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APPELLATE COURT CAUSE NO. 14-15-00787-CV
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Clerk

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

JURY TRIAL

On the 21st day of April, 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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JURY TRIAL**

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(NO EXHIBITS)**

PROCEEDINGS

1
2 THE COURT: Anything we need to do before we
3 bring the jury in?

4 MR. ARNOLD: Two brief limines, Your Honor.

5 THE COURT: All right.

6 MR. ARNOLD: One's, I think, agreed; and the
7 other one we need to discuss.

8 THE COURT: Okay.

9 MR. ARNOLD: Your Honor, I apologize. Here's
10 two copies for Your Honor.

11 THE COURT: Thank you.

12 MR. ARNOLD: We filed limines on mentioning
13 the fact that Link-Belt or Dixon had been sued or settled.
14 As to Dixon, they're agreed. As to Link-Belt, we have a
15 disagreement. Your Honor, I agree that they get a
16 submission on the jury charge for a settling defendant, and
17 they can argue all they want that it's all Link-Belt's
18 fault. That's fine. I don't think they get to say that
19 they're sued, they're not here, they settled, they paid
20 money, whatever it might be, as to Link-Belt.

21 They can argue till they're blue in the face
22 that Link-Belt's responsible for it; but I don't think that
23 they actually get to say that, in fact, we sued and that
24 they settled.

25 MR. MCKINNEY: We absolutely get to say that

1 Link-Belt was sued --

2 THE COURT: Right.

3 MR. MCKINNEY: -- and that they were a party
4 in this case up until recently. And the reason why we get
5 to do that is because this case is full of Link-Belt
6 testimony and Link-Belt documents and we're going to be
7 arguing that Link-Belt was trying to throw us under the bus
8 and Link-Belt knew that it was guilty and -- you know, we
9 have a lot of things to say about Link-Belt and we're
10 allowed to say it.

11 The fact that they were a party to this case
12 totally puts so much of what they said and did into context,
13 but we can't talk about settlement. I agree with that.

14 MR. DIAMOND: They're still a party,
15 actually.

16 THE COURT: I think they get to talk about
17 the fact they were a party. I don't think you get to go
18 into, Well, they paid a lot of money or --

19 MR. MCKINNEY: No --

20 MR. ARNOLD: Okay. So they can say that they
21 were a party at --

22 THE COURT: Up until --

23 MR. ARNOLD: -- one point --

24 THE COURT: -- recently -- yeah.

25 MR. ARNOLD: Okay.

1 THE COURT: The jury can draw their own
2 conclusions.

3 MR. ARNOLD: And just -- Judge, not to pick
4 at Mr. McKinney here; but --

5 MR. McKINNEY: You suspect that I might --

6 MR. ARNOLD: No, not like --

7 MR. McKINNEY: -- get into a gray area.

8 MR. ARNOLD: Not that, They were a party up
9 until Friday at 4:00 o'clock. You know, I think he can say
10 that they were a party at some point, not --

11 MR. McKINNEY: Up until very recently.

12 THE COURT: I just think that you can say
13 they were a party and just leave it at that.

14 All right. So --

15 MR. ARNOLD: So Dixon's agreed and then
16 Link-Belt, I guess, we have an understanding amongst the
17 attorneys about what we can and can't do.

18 MR. DIAMOND: So we'll withdraw the
19 memorandum of settlement between the two of you as an
20 exhibit.

21 MR. ARNOLD: Yeah. Thanks.

22 And then, Judge, I've shown them my slides
23 for opening. There's one that Mr. McKinney disagrees with
24 where I talk about what the black box data says. It doesn't
25 actually have the exhibit in there.

1 THE COURT: Okay.

2 MR. ARNOLD: I think I'm entitled to -- Your
3 Honor did not exclude it under the limine. So I'm entitled
4 to go into it in opening. I'm just not going to show them
5 the actual exhibit.

6 MR. DIAMOND: We oppose that as well, Your
7 Honor.

8 THE COURT: You're going to talk about the
9 black box and what it showed?

10 MR. ARNOLD: Yeah. It showed that it was
11 overloaded 211 percent and that it had been overloaded in
12 the past, 1169 times since 2009.

13 MR. DIAMOND: We have a huge problem with the
14 overload count because they have not shown in any way, shape
15 or form that it is even remotely reliable. And the evidence
16 has been very, very clear that this black box was in
17 different cranes with different booms with different
18 configurations on different jobsites. And they have deposed
19 no one from any other jobsite. They have deposed no
20 operator from any other jobsite. They have not gotten any
21 other records dealing with any other configuration, crane or
22 any usage --

23 THE COURT: Are you telling me the black box
24 in the crane was moved from crane to crane?

25 MR. DIAMOND: Yes.

1 MR. ARNOLD: One time.

2 MS. KNIGHT: It was one time, Your Honor.
3 Initially it was put into the crane in 2011, in the incident
4 crane. And then this was kind of eluding to what I argued
5 on Friday was, the problem we have is that it's -- the
6 computer is showing the overload count and it was only in
7 the crane for two, four years before the accident; and also,
8 they changed the boom out on this crane over time.

9 So it's -- what I'm concerned about primarily
10 is that it's going to -- once again, we talked about the
11 fatigue issue and really it's just got nothing to do with
12 this accident.

13 MR. DIAMOND: It's misleading because there's
14 no --

15 MS. KNIGHT: It's very prejudicial.

16 MR. DIAMOND: -- frame of reference.

17 MR. ARNOLD: Judge, Chuck might -- I can hear
18 him breathing right next to me.

19 The crane computer -- the crane was made in
20 2009, and the computer was taken off another 2009
21 computer[sic]. Now, they might try to argue that all these
22 overloads happened prior to 2011; but that's as to the
23 credibility of the evidence. They can argue if that
24 seems --

25 THE COURT: Does the box show when they

1 occurred?

2 MS. KNIGHT: No.

3 MR. DIAMOND: No.

4 MR. CLAY: Well, wait a second. It kind of
5 does.

6 MS. KNIGHT: It does on the day of the
7 accident. We can show on the day of the accident what
8 happened on the day of the accident; but as far as the other
9 overloads that are reflected on the computer, there is no
10 way of knowing when those occurred.

11 THE COURT: Okay. And when the box was taken
12 off the original crane, was it -- were the statistics and
13 the data downloaded at that time?

14 MS. KNIGHT: No, it wasn't, Your Honor.

15 THE COURT: So there's no way to tell --

16 MR. CLAY: Wait a second. That's a little
17 bit misleading, guys. It was downloaded -- this thing
18 happened September 30th. It was downloaded October 4, five
19 days after this. I mean, yeah, it wasn't at the jobsite.
20 They sent it to --

21 THE COURT: No, I'm not worried about that.

22 MR. CLAY: Yeah. I mean, it was --

23 THE COURT: I'm worried about --

24 MR. CLAY: -- right after --

25 THE COURT: -- if it came off another crane,

1 how you know what happened on which crane.

2 MR. CLAY: Well, Maxim shouldn't benefit from
3 the fact that they don't choose to track their data when
4 they move the computer from one crane to another. And we've
5 got an expert who's critical of that fact, that they had
6 that data available and for 600 bucks they could have had
7 Link-Belt tell them, What's our history on this crane.

8 THE COURT: I love the fact that y'all are
9 raising your hands. Thank you.

10 Yes, Mr. McKinney? Your turn.

11 MR. MCKINNEY: The black box -- the black box
12 data is hocus-pocus hearsay, and I'm happy to illustrate
13 that understated point.

14 THE COURT: Okay. You don't have to do that.
15 I'm following you.

16 MR. MCKINNEY: The way this data is
17 gathered -- it's not printed out from a computer, okay? In
18 fact, the first red flag we ought to have is we have 1,167
19 prior things, overloads, but we can't identify the date or
20 anything else. But conveniently, for the day of the
21 accident, we have all kinds of data. We have boom angles.
22 We have radiuses. We have overload percentages.

23 Now, all of this information is supposedly
24 determined by gazing at the screen and then interpreting
25 data that appears on the screen and then writing it down,

1 okay? Now, the person who interpreted the screen, who wrote
2 it down, hasn't been deposed, hasn't testified and probably
3 isn't going to testify. So what we have is we have other
4 people who may be called to testify that -- to say, We saw
5 this person essentially watch TV and write down what he
6 heard the characters say, and trust me, he wrote it down
7 just the way they said it.

8 THE COURT: All right. Well, here's the deal
9 and -- okay. Go ahead, quickly.

10 MR. CLAY: Your Honor, I want to give this to
11 you. This is a notebook of our trial brief on this issue of
12 the testimony from the corporate representative of
13 Link-Belt. It's got some citations to Maxim's corporate rep
14 who says this is the most critical data in the case.

15 I mean, this is Maxim's box. They can't
16 benefit and try to exclude the data which they own, and that
17 we've had explanation after explanation. I believe Maxim
18 cited this and said it was highly relevant and probative in
19 their opposition in their motion for summary judgment
20 against Berkel.

21 MS. KNIGHT: Your Honor, that's with respect
22 to the day of the accident. That's not with respect to the
23 total overload count for the computer.

24 THE COURT: Okay. Well, here's what we're
25 going to do. For opening don't go into what the black box

1 showed.

2 MR. ARNOLD: Okay.

3 THE COURT: The fact that there was a black
4 box, you can talk about. Other than that, don't go into
5 what it showed and we'll deal with that as we get to it and
6 I see what the state of the evidence is and have time to
7 look at this law.

8 MR. ARNOLD: Can you give me two seconds,
9 Judge, to pull it from my PowerPoint?

10 MS. BARGER: Your Honor, I got that yesterday
11 and I have a response in the works and I'll get it to you
12 this morning.

13 THE COURT: That's fine. Thank you.

14 MR. CLAY: I want to say a couple of other
15 things about this because our first witness in this case is
16 going to talk -- if you allow, Your Honor, is going to talk
17 about it. He's an expert. He's entitled to rely upon
18 hearsay even if you deem it --

19 THE COURT: That's true.

20 MR. CLAY: -- hearsay. So we're clear on
21 that because otherwise it's going to change the order of
22 witnesses.

23 THE COURT: No. You're fine.

24 MR. CLAY: Okay. Thank you.

25 MR. MCKINNEY: If we're going to -- if we're

1 going to be using experts as a funnel to just get in any
2 kind of hearsay at all --

3 THE COURT: He doesn't get to talk about what
4 it was. He gets to rely on -- I mean, experts can rely on
5 hearsay --

6 MR. DIAMOND: They can't regurgitate it.

7 *(Simultaneous discussion)*

8 THE COURT: -- but they don't get to go
9 through it, bam, bam, bam, bam, this is what it says --

10 MR. McKINNEY: Well, actually --

11 THE COURT: -- but they get to rely on it.

12 MR. McKINNEY: Actually -- well, there are
13 limits to that.

14 MS. BARGER: There actually are.

15 MR. McKINNEY: Experts are not an exception
16 to the hearsay rule. Experts, from time to time in the
17 normal course of their business, rely on what would be
18 hearsay if offered into court. A doctor relies on another
19 doctor's records. An oil field driller relies on a
20 third-party testing certificate even though that certificate
21 technically would be hearsay as to that party. But
22 courtroom experts whose sole job is to come into court and
23 opine for money are not allowed to shoehorn into evidence
24 otherwise clearly inadmissible evidence and --

25 THE COURT: I just said he doesn't get to

1 talk about what it said. Now, he can say he relied on
2 something but; he doesn't get to go through, This is what it
3 said, bam, bam, bam. Just because he relied on it does not
4 make it admissible.

5 MS. BARGER: No, that's correct.

6 MR. McKINNEY: If he doesn't say what the
7 numbers are, if he doesn't say that I saw computer evidence
8 of overload, I'm fine with that.

9 THE COURT: Well, you guys, sometimes you're
10 just going to have to object when it comes up. We're not
11 going to rule on everything prior to it coming up. We've
12 already done a whole lot of that. I think you have your
13 parameters.

14 You guys get 45 minutes to open.

15 You guys have an hour and a half.

16 We need to move.

17 MR. McKINNEY: Check my makeup, and I'll be
18 right back?

19 THE COURT: Check your makeup.

20 MR. MENA: Your Honor, just so I'm clear: He
21 can talk -- he can't talk about numbers. Anything above and
22 beyond that, I need to object to at the time.

23 THE COURT: Object at the time if it comes
24 out.

25 MR. CLAY: You're not saying right now he

1 can't talk about the numbers. You're saying we'll deal with
2 it when the evidence comes in and you'll read the trial
3 brief.

4 THE COURT: Exactly.

5 MR. CLAY: Right.

6 THE COURT: That's where we are. I will be
7 glad to read your briefs, and we'll go from there.

8 I've signed Dixon's order and Link-Belt's,
9 which I'm just making an order out of your motions because I
10 didn't have orders.

11 MR. CLAY: I know, Judge. I'm sorry.

12 THE COURT: That's fine. I just wanted you
13 to know what I'm doing.

14 All right. Are y'all ready for the jury?

15 MR. MCKINNEY: Yes.

16 THE COURT: I need to finish instructing them
17 this morning, and then we'll do opening.

18 MR. MCKINNEY: Okay, Judge.

19 THE COURT: Bring them in, Glen.

20 THE BAILIFF: Come to order.

21 *(Jury enters courtroom)*

22 THE BAILIFF: All present, Your Honor.

23 THE COURT: All right. Be seated, please.

24 All right. Ladies and gentlemen, good

25 morning. I'm going to give you the instructions that I did

1 not give you yesterday so we could let you go home at a
2 decent hour. And I will read these to you. You have a copy
3 that we provided for you yesterday; and if you want to
4 follow along, you can.

5 You have been chosen to serve on this jury;
6 and because of the oath you have taken and your selection
7 for the jury, you have become officials of this court and
8 active participants in our system of justice. You have each
9 received a set of written instructions and I'm going to read
10 them with you now and some of them you've heard before and
11 some are new.

12 First, turn off all your cell phones and
13 other electronic devices. While you're in the courtroom and
14 while you're deliberating, do not communicate with anyone
15 through any electronic device. For example, do not
16 communicate by phone, text message, e-mail message, chat
17 room, blog or social networking website such as Facebook,
18 Twitter or Myspace. I will give you a number where others
19 may contact you in case of an emergency.

20 Do not post information about the case on the
21 Internet before these court proceedings end and you are
22 released from jury duty. Do not record or photograph any
23 part of these court proceedings because it is prohibited by
24 law. To avoid looking like you're friendly with one side of
25 the case, do not mingle or talk with the lawyers, witnesses,

1 parties or anyone else involved in this case. You may
2 exchange casual greetings like "hello" and "good morning";
3 but other than that, do not talk with them at all. They
4 have to follow the same instructions. So please don't be
5 offended when they do. Do not accept any favors from the
6 lawyers, witnesses, parties, or anyone else involved in the
7 case; and do not do any favors for them. This includes
8 favors such as giving rides and food.

9 Do not discuss this case with anyone, even
10 your spouse or a friend, either in person or by any other
11 means, including by phone, text message, e-mail message,
12 chat room, blog, or social networking website such as
13 Facebook, Twitter, or Myspace. Do not allow anyone to
14 discuss the case with you or in your hearing. If anyone
15 tries to discuss the case with you or in your hearing,
16 please tell me immediately. We don't want you to be
17 influenced by something other than the evidence admitted in
18 the courtroom.

19 Do not discuss this case with anyone during
20 the trial, not even with the other jurors until the end of
21 the trial. You should not discuss the case with your fellow
22 jurors until the end of the trial so that you do not form
23 opinions about the case before you've heard everything.
24 After you have heard all the evidence, received all of my
25 instructions, and heard all of the lawyers' arguments, then

1 you will go to the jury room to discuss the case with the
2 other jurors and reach a verdict. Do not investigate this
3 case on your own. For example, do not try to get
4 information about the case, lawyers, witnesses, or issues
5 from outside this courtroom.

6 Don't go to places mentioned in the case to
7 inspect them. Don't inspect items mentioned in this case
8 unless they are presented as evidence in Court. Don't look
9 up anything in the law book, dictionary, or public record to
10 try to learn more about the case. Don't look up anything on
11 the Internet to try to learn more about the case or let
12 anyone else do any of these things for you. This rule is
13 very important because we want a trial based only on the
14 evidence admitted in open court.

15 Your conclusions about this case must be
16 based only on what you see and hear in this courtroom
17 because the law does not permit you to base your conclusions
18 on information that has not been presented to you in open
19 court. All the information must be presented in open court
20 so the parties and their lawyers can test it and object to
21 it.

22 Information from other sources, like the
23 Internet, will not go through this important process in the
24 courtroom. In addition, information from other sources
25 could be completely unreliable. As a result, if you

1 investigate this case on your own, you could compromise the
2 fairness to all parties in this case and jeopardize the
3 results of this trial. Do not tell other jurors about your
4 own experiences or other people's experiences. For example,
5 you may have special knowledge of something in the case,
6 such as business, technical, or professional information.
7 You may even have expert knowledge or opinions or you may
8 know what other -- what happened in this case or another
9 similar case.

10 Do not tell the other jurors about it.

11 Telling other jurors about it is wrong because it means that
12 the jury will be considering things that were not admitted
13 in court. Do not consider attorneys' fees unless I tell you
14 to, and do not guess about attorneys' fees. Do not consider
15 or guess whether any party is covered by insurance unless I
16 tell you to.

17 During the trial, if taking notes will help
18 focus your attention on the evidence, you may take notes
19 using the materials the Court has provided. Do not use any
20 personal electronic devices to take notes. If taking notes
21 will distract your attention from the evidence, you should
22 not take notes. Your notes are for your own personal use.
23 They are not evidence. Do not show or read your notes to
24 anyone, including other jurors. You must leave your notes
25 in the jury room or with the bailiff and the bailiff is

1 instructed not to read your notes and to give your notes to
2 me promptly after collecting them from you. I'll make sure
3 your notes are kept in a safe, secure location and not
4 disclosed to anyone else. You may take your notes back into
5 the jury room and consult them during deliberations, but
6 keep in mind that your notes are not evidence.

7 When you deliberate, each of you should rely
8 on your own independent recollection of the evidence and not
9 be influenced by the fact that another juror has or has not
10 taken notes. After you complete your deliberations, the
11 bailiff will collect your notes; and when you're released
12 from jury duty, the bailiff will promptly destroy your notes
13 so that no one can read what you wrote.

14 I will decide the matters of law in this
15 case. It is your duty to listen to and consider the
16 evidence and to determine fact issues that I may submit to
17 you at the end of the trial. After you've heard all the
18 evidence, I will give you instructions to follow as you make
19 your decision. The instructions also will have questions
20 for you to answer. You will not be asked and you should not
21 consider which side will win. Instead, you will need to
22 answer the specific questions I give you.

23 Every juror must obey my instructions; and if
24 you do not follow these instructions, you will be guilty of
25 juror misconduct. I may have to order a new trial and start

1 this process all over again. This would waste your time,
2 parties' money and would require the taxpayers of this
3 county to pay for another trial.

4 Does everybody understand these instructions?

5 UNIDENTIFIED JURORS: Yes, ma'am.

6 THE COURT: All right. If you don't, let me
7 know now.

8 Please keep these instructions with you and
9 review them as we go through this case; and if anyone does
10 not follow those instructions, please let me know.

11 All right. Thank you for being here this
12 morning. I hope everybody got their coffee, water, whatever
13 they needed.

14 Plaintiff, ready to open?

15 MR. ARNOLD: I think so, Judge.

16 THE COURT: All right. You may proceed.

17 MR. ARNOLD: Quick minute to set up, Your
18 Honor?

19 THE COURT: Yes, sir.

20 MR. ARNOLD: May it please the Court?

21 THE COURT: Thank you.

22 MR. ARNOLD: Good morning.

23 UNIDENTIFIED JURORS: Good morning.

24 MR. ARNOLD: Thank you for being with us
25 today on behalf of Tyler Lee and Leigh Ann Lee. I want to

1 thank you for your service and helping us in this case. You
2 might be wondering, Why are we here? We are here because a
3 Berkel superintendent on a jobsite ignored all of the
4 warning signs of an impending crane collapse, ignored all of
5 his other crew members who told him to stop the job, and the
6 crane collapsed and ultimately fell upon Tyler Lee who was
7 not even a part of the job and was over a hundred feet away.

8 We are here because Maxim had the -- the
9 owner of the crane had the opportunity and the
10 responsibility to prevent this accident, and they did not.
11 They brought the crane to the jobsite. They assembled it.
12 They did not test the alarms for the overload. They turn it
13 over to a crane operator who should not have been operating
14 the crane. He lacked the sufficient experience, which you
15 will learn; and then when they saw how Berkel had configured
16 the equipment in an unsafe way, they chose not to stop the
17 job.

18 It is undisputed in this case that Tyler Lee
19 played no role in bringing about this accident. It is
20 undisputed in this case that Tyler Lee and his family have
21 suffered tremendously, and will, for the next 50 years. We
22 are here because they do not want to take responsibility for
23 all the harms they have caused. We are here because we need
24 you to make them take responsibility for all the harms that
25 they have caused to this family. And for what you decide in

1 this trial will last Tyler Lee and Leigh Ann Lee and their
2 family for a lifetime. Make no mistake, you have a
3 incredible power and responsibility before you.

4 Now, I've got a little -- about an hour and a
5 half to summarize what's taken 30 plus depositions and a
6 year and a half to show you. I'm going to tell you where
7 I'm going first. I'm going to give you kind of the
8 30,000-foot view, and then we're going to start back over.
9 I'm going to introduce you to Tyler and his family and kind
10 of walk you through what led up to the day of the accident,
11 the day of the accident, and what's happened since.

12 30,000-foot view. In Skanska -- who Mr. Lee
13 works for, who is building a building for itself -- it was
14 out in a West Memorial jobsite. The -- about a month
15 before, they had contracted with Berkel to drill the pilings
16 down into the ground that support the foundation. The --
17 about a month before, Berkel needed a crane. So they asked
18 Maxim to provide them a crane, which Maxim did. It was a
19 200-ton pound Maxim crane. Maxim came to the jobsite and
20 spent two days assembling the crane for use. During those
21 two days, Maxim's responsibility is to do an adequate
22 inspection; and during those two days, Maxim would learn who
23 it was that would be operating the crane, a young man named
24 Mr. Bennett.

25 Now, Maxim's corporate representative said,

1 the head of safety, that "I can tell in five minutes whether
2 someone's got the experience and the knowledge to operate a
3 crane."

4 Maxim chose not to use that two days to learn
5 what this young man's experience was. Had Maxim chose to
6 ask any questions, or the right questions, they would have
7 learned that Mr. Bennett had never operated a crane of this
8 type, he is -- I don't remember exactly if he was 21 years
9 old, but he was a young man -- Mr. Bennett had not read the
10 crane operator's manual, that Mr. Bennett had no knowledge
11 of how to use the crane computer, that Mr. Bennett did not
12 have the requisite experience to be operating this crane;
13 but they didn't. This is not renting a car. This is
14 operating a 200-ton crane.

15 Going forward, Maxim leaves. Now, Maxim sees
16 how Berkel adds equipment to its crane because the way it's
17 supposed to work is if you add additional equipment to the
18 crane, it affects the center of gravity and things of that
19 sort. They added a large power pack. They've got these
20 hoses hanging from the -- this is the boom, and Maxim and
21 Berkel are supposed to get permission from Link-Belt to see
22 if that's okay. It's undisputed had they asked Link-Belt,
23 Link-Belt would have said no; and you'll hear from a
24 Link-Belt representative.

25 Going forward, Maxim leaves. Maxim sees it's

1 unconfigured in a safe way, calls back to the office; but
2 they say that's Berkel's problem. Importantly, going
3 forward to the day of the accident -- and we'll get into it
4 in much more detail -- there were warning signs all about.
5 They had stuck an auger into the ground, and they could not
6 get it out. So after the foreman initially tried to unstick
7 the auger pursuant to protocol, he said, "We can't get it
8 out. Let's cut it and move on," because there's no reason
9 risking the safety of anybody for some stupid auger, right?

10 But the superintendent said no. Came down
11 the hill after the crew had made the decision to cut the
12 auger, said no, cursed at them, told them get out of the
13 way. They get into a fight. He leaves the jobsite; and for
14 the next 40 minutes, that superintendent ignores every
15 warning sign possible. There is -- it's under so much
16 pressure, oil is shooting out of the seams of all the hoses
17 and misting the entire crew.

18 The crane operator literally is wiping down
19 his windshield so that he can see. The crane operator, four
20 times, gets out of his crane cab -- and imagine this, a
21 young 21-, 22-year-old man -- and is screaming to stop the
22 job. You will hear from multiple witnesses that they all
23 told Chris Miller to stop, but he didn't care. He said,
24 "Get back in. Keep going." And they kept pulling on the
25 auger, pulling on the auger such that even with all this

1 weight added to the back, it is coming up on its toes. And
2 eventually you pull, you pull, you pull, and it all comes
3 down.

4 Those -- those gentlemen were lucky that they
5 did not lose their lives or an injury. I don't know how.
6 Tyler Lee was not so lucky. Tyler Lee, who was up the
7 hill -- ultimately it fell and severed his leg; and he's
8 been living with the consequences since.

9 Before -- I want to talk to you now and go
10 backwards in time. Let's talk a little bit about Tyler Lee.
11 He's from a little town called Nome, Texas. You might not
12 know where that is because I'm not sure that I knew where it
13 was when he told me, but it's about 30 miles from Beaumont.
14 Tyler Lee grew up on a -- in Nome, population 588. He
15 worked his way through school. Worked a variety of
16 construction jobs and was able to go to Texas A&M. Mr. Lee
17 self-financed his way through school and at Texas A&M, he
18 was fortunate to meet his beautiful bride, Leigh Ann, and
19 they became married. They both graduated from Texas A&M,
20 and Tyler took a job with Skanska.

21 Tyler excelled at his job. Tyler was the
22 youngest superintendent in Skanska history. Tyler has only
23 worked for one employer his entire life and has progressed
24 through the ranks. Tyler and Leigh Ann are fabulous people.
25 Like a lot of young people in their early 30s, Tyler is a --

1 they love to go to football games. They love to be outside.
2 They -- I kind of like this picture of Tyler giving him
3 his -- your strongman there on the far right; but Tyler and
4 Leigh Ann before this accident, they were on top of the
5 world. They had just had their first young daughter. Leigh
6 Ann was excelling at her job. Tyler was doing well in his
7 job, and Sydney Rose was born. And that's the last picture
8 that I can find of Tyler with his leg.

9 Baby was born approximately two months before
10 this accident; and as Leigh Ann would describe it, she felt
11 like they were on top of the world. They were doing well at
12 work. They were doing well at home. They -- strong family,
13 young baby, everything was right in the world; and then this
14 accident happened.

15 Now, I want to talk a little bit in more
16 detail about the events leading up to the day of the
17 accident. So if we go to the next slide, this is a picture
18 of the West Memorial jobsite. This is before the accident,
19 but Berkel's job is to otherwise drill pilings for the
20 foundation of the building that they're going to build. And
21 this is a Skanska building that's there, which is the reason
22 Tyler Lee was there, okay?

23 So again going back in time, they needed a
24 crane; and these cranes, they don't come this way, right?
25 They've got to get assembled. So in August 29th -- so the

1 accident is September 30th -- Maxim provides the crane; and
2 Maxim doesn't just say, "Here's a crane. There you go."
3 Maxim's responsibility is to assemble it, which took
4 approximately two days, and then they've got to do all the
5 inspections to make sure that the crane is functioning in
6 all the proper ways. Maxim, in fact, assembled the crane
7 with the crane operator, Mr. Bennett; and at that point in
8 time, they did two days' worth of inspections. Importantly,
9 later on -- and I'll come back to this -- they chose not --
10 or for whatever reason, although they checked that they
11 checked the alarms, they didn't actually check the alarms.
12 That will become important later on.

13 When Maxim -- I'm going to talk a little bit
14 about this various equipment here. Maxim knew that Berkel
15 was going to add all of this various equipment because Maxim
16 knew Berkel was in the job of these auger cast pilings, and
17 Maxim saw at various points in time before the accident how
18 they were going to add this various equipment. You'll see
19 that hoses are draped from the booms. They've added a
20 spotter arm and welded it on, and they've added a giant
21 power pack in addition to the counterweight.

22 Well, all these things affect the integrity
23 of the crane and affect its center of gravity. Maxim knew,
24 for example, that Berkel added a PIR system and literally
25 put it in front of the crane computer. Berkel put this

1 equipment in front of the crane computer where the crane
2 operator couldn't even see the computer, the computer that
3 tells you what your capacity is, what your load is, what
4 your weight is. It's the equivalent of driving blind.

5 Despite this, Maxim and Berkel knew that they
6 had to get permission of the manufacturer to do all these
7 things. Maxim and Berkel chose not to. When they were --
8 the testimony will be that Maxim's own personnel even said,
9 "Wait a minute, this doesn't seem right," and then called
10 the office. And when they called the office, they said
11 that's Berkel's responsibility.

12 Let's talk a little bit about the day of the
13 accident.

14 And, Mary, can we talk just about the
15 operation itself? Do you mind playing the video here?

16 *(Video of similar operations playing in open*
17 *court)*

18 *(Stopped)*

19 MR. ARNOLD: Okay. Let's talk a little bit
20 about just the mechanics of what's going on because it will
21 become important, and I can do this a little bit with the
22 crane perhaps. This is the boom of the crane, okay? These
23 are what's called leads -- okay -- which are attached to the
24 crane. You can't quite tell. And what that thing is in the
25 middle that looks like a corkscrew, that's a -- that's the

1 auger, okay? So what they're doing is they're drilling
2 down, down below a hundred feet. And they're drilling the
3 hole. And then as they drill back -- as they drill the
4 hole, all this dirt comes up, right? And you have
5 individuals scraping the dirt away, things of that sort.
6 And you'll hear from these people that are doing it. And
7 then they -- and then as they come out of the hole, they
8 pump grout all the way down into the bottom.

9 Now, day of the accident, orient you as to
10 time, before they start drilling the pile that ultimately
11 led to the crane collapse, okay? There's a rule, and that
12 rule for Berkel is, is you don't drill -- excuse me -- you
13 don't start drilling a pile and pumping a pile unless you've
14 got sufficient grout on site to do the whole pile because
15 you don't want to do half a pile and have it hardened and
16 you want to have a continuous pour, right? It makes sense.
17 The reason why is grout trucks come from offsite, and
18 they're going back and forth and mixing the grout and things
19 of that sort because grout expires. It's only got about a
20 two-hour window.

21 So immediately prior to this accident,
22 they've -- and I'm going to skip forward -- well, actually,
23 I'll come back to that in a second. Immediately prior,
24 they're having this piling, guess what? There's not enough
25 grout on site, right? There's just -- it takes two grout

1 trucks to do the entire piling. There is only one truck
2 left, and it only had a little bit left. So the foreman,
3 Mark Stacy, and the crew weren't going to start drilling
4 that next piling because they didn't have -- they were
5 following the rules; and the rules were you had to have two
6 grout trucks. Chris Miller, the superintendent, the head
7 man of Berkel at the jobsite, he said, "No, we're going to
8 drill the piling." This is a constant theme. He gets into
9 an argument. He overrules everybody.

10 And so they do what they're told. They go
11 down. They're drilling the piling in question that would
12 ultimately lead to Tyler's accident. They pump a little bit
13 of grout. Guess what? Those grout trucks don't show up.
14 So they sit there and they sit there and they sit there.
15 Finally, the grout trucks show up; but at this point the
16 grout's already hardened in the hole. So the crane operator
17 is ordered to drill back down through the grout; and as he's
18 starting to come out and pump the new grout, the concrete
19 seizes on the auger and creates a plug. And what happens
20 when you pump the new grout in? It pushes it up. And
21 anybody knows that when you -- on a fishing line when you've
22 got too much line come back, what happens? It bird nests.
23 So on the drum of the crane, that sudden pushing of the
24 auger has caused the cable to come unspooled. Why is that
25 important? It's just sitting there now with this hardened

1 grout around it while they're trying to unspool the cable.

2 They get the cable fixed. They go to begin
3 operations, and it's stuck. It is stuck in that hardened
4 concrete. The auger will not move. So there's a procedure
5 about what you're supposed to do when you have a stuck
6 auger. You try for a few minutes turning it left and right,
7 but not pulling on it because -- and if you can't, you cut
8 it and you get a new auger, right? There's no point in ever
9 sacrificing time or safety -- excuse me -- sacrificing
10 safety for time or money. You can always cut the auger and
11 get another one, right?

12 So on this day, Mark Stacy and the crane
13 operator, they try for about ten minutes to unstick the
14 auger. Now, if you can imagine the scene -- and I'm going
15 to flip ahead to a -- this is the collapse, all right? And
16 I'm going to come back to this. I don't want to focus so
17 much on the collapse, but they're trying to unstick the
18 auger over here. You've got the foreman. You've got the
19 crane operator in the cab. You've got another crane
20 operator over here doing something else, and then you've got
21 this Bobcat driver down here. There's a handful of crew
22 members that are present.

23 Now, remember, the crew is there by the
24 foreman, and they have made the decision, "We are not going
25 to get this auger out. It's stuck, and we need to cut it."

1 Down comes the superintendent, Chris Miller,
2 who comes down and, again, curses at the foreman. They get
3 into a fight. The foreman storms off. Miller says he's
4 taking over; and over the next 40 minutes, you will hear
5 that they ignored repeated signs. And to paint this
6 picture, while they're trying to unstick the auger, they
7 have violated every cardinal rule that you can violate,
8 okay? Because when you're pulling -- cardinal rules --
9 well, I'll do the cardinal rules in a second. Let me tell
10 you a little bit about what happened.

11 The -- the -- Mr. Miller refused everybody
12 telling him that there was impending trouble. The crane
13 operator, four separate times -- and think about the courage
14 of a young man in his early 20s to get out and tell the boss
15 he's wrong. Four times got out of this cab, held up his
16 hands, would say, "This is stupid, look at the boom," and
17 yell at him.

18 Mickey Disotell, the other crane operator, at
19 some point is so nervous that he gets out of his crane
20 because he wants to have his feet on the ground. And they
21 are going back, and they are looking because the crane is
22 tipping up on its toes. Meanwhile, the boom is flexing and
23 they're pulling on it and the hoses are going crazy, dancing
24 back and forth violently with oil shooting out the seams.

25 Mr. Miller is told by three different people

1 to stop the job, and he doesn't. He refuses. And at some
2 point, something's got to give, right? You will hear
3 testimony from Mr. Disotell and Mr. Prestridge -- two of the
4 most important witnesses, because they're no longer employed
5 by Berkel and they can testify without fear of
6 consequence -- that they told Mr. Miller it was tipping,
7 that they told him to stop, everybody told him it was
8 unsafe. And he went forward anyways. He consciously
9 disregarded the safety of all the crew.

10 It comes down, and it snaps. And imagine the
11 scene. All of these -- the boom collapses, and the auger
12 snaps. The hoses go everywhere. Everybody scrambles and
13 runs. People jump under the other crane, things of that
14 sort, and as the debris happens, everybody looks up and
15 they're checking to see what's going on. Well, everybody
16 had, at that point in time, thought that everybody was okay
17 until they hear screaming. Up the hill is -- you can see
18 how far away Mr. Lee, who had been no part of this
19 operation, up the hill is pinned beneath the leads.
20 80,000 pounds have pinned him down, and he can't move. For
21 30 minutes he is completely conscious and it takes them --
22 because they cannot get the leads off of his leg because
23 they're too heavy because these things -- as you can
24 imagine.

25 During that time, Chris Prestridge runs to

1 his side; and eventually as they get there, he tries to talk
2 to him about anything else other than what's happened to
3 him. Tyler has gone white. They fear that Tyler is going
4 to die. Tyler is asking, "Please call my wife," Leigh Ann.
5 A young man -- or excuse me. An older man comes next to
6 Tyler and begins to pray. While they wait for the
7 ambulance, they get the leads off of his leg, and it's what
8 they feared. His leg is completely severed. Tyler's leg is
9 cut in half.

10 Chris Prestridge is afraid that he's going to
11 freak out and go into shock. So he pulls the leg out from
12 under the leads and just puts it next to his side as he
13 begins to tie a tourniquet because he's -- all that pressure
14 is relieved, and he's beginning to bleed. Everybody is
15 concerned that Tyler is going to die.

16 Now, Tyler -- Tyler and his family, at this
17 point in time, start their long journey because Tyler is
18 rushed to the hospital, rushed into surgery where they do an
19 additional surgery to try stabilize his leg from his
20 condition. It's amputated above the knee. So as Tyler has
21 his leg, his leg has suffered severe trauma. Tyler is
22 fortunate to have gotten incredible medical care. Tyler,
23 during this point in time, starts his long road back. Tyler
24 has to learn how to walk. He is -- he goes to TIRR, and
25 Tyler spends the next several months trying to learn how to

1 live with the loss of a limb. Tyler's eventually -- Tyler
2 eventually gets a prosthetic, and we're going to talk more
3 about that later and about what that means. But during this
4 time, Tyler learns how to walk again and learns how to
5 otherwise live and cope with being somebody who lost a limb.

6 Tyler, according to his doctors, are the
7 most -- is the most amazing patient that they've ever seen.
8 They actually asked Tyler -- he's the type of person that
9 can give testimonials to other people about how you can come
10 back from such an injury. Tyler does everything right in
11 his effort to try and get back to some sense of normalcy;
12 and to give you a sense of who Tyler Lee is, he didn't get
13 his prosthetic for a period of time. You can tell that
14 Tyler goes back to the same jobsite doing the same job on
15 crutches without a leg. Imagine that. How many people
16 could physically or mentally go back to the same jobsite
17 where your accident happens to try to finish the job? It is
18 a testament to how great of a guy and the character of my
19 client that he is able to do such a thing.

20 Now, I want to talk a little bit about
21 prosthetics, prosthetic history, okay? Many years ago with
22 amputees and people that suffered a loss of a limb, you
23 know, there wasn't a lot of help, okay? And it's
24 progressed. In the last 20 or 30 years, prosthetics have
25 become much more advanced, right? In part, largely, because

1 helping veterans come back from wars and things of that
2 sort.

3 Over the last 20 to 30 years, prosthetics
4 have advanced a great deal. And in fact, even in the
5 future, the state-of-the-art horizon is very bright, okay?
6 Now, Mr. Lee, he received what's called a X3. It's
7 actually -- his leg has actually even got its own computer
8 chips and things of that sort.

9 Now, Tyler has had the benefit of this
10 prosthetic leg. I want to talk a little bit about it. An
11 X3, to give you a sense, is not just a stand-alone leg. You
12 can add different components and things of that sort. For
13 Tyler, currently, the X3 is kind of the state-of-the-art.
14 The X3 suggested price for retail costs about \$140,000.
15 This X3 is something that gets replaced every few years; and
16 in fact, it's got maintenance. It's got a running
17 attachment, a swim -- it's called a swim leg attachment.
18 It's got various different things that also cost additional
19 money beyond just what the X3 is. The X3 wasn't around two
20 years ago, all right?

21 What you'll learn from Dr. Meier, and others
22 that are going to testify, is that the cost of -- or excuse
23 me -- the state-of-the-art prosthetics has grown greatly
24 and, in fact, the last 20 years has grown at 6 percent a
25 year to keep up with the increased technology. And that

1 you'll hear that in the future, Tyler will -- the technology
2 is even brighter, but it's going to cost more money.

3 Now, I think we can all agree that Mr. Lee is
4 entitled to the very best medical care. He didn't ask for
5 this accident. We hired Dr. Meier. Dr. Meier is the former
6 director of TIRR. Dr. Meier has treated over 3500 amputees,
7 more than, I think, anybody in the country. Dr. Meier can
8 tell you about all the things that Tyler will have to
9 undergo. Dr. Meier has worked with Dr. Kistenberg -- or
10 excuse me -- Mr. Kistenberg, one of the leading prosthetists
11 who helps make these legs. For Tyler to receive the
12 state-of-the-art technology in his leg for the next 48 years
13 or until approximately the end of his life, it will cost
14 nearly 11 and a half million dollars because the prosthesis
15 must be changed out every three or four years, and they
16 become obsolete and obsolete.

17 We know this because in the past 20 years,
18 it's -- if you track the state-of-the-art technology, it's
19 increased at approximately 6 percent per year. We know from
20 Dr. Meier that in the future, it only expects things to
21 increase. So knowing that, you have to look at -- you look
22 at the past to determine what's in the future. They know,
23 and Dr. Meier will testify, that there are further advances
24 that will help his mobility, help his function, and limit
25 his pain, okay? But it's expensive.

1 We are asking that you provide for Tyler
2 Lee's future medical care. And I say -- when I say 11 and a
3 half million dollars, it's not just prosthetics. It's all
4 of the things that he has to deal with. Because Dr. Meier
5 will tell you that for somebody in Tyler's position, unlike
6 us, as we age, he -- it causes a hardship on the rest of
7 your body. So because you have lost a limb, it causes
8 stress on your back and your gait and things of that sort.
9 It ages him, essentially accelerates all the complications
10 that otherwise come.

11 His -- all of his various -- it will cause
12 problems. All of his problems with his gait that you can
13 see even from just walking around, it's not a question of if
14 it's going to happen, it's when it's going to happen, how
15 frequent it's going to happen, infections, back problems
16 he's already experienced as a result. So that plan includes
17 the prosthetics and everything Dr. Meier has come to tell
18 you about, and he'll come on Friday to tell you directly
19 about what you should expect for Tyler.

20 Now, I want to talk a little bit about the
21 impact on Tyler every day. Tyler, in a lot of ways, if you
22 look at Tyler, Tyler looks like a very normal young man. I
23 can tell you -- and you have to consider all of the things
24 that he must go through on a regular day just to do -- be
25 himself. Tyler wakes up, and it takes about 20 minutes to

1 get his leg and otherwise situated, and Tyler spends the
2 entire day kind of undergoing a process. Everything that
3 you and I take for granted, a jog in the morning, whatever
4 it might be, Tyler can no longer do.

5 Tyler was an avid outdoorsman prior to this
6 accident. Tyler, you know, would do, you know, all the 5Ks
7 and all the various things, the competitions, the mud
8 crawls, and all this stuff that you can imagine. Tyler now
9 spends a lot of his day planning around his leg. Tyler,
10 when he gets home, is so exhausted because it takes so much
11 more energy to walk, to get in and out of your truck, to do
12 all the various things -- because Tyler's gone back to work
13 and is at a jobsite, construction jobsite, doing all the
14 things he did before except now he's got to deal with it.
15 Tyler has -- as he kind of goes throughout the day, his pain
16 increases. And as you can imagine, once he gets home, he
17 has to remove his leg and then for the rest of the night
18 he's on crutches. That's something that Tyler deals with
19 every day.

20 And of course, it's not just affecting Tyler.
21 It affects the entire family. He now has two little
22 girls -- right -- and his wife, Leigh Ann; and it affects
23 their entire relationship. Because candidly, Leigh Ann has
24 got to pick up a lot -- right -- that Tyler can't do. Tyler
25 fears, for example, about basic protections, being able to

1 protect his family, right? Because the worst thoughts that
2 he has is: What if someone breaks in while I'm in bed and I
3 don't have my leg on? Right? And he has all of these
4 various things that he must deal with every single day.
5 Tyler never gets a day off from his injury. Tyler will
6 never get a day off for his injury. Tyler is going to
7 ultimately live with this for the next 50 years.

8 Now, Tyler -- and when I say the next 50
9 years, again, I'm going back to a little bit about what
10 Dr. Meier has talked about. We are here today talking about
11 Tyler now, okay? But importantly -- and we'll talk about
12 this a little bit in the jury charge -- y'all -- what y'all
13 decide will ultimately dictate Tyler for the rest of his
14 life, right? So there's no -- there's no time to come back,
15 right? Y'all are going to have to consider what it is that
16 Tyler and his family will go through. He's 32 right now.
17 So he's going to live approximately till 80? Because of --
18 you need to consider all of the things that he must go
19 through.

20 Let me give you examples. Tyler and I talk
21 sometimes about his greatest hopes, greatest fears. What's
22 his greatest hopes? Let's talk about that first. Getting
23 back to running a 5K with a running leg. Maybe some day
24 figuring out how to go snow skiing like he used to. Being
25 able to keep his job. Being able to mentally handle the

1 additional stress that comes with being -- having his
2 disability every single day. Coaching his little girls'
3 teams. Giving them proper instruction. Being strong for
4 his wife and his family.

5 Now, let me tell you his fears: Dying early.
6 Dying due to a complication. Losing his job. Losing his
7 job because he can't quite keep up the same way that the guy
8 with the leg can. Because in our lives -- right -- we value
9 speed. We all know it. We want to get somewhere fast. We
10 want to get a job done fast. Well, Tyler doesn't have that
11 luxury because everything is a process. He worries about
12 his little girls being embarrassed when he takes them to
13 school and everybody seeing his leg. He worries about his
14 wife and the stress his injury and his inability to do
15 things puts on her, and he worries that -- how it's going to
16 affect them long-term.

17 This is very much a concern. He says he --
18 he's constantly frustrated, every single day, right? And he
19 gets self-conscious about how he's perceived by others,
20 whether they treat him as somebody -- whether they stare at
21 him, or they treat him as somebody that can't do the same as
22 he had done before.

23 We're in court. And you can look at Tyler
24 Lee and look at his family, but I want you to look beyond
25 Tyler and his family sitting here today. I want you to

1 think about what Tyler does every single day from the start
2 to the finish and how this injury affects him, right? You
3 need to think about not only today, but 2030, 2040 and how
4 this injury will affect Tyler as he's 40, as he's 50, as
5 he's 60, as he's 70, right?

6 Tyler does not get a day off from his injury.
7 Leigh Ann does not get a day off from his injury. When she
8 cares for him and cares for the babies at night, imagine it,
9 right? A young mother got two -- one,
10 one-and-a-half-year-old and a one-month-old, right? And
11 Tyler feels bad because he's around crutches because he's
12 supposed to take his leg off as soon as he gets home to
13 rest, right? And imagine every day he's on crutches trying
14 to take care of his two baby infants.

15 I know it's hard to think about how this
16 affects him and their family for 50 years, but this is the
17 best we've got, right? And I want you to consider that in
18 terms of what it is that Tyler is going to have to go
19 through. Because ultimately -- I'm going to skip ahead here
20 a little bit. That's the questions that you're going to be
21 asked, right? So you're going to be asked at the end:
22 Who's responsible, right? Berkel? Consciously disregarding
23 the jobsite, broke every single cardinal rule. You're not
24 supposed to overload a crane. They did. You're not
25 supposed to make a lift if you don't know the crane's

1 weight -- or excuse me -- the load's weight. They did,
2 because it's stuck in the ground. They're just pulling on
3 the ground, right? It's not a suspended load.

4 Their crane operator had never read the crane
5 operator manual for the 200-ton crane that he was fixing.
6 Their crane operator literally cannot see the crane computer
7 by the way they configured it. The crane operator is having
8 to operate with oil misting out. And then all the things
9 that Maxim did and had the opportunity to stop. You're
10 going to consider all that, all right?

11 In fact, the jury charge -- and the Judge
12 will give you the exact instruction, but this will give you
13 a sense, right? You're going to ask: Were they negligent?
14 You've heard that word; but it's basically they didn't use
15 common sense, ordinary care. And you'll answer "yes" to
16 both, I believe. But then ultimately, you're going to be
17 asked: What's the percentage of fault between the
18 defendants? And you'll make that determination. You're
19 going to hear all the evidence. You're going to hear from
20 all the crew members. Some of them you'll hear live. Some
21 of them we'll only have by deposition. I wish they could
22 all be live because trust me live testimony is much more
23 interesting than it is by deposition, but they might.

24 For example, Mickey and Chris, they don't
25 work for the company anymore. They live in Louisiana. So

1 we had to take their deposition, right? Those are two of
2 the most important people that you'll hear from because they
3 were the two guys on the ground by the superintendent and
4 the crane operator and they saw everything and they heard
5 everything and they can testify without fear of being fired,
6 right? There's a difference between somebody that's still
7 working for the company and then somebody who has no fear of
8 reprisal.

9 But you'll hear from the Maxim individuals.
10 More of those people will come live. And you'll hear that
11 John Merrill said, In five minutes I can tell somebody
12 whether or not they're qualified to operate a crane. And
13 they chose not to in this case, and you'll decide that
14 fault. We don't need to -- we don't need to do that right
15 now, okay? But know that's where -- it's coming.

16 But then we've talked about things like this,
17 but I want to talk to you a little bit about damages, okay?

18 This is not very high-tech, okay? This is my
19 lack of PowerPoint experience; but this is a person, okay?
20 Everybody see it? It's circled. Everybody I think will
21 agree with me that a person's not just how much does it cost
22 to allow him to live, right? So the way it works under the
23 law is you're to consider a whole person, right? And I say
24 that. That makes sense. You're not just a wage, right? So
25 lost wages. You're not just medical bills, all right?

1 Whatever you decide as to medical bills, those get set aside
2 and those get set aside in a fund to help pay for Tyler's
3 future, right?

4 But you must consider things -- this is what
5 the law says -- physical pain sustained in the past, okay?
6 Physical pain that, in a reasonable probability, he'll
7 sustain in the future. I want you to think about that.
8 Remember in voir dire I asked a lot of these questions to
9 the panel? I'm not sure if you recall, right? Can you
10 remember who can give pain and suffering? Some people said
11 they couldn't, things of that sort. Well, this is why I'm
12 asking, because the law says to consider a full -- to
13 consider all the damages.

14 It's not just deciding liability. It's not
15 just figuring out what his medical future holds, but you're
16 to consider the whole person and what's happened. Medical
17 bills are some portion of the pie. If Mr. Lee can't
18 continue with his job, say, when he's 50 years old, as
19 Dr. Meier indicates, well, that would be one portion of the
20 pie; and we can figure out what his lost wages will be,
21 right? That's not the whole person. You ever heard the
22 saying, "Nothing's more important than your health"? Tyler
23 Lee didn't ask for this, okay? Tyler doesn't want to be
24 here. I assure you there's nothing more than Tyler would
25 like to do than be at home with his baby girls without the

1 worry and the anxiety of dealing with his loss of limb every
2 day, all right? Think about that.

3 When you have to consider -- this is what the
4 law says -- mental anguish in the past and mental anguish in
5 the future, and it's -- and it's a lot. You've got to
6 think, when Tyler Lee doesn't get a day off from his
7 disability for the next 40-something years, how that affects
8 him. That's your -- that's your role. It's because the law
9 says that you treat -- you award all the damages that the
10 person suffered, and this is real. The worries and
11 anxieties that Mr. Lee will face as a result of his
12 disability, future complications, whether or not he can
13 continue with his job, how it affects him and his wife's
14 relationship, his little girls being embarrassed of Dad
15 because he's got a metal leg.

16 These are real and we don't need to go
17 through all of these, but I want to at least tell you you've
18 got things like disfigurement. Tyler obviously has a lot of
19 disfigurement. Physical impairment, you know, his inability
20 to do the things and function like he was. These are things
21 that the law says that when ultimately a company causes
22 somebody or anybody -- I say a company -- when you cause
23 somebody harm and you're at fault, that you're supposed to
24 pay for it.

25 Now, when you -- when you go back and

1 deliberate, I'm going to tell you this -- and I haven't done
2 the math yet, okay? But you're going to have to consider
3 essentially 49 years, 365 days and 24 hours a day of what
4 Mr. Lee's going to go through. And I put that up there
5 because it's a -- it's a big consideration. It's an
6 important consideration. After this trial, the defense
7 lawyers will move on to a new case. Candidly, the Court
8 will probably be trying another case. I'll be trying
9 another case or helping someone else. You'll go back to
10 your everyday lives.

11 You know who doesn't get to go back to their
12 everyday life? That's Tyler Lee, that's his wife, it's
13 their family. He doesn't get a do-over. He doesn't get a
14 day off. He will live with this for his entire life, and
15 it's not right. I wish we could give him back his leg. I
16 wish I could take away all the pain. I wish that we didn't
17 have to talk about prosthetics and how much it's going to
18 cost in the future, because we have to consider how much is
19 it going to cost 40 years from now, right? Not just what it
20 costs in today's dollars. But we can't, as much as I want
21 to, we can't.

22 So our system relies on y'all. I only tell
23 you that -- what you decide has so much power and impact on
24 this family, right? And if you're wrong on something --
25 right -- and Tyler's complications are such that he can't --

1 he doesn't get to come back. He doesn't get to say,
2 "Berkel, whoa, whoa, whoa, whoa, I get to come back."

3 I know that you'll do the right thing. We
4 ask that you do the right thing. We are here, okay? We've
5 talked about a lot of things. We're here for
6 accountability. We cannot make them responsible for all the
7 harms ourselves. It requires your help. We ask that you
8 consider the evidence, and I think you'll find that both
9 defendants have fault. I will tell you that I think this
10 is -- may be the most clear case I've ever tried. There's a
11 lot of exhibits. There's a lot of people. You can tell
12 this case is important, and they're all looking at you.

13 I ask that you listen to the evidence and you
14 hold these two defendants accountable, okay? And when you
15 hold them accountable -- okay -- that you consider the whole
16 person and what he's suffered and that you hold them
17 accountable for all the harms, not just part of the harms.
18 I want you to hold them responsible when they try to say,
19 "No. No. No. It's someone else. No. No." Just listen
20 to the evidence. It's overwhelming.

21 I thank you for your time. I appreciate your
22 consideration. This is the last time I'm going to get to
23 talk to you directly until closing statements. I can tell
24 you, on behalf of Tyler and Leigh Ann, that we know you'll
25 do the right thing. And I look forward to trying this case,

1 and hopefully we can move it along as fast as possible. And
2 we appreciate your consideration. Thank you.

3 THE COURT: Mr. McKinney?

4 MR. McKINNEY: Morning break, or you want me
5 to start, Judge?

6 THE COURT: Go ahead.

7 MR. McKINNEY: I'm going to do it like this.
8 Good morning.

9 UNIDENTIFIED JURORS: Good morning.

10 MR. McKINNEY: Okay. There's a lot I want to
11 cover and I don't have as much time as Mr. Arnold had to
12 speak but before I get into it, I need to make some
13 introductions. This gentleman right here is Doug Mena.
14 He's my law partner. Doug knows a lot more about cranes
15 than I do, and Doug will be examining all of the witnesses
16 in this case on the topic of cranes. This is my associate,
17 Brandon Mullen. Brandon's going to be helping us with the
18 trial and handling our limited matters with technology. In
19 the back -- stand up, please, Ken. This is Ken Blum. Ken
20 Blum is the vice president of operations for Berkel.
21 Mr. Blum will testify in this case. He will be called to
22 the witness stand by Mr. Arnold.

23 When Mr. Blum testifies, his hands are going
24 to shake because he has Parkinson's disease. Some people
25 think that his hands shake because he's nervous. The most

1 fearless man -- or the second most fearless man in this
2 courtroom is Ken Blum. He will answer every question that
3 Mr. Arnold has, and he will answer every one of those
4 questions honestly.

5 It is a privilege for me to represent Berkel.
6 Berkel is unlike any company I have ever represented before
7 in 35 years of doing this. Berkel is an ESOP. I thought
8 ESOP was a Greek guy who wrote some stories called *Aesop's*
9 *Fables*. I learned that in high school. It turns out an
10 ESOP company is owned by its employees. When you go to work
11 for Berkel and you've been there for 90 days, you become an
12 owner of the company. And when you leave Berkel, you leave,
13 they write you a check for when you retire, all of your
14 ownership interest goes into your retirement fund. I've
15 never represented a company that was owned 100 percent,
16 which Berkel is, by its employees. That's new for me, and I
17 like doing that.

18 Now, what happened that day was a tragedy.
19 As I was sitting at the counsel table, like I have done in
20 maybe a hundred and twenty or a hundred and thirty cases
21 over the years, listening to Mr. Arnold give his side of the
22 story, I was saying to myself the same thing I've said the
23 other hundred and twenty or thirty times I have done this:
24 Lord, I hope that jury understands that there are two sides
25 to this case. I sure hope that's what that jury is keeping

1 in their mind.

2 You may have noticed that I go second and
3 Maxim goes third. So you're going to hear one perspective
4 in this case and Mr. Arnold gets to decide which witnesses
5 are called and in what order. That's totally within his
6 control. Mr. Arnold will call virtually every witness in
7 the case in the order he wants you to hear from them. We
8 pick up the pieces afterwards. That's the way our system
9 works and that's because Mr. Arnold and Mr. Lee, the
10 plaintiffs, have the burden of proof. And I'm going to talk
11 some more about that in just a minute.

12 What happened that day was a true tragedy.
13 It was awful. No doubt about it. It's a tragedy, however,
14 that no one saw coming. The fundamental disagreement
15 Mr. Arnold and I have -- and I'm glad he said it to you the
16 way he said it in the very beginning of his opening
17 statement -- that Chris Miller disregarded every sign of
18 impending disaster and went forward with this operation. I
19 am glad Mr. Arnold put it like that because the flip side is
20 if Mr. Miller did not disregard -- if there were no signs of
21 impending disaster and what Mr. Miller was doing was normal,
22 normal unsticking an auger process -- and even though you
23 may all agree that Mr. Miller would not be the most pleasant
24 person in the world to work for, I will grant you that, and
25 he's a construction worker, he uses language that we will

1 not be using in the courtroom. I promise you that. But if
2 the flip side of what Mr. Arnold says is true, that there
3 were no signs of impending doom, that no one thought that
4 crane boom was getting ready to collapse and kill or injure
5 someone, then the only logical conclusion is that Berkel did
6 not do anything wrong that day. It's either A or B, and now
7 I'm going to open up the first of my PowerPoint slides.

8 Okay. You haven't heard those words before,
9 the greater weight of the credible evidence. Mr. Arnold and
10 I are going to disagree about a lot of things. You'll have
11 to decide at the end of the case who's got the right of it
12 and who's got the wrong of it. Remember yesterday when
13 Mr. Arnold told you that you would be -- he had two reames
14 of paper -- that you would be instructed that the burden of
15 proof in a civil case is if he puts one more piece of paper
16 on top of one of those reames, he wins. Remember that?
17 That is not what the judge is going to tell you at the end
18 of the case. That is not even within a light year of what
19 the burden of proof is in a civil lawsuit.

20 In a civil lawsuit, you will be instructed
21 that you can only find something to be true if that
22 something is proven by the greater weight of the credible
23 evidence admitted before you. So the first thing you have
24 to do -- and this is going to become germane, relevant,
25 important to what I'm getting ready to tell you about the

1 facts of this case. The first thing you have to do before
2 you get into the weighing business and counting the
3 evidence, figuring how much there is, you've got to
4 determine whether you believe it because if you don't
5 believe it, you disregard it. If it's not true, you don't
6 base your verdict on it. It's fundamental American law.

7 So you take the true evidence. You take the
8 true evidence and you weigh that and if the evidence weighs
9 in favor of Mr. Lee, then you say so by your verdict. If
10 the evidence does not weigh in favor of Mr. Lee, the
11 credible evidence, then you also say so by your verdict; and
12 that's your solemn duty as jurors, even if you don't like
13 doing it. Even if you think the outcome might hurt Mr. Lee,
14 that's what you've got to do.

15 So here's some more information: Berkel has
16 been drilling holes in the ground for 56 years. That was
17 not their first stuck auger. That was not their first
18 rodeo. When augers get stuck in the ground, there is a
19 process for getting the auger out. Chris Miller was in the
20 middle of his process; and it's an orderly step-by-step
21 process, trying to get the auger unstuck. It is a fact that
22 Mark Stacy -- and Mark Stacy and Chris Miller are cats and
23 dogs. They've never liked each other. They're not going to
24 like each other. They're going to have to go to different
25 parts of heaven because they are never going to get along

1 for as long as there is time in this universe, okay?

2 So they disagree. They didn't get into a
3 fight. Don't think blows were exchanged. That didn't
4 happen. Miller took over the operation. It went on longer
5 than Andrew Bennett thought it should. Andrew Bennett did
6 get out and say, "This is a waste of time. We're not doing
7 any good." That far we agree.

8 Can you get that thing up, the picture --
9 okay.

10 This is -- I'm showing you this because I
11 want you to understand something really important. This
12 area right in here is where the entire Berkel crew of ten or
13 so men was standing during the efforts to remove -- to
14 unstick the auger. Right in this area, where as you can
15 see, all the damaged equipment fell when the boom failed.

16 Now, let's think about this, okay? Chris
17 Miller -- if I may use this -- during the removal
18 operations, was standing right at the base of the auger,
19 okay? Andrew Bennett is in the cab. Mickey Disotell and
20 Chris Prestridge, two disgruntled former employees, are
21 standing right beside the cab. The rest of the crew is all
22 in this area, okay?

23 Now, if you think a crane is getting ready to
24 collapse, is that where you're going to stand? Seriously?
25 You're not going to say something about it, get the heck out

1 of dodge?

2 Not only did the crew not do that, the next
3 day they were taken off to a Chinese restaurant. Everybody
4 seems to remember it's a Chinese restaurant. They were
5 given blank sheets of paper and told, "Write down what you
6 remember. Write down what you saw." I made it a point to
7 ask -- to ask Mr. Disotell and Mr. Prestridge, "Well, did
8 anyone try to influence or limit what you wrote down?"

9 "No, we were free to write down whatever we
10 wanted to say."

11 Okay. So here we have eight or ten men who
12 have just, within 24 hours, experienced a horrifying
13 incident in which a fellow worker lost a leg. Men who are
14 in the immediate aftermath of a huge tragedy, an
15 upsetting -- an incredibly disturbing tragedy. It's the
16 perfect time for at least one of them to unload on Chris
17 Miller and blame him for everything and accuse him of
18 running an unsafe jobsite, et cetera, et cetera, et cetera;
19 but not a single person said that in the immediate
20 aftermath.

21 Only two people who were there that day
22 criticized the operations, Mr. Disotell and Mr. Prestridge.
23 This is not my first lawsuit in which there was at least one
24 disgruntled former employee testifying against his employer
25 or her employer. It happens. It happens a lot. And so

1 what you do is you just let them talk. Let them get it all
2 off their chest. And the more Mr. Disotell, in particular,
3 talked, the more we learned.

4 I will show you, and it will take a lot of
5 this and a lot of that and look what he said here and look
6 what he said here, that Mr. Disotell is, in fact, all over
7 the place describing what happened that day. But in and
8 amongst what he said -- and this was in response to a
9 question from Mr. Arnold in the early part of his deposition
10 before he got all wound up -- Mr. Arnold asked him, "Well,
11 how many times did that crane tip that day?"

12 He said, "Well, once."

13 It didn't really tip. One or two of the
14 wheels inside the track came off the ground one time.

15 And he went on to say in his deposition, "But
16 you had to be looking real carefully to even see that
17 happen," one time. Okay. That is not the world getting
18 ready to come to an end, but that was his testimony. Chris
19 Prestridge in the same light. I asked these gentlemen, "You
20 were standing right there next to mister -- Mr. Bennett when
21 he was operating the cab, the crane" -- and by the way, they
22 both think Andrew Bennett's a fine crane operator -- "Did
23 you see him do anything immediately before the boom failed
24 that would have caused, you know, the crane to do something
25 and cause that boom to fail?"

1 No, he didn't see anything like that.

2 And by the way, in these statements that
3 these men wrote, in the depositions of everyone but
4 Mr. Disotell and Mr. Prestridge, it was normal work
5 operations and then suddenly they heard a loud boom above
6 them and they looked up and they saw it all coming down. No
7 one expected this to happen. No one acted the way a normal
8 human being would act if they expected some kind of enormous
9 disaster to take place.

10 So to get back to where Mr. Arnold and I
11 disagree, on the one hand, there were all these warning
12 signs. On the other hand, you have two unhappy former
13 employees who are saying two different things, one before
14 the lawyers got involved and one after, okay? That's your
15 job: To find the credible evidence, find what is the true
16 evidence, and then weigh it. And it is hard work. It's
17 hard work being a juror.

18 But that's not all the evidence Mr. Arnold's
19 going to have in this case. He's going to have paid expert
20 witnesses. I am not a big fan of paid expert witnesses. If
21 you can't get there on what the eyewitnesses said, why
22 should you have to go out and buy the testimony? Why should
23 you have to go out and buy your evidence? So there will be
24 paid expert witnesses who will say, "Well, we've looked at
25 this and we've looked at that and we're engineers and we're

1 getting paid 3- or 400 bucks an hour, 250 bucks an hour, and
2 our opinion is all these bad things happened."

3 So is it credible? Does it outweigh the
4 eyewitness testimony? But more importantly, not the
5 eyewitness testimony, the eyewitness behavior, the way folks
6 conducted themselves right up until that boom collapsed.

7 What evidence can be brought that would dispute people
8 acting perfectly normal and saying so the next day? What
9 evidence overcomes that, and how many witnesses can you buy?
10 How many former employees changing their story can you have
11 to overcome what actually happened?

12 Okay. So we're not here because we don't
13 want to be held accountable. We're here because we don't
14 know why that crane failed and we do not believe we
15 overloaded that crane. And now I want to talk about cranes.
16 And I stand to be corrected to a degree, but I'm pretty sure
17 I'm about 95 percent right on this.

18 This particular crane, it's a Link-Belt
19 crane. Have you heard the name Link-Belt so far in this
20 trial? Link-Belt was a defendant in this lawsuit. They
21 were a party to this lawsuit and trying really hard to throw
22 us under the bus, by the way. They aren't any longer. That
23 jury charge that you saw up there that Mr. Arnold was
24 throwing around, Link-Belt would be on there, too. I'm
25 going to talk about Link-Belt quite a bit throughout this

1 trial, as will Doug Mena. The Link-Belt crane has a device
2 that's a combination of alarms and function limiters. There
3 are keys that Maxim delivers to Berkel, some of which you
4 can use to override some of the alarms and some of the
5 functions.

6 We have conclusive photographic evidence that
7 those keys were on a key ring attached to the ignition key
8 inside the crane. That's kind of an obscure factual
9 reference that I'm making here, but it's going to come up
10 throughout the trial because there's going to be an
11 allegation, I suspect, that Andrew Bennett overrode one of
12 the alarms. We think that's pure garbage and we think the
13 evidence conclusively proves that, but nonetheless there may
14 be that allegation in the case.

15 When the alarms are functioning properly --
16 I'm going to cut to the chase and tell you how the story
17 ends and then I'll tell you. The alarms on this crane
18 weren't functioning. The function limiters on this crane
19 weren't functioning. Nothing was working on this crane.
20 When you operate a crane and you get to 90 percent of its
21 rated power, an alarm comes on and says you're at
22 90 percent. When you get to a hundred percent, an alarm
23 comes on and says you're at a hundred percent and the crane
24 essentially goes into neutral. That never happened. That
25 never happened.

1 Now, Link-Belt, if they were here, they'd be
2 claiming, "Oh, no Andrew Bennett overrode all that stuff.
3 He overrode all that stuff and that's why -- that's why it
4 never happened." But Link-Belt, if they were here -- to
5 speak honestly to you, if I can do that -- would have to
6 admit that, well, if the crane goes to a hundred and twenty
7 percent, which is not going to collapse a boom, it's
8 20 percent over its load; but it's still well within the
9 safe working distance of the margin of safety.

10 If it goes to a hundred and twenty percent,
11 there's nothing the operator can do about what happens next.
12 If it's working properly, a loud, obnoxious, unpleasant,
13 screeching smoke alarm/fire-alarm-type noise goes on and it
14 won't go off. Chris Prestridge and Mickey Disotell standing
15 5 feet outside the cab -- and we will have testimony from
16 Link-Belt that admits that somebody who's 5 feet outside of
17 the cab would absolutely hear that alarm if it went off --
18 never heard the alarm. No one heard that alarm and that's
19 because no part, no part of the function limiting system, no
20 part of the alarm system on this crane was operating. Now,
21 why is that?

22 Well, the electronics, whatever it is, it's a
23 20-year-old computer system. No technological upgrades. No
24 maintenance schedule. No tech coming out every three or
25 four years. No recommended, "Here's how you troubleshoot

1 it." No. They stick those dadgum things in a crane. They
2 might be there 5 years, 10 years, 20 years; and they just
3 leave them there until they break. Who does business that
4 way? No wonder they're not here.

5 I can't tell you the crane wasn't overloaded.
6 I can't tell you that. We can't know that if the function
7 limiters and all the other stuff isn't working, and forget
8 about the PRI[sic] being in the way of the computer. A, you
9 can fold it out of the way or you can lean over it and look
10 at it; but more importantly, if the alarms aren't going off,
11 that computer's not telling you anything anyway. That's
12 what the evidence is going to be in this case.

13 So the bottom line is: We have what the
14 people who were actually out there that day said and did and
15 what they wrote the day after, before the lawyers got
16 involved, before there was a lawsuit and we have the paid
17 experts, the two former disgruntled employees whose
18 testimony I will show you contradicts itself and if I got to
19 just pick the part that I like, you would have to agree with
20 me that Berkel did absolutely nothing wrong.

21 Now, the hard part about somebody who can't
22 keep their story straight is you don't know which part to
23 believe. So it's kind of hard to determine whether it's
24 credible in the first place and if you think the conflicting
25 parts are credible, how do you weigh them against each other

1 when it all comes from the same person. It's very
2 difficult, or so I've been told.

3 The last point I want to make is you'll have
4 a chance to meet Chris Miller and Andrew Bennett, live and
5 in person. A number of the other Berkel men will testify by
6 video deposition. If Mr. Arnold's position is the correct
7 position, each of these men is somewhere between extremely
8 reckless about their own lives and safety -- and in
9 Mr. Bennett's case and in Mr. Miller's case, they approach
10 suicidal because those two men -- and Mr. Disotell and
11 Mr. Prestridge because those four men, if they thought
12 something like this was getting ready to happen, they were
13 in the area most likely to be affected by this. If
14 Mr. Prestridge and Mr. Disotell are telling the truth, they
15 were standing essentially in front of a runaway train, but
16 they were afraid to get out of the way because they were
17 afraid they would be fired, or so they say.

18 Now, when I heard him say that, I thought, So
19 by your story you're working for the worst, most unsafe
20 company in the world, they're about to kill you, and you
21 won't get out of the way because you're afraid they won't
22 let you work for them anymore? Does that even make sense?

23 Changing subjects: One of the -- I don't
24 know whether you're going to find this to be intensely
25 boring or quite interesting; but one of the aspects of this

1 case will be evaluating not Mr. Lee's future medical needs,
2 there's not that much disagreement on what those future
3 needs are, rather, where the fight lies -- once again, we
4 get down to paid expert witnesses. Where the fight lies is:
5 What are these prosthetic devices going to cost in the
6 future?

7 I'm going to try to preview for you what the
8 evidence in that regard will be, what the history of
9 prosthetic development has been so far, who the witnesses
10 are and all of that.

11 Judge, do you happen to know how much time I
12 have left?

13 THE COURT: You have 14 minutes left.

14 MR. MCKINNEY: 14 minutes. Thank you.

15 Okay. The history of prostheses -- and we're
16 talking specifically prosthetic devices for people who, for
17 whatever reason, have lost a leg above the knee. There's a
18 big difference between losing a leg above the knee and
19 losing a leg below the knee. No one ever wants to be put to
20 this choice, but it's much easier to deal with the loss of a
21 leg below the knee than it is above the knee.

22 Twenty, 25 years ago, the best that people
23 could do was a wooden leg, pretty awful actually. And in
24 time some mechanical elements were introduced and then about
25 18 years ago, the first microprocessor knee was invented and

1 given -- and this is a very important fact. You're going to
2 hear this over and over. It was given a Medicare L Code; L,
3 new word, code. That's going to be a big deal in this case.

4 That microprocessor, evolved over time into a
5 prosthetic called the C-Leg; capital C, leg, two words[sic].
6 The C-Leg today is the basic standard of care. This is what
7 we give to folks who have lost a leg above the knee
8 prosthesis. C-Leg's been around 15 years or thereabouts.

9 We invaded Iraq and Afghanistan after 9/11 --
10 we all know that -- and our troops, after the occupation of
11 Iraq began, began experiencing casualties as a result of
12 IEDs, improvised explosive devices, and an extraordinary
13 number of troops were losing limbs. The Department of
14 Defense went to a company called Ottobock, O-t-t-o, B-a-c-h,
15 two words[sic] and said to Ottobock, "Here's a bunch of
16 money, take that C-Leg and make it do things that will put
17 men and women who have lost their legs back into uniform and
18 back into service."

19 Ottobock said, "Okay. We'll take that
20 challenge."

21 Ottobock was given five years to create the
22 next, new best thing in prosthetics. They fell short on one
23 key element and so at the end of five years, they came up
24 with an interim prosthetic called the Genium. The next
25 layer up is the X3. The X3 refers to the microprocessor

1 that's in the knee. The difference between the Genium and
2 an X3: The X3 is waterproof. The Genium is not. That's
3 the only difference.

4 Now, let's talk about L Codes. Every part on
5 Mr. Lee's leg, every single part, except the X3 processor,
6 has a Medicare L Code. What that lets us do is go back in
7 time and look at the growth -- the rate of growth for the
8 cost increase on all of these different component parts and
9 determine how much the cost of these parts has gone up over
10 time.

11 This isn't something you have to be a paid
12 expert to do. You can -- you can go online. You can't
13 because you've been told not to. If you were allowed to,
14 you could go online. You could look at the Medicare L
15 Codes. You could match the L Codes from online to the L
16 Codes that are actually -- and they should be in evidence.
17 You're going to see this. The L Codes that make up the X3
18 processor and you could -- you would find out that every L
19 Code, whether it's a microprocessor knee, whether it's a
20 foot, whether -- whatever the component is, the cost
21 increase over ten years, about 1 percent a year.

22 That's a big, big deal because that
23 \$11.5 million number that Mr. Arnold mentioned, when you
24 look at the actual L Code costs over time, it shrinks down
25 to about 3 million; and we've got no issue with that number.

1 We want Mr. Lee to get the medical care he deserves. No one
2 expects Mr. Lee to dial it back to a C-Leg or even a Genium.
3 The X3 is perfectly fine. He deserves not just that, but a
4 swim leg and a running leg and if you listen to the evidence
5 in this case, you will see -- not from our paid expert,
6 although we've had to hire experts, too, to counter these
7 number people that Mr. Arnold's hired. If you look at the
8 prosthetist, the man who makes the prosthetics, look at his
9 costs, if you listen to doctor, Mr. Lee's own treating
10 doctor, you'll see what he needs in the future and you'll
11 have a good sense of what it costs. Our paid witnesses have
12 used those numbers to project the future losses. You have
13 to decide who you believe and how to weigh it.

14 Now, every time I sit back there, I make a
15 bunch of notes about some things that got said that I feel
16 like I need to comment on. So I'm going to go through my
17 notes and see what those might be. We talked about -- oh,
18 the useful life of the prosthesis, five years. That's per
19 John Holmes, the prosthetist who takes care of Mr. Lee.
20 It's not three to four years; five.

21 What's on the horizon technologically
22 speaking? Potentially, potentially, mechanically driven
23 prosthetics; but we're a long way away from that. The only
24 mechanically driven prosthesis that Mr. Holmes will tell you
25 about, his patient give it back. It has a battery life of

1 about six hours. The battery life on the X3 is five days.
2 It weighs a ton. Just not satisfactory. It'll never be
3 waterproof. The only thing that Dr. Meier and Dr. Melton,
4 Mr. Lee's treating doctor, could identify that they see on
5 the horizon is not a change in prosthesis. They couldn't --
6 so far the X3 looks like it's going to be the Lexus and the
7 long time Lexus in the prosthetic department.

8 There is a potential that in the future the
9 FHA may approve a procedure that's being used in Great
10 Britain and in Australia where instead of a socket -- which
11 I call a sleeve, and I have it wrong; but that's the device
12 that fits over the remainder of Mr. Lee's leg. Instead of
13 using a socket, the prosthesis will attach directly to the
14 bone. Quite frankly, I have my doubts about that. I'm not
15 sure that the bone is going to be -- I think that we're
16 going to need a lot of research before we can assure
17 ourselves that the vertical loading on the bone will carry
18 that kind of a load for the lifetime of a human being, but
19 that's -- that's what's on the horizon. Just -- that's what
20 the evidence is going to be. I'm not making that up because
21 I've taken all of these depositions myself. You'll be
22 hearing about it.

23 Just like the 11-and-a-half-million-dollar
24 number -- and by the way, when you're finished hearing what
25 those paid witnesses have to say about how they got to those

1 numbers, you're going to be shaking your heads. I don't
2 think you're going to approve of that kind of methodology in
3 a court of law. Just like those numbers are extraordinary,
4 I anticipate you will hear other numbers throughout this
5 case and at the end of the case that are extraordinary. So
6 I ask you: Really consider these thoughts that I'm going to
7 put before you.

8 In real life -- every one of us has our own
9 tragedy in our lives, if not multiple tragedies, that those
10 near and dear to us have had to deal with. In our own
11 lives, if at the end of the month, you have, after working
12 hard all month, you have 4- or \$500 left over in your
13 checking account, or a thousand dollars left over in your
14 checking account, for most folks that's been a pretty good
15 month.

16 Now, let's talk about a thousand dollars.
17 When you decide to buy a home, whether it's a 100,000-dollar
18 home or a 200 or a 300 or, you know, whatever you can
19 afford, the difference between 100 and \$120,000, if that's
20 your price range based on your budget, those are real
21 dollars. Those are significant dollars in a human being's
22 life. You're not going to be asked to compensate Mr. Lee,
23 nor would any jury be asked to compensate any plaintiff,
24 based on what I like to call lawyer dollars. Lawyer
25 dollars, the minimum bill is a hundred thousand dollars.

1 That's the smallest bill in lawyer dollars, and it goes up
2 into millions. Everything is millions for this and millions
3 for that.

4 And in fact, you will be asked what sum of
5 money, if paid in cash today, would fairly and reasonably
6 compensate Tyler Lee for mental anguish in the past,
7 conscious pain and suffering in the future, loss of earnings
8 in the past, and so on. You can go with lawyer dollars.
9 You'll make the headlines. You will. Or you can think
10 about how every one of us have lived our lives and will live
11 our lives and you can use normal human dollars in the kinds
12 and amounts of money that normal humans think of and deal
13 with on a day-to-day basis and you can award dollar amounts
14 that fairly and reasonably compensate and you will have
15 certainly done your duty as jurors and no one can complain
16 about that.

17 Even if I have a little bit of time left,
18 folks, I'm going to give it back to you. I know you're
19 probably ready to start hearing some evidence and you're
20 tired of hearing from lawyers. Unfortunately, you have to
21 listen to Mr. Diamond. You should listen to Mr. Diamond.
22 He goes last. He'd like your consideration every bit as
23 much as you've given it to me and Mr. Arnold. Thank you.

24 THE COURT: All right. Ladies and gentlemen,
25 we're going to take our morning break at this time. Please

1 leave your notes in your chair or slide them under your
2 chair so they'll be there when you return, and we'll take
3 about a ten-minute break. Please be back at your assembly
4 point at 11:15. Thank you.

5 *(Jury leaves courtroom)*

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

7 MR. ARNOLD: Judge, I just wanted to raise
8 one issue. I'm not sure of our position; but I just want to
9 remind Your Honor while it's fresh, I think potentially by
10 raising this ESOP issue and somehow implying that the
11 employees of Berkel are going to have to pay for this
12 verdict might introduce the need to show that, in fact,
13 there's insurance for it. I'm not making that motion right
14 now; but I want, since he started off with it, to know that
15 certainly that's an issue, I think.

16 THE COURT: All right.

17 MR. ARNOLD: Thank you, Judge.

18 THE COURT: Ten minutes.

19 *(Recess taken)*

20 THE BAILIFF: We're ready now, Your Honor.

21 THE COURT: Bring them in.

22 THE BAILIFF: Come to order.

23 *(Jury enters courtroom)*

24 THE BAILIFF: All present, Your Honor.

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

1 Mr. Diamond, are you ready to proceed?

2 MR. DIAMOND: Yes, ma'am.

3 THE COURT: You may do so.

4 MR. DIAMOND: May it please the, Court?
5 Counsel?

6 I don't know if you guys could see me over
7 there. I was kind of sitting on my hands the whole time,
8 fidgeting, while the other lawyers were talking. I go last.
9 So there's quite a bit that I will hear and will be able to
10 comment on. I am so glad that you have elected to take
11 notes. That makes my day. Because I believe and my client
12 believes in this process but you got to pay -- you have to
13 pay attention, which you guys are doing, and you're taking
14 down notes.

15 And I'm hoping that you're writing down what
16 these lawyers are saying because the opening statements is
17 where lawyers build their credibility with you, where they
18 tell you what the evidence is going to show and where you
19 ought to hold them to what they said in opening at the end
20 of the day. So if they tell you something in their opening,
21 you need to be watching for it; and if you don't see it,
22 that's a problem during the trial of the case.

23 Now, the opening is not evidence. So what
24 someone tells you, what someone says, is not going to be
25 evidence. The evidence is going to come forward; but if

1 you're writing down what the lawyers are telling you at the
2 beginning, you're supposed to be able to say, "Oh, yeah. He
3 said that. So here's that evidence." Okay? And then you
4 can deal with it appropriately at the end of the day.

5 This is -- this is an important trial to my
6 client. I represent Maxim, like I mentioned in opening, and
7 James Davidson -- in voir dire rather. And I listened
8 carefully to what the Lee's lawyer said about how this event
9 transpired, and he used the word they a lot. Did you guys
10 hear him say, "they did this," "their crew did that," "they
11 were on site," "they said this"? This is not a "they" case.

12 This is a Berkel case. I represent Maxim.
13 Two separate and distinct entities. And you need to make
14 sure that you recognize when you're listening to the
15 evidence who that person is employed by, who they were
16 working for. That is going to be critically important. I
17 have no connection to Berkel and none to Link-Belt. None.
18 The companies are separate and distinct. We don't share
19 employees. We don't share crews. We don't share anything,
20 and that's critically important because all of the
21 individuals that were -- that were lumped into the "they" by
22 the Lee's lawyers are Berkel employees. Period.

23 Let's walk through that. Let's set the stage
24 on what happened, and I'm going to go back a ways.
25 Link-Belt, they manufacture, design, all that stuff, cranes.

1 They do everything, and they get -- they're the ones that
2 start from ground zero, and all of a sudden, ba, ba, ba, ba
3 (descriptive sound), there's a crane.

4 My client buys that crane from Link-Belt.
5 Now, my client, Maxim, has a number of ways it deals with
6 the cranes that it owns. It can say, "You know what,
7 Customer X? We can send you our crane operator, our
8 technicians, our crew, and our crane and you tell us the end
9 result that you want and by golly, we'll do it because we
10 know how to do that."

11 Or the cheaper route is having the customer
12 say to us, "You know what? Don't need your expertise on
13 operating a crane because we have our own crane operators.
14 We actually have our own cranes. All we need you to do is
15 to give us the equipment per our directions, our
16 instructions, our specifications; and we'll deal with
17 operating the crane on our jobsite with our people."

18 That's what we dealt with here. It's called
19 a bare rental, meaning all you are renting -- you're just --
20 the bare rental is the crane itself. Call up Maxim and you
21 say, "Hey, Maxim" -- this is what Berkel did. "Hey, Maxim,
22 I need a crane. I need it to have this capacity. I need it
23 to have this length of boom. I need it to have this
24 configuration."

25 We got our people -- because we own cranes --

1 and the evidence is going to show you Berkel owns their -- a
2 fleet of cranes, their own. They just didn't have one
3 available for this job. They have crane operators left and
4 right. So they didn't need one from us. All they needed
5 was the crane. They call us and they say, "This is what we
6 need. Doomp, doomp, doomp, doomp, doomp (descriptive
7 sound)," not "Maxim, tell us what you recommend," you know,
8 "what do you think we need?" None of that. It was "Maxim,
9 give me A, B, C crane, and have it at this jobsite."

10 So that's what we did. James Davidson
11 brought the crane out. And yes, it's our crane; but it had
12 the boom that Berkel directed. It had the lifting capacity
13 Berkel wanted. And our -- Mr. Davidson, my other client,
14 comes out and uses Berkel employees to put it together.
15 You'll hear that, too. That's standard -- okay -- because
16 one person can't put together this type of crane. He can
17 bring the component parts out. And yes, it took two days to
18 do; but it's all Berkel employees doing it -- okay --
19 because Berkel knows what it wants and how it's going to
20 operate this crane.

21 Now, this rental agreement -- and there is a
22 written agreement that's in evidence. You'll see it. And
23 it says, "You know what, Berkel? You supply the operator.
24 You do the maintenance. You take care of this crane the way
25 industry standards say you're supposed to. You don't

1 overload it. You don't abuse it, and you're supposed to
2 give it back to us in the same condition as we gave it to
3 you."

4 You know, renting a Hertz car. I mean, basic
5 analogy, but similar situation. More like actually having a
6 racecar driver call and say, "Hertz, I want a racecar. I
7 drive racecars. Bring it out here."

8 Okay. So we do that, and we leave. Just
9 keep in mind there was not one Maxim employee on this
10 jobsite after this crane was set up. We were gone, not one
11 Maxim employee on site when this accident happened or even
12 the day of. We delivered the crane, and we were out of
13 there. That was all we were required to do. You'll see in
14 writing that Berkel indicates, also, that it's going to
15 provide a competent operator.

16 Now, let's talk about the operator briefly.
17 Opposing counsel, the Lee's lawyer said, you know, "Maxim
18 did not ensure that Mr. Bennett, the Berkel crane operator,
19 was competent."

20 Well, first of all, that's not my
21 requirement. I'm not required to do that. I don't even
22 have the obligation to do it, nor can I do it, okay? And
23 second, if you remember -- and I know you were taking
24 notes -- later on in his talk he said, but Mr. Bennett said
25 as he was doing these activities that Chris Miller --

1 Mr. Bennett's supervisor, the Berkel supervisor -- said, "Do
2 this. Do this. Do this." Then he said, "Well, Mr. Bennett
3 had the -- the strength of character and the knowledge to
4 step back and say, 'This is not safe. I need to stop. I
5 don't want to do it. We shouldn't do it. We shouldn't do
6 it.'"

7 You can't have it both ways. Either he's
8 incompetent or he knows what he's doing and says this is
9 unsafe. I mean, you cannot have it both ways, okay?

10 What you'll hear is that Mr. Davidson, when
11 he was there, after he put the crane together --
12 Mr. Davidson's my client, works for Maxim -- puts the crane
13 together. He sees Mr. Bennett operate the crane, okay?
14 You'll also -- the evidence is going to show Mr. Bennett
15 didn't say to him, "Hey, you know what? I don't know what
16 I'm doing on this crane. I need some help."

17 You didn't see -- you're not going to hear
18 anybody from Berkel saying, "You know what, Maxim dude?
19 Before you leave, I want you to instruct this certified
20 crane operator how to do this crane."

21 As they say here in Texas, this was not
22 Mr. Bennett's first rodeo. He knew exactly how to operate
23 this crane. So this, "We didn't train him and make sure he
24 was an appropriate operator" is a bunch of hooey. Also,
25 you'll see the evidence on that. Also, you'll hear --

1 Davidson and Bennett both will say the alarms on this crane,
2 when they put it together and they tested it, they were
3 working fine.

4 Why is that important? It's really not, and
5 I'll explain why, but just to address some of the other
6 attorneys' comments: The alarms were working when we left
7 and there is a daily sheet that is filled out by Berkel.
8 Berkel supervisor, Chris Miller, signs off and says, "You
9 know what, this crane's working great today; and I'm
10 verifying that"; or "You know what, this crane has this
11 issue, this issue, and this issue, Maxim, get out here and
12 fix this thing because that's not what we rented, that's not
13 what we're renting. We're renting a crane that works, and
14 this one doesn't work."

15 You will see the entire time this crane was
16 in the possession of Berkel not one complaint by Berkel that
17 the arm's not working or this isn't doing this or this isn't
18 doing that except for there was a drum issue which is
19 totally unrelated. It's a maintenance thing; and they
20 called us, we came out and fixed it. No issue, okay?

21 The other thing that you're going to see is
22 when we leave the site after Mr. Davidson, you know, did the
23 crane and put it together with the Berkel employees, Berkel
24 signs off saying, "Hey, this is what we ordered. It's
25 working fine. See you, Maxim. Don't call us. We'll call

1 you." And we leave.

2 Now, let's go -- let's fast forward to the
3 day of this event. You're not going to hear me say that
4 Tyler Lee did anything wrong. He didn't. I feel for both
5 he and his wife; and honestly I don't say that often because
6 as they -- as some people will say, I'm the calloused
7 defense lawyer. I don't say that often about plaintiffs but
8 I genuinely like these people and I feel sorry for them as
9 to this event. This should not happen to anyone. It brings
10 me to my -- my colleagues for Berkel and their position that
11 they had no knowledge that this was an accident waiting to
12 go happen.

13 That is absolutely absurd. The evidence is
14 going to show that it is absolutely absurd. You heard
15 "disgruntled" used, I think, five or six times.
16 "Disgruntled" in this courtroom is defined as honest and not
17 what I want them to say. That's why they're disgruntled.
18 Let's go to that. Let's talk about that. Because the day
19 of this event, Berkel has a grout policy. It's got a stuck
20 auger policy. What does that mean? Grout policy means,
21 "Hey, you have all the grout here, all of it is ready to go
22 before you start pouring any in there." Why? Why would we
23 have that? We would have that because, as counsel said, you
24 don't want to get started and be waiting around while it's
25 hardening in the ground because it just makes things

1 problematic.

2 So that's what we have here. We have a truck
3 that's partly full. No truck on site; and you've got the
4 workers, the Berkel workers -- no Maxim folks on site,
5 remember. Berkel workers saying, "You know what, we've got
6 to wait. We've got to wait for the truck." And who --
7 Chris Miller, says, "Nah, we're not waiting. Go ahead and
8 start," knowing that if the trucks don't show up and it gets
9 hard and they have to redrill, that there's a potential for
10 this auger to get stuck.

11 Okay. Let me go back to -- the other thing
12 Berkel agreed to in its bare rental agreement is you're not
13 to, you know, overload the crane. Remember, I said that.
14 You're supposed to know the weights that you're lifting.
15 When you have a stuck auger and you're trying to get it out
16 of the ground, I think there's some testimony that it's like
17 lifting the State of Texas. You don't know how heavy it is
18 because you're pulling on something that, "Is it going to
19 give now? Is it never going to give?" So you have no idea
20 what you're lifting. These cranes are not supposed to be
21 for lifting that type of weight. They're supposed to lift
22 free weight. They're supposed to move things around.
23 They're not supposed to be pulling stuff that's stuck.

24 Okay. Go back. Let's go to the auger policy
25 and the grout policy. They didn't follow the grout policy.

1 The auger gets stuck. You've heard that already. Drill it
2 down in there. It's stuck. So then you have Mr. Stacy
3 coming up and saying, "Okay. Well, let's try," because, you
4 know, you get something stuck, you can try. There's nothing
5 wrong with trying initially. So they tried for a few
6 minutes. You go down. You go reverse. Nothing happens,
7 and the crane was fine then. You've got Mr. Bennett doing
8 what Mr. Stacy wanted him to do -- this is after everyone
9 objected to Mr. Miller proceeding with the grout before the
10 trucks got there, okay?

11 And so we've tried it once, twice, a few
12 minutes. Nothing worked. It's stuck. So Stacy goes to
13 Miller, who's the head dude for Berkel, and says, "Hey, it's
14 stuck." What do you generally do under those circumstances?
15 You cut the auger. You fill in the hole. And you go,
16 "Okay. We're chalking that up as a poor decision on the
17 grout issue. The auger is stuck. We'll move on safely with
18 a new auger and a new hole."

19 But no, they didn't do that. Instead,
20 instead you've got Mr. Miller and Mr. Stacy arguing because
21 Mr. Miller wants the auger out at all costs. So Mr. Miller
22 comes over and instructs Mr. Bennett to continue the efforts
23 for 40 minutes. During that 40 minutes, the back of the
24 crane is coming up; and I think the word -- some of the
25 words were it was bobbing. And they added the -- you know,

1 you heard, oh, well, they added the -- the cables and
2 they -- I mean, not cables. They added the arm, the guide
3 arm. They added, you know, the grout cable. They added a
4 counterweight. That's all, as they say, red herrings.
5 You're going to hear no evidence that any of that caused
6 this event at all. You will hear nothing about that. Those
7 are total red herrings, okay?

8 So what you are going to hear, however, is
9 that the back of this crane with the extra weight on it was
10 bobbing. Not good. Not supposed to happen. That crane is
11 supposed to stay flat. The back rollers -- I think the
12 words you'll hear were you could see daylight, meaning you
13 could see between the bottom of the rollers and the ground.
14 Not good. Not right. The front of the crane was digging
15 into the dirt. Once again, not good. Not right.

16 Continue the efforts. Down, up, down, up,
17 down, up. Nothing, for 40 minutes. Continued with the boom
18 almost perpendicular. Not supposed to be that way. It's
19 supposed to have an angle. It's perpendicular. So then it
20 actually flexes backwards due to the weight that Mr. Bennett
21 put on it at the direction of Mr. Miller. All Berkel
22 employees.

23 And then you've got Disotell and Prestridge,
24 the disgruntled employees. One of them is so disgruntled,
25 as he's working, he takes a cell phone video of what's

1 happening because he says, This is a disaster waiting to
2 happen. A cell phone video, think about that. You're on a
3 jobsite. You've told your supervisor on the site, "This is
4 a problem. We need to stop. It's not safe." The operator
5 has said, "This is a problem. It is not safe. We need to
6 stop." Four times Bennett said this, four. Off the crane.
7 This is -- "it's stuck. I don't want to do this anymore."

8 Miller says, "Go. Do it. Do it. Do it. Do
9 it." So Bennett does. Disotell takes out his cell phone
10 and goes, "Oh, my gosh, this is -- I can't believe this is
11 happening. I've got to video it." You know, that's
12 commonplace these days, as we all know with the news. That
13 happens all the time. So he's doing that, showing what's
14 happening. You'll see that. You'll see the stills. You'll
15 see the video.

16 Then the oil cable that's feeding the gearbox
17 of this auger starts to spew oil because it's under such
18 stress. Down, up, down, up, down, up; and stuck. Spraying
19 oil everywhere. So how Berkel can tell you that this is
20 unknown to us that this was a potential problem is beyond
21 me. It's like a cruise ship captain heading out to sea and
22 seeing lightning and thunder and rain and waves and saying,
23 "We had no -- I had no idea we were going into a storm, and
24 I had no idea it was going to push the boat into the rocks."

25 Because you know what? You've got to rely on

1 your common sense. And that's why these operators know what
2 they're doing and that's why Bennett said, "We need to
3 stop." That's why Disotell and Prestridge, Berkel
4 employees, will testify they not only told Bennett that you
5 were going -- going light means the back of the crane is
6 coming up -- "You're going light. The rollers are up.
7 You're overloading the crane." Clearly they will say that.

8 Bennett, young guy, but a certified crane
9 operator, doing what Chris Miller tells him to do, his boss,
10 Berkel supervisor, tells him what to do; and the event
11 happens. Now, you'll hear comments about, you know, the --
12 these guys are obviously on a suicide mission because
13 they're still standing there. None of them were hurt. They
14 were so vigilant and watching what was going on and
15 anticipating something was going to happen that they managed
16 to get out of the way, dove where they needed to dive, moved
17 where they needed to move.

18 Mr. Lee doesn't know what's going on down
19 there because he's up on the hill, away. He's assuming that
20 Berkel's doing its job and doing it safely. Just like Maxim
21 contracted with Berkel to do the same thing. We're not
22 there saying "Oh, wait. Mr. Miller, that's not right."
23 We're not there tapping on Mr. Bennett's shoulder saying,
24 "Ah, we're going to shut this down because we don't think
25 you're doing this right." We're not even there.

1 You're going to hear about the computer and
2 that -- that the -- the sounds weren't going off and that
3 the overrides weren't working, et cetera, et cetera. The
4 limits -- the limits I think is the word they used. The
5 limits weren't working. Let me tell you: You're also going
6 to hear evidence that the audio on the alarms was turned off
7 in the crane. Exactly. Exactly. Surprising, right?

8 You'll also see that there is a little box
9 that covers the overrides that allow you to go -- when the
10 limits hit, it will allow you to go over that. Why is that
11 there? Safety measure so that if you're overloading and you
12 need to back out of it, you can override the crane and do
13 that. That override box was propped open with a cable that
14 was installed by Berkel. The overrides are propped open,
15 audio is turned off. The computer that tells Berkel's
16 operator "this is how much grout you're putting into the
17 hole" is on a swivel. It turns. So it will move out of the
18 way so you can see the computer system if you want.

19 The problem is the computer is a red herring
20 as well. It's a red hearing because this operator was never
21 using that computer. He had his coat draped over that
22 computer screen, and there's a photograph of it. This is
23 not like me saying this or someone saying this. There's a
24 photograph of it propped over the computer. He wasn't using
25 that computer, but you know what? It doesn't really matter

1 whether he was using the computer or not. The computer is
2 not an issue in this case. Why? Why? Because the
3 computers are relatively new to cranes in the overall grand
4 scheme of crane history. People operated these type of
5 cranes without computers for decades. So how do you -- how
6 do you, Mr. Diamond, know that you're overloading a crane,
7 you're doing what you're not supposed to? You've got
8 charts. You've got calculations, and you have signs and you
9 have facts that you can look at that will tell you that
10 you're pushing the crane to the limit.

11 Other thing you need to be aware of is those
12 signs and symptoms that we were -- that I was talking about,
13 the spewing of the oil, the back of the crane going light,
14 the weight bobbing, the boom flexing. This was not a
15 situation where that happened and a split second later the
16 event occurred. No. Those events were happening in the 40
17 minutes that Mr. Miller insisted that Mr. Bennett continue
18 the efforts to get this auger out. So this is not something
19 that was a split-second situation. This was a decision.
20 Not Maxim's, but Berkel's.

21 THE COURT: You have ten minutes, Counsel.

22 MR. DIAMOND: Thank you.

23 Remember in voir dire I mentioned about my --
24 my son Conner with the cookies and the cookie jar and all of
25 that? And just for the record, he's a sweet kid and he's

1 now in college and, you know, I couldn't be prouder of him.
2 But when he was little, he was a hellion. He just was. And
3 I made that analogy because it's very, very apropos for this
4 case. Why? Because you're going to hear Bennett, who for
5 whatever reason when he testifies, he is absolutely -- he's
6 less than forthright. Is that a polite way to put it? And
7 he's going to be saying to you, "I didn't overload this
8 crane. I never overloaded a crane. Wasn't me. The
9 computer wasn't working. I was relying upon the computer.
10 The alarms weren't going off. I had no idea what was
11 happening. Not me. Not me."

12 Yet honestly, of anybody in this case,
13 Bennett's got chocolate over his face. He's got crumbs on
14 his shirt. He's skipping dinner he's had so many cookies.
15 He had the sounds. He's got the oil. He's got his
16 disgruntled coworkers, at the time before the event
17 happened, videotaping this catastrophic, unsafe situation
18 and also telling him, "You're going light. The crane's
19 tipping." He can see from his, you know -- and, you know,
20 the buck stops with him. He's the operator. He can see
21 through the window that the boom is flexing. Not good. Not
22 good.

23 But you know what? He's a young guy. Does
24 that mean he's incompetent? No. But does that mean he's
25 more susceptible to a boss telling him, "Get back on the

1 crane and do what I'm telling you to do, that is your job,
2 and I'm your boss, do it"? Yeah, probably. That's Chris
3 Miller.

4 So Berkel[sic] shouldn't be here. It's our
5 crane, yes; but that's it. That's it. Nothing we did
6 caused this event; and nothing we could have done would have
7 prevented this event, period. Listen to the evidence. I'm
8 really, really good with you listening and writing down the
9 evidence because you will hear a lot, but what you have to
10 think is: What have you heard that will connect an action
11 by Maxim to causing or failing to prevent this event?

12 Nothing. You will see and hear nothing. You'll hear a lot,
13 but you will not hear anything that makes the connection.

14 Remember I mentioned cause and effect in my
15 voir dire and I talked about that? Nothing we did caused
16 this event. Nothing we did, would have or could have done
17 would have affected this event. Berkel can't say the same
18 thing. Matter of fact, the evidence you're going to hear is
19 very, very clear that every opportunity -- and there were
20 multiple opportunities to prevent this from happening --
21 were all in Berkel's control. Lock, stock, and barrel.
22 Period. Their operator, their supervisor, their decisions,
23 their accident. Period. Thanks.

24 THE COURT: All right. Ladies and gentlemen,
25 we're going to break for lunch; and then as soon as you