19071

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas
Doyet A Early, III, Circuit Court Judge

Case No 2006-CP-05-00034

Connie Carson as Personal Representative
of the Estate of Beryl Harvey, Appellant,

-v-

CSX Transportation, Inc , Respondent

Case No 2006-CP-05-00107

Connie Carson as Personal Representative
of the Estate of Beryl Harvey, Appellant,

-v-

CSX Transportation, Inc , Respondent

RECORD ON APPEAL
Volume III of IV
(Pages 950-1433)

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SC Court of Appeals

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hearing loss
Q Okay All right Mr Cowan based upon your personal observation being there on the train do you believe you, Mr Stephens, the crew, did anything to cause this death?
A We were doing everything proper, giving the proper warning
MR HARMON Your Honor, I'll pass the witness
THE COURT Mr Parker?
MR PARKER Thank you

CROSS-EXAMINATION

BY MR PARKER
Q They always told me you don't ask a lady their age but I can ask you yours
A That's all right I am 74 --
Q And you --
A And I'm in my prime
Q I'm 63 and I am in my prime
A I see that
Q So, let's go back here because I think somebody has got something wrong about this little figure back here and I'm not -- I realize that people don't get things to sight, but I am 5'8 so I know how tall 5'8 is unless I have shrunk I am going to stand by this and you tell me how much taller this man is than I am
A He is a good four and a half inches taller than you

in that picture
Q Well, how did he get that?
A You're 5'8?
Q I am 5'8
A He measured to be 5'11
Q Three inches? That's more than 3 inches, isn't it?
A Slightly
Q Did you measure it or did somebody tell you that?
A But that is -- it might be from where he is standing on the rail there You can't get quite far enough back
Q Now you told me about him having 3-inch heels on, correct, or you told Mr Harmon that?
A That's right
Q He had high heels on?
A Come back?
Q He was wearing high heels that day?
A You see the railroad boots and you know what high heels is
Q I mean a woman's high heels wouldn't be 3 inches high?
A Yea, it would Railroad safety boots had a big heel on it a thick sole, and steel toes
Q That high?
A Sir?
Q That high?

A Yea, approximately that much It made a difference in him
Q The reason I am asking you that is I don't think it makes a whole lot of difference about what we're talking about, but, clearly, that man in that picture is not 5'8 inches in that picture?
A He is slightly a little -- you know, a tad over 5'8
Q And your testimony is by putting on the boots he went to 5'11, right?
A Yea That's right That was the measurement
Q Did you measure this man?
A I did
Q You took the tape and put it on him?
A I put the tape to his shoes in that picture up to the top of his head
Q When did you do that?
A Yesterday
Q Where is this man?
A Who is he?
Q Is he in the courtroom? Is that one of these guys? I don't think so
A No No It is Andy Holiday He's in the Fulcher Firm
Q So you took the picture sometime before you measured him?

A Right I measured the picture
Q Oh, you measured --
A No, I physically measured him yesterday
Q When did you measure the picture?
A Yesterday
Q So you got the tape out for you yesterday?
A I got the tape They got the tape out for me
Q Who did you measure up at the Fulcher Firm in Augusta?
A No He came He was at the hotel yesterday
Q Okay Now, I want to go over a few things with you and let's put up 114-B You can go ahead and take it down Blow up the first part
This is Rule 34 You're familiar with that of the operating rules?
A Right
Q It says employees must maintain a lookout for signals or conditions along the track affecting the movement of their train, correct?
A Yes, sir I'm aware of it
Q And that's what people should be doing You should be looking and you have to be vigilant to see what may come in contact with the train?
A Exactly
Q And in order to protect the train and the public you

have to keep this lookout?
A Looking all the time
Q And not only you have to look you have to see, correct?
A Correct
Q And in order to see you have to be able to see what's out there at the crossings, correct?
A Correct
Q If they've got vegetation grown up, you can't see, correct?
A We were able to see
Q I'm not asking about on this occasion If you have vegetation grown up at the crossing you can't see the cars approaching and that kind of thing, correct?
A I haven't ran into that so I don't know
Q You haven't seen that?
A No
Q In all of your 40 years?
A All of my 40 years we keep it cut back
Q Didn't they just start a program in 2001 to cut it back?
A We've always cut it back
Q They didn't cut site triangles at CSX until 2001, did they?
A Well, the cutting changed

MR HARMON Objection, Your Honor
THE COURT Hold on Whoa, whoa
MR HARMON Objection He is outside of his personal knowledge It is beyond the scope of direct
THE COURT Overruled
Q Mr Cowan, didn't they start a program in 2001 to cut these crossings because people were getting killed at crossings?
A It's always been a program of cutting back
Q I'm talking about cutting the right-of-way for 300 feet down the track Didn't that start in 2001?
A I don't know when it started I know they've always cut the crossings back and in the early days they could spray a chemical that's been outlawed and so they had to go back physically cutting back That's all I can tell you It's always been cut back as far as our view
Q And you're not aware of them increasing the amount cleared at crossings since 2001?
A As far as we're concerned it's always been cut back
Q So you don't know anything about that?
A No, I don't Sorry
Q But you would agree that you would like to see people as they approach the crossings -- have as much view of them as possible?
A We've always been able to see people

Q It's nice to be able to see them, isn't it?
A It is good and we can see and
Q Let me ask you a little bit about 114-A And 114-A clearly says, does it not, that you're supposed to keep that horn blowing in two longs, a short, and a long continuously through the crossing either by prolonging the blowing or either repeating the sequence?
A That's what it says
Q That's what you're supposed to do, isn't it?
A In this case it came an emergent situation This is not a normal horn blow, per se In the last few seconds of this blow it became an emergency situation and the reaction time in there to place the train into emergency was -- and the car on the grade crossing prevented the blow through the car
Q Excuse me I didn't understand that
THE COURT Say it again
Q You said blow through the car?
A He blew the horn right up to the crossing when it became an emergency situation The rest is reaction time as he placed the train in emergency
Q And you understand you ve been told that the train wasn't put into emergency until some 400 feet past the crossing?
A I don't know -- I haven't seen the event recorder

Q No, but you've been told that, haven't you? When you met with these lawyers, they told you that, didn't they?
A Told me what?
MR HARMON Your Honor, he knows --
THE WITNESS I am not following you there, Mr Parker
Q You're not aware that the train was not put into emergency until 400 feet past the crossing?
A That might be the reaction time, but it was -- all I can tell you is that the train was placed in emergency immediately when the accident was imminent
Q In other words, you're saying it was placed in emergency prior to the collision?
A As soon as possible
Q That means before the collision?
A I couldn't tell you the exact split second, but it was put in emergency immediately when the accident was imminent
Q So, imminent is before?
MR HARMON Objection, Your Honor Asked and answered
THE COURT Hold on Hold on
MR HARMON My objection is that it's been asked and answered three times
THE COURT All right Move an

Q Let me -- I am going to put up -- you say you're familiar with the -- let me before we go there go down to P Excuse me Go back to 114 and go down the Rule P P is the emergency horn or the warning to people or animals?
A It is not an emergency of anything It's a normal horn blow for animal, livestock, and people about the track Now, people about the track is like ballgames or stadiums letting out or people crossing or anything
Q Well, I mean, you would want to if you want to get somebody's attention what you do is hit the horn real rapidly, correct?
A That's just -- that blow is for livestock and people about the track
Q Okay
A It's not a crossing blow
Q You wouldn't do that to get someone's attention?
A If there was a ballgame and people were close to the track I would blow that blow
Q Right And so you would only do that if people are walking?
A See, the government comes up -- they came up with these different horn blows and that is not a crossing blow
Q And, so, you wouldn t give a warning to people in a

car You would only give it to them walking?
A I would blow the designated crossing blow by the FRA and the railroads together
Q What do you know about the FRA?
A I know it's a Federal Railroad Agency of the Department of Transportation
Q All right Now tell me about the horn blowing rules that the FRA's adopted?
A They sign off on the railroad's rules, same rules
Q You know, I am just wanting to ask you this Do you me anything about the FRA rules?
A All I know is CSX rules
Q That's what I was getting at Let's go to the event recorder now Let's put it up if you will This is Exhibit 113 and let's go to this page
All right We're looking here at the event recorder and I know you're not familiar with this I'm --
A I'm not
Q But I am going to tell you that these little ones in there are tenths of a second Do you understand that?
MR HARMON Your Honor, I'm sorry Lack of foundation This witness has said he's not familiar with the event recorder documents He is refreshing him about something he is not familiar with
THE COURT Overruled

Q I am going to tell you that the testimony in this case has been those little ones are one-tenth of a second? Do you see that?
A Which ones are you talking about? I see a bunch of them
Q We'll start here at 4547 Do you see 4547?
A Let me get my glasses out here
THE COURT Somebody point it out
Q I will Somebody tell me how to operate this thing There you go I see it
You see it?
A Which one are you talking about?
Q I'm talking about 4547 right there
A Oh, 4547 I see it
Q And you see there is three-tenths of a horn there That's where the horn starts?
A I am not aware of that's where it started Is that what you say it started?
Q That's what your event recorder says, not me
A I haven't read the event recorder I'll have the take your word for that
Q Do you know there is an event recorder or what people refer to as a black box that records the information that's going on in the locomotive, don't you?
A It's why you have event recorders I just want to

say they're not as accurate as a black box For instance, the same train when I wasn't it derailed It had three engines They pulled three event recorders and none of them worked

Q Well, that was a violation of federal regulations, wasn't it?

A No, they --

Q Wasn't it?

A Well they just didn't work -- you know, the vibrations of the engine or whatever

Q All right So, you're contending in this case that the event recorder doesn t accurately --

A I don't know how accurate it is That's all I'm saying

Q And you're basing your view of that on the fact that you were in a derailment and all of CSX --

A I wasn't in the derailment

Q Oh, you just know about it?

A No I just said an extra crew operating derailed an engine They couldn't find one that was accurate

Q And somebody told you that?

A It was a week I was on vacation

Q Right When you came back somebody told you --

A Yea, I was told that

Q Somebody told you CSX was operating trains with

inaccurate event recorders?
A They don't know it's inaccurate until they pull them and then it can be some flaw in the event recorder I am just saying there is room for, you know, error That's all I'm saying
THE COURT Let's move along
Q Okay Let me ask you this
A That's my testimony
Q 4547 -- it shows that you had the horn on for one, two, three, four, five, six, and one and it would be 1 9 seconds Do you see that? If that's correct
A Yea
Q Y'all started the horn, blew 1 9 seconds?
MR HARMON Again I object
THE COURT What's the objection?
MR HARMON My objection is the witness has not identified -- he is using this witness as he's an expert on event recorders
THE WITNESS Well, I mean, I'm --
THE COURT Hold on
THE WITNESS -- taking Mr Parker's word for it I --
THE COURT Hold on When I say whoa, whoa The same thing as hold on All right, gentlemen He can cross examine him on the event recorder We know he's not

an expert on event recorders He is a train engineer Mr Parker can ask him If that's what it is, it is

MR HARMON Thank you, Your Honor

THE COURT Listen to his question very carefully Y'all don't get into an argument with each other --

THE WITNESS No, sir I apologize for that

THE COURT You don't have to apologize I'll make both of you apologize

THE WITNESS Excuse me, Mr Parker

MR PARKER Excuse me, Mr Cowan

THE COURT How about that? Let Mr Parker ask the question

THE WITNESS All right, sir

Q All right So, we know the horn, if this is correct, it was on for 1 9 seconds, correct?

A Correct

Q And then we have it off here You see? It's off for that for four-tenths and then we come back here and we look over here it is off one two three, four, five six, seven, about eight seconds that it's off Do you see that?

A Okay What are you saying? What is the question?

THE COURT No Let him ask the question

Q You see that it's off for eight seconds?

A Yes

Q Do you recall it being off for eight seconds that day?
A Not at the time I don't I mean, you say it is, but according to what we understood the horn was blowing properly
Q Well, it's always blown properly, isn't it?
A Not always, no
Q But if you had something bad happen --
A We had a few junior engineers we had to snatch out of the seat because they weren't blowing the horn properly
Q All right Did you snatch Mr Stephens out the seat?
A Oh, no He did a good job
Q And a good job to you is if you quit blowing the horn for eight seconds? That's a good job?
A It could be
Q And if you were right before the crossing and you quit blowing for 8 second that's a good job?
A You have equal breaks and equal blows That's what distinguishes the horn blow
Q Well, suppose we had that gap of 8 seconds right at the crossing Don't blow it for 8 seconds right before the crossing According to you that would be a good horn blow?
A Well, you have the break and the horn blowing, plus the reaction time placing the train into emergency

That's not unreasonable
Q Let me get back to my question here
THE COURT Please listen to the question and try to answer the question
THE WITNESS Okay
Q The question is if Mr Stephens had not blown the horn because he determined that it was okay not to blow the horn to have an 8-second gap immediately before the collision then according to your testimony that would be proper, is that correct, yes or no?
A That's so hypothetical that's hard to answer
Q Now, I want to be clear What do you don't understand about that?
A You re talking about the gap in the horn blowing am I correct?
Q Yea eight seconds
A Okay When you blow a horn you have the long, the break which you don't understand You have the break and it could be equal to the horn blow Then you have another blow You have the break Then you have another short blow and a break and then a long Normal blowing
Q Well, let me ask you about that then So, what we ought to have instead of a 1 9 second blow he should have blown 8 seconds, correct?
A Well, are you talking about the third blow?

Q No The second blow because what you said you have two longs, so you said that the blowing and the gap should be equal, correct?
A Not exactly equal I mean, this is -- anybody that blows a horn everybody blows it slightly different It is still qualified by blowing long, short, and a long
Q All right So, if it's a long and an equal gap it should be blown 8 seconds approximately and then you're going to get a gap for 8 seconds and then blow again for 8 seconds, is that correct?
A No I mean, I am not following you because Mr Michael Stephens blew the horn properly at this crossing Now, when he got closer and he saw the car not stopping at the rail where it should have stopped he might have blown it a little longer There is nothing unreasonable about that
Q Well, in fact at the time y'all first saw that car then Mr Stephens started blowing constantly, didn't he?
A He blew one blow pretty heavy
Q Right
A He was trying to get her attention, the driver's attention
Q That was when he saw the car moving towards the crossing, correct?
A When it was getting to the danger point, right

Q And that would have been when we get right here, correct?

MR HARMON Objection, Your Honor This is --

Q 35-A you said?

A I don't know if that --

THE COURT Whoa, whoa, whoa Objection is what?

MR HARMON My objection is it's calling for an improper hypothetical from a lay witness He is now asking him to speculate on sight distance and other things that are appropriate for experts, not for --

THE COURT Just tell us what you know, Mr Engineer That's all we're asking for -- not expert Just tell us what happened that day is all we want to know Answer Mr Parker's questions

Q I want to ask you that when Mr Stephens saw that the car was moving towards the crossing then he started really engaging the horn, is that correct?

A Right That's correct

Q And if we look here he starts that at 3586 Do you see it where he starts it? 3586 and he blows it right on up, correct?

MR HARMON Same objection, Your Honor

THE WITNESS See, the point here, Mr Parker, is my problem I'm having I don't know where he is respect -- in respect to the crossing I don't know if it's the second

blow you're talking about, the third blow If you make it a little clearer

Q I'll be happy to From what the event recorder shows here -- and I want you to go with me -- you see the horn, even though there is a little bit of gap in there, it is pretty well blown steady up until it quits here at 3110 Do you see that?

A Yes, sir

Q That is after -- that blow started after you saw the car, van approaching the crossing, correct?

A Correct

Q And, obviously, there is a gap in here You see it right here? This gap that we know that the horn if you add those seconds up there would be 6 seconds there, a second there, and 8 there, 2 4 second gap in there Do you see it?

A If you say so, I believe you I see a gap, right

Q I mean, you don't have to believe me You can add them up

A Okay

Q I might make an error and --

A All right Your question?

Q Is if there is a gap in there Mr Stephens then quit blowing the horn as the van was approaching the crossing, didn't he?

A Is this the last blow?
Q The last blow
A Okay This is the point -- he made a break He went to place the automatic brake valve into emergency position This is reaction time from my understanding It is reaction time When it became an emergency situation he did everything he could to avoid it
Q I understand that, but my question to you is did Mr Stephens quit blowing the horn once y'all saw the van moving to the crossing? Did he ever quit blowing the horn?
A I wasn't blowing the horn so I can't tell you exactly, but he was blowing it properly I don't know if the blow you're talking about there is where he went to the reaction time to place the train into emergency or not That's where you lose me
Q Well, I am not asking you about the brake
A Okay
Q We'll ask about that in a minute
A Okay
Q But right here Mr Stephens -- if he had seen that the van was coming in there to the crossing, he wouldn't have quit blowing the horn, would he?
MR HARMON Objection, Your Honor
THE COURT What's the objection?

THE WITNESS We --
THE COURT Hold on Hold on
MR HARMON He is asking about what Mr Stephens thought
THE COURT Sustained
Q Did you hear Mr Stephens quit blowing the horn when you saw the van approaching the crossing?
A My remembrance of that horn blowing the only time he had the short that you're talking about close to the crossing is the time he stood up to put the train into emergency
Q Now, we look here and there is a place here where for the train to get put into emergency The train doesn't get put into emergency until some almost a thousand feet beyond that?
A What blow are we talking about? Are we talking about the last blow?
Q The last blow
A That was in between blows coupled to the emergency situation Reaction time It was a break in the horn blowing
Q In other words, you're saying that the train should have been put in emergency right here?
A No Everything was done properly
MR HARMON Again, I just want to renew my --

THE COURT What's the objection?
MR HARMON -- objection My objection is -- May we approach at side bar?
THE COURT Well, we're going to move along from the horn right now
MR HARMON Okay
THE COURT Let's go to something besides the horn
MR PARKER Certainly
Do you know that when the train is placed in emergency once you place it in emergency how long does it take for the brake to activate on the train?
THE WITNESS Generally, it takes four to five -- to activate on the train?
Q Yea
A Okay Immediately you have the reaction time of the brake, you know, being applied Not only have you got to get all the loose slack in the operating rods, you only have one piston on each car Okay? All of the rods you have to get all of the slack out of the rods and it begins putting the brake shoe against the wheel Okay? Then you have a rapid build-up of air pressure in the brake cylinders So, to -- an emergency takes travels 7 to 8 seconds for 100 feet
Q In other words, it takes time for the brake to become fully activated --

A That's what I am talking about
Q Once you engage the emergency brake, it automatically starts the process So it will show up on the event recorder when the emergency brake is activated, correct?
A I guess so
Q Now --
A I am not very good on these event recorders I never have read the later ones
Q Okay Now, after the collision two or three days later someone I presume asked you to identify where you stopped, is that correct?
A Right
Q And you made a note and said that you stopped 700 feet from the point of the accident?
A Seventeen
Q 1700 Excuse me
A That was an estimate on a trip -- a return trip I knew where we had stopped after we cut the crossing and with our ohm meter on a train heading from Cayce to Savannah I pushed the ohm meter which measures feet -- it is a head-in device that's hooked up to the rear-end device which gives you the pressures from the rear and I used that ohm meter and I got 1700 feet which was an error
Q You estimated that distance in addition to taking it

with a meter?
A Yea The meter was an error That was just an estimate I wrote it down because I wanted to have some idea of stopping distance
Q The reason they want the stopping distance is that allows you then to recreate what happened with the event recorder, correct?
A I always want to know how far we stopped and I could tell, you know, if everything is right I know how long it takes a train to stop generally in emergency and if the train is placed in emergency we would have stopped around 2500 feet at that speed with that tonnage is my estimate and I am only a layman
Q Well, the evidence in the case is that you stopped at about 2017 So, you're off about 500?
A The tonnage graphs which I showed you in the depositions gives the exact reading where we stopped That was done by knowing how many cars we had using that computerized document which shows the feet of each car and we know we had 29 cars and two locomotives
Now, the State Patrol's picture of the train that we left standing on the south end of the crossing had a GPS 5337 -- GPS hopper Now, I could take that hopper and that tonnage graph that I showed you and we can get the exact feet plus the two locomotives of the stopping

distance
Q You're saying the work that CSX's expert did where he came up that was 2017 feet?
A That's close
Q Right Didn't you go out there with the attorneys for CSX and come up and testify in your deposition that y'all stopped in 2000 feet?
A Did you go out there and measure anything?
THE COURT No, sir No, sir Hold on Hold on I know both of you are in your prime But you answer He gets to ask the questions and you have to answer
THE WITNESS Yea, sorry
THE COURT No problem
THE WITNESS I'll behave
Q Well, Mr Cowan, I couldn't go out there and measure where you stopped that day because I wasn't out there that day with you
A Did you have the picture of the State Patrol's picture?
THE COURT No, sir Don't ask him, please
THE WITNESS I am not going to answer
Q But you went out there with the attorneys and y'all established that it took 2000 feet approximately for you to stop that day, correct?
A Yes, sir

Q Past the crossing is that correct?
A Correct
Q And even though your estimate is 2500 it turns out that 2000 would be more accurate?
A Yea The estimate was wrong
Q The 1700 we got up there Okay Now, you testified as I heard your testimony I believe that there was a pause -- something about a car paused Is that correct?
A Yes, sir A hesitation, a stop on top of the crossing
Q And you have testified under oath that she never stopped, haven't you?
A I was talking -- you were asking me about the stop sign at the time -- did she stop at the crossing
Q No, sir I am going to ask you --
A That's in relation to that stop sign
Q I'll put your testimony up in just a second, but you have given a statement in this case and you have given a deposition in this case, correct?
A Correct
Q This is the first time that you have said that Ms ~Harvey stopped, correct?
A No, sir Do you have my statements to the state patrol?
Q I sure do Hold on Let me get my stuff together a

little bit I am a little disheveled here
A That's okay
Q Let me go over a few things with you and then we'll get back to the stopping You would agree and I think you testified that the van approached when y'all first saw it that it was about halfway through the blowing cycle, correct?
A Right
Q And if y'all blew the horn for some 1347 feet it would be about half that when y'all first saw the van?
A I don't know about the feet now I said approximately half of the blowing cycle
Q When you first saw it you saw the van in the line of trees, is that correct?
A That's right Sight line
Q You could see the front of the van, but you couldn't see all of the van because it was in the trees?
A I seen a van approaching the crossing
Q Right And when you saw it in the trees you only saw the front because the brush was blocking the rest of it, correct?
A Well, now I could make out a vehicle That's, you know, when I reported that I saw the van
Q And you were about halfway between the whistle post and the crossing at that time?

A Approximately Approximately halfway through the blowing cycle
Q And you recall being asked at your deposition was it stopped when you first saw it?
A Right I said coming slow
Q And do you recall testifying that it never stopped as far as what you saw?
A At the stop sign
Q All right Now, let me go to page 7 of your deposition
A I didn't say stop sign, but that's what it was in my mind that you was asking me
Q All right Look at your deposition on page 7 I want to make sure I get this correct Page 7 Keep on going This is the line of questions I was very specific in asking you about this at the deposition Was it stopped when you first saw it? It never was No, it wasn't stopped It was coming slow Do you recall that?
A Yes, sir
Q And then you said, And it never stopped -- I asked you, And it never stopped as far as what you saw? No, it never stopped
A Okay, now Can I explain that?
MR HARMON Your Honor, may I --
THE COURT You may explain it and you may -- is

there something else on it for completion?
MR HARMON Well, to read to completion we need to read a little before If we can go before where he s first asked page 6, starting at line 17 then down through this Page 6, line 17 Right there starting on line 17 if you read through
THE COURT Go on to the next page
Q Did you get that?
MR HARMON Did you see that?
Q I tried to get you to estimate how far it was from the crossing and you said you couldn t do that
A You asked me how far it was from the crossing --
THE COURT Hold on Hold on Put it back up there We can all read it
MR PARKER We can read it together
THE COURT That s what they wanted to put up
MR HARMON And then through what was just read Thank you
THE COURT Can you read that?
THE WITNESS Yes, sir, with a little help
THE COURT All right Let me know when you finish reading it
THE WITNESS I never did give any footage
THE COURT Hold on Go to the next page -- what you want

MR HARMON Next page Read that
THE COURT Okay
THE WITNESS All right, sir
Q You testified, did you not, that it was -- Was it stopped when you first saw it? It never was No, it wasn't stopped It was coming slow So, it was moving, correct?
A Correct That s only in relation to the stop sign
Q Now, let's go to his statement You also gave a statement to the patrol, correct?
A Right
Q And it said I was the engineer on train 75730 on May 20 -- Excuse me, May 30 I read it wrong even though I knew the date We approached Honey Ford Road My engineer trainee was operating train 757 northbound Savannah to Cayce M G Stephens was blowing the horn from the whistle post to crossing when a Chevy van approached slow The driver of the van never looked, slowed down for the crossing momentarily for a rough crossing to protect front end of van, correct?
A Can I explain that?
Q Just a minute
THE COURT Hold on
Q Did I read that correctly?
A I believe you did

Q And you said slowed down for the crossing momentarily to avoid a rough crossing to protect the front end of the vehicle? Correct?
A Can I explain it?
Q What is it about --
THE COURT You will in just a second
Q If you would tell me first what is it about that that needs explaining?
A I said as to negotiate the crossing as a rough crossing I didn't get the word negotiate That is written in the dark on the hood of the state patrol's car with a flashlight So, it is very concise, but the truth is she came up to the crossing and paused, just like you go over a speed bump in a parking lot one wheel at a time and that's where she was when the locomotive struck her
Q In other words, you're saying that she slowed down a little more?
A She paused
Q Is paused slowing down?
A Pause hesitate
Q Whatever?
A You use your ward
Q Whatever you want to make it You ve been out there at that crossing That's not a rough crossing, is it?
A That's why we couldn't understand why the pause

Q Why did you write it was a rough crossing?
A No, I said as if it was a rough, but it was a grade crossing, perfectly level
Q Now, when you wrote out this statement with the trooper in this thing I think you said you had to do it with a flashlight?
A The state patrol came up to me on that dirt crossing where the locomotive stopped, the logging crossing and I told him what happened I said the car didn't stop -- stopped on -- I mean, did stop on the crossing and I said as she was -- as if it was negotiating a crossing, you know, like a rough crossing We couldn't understand why the pause and I made a statement earlier in Savannah that she stopped on the crossing So, in my mind she hesitated on top of the crossing and we was just wondering why We couldn't figure that out
Q In other words, she hesitated as you're saying That's your accurate memory is she hesitated?
A Right That's what I am swearing to right now on this Bible If it wasn't true, I wouldn't say it
Q And I ask you -- I think you said that Mr Stephens was blowing the horn in accordance with CSX operating rules, correct?
A Right
Q Let's go to page 8 of his deposition Do you recall

testifying that it would not -- you did not know where you would find it in the rules that you could have an 8-second gap --

THE COURT Hold on a second What in the world is that? Please turn it off No problem Move along

Q You see your testimony here, Mr Cowan?

A Okay What part are you talking about?

Q I asked you, Would it be within the rules of CSX to not blow the horn for 8 seconds between the whistle post and the crossing, and you said, I don t know where you'd find that in the rule

A I didn't understand what you meant by the 8-second gap in accordance with the rules, in relation to the rule

MR HARMON I'm sorry Can we read the next question and response, please?

THE COURT Sure

MR HARMON The immediate next question right after that Can we blow that up?

MR PARKER Absolutely

Q Do you remember me asking, My question is would it be appropriate to have an 8-second gap when there was no horn blowing, and you said, I couldn't say that?

A I remember that I didn't know where you found that

Q What didn't you know what I found?

A I hadn't seen the event recorder So I really don't

know what you were talking about
Q And --
A I understand it now I mean --
Q You knew it wasn't appropriate within the rules to not blow for 8 seconds as you approach the crossing, didn't you?
A It's according to, you know, what speed, how far the whistle post is It could be a gap of 8 seconds in between blows
THE COURT All right gentlemen Let's move away from the horn
MR PARKER Excuse me
THE COURT We've done the horn
MR PARKER Okay
Q Now, you testified that Mr Stephens I believe -- did you say he put the train in emergency simultaneously with the collision?
A When it became an emergent situation all I know is he put the train in emergency which I directed him to, but he was going for the brake valve already so all I did was to assure he put it in emergency
Q Let me show you your testimony on that and see if you still agree with it It is on page 25 I asked you did you put the train -- Did Mr Stephens put the train in emergency before or after he hit the car? You said,

simultaneously
A I said simultaneously
Q That's still your testimony today?
A That's still my testimony
Q Even if the event recorder shows otherwise?
A Well, I mean, that's my memory
Q And we all make --
A It is not as good as that event recorder evidently
Q Well, all it's doing is recording information It doesn't have feelings in this about us -- how we feel about things and whether or not we want to defend our other employees and our company
MR HARMON Objection
THE COURT What is the objection?
THE WITNESS That has nothing to do with it
THE COURT Hold on What's your objection?
MR HARMON It is an argumentative question
THE COURT Rephrase your question
Q Mr Cowan, this event recorder has no interest in this case, does it?
A I'm telling it just like I remember the truth So, it should be the same
Q And if it isn't, then we have other things going on, don't we?
A That's an assessment you made

Q But they ought to be the same if we're accurately recounting it and it's accurately recounting it?
A We're humanly as accurate as we can be
Q But like all of us we let people we like that we want to defend we may see things a little in that person's eyes, correct? Through that person's eyes?
A Yea, but I could be right and that could be wrong
THE COURT All right Let s move along
Q All right Good enough Thank you
THE COURT Mr Harmon, how long you got?
MR HARMON Very briefly, Your Honor
THE COURT All right Let's do it

REDIRECT EXAMINATION

BY MR HARMON
Q All right Now, if we could just put up one of the event recorder slides Now, Mr Cowan, are you trained how to read event recorders?
A No, sir
Q And you're not here disputing CSX's event recorder, are you?
A No, I'm not
Q You're telling us what you remember, right?
A Sir?
Q You're telling us what you remember?
A Oh, I remember the accident Mr Stephens was

blowing the horn properly
Q Okay But you're not here to dispute what the event recorder says, correct?
A No, I'm not into that
Q And you're not trained -- and Mr Parker asked you a lot of questions about what all of these numbers mean, whether it is read from the top or bottom or bottom to top, you're not trained on that, are you?
A I am not trained in that I don't read them
Q All right But you're been here when other people have testified about it? Their experts, right?
A Yea, I have
Q Now, I want to turn and talk about very briefly this demonstrative that Mr Parker asked you questions about The jury can't see it from over there, but you've seen this before, right?
A Right
Q All right And this is actually up on a track here, isn't it, that we got down at the bottom?
A The man is standing on the ground, the cross ties
Q And the train is actually on --
A The train is on the rail
Q Okay And this gentleman here, who is he?
A That is Andy Holiday
Q Okay And did you measure him without any boots on?

A I measured him, yea Right 5'8"
Q All right And when did you do that?
A Yesterday
Q Okay And you indicated in this photograph how tall was he?
A 5'8
Q Okay
A The photograph is 5'11
Q All right And if we look down here at the bottom what is he wearing?
A He's wearing CSX designated safety boots
Q And why does he have to wear the boots?
A It is extra-sized heels and soles with a steel toe for safety because of the balance
Q All right So, you have to wear them when you're on the tracks?
A They have to wear it when they're around the CSX property
Q Okay And, again, did you measure with this laying down the actual height from the bottom of the train to the top of the train?
A Right
Q And how tall was it on this picture?
A Oh it's 14 feet, 2 inches
Q And did you measure that?

A I measured it
Q And how tall was the actual train that day?
A CSX specs -- I mean, General Electric who made the locomotive specs are 15 feet, 5 inches
MR HARMON Your Honor, I don't have any further questions
THE COURT Thank you You may step down
Mr Hiers, go back to the jury room and take care of lunch for me Make sure they get lunch It is a quarter 'til 1 Can we start back -- can y'all eat in an hour and 15 minutes? We're going to try to start at 2 Don't get indigestion by eating fast I can't start without y'all Just let me know when you get back
Don't discuss the case Don't let anybody discuss it with you
If you go out at the barbecue place everybody in town will be out there so get them to sit back there by themselves, Mr Hiers
Don't let anybody talk to you about the case Thank you Everybody else remain seated
Y'all can take it down
(Whereupon, the jury exited the courtroom at 12 46)
THE COURT Mr Parker and Mr Harmon, everybody get a bathroom break and before y all go to lunch check in here with me so I can talk to you

RICHARD S WHATLEY, after being duly sworn, testified as follows

THE COURT Trooper, if you would give us your full name for the record and spell your last

THE WITNESS Richard Samuel Whatley, W-H-A-T-L-E-Y

DIRECT EXAMINATION

BY MR MILLBERG

Q Where do you live, Mr Whatley?

A Barnwell, South Carolina

Q Are you a married man?

A Yes, sir, I am

Q Are you employed, sir?

A No, sir I am retired

Q What are you retired from?

A From the South Carolina Highway Patrol

Q How many years did you put in?

A Twenty-six years

Q When did you retire?

A February 1 of this year

Q What was your rank when you retired?

A I was a Lance Corporal

Q Over 26 years did you have a chance to investigate a few wrecks?

A Too many

Q Do you have much experience in evaluating sight

distance in car wrecks?
A I do, yes, sir
Q Tell us about that
A Well, normally at every intersection wreck you always look in both directions to see if there is anything hampering your vision
Q You have been doing that since you were a young trooper?
A Ever since I started, yes, sir
Q Now, did you -- Were you involved in the train van wreck at the Honey Ford Road crossing on May 30, 2004?
A I was the lead investigator
Q And we've already heard a little bit of testimony Can you tell us who else was there from the Highway Patrol that day that responded to that wreck?
A Corporal J J Cruz, First Sergeant Nick Wallen, Lieutenant Henry Sims
Q As the lead investigator was it your responsibility to prepare the report for this wreck?
A It was
Q When there's a serious accident that results in a fatality, what kind of report does the Highway Patrol do?
A A fatality packet
Q A fatality packet
May I approach, Your Honor?

THE COURT (Witness nods head)
Q Is Exhibit 58 a copy of the fatality packet that you prepared in connection with this case?
A Yes, sir
Q You can just hang on to it Refer to it if you need to Now, can you give the jury an overview, Corporal Whatley, of what your investigation was and what your investigation involved in connection with this collision?
A My investigation was that Ms ~Harvey failed to yield the right-of-way at a stop sign
THE COURT Hold on
MR PARKER Your honor, I have an objection
THE COURT Ladies and gentlemen, just disregard that last statement Here is the reason why
THE WITNESS Yes, sir
THE COURT You know we talked about experts being qualified to give opinions
THE WITNESS Yes, sir
THE COURT Everybody else can't give opinions Troopers normally ever since I started practicing law can tell us everything they see at the scene You're the ultimate finders of fact You make the ultimate decision They can't give us opinions about if somebody failed to yield a right-of-way They can just tell you what they saw So, just limit it to that

THE WITNESS Yes, sir
Q I probably didn't ask a very good question, Corporal What I am after is what you saw - what you did and what you saw
A Upon -
Q First of all -- Hold on just a second Just give us an overview of what kind of activities you were involved in there -- measurements, photographs, that kind of stuff What did you do?
A Yes, sir Upon arriving I first noticed all the debris field from the collision I took the actual measurements of the vehicle from point of rest in the collision from a reference point looking all directions for visions obstructions, clearality (phonetic) to anything that hampered the driver's obstruction to move ahead in a reasonable manner Photographs are a responsibility, but I was so busy at this time J J Cruz, Corporal, on the scene took the photographs for me
Q Yes, sir
A Also, get witness statements and such as
Q All that kind of thing?
A Yes, sir
Q Now, there's been a lot of talking in our case here, Trooper Whatley about the visibility and that's the main thing I want to ask you about As part of your

investigation of this wreck did you investigate as the visibility at the crossing?
A Yes, both directions from both sides of the railroad track
Q Now, I want to direct your attention in particular to the direction down the track the train came from, okay?
A Yes, sir
Q And I want to direct your attention to coming from the way that Ms ~Harvey came from Highway 321, okay?
A Yes, sir
Q That's what I want to ask you about Now, did you inspect the visibility in that quadrant of the crossing?
A I did
Q And can you explain to the jury how you went about doing that?
A Actually, I was in my patrol vehicle which is a full-sized Crown Victoria
Q And where did you put your Crown Vic with respect to the stop line there on the highway?
A At the furthest point of the stop line nearest rail
Q Let me make sure I understand you now We've heard that that stop line is about 2 feet wide?
A Approximately, yes, sir
Q So, as you pulled -- if you were in a car pulling up like Ms ~Harvey coming from 321 would you have stopped at

the first part of the stop line you came to?
A No, sir I pull -- well --
Q You describe it in your words
A I always pull up as state law says to where you can see the best at an intersection to proceed carefully
Q Okay And where was that with respect to this stop line?
A I pulled reasonably as close as I know to the very end of the stop line towards the rail
Q Okay
A The closest point towards the rail
Q Now, and what kind of vehicle were you driving?
A I was driving a full size Crown Victoria
Q State patrol car?
A Yes, sir
Q And when you did that did you stop in that position?
A I did
Q And did you look to your left?
A Yes, sir
Q And what were you able to see?
A I could see clear sight distance besides small under growth
Q Did you -- did you consider there to be any obstructions to the view of the driver from that position?
A No

Q Did you record that in your report?
A Yes, sir
Q When was it that you made this inspection, Corporal Whatley?
A At the scene of the accident
Q Was it that very day?
A It was, yes, sir
Q Was it still daylight?
A Yes sir
Q Now, can you -- I would ask you to turn to page 18 of your -- Here is another copy of Exhibit 58
THE COURT I am giving it back to him Page 18?
MR MILLBERG Page 18, Your Honor Thank you, sir
Do you have that in front of you, Corporal?
THE WITNESS Yes, sir
Q Let me get with you And this is part of your -- of the official Highway Patrol report?
A This is the fatality packet, yes, sir
Q Fatality packet Is there a section on there entitled vision obstructions?
A It is, yes, sir
Q And underneath that there is a number of places where you can check the appropriate box?
A Yes sir
Q And what are the different things that you can check

depending on what you find?
A Buildings, sign, curve, hill, vehicle, snow banks, vegetation, sunlight, other, and none
Q Building, sign, curve, hill, vehicles, snow bank, vegetation, sunlight or other you can check or none Did you check any of those boxes?
A No, sir I checked none
Q You checked none?
A None
Q Did you check vegetation?
A No, sir
Q Did you check sunlight?
A No, sir
Q The only box you checked was none?
A That's correct
Q Could we pull up page 18 of Exhibit 15 -- excuse me, Exhibit 58 and it's on the right hand side about halfway down there?
Is that the part of the fatality packet that you just testified about?
A Yes, sir
Q And that was prepared by you? When was the report completed, approximately?
A The fatality packet itself?
Q Yes, sir, the fatality packet

A Several days later, but most things I have a working copy in my car at all times that I make the notes on at the scene
Q And --
A This is a computer representation
Q Did you also make some handwritten notes, some field notes while you were out at the scene?
A Yes, sir, I did
Q Can you find the page that talks about vision, about visibility? I think it's marked 58 down in the bottom right hand corner
A All right Yes, sir, I have it
Q Are you with me there?
A Yes, sir
Q When and where did you make your field notes?
A I made my field notes at the scene of the accident
Q That very day?
A Yes, sir
Q And what did you note about vision obstructions in your field notes?
A No vision obstructions
Q I'm sorry?
A No vision obstructions
Q Did you make a note there about the stop sign?
A Yes, sir The stop sign was in place

Q Bob, can we flip over to page CSX 58 of that down at the bottom right there?

Is that document that we're looking at now, Corporal Whatley, is that your handwriting?

A Yes, sir, it is

Q I'll bet I am not the only one here that might have a little trouble reading that

A I'm a left-hander It is explainable

Q Can you just quote that part for us, please, sir?

A No vision obstruction, stop sign in place at crossing

Q Thank you sir You can take that down

May we approach for just one moment, Your Honor?

(Whereupon, a bench conference was held)

THE COURT Thank you for handling it in that manner

MR MILLBERG Yes, sir, Your Honor

Corporal Whatley, are you giving any thought to going back with the patrol?

THE WITNESS I have been asked by headquarters if I would come back for a year as a retired trooper working hourly in construction zones on the interstate and I am seriously considering it

Q We appreciate your coming today

A Thank you

THE COURT Mr Parker is going to ask you a few

questions

CROSS-EXAMINATION

BY MR PARKER

Q Mr Whatley, I think you testified that you looked at sight distance for a lot of years at intersections because in order to see a car coming you have to have adequate sight distance at an intersection, don't you?

A Yes, sir

Q If you don't have a safe sight distance, then people get killed?

A Yes, sir, that's --

Q And, so, you want to make sure you have safe sight distance?

A Yes, sir

Q You're aware that CSX has adopted a policy whereby they're clearing the sight distance at the crossings now?

A I am not, no, sir

Q You haven't gone out and seen where they've been cutting them initially for up to 100 feet to 300 feet?

A No, sir

Q Now they cut them for up to 950 feet down to a point?

MR MILLBERG Objection, Your Honor No foundation as to this testimony

THE WITNESS No, sir

THE COURT Overruled

Q As you go by crossing I believe in your deposition you said you look at them regularly, correct?
A I do
Q What you told us is you have never seen one that had sight obstructions?
A I think you asked me lately I don t know what your term of lately would be Has it been since I retired or while I was on the job?
Q Well, have you seen railroad crossings that were overgrown and there were sight obstructions?
A Not to my knowledge
MR MILLBERG Objection, Your Honor
THE WITNESS If I did I would report that to DOT
Q Because it would be a safety hazard if you couldn't see the train coming?
A That's correct
Q And you have to be able to see it coming in a time that you can see it, look around, go, and react to it, correct?
A I would say if you see it you would stop and let it pass
Q Absolutely You'd be crazy not to, wouldn't you?
A That's a fact
Q Because they'll kill you if you don't see them and they hit you, correct?

A If you pull out in front of them they sure will
Q They'll hit you if you don't see them, isn't that correct?
A If you don't see them
Q Right You can t avoid them if you don't see them?
A That's correct
Q And I think you talked about -- you talked about your going out and looking a little bit at what the sight lines were out there, correct?
A Yes, sir
Q I am going to talk with you about it You had a lot going on that night, didn't you?
A I did
Q It was -- you get out there and I'm sure it is a daunting task to go out there and handle something like this and you had Mr Cruz who's already testified helping you along with a couple of other guys, a couple of other patrolmen?
A Yes, sir
Q There's mr Sims and I think you said Mr Walling?
A Yes, sir
Q And when you got there at some point in time you were put in charge as the lead investigator?
A I was from the initial call
Q And who -- they tell you -- somebody tells you you're

going to be the lead investigator?
A No, sir
Q How is that done? I don't understand that
A No, sir On this day I was the road trooper The other three that you mentioned are supervisors The road troopers are going to handle all the accidents
Q Okay So, when you arrived there do you recall what time it was?
A Twenty-five after seven, possibly
Q Okay
A Roughly
Q You got out there You assessed the situation, what you were dealing with?
A Yes, sir
Q And was the emergency people already out there?
A They were yes, sir
Q Were fire trucks already out there?
A I believe so, yes, sir
Q And there were a lot of people out there?
A There were
Q And you had Mr Cruz -- Officer Cruz take the photographs?
A Yes, sir
Q And you also endeavored to take statements from the train crew?

A Yes, sir
Q And was Ms ~Harvey still there when you arrived?
A She was
Q And was Beryl Harvey -- he was still there when you arrived?
A Yes, sir
Q Did you talk with Ms ~Harvey?
A No, sir I went and saw that she was being worked on by EMS My attention was behind that to Mr Harvey
Q She was -- because of medical condition, you couldn't interview her?
A Yes, sir Yes, sir
Q And, so, what you heard that night all came from the train crew about what happened?
A What I heard, yes, sir
Q And so you endeavored to get statements from them?
A I did
Q When -- how long had you been there -- just walk us through how long it took you to do the various activities
A I think I was at the scene for approximately three hours, give or take more or less
Q And if you would just walk through how long it took you -- you initially got there You assessed the situation You decided what you needed to do?
A Yes, sir

Q You got I presume -- probably did nothing until the EMS people and rescue people could get everybody out of there?
A I'm sorry?
Q Did you do any investigation when the EMS people were still there?
A I could ve done some, yes, sir
Q Do you know what you did while the EMS people were still there?
A No, sir Not truthfully no, sir
Q And then at some point in time the scene was in a condition you could do some investigation?
A Yes, sir
Q And at that point in time did you measure certain distances?
A I did
Q And you used a tape measure to do these things?
A Sir?
Q You used a tape measure to do these things?
A I used the tape measure and I also used a hand-held GPS to give exact locations within 15 feet
Q Sure And you took -- somebody helped you with the tape measure?
A Corporal Cruz
Q All right And y'all did a good bit of measuring?

A Yes, sir
Q Was that the first thing you did once it was clear enough for you to do that?
A I am not sure
Q Do you remember the sequence in which you did that?
A No, sir
Q How long would it have taken you to do the measurements that you took out there?
A Forty-five minutes approximately
Q Did you do that in the daylight?
A I did
Q And then you -- did you do the measurements before or after you talked to the train crew?
A I believe it was after
Q Okay So, the first time that you did the -- really did your measurements was after you had talked to the train crew?
A I believe so, yes, sir
Q And in order to talk to the train crew you got the train crew together somehow with yourself?
A Separately, yes, sir
Q And where did they meet with you?
A I actually drove down to the scene since it was secured by my three supervisors and, actually, there was a dirt road that I knew of to go to where the engineer was

with the engine They broke the train loose so EMS could get across the tracks I proceeded northbound on 321 and took a little cut-thru to the railroad track and talked with Mr Cowan at the engine

Q All right Had you already talked with Mr Bonner and Mr Stephens before then?

A I do not recall

Q And you talked with them?

A I did

Q And they told you what their version of what happened was?

A Yes, sir

Q And you wrote that -- you didn't write that down You had them write that down?

A I had them to write down their statement

Q All right And were you there when they wrote the statements?

A I don't believe that I was I believe actually Sergeant Walling went back and collected the statements for me to the best of my recollection

Q It looked like he witnessed the statements

A Yes, sir

Q That's why I am asking that

A Okay

Q But they made those same statements to you and then

they wrote them down?
A In their own terms, yes, sir
Q And you took the -- All right You took measurements You took the statements from the train crew, and you had Mr Crews take photographs, correct?
A Yes, sir
Q What else did you do out there?
A I actually observed from my car directions of the track from the intersection
Q And that was one of the last things you did, wasn't it?
A No, sir
Q When did you do it?
A I did this while the sun was still up This would be after -- you know, the train was still there, but it was still broke apart, but after some of the EMS have already cleared out the way
Q Fire truck is still there?
A I don't recall
Q Do you know what time the fire trucks left?
A I do not No, sir
Q And you realize that there was a fire truck on the stop line, correct?
A Not to my knowledge, no, sir I don't recall where he was parked

Q There never was a fire truck on the stop line?
A I don t recall, sir I know there was a fire truck on the scene
Q Do you know there was a fire truck up to the crossing?
A I do not
Q You don't recall that?
A I do not recall that
Q Let's look at Plaintiff's Exhibit No 2 Do you see the fire truck there?
A I see it
Q I think that it's about the area of the white line or covering the white line there?
A Approximately From where I'm sitting I can't tell if it's more over on this side or more towards the middle of the road
Q You see the stop sign there?
A I do
Q And you recognize this as the scene of the collision?
A Yes, sir
Q And this is the -- The train had to be cut?
A That's correct
Q Were you out there when it was cut?
A No, sir
Q Been cut before you got there?

A Yes, sir
Q And looking down on the other side you see the cross buck sign on the other side?
A Yes, sir
Q Do you see the vegetation over there on the other side?
A I see some behind the crossbuck which runs parallel to it, yes, sir
Q And your testimony earlier was that would not obstruct your sight, correct?
A Are we looking on the fire truck side?
Q Other side
A Other side, no, sir
Q And your view of that vegetation growing there was not a sight obstruction?
A No, sir
Q And you could see sufficient distance -- would you have to look through that vegetation?
A One shrub that I remember which would have been a whole lot lower than the light on the train itself
Q Now, we're talking about on the fire truck side now, correct?
A I thought we were talking on the other side That vegetation you could see over in my Crown Victoria
Q The vegetation is coming as you're coming towards 321

6 feet below that --
MR MILLBERG Objection, argumentative
MR PARKER -- would be the light
THE COURT Hold on
THE WITNESS I --
THE COURT Hold on, Gentlemen
MR MILLBERG Objection, argumentative
THE COURT Overruled
THE WITNESS I am guessing the light would be approximately 13-foot high from me observing the front end of the damage on the engine itself
Q And if it were 5 feet below that, then we'll say that the light is 10 feet Then if the brush was 10 feet high it would have obstructed your view of it, correct?
MR MILLBERG Objection
THE COURT Hold on
MR MILLBERG Speculation
THE WITNESS No sir
THE COURT Hold on, please
MR MILLBERG Speculation It calls for expert testimony
THE COURT Just tell us what you observed Mr Parker, he can't -- we're getting now into what could be and couldn't be
Q Well, I would ask you this Did you observe brush

down the track that you were looking at that was 10 to 12 feet high from your eye?
A I saw brush, but my observation it might have been 5 to 6-foot high
Q And if it were on an embankment that was 5 to 6 feet high then it would be 12 feet high?
A You just told me that the track was flat
THE COURT Sir, just answer his question
THE WITNESS No, sir
Q It wouldn't be?
A No, sir Not the way you're putting it, no, sir
Q And you didn't go down that track and measure that vegetation, did you?
A No sir
Q Let's look at Plaintiff's Exhibit 64 Scroll to the vegetation measurements
All right If you see at 300 feet this is -- I represent to you that this was measured shortly thereafter and at 300 feet there was brush that was 6 feet high and a bank is 4 to 5 feet high above that and you would agree with me if we take -- that s 10 to 11 feet that that brush would be above?
A The only brush that I'm aware of is one little 5 to 6-foot shrub As to the embankment part, no, sir
Q And if this is correct at 340 22 feet from the first

track there was start of trees 28 feet from the track 40 to 50 feet high?
A If that's correct I am not a mathematician, no, sir
Q But these things -- if these things are in your sight -- line of sight -- they would block your view somewhat, wouldn't they?
A I do not because -- as I ve stated, those numbers up there I can't correlate them, no, sir
THE COURT Let's move along
MR PARKER Thank you, Your Honor Let's go to Plaintiff's Exhibit 22
Now this is looking in the other way towards the crossing?
THE WITNESS That would be northbound, yes, sir
Q And this would be looking towards Honey Ford crossing?
A Yes, sir
Q And you see the brush in there that you saw that was between you and where you thought the train would be visible?
A Is that the northbound side of the accident or the southbound side?
Q It's the southbound side
A It's southbound? Yes, sir, you could see over that

Q You see the vegetation?
A I see what you're talking about
Q You're thinking you can see over all of that?
A Well, at the stop line, yes, sir I had no problem looking down the track
Q All right And you also see down there there was a building You see the building now?
A Yes, sir
Q You recall that?
A Yes, sir
Q And you put that there was no sight obstruction in that direction, correct?
A That's correct
Q You didn't think that building obstructed the sight?
A No, sir
Q And as you go towards that in 22 if we look down there you can see that brush that's obstructing that telephone pole, correct?
A I could see where the brush has grown up on the telephone pole, yes, sir
Q Let's go to Plaintiff's Exhibit 23
Do you see the embankment there we're talking about?
A I do
Q And you can tell that that is a fairly high embankment, can't you?

A Well, without the brush I really can't tell, no, sir I don't know where the brush actually starts on the embankment
Q Well, let's look on the left side Do you see the embankment on the left side of the track where it looks like to me -- I can't be sure --
MR MILLBERG Your Honor, may we approach?
(Whereupon, a bench conference was held)
Q On 23 you see the arrow there on the embankment?
A I do, yes, sir
Q When you were out there that night you didn't observe that embankment?
A I was looking down the track, Mr Parker I wasn't -- I was looking for things that obstructed my view from where my car was parked So, that would be no
Q While you were out there I think that you -- all of those field notes were written while you were out there?
A They were, yes, sir
Q And I believe there are some numbers of pages of field notes?
A They are, yes, sir
Q And I think I counted them as five handwritten pages?
A Roughly, yes, sir
Q And I think I miscounted them There might be more than that I don't want to shortchange you Let's go

through it and count the ones because I want to figure out what you wrote out there that night

A Ten pages

Q How many?

A Ten

Q Ten And included in that was a scale drawing?

A No, sir Nothing is to scale

Q Oh, it is just an approximation?

A That's correct

Q And you put the train on it where the vehicle was struck and those types of things, where people were found?

MR MILLBERG Page reference, please?

MR PARKER I don't have the pages on there

THE WITNESS I'm looking at it, Mr Parker

Q Do you see it there, Mr Whatley?

THE COURT We got a bate stamp CSX64 and 65

MR MILLBERG 64 and 65 Thank you

Q And then you have another diagram in which you put reference points?

A Yes, sir

Q And this is the measurements that you and Cruz or Officer Cruz made that night?

A Yes, sir

Q And then you have another handwritten note that said that you arrived at 19 05, is that correct?

A I believe that was the time of the accident I believe I arrived --
Q Excuse me
A -- at 19 25
Q I'm sorry You're exactly correct And you filled out a form on that that's a very detailed form about the people who was involved and so forth?
A It was not all the way detailed It was just some of the people I was just noticing while I was out there such as Bamberg County EMS -- nobody named -- Denmark Fire Department, Govan Fire Department, and the coroner
Q Let's go back to Exhibit No 2 -- Plaintiff's Exhibit 2
As you can see on there there is a fire truck there The train is still there, correct?
A It is
Q And you can see shadows in there Do you see the shadows?
A I do
Q And would you be doing any measurements from looking where you stopped at that time or would it have been after this?
A Measurements?
Q Yea Looking from the stop line or stop sign or wherever you stopped

A Looking down the track?
Q Right
A It was while the sun was still up
Q Well --
A It was still daylight
Q Was it before or after this picture was taken?
A I do not know
Q And it would appear in this picture that there is a fire truck sitting in that lane where you would have stopped at the stop sign, correct?
MR MILLBERG Repetitious, Your Honor
THE COURT Sir?
MR MILLBERG Objection Repetitious, asked and answered
THE COURT Well, it has, but let's move along Answer the question
THE WITNESS Yes, sir
Q Was the stop sign there when you took -- I mean the fire truck there when you took your look?
THE COURT Was it there or was it not?
THE WITNESS No, sir
Q The fire trucks had left the scene?
A It was not there at that location, no, sir I don't know if it was still on scene or left
Q Mr Whatley, in your report you have a sheet where

you checked the equipment I believe on the train and on the cars
A It's in the fatality packet, yes sir
Q And see if you can locate that for us I believe it's page 22
A I'm looking at --
THE COURT Hold on Bate stamp?
MR PARKER That's 22 on the report It's train information It's got a thing on train information See up top -- train information?
THE COURT He is getting there
THE WITNESS Yes, sir
Q And on page 22 it's got whether or not the train was equipped with a bell?
A Yes, sir
Q And you say no? You see that?
A I see it yes, sir, and I checked no
Q And you asked if it was operative -- the form does -- and you said no?
A That's correct
Q And you received that information from the train crew?
A Yes, sir
Q Now, I am going to put up Exhibit 32 -- Plaintiff's Exhibit 32 Let's put up 32

The vegetation that you say was between you and the oncoming train in Plaintiff's Exhibit 32 would be there just to the right of the power pole?

A Yes, sir

Q And that is your view Even though you had nothing to judge it by, you determined that you could see high enough over that to see the light of a locomotive, correct?

A I could, but that's not where my car would have been located It would have been more to the right and more forward

Q Okay Well, let's go to 48-B, 48-A

It would have been more in the area where you took -- your look would have been at this point?

A Well, I'm still saying that from where I'm looking at it I'm not looking mostly down the train line It still appears to me that that picture was taken in the other lane and not the lane that the driver was actually in

Q If this lane is taken from the center of the road you would have been farther towards the track when you were looking?

A I would have been closer to the track

Q And let's talk a little bit about how much closer to the track you would have been

A I didn't measure it

Q It would have been such that that vegetation there you would have been clear of it?
A Yes, sir, the sight line
MR PARKER Thank you
THE COURT Redirect?

REDIRECT EXAMINATION

BY MR MILLBERG
Q Corporal Whatley, do you recall the exact order in which you conducted the various aspects of your investigation that you performed that --
A I do not
Q -- day? Whether you did your inspections first or statements first?
A No, sir
Q Checked the sight line first, that kind of thing?
A No sir
Q It's been some five years since the accident?
A That s correct
Q You know you did all of those things?
A Oh, I know I did it all Yes, sir
Q Now, counsel asked you about whether you took statements from train crew?
A Yes sir
Q And can you find those in your fatality packet there? I have pulled them out With respect to the statement of

Michael Stephens --
A Yes, sir
Q -- and I have highlighted a little part of it here -- did he tell you that the van pulled out and stopped on the railroad tracks?
A Yes, sir
Q With respect to the statement that was the very day of the accident?
A It was
Q Jimmy Bonner, the conductor, did he tell you the day of the accident he saw a tan van pull on to the track and stop?
A Yes, sir
Q Now, as I understand it it was actually Officer Walling -- after you conducted the initial interview First Sergeant Walling went back later and took the written statements --
A He did, yes, sir
Q -- if I understand your correctly on that?
A Yes, sir
Q Now, you were asked a number of questions about the fire trucks?
A Yes sir
Q You were not in the courtroom when the fire department folks testified the other day that the fire

trucks were repositioned during the course of that -- the follow-up to the accident?
A No, sir This is the first time I have been in the courtroom
Q Okay Now, let me -- Can we get Plaintiff's Exhibit 23 back up?
MR PARKER Number 32?
MR MILLBERG 23
Now, before you came in here today had you ever seen any of these photographs looking down the track -- looking down the track at the crossing?
THE WITNESS I have seen some in a deposition, yes, sir
Q Is that the only time?
A That's the only time, yes, sir
Q Now, on this particular exhibit looking at it this way the Harvey van would have come from the right, is that correct?
A Yes, sir
Q Coming this way?
A Yes, sir
Q Is that correct?
A That s correct
Q And, actually, if you look closely in there you can see the stop sign and the crossbuck right there, can't

you?
A Yes, sir
Q Inside that telephone pole?
A Yes, sir
Q And when I say inside I mean closer to the track?
A Yes, sir
Q You see this embankment over here that counsel was asking you about?
A I do
Q That's not blocking the line of sight --
A No, sir
Q -- for a vehicle sitting down there at the stop sign looking back up in this direction, is it?
A No, sir
Q Now, you have been investigating accidents on behalf of the State of South Carolina for 26 years?
A Yes, sir
Q You don't get paid $350 an hour for doing that, do you?
A No, sir
Q Do you know the Harvey family?
A No, sir
Q You got anything to do with CSX?
A No, sir
Q Let's pull up Exhibit 58, page 18

When you looked at this crossing as a state trooper on a state trooper's salary and looked at the visibility at the crossing, what did you see?
A I saw enough sight distance to proceed carefully
Q Did you see any vision obstructions?
A No, sir
Q None?
A None
Q Did you record that that very day?
A I did
Q Thank you for coming today
MR PARKER Thank you
MR HARMON Your Honor, the next witness will be Mr John Johnson
THE COURT Everybody okay?
MR MURDAUGH Your Honor, may we approach?
(Whereupon, a bench conference was held)
JOHN L JOHNSON, after being duly sworn, testified as follows
THE COURT Please have a seat Give us your full name and spell your last Go ahead You can pull up How are you doing?
THE WITNESS Good
THE COURT All right, sir Full name?
THE WITNESS John L Johnson

THE COURT J-O-H-N-S-O-N?
THE WITNESS John
THE COURT Son
THE WITNESS Son

DIRECT EXAMINATION

BY MR HARMON
Q Good afternoon, Mr Johnson Sir, where are you from?
A Denmark, South Carolina
Q Where do you live?
A Honey Ford
Q How long have you lived there?
A All my life
Q Can you tell us about your family? Are you married?
A I was
Q And do you have any children?
A I have two sons
Q What are their ages?
A Twenty-one and 26
Q Do you currently work?
A Yes, I do
Q Where?
A Goodrich Delavan here in Bamberg
Q And how long have you worked there, Mr Johnson?
A Too long Thirty-three years

Q What do you do for them?
A A machinist
Q Okay And have you served our country in the National Guard?
A Twenty-one years, sir
Q Are you retired?
A Yes, sir
Q All right I want to -- my questions are going to be limited Mr Johnson, to the time period of May of 2004 and April of 2004, okay?
A Okay
Q Are you familiar with the Honey Ford Road crossing?
A Yes, I am
Q And how is it you're familiar with it?
A By going across it twice a day
Q Okay And that crossing, do you use it -- in the years 2003 and 2004 were you using it two times a day as well?
A Yes
Q And are you familiar with the visibility as you're approaching the crossing looking left towards Govan?
A Yes
Q All right Can we bring up Defendant's Exhibit -- let s start with 74
Now, this is a view looking left at the crossing

before the stop bar, correct?
A Correct
Q And is that view accurate as to what you could see sir, while stopped there at the stop line?
A As far as I can see
Q Okay And when you would cross the crossing in April and May of 2004 did you ever have any problems seeing down the tracks?
A No
Q And based upon your use of the crossing, Mr Johnson, how far in your estimation do you believe you could see when you were stopped there at the crossing at the stop line looking towards Govan?
A I imagine between 250 and 300 yards I drives a truck I can see a little further maybe
Q Okay What kind of truck do you drive?
A A Ford F150
Q All right Your Honor, I pass the witness
THE COURT Mr Murdaugh?
MR MURDAUGH We don't have any questions for Mr Johnson Thank you
THE COURT Let me see one of each side
(Whereupon, a bench conference was held)
THE COURT All right Madam forelady, ladies and gentlemen of the jury, we got two more short witnesses

THE WITNESS Janice Greene, G-R-E-E-N-E

DIRECT EXAMINATION

BY MR WILBY

Q Ms Greene, how are you doing today?

A Good

Q Good Thanks for coming in Ms Greene, are you still a volunteer?

A Yes

Q Okay And I know you're married and you have a couple of children?

A No I'm not married

Q I'm sorry All right You have a couple of kids anyway?

A Yes, sir

Q And I asked you if you're a volunteer Where do you volunteer?

A Now I'm on Govan Fire Department

Q All right And your two boys, I believe, are Robert and Shannon Hutto?

A Yes, sir

Q Those are the two I know about anyway, and do they also serve in that capacity or in some capacity as a volunteer?

A One of them is in Denmark and one of them is in Govan

Q All right And I believe Ms Greene, that you know maybe some of the Harveys?
A Yes, sir
Q Okay Where is your home?
A In Denmark
Q All right You are born and raised in this area?
A Yes, sir
Q And where do you currently reside?
A At 1017 Grapevine in Denmark
Q And is that fairly close to the Honey Ford Road area?
A Yes, sir
Q All right And are you employed today?
A Yes, sir
Q Where are you employed?
A At Bamberg District Two
Q What do you do for Bamberg District?
A I'm a bus driver
Q Thank you, ma'am And how long have you been doing that?
A Over twenty-six years
Q All right And does your bus route take you over the Honey Ford Road crossing?
A Yes, sir
Q All right And do you have a CDL license?
A Yes, sir

Q Are you required to have that to drive a bus?
A Yes, sir
Q What kind of training have you had in regard to railroad crossings?
A A lot We have to go through extensive training every year
Q Okay And, for example, what about as you're approaching a railroad crossing, what kind of training have you had?
A We have to stop before at the white line, open our window, open our door, go across
Q All right Okay Now, is part of what you do in driving a bus are you driving school children?
A Yes, sir
Q All right And if you encounter something that you think is an unsafe condition at a railroad crossing or at an intersection on a street, what are you supposed to do?
A I have to report it to my supervisor
Q Now, did you respond to the accident on May 30, 2004 at Honey Ford Road?
A Yes sir
Q All right And in what capacity did you respond?
A As what I did?
Q Well, yes, ma'am
A That day I did crowd control, basically

Q Okay And was there a big crowd at the scene?
A Yes, sir
Q And while you were out there did you do any investigation?
A No, sir
Q Now I want to talk to you a little bit about the day of the accident and immediately before specifically about the Honey Ford Road crossing You are familiar with it, of course, because you drive it?
A Yes sir
Q And if we could bring up Defendant's 76, please
I don't know if you can see it from where you're sitting, but 1014 feet down the track there is a man there Have you seen that photo before?
A Yes, sir I think that's the one I seen
Q All right And does that photograph right there accurately reflect what the crossing looked like on May 30, 2004 and immediately before?
A Yes, sir
Q And you, of course, had to drive over that crossing in your school bus, correct?
A Yes, sir
Q And when you were at that crossing driving a school bus did you feel like you could see far enough down the track that you could see a train if it was coming from the

Govan direction?
A Yes, sir
Q Did you ever have any problems at this crossing as you were crossing this direction?
A No, sir
Q Did you ever have any trouble seeing to the left toward Govan?
A No, sir
Q And had you been there at that railroad crossing where you had to stop and wait for trains to pass through?
A Yes, sir, I have
Q And on the occasions that you drove your school bus over that crossing did you ever report any problems with visibility to the left there?
A No, sir
Q Thank you very much
MR PARKER Just a couple of questions

CROSS-EXAMINATION

BY MR PARKER
Q Ms Greene, in a school bus because you might have problems hearing a train the law requires you to open the door and windows --
A Yes, sir
Q -- when you're stopped?
A Yes sir

Q All right That's fine Thank you
THE COURT Anything else?
MR WILBY Just a couple, Your Honor, very, very brief
THE COURT Very briefly
MR WILBY Yes, sir

REDIRECT EXAMINATION

BY MR WILBY
Q When you were there in your personal car even if you were a couple of feet behind the stop line you still could see a good distance, couldn't you --
A Yes, sir
Q -- Ms Greene? And the times that you -- many times you drove school children in the bus you never felt like this was an unsafe crossing, did you, Ms Greene?
A No, sir, I didn't
Q Thank you so much for coming
THE COURT Last witness for today
MR WILBY William Grubbs, sir
MR HARMON Your Honor, may we briefly approach? Very briefly
(Whereupon, a bench conference was held)
THE COURT How are you doing?
THE WITNESS All right How are you, sir?
THE COURT Fine

car

THE WITNESS Okay I will

DIRECT EXAMINATION

BY MRS MCLEOD

Q Mr Grubbs, where do you currently live?

A 5849 Carolina Highway

Q Where did you grow up?

A 5762 Carolina Highway

Q Okay Are you employed?

A I am

Q In what capacity?

A EMT Intermediate for Bamberg County EMS

Q Do you have any military service?

A I was in the Army a very brief period of time -- nine weeks, I believe I was discharged for medical reasons

Q Okay And have you been to Iraq?

A I was serving in Iraq with a civilian contract company as a fire fighter for approximately four months

Q For what period of time?

A That was from I want to say November to January It is hard to remember exactly when I was in the country there It was November of '04 to January of '05, I believe

Q Okay Did you respond to the scene of the Harvey accident on May 30, 2004?

A I did
Q What capacity did you respond?
A As a volunteer fire fighter with Denmark Fire Department
Q Did you have your first responders certification at that time?
A I believe I had just acquired my first responder, yes, ma'am That's correct
Q Did you respond in an emergency vehicle or your own personal vehicle?
A I responded in my personal vehicle
Q Do you know how long after the accident occurred that you arrived on the scene?
A I'm not sure when the accident occurred I know it took me approximately two to three minutes after I was notified via our pager system that the accident occurred So, as far as when the actual accident occurred as opposed to when I got there, I don't know Two or three minutes once I was notified
Q Very good What was your role at the scene of the accident?
A My role at that time -- I was one of the first arriving people and I just started assisting the EMS crew I had no Fire Department equipment available to me Once they got there we would assist with any type of

extrication or if the vehicle were to catch fire or any other sort of incident stabilization that we could handle, but my personal role that day is I was assisting the EMS crew with whatever they needed

Q Did you have an opportunity to observe the visibility of the crossing on the day of the accident?

A I did

Q Did you have an opportunity to observe the direction that Ms ~Harvey would have been approaching the crossing?

A Yes, ma'am

Q Could we pull up Defendant's 76, please?

Defendant's 76 here, does that represent what the crossing looked like on the day of the accident back in March of 2004?

A Yes, ma'am

Q And approaching from the direction that Ms ~Harvey would have been approaching from looking back towards Govan describe for me the visibility on that day

A On that day -- well, on that day, obviously, there was a train there, but the visibility I would say as far as the clearing was quite a few hundred yards

Q Did you have any trouble seeing down the track on that date?

A No, ma'am But my attention wasn't focused down on that end of the track

Q Yes, sir
A But, no, ma'am, there was no obvious obstructions
Q Now, are you a good judge of distance?
A I wouldn t consider myself one, no, ma'am, but I would say that I could hold my own, but I wouldn't say I was a master at it --
Q Okay
A -- by no means
Q Did you have familiarity of the crossing before the date of the accident in May of 2004?
A Yes, ma'am
Q How long had you been going over this crossing?
A I was born and raised here, so for 20-something years Short of the time I wasn't in the area I used it on and off It is a road to a lot of back roads
Q And for what purposes did you have or what occasions did you have to use this crossing?
A My primary -- usually, when I was going across there I was going to visit a friend that I had I had multiple friends, but one in particular that lived on the road down at the other end of Honey Ford So
Q Did you have occasion the use this crossing during the time period of April and May of 2004 right before the accident?
A I can't recall a specific incident, but I'm sure I

would have at some point, yea I usually traveled that road at least once a week or so for some purpose
Q Did you have occasion to approach the crossing from 321 in the direction that Ms ~Harvey was traveling on the day of the accident?
A I have crossed and approached that section from there, yes, ma'am
Q And during that time period looking left back towards Govan describe for me your visibility
A It is clear as far as I could see to the -- I would describe to the horizon, but it's to the track turns I'd say you could see as far as you needed to see until, you know, the woodlands took over
Q What type of vehicle were you driving during that time period?
A I have drove everything from a small car to a fire truck across that intersection So, during that time frame I am trying to remember I think I was in a small Acura
Q April or May of 2004?
A Yea I believe I was in an Acura at that time, a personal vehicle I owned
Q Where did you typically pull your vehicle up in relation to the stop line or the stop sign at that intersection?

A Just in general just getting around?
Q Yes When you stopped there
A Where would I stop?
Q Yes, sir
A Not often It is one of those rolling stops to be honest I usually didn't stop to a complete stop I am being honest I am not on trial I mean
THE COURT You'll be glad to know that the Highway Patrol just left
THE WITNESS Well, I mean honestly I usually didn't just due to the fact that it was very clear visibility I understand that's a very unsafe thing for me to do on my part and I of all people certainly know better, but, yea, I usually didn't stop So
Q Well, on those occasions when you did or did not stop approaching from 321 looking back towards Govan did you ever have any problem crossing that track?
A No, ma'am I have never had a problem crossing it
Q In that time period April or May of 2004 are you aware of anything that would have obstructed your visibility of an approaching train?
A No, ma'am
MRS MCLEOD Very good Thank you, Mr Grubbs
THE COURT Anybody?

CROSS-EXAMINATION

BY MR PARKER
Q Mr Grubbs, I just have a question for you
A Yes, sir?
Q As you're going through there on your rolling stop --
A Yes, sir
Q -- you don't have a lot of time to check it out, do you?
A No, sir, not on those rolling stops, no, sir
Q And, so, you're looking to your left, looking to your right, and going ahead, correct?
A Yes, sir, during those rolling stops
Q And what happens at this crossing is -- if we can see there we see a white dot They asked you about this dot and I assume the lawyers for CSX have shown you that before?
A I have seen the picture I was notified as to what the dot was later on a phonecall, but, yes, sir, I later found out what the white dot was
Q The lawyers told you it was a man standing down there?
A Well, one of the lawyers called me later that evening, yes, sir, and advised me or asked me if I had seen it and then advised that it was a man standing down there about a thousand feet
Q All right Let's go to Plaintiff's Exhibit 42

And this is the view you're talking about going off to the horizon, correct?
A Correct
Q And you would recognize that you are almost on the track before you can see that much?
A I would say from that photo it looks like you're probably a few feet from the track, yes, sir
Q That s what you're looking at while you're doing your rolling stop?
A No, sir I've already been looking before I got that far ahead of time
Q You were looking as you came back --
A Well, as I approached the intersection
Q But to get this view you had to get right up to the track, didn't you?
A Well to get that view, yes, sir, but I didn't need it when I was traveling because I wasn't looking for how far I could see down the track I would be looking for a train down the track coming So that's a little easier to spot coming
Q If you're looking right when it's coming and the brush is not in your way, right?
A This is true
Q Thank you
MRS MCLEOD Just a few quick follow-up, Judge

REDIRECT EXAMINATION

BY MRS MCLEOD

Q Mr Grubbs, just real quick

A Yes, ma'am

Q There were occasions when you pulled up to the railroad track in this direction and came to a complete stop, correct?

A Yes, ma'am

Q And on those occasions did you have any trouble looking down toward the left towards Govan?

A No, ma'am, none whatsoever

Q And did you have a chance to talk to Chris Wilson before you testified just the other day?

A Have I spoken with Chris before? Yes

Q Yes, sir Thank you That's all I have

THE COURT All right You did good I have to warn you, though, when you walk out that door over there --

THE WITNESS Uh-huh?

THE COURT -- all of the Highway Patrolman will be over there They're checking rolling stops today

THE WITNESS That's good I am riding with somebody today

THE COURT Anything else for today?

MR HARMON No, Your Honor

THE COURT All right I am going to order the Clerk

DIRECT EXAMINATION

BY MR MILLBERG

Q Please state your full name

A Jimmy Lee Bonner

Q Mr Bonner, where do you reside?

A Here in Savannah

Q And your address?

A 606 Suncrest Boulevard

Q How long have you lived in Savannah?

A Sixty-one years

Q And you're 61 years old?

A Sixty-three years old

Q And you're retired from CSX?

A That's correct

Q What year did you retire?

A 2002

Q 2002?

A Yes, sir

Q Now, this collision that we're here about happened May 4 2004 and that's why I am asking

A I am wrong about the retirement date It was 2004, 2005

Q Okay The collision we're here about happened May 30, 2004 What time in 2005 did you retire?

A I retired in February 2005

Q And during your employment with CSX you were a train man, I guess, at some point in time?
A Conductor, train man, yes, sir
Q And when did you become qualified as a conductor?
A 1968
Q And you were employed as a conductor from '68 until your retirement in February of 2005?
A That's correct
Q And did you normally work a certain job?
A Yes, sir, I did
Q What job -- what was that job?
A A local from Savannah to Columbia, South Carolina -- out of Savannah one day and return the next
Q And you would work the industries between Savannah and the Cayce yard?
A Yes, I did
Q And did you normally work with Mr Cowan?
A Yes, I did
Q How long did y'all work that job?
A Me and Jack probably worked 15 years together on that job
MR MILLBERG Page 6, line 16
Q When you left Savannah how many industries approximately did y'all work between Savannah and the Cayce yard?

A It depended on what kind of work load we had each individual day Normally, we'd work maybe seven to eight different industries
Q Do you recall which ones?
A The day of the accident or --
Q No, just in general
A Well, we had northbound We have a paper mill at Rincon called Georgia Pacific, feed mills at Estill I forget the name -- Southern Sawyer -- Central Sawyer, I think
Q Carolina Sawyer?
A That's correct Carolina Sawyer and then we'd have I think the name of the place is Tanner Gas Company at Swansea, South Carolina and then there is a dog food factory right outside of Columbia that we worked northbound
MR MILLBERG Ending at page 7, line 9 and starting at page 7, line 17
Q And how long would it take you to make the run from Savannah to Cayce yard on a normal day?
A Normal you'd run maybe 10 hours
Q And then you'd spend the night in Columbia?
A Yes, we would
MR MILLBERG Ending at page 7, line 22 and picking up at page 8, line 5

Q And so on this day that this collision happened you and Mr Cowan and a trainee Mr Stephens were on the train that day?
A Yes, we were
Q And Mr Stephens was training under Mr Cowan?
A Yes, he was
Q And how many cars were y'all pulling that day, do you recall?
A Sixty-one
Q And you had two locomotives?
A Yes, we did
Q And what kind of cars did you have on the train? Did you have any hazardous material cars?
A I recall one
Q And where was it located in the consist?
A I don t recall but it had to be at least five cars from the locomotive, but I don't recall exactly where it was at that day, but it was at least five cars behind the locomotive
Q And as you approached the crossing where the collision occurred do you recall the speed of the train?
A Yes, I do
Q And what was it?
A 47 miles an hour
Q And how do you recall that in particular?

A On those particular locomotives you have a speedometer that sits right in front of the conductor
Q And you saw the speedometer?
A Yes, I did
Q And as you approached the crossing where the collision occurred who was operating the locomotive?
A Michael was, the trainee
Q And where was he seated?
A In the engineer's seat on the right hand side of the locomotive
Q And if you would just tell me what he did about blowing the horn on the train?
A I'm sorry?
Q Did he blow the horn?
A Yes, he did
Q And where did he start blowing it?
A At the W board, whistle post board
Q How did he blow the horn prior to the collision?
A He blowed the horn at the whistle board as prescribed by the rules to CSX which would consist of two longs, one short blast, and a long blast until you cover the road crossing
Q And that would be you would repeat that sequence over through the crossing?
A To the crossing, that's correct

Q And how many sequences did it occur before you reached the crossing and the collision?
A He would blow the horn actually four times
Q He would blow two long, a short, a long, and then he would start that over, if necessary?
A If necessary
Q Was it necessary?
A No, it wasn't
Q So, he blew to your recollection two longs, a short, and a long?
A That's correct
Q And that's all he blew?
A No, sir He blowed the long, then another long, a short, and he started his long for the last part of the road crossing and then he went into a broken pattern trying to get attention of the motorist
Q Was there ever a gap in the horn blowing?
A Yes, there was
Q How long a gap?
A I couldn't say
Q Would it be permissible under the operating rules of CSX to have an 8-second gap in the horn?
A Yes, it would
Q It would be?
A Yes, sir

Q In other words, you could not blow the horn for 8 seconds?
A You blow the horn at the whistle board according to the speed of the crossing In other words, we were running 47 miles an hour and we'd been blowing the horn almost constant
Q And you're supposed to blow the horn constantly, aren't you?
A No
Q What does rule 14-L say?
A I have no idea
Q And that's what governs the horn sequence, isn't it?
A I have no idea
Q Well, the horn should be blown in accordance with the operating rules, shouldn't it?
A 14-L -- I have been out of the railroad for three years I don't know exactly what rule you're talking about
Q You don't recall the rule for the horn sequence?
A Not after three years I don't
Q Now, what did you see as you approached the crossing?
A When I looked forward the van was sitting right straight in front of us
Q It was on the track?
A It was on the track and it was stopped

Q So the first time you saw the van it was on the crossing?
A That's correct
Q Did anyone say anything prior to that?
A I heard Jack and Mike hollering back and forth, but what they were saying I don't know
Q And you gave a statement about what happened to the investigating officer?
A Yes, I did
Q And do you -- Anything in that statement you want to change?
A No, there's not
Q I'm going to hand you what's been marked as Exhibit No 5 Is this a copy of your statement?
A Yes, it is
Q And I am going to hand you Exhibit No 1 Do you recognize the handwriting of anyone on that Exhibit 1?
A Yes, I do
Q And whose handwriting is that?
A This on the left is mine
Q Whose is on the other side?
A I'm guessing it is Mr Cowan's
Q The information on here says train 75730 stopped 1700 feet from the point of accident, is that correct?
A Yes sir

Q Do you know who measured that distance?
A No, I don't
Q Did you measure that distance?
A No, I didn't
Q Now, after the collision you got off the locomotive?
A Yes, I did
Q And you went back to the crossing?
A Yes, I did
Q And what did you observe there?
A When I got back to the road crossing to the van the lady was knocked out of the van with her feet hung up in the underneath the seat or somewhere there and she was laying on the ground Rescue people was on the scene and she was telling them to take care of her son, take care of her son, and they said her son was being taken care of, and I never went over to the other part of it because the rescue people was there
Q After you went back did you have to cut the train to be able to allow the ambulances to come through?
A Yes, I did
Q If you will just tell us what you did to cut the train
A When I got to the scene and I knew she was being taken care of people were jumping across our train at the road crossing trying to help so I opened the road crossing

up so that people could get back and forth without jumping over our train
Q In order to disconnect the cars you had to disconnect the air hoses?
A What we do is we close the air valve that shuts off the air that runs all the way through the train and then we lift the lever that disconnects the coupling and then that pulls the air hoses loose
Q And so you did that and disconnected the train at the crossing?
A Yes, I did
Q And we have some photographs that were taken out there that day and I am going to hand you a couple of them and let you look at them Exhibit 7 would be the train where it was pulled forward and would be towards Columbia from the crossing?
A Yes, it is
Q And do you know -- and do you know that car number?
A No, I don't Not right off hand I don't
Q Did you mark it on something?
A I marked it on our tonnage graph
Q Okay I'll ask you about that in a minute And Exhibit 8 would show the car that would have been immediately south of the crossing?
A Yes, it is

Q Next I am going to hand you Exhibit 6 Do you recognize Exhibit 6?
A Yes, I do
Q Exhibit 6 is what?
A This is our work order leaving Savannah
Q And the work order gives the sequence of cars on your train?
A Yes, it does
Q Are the two locomotives listed on that?
A Not on this one, no, sir
Q So, in addition -- so in addition to this would be two locomotives?
A Yes, sir
Q And if you would look at page 2, did you mark the car that was at the crossing?
A Yes, I did
Q And which car was it?
A I marked it on GPSX 5336, but that's not correct
Q Why is that not correct?
A Because I can look at all of these pictures and tell it's not, and we had 29 cars north of the road crossing and if we count them this would not be the 29th car
MR MILLBERG Stopping at page 16, line 4 and skipping down to page 16, line 23
Q The car on exhibit 8 should be 53 what?

A 5337 which would have been line 43 on the consist
Q And so on the consist that would be the 43rd car?
A Yes, it would
Q So, the 29 cars would not be correct?
A Twenty-nine cars is correct
Q Tell me how you get there
A I counted them from the road crossing back to the engine
Q So the consist is not correct?
A No, it s not
Q How did the consist -- Why is the consist not correct?
A Because I marked it wrong
Q How did you mark it wrong?
A Probably a lot -- when I marked it there was still a lot going on and I just marked the wrong car number
MR MILLBERG Stopping at page 17, line 13 and skipping over to page 19 line 14
Q But there would be a CSX document showing when those cars were set off?
A Yes, there would
Q And --
A Or there would have been Whether there is one now or not I don't know
Q There was at one time?

A At one time
Q And this document would show two things One, that you set off 16 cars at Georgia Pacific and you picked up four empty ones?
A That's correct
Q Now, when you got to Carolina Sawyer in Estill did you pick up any cars?
A No, we didn't
Q Did you leave any cars?
A We left one empty
Q How do you know that?
A How do I know I sent one car -- set off one car in Estill? Because it's on my work order
Q Where do you see it on this?
A Right there
Q Which one is it?
A Line 17
Q The one you crossed out?
A Yes
Q And there would be -- there would be again you would have entered the computer at Estill to show what you did?
A Yes
Q And when you entered into the computer with that what would you call the report that you entered -- used to do by hand but now do by computer? What would you call that

report?
A I believe they call it like form 408
Q It's called a handling and what?
A It is a handle I don't know the name of it now, but it was a handling report -- what you set off and what you picked up and then they went to computer and done away with all of that
Q Right And your consist that we've marked as Exhibit 6 also shows on there that you had looks like a car with sodium hydroxide?
A Solution, yes, sir
Q Is that one car or two cars?
A That's one car
MR MILLBERG Stopping at page 21, line 9 and starting at page 22, line 13
Q Okay And you stayed there at the scene after the train was cut You stayed there with the train?
A I'm sorry?
Q You stayed with the train and went on to Cayce?
A Yes, I did
Q And who from CSX came to the scene?
A Train Master Frank I done forgot his name
Q Zimmerman?
A Zimmerman, yea
Q Anyone else?

A No

MR MILLBERG Stopping at page 22, line 23 starting at page 23, line 9

Q All right When you got the Cayce who did you meet at the Cayce yard?

A Frank was -- he had come to pick up Michael and come out to the crossing and I talked to him

Q At the crossing?

A At the crossing, but I talked to him also in Cayce yard

MR MILLBERG Stopping at page 23, line 15, starting at page 23, line 24

Q Mr Bonner, I think you said you talked with Mr Zimmerman at the scene and then again when you arrived at Cayce yard?

A That's correct

MR MILLBERG Stopping at page 24, line 2, moving over to page 25, line 10

Q How long were y'all at the scene?

A That I don't know

Q Someone has written down here -- I don't know -- some numbers and said 19 05 Is that when the collision occurred?

A Best to my recollection it was 19 00

Q And then it's got departed at 21 20?

A I don't know that
Q But that would be -- were y'all there at the scene approximately --
THE COURT Hold on a second
Q Were y'all there at the scene approximately two hours?
A Approximately, yes
Q Now, the movement of the train was that after you cut the cars then the locomotive moved forward and pulled 29 cars northbound?
A Northbound
Q Two locomotives and 29 cars?
A That's correct
Q And you know that because you counted them?
A Yes, I did
Q After you did that and y'all stayed in that position stopped one time The locomotive after it pulled forward stopped?
A Yes, it did
Q And did it stay stopped until it backed up?
A Yes, it did
Q And then when everyone was cleared out it then backed up and you recoupled the cars that were left south of the crossing?
A Yes, we did

Q And then you pulled forward from there?
A Yes, we did
Q And did you have any stops between there and Cayce yard?
A We made no more stops
Q Before you reached this crossing where the collision happened do you recall anything happening that was out of the ordinary?
A No, sir
MR MILLBERG Ending at page 26, line 22, and that concludes the deposition of Mr Bonner, Your Honor
THE COURT Mr Parker, anything that y'all wanted published?
MR PARKER They published our designations
THE COURT We got something on the next one?
MR PARKER Yes We have on objection to the next one
THE COURT All right Give me about five minutes Step back in the jury room
(Whereupon, the jury exited the courtroom at 9 47)
MR PARKER Your Honor, I am going to hand you a copy We filed the original
THE COURT That will be fine
MR PARKER Our objection is on page 45
THE COURT Line?

MR HARMON Yes, Your Honor
THE COURT Thank you
Anything else, Mr Parker?
MR PARKER Nothing, Your Honor
THE COURT All right Bring the jury in
(Whereupon, the jury came into open court at approximately 9 53)
THE COURT You may present your next witness
MRS MCLEOD Your Honor, next we'll be reading the deposition of Michael Stephens We will be reading the designations of the Plaintiff and also of CSX, Judge
THE COURT Thank you Mr Harmon will be reading on behalf of Michael G Stephens and Mr Stephens was the trainee, is that correct?
MRS MCLEOD Yes, sir
THE COURT Who has passed away since then, obviously unrelated to anything in --
MRS MCLEOD Yes, sir
THE COURT You may begin
Once again, ladies and gentlemen, this is another deposition Treat it as if this was testimony in the court
(Whereupon, excerpts from the deposition of Michael G Stephens was read as follows)

DIRECT EXAMINATION

MRS MCLEOD Page 5, line 17
Q Please state your full name
A Michael G Stephens
Q Mr Stephens, do where do you reside?
A Savannah, Georgia
Q What is your address?
A 11910 White Bluff Road Apt C-8, Savannah, 31419
Q And by whom are you employed?
A CSX
Q And have been for how long?
A Eight years
Q And if you will, just tell us briefly about your employment history with CSX
A Yes After I got out of the military I hired on CSX and, basically, I went to Tallahassee, Florida and transferred from Tallahassee back to Savannah and have been here
Q And you started in what position?
A As a conductor
Q And you worked as a conductor for how long?
A Four years
Q And then when did you train to be an engineer?
A I trained to be an engineer in about 2003
Q When were you certified as a locomotive engineer?
A Around July 3

Q Of '04 or '03?
A '04
Q So, at the time of this accident you were a trainee?
A Yes
Q What kind of training were you going through?
A I was going through engineer training at the time of the accident
Q If you would just go into some detail about that, what you were doing Were you just working with an engineer or had you been to school at that time? What had taken place?
A Okay I had been to school already and I had been training I was well advanced in my training I had been training for about five months and I was the crew That was one of the last crews I had to work with before I actually became a full time engineer
Q But you had not completed -- What did you have left to do to be able to be certified?
A That was pretty much it I had just to write a few -- the review of the jobs I had been on That was pretty much it
Q And you had been tested on the rules and everything?
A We had went through some testing on rules, not all the way but most of them, yes
Q You had some testing to finish?

A Yes
Q And did you successfully complete that testing?
A I did
Q Let's go to the day of the accident Do you remember that?
A Yes
Q What was that date?
A I think --
Q 5/30/04?
A Uh-huh
Q And you were -- that day y'all left where, Savannah Georgia?
A That's right
Q And your destination was Cayce?
A Columbia, Cayce, South Carolina
MRS MCLEOD Go to page 9, line 10
Q And on the crew that day who was with you?
A Me myself, Jimmy Bonner and Jack Cowan
Q And who was the locomotive engineer?
A Jack Cowan
Q And he was a person you were training under?
A Yes
Q And Mr Bonner was the conductor?
A That's right
MRS MCLEOD Page 10, line 10

Q Had you been underway for a while when the collision occurred?
A Yea
MRS MCLEOD Then line 15
Q If you will just tell us what occurred that you remember
A Okay We was on the 5 -- excuse me -- 757 northbound going to Cayce, South Carolina, and I approached the whistle board and I just started blowing the horn as I approached the whistle board I was well into my whistle blow -- I mean blowing my horn and at the last series this brown custom van pulled up to the stop sign She stopped momentarily She pulled on to the crossing and stopped on the tracks
I immediately started giving short second bursts and then I hit Right before impact I turned my face because I didn't want to see the woman, see her face in my eyes or whoever was in the car and we impact the car and I immediately put the train in emergency
Q All right Let's go now to -- let's go now to as you were approaching the crossing You started sounding the horn at the whistle board?
A That's correct
Q Tell me where everybody was in the cab of the locomotive

A Everyone was being focused on the tracks ahead doing what we're supposed to be doing
Q I mean, where were you seated?
A I was in the engineer's seat Jack was in the middle seat and Jimmy was in the conductor's seat
Q And you would have been on the left side of the locomotive?
A I was on the right side of the locomotive
Q Who was in the middle?
A Jack Cowan
Q And he was right next to you?
A Yes
Q And when you got to the whistle board were you talking or what were you doing?
A No We weren't talking
Q When you got to the whistle board did you see the van?
A No I didn't see the van until after I was midway between the whistle board and the crossing
Q So you saw the brown van at approximately -- the whistle post is supposed to be 1500 feet from the crossing?
A I'm not for sure what it should be
Q Do you know what the law is in South Carolina about how long you're supposed to blow the horn previous to a

crossing?
A I am not familiar with South Carolina laws, no
Q Have you been trained to operate under the rules of CSX you're supposed to blow the horn in accordance with state law?
A No
Q You have not? You don't know that?
A No
Q What is the rule on sounding the horn?
A The rule on sounding the horn is coming to the crossing -- I mean to the whistle board -- two longs, a short, and a long
Q To commence where?
A Right at the whistle board
Q And so wherever the whistle board is you're supposed to start previous to the whistle board or right at it?
A Right at it
Q And to continue blowing the horn through the crossing?
A That's correct
Q Did you do that that day?
A Yes I blew the horn I did my two longs and my short and my last long and then she rode on to the crossing and I started doing some erratic blowing and then we impacted the car

MRS MCLEOD Down to line 18
Q What are you supposed to do in sounding the horn if you see someone with that is in peril or danger?
A Just sound it quickly
Q In other words, a quick blow?
A Quick blow
Q Just pop, pop, pop, pop?
A Yes
Q In other words, to let off the horn but immediately get back on it?
A Just get on and so they can get their -- you know, get their attention
Q And you want to let it off of it, though, to try to have a change in sequence to catch their attention, don't you?
A No
Q You don't?
A No Just lay on it Get on it and pop
Q Just keep the horn down?
A Short second bursts
MRS MCLEOD Down to line 17
Q If we go back on the event recorder where you last activated the horn before getting to the crossing that would be where you saw the van?
A No

Q Is that correct?
A No
Q Where would it be in your horn sequence that you saw the van?
A It was my last long
Q You were in your last long?
A Yes
Q How long is a long?
A It's seconds, seconds
Q One second, two seconds?
A Just a couple of seconds
Q What is the longest permissible gap in your horn sequence as you're blowing from the whistle post to the crossing that would be allowed? In other words a gap in the horn blowing where you didn't blow any horn?
A I'm not sure what you're talking about
Q In other words, you quit blowing the horn Can you quit blowing the horn for four, five seconds?
A No
Q And that's acceptable? That wouldn't be acceptable, would it?
A I am not sure what you're saying
Q In other words, as you're approaching you've gone past the whistle post and you blow whatever you blow, you can't stop blowing the horn for five seconds, can you,

prior to reaching the crossing?
A I mean, you keep blowing
Q If you did that you wouldn't be -- if you left a 5-second gap that would not be in accordance with operating rules, would it?
A It's not true
Q That's true, isn't it?
A No
Q That's not true?
A I'm not -- the question you're asking me I don't understand what you're asking me
Q The question is as you hit the whistle post you're supposed to start your sequence, right?
A Correct
Q And that's two longs, a short, and a long?
A Correct
Q And then you're supposed to start that over?
A No
Q You're not?
A No, one series
Q Oh, just one series all of the way to the crossing?
A The crossing That's correct
Q You're not supposed to repeat it?
A No We're supposed to time it from the whistle board all the way to the crossing

Q How do you do that?
A I mean, you --
Q Tell me how you do that
A I mean, you just come up to the crossing Start at the whistle post and hold it down and blow it long, hold it down, another long, a short, and then a long, and you should be over the crossing
Q And that s what you've been taught?
A Yes, sir
Q Who taught you that?
A That's what we learned That's the rules at CSX
Q Who with CSX taught you that?
A We learned that in school I mean, that's part of the operation rules
Q And they taught you that to try and time your whistle blow so that the two longs, a short, and a long are spaced out continuously until you get to the crossing? Is that correct?
A Is that correct?
Q That is correct?
A No
Q What is correct?
A I mean, two longs a short and a long supposed to go completely over the crossing
Q It's supposed to go from the whistle post to the

crossing?
A Yes
Q And there shouldn't be any gap in there Is that correct?
A I mean no gap I mean --
Q Is that correct?
A No
MRS MCLEOD Okay Going down to line 24
Q In the horn blowing are you supposed to blow the sequence you've talked about?
A Yes, my sequence
Q You're supposed to blow the sequence?
A Yes
Q And did you do that that day?
A I did what the rules CSX taught me to do, trained me to do that day
Q You tried to comply with what you were trained to do?
A Yes
Q Did Mr Cowan train you that way?
A No I mean CSX taught me that way Mr Cowan oversaw my training
Q As I understand it you're saying that the time you saw the van was when you were in your last long, correct?
A That's correct The last series of blowing That's correct

Q Have you reviewed the event recorder download?
A Never seen it
MRS MCLEOD Down to page 20, line 1
Q You've looked at downloads before and reviewed them with the Road Foreman of Engines and Train Masters that have been in charge with what you're doing?
A No
Q Never have?
A No
Q Never seen one?
A Never seen one
Q Don't know what it looks like?
A Don't know what it looks like
Q Well, let's look at one and that's Exhibit No 2 This has been given to us as the way you operated the train at that time on that day and it shows that day that immediately before the collision you were -- when you started your horn sequence you were doing about 48 miles per hour, is that correct? Would that be correct?
A I don't recall exactly
Q Look at on the document the CSX ending in 26 That would be one, two, three, four, five pages over
A Okay I am not familiar I don't know what this is we're looking at
Q I'm looking down at the -- if you look at the first

three ones
A I don't know what this is I don't know even know how to interpret this I have never been trained in this
Q If you look at mile at the distance of 4547 it shows the horn If you look up at the top it says horn and it shows three-tenths of a second of horn
A All right
Q Do you see that?
A I see it, but I don't know what this sheet is I don't know even how to interpret this sheet
Q Well, I am asking you but you see that on here I am not asking you to interpret it
A I don't see what you're talking about
Q Down where you see the three ones -- do you see that?
A Uh-huh
Q Then if you look at that point in time if we look in the speed column you see speed up top?
A Yea, I see it I don't know how to read this
Q And if you go down to where those three ones are it shows that the speed is 48 miles per hour Do you see that?
A Yes
Q And my question to you is 48 miles an hour, the speed you were doing at the time you started your horn blowing?
A I am not for sure I'm not for sure

Q Do you know what your speed was as you approached the crossing where the collision occurred?
A I am not for sure what my speed was at the time
Q And it shows -- the event recorder shows that you blew the horn continuously for about two seconds?
A Okay
Q Is that your long?
A I don't know what the four two is I don't know what that is
Q Well, let me ask you did you blow the horn for two seconds?
A I don't remember exactly how long it was at the time we was blowing
MRS MCLEOD Go to page 23, line 17
Q But if you know that what you showed me is once you do that the two longs, a short, and a long, then you're supposed to start that sequence over, is that correct?
A No
Q You don't know that?
A One sequence
Q One sequence all the way to the crossing?
A Yes
Q Continuously, correct?
A I am not sure the question you're asking me I don't know what you're talking about

Q In other words, once you hit the whistle post until you go through the crossing the horn is supposed to be blowing, is that correct?
A I am not understanding where you're coming from with this question
Q What don't you understand about it?
A I mean two longs, a short, and a long to get through the crossing
Q But the horn as you approach the crossing for 1500 feet or wherever the whistle post is --
A Uh-huh
Q -- once you hit that, that horn on that locomotive is supposed to be blowing until you get through the crossing, is that correct?
A I am not sure what you're asking I don't understand Don't remember
Q You weren't trained that you're supposed to blow the horn from whistle post through the crossing?
A Supposed to do two longs, a short, and a long
Q And start at the whistle post and end after you're through the crossing, is that correct?
A I don't recall
Q And that's rule 14-L of the operating rules, is that correct?
A Somewhere around by that

Q Now, I think what you told me when we were talking a little earlier was that once you saw the van was on the crossing you didn't want to see when you hit the van, is that correct?
A Yes
Q So, you did not put the train into emergency?
A I did not put the train into emergency until after impact
Q It was after impact?
A That's when train -- I put the train in emergency
Q How far after impact?
A I can t recall I mean, as soon as I hit her -- as soon as the train hit her I put it into emergency
Q So where the train went into emergency should be right at the crossing?
A I don't recall exactly where When I hit her was where exactly I was at
Q Did you stop blowing the horn before you got to the crossing?
A I impacted when I got to the crossing
Q Right, but prior to the crossing did you quit blowing the horn?
A I don't recall
Q Did you quit blowing the horn several hundred feet before the crossing?

A I don't recall exactly when it happens I don t recall

MRS MCLEOD Page 28, line 7

Q Would it be in accordance with the operating rules of CSX that after you passed the whistle post but before you got to the crossing where the collision occurred to not blow the horn for 549 feet?

A I don't know I don't know where you're coming from with this question I don't understand

Q I'm saying that if you didn't blow the horn for 549 feet between the whistle post and the crossing would that be a violation of the operating rule?

A I didn't measure I don't know the feet I didn't measure it

Q Well, I understand that, but I am asking you if you didn't blow the horn for 549 feet in between the whistle post and the crossing would that be in accordance with the train you received from CSX?

A I mean, I didn't measure I don't -- I don't remember

Q You don't know whether that would be in accordance?

A I mean, I didn't measure it I don't know about the feet wise I don't remember

Q And you can't answer whether that would be in accordance with the training you received or not?

A I mean --
Q You can go ahead
A That's it
Q You don't know whether or not that would conform to CSX's rules or not to do that?
A I don't -- I didn't measure it I didn't
Q I understand you didn t measure it, but I'm saying -- I am asking you about anytime
A You blow the horn two longs, a short all the way through it
Q All right But what I am asking you is the training you received from CSX if after you passed the whistle post and started your horn and before you got to crossing where the collision occurred you did not blow the horn for 549 feet would that be accordance with the training you received from CSX?
A I don't recall that I mean I don't remember that It's been a long time and I don't remember
Q I understand you don't remember, but my question is if that's correct is that the way you were trained to blow the horn?
A I blew it according to CSX rules
Q So, whatever the event recorder shows how the horn was blown is how you were trained to do it is that correct?

A I mean, whatever -- I don't understand it to interpret it So
Q But if this Exhibit No 2 is accurate and it reflects what you actually did that day that's how you were trained to blow the horn?
A Don't recall
Q After the collision when you put the train in emergency you stopped some distance from the crossing, is that correct? How far did you stop?
A I don't -- I didn't I didn't measure it
MRS MCLEOD Page 31, line 10
Q Did you stay on the locomotive?
A No
Q You got off the locomotive?
A Yes
Q And what did you do?
A I got off and went with Jimmy back just in case someone needed assistance, just in case somebody was hurt, and we walked back there to the accident to the crossing
Q Did you walk back to the van?
A We walked in the area We just walked They was already back there The officer was already back there so we stayed away
Q Who all went with you?
A Just me and Jimmy

Q Where was Mr Bonner?
A That's Mr Bonner
Q Oh, excuse me
A Mr Cowan
Q Mr Cowan What's his first name?
A Jack
Q Jack Okay Did Mr Bonner measure the stopping distance?
A No
Q After you were there was it necessary to move the train? After you did that did you have to get back on the locomotive to move the train?
A I didn't get back on the locomotive
Q Did Mr Cowan get back on the locomotive?
A Never got off the locomotive
Q Okay He stayed with the locomotive?
A That's correct
MRS MCLEOD Down to line 25
Q Here is your statement which is exhibit 3
A All right
Q And in your statement, I believe, I asked you if that statement was accurate and you told me it was?
A That's correct
Q There is nothing on there you would like to change?
A There is nothing I would like to change

Q And in that statement you say you were doing 47 miles per hour at the time you hit the car?
A Approximately somewhere in about
Q And that was that day you told what you told the investigating officer that day, correct?
A That's correct
Q And the 47 miles per hour you had looked at the speedometer before the collision?
A I had glanced at it on and off
Q And when did you last look at it to determine that you were doing 47 miles per hour?
A I looked at it when I went into the whistle, you know At the whistle board I noticed my speed
Q And prior to the crossing had you slowed down?
A No
Q So the speed at the whistle post was essentially what it was at the time of the collision?
A That's correct
MRS MCLEOD Page 35, line 9
Q Now, what was the speed -- timetable speed -- for that section of track on that day?
A For a freight train freight locomotives 50 miles an hour
Q Were there any slow orders in effect for that section of track that day?

A No
Q So the permissible speed was 50 miles per hour?
A That's correct
Q And your testimony is that you were doing 47?
A Correct Somewhere about
Q Now, what CSX officials came to the site of the collision that day that you recall?
A Train Master Zimmerman
MRS MCLEOD Let's flip to page 43, line 19
Q Where is the -- was the emergency brake located on the locomotive?
A It's on the panel It's on the right
Q And it would have been to your right?
A Yes It's on my right right in front of me right straight forward
Q You had to mash a button?
A No
Q What did you have to do?
A Just push the level forward
Q Push the level forward?
A Forward
MRS MCLEOD Page 45, line 2
Q Did you ever see the driver or the passenger in the van?
A I did not I did not pay attention I walked I

did not go up to them, no
Q And I want to go through that one more time exactly what you saw You said that you saw that you were blowing your long, a long, and you saw the van do what?
A I saw the van coming up to the crossing I mean, she came up to the stop sign She stopped at the stop sign and then rolled on to the crossing, but I did everything according to CSX rules She rolled up to the crossing She stopped, and that's when impact occurred
Q She stopped right at impact?
A She stopped on the crossing
Q Right at impact?
A She -- I couldn't see exactly where she stopped at, but she stopped somewhere down in front of the nose of the engine when I came over the crossing
Q In other words, she was slowly approaching the crossing from the area of the stop sign?
A And then she just like stopped on the tracks
Q All right Now, where exactly was the front of her van?
A I don't know I couldn't see the nose of the cab I don't know exactly where the front of the van was when she -- when you look at the front of the engine Cars disappear when they get before the engine
Q All right When she stopped the first time when you

saw her stop where was the front of the van located in relationship to the stop sign?
A She was at the stop sign
Q Now, does that mean the front of the van was right at the stop sign, behind the stop sign, in front of the stop sign?
A I think she stopped in front of the stop sign
Q She stopped in front of the stop sign?
A She slowed down, stopped in front at the stop sign She stopped at the stop sign
Q So, the front of the van was right at the stop sign?
A Correct
Q It wasn't in front of the stop sign?
A At the stop sign
Q You could see the stop sign?
A I saw it, glanced at it
Q And what else did you see at the area of the stop sign?
A I saw her slowly pull up from the stop sign on to the tracks
THE COURT Everybody with me
Q Did you see a stop line on the pavement?
A No, I don't recall I can't remember I can't remember seeing all that
Q See a power pole?

A No, I don't remember seeing that I don't recall I wouldn't -- I don't recall
Q Is there an equipment shed at that crossing?
A Yes
Q Did you see that?
A I wasn't paying attention I was paying attention to the crossing and her I don't remember seeing it at the time
Q Now, how fast did she approach the crossing from the stop sign? What was her speed?
A I don't know her speed I didn't get out there and measure it I don't know what her speed was I know she pulled on to the tracks
Q Approximately how fast?
A I can't say I would be estimating I don't know
Q Was it 10 miles per hour?
A I don't remember I don't know
Q Five?
A I wasn t in the car with her
Q What was that?
A I say I wasn't in the car with her
Q I understand that
A Right
Q But you can't give us an approximation of speed?
A No

Q And once she stopped and approached the crossing how far did she have to travel?
A I don't know exactly what feet from the stop sign of the crossing I don't know exactly what the feet was
Q What's the approximate distance?
A A guestimate? I don't know
Q You can't give us an estimate?
A Huh-uh
Q Less than 100 feet more than 100 feet?
A Somewhere less I don't know exactly what it was
Q Was it -- it was less than 100?
A Somewhere I don't know exactly the feet I didn't measure it I don't know
Q Was it less than 50 feet?
A I don't know I didn't measure
Q Mr Stephens, just a few more questions You had your training as a locomotive engineer, I think you told me on-the-job training with different engineers?
A Yes, sir
Q Which engineers did you train with other than Mr Cowan?
A Hundreds of them
Q Which ones do you recall?
A I can't Many of them -- too many to list
MRS MCLEOD Go down to 25

Q And when you were in Jacksonville training in locomotive engineer school who taught that? Do you recall the instructors?
A Sir?
Q Do you recall any of the instructors in locomotive school that you attended?
A The school was in Cumberland, Maryland
Q Excuse me Do you recall the names of any of the instructors?
A I can't recall their names
Q And than was a how long was that course?
A About six weeks
Q Did you receive materials that you study?
A Yes
Q And you still have that?
A No
THE COURT You may step down Next witness
MR HARMON Your Honor, subject to admissions to some of the documents the Defendants rest
THE COURT Anything in reply?
MR PARKER Yes, Your Honor, we have some motions
THE COURT I mean any reply testimony?
MR PARKER Your Honor, I believe that we're required to make our motions at this point in time
THE COURT Can we move on into that and do it all

contract all crossings not completed by December 31, 2003

THE COURT Excuse me What is the purpose of this one?

MR PARKER It would be to rebut Mr Cowan's testimony they were all clear They had a deadline of December 31, 2003

THE COURT All right I am going to sustain the objection on that one We now have rebutting Mr Cowan one -- that's 74, 81, 84, 85, and 86 That's five exhibits and I think 95 would be cumulative

MR PARKER 95-B

THE COURT Strike that, 95-A would be cumulative

MR PARKER Right We've got 95-B and you make the same ruling on it?

THE COURT Same -- yes, sir

MR PARKER Then we would go to the last one, Your Honor This will be with Mr Crews' testimony when he -- we'll call him as a rebuttal witness and we need to take this up

THE COURT What is he going to say, Mr Parker? I mean, what do you want?

MR PARKER This is a photograph that he took Friday at the crossing where they have cleared it and we would put this -- Mr Cowan said it was clear We want to put up 32 and show -- This is 32-A that shows what it looks

like when it's cleared and 32 shows what it looked like when it's not cleared

THE COURT Well, doesn't 32-A get now -- Strike that I shouldn't be arguing their -- Mr Wilby?

MR WILBY Your Honor, it would be a subsequent remedial measure It is post-accident and it would be highly prejudicial and not probative as to what the accident look liked on the day in question There is plenty of testimony about that So, having worked so hard to keep that out, we're now going to let it in

MR PARKER Your Honor, we would submit it's admissible to directly impeach Mr Cowan's testimony that the crossing was clear 32-A shows what it looks like when it's cleared 32 shows what it looks like when it's not cleared, and we believe that it directly impeaches his testimony and as shown in Webb and under the Rule 407 that it's admissible for impeachment purposes

THE COURT All right I am going to sustain the objection on that I find that 32-A, number one, as we've said I've tried to try this case -- I've attempted to try this case based on what happened on the day in question It could be deemed and I think it probably is a stretching of the 407 subsequent remedial measure It is also cumulative under 403, and it's also more prejudicial than probative under 403 I sustain your objection

Good morning I remind you that you're still under oath from one day last week You may have a seat

R DONALD CREWS, after being previously duly sworn, testified as follows

DIRECT EXAMINATION

BY MR PARKER

Q Mr Crews, as we discussed last week you work for our law firm, is that correct?

A Yes, sir

Q And on 11/5/09 did you take some pictures at a railroad crossing to determine from a van similar to the one that Ms ~Harvey was driving when you could see the stop line?

A I did

Q And I want to take you through a few photographs starting with Plaintiff's Exhibit 142

THE COURT Mr Parker, how about as we discussed outside of the presence of the jury so there won t be any confusion -- This is not the crossing in question It's sort of an exemplar --

MR PARKER That's correct

THE COURT -- of a stop line?

MR PARKER That's correct

THE COURT So ladies and gentlemen, this is not the crossing at Honey Ford It was just another crossing and

the purpose of this testimony is dealing with that stop line and particular van in question So, don't get confused that this is the crossing in question This is a crossing that they're using just as an example of the stop line

Is that correct, Mr Parker?

MR PARKER Yes

Mr Crews, Exhibit 142, can you tell us what distance that photograph is taken from

THE WITNESS 25 feet and some inches, I think

Q And Exhibit 144 is taken from what distance?

A That s 18 feet and some inches, I think

Q And Exhibit 147?

A That was from 16 feet

Q And in the -- you were in the -- tell us how you did this

A I got a van similar to the one in question and I was in the driver's seat driving the van, pulled up to a point where I could clearly see the white line That was the first picture at 25 feet and some inches Then I pulled up to a distance where you could barely see the white line That was 18 feet something Then I pulled up to a point where the white line completely disappeared That was 16 feet

Q And those are measurements from the front bumper to

the back of the stop line?
A Correct
Q And Exhibit 155, is that a picture of the van?
A That is
Q And Exhibit 160, are those your measurements?
A That's correct
Q That we just talked about?
A Yes, sir
Q All right
Let me approach just for a minute
(Whereupon, a bench conference was held)
MR PARKER Answer any questions Excuse me just a minute

CROSS-EXAMINATION

BY MR WILBY
Q Mr Crews, it is always a pleasure to see you Thank you for coming back
If we could pull up 142
Mr Crews, you would agree as you approach this stop sign there are other things at and around to stop line that cue you to where the stop line is, correct?
A There is a stop sign, a crossbuck, yes, sir
Q Okay So, for example, at this particular crossing as you're approaching the stop line which is in front of the railroad tracks, the stop sign never disappears from

view, does it, sir?
A No, not totally
Q Okay And then the crossbucks, of course, as you're approaching the stop line the crossbucks would help you determine where the stop line is in relation to the crossbucks, correct? That would cue you where to stop if you were a driver, wouldn't it?
A It would tell you, you know, it's a railroad crossing, but it wouldn't have any relationship to the stop line that I'm aware of
Q Well, it just visually as you're a driver approaching that would be a cue that would help you to know where you are in relationship to the stop line, wouldn't it, Mr Crews?
A No, I don't think so It would to the railroad, but --
THE COURT Sir, he can't -- Let's stop right there He can't answer --
MR WILBY Okay
THE COURT Just ask him what he sees He is just like a highway patrolman He can testify about what he sees, but not opinions
Q At our crossing, Mr Crews, you have already testified the stop sign is 3 feet in front of the stop line correct?

A I'd have to look at my notes again I can't remember
Q Okay But if the stop sign is 3 feet in front of the crossed line that would help you because that stop sign does not actually disappear from view as you're approaching the stop line, does it, sir?
A No
Q All right And you would agree, Mr Crews, at our crossing -- the one that you've looked at -- if a driver is approaching the stop line and stops at the stop sign at our crossing then the driver would be stopping on or actually in front of the stop line, correct?
A Like I said, I would have to look at my notes because I don t remember what those distances were
Q All right, sir
Pull up 76, please
You remember this is a photograph that you took 70 inches behind our stop line?
A Correct
Q And you remember you took seven photographs from that position?
A I believe that's right
Q All right And the reason you did that is you believed at the time you took the photos that is where a driver would stop?

A If you stopped with the front bumper at the white line and backed up to where normal driver in a vehicle would be, that would be close, yes, sir
Q All right Thank you, sir
THE COURT Redirect, if any?
MR PARKER None
THE COURT You may step down Don't leave, Mr Crews You can have a seat right out there in the audience
THE WITNESS Okay, sir Thank you
THE COURT All right Mr Parker, anything else in reply?
You can turn that off, please Thank you
MR PARKER Yes, we would at this time publish Plaintiff's Exhibit 74
MR WILBY Your Honor, may I just have standing objections to these?
THE COURT You do You've already made them when we had in-camera discussion
MR PARKER Go up high Exhibit 74 is a document from Mr McMaster to a number of people that's dated February 4, 1999
Go down to the -- and the document reads, As you all know there isn't enough money to cut and kill the brush and trees along our right-of-way even on a three-year

cycle, therefore, we need to develop other methods to attempt to control and correct our problem with vegetation The following is one way suggested by Tom Schmidt Tom forwarded a listing of over 300 loggers that are located in various states near CSX lines Most of the names on this list produce logs that are used by the saw mills that produce cross ties, for CSX Tom's idea is to have various loggers remove the trees along our right-of-way and supply these logs to saw mills for cross ties I need you to consider this option to remove trees at specific locations keeping in mind access to the site and safety concerns While we may have safety reservations for this type of work on the property, this would be an excellent way to remove trees at little or no cost to us If there are areas you decide would work contact me and I'll arrange for the agreement specifications and loggers We'll consider giving them the trees and hopefully this would offset their cost to remove and our flagging expense Please forward your areas to me along with other comments or suggestions on ways to improve the brush vegetation control

We'd next publish Exhibit 81 Exhibit 81 is -- Go up to the top It is from a Mr Ramsey to other people and the subject being the White Paper Tree Program and this applies to the logging operations Go down Go over to

page two and we'll publish the purpose and the problem

The purpose of this program is primarily to improve railroad safety by reducing sight restrictions, to reduce storm damage caused by fallen trees, and to improve drainage Problem Trees and brush on CSX rights-of-way interfere with train sight and the sight of the motoring public at crossings Further overhead canopies of vegetation restrict sunlight on the track which gives rise to drainage and visibility concerns

Next we will publish exhibit 84 Exhibit 84 --

MR HARMON Your Honor, I'm sorry

THE COURT I'll take that up in just a few minutes

MR HARMON Okay Thank you, Your Honor

MR PARKER Exhibit 84 is a mentored champion kickoff plan and this is a CSX document about vegetation control at highway rail crossings and it names the members of the team and the concern -- it says, Strategies and interest, and it says, Concerned about safety at highway railroad passive crossings And the goals and objectives were to develop plans and specification to reduce exposure, complete southern half of system in 2002, complete project under budget

Next page And the issue is safety at passive crossings And the analysis is that no FRA or railroad specification how large an area to clear, Steve Ramsey's

safety developed spec based on speed of train complete southern part of the system in 2002, complete northern part of the system in 2003, 10 million budget for 2002, south Carolina partially completed in 2001 with different spec, problem with contractor That's it

Exhibit 85 is next and this is a document --

MR WILBY Your Honor --

THE COURT Hold on

MR PARKER Mr Parker was going to redact this document It's not completely redacted

THE COURT All right Take it off

MR PARKER I think we did, Your Honor Well, we'll do it

THE COURT Neither was the one prior to that

MR WILBY No, sir

MR PARKER We failed in --

THE COURT Before you put anymore back up there, make sure

MR PARKER I think that 85 -- the first page that I refer to has been redacted, Your Honor

THE COURT Look at it before you put it up

MR PARKER I hate to admit I can't see

THE COURT Put some glasses on

MR PARKER I think it's all right

THE COURT All right I trust you

MR PARKER This is a letter dated March 6, 2002 from CSX Corporation to a number of people It says, This letter is to notify of the carrier's intent to contract the initial clearing, cutting of each side of the various public passive crossings located on the southern region of CSX system This project by CSX involves the clearing of land at grade crossings protected by passive protection, parentheses, crossbucks This project involves the clearing of land that has not previously been cleared by the railroad to improve the visibility for the motoring public at these grade crossings The contractor will control future growth of the cleared areas by treating them with a chemical spray The operating speed at each crossing will determine the distance of each The proposed start date is approximately March 22, 2002

Then page five of Exhibit 86

THE COURT That's suppose to be redacted, too

MR PARKER Let me look at it

THE COURT Eighty-six, page five

MR PARKER Your Honor, I don't recall anything that was supposed to be redacted

THE COURT Let me look at it Eighty-six, page five What was to be redacted is on page two of it So, if you're not publishing page two --

MR PARKER No, only page five

THE COURT That's fine But before it goes anywhere else beside right here, we need to redact it

Is that correct, Mr Wilby?

MR WILBY Yes, sir I believe that is correct

THE COURT Mr Parker?

MR PARKER Yes, we're ready to go to page five

THE COURT All right

MR PARKER This is a CSX proposal I will read the part that deals -- it says, The South Carolina Pilot Project involves approximately 641 crossings Bids were received from six bidders and ranged from 437,682 per crossing to 2 3 million, 3588 per crossing The average bid was 894,1395 per crossing Elimination of the high and low bids resulted in an average bid of 1525 per crossing The current proposal is to implement the project on a system-wide basis to be completed over a two to three-year period The project will involve brush cutting only Subsequent year chemical maintenance will be handled as an addition to the existing weed and brush spray programs The project will start in the southern region where vegetation grows year around Vegetation is more abundant The estimated project cost is 20 3 million subject to the following sensitivities South Carolina program is currently in progress 437,000 Estimated unit cost based on four by 100 by 300 area per crossing

Actual unit cost bid may vary Estimate that 10 percent of crossings will have been or have been addressed through other programs such as right-of-way logging operations or municipal beautification contracts or otherwise already compliant by virtue of specific local conditions

That would be that, Your Honor

THE COURT All right

MR PARKER Your Honor, at this time we would like to publish some answers to interrogatories in the case It is going to take me just a second

THE COURT Madam forelady, ladies and gentlemen, as I told you the other day when we -- when we -- when the lawyers now start a lawsuit and they file the complaint and the summons and the next thing is the answer by the defendant and then they can get into pretrial discovery Discovery means you're able to find out everything each side knows about the lawsuit You do that, basically, by two ways The first way is by what is known as interrogatories or simply questions

Mr Parker has the right to ask the railroad The railroad has the right to ask Mr Parker who your witnesses are, what documents you're going to rely on, just -- what pictures do you have -- just a number of things they can ask and the other side has to respond to those questions by written answers The other way is

by depositions which you've heard a lot of here in the case

Mr Parker now under the rules is going to publish or read to you some questions that he asked the Defendant and their responses, and that I think will conclude all of the rebuttal testimony?

MR PARKER Yes, Your Honor Give me a minute and we'll look at it

THE COURT Sure

MR PARKER The question was asked of CSX, Please state the distance from crossing where the front of the lead locomotive first stopped prior to being moved after the collision CSX states that it cannot state the exact distance from the crossing where the front of the lead locomotive first stopped prior to being moved after the collision However, in the spirit of discovery CSXT offers the following The Plaintiff deposed engineer Jack Cowan on January 31, 2008 He testified that the train traveled approximately 2000 feet past the crossing In addition, the photographs taken on the date of the accident appears to show that the train was cut between car number GPSX 4209 and GPSX 5337 Photographs also show the train -- that the train was cut some distance south of the crossing which has not been measured The length of the train from and including car GPSX 4209 to the front of

the lead engine was approximately 2016 feet Okay

MR WILBY Your Honor, can we complete the response, please?

THE COURT You may

MR PARKER CSX has furnished documents -- Let me get the exact one

MR WILBY Do you need my copy?

MR PARKER No, I got it CSX states that it's provided Plaintiff all documents necessary for Plaintiff to make their own calculations

We're now going to publish this question that was asked of CSX Please state the distance from the south edge of the crossing to where the horn of the lead locomotive was first blown prior to the crossing CSXT states it cannot state the exact distance from the south edge of crossing to where the horn of the lead locomotive was first blown prior to the crossing However, in the spirit of discovery CSXT offers the following The download printout provided to Plaintiff in discovery shows that the horn was blown for a total of 1505 feet CSXT estimates the horn was blown approximately 1366 feet to 1396 feet from the south edge of the crossing to where the horn was first blown Finally, CSXT states that it has provided the Plaintiffs all of the documents necessary for Plaintiffs to make their own calculations

Question was asked, Please state the total distance in feet during which time the horn was blown prior to the collision CSXT states that it cannot state the exact total distance in feet during which time the horn was blown prior to the collision However, in spirit of discovery CSXT offers the following The download printout provided the Plaintiff in discovery shows that the horn was blown for total of 1505 feet CSXT estimates the horn was blown for approximately 385 to 1415 feet prior to the collision CSXT states that it's provided Plaintiff with all documents necessary for Plaintiffs to make their own calculation

That is all we have, Your Honor Oh, just a second

(Whereupon, the attorneys conferred)

MR PARKER We also have a stipulation that exhibit -- Plaintiff's Exhibit 161 is a survey that was commissioned by the Defendant CSX

THE COURT Is that correct?

MR HARMON That's correct, Your Honor

THE COURT 161 as I remember was the sketch or the plat?

MR PARKER That's correct

THE COURT Any other testimony by the Plaintiff in reply?

MR PARKER That's all we have, Judge

I'm sorry When we get back, we need to proffer --

MR PARKER Mr Crews

THE COURT Okay

(Whereupon, a break was taken)

THE COURT Mr Parker, you want to call Mr Crews back up so you can make your proffer?

MR PARKER Yes, Your Honor You can come back up and be sworn, please

THE COURT Mr Crews, you re still under oath for the third time

THE WITNESS Yes, sir

R DONALD CREWS, after being previously duly sworn, testified as follows

PROFFER DIRECT EXAMINATION

BY MR PARKER

Q I am going to hand you Exhibit 32-A and tell us what this picture depicts

A It shows the Honey Ford railroad crossing

Q And have you compared Exhibit 32-A with Exhibit 32 which was taken from approximately the same location?

A Yes I have looked at both

Q Immediately afterwards? And does this photograph show the vegetation in 32 after it was cleared?

A After it was cleared, yes

Q And this photograph was taken when?

A This one last Friday, if I remember right I'm sure it was

MR PARKER Answer any questions that these gentlemen may have for you

MR WILBY No questions, Your Honor

MR PARKER We would mark that for identification as part of the record

THE COURT All right

Madam Court Reporter, please, that does not go to the jury That is simply for ID for the purposes of the proffer and is not to be presented to the jury

Also, Mr Parker, on the exhibits by Mr Crews you handed me a number of them the other day I assume only the ones that you talked about when he testified would be coming in So here they are

MR PARKER That's correct

THE COURT Y'all need to decide which ones were in there

MR PARKER Thank you

THE COURT Also, I think it was Exhibit 84 that I had ruled was admissible but you had to redact out the liability language It was placed in front of the jury I think it was 84, is that correct?

MR PARKER I believe that's --

MR HARMON Yes, Your Honor

MR PARKER That's fine with me, Your Honor

MR WILBY Whatever

THE COURT Move on Anything else on directed verdict?

MR PARKER No, Your Honor

THE COURT All right Now, where do we go?

MR PARKER Your Honor, I believe that -- I guess we have contended that since the court has bifurcated the trial that the comparative which would only be to one-half at most of the survival action should be submitted in a second deliberation during which time the jury would consider the amount of comparative and punitive damages and that we submit it should be done in that fashion to prevent the one-half of the survival action from being prejudiced and there is no prejudice to the Defendant in doing it

THE COURT Let's talk about what we can agree on On the wrongful death action can we agree on the actual damages portion of that? That it would be a straight comparative negligence verdict form?

MR PARKER Your Honor, we will take -- we take the position because it's very unclear that based on -- because there is no South Carolina case -- that Mr Harvey's portion of the wrongful death action would go to his children The Defendant --

THE COURT I have read last night case law that it abates upon his death which would leave simply Ms ~Harvey Do you have any case law that is different from that? Some of that is right old case law

MR PARKER Not in South Carolina, but we would submit that where you have divorced spouses that it would be a different situation The law should be different based upon the fact that because Mr and Ms ~Harvey were divorced then it should be a different -- applied differently and that her share should go to the children

THE COURT All right My ruling is as to the wrongful death action that I'm going to submit it strictly on comparative negligence verdict form All right As to survival action, who is going to argue that one on behalf of the railroad?

MRS MCLEOD I will, Judge

THE COURT All right

MRS MCLEOD Your Honor, the case law we have found which we have passed up in the trial brief indicates that Frances Harvey is also the real party in interest in the survival action So, we think the same public policy that requires a comparative negligence analysis in the wrongful death action also applies to the survival action as it relates to Frances Harvey The question remains as to what happens to Charles Harvey's share once he died

because Beryl died first survived by his mother and father Then the father died before this case came to trial So, he's only survived by the mother, and I will agree, Judge, that the law in South Carolina is unclear as to what happens to Charles Harvey's share, but in reading the probate code and making the same logical and public policy analyses that the courts do with respect to the wrongful death actions I think it is more logical and more appropriate under the law to find that Charles Harvey's share of the survival action also abates to Frances Harvey

Under the survival statute like the wrongful death statute the parents are the preferred class of beneficiaries, and you remember, Judge, the relationship that's important here is the relationship of the beneficiaries to Beryl Harvey and not to each other So, I think their status as to whether they were married or divorced is not important for this particular analysis so I don't think it makes any sense for it to go down to Beryl Harvey's siblings and half-siblings when you have a preferred beneficiary Ms Harvey still alive in that class and that applies for the survival and the wrongful death

Under the probate code 62-1-103 the law provides that unless displaced by the particular provisions of the code -- and they're talking about the code that applies to

intestacy -- the principals of law and equity supplement its provisions and I think if you look at law and equity in this case it is logical and it makes sense that his share of the survival action would abate in favor of his mother Frances Harvey, rather than passing down

THE COURT So, you're suggesting a comparative negligence verdict form as to wrongful death and survival?

MRS MCLEOD Yes, sir

THE COURT Just let them compare the negligence and if they find the railroad's negligence is 50 percent or greater, then it would go to damages or the actual damages, and assume they award a hundred thousand dollars, then we'd make the deduction based on percentage both on the survival and the wrongful death?

MRS MCLEOD Yes sir And I have prepared a proposed verdict form that I can hand up to Your Honor

THE COURT Mr Parker?

MR PARKER Your Honor, clearly, the law is to the contrary in that in the law of intestacy Mr Harvey's share -- I mean, the conscious pain and suffering case it accrued at the time of Beryl Harvey's death which that case Mr Harvey was entitled to a one-half share Under the statute of dissent and distribution his share goes to his children and clearly the statute --

THE COURT Well, then, how do you propose dealing

with that in respect with Mrs Harvey's alleged comparative negligence?

MR PARKER I propose that the first phase of the trial the only thing would be -- the defense would be sole negligence of Ms ~Harvey If they find that she was solely negligent, then the case, you know, they go no further If they find the railroad was negligent and Ms ~Harvey was negligent, then in the second phase they would be charged the comparative statute and they would then compare the two in that phase and that way the survival action would not be prejudiced because the only way that they can defeat one-half of the survival case is to prove that Ms ~Harvey was solely negligent

THE COURT Well, if they find in comparing negligence that she was 100 percent, then, obviously, that's it

MR PARKER Well, that's true, they would have -- that's what they would have to find is that she was 100 percent, but the fact that it's not a defense -- comparative is not a defense -- will prejudice that case

THE COURT Well, comparative is a defense on the survival action, is it not?

MRS MCLEOD Yes, sir

MR PARKER No, only to Ms ~Harvey's share

THE COURT Let me see your proposed verdict form

Mr Parker, yours?

MR PARKER Your Honor, we have them in -- William left so we're going to have to take a minute

THE COURT Well, Mrs ~McLeod, you just got a straight-up -- Strike that It is just a straight-up comparative negligence verdict form and separating survival action and wrongful death action --

MRS MCLEOD Yes, sir, and that way --

THE COURT For the amount of damages?

MRS MCLEOD Yes, sir, and that way the court can determine --

THE COURT Well, she can't be any more -- if they find comparative negligence, they can't find any -- Strike that The percentages have to be the same in the wrongful death and the survival I mean, it would be inconsistent, and it seems to me then you'd just make the adjustment on the amount -- and I'm just thinking out loud, but let's assume that they found $100,000 actual damages for the survival action and they found the railroad 60 percent negligent and Ms ~Harvey 40 percent So, we'd make a 40 percent reduction in the hundred off the survival That leaves us 60,000, right?

Wouldn't Ms ~Harvey take 30 of that and Mr Harvey take 30 of that? Wouldn't that be the solution? Of course, Mr Harvey's would go to his heirs, whether he is

intestate or not

MRS MCLEOD I think that's probably right, Judge, if you're convinced that his share goes down to his children as opposed to abating to Frances Harvey in a survival action I m not aware of any law that it --

THE COURT Well, let's assume it abated to Ms ~Harvey Then you still have -- you reduce it by 40 percent You still got the 40 percent She gets it all

MRS MCLEOD Yes, sir Yes sir

THE COURT I mean, reduce it by 40 leaving you 60

MRS MCLEOD Yes, sir

THE COURT She would get 60 as opposed to splitting 60 and 30 and 30 each one

MRS MCLEOD Exactly

THE COURT So, it's six of one, half a dozen of the other

MR WILBY You're right

MRS MCLEOD So, I think the comparative the way we've done it would cover all scenarios, Judge, just putting it on the bottom and letting the court allocate

THE COURT Of course, if they find that there is a survival action, they'd have to bring actual damages on the wrongful death and actual damages on the survival There is no question about that Y'all agree with that?

It's two separate, distinct causes of actions or separate lawsuits and then we just treat the multiplication or division or whatever after the fact

MRS MCLEOD I think so, Judge

THE COURT Mr Parker says that prejudices Mr Harvey's claim coupled in Ms ~Harvey's comparative negligence What do you say to that?

MRS MCLEOD I don't see how that can apply, Judge, if you're having the jury put in the total amount of damages on that claim and you're doing the allocation I don't see how it that's prejudice to his claim

THE COURT All right, Mr Parker Y'all got y'alls form?

MR PARKER Yes, Your Honor I would also state that in order to determine Ms ~Harvey's comparative negligence the jury should at the same time consider the recklessness that we alleged of CSX So, they're being allowed when all of our evidence hadn't come in on that issue so they're not being able to consider the complete picture and in order to determine her negligence they've got to compare it totally with CSX's and they have to consider whether they were willful and wanton which is not in this phase So, we would be --

THE COURT The cases I've read comparative negligence sort of does away with contrib and having two

different classes of negligence You just compare If they award actual damages, I have already told you we'll go to a punitive phase of it for you to be able to prove by clear and convincing evidence that they were willful, wanton, and reckless

MR PARKER But our position is in this case is by not hearing the evidence to compare it you need -- you can't compare it with part of the evidence You got to compare it with all of the evidence

THE COURT I understand your position and I having read Webb and all of the other cases that have presented to me this week, I have struggled with it, but I am of the opinion that bifurcating it -- if they find and award actual damages to your client that you'll be allowed under Webb to introduce that evidence and establish by clear and convincing evidence willful, wanton, and reckless conduct

MR PARKER Our problem with that, Your Honor, is that in that during the comparison then you don't have the ability to compare the complete picture of CSX's negligence with Ms ~Harvey's

THE COURT Well, you may not get to that point if they find that you're not entitled to actual damages If they do, then we cross that bridge Mr Parker, I am acutely aware of this being sort of not your ordinary run-of-the-mill comparative negligence case, but, you

know, I've had comparative verdicts before where, obviously, they alleged reckless conduct on behalf of the defendant and we didn't separate those I have never known one to be separated out after Nelson -- what is his name?

MR PARKER I've never, to be honest with you, only been involved with where the negligence would only apply to part of the case

THE COURT Well, they could argue that Ms ~Harvey was reckless I mean --

MR PARKER Absolutely

THE COURT -- if you believe that she violated the statutes and pulled up on the railroad track and stopped

MR PARKER That's our point, Your Honor They can argue that in the opening part of the trial in the first deliberation and bifurcation, but we can't argue the documents that's been kept from the jury to prove recklessness

THE COURT Well but those documents to prove recklessness I believe are the type of documents that the court in Webb has instructed us to deal only within a punitive setting and not in the case dealing with the negligence claim

MR PARKER I understand

THE COURT That's my ruling, and I may be wrong I

don't know I'll -- That's the way I call it

MR PARKER I understand that, Your Honor I just think that what it does in this unique situation that to prevent that prejudice if it was submitted in the second phase, it would be no prejudice to CSX but then it would eliminate the prejudice to us by having the verdict tainted by the fact that we were not allowed to put in all of that evidence of recklessness

THE COURT Well, you were allowed to in Webb and you were reversed, and I just don't want to get reversed I am cautious of that and aware of the ruling in Webb So, I am going to do a straight-up comparative negligence verdict form

How about hit some air conditioning, please?

MR PARKER Let me pass up our verdict form

MRS MCLEOD Your Honor, I would like to see a copy of it

THE COURT This verdict form is almost like a contrib, isn't it? It is talking about contributed

MR PARKER That's not the right form Excuse me, your Honor We had -- we were going -- toying with the idea with that one of going with the whether or not 58-17-1440 which we had plead and not relying on, but we could do -- we could go under -- would make the railroad presumed liable for not blowing the horn and we have made

a decision not -- and that verdict form was with that

THE COURT Give me the one that we ended up -- that you ended up with, please

MR PARKER Let me --

THE COURT If you don't have it right there, we can take a lunch break

MR PARKER No I have got it right here I just got to make sure that you get the right one

THE COURT Boy, y'all suffer without William down there

MR PARKER Well yes, sir We miss him already All right This is, Your Honor, we believe the verdict form that should be used, but that doesn't put the comparative in

THE COURT Well, this verdict form you're passing up is sort of a hybrid between it's got sole negligence defense and it doesn't ask -- There is no comparison

MR PARKER Right As we were going to have -- the comparative would have gone in the second phase of the trial

THE COURT All right I am going to stick with my decision I am going to submit it based on the verdict form provided to me by the railroad and you're certainly protected on your position on that, Mr Parker

Now, we had talked in chambers on Friday afternoon

Mr Harmon was -- How long did it take you to get home?

MR HARMON A little shorter than six hours, five and a half, Your Honor

THE COURT That's not bad

MR HARMON No, it wasn't bad at all

THE COURT Anyway, we talked in chambers about the bifurcation and if they come back with an action where you receive actual damages then we would go into the punitive phase Is that correct, gentlemen, lady? And may be informed that it would require a second proceeding at which time evidence would -- proper evidence could be introduced concerning the issue of punitive damages and evidence to allegedly support that and require just a separate hearing Isn't that the way we worded it the other day?

MR WILBY I believe so

THE COURT And it would just simply be a verdict form -- We find Plaintiff has proven by clear and convincing evidence that the Defendant was willful, wanton -- the same language, conscious disregard If so, yes, and the amount

MR PARKER Your Honor, in that second phase we'd have an opportunity to then put in the documents that were left out and, secondly, I guess we would have some argument on punitive damages

THE COURT You would have an argument on punitive I don't know if you want to put in net worth and all of that

MR PARKER We do

THE COURT Ability to pay The Gamble factors is what we normally do

All right That takes us down to the jury charge Is that correct? Y'all want a little quick bite or do you want to go for a while?

MR PARKER Why don't we take a break? Maybe over the break we can get together on the exhibits

THE COURT How much break do you need?

MR PARKER It will probably take 30 minutes or more to go over these exhibits

THE COURT And you need to eat Is 2 o'clock an imposition?

MR PARKER That would be fine

MRS MCLEOD That's great, Judge

THE COURT Mrs Beth, is that an imposition?

MRS MCLEOD That would be lovely, Judge

THE COURT Mr Murdaugh, does that offend you?

MR MURDAUGH Absolutely, sir

THE COURT It does

MR MURDAUGH Yes, sir What did you ask? That didn't suit me?

with it on Monday as you see fit

THE COURT Tomorrow just --

MR PARKER Yes

THE COURT I am going to put all four alternates in a hat and draw one I'll let Pedie do that If I forget to do it, please bring it to my attention All right Exhibits What are we down to?

MR PARKER Your Honor, we -- I guess I can go ahead an announce the exhibits that we have agreed on that are in from the Plaintiff's side and then from the Defendant's side, also, and then we can take up the ones we don't agree to

THE COURT All right Mrs ~McLeod, please keep good notes

MRS MCLEOD Yes, sir

THE COURT I am not going to try to -- I'm not going to try to -- you got them all listed out, don't you?

MRS MCLEOD Got them, Judge

THE COURT All right Mr Parker, for the record

MR PARKER We've got an agreement --

THE COURT Hold on one second

MR WILBY Judge, can I ask Johnny just to be a little more methodical so Beth can make sure she keeps up

MRS MCLEOD All right We'll start with exhibits 1 through 7 are in by agreement

MRS MCLEOD Yes, sir

THE COURT You don't have to stand, Mrs McLeod If you just see that there is something that's not what you agree to, just let us know

MR PARKER Exhibits 8 through 10 are in by agreement Exhibits 13 through 23 are in by agreement Exhibits 25 through 28 are in by agreement Exhibits 32 through 36 are in by agreement Exhibits 38 through 44 are in by agreement Exhibit 46 through 48-B -- Excuse me Including 48 and 48-B through 50 are in by agreement Exhibits 53 through 56 are in by agreement Exhibits 57 through 61 are in by agreement Exhibits 63 will consist of a clip of the videotape Mr Crews took from 40 feet and will only entail that portion of the videotape

MRS MCLEOD Yes, sir On Exhibit 63 we have no objection to just the one limited clip that he played for the jury So, we'll have to make sure that gets edited down

THE COURT I am going to leave that up to y'all

MRS MCLEOD Yes, sir

MR PARKER Sure Exhibit 64 they have an objection to

THE COURT 64?

MR PARKER Yes, sir, and my understanding is it was already in evidence This was Mr Crews' measurements

which have been testified at length in the trial by numerous witnesses, several witnesses

THE COURT All right Keep going We'll come back to 64

MR PARKER Sixty-five is in

MR WILBY Your Honor, we do have an objection to 65 to the extent -- I'm sorry This is yours, isn't it?

MR PARKER Correct I thought you had no objection to that

MR WILBY We have to take a look at that one

MR PARKER Okay

THE COURT Sixty-five, we'll come back to, is that correct?

MR PARKER Sixty-five -- I don't -- let me -- I guess the best thing to do is go through the ones that there is no objection to and then we'll come back to the ones there is an objection to 70-D is in without objection 71, the animation, I think they have an objection to that maybe of some description

MR WILBY Your Honor, on the animations, both of them we take that they're demonstrative and wouldn't go back to the jury So, that would be our position on those

MR PARKER Seventy-four as you've admitted into evidence

MRS MCLEOD We just renew our objection to 74, Judge, but you've let it in

THE COURT Thank you

MR PARKER Seventy-five would be in for the punitives, but not in for this stage Seventy-six --

THE COURT Hold on a second

MRS MCLEOD Your Honor, we're not agreeing to anything going in at the punitive stage at this point

MR PARKER All right Well, let me go back I think you had ruled on that but what I'll do then is just not --

THE COURT What number was that?

MR PARKER -- just not mention those That would be 75 There is a number of them

THE COURT Hold on Hold on Seventy-five?

MR PARKER Yes There is a handwritten note that my recollection is you ruled that it would be admissible for punitives only

THE COURT I think that was my ruling according to my notes

MR PARKER That was my recollection

THE COURT But don't mention it in this

MR PARKER Oh, we're not

THE COURT If we get to it, we will, and then Mrs ~McLeod can make another objection

MR PARKER I am going to skip over the ones that are punitives only I guess we'll take those up when we get to that stage Seventy-eight is in

MRS MCLEOD Subject to our previous objection, Judge

MR PARKER Seventy-nine is in

MRS MCLEOD Same thing, subject to our previous objection

THE COURT Yes, ma'am

MRS MCLEOD Eighty

MR PARKER Eighty is in

MRS MCLEOD Subject to our previous objection

MR PARKER Eighty-three is in

THE COURT Hold on Eighty?

MR PARKER Eighty is in

THE COURT I thought I said no on 80

MR PARKER Eighty is one you let in today for rebuttal

THE COURT That's correct

MR WILSON The last number you said was 83, Johnny

THE COURT I let 81 in?

MR WILBY No Eighty-one you didn't let in

THE COURT Did not?

MR WILBY Yes, sir

THE COURT Okay That s correct

MR PARKER No Eighty-one you did let in That's the white paper

MR WILBY No Eighty-one you didn't let in

MR PARKER We published it You published this piece of it to the jury

MRS MCLEOD That must be one that you initially ruled out, Judge, and then came in on rebuttal

THE COURT That's correct

MR PARKER That's correct Eighty-three is --

MR WILBY Eighty-three is in

MR PARKER -- in Eighty-four is in

THE COURT Redacted

MR PARKER That's correct It's been redacted and they've reviewed it Eighty-five?

THE COURT Redacted

MR WILBY That's right

MR PARKER Correct We'll have to present them with a copy of that in the morning because we only played the first page of it because of that Eighty-six, only page five is in

MR WILBY That's correct

THE COURT Redact, too All right

MR PARKER Eighty-seven is in

MRS MCLEOD Excuse me for one minute, Johnny Judge, we'd just like to renew our previous objection to

84, 85, 86, and 87

THE COURT Yes, ma'am

MR PARKER 87 is in 88 is in 89 is in 90 -- we're going to mark as a Court's Exhibit for the record because it was part of the foundation for 91 and 91 is in

MRS MCLEOD Subject to our previous objection

THE COURT Yes, ma'am

MR PARKER 92 is in only for the record, not to go to the jury 92-A is in 93 is in for the record 94 is in for the record 95 is for the record only 95-A is, I believe for the record only 95-B is record only 95-C -- let me see what 95-C is

MRS MCLEOD Your Honor, on 93, 94, 95, 95-A and B and 95-C my understanding is they are not to go to the jury He's only making those a Court Exhibit just to protect himself

MR PARKER That's correct

THE COURT That's correct

MR PARKER And that's the same on down to 99 100 is in in a redacted form which they've reviewed

MRS MCLEOD Subject to our previous objection

THE COURT Yes, ma'am

MR PARKER 101 is in for the record only 101-A is in

MR WILBY Redacted

MR PARKER Redacted It's been redacted
MRS MCLEOD If I could just renew my objection, Judge
THE COURT Yes, ma'am
MR PARKER 102 is in 103 is in 104 is in, but they have an objection to it Do you want to take that up now?
THE COURT Let's do all of the objections in just a minute Finish doing what's agreed upon
MR PARKER All right 105 is in for the record 106 is in for the record 107 is in
THE COURT Hold on one second
MRS MCLEOD 105 and 106 are just Court Exhibits, Judge
MR PARKER That's correct 107, 108, 109 are in 113 is in, but there is an objection
THE COURT That we need to deal with now?
MR PARKER We ll deal with them when we go back
THE COURT Yes, sir
MR PARKER And 113-A I think is the same thing and 114 is the same objections to them 114-A is in 114-B is in 116 is an objection and then 116-A through 138 are in Then 142 is in 144 is in 147 is in 155 is in 160 is in 161 is the survey
MR WILBY We've got an objection to that

MRS MCLEOD Your Honor, on 142, 144, 147, 155, and 160, those are the 11/5 Crews photos and notes We object to those and renew our previous objections Then we have an objection on 161 which is the survey

THE COURT All right Let's take up the objections First one is what, Mrs ~McLeod

MR PARKER Sixty-four would be Mr Crews' measurements

THE COURT All right Hold on All right I am going to 64 which are the measurements of Investigator Crews dated 6/4/04 which have been used throughout the trial

MR WILBY No doubt about that Judge We just -- our objection would be that these are cumulative and would unduly highlight or underscore his testimony

THE COURT Objection overruled

MR WILBY Thank you, Judge

THE COURT Sixty-four is in

Mrs ~McLeod, did you get that?

MRS MCLEOD I got it, Judge

MR WILBY 65-A, Judge

THE COURT 65-A?

MR WILBY A as in apple

THE COURT That is a Railroad Highway Grade Crossing Data

MR WILBY Yes, sir This document comes out of Dr Heathington's conclusions, report, if you will

THE COURT Didn't we deal with that earlier?

MR WILBY Yea

THE COURT The chart or compilation?

MR PARKER This is the thing that he went through as he evaluated the crossing and there were certain things in there that you said needed to be redacted which they were and I'll pass you up a redacted copy of it

THE COURT My notes say 65-A, no All right This is the redacted copy?

MR PARKER That's correct

THE COURT What is the objection?

MR WILBY Your Honor, a couple First of all, this is the demonstrative It's a part of his report It's essentially trying to get his oral testimony to the jury in written form It is cumulative It's unduly prejudicial because it emphasizes a portion of his testimony It is, as you can see on the bottom, sir, it's from the site visit two years after the accident On the second page he talks about reduced sight distances from his site view two years after the accident, and that's also true on page three

So, let's see It also references, I believe, the 2004 SCDOT diagnostic review unless that's been taken out

MR PARKER It's been taken out

MR WILBY And it's misleading, Your Honor This appears to be some kind of an official document when, in fact, it was prepared by Dr Heathington

THE COURT Mr Parker?

MR PARKER Your Honor, we believe it's admissible under Rule 106 which is summaries of things that have been done to where you have voluminous testimony on something you can prepare a summary of what it is and we believe it is admissible It was all testified to

THE COURT It was all testified to I am going to sustain the objection

MR PARKER Okay

MR WILSON Judge, I was trying to keep up with you Was that in or out?

THE COURT The objection is sustained So, it's out

MR WILSON Okay Thank you

MR WILBY Your Honor, 66 and 67, 68, 69 are all charts from his report and so we'd make the same objections to those, Your Honor

MR PARKER Sixty-six and 67 we'll withdraw as exhibits They were used as demonstrative exhibits Sixty-eight, sight distance chart, I think you've already ruled it in

THE COURT Sir?

MR PARKER You had already ruled on that Sixty-eight is the sight distance chart

THE COURT I allowed that and we've used it according to my notes Do you need to reobject to it?

MRS MCLEOD On 68, Judge, I have that you allowed it as a demonstrative

THE COURT Well, I am going to allow it now as a document, as an exhibit

MR PARKER You made the same ruling for 68, 69, 70, and 71, and 70-A was the work where Dr Heathington evaluated the sight distances as they existed in time

THE COURT Well, I know I allowed 68 That was a sight distance

MR PARKER Yes

THE COURT And now how is 69 any different than --

MR PARKER It is the same information It is just from a different source, and, of course, 69 is for the Railroad Grade Crossing Handbook which Dr Heathington testified was what people in the industry used -- those two -- and then we put in two railroad sight distance charts They're all the same

THE COURT Well, what is the objection, if any?

MR WILBY Your Honor, on 69 the same thing This was part of his -- this is a chart in his report He s

testified to it so it would be cumulative It would be prejudicial in that it over-emphasizes certain portions of his testimony It's essentially getting his testimony in written form in front of the jury

THE COURT Well, I am going to allow 68 in and I think the rest of it is cumulative It is getting into my opinion to be cumulative and confusing So, I am just allowing 68 in

MR PARKER All right 70-B we will withdraw

MR WILBY What about 70?

MR PARKER Seventy was a chart

THE COURT That's been disallowed

MR WILBY Okay

MR PARKER And 70-A-1 is the actual sight distance chart in this case

THE COURT Well, do you want to use 70-A-1 or --

MR WILBY Sixty-nine, 68?

THE COURT Sixty-eight

MR PARKER Well, no, the AAASHTO chart shows what the requirements are and then 70-A-1 measures this crossing against those requirements

THE COURT Mr Wilby?

MR WILBY Your Honor, this -- Dr Heathington gave testimony about this over our objection because it involves all the other quadrants in addition to ours, and,

again, it's part of -- this is an exhibit as part of his report He testified at length about this So, we think it would be both cumulative and that it would be prejudicial and it over-emphasizes portions of his testimony and, essentially, gives him two bites at the apple

THE COURT Like I ruled I think when he was up there before or either made some comment, this one now is a little different than 68 because this gives the other three quadrants Even though they're not germane to the actual quadrant in question, it gives an overall view as to the safety of crossing in general and I will allow that for that purpose

MRS MCLEOD Is that 70-A-1?

THE COURT 70-A-1

MRS MCLEOD And, Your Honor, if we could renew our objection to 68, also?

THE COURT Yes, ma'am

MR PARKER The next thing we have Your Honor, we have an issue is 71, the animation

THE COURT Seventy-one, the animation I doubt it's in my book That's the one we've been looking at all week?

MR PARKER That's the one we've been looking at

THE COURT What's the objection?

MR WILBY Just that it's a demonstrative, Your Honor, and it shouldn't go back to the jury

THE COURT Overruled Now, of course, if they want to see it, it becomes a horse of a different color I guess we'll bring them out here

MR PARKER We'll have to get a computer

THE COURT We'll deal with that when it becomes an issue

MR PARKER 71-A you --

THE COURT And before you get there, what I normally do, Mr Wilby, is I'll tell them that the animation is on a CD and if they want to review it or look at it, just let me know and we'll make arrangements for them to be shown It will either be out here or back in there in the jury room Next

MR PARKER 71-A you've ruled in and we've redacted it and presented it and I hope this is acceptable

THE COURT Well let them look at it

MR PARKER They've looked it over 71-A

MR WILBY 71-A is fine, Judge Yea, subject to our previous objection

THE COURT The redacted copies are --

MR WILBY Yes

THE COURT -- okay with you --

MR WILBY Yes

THE COURT -- subject to your previous objections?
MR WILBY Yes, sir
And, Johnny, you were going to pull the last page of that, correct?
MR PARKER I have already done it
MR WILBY Okay Good Thank you
THE COURT All right Move along
MR PARKER 71-C is the animation that they played with Mr Huett, the Fay animation
THE COURT Hold on one second 71-C? I don't have it
MR PARKER No, you wouldn't have it up there That's the animation they did with the train in the animation that they played with Dr -- not Dr , but Mr Huett
MR WILBY Judge, you know, our only objection is the demonstrative one, but if you re going to get one back, then we have no problem with the other one
THE COURT Okay What's the good for the goose is good for the gander Objection overruled
Mr Parker?
MR PARKER I am trying to get to the next one
THE COURT I'm sorry I didn't mean to push you
MR PARKER We're down to 85 which we need to redact which we will do

THE COURT All right Just show it to them before
MR PARKER Correct We'll do that
THE COURT That's the one you're going to redact out FBU midwest and it was redacted up on the screen You did not redact out, if I remember correctly, the liability issues
MR PARKER Yea, we will do that one clearly and the other one is -- this one is the one where we had a multiple page document and we didn't have time to redact it
MR WILBY Judge, we'll need to renew our objection to 74 Which one are you on?
MR PARKER Seventy-four It is already in
MR WILBY It is in
(Whereupon, the attorneys conferred)
THE COURT Do you need this on the record? I mean, y'all are just talking among ourselves
MR WILBY Yes, sir Sorry I am just trying to locate where he is
THE COURT No problem I am not fussing I am just saying she has to --
MR PARKER The next one I have they had an objection to is 104
MR WILBY Can you give me just a second?
THE COURT DeAngelo Brothers --

MR PARKER Correct
THE COURT -- bid form?
MR PARKER Correct
MR WILBY Yes, sir This documented is dated, Your Honor April 30, 2004, but DABCO didn't actually do work out there until after the accident
THE COURT This one hadn't been brought up at all during anything, has it?
MR PARKER There was no objection to it so it wasn't brought up They now object to it
THE COURT And the objection is?
MR WILBY Well, it really is a subsequent remedial measures Even though it predates the accident, the work itself was not done until subsequently to the accident
THE COURT I'll sustain the objection
MR PARKER Your Honor, there is no evidence in the record that there was this work was done after the accident I, in fact, don't know whether it was over done The purpose of it is to show that it needed this work prior to the accident They wouldn't be doing it if they didn't need it
THE COURT I think you've got ample documents in so far proving that point I am going to rule it as cumulative and sustain the objection
MR PARKER The next objection I have is on the

event recorder download, 113

MR WILBY Yes, sir On that one, Judge, as you know we talked about the event recorder download a good bit and there are actually two different versions One is -- it's the same download, but we produced initially two pages and then we produced about 10 or 11 pages

THE COURT And they're all on that same exhibit?

MR WILBY They are all on that same exhibit and when you go to page three which begins the first page of the second production --

THE COURT Correct

MR WILBY I'm going to count, one, two, three -- the fourth page, Your Honor --

THE COURT Hold on That starts with 19 04 18? 5 31?

MR WILBY Yes, sir, 19 04 19 Yes

THE COURT All right

MR WILBY That, sir, with those lines, that's our horn That's our accident, and, basically, this page and the three pages in front of it that we've already gone over just passing by are from the time the accident until the time the train stops So, everything behind this document predates our accident and there is some additional -- you know, there are horn blows and stuff like that at I guess other crossings We're not sure

There's been no evidence or testimony about any of that
So, we would just object to it beyond -- behind our accident There is no evidence or testimony regarding any of that stuff
THE COURT Behind means happening before?
MR WILBY Yes, before Before
THE COURT I will allow it in as to the hour or so surrounding the wreck or the collision
MR WILBY Okay, Judge
THE COURT Is an hour too much?
MR PARKER It doesn't even go back an hour
MR WILBY It is only five minutes, Judge
THE COURT You mean they were blowing on down the track five minutes before?
MR WILBY Yea It's just the five minutes before, but it just isn't relevant to our accident That's all
MR PARKER It is highly relevant because it shows they knew how to blow the horn correctly and didn t on this occasion
THE COURT You know, the event recorder has been the subject of a lot of testimony in this case I am going to allow it in
MR WILBY Thank you, Judge
THE COURT I think it's relevant
MR PARKER 114, no objection to which is

Mr Scott's chart where he put forth where the various events happened

MR WILBY Judge, I can't remember the chart, but it was something, I guess, that Mr Parker put up on the screen

THE COURT I don't have it in my package

MR WILBY Yea So, it's essentially his chart It is his testimony It would be cumulative and over-emphasize a portion of his testimony so we would --

THE COURT That's the only chart out of Mr Scott?

MR PARKER Yes, sir

THE COURT I will allow it

How about hit the air?

MR WILSON Y'all want to talk about 113?

MR WILBY What is 113-A?

MR PARKER 113-A is the part where they pulled forward and backed up

MR WILBY I didn't have that as two separate exhibits Okay

THE COURT Okay, what now?

MR PARKER We're okay with that

THE COURT With which one?

MR PARKER With 113-A

MR WILBY 113 was the first two-page report 113-A was the one I just brought to the court's attention that's

five minutes before

THE COURT Thank you

MR WILBY So we object to 113-A to the extent it doesn't involve our accident

THE COURT I have already ruled on it

MR WILBY Yes, sir Thank you

MR PARKER 116 is the chart Dr Lipscomb used to DBA's -- the difference in standards

THE COURT And you put that up when he was testifying, didn't you?

MR PARKER Yes, I did

THE COURT Is that the only one you want to use from Lipscomb?

MR PARKER Only one Only one

THE COURT Objection?

MR WILBY Well, I raise the same objection, Judge was, but I will point out to the court that it s the only one used

THE COURT It's what?

MR WILBY It's the only chart he used

THE COURT All right I'll overrule it

MR WILBY Thank you, Judge

MR PARKER And the last one is the SDI survey as I have it

MR WILBY Yes, sir, and --

THE COURT That's the one Lisa's had the whole time?

MR PARKER Yes, Your Honor It was admitted without objection

THE COURT Well, there was a stipulation that it was done at the behest or request of the Defendant What else?

MR PARKER Your Honor, at the time it was offered I offered it into evidence during the testimony and they had no objection and I remember specifically Mr Harmon said he had no objection It was admitted

THE COURT What kind of objection could they have for that?

THE WITNESS May I approach, Judge?

THE COURT You may

MR WILBY There is only one objection Judge, the -- it's got a car on both sides which is just a model and it's not designed to be either vehicle in this accident or any vehicle in this accident, and, so, that's the only problem we have with it because Mr Parker is going to say that we had SDI do a survey for us and look where we had them put the cars which would be just absolutely untrue There is no testimony about that at all So, that's the only objection that we have to it

THE COURT Mr Parker?

MR PARKER Your Honor, the clear inference from

that and that's why we had testimony as to when this was prepared and the stipulation for whom it was prepared, it was prepared -- Mr -- the document showed that Mr Davison commissioned it on 6/3 One car is where Mr Spell was One car is where she was There is clearly evidence that someone on behalf of CSX placed those cars in that position

MR WILBY Mr Parker knows there is no testimony about that at all There is none in the record Nobody has testified to that and nobody would because that's not the truth

THE COURT Well I got to let the exhibit in We've talked about it all the way through I can't help it shows what it shows Y'all can argue within what the facts are in this case Overruled What else?

MR PARKER That is all on ours, Your Honor, and then we have theirs

THE COURT Hold on a second

Are you ready, Mrs ~McLeod?

MRS MCLEOD Yes, sir

THE COURT Y all need a second?

MRS MCLEOD No, sir, we're good I'm sorry

THE COURT No, ma'am No

MR PARKER On their exhibits we agree to one, two, three, and four

THE COURT Hold on one second

MR WILBY Judge, if I could have just a second to get the exhibit notebook out then I could follow along

THE COURT Hold one second

MR PARKER We have agreed to their exhibits 1, 2, 3, and 4 would come in without objection Exhibit 12 will come in without objection -- Defendant's Exhibit 12 and Exhibit 34 through 39 comes in without objection

THE COURT Hold on one second Are you with us?

MR WILBY Judge, we would like to move in Exhibit 19, too I am only bringing it up because it's earlier in the process

MR PARKER I believe 19 is in evidence I believe it's our 24

THE COURT No objection to 19

MR PARKER We will agree to it

THE COURT Are you ready, Mrs McLeod?

MRS MCLEOD Yes, sir I was just going to say our exhibits 5 through 11, 13 through 25 -- they had no objection to those He said they were covered by his exhibits So, just as long as we have one version of those in, either his or ours

THE COURT Lady, gentlemen, y'all just -- before you leave tonight -- I am not going to make my court reporter shuffle around all day in the morning Y'all try to have

them all stacked up ready to go tonight or first thing in the morning --

MR WILBY Yes, sir

THE COURT -- so I don't have to hold the jury up

MR PARKER Your Honor, we went through these for that purpose and if they want to add something to what we've done, then we'll be happy to look at it

THE COURT That's fine I am just trying to make sure that we took this whole afternoon at y'alls request so we could have this done

MR WILBY We're getting squared away, Judge

MR PARKER We have an objection to 58 which is the entire South Carolina Highway Patrol fatality package which there was testimony to maybe one or two pages out of it

THE COURT Well, that's the one you cross examined him on about the bell being checked no?

MR PARKER That's correct That's correct And they asked about the check on the obstructions on that page They offered the entire package and we object to it In fact, the accident report is clearly inadmissible by law

MR MILLBERG All we really want in is the page about the obstructions which was used with Whatley

THE COURT That obstruction page have the bell

designation too?

MR MILLBERG That was a different page

THE COURT I will allow those two pages -- sight obstruction none and bell as I recall, whether it was not working

MR MILLBERG Off

THE COURT Some kind of check that it was adverse to the railroad One favored the railroad One favored the Plaintiff Just those two pages

MR PARKER We've agreed to 60, 61 and 62 From 68 to 80 we have agreed that if those come in if they don't duplicate ones that are already in and they want them in

THE COURT Is that correct, Mrs McLeod?

MRS MCLEOD Yes

MR PARKER Eighty-seven we have an objection to

THE COURT What is 87?

MR PARKER I don't know I have to look because they had withdrawn it

MRS MCLEOD We're not offering 87 or 88

THE COURT Okay

MR PARKER We had already offered those

MR WILBY Johnny, excuse me You're at 87 and 88 now, and unless you have informed the court that you have an objection we can assume you don't have any objections to the other documents, correct?

MR PARKER Which other documents?
MR WILBY Anything that precedes 87 and 88
THE COURT Except for the fatality reports that we've agreed -- not agreed, but I ruled it's just two pages
MR PARKER No, I do They've put on the list they gave me they were withdrawn I am going by the list that I was given that these documents that preceded that were withdrawn
MRS MCLEOD Well, I think the confusion here, Judge, is we reached an agreement on these exhibits and we said to the extent they're covered by Plaintiff's Exhibits we won't put in a duplicative copy So, I think that's where the confusion arises We skipped over some of those
MR PARKER We spent at least an hour going through these and the ones that they said were withdrawn, now they're saying they want to put in evidence
MR WILBY No, no, no
THE COURT Whoa, whoa Gentlemen, just take a few seconds and y'all huddle
(Whereupon, the attorneys conferred off the record)
THE COURT All right Let's go back on the record Where we, Mr Parker?
MR PARKER On Exhibit 81

THE COURT What is 81, please?

MR PARKER Mr Crews was asked about some measurements They presented an Exhibit 81 that had some handwriting He said he could not identify it and now they're offering it as an exhibit

MR WILBY Your Honor, Exhibit 81 was a document produced to us by the Plaintiff along with Mr Crews' notes and he testified at his deposition he didn't know whose handwriting --

THE COURT What did he testify in court?

MR WILBY Same thing He didn't know whose handwriting it was, but he usually takes measurements of the van That's what he normally does and this was in his file

THE COURT All right I'll allow it

MR WILBY Johnny, 82 is withdrawn Eighty-three, 84, 85 are trooper photos

MR PARKER They are already in

MR WILBY 86 is withdrawn eighty-seven, 88, 89 we're not offering

THE COURT Hold on a second

Mrs ~McLeod, are you keeping up?

MRS MCLEOD I am keeping up

MR PARKER Your Honor, we would offer Defendant's Exhibit 89

THE COURT Which is what?

MR PARKER It is an invoice, business record

MR WILBY Judge, if I may point out you've already got yours in You got it in under 102 of Plaintiff's Exhibit

MR PARKER It is a different document

MR WILBY Which one are we talking about, Johnny?

MR PARKER Eighty-nine

THE COURT Let him look at it

MR WILBY No, it's the same document All we've done is redacted our copy so it doesn't have the same information you have on it, but it is the same document

MR PARKER It is It is I stand corrected

THE COURT Very well

MR WILBY And then, Judge 91 and 92 are our exhibits that Mr Parker has an objection to and these documents, Your Honor, are spray records from June 11, 2003 and then May 30, 2003 They're just two sets of records where our brush spraying program was in process at this crossing

THE COURT Mr Parker?

MR PARKER We object There's been no testimony about it, no one to tell us what it is, and I know the attorneys say that's what it is, but I don t know what that is

MR WILBY Well, Judge, they are spray records They show that they were sprayed It tells you what the spray is It tells you where it was sprayed in Denmark, South Carolina with this mile post, and, frankly, Judge, we were not going to admit these documents until they admitted the rebuttal documents today

THE COURT I'll allow it

MR WILBY Thank you, Judge Ninety-three and 94 is withdrawn Ninety-five is withdrawn Ninety-six is withdrawn Ninety-seven is withdrawn, 98, 99, 100 101

MR PARKER Your Honor, may I be heard briefly on that on 91 and I just want to put our objection on the record On ninety-one and 92 they are purporting that these are records that they did something at this crossing and I assume will argue that way They've had no one to -- these appear to be records of Asplundh Tree Company They've had no one testify to identify these as business records They could have called any number of people from CSX to testify about whether or not they sprayed this crossing They haven't authenticated these records There is no authentication of them that they are even what they purport to be They certainly haven't called anyone to establish that these records are anything other than hearsay We have an objection to that

THE COURT Well, I understand that The reason they

didn't do that was because there really was not an issue until you put your reply testimony in and I'm going to allow them Your objection is noted

MR WILBY Judge, then we withdraw our documents 93 through 101 We've also withdrawn 102 103 is the animation and, so, that's already in 104 is in That's the photograph of the man and the train Then 105 through 112 are Fay exhibits that were never discussed so we've withdrawn those 113 is a resume of Joseph Blaschke It's withdrawn 114, Your Honor, is the Guidance Control Devices at Highway Grade Crossings and then we have two pages out of that -- out of that document, Your Honor, that we want to admit into evidence that would be sort of the counterpoint to Mr Parker's --

THE COURT Heathington

MR WILBY Yea, Heathington's sight distance chart

THE COURT Mr Parker?

MR PARKER Your Honor, we have the same objection that we had in that these deal with -- if they want to calculate them, I guess they ll have to go get Dr Heathington to do it This is for 15-foot -- where somebody is 15 feet from the tracks at a 90-degree angle to the track which is not present, but I think in all fairness we can put our sight distance chart in if they can put theirs in

THE COURT I'll allow it
MR MILLBERG Those two blow-ups have been marked 114-A and 114-B
THE COURT Subject to Mr Parker's objection
MR WILBY Your Honor, 115 is withdrawn 116 is withdrawn 117 is withdrawn 118 is withdrawn 119 we did want to admit, Your Honor, and that is --
THE COURT Any objection?
MR PARKER Yes, Your Honor
THE COURT What is 119?
MR PARKER It is Lipscomb invoice dated 9/19/2009 Nobody testified about that There was no testimony concerning it
THE COURT 2009?
MR PARKER It would be -- yes, it is 9/9/09 It is his invoice for what he charged for doing his work
MR WILBY This is for his work in this case, Judge
THE COURT Whose work?
MR WILBY Dr Lipscomb
MR PARKER The expert, the audiologist
THE COURT You had him on cross You asked him what how much he charged You never did get the total amount How much is it?
MR WILBY It's only $2,500, Your Honor It's not a big bill It's just the only one we have on him,

honestly

THE COURT I understand Overruled I mean, you could have asked him that on cross You can argue that he's charging X amount of dollars an hour and look at how long he's been in here

MR WILBY Okay, judge Are you okay with that?

MR PARKER Yea It is not in It's out

MR WILBY I understood when the Judge said it was overruled he was talking to me, not you

THE COURT Y'all did so good for so long Don't mess up

MR WILBY I'm sorry, Mr Parker

THE COURT I accept your apology

MR WILBY Okay 120 is withdrawn, also 121

THE COURT If that's all y'all fuss, I will give you both A-pluses

MR WILBY Okay 122 is withdrawn

THE COURT I've already told y all the only thing that's gotten my gander up and I am going to deal with that later on with that lawyer involved Go ahead

MR WILBY 123 is withdrawn 124, 125, 126, 127, 128, 129, 130, 131, 132, 133 -- that s it Through 133 are all withdrawn 134, I believe, is admitted without any objection, Your Honor

THE COURT Is that correct?

MR PARKER Correct, Your Honor
THE COURT 135 is withdrawn 136 is withdrawn 137, withdrawn -- thirty-eight, 39, 140, 141, 142, 143, 144 -- all withdrawn 145 is Plaintiff's animation They're offering that 146 is withdrawn
MR WILBY Oh, I'm sorry 145-A through D, Your Honor, are slides from Gary Huett and --
MR PARKER We have no objection to 145-A,B,C We have an objection to 146-D
THE COURT What is 146-D? First of all, what is it?
MR WILBY It is the photo board, Judge, from Mr Huett's animation
THE COURT There are some up here
MR WILBY Oh, it's right up front Thank you You might remember when I had Mr Huett on cross and I asked him about -- I had ran his two animations side by side and I stopped them at 8 07 seconds before impact and had him testify about that So, this is just the still taken from the animation at that frame
MR PARKER Your Honor, we object to it It unduly emphasizes one part of the animation They'll have the animations back there and if they want the play it again, but it wouldn't be fair to isolate one part of it
THE COURT Well, if you want to play the whole in the closing, you can I'll allow him to play the whole or

use that Overruled

MR PARKER Is that going to go to the jury? That s what I am objecting to I don t mind him using it in his closing, but I object to it going to the jury because it unduly emphasizes one portion

THE COURT Mr Wilby?

MR WILBY Judge, I mean he can testify There is some angst about that So I would -- I think it's a still out of his animation and they will have the whole animation so they can compare it to other parts --

THE COURT I will allow it

MR WILBY Thank you, Judge 146 is withdrawn 147 is admitted without objection 148 is Michael Stephens' photo I think they object to that

MR PARKER We do We didn't take photographs of any other witnesses It would be inappropriate to do that

THE COURT Sustained

MR WILBY 149 is the timetable That's withdrawn 150 is the forward on the scene -- the partial survey That's admitted without objection

MR PARKER The demonstrative, not to go to the jury

THE COURT What was 150? Is that not the same thing as the sketch y'all just argued?

MR WILBY It is a sketch, Judge
THE COURT Why is that not evidence and a demonstrative and the other one is evidence? Let me see I see I see Well, what is the objection on this one?
MR PARKER They just listed it -- I didn't have any objection, but they listed it as a demonstrative only If they want to change that, then I guess they can change it
THE COURT What is your pleasure?
MR WILBY We'd like that to be an exhibit, Your Honor
THE COURT I'll allow it
MR WILBY Thank you I think -- Isn't that it, Beth?
MRS MCLEOD I think so
MR WILBY I think that's everything
THE COURT Are y'all going to use the big --
MR WILBY We are
THE COURT Now -- hold on Mr Millberg?
MR MILLBERG Just briefly, Your Honor, we still needed to consult on Plaintiff's 65 which I don't think they have in the courtroom It's -- we'll look at that either when we have a minute or in the morning We just need to take a look at it
THE COURT Very well All right How much -- I know that y'all are all getting ready for your final

arguments I'll tell you what My question was going to be how much imposition would it be for somebody to come up with a list of what's in and out?

MRS MCLEOD I can do that for you

THE COURT Well, I don't want you have to I can just -- Lisa, can you get me a rough copy of what we testified to so I can flip through it if I need -- unless somebody does want it, then just give me a copy

MRS MCLEOD I'll probably rough it out So I'll get you a copy of it

THE COURT Show it to Mr Parker

MR PARKER E-mail us a copy

MRS MCLEOD I will

THE COURT That way if y'all start arguing during your arguments about what's in and not in, I'll --

MR WILBY We'll get that together

THE COURT All right Okay What else?

MR PARKER We got charges

THE COURT Yes, sir Other than the charges

MR PARKER I don't know of anything

THE COURT All right My charge will be as follows

MR WILBY Judge, may I mention one other thing?

THE COURT You may

MR WILBY On Exhibit 101-A --

THE COURT 101-A which is what?

MR WILBY It is a letter to Mike McMaster and you ruled that it could come in in redacted form and I looked at Mr Parker's redaction and there is just some additional stuff I have problems with I don't know if it was an oversight or if he intended to leave it in, but -

THE COURT Well, I'll tell you what Y'all look at it after you get through the charges I am not going anywhere See if you can agree If not, I'll listen to it

MR MILLBERG Your Honor, can we hand up our -- we've had just a couple of changes to ours -- charges

THE COURT You mean I spent last night doing that and you've changed it?

MRS MCLEOD Very, very minor

MR MILLBERG I'm sure Mrs ~McLeod will point you right to the changes, Your Honor

THE COURT She better All right Here is what I am going to charge Start off with duties of judge and jury, jury and judge, preponderance of the evidence, direct and circumstantial evidence, credibility of witnesses, expert witness, corporation as a person, and then I am going to go into negligence, define what negligence is as follows I am going to say that, obviously, the Plaintiff claims the Defendant was negligent and should compensate the Plaintiff for the

injuries the Plaintiff suffered in the wrongful death survival action as a result of the Defendant s negligence In order to prove it they must prove it by preponderance or the greater weight of the evidence I am going to go through duty of care, breach of that duty proximate cause, and damage, and then I will talk about right after that that the Defendant claims the Plaintiff's own negligence -- that would be Ms ~Harvey's -- proximately caused Beryl Harvey's injuries and I'll go through the comparative negligence charge

Now, what I've got to decide -- I think a lot of your charges dealt with what actually the duties are of the railroad and the driver A lot of what y all gave me was redundant but I think I need to be specific on the duties that are set out by statute and by case law Just bear with me a second I had intended when I started talking about duties Plaintiffs one, a railroad has a duty to maintain a reasonably safe grade crossing I am tempted to leave it at that because when I start talking about allowing vegetation to grow as set forth in their number two or number three I think I'm getting to charging the facts

Then, of course, I have to -- just hold on one second Then I have to talk about the duty of the driver of the vehicle and I would go to the Defendant's charges

talking about the duties of a driver

MR PARKER Your Honor, how about the signals -- the duty to give appropriate warnings?

THE COURT Mr Parker, I am going to get to those signals You're talking about the bells and the whistles?

MR PARKER Yes, sir

THE COURT Those are statutes

MR PARKER Well, it is also common law duties to do that

THE COURT Well, let me get to that in just a second Driver's duty is has a duty to exercise ordinary care, duty to keep a proper lookout Along those same lines statutory 56-5-2330 and 2270 -- I'll probably charge that statute verbatim Every driver of a vehicle approaching a stop sign shall stop at a clearly marked stop line, so forth and so on

MR PARKER Your Honor, we have an objection to that on the grounds that there is a specific railroad statute dealing with where you stop and that's 56-5-2710 and 56-5-2715 It says it is legal to stop at any railroad crossing between 15 and 50 feet

THE COURT Pursuant to South Carolina statute any person driving a vehicle approaches a railroad grade crossing the driver of the vehicle shall stop within 50 feet, but not less than 15 feet from the nearest rail?

MR PARKER Yes, sir

THE COURT That's what I'll charge

MR PARKER Are you going to charge the highway intersection statutes that they asked?

THE COURT I don't think so In other words, what I am trying to do is the railroad owes a duty to maintain a reasonably safe grade crossing and the motorist has to maintain a proper lookout, et cetera, and the statute about stopping at railroad crossings I think if I get too much beyond that I am just charging on the facts and I don't want to do that That is just my thought process going through it last night, and I've still got negligence, violation of statute and negligence, per se, and then the actual damages and a wrongful death and a survival action

That's pretty standard law I don't intend to make it real difficult So, I'll be glad to hear from y'all If I am not being specific enough, just ask me and I'll clarify it

Duty of the driver or operator of a motor vehicle is required to use the same care that would be used by a person of ordinary reasoning prudent if that person were driving the same vehicle at the same time and place under the same circumstances The driver of an automobile has a duty to keep a proper lookout This requires the driver

to watch attentively so that the driver is able to see the roadway or in this case the railway Proper control is so the driver is able to slow down, stop, and turn to avoid colliding with other objects Violation of the statute in this case the Plaintiff claims that the Defendant failed to follow the following statutes Also, the Defendant claims the Plaintiff failed to follow the following statutes, and I'll tell you what the applicable statutes are Then I'll say the failure to follow the statutory rules is negligence as per se if you find the Defendant failed to follow or the Plaintiff, then you must determine whether or not that failure proximately caused either the Plaintiff's or -- caused the injuries

MR PARKER Which statutes are you going to charge, Your Honor?

THE COURT That's a fair question The one that you just referred to, Mr ~Parker, about the 15 and 50 feet

MR PARKER 56-5-2710 56-5-2715

THE COURT That's correct

MR MILLBERG That's the plain and visible and clearly audible statute, Your Honor?

MR PARKER That's correct

THE COURT 56-5-2710 Whenever any person driving a vehicle approaches a railroad grade crossing the driver shall stop within 50 but not less than 15 from the nearest

rail and shall not proceed until he or she can do so safely

MR PARKER That s correct

THE COURT Now, there is all kind -- the foregoing requirements shall apply when a clearly visible electrical mechanical signaling device -- that's not --

MR PARKER That's not applicable

THE COURT I think three is the one that we need to do Three and four -- train approaching within approximately 1500 feet?

MR PARKER Correct And giving the sound of the horn

THE COURT Crossing emits a signal audible by such distance and the train by reason of its speed or nearness of the crossing is an immediate hazard or an approaching train is plainly visible and is in hazardous proximity to the crossing

MR MILLBERG We agree those are the two parts, Judge

THE COURT Okay And I think that's the main statute dealing with the --

MR PARKER 2715 is the stop sign at the railroad crossing statute

THE COURT Which number is that on your charge?

Mr Murdaugh, what was that, please?

MR MURDAUGH I'm sorry What was the question, sir? I wasn't paying attention, Judge I was looking over here

THE COURT You were studying on something else?

MR PARKER It is our charge number 16, Your Honor

THE COURT Department of Transportation local authorities may designate -- that's not it When such signs are erected the driver of any vehicle shall stop within 50 but not less than 15 feet from the nearest rail and shall proceed on upon exercising due care

MR PARKER Correct

THE COURT Now, that's on the motorist How about the railroad?

MR PARKER 58-15-910

THE COURT 58-15-910 is which one of your charges?

MR PARKER It's --

THE COURT 58-15-910?

MR PARKER Yes, sir

THE COURT A bell of at least 30-pound weight --

MR PARKER Correct

THE COURT -- and a steam of air or -- Strike that -- and a steam or air whistle shall be placed on each locomotive

MR PARKER That's correct

THE COURT We're not talking about an interurban

car, are we?

MR PARKER No, we're not

THE COURT What is that? All right That's a statutory duty

MR PARKER Yes, Your Honor, that's ten -- I request to charge ten

THE COURT Sir?

MR PARKER Our request to charge ten, but we agree that the interurban is not --

THE COURT I am going to charge your number ten So, those are the duties, basically, on the driver and the railroad without getting real fact specific

MR PARKER Your Honor, we would ask that the other thing is there is a common law duty outside of the statute of the railroad to give a proper warning That is -- we have --

THE COURT That's number four, Doremus

MR PARKER Four is one of them and there are several of them and exhibits -- Plaintiff s request to charge seven really deals with what the common law duty of the railroad is All of those leading up to it are somewhat duplicative

THE COURT I would rather read out of Doremus than out of CJS I'll give the common law duty to warn, probably the language in number four out of Doremus Any

other common law?

MR PARKER Let's see We think that the common law duty is that number five would also go to that It's not limited to just -- it is to use whatever signals are necessary and whatever precautions are reasonable to protect travelers using the crossing I think number five goes to that

THE COURT Well, that may be getting into those signals that was a subsequent remedial measures that I have been so carefully trying to avoid

MR PARKER Well, the signals would be as Dr Heathington testified and the testimony in the case is they have to use whatever to make a safe crossing and he testified that part of that was a wreck case and lights and they could not provide sufficient --

THE COURT Then that's going to make me get into all of that law dealing with railroad not having -- can't do that without SCDOT becoming involved in all of that

MRS MCLEOD Your Honor, I just wanted to comment on Plaintiff's request to charge number four which quotes Doremus They left out a lot of the language in these cases that apply to the driver's duty and I would request the court to charge the remainder of the language which talks about the railroad's duty and the driver's duty at the same time, Judge

THE COURT What number is yours?
MRS MCLEOD Plaintiff's four
THE COURT No On yours Do you have one on yours?
MRS MCLEOD No, sir I would just like if you're going to use Plaintiff's four I would just like to complete the language from Doremus
THE COURT I'll be glad to look at that in the morning if you want to get it to me in just a few minutes
MRS MCLEOD Yes, sir
MR PARKER Your Honor, we'd ask also that request to charge number 31 be charged There is some indication by Mr Cowan that the event recorder may be inaccurate or something It is just CFR that requires them to have a -- equip the locomotive
THE COURT Thirty-one?
MR PARKER Yea Plaintiff's request to charge number 31
THE COURT I don't see a 31 in there
MR PARKER You might not have it I think I passed up a later version
MRS MCLEOD Which number is this?
MR PARKER Thirty-one
MR MILLBERG Your Honor, we object to that
THE COURT On what basis?
MR MILLBERG Well, there's no evidence in the

record about maintenance or record-keeping of event recorders and this doesn't seem to us to be necessary to charge that

THE COURT I'll take that one under advisement You may be getting on the facts, too

MR MILLBERG I believe it is

MR PARKER Your Honor, we d also ask you to charge that since DeAngelo Brothers was the contractor that charge 18 be given about non-delegable duties

MRS MCLEOD Johnny, what number is that?

THE COURT Well, my predecessor taught me not to use the word liable and all of that in charges

MR MILLBERG Judge, that is not non-delegable duty I think that everything that they're trying to say here is already encompassed within the court's charge on Doremus

THE COURT It is and I am not going to get into non-delegable and what that means I am going to try to keep it simple about what simple duties are and y'all can argue the facts until the cows come in

All right Let's take a look at Defendant's charges, your definitions of negligence That's all in my general charge

Mr Wilby, do y'all really want 58-17-1450 on the South Carolina law the duty to inspect the crossings lies with the governing body?

MR PARKER Your Honor, that would not be relevant in this case That's the -- the DOT has by statute a duty to go to crossings and do certain things It has nothing to do with the railroad's duty

THE COURT I am going to leave it at the duty to maintain a reasonably safe grade crossing and not get too much beyond that

MR MILLBERG Your Honor if I may --

THE COURT Sir?

MR MILLBERG -- make one comment on that one?

THE COURT Sure

MR MILLBERG If counsel is going to argue, which I guess he is, that the railroad had some obligation to advise the DOT that the crossing was dangerous and needed lights and gates, this would be relevant on that

THE COURT Well, if Mr Parker does that in his argument to the jury I'll probably have to include a charge on that If he stays away from it, I am not And we talked about that earlier and I gave a limited instruction to the jury while that was going on So, but if it becomes relevant, then I will If it doesn't, I'm not

MR PARKER If we had allowed in the fact that they had decided to put up gates and lights, then, of course, they had done that before the wreck then I guess this

could come in somehow

THE COURT But I didn't allow that

MR PARKER That's correct

THE COURT There is a lot of charges involving lights and gates, and, gentlemen, we've avoided that all week I would ask that you continue to avoid it

MR MILLBERG If I could get a little clarification, Your Honor It sounds like what Your Honor is anticipating with respect to the statute -- the other DOT statute about them having the exclusive authority to make decisions for traffic control devices and so forth -- you would only charge on that if Plaintiff goes there in his argument

THE COURT And that's going to be -- if he gets into that in the argument, I suspect I'll have an objection from y'all along those lines You know, it came in just minutely with Heathington who was testifying about a broad spectrum of things that could be done to make a railroad reasonably safe to a grade crossing, but since we've got the specific problem in this case subsequent to the collision that they put up the lights and the gates, it creates a real 407 problem I am going to ask y'all to stay away from it I tried to try this case without doing that

Now, you've got a charge in here about the object of

the statute in requiring the whistle or bell to be sounded as to warn those I am not going to get into what the object of a statute is The statute is what it is Y'all can argue You've got a negligence per se charge I think I told you what I was going to charge on that -- basically, the same thing you've got You've got a charge exercise ordinary care by a motorist at all times, proper lookout I've told you I've just got a general charge on due care, proper lookout

All right Mr Parker, they've got a 56-5-2330 and 2740 which is every driver of a vehicle approaching a stop sign shall stop at a clearly marked stop line

MR PARKER They have left out part of the statute These are dealing with highway intersections and the specific railroad law that tells you where to stop with the railroad --

THE COURT That s the 15, 50?

MR PARKER That's 56-5-2710

THE COURT That's the 50 feet and 15 feet

MR PARKER That's correct and this deals with highway intersections -- both of these statutes

MR MILLBERG Your Honor --

THE COURT Mr Millberg do you agree it's just the railroad intersection statute which you've got 56-5-2710?

MR MILLBERG I think you ought to give them both

THE COURT Sir?

MR MILLBERG I think you ought to give them both

THE COURT You think I ought to give both?

MR MILLBERG Yes, sir

THE COURT Why is that?

MR MILLBERG Well, the other one deals with -- if I understand what the court is saying the other one deals with when the train is plainly visible and clearly audible, and this deals with stop signs, and all three of those things unless I am -- is that not what you're saying, Johnny?

MR PARKER No 2715 -- 56-5-2715 tells where a motorist stops at a railroad grade crossing with a stop sign If you read this it would contradict it and, clearly, a more specific statute dealing with the railroad governs over a more general statute dealing with highway intersections This is not a highway intersection It is a railroad grade crossing intersection

THE COURT And I am going to tell the jury the law dealing with what the law requires a motorist approaching a railroad crossing is codified in section whatever it is It requires the 15, 50 feet language and two exceptions that we talked about a while ago

MR MILLBERG That's fine I misunderstood what we were talking about, Your Honor We only need one charge

on the stop sign

MR WILBY Well, Judge, I -- well, like today for what it's worth Mr Parker made the same argument in Colvin and both statutes were charged

MR PARKER And we think so in vast error They were not charged in Williams which was affirmed --

THE COURT Gentlemen, I appreciate what the other judges did in all the other cases I am trying this case based on this crossing at Honey Ford I find that there is a statute to deals with motorist's statutory duty when approaching a railroad crossing grade which is codified in statute we just talked about 15 feet, 50 feet from the near rail, only to proceed when -- the language dealing with a hazardous situation and the sounds and bells of the whistle I just quoted it a while ago I can't recite it off the top of my head That's the one I am going to charge

MR MILLBERG Yes, sir When the train is plainly visible, when the train is clearly audible

THE COURT Yes sir

MR MILLBERG I guess it's plaintiff's 16 that deals with stop signs at grade crossings

MR PARKER That's correct

MR MILLBERG I do think there are three different things that trigger the duty to stop The train is

visible, the train is audible, and the stop sign

THE COURT All right So we're clear, here is the statutes I am going to charge 56-5-2710-A, whenever any person driving a vehicle approaches a railroad grade crossing shall stop within 50 but not less than 15 from the nearest rail and shall not proceed until he or she can do so safely These requirements apply when a railroad train approaching within approximately 1500 feet emits a signal, so forth and so on, or an approaching railroad train is plainly visible and is in hazardous proximity to the crossing

Certain crossings may have been designated as particularly dangerous highway -- strike that There is another statute 56-5-2715 says that when stop signs are erected at a railroad crossing the driver of any vehicle shall stop within 50 feet but not less than 15 feet from the nearest rail and shall proceed only upon exercising due care Those are the two I am going to charge I am not going to charge an intersection stop sign, stop line statute

MR MILLBERG There is just one other comment to make, Your Honor

THE COURT Yes, sir

MR MILLBERG In the Plaintiff's charge where it talks about the DOT designated --

THE COURT You heard me sort of paraphrasing that and leaving that out?

MR MILLBERG I would ask the court to leave that part out

THE COURT Leave it out?

MR MILLBERG About the DOT designating this as a particularly grade crossing

THE COURT And you heard me leave it out

MR MILLBERG Okay

THE COURT And you want me to leave it out?

MR MILLBERG Yes, sir

THE COURT And I will leave it out

MR MILLBERG Thank you

MR PARKER Your Honor, we think it should be in there, but we understand the court s --

THE COURT I understand You got here 56-5-2710 says the law gives the train the right-of-way at a railway crossing That's not quoted in 2710, is it?

MR PARKER No, Your Honor

THE COURT That's just sort of --

MR PARKER That's sort of a railroad view of what they want it to say

THE COURT Well, Mr Parker, I've seen a lot of charges you charge what you wanted it to say

MR PARKER I don't get many of them either, Your

Honor

MR MILLBERG That is somewhat --

THE COURT I am not going to charge it is always train time at a railroad crossing I think y'all see where I'm coming from

MRS MCLEOD Yes, sir

THE COURT I am going to do the best I can I will charge the regular law on wrongful death I know the next question from Mrs ~McLeod, well, Judge what is the regular law? Well, y'all want me to tell you -- it is pretty general law In the wrongful death action the plaintiff as PR personal representative claims the deceased wrongfully died as a result of the negligent acts or omissions of the defendant When the death of a person is proximately caused by the wrongful act and the act or neglect is one which would have entitled the deceased to recover damages if the deceased had not died, PR of the estate may bring an action for wrongful death or survival action The personal representative has the right to recover compensatory damages and for damages that would have survived the decedent that he would be entitled to prior to his death Then it says it's not necessary to show the monetary value or the money value of the deceased's life for direct proof of the value of a human life is not possible, but reasonable compensation is left

to you at your sound discretion and judgment

Damages in a wrongful death include enormous pecuniary loss, but there is no pecuniary loss in this case, is it, Mr Parker?

MR PARKER Well, there is the funeral bills

THE COURT Well, I'm talking about --

MR PARKER No lost wages

THE COURT Right We talk about mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, loss of the use and company of the deceased s society including the loss of the deceased s experience, knowledge, judgment in managing the affairs of the deceased's beneficiaries, and, obviously, in the survival action then it would include any reasonable and necessary medical expenses, funeral expenses and any pain and suffering sustained by -- any conscious pain and suffering sustained by the decedent prior to his death, and that's, basically, where I am going with it

MRS MCLEOD Your Honor, we would also like to -- Could you look at our number 28 and 38?

THE COURT Your number 28 and 38? Now, which one? The one you just handed me

MRS MCLEOD The one I just handed you, Judge Number 38 is an addition

THE COURT That says, 38, It is unlawful for a

motorist to stop her vehicle on any railroad track except when necessary to avoid contact with another vehicle or at the direction of a police officer or traffic -- official traffic control device 56-5 What is 2537?

MRS MCLEOD Your Honor, I've got a copy of it, I believe

THE COURT I bet I got one right here

THE COURT 2530?

MRS MCLEOD Yes, sir

THE COURT Mr Parker?

MR PARKER Your Honor, we would think that would apply not in a situation like we have here where somebody voluntarily and under circumstances -- I don't know -- we've got a conflicting testimony as to whether she stopped or didn't stop but in any event through all of the testimony she did stop It would be because there was conditions present which would indicate that there is no question but that she was not unreasonably stopping There is no evidence whatsoever to charge that statute

This statute is intended where someone -- normal traffic stops on the railroad grade crossing We don't think it's applicable I wasn't aware of that or we would have done a little more work on it

THE COURT I'll let you work on it between now and in the morning, but it says what it says It says -- I

don't see where it's been changed Except when necessary to avoid conflict with other traffic or in compliance with law or the directions of a police officer or official control device no person shall stop, stand, or park a vehicle on any railroad tracks, and there is evidence from the conductor -- Strike that -- from the engineer trainee and the engineer that she pulled up and stopped on the track

MRS MCLEOD And the conductor, Judge

THE COURT Ma'am?

MRS MCLEOD It was --

THE COURT And the conductor?

MRS MCLEOD Yes, sir

THE COURT I'll let you look at that over the evening

MR PARKER We'll look at it overnight, Judge

THE COURT We'll address it in the morning

MRS MCLEOD And then 28, Judge, our charge 28

THE COURT The employees of a railroad have the right to assume that a motorist approaching a crossing in the face of an oncoming train will use her senses of sight and hearing The railroad is not required to slack in speed upon seeing a person approaching on the assumption that the driver driving -- in the face of an oncoming train You cite a 1943 to 1968 case

Well, like I told Mr Parker on some of his that got sort of fact specific I probably will not charge that I am going to charge that she has the statutory and common law duty to maintain a proper lookout Obviously, that means you got to look and hear Y'all can argue that

MR WILBY Thank you, Judge

THE COURT What else can I help anyone with?

MR PARKER We have -- I neglected on two exhibits that we started to take them up The exhibit 108-A, do y'all have any objection to that?

MR WILBY Both of these are from Gary Wolf, Your Honor, who didn't testify We withdrew our exhibits for Mr Wolf Johnny did ask Dr Scott about these, but we would object on that basis, Your Honor

MR PARKER This is the document that Mr Scott -- that Mr Wolf prepared that it was displayed to the jury

THE COURT I'll allow it

MRS MCLEOD What exhibit number?

MR PARKER 108-A And 108-B is -- Mr Scott testified about Mr Wolf's stopping distances and his They coincided with each other and we would now like to introduce the Plaintiff's Exhibit 108, Mr Wolf's work that coincided with Mr Scott's testimony

MR WILBY Judge, the -- I think the record is closed, but -- maybe I am wrong about that, but in any

event --

THE COURT Well I told y'all you could come back after the charges

MR WILBY -- same objection to that document

THE COURT Overruled I'll allow it

MR PARKER That's all we have, Your Honor

THE COURT All right Y'all have watched the jury all week So have I I am not going to do like -- Strike that How much time do you think you need in arguing -- but I am not going to sit here and start tapping on the desk when it gets to be that time, but just give me some guestimate

MR PARKER Your Honor, we will try to keep ours around an hour and 15 minutes, somewhere thereabouts with Mr Murdaugh and myself It won't -- we'll try not to go any longer than that

THE COURT I understand Y'all are good lawyers Y'all watched the jury all week They smile when I say things are speeding up They frowned when we took a little longer, but I let y'all make that call I'm not going to beat on the desk unless you really start going over

Who is going to do y'all's?

MR WILBY Mr Harmon will and, you know, it won't be -- it'll be an hour or less, Judge, I know

THE COURT Anything I can do for y'all before the evening?

MR WILBY One last thing, Johnny, did you get to look at those redaction issues I had on that document?

MR PARKER Yes, and we --

THE COURT Y'all look at those and just get with me

MR PARKER We'll get with you

(Whereupon, the attorneys conferred)

(Whereupon, the proceedings were concluded for the day and were reconvened on November 17, 2009 as follows)

THE COURT Let's put on the record the first thing we need to do this morning In light of the revelation to me yesterday that juror number 122 was an active client of Mr Chandler

MR PARKER Steve Chandler

THE COURT Even though Mr Chandler was with us all week in the courtroom and didn't advise me of that fact I felt compelled after it was brought to my attention yesterday that I had no choice but I will dismiss her this morning from the jury panel That left us four alternates to choose from In chambers the railroad expressed a concern about juror number 57 Ms Green as a person who had -- was smoking in the presence of Ms ~Harvey during the first of the week and in chambers asked in the

remember, that is simply argument You've heard the facts and you will make your decision from the facts as you find them to be and then you take those facts and apply it to the law that I will charge or instruct you after the lawyers make their opening -- Strike that -- their closing arguments

Now, if at any time during the arguments you become uncomfortable or you need a bathroom break, raise your hand and we'll stop Okay

Mr Parker?

MR PARKER Thank you, Your Honor

THE COURT Mr Bailiffs, do not -- can y'all hear me? Can y'all hear? I know that's sometimes questionable Do not let anybody in or out

CLOSING STATEMENT

MR PARKER Madam forelady, ladies and gentlemen, it's a pleasure to be finishing this case with you It s really a pleasure for us to have represented the Harvey family who we have with us about this case It is a tragic, tragic case It is particularly tragic when somebody dies that probably shouldn't have and anytime a loss of life is involved that's the ultimate punishment that we can give out and the ultimate bad thing that can almost happen to us

It may be some few things that we can think of are

worse, but it would be very few of them, and the wonderful thing about being here -- but before I do that, I want to thank you on behalf of myself and the lawyers and the Harvey family for sitting on this case because under our system of justice the Harveys can come up against CSX Railroad, a powerful corporation, and they're equal under the law They are -- We have the same justice that they have and we're able to present this case to 12 people to get a verdict based upon the evidence that has been presented in court and that we can weigh that evidence and decide who should prevail in this case and who should not

I think there is one principal that I think we could all agree on in this case, and that is that it's absolutely wrong to choose money over lives It is absolutely wrong not to do what you have committed to do because you want to make more money I don't think anybody would disagree with that I think that is a universal truth that we all believe that we should do what we should do to protect the public and we should do it not in regards to what it's going to cost us or in regards to how much money we are going to have to spend because there's just absolutely -- human life is priceless and our safety as the public is priceless

Now, in this case -- and I am going to show you the documents and go through them I am going to go through a

lot of evidence I'll try to do it right fast and do it as quickly as I can, but in this case there is no doubt and we're going to prove beyond a doubt that CSX made a commitment to the public to clear Honey Ford Road, the crossing there, for 950 feet prior to May 30, 2004, and we're going to prove and have proved beyond -- they just didn't do it, and we're going to prove some evidence about why they didn't do it and what was going on here that caused them not to do what they made a public commitment to do

Now, all of us have duties, and this case is about duties Involved in this case is Ms ~Harvey who was driving She has certain duties and CSX, the railroad, represented by Mr Harmon and these fine gentlemen have duties, and those duties are what's involved in this case

Now, what are the duties of CSX? CSX has a duty to -- number one the train crew to keep a proper lookout They have a duty to sound the horn at 1500 feet required by law Section 58-15-910 provides they have to sound the horn at 1500 feet and blow it through the crossing That is their duty They admitted in this case in opening statement Mr Harmon admitted that they did not blow the horn in accordance with the law They failed to do so, and that breach of that duty then goes to the next level to decide whether or not that had anything to do with this

collision, and we will talk about that

The other duty that CSX has is to provide a safe crossing and that is their duty Now, how do you decide what they had to do to provide a safe crossing? And I think that it's very easy to do that because they have said themselves what they had to do to provide a safe crossing We didn't say this They said it They didn't keep the commitment but they said what they had to do to provide a safe crossing

I want to put up a slide because I think it sort of puts this in perspective about some things that I don't think anybody can question The railroad had notice of this, and this is a note that Dr Heathington published during his deposition and that is that no rational person could question the need to maintain sight distance by keeping the railroad rights-of-way free from obstructing vegetation This is from the administrative -- FRA to the US Department of Transportation and there is no question about that In order to be safe, you've got to see the train or you've got to hear the train You can't avoid the train unless you can hear the train or see the train

Now, let's go to the next slide Now, what did CSX know about hearing the train? They knew as Dr Lipscomb testified that the motorist s ability to hear an audible signal is interfered or impaired by the operating vehicle,

by closed windows, air conditioning, those kinds of things, therefore, an audible signal system may be desirable or even necessary It should be considered as a supplemental system So, what we know and what CSX s expert has known for a long, long time is that train horns are difficult to hear because of tight vehicles and that just accentuates their duty to provide a safe crossing by clearing the sight distance

Now, they did not do that here, and we got to ask ourselves and you ask yourselves why didn't they do that I want to talk with you a bit about that because here's where they chose money over safety, and let's go to Exhibit 74 and blow that up, if you will Exhibit 74 which is in evidence that you'll have back there is between high-level CSX employees It states, As you all know there isn t enough money to cut and kill all the brush and trees along our right-of-way even on a three-year cycle, therefore, we need to develop other methods to attempt to correct and control our problem with vegetation

So, they recognized clearly there is a problem with vegetation on their rights-of-way and they recognized they're not allocating sufficient funds to do that With that recognition, they've done certain things all of which I will show you have been driven by the fact that they

have decided to choose money over safety and money over lives

Let's next go to Exhibit 81 Exhibit 81 is if you'll remember is a document whereby they're talking about the logging program and what they decided they were going to do where they could get the crossings cleared without spending money they were going to get loggers to come in and they were going to give them the timber to get the rights-of-way cleared without spending anything It won't cost us anything and we'll get it done and the purpose of it -- The purpose of this program is primarily to improve railroad safety by reducing sight restrictions and that is what it's for

Let's go to the second page of that Now, this document is dated September 2001 Go to the second page The problem Let's go to the purpose The purpose is to primarily improve railroad safety by reducing sight restrictions Problem Trees and brush on CSX's right-of-way interfere with the train sight and the sight of the motoring public at crossings Clearly, they're looking at this and saying, you know, we are not providing adequate sight distance They know they're not providing adequate sight distance, but they're trying to come up with a method to do this without spending any money so that they can provide safety without spending money

And then let's look at the second down where it says that moreover trees can fall and so forth and injure people increasing the company's risk and so forth and other liability, and what that tells us is they know if they don't clear the rights-of-way they should be liable for not providing adequate sight distance What did they do?

Let's go to Exhibit 78 Exhibit 78 is where they decided, well, there is a lot of pressure on doing something There is a lot of pressure on making a safe crossing so what they decided -- first decided that they would be cutting all crossings from 300 feet on either side of the crossing unless the state requires more for the full length of the right-of-way not to exceed 100 feet and they are going to start this in either South Carolina, Georgia -- the southern states you ll see there This was going to apply to all grade crossings across their system which was a lot of them

Now, this is a very important point that I am going to point out to you and I'll come back to it in a minute It says, Safety, quality, and price The bitterness of poor quality remains long after the sweetness of low price is forgotten In other words, they know that they should not pick necessarily the cheapest price because that may lead to problems down the road Let's see what they did

and we'll come back to that in a minute and I want you to remember that comment because it ties in to what they eventually did

Let's next go to Exhibit 87 Now, Exhibit 87 is a document whereby high level CSX employees discuss what s going to be -- that they're going to be doing -- and let's blow up the first paragraphs It says, CSXT is about to launch a system-wide program -- and this is May of 2002 -- to clear-cut and control trees and vegetation at public grade crossings equipped with passive warning devices -- that s crossbucks This program involves clearing land at designated passive crossings to improve visibility for the motoring public It is anticipated that the subsequent growth of vegetation in the cleared area will be controlled through the application of chemical spray CSXT will employ an outside contractor, DeAngelo Brothers, to perform the work in accordance with program specifications The area cleared at each crossing will depend upon right-of-way width and maximum authorized track speed except where the law requires greater amounts of vegetation to be cleared at crossings or requires additional crossings to be cleared, and the distances that they first adopted and committed to doing was 300 feet for 30 miles an hour, 600 feet for 30 to 60, and 900 feet for greater than 60 The track here involved is a

79-mile-per-hour track, and, therefore, it required 900 feet May of 2002 they committed to clearing Honey Ford Road for at least 900 feet They did not do it

Now, they did -- it is apparent that they went in sometime in probably 2001 from the evidence and they did some limited clearing at that crossing, but what they did is they committed to maintain it by spraying it They didn't keep the vegetation down as they said they would do and as they committed to do

Next, let's look at Exhibit 84 Now, Exhibit 84 shows that they had a program and they are doing this that we're talking about in this May of 2002 document that they are concerned about safety at highway railroad grade crossings and that they're going to develop plans to reduce exposure and that is exposure to a liability as they said in the other documents because they know if they kill people and they don't do this they should be liable, and they are going to complete the southern half of the system in 2002 and they're going to complete the project under budget

So, here we see again it is cropping up that the money is very important -- and there is nothing wrong with doing things as cheap as you can do them as long as you do the job There is absolutely nothing wrong with saving money if you fulfill your duty to provide a safe crossing

Next page Now, what we know is that from this it says if you'll look at the last line under Analysis, South Carolina partially completed in 2001 with different spec, problem with contractor This is where this ties back in to Exhibit 78 What they did -- and I am going to put up -- now put up our next exhibit which is Exhibit 86 and if you'll look at this what they did is they received bids to clear the crossings 100, 300, no more than 4 inches high, and you'll see that down there, 4 by 100 by 300, 4 inches Cut the vegetation down to 4 inches by 100 by 300 It says, The South Carolina pilot project involves 641 crossings The bids were received from six bidders ranging from 437, 682 per crossing, to 1395 Elimination of the high and low bids results in an average bid of $1525 What they did is they took the 682

Even though they recognize that the bitterness of poor quality remains long after the sweetness of low price they decided that they would go in and go on the cheap when they knew -- they absolutely knew that they would not -- this contractor would not be able to complete this contract under these circumstances, but I guess that they could not resist choosing money over lives

They -- 80 They then decided that they would go to 950 and if you'll look at -- this is a C crossing They then changed their program to go for distance of 100 feet

and down to 950 located at 28 feet from the center line at 950 This was how they changed the program By doing this they reduced the area to be cleared by about one-third and, of course, it would be more economical to do it this way, but they did not do that in this case

Now, as I spoke with you earlier about CSX made some commitments in this case and they made commitments because it's their duty to provide a safe crossing They have the duty to do this They can get DeAngelo Brothers They can get local people They can get anybody they want to do this, but the one thing they have to do is make sure they fulfill that duty and they have to get people that are going to fulfill the contracts and do what they re supposed to do

Now, blow this up, if you will -- 91 This is a meeting between DBI, DeAngelo Brothers, and CSX and what they're looking at here is what to do about this project This is April 9 of 2003 and they're looking at this and what's being done about providing a safe crossing and they say and in this meeting discuss this is a time sensitive project They knew it was time sensitive because people would get killed if you didn't clear the crossing If you can't see the train coming because of poor sight distance and we know you can't hear the train good, you can't avoid the train

In order to avoid the train the motoring public has to be able to plainly see the train and they have to be able to hear the train or hear it and we know they can't hear it so, therefore, it is imperative that you be provided a safe sight distance, and they say concerns over deadline are related to, one, this is a major safety initiative Do you think for a minute given these documents if CSX didn't know people were going to get killed by not doing this that they would have spent this money to do it and then once they decided to spend the money they couldn't carry it out and didn't carry it out and there is a reason they didn't carry it out and I'll talk with you about that in just a second and the concerns over the deadline are related to major safety initiative, public commitment statements made to the public They committed to the public to do this -- three, commitment to the board to complete the system by 12/31/03 They committed to the Board of Directors of CSX Corporation that this would be done by 12/31/03

Here is the real driving force and what I want to talk with you about and they're going to get up and say we shouldn't be responsible for this Look what they said then We need to avoid liability and legal expenses Why do they need to avoid liability and legal expenses? Because if they don't provide a safe sight distance

they're going to kill people and they sit right there and know this, yet at Honey Ford crossing they refused to and didn't do it and they didn't do it over months when they knew it should be done and they allowed this vegetation to grow up and when they did it but for the grace of God it almost killed four people out there They did kill one They almost killed four

You'll remember the testimony of Mr Tyler, fine gentleman from out there He said he barely made it He got through a couple of months prior to that He stopped like he thought he was supposed to and he knew he was supposed to He looked both ways He went He was almost hit He said he missed it just by a second or so And why did that happen? Is Mr Tyler doing something wrong? No He is doing exactly what he's supposed to do out there

Mr James Johnson very nice gentleman from out there on Honey Ford Road He almost got killed -- barely missed him Mr Dwayne Johnson almost got killed, and Lavern Battle, fine lady, came all the way from Atlanta to tell you about her experiences about what happened out there

Now, these people, you know, they are what all of us do They ride the road They try to do what they're supposed to, and they look, and, you know, you look both ways and that's what you re supposed to do Look left,

look right or right or left, but you have to look for trains and that's what you should do You should look for trains, and you should decide to do things in the right way, and I am going to talk to you about the driver's duties in just a minute, but I want to go on about the crossing and what happened out there and what we know about it

Now, let's go now to Exhibit 103 This is an exhibit that you'll have in the jury room What it shows is that now -- this goes back to the bitterness of poor quality and the sweetness of low price 350 -- excuse me To clear for 350, a little more than the 300 feet, the price for doing that is 2,669 Now, what did CSX do when they contracted with the incompetent contractor in 2001 to do the crossing? They took a figure of some $600 which was about, you know, reducing it a little bit about a fourth of what you could do it for So they knew it wasn't going to get done right There is no question about it

Now, let's go to the next part of this exhibit and what it shows is that this crossing was cleared for 950 feet on October 31, 2003 What do we know about that? We know that wasn't done CSX knew it wasn't done The one document you don't have in here is where they paid DeAngelo Brothers to do it because they didn't because they didn't do it and CSX knew they hadn't done it Even

though their document showed they had done it, they hadn't done it CSX knew that They were aware of it, and again, let s see why CSX didn't go out and do it

Let's look at Exhibit 85 Exhibit 85 is a letter that CSX wrote to a number of union employees -- union people -- high-up union people about their need to contract out this job of clearing the rights-of-ways and cutting them and in this what they say is that this letter is a notification of carrier's intent to contract the initial clearing of each side of the various public crossings located on the southern region -- that's where we are -- and this new project involves and they go through the project which we talked about to improve visibility for the motoring public The contractor will control future growth of the cleared areas by clearing them with a chemical spray They're supposed to keep them cleared and the proposed start date is approximately March 22, 2002

Next page Contracting of this work is necessary It requires specialized equipment that CSXT currently does not own or operate The equipment must be provided by a contractor, and they go through and name the type of equipment It says the large capital expenditure needed to purchase this equipment cannot be financially justified since this equipment will be needed only to clear the land

initially Thereafter, the growth will be controlled by spraying and subsequent brush cutting The equipment is not readily available because of some of the design and it says and the fact that CSXT does not have trained people to operate the equipment properly and safely Furthermore, it is not feasible for CSXT to train its employees given the months of training and daily operations needed to become qualified Additionally, CSXT forces do not have the required certification, license, or training to handle and apply herbicides

So, what we see here is again the same thing that I started with and that is they're not doing and fulfilling their duty because they don't want to spend the money They don't want to spend the money to clear these crossings They made a commitment to do this by December 31 of '03 and if that had been done we would not be here today We would not be before you because the crossing would have been cleared as it was supposed to have been cleared

CSX then extended this deadline for their contractor who they're responsible for to do it Let's go to exhibit 100 You'll have that exhibit and all it does is shows the millions of dollars that CSX didn't want to spend to obtain the equipment and train the people necessary to do the job Exhibit 100 is a document which

shows that DeAngelo Brothers was granted until March 15 to be able to clear the crossings in South Carolina and they did not do it CSX knew they weren't doing it

Exhibit 101-A talks about they have 15 -- second paragraph This is a result of a meeting they had on February 23 It says that they are adding people because we have 15 mechanical crews working on correcting crossings that were deemed noncompliant in the southeast Honey Ford Road was noncompliant

Go back down to one, two, three, fourth crossing -- fourth paragraph, excuse me As we discussed earlier this week DeAngelo Brothers is 100 percent committed to correcting these deficient crossings as soon as possible and they're committing all resources to meet the 3/15/04 deadline

Go down a little bit further, if you will Okay Down at the bottom paragraph When we met you stated DeAngelo Brothers has consistently missed deadlines on the clearing contract I agree with this statement in regards to work in the southeast

Let's go to the next page Down at the bottom of the page, We understand We understand that we have missed deadlines in the southeast and are willing to amend our contract -- cutting contract to assess liquidated damages if future deadlines are missed These types of penalties

are common in our industry and we see no reason why this approach would not be considered more favorable to CSX, and what this says and you'll have it back there, but what it says is that if DeAngelo Brothers doesn't meet the deadline CSX is going to get money -- $25,000 -- for their failure to do it

So, rather than getting the job done and providing a safe crossing they are talking about negotiating where they would make money to be able to -- I guess rather than doing what they should, they are looking at this approach to it In other words, they didn't provide a safe crossing at Honey Ford Road and they're looking at they're going to be paid -- and you'll have that document, you can look at it -- for not doing so

Let's next go to Exhibit 69 Exhibit 69 is a sight distance chart It is in the Federal Railroad Grade Crossing Handbook and what this shows us here is the sight distance you need at a railroad crossing to be able to see and avoid a train As Dr Heathington testified about this was a 79-mile-an-hour track speed and you know that long vehicles such as tractor trailers use this crossing So, you know what you got to do to make the crossing safe

CSX knows about -- all about this They know what they have to do to make it safe, and we know they know it because they said they were going to do it They just

didn't do it Let's look at 0 miles per hour and if we go down to 80 they should have provided a sight distance of 1920 feet They did not do it The uncontroverted evidence in this case is they provided an unobstructed sight distance in the southeast quadrant for only 650 feet You could see the train a little farther than that, but if you stopped at 10 feet back from the stop line that sight distance that was provided unobstructed was 650 feet

Now, Dr Heathington -- he went out and looked at this crossing, looked at the pictures, and he made an assessment of the sight distance available in all of the quadrants, and if you'll look on 70-A-1 when you get back there every one of these quadrants were deficient They had sight distance problems in every quadrant

Mr Tyler almost got hit also in the other quadrant going the opposite way because -- you'll see the photographs -- vegetation was grown up over there and they knew that They again put people at risk You'll see the photographs over there doesn't look like they cleared anything in that quadrant where Mr Tyler almost got hit on another occasion, and if you'll look at the deficient -- the deficient sight distance in there they are really abhorrent and some of this has to do with this being a skewed crossing where you really have to look back to see

and have to turn your head You can't see because it's at an angle, and you have to really turn as we'll talk about in just a moment

Let's look at Plaintiff's Exhibit 32, and this is what Ms ~Harvey -- essentially, what she would have seen as she approached the crossing that day and stopped where she said she stopped There is a wall of vegetation out there and it limits how far you can see, and somewhere in there you can get a clear view of a train at about 650 feet You can see it farther than that, but you need to be able to get a clear view of it because you might or might not see it There is no doubt that you can see a little farther than that in there, but what we know -- what do we know about this vegetation? We know for a fact that this vegetation violates what CSX committed to the public to do, and there will be no dispute about that it does in fact, violate the -- what they said they were going to do

We introduced Plaintiff's Exhibit 64 and what we have here is Mr Crews -- and nobody's contested this or said he didn't do it right He went out and measured where this vegetation was in regards to their crossing clearing program If you'll look through this you'll see that the vegetation there down that track is 5 to 6 feet high, 30 feet from the track on an embankment that's 5 to 6 feet

high So, you're going up 12 feet or so, the vegetation, from where the ground level at the crossing and this is obstructing vegetation and it goes down and it's 22 feet Things are coming in there 392 feet You got the start of 40 to 50-foot trees in that area that was supposed to be cleared and right on down they just did not do it They neglected to do what they said was a major public safety initiative that was needed to avoid liability and save lives They neglected to do it

Now, as Ms ~Harvey approached that crossing that day she did what Mr Tyler, Mr Johnson -- the two Mr Johnsons -- and Mrs Battle said she did -- They did She looked left, liked right, and then went, proceeded ahead Once you proceed ahead and they -- I'm sure they're going to argue, well, if she -- they questioned witnesses, well, if you look left she would have been able to see it, but you know you might have got hit from the right because, you know, they don't make two-lane railroads They only have one lane Traffic goes both ways You know, you go up to a stop sign and you know you can look left because the traffic is going to approach in the right lane Railroad doesn't have two lines It only has one so you don't know You can't be looking back and forth, looking back and forth because you're going to wreck going across the crossing That's why you have to

have safe sight distance That's why they have to provide what they said they were going to provide in which they didn't do

Now, I want to go over the animation with you and look at what we contend happened out there that day and I think is a fair representation of what happened out there that day We need the lights out

(Whereupon, the animation video is played)

MR PARKER Here we're going to see a vehicle, Ms ~Harvey, approaching the crossing She testified she stopped She looks left You see the brush there She looks back to the right Now remember that skewed angle She has to look way back to make sure there is nothing coming She proceeds and she's hit

(Whereupon, the animation video ends)

This is what almost happened to Mr Tyler, Mr Johnson, Mr Johnson, and Mrs Battle But for the grace of God, this same thing may have happened to them because of this sight distance obstruction

Now, what we know about this animation -- and I'll talk with you in a minute -- it matches up with not what anybody says but what the event recorder on the train shows The event recorder tells us a lot out there about what happened, but before we do that I want to look at the animation that their expert -- CSX's expert that they

didn't call as a witness -- says about what you can see and what you can't see

THE COURT Lower the lights again

MR PARKER Is that as big as you can -- There we go

(Whereupon, the animation video is played)

MR PARKER Now what we see here is we're right at 24 seconds They are very close now Hold on a minute and I want to point something out to you The reason there was a lot of criticism and a lot of asking about the animation and distances and there is two things different in our animation and their animation Their animation what they've done is cut a picture in half and put the train in there and sort of put it back together There are two things different about that

Over on the right they took this picture This is a picture that was taken online with the picture that our investigator Mr Crews took that was with the bumper of the vehicle right at the stop line up to it making a stop -- I mean, it's not a good stop particularly It s just a stop you can make, but this is where you have the 1014 feet that you can see As you go back Ms ~Harvey was stopped about 3 feet back The sight distance gets much more obstructed because those brush get in your line of sight

Now, let me tell you a little about sight distance and I think that y'all have probably learned this You probably didn't know it and I think it will probably serve you well and that is we don't think about as ordinary drivers we don't know that 1 mile per hour is 1 47 seconds -- that that is what time it takes you to travel that distance You can convert it into feet per second, and we don't know that at 60 miles an hour you're traveling 88 feet per second, but if you know that then you could judge your distance and calculate all this We don't know that, but what we try to do is use, you know, do we have enough sight distance?

Now, the railroad knows all of this and the railroad has traffic engineers that look at all of this The railroad in this case had a traffic engineer that looked at this He didn't testify The reason, of course, is because he couldn't contest what we're putting up there or they would have called him as a witness They did have an animator, also, who didn't testify and he looked at this and he's an expert in photogrammetry and he did this work showing what you can see, and the reason I want to put this up is because it shows you how closely these two animations are consistent with each other except for one thing -- the photograph to the right you are 3 feet closer than Ms ~Harvey would have been where she stopped that day

when she cleared that post and you really shouldn't have to be required to get right on the line to have a safe sight distance

The railroad knows that if they do that people are going to be killed because they know that the stop line disappears as you approach it In this case it disappears at about 16 feet So, you sort of don't know where you are in relation to that stop sign Should people be killed because they don't get right on the stop line? We submit they shouldn't be -- that them knowing -- the railroad knowing what they know, they should provide you with that safe sight distance

Now let's go through it and play them side by side and we'll stop sometime Now the horn up top is on when it lights up Hold on right there You've seen for several seconds there no horn The law requires that the horn be blown for the 1500 feet It's not on Keep going All right It comes on Stop it right there

Now, they've criticized our animation and said that it was terrible The only difference in these animations is that the one on the right they did goes in whole seconds The one on the left goes in parts of seconds so they don't add up just exactly on it, but they're within a foot like there I think it's 590 and 589 So they're very, very consistent with each other and when you re

doing work like this that's what you get

The vegetation in their animation according to Mr Huett is actually one foot closer than what he did in this animation Let's go forward It came back on Back it up to where it came on All right Seven seconds the horn comes back on In the animation what we know is we know at 8 seconds she started to move We know that the engineer had to have some reaction time, and there's been a lot of testimony about that that 2 5 seconds is used at railroad grade crossings for reaction time He probably had a little quicker reaction time and what we know is from this -- and I'll talk with you and go over the event recorder with you What we know is that sometime prior to that he saw the car moving He reacted, and he started his last blow, and that's really his testimony in the case by deposition and everybody's testimony

So he at that time is getting right up on the crossing at that time Mr Spell -- what we know about him, the witness, is -- and I'll go over the event recorder with you -- we know that he heard two blows and then the last blow right at the crossing Let's run this on down And by the time it gets there they are almost identical down to the second and the feet, but the reason we did this is because there was a lot of criticism about the animation and things about it and they have their own

people who did like work

Now, let's look at Exhibit 50

THE COURT Turn the lights on

MR PARKER All right What we know about this and what this shows is that Ms ~Harvey almost made it across the track The impact was beyond the driver s door and, unfortunately, tragically Beryl was seated behind the driver and that's why he was tragically killed, but the testimony in this case is sort of all over the board about what happened and I want to speak with you just a minute about that because the testimony from Mr Cowan was that Ms ~Harvey paused -- looked like she paused -- say she heard the horn She paused The testimony from Mr Bonner who was not here that the railroad didn't call who was their former employee but read his testimony and Mr Stephens who is, unfortunately, no longer with us was that she stopped and I don't really think their testimony is contradictory of each other We did not have Mr Stephens and Mr Bonner to question them, but I suspect that exactly what Mr Cowan said probably happened -- that there was probably a pause because at the last possible second she may have been alerted by the horn and that's what happened If she had been there a second quicker, got a second over, she would have made it She didn't make it The reason she didn't make it is because

she didn't have a safe sight distance

I want to now go over the event recorder with you, Plaintiff's Exhibit 114 This is the exhibit Mr Scott who was a Road Foreman of Engines with CSX testified about in looking at event recorders and the distance of the whistle post in this case was put up so that by the railroad putting it up wrong the engineer has got to violate the law It's supposed to be at 1500 feet It was put up at 1357 feet That's by survey And if you take that and look at it and let's go through it and we're going to look at the horn, the first horn started 13 47 from the south edge of the crossing They blew the horn for 1 9 seconds They blew the horn for 1 7 seconds They had a 8 1-second gap in there

Do you recall the testimony -- This is unbiased evidence The FRA requires event recorders on locomotives When you have this it doesn't matter what the witness said You can see what happened You don't have to rely on the testimony of Mr Cowan who says they blew two longs, a short, and a long Those are two shorts Those aren't two longs Is a long 1 9 seconds? You can't hardly blow it any shorter Those are two shorts and then they have no horn Then they do a longer If those were longs, why is 3 2 seconds there? Then they have no horn for a tenth of a second Then they have a

fourth horn at 1 6 seconds after that

So, part of that was after impact -- part of that horn We know that from the event recorder and we know that 1 1 seconds of the horn occurred after impact or thereabouts or it may be -- if you take their figure, I think that's 3200 -- I'll go over with you It would be the edge of the crossing, not the exact point of impact The highway there is 16 feet wide So, it would probably be 8 feet closer

Now, let s go to the next -- What else we know about there that we have the emergency brake after impact at 499 feet That's actually after the south edge of the crossing, not after impact using 3200 feet and we've got Exhibit 108 which is their document and you'll have it back there to look at and this is Mr Wolf their other expert they did not call, who did this and those documents are very close There is a little bit of difference Mr Wolf says the impact is 3177 on the crossing We say 3200 is the edge of the crossing Very, very close

Now, I want to go over with you the event recorder which is Exhibit 113 and 113 really tells us a lot about what happened out there that day And what we can see here and you can -- y'all can go back there and do this and figure this out yourself It's a mathematical exercise, but if we look at where the horn started it

started at 4547 and we know it was on for 1 9 seconds We can see that right there Those little ones there, those are one-tenth of a second We talked about that Then we looked to see what is going on There is an 8-second gap in there that totally violates CSX operating rules to do that as Mr Scott testified

Now, when you get -- the interesting thing about this and it tells you and there is an error on 114 It says it went from throttle position six to eight It really went as I read that is throttle position five to eight What does that tell you? What it tells me is that at that time Mr Stephens couldn't tell that Ms ~Harvey was moving or didn't know she was moving Certainly, he is not going to speed up if he saw her moving

So, we need the know then at that point in time how many seconds is that from the crossing and we can look You can do the math Just take 30 If you look down there at about 3200 or 3177, then we know on there he's right at it is 459 there time and we looked at when that's happening and we can tell that over in the column over there that -- let's look and see when he goes to eight It's at 52 and then when he went into emergency is 59 -- Excuse me -- forty-nine About 10 seconds So, we know that at about 10 seconds they hadn't seen her move

Another thing that's interesting about this is they

then after that they have some horn and they have 1 7 seconds of horn You can see that You can count those ones and it's 1 7 seconds Then they did what? They let up off the horn Hadn't seen her move yet If they had seen her move, they wouldn't have let up off the horn I can assure you that these gentlemen would not have done that So, what that tells us is that they saw Ms ~Harvey moving somewhere around eight, nine seconds, maybe a little more than nine seconds prior to her start moving and that's when they saw her move and then they get into the long blast there that lasts up to the crossing

Now, the reason I brought this up is because you'll look -- I am not going to put the animation up again -- and the reason we know that's what happened and it's correct about what happened she started moving in the animation at 8 seconds That's the time it takes for a slow-moving vehicle to get that far So, all of this adds up and proves that, in fact, she looked, she didn't see, she proceeded, and she was hit And all of this is consistent Every bit of it is consistent with what happened and that's why they didn't call Mr Wolf -- their expert on train operations -- because they knew that this was consistent with the testimony that we've put up

Now, the law requires -- and let's put up 58-15-910 58-15-910 requires them to sound the horn for 500 yards

and to keep it ringing or whistling -- they could have a 30-pound bell which there is no evidence they had on there -- until the engine has crossed such highway, street, or travel place, and, so, they have to by law -- their duty is to start at 1500 feet, blow it continuously through the crossing Did not do it Did not do it and these gaps in this horn and the way they blew it is in violation of the law and contributed to Beryl Harvey's death as a proximate cause

Your Honor is going to charge you that the sounding of the horn had to have some involvement in this as the proximate cause and it absolutely the way the horn was blown and the timing and all she did not hear it and we'll never know if they would have blown it correctly, hopefully, we wouldn't have been here

Let's next look at 114-A - 114-A is their rule which is Rule 14-L which tells them how to do it The signal is to begin at the whistle post and be prolonged or repeated until the engine or the train is on the crossing Where multiple crossings -- That doesn't apply, but it's to start at the whistle post, but it's two longs, a short, and a long That's what those cymbals are They violated another part of that law -- that's 14-P -- and that's a succession of warnings to people or animals, and it's amazing to me that the testimony of Mr Cowan who had been

with the railroad 40 years, he said he didn't know that you warn people this way, but you know what belies that? What was the testimony from Mr Stephens, his trainee, who was operating the train? He said he went pop pop, pop If that wasn't the rule, why did he say that?

Now, the event recorder shows they didn't do it, but that's what he said you're supposed to do so he was saying what you're supposed to do I want to talk with you a little bit about the testimony of Mr Cowan and what he says -- most of which, you know -- we really disagree with one thing he said and he testifies -- I don't think -- it doesn't matter what the question was His answer was, We blew the horn properly I think I would ask a question and he'd say, Mr Parker, we blew the horn correctly

Well, that wasn't even the question, one, did you blow the horn correctly, but that was his answer, and he did it several times, and the other answer was it was reaction time I would ask him where was the car? Mr Parker, it was reaction time, and he answered that about four or five times It was unresponsive to the questions Now, you can ask yourself why did he give those answers and why did he say we blew the horn properly when the event recorder clearly shows they didn't and ask yourself that while you're doing your deliberations

I want to now look at certain code sections with you

That is 56-5-2610 -- 2710, excuse me, William We have talked about the railroad's duties and we want to talk to you a little bit about motorists have duties, also They have a duty to keep the proper lookout and keep the vehicle under control and they have to abide by the traffic laws This is what the traffic laws provide One section says, Whenever any person driving a vehicle approaches a railroad grade crossing under any circumstances stated in the section the driver of the vehicle shall stop within 50 feet, but not less than 15 feet Ms ~Harvey stopped in the legal distance -- 15 to 50 feet Her front bumper was about 35 feet within the distance required by law and it says this foregoing -- and shall not proceed until he can do so safely The foregoing requirements shall apply when a railroad -- and that should say train -- William, you made an error there -- approaching within approximately 1500 feet of the highway crossing emits a signal audible from such distance and the train by reason of its speed or nearness of the crossing is an immediate hazard

In other words, the law requires two things It requires you to look for a train -- make a reasonable look -- and it requires the railroad to do two things It requires the railroad to emit an audible signal that you can hear from 1500 feet, and it requires also that an

approaching train is plainly visible and in hazardous proximity to crossing In order to know that you have to know and be able to see this train and they knew this That's why they adopted this program that they didn't live up to

Next Another section of the law --

THE COURT Take that down Take that down Take that down Mr Parker

MR PARKER I will --

THE COURT Thank you

MR PARKER -- ask you to -- let me just tell you about it His Honor will charge you that That code section says the same thing except it says when it's a stop sign The stop sign says even if there is a stop sign you're to stop within 15, no more than 50 feet from the crossing Ms ~Harvey did that Her duty was to look, listen, and do the things that you have to do to protect yourself and to protect Beryl Harvey

Let me tell you something If you think for one second that Frances Harvey would not have protected Beryl who she loved more than life itself by being reasonable, we do not believe that to be the case and we don't believe the evidence proves that What it proves is, in fact that she did look, she did listen, she couldn't hear because of the insertion of the sound in the vehicle which

is -- the difference between her and Mr Spell his vehicle was open He didn't hear but two short blasts and he heard the last blast His window was down

Dr Lipscomb testified in detail about why that happens, why you can hear it with window down, why you can't hear it with the window up That is certainly a known thing and we put up there in the slide it's known to the railroad that that, in fact, is the case and how else do we know it's the case? Mr Tyler, the two Mr Johnsons, Mrs Battle never heard the train right to the last second -- heard it at the last second and were luckily able to avoid it So, that's five people out there at this crossing within a short period of time that didn't hear the train and the reason is -- and we don't know whether they blew it on all of those occasions or not, but we know they didn't hear it and that is an explanation for why they didn't hear it

Now, Ms ~Harvey -- and we believe the defense will argue that she was negligent in some fashion, that she did not do what she was supposed to do and contributed as a proximate cause to this collision We don't believe she did, and you're going to have on your jury form when you fill it out back there there is going to be a place for you to put percentages of negligence You compare the railroad's, if any, to Ms ~Harvey's, if any, and you do

what's called a comparative form You compare it to 100 percent between the two of them

They are going to ask you to put a figure in there that I'm sure is going to be more than 50 percent If the comparative negligence is more than 50 percent, then in this particular case the Harvey family will not receive a verdict if you decide they're entitled to one So in your consideration you weigh the relative faults here, if any If you think something was on Ms ~Harvey, then you weigh that, and then you weigh the conduct of CSX in looking at this crossing safety and to save money and not doing what the law required them to do to provide a safe crossing

Now, they contend and are probably going to contend that Mrs Harvey was somewhere -- I believe that Mr Stephens in his testimony said he thought she stopped at the stop line -- stop sign, excuse me I didn't mean the misquote it, but if you think about it he's going down traveling to that crossing at 46 -- well, started out 48 and went down to 46 miles per hour and the stop sign is looking to the side of him and for him to make a judgment going at that speed and at that time of exactly what happened I would say is fairly close and very difficult and you should weigh his testimony with that in mind, but let's look at what the railroad did in this case and let s

look at Plaintiff's Exhibit 161 and you're going to have this in the jury room with you

Now, what this is is a survey that the railroad commissioned prior to June 18, 2004, was done on 2004 and they put two vehicles on this survey They put Ms ~Harvey's vehicle which would be the one at the top of the picture and they put Mr Spell's vehicle You ll see it down at the bottom Now, they put Ms ~Harvey's vehicle as we've measured it on the survey at about 6 feet behind the line approximately where she testified she was when she cleared the pole The other side they put Mr Spell's vehicle They put it at a different place

Now ask yourself how did the surveyor get this information other than from CSX and other from Mr Stephens or Mr Cowan or Mr Bonner? The only way they can place those vehicles on this survey is someone with CSX put them there The only explanation I can think of is they are going to get up here -- and you question this and listen to it -- and say, well the surveyor just must have put them on there and I promise you that that did not occur and you look at that and listen to that and you think about it

Now, the other part of this case is damages and Mr Murdaugh is going to get up here and talk with you about that and the impact that this terrible tragedy has

had on the family -- on the Harvey family, on Frances, and what we really here about whether or not CSX is going to be held to their commitments, whether or not they're going to be held liable for not fulfilling their duty as they said they would be if they didn't, and whether or not we're going to require CSX, a railroad corporation, to do what's necessary as they committed to do for public safety, or are we going to require them to live up to the commitments that they made to the public including all of you, including the Harvey family, and had they did that we would not be here today dealing with this tragic death Thank you

Mr Murdaugh?

THE COURT Everybody okay over there? Mr Murdaugh is not going to be as long as Mr Parker

MR MURDAUGH No

THE COURT Of course, Mr Parker has covered more of the case The damage portion -- Just let me know Everybody comfortable? All my lawyers okay?

MR MURDAUGH May it please the court

CLOSING STATEMENT

MR MURDAUGH I want to also thank you for allowing us this time to be here with you for this important day for the Harvey family and this important trial this week, and I am going to talk to you a little bit about damages

It's an important part of this case, but we'll try to move through that I know that y'all have been sitting for a while In order to understand the damages in this case we have to understand the loss that this family suffered, and in order to understand the loss that this family suffered, we got to look and understand the life of Beryl Harvey

Bring it up Put a picture of him In -- events and occurrences happen in each of our lives that bring life into perspective That's what happened when Beryl Harvey had his swimming accident when he was 16 years old It brought it into perspective He had a real appreciation He developed a real appreciation and a real zest for life, and it seems to me that after that accident that Beryl recognized -- I am in y'alls way, aren't I? It seems to me that Beryl recognized after that accident that tomorrow is not guaranteed

Now, let's review what some of the testimony has shown in this case After Beryl had his swimming accident he never did say, Why me? He never felt sorry for himself, and he never wanted anybody else to feel sorry for him He loved life He loved to be with other people He loved to tell a good joke You heard Ida Freeman in there talking about he lived life to the fullest

Now, even though he did it with some limitations, he

did live life to the fullest His love of the outdoors that he had as a young boy -- I think you are ahead of, William Let's back up when he was a young boy

The love that he developed of the outdoors as a young boy, that continued with him on into the future and you heard the testimony about loving to go fishing and how he and Frances spent a lot of time fishing and I imagine that it was a sight to see to see Beryl out there with his chair by the bank of a creek or down at the pond with a big red breast on the line pulling it in hollering for Frances to come help him get it off the hook

We heard and saw all of the pictures about how Beryl loved his Gamecocks -- the Gamecocks and the Miami Dolphins, and as I watched the second half of the football game -- the Carolina football game this Saturday night -- I thought of how proud Beryl would be of his Gamecocks if he was at that game in his jersey or at his house with his flag flying -- how proud he would be of his Gamecocks playing hard against the number one team in the nation

Now, the swimming accident that we talked about and that effect it had on Beryl, it didn't just affect him It affected the whole family and you heard that testimony that it brought this family together and they cherished the time they spent with one another They cherished the family cookouts There is a picture of the family

together and they cherished the time that they spent with Beryl, and there was testimony from the children that a ride on uncle Beryl's motorized chair put a smile on many of the nieces and nephews and his family and that relationship with those children was a wonderful relationship

Now, the relationship that developed with the family was even more true with the relationship for Frances As I told you in the opening she became his arms and legs She became a combination of mom, caregiver, and best friend They went everywhere together and they were always together You never saw one without the other Ms ~Frances possessed an ability to be able to assist Beryl with his needs and do things for him without infringing on his dignity or that desire of his not to have things done for him

Now, Beryl was, obviously, a creative and innovative person, and you heard the testimony about the design of a swing set and figuring out those angles and getting that swing set built, and he was creative in the development of that upside down tomato plant that he came up with and this creativity and innovation is evidenced by the design of the implement that he put on his hands so that he could hold that fishing rod or hold a fork to feed himself or hold a pencil so that he could navigate the internet at

his house

I want you to think about what a special character trait that Beryl Harvey had to possess to put a paintbrush in his mouth for the first time and these wonderful pictures that we see show that and he started with the paint-by-numbers as you heard and eventually improved and graduated to painting pictures by himself

Beryl's sense of purpose in his life is evidenced by his desire to be productive He didn't sit around and just let the time idly slip away Beryl was productive Whether that was harvesting his garden or whether that was going to the auctions and purchasing things and selling them at the flea market or whether that was selling peanuts at the Bi-lo, Beryl was always on the move, and I just can only imagine the inspiration that Beryl must have been for the people and that were fortunate enough to know him

Let s remember how throughout this trial we heard how Frances and Beryl were always together We talked about that just a little bit earlier, but you never saw one without the other Now, most of the things that Beryl and Frances did were things that they would both enjoy doing together and things that were enjoyable There were things, though, that Frances had to do for Beryl because of his condition that probably weren't so pleasant in

caring for him and that demonstrates that old adage that you hear about that there is no love like a mother's love, and Frances personifies that That relationship is personified in Frances and Beryl

The natural order of life dictates that children bury their parents, not the other way around Parents aren't supposed to bury their children Now, by not blowing the horn and cutting the vegetation in this case CSX upset the natural order They made Frances live every parent's nightmare by making her bury her child, and not only has Frances had to endure this nightmare, but she had to do it without the benefit of getting to grieve properly because she was in the hospital when they buried Beryl, and we'll talk about that in a minute

Now, the damage in this case are two-fold As the Judge is going to instruct you there is the wrongful death claim and there is the conscious pain and suffering claim or the survival claim and those are two separate distinct claims, and I am going to talk to you about it for a minute Now, wrongful death damages are awarded on behalf of the beneficiary for Beryl's life Okay? And the sole beneficiary under the wrongful death claim in this case is Ms ~Frances Harvey

Now, the damages for the negligent causing of another person's wrongful death include shock, suffering, wounded

feelings, loss of companionship, and His Honor is going to instruct you on all of that and tell you about that The conscious pain and suffering claim is brought on the benefit of the estate It is for the pain and suffering and emotional agony and mental anguish that Beryl suffered out there from the time that train hit that van until he passed away We'll talk about that in just a minute, but the beneficiaries under the conscious pain and suffering claim would be that one-half of that claim would go to Frances Harvey, one-half of that claim would go to Beryl's Dad's estate -- which, he's passed away, so it would go to Beryl's siblings

Now, I want to talk to you about wrong -- the wrongful death damages, and I don't envy your decision I mean, I don't envy what you have to go through to reach this decision All right? And I can't tell you what those damages are, but I will suggest to you that is totally within your province to decide what those damages are, but I will suggest to you a method that if you so choose that you can follow

Now, before we talk about wrongful death I want to talk to you about some of the basic values that we as a society put on everyday life and on human value A couple of days ago thinking about this -- I knew this would come and in figuring out how to talk about this I saw -- my

wife had a People magazine I picked it up and there was a thing in there about a celebrity paying six or $7 million for a house out in Holly wood I looked at ESPN and there was something on there where a guy paid $10 million for a race horse For a race horse

In figuring out how to put this into perspective I thought about -- you remember a couple of years ago where the little girl fell into a well? I think it was out in Texas and the State of Texas spent eight, ten, $12 million saving that little girl's life and they didn't bat an eye They didn't think twice about doing it I thought about the miners that got trapped in the mine out in Utah and they were in the mine for 25 days and the federal government and the State of Utah spent 20, $21 million saving those lives I thought about a fighter pilot who is going up in these high-tech planes that our federal government spends 25 or $30 million for, and what do they teach them to do when there is a problem? They eject and bail out and let that 30 million-dollar plane go No question about it

Now, let's put up that blank damages chart As I told you shock, suffering, wounded feelings, loss of companionship, grief, and sorrow are all elements that are hard to decide A couple of these things -- the damages are easy We know that there is a bill for the funeral

bill and a bill for the headstone and those are easy to figure because there is a bill and there is an amount that they paid, but the others are harder, and let's talk about them for just a second, and His Honor is going to charge you that each of these elements -- each of these things are elements of the damage for which this family has suffered a loss and is entitled to recover, but you have to decide what these damages are You have to put a value on this loss and decide what this inspirational person, this son, and this best friend's life was worth

Now, what is shock? Shock is what Frances felt when she was in that hospital and Gerald came in that room and told her that news This is for that feeling that she got when Gerald told her and she learned that her son was dead How much is it worth for a mom to learn that her son is dead? Again, it is totally within your province You could put a million dollars on that You could put $500 000 You may decide that $600,000 would be an appropriate figure to put on shock

What is suffering? All right This is when this mom and this best friend rides over a railroad track and thinks about Beryl It's for every time she sees a pack of boiled peanuts and thinks about Beryl It is for every time she sees a picture sitting on that shelf in her house and thinks about Beryl It's for Frances Harvey suffering

a broken heart that will never be healed How much is this worth? And, again, totally within your province You could decide it's a million dollars You could decide it's three or $400,000 You may decide that that is $600,000

Wounded feelings Wounded feelings are what we suffer when we lose a loved one It's a natural, basic human emotion, all right? And what this is this is when Frances says that she knew Beryl needed her out there -- despite her injuries, she knew that Beryl needed her out there and she couldn't go to him and she lives with that the rest of her life Like I said, it's a basic human emotion hand she's going to live with it the rest of her life, and, again, you decide what the value to put on that Again, we put $600,000 on that

Loss of companionship And this is another thing Frances is going to suffer for the rest of her life It's not just going to be on Beryl's birthday or holidays or Mother's day, but it's going to be everyday It's going to be every time that she thinks about going fishing or she rides by a flea market or anytime that she does anything that she used to do with Beryl and thinks about him and misses him and misses that companionship that she and Beryl shared together What is that worth? What is that worth to miss that companionship? Again, it's

totally within your province, but we put $600,000 on that, also

Grief and sorrow That one pretty well explains itself All right? And, really, it's all that needs to be said, but what it really is is it's a heartache It is a pain in your chest, an absolute heartache It is losing part of your soul It's losing part of your being You know, the way the grieving process works is that when there is a death and we lose a loved one, we get together with family and close friends and we go and we talk about the good times and share memories and talk about that and then we go and we go to the funeral and we bury them and that process -- that grieving process -- allows us to heal and it allows us to move on and get on with our life, and like I said what she's left with is a heartache that won't heal

She never got to go through that grieving process so when you go back there and you're trying to determine what is a fair value to put on grief and sorrow, you remember that when this family buried Beryl that Frances was laid up in the hospital in Columbia and had to look at the photographs of the funeral and wasn't able to be there And the same thing applies here, but we also put $600,000 on that, and you would then add those up and you may decide that a fair verdict for the wrongful death claim in

this case would be $3 million, plus the funeral bill and the headstone bill

Now, let's talk about conscious pain and suffering We don't have much longer I know you've been sitting a while Again, some parts of this claim are easy to determine We got an EMS bill for $300 That's where they treated Beryl out there on the scene that day and that's -- That's an easy one Now, what is conscious pain and suffering? Again, the title pretty well explains it It is for the conscious pain and suffering that a person endures from a particular time in this case when that train hit that car until they pass away, and it includes both the physical pain and it includes the mental anguish that one suffers during that period

I want to -- Let's put the picture of the van up While we're talking about this I want you to imagine the horror that was in Beryl Harvey's mind when that train ripped into that van behind where he was seated and drug them down that track and threw him over into the bushes I want you to imagine the fear that had to be going through his mind as he was ejected from that vehicle as that van was tossed down that track

What was Beryl thinking when he was laying over in the briars where they showed us where he was? What was he thinking when he was in those briars, his body folded up

from multiple fractures, his liver lacerated, the multiple internal organs -- where his internal organs were beat up? What was going through his mind as he laid in those briars hollering for his mama? Moaning and groaning in pain And that's what you have to decide You have to place a value on that pain that Beryl endured and that fear and that horror from the time that train hit them until the time Beryl died

In thinking about this made me think about that debate that we always hear about death What happens right before you die? Does your life flash before your eyes? Do you know you're dying? When Beryl took his last breath did he know he was dying out there on that railroad track? That's what you have to decide in this conscious pain and suffering claim and you may think that that is worth two or $3 million You may think that's worth four or $500,000 We suggest to you that your method may determine that that would be worth a million dollars We have put that on the board, if that's what you decide, then your verdict for conscious pain and suffering for that time out on that track that Beryl suffered

Just a couple of more seconds I want to point out two things to you When Harmon stood up and came and wrote up on this board he told you at the beginning of this case that there was no doubt about the fact that

Beryl was a loyal member of this community and that this was a loving family who loved him deeply and that they weren't contesting the damages in this case, and I recognized -- I am born and raised right in Hampton I recognize that these numbers -- Let's go to the full screen -- that we put on this board are a lot of money, but when you bring it into perspective and you say to be awarded this that you got to give up your son you got to give up your best friend, and you got to live that way without him for the rest of your life, it brings it into perspective

I thank you so much for your attention during this case I can't tell you -- I don't remember a time when everybody here wasn't paying close attention We ask you to go back in that jury room and deliberate and return a verdict in favor of the Plaintiffs in both cases for wrongful death and for survival, conscious pain and suffering Thank you

THE COURT All right Madam forelady, ladies and gentlemen, we still got to hear the argument of the Defendant, and under our rules after they make their argument the Plaintiff is allowed to briefly reply to the Defendant's argument I am going to go ahead and let's take a quick bathroom break Please, most importantly now, do not talk about the case Don't talk about the

THE COURT Well, closing argument is not evidence, and I have told the jury that, and, obviously, it did not come in during the trial of the case so I am not going to admit new evidence or new demonstrative evidence during the closing argument

Mr Harmon, you can point that out very vividly to them and make your argument according to that

MR HARMON Thank you, Your Honor

THE COURT Thank you All right As soon as they get ready

(Whereupon, a break was taken)

(Whereupon, the jury came into open court at approximately 11 34)

THE COURT Mr Harmon?

CLOSING STATEMENT

MR HARMON May it please the Honorable Court, Counsel, Madam Forelady, Members of the jury Before I begin I want to thank you on behalf of Mr Cowan and CSX for your service on this jury I know that you didn't necessarily choose to be on this jury, but you did choose during the process to pay attention and to fight through a lot of the inconveniences associated with a trial like this So, I want to thank you

You may remember about a week ago I was standing here and I told you this case involved a tragedy and the

tragedy being that on May 30, 2004 the Harvey family lost somebody very valuable to them -- Mr Beryl Harvey There is no dispute that he was lost and he was valuable to this family, but we're here to determine what caused Mr Beryl Harvey to pass on May 30, 2004 What caused that? Now, Mr Parker and Mr Murdaugh would have you believe that it was the crew and the view at the scene that caused Beryl Harvey to lose his life on that day

Now, I have to report to you, ladies and gentlemen of the jury, that on May 30, 2004 stopped in the area where Ms ~Harvey stopped at the crossing that day you could see a long long, long ways down the tracks, and you remember I told you in opening and it hasn't been disputed if you can see you can always be safe because you as the driver are in total control whether or not you're going to put yourself in harm's way, and I also have to report to you, ladies and gentlemen of the jury, that on that day when Ms ~Harvey pulled her van from the safe place and went in front of the 15-and-a-half-foot 10-foot-wide train and went on the tracks and stopped, there wasn't anything Michael Stephens, Jack Cowan, or any crew ever in the existence of human kind could do to avoid the accident

Now, the Judge told you on Friday that the most important part of your jury service was about to occur He is right because, members of the jury, in just a little

while you all are going to answer some questions, and your answers to those questions will determine whether you believe this crew killed Beryl Harvey Your answers to those questions, ladies and gentlemen of the jury, will determine whether or not you believe a person stopped at the crossing on May 30, 2004 should have seen a train Your answers to those questions will determine whether you as this jury are able to speak the truth or whether the truth gets buried because of sympathy and things that you can't base a verdict on

So what I want to do now is go through those questions that you all are going to have to answer If we could put the verdict form up There are two questions I want to talk to you all about primarily The first question, Do you find that CSX transportation was negligent? You remember I told you and the Judge will instruct you negligence is failing to act as a reasonably prudent person would in similar circumstances The second question is, Do you find that the negligence of the Defendant CSX Transportation was a proximate cause of Beryl Harvey's death?

You remember during opening I told you two things First, we talked about how it is the Plaintiff who has the burden of proving the elements of their claim -- would've, could've should've, speculation is not enough to meet

their burden of proof Likewise, if it's fifty-fifty in your mind they have not met their burden, and I also told you in opening you may remember that there were going to be things in this case that didn't cause this accident at this crossing with this driver, and we were going to be talking and your verdict has to be based upon the things that caused this accident at this crossing, and the evidence in this case that you heard has shown that at this crossing that day there was sufficient sight distance to see a long ways down the track, and as Mr Parker said in his opening or closing the question -- the central question you all have to decide in this case is should a train have been seen by Ms ~Harvey where she stopped that day -- sight distance being of the utmost importance Should a train have been seen?

So, what I want to do is talk to you about that using three simple questions The first question deals with where did Ms ~Harvey stop on that day? Secondly, how far could you see in the area she stopped, and, thirdly, was it enough? Let's turn to the first question Where did Ms ~Harvey stop that day? There was no video camera there as you all know There was nobody there at the side of the road, and, so, the best person to ask about where she stopped that day would be Ms ~Harvey

Ms ~Harvey testified in this case about where she

stopped I would like to show that to you This nice woman here has been taking down in the trial everything that's being said and a few days ago you heard from a very nice lady Ms ~Frances Harvey and there is a transcript of it and what I am going to show you now is the transcript of what she said in front of you in this courtroom, if we could flash that up

The question was asked by her lawyer, Ms ~Frances, when you stopped that day, all right, were you behind the stop line? That was the question that was asked Her answer, No I thought I stopped on it, but I didn't get out to look Ms ~Harvey's testimony regarding where she stopped is the best testimony about where she was located that day You've heard testimony and some argument about a stop line and how when you approach a stop line the stop line disappears We all know that be true when you have a vehicle with a hood, but at this crossing, members of the jury, it was a stop sign on the side of the road four to 5 feet in front of the stop line Ms ~Harvey had been across this crossing many times so when she told us where she stopped she gave us a very good indication of where she was that day either on the line or very, very close to it

Don't be tricked by things the Plaintiff is trying to show you -- a survey that has nothing to do about where

she stopped and other things when we have the best indication for Ms ~Harvey who is the only person pulling up to the crossing that day of where she stopped So in answering this question where did Ms Harvey stop, based upon her testimony the answer is she stopped at the stop line

Now, the second question that we have to ask is stopped in that area, how far could you see? There's been a lot of disputing as you've heard over the last several days about what you could see, where you were, and things of that nature You all are the finders of the truth in this case the fact-finders So, how do you go about determining how far she could see based upon this conflicting evidence?

It wasn't too long ago that one of my daughters -- I have four children -- was watching a show from the 80's and they had the styles of the 80's, the hair and everything else like that After the show sometime she came up to me and she said Daddy, did you ever have a flat top? And I said, No Well, standing near was our what I call a family historian -- the one who generally gets it right, my wife -- and she said, Yes, you did, and I thought, Well, how do you know? You don't know before I met you what my hair looked like How do you know? And an argument could have ensued, but my wife did something

very smart She walked away, went down to a box -- a box I probably should have gotten rid of a long time ago -- and pulled out a picture and she walked over to our kids and when the picture was handed to my kids and I heard the laughter, I knew, as my kids say, I was busted because in this picture was a picture of me with an ugly, ugly, very high flat top The picture settled the dispute, and neither my wife nor my children needed Vidal Sassoon or some other hair expert to come in and tell them what they were seeing The picture settled the dispute

Unlike people -- all of us, we have emotions Time passes and our memories fade Other things happen and we become sympathetic towards something, but a picture doesn't change with time It doesn't have any emotions, and it cannot be paid to change its point of view So, a picture, ladies and gentlemen of the jury, is worth a thousand words -- a thousand of Dr Heathington s words a thousand of Mr Huett's words, and we know -- Defendant's 76 -- from this picture what the sight distance was at the crossing that day We know it

Remember that this photograph was taken -- Let me get out your way This photograph was taken not by anybody at CSX, not by -- it was taken by someone from the Plaintiff's firm, an investigator who was out there a few days after the accident with a lawyer, and they sent the

lawyer down the tracks -- Mr John Moorman -- in a white shirt and they measured from 6 feet behind the stop line -- behind it they measured and they could see a man 1014 feet This picture was taken to see the visibility of a driver that day, the day of the accident

Now, please don't be fooled by people with Ph D's, Doctorates, a lot of letters after their names trying to tell you something that you already know and that is this If you could see a 5'9 man at 1014 feet, you definitely could see a train How much further? Is it 100 feet? Is it 200 feet? Is it 300 feet? I am not sure, but our common sense -- all you need is common sense and a desire to tell the truth to realize that you could see a long ways down the track -- that if you could see that man, you certainly could see a train much further, but I want to tell you something If we didn't have this photograph from the Plaintiff's lawyers about the sight distance, you still, as members of this jury seeking the truth about what you could see, would know that you could see a long ways down the track even without this photograph

Let's take it off for a moment Even without it, how would you know? Well, ladies and gentlemen of the jury, you heard from Corporal Cruz, a person who is trained in investigating sight distance, a person who has investigated it on many different occasions, and also

because of his training in the military has had to do further training Corporal Cruz came out there within an hour of this accident He didn't come out at the behest of the Plaintiffs He didn't come out at the behest of CSX He came out there in the official line of duty to do his job, and part of his job was to see how far could you see stopped at that crossing, and you remember the testimony of Corporal Cruz Corporal Cruz explained to you that you could see for a quarter of a mile -- that's 1320 feet -- when you were stopped four paces behind the stop line Corporal Whatley who was also out there and did his own investigation further indicated that you could see a long ways down the track

Now I want you to contrast what you heard from these two men with what you heard from the experts they brought here today to try to convince you that the picture you're seeing is not real -- to try to convince you that you couldn't see at this crossing Here we have two officers who are not being paid by anybody You have two experts -- Dr Heathington and Mr Huett are being paid 325 and $290 an hour to give an opinion to bolster their case Here you have two officers who have absolutely no dog in this fight Two experts who are doing this as a regular part of their practice to find against the railroad Here you have two officers who were there

within an hour -- one hour of this accident Two experts who came two and five years afterwards to reach these conclusions

Based upon what you've heard, your common sense, the testimony that you've heard from the witnesses, we know how far you can see We know a range and that range is between 1014 feet and a quarter of a mile, 1320 feet We know that we can see a man We know a train is much bigger Corporal Cruz told us a quarter of a mile you could see

Now, the third question you have to answer to properly determine should a train have been seen that day on May 30, 2004 is this How much sight distance was enough? How much was enough on that day? We've heard some conflicting things, but I want to take you to Dr Heathington You may remember on cross examination of Dr Heathington I put together a chart because I wanted to share it with you all at this very moment in time so that you could see that even Dr Heathington -- even Dr Heathington if we use our common sense knows that for this train on that day there was more than enough sight distance

Let's take a look at this Okay You remember this chart? And I went through this with Dr Heathington first according to the United States Department of

Transportation and you remember we went through four different agencies The Federal Highway Administration, the Federal Railroad Administration, the FTA, and the NHTSA Something very important We want our government agencies to work together We don't want the rancor and the people throwing and yelling

Well, these agencies did something and came together to talk about sight distance and they put together in 2002 guidance on traffic control devices at rail grade crossings This was an important document You remember when I read to you there was a landmark effort of cooperation and they determined the sight distance in that chart This is what doctor Heathington said on examination and what was the sight distance needed for a train going the speed of this train with the vehicle stopped? 483 5 feet

Now, remember that this assumed a car Dr Heathington explained that a car is closer in line with a van than any other vehicles that we talked about Now, the next thing we went through with Dr Heathington was another publication This one came out five years later, and you remember it was the Rail Highway Grade Crossing Handbook Remember this very important point Dr Heathington uses the Rail Grade Handbook in many of his calculations It's littered throughout his report,

but he didn't use this one when coming to figure out the sight distance because it wasn't favorable to what he wanted to accomplish

In that book, ladies and gentlemen of the jury, which was published two years before he did his analysis said that sight distance needed for this particular case -- and we're here talking about this case, this crossing with this driver and this train -- the distance that was needed was 483 5 feet Again they assumed a car Now, what did Dr Heathington rely upon to give you these numbers that Mr Parker talked about and Dr Heathington talked about? He used something that is not from a government agency -- the American Association of State Highway and Transportation Officials -- not saying they're a bad organization, but they're not a government organization

They published a book Get this 1990 So, what Dr Heathington did to get to his conclusion, he pushed aside documents in 2007 pushed aside documents from 2002 and reached back to a document almost 20 years old Twenty years to give you the number he wanted you to believe you needed for sight distance at this crossing Don't be fooled He knew and I knew that he was trying to pull a fast one

Now, what did that document say? It said for a vehicle going 47 miles per hour that you would need

1133 feet of sight distance Keep in mind all of his calculations dealing with sight distance assumed not a van, a car, but a 65-foot tractor trailer There will be no dispute that on the day of this accident Ms ~Harvey was not driving a 65-foot tractor trailer But you know what? Even under the skewed thing he was trying to present to you, had Ms ~Harvey been driving a tractor trailer -- a 65-foot tractor trailer that day -- given the sight distance that was available at this crossing it still would've met the standard It still would have been able to cross safely as long as you're paying attention and doing what the driver is supposed to do

So, members of the jury -- you can bring that down -- the central question -- Mr Murdaugh talked a lot about damages and said I didn't disagree That's not accurate, but I am here to talk to you about what caused this accident and the central question -- the central question is should she have seen a train because sight distance is the primary of importance at a crossing like this, and this evidence shows between where she stopped, how far you could see, was it enough? The answer is clearly yes Yes, it was

Now, once you answer that question and I know -- I know serving on a jury where someone has passed there is a lot of emotion and there's a lot of sympathy because of

this tragedy, but you all took an oath in this case to speak the truth, and once you answer this question about should a train have been seen, that leads you to one unmistakable, irrefutable, undeniable conclusion about what caused this accident on that day

Now you've heard from different witnesses and Mr Parker talked to you about some of them relating to folks who said different things You had Ms Lakeisha Reed saying she didn't think you could see far enough You had Mr Johnson who I put on on Friday, I believe, saying you could see a long way All of those folks are neighbors who live there along Honey Ford Road You had Ms Janice Green, school bus driver, saying I've used this crossing with kids in it, I feel that it is very, very safe You had someone else from their side saying it's not

Now, we all know that judging how far you can see is not an exact science If I asked all of us how far it is to that back corner, we all may have different interpretations of what that distance is So, I am not saying these folks came in here and lied or anything like that who had differences of opinions, but I do want to talk to you about these near misses as Mr Parker did

One of the people you heard came in here and talked to you about a near miss was Mr Dwayne Johnson Do you

all remember him? He came in and he said when he was asked questions on cross examination with that white-dot photo, can you see this? Well, if it's beyond four to 500 feet, I can't see it If it's within four to 500 feet, I can That didn't make any sense Either you can see it or you can't It sounded to me like him and some of the other testimony was a little rehearsed because we had a group of people saying four to 500 feet, four to 500 feet And you remember Mr Johnson also saying I can estimate with exact precision how far it is Four to 500 feet Yes, I can Well, how far was it from the stop sign to the rails? I can't tell you that I can't answer that His testimony really wasn't credible

Then you also got to hear from Mr Dwayne Johnson's father, a very nice man very nice man who came in here and told you pretty much the same thing what his son said -- four to 500 feet and he also described a near miss he had, and I found it very, very interesting if you remember this when he was asked, Sir, during this near miss how far was the train when you crossed the tracks? I thought it was a reasonable question to ask and he sounded as if he gave a very clear answer He said two to four football fields away Two to four football fields away That's 600 to 1200 feet That's 10 to 20 seconds away That's not a near miss

Then we also heard the last near miss witness and Mr Parker talked about her is Lavern Battle Ms Battle came from Atlanta and one thing was very clear She loved her mother She came here every week, and I found her testimony to be credible until I heard the last thing that she said which made me question everything that I had heard earlier I am going to flash up again from this trial the testimony that was presented to you all in this court case This was taken under oath here We can flash it up, please

The question was asked -- can we -- the question, You didn't -- This was a question asked by Mr Millberg You didn't report it to anyone at CSX? I didn't even tell my mother

Now, that struck me as very, very odd if I'm going to see my mother who lives very close to the crossing and I know there is a dangerous condition there and I have just almost been hit by a train and I walk in the house and I know my mom is going to be using that crossing do I not mention it then? How about a few weeks later, she testified, when is accident with the Harvey family happened and she's concerned about her children? You don't mention it then?

You all are going to have to determine the truth about all these facts, and one thing I want you to

understand is I am not saying -- please, understand I am not saying that there have never been near misses at this crossing I am not saying that You know, sometimes when you get very familiar with something or a person you can take it for granted You get familiar with a crossing You get used to it being a certain way, and you don't take the same precautions you do when you're unfamiliar with it

I think a very good example of that was Mr William Grubbs who uses the crossing very frequently You remember him the gentleman with the tattoos that came in last Friday? He said -- he admitted that I do a rolling stop Don't do what I'm probably supposed to do He is familiar with it Familiarity sometimes can breed complacency

So, the total of all this testimony, ladies and gentlemen of the jury, on sight distance is that at that crossing this day stopped at or near the stop line you should have seen a train You should have seen a train because there was more than sufficient sight distance We know that from the picture, and we know that from the officers that investigated it, and that conclusion leads you to one -- for some of you it may be difficult, but one unmistakable conclusion in this case

Now, I want to turn now and talk to you all about the

horn There's been a lot of testimony about the horn and if we can go to Defendant's Exhibit 12, please You remember Mr Bennie Spell? And Mr Spell -- can you zone in a little bit for me, sir? Mr Spell testified that as he was coming around the corner here in this vicinity where the tree is he heard the horn blow loudly two times He said he slowed down because he knew the train was coming, and then he got closer and he said he heard the horn go wide open Excuse me And then there was a crash Mr Bennie Spell was there -- the only person there at the time -- and he heard the horn He heard the horn

Now, there's no dispute in this case that the horn was blowing We're not here saying that there wasn't any warning given What the Plaintiffs are arguing about is that you all started just a little bit late -- a second or so late and that this gap was too long You remember the testimony as Mrs ~McLeod was talking to Mr Scott and he explained -- she explained through him that this was the horn pattern that was blown There was close to two seconds -- 1 9 seconds of horn and then there was a gap and then there was 1 7 seconds of horn and then a gap Then the last 7 2 seconds -- the critical time before this collision -- that horn was on 5 9 seconds and off 1 3, a blowing pattern This is what Mr Scott testified on

cross examination, ladies and gentlemen of the jury

So, the horn was blowing to give warning Mr Bennie Spell heard it, and I understand from the testimony that Ms ~Harvey did not, but the horn was blowing Now, was the 8-second gap too much? Mr Cowan told you that he believed Mr Stephens was blowing the horn properly, but that he wouldn't have had an 8-second gap So, was an 8-second gap too much? Perhaps But remember what I told you in this case about keeping your eye on the ball

We're here to talk about things that caused this accident at this crossing, not other things they can point to that they say foul but did not cause the accident at this crossing because their own witness Dr Lipscomb said Ms ~Harvey likely didn't hear the train at any point in time and that's what she testified to She didn't hear it at 50 feet, at 100 feet, at 200 feet, 300 feet, 500, at any point in time when this horn was blowing, and, again, it was She never heard the horn

So, if she didn't hear it at 100 feet, ladies and gentlemen of the jury, why are they picking at the fact that they think she would have heard it at 1500 feet? If she didn't hear it when it was 200 feet from the crossing and it was blowing, why does this gap that they're talking about have anything to do with this case? Let me tell you something The horn is a smokescreen to get your eyes

diverted from what the truth is in this case to focus on things that caused it This horn goes in the box of things that didn't cause this accident at this crossing with this driver

Now, because of the testimony you've heard relating to the sight distance that you can see a long ways down the track -- If we can go back to the verdict form Because of that testimony and you all get to judge that testimony relating to sight distance, but when you're answering these questions we believe that you should not -- you will not get to any damages because the first thing you have to decide is should you have seen a train on that day? What caused this accident at this crossing? And so the answers to the questions should be no and you would go no further in deliberations

Now, I want to talk to you about something a little bit more, and that is, you know, sometimes in a trial like this the evidence comes in very disjointed and you don't see the bigger picture So, I want to talk to you now about what's the truth Reflash that up for me What's the truth? And I am going to take you through chronologically so you can see things that are undisputed and put them in the proper context so you know exactly what's going on with all of the facts in this case

So, let's start off What we know, first, on Sunday

May 30 between 6 and 7 there is an accident with Ms ~Harvey and Beryl Harvey, okay? We know that on that date two officers in the line of duty Corporal Cruz and Corporal Whatley go out to the scene -- no allegiance to anybody, just doing their jobs, and they say there are no visual sight obstructions You could see a long ways down the track We then have statements from two crew members saying that Ms ~Harvey stopped on the tracks We know that the only witness there that day heard the horn blow multiple times

Monday, May 31 was a holiday We know that shortly thereafter the Plaintiff in this case which is Mrs Connie Carson, the daughter, the lawyers are on the scene and Mr Crews beginning June 2 conducts an investigation He goes out and he measures and inspects the van that was involved and he determines that from the front seat to -- I'm sorry -- from the bumper to the front seat is about 70 inches He then takes photographs to see the visibility of someone who had stopped with their front bumper at the stop line -- 7 feet -- excuse me, 6 feet or 70 inches, approximately 6 feet behind the stop line and those are the photographs of the person with the white dot This is all known in the first few days of June He could see a man at 1014 feet, and Mr Crews, who is a very competent railroad investigator, a nice man, he knew what

those photographs meant

Now I wasn't there in the Plaintiff's office when these photographs came to their attention I wasn't a fly on the wall, but I can imagine the language that you would not want to hear when Mr Crews presented those photographs to them showing that you could see a man 1014 feet down the tracks from where you stopped at that stop line

So, what's going on? Well, there is a big problem, very big problem We have someone whose died and that all moves us We don't want people to pass away, but you've got to show that what caused it and they knew at that time that at that crossing on the date of the accident you could see a long ways down the track based upon Mr Crews The problem is you should have seen the train How can you miss the train at this crossing?

So, what is the solution? What do we do now that we have this problem? Enter team Heathington You saw in this case, members of the jury, experts -- first, from Texas, Dr Heathington, 325 an hour, Dr Lipscomb, we failed to ask him how much he's been paid I know but I can't tell you because we failed to ask the question We saw Mr Scott from Tennessee, $200 an hour, and Mr Huett from Indiana at 290 an hour

Now, these experts were brought in to try to fix in

part -- Is that me? What did I do? Thank you These experts were brought in to try to undo really what that photograph showed, and you heard during the testimony that they have worked together in tandem before and it reminds me of when I was a child coming out of a grocery store with my mama I would pull on her dress and ask, Can you give me some money so I can ride these little -- I'm sure -- I don't know if they have them anymore, but these little rides you put the nickel in and you get on it It's like a little airplane and it rides and it sings a little song, okay? As long as you pay the fee, you got the same song and you got the same ride As long as you pay the fee with this team, you get the same thing to try to find against the railroad even when it doesn't make any sense because they knew that this photograph was a big problem and they knew that the sight distance was good

So, what happens? Dr Heathington goes out for a sight inspection two years after the event, two years after Corporal Cruz has been out there and done his investigation, two years after most of the photographs have been taken by Mr Crews, and you remember he somehow forgot that he had ridden to the scene with Mr Crews, and Mr Crews, it's undisputed, provided him all of his photographs -- all of them So, what do they do in this courtroom in front of you all to convince you that you

shouldn't have seen a train? What happens?

Well, you saw -- you remember this chart we created with Mr -- Dr Heathington and this lays out the sequence of events Mr Crews' photograph, then five years later Mr Huett in his notes that he didn't tell you about on his direct examination says that his analysis is consistent -- this is undisputed -- with the 1014 photograph Now, somehow I guess he didn't coordinate with Dr Heathington -- they worked together -- because less than two weeks later -- two weeks and a day later Dr Heathington who has a photograph, who knows all of this, comes in and says that the sight distance is 329 feet He didn't give any explanation how he cut this sight distance almost by a third

Why was he doing it? And this was under oath, ladies and gentlemen of the jury

MR PARKER Your Honor, I have an objection He's misquoting the testimony There was much testimony on that and he's totally -- I hate to say it and I hate to interrupt

THE COURT Well, I understand

Ladies and gentlemen, that's why we have you You're the finders of the facts You've heard it all The lawyers, obviously, disagree You determine what the true facts are

You may continue to argue

MR HARMON Thank you, Your Honor

You saw this chart being built with Dr Heathington in the courtroom This is the exact chart without the red at the bottom, and he prepared a written conclusion He put it in his own handwriting, and he said in that written conclusion, ladies and gentlemen of the jury that he presented as part of his report in this case that it was approximately 329 feet and then he gave sworn testimony in this case -- not in the courtroom -- at deposition and Mr Millberg took his deposition and he said it was approximately 329 feet, and we asked him, Well, who do you work with on this case, Dr Heathington? And he told us about his brilliant assistant Dr Midendorf so we mosey on down to take Dr Midendorf's testimony under oath What does he say about the sight distance? Approximately, 700 feet

You see, one thing I think you all know is that the truth is simple When you're speaking the truth, you don't have to have 50 different explanations for something simple We then saw Dr Heathington's testimony in court and he said approximately 650 feet Why all this change? They were trying to convince you all that the picture doesn't show what we all know it shows -- that you couldn't see at this crossing when we all know that you

could see at this crossing, that she couldn't have been safe and we all know she should have been

Now, at trial the team -- team Heathington did certain trial fixes to try to convince you further The first one you remember there is a ridiculous denial When I say ridiculous denial, you remember Dr Heathington sitting right up here and I asked him, Sir, you would agree with me if you could see a man at 1014 feet you should be able to see a train? You remember his answer? Well, it depends I can't agree with that It could with a peep-hole Does that make any sense to you?

During opening I asked y'all, I said when Dr Heathington and some of these other folks get up here please use your common sense Just because someone has advanced degrees, that does not mean you as the jury have to accept that testimony if it doesn't make sense to you

There is the picture This man as you found out here today with his work boots on is actually a little taller than five-nine, but if you could see that white shirt on a man 1014 feet, you all know

The next thing that happened is we had -- Let me go back here -- we had a smokescreen I am going to talk to you about this The smokescreen relating is really intended to divert your attention away from the true issues in this case In old western movies there would be

a smokescreen and what was going on behind the smokescreen was intended to trick or to harm the people who the smokescreen had been erected for, and the first smokescreen that you heard a lot about during Mr Parker's closing is the crossing clearing program and I want to talk to you about that very briefly about the crossing clearing program

As I told you in opening the crossing clearing program by CSX was done in 2000 and 2001 to make crossings safer Mr Parker has suggested that we were putting safety over profits, and that's not the truth What you're going to see here, members of the jury, first -- if we can go to Plaintiff's 78 -- this program, it wasn't a program to do one crossing It was a program -- if you can blow up the 29 -- to do thousands, tens of thousands of crossings across many different states -- many different states and CSX went about doing that

Now, if you'll turn to Plaintiff's Exhibit 84 Mr Parker suggested they were willing to be cheap, they didn't want to pay any money Well, his own document -- the second page, please -- that he just showed you I hope you saw it and picked up that back in 2002 the budget for this -- blow up the 10 million -- was $10 million and at that time they had already started to clear crossings here You see, we're here to talk about this crossing,

not tens of thousands of other crossings across CSX's system and I will tell you openly that the program wasn't perfect for all 30,000 crossings There were delays There were issues with contractors There were things that would happen when a company goes to do something this groundbreaking, but, members of the jury, I am about to show you that this crossing had been cut, and contrary to what Mr Parker is trying to suggest to you that you couldn't see, you could see

If you could turn to Plaintiff 92-A Okay? This is a part of a document Mr Parker showed you and if you notice the language there, spreadsheet where previously cut under 2001 Now, let's go to what the spreadsheet shows -- the next page -- and you see there that this is one of the crossings This is the crossing involved in this case You see Honey Ford Road up there? It was cut back in 2001 It was cut The spot where you see you're able to look down the tracks, there were previously trees there and they were removed, and we all know that vegetation and things can grow up from time to time here in the south We know that That's why CSX has a spraying and brush-cutting process that it continues to do

If we could go to Plaintiff's 103 and we see that further cutting, brush spraying, and others was done in

2003 Next page This is the crossing that was in issue, okay? And Mr Parker marks that it says 950 feet Well, ladies and gentlemen of the jury, how far could you see at this crossing? Was it 900 feet, 950? You could see beyond 950 feet down the tracks CSX had cleared and had done programs at this and other crossings, but we're not here to talk to you about this programming generally as it applies to all of the crossings, all 30,000 crossings, okay? Really, what's happened is this crossing clearing program is designed, again, to get you diverted from whether or not Ms ~Harvey on that day should have seen the train, and, so, the crossing clearing program -- There was money spent on it This crossing had been cut, but as it relates to this accident at this crossing it, too, goes into the things that did not cause this accident at this crossing

Now, back to the presentation I've already talked to you about the horn They also talked to you a little bit about the emergency brake I think you all understand that a train doesn't stop like a car You don't put on the brake and the train stops It takes a third of a mile So, whether the emergency brake was put on exactly at the time of impact or whether it was put on a second before or a second after has nothing to do with this accident at this crossing Once that van pulled out in

front of the train and stopped, the accident was unavoidable There was nothing that the crew could do

Now, I want to turn and talk about the last things that went on here and you saw some of it during their closing to, again, try to fix the problem that there is sufficient sight distance The first thing that was done -- and this is undisputed -- is that they created an animation that has 19 seconds where the driver is not looking left and then pulls straight in front of the train I am going to time 19 seconds here in a moment I just want you the feel what that feels like Now (pause) Stop That's 19 seconds right there

Who -- who pulls up to a crossing and has 19 seconds -- 19 seconds where they don't look left and pull up? You all are drivers and have experience Ask yourself if that makes any sense When you go back in the jury room do that same exercise with your own watch Time it and ask yourself does that make any sense what they're trying to suggest happened

Also, they have on this animation 22 seconds to look left, look right, and move forward I am not going to take the time to do that, but you could do that How long does it take you to look left, look right, and then to move forward? Try to -- try to do it for 22 seconds

The last thing the deceptive animation did was it

didn't show you a train that was in plain view It did not show you a train that was in plain view, and I want to go to the first clip so we can see that Now, you remember Mr Wilby when he had Mr Huett here on the stand with the animation and you remember Mr Huett's demeanor when he was answering questions about this animation and the things that he said and the way he acted with Mr Wilby? Now, what this is going to show I am going to show you here in a moment is we have taken their two animations and then Mr Wilby you remember took the one where they didn't show the train and transposed it so you could see from their animation which they didn't want you to see when you could see a train Let's roll it

(Whereupon, the animation video is played)

MR HARMON Mr Wilby pushed this over here This is their animation Now watch what happens The driver in there looks left -- Excuse me, looks right See the train has been coming already and then turns forward and there is the train before you move and they would have you believe you couldn't see it You remember that, members of the jury You remember this piece that Mr Wilby did

Now, you had the opportunity to see the animation that we did and I would like to show it to you because you can look at this and using the photograph you can see what lines up with what we've talked about earlier If you

could roll that

(Whereupon, the animation video is played)

MR HARMON There is the train beyond 1200 feet a moment ago, coming down, lights flashing, horn blowing, and this is the exact spot in this photograph where Mr Crews took the photos that day

Now, what all this shows -- You can go back -- is that the last one?

THE MEDIA SPECIALIST Yes, sir, I believe so

MR HARMON What all this shows, members of the jury, all of this evidence is that although this was a tragedy and I am not here to minimize -- I am not -- the Harvey's loss of their son Beryl, but you all as the finders of the truth have to first figure out should this train have been seen Because the answer to that question is yes we believe that you shouldn't -- you won't go any further in deliberating as Mr Murdaugh was talking about because you have to first decide did this crew or the view cause Beryl Harvey to be killed?

Now, His Honor is going to instruct you -- and I am almost finished and I very much appreciate y'alls patience and attention with me The word verdict His Honor is going to tell you means to speak the truth That is what the word verdict means, and you as the members of the jury your verdict should speak the truth about these facts --

the truth, the whole truth, and nothing but the truth

And I know there may be a temptation There may be a tug to wander from the truth because of sympathy that we all feel for a mother who's lost her son and brothers and sisters who have lost a brother You may be tugged and think and say, well, since it's a railroad company, they're a company, we should just give them some money and compromise anyway I want to tell you why that's not right and I want to tell you that, first of all, it would be wrong to hold someone responsible for causing someone else to be killed if they didn't do it It wouldn't be right, and, also, the moment that you stopped following the truth and you compromise, it's no longer the truth It's something else There is the truth and then there is something else, and, also, members of the jury, His Honor will instruct you something about all people -- all parties being equal under the law

There was a time in this country when that wasn't so -- when all parties weren't equal under the law, but there's been fighting, there's been blood shed, and there have been laws passed to make sure -- and the Judge will read this to you -- that all parties in the court of law get treated equally whether you're black or white, red or yellow, an individual or corporation, whether you're from Bamberg or Virginia, in the court of law everyone is

treated equally That's why a lot of times you see the scales of justice with a lady with a blindfold on So you are to judge this case as if it was two individual people in the community because everyone is treated equally under the law and everybody deserves the fair, same treatment

Now I appreciate your time, and the last thing I am going to say is you remember at the beginning of this case I told you that this point I believed you would be persuaded of three things First, that neither CSX nor this crew was negligent, secondly, that nothing that CSX did or didn't do or this crew did or didn t do caused this accident at this crossing with this driver, and, then thirdly, stopped at the stop line or in the vicinity of the stop line on that day on May 30, 2004 you could see a long, long ways down the tracks, and if you can see, you can always be safe as a driver because if you can see, you're in control You get to determine if you're paying attention and doing what you're supposed to do whether or not there is going to be an accident that day

I thank you, ladies and gentlemen, for your time and while it may be difficult for some of you given the sympathies in this case, I am going to ask you to return a verdict in favor of Jack Cowan and CSX in this matter Thank you

THE COURT Everybody okay? Mr Parker?

MR PARKER Your Honor, could we have about a five-minute break?

THE COURT All right Let's take five minutes for the bathroom Don't discuss Don't deliberate

(Whereupon, the jury exited the courtroom at 12 30)

THE COURT All right Let's take five minutes

(Whereupon, a break was taken)

(Whereupon, the jury came into open court at approximately 12 41)

THE COURT Mr Parker?

MR PARKER Thank you Your Honor

CLOSING STATEMENT

MR PARKER Ladies and gentlemen, you know, I've been practicing law a long time I have been doing this thing for 36 years, and today is the first time in 36 years I have had a lawyer stand up and call me dishonest I've had no one else stand up and call me dishonest because I will tell you one thing Our system is based on integrity Mr Wilson is not dishonest Mr Murdaugh is not dishonest We're honest lawyers, and I hate to have to talk like this, but the attack has been made and it has to be answered I am going to tell you who is dishonest I am going to prove it to you

I hope y'all were looking at your watches

Mr Harmon -- when he said he was timing 19 seconds --

THE COURT Mr Parker Mr Parker, stick with the facts

MR PARKER We're talking about the facts, and I'm telling you that we can tell he is dishonest in another way

THE COURT Mr Parker, stick with the facts, please

MR PARKER Let me get a magic marker Mr Harmon said that Dr Heathington said that he had a sight distance of 483 5 feet I want to write it up He had it on his chart there, and I am sure y'all are going to remember this testimony, and I just want to talk about it He said sight distance 483 5 feet He said Dr Heathington had to admit that You remember that testimony because what they were talking about is someone 15 feet from the crossing at a 90 degrees looking both ways, and that that is what -- if you saw the train that that is what distance it would take The train would have to be that far away to clear the crossing -- 483 5 feet

Now, that is a totally different thing than being stopped where you evaluate a crossing from 35 feet back, 25 feet plus 10 So, who is doing the slight of hand here? Who is creating a case? That is the way you create a defense by taking the testimony -- Dr Heathington -- he said Dr Heathington changed his testimony about the 325

and you'll recall his testimony He said, well, that was based on a line I told you at the deposition that was not accurate What I did was that once I got the animation I looked at it and determined what it was

Let's put up 32 and 48-B Now, 48-B is what -- This is the photograph that the animation was based on It is also the distance 70 inches behind the stop line that the animation done by their expert was based on and what we have in Exhibit 32 is what happens when you go 3 feet farther back, and this is why sight distance is so, so critical and why people will get killed if you don't have it You move 3 feet back and then the sight distance in that time -- you can't see Mr Moorman down the track at 1014, and let me ask you something Mr Harmon -- he put up there -- create a case and he said we've created a case Now, why would we if we thought this photograph that showed Mr Moorman 1014, why would we give it to CSX if we were going to do something improper in this case and create a case? Would that make any sense whatsoever?

That is what you could see from that distance where that photograph was taken That is a fact That is a fact that proves our case They can't deal with the fact So, in order to have her -- them live up to what -- they can't prove anything that they lived up to their commitment, but what they want to do is to say that she

was at 1014 or that distance where she could see that far Well, to start with, that's not adequate sight distance even if you could see that Go back there and look at the charts Look at their commitment about what they said they could do

So, what Mr Moorman is trying to do -- You talk about smokescreen It's an illusion what he's trying to do is to say that it doesn't matter what you can see there as long as you could see at 70 inches and if you made a perfect stop and you got in the perfect position maybe you re all right, but if you are stopped 3 feet behind that, then you're dead, and if that s the kind of safety that CSX committed to, that's not the kind of safety they said they were going to have, but that's what they have said that they want to -- you to say it's all right for them to do -- that they don't have -- why did they say in there all of their documents if we don't clear this we're going to be liable if you didn't need it? Why would they say that?

I want to talk with you just a minute about, you know, we're talking about being not being totally straight forward with things Mr Moorman said John Johnson said you could see a long ways\ What he said was you could see about 750 feet, maybe a little further Two different things He said Mr Crews said that you could see

1320 feet Where was that that he said that from? He saw that from 4 feet behind the stop line There is no car going to be in there A car -- you're about 7 or 8 feet back

So, this is critical distances we have here that, you know, we're trying to get it so that, well, you could see a long ways, therefore, this -- Ms ~Harvey must just not have looked Why would she stop and not look?

Mr Moorman said that the horn -- Mr Spell put up -- heard it blow multiple times Multiple is true because three is multiple It is over two, but is that a fair way to look at things? He stated in here that the crew -- you can't hold Mr Cowan liable, and that's not correct Mr Cowan is not even a party in this case CSX is the party in this case -- the railroad The railroad is a party for not clearing the crossing

And when we look at this thing they say, well, we got team Heathington We got four experts Guess how many experts they had? Four experts If any one of them would have contradicted what was testified in this courtroom and if Dr Heathington and Dr Lipscomb and Mr Scott and Mr Huett weren't being honorable, they would have been down here telling you why they're not You ask yourself that question in this case Why didn't they call someone?

Another thing missing from this case is why didn't

they have people from CSX here to tell you why they didn't do what they committed to do? They did not call one person from the management of CSX to tell you why this crossing wasn't cleared Now, Mr Moorman says, well, she must have looked and she didn't look back which if she did there's no doubt about it at a time, but you won't ever need to clear crossings if the railroad is not responsible because you didn't keep looking right and left and see the train because there is never a crossing accident that occurs no matter how bad you keep the crossing that at some point in time if you looked at the right time you couldn't see the train

Now, I want to talk with you a minute about -- interesting that he said two crew members I guess, you know, how you pick and choose We as lawyers pick and choose what we want He said two crew members said she stopped There was three crew members Mr Cowan said she didn't stop So, he wants to pick for whatever reason the stop language -- that she stopped and that is the way words are manipulated to get what you want and Mr Cowan the one here said that she didn't, but remember -- I want to tell you a story about the railroad and a little bit of railroad lore in this story

If you remember about -- and he talked about rehearsed witnesses, and that's what reminded me of it

You'll remember Mr Cowan no matter what the question I asked said we blew the horn correctly and reaction time Whatever the question was, we blew the horn correctly, and it reminded me of a story I heard as a young lawyer about a railroad witness by the name of Jelly Roll Johnson and Jelly Roll was on the train and the lawyer was trying to get him ready They said Jelly Roll, whatever you do said you remember that the horn was blowing and the bell was ringing, and so Jelly Roll got on the stand and he was asked, please state your name, and he said the horn was blowing and the bell was ringing And what we have here is the horn was blowing and the bell was ringing no matter what the question was

So, you know, I don't know what to say to you other than to tell you that we have tried our best to take the evidence -- the evidence that is out there, one of which is that 70 inches behind the sight line you can see 1014 feet You move back to about 35 feet and you can see about 650 feet So, what we know -- actually, I think it's 10 feet behind the stop line We measured that distance

One other thing I want to talk with you about is there was a lot of criticism of our deceptive animation We had to do an animation Put up Exhibit 74 Defendant's This is Defendant's Exhibit 134

MR WILBY Your Honor, may we approach?

(Whereupon, a bench conference was held)

MR PARKER Mr Huett had to work He didn't have the scene He had to work with pictures He took the pictures, and, again, I want to tell you that, you know, the claim has been made Mr Wilson, Mr Murdaugh, and I have done something to try to pull the wool over you good people's eyes I promise you I know that there is no wool that can be pulled Y'all are going to judge this case based on the evidence that you heard You're going to look at these facts, and I want you to think about this -- that Ms ~Harvey didn't know where she stopped They put it up there I stopped behind the stop line I stopped at the stop line You know, I looked up "at," what that means and most of us at means near Is where she stopped near the stop line?

So, that's how word games are played to get what you want for the railroad to try to escape liability for the harm they've done to this family What they've done is try to play word games They've taken this testimony and, of course, I think flat misstated what the testimony was Ask yourself why is the railroad misstating the testimony? Why is the railroad not accurately stating for this -- this 483 5 feet? Why did Mr Moorman get up here and tell you that Dr Heathington testified that that was what the

sight distance was?

And if you ll -- Get your memory back there Get your memory and ask yourself if you remember that testimony and what the testimony was about it and you'll remember that he testified that this was the sight distance for a vehicle the time it took -- if a car looking left a driver at a 90-degree crossing saw the thing and this is the time you could go and you could get across and that's what that is, and, of course, it has nothing to do with the sight distances in this case, has nothing to do with why they didn't blow the horn as they should as the law requires, and we heard very little justifying it other than the fact that we ought not have to comply with the law because probably wouldn't have heard it You have to comply with the law to give the warning required by the law and the 1500 feet is where you need to see the train because 56-5-2710 says that you got to hear it from there and it s got to be heard from 1500 feet for them to comply with the law and it's got to be plainly visible and it was not Thank you

THE COURT Madam forelady, ladies and gentlemen of the jury, my charge or instructions is 15 minutes at the most As soon as I say that, it'll start rambling and it'll go longer Can y'all handle 15 more minutes without the bathroom?

JURY CHARGE

THE COURT You know I told you when we started --

MR PARKER Your Honor, may I -- One Thing I need to protect the record --

THE COURT Sure

MR PARKER -- on that matter that we had took up at the side bar

THE COURT We'll do that after I let them out

MR PARKER Thank you

THE COURT Mr Parker, remind me, please

When we started I told you -- I tried to give you a little bit about what was going on and I told you, obviously, me sitting up here as the judge -- I mean this position of judge obviously, makes me the judge of the law in the case I told you that, and I told you also I judge and rule on the admissibility of evidence So, being the judge of the law in the case, you're sworn to accept the law as I now give it to you As I told you earlier if you have some preconceived idea about what it is or should be and it doesn't agree with what I tell you, you have to set aside that preconceived idea and accept the law as I give it to you

I am the law -- judge of the law in the case -- not me, but my position and I have ruled on the admissibility of evidence in this trial of this case, and you've heard

what has come into the trial of the case, and that's why I told you at the beginning I can promise you from the facts that you hear in the case you will hear different versions of the facts You will hear arguments made about what those facts show or don't show or what they are or what they weren't You'll hear that one side blew a smokescreen and the other side was not saying exactly right That's lawyers arguing to you Their arguments is not evidence in the case You twelve people acting collectively are the judges of the facts in the case

That's how the system works That s what makes it so good The twelve of you will determine what the true facts are in this case, and because you are the finders of the facts in the case, please, as the judge of the law I cannot have any opinion about the facts I can't tell you what the facts are You can't tell me what the law is So, if at any time during the trial of this case I have yawned, frowned, smiled, or acted upset or acted happy, that doesn't mean I had any opinion about the facts I can't have an opinion about the facts I listen to these things almost 52 weeks a year So, I hear all kind of facts I have to stay out of that So, please, don t think that I have any opinion That is your sole duty You determine what the true facts are in the case from the evidence presented So, that is your job

As I told you at the beginning this is a civil case so the burden of proof at this stage of the trial is by what we call the preponderance or greater weight of the evidence It is evidence which as a whole shows that the facts sought to be proved is more likely true than not true

In this case the Plaintiff has the burden of proving that the Defendant, the railroad, was negligent and that negligence proximately caused the injuries or death as they've stated So, the parties come in on equal footing For the Plaintiff to prevail on their cause of negligence, they have to show by the preponderance or greater weight of the evidence They have to tip the scales ever so slightly in their favor to be able to meet their burden of proof as to the actual damages

The Defendant has plead in their Answer and I'll explain it to you or in their position is that Ms ~Harvey was likewise negligent, and you're going to be asked to compare the negligence of both parties under certain circumstances For them the meet that burden that Ms ~Harvey was negligent in comparing negligence, they, too, must meet that burden by the preponderance or greater weight of the evidence So, both sides have some burden of proof -- one in comparative negligence as to the Defendant and one on the initial case as to the Plaintiff

If after you consider everything and everybody remains the same, then it would be a verdict in favor of the Defendant If the Plaintiff has proven their case, the verdict for the Plaintiff If the Defendant has proven that Ms ~Harvey was negligent, then you would compare negligence and I ll talk to you about that in a minute So, that's the burden of proof at this stage of the trial on the actual damages It is called the preponderance or greater weight of the evidence

There are two types of evidence that the law recognizes One is called direct evidence and one is called circumstantial evidence Direct evidence is testimony of a person who claims to have actual knowledge of a fact In other words, you can come in and testify I walked out in the parking lot I got wet It was raining That's direct evidence that it was raining Circumstantial evidence is often shown that you walk out in the parking lot and it's not raining, but there's puddles all over the place You heard thunder You saw lightning, and you went outside and it was wet so that's circumstantial evidence that it was raining in the past or near past Both types of evidence are accepted evidence The law makes no distinction between either direct or circumstantial evidence, nor is any greater degree to be given one over the other

In the trial of this case, obviously, we heard people who were qualified as experts Lay witnesses like the highway patrolmen, the people who testified about what they saw at the crossing and things, those are lay witnesses, and they can only testify about what they see, hear, smell, touch -- what they actually see and it does not allow them to give opinions If someone because of their education, experience has some expertise in some art, science, or profession, they may give an opinion on the subject which the witness claims to be an expert in and can also give reasons for that opinion So experts -- there is an exception to the rule that allows experts to give opinion testimony

Now, the law says in our state that you should consider any expert's opinion given by a witness and like any other evidence give it the weight you think it deserves If you decide that an expert's opinion is not based on sufficient education and experience or if you decide that the reasons or the facts given in support of the opinion are not sound or that the opinion is outweighed by other evidence, you can disregard the opinion entirely An expert's testimony is to be given no greater weight than that of any other witness simply because the witness is an expert You do not have to accept an expert's opinion even though it is

uncontradicted

In our courts no distinction whatsoever is made between corporations and individuals A corporation is a person in the eyes of the law A corporation is entitled to the same fair and impartial consideration and to justice by the same legal standards as an individual

Now, this part of the charge is what I give in all civil cases all over the state, and the most important part about the general charge before we go to negligence is this Sitting as the finders of the facts in the case, sitting as the judges of the facts in the case you have the absolute authority and you are required under your oath as a juror to determine the credibility of the witnesses who have testified in this case Credibility simply means believability It becomes your duty as jurors to evaluate the evidence and determine which evidence convinces you it is true

You use your ordinary daily common experience You use your common sense You deal with husbands You deal with wives You deal with children You deal with people in the community You judge their credibility everyday You judge their believability So, use those innate senses in judging credibility of these witnesses and this testimony that's coming into the trial of the case You determine what the true facts are You determine the

credibility or believability of the witnesses

In carrying out the function of determining the believability of witnesses who have testified in this case you have the right to believe one witness over several or you can believe several witnesses over one You can disregard everything that a witness says or you can believe everything a witness says You can believe part of what he says -- he or she says -- or disregard the remaining part You have and you may consider whether the witness has an interest in the result of the case, whether the witness is prejudiced towards either the Plaintiff or the Defendant and the opportunity for the witness to have seen the matters and things about which the witness may testify and you even have the right to judge credibility based on the witness' demeanor or how the witness acts on the witness stand So, use all of that as a guidance in determining what you decide who to believe and what evidence convinces you of its truth

Once you decide what that true evidence is, the true facts are, you apply it to the law in the case and you'll be in a position to render a true and just verdict That's all we ask A true and just verdict The verdict means to speak the truth It can't be based on sympathy, passion prejudice You got to base your verdict based solely on the facts from the case as you find them to be

and the law as I give it to you

There are all kinds of civil cases Medical malpractice, legal malpractice, breach of contract -- a lot of them a slew of them This is a negligence claim, and I will say most tort or civil actions are negligence claims In this case the Plaintiff claims the railroad should compensate her or the personal representative -- and I'll talk to you about that in a minute -- for the death of Beryl Harvey and for the conscious pain and suffering, if you find any, that he sustained before he died as a result of the Defendant's negligence As a defense the Defendant says -- the railroad says -- that if you find that we're negligent and that our negligence caused the death, then you should also judge the negligence or the alleged negligence of Ms ~Harvey So it's a negligence back and forth or both positions -- both sides have a negligence claim

In order to prove negligence either in the Plaintiff's case or the Defendant's comparative negligence case there are four things that the parties must prove by the preponderance or greater weight of the evidence The first thing the parties must prove -- and all of these must have to be by the preponderance or greater weight of the evidence -- is that the parties owed each a duty of care There will be certain duties that the railroad owed

to the Plaintiff and there are certain standards of care, certain laws that Ms ~Harvey has to uphold I'll explain those to you in a minute So, you have to prove what the duty of care is

Next, the parties must prove by the preponderance or greater weight of the evidence that either the Plaintiff or the Defendant when you analyze it breached that duty of care Now, what does that mean? I'll lay out to you in just a few minutes what each respective party's duties are right up here To breach that duty their conduct has to fall below the standard of care That s the breach Okay? The duty, conduct fell below That's the breach That's the second thing

The third thing in the four elements of negligence, breach -- I'm sorry Duty, fall below, breach, and that breach of the duty proximately caused the injuries complained of, and the fourth thing is on the Plaintiff's claim they have to prove damages -- actual damages So, those are the four things What the duty is -- I'll tell you what the duties are in a minute -- that they fell below or breached the duty and that breach proximately caused the injury Okay?

To prove proximate cause the Plaintiff must prove by the preponderance or greater weight of the evidence causation in fact This is proven by showing that the

injury would not have occurred but for the Defendant's negligence The Plaintiff must also prove legal cause Legal cause is proven by showing that the injury or death was foreseeable This means that the injury occurred as a natural and probable consequence of the Defendant's negligence The Plaintiff must prove that some injury from the Defendant's negligence was foreseeable, but does not have to prove that the particular injury that occurred was foreseeable However, the Defendant cannot be held responsible for things which could not be expected to happen Proximate cause does not mean the only cause The Defendant's act can be a proximate cause of the Plaintiff's injury if it was at least one of the direct causes of the injury

And, ladies and gentlemen, you base -- and when you are making these findings, you take both the railroad and Ms ~Harvey You look what a reasonable person or corporation would have done under like circumstances That's sort of the standard that the reasonable person has to be in these cases

Now, also, as I keep telling you in this case, obviously, the Plaintiff is claiming by negligence the railroad proximately caused by breaching their duties the death of Beryl Harvey Likewise, as a defense the railroad claims that Ms ~Harvey's own negligence

proximately caused Beryl Harvey's death So, if you find that Ms ~Harvey was negligent, you must then decide and compare the negligence of the railroad and the negligence of Ms ~Harvey, and I'll go through that verdict form with you in just a few minutes because you do them in order, and if you find certain things you go to the next If you don't find certain things, that's the end of it

If you find that the Plaintiff has not proven a negligence cause of action or that the negligence didn't proximately cause the death of Beryl Harvey, that would be the end of it and you wouldn t analyze Ms ~Harvey s negligence You would only compare the negligence if you find that she was negligent in the event you found the railroad negligent and that negligence proximately caused Mrs Harvey's son's death

Now, as I told you just a second ago the first element of a negligence cause of action is that the parties must prove what the duty is owed and the law sets out what the duties are First of all, I will tell you that -- Let's talk about what the duties the railroad has, and then I will talk to you about what duties a driver such as Ms ~Harvey has under the law The railroad has a broad duty which encompasses a lot of things, some of which have been argued in this case They have a broad duty to maintain under our law a reasonably safe grade

crossing That's pretty broad, but that's what the duty under the law imposes upon them -- to maintain a reasonably safe grade crossing It is further under our law common law that is it is the duty of the railroad to give such signals as may be reasonably sufficient in view of the situation and surroundings to put individuals using the highway and the crossing on their guard

I further inform and charge and instruct you that under our law enacted by your legislature -- your house members and senators -- under section 58-15-910 the law in this state is through a statutory obligation or statutory duty that a bell of at least 30 pounds weight and a steam or air whistle shall be placed on each locomotive engine and such bell shall be rung or such whistle sounded by the engineer, fireman, or motorman for a distance of at least 500 yards from where the place -- from the place where the railroad crosses any public highway, street, or travel place and be kept ringing or whistling until the engine has crossed such highway, street, or travel place That's codified in section 58-15-910

So, as I tell you the duty imposed by law as to the railroad is a broad duty to maintain a reasonably safe grade crossing, and then the statutory duty about the bell and whistle as I just read to you

Also, under our law drivers of vehicles have certain

duties imposed upon them by law The operator of a motor vehicle under our law is required to use the same care that would be used by a person of ordinary reason and prudence if that person were driving the same vehicle at the same time and place and under the same circumstances So, the driver has a duty of care and that is measured by what the ordinary, reasonable person would have done on the same like circumstances It's called a duty of care

There is also the law in our state that the driver of an automobile has a duty to keep a proper lookout for other vehicles on the road or this means that the driver -- this duty requires the driver to watch attentively so that the driver is able to see an object on the highway or at the crossing It is further the law in this state that the driver of an automobile has a duty to keep the automobile under proper control so that the driver is able to slow down, stop to avoid colliding with other objects

It is further the duty of a driver on reaching a railroad crossing and before attempting to go upon the track the driver must use his or her senses of sight and hearing to the best of her ability under the existing and surrounding circumstances She must look and listen to both directions for an approaching train If not prevented from doing so by the fault of the railroad company and to the extent the matter is under his control,

he or she must look and listen at a place and in a manner that will make the use of his senses or her senses effective

There is a statutory provision enacted by your legislature 56-5-2710 which reads whenever any person driving a vehicle approaches a railroad grade crossing the driver of the vehicle shall stop within 50 feet but not less than 15 feet from the nearest rail of the railroad and shall not proceed until he or she can do so safely The foregoing requirement shall apply when a railroad train approaching within approximately 1500 feet of the railroad crossing emits a signal audible from such distance and the train by reason of its speed or nearness to the crossing is an immediate hazard and when an approaching train is plainly visible and is in hazardous proximity to the crossing

I further charge you in our state that we have a statute 56-5-2715 that says if stop signs are erected at a crossing when such signs are erected the driver of any vehicle shall stop within 50 feet, but not less than 15 feet from the nearest rail of the railroad and shall proceed only upon exercising due care, and there's another statute 56-5-2530 which says that that statute requires a motorist to stop their vehicle -- Strike that That statute precludes and says it is unlawful for a motorist

to stop a vehicle on any railroad track except when necessary to avoid contact with another vehicle or at the direction of a police officer and traffic control device

So, those are the duties that the railroad has -- it is a broad duty to provide a reasonably safe crossing -- the duties that a driver has Those are the duties that you have the look at to see if the railroad breached that duty by not providing a reasonably safe crossing or if you compare the negligence when you get to that point whether or not Ms ~Harvey breached any of those statutory or common law duties of operating a vehicle

In this case the parties claim that each other if you get to the comparative negligence parts that they failed to follow some statute which I just read to you The failure to follow a statutory law is negligence per se, and if you find the parties failed to follow these statutory rules, you then have to decide whether or not the failure was the proximate cause of the injuries and or death

Now, when you make that analysis -- and I'll talk to you in a minute about the verdict form, but if you get to the point where you have decided that the Plaintiff is entitled to a verdict, obviously your next step would be to decide how much monetary damages the Defendant should be required to pay In this stage of the trial we're

talking only about actual damages

There are two types of damages that our courts recognize One is actual damages One is punitive damages It depends on your verdict in this case as to whether or not we will have to consider the punitive damage aspect of the case, but right now you're only concerned with actual damages

Actual damages are designed to compensate the Plaintiff for the Plaintiff's injuries or loss and to attempt to put the Plaintiff as near as possible in the same position that the Plaintiff was in before the accident occurred or the incident occurred In other words, actual damages would be the actual losses and expenses which the Plaintiff has suffered because of the Defendant's negligence

In this case we have two types of cases, so to speak We have -- as the lawyers have argued, we have a wrongful death case and we have a survival action Those are two types of actions that the law allows when someone has died and the Plaintiff has proven by the preponderance or greater weight of the evidence that the Defendant proximately caused that death So, in this case -- let's talk about them separately I'll talk about, first of all, the wrongful death action

In a wrongful death action the damages recoverable

are those damages sustained by the statutory beneficiaries resulting from the death of the decedent Thus, the question of damages is not directed towards the value of the human life that was lost, but rather the damages suffered by the beneficiary as a result of the wrongful death In an action for wrongful death the elements of damages to be considered by you include the following Mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, loss of the use and comfort of the deceased's society including the loss of the deceased's experience, knowledge, and judgment in managing the affairs of the deceased and his beneficiaries The beneficiaries are entitled to recover all damages which are naturally the proximate result of the wrongful act, and, also, any medical or funeral expenses are allowed under the wrongful death act So, that's the wrongful death portion

The survival action is what the person would have -- cause of actions the person would have had had he lived In other words, things that accrued before his death and the main thing here is what we call conscious pain and suffering If you find that the railroad was negligent and the negligence proximately caused the death of Mr Harvey, then you can consider the survival action which would allow you to consider whether or not

Mr Harvey suffered any conscious pain and suffering prior to his death or incurred any medical expenses, and, obviously, conscious pain and suffering compensates -- in this case it would have compensated Mr Harvey had he lived for the physical discomfort and emotional response to the sensation of pain caused by the injury itself, and there is no definite standard by which to compensate one for pain and suffering You have the authority to determine the amount, if any, to be allowed for pain and suffering using calm and reasonable judgment to insure that the damages are just and reasonable in light of the testimony and evidence presented in this case

And there is one other statute that we have in South Carolina that when we deal with wrongful death cases there is codified what is known as a life expectancy table You can use the life expectancy table to estimate the probable average remaining length of the life of Beryl Harvey and he was born April 12, 2000 -- strike that -- 1964 and under our law he has -- had a life expectancy of 38 years, and, obviously, that is just one piece of evidence along with all of the other facts that you may consider, and evidence bearing on his life expectancy including whether or not his occupation, habits, health at the time of his death in deciding the amount of damages for conscious -- in deciding the amount of damages for the wrongful death

if you get to that point

Now, ladies and gentlemen, I think I've said this, but let me just make sure that you understand this As some of the lawyers have argued and we always -- I always tell the jury that, obviously, the verdict means to speak the truth The verdict must be unanimous All twelve of you must agree on the verdict It cannot be based on sympathy, passion, prejudice, emotion, or any other consideration not in evidence in this case It must be based on the true facts as you find them to be and apply those true facts to the law in the case as I have given it to you

MR PARKER Your Honor, may we speak with you at side bar about the verdict form?

(Whereupon, a bench conference was held)

MR PARKER Your Honor, we'd like to be protected on that

THE COURT You will be I'll let you put it on the record

All right As I said, the verdict has to be unanimous All twelve of you must agree And the verdict form I hope will walk you through this This is what's been given to us by Columbia If you can't get through it, don't blame me Just knock on the door and ask me for clarification, but in order to follow the law as I just

gave it to you the first thing you have to do is determine whether or not the Defendant CSX was negligent, whether or not the Plaintiff has proven by the preponderance or greater weight of the evidence that they were negligent They had a duty They breached the duty That's the first thing If you find that they were not, it says no Stop Then that's it

If you find that they were negligent or that they breached that duty, then you go to question two Was that negligence the proximate cause of the death of Beryl Harvey and or any conscious pain and suffering that he may have had? If you said it was not, it says no You would just stop there and that would be the end of it It says stop here If you say yes, it says then go to question three Okay?

So, if you find that the railroad was not negligent or if you find that it was not the proximate cause, then that's the end of it If you find that they were negligent and that negligence proximately caused the death of Beryl Harvey, then you would go to three, and that s when we start the analysis of comparing any negligence, if any, of Ms ~Harvey

So, three asks the question if you've answered the first two yes, do you find that Ms ~Harvey or Frances Harvey was negligent? Her duties that I gave you, did she

breach those duties? If you say no, that's the end of it If you say yes, then you have to go to question four

That simply says if you found her to be negligent, then you have to find whether or not her negligence also proximately caused her son's death If you answer all four of those questions yes, then, obviously, then you have to make an analysis of the percentage of the railroad's negligence and the percentage of Ms ~Harvey's negligence using one hundred obviously, and you assign a number to the railroad if your deliberation deemed it to be and you assign a number to Ms Harvey after you deliberate and deem that to be

If you then find that Ms ~Harvey's negligence was greater than 50 percent, that would be the end of it If you find that her negligence was less, then you would go to the issue of damages and you would award damages based on the whole case, and then I would make the appropriate modifications according to the law

It is set out on there, Mrs Chassereau I think it's pretty clear If you have any questions you need the ask me or write me a note and knock on the door and the bailiffs will send it back If you get down to the damage part when you are going to start to consider that you do one for wrongful death and one for survival action like I just instructed you

Once you've reached a unanimous verdict, sign your name, date it, and knock on the door and we'll receive you back Write out -- if you find damages, write out the amount like you write a check just so I can read it How about that?

I am going to let you go back to your jury room now I suspect we got some pizzas back there by now

THE CLERK Should be, yes, sir

THE COURT Don't start talking about the case yet I have to ask the lawyers if I have left anything out We have to gather the evidence and send it back to you Once I -- the bailiff brings back the verdict form and the exhibits, then you can start deliberation If at any time during the deliberations you have a question about anything, sometimes I can answer them Sometimes I can't It depends on what your question is, but write that out and knock on the door and the bailiff will give it to me

I am going to let my twelve regular jurors -- we got to get some pizza for the alternates Y'all go back there and divide up your pizza now Don't start talking about it When we get ready to start deliberating, I'll tell you and then I'll deal with the alternates

(Whereupon, the jury exited the courtroom at 1 34)

THE COURT All right Any objections to the charge by the Plaintiff?

MR PARKER Your Honor, yes I would object to, number one, the verdict form itself as we took up at the side bar in that Ms ~Harvey's imputable negligence would not apply to one half of the survival action

THE COURT That's correct And the way I think we talked about it yesterday afternoon if -- let's assume they brought back under the survival action $100,000 verdict Let's assume that -- hold on -- and they found Ms ~Harvey 30 percent negligent, I would have to reduce her portion

MR PARKER I agree with that, but they would not go to the question was my objection on survival because they could find her 70 percent at fault and we would still recover the half of the survival action because her negligence is not imputable

THE COURT I understand

MRS MCLEOD Your Honor, our position on that is that when Mr Harvey died even on the survival action his interest abated

THE COURT Mr Harvey being the father?

MRS MCLEOD The father Beryl Harvey's father, Your Honor The interest abated to Frances Harvey leaving her the sole beneficiary under the wrongful death and the survival action, and under those circumstances the comparative negligence would apply to both claims in

full -- the survival and the wrongful death

THE COURT That was my understanding yesterday and my ruling

MR PARKER I understood it to be the other way that you ruled it didn't apply to one half of it and his half went to his children, but you couldn't be imputable under the statute

THE COURT What would your suggestion be Mr Parker?

MR PARKER Would be to take out that question about -- explain to them that that question has been removed and regardless of what they do in that question they are to arrive at a verdict if they find that CSX was negligent

THE COURT And then if Ms ~Harvey's negligence was 51 percent or more, there would be a zero wrongful death and we'd still have --

MR PARKER The court would as a matter of law hold it as no recovery I mean, even if they arrived at a verdict they would --

THE COURT And it would still -- if it was $100,000, half of it would go to Mr Harvey

MR PARKER That's correct

THE COURT None to Ms ~Harvey?

MR PARKER That's correct

THE COURT Do you agree with that?

MRS MCLEOD I agree if it passes that way, then we need to make some accommodations for it, but I do not agree that it passes down to his children, Judge I think -- I mean the solution for that is if you decide that Mr Charles Harvey, the Dad's share, goes down to his children, then what you should do on the verdict form on number six is say if you answer yes, answer only question 8, and if you answer no, go to question 7 and 8, but we are not agreeing that it passes down in that way We think it abates to Frances Harvey

THE COURT Would that satisfy you, Mr Parker?

MR PARKER Well, it doesn't satisfy me, but I believe it would satisfy me more and I believe it would be probably correct

THE COURT All right Mrs McLeod, get your able-bodied -- Do y'all have a printer up here? Where is the closest printer?

MR WILBY It would be just to our office, Judge

MRS MCLEOD We can get it right quick, Judge

THE COURT I mean like five minutes?

MR WILBY Yes, sir

THE COURT What if I say three minutes?

MR WILBY Yes, sir

MRS MCLEOD No, sir That will not happen

THE COURT Thank you, Mrs McLeod All right Start making that change ASAP

MR PARKER Your Honor, we have an objection to the charging 56-5-2530 in that we don't believe it would be appropriate under the facts of the case, but we believe that if it was charged you did not charge the statute but their request based on the statute We don't believe that's -- I think the title to the statute and the language preceding the railroad crossing should be charged so the jury would have full understanding of the statute

THE COURT Well, I ruled yesterday I was going to charge it so you're protected on that

MR PARKER We think the title to the statute and the body of it ought to be charged with -- clearly, we're talking about stopping -- standing stopping -- what does it say? It says --

THE COURT Stopping, standing, or parking prohibited --

MR PARKER Right

THE COURT -- under specific places

MR PARKER Right and then it goes on to say one of them is a railroad track and we don't believe that this statute was intended for this type of situation It is clearly a stopping, standing, or parking statute

THE COURT All right You're protected on the

record as you were yesterday I stand by the charge on that

MR WILBY Judge --

THE COURT Hold on a second You may See how fast you can run, ma'am

MR PARKER We also object, Your Honor, to the failure to charge 56-5-2715 in its entirety in which stop signs can only be erected at crossings when it's a particularly -- the Department of Transportation determines it is a particularly dangerous crossing and that the law -- the complete statute should have been charged

THE COURT We've discussed that yesterday in the charge conference I stand by the charge You're protected Anything else, Mr Parker?

MR PARKER Just a second

THE COURT Certainly

MR PARKER Yes, Your Honor I would also like to put on the record we attempted to argue from Defendant's Exhibit 134 that was placed into evidence yesterday In that there was argument about the animation There was argument about Mr Huett and what he did, and we wanted to use Exhibit 134 to show that, in fact, he had to do an animation to get the distances because they had cut the crossing The Exhibit 134 with this information was

admitted yesterday into evidence without objection, and we didn't object to it, and, of course, they then objected when the argument was to be made, but the document itself even though not seen by the jury nor published by the jury wasn't moved into evidence

THE COURT Thank you We've ruled consistently through the trial that any subsequent -- whether it's remedial or whatever it was -- any subsequent cutting of the trees I was keeping out I found it not to be relevant I found it to violate 407 and 403, and when it was brought to our attention at the side bar during argument that document or exhibit in its entirety would have violated my prior rulings and that's the reason I precluded argument on it at that time You're protected, Mr Parker

MR PARKER Yes, Your Honor I would like the put on the record that the document by Mr Huett would have been helpful in explaining the attack by the Defendant on the animation and the distances and these things and also explain why the attack on Dr Heathington about why his testimony was that he didn't have the measurements of the vegetation was a survey with a line that he went through and it was corrected and it would be helpful in explaining that testimony

THE COURT Well I am going to stand by my ruling,

and I take a little bit of exception with your word attack I think you and defense counsel questioned each other's clients, et cetera I don't know that either one of you attacked each other

MR PARKER I was speaking of the attack on Dr Heathington

THE COURT I understand Anything else by the Plaintiff?

MR PARKER No

THE COURT Thank you Mr Moorman, et al? Mrs ~McLeod?

MRS MCLEOD Your Honor, the only objection we have to the charge is failure to give Defendant's request number seven

THE COURT Which was what?

MRS MCLEOD It's the charge indicating that the sole authority to place and maintain traffic control devices on safe highways including Honey Ford Road rests solely with the South Carolina Department of Transportation

THE COURT Thank you And I have -- I am not going to say what I was going to say I have on many occasions in the trial of this case we've explained that, my reasoning for that You're fully protected on that

MRS MCLEOD Thank you, Judge

THE COURT I didn't think you wanted me to open that door, but anyway

MRS MCLEOD No, sir And with respect to the verdict form, Judge, I think you had it right the first time before Mr Parker's objection I do think that the comparative negligence should bar the wrongful death claim and the survival action in whole if she is 51 percent negligent So, to the extent that it lets the survival action go to the jury even if she is 51 percent negligent -- we're talking about Ms ~Harvey -- we object to it on that basis

THE COURT Well, I am going to have to deal with that depending on what the verdict is on a post-trial review, and I'll just let y'all brief that fully That's been a subject of debate throughout the trial, and I'll let it go to jury as we just recently modified and then we'll deal with the effect of that if we need to

MRS MCLEOD Thank you, Judge

THE COURT Fair enough?

MRS MCLEOD Thank you

THE COURT I would like to bring the forelady back out and tell her that I have to make a modification of the verdict form and for them to go ahead and enjoy their pizza and not to start deliberating until I get that It will require me to bring them back out with a brief

explanation Any objection to that?

MR PARKER None, Your Honor

MR HARMON No

THE COURT Ask Mrs Chassereau to look out here for me

(Whereupon, the foreperson enters the courtroom)

THE COURT Mrs Chassereau, I had to make a slight modification with the verdict form It's taken me -- we got to get it tight It is just going to take just a few minutes Y'all enjoy your pizza Do not start talking about the case because when I do the modification I got to bring you back out -- it'll take three minutes -- about what I did I made an error in it

THE FOREPERSON Okay

THE COURT Please pass that along

THE FOREPERSON Yes, sir

(Whereupon, the foreperson exits the courtroom)

THE COURT Any exceptions to that remark?

MR HARMON No, Your Honor

THE COURT All right Mr Parker, let's make this time productive If y'all will please gather up the exhibits -- Mrs ~McLeod, whoever is in charge of that task -- so when I get the jury verdict form corrected we can pass it right in there to them

MR WILBY I'll do it, Judge

MR PARKER I think we got all of ours together except we're missing 104

THE COURT We're off the record right now

(Whereupon, a break was taken)

MR WILBY Your Honor, Mr Moorman slipped in the restroom a second

THE COURT I can do it without him

Mr Parker, have you had an opportunity to look at -- subject to your objection?

MR PARKER Yes, sir I have, Your Honor, in accordance with your ruling

THE COURT Anything -- you need to put anything else on the record to protect your client? I think you're good

MR PARKER On that, no, sir We were trying to get these exhibits in order, and I think we are fairly well got them We had offered Exhibit 29 I don t know --

THE COURT Well, gentlemen, let's just do this Let me get my jury back out here, explain this to them and perhaps by that time y'all will have them -- all that yesterday effort

Mrs ~McLeod, any comments you need to make on behalf to the verdict?

MRS MCLEOD Only the same objection already stated, Judge

THE COURT You re protected

MRS MCLEOD Thank you

(Whereupon, the jury came into open court at approximately 2 10)

THE COURT Get through your pizza or are you about half-way through it?

THE FOREPERSON We're about through it

THE COURT Boy, I gobbled mine I am going to have to borrow one of Mr Murdaugh's anti-acid pills

On this verdict form I changed one thing My explanation on the questions concerning the negligence or alleged negligence of CSX is the same Ms ~Harvey's comparative negligence is the same and if you get to the point where you're having to compare the railroad and Ms ~Harvey, when you make that comparison I had earlier talked about more than 50 percent of Ms ~Harvey that would be the end of it That's not quite correct If you get to number six and you answer that question was Ms ~Harvey's negligence greater than 50 percent, if you answer yes, then you go to question eight If you answer no, you do seven and eight I think that's self-explanatory

Mrs Chassereau, if you have any problems with it, let --

THE FOREPERSON We'll holler at you

THE COURT -- me know Okay? Now, y'all all got the exhibits ready to give them to them?

MR PARKER Yes, sir We've got -- I think we do

MR WILBY We're about two minutes away

THE COURT Two minutes away So, go back to your jury room I am going to -- Have you alternates had an opportunity to eat your pizza? You got any left? That's a bad question Do you -- Are you okay? I am going to separate y'all out

Put them over in the other jury room for a few minutes Put my regular jurors over here

Give me about two more minutes and I'll send it back to you You can continue to eat Do it however you want to

THE FOREPERSON But don't discuss it

THE COURT Don't discuss it until I send everything back Listen, if anybody needs -- do we have smokers?

THE FOREPERSON One of the alternates is a smoker

THE COURT Well, I am not worried about them I can handle them

(Whereupon, the jury exited the courtroom at 2 12)

THE COURT All right Mr Parker, obviously, with your -- objection is already made Do you have any objection to what I just explained?

MR PARKER No, Your Honor

THE COURT Mrs ~McLeod?

MRS MCLEOD No, sir

THE COURT All right Let's get the exhibits quickly

MR PARKER Your Honor, the exhibits we need -- I guess at some point in time the court reporter will initial what's been put into evidence or we will -- how will we maintain that to --

THE COURT REPORTER Everything that's going back is in evidence

THE COURT What we agreed on yesterday is what's going in is in the record

MR PARKER I understand that, but what -- all of these exhibits I just want to make sure those are maintained as done

THE COURT Well, they won't leave the jury room and they ll all come back out here I am not going to make her go through it and check off what y'all agreed to yesterday I am leaving it up to y'all

MR PARKER That's fine I just wanted to make sure we didn't get mixed up so that other documents got in there

THE COURT That's why I am asking you, once again, to look through it

MR PARKER We've looked through them

MR WILBY These are not redacted, Mr Parker
MR PARKER We'll have to print those two off, but I would think we could send those back
THE COURT Any objection to going ahead an submitting it to the jury with what we have and then sending the other two redacted documents in just a second?
MR WILBY I do not have a problem with that, Your Honor I want to make sure that the video is not in because that video had not been reducing to the 40 -- are we square on that?
MR PARKER What we suggest is that if in the event that the jury wants that played, then we will play that clip They won't have video equipment
THE COURT We'll bring it out here
MR PARKER It just stays out
THE COURT I'll ask Mrs Chassereau to come back out and advise her of that
MR PARKER Okay
THE COURT Any problem?
MR PARKER None from the Plaintiff
THE COURT All right Where is my bailiff? Let me have a bailiff, please One or the other Mr Bailiff, Mr Parker, Mrs McLeod, y'all hand the bailiff the exhibits, please We're off right now, ladies and gentlemen

(Whereupon, a discussion was held off the record)
THE COURT Back on the record Mr Parker and Mr Wilby, we're sending everything back to the jury except for two additional exhibits that need to be redacted and we ll send those back in a second I am also going to ask the foreperson of the jury to step right out here one second for me to tell her about the video
(Whereupon, the bailiff took the exhibits to the jury room and the foreperson entered the courtroom)
THE COURT Mrs Chassereau, we have sent all of the exhibits back to you except for two We have to make a quick change on them We'll send those back in just a few minutes You may start your deliberations Included in the exhibits are the CD's of the animation I do not have the capability of playing those back in the jury room If y'all need to see those at any time, you send me a note and we'll come back out here with no testimony, no nothing Y'all will just look at it You tell me what you need to see Fair enough?
THE FOREPERSON That's fair
THE COURT All right You may start your deliberations
THE FOREPERSON Thank you
(Whereupon, the jury begins to deliberate at 2 15)
THE COURT Any objections?

MR PARKER None, Your Honor
MR HARMON No, Your Honor
THE COURT All right Before we -- the court reporter wants to make sure that there were a lot of exhibits that were ID'd but not put into the trial of the case In just a few minutes, Mr ~Barnes, would you and Mrs ~McLeod or whoever on either team make sure we have all of those so they can be turned over to the court reporter for inclusion in the record?
MR PARKER We've got a stack of exhibits that we have -- for the record that were not --
THE COURT Okay I would just ask William to go through them along with Mrs ~McLeod to make sure that we got them all and then we'll turn those over and give those to the court reporter so they won't in any way get sent back to the jury
All right We will stand at ease until we have a question from the jury panel
Mr Barnes, as soon as you get the redacted copies Done show them to Mr Wilby or whoever on their side and then hand them to the bailiff and they will then send them to the jury Any problems with that?
MR PARKER Nothing, Your Honor
THE COURT All right We'll stand it ease
(Whereupon, a break was taken)

THE COURT Let the record reflect I received -- everybody in? Where is Chris? We okay without them?

MR PARKER We're all right

THE COURT I received a question from the foreperson which I have discussed in chambers with Mr Parker and Mr Millberg Question If we answer, quote, yes, quote, to question one and answer no to question two, does that mean that the scale is equal? My response is no You must follow instructions on verdict form If this does not answer your concern, please advise If you need further instructions or a charge, please advise

I know either one of you may not like that, but that's what I am going to do

Mr Parker, you got any further suggestions?

MR PARKER No, Your Honor

THE COURT Mr Whoever, Mr or Mrs ?

MR MILLBERG Your Honor, we would suggest that you not answer the question and just direct them back to the form and to the charge

THE COURT I didn't answer the question Well, I did

MR MILLBERG The word no we would ask that you omit

THE COURT No, you must follow instructions on verdict form I stand by my response All right Tell

the clerk to hold on to that We'll stand at ease for a few minutes

(Whereupon, a break was taken)

THE COURT All right I received at question from the jury We discussed it in chambers with all lawyers present, I think

MR MURDAUGH I think so

THE COURT The question was If we answer yes to number six do we have to award any amount on number eight? Number eight being, of course, conscious pain -- survival action The answer is, yes, if you find Beryl Harvey suffered conscious pain and suffering, no, if you find that Beryl Harvey did not suffer any conscious pain and suffering

MR PARKER Your Honor, I want to put on the record our objection to that because we believe the funeral bill and the monument and also the EMS bill would have to be -- they --

THE COURT Well, Mr Parker, the funeral bill is an element of wrongful death or survival Mr Murdaugh argued it under the wrongful death If they come back with a zero amount, I will consider a post-trial amendment if that be the case We'll stand at ease

(Whereupon, a break was taken)

THE COURT All right Ladies and gentlemen, I know

that we've had a long week and a long half a week I know that everybody has worked hard on the case I know I have representatives from the railroad in the audience, representatives from the family I will not allow any display of emotion, notwithstanding what the verdict is So, if you feel like that you cannot control your emotions, I am going to ask you very respectively to leave now Okay Fair enough? All right

(Whereupon, the jury came into open court at approximately 4 36)

THE COURT All right Madam forelady, have y'all reached a verdict?

THE FOREPERSON Yes, sir

THE COURT And you've passed it up to me, is that correct?

THE FOREPERSON Yes, sir

THE COURT Thank you All right Let me publish the verdict This is Connie Carson as PR of the Estate of Beryl Harvey versus CSX Transport Question one Do you find that CSX was negligent? Yes Two Do you find the negligence of Defendant CSX Transportation was a proximate cause of Beryl Harvey's death? Yes Three Do you find that Frances Harvey was negligent? Yes Four Do you find that Frances Harvey's negligence was a proximate cause of Beryl Harvey's death? Yes Five If you've

answered yes to questions two and four, please apportion the percentage of negligence between Defendant CSX and Frances Harvey The total percentage you assign must add up to 100 percent As to the Defendant CSX Transportation Inc 40 percent As to Frances Harvey 60 percent Six Was Frances Harvey's negligence greater than 50 percent? Yes Go to question eight State the amount of actual damages under the survival action? Zero

Mrs Chassereau, is that your verdict and is it still your verdict?

THE FOREPERSON Yes sir

THE COURT Ladies and gentlemen of the jury of the jury panel, I ask each and every one of you is that your verdict and is it still your verdict, Mrs Jacquelyn Cook?

THE JUROR Yes

THE COURT Thank you Ms Gladys Dowling?

THE JUROR Yes

THE COURT Mr Robert Kirkland?

THE JUROR Yes, sir

THE COURT Ms Christa Rice?

THE JUROR Yes

THE COURT Where is Ms Rice?

THE JUROR Right here Yes

THE COURT I see you Ms Bowman?

THE JUROR Yes

THE COURT Ms Wise?
THE JUROR Yes
THE COURT Patricia Chassereau?
THE JUROR Yes
THE COURT Ms Amanda Campbell?
THE JUROR Yes
THE COURT Mrs LaToya Davis
THE JUROR Yes
THE COURT Mr Spires?
THE JUROR Yes
THE COURT Mr Carl A Hair also known as Moose?
THE JUROR Yes
THE COURT And Ms Lewis? What is the alternate? Hold on Don't anybody tell me Ms Smalls?
THE JUROR Yes
THE COURT Thank you
Anything for the jury, Mr Parker, before I dismiss them?
MR PARKER Nothing, Your Honor
THE COURT All right, ladies and gentlemen -- I assume nothing?
MR HARMON Nothing, Your Honor
THE COURT I know most of you I have practiced here for 30 years, loved doing it I have been on the bench now going on six years and I try cases -- I have

been in about half of the counties and tried cases, but I hadn't had a jury yet no matter where I went that paid as much attention as y'all did and you were just a great jury and I can't thank you enough You have been an example of what all juries should be like I just appreciate it

It is a tough case I think y'all gave it due consideration, and I appreciate all of your hard effort I wish I could pay you more I made Mr Hiers pay you an extra hundred last week He came in there whining to me today about how much money he spent on court this week I said, well, just take it out of your paycheck

Mr Hiers has been wonderful I appreciate him doing that You want to give them their check today?

THE CLERK Judge, if they can let me mail them -- we had a problem with the computer with the jury selection We got to do a little --

THE COURT I'll get him to mail them out tomorrow Does anybody need a work excuse? Y'all just go downstairs and we'll take care of that Okay?

I want to thank my alternates, too It is like, you know, getting incited to the dance and then you can't dance, but y'all paid just as much attention and I do appreciate all of your hard effort and thank you very much

So, I am going to ask everybody else please remain

seated

My three alternates and my jury, you may leave

(Whereupon, the jury exited the courtroom at 4 42)

THE COURT Mr Parker, you are welcome to make your motions now or I'll be glad to give you 10 days

MR PARKER I would prefer to have 10 days

THE COURT I assume that y'all have no objection to that?

MR HARMON No objection

THE COURT Mr Parker, please get Mr ~Barnes -- Mrs ~McLeod, y'all make sure that we got all the exhibits returned

Once again -- I put on the record several times and I want to thank each and every one of you It was hard fought, well prepared Good job Anything for the record before we break? Thank you

(End of Transcript of Record)

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF BAMBERG

FRANCES HARVEY,
Plaintiff,
vs CASE NO 2006-CP-05-0090
CSX TRANSPORTATION, INC AND
SOUTH CAROLINA DEPARTMENT OF
TRANSPORTATION,
Defendants

CONNIE CARSON, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BERYL HARVEY,
Plaintiff,
vs CASE NO 2006-CP-05-34
CASE NO 2006-CP-05-107
CSX TRANSPORTATION, INC AND
SOUTH CAROLINA DEPARTMENT OF
TRANSPORTATION,
Defendants

VIDEOTAPED

DEPOSITION OF DARRELL B MUNN

DATE October 12, 2009

TIME 11 20 A M

LOCATION Offices of SC DOT
955 Park Street, Room 210
Columbia, SC

TAKEN BY Counsel for the Plaintiffs

REPORTED BY LORI S MORTGE,
Certified Court
Reporter, CCR

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Darrell B Munn
Alan Metts, Videographer

(INDEX AT REAR OF TRANSCRIPT)

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STIPULATION

It is stipulated by and among Counsel that this deposition is being taken in accordance with the South Carolina Rules of Civil Procedure, Rule 30, that all objections as to Notice of this deposition are hereby waived, that all objections except as to form are reserved until the time of trial, and that the deponent does not waive reading and signing of this deposition

(PLF EXH 4, Defendant SCDOT's Privilege Log, dated August 25, 2008, was marked for identification)

THE VIDEOGRAPHER We're now on the record This is the beginning of the videotaped deposition of Darrell Munn The time is approximately 11 20 a m , the date is October 12, 2009

Will the Court Reporter now swear in the witness?

DARRELL B MUNN

being first duly sworn, testified as follows

EXAMINATION

BY MR PARKER

Q Please state your full name

A Darrell Munn

Q Mr Munn, where do you live?
A I live at 367 Country Manor Road in Camden South Carolina
Q And you're employed by the South Carolina Department of Transportation?
A Yes, sir
Q And what is your job?
A I'm the rail safety and research engineer
Q And your job would entail looking at crossings in the state to determine whether or not gates and lights would be needed at railroad crossings?
A Yes, sir
Q That's part of what you do?
A Yes, sir
Q And in order to do that, you would go with others employed by the Department and railroads to determine whether or not gates and lights would be needed?
A Yes, sir
Q And in doing that, do you use the criteria set forth in Code of Federal -- 49 -- no, excuse me, 23 USC -- not USC, CFR Section 646 214? Would you use that criteria?

A I'm not sure of the number itself
Q We have it there as an exhibit if you'd look -- maybe we didn't make it an exhibit, I'm sorry Let me hand you a copy of it
A (Reading) Yes, sir That does look like a code that we use, yes, sir
Q And that would give you the criteria that you would look at in trying to determine which grade crossings in South Carolina would -- an adequate warning device would be gates and lights?
A Yes, sir That, along with the Railroad-Highway Grade Crossing Handbook, yes, sir
Q And we've marked as an exhibit to Mr Jenkins' deposition the AASHTO sight distance chart and the Federal Highway grade crossing sight distance chart These would be the charts that the Department would use to determine whether or not sight distances at a crossing was adequate?
MR WILBY Object to the form
BY MR PARKER
Q Is that correct?
A Yes, sir Mostly we use the equations that this chart is derived from that's in the Railroad-Highway Grade Crossing Handbook
Q And you would look at it from the

standpoint of a tractor trailer truck using a crossing?

A The chart that's in the book that we use is based on the tractor trailer -- the 65-foot long tractor trailer So worst case scenario, yes, sir

Q And then determining whether or not a crossing has adequate sight distance and the motorist has adequate warning, you want to assume that tractor trailers will be using the crossing since we know that the highways are available for use by tractor trailers?

A In most cases the tractor trailer should be able to use a crossing There are a number of cases in the state where a tractor trailer could not use a crossing In that case, my technicians do have programmable calculators, and I put the equations in their calculators and they're able to run the numbers for the types of vehicles they think they use the crossing for But, in most cases, you are correct that the tractor trailer should be able to use the crossing, yes, sir

Q I assume there would be some geometric condition of the crossing that would prevent a tractor trailer from using it?

A Yes, sir There are crossings out there

which are called high profile crossings that are humped which a 65-foot long tractor trailer would not be able to use

Q And you would put a sign up warning tractor trailer trucks not to use the crossing?

A In the cases where we understand that the grades would not permit a tractor trailer of such length to use it we would put up a sign, yes, sir

Q Now, we're here about a crossing in Bamberg County called Honeyford crossing Are you familiar with that crossing?

A Yes, sir

Q And when is the last time you've been out there?

A I visited a few days ago last week -- last Tuesday, I believe, yes, sir

Q And when was the time before you were out there that you recall?

A I don't recall the last time I was out there before that

Q Do you recall going out there with the diagnostic team to look at the crossing in 2004?

A I don't recall it specifically, no, sir

Q All right Have you refreshed your

memory by looking at documents for your deposition?

A Yes, sir

Q And from those documents, were you able to tell when you were out there?

A According to the documents it was in April of '04, I believe, yes, sir

Q And who went out there with you, if you can recall?

A I don't recall who went with me

Q And did you see on the documents who went with you?

A No, sir

Q But you -- you would have been the leader of the diagnostic team?

A Yes, sir

Q And when you looked at the crossing in April where you recalled the data, did you refresh your memory as to the date by looking at the documents? You said in April and I'm trying to get more specific --

A Right

Q -- than just April

A Yeah I recall from looking at the documents that it was in April, but I don't recall the exact date, no, sir

Q You have submitted an affidavit in this case that said the recommendation to install gates and lights was made April 26th, 2004, is that correct?

A That's the date that I observed in the field that I would want to recommend flashing lights with gates at the crossing, yes, sir

Q And once you -- that determination was made in the field, go through the process of how that was implemented, that decision

A I make a recommendation, and at that time I'll sketch up the crossing And I'll proceed to look at other crossings that are on the priority list, which we have a listing that ranks each crossing relative to each other statewide, and that's done usually in late March/early April It just depends on when I get information from the Department of Public Safety pertaining to collisions

The equations that go into the ranking use five years' worth of accident data, so what I do is I add on the latest year and subtract off the oldest year And like I said, those are re-ranked Late March/early April I'll proceed to look at the highest ranking crossings on that list and I'll look

at them in the field to determine which ones we want to make recommendations for

From early April to October I get paperwork ready to ask the Federal Government for funding for those signalizations and we fill out what we call PARs, Program Action Requests In October, which is when the funding becomes available, you know federal fiscal year, we submit these PARs to the Federal Government basically saying these are the ones that we're recommending an upgrade warning device Will you allow funding for these? They look at them and they determine, okay, yeah, we'll allow funding for those

Once I get authorization back from the Federal Government, I send a letter to the railroads, listing the five or six crossings that I've determined on their line that I'm recommending an upgraded warning device, and I'll let them know these are the ones I'm recommending If you agree, you are authorized to begin the process of estimating and drawing up the plans for these locations And I ask them, you know, once the plans are ready and the estimates are ready, send those to me, I'll look over the plans, see if I agree with them, make sure the estimate is within what I think

it ought to be, and once we do that then the process kind of changes between the various railroads

In the case of CSX, they will actually prepare an agreement and send it to us and it will have their estimate in there that we agree to And we will execute the agreement, then they will execute it And from then on it's basically up to the railroad to get everything scheduled as far as getting the equipment made and getting it scheduled for installation

Q So in the case of Honeyford crossing, when was the request for funding submitted to the Government for the funds to do that crossing?

A I'm not sure on the Honeyford Road crossing because at that time I believe the funding was requested out of the utilities office, whereas now it's requested from traffic engineering I do that now, but I believe in 2004 that request was still coming from the utilities office

Q That's another department of South Carolina Department --

A Yes, sir

Q -- of Transportation? And would it have been made out of 2004 funding, or would it have been made out of funding that --

A No That would have been the next fiscal -- the 2005 fiscal year, yes, sir Yeah, we would not have had any funding available until October, because what we try to do is get all the funding obligated as quickly as possible, you know, once the fiscal year starts

Q When did you -- would you have notified CSX that you were going to request the funding for Honeyford Road crossing gates and lights?

A It should have been, I would say, late 2004 or maybe early 2005 I'm not exactly sure when the letter was sent to CSX letting them know that we were recommending an upgraded device at the location

Q Sometime after April 26, 2004?

A Definitely after then --

MR NESS Object to the form of the question

THE WITNESS Yes, sir

BY MR PARKER

Q That's the date you decided --

A Yes, sir

Q So it had to be after that?

A Definitely after that, yes, sir

Q But do you know how long after that?

What's the normal?

A It would have been no earlier than mid-October, you know, at the earliest

Q In making the decision that Honeyford Road -- you looked at the volume of the traffic there at the crossing?

A Yes, sir

Q And that was, I believe, 320 vehicles per day?

A That's possible I forget the ADT at the time

Q That was low?

A Low is a relative term

Q Is 320 considered low?

A In some cases 320 is considered low, and some of it's -- it could be a good bit for a secondary road

Q You considered the train traffic?

A Yes, sir

Q And how would you characterize the train traffic on that track?

A I would say that there's a good number of trains on that line, yes, sir

Q So it's fairly high?

A Fairly high -- not the highest we have,

but it's -- it's a good number of trains

Q And the maximum train speed was what?

A I believe that being the Amtrak line, and there's no slow orders through there that I know of It was probably 79 miles an hour, yes, sir

Q So that would be a high speed?

A Yes, sir That's the highest speeds we have in the state are 79, yes, sir

Q And did you look at the accident record at that crossing?

A Yes, sir

Q Do you recall what it was?

A No

Q And did you look at sight distance at that crossing?

A Yes, sir

Q And did you find that there was restricted sight distance?

A No, sir

Q Did you find it in accordance with the sight distance charts published in the Highway Grade Crossing Handbook and AASHTO?

A The sight distance that I would have looked at would have been, as you mentioned previously, the -- where the vehicle speed is zero

In other words, where the vehicle was stopped at the stop bar at the crossing

Now, this chart shows distances along the highway from the crossing and use vehicle speed and train speed And you look at these distances along the bottom and that will tell you where your vehicle can be and still cross safely in front of a train Now, those -- at the time that I did my investigation, I would not have looked at those

Q Why -- why not?

A Well, there's two reasons One -- one is at this crossing, we already had stop signs and those were put up at some point in the '70s So with those stop signs, the reason that they're there is because you have a limited line of sight on the approach -- not at the stop condition, but on the approach itself

Q And limiting the sight distance was the vegetation?

MR WILBY Object to the form

THE WITNESS I don't recall exactly what was limiting the sight distance But just from my observations recently, there are pine forests in the quadrants, yes, sir

BY MR PARKER

Q And do you recall stopping at the stop bar and measuring the sight distance?

A Actually measuring the sight distance? No, sir

Q So insofar as knowing whether or not the sight distance required by the Railroad Grade Crossing Handbook and AASHTO was provided from the stop bar, you would have no memory of that?

MR WILBY Object to the form

THE WITNESS I don't have a specific memory, no, sir

BY MR PARKER

Q Now, the -- insofar as the sight distance is concerned, that's one of the criteria for gates and lights?

A Well, it's one of them, yes, sir

Q And this -- do you recall this being a skewed crossing?

MR WILBY Object to the form

THE WITNESS I don't recall that there was a great skew to this crossing, no, sir

BY MR PARKER

Q It's not perpendicular, is it --

A No, sir

Q -- that you remember?

A No, sir

Q And do you also recall there being a building on the right-of-way that would obstruct the view at this crossing?

A No, sir I didn't recall that

Q Do you recall what observations you made that led you to the conclusion to recommend gates and lights for this crossing?

A Well, first of all, we have the ranking that I mentioned and that determines a lot of what we do, where a crossing, you know, ranks relative to the other crossings in the state You've got a high speed line you had a fair amount of ADT which, I think you said at the time, was 300

Q 320, I believe (Tendering)

A (Reading) Let's see This is from 3/15/04, we're showing 320 So 320 is not high, but it's not very low And we had a substantial amount of trains, I would say So those, added together with the fact that on the approaches themselves you had limited sight distance, so my recommendation was to add gates

Q And the -- was the ADT that was done on 3/15/04, was that done in preparation for your diagnostic team visit or is that --

A Not coincidentally, no, sir I have one engineer and technician that work for me and they go out and they actually either hand count these crossings or they put out the tubes, 24-hour count

Q And those are records that are just kept in the normal course of operations for the Department?

MR NESS Object to the form

THE WITNESS These records are kept to help us in the rail highway safety program That data is used to determine the rankings for the crossings

(Off-the-record conference)

BY MR PARKER

Q Let me ask you, while we're looking for that, who was on the diagnostic team with you if you recall?

A I don't recall, no, sir

MR PARKER Let me hand you what we'll mark as the next exhibit

(PLF EXH 5, Defendant SCDOT's Privilege Log, dated August 25, 2008, was marked for identification)

BY MR PARKER

Q Is Exhibit 5 the -- is a privilege log

that has been submitted that lists out I'm pretty sure documents from SCDOT14 through SCDOT54 Have you reviewed those documents?

A (Reading)

MR NESS Johnny, for the record, now, some of these were later produced

MR PARKER Okay

MR NESS Not all, but some

MR PARKER Okay

THE WITNESS (Reading) The question is have -- have I --

BY MR PARKER

Q Have you reviewed --

A -- seen these documents?

Q Not this document, but the documents --

A That this refers to?

Q -- that represent that are those 54 pages of documents

A I believe I have seen these documents, yes, sir

Q Okay And not dealing with this case but, typically, what documents would be in a crossing file?

A Well, it depends on which file you're referring to We have a -- a file for the crossing

and the various inspections that we do in my office Then we have a file for the crossing upgrade project which would be -- for this crossing would be in the utilities office

Q Now, the file in your office, what would be in that file?

A The file in my office would have the various inventory forms We have what we call the yellow sheets, which are the FRA inventory sheets, we would have various reports for studies that we've performed on the crossing for the safety program, and collision reports, maps, sketches, things like that

Q Let's go first with -- you said various reports What type reports do you keep?

A We have inspection reports for the inspections we do under the Lourie Law We have reports that we do for nighttime inspections that we do, for inventory inspections that we do, and any sight distance studies that we perform

Q And so you would have a report that would reflect what you did when you went out there on April 26, I guess? Would there be a report for that day?

A For that crossing I believe the sketch

itself would be the report, yes, sir

Q And the sketch would contain what information?

A The sketch, other than having the -- the geometrics of the crossing itself, would have the crossing number, the road that it's on, what signs were present, markings, and what my recommendation was

Q Just your hand prepared sketch?

A Yes, sir

Q And other than that -- and that document would have contained your recommendation that it -- gates and lights be installed?

A That document would have the recommendation, yes, sir

Q And at Honeyford Road, that was your recommendation on the 26th?

A That was my recommendation on -- in April of '04, yes, sir

Q Was there a sight distance study done on Honeyford Road crossing at any time, to your knowledge?

MR WILBY Object to the form

THE WITNESS I don't recall, no, sir

BY MR PARKER

Q And if you will tell us what a sight distance study is

A For a railroad crossing, the sight distance studies that we perform involves using the formulas from which this chart is generated And we have -- a technician will park a vehicle the distance from the crossing as stated in this chart on this bottom line, and another technician will basically walk down the track And the technician in the vehicle will let him know when he cannot see that person anymore -- actually, what we use is a range pole that indicates the height of a train

Q And then you would note that on some type of report?

A Right Yes, sir

Q Do you have a form for that?

A Yes There is a form yes sir

Q And do you know whether that was done prior to April 26th, '04?

A It has not been done since I've been involved with the program, which I started in '87 as Mr Jenkins' assistant

Q So as far as from '87 to 2004, you don't believe that was done?

A I don't think so, no, sir

Q Now, the documents that would have been used to accumulate or compile for applying for federal funds, what would that have been?

A As I stated earlier, beginning in October -- early October we'll submit what we call a PAR, which is a Program Action Request, and that goes through various channels within the Department, and then it's forwarded to the FHWA to get the funds authorized for the project So as far as documents go, since I don't deal with that directly I submit the PAR itself You probably need to talk to somebody in federal aid to find out exactly what they submit to the Federal Government to receive that funding

Q I'm thinking about you told us about you prepared a sketch with your recommendation on it

A Yes Yes

Q And that document was prepared or collected or compiled for the purposes of applying for federal funds, is that correct?

A That document is used to notify the railroad of our recommendation The PAR itself is what I submit to receive the funding, to -- to request the funding

Q Now, the -- the document that you fix

with your sketch, when would that have been transmitted to the railroad?

A I don't know exactly when it was transmitted to the railroad, but the earliest it could have been would have been mid or late October That's the earliest it could have been

Q You would not have sent it until you sent the request --

A Until --

Q -- for the federal funds?

A Until we get notification from FHWA that they've authorized the funding for that project, we would not send that to the railroad

Q Now, I assume that the other documents you told me about you may have collected would have been an accident history?

A Yes, sir

Q And then the equation, the accident prediction results, would have been one of the documents you would have compiled -- or would you have compiled a document?

A No, sir What we have is a listing of every public -- every crossing in the state And the actual number, which is called Predicted Accidents Per Year, that's what they're ranked on,

that number would be in there It would be in that listing

Q And you would have -- the priority list, is there a priority list?

A That list gives me a place to start as far as which locations I want to look at and maybe recommend that the warning devices are upgraded, yes, sir

Q Does that prioritize all grade crossings in the state that do not have gates and lights?

A It prioritizes all public at grade crossings, whether they have gates and lights or just passive warning devices They're all in there

Q These are the ones with -- insofar as the priority for gates and lights, would it include -- it wouldn't include ones where gates and lights have already been installed, would it?

A It does include those What I have to do is go through the list --

Q And eliminate?

A Right Yes, sir

Q And each October that's looked at?

A Actually, that's looked at in probably mid-April Once I have that priority listing, then starting in about mid-April I can go out in the

field and start looking at the highest ranking crossings and determine which ones we're going to recommend to the railroads

Q And approximately how many a year do you fund?

A Right now, I can do about 17 or 18 with the funding we receive

Q That's down from a greater number --

A Yes, sir

Q -- in past years?

A Rates have gone up

Q So -- so each year you would do 20 or whatever you could do and then those would, of course, come off your list So you would move up -- or the crossing would move up each year?

A What would occur, we do the highest ranking ones -- you know as many as we could Then the process starts over, March or April I get all the collision data from DPS, I re-rank the crossings then and we go through the list again

Q And based upon the accident history, that priority list may change?

A Yes, sir Not just accident history, there's a lot of things that change throughout the year But accident history --

Q What other kinds of things may change over time?

A Well, the number of trains can change, the ADT can change, train speeds, roads get paved, things like that

Q And after you recommend the crossing, you submit the request and it comes back and the railroad designs the crossing?

A I get the authorization back, then I notify the railroad that if they agree with the recommendation -- because it is possible that they would not agree with it I haven't had that occur, but that is a possibility Then if they agree with it we tell them, you are authorized to begin designing the signals and preparing an estimate And once that's completed, they forward it to me so that I can look over the plans and look at the estimate and basically make sure I agree with what they're planning and how much it's going to cost

Q And then you sign an agreement?

A We -- it differs with the different railroads, but with CSX they prepare the agreement and in the agreement is the amount we agree to pay And they say they're going to design and install signals for, you know, the crossing So we execute

it, they execute it

Q Do you know when that took place for Honeyford crossing, when the agreement was signed?

A No sir

Q Now, you've been listed as a witness in this case Do you have any opinions in this case?

A No, sir

Q Do you have any expert testimony that you're prepared to offer in any way?

A No

Q Do you know where the Honeyford Road crossing was on the pri -- priority list the previous year, in 2003?

MR NESS Object to the form

THE WITNESS No, sir

BY MR PARKER

Q No memory of that?

A No, sir

Q Do you recall whether or not Mr Jenkins was involved in the Honeyford Road crossing recommendation?

A I don't recall if he was or not At that time he had taken on some additional duties and I don't think he was, but I'm not positive of that

Q How about Jerry Watkins?

A Jerry Watkins was the utilities engineer at the time -- actually, he was the railroad project's coordinator and it is possible that he was on the team at the time, yes, sir

MR PARKER I don't have anything further Thank you

MR WILBY No questions

MR NESS We have no questions

THE WITNESS Thank you

THE VIDEOGRAPHER This concludes the videotaped deposition of Darrell Munn The time is approximately 11 55 a m We're now off the record

(The deposition was concluded at 11 55 a m)

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SIGNATURE OF DEPONENT

I the undersigned, DARRELL B MUNN, do hereby certify that I have read the foregoing deposition and find it to be a true and accurate transcription of my testimony, with the following corrections, if any

PAGE	LINE	CHANGE	REASON

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DARRELL B MUNN Date

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CERTIFICATE OF REPORTER

I, Lori S Mortge, Certified Court Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof

Witness my hand, I have hereunto affixed my official seal this 21st day of October, 2009 at West Columbia, Lexington County, South Carolina

Lori S Mortge
Lori S Mortge
Certified Court
Reporter, CCR
My Commission expires
December 13, 2016

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(No Information Requested)

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PLAINTIFF'S REQUEST TO CHARGE NO 16

Code 1976 § 56-5-2715

Code of Laws of South Carolina 1976 Annotated Currentness

Title 56 Motor Vehicles
Chapter 5 Uniform Act Regulating Traffic on Highways
Article 21 Required Stops
§ 56-5-2715 Stop required at designated railroad grade crossings

The Department of Transportation, and local authorities with the approval of the Department of Transportation, may designate particularly dangerous highway grade crossings of railroads and erect stop signs thereat When such signs are erected, the driver of any vehicle shall stop within fifty feet, but not less than fifteen feet, from the nearest rail of the railroad and shall proceed only upon exercising due care

HISTORY 1979 Act No 105 § 5, 1993 Act No 181, § 1417



PLAINTIFF'S EXHIBIT

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ROA 358



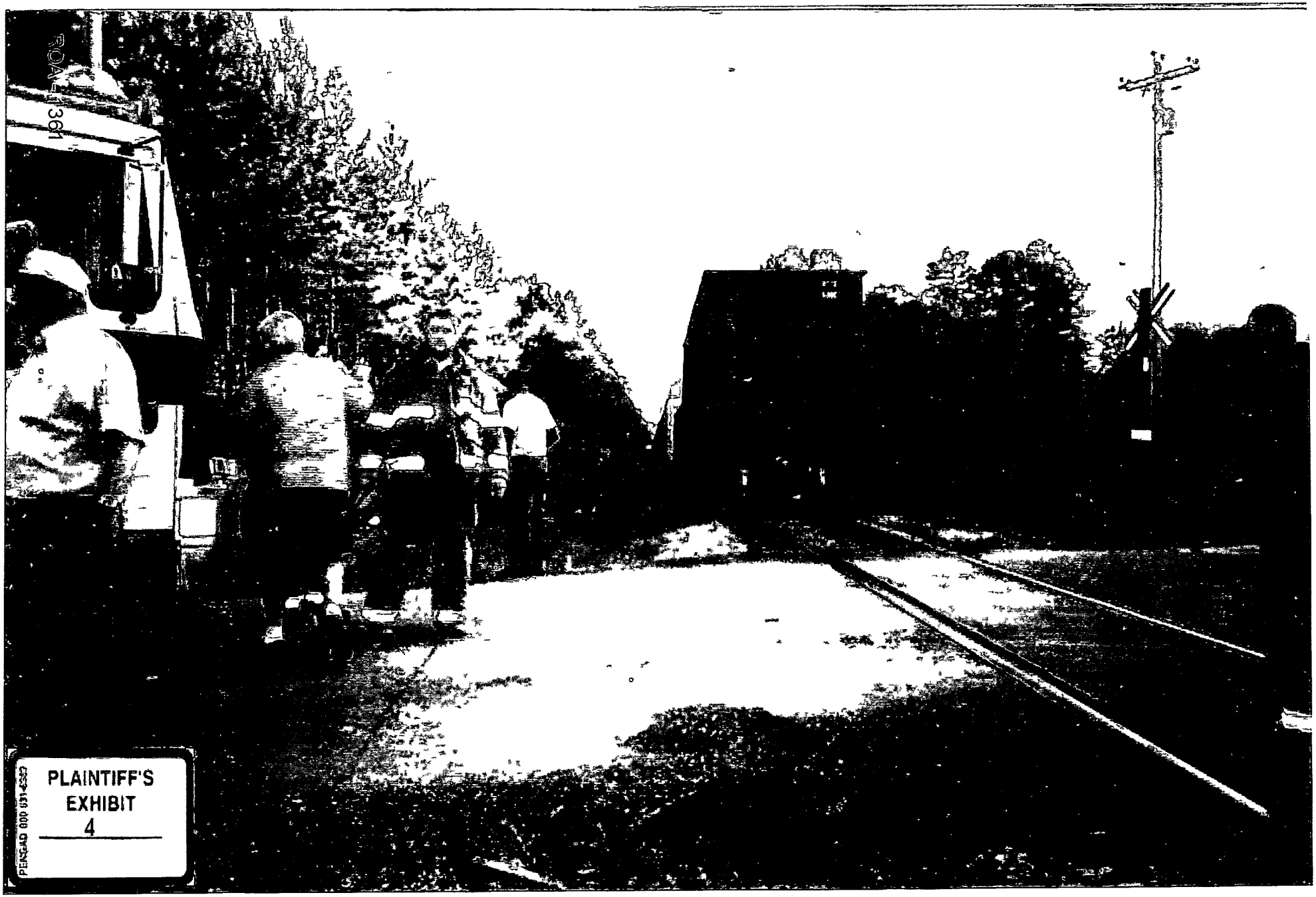
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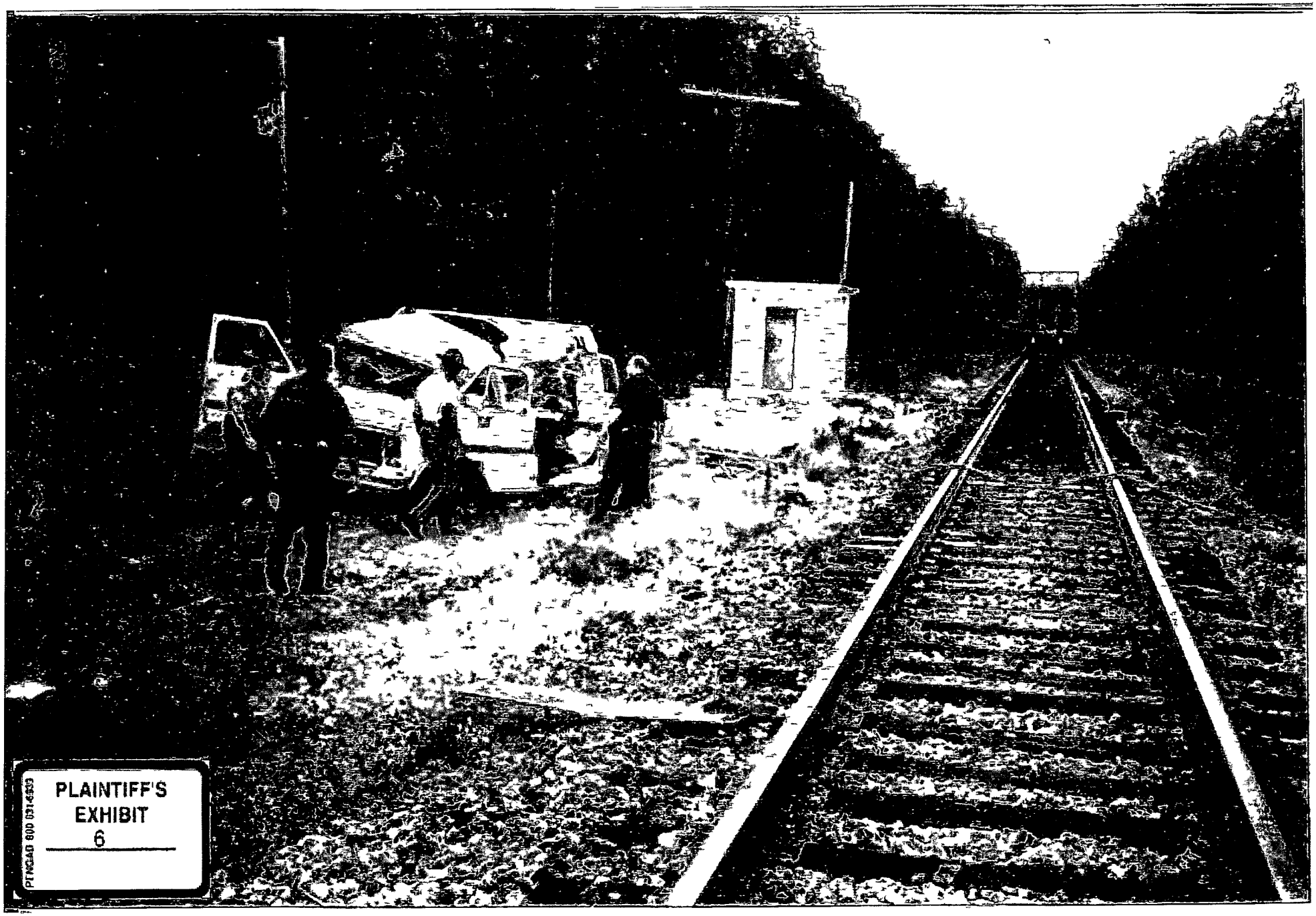
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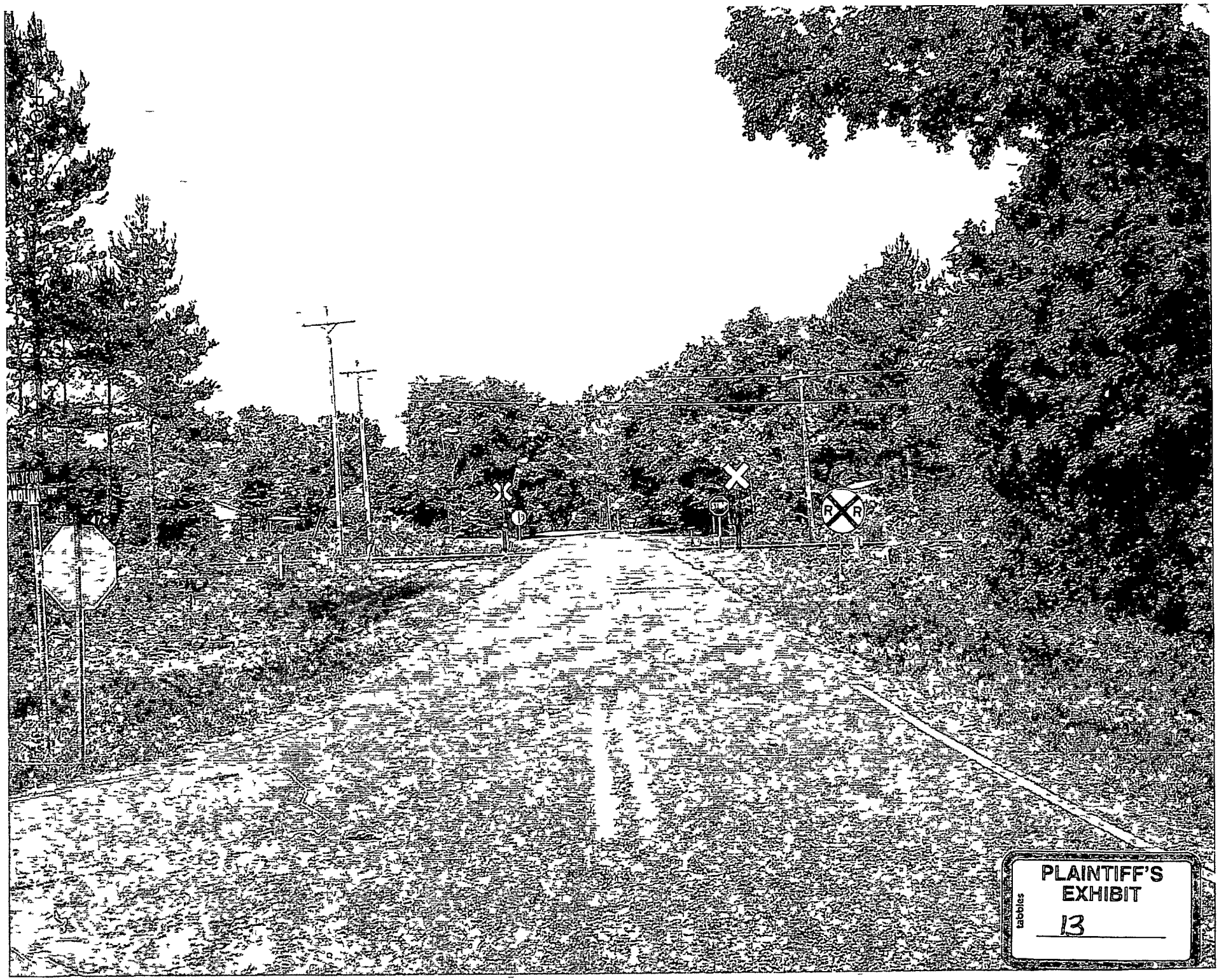


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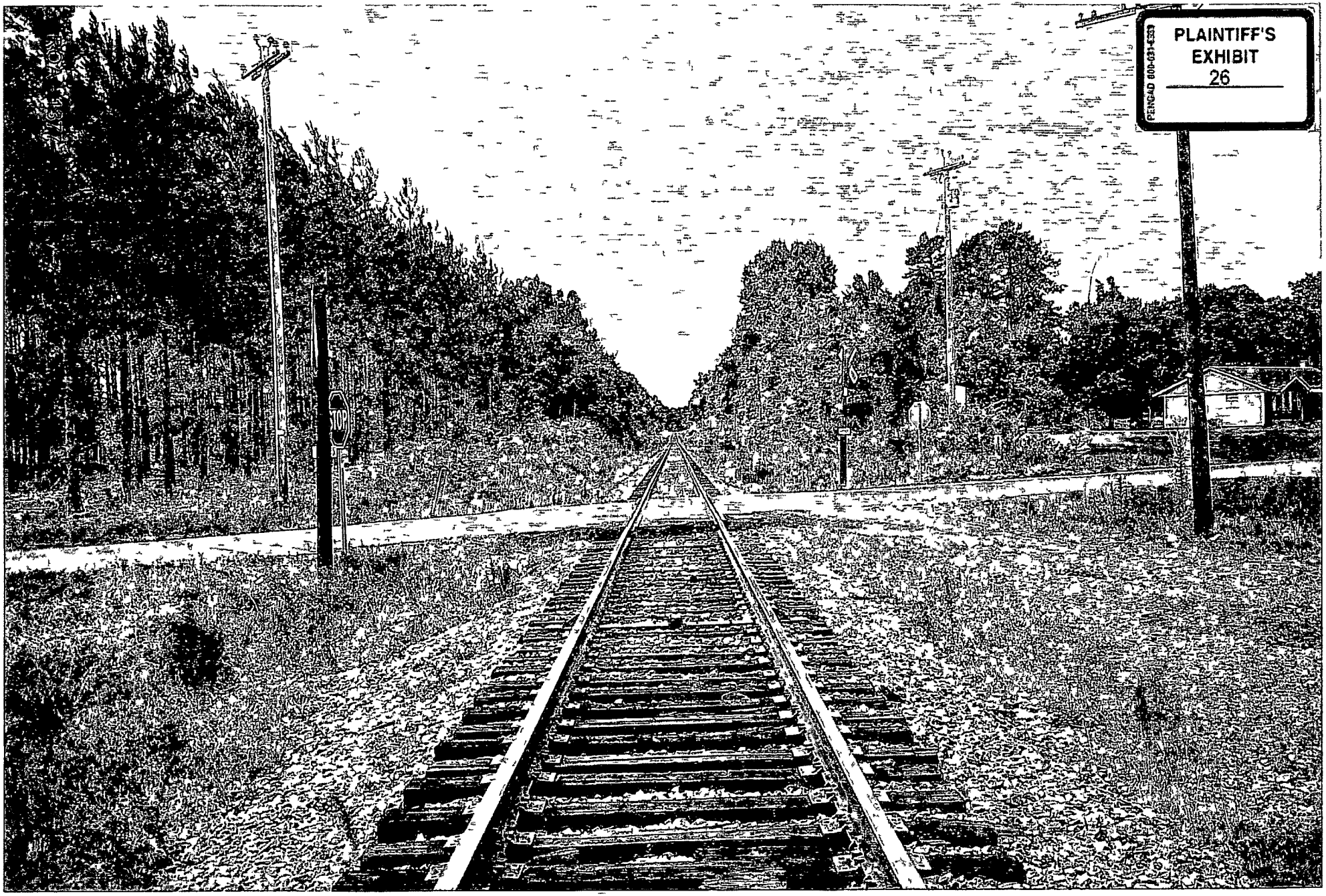

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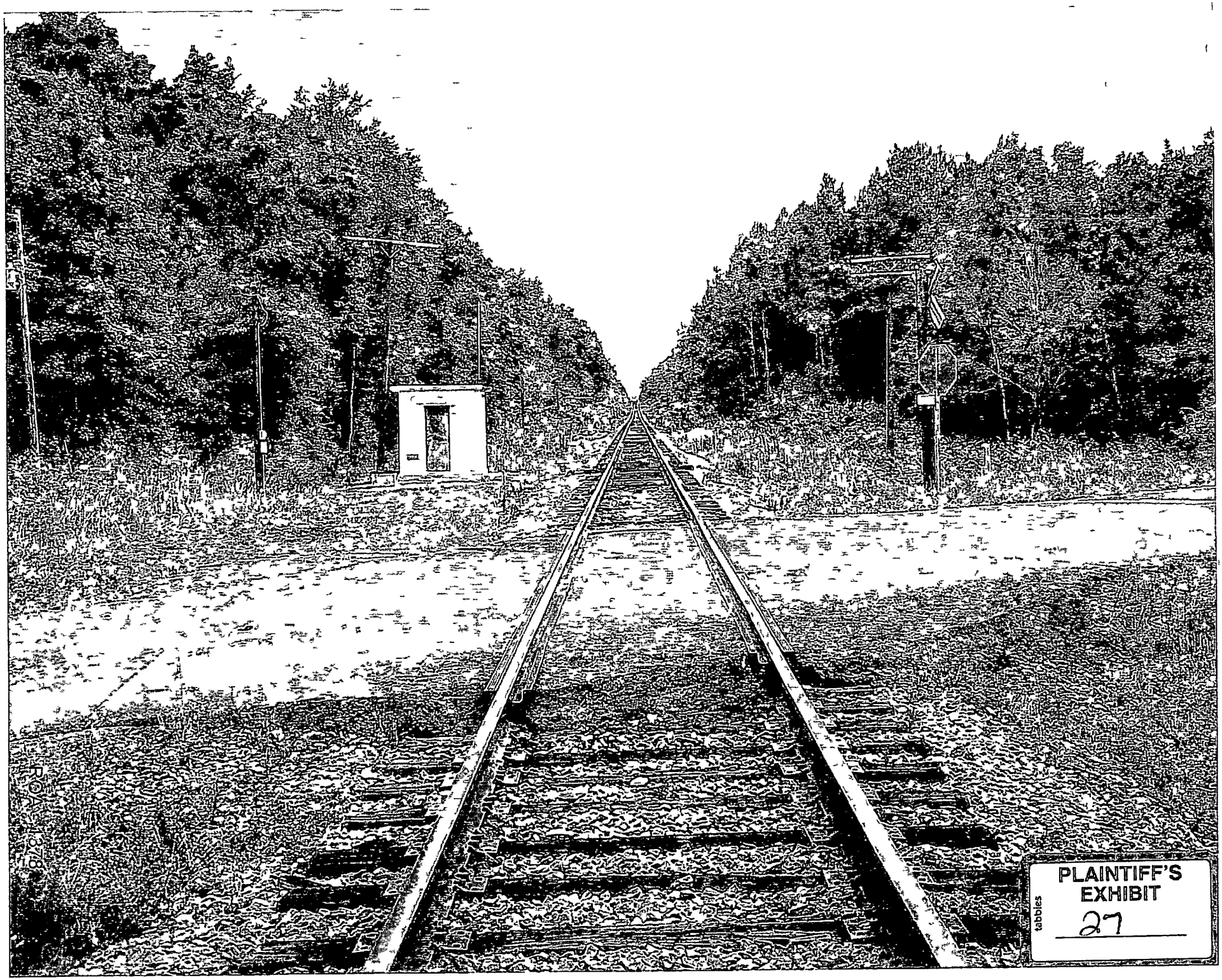

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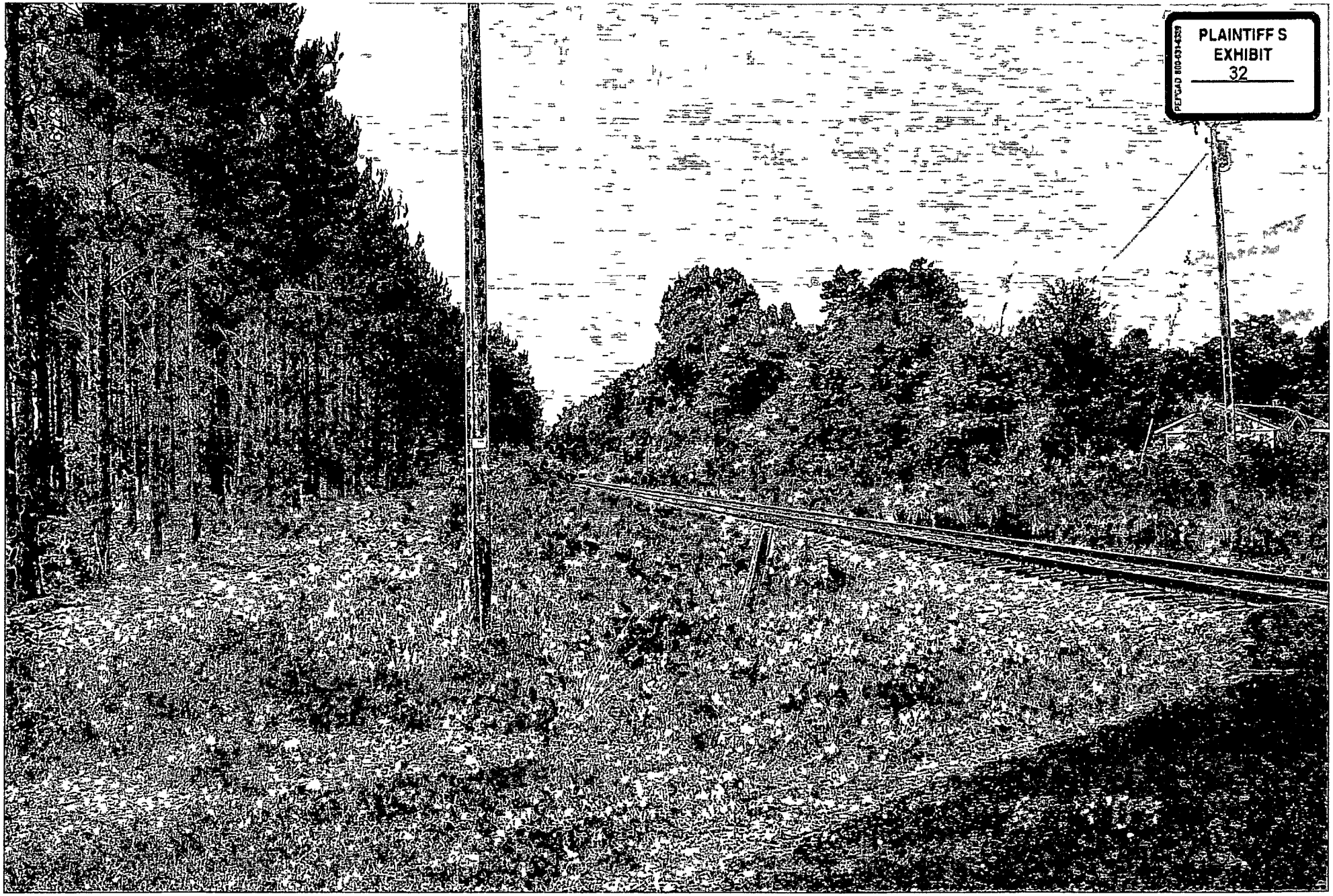
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PLAINTIFF'S
EXHIBIT
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PENCAD 800-631-6989



PLAINTIFF'S EXHIBIT
27


PLAINTIFF S
EXHIBIT
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PEPGAD 800-631-6989

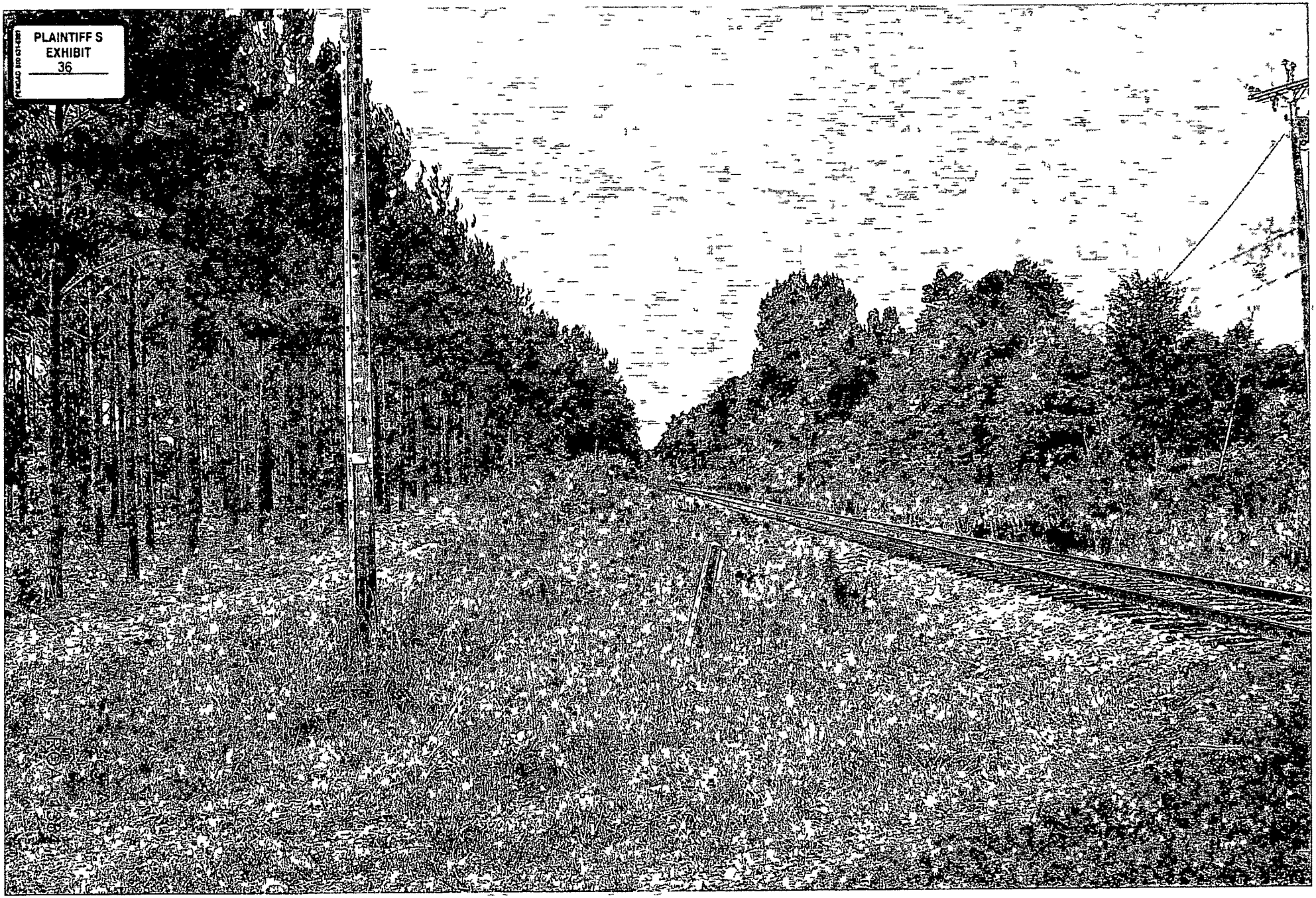


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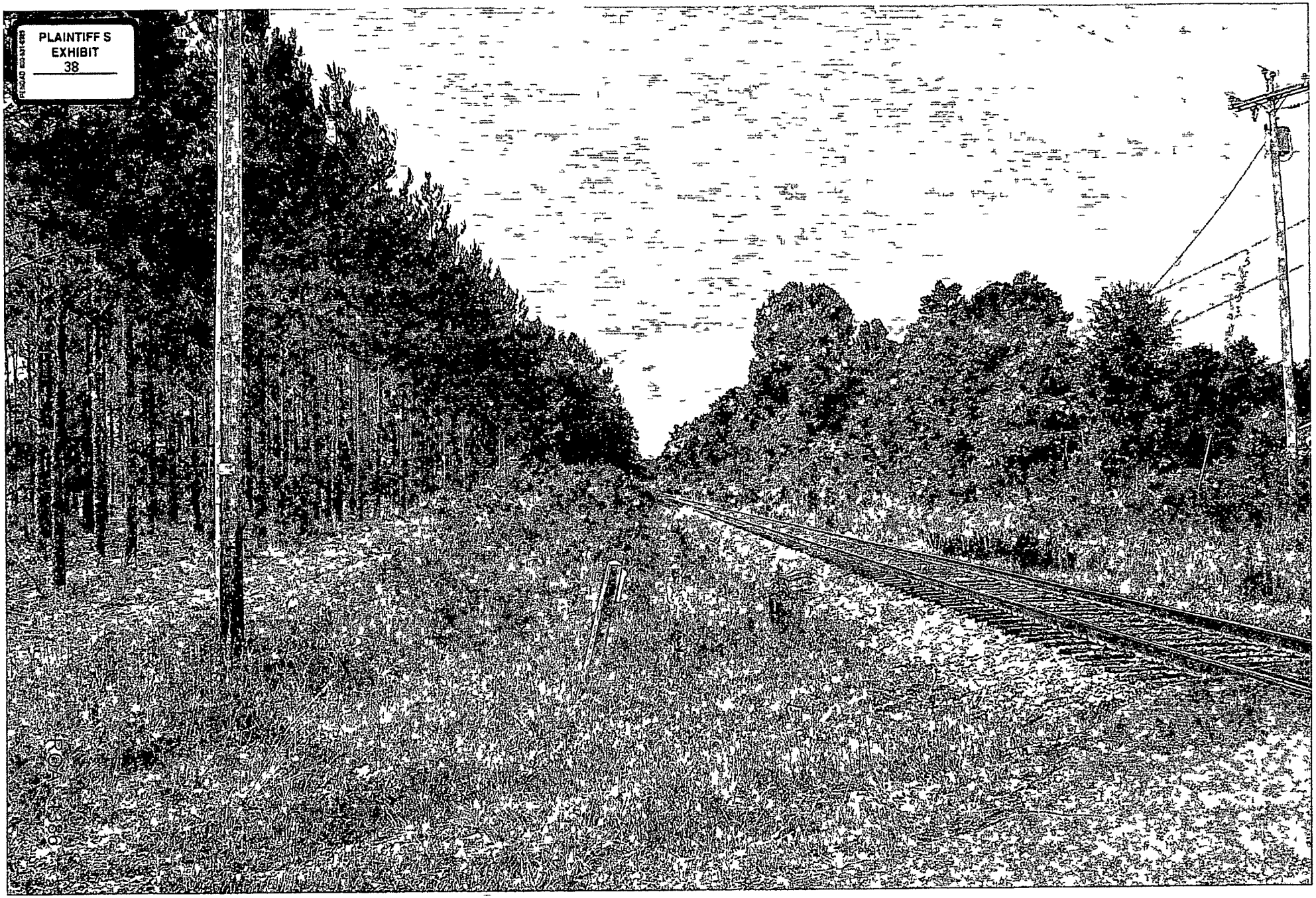
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EXHIBIT
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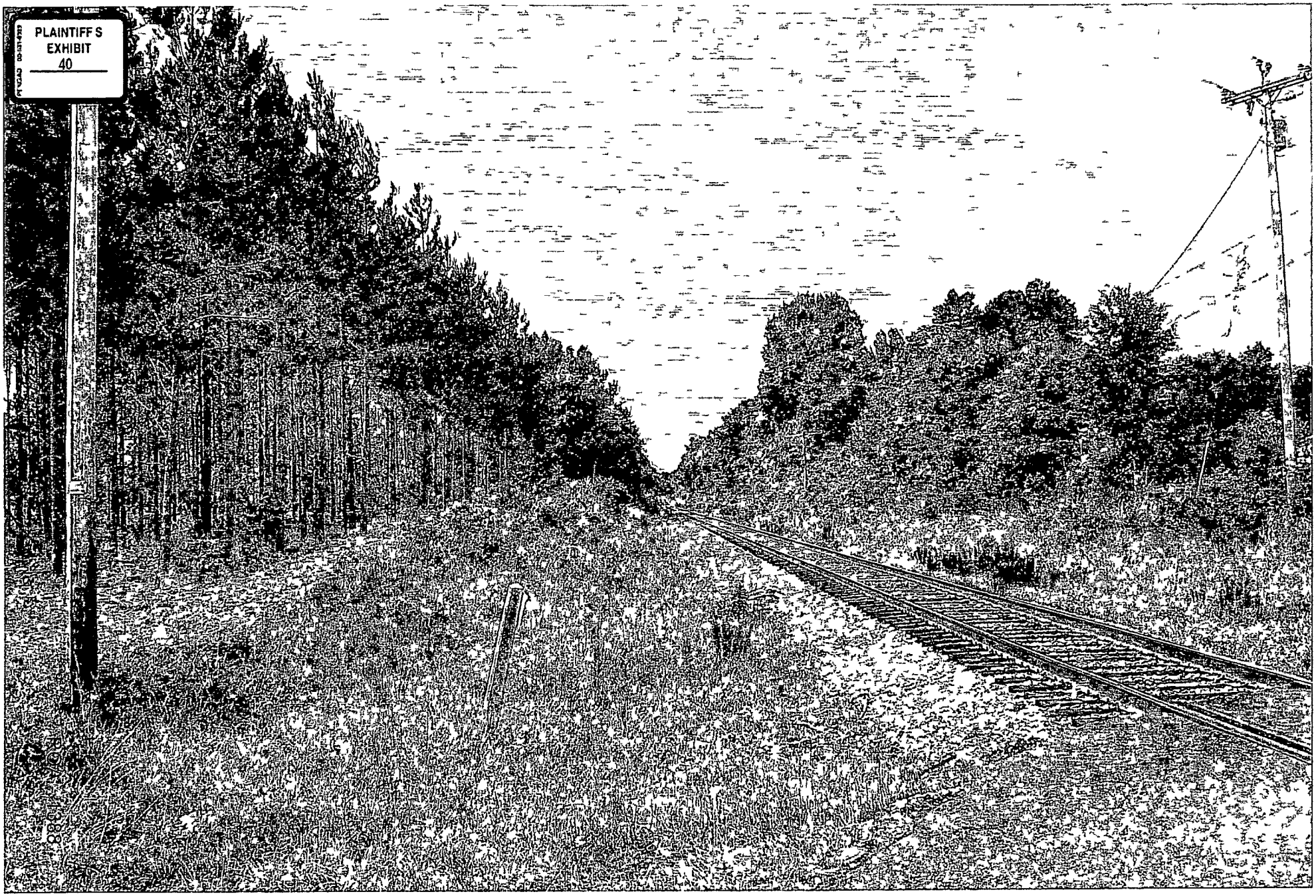
PLAINTIFF'S
EXHIBIT
37

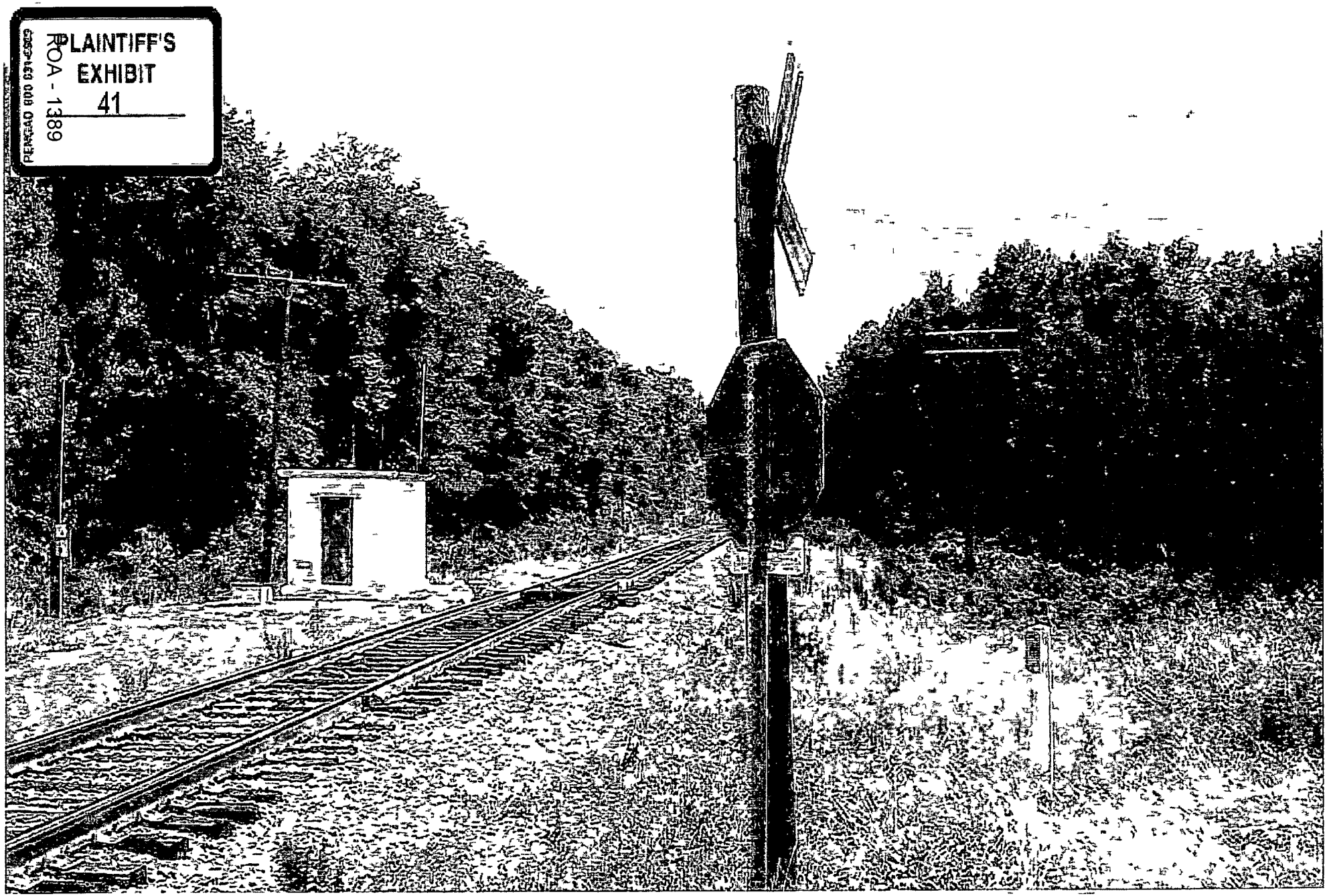
ROA - 1385

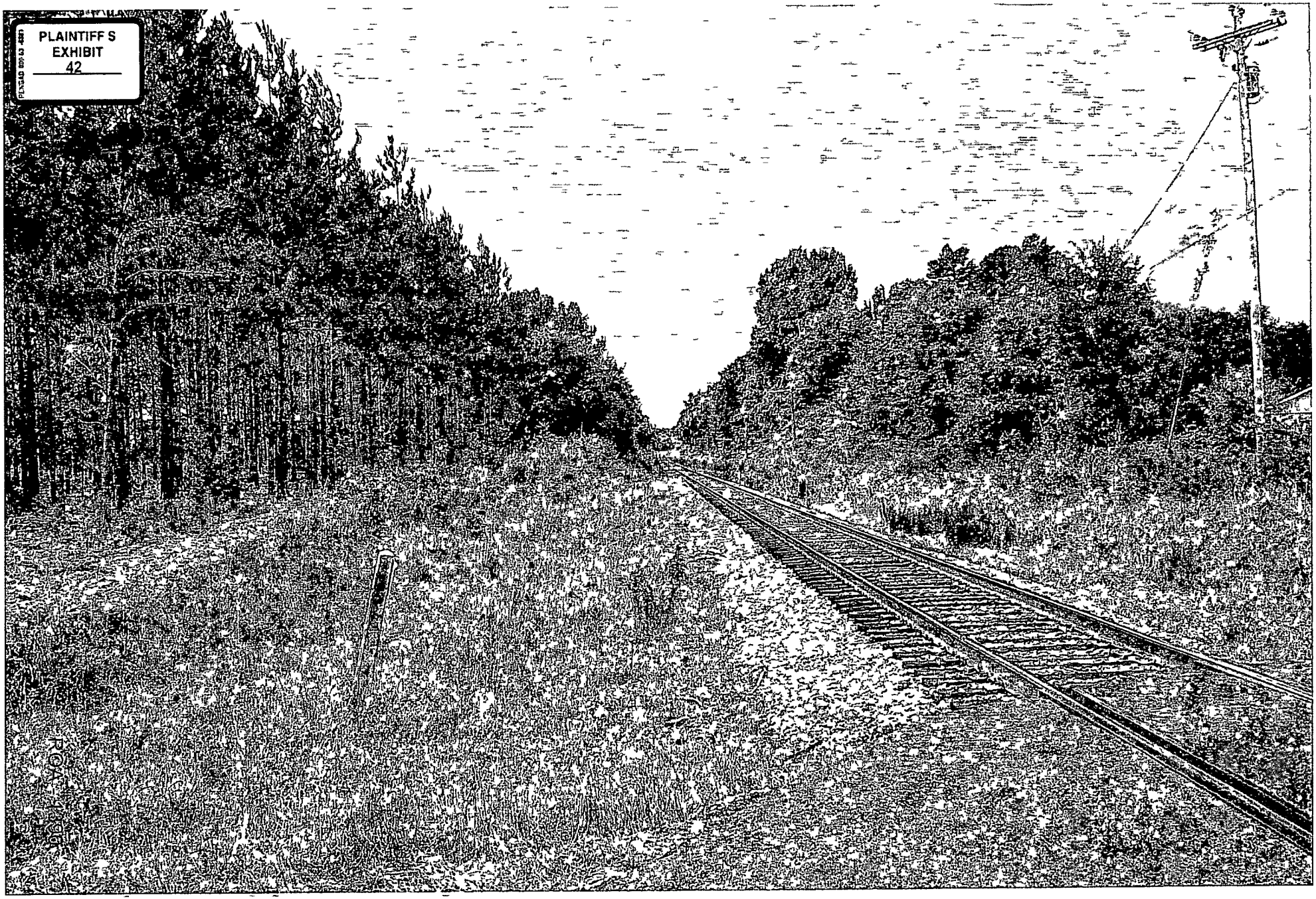



PLAINTIFF S
EXHIBIT
38

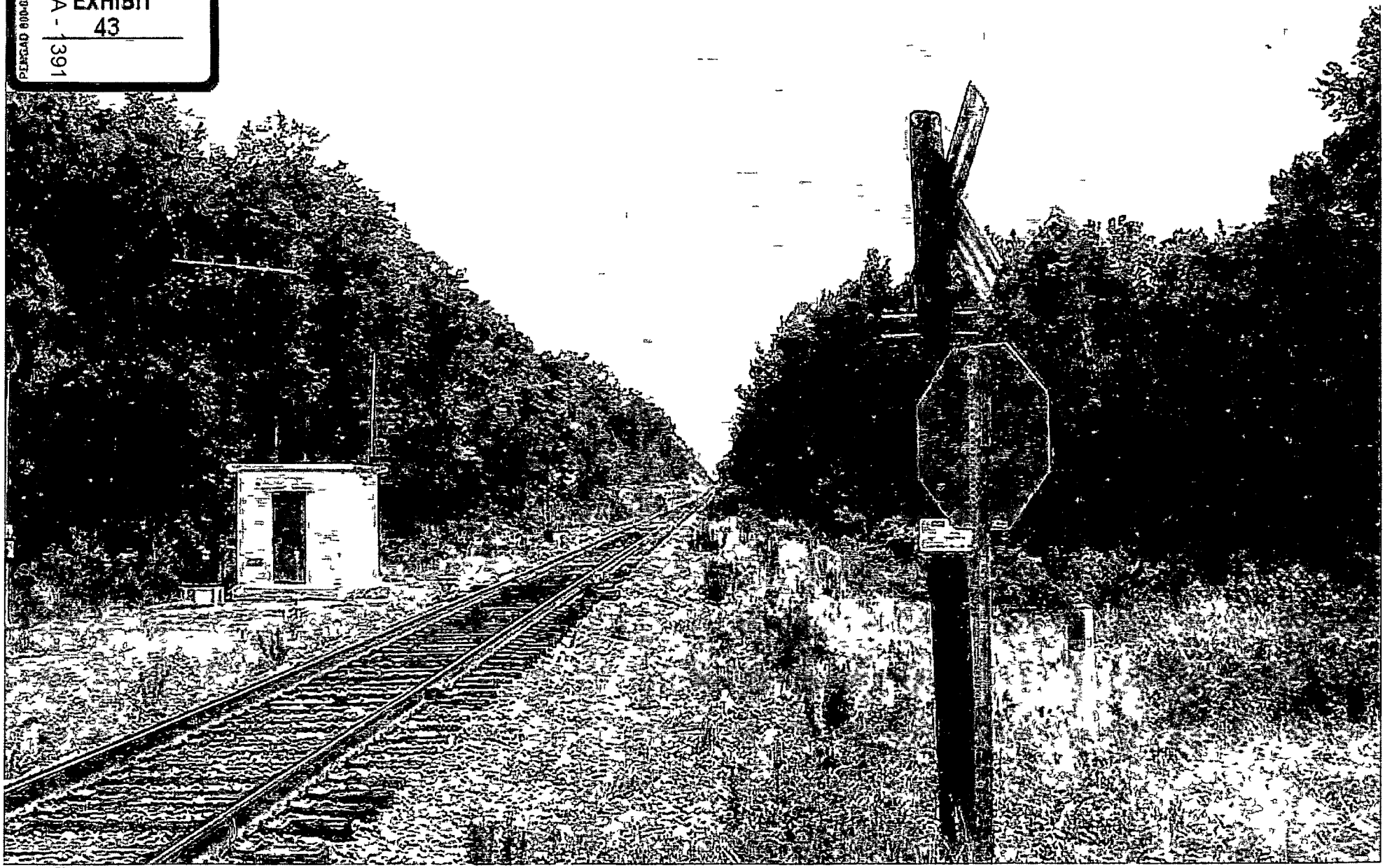
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EXHIBIT
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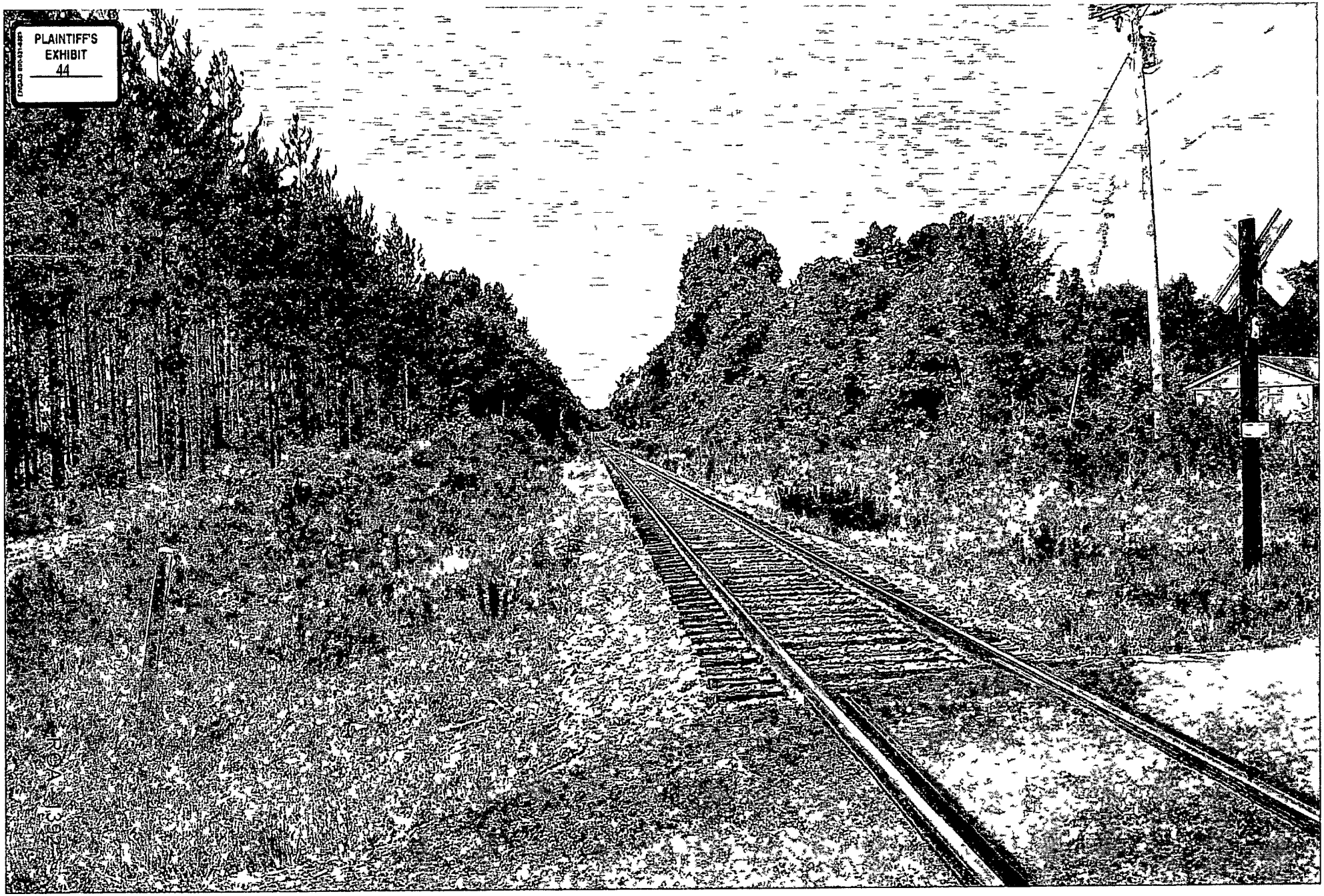

PLAINTIFF S
EXHIBIT
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PLAINTIFF'S
EXHIBIT
41
ROA - 1389

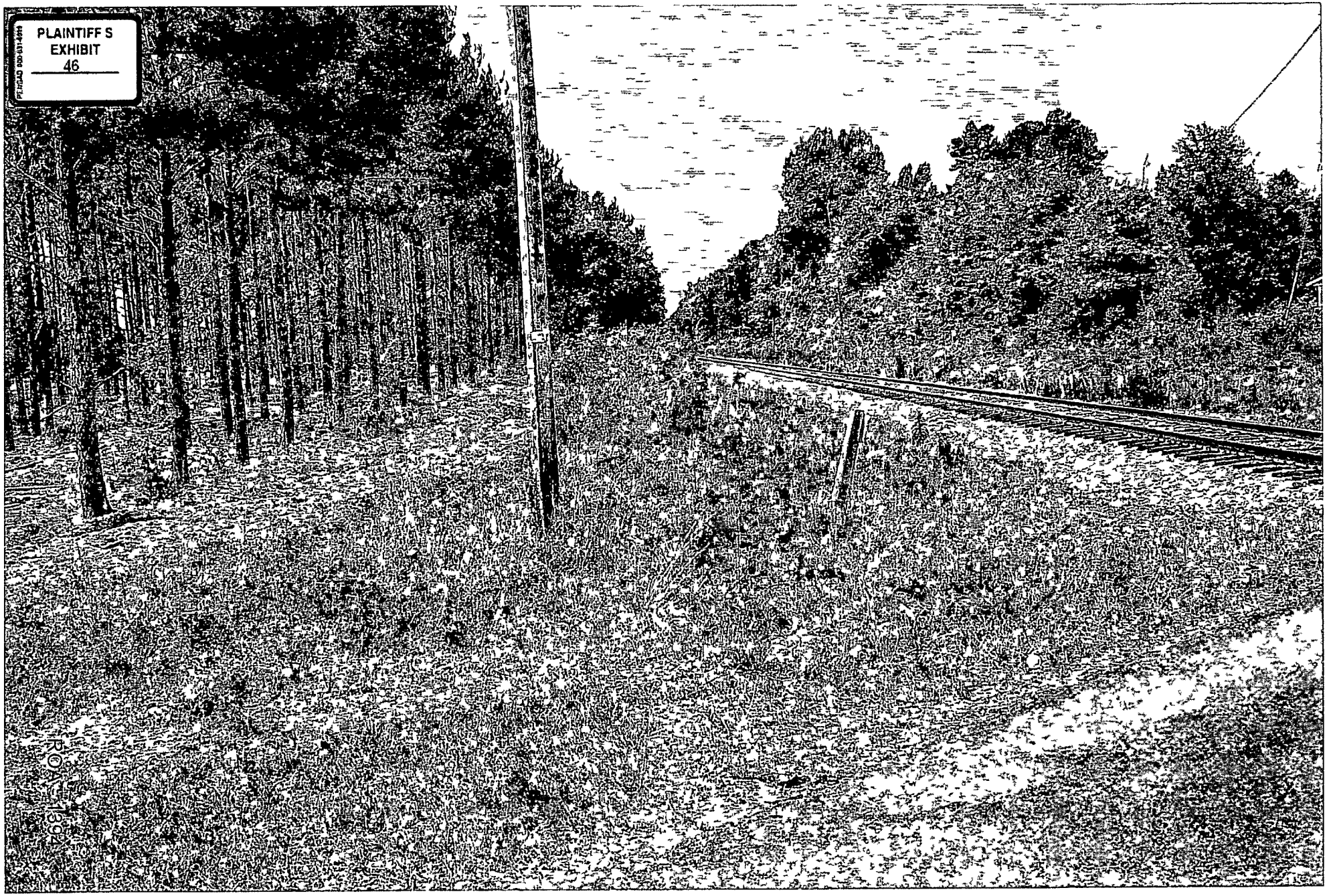

PLAINTIFF S
EXHIBIT
42

PLAINTIFF'S
EXHIBIT
43
BOA - 1391
PEARSON 800-631-6989

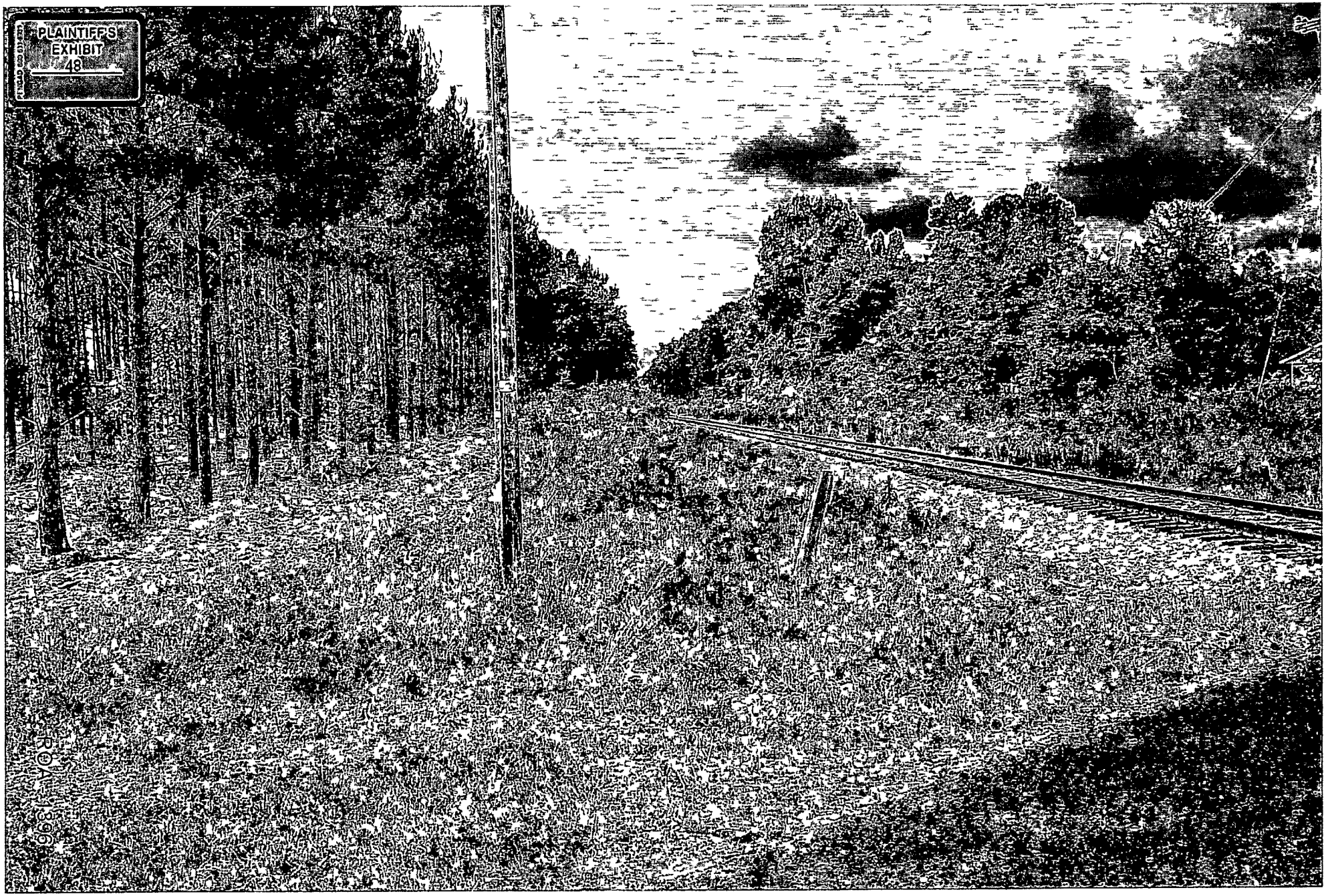


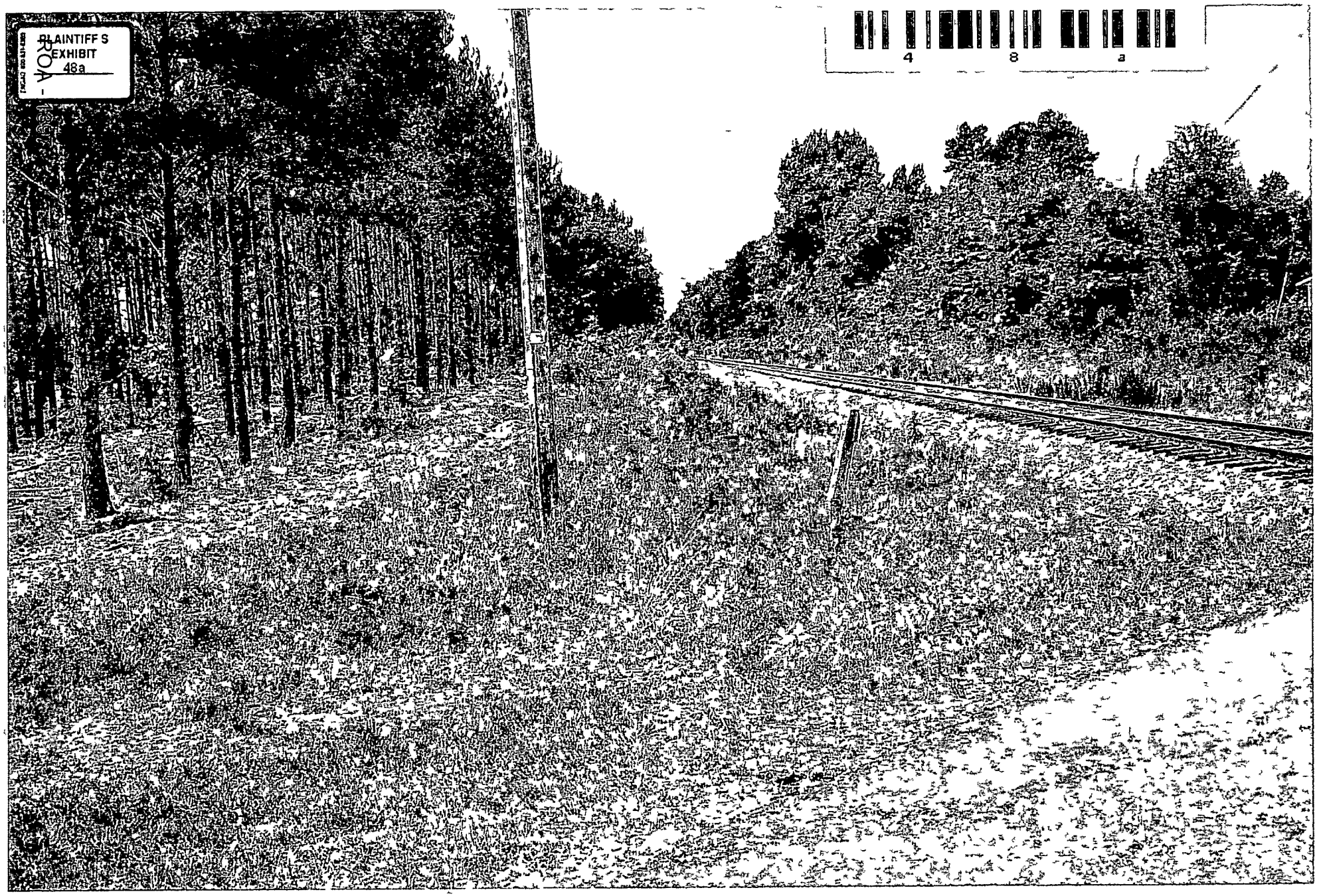

PLAINTIFF'S
EXHIBIT
44


PLAINTIFF'S
EXHIBIT
45
ROA - 1393

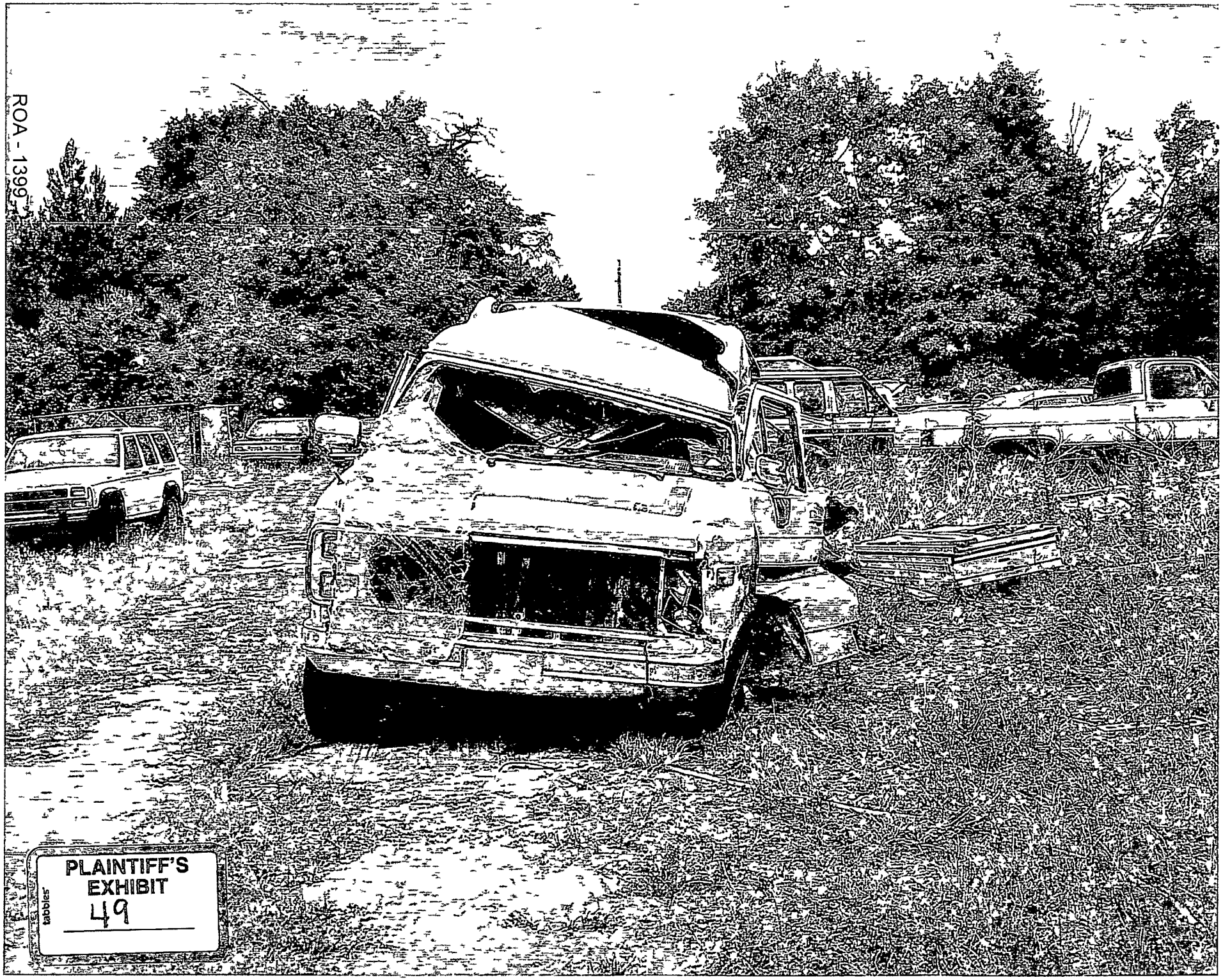

PLAINTIFF S
EXHIBIT
46

PLAINTIFF'S
EXHIBIT
47

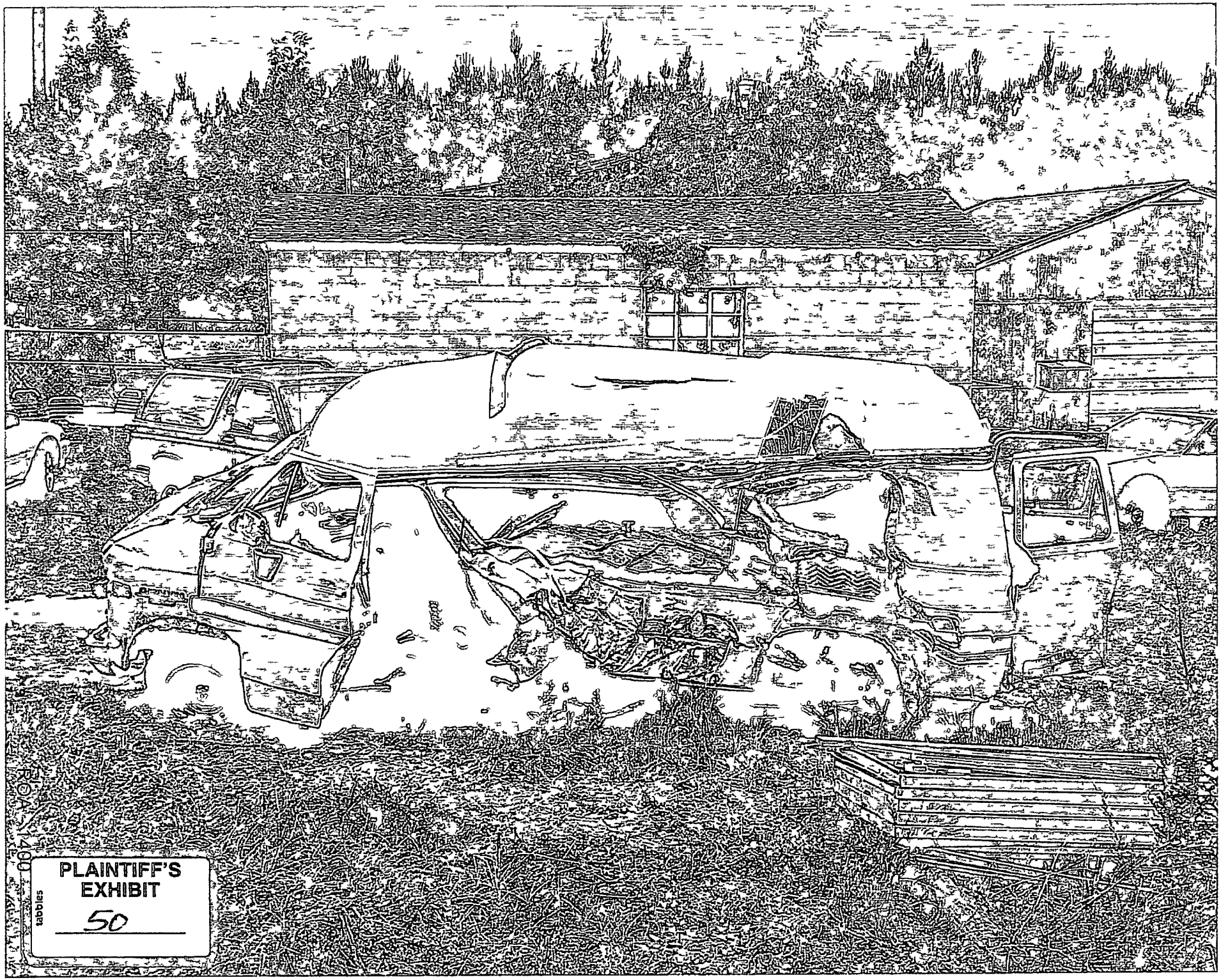

PLAINTIFF'S
EXHIBIT
48


PLAINTIFF S
EXHIBIT
48a
ROA -

PLAINTIFF'S
EXHIBIT
48b
PEIGAD 800 031-6533

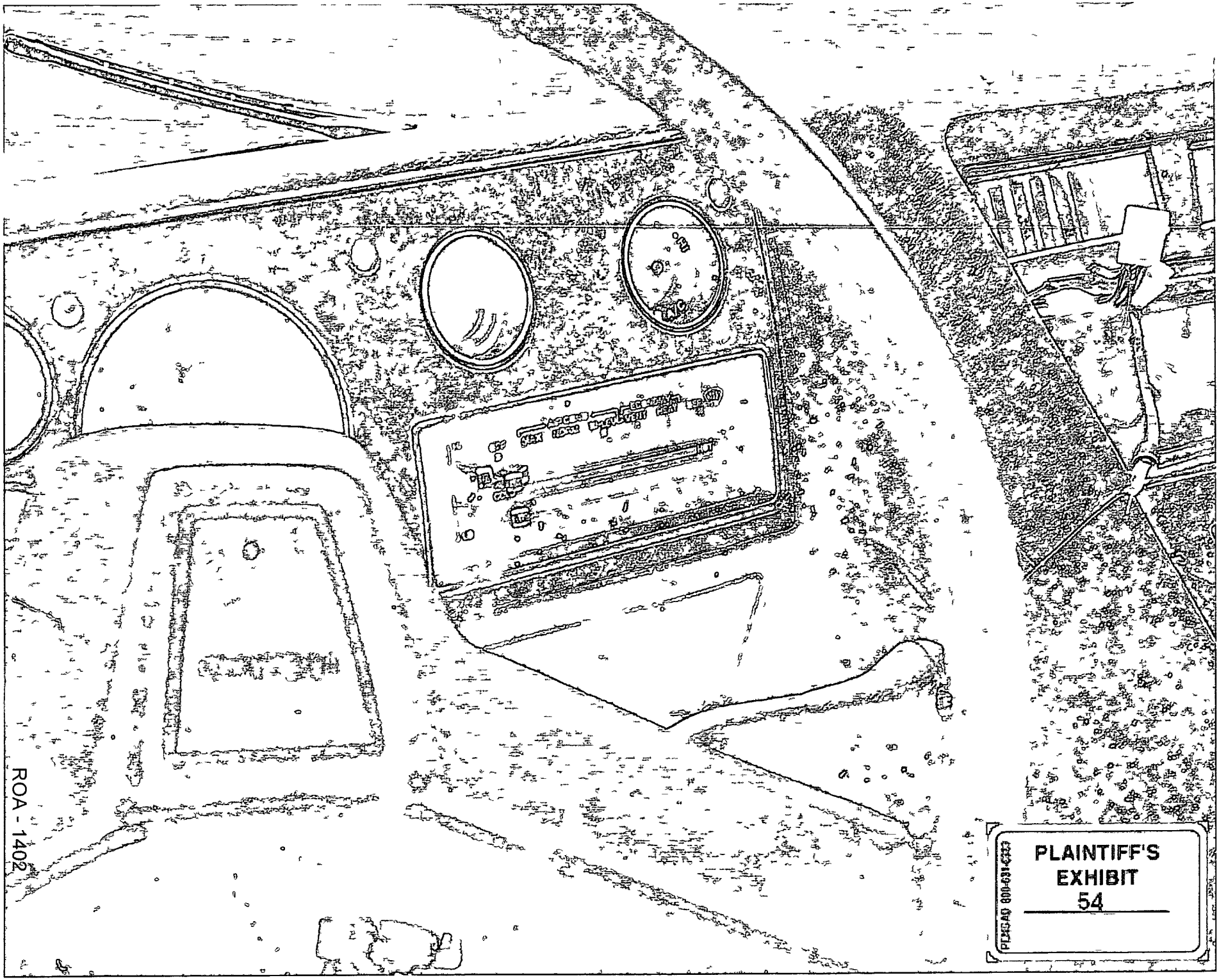


PLAINTIFF'S EXHIBIT 49



PLAINTIFF'S EXHIBIT
50

PLAINTIFF'S
EXHIBIT
53
tabbies



PLAINTIFF'S EXHIBIT 54

PLEASE CALL 800-631-6333

ROA - 1409

PLAINTIFF'S
EXHIBIT
55



PLAINTIFF'S EXHIBIT 57

RCA - 1404

PLAINTIFF'S
EXHIBIT
58

PENGAD 800-631-6989



PLAINTIFF'S EXHIBIT 59

PEACHTREE BUSINESS PRODUCTS

PLAINTIFF'S
EXHIBIT
60

RQA000 1407.tif

Plaintiff's Exhibit 63

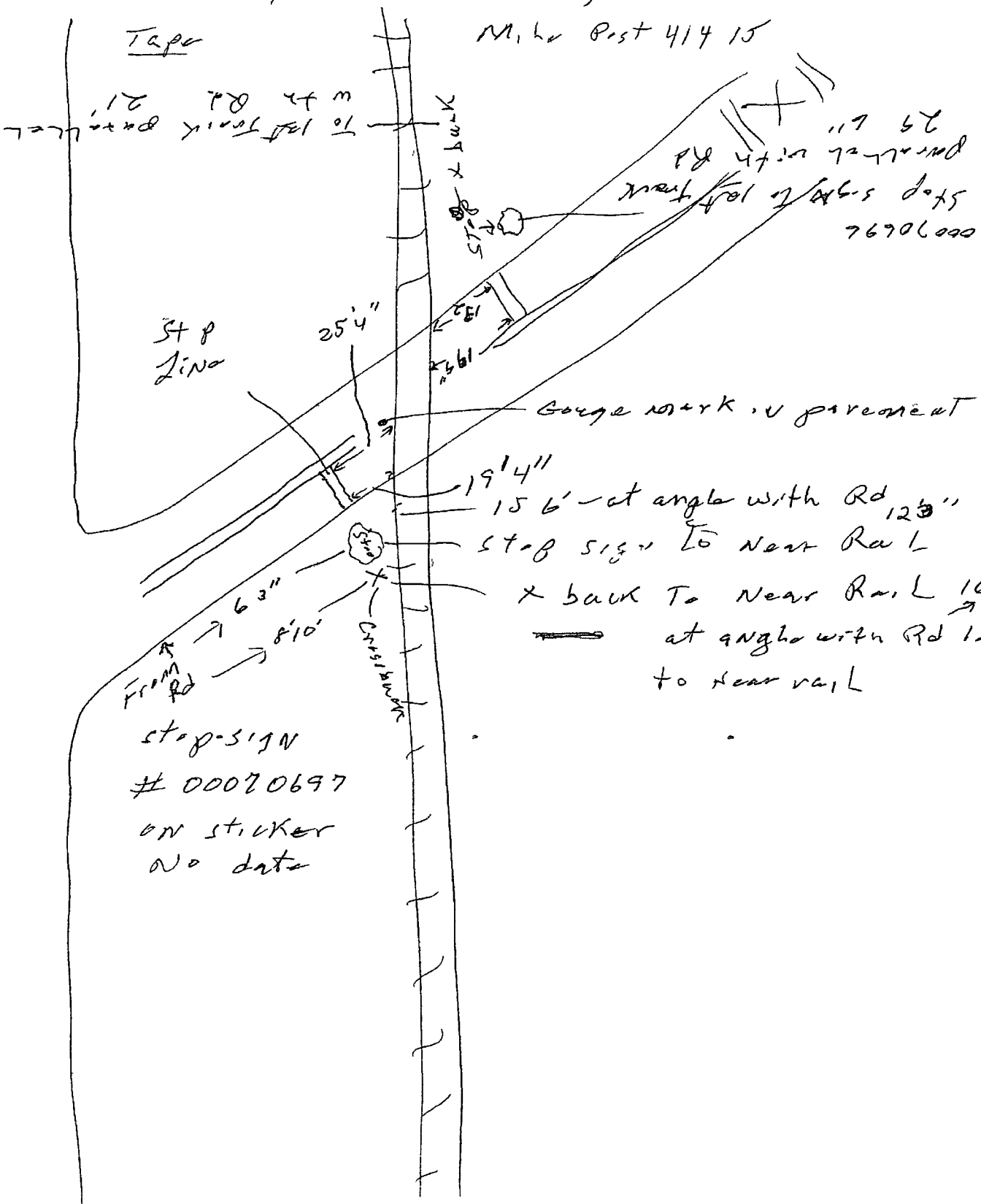
CD-Video of Scene
(Retained by the Trial Court)

6-4-04

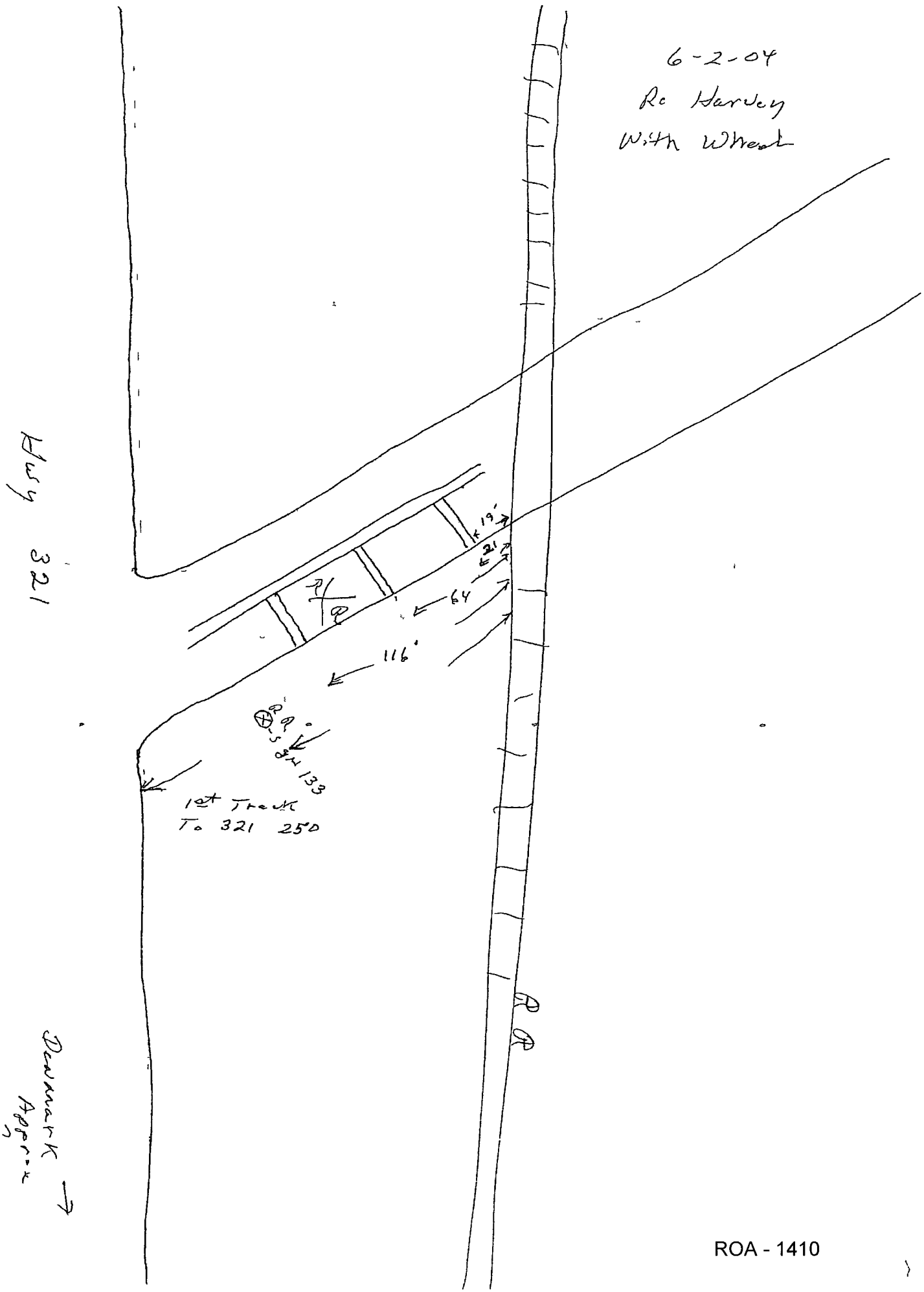
Crossing #634 785 N

Mile Post 414 15

Tape



PLAINTIFF'S EXHIBIT 64 11-9-09 LD

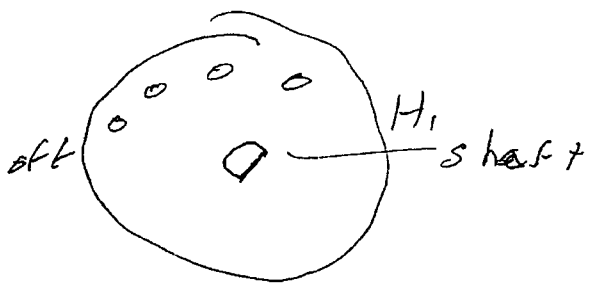

6-2-04
Re Harvey
With Wheat
Hwy 321
19'
21'
64'
116'
S 84° W 133
1st Treat
To 321 250
Denmark
Approx

6-2-04 Re: Harvey -v- R R.

Did not find a Radio

Heat & Air off position
Fan O - Hi
this position ← O
O - Lo

Rear Ac Knob gone



6-4-04 Harvey v CSX

Roll #1

5' - 35' from 1st Rail
on 321 side
at 65"

#1	Looking South	5	From 1st Track
#2	" North		
3	South	10'	
4	North		
5	S	15'	
6	N		
7	S	20'	
8	N		
9	S	25'	
10	N		
11	S	30'	
12	N		
13	S	35'	
14	N		

6-4-04

2 Continued

Harvey

620 Brush 14' from Track 6' Height

700 14'

800' 14'

900 21'

1006 18' at 15' pine Limb 5' above ground

Whistle Post Approx 1500'

T. Lau ROCL # 2

4 5-6-7 at 62" 64" 66" 68'

at 70' behind Stop Sign & Line



Train Speed (mph)	Case II Departure from Stop	Case I Moving Vehicle						
		Vehicle Speed (mph)						
	0	10	20	30	40	50	60	70
		Distance Along Railroad from Crossing, d_T' (ft)						
10	240	145	103	99	103	112	122	134
20	480	290	207	197	207	224	245	269
30	719	435	310	296	310	337	367	403
40	959	580	413	394	413	449	489	537
50	1 200	725	517	493	517	561	611	671
60	1 439	870	620	591	620	673	734	806
70	1 679	1 015	723	690	723	786	856	940
80	1 918	1 160	827	789	827	898	978	1 074
90	2 158	1 305	930	887	930	1 010	1 101	1 209
		Distance Along Highway from Crossing, d_H (ft)						
		69	132	221	338	486	659	865

Table IX 21 Required design sight distance for combination of highway and train vehicle speeds, 65-ft truck crossing a single set of tracks at 90°

EXHIBIT XII (REVISED)

AVAILABLE AND REQUIRED SIGHT DISTANCES FOR THE HONEY FORD ROAD CROSSING

Quadrant	Driver Position (feet)	Train Required (feet)	Train Available (feet)	Train Deficient (feet)	Train Deficient (Percent)
NORTHEAST					
30 mph	225	780	36	744	95 4
20 mph	135	820	132	688	83 9
10 mph	70	1 146	97**	1 049	91 5
Stopped	36*	1 896	43**	1 853	97 7
SOUTHEAST					
30 mph	225	780	72	708	90 8
20 mph	135	820	86	734	89 5
10 mph	70	1 146	129	1 017	88 7
Stopped	35*	1 896	650***	1 246	65 7
SOUTHWEST					
50 mph	490	889	25	864	97 2
40 mph	340	820	28	792	96 6
30 mph	225	780	34	746	95 6
20 mph	135	820	45	775	94 5
10 mph	70	1 146	87	1 059	92 4
Stopped	31*	1 896	30**	1 866	98 4
NORTHWEST					
50 mph	490	889	18	871	98 0
40 mph	340	820	21	799	97 4
30 mph	225	780	53	727	93 2
20 mph	135	820	300	520	63 4
10 mph	70	1 146	944	202	17 6
Stopped	31*	1 896	334	1 562	82 4

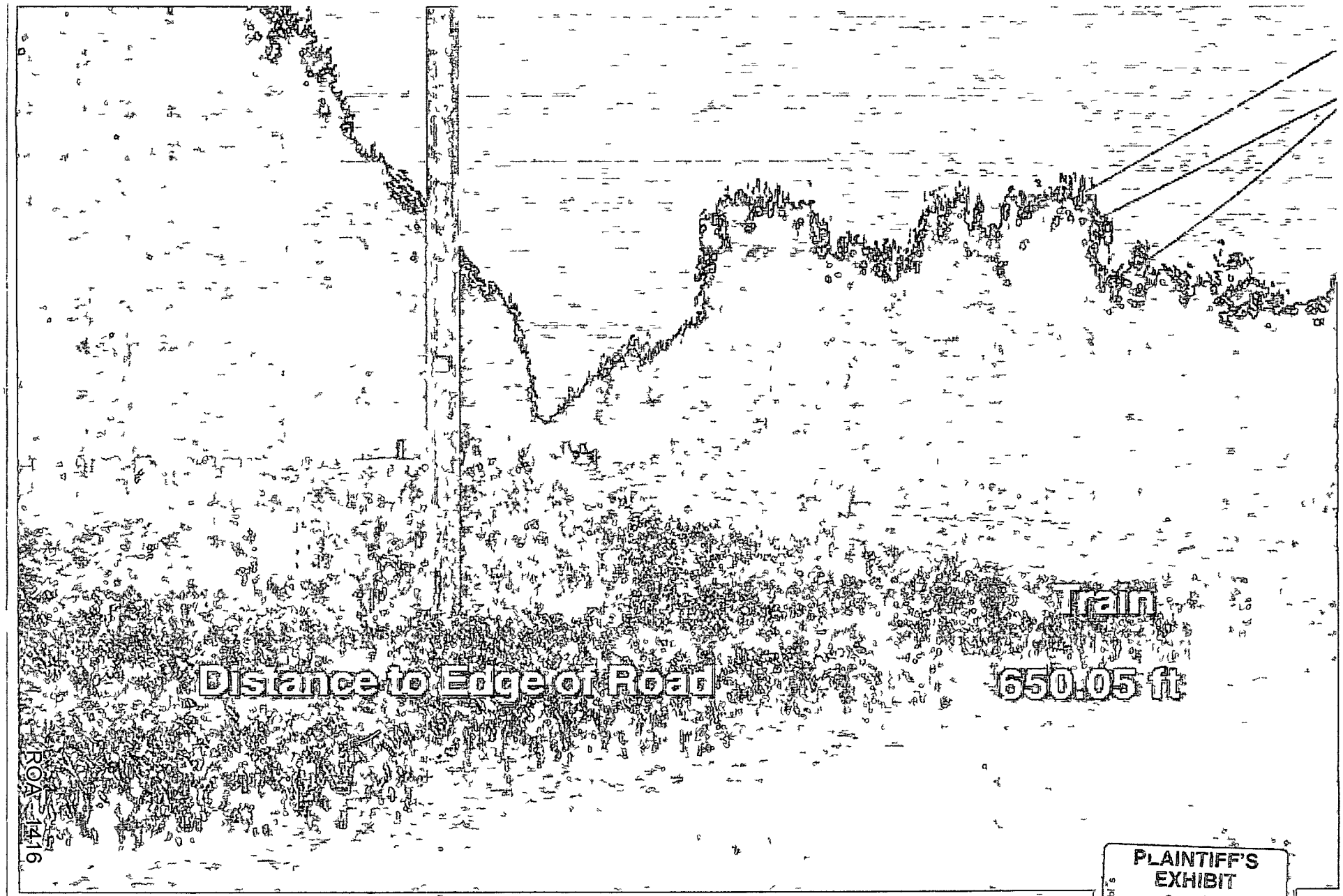
MAXIMUM TIMETABLE SPEED FOR TRAINS IS 79 MPH FOR CROSSING

* Front of vehicle is at the stop line distance from the driver to the front of the vehicle is assumed to be 10 feet

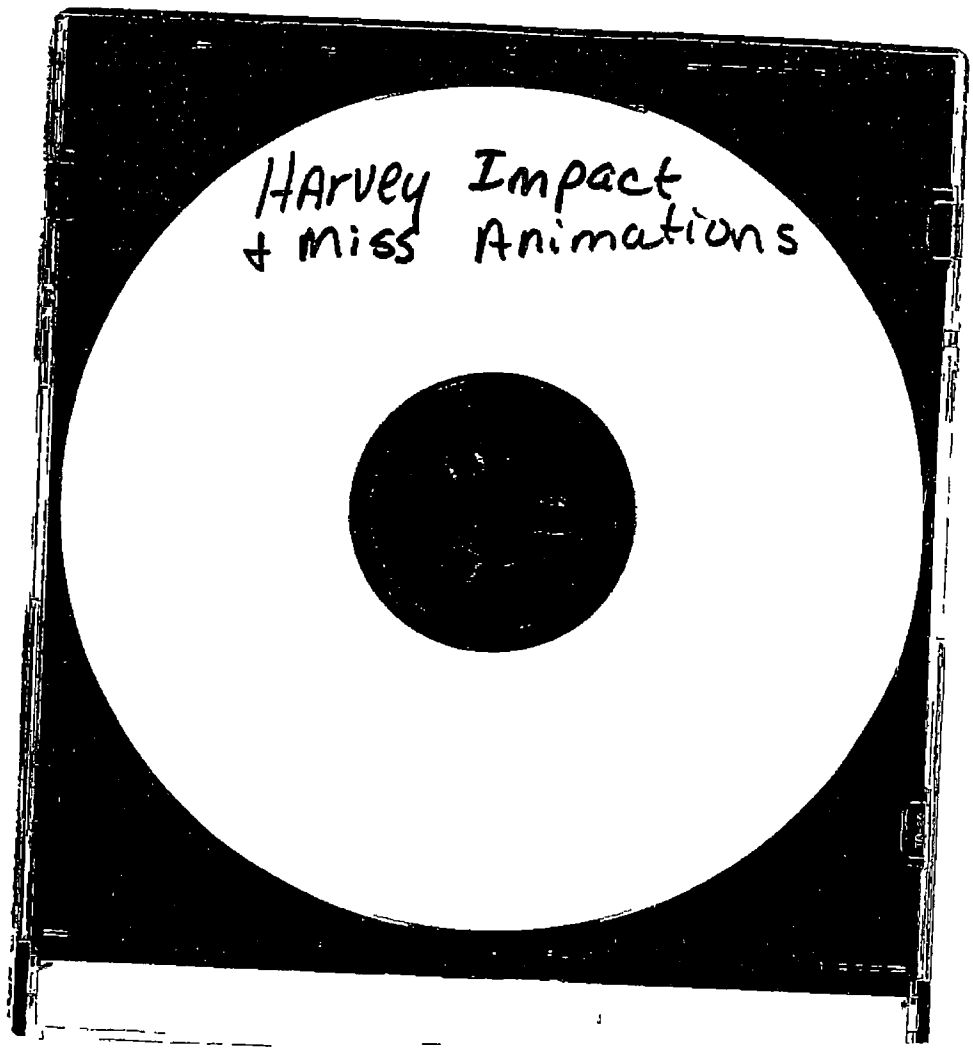
** Available sight distance due to head movement limitations as a result of the skewed crossing angle

*** Determined by photogrammetric analysis





PLAINTIFF'S EXHIBIT

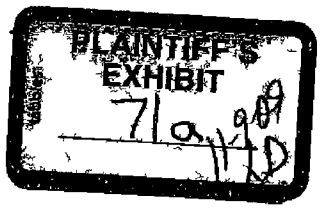


Plaintiff's Exhibit 71

CD-Harvey Impact and Miss Animations (Retained by the Trial Court)



CSX 050915



CSX TRANSPORTATION INC
Service Contract Form

DeAngelo Brothers Inc
Contract No 10-1202

This Service Contract (hereinafter "Contract) dated and effective January 1 2003 is between DeAngelo Brothers, Inc. ("Contractor") a Pennsylvania corporation with offices located at 100 N Conahan Drive Hazleton PA 18201 and CSX Transportation Inc ("CSXT") a Virginia corporation whose principle offices are located at 500 Water Street, Jacksonville Florida 32202

WITNESSETH

WHEREAS CSXT wishes to purchase certain services from Contractor and

WHEREAS Contractor is willing to provide such services to CSXT

NOW THEREFORE for and in consideration of good and valuable consideration the receipt and sufficiency of which are hereby acknowledged the parties hereto agree as follows

1 Term The term of this Contract is for a period of five (5) years beginning January 1 2003 and ending December 31 2007

2 Services The work hereinafter "Services" to be performed by the Contractor under this Contract is as follows Control of Vegetation at Highway Rail Grade Crossings per General Specifications attached as Exhibit A and hereby made part of this Agreement.

A To perform the Services described in Exhibit B at the Rates listed thereon according to the work performance specifications attached thereto Contractor warrants that the Services shall be performed at a standard at or higher than the industry standard for similar services

B To submit monthly invoices with any reports as further described herein to

Mike McMaster
Assistant Chief Engineer
CSX Transportation
4901 Belfort Road Suite 130
Jacksonville FL 32256

C To perform all Services in a safe and workmanlike manner and use only quality materials that meet or exceed the industry standard and are fit for the purpose intended More specifically Contractor agrees to furnish at its expense all relevant expertise and all necessary items including without limitation mobile repair trucks cranes machines labor supplies tools materials ordinary safety items and protective clothing and equipment, for proper and safe performance of its Services

D To comply in all respects with the applicable laws, codes, rules regulations and decisions of any legislative, administrative or judicial body exercising any power or jurisdiction over any Services described in this Contract including but not limited to

(1) Fair Labor Standards Act
(2) Social Security Laws
(3) Workers Compensation Laws
(4) The Occupational Safety and Health Act of 1970 and
(5) All applicable federal state or local laws regarding drug and/or alcohol testing

3 Volume Contractor understands that CSXT does not guarantee the volume of Services that CSXT may purchase from Contractor

4 Non Disclosure All information including but not limited to financial statements product information manufacturing capabilities passwords documents data and business records which is disclosed to Contractor or which Contractor observes or comes into contact with during the term of this Contract or the rendition of any services to CSXT whether generated by CSXT or a customer or contractor of CSXT shall be deemed "Confidential Information and the sole and exclusive property of CSXT Contractor shall take all reasonable measures to maintain the confidentiality of said Confidential Information by its employees agents representatives and couriers Contractor shall not use the Confidential Information for any purposes other than to perform its obligations hereunder and shall not disclose any Confidential Information to any third party without the prior written consent of CSXT Contractor acknowledges that all right title and interest in and to said Confidential Information including the right to produce extract or exhibit to any third party and any intellectual property rights exist in CSXT only Contractor shall return such Confidential Information promptly upon the expiration or termination of this Contract

It is understood that the confidentiality provisions contained herein shall not apply to any information Contractor can demonstrate by written evidence

(a) was at the time of disclosure by CSXT or thereafter (but prior to disclosure by Contractor) becomes through no act or failure to act on the part of Contractor part of the public domain or

(b) was at the time of disclosure by CSXT in Contractor's possession and was not acquired directly or indirectly from CSXT

Contractor expressly agrees that CSXT shall be entitled to injunctive and/or other equitable relief in any court of competent jurisdiction to prevent or otherwise restrain a breach of this section of this Contract provided that the foregoing shall not preclude CSXT from seeking any and all damages suffered as a result of any unauthorized disclosure by Contractor

5 Default,Termination

A. If CSXT makes a determination that Contractor is not in compliance with the provisions of this Contract it shall notify Contractor in writing and specify such deficiencies If Contractor has not corrected such deficiencies to CSXT's reasonable satisfaction within ten (10) days of the date of CSXT's notice CSXT may immediately cancel the Contract. Upon termination of this Contract in accordance with this subparagraph 6A, CSXT shall be entitled to (i) a full refund for all Services for which CSXT has paid but which Contractor failed to perform or performed incorrectly (ii) reimbursement for all damages caused by Contractor's default including but not limited to any costs incurred by CSXT in acquiring replacement Services if the cost of the replacement Services is in excess of what CSXT would have paid Contractor for those Services in accordance with this Contract and (iii) any and all other remedies to which CSXT is entitled in law or equity

B If Contractor makes a determination that CSXT is not in compliance with the provisions of this Contract, it shall notify CSXT in writing and specify such deficiencies If CSXT has not corrected such deficiencies within thirty (30) days of the date of Contractor's notice, Contractor may cancel the Contract on thirty (30) days notice Contractor s sole remedy upon termination in accordance with this subparagraph 5B shall be payment for any Services actually rendered by Contractor through the date of termination

C CSXT may terminate this Contract on 30-day written notice to Contractor without penalty and for any or no reason including without limitation diminished demand for the services capital constraints and/or Contractor s inability to maintain competitive pricing quality or quantity of services

D If during the Term of this Contract, the ownership of Contractor changes or if Contractor is purchased or merges with another company CSXT shall have the right to immediately terminate this Contract

E Upon termination by CSXT Contractor shall immediately discontinue all work, thereafter doing only such work as may be necessary to preserve and protect work already in progress

F Termination hereunder shall discharge all executory obligations of the parties but shall not affect any right based on a prior breach of performance of this Contract nor affect any right or obligation which is intended to survive such termination

6 Invoices All invoices submitted by Contractor must be separated by labor and material charges and, if applicable by location Contractor agrees to recognize the statutory exemptions and direct payment permits listed in the Schedule of CSXT's Sales and Use Tax Exemption and Direct Pay Permits" (Schedule) where appropriate in lieu of otherwise applicable sales and use tax A copy of the Schedule is attached as Exhibit B and hereby incorporated into this Contract

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C Additional Remedy for Failure to Comply Notwithstanding any contrary provision hereof and in addition to any other remedy provided herein In the event that Contractor fails during the term hereof to comply and continue its compliance with the provisions of this Section CSXT may in its sole and absolute discretion thereafter immediately deny or revoke access to CSXT's premises

9 Ownership of Works of Authorship and Invention Contractor acknowledges that all Works of Authorship (as defined in 17 USC 102 "The Copyright Act") produced as a result of the Services performed for CSXT hereunder shall meet the definition of "works made for hire" In such case CSXT shall be considered the author and owner of such works under 170 USC 201(b)

In the event that any Works of Authorship do not meet the definition of "works made for hire" then Contractor shall assign and transfe. to CSXT all of its copyrights in and to such Works of Authorship produced as a result of the Services performed for CSXT hereunder The rights assigned herein include but are not limited to the right to reproduce said works the right to distribute copies of said works and all other rights accruing to Contractor under the provisions of 17 USC 106

CSXT has the right to register all copyrights in Works of Authorship acquired from Contractor hereunder in CSXT's own name and shal' have the exclusive right to dispose of such works in any way CSXT deems appropriate To the fullest extent possible Contractor waives its right to bring any action against CSXT which relates to copyright or moral righ infringement in these acquired works in every country where such rights exist. Contractor shall retain no right in such works whatever

Contractor agrees to assist CSXT in identifying inventions and filing applications for Letters Patent If any which cover the technology developed under this Contract Contractor further agrees to promptly upon request of CSXT to communicate any facts known respecting said applications and the inventions set forth therein and to execute and deliver without further compensation, any power of attorney assignment, application whether origina. continuation divisional or reissue or other papers which may be necessary or desirable fully to secure to CSXT the inventions and any of them described in said applications and all patent rights therein in the United States and in any country foreign thereto and to cooperate and assist in the prosecution of interference proceedings involving said inventions and in the adjudication and re examination of said Letters Patent provided the expenses which may be incurred by Contractor in lending such cooperation and assistance be paid by the assignee

10 Waiver The failure by CSXT to enforce any provision of this Contract shall not be construed as a waiver of that provision

creditors or Contractor shall apply for relief in any form as a debtor under any statute of the United States or laws or regulations of any other governmental authority or any other proceeding under any statute of the United States or laws or regulations of any other governmental authority seeking the relief or readjustment of Contractor's indebtedness shall be commenced, then CSXT shall have the right to immediately cancel this Contract or so much of it as has not been completed

17 Severability Any provision of this Contract which is determined to be invalid or unenforceable will be ineffective to the extent of such determination without invalidating the remaining provisions of this Contract.

18 Complete Contract This Contract and each Appendix constitute the complete agreement of the parties relating to the matters specified in this Contract and supersede all prior and contemporaneous representations or agreements with respect to such matters No oral modifications or waiver of any of the provisions of this Contract shall be binding on either party

19 Assignment, Successor and Assigns CSXT may assign its rights under this Contract to any parent subsidiary or other affiliate Any assignment of this Contract by Contractor by operation or law or otherwise, or any interest herein or any payment due or to become due hereunder without the reasonable prior written consent of CSXT shall be void However this Contract shall be binding upon and inure to the benefit of CSXT Contractor and their respective permitted successors and assigns

20 Governing Law This Contract shall be governed by and interpreted in accordance with the laws of the State of Florida.

21 Hazardous Material Materials deemed hazardous utilized by the Contractor shall comply with all federal, state and local laws and regulations then in effect and will further comply with any special requirements as might be noted in the Appendix.

22 Arbitration Any controversy or claim arising out of or relating to this Contract, or the breach thereof shall be settled through binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association and judgment on the award rendered by the arbitrator(s) may be entered in any court of competent jurisdiction Exclusive venue for such arbitration shall be Jacksonville Florida

24 Audit Contractor agrees to keep full accurate and complete books of account and records in sufficient detail in accordance with generally accepted accounting practices Contractor will retain and not purge financial data and computer files for a period of not less than three (3) years after such data and files are created CSXT will have the right to audit all of Contractor's records which relate directly or indirectly to Contractor's relations with CSXT as contemplated by this Contract. The audit will take place at Contractor's place of business and the timing of such audit will be mutually agreed upon Contractor will not be unreasonable in granting timely access to CSXT CSXT will have access, without cost to all accounting operational and administrative information of Contractor and those who control, produce or are responsible for the information The records contemplated by but not limited to this Contract are EDI records with CSXT invoicing receipts from CSXT disbursements documents payroll payee listings expense reports and other related support documents During the audit CSXT shall have the right to copy information it considers appropriate using Contractor's resources and CSXT will be responsible to reimburse Contractor for direct cost

11 Inability to Perform If Contractor is unable to perform its Services for any reason CSXT may upon twenty four (24) hours written notice substitute another party to perform those Services Contractor agrees to reimburse CSXT for the expense of having another party performing those Services if CSXT must pay more than the amount that would have been paid to Contractor

12 Labor Matters

A. If Contractor shall at any time fail to perform the Services herein required or if Contractor is unable to stop interference to CSXT's operations because of a strike picketing or a work stoppage by Contractor s or its subcontractor s employees or a dispute between a union and the Contractor or its subcontractor CSXT after twenty four (24) hour oral notice to the Contractor may either employ a substitute or terminate its agreement with Contractor Further the Contractor shall be liable for and promptly pay to CSXT any additional expense incurred by CSXT in employing such substitute or terminating the Contract.

B Nothing contained in this Contract should require either party to perform any service or take any action which would violate any term or condition of any CSXT or Conrail labor agreements If however it is subsequently determined by a court or arbitrator that CSXT or Conrail is required to utilize CSXT or Conrail employees to provide a function which Contractor was to provide under this Contract Contractor agrees that CSXT or Conrail employees shall perform the function and to reimburse CSXT for the cost of such labor up to a maximum of the amount Contractor actually saved as a result of utilization of a CSXT or Conrail employee to provide the function which Contractor was to provide

13 Force Majeure Fires floods strikes lockouts epidemics accidents war riots earthquake flood shortages of transportation or any Act of God or other cause beyond the reasonable control of the parties which prevents Contractor from delivering or CSXT from receiving any of the Services covered by this Contract, shall operate to suspend the parties obligations affected by the force majeure condition during the period required to remove such cause or causes, subject, however to CSXT's right of cancellation as stated above The party claiming the benefits of this provision must use due diligence to remove any such causes and resume performance under this Contract as soon as possible Suspension of this Contract does not affect the right to payment for Services delivered prior to the suspension or the right to delivery of the Services paid for prior to the suspension or a refund of amounts prepaid for which Services were not delivered

14 Nondiscrimination/Diversity CSXT's corporate policies provide for equal opportunities in employment without regard to race color religion sex age or national origin, and CSXT is committed to employing and advancing qualified disabled veterans handicapped persons and Vietnam era veterans CSXT further complies with the requirements placed on government contractors and subcontractors by Executive Order 11246 Section 402 of the Vietnam Era Veterans Readjustment Assistance Act of 1974 and Section 503 of the Rehabilitation Act of 1973 With regard to providing the Services as provided herein Contractor shall likewise comply with those Executive Orders statutes rules and regulations as applicable

15 Prohibition on Improper Influences Contractor represents that it has not and will not exchange any gift rebate influence or other compensation (excluding nominal business entertainment or gifts) with any official employee representative or agent of CSXT or any of its parent affiliate or subsidiary companies Contractor further represents that none of its officials or employees is employed by CSXT or any of its parent affiliate or subsidiary companies Contractor agrees to immediately notify CSXT if Contractor becomes aware of changes in the foregoing representations Contractor understands that CSXT has the right to rely upon the foregoing representations and that failure to honor these representations may result in a default of this Contract

16 Insolvency In the event Contractor shall file a voluntary petition in bankruptcy or a petition in bankruptcy shall be filed against Contractor or Contractor shall make an assignment for the benefit of its

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of these copies The payment by CSXT of any invoice sent to CSXT by Contractor in accordance with terms of this Contract shall not preclude CSXT from questioning the correctness of said invoice at any time

25 Notices All notices and Certificates of Insurance shall be mailed to the following addresses

A. To CSXT

(2) All Notices pertaining to this Contract
Patrick L Powell,
CSX Transportation
500 Water Street, [Speed code]
Jacksonville FL 32202
(904) 359 1561 / Fax (904) 359 3571

B To Contractor
Paul DeAngelo
DeAngelo Brothers Inc
100 N Conahan Drive
Hazleton PA 18201
(570) 459 5800 / Fax (570) 459 5500

or such other address as any party thereof shall indicate by writing as herein provided

C Notices shall deemed to be given on the date received or the date that receipt of such notice is rejected or refused

26 Abandonment. Contractor acknowledges that CSXT and its rail affiliates have the right to seek abandonment of or a discontinuance of service over their trackage If the trackage serving the location at which the Services are to be performed is abandoned or if service is discontinued over that trackage this Contract will be canceled as of the implementation date of the abandonment or discontinuance

27 Interpretation It is possible that the scope of this Contract may overlap with the scope of other contracts or agreements between the parties In that event the documents will be read, to the extent possible as being compatible with each other, and not in contradiction, with the more specific language controlling

28 Total Fee The Rates in Exhibit A represent the full cost to CSXT as all other overhead costs and expenses such as sick benefits vacations pensions etc are the sole responsibility of Contractor

29 Priority of Documents In the event of any conflict between any documents exchanged between the parties the following order of priority shall control (i) this Contract (ii) any Appendix, (iii) any other document incorporated herein by reference (iv) CSXT's purchase order and (v) Contractor s Invoice

DB0401

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ROA - 1424

IN WITNESS WHEREOF this Contract has been executed by the authorized officials of both parties on the dates shown below

DEANGELO BROTHERS, INC

Date 1/23/03

By _____
Name _____
Title CEO

CSX TRANSPORTATION, INC.

Date _____

By _____
Name Howard Levy
Title Senior Vice President
Purchasing & Materials

DB0402

CONFIDENTIAL

Exhibit A

GENERAL SPECIFICATIONS

Control of Vegetation at Highway-Rail Grade Crossings

1 Through a separate program, CSXT engaged third parties to clear trees brush and vegetation at certain highway-rail grade crossings (the "Crossings"), and that program included a single herbicide application It is the intent of this program to maintain the cleared area required by the original program by controlling re-growth of vegetation and by maintaining a height limit on all vegetation at the Crossings

2 Contractor shall be responsible for the maintenance and control of vegetation in accordance with these specifications at all Crossings designated by CSXT Except in instances where state law requires greater amounts of vegetation control at the Crossings (in which case CSXT will endeavor to provide the applicable state law requirements) Contractor will be required to control all vegetation on CSXT property at the designated Crossings in accordance with the following: Contractor shall be required to control vegetation over the entire width of the Railroad right-of-way for a distance (in each direction from the edge of the traveled roadway) parallel to the track of (a) three hundred feet (300'), where the Maximum Authorized Track Speed (per timetable) is 30 mph or less, (b) six hundred feet (600') where the Maximum Authorized Track Speed (per timetable) is 30 to 60 mph, and (c) nine hundred feet (900') feet where the Maximum Authorized Track Speed (per timetable) is 60 to 90 mph CSXT will provide to Contractor relevant information regarding the location of each Crossing to be cleared, the Maximum Authorized Track Speed (per timetable) and the right of-way width

3 Vegetation shall be controlled, including vegetation within inaccessible areas or areas difficult to reach with the methods selected by Contractor (*i e*, signs buildings poles, etc) so that maximum height of vegetation at the Crossings shall not exceed thirty-six inches (36") above ground level, provided that an approved herbicide shall be applied around all signal facilities to maintain bare ground control for five feet (5) in all directions Vegetation overhanging the right-of-way shall be maintained to a cleared height of fifteen feet (15') above the top of the rail Contractor shall employ its vegetation control methods at each Crossing at least once per twelve (12) month period Contractor must monitor all Crossings on a periodic basis but not less frequently than once per twelve (12) month period to insure that all Crossings remain in compliance with this specification Within five (5) days of determining non-compliance Contractor shall at its sole cost and expense correct any Crossing that is out of compliance If Contractor fails to make such corrections to Railroad s satisfaction Railroad reserves the right to pursue alternative means to correct any

Crossing that is out of compliance, including the hiring of other contractors with the associated cost to be deducted from Contractor's invoices

4 All vegetation cleared at the Crossings shall be removed from the Railroad tracks (to a distance of at least twelve feet (12') from the end of the ties), from drainage ditches, from drainage structures, or from any other location where vegetation may create a potential operating hazard Subject to the foregoing

(a) vegetation residue may be handled on the right-of-way within the specified cleared areas provided that residue must be crushed (to no greater than four inches (4") in diameter and six feet (6') in length), spread flat and laid evenly and such residue collectively must not exceed a height of four inches (4") above ground level, and

(b) *outside the limits of any cities towns, or other municipalities* vegetation residue exceeding the above specifications may be handled on the right-of-way outside the specified cleared areas, in such a manner that

1 Residue must not be visible from any highway-rail grade crossing
2 Brush must be de-limbed and laid flat
3 Brush must not be stacked
4 Residue must not exceed twenty-four (24') above ground level
5 Residue must not be placed within five hundred feet (500') of any residential structure
6 Residue must not be placed in wetlands or environmentally sensitive areas

Placement of residue under Sections 4(a) and (b) shall be to the satisfaction of the Railroad

5 Contractor shall use its professional judgment to select the means and methods necessary to control vegetation at the Crossings in accordance with this specification, provided that

(a) Any equipment used by Contractor must be in good working condition and shall be free from leaks Railroad shall not be responsible for equipment failure, and Railroad will not pay for equipment downtime Railroad will not be responsible for (i) damage to (ii) vandalism of, or (iii) theft of Contractor's equipment and

(b) Any herbicides or other chemicals used by Contractor shall be an approved herbicide that complies with all applicable federal state and local laws, rules and regulations, including but not limited to the Federal Insecticide Fungicide and Rodenticide Act (7 USC ss 136-136y) and similar state and local laws Contractor is accountable for compliance with such applicable laws and shall obtain all necessary

permits, registrations and licenses for handling, applying and disposing of said herbicides and containers Contractor shall furnish the herbicides and other necessary chemicals and shall also submit for approval a proposed plan relating to the timing of herbicide application Contractor's herbicide program must promote the growth of desirable grasses with the long-term goal of growing only desirable vegetation not to exceed a height of thirty-six inches (36") above ground level

6 Contractor shall be responsible for any damages to Railroad or adjacent properties public or private and injuries to or death of any persons, including the employees of Railroad and Contractor occurring during or as a result of Contractor's performance of its work under the contract Contractor shall solely at its expense restore, repair replace, and maintain all property, regardless of ownership, which is damaged or altered during or as a result of the performance by Contractor of its work under the contract

7 Work hereunder will involve operations on the Railroad's active right-of-way, and Contractor shall be required to coordinate its activities with the activities of the Railroad as well as others not party to the Contract Contractor shall comply with all applicable FRA and Railroad operating and safety rules All Contractor employees must be CSXT Safety Certified and On Track Worker Certified before coming on Railroad property Contractor must also comply with CSXT Safe Way manual If flagmen are required to ensure the safety of Railroad operations, the Railroad will supply the flagmen and bear the cost of the flagging If subcontractors are used Contractor shall submit the names thereof for Railroad's prior approval. Notwithstanding such approval, Contractor is responsible for any subcontractor s compliance with all aspects of the contract and for their acts and omissions

8 Contractor shall be paid on a per-Subdivision basis as follows Invoices by Subdivision for work performed in connection with this program will be approved only upon submittal of a completion schedule for each specified Crossing within a particular Subdivision showing the actual date of inspection and control, and the method of control used, including, when applicable, spray log showing weather conditions herbicide product applied, spray mixture, method of applications, rate of application and total gallons used Contractor acknowledges that only one annual payment per Subdivision will be made, regardless of the degree of work required to inspect, control and maintain vegetation growth at the Crossings

9 At the outset of the program, Contractor shall submit a schedule showing Contractor s planned dates for initial inspection and control during the ensuing twelve (12) month period If progress falls behind schedule, appropriate adjustments will be made to accelerate the pace of work (including increasing the number of crews) If Contractor fails to make adjustments to Railroad's satisfaction, Railroad reserves the right to pursue alternative means to satisfy the schedule, including the hiring of other contractors with the associated cost to be deducted from Contractor s invoices

10 Contractor shall provide and be represented by qualified field personnel acceptable to CSXT at all times for the supervision and operation of equipment, for the application of herbicides and other chemicals and otherwise for the performance of the work required hereunder Contractor will work progressively with no break in work and provide planned start and finish dates with its bid proposal In addition to weekly progress reports, a monthly conference call to review status and progress will be scheduled for attendance by field supervisors and Contractor's management

11 Prior to commencing any work, Contractor shall furnish evidence of Contractor s having secured the necessary insurance coverages and the necessary permits and licenses for performing the work required hereunder from proper Governmental authorities Contractor shall comply with all Local, State, and Federal laws rules requirements, ordinances and regulations pertaining to the work required hereunder including without limitation, those relating to the removal, control and disposal of brush, trees and other vegetation and herbicidal applications Contractor will be solely responsible for any citations or fines imposed as a result of Contractor's violation of any such Local, State, and Federal laws rules, requirements ordinances and regulations

EXHIBIT B

CSX Transportation, Inc
DESCRIPTION OF SERVICES

SERVICES	Control of Vegetation at Highway Rail Grade Crossings
PAYMENT TERMS	1 1/2% Net 45
RATES	Proposal Sheet attached and hereby made part of this Agreement

Consortium Purchasing Contractor acknowledges that it benefits from CSXT obtaining greater quantities of goods and/or services from Contractor and has reflected that by granting CSXT a discount for volume purchases To encourage CSXT to have third parties purchase goods and/or services from Contractor Contractor agrees to allow CSXT to aggregate its purchases with those of any such third parties so that CSXT and such third parties each receive benefit of the volume discounts set forth in the Appendix attached hereto CSXT shall forward the name address telephone number and the name of the representative of any such third parties and unless Contractor objects in writing within fifteen (15) days thereafter Contractor shall provide the named third party with the goods and/or services upon the same terms and conditions as are contained in this Contract, and shall aggregate CSXT's and all such third parties volume for purpose of determining the prices and discounts of the goods and/or services provided to each of the parties Notwithstanding the foregoing Contractor agrees that CSXT and such third parties are independent entities and that with the exception of aggregating purchase volumes (a) Contractor shall deal with each such party independently, and (b) CSXT is not a guarantor or surety for any such third parties and is not responsible in any way for any actions or inactions of such third parties including without limitation any disputes for non payment which may arise between Contractor and any such third party

ROA - 1431

DB0408

CSX Vegetation Control at Highway Rail Crossings Supplier Proposals

Instructions to Supplier

Supplier Name DeAngelo Brothers, Inc

Proposal, 5 Year price CSX Southeast states with 8% discount

Rail Crossing Category Type

STATE	A (300' Crossing) No	Cost	Total	B (600' Crossing) No	Cost	Total	C (800' Crossing) No	Cost	Total
AL	353	$ 282	$ 99 546	281	$ 565	$ 158 765	15	$ 717	$ 10 755
FL	318	$ 419	$ 133,242	114	$ 832	$ 94 848	26	$ 1 316	$ 34 216
GA	400	$ 282	$ 112,800	390	$ 565	$ 220 350	34	$ 717	$ 24 378
KY	584	$ 262	$ 153 008	226	$ 522	$ 118,016	24	$ 725	$ 17 400
LA	3	$ 419	$ 1,257	1	$ 832	$ 832	0	$ 1 316	$
MS	21	$ 419	$ 8 799	47	$ 832	$ 39 104	4	$ 1 316	$ 5 264
NC	386	$ 295	$ 113,870	183	$ 591	$ 108 153	4	$ 886	$ 3 544
SC	181	$ 295	$ 53,395	133	$ 691	$ 78 603	0	$ 886	$ -
TN	211	$ 295	$ 62,245	178	$ 591	$ 105,198	0	$ 886	$ -

PROPOSAL TOTAL $ 1 758,588

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McMaster, Mike

From	McMaster Mike
Sent	Thursday February 04 1999 10 38 AM
To	Akers Ed BAER RON J (AMS) Bippus Joe BLACK TED W (AMS) Downard Ken Fe guson Al FOSTER RON F (AMS) Foster Ron F HIRSCH BOB J (AMS) JOHNSON KEN L JR (AMS) RAMSEY MARTIN D (AMS) TUCKER PAUL M (AMS) THOBURN TOM S (AMS) Zenisek Ray
Cc	Melodini George Pettry, Dave Romaine Larry Dean Roy
Subject	Tree Removal

Subject Tree Removal

As all of you know there isn t enough money to cut and kill all the brush and trees along our right of way even on a three year cycle Therefore we need to develop other methods to attempt to control and correct our problem with vegetation The following is one way suggested by Tom Schmidt

Tom forwarded a listing of over three hundred loggers that are located in various states near CSX lines Most of the names on this list produce logs that are used by the sawmills that produce crossties for CSX Tom s idea is to have various loggers remove trees along out right-of way and supply these logs to sawmills for crossties

I need you to consider this option to remove trees at specific areas keeping in mind access to the site and safety concerns

While we may have safety reservations for this type of work on the property this would be an excellent way to remove trees at little or no cost to us If there are areas you decide would work contact me and I ll arrange for the agreement specifications and loggers We ll consider giving them the trees and hopefully this would offset their cost to remove and our flagging expense

Please forward your areas to me along with other comments or suggestions on ways to improve the brush/vegetation control



VV-0075

Ramsey, Steve

From Vaccarello Vinnie
Sent Tuesday January 02 2001 9 55 AM
To McMaster Mike
Cc Ramsey Steve
Subject FW Grade Crossing Vegetation Management program proposal for the next three years

Mike
I will be meeting with Steve Ramsey in the morning at 9 00 am to finalize specs to forward for your approval and forward them once you approve to Buddy Powell
Vinnie

---Original Message---
From **Vaccarello, Vinnie**
Sent Monday December 04 2000 2 20 PM
To Schmidt Tom
Subject Grade Crossing Vegetation Management program proposal for the next three years

(1) Total grade crossings across CSXT System 29 437
(2) Total active public grade crossings system wide 11 216
(3) Total active private grade crossings system wide 9 749
(4) Total passive public grade crossings system wide 8 472
(5) We will target all passive public grade crossings which only 90% of them will need to be cut which comes to 7 624
(6) We will target the Southern Region for the first year and the following states in priority order due to the highest incidents at grade crossings per Ed Codd NC SC GA, and AL
(7) The cutting specifications will be 300 feet on either side of the crossing unless State requires more and full length of the right of way not to exceed 100 feet
(8) Approximate budget number per crossing will be around $1 600 00 per depending on volumes given per year
(9) We would need approximately 4 Million Dollars per year over a three year period to complete all passive public grade crossings system wide (Estimated)
(10) We should set it up on a competitive bid process on a lump sum basis per Sub Division to be most cost effective
(11) Safety Quality and Price (The Bitterness of Poor Quality Remains Long After The Sweetness of Low Price Is Forgotten)

If you need any additional information or have any questions please let me know
Thanks
Vinnie

As info we will finish this year logging 275 miles and 130 crossings



E-00077

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