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SUPERIOR COURT OF NEW JERSEY
MIDDLESEX COUNTY, CIVIL PART
DOCKET NO. MID-L-3932-03
APP. DIV. NO. _____

FUCCILLI,)
)
 Plaintiff,)
 vs.)
)
 NEW JERSEY TRANSIT, CNJ,)
)
 Defendants.)

EXCERPT OF PROCEEDINGS
SUMMATIONS BY:
ALAN GRANT, ESQ.
WILLIAM LEVINSON, ESQ.

Place: Middlesex County Court
New Brunswick, N.J.

Date: August 8, 2005

BEFORE:

THE HONORABLE ANN G. MC CORMICK, J.S.C.

TRANSCRIPT ORDERED BY:

RICHARD VOGEL, ESQ. (Eichen Levinson)

APPEARANCES:

BARRY EICHEN, ESQ. (Eichen Levinson)
-and-

WILLIAM LEVINSON, ESQ. (Eichen Levinson)
Attorneys for Plaintiff.

ALAN BART GRANT, ESQ. (Mauro, Savo, Camerino & Grant)
-and-

SAMUEL ROSENBERG, ESQ.
Attorneys for Defendant New Jersey Transit.

TRANSCRIBER LOUISE GARGANO
KING TRANSCRIPTION SERVICES
65 Willowbrook Boulevard
Wayne, New Jersey 07470

973-237-6080

Video Recorded By: G. M-B

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APPEARANCES: (cont'd.)

SPENCER ROBBINS, ESQ. (Robbins & Robins)
Attorney for Defendant CNJ.

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Colloquy

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MR. GRANT: Yes, Your Honor. Thank you very much.

Counsel, good afternoon, ladies and gentlemen of the jury. This is going to be my last opportunity to speak to you in connection with the matter that you have in front of you.

Four weeks ago now -- it doesn't seem that long. Maybe it does seem that long -- you embarked on one of the most important undertakings that a citizen in our society can participate in. You were asked to sit as jurors and -- and decide a case of a dispute between parties to the litigation. Your oath was to do so. You put your hands on the Bible and swearing. Your oath was to do that impartially, fairly, without bias or prejudice to any of the parties in -- involved in this case. I know you will do that in connection with evaluating the evidence in this case.

I told you in my opening that -- and I promised you that you would have something today that nobody else in the courtroom had when we started this case four weeks ago, and that is all of the evidence that's been produced here through the witnesses and various documents that you've seen. And you now have that and you now are going to be able to take your

Summation - Mr. Grant

1 collective oath and make your decision based upon that
2 evidence that you now have.

3 If all that was necessary was to utilize
4 sympathy for the Fuccilli family we would never have to
5 have a trial or we would never had to have a trial in
6 this case or any of the evidence that was produced.

7 You know, one -- one of the things that makes us human
8 is our ability to have sympathy for people when -- when
9 someone is injured as Roger Fuccilli was in this case.

10 Compassion is a human quality that we all have.

11 Compassion literally means to suffer with someone. And

12 we've seen some evidence of -- of the suffering that

13 Roger Fuccilli went through. But there's more that's

14 required of you than -- and you have to set that

15 sympathy and compassion aside because that's what the

16 law demands of you as jurors. The law demands more.

17 And there's another quality that makes us human and

18 that quality is the quality to be able to reason, to be

19 able to look at evidence, to be able to evaluate that

20 evidence, to be able to look at human beings when they

21 testify under oath and determine whether they're

22 telling you the truth, whether they're being credible

23 in terms of what they say, what they recall and how

24 they recall it and why they recall it. So that really

25 is your function as jurors, to use your collective good

Summation - Mr. Grant

1 judgment and good common sense, bring that all together
2 in order to make a determination when you go into the
3 jury room to start your deliberations.

4 It was once said -- and -- and by the way, in
5 -- in connection with this idea of sympathy, it was
6 once said that some -- you know, he just had scars that
7 never felt a wound. And that's the kind of thing that,
8 you know, makes us human. As I said, but you've got to
9 set that aside and look at the evidence in the cold,
10 clear light of day and find out whether, in fact, the
11 plaintiff has sustained its burden of proof. I think
12 when you finally and ultimately get to that conclusion
13 you're going to find that New Jersey Transit was not
14 responsible for the death of Roger Fuccilli. New
15 Jersey Transit is not responsible for the pain and
16 suffering of Roger Fuccilli in his life before it ended
17 in December of 2002; that New Jersey Transit is not
18 responsible for the pecuniary loss, the losses that
19 Catherine Fuccilli and Michael Fuccilli claim as a
20 result of the death of their husband and father.

21 Ultimately, we're talking about justice in
22 this case. And a Supreme Court Justice once said that
23 fairness -- fairness is what justice is all about.

24 That's what it comes down to. That requires you to be
25 fair and to treat the parties in this case equally on

1 an equal footing and an equal basis.

2 Now, the courtroom is filled with symbols.
3 We see them everywhere. We see the -- the Judge's
4 robes, we see the counsel table here, we see the jury
5 box. You may have seen the scales of justice. These
6 are all symbols but they're more than that. They're
7 actually our desire for justice, for all of us to have
8 justice in a courtroom. And that's why we count on you
9 as citizens in the community to look hard and fast at
10 all the evidence. And that's not an easy thing to do.
11 There were many witnesses in this case, a considerable
12 number of witnesses that you're going to have to think
13 about during the course of -- of your deliberations.
14 In fact, in a very real sense today you collectively
15 are the law. You have the power to make a decision
16 that's going to affect all of the parties in this case,
17 each and every one of them. And that's -- that's an
18 awesome power. That's an awesome responsibility that
19 you have to make that determination. Again, you have
20 to do that without -- you have to do that impartially,
21 with fairness, without prejudice to anyone and without
22 passion to look at these facts in evidence very
23 deliberately and come to a decision in this case.

24 Now, I will tell you that New Jersey Transit
25 did not come into this courtroom to be a scapegoat. We

1 know that the claim has been made that we caused the
2 death of a human being. I think the evidence in this
3 case -- and I'm going to review that evidence with you
4 very shortly -- the evidence is going to show that New
5 Jersey Transit is not responsible. It is not a
6 scapegoat. In Biblical times a scapegoat was actually
7 that, a goat. And in the village the villages were --
8 heaped their sins on this -- on this goat and send it
9 out to the wilderness never to be seen again.

10 New Jersey Transit is not here to be a
11 scapegoat. The evidence in this case clearly indicates
12 that Roger Fuccilli's illness, pulmonary fibrosis was
13 not due to any exposure that took place while he was
14 employed by New Jersey Transit from 1983 to the year
15 2000.

16 Now, we had over 20 witnesses that testified
17 in this case either by way of deposition -- remember
18 those were sessions where the attorneys asked witnesses
19 about their knowledge of the case. And we also had
20 live witnesses who appeared before us. But my
21 recollection is it's more than 20.

22 Now, what I want to do with -- with you now
23 is to go over the testimony as I recall it and indicate
24 what I thought was important with respect to each and
25 every one of those witnesses in this case. Now, it's

1 going to take a long time to do this and I'll apologize
2 to you. But in order for you to find out or get to the
3 truth, which will come out of this evidence, because it
4 doesn't shout at you. You have to grab down and look
5 for the truth as you find it in the evidence. I want
6 to go over this with you and I prepared a presentation
7 which I'll ask you to follow along with me as we go
8 through each and every one of the witnesses. And I
9 prepared this presentation based upon the order in
10 which the witnesses testified. And so with the
11 assistance of Mr. Rosenberg, my co-counsel, I'd like to
12 start to review that evidence with you now.

13 And the first witness that we heard from in
14 this case was Mr. Dennis McGuire (phonetic), who was an
15 -- an employee of the railroad. Thank you. Mr.
16 McGuire said that he was good friends with Roger
17 Fuccilli and he knew the family, the Fuccilli family
18 for years. And as a matter of fact, he attended
19 Roger's daughter's wedding. He agreed that in
20 testifying he was testifying in order to help the
21 Fuccilli family. We asked him about the -- his
22 subpoena. Did you have a subpoena which required you
23 to come into court? He said he did but he didn't have
24 the subpoena with him when he came into court to
25 testify.

Summation - Mr. Grant

1 What do we know about Mr. McGuire's work
2 history? Well, he was familiar with E-Port. That was
3 the first facility where Mr. Fuccilli worked when he
4 began his railroad employment. And Mr. McGuire was
5 familiar with E-Port from his Central Railroad of New
6 Jersey years from 1974 to 1976 because of his
7 father-in-law. Now, Mr. McGuire began work with
8 Conrail in 1978. At E-Port he was there from 1979 to
9 1981 for Conrail. And Conrail was, in Mr. McGuire's
10 words, a freight rail -- railroad and they had hundreds
11 of cars carrying all kinds of chemicals. That's what
12 Conrail did and that's what Mr. McGuire recalled. He
13 said that he did not paint at E-Port for New Jersey
14 Transit. Again, that's the first facility that Mr.
15 Fuccilli worked at. But only did some touch-up paint
16 jobs at New Jersey Transit by hand. There was some
17 testimony about spray painting, but this is Mr.
18 McGuire's recollection. He did not spray paint at New
19 Jersey Transit and never saw Mr. Fuccilli spray paint
20 at New Jersey Transit.

21 Mr. Malgow (phonetic), Fred Malgow, who again
22 was -- we'll get to Mr. Malgow later -- but Mr. McGuire
23 said that Mr. Malgow would know more about Mr.
24 Fuccilli's work. Mr. McGuire said he did not work with
25 Mr. Fuccilli at E-Port; that he worked with Mr.

Summation - Mr. Grant

1 Fuccilli at the MMC Kearny facility. That's the second
2 facility -- facility which Mr. Fuccilli worked for New
3 Jersey Transit. And Mr. McGuire stated, as other
4 witnesses did, that that was a state of the art
5 facility. It was brand new.

6 Now, Mr. McGuire also indicated that he had
7 worked with Mr. Fuccilli in Hoboken. And again, that
8 was a train yard. And Hoboken was a wide open facility
9 according to Mr. McGuire. Mr. McGuire said that safety
10 precautions were taken when asbestos was at Hoboken.
11 Warnings were posted. There was plastic sheeting in
12 the areas where the asbestos was removed, and there
13 were special suits used. And nobody who was working in
14 that building -- nobody was working in that building in
15 the New Jersey Transit facility -- none -- none of them
16 were working those buildings when that removal process
17 -- when that abatement process was taking place.

18 When you talk about safety with Mr. McGuire,
19 he said that there were discrepancies between his
20 initial remarks regarding safety and his testimony
21 under oath at depositions. Remember, depositions can
22 be used at the time of trial if there's a discrepancy.
23 And what discrepancies were there? Well, Mr. McGuire
24 said that he admitted that New Jersey Transit gave
25 safety rules to its employees every day and that he

Summation - Mr. Grant

1 signed -- and that he signed and read the rules. He
2 also said that New Jersey Transit gave him a safety
3 rule book. We heard about those rule books and the
4 safety that was contained in those books. And he
5 doesn't recall if Conrail did that.

6 Now, just a -- a point as to Conrail. They
7 are a settled defendant in this case. You will hear
8 from Judge McCormick that you're not to consider the
9 terms of the -- of the settlement but you are to
10 consider whether they in any way are responsible if you
11 find that there's any liability on any of -- or that
12 Conrail is responsible for any of the illness or death
13 of -- of Roger Fuccilli. That's -- that's our burden.
14 That's -- that's New Jersey Transit's burden to
15 demonstrate that. And I'll give you the proof with
16 respect to our burden with respect to that.

17 Mr. McGuire again said that New Jersey had
18 safety meetings and Conrail did not. He admits that
19 there was better safety under New Jersey Transit than
20 Conrail and there were improvements that were made with
21 respect to the things that made them safe. He also
22 said that he received equipment, safety equipment more
23 quickly at New Jersey Transit than he did at Conrail.
24 He claims he's only familiar -- he claims he's only
25 familiar with the type of -- shown in court, but that

Summation - Mr. Grant

1 ignores Roger Fuccilli's video. That was referred to
2 earlier by Mr. Robbins. You saw that videotape, that
3 question and answer session with Mr. Fuccilli. We saw
4 in this courtroom the masks that plaintiff's counsel
5 showed to you. What we didn't see -- what we didn't
6 see and what Mr. Fuccilli talked about was a mask that
7 he wore that had two filters in it. You didn't see
8 that in this courtroom and the question you have to ask
9 yourself is why. He claims that he only heard about
10 the right to know, that is, Mr. McGuire, in around the
11 year 2000. In fact, the testimony is the right to know
12 was enacted in the early 1980s.

13 Now, the next witness that testified was
14 Joseph Ruffalo (phonetic), who was an industrial
15 hygienist that was produced by the plaintiffs in this
16 case. He's a former OSHA, Occupational Safety and
17 Health Administration employee, but he's not certified
18 as an industrial hygienist. He was not a licensed
19 engineer. And he said that the early exposure at
20 Conrail is -- is greater or was greater than the
21 exposure that Mr. Fuccilli had at New Jersey Transit.
22 He said that Conrail did not provide a safe workplace.
23 And we got into a discussion about levels of exposure.
24 You remember the terms permissible exposure limits,
25 PELs and TLBs, time threshold limit values and time

Summation - Mr. Grant

1 weighted averages, which all together talk about safe
2 levels of exposure you could have with various
3 substances without contracting illness. Mr. Ruffalo
4 never visited or inspected any New Jersey Transit
5 facility. That was according to his testimony. And he
6 never did any tests at New Jersey Transit to determine
7 what levels of exposure Mr. Fuccilli may have had or
8 did have while he was exposed or while he worked at New
9 Jersey Transit.

10 Mr. Ruffalo talked about now knowing the
11 dates or the source of the -- again, the data sheets.
12 He just assumed that they were relevant. He said that
13 Mr. Fuccilli was issued an air purifying respirator and
14 he -- Mr. Ruffalo reviewed the New Jersey Transit
15 respiratory protection policy 'cause I showed it to
16 him. I asked him about that and he found that it was
17 very good. Then his comment was that the policy was
18 just window dressing, but that was based upon what he
19 had heard, based upon what Mr. McGuire had said. That
20 was his opinion. This policy was in place to insure
21 the safety of the employees at New Jersey Transit. It
22 wasn't window dressing. And I say it wasn't window
23 dressing because there were other policies that New
24 Jersey Transit had in place to keep its workers safe
25 from the kinds of exposure that can result in illness.

Summation - Mr. Grant

1 Mr. Ruffalo also said as the industrial
2 hygienist that in order for asbestos to be hazardous it
3 had to be released into the air in order to be a
4 problem. Undisturbed asbestos could not -- would not
5 be a problem. There had to be that kind of contact.
6 So you had to get the air -- you had to get the fibers
7 into the air and they had to be inhaled by an
8 individual in order for them to be dangerous.

9 Mr. Ruffalo also indicated the demolition of
10 asbestos containing structures today re -- results in
11 no exposure to employees. He did say that sheetrock
12 and insulation before 1970 contained asbestos and that
13 renovation work with those products caused exposure.
14 And why do we talk about that? Well, we know that
15 before Mr. Fuccilli worked for New Jersey Transit he
16 did some -- we also know about several instances in
17 which he had an interest. I'll rely upon you and your
18 recollection with respect to what testimony there was
19 with respect to what Mr. Fuccilli did or did not do
20 with respect to those enterprises that he had.

21 Mr. Ruffalo was an industrial hygienist,
22 couldn't state what the threshold limits value for
23 silica was. And he said that he couldn't say if the
24 sand exceeded the threshold and the value for silica
25 unless you would know what the percentage of silica was

Summation - Mr. Grant

1 in the sand and the size of the sand particles or the
2 silica particles. He had no knowledge about that
3 although he was an industrial hygienist. And he didn't
4 know what the safety standards were for diesel. And he
5 didn't know the number of electric powered versus
6 diesel powered locomotives at New Jersey Transit, which
7 of course would be important with respect to any
8 exposure that Mr. Fuccilli may or may not have had with
9 diesel fumes.

10 Medical witnesses. The first -- I have three
11 and five. The reason was if you recall, Dr. Utison
12 (phonetic) came into court, was -- we didn't finish her
13 testimony one day and we had to bring her back. Dr.
14 Utison was an occupational medicine expert, was
15 produced by the plaintiffs in this case. She was not a
16 pulmonologist. She was not a pathologist. She
17 believed and she testified that if someone is wronged
18 she would help them in some way and she brought this
19 sentiment, if you will, to this case in terms of her
20 view as a professional, as an expert, as a doctor to
21 this case. ~~And I say to you that that demonstrates~~
22 ~~bias on the part of Dr. Utison. She said I did the~~
23 ~~best I could for this poor guy.~~ That's a quote from
24 her testimony. She did not distinguish between the
25 railroads because she was confused about the work

1 history. She -- initially the reports referred to New
2 Jersey Transit or Mr. Fuccilli working for New Jersey
3 Transit from 1974 on and didn't know that Mr. Fuccilli
4 had no exposure at New Jersey Transit before 1983. New
5 Jersey Transit didn't come into existence until 1983.
6 Remember in my opening I told you about the Public
7 Transportation Act which -- which caused the
8 development or the founding of New Jersey Transit. New
9 Jersey Transit didn't exist before 1982. Yet, Dr.
10 Utison, if you rely upon her in the history, says Mr.
11 Fuccilli was being exposed at New Jersey Transit
12 beginning in 1974.

13 When asked about her opinions regarding the
14 exposure that Mr. Fuccilli had at work, she said it was
15 just a guess on her part the type, extent, the
16 concentration of the exposure that Mr. Fuccilli had.
17 Dr. Utison didn't know that ~~Conrail~~ was a freight
18 railroad that carried chemicals and other cargo. She
19 didn't even know that Central Railroad of New Jersey
20 ever existed, even existed in connection with her
21 evaluation in this case. She didn't know what kind of
22 exposures Mr. Fuccilli had in nonrailroad activities
23 and didn't know what kind of respiratory protection Mr.
24 Fuccilli had while he was employed by New Jersey
25 Transit. In fact, she never investigated that. And we

Summation - Mr. Grant

1 know again, looking at the person who would best know
2 about respiratory protection and that's Mr. Fuccilli
3 himself. That question and answering session where he
4 said I wore a mask. That was more than the mask that
5 we saw here in the courtroom. It was a mask that had
6 two filters on it. He wore it. He testified to that
7 fact. Dr. Utison never did any air sampling with
8 respect to any New Jersey Transit sites. The key here
9 is that she said there was no evidence of asbestosis.
10 That is the disease, the scarring process in the lungs
11 that is caused by exposure to asbestos fiber. She
12 talked about a latency. Remember latency was the --
13 was the concept of exposure and the time it takes for
14 -- for one to see the development of disease, from
15 first exposure when does the disease develop? Dr.
16 Utison's opinion was that a latency for asbestos --
17 asbestosis is 20 to 25 years after exposure.

18 Now, pleural plaque. Remember we heard some
19 doctors talk about pleural plaque? Dr. Berg
20 (phonetic). We -- we had Dr. Goldstein (phonetic), our
21 -- our pulmonologist, that pleural plaque is an
22 indication, a hallmark, if you will, of asbestos
23 exposure. And what did we find and what did Dr. Utison
24 find? She said there was a reaction to asbestos fiber
25 in the pleural -- pleural space. That is the lining of

Summation - Mr. Grant

1 the lung. And none was found in Mr. -- in Mr.
2 Fuccilli. That was based upon her review of the
3 records in the case.

4 Dr. Utison told us about idiopathic. We've
5 heard that term many, many times through the course of
6 this case. Idiopathic is an unknown cause. Dr. Utison
7 also did two -- two separate reports with two different
8 conclusions. Her first report -- and I went through
9 this with her in my cross-examination of Dr. Utison.
10 Her first report was done in 2001 and it was done for
11 the New Jersey Department of Health. And Dr. Murphy
12 was the treating physician at Deborah Hospital who was
13 treating Mr. Fuccilli for his condition. Dr. Utison
14 relied upon information that was supplied by Mr.
15 Fuccilli and she reviewed the MSDS and again, material
16 safety data sheets from a New Jersey Transit foreman.
17 There was no asbestos in the brake shoes. And the
18 diagnosis was idiopathic pulmonary fibrosis. And Dr.
19 Utison concluded after we got through with her direct
20 examination, after we got done with her
21 cross-examination, her conclusion in that was that it
22 was impossible to state the cause of Mr. Fuccilli's
23 illness. That was Dr. Utison's conclusion.

24 Now, Dr. Utison did a second report. This is
25 about three years later. It was done for plaintiff's

1 counsel. And the atto [redacted] rneys had g
2 plaintiff's counsel ha [redacted] d given her
3 -- the attorneys gave [redacted] her new mat
4 sheets and she assumed [redacted] they were
5 Transit but she was, a [redacted] gain, confu
6 different railroads. [redacted] We're talki
7 railroads: Central Ra [redacted] ilroad of N
8 New Jersey Transit. S [redacted] he changed
9 she changes from her f [redacted] irst report
10 asbestos in the brakes [redacted] . Before s
11 asbestos. Now she say [redacted] s there was
12 second report. She sa [redacted] w the video
13 Again, that's the same [redacted] video, tha
14 session that we all sa [redacted] w here, whi
15 case. Mr. Fuccilli sa [redacted] id that tha
16 New Jersey Transit; th [redacted] at is, that
17 in brakes when he work [redacted] ed for New
18 Dr. Utison came up wit [redacted] h the same
19 second report, idiopat [redacted] hic, meanin
20 fibrosis. She does ch [redacted] ange one co
21 blames the railroads f [redacted] or the expo
22 can't say which railro [redacted] ad was resp
23 exposure that she now [redacted] suggests 'c
24 illness.

25 Dr. Murphy. Dr. Murphy

Summation - Mr. Grant

1 counsel. And the attorneys had given her --
2 plaintiff's counsel had given her new information which --
3 -- the attorneys gave her new material safety data
4 sheets and she assumed they were from New Jersey
5 Transit but she was, again, confused about the
6 different railroads. We're talking about three
7 railroads: Central Railroad of New Jersey, Conrail and
8 New Jersey Transit. She changed her first report --
9 she changes from her first report to say that there was
10 asbestos in the brakes. Before she said there was no
11 asbestos. Now she says there was asbestos in her
12 second report. She saw the video of Mr. Fuccilli.
13 Again, that's the same video, that question and answer
14 session that we all saw here, which is evidence in this
15 case. Mr. Fuccilli said that that was not true at the
16 New Jersey Transit; that is, that there was no asbestos
17 in brakes when he worked for New Jersey Transit. And
18 Dr. Utison came up with the same diagnosis in her
19 second report, idiopathic, meaning unknown pulmonary
20 fibrosis. She does change one conclusion. She now
21 blames the railroads for the exposure and -- and -- but
22 can't say which railroad was responsible for the
23 exposure that she now suggests 'caused Mr. Fuccilli's
24 illness.

25 Dr. Murphy. Dr. Murphy was a treating

Summation - Mr. Grant

1 physician. He saw Mr. Fuccilli while he was alive at
2 Deborah Hospital and was treating him. He saw him I
3 believe -- I believe it was -- I'm not sure. He's not
4 an epidemiologist. Remember, we talked about
5 epidemiology being the study of diseases in
6 populations. He had no electronic microscopy done to
7 detect any particles in Mr. Fuccilli's lungs. And the
8 reason or the explanation for that was that that
9 examination would be too expensive. And so it was --
10 Dr. Murphy said the cause of the interstitial pulmonary
11 fibrosis is unknown and it's idiopathic, just like Dr.
12 Utison said. He found that there was no asbestosis;
13 that is the scarring in the lung that would be or could
14 be caused by asbestos fib -- asbestos fibers,
15 inhalation of the asbestos fibers. He found no
16 evidence of asbestosis. Again, he found and -- and
17 testified as an expert that one of the hallmarks -- one
18 of the markers for -- for asbes -- asbestos exposure is
19 pleural plaques, those plaques that would be found on
20 the pleura, the lining of the lung, and Dr. Murphy said
21 he found on Mr. Fuccilli. He also said that he found
22 -- and this is in addition when we talk about silica --
23 he found no silicosis. He found no evidence of that
24 disease in Mr. Fuccilli. And he made no mention of
25 asbes -- asbestos or silica is reported.

Summation - Mr. Grant

1 Dr. Murphy assumed or testified, I should
2 say, that there was unprotected exposure to dust, sand, -
3 diesel fumes, and that could cause pulmonary fibrosis.
4 But we know from Mr. Fuccilli's own testimony -- own --
5 own statements, his own statements that he was
6 protected with a mask that had two filters. And he
7 talked about -- Dr. Murphy talked about exposures to
8 painting at Conrail and a much less -- much less
9 exposure to painting at New Jersey Transit.

10 Dr. Berg. Dr. Berg was produced by the
11 plaintiffs and Dr. Berg was the radiologist, the B
12 reader. Remember there was that ILO classification
13 from reading X rays? These -- these men and women are
14 expert in reading X rays and compare, you know, one X
15 ray to a -- a standard X ray to determine what the
16 disease process is in the -- in the lung. Dr. Berg was
17 well-credentialed. He was produced by the plaintiff
18 and he said there was no evidence of pleural plaque, a
19 marker for asbestos exposure, when he looked at the X
20 rays of Roger Fuccilli. He did see that honeycombing
21 effect which indicates pulmonary fibrosis. And we
22 heard the doctors talk about it. They -- they showed
23 it to you on X ray, what that honeycombing looked like
24 at the base of the lungs. Dr. Berg agreed that
25 idiopathic interstitial pulmonary fibrosis has no known

1 cause and there was no evidence of other disease except
2 interstitial pulmonary fibrosis in Mr. Fuccilli's
3 lungs. And that's important. Again, Dr. Berg confirms
4 the absence of asbestosis and the absence of silicosis.

5 Dr. Steven Factor. Now, we have to talk
6 about Dr. Factor as a separate witness. Dr. Factor did
7 not come into the courtroom to see us. He was unable
8 to do that. But we did have the benefit of his
9 videotaped de bene esse, meaning it was the same as
10 though he was sitting in this witness stand, the
11 witness chair testifying to you. And you saw him on --
12 on -- on the video screen. What Dr. Factor talked
13 about -- and again, Dr. Factor was the pathologist. He
14 studied tissue to see, you know, what's in the tissue
15 so they can come up with a conclusion as to what kind
16 of disease process is in the lung. Dr. Factor looked
17 and did not find any asbestos or ferruginous
18 (phonetic) bodies, meaning those iron bodies which
19 occur because of the asbestos fiber in the lung. In
20 the tissue slides that he looked at in connection with
21 this case on behalf of the plaintiffs he did not find
22 what appeared -- he did find -- he did not find what
23 appeared like silica under polarized light first in
24 2005 and his 2005 study. He didn't find any silica
25 when he first looked at it. Remember we talked about

1 this and he -- he said I used the polarizing lenses.
2 He didn't use the polarized -- polarized microscopy.
3 He just looked at the lenses. And when he first looked
4 in June he said I didn't find any silica. But you know
5 what? Two weeks later he goes back -- he goes back and
6 he says I looked again at the tissue slide and -- but I
7 used a more powerful instrument, a polarizing
8 microscope, and looked at that microscope. It's the
9 same principle but it had these polarized lenses. And
10 he looks at it and two weeks later after he didn't find
11 silica what does he find? He finds what appears to be
12 silica under that polarized light.

13 But Dr. Factor says further I did not say
14 specifically it was so. He admits -- readily admits
15 that he -- he admits that no other doctor saw silica.
16 He did not see any asbestos in the tissue. No asbestos
17 fiber in the tissue. And he agrees with Dr.
18 Craighead's (phonetic) description of the pathology.

19 Dr. Factor also said I don't think there is a
20 specific agent or material that damaged this -- that
21 was his opinion. He didn't know what levels of
22 exposure he had in the rail yards, and he was not an
23 expert on exposure. He readily admitted that. And he
24 doesn't know how long that -- material which would be
25 the silica or the silicate or what appeared to him to

1 be -- appeared to be silica was in Mr. Fuccilli's
2 lungs. He couldn't give us anything with respect to
3 that.

4 Mrs. Fuccilli testified. She testified on a
5 couple of occasions and in court here. And she
6 indicated that her husband was in critical care at the
7 hospital for five months. She admitted or indicated
8 Mr. McGuire was invited to her daughter's wedding
9 almost two years after he and Mr. McGuire and Mr.
10 Fuccilli worked together. She -- she described Mr.
11 McGuire as a very good friend at a deposition, but then
12 here said that they were not really very good friends.
13 She knew Fred Malgow was her husband's boss because he
14 spoke with him. And Mr. Malgow was -- was very good to
15 Roger. Mr. Fuccilli was issued a respirator, according
16 to Mrs. Fuccilli, and other protective equipment while
17 he worked at the railroad. And she did not -- Mrs.
18 Fuccilli did not know that her husband had worked as a
19 carpenter before he began to work with the railroad in
20 1974.

21 Mrs. Fuccilli in her testimony indicated that
22 Mr. Fuccilli complained most about E-Port. That was
23 the first facility -- facility that Mr. Fuccilli worked
24 at when he was employed by the railroads. She also
25 indicated that her husband didn't like to paint at home

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1 and did a minimum amount of work at home. She did talk
2 about Mr. Fuccilli's wages and talked about her having
3 seen a net income of about \$700 per -- per week. That
4 was all the information Mrs. Fuccilli could share with
5 us regarding the various kinds of deductions.

6 Mrs. Fuccilli talked about her husband's
7 involvement with Michael, which she indicated was about
8 two hours daily after he got home from work, and that
9 he helped with Michael's bathing and grooming and that
10 -- that most of the time that Mr. Fuccilli and Michael
11 were together was on the weekends.

12 Now, we had three of the children -- other
13 children of Roger Fuccilli come into court: Maria --
14 Maria, I'm sorry, Raphaela (phonetic) and Nick. And
15 you were all present in the courtroom here. They spoke
16 about their father in loving terms. You would expect
17 nothing else. They obviously missed him. You heard
18 that testimony. But they are all independent. They
19 are -- they are living their lives, as you would expect
20 they would. And Nick stated that he feels responsible
21 for his sisters and Michael.

22 And Michael, we have to talk about Michael.
23 You saw Michael. You saw Michael here. You saw
24 Michael come and kiss his mother while she was seated
25 in the witness stand. You had a moment to see Michael.

Summation - Mr. Grant

1 You didn't have an opportunity to hear from Michael.
2 You really weren't given any measure of the extent of
3 Michael's disability. We don't know what it is. We
4 don't know how severe it is. We don't know the amount
5 of time that Roger helped, the father helped the son as
6 you would expect a father to help a son like Michael.
7 But as I say, we don't know the extent of it. You
8 don't know the extent of it.

9 Now we get to Roger Fuccilli's video. I call
10 it a question and answer session because it wasn't
11 under oath. But it gives us a glimpse -- it gives more
12 than a glimpse. It told us about his work history. If
13 anybody knew the work history here besides Mr. Malgow
14 it was Mr. Fuccilli himself. He lived it. It's like
15 anybody else, you know, nobody can tell you your work
16 history because you're the one best to know that.

17 Now, we didn't have an opportunity to be
18 there, any of the attorneys questioning Mr. Fuccilli in
19 detail about it. But it was a fairly complete history.
20 Now, what did he say? Mr. Fuccilli said that he
21 started at Central Railroad of New Jersey as a
22 carpenter and we heard that. But while at Conrail --
23 and this is -- this is when we get into the issue of
24 proofs against Conrail. That's my burden. New Jersey
25 Transit's burden, the issue that if there was an

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1 exposure which caused an injury on the railroad, it's
2 my burden -- it's my burden to demonstrate that. Now,
3 this is from Mr. Fuccilli himself. Let's see what he
4 said, what I recall he said. He worked at E-Port for
5 six years. And again, that's the first facility in
6 which -- in which he worked. He spray painted with M1
7 paint. He was gliding and scraping and scraping.
8 Again, this is for Conrail. He painted dark blue to
9 light blue. That was the railroad from one to another,
10 from CNJ to Conrail. And he painted one or two --
11 there was no painting booth. He took a month to paint
12 the -- and he applied six or seven coats to each one of
13 those locomotives. And he painted at least 12 of those
14 locomotive engines while he was working at Conrail. He
15 also changed brakes, shocks, doors and windows and
16 grinding and welding while at Conrail. And Conrail, as
17 you know from the testimony, was a freight operation.

18 It didn't carry chemicals.

19 Now, what did Mr. Fuccilli say about New
20 Jersey Transit? He said that he worked at E-Port, New
21 Jersey Transit, for -- beginning in 1983 and he was at
22 E-Port for 13 months. Why do I say that? You'll hear
23 testimony that he was -- of the 48 months he was
24 employed by New Jersey Transit beginning in '83 he lost
25 36 months. He was out of work. He couldn't be exposed

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1 at -- at E-Port during that period of time. He was
2 only there for that 13-month period. He then moved to
3 the state of the art, again, the facility at the MMC of
4 New Jersey Transit in Kearny followed by -- followed by
5 a move to Hoboken where he worked mostly outdoors where
6 you could look up and you could see the sky. He didn't
7 do much painting at New Jersey Transit and changed
8 maybe three trains from Conrail blue to silver of New
9 Jersey Transit under the commuter operating agreement.
10 You heard evidence of that from other witnesses that
11 I'll get to. Mr. Fuccilli was doing that painting at
12 those New Jersey Transit locomotives when he was
13 employed by Conrail, not while he was employed by New
14 Jersey Transit. At New Jersey Transit Mr. Fuccilli was
15 a car inspector and he inspected trains and he changed
16 brakes. But those brake shoes had no asbestos for more
17 than 20 years according to Mr. Fuccilli. He did not
18 weld much at New Jersey Transit because he had -- Mr.
19 Fuccilli said he had poor vision.

20 There were questions asked of Mr. Fuccilli in
21 that video about safety. Because one of the issues
22 here is did New Jersey Transit provide a safe workplace
23 for Mr. Fuccilli. That's -- that's the standard as
24 Judge McCormick is going to instruct you later on in
25 the charge. That's the standard. That's the

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1 plaintiff's burden of proof. What were the safety
2 issues discussed by Mr. Fuccilli? He had a respirator
3 and a mask with two filters. He specifically said that
4 in his testimony or in his statement. New Jersey had
5 safety -- and did that. And they read safety sheets
6 which they signed every day at New Jersey Transit and
7 they had safety rules of the day. And they got those
8 safety sheets on all kinds of safety issues, but Mr.
9 Fuccilli described it in his word as baloney. Well,
10 they weren't baloney because these were issues. We're
11 talking about railroads. We have heavy equipment where
12 you could have potential serious injuries on the
13 railroad working with that kind of equipment. And
14 safety was a concern from the very first day that New
15 Jersey Transit started to operate. And no better
16 evidence of that -- that concern not only for the
17 traveling public but for the employees were all of the
18 safety rules and regulations and requirements that New
19 Jersey -- New Jersey Transit required that its
20 employees follow to protect them, their health as well
21 as anybody else in New Jersey Transit operations.

22 Now, with respect to his health, Mr. Fuccilli
23 said of his breathing problems they claim it's
24 asbestos. He said they and the question I have is who
25 are they? Not one physician in this case, not a single

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1 one including all the doctors that were hired by -- by
2 the plaintiff in order to express an opinion said that
3 Mr. Fuccilli had asbestosis. It just isn't there. It
4 doesn't exist. No asbestosis.

5 Now, we saw the day in the life video where
6 Mr. Fuccilli was on oxygen. And Marie, his daughter,
7 said it was representative of the condition that Mr.
8 Fuccilli found himself in, difficulty coughing, the
9 need for the oxygen because of his illness from
10 February -- about February, 2002 when the condition
11 worsened until February -- December of 2003 when Mr.
12 Fuccilli died. What we don't know after looking at
13 that video is was Mr. Fuccilli on oxygen all day?
14 Maybe he was, maybe he wasn't. I -- I don't know the
15 answer to that. You will be able to answer that based
16 upon your recollection of the testimony. When did the
17 condition actually worsen? And how did that condition
18 worsen? And what was it like when he was feeling
19 better or if he was ever feeling better? We don't know
20 that. We had a shortened clip of that video and it was
21 very difficult to -- to look at obviously.

22 Now, during the course of the trial we -- we
23 had to take some witnesses out of -- out of turn before
24 the plaintiff finished their case just because of
25 scheduling matters. Our expert, our first expert who

1 came into court to testify was Dr. Jerinsky (phonetic),
2 who was a certified industrial hygienist. He was the
3 only expert in this case that went and looked at any
4 facility and he went -- of course, the E-Port facility
5 was known as -- Dr. Jerinsky did his evaluation on
6 behalf of the defendant. But he personally took the
7 time out to go to the MMC facility in Kearny and -- and
8 as well as the Hoboken one. And he said that the MMC
9 -- that is the Kearny facility, the second facility
10 where Mr. Fuccilli worked for the railroads had two
11 separate exhaust systems: A special exhaust -- a -- a
12 special exhaust for engines and overhead exhaust for
13 the length of the S and I building where Mr. Fuccilli
14 worked. It was -- the exhaust system was so strong --
15 you may recall his testimony -- that it was hard to
16 open the doors because there was negative pressure. He
17 said that the Hoboken yard was -- the rail yard was
18 outdoors and it was along a river, which he indicated
19 provided for good ventilation. And here's the thing.

20 Dr. Jerinsky -- I think this was important --
21 he was the only one who looked at air monitoring tests
22 conducted by U.S. Testing on behalf of New Jersey
23 Transit. Again, this is another issue about safety,
24 about safety. And it wasn't forever that Mr. Fuccilli
25 worked for New Jersey Transit but it was for a number

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1 of years. And you'll recall the testimony with respect
2 to the number of years those tests were done, they were
3 done in the same facilities that Mr. Fuccilli worked.
4 And that was done by U.S. Testing on behalf of New
5 Jersey Transit. And it revealed that all of the tests
6 showed that the levels of exposure did not exceed safe
7 exposure levels. Remember we talked about PELs,
8 permissible exposure levels, as set by OSHA, which
9 shows what a worker can be exposed to for eight hours a
10 day day-in and day-out through his career without an
11 adverse effect. Those are the standards that were
12 testified to by Mr. -- Dr. Jerinsky. And Mr. Fuccilli
13 was not exposed to levels above those PELs at Kearny or
14 Hoboken based upon those studies.

15 Now, we had some further deposition readings.
16 These were readings that were done by plaintiff's
17 counsel and it's perfectly legitimate readings that can
18 be read. They constitute admissions. But let's take a
19 look at what Fred Malgow said in his deposition. This
20 is not his testimony here on the witness stand,
21 although it serves the same -- the very same purpose.
22 It is evidence. Let's see what Dr. -- Mr. Malgow said.
23 He said he was at Conrail from April of 1976 and then
24 began his work -- work at New Jersey Transit from 1983.
25 He knew Mr. Fuccilli since 1986, '87. He had a passing

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1 relationship with him before that. Mr. Malgow said
2 masks were available at New Jersey Transit with their
3 grinding machines, and the safety rule books said that
4 to use masks for dust exposure. He knew that as an
5 employee of New Jersey Transit. He also said that the
6 facility in Kearny was a modern, well-ventilated
7 facility where respirators were available.

8 Frank McCarr (phonetic) testified by
9 deposition as well as testified here as -- as a
10 witness. He's the director of claims. Mr. McCarr was
11 in the courtroom this afternoon. He had -- he had
12 various exposure claims. That's what he said in his
13 deposition. But here's my question that counsel didn't
14 read. There was no evidence about were those claims
15 proven? We don't know because plaintiff's counsel
16 didn't ask for the deposition about any of those --
17 anybody can make a claim.

18 John Rukowsky. Mr. Rukowsky didn't come into
19 court personally to testify but his testimony is in
20 front of you in this evidence as though he had been
21 here. He testified by way of deposition. And again,
22 this is plaintiff's counsel reading these depositions,
23 which they have a right to do. So let's see what Mr.
24 Rukowsky said. He was a general supervisor for New
25 Jersey Transit in the mechanical department since 1983.

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1 He met Mr. Fuccilli at E-Port in 1980, the first
2 facility that he -- he worked at. There was an MU
3 machine which was battery operated. It moved
4 locomotives into facilities for the work repairs. The
5 reason that's important is because they -- those
6 locomotives would have to be -- they would therefore
7 not be any diesel exposure at the facility. So Mr.
8 Rukowsky is consistent with the other witnesses in this
9 case that masks were available, and Mr. Rukowsky said
10 that they were told to wear masks in the dusty
11 conditions.

12 Steven Kliest (phonetic). Again, plaintiff's
13 counsel read from Mr. Kliest's deposition and again, he
14 was here in terms of testifying. Mr. Kliest said he
15 was with New Jersey -- Jersey Transit since '83. He
16 was in the safety department. He still is. He worked
17 at E4 from '78 to '82. So he had some personal
18 knowledge about that facility. He saw workers with
19 masks around their necks when he -- when he worked at
20 that facility.

21 Russell Samaru (phonetic) is a New Jersey
22 Transit employee. Mr. Samaru did not testify on the
23 witness stand here but he testified by way of his
24 deposition as read by plaintiff's counsel. Mr. Samaru
25 said that he, on behalf of New Jersey Transit, he deals

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1 with asbestos abatement and environmental services at
2 New Jersey Transit. He also deals with lead paint,
3 diesel fumes and UST, the underground -- to abate
4 potential hazards that exist at any New Jersey Transit
5 facilities. Air sampling is done when potential
6 hazards exist. Again, that's a safety issue. An air
7 sampling is done pursuant to diesel, asbestos and lead.
8 So New Jersey Transit as a company concerned about
9 safety, concerned about health, concerned about its
10 operations has an employee on staff to offset these
11 issues and determine whether there are problems and
12 attempts to abate those so that the health risk is
13 minimum.

14 Ron Sassi (phonetic). Mr. Sassi's in the
15 courtroom this evening -- this -- this afternoon. You
16 heard from Mr. Sassi. He testified from the witness
17 stand but he was also quoted from his deposition by
18 plaintiff's counsel. And what did Mr. Sassi say? He
19 was a claims manager. He answered the interrogatories,
20 those written questions that we talked about that are
21 exchanged by the parties for New Jersey Transit, and he
22 did not recall seeing the silica standards used.

23 Now, masks. We talked about the mask which
24 is in the courtroom, which is marked for
25 identification. Judge McCormick indicated and

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1 cautioned you and instructed you in connection with
2 that mask that there was no evidence that the mark that
3 plaintiff's counsel had in this courtroom was the type
4 of mask that was worn by Mr. Fuccilli. Mr. Fuccilli,
5 again, and we'll go back to that question and answer
6 session, talked about a mask with two -- on it. Mrs.
7 Fuccilli. Her testimony also talked about a mask --
8 another mask that Mr. Fuccilli had in his car trunk
9 which covered his face.

10 Mr. Sassi came into court here and testified
11 under oath. He's the manager of claims since December
12 of '86 to the present time. And he said that Mr.
13 Fuccilli was out of service for 35 of the 48 months he
14 was posted to E-Port, the first facility Mr. Fuccilli
15 worked at while he was working for New Jersey Transit.
16 Thirty-five of the 48 months Mr. Fuccilli was not at
17 the E-Port facility for New Jersey Transit. He was out
18 of work. He wasn't there. He couldn't be exposed to
19 anything at that facility of New Jersey Transit for
20 those 35 months. That, in fact, is -- leaves you about
21 13 months when Mr. Fuccilli was at the facility that
22 was the most concern based upon Mrs. Fuccilli's
23 testimony, the most concern to Roger. That's actually
24 less time than he was there for Central Railroad of New
25 Jersey.

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1 Mr. McGuire did not tell you the truth about
2 the median -- to discuss testimony. That's what Mr.
3 Sassi said. Mr. Sassi was there when asked about that.
4 Mr. McGuire announced at the meeting that he didn't
5 know if he should talk to Mr. Sassi because -- there is
6 nothing -- there is nothing to prevent an attorney from
7 speaking to a witness. There is nothing under law that
8 prevents an attorney from gathering information,
9 talking to a witness to find out what that witness
10 knows, the personal knowledge of that witness. So all
11 of that -- that questioning about, well, were we trying
12 to prevent Mr. McGuire to come into this courtroom? We
13 weren't trying to prevent that. Mr. McGuire did -- was
14 forced to come into this courtroom with a subpoena.
15 Nobody could prevent that from occurring, not me, not
16 Mr. Robbins, nobody. Because that's what the law
17 provides. If you need a witness to come into a
18 courtroom and issue a properly served subpoena, you
19 must comply with that subpoena.

20 Dr. Craighead came into court and testified,
21 and he's the pathologist that was -- that we retained
22 in order to evaluate this case and look at the slides.
23 He's the doctor's doctor. In other words, doctors go
24 to him and say, look, let's look at this tissue. What
25 do you see there? Use your expertise. Tell me what

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1 you see so I can arrive at a diagnosis. And the
2 pathology is, the doctor says the gold standard is
3 diagnosed idiopathic pulmonary fibrosis just like any
4 other doctor in this case diagnosed. There was no
5 asbestosis that he saw in these slides and no
6 silicosis. He said that there was no connection to any
7 exposure at the workplace which contributed to Mr.
8 Fuccilli's idiopathic pulmonary fibrosis. He looked at
9 the tissue under polarizing microscopy, under a
10 polarized microscope, and what he saw -- now, this is
11 different from Dr. Factor -- what Dr. Craighead saw was
12 silicate -- silicate, not silica, and he described
13 those differences in their structure. And silicate is
14 brighter, that's what Dr. Craighead said, than silica.
15 And you saw not bright the -- that substance was. As a
16 matter of fact, what's in evidence are the -- the photo
17 micrographs that were taken by Dr. Fanning (phonetic).
18 And you have those and you take a look at those and see
19 how bright they are. It's going to show you silica --
20 silicate and not silica.

21 Mr. McCarr, besides testifying by way of the
22 deposition, also came into court and testified and said
23 talk about a commuter operating agreement in which
24 Conrail's trains were -- were changed by way of
25 painting from blue to silver. But that's while Mr.

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1 Fuccilli was employed by Conrail, not while he was
2 employed by New Jersey Transit. And Mr. McCarr
3 described the MMC facility in Kearny where Mr. Fuccilli
4 began his employment -- worked at New Jersey Transit as
5 a state of the art facility, and he trusted you and he
6 was honest about this for you to make a fair decision.
7 And when he was asked by plaintiff's counsel, what do
8 you think should be done here in this case? He gave
9 his opinion because he was asked about it. He was --
10 he was being honest with you. He said a zero verdict
11 against New Jersey Transit would be fair because he
12 didn't believe New Jersey Transit was to blame.

13 And back to Mr. Malgow finally. When he came
14 into court to testify, he was present at all three
15 sites where Mr. Fuccilli worked: At E-Port, the MMC in
16 Kearny and Hoboken. And Conrail used E-Port as a major
17 shop; New Jersey Transit did not. There was no
18 asbestos in the brake shoes according to Mr. Malgow's
19 recollection. That was in the 1960s when it became
20 asbestos-free. The MMC had good ventilation according
21 to Mr. Malgow, and that was confirmed by Dr. Jerinsky
22 when he actually went and visited in terms of
23 evaluating this case from an industrial hygien --
24 hygienist standpoint. Mr. Malgow said that Mr.
25 Fuccilli spent 75 percent of his time outdoors in both

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1 Hoboken and E-Port. He also said that Mr. Fuccilli was
2 not cut concrete for New Jersey Transit. The reason
3 that's important is because the plaintiff's expert, Mr.
4 Ruffalo, claimed that that's how Mr. Fuccilli would
5 have been exposed to silica, cutting concrete. Mr.
6 Malgow, who was there, who knew about it, who saw the
7 operations, said there would be no reason why Mr.
8 Fuccilli would cut concrete. He couldn't -- Mr. Malgow
9 couldn't confirm Mr. Fuccilli's testimony that -- that
10 -- the use of a respirator. He didn't see that.

11 Dr. Edelman (phonetic) came in to testify.
12 He was the pulmonologist who was asked by the
13 defendants to evaluate this case. He's a specialist
14 when it comes to the lungs, diseases of the lungs.
15 He's Board-certified in pulmonology. He's
16 Board-certified in internal medicine. He's
17 Board-certified in critical care medicine. He has all
18 the credentials to support his opinion. And his
19 opinion as well as the opinion of the other medical
20 experts in this case, was that there was no evidence of
21 asbestos related disease. There was no evidence of
22 silica related disease. And there was no evidence that
23 any of the exposures at New Jersey Transit was the
24 cause of Mr. Fuccilli's idiopathic pulmonary fibrosis.
25 The cause was idiopathic, unknown. He considered the

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1 exposures. He knew about what the history was, the
2 exposures. He was very firm in his opinion. His
3 exposure at work did not cause his illness.

4 Dr. Allen Goldstein (phonetic) came in, and
5 he's a pulmonologist but he's also a B reader.
6 Remember we talked about X rays and reading them and
7 you can qualify and take the test? He reviewed a CT
8 scan, the X rays and other records and his opinion was
9 again, like everybody else, no evidence of asbestosis,
10 no evidence of silicosis, and no evidence that any
11 other disease was attributed -- was attributable to a
12 work related exposure of the railroad.

13 Dr. Wolf was the economist, the
14 rehabilitation econo -- economist that was produced by
15 the plaintiffs. He came in and -- and told you that he
16 spoke to Mrs. Fuccilli for one hour, about one hour on
17 the telephone. And that constituted the basis for his
18 opinions as expressed here as a rehabilitative
19 economist. That was the sole basis for his opinion,
20 that the loss of services that Mrs. Fuccilli and
21 Michael suffered as a result of the fact that the
22 husband and father -- he did not -- he did not
23 investigate -- Dr. Wolf did not investigate the extent
24 of -- by Mrs. Fuccilli. He didn't investigate the
25 nature and the extent of the services provided by Mr.

Summation - Mr. Grant

1 Fuccilli to Mrs. Fuccilli. We do know Mrs. Fuccilli's
2 testimony about the time that Roger spent. We know ^{Uimuel} @
3 about that, time in terms of -- personal hygiene, but 1:03:00
4 that's the extent of the evidence. And -- and yet, Dr.
5 Wolf gave us a range -- or how often and how much and
6 for how long.

7 Steven Price (phonetic). Again, by way of
8 deposition, he's with New Jersey Transit. He's the
9 deputy general manager of safety since '95. And his
10 duties are -- he started in -- he talked about the
11 right-to-know being implemented in 1982 giving
12 information to the workers of the facility, about what
13 kinds of exposures they might be confronted with,
14 exposures that have -- potentially have -- we know that
15 New Jersey Transit -- and it -- and that led to -- it
16 was New Jersey Transit's policy according to Mr. Price
17 to inform its employees of -- to follow all local,
18 State and Federal regulations and he talked about the
19 safety features that New Jersey Transit implemented to
20 protect its workers, the safety rule of the day, why
21 safety meetings, the senior management union and
22 Federal Railroad Administration representing -- all
23 this. In each and every instance talked about one
24 thing and one thing alone, safety for employees.
25 The Federal Railroad Administration had inspectors

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1 inspecting New Jersey Transit facilities and there were
2 no violations according to Mr. Price except mechanical
3 defects. Employees were also instructed to advise
4 their supervisors if equipment was not in proper
5 working order. Again, that's another safety feature.
6 It's common sense. Employees were instructed to use
7 correct equipment demanded for a specific situation.
8 And respirators were available. Mr. Price also
9 confirmed that Conrail painted New Jersey Transit
10 locomotives under the commuter operating agreements and
11 new locomotives were purchased by New Jersey Transit,
12 which did not need painting. Mr. Fuccilli did not
13 paint for New Jersey Transit. There was no grinding.
14 There was no asbestos. The brake shoes had no
15 asbestos. And Mr. Fuccilli didn't work on count-down
16 car inspections, commuter car inspections. So no mask
17 or respirator was needed under those circumstances. It
18 was performed outside,

19 And we saw photos of -- of -- of equipment
20 that was found in Mr. Fuccilli's car trunk. And the
21 questions I have here and I don't think they've been
22 fully answered but I think you need to ask these for
23 yourself. Why were they there? What was it used for?
24 Was it used for working at New Jersey Transit? Was it
25 for work outside New Jersey Transit? Maybe it was used

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1 for those residential rental units. Finally, Mr. Price
2 said Mr. Fuccilli did not need a respirator for the
3 types of duties he was performing at New Jersey
4 Transit, and stated that the -- of permissible exposure
5 was not exceeded where -- where Mr. Fuccilli was
6 working for New Jersey Transit.

7 Mrs. Fuccilli, again, testified and talked
8 about the rental properties that Mr. Fuccilli owned.
9 She testified originally that Fred Malgrow was a very
10 good friend and she said that, you know, during the
11 course of the trial everyone was talking about Mr.
12 Malgrow because he had so much information with respect
13 to these various sites and what Mr. Fuccilli may have
14 done. But then something happened and there was some
15 dispute here about Mr. Malgrow -- instead of being
16 someone who's very good all of a sudden it looked like
17 Malgrow had some -- concocted some sort of scheme to get
18 Mr. Fuccilli overtime. You know, Mr. Malgrow asked Mr.
19 Fuccilli come on over and help me out with the board.
20 He was a carpenter, according to the testimony. And
21 now they raise this issue. Why was this raised? How
22 does that fit in? Does that intrigue you, you know,
23 that Mr. Malgrow -- you know, it just didn't fit. And
24 that's something you have to make a decision about.
25 You have to decide that, what was said and how it was

Summation - Mr. Grant

1 said and why that was brought into this courtroom.

2 Mrs. Fuccilli, when asked about this whole
3 issue about this -- this scheme, she wasn't present
4 during that conversation, alleged conversation took
5 place. She couldn't -- she couldn't name the witnesses
6 besides -- she didn't know when it took place and she
7 couldn't remember when her husband had mentioned it in
8 relationship to when it happened. I just have the
9 question why was this raised in this courtroom? It had
10 never been part of any of the discovery.

11 Mr. Malgow had a great deal of information
12 and that's why he was produced. He was someone other
13 than Mr. Fuccilli who would know what Mr. Fuccilli did
14 day-in and day-out at these facilities.

15 I want to thank you for your patience. I
16 know this was a long period of time. You've heard all
17 of the testimony in this case. I'm going to have to
18 sit down in a few moments and counsel for the plaintiff
19 will discuss arguing the plaintiff's case with you. I
20 just want you to -- to remember this, that -- common
21 sense and good judgment and -- I'll probably want to
22 stand up after Mr. Levinson gets his opportunity to
23 talk to you. But there has to be an end to this
24 process and -- I will sit down. There are things I'll
25 want to say to you in response. I won't have a chance

Summation - Mr. Grant

1 to do that.

2 But I would just ask you to put together what
3 we had in this case as I presented it to you and all
4 the consideration in your deliberations. If you do
5 that I think you will come to the conclusion that New
6 Jersey Transit was not responsible for the illness of
7 Roger Fuccilli. I ask you for a verdict for New Jersey
8 Transit. I think that's what's fair in this case. I
9 ask for justice for New Jersey Transit. I ask for
10 nothing more.

11 (Conclusion of Mr. Grant's summation)

12 * * *

13 MR. LEVINSON: Thank you, Your Honor.

14 Good afternoon, members of the jury. I'll
15 make this as brief as possible. And I promise you I
16 won't go over all the evidence.

17 Roger Fuccilli was a railroad man. He loved
18 the railroad and the guys at the railroad liked him.
19 And he gave his life for the railroad. He suffocated
20 to death over two years, a minute and a half of which
21 you saw, a death that could only be described as
22 probably one of the most gruesome ways one could endure
23 death. He left behind his widow, three grown children
24 and a profoundly autistic son.

25 Now, before I go into what we proved, I saw

Summation - Mr. Levinson

1 as did you through two long summations ably argued, but
2 I found a profound and glaring disconnected in those
3 arguments. At one point counsel repeated over and over
4 that the disease is idiopathic, meaning it has no known
5 cause whatsoever and we don't even know what
6 contributes to it. And that peppered throughout the
7 arguments were repeated insinuations about what did
8 cause it that wasn't at the railroad. Cabinet-making,
9 renovation work, Conrail. They even alluded to the
10 fact that Conrail carried chemicals on its cars. To
11 what purpose? The only purpose could be to convince
12 you that this disease was caused by an exposure, just
13 not the exposures to the toxins at their railroad.

14 You can't have it both ways. It can't be
15 idiopathic with no known cause and then try to find
16 another cause that doesn't make you culpable. But
17 that's exactly what they want. To do that they need
18 medical testimony. Their medical testimony did not
19 support their arguments. And you must judge their
20 credibility and their client's credibility based upon
21 the things they promised to prove, the things they said
22 they proved and the insinuations they made. And we'll
23 get into more detail in a minute. But keep in your
24 mind -- keep in the back of your mind this disconnect
25 that was occurring throughout the case. On one hand

Summation - Mr. Levinson

1 it's idiopathic. We don't know what it caused -- what
2 it was caused by, and on the other hand, a desire to
3 blame Roger, a desire to blame cabinet-making, a desire
4 even to blame farming in Italy. But how could those
5 two co-exist in an honest statement? They can't.

6 What did we prove? The railroad clearly and
7 unequivocally exposed Roger to airborne toxins at the
8 workplace. The cabooses project was the first. The
9 cabooses were built in the 1940s. In the 1940s the
10 predominant insulating material was none other than
11 asbestos. Their own experts agreed with this fact.
12 And interestingly, CNJ produced no schematic diagram
13 which presumably would be something in their possession
14 to tell us beyond the words of a lawyer that it didn't
15 contain asbestos. That information closely held would
16 be in their control, not ours. One can conclude that
17 the absence of that information would lead a reasonable
18 person to believe that they did contain asbestos. But
19 let's see what the evidence was at trial on asbestos in
20 the cabooses, because I'm not going to write on a board
21 what I thought the evidence showed. We're going to
22 show you some short clips.

23 We don't have to dim the lights. That's
24 okay.

25 (The video is played)

Summation - Mr. Levinson

1 MR. LEVINSON: Now, that was Joseph Ruffalo,
2 who was regional director of OSHA, not a professional
3 expert witness, a professional health care director for
4 the United States Government coming here to tell you
5 about what the standard of knowledge was with respect
6 to cabooses now.

7 Then they called Dr. Craighead, who as you
8 may realize or remember testified in hundreds of
9 asbestos cases if not thousands. And here's what their
10 -- one of their asbestos experts said.

11 (The video is played)

12 MR. LEVINSON: The one thing I was waiting to
13 hear from CNJ besides Mr. Robbins' eloquent -- eloquent
14 speech, was the document that says here's what they're
15 made of and there's none there.

16 And as we know from Mr. Grant's presentation,
17 latency for an asbestos exposure in terms of having
18 disease can take as much as 20 years, exactly the time
19 correlation between CNJ and Roger's illness.

20 Now, we also established that New Jersey
21 Transit exposed Roger to some bad toxins. They exposed
22 him to silica. They exposed him to asbestos. They
23 exposed him to metal dusts and welding dusts. But I
24 want you to hear it from our witness. I want you to
25 hear it from Dr. Edelman. Their pulmonologist, who as

Summation - Mr. Levinson

1 you recall has issued over 500 reports on behalf of the
2 railroads in toxin cases like this, as their witness,
3 their own pulmonologist. Volume up.

4 (The video is played)

5 MR. LEVINSON: I don't think they realized
6 just how much Dr. Edelman did. But I don't think they
7 expected him to be asked this question because Dr.
8 Edelman has been testifying for the railroad for years
9 in asbestos, silica and toxin exposure cases as a
10 pulmonologist. He has years of history that he knew
11 about and other litigation reports. And the truth came
12 out with him on that.

13 Now, there was an extensive discussion as to
14 whether Roger had silicosis or asbestosis. He didn't
15 have either and we all know that. So you're not going
16 to have the classic signs of either of those two
17 classic disease formulations. But we do know that
18 every one of these substances causes pulmonary
19 fibrosis, which is what Roger had. And let's hear from
20 their three experts, Dr. Craighead, Dr. Goldstein and
21 Dr. Edelman as to whether these substances that Dr.
22 Edelman just said were at the railroad, at New Jersey
23 Transit, whether they caused pulmonary fibrosis,
24 Roger's illness that killed him.

25 (The video is played)

Summation - Mr. Levinson

1 MR. LEVINSON: Now we go to Dr. Edelman, who
2 explains essentially how the process works.

3 (The video is played)

4 MR. LEVINSON: Now, we've proven the exposure
5 through their own mouths and we've proven that these
6 exposures cause pulmonary fibrosis. So what was their
7 responsibility? To provide a safe place to work for
8 Roger. And their responsibility first and foremost was
9 to make sure that the air was safe. For the entire
10 time Roger worked there back at CNJ in 1974 for that
11 period the air had to be tested. And then all the way
12 in New Jersey Transit from 1983 to 2001, which is 18
13 years. Right? So let's see what of those 18 years of
14 air where you would expect testing periodically, maybe
15 bi-monthly, bi-annually? Certainly the air Roger was
16 supposed to breathe tested on a regular basis. Let's
17 see what the actual air testing was.

18 (The video is played)

19 MR. LEVINSON: Now, that was Dr. Jerinsky,
20 their industrial health doctor, saying that they never
21 checked the personal air such as Roger would have been
22 exposed to in the many jobs you heard that he did.

23 Let's move on to Mr. Kliest who testified.
24 He's head of safety, as you may recall.

25 (The video is played)

Summation - Mr. Levinson

1 MR. LEVINSON: Now, finally their own safety
2 expert had to acknowledge that only four out of the 18
3 years had any testing.

4 (The video is played)

5 MR. LEVINSON: So what you have to see here
6 is that when Mr. Kliest is saying -- and Mr. Kliest is
7 not a medical doctor. He's an MBA in charge of safety.
8 He's a -- a master's of business administration
9 determining how much I guess money to allocate to
10 safety. I'm not sure. But he had no credentials. And
11 he admitted there was no air testing for the five years
12 here, which is E-Port, of course, and he admitted that
13 there was no testing for the nine years here; that
14 there were only six tests here and none of them covered
15 Roger. And that's what they say was adequate testing
16 and that's what they say fulfilled their duty to their
17 worker, and that's what they say is fair play here.
18 And I say it's not.

19 Finally, there's the issue having done no air
20 testing, which as we know from the OSHA expert you have
21 the air testing to determine if there's a hazard and
22 then you give respiratory protection to him, and
23 there's a whole series of correct steps that had
24 existed, by the way, since 1970. Remember when Ruffalo
25 told you about the formation of OSHA and the very first

Summation - Mr. Levinson

1 thing they said was respiratory protection. So even
2 though they didn't have any meaningful air testing and
3 certainly none at CNJ, did Roger receive a proper
4 fitted respiratory? Now, we know that Mr. McGuire
5 testified on this issue.

6 (The video is played)

7 MR. LEVINSON: Members of the jury, that is
8 four years of negligence, four years of exposure to
9 toxic substances and a dinosaur of a building,
10 remember, with cascading dust everywhere, with
11 locomotives being stored up, with spray painting
12 operations and sand blasting operations and welding
13 operations all taking place in this giant warehouse in
14 an antiquated building with almost no ventilation, and
15 this is what they got.

16 Now, that wouldn't be bad if the state of the
17 art was to use these at that time. But you heard Joe
18 Ruffalo say since the 1970s, the early '70s OSHA
19 mandated real respiratory protection, not paper masks.
20 And these masks are not respiratory protection and no
21 one says they are and no one can.

22 Now, Dr. Murphy gives you the explanation
23 from a pulmonology point of view. So let's hear his
24 explanation of what a paper mask does.

25 (The video is played)

Summation - Mr. Levinson

1 MR. LEVINSON: Now, they talked about Roger
2 saying he got a respirator. But if you remember that
3 video, you know where he got that respirator? Conrail.
4 Conrail. By the time New Jersey Transit took over no
5 proof he got a respirator at all.

6 He was not even given the safety rules.
7 Well, listen, talk about the proof that he didn't get a
8 respiratory, in evidence is his employee file, which
9 has every safety meeting he ever signed for. Remember
10 he got a receipt for a raincoat? He got a receipt for
11 every safety meeting. He never got a receipt. If
12 they're going to give you a receipt for a raincoat
13 don't you think they're going to give you a receipt for
14 an expensive respirator? He couldn't find it.

15 And according to this, he only got the safety
16 instructions in 1996, 13 years after he started
17 working.

18 (The video is played)

19 MR. LEVINSON: This is the company that was
20 just described by counsel for the company as being
21 assiduous about safety.

22 I would like to go through their own safety
23 rules in a piece of evidence called TR05. TR05 --
24 there we go. Employees must be trained and get an
25 approved respiratory, according to New Jersey Transit,

Summation - Mr. Levinson

1 with mechanically generated dust which we know was
2 there from the wheel churning operations, from the belt
3 sanding operations, metal fumes from welding, paint or
4 solvent, and we'll talk about the painting operations.
5 There was painting done there when they changed from
6 the DOT to New Jersey Transit. According to Mr. Malgow
7 himself, acetylene cutting, exposure to metal fumes
8 again, grinding with power tools, all of this was done
9 at E-Port. And he never got a respirator.

10 Go to the next page. The list goes on. You
11 have to get a respirator when there's operating dust,
12 grit or fumes producing from a power tool or if you're
13 operating sand, grit or shop blasting, all of this was
14 done at E-port, all of it. There was no air testing
15 for it and there was no respirator, and they had not
16 proven a thing to the contrary. You know that. That's
17 not my standard. That's not Joe Ruffalo's standard.
18 That's a respiratory protection policy of the railroad.

19 Now, who did we prove these facts with other
20 than their own witnesses who you just saw? Was proved
21 them with Joe Ruffalo, a regional director of OSHA
22 himself. We proved it with Dr. Iris Utison, a
23 professor of occupational and health at University of
24 Medicine and Dentistry of New Jersey, U.M.D.N.J. She's
25 not a professional witness. You heard her say, for

Summation - Mr. Levinson

1 instance, whatever money she gets testifying, where
2 does it go? The check gets made out to the medical
3 school, not to her. She's not in the business on one
4 side or the other. What she did is over time
5 accumulated more information and more information in
6 order to establish what the contributing causes of this
7 illness was.

8 Now, I believe I heard the opening salvo of
9 the defense stating that the death certificate says
10 idiopathic. Well, wouldn't you like to see the doctor
11 who signed that? I don't know, maybe he's a
12 pediatrician for all I know. But he wasn't here to
13 cross-examine. Most death certificates just say heart
14 attack. But you can't say the person had cancer and
15 didn't die from the cancer which caused the heart
16 attack. We all die of heart failure. But to wave the
17 death certificate in the air, which is not in evidence,
18 and it's not in evidence for a good reason, because for
19 that to be in evidence you have to have the testimony
20 of that doctor.

21 Now, we called Dr. Utison, who as you can see
22 was honest, sincere and genuine. If she were a
23 professional witness out of central casting like Dr.
24 Craighead she would have been a lot tougher and more
25 prepared and more of a professional witness. We didn't

Summation - Mr. Levinson

1 pick her. She treated Roger. She cared about him just
2 as a doctor should care about. They want to blame Dr.
3 Utison for saying I cared about Roger. Maybe that's
4 the ethos the railroad works at. Maybe that's their
5 moral vision of right and wrong. If you care about
6 someone you're prejudiced, you can't give an honest
7 feeling. But the way we work in this world and the way
8 we want to work sometimes are two different things.
9 But they should be one. We live in a community.
10 That's why you're here as a jury. We see each other at
11 the mall. We see each other on the streets. To be
12 kind to someone doesn't mean that you're biased or
13 lying. It just means you're a member of the community
14 and you're doing a decent thing. Does it mean she lied
15 on the stand? Absolutely not. And it's preposterous
16 and offensive -- offensive to think that that's what
17 that means.

18 Now, Dr. Murphy, head of the lung division at
19 Deborah Heart and Lung, and I believe I heard a
20 critique that he was not a Board-certified
21 pulmonologist. I also think we all know Deborah Heart
22 and Lung is the premier heart and lung institute in New
23 Jersey and one of the premier heart and lung institutes
24 in America. And he's the head of the lung division.
25 Why is he here? We didn't pick him. He treated Roger.

Summation - Mr. Levinson

1 He cared about Roger. He tried to make his pain less.
2 He tried to find a way to cure him and he couldn't.

3 Both of these doctors testified under oath
4 not as professional witnesses but as just caring
5 members of the community with impeccable credentials
6 that these substances at these railroads contributed
7 not one -- not one seminal original cause but all
8 contributed to create this condition called pulmonary
9 fibrosis, which was no coincidence.

10 You heard from Dr. Berg, Roger Berg. They
11 even said he has impeccable credentials. Why? Because
12 he was the only radiologist in the case. Do you
13 remember Dr. Goldstein and Dr. Edelman were talking
14 about X rays? Neither of them are radiologists.
15 Medicine is subspecialized for a reason. Radiologists
16 are the people who read X rays. And Dr. Berg testified
17 under obvious circumstances that the bilateral pleural
18 thickening in the January 8, 2001 film, the film that
19 Dr. Goldstein didn't bother to look at or wasn't sent,
20 bilateral pleural thickening is a classic sign of
21 asbestos disease and it is not consistent with
22 idiopathic pulmonary fibrosis. You recall that? They
23 brought no one to rebut it except Dr. Goldstein and Dr.
24 Edelman, neither of whom were radiologists.

25 Now, Dr. Factor is a Board-certified

Summation - Mr. Levinson

1 pathologist. He simply said what he said, I found
2 silica in here. Take a look. And we all can take a
3 look and see silica. And Dr. Craighead made a mistake.
4 Remember that? He said there is none. We'll go into
5 that in a minute. No one disputes that that's silica
6 or silicate.

7 — So the objective proof of injury, we know
8 that radiologist B reader, there was only one, Roger
9 Berg is the best qualified. And who says so? Dr.
10 Craig -- Dr. Craighead.

11 (The video is played)

12 MR. LEVINSON: With a little dodging even he
13 -- and a little encouragement would answer the question
14 that he's not a radiologist.

15 Now, interestingly, Dr. Berg, as I said,
16 looked at the January 8, 2001 film, the only critical
17 film in this case with asbestos.

18 Please let's cut to that.

19 (The video is played)

20 MR. LEVINSON: Now, we know that Dr.
21 Goldstein didn't look at that film and Dr. Edelman
22 didn't look at that film. In fact, no one from the
23 defense even got that film or gave it to their experts.
24 Why not? Bilateral pleural thickening is an asbestos
25 injury. It is inconsistent with this idiopathic

Summation - Mr. Levinson

1 pulmonary fibrosis. It gives a clue to the cause of
2 the initiation of the inflammation that killed Roger.

3 Let's go to the pathology, the second piece
4 of objective evidence. We've already pointed to the
5 fact that Dr. Factor found silicate on it. Let's see
6 what Dr. Craighead, Edelman and Goldstein did when they
7 found out that they were all wrong, that there was no
8 silica.

9 (The video is played)

10 MR. LEVINSON: This is very important. Dr.
11 Craighead supports their opinion it's idiopathic 'cause
12 he didn't look at it under a polarizing microscope and
13 all he saw was this, which is all you see until you
14 turn the polarizer on.

15 Now let's go to see what happened when Dr.
16 Edelman is --

17 (The video is played)

18 MR. LEVINSON: And Goldstein likewise
19 premised his report on the absence of silica in these
20 slides, and then all of them were caught unawares when
21 it came out. And there's no arguing about it. It's
22 simply a fact.

23 Now, as for asbestos bodies in pathology,
24 you'll recall the testimony was that they don't always
25 show up, 10 to 20 percent don't show up at all. And

Summation - Mr. Levinson

1 the only way to actually see asbestos is by an electron
2 microscope, and the defense didn't do it. I don't know -
3 why they didn't. But we didn't do it because Mr.
4 Fuccilli's family didn't pay for electronic microscopy
5 before this was done.

6 Now, those are our witnesses and their
7 witnesses on these subjects. Who did they bring? And
8 this is really important because Mr. Robbins on behalf
9 of CNJ said we brought the best, top experts in the
10 country. And Mr. Grant impugned the integrity of Drs.
11 Utison and Murphy, two treating doctors who got caught
12 in the fray of litigation 'cause they happened to treat
13 this man. Let's see who they brought and what their
14 motivation is to testify.

15 First we'll find out that all three
16 defendants are experts for hire in a real way. Let's
17 see Dr. Craighead.

18 (The video is played)

19 MR. LEVINSON: How dare they impugn the
20 integrity of Drs. Utison and Murphy when Dr. Craighead
21 makes six million dollars over his career as a
22 professional expert witness. You sure don't want to
23 make your clients unhappy. But that would be okay if
24 Dr. Craighead testified fair and square for plaintiffs
25 and defendants and called it like it was. Right? But

Summation - Mr. Levinson

1 that's now how it works and you'll see.

2 But let's move on to Dr. Goldstein -- Dr.
3 Edelman.

4 (The video is played)

5 MR. LEVINSON: Let's check Dr. Goldstein now.

6 (The video is played)

7 MR. LEVINSON: That's Dr. Goldstein, for what
8 he was worth.

9 And let's go to one more cut where we can
10 make clear that Dr. Craighead is a witness for the
11 defense only 'cause I didn't think that came in in the
12 last one.

13 (The video is played)

14 MR. LEVINSON: Now, here's -- here's the --
15 there's the cast of characters. They've never
16 testified for a worker. They've never testified
17 anything ever caused any disease. They've made -- Dr.
18 Craighead makes an extraordinary amount of money
19 virtually on retainer to the asbestos companies, silica
20 companies and the -- and they say -- and they have the
21 chutzpah to say that these are the top in the country.
22 Well, I don't believe so and I don't think you do
23 either.

24 Where are the academic doctors that they
25 should have called? Where are the other treating

Summation - Mr. Levinson

1 doctors who they referred to in their opening
2 statements? Remember that? They talked about other
3 treating doctors? They could have called them.
4 There's no special right I have to call a treating
5 doctor but they didn't. They called professional
6 experts. And professional experts give you what you
7 want to keep the train coming, 500 cases of Edelman,
8 4,000 depositions of Craighead, 4,000 depositions all
9 for the manufacturers, for the mining companies, the
10 asbestos and silica companies. And always against the
11 worker. They didn't bring a radiologist. They didn't
12 bring a safety engineer for CNJ or an occupational
13 health expert at all.

14 Now, Dr. Jerinsky was a nice man, but you
15 know that he had six air samples over four years, and
16 he told you that that was good enough. He was doing
17 his job as an expert witness. But he admitted his
18 opinion is only as good as his foundation and that
19 wasn't good.

20 So the next thing they call are fact
21 witnesses to try to bolster. Now, who would you expect
22 the railroad to call with the most knowledge?
23 Co-workers. Right? People who worked side-by-side
24 with Roger to tell you what it was really like in the
25 trenches? What he was really exposed to? They called

Summation - Mr. Levinson

1 the managers. They called Mr. Sassi.

2 (The video is played)

3 MR. LEVINSON: Okay. He's like the used car
4 salesman who wants you to pay less for a car. He's
5 like the banker who wants to charge you less interest
6 rate. Would you believe it when you go to a banker and
7 he goes my job is really to charge you as low an
8 interest rate as possible or a house seller who would
9 say I want you to pay as little for my home as
10 possible? My God, he's the director of claims. His
11 job is to keep claim payments down. That's his only
12 job.

13 Who else did they call to call you about the
14 railroad? Mr. Malgow. In the end of the day, Mr.
15 Malgow is a company man.

16 (The video is played)

17 MR. LEVINSON: Interesting that Mr. Malgow
18 before he testified was promoted because you heard the
19 testimony I read in of Mr. Malgow before his promotion,
20 and then you heard the testimony he gave here and a lot
21 of it was fresh, new stuff.

22 Finally, they called Mr. Kliest, the master
23 of business administration, a number cruncher, a bean
24 counter who's in charge not of counting beans but in
25 charge of worker safety.

Summation - Mr. Levinson

1 (The video is played)

2 MR. LEVINSON: No fact witnesses who really
3 knew and the fact witness they wanted telling something
4 that they didn't want to hear, they created a different
5 defense. And their defense was in their opening
6 statements. It was three parts. Their first defense
7 was smoking. Roger was a smoker.

8 (The video is played)

9 MR. LEVINSON: Mr. Grant made that
10 representation to you in his opening statement. And
11 then gradually as this case proceeded the evidence
12 unfolded. What happened to that representation? He
13 just wanted to poison the water 'cause we all hate
14 smoking. But the truth came out when their own Dr.
15 Goldstein was forced to confront the question.

16 (The video is played)

17 MR. LEVINSON: All right. Remember all the
18 talk about GERD and his acid reflux? We asked you
19 questions on your questionnaire whether you suffer from
20 it? That was a red herring, members of the jury. Not
21 one of their doctors said that. Just lawyer talking.
22 They talked about smoking to poison you against Roger,
23 but not one of their doctors said smoking had anything
24 to do with his illness, not one. That's their burden
25 of proof. And you can bet a doctor like Goldstein and

Summation - Mr. Levinson

1 a doctor like Edelman and a doctor like Craighead, who
2 are virtually professional witnesses full-time for the
3 railroad, would tell you that if they had any basis at
4 all. They're not the type who are shy. But they
5 didn't.

6 Finally, I want to move on to the asbestos
7 brake shoes very quickly and then we'll move on to
8 damages.

9 They promised to tell us and they continued
10 to tell us there was no asbestos in the brake shoes.

11 (The video is played)

12 MR. LEVINSON: Remember that? You just heard
13 it recently. Well, let's hear what their own Dr.
14 Edelman said about brake shoes with his knowledge of
15 having written 500 reports for the railroad against
16 workers.

17 (The video is played)

18 MR. LEVINSON: You know, I saw a little
19 slight of hand going on. I'm sure it was not
20 intentional. But the argument was that asbestos hadn't
21 been used since the '60s. Remember? That was the
22 first argument. And then I heard an argument asbestos
23 was used in the brakes when Conrail was there.
24 Remember hearing that during the last summation before
25 mine? I'm not sure why that was said but it's

Summation - Mr. Levinson

1 certainly not consistent with the '60s 'cause Conrail
2 was only in operation for what, six years in the '80s,
3 the late '70s and early '80s. But what we really do
4 know is we know from their own Dr. Edelman that it was
5 in use by New Jersey Transit at this time.

6 Now, the result of all of this was that Roger
7 didn't die from a coincidental exposure to many of
8 these things which are known to cause pulmonary
9 fibrosis and just happened to get it for an unknown
10 reason.

11 Mr. Grant asked you to use your common sense.
12 I do, too. When these exposures, which have all been
13 demonstrated and proven quite amply in the absence of
14 respiratory protection from Mr. Malgow's own mouth that
15 there was not at E-Port, from Mr. McGuire's own mouth
16 that there was none at any of the places, and that
17 these places were open facilities where there was --
18 especially E-Port where there was nothing to vent it
19 out except a couple of attic fans, that you would
20 expect exposure and you would expect these to
21 contribute. It's common sense. Don't leave it at the
22 back door. And I'm sure you won't.

23 Under the law that we are obligated to follow
24 here is a law called FELA, the Federal Employee
25 Liability Act, a special law to protect railroad

Summation - Mr. Levinson

1 workers and govern -- and certain type of government
2 workers, a very high risk business. And that law
3 provides that if there is any negligence -- any
4 negligence which has the slightest contribution to the
5 injury or theft, the worker prevails. That's a special
6 law and the Judge will charge that to you. And that's
7 because the people who go to work for the railroad do
8 lose their lives, lose their limbs. They give it up
9 for the railroad. And in exchange for that the law is
10 much easier to prove and the railroad is legally
11 responsible.

12 Now, two years before Roger died he was
13 diagnosed with pulmonary fibrosis. And it came on when
14 he was short of breath. He was starting to get rales
15 when he breathed. You could hear crackling. I think
16 someone says it's like hair breath. I'm not -- I can't
17 find any to demonstrate. The -- it just progressively
18 got worse. They tried steroids. I think we all know
19 from common sense what steroids can do. Certainly in a
20 baseball situation they can make you a great hitter but
21 they can also be pretty miserable. And that didn't
22 work.

23 They opened up his chest and did surgical
24 biopsies only to find out that what they found wasn't
25 true. Then Roger went on oxygen probably about 18

Summation - Mr. Levinson

1 months before he died, and that tank never left his
2 side until the day he died.

3 Then he went on the lung transplant list in
4 September of 2001, and that was waiting for a -- a lung
5 that would never come. And you heard Roger testify
6 that he knew if it did come it would only give him a
7 couple more years maybe. So being on a lung transplant
8 list is not like another transplant where you actually
9 have hope. This was a hopeless two years. This was a
10 time of hopelessness. He was a fighter. He cared
11 about his family. He'd do anything for them. He was
12 fighting I'm sure for them and not for himself, which
13 is like he did everything else in his life. But he
14 knew he was doomed that whole time.

15 In February of 2002 through July of 2002 when
16 that video was taken you saw a grim and violent image
17 of an impossibly painful existence. And I'm not going
18 to show you the whole thing. I just want to take ten
19 seconds of it, ten seconds -- ten seconds out of ten
20 months.

21 (The video is played)

22 MR. LEVINSON: From July -- and I heard a
23 shocking thing, that maybe it felt better sometimes, I
24 don't know if you recall that. We don't know if he got
25 better. I don't think Roger was getting any better.

Summation - Mr. Levinson

1 His family testified he didn't. There's no medical
2 record that supports the defense summation. That's
3 wishful thinking maybe of someone who's compassionate
4 but it's wishful thinking because that's not how it
5 went. It was like that from February through July, and
6 then you heard the family testify from July to December
7 it only got worse. And it's inconceivable how that can
8 get worse and to still stay alive, but apparently it
9 did.

10 There's a way to help explain damages to you.
11 We notified our adversaries and the Court to explain
12 how damages are sustained over time. And if you'll
13 bear with me, I'll leave this over here.

14 For that ten months from February -- only
15 from February to December, 2002, that's 300 days, he
16 was like that and worse. And we agree on that. This
17 is assuming only 20 hours a day, assuming he managed to
18 get four hours of sleep, which seems like an impossibly
19 wishful thing to think of given that condition he slept
20 -- he slept at all for any actual sleep. But assuming
21 he managed to sleep for four hours a day, that's 6,000
22 hours times 60 minutes an hour is 360,000 minutes.

23 Now, the question is to evaluate suffering
24 over time because what you have to do is measure what
25 the value of that is. It's incomprehensible. You have

Summation - Mr. Levinson

1 to have some objective way to actually without -- to be
2 objective and to be fair, to be honest you have to
3 determine what's the value of these minutes. I can't
4 tell you what the numbers but I can tell you how many
5 breathes. We all know we take about 20 breaths a
6 minute if we're a normal person. Normal respiration
7 rate is about 20 breaths a minute. That's 7.1 million
8 breathes, agonal (phonetic) breaths assuming he was
9 breathing normally.

10 Do you remember what Dr. Murphy testified
11 about breathing and how as your lungs harden up inside
12 you breathe faster and faster and faster and faster but
13 you can't get more oxygen but you have to do that? He
14 said it's like running a race you'll never win.

15 How fast was Roger breathing in that
16 videotape? I was looking at it earlier and I know it's
17 more than 20 'cause I was counting against my watch.
18 It struck me by my observation as double normal
19 respiration to no effect. But if it was double this
20 res -- respiration rate then you'd be at 14 million
21 agonal breaths. And that's just the period of time
22 from February to December, 2002. Now, he suffered and
23 you saw that.

24 Now, pain wasn't his only suffering. His
25 suffering was known that he never get better for 18

Summation - Mr. Levinson

1 months. You know, it's one thing to break your leg and
2 it may hurt like hell. But you know the doctor's going
3 to take care of it. You're going to get through it.
4 This was something from fairly early on and it was a
5 death sentence and it was only going to get worse. He
6 knew he was going to die. He knew Kathy would have to
7 fend for herself and he knew that Michael would have to
8 fend for himself and that Kathy would have to take care
9 of him.

10 Now, Kathy, she's sitting right here. If she
11 didn't realize already, by the time Roger was getting
12 really sick she was knowing what a really good husband
13 he was 'cause she was taking care of him at that point.
14 And all the things he did for her are now reversed. He
15 was a caring and loving man who sacrificed everything
16 for everybody, according to all the testimony, before
17 himself. For all of his children, for his friends --
18 do you remember when they brought up the marble
19 business? He had lent him money to -- a friend money
20 to start a marble business. He wasn't in one. But
21 there's another proof using Roger's capacity as a nice
22 guy and a guy who gave unto others and a member of his
23 community and a decent friend. They tried to use that
24 against him until they found out that was another
25 untrue statement that they were making in defense of

Summation - Mr. Levinson

1 the railroad. You heard Dr. Wolf testify about the
2 value of services. This is just part of Roger's pain
3 and suffering, just part of Roger's pain and suffering.

4 Now, I remember Mr. Grant talking about
5 charity. Well, charity is something we do because we
6 want to because we care. The Fuccilli do not come to
7 you for charity. They're not someone on the sidewalk
8 holding out a cup saying feel sorry for me. They're
9 coming to you under the law of the Federal Employee
10 Liability Act and ask that you enforce it against these
11 defendants, enforce it fair and square. We don't want
12 charity. Kathy is entitled to damages for two things,
13 for the present value of his lost wages. Remember
14 that? It was kind of beyond me, part of it. But you
15 remember the number that Dr. Wolf gave on
16 cross-examination? Do you all remember that, what the
17 present value was, what Mr. Robbins was asking? It was
18 \$500,000.

19 MR. ROBBINS: Objection.

20 (Side bar)

21 MR. ROBBINS: I didn't ask for that question.
22 He blurted out that question. I didn't even ask him
23 the different things. He didn't say it on -- on this,
24 I didn't want any of those things out and that wasn't
25 part of the evidence --

Summation - Mr. Levinson

1 THE COURT: But did you then ask that the
2 jury be instructed and therefore object? You did not
3 --

4 MR. ROBBINS: I did. I -- as a matter of
5 fact, Judge, I was on there and I said, please, would
6 you direct this defendant not to be saying these things
7 with regard to it. And then I said it several times
8 with regard to it right then and there.

9 THE COURT: Right. But you did not object to
10 have the testimony stricken. It was an instruction to
11 the jury, which is the way that you would have gotten
12 out of it.

13 MR. ROBBINS: Judge, I did do that. I did
14 that in front of you and I asked that you direct the
15 defendant to only answer my questions, not to answer
16 his questions and --

17 THE COURT: That's different.

18 MR. GRANT: Your Honor -- Your Honor, if I
19 may, just for a moment, I didn't want to interrupt
20 counsel's closing, but one thing that counsel indicated
21 was that he had counted, meaning Mr. Levinson, he
22 counted the number of breaths Mr. Fuccilli was taking
23 each -- each minute, and there was no evidence with
24 respect to that from any -- from any witnesses, Your
25 Honor. And I think that's common by counsel, his own

Summation - Mr. Levinson

1 personal recollection, his own understanding and it
2 constitutes testimony. I think that should be
3 stricken.

4 THE COURT: I -- I think that you could
5 correct that by saying --

6 MR. LEVINSON: I'll correct that.

7 THE COURT: -- that you -- you could count.

8 MR. LEVINSON: I will.

9 (Conclusion of side bar)

10 MR. LEVINSON: Let me go back to one point I
11 made earlier. I counted when I was watching Roger
12 double respiration. You may count it triple. You may
13 count less. You should judge about this and everything
14 else in the case. That's important.

15 But when we talk about Kathy's entire life --
16 and this is not charity, this is a legal entitlement
17 -- the present value of this lost wage is minus all
18 benefits, minus all taxes and reduce the present value,
19 that was the number that Mr. Robbins elicited with
20 regard to -- and she's also entitled to the value of
21 services, all of the things that a good spouse does for
22 another spouse. And sometimes you don't realize it
23 until your spouse goes on vacation or your girl
24 friend's on vacation or your boyfriend's on vacation,
25 and you suddenly realize, oh, my God, my life is going

Summation - Mr. Levinson

1 to hell in a hand basket. I don't -- where's the
2 laundry? Where's everything if you're a guy? If
3 you're a woman there are other things you think about.
4 But I've come to these realizations and I'm sure all of
5 you have, too, as members of the community and people
6 who have grown up. These are what I meant by services
7 and all of those things that she would have had to
8 purchase in the marketplace to replace a good husband.
9 Dr. Wolf gave you a range of values for those services
10 to Kathy. Do the best -- do the best you can in
11 recalling the testimony to do justice to Kathy because
12 these are the limits of the law. The law has certain
13 formulas we have to use to assess damages. Emotional
14 anguish is not part of it. Roger's emotional anguish
15 and pain and suffering is but Kathy, the children,
16 that's not part of it. So Kathy is entitled to these
17 lost wages and the value of services for 28 years or
18 just under 28 years he would have provided those
19 services.

20 Think about what life was like 28 years ago,
21 30 years ago. It was 1975. In 1975 no one had a PC.
22 We were about to enter a recession with
23 hyper-inflation. We had really just landed on the
24 moon. We were just getting over Vietnam. We hadn't
25 been to Panama. We hadn't been to Iraq. We hadn't

1 been to Afghanistan. The World Trade Towers were a
2 brand new wonder. The world was different and the
3 world will be different 28 years from now. It's as
4 different as you could comprehend it was from 1975 to
5 now. If we could ever have envisioned the dramatic
6 changes that occurred, that -- those changes and more
7 will occur between 19 -- between 2005 and 28 years from
8 now. God help us and I pray that they're all good
9 changes or most of them. But this is the time frame
10 you have to compensate Kathy and that's a long time
11 'cause that was the time Roger should have lived.

12 And finally we come to Michael. If Michael
13 could only write his name as well as I can write.
14 Michael lives in a world of video Disneyland and
15 seizures. He's autistic. Roger and Michael had a
16 special relationship. Before I go into it -- and I'm
17 only going to be a few more minutes. I apologize. But
18 I heard the defense imply that Michael should not
19 receive a lot of conversation because of his autism.
20 In other words, I guess he wouldn't know how to -- he
21 wouldn't need it because he's autistic. And then I
22 heard an implication that what advice, what real advice
23 could Roger have given a child like Michael and
24 nurturing and guidance 'cause Roger only had an eighth
25 grade education. I heard those things and I was

Summation - Mr. Levinson

1 shocked. Do you have to be a lawyer in a fancy suit
2 with a Ph.D. or a doctor to command respect? Because
3 the opinions I heard from Dr. Goldstein and Dr.
4 Craighead and Dr. Edelman were not more than bought and
5 paid for crap with no value. And now they're telling
6 me and telling you that the value of a man with an
7 eighth grade education who loved his family, who loved
8 his son and took care of him through the night, every
9 night. Instead of going on romantic vacations with
10 Kathy in the Caribbean, when they saved up the money
11 they took the whole family to Disneyland over and over
12 and over again because he's autistic and he wanted the
13 same thing. And they devalued that. Well, I don't
14 devalue that and I don't think any of us devalue that.

15 He understood Michael like no one else did.
16 Kathy told us that. So what is the value for the next
17 28 years that Michael won't have Roger for all those
18 things he did, for as counsel said, two hours a day
19 plus much more on the weekend. And assume that's just
20 ten hours on the weekend by the day. That's their own
21 numbers. So that's 20 hours a week Roger spent
22 providing that special nurture, guidance and care for
23 Michael. And Michael responded to it.

24 And Dr. Wolf's numbers at \$100 an hour -- and
25 he gave you a range. Remember that? He said it's

Summation - Mr. Levinson

1 toward the high end of the 275 an hour, the value of
 2 these services, not because he has an eighth grade
 3 education. You misunderstand or the defense
 4 misunderstood. He's up to the high range of these
 5 numbers because he understood his son 'cause he could
 6 get through to him. He could reach him. He could calm
 7 his seizures. He could make him happy.

8 If you took just \$100 a week at 20 hours a
 9 week -- I can't read that -- the total is 2.6 million.
 10 If you go up to 275 a week at the same 20-hour week the
 11 number is seven million. It may be even more than 20
 12 hours a week. I was using the defense's numbers. But
 13 having done that, you have to reduce this to present
 14 value. Reducing to present value right now is an equal
 15 offset between inflation and present value discount
 16 because right now you get about as much as -- or money
 17 as you -- do you understand what I'm saying? So one of
 18 you will lead the rest of the jury to help understand
 19 that that which I'm not -- this is for Michael alone.
 20 This is for Kathy for 28 years for the loss of his
 21 services and his ages that he gave to his family. And
 22 this is the time of his suffering, just for ten months
 23 of it, not even 18.

24 Let me go through the jury verdict form very
 25 quickly and I'll be done. There we go. That's fine.

Summation - Mr. Levinson

1 Can you read that? Make it a little bigger. Got that
2 now? Okay.

3 Did we prove by a preponderance of the
4 evidence that New Jersey Transit was negligent? Yes.
5 There was no -- if -- if only -- if only in E-Port, no
6 air testing, no respiratory protection and clear
7 exposure to toxins. Did we prove by a preponderance of
8 the evidence that New Jersey Transit's negligence
9 caused or contributed to in whole or in part? Now, let
10 me explain that. In whole or in part, meaning even the
11 slightest cause, was it a cause? Unquestionably yes.
12 It was not a coincidence, it could not have been a
13 coincidence.

14 Was he exposed to asbestos working at Central
15 New Jersey? Now, I think he probably was and I'm
16 surprised by the absence of evidence from CNJ. The
17 answer is probably yes.

18 Was he exposed to wood dust at Central New
19 Jersey? Of course he was. He was working as a
20 carpenter. Did we prove that Central New Jersey was
21 negligent? In this case there's no evidence that he
22 was given any respiratory protection from CNJ. There's
23 no air testing by CNJ. There's no demonstration that
24 he was even given a paper mask let alone a respirator.
25 So the answer is yes. And did it contribute to his

Summation - Mr. Levinson

1 injuries? Certainly it -- if it was asbestos, yes,
2 because of the latency period.

3 Now, the defendant's burden of proof goes to
4 Conrail. They had to prove Conrail was negligent. I
5 don't think they proved a thing. We actually proved
6 that Conrail was negligent 'cause they were in this
7 chain. So was it -- did they prove it? No. Was it
8 probable that Conrail was negligent? I would say yes.

9 Now -- now you have to ask if defendants --
10 if it was proven that Conrail, just like everyone else
11 was negligent, was it a cause of Roger's problems?

12 Now, on that I'm unsure because the only respirator he
13 ever got from any railroad appeared to be Conrail, not
14 New Jersey Transit, not CNJ. I leave that to your
15 judgment. I don't think so.

16 Now, was Roger Fuccilli contributorily
17 negligent? This is a fascinating question because they
18 blamed him for everything under the sun but they didn't
19 prove a darn thing. Contributory negligence of Roger
20 would be smoking if it caused this problem. And what
21 was the answer to that from their own doctor? No. So
22 that's out.

23 Untreated GERD, I guess. If he didn't go to
24 a doctor -- you had reflux and you didn't bother to see
25 a doctor for it, that might be contributory negligence.

Summation - Mr. Levinson

1 But there are experts say GERD played no role.

2 Cabinet-making their own expert said played
3 no role. And then remember the farming in Italy
4 argument that kind of dropped by the wayside? They
5 didn't prove a thing with that.

6 So I don't think they proved that Roger did a
7 darn thing wrong, nothing. The only comment was a
8 preposterous statement that Roger should have asked for
9 more respiratory protection. At New Jersey Transit
10 their own TRO5 says their supervisors are responsible
11 for giving it to you, making sure you were fitted. He
12 didn't do anything wrong. He was obligated to follow
13 his superior's instructions. If they say take a
14 respirator he was supposed to take it. If they say use
15 it he was supposed to use it. Right? There's no
16 evidence that they even gave it to him. So the absence
17 of that evidence Roger Fuccilli was not negligence.
18 And of course, nothing he did contributed.

19 Now you have to allocate the relative
20 percentages of responsibility. It is our feeling that
21 New Jersey Transit is over 80 percent responsible. It
22 is our feeling that Central New Jersey is 10 to 20
23 percent responsible. And that's it.

24 Now, that's the form you'll fill out at the
25 end of the case. We can't ask you to award a specific

Summation - Mr. Levinson

1 amount of money. We want you to be honest, fair and
2 decent as members of the community to another member of
3 your community, to this family, this decent family and
4 a decent man. Tell them that their neighbors
5 understand what happened here. Tell them that their
6 neighbors don't like company experts for hire. Tell
7 them that you all believe in integrity and fair play.
8 And when you're at the mall ten years from now, 20
9 years from now, one year from now or on the street in
10 Metuchen or in New Brunswick or wherever you are, and
11 if you see Kathy and Michael walking down the street
12 you'll feel proud as a member of the community that you
13 did the right thing that day. And that day is today.

14 Thank you.

15 (Conclusion of requested summations)

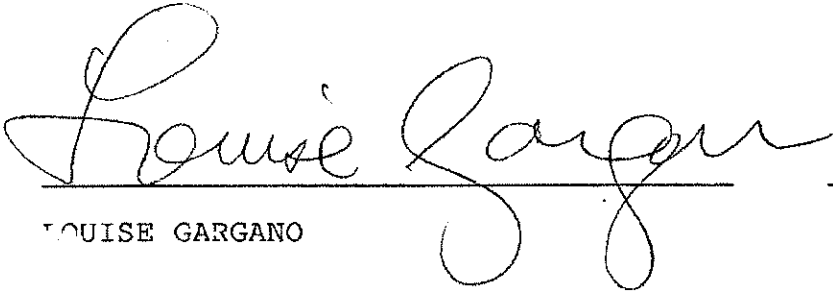
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CERTIFICATE

I, Louise Gargano, the assigned transcriber, do hereby certify that the foregoing transcript of proceedings on Videotape Index No. 13:35-16:31, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings as recorded.



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