

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS
STATE OF NEW YORK

MOTELSON,

Appellant,

-against-

No. 195

FORD MOTOR COMPANY AND
FORD MOTOR CREDIT COMPANY,

Respondents.

20 Eagle Street
Albany, New York 12207
October 22, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE ABDUS-SALAAM

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Appearances:

BRIAN J. ISAAC, ESQ.
MARC J. ROTHENBERG, ESQ.
POLLACK, POLLACK, ISAAC & DE CICCO, LLP
Attorneys for Appellant
225 Broadway
Suite 307
New York, NY 10007

WENDY F. LUMISH, ESQ.
CARLTON FIELDS JORDEN BURT, P.A.
Attorneys for Respondent Ford Motor Company
100 Southeast Second Street
Suite 4200
Miami, FL 33131

ELLIOTT J. ZUCKER
AARONSON RAPPAPORT FEINSTEIN & DEUTSCH, LLP
Attorneys for Respondent Ford Motor Company
600 Third Avenue
New York, NY 10016

JOANNA M. TOPPING, ESQ.
WILSON ESLER MOSKOWITZ EDELMAN & DICKER LLP
Attorneys for Respondent Ford Motor Credit Company
1133 Westchester Avenue
White Plains, NY 10604

1
2 CHIEF JUDGE LIPPMAN: Motelson v. Ford
3 Motor Company.

4 Counsel, do you want any rebuttal time?

5 MR. ISAAC: Yes, Your Honor, if I could,
6 I'd like four minutes rebuttal, please.

7 CHIEF JUDGE LIPPMAN: Four minutes
8 rebuttal, you - - - you have it. Go ahead,
9 counselor.

10 MR. ISAAC: Thank you. Your Honors, my
11 name is Brian Isaac. As you know, I represent the
12 plaintiff-appellant in this matter. I just want to
13 introduce you to - - - to my left is Marc Rothenberg.
14 He assisted me in the case, and he assisted me on the
15 - - -

16 CHIEF JUDGE LIPPMAN: Okay, counsel, tell
17 us what this is all about. Is this all about what
18 the judge did or didn't do in this case? You - - -
19 as I understand it, the contention is that - - - that
20 this zone of danger or the equivalent of it was
21 pleaded and yet it was never before the jury. Is
22 that what went on here? And if not, who's to blame
23 for that?

24 MR. ISAAC: Okay, that's a - - - that's a
25 loaded question. Let me try to answer it - - -

1 CHIEF JUDGE LIPPMAN: Go ahead.

2 MR. ISAAC: - - - a nonfraudulent manner,
3 if I can. The defendants said in the brief that this
4 was a "surprise". It's the word they used. I'm
5 quoting it. It's page 13 of the brief. The problem
6 is I - - - I don't know how anybody can say it's a
7 surprise when we specifically pled it in the
8 complaint. And I don't - - -

9 CHIEF JUDGE LIPPMAN: Yeah, but say I - - -
10 say we accept that.

11 MR. ISAAC: Okay.

12 CHIEF JUDGE LIPPMAN: What I'm asking you
13 is - - - and it appears that, let's accept, despite
14 what you pled, and that - - - and that let's assume
15 it's all in there, that specific interrogatories were
16 not given to the jury in relation to Evan and - - -

17 MR. ISAAC: Gary, who's now deceased.

18 CHIEF JUDGE LIPPMAN: Yeah, and Gary in
19 relation to the - - - the roof and all of that but
20 this wasn't - - - the jury wasn't exactly asked those
21 questions. What - - - assuming that's the case, you
22 pled it. It's not what was given to the jury. Whose
23 responsibility is it? What - - - what happens now?

24 MR. ISAAC: Well, if it's - - -

25 CHIEF JUDGE LIPPMAN: The judge obviously

1 tried to make some corrections in terms based on this
2 kind of a template. So - - - so what do you we have
3 now? What are we supposed to be looking at?

4 MR. ISAAC: Well, I - - - I would suggest
5 to you if - - - if I could, Judge Lippman, that Judge
6 Maltese did this one exactly right. One of the
7 points I made in my brief - - - and I don't think
8 it's disputed - - -

9 CHIEF JUDGE LIPPMAN: Even what went to the
10 jury?

11 MR. ISAAC: Yes, and let me tell you why.

12 CHIEF JUDGE LIPPMAN: Go ahead.

13 MR. ISAAC: Let - - - let me tell you why.
14 The charge he gave is 2:284, and as I stated in my
15 brief, when you look at 2:284, and I have it right
16 here, he gave it verbatim. There is no separate
17 charge for zone-of-danger injuries. There's no
18 separate - - -

19 CHIEF JUDGE LIPPMAN: But we know what the
20 PJI says today, right, that the judge should fashion
21 something, right?

22 MR. ISAAC: Judge can always fashion
23 something. But I would suggest to you that there's a
24 real reason why Judge Maltese didn't.

25 CHIEF JUDGE LIPPMAN: Why not? Go ahead.

1 MR. ISAAC: Let me tell you what it is.

2 CHIEF JUDGE LIPPMAN: Go ahead.

3 MR. ISAAC: And it's a little outside of
4 what the briefs say, but I think it's a fair
5 statement. If you look at page 13 of my adversary's
6 brief, the statement that's made is, "Had Ford known
7 that plaintiffs were pursuing the claims, it would
8 have asked for specific instructions and
9 interrogatories." There was no need for specific
10 instructions, and there was no need for specific
11 interrogatories because the way you framed Bovsun
12 itself, your actual holding in Bovsun, based upon the
13 concessions that were made by the defendants here as
14 to the emotional injuries - - - and no one is saying
15 that Gary and Evan were not devastated by this. They
16 admitted it. They said it wasn't disputed.

17 CHIEF JUDGE LIPPMAN: So then the jury
18 didn't do - - - did something wrong?

19 MR. ISAAC: The jur - - - the jury does,
20 because remember - - -

21 CHIEF JUDGE LIPPMAN: Does - - - does what?

22 MR. ISAAC: The jury did decide it, because
23 what happens is when you have a - - -

24 JUDGE SMITH: They decided for you or
25 against you?

1 MR. ISAAC: They decided for me. They
2 decided against me on two claims and decided for me
3 on the roof claim.

4 JUDGE SMITH: Well - - - well, how did they
5 decide on the ro - - - zone-of-danger claim?

6 MR. ISAAC: Excuse me?

7 JUDGE SMITH: How did they decide on - - -
8 on Evan and Gary's claim based on the roof?

9 MR. ISAAC: Because in your holding in
10 Bovsun - - -

11 JUDGE SMITH: I mean how - - - which way
12 did they go on Evan and Gary's claim based on the
13 roof?

14 MR. ISAAC: They - - - they voted - - -
15 well, they voted against us in terms of not awarding
16 damages. But in terms of setting aside the amount,
17 we proved the zone-of-danger case and proved it as a
18 matter of law.

19 JUDGE SMITH: Did they - - - did - - - did
20 - - - in - - - in other words, you - - - you say the
21 jury didn't have to decide it. You're entitled to a
22 directed verdict on that.

23 MR. ISAAC: Absolutely, no question about
24 it.

25 JUDGE GRAFFEO: Can - - - can we go back a

1 couple - - -

2 JUDGE SMITH: Did you try it?

3 JUDGE GRAFFEO: Oh.

4 JUDGE SMITH: I'm sorry. Go ahead.

5 JUDGE GRAFFEO: Can we go back a couple of
6 steps?

7 MR. ISAAC: Yes, sure, I'm sorry.

8 JUDGE GRAFFEO: Just so I can understand
9 the record here.

10 MR. ISAAC: Um-hum.

11 JUDGE GRAFFEO: Did the plaintiff's
12 attorneys submit proposed jury charges - - -

13 MR. ISAAC: They did.

14 JUDGE GRAFFEO: - - - to the judge?

15 MR. ISAAC: They did.

16 JUDGE GRAFFEO: They didn't ask for
17 separate items on the special verdict sheet?

18 MR. ISAAC: They did. They just didn't - -
19 -

20 JUDGE GRAFFEO: For the - - - for the
21 emotional distress? I mean I didn't see it on this
22 verdict sheet. Did they ask for it and it didn't
23 make the final verdict sheet?

24 MR. ISAAC: No, no, no, no. They - - -
25 they did not. And - - - and the reason is that

1 emotional damages are simply a subspecies of pain and
2 suffering. We - - - we - - - this - - - this issue
3 is just - - -

4 JUDGE GRAFFEO: Right, now how was the jury
5 to know how to - - - how to divide those two
6 categories, pain and suffering and the emotional
7 distress?

8 MR. ISAAC: Because emotional suffering and
9 pain and suffering are not separate categories of
10 injury. In other words, in McDougald - - -

11 JUDGE GRAFFEO: So - - - so then if - - -
12 if - - - if the jury - - -

13 MR. ISAAC: It's - - -

14 JUDGE GRAFFEO: - - - understood that and
15 they decided what they decided on this verdict sheet,
16 then what are we to do here?

17 MR. ISAAC: Well, the - - - you - - - you -
18 - - you're to see whether not - - - we're - - - we're
19 not - - - we're saying the judge made a mistake - - -
20 not the judge, the jury made a mistake. They - - -

21 CHIEF JUDGE LIPPMAN: So what do we do if
22 the jury made a mistake?

23 MR. ISAAC: Affirm Judge Maltese's decision
24 based on the fact that his decision is predicated
25 upon undisputed testimony - - - undisputed testimony

1 that was not - - -

2 JUDGE ABDUS-SALAAM: Mr. Isaac, how can you
3 say the jury made a mistake when, I think you would
4 agree that, if it takes the Court of Appeals to
5 decide on zone-of-danger damages or zone-of-danger
6 injuries, if a jury is not really instructed on that,
7 what are they supposed to deliberate on in that
8 regard?

9 MR. ISAAC: Well, the - - - the problem - -
10 - the - - - the problem with that is when you look at
11 your - - - and - - - and I want to discuss Bovsun,
12 but I also want to discuss McDougald against Garber
13 and I want to dis - - - discuss Nussbaum against
14 Gibstein, as well because I think it's important
15 because that's what you're focusing on. We fought
16 this battle in 19 - - - 1980s up to 1989. We lost.
17 The plaintiffs won - - - keeping myself at the
18 plaintiffs' bar. What we said was that there were
19 differences in various damages. You can have pain
20 and suffering. You can have loss of enjoyment of
21 life.

22 I actually read the amicus briefs that you
23 had in McDougald and Nussbaum. And I am telling you
24 the defense bar went absolutely crazy and said you
25 can't do that. What you're doing is you're

1 increasing the amount of damages that the plaintiff
2 has. And the court itself, actually, Judge Abdus-
3 Salaam, is - - - is kind of interesting. If you look
4 at 990, the court dealt with that exact issue.
5 Here's what it said, line 14, quote, "You may find
6 that the plaintiffs and the decedents are entitled to
7 recover from the defendant. You must also include in
8 your verdict damages for any mental suffering,
9 emotional psychological injuries" - - -

10 JUDGE SMITH: I think - - - I think you're
11 making the point, and I think you're right, that
12 under Bovsun the - - - the - - - the emotional
13 suffering is just a part of a broader claim, which
14 would be the claim for the defective roof.

15 MR. ISAAC: Correct.

16 JUDGE SMITH: What, in this whole trial,
17 told the jury that they had a claim by Gary and Evan
18 for a defective roof?

19 MR. ISAAC: It's - - - but that's not the
20 claim. Let - - - let - - - let - - - and I - - - I
21 don't mean to disagree with you, Judge Smith, because
22 I have to get your vote, because I don't think that's
23 what Bov - - - I don't think that's what Bovsun held.
24 Let me just read you the - - - the holding, and then
25 I'll give you my - - - my take on what you're saying.

1 This is the holding in Bovsun. It says, "Holding,
2 where a defendant" neg - - - "negligently exposes a
3 plaintiff to an unreasonable risk of bodily injury or
4 death."

5 JUDGE SMITH: The - - - the unreasonable
6 risk in this case was the roof?

7 MR. ISAAC: The roof. They're all - - -
8 they're all in the car, so they were exposed to the
9 risk of roof.

10 JUDGE SMITH: So - - - so - - - so - - -
11 the jury - - - the jury's supposed to figure out that
12 you're suing for the danger to - - - to - - - to Evan
13 and - - - and Gary from the roof even though there's
14 no claim that the roof physically touched them?

15 MR. ISAAC: But in - - - in an emotional
16 claim under Bovsun, you usually need it.

17 JUDGE SMITH: Yeah, but how is the jury
18 supposed to know that?

19 MR. ISAAC: Because the - - - the mental
20 injuries were undisputed. And there's no - - -

21 JUDGE SMITH: But you said that - - - you
22 said that - - -

23 JUDGE GRAFFEO: But - - - but even if they
24 - - -

25 JUDGE SMITH: - - - the jury made a

1 mistake. What - - - what - - -

2 MR. ISAAC: Well, the jury didn't - - - the
3 jury didn't award any damages.

4 JUDGE GRAFFEO: But what - - - what if they
5 understood that but they still didn't award damages?
6 How do we - - - how do we know the jury didn't
7 discuss that but decide they didn't want to award
8 damages for that?

9 MR. ISAAC: Well, it wouldn't - - - it - -
10 - my opin - - - my - - - my argument to you is it
11 wouldn't matter. If you have undisputed testimony
12 that's - - - that's admitted by the other side - - -

13 JUDGE SMITH: You - - - you would be
14 entitled to a directed verdict is your answer.

15 MR. ISAAC: I'm entitled to a directed
16 verdict. And what - - -

17 JUDGE SMITH: So why - - - why - - - why
18 couldn't the jury have decided that let's - - - that
19 let's take Evan was because he was thrown clear of
20 the car, was never - - - was not in the zone of
21 danger at the time the roof hit the ground?

22 MR. ISAAC: Because we never pled a
23 physical injury claim. And every - - -

24 JUDGE SMITH: No, no, no, no, no. The - -
25 - let's assume the jury understood - - - every juror

1 has read Bovsun and understands it.

2 MR. ISAAC: Okay.

3 JUDGE SMITH: And they know - - - they know
4 there's a zone-of-danger claim before them. Are they
5 not allowed to say well, Evan was actually out of the
6 - - - I mean this is such a horrible case. I hate
7 discussing these facts. But Evan was actually out of
8 the zone of danger before the roof coll - - -
9 collapsed.

10 MR. ISAAC: Well, first, the - - - if - - -
11 if you look at the record, that's not what the record
12 shows. The record shows that it was the first
13 turnover when the roof collapsed. He was in the car.
14 But it does - - - it does - - - it doesn't matter.
15 The fact is that the medical testimony, it's not - -
16 - jurors can't make it up on their own. I'm sorry.
17 I - - - I see my light is on.

18 CHIEF JUDGE LIPPMAN: No, that's all right.
19 Continue your answer.

20 MR. ISAAC: Okay, the medical testimony was
21 unequivocal. The only doctors who testified said
22 that the emotional injuries that they suffered was a
23 result of the death of Steven and was also a result
24 of the death of Brian.

25 CHIEF JUDGE LIPPMAN: Counsel, that - - -

1 JUDGE SMITH: That doesn't - - - that
2 doesn't do it unless he's in the zone of danger.

3 MR. ISAAC: But he is in the zone of
4 danger. It was the car.

5 CHIEF JUDGE LIPPMAN: Counsel, is the - - -
6 is the only way you win on your theory, on that
7 theory? I mean we can't look at this and say that
8 gee, they really should have had interrogatories and
9 that without them, you know, they couldn't find - - -
10 even - - - even given whatever you pled, even given,
11 you know, everything that - - - that you say, they
12 just couldn't get the right ruling. Shouldn't we be
13 looking at that as to another - - - isn't that
14 another alternative theory that - - - that you could
15 prevail? That - - - that - - - that not having those
16 interrogatories and, again, based on the PJ - - - PJI
17 charge book today which talks about, you know,
18 fashioning a charge, isn't that a thing that we
19 should be looking at, too? Where you only say - - -

20 MR. ISAAC: No.

21 CHIEF JUDGE LIPPMAN: - - - the only way
22 you win is by directed verdict?

23 MR. ISAAC: No, no, no, no. I - - - I
24 didn't - - - I - - - I - - - you're a hundred percent
25 right and, quite frankly, if I had the benefit of

1 hindsight, I - - - I would have done it that way. If
2 I had had the benefit of hindsight, I'd be at the
3 track and I'd be a millionaire also, but I don't.
4 But I would say you - - - to you one other thing,
5 though. It's not our fault. Okay, it's not our
6 fault, absolutely no way. Look at 1097 of the
7 record. This is my record, the appendix. The
8 instruction sheet that the trial court gave, that was
9 not objected to by the defendant, says and I'm going
10 to quote - - - and if you want Judge Lippman, you can
11 take off my time on replies.

12 CHIEF JUDGE LIPPMAN: No, no, keep going.

13 MR. ISAAC: Quote, "If you answered yes to
14 any one or more of the following questions: 1B, 2B,
15 3B, 4B, 5B, 7B," all the way down to 13B, "proceed to
16 question 14." Question 14 is Steven Motelson's
17 comparative, and then it said proceed to 15, answer
18 the damage question. They consented to that. And if
19 you look at Bichler against Eli Lilly, Knobloch
20 against Upfront Industries, Martin against City of
21 Cohoes, all cited in our brief, that's the law of the
22 case. So I agree with you. Probably this case is
23 the case to say what we should have. But in terms of
24 who's at fault, it wasn't Judge Maltese; it wasn't
25 Marc Rothenberg. And if you look at 1097 it was

1 their obligation to object to that because that is
2 the law of the case, and that's the standard under
3 which you rule.

4 CHIEF JUDGE LIPPMAN: Okay, counselor.

5 JUDGE SMITH: You - - - I'm - - - I'm not
6 sure I understand your point. I'm sorry, I don't
7 want to keep you forever, but - - - but you - - -
8 you're saying that the instruction you just read, if
9 you answered yes to any one or more of the following
10 questions proceed to question 14, that told the jury
11 that they were deciding the question that - - - on -
12 - - on which you've now been awarded damages?

13 MR. ISAAC: Yeah, because it says you have
14 to go answer damages. Look at 15.

15 JUDGE SMITH: And - - - and - - - and where
16 does it - - - where - - - where, from anywhere in the
17 trial, forget about the charge, is the jury supposed
18 to figure out that they had to - - - that they had to
19 award emotional damages to Gary and Evan for the - -
20 - for the experience of the loss of their grandfa - -
21 - of - - - of the grandfather and the brother?

22 MR. ISAAC: Judge Smith, they gave a 2:284
23 charge and I - - - I just - - - I know I'm going
24 over. They're jurors; they're not Court of Appeals
25 judges; they're not appellant lawyers; they're

1 jurors. They would - - -

2 JUDGE PIGOTT: Well, could the - - - could
3 the mistake then be the judge who said - - - who
4 counts this in terms of zone of danger. In other
5 words, rather than saying anything about a zone of
6 danger, if you just said I think the - - - the award
7 is inadequate for the emotional loss that these two
8 kids suffered, we wouldn't be here, right?

9 MR. ISAAC: I think he - - - well, he
10 actually made an award. He actually directed a
11 verdict with specific numbers based on the - - -
12 based on Berenson's testimony.

13 JUDGE SMITH: Well, the - - - the only they
14 can get that award is on a zone-of-danger theory.

15 MR. ISAAC: Yes, that - - - that - - -
16 that's true. And - - - and again, if you look at
17 that instruction, that instruction commands the jury
18 to actually award damages. The more - - -

19 CHIEF JUDGE LIPPMAN: Okay, counselor.

20 MR. ISAAC: I'm sorry.

21 CHIEF JUDGE LIPPMAN: Let's - - - we'll - -
22 - we'll get back to this. Let's hear from your
23 adversary.

24 MS. LUMISH: Good afternoon; may it please
25 the court, Wendy Lumish and Elliott Zucker here for

1 Ford; Joanna Topping is also here for Ford Motor
2 Credit. The jury rejected all of the liability
3 questions and awarded no damages to Gary and Evan.
4 They - - - they rejected the liability questions as
5 it related to those two - - -

6 CHIEF JUDGE LIPPMAN: Why was the judge
7 wrong in what he did - - -

8 MS. LUMISH: The judge - - -

9 CHIEF JUDGE LIPPMAN: - - - after that in -
10 - - in - - - in effect directing an award to the two
11 of them.

12 MS. LUMISH: The - - - the judge was wrong
13 in what he did for multiple reasons.

14 CHIEF JUDGE LIPPMAN: Why?

15 MS. LUMISH: The first reason was that
16 claim was not tried - - -

17 CHIEF JUDGE LIPPMAN: And if he's wrong,
18 can we address that, or why shouldn't we address
19 that?

20 MS. LUMISH: The - - - the judge was wrong
21 because that issue was not tried. It was not
22 instructed on. And there was no jury finding.

23 CHIEF JUDGE LIPPMAN: Yeah, or maybe - - -
24 let's assumed it should have been instructed on.

25 MS. LUMISH: The burden - - - you asked the

1 question earlier about who's responsibility is it.

2 CHIEF JUDGE LIPPMAN: Yeah.

3 MS. LUMISH: It was plaintiff's claim.
4 It's their burden to pursue the claims that they want
5 to pursue at trial.

6 JUDGE SMITH: How many - - - how many
7 causes of action did they have in their complaint?

8 MS. LUMISH: They had - - - they had quite
9 a number of them. They had multiple causes of action
10 relating to the - - - the sudden acceleration.

11 JUDGE SMITH: The - - - the - - - the num -
12 - - the number is, like, in the dozens, isn't it?

13 MS. LUMISH: Exactly.

14 JUDGE SMITH: I guess - - - I guess my - -
15 - maybe it's a softball question, but you - - - you -
16 - - you - - - your argument is that they - - - they
17 made their choice. They didn't want to - - - they
18 put all million causes of action before the jury.

19 MS. LUMISH: Right.

20 JUDGE SMITH: They tried the ones they
21 wanted to try.

22 MS. LUMISH: Right, and, in fact, they had
23 a - - - for example, a manufacturing defect claim.
24 They didn't pursue that at trial, either. The fact
25 that it's pled, I think we all recognize that doesn't

1 tell you what happened at trial.

2 CHIEF JUDGE LIPPMAN: Did the - - - did the
3 judge have a ques - - - a - - - a duty to put into
4 the charge a zone-of-danger kind of question to the
5 jury?

6 MS. LUMISH: Absolute - - - absolutely not
7 unless the plaintiff said we've got this claim and we
8 want it. There is - - - plaintiff - - -

9 CHIEF JUDGE LIPPMAN: Assuming that they
10 pled it and that you didn't object to any of the
11 damages, why shouldn't the - - - the jury been asked
12 about it?

13 MS. LUMISH: Because the plaintiff had to
14 ask the court for a charge on the issue. As we know,
15 it is a very specific claim. This - - -

16 CHIEF JUDGE LIPPMAN: And the judge has no
17 responsibility to fashion a charge?

18 MS. LUMISH: Absolute - - - the judge
19 doesn't have a - - - an obligation to go back and say
20 let me look at your complaint now. I think there's
21 some causes of action here. Did you mean to pursue
22 those? The - - - the burden is one hundred percent
23 on the plaintiff to pursue the claims that they want
24 to pursue.

25 JUDGE ABDUS-SALAAM: There - - - there are

1 many times when pain and suffering and emotional
2 damages may not be completely intertwined. Are you
3 saying that a general charge on emotional damages or
4 pain and suffering wouldn't be sufficient in a case
5 like this or in other cases?

6 MS. LUMISH: It would not be sufficient in
7 the context of zone of danger, and the reason for
8 that is zone of danger has a combination of liability
9 components and damage components. The - - - the
10 plaintiff wants to really focus on we had
11 psychological injuries, we've proven emotional
12 distress. But that's not all of what a - - - a claim
13 for zone of danger is, as - - - as this court's well
14 aware. It's a very narrowly carved - - -

15 JUDGE SMITH: He says - - - he says he
16 would have been entitled to a directed verdict on the
17 question whether they were in the zone of danger. Do
18 you agree?

19 MS. LUMISH: Well, absolutely not. And he
20 didn't - - -

21 JUDGE SMITH: Why not? He - - - he - - -
22 he says it's perfectly clear they were in the car
23 when the roof hit the ground.

24 MS. LUMISH: Well, first of all, it - - -
25 what's interesting is he didn't move for that

1 directed verdict before the - - -

2 JUDGE SMITH: Okay, but - - -

3 MS. LUMISH: - - - the case went to the
4 jury.

5 JUDGE SMITH: Okay, but he - - - he - - - I
6 guess what he's saying is - - -

7 MS. LUMISH: Had - - -

8 JUDGE SMITH: - - - I would have been
9 entitled to it so no harm, no foul.

10 MS. LUMISH: No, absolutely he wouldn't
11 have been entitled to it. Let's look at Evan first.

12 JUDGE PIGOTT: How are they not in the zone
13 of danger?

14 MS. LUMISH: Evan was not in the zone of
15 danger because the evidence is that he was thrown
16 free of the car before - - -

17 JUDGE PIGOTT: What was the zone of danger
18 in your view?

19 MS. LUMISH: The zone of danger in my view
20 is the - - - the roof crushed, because remember - - -

21 JUDGE PIGOTT: Wait a minute, wait a
22 minute. Wait, the roof of what?

23 MS. LUMISH: The roof of the vehicle.

24 JUDGE PIGOTT: Which he was riding in.

25 MS. LUMISH: Right, but the important - - -

1 JUDGE PIGOTT: But he's not in the zone of
2 danger even though he's in the vehicle whose roof was
3 crushed?

4 MS. LUMISH: The - - - here's what's
5 interesting about this case. The jury found - - -

6 JUDGE PIGOTT: I guess the answer's no?

7 MS. LUMISH: The answer's no. The - - -

8 JUDGE SMITH: You - - - you say he wasn't
9 in the vehicle when the roof was crushed.

10 MS. LUMISH: Exactly, and the jury found
11 that Ford Motor Company was not responsible for the
12 accident.

13 JUDGE ABDUS-SALAAM: But what about Gary,
14 counsel?

15 MS. LUMISH: And that is a critical fact.

16 JUDGE ABDUS-SALAAM: Counsel, what about
17 the father who was still hanging upside down when the
18 roof - - - and - - - and actually saw his father
19 being crushed by the roof?

20 MS. LUMISH: I think - - - well, first of
21 all, let me - - - let me be clear before - - - before
22 I answer that. There's two other elements. It's - -
23 - proving zone of danger is not enough. And as to
24 Evan, they didn't demonstrate that he contemp - - -
25 contemporaneously observed a immediate family member.

1 We've got other issues.

2 CHIEF JUDGE LIPPMAN: Yeah, yeah, but the
3 question's about Gary; put Evan aside for the time
4 being.

5 MS. LUMISH: Put Evan aside for the moment.
6 I would have to say, with respect to Gary, I think
7 that the issue of whether or not he was in the zone
8 of danger of the roof, because he was so close, that
9 probably is an issue where the plaintiff would be
10 entitled to - - - to at least get on that step, or it
11 would have been a jury issue, because we would have
12 prevented evidence as to why we believe he wasn't.
13 But I - - - but I would agree that that one's a close
14 question.

15 But again, even on Gary, then you have to
16 go to the next question. Did he contemporaneously
17 observe or have an awareness of it? The only
18 testimony in the case is about two sentences from
19 Gary where he says I was being jostled around and
20 then the vehicle stopped, and I saw my father under
21 the roof. Is - - - is that a contemporaneous
22 observation or awareness? I would say that that
23 can't be decided as a matter of law. Perhaps it was
24 a jury question, but it wasn't a question that was
25 asked to the jury. And then as you go back and to go

1 back to - - -

2 JUDGE SMITH: What - - - what about - - -
3 what about, I guess - - - I hate asking, but what
4 about Gary's observation of Evan - - - of - - - of
5 Brian, I mean?

6 MS. LUMISH: That's not an issue in the
7 case because Ford Motor - - - they can't recover for
8 that.

9 JUDGE SMITH: Oh, for Bri - - - because,
10 I'm sorry. I - - - I got it, sorry.

11 MS. LUMISH: Right, and that's really the
12 critical - - - that's really the critical problem
13 here is because the jury said no to the cause of the
14 accident and no to the seatbelt, the plaintiff can't
15 come along afterwards and say let's wipe all of that
16 under the rug and say because we were in an accident
17 and because of all these horrible things happened,
18 which, of course, we agree with.

19 JUDGE SMITH: You - - - you - - - you - - -
20 you say a jury's going to do what I just did.
21 They're going to start thinking - - -

22 MS. LUMISH: Exactly.

23 JUDGE SMITH: They're going to start
24 thinking about - - - about the horrible things that -
25 - - that - - - that - - - that Ford is not liable

1 for.

2 MS. LUMISH: And - - - and that this
3 precisely why this had to go to the jury. This is
4 not an issue that we can wait until after the
5 verdict. And quite - - -

6 CHIEF JUDGE LIPPMAN: But could the jury
7 really look at this without - - - without
8 interrogatories?

9 MS. LUMISH: Sure, the jury had - - -

10 CHIEF JUDGE LIPPMAN: Shouldn't - - -
11 shouldn't - - - shouldn't - - - shouldn't the judge
12 have - - - have put that into the charge just as - -
13 - if you look at the PJI charge today, it says the
14 judge has to fashion something. Why wouldn't the
15 judge fashion something in this particular
16 circumstance?

17 MS. LUMISH: Because the plaintiff never
18 said I have a claim for zone-of-danger damages. Look
19 at the record, and we provided the court - - - they
20 gave you an excerpt. We made sure the court has the
21 entire record. The words "zone of danger" is not in
22 it.

23 CHIEF JUDGE LIPPMAN: They claim they
24 proved the - - - the zone of danger.

25 MS. LUMISH: They didn't - - - they say

1 they proved it because there was some testimony in
2 the case to the - - - to the effect, what the effect
3 was on different people, but, of course, that would
4 have been presented - - -

5 CHIEF JUDGE LIPPMAN: But shouldn't that be
6 up to the - - - you just said shouldn't it be up to
7 the jury to decide?

8 MS. LUMISH: No, because that evidence was
9 presented as part of a whole case, during which the
10 jury was considering whether or not the defect caused
11 the accident - - - whether or not defects caused - -
12 -

13 CHIEF JUDGE LIPPMAN: The language that you
14 - - - that you read to Judge Pigott, isn't that
15 certainly something that the jury should decide?

16 MS. LUMISH: The - - - the - - -

17 CHIEF JUDGE LIPPMAN: About whether Gary's
18 in the zone of danger, isn't that - - -

19 MS. LUMISH: Well - - -

20 CHIEF JUDGE LIPPMAN: It - - - it would
21 almost seem on its face that it is, but, the very
22 least, shouldn't the jury decide that?

23 MS. LUMISH: Well, I guess my answer to
24 that would be yes, that's something the jury should
25 be dec - - - decide, which is why the plaintiff had

1 to request that - - - that that be decided.

2 JUDGE PIGOTT: So - - -

3 MS. LUMISH: And by not doing that, they -
4 - - they waited until after the verdict, and - - -
5 and, frankly, I think they were surprised because the
6 jury - - -

7 JUDGE PIGOTT: So - - - so what you're - -
8 - what you're suggesting is that let's - - - let's
9 take Gary for a minute. That you have - - - you have
10 a claim for and behalf of Gary and you expect to win
11 everything on - - - on that claim in the one - - - in
12 - - - in the Gary claim. You don't expect, nor do
13 you think you need, a zone of danger, because you're
14 confident in your case, same thing with the - - -
15 with the - - - with the other kids. Unfortunately,
16 the - - - the - - - the - - - the seatbelt and the -
17 - - and the speed thing didn't work, and now they're
18 stuck with nothing for them and the zone of danger
19 becomes more important.

20 MS. LUMISH: That's exactly what we believe
21 happened. And, in fact, it's interesting because as
22 - - - as Judge Smith, you raised the question before
23 about why not for Brian? And, of course, if you look
24 at the evidence in the case, the father was
25 devastated as much by the death of his father as he

1 was by the death of his son, but they're not making
2 that claim here because under the law they can't get
3 that.

4 JUDGE SMITH: You're - - - you're saying -
5 - - your point now is if - - - is if - - - if they'd
6 been - - - if anyone had focused on the claim we're
7 now focusing on, you could have made the depressing,
8 but probably convincing argument, that the loss of
9 Brian was a much bigger deal to the father than the
10 loss of his father.

11 MS. LUMISH: Well, we would have done a lot
12 of things. The first thing we would have done was
13 argue as a matter of law that Evan can't recover in
14 any manner for - - - for numerous reasons, including
15 we would say he wasn't in the zone of danger. He
16 didn't contemporaneously observe. They can't
17 demonstrate as a matter of law that the injuries - -
18 -

19 CHIEF JUDGE LIPPMAN: Why did Judge Maltese
20 do - - - do what he did?

21 MS. LUMISH: Judge Maltese did what he did
22 - - -

23 CHIEF JUDGE LIPPMAN: Why did he - - - why
24 did he put that there should be awards of this amount
25 and that amount to Gary and Evan?

1 MS. LUMISH: He did it because he found
2 that the ev - - - that the jury's finding that these
3 two boys were - - - the two rear-seated occupants
4 were not belted, he was astonished by that. And he
5 says in his opinion he finds it's against the
6 manifest weight of the evidence, but he's not going
7 to do anything about that. And then he - - -

8 CHIEF JUDGE LIPPMAN: Yes, but what he did
9 do, yeah.

10 MS. LUMISH: What he did do was then he
11 said well, there were some emotional damages here,
12 and the jury must not have understood that, so now
13 I'm going to assume that that goes with the zone of
14 danger.

15 CHIEF JUDGE LIPPMAN: So what's wrong with
16 that?

17 MS. LUMISH: The claim wasn't tried. It's
18 not within the province of the trial judge to have
19 taken those issues from the jury and decide them on
20 his own.

21 JUDGE ABDUS-SALAAM: So what's your
22 response to Mr. Isaac's point about the causation
23 questions on the verdict sheet, and then once - - -
24 if you answer any of them yes you have to go to
25 damages after you get past the comparative negligence

1 charge.

2 MS. LUMISH: My position on that is that
3 doesn't - - - that doesn't answer the causation
4 question. There needed to be a causal link between
5 the finding of the roof defect and then tying that
6 into the particular elements of damages. What that
7 real - - - what that question really said was if you
8 said yes to anything, then you've got to move beyond
9 that and start answering questions. It didn't say if
10 you said yes - - -

11 JUDGE GRAFFEO: So what's the - - - what's
12 the question - - -

13 MS. LUMISH: - - - answer everything.

14 JUDGE GRAFFEO: What's the question the
15 verdict sheet should have had then?

16 MS. LUMISH: The question on the verdict
17 sheet would have been a specific question about do
18 you find that these plaintiffs were in the zone of
19 danger and suffered damages? And then we can talk
20 about how detailed those findings have to be. But in
21 some manner, as the Second Department said, the jury
22 was asked if the defect in the roof caused Steven's
23 injuries. They weren't asked if the roof defect
24 caused injuries to this plaintiff. That would be the
25 bare minimum. There had to be some finding tying the

1 roof defect to the - - - these plaintiff's injuries.

2 JUDGE ABDUS-SALAAM: So you're - - - you're
3 saying Question 9B on the verdict sheet began and
4 ended with Steven's injuries, the grandfather, his
5 injuries and his death, and didn't go beyond any
6 other plaintiff in this action?

7 MS. LUMISH: Exactly, exactly. And I - - -
8 I would say that wouldn't have been enough, but that
9 would at least have been a start to understanding
10 that they made a finding. But here - - -

11 JUDGE SMITH: Any - - - is there any
12 question in the verdict sheet which would have given
13 the jur - - - suppose you have a juror who just
14 happens to know offhand exactly what the law is and
15 understands what a zone-of-danger claim is, even
16 though no one's told him. Is there anything in that
17 verdict sheet that would have given that juror an
18 opportunity to award zone-of-danger damages?

19 MS. LUMISH: I - - - you know, I'd have to
20 speculate as to how they would have done it there,
21 because they said no as to the claims for that
22 plaintiff. And so I think without having some kind
23 of question.

24 JUDGE SMITH: Well, okay, but I mean, yeah
25 - - -

1 MS. LUMISH: Without having a question
2 leading them there. And, in fact, if - - -

3 JUDGE SMITH: They - - - they - - - well,
4 if they'd have had a general question saying did
5 Ford's negligence cause the - - - cause Evan and Gary
6 injury and they answered yes to that question,
7 shouldn't you - - -

8 MS. LUMISH: I don't think - - - I don't
9 think that's clear enough. I think you have to
10 remember there's a difference between - - -

11 JUDGE SMITH: Well, okay, but - - - but - -
12 - but was there a question that general?

13 MS. LUMISH: Well, there was a question
14 about was the particular - - - did the particular
15 defect cause - - -

16 JUDGE SMITH: Yeah.

17 MS. LUMISH: - - - injury to that
18 particular plaintiff.

19 JUDGE SMITH: Did they - - - did they ever
20 - - - did they ever ask him whether the - - - yeah,
21 whether the roof defect caused any injury to Evan or
22 Gary?

23 MS. LUMISH: No, and that's the point.
24 That's what the Second Department said. They didn't
25 ask that. They asked whether the - - - whether the -

1 - -

2 JUDGE SMITH: And so I guess the answer to
3 my question is that even the most - - - even a
4 clairvoyant juror would have found no way to award
5 damages to Gary - - - Gary or Evan based on the roof
6 defect?

7 MS. LUMISH: Exactly, and - - - and, in
8 fact, the plaintiff concedes that the jury knew
9 nothing about zone of danger. Well, that - - - that,
10 unfortunately, lies with the plaintiff.

11 CHIEF JUDGE LIPPMAN: And all of this is
12 the fault of the plaintiff?

13 MS. LUMISH: If the plaintiff wants to
14 pursue a claim then - - -

15 CHIEF JUDGE LIPPMAN: And there's nothing
16 that we can look at now in terms of how to remedy
17 this situation?

18 MS. LUMISH: I don't - - - I don't believe
19 that there is anything that the court can do at this
20 juncture. I believe that this case stands and falls
21 on the basic proposition that a court can't find
22 liability and award damages on a claim that wasn't
23 tried, on which there were no instructions, and on
24 which there was no jury finding.

25 CHIEF JUDGE LIPPMAN: Okay, counselor.

1 MS. LUMISH: And that's what the Second
2 Department held. We would ask that the court affirm.

3 CHIEF JUDGE LIPPMAN: Thank you.

4 MS. LUMISH: Thank you.

5 CHIEF JUDGE LIPPMAN: Counsel?

6 MR. ISAAC: Judge Lippman, with all due
7 respect, in response to the last question, it - - -
8 it's not our fault. It - - - it just isn't. 979 of
9 the record, judge's charge, "If you find that the
10 plaintiffs are entitled to recover from the
11 defendant, you must render a verdict in a sum of
12 money that will justly and fairly compensate the
13 plaintiffs for all of their losses resulting from any
14 injuries they sustain."

15 JUDGE SMITH: And - - - and a juror's
16 supposed to figure out from that that if - - - if the
17 - - - if - - - if Gary and Evan are horrified by the
18 emotional experience of - - - of their grand - - - of
19 - - - of what happened to their grandfather they have
20 to award damages?

21 MR. ISAAC: The damages here are solely
22 emotional injuries. I don't think jurors get any
23 question ever, that I've seen, about zone of danger.
24 Let me give you an example. If a - - - if a judge -
25 - -

1 JUDGE SMITH: So your - - - your answer is
2 yes?

3 MR. ISAAC: They get the damages if they
4 prove it.

5 JUDGE SMITH: They are - - - they are
6 supposed to figure out from the charge you read that
7 what we call a zone-of-danger claim - - - I know you
8 under - - - you tell me there's no such thing as a
9 zone-of-danger claim, what we call a zone-of-danger
10 claim is in the case?

11 MR. ISAAC: Yes, a zone-of-danger - - - a
12 zone-of-danger claim is - - - is - - - is words that
13 appellate judges, appellate lawyers, trial lawyers
14 use. Jurors don't get that.

15 JUDGE SMITH: I know but you - - - you say
16 there's no separate zone-of-danger claim, and you're
17 right because if - - - if they had suffered physical
18 injuries from the roof and emotional injuries, that
19 would be part of the same claim. But, in fact, they
20 suffered no physical injuries from the roof. So it's
21 not - - - in this case, you can reasonably call it a
22 zone-of-danger claim is that the - - - the only
23 damages are zone-of-danger damages.

24 MR. ISAAC: Right, except the point is, and
25 I - - - I think my point to you is that emotional

1 injuries, whether they result from zone of danger or
2 they result from something else, are still just
3 emotional injuries. You can't increase it and say
4 I'm going to have this kind of emotional injury for
5 my pain and suffering, I'm going to have another
6 emotional injury, because it's doubling the damages,
7 and that's - - -

8 JUDGE SMITH: Tell - - - tell - - - tell me
9 again - - -

10 JUDGE ABDUS-SALAAM: Counsel - - -

11 JUDGE SMITH: - - - how a logical - - - now
12 you - - - you go to the verdict sheet now.

13 MR. ISAAC: Um-hum.

14 JUDGE SMITH: Tell me again how a logical
15 juror with this verdict sheet in front of him awards
16 - - - and assuming he understands the law as well as
17 you and I, how he awards what we call zone-of-danger
18 damage?

19 MR. ISAAC: It's just emotional damage.
20 It's part of pain and suffering. It's there - - -

21 JUDGE SMITH: Well, but he - - - but - - -
22 but - - - but - - - you - - - you - - - he - - - he -
23 - - he made - - - what finding has he made, what
24 liability finding provides a predicate for the
25 damages?

1 MR. ISAAC: Because he - - - the - - - the
2 jury verdict sheet itself, Judge Smith. I'm - - -
3 I'm not - - - I'm not making it up, 1097 is the
4 verdict sheet that they consented to you, not me.

5 JUDGE SMITH: Okay, okay, okay.

6 MR. ISAAC: Okay, so - - -

7 JUDGE SMITH: But I - - - I just want you
8 to show me.

9 MR. ISAAC: I will.

10 JUDGE SMITH: Show - - - show me where
11 there's a liability finding.

12 MR. ISAAC: But - - - but - - - but I just
13 - - - I just want you to understand something.
14 People are framing these questions like you want to
15 save me from what I did. You're actually talking
16 about saving them from what they did. The verdict -
17 - -

18 JUDGE SMITH: I - - - you know, look, I'm -
19 - - no, I'm - - - I'm not really worried about whose
20 fault it was. I mean the - - - the - - - a horrible
21 thing happened here. I - - - I don't care what
22 lawyers should have done. I just want to know how
23 the - - - yeah, how a juror could possibly have got
24 to zone-of-danger - - - danger damages on this
25 verdict sheet?

1 MR. ISAAC: Because it's just emotional
2 damages. It's not zone-of-danger damages.

3 JUDGE SMITH: Okay, but you got to find
4 liability before you find the damages, right?

5 MR. ISAAC: Yes, and we have it.

6 JUDGE SMITH: Where is the liability
7 finding?

8 MR. ISAAC: The liability's predicated upon
9 the fact that Steven Motelson died as a result of a
10 defective roof. Gary - - -

11 JUDGE GRAFFEO: Which - - - which question?

12 JUDGE SMITH: So you're saying question 7A?

13 MR. ISAAC: 7A, 7B, 9A, 9B, I win. It's
14 that simple based on the verdict sheet.

15 JUDGE SMITH: But it - - - but only - - -
16 but - - - but the only injuries referred to - - - I
17 mean doesn't that - - - does - - - does that tell a
18 juror that there's a liability to - - - to - - - to
19 Gary and Evan that their damages - - - that they have
20 to find damages to Gary and Evan resulting from the
21 roof support system defect design?

22 MR. ISAAC: Gary and Evan's - - - Gary and
23 Evan's damages are predicated on the medical
24 testimony. That's what they - - - that's what they
25 do.

1 JUDGE SMITH: I'm not - - - I'm not saying
2 there's evidence of the damages. I'm saying how does
3 a juror figure out that that juror is supposed to
4 consider those damages based on a fact - - - based on
5 a series of questions that mention only injury to
6 Steven Motelson?

7 MR. ISAAC: Because of the directions on
8 1097. I - - - I know I'm repeating myself, but the -
9 - -

10 CHIEF JUDGE LIPPMAN: Go ahead and finish,
11 counsel.

12 MR. ISAAC: - - - the directions on 1097
13 command them to go decide the damages.

14 CHIEF JUDGE LIPPMAN: Counsel, could the -
15 - - did the judge have any discretion to make this
16 clearer to the jury, and can we look at that now?
17 Can we deal with that?

18 MR. ISAAC: The answer is of course the
19 judge has discretion to make it clearer. We never
20 said that the PJI was a be all and end all. If they
21 have to be modified, you don't have to quote
22 verbatim. And yes, you can, because of 1097.

23 JUDGE PIGOTT: I asked before, though, I -
24 - - I - - - did - - - did Judge Maltese make a
25 mistake in referring to this as zone-of-danger

1 damages? And somebody, I forget who I asked, so I
2 don't - - - forget who answered, said you need the
3 zone of danger in order to get the damages.

4 MR. ISAAC: I - - - I - - - I - - - I know
5 where you're going, Judge Pigott. I - - - I don't
6 know if he made a mistake or not, and for a jury I
7 don't think it matters. Jury doesn't know what zone
8 of danger is. They don't know what Bovsun is.

9 JUDGE PIGOTT: No, this isn't a jury. This
10 is - - - this is a bit afterward. This is the after.

11 MR. ISAAC: This is us, I know, and all I'm
12 saying is that if you look at the medical proof, look
13 at 767 of the record where their lawyer got up and
14 said not only are we not disputing it, we decided
15 we're not even going to question any of the witnesses
16 about it. What am I missing? I've got the damages.
17 The verdict sheet tells the jury what to do. If
18 there's any problem here it's not with me, it's with
19 them. Look at Bichler, look at Knobloch, look at
20 Martin against City of Cohoes. The - - - they're
21 directly on point with law of the case in a situation
22 such as this.

23 CHIEF JUDGE LIPPMAN: Okay, counselor.

24 MR. ISAAC: Thank you.

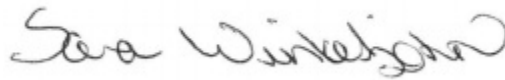
25 CHIEF JUDGE LIPPMAN: Thank you both.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

(Court is adjourned)

C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Motelson v. Ford Motor Company and Ford Motor Credit Company, No. 195 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

Date: October 27, 2014