



Deposition of:  
**Conf. & Non-Conf. Trial Vol. IV**  
*January 20, 2017*

In the Matter of:  
**In Re: Georgia Southern Nurses**

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IN THE SUPERIOR COURT OF BRYAN COUNTY  
STATE OF GEORGIA

MEGAN REBECCA RICHARDS,

Plaintiff,

CIVIL ACTION FILE

vs.

NO. 2015-V-174(RO)

TOTAL TRANSPORTATION OF  
MISSISSIPPI, LLC, U.S. XPRESS  
ENTERPRISES, INC., U.S.  
XPRESS, INC., U.S. XPRESS  
LEASING, INC., NEW MOUNTAIN  
LAKE HOLDINGS, LLC, MOUNTAIN  
LAKE RISK RETENTION GROUP,  
INC., JOHN WAYNE JOHNSON,  
GREYWOLF LOGISTICS, INC., ARCH  
INSURANCE COMPANY, and ROBERT  
GORDON TAYLOE,

Defendants.

VOLUME IV  
CONFIDENTIAL AND NON-CONFIDENTIAL PROCEEDINGS HELD  
BEFORE HONORABLE CHARLES P. ROSE  
January 20, 2017  
9:00 A.M.

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Pembroke, Georgia  
Lee Ann Barnes, CCR-1852, RPR, CRR

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E X H I B I T S

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(All exhibits were retained by counsel.)

1 (The following proceedings were held  
2 outside the presence of the jury.)

3 THE COURT: All right. Let's bring our  
4 jury in, please.

5 (The following proceedings were held in  
6 the presence of the jury.)

7 THE COURT: All right. Everyone please be  
8 seated.

9 When we adjourned last night, I believe  
10 the plaintiffs' counsel stated that there were  
11 no additional witnesses, but there are  
12 additional documents and stipulations.

13 MR. JONES: There are, Your Honor.

14 We've gone over these this morning with  
15 opposing counsel and the plaintiffs would  
16 tender Plaintiff's Exhibit 32, 35, 140, 87,  
17 216, 252, 170, 73, 67, and 59, Your Honor.

18 THE COURT: All those exhibits are  
19 admitted without objection?

20 MR. D. DIAL: Yes, Your Honor.

21 THE COURT: All right.

22 (Plaintiff's Exhibits 32, 35, 59, 67, 73,  
23 87, 140, 170, 216, and 252 were admitted into  
24 evidence.)

25 MR. D. DIAL: In addition, Your Honor, at

1 the end of the day we talked about  
2 Exhibit 171-1 through 5 and that we had to do  
3 some adjustments to them. We've done those,  
4 we've gone over them with plaintiff, and we  
5 would move to admit as evidence Exhibits 171-1  
6 through 171-5.

7 THE COURT: All right. They are admitted  
8 without objection?

9 MR. JONES: That's correct.

10 I still have the stipulations to address.

11 THE COURT: Yes, sir.

12 MR. JONES: If you'll reserve those, Your  
13 Honor, we'll do those at the appropriate time,  
14 and with that, we'll rest.

15 THE COURT: There are no stipulations to  
16 be read in the presence of the jury?

17 MR. JONES: Your Honor, quite frankly, I  
18 think we -- they do need to be read to the  
19 jury, but I don't think we're quite ready with  
20 all of the parties to do that at this time yet.

21 Mr. Pittman, if you want to address that.

22 MR. PITTMAN: Yes. Your Honor, they're  
23 the stipulations that are in the pretrial order  
24 from the section for the U.S. Xpress defendants  
25 and the corporate Greywolf defendants. It's



1 about 11 or 12.

2 THE COURT: Okay. Fine. Thank you.

3 All right. Plaintiffs have now rested.

4 Are the defendants ready to proceed?

5 MR. D. DIAL: Your Honor, we have -- we'd  
6 like to make a motion if we could.

7 THE COURT: Okay. All right. Ladies and  
8 gentlemen, the plaintiff has now rested in this  
9 case. There are a couple of matters I have to  
10 take up outside your presence, so if you'll go  
11 back with the bailiffs, we'll have you back in  
12 just a few minutes.

13 (The following proceedings were held  
14 outside the presence of the jury.)

15 THE COURT: All right. The jury's out.  
16 Counsel, you may proceed.

17 MR. D. DIAL: Your Honor, at this time, we  
18 move for a directed verdict on claims made by  
19 the plaintiff.

20 First, I'll address the punitive damage  
21 claim against John Wayne Johnson. As Your  
22 Honor knows the standard, we don't need to  
23 repeat that. I know Your Honor's been studying  
24 the law on this issue, so I won't make this  
25 argument very long.

1           But we believe in the beginning of the  
2 case, in opening statement, the plaintiff said  
3 that they were going to base their punitive  
4 damages case on the unconscionable conduct of  
5 Mr. Johnson watching either videos or playing a  
6 game at the time of the accident.

7           As Your Honor knows, that attempt failed  
8 miserably based upon incorrect calculations of  
9 plaintiff's expert witness, Randy Stone, and  
10 also the only evidence in the case concerning  
11 his use is that they specifically quizzed  
12 Mr. Johnson about whether or not he was using  
13 the phone at the time of the accident and he  
14 said no. So that's that issue.

15           They then switched strategies and said,  
16 "We're now going to prove punitive damages  
17 based on a pattern of conduct of fatigued  
18 driving," and they entered into evidence the  
19 2011 accident that happened some three and a  
20 half years before this one. It was a  
21 single-vehicle accident in which Mr. Johnson  
22 admitted that he did fall asleep and that  
23 accident resulted.

24           We don't believe that that violation of a  
25 rule of the road evidence is a pattern or

1 policy of conduct. It was a one-time event  
2 that happened during this man's driving career.

3 It is no evidence that it's substantially  
4 similar to this event. There's essentially no  
5 evidence of any fatigue on the part of  
6 Mr. Johnson with this accident. He has  
7 testified, and he said so at the scene, that he  
8 was awake and he saw lights ahead of him; he  
9 simply did not understand he was gaining on  
10 them at the rate he was and did not react in  
11 time to stop. That's what the evidence is.

12 So I don't think that that single event  
13 that happened three and a half years earlier,  
14 which was nothing more than another violation  
15 of the rule of the road, it did not cause a  
16 suspension of his license, it did not cause him  
17 to be ineligible to drive, it did not eliminate  
18 him from being a truck driver in the United  
19 States in any state on any highway. That is  
20 not enough conduct, and certainly not clear and  
21 convincing evidence that Mr. Johnson acted  
22 want- -- wantonly, willfully, and with  
23 conscious disregard. That's that issue.

24 The other issue, we would again, based --  
25 and I would incorporate our motion for summary

1 judgment on that issue, as well, Your Honor,  
2 and the cases cited therein.

3 THE COURT: Yes.

4 MR. D. DIAL: With respect to the other  
5 issue, we would move for a directed verdict  
6 under the long-established Georgia law, the  
7 impact rule, that in this case, the evidence  
8 that we've heard -- and I would also move for a  
9 mistrial on the basis that the evidence we  
10 heard largely is about the emotional distress  
11 caused by Megan Richards being involved in this  
12 tragic event in which her friends, co-students,  
13 were killed and injured. That has been the  
14 bulk of the evidence of what is causing her  
15 posttraumatic stress disorder and other  
16 emotional distress. We've heard very little  
17 about any of that arising from a physical  
18 injury.

19 So we believe under the Lee case, that  
20 case, that should be dismissed and, if not  
21 dismissed, we would also move for a mistrial  
22 for that evidence having come in.

23 Thank you, Your Honor.

24 THE COURT: Thank you.

25 Counsel.

1 MR. JONES: I'll address the punitive  
2 damages issue briefly, Your Honor.

3 We have never switched tracks. We have  
4 maintained from the very outset that this  
5 driver, holding a CDL license -- we've always  
6 tried to admit, and we did it in our recent  
7 oppositions to the motions for summary  
8 judgment -- we showed the Court about this  
9 previous falling asleep and having a wreck and  
10 then his lack of attention in doing so.

11 There can be no greater lack of attention  
12 than when a driver of a commercial vehicle is  
13 asleep. It is the very definition of lack of  
14 attention.

15 And the Clinch case says that if you can  
16 show that a driver has a history of  
17 inattentiveness, then -- and that is also  
18 related to the facts of this case, then that's  
19 sufficient to go to the evidence -- to go to  
20 the jury on punitive damages. It's for the  
21 jury to decide whether or not it's enough to  
22 award punitive damages. The Court's function  
23 is to merely decide whether or not that should  
24 go to the jury.

25 Secondly, the reason we put in all the

1 text messages was not to show that he was  
2 texting at the time of the accident, but to  
3 show that from the time he got up in  
4 Shreveport, Louisiana, until he took the bus  
5 trip to Jackson, Mississippi, and then he took  
6 his truck and drove all the way across the  
7 states of Mississippi and Alabama and into  
8 Georgia and into the early morning hours, all  
9 of those text messages showed that he never got  
10 any sleep. He says he was sleeping all that  
11 time. He says he slept at the terminal. He  
12 says he slept the night before on the bus.  
13 Well, all those text messages show, or a jury  
14 could conclude, that he didn't get enough sleep  
15 and, consistent with his inability to explain  
16 what happened -- I mean, he sat here on the  
17 witness stand himself and said, "I hope one day  
18 somebody finds out what happened. I hope some  
19 expert concludes or figures out what I was  
20 doing and what happened, because I can't  
21 explain it myself." So the jury can certainly  
22 conclude from his own testimony that he was  
23 asleep at the time this collision occurred, as  
24 well.

25 So we've got the two falling -- we've got

1 the falling asleep three years prior to this  
2 one, we've got the falling asleep here. It's  
3 certainly in evidence and certainly something  
4 that the jury can decide, and it certainly  
5 meets the Clinch County case as to whether or  
6 not we should go to the jury on the issue of  
7 punitive damages, Your Honor. We think -- we  
8 would ask that the Court let that issue go to  
9 the jury.

10 MR. PITTMAN: Your Honor, I'm going to  
11 address the impact rule.

12 THE COURT: Yes.

13 MR. PITTMAN: And two further points on  
14 Mr. Jones.

15 You know, there's evidence before this  
16 jury that he told different stories about what  
17 happened, that he initially said, "Oh, I tried  
18 to brake," and that goes to his credibility,  
19 and the rollover that went in is, of course,  
20 notice of the importance of driving not  
21 distracted.

22 On the impact rule, Your Honor -- and this  
23 also goes to their charges, they've asked for a  
24 limited charge -- the impact rule is only  
25 applicable, including as a charge, if there is

1           some manner to limit the damages that are  
2           sought for her mental pain and suffering, and  
3           that's just not in this case for multiple  
4           grounds.

5           The Court has ruled that the impact rule  
6           should not be followed here, including under  
7           the compelling circumstances test of Lee, so  
8           the fact that maybe some of it does involve the  
9           memories of her deceased friends is not -- is  
10          not a reason to move as these defendants have.

11          We have put in abundant testimony from  
12          physicians that the PTSD and the mental  
13          suffering, which is -- of course the Court will  
14          charge on the pattern charges for mental pain  
15          and suffering -- is a part of her physical  
16          injuries, including her physical injuries that  
17          were suffered at the scene. There is a  
18          physical component to that.

19          Dr. Lacy testified to the fact that it  
20          actually changes the brain structure, and so  
21          we've got that issue, as well, Your Honor.

22          There's certainly no basis for a mistrial,  
23          and moreover, there's no directed verdict  
24          available for that for the abundant testimony  
25          that we've put in from Dr. Lacy, Dr. Sass, and



1 Ms. Richards and other witnesses themselves.

2 THE COURT: All right. Thank you,  
3 Counsel.

4 All right. With regard to the issue of  
5 punitive damages, there does have to be a  
6 pattern of dangerous driving. You know, the  
7 Court can't substitute its judgment for that of  
8 the jury. The Court is going to submit it to  
9 the jury and the jury will have to make that  
10 determination.

11 As far as the motion for mistrial, the  
12 Court will deny the motion based on its  
13 previous ruling.

14 And I believe that addresses the issues.

15 MR. BARBER: Judge, I also have a  
16 motion --

17 THE COURT: That's right, on the corporate  
18 piece.

19 MR. BARBER: -- on the corporate piece.

20 THE COURT: Yes.

21 MR. BARBER: And I'll be very quick.

22 THE COURT: Yes, sir.

23 MR. BARBER: These are the same law that I  
24 cited in the summary judgment motion you've  
25 already read, but I did want to point out now

1 we actually have the evidence in, joint venture  
2 requires mutual control. There's no testimony  
3 in the case that John Stomps at Total  
4 Transportation had any control over any of the  
5 other entities that are defendants, the U.S.  
6 Xpress defendants, New Mountain Lake, U.S.  
7 Xpress Enterprises, U.S. Xpress, Inc., U.S.  
8 Xpress Leasing, and the Risk Retention. He had  
9 no control over this. You have to have mutual  
10 control. There's no evidence he had any mutual  
11 control.

12 I noticed that's the one jury charge we  
13 all agree on the law and their jury charge is  
14 almost like our jury charge. They didn't show  
15 any evidence in the case of mutual control.  
16 They have to do that. It's not just mutual  
17 control at the moment John Johnson's driving,  
18 they're saying the business model of running  
19 Total Transportation is a joint venture. That  
20 requires -- the legal requirement is they have  
21 to show mutual control, and they did not do  
22 that in this case. There's no evidence in the  
23 record.

24 And then on the alter ego, there's no  
25 evidence of insolvency, which, as we argued in

1           our brief for summary judgment, the panel case  
2           says you have to have evidence of insolvency.  
3           I asked their expert the question did they pay  
4           their debts when due. He said, "Yes." I said,  
5           "Do they have positive stockholder's equity?"  
6           He said, "Yes." Judge, that's it. There is no  
7           evidence of insolvency.

8                     What he tried to do is get around it by  
9           saying, "Well, they might not have been able to  
10          stand on their own, they were weak because they  
11          were undercapitalized." That's not insolvency.  
12          They have to show insolvency. It's undisputed  
13          fact that there is no insolvency.

14                    And, again, under the panel case, we  
15          believe that is a requirement under the law.  
16          They did not make a prima facie case, so we  
17          would move for summary judgment on that -- or  
18          not summary judgment, directed verdict.

19                    The last piece is the dual agency, and we  
20          believe that there's not enough evidence about  
21          Mr. Johnson acting as an agent for all of the  
22          defendants. There's no evidence that he acted  
23          as an agent for U.S. Xpress Leasing or the Risk  
24          Retention Group or the other motor carrier,  
25          U.S. Xpress, Inc. The only allegation was that

1 he was somehow part of a corporate holding with  
2 what they keep calling the mother ship, but,  
3 again, Judge, there was no direct evidence that  
4 he was acting on their behalf furthering their  
5 business, and so we would move for a directed  
6 verdict on that ground, as well, also using the  
7 law we cited to the Court in our summary  
8 judgment briefs.

9 THE COURT: Thank you, Counsel.

10 Plaintiff's response?

11 MR. PITTMAN: Yes, Your Honor. There are  
12 multiple theories as part of this case as to  
13 the --

14 THE COURT: And I want to try to distill  
15 that for the jury. I could charge them for 30  
16 minutes on agency, parent, subsidiary, parent  
17 agency, dual agency, alter ego. I think that  
18 is just totally confusing to this jury. I  
19 think we've got to simplify it for them. We've  
20 got to condense it. We've got to put it in a  
21 way that's understandable.

22 MR. PITTMAN: And we agree with Your  
23 Honor, and, in fact, it's --

24 THE COURT: But I digressed. Please  
25 respond.

1 MR. PITTMAN: No, no, we always appreciate  
2 the guidance from the Court.

3 Your Honor, we have presented abundant  
4 evidence as to the control under the common  
5 enterprise theory and as to the -- the dual  
6 agency going on between these parties.

7 It's very clear that -- and I'm not going  
8 to use the word mother ship here, but the  
9 owner, New Mountain, controls, through its  
10 control of the board, the -- we've put in front  
11 evidence that U.S. Xpress Enterprises controls  
12 the money; we've put in that U.S. Xpress, Inc.,  
13 the other carrier, pays; that U.S. Xpress  
14 Leasing is responsible for the equipment, the  
15 cab that he was driving at the time; and we  
16 intend to put before as part of the charges  
17 that whether you view it as a common enterprise  
18 with control or some type of agency, that --  
19 this is an integrated enterprise, and when  
20 Defendant Johnson was driving that truck, he  
21 was driving a truck that was put on the road by  
22 all of these, including U.S. Xpress.

23 You know, some of the confusion, some of  
24 the points he makes, has to do with the  
25 piercing the corporate veil theory, which is

1 often -- I'm sure the Court's familiar with --  
2 in post-judgment situations and the insolvency  
3 and those issues. That's not what we're  
4 talking about here. We're talking about a  
5 common enterprise that operates as one such  
6 that they are, as a group of entities,  
7 responsible for putting him on the road and,  
8 therefore, under respondeat superior, they are  
9 all liable for the admitted liability of Total  
10 Transportation of Mississippi.

11 And we saw other examples. I don't want  
12 to go on long while the jury's here. The  
13 claims reporting, hiring procedures, policies.  
14 It's clear there's abundant evidence to go to  
15 the jury on whether this is a common enterprise  
16 for which control is exerted on the Total  
17 Transportation by the U.S. Xpress entities.

18 THE COURT: I'll let it go to the jury,  
19 but we're going to have to get together and  
20 formulate a charge that is much shorter than  
21 what's been offered thus far.

22 MR. D. DIAL: And, Your Honor, I just --

23 MR. PITTMAN: I agree on that, Your Honor.

24 MR. D. DIAL: I'm sorry. I would just  
25 like to make sure the record's clear that when

1           you denied my motion for mistrial, you're also  
2           denying my motion for directed verdict.

3           THE COURT:   Yes, sir.   Yes.

4           MR. BARR:   Your Honor, I would move for  
5           directed verdict on behalf of the Greywolf  
6           defendants.  We spoke at the pretrial order  
7           about the Smith case, but what we didn't talk  
8           about is the pattern charge on the situation,  
9           which is 670.2.202 that I believe all the  
10          parties agree should be given.  I don't know if  
11          Your Honor had a chance to look at that last  
12          night, but it requires the evidence be that the  
13          injuries were the natural, reasonable, and  
14          probable result of the original negligent act.

15          And I don't believe plaintiffs are even  
16          alleging that this accident was likely to  
17          happen and, in fact, they're alleging punitive  
18          damages.  There's been lots of evidence about  
19          the distance, the unlimited line of sight, and  
20          so I don't, frankly, Judge, see how any  
21          reasonable jury could find that these injuries  
22          were reasonable, that they were natural, or  
23          that they were probable, meaning likely to  
24          occur, just because of the first accident.

25          THE COURT:   Well, you'd be surprised what

1 a reasonable jury might do. They'll surprise  
2 you. But --

3 MR. BARR: True enough.

4 THE COURT: -- Counsel, your response.

5 MR. PITTMAN: Yes, Your Honor. The  
6 Greywolf defendants have stipulated as to the  
7 negligence of the first driver as to the  
8 blocking the road and all that, and as the  
9 Court will remember from the briefing on this  
10 issue --

11 THE COURT: Well, I decided on the Smith  
12 case there was a jury question, but --

13 MR. PITTMAN: Exactly.

14 THE COURT: And the Smith case was very  
15 close with regard to the facts of that case and  
16 this case.

17 But, I mean, most of the focus of this  
18 case has been against the driver and Total and  
19 U.S. Xpress. You want a verdict form that's  
20 going to apportion liability?

21 MR. PITTMAN: Yes, Your Honor.

22 THE COURT: All right. I'll allow it to  
23 go to the jury.

24 MR. BARR: The only other thing, for the  
25 record, Judge, we would join in the



1 codefendants' impact rule motions that were  
2 just stated.

3 THE COURT: All right. That's preserved  
4 for the record.

5 MR. BARR: Thank you, sir.

6 THE COURT: All right. Anything else  
7 before we bring the jury back in.

8 MR. JONES: And just to be sure, Judge,  
9 there's confusion about these blowups.

10 THE COURT: Yes, sir.

11 MR. JONES: We still -- everybody's looked  
12 at them. We've identified them. We still  
13 haven't been able to get the small pictures and  
14 collate that. And, you know, I don't want to  
15 waste everybody's time, but we do need to  
16 tender those pictures, all the numbered  
17 pictures, of these photographs that are  
18 blowups.

19 MR. D. DIAL: We looked at those  
20 yesterday --

21 MR. JONES: And we talked about all that.  
22 I just wanted to be sure we were all in  
23 agreement.

24 THE COURT: That's fine. Those can go out  
25 to the jury as they are.

1 MR. JONES: And we may have to do that.  
2 We've been trying to find pictures.

3 MR. PITTMAN: Well, in fact, Your Honor,  
4 with that instruction, we will label these -- I  
5 mean, really, all we're talking about here is  
6 assigning a number -- just asking the Court's  
7 forbearance to assign exhibit numbers to what  
8 everybody's already agreed has been shown.

9 So we'll do that at one of the breaks and  
10 we'll put those numbers into the record, and  
11 we'll also tender some type of photo or  
12 something so there's something in the small  
13 record as to what these were.

14 THE COURT: All right.

15 MR. PITTMAN: Thank you, Your Honor.

16 THE COURT: All right. Can we bring the  
17 jury back in?

18 MR. BARBER: Judge, can I have just --

19 THE COURT: Yes, sir.

20 MR. BARBER: -- about two minutes to make  
21 sure I've got everything ready to hand to the  
22 witness?

23 THE COURT: Sure.

24 MR. BARBER: I'm almost done. I don't  
25 want to do it while they're here, so...

1 THE COURT: Sure.

2 Bring the jury in.

3 (The following proceedings were held in  
4 the presence of the jury.)

5 THE COURT: Everyone please be seated.

6 Ladies and gentlemen, if you'll bear with  
7 us for just a minute. We weren't quite ready,  
8 but we see that you are.

9 MR. BARBER: Judge, we're going to get one  
10 more document in a minute, but I'm going to go  
11 ahead and start and then she'll just bring me  
12 the document when it's ready.

13 THE COURT: Okay.

14 MR. BARBER: I'd like to go ahead and get  
15 started.

16 Okay. On behalf of the defendants, Judge,  
17 we call Lisa Pate to the stand.

18 THE COURT: All right.

19 LISA MARIE PATE,  
20 a witness herein, being first duly sworn in the  
21 above cause, was examined and testified as follows:

22 THE COURT: All right.

23 DIRECT EXAMINATION

24 BY MR. BARBER:

25 Q. Good morning, Ms. Pate.

1 A. Good morning.

2 Q. Would you please tell the jury your name.

3 A. Lisa Marie Pate.

4 Q. And where do you live, Ms. Pate?

5 A. 8332 Mill Race Drive, Ooltewah, Tennessee.

6 Q. And where do you work?

7 A. U.S. Xpress Enterprises.

8 Q. And what is your title there?

9 A. My title is chief administrative officer  
10 and acting general counsel.

11 Q. Okay. And just describe for the jury what  
12 you do in that role.

13 A. I'm in charge of the non-financial back  
14 office services, so essentially things like IT, HR,  
15 safety, risk management, which is our claims, legal  
16 matters. We have a process and prevent group that  
17 reports up through me, communication. So, really,  
18 all the non-operational and non-financial  
19 departments report up through me.

20 Q. Okay. And you're here today testifying on  
21 behalf of New Mountain Lake Holding, LLC; correct?

22 A. Yes.

23 Q. And U.S. Xpress Enterprises, Inc. ;  
24 correct?

25 A. Yes.

1 Q. And U.S. Xpress, Inc. --

2 A. Yes.

3 Q. -- correct?

4 And U.S. Xpress Leasing, Inc.?

5 A. Yes.

6 Q. And Mountain Lake Risk Retention Group?

7 A. Yes.

8 Q. Okay. Ms. Pate, I would like you to just  
9 address the jury on this one point.

10 Is Total Transportation of Mississippi  
11 managed and run separately from the U.S. Xpress  
12 defendants I just named?

13 A. Yes, absolutely.

14 Q. And on the date of the accident, was John  
15 Wayne Johnson acting on behalf of any U.S. Xpress  
16 entity other than Total Transportation of  
17 Mississippi, LLC?

18 A. No.

19 Q. Was he acting as an agent for any other  
20 U.S. Xpress entity other than Total Transportation  
21 of Mississippi?

22 A. No.

23 Q. Was he under the control of any other U.S.  
24 Xpress entity other than Total Transportation of  
25 Mississippi?

1 A. No.

2 Q. And you understand that Total  
3 Transportation of Mississippi has admitted that John  
4 Johnson was acting in furtherance of their business  
5 and in the scope of his employment with them?

6 A. Yes.

7 Q. And so to the extent you're in that  
8 corporate tree, you also agree that Total  
9 Transportation is responsible for the actions of  
10 John Wayne Johnson on April 22, 2015?

11 A. Yes.

12 Q. Okay. Is there any doubt in your mind who  
13 runs Total Transportation of Mississippi on a  
14 day-to-day basis?

15 A. There's absolutely no doubt. It's John  
16 Stomps.

17 Q. Okay. Would you just give us a brief  
18 description of the functions that Total  
19 Transportation performs that are independent of  
20 similar functions that might be run at U.S. Xpress,  
21 Inc.

22 A. Sure. Total has its own sales and  
23 marketing department, so they sell their services to  
24 customers directly. They have their own operations  
25 staff. They have their own driver recruiting

1 department. They have their own safety department,  
2 their own HR department. They have a completely  
3 separate website.

4 They have their own DOT motor carrier  
5 number and authority. One of the Total entities,  
6 the Logistics, has its own brokerage authority  
7 number. So it's completely separate in those  
8 regards.

9 Q. How about its CEO? Is the CEO of Total  
10 Transportation different than the CEO of the other  
11 U.S. Xpress entities that are defendants in the  
12 case?

13 A. Yes.

14 Q. Okay. And the CEO of Total Transportation  
15 of Mississippi is who?

16 A. Is John Stomps.

17 Q. John Stomps. Okay.

18 You mentioned broker authority. Does  
19 Total Transportation of Mississippi have broker  
20 authority?

21 A. My understanding is it's the Total  
22 Logistics entity that has the brokerage authority.

23 Q. Okay. And is it separate from the U.S.  
24 Xpress --

25 A. Yes.

1 Q. -- broker authority?

2 A. Yes.

3 Q. How about driver training?

4 A. They're responsible for their own driver  
5 training. They have a different driver training  
6 program from the U.S. Xpress, Inc. driver training  
7 program.

8 Q. And how about payroll?

9 A. They administer their own payroll.

10 Q. How about marketing?

11 A. They do all of their own marketing to  
12 customers.

13 Q. Okay. Do these items that Total  
14 Transportation -- or I guess these services that  
15 they provide for their company, do those cost money  
16 to the company?

17 A. It costs money to Total, correct.

18 Q. Sure.

19 And if they were being run as a part of  
20 U.S. Xpress and as if you-all were just a single  
21 entity, would you need to incur all this expense?

22 A. No. It would be redundant.

23 Q. Are there occasions, to your knowledge,  
24 where U.S. Xpress and Total compete against each  
25 other?



1 A. Yes.

2 Q. Okay. And would it make any sense to you  
3 if a single company being run as a single company  
4 had entities within its group that competed against  
5 each other?

6 A. No.

7 Q. Okay. Are there occasions when Total  
8 Transportation and U.S. Xpress, Inc. provide  
9 transportation service to the same customers?

10 A. Yes.

11 Q. And do you use separate con- -- or do the  
12 two companies use separate contracts?

13 A. Yes.

14 Q. Okay. One thing I forgot to mention at  
15 the beginning.

16 New Mountain Lake Holdings, what do they  
17 do?

18 A. New Mountain Lake Holdings is really a --  
19 it's just a pure holdings entity. When U.S.  
20 Xpress -- U.S. Xpress Enterprises was a public  
21 company and we went private in 2007, and at that  
22 time that was the entity created to go private. So  
23 that's what it is.

24 Q. Okay. So does it have any operational  
25 function?

1 A. No.

2 Q. Okay. So the first operating company that  
3 has actual work to do is U.S. Xpress Enterprises?

4 A. Correct.

5 Q. All right. Now, under U.S. Xpress  
6 Enterprises, there is also U.S. Xpress, Inc.

7 A. Yes.

8 Q. And is that the what we call U.S. Xpress  
9 motor carrier?

10 A. Yes.

11 Q. Okay. So we have a U.S. Xpress motor  
12 carrier, which is U.S. Xpress, Inc., and then  
13 there's another motor carrier, Total Transportation  
14 of Mississippi, LLC.

15 A. Yes.

16 Q. And those are the two largest motor  
17 carriers?

18 A. Yes.

19 Q. Okay. And then the leasing -- just  
20 explain what the function of U.S. Xpress Leasing is.

21 A. U.S. Xpress Leasing is the entity that  
22 owns all of what we call rolling stock, but it's --  
23 your rolling assets are your tractors and trailers.

24 And that entity then leases that equipment  
25 to the motor carrier, so it leases equipment to U.S.

1 Xpress, Inc. and it leases equipment to Total  
2 Transportation of Mississippi, and both entities are  
3 charged the direct cost of that equipment.

4 Q. Okay. And getting back to the point we  
5 were previously, you said that there were certain  
6 occasions where you shared actual customers  
7 together; correct?

8 A. Yes.

9 Q. And can you just give some examples where  
10 U.S. Xpress, Inc., the U.S. Xpress motor carrier,  
11 and Total actually served the same customers?

12 A. Sure. We both -- both U.S. Xpress, Inc.  
13 and Total Transportation provide services for  
14 Amazon. We both provide services for Walmart, for  
15 FedEx, for Smucker's, I think Conagra, as well.  
16 There are several examples.

17 Q. Okay. Just to give the jury a flavor of  
18 that, I want to show you what's been marked as  
19 Exhibits 142-1, -2, and Exhibits 128-1 and -2, and  
20 just ask you to look at these and identify them.

21 A. Sure. Exhibit -- these are customer  
22 contracts with U.S. Xpress, Inc., so there's a  
23 Walmart agreement with U.S. Xpress, Inc., a FedEx  
24 agreement with U.S. Xpress, Inc., and a -- another  
25 FedEx agreement with -- one's FedEx Ground and

1 one's -- yeah, both are FedEx Ground, I'm sorry,  
2 with U.S. Xpress, Inc. and one with Total  
3 Transportation.

4 And then this one is a Walmart agreement  
5 with Total Transportation.

6 Q. Okay. So you've got Walmart with two  
7 contracts, one with Total and one with U.S. Xpress?

8 A. Yes.

9 Q. And you've got FedEx Ground, one contract  
10 with U.S. Xpress and one contract with Total  
11 Transportation of Mississippi?

12 A. Yes.

13 Q. Okay. Would it -- would it make any sense  
14 under the sun for you to have two separate contracts  
15 for the same customer if you were being run as the  
16 same entity?

17 A. No.

18 MR. BARBER: Okay. We would tender the  
19 documents identified, Judge, into evidence.

20 THE COURT: Any objection?

21 MR. JONES: May I see them?

22 MR. BARBER: Sure. I'm sorry.

23 MR. JONES: I'd like to take a look at  
24 them. You can continue with your questions.

25 MR. BARBER: Yeah, I'm going to have more

1 questions. Okay.

2 Q. (By Mr. Barber) Ms. Pate, despite the  
3 fact that Total is run separately on an operational  
4 basis, are there occasions when the companies work  
5 together as a concerted group?

6 A. Yes.

7 Q. And, in fact, the companies actually have  
8 a contract together?

9 A. Yes. There's a consulting agreement.

10 Q. All right. And that consulting agreement  
11 is between the parent of Total Transportation --  
12 which is Transportation Investments; correct?

13 A. Yes.

14 Q. -- and U.S. Xpress Enterprises?

15 A. Correct.

16 Q. Okay.

17 MR. BARBER: Could you bring up the  
18 Exhibit 68, please, Bates -4345.

19 Q. (By Mr. Barber) I'm going to show you  
20 what's been marked Exhibit 68.

21 MR. BARBER: Go ahead and highlight  
22 paragraph 1, please.

23 Q. (By Mr. Barber) You were here yesterday  
24 when we went over this services contract with  
25 Mr. Gingras?

1 A. Yes.

2 Q. So I'm not going to spend too much time on  
3 it today because we've already seen it, but is this  
4 the consulting agreement, Exhibit 68, that exists  
5 between, among other entities, Transportation  
6 Investments, the parent company of U.S. Xpress --  
7 excuse me, the parent company of Total  
8 Transportation of Mississippi, LLC, and U.S. Xpress,  
9 Inc.?

10 A. Yes.

11 MR. BARBER: All right. We would tender  
12 Document 68 into evidence, Judge.

13 MR. JONES: We have no objection to 68.

14 THE COURT: All right. They're all  
15 admitted.

16 (Defendants' Exhibits 68, 128-1 and -2,  
17 and 142-1 and -2 were admitted into evidence.)

18 Q. (By Mr. Barber) And looking just quickly  
19 at the part that says "Services," just describe for  
20 me -- without reading it and going through the  
21 detail of it, just describe to the jury what this is  
22 intended to do and how it operates in practice.

23 A. So it -- what it's intended to do is take  
24 advantage of some economies of scale. And so in  
25 practice, that would mean things such as the finance

1 and treasury functions, we provide services at the  
2 U.S. Xpress Enterprise level for the operating  
3 entities.

4 For U.S. Xpress Leasing, for instance,  
5 that entity that owns the rolling assets, the  
6 tractors and trailers, if you can buy them all  
7 together, there's cost economies.

8 Same for certain things like benefits.  
9 Total does have its own benefit plans with different  
10 premiums and different parameters, but U.S. Xpress  
11 Enterprises negotiates those benefit plans with the  
12 third-party vendors.

13 There are certain services like legal  
14 services that Enterprise provides for all of the  
15 operating entities and that Total Transportation  
16 pays for.

17 Q. Would claims also fall under that group?

18 A. Yes, they would. So the claims services  
19 is part of the consulting agreement services  
20 offered.

21 Q. Okay. We heard some testimony in this  
22 case about the fact that Mr. Johnson called Total  
23 Transportation first from the scene; correct?

24 A. Yes.

25 Q. That's your memory of his testimony?

1 A. That's my memory.

2 Q. Right. And then he called Don  
3 Rittenhouse.

4 A. Yes.

5 Q. All right. And Don Rittenhouse works for  
6 U.S. Xpress, Inc.

7 A. He does. He's a member of the claims  
8 department.

9 Q. Okay. But in his role there, is this part  
10 of the service that was provided for under the  
11 consulting contract?

12 A. Yes.

13 Q. Okay. So it was actually planned as a  
14 part of this consulting agreement that in the event  
15 of a Total claim, the claim department of U.S.  
16 Xpress, Inc. would be contacted?

17 A. Yes.

18 Q. Okay. Does that have anything to do with  
19 who operationally runs Total Transportation on a  
20 day-to-day basis?

21 A. No.

22 Q. And that still remained with Mr. Stomps?

23 A. Yes.

24 Q. Okay. All right. And you mentioned  
25 treasury. Would -- we've also heard some testimony



1 about the loan process that was conducted in 2014.

2 A. Yes.

3 Q. Is that a part of the treasury and  
4 finance, I guess, group?

5 A. Yes. It's part of the -- I would probably  
6 categorize that as part of the finance function, and  
7 that's part of the services provided to the  
8 operating entities through the consulting agreement.

9 Q. And there's no doubt -- and we're not  
10 trying to hide it -- there's no doubt that the U.S.  
11 Xpress entities, as all of them, including Total,  
12 were parties to the loan agreement.

13 A. Yes.

14 Q. Okay. Is there any doubt that all the  
15 companies had to pledge their assets to get the  
16 loan?

17 A. There's no doubt.

18 Q. Okay. And that was required by the bank?

19 A. By the lenders, yes.

20 Q. Okay. Does this have anything to do with  
21 whether Total Transportation is run separately from  
22 U.S. Xpress?

23 A. No.

24 Q. And, in fact, despite this loan process,  
25 were they run separately?

1 A. Yes.

2 Q. And, again, the loan process, was this a  
3 part of the back office function?

4 A. Yes.

5 Q. All right. Now, these --

6 MR. BARBER: Would you please highlight  
7 paragraph 2?

8 Q. (By Mr. Barber) These services that are  
9 being provided by U.S. Xpress Enterprises and its  
10 affiliates, these services are actually charged to  
11 Total Transportation; correct?

12 A. Yes.

13 Q. And you can see that the fee is \$284,000  
14 per year.

15 A. Yes.

16 Q. All right. So those back office services  
17 you mentioned, among others, would be part of this  
18 fee that's paid?

19 A. Correct.

20 Q. And the contract was entered into in  
21 2005 -- and I'm going to just do rough estimates --  
22 11-1/2 years, a little bit more -- but 11-1/2 years  
23 of \$284,000 a year is just about 3. -- it's very  
24 close to \$3.2 million; right?

25 A. Yes.

1 Q. All right. So is it true that in the last  
2 11-1/2 years, Total Transportation of Mississippi,  
3 LLC, has been charged 3.2, roughly, million dollars  
4 for these back office services?

5 A. Yes.

6 Q. Okay. Would there be any reason under the  
7 sun to charge a subsidiary \$3.2 million if they were  
8 run as the same company?

9 A. No.

10 Q. Okay. You mentioned another back office  
11 service and, again, you're calling it treasury.  
12 Let's be sure we understand what that means in terms  
13 of the day to day.

14 That includes banking?

15 A. It includes banking, cash management,  
16 things like that.

17 Q. Okay. Well, explain how the money from  
18 Total -- and, again, just very broadly, I don't want  
19 detail, just -- let's give it the 30,000-foot  
20 treatment -- just explain broadly how money from  
21 Total is accounted for separately from the money  
22 from U.S. Xpress.

23 A. Just high level how it works, Total  
24 provides services for its customers. It bills its  
25 customers for those services. The customers pay

1 those bills and they pay their checks to Total.  
2 They're paid into a lockbox.

3 That lockbox then does go into a  
4 consolidated bank account, but the money is managed  
5 in such a way that Total's expenses are paid and  
6 attributed to Total and Total's revenue is  
7 attributed to Total on their financial documents.

8 So all of their expenses and their money  
9 coming in is all attributed to Total and not mixed  
10 up with U.S. Xpress or any other entity.

11 Q. Do you consider this commingling of the  
12 funds?

13 A. I don't.

14 Q. Okay. Just explain why not.

15 Well, if you need to do more than you just  
16 did, but...

17 A. It's -- really, it's just cash management.  
18 It's commonly done at a corporate level.

19 Q. Okay. And is this a -- as you pointed  
20 out, it's commonly done. Are there other companies  
21 you're aware of that do it the same way that you-all  
22 do?

23 A. Yes.

24 Q. Okay. And when you provide this treasury  
25 function, which includes the banking, do you

1 consider this one of the back office services that  
2 are paid for by Total Transportation of Mississippi?

3 A. Yes.

4 Q. All right. Does that have anything to do  
5 with whether Total is run independently of U.S.  
6 Xpress?

7 A. No.

8 Q. All right. Now, there are certain  
9 instances where there's no doubt that U.S. Xpress,  
10 Inc. does act as a limited agent for Total  
11 Transportation of Mississippi; correct?

12 A. Yes.

13 Q. All right. And some examples would be  
14 payroll taxes, issuance of W-2s, that sort of thing.

15 A. Yes.

16 Q. All right. But this -- in these instances  
17 where they act as agent, first of all, it's with  
18 permission and with the understanding from Total  
19 that they're doing it on their behalf?

20 A. Yes.

21 Q. Okay. And it's in limited circumstances?

22 A. Yes.

23 Q. All right. And just because U.S. Xpress,  
24 Inc., acts as an agent for certain items, does that  
25 mean that that at all times they're acting as an

1 agent for Total?

2 A. No.

3 Q. And just the fact that in certain  
4 circumstances U.S. Xpress performs these services as  
5 agent, limited services, does it mean that the Total  
6 Transportation employees are really working as  
7 agents for the U.S. Xpress entities?

8 A. No.

9 MR. BARBER: Could you go to paragraph 5,  
10 which is -4347.

11 Q. (By Mr. Barber) Under the --  
12 paragraph 5 -- I'm not going to read it all, but the  
13 essential point here is that as a general  
14 proposition, just because of the services agreement,  
15 you're not intending to be joint ventures or agents?

16 MR. JONES: Your Honor, I object to --  
17 I've been letting him go pretty far afield, but  
18 he is absolutely leading the witness now.

19 THE COURT: It is leading in nature. If  
20 you could try to rephrase your questions.

21 MR. BARBER: Well, Judge, when I'm  
22 speaking about a document, I thought I could  
23 lead her to get to the document.

24 THE COURT: You're on direct. If you  
25 would try to avoid it.

1 MR. BARBER: I'll do my best, sir. Okay.

2 Q. (By Mr. Barber) All right. Well, look at  
3 paragraph 5.

4 And you're familiar with paragraph 5;  
5 correct?

6 A. Yes.

7 Q. Okay. And would you just explain whether  
8 or not this paragraph seeks to make U.S. Xpress  
9 Enterprises in all -- in all cases an agent for  
10 Total Transportation?

11 A. No. It specifically says, "This agreement  
12 shall not be construed as constituting any party as  
13 a partner, joint venture, agent, fiduciary,  
14 et cetera."

15 Q. Right. So just by the agreement itself,  
16 you're not an agent.

17 A. Correct.

18 Q. Or a joint venture.

19 A. Correct.

20 Q. But you could perform functions as an  
21 agent with agreement.

22 A. Yes.

23 Q. Okay. And that's done?

24 A. Yes.

25 Q. All right. Okay. There has been an

1 argument made in this case that the corporations are  
2 not separate.

3 Do you agree with that?

4 A. I do not agree.

5 Q. All right. And are the defendants, Total  
6 Transportation of Mississippi, LLC; New Mountain  
7 Lake Holdings, LLC; U.S. Xpress, Inc.; U.S. Xpress,  
8 Incorporated; U.S. Xpress Leasing; and Mountain Lake  
9 Risk Retention Group, are they all separate either  
10 corporate entities or limited liability companies?

11 A. Yes.

12 Q. Okay. And they all have separate  
13 corporate formation documents; correct?

14 A. Yes.

15 Q. Okay. I'm going to do each one of these  
16 very quickly --

17 A. Okay.

18 Q. -- and separately.

19 Exhibit 147, is that the corporate  
20 formation documents for U.S. Xpress, Inc.?

21 A. Yes.

22 Q. And Document 148, is this the corporate  
23 formation document of U.S. Xpress Leasing?

24 A. Yes.

25 Q. And is Document 133 the corporate



1 formation document for Mountain Lake Risk Retention  
2 Group?

3 A. Yes.

4 Q. And Exhibit 146, corporate formation  
5 documents for U.S. Xpress Enterprises, Inc.?

6 A. Yes.

7 Q. All right. So are these corporate  
8 formation documents documents that are held by the  
9 company in the normal course of business?

10 A. Yes.

11 MR. BARBER: Okay. And I would just  
12 tender these exhibits into evidence.

13 MR. JONES: No objection, Your Honor.

14 THE COURT: All right. They're admitted.

15 (Defendants' Exhibits 133, 146, 147, and  
16 148 were admitted into evidence.)

17 Q. (By Mr. Barber) And, again, the only  
18 reason that we're submitting these is to show that  
19 they are corporately separate; correct?

20 A. Yes.

21 Q. Okay. And we won't spend much time on  
22 this, but these companies, in addition to being  
23 formed as companies, they also have to hold board  
24 meetings and that sort of thing?

25 A. Yes.

1 Q. And they do regularly do that?

2 A. Yes.

3 Q. And they have minutes and so on?

4 A. Yes.

5 Q. And there are hundreds and hundreds of  
6 pages of minutes --

7 A. Yes.

8 Q. -- which we won't tender, but you say you  
9 know they exist for all these entities?

10 A. I do.

11 Q. Okay. Now, you mentioned earlier U.S.  
12 Xpress Leasing, it owned the truck involved in this  
13 accident; correct?

14 A. It does.

15 Q. And it leased the vehicle to Total  
16 Transportation of Mississippi?

17 A. Yes.

18 Q. Okay. Now, there was a separate charge  
19 for that, though; right?

20 A. Yes. There's --

21 Q. So that --

22 A. -- a separate lease agreement between the  
23 entities and charge associated therewith.

24 Q. Okay. And there was a written lease as a  
25 result of that; correct?

1 A. Yes.

2 Q. All right. And Total Transportation, is  
3 it charged any different than the U.S. Xpress, Inc.?

4 A. No.

5 Q. Okay. So Leasing buys it and then leases  
6 to the two motor carriers?

7 A. Right, and they're charged the actual cost  
8 of the vehicle.

9 Q. Okay. And why is using a single company,  
10 U.S. Xpress Leasing, advantageous to the collective  
11 group?

12 A. It's really a buying power thing. The  
13 more volume, the more of a discount you can get from  
14 your third-party vendors and truck manufacturers.

15 Q. Okay. Let's talk for a second about the  
16 concept of control.

17 Mr. Gingras yesterday testified about  
18 control. Now, is there any doubt that through the  
19 corporate tree, U.S. Xpress owns or has what we  
20 might call ownership control of Total Transportation  
21 of Mississippi?

22 A. It does.

23 Q. Okay. And if I understand it, they own  
24 90 percent of Total Transportation of Mississippi  
25 through the corporate tree?

1 A. Correct.

2 Q. And Mr. Stomps owns 10 percent?

3 A. Yes.

4 Q. Okay. And I think even Mr. Stomps said  
5 this, but if the U.S. Xpress corporate tree ever  
6 wanted to come take over the operation of U.S.  
7 Xpress, could they do it?

8 A. Yes.

9 Q. Excuse me, the operation of Total  
10 Transportation, could they do it?

11 A. Yes.

12 Q. And have they chosen to exercise that  
13 authority?

14 A. We have chosen not to exercise that  
15 authority.

16 Q. Okay. And so, again, who has operational  
17 control?

18 A. John Stomps and his team have operational  
19 control.

20 Q. Is Mr. Stomps on the corporate boards of  
21 any of the other U.S. Xpress entities that are  
22 defendants in this case?

23 A. No.

24 Q. Is he an officer of any of those  
25 companies?

1           A.    No, not outside of the Transportation  
2 Investors, Inc. and Total entities.

3           Q.    Yeah.  But the other defendants in this  
4 case, is he involved as an officer, director of any  
5 of those companies?

6           A.    He is not.

7           Q.    Okay.  Does Mr. Stomps or any of the other  
8 managers at Total Transportation of Mississippi, do  
9 they have any control over any aspect of the  
10 operations of New Mountain Lake Holdings, LLC, U.S.  
11 Xpress Enterprises, Inc., U.S. Xpress, Inc., or U.S.  
12 Xpress Leasing, Inc.?

13          A.    He does not.

14          Q.    So he doesn't and does anybody else at  
15 Total have any control in any way over the actions  
16 of those companies?

17          A.    They do not.

18          Q.    Okay.  There was some testimony about  
19 Mr. Johnson's log in this case, and the log says  
20 that the motor carrier is U.S. Xpress, Inc.

21                Have you explored the circumstances about  
22 how that happened?

23          A.    I have.

24          Q.    Could you explain that to the jury?

25          A.    Sure.  So what happened was the day of the

1 accident, as is normal, the DOT asks for eight days  
2 of Mr. Johnson's logs, from the day of the accident  
3 back eight days.

4 And I'm not sure if the truck -- if the --  
5 we do electronic logs, not paper logs, so the  
6 electronic logs are done on what's called a  
7 DriverTech unit in the truck. That's where they  
8 enter the logs and that's where we can get them for  
9 the DOT.

10 But I don't know if the truck was  
11 unavailable --

12 MR. JONES: Excuse me, Your Honor. If she  
13 doesn't know, then she can't testify about it.

14 THE WITNESS: My understanding was that --

15 MR. JONES: Your Honor, I --

16 THE COURT: Hold on.

17 MR. JONES: -- object to her testifying  
18 about something that she says she doesn't know  
19 about it.

20 THE COURT: What's your response, Counsel?

21 MR. BARBER: Well, she did investigate it  
22 for this accident, Judge, and I think she does  
23 have the ability to testify about it.

24 MR. JONES: Well, Your Honor, not if she's  
25 relying on hearsay from other people. I mean,

1 she can't back-door the information. Either  
2 she knows it and she can testify about it or  
3 she can't.

4 MR. BARBER: Well, she's the corporate  
5 representative, Judge, which means her  
6 knowledge is going to come necessarily from  
7 other people. That's what we do when we do a  
8 30(b)(6) deposition. It's the same concept.

9 MR. JONES: No, Your Honor, this witness  
10 is on that witness stand and she can testify  
11 about what she knows about.

12 THE COURT: What is the question again,  
13 please?

14 MR. BARBER: I was asking her to explain  
15 the circumstances about how the log shows U.S.  
16 Xpress, Inc. instead of Total Transportation.

17 THE COURT: All right. I'll allow the  
18 question. We went through the same thing with  
19 Mr. Stomps and other corporate representatives.  
20 I'll allow it.

21 You may proceed.

22 THE WITNESS: The DriverTech unit was  
23 unavailable on the truck to produce the logs,  
24 so the DOT was in touch with Total and the  
25 safety department at Total utilized a training

1 DriverTech unit that was in the safety  
2 department to print off Mr. Johnson's logs.

3 What we didn't know until we investigated  
4 the situation was that the DriverTech unit had  
5 been purchased from U.S. Xpress, Inc. for  
6 training purposes, but no one had reprogrammed  
7 it. Because it was purchased from U.S. Xpress,  
8 Inc., it had U.S. Xpress, Inc.'s carrier  
9 information and DOT number on it, and it had  
10 never been reprogrammed because the intent was  
11 only to use it for training purposes, not in an  
12 actual truck.

13 So when those logs were printed off on  
14 that unit, it printed off the U.S. Xpress, Inc.  
15 carrier information, including the DOT number,  
16 rather than the Total Transportation carrier  
17 information, and all of Mr. Johnson's other  
18 logs have "Total Transportation" on it, all the  
19 logs that were not printed from that actual  
20 unit. So it was a programming issue.

21 Q. (By Mr. Barber) Okay. Well, just --  
22 despite this printing issue, as a factual matter,  
23 was Mr. Johnson working for U.S. Xpress, Inc. on the  
24 day of this accident?

25 A. He was.



1 Q. Inc. or Total?

2 A. I'm sorry. He was working for Total  
3 Transportation of Mississippi. Sorry.

4 Q. Okay. All right. So he was working for  
5 Total Transportation of Mississippi, LLC, on the day  
6 of the accident?

7 A. Yes.

8 Q. Any doubt about that?

9 A. No doubt at all.

10 Q. Okay. Was he working for U.S. Xpress,  
11 Inc. on the day of the accident?

12 A. He was not.

13 Q. Okay. Any doubt about that?

14 A. No doubt.

15 Q. Okay. So the fact that the log says what  
16 it says is a feature of this printing?

17 A. Correct.

18 Q. Okay. Now, Mr. Gingras raised an argument  
19 yesterday that Mr. Stomps has an incentive to hurt  
20 his own company in order to help the parent company.

21 Do you remember him saying that?

22 A. I do.

23 Q. And I wasn't sure exactly where that came  
24 from, but do you agree with that?

25 A. I do not.

1 Q. Okay. How -- how did you come to the  
2 conclusion that that couldn't be right?

3 A. Mr. Stomps owns 10 percent of Total  
4 Transportation, so he's incentivized through his  
5 ownership and he's also incentivized through a bonus  
6 program as outlined in his employment agreement, in  
7 which he receives a bonus based on Total  
8 Transportation results.

9 Q. And you reviewed that contract?

10 A. I reviewed it and helped negotiate it, so  
11 I'm familiar.

12 Q. Okay. All right. Ms. Pate, have you been  
13 involved in acquisitions of other motor carriers  
14 prior to the -- prior to the Total Transportation  
15 acquisition?

16 A. Yes.

17 Q. And in some of those occasions, were those  
18 motor carriers just absorbed into the U.S. Xpress,  
19 Inc. company?

20 A. Yes. They were merged in as part of the  
21 purchase.

22 Q. Okay. And -- and in those cases, was  
23 there any attempt made to keep the company separate?

24 A. No.

25 Q. And some examples would be Victory Xpress?

1 A. Yes.

2 Q. Okay. How about PST Trucking?

3 A. Yes.

4 Q. All right. And then there was another  
5 motor carrier, if I'm understanding, Southwest Motor  
6 Freight?

7 A. That was before my time, but that was --  
8 actually, all of those were before my time, but that  
9 was what happened in those circumstances.

10 Q. And in those cases, those motor carriers  
11 ceased to exist as separate entities?

12 A. Yes.

13 Q. All right. And did you choose to do that  
14 here with Total Transportation of Mississippi?

15 A. We did not.

16 Q. All right. And on the date of this  
17 accident, was any other USX defendant controlling  
18 the actions of John Wayne Johnson other than Total  
19 Transportation of Mississippi?

20 A. No.

21 MR. BARBER: Excuse me one second.

22 Q. (By Mr. Barber) All right. Last one  
23 document-wise. We finally found the one I was  
24 missing. Sorry about that.

25 There is a Document 107 that I'm going to

1 show you, and that is the corporate formation  
2 documents for Mississippi -- for Total  
3 Transportation of Mississippi, LLC; is that correct?

4 A. Yes, it is.

5 MR. BARBER: Okay. I would move  
6 Exhibit 107 into evidence, Judge.

7 THE COURT: Any objection?

8 MR. JONES: No objection.

9 THE COURT: They're admitted.

10 (Defendants' Exhibit 107 was admitted into  
11 evidence.)

12 MR. BARBER: Okay. That's all I have,  
13 Judge.

14 THE COURT: All right. Cross-examination.

15 CROSS-EXAMINATION

16 BY MR. JONES:

17 Q. Good morning, Ms. Pate.

18 A. Good morning.

19 Q. How are you?

20 A. I'm all right.

21 Q. Now, when this wreck happened, as soon as  
22 you learned about it, were you a part of the effort  
23 by U.S. Xpress to hire a public relations firm to  
24 handle this matter?

25 A. No. My understanding was the insurance

1 company did that.

2 Q. All right. You weren't involved in that  
3 at all?

4 A. I was aware of it, was -- but was not  
5 involved in the decision to do so.

6 Q. Were you a part of the board meeting of  
7 U.S. Xpress where y'all met to examine the cause of  
8 this wreck?

9 A. There were several meetings in which we  
10 discussed this accident and the -- what may have  
11 caused it --

12 Q. Uh-huh (affirmative).

13 A. -- and I believe that the actual board  
14 meeting was done at the New Mountain Lake level.

15 Q. And so at the New Mountain Lake level,  
16 which is the holding company up at the top of that  
17 food chain, if you will, that's where the board  
18 meeting was held to discuss and examine what  
19 happened in this wreck?

20 A. The purpose of that meeting was to inform  
21 the board of the wreck -- we do have outside board  
22 members -- and to update them on what we knew at  
23 that time.

24 Q. Okay. Now, you indicated in a response to  
25 your attorney's question that y'all had bought other

1 companies -- U.S. Xpress and New Mountain Lake  
2 Holdings, LLC, have bought other companies prior to  
3 buying 90 percent of the stock in Total  
4 Transportation.

5 A. New Mount- -- since 2007, I'm not aware of  
6 any acquisitions, and that was the time when New  
7 Mountain Lake was created. But prior to that, yes,  
8 that is correct.

9 Q. And in response to his question, he asked  
10 you if, when y'all purchased the 90 percent interest  
11 in Total Transportation, if y'all could have  
12 terminated or absorbed Total Transportation and your  
13 answer to that was "yes," was it not?

14 A. We could have, correct.

15 Q. You could have.

16 So you could have terminated the existence  
17 of Total Transportation if y'all had made that  
18 decision?

19 A. If that was a business decision we wanted  
20 to make, yes, correct.

21 Q. So you had the ability to extinguish the  
22 very existence of Total Transportation if you wanted  
23 to make that decision.

24 A. Yes.

25 Q. Isn't that the very definition of control?

1           A.    It is control associated with ownership,  
2   but not control associated with day-to-day  
3   operations of an entity.

4           Q.    But it is the ability to control it.

5           A.    Through ownership, correct.

6           Q.    Right.

7                    Now, who are the major individual owners?  
8   You're one of the major owners of New Mountain Lake  
9   Holdings, LLC, are you not?

10          A.    The -- the ownership is -- with the  
11   exception of certain management ownership that makes  
12   up a small percentage of ownership of New Mountain  
13   Lake, it's divided between the Quinn family and the  
14   Fuller families, who are the -- the founding  
15   families of U.S. Xpress, Inc.

16          Q.    Okay.

17          A.    And my father's deceased, so I am one of  
18   those owners now.

19          Q.    Mr. Quinn was your father?

20          A.    Yes, sir.

21          Q.    Okay.  And Mr. Quinn and Mr. Fuller for  
22   years and years and years had been in the business  
23   and had grown U.S. Xpress over the years?

24          A.    Correct.

25          Q.    And how big is U.S. Xpress, how many

1 trucks?

2 A. There's -- with all of the entities  
3 combined, it's about 8,000 trucks, give or take.

4 Q. Okay. And how many trucks are in Total  
5 Transportation?

6 A. It's -- my understanding, there's around  
7 750-ish. It kind of ebbs and flows a bit, but  
8 around that number.

9 Q. And one of the companies owned by New  
10 Mountain Lake Holdings is U.S. Xpress Leasing, is it  
11 not?

12 A. Yes, sir.

13 Q. And U.S. Xpress Leasing owns all of the  
14 trucks operated by Total Transportation.

15 A. Yes, sir.

16 Q. Now, this -- you indicated -- you used the  
17 word earlier that when establishing this line of  
18 credit -- who is that line of credit established  
19 with?

20 A. It's two lending companies, Provident and  
21 GSO.

22 Q. And those are lenders in New York, I  
23 assume?

24 A. Yes, sir.

25 Q. And as a part -- as a part of the process



1 in making that loan, did y'all prepare a management  
2 presentation?

3 A. Yes, sir.

4 Q. And you presented that to those huge banks  
5 or lenders?

6 A. Yes, sir.

7 Q. Were you involved in the preparation of  
8 that document, that management presentation?

9 A. At a very kind of peripheral level, but  
10 yes, I had involvement in it.

11 Q. Do you -- are you familiar that it lists  
12 in there that you have a one-way demand critical  
13 transports in the eastern U.S.? What does that  
14 mean?

15 A. Demand critical is a service for companies  
16 such as FedEx or Amazon, where they have an  
17 expectation for team services, so that their load is  
18 legally delivered in an expeditious manner.

19 Q. Delivered on time?

20 A. Delivered on time, yes, sir.

21 Q. And when you made this presentation to the  
22 bank, that was sort of your way of saying, "We have  
23 one-stop shopping"?

24 A. Yes, sir.

25 Q. And did you include on this presentation

1 to those lenders that that includes Total  
2 Transportation?

3 A. I don't recall. I don't recall.

4 MR. JONES: May I approach the witness,  
5 Your Honor?

6 THE COURT: You may.

7 Q. (By Mr. Jones) Do you recognize this  
8 management presentation? And I've marked it there  
9 for you.

10 A. Okay. Okay. Yes, it does say -- I  
11 believe it says -- under the "Solo Regional" bucket,  
12 one bullet point refers to demand critical and one  
13 bullet point states that the solo regional includes  
14 Total Transportation, meaning they provide those  
15 services.

16 MR. JONES: I need to mark this exhibit,  
17 Your Honor. Is this the -- that is Plaintiff's  
18 Exhibit No. 81, Your Honor. We would tender  
19 into evidence this management presentation made  
20 by U.S. Xpress, Inc. to these lenders.

21 MR. BARBER: Judge, I object to that and  
22 can I approach?

23 THE COURT: You can.

24 (The following proceedings were held at  
25 the bench, outside the hearing of the jury.)

1 MR. BARBER: First of all, this is full of  
2 financial information, which is not relevant to  
3 anything in the case if the parent company's  
4 not Total. It doesn't have separate  
5 information about Total, it's got parent  
6 company financial information, which I think is  
7 prejudicial and inadmissible.

8 In addition, it is -- at the least  
9 pursuant to your confidentiality order, if he's  
10 going to ask any questions about the amounts, I  
11 want to ask that the cameras be turned off and  
12 that it be filed under seal.

13 MR. JONES: I can make this real easy,  
14 Judge. I'll redact this document to show just  
15 the first page and the seventh page, which  
16 shows the Total Transportation --

17 THE COURT: Okay.

18 MR. JONES: -- and I'll -- I'll agree to  
19 take the figures out.

20 MR. BARBER: Without the figures, we have  
21 no objection whatsoever.

22 THE COURT: Okay. Thank you.

23 (The following proceedings were held in  
24 open court, in the hearing of the jury.)

25 Q. (By Mr. Jones) Just to be clear,

1 Mrs. Pate, for the record, with counsel we've  
2 approached the bench. We have agreed to use just  
3 the first page of this document, Plaintiff's Exhibit  
4 1, which is the management presentation that U.S.  
5 Xpress made to those lenders where y'all were asking  
6 for this loan, and we've agreed to take out any  
7 reference to any financial information.

8 But page 7 thereof also shows that as a  
9 part of this one-stop shopping concept, that it  
10 includes Total Transportation; is that fair?

11 A. Yes.

12 Q. Okay. Now, would you agree that  
13 Mr. Johnson's form W-2 shows that U.S. Xpress is the  
14 employer of record and shows U.S. Xpress' employee  
15 identification number?

16 A. It does. It -- yes, it does.

17 Q. Okay. So you agree that at least with  
18 respect to what you-all report to the Internal  
19 Revenue Service and to the federal government, that  
20 you show that U.S. Xpress was -- was his employer?

21 A. As allowed by the tax code, we're allowed  
22 to do so, and as an agent for Total and as part of  
23 the consulting agreement services, correct.

24 Q. Have you looked at the shipping documents  
25 in this case?

1 A. I have not.

2 Q. Are you aware that the shipping documents  
3 in this case list U.S. Xpress as the carrier?

4 A. I was not aware of that.

5 Q. Are you aware that Mr. Johnson was  
6 instructed if he was involved in a wreck or a  
7 collision, that he was to call U.S. Xpress?

8 A. I am aware of that. The -- the risk  
9 management department or claims department provides  
10 those services to Total.

11 Q. On Plaintiff's Exhibit 32, item F, are you  
12 aware that an employer -- an employee is to call a  
13 U.S. Xpress toll-free number, 1-800-601-5500?

14 A. Yes, I'm aware of that.

15 Q. And if we dial that number right now,  
16 would somebody answer for U.S. Xpress?

17 A. I don't know if that number's changed, but  
18 if it hasn't changed, yes.

19 Q. Okay. Now, this finance function that you  
20 mentioned earlier in establishing this line of  
21 credit, that line of credit allowed the U.S. Xpress  
22 companies to be able to access cash credit, when it  
23 needed, to operate; is that fair to say?

24 A. Correct.

25 Q. Now, are you aware of whether or not any

1 of that credit that was established was ever used by  
2 Total Transportation or was it not, in fact, all  
3 used by U.S. Xpress?

4 A. I don't know.

5 Q. You don't know the answer to that?

6 A. I don't.

7 Q. Are you aware that Mr. Stomps testified  
8 that he was -- Mr. Stomps, who is seated right over  
9 here, testified that he was unaware that this loan  
10 that y'all went to New York to obtain, he was  
11 unaware that the assets of Total Transportation were  
12 pledged as -- as collateral for that loan?

13 A. I'm aware he testified to that, although  
14 he did sign the consents and the board consents that  
15 were required for the loan to be finalized.

16 Q. Okay. Well, nobody ever explained it to  
17 him what he signed, I assume, if he says he was  
18 unaware of it; would you agree with that?

19 A. I'm unaware of --

20 MR. BARBER: Objection, Judge.

21 THE WITNESS: -- what happened at that  
22 time.

23 MR. BARBER: That's speculating.

24 Q. (By Mr. Jones) You are the chief  
25 financial officer or what is your title?

1           A.    I am not the chief financial officer.

2           Q.    Were you one of the parties that signed  
3 those documents to secure this loan?

4           A.    I was one of the officers that signed  
5 documents related to this loan.

6           Q.    Okay. Did you ever explain yourself to  
7 Mr. Stomps what he was signing when you say he  
8 signed some authorization for you and the other  
9 officers to obtain this loan?

10          A.    I personally did not handle the  
11 administration of obtaining all of the signatures  
12 required, so I did not.

13          Q.    You didn't discuss it with him.

14                And you have no doubt that he was unaware  
15 of it if he says he was unaware of it?

16          A.    I have no doubt that he doesn't remember  
17 it.

18          Q.    Do you know how the moneys were disbursed?  
19 Do you know to which companies the moneys were  
20 disbursed on the line of credit?

21          A.    I do not.

22          Q.    Are you aware that Mr. Stomps testified  
23 that he had never seen this agreement, the loan  
24 agreement?

25          A.    The loan agreement? I am aware of that,

1 yes.

2 Q. You're aware that Mr. Stomps, the owner of  
3 Total Transportation, never saw the loan agreement?

4 A. I am aware of that.

5 Q. Are you aware that none of the proceeds of  
6 that loan for which the collateral of -- Total  
7 Transportation's assets were pledged, are you aware  
8 that none of those loan proceeds were contributed to  
9 fund any of the operations of Total Transportation?

10 MR. BARBER: Judge, I'm going to object as  
11 assuming a fact not in evidence.

12 MR. JONES: Your Honor, Mr. Gingras  
13 testified to that during his testimony  
14 yesterday.

15 THE COURT: I'll overrule the objection.

16 Q. (By Mr. Jones) Are you aware of that?

17 A. I did not know that, no.

18 Q. You do not know whether or not any of the  
19 funds from that loan went to Total Transportation?

20 A. No.

21 Q. Or were ever used by Total Transportation?

22 A. No.

23 Q. Now, who is Mr. Costello? Is he the  
24 accountant of one of your companies, one of the U.S.  
25 Xpress companies?



1           A.    My understanding is he's an expert in this  
2 case, but he personally is not one of our  
3 accountants.

4           Q.    Okay.  Now, this -- this cash box idea or  
5 zero -- where all the moneys every day taken in by  
6 all the companies, they all go into one account?

7           A.    That's my understanding.

8           Q.    And you've testified to that?

9           A.    Yes, sir.

10          Q.    Okay.  So money made by each and every one  
11 of these companies which are defendants in this  
12 case, every day, at the end of every day, at the end  
13 of yesterday, as of last night when we all left  
14 here, they were all put in the same account?

15          A.    I think technically the moneys come in for  
16 services for U.S. Xpress, Inc. and for U.S.  
17 Xpress -- or, I'm sorry, and for Total  
18 Transportation.  The other entities that aren't  
19 actual operating entities, there wouldn't be money  
20 coming in on a regular basis.

21                   And they come into individual lockboxes  
22 and then are consolidated into a common bank  
23 account.

24          Q.    And then put into a common bank account?

25          A.    Yes, sir.

1 Q. And the companies that would deposit funds  
2 into that account every day are U.S. Xpress, Inc.?

3 A. The -- the lockboxes that would be  
4 consolidated on a regular basis would be U.S.  
5 Xpress, Inc. and Total Transportation.

6 Q. Okay. Now, who are the -- who are the  
7 directors of New Mountain Lake Holdings, LLC?

8 A. The directors of New Mountain Lake  
9 Holdings are Max Fuller, Eric Fuller, Brian Quinn,  
10 myself, a gentleman named Phil Connors, and we're  
11 currently in transition, but the current person is  
12 Jim Roche and we're transitioning to Mike Fabiano  
13 for his seat.

14 Q. Okay. So Mr. Fuller and Eric Fuller are  
15 obviously from the Fuller family?

16 A. Yes, sir.

17 Q. And Brian Quinn, is that your brother?

18 A. Yes, sir.

19 Q. And you obviously were a Quinn before you  
20 got married.

21 So the Fullers and the Quinns have the  
22 controlling interest in New Mountain Lake Holdings,  
23 LLC?

24 A. Yes, sir.

25 Q. And New Mountain Lake Holdings, LLC, owns

1 U.S. Xpress, Inc.?

2 A. Owns U.S. Xpress Enterprises, which owns  
3 U.S. Xpress, Inc.

4 Q. And who are the directors of U.S. Xpress  
5 Enterprises?

6 A. I think the current directors of U.S.  
7 Xpress Enterprises are Max Fuller, Eric Fuller, I am  
8 a director, and my brother's a director.

9 Q. Okay. So the same family members control  
10 that corporation?

11 A. Yes, sir.

12 Q. And how about U.S. Xpress Enterprises,  
13 Inc.?

14 A. Oh, I'm sorry. I was referring to U.S.  
15 Xpress Enterprises, Inc. there.

16 Q. Okay. How about U.S. Xpress, Inc.?

17 A. U.S. Xpress, Inc. --

18 Q. Who's on that board of directors?

19 A. I am not on that board of directors. So I  
20 know Max and Eric are, Eric Fuller, but I'm not sure  
21 of the other board directors on there. I think  
22 Brian is.

23 Q. Okay. So your brother's on that one.

24 What about U.S. Xpress Leasing? Are --

25 does that board of directors consist of Fullers and

1 Quinns and yourself?

2 A. I'm not on that board, so I -- I don't  
3 remember who's on that board.

4 Q. Who's on the board of Total Transportation  
5 of Mississippi?

6 A. I believe the members are John Stomps,  
7 Eric Peterson, Eric Fuller, and Max Fuller.

8 Q. So the Fullers are on that board, as well?

9 A. Yes, sir.

10 Q. And what about New Mountain Lake Risk  
11 Retention Group, which is the insurance company for  
12 Total Transportation?

13 A. Mountain Lake Risk Retention Group,  
14 there's Leigh Anne Battersby, I am a board member,  
15 Eric Peterson is a board member, and I think that  
16 Peter Joy may be a board member, as well, at that.

17 Q. Okay.

18 A. And that one I can't remember entirely.

19 Q. Now, were you in the courtroom yesterday  
20 when Megan Richards testified?

21 A. Yes, sir.

22 Q. Do you agree with me that Megan Richards  
23 knew absolutely nothing about all these internal  
24 documents that your lawyer has gone over with you  
25 today?

1 A. Oh, yeah, I agree with that.

2 Q. And these are internal operating and  
3 consulting agreements and they -- would you agree  
4 that they're not available to the public?

5 A. I would agree with that.

6 Q. Would you agree that as far as the outside  
7 world is concerned, outside of your corporate  
8 family, nobody knows about all these internal  
9 agreements?

10 A. We're a private company, so, yes, I would  
11 agree with that.

12 Q. And would you agree that as to the outside  
13 world, Total Transportation acts on behalf of U.S.  
14 Xpress as its agent?

15 A. No, I would not agree with that.

16 Q. Okay. Now, you indicated that in the  
17 safety department at Total Transportation, there was  
18 a computer that printed off the logs to send to the  
19 U.S. Department of Transportation?

20 A. It was a DriverTech unit.

21 Q. And y'all sent that to the federal  
22 government and reported that U.S. Xpress was the  
23 carrier in this wreck.

24 A. We sent that to the Department of  
25 Transportation, who subsequently did a full audit

1 related to this accident, a very extensive audit,  
2 and they understood what happened with those  
3 particular logs.

4 And as a result of that audit, Total  
5 Transportation was found to be a hundred percent  
6 compliant with all rules and regulations.

7 Q. So did -- did you file an amendment  
8 showing that there was a different carrier for this  
9 wreck?

10 A. No, we did not.

11 Q. So that wreck would be listed or charged  
12 against U.S. Xpress?

13 A. No. The DOT charged it against Total  
14 Transportation.

15 MR. JONES: I believe that's all I have,  
16 Your Honor. Just one second.

17 May we approach the bench, Your Honor?

18 (The following proceedings were held at  
19 the bench, outside the hearing of the jury.)

20 MR. JONES: I just wanted to make sure I  
21 didn't run afoul of any ruling. You know,  
22 we've got out the issue of negligent hiring,  
23 but I just want to show that U.S. Xpress' legal  
24 department approves the driver application form  
25 for Total Transportation.

1 THE COURT: Any objection?

2 MR. BARBER: I'm not sure what we're  
3 asking here, Judge.

4 MR. JONES: I'm going to ask her if U.S.  
5 Xpress' legal department approves this form.

6 MR. BARBER: You're asking can you do some  
7 more testimony?

8 MR. JONES: Yeah.

9 MR. BARBER: Okay. I thought you were  
10 done.

11 THE COURT: He's showing you in advance  
12 what he's going to get into.

13 MR. JONES: I'm showing you in advance  
14 this document. I didn't want to run afoul of  
15 any order of the Court on negligent hiring.  
16 I'm not going to go into negligent hiring, I  
17 just want to ask her if that's --

18 MR. BARBER: That's fine, Judge.

19 THE COURT: Okay.

20 MR. BARBER: Okay. No objection.

21 (The following proceedings were held in  
22 open court, in the hearing of the jury.)

23 Q. (By Mr. Jones) I show you what has been  
24 labeled Plaintiff's Exhibit 5, which I've exhibited  
25 to your lawyers.

1           Are you familiar with that form?

2           A.    Yes.

3           Q.    And that's a form that a driver uses when  
4 he fills out an application?

5           A.    Yes, sir.

6           Q.    And down at the very bottom of that on the  
7 left-hand side, does that show that that form has  
8 been approved by the U.S. Xpress legal department?

9           A.    Yes, sir, as part of the consulting  
10 agreement services.

11           MR. JONES:  I don't believe I have  
12 anything else, Your Honor.  No further  
13 questions.

14           THE COURT:  Thank you.

15           Anything else, defense counsel?

16           MR. BARBER:  Judge, can I ask Mr. Jones to  
17 approach?

18           THE COURT:  Sure.

19           (The following proceedings were held at  
20 the bench, outside the hearing of the jury.)

21           MR. BARBER:  Judge, we don't have any  
22 objection to page 1 of this document coming in,  
23 which is the only thing I looked at, but  
24 there's a bunch of other stuff on here related  
25 to previous employment that we would object to.



1 So if it's only the first page, we don't object  
2 to Plaintiff's 5.

3 THE COURT: Is that agreeable?

4 MR. JONES: That's agreeable.

5 THE COURT: So the first page is admitted.

6 MR. BARBER: Has it been moved and  
7 admitted? I just want to make sure.

8 THE COURT: I think so.

9 MR. JONES: I did move, Your Honor.

10 THE COURT: All right. It's admitted.

11 (Plaintiff's Exhibit 5 was admitted into  
12 evidence.)

13 MR. BARBER: I don't have any further  
14 questions of Ms. Pate.

15 THE COURT: All right. Ladies and  
16 gentlemen, we'll go ahead and take a morning  
17 break. You can go out with the bailiffs.  
18 We'll take ten minutes.

19 (Whereupon, a recess was taken from 10:28  
20 a.m. to 10:44 a.m. and the following  
21 proceedings were held outside the presence of  
22 the jury.)

23 THE COURT: Yes, sir, we're on the record.

24 MR. D. DIAL: Your Honor, this may or may  
25 not be an issue, but I have noticed some of the

1 family members, the parents of the other  
2 nursing students are here, and I just don't  
3 want there to be any kind of introduction of  
4 them to this jury. It can only be elicited  
5 separately.

6 THE COURT: Do you intend to do that?

7 MR. CHEELEY: I can tell the jury that  
8 family members of the other girls are here.  
9 I'm not going to have them stand up and  
10 introduce each one.

11 MR. D. DIAL: Your Honor, that's not  
12 anything that's in evidence. We're supposed to  
13 be arguing the evidence.

14 THE COURT: I don't think we need to go  
15 there, I mean, to say that families of the  
16 other parties are here.

17 MR. CHEELEY: Okay.

18 THE COURT: I agree with defense counsel.

19 MR. CHEELEY: That's fine.

20 THE COURT: You've got plenty to argue  
21 without that.

22 MR. CHEELEY: All right.

23 THE COURT: All right. Let's bring the  
24 jury back in, please.

25 (The following proceedings were held in

1 the presence of the jury.)

2 THE COURT: All right. Everyone please be  
3 seated.

4 Mr. Barber, you may continue.

5 MR. BARBER: Thank you. Judge, we're  
6 going to call Ms. Pate back for one more  
7 question.

8 REDIRECT EXAMINATION

9 BY MR. BARBER:

10 Q. Okay. Ms. Pate, you're still under oath.  
11 Do you understand?

12 A. Yes.

13 Q. Okay. During your cross-examination, you  
14 were asked a question about shipping documents, and  
15 the question was: Did you know that the shipping  
16 documents said that the carrier in this case was  
17 U.S. Xpress?

18 Do you remember that question?

19 A. Yes, sir.

20 Q. Okay. I want to show you -- what is the  
21 exhibit number showing you?

22 A. This is Defendants' Exhibit 298.

23 Q. Okay. And is that the bill of lading in  
24 this case?

25 A. Yes.

1 Q. And over on the right top, who is the  
2 carrier shown?

3 A. It says "TTMS," Total Transportation of  
4 Mississippi.

5 MR. BARBER: Okay. No further questions  
6 and -- well, I would tender that into evidence.

7 THE COURT: Any objections to the exhibit?

8 MR. JONES: No objection.

9 THE COURT: It's admitted.

10 (Defendants' Exhibit 298 was admitted into  
11 evidence.)

12 THE COURT: Any further questions on  
13 cross?

14 MR. JONES: No, Your Honor.

15 THE COURT: All right. Thank you, ma'am.  
16 You can step down.

17 Call your next witness.

18 MR. BARBER: Judge, we call to the stand  
19 Mike Costello. He's right out the door there.

20 DAVID MICHAEL COSTELLO,  
21 a witness herein, being first duly sworn in the  
22 above cause, was examined and testified as follows:

23 DIRECT EXAMINATION

24 BY MR. BARBER:

25 Q. Good morning, Mr. Costello.

1 A. Good morning.

2 Q. Would you please give your full name to  
3 the jury, please.

4 A. Yes. It's David Michael Costello.

5 Q. And you go by Mike?

6 A. I go by Mike, yes, sir.

7 Q. Okay. Where do you live, Mr. Costello?

8 A. I live at 1214A Fort Stephenson Oval,  
9 Lookout Mountain, Tennessee 37350.

10 Q. And who do you currently work for?

11 A. I work for Elliott Davis Decosimo, which  
12 is a CPA firm that's regional throughout the  
13 Southeast.

14 Q. Okay. And what do you do there for that  
15 firm?

16 A. I'm in charge of fraud forensic services  
17 and litigation support services.

18 Q. And do you -- as part of your job, are you  
19 considered a forensic accountant?

20 A. Yes, I'm known as a forensic accountant,  
21 yes, sir.

22 Q. Just give the jury a quick explanation  
23 what a forensic accountant does.

24 A. Basically, we analyze financial  
25 information and then prepare ourselves to make

1 presentations to organizations or sometimes legal  
2 bodies such as this.

3 Q. And give us a brief synopsis of your  
4 educational background.

5 A. Okay. I attended University of Tennessee  
6 at Chattanooga, known as UTC, from 1970 to 19--  
7 well, actually from 1973 to '75. I attended  
8 University of Tennessee in Knoxville for a couple  
9 years.

10 And then after I graduated, I went back to  
11 school and -- well, the first time there I got a  
12 bachelor of science degree in business  
13 administration, and then later I went back and  
14 around 1995, I got a master's degree in accountancy  
15 from UTC.

16 Q. And give us a brief overview of your  
17 professional background as an accountant.

18 A. Okay. I first started when I graduated  
19 from UTC in 1975 as the staff accountant for  
20 Combustion Federal Credit Union. It was a fairly  
21 large credit union in Chattanooga connected to  
22 Combustion Engineering, which was a major employer  
23 at that time.

24 In 1980 -- I had passed the CPA exam in  
25 1979, so in 1980 I went to work for a company known

1 as Joseph Decosimo & Company. At that time, it was  
2 the largest CPA firm in Chattanooga.

3 I worked with that firm from 1980 to 1984,  
4 and I started as a staff accountant and then I was  
5 promoted to manager accountant and did a lot of  
6 auditing and tax return preparation during that  
7 time.

8 Then I left in 1984 and formed my own CPA  
9 firm known as Costello, Strain & Company -- Strain,  
10 S-T-R-A-I-N, & Company -- and I was the managing  
11 director of that firm for 19 years and we did  
12 primarily the same things that I did at the Decosimo  
13 firm, which is auditing, accounting, and tax work,  
14 but then I added to that the forensic accounting  
15 part. I started doing work in the courts and in  
16 other venues as a forensic accountant.

17 And as a result of that, the firm that I  
18 left back in 1984, the Decosimo firm, approached me  
19 and asked me to come back and merge my firm. I had  
20 15 employees at that time. So I merged my firm with  
21 the Decosimo firm in 2003. And so I've been back at  
22 the Decosimo firm for about -- I would say 12 to 14  
23 years.

24 And then about two years ago, roughly, the  
25 Decosimo firm merged with this Elliott Davis firm

1 out of Greenville, South Carolina, and so now I'm a  
2 shareholder with Elliott Davis Decosimo for the last  
3 couple of years.

4 Q. All tolled, how many years have you acted  
5 as a forensic accountant?

6 A. Probably 35-plus years.

7 Q. Do you do any teaching in the area of  
8 accountancy?

9 A. Yes. I have taught cost accounting at  
10 UTC, where I went to school, and I also taught, two  
11 or three years ago, advanced accounting to graduate  
12 students there at the University -- advanced  
13 auditing, excuse me.

14 And then I've taught at a local college  
15 called Tennessee Temple, which is a Baptist school,  
16 and I taught auditing at Tennessee Temple.

17 Q. Have you written any articles in the field  
18 of accounting?

19 A. Yes. I've written a number of articles in  
20 accounting.

21 Q. And do you have experience -- I think you  
22 mentioned it, but how much experience would you say  
23 you have preparing and analyzing tax returns?

24 A. Well, you know, when I had -- especially  
25 when I had my own company, I did a lot of tax work.



1 That was one of the reasons that the Decosimo offer  
2 to me to come back and merge with their company was  
3 interesting to me, was because I had done a lot of  
4 auditing and tax work and accounting work in my own  
5 CPA firm for 19 years and we -- you know, I probably  
6 was preparing 500 returns in a year at my own firm.

7 And when they asked me to come back, they  
8 said, "You know, what you would do at our firm is  
9 you would just do your forensic accounting and you  
10 wouldn't have to do the tax work and auditing,"  
11 which I was real happy about.

12 So that's -- all I do now is the forensic  
13 accounting work and I no longer do tax or auditing  
14 work.

15 Q. Okay. Are you a member of any  
16 professional associations?

17 A. Yes. I'm a member of the American  
18 Institute of Certified Public Accountants, which I  
19 joined right away in 1979 when I passed the CPA  
20 exam. Also, I joined the Tennessee Society of  
21 Certified Public Accountants at that time.

22 And then later, as I got more credentials,  
23 I joined the Association of Certified Fraud  
24 Examiners, the American Society of Appraisers, and  
25 those are the main ones that I'm involved with right

1 now.

2 MR. BARBER: Judge, I would tender this  
3 witness as an expert in the field of forensic  
4 accounting.

5 THE COURT: Any objection?

6 MR. CHEELEY: No objection.

7 THE COURT: All right. You may proceed.

8 Q. (By Mr. Barber) Okay. Mr. Costello,  
9 first of all, would you promise me one thing? Would  
10 you promise to be sure you answer my question if I  
11 ask it to you?

12 A. Of course.

13 Q. And would you make the same accommodation  
14 to counsel --

15 A. Yes, sir --

16 Q. -- for the other side?

17 A. -- absolutely. Yes, I will.

18 Q. Okay. Good.

19 In your capacity as a forensic accountant,  
20 do you believe that Total Transportation of  
21 Mississippi is being run as a separate company from  
22 the USX parents?

23 A. I do, yes, sir.

24 Q. And what evidence convinces you of that  
25 from an accounting standpoint?

1           A.    Well, from an accounting standpoint, you  
2 know, I've just looked at things like their  
3 corporate charter. They've got a separate charter.  
4 They file a separate corporate tax return in  
5 Mississippi. Their accounting records are separate.  
6 They have a separate general ledger that reflects  
7 all of their assets, liabilities, equity, revenues,  
8 and expenses.

9                   And they have, there at Total  
10 Transportation of Mississippi, the capacity to do  
11 payroll. They have employees that do payroll, they  
12 have employees that prepare accounts payable, and  
13 they also, when they make sales, they have a sales  
14 department there at Total Transportation of  
15 Mississippi. They make sales and then they bill for  
16 their sales. They prepare their own bills and send  
17 those out, and then they collect those bills.

18                   And those receivables that are created  
19 from the invoices get booked on Total Transportation  
20 of Mississippi's financial statements.

21           Q.    And from an operational standpoint, as  
22 opposed to accounting standpoint, from an  
23 operational standpoint, what evidence do you see  
24 that Total Transportation is being run separately  
25 from U.S. Xpress?

1           A.     Just testimony by Mr. Stomps and then also  
2     by the CEO of U.S. Xpress, Mr. Max Fuller.

3           Q.     But what -- what examples is what I was  
4     getting to.  What are the items that you think  
5     make -- appear to you to make it separate?

6           A.     Oh, well, the fact that they -- as I said,  
7     they have their own billing department.  They do  
8     billing, collections.  They have their own sales  
9     department.  Of course, you know, they sell their  
10    transportation services.

11           They have, you know, their -- they have  
12    their own operation.  In other words, they have  
13    their own office with their name on the door, you  
14    know; when you go there, you know you're at Total  
15    Transportation of Mississippi.

16           They have their own website, so their  
17    website shows that they are separate.  You can, you  
18    know, Google "Total Transportation of Mississippi"  
19    and that's what comes up.  They have -- the safety  
20    and recruiting departments are there at Total  
21    Transportation of Mississippi.

22           And I'm sure there are lots more, but  
23    those are the ones that come to mind right now.

24           Q.     Do they have the same CEO as the U.S.  
25    Xpress entities?

1           A.    No.  U.S. Xpress, as I mentioned earlier,  
2           has Mr. Fuller and then Total Transportation of  
3           Mississippi has Mr. Stomps.  So there's separate  
4           CEOs running separate companies.

5           Q.    How about the drivers?

6           A.    The drivers are hired by Total  
7           Transportation of Mississippi and are employed by  
8           Total Transportation of Mississippi.

9           Q.    What about DOT numbers?

10          A.    Oh, the DOT numbers on the trucks are  
11          Total Transportation of Mississippi DOT numbers and  
12          the trucks, in fact, say "Total Transportation of  
13          Mississippi."  In other words, their logo is on the  
14          truck.  That would be another feature.

15          Q.    What about the customer base?

16          A.    They have a separate customer base.  They  
17          have -- I did, as I prepared to testify here today,  
18          look at a lot of contracts and they have their own  
19          contracts with customers.

20                    And in some cases, I learned that they  
21          have contracts with customers and the same customers  
22          are customers of U.S. Xpress.  So they -- U.S.  
23          Xpress has different contracts, so there's separate  
24          contracts for the separate companies.

25          Q.    Okay.  Well, I want you to assume that in

1 evidence already are contracts with Walmart and  
2 FedEx from U.S. Xpress, Inc., and also contracts  
3 from Walmart and FedEx from Total Transportation.

4 A. Okay.

5 Q. Same customer, but different companies and  
6 different contracts.

7 A. Yes, sir.

8 Q. And those are part of what you reviewed  
9 for preparation; correct?

10 A. Yes, sir.

11 Q. Okay. Would it make any sense to you to  
12 create separate customer contracts if you're really  
13 running a single company?

14 A. No, sir, it wouldn't, no.

15 You know, what could have happened in this  
16 case -- you know, this is a company -- Total  
17 Transportation was purchased by U.S. Xpress in 2005,  
18 and they could have at that time folded all the  
19 operations into U.S. Xpress, but instead of doing  
20 that, they decided to keep these companies separate.

21 Q. All right. Just -- I think we've -- we've  
22 established through Ms. Pate through the corporate  
23 tree, would you agree that Transportation  
24 Investments, which is a subsidiary of U.S. Xpress,  
25 owns an ownership controlling interest in Total

1 Transportation?

2 A. Yes, it does.

3 Q. There's no doubt about that?

4 A. No doubt about it.

5 Q. Okay.

6 A. When they made that acquisition, like I  
7 said, when the company was purchased years ago, it  
8 was purchased at 90 percent. So Mr. Stomps, in  
9 fact, owns 10 percent.

10 Q. Okay. But despite owning 90 percent, do  
11 the U.S. Xpress companies choose to control the  
12 day-to-day operations of Total Transportation?

13 A. No, sir. They have Mr. Stomps, who  
14 controls the operations on a day-to-day basis.

15 Q. Okay. Well, yesterday Mr. Gingras  
16 testified that he thought the U.S. Xpress family or  
17 group of companies was being run as one company.

18 Do you agree with that?

19 A. No, sir. They're being run as separate  
20 companies.

21 Q. Okay. Well, one reason Mr. Gingras gave  
22 was that they filed -- or prepare, I should say,  
23 what are called consolidated financial statements.

24 In your professional opinion, does the  
25 filing of a consolidated financial statement which

1 includes both the parent and subsidiary mean that  
2 Total Transportation was not being run separately?

3 A. No, sir. No. What that means, when a  
4 corporation -- you asked about consolidated  
5 financial statements?

6 Q. Correct.

7 A. Yes. Consolidated financial statements  
8 have to be prepared in accordance with what's known  
9 as Generally Accepted Accounting Principles that are  
10 accepted in the United States, and those are the  
11 accounting rules that every CPA has to follow.

12 And the company, the parent company, U.S.  
13 Xpress Enterprises, is audited every year, and the  
14 auditors decide -- if the company owns another  
15 company, owns 50 percent or more of another company,  
16 then they decide if those separate companies have to  
17 be included in the financial statements, which are  
18 called consolidated financial statements.

19 And it's based on an accounting rule  
20 that's generally accepted, as I said, in the United  
21 States.

22 Q. And is it based on ownership or actual  
23 control?

24 A. It's based on ownership.

25 Q. Okay. Does it have anything to do with



1 operational control?

2 A. It has nothing to do with operational  
3 control. It is a -- a requirement based on  
4 accounting rules.

5 Q. And -- and do you consider there to be a  
6 difference between having ownership control and then  
7 exercising actual day-to-day control of the company?

8 A. Yes, there is a difference. The control  
9 is defined in the accounting literature -- and I  
10 spoke it out a moment ago -- over 50 percent  
11 ownership, and then that's what creates the control  
12 for consolidated financial statement purposes.

13 And then operating control has to do with  
14 if management decides to have someone run a company  
15 separately and then turns that over to them and  
16 gives them all the responsibility for that company's  
17 management, then that's the operational control.

18 Q. Okay. Mr. Gingras also said yesterday  
19 that by filing a consolidated tax return, the U.S.  
20 Xpress companies were acting as a single, integrated  
21 company.

22 Do you agree with that?

23 A. No, sir.

24 Q. Okay. Explain why not.

25 A. Well, because it's a similar situation

1 based on the Internal Revenue Code. The Internal  
2 Revenue Code, Section 1504A, speaks to the test for  
3 companies filing consolidated tax returns, and  
4 there's an 80 percent ownership test and an  
5 80 percent voting test, and if those two tests are  
6 met, then companies can elect to file tax returns  
7 together.

8 So that's another -- it's not really a  
9 rule. They're not required to do it, but they may  
10 elect to do it. And so that's an IRS....

11 Q. So, again, is this ownership control or  
12 operational control?

13 A. This is ownership control.

14 Q. All right.

15 A. There's a test that you have to follow,  
16 and if you meet that test, then you can elect to  
17 file a consolidated return.

18 Q. And if the -- if the percentage is  
19 80 percent ownership, would this ownership tree with  
20 Total Transportation of Mississippi have -- has  
21 qualified for Total to be part of the consolidated  
22 financial statement?

23 A. That's correct, yes, sir.

24 Q. Is there anything inconsistent with Total  
25 Transportation being run as a separate company but

1 also being included as a part of the consolidated  
2 tax return of the corporate group?

3 A. No, sir.

4 Q. All right. Mr. Gingras also stated to me  
5 yesterday that Total Transportation did not file a  
6 separate tax return.

7 Do you agree with that?

8 A. No, I don't agree with that. I  
9 respectfully disagree with Mr. Gingras, because  
10 Total Transportation of Mississippi files a separate  
11 corporate tax return in the State of Mississippi.  
12 The State of Mississippi requires a corporation,  
13 whether it's consolidated for federal purposes or  
14 not, to file a separate return in that state, and  
15 Georgia has a similar rule.

16 Q. And do you believe that by filing this  
17 Mississippi -- this separate Mississippi tax return,  
18 is that significant to you?

19 A. Well, yes. It just shows that there's a  
20 requirement for a separate corporation to file a  
21 separate return in that state where it's registered.

22 Q. And is it significant in the sense that it  
23 has anything to say about whether Total is tracked  
24 as a separate company or a part of a corporate  
25 whole?

1           A.    It says they're a separate company.  
2           They're required to file their own separate tax  
3           return.

4           Q.    And Mr. Gingras also said that he believed  
5           the United States -- I keep saying United States --  
6           that U.S. Xpress, Inc. was acting as an employer  
7           when it filed W-2 and paycheck information showing  
8           its own tax ID number, even though the employees  
9           being represented on some of these documents were  
10          actually Total Transportation of Mississippi  
11          employees.

12                   Do you agree with Mr. Gingras that that  
13          makes U.S. Xpress the employer?

14          A.    No.  I respectfully disagree with him,  
15          again, because there's a Tax Rule 3504 that allows  
16          groups of employers to have one employer group take  
17          responsibility for filing the payroll tax returns  
18          for the other employers as an agent.  And so that's  
19          commonly done.  It's not anything unusual.

20          Q.    Does that make every employer -- or,  
21          excuse me, employee an employee of the filing  
22          company?

23          A.    No.  They're separate employees.  In other  
24          words, what this rule talks about is separate  
25          companies.  And if one employer does the payroll tax

1 returns for other employers, then they're allowed to  
2 do that. So it speaks to the fact that these are  
3 separate companies.

4 Q. So in this case, how would you describe  
5 what U.S. Xpress, Inc. was doing?

6 A. U.S. Xpress, Inc. was acting as the --  
7 basically, the payroll agent. They were doing -- in  
8 other words, Total Transportation would do their own  
9 payroll and then transmit it to U.S. Xpress, and  
10 U.S. Xpress would just pay -- you know, write the  
11 payroll checks and then do the payroll tax returns  
12 that were associated with that.

13 Q. Does this have anything to do with who is  
14 controlling Total Transportation on an operational  
15 basis?

16 A. No, it does not.

17 Q. So if U.S. Xpress, Inc. acts as a paying  
18 agent for taxes, does it mean that all Total  
19 Transportation of Mississippi employees are acting  
20 as agents for U.S. Xpress?

21 A. No, sir.

22 Q. What is your understanding about the  
23 ability of an agency relationship to be limited?

24 A. It could be limited, and in this case this  
25 is limited because it's an IRS rule that speaks to

1 this very one specific situation.

2 Q. And if you do have limited agency, does  
3 that mean you can assume that the agent is an agent  
4 for all other purposes or is it limited to the  
5 limitations of the agency?

6 A. No, it's just limited to this one purpose.  
7 I mean, it's for tax purposes. It's a specific tax  
8 rule that allows this situation to exist.

9 Q. Mr. Gingras also mentioned that because  
10 the U.S. Xpress companies as a group applied for a  
11 loan, that that was proof that they're really just  
12 one entity.

13 Do you agree with that?

14 A. No, sir, I do not.

15 Q. First of all, before we get into the  
16 details, is there anything unusual about corporate  
17 families approaching lending institutions as a  
18 corporate group?

19 A. No. As a matter of fact, that's common.  
20 That's done every day. That's why -- you know,  
21 that's why companies merge in with other companies  
22 and, you know, companies acquire one another and  
23 there's a parent and subsidiary and that type of  
24 thing. These companies all consolidate and combine  
25 for economies of scale. They're trying to get more

1 efficient operations.

2 And so one of the efficiencies that comes  
3 from that is the ability to go to a bank or lending  
4 organization and request borrowing, and then one  
5 reason that they would do it this way is because the  
6 bank is going to require every year a financial  
7 statement. As we discussed earlier, it's gonna be a  
8 consolidated financial statement of the parent and  
9 subsidiaries that are filing these consolidated  
10 financial statements, and the bank's going to  
11 require them to hand over those financial statements  
12 because they want to see how they're doing.

13 And so, you know, why would you go  
14 separately to borrow money when your financial  
15 statement shows this consolidated group? You go as  
16 a group to borrow money. It just makes sense.

17 Q. Well, just because you're a corporate  
18 group and act in concert with your sister and parent  
19 companies, does that mean that the subsidiaries are  
20 not being run operationally as separate companies?

21 A. No, it does not.

22 Q. Does it have anything to do with it?

23 A. Nothing to do with it.

24 Q. And that's true even if they are requested  
25 by the bank to pledge all of their assets together

1 to secure the loan?

2 A. That's correct. The bank's going to  
3 require them to pledge all assets of every member  
4 that the bank can find. You know, that's generally  
5 how that works.

6 Q. Well, you mentioned efficiencies,  
7 economies of scale.

8 Is this -- is this loan process a part of  
9 that?

10 A. Yes, absolutely.

11 Q. All right. How about the banking  
12 relationships between the U.S. Xpress entities? Is  
13 that another example of economies of scale and  
14 efficiencies?

15 A. Yes. It's an operating efficiency the way  
16 the bank situation is operated, yes, sir.

17 Q. Do you believe this arrangement results in  
18 improper commingling of funds between the various  
19 companies?

20 A. No, not at all, because what happens is,  
21 you know, first of all, with respect to Total  
22 Transportation of Mississippi, as I said earlier,  
23 they bill their own invoices. They collect the  
24 payments. They go into a separate lockbox.

25 Well, those payments that go into that



1 separate lockbox are recorded on the general ledger  
2 of Total Transportation of Mississippi as sales  
3 revenues, and then when checks are written, whether  
4 it's payroll or accounts payable or what have you,  
5 from this checking account, those checks are posted  
6 to the general ledger of Total Transportation of  
7 Mississippi.

8 So what you have is a situation where  
9 whatever goes through that account gets separated to  
10 the correct place and recorded properly and  
11 reflected in the separate financial statements of  
12 the various entities that they provide this checking  
13 account service for.

14 Q. And is there actually a separate financial  
15 statement prepared for Total Transportation of  
16 Mississippi?

17 A. Yes, yes, it's prepared, and I've reviewed  
18 those in preparing for my testimony here today.

19 Q. Does Total Transportation's participation  
20 in this group banking arrangement mean that they're  
21 not being run separately?

22 A. No.

23 Q. Does it have anything to do with who  
24 controls the day-to-day operations of the company?

25 A. Nothing to do with it whatsoever.

1 Q. And you mentioned that you reviewed the  
2 financial statements.

3 In April of 2015, was Total Transportation  
4 of Mississippi solvent from an accounting  
5 standpoint?

6 A. Yes.

7 Q. Okay. What does that mean?

8 A. As a forensic accountant, what I looked at  
9 was their current assets minus their current  
10 liabilities.

11 On the financial statement of Total  
12 Transportation of Mississippi, the largest current  
13 asset is accounts receivable, because that's -- that  
14 consists of these bills that have gone out to their  
15 customers and then you collect all those together  
16 and add -- total them up and they total the accounts  
17 receivable.

18 Well, they have more than enough  
19 receivables and other current assets to pay their  
20 payroll taxes, their payroll, their accounts  
21 payable, and so they have about one-and-a-half times  
22 current assets as they do current liabilities.

23 And so the test for solvency is can a  
24 company pay its normal obligations in the normal  
25 operation of the business, the debts and

1 obligations.

2 And because they had this relationship  
3 that I just described, with their current assets  
4 being one-and-a-half times more than their current  
5 liability, then they are solvent.

6 Q. Did you -- do you -- did you see anything  
7 in the file of this case that you reviewed  
8 indicating that Total Transportation of Mississippi  
9 was unable to pay its debts when due in the normal  
10 course of business?

11 A. Nothing.

12 Q. All right. How about the sort of strict  
13 balance sheet test for solvency? Did you review  
14 that, too?

15 A. Yes.

16 Q. All right. And just explain what you're  
17 looking for there.

18 A. Okay. In that case, I look to see if  
19 the -- well, let me back up.

20 This is probably one of the first things I  
21 learned in Principles of Accounting 101: Assets  
22 equals liabilities plus owner's equity. It's the  
23 most fundamental accounting equation. And so what  
24 that means is that a company should have assets that  
25 equal what they owe its creditors and then what the

1 owners have put in, so that's the owner's equity.

2 So in this case, Total Transportation --  
3 using that formula, Total Transportation of  
4 Mississippi had more assets than it owed its  
5 creditors, which are its liabilities. So total  
6 assets equals total liabilities plus owner's equity,  
7 it had also an owner's equity. So from that  
8 perspective, they're solvent.

9 Q. Okay. Mr. Gingras said yesterday that he  
10 thought Total Transportation was shaky financially.

11 Do you believe that?

12 A. No, sir.

13 Q. So based on every financial test known to  
14 you, was Total Transportation of Mississippi  
15 insolvent in April of 2015?

16 A. No, sir.

17 Q. Now, as a part of your review of the file  
18 in this case, did you become aware of the consulting  
19 contract?

20 A. Yes, sir.

21 Q. And that is between U.S. Xpress  
22 Enterprises and the parent of Total Transportation  
23 of Mississippi, which is Transportation Investments;  
24 correct?

25 A. Yes, sir.

1 Q. All right. And you understand that it was  
2 the basis for providing what I think has been  
3 described as what we call back office services?

4 A. That's correct, yes, sir.

5 Q. Okay. And am I correct in saying that  
6 there was a charge associated with those services?

7 A. Yes, sir. I believe it was \$284,000 a  
8 year.

9 Q. And so that is a charge against the  
10 revenue of Total Transportation of Mississippi?

11 A. Yes. That would be one of those expenses  
12 that would be recorded on the books of -- and  
13 general ledger of Total Transportation of  
14 Mississippi, yes, sir.

15 Q. Would there be any reason under the sun  
16 for the U.S. Xpress parent companies to charge their  
17 subsidiary \$284,000 a year if they were trying to  
18 run this single integrated company?

19 A. No, sir.

20 Q. And so in 11-1/2 years, \$284,000 is close  
21 to \$3.2 million; correct?

22 A. Yes, sir.

23 Q. So if they were being run as one company,  
24 which Mr. Gingras said, would there be any reason to  
25 charge a subsidiary that sum of money for 11-1/2

1 years?

2 A. No, there would be no reason for it.

3 Q. Okay. Now, the services provided under  
4 this agreement, just because the services are  
5 provided under the agreement, do you believe that  
6 that means that Total Transportation is not  
7 independent?

8 A. No, sir.

9 Q. Okay. Well, then, if the services are  
10 provided under this agreement for them, do you know  
11 what those services are?

12 A. Yes, I know some of them, yes, sir.

13 Q. Okay. Just from the standpoint of  
14 accounting, can you give me some -- what the back  
15 office services would include?

16 A. Well, yes. As we discussed earlier, they  
17 include preparation of payroll and payroll tax  
18 returns, assistance with the audit every year,  
19 assistance with the tax return every year.

20 They would be keeping the general ledger  
21 accounting for all the companies -- well, in this  
22 case, they're charging Total Transportation, so  
23 keeping their general ledger up to date so, you  
24 know, the companies know on a monthly basis where  
25 they stand.

1           And those are examples.

2           Q.    Okay.  And then how about the banking  
3 relationship?

4           A.    Yeah, the banking relationship would be  
5 another one.  They operate to the banking situation.

6                    Yeah, what they -- what they do there is  
7 they have a situation where they try to minimize  
8 their interest expense, and what they do is they  
9 advance on their line of credit when they need money  
10 for cash flow purposes.  And so then when they  
11 collect their receivables and pay their debts and  
12 they've got excess cash flow available, then they  
13 pay back on the loan, and in that way they try to  
14 keep the interest expense as low as possible.

15                   And so what you'll see on all the various  
16 companies is a very low or even sometimes a very  
17 small negative cash balance, because they're not  
18 leaving cash in their checking accounts because if  
19 they do that, that just means they're paying  
20 interest on it.

21                   So what they want to do is take that money  
22 and take it out of their checking account, pay it  
23 right to the bank, so they keep their interest  
24 expense at the lowest possible amount.  I mean,  
25 that's just prudent management on the part of these

1 companies.

2 Q. Well, Mr. Gingras pointed out that at the  
3 end of April 2015, there was negative 600-some  
4 dollars in the cash account -- I think it was called  
5 the payroll account, actually -- for Total  
6 Transportation of Mississippi, and he tried to make  
7 it sound like that made them financially unviable.

8 Do you agree with that?

9 A. No, sir.

10 Q. Is there anything unusual about having low  
11 or slight small negative cash balances during the  
12 month?

13 A. No, sir. I just explained exactly why  
14 they would have that. That's another place where I  
15 would respectfully disagree with Mr. Gingras.

16 Q. And the back office services, would those  
17 also include claims --

18 A. Yes.

19 Q. -- and legal?

20 A. That's correct, yes, sir.

21 Q. And computers and IT?

22 A. That's correct.

23 Q. All right. Mr. Costello, is it common, in  
24 your experience, for corporate family members to  
25 engage in these type of collaborative arrangements?



1 A. Yes.

2 Q. Is there anything inconsistent between  
3 having a subsidiary be a part of one of these  
4 arrangements and still be run independent?

5 A. There's nothing inconsistent about it.  
6 It's done all the time. I mean, that's a normal  
7 part of the way companies operate.

8 Q. Is there anything improper about it?

9 A. There's nothing improper about it. As a  
10 matter of fact, it's -- it's, you know, something  
11 that you would want to do.

12 Q. Is there anything illegal about it?

13 A. There's nothing illegal about it.

14 Q. Is there anything fraudulent about it?

15 A. No, sir.

16 MR. BARBER: Okay. I have no more  
17 questions.

18 CROSS-EXAMINATION

19 BY MR. CHEELEY:

20 Q. Good morning, Mr. Costello.

21 A. Good morning, Mr. Cheeley.

22 Q. We've met before; right?

23 A. Yes, sir.

24 Q. When I took your deposition.

25 Do you remember that?

1 A. I do, yes, sir.

2 Q. It was back March 18, a year ago.

3 A. That's correct, yes, sir.

4 Q. All right. Have you reread that  
5 deposition in preparation --

6 A. I have.

7 Q. -- for your testimony today?

8 A. Yes, sir, I have.

9 Q. You were hired to serve as an expert  
10 witness in not just Megan Richards' case, but in  
11 cases for the five young women who lost their lives?

12 A. I believe that's correct, yes, sir.

13 Q. And also for the case for Brittney  
14 McDaniel, who was severely injured in this wreck;  
15 correct?

16 A. I believe that's correct, yes, sir.

17 Q. Okay. Do you have an idea -- well, first  
18 of all, how much do you charge for your time?

19 A. \$500 an hour.

20 Q. And how much have you billed,  
21 approximately, and been paid for all these -- for  
22 your work in all these cases?

23 A. I don't know. And the reason I don't is  
24 because the firm that I work with has a billing  
25 department that handles all that and then there are

1 other people who take care of that process so I  
2 don't have to deal with it. So I've not reviewed  
3 that in preparation for this.

4 Q. How many hours have you spent?

5 A. I don't know.

6 Q. 50?

7 A. I've spent a substantial number of hours.

8 Q. A hundred hours?

9 A. I could have, yes, sir. I mean, I just --  
10 I don't know.

11 Q. \$50,000 or more?

12 A. It could be, yes, sir. I believe that's  
13 right.

14 Q. And that was all to come in here and say  
15 that these were two separate companies, correct,  
16 standing on their own?

17 A. Well, no, not --

18 Q. That Total Transportation is a separate  
19 company and it alone should be --

20 MR. BARBER: Judge, I object. He  
21 interrupted the witness before the witness was  
22 finished answering.

23 MR. CHEELEY: I'm sorry.

24 Q. (By Mr. Cheeley) If I did, go ahead.

25 THE COURT: Finish your answer.

1           THE WITNESS: What I was going to say is  
2           what I was hired to do is look -- Mr. Gingras  
3           had written a report, he had a report that he  
4           had reduced to writing -- I think he called it  
5           a preliminary report -- and so I was asked to  
6           review that report to see if I had any comments  
7           or criticisms or agreement or disagreement with  
8           it.

9           Q.    (By Mr. Cheeley) Now, you know -- you  
10          know Mr. Max Fuller through some sort of club in  
11          Chattanooga; right?

12          A.    I've met Max Fuller one time through the  
13          UC Foundation board, which is an organization that  
14          provides scholarships and grants to students at UTC  
15          and then also, you know, professorships and that  
16          type thing for professors there at the University.

17          Q.    And how long have you known him?

18          A.    I might have met him a year or two ago,  
19          something like that. I've only been on that board  
20          now maybe two years.

21          Q.    But you knew him before you got hired in  
22          these cases; correct?

23          A.    I did. I met him. I mean, I don't really  
24          know him; I sat next to him at lunch one day.

25          Q.    Okay.

1           A.     So as far as you can get to know somebody,  
2     that's how I know him.

3           Q.     All right.   So you're not coming into this  
4     courtroom, are you, and telling this jury that Total  
5     Transportation of Mississippi had the assets  
6     sufficient to cover the deaths of these five young  
7     women and the injuries of these two young women, are  
8     you?

9           MR. BARBER:   Object to the form of that  
10    question, Judge.

11          THE COURT:   Well, specifically what's your  
12    objection?

13          MR. BARBER:   Well, I think that he's  
14    asking this man to start speculating about the  
15    value of a lost life.   I don't think that's a  
16    proper question for a forensic accountant.

17          THE COURT:   What's your response,  
18    Mr. Cheeley?

19          MR. CHEELEY:   Well, he said -- the whole  
20    point of their direct examination was Total  
21    Transportation was sufficient to stand on its  
22    own, it wasn't insolvent, and that insolvency  
23    or not also depends upon whether TTM has the  
24    ability to handle the, quote, normal  
25    obligations of operating a trucking company.

1 THE COURT: That's fair game on cross.

2 I'll allow it.

3 Q. (By Mr. Cheeley) All right, sir. So you  
4 spent a lot of time with Mr. Barber talking about  
5 solvency.

6 Do you remember those questions --

7 A. Yes, sir.

8 Q. -- and your answers?

9 A. Yes, sir.

10 Q. And you talked about normal obligations to  
11 pay its bills and to stay in business; correct?

12 A. Yes, sir.

13 Q. Now, you know that part of the risk of  
14 operating a trucking company of some 700, 800 trucks  
15 is that those trucks can be involved out on the road  
16 in major wrecks and cause major injuries and deaths;  
17 correct?

18 A. Correct, yes, sir.

19 Q. All right. And you're not telling this  
20 jury, are you, that Total Transportation of  
21 Mississippi, just looking at it by itself, was  
22 capable of handling and resolving, as Mr. Dial said  
23 in his opening statement, those five wrongful death  
24 cases and the case for Brittney McDaniel, are you?

25 A. I'm not -- I did no analysis on that, sir,

1 so I -- in other words, the question --

2 Q. I don't want you to -- excuse me.

3 A. May I please answer the question?

4 Q. Yes. I'm sorry.

5 A. Okay. What I was asked to do and what I  
6 was asked to look at was what Mr. Gingras opined on,  
7 and I don't believe Mr. Gingras had any opinion  
8 about that.

9 And so what I was doing was looking at  
10 just was this -- Total Transportation of Mississippi  
11 solvent from an accounting perspective, which is the  
12 question I was asked. So that's all I did.

13 Q. I don't want you to tell the amounts that  
14 those other cases resolved at, but are you aware of  
15 those amounts?

16 A. I did see a news release about them, but I  
17 didn't commit it to memory. But I know those are  
18 significant amounts, yes, sir.

19 Q. Okay. Now, you agree, sir, that Total  
20 Transportation of Mississippi on its own did not  
21 have the wherewithal to resolve those amounts on its  
22 own, based on your review of their financial  
23 statements; correct?

24 MR. BARBER: Judge, I object to the form  
25 of the question.

1 THE COURT: Let's come to the bench,  
2 please.

3 (The following proceedings were held at  
4 the bench, outside the hearing of the jury.)

5 MR. BARBER: Judge, I object to getting  
6 into insurance amounts because the insurance is  
7 asset to pay claims, and that is completely  
8 improper.

9 THE COURT: I think we need to go past  
10 this. This is not from the ordinary course of  
11 business of the trucking business. They've got  
12 insurance to cover this. There could be  
13 excess.

14 MR. CHEELEY: He testified in his  
15 deposition, Your Honor, that there's no way  
16 that Total Transportation of Mississippi could  
17 have afforded that much coverage. I'm not  
18 going to go into it past this one question. I  
19 just want to know, based on his review of the  
20 financial statements, were they capable. I'm  
21 not asking about the amount of insurance,  
22 because this kind of thing, if they did not  
23 have insurance, would put that company out of  
24 business.

25 MR. BARBER: So the insurance has to be



1 in. We can't have that.

2 MR. D. DIAL: The next mention of  
3 insurance, I will move for a mistrial, Judge.

4 MR. CHEELEY: I'm not mentioning it.

5 MR. D. DIAL: You're trying to get the  
6 witness to say it.

7 MR. CHEELEY: No, I'm not.

8 THE COURT: I'm going to sustain the  
9 objection at this point. I think it's  
10 dangerous to go any further with regard to  
11 that, because it does possibly bring in the  
12 insurance. Anything regarding their inability  
13 to, you know, pay the normal day-to-day  
14 operation, I think that's all fair game, but  
15 this is getting into a dangerous area.

16 MR. CHEELEY: All right. Thank you.

17 (The following proceedings were held in  
18 open court, in the hearing of the jury.)

19 MR. CHEELEY: May I proceed, Your Honor?

20 THE COURT: Yes, sir.

21 Q. (By Mr. Cheeley) Mr. Costello, U.S.  
22 Xpress Enterprises is directly underneath New  
23 Mountain Lake Holdings, correct --

24 A. Yes, sir.

25 Q. -- on the corporate org chart?

1           You've seen this; correct?

2           A.    I have, yes, sir.

3           Q.    So this is the entity, New Mountain Lake  
4 Holdings, that files one tax return for all these  
5 companies underneath it; correct?

6           A.    Well, I didn't memorize that, but I know  
7 that they file --

8           Q.    Just "yes" or "no."

9           A.    Well, I don't know.

10          Q.    Okay. And if you remember, I asked you at  
11 your deposition this question:

12                    "If the IRS had a problem with the tax  
13 return, and specifically with Total Transportation  
14 of Mississippi's portion of the tax return, who do  
15 you think they would call, U.S. Xpress or Total  
16 Transportation of Mississippi?"

17                    And what was your answer?

18          A.    They would contact New Mountain Lake  
19 Holdings.

20          Q.    Correct.

21                    And that's because they're the ones with  
22 control of the subsidiaries; correct?

23          A.    For tax purposes, yes, sir.

24                    MR. CHEELEY: That's all I have, Your  
25 Honor.

1 THE COURT: Anything else?

2 MR. BARBER: No further questions, Judge.

3 THE COURT: All right. Thank you, sir.

4 You can step down.

5 Your next witness, please?

6 MR. D. DIAL: Your Honor, the defense

7 rests.

8 THE COURT: Anything in rebuttal?

9 MR. CHEELEY: No, Your Honor.

10 THE COURT: All right. Gentlemen, we  
11 still haven't addressed the stipulations. Do  
12 we need to do that outside the presence of the  
13 jury?

14 MR. JONES: I think we need to, Your  
15 Honor.

16 MR. D. DIAL: I'm not sure. We agree with  
17 ours.

18 THE COURT: All right. Ladies and  
19 gentlemen, we have a number of things that we  
20 have to discuss outside your presence, so I'm  
21 going to go ahead and release you for lunch,  
22 ask that you come back at 1:00. You are  
23 excused until 1:00.

24 (The following proceedings were held  
25 outside the presence of the jury.)

1 THE COURT: Everyone in the audience,  
2 we're taking a break, but I am going to take up  
3 some matters with the lawyers.

4 MR. PITTMAN: There are two sets of  
5 stipulations that are part of the pretrial  
6 order, one set made by the U.S. Xpress  
7 defendants and one by the Greywolf defendants.  
8 They've each separately stipulated to certain  
9 facts, and we just wanted what they've agreed  
10 to stipulate to to be published to the jury.

11 And, Billy, we're okay if -- at this point  
12 if that's just a part of your charge, but at  
13 some point --

14 THE COURT: I'm not charging them any  
15 more. I've already got about an hour-long  
16 charge.

17 MR. PITTMAN: Okay. Well, then --

18 MR. JONES: Then the stipulations need to  
19 be read to the jury.

20 THE COURT: That's fine.

21 MR. D. DIAL: Now, here's going to be the  
22 issue, Your Honor. I'm so sorry. I was  
23 wondering why everybody was saying we disagree  
24 when I didn't disagree.

25 But the -- we're going to have to read

1           them and send the jury back out to make my  
2           motion again to preserve the record. I mean,  
3           it's -- I hate it that it happened this way,  
4           but I just want to alert Your Honor we're going  
5           to have to do that.

6           THE COURT: That's fine. So what are the  
7           stipulations? I think on page 18?

8           MR. D. DIAL: Yes, Your Honor.

9           MR. JONES: Yes, Your Honor.

10          THE COURT: So y'all want to read the  
11          stipulations that are on page 18 and go into  
12          page 19; is that right? So you want to read  
13          those stipulations that appear on page 18 and  
14          go over into page 19?

15          MR. JONES: Yes, sir.

16          THE COURT: And then what sort of motion  
17          are you going to make after that?

18          MR. D. DIAL: I'm going to renew my motion  
19          for directed verdict, Your Honor. I think I  
20          have to to be extra careful.

21          THE COURT: All right. That's fine.

22          MR. D. DIAL: Because it's at the close of  
23          all -- that would be the close of all the  
24          evidence, I believe.

25          I'm sorry. Go ahead.

1 MR. JONES: I just want to say and we want  
2 to finally, once and for all, put these  
3 Plaintiff's exhibits into the record:  
4 Plaintiff's Exhibit 302, 303, 304, 312, 313,  
5 314, 315, 316, 317, 318, 319, and 320.

6 Are there any others?

7 MR. PITTMAN: We'll do that in front of  
8 the jury, as well.

9 THE COURT: That's fine.

10 MR. JONES: And Plaintiff's 301, 305, 306,  
11 307, 308, 309, 310, and 311 also tendered.

12 MR. PITTMAN: And, Your Honor, as per our  
13 earlier discussion, we're still working on  
14 getting pictures of all so that there's a small  
15 copy for the record.

16 THE COURT: That's fine. That's fine.

17 I'm going to get into the charges and the  
18 verdict form in just a moment.

19 MR. D. DIAL: As to those exhibits, we  
20 have no objection, Your Honor, other than our  
21 objection regarding the impact rule.

22 THE COURT: Okay. So the exhibits are in  
23 order?

24 MR. JONES: Yes, sir.

25 THE COURT: We have the exhibits.

1 (Plaintiff's Exhibits 301 through 320 were  
2 admitted into evidence.)

3 THE COURT: All right. If y'all would  
4 take a seat, we're going to get into some of  
5 these charges.

6 All right. I do have a proposed verdict  
7 form. Does everyone have the verdict form?

8 MR. BARR: Judge, for what it's worth,  
9 I've reviewed the form.

10 THE COURT: Have you looked at the  
11 plaintiff's form.

12 MR. HILL: We just got it.

13 THE COURT: I guess, Mr. Varnedoe, why  
14 don't you look at their proposed form and see  
15 if you have any objections to that verdict  
16 form.

17 MR. VARNEDOE: Your Honor, hopefully, to  
18 answer your question, taking them in reverse  
19 order, but the punitive, the Phase 2 --

20 THE COURT: Yes, sir.

21 MR. VARNEDOE: -- do you have a copy of  
22 the defendants' proposed verdict form?

23 THE COURT: I do.

24 MR. VARNEDOE: Okay. Plaintiffs --

25 THE COURT: I will say as far as the

1           apportionment part of it, I like the  
2           plaintiff's portion better because it sets it  
3           out in detail. I just see a blank after the --  
4           I mean, "If you answered 'yes' to Question 1,  
5           please apportion fault among the following  
6           defendants," and I like the way the plaintiffs  
7           have specifically allowed for apportionment.

8           MR. BARBER: That part of it I don't have  
9           a problem with, Judge. I think the problem is  
10          they -- they've lumped all of their theories  
11          into this one question and they're not all  
12          necessarily that simple.

13          MR. VARNEDOE: Well, your Honor, if the  
14          jury finds that there's a common enterprise  
15          under any of the alternative theories -- and we  
16          may only present a Charge 1 theory -- it  
17          doesn't matter if they decide that they're all  
18          one. It's the same question.

19          THE COURT: I don't think it matters  
20          either.

21          MR. VARNEDOE: Thank you.

22          MR. BARBER: Except for each defendant has  
23          to have the ability to say that they didn't  
24          prove it as to them.

25          THE COURT: You are correct about that.



1           What he's saying is in Question 1,  
2           Mr. Varnedoe, in your verdict form, you lump  
3           all the separate corporate defendants together.

4           MR. VARNEDOE: In an attempt to avoid a  
5           seven-page verdict form.

6           THE COURT: Yeah.

7           MR. D. DIAL: But --

8           THE COURT: We can separate it out like  
9           they did in theirs.

10          MR. BARBER: Maybe combining the two would  
11          be --

12          THE COURT: Combining the two.

13          MR. BARBER: That would probably be the  
14          best thing. Because I do like the percentage  
15          thing, Judge. I think that's probably a good  
16          idea.

17          THE COURT: Okay. So we can take page 1  
18          of the defendants' verdict form. I think y'all  
19          know where we're going, so why don't you just  
20          collaborate and...

21          MR. BARBER: Do it on a Word doc instead  
22          of trying to -- rather than marking it up.

23          THE COURT: Yeah. Rather than  
24          piecemealing it here in open court, I think the  
25          two of you can get together and get a proposed

1 verdict form.

2 And I'm going to go ahead and just read to  
3 you what I'm going to charge the jury. There  
4 is no pattern jury charge on alter ego or joint  
5 venture or any of these theories, but here's  
6 what I propose and I think this conveys to them  
7 in a succinct fashion what the issue is, and  
8 then they'll have the verdict form. And I have  
9 taken portions of the various defense charges  
10 and some of the plaintiff's charges and tried  
11 to mesh them together.

12 Here's what I intend to tell the jury:  
13 Plaintiff claims that Total was a mere  
14 instrument or tool, what the law refers to as  
15 the alter ego of its parent and affiliated  
16 corporations, so that the corporations were  
17 acting as one entity. The defendants deny this  
18 claim and maintain that the companies were  
19 separate corporate entities and acted  
20 independently of each other.

21 For the plaintiff to prove that one  
22 company is the alter ego of another company,  
23 she must show by a preponderance of the  
24 evidence that there is such unity of interest  
25 of ownership that the separate personalities of

1 the corporation no longer exist.

2 In considering this -- these issues, the  
3 following factors are relevant in making this  
4 determination:

5 Whether the corporation maintained  
6 adequate observation of corporate formalities,  
7 separate records, accounts, minutes, ledgers.

8 Whether the corporate officers actually  
9 functioned as corporate officers.

10 Whether there exists commingling of  
11 control, property, employees, and records.

12 Whether generally one corporation operates  
13 as the mere shadow of another corporation.

14 Whether the corporation was solvent or  
15 insolvent;

16 And, lastly, whether one corporation had  
17 the right to direct and control the conduct of  
18 the other party in the activity causing the  
19 injury.

20 And then I would go on to give the charge  
21 on general agency principles: Under general  
22 agency principles, a parent corporation may be  
23 held liable for the activities of its  
24 subsidiary.

25 I know that's a condensed version. I

1 think it conveys to them what they need to  
2 decide. It gives them a host of factors that  
3 not individually are controlling, but they can  
4 consider in arriving at their verdict.

5 Does either side have any --

6 MR. VARNEDOE: Your Honor, the plaintiffs  
7 fully accept the proposed charge.

8 MR. BARBER: And, Judge, I think the last  
9 statement is -- I've got two problems with the  
10 charge.

11 One is I think solvency is a condition of  
12 giving a charge on alter ego, so I would object  
13 to that part of it. But the last sentence that  
14 said a corporate --

15 THE COURT: That's taken.

16 MR. BARBER: -- a corporate parent is  
17 always liable for the actions of its subsidiary  
18 I don't think is the law.

19 THE COURT: I think you -- I think you  
20 both submitted the general agency charge.  
21 Under general agency principles -- well, first  
22 of all, before we get to general agency, do you  
23 have any objection to the charge the Court's  
24 going to give?

25 MR. BARBER: Yes. Again, I think the --

1 my issue is I think under the Fallon case that  
2 I argued on summary judgment --

3 THE COURT: Yes.

4 MR. BARBER: -- insolvency is the stepping  
5 stone for the remedy.

6 THE COURT: I've given it as a factor.  
7 You're saying that they have to prove that  
8 they're totally insolvent?

9 MR. BARBER: Right.

10 THE COURT: Okay. I'll deny your request  
11 with regard to that. I'm going to give the  
12 charge I just read.

13 Then going on to general agency --

14 MR. BARBER: Judge, the other thing I  
15 think that is problematic about the charge is  
16 the way the charge is written, it says they  
17 have the right to control, which is just an  
18 ownership-based concept, and I think that is  
19 not -- what the law says is that you have to  
20 exercise improper control and mere ownership is  
21 not enough, because otherwise every parent  
22 would always be liable for the subsidiary. I  
23 think there has to be improper levels of  
24 control on the corporate --

25 MR. VARNEDOE: Your Honor, that's for the

1 jury. He's arguing degree.

2 THE COURT: I don't know how I can  
3 possibly satisfy you, Mr. Barber. The jury's  
4 got to make a determination. I've got to give  
5 them a list of factors to consider. If that's  
6 an objection, it's noted. It's overruled.

7 MR. BARBER: Okay.

8 THE COURT: But I do want to hear your  
9 point on the general agency principles, because  
10 this is something I think you both submitted.  
11 Under general agency principles -- I'll agree  
12 not to give the agency charge if -- we don't  
13 even have to go there.

14 MR. BARBER: Well, the principal is liable  
15 for an agent and a corporation can be liable  
16 for --

17 THE COURT: Do you want me to give a  
18 charge or not?

19 MR. BARBER: Well, not the way it was  
20 stated.

21 THE COURT: Then what charge do you want  
22 me to give, Counsel?

23 MR. BARBER: Well, I thought we had an  
24 agency charge. We submitted one, Judge, and  
25 that's not it.

1 THE COURT: Okay. Well, please refer me  
2 to your -- the charge you want me to read.  
3 They don't listen to these anyway, but we can  
4 spend a lot of time talking about them.

5 MR. BARBER: The Court of Appeals does.

6 THE COURT: Yes.

7 MR. BARBER: Okay. Starting at 32,  
8 Defendants' 32 is our submitted agency charges.

9 THE COURT: All right. For plaintiff's  
10 counsel's edification, that would be Defense  
11 Charge No. 32, 33, 34, 35, 36, 37 -- no, 36.

12 All right. So the relationship with  
13 principal and agent arises whenever one person  
14 or principal expressly or implicitly authorizes  
15 another, the agent, to act for the principal.  
16 A business entity such as a corporation like  
17 Total is regarded as a person in this instance.

18 I don't have a problem with that.

19 MR. VARNEDOE: The only problem is that a  
20 business entity such as a corporation like  
21 Total or U.S. Xpress or any of the other  
22 defendants. Their whole objective is to limit  
23 everything to Total because they've admitted  
24 liability.

25 THE COURT: I understand that.

1 MR. VARNEDOE: You either need to  
2 eliminate "Total" or add all of the defendants,  
3 corporate defendants.

4 THE COURT: I'll just take out the -- I'll  
5 take "Total" out.

6 MR. VARNEDOE: Okay. Thank you, Your  
7 Honor.

8 And on Defendants' Request 33, it's only  
9 part of the statute and it's not adjusted to  
10 the evidence. There was no testimony that  
11 Johnson exceeded the scope of his authority.

12 MR. D. DIAL: We stipulated to that.

13 MR. MARCOVITCH: It's in the charge.  
14 We've admitted that Total is vicariously  
15 liable.

16 MR. VARNEDOE: Trying to separate Johnson  
17 from Total?

18 MR. MARCOVITCH: No.

19 MR. VARNEDOE: Okay. Well, it's not  
20 adjusted to the evidence, in my opinion, Your  
21 Honor, and it's certainly not a complete  
22 statement of the law.

23 I mean, there's no evidence that Johnson  
24 exceeded or violated his instructions so that  
25 he stands alone at his own risk.



1 MR. BARBER: Well, I thought the argument  
2 was that he had been told not to drive fatigued  
3 and you-all are arguing that he exceeded that  
4 or didn't follow it.

5 Isn't that your argument?

6 MR. VARNEDOE: I don't think so. And I'll  
7 remind everyone argument isn't evidence.

8 THE COURT: Let me get back and read the  
9 shorter version.

10 How about if I just said this: Generally,  
11 an agency relationship arises whenever one  
12 entity expressly or by implication authorizes  
13 another entity to act for it or subsequently  
14 ratifies the act of the other entity on its  
15 behalf. Once a principal/agent relationship  
16 has been created, the principal is bound to the  
17 care, diligence, and fidelity of its agent and  
18 its business, and hence the principal is also  
19 bound for the neglect of its agent in the  
20 transaction of its business. In other words,  
21 the negligence of one entity could be imputed  
22 to another entity if the first entity was  
23 acting as an agent.

24 Can we just do that?

25 MR. BARBER: Well, we can except I need

1 the limitation piece to it, because you can be  
2 an agent for a limited purpose.

3 THE COURT: All right. So we do that, and  
4 give me the language.

5 MR. BARBER: I think it's in my charge,  
6 Judge.

7 MR. MARCOVITCH: Your Honor, you have my  
8 copy of the charge. I don't know if Mr. Barber  
9 has a copy.

10 THE COURT: Yeah. I'm sorry.

11 MR. MARCOVITCH: That's all right. But I  
12 think we've covered it in the respondeat  
13 superior charge, which is earlier than agency.

14 MR. BARBER: Oh, I'm sorry. I'm sorry,  
15 Judge.

16 MR. MARCOVITCH: So I can probably find it  
17 if I just look at the charge real quick.

18 THE COURT: Sure. Sure. You're the  
19 defendant in that case.

20 MR. MARCOVITCH: That's all right.

21 THE COURT: By the way, both sides -- this  
22 is just a random thought -- both sides  
23 submitted the charge on medical expenses.  
24 There have been no medical expenses.

25 MR. VARNEDOE: I agree, Your Honor. That

1 can be withdrawn.

2 THE COURT: Okay.

3 MR. MARCOVITCH: Your Honor, for the  
4 record, I was referring to -- do you have a  
5 copy of our charge or not?

6 THE COURT: It's in separate pieces, so --

7 MR. MARCOVITCH: Does anybody have a copy  
8 of our charge? Well, I'll hand it to you.  
9 Defendants' Request No. 23 is respondeat  
10 superior, and it includes the admission of  
11 liability with respect to Johnson at the bottom  
12 line there.

13 THE COURT: Okay.

14 MR. JONES: Which one?

15 MR. VARNEDOE: 23.

16 That's entirely confusing. There's no  
17 reason to set forward paragraph 1 or 2 when  
18 they've admitted it. All the jury has to be  
19 instructed on is what their admission of  
20 liability is. The prerequisite doesn't matter.  
21 It's confusing.

22 MR. MARCOVITCH: That's fine.

23 THE COURT: Okay.

24 MR. VARNEDOE: So I think the last  
25 sentence, Your Honor, that says, "I instruct

1           you that Total, the USX defendants, and Johnson  
2           admit that Mr. Johnson was working within the  
3           scope of his employment with Total, because  
4           that's what they've admitted, when the accident  
5           occurred."

6                     But it is still for the jury to decide if  
7           Mr. Johnson was also acting within the scope of  
8           his employment with the USX defendants because  
9           of this common enterprise theory. So their  
10          charge is not adjusted to the evidence and it's  
11          incomplete.

12                    MR. MARCOVITCH: This charge was  
13          submitted, as Mr. Varnedoe stated, with respect  
14          to Total's vicarious liability for Johnson. It  
15          was not intended to cover the USX defendants,  
16          which is really within Mr. Barber's bailiwick.

17                    So I'm sorry to not be able to help with  
18          that score, but it's absolutely fine with  
19          respect to Total to skip over the vicarious  
20          liability issue, because I just submitted it in  
21          case the Court wanted to instruct the jury on  
22          it.

23                    THE COURT: Okay.

24                    MR. MARCOVITCH: But we're fine to say  
25          we've admitted as we've written it here --

1 THE COURT: Okay.

2 MR. MARCOVITCH: -- which is in 23, Your  
3 Honor, last line.

4 MR. VARNEDOE: And, Your Honor, I think in  
5 that regard, the only suggestion I would make  
6 is that the third sentence be moved to the  
7 front of the charge to say, "Jury, Total has  
8 admitted liability, but you still have to  
9 decide if he was working within the scope and  
10 course of his employment for U.S. Xpress," da  
11 da da da da.

12 THE COURT: Do you have the ability to  
13 revise that and get it to me in hard fashion?

14 MR. VARNEDOE: I do.

15 MR. MARCOVITCH: Your Honor, I think I  
16 actually included that. I just repeated that  
17 line from one of the introductory patterns, but  
18 I've got no problems doing what Mr. Varnedoe  
19 suggests.

20 THE COURT: Okay. All right. So I think  
21 we're through that. You know what I'm going to  
22 charge as far as the alter ego, commonality of  
23 interest issue, and we're going to collaborate  
24 on the verdict form.

25 MR. VARNEDOE: Yes, Your Honor.

1 THE COURT: All right. You know what my  
2 agency charge is going to be.

3 Some of the other issues I wanted to talk  
4 about are the plaintiffs have submitted a host  
5 of CFR regs and the texting statute.

6 And, I mean, are you still asking the  
7 Court charge those to the jury?

8 MR. VARNEDOE: I think it's important,  
9 Your Honor. I think that evidence has been  
10 introduced to at least give the jury the  
11 opportunity to decide if any of the conduct is  
12 negligence per se under those various  
13 regulations or statutes.

14 THE COURT: But how would there be  
15 negligence per se if none of this occurred at  
16 the -- well, there is the statute about  
17 communication --

18 MR. VARNEDOE: Yeah, he can't touch a  
19 phone while he's driving.

20 THE COURT: Yeah, that can --

21 MR. VARNEDOE: He did a lot of that.  
22 But --

23 MR. J. DIAL: But it has to cause the  
24 accident to be negligence per se, which he  
25 couldn't --

1 THE COURT: Well, it's up to the jury to  
2 decide what caused the accident.

3 MR. J. DIAL: Yeah, but it couldn't have  
4 been texting. He wasn't texting.

5 THE COURT: And I agree with you there's  
6 no evidence that he was texting, but there may  
7 be evidence that he had access to, may have  
8 used a communication device, which is what the  
9 statute says.

10 MR. VARNEDOE: And it's also relevant to  
11 the determination of punitives.

12 THE COURT: It's the second statute from  
13 the texting statute.

14 MR. MARCOVITCH: For the record, Your  
15 Honor, we do object to Plaintiffs' 51, 52, and  
16 54, because we believe they do not conform to  
17 the evidence. There is no evidence that he was  
18 texting anywhere close to the time of the  
19 accident and he did not -- there's no evidence  
20 that he was holding the phone in his hand,  
21 which is a violation of O.C.G.A. 40-6-241 and  
22 54 and the CFR, 49 CFR 392.82.

23 THE COURT: I don't intend to give any of  
24 the CFR regs, but as far as the Georgia law, I  
25 don't see any reason -- you can argue to the

1 jury that he was texting. There's evidence  
2 that he was texting a couple hours prior to it.  
3 It sort of dovetails into your argument that he  
4 was preoccupied, he was tired, he'd spent all  
5 this time in the last 24 hours prior to the  
6 event.

7 So, I mean -- but to charge the jury --  
8 they know that texting is illegal, but this  
9 occurred some two-and-a-half hours prior to the  
10 accident.

11 MR. VARNEDOE: But under 49 CFR 392.3, an  
12 ill or fatigued operator, if you don't charge  
13 that CFR, then we don't have any hanger to hang  
14 the evidence on. He cannot operate a  
15 commercial motor vehicle. And Mr. Dial stood  
16 up in his opening and said, "It's up to John  
17 Wayne Johnson to decide if he's fatigued or  
18 not." There is a federal regulation that says  
19 you cannot drive if you're fatigued.

20 THE COURT: I can give that.

21 What about the texting statute?

22 MR. VARNEDOE: 49 CFR 392.8, "Prohibition  
23 against texting. (a) No driver shall engage in  
24 texting while driving." And that's obviously  
25 talking about a commercial motor vehicle



1 operator.

2 He did that. He did that on this trip.  
3 He wasn't texting at the time, but it shows a  
4 pattern, which speaks directly to punitive  
5 damages and him violating the law.

6 THE COURT: I'll give that charge.

7 MR. MARCOVITCH: For the record, Your  
8 Honor, we object to that charge.

9 THE COURT: I understand. I understand.

10 MR. VARNEDOE: 49 CFR 392.82(a)(1), "No  
11 driver," again talking about a commercial motor  
12 vehicle driver like Mr. Johnson, "shall use a  
13 hand-held mobile telephone while driving a  
14 CMV." There's evidence that he did. It  
15 doesn't have to be at the time of the wreck, it  
16 shows a pattern of him being totally ignorant  
17 or willfully disregarding the law.

18 MR. MARCOVITCH: Your Honor, I don't think  
19 there's any evidence that he had that phone in  
20 his hand at all during this trip.

21 MR. VARNEDOE: Well, how in the hell does  
22 he text if he's not holding his phone?

23 MR. MARCOVITCH: You can do it. Would  
24 have had to have been voice'ting.

25 THE COURT: I'll let you-all argue that to

1 the jury, but I'll give the charge.

2 MR. MARCOVITCH: All right.

3 THE COURT: I'm still a little confused  
4 about --

5 MR. VARNEDOE: O.C.G.A. 40-6-180 you said  
6 Your Honor would give, basic speed rules.

7 THE COURT: Yes.

8 MR. VARNEDOE: O.C.G.A. 40-6-241 by  
9 reference implicates O.C.G.A. 40-6-241.2, which  
10 speaks directly to a commercial motor vehicle  
11 driver in subsection (c) that prohibits a  
12 commercial motor vehicle operator from  
13 operating that commercial motor vehicle on any  
14 public road or highway in the state (a) holding  
15 a wireless telecommunications device to conduct  
16 voice communication. It's basically the  
17 Georgia equivalent of the CFR that Your Honor  
18 said you're going to charge.

19 THE COURT: Why would I give both? Aren't  
20 they somewhat redundant?

21 MR. VARNEDOE: Why does a federal jury --  
22 why does a federal case get tried when the  
23 guy's already convicted in State Court for  
24 murder? I mean, they're two independent  
25 sovereign entities that have both set

1 (inaudible) over this issue. He is in  
2 violation of the federal rules and he's in  
3 violation of state law. We ought to be able to  
4 tell the jury that.

5 THE COURT: I take it you want to respond  
6 to that?

7 MR. MARCOVITCH: Your Honor, we believe,  
8 again, that the evidence does not conform and  
9 that those charges do not conform to the  
10 evidence. So just for the record, one more  
11 time --

12 THE COURT: Understood.

13 MR. MARCOVITCH: -- we object to  
14 Plaintiff's 51, which relates to 49 CFR 392.80;  
15 we object to Plaintiff's 52, which relates to  
16 49 CFR 392.82; and we object to Plaintiff's 54,  
17 which relates to O.C.G.A. 40-6-241.

18 THE COURT: All right. Those objections  
19 are noted.

20 All right. I don't recall there being any  
21 other out-of-the-ordinary requests.

22 MR. MARCOVITCH: Your Honor, I believe the  
23 plaintiffs made some requests. I don't know  
24 whether --

25 THE COURT: Oh, there's one request on the

1 insurance, the liability coverage.

2 Is there any objection to that?

3 MR. MARCOVITCH: What was the charge?

4 MR. VARNEDOE: Let's see.

5 MR. MARCOVITCH: That's really more of a  
6 Mountain Risk issue, I believe.

7 MR. VARNEDOE: And, Your Honor, the  
8 requested charges made by the defense about  
9 note taking and all that, I know they're not  
10 being charged.

11 THE COURT: Those are all preliminary  
12 charges. We're way past that.

13 MR. VARNEDOE: Yes, sir.

14 MR. MARCOVITCH: Your Honor, while he's  
15 looking at the direct liability, there's a  
16 couple of other charges here that we just don't  
17 think are warranted by the way the case was  
18 presented.

19 We believe Plaintiff's 63, 64, and 65 all  
20 relate to claims that have been dismissed, the  
21 negligent entrustment and negligent hiring  
22 claims.

23 THE COURT: Yeah, those are.

24 MR. MARCOVITCH: 73 and 74 all relate to  
25 the cap --

1 THE COURT: Those are all out. Those are  
2 obviously out.

3 MR. MARCOVITCH: The -- 91, voluntary  
4 assumption of duty by breaking corporate rules,  
5 which is the final paragraph of 91 --

6 THE COURT: That's not in the case.

7 MR. MARCOVITCH: Okay. And we're not  
8 there yet, but on the punitive damages, 92,  
9 we've got an objection.

10 THE COURT: We'll have another charge  
11 conference if we get there.

12 MR. MARCOVITCH: Okay. Your Honor, we  
13 also take issue -- and I haven't heard any  
14 argument on it yet -- on the spoliation charges  
15 that they've submitted, 26 and 27, any and all  
16 spoliation charges that they may have  
17 submitted. We believe that no spoliation  
18 charge is warranted. The code -- the evidence  
19 showed the pass code was available and that  
20 they --

21 THE COURT: To me, that's more a matter  
22 for argument to the jury than it is the Court  
23 being involved in that.

24 MR. MARCOVITCH: Right. So we are seeking  
25 no adverse inference charge, and it sounds like

1 the Court's not going to do that.

2 THE COURT: Yeah, I don't intend to go  
3 there.

4 MR. MARCOVITCH: Okay. We also have to  
5 talk about how we're going to charge the jury  
6 on emotional distress, but we're not there yet.

7 THE COURT: At this point, I haven't seen  
8 anything other than -- I just going to give the  
9 standard charge and have a physical injury  
10 requirement in there.

11 MR. VARNEDOE: We're fine with that, Your  
12 Honor.

13 THE COURT: Okay.

14 MR. MARCOVITCH: Well, that's okay. I  
15 mean, that's the law, that's our belief, but,  
16 of course, we're going to be arguing  
17 accordingly, Your Honor.

18 And we also -- Mr. Dial's already moved  
19 for a mistrial based on all the evidence that's  
20 come in --

21 THE COURT: Yes, sir.

22 MR. MARCOVITCH: -- that completely lacks  
23 any relation to the impact rule.

24 THE COURT: I mean, it's a one-line charge  
25 on mental pain and suffering, that she can

1 recover as long as there's a physical injury.

2 MR. MARCOVITCH: Well, Your Honor, we've  
3 submitted --

4 MR. VARNEDOE: It's pretty innocuous, Your  
5 Honor.

6 THE COURT: I saw what she submitted about  
7 I'm supposed to tell them -- you want me to  
8 tell them that she can't recover specifically  
9 for the deaths of the other --

10 MR. MARCOVITCH: That's directly from  
11 Bennett versus Moore, Your Honor, almost  
12 verbatim.

13 MR. VARNEDOE: With the --

14 THE COURT: Yes, it is.

15 MR. VARNEDOE: -- exception of -- that's  
16 what Your Honor has ruled.

17 MR. MARCOVITCH: Well, but if we're going  
18 to give the impact rule charge, then we've got  
19 to give the impact rule charge.

20 THE COURT: I would be giving the impact  
21 rule charge that is in pattern charge that's  
22 been accepted time and time again. You know,  
23 to go further and start telling them what they  
24 can't recover for, they'll have to decide. You  
25 can argue that to the jury.

1 MR. MARCOVITCH: All right. So, Your  
2 Honor, just so the record's clear, we except to  
3 the Court not giving our submitted Defendants'  
4 26.

5 THE COURT: All right. The Court's going  
6 to give the pattern charge in lieu thereof and  
7 your objection's noted.

8 MR. MARCOVITCH: Okay.

9 THE COURT: But then you can argue to the  
10 jury that, you know, that doesn't flow from her  
11 physical injuries and they shouldn't recover  
12 for that.

13 So I don't think I've handicapped you in  
14 any way as far as making that argument; I'm  
15 simply going to give the pattern charge that  
16 requires a physical injury to recover for  
17 mental pain and suffering.

18 MR. MARCOVITCH: And on the Mountain, on  
19 the direct liability for the insurer, Judge --

20 THE COURT: Yes.

21 MR. BARBER: Judge, the last sentence I  
22 have a problem with the liability insurance --

23 THE COURT: See if you can get Carl to  
24 agree to take that out.

25 MR. BARBER: You know there's going to be



1 a judgment against U.S. Xpress, but the way  
2 this reads you can find two judgments.

3 MR. VARNEDOE: I'll take a look at that,  
4 Your Honor.

5 THE COURT: All right. Can you take a  
6 look at it now? It's just one sentence.

7 MR. BARBER: The last sentence is the only  
8 the thing I have a problem with.

9 MR. VARNEDOE: My esteemed colleague.  
10 Defendants' 18, sympathy, we would request  
11 the pattern as we have. Their charge as  
12 submitted is argumentative.

13 THE COURT: I'll give the pattern on  
14 sympathy.

15 MR. JONES: So your objection is to what?

16 MR. BARBER: Just the last sentence.

17 MR. JONES: We're fine. We will -- we  
18 will agree to delete the last sentence of  
19 Plaintiff's requested Charge No. 87, which they  
20 objected to.

21 THE COURT: All right. 87, delete last  
22 sentence.

23 MR. MARCOVITCH: Your Honor, we except to  
24 their objection to No. 18, just for the record.

25 THE COURT: All right. I appreciate that.

1 MR. VARNEDOE: We take, sir, exception,  
2 Your Honor, to their exception to my objection  
3 to your ruling.

4 THE COURT: Don't confuse my court  
5 reporter. She's had a long week.

6 MR. VARNEDOE: Your Honor, defendants  
7 requested Charge No. 20. We would request, as  
8 we have, the pattern charge on ordinary  
9 negligence. They go further and set forth from  
10 a case duty, breach, causation -- I mean, the  
11 pattern charge is more appropriate and it's  
12 safer.

13 THE COURT: I'll give the pattern charge.

14 MR. MARCOVITCH: We're excepting to the  
15 omission of our Charge No. 20.

16 MR. VARNEDOE: And Defendants' 21, it's  
17 the same issue that I think I am going to look  
18 at it at lunch to see if we can figure out  
19 proximate cause, how we deal with the admission  
20 of liability for Total and then the remaining  
21 issue of liability for the USX defendants.

22 THE COURT: All right. And, again, it  
23 would be very helpful if you could reduce that  
24 to a hard copy.

25 MR. VARNEDOE: Yes, Your Honor.

1 MR. MARCOVITCH: Your Honor, when I say  
2 our concession of liability was earlier in the  
3 charge, it's in 21.

4 MR. VARNEDOE: And I'll look at it, but  
5 it's a lengthy --

6 MR. MARCOVITCH: I believe it's also  
7 earlier in the instruction.

8 THE COURT: Okay.

9 MR. VARNEDOE: And I believe you're not  
10 giving Defendants' 26? This is their impact  
11 rule charge.

12 THE COURT: No, I'm not.

13 MR. VARNEDOE: Thank you, Your Honor.

14 MR. MARCOVITCH: We've already excepted to  
15 that.

16 THE COURT: Yes, you have.

17 MR. VARNEDOE: And you said we'll come  
18 back for punitives.

19 THE COURT: Yes.

20 MR. MARCOVITCH: Well, wait a second.  
21 There is a charge about the jury checking the  
22 box for punitive damages, not the amount.

23 THE COURT: Yeah.

24 MR. MARCOVITCH: We're just going to give  
25 the patterns; right?

1 THE COURT: All I'm going to do is give  
2 them a standard on the definition of punitive  
3 damages, the requirement for there to be clear  
4 and convincing evidence, right out of the  
5 pattern charge book.

6 MR. VARNEDOE: And there is the issue of  
7 respondeat superior liability for Johnson's  
8 negligence. Are you going to charge that in  
9 Phase 1?

10 THE COURT: Yeah, I think I have to.

11 MR. VARNEDOE: I think you do, too, and  
12 we've submitted a request on that, Your Honor.

13 THE COURT: What number is that?

14 MR. VARNEDOE: Let's see. It's in our  
15 non-pattern charge as Exhibit A to the charge.

16 MR. MARCOVITCH: That's my copy.

17 MR. VARNEDOE: Can I borrow it?

18 MR. MARCOVITCH: Well, what charge are you  
19 talking about?

20 MR. VARNEDOE: The Georgia liability --  
21 yes, sir, it's Plaintiff's 93, Your Honor.

22 (Thereupon, there was an interruption in  
23 the proceedings.)

24 MR. MARCOVITCH: Your Honor, we -- our 23,  
25 I believe, is the pattern for respondeat. We

1 just added the last line and Mr. Varnedoe  
2 earlier objected to including paragraphs 1 and  
3 2 in our 23. I'm almost certain that's the  
4 pattern instruction.

5 MR. VARNEDOE: I'm talking about punitive  
6 damages and derivative liability for punitive  
7 damages. I was talking about compensatory with  
8 respect to Defendants' 23.

9 This is a direct quote from a 2013 Court  
10 of Appeals case. I mean, it says -- it clearly  
11 lays out accurately the law in the state of  
12 Georgia.

13 THE COURT: You're referring to your 93?

14 MR. VARNEDOE: Our 93, yes, sir.

15 MR. MARCOVITCH: But, Your Honor, the jury  
16 is not making a find- -- all the finding is  
17 whether to check the box for punitive damages.  
18 It's a matter of law --

19 THE COURT: Let me take a look at 93. I  
20 don't have it in front of me.

21 MR. MARCOVITCH: Yeah. Just so I can  
22 finish my point, Your Honor, as a matter of  
23 law, Total is responsible for those punitive  
24 damages and the Court would just so order.  
25 It's not a determination for the jury.

1 Vicarious liability, as we just discussed  
2 earlier, isn't even being presented to the  
3 jury, so...

4 MR. VARNEDOE: Sir, are you saying that  
5 Total has stipulated to their responsibility  
6 for punitive damages awarded against Johnson?

7 MR. MARCOVITCH: Total is responsible  
8 for -- they're vicariously liability for the  
9 liability of Johnson.

10 THE COURT: Regardless of what the damages  
11 are, whether they're compensatory or punitive?

12 MR. MARCOVITCH: I believe it's the law,  
13 Your Honor.

14 THE COURT: Yeah, I think it is.

15 MR. VARNEDOE: Well, I want to know are  
16 y'all saying that? Because if not, the jury  
17 has to decide it.

18 THE COURT: He just said it.

19 MR. MARCOVITCH: Total is responsible for  
20 the liability, including punitive, of Johnson.

21 MR. VARNEDOE: Okay.

22 THE COURT: Then I wouldn't need to give  
23 93.

24 MR. VARNEDOE: That's correct, Your Honor.  
25 Thank you.

1 I think I'm almost done, Your Honor.

2 THE COURT: So I won't give a respondeat  
3 superior charge, although there are references  
4 in the charge that Total admits that they are  
5 liable for the actions of the driver.

6 MR. VARNEDOE: I mean, I think it's fair  
7 to read that stipulation to the jury.

8 THE COURT: Sure.

9 MR. MARCOVITCH: That's fine.

10 THE COURT: Yeah. Okay.

11 MR. BARBER: Judge, would it be possible  
12 for me to get a photocopy of your proposed  
13 charge on the alter ego stuff, take a look at  
14 it? Because it hasn't been submitted.

15 THE COURT: I just read it to you.

16 MR. BARBER: Oh, you mean -- is it like in  
17 your handwriting?

18 THE COURT: It's in my handwriting. Good  
19 luck with that.

20 MR. VARNEDOE: Subject to the right to  
21 have a subsequent charge conference on  
22 punitives --

23 THE COURT: I'm sure we will. I'm sure we  
24 will.

25 MR. VARNEDOE: -- we're okay.

1 THE COURT: I think we made a little  
2 progress. That's all I wanted to do.

3 MR. MARCOVITCH: Your Honor, if I could  
4 just add one more on 28, Defendants' Request  
5 28.

6 THE COURT: Yes, sir.

7 MR. MARCOVITCH: I believe there's a line  
8 in there that does not conform to the pattern,  
9 which comes out of Carter versus Spells. I  
10 just want to bring it to the Court's attention.

11 THE COURT: This is Defense 28?

12 MR. MARCOVITCH: This is Defense 28. "In  
13 a traffic collision such as this case" --  
14 sorry. "In a traffic collision case such as  
15 this, punitive damages are not recoverable  
16 where the driver at fault simply violated a  
17 rule of the road," which is a quote from Carter  
18 versus Spells. That's in the authority down  
19 there below.

20 THE COURT: Okay. Yeah, I mean there's no  
21 question that's what it says. I don't know --  
22 I don't think that's in the pattern charge.

23 MR. VARNEDOE: It's not in the pattern  
24 charge, and I thought Your Honor was going  
25 to --



1 THE COURT: I'm going to give the pattern  
2 charge.

3 MR. VARNEDOE: Thank you.

4 MR. MARCOVITCH: Okay. So we except to  
5 the omission of that sentence.

6 THE COURT: I understand.

7 MR. BARR: Judge, I have one more  
8 question. I assume --

9 THE COURT: Now you again.

10 MR. BARR: Absolutely. Just to make sure  
11 you didn't forget I was here.

12 I assume Your Honor's going to give the  
13 chain reaction pattern charge that was  
14 requested by both myself and codefendant?

15 THE COURT: Yeah, I looked at that.

16 MR. BARR: The only thing I wanted to  
17 point out is there's actually a difference  
18 between the one that we requested, which is the  
19 pattern, and the one that the codefendants  
20 requested, which is their No. 22, because their  
21 No. 22 adds a paragraph.

22 THE COURT: I'm going to give the pattern.

23 MR. BARR: Okay. That's what I wanted to  
24 know.

25 MR. JONES: Judge, one other thing. Can

1 we address the order of closing arguments?  
2 Mr. Cheeley and I would expect to split the  
3 plaintiff's close, I would go first and he  
4 would go last. I assume they're sandwiched all  
5 in between, and can we find out what order  
6 they'll be arguing so that we can figure out  
7 our strategy?

8 MR. BARR: I assume I'm last.

9 THE COURT: Just let them know after  
10 lunch.

11 MR. MARCOVITCH: One more thing, because  
12 I, unfortunately, wasn't listening close enough  
13 to Mr. Barr.

14 But to the extent the Court is not giving  
15 Defendants' Requested Charge No. 22, we would  
16 like to object to that.

17 THE COURT: Okay. Thank you. All right.  
18 Enjoy your lunch.

19 (Whereupon, a recess was taken from 12:16  
20 p.m. to 1:23 p.m. and the following proceedings  
21 were held outside the presence of the jury.)

22 THE COURT: All right. Gentlemen, just so  
23 we have a clear understanding, when they come  
24 out, we're going to read the stipulations and  
25 then let them go back and then return for the

1 arguments?

2 MR. PITTMAN: Your Honor, I proposed to  
3 Mr. Dial that instead of having to send them  
4 back, he can just renew his motion up to the  
5 Court.

6 THE COURT: Yeah, we can do it at side  
7 bar.

8 MR. D. DIAL: That's fine, Your Honor.

9 THE COURT: Okay. All right. Let's bring  
10 the jury out, please.

11 (The following proceedings were held in  
12 the presence of the jury.)

13 THE COURT: All right. Everyone please be  
14 seated.

15 All right. Counsel, you may proceed.

16 MR. JONES: I thought you were going to  
17 read the stipulations, Your Honor.

18 THE COURT: I'm going to let y'all read  
19 those to the jury.

20 MR. JONES: Oh, okay. I apologize. I  
21 thought you were doing it. My bad.

22 THE COURT: I can do it.

23 Starting on page 18, and if counsel would  
24 read along with me.

25 Ladies and gentlemen, at this point, I am

1 reading to you certain stipulations that both  
2 sides have agreed to.

3 No. 1, Mr. Johnson was negligent in his  
4 operation of his tractor-trailer on April  
5 the 22nd, 2015; Mr. Johnson's negligence was  
6 the proximate cause of the second accident;  
7 Mr. Johnson's negligence was the proximate  
8 cause of Ms. Richards' injuries occurring in  
9 the accident to the extent her injuries are  
10 proven at trial; Mr. Johnson was acting within  
11 the scope and course of his employment with  
12 Total Transportation at the time of the second  
13 accident; and Total is liable to Ms. Richards  
14 under the doctrine of respondeat superior for  
15 the negligence of Mrs. Johnson -- Mr. Johnson.

16 Further stipulations: Defendant Greywolf  
17 Logistics, Inc., hereafter referred to as  
18 Defendant Greywolf, is engaged in business as  
19 an interstate motor carrier transporting goods  
20 for compensation. On April 22, 2015, Defendant  
21 Robert Gordon Tayloe, hereinafter referred to  
22 as Defendant Tayloe, was operating a  
23 tractor-trailer in furtherance of Defendant  
24 Greywolf's business. During the early morning  
25 of April 22, 2015, a wreck occurred on I-16

1 eastbound near Mile Marker 143 in Bryan County,  
2 Georgia, involving the tractor-trailer driven  
3 by Defendant Tayloe and a Winnebago motor home.  
4 Defendant Tayloe negligently caused the  
5 April 22, 2015, wreck involving the  
6 tractor-trailer he was driving in the scope of  
7 his employment with Greywolf and the motor  
8 home. As a result of this collision, both the  
9 tractor-trailer Defendant Tayloe was driving  
10 and the Winnebago motor home rolled over and  
11 slid along the roadway, coming to a rest on or  
12 near the roadway, blocking all or part of I-16  
13 eastbound. Eastbound traffic on I-16 was  
14 backed up following this collision while  
15 emergency crews worked to clean up and remove  
16 the large overturned vehicles from the roadway.  
17 Defendant Arch Insurance Company provides  
18 liability insurance coverage to Defendant  
19 Greywolf for this collision.

20 Again, those are stipulations agreed upon  
21 by counsel and should be accepted by you as  
22 evidence in this case.

23 Anything else from either side?

24 MR. JONES: No, Your Honor.

25 THE COURT: I understand counsel wants to

1 approach the bench.

2 MR. D. DIAL: Yes, Your Honor.

3 (The following proceedings were held at  
4 the bench, outside the hearing of the jury.)

5 MR. D. DIAL: A couple of things, Your  
6 Honor. We renew our motion for directed  
7 verdict on the same grounds we argued at the  
8 close of our case and incorporate also our  
9 motion for summary judgment briefs on those  
10 same issues.

11 THE COURT: All right. Thank you, and  
12 those motions are respectfully denied and  
13 preserved for the record.

14 MR. D. DIAL: Your Honor, I'm sorry. Can  
15 I do the same thing regarding my previous  
16 motion for directed verdict?

17 THE COURT: Yes, sir.

18 MR. D. DIAL: Your Honor, I just want to  
19 note for the record -- I understand the charge  
20 you decided on with respect to the impact rule  
21 and what your decision is, but you also said I  
22 would be open to argue that she can only  
23 recover for emotional distress.

24 THE COURT: Sure.

25 MR. D. DIAL: I want to note that I think,

1           that boxes me in and doesn't given me a viable  
2           option because I won't be able to argue to the  
3           jury that that's the law and point to an  
4           instruction so saying.

5           Thank you.

6           THE COURT: All right. You're welcome.

7           (The following proceedings were held in  
8           open court, in the hearing of the jury.)

9           THE COURT: All right. Ladies and  
10          gentlemen of the jury, at this time you will  
11          hear the closing arguments made by the  
12          attorneys. Like the opening statements, the  
13          arguments made at this point are not evidence,  
14          but they are the summations made by the  
15          attorneys. It is their view of the evidence.  
16          It's an attempt on their part to persuade you  
17          to see the case in a light most favorable to  
18          their position. However, I ask that you give  
19          them your attention as they make those  
20          arguments.

21          The plaintiff would have the right to open  
22          and conclude.

23          MR. JONES: Your Honor, we're going to  
24          split our opening. I will do the opening part  
25          of closing and Mr. Cheeley will do the closing

1 part of the plaintiff's close.

2 THE COURT: Thank you, Mr. Jones. You may  
3 proceed.

4 MR. JONES: Ladies and gentlemen of the  
5 jury, it's my pleasure to address you once  
6 again in what is without a doubt the most  
7 horrific and the most horrible wreck and loss  
8 of life to have ever occurred in Bryan County.  
9 We all hope and pray that something like this  
10 never happens again.

11 There's been a lot of talk and a lot of  
12 discussion about it, but we do not want to lose  
13 sight of what happened here on that night, in  
14 that early morning hours of April 22, 2015.  
15 Emily Clark lost her life; Catherine Pittman  
16 lost her life; Caitlyn Baggett lost her life;  
17 Abbie Deloach, the driver of the Ford Escape,  
18 lost her life; Brittney McDaniel was badly  
19 injured and survived; Morgan Bass lost her  
20 life; and Megan Richards is what this case is  
21 all about.

22 Now, Tuesday morning when we started the  
23 case, Mr. Dial used the word "evidence" some 35  
24 times in his opening statement. He harped on  
25 the fact that he wanted y'all to get your



1 evidence in this case from this witness stand,  
2 and I totally and 100 percent agree with him.  
3 The evidence doesn't come from anywhere else,  
4 nothing that I say or nothing anybody else  
5 says.

6 And remember this, there are 12 of y'all  
7 with the 2 alternates and there's one of me,  
8 and I may not remember everything that you  
9 think is important. So when y'all go in the  
10 jury room, if there's something you think  
11 important, you discuss that. You have the  
12 right as a juror to do that and to mention  
13 that.

14 The system we have is not perfect. I  
15 can't remember -- and y'all would be bored to  
16 death if I went over every little thing. I'm  
17 just going to talk about some matters that I  
18 think are important to our case.

19 Now, when Mr. Cheeley and I first got  
20 involved in these cases -- and we were involved  
21 in some of these other -- the majority of these  
22 other cases, as well -- why did we sue Greywolf  
23 and Tayloe, who caused the first wreck way down  
24 the road? We sued them so that if somebody  
25 were trying to point at liability as to them,

1           they would have to be in this courtroom and a  
2           jury would have to decide. Not us, not these  
3           defendants -- we didn't want these defendants  
4           pointing at somebody else that wasn't here, so  
5           we wanted one jury to hear it all.

6                     Under the law that Judge Rose will give  
7           you and under the facts that you've heard,  
8           you'll make the decision and not somebody else  
9           about Greywolf and Tayloe's liability in this  
10          case.

11                    But we put all of the facts before you  
12          because we wanted you to hear everything. We  
13          did not want to hide anything from you. We  
14          didn't want to mislead you in any way.

15                    Now, as to the evidence, I don't think  
16          I've ever heard any evidence and any testimony  
17          any more compelling and any more dramatic than  
18          the testimony of Sergeant Robenolt, an American  
19          hero. I mean, I don't know what most people  
20          who have done under those circumstances that  
21          he's found himself in, but to get out of his  
22          car and run towards this danger -- most people  
23          run away from danger. Most people run away  
24          from a fire, a burning automobile. Most people  
25          try to escape something like that. But what a

1 brave man and what a wonderful man that went to  
2 the car and got Megan Richards out of that car.

3 Sergeant Garrett, Sergeant Cason, Officer  
4 Wheeler, all of those State Patrol that came in  
5 and laid out for you exactly what happened in  
6 this case, who was at fault, who caused this,  
7 what he said to them.

8 We played for you the testimony -- the  
9 oral testimony of Mr. Johnson, which was taken  
10 in Mr. Cason's patrol car on the morning that  
11 this thing happened.

12 Now, one of the things that he said in  
13 there -- and I'll come back to this in a minute  
14 but I want to mention it while I was talking --  
15 I want to mention it while I'm thinking about  
16 it -- one of the things he said in there that  
17 was so important in this case was when he asked  
18 him who his employer was, if you'll remember --  
19 and if you don't remember, you can ask the  
20 judge to play that video -- or to play that  
21 audiotape again, which is part of the record --  
22 but he said -- when asked who his employer was,  
23 he said, "Total Transportation, but everything  
24 goes to U.S. Xpress." Even the driver, even  
25 the company driver for Total Transportation,

1           knew everything goes through U.S. Xpress. Even  
2           he knew that. So when you're considering this  
3           issue about U.S. Xpress, I ask you to remember  
4           that.

5                     Now, Mr. Johnson, let's talk about him for  
6           a little bit. And I'm not talking about him to  
7           embarrass him; I'm not talking about him to  
8           single him out; I'm not talking about him to  
9           make him feel bad, because he's sitting in this  
10          courtroom, but the facts and the truth  
11          sometimes are harsh things.

12                    Mr. Cheeley was finally able to elicit  
13          from him that when he was driving for another  
14          company, driving a tractor-trailer rig like the  
15          one he was driving in this case in November of  
16          2011, he fell asleep and that vehicle did a  
17          complete 180, which means it went halfway  
18          around and went off the road and turned up  
19          against -- turned over against the guardrail,  
20          and that vehicle was totaled.

21                    Now, that's relevant. That's relevant in  
22          this case. It's relevant to your determination  
23          of the harm caused by this man in this case,  
24          because he's back out on the road again,  
25          company driver, working for Total

1           Transportation, back out on the road again.

2           And what are the circumstances and the  
3 facts in which he found himself in? Now, we  
4 all get sleepy and I understand that. Some of  
5 us work long hours. But if you're driving a  
6 tractor-trailer, you simply can't make that  
7 mistake. You can't take lives into your own  
8 hands. The people of Bryan County and the  
9 people of Georgia and all of the motoring  
10 public deserve better. We don't deserve to  
11 have drivers falling asleep operating their  
12 vehicle.

13           Now, there was a lot of back and forth  
14 about all this texting, and we agree totally  
15 that he was not texting at the time of the  
16 wreck. That gets confusing, because there's so  
17 much back and forth and arguing and then the  
18 judge has to decide certain issues, and we say  
19 to you now we've got the records, they went  
20 into evidence, he was not texting at the time.

21           But the reason we put all those texts in  
22 is to show you that from the time he got up in  
23 Shreveport, Louisiana, some 50 hours prior to  
24 this wreck, and he says, "I'm sleeping," he's  
25 riding on a bus, he's texting.

1           He goes from Shreveport, Louisiana to  
2           Jackson, Mississippi to the bus station. He  
3           gets to the bus station at 5:00 in the morning.  
4           He's still texting. He says he's sleeping.

5           He goes from the bus station to the  
6           terminal and he's there all day long. He says  
7           he's sleeping. You'll have the records out,  
8           and it's one of the exhibits where we -- where  
9           we show all the texts. He's not sleeping, he's  
10          texting. He's in a driver's lounge, there's  
11          noise, there's TVs, there's other people coming  
12          in and out. He's going back and forth to check  
13          on his truck. He didn't get any sleep.

14          And then at 5:00 in the afternoon, they  
15          finally get his truck ready. They put him on  
16          the road over there in Jackson, Mississippi,  
17          and they send him through the night to  
18          Savannah.

19          Now, that's a long time to be up and awake  
20          and intermittently texting and intermittently  
21          doing things on your phone, intermittently  
22          making phone calls, from the time he left  
23          Shreveport, Louisiana until the time he got to  
24          this accident scene.

25          Now, Mr. Johnson, no explanation, no

1 reasonable or plausible explanation for what  
2 happened here. I listened to it and I know  
3 y'all listened to it. I have no understanding  
4 of what his testimony was, as hard as I tried  
5 to listen to it, as many times as I tried to  
6 listen to it.

7 And if he fell asleep, why didn't he just  
8 say he fell asleep? Why doesn't he tell this  
9 jury what really happened, if he knows what  
10 happened? He even said that he hoped one day  
11 that somebody, some other expert or some other  
12 person or somebody else -- remember, we put  
13 Mr. Buckner up as a mechanical expert to go  
14 through precisely what happened in the  
15 collision, but Mr. Johnson still said -- he  
16 still said to y'all, "I wish I knew what  
17 happened. I wish someday somebody would figure  
18 out for me what happened. I wish some expert  
19 one day would give me an answer as to what  
20 happened."

21 Now, is there anybody here in this  
22 courtroom or anybody who has listened to any of  
23 this evidence who believes for one minute that  
24 Megan Richards would not go back to the night  
25 before, early morning hours before this

1           horrific accident, this horrific wreck that  
2           caused all of her injuries.

3                     She didn't ask for it, she didn't want it,  
4           she didn't look for it. She doesn't want to be  
5           here and she certainly never wanted to lose the  
6           lives of her friends.

7                     In Mr. Dial's opening to you, he says,  
8           "It's false that we are saying that Megan is  
9           faking." He says, "It's false that we say  
10          she's faking." And then they go get some guy  
11          from Denver that they didn't even have when we  
12          started the trial Tuesday morning, they run  
13          around and they get him and they fly him all  
14          the way from Denver on Wednesday to testify  
15          here yesterday before y'all to tell y'all that  
16          there's no correlation between a traumatic  
17          brain injury and the problems she's having or  
18          there's no correlation between finding blood on  
19          an MRI in somebody's brain and the injuries she  
20          described. Y'all heard his testimony,  
21          Dr. Wortzel.

22                    Now, what the plaintiffs are seeking in  
23          this case is not a prize and it's not an award.  
24          And the judge will charge you on the law  
25          regarding what Ms. Richards is entitled to.



1           What we're asking you to do and what we're  
2           giving you help in determining is to make a --  
3           is what is called a determination as to the  
4           value of the harm that she's incurred, the  
5           level of money that is equal to the level of  
6           harm that she has suffered. It is one of the  
7           oldest ways that we have ever valued anything  
8           in our lives. People have always had to put  
9           money value on something.

10           This is a jury trial and this is the only  
11           way -- this is the -- it may not be a perfect  
12           system, but it is the best system of justice  
13           that we have. If we couldn't come in cases  
14           like this to a jury and let a jury make these  
15           decisions, we would have absolute chaos in  
16           society. While this is not a perfect solution,  
17           it is the only solution that Americans have  
18           been able to come up with, and it is the best  
19           solution.

20           You remember when we were doing what is  
21           called voir dire and I asked each and every one  
22           of you to place a value on human lives and  
23           you-all said you did, and it's the difference  
24           between our countries and others.

25           And this compensation for her is not a

1 reward and it is not a prize. You're the only  
2 ones that have the power -- the judge doesn't  
3 have the power, I don't have the power, nobody  
4 else in America has the power -- that is the  
5 power vested in the 12 of you, chosen randomly  
6 here in Bryan County and sitting where you're  
7 sitting now. It is an awesome responsibility.

8 You can hold these defendants responsible  
9 where they don't want to evade -- where they  
10 don't want to accept responsibility. They want  
11 to evade responsibility.

12 Now, they'll tell you, "Oh, no, we're  
13 responsible and we're liable, but be fair to  
14 us. Be fair to us." What they're really  
15 saying is don't award Megan sufficient money  
16 damages to properly and adequate award her.  
17 Make no mistake about it, when Mr. Dial uses  
18 the word "fair" to Mr. Johnson and Total  
19 Transportation, that's code for don't award her  
20 the money damages that she's entitled to.

21 MR. D. DIAL: Your Honor, I object.  
22 Mr. Jones is misstating the law. The law  
23 requires that the jury be fair to both parties.

24 THE COURT: The Court will instruct on the  
25 law.

1 MR. JONES: Now, it's okay to have all  
2 these corporations acting jointly. All these  
3 corporations are all huddled up over here  
4 together, they've got all the same lawyers, but  
5 when it comes to taking responsibility, they  
6 pile mountains and mountains and mountains of  
7 documents and bring in this accountant -- who's  
8 a nice fella, by the way, I like him -- but he  
9 cannot escape their exhibits. He can't escape  
10 and get away from what they did.

11 And remember the lady that sat up here,  
12 nice lady, Mrs. Pate? I asked her about  
13 Plaintiff's Exhibit 81, the management  
14 presentation they made to the banks in New  
15 York. That will be out in evidence with you.

16 In other words, these companies, all  
17 acting together as one, go to New York City and  
18 want to borrow a bunch of money from bankers in  
19 New York as one and tell the bankers in New  
20 York, "We're a one-stop shopping center. We  
21 can provide everything. We work together, and  
22 this includes Total Transportation, a  
23 90 percent owned company, medium-haul carrier  
24 operating 700 tractors." That's part of the  
25 presentation they made to the bankers, but they

1 want y'all not to hold them liable for Megan  
2 Richards. We're one when we go to New York,  
3 but we're all separate when we're sitting here  
4 in Bryan County, and I don't believe a one of  
5 you buy that.

6 We heard that these companies are managed  
7 and owned and operated by those two families.  
8 The evidence went in as to who those families  
9 were. I'm not even going to call their names.

10 It's not okay to evade responsibility.  
11 They can't evade the responsibility like that  
12 in this case, and I urge you not to let them do  
13 that.

14 These defendants don't want to fix what's  
15 happened, they don't want to help Ms. Richards,  
16 and they don't want to make up for anything.  
17 So you are the ultimate judges. You will  
18 decide how far one can go in balancing what has  
19 happened here.

20 And as I mentioned earlier, one of the  
21 best ways to do that is to put all of the harm  
22 they've caused Megan Richards on one scale of  
23 justice and then y'all have to put enough money  
24 on the other scale to balance the harm.

25 And you've got to look at these harms.

1           You've got to look at what she's been through.  
2           You've got to look at what -- how her life has  
3           been changed. And to do that, you've got look  
4           at three things: How bad was it, how long will  
5           it last, and how will it interfere with her  
6           life. Three things: How bad, how long, and  
7           how does it interfere with her life.

8                     As I said when I first stood up, I cannot  
9           imagine a more horrific thing to live through  
10          than what she lived through. I don't think it  
11          could be any worse. So how bad? It's pretty  
12          bad. So where on the scales does that  
13          intensity of harm lie? How bad?

14                    How long will that conduct affect her?  
15          How long will it affect her? Is there any one  
16          of us who doesn't believe that until the good  
17          Lord takes her away, that she will live with  
18          what happened that morning?

19                    Is there any one of us -- we've got --  
20          that's why we have such a mix of jurors, is  
21          each and every one of you bring to this  
22          courtroom your own experiences in life, what  
23          you've lived through in life, what you've seen,  
24          what's happened to you.

25                    I know as I've gotten older, my opinions

1 and my attitudes and things that I believe have  
2 changed, and all of that helps us, as we  
3 mature, make decisions. And we all know  
4 because we're older that she's going to live  
5 with that for the rest of her life, for a long,  
6 long time.

7 And how much will it interfere with her  
8 life? Now, to her credit -- and, golly, I love  
9 her for this -- she says, "I'm a fighter. I'm  
10 not going to quit. I'm going to do everything  
11 I possibly can to continue with my life. I  
12 want to go to work."

13 I think the defendants -- you know, they  
14 can't have it both ways. If we say she's going  
15 to go to work and she's going to do as much as  
16 she possibly can, then they say she's not hurt.  
17 If she stayed home and didn't try to do  
18 anything, they would say she's faking. So  
19 y'all got to decide that. Y'all have to decide  
20 that. Think about how bad she'll be affected.  
21 Your verdict has to touch all these issues, how  
22 long she'll be affected and how it will  
23 interfere with her.

24 Now, she was honest. She says, "There's  
25 some days I have good days. There's some days

1 I have good days. There's some days that are  
2 absolutely awful. Not every day is my worst  
3 day. Not every hour is my worst hour. Not  
4 every minute is my worst minute."

5 But there are times when she is at the  
6 bottom of her spirit, her life, everything  
7 she's ever worked for.

8 And God bless nurses. I know we've got  
9 two of them on the jury. We thank you for what  
10 y'all do for all of us and what you do for  
11 society. But that's what she wanted to do and  
12 that's what we hope that she can do, but we  
13 don't know that. Going forward, we don't know  
14 that.

15 Now, the judge will charge you that  
16 there's different facets or different parts of  
17 what she's entitled to recover. She's entitled  
18 to recover for her physical pain and for her  
19 mental pain.

20 And what -- I mean, we all know in this  
21 case the mental pain vastly outweighs the  
22 physical pain. She certainly has had  
23 tremendous mental pain and mental suffering  
24 that will -- that will continue throughout the  
25 rest of her life.

1           Is there any one of us, as I said earlier,  
2           who doubts that she would go back to where she  
3           was before if she possibly could?

4           And just because we aren't trying this  
5           case in Atlanta doesn't mean that it's any less  
6           important. Just because we're not trying this  
7           case in New York or some big city doesn't mean  
8           that it's any less important. It's just as  
9           important here, and the lives of people in  
10          Bryan County and Bulloch County and Liberty  
11          County and Chatham County are just as important  
12          as the lives of people elsewhere around the  
13          country. So don't hold your verdict down  
14          because somebody might think that we live in  
15          South Georgia and we're not as good or we're  
16          not as important as folks that live in some of  
17          these big cities.

18          And so when you think about your damages,  
19          think about just the event itself. What is  
20          fair compensation for going through that event  
21          that morning, being in that wreck, being in  
22          that car, which was totally destroyed? Seeing  
23          the death and destruction all around her and  
24          understanding what happened.

25          Now, with respect to your award, your



1 finding in favor of the plaintiff -- and  
2 they've admitted they're liable, Total  
3 Transportation has and John Wayne Johnson  
4 has -- you've got to decide about physical  
5 harm, you've got to decide about mental harm,  
6 and you've got to decide about what she's been  
7 through in the past, the present, and the  
8 future. You've got to think about the next 10  
9 years, the next 15 years, the next 18 years,  
10 the next 30 years, because she can't come back  
11 again. This is her only shot at a jury. She  
12 can't come back -- or y'all can't come back  
13 either. You can't come back next week, next  
14 month, next year, and say, "Gee, I wish I'd  
15 done something different." When you leave here  
16 today if you reach your verdict today, or  
17 tonight or tomorrow, whenever you do, leave  
18 with the comfort in your heart that you know  
19 you've made the right decision and one that you  
20 can live with the rest of your life like she'll  
21 have to live with the rest of her life.

22 And I'm going to suggest some numbers to  
23 you. We were talking about physical pain and  
24 mental pain. You'll have to break those down  
25 as you think through your verdict, and as you

1 work your way through it, you'll think about  
2 past, link the event and the two years that  
3 she's lived through to get here, the mental  
4 anguish that she's been through just to get to  
5 this trial and have the courage to come to this  
6 trial, her past physical and mental pain and  
7 suffering, her present physical and mental pain  
8 and suffering, and her future physical and  
9 mental pain and suffering.

10 Now, I wrote up here, "Paid Wortzel."  
11 Now, when he flew from Denver all the way to  
12 Savannah, how many neuropsychiatrists did he  
13 fly across to get here? Do y'all not think  
14 they couldn't find somebody in Savannah or  
15 Dublin or Statesboro or somewhere else?

16 MR. D. DIAL: Your Honor, I object. It's  
17 not a proper measure of damages. He's arguing.  
18 It's not about the cost you pay a witness, it's  
19 about the harm suffered by Ms. Richards.

20 THE COURT: I'll overrule the objection.

21 MR. JONES: Paid him \$500 an hour to get  
22 here, to come from Denver -- to come from  
23 Denver, Colorado, to tell y'all a bunch of lies  
24 because they couldn't find somebody closer.  
25 That's exactly why he came and he testified.

1 We've got plenty of those types of doctors  
2 around here.

3 Now, she's 24 years -- 22? I'm sorry. I  
4 apologize -- 22 years old. If she lives to 82,  
5 that's another 60 years. So when you're  
6 thinking of future physical and mental pain, at  
7 least break it down into each year when you put  
8 a number on it and then multiply it out times  
9 60 so you come to a number that fairly balances  
10 these scales of justice.

11 You've got the harms over here done by  
12 these defendants to her, you've got her over  
13 here on this side, and you have the right and  
14 you have the power to do that. You can do it a  
15 hundred dollars an hour, you can do it at \$50  
16 an hour, you can do it at \$10 an hour. You can  
17 do it at any number you want to do it at, but  
18 you have to assign numbers to it.

19 You have to figure out as a juror what is  
20 her future mental pain and suffering going to  
21 be. You've got to put a number on it.

22 We suggest 5 million for what she's been  
23 through up until today; we suggest something in  
24 the range of 5 million for what she's going  
25 through now; and y'all can break it down into

1 so much per year -- I suggest \$500,000 a year  
2 for the next 60 years -- but something within  
3 the range of all of that to properly and  
4 adequately compensate her.

5 There's nobody who would not go back and  
6 nobody would believe -- or nobody would take  
7 the position that if Megan Richards could go  
8 back to the day before this happened and be  
9 herself with all of her friends, that she would  
10 not do it. We ask you for an award that  
11 reflects what these defendants have put her  
12 through and what she's been through.

13 Thank you.

14 THE COURT: Mr. Dial.

15 MR. BARR: Your Honor, we discussed that I  
16 would go first unless you --

17 THE COURT: Okay.

18 MR. BARR: Is that still okay, Dave?

19 MR. D. DIAL: Yeah, that's fine.

20 MR. BARR: Good afternoon, ladies and  
21 gentlemen. Typically, by this point in the  
22 trial, you're completely sick of the lawyers  
23 talking. You.

24 May remember I really haven't done  
25 anything in this trial.

1 I did address you at the end of the day on  
2 Monday. It was like 6:20 or something. I  
3 represent the Greywolf defendants, Greywolf,  
4 its driver, Robert Gordon Tayloe, and Arch  
5 Insurance.

6 First thing I'm going to do -- the reason  
7 why I'm going first, as opposed to last, is I'm  
8 going to be short and we know Mr. Dial is going  
9 to take some time to review anything.

10 But I know on behalf of all of the  
11 parties, we want to thank you for your  
12 attention. You guys have been one of the most  
13 attentive juries I've ever seen, and that's  
14 good, and that's good particularly for my  
15 client, Greywolf.

16 And I hope that what Mr. Jones just said,  
17 the importance of what he said about my  
18 clients, was not lost on you. What he said was  
19 that the reason they brought us into the case  
20 is to prevent the codefendants from pointing  
21 the finger; right? Not because there's some  
22 strong reason or some legal basis that they're  
23 asking you to award money against us, it's just  
24 to have somebody there to make sure that Mr. --  
25 the other parties in the case aren't pointing a

1 finger at some empty chair. Okay? So we're  
2 here.

3 So after hearing that, my first  
4 inclination is just to sit down and say, "Okay,  
5 you guys get it," but I do want to take a  
6 couple minutes just to explain why that's the  
7 case, why is there no valid legal reason for  
8 Greywolf to be in this case?

9 Mr. Tayloe, you may have noticed, he did  
10 not testify. He was not called by the  
11 plaintiffs and, frankly, how the first accident  
12 happened really isn't important. It's not an  
13 issue that y'all need to decide in the case,  
14 and there's no claim that he was overtired or  
15 texting or any of that kind of stuff that he  
16 needed to be here to address.

17 As you heard, Mr. Tayloe, by causing the  
18 first wreck -- and, by the way, as I said at  
19 the opening, he did cause the first accident.  
20 We're not hiding from that. We have accepted  
21 responsibility and resolved the claims that  
22 were brought by the folks in the Winnebago.  
23 Those are the harms that Mr. Tayloe proximately  
24 caused or directly caused.

25 One thing y'all heard in openings from

1 both sides is that these other cases involving  
2 the other nurses -- nursing students were all  
3 resolved. And that's true, but just so you  
4 don't get the wrong idea, my clients did not  
5 participate in those resolutions. Okay? We  
6 were never asked to. All those cases are done.  
7 We believe that is what should happen here.

8 This is about two distinct wrecks that  
9 happened over a mile apart, six hours apart.  
10 And, you know, you haven't heard, really, any  
11 evidence as to Greywolf. It's clear, even from  
12 Mr. Jones' statements, that Greywolf is not the  
13 focus in this case. Again, we're kind of a  
14 placeholder, if you will, just to prevent  
15 finger pointing.

16 To their credit, Total and Mr. Johnson  
17 have accepted responsibility. Mr. Johnson pled  
18 guilty, as you heard, to the criminal charges  
19 and, as the Judge just read to you, a  
20 stipulation.

21 And the stipulation says that the  
22 codefendants, Mr. Johnson and Total, stipulate  
23 or agree that his negligence was the proximate  
24 cause of Megan's injuries. Okay? The  
25 proximate cause, not a proximate cause or one

1 of the proximate causes, the proximate cause.

2 So I want to spend just a second  
3 explaining what that means. You know, things  
4 happen during the day, a lots of things happen  
5 to put us at a particular point at a particular  
6 time.

7 It is true that this accident that  
8 happened that was caused by my client led to  
9 the fact that these vehicles were slowed down  
10 at the back of the line, but if you think about  
11 it, a million things happened to put us in that  
12 situation in terms of which wrecker service was  
13 called and what equipment they brought out.  
14 Nobody's claiming that anybody did anything  
15 wrong during the cleanup, but all of those  
16 things are factors.

17 The reason why we have, under the law,  
18 proximate cause is it limits that, and it  
19 limits the ability to recover to only the  
20 things that were proximate causes of the harm.  
21 "Proximate" means "close." "Direct" is another  
22 way to say it. And so, obviously, you can see  
23 why Mr. Johnson and Total agree that his  
24 actions were the proximate cause of Megan's  
25 injuries.



1           My client's actions some six hours before,  
2           a mile up the road, were not the proximate  
3           cause of Megan's injuries. They were of the  
4           injuries of the people in the Winnebago, and  
5           we've accepted responsibility for that and  
6           resolved that.

7           One of the things that the Judge is going  
8           to do is read you the standard, and it's the  
9           standard for what -- how -- if you cause an  
10          accident at the front of the line, how you  
11          might be liable for the negligence at the back  
12          of the line. And so I want to spend a couple  
13          minutes on this and then I think I'll be done.

14          Here's the standard that Judge Rose will  
15          read to you in a few minutes once the lawyers  
16          are done. The question is whether the injuries  
17          were natural, reasonable, and a probable result  
18          of the first accident. Okay? So my clients  
19          can't be liable in this case unless the  
20          injuries were natural, reasonable, and  
21          probable. "Probable," of course, means  
22          "likely." Okay?

23          So -- and that's why we're only in the  
24          case to avoid finger pointing, not because  
25          there's a valid claim here, because who could

1 possibly think that the injuries here were  
2 reasonable or that this was likely going to  
3 happen?

4 And so just -- you remember the evidence  
5 and I just want to run through a few things.

6 Mr. Johnson had virtually unlimited sight.  
7 Remember the testimony is as he came up the  
8 road, he could see for almost -- what was  
9 it? -- 4,000 feet or something. It was  
10 basically .8 miles. There's evidence that he  
11 saw the lights and I'm not sure why he didn't  
12 stop. I'm not sure if you remember his  
13 explanation for that.

14 Hundreds of cars ahead of him were able to  
15 stop without incident including about 70  
16 tractor-trailers. Remember his testimony about  
17 how many tractor-trailers stopped behind the  
18 first accident without plowing into anybody.

19 Also, the speed in terms of the speed of  
20 the impact. All those things are not  
21 reasonable and they're not claiming that they  
22 are. They've admitted that what -- Mr. Johnson  
23 admitted what he did was not reasonable.

24 If they're not reasonable, then there  
25 can't be a connection between the first wreck

1 and the second wreck. And that's the point.

2 And, again, remember Mr. Johnson did plead  
3 guilty to criminal charges, and criminal  
4 conduct is not reasonable by definition. It's  
5 not foreseeable.

6 So that's basically it. I just would  
7 ask -- and that's -- again, you can see why I'm  
8 going first, is just to kind of get the lay of  
9 the land. Mr. Dial's going to address his  
10 client's contentions and the damages. I'm not  
11 even going to talk about the damages in the  
12 case because, frankly, I'm confident that you  
13 guys will agree that there should be no  
14 liability as to my clients, Greywolf and  
15 Mr. Tayloe.

16 Certainly, you know, it's a difficult case  
17 and Megan is certainly a wonderful person. I'm  
18 married to a nurse. I know how special nurses  
19 are and I know that we all hope that she moves  
20 forward, and perhaps the conclusion of this  
21 trial and having this case over with will help  
22 her somewhat and I know that's what we all  
23 hope.

24 On the verdict form that you'll get -- I  
25 left it over there -- there is a question. And

1 where you deal with my client, Greywolf, is the  
2 third question.

3 Thanks, Dave.

4 It's Question No. 3. And the other  
5 attorneys may go after this, but basically you  
6 return a number for damages and then there's a  
7 bunch of questions about U.S. Xpress, and they  
8 can address that.

9 But where you address my client's role,  
10 Greywolf, is Question No. 3, and it says -- it  
11 asks you to put percentages for what happened  
12 here between Mr. Johnson and Mr. Tayloe. Okay?  
13 Again, Mr. Johnson, the guy for Total  
14 Transportation, and my client, Mr. Tayloe.

15 What I would ask you to do -- and I'm sure  
16 the plaintiffs aren't asking you to do any  
17 different -- is to put a zero there, and so  
18 assign 100 percent of what happened to the  
19 person who was the direct cause of Megan's  
20 injuries. So I would ask that you put a  
21 hundred percent on the codefendants and  
22 zero percent as to my clients for all the  
23 reasons that I've outlined. But that's where  
24 you address it and that's how you do what I'm  
25 respectfully asking you to do.

1           That's it. I don't know what anybody else  
2           is going to say. I've tried to be thorough. I  
3           didn't want to spend a few minutes and explain  
4           to you what the law is and why the law requires  
5           that there be a verdict in my client's favor  
6           because the actions of the second accident were  
7           not probable or reasonable or foreseeable.

8           Okay?

9           That's it. Thank you very much.

10          THE COURT: Thank you, Counsel.

11          MR. D. DIAL: Thank you, Your Honor. May  
12          it please the Court.

13          THE COURT: Yes, sir.

14          MR. D. DIAL: Good afternoon, members of  
15          the jury. It's been since, I guess, Tuesday  
16          morning or maybe it was Tuesday afternoon that  
17          I got to speak to you directly last. It seems  
18          like it's been about a month, frankly. It's  
19          been a long, hard week and that's what I want  
20          to do on behalf of my clients, Total  
21          Transportation, Mr. Johnson, U.S. Xpress, is  
22          thank you for your hard work. There were some  
23          long trial days here and I appreciate it. It's  
24          difficult to sit and listen to lawyers talk and  
25          witnesses testify, documents being introduced

1 into evidence, and it's a real job and it's a  
2 very important job.

3 And all of you have paid attention. I've  
4 watched you and we very much appreciate it, and  
5 we're depending on you to do what you took an  
6 oath to do and I know you will do, and that is  
7 to make this decision -- and I'm not  
8 embarrassed to say it -- based on the evidence  
9 and based on the law.

10 And the decisions you're going to be  
11 making, generally -- and the verdict form will  
12 have these on them -- but, generally, to me the  
13 primary focus of your attention today would be  
14 what is fair compensation for Megan Richards.  
15 I told you that in my opening and I'm repeating  
16 it today, what is fair compensation to her.

17 And, again, I'm not apologetically asking  
18 you to follow the law, and the law the Judge  
19 will read to you will tell you that when making  
20 that decision, it is to be a decision that is  
21 fair to all parties.

22 I don't apologize for asking you to do  
23 what the law requires, because you want to  
24 abide by your oath, I'm certain, and you will,  
25 and that is what the law requires when deciding

1           that number: Fair to Mr. Johnson, fair to  
2           Megan Richards, fair to Total Transportation,  
3           fair to U.S. Xpress and their companies.

4           The other question you'll be asked  
5           about -- and I'm going to talk about each of  
6           these -- is whether John Johnson -- there's a  
7           claim for punitive damages made by plaintiff's  
8           counsel in this case, and the question will be  
9           whether John Johnson acted maliciously,  
10          wantonly, oppressively, or with an entire want  
11          of care. And it's more than negligence and  
12          it's more than even gross negligence. It is a  
13          very difficult standard to meet and it has to  
14          be met by clear and convincing evidence. It's  
15          something more than having a wreck. It's  
16          something more than having a tragic, horrific  
17          wreck. You have to show that he, essentially,  
18          was acting willfully to cause this crash,  
19          wantonly to cause this crash, and you will be  
20          asked to make that decision.

21          Next, you'll also be asked -- and I know  
22          this is probably the most scintillating part of  
23          the case for you -- but you'll be asked to  
24          decide whether these companies are independent  
25          and acting independently, although they

1 cooperate from time to time, but are  
2 independent companies, separate from each  
3 other, and that they're controlled by different  
4 folks and they operate independently, although  
5 since they're a member of the family, there are  
6 instances with how they cooperate to make them  
7 all more efficient. That was another question  
8 you'll be asked -- or line of questions asked,  
9 actually, you'll see on the verdict form when  
10 you get it, you have to answer that question  
11 about a number of different companies.

12 So as we go forward in answering those  
13 questions, it is my hope that I can go over the  
14 evidence with you and provide with you what you  
15 need, the ammunition you need to fairly answer  
16 those questions.

17 But before I go through that, I want to  
18 talk about a few other things that you should  
19 consider while you're making that decision.

20 In the beginning of this case,  
21 Mr. Cheeley, the plaintiff's counsel, said to  
22 you in opening, "Your duty is to sift through  
23 and decide if we, as Megan's lawyers, are  
24 shooting straight with you or if the defendants  
25 are." I accept that challenge and I want to



1 talk to you about that.

2 He also said, "My job and Billy's job is  
3 to lead you on a diligent search for the truth  
4 and I will not mislead you." I want to talk  
5 about whether that promise was fulfilled and  
6 whether there were attempts by the plaintiff's  
7 counsel to get you off course and to divert  
8 your attention and your consideration to  
9 something other than what your job is, and that  
10 is deciding the questions that I just put  
11 forward.

12 The first example of this is that -- and  
13 they said it, I think, again today -- the  
14 plaintiffs said repeatedly during the opening  
15 statement that we, the defendants, believe  
16 Megan is faking or grossly exaggerating her  
17 emotional and mental trauma. I said it in the  
18 opening, that that was false, and I'll say it  
19 again. We have never said that and did not say  
20 this.

21 Recall that when witnesses testified about  
22 Megan and the problems she was experiencing,  
23 including Ms. Richards herself, we didn't  
24 cross-examine Ms. Coon, we didn't cross-examine  
25 Dr. Lane, we didn't cross-examine Mr. Richards,

1 her father. We asked some questions to Megan  
2 Richards, but we didn't challenge that she was  
3 faking. Nobody has said she is faking.

4 They tried to point to, and they did  
5 today, that we had a doctor come in here and  
6 say that her injuries weren't real, but if you  
7 recall, he absolutely said that he wasn't  
8 taking issue with the fact that she had been  
9 diagnosed with PTSD and he was not taking issue  
10 with the fact that she suffered a concussion,  
11 which is a form of a mild brain injury. He  
12 said that and we weren't challenging that. So  
13 that's yet again of -- an absolute  
14 misrepresentation about what a witness said.  
15 He did not say that. Now, I'm going to go back  
16 over what he actually said a little bit later,  
17 but that simply is not true.

18 We do challenge certain things, but it's  
19 not that. What we challenge is whether  
20 Ms. Richards' injuries are permanent or whether  
21 she will recover in order to live a productive  
22 life. We think the evidence is that she will.

23 Now, will she ever forget this incident?  
24 Will she ever get over the grief? Will there  
25 always be some grief because of this event that

1 certainly was a life-changing event? Of course  
2 there will be. In all aspects of life,  
3 reasonable people experience things that go  
4 with them for the rest of their life.

5 So we're not saying that somehow  
6 miraculously this accident and the memory of it  
7 is going to go away; what we're saying is her  
8 injuries, the PTSD and any effects of the  
9 concussion, will recover. She will get better.  
10 That's what the evidence will show and has  
11 shown. That's what we are challenging.

12 We believe that she will recover from  
13 those injuries and she will move forward and be  
14 able to be what she always wanted to be, and  
15 that is a good nurse. We strongly believe that  
16 that's what will happen, that it will not be a  
17 permanent thing and that she will not be  
18 exposed to dementia, another diagnosis that  
19 someone made mention of. It wasn't an actual  
20 diagnosis, but it was a mention that some folks  
21 get dementia. They didn't tie it to  
22 Ms. Richards, it was just thrown out, but I  
23 wanted to address that.

24 What we also said to you was, in the  
25 opening -- and I stand here today -- we said we

1           were prepared to pay for the cost of her  
2           medical expenses to treat her, both past and  
3           future. No question. I said, "Whatever number  
4           they tell you that is, pay it." We don't  
5           dispute it. We owe her that. We caused the  
6           harm. We caused the injury. Now, you didn't  
7           hear that. That was not a number that was put  
8           before you. There's no claim for those.

9                     There's not a lost wages claim. We heard  
10           a lot about concerns of whether or not Megan  
11           would be able to proceed and go forward as a  
12           nurse, but yet they didn't tell you and didn't  
13           tell you today that that's going to cause a  
14           loss of income or earning capacity. They  
15           didn't claim that.

16                    So usually those types of numbers, past  
17           medical costs, future medical costs, and a lost  
18           wages claim, gives the jury some guidance about  
19           what would be fair compensation. It's  
20           something you can enter into the formula to  
21           consider, "We know it's going to cost this;  
22           what, in addition to that, do we give for pain  
23           and suffering or emotional distress," as  
24           Mr. Jones talked about. But you don't have  
25           those for guidance. I'll leave it to you to

1 conclude why you don't have those numbers. I  
2 don't know.

3 The next thing that we heard plaintiff's  
4 counsel do in opening statement was make a  
5 vicious attack on Mr. Johnson. And I  
6 understand Mr. Johnson's at fault. He's always  
7 said he was. He's a man that made a mistake  
8 and you saw when they were playing his  
9 statement, he sobbed throughout. It torments  
10 him.

11 You saw when he was on the stand and he  
12 was talking to you about what he did after the  
13 accident, he teared up and broke down and had a  
14 difficult time.

15 But they want to vilify him even more.  
16 He's a man that took -- accepted the  
17 responsibility and gave up his liberty in doing  
18 it. He is in jail, this fine Marine of 21  
19 years, sitting in jail because he stood up and  
20 did what was right. Did what was right.

21 The attacks on him have been based on  
22 falsehoods. Let's recall some that were gone  
23 over by Mr. Stone.

24 At first, the theory was, "Well, he must  
25 have been looking at his computer. We want to

1 do a forensic analysis of his computer. He was  
2 looking at his computer when he caused this  
3 accident."

4 Well, you know what? That didn't work  
5 out. He was not. The analysis that their own  
6 expert did proved without any doubt that he was  
7 not on any computer.

8 The next thing we heard forever was, "He  
9 had to be texting when this happened." Well,  
10 that proved to be wrong, as well, and for the  
11 first time today, I think I finally heard the  
12 plaintiff's counsel say, "We agree he wasn't  
13 texting at the time of the accident."

14 Then there was a theory maybe he was  
15 distracted because he was on his phone. Well,  
16 we knew that, based on the phone records, that  
17 wasn't true either. He wasn't on his phone.

18 So when all of those fell through, what  
19 did we hear about in opening? What did we hear  
20 on Tuesday that Mr. Johnson surely was doing at  
21 the time of this accident? Mr. Cheeley said --  
22 and I'm reading from the transcript -- "The  
23 driver was more interested in watching  
24 something on his smart phone than he is  
25 watching the road ahead."

1           He went on to talk about how that was  
2           based upon his expert, Mr. Stone, who they flew  
3           all the way from, I think, Wichita across the  
4           country here to testify about this, that he  
5           based it on the fact -- the size of the  
6           download and upload and the period of time.  
7           And I'll talk more specifically about it here  
8           in just a second.

9           But in talking about that, Mr. Cheeley  
10          said, "We know that he was looking at his cell  
11          phone. He had to be, and he's going to be  
12          given the chance to tell you what he was doing,  
13          because up until now he has not told us." He  
14          went on.

15          "Driving while watching movies or  
16          Facebooking or whatever is unconscionable. It  
17          displays a conscious indifference to the  
18          consequences." And then he went on and said,  
19          "Seven young women paid dearly for what John  
20          Johnson was doing on his cell phone."

21          That's what he told you. That's the  
22          latest theory of what John Johnson was doing  
23          that makes him so willfully and wantonly cause  
24          this accident.

25          Well, we all know how that turned out.

1 Mr. Stone came in here and he said, "Yeah, I  
2 can tell that Mr. Johnson had to be streaming a  
3 video or he had to be on some sort of  
4 interactive game or he had to be on some  
5 interactive site, because when I looked at his  
6 cell phone records," which he had for quite  
7 some time, by the way, "I see that" -- he used  
8 the size of the download of 291 megabytes  
9 download and 47 megabytes upload -- "is  
10 consistent with the amount of data you would  
11 use, particularly over a 42-minute period,  
12 which takes him 42 minutes or so from the wreck  
13 up and through the wreck, those two things tell  
14 me," and they obviously must have convinced  
15 Mr. Cheeley, "that he had to be watching a  
16 video or a game," and they vilified him for  
17 that.

18 Well, unfortunately, Mr. Stone made his  
19 opinion based upon the fact that 1 megabyte is  
20 equal to 1,000 bytes. Well, he was only a  
21 thousand times wrong. 1 megabyte is a million  
22 bytes, not a thousand.

23 And so when you did the correct formula,  
24 those downloads were not even big enough to be  
25 an e-mail happening over 42 minutes. They were



1 nothing, and he agreed. Mr. Stone agreed.

2 "No, that size over those minutes certainly is  
3 not a video and certainly is not indicative of  
4 playing a game."

5 So he told you he knew for certain that he  
6 had to be watching a video or he had to be  
7 playing a game, and that turned out to be  
8 wrong. And not just a little wrong, it turned  
9 out to be really wrong and misleading and not a  
10 search for the truth.

11 I think this is evidence that you should  
12 consider when you're considering the  
13 credibility of other positions that plaintiff's  
14 counsel takes -- not the plaintiff herself, but  
15 plaintiff's counsel. When they make arguments  
16 to you, when they make allegations, make sure  
17 you harken back to can I believe those  
18 allegations? Are they really supported by the  
19 evidence or are they supported only by  
20 argument?

21 Once the plaintiff figured out that that  
22 incredibly incorrect assertion, no matter how  
23 certain Mr. Cheeley was about it, was wrong,  
24 they changed course and they said, "Well, he  
25 was fatigued. He had not slept." And I think

1           they said he hadn't slept for something like 24  
2           to -- 36 to 24 hours before the accident, he  
3           didn't sleep.

4                     Well, how would they know that?  
5           Mr. Johnson informed everyone he was resting  
6           during the day when he testified.

7                     They said, "Well, that can't be true  
8           because you were on your phone texting during  
9           that entire period of time," and that was their  
10          proof. They were going to show you that he  
11          couldn't have been resting because there were  
12          no period of time where he wasn't texting.  
13          They just repeated that a few minutes ago.

14                    Well, let's take a look at that. Let's  
15          see if that's supported by the evidence.

16                    Let's pull up Plaintiff's Exhibit 216,  
17          please.

18                    This is an exhibit that was referenced on  
19          numerous occasions. They mentioned, and they  
20          liked to mention often, that it was prepared by  
21          defense counsel, and it was prepared and we  
22          provided it to the plaintiff to try to assist  
23          them in being able to understand what the  
24          records said and they didn't say, but  
25          apparently we weren't that successful.

1           If you look at a part of that exhibit at  
2           the top where I have that 12:23 a.m. is when  
3           he's in Shreveport, if you look at the top when  
4           you get the whole thing. He gets on the bus  
5           and departs for Jackson around 12:30, so the  
6           last text before he gets on that bus -- and  
7           it's a duplicate from the one above it but the  
8           time is right -- is 12:23.

9           Now, when is his next? When does  
10          Mr. Johnson do anything on his phone, his  
11          texting on his phone? Not until 3:18. That's  
12          a three-hour period of time with no texting  
13          activity. That doesn't show he's constantly on  
14          his phone and unable to rest or nap when he's  
15          taking this ride on the bus.

16          And then if we continue down, you'll see  
17          he got off -- that trip ended somewhere around  
18          4:30, so there was essentially another hour or  
19          more where there was no text activity.

20          So during that bus trip, as opposed to him  
21          manipulating that phone the entire time as  
22          plaintiff's counsel has told you repeatedly,  
23          four of the hours were available to nap, as  
24          Mr. Johnson consistently stated he did. He was  
25          resting during that trip when he was coming

1 across.

2 The next thing they told you was while he  
3 was at the terminal in Richland, that he was  
4 constantly texting and there's no way he could  
5 be resting. They just said it a couple of -- a  
6 few minutes ago, reiterated that allegation.

7 Well, what did the actual records show and  
8 this exhibit that they put into evidence show?  
9 Well, when he got to Shreveport, he got  
10 there -- if we go to the bottom part here, he  
11 got to the facility -- excuse me. When he got  
12 to the facility in Richland, Mississippi, he  
13 got there about 7:00 a.m. He told the police  
14 that in his interview.

15 And so if you look what was going on from  
16 7:00 a.m. -- I put it there, it's item 32 --  
17 and you go down, he doesn't get any kind of  
18 text message until 2:32 p.m. That's about  
19 seven-and-a-half hours, plenty of time to be in  
20 that lounge that's provided for drivers to rest  
21 and sleep and be rested up when they start  
22 their trip.

23 So this position that he couldn't have  
24 been rested and therefore was fatigued, the  
25 part of their fatigue case is that he was

1           constantly texting before he started his trip.  
2           He had seven-and-a-half hours, uninterrupted by  
3           text, to rest, because we know that he  
4           eventually did get up and checked on the truck  
5           and he ended up leaving that facility around  
6           5:00. So that's 11 hours available to get rest  
7           and he was just coming off a vacation, where he  
8           said he relaxed during that vacation.

9           There's no evidence that he was up all the  
10          time before he started this trip. He had 11  
11          hours available to him to rest and be fresh and  
12          ready to take this load if he so decided.

13          That's what the actual evidence is about  
14          that, not what plaintiff's lawyers told you in  
15          the opening statement that for 24 -- or 36 to  
16          24 hours this gentleman didn't sleep and,  
17          therefore, that's why he was fatigued.

18          And they say since he was fatigued here,  
19          it's similar to what he was fatigued about way  
20          back in -- four years ago or three-and-a-half  
21          years ago, when he admitted that he fell asleep  
22          and had an accident. But they're trying to do  
23          that because they want you to use that accident  
24          that happened three-and-a-half years ago as a  
25          basis to say that Mr. Johnson acted willfully

1 and to punish him even further by awarding  
2 punitive damages. That's the whole purpose of  
3 that. It doesn't make sense. It doesn't  
4 follow through and it's not consistent with the  
5 evidence. Just because the plaintiff's lawyers  
6 say it with passion doesn't make it so. Look  
7 at the evidence.

8 Another thing that was said on a number of  
9 occasions was that the defendant wouldn't bring  
10 in a single doctor to testify. They said,  
11 "Defendant will bring -- will not bring even  
12 one doctor to challenge the facts which Megan's  
13 doctors have testified. You will be presented  
14 with undisputed testimony about the permanency  
15 of her brain injury, critical issue. The  
16 defendants have no medical experts to disagree  
17 with or deny our medical proof." He said that  
18 on several occasions.

19 Well, you know, prior to Monday evening,  
20 January the 16th, when we got new reports from  
21 Dr. Sass and Dr. Lacy flip-flopping on their  
22 earlier opinions, he was exactly right, we did  
23 not intend to bring a doctor in to testify  
24 because we did not disagree with what Dr. Lacy  
25 and Dr. Sass were saying at that time when they

1 rendered their opinions and held those opinions  
2 for many, many months. So he was correct.

3 I assume the tactic of delay until  
4 literally hours before the case was going to  
5 begin and we were going to be picking a jury,  
6 to tell me that now these people who had been  
7 treating Megan for many months have decided to  
8 change their opinions.

9 And they were big changes. They were  
10 important changes. Dr. Sass previously had  
11 said he saw no evidence of any traumatic brain  
12 injury. That's not a defense witness saying  
13 that, that's not David Dial saying that, that's  
14 not anyone from Total Transportation saying  
15 that; that's the paid-for expert by the  
16 plaintiff saying that, Dr. Sass, for many  
17 months.

18 He issued that report in October of 2015  
19 and never changed it until hours before this  
20 trial was to start, and in that report, he  
21 clearly said -- and he confirmed it when he  
22 testified -- I found no evidence of a traumatic  
23 brain injury, I found no evidence that her  
24 cognitive problems were related to a traumatic  
25 brain injury. So we agree. We didn't have any

1 reason to bring in a doctor.

2 Dr. Lacy at that time said she was  
3 treating her for a concussion and the  
4 aftereffects of a concussion, which is a form  
5 of a brain injury. We agreed. That's exactly  
6 what we believe, it was a concussion that would  
7 eventually alleviate, like most concussions do.

8 We didn't have any reason to come in and  
9 have a doctor disagree with Dr. Lacy. We, too,  
10 agreed with that. There would be no need. And  
11 believe me, y'all didn't need me to bring in  
12 doctors and say, "Amen, I agree with what  
13 Dr. Sass said."

14 So it wasn't until they changed and all of  
15 a sudden out of nowhere, Dr. Sass says, "I  
16 think she has not just a brain injury, but a  
17 complicated mild traumatic brain injury," and  
18 Dr. Lacy all of a sudden says, "I think she has  
19 a complicated mild traumatic brain injury."  
20 And they base it all on an MRI that was done  
21 months after the accident.

22 Now, when we got those, you better believe  
23 we said, "We need to get a doctor here,"  
24 because we don't think that -- that change  
25 doesn't make sense to us. So we consulted with



1 people, with this -- a doctor that happens to  
2 be in Denver.

3 You know, last time I checked, Denver was  
4 still part of the good ol' U.S. of A, and so is  
5 Atlanta, by the way. And I'm a South Georgia  
6 boy anyway, so I know all about Bulloch County  
7 and Bryan County and all these other counties  
8 down here. I've hunted and fished and gone out  
9 down here. I love South Georgia, so don't hold  
10 it against me. In fact, I wish I didn't live  
11 in Metro Atlanta a lot of the time.

12 But Dr. -- yes, he's from Denver and, yes,  
13 he came here, and, yes, we paid him good money.  
14 He charged a high rate.

15 He looked at it and he said, "That's not  
16 the way neuropsychologists and other folks make  
17 a change in diagnosis. They don't rely on an  
18 MRI that's done many months after the accident.  
19 That's not the basis of classifying. You look  
20 at the immediate available information," and  
21 that's what Dr. Lacy and Dr. Sass did  
22 originally and that's why they came up with  
23 their conclusion, but then they changed it. He  
24 said, "That's not clinically sound, that's not  
25 supported by science, that's not supported by

1 medicine, that's not supported by anything.  
2 That's an incorrect diagnosis. It's not  
3 justified."

4 And then he did also agree that their now  
5 more dire projection of future problems was  
6 also not justified because the diagnosis wasn't  
7 justified.

8 He didn't say -- again, he did not say she  
9 doesn't have PTSD, he did not say she didn't  
10 have a concussion and a mild brain injury; he  
11 said, "I agree with their other discussions of  
12 what her future would be."

13 He agreed with Sass 1, where Sass 1 said,  
14 "She won't have any problems being a nurse."  
15 He didn't raise any concerns with that until  
16 the Monday before we started trial. Dr. Lacy,  
17 while raising some concerns, never said that  
18 she would not be able to be a nurse.

19 So of course we now had a doctor here, and  
20 we did get him here because we had a reason to  
21 get him here. Before, we didn't plan on it.

22 And I will say this about Dr. Wortzel. He  
23 came here and he gave that opinion. The  
24 plaintiffs knew what the opinion was. They  
25 cross-examined him about everything but his

1 opinion. They didn't ask him -- they didn't  
2 challenge the opinion in cross-examination.

3 And you know what else they didn't do?  
4 They didn't call back Dr. Sass or Dr. Lacy,  
5 which they had every right to do in rebuttal,  
6 and say, "He was wrong and we were right."

7 So the person that didn't bring you a  
8 doctor to talk about the final issue was the  
9 plaintiffs, and the reason they didn't bring  
10 those doctors back is because they know  
11 Dr. Wortzel was correct. They had every right  
12 to bring in those doctors and say, "We  
13 disagree," so the unrefuted testimony is that  
14 of Dr. Wortzel. That's the unrefuted  
15 testimony.

16 And while he agrees she suffered these  
17 injuries, he does not agree that they are going  
18 to prohibit her from proceeding and going  
19 forward to be a nurse.

20 Excuse me while I catch back up.

21 Now I want to talk to you about the issue  
22 of the award of compensatory damages that  
23 you're going to be making. And the reason  
24 you're going to just be making that, as I've  
25 said enough and you understand it by now, is

1 because Total does not contest and Mr. Johnson  
2 does not contest that he was liable and  
3 responsible for causing these injuries. So we  
4 owe damages, we do.

5 I think you probably know now why we're  
6 here. \$40 million. A lot of money. That's a  
7 lot of money. It doesn't mean Megan -- by  
8 disputing that that's a reasonable sum doesn't  
9 mean I don't think Megan was injured. Again, I  
10 do. \$40 million.

11 Before we specifically address it again, I  
12 do want to remind you of a few things. Your  
13 decision is to be based on the evidence and the  
14 law and it's not to be based on the following.  
15 And this is sometimes difficult for jurors to  
16 do and this is when people like me, whose  
17 clients depend on you, depend on good folk like  
18 you for doing exactly what I know you're going  
19 to do, and that's abiding by your oath and  
20 listening to the judge.

21 The judge is going to tell you that when  
22 doing this, your award of damages cannot be  
23 based on speculation. There was a lot of  
24 discussion about what might happen, what could  
25 happen, but that's not -- that's speculation.

1 That's not giving you -- testifying with the  
2 amount or certainty necessary to tell you it's  
3 going to happen. So you can't base your award  
4 on speculation. Don't do that.

5 You can't base your decision on anger or  
6 passion -- we saw a little bit of that today --  
7 or prejudice or bias, when there was -- for  
8 some reason a lot of mention was made that  
9 somehow maybe Total doesn't think lives in  
10 Bryan County matter. Well, they matter,  
11 absolutely. Just because folks are from  
12 Mississippi and folks are from Atlanta doesn't  
13 mean that we don't think lives down here  
14 matter. He's trying to get you to somehow  
15 react in some prejudice fashion when you're  
16 making your award rather than based on the  
17 evidence and the law.

18 That's why I think we heard a lot of the  
19 evidence about Mr. Johnson. I think they were  
20 just trying desperately to cook up something to  
21 make you mad so that it would influence your  
22 award for compensatory damages, and they failed  
23 miserably on that.

24 So when thinking about compensatory  
25 damages -- and I must say this, there is

1 absolutely something that is very important  
2 here. When you're awarding and thinking about  
3 what Megan's injuries deserve as compensation,  
4 you cannot be awarding because other people  
5 were killed and injured in this wreck. They  
6 had their own cases. Those are done. It's --  
7 this is Megan's case. These are Megan's  
8 injuries. These are not awarding for the  
9 horrific event caused these other things. You  
10 have to remove that, these other fine young  
11 women, Brittney McDaniel and those ladies, from  
12 the equation. Difficult to do, but I'm  
13 confident you will and I'm confident you'll be  
14 fair.

15 So if we can't consider those things,  
16 Mr. Dial, why don't you tell us what you think  
17 we ought to consider. Here is what I believe  
18 the undisputed facts say. And in relating to  
19 you these undisputed facts, don't fall prey to  
20 the ploy that because I bring out additional  
21 facts, it automatically means that I think  
22 Megan is exaggerating. That's not correct.  
23 I'm simply providing you with facts and  
24 evidence for you to consider when making the  
25 decision.

1           Plaintiff's lawyers have a habit of doing  
2           that. They get up here and they say, "When the  
3           defense lawyer comes up here and he comes up  
4           here and challenges the amount of damages I'm  
5           seeking, this \$40 million that I'm seeking,"  
6           he's essentially telling you, "It's code for he  
7           thinks Megan's faking."

8           Well, that's just not true. That's not  
9           true. I'm not. I won't. My client won't, and  
10          they made sure they told me many times. "You  
11          make sure that girl understands we want her to  
12          be fairly compensated."

13          What do I think is the facts that are  
14          relevant to? And we heard the doctor say that  
15          looking at someone's functioning is probably  
16          sometimes the best evidence to see how the  
17          injuries are proceeding, how they're healing,  
18          how they're going forward.

19          Here's some facts. Immediately after the  
20          accident -- you heard this, but I remind you --  
21          two different EMT units did Glasgow Score  
22          ratings on Ms. Richards and she scored 15 both  
23          times, which means she's functioning at the  
24          highest level. She did not have a low Glasgow  
25          Coma Scale. That's something for you to

1 consider.

2 Two CT scans were run, one in Savannah and  
3 one in Augusta, of her brain. None of those  
4 scans showed any structural damage to her  
5 brain, none, no lesions, no bleeding, no  
6 hemorrhages, no edema, nothing. That's  
7 something for you to consider, and those --  
8 these are not disputed facts. We're not  
9 arguing about this.

10 Ms. Richards was able to return to school  
11 in June, a few months after the accident, in  
12 June of 2015, and take her finals that had left  
13 over from April, and she did quite well. She  
14 had a GPA of 3.41. Now, because she's doing  
15 well in school doesn't mean she wasn't injured,  
16 but it is relevant to determine the permanency  
17 and the healing process she's going through.

18 She returned to school full time in August  
19 of 2015. In October of 2015, she saw Dr. Sass  
20 and he ran a battery of tests on her, and at  
21 the end of those tests, I think you'll recall  
22 he showed this page of the results of all that  
23 test and some were higher and some were lower.

24 But the average, her average score, she  
25 was in the 75th percentile, meaning that she's



1 in the -- she's functioning better than  
2 75 percent of the population of the same age  
3 and education. She's in the top 25 percent,  
4 and that's after the injury and before --  
5 Dr. Sass confirmed it was before the concussion  
6 would have necessarily been healed and it was  
7 before she was being treated or very early in  
8 her treatment for PTSD. But even then, those  
9 tests showed she's still functioning in the top  
10 25 percent of similarly situated people.

11 When she gets back to school, which was  
12 essentially her occupation at that time, we  
13 heard her say -- and she's to be congratulated  
14 for it and I absolutely agree she should be  
15 congratulated for it -- I know it took hard  
16 work and courage. She did very well. Her  
17 grades got better and better. Her cumulative  
18 GPA went up and up and she's on the dean's list  
19 every semester and, upon graduating, she  
20 graduated with honors.

21 That is relevant to see how her injuries  
22 are healing, how she's functioning. It doesn't  
23 mean she wasn't injured, but it means -- it's  
24 very relevant to the permanency and ability to  
25 recover.

1           And I should say when I use that word  
2           "recover" -- and I probably have it later in  
3           here -- but there wasn't a single doctor who  
4           said she was not going to recover. Dr. Lacy,  
5           who probably had the most negative outlook of  
6           anyone -- in fact, I frankly was astounded by  
7           some of the things she said -- but she even  
8           said that her recovery may be longer, but she's  
9           going to recover. It could be longer -- she  
10          said because of the combination of the PTSD and  
11          the mild brain injury, she would be longer, but  
12          she did not say she was not going to recover.

13          Dr. Wortzel said based upon what he saw  
14          from the other folks, that she was going to  
15          recover.

16          Dr. Sass, although he said she may be at  
17          increased reas -- increased risk for some  
18          things -- talk this long and this fast, you get  
19          dry -- that even then he would not say that she  
20          was certainly going to experience these, that  
21          it was just -- it wouldn't be real whether she  
22          would or she wouldn't have these increased  
23          risks. So he didn't say that she was not going  
24          to recover.

25          No doctor has come in here and told you

1 based on a reasonable degree of medical  
2 certainty Megan Richards is not going to be  
3 able to be employed as a nurse, and that, I  
4 say, is the reason we don't have a lost wages  
5 claim or a lost increased earning capacity,  
6 because no one would say that. No one believes  
7 that.

8 The -- I think perhaps to me -- you may  
9 think differently -- the most persuasive  
10 evidence about Megan and her future came from  
11 Dr. Lane, someone who genuinely loves and cares  
12 for Megan, someone who testified that she hopes  
13 Megan marries Jacob.

14 So -- and I will tell you something, I  
15 got -- I have two sons and I know how mamas are  
16 about picking daughter-in-laws. So for  
17 Dr. Lane to say that she would be happy for  
18 Megan to marry Jacob I think speaks volumes for  
19 Megan.

20 She also said -- when there was an effort  
21 made by Mr. Cheeley to sort of push her into  
22 saying that her anxiety was worsening and  
23 wasn't relieving, she said something to the  
24 extent, "No, time is healing wounds, as it  
25 always does." She wouldn't get pushed into

1 that, that she was more anxious than she was a  
2 month ago. She wouldn't go that route, even  
3 though she was being shoved in that direction.

4 She then testified about her -- and I hope  
5 I say this right, once you get over four of  
6 five syllables I have have trouble -- that her  
7 preceptorship that she did in Augusta or her  
8 clinicals, I'll call it from this point  
9 forward, in Augusta in the neuro ICU unit, she  
10 talked about that and she talked about how  
11 that's hard. You work 12-hour shifts, it's  
12 stressful, it's hard, it's difficult, and she  
13 talked about the fact that maybe Megan's  
14 situation was even more stressful because she  
15 would drive often from Statesboro to Augusta to  
16 do that, participate in that shift. Sometimes  
17 she would drive back; sometimes she would stay  
18 at Dr. Lane's house for the night. So she had  
19 a combination of being on the road for that  
20 drive and long shifts, and what did she tell  
21 you? How did Megan do? This is recent now.  
22 This isn't in the past, we're talking about the  
23 very last semester here. She said the reports  
24 she got back from friends that she knew is that  
25 Megan did well, performed well under those

1 stressful circumstances, and that's also played  
2 out by the fact that Megan made an A in that  
3 class that semester.

4 So that, to me, is very credible evidence  
5 of what we can look to to see how Megan -- how  
6 she's recovering and how she's going forward.

7 The other thing Dr. Lane said was -- and I  
8 think Mr. Cheeley asked this about everyone --  
9 he said, "Was" -- asked Dr. Lane, "Were you  
10 worried, in view of the issues and the injuries  
11 that Megan has suffered, are you worried about  
12 her ability to perform as a nurse?" And  
13 Dr. Lane, if I recall it -- I wish I could have  
14 the quote exactly because I liked it, but I  
15 didn't get that transcript in time -- she said  
16 something to the effect, "Well, we in the  
17 medical community all come with some issues.  
18 We all come with issues," and she said, "and we  
19 just work through them and we get over them."

20 And she indicated that, of course, Megan  
21 would be able to do the same thing. Yes, she's  
22 coming with some issues, but she's confident,  
23 like others in the community, to work through  
24 it and continue to be successful. And I  
25 believe that, too, and I believe that's what

1 the evidence is.

2 Another piece of evidence is something  
3 that Megan shared with us yesterday in talking  
4 about her job. She described the interview  
5 process she has to go through to get the job  
6 that she got.

7 She selected that she wanted to be in ICU  
8 and pediatrics and that she had to go through a  
9 very strenuous and stressful interview process  
10 with panels. You would go from panel to panel  
11 and be quizzed. She obviously performed very  
12 well in that, because she was offered  
13 employment in both of her chosen fields, so it  
14 shows that Megan is progressing in very  
15 stressful environments.

16 And, finally, she has moved to Savannah,  
17 she let us know, to prepare for taking her job  
18 and she's also studying for the boards.

19 So those are some objective data that are  
20 not in dispute in this case for you to consider  
21 when making your award. It doesn't mean that  
22 she wasn't suffered -- doesn't mean she doesn't  
23 have incredible grief and sorrow about this  
24 incident, but it's very relevant to what her  
25 future holds.

1 I should mention that in Sass 1, before he  
2 changed, he offered no opinions -- he said  
3 there was nothing about what he saw that would  
4 prohibit Megan from being a nurse. His  
5 concerns that he raised -- and they were just  
6 raised -- about being increased risk came  
7 later, and there was nothing in Dr. Lacy's  
8 first report that indicated that Megan wouldn't  
9 become a nurse.

10 So that's the things for you to consider  
11 when you're making your award, and I know that  
12 you will consider it.

13 I'm going to argue a little bit about the  
14 corporate issues very shortly.

15 Some of the evidence you heard today when  
16 the folks testified was that there is an  
17 agreement between the companies about services  
18 that would be provided by U.S. Xpress or U.S.  
19 Enterprise and that that agreement specifically  
20 said, "Just because we're providing these  
21 services doesn't mean that we're joint venture  
22 partners, we're not agents with each other,  
23 we're not partners with each other," set forth  
24 as clear as it could. That's the document that  
25 set forth to control their relationship.

1           You saw that each and every one of the  
2           entities was its own legal entity, and under  
3           the law that means they're all a person, just  
4           like each of us is a person. Doesn't mean they  
5           can't be part of a family just because they're  
6           a person. We all are parts of a family.

7           There was no evidence that anyone controls  
8           Total but John Stomps, and that was confirmed  
9           today by Lisa Pate. And I think you probably  
10          saw, from Mr. Stomps' personality when he  
11          testified, that he can be forceful, and he  
12          controls and operates that company. There's no  
13          question about that, and he does nothing, as  
14          they said today, to control or exert any  
15          influence or control the operations of the USX  
16          entities.

17          So there's no control of Total, there's no  
18          control by Total and John Stomps of USX,  
19          there's no mutual control; therefore, they  
20          can't be joint venture partners.

21          They compete for the same customers.  
22          Wouldn't make sense, if they're all just the  
23          same, why you'd go compete against one another,  
24          and they gave examples of several companies  
25          they do that with and both have contracts with,



1 which have different terms and different rates.

2 They also said something today. They  
3 said, "Well, here's some evidence of it,"  
4 during cross-examination of Ms. Pate. They  
5 said, "Here's the bill of lading." The bill of  
6 lading has to do with, you know, what goods  
7 you're carrying to what location. It's a  
8 document you have to have as a trucker coming  
9 across the U.S. He said, "The bill of lading  
10 in this case shows U.S. Xpress." That's what  
11 it showed.

12 Well, we had to go get the document and  
13 actually put Ms. Pate back up here, because  
14 that just wasn't right. It shows Total was the  
15 carrier that was listed on the bill of lading.  
16 Another mistake being made.

17 There simply is no evidence that the  
18 things that were pointed to by Mr. Gingras  
19 about what he believes makes these companies  
20 all one are things that are done in corporate  
21 life every single day, consolidated financial  
22 statements, consolidated tax returns, the  
23 consolidation perhaps into one unit to do G&A  
24 work, general and administrative work, for the  
25 other operating companies. That's common in

1 almost every corporate tree in America, because  
2 it drives efficiency, it keeps down costs, it  
3 makes their products more affordable, and it  
4 makes them probably more profitable. I was  
5 saying a bad word there, but that's true.

6 So that's not unusual. If that were the  
7 test that was used, then every corporation and  
8 almost every corporate family would all be one  
9 and people wouldn't have been going through a  
10 lot of difficulty to set up different  
11 corporations and operate them independently.

12 There simply is no evidence that you can  
13 rely on to hold that that corporate structure  
14 is not effective, is not real, and that these  
15 folks are just one and the same. They are not.

16 And there's no question, despite the fact  
17 that one of the services that is provided by  
18 U.S. Xpress for its subsidiaries is that it  
19 does the W-2 filings, which is perfectly legal  
20 and valid under the tax laws. Rather than  
21 having several different companies do it, they  
22 have -- they do it and so it's going to show  
23 U.S. Xpress. That's who. That doesn't mean  
24 that's actually who Mr. Johnson works for;  
25 that's just an accounting function that's done

1 on behalf of everyone.

2 So listen closely, and I think the  
3 evidence is overwhelming that even though  
4 Mr. Gingras talked about control, he never --  
5 he never would have answered the question,  
6 frankly, but he never would tell you of any  
7 instance where he saw U.S. Xpress exerting  
8 control over Total.

9 He admitted that they could and we  
10 admitted that they could, but they don't, and  
11 that's what's important and he gave you no  
12 evidence of them doing that.

13 I'm going to wrap up now and I want to say  
14 to you all thanks again. This is a very  
15 difficult time for trial lawyers, particularly  
16 defense lawyers, because I'm done and I can't  
17 do anything else. This case is about to get  
18 out of my hands and that's a feeling that you  
19 don't like. It's a feeling of a lack of  
20 control.

21 I've got to sit down and shut up, and I  
22 know you'll be happy for that to happen, but  
23 let me say what makes it easier is that I know  
24 when it leaves these hands, it's going to go  
25 into your hands, and you're good, fair-minded,

1 law-abiding citizens and we have perfect  
2 confidence that you're going to return a fair  
3 verdict to the parties.

4 Thank you very much.

5 THE COURT: Thank you, Mr. Dial.

6 Ladies and gentlemen, we've gone about an  
7 hour-and-a-half, so we'll give you a break.  
8 You can step out with the bailiffs.

9 (Whereupon, a recess was taken from 2:54  
10 p.m. to 3:13 p.m. and the following proceedings  
11 were held outside the presence of the jury.)

12 MR. D. DIAL: I think we had -- I know we  
13 had one exception, Your Honor, that in the  
14 percentages, when allocating percentages,  
15 rather than just having Defendant John Wayne  
16 Johnson, it also has Defendant Total  
17 Transportation.

18 There's no independent claim against  
19 Total, and the law is -- and I have a case for  
20 Your Honor -- that when you have vicarious  
21 liability, you only put on the verdict form the  
22 entity who's the active tortfeasor.

23 THE COURT: Does the case state that?

24 MR. D. DIAL: Yeah.

25 THE COURT: Let me look at that case.

1 MR. D. DIAL: I have to give you the cite,  
2 Your Honor. I tried to get them to pull it up  
3 on the computer for you.

4 THE COURT: That would be great.

5 MR. D. DIAL: Bob, can you pull up the  
6 corporation case?

7 Now, that's just some notes here, Judge.  
8 I hope I'm not sending you anything --

9 THE COURT: I understand.

10 MR. D. DIAL: -- I didn't say anything bad  
11 about you in there.

12 THE COURT: Hey, listen, you can say  
13 whatever you like. I've been called a lot of  
14 things over the years. My skin's getting  
15 thicker. As I approach retirement, it's  
16 getting real thick.

17 MR. D. DIAL: Don't blame you. Me, too.

18 THE COURT: If it says that, that I'm not  
19 supposed to put that in the verdict form, we'll  
20 change it.

21 MR. D. DIAL: If it doesn't say that, I'm  
22 blaming him, Your Honor. I depend on him to  
23 give me the right law.

24 MR. BARBER: While we're doing that,  
25 Judge, I'd like to just also reiterate my

1 objection to Question No. 2. It says, "Do you  
2 find that one or more of the following  
3 defendants had a unity of interest and  
4 ownership," and then just lists them.

5 But there are three different theories,  
6 and I think as to each theory, the defendants  
7 need to be separately represented on a jury  
8 verdict form. There is no common enterprise  
9 liability theory in Georgia. That's a theory  
10 in other states.

11 THE COURT: What do you suggest -- and  
12 I've asked you before -- what do you suggest  
13 the jury question should say?

14 MR. BARBER: Same question except just  
15 three times for each theory. The joint  
16 venture, "We do agree there was a joint venture  
17 between Total Transportation and one of the USX  
18 defendants." If they answer "yes," here they  
19 are. And there's no percentage, remember --

20 THE COURT: Right.

21 MR. BARBER: -- this is just a "yes" and  
22 they owe it.

23 THE COURT: Right.

24 MR. BARBER: Same thing with alter ego,  
25 "Do you believe that they're alter egos," and

1 the third one would be, "Do you believe the  
2 acts of John Wayne Johnson was acting as an  
3 agent for one of the USX entities?" "Yes" or  
4 "no." "If so, list them."

5 THE COURT: Okay.

6 MR. BARBER: So it's not that much  
7 different than this; it's just I think we need  
8 to break out each of the three theories.

9 MR. VARNEDOE: In light of Your Honor's  
10 sort of hybrid charge that we, I think, all are  
11 good with, I think the verdict form reflects  
12 what the instruction to the jury is going to  
13 be.

14 THE COURT: Well, that -- I respect your  
15 position on that. I'll overrule it. It's  
16 preserved for the record.

17 MR. BARBER: Okay. Thank you, Judge.

18 MR. BARR: Judge, just for the record, I  
19 was just -- except to the extent we didn't use  
20 the defense version, which had a preliminary  
21 question that they would ask "yes" or "no"  
22 whether they found proximate cause as to my  
23 client, Mr. Tayloe, and only if they did would  
24 they then move down to the percentages, No. 3.  
25 I was able to explain to them to put a zero --

1 THE COURT: You did a great job in front  
2 of the jury and I'm sure you've cured any error  
3 I might have committed.

4 MR. BARR: Just wanted to state that.  
5 Thank you.

6 MR. VARNEDOE: Okay. That case doesn't  
7 speak to a verdict form --

8 THE COURT: It doesn't.

9 MR. VARNEDOE: -- all it does is say if  
10 you -- I mean, it's just the standard law about  
11 respondeat superior liability. But, I mean,  
12 for the jury -- for the jury to sit there --

13 THE COURT: I just don't see the harm --

14 MR. VARNEDOE: I don't, either.

15 THE COURT: -- because you've admitted  
16 that. It's actually been entered as a  
17 stipulation, so I'll allow it to go out as is.  
18 But your objection's noted for the record.

19 MR. VARNEDOE: Thank you, Your Honor.

20 THE COURT: Yes, sir.

21 All right. Bring the jury in, please.

22 (The following proceedings were held in  
23 the presence of the jury.)

24 THE COURT: Everyone please be seated.

25 Mr. Cheeley, you may now conclude for the



1 plaintiff.

2 MR. CHEELEY: Thank you, Your Honor, and I  
3 want to thank each and every one of you members  
4 of the jury on behalf of Megan and Billy and  
5 Keith and Carl.

6 You know, we've been working on this since  
7 shortly after this wreck happened, and the  
8 first question that came to our minds was, "Why  
9 did this happen?" You know, we've all been  
10 wondering, "Why did this happen? Why did a --  
11 why did a truck driver not see that traffic was  
12 stopped up ahead and he had 4,000 feet to see  
13 it?" I mean, that just doesn't happen. It's  
14 just not a random wreck.

15 We knew that he had to be distracted. He  
16 had to be distracted in one of two ways:  
17 Either he was fatigued and he caused a wreck  
18 like he did before back in 2011, when he worked  
19 for the only other tractor-trailer commercial  
20 company and he totaled the truck there and then  
21 immediately got fired and they said, "Don't  
22 even bother applying for a job here again,  
23 you're not eligible for rehire." Then he gets  
24 hired by Total Transportation of Mississippi,  
25 takes it back out on the road.

1           You know, we get his cell phone records.  
2           We see that he's been up a lot. You don't get  
3           restful sleep on a bus, ladies and gentlemen,  
4           you know that. You don't park your common  
5           sense at the courthouse steps when you walk in  
6           this building and listen to the smooth lawyer  
7           talk. He was either fatigued or he was looking  
8           at his cell phone, something on that cell  
9           phone.

10           And we made a mistake relying upon Randy  
11           Stone. He came up with this idea that -- and  
12           he miscalculated and we own it. We apologize  
13           for his mistake. It's not a mistake from the  
14           heart, it was from his head.

15           But we do know this: Mr. Johnson's own  
16           cell phone records showed that he was not  
17           getting the rest that he needed before he got  
18           on the -- a long trip from Richland,  
19           Mississippi, to Savannah, Georgia.

20           You know, there's lives at stake along the  
21           way. A truck driver's got to ensure that he  
22           gets proper rest. He's driving what is  
23           equivalent to an 80- -- 70-, 80,000-pound  
24           missile at 68 to 70 miles an hour.

25           So that's one explanation, possibly, he

1 was fatigued. But, you know, even that didn't  
2 set well with us as we continued to talk about  
3 it and wrestle with it, because how could he  
4 keep his truck in the lane, in the right-hand  
5 lane, all that distance if he was asleep?  
6 Surely, you know, Mr. Robenolt -- or Sergeant  
7 Robenolt, who passed him some distance back,  
8 would have seen him weaving off the road, but,  
9 no, none of that. He was staying in his lane.

10 So we believe that he had to be distracted  
11 looking at something, and most likely it was  
12 some of those pictures that Anastasia had sent  
13 him. We didn't get into the details of what  
14 those pictures might be, but he's a 57-year-old  
15 man and she's a 26-year-old woman. You can  
16 figure that out on your own.

17 If he was looking at his cell phone or if  
18 he was fatigued and driving at 68 miles an  
19 hour, that is unconscionable in my book where I  
20 come from. I don't care what Mr. Dial has to  
21 say about trying to sugarcoat it, it's  
22 unconscionable that a man would drive a  
23 tractor-trailer, knowing that he's had a  
24 problem falling asleep in the past.

25 It may just not be a good idea to be

1 riding a bus the very night that you're  
2 supposed to leave on the trip the next morning  
3 at 7:00 a.m. You don't get good sleep on a  
4 bus. Maybe he should have gone to Richland,  
5 Mississippi, the day before and got a hotel and  
6 got a really good night's sleep before he gets  
7 on the road with this load.

8 And, you know, and then to make matters  
9 worse, when he gets there at 7:00 a.m. in the  
10 morning, his truck's not even ready. He has to  
11 go sit and cool his heels for nine or ten hours  
12 in a driver's lounge, of all places, where  
13 there are no beds, TV's going, other drivers  
14 are talking. I'm sure they're, you know,  
15 cutting up in there. You can't sleep in a  
16 truck terminal driver's lounge.

17 Then he hits the road to Savannah,  
18 Georgia, and that's where, at Mile Marker 141,  
19 Megan's world and five other young women who  
20 lost their lives and Brittney McDaniel, that's  
21 where their world changed.

22 I told you in opening statement -- I read  
23 you a note that Megan wanted me to read to  
24 y'all, and I'm going to read it again because I  
25 think it bears emphasis of what she's going

1 through. It sums it up.

2 When she looks at this car that she was in  
3 and the mangled mess that it's in, here's what  
4 she had to say. "When I look at this picture,  
5 I see a picture of me. Even though I look  
6 normal on the outside, I really feel like  
7 damaged goods on the inside. So when I look at  
8 this picture, instead of seeing the totally  
9 destroyed car, which I am amazed that I did not  
10 die in, I see a picture of what happened to my  
11 body, to my back, to my brain, my memory, my  
12 emotions, my confidence, my relationships, my  
13 career, my hopes, my dreams, my future, my  
14 everything. I know that each one of you see a  
15 picture of a horribly mangled SUV, but I see a  
16 picture of my whole life cracked and not put  
17 together, smashed and damaged from the inside  
18 out. But when people look at me now, they see  
19 a Megan who is different from the Megan who  
20 enjoyed everything about life and looked  
21 forward to my future with enthusiasm. That was  
22 before April 22, 2015. That day changed my  
23 life forever. When people see me, the Megan on  
24 the outside, they have absolutely no idea just  
25 how much things have changed on the inside."

1           You know, Mr. Dial, I don't know if he was  
2           hearing the same evidence that you and I were  
3           hearing, but they, Mr. Johnson, Total  
4           Transportation of Mississippi, and the parent  
5           company that controls them, they have taken  
6           away Megan's fullness of life and all of the  
7           good that she was going to do for other people  
8           as a nurse. They've taken away the fullness of  
9           what she was going to give to her community,  
10          and it's a loss to every one of us.

11           How have they done that? Well, you know,  
12          they criticize us for bringing in the best  
13          medical evidence of a brain injury that you  
14          could possibly have.

15           Chip, would you put that up on the screen,  
16          the MRI, please?

17           You heard Dr. Forseen, who is a  
18          neuroradiologist. There's not very many of  
19          those. He's a neuroradiologist in Augusta. He  
20          did an MRI at the request of Megan's  
21          neurosurgeon because Megan was still having  
22          problems in November 2016. A year-and-a-half  
23          after this wreck, she was still having the same  
24          problems. She was having forgetfulness. She  
25          was having to take notes.

1           You heard her roommate talk about how she  
2           used to have a photographic memory before this  
3           wreck. She was the one on easy street in  
4           school. She was helping others make good  
5           grades in school.

6           And then after this wreck, everything up  
7           here changed, and we wanted to know why. Why  
8           did it change? Why is Megan still having all  
9           these problems with memory?

10          She went back to see her neurologist,  
11          Dr. Shaver in Augusta, who treated her  
12          initially when this wreck occurred. Dr. Shaver  
13          was concerned, so she sends her to have another  
14          MRI done -- or to have the first MRI done.  
15          You'll remember the first two scans that were  
16          done were CT scans, one at Memorial in Savannah  
17          and then one in Augusta.

18          And you heard what Dr. Forseen said, and  
19          even their expert, who -- Johnny-come-lately  
20          expert who they flew in from Denver yesterday,  
21          he didn't refute this. He can't because he's a  
22          neuropsychiatrist, he's not a neuroradiologist.  
23          He doesn't know about MRIs and  
24          susceptibility-weighted imaging MRIs, SWIs.  
25          It's probably the most sophisticated MRI you

1 can do. Not every hospital in Georgia has that  
2 kind of equipment. It's very high tech and  
3 very expensive. It takes a trained person,  
4 very particularly skillful, trained person like  
5 Dr. Forseen, to even read them.

6 He counted 8 to 10 hemosiderins in Megan's  
7 brain in the left frontal lobe. That's where  
8 all the executive function of the human body is  
9 concentrated.

10 Now, I guess Mr. Dial thinks that I guess  
11 that just happened somehow. The defendants  
12 would have you believe that that didn't happen  
13 in this wreck. They've known -- they've known  
14 since back in early December -- when we first  
15 got notice that she had this mild traumatic  
16 brain injury from doing that MRI, we told them  
17 immediately about it.

18 And you know what? We didn't know until  
19 yesterday that they were talking to  
20 Dr. Wortzel, even back in mid December, about  
21 it. We didn't find out about Dr. Wortzel until  
22 yesterday or the night before, when they said  
23 they were going to bring him.

24 So, yeah, I was able to stand in front of  
25 each one of you on Tuesday during opening



1 statements and say, "They're not going to bring  
2 a single medical person to refute our medical  
3 evidence," because I didn't even know about  
4 Dr. Wortzel until two nights ago.

5 You know, I really -- I feel like the  
6 defendants are attacking me because they know  
7 they can't attack Megan. I wanted and Billy  
8 wanted to get the best medical proof, the most  
9 up-to-date information. We knew this case was  
10 coming to trial. We wanted to get you the best  
11 medical proof and evidence available to explain  
12 why is Megan still having problems if she just  
13 had a concussion. That didn't make sense to  
14 us, and I'm thankful that we took the time to  
15 get the answers for you.

16 I am burdened, Billy is burdened, for  
17 Megan. We feel like she is carrying a  
18 millstone around her neck, and it's a millstone  
19 that was placed on her by the corporate  
20 defendants over here and their corporate  
21 driver. She didn't ask for any of this. She  
22 didn't volunteer for this.

23 And now it sounds like they're wanting  
24 you, ladies and gentlemen of the jury, to give  
25 them a pass, to just treat this as a, "Oh, it's

1 not a mild traumatic brain injury, it's just a  
2 concussion. She'll get over it." Well, it's  
3 been 19 months since this wreck happened and  
4 she's not over it.

5 You know what Dr. Lacy had to say.  
6 Dr. Lacy has seen Megan, I think she said, 16  
7 to 18 times. Isn't it -- by contrast, isn't it  
8 amazing that in the 19 months that this case  
9 has been pending, that the defendants have not  
10 asked one time for Megan to be evaluated by a  
11 doctor of their own choosing? That tells you  
12 something. They could have done that. It's  
13 called an independent medical examination.  
14 They could have asked for it, but they didn't  
15 do it because they knew that what we were  
16 claiming about her injuries were true.

17 And it's also telling that when we put  
18 Dr. Lacy on the stand the other day, they  
19 didn't ask her a single question. They didn't  
20 challenge her at all. You need to take that  
21 into account, ladies and gentlemen.

22 And I'm going to tell you, I want to  
23 remind you, what Dr. Lacy had to say about  
24 Megan. Dr. Lacy is a neuropsychologist. She  
25 treats people with brain injuries for a living.

1 She doesn't fly around the country at a  
2 moment's notice and give some jackleg opinion  
3 to some defense group that needs her and bail  
4 them out of a problem.

5 I'm reading from Dr. Lacy's notes that she  
6 testified from on the stand. She says, "Megan  
7 Richards has been diagnosed with posttraumatic  
8 stress disorder, and initially she was  
9 diagnosed with post-concussive syndrome as a  
10 result of her injuries secondary to a multiple  
11 motor vehicle collision on 4/22/2015. She was  
12 initially diagnosed with acute stress disorder,  
13 often a precursor to PTSD, within one month  
14 after this wreck and continued to have symptoms  
15 that met the criteria for PTSD after one month.  
16 She met not only one, but three possible  
17 precipitating events that are required for a  
18 diagnostic -- or a diagnosis of PTSD:

19 Number one, experience a life-threatening  
20 event. Well, I think we all can agree with  
21 that, that she did experience a  
22 life-threatening event.

23 Number two, she witnessed a serious injury  
24 or death to others. Yeah, she sure did.

25 And then, number three, she learned about

1 the violent deaths of her friends.

2 So she didn't meet just one, but she met  
3 all three of the criteria of PTSD. And that's  
4 within a month of this wreck.

5 So this is not a situation where she can  
6 just get over it, that this is going to clear  
7 up. What explains the sweating in the bed  
8 every night if she can just get over it?

9 What explains the horror that is filled in  
10 her heart when she's driving on the interstate  
11 and sees a tractor-trailer in her rearview  
12 mirror, if she can just get over it?

13 What explains the 150 milligrams of Zoloft  
14 every day to battle depression if she can just  
15 get over it?

16 What explains the necessity of having to  
17 take a prescription medication just to try to  
18 sleep at night if she can just get over it?

19 Dr. Lacy said she is very concerned about  
20 Megan. She has significant depression -- I'm  
21 reading from her notes -- she has significant  
22 depression, anxiety, and survivor's guilt as a  
23 result of the traumatic experience that was  
24 perpetrated on her by these corporate  
25 defendants and their corporate driver.

1 I'm reading on. Dr. Lacy says, "To what  
2 degree a person may recover or experience  
3 residual symptoms is unknown. Some patients  
4 have symptoms for the rest of their lives.  
5 There is a study that suggests increased risk  
6 of dementia" -- and, Megan, I'm sorry I have to  
7 read this in front of you.

8 MS. RICHARDS: It's okay.

9 MR. CHEELEY: "There is a study that  
10 suggests increased risk of dementia with PTSD  
11 and substantial additional evidence that there  
12 are both structural and chemical changes in the  
13 brain in patients with PTSD."

14 You remember the study Dr. Lacy talked  
15 about? 50,000 people were studied and there  
16 was a substantial increased risk of people  
17 developing dementia after sustaining a  
18 traumatic brain injury?

19 "TBI" -- she goes on to say, "TBI causes  
20 permanent changes to the brain structure. The  
21 fact that she has both PTSD and complicated  
22 mild traumatic brain injury suggests that her  
23 need -- or her road to recovery will be more  
24 prolonged and difficult, with the final outcome  
25 being difficult to determine in any single

1 individual."

2 Listen to this part. "I have serious  
3 concerns about her ability to work in a  
4 pediatric or neonatal ICU unit, as she may  
5 struggle with memory, multitasking, and  
6 accuracy in her work, as well as the emotional  
7 component of the position and the physical  
8 demands that may aggravate and maintain her  
9 pain condition."

10 That's what Dr. Lacy, who is -- who knows  
11 Megan, said, not what some out-of-town expert  
12 who's willing to say whatever for \$500 an hour  
13 says about her.

14 I also want to refer you to what -- remind  
15 you of what Dr. Sass testified about. He  
16 says -- and, remember, Dr. Sass took the time  
17 not only to give Megan a neurological --  
18 neuropsychological exam that lasted over eight  
19 hours, something that Dr. Wortzel didn't even  
20 do. Dr. Sass has met with Megan. He met her  
21 as recently as last November and he saw that  
22 she was still having the same problems. He was  
23 concerned. This doesn't make sense if the  
24 diagnosis is a concussion. She shouldn't still  
25 be having these symptoms.

1           So he was relieved when he learned in  
2           early December that an MRI was being done on  
3           Megan, and it was a sophisticated MRI that  
4           would show conclusively whether or not she had  
5           a brain injury or whether she ought to just be  
6           getting over it.

7           And here's what Dr. Sass had to say. By  
8           the way, he called -- before he did any  
9           additional report, he called and spoke to  
10          Dr. Forseen. You remember him saying that? He  
11          didn't want to just read some, you know,  
12          report; he wanted to talk to Dr. Forseen and  
13          understand this susceptibility-weighted imaging  
14          MRI and its results and what Dr. Forseen was  
15          gleaning from those MRI slides showing brain  
16          damage, deposits of hemosiderin.

17          So Dr. Sass concluded as follows: "An MRI  
18          involving susceptibility-weighted imaging was  
19          performed by Dr. Scott Forseen on December 2,  
20          2016, which revealed," -- and pardon me if I  
21          don't pronounce these medical terms correctly,  
22          but he says, "which revealed numerous punctate  
23          foci of magnetic susceptibility artifact at the  
24          corticomedullary junction of the left superior  
25          frontal gyrus, suspicious for shear injury in

1 the setting of previous closed head injury. In  
2 light of these neuro imaging findings,  
3 Ms. Richards appears to have sustained a more  
4 complicated mild traumatic brain injury versus  
5 a concussion, along with comorbid posttraumatic  
6 stress disorder secondary to this motor vehicle  
7 collision of 4/22/2015.

8 "Moreover, the deficits described in the  
9 neuropsychological evaluation performed with  
10 Ms. Richards on October the 12th, 2015, by  
11 myself, the undersigned neuropsychologist,  
12 involving disruption in working memory,  
13 sustained visual attention, and aspects of  
14 verbal/visual learning are consistent -- are  
15 consistent with disruption to areas of frontal  
16 executive functioning. Disruption of  
17 attention, working memory, and executive  
18 functioning is also seen in PTSD, which causes  
19 structural changes in the brain involving the  
20 prefrontal cortex amygdala" --

21 A-M-Y-G-D-A-L-A -- "and the hippocampus.

22 However, the combination of physical and  
23 psychological insult appears to be particularly  
24 detrimental to cognitive functioning," and he  
25 cites a study done by Bryant and Harvey in



1 1999.

2 He goes on to say, "The presence of  
3 MRI-identified hemosiderin is considered a  
4 distinct marker of brain injury and likely  
5 axonal damage," and he cites a study done by  
6 Gean, G-E-A-N, and Fishdine in 2010.

7 "Ms. Richards' left-sided impact with  
8 bleeding above the left eye, bruising to the  
9 left temporal area, and injury to the left  
10 scapula and knee are also consistent with  
11 greater trauma to the left side of her body,  
12 including the left frontal area of her brain.  
13 She was treated for closed-head injury with  
14 unspecified loss of consciousness and evidence  
15 of confusion and repetitive speech.

16 "Thus, to a reasonable degree of medical  
17 certainty, this changes her previous diagnosis  
18 of post-concussive syndrome to a mild  
19 neurogenitive [sic] disorder due to TBI" --  
20 that stands for traumatic brain injury --  
21 "along with her existing diagnosis of PTSD.

22 "The previous rule-out of somatic symptom  
23 disorder with predominant pain has also been  
24 eliminated based on the fact that Ms. Richards  
25 is not making excessive complaints, but rather

1 the combination of cognitive, physical, and  
2 physiological issues increases her  
3 symptomatology beyond the typical psychiatric  
4 samples that measures such as the Millon  
5 Clinical Multiaxial Inventory-III or norm  
6 deposit.

7 "Finally, on a functional basis, the  
8 combination of mild TBI," traumatic brain  
9 injury, "PTSD, and chronic pain place her at  
10 increased risk for psychosocial problems and  
11 difficulties in her profession as a pediatric  
12 ICU nurse. These include increased  
13 vulnerability to emotional distress, problems  
14 with focus or sustained attention and/or  
15 working memory, and physical pain due to  
16 lifting, standing, and stooping. Signed  
17 John R. Sass, Ph.D, board certified in clinical  
18 neuropsychology."

19 We wanted to bring you the truth, we  
20 wanted to bring you the facts, and so we did.

21 You remember -- I'm sure you will -- I  
22 guess to hear the defendants tell it, you know,  
23 "Yeah, this was a bad wreck. Yeah, there was  
24 loss of life, but Megan was fortunate. She  
25 only had a concussion. Forces weren't all that

1 great." We're the only party in this case that  
2 brought an expert to tell you how -- what those  
3 forces were in this wreck. They didn't bring  
4 anybody to refute Bryant Buckner.

5 And here's what Mr. Buckner had to say.  
6 You'll remember this. I think he was standing  
7 right here when he was drawing on this exhibit.  
8 This is Exhibit 306. This is the crush pulse.  
9 If you remember, he was talking about how fast  
10 this car that Megan was in accelerated from  
11 zero to 47 miles per hour, and he said when  
12 that happens, when you get hit in the rear by a  
13 truck this big, it is no whiplash kind of  
14 crash; it's equivalent to a car, with Megan in  
15 it and her friends, being pushed off -- I think  
16 he said it was a seven-story building.

17 And then he said right after that, you  
18 know, a nanosecond later, you get slammed into  
19 the rear of a tanker truck, and so your body's  
20 speeding up, your brain's sloshing around  
21 inside your skull, and then it's like falling  
22 off a four-story building, I think he said, the  
23 other way.

24 And then on top of that, then you've got  
25 two pounding rollovers after that that results

1 in this kind of damage. It's amazing. But for  
2 the quick actions of the driver of that  
3 vehicle, I think we wouldn't be here today  
4 because this one would have been resolved, too,  
5 I guess, by now. I'm sorry, Megan.

6 You know, instead of focusing on trying to  
7 make things right by Megan, the defendants --  
8 let's look at the defendants' conduct. What  
9 did they do?

10 After this wreck, instead of securing  
11 Mr. Johnson's cell phone and password  
12 immediately from him so that they could do -- I  
13 mean, you know, if they were interested in what  
14 caused this wreck, the natural thing to do  
15 would be to get his cell phone and see if there  
16 was anything on there that he might have been  
17 looking at so that we can make sure this  
18 doesn't happen again. But that wasn't done.

19 What did they do? Well, they went out and  
20 hired a PR firm and sent lawyers to the scene  
21 of this wreck on the very day that it happened  
22 and lawyered up.

23 As I said at the beginning of my remarks,  
24 these defendants, except for Greywolf, these  
25 defendants have robbed Megan of the enjoyment

1 of the fullness of life.

2 You heard Kellie Lane, Dr. Lane. She was  
3 the admitting physician for Megan in Augusta.  
4 She said that she had a flat demeanor. I think  
5 she still has some of that.

6 I want to read something to you that  
7 Dr. Lane sent to me this morning. It's an  
8 e-mail. I can't --

9 MR. D. DIAL: Your Honor, I object. It's  
10 not in evidence. He's arguing outside.

11 MR. CHEELEY: All right. I'll make this  
12 my own. I'll make these my own words, Your  
13 Honor.

14 Megan might not have lost her life in this  
15 horrible wreck, while the other families did  
16 lose a daughter, but she did lose part of her  
17 soul and her inner peace died on that morning.

18 Physicians can stent a blocked artery,  
19 they can remove a cancer, they can stitch up a  
20 wound and give medications to treat diabetes  
21 and infections. We have not one thing that  
22 mends the soul. We have no x-ray to look for  
23 this, no blood test to measure how healthy it  
24 is, no stress test for the soul that tells us  
25 the status.

1           Even sadder is that there is not a bandage  
2           or a cream or a concoction of pills or an  
3           expensive treatment that will fill the void,  
4           lessen the pain, or heal the soul.

5           We say time heals all things, but that is  
6           not always true. A damaged soul is not that  
7           easy. Megan is an example of this. She is  
8           beautiful when she smiles and goes through each  
9           day, but she will never be the same. I only  
10          hope through many years of love from her family  
11          and hopefully her children someday and a full  
12          life that her soul will be at peace.

13          The part of her that she lost that day is  
14          with her sweet dear friends who she lost, and I  
15          think that all of those girls are lucky to have  
16          had a friend like Megan.

17          Ladies and gentlemen, the word "verdict"  
18          means to speak the truth, and it's time these  
19          defendants heard the truth from a Bryan County  
20          jury.

21          Do you remember when Mr. Dial said in  
22          opening statement -- he said it again here just  
23          a little while ago -- that he wants you to be  
24          fair. But at whose expense? Don't make it at  
25          Megan's expense. She's already endured enough

1 of their misconduct.

2 What we have here between Megan on this  
3 side of the courtroom and that side of the  
4 courtroom is a failure to communicate about  
5 what she's been going through and the fair  
6 value of what amount of money it's going to  
7 take to at least recognize the harm that they  
8 inflicted on her.

9 Mr. Dial had the audacity to stand up here  
10 a while ago and tell you that he thought she's  
11 going to get over this. He said -- I wrote it  
12 down -- "The PTSD will recover and she'll  
13 recover from those injuries and she will not  
14 get dementia." How does he know that? He's  
15 not a medical doctor. They presented no proof.

16 And he accused me of trying to vilify John  
17 Wayne Johnson. I did not try to vilify him, I  
18 let him ramble on and on and on. You know, I  
19 wasn't mean to him. I just want to know, "Why  
20 did this happen, Mr. Johnson? Can you tell us?  
21 Can you now tell us what your four-digit code  
22 is to your phone?" He wouldn't even do that.

23 You know, you would have thought that if  
24 she just had a concussion, she wouldn't still  
25 be having nightmares. Mr. Dial didn't address

1           that in his closing argument. Why is she still  
2           having nightmares if she just had a concussion?

3                       Why did she break down and cry in a  
4           classroom at Georgia Southern last semester  
5           when EMTs come in and talk to the class about  
6           the horrors of a wreck scene and start showing  
7           pictures? Why did she have to get up and leave  
8           that classroom?

9                       Doesn't that factor into Dr. Lacy's  
10          opinion and Dr. Sass's opinion that, you know,  
11          maybe it's not going to work out so well to try  
12          to be a pediatric ICU nurse. She's going to  
13          see a lot of that, and you need to take that  
14          into consideration when you bring back full  
15          justice for Megan. The defendants want you to  
16          bring back a portion of a cup of justice; we  
17          want you to bring a full cup of justice back  
18          for her.

19                      I want to read you something in the Bible  
20          that I think sums up what Megan has gone  
21          through here. You know, you heard her say that  
22          her faith and her friends and her family has  
23          gotten her this far. Lord knows where she  
24          would be if she didn't have those three things,  
25          those people in her lives and her faith.



1           And I just want to -- I just want to --  
2           when I talk about this, she's lost -- they have  
3           robbed her of the fullness of life, I want you  
4           to think about these words from the Book of  
5           Psalms.

6           Psalm 139:13. This is David writing a  
7           psalm, and he says to the Lord, "For you  
8           created my inmost being; you knit me together  
9           in my mother's womb. I praise you because I am  
10          fearfully and wonderfully made; your works are  
11          wonderful, I know that full well. My frame was  
12          not hidden from you when I was conceived in  
13          that secret place, when I was woven together in  
14          the depths of the earth of my mother's bosom.  
15          Your eyes saw my uninformed body; all the days  
16          ordained for me have been written in your book  
17          before any of them came to be."What God  
18          designed as a beautiful, full-of-life young  
19          woman has been radically changed by these  
20          defendants.

21          And so you saw the numbers that Billy  
22          spoke of. It's time for us to talk about  
23          numbers. I don't -- I feel uncomfortable just  
24          doing this, but I know this is the only thing  
25          that you can do to make things right.

1           You know, Megan's 22 years old. If you  
2           take 365 days and multiply it by 60 years,  
3           that's 21,900 days. 24 hours in the day,  
4           that's 525,600 hours.

5           You -- ladies and gentlemen, we trust you  
6           to insert the right per-hour number for her  
7           suffering, because after you walk out of this  
8           courthouse today, as Billy said, this is it.  
9           There's no coming back in the future saying,  
10          "Well, that wasn't enough to compensate her,"  
11          if she's still got a sound mind. I hope that  
12          she does. We all do. I pray for her that she  
13          will -- that God will make her path straight  
14          even though her world is wobbly. You remember  
15          I told you in opening statement, her world is  
16          wobbly and it's nothing that she chose.

17          But if you insert \$47 an hour for those  
18          years, it works out to a verdict of  
19          \$25 million. I think that's very reasonable.  
20          You may choose to do more, and we'll trust you  
21          with whatever you choose to award, but I would  
22          submit to you that your verdict should be no  
23          less than \$25 million.

24          Now, I feel like a burden's been lifted  
25          from my shoulders, but remember, it's now been

1 passed to you. But Megan is the one that's  
2 going to be carrying the millstone for the rest  
3 of her life, and I know that you'll take that  
4 into consideration when you do justice by your  
5 verdict form.

6 I want to show you -- Chip, if you would,  
7 put the verdict form up on the screen, please.  
8 I want to tell you -- I want to show you what  
9 this verdict form's going to look like and I  
10 want to tell you on behalf of Megan how we want  
11 you to fill it out.

12 You'll see here it says, "Megan Rebecca  
13 Richards, Plaintiff, versus Total  
14 Transportation of Mississippi, et al." We're  
15 trying to save space. We're not printing all  
16 the other names on there at the top. Civil  
17 Action File No. 2015 -- that means it was filed  
18 in 2015 -- and that's the number given to it.

19 Verdict. "Verdict" means to speak the  
20 truth. Read this verdict through in its  
21 entirety before answering any questions.

22 And this is the oath that you all took at  
23 the beginning of the trial. "We, the jury,  
24 make the following answers to the questions  
25 submitted by the Court."

1           Question No. 1, "We, the jury, return a  
2           compensatory damages verdict for Megan Richards  
3           in the amount of," and that's where you'll  
4           write in the number.

5           Question No. 2. "Do you find that one or  
6           more of the following Defendants had a unity of  
7           interest and ownership with Defendant Total  
8           Transportation of Mississippi, LLC?" And then  
9           there you will write -- put the checkmark by  
10          the names of the defendants that you find have  
11          liability here for her damages, her injuries.

12          The first is New Mountain Lake Holdings,  
13          the mother ship. They owned it all. They  
14          controlled it all. You heard their own  
15          witness, Mr. Costello, say from here everything  
16          else is controlling.

17          The money comes in to Total Transportation  
18          of Mississippi's account. According to the  
19          bank flowchart right here, that money goes in  
20          every day; it goes out at the end of each day  
21          right into that account, U.S. Xpress  
22          Enterprises Depository Account, commingled  
23          funds.

24          They set the policies, even all the way  
25          down to approving the form for the driver

1 applications that John Wayne Johnson filled  
2 out.

3 They are the ones -- U.S. Xpress  
4 Enterprises, their wholly owned subsidiary,  
5 Ms. Pate, the lawyer, her department approves  
6 everything about policies and forms. I showed  
7 you some of those a day or two ago.

8 Also, it's so amazing that they would  
9 stand here and make all these arguments that  
10 all these companies, the parent companies up  
11 here, don't have any responsibility for Total  
12 Transportation of Mississippi when John Wayne  
13 Johnson's W-2 -- what better proof could there  
14 be -- comes from U.S. Xpress Enterprises? What  
15 do they make us all out to be, ladies and  
16 gentlemen? We left our common sense at the  
17 front steps of the courthouse?

18 So I want you to check that and make quick  
19 work of it. Check U.S. Xpress Enterprises,  
20 yes; U.S. Xpress, Inc., yes; U.S. Xpress  
21 Leasing, yes; Mountain Lake Risk Retention  
22 Group, yes.

23 Question No. 3, "Assume that 100  
24 represents the total fault that proximately  
25 caused Plaintiff Megan Richards' injuries and

1 losses. What degree or percent of this  
2 100 percent is attributable to," and then here  
3 you'll see the percentage attributed to  
4 Defendant John Wayne Johnson and Defendant  
5 Total Transportation of Mississippi, Defendant  
6 Robert Gordon Tayloe and Defendants Greywolf  
7 Logistics, and then it says, "100 percent.  
8 Your total must equal 100 percent."

9 And I would ask you to fill in right there  
10 100 percent for Defendant John Wayne Johnson  
11 and Defendant Total Transportation of  
12 Mississippi, LLC.

13 And then on the next page, you'll have one  
14 last question to answer, and that deals with  
15 punitive damages, our claim against  
16 Mr. Johnson.

17 And this claim for punitive damages,  
18 because he was -- he knew that he shouldn't  
19 drive fatigued, he had already fallen asleep  
20 once before, out of the grace of God nobody was  
21 killed then when his tractor-trailer spun  
22 around on the interstate.

23 So here -- and this is going to be against  
24 him and, because his employer has admitted  
25 liability, that he is acting on their behalf,

1           it will also -- whatever you award there is  
2           going to be attributed to his employer, Total  
3           Transportation of Mississippi.

4           And the question here is, "We, the jury,  
5           find that the Defendant John Wayne Johnson's  
6           actions showed willful misconduct, malice,  
7           fraud, wantonness" -- we're not contending that  
8           it was willful, we're not contending that it  
9           was malicious or fraudulent or wanton, but we  
10          do say that it was -- this last sentence, that  
11          it shows "an entire want of care which would  
12          raise the presumption of a conscious  
13          indifference to the consequences." And we  
14          would ask you to check "yes" and then date and  
15          sign it.

16          You'll elect a foreperson and bring it  
17          back, and let this community and let this  
18          entire state know that Megan has been made  
19          whole by this jury as best as the mind of man  
20          has been able to do. That's all you can do, is  
21          award money damages. We wish there was  
22          something more, but there's not.

23          So with that, Your Honor, I finish my  
24          remarks, and I thank you for your service on  
25          behalf of Megan Richards. Thank you.

1 THE COURT: Thank you, Counsel. If  
2 someone could move those exhibits.

3 All right. Ladies and gentlemen of the  
4 jury, if you'll please bear with me. Hopefully  
5 in 10 or 15 minutes you'll have this case.

6 It is my duty to charge you on the law  
7 that applies to this case. You are bound by  
8 the law in this charge and you must apply that  
9 law to the facts as you find them to be.

10 Now, ladies and gentlemen, you have been  
11 considering the case of Megan Rebecca Richards  
12 versus Total Transportation of Mississippi,  
13 LLC, U.S. Xpress Enterprises, Inc., U.S.  
14 Xpress, Inc., U.S. Xpress Leasing, Inc., New  
15 Mountain Lake Holdings, LLC, Mountain Lake Risk  
16 Retention Group, Inc., John Wayne Johnson,  
17 Greywolf Logistics, Inc., Arch Insurance  
18 Company, and Robert Gordon Tayloe here in the  
19 Superior Court of Bryan County, Georgia.

20 In this case, the plaintiff contends  
21 generally that she was injured as a result of  
22 the defendants' negligence in a motor vehicle  
23 collision.

24 I charge you that the plaintiff has the  
25 burden of proof, which means that she must



1           prove whatever it takes to make her case except  
2           for any admissions by the defendant. The  
3           plaintiff must prove her case by what is known  
4           as a preponderance of the evidence; that is,  
5           evidence upon the issues involved, while not  
6           enough to wholly free the mind from a  
7           reasonable doubt, is yet sufficient to incline  
8           a reasonable and impartial mind to one side of  
9           the issue rather than to the other.

10           Total, the USX defendants, and Johnson  
11           have all admitted that: One, Mr. Johnson's  
12           conduct was negligent.

13           Number two, Mr. Johnson's conduct was a  
14           proximate cause of the accident involving the  
15           car in which plaintiff was a passenger and of  
16           certain physical injuries incurred by  
17           plaintiff, as well as emotional injuries  
18           directly caused by those physical injuries.

19           And also, number three, that Mr. Johnson  
20           was working within the scope of his employment  
21           with Total when the accident occurred and that  
22           Total is responsible for Mr. Johnson's  
23           negligence.

24           Plaintiff has also alleged a claim for  
25           punitive damages in this case against

1 Mr. Johnson, about which I will later provide  
2 you more specific instructions. As to this  
3 claim, plaintiff must prove to a reasonable  
4 certainty by clear, convincing, and decisive  
5 evidence that she is entitled to an award of  
6 punitive damages.

7 This is a different and higher burden of  
8 proof than a mere preponderance of the  
9 evidence. Clear and convincing evidence is  
10 defined as evidence that will cause the jury to  
11 firmly believe each essential element of the  
12 claim to a high degree of probability.

13 Proof by clear and convincing evidence  
14 requires a level of proof greater than a  
15 preponderance of the evidence, but less than a  
16 reasonable doubt.

17 Now, evidence is the means by which any  
18 fact that is put into question is established  
19 or disproved. Evidence includes all the  
20 testimony of the witnesses, as well as the  
21 exhibits admitted during the course of the  
22 trial. Evidence may be either direct or  
23 circumstantial or both. In considering the  
24 evidence, you may use reasoning and common  
25 sense to make deductions and reach conclusions.

1 Direct evidence is the testimony of a  
2 person who asserts that he or she has actual  
3 knowledge of a fact, such as personally  
4 observing or otherwise witnessing that fact.  
5 Circumstantial evidence is proof of facts  
6 and/or circumstances that tend to prove or  
7 disprove another fact by inference. There is  
8 no legal difference in the weight you may give  
9 to either direct or circumstantial evidence.

10 Testimony has been given in this case by  
11 certain witnesses who are termed experts.  
12 Expert witnesses are those who, because of  
13 their training and experience, possess  
14 knowledge in a particular field that is not  
15 common knowledge or known to the average  
16 citizen. The law permits expert witnesses to  
17 give their opinions based upon their training  
18 and experience. You are not required to accept  
19 the testimony of any witness, expert or  
20 otherwise. Testimony of an expert, like that  
21 of all witnesses, is to be given only such  
22 weight and credit as you think it is properly  
23 entitled to receive.

24 Now, you, the jury, must determine the  
25 credibility of all the witnesses. In deciding

1           this, you may consider all the facts and  
2           circumstances of the case, including the  
3           witness's manner of testifying, their  
4           intelligence, their means and opportunity for  
5           knowing the facts about which they testified,  
6           the nature of the facts about which they  
7           testified, the probability or improbability of  
8           their testimony, their interest or lack of  
9           interest in the outcome of the case, and their  
10          personal credibility as you observe it.

11           To impeach a witness is to show that a  
12          witness is unworthy of belief. A witness may  
13          be impeached by disproving the facts to which  
14          the witness testified.

15           Now, ladies and gentlemen, at this point  
16          I'm going to talk to you about damages.  
17          Damages are given as pay or compensation for  
18          injury done. When one party is required to pay  
19          damages to another, the law seeks to ensure  
20          that the damages awarded are fair to both  
21          parties.

22           If you believe from a preponderance of the  
23          evidence that the plaintiff is entitled to  
24          recover, you should award to the plaintiff such  
25          sums as you believe are reasonable and just in

1           this case.

2                   Damages are given as compensation for an  
3           injury done, and generally the injury is the  
4           measure when the damages are of a character to  
5           be estimated in money. If the injury is small  
6           and mitigating circumstances are strong, only  
7           nominal damages are given.

8                   Now, I charge you that pain and suffering  
9           is a legal item of damages. The measure is the  
10          enlightened conscience of fair and impartial  
11          jurors. Questions of whether, how much, and  
12          how long the plaintiff has suffered or will  
13          suffer are issues for you, the jury, to decide.

14                  Pain and suffering includes mental  
15          suffering, but mental suffering is not a legal  
16          item of damage unless there is physical  
17          suffering also. In evaluating the plaintiff's  
18          pain and suffering, you may consider the  
19          following factors if proven:

20                   Interference with normal living;  
21          interference with enjoyment of life; loss of  
22          capacity -- excuse me, impairment of bodily  
23          health and vigor; fear of extent of injury;  
24          shock of impact; actual pain and suffering,  
25          past and future; mental anguish, past and

1 future; and the extent to which the plaintiff  
2 must limit activities.

3 I charge you that in order for the  
4 plaintiff to prevail for the negligent  
5 infliction of mental suffering, she must show  
6 that she suffered a physical impact, the  
7 physical impact caused her physical injury, and  
8 the physical injury caused her mental suffering  
9 and emotional distress.

10 In tort actions, there may be aggravating  
11 circumstances that may warrant the imposition  
12 of additional damages called punitive damages.  
13 In this case, the plaintiff has a claim for  
14 punitive damages against the defendant driver  
15 Johnson.

16 Before you may award punitive damages, the  
17 plaintiff must prove that Defendant Johnson's  
18 actions in causing harm to the plaintiff showed  
19 willful misconduct, malice, fraud, wantonness,  
20 oppression, or that entire want of care that  
21 would raise the presumption of conscious  
22 indifference to the consequences.

23 Plaintiff must prove that Defendant  
24 Johnson is liable for punitive damages by a  
25 higher standard than that for proof of other

1 damages; that is, by clear and convincing  
2 evidence.

3 If the plaintiff fails to prove as to  
4 Defendant Johnson by clear and convincing  
5 evidence that he was guilty of willful  
6 misconduct, malice, fraud, wantonness,  
7 oppression, or the entire want of care that  
8 would raise the presumption of conscious  
9 indifference to the consequences, then you  
10 would not be authorized to award punitive  
11 damages.

12 Mere negligence, although amounting to  
13 gross negligence, will not authorize an award  
14 of punitive damages. Punitive damages, when  
15 authorized, are awarded not as compensation to  
16 a plaintiff, but solely to punish, penalize, or  
17 deter a defendant.

18 As you've already seen in the verdict  
19 form, you will have to specify whether you do  
20 or you do not decide to impose punitive  
21 damages.

22 If you find that damages sustained by the  
23 plaintiff were caused by more than one  
24 defendant, in determining the total amount of  
25 damages to be awarded, you should apportion

1           your award of damages among the parties who are  
2           liable according to the percentage of fault of  
3           each defendant. Again, you saw that on the  
4           verdict form and you will have to insert your  
5           answer in arriving at your verdict.

6           Now, ladies and gentlemen, you have heard  
7           a lot of evidence in this case about different  
8           companies and how they interrelate with each  
9           other. The plaintiff claims that Total  
10          Transportation was a mere instrument or tool,  
11          what the law refers to or calls the alter ego  
12          of its parent and affiliated corporations, so  
13          that the corporations were acting as one  
14          entity.

15          The defendants deny this claim and  
16          maintain that the companies were separate  
17          corporate entities and acted independently of  
18          each other.

19          For the plaintiff to prove that one  
20          company is the alter ego of another company,  
21          the plaintiff must show by a preponderance of  
22          the evidence that there is such a unity of  
23          interest and ownership that the separate  
24          personalities of the corporation no longer  
25          exist.



1           In making this determination, you may  
2           consider the following factors:

3           Whether the corporation maintained  
4           adequate observation of corporate formalities,  
5           separate records, accounts, minutes, general  
6           ledgers;

7           Whether the corporate officers actually  
8           functioned as corporate officers;

9           Whether there exists commingling of  
10          control, property, employees, and records;

11          Whether generally one corporation operates  
12          as the mere shadow of another corporation;

13          Whether the corporation was solvent or  
14          insolvent; and

15          Whether one corporation had the right to  
16          direct and control the conduct of the other  
17          party in the activity causing the injury.

18          Ladies and gentlemen, I charge you that  
19          generally an agency relationship arises  
20          whenever one entity expressly or by implication  
21          authorizes another entity to act for it or  
22          subsequently ratifies the acts of the other  
23          entity on its behalf. Once a principal/agent  
24          relationship has been created, the principal is  
25          bound for the care, diligence, and fidelity of

1           its agent in its business and, hence, the  
2           principal is also bound for the neglect of its  
3           agent in the transaction of its business. In  
4           other words, the negligence of one entity will  
5           be imputed to another entity if the first  
6           entity was acting as an agent of the second  
7           entity when it engaged in such negligent  
8           conduct.

9           Ladies and gentlemen, as you know, this is  
10          a tort case in which the plaintiff must prove  
11          by a preponderance of the evidence generally  
12          that the negligence of the defendant or  
13          defendants, if any, was the proximate cause of  
14          her injuries.

15          Ordinary negligence means the absence of  
16          or the failure to use that degree of care that  
17          is used by ordinarily, careful persons under  
18          the same or similar circumstances.

19          Before a plaintiff can recover damages  
20          from a defendant in a case such as this, there  
21          must be injury to the plaintiff resulting from  
22          the defendant's negligence.

23          In order for a plaintiff to prevail on a  
24          claim for ordinary negligence as plaintiff  
25          alleges here against the defendants, she must

1 establish the following elements by a  
2 preponderance of the evidence:

3 Number one, a legal duty to conform to a  
4 standard of conduct raised by the law for the  
5 protection of others against unreasonable risk  
6 of harm.

7 Number two, a breach of this standard.

8 Number three, a legally attributable  
9 causal connection between the conduct and the  
10 resulting injury; that is, that the conduct was  
11 the proximate cause of the injury.

12 And, four, some loss or damage flowing to  
13 the plaintiff's legally protected interest as a  
14 result of the alleged breach of a legal duty.

15 I will now define to you what "proximate  
16 cause" is. "Proximate cause" means that cause  
17 which, in a natural and continuous sequence,  
18 produces an event and without which cause such  
19 event would not have occurred.

20 In order to be a proximate cause, the act  
21 or omission complained of must be such that a  
22 person using ordinary care would have foreseen  
23 that the event or some similar event might  
24 reasonably result therefrom.

25 There may be more than one proximate cause

1 of an event, but if an act or omission of any  
2 person not a party to the suit -- I'm sorry,  
3 that does not apply, so to strike the last  
4 sentence. That does not apply in this case.

5 Ladies and gentlemen, I charge you that a  
6 defendant may be held liable for an injury when  
7 that person commits a negligent act that puts  
8 other forces in motion or operation resulting  
9 in the injury, when such other forces are the  
10 natural and probable result of the act that the  
11 defendant committed and that reasonably should  
12 have been foreseen by the defendant.

13 Now, ladies and gentlemen, I will now  
14 charge you on certain laws that will apply in  
15 this case.

16 First of all, the Code of Federal  
17 Regulations states that no driver shall operate  
18 a commercial motor vehicle and a motor carrier  
19 shall not require or permit a driver to operate  
20 a commercial motor vehicle while the driver's  
21 ability or alertness is so impaired or so  
22 likely to become impaired through fatigue,  
23 illness, or any other cause as to make it  
24 unsafe for him to begin or continue to operate  
25 the commercial motor vehicle.

1           No driver shall engage in texting while  
2           driving. No motor carrier shall allow or  
3           require its driver to engage in texting while  
4           driving.

5           The law further states that no driver  
6           shall use a handheld mobile telephone while  
7           driving a CMV. No motor carrier shall allow or  
8           require its drivers to use a handheld mobile  
9           telephone device while driving a CMV.

10           I charge you that the Official Code of  
11           Georgia Annotated reads as follows: No person  
12           shall drive a vehicle at a speed greater than  
13           is reasonable and prudent under the conditions  
14           and having regard for the actual and potential  
15           hazards then existing. Consistently with the  
16           foregoing, every person shall drive at a  
17           reasonable and prudent speed when approaching  
18           and crossing any intersection, et cetera.

19           Now, ladies and gentlemen, the Georgia  
20           Code also requires as follows: A driver shall  
21           exercise due care in operating a motor vehicle  
22           on the highways of this state and shall not  
23           engage in any actions which shall distract such  
24           driver from the safe operation of such vehicle.

25           The Georgia Code further requires and

1 prohibits anyone from operating a commercial  
2 motor vehicle on any public road or highway of  
3 this state while holding a wireless  
4 telecommunications device to conduct a voice  
5 communication.

6 I charge you that under Georgia law, all  
7 drivers have a duty to exercise ordinary care  
8 with regard to other drivers or users of the  
9 roadway. Specifically, every driver is under a  
10 duty to keep a proper lookout for potential  
11 hazards. A driver has no right to assume that  
12 the road ahead is clear of traffic and it is  
13 his duty to maintain a diligent outlook ahead.

14 Ladies and gentlemen, I charge you that  
15 Defendants Total Transportation of Mississippi,  
16 LLC, and U.S. Xpress, Inc., are motor carriers  
17 as defined by the laws of the State of Georgia.

18 I charge you further that there is a valid  
19 existing statute in the State of Georgia which  
20 requires a motor carrier to maintain a policy  
21 of indemnity insurance by an insurance company  
22 licensed to do business in this state, which  
23 policy must provide for the protection of the  
24 public against injury proximately caused by the  
25 negligence of such motor carrier, its servants,

1 or its agents.

2 The statute also permits the plaintiff to  
3 join, in the same action as the motor carrier,  
4 the motor carrier's insurance company.

5 I charge you further in this regard that  
6 the Defendants Total Transportation and U.S.  
7 Xpress, Inc. complied with this statute and  
8 maintain a policy of indemnity insurance issued  
9 by Defendant Mountain Lake Risk Retention  
10 Group, which was in effect at the time of the  
11 wreck and, therefore, Defendant Mountain Lake  
12 Risk Retention Group, Inc. has been properly  
13 joined as a defendant in this case.

14 I charge you further that the liability of  
15 Defendant Mountain Lake Risk Retention Group is  
16 based upon the liability of Defendants Total  
17 and U.S. Xpress and they have admitted  
18 liability for the plaintiff's injuries and  
19 damages -- I'm sorry -- and Defendant Total  
20 Transportation has admitted liability injuries  
21 as I have already charged you.

22 Now, ladies and gentlemen, if you believe  
23 from a preponderance of the evidence and clear  
24 and convincing evidence with regard to the  
25 punitive damages, but again with regard to the

1           compensatory damages, if you believe that they  
2           have been proven by a preponderance of the  
3           evidence, the form of your verdict would be,  
4           "We, the jury, find for the plaintiff," and  
5           you've already seen the form of that verdict.

6           I want to emphasize to you that -- I'm  
7           sorry. Let me go back.

8           Whatever your verdict is in this case, it  
9           must be agreed to by every juror. It must be  
10          in writing, dated and signed by your  
11          foreperson, and it must be returned and read  
12          aloud in open court.

13          You have the verdict form and you know  
14          what it consists of, but I do want to emphasize  
15          that anything that I did say during the course  
16          of this trial was not intended and did not  
17          intimate, hint, or suggest to you which of the  
18          parties should prevail in this case. Whichever  
19          of the parties is entitled to a verdict is a  
20          matter entirely for you to determine and  
21          whatever your verdict is, it must be agreed to  
22          by all of you. The Court's interest in this  
23          matter is that the case be fairly presented  
24          according to the law and that you, as honest,  
25          conscientious, impartial jurors, consider the



1 case as the Court has instructed and return a  
2 verdict that speaks the truth as you find the  
3 truth to be in this case.

4 Your verdict should be a true verdict  
5 based upon your opinion of the evidence  
6 according to the law given you in this charge.  
7 You are not to show favor or sympathy to one  
8 party or the other, including, without  
9 limitation, the local or remote residence of  
10 the parties and the corporate status of any of  
11 the defendants. It is your duty to consider  
12 the facts objectively, without favor,  
13 affection, or sympathy to any party.

14 Your verdict, again, must be unanimous.  
15 One of your first duties in the jury room will  
16 be to select one of your number to act as  
17 foreperson. He or she will preside over your  
18 deliberations and he or she will sign the  
19 verdict form to which all 12 of you freely and  
20 voluntarily agree.

21 You should start your deliberations with  
22 an open mind. You should consider all of the  
23 evidence in the case and deliberate with an aim  
24 toward reaching a unanimous verdict consistent  
25 with your consciences and the oath you took as

1 a juror.

2 You should avoid premature fixed opinions.  
3 Consult with one another and consider each  
4 other's point of view. Each of you must decide  
5 this case for yourself, but you should do so  
6 only after a discussion and consideration of  
7 the case with your fellow jurors.

8 Do not hesitate to change an opinion if  
9 convinced that it is wrong; however, you should  
10 never surrender an honest conviction or opinion  
11 in order to be congenial or to reach a verdict  
12 solely because of the opinions of other jurors.

13 Now, ladies and gentlemen, you're going to  
14 go out in just a minute. You'll have this jury  
15 form. After you have a discussion of this case  
16 and you arrive at a verdict, you're going to go  
17 through the entire form. You have to read it  
18 in full before you begin to answer any of the  
19 questions.

20 Once you've reached a verdict and you have  
21 filled out the verdict form in its entirety and  
22 it's been dated and signed by your foreperson,  
23 then you would simply knock on the door, let  
24 the bailiffs know that you have arrived at a  
25 verdict, and we will then bring you back out,

1 where your verdict will be published in open  
2 court.

3 Now, ladies and gentlemen, at this point  
4 I'm going to go off script. You've been here  
5 all week. You've been here early in the  
6 morning until late in the evening. It is  
7 really unfair to you to give you this case at  
8 4:35 on Friday afternoon.

9 I don't want you to feel that you're under  
10 any pressure to be in any hurry. You know how  
11 important this case is to everyone in this  
12 courtroom. So I'm going to leave it to you. I  
13 don't want you to be in a rush. I want you to  
14 take your time. I want you to consider all of  
15 the evidence in the case.

16 If you want to work for a few hours  
17 tonight, that's fine. We will abide by  
18 whatever your schedule is. If you work for a  
19 few hours and you decide you want to go home  
20 and you want to rest and you want to come back  
21 tomorrow, that's fine. Again, I don't want you  
22 to feel that you're under any pressure  
23 whatsoever. You go according to your own  
24 schedule.

25 So with those instructions, I'm going to

1           excuse you at this time to go back to the jury  
2           room, but you cannot begin your deliberations  
3           until you receive all of the evidence that will  
4           be delivered to you by the bailiffs.

5                     (The following proceedings were held  
6           outside the presence of the jury.)

7           THE COURT: All right. The jury is out.  
8           Everyone please be seated.

9                     On behalf of the plaintiffs, can you state  
10          your objections to the charge.

11          MR. JONES: We don't have any.

12          THE COURT: All right. From the  
13          defendants, Counsel?

14          MR. MARCOVITCH: Your Honor, we renew our  
15          objections to the charge as stated and  
16          articulated at the charge conference.

17                     I would like a second to review the -- our  
18          pattern, though, so if we have more exceptions,  
19          I'll bring it to the Court's attention before  
20          the jury comes back with a verdict.

21                     And specifically we do -- well, Mr. Dial  
22          has something to say.

23          MR. D. DIAL: Yeah, Your Honor.

24                     Based upon the charges that were given  
25          regarding the impact rule, which I -- I will

1           move for a mistrial based on the fact that the  
2           instruction was given concerning the limitation  
3           to the recovery for physical injuries when that  
4           was not, my understanding, how this case was  
5           tried and then that instruction was given.

6           THE COURT: Mr. Dial, I'll tell you what,  
7           that was verbatim the request that you made. I  
8           gave your -- I gave the defense instruction.

9           MR. D. DIAL: But, Your Honor, you gave it  
10          contrary to the evidence that you allowed, so I  
11          move for a mistrial. In other words, the  
12          evidence isn't consistent with the instruction.

13          THE COURT: I think I understand your  
14          objection. It's based on your assertion early  
15          on that we should -- we should not have allowed  
16          any other evidence in the case.

17          MR. D. DIAL: Well, no, I don't think that  
18          was my position, but I think we're talking -- I  
19          think we understand it.

20          I don't think you should have allowed in  
21          evidence of mental anguish and suffering that  
22          was caused by something other than the physical  
23          injuries.

24          THE COURT: I take your point and it's  
25          preserved for the record.

1 MR. MARCOVITCH: Just to clarify, my  
2 understanding from the charge conference was  
3 that the Court was not going to give Defense  
4 Requested 26, and we argued accordingly.  
5 That's the basis for the motion for mistrial,  
6 Your Honor.

7 THE COURT: You know, we dealt with about  
8 50 charges. I can't recall specifically, but I  
9 gave the exact defense request with regard to  
10 physical impact. We went through the three  
11 prongs. So, you know, it's --

12 MR. D. DIAL: We'll have to look at the  
13 charge conference, but I was not aware that  
14 charge was going to be given.

15 THE COURT: I don't recall you ever  
16 withdrawing that charge.

17 MR. MARCOVITCH: No, but we excepted to  
18 the Court not giving the charge, which I was --  
19 my recollection was that the Court said you  
20 were not going to give. That was the impact  
21 rule charge --

22 THE COURT: Yes, sir.

23 MR. MARCOVITCH: -- that we specifically  
24 discussed, and the Court stated that you were  
25 not going to give it but that we're free to

1 argue it.

2 MR. D. DIAL: That's why I made the  
3 comment to Your Honor before my argument, that  
4 I felt like it was unfair for you to say I  
5 could argue something that there wasn't going  
6 to be a charge on. If I recall, I made that  
7 statement.

8 THE COURT: You did, you did. And,  
9 gentlemen, you may be right, so it's preserved  
10 for the record.

11 MR. D. DIAL: Thank you, Your Honor.

12 THE COURT: Anything else?

13 MR. D. DIAL: Is my motion denied, Your  
14 Honor?

15 THE COURT: Yes, sir.

16 MR. D. DIAL: Thank you.

17 MR. PITTMAN: Your Honor, the blowups can  
18 go back?

19 THE COURT: They can go back.

20 MR. PITTMAN: I'm going to check to make  
21 sure there aren't any in here that are not  
22 exhibits.

23 THE COURT: Go ahead, Counsel.

24 MR. MARCOVITCH: I just want to make sure  
25 Mr. Varnedoe can hear.

1           Your Honor, by my reading, I believe you  
2           gave -- on our 26, Defense 26, you gave the  
3           first four paragraphs, but not the last  
4           paragraph, which is based on Bennett versus  
5           Moore. So you gave --

6           THE COURT: Yeah, I didn't give that.

7           MR. MARCOVITCH: Okay. So we excepted to  
8           the admission of that aspect of 26 in any  
9           event.

10          THE COURT: I saw that and I intentionally  
11          did not give it.

12          MR. MARCOVITCH: I understand.

13          MR. VARNEDOE: That is it?

14          MR. MARCOVITCH: I just wanted it on the  
15          record.

16          MR. VARNEDOE: I didn't know if you had  
17          something else.

18          MR. MARCOVITCH: No, no, no.

19          THE COURT: Can I look at yours?

20          MR. MARCOVITCH: Sure.

21          THE COURT: Yeah, about the injuries to  
22          her friends?

23          MR. MARCOVITCH: Yes.

24          THE COURT: That's true.

25          MR. MARCOVITCH: I just want it to be on



1 the record that we're excepting to that.

2 THE COURT: I just tried to stick to the  
3 pattern and then the three prongs and read as  
4 you had requested.

5 MR. MARCOVITCH: Correct.

6 THE COURT: Which to me --

7 MR. VARNEDOE: And I do want the record to  
8 reflect that that charge was never withdrawn by  
9 the defense.

10 MR. MARCOVITCH: Absolutely, it wasn't  
11 withdrawn. We moved for a mistrial, however.

12 THE COURT: And to be honest with you, I  
13 don't understand the objection because all I  
14 did was flesh out even further what the pattern  
15 charge says, which is there has to be a  
16 physical injury to recover for mental pain and  
17 suffering.

18 So then I went further and went through  
19 the three prongs that they have to -- it made  
20 sense to me to go ahead and do that.

21 So I apologize if there was some  
22 confusion. I didn't see any harm in giving the  
23 defense charge, so that's what I did.

24 MR. MARCOVITCH: So in any event, we're on  
25 the record --

1 THE COURT: Yes.

2 MR. MARCOVITCH: -- that we do not except  
3 to the Court having given 26, but to the  
4 omission of the last paragraph of 26, and we're  
5 on the record as to the mistrial in light of  
6 the circumstances of the evidence coming in, as  
7 Mr. Dial articulated.

8 THE COURT: Understood. Understood.  
9 Thank you.

10 MR. VARNEDOE: Thank you.

11 (Whereupon, a recess was taken from 4:48  
12 p.m. to 5:55 p.m. and the following  
13 CONFIDENTIAL proceedings were held in chambers,  
14 outside the presence of the jury.)

15 THE COURT: All right. It's my  
16 understanding that the parties want to place  
17 something on the record. We have Mr. Cheeley  
18 and Mr. Jones for the plaintiff, we have  
19 Mr. Dial, and we also have a representative  
20 of --

21 MR. D. DIAL: AIG/Lexington of Lexington,  
22 Bob Ulrich.

23 THE COURT: Mr. Bob Ulrich, U-L-R-I-C-H.  
24 Gentlemen, you may proceed.

25 MR. CHEELEY: Your Honor, after the jury

1 began its deliberation, Mr. Dial brought  
2 Mr. Ulrich over and introduced him to me, and  
3 Mr. Ulrich and I have been talking about a  
4 high/low and we've reached an agreement on that  
5 high/low. And I'll memorialize it at this  
6 time, and we've got it written down. We'll  
7 probably make this as an exhibit, as well.

8 You want to do that?

9 MR. ULRICH: It's my sloppy handwriting.

10 MR. CHEELEY: Okay. So the high will be  
11 14.5 million, the low will be 1 million, and  
12 this will conclude the case. There won't be a  
13 punitive damage phase 2.

14 THE COURT: And no appeals?

15 MR. CHEELEY: No appeals.

16 MR. ULRICH: Waive appeals.

17 MR. CHEELEY: Yeah, all the appeals are  
18 done. And this only applies if the jury's  
19 verdict is against -- no matter what the  
20 defendants it's against, even if it includes  
21 Greywolf, this is buying their peace and our  
22 peace.

23 MR. D. DIAL: In other words, we wouldn't  
24 pay any money associated -- the money that  
25 Greywolf might have wouldn't be figured into

1 the calculation of the high and the low.

2 MR. ULRICH: They would pay their own  
3 share.

4 MR. CHEELEY: Right. Waive all  
5 appealable -- or appellate rights and also any  
6 rights under an offer of judgment under  
7 9-11-68; waive all costs, fees, and interests,  
8 including Holt and time-limited demand.

9 They would pay the low within 30 days, and  
10 anything above that they'd pay within 90 days  
11 up to the 14-1/2 million; right?

12 MR. ULRICH: Correct.

13 MR. CHEELEY: And if there's any fines to  
14 be structured, it would be with an AIG-approved  
15 broker, with AIG-approved life company, and the  
16 terms would be confidential. We agree to that.

17 THE COURT: All right. Anything else that  
18 needs to be placed on record?

19 MR. D. DIAL: No. I'd just put -- state  
20 for the record that the Defendants Total and  
21 U.S. Xpress defendants and John Wayne Johnson  
22 agree, as well.

23 THE COURT: All right. Thank you. That  
24 will conclude the matter.

25 MR. CHEELEY: All right. You want to mark

1 this as an exhibit?

2 THE COURT: I will. I think that would be  
3 Court's Exhibit 2.

4 (Court's Exhibit 2 was marked for  
5 identification.)

6 (Whereupon, a recess was taken from 5:57  
7 p.m. to 6:04 p.m. and the following proceedings  
8 were held outside the presence of the jury.)

9 THE COURT: Okay. Bring the jury in.

10 (The following proceedings were held in  
11 the presence of the jury.)

12 THE COURT: All right. Everyone please be  
13 seated.

14 All right. It's my understanding that  
15 Brad Singer is our foreman.

16 MR. SINGER: Yes, Your Honor.

17 THE COURT: Mr. Singer, I have your  
18 handwritten question, but before I address  
19 that, I want to ask you a question, but I want  
20 you to be very careful about your response.

21 On the verdict form, has the jury reached  
22 a decision -- and don't tell me what the  
23 decision is -- but has the jury reached a  
24 decision with regard to Question 1?

25 MR. SINGER: No, Your Honor.

1 THE COURT: All right, sir. Has the jury  
2 reached any decision with regard to Question 2?

3 MR. SINGER: Yes, Your Honor.

4 THE COURT: All right. Has the jury  
5 reached a decision with regard to Question 3?

6 MR. SINGER: Yes, Your Honor.

7 THE COURT: All right. Your questions all  
8 pertain to Question 4?

9 MR. SINGER: Yes, sir.

10 THE COURT: All right. If you were to --  
11 and let me read into the record exactly what  
12 your note says.

13 "Need more explanation of Question No. 4.  
14 What does answering 'yes' mean? What does  
15 answering 'no' mean? After 'or that entire  
16 want of care,' what does this mean?"

17 If you were to answer "yes" as to Question  
18 4, you would come back before the Court, hear  
19 additional evidence, additional argument, and  
20 we would have another phase of the trial. If  
21 you answer "no" as to Question 4, there would  
22 be no additional evidence or argument.

23 As to the request as to what the "entire  
24 want of care" means, I cannot elaborate on  
25 that. They are words of common language and

1 understanding, and I would ask you to refer to  
2 the Court's previous charge with regard to  
3 that.

4 MR. SINGER: Okay.

5 THE COURT: Does that answer your  
6 questions?

7 MR. SINGER: I'm not sure, Your Honor.  
8 May I?

9 THE COURT: You can confer, yes.

10 MR. SINGER: Your Honor, do we have a copy  
11 of the charges you mentioned? Do we have a  
12 copy of that, sir?

13 THE COURT: Unfortunately, I do not, but I  
14 can confer with counsel and if there's a  
15 particular charge that you want reread, I can  
16 do that.

17 MR. SINGER: I think that would be helpful  
18 to kind of clear up what exactly we're  
19 answering on Question No. 4.

20 THE COURT: Okay. Counsel want to  
21 approach the bench or do you want me to excuse  
22 them for a few minutes?

23 (The following proceedings were held at  
24 the bench, outside the hearing of the jury.)

25 MR. D. DIAL: Do we have a charge, Your

1 Honor, that distinguishes between compensatory  
2 and punitive damages? I'm concerned that they  
3 will take into consideration the amount of 1  
4 based on how they answer 4. That's what I'm  
5 concerned about, since we don't have a line for  
6 4.

7 THE COURT: I understand. I just don't  
8 know how else to respond to their inquiry.

9 MR. D. DIAL: Could we respond -- I think  
10 you said that the -- if you find as to 4, the  
11 amount is decided later. It's not before you  
12 now.

13 MR. JONES: That might help. I agree,  
14 that might help.

15 (The following proceedings were held in  
16 open court, in the hearing of the jury.)

17 THE COURT: Okay. All right. Let me go  
18 back to your question with regard to Question  
19 No. 4.

20 If you were to answer "yes," we would come  
21 back, hear additional evidence and argument,  
22 and you would enter -- you would determine what  
23 that award would be. But you should not  
24 consider that in any way whatsoever in  
25 answering No. 1.



1 Does that help you?

2 MR. SINGER: Yes. So if I may, Your  
3 Honor.

4 THE COURT: Yes.

5 MR. SINGER: So by answering "yes," that  
6 would be that we're -- would then come back and  
7 discuss awarding punitive damages?

8 THE COURT: Yes, sir. But you should not  
9 consider that in arriving at your answer to  
10 Question No. 1.

11 MR. SINGER: Okay. I believe that -- I  
12 believe that resolves the question for us.

13 THE COURT: All right. Any objections  
14 from the plaintiff?

15 MR. CHEELEY: No, Your Honor.

16 THE COURT: How about the defendant?

17 MR. D. DIAL: No, Your Honor.

18 THE COURT: All right. Then you may  
19 resume your deliberations.

20 (Whereupon, a recess was taken from 6:10  
21 p.m. to 8:02 p.m. and the following proceedings  
22 were held outside the presence of the jury.)

23 THE COURT: All right. I think we have  
24 everybody in place.

25 Okay. You can bring the jury in.

1 (The following proceedings were held in  
2 the presence of the jury.)

3 THE COURT: Everyone please be seated.

4 Mr. Singer, has the jury reached a  
5 verdict?

6 MR. SINGER: We have, Your Honor.

7 THE COURT: Is it a unanimous verdict?

8 MR. SINGER: It is, Your Honor.

9 THE COURT: Has the verdict form been  
10 completed in writing?

11 MR. SINGER: It has, Your Honor.

12 THE COURT: Have you dated and signed it  
13 as the foreman of the jury?

14 MR. SINGER: Yes, Your Honor.

15 THE COURT: And, sir, if you would hand  
16 the verdict form to the bailiff.

17 In the Superior Court of Bryan County,  
18 State of Georgia, Megan Rebecca Richards,  
19 plaintiff, versus Total Transportation of  
20 Mississippi, LLC, et al., defendants.

21 We, the jury, make the following answers  
22 to the questions submitted by the Court:

23 We, the jury, return a compensatory  
24 damages verdict for Megan Richards in the  
25 amount of \$15 million.

1           Question No. 2, "Do you find that one or  
2           more of the following defendants had a unity of  
3           interest and ownership with Defendant Total  
4           Transportation of Mississippi, LLC?" As to New  
5           Mountain Lake Holdings, LLC, "yes"; as to U.S.  
6           Xpress Enterprises, Inc., "yes"; as to U.S.  
7           Xpress, Inc., "yes"; as to U.S. Xpress Leasing,  
8           Inc., "yes"; as to Mountain Lake Risk Retention  
9           Group, Inc., "yes."

10           As to Question No. 3, "Assume that  
11           100 percent represents the total fault that  
12           proximately caused Plaintiff Megan Richards'  
13           injuries and losses. What degree or percent of  
14           this is attributable to: 100 percent Defendant  
15           John Wayne Johnson and Defendant Total  
16           Transportation of Mississippi, LLC."

17           Question No. 4, "We, the jury, find that  
18           Defendant John Wayne Johnson's actions showed  
19           willful misconduct, malice, fraud, wantonness,  
20           oppression, or that entire want of care which  
21           would raise the presumption of conscious  
22           indifference to consequences." The answer is  
23           "yes."

24           "So say we all this 20th day of January,  
25           2017, Bradley A. Singer, Foreperson."

1                   From the plaintiff, any objections to the  
2                   form of the verdict?

3                   MR. CHEELEY: No, Your Honor.

4                   THE COURT: From the defense, any  
5                   objection to the form of the verdict?

6                   MR. D. DIAL: No, Your Honor.

7                   THE COURT: All right. Ladies and  
8                   gentlemen, I've had previous discussions with  
9                   counsel and even though you have checked "yes"  
10                  as to Question No. 4, counsel for both sides  
11                  have agreed that they would accept your verdict  
12                  as is.

13                  Is that correct, Counsel?

14                  MR. CHEELEY: That is correct, Your Honor.

15                  MR. D. DIAL: Correct, Your Honor.

16                  THE COURT: So there is no need to go any  
17                  further.

18                  So, ladies and gentlemen, that completes  
19                  your service in this case. I cannot express to  
20                  you my feelings of gratitude for the hard work  
21                  you've done. This has been a very difficult  
22                  case for everybody involved. You've worked  
23                  overtime, you're here at 8:00 on Friday night,  
24                  but this, as I said at the outset, is one of  
25                  the most important civic duties that you will

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ever undertake. I hope it's been a good  
experience for you, but I cannot tell you how  
much I appreciate your hard work.

So you are excused at this time with the  
thanks and gratitude of this Court. Thank you  
very much.

(Whereupon, the proceedings in this matter  
concluded at 8:08 p.m.)

C E R T I F I C A T E

STATE OF GEORGIA:

COUNTY OF FULTON:

I hereby certify that the foregoing transcript was taken down, as stated in the caption, and the questions and answers thereto were reduced to typewriting under my direction; that the foregoing pages represent a true, complete, and correct transcript of the evidence given upon said hearing, and I further certify that I am not of kin or counsel to the parties in the case; am not in the regular employ of counsel for any of said parties; nor am I in anywise interested in the result of said case.



LEE ANN BARNES, CCR B-1852, RPR, CRR

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COURT REPORTER DISCLOSURE

1  
2  
3 Pursuant to Article 10.B. of the Rules and  
4 Regulations of the Board of Court Reporting of the  
5 Judicial Council of Georgia which states: "Each  
6 court reporter shall tender a disclosure form at the  
7 time of the taking of the deposition stating the  
8 arrangements made for the reporting services of the  
9 certified court reporter, by the certified court  
10 reporter, the court reporter's employer, or the  
11 referral source for the deposition, with any party  
12 to the litigation, counsel to the parties or other  
13 entity. Such form shall be attached to the  
14 deposition transcript," I make the following  
15 disclosure:

16 I am a Georgia Certified Court Reporter. I am here  
17 as a representative of Veritext Legal Solutions.  
18 Veritext Legal Solutions was contacted to provide  
19 court reporting services for the deposition.  
20 Veritext Legal Solutions will not be taking this  
21 deposition under any contract that is prohibited by  
22 O.C.G.A. 9-11-28 (c).

23 Veritext Legal Solutions has no contract/agreement  
24 to provide reporting services with any party to the  
25 case, any counsel in the case, or any reporter or  
reporting agency from whom a referral might have  
been made to cover this deposition. Veritext Legal  
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will not be given to any party to this litigation.

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LEE ANN BARNES, CCR B-1852, RPR, CRR

1                   TIFFANY ALLEY, A VERITEXT COMPANY  
2                   FIRM CERTIFICATE AND DISCLOSURE  
3

4       Tiffany Alley Veritext represents that the  
5       foregoing transcript as produced by our Production  
6       Coordinators, Georgia Certified Notaries, is a true,  
7       correct and complete transcript of the colloquies,  
8       questions and answers as submitted by the certified  
9       court reporter in this case. Tiffany Alley Veritext  
10      further represents that the attached exhibits, if any,  
11      are a true, correct and complete copy as submitted by  
12      the certified reporter, attorneys or witness in this case;  
13      and that the exhibits were handled and produced exclusively  
14      through our Production Coordinators, Georgia Certified  
15      Notaries. Copies of notarized production certificates  
16      related to this proceeding are available upon request to  
17      litsup-ga@veritext.com.

18  
19      Tiffany Alley Veritext is not taking this deposition  
20      under any relationship that is prohibited by  
21      OCGA 15-14-37(a)and(b). Case-specific discounts are  
22      automatically applied to all parties, at such time as any  
23      party receives a discount. Ancillary services such as  
24      calendar and financial reports are available to all  
25      parties upon request.



<b>&amp;</b>	<b>1214a</b> 893:8	<b>171-1</b> 816:2,5	<b>2007</b> 841:21 870:5
<b>&amp;</b> 811:11,17 812:7 812:13,21 895:1,9 895:10	<b>128-1</b> 814:8 843:19 846:16	<b>171-5</b> 816:6	<b>2010</b> 1065:6
<b>1</b>	<b>128-2</b> 814:9	<b>174</b> 810:6	<b>2011</b> 818:19 980:16 1049:18
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<b>10.b.</b> 1119:3	<b>139:13</b> 1073:6	<b>19</b> 894:6 895:11 897:5 933:12,14 1058:3,8	<b>2017</b> 810:18 1115:25
<b>100</b> 977:2 1004:18 1077:23 1078:2,7 1078:8,10 1115:11 1115:14	<b>14</b> 895:22	<b>1970</b> 894:6	<b>206</b> 811:12
<b>101</b> 915:21	<b>14-1/2</b> 1108:11	<b>1973</b> 894:7	<b>20th</b> 1115:24
<b>107</b> 814:7 867:25 868:6,10	<b>14.5</b> 1107:11	<b>1975</b> 894:19	<b>21</b> 962:16 963:3 1013:18
<b>10:44</b> 889:20	<b>140</b> 813:14 815:16 815:23	<b>1979</b> 894:25 897:19	<b>21,900</b> 1074:3
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Georgia Code  
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Article 5, Section 9-11-30

(e) Review by witness; changes; signing.

If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate prescribed by paragraph (1) of subsection (f) of this Code section whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed. If the deposition is not reviewed and signed by the witness within 30 days of its submission to him or her, the officer shall sign it and state on the record that the deposition was not reviewed and signed by the deponent within 30 days. The deposition may then be used as fully as though signed unless, on a motion to suppress under paragraph (4) of subsection (d) of Code



Section 9-11-32, the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

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VERITEXT LEGAL SOLUTIONS  
COMPANY CERTIFICATE AND DISCLOSURE STATEMENT

Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

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