

## Case Story

### **Penn Law Firm Uses Tell The Winning Story Trial Techniques Wins Nearly \$90 Million Against Negligent Trucking Firm**

#### **The Crash**

*Their lives would never be the same*

On December 30, 2014, the Blake family— 32 year-old Jennifer and her three children, 14-year-old Nathan, 12-year-old Brianna, and 7-year-old Zackery--made a day trip on I-20 from their home in Midland, Texas to Pecos, Texas, a town about 10 miles west. Trey Salinas, a family friend, drove them in his Ford F-350 pick-up. The weather was clear and the temperature was above freezing when they left Midland that morning, and was also clear in Pecos when they left at about 3:30 pm to head back to Midland. What the Blake family did not know was that at about 2:00 pm that afternoon, a winter storm had moved into the Midland-Odessa area. The temperature had dropped below freezing and the roads had become icy. The pick-up carrying the Blake family hit a patch of invisible “black ice” about 5 miles west of Odessa, lost control and started to spin across the median.

At that same moment, a Werner Enterprises eighteen-wheeler was proceeding west-bound on the other side of the interstate and had to be in California the next day. The eighteen-wheeler was driven by Shiraz Ali, a 24-year-old student driver, with about 55 hours of driving experience, and no prior experience driving in winter weather. Ali was still in the first phase of Werner’s four-phase driver-training program and had not completed Werner’s winter-weather driving training module. Ali’s trainer, Jeffrey Ackerman, had been asleep in the sleeper berth of the truck for five hours when the accident occurred, so he would be rested when he planned to take over driving when Ali had driven his maximum legal drive time that day.

Ackerman and Ali knew that Ali would be driving into winter weather when they left Dallas that morning because they had seen a National Weather Service Winter Storm Warning predicting freezing rain and extremely hazardous road conditions to develop along I-20 in West Texas that afternoon. Ali and Ackerman could have avoided the winter storm altogether by taking the alternative route along I-40, a shorter route to their destination, yet Ackerman left Ali to drive through the winter storm unsupervised, even telling Ali, “hopefully we can make it through before it gets too bad.”

At the time the pick-up lost control and entered the median, the eighteen-wheeler was traveling 50.5 miles per hour, and was accelerating at 100% throttle, despite the fact that it had been driving on ice-covered roads for the previous 52 miles. This was in violation of a federal statute that requires commercial truck drivers to exercise “extreme caution” in hazardous weather and road conditions and stop driving altogether if conditions become too hazardous. It was also in violation of the directive in the federally mandated Texas Commercial Motor Vehicle Drivers Handbook (the “CDL Manual”) that instructs commercial drivers to “reduce speed to a crawl and stop driving as soon as you can safely do so” when they encounter icy roads.

These rules exist because it is well known that passenger vehicles are likely to lose control on slick road surfaces, and if a passenger vehicle loses control and is struck by an eighteen-wheeler traveling at highway speeds, the results for the occupants of the passenger vehicle can be catastrophic.

Although Ali saw the pick-up enter the median and applied his brakes, he was traveling too fast to slow appreciably on the icy roadway or avoid colliding into the pick-up when it spun into the west-bound lanes. If Ali had been driving at a crawl (15 miles per hour or less) when he perceived the pick-up entering the median, he would have been able to slow down sufficiently to avoid the collision altogether. As it was, the eighteen-wheeler plowed into the rear driver's side corner of the pick-up at nearly 45-miles per hour, blowing the bed of the pick-up completely off and crushing the truck's roof down into the passenger compartment.

Due to this horrific crash, the Blake Family's lives would never be the same. Jennifer Blake sustained a traumatic brain injury and severe lacerations in the crash. Nathan sustained a traumatic brain injury, a collapsed lung and several broken bones. Twelve-year-old Brianna Blake sustained multiple injuries, including a catastrophic brain injury that has rendered her a quadriplegic who will require 24-hour medical care for the rest of her life. And seven-year-old Zackery Blake, who sustained a catastrophic head injury and lacerated organs in the crash, died after struggling for his life for three days before finally succumbing to his injuries.

### **The Problem** *An Underdog Case*

“This was an underdog case from the beginning.” When attorney Eric Penn of Jacksonville, Texas, began investigating the crash, he realized that this would not be a simple case. The investigating officer who completed the crash report had indicated that neither Salinas nor Ali could have done anything to prevent the crash because, in his opinion, there was no way for Salinas to know that there was “black ice” on the highway, and by the time Ali perceived the pick-up entering the median, it was too late for him to avoid the collision.

Considering the crash report, many lawyers would have simply told the Blakes there was nothing they could do. But Penn was moved by the way this unusually close and loving family had been devastated by the crash, and decided to dig deeper. As he did so, his investigation revealed numerous things that Werner could and should have done to prevent the collision, and nothing to indicate that Salinas had behaved unreasonably, other than the fact that his vehicle skidded on the black ice.

So Penn resolved to undertake the enormous investment of time and resources to prove that, contrary to what the investigating officer had written in his crash report, this crash was in fact caused in large part by Werner's negligence. Indeed, when the investigating officer was deposed in the case, he explained that when he had said there was nothing Ali could have done to avoid the crash, he had not considered anything that had happened prior to the moment the pick-up entered the median.

As a Harris County jury would later determine after hearing six weeks of evidence, it was Werner's negligence in the years, months and hours *before* the pick-up entered the median that was the primary cause of the injuries the Blake's sustained. The problem on this case also turned out to be the Blake trial team's greatest advantage. Quite simply, the Werner defense team had misjudged the opposition, possibly thinking "What unknown lawyer would ever want to go against a multi-billion dollar trucking company?" Werner got it wrong.

## **The Approach** ***Go Big Or Go Home***

Understanding the Herculean task ahead, Penn enlisted former Judge Kelley Peacock of Jacksonville and Zollie Steakley, a partner in the Waco law firm of Harrison Davis Steakley Morrison and Jones, as co-counsel. Penn, Steakley and Peacock then spent 3½ years investigating and preparing the case, which would ultimately require them to engage and depose over 50 witnesses (including expert witnesses) all over the country.. This included trucking experts, a forensic meteorologist, an accident reconstructionist to address liability issues, a life-care planner, psychologist, neuropsychologist, neuroradiologist and a forensic economist to address the Blakes' damages.

Werner's side of the story can be told in a single sentence, "the pick-up lost control and came into our lane." The Blake's side of the story would take longer to tell and would require the jurors to keep an open mind until they had heard all the evidence. Fortunately, there was a mountain of evidence establishing Werner's negligence. So, the Blake's trial team worked hard at crafting the best way to tell the Blake's side of the story.

At this point, the trial team also knew they were going to need help telling their story—so they engaged with Jesse Wilson, CEO of *Tell The Winning Story* (one of the foremost experts at crafting the best trial strategy, identifying the most persuasive approach and then converting it to the right story to win the case). Prior wins of \$10 to \$45 million verdicts proved his methods worked—so he was hired on the spot.

With the help of *Tell The Winning Story*, along with Eric Penn's conversational and open style, and natural storytelling abilities, he created a vital connection with the jurors that stayed consistent throughout the trial. He was clearly aligned with the ongoing theme, "Go Big Or Go Home."

Eric was following one of the "8 fundamentals of breakthrough communication" taught in *Tell The Winning Story* which was to "Flip The Script—The Value of Conflict." He was not shying away from the potential weaknesses of the case--which could undermine *all* areas of the trial (from jury selection to Closing). He was ready to transform the potential landmines into the team's greatest strengths.

In Eric's words, "We went big in our story, in our themes, in our message that was consistently communicated to the jurors. By staying close to the human story, Jesse kept bringing us back to

the ending of the story we needed to tell, and the emotional state that we needed to tap into in Closing and rebuttal: *This is bigger than all of us*. That’s the story we told. We did not tip toe around anything. We literally put everything on the line. That’s how much we believed in this story and how much we knew Werner was wrong.”

## **Turning Points**

### ***Attack With Kindness***

When the Blake’s trial team deposed the drivers, Ali and Ackerman early in the discovery process, they were surprised to hear both drivers testify that they had encountered no precipitation or icy roadways that entire day, including at the time and place of the crash.

Finding this implausible, the Blake’s team obtained every crash report of any other accident within the same region about the same time. They also hired a forensic meteorologist to investigate Werner’s claim and determine whether it was probable that the Werner eighteen-wheeler had encountered precipitation prior to the crash. The crash reports revealed approximately 65 ice-related crashes that occurred on and near I-20 in the area and during the time period when the Werner eighteen-wheeler would have passed by, and eventually 14 independent witnesses testified that I-20 was covered in ice for the 52 miles prior to the crash site.

During the first week of the trial, the Blakes presented the jury with the testimony of 11 of these 14 witnesses, who all testified that I-20 was covered in ice at times and locations along the exact route that the Werner eighteen-wheeler had driven within an hour prior to the crash.

Then Ali, who had been present in the courtroom and had heard the 11 neutral witnesses, testified. Right off the bat, Penn asked Ali if, in light of the 11 neutral witnesses’ testimony, he continued to maintain that he never encountered any icy roads prior to the crash. Incredibly, Ali continued to testify that there was no ice. In addition, Werner’s other witnesses, including Ackerman and safety-department executives Jamie Maus and James Kochenderfer, also testified that they still believed Ali’s testimony that he never drove on icy roads that day.

This stubborn refusal to admit that the roads were icy in the face of *overwhelming* contrary evidence was undoubtedly a substantial factor in Werner’s lack of credibility with the jury.

Werner miscalculated. By taking the position that the CDL Manual (the state guidelines for all commercial drivers) was not a statute or regulation, they argued that truck drivers were not required to comply with its directive to “reduce speed to a crawl and stop driving as soon as you can safely do so” when they encounter icy road conditions.

However, the evidence established that a federal regulation requires each state to provide CDL Manuals to those seeking a commercial driver’s license, and that the regulation requires each state’s CDL manual to be based on an approved form, and that all states’ manuals are substantively identical, and that the test an applicant must pass to obtain a commercial driver’s license is based on the CDL Manual. Yet, it was discovered that Werner deliberately trains its

drivers that, they may continue driving at whatever speed they feel comfortable driving, and need only stop if they feel uncomfortable, when they encounter icy roads.

Werner also lost credibility by taking the position that Ali and Ackerman made “perfect” decisions on the day of the crash, that Werner did nothing wrong to contribute to the crash, and that Werner had learned no safety lessons and would make no changes to its operations as a result of the crash. In fact, Werner’s head of safety, Jamie Maus testified that it was perfectly acceptable for one of its drivers to drive an eighteen-wheeler 65 miles per hour across ice-covered roads, as long as the eighteen-wheeler did not lose control. And Jamie’s cohort, Kochenderfer, went so far as to say that he was “happy” with what Ali did on the day of the crash.

The jury was also not impressed with Werner’s decision, made several years before this crash, to take preventability investigations in catastrophic crashes out of the hands of the safety department and place them into the hands of the legal department. The evidence demonstrated that the purpose of preventability investigations is to determine if any safety improvements can be made to prevent crashes in the future.

Yet Kochenderfer testified that the legal department only determined that Werner did anything wrong in about one out of every 200 catastrophic crashes it investigated, and Maus testified that she could only think of four times when the legal department had ever notified the safety department of a safety lesson learned from one of its investigations (which was two more times than she had testified to in her pre-trial deposition—a mistake).

In connecting to the human element of the story and the overall strategy of the winning story, Eric Penn took a non-traditional approach and did not attempt to portray Ali, the driver of the eighteen wheeler, as the villain in the story.

Eric explains, “I told the jury in opening, that Werner Trucking was the villain—not the driver. This was just a kid up there—a student driver- who had been improperly trained by a company that *chose* not to follow basic safety systems.

Showing the jurors the power of choice is one of the fundamentals in *Tell The Winning Story*, called, “Come to the Crossroads.” Identifying the choice of the villain or the hero in the story, arms the jury with the power of their choice—that they must make (in the plaintiffs favor).

“Working with Jesse helped reinforce how important it was to go super soft with Ali so that we could highlight the real villain--Werner.” The problem was, Ali hung himself with a script that Werner told him to stick to *no matter what*. He also showed zero remorse or any regret for the Blake family—which resonated negatively with the jurors. This was a huge turning point and everyone felt the presence of the villain even more. As Jesse reminded me, ‘in slaying the dragon, attack with kindness and compassion. The story—the right story-- will take care of itself.’ It worked beautifully.”

## **Unique Approaches** ***The Black Curtain***

The Blake’s presentation of the evidence included at least 200 3-foot by 4-foot demonstrative exhibits. Blake’s attorneys carefully sequenced and displayed these on three easels while examining the witnesses and presenting opening statements (including five-minute “mini openings” at the beginning of each week of trial) and closing arguments. Some of these exhibits were traditional with photographs, excerpts from relevant regulations or publications, or summaries of experts’ testimony. But many of them were creative pictorial images deigned to make the concepts more interesting, understandable and memorable.

Further, the use of these exhibits had another result. They increased the dramatic tension, because counsel had to physically reveal each board by lifting it and turning it around so the jury could see it, as it was placed on the easel. This built anticipation for the jurors—and the talking stopped for several seconds while counsel revealed each new exhibit. At other times, counsel would reveal an exhibit that related to the witness’s testimony *while* the witness was testifying, reinforcing the testimony or, in the case of adverse witnesses, impeaching the testimony even while the witness was giving it.

“I was initially on the fence with the use of so many exhibits,” says Jesse Wilson. “My attitude was as long as the exhibits serve and advance the story, and are not up there to look clever or to hide behind the human element of the story, then great--because lawyers can use exhibits the same way they can use their words: like shields. And the jury shuts off. But Eric stayed so emotionally connected to the jurors that you felt each exhibit he displayed felt natural and compelling. Also, the choreography and timing of the exhibits were important as well—they had to be displayed congruently with Eric’s natural story telling style.”

In helping craft the overall presentation, Jesse and the trial team embraced and utilized Eric’s desire to “abandon script” (make it his own—without using a template approach).—Instead, they organized and wordsmithed the opening and arguments. They phrased examination questions, and maximized the effectiveness of counsel’s nonverbal communication.

Eric chose not to follow the “cookie cutter approach to persuading the jurors” that many lawyers will often take. Following *Tell The Winning Story’s* 3 Act Structure approach in Opening Statement and Closing Argument meant that Eric would abandon the safety net for what most lawyers would cling to and find the right story structure, framing, and sequencing for the story that *needed* to be told.

The team followed the cue reinforced by Jesse in the nightly strategy sessions in pre-trial and trial:

“Being a good trial consultant means you have to pay close attention to the way the storyteller—the lawyer—naturally communicates and tells a story. A lot of that connection to story falls apart when you’re putting in all the areas of what the jury needs to hear vs what you want them to hear. Eric already was of the mindset that ‘if it doesn’t feel right for the story we need to tell, get

rid of it.’ I just helped communicate that mindset of the team, and we were all on the same page. That’s huge. That’s incredibly risky, too.

We were all telling the right story together and listening to each other, no matter what. So what the jurors saw up there was 100% vintage Eric—not a guy following the script and jaded approach he had to memorize because he knew it worked for other successful lawyers. Jurors can sniff out BS a mile away—what’s that Billy Wilder line? ‘Individually, people are idiots. Collectively, they’re geniuses. That’s the jury.’ So being a real human being up there—a guy who is not afraid to show that he’s afraid and a guy who is not afraid to show that he’s a little too passionate at times, God forbid... That’s critical in telling the winning story. That was Eric, all the way, down the line.”

One of the most effective themes of the case, which developed as a result of the testimony of Werner’s own witnesses during trial, was Werner’s decision to have the legal department, rather than the safety department, conduct preventability investigations to shield Werner’s operations from the safety lessons that could be learned from those investigations. Penn referred to this as “the black curtain” at Werner’s headquarters in Omaha.

Kochenderfer testified that Werner’s safety department deliberately instructs its drivers who are involved in catastrophic crashes (defined as one involving a catastrophic injury or death) not to “tell their story” to the safety department, because Werner wants the driver to tell that story only twice: once to the investigating officer and once to the legal department.

When asked why he, as a safety executive, would not want to hear the driver’s story, Kochenderfer testified that if he heard the story, he could be deposed and have to testify about it. Kochenderfer also testified that the legal department only finds a crash preventable in about one-half of one percent of their investigations, and Maus testified that the legal department had only passed along a safety lesson learned from an investigation to the safety department on four occasions in the approximately eight years the legal department had been performing the investigations. This practice of isolating the investigation of catastrophic crashes to the legal department gave birth to the theme of the “black curtain,” which became a very effective means of communicating the danger of Werner’s policy.

“The use of the black curtain came about in working with Eric on his feet,” says Jesse Wilson. “I asked Eric to describe the villain to me—Werner—and he said, ‘Every time something goes wrong at Werner, the black curtain goes up between legal and safety... and I said, ‘that’s great! Let’s use it! We used it in our story, we used it visually in our exhibits...’”

“The symbolism of ‘the black curtain’ played a bigger role than we thought it would in the trial,” says Eric Penn. “Especially since the Werner defense team kept insistently telling the jurors, ‘there is no black curtain.’ Boy, what a way to reinforce our argument, right?”

Another of the *Tell The Winning Story* fundamentals is to *always* find a way to show that the victims in a trial are not victims, but are Victors (“Tell the Winning vs *Whining* story: take your client from Victim to Victor”).

“Jurors care more when they see fighters up there. Somebody they can get behind and help along further, long after the trial is over. Portraying the Blake family--Jennifer, Brianna, and Nathan--as fighters, as people who never give up, was essential. Sadly, many lawyers would go with the tactic of ‘Poor them. Their lives are ruined. Give them money.’ And the jurors end up feeling manipulated. Who cares about that story? Show the fight in your clients and the fight becomes the jurors fight. When it came to Brianna Blake that was easy. That’s who she was.”

A young teenage girl who used to be a dancer and singer now learning—fighting—to find her voice again was the story Eric told. The story of Surviving to Thriving, and not being afraid to show how well Brianna was doing, and that she would *continue to get better*. The jurors job was to see their role in helping her get better... *not* making her whole. That would be impossible.

A critical scene that Jesse helped Eric make come to life, was through a vivid reenactment for the jurors to step into Brianna’s bedroom--present day. Eric asked Brianna why she still liked to watch videos of herself singing and dancing on stage, like the “true arts Geek” that she was. Brianna still maintained her sense of humor and was not afraid to show it--even though she had to communicate it through sign language.

“Bri, some people might find it hard to look at videos and pictures of who they used to be, and what they used to be able to do. But it’s like you watch these videos all the time as motivation. I’m wondering why?” Signing slowly, Briana responded, “That’s... still... me.”

In coming full circle, the final theme that was very effective in the closing argument was that this case involved matters that were “bigger than all of us.” Although this was certainly a case of huge significance to the Blakes, Werner’s unsafe practices that led to the crash are system-wide practices. Given that Werner has approximately 7,500 eighteen-wheelers operating all across the continental United States on every single day, and hires 8,000 new drivers every year (half of whom have no prior truck-driving experience), these unsafe practices pose a huge risk to the motoring public. The jury obviously determined that the enormous risk posed by Werner’s operations required it to exercise far more care than it does.

### **Final Result – near \$90 million verdict**

The jury determined that the negligence of Ali, Werner’s other employees, and Salinas were all proximate causes of the Blake’s injuries. But the jury clearly believed that Werner’s negligent policies, procedures and negligent training and supervision of Ali were the primary causes of the injuries, for it assessed 70% of the responsibility to Werner’s employees other than Ali, and only 14% of the responsibility to Ali’s operation of the eighteen-wheeler on the day of the crash. This comported with the Blake’s theme that, although Ali was negligent in operating the eighteen-wheeler on the day of the crash, this negligence was the result of his being *required* to drive through an ice storm without any supervision when he had no experience in winter driving and a result of Werner affirmatively training him to continue driving at whatever speed he felt comfortable, even if he encountered icy roadways.

The \$90 million damage award in this case is impressive, but it is hardly excessive, given the devastating injuries the Blakes sustained in this crash. Over \$43 million of the award was for Brianna’s future medical care. The jury awarded Brianna \$8.75 million for her past physical pain, mental anguish, physical impairment and disfigurement, and \$16.25 million for these elements of damage for the remainder of her life.

These awards were conservative, given the catastrophic injuries Brianna sustained, which have left her unable to talk, eat, or move most of her body. The jury awarded Jennifer \$4.62 million for her past physical pain, mental anguish and physical impairment, and \$6.93 million for these elements of damage in the future. This must compensate Jennifer for her brain injury, as well as overwhelming emotional distress that her psychologist and neuropsychologist testified could lead to emotional decompensation.

The jury awarded Nathan \$2.5 million for his past physical pain, mental anguish, physical impairment and disfigurement, and a like amount for these damages in the future. Nathan also sustained a brain injury, and has suffered from severe Post Traumatic Stress Disorder. The jury awarded Jennifer \$3.3 million for the wrongful death of Zackery, and awarded her \$1.65 million, divided evenly between past and future damages, for the mental anguish she sustained from witnessing her children being injured in the crash.

### **Synopsis – what can we learn from this**

If the Blake’s lawyers had simply taken the crash report at face value and turned the Blakes away, the many acts of Werner’s negligence that resulted in the Blake’s injuries would never have been discovered, and Werner would never have been called to account for them. The Blakes, who bore no responsibility whatsoever for what happened to them, would have had to bear the life-long consequences of Werner’s negligence.

The lesson of this case is that events are usually more complex than a one-sentence soundbite like “the pick-up lost control and came into our lane.” But sometimes, it takes a lot of investigation and hard work to uncover the truth and present it to those with the authority to do something about it. This case proves that when a jury is presented with all the facts, along with the right emotional and human story, it can see past the one-sentence soundbite and arrive at the truth.

Werner, too, could learn valuable lessons from this case. It could start training its drivers to comply with the CDL manual. It could stop assigning student drivers to expedited runs when they will have to operate unsupervised while their trainers sleep. It could start monitoring the weather and road conditions and advising its drivers to take appropriate precautions when they are driving into hazardous road and weather conditions. It could supervise its driver’s route selection to ensure that they do not take unsafe routes.

But it does not appear that Werner will do so. They have never admitted that they bear any responsibility at all for the Blake’s injuries. They have stated that they will not make any changes as a result of this crash. And after the verdict, they have publicly repeated their assertion

that they did nothing wrong (even going so far as to publicly state that the pick-up struck the eighteen-wheeler, when even Werner's own crash reconstructionist opined that the eighteen-wheeler T-boned the pick-up), and steadfastly refusing to examine their behavior at any time before the pick-up entered the median a few seconds before the collision.

Perhaps, just perhaps—this story will make a company listen, forever make all our lives safer, and teach us all that corporate profits cannot destroy lives without someone being held accountable. This is all possible... when we tell the winning story.

### **About Tell The Winning Story**

Tell the Winning Story's litigation jury and trial consulting firm helps prepare trial lawyers and witnesses to win by crafting the best strategies and identifying the most persuasive approach to connect and persuade jurors--culminating with *the winning story*. The strategies have won \$10, \$13, \$45 and \$90 million dollar verdicts. Services include one-on-one consulting, speaking events, and multi-day workshops for CLE credit.

Tell The Winning Story is not a typical book, seminar, or boot camp teaching “communication skills,” since none of these reach the heart of the problem: unlocking your ability to deliver a powerful performance and awaken your hidden power to connect, evoke potent emotion, persuade and win. A growing number of top trial lawyers in the country consider Tell The Winning Story to be the “#1 Communication Breakthrough Program” to help them win...inside and outside the courtroom stage.

It was developed and perfected by Jesse Wilson, a renowned communication specialist and jury trial consultant. He started as a Juilliard School graduate and after 20 years in the theater, translated his “lessons from the stage” into a peak performance success tool for Lawyers, Leaders and Entrepreneurs—with impressive results. [www.tellthewinningstory.com](http://www.tellthewinningstory.com)