: He works hard all day and he is tired when he comes  
3 home. And his pain gets worse throughout the day because  
4 he's -- so it's better in the mornings, harder on his leg all  
5 night because the reality is both of his doctors said he ought  
6 to be doing a desk job now but Tyler's -- he's too stubborn.  
7 He don't want to work at a desk, right? He never has. That's  
8 why he went and got a construction degree. He likes building  
9 things. He likes challenges. He likes telling his little  
10 girl, "Dad built that," right? So good for Tyler for going  
11 back to work.

12 Now, this pain is -- and the mental anguish,  
13 it's all of the stuff that he goes through every day for 50  
14 years, right? He called that -- one he called shock pain --  
15 right -- which he equated to a stinger if you played football.  
16 He gets shock pain and then he gets phantom pain, and I'm  
17 trying to remember how Tyler described it. I think he said it  
18 was like a vice because he could feel his leg at night, right?  
19 Do you remember that? That shocking pain?

20 Now, has it gotten better? Yes. Is it going  
21 to be with him? Yes. Maybe not as -- not the same intensity  
22 as in the past; but even Dr. Melton, if you recall, and  
23 doctor -- even Berkel's expert said that if he's had it beyond  
24 six months, it's chronic; and chronic means permanent, right?

25 So mental anguish, okay? Mental anguish. My

1 partner, for example, my law partner, he is not a worrier,  
2 okay? He doesn't care. I mean, he just goes. I'm the guy  
3 that's, like, you know, worried about everything, you know,  
4 (descriptive sound) and I overanalyze. All right? And I say  
5 that because I want you to think through all the things that  
6 Tyler has to worry about; and is it real. All right?

7           We can talk about this in a little bit:

8 Worried about his job; worrying about providing for his  
9 family; worrying about someone breaking in and he can't do  
10 anything about it; worrying about the fire catching at his  
11 house and he can't get his little girls out because he's on  
12 crutches; worrying about whether Leigh Ann -- how she feels  
13 and how much stress it puts upon here and the family. All the  
14 things that he has to worry about is real.

15           It's real life, and it's called mental anguish.  
16 Sometimes people give it a bad name, but do we think that  
17 Tyler doesn't worry about all these things and will worry for  
18 the next 50 years. All right. How many people you know have  
19 worked at one job for 50 years? Last time I checked, it's  
20 harder for people that have disabilities to stay employed. I  
21 hope he stays employed. We have assumed he has; but you don't  
22 think he doesn't worry about it when his last performance  
23 review isn't quite the same as it always has been -- right --  
24 felt like his career is on hold? You know Tyler. You heard  
25 him. He's a work guy.

1           He thinks about that stuff, worrying about his  
2 little girls getting bullied or made fun of, because kids can  
3 be cruel; worrying about not being able to do things like  
4 coach your little girls in softball. Tyler is a strong guy.  
5 He doesn't articulate it, right? Tyler is very -- everything  
6 is black and white, I think, is what Leigh Ann said. If you  
7 don't think this burden is not upon this family, you're wrong.  
8 It's serious, and it's 50 years. I ask that you award  
9 \$6 million.

10           THE COURT: You have 15 minutes, Counsel.

11           MR. ARNOLD: So I'm going to move along because  
12 she's telling me I only have 15 minutes, okay? And I'm going  
13 to try to expedite this as much as I can. Disfigurement in  
14 the past, and disfigurement in the future. It is what -- as a  
15 result of him having to have an amputated leg and what is that  
16 worth -- okay -- how it appears, how it makes him feel walking  
17 around. We live in Texas for crying out loud, right? You  
18 can't wear pants all that much, right? It's all of those  
19 things and how people perceive him. I'm going to move quick  
20 because I'm running out of time, but I ask that you award  
21 2 million in the past and 3 million in the future.

22           Loss of earning capacity, okay? Where's  
23 Dr. McCoin over here? Here's the deal. I'm not going to  
24 suggest a number here. If he works till 50 and stops, it's  
25 2,211,000. All right? Now, if you think he can -- he's not

1 going to work anymore, you award him the whole amount. If you  
2 think he can get a desk job and make half, well, give him half  
3 of that amount. If you think he's going to work and make the  
4 same wages at the same company all the way to 65, don't give  
5 him any of this amount. Y'all make that call. But we do know  
6 with the complications and the things that he has to undergo  
7 that it will get harder and harder and harder as his body, I  
8 don't want to say it, but breaks down, right?

9 We've already started to see the back pain and  
10 started to talk about it affecting his gait and all of those  
11 things. So it's 2 million -- and I'm going to not even put it  
12 in the blank -- 211,991. Now, I'm going to put a plus or  
13 minus. It goes up or down. Y'all decide.

14 So before I go on to the next question, if the  
15 defense lawyers stand up and say, "That's ridiculous. If  
16 you've already given him this much for medical damages, don't  
17 give him that much money." Those medical damages, they get  
18 set aside to pay for doctors. And if he says, "Well, you  
19 shouldn't consider these numbers because they're crazy or  
20 they're too high," I want you to -- I want you to think. Next  
21 to each element -- okay -- I want you to isolate them. Now, I  
22 want you to isolate that element, because that's what the law  
23 requires, and isolate the element and think through 50 years,  
24 50 years of having to deal with this, okay?

25 I know that we are asking for a large award.

1 You know why? Because the facts justify it. They harmed a  
2 young man, and it will cause a lifetime of problems. They do  
3 not get to short him now. They do not get to nickel and dime.  
4 They do not get to come down here and say, "We only want to  
5 pay for part of the harm." The law says that you pay for all  
6 of the harm and that's why -- because have you ever heard the  
7 saying, Nothing's more important than your health? Does  
8 anybody disagree with that?

9 Question 6, household services, okay? A and B  
10 this is talking about Leigh Ann, okay? If you give the full  
11 life care plan, if you give the life care plan, you should  
12 give zero here. Why? Because the life care plan added the  
13 chore helper and things of that sort. That is what the  
14 household services is trying to do, okay? So Mr. Lee is  
15 allowed to recover it under the law because it's a medical  
16 necessity, but he's also allowed to recover it or Leigh Ann's  
17 allowed to recover it, but you should do one or the other. I  
18 think if you give the full life care plan, you can take this  
19 out.

20 Now, loss of consortium. This is extremely  
21 real, "affection, solace, comfort, companionship, society,  
22 assistance, sexual relations, emotional support, love and  
23 felicity necessary to be a successful marriage"; and then this  
24 goes, one more time, 24 times 365 times 48. I want you to  
25 think about that, how it's going to affect their marriage for

1 the next 50 years. All right? Because there's going to be  
2 tough times. And look, I have tremendous respect for Leigh  
3 Ann and how she has handled this, when Tyler said how he came  
4 out of the hospital and she looked at him and gave him that  
5 support, that strength, okay?

6 They are terrific people, but you are not being  
7 honest if you don't think that's not going to affect their  
8 marriage. All right? Y'all know better than me. I'm not  
9 going to -- I'm running out of time. I'm not going to suggest  
10 a number; but each one of you knows better than me. All  
11 right?

12 Similarly, "parental consortium." Jill wanted  
13 me to tell y'all why is it that it's only for Sydney if they  
14 have two children, right? The law freezes you at the time of  
15 the accident, your family. So they have a new addition, but  
16 the law doesn't allow you to consider the new addition. Don't  
17 ask me why. I don't think it makes much sense; but that's the  
18 law, okay? It talks about positive benefits flowing from the  
19 parent's love, affection, protection, emotional support, all  
20 those things, right? These are things that are going to  
21 affect her. Again, it's real. I want you to consider it. I  
22 trust your judgment.

23 Your Honor, how much time do I have?

24 THE COURT: You have eight minutes before your  
25 hour and a half is used.

1 MR. ARNOLD: Thank you, Judge.

2 No. 8, let's talk about gross negligence. All  
3 right? This is just against Berkel. Maxim contributed to the  
4 accident but Berkel's actions, right -- actions speak louder  
5 than words. I think I heard Mr. Blum say that. Their actions  
6 in this case, Chris Miller, are egregious. There's causing an  
7 accident and then there's acting recklessly, acting in  
8 conscious disregard of the safety of your crew; and it talks  
9 about gross negligence, okay?

10 And I want to talk about this real quick,  
11 "clear and convincing evidence"; and this is a different  
12 standard, right? Up until this point, we're on preponderance  
13 of the evidence. Are you with me? Once we get here,  
14 plaintiff has a higher burden of proof. And it says clear and  
15 convincing evidence "produces a firm belief or conviction of  
16 the truth of the allegations." And this only applies to this  
17 question, right?

18 Gross negligence means "viewed objectively from  
19 the standpoint of Miller at the time of its occurrence  
20 involved an extreme degree of risk" and "actual, subjective  
21 awareness of the risk involved, but nevertheless proceeded  
22 with conscious indifference of the rights, safety or welfare  
23 of others."

24 All right. If I told you the facts of this  
25 case when we picked a jury, you'd say you don't believe me --

1 right -- how egregious it is. If I just met you on the street  
2 and I walked up and I said, "Here's what's going on. This  
3 case is getting tried over here with this jury," you'd say,  
4 "No," right? "That doesn't happen." Oh yes, it does. It  
5 does.

6 Now, I'm going to talk about something. This  
7 is talking about punitive damages, and I want to stop right  
8 here. If you are going to take away a single dollar from what  
9 Tyler is entitled to under his actual damages, because you  
10 think that you need to even them out between actual and  
11 punitives, don't do it. They are different questions. They  
12 have different purposes. This is to ensure that next year  
13 there's not a jury somewhere and Berkel's here defending it  
14 again and they've killed somebody. This is to say, "Hey,  
15 Berkel, the way you're doing this, it ain't right" -- okay --  
16 "and you've got to change your way," right? It's a totally  
17 different purpose.

18 This is to say, "We have heard what you have  
19 said. We have seen what you have done and we do not approve  
20 and you need to change the way you do business before you kill  
21 somebody or hurt someone else this bad." Isn't it a miracle  
22 that more people were not killed in this accident when that  
23 boom collapsed around them, right?

24 What did Tyler tell you? He said, I have two  
25 purposes for bringing this lawsuit. One is because -- really



1 three: No one ever apologized; I need to take care of my  
2 future; and the third thing is I don't want to read the  
3 newspaper two years from now and see that it's happened to  
4 somebody else. And that's what this is. Is there any doubt  
5 that Miller had "actual, subjective awareness of the risk"?

6 I don't -- I don't want to -- I don't have  
7 enough time to go back and show you Mickey Disotell and Chris  
8 Prestridge and Andrew Bennett, but is there any doubt that he  
9 was not aware of the risk? Oil shooting out of the hoses, the  
10 crane operator literally is wiping his windshield down because  
11 he can't see. The crane is tipping. The boom is flexing and  
12 everybody is screaming at him to stop, and his foreman told  
13 him to cut the auger.

14 Andrew Bennett gets out of the cab five times  
15 and tells him to cut the auger. And don't let them say,  
16 "Well, that was operational. He just thought it was stupid."  
17 We know his testimony right here. He was worried it was going  
18 to snap, snap and bring down the boom. Chris -- Mickey  
19 Prestridge -- or Mickey Prestridge -- Mickey Disotell and  
20 Chris Prestridge all told him over and over and over, and what  
21 did he do? He, nevertheless, proceeded with conscious  
22 indifference, right? I don't need to hit these questions  
23 again. Remember I told you the questions were the same? Vice  
24 president, managerial capacity -- right -- vice principal,  
25 excuse me. That's Chris Miller. All right?

1 I'm not -- we're talking about Miller. He's  
2 even in the jury charge, right? I don't need to hit that.  
3 Clearly he was running the job site. He was in charge of  
4 safety. All those questions that you probably got annoyed  
5 with because I asked them so many times, it's because there's  
6 no doubt here. Remember, these are all "ors," right?

7 Question: Yes. Do you have a firm belief that Mr. Miller had  
8 actual, subjective awareness of the risk and nevertheless  
9 proceeded? Is there any doubt?

10 Now, I want to be clear: I don't think  
11 Mr. Miller has any credibility. I don't think it's credible  
12 to say he somehow doesn't remember the worst crane accident in  
13 company history, leading up to it. Why does he hide there?  
14 Because he would have to admit that he knew the risk. You  
15 don't have to believe him, right? You can believe every other  
16 member of his crew who told you that they told him, "Don't do  
17 this. It's stupid. Look at the boom."

18 Remember Bennett doing this? "Look at the  
19 boom." That wasn't because they were having a discussion. It  
20 was because they were nervous. They were scared. They were  
21 nervous that they were going to snap that auger, bring it all  
22 down.

23 Remember Prestridge? "Something's got to  
24 give."

25 Remember Disotell? "We all told him. Bennett

1 told him. I told him. There's only so many times you can  
2 tell him." But he proceeded anyway. Why? Money and time.  
3 He got this thing stuck trying to save 3- or \$400, right? He  
4 got this thing stuck trying to save 3- or \$400 and then he was  
5 behind schedule and he didn't want to cut the auger and wait  
6 two days. That's it. That's it. When companies take  
7 advantage, and because time and money hurt people -- right --  
8 you have to tell them that's not okay. It's not okay in this  
9 courthouse. It's not okay with this jury, right?

10 I want you to ask yourself -- if you can, write  
11 this down -- do think Berkel's learned their lesson? When you  
12 get to this question, do you think Berkel's learned their  
13 lesson? Because I've got an opinion on that.

14 Despite every one of these crew members coming  
15 in and saying all the things that they told him, what does  
16 Mr. Miller do? He says he's 0 percent responsible; in the  
17 past 18 months, he's never considered that he played any part.  
18 Never. Not in a moment of reflection, when I nearly killed  
19 this man, has he considered it. He said, Berkel's not  
20 responsible and then -- and maybe -- I don't know why it  
21 inflames me so much, he gave himself a B plus. Really?

22 You're the man in charge of safety on site.  
23 You brought down this crane because of your foolish actions,  
24 and you're going to give yourself a B plus? Does that offend  
25 you? I tell you what offends me more than that -- and

1 remember Blum agreed with all this? I want you to think about  
2 this: Mr. Blum sat in this chair and I asked him, "Mr. Blum,  
3 what are you?"

4 "I'm the national VP of operations."

5 He's got to report to the CEO. He is just down  
6 the hall from the CEO; and the CEO, Alan Roach, listens to his  
7 words. This was the worst accident in history, okay? I'm  
8 going to stop right there. The worst accident in history of  
9 this company, big company, operates in 49 states,  
10 internationally, it's the worst accident in history.

11 We saw that other crane collapse, remember, in  
12 2009? Five things they were supposed to do to prevent it in  
13 the future. How many did they do? Zero. And the amazing  
14 thing is it's the same superintendent. Chris Miller didn't  
15 learn his lesson; and neither did Berkel, right?

16 Now --

17 THE COURT: You've used an hour and a half,  
18 Counsel.

19 MR. ARNOLD: I'm going to take two more  
20 minutes, Judge.

21 THE COURT: Go ahead. Just letting you know.

22 MR. ARNOLD: The Berkel man that reports to the  
23 CEO comes to this jury and says what? "I'd do it again. We  
24 did it all the right way. Berkel did it the right way on the  
25 date of the accident."

1                   So I ask you: Has Berkel learned their lesson?  
2 Does anybody seriously think that they've learned their  
3 lesson? They have an investigation, ongoing. It's been 20  
4 months, no root cause analysis. He, quote, can't tell us the  
5 cause. Why do you do a root cause analysis? Prevent them in  
6 the future, right? To learn the truth about what you did  
7 wrong and then you want to prevent it in the future, right?  
8 And then you take steps and you implement them company wide to  
9 prevent them in the future. That's why you do it. Did they  
10 do it after the worst accident in company history?

11                   Answer: No. You know why? They'd have to  
12 tell you the truth about what they found. Here's my point:  
13 Have they learned their lesson? And if the answer is no, then  
14 you need to send a message, whatever the message might be, to  
15 the CEO saying this is not okay. Because if you don't, five  
16 years, ten years from now, there'll be another jury, there'll  
17 be another Berkel and maybe the person's dead, whatever, maybe  
18 he's severely injured. Because otherwise, they -- the man  
19 that talks to the CEO said that they were, quote, 0 percent  
20 responsible. And he doesn't get a pass. He went to all the  
21 depositions. He sat through trial. The man that they put on  
22 the stand as the face of Berkel looked you in the eye under  
23 oath and said, "We didn't do anything wrong, and I'd do it  
24 again."

25                   That is unbelievable. So when you get to that

1 point in time, don't short Tyler. Don't start saying, "Well,  
2 if we give him actuals here, you know, if we give him  
3 punitives, we've got to take him down over here."

4 Different purpose. If you do that, I don't  
5 want you to give them. But I do want you as a community to  
6 say, "Hey, you got to do business a different way"; and tell  
7 them. And that's how you tell them. That's the only way.  
8 This is why I'm jealous of you. I've been telling them. Only  
9 you can tell them because if you tell them, it's a verdict.  
10 It's power. It's an awesome power. You have the power to  
11 both right a wrong, to take care of Tyler and his family, and  
12 you have a power to tell them that it is not okay. I don't  
13 have that power. Today I wish I was sitting there. I want  
14 you to use your power. I'm going to sit down and I'll talk to  
15 y'all -- maybe 25 minutes left, Judge, or --

16 THE COURT: Yes. About that.

17 MR. ARNOLD: Thank you for your time.

18 THE COURT: All right. Ladies and gentlemen,  
19 we're going to take our morning break at this time. Please  
20 leave your notes and recall my instructions. Be back at your  
21 assembly point in ten minutes, which will be 25 after the  
22 hour. See you then.

23 *(Jury leaves courtroom)*

24 THE COURT: All right. Ten minutes, Counsel.

25 *(Recess taken)*

1 THE COURT: Back on the record. Counsel ready  
2 to proceed?

3 MR. MCKINNEY: Yes. Berkel moves that  
4 plaintiff has not opened fully on the subject of the amount of  
5 punitive damages. No number was stated to the jury in the  
6 opening phase of plaintiff's argument. Therefore, I do not  
7 have a number to address. Therefore, the plaintiff should be  
8 precluded from directly or indirectly suggesting a number or  
9 dollar amount of punitive damages on closing argument.

10 MR. ARNOLD: Judge, I opened fully. I went  
11 through that entire charge; and I don't have to say every  
12 element a specific dollar amount. I addressed it. I was  
13 running out of time. This is not the purposes of opening  
14 fully.

15 The purposes of not opening fully is when  
16 someone reserves an hour and a half and they take 30 minutes  
17 and then they keep an hour so they can lay behind the log. I  
18 took more time than I had allocated myself, and I don't think  
19 I'm precluded from suggesting an amount or a range or whatever  
20 it might be on punitive damages.

21 THE COURT: All right. At this point I'm going  
22 to deny your request.

23 They ready?

24 THE BAILIFF: Yes, Your Honor.

25 THE COURT: Bring them in.

1 THE BAILIFF: I've got one getting coffee.  
2 We'll be right in.

3 THE COURT: All right. Thank you.

4 MR. ARNOLD: And the only other thing, Judge,  
5 I'll raise before the jury comes in --

6 THE COURT: Yes.

7 MR. ARNOLD: -- is that we talked about this  
8 with Mr. McKinney: Net worth is relevant to punitive damages  
9 only. So he cannot address actual damages by referring to net  
10 worth and it bears the risk that if he crosses that line, that  
11 it would have to introduce insurance into this case and I do  
12 not want to do that. We have tried very hard for a little  
13 over two weeks to get this case tried, and so him addressing  
14 net worth with what I did as to damages is inappropriate.

15 THE COURT: All right. Make your objections as  
16 they become relevant.

17 MR. ARNOLD: Okay.

18 THE BAILIFF: Come to order.

19 *(Jury enters courtroom)*

20 THE BAILIFF: All present, Your Honor.

21 THE COURT: Thank you. Be seated, please.

22 MR. MCKINNEY: If I may have a minute or two,  
23 Your Honor, to get my papers lined out?

24 THE COURT: You may.

25 MR. MCKINNEY: May it please the Court?



1 THE COURT: Thank you.

2 MR. MCKINNEY: Counsel, Mr. and Ms. Lee.

3 Good late morning to each of you; and before I  
4 jump into this, I don't want to forget to thank you for your  
5 jury service on behalf of Berkel and on behalf of all the  
6 parties to this case. The lawyers do agree on a couple of  
7 things; and one of those things that we all agree on is that  
8 the 14 of you have been extraordinarily attentive in following  
9 the evidence, looking over there, listening to video  
10 depositions. The conventional wisdom is they bore juries to  
11 tears after 15 minutes, and they quit listening. You folks  
12 hung in there and fought the good fight from beginning to end,  
13 and for that we all thank you.

14 Next -- normally I don't begin my jury  
15 arguments by talking about damages because damages comes at  
16 the end of the charge. Damages comes at the end of argument.  
17 I think I can draw a bright line here. Mr. Arnold says  
18 defendants like to draw bright lines and keep moving them.  
19 You can decide that for yourself after you've heard our side  
20 of the story, but I am going to draw one bright line.

21 \$37 million is an enormous, enormous amount of  
22 money. I got to tell you, I don't live in that world.  
23 Numbers like that just don't register on my brain as anything  
24 other than what you hear a Government program costing or  
25 damage after a storm or something like that. For ordinary

1 human beings, that kind of money being involved in our lives,  
2 über-rich have that kind of money and they have private jets  
3 and whatnot, but most -- I don't know anyone like that.

4 I don't know anybody in the courtroom that  
5 knows anyone who has that kind of money. And I'm going to try  
6 to show to you that -- with an illustration here at the  
7 beginning, why that kind of money -- and I'm not saying the  
8 Lees don't deserve to be compensated, because they do -- why  
9 that kind of money should not find support under the law that  
10 the Judge has given you. And on that topic, let me digress a  
11 minute. Mr. Arnold mentioned several times the power that you  
12 have, the power to do this, the power to do that. Here's the  
13 power I think that you have: The power to be fair. The power  
14 to look at both sides. The power to do justice. What's wrong  
15 with that?

16 ELMO, please.

17 I am confident that y'all are tired of looking  
18 at these tables. We're blowing this up a little bit, and --  
19 okay. Excellent. Good work, Brandon.

20 What in the world are we looking at here? This  
21 is the end result of the combined efforts of Mr. Kistenberg  
22 and Ms. Vinett and Dr. McCoin. It's part of the  
23 11,600,000-dollar number that you were given for future  
24 medical for Tyler Lee. Now, why am I talking about this right  
25 now? The top box here, here, here and here (indicating)

1 represents the second to last six-year period of Mr. Lee's  
2 projected life span, okay? He will need one definitive  
3 prosthesis and if -- well, according to Mr. -- according to  
4 Dr. McCain, at age 64 or -5, he will also need a running  
5 prosthesis and a swimming prosthesis.

6 But here's the point: In his second -- in his  
7 prostheses in the last -- in the second six-year period of his  
8 life, will be \$1,767,000. That is what Dr. McCain projects  
9 Tyler Lee will spend on three prostheses in the latter years  
10 of his life. His last prosthesis -- or last three prostheses  
11 will cost \$2,201,000. These are devices that currently  
12 Mr. Lee is paying about \$150,000 for.

13 The numbers that you're seeing talked about in  
14 this case all begin with Dr. McCain using a growth rate of  
15 6 percent, which I know is very boring to talk about and  
16 whatnot, but I went through it with Dr. McCain -- well, we'll  
17 get to that part later. I've got it on down in my argument.

18 The bottom line is that Dr. McCain has taken  
19 \$150,000 and produced -- starting with a base of 149,000, he  
20 has produced an 8,583-dollar allowance for prosthetic devices.  
21 Using the X3 prosthesis, using the prosthesis that Tyler Lee  
22 is using today, he's -- he has Mr. Lee spending an average of  
23 a million dollars every six years for his prosthetics.

24 Now, if you go back over your notes in the jury  
25 room, you won't find any notes or any evidence, any testimony

1 that you have written down that justifies any of these  
2 numbers. If you've written down the evidence where Dr. McCoin  
3 and Dr. Reynolds agree, for example, the X3 prosthesis, now  
4 that it is on the market, is going to do what every other  
5 prosthesis does, which is grow at a steady 2 percent rate a  
6 year, which is why Dr. Reynolds has her numbers, why  
7 Dr. McCoin doesn't agree.

8           So this is the kind of analysis that is the  
9 core, the basis of what's being put forth to you in numbers  
10 and how these numbers get so big. Your job, as you know, is  
11 to decide this entire case on the credible evidence. The  
12 Judge has defined preponderance of the evidence for you as to  
13 greater weight of the credible evidence. The credible  
14 evidence, the evidence that you believe.

15           Do you believe that Mr. Lee, in the last 12  
16 years of his life, if he had his own money to spend, would  
17 spend \$4 million on prosthetics? Because if that's true for  
18 Mr. Lee, it's true for every American citizen, wounded  
19 veteran, other construction accident victim, every American  
20 citizen who has ever lost a leg above the knee is looking at  
21 numbers like this. If every American citizen was looking at  
22 numbers like this, this would be a topic of national  
23 conversation. We would all know about it because that would  
24 be such a huge expense that was being imposed on people; but  
25 in fact, the evidence is nowhere like that.

1           The point here is I'm going to take you through  
2 the evidence, what folks actually said and what I think you'll  
3 find is written down in your notes and I think it'll resonate  
4 with you. Compare what I say to what Mr. Arnold has said  
5 based on the actual evidence in the case, then make your  
6 decision. There are two distinct pictures of the -- of what  
7 happened that day.

8           According to Mr. Arnold, it was utter chaos on  
9 that work site. Everybody was waiting for that crane to come  
10 down. Everybody knew the crane was overloaded. It was just  
11 terrible. Actually, the one person who says that is Mickey  
12 Disotell, backed up somewhat by his friend Chris Prestridge.  
13 We're going to look at some of Mr. Disotell's testimony in  
14 just a minute.

15           The other view of the work site that day is  
16 that you had ten men, all working within the fall radius of  
17 the crane, all mostly standing around watching because there  
18 wasn't much to do. And the two most senior men, Mark Stacy  
19 and Chris Miller, standing closest to the stuck auger, closest  
20 to the most likely place of injury, if what Mr. Disotell says  
21 is true, yet all of these men at the time didn't seem to be  
22 exhibiting any fear whatsoever of anything going on. They  
23 were simply doing their job. And their statements the day  
24 after, bear that out.

25           I will read to you now what Mr. Disotell said

1 the day after -- here we go, the day after the accident. This  
2 statement is in evidence. It's Berkel Exhibit 9.

3 Mr. Disotell's testified. You heard his testimony, that he  
4 was told to write down what happened and why he thought it  
5 happened, et cetera, et cetera, the day after the accident,  
6 when everything is fresh on his mind. He wasn't told what to  
7 say. No one told him to leave anything out. He was free to  
8 write down whatever he wanted.

9                   Verbatim, this is Mickey Disotell the day after  
10 the accident, "The auger locked up, the crane rapidly changed  
11 positions followed by a loud noise, and we dove for cover  
12 under the picker.

13                   "What started as a normal Monday morning ended  
14 as a horrific nightmare. As we drilled down on number seven,  
15 I sat in my picker waited to set a cage. After the bit locked  
16 up I got out of my picker and helped Mark Stacy reassemble the  
17 grout hoses. Hydraulic oil was spraying as the crane  
18 struggled to free the auger. I told Joe Riojas if something  
19 were to bust we should take cover under the picker,"  
20 parentheses, "in a jokingly manner," close parentheses.

21 "Approximately ten minutes later, standing between the crane  
22 and the picker, I saw a rapid jolt or swing and heard a loud  
23 noise. I grabbed my friend, Chris Prestridge, and pulled us  
24 under the picker as everything fell on top of us. After what  
25 seemed like several minutes of chaos, we ran out from under

1 the picker and ran to the hill top. After finding Tyler  
2 laying under the leads, Chris and Joe assisted with him while  
3 I called 911 and gave them the address and cross street.

4 "The crane operator stopped several times  
5 during about a 20 to 30 minute to inspect boom and hoses."

6 Signed Mickey Disotell.

7 Does that sound like -- does that sound like  
8 the Mickey Disotell you heard on his deposition after the  
9 lawyers got involved in this case? Does that even remotely  
10 sound like the Mickey Disotell you heard on deposition?

11 The specific cause -- the specific cause that  
12 Mr. Arnold has brought evidence to you on why this crane boom  
13 fell, why the boom fell, came from the first witness on the  
14 stand, Mr. Van Iderstine. You might remember him. He's the  
15 paid expert witness whose fees were about \$200,000 by the time  
16 he got on the stand. Mr. Van Iderstine --

17 *(Juror sneezes)*

18 MR. MCKINNEY: Are we doing okay there?

19 UNIDENTIFIED JUROR: Allergies.

20 MR. MCKINNEY: Yes, it's that season.

21 Mr. Van Iderstine had never worked on a  
22 collapsed crane boom case before in his life. He's a  
23 professional forensic engineer. This is what he does. He  
24 works with lawyers to come in the courtroom and tell juries  
25 why things happened, and that's what he did in this case. And

1 he was pinned down at the very end of his testimony, pinned  
2 down by Mr. Mena, my partner, and he testified that the crane  
3 boom collapsed for two reasons: One, Andrew Bennett was  
4 bringing the auger side to side, pumping it side to side, full  
5 throttle, according to Mr. Van Iderstine; and at the same  
6 time, he was booming up -- not hoisting up, but booming up --  
7 putting tension on the crane boom, putting the boom in  
8 compression and letting the force of the hose cause the boom  
9 to fail.

10 I've got his testimony right here, page 118 to  
11 121 typed up by our court reporter. If there's ever a dispute  
12 about that, you can send a note out and have it read back  
13 while you're in the jury room. Now, why is -- why am I  
14 mentioning that at this time? Mickey Disotell was asked --  
15 here we go, page 215 of his deposition.

16 "When the crane first started to move rapidly  
17 to the left, you're telling me that you were looking at Andrew  
18 in the cab; is that correct?"

19 Mr. Disotell says, "Right."

20 "Okay."

21 Mr. Disotell went on to say, "I just remember  
22 seeing the -- seeing the cab just -- just take off and  
23 explode, noise, and then -- then I'm underneath the picker."

24 I said, "All right. There wasn't anything  
25 about what you were seeing Andrew do inside the cab before the



1 crane started to move --"

2 Answer: "Oh, no."

3 "-- that you think caused the crane to start to  
4 move?"

5 And Mr. Disotell said, "No. Something  
6 specifically like him grab a lever or something?"

7 I said, "Yeah."

8 "Oh, like him pushing the swing lever and make  
9 it swing?"

10 Yet another question from Mr. Disotell trying  
11 to get clarification; and I said, "Anything."

12 "No, that didn't happen. Because I  
13 thought about -- I kept wondering why -- why did that thing  
14 take off swinging like that because I was looking at it. We  
15 were all looking at him. He was looking at all of us and  
16 looking at the, you know --"

17 "And that's what I'm asking you. If there's  
18 anything in particular --"

19 "No."

20 Obviously we're interrupting each other a lot.  
21 I guess that's the end of it.

22 "Anything in particular"; and he says, "No."

23 So we have the paid expert describing two  
24 separate hand movements by Andrew Bennett. This is the --  
25 this is the testimony. This isn't me characterizing the

1 testimony. We can read it -- I can read it to you if you need  
2 it. We have Disotell saying none of that happened, none of  
3 that happened. Andrew Bennett didn't have his hands on  
4 anything, not a lever, not nothing, okay? How do you  
5 reconcile that? How do you deal with the fact that the paid  
6 expert tells you it had to be this way and the eyewitness most  
7 favorable to Mr. Arnold's case tells you the polar opposite  
8 happened? How are you going to sort that out?

9                   Now, another thing that Mr. Disotell tells  
10 us -- this is all going to come together in just a little  
11 bit -- is that ten minutes passed between the time the oil  
12 first started spraying and the accident. Ten minutes. I  
13 think I brought that page with me; but in any event, it's  
14 absolutely in the deposition. In addition to Mr. Disotell's  
15 testimony that it was ten minutes in that regard, he also told  
16 you that the three videos he took, he took from inside the  
17 crane cab, okay?

18                   There we go.

19                   "How long was the oil spraying down from the  
20 hoses prior to the accident?"

21                   "That probably happened -- probably ten minutes  
22 or so, at least, worth of that happening and that was when --  
23 you know, getting closer to the accident."

24                   "Okay."

25                   Thank you.

1                   While in the cab, that's when the videotape  
2 that you saw was taken. The video is in evidence as  
3 Plaintiff's Exhibit 87. Plaintiff's Exhibit 87. The video  
4 has some time stamps on it, if I'm recalling correctly. If  
5 you look at that video taken before he got out of the cab,  
6 you'll see various men doing various things. You will see  
7 Chris Miller giving this signal (indicating) and this signal  
8 (indicating). That's forward and backward, or that's side to  
9 side (indicating) on the auger.

10                   You'll see Mark Stacy doing exactly what he  
11 told you he was doing when he testified, looking at the auger.  
12 You won't see Chris Prestridge anywhere. You won't see any  
13 heated conversations between anyone. You won't see anyone  
14 trying to get out of the way. You'll see men going about  
15 their business in a pretty straightforward way, all within  
16 about ten minutes of the accident. The heck that was breaking  
17 loose wasn't breaking loose for 40 minutes, if you want to  
18 call the oil coming out of the hoses heck breaking loose. It  
19 was coming out for ten minutes. That's a pretty short period  
20 of time. And we talk about all the decisions, all the bad  
21 decisions that were made. That's a pretty short period of  
22 time, but there's a bit more there.

23                   You understand, I think, that when Mr. Disotell  
24 got out of the cab, what he did was -- you remember him  
25 talking about breaking the grout hoses? Remember that

1 conversation? Check your notes. He got out of the cab, and  
2 he helped Chris Prestridge break the grout hoses. Why did he  
3 do that? Why did he break the grout hoses? Because the way  
4 you break an auger free when it's stuck is you take the grout  
5 out of the hose, you flush the hose, you put the hose back on  
6 the auger and then you run water through the auger down to the  
7 bottom of the hole. The idea is the water will soften up the  
8 grout at the bottom of the hole; and as you bump the auger  
9 from side to side, you improve your chances to break it free.

10 That's the evidence in this case. That's the  
11 testimony of what those -- that's what those men were doing  
12 out there. Now, if he gets out of his cab after he's taken  
13 these pictures and if the accident happens ten minutes after  
14 the oil starts to come out of the hoses -- but the -- but  
15 after he gets out of the cab, he breaks these grout hoses free  
16 and reattaches them to the water, they were only at the  
17 beginning, only at the beginning of the process of unsticking  
18 the auger using the stuck auger procedure where you run the  
19 water through the auger. They were at the beginning of that  
20 particular stage of the process.

21 Now, let's take a step back. At that point in  
22 time, do you seriously think that any of those men thought  
23 they were getting ready to bring a crane boom down on top of  
24 themselves? I mean, do you really think that, that they would  
25 stand there and expose themselves to death, their fellow

1 workers to death, that that's what they were doing?

2 Now, keep this in mind: Five, six minutes  
3 later, a tragedy occurs. Before that tragedy occurred, before  
4 that tragedy occurred, Berkel has been pulling stuck augers  
5 out of the ground since 1959. And with the exception of one  
6 auger that, as you know, because you heard the evidence, was  
7 not properly assembled before it was sent out by the crane  
8 owner -- that auger simply fell down -- we've never had a boom  
9 explode. Nothing like this has ever happened in the history  
10 of the company. Those men were standing around that  
11 morning -- or that -- early that afternoon doing what this  
12 company has done for 55 years when an auger gets stuck --  
13 really, barely into the process where the water part plays its  
14 role -- and then that boom collapsed.

15 So what happened? Do you believe Andrew  
16 Bennett? You were asked by Kurt Arnold to write down a  
17 question about whether Berkel has learned its lesson. Here's  
18 a question I'd like you to write down, or at least have in  
19 mind: Do you believe Andrew Bennett, or do you think Andrew  
20 Bennett came over here from Louisiana to commit perjury? I  
21 don't think so. I think he came over here to tell you the  
22 truth. What did Andrew Bennett tell you? What did Andrew  
23 Bennett tell you?

24 The first thing he told you was he didn't think  
25 they could get the auger unstuck and he kept telling Chris

1 Miller that, but Miller continued to try to unstick it. He  
2 specifically told you he had no safety reason whatsoever for  
3 telling Chris Miller that the auger -- that he wanted to stop  
4 operations, just that he thought they weren't going to get the  
5 auger unstuck.

6 Yes, he told you that in his mind he thought  
7 the auger might snap from the side to side motion; but he  
8 never communicated that to Chris Miller. More importantly, he  
9 told you he had never overloaded the crane. He never  
10 overloaded the crane, and he never told Chris Miller that the  
11 crane was overloaded. All this punishment business, all this  
12 substantial certainty stuff, that's leading questions from  
13 Mr. Arnold to a friendly witness, Chris Prestridge and Mickey  
14 Disotell.

15 The fact of the matter is when you drill down  
16 and you look at the hard facts in this case, the actual  
17 testimony in this case, what we call evidence, which you have  
18 sworn to base your verdict on, we have a crane operator who  
19 under oath has said repeatedly, every time he's ever been  
20 asked, "I never overloaded the crane. I never told anyone I  
21 overloaded the crane." And if he doesn't believe he  
22 overloaded the crane and if he never told anyone that he  
23 overloaded the crane, how in the blue-eyed world could Chris  
24 Miller or anyone else believe the crane was overloaded?

25 Now, I know that Mickey Disotell says, "We all

1 knew the crane was overloaded." Yes, Mickey Disotell says  
2 that time and time again. Is Mickey Disotell's testimony so  
3 credible, so believable that you believe that Andrew Bennett  
4 came over here from Louisiana to commit perjury and expose  
5 himself to prison in Texas? Do you believe that?

6 This is going to be my last little bit of  
7 boring you with extracts from Mr. Disotell's deposition. I'm  
8 doing it for a reason.

9 There we go.

10 This particular extract is page 78 and 79.

11 "While you were present before the accident,  
12 did you observe the back rollers come off the ground on this  
13 crane?"

14 "Yes."

15 "Did you observe it multiple times?"

16 "I -- I think -- I think it was really just one  
17 main time that -- that that happened and that was -- that was  
18 pretty close to -- to the end."

19 "And do you remember how many of the rollers  
20 were off the ground?"

21 "Two or three. I mean, it -- it may have been  
22 happening the whole -- the main thing we were looking at was  
23 the boom because the rollers being off the ground wasn't --  
24 that doesn't" -- and then it goes to the next page -- "tell  
25 you a whole lot because they weren't on mats or a flat, firm

1 surface."

2                   Then I asked him -- let's put a -- can we get  
3 that exhibit up?

4                   We'll switch over to another -- I want to show  
5 you a picture.

6                   That's not it. That's not it. All right.

7                   This -- this was marked as Disotell Exhibit 175  
8 at Mickey's deposition. This is a crane in a different  
9 location where you can see it's in soft dirt and the back end  
10 is up. Plaintiffs say it's tipping, but we say it's soft  
11 dirt. Regardless, you can see the back tracks off the ground.  
12 It's from a different location.

13                   So take that picture away.

14                   "So you observed the crane tipping similar to  
15 Exhibit 175, but not quite as dramatic?"

16                   Answer: "Not nearly as dramatic. I mean, you  
17 would have to look at it real good to --"

18                   "Okay."

19                   "-- tell they were. At that point we were  
20 examining everything and squatting down kind of looking at the  
21 rollers. That one main time that we were all -- when  
22 everything was starting to happening -- it was nothing like  
23 this at all."

24                   That's Mickey Disotell talking about the crane  
25 tipping constantly. One time, hard to see. In fact, he



1 repeated that.

2 Page 189 of his deposition: "All right. Did  
3 you tell us that when the rollers came off the ground that you  
4 actually would have to look at it real good to be able to tell  
5 that the rollers came off the ground?"

6 "Yeah. It wasn't -- it wasn't that high. It  
7 wasn't that obvious."

8 The big deal that you've been hearing over and  
9 over again is this crane keeps tipping up in the air where  
10 everybody can see it, a clear sign of overloading. And yes,  
11 Mickey Disotell was led by leading questions into saying that;  
12 but when he used his own words -- because you saw him, One  
13 time you had to get down and look at it closely; one time two  
14 or three rollers came off the ground, not the tracks, just a  
15 couple of rollers inside the track. One time, and it's not  
16 that big of a deal because you're on unlevel surface. So it  
17 doesn't really tell you anything.

18 Depending on which part of his deposition you  
19 read, Berkel did just fine. You read another part of his  
20 deposition, Berkel is the worst company in the world. Now,  
21 you're the judges of the credibility of the witnesses. Judge  
22 told you that. All right?

23 Now, when the same witness says two different  
24 things about the same thing, how do you know which one to  
25 believe? And when it's on something that's that important and

1 when his testimony is that much different from the statement  
2 he gives the day after the accident, how much credibility can  
3 you put on that witness' testimony? And if you subtract  
4 Mickey Disotell from this lawsuit, what is the state of the  
5 evidence then? Is it really and truly the slam dunk that  
6 you've been told it was?

7 I'm asking you folks, I'm asking you folks to  
8 do what good juries do all across this country, to look  
9 past -- to look past the highly-skilled lawyers, look past --  
10 I'm not going to call it smoke and mirrors -- look past the  
11 zealous advocacy and see what the witnesses said, when they  
12 said it, how they said it, and follow the law scrupulously.  
13 If you do that, you do justice; the highest power a jury has  
14 in this country.

15 Chris Miller doesn't talk nice to people, uses  
16 a lot of bad language. I'm guessing he gets very few  
17 Christmas cards. Just going out on a limb here, but I'm  
18 thinking that's probably the case. What does he remember  
19 about this accident? Not as much as he should. What does  
20 that mean? According to Mr. Arnold, it means the world; but  
21 Mr. Arnold doesn't get to decide this case.

22 Let's look at what -- again, at what some of  
23 the witnesses said. Mark Stacy, if you think -- if Mr. Arnold  
24 thinks that Disotell is the most important witness in this  
25 case, I submit to you that Mark Stacy is a very important

1 witness for several reasons. Mark Stacy is the witness that,  
2 according to Mr. Arnold, got in a fight with Chris Miller.  
3 Stacy didn't say he got in a fight. They had a disagreement  
4 about whether to pump grout early on, okay?

5 Mark Stacy said that Chris Miller did a pretty  
6 good job under the circumstances. Mark Stacy said that Chris  
7 Miller did what Mark Stacy would have done, or Mark Stacy  
8 would have done what Chris Miller did. We can play that back  
9 for you, too. It happened. I think your notes will show  
10 that. But here's the real interesting thing about Mark Stacy:  
11 According to Mickey Disotell, after this big fight, Mark Stacy  
12 ran off in a huff, left the entire construction site, hanging  
13 out at his truck. He was disgusted.

14 You're going to have video evidence, if you  
15 care to look at Plaintiffs' 87, that Mark Stacy was right  
16 there where he said he was, under oath, right there with Chris  
17 Miller waiting for that auger to break loose, eyeballing the  
18 auger, looking for some kind of movement. So what does  
19 Mark -- what's the takeaway from Mark Stacy's testimony? It  
20 was another day on the job. It wasn't that big of a deal.  
21 They were unsticking an auger, something they've done many  
22 times before. They were looking for auger movement and what  
23 everybody says in their statements -- read them, they're all  
24 in evidence. What everybody says in their statements is  
25 suddenly there was a boom from up above and the boom folded

1 back over on itself.

2 Now, back to Andrew Bennett. What have we  
3 learned about cranes with this computer on board? They have a  
4 series of alarms, and they have a series of function limiters.  
5 These are a big deal, and this is kind of where I get into the  
6 area where I have a real bone to pick with Maxim. We're going  
7 to talk about it. We're going to look at some pictures. When  
8 y'all go back in the jury room, you size it up yourselves.

9 At 90 percent power on this crane, with the  
10 computer, a voice comes on and says, "You're at 90 percent,"  
11 okay? It talks to you. At 100 percent, the voice says,  
12 "You're at 100 percent"; and you get locked out. You can't go  
13 past 100 percent unless you get the master override key and  
14 turn the master override key, which is on the control panel,  
15 then you have to hold the toggle switch down, which makes you  
16 a one-armed crane operator, and then you can override it. But  
17 if you override to 120 percent, an alarm goes off and drives  
18 you crazy. It's like the smoke alarm from h-e-l-l. It's not  
19 a pleasant noise. Mr. Bennett testified that no alarm ever  
20 went off. No alarm ever went off.

21 Brandon, let's look at the first six pictures  
22 taken on September 30th by Maxim.

23 Maxim, you'll recall, ladies and gentlemen --  
24 we'll stop with this one right here. Maxim was the only -- of  
25 all the folks in this lawsuit, the only people who got inside

1 the crane cab after this accident, the only people who could  
2 secure the scene and document the scene.

3 MR. DIAMOND: I'm going to object. That  
4 mischaracterizes the evidence, Your Honor.

5 THE COURT: The jury will recall the evidence  
6 as they heard it.

7 MR. McKINNEY: Maxim, the Maxim investigators,  
8 say that they knew how important it was to photograph  
9 everything just as it was and to not disturb the scene. All  
10 right? Now, here we have a crane operator's manual sitting in  
11 the seat where Andrew Bennett had been right before the crane  
12 collapsed. Do you really think that Mr. Bennett is sitting on  
13 top of the operator's manual while operating the crane?

14 Next picture.

15 The six pictures we're showing you are the only  
16 six pictures that were taken inside the crane on September the  
17 30th, the day of the accident, inside the crane cab.

18 Next picture.

19 Okay. We have the certificate of annual  
20 inspection.

21 Next picture.

22 I'm not sure what that is, more paperwork.

23 Next picture.

24 No idea what that means but -- what that is;  
25 but again, that's another book.

1                   Next picture.

2                   Looks like broken glass on the bottom of the  
3 floor, but who knows.

4                   Next picture. Next picture. All right. What  
5 day is this one, Brandon? Show us the properties.

6                   This is the next day. This is on October the  
7 1st, 2000 -- 2013, okay?

8                   Take that away, please.

9                   Let's talk about this. On the day of the  
10 accident, no pictures are taken of the control panel. You see  
11 right here, okay? No pictures. Crane investigators, they  
12 know how to secure the scene. They know what to take pictures  
13 of, blah, blah, blah. Here we see the key ring that,  
14 according to Andrew Bennett, that's the key ring he was given  
15 by Maxim. It's got all the keys on it that Maxim wanted him  
16 to have. The day after the accident, after Maxim has had a  
17 day of access, a day of access to the crane cab, we see a key  
18 appear in the LMI override, which would let you turn off the  
19 voice alarm, one assumes.

20                   Now, we also see these crackers leaning up on  
21 this cover right here and this other wrapper right here where  
22 it comes to about even with the key. You see all that? Why  
23 am I wasting your time with all that stuff? All right.  
24 Anyway, for some reason this wasn't photographed on day one;  
25 but it gets photographed on day two.

1                   Let's go to day three. Day three. Show us  
2 the -- show the properties.

3                   10/2/13. Again, these are all Maxim photos.  
4 This is all Maxim securing the scene at the accident.

5                   Take that down, Brandon.

6                   This is a better view of the cover over the  
7 switches.

8                   Can you do a side by side for us, Brandon?

9                   Bear with us just a second.

10                  Judge, how much time have I used?

11                  THE COURT: You have used 45 minutes or so.

12                  MR. McKINNEY: Thank you.

13                  All right. Now, here on day one -- sorry. Day  
14 two, you see the package is leaning on top of this cover right  
15 here. And this little thing here, this green thing is about  
16 even with the key in the override switch. There is no key in  
17 the master override switch over here to get you past  
18 100 percent, just this other override over here that turns off  
19 the voice alarm. Yet on day two, the cracker package has been  
20 moved over here, the green -- oh, it's antojito(phonetic)  
21 whatever that is, the green thing has been moved over. The  
22 scene's been changed. I don't know why, but the point is day  
23 one, no photograph of the control panel, no key in the  
24 override. Day two, key in the override. Day three, key in  
25 the override, things have been moved around.

1           Why is Maxim getting in this -- in the cab and  
2 doing this and not reporting to people what they're finding in  
3 here? It's a fairly significant finding that there's a key  
4 that shouldn't be there in this override switch. It wasn't on  
5 the key ring that was given to Andrew Bennett, and we have  
6 Andrew's testimony that these alarms never went off.

7           So did Andrew never overload the crane and  
8 that's why the alarms didn't go off, or was this computer  
9 simply not working? We don't know. There's no way to know.  
10 But these pictures, they tell us something. What exactly, I  
11 don't know; but Maxim should have let everybody have access to  
12 this crane cab. Maxim should have shared these pictures early  
13 on. That's part of the reason why we've had difficulty  
14 investigating this case prior to litigation; and yet, here we  
15 see Maxim on three different days taking three different sets  
16 of conflicting photographs for reasons that we will never  
17 fully understand and answer them. But no one that day heard a  
18 crane alarm. Everyone's been asked. No one that day heard a  
19 crane alarm. That has to be a problem for Maxim. We have to  
20 let you folks solve it. I don't know how.

21           Okay. Let's get our jury charge out, folks.  
22 We're going to go through it. We're going to go through what  
23 I call the liability issues, and then we're going to come back  
24 to damages. Question No. 1 is the question --

25           UNIDENTIFIED JUROR: What page?



1                   MR. McKINNEY: Oh, I'm sorry. I'm sorry. Page  
2 4, please. This is the negligence question. This asks  
3 whether Berkel or Maxim or both were negligent on the facts of  
4 this case. We believe as to Berkel the answer is no. We  
5 believe the answer is no because Andrew Bennett never heard an  
6 alarm. We believe he never overloaded the crane, never told  
7 Chris Miller that he overloaded the crane; and if you don't  
8 overload the crane, you haven't done anything wrong that  
9 causes a boom collapse.

10                   It's pretty straightforward. It's not  
11 complicated. You've got to over -- we have to have made a  
12 mistake that caused this accident; i.e., the boom to collapse,  
13 to be negligent. If we didn't cause the boom to collapse  
14 because we didn't overload the crane, we're not negligent.

15                   Maxim, for the reasons that Mr. Arnold gave you  
16 and, as well, because more likely than not their alarms never  
17 worked, Maxim is negligent. They didn't maintain their crane.  
18 They didn't give us a crane with a working alarm system. They  
19 didn't give us a crane that -- if we did unknowingly overload  
20 the crane because the alarm system never kicked in, we got a  
21 crane that let us go past 100 percent without telling us,  
22 which that crane is supposed to do.

23                   And if you believed the testimony that says  
24 that the rollers only came off the ground once, then Bennett  
25 wasn't getting light in his seat, despite the testimony from

1 Disotell saying that he was. There were no outward signs to  
2 anyone that the crane was being overloaded. All right? We  
3 believe the answer to this question should be "no."

4 Now, I'm not sitting in the jury. I'm an  
5 advocate. I'm an advocate. I'm here to advocate for my  
6 client just like Mr. Arnold is here to advocate for his  
7 clients, and he has done an excellent job of doing so. I also  
8 have, in my mind, that a fair argument can be made that you've  
9 got a stuck auger, the boom did collapse, you may have gone  
10 past the rated limit of the crane even though the alarms  
11 didn't sound. If you did go past the rated limit of the crane  
12 unintentionally, unintentionally, but if you did it, if you  
13 hold yourself out as a professional hole drilling company --  
14 that's what we do, we drill holes in the ground, fill them up  
15 with grout -- then you probably ought to know if you've gone  
16 far enough past to cause an accident.

17 I don't know what condition the boom was in,  
18 don't know if it was in tiptop condition or at the end of its  
19 useful life. I have no idea.

20 MR. DIAMOND: I'm going to object that argues  
21 outside the record, Your Honor.

22 THE COURT: Sustained.

23 MR. DIAMOND: Thank you.

24 MR. McKINNEY: I'll just tell you that if you  
25 don't agree with me, we will accept your verdict. We will

1 understand your verdict, and we won't quarrel. All right?  
2 That's what your job is to do is to figure out the right and  
3 the wrong here.

4 Now, the next page I have a very strong view  
5 on. This is a definite "no." The next page, which is page  
6 5 -- and let's also turn to page 12, which is the gross  
7 negligence question regarding Chris Miller. Now, if it's not  
8 crystal clear to everybody when you look at Question 2, "Did a  
9 Berkel employee acting in the course and scope of his  
10 employment believe that injury was substantially certain to  
11 result from his conduct on the date in question," if that  
12 question doesn't refer to Chris Miller, I have no idea who it  
13 might be asking about. So we're talking about Chris Miller.  
14 We're talking about Chris Miller in Question No. 2. We're  
15 talking about Chris Miller in Question No. 8.

16 Did Chris Miller -- was he substantially  
17 certain to believe that his conduct was going to cause the  
18 crane to collapse? Was his conduct gross negligence? He was  
19 looking at an auger. He wasn't operating the crane, and the  
20 alarms never went off. You have the power to do justice and  
21 to be very fair to the Lee family without taking the evidence  
22 farther than it will go and branding a man for life.

23 You don't have to like Chris Miller to  
24 recognize that he has been with Berkel for 25 years. He's  
25 been doing this for over 30 years. He's never failed a crane

1 in his life. The other crane accident, Chris Miller was --  
2 not only was it not caused by overloading the crane, but Chris  
3 Miller was 2 miles away in a trailer. This is the only time  
4 in Chris Miller's life when anything like this has happened  
5 when he was on the scene directing operations, doing what he  
6 had done at least 30 times before in his life without a single  
7 problem.

8           It's not enough for Mr. Arnold to get fair  
9 compensation for his clients. He wants to brand Chris Miller  
10 for life. The argument is if you don't brand Chris Miller for  
11 life, then Berkel will not have learned its lesson. Do you  
12 really think, as Berkel sits here in this courtroom, all that  
13 it's gone through in this trial, everything that it's learned,  
14 that it hasn't figured out that next time, you know, we're  
15 just going to start cutting augers? It's a lot cheaper, and  
16 it's a lot easier. You have heard they've made a policy  
17 change. The home office is called now every time an auger is  
18 stuck, every time an auger is stuck.

19           So I'm going to address Question No. 2,  
20 Question No. 8 and Question No. 9, punitive damages, all at  
21 one time. I have no idea what number Mr. Arnold is going to  
22 suggest to you for punitive damages. I'm going to go out on a  
23 limb and guess it's going to be more than \$10 million, maybe  
24 even more than \$20 million. I don't know. One thing that you  
25 are allowed to consider, and I ask you to consider very much,

1 is the net worth of Berkel. Net worth is the same as  
2 stockholders' equity. I don't know if any of you have any  
3 accounting background; but over a period of 57 years, Berkel  
4 has managed to save \$61 million, a little over a million  
5 dollars a year.

6 Now, you've been asked to focus on the Lee  
7 family in evaluating the effect of your verdict. Imagine the  
8 effect on the employees of Berkel and their families who  
9 depend on them for support. If you --

10 MR. ARNOLD: Your Honor --

11 MR. McKINNEY: -- were to make --

12 MR. ARNOLD: -- I'm going to object to this as  
13 highly misleading.

14 MR. McKINNEY: Not at all, the sense and  
15 sensibilities of parties, the net worth.

16 THE COURT: I --

17 MR. ARNOLD: Effect on the verdict.

18 THE COURT: I sustain that objection.

19 MR. McKINNEY: I believe I'm being unreasonably  
20 and unfairly limited in my argument, Your Honor. Please note  
21 my objection.

22 THE COURT: I will. Thank you.

23 MR. McKINNEY: \$61 million over 57 years. Your  
24 verdict runs two different directions. You can do good and  
25 right and just things with your verdict, and you can do a

1 great injustice to a company who's had this thing happen one  
2 time. I leave it to you and your conscience to decide the  
3 right way to go on this critical issue. If you want to say  
4 that Berkel was negligent, I think the evidence goes the other  
5 way; but I understand. If you want to award compensatory  
6 damages to the Lees, I can hardly blame you.

7 I understand that; but branding a permanent  
8 record here in Brazoria County, every job application he ever  
9 fills out -- that will haunt the company. That will haunt  
10 Chris Miller. He's not a repeat offender. He may not be the  
11 nicest man in the world, but he doesn't deserve that. It is  
12 not right.

13 Last thing I want to chat with you about are  
14 damages; and this may well be where I'm just too old for this  
15 stuff and I need to retire because I don't look at money the  
16 way Mr. Arnold does, not in the slightest. Here's how I look  
17 at money: I'm 61. I've been married 38 years. I've got two  
18 kids, grown and gone, and two dogs. I hope to retire in four  
19 years. 31-year-old man -- well, let's look at it like this --  
20 who lives in a home that costs \$250,000? You can buy a pretty  
21 good home for \$250,000. You can buy a real nice home for 4-  
22 or \$500,000. In the United States, the principal asset that  
23 any family has is its home.

24 THE COURT: You have 15 minutes, Counsel.

25 MR. MCKINNEY: Thank you, Judge.

1           You want to put a kid through college. You've  
2 got a young child, 3 years old. If you had \$250,000 -- if,  
3 because very few of us have \$250,000 -- but if you had  
4 \$250,000 at the time your child was 3 years old and you  
5 invested that money prudently, your child could go to Harvard  
6 and graduate and not have a penny in student debt.

7           If you had a home for \$500,000 that was paid  
8 for and you had your kid's college paid for, in the kind of  
9 money that makes sense in my world, that would be an awful lot  
10 of money. That would be an awful lot of money. If over the  
11 course of a lifetime, work until you were 65 years old, if you  
12 were able to put back \$3 million after taxes, after paying all  
13 of your living expenses, after putting your kids through  
14 school and if you were able to pay off your house and your  
15 kids didn't have any college debt, you would have to say that  
16 was a life well-lived and very prudent, very successful money  
17 management and savings, but it takes a lifetime to accomplish  
18 that.

19           In my world -- and I think in most folks'  
20 world -- if you end the month with 500 or \$1,000 left over  
21 after paying all of your expenses, it's a pretty good month  
22 for most folks. Most folks can't imagine, can't imagine,  
23 being millionaires.

24           All right. The Lees want to have three  
25 children. They have two. If they had a home paid in full --

1 and I'll just put the numbers up here. If they had a home  
2 that was fully paid for that cost a half a million dollars,  
3 really nice place; if they funded all three kids' college and  
4 had \$3 million right now to invest, who can say in real life,  
5 in the real world, that's not enough money? That's just not  
6 fair. A nice home is \$250,000. That's two homes right there.  
7 That's three homes right there. That's ten homes -- no.  
8 That's 12 homes right there, tax-free. All the money you  
9 award for compensatory damages is tax-free.

10 Now, life care plans. I've got a lot I'd like  
11 to say. I'm going to keep it real short. I'm not a big fan  
12 of paid experts on either side. If you go back and read my  
13 opening statement, I said that then, I'll say it now. I think  
14 what Kistenberg and Ms. Vinett and Dr. McCoin did, from where  
15 I stand, guacamole, smoke and mirrors. I know what they did  
16 and how they did it. I've seen it before. I don't think much  
17 of it. I'm more or less okay; but I think they're too  
18 conservative, quite frankly, with the folks that I hired.

19 You heard the testimony. If Dr. Melton hadn't  
20 been treating Tyler Lee, she's the one who would have done the  
21 life care plan; and our life care planners used her model, her  
22 modeling, which is conservative. Okay. And I don't think  
23 conservatism has a place in this either; but in a case like  
24 this when they come up with their life care plan, I've got to  
25 go out and hire folks, too, because I can't testify. So



1 that's what you get. They bring in paid witnesses. We've got  
2 to bring in paid witnesses. It's crazy stuff.

3 Here's how I propose to resolve it, if I can  
4 get my notes here organized. I think it makes sense.

5 Big disagreement between Mr. Arnold and I about  
6 medicine. Turn in your charge, please, to -- turn in your  
7 charge, please, to page 8 and look at line B, medical care  
8 expenses that in reasonable probability Tyler Lee will incur  
9 in the future.

10 That's the legal instruction. And if you go up  
11 to the top on Question 5, the first question is: "What sum of  
12 money, if paid now in cash, would fairly and reasonably  
13 compensate Tyler Lee for his injuries, if any..." and we look  
14 at medical care expenses in the future and it's what's awarded  
15 based on reasonable probability. To determine what's going to  
16 be awarded on reasonable probability, you would have to look  
17 at the present, okay? And presently, Mr. Lee isn't taking a  
18 ton of medicine. Presently, Mr. Lee is only taking one  
19 tramadol. That's just a fact in the case. We didn't make  
20 that fact. It's there. We got to deal with it.

21 Now, you can't just invent medicines that  
22 someone is not taking, throw them in a life care plan and say  
23 it's reasonably probable that those medicines will be taken in  
24 the future and then -- and here's my problem with the  
25 Vinett/McCoin/Kistenberg program. It's not \$9,000 that we're

1 talking about. It's these numbers right here. Once you take  
2 that 9,000-dollar figure that Ms. Vinett comes up with and you  
3 give it to Dr. McCoin, you get these three numbers right here,  
4 285,000; 4,000, not a big deal; and \$276,000.

5 So you wind up adding \$566,000 to the bottom  
6 line on medicine that's not being taken. It's not nickel and  
7 diming. In my world, and I think in your world, too, a half a  
8 million dollars is real money. And when somebody puffs up a  
9 life care plan to the tune of a half a million dollars, you  
10 folks are going to decide what's right and what's wrong,  
11 what's true and what's not true. That just doesn't seem  
12 right.

13 Likewise, we have this personal care  
14 assistance, which is included in the life care plan.  
15 Dr. Meier, the retained expert by Mr. Arnold, says personal  
16 care assistance only applies if Mr. Lee is single. If he's  
17 not single and if he's happily married, you take this out of  
18 the life care plan. Did they take it out of the life care  
19 plan? Nope. What did Dr. McCoin do with it? He runs it up  
20 to these numbers right here: 200,000; 301,000; \$323,000. So  
21 you wind up with \$825,000. \$825,000 in labor that's never  
22 going to be used, that's not recommended by any doctor, but  
23 it's in the life care plan. No evidence to support it.

24 The law is the evidence must support it within  
25 reasonable probability. If you add up all of Mr. McCoin's --

1 Dr. McCoin's inflated numbers -- prosthetics, medicine,  
2 labor -- you get almost \$10 million. Out of the \$11.6 million  
3 life care plan, almost all of it is either inflated at  
4 6 percent growth or simply is unsupported by the evidence.

5 THE COURT: You have five minutes, Counsel.

6 MR. McKINNEY: I'm going to need -- may I have  
7 ten more minutes, Judge?

8 THE COURT: Go ahead.

9 MR. McKINNEY: If you take the Vinett life care  
10 plan, extend it out using Dr. McCoin's numbers, subtract the  
11 excess -- these numbers right here, they don't belong here --  
12 you get a net of \$1,661,000. That's where there's common  
13 ground between their life care plan and our life care plan.  
14 You still have to deal with the future. Their life care plan  
15 and our life care plan are both based on the X3 prosthesis.  
16 Nobody has built in future technology changes. Nobody has  
17 priced future technology because nobody knows what it's going  
18 to cost or when it's going to get here. We just don't know.

19 Now, technical legal argument would be well, if  
20 we don't know, then the answer is zero. You've got to just  
21 stay with the X3 prosthesis, and that's all Mr. Lee ever gets.  
22 I think that's as ridiculous as Dr. McCoin's numbers. I think  
23 a fair estimate for the future for Mr. Lee is to take his  
24 current baseline expenditure of prosthetics, \$147,000, round  
25 that up to a buck fifty, double it. He's going to need eight

1 more prostheses. He gets one every six years. He's got a  
2 useful life -- he's got a life expectancy of 48 years. Six  
3 goes into 48 eight times.

4                   We say that we take \$300,000, twice what he's  
5 currently paying for prostheses, and multiply that times  
6 eight. Take that out for his life expectancy. It's  
7 \$2.4 million in the bank today, tax-free to be spent as he  
8 likes. He can stay with the X3 that, if it holds with all of  
9 the other prosthetics that we've seen, the price is not going  
10 to go up by much. He can stay with the X3 as long as he wants  
11 until the right technology comes along for him. He'll have  
12 that option.

13                   As for the rest of the numbers, physical  
14 impairment in the past -- pardon me. Let me fill in these --  
15 we all agree on the 192,000. If you take the 1,661,000, add  
16 that back into the 2.4 million that would make a good  
17 prosthetic allowance and do a medicine estimate -- he's going  
18 to have arthritis in the future. We know that. He's going to  
19 need some Mobic or some similar medicine. Add in a medicine  
20 estimate of, let's say, \$70,000 today to be invested today.  
21 Arthritis kicks in at age 50 or 60. Should be plenty of money  
22 for the arthritis in the out years. It comes out to  
23 \$4,200,000.

24                   Now, in the general damages department, again,  
25 Mr. Arnold and I, we live in two different worlds, okay?

1 Physical impairment sustained in the past, losing a leg above  
2 the knee, it's tough. There's no getting around it. And 25  
3 years ago, when you got a wooden leg and life was well and  
4 truly horrible, it was one of the worst things in the world  
5 that could happen. If, if a tragedy is going to strike -- the  
6 United States Government, with our wars against terrorism, has  
7 moved prosthetics a long way. Can't -- can't undo the past.  
8 We can't undo the past, but the law is fair and reasonable  
9 compensation.

10 As time passes -- as we all know, everybody in  
11 this room has their own personal tragedy, if not more than one  
12 personal tragedy. As time passes, these things, you adjust.  
13 You get better. They've had a child. They love each other  
14 greatly. It's a solid marriage. Yes, fair compensation; but  
15 like I said, we're in two different worlds. Past impairment,  
16 \$500,000. Future impairment, Mr. Arnold suggested  
17 \$10 million. Two columns up he had \$11.6 million to buy all  
18 this technology, okay?

19 Let's square that circle. As the technology  
20 improves, the impairment level goes down. Your life gets  
21 better. So there ought to be a balance in there somewhere,  
22 but there's not. In Mr. Arnold's world all the numbers are  
23 huge. And yes, we're going to have all these new technologies  
24 and yes, things are going to be much, much better; but that  
25 doesn't really change anything. The impairment level is still

1 the same. That doesn't make sense.

2 Future impairment, \$1 million. \$1 million is  
3 not a small amount of money. It is not a small amount of  
4 money. Physical pain and mental anguish sustained in the  
5 past. It had to have been excruciating lying there with those  
6 leads cutting his leg off. I can't imagine what that was  
7 like. And absolutely every day he has to deal with the issues  
8 associated with not having his leg.

9 I understand all of that, but we are talking  
10 about fair and reasonable compensation if paid now in cash in  
11 the real world in the past and I don't know why this isn't a  
12 large amount of money in everyone's mind: \$750,000. How many  
13 people in this room expect to have \$750,000 in their 401(k) or  
14 their IRA when they retire at age 65? I mean, that's what  
15 real money is.

16 Physical pain and mental anguish that in all  
17 reasonable probability Tyler Lee will sustain in the future.  
18 I say \$550,000. Why? Well, the medical records support that.  
19 The reported pain level in the medical records is a zero to  
20 one. There are times when it gets worse. I accept that. I  
21 do not dispute anything that Mr. Lee says. Over time -- I do  
22 believe that over time in America medicine gets better.  
23 Doctors get better. Therapies get better. Better ways will  
24 be found to deal with these things. That's the whole point of  
25 advancing. That's the whole point in talking about future

1 technologies.

2 THE COURT: Your time has expired, Counsel.

3 MR. McKINNEY: Pardon me?

4 THE COURT: Your time has expired.

5 MR. McKINNEY: May I have 5 more minutes, Your  
6 Honor?

7 MR. ARNOLD: Judge, at some point --

8 THE COURT: You're going to add on to everybody  
9 else's if you keep going.

10 MR. McKINNEY: Two more quick numbers then I'm  
11 done. Disfigurement sustained in the past, \$500,000.  
12 Disfigurement sustained in the future, \$500,000. Why does it  
13 stay the same for the future? Because I believe that people  
14 adjust to their circumstances. That's the normal human thing.  
15 Tyler Lee and Leigh Ann Lee are healthy, well-adjusted adults.  
16 They will adjust to this situation. They will make the best  
17 of it; and as time goes by, having a half a million dollars  
18 tax-free invested somewhere will make for a very nice life for  
19 them.

20 Mr. Lee continues to work. He will continue to  
21 work for as long as he can. He's that kind of man. I don't  
22 think there's any evidence that supports a future wage loss  
23 regarding Ms. Lee's damages. I put a hundred thousand for  
24 loss of household services, 15 in the past; 85,000 in the  
25 future. Consortium loss, 15,000 in the past; 85,000 in the

1 future.

2 Ma'am, I'm on Question No. 6.

3 UNIDENTIFIED JUROR: I'm just trying to follow  
4 your numbers.

5 MR. MCKINNEY: Yeah. I'm going fast because  
6 I'm out of time.

7 Ms. Lee, \$200,000 all up; and Sydney Rose Lee,  
8 her loss of consortium damages in the past, zero. In the  
9 future, \$250,000. I think Mr. Lee's going to be just as great  
10 a dad without a leg as he would be with a leg, but let's just  
11 put that young lady through college and call it even.

12 All up this amount of money, the medical,  
13 everything else that I've proposed is about \$8.8 million,  
14 \$8.8 million. That is a fair and reasonable amount of money  
15 to compensate someone for a loss this significant. I agree  
16 it's not Mr. Arnold's numbers; but like I said, we come from  
17 two different universes. I'm out of time.

18 Thank you, Judge, for extending my time.

19 Thank you, ladies and gentlemen, for your  
20 incredible attention this late in the day, this far in the  
21 lunch hour. I don't deserve it. My client and the Lees do.  
22 Thank you.

23 THE COURT: All right. Ladies and gentlemen,  
24 if you would just stack your notes on the bar and if you've  
25 written on your charges, just slide those under your chairs.



1 Slide those under your chairs, and then they'll be there when  
2 you return. So if you will be back at your assembly point at  
3 ten till 2:00, we'll resume at that time. Thank you, and have  
4 a good lunch. Remember my instructions, please, not to  
5 discuss this matter.

6 *(Jury leaves courtroom)*

7 THE COURT: All right. It's ten minutes in  
8 addition that we've had added to Mr. McKinney's argument that  
9 we'll add to both of yours if you want it.

10 MR. DIAMOND: Okay.

11 MR. ARNOLD: Okay. Thanks, Judge.

12 THE COURT: All right. See y'all back at ten  
13 till 2:00.

14 *(Recess taken)*

15 THE COURT: Y'all ready?

16 MR. DIAMOND: Ready.

17 THE COURT: Sorry I'm late.

18 Glen, I think they're ready because they were  
19 giving me a hard time about being late. Sorry. Bring them on  
20 in.

21 Mr. Diamond, since you have ten extra minutes,  
22 do you still want 15-minute and a five-minute warning?

23 MR. DIAMOND: Let's do 20 and 10, if you don't  
24 mind.

25 THE COURT: Okay.

1 MR. DIAMOND: Thank you. I'm going to try to  
2 give you some time back depending on how much I fumble and  
3 stumble.

4 THE COURT: All right. 20 and 10. Got it.

5 THE BAILIFF: Come to order.

6 *(Jury enters courtroom)*

7 THE BAILIFF: All present, Your Honor.

8 THE COURT: Thank you.

9 Be seated, please.

10 Mr. Diamond, are you ready to proceed?

11 MR. DIAMOND: I'm ready, Your Honor.

12 THE COURT: You may do so.

13 MR. DIAMOND: Please the Court? Counsel?

14 All right. First of all, thank you. I have  
15 noticed -- and I know you will remember, when I did my  
16 opening, I pleaded with you to take really good notes and to  
17 hold everybody to what they said. And I knew that the  
18 testimony would be a lot and the evidence would be a lot and  
19 so your notes were important and I think you know now why I  
20 said that.

21 I also -- I'm sitting over here, I'm feeling a  
22 little bit like I'm in the twilight zone after listening to  
23 Berkel's closing because I'm curious if we were sitting in the  
24 same trial. And that's where your notes come back and play a  
25 role in your deliberations because it's very easy for lawyers

1 to play snippets and shift focus away from the big picture and  
2 this is, as they say, a big picture case -- and I also, in my  
3 voir dire and in my opening, also commented about credible  
4 evidence and the cookies and the crumbs, I know you remember  
5 that -- because the evidence in this case overwhelmingly  
6 supports that this crane was overloaded. And I am amazed --  
7 and amazed is probably not the right word, a bit offended,  
8 that Berkel would take the position that they have no  
9 responsibility for this event and then have the nerve to  
10 intimate -- no, actually say that Maxim, my client, through  
11 photographs, somehow staged this whole situation, which is  
12 amazing.

13 I think the only thing that you have not heard  
14 from Berkel to date is that the construction fairies entered  
15 Bennett and Miller's minds and were controlling their actions,  
16 and that's about the only thing you haven't heard. So I think  
17 if we focused back on the evidence, let's talk about those  
18 photographs briefly. And I'm not going to spend lot of time  
19 because the comments regarding the taking of the photographs  
20 and so forth I think are misplaced.

21 You heard Cody Crisp talk about that, a  
22 credible witness. You heard what he said about the  
23 photographs. What you also have to keep in mind is HPD was  
24 out there, Skanska was out there, Berkel was out there, OSHA  
25 was out there, all kinds of people were out there. Everyone,

1 at some point in time, had access to that crane.

2 The bigger question is: Where are Berkel's  
3 photographs? Matter of fact, where is Berkel's investigation  
4 into this catastrophic event? Where are the results of all of  
5 this time that they supposedly spent looking into this issue?  
6 You haven't seen any of that because I don't think there is  
7 any. There wasn't an investigation. Why? Because if you  
8 remember correctly, Cody said when he got on scene, on the  
9 site at the job site, who took him and brought him over to  
10 where the crane was? Bruce Miller. Berkel's Bruce Miller  
11 brought him over there because it was a Berkel job site; and  
12 he said, "We know what happened. We overloaded the crane."

13 That's why you haven't seen any photographs  
14 from Berkel. That's why you haven't seen any investigation  
15 from Berkel. That's why you haven't seen any reporting from  
16 Berkel because they know what happened. And so what they're  
17 going to do is sit back throughout the entirety of this trial  
18 and try to shift your focus from the true issues in this case;  
19 and if you look at it from the standpoint of -- let's look at  
20 it from a motive standpoint.

21 They know -- they admitted on site what  
22 happened, and they know this is their issue. So they're going  
23 to attack the manner in which Maxim took the photographs.  
24 They're going to attack their former employees as being  
25 disgruntled. They're going to try to blame things on a

1 computer system and an alarm system. Let's talk about that,  
2 too. And I'll get into the specifics as we're going, but you  
3 remember Bennett's testimony. I asked Bennett myself and I  
4 said, you know, "Did you look at the computer at all on the  
5 day of this event? Did you stop when all this was going on  
6 and say, You know what, I need to look at that computer system  
7 so that I can see what's going on?"

8           And his answer was, "No, I did not stop to look  
9 at the computer."

10           And even if he had, he had his jacket thrown  
11 over it. So it wouldn't have made any difference. I also  
12 asked him, I said -- you know what, I said, "There's a lot  
13 going on out there. There was activity left and right at the  
14 time leading up to this event. Could it be that with all of  
15 the construction noise and the yelling of people and the  
16 whirring of machinery that the alarms may have been going off  
17 and you didn't hear it?"

18           He said, "Possibly."

19           But you know what, let's talk about alarms so  
20 we can put that to bed, too. What better alarm do you have  
21 than your coworkers, your crew members that are actually out  
22 there screaming, "Stop"; screaming, "The boom is flexing";  
23 screaming that the back of this crane is coming off the  
24 ground; screaming that it's bobbing? What better alarms would  
25 there be than the operator getting out of the cab five times

1 and saying, "This is crazy. Stop."

2           So once again, Berkel is trying to shift your  
3 focus to anybody but itself. And if you look at it, the  
4 question becomes who really, at the end of the day, had the  
5 opportunity to actually prevent this accident from occurring?  
6 Maxim wasn't even on site, and they hadn't been on site for  
7 weeks. So who had the -- who had the last chance to stop  
8 this? Chris Miller had the last chance to stop this. And did  
9 you notice that in opening, Mr. McKinney said, "Whenever Blum  
10 testifies, his hands are going to shake, he's got  
11 Parkinson's." Do you remember that comment he made?

12           And then he went on and said, "The most  
13 fearless man -- or the second most fearless man in the  
14 courtroom is Ken Blum. He will answer every question that  
15 Mr. Arnold has, and he the will answer every one of those  
16 questions honestly."

17           Did you hear Mr. Blum's name in Mr. McKinney's  
18 closing? I didn't. I was waiting for it. Why do you think?  
19 Because I remember Mr. Blum's testimony. Do you guys? I hope  
20 you took notes because I think that you will agree with me  
21 that he did a lot of things in his testimony, but testifying  
22 honestly was not one of them. And if you'll also remember  
23 from Mr. Blum's testimony, I asked him, I said, "You would  
24 agree that it's Berkel's responsibility to make sure the crane  
25 operators it puts in these cranes knows how to operate the

1 computer as well as the crane itself, correct?"

2 He said, "Yes."

3 Yet in closing, all of a sudden it's Maxim's  
4 fault.

5 The other thing to keep in mind is the crane  
6 operator was operating this crane for three weeks before this  
7 event. He was testing this crane and its capabilities, as  
8 well as its computer system, on a daily basis and reporting  
9 back if there were any problems; and if you remember  
10 correctly -- let's pull up the day of the event, the  
11 checklist, please. Yeah. 17, I believe.

12 Anyway you'll see up here on the board that  
13 there was -- can you raise it up, please?

14 Okay. This is the day of the event. Now,  
15 what's so interesting about this is that now Berkel is taking  
16 the position, and I think you heard it in closing, that,  
17 Wow -- I'm sorry?

18 UNIDENTIFIED JUROR: Oh, I said, God bless you.

19 MR. DIAMOND: Oh, okay.

20 That, "Wow, there's something wrong with the  
21 crane. There's something wrong with the computer system.  
22 There's something wrong with the alarms." How convenient that  
23 that's their argument now, yet during the entire time that  
24 Mr. Bennett was operating this crane, no problems noted  
25 anywhere, none with the computers, none with the alarms, none

1 with the sounds, none with the operation other than the brake  
2 drum, which -- where they called us and we fixed.

3           How convenient that now, when we're in  
4 litigation and we're in trial, all of a sudden there's  
5 maintenance issues. All of a sudden there's a claim that the  
6 computer wasn't operating, the alarms weren't sounding, et  
7 cetera, et cetera. Ridiculous. Because we have not only this  
8 in evidence, but all of the other sheets that Mr. Bennett and  
9 Chris Miller signed off on showing that there was not one  
10 reported problem with this crane other than the brake drum,  
11 which had absolutely zero to do with anything associated with  
12 this event.

13           The other thing that you've heard a lot about  
14 is the attachments. The attachments of the hoses and the  
15 power pack, the spotter arm, et cetera.

16           You can take that down.

17           But you've heard no evidence that it actually  
18 caused this accident. You've heard that, you know, maybe it  
19 shouldn't have been on there, maybe it should have been  
20 approved by somebody or not approved by somebody, maybe it  
21 wouldn't be the best set of circumstances. But what you have  
22 to keep in mind is this: The hoses, the spotter arm, the  
23 counterweight, the power pack worked fine the first 30 pilings  
24 that were done for the first three weeks on this job site. No  
25 issues at all. The only difference -- and the other thing is



1 this -- pull up the Manitowoc crane.

2           This is in evidence as well. This is the crane  
3 after the event that was brought out by Manitowoc, a bigger  
4 crane, not anything that Maxim provided, to take the place of  
5 the crane that Berkel ruined. They -- you can see it's  
6 configured the exact same way. They finished the job. I  
7 proffer to you that if Berkel or Skanska or anyone else truly  
8 believed that the hoses or the power pack or the spotter arm  
9 had anything to do with this event, they would have configured  
10 it differently; and they didn't. They continued on and with  
11 no problems. So the power pack, the hoses, the spotter arm,  
12 the alarms, the computer, totally, as they say, red herrings  
13 in this case. What is -- you can take it down.

14           What is the different set of circumstances for  
15 this event that wasn't present before, in the 30 pilings  
16 before, and that was different on this day? What have you  
17 heard? You have heard stuck auger until -- I wish I had  
18 written down every time that stuck auger, two words, were used  
19 in this trial. That is the only difference. Up until that  
20 point, everything was fine. Hoses, no problem. Spotter arm,  
21 no problem. Power pack, no problem. Bennett, no problem.  
22 Crane, no problem. Computer, no problem. Alarms, no problem.  
23 Load limiters, no problem. No issue. None.

24           Then we get a stuck auger. And why do you  
25 think that Chris Miller was so determined to get that stuck

1 auger out? Because he's the reason that it was stuck in the  
2 first place and he was trying to save face, that's why. And  
3 if I heard from Chris Miller or from Mr. Blum another time  
4 that they were just following their process, I was going to  
5 scream at the end of the table. It was constant. They were  
6 going to follow that procedure come hell or high water until  
7 that crane rained down around them, and that's what happened.  
8 And that's exactly what happened.

9 Let's do the crane diagram from the Link-Belt  
10 manual, and let's focus in on -- yes. Please -- exactly.

11 Okay. You heard the, "Wow, that's a big fish"  
12 comment. You guys remember the testimony on that where  
13 someone -- you know, where we were describing this? Well,  
14 it's not so much a big fish, per se, as it is -- I believe the  
15 same analogy with a fishing rod and you're fishing in a lake  
16 and your line gets hooked on something that is at the bottom,  
17 tree log, roots, whatever. You don't know what you're  
18 pulling. You don't know what you're stuck on. You don't know  
19 how much it weighs; and if you do enough pulling on it, your  
20 rod's going to break. Plain and simple.

21 Same analogy here. And I think even  
22 plaintiffs' counsel said, you know, something's got to give;  
23 and I agree. It could just as easily have been the auger line  
24 snapping, whipping up against the boom and causing problems.  
25 It could just as easily have been, and was, the boom under

1 pressure finally at the breaking point. Because why? These  
2 cranes, as you heard, are for freely suspended loads. In  
3 other words, you're supposed to use these to lift up stuff.  
4 That's what you know. I mean, you're supposed to lift up  
5 weights that you are knowledgeable of before you start the  
6 process. You got to know what you're lifting. And even  
7 Mr. Bennett said, "I had no idea of the weight of what I was  
8 lifting." And why? Because it's stuck in the ground. Because  
9 it's stuck in the ground.

10 So that's the other reason why having all of  
11 these other people out there and all these other signs of  
12 what's going on are so important in this case. You've heard  
13 all of the signs and, as they say, symptoms of an overload.  
14 They were constant. I mean, the only thing that could have  
15 stopped it under these circumstances is Chris Miller listening  
16 to reason; and he failed to do so.

17 In fact, Mr. Blum had, amazingly is the nice  
18 way to put it, amazingly testified -- do you remember my  
19 cross-examination of him? He amazingly testified that, you  
20 know, "Mr. Miller didn't need my stuck auger policy on site  
21 even though it's supposed to be there because it was in his  
22 memory." And I even think I said -- "Well, you know his  
23 memory ain't so great," was the way that I responded to that;  
24 and he said, "Well, not on certain things."

25 Yeah. Exactly. Well, let's talk about what

1 his memory ain't so great on. You remember this board. It  
2 would have been easier and less time-consuming to write down  
3 what he remembered as opposed to what he failed to remember.  
4 All of these things that he failed to remember are important.  
5 And I know you know the testimony, but if you look at the  
6 actual evidence on that particular day as it pertains to this  
7 photograph -- this diagram rather, that is -- that says  
8 "wrong," which was in the handbook that was in the crane that  
9 Mr. Bennett failed to read, but basically it's: Look, you're  
10 pulling on a load that you don't know the weight. You don't  
11 know how much pressure you're putting on the crane.

12 But even if, even if you believe that he  
13 thought, Oh, wow, you know, my alarms weren't going off. I  
14 must be okay -- which I find incredible under the  
15 circumstances -- he could still have been kicked out of the  
16 system.

17 You heard Mr. Merrill say he could be kicked  
18 out of the system and could still boom up putting pressure on  
19 the crane boom, and that's exactly what happened. He was  
20 kicked out. He continued to boom up because he's still trying  
21 to pull up on a load that is stuck in the ground and that's  
22 what caused this to occur, but let's look at it right before.

23 And in 40 minutes, 40 minutes -- keep in mind  
24 the stuck auger policy.

25 Let's get that up, please. And let's focus in

1 on the last part. It's the -- No. 10. There you go.

2 This is the stuck auger policy and you remember  
3 I questioned Mr. Blum about that and I said, "Do you think  
4 that your crane operator getting out of the crane on five  
5 different occasions should have put just a glimmer of doubt in  
6 Mr. Miller's mind that maybe he should stop?"

7 And after about five minutes of refusing to  
8 answer the question, he finally did and said, "Yes. That  
9 would have put a doubt in his mind."

10 Well, if he's following the policy of Berkel,  
11 "he" meaning Miller, you stop. And he should have stopped  
12 long before the five different times that Bennett got out of  
13 the cab. What else would have given them a warning sign there  
14 was a problem? The back of the crane bobbing? The wheels  
15 showing light underneath and lifting? The crane boom flexing?  
16 The oil spewing and the crew members going, "Stop. Look at  
17 the boom"; having Mr. Bennett get out going, "Look"?

18 But Mr. Miller was following his procedure, and  
19 Berkel would do nothing different today. Nothing. But Berkel  
20 has the nerve to stand up here and say, "You know what, the  
21 alarms weren't going off and you took some pictures and the  
22 crackers are in the wrong spot. So King's X, not us."

23 Amazing. Amazing. That's like the cruise ship  
24 captain looking out the window, seeing the lightening, seeing  
25 the rain, seeing the wind, seeing the iceberg, throwing the

1 jacket over the radar, turning off the audio and saying, "You  
2 know what, I don't hear bells and whistles and I'm going to  
3 ignore my crew members that are saying, 'We're headed for  
4 disaster.' I'm going full steam ahead. Go ahead and make the  
5 engines go forward and proceed into the horizon," and then go  
6 back and say, "Oh, King's X, not us." That's exactly what  
7 happened here. Maxim wasn't on site.

8           And the other issue, this training issue, I do  
9 want to address -- I do want to address that because you heard  
10 Mr. Blum finally admit that, "Hey, this is not Maxim's  
11 responsibility." The other thing that you need to keep in  
12 mind is this: I asked him, I said, "So I guess, then, every  
13 time you guys unilaterally change out an operator and put  
14 someone else to operate this crane after Maxim leaves, you  
15 call them and you say, 'Hey, we've got a new operator come on  
16 and it's your responsibility so come on out and train.' You  
17 do that, don't you?"

18           And he said, "I can't think of one time that we  
19 did that." Why? Because he knows it wasn't our  
20 responsibility. He knows that it's their operators. He knows  
21 that they can change them out when they want, and do; and he  
22 knows we're not on site.

23           Let's look at what Davidson did. Davidson,  
24 with Maxim, was out there for two days with Mr. Bennett. He  
25 testified, "I saw him operate the crane for two days. There

1 was no issue."

2           You heard Mr. Bennett say, "You know what, I  
3 didn't need any training on the computer or the crane. I knew  
4 what I was doing. I knew how to do it."

5           He was CCCO certified. And he continued  
6 operating that crane for three weeks, for 30 pilings with no  
7 issue. It wasn't until Mr. Miller decided, "You know what,  
8 I'm going to go against everything that everyone is telling  
9 me, every sign or symptom of an overload and an impending  
10 problem because I'm following my procedure and we're getting  
11 this auger out come hell or high water."

12           And that's exactly what he did. So if you look  
13 at the -- let's look at your charge for me real quick. And  
14 let's turn to page 2; and right in the middle under No. 6, it  
15 says the term preponderance of the evidence in quotes. Do you  
16 see that? And it says "the greater weight of credible  
17 evidence," of credible evidence. I think the way that you  
18 think about the credible evidence is the cookie/cookie jar  
19 analogy. Is it what someone's telling you, or is it what  
20 you're seeing? It doesn't make sense.

21           And honestly, with Berkel, with Miller, Blum,  
22 and Bennett, I don't see how, with those three people  
23 testifying in this courtroom, Berkel can sit here and tell you  
24 in front of the Lees that they have no responsibility for this  
25 incident, much less point the finger at my client. That's --

1 what's the nice way to put it? Disingenuous is the nice way  
2 to put it. Flat and out wrong is really what it is, at least  
3 with respect to the evidence.

4 Let's go to the next page, page number -- or  
5 no. I'm sorry, 4. Let's go to page 4. Let's go to proximate  
6 cause in quotes, which is the middle of the page. It says,  
7 "means a cause that was a substantial factor in bringing about  
8 an event," comma. That's where prior counsel stopped talking,  
9 but the next sentence is -- the next part of that sentence is  
10 critical, "and without which cause such event would not have  
11 occurred."

12 That's the key. That's the key, "without which  
13 cause such an event would not have occurred." That's very  
14 important that you need to keep that in your deliberations.  
15 Keep that in mind while you're deliberating because all of  
16 this other, as they say, spaghetti thrown on the wall, doesn't  
17 stick when you apply it to this definition. The only thing  
18 "without which cause such event would not have occurred" is  
19 Berkel not following its own stuck auger policy and stopping  
20 when all of this was coming about. And for them to say they  
21 had no knowledge of an overload is absurd. Absurd.

22 And I -- and you know the evidence. You know  
23 the testimony. I'm not even going to go into Disotell and  
24 Prestridge because I know you took notes. I was watching.  
25 And to say that they had no notice that this was an overload



1 situation is amazing to me. I know you took notes on  
2 Bennett's testimony as well. I know that you also took notes  
3 when he acknowledged when Mr. Davidson checked the system, the  
4 alarms worked. Let's go to -- and you notice I didn't hire  
5 any experts in this case. You noticed that, right?

6 Matter of fact, I felt kind of, at certain  
7 parts of the trial, like the redheaded stepchild over here in  
8 the corner. I had to, like, stand up and say, "No questions,"  
9 et cetera, et cetera; and you've got both these parties hiring  
10 people and paying them lots of money to come talk to you,  
11 okay? I didn't hire any experts because honestly, I am a huge  
12 fan of this judicial system that we have and I have strong  
13 faith that people in the community that sit in this jury box  
14 are listening. They're smart. They look at the evidence, and  
15 they will do what the evidence dictates that they do and  
16 they're not going to be smoke and mirrored out over here,  
17 looking over here. They're going to actually see the big  
18 picture. And that's why I did not need to hire somebody in  
19 this particular case because my client had zero to do with  
20 this event and we could not have prevented it under any set of  
21 circumstances.

22 But let's look at the expert that plaintiff  
23 hired, Van Iderstine.

24 MR. MCKINNEY: Why are you showing a Bench  
25 conference that we had at the Bench? The part that you're

1 showing is a Bench conference.

2 MR. DIAMOND: Okay. There we go.

3 This is Mr. Clay, "Did you read any Link-Belt  
4 depositions where the witnesses talk about whether this system  
5 was tested after the accident?"

6 "Yes."

7 "What did they say?"

8 MR. McKINNEY: Excuse me, Judge. You excluded  
9 that from evidence for the reasons that --

10 THE COURT: I'm sorry. I couldn't hear you.

11 MR. McKINNEY: You excluded that from evidence  
12 for reasons we don't need to go into.

13 MR. DIAMOND: I have the transcript. I'm happy  
14 to bring it to you, Judge; and you did not.

15 THE COURT: I need to see the transcript.

16 MR. DIAMOND: Sure.

17 That, and it continues on the next page.

18 THE COURT: Is this the transcript from --

19 MR. DIAMOND: That's the transcript from the  
20 court reporter, yes, ma'am.

21 MR. ARNOLD: What page, Jeff?

22 MR. DIAMOND: She's got it.

23 THE COURT: 34.

24 If that's the transcript, then go right ahead.

25 MR. DIAMOND: Okay. Thank you.

1                   Like I said, here's the testimony of Van  
2 Iderstine. And I'm not technologically savvy, so I'm doing  
3 the best I can here.

4                   "Did you read any Link-Belt depositions where  
5 the witnesses talk about whether this system" -- talking about  
6 the alarm system -- "was tested after the accident?"

7                   "Yes."

8                   "And what'd they say?"

9                   "The crane computer was tested after the  
10 accident."

11                   "And did it work or not, these alarms?"

12                   "That's what I recall." "They did."

13                   He next testified in response to a question,  
14 "Do you think this crane was overloaded?"

15                   "I do."

16                   I didn't hire this guy. I didn't speak to him  
17 before his deposition, neither did anyone else in my office.  
18 And here's the key -- and look at your proximate cause  
19 definition that we were talking about, the "and without which  
20 cause such event would not have occurred" definition.

21                   The question is: "And if they hadn't tried to  
22 pull the auger out of the ground, this accident wouldn't have  
23 happened. Would that be a fair statement?"

24                   "Yes."

25                   That's from plaintiffs' expert. Now, I proffer

1 to you that if Berkel thought that there was a problem with  
2 this crane computer, I can tell you they'd be paying a crane  
3 computer expert \$875 an hour like they did Mr. Valena, their  
4 life care planner person, to say exactly that.

5 MR. MCKINNEY: Judge, that's outside of the  
6 record.

7 THE COURT: Sustained.

8 MR. DIAMOND: Let's talk about Bennett's  
9 testimony real quick. Right here.

10 "So those alarms could have been going off and  
11 you couldn't hear it because of all the chaos, right?"

12 "Possibly."

13 Then we've got Mr. Bennett further saying, "All  
14 right. But didn't you also say in your deposition that on the  
15 day of this event, while this stuck auger issue was happening,  
16 that you didn't look at the computer at all?"

17 "Correct."

18 So for Berkel to get up here and say, "Hey,  
19 it's an alarm issue. Hey, it's a computer issue. That would  
20 have prevented this problem." Ridiculous. Let me say that.  
21 Ridiculous.

22 So if you look at this Question No. 1, which is  
23 on page 4 of your charge, that's how it should be answered.  
24 That's the only way it can be answered, in light of the  
25 evidence, because the only entity, the only person that could

1 have prevented this accident from happening is Mr. Miller,  
2 period. Period. All it took was for him to say to  
3 Mr. Bennett, "You're the operator. You're concerned. I have  
4 doubt. Per my company policy, I'm supposed to stop; and I'm  
5 going to."

6 And he does, and we're not here. That's why we  
7 have policies. And speaking of policies, you -- you remember  
8 Mr. Blum's testimony about, you know, "The statements of all  
9 of my crew members, they're not exactly what they said in  
10 sworn testimony. And ooh, that's a big huge problem." Yet he  
11 sat up here for 35 minutes explaining his stuck auger policy  
12 and expanding upon it and restricting it and explaining what  
13 certain things meant. What's good for the goose is good for  
14 the gander. You know what I'm saying?

15 It just made no sense how he can put in a  
16 policy after much thought in the comfort and privacy of an  
17 office with no stress and then sit up here and testify about  
18 that same policy and what it really means and how it was  
19 really supposed to be carried out and what really certain  
20 sections meant for this auger versus another auger and then on  
21 the other hand complain about the crew members' statements is  
22 amazing. Nice way to put that, I might add.

23 And then once you answer this way, I'm done.  
24 The rest of it is a Berkel issue, just like this entire  
25 accident is a Berkel issue, just like this trial has been a

1 Berkel issue. And, you know, the actions speak louder than  
2 words. How many times have you heard in this trial, "If it  
3 weren't for this auger being stuck and you not following your  
4 procedures, this accident wouldn't have happened?" Countless,  
5 from almost every witness you've heard.

6 Apply that to the definitions in Question 1,  
7 and you'll see that it's a Berkel problem. And that is -- the  
8 reason why we are here is a stuck auger, Chris Miller not  
9 doing what he's supposed to do and certainly not following his  
10 own company's policy. To say that they did not know that this  
11 could happen in light of the '09 event that you've heard all  
12 about is also amazing. But actions speak louder than words;  
13 and if you remember all of the evidence by your notes and just  
14 from watching people testify, you know the focus of this trial  
15 has been exactly where it should be, on Berkel, because  
16 they're the ones that caused this.

17 My client could not have stopped it and didn't  
18 create it. We shouldn't be here. We are the redheaded  
19 stepchild. We shouldn't be here at the family gathering. We  
20 just shouldn't. And I think once you get back to the jury  
21 room and you look at your notes and you look at -- and you  
22 remember everyone's testimony, you will understand that that  
23 is the only fair and just thing you can do, is hold Berkel  
24 responsible, solely, for this event, not Maxim. We had no  
25 involvement here and nothing that we did or didn't do would

1 have prevented this accident from happening under the facts  
2 that you have in front of you. Thank you.

3 THE COURT: All right. Mr. Arnold?

4 MR. ARNOLD: You want me to go ahead and  
5 proceed, Judge?

6 THE COURT: You may.

7 MR. ARNOLD: May I take two minutes to get a  
8 couple things together?

9 THE COURT: Sure.

10 MR. ARNOLD: Let's see. What time is it,  
11 Judge?

12 THE COURT: It's 2:43.

13 MR. ARNOLD: 2:43. I got it. May I proceed,  
14 Your Honor?

15 THE COURT: You may.

16 MR. ARNOLD: Ladies and gentlemen, have you  
17 ever heard the term pulling the wool over your eyes, right?  
18 In this case, in this case involving Tyler Lee and his family,  
19 Berkel literally just stood up and said they did nothing  
20 wrong, that they have no accountability, and then proceeded to  
21 then explain why you should short Tyler in every one of his  
22 damage elements, including his future medical care, to save  
23 them money.

24 I told you that they were going to do this, and  
25 they still stood up and did it. They drew the line in the

1 sand, "We didn't do anything wrong. It wasn't me." You ever  
2 heard that song? "It wasn't me." They drew a line in the  
3 sand and then they moved back and said, "Maybe it's a little  
4 bit me," right? And then they drew a line in the sand again,  
5 "Okay, maybe it's me; but don't give Tyler Lee his future  
6 medical care." And I'm going to show you how he did some  
7 funny McKinney math.

8                   And then he drew a line in the sand again, "And  
9 by the way, we think that maybe you ought to give Leigh Ann  
10 \$85,000 for this accident." And it's just amazing and it --  
11 and I'm kind of laughing, but I want to be real clear: This  
12 isn't funny. If you believe them -- right -- you believe them  
13 and you don't set aside his full medical, that's -- this might  
14 be funny to -- because it's so ridiculous. What happens?  
15 What are the consequences, right? What are the consequences  
16 of what they ask you to do here? I want you to remind  
17 yourself when you start considering all of these various  
18 elements, these are real elements.

19                   These aren't a house and sending your kid to  
20 college and things of that. This is what Tyler Lee has gone  
21 through, and they told you that they did nothing wrong. Think  
22 about that. You should be offended that they can sit there on  
23 the stand and say, "We did it the right way; and we'd do it  
24 again this way." And that, "We're not 100 percent at fault.  
25 In fact, we're 0 percent at fault."



1                   And then they ask you for a favor to short  
2 Tyler Lee to save them money. They gambled because they  
3 wanted to save time and money, and their gamble caused this  
4 accident. Now they want you to gamble with this family's  
5 future, okay? They are asking you to gamble. Make no doubt.  
6 They are asking you to put aside the evidence, to short Tyler.  
7 I want you to think about this because I took those notes  
8 really carefully.

9                   Berkel caused this crane collapse. I don't  
10 think there's any doubt, and I'm going to run through them  
11 really quick. In 2009 they had five safety policies that came  
12 out of the prior crane collapse involving Chris Miller that he  
13 was a superintendent on. He was there at the job site earlier  
14 and he had gone off site, but make no mistake that was a Chris  
15 Miller job.

16                  All five policies that came about as a result  
17 were not followed in this case. All five things that they  
18 thought about to prevent accidents, like this one, were pushed  
19 aside. Remember, Miller violated the grout policy, which got  
20 the auger stuck. He didn't do a JSA. He didn't consider all  
21 of the things he was supposed to do. He did not -- the crew  
22 didn't even know there was a policy. At that point in time,  
23 Miller -- okay, and I -- how they try to isolate snippets,  
24 we're going to play a little Mickey and Chris video to tell  
25 you exactly what they said.

1 Miller had the warning signs of the boom  
2 flexing, had oil raining down on everybody, which every crew  
3 member said they had never seen before, with the exception of  
4 Miller. And you had the tracks coming off the back; and more  
5 importantly than all of this stuff, the crane operator, five  
6 times outside of his cab saying, "Stop." And this wasn't a  
7 discussion. They were yelling at him to stop; and because  
8 Chris Miller cared more about saving two days' time, this  
9 accident happens, okay?

10 And then, what I don't understand, is that  
11 somehow we should be concerned about branding Chris Miller for  
12 life. Do you remember that? Do you remember Mr. McKinney  
13 saying that? "Don't brand this man. He's not a repeat  
14 offender." I disagree. There's one person in this courtroom  
15 and in this case that's been branded by Chris Miller's  
16 actions, and it ain't Chris Miller. Chris Miller has caused  
17 Tyler and his family a lifetime of pain and suffering and  
18 consequences. So to stand before you and say, "Don't do this  
19 because it would be a bad mark on Chris Miller" is ridiculous.

20 We saw Chris Miller. Do we owe him something?  
21 Do any of us, after all the things he's brought upon this  
22 family? Does he deserve the same respect as Tyler does? Are  
23 you serious? Did that just come out of his mouth? I think it  
24 did. Does that disrespect Tyler to say that, "Don't brand  
25 Chris Miller"? Does it disrespect his family to stand in

1 front of him and have Mr. Blum look at him and say, "We did  
2 nothing wrong, we'd do it again the same way"?

3 Let's be real clear: Berkel doesn't care about  
4 the Lees. They can say he's a great guy, he's a wonderful  
5 person, all those things. Their actions speak otherwise. The  
6 only thing that Berkel cares about in this case is saving  
7 money, okay? I want you to go back with me. Why'd this  
8 accident happen? Ask yourself truthfully. Saving 3- or \$400  
9 of old grout caused this whole chain of events, true? Of  
10 course. Y'all are sick of hearing it. And then they didn't  
11 cut the auger despite every single crew member telling  
12 Mr. Miller to cut the auger and to stop. This isn't just one  
13 crane operator. They did not call a witness, right? Did they  
14 call a single witness in their case? No. And it happened  
15 because Chris Miller didn't want to waste a day or two.

16 Now, I want to talk a little bit about what  
17 Mr. Prestridge and Mr. Disotell said.

18 Mary, do we have that video?

19 I'm going to play you what was played, just  
20 briefly, a couple minutes of it, of what we played in trial,  
21 okay?

22 MS. MARKERT: Prestridge?

23 MR. ARNOLD: Yes, please.

24 *(Chris Prestridge deposition testimony played*  
25 *as follows:)*

1                   QUESTION: Okay. And somewhere around  
2 underneath the power pack you had to hook up the air  
3 compressor; is that true?

4                   ANSWER: Yes, sir. We hooked it up somewhere  
5 around there. I just remember being under that death trap  
6 while it was bouncing up and down.

7                   QUESTION: While you are working in the  
8 vicinity of trying to hook up the air compressor underneath  
9 the power pack, what are you observing?

10                  ANSWER: A lot of sunlight underneath them  
11 tracks.

12                  QUESTION: Okay. When you came out, did you  
13 tell anybody that the tracks were coming off -- or excuse  
14 me -- the rollers were coming off the ground?

15                  ANSWER: Yeah. That was me and Joe. Yeah, we  
16 told Chris Miller, you know, when we, you know --

17                  QUESTION: Yeah. What did you tell him?

18                  ANSWER: You know, that thing is -- you've got  
19 the thing coming off the ground, yeah.

20                  QUESTION: Yeah. But you heard Mr. Bennett  
21 yell out that he didn't think it was safe to continue?

22                  ANSWER: Yes, sir.

23                  QUESTION: Okay. What was Mr. Miller doing in  
24 response when the crane operator is getting out of the -- out  
25 of the cab and saying he doesn't want to continue?

1                   ANSWER: Oh, he's just yelling. I don't  
2 remember exactly. He was yelling, screaming, "Pull it out,  
3 pull it out."

4                   *(Chris Prestridge deposition testimony stopped)*

5                   MR. ARNOLD: Okay. First of all, Chris  
6 Prestridge and Mickey Disotell, they have no dog in this hunt,  
7 right? They -- they are actually friends with Andrew Bennett.  
8 They had to testify against one of their friends who had  
9 actually gotten them the job. Now, let's look and see what  
10 Mickey Disotell says.

11                   All right. And I want to set the stage here  
12 real quick.

13                   Mary, hold it real quick.

14                   So Mr. McKinney tried to show you one portion  
15 of a 300-page deposition where he said that it could only --  
16 that it only happened one time right before the end, okay?  
17 Now read what Mr. Disotell actually said.

18                   *(Mickey Disotell deposition testimony played as*  
19 *follows:)*

20                   QUESTION: (By Mr. McKinney) All right. Well,  
21 is it true that the rollers only came off the ground one time  
22 during this operation?

23                   ANSWER: They were on and off. I think that's  
24 what I said. That he would -- Chris would make him hoist up  
25 and overload it and then he would slack back off. And then he

1 would hoist up and overload it. It was -- I don't know how  
2 many times exactly. There was one main time where, you know,  
3 we were all looking at it and concerned. But throughout that  
4 whole -- since it first got stuck the -- probably from the  
5 second attempt -- the first attempt they didn't pull that hard  
6 on it.

7                   The second attempt he pulled probably till --  
8 till about -- he probably gave it all it had that second  
9 attempt and then throughout the whole time up until the  
10 accident, it was just, you know, on and off.

11                   QUESTION: Okay. So if you testified this  
12 morning that the rollers only came off the ground one time,  
13 you're now telling us that they came off the ground more than  
14 once. Is that a fair statement?

15                   ANSWER: Yeah. Maybe I misinterpreted the  
16 question earlier.

17                   QUESTION: Okay. Let me ask you some more  
18 questions.

19                   ANSWER: Can I explain --

20                   QUESTION: Well --

21                   ANSWER: -- why it's not fair?

22                   QUESTION: Yeah. Fire away.

23                   ANSWER: I was -- the first part of that whole  
24 situation, I was in my crane. And -- and I videoed some of  
25 it. And -- and eventually it got worse and worse. And to me,

1 that was the worst spot for me to be stuck, in the cab of my  
2 crane. And thank God I got out because the boom landed on my  
3 cab, but -- but I got out of my cab because I felt unsafe.  
4 And I got in a position where -- where, you know, I could run  
5 away if I had to or whatever, but --

6 QUESTION: Is that what --

7 ANSWER: -- just in case.

8 QUESTION: (By Mr. Arnold) Okay. And did you  
9 tell -- you actually saw the rollers coming off the ground?

10 ANSWER: Yeah.

11 QUESTION: Did you tell Mr. Bennett, "Your  
12 rollers are coming off the ground"?

13 ANSWER: Yeah, and he slacked back off.

14 QUESTION: Okay. What -- what does that  
15 indicate when the rollers are coming off the ground?

16 ANSWER: Crane's overloaded.

17 QUESTION: (By Mr. McKinney) Did the other  
18 people standing there with you also do that?

19 ANSWER: On and -- on and off. Throughout  
20 however long that whole thing lasted, you know. It wasn't  
21 like it just lasted a few minutes and it was one person's job  
22 to just watch his rollers. It lasted for a long time. And  
23 like I say, Chris was signaling him to cable up the whole  
24 time. So what Andrew would do is -- he was doing what you  
25 typically do in that situation. You overload the crane to try

1 to get the auger to come unstuck and then you slack off. And  
2 then you -- then you get on it again. And you -- and you max  
3 out and then you slack off.

4           So I don't know exactly how many times they  
5 came off the ground. It was just back and forth several  
6 times, you know, maxing out every pull to try to free up the  
7 auger. It's -- you can't -- you can't free it up without --  
8 without putting a tremendous bind on it. That's what frees it  
9 up. So he would -- he would pull it until he could pull no  
10 more. And that's when he got out of the crane, you know,  
11 five, six times or whatever, where he would be tremendously  
12 overloaded and concerned. And he would get out, and he'd look  
13 at it hisself.

14           QUESTION: (By Mr. Arnold) Yeah. Did you hear  
15 Mr. Bennett say that he felt like continuing was unsafe?

16           ANSWER: Like those exact words or just --

17           QUESTION: What did you hear about -- what did  
18 you -- I mean, I'll ask you a new question.

19           What did you hear Mr. Bennett say?

20           ANSWER: Things like, "This is stupid. Look at  
21 the boom." It's not -- it's -- something to the effect, like,  
22 it's not -- "It's not working. It's not coming up." You  
23 know, stuff like that. Yeah. He -- he -- he felt unsafe.

24           QUESTION: You remember Mr. Bennett telling  
25 Mr. Miller that the crane was tipping?



1                   ANSWER:  Yes.

2                   QUESTION:  Okay.  And this was going on during  
3 the process when Mr. Bennett was trying to discontinue the  
4 operations?

5                   ANSWER:  Right.

6                   *(Mickey Disotell deposition testimony stopped)*

7                   MR. ARNOLD:  Okay.  And then you saw -- you see  
8 that board over there?  You remember I asked Mr. Bennett --  
9 that far board, what I call my small board before I got too  
10 many other boards, right?  All right.  We asked him, "What  
11 happens when you're tipping the crane?"  Okay.  And you know  
12 you're overloading the crane and when you overload the crane,  
13 you know the consequences are:  Equipment fail, collapsed.  
14 You might not know the exact way it's going to occur; but in  
15 fact, it's going to happen.

16                   So here's the question.  Ready?  This is  
17 Question 2, and it's also the answer to Question 8.  All  
18 right?  It's the same comment.  If you believe -- you have to  
19 either make a decision.  Do you believe Mickey Disotell?  Do  
20 you believe Chris Prestridge?  Do you believe the other crew  
21 members that say they told Miller the crane was in a bind, it  
22 was overloaded and it was tipping, okay?  Even Mr. Bennett  
23 says I remember Mickey telling me something.  Do you remember  
24 that?  Along those lines.

25                   You can either believe the crew members or you

1 can believe Mr. Miller; but if you believe Mickey Disotell,  
2 Chris Prestridge and the other crew members, what's that say?  
3 Miller had actual subjective awareness of the risk but  
4 nevertheless proceeded with conscious indifference, right? He  
5 knew. He knew. He knew the equipment was in a bind. He  
6 didn't care, right? And we know from that over there, from  
7 every witness that's testified, that if you overload the crane  
8 and you tip it on the back on its toes, you're substantially  
9 certain to cause injury or death, right? So if you believe  
10 the crew members, you have to answer "yes" to this. If you  
11 believe Chris Miller, well, then you would answer "no"; but  
12 it's mighty convenient that Mr. Miller doesn't remember any of  
13 this, right?

14 Now, let's talk about damages. This is  
15 something that I think is real important. Do you remember  
16 this example with Helen Reynolds, right? True? I want to  
17 talk a little bit about Mr. McKinney's analysis. What he did  
18 is he went to 2062 and said at that point in time a leg could  
19 cost as much as a million dollars, right? When he added up  
20 all the three prostheses, do you remember that, when he said  
21 that in closing, right? Well, why is that misleading?

22 Think about it. That's almost a -- it's not  
23 quite a thousand percent increase; but when you go back and  
24 you have that question, I want you to think about this: What  
25 did a Coke cost 50 years ago, right? It is much greater of a

1 percentage increase. What did a car cost 50 years ago? It's  
2 misleading to pick out the last six years 50 years from now  
3 and say that's ridiculous, okay? And candidly, when you're  
4 gambling with Mr. Lee's future, I also think it's a little  
5 ridiculous to say, So my -- this is what he said, "My experts,  
6 maybe they're light" is what he said. "So what I've done is  
7 I've done some math and do two times how much his leg costs  
8 and then set that aside for him in the future."

9 Remember that, and he came up with 4.2? So  
10 what I want to do is if you were the jury in 1994 and you  
11 accepted what he just told you, what would happen? Ready? He  
12 would multiple 13,800 by two and he would have about 27- to  
13 \$28,000 in today's dollars for Mr. Lee set aside. And he  
14 would be 80 percent short, at a minimum, of the price.

15 If you had done Berkel's math 15 years ago,  
16 he'd have \$52,000 and he would be short just 20 years later;  
17 and that's 15 and 20 years later. It's not 2060. What  
18 Mr. McKinney did is not evidence. You don't get to gamble  
19 with Tyler's future and just say, "Oh, that seems like a lot.  
20 So let's just do this times two times eight. There you go."  
21 Right?

22 That's irresponsible. It would be  
23 irresponsible to do off-the-cuff math to save Berkel money to  
24 then somehow -- because we know in real life, if you had done  
25 that 20 years ago, Mr. Lee would not be getting the state of

1 the art technology that he deserves because look, in just 20  
2 years it went from 13,000 to 89,000. And we know today it's  
3 102 to 142, right? Think about that. He chose something 50  
4 years from now and said how could it grow that fast; but if  
5 you look at the percentages, it actually grew faster in the  
6 last 20 years, right?

7           But he used that as a basis to try to get you  
8 not to award based upon evidence but based on rough math,  
9 right? He's asking you to gamble with Tyler's future with  
10 off-the-cuff math, and he's asking you for one reason. Why?  
11 Because Berkel still hasn't learned its lesson. All he's  
12 doing is trying to get you distracted to try to save his  
13 client money.

14           Call a spade a spade. It is what it is.  
15 That's what he's doing. This is not in evidence rough math  
16 and let's just double and maybe we'll add a little bit over  
17 here. I think he said, "Well, let's -- maybe we'll just throw  
18 in some medications over here." Where'd that come from?  
19 Because your expert had \$400 set aside, right? That's not  
20 evidence.

21           Is there anybody that was more credible on this  
22 stand than Mr. Kistenberg, I think, throughout this entire  
23 trial? I don't think so. I'll submit that to you, with the  
24 exception of my clients, right? Is there anybody more  
25 credible in putting together an analysis of what his future

1 looks like? No. He said, Well, let's -- a little rough math  
2 off the top of his head, he said, "Well, let's give \$85,000 to  
3 his wife," right? You remember that? To his wife, \$85,000  
4 over 50 years, you know what that comes out to? Somewhere  
5 between 1,000 and 2,000. My math's not perfect, right?  
6 Basically he said, "Here you go, Leigh Ann. Here's a hundred  
7 dollars a month for the next 50 years for what you're going  
8 through."

9 Does that seem right to you? Seriously? This  
10 whole discussion about, "If you're a really lucky American and  
11 you have a house, you've got a retirement, you know, and if  
12 you could set that money aside, you know, somebody would be  
13 really happy." But why does that play into what his damages  
14 are?

15 THE COURT: You have ten minutes, Counsel.

16 MR. ARNOLD: How does that relate to Mr. Lee's  
17 damages? Because Mr. Lee still doesn't have his leg in that  
18 scenario. He still has to deal with crutches for the next 50  
19 years, right? I mean, I don't understand how a house and  
20 "let's put a retirement aside for him" relates to what Tyler  
21 Lee has not only gone through but will go through for the next  
22 50 years. Does that make sense? You know what it is? It's  
23 distractions. "Maybe if I can say, 'Wow, it would be great if  
24 we can do this, this and that over here,' it'll focus them  
25 away to what he actually went through and what he's going to

1 go through."

2           When you go back to deliberate, when you go  
3 back to consider all of the circumstances, I want you to  
4 promise me that you will consider 50 years, okay? Because  
5 Mr. Lee is going to live with your determination. There  
6 are -- this is a real case. This is a real life. You just --  
7 there are real consequences -- okay -- to your decisions.

8           I respectfully submit Berkel, with all that  
9 they have caused and all the harm that they have brought about  
10 this family, doesn't get to pick and choose which parts they  
11 have to pay, right? They don't get to come down here and over  
12 and over tell you they didn't do anything wrong. "It's the  
13 worst accident in history, but we'd do it the same way again."  
14 They don't get to come down here and say -- have no  
15 credibility by sitting here all through trial and despite the  
16 testimony and yet they still can stand here and look you in  
17 the face and say that they want you to put a 0 percent on  
18 there, right?

19           He kept talking about real word and my world.  
20 When you say things to me and they turn out to be not true,  
21 you lose credibility, right? So if he has come down here and  
22 their witnesses get on the stand and say things like, "We're  
23 not responsible at all," in my mind, I don't assign them  
24 credibility. I suggest you shouldn't either. And the reason  
25 I say that is so then in the second part when they get up and

1 he tries to do quick math as a way to save his client money --  
2 right -- that should get no credibility.

3 Remember, after this trial Berkel gets to go on  
4 doing its business. Tyler -- or excuse me. You're going to  
5 go home and go back to your everyday life. The Judge will  
6 call their next case. Everybody in this courtroom walks  
7 out -- right -- except Tyler and Leigh Ann. And they live  
8 with the consequences of your decision for the next 50 years.  
9 If you choose to believe the Berkel way in calculating  
10 damages -- okay -- you are gambling with his future.

11 Every witness in this case has said he deserves  
12 the very best medical care and he deserves the  
13 state-of-the-art technology. If you gamble their way, he  
14 doesn't receive it. That's a fact. I don't think that you  
15 want to gamble with Tyler's future. When you go back, you  
16 start talking about the elements of the damages -- okay -- I  
17 want you to make me this promise: You don't talk about a  
18 house or all these things that Mr. McKinney brought up that  
19 have nothing to do. I want you to isolate each element. I  
20 want you to look to the side and say 24 hours a day, 365 days  
21 a week -- or a year. Sorry. And 50 years, okay?

22 I want you to look at that and then say: What  
23 is Mr. Lee going to go through for these 50 years when it  
24 comes to physical impairment, okay? Don't let him kind of  
25 rough math over it. I want you to promise if someone says,

1 "Well, that's -- we shouldn't do that or that's too much," I  
2 want you to fight for Mr. Lee. I want you to dig in and say,  
3 "No, that's not fair. What they said is not based upon  
4 evidence. They didn't talk at all about what Tyler is going  
5 through or will go through." And then he says, "Well, all  
6 this is speculative and let's just assume it's all going to  
7 get better in the future," right?

8 That's not right. Berkel cannot, cannot say to  
9 you with a straight face in opening statements and then watch  
10 every witness get on and say they're at fault and then come  
11 back to you with another straight face and say they didn't do  
12 anything wrong and as a result, you should not give Tyler what  
13 he deserves.

14 THE COURT: You have five minutes, Counsel.

15 MR. ARNOLD: Now, question -- the last question  
16 you have to answer: Punitive damages. Okay. In the  
17 instructions that's the only time that you consider net worth,  
18 right? It's the only time. I want you to ask yourself if  
19 after the worst accident in history they have taken no action  
20 against any employee; they have not docked a single day's pay;  
21 they have not fired anybody, terminated them, suspended  
22 anybody; they've done no root-cause analysis; 20 months later  
23 they still say they don't know what happened, but they just  
24 know it's not their fault, ask yourself this question: Did  
25 they learn their lesson?





1 conversation. It's time for them to talk. It's time for them  
2 to do something different. Don't let them pull the wool over  
3 your eyes. The evidence in this case is overwhelming. You  
4 can either choose to believe the Chris Millers and the Blums  
5 of the world; or you can say, "You cannot recklessly proceed  
6 ahead nevertheless the consequences."

7 I ask you to render a verdict. I ask you to  
8 fight for Tyler and Leigh Ann. I know you're tired. I'm  
9 tired, okay? But when you get tired or when someone else is  
10 saying, "Let's go home" or this issue -- or, "Let's not worry  
11 about it," your verdict has consequences in this courtroom for  
12 this family and for the way Berkel does business.

13 On behalf of the family, I thank you again. I  
14 thank you for your time and your consideration. So let's get  
15 to it.

16 THE COURT: Thank you.

17 All right. Ladies and gentlemen, couple  
18 things. First of all, I'm going to have you retire to the  
19 jury room; but you need to leave your phones.

20 THE BAILIFF: We can put the phones right here  
21 by this TV.

22 THE COURT: Okay. Glen's got a place for your  
23 phones because we've rearranged the courtroom. I'm like, "Our  
24 table's gone."

25 So anyway, please leave your phones right there

1 on the -- by the TV where Glen will designate for you. Take  
2 your notes. Take whatever you want to take with you. I will  
3 send back the original charge with Glen. He will give you  
4 some instructions about how to communicate with the Court if  
5 you need to.

6 And I need to see, please, Mr. Vo and  
7 Ms. Scanlin here at the Bench.

8 Thank you all, and you're free to retire to  
9 begin your deliberations.

10 *(Jury retired for deliberations)*

11 *(Requested excerpt concluded)*

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1 STATE OF TEXAS )

2 COUNTY OF BRAZORIA )

3 I, Robin Rios, Official Court Reporter in and for  
4 the 149th District Court of Brazoria County, State of Texas,  
5 do hereby certify that the foregoing contains a true and  
6 correct transcription of all portions of evidence and other  
7 proceedings requested in writing by counsel for the parties to  
8 be included in this volume of the Reporter's Record, in the  
9 above-styled and numbered cause, all of which occurred in open  
10 court or in chambers and were reported by me.

11 I further certify that the total cost for the  
12 preparation of this Reporter's Record is \$914.00 and was paid  
13 by VB Attorneys.

14 WITNESS MY OFFICIAL HAND this the 14th day of July,  
15 2015.

16 /s/Robin Rios

17 Robin Rios, Texas CSR 8910  
18 Expiration Date: 12/31/2016  
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