

1 indicator; didn't do it. That's all violations of  
2 Statute; it's negligence.

3 I don't have a second opportunity to address  
4 you. The Plaintiff will have a second opportunity. We  
5 don't get to do a rebuttal that's cause it's their burden  
6 of proof.

7 So I would just like to finish by thanking you  
8 again for your time today and -- please bear in mind when  
9 the Plaintiff's attorney gets back up to present his  
10 rebuttal, view his rebuttal through the prism of  
11 skepticism bearing in mind all the points that I've made.

12 Ask yourself, what point would Mr. Stephenson  
13 point to in response to that.

14 Thank you for your time.

15 THE COURT: Rebuttal.

16 CLOSING STATEMENTS

17 BY MR. BRATT:

18 One thing I want to be clear about, you've  
19 heard all of talk about burden of proof. And some  
20 lawyers deal with it everyday but it's not something that  
21 everybody else does.

22 And what I want to make sure you absolutely,  
23 clearly understand about the burden of proof as it exists  
24 in this case, is that it cuts both ways.

25 Mr. Ervin has to prove if one or both of these

1 Defendant's was negligent and if that negligence -- or --  
2 and -- and if that negligence was a cause of this  
3 collision.

4 What Mr. Ervin does not have to prove is that  
5 he wasn't negligent. If you're gonna find that he's  
6 contributorily negligent, the Defense has the burden of  
7 proof of showing beyond -- I'm sorry -- that the Defense  
8 has to show that it's more likely than not that my client  
9 was negligent in what he did.

10 And you heard the Judge instruct you as to how  
11 you evaluate Mr. Ervin's decision making process. You  
12 can't evaluate Mr. Ervin's decision making process  
13 through the lens that we have here today of six  
14 uninvolved people who are Monday morning quarterbacking  
15 what somebody did in a split second when faced with a --  
16 an obvious and serious danger.

17 The instructions the Court gave are that you're  
18 to evaluate Mr. Ervin's conduct in light of the immediate  
19 and serious danger that was apparent to him that he was  
20 trying to avoid.

21 This isn't a situation where Mr. Ervin had time  
22 to look at the situation, stop for a few minutes, check  
23 everything out and decide what to do. He had to react  
24 because if he didn't he was gonna have a tractor trailer  
25 hit him. A tractor trailer pulling a fuel tank.

1           What he did is what a reasonable person would  
2 have done. He swerved away from it as quickly as  
3 possible.

4           And he told you straight up; I didn't have time  
5 to think about this. It was a split second decision;  
6 split second (fingers snapping). Quick.

7           He didn't have time to think about the horn.  
8 He didn't have time to tell you whether he used the brake  
9 or not. And he didn't say he didn't use the brake. I  
10 want to be very clear about that. What he said was he  
11 couldn't remember if he used the brake or not.

12           Well, let's think about that. Look at the lens  
13 we're viewing this through. A man who's faced with a  
14 danger who's remembering what he did two years later. He  
15 didn't tell you that he didn't hit the brake. What he  
16 told is he didn't remember if he did or not. But that  
17 what he was certain about was that he immediately swerved  
18 to the left because to him at the time and light of what  
19 he saw that was the most direct way to get away from that  
20 danger.

21           Now, when you look at any evidence that Mr.  
22 Ervin was negligent in light of the burden that the  
23 Defense had, the Defense can't ask you to guess or  
24 speculate that Mr. Ervin was negligent. There has to be  
25 some affirmative evidence to show that he was. And there

1 isn't any.

2 Ms. Young can't say whether Mr. Ervin was  
3 negligent or not because she never saw him until he  
4 appeared right in front of her. Mr. Quade can't say if  
5 Mr. Ervin was contributorily negligent or not because he  
6 never saw him. He has no recollection of this day.

7 What -- what do you have? You've heard Counsel  
8 making an argument about well, Mr. Ervin's placement of  
9 his vehicle alongside of the tractor trailer isn't exact.  
10 Well, okay, maybe it's not exact. And maybe it's a  
11 little farther here than it is there. What is consistent  
12 about it looking at that? What's consistent is that both  
13 times he's shown where his car was next to a big tanker  
14 trailer and that it came into his lane.

15 He can't tell you exactly to the foot how close  
16 he was up or down the side of it. He told you that he  
17 couldn't tell you the exact feet and distance of where he  
18 was on the road but he told you what happened in the  
19 accident.

20 And so far out of everything you've heard  
21 today, he's the only person that's told you what happened  
22 in the accident. He's the only person.

23 Let's look about what's more likely than not,  
24 okay. What Baltimore Tank Lines wants you to believe is  
25 that this driver did what he said he ordinarily does.

1 Well, everything that happened for this accident to have  
2 occurred has to show that this driver didn't do what he  
3 ordinarily did. Does he ordinarily cause an accident on  
4 his way home? I'm gonna assume that he doesn't.

5 So the fact that there was an accident shows  
6 that he did something that he didn't ordinarily do --  
7 didn't ordinarily do -- that sounded right.

8 Now, how can it have happened? How could this  
9 vehicle have gotten closer to where Mr. Ervin was if in  
10 fact it would have been easier for him to just coast  
11 through straight.

12 Maybe the driver wasn't paying attention.  
13 Maybe the driver drifted over a little bit. Maybe he'd  
14 been working a long time and wasn't as alert as he had  
15 hoped to be.

16 MR. STEPHENSON: Objection.

17 MR. BRATT: Maybe he decreased his speed.

18 THE COURT: Overrule.

19 MR. BRATT: Maybe he decreased his speed. We  
20 don't know how that tractor trailer got there. And you  
21 know what; neither does the guy driving the tractor  
22 trailer.

23 But what Mr. Ervin does know is that he knows  
24 what he did. And he knows that he went over right into  
25 this lane as soon as he was able to. His speed remained

1 constant at 35 or 40 miles an hour and that's consistent  
2 with what Ms. Young said. She said she was going 35 or  
3 40 miles an hour and that she had been in the back -- you  
4 know -- along this time.

5 There's nothing inconsistent about Mr. Ervin's  
6 version of this accident. And when you look at how --  
7 the Defense had asked for you to speculate as to what Mr.  
8 Ervin may have done that could have resulted in this  
9 situation. I'm not asking you to speculate about what  
10 somebody did.

11 I'm asking you to use the evidence that was  
12 given to you by the only eye witness to the accident as  
13 to what happened. And it's not unsupported evidence.  
14 It's not Mr. Ervin just saying that this is what  
15 happened. Ms. Young, she said that she never saw this  
16 car, this -- this tractor trailer before the accident.

17 And Mr. Stephenson asked you to think well,  
18 okay, she would have had -- she said -- he even quoted  
19 her testimony that she said she would have had to -- you  
20 would think she would have seen something as big as that.  
21 You would think somebody would see something as big as  
22 that.

23 But you know what else, it isn't unusual for  
24 Ms. Young not to be able to tell you exactly where the  
25 vehicle was because what else didn't she see? She didn't

1 see the white Honda either which would have been right  
2 next to the big truck she didn't see. Her testimony is,  
3 is that she didn't see the tractor trailer and she didn't  
4 see the Honda. But what she did, was emphatic about, is  
5 is that the first thing that was said to her is did you  
6 see the truck that cut me off. And that at the scene she  
7 saw the truck after the accident; that it was up by the  
8 light.

9 So, so far what we have here is, the Defense is  
10 asking you to speculate as to what Mr. Ervin may have  
11 done that could have resulted in this situation. Mr.  
12 Ervin isn't asking you to speculate. He told you what he  
13 did and he told you what the tractor trailer did.

14 Now, he couldn't tell you how it is that the  
15 tractor trailer got into the position next to his car  
16 that it was because he wasn't driving the tractor  
17 trailer. So he can't tell you whether the driver of that  
18 vehicle braked or whether he did anything else other than  
19 what he did tell you that the driver of that vehicle did.  
20 That the vehicle came into his lane and that in order for  
21 him to get away from it he had to swerve.

22 Now, one of the great things about having  
23 common sense is that it cuts both ways just like  
24 everything else does. And you do bring your common  
25 experience to this courtroom. And when I look at this

1 diagram what I see, what I think is what most likely  
2 happened, is I think that most likely these vehicles came  
3 in a position somehow where Mr. Ervin was in this tractor  
4 trailer's blind spot. And I think the tractor trailer  
5 never saw him. I think the tractor trailer started to  
6 come into his lane. And I think because Mr. Ervin was  
7 alert enough to swerve away from it and have it not  
8 contact him. I think the tractor trailer kept on going  
9 and never realized what the heck happened because he was  
10 in the blind spot and he just kept on trucking right down  
11 the road.

12 Now, that's what most likely to have happened  
13 in this case; is that Mr. Ervin had to react quickly in a  
14 dangerous situation and he reacted appropriately as a  
15 reasonable person would by taking the most immediate  
16 route away from the danger.

17 He testified that he didn't -- that he didn't  
18 see Ms. Young was there. Of course he didn't. He didn't  
19 have time. But it was a split second decision that he  
20 had to make. Because of that I'm gonna ask that you view  
21 the negligence of the tractor trailer driver in the light  
22 that it should be viewed in.

23 You have primary direct evidence as to what  
24 happened. It's supported by Ms. Young's comments that  
25 that is exactly what he said at the scene. You should



1 answer question -- the question pertaining to Baltimore  
2 Tank Lines that one, the Baltimore Tank Lines vehicle was  
3 negligent. And two, that that negligence was the cause  
4 of the accident.

5 You should evaluate Mr. -- what Mr. Ervin did  
6 as you're required to under the law through the light of  
7 the situation he was in a clear and present serious  
8 danger right there to him. He did what a reasonable  
9 person would do in trying to get away from it. And we  
10 can't Monday morning quarterback what he did from our  
11 comfortable position in the courtroom.

12 Also, he doesn't have the burden to show that  
13 he didn't do something negligent. The Defense has the  
14 burden to show that he did and you've heard no evidence  
15 that he did anything negligent.

16 Thank you, ladies and gentlemen.

17 THE COURT: Okay.

18 At this stage we'll release our alternate who  
19 is Juror Number 30. Thank you for your participation  
20 today. If you'd call the jury commissioner after 5:00  
21 they'll let you know if you're needed tomorrow.

22 30; yeah.

23 Okay, swear the Bailiff please.

24 THE CLERK: You do solemnly promise and declare  
25 that you shall well and truly keep this jury together in