

1 court deputy who will pass it to me. You must not
2 show your question to anyone or discuss it with
3 anyone. I will then review the question with the
4 attorneys. Under our laws, only certain evidence
5 may be considered by a jury in determining a
6 verdict. You are bound by the same rules of
7 evidence that control the attorneys' questions. If
8 I decide that the question may not be asked under
9 our rules of evidence, I will tell you. Otherwise,
10 I will direct a question to the witness.

11 The attorneys may then ask follow-up questions
12 if they wish. If there are additional questions
13 from jurors, we will follow the same procedure
14 again.

15 By providing this procedure, I don't mean to
16 suggest that you must or should submit written
17 questions for witnesses. In most cases, the lawyers
18 will have asked the necessary questions.

19 Those are the preliminary jury instructions,
20 members of the jury. At this time you will hear
21 opening statements from the attorneys, first from
22 Mr. Avera for the plaintiff.

23 MR. AVERA: May it please the court?

24 THE COURT: Yes, sir.

25 MR. AVERA: Good morning, ladies and gentlemen.

1 Domino's Pizza, LLC, has a right to control each and
2 every franchise's day-to-day operations. It is an
3 international company with about 15,000 stores, most
4 of them owned by individuals. That right of control
5 is important in this case, because as Judge Roche
6 has told you, if you find that Domino's Pizza has a
7 right of control and that Fischler Enterprise, the
8 Domino's franchise owned by Mr. Fischler and/or
9 Jeffrey Kidd are agents of Domino's Pizza, then
10 Domino's Pizza is responsible for the automobile
11 crash of January 13, 2011, caused by Mr. Kidd.

12 This case is about primarily three things.
13 Domino's right to control their franchisees in
14 general and Mr. Fischler's franchise here in
15 Orlando, in particular. Of course if you find yes
16 on agency, Domino's is responsible for Mr. Fischler
17 and Mr. Kidd. It's about the negligence of Jeff
18 Kidd, a Domino's Pizza delivery driver who caused
19 that crash on January 13, 2011.

20 His negligence caused Rich Wiederhold, a
21 retired Brevard County District Fire Chief, to
22 suffer catastrophic injuries when he took evasive
23 action to avoid an emergency that was caused by
24 Mr. Kidd when he pulled out in front of
25 Mr. Wiederhold on East Colonial at St. Catherine's

1 Avenue in Christmas, east of downtown.

2 Those complications from quadriplegia resulted
3 in Mr. Wiederhold's death 15 months later, leaving
4 his wife, Yvonne Wiederhold.

5 The three issues we will prove to you, that we
6 have the burden of proving to you by the greater
7 weight of the evidence: First, overwhelming
8 evidence that Domino's Pizza has, in fact, a right
9 to control virtually every aspect of Jarred
10 Fischler's Domino's franchise on State Road 50 in
11 Bithlo, just west of Christmas on East Colonial
12 Avenue [sic]. I'll submit to you that evidence will
13 be overwhelming of the right to control that
14 franchise, and not only that they have the right to
15 control that franchise, but they actually exercised
16 that right and do control the day-to-day operations
17 of the franchise.

18 Mr. Fischler himself will testify later today
19 by videotape in our case that Domino's Pizza
20 controls every aspect, maybe only pricing;
21 everything else, Domino's has a right to control and
22 they do control.

23 The second issue that we will prove to you is
24 that Mr. Kidd was the cause of the crash on
25 January 13, 2011. I'm going to talk about the crash

1 in just a few minutes.

2 And third, we'll discuss the damages stemming
3 from the death of Mr. Wiederhold which will include
4 Mrs. Wiederhold's mental pain and suffering, her
5 anguish, her loss of companionship, losing her
6 husband in the manner in which she lost him, from
7 the date of the marriage forward to today and into
8 the future, as Judge Roche told you; the medical
9 bills, renovations and expenses to accommodate
10 Mr. Wiederhold when he came home six months after
11 the crash, when Yvonne brought him back home to here
12 in Orlando. We'll talk about the chronology of
13 events.

14 Some definitions are helpful here. Now, Judge
15 Roche has already given you these about what an
16 agent is and what an independent contractor is. So
17 to be clear, I'm not going to reread these again.
18 Judge Roche will give these to you again at the
19 close of the case, and I think each of you will have
20 your own copy of at least the instructions to look
21 at these definitions when you deliberate.

22 We allege that Domino's Pizza is the principal
23 here and that Fischler Enterprises and Mr. Kidd are
24 the agents of Domino's Pizza, and that's what you
25 have to find to find Domino's Pizza responsible for

1 the negligence of Mr. Kidd.

2 Domino's, you will learn, takes the position
3 that no, Fischler Enterprises, the franchise and
4 Mr. Kidd are independent contractors. And this
5 definition is really important. I do want to review
6 part of it briefly again with you because an
7 independent contractor does the work according to
8 his own methods and whose methods of performing work
9 are not controlled by the company, Domino's,
10 engaging him, and are not subject to Domino's right
11 of control. You are going to find from the evidence
12 in this case, as I said, that Domino's controls
13 virtually every aspect, and that evidence will be
14 overwhelming.

15 This morning what I'm going to do is to go
16 through with you what you're going to find from the
17 documents, first of all, which describe the degree
18 to which Domino's has a right to control, and we
19 won't go over everything. Exhibit 20, in evidence,
20 you may want to look at when you deliberate. That's
21 going to be called the MRG, the Manager's Reference
22 Guide. You are going to hear it referred to as the
23 MRG or the Manager's Reference Guide. It's
24 Exhibit 20, and it has the standards and rules and
25 that Domino's places upon its franchisee that they

1 have to follow. There isn't any deviation from
2 that. We'll talk about that in just a minute.

3 Judge Roche has also already told you about
4 what the definition is of negligence. You'll hear
5 this again, and this is important because after we
6 talk about what's in the documents with Domino's,
7 we're going to talk about how the accident happened,
8 the specifics of who says what.

9 And of course, we'll have the testimony of
10 Mr. Wiederhold. He passed away before his
11 deposition could be taken, and that's nobody's
12 fault, but we have what Ms. Wiederhold recalls, I'll
13 tell you about that; what Mr. Kidd recalls; and then
14 we'll talk about the expert witness that will appear
15 before you, I believe, live to testify about what he
16 believes happened in the accident as a result of his
17 recreation, Mr. Fornier.

18 Domino's Pizza describes themselves as the
19 pizza delivery experts, getting hot, fresh pizza to
20 its customers as quickly as it can. They maintain
21 that right of control on those day-to-day operations
22 of getting hot and fresh pizza to their customers
23 through their franchises. Mr. Fischler owns that
24 store, and Mr. Kidd was a delivery driver that
25 worked for him at that store.

1 Mr. Fischler is going to appear by videotape,
2 as is Ms. Klinge, his manager at that store at the
3 time of the crash in January of 2011. Both of them
4 will tell you that Domino's controls every aspect of
5 their day-to-day operations. This is from the
6 actual franchise owner, and his manager will tell
7 you that. And they will give you examples of how
8 Domino's Pizza, the corporate store, controls them
9 on a day-to-day basis.

10 I should mention at this point in time that a
11 lot of what you're going to hear today is from
12 videotape testimony or from the reading of
13 depositions; time has gone by, people's schedules.
14 Some physicians are testifying. They'll be --
15 Dr. Snyder will be here later today.

16 I'll tell you who Dr. Snyder is. He is going
17 to be out of the order that I would prefer him to be
18 in, the logical sequence of the testimony to make
19 sense to you, but that's just sometimes how we have
20 to do it, because we're a day behind here putting on
21 evidence. So Dr. Snyder will appear live today.
22 And Judge Roche will give you an instruction about
23 how to consider that videotape testimony or
24 testimony we might read to you from depositions
25 taken in the past here today.

1 You are going to hear and learn that Domino's
2 maintains a right to control access to the store
3 premises for surprise inspections. The corporation,
4 any time during normal business hours, can come into
5 the store, go behind the counter, and begin to
6 inspect things.

7 And as I mention these rules and standards
8 today, ladies and gentlemen, I don't want you to
9 assume that we are arguing that any of these
10 standards or rules are bad standards or bad rules.
11 Quite to the contrary, you might find them a good
12 idea.

13 But whether they have good or bad rules is not
14 an issue for you to decide. The issue for you to
15 decide is whether those standards and rules exist to
16 such an extent that the corporation, Domino's Pizza,
17 maintains a right to control, merely a right.
18 That's all we have to prove. We don't have to prove
19 they exercised that right, but you will find from
20 the evidence that they do.

21 Domino's maintains a right to control access to
22 the franchisee's computers and to access
23 Mr. Fischler's data. While they're there inspecting
24 the premises, they can go into his computer and look
25 at the data that's in that computer. You're also

1 going to learn that they have the right to do that
2 remotely from Ann Arbor, Michigan, where Domino's is
3 headquartered.

4 You may hear from the defense today that
5 Mr. Fischler has a right to hire and fire people.
6 He does that. Well, to some degree, that will be
7 true, but what you're going to find out is that
8 there are limitations there. The evidence is going
9 to be that Domino's has a rule that there is a
10 minimum age of drivers and they prohibit anyone
11 under the age of 18. So if a Domino's franchise
12 owner has a son who is a senior in high school that
13 that franchisee believes is responsible and he wants
14 him to be able to deliver pizzas, Domino's prohibits
15 that. That's control, the evidence will show you.

16 It may suggest that they can hire any driver.
17 That's not altogether true, because what you're
18 going to learn is that there are certain infractions
19 on a potential delivery driver's motor vehicle
20 record that would prohibit him or her from serving
21 as a Domino's delivery driver. Again, not to
22 suggest that's a bad idea or a bad rule, but it's
23 evidence of the degree to which the corporation
24 controls or has a right to control the franchise.

25 Domino's maintains a right to control the

1 signage on delivery vehicles, the delivery vehicle
2 in this case. And all delivery vehicles at
3 franchise-owned stores are personal delivery
4 vehicles where Domino's maintains the right to force
5 the delivery driver in their personal vehicle to put
6 a sign on top.

7 The corporation maintains the right to control
8 who can ride in a personal vehicle of a delivery
9 driver. If you're a Domino's delivery driver at a
10 franchise, like Mr. Kidd in this case, you can't
11 have a non-Domino's employee ride with you. They
12 prohibit that.

13 You will learn that the corporation controls
14 the facial hair of all team members. You're going
15 to learn that everybody at Domino's is called a team
16 member, including the employees at franchises. The
17 corporation controls how much money a delivery
18 driver has in their pocket when they leave the
19 store. They're not permitted to have more than \$20
20 when they leave the store.

21 They control what the team members wear. They
22 control the appearance of tattoos of all team
23 members. The corporation controls the appearance of
24 bumper stickers on private delivery vehicles. They
25 are prohibited from having any bumper stickers that

1 they deem to be offensive.

2 In Florida, people can carry concealed weapons
3 if they have a permit. I'm not suggesting whether
4 that's a good idea or a bad idea, but Domino's
5 prohibits that, even if the delivery driver is an
6 off-duty police officer or sheriff's deputy who
7 wants to work a side job; evidence of right of
8 control.

9 Domino's controls the computer system used by
10 Mr. Fischler. He must use the Pulse system. That's
11 a point-of-sale system, software system that
12 Domino's uses nationwide. And you will learn from
13 Mr. Joseph Devereaux, the franchise services
14 director who will testify either Thursday or Friday,
15 that he knows about litigation where franchisees
16 didn't want to use that system, and they were forced
17 to do so.

18 You're going to learn that the corporation
19 requires them to use certain hardware to run the
20 Pulse system. The corporation requires only certain
21 vendors be used to work on the computers or to
22 perform background checks on franchise employees.
23 The corporation prohibits the use of radar detectors
24 in private delivery vehicles. They control speech
25 on franchise grounds. They prohibit anything that's

1 obscene or profane on the premises.

2 They control background checks and mandate that
3 they be done every three years, and you'll see
4 what's called a default letter issued to
5 Mr. Fischler by Domino's Pizza regarding this issue.
6 I'll tell you what default letters are and how they
7 work in this system.

8 The corporation even controls the equipment
9 that has to be on bicycles if delivery personnel are
10 delivering by bike. The corporation prohibits the
11 use of a motorcycle. If you want to deliver your
12 pizza by motorcycle, that's prohibited. They
13 control the hours of operation and days that a store
14 must be open. In those documents, I think you'll
15 see the three days they're permitted to be closed
16 are Christmas Eve, Christmas Day, and I think
17 Thanksgiving. The rest, they're required to be
18 open.

19 Here are some of the actual clips that reflect
20 what we've been discussing for the last five
21 minutes. In the right column are the page numbers
22 in Exhibit 20. The MRG, again, stands for the
23 Managers Reference Guide. It's Section 12 of a big
24 book; Section 12 are the standards and rules, and to
25 the far right are the pages.

1 And here you can see that they prohibit
2 profanity or any other unprofessional behavior in
3 the course of business. No one under the age of 18
4 is permitted to operate a motor vehicle while in the
5 course and scope of employment at any Domino's Pizza
6 location. Delivery vehicle passengers; can't have
7 anybody who is a non-Domino's employee. Radar
8 detectors prohibited. Car signage required to be
9 utilized unless it's prohibited by local regulations
10 or state law. Motorcycles prohibited to be used in
11 the continental United States. The equipment
12 required on bicycles. And at the bottom, even the
13 degree to which they require that helmets that are
14 worn by bicycle delivery drivers have to have a
15 certain sticker on them before they can use that
16 helmet in the operation of their bicycle.

17 If all of that is not sufficient evidence of
18 Domino's right of control of their franchisees and
19 those employees who work for the franchisees, here's
20 from the franchise agreement signed and executed by
21 Mr. Fischler and Mr. Devereaux as a director of
22 franchise services back in 2004.

23 In the new concepts in the franchise agreement,
24 if Mr. Fischler develops any new concept or
25 improvement or any slogan in the operation or

1 promotion of the store, you agree -- referring to
2 Mr. Fischler -- to promptly notify us and provide us
3 with all necessary information without compensation.
4 You acknowledge that any such concept, process or
5 improvement or slogan shall become our property and
6 that we may utilize or disclose this information to
7 other franchisees. They don't ask him for it. The
8 evidence will be they take it from him. If he comes
9 up with it, he's required to immediately notify
10 them, and they keep the profit, if any. And they
11 can force other franchisees to use this concept.

12 That may be referred to by the defense as
13 intellectual property, and that may be, but it's an
14 issue of right of control, the franchise operators.

15 Now, you may be thinking, well, what happens if
16 they violate the rules? What does corporate do if
17 they violate the rules? And you'll hear
18 Mr. Devereaux refer to a default letter, like this
19 one issued to Mr. Fischler on July 21st of 2010,
20 some six months before the crash in January of 2011.

21 And here, you see where Domino's requires
22 agreement, and Mr. Fischler does agree, among other
23 things, to fully comply with all specifications,
24 standards, operating procedures and rules from time
25 to time prescribed for the operation of the Domino's

1 Pizza store. And here, they're sending a default
2 letter because of the criminal background check
3 standard, reminding him that a franchise operator
4 can cure their breaking of the rules by taking care
5 of it.

6 And Mr. Devereaux will tell you, if there are
7 enough defaults, we can terminate them. Evidence of
8 right of control.

9 Now, this is the documentation regarding right
10 of control, and I'll come back to this, but this
11 will be the first question you'll be asked; this
12 question or one very similar to if it's not this
13 exact question. And the question is: Was Fischler
14 Enterprises of CF, Central Florida, and Jeffrey Kidd
15 agents of Domino's Pizza at the time of the motor
16 vehicle crash? And your answer to that question,
17 because of the overwhelming nature of the evidence,
18 far, far more evidence than the greater weight of
19 the evidence, should be yes.

20 Before we talk about the motor vehicle crash,
21 you need to know a little bit about Rich Wiederhold,
22 a big guy with a big heart, 6'7". He had worked
23 years ago, decades ago, as a firefighter at Reedy
24 Creek and Winter Park. He had been a district fire
25 chief for Brevard County Fire Rescue, retiring about

1 July of 2005, serving a little over three decades
2 serving the communities of Central Florida in
3 emergency services, responding to the needs of
4 citizen in Central Florida where they called for
5 help as both a firefighter and a paramedic. He was
6 well-educated. He had a bachelor of arts from
7 Florida State University and a Master's in Public
8 Administration from the University of Central
9 Florida.

10 He volunteered for the National Disaster
11 Medical System as a safety officer at what's called
12 DMAT, the Disaster Medical Assistance Team. And
13 you'll learn that as part of that team, he was
14 deployed with DMAT to New Orleans for Hurricane
15 Katrina to take supplies to the victims of that
16 natural disaster that were in need.

17 You will learn that he responded in January of
18 2009 with that team to President Obama's
19 inauguration in January of 2009 to serve with other
20 emergency services in the event of any kind of
21 untoward event that would happen in Washington
22 during the inauguration.

23 He taught emergency medical services. He
24 taught emergency management as an adjunct instructor
25 at the University of Central Florida. He taught at

1 Brevard Community College, Valencia College, and
2 Seminole College.

3 When he began dating Yvonne Hunter, at the
4 time, he learned of her passion in taking in
5 unwanted exotic birds, parrots typically, that had
6 people who no longer wanted them or they were sick
7 or in need of some kind of treatment, and she would
8 find them homes after they were rehabilitated.

9 Her passion became his passion and that was
10 something that he took great joy in in the last few
11 years before this crash when this happened.

12 By Christmas of 2010, a few weeks before the
13 crash, Rich Wiederhold and Yvonne were sending out
14 Christmas cards to friends and family. You'll learn
15 that they loved to travel. I'll talk a little bit
16 more about this in a few minutes, but Mrs.
17 Wiederhold will tell you that this was a second
18 marriage for both of them. And perhaps although not
19 perfect for others, they were perfect for each
20 other.

21 They took great joy in their community and they
22 enjoyed and loved their neighbors. The photograph
23 on the right, Rich is holding a child of Phil
24 Mangel's, a neighbor who will be with us, I believe,
25 tomorrow, who will talk about the nature of their

1 relationship while they were neighbors.

2 That leads us to the events of January 13, 2011
3 at the crash scene east of Orlando on East Colonial
4 at St. Catherine's Avenue. This is an aerial view,
5 and you'll see a lot more photographs of the scene
6 from all types of different perspectives. I'll just
7 give you a few to get you oriented about how the
8 crash happened.

9 So we are looking at a photograph where north
10 is on the top of the photograph, south is at the
11 bottom, obviously then east and west. And you're
12 going to learn that Mr. and Mrs. Wiederhold were
13 traveling west on East Colonial Avenue from
14 Edgewater.

15 Mr. Wiederhold had purchased a home in
16 Edgewater for his elderly parents who at the time
17 lived in North Carolina. His mom's health was not
18 good, and it was his intention to move them to that
19 home. Once getting them established, he had hoped
20 to buy a home close to them in Edgewater, leave
21 downtown Orlando, and move out next to them in
22 Edgewater.

23 There was nothing going on in Orlando that
24 evening for which they were in a hurry. This was a
25 Thursday. And although all the photographs you're

1 going to see are daytime, this is a nighttime crash.
2 This is about a 7:10, 7:15 p.m. crash, and in
3 January, it's wintertime and it's dark. That's not
4 in dispute.

5 There is no light, ambient light, from the sun.
6 You're going to learn there are no streetlights in
7 that area. It's very dark. The nature of the
8 roadway is it's straight, it's flat, it's not curvy,
9 and there's no weather that has anything to do with
10 what happened that night.

11 Mr. Kidd will describe to you in his videotaped
12 testimony how he had just delivered a pizza and was
13 on his way back to the store in Bithlo. And you're
14 looking west, the same direction that Mr. and Mrs.
15 Wiederhold would have been going that evening.
16 There are some better photographs. Mr. Wiederhold
17 is in the left lane at the time this happens.

18 You're looking at both of the westbound lanes,
19 and the arrow points to the median break we were
20 just looking at in that overhead view. And that's
21 the median break where Mr. Kidd pulls out from
22 St. Catherine's with the intention of turning left
23 and heading to the store.

24 This is the view of St. Catherine's street
25 traveling north and approaching the stop sign at

1 East Colonial Avenue. This view doesn't have much
2 to do with the specific circumstances of the
3 accident, but it just shows you where Mr. Kidd is
4 and where he's traveling as he approaches East
5 Colonial. You can almost make out the stop sign
6 that's right there. His intention is to pull up
7 here, to stop, check for eastbound traffic, cross
8 the eastbound lanes, stop in the median, and then
9 turn left and travel to the store in Bithlo.

10 Here are the vehicles involved. On the left is
11 Mr. Kidd's Chevrolet Cavalier. I would ask you to
12 take note of the nature of the tinted windows on
13 Mr. Kidd's car. That may become important during
14 your deliberations, and you're going to hear me talk
15 about it in the seconds before the crash happened.

16 On the right is Mr. Wiederhold's 2004 Toyota
17 Tacoma. That vehicle is equipped with an
18 anti-breaking system. You will hear from
19 Mr. Fornier that may describe why or explain why you
20 don't see hard skid marks if you were to lock up the
21 brakes in the seconds before the crash. And we'll
22 talk about that with Mr. Fornier.

23 First, Ms. Wiederhold's version of events.
24 They'd just had an enjoyable day working on the
25 home, trying to fix it up for Mr. Wiederhold's

1 parents. They're traveling west on East Colonial
2 Avenue in the left lane, traveling along with
3 traffic. The speed limit in this area is 60 miles
4 per hour.

5 Ms. Wiederhold -- the defense is going to tell
6 you that Ms. Wiederhold believes they might have
7 been going 55, certainly may have been going 60 or
8 faster, but she does remember they were traveling
9 along with traffic. There were a couple of vehicles
10 in the right-hand lane. And I'll have a board up
11 later in the trial that is an overview view, and
12 we'll place the vehicles and show the circumstances
13 of how this happened.

14 Everything seems normal. Nothing abnormal
15 about Mr. Wiederhold that day. You're going to hear
16 her tell you that it's undisputed they were both
17 wearing seatbelts. That's not in dispute.

18 All of a sudden, as they're in the left lane
19 traveling, a light-colored vehicle with a lighted
20 sign on top just suddenly pulls out right in front
21 of them. She wasn't expecting it. She can't say
22 what Mr. Wiederhold thought or saw in the seconds
23 before this. She screamed when Mr. Kidd pulled out.
24 She recalls that it seemed to her at the same time
25 Mr. Wiederhold jammed on the brakes, a trained

1 emergency services operator for decades as a
2 firefighter, paramedic, and he swerves left to avoid
3 the crash. There's cars in the right lane. There's
4 not an avenue to escape there.

5 There's a median, grassy median, and
6 Mr. Wiederhold hits the brakes, swerves left, and
7 goes into the median and goes around Mr. Kidd. And
8 Mrs. Wiederhold does not know how Mr. Wiederhold
9 avoided hitting Mr. Kidd.

10 Mr. Kidd is going slow enough where
11 Mr. Wiederhold passes him as he brakes and tries to
12 regain control, and goes back across the westbound
13 lanes in front of Mr. Kidd.

14 I'll tell you in a second what Mr. Kidd says
15 about what he remembers.

16 But the vehicle travels across the westbound
17 lanes of East Colonial and leaves some yaw marks as
18 the vehicle is moving, not straight ahead, but at a
19 side angle, and the truck rolls, we believe, once.
20 And it comes to rest violently on its tires,
21 upright.

22 It's dark, and Mrs. Wiederhold is scared,
23 smells things. She turns to Rich Wiederhold and
24 says, "Rich, honey?" And he's not immediately
25 responsive.

1 She gets out, gets around the side of the car.
2 Now Rich is responsive. He's not moving. She says,
3 "Honey, Rich, are you okay?" He's bleeding a little
4 bit.

5 He says, "Don't move me. I can't breathe.
6 Call 911."

7 She wouldn't know that in that moment he had
8 suffered in the crash a high-level spinal cord
9 injury in his cervical spine, high enough, in fact,
10 to affect his diaphragm which is the organ that
11 holds our lungs down and makes them be able to
12 expand so he can breathe. Now his diaphragm isn't
13 working. His lungs aren't working. He's not
14 breathing right.

15 She recalls as she's there, looking up the
16 roadway, they're on the north side of East Colonial
17 Avenue, and she sees a light-colored vehicle with
18 that lighted sign on the side of the road up there.
19 She remembers somebody wearing pizza clothing
20 walking towards her, and she yells at that person,
21 "You pulled out in front of us." That person
22 replies, "I know, I'm sorry, I'm sorry."

23 She says, "Get away from me."

24 You will hear a 911 call. The call was made by
25 Mr. Jeffrey Kidd, who was that gentleman she told to

1 get away from her. And Mr. Kidd will tell you that
2 what he heard was, "Do you need me to stay?" And
3 Mrs. Wiederhold replied, "No, thank you for your
4 help. You can go." Mrs. Wiederhold is going to
5 tell you she didn't say that. And Mr. Kidd left the
6 scene.

7 In the 911 call that you will hear, Mr. Kidd,
8 in response to a question by the operator, what
9 happened? Mr. Kidd will say something to the effect
10 of "Somebody pulled out."

11 Trooper Kevin O'Quinn had been a trooper about
12 a year when this happened. He has since moved to
13 another station, so again, it's going to be by
14 videotape. He's going to appear before you today to
15 testify. And he'll tell you that the crash was
16 reported to the highway patrol around 7:17 p.m., but
17 by the time he got there, Mr. Wiederhold had already
18 been taken to the hospital.

19 And with the information at the scene that
20 there was a Domino's sign on the vehicle that pulled
21 out in front of Mr. Wiederhold, he goes the next day
22 to the closest Domino's store, the Bithlo store,
23 west of where the crash happened, to investigate.

24 And there he learns from Ms. Andrea Klinge
25 that the employee involved was Mr. Kidd, and he

1 interviews Mr. Kidd that day. And Trooper O'Quinn
2 will tell you that Mr. Kidd told him that as soon as
3 he pulled out and started to accelerate, he saw a
4 vehicle go sliding by him; that he never saw that
5 ongoing vehicle.

6 I'm going to talk to you for a few minutes
7 about the specifics about what Jeffrey Kidd is going
8 to tell you, but in closing argument I will tell you
9 that when people pull out in front of people, they
10 always say "I never saw them."

11 This is Mr. Jeffrey Kidd. And by my comments
12 today, I would not want anyone to think that I would
13 suggest that Mr. Kidd is a bad young man; I don't.
14 He was doing a job, and in a moment's lapse of
15 judgment, was negligent, pulled out in front of
16 another vehicle and caused this tragedy.

17 He was a delivery driver of Domino's, a team
18 member. He had worked there for about a year.
19 He'll tell you about his car that he had. He'll
20 tell you that he just made that delivery and was
21 headed back to the store.

22 And when you see his testimony, his video
23 testimony, he's going to describe where he is in the
24 median, and this is why this part is important
25 because it will be evidence that conflicts with what

1 the defense expert, Mr. Fornier, is going to tell
2 you.

3 And Mr. Kidd will show you on the video that he
4 says that when he pulled in the median, he is pretty
5 much almost parallel to the travel lanes. That's
6 the evidence that Mr. Kidd will give you. And we'll
7 suggest that that evidence allows you to infer that
8 he either had to use his rearview mirror, side view
9 mirror or look over his right shoulder or all three
10 to check for oncoming traffic.

11 And we'll talk about how that conflicts with
12 Mr. Fornier's testimony in just a moment.

13 Mr. Kidd sees a car in the left lane that he
14 believes he has to wait for, and he says it goes by.
15 Now, he doesn't know how far away that car is in the
16 left lane when he sees it. He sees some cars in the
17 right lane and believes it's safe to pull out. He
18 looks over his shoulder, and doesn't see any
19 oncoming traffic in the left lane. You may hear
20 testimony that he says Mr. Wiederhold came out of
21 nowhere.

22 Mr. Kidd does not know how long he was stopped
23 in the median, how fast he was going when he first
24 saw Mr. Wiederhold or the time that went by from
25 when he first saw Mr. Wiederhold. We know he was

1 going slow enough for Mr. Wiederhold to go by him
2 and then cross in front of him as Mr. Wiederhold
3 lost control, rolling to the north side of East
4 Colonial Avenue. And then he'll reference the 911
5 call that you will hear to Orange County fire
6 rescue.

7 Now, Mr. Fornier is hired by the defense to
8 give you their version of how they believe the crash
9 happened, and Mr. Fornier is an accident
10 reconstruction expert. Some things that you should
11 know about Mr. Fornier before he testifies is that
12 he wasn't retained by the defense until about two
13 years after the crash. He never inspected either of
14 the two vehicles involved.

15 He does work defending Pizza Hut and their
16 delivery drivers. And in the three years preceding
17 2016, he was retained by the lawyers for Domino's in
18 this case 30 times in other matters. And in the
19 three years after 2016, from then until about now,
20 retained an additional nine times by the lawyers
21 representing Domino's in this case. So right at 40
22 times in the last six years.

23 Mr. Fornier has done an accident reconstruction
24 that does a time/distance analysis. He did not know
25 anything about Mr. Wiederhold when he did this

1 analysis; that he was a retired district fire chief,
2 emergency driver, trained Mr. Joe Lashley -- you'll
3 hear his testimony. My daughter will ask the
4 questions. Mr. Steinberg will read the testimony of
5 Mr. Lashley, who is older now. He'll testify to you
6 by us reading his deposition that Mr. Wiederhold
7 taught the course. He took the course on emergency
8 driving.

9 I want to talk just for a minute about the
10 time/distance study, and the assumptions that
11 Mr. Fornier has made. And this will become clearer
12 to you as Mr. Fornier is on the stand and I have a
13 chance to talk to him while he's up there, but let
14 me give you the gist of the issue. That is that
15 Mr. Fornier's analysis is dependent on two variables
16 that he has to assume.

17 And those variables are, one, where Mr. Kidd is
18 in the median. And he places him about 25 feet away
19 from the travel lanes of East Colonial in the median
20 at about a 45-degree angle to oncoming traffic,
21 which some people might do. Some people might pull
22 up perpendicular to the travel lanes, some a
23 45-degree angle, some, like Mr. Kidd describes,
24 almost parallel to the lanes. And then we'll talk
25 at the conclusion of the evidence how that might

1 make it difficult to see oncoming traffic.

2 The other variable that he assumes is a rate of
3 acceleration; Mr. Kidd's rate of acceleration from
4 when he starts from a stopped position in the travel
5 lane. He's got to travel that 25 feet. He's got to
6 cover that distance before he gets to the travel
7 lanes, so that takes some seconds. So the longer it
8 takes Mr. Kidd to enter those travel lanes, the
9 farther back Mr. Wiederhold is from the point of
10 where this happened.

11 And Mr. Fournier believes that Mr. Wiederhold is
12 550 feet away when Mr. Kidd first begins to move,
13 traveling at about 70 miles an hour.

14 Mr. Fournier will tell you that there's a range
15 involved here with the lowest being -- I think
16 62.5 miles an hour is the lowest he attributes to
17 Mr. Wiederhold, but he believes that 70 miles an
18 hour is a more reasonable speed.

19 The difficulty, and you will learn this, the
20 evidence will be that as you move Mr. Kidd's vehicle
21 up closer to the travel lanes, the closer
22 Mr. Wiederhold has to be. And if Mr. Kidd
23 accelerates quicker, then Mr. Fournier believes the
24 closer Mr. Wiederhold has to be.

25 And so we get to a point that I think

1 Mr. Fornier will acknowledge to you that if you put
2 Mr. Kidd up close to the travel lane and then he
3 accelerates quicker, the crash happens like
4 Mrs. Wiederhold describes it.

5 So at the conclusion of the evidence, and there
6 will be about a half a day spent on the evidence of
7 the crash, total; was there negligence on the part
8 of Mr. Kidd that was a legal cause of
9 Mr. Wiederhold's injury and death? The answer to
10 that is yes. There is no contention here that that
11 15-month span -- he died from a pulmonary embolus,
12 which is a complication of quadriplegia. It
13 happens.

14 And on the question of Mr. Wiederhold's
15 negligence, the answer should be no. I would
16 suggest to you that the evidence the defense will
17 provide to you will require you to assume that Rich
18 Wiederhold saw Jeff Kidd pull out in front of him,
19 and he just continued to drive until the very last
20 second, and swerved around him. And in closing, at
21 the conclusion of all the evidence, I will suggest
22 to you that defies credulity.

23 Let's go back to the testimony now about
24 Domino's right of control.

25 Mr. Fischler, we've already talked about, is

1 going to tell you about the control. And the only
2 thing he can think of -- Mr. Fischler says, the only
3 thing I can think of they don't control is opening
4 times, pricing, and then he'll tell you -- you're
5 right, they do control the opening times. So it's
6 just pricing that he can think of that they don't
7 control on the day-to-day operations. And he'll
8 give you examples of that.

9 Andrea Klinge we've mentioned. There's two
10 things she's going to address. One is, briefly, a
11 statement about what Mr. Kidd told her when he came
12 to the store, wasn't sure if he caused the crash.
13 On Domino's right of control, she's going to give
14 you a lot of examples, like Mr. Fischler will, about
15 those day-to-day operations that they control:
16 Unannounced audits to the store; the Pulse system
17 that we already discussed; the customers ranking the
18 franchise delivery driver on a national website
19 maintained by Domino's, LLC. You're going to learn
20 that a lot of the orders that these franchisees
21 receive come from Domino's national website that
22 they control. Domino's determines where that
23 order -- when it comes in on the website, to who
24 that goes to.

25 And then the franchise has to fulfill that

1 order.

2 All these things that we've already covered,
3 Ms. Klingle will confirm for you. She can't think
4 of any aspect of day-to-day operations for which
5 Domino's Pizza does not have a rule. And then
6 she'll be asked, are you aware that they call
7 themselves delivery experts, and that they have a
8 formula on it? And she knows that. And that they
9 control how it's done; she will agree with that.

10 Mr. Devereaux, I mentioned to you. He's here
11 to address this issue of whether Domino's has a
12 right of control on behalf of Domino's Pizza, the
13 corporate store. He's going to tell you they don't
14 have the right of control, and I'll get to ask him
15 some questions about that, but they have standards
16 that they expect Mr. Fischler to follow. But in the
17 exact franchise agreement that Mr. Fischler
18 executed, Domino's required him not just to comply
19 with the standards, but the rules and the
20 operations.

21 He'll talk to you about the Pulse system.
22 He'll describe in more detail about the default
23 letters that we suggest to you is evidence of how
24 Domino's corporate controls and influences a
25 franchisee's behavior to make sure they comply with

1 the rules. Mr. Devereaux will tell you that
2 Domino's can terminate Mr. Fischler or any
3 franchisee if there's no compliance with a default
4 letter.

5 And he'll admit to you many of the things that
6 we've already talked about that Domino's has control
7 over. Mr. Devereaux will also talk about the
8 concept of ideas that Mr. Fischler might come up
9 with and he may quibble with us whether those are
10 rules or not.

11 Here, Mr. Devereaux -- you'll see an e-mail
12 that he will look at, and we'll talk with him about,
13 because it discusses using default letters to get
14 franchisees out of the system if it's due to
15 repeated violations of their franchise agreement.

16 I'm going to use my remaining time to talk to
17 you about our damages.

18 This is a photograph from the Christmas card.
19 You can see it in their eyes and in their smile.
20 The evidence will be that by Christmas of 2010, they
21 were engaged. They were living together with plans
22 to marry in April of 2011. She will tell you he was
23 a tall guy, 6'7", with a big heart that became the
24 center; that their lives revolved around each other
25 because, as it happens, they found each other late

1 in life.

2 They loved to travel. They had someone that
3 would come and look after their birds for them.
4 Rich had become a private pilot, and they would take
5 a plane and they would go to the Bahamas, go up to
6 North Carolina to visit Rich's parents. He loved
7 aviation, and that's a passion of his that she fell
8 in love with, just like he fell in love with her
9 passion for taking in parrots and rehabilitating
10 them.

11 This wasn't something that he did in the years
12 leading up to when he met Yvonne, but he certainly
13 is enjoying the company, and she loved being around
14 him in moments like this. They very much became his
15 passion, and although she would confess that they
16 probably were not right for other people, they were
17 perfect for each other.

18 When this crash happened, their hope for a
19 marriage day in April, 2011, was four months away, a
20 small intimate affair in the middle of the week when
21 they could take a long weekend and have friends and
22 family join them.

23 You will hear Mrs. Wiederhold describe to you
24 how Rich was transferred to Orlando Regional where
25 he was cared for, and she never left his side. And

1 you will hear how in those days, early days, early
2 weeks, how it became apparent what a daunting task
3 was ahead of her. But you will hear her describe
4 how she had made a promise, the promise to be with
5 him together for the rest of their lives. And where
6 some might have walked away from that promise, she
7 did not. She will tell you that she would not leave
8 him, she could not leave him. She did not.

9 On February 14, 2011, Valentine's Day, she
10 arranged for an air ambulance to transfer him to
11 some of the best care east of the Mississippi for
12 spinal cord injury patients, to the Shepherd Center
13 in Atlanta where he was cared for for the next four
14 months, and she dedicated herself during those four
15 months to learning everything she needed to learn to
16 care for him on a day-to-day basis.

17 That's evidence of devotion, and the Shepherd
18 Center staff taught her what she needed to know to
19 care for a quadriplegic patient. And she watched as
20 her husband, who had been 6'7", standing tall, was
21 now unable to do anything for himself. And we'll go
22 into the detail of that with Mrs. Wiederhold and
23 Dr. Snyder.

24 Comes home in June to Orlando from Atlanta, and
25 it's only upon their return when they became

1 married. Formally become married, June 3, 2011,
2 some nine months before he will die from a pulmonary
3 embolism as a result of those complications. And
4 for every day, you will learn that her life was in
5 two-hour blocks, two hours because at two hours,
6 Mr. Wiederhold's weight has to be shifted to avoid
7 skin breakdown, decubitus ulcers; the emptying of
8 urinary bags because he has a tube that goes into
9 his bladder; the emptying of the colostomy bag; a
10 feeding tube, a diaphragmatic pacemaker, a device
11 that runs on a battery that operates electronically
12 on his diaphragm so he continues to breathe. And
13 she's scared to leave him for more than three
14 minutes because that's what -- she believes that's
15 how long he can survive without any damage if the
16 pacemaker were to stop, if she were to step out of
17 the room.

18 And this is the room that became her life,
19 formerly a master bedroom that she had renovated
20 into Rich's hospital suite where she cared for him
21 almost 24 hours a day, seven days a week, with no
22 help.

23 We'll talk about home health and nursing, and
24 she'll tell you that she was never satisfied when
25 she tried it because of infection control. They

1 didn't do it to her liking. They didn't take care
2 of him as she would.

3 And she'll tell you there were times she looked
4 in the mirror, and the person she saw back, she
5 didn't recognize because of the level of exhaustion.

6 The trips to the hospital, the trips to the
7 doctor. You'll learn that the trips to the hospital
8 were the only vacation that she had, because when
9 Rich was in the hospital for complications would be
10 a time when there was medical staff there to care
11 for him, and she could get some rest that she would
12 not have had.

13 The evidence of her devotion and dedication to
14 Rich Wiederhold during these nine months will come
15 from her, Phil Mangels, and Dr. Snyder himself, and
16 that level of devotion and dedication will be
17 monumental from the evidence.

18 What is the total amount of any expenses
19 incurred or sustained by Mr. Wiederhold, his estate,
20 for medical/renovation expenses? This may appear in
21 a different format on the verdict form, but this is
22 essentially the elements of these damages that we'll
23 put out in more particularity in closing. But the
24 medical bills are \$863,056.55, and renovation
25 expenses, which are \$114,732, which total \$977,788

1 and change.

2 There is another component that I won't put up
3 here today, and that is the nature of the human loss
4 suffered by Mrs. Wiederhold, what she's been
5 through. Mr. -- Dr. Snyder will give you some idea
6 about that. Mrs. Wiederhold herself will tell you
7 what a good day was like and what a bad day was
8 like. You might find from the evidence that a good
9 day was just a better day. On days when his
10 colostomy bag, because of gas or diarrhea, would
11 explode, having to get him into a Hoyer lift to get
12 him into a shower to clean him was a three- to
13 four-hour ordeal. And some of this will be
14 uncomfortable to hear.

15 And Mr. Womble is right. There should not be
16 any sympathy consideration of that evidence. But at
17 the end of this, I will ask you to employ your
18 empathy to understand it. Mrs. Wiederhold will help
19 you understand it, Dr. Snyder will, and finally
20 Dr. Louis Damis, a psychologist who has seen
21 Mrs. Wiederhold in the past and will talk about her
22 condition mentally, emotionally, and her coping with
23 this loss, losing her husband in the manner in which
24 she did.

25 That component of human loss, that mental

1 anguish, from the date of marriage to today, going
2 forward, will be an issue that you'll have to decide
3 from your own experiences and common sense as the
4 court instructs you. And I won't suggest it today,
5 but at the close of evidence, I suggest to you
6 something that should be fair in light of the
7 evidence and your common sense.

8 We can ask nothing more of you than to devote
9 your entire attention to the evidence in this case,
10 and at the conclusion of the evidence, to deliberate
11 and render a just and true verdict.

12 Some of the testimony, more than I would want
13 or like, is by videotape, sometimes after lunch. I
14 don't like putting on videotape evidence after
15 lunch, so I will implore you, if you get a little
16 tired, particularly after lunch, please let the
17 court know. I'm sure Judge Roche will try to
18 accommodate everybody and listen to the evidence.

19 We're convinced that at the conclusion, the
20 evidence will be overwhelming about the nature of
21 Domino's right of control, and not just the right of
22 control, the fact that they exercised that right.
23 And the monumental loss of Yvonne Wiederhold in
24 losing her husband, notwithstanding her heroic
25 efforts to do everything to take care of him and to

1 keep him alive.

2 Thank you very much for your attention, ladies
3 and gentlemen.

4 THE COURT: All right. Members of the jury, I
5 think we'll take a brief recess, and we'll come back
6 and hear from the defense in opening statement.

7 COURT DEPUTY: Jurors, prepare to exit.

8 (The jury exited the courtroom after which the
9 following proceedings were had:)

10 (Brief recess.)

11 THE COURT: Please bring in the jury.

12 COURT DEPUTY: Yes, Your Honor.

13 (The jury entered the courtroom after which the
14 following proceedings were had:)

15 THE COURT: Please be seated. The court
16 recognizes the presence of the jury and counsel.

17 Will the defense please present your opening
18 statement to the jury?

19 MS. ZHAROVA: Yes, Your Honor. May it please
20 the court?

21 THE COURT: Yes.

22 MS. ZHAROVA: Good afternoon, or good morning,
23 ladies and gentlemen.

24 My name is Christine Zharova, and Dick Womble
25 and Dinah Stein and I represent Domino's Pizza in

1 this case.

2 Domino's Pizza is a franchisor, and let me just
3 make sure I clarify this. Domino's has several
4 corporate stores that it owns, that it manages, that
5 it hires employees for. The reason why we're here
6 today is not because of a corporate store, okay. I
7 just want to make sure that's clear.

8 We're here today because of a franchise store.
9 So as it relates to franchises, Domino's is a
10 Michigan company and it is in the business of
11 selling the right to distribute services and
12 products under the Domino's brand. Domino's has
13 over 1,400 franchise -- 14,000, excuse me,
14 franchises.

15 One such franchise is Mr. Fischler, who owns
16 Fischler Enterprises. He entered into a contract
17 with Domino's in 2004, and he is still a franchise
18 owner and a franchise operator.

19 So Mr. Fischler has his own company. He
20 established a Florida corporation himself in 2004,
21 maybe a little bit earlier, and that is what he
22 operates his franchise under. The corporation is
23 owned by Mr. Fischler, not by Domino's.

24 Mr. Kidd, who you've heard about, was the
25 delivery driver. Now Mr. Avera or Mr. Steinberg may

1 refer to him from time to time as a Domino's driver,
2 but Mr. Kidd is not employed by Domino's Pizza, LLC.
3 Mr. Kidd is employed by Fischler Enterprises. That
4 is who cuts his check, that is who hired him.

5 So let's talk about some of the issues that you
6 will be deciding today -- well, the issues that you
7 will be deciding when this case is over.

8 The very first issue is whether Fischler
9 Enterprises and Mr. Kidd were agents of Domino's
10 Pizza, LLC. Okay. That's the most important issue.
11 The evidence will prove that they were not.

12 The next issue is whether Mr. Kidd was
13 negligent in the operation of the vehicle. The
14 evidence by the end of this trial will also prove
15 that he was not.

16 And the last issue is whether Mr. Wiederhold
17 himself was the cause of the accident, was the cause
18 of the injuries, and the evidence will show that he
19 was.

20 So let's talk about the burden of proof.
21 Mrs. Wiederhold has filed a complaint against
22 Domino's Pizza, LLC. So she is proceeding in this
23 case as the plaintiff. She has the burden of proof
24 to establish all of the elements and all of the
25 issues with the exception of comparative negligence,

1 and we'll talk about that.

2 So she has to prove by the greater weight of
3 evidence that Fischler Enterprises and Mr. Kidd were
4 agents of Domino's Pizza, LLC. She also has to
5 prove by the greater weight of the evidence that
6 Mr. Kidd was negligent. The burden is on her.

7 If you find that the greater weight of evidence
8 does not support the claim of plaintiff against
9 Domino's Pizza, LLC, on the issue of agency, you end
10 there. Your verdict is for the defense in favor of
11 Domino's and you don't even get to analyze the other
12 issues.

13 So what is the greater weight of the evidence?
14 And the judge will give you instruction on that
15 before you deliberate, but it is the more
16 persuasive, convincing force and effect of the
17 entire evidence in the case.

18 So let's talk about agency. The first question
19 is whether Fischler Enterprises and Mr. Kidd were
20 agents of Domino's. Once again, Mrs. Wiederhold has
21 the burden of proof by the greater weight of the
22 evidence that Domino's has the right to control, and
23 this is very important, day-to-day operations. I'm
24 going to talk about that a lot, because there's a
25 difference between right to control certain things,

1 and I'll explain that to you, and the right to
2 control day-to-day operations.

3 So what are some of the hallmarks of
4 franchises? I'm sure many of you have been to a
5 franchise store. There's a consistency. There's a
6 consistency in how the store appears, how the
7 employees are dressed. There's a consistency in
8 products and services. Most likely, you know, the
9 product you buy at one store is going to taste the
10 same, it's going to look the same as the product you
11 buy at a different store. That is a hallmark. That
12 is the foundation of a franchise.

13 So that consistency has to exist in corporate
14 stores, corporate stores that Domino's owns which is
15 not why we're here today or we would not be here
16 today if it was the case, and independently owned
17 stores that are ran and owned by franchises, like
18 Mr. Fischler.

19 So what is a franchise? A franchise is --
20 basically, it's created through a contractual
21 relationship between the franchisor, like Domino's
22 Pizza, and a franchisee, Mr. Fischler. And we'll
23 talk about the franchise agreement between those
24 two.

25 So Mr. Fischler, when he entered into a

1 franchise agreement with Domino's in 2004, 15 years
2 ago, he licensed from Domino's the right to
3 distribute specific products and services under the
4 Domino's brand, to use the trademark and the brand
5 and to use the entire business format. He
6 contractually agreed to it. And in fact, I will
7 explain to you how it's beneficial to him to do
8 that, the reason why somebody, instead of having a
9 mom-and-pop pizza shop, may choose to elect to have
10 a franchise store instead.

11 So what is a business format system? The
12 business format system basically is a framework that
13 Domino's licenses to franchisees within which each
14 individual franchisee has to run its business, run
15 the day-to-day operations.

16 So the framework consists of standards. Those
17 standards that you've heard Mr. Avera describe that
18 you will continue hearing about for this week are
19 they are to protect the brand, to protect the brand
20 consistency, and to protect the trademark.

21 What is a brand? A brand is not just a logo,
22 right. You may go to one grocery store and you may
23 know, you know, you can expect a really pleasant
24 shopping environment. The employees are going to be
25 courteous. The product is going to be fresh versus

1 going to a different grocery store where your
2 expectation is going to be different. That's a
3 brand.

4 How somebody appears, how courteous they are to
5 you, what types of products they provide. That's
6 all part of the brand. That's the -- that's the
7 foundation of franchise.

8 So Domino's has to provide a framework which is
9 made up of standards, standards that ensure that the
10 brand is consistent, coast to coast, country to
11 country, store to store, and protect its trademark.

12 Domino's does not provide these standards to
13 engage in day-to-day operations of a business, and
14 we'll talk about that. The success of the franchise
15 system, whichever franchise system it is, depends on
16 maintaining that reputation, right. Customers learn
17 over the years to expect a certain type of product.

18 A customer may learn that a pepperoni pizza will
19 have 50 pepperoni slices on it, right. If one
20 franchise store gives a pepperoni pizza with five
21 pepperonis, the customer is not going to be happy,
22 he is not or she is not going to be satisfied.

23 So the brand has to be protected. And to be
24 protected, the way that the stores operate, the
25 products and services they supply have to be

1 consistent.

2 So Domino's has to impose certain control over
3 franchises. I'm not going to sit here and tell you
4 today that there's no control. But that type of
5 control is very different from the right to control
6 and actually controlling day-to-day operations. The
7 things that Domino's controls, once again, pertain
8 to brand consistency, pertain to its trademark.

9 If Domino's doesn't do certain things, Domino's
10 can lose its trademark. And that's going to affect
11 everybody, not just Domino's, but the franchise
12 owners that purchased the right to operate under
13 that name. So the risk is not only inconsistency of
14 its brand if there is no brand protection, if
15 there's no trademark protection, but also in the
16 loss of the associated goodwill that Domino's has
17 worked decades and decades to establish.

18 So what does Domino's do to achieve
19 consistency? Domino's has responsibilities to its
20 franchisees. Domino's has the responsibility of
21 growing the brand, right. Every franchise owner who
22 purchases the right to operate a store under the
23 Domino's -- or to sell product and services under
24 the Domino's brand wants for Domino's to do well,
25 wants for the brand to do well, for the brand to be

1 consistent.

2 Domino's also provides training materials. I'm
3 not going to dispute that. The training materials
4 are implemented by each individual franchise owner.
5 They have to implement them. They have to train
6 their own employees under those training books. And
7 the training materials are there to make sure that
8 all of the employees of the franchise owner do
9 things the same, do things consistently.

10 Domino's also provides an informational
11 technology platform. It's called the Pulse system.
12 Why does Domino's have that? It's not to exert
13 day-to-day control. Could you imagine having over
14 15,000 separate web pages and you have to figure out
15 which particular web page you're going to go to to
16 order your pizza in Orlando versus Daytona Beach?
17 That would be difficult. That would be impossible.
18 It may be possible, but difficult, cumbersome, and
19 very expensive for the franchisee owner because
20 there are bugs when it comes to providing such
21 platforms.

22 And so Domino's has created a platform where
23 any customer can go on Dominos.com, they put in
24 their zip code, and Domino's figures out which store
25 is designated to service that particular area.

1 Domino's does not decide which store is going to
2 deliver the pizza. It's a contractual thing that
3 was decided years ago when the franchise enters into
4 a contract with the franchisor. They say, this is
5 the geographical area within which you will have the
6 right to sell the products and services for.

7 So Domino's, you enter the zip code. Domino's
8 allows the customer to identify or allows the store
9 to identify which store is going to deliver it, and
10 that's it. Then that order comes in to the
11 franchise. That order is fulfilled by the
12 franchise. That order is delivered by the
13 franchise. And Domino's Pizza, LLC, has nothing to
14 do with that. They just find the right store in the
15 right geographical area to deliver that pizza.

16 Domino's also has to identify the non-compliant
17 franchisees. Why is that? Well, you have to
18 remember, the franchise -- or franchisee purchases
19 the right to distribute under the Domino's brand,
20 and if one franchisee is not following those
21 standards, is not meeting the customer's
22 expectations, is not delivering the pizza with 50
23 pepperonis, that may affect that customer's thoughts
24 and feeling about Domino's. So maybe you're going
25 to lose business. You can lose customers, and that

1 is the reason why Domino's has to identify the
2 non-compliant stores.

3 Domino's will send a default letter.
4 Basically, it's a letter that says this franchise is
5 not doing certain things as they agreed
6 contractually to do and is violating the brand
7 basically. But Domino's will provide the franchisee
8 with an opportunity to cure that issue. All right.

9 So if the franchisee owner does not cure the
10 issue, Domino's does not take back their business.
11 Domino's only terminates the contractual franchise
12 agreement, that's it. They say you're not in
13 compliance with the standards that are required to
14 maintain our trademark, to maintain our brand. You
15 no longer can sell products under our brand. They
16 don't close down the business. They don't close
17 down the accounts. They don't terminate the lease.

18 Once again, Domino's has to enforce those
19 standards because it has sold the right to
20 distribute products and services to over 15,000
21 franchises. So if people -- if franchisee owners
22 start not complying, it's going to affect others.

23 All right. So what are some of the benefits to
24 the franchise? What were the benefits to
25 Mr. Fischler?

1 It's an opportunity to own a business with a
2 competitive edge over other small businesses.
3 Mr. Fischler could have opened Fischler Pizza in
4 Bithlo or wherever he was in Orlando. He could have
5 done that. He chose, instead, to open a franchise.
6 Why? Because there's a customer base. He opens up
7 a store, he doesn't have to market. Everybody knows
8 what Domino's Pizza is. He automatically has a
9 customer base with loyalty to that product.

10 So Mr. Fischler also has the right to use the
11 trade name, has the right to use Domino's marketing
12 experience that has been honed decades after
13 decades. He doesn't have to reinvent the wheel to
14 figure out how many pepperonis a customer likes on
15 their pizza. That's been done for him.

16 He has a distinctive business appearance. Why
17 is that important? Let's say somebody is hungry,
18 they're driving down the road, and they see the
19 Domino's Pizza logo, right. And they like Domino's
20 Pizza. They're likely to stop and eat there. They
21 see Mr. Fischler's logo, Fischler's Pizza, they have
22 no idea what Fischler's Pizza is. They don't know
23 if it's good, they don't know if it's bad. So
24 that's -- that's a benefit to a franchise owner.

25 There is also the standardization of products

1 and services. Once again, it falls under brand
2 consistency. It falls in meeting customers'
3 expectations.

4 Domino's also provides support. It provides
5 support to its franchisees to prevent them from
6 having to reinvent the wheel. All right.

7 So on the issue of agency, Domino's Pizza, LLC,
8 and Fischler Enterprises, they are two separate
9 businesses. One is in Michigan, one is in Florida.
10 They each operate independently. And in fact,
11 they're in two different industries.

12 So I'm not talking about Domino's corporate
13 stores, where Domino's owns those stores, operates
14 those stores. That's not an issue. But I'm talking
15 about Domino's from a franchise perspective.

16 Domino's Pizza, LLC, as it relates to their
17 franchise business is in the business of
18 distributing the business format. It's not in the
19 business of selling pizza. It's not in the business
20 of delivering pizza. It's in the business of
21 selling the right to operating a franchise to other
22 people who want to do that.

23 Mr. Fischler and Fischler Enterprises is in the
24 business of distributing the pizza and the products.
25 Mr. Fischler is the one who is engaged in the

1 day-to-day operations of its business.

2 So what is Mr. Fischler's role? Mr. Fischler
3 has the sole right to manage his business. He has
4 the sole right to manage his employees day-to-day,
5 minute to minute.

6 So I've been talking about day-to-day
7 operations, right, and you may think to yourself,
8 what are the day-to-day operations? How is that
9 different from the right to control? Because
10 remember, when you're evaluating whether or not
11 there's agency, the question you are going to ask
12 is, was Mr. Fischler -- excuse me -- did Domino's
13 have the right to control the day-to-day operations
14 of Mr. Fischler and Fischler Enterprises?

15 So what are those day-to-day operations? These
16 are just some examples. So the day-to-day
17 operations basically is what you do to run a
18 business, whether you're a franchisee, whether you
19 have a mom-and-pop store. It includes operation
20 planning, managing one's finances, leadership
21 management, exiting a business. These are just some
22 examples of what it takes to run a business. These
23 are some examples of what it takes to handle
24 day-to-day operations. So let's break them down.

25 Operations planning. Mr. Fischler has to

1 advertise to hire or have some hiring process.
2 Domino's does not take care of that for him.
3 Mr. Fischler hires the employees. He hired Mr. Kidd
4 in this case. He sets his schedule. Mr. Fischler
5 set Mr. Kidd to work on the day of the accident.
6 Mr. Fischler is the one who decides how many
7 employees are going to be working on that day, when
8 they're going to start their workday, not Domino's.

9 Mr. Fischler decides the pay scale for his
10 employees. He supervises his employees and their
11 performance. He disciplines his employees.
12 Domino's is not involved in that. Those are
13 day-to-day operations of a business. That's not
14 wearing a uniform, that's not making sure there's no
15 radar detectors in somebody's car. It's those
16 things.

17 Mr. Fischler has the right to terminate his
18 employees. Domino's does not come into his store
19 and say you have to terminate employee Joe. Okay.

20 Other examples of operations planning is
21 selecting management for your franchise. It's
22 determining what human resources policies you're
23 going to implement into your store. It's
24 determining bonus structure, vacation time, how much
25 you, as the owner, is going to draw. Domino's can't

1 come in and say, you know what, you've been drawing
2 way too much money. You're going to bankrupt your
3 franchise. Domino's has nothing to do with that.
4 It's Mr. Fischler and each independent franchise
5 owner who will make that determination.

6 It's determining whether to contribute to your
7 employees' retirement plans. Mr. Fischler has to
8 make operating decisions, once again, day-to-day
9 operations. For example, inventory. Let's say
10 there's a franchise near UCF and it's football
11 season, right. Chances are you're going to have a
12 lot of hungry students and their parents visiting
13 your store. So a franchise owner would have to
14 determine that maybe on that particular day or for
15 that particular week, they need more inventory to
16 satisfy that customer demand.

17 Domino's does not handle that. Domino's does
18 not keep track of what football games and basketball
19 games are going on where to call their franchise and
20 say maybe you should get some more inventory. No.
21 It's day-to-day operations, and it is what each
22 individual franchise owner does, what they
23 determine.

24 Mr. Fischler makes the decision as to whether
25 to deliver a particular order. Let's say a phone

1 call comes in and there's something suspicious,
2 there's something suspicious about it. Domino's is
3 not going to hold it against the franchise if
4 Mr. Fischler would say, you know what, I'm not going
5 to send a driver out there. I think it's
6 suspicious. It's his decision whether or not to
7 fulfill a certain order.

8 The franchisee, including Mr. Fischler, also
9 gets to establish his business structure. Is it
10 going to be a corporation? Is it going to be a sole
11 proprietorship? And that is what Mr. Fischler did
12 when he created Fischler Enterprises of CF, Inc. I
13 think that's the correct name.

14 Mr. Fischler is the one who is complying with
15 the building codes. He is the one that's complying
16 with the health department regulations, he is the
17 one that's complying with all the laws. And if
18 Mr. Fischler is not in compliance, Domino's is not
19 on the hook for it. Domino's does not come in and
20 rectify that issue. The responsibility is on him.

21 Mr. Fischler also hires financial, legal and
22 tax accountants. Domino's has nothing to do with
23 it. All right.

24 The next part of the day-to-day operations is
25 managing financing. Once again, basic things. It's

1 bookkeeping. Domino's does not book keep for
2 Mr. Fischler. It's budgeting, you know. How much
3 inventory should you buy, how much should you pay
4 your employees. It's monitoring sales cash flow or
5 expenses and profits. Domino's has nothing to do
6 with that. Mr. Fischler maintains his own separate
7 bank account.

8 Let's say he's not in compliance with
9 something, and let's say Domino's sends him a letter
10 saying, Mr. Fischler, you are in default. We're
11 going to take away your right to operate under our
12 brand. And let's say Mr. Fischler says, I'm not
13 going to cure it. Domino's is not going to his bank
14 account and take what's in there. It's his own bank
15 account because he is an independent corporation.
16 Mr. Fischler receives all the profits, not Domino's.

17 Mr. Fischler is the one that's responsible for
18 all losses. If inventory is stolen, if equipment is
19 damaged, it's his responsibility to replace it, to
20 pay for it.

21 Mr. Fischler files separate tax returns, pays
22 for his own taxes, possesses his own independent
23 identification number. Why? Because he's an
24 independent business. He maintains his business
25 licenses and operating permits. He is the one that

1 sets prices for his goods and services.

2 So, yes, typically, you know, a franchisee will
3 look at their market to determine how expensive --
4 to determine the price point for their pizza. But
5 let's say the franchise decides to charge way too
6 much for their pizza and they lose customers and
7 they have a loss. Domino's is not going to come in
8 and say maybe you should adjust this price, maybe
9 you should charge \$5 versus \$15 for the pizza.
10 That's not on Domino's. That's on the franchisee,
11 even if that hurts their bottom line.

12 The franchisee also leases the property and the
13 business equipment. Domino's is not part of that
14 lease. So when a franchise purchases the right to
15 distribute under Domino's name, the franchise will
16 enter -- the franchisee will enter into a lease
17 agreement or get a mortgage for the building where
18 they're going to operate their store. Domino's is
19 not a part of it.

20 Leadership management. It is up to each
21 individual employee [sic] to establish employee
22 duties. In fact, Mr. Fischler here established what
23 Mr. Kidd would do. It's up to Mr. Fischler to
24 demote or promote employees. It's up to
25 Mr. Fischler to mentor the employees, to provide

1 employee incentives, to retain some of those
2 employees, to train the employees. And last but not
3 least, is exiting the business. Remember, it's a
4 separate corporation. So each independent
5 franchisee owner has to plan for exit, whether it's
6 succession planning, closing down the business,
7 selling the business, seeking professional services
8 to assist with that succession planning or selling
9 the business and closing franchise accounts. Once
10 again, independent accounts. Domino's has nothing
11 to do with it. And dissolving the corporation,
12 Domino's does not have the right to dissolve
13 Fischler Enterprises. Fischler Enterprises can
14 operate and create a nursery, all right. They can
15 do that.

16 So these are examples and these are just some
17 examples of day-to-day operations because, remember,
18 day-to-day operations is what it takes to run a
19 business. Day-to-day operations is what it takes to
20 put some money into your pocket, because, let's face
21 it, we don't work for free; right? So when you're
22 creating a corporation, your ultimate goal is to pay
23 your employees, to pay your overhead expenses, and
24 put some money back into your bank account to
25 survive. So the ultimate goal of any business is

1 earning money, and the way you earn money is through
2 day-to-day operations.

3 Okay. Wearing a certain uniform is not going
4 to earn you money. Wearing a certain uniform is not
5 going to answer the phone call. You know,
6 preventing a driver from using a radar detector is
7 not going to answer a phone call to get the pizza
8 delivered.

9 MR. AVERA: Objection, Your Honor; argument.

10 THE COURT: Overruled.

11 MS. ZHAROVA: Those are day day-to-day
12 operations, ladies and gentlemen.

13 So as you're listening to the evidence
14 presented throughout this week and as you listen to
15 the questions that Mr. Avera is going to be asking
16 the witnesses, consider whether the things that
17 Domino's does have control over, whether that
18 pertains to day-to-day operations of a business and
19 runs the business or has to do with standards that
20 are set to keep that brand consistent, to keep that
21 trademark protected, which is the foundation of a
22 franchise system.

23 So the relationship between Mr. Fischler and
24 Domino's is contractual. It's based on the terms of
25 the franchise agreement. As I mentioned, it's

1 signed -- it was signed by Mr. Fischler and Domino's
2 in 2004, and he is still a franchise operator and
3 owner.

4 So let's look at it. So the franchise
5 agreement provides that Fischler Enterprises must
6 comply with standards. Once again, the primary goal
7 of those standards are brand consistency and
8 trademark protection. Now, Mr. Fischler can create
9 his own standards, as long as those minimum
10 standards that Domino's does require or will
11 contractually require for the franchisee to follow
12 to protect the brand and trademark are there. He
13 can go above and beyond. He can make it better. He
14 can make it stricter.

15 All right. So here is the franchise agreement
16 entered into between Domino's and Fischler
17 Enterprises in 2004. You're going to hear from
18 Mr. Devereaux, and you're going to hear from
19 Mr. Fischler.

20 So it states the franchisee must directly
21 supervise the store. So back in 2004 when
22 Mr. Fischler entered into this contract, he
23 understood and he contractually agreed that he was
24 solely responsible for recruiting, hiring, training,
25 scheduling for work, supervising and paying the

1 persons who work in the store and that those persons
2 shall be your -- meaning the franchisee's,
3 Mr. Fischler's -- employees and not our, meaning
4 Domino's, agents or employees. Okay. So
5 Mr. Fischler did, in fact, hire, train, supervise
6 Mr. Kidd, and followed the contract.

7 Section 22.8 of the franchise agreement,
8 independent contractors, states: The parties to
9 this agreement are independent contractors and no
10 training, assistance or supervision which we may
11 give or offer to you shall be deemed to negate such
12 independence or create a legal duty on our part. So
13 the parties, when they entered into this contract in
14 '04, both knew that they're independent contractors.
15 Mr. Fischler acknowledged that by entering into this
16 contract.

17 It also states that we, meaning Domino's, shall
18 not be liable for any damages to any person or
19 property arising directly or indirectly out of the
20 operation of the store, including but not limited to
21 those damages which may occur while your employees,
22 meaning Fischler's employees, are making or
23 returning from making deliveries. Once again, the
24 contract between Mr. Fischler and Domino's that
25 Mr. Kidd -- excuse me -- Mr. Fischler voluntarily

1 entered into, understanding what that means.

2 Operating assistance. You acknowledge --
3 meaning Mr. Fischler, acknowledge and understand
4 that it is not our responsibility or duty to operate
5 the store and we do not have the legal right to
6 direct your employees in the operation of the store.
7 Those functions remain your sole responsibility and
8 duty.

9 This is the Manager's Reference Guide, and
10 Mr. Devereaux, who is the director of franchisee
11 services for the entire world, he'll be here, I
12 think, on Thursday, he's going to tell you that out
13 of 5- or 600 pages that this Manager's Reference
14 Guide is composed of, it has 12 sections. Each of
15 the franchise owners has to only comply with three
16 sections: Product, standards, and image and
17 identity.

18 The Manager's Reference Guide also states that
19 the franchisees are solely responsible for the terms
20 and conditions of employment applicable to their
21 team members. Domino's Pizza, LLC, is not
22 responsible for the terms and conditions of
23 employment applicable to franchisee team members.

24 Mr. Devereaux will also tell you that when the
25 standards were first created, there was Domino's

1 Pizza, LLC, the franchisor, and there were a few
2 franchisees that came together and determined what
3 standards should be created to make sure that
4 everybody benefits, to make sure that the brand
5 remains consistent, that the trademark is protected.

6 So those standards that are applicable to every
7 franchise operator, including Mr. Fischler, were
8 created by Domino's and some other franchises years
9 ago. All right. So as I mentioned before, they are
10 there for trademark protection and brand
11 consistency.

12 Mr. Devereaux is also going to tell you that
13 every franchisee agrees to comply with those
14 standards when they enter into that contract. This
15 is not something unknown to them. They willingly
16 enter into a contractual agreement pursuant to which
17 they agree to comply with those standards, because
18 they understand that the brand has to be protected.
19 Mr. Devereaux will tell you that it's the franchisee
20 owner that is responsible for adopting and
21 implementing the standards. Yes, they're required
22 to implement them, and yes, there is a possibility
23 of a default letter and a termination of a
24 contractual franchise agreement, but Domino's can't
25 force them to do this. It's the responsibility for

1 each individual franchisee.

2 Mr. Devereaux will also tell you that the
3 franchisees can use their own training material and
4 that some of the franchise operators actually go
5 above and beyond and implement their own practices.

6 We talked about this. The Manager's Reference
7 Guide only has three out of the 21 sections with
8 which the franchise must comply with. I expect that
9 Mr. Avera is going to spend a lot of time going
10 through the Manager's Reference Guide and those
11 three sections. And as you are listening to that
12 evidence, consider whether or not it has anything to
13 do with the right to control day-to-day operations
14 of a business. The evidence is going to show that
15 it does not.

16 Domino's does not have the right to control the
17 manner in which the drivers operate their vehicles.
18 Domino's did not know Mr. Kidd existed until this
19 lawsuit. Domino's did not schedule Mr. Kidd for
20 work that day. Domino's did not direct Mr. Kidd to
21 deliver a pizza to another customer prior to the
22 accident.

23 Domino's does have 13 delivery requirements,
24 most of which, I think, Mr. Avera covered and I
25 expect will cover more this week. The driver cannot

1 use a cell phone. There may not be any passengers
2 in the driver's vehicle. The driver cannot use a
3 radar detector, cannot carry a firearm. He has to
4 be clean and kept up. He can't enter the customer's
5 home. He has to use a sign on the car, et cetera.

6 All those things have to do with meeting the
7 customer's expectation as it relates to the brand.
8 Okay. It has nothing to do with running your
9 business. It has nothing -- this is not going to
10 make you money. This is not going to pay your
11 employees. This is not going to answer the phone
12 call that comes in to deliver pizza. This has to do
13 with the brand and protecting that brand and
14 protecting that trademark. Those things do not
15 control or affect the day-to-day operations of each
16 business.

17 Mr. Devereaux will also tell you that there are
18 times when Domino's Pizza will send their
19 individual, their representative, to a franchise
20 store. That happens. Why? They want to make sure
21 the standards are complied with. They are there to
22 check. They are there to cure issues. They are
23 there to make sure that the over 15,000 franchises
24 are complying with the standards and are meeting the
25 customer's expectations.

1 So when you really do the math, a Domino's
2 representative is inside that franchise store 0.12
3 percent of the time, approximate. They have a right
4 to come in. Usually they come in every six months,
5 sometimes they come in every ninety days, every four
6 months. It happens. But when you really break it
7 down, it's 0.12 percent of the time that they are
8 actually involved in the store, not telling the
9 franchise how to operate their business, but making
10 sure that the standards are complied with.

11 You are also going to hear from Mr. Wehbe.
12 Mr. Wehbe is a retired franchise operator. Prior to
13 retirement, he owned ten stores, franchise stores,
14 in Gainesville and kiosks at different sporting
15 events. He considered himself to be a local
16 business owner. He will tell you that he performed
17 thorough screening of a potential employee before
18 hiring. He would fire employees if there were red
19 flags; not Domino's, that would be him. He drug
20 tested his employees; not a requirement by Domino's.
21 He created his own guides for training, and he
22 provided his own training that -- where the standard
23 was higher than what Domino's requires.

24 You're also going to hear from Mr. Fischler.
25 Mr. Fischler is the owner of Fischler Enterprises,

1 and he will tell you that he controlled Mr. Kidd.
2 He hired him. He trained him. He supervised him,
3 scheduled him. He directed his deliveries. He set
4 his salary.

5 When the accident occurred, Mr. Kidd notified
6 Fischler Enterprises. He didn't notify Domino's.
7 And Fischler Enterprises or Mr. Fischler or his
8 manager did not notify Domino's.

9 Mr. Fischler does not share profits with
10 Domino's. He does pay a royalty because he's
11 operating under the Domino's brand. No one is going
12 to dispute that. But the royalty is based on the
13 percentage of the net sales, not profits. Let's
14 talk about that distinction.

15 Net sales is the money that comes in before you
16 pay any expenses. Profit is the money that comes in
17 minus the expenses, your overhead, your -- you know,
18 your expenses for whatever you've purchased to make
19 the pizza, your employees and so forth. So
20 Mr. Fischler pays a royalty based on the percentage
21 of net sales. Why? Because he has agreed that he
22 is selling products and services under the Domino's
23 brand, so he owes that royalty. The profits he gets
24 to keep, and Domino's has nothing to do with the
25 profits because the profits are affected by his

1 expenses.

2 And who decides those expenses? What are they
3 based on what are they -- what are the factors that
4 will affect your expenses? It's your overhead.
5 It's how much you pay your employees. It's how much
6 is your pizza costing you to make. It's how many
7 people you have working for you. Are you meeting
8 the customer demand? Do you have too many employees
9 and are you wasting money? Those are the factors
10 that affect the profit. Those are the factors that
11 affect the bottom line.

12 Domino's has nothing to do with it. Why?
13 Because they don't effect those things. They don't
14 effect the day-to-day decisions that a business
15 owner such as Mr. Fischler has to make as an
16 independent owner and operator of his business.

17 Mr. Fischler will basically -- if he loses
18 money, Domino's is not responsible for that loss.
19 So his decision making is what decides whether or
20 not he's going to make the money, which is the
21 ultimate goal of any business operator. He is the
22 sole one who is responsible for the success of his
23 customer -- excuse me -- of his company.

24 Mr. Kidd was the driver of -- for Fischler
25 Enterprises on the night of the accident. He worked

1 for Mr. Fischler. He will tell you that he received
2 paychecks from Mr. Fischler directly. He's actually
3 worked at other franchise stores in Florida, and he
4 got paid differently at those other stores.

5 Once again, it is the franchisee that decides
6 how to pay what the structure is going to be for his
7 or her employees.

8 So the first issue, were Fischler Enterprises
9 and Mr. Kidd agents of Domino's? The evidence will
10 show that they were not.

11 Did Domino's control or have the right to
12 control the day-to-day operations, not what uniform
13 they're going to wear, not if they can smoke in the
14 car, not if they can use a radar detector; the
15 day-to-day operations, what it takes to run a
16 business. So did Domino's control or have the right
17 to control the day-to-day operations of
18 Mr. Fischler? No.

19 The second issue that you will decide is the
20 issue of negligence. Was Mr. Kidd negligent in the
21 operation of his vehicle? The answer will be no.
22 Negligence is the failure to use reasonable care. I
23 know we haven't talked much about what happened on
24 the night of the accident, and we will.

25 The third issue is whether Mr. Richard

1 Wiederhold was himself negligent in the operation of
2 his vehicle. The evidence will show that he was.

3 All right. So let's talk about -- let me just
4 check my time here real quickly.

5 So here is the aerial photo of the accident
6 scene. Mr. Kidd -- so this is north, this is west,
7 this is east, and this is south. So Mr. Kidd is
8 heading in this direction, in the northbound
9 direction, and he's stopped right here at a stop
10 sign on St. Catherine Avenue. He's waiting for some
11 cars to pass before he crosses State Route 50 and
12 stops at this median.

13 Mr. Wiederhold is heading west on State Road
14 50. So he's coming down this way or coming from
15 that direction. So Mr. Kidd, once again, he stops
16 before he crosses State Road 50. He's planning on
17 making a left turn, and this is a photograph of what
18 he sees before he crosses State Road 50 and stops
19 right here at the median.

20 So once he's in the median, once he's right
21 here, he's stopped and he's waiting for a car in the
22 left lane to pass. So he notices there's a car
23 coming. He's waiting for it to pass. He turns on
24 his right-hand signal.

25 Once it's passed, he checks his mirrors, looks

1 over the shoulder, and he sees -- he's checking for
2 oncoming traffic. What he sees, according to his
3 testimony, is two cars in the right lane. So
4 somewhere down here, there's two of them. The left
5 lane is clear when he checks the road.

6 Mr. Kidd will tell you, he takes his foot off
7 the brake. He goes forward, he pulls into the left
8 lane. He accelerates. Then he looks in his
9 rearview mirror, and he sees a car behind him, and
10 then that car starts to swerve.

11 So at the time that Mr. Kidd has enough time to
12 take his foot off the brake, put on the gas, start
13 traveling into the lane, into the left lane,
14 accelerate his vehicle, straighten out, then he
15 looks in the rearview mirror and he sees
16 Mr. Wiederhold who is behind him. So think of that
17 time that had to elapse for him to look, to see that
18 there were no cars in the left lane, think that the
19 coast is clear, proceed to move forward, pulling
20 into that lane, accelerating his car, and then he
21 sees Mr. Wiederhold.

22 He's going to say Mr. Wiederhold came out of
23 nowhere. Why? Because when he checked, there were
24 no cars in the left lane, according to him.

25 All right. So this is Mr. Wiederhold's view as

1 they're approaching the intersection, and this is
2 where -- and we'll talk about this. The testimony
3 will show that Mr. Wiederhold -- this may be
4 disputed. I think this is disputed. But from the
5 defense perspective, based on the physical evidence
6 that we have on the road, Mr. Wiederhold did not
7 brake. Instead, he swerves around Mr. Kidd and he
8 goes into the grassy median right here. He
9 continues down in the grass, and then he goes back
10 onto the road, swerves up the road, and this is
11 where he ends up. These are the actual track marks
12 from the scene.

13 After the accident, Mr. Kidd calls -- he stops.
14 He doesn't go forward. He stops. He called 911.
15 You're going to hear that phone call. He's nervous.
16 He's frantic himself. He's transferred, and he
17 speaks with a paramedic. They want to have more
18 information so that they can decide what they need
19 to help.

20 Then he goes to the vehicle, to Mr. and Mrs.
21 Wiederhold's vehicle. He asks Mrs. Wiederhold if
22 she wants him to stay. And from what he remembers
23 she says, "No, thank you, thanks for your help, you
24 can go."

25 He waits for the paramedics to arrive.

1 Paramedics come. He says, "Do you want me to stay?"

2 They say, "No, you can go."

3 So he leaves, goes back to the store. He tells
4 his employer, Mr. Fischler, the accident happened.
5 It's not like he's lying about it. He's not
6 covering it up.

7 Mrs. Wiederhold will testify that on the night
8 of the accident she recalls that her -- that
9 Mr. Wiederhold was driving about 55 to 56 miles an
10 hour in the left lane. The speed limit in that road
11 is 60, by the way, 60 miles per hour.

12 She recalls that as they are coming close to
13 the accident, before the accident, as they're
14 traveling down the lane, there's a car to their
15 right. She doesn't know where the car is exactly.

16 She will also testify that Mr. Kidd came out of
17 nowhere. She doesn't know the distance between
18 Mr. Wiederhold's car and Mr. Kidd's car when she
19 sees Mr. Kidd for the first time. And remember,
20 Mr. Kidd will testify that he was sitting in that
21 lane -- in the median for some time, waiting for
22 cars to pass. So he's visible on the road. That
23 road is not obstructed. It's a straight shot, if
24 you remember that aerial photo. So he is in the
25 median. She doesn't see him. I don't blame her for

1 it, but she doesn't see him.

2 She will also testify that Mr. Wiederhold
3 braked.

4 Mr. Fornier is the accident reconstruction
5 expert. He is the defense expert. He was retained.
6 He is the only expert that either side has. We've
7 retained him, but the plaintiff does not have an
8 expert to tell you what happened.

9 Now, he is a forensic engineer, and let me just
10 tell you this. There is only two in Central Florida
11 that can do this type of work, all right. So he
12 performed the accident reconstruction, and it is
13 correct that he performed the accident
14 reconstruction about two years later. Why?
15 Domino's did not receive a phone call from Mr. Kidd
16 or Fischler Enterprises, the accident happened.

17 But I'll tell you what, Mr. Fornier relied on
18 the physical evidence that was gathered from the
19 road shortly after the accident to formulate his
20 conclusions. So it's not like he went on the
21 accident scene two years later and tried to
22 reconstruct it. He had hard evidence from the road,
23 physical evidence from the road that helped
24 substantiate and formulate his opinions.

25 Mr. Fornier has concluded that the most likely

1 scenario is that Mr. Wiederhold was driving about 70
2 miles an hour in a 60 mile per hour zone. That's
3 certainly inconsistent with what Mrs. Wiederhold
4 says, and once again, I don't blame her. She's a
5 passenger. Consider whether, you know, what
6 recollection a person has, how much attention a
7 person who is a passenger pays versus a driver.

8 Mr. Wiederhold's car, according to Mr. Fornier,
9 was about 550 feet from Mr. Kidd's car when Mr. Kidd
10 began to enter the lane. Okay. That's about a 183
11 yards or almost two football fields.

12 Now, it's 550 feet from when Mr. Kidd began to
13 enter the travel lane. Remember, he was stopped.
14 He looked, he turned, he checked -- you know, he
15 checked his mirrors, he looked over his shoulder, he
16 turned back, he took his foot off the brake, he put
17 it on the gas, he starts pulling out. So some time
18 had passed between when he last checked his mirrors
19 to the time that he pulled forward.

20 So the distance between Mr. Kidd's car and
21 Mr. Wiederhold's car was even greater than 550 feet
22 the last time that Mr. Kidd checked.

23 When you're considering whether or not Mr. Kidd
24 was negligent in the operation of his vehicle, you
25 have to judge him by what he saw or should have seen

1 when he looked down that lane.

2 Mr. Fornier, based on his accident
3 reconstruction, will also tell you that
4 Mr. Wiederhold did not brake. Instead, he just
5 swerved into the grassy median. There is no
6 evidence of breaking on the road. So
7 Mr. Wiederhold's reaction, for whatever reason, was
8 to turn left.

9 Now, Mrs. Wiederhold will say that there was a
10 car in the right lane that he didn't want to hit,
11 but there were no witnesses after the accident.
12 Nobody else stopped that was traveling on the road
13 at that time.

14 So Mr. Fornier will say based on his
15 calculation, that if Mr. Wiederhold was traveling
16 60 miles an hour, as he was supposed to do per the
17 speed limit, he could have avoided the accident by
18 slowing down. So Mr. Wiederhold had enough time --
19 would have had enough time to come and avoid the
20 accident and slow down if he was traveling the speed
21 limit, which Mr. Fornier does not believe he was.

22 Mr. Fornier will say even if Mr. Wiederhold was
23 traveling at 70 miles an hour, if he had done a hard
24 brake, he could have also avoided the accident. So
25 not steering left, but instead a hard brake, and

1 he's going to show you, explain to you what he means
2 by that. All right.

3 Remember, Mr. Kidd did not see any vehicles in
4 the left lane when he turned. He saw two vehicles
5 in the right lane before he turned. Mrs. Wiederhold
6 will testify that she was traveling in the left lane
7 and there was another vehicle in the right lane.
8 Consider the possibility of Mr. Wiederhold's vehicle
9 being one of those two vehicles in the right lane.
10 And we talked about this. He looked, he pulls into
11 the left lane, he accelerates and he sees
12 Mr. Wiederhold for the first time behind him.

13 So after taking all these steps to come out of
14 the median, take his foot off the brake, put on the
15 gas, pull up, accelerate, straighten out, that's
16 when he sees Mr. Wiederhold.

17 He also says he came out of nowhere. Why?
18 Because he looked and he didn't see anybody
19 traveling down the left lane.

20 Let's talk about marriage, and this is a
21 sensitive subject, but we have to address it because
22 the plaintiff will be asking you to award a
23 significant amount of money.

24 So Mr. and Mrs. Wiederhold were not married at
25 the time of the accident. Were they engaged? The

1 testimony is going to be inconsistent.
2 Mrs. Wiederhold will say that they were engaged.
3 Erich Wiederhold, who is the son of Mr. Wiederhold,
4 who did not have a great relationship with his
5 father before his father's accident, but after the
6 accident, they reconnected. Mr. Wiederhold will say
7 that when he came to the hospital room, he asked
8 Mrs. Wiederhold, Yvonne, Yvonne Wiederhold, Are you
9 engaged? Are you married? Because that would make
10 it easier for you to make medical decisions for him.
11 She said, No.

12 All right. So in Florida, in order to recover
13 as a surviving spouse, you have to be married at the
14 time of death. And Mrs. Wiederhold will be able to
15 recover damages for the loss of her husband's
16 companionship, protection, and for her pain and
17 suffering.

18 Another thing that I want to point out,
19 Mr. Wiederhold was involved in a terrible accident.
20 He became a quadriplegic, and he spent the next
21 13 months of his life in that condition before
22 passing away. No one disputes that he had
23 suffering. He had pain. But the issue for you to
24 determine is not his pain and suffering. It's Mrs.
25 Wiederhold's pain and suffering.

1 As you are listening to the evidence being
2 presented, consider the circumstances of the
3 couple's decision to get married. Let's talk about
4 sympathy. And Mr. Avera covered this, but I just
5 want to make sure we go over it very quickly.

6 As you're listening to all the evidence, and
7 there's going to be emotional evidence from
8 Mrs. Wiederhold, you're going to see graphic photos.
9 And as human beings, it's sad to see. It's going to
10 affect us.

11 But in making a determination in this case on
12 the issues that we will have in front of you, Judge
13 Roche will instruct you that in reaching your
14 verdict, you cannot let your bias, your sympathy,
15 your prejudice, public opinion or any other
16 sentiment influence that decision, okay. Your
17 verdict must be based on the evidence that you will
18 hear this next week and the law that Judge Roche
19 will instruct you on.

20 Very quickly, going through the verdict. This
21 is the verdict that you're going to see as you go to
22 deliberate. And the very first question is whether
23 Fischler Enterprises, CF, Inc. -- this is
24 Mr. Fischler's own business -- and Jeffrey Kidd were
25 agents of Domino's Pizza. Once again, as you are

1 making that determination, the question is, did
2 Domino's have the right to control the day-to-day,
3 the minutiae of running a business, the bookkeeping
4 of figuring how much inventory to buy, of hiring
5 people, of firing people, determining people's
6 schedule. Did Domino's have the right to control
7 that minutia, day-to-day operation? The answer will
8 be no.

9 If you get to no, you stop there. You don't
10 get to assess the next question, but I need to go
11 over that with you just in case you get to it.

12 The second question is whether the negligence
13 of Mr. Kidd which was the legal cause or injury --
14 excuse me. Whether there was negligence on Mr. Kidd
15 which was the legal cause of injury to
16 Mr. Wiederhold. The answer will be no.

17 And the last question is: Was there any
18 negligence on the part of Mr. Wiederhold that was
19 the legal cause of his injury, and the answer will
20 be yes.

21 Ladies and gentlemen, I thank you for your
22 time. Thank you.

23 THE COURT: Would counsel approach the bench,
24 please?

25 (The following proceedings were had before the