

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 I of IV
(Pages 1-474)

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STATE OF SOUTH CAROLINA)
COUNTY OF BAMBERG)
FILED)
BAMBERG COUNTY)
IN THE COURT OF COMMON PLEAS)
JAN 23 2009 AM 8 58

CONNIE CARSON as Personal Representative of the Estate of BERYL HARVEY,)
Plaintiff,)
v)
CSX TRANSPORTATION, INC and)
SOUTH CAROLINA DEPARTMENT OF)
TRANSPORTATION)
Defendants)
JAN 23 2009 AM 8 58
CLERK OF COURT
BAMBERG SC CIVIL ACTION NO 06-CP-05-0034

CONNIE CARSON as Personal Representative of the Estate of BERYL HARVEY,)
Plaintiff)
v)
CSX TRANSPORTATION, INC and)
SOUTH CAROLINA DEPARTMENT OF)
TRANSPORTATION)
Defendants)
CIVIL ACTION NO 06-CP-05-107

FRANCES HARVEY,)
Plaintiff,)
vs)
CSX TRANSPORTATION, INC and)
SOUTH CAROLINA DEPARTMENT)
OF TRANSPORTATION,)
Defendant)
CIVIL ACTION NO 06-CP-05-90

ORDER GRANTING DEFENDANTS' MOTION TO ESTABLISH COMPLEX CASE
DESIGNATION AND TIME FOR TRIAL

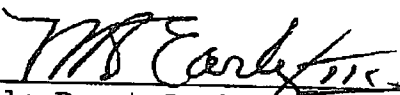
Defendants CSX Transportation, Inc and the South Carolina Department of Transportation ("Defendants") filed a Motion to

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#1

Establish Complex Case Designation and Time for Trial, which came on for hearing before this Court on June 17, 2009, at the Aiken County Courthouse. Having considered Defendants' motion and upon consent by Plaintiffs, IT IS HEREBY ORDERED that these cases be designated as complex and that the trial of these cases take place on or after November 9, 2009.

IT IS FURTHER ORDERED that these cases be assigned to the Honorable Doyet A. Early, III to hear and handle all pretrial motions and other matters pertaining to these cases.

IT IS SO ORDERED



Honorable Doyet A. Early, III
Chief Administrative Judge
Second Judicial Circuit

 , South Carolina

June 17, 2009

STATE OF SOUTH CAROLINA)

COUNTY OF BAMBERG)

CONNIE CARSON as Personal)
Representative of the Estate)
of BERYL HARVEY,)
Plaintiff)

v)

CSX TRANSPORTATION, INC)
Defendant)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO 06-CP-05-0034

CONNIE CARSON as Personal)
Representative of the Estate)
of BERYL HARVEY,)
Plaintiff,)

v)

CSX TRANSPORTATION, INC)
Defendant)

CIVIL ACTION NO 06-CP-05-1076

FILED
2018 FEB -6 AM 11 56
CLERK OF COURT
BAMBERG COUNTY

**ORDER DENYING PLAINTIFF'S MOTIONS FOR JUDGMENT
NOTWITHSTANDING THE VERDICT, FOR NEW TRIAL,
AND FOR NEW TRIAL *NISI ADDITUR***

The captioned cases are before the Court on Plaintiff's motions for judgment notwithstanding the verdict ('JNOV), new trial, and new trial *nisi additur* . Upon due consideration of the arguments of counsel both oral and written, Plaintiff's motions are **HEREBY DENIED** for the reasons explained below

First Plaintiff has not shown that she is entitled to JNOV . In ruling on a motion for JNOV, the Court is required to view the evidence and all inferences that can reasonably be drawn therefrom in the light most favorable to the non-movant . McMillan v Oconee Mem l Hosp., Inc., 367 S C 559 564, 626 S E 2d 884 886 (2006) . Accordingly, Plaintiff's motion should be denied where either the evidence yields more than one inference or its inference is in doubt . Id . Here the evidence clearly presented jury questions on the issues of proximate cause

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and comparative negligence. Accordingly, the Court did not err in denying Plaintiff's motion for directed verdict at trial, and Plaintiff is not entitled to JNOV.

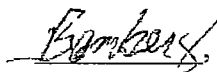
Nor is Plaintiff entitled to a new trial. First, the Court rejects Plaintiff's arguments regarding the Court's jury instructions and evidentiary rulings. The Court's rulings with respect to these matters were well within its discretion, and Plaintiff has shown no prejudice. Next, the Court rejects Plaintiff's objections to the jury's zero damages verdict in the survival action. Plaintiff is not entitled to a new trial absolute or the remedy of *additur*.

Accordingly, for the foregoing reasons, Plaintiff's motions for JNOV, new trial, and new trial *nisi additur* are **DENIED**.

IT IS SO ORDERED.



Honorable Doyet A. Early, III
Chief Administrative Judge
Second Judicial Circuit

, South Carolina

February 5, 2010

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BAMBERG	)	
	)	
CONNIE CARSON as Personal	)	
Representative of the Estate	)	CIVIL ACTION NOS 06-CP-05 0034
of BERYL HARVEY	)	
	)	& 06-CP-05-107
Plaintiff	)	
v	)	
CSX TRANSPORTATION, INC	)	
	)	
Defendant	)	

1 Do you find that Defendant CSX Transportation Inc was negligent?

 X Yes (If you answer YES go to Question 2)

 No (If you answer NO stop here)

2 Do you find that the negligence of Defendant CSX Transportation, Inc was a proximate cause of Beryl Harvey's death?

 X Yes (If you answer YES go to Question 3)

 No (If you answer NO, stop here)

IF YOU ANSWERED YES TO QUESTION 2 PLEASE GO TO QUESTION 3 IF YOU ANSWERED NO TO QUESTION 2 THE FOREPERSON SHOULD SIGN THE VERDICT FORM AND INFORM THE BAILIFF THAT YOU HAVE FINISHED YOUR DELIBERATIONS

3 Do you find that Frances Harvey was negligent?

 Yes (If you answer YES go to Question 4)

 No (If you answer NO skip to Questions 7 and 8)

4 Do you find that Frances Harvey's negligence was a proximate cause of Beryl
Harvey's death?

 Yes (If you answer YES, go to Question 5)

_____ No (If you answer NO, skip to Questions 7 and 8)

5 If you answered YES to Questions 2 and 4, please apportion the percentage of
negligence between Defendant CSX Transportation, Inc and Frances Harvey. The total of
percentages you assign must add up to 100%.

40 % Defendant CSX Transportation, Inc

16 % Frances Harvey

6 Was Frances Harvey's negligence greater than fifty (50%) percent?

 / Yes (If you answer YES, go to Question 8)

_____ No (If you answer NO answer Questions 7 and 8)

7 State the total amount of actual damages to be awarded to the Plaintiff on the wrongful death action (Make no adjustment for the percentage of negligence assigned to Defendant or Frances Harvey)

\$ _____

8 State the total amount of actual damages to be awarded to the Plaintiff on the survival action (Make no adjustment for the percentage of negligence assigned to Defendant or Frances Harvey)

\$ _____

THIS IS OUR VERDICT

William J. Lawrence
Foreperson

November / 7 2009

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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FEB 11 2010

SC Court of Appeals

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

Doyet A. Early, III Circuit Court Judge

Case No. 06 CP-05-034

Case No. 06-CP-05-107

Connie Caison as Personal Representative
of the Estate of Beryl Harvey,

Appellant,

-v-

CSX Transportation, Inc.

Respondent

NOTICE OF APPEAL

Connie Caison, Personal Representative of the Estate of Beryl Harvey, appeals
the November 17, 2009 Verdict and Order of the Honorable Doyet A. Early, III filed
February 4, 2010. Appellant received written notice of the Order on February 5, 2010.

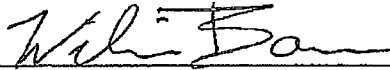
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CSX TRANSPORTATION, INC

STATE OF SOUTH CAROLINA)

COUNTY OF BAMBERG)

CONNIE CARSON as Personal)
Representative of the Estate)
of BERYL HARVEY)
Plaintiff)

v)

CSX TRANSPORTATION, INC)
Defendant)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO 06-CP-05-0034

CONNIE CARSON as Personal)
Representative of the Estate)
of BERYL HARVEY)
Plaintiff,)

v)

CSX TRANSPORTATION, INC)
Defendant)

CIVIL ACTION NO 06 CP-05-107-

FILED
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2010 FEB-4 AM 11 56
CLERK
BAMBERG
S.C.

**ORDER DENYING PLAINTIFF'S MOTIONS FOR JUDGMENT
NOTWITHSTANDING THE VERDICT, FOR NEW TRIAL,
AND FOR NEW TRIAL NISI ADDITUR**

The captioned cases are before the Court on Plaintiff's motions for judgment notwithstanding the verdict (JNOV) new trial and new trial *nisi additur* Upon due consideration of the arguments of counsel, both oral and written Plaintiff's motions are **HEREBY DENIED** for the reasons explained below

First, Plaintiff has not shown that she is entitled to JNOV In ruling on a motion for JNOV the Court is required to view the evidence and all inferences that can reasonably be drawn therefrom in the light most favorable to the non-movant McMillan v. Oconee Mem'l Hosp. Inc. 367 S C 559, 564, 626 S E 2d 884, 886 (2006) Accordingly, Plaintiff's motion should be denied where either the evidence yields more than one inference or its inference is in doubt ' Id. Here the evidence clearly presented jury questions on the issues of proximate cause

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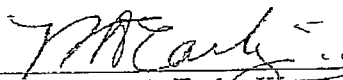
1 OF COURT
ROA-9 COUNTY SC
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and comparative negligence. Accordingly, the Court did not err in denying Plaintiff's motion for directed verdict at trial and Plaintiff is not entitled to JNOV.

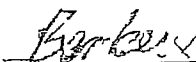
Nor is Plaintiff entitled to a new trial. First, the Court rejects Plaintiff's arguments regarding the Court's jury instructions and evidentiary rulings. The Court's rulings with respect to these matters were well within its discretion and Plaintiff has shown no prejudice. Next, the Court rejects Plaintiff's objections to the jury's zero damages verdict in the survival action. Plaintiff is not entitled to a new trial absolute or the remedy of *additur*.

Accordingly, for the foregoing reasons, Plaintiff's motions for JNOV, new trial, and new trial *nisi additur* are **DENIED**.

IT IS SO ORDERED.



Honorable Doyel A. Early, III
Chief Administrative Judge
Second Judicial Circuit

 South Carolina

February 7, 2010

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BAMBERG	)	
	)	
CONNIE CARSON as Personal	)	
Representative of the Estate	)	CIVIL ACTION NOS 06-CP-05-0034
of BERYL HARVEY	)	
	)	& 06-CP-05-107
Plaintiff	)	
v	)	
CSX TRANSPORTATION INC	)	
	)	
Defendant	)	

1 Do you find that Defendant CSX Transportation, Inc was negligent?

 X Yes (If you answer YES go to Question 2)

 No (If you answer NO stop here)

2 Do you find that the negligence of Defendant CSX Transportation, Inc was a proximate cause of Beryl Harvey's death?

 X Yes (If you answer YES go to Question 3)

 No (If you answer NO stop here)

IF YOU ANSWERED YES TO QUESTION 2 PLEASE GO TO QUESTION 3 IF YOU ANSWERED NO TO QUESTION 2 THE FOREPERSON SHOULD SIGN THE VERDICT FORM AND INFORM THE BAILIFF THAT YOU HAVE FINISHED YOUR DELIBERATIONS

3 Do you find that Frances Harvey was negligent?

 Yes (If you answer YES go to Question 4)

 No (If you answer NO skip to Questions 7 and 8)

/ Yes (If you answer YES go to Question 5)

5 If you answered YES to Questions 2 and 4, please apportion the percentage of negligence between Defendant CSX Transportation Inc and Frances Harvey The total of percentages you assign must add up to 100%

70 % Defendant CSX Transportation Inc

6 Was Frances Harvey's negligence greater than fifty (50%) percent?

 4 Yes (If you answer YES go to Question 8)

7 State the total amount of actual damages to be awarded to the Plaintiff on the wrongful death action (Make no adjustment for the percentage of negligence assigned to Defendant or Frances Harvey)

§ _____

8 State the total amount of actual damages to be awarded to the Plaintiff on the survival action (Make no adjustment for the percentage of negligence assigned to Defendant or Frances Harvey)

§ _____

John J. Thompson
Thompson

ROA-12

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 06-CP-05 034
Case No 06-CP-05-107

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

Appellant,

-v-

CSX Transportation, Inc ,

Respondent

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on CSX Transportation, Inc by
depositing a copy of it in the United States Mail postage prepaid on February 10, 2010
addressed to its attorneys of record as follows

Mark C Wilby
Elizabeth A McLeod
Fulcher Hagler LLP
P O Box 1477
Augusta, GA 30903-1477
-And-
John C Millberg
Millberg, Gordon & Stewart, P L L C
1101 Haynes Street
Suite 104
Raleigh, NC 27604
ATTORNEYS FOR RESPONDENT
CSX TRANSPORTATION INC

Respectfully submitted,

J Christopher Wilson
WILSON LAW FIRM

P O Box 1150

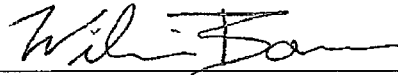
Bamberg, SC 29003

Phone (803) 245-7799

-And-

PETERS, MURDAUGH, PARKER ELTZROTH
& DETRICK, P A

BY



John E Parker

R Alexander Murdaugh

William F Baines, III

101 Mulberry Street, East

P O Box 457

Hampton, SC 29924

Phone (803) 943-2111

ATTORNEYS FOR APPELLANT

STATE OF SOUTH CAROLINA
COUNTY OF BAMBERG
CONNIE CARSON as Personal
Representative of the Estate of BERYL
HARVEY,

Plaintiff,

vs

CSX TRANSPORTATION, INC AND
SOUTH CAROLINA DEPARTMENT OF
TRANSPORTATION

Defendants

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO 06-CP-05-00 24

SUMMONS
(Jury Trial Requested)
(Wrongful Death)

TO THE DEFENDANTS ABOVE NAMED

YOU ARE HEREBY SUMMOMED and required to answer the Complaint in this action of which a copy is herewith served upon you, and to serve a copy of your Answer to said Complaint on the subscribed at their office, 101 Mulberry Street, Hampton, South Carolina within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in this Complaint

PETER, MURDAUGH, PARKER, ELTZROTH
& DETRICK

BY



John E. Parker
R. Alexander Murdaugh
P O Box 457
Hampton, SC 29924
(803) 943-2111

And

J Christopher Wilson
WILSON LAW FIRM
P O Box 1150
Bamberg, SC 29003

Hampton, South Carolina
February 14 2006

ATTORNEYS FOR PLAINTIFF

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BAMBERG	)	CIVIL ACTION NO 06-CP-05 <u>0631</u>
	)	
CONNIE CARSON as Personal	)	
Representative of the Estate of BERYL	)	
HARVEY,	)	
	)	
	)	COMPLAINT
Plaintiff,	)	(Jury Trial Requested)
	)	(Wrongful Death)
vs	)	
	)	
CSX TRANSPORTATION, INC AND	)	
SOUTH CAROLINA DEPARTMENT OF	)	
TRANSPORTATION	)	
	)	
Defendants	)	

The plaintiff complaining that the defendant alleges

1 The Plaintiff has been duly appointed Personal Representative of the estate of Beryl Harvey by the Bamberg County Probate Court, and he brings this action for the wrongful death of Beryl Harvey on behalf of the statutory beneficiaries of Beryl Harvey

2 The Defendant, CSX Transportation, is a corporation organized and existing under the laws of a state other than the State of South Carolina The defendant South Carolina Department of Transportation is a governmental agency and this action is brought pursuant to the South Carolina Tort Claims Act

3 On or about the 2nd day of June, 2004, Beryl Harvey was a passenger in an automobile traveling northeast on Honey Ford Road in Bamberg County, South Carolina The automobile in which Beryl Harvey was a passenger approached a railroad crossing that intersects Honey Ford Road

4 As the driver of the automobile approached the railroad crossing she stopped on or for a stop sign and looked to the left in a southerly direction, the view was obstructed by trees and other vegetation, because of the obstructed view of approaching trains the Honey Ford Road crossing is a dangerous crossing

5 Before the automobile in which the Plaintiff was a passenger cleared the tracks, the car was struck by a train that was traveling in a westerly direction, the train was owned and operated by the Defendant CSX by its employee. As a result of this collision, the Plaintiff was severely injured, and did thereafter die.

6 The Defendant, CSX Transportation, owns the railroad track that crosses Honey Ford Road in Bamberg County and has a duty to warn the public of approaching trains traveling along its tracks and to inspect its railroad crossings for the presence of dangerous and hazardous conditions such as the trees and vegetation that obstructed the view of oncoming trains. The Defendant, CSX Transportation, has a duty to properly maintain its right-of-way.

7 The crossing did not have traffic control gates or signals, CSX should have installed gates and signals at this crossing.

8 The Defendants, by and through the acts and/or omissions of their agents, servants, and employees, were negligent, careless, reckless, grossly negligent, willful and wanton at the time and place above mentioned in the following particulars:

AS TO DEFENDANT CSX TRANSPORTATION, INC.

- a) In maintaining an unreasonably hazardous and unsafe crossing,
- b) In failing to inspect the crossing for unsafe and hazardous conditions,
- c) In allowing trees and other vegetation to grow near the crossing in such a manner as to obstruct the traveling public's view of trains approaching,
- d) In failing to take steps to warn the public that the view of approaching trains was obstructed,
- e) In failing to install and maintain adequate warning devices at the crossing,
- f) In failing to adequately sound a bell or horn prior to entering the crossing in violation of Section 58-15-910 of the South Carolina Code of Laws
- g) In failing to properly maintain its right of way at this crossing when CSX knew or should have known that the trees and vegetation were obstructing the view of approaching trains,
- h) In violating its own rules for the maintenance of its right of way, and the operation of its locomotive,

- 1) In failing to flag the crossing

AS TO DEFENDANT SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

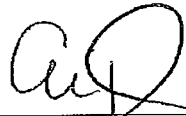
- a) In failing to properly erect proper traffic control devices,
b) On failing to maintain a safe and serviceable highway

9 As a result of the above conduct of the defendants, Beryl Harvey sustained serious and severe injuries which resulted in her death, resulting in damages to her

WHEREFORE, the Plaintiff prays for judgment against the defendants in a sum sufficient to adequately compensate the Plaintiff for actual damages, for punitive damages, and for the costs of this action

PETERS, MURDAUGH, PARKER, ELTZROTH
& DETRICK

BY



John E. Parker
R. Alexander Murdaugh
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Hampton, SC 29924
(803) 943-2111

And

J Christopher Wilson
WILSON LAW FIRM
P O Box 1150
Bamberg, SC 29003

— ATTORNEYS FOR PLAINTIFF

Hampton, South Carolina
February 14, 2006

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BAMBERG	)	CIVIL ACTION NO 06-CP-05-0034
CONNIE CARSON as Personal	)	
Representative of the Estate	)	
Of BERYL HARVEY,	)	
	)	
Plaintiff	)	
	)	
v	)	
	)	
CSX TRANSPORTATION, INC and	)	
SOUTH CAROLINA DEPARTMENT OF	)	
TRANSPORTATION	)	
	)	
Defendants	)	

ANSWER OF DEFENDANT CSX TRANSPORTATION, INC

NOW COMES Defendant CSX Transportation, Inc and responds to the Complaint filed against it as follows

FIRST DEFENSE

The sole proximate cause of any injuries Plaintiff alleges was the negligence of a person or persons other than this Defendant, with the result that Plaintiff is not entitled to any recovery from this Defendant

SECOND DEFENSE

This Defendant did not commit any malicious, willful, wanton or reckless act Therefore, any award of punitive damages is barred

THIRD DEFENSE

Plaintiff's claim for punitive damages against this Defendant should be dismissed because the imposition of punitive

damages against this Defendant would violate its constitutional rights, including, but not limited to, its rights under the First, Fifth, and Fourteenth Amendments to the United State Constitution, the Ex Post Facto Clause of Article I, Section 10 of the United States Constitution, and the parallel provisions of the Constitution of the State of South Carolina

FOURTH DEFENSE

The statutes and common law of the State of South Carolina which authorize the imposition of aggravated exemplary, or punitive damages are contrary to the Constitution of the United States and to the South Carolina Constitution, and are therefore unenforceable inasmuch as they allow for the deprivation of property without due process of law, and deny this Defendant equal protection of the laws by providing fewer protections for civil litigants than the criminal statutes which provide for the imposition of monetary fines

FIFTH DEFENSE

The Eighth Amendment to the United States Constitution, which prohibits the imposition of excessive fines, bars plaintiff's claims for punitive damages against this Defendant, as does the South Carolina Constitution

SIXTH DEFENSE

The statutes and common law of the State of South Carolina that authorize the imposition of aggravated, exemplary or

punitive damages are contrary to the Constitution of the United States and to the South Carolina Constitution, and are therefore unenforceable in as much as the statutes are impermissibly vague, imprecise and inconsistent

SEVENTH DEFENSE

Unless this Defendant's liability for punitive damages and the appropriate amount of punitive damages are required to be established by clear and convincing evidence, any award of punitive damages would violate this Defendant's due process rights, guaranteed by the Fourteenth Amendment to the United States Constitution and by the South Carolina Constitution, and would be improper under the common law and public policies of the State of South Carolina

EIGHTH DEFENSE

Defendant CSX Transportation, Inc owed no legal duty to Plaintiff that was violated in reference to the subject incident

NINTH DEFENSE

Some or all of Plaintiff's claims are pre-empted by state law Therefore Plaintiff cannot recover against this Defendant for such claims, and these claims should be dismissed

TENTH DEFENSE

Some or all of Plaintiff's claims, including but not limited to, those which may seek recovery based upon any alleged

failure of this Defendant to insure adequate signals or warning devices at the grade crossing in question, or any alleged violation of speed restrictions, are preempted by federal law pursuant to the Railroad Safety Act of 1970 (45 USC § 434) and the Highway Safety Act of 1973 (23 USC § 130, et seq), as amended, and the regulations issued by the Secretary of Transportation pursuant thereto. Therefore, Plaintiff cannot recover against this Defendant for such claims, and these claims should be dismissed.

ELEVENTH DEFENSE

Venue in Bamberg County is improper.

TWELFH DEFENSE

To the extent that the damages and injuries of the plaintiff were the direct and proximate result of negligent, reckless and willful conduct on the part of the plaintiff's decedent, which combined and concurred with any negligence on the part of this Defendant, which is specifically denied, and to the extent the alleged injuries and damages to the plaintiff would not have occurred if the plaintiff's decedent had not been guilty of such negligence and recklessness, the plaintiff's claims are barred in whole or in part. The complaint is barred to the extent the plaintiff's decedent's contributory negligence and recklessness is more than 50% of the total negligence in this action. The plaintiff's recovery should be reduced by the

percentage of the plaintiff's decedent's negligence and recklessness to the extent that such negligence and recklessness is 50% or less than the total negligence in this action

THIRTEENTH DEFENSE

Defendant CSX Transportation, Inc responds to the specific allegations of the Complaint as follows

1 This Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1

2 In response to paragraph 2, this Defendant admits it is a corporation organized and existing under the laws of a state other than South Carolina, and is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 2

3 In response to paragraph 3, this Defendant admits that on May 30, 2004 Beryl Harvey was a passenger in a van that approached the railroad crossing intersecting Honey Ford Road in Bamberg County, which crossing was well-marked and guarded by a stop sign This Defendant denies the remaining allegations of paragraph 3

4 This Defendant denies the allegations contained in paragraph 4

5 In response to paragraph 5, this Defendant admits the driver of the van containing Beryl Harvey failed to properly

stop, look and listen, failed to yield the right of way, and pulled in front of this Defendant's open and obvious train, resulting in fatal injuries to Beryl Harvey This Defendant denies the remaining allegations of paragraph 5

6 In response to paragraph 6, this Defendant admits it owns the railroad track that crosses Honey Ford Road in Bamberg County, and that it fulfilled all duties owed by it at the time of the subject accident This Defendant denies the remaining allegations of paragraph 6

7 In response to paragraph 7, this Defendant admits the crossing did not have active gates or lights By way of further response, this Defendant states the crossing was properly marked in full compliance with all applicable law, and Plaintiff's claims to the contrary are pre-empted by law This Defendant denies the remaining allegations of paragraph 7

8 This Defendant denies the allegations of paragraph 8, including all sub parts

9 This Defendant denies the allegations contained in paragraph 9

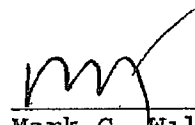
10 This Defendant denies each and every other allegation of the Complaint not specifically admitted herein

DEMAND FOR JURY TRIAL

Defendant CSX Transportation, Inc hereby demands a trial
by jury of twelve

WHEREFORE, having fully answered, Defendant CSX
Transportation, Inc prays that the Complaint be dismissed, and
that Defendant CSX Transportation, Inc be discharged without
further costs

This 17 day of April, 2006



Mark C. Wilby
J. Arthur Davison
Elizabeth A. McLeod
Attorneys for Defendant
CSX Transportation, Inc

OF COUNSEL
FULCHER HAGLER LLP
POST OFFICE BOX 1477
AUGUSTA, GA 30903-1477
(706) 724-0171

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that I have this day served a copy of
the foregoing Answer of Defendant CSX Transportation, Inc upon
the following

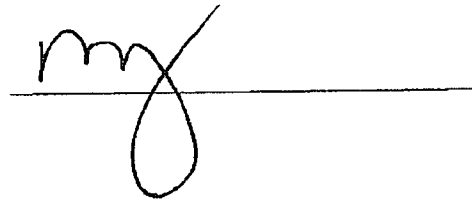
John E Parker, Esq
Peters, Murdaugh, Parker, Eltzroth & Detrick, PA
303 First Street, East
Post Office Box 457
Hampton, SC 29924

J Christopher Wilson
Wilson Law Firm
P O Box 1150
Bamberg, SC 29003

Michael S Pauley
Vinton D Lide & Associates, LLC
P O Box 2189
Lexington, SC 29072-9155

by depositing said copy in the United States mail with adequate
postage affixed thereto to ensure proper delivery

This 17 day of April, 2006

A handwritten signature, possibly reading 'my', is written over a horizontal line.

STATE OF SOUTH CAROLINA
COUNTY OF BAMBERG
CONNIE CARSON as Personal
Representative of the Estate of BERYL
HARVEY,

Plaintiff

vs

CSX TRANSPORTATION, INC AND
SOUTH CAROLINA DEPARTMENT OF
TRANSPORTATION

Defendants

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO 06 CP-05-0034

AMENDED SUMMONS
(Jury Trial Requested)
(Wrongful Death)

2006 APR 14 AM 10 29

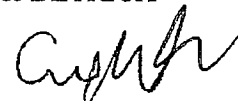
CLERK
BAMBERG
S.C.

TO THE DEFENDANTS ABOVE NAMED

YOU ARE HEREBY SUMMOMED and required to answer the Complaint in this action of which a copy is herewith served upon you, and to serve a copy of your Answer to said Complaint on the subscribed at their office, 101 Mulberry Street, Hampton, South Carolina within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid judgment by default will be rendered against you for the relief demanded in this Complaint

PETER, MURDAUGH, PARKER, ELTZROTH
& DETRICK

BY



John E Parker
R Alexander Murdaugh
P O Box 457
Hampton, SC 29924
(803) 943-2111

And

Hampton South Carolina
August 12, 2008

J Christopher Wilson
WILSON LAW FIRM
P O Box 1150
Bamberg, SC 29003

ATTORNEYS FOR PLAINTIFF

STATE OF SOUTH CAROLINA
COUNTY OF BAMBERG
CONNIE CARSON as Personal
Representative of the Estate of BERYL
HARVEY,

Plaintiff,

vs

CSX TRANSPORTATION, INC AND
SOUTH CAROLINA DEPARTMENT OF
TRANSPORTATION

Defendants

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO 06-CP-05-0034

AMENDED COMPLAINT
(Jury Trial Requested)
(Wrongful Death)

CLERK OF COURT
JULIA W. SCOTT
SC

2006 AUG 14 AM 10 29

The plaintiff complaining that the defendant alleges

1 The Plaintiff has been duly appointed Personal Representative of the estate of Beryl Harvey by the Bamberg County Probate Court, and he brings this action for the wrongful death of Beryl Harvey on behalf of the statutory beneficiaries of Beryl Harvey

2 The Defendant, CSX Transportation, is a corporation organized and existing under the laws of a state other than the State of South Carolina The defendant South Carolina Department of Transportation is a governmental agency and this action is brought pursuant to the South Carolina Tort Claims Act

3 On or about the 30th day of May 2004, Beryl Harvey was a passenger in an automobile traveling northeast on Honey Ford Road in Bamberg County, South Carolina The automobile in which Beryl Harvey was a passenger approached a railroad crossing that intersects Honey Ford Road

4 As the driver of the automobile approached the railroad crossing she stopped on or for a stop sign and looked to the left in a southerly direction the view was obstructed by trees and other vegetation because of the obstructed view of approaching trains the Honey Ford Road crossing is a dangerous crossing

5 Before the automobile in which the Plaintiff was a passenger cleared the tracks, the car was struck by a train that was traveling in a westerly direction the train was owned and operated by the Defendant CSX by its employee As a result of this collision, the Plaintiff was severely injured, and did thereafter die

6 The Defendant, CSX Transportation, owns the railroad track that crosses Honey Ford Road in Bamberg County and has a duty to warn the public of approaching trains traveling along its tracks and to inspect its railroad crossings for the presence of dangerous and hazardous conditions such as the trees and vegetation that obstructed the view of oncoming trains The Defendant, CSX Transportation, has a duty to properly maintain its right-of-way

7 The crossing did not have traffic control gates or signals, CSX should have installed gates and signals at this crossing

8 The Defendants by and through the acts and/or omissions of their agents, servants, and employees, were negligent, careless, reckless, grossly negligent, willful and wanton at the time and place above mentioned in the following particulars

AS TO DEFENDANT CSX TRANSPORTATION, INC

- a) In maintaining an unreasonably hazardous and unsafe crossing,
- b) In failing to inspect the crossing for unsafe and hazardous conditions,
- c) In allowing trees and other vegetation to grow near the crossing in such a manner as to obstruct the traveling public's view of trains approaching
- d) In failing to take steps to warn the public that the view of approaching trains was obstructed,
- e) In failing to install and maintain adequate warning devices at the crossing,
- f) In failing to adequately sound a bell or horn prior to entering the crossing in violation of Section 58-15-910 of the South Carolina Code of Laws
- g) In failing to properly maintain its right of way at this crossing when CSX knew or should have known that the trees and vegetation were obstructing the view of approaching trains,

- h) In violating its own rules for the maintenance of its right of way, and the operation of its locomotive
- i) In failing to flag the crossing
- j) In traveling at an excessive rate of speed

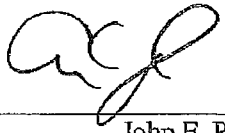
AS TO DEFENDANT SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

- a) In failing to properly erect proper traffic control devices,
- b) On failing to maintain a safe and serviceable highway

9 As a result of the above conduct of the defendants, Beryl Harvey sustained serious and severe injuries which resulted in his death, resulting in damages to him

WHEREFORE, the Plaintiff prays for judgment against the defendants in a sum sufficient to adequately compensate the Plaintiff for actual damages, for punitive damages and for the costs of this action

PETERS, MURDAUGH, PARKER, ELTZROTH
& DETRICK

BY 
John E. Parker
R. Alexander Murdaugh
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(803) 943-2111

And

J Christopher Wilson
WILSON LAW FIRM
P O Box 1150
Bamberg SC 29003

ATTORNEYS FOR PLAINTIFF

Hampton, South Carolina
August 12 2008

STATE OF SOUTH CAROLINA)
)
COUNTY OF BAMBERG) IN THE COURT OF COMMON PLEAS
)
) CIVIL ACTION NO 06-CP-05-0034

CONNIE CARSON as Personal)
Representative of the Estate)
Of BERYL HARVEY,)
)
 Plaintiff) (WRONGFUL DEATH)
)
v)
)
CSX TRANSPORTATION, INC and)
SOUTH CAROLINA DEPARTMENT OF)
TRANSPORTATION)
)
 Defendants)

ANSWER OF DEFENDANT CSX TRANSPORTATION, INC
TO AMENDED COMPLAINT

NOW COMES Defendant CSX Transportation, Inc and responds
to the Amended Complaint filed against it as follows

FIRST DEFENSE

The sole proximate cause of any injuries Plaintiff alleges
was the negligence of a person or persons other than this
Defendant, with the result that Plaintiff is not entitled to any
recovery from this Defendant

SECOND DEFENSE

This Defendant did not commit any malicious, willful,
wanton or reckless act Therefore, any award of punitive
damages is barred

THIRD DEFENSE

Plaintiff's claim for punitive damages against this Defendant should be dismissed because the imposition of punitive damages against this Defendant would violate its constitutional rights, including, but not limited to, its rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution, the Ex Post Facto Clause of Article I, Section 10 of the United States Constitution, and the parallel provisions of the Constitution of the State of South Carolina

FOURTH DEFENSE

The statutes and common law of the State of South Carolina which authorize the imposition of aggravated, exemplary, or punitive damages are contrary to the Constitution of the United States and to the South Carolina Constitution, and are therefore unenforceable inasmuch as they allow for the deprivation of property without due process of law, and deny this Defendant equal protection of the laws by providing fewer protections for civil litigants than the criminal statutes which provide for the imposition of monetary fines

FIFTH DEFENSE

The Eighth Amendment to the United States Constitution, which prohibits the imposition of excessive fines, bars plaintiff's claims for punitive damages against this Defendant, as does the South Carolina Constitution

SIXTH DEFENSE

The statutes and common law of the State of South Carolina that authorize the imposition of aggravated, exemplary or punitive damages are contrary to the Constitution of the United States and to the South Carolina Constitution, and are therefore unenforceable in as much as the statutes are impermissibly vague, imprecise and inconsistent

SEVENTH DEFENSE

Unless this Defendant's liability for punitive damages and the appropriate amount of punitive damages are required to be established by clear and convincing evidence, any award of punitive damages would violate this Defendant's due process rights, guaranteed by the Fourteenth Amendment to the United States Constitution and by the South Carolina Constitution and would be improper under the common law and public policies of the State of South Carolina

EIGHTH DEFENSE

Defendant CSX Transportation, Inc owed no legal duty to Plaintiff that was violated in reference to the subject incident

NINTH DEFENSE

Some or all of Plaintiff's claims are preempted by state law Therefore, Plaintiff cannot recover against this Defendant for such claims, and these claims should be dismissed

TENTH DEFENSE

Some or all of Plaintiff's claims are preempted and/or precluded by federal law, rules and regulations. Therefore, Plaintiff cannot recover against this Defendant for such claims, and these claims should be dismissed.

ELEVENTH DEFENSE

Some or all of Plaintiff's claims, including but not limited to those which may seek recovery based upon any alleged failure of this Defendant to insure adequate signals or warning devices at the grade crossing in question, or any alleged violation of speed restrictions, are preempted by federal law pursuant to 49 USC § 20106 and the Highway Safety Act of 1973 (23 USC § 130, et seq), as amended, and the regulations issued by the Secretary of Transportation pursuant thereto. Therefore, Plaintiff cannot recover against this Defendant for such claims, and these claims should be dismissed.

TWELFTH DEFENSE

Venue in Bamberg County is improper.

THIRTEENTH DEFENSE

Defendant CSX Transportation, Inc. responds to the specific allegations of the Amended Complaint as follows:

1. This Defendant admits that plaintiff was appointed personal representative as indicated in paragraph 1 and that she has initiated this wrongful death action, but denies all

remaining allegations contained in paragraph 1 and denies that plaintiff is entitled to any recovery or relief in this action

2 In response to paragraph 2, this Defendant admits it is a corporation organized and existing under the laws of a state other than South Carolina, and is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 2

3 In response to paragraph 3, this Defendant admits that on May 30, 2004 Beryl Harvey was a passenger in a van that approached the railroad crossing intersecting Honey Ford Road in Bamberg County, which crossing was well-marked and guarded by a stop sign. This Defendant denies the remaining allegations of paragraph 3

4 This Defendant denies the allegations contained in paragraph 4

5 In response to paragraph 5, this Defendant admits the driver of the van in which Beryl Harvey was a passenger failed to properly stop, look and listen, failed to yield the right of way, and pulled in front of this Defendant's open and obvious train

resulting in fatal injuries to Beryl Harvey. This Defendant denies the remaining allegations of paragraph 5

6 In response to paragraph 6, this Defendant admits it owns the railroad track that crosses Honey Ford Road in Bamberg

County, and that it fulfilled all duties owed by it at the time of the subject accident. This Defendant denies the remaining allegations of paragraph 6.

7 In response to paragraph 7, this Defendant admits the crossing did not have active gates or lights. By way of further response, this Defendant states the crossing was properly marked in full compliance with all applicable law, and Plaintiff's claims to the contrary are preempted by law. This Defendant denies the remaining allegations of paragraph 7.

8 This Defendant denies the allegations of paragraph 8, including all subparts.

9 This Defendant denies the allegations contained in paragraph 9.

10 This Defendant denies each and every other allegation of the Amended Complaint not specifically admitted herein.

DEMAND FOR JURY TRIAL

Defendant CSX Transportation, Inc. hereby demands a trial by jury of twelve.

WHEREFORE, having fully answered, Defendant CSX Transportation, Inc. denies that plaintiff is entitled to any relief or recovery in this action, prays that the Amended Complaint be dismissed, and requests that Defendant CSX Transportation, Inc. be discharged without further costs.

This 22nd day of August, 2008

Elizabeth A. McLeod
Mark C Wilby
SC Bar No 8000
Elizabeth A McLeod
SC Bar No 72660
Attorneys for Defendant
CSX Transportation, Inc

OF COUNSEL
FULCHER HAGLER LLP
POST OFFICE BOX 1477
AUGUSTA, GA 30903-1477
(706) 724-0171

JOHN C MILLBERG
SC Bar No 68787
Co-counsel for Defendant CSX
Transportation, Inc

MILLBERG, GORDON & STEWART, P L L C
1101 Haynes Street, Suite 104
Raleigh, NC 27604
(919) 836-0090

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that I have this day served a copy of
the foregoing Answer of Defendant CSX Transportation, Inc to
Amended Complaint upon the following

John E Parker, Esq
Peters, Murdaugh, Parker, Eltzroth & Detrick, PA
Post Office Box 457
Hampton, SC 29924

J Christopher Wilson
Wilson Law Firm
P O Box 1150
Bamberg, SC 29003

Michael S Pauley
Vinton D Lide & Associates, LLC
P O Box 2189
Lexington SC 29072-9155

John C Millberg
Millberg, Gordon & Stewart, P L L C
1101 Haynes Street, Suite 104
Raleigh, NC 27604

by depositing said copies in the United States mail with
adequate postage affixed thereto to ensure proper delivery

This 22nd day of August, 2008

Elizabeth A McJannet

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF BAMBERG) CIVIL ACTION NO 06-CP-05-0034

CONNIE CARSON as Personal)
Representative of the Estate)
of BERYL HARVEY,)
) (WRONGFUL DEATH)
Plaintiff)
)
v)
)
CSX TRANSPORTATION, INC and)
SOUTH CAROLINA DEPARTMENT OF)
TRANSPORTATION,)
)
Defendants)

AMENDED ANSWER OF DEFENDANT CSX TRANSPORTATION, INC
TO AMENDED COMPLAINT

NOW COMES Defendant CSX Transportation, Inc and files this Amended Answer to the Amended Complaint filed against it as follows

FIRST DEFENSE

The sole proximate cause of any injuries Plaintiff alleges was the negligence of a person or persons other than this Defendant, with the result that Plaintiff is not entitled to any recovery from this Defendant

SECOND DEFENSE

This Defendant did not commit any malicious, willful, wanton or reckless act. Therefore, any award of punitive damages is barred.

THIRD DEFENSE

Plaintiff's claim for punitive damages against this Defendant should be dismissed because the imposition of punitive damages against this Defendant would violate its constitutional rights, including, but not limited to, its rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution, the Ex Post Facto Clause of Article I, Section 10 of the United States Constitution, and the parallel provisions of the Constitution of the State of South Carolina

FOURTH DEFENSE

The statutes and common law of the State of South Carolina which authorize the imposition of aggravated, exemplary, or punitive damages are contrary to the Constitution of the United States and to the South Carolina Constitution, and are therefore unenforceable inasmuch as they allow for the deprivation of property without due process of law, and deny this Defendant equal protection of the laws by providing fewer protections for civil litigants than the criminal statutes which provide for the imposition of monetary fines

FIFTH DEFENSE

The Eighth Amendment to the United States Constitution, which prohibits the imposition of excessive fines, bars plaintiff's claims for punitive damages against this Defendant, as does the South Carolina Constitution

SIXTH DEFENSE

The statutes and common law of the State of South Carolina that authorize the imposition of aggravated exemplary or punitive damages are contrary to the Constitution of the United States and to the South Carolina Constitution, and are therefore unenforceable in as much as the statutes are impermissibly vague, imprecise and inconsistent

SEVENTH DEFENSE

Unless this Defendant's liability for punitive damages and the appropriate amount of punitive damages are required to be established by clear and convincing evidence, any award of punitive damages would violate this Defendant's due process rights, guaranteed by the Fourteenth Amendment to the United States Constitution and by the South Carolina Constitution, and would be improper under the common law and public policies of the State of South Carolina

EIGHTH DEFENSE

Defendant CSX Transportation, Inc owed no legal duty to Plaintiff that was violated in reference to the subject incident

NINTH DEFENSE

Some or all of Plaintiff's claims are preempted by state law Therefore, Plaintiff cannot recover against this Defendant for such claims, and these claims should be dismissed

TENTH DEFENSE

Some or all of Plaintiff's claims are preempted and/or precluded by federal law, rules and regulations. Therefore, Plaintiff cannot recover against this Defendant for such claims, and these claims should be dismissed.

ELLEVINTH DEFENSE

Some or all of Plaintiff's claims, including but not limited to those which may seek recovery based upon any alleged failure of this Defendant to insure adequate signals or warning devices at the grade crossing in question, or any alleged violation of speed restrictions, are preempted by federal law pursuant to 49 USC § 20106 and the Highway Safety Act of 1973 (23 USC § 130, et seq), as amended, and the regulations issued by the Secretary of Transportation pursuant thereto. Therefore, Plaintiff cannot recover against this Defendant for such claims, and these claims should be dismissed.

TWELFTH DEFENSE

Venue in Bamberg County is improper.

THIRTEENTH DEFENSE

Frances Harvey's negligence will be imputed to this Plaintiff to reduce or bar Plaintiff's recovery under the principles of comparative and contributory negligence.

FOURTEENTH DEFENSE

Frances Harvey's gross negligence and reckless conduct will be imputed to this Plaintiff to reduce or bar Plaintiff's recovery under the theories of comparative and contributory negligence

FIFTEENTH DEFENSE

Defendant CSX Transportation, Inc responds to the specific allegations of the Amended Complaint as follows

1 This Defendant admits that plaintiff was appointed personal representative as indicated in paragraph 1 and that she has initiated this wrongful death action, but denies all remaining allegations contained in paragraph 1 and denies that plaintiff is entitled to any recovery or relief in this action

2 In response to paragraph 2, this Defendant admits it is a corporation organized and existing under the laws of a state other than South Carolina, and is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 2

3 In response to paragraph 3, this Defendant admits that on May 30, 2004 Beryl Harvey was a passenger in a van that approached the railroad crossing intersecting Honey Ford Road in Bamberg County, which crossing was well-marked and guarded by a stop sign This Defendant denies the remaining allegations of paragraph 3

4 This Defendant denies the allegations contained in paragraph 4

5 In response to paragraph 5, this Defendant admits the driver of the van in which Beryl Harvey was a passenger failed to properly stop, look and listen, failed to yield the right of way, and pulled in front of this Defendant's open and obvious train, resulting in fatal injuries to Beryl Harvey This Defendant denies the remaining allegations of paragraph 5

6 In response to paragraph 6, this Defendant admits it owns the railroad track that crosses Honey Ford Road in Bamberg County, and that it fulfilled all duties owed by it at the time of the subject accident This Defendant denies the remaining allegations of paragraph 6

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8 This Defendant denies the allegations of paragraph 8, including all subparts

9 This Defendant denies the allegations contained in paragraph 9

10 This Defendant denies each and every other allegation of the Amended Complaint not specifically admitted herein

DEMAND FOR JURY TRIAL

Defendant CSX Transportation, Inc hereby demands a trial by jury of twelve

WHEREFORE, having fully answered, Defendant CSX Transportation, Inc denies that plaintiff is entitled to any relief or recovery in this action, prays that the Amended Complaint be dismissed, and requests that Defendant CSX Transportation, Inc be discharged without further costs Defendant CSX Transportation, Inc requests such other relief as this Court deems just and proper

This 26 day of October, 2009



Mark C. Wilby
SC Bar No 8000
Elizabeth A McLeod
SC Bar No 72660
Attorneys for Defendant
CSX Transportation, Inc

OF COUNSEL
FULCHER HAGLER LLP
POST OFFICE BOX 1477
AUGUSTA, GA 30903-1477
(706) 724-0171

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that I have this day served a copy of
the foregoing Amended Answer of Defendant CSX Transportation,
Inc to Amended Complaint upon the following

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Peters, Murdaugh, Parker, Eltzroth & Detrick, PA
P O Box 457
Hampton SC 29924

J Christopher Wilson
Wilson Law Firm
P O Box 1150
Bamberg, SC 29003

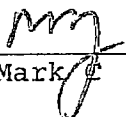
Michael S Pauley
Lide & Pauley, LLC
P O Box 2189
Lexington, SC 29072-9155

Richard B Ness
Ness, Jett & Tanner, LLC
P O Box 909
Bamberg, SC 29003

John C Millberg
Millberg, Gordon & Stewart, P L L C
1101 Haynes Street, Suite 104
Raleigh, NC 27604

by depositing said copies in the United States mail with
adequate postage affixed thereto to ensure proper delivery

This 26 day of October, 2009


Mark F Wilby

STATE OF SOUTH CAROLINA)

COUNTY OF BAMBERG)

CONNIE CARSON as Personal)
Representative of the Estate of BERYL)
HARVEY,)

Plaintiff,)

vs)

CSX TRANSPORTATION, INC AND)
SOUTH CAROLINA DEPARTMENT OF)
TRANSPORTATION)

Defendant(s))

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO 06-CP-05- 107

SUMMONS
(Jury Trial Requested)
(Survival Action)

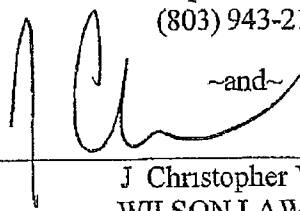
TO THE DEFENDANTS ABOVE NAMED

YOU ARE HEREBY SUMMOMED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your Answer to said Complaint on the subscribed at their office, 101 Mulberry Street, Hampton, South Carolina within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in this Complaint

PETER, MURDAUGH, PARKER, ELTZROTH
& DETRICK

John E Parker
R Alexander Murdaugh
P O Box 457
Hampton, SC 29924
(803) 943-2111

BY


J Christopher Wilson
WILSON LAW FIRM
P O Box 1150
Bamberg SC 29003

Hampton, South Carolina
May 25, 2006

ATTORNEYS FOR PLAINTIFF

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BAMBERG	)	CIVIL ACTION NO 06-CP-05- <u>107</u>
	)	
CONNIE CARSON as Personal	)	
Representative of the Estate of BERYL	)	
HARVEY,	)	
	)	
	)	COMPLAINT
Plaintiff,	)	(Jury Trial Requested)
	)	(Survival Action)
vs	)	
	)	
CSX TRANSPORTATION, INC AND	)	
SOUTH CAROLINA DEPARTMENT OF	)	
TRANSPORTATION	)	
	)	
Defendants	)	

The plaintiff complaining that the defendant alleges

1 The Plaintiff has been duly appointed Personal Representative of the estate of Beryl Harvey by the Bamberg County Probate Court, and he brings this action for the injuries suffered by Beryl Harvey on behalf of the Estate of Beryl Harvey

2 The Defendant, CSX Transportation, is a corporation organized and existing under the laws of a state other than the State of South Carolina The defendant South Carolina Department of Transportation is a governmental agency and this action is brought pursuant to the South Carolina Tort Claims Act

W #1

3 On or about the 30th day of May, 2004, Beryl Harvey was a passenger in an automobile traveling Northeast on Honey Ford Road in Bamberg County, South Carolina The automobile in which Beryl Harvey was a passenger approached a railroad crossing that intersects Honey Ford Road

4 As the driver of the automobile approached the railroad crossing she stopped on or for a stop sign and looked to the left in a southerly direction, the view was obstructed by trees and other vegetation, because of the obstructed view of approaching trains the Honey Ford Road crossing is a dangerous crossing

5 Before the automobile in which the Plaintiff was a passenger cleared the tracks, the car was struck by a train that was traveling in a westerly direction, the train was owned and operated by the Defendant CSX by its employee. As a result of this collision, the Plaintiff was severely injured, and did thereafter die.

6 The Defendant, CSX Transportation, owns the railroad track that crosses Honey Ford Road in Bamberg County and has a duty to warn the public of approaching trains traveling along its tracks and to inspect its railroad crossings for the presence of dangerous and hazardous conditions such as the trees and vegetation that obstructed the view of oncoming trains. The Defendant, CSX Transportation, has a duty to properly maintain its right-of-way.

7 The crossing did not have traffic control gates or signals, CSX should have installed gates and signals at this crossing.

8 The Defendants, by and through the acts and/or omissions of their agents, servants, and employees, were negligent, careless, reckless, grossly negligent, willful and wanton at the time and place above mentioned in the following particulars

fw
#2

AS TO DEFENDANT CSX TRANSPORTATION, INC

- a) In maintaining an unreasonably hazardous and unsafe crossing,
- b) In failing to inspect the crossing for unsafe and hazardous conditions,
- c) In allowing trees and other vegetation to grow near the crossing in such a manner as to obstruct the traveling public's view of trains approaching,
- d) In failing to take steps to warn the public that the view of approaching trains was obstructed,
- e) In failing to install and maintain adequate warning devices at the crossing,
- f) In failing to adequately sound a bell or horn prior to entering the crossing in violation of Section 58-15-910 of the South Carolina Code of Laws
- g) In failing to properly maintain its right of way at this crossing when CSX knew or should have known that the trees and vegetation were obstructing the view of approaching trains,

- h) In violating its own rules for the maintenance of its right of way, and the operation of its locomotive,
- i) In failing to flag the crossing

AS TO DEFENDANT SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

- a) In failing to properly erect proper traffic control devices,
- b) On failing to maintain a safe and serviceable highway

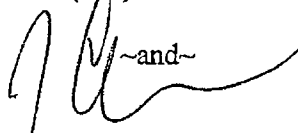
9 As a result of the above conduct of the defendants, Beryl Harvey sustained serious and severe bodily injuries resulting in conscious pain and suffering, medical bills and other damages to him

WHEREFORE, the Plaintiff prays for judgment against the defendants in a sum sufficient to adequately compensate the Plaintiff for actual damages, for punitive damages, and for the costs of this action

PETERS, MURDAUGH, PARKER ELTZROTH
& DETRICK

John E Parker
R Alexander Murdaugh
P O Box 457
Hampton, SC 29924
(803) 943-2111

BY



Christopher Wilson
WILSON LAW FIRM
P O Box 1150
Bamberg, SC 29003

ATTORNEYS FOR PLAINTIFF

Hampton, South Carolina
May 25, 2006

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BAMBERG	)	CIVIL ACTION NO 06-CP-05-107
CONNIE CARSON as Personal	)	
Representative of the Estate	)	
Of BERYL HARVEY,	)	
	)	
Plaintiff	)	
	)	
v	)	
	)	
CSX TRANSPORTATION, INC and	)	
SOUTH CAROLINA DEPARTMENT OF	)	
TRANSPORTATION	)	
	)	
Defendants	)	

ANSWER OF DEFENDANT CSX TRANSPORTATION, INC

NOW COMES Defendant CSX Transportation, Inc and responds to the Complaint filed against it as follows

FIRST DEFENSE

The sole proximate cause of any injuries Plaintiff alleges was the negligence of a person or persons other than this Defendant, with the result that Plaintiff is not entitled to any recovery from this Defendant

SECOND DEFENSE

This Defendant did not commit any malicious, willful, wanton or reckless act Therefore, any award of punitive damages is barred

THIRD DEFENSE

Plaintiff's claim for punitive damages against this Defendant should be dismissed because the imposition of punitive

damages against this Defendant would violate its constitutional rights, including, but not limited to, its rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution, the Ex Post Facto Clause of Article I, Section 10 of the United States Constitution, and the parallel provisions of the Constitution of the State of South Carolina

FOURTH DEFENSE

The statutes and common law of the State of South Carolina which authorize the imposition of aggravated, exemplary, or punitive damages are contrary to the Constitution of the United States and to the South Carolina Constitution, and are therefore unenforceable inasmuch as they allow for the deprivation of property without due process of law, and deny this Defendant equal protection of the laws by providing fewer protections for civil litigants than the criminal statutes which provide for the imposition of monetary fines

FIFTH DEFENSE

The Eighth Amendment to the United States Constitution which prohibits the imposition of excessive fines, bars plaintiff's claims for punitive damages against this Defendant, as does the South Carolina Constitution

SIXTH DEFENSE

The statutes and common law of the State of South Carolina that authorize the imposition of aggravated, exemplary or

punitive damages are contrary to the Constitution of the United States and to the South Carolina Constitution, and are therefore unenforceable in as much as the statutes are impermissibly vague, imprecise and inconsistent

SEVENTH DEFENSE

Unless this Defendant's liability for punitive damages and the appropriate amount of punitive damages are required to be established by clear and convincing evidence, any award of punitive damages would violate this Defendant's due process rights, guaranteed by the Fourteenth Amendment to the United States Constitution and by the South Carolina Constitution, and would be improper under the common law and public policies of the State of South Carolina

EIGHTH DEFENSE

Defendant CSX Transportation, Inc owed no legal duty to Plaintiff that was violated in reference to the subject incident

NINTH DEFENSE

Some or all of Plaintiff's claims are pre-empted by state law Therefore, Plaintiff cannot recover against this Defendant for such claims, and these claims should be dismissed

TENTH DEFENSE

Some or all of Plaintiff's claims, including but not limited to, those which may seek recovery based upon any alleged

failure of this Defendant to insure adequate signals or warning devices at the grade crossing in question, or any alleged violation of speed restrictions, are preempted by federal law pursuant to the Railroad Safety Act of 1970 (45 USC § 434) and the Highway Safety Act of 1973 (23 USC § 130, et seq), as amended, and the regulations issued by the Secretary of Transportation pursuant thereto. Therefore, Plaintiff cannot recover against this Defendant for such claims, and these claims should be dismissed.

ELEVENTH DEFENSE

Venue in Bamberg County is improper.

TWELFH DEFENSE

To the extent that the damages and injuries of the plaintiff were the direct and proximate result of negligent, reckless and willful conduct on the part of the plaintiff's decedent, which combined and concurred with any negligence on the part of this Defendant, which is specifically denied, and to the extent the alleged injuries and damages to the plaintiff would not have occurred if the plaintiff's decedent had not been guilty of such negligence and recklessness, the plaintiff's claims are barred in whole or in part. The complaint is barred to the extent the plaintiff's decedent's contributory negligence and recklessness is more than 50% of the total negligence in this action. The plaintiff's recovery should be reduced by the

percentage of the plaintiff's decedent's negligence and recklessness to the extent that such negligence and recklessness is 50% or less than the total negligence in this action

THIRTEENTH DEFENSE

Defendant CSX Transportation Inc responds to the specific allegations of the Complaint as follows

1 This Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1

2 In response to paragraph 2, this Defendant admits it is a corporation organized and existing under the laws of a state other than South Carolina, and is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 2

3 In response to paragraph 3, this Defendant admits that on May 30, 2004 Beryl Harvey was a passenger in a van that approached the railroad crossing intersecting Honey Ford Road in Bamberg County, which crossing was well-marked and guarded by a stop sign This Defendant denies the remaining allegations of paragraph 3

4 This Defendant denies the allegations contained in paragraph 4

5 In response to paragraph 5, this Defendant admits the driver of the van containing Beryl Harvey failed to properly

stop, look and listen, failed to yield the right of way, and pulled in front of this Defendant's open and obvious train, resulting in fatal injuries to Beryl Harvey This Defendant denies the remaining allegations of paragraph 5

6 In response to paragraph 6, this Defendant admits it owns the railroad track that crosses Honey Ford Road in Bamberg County, and that it fulfilled all duties owed by it at the time of the subject accident This Defendant denies the remaining allegations of paragraph 6

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DEMAND FOR JURY TRIAL

Defendant CSX Transportation, Inc hereby demands a trial
by jury of twelve

WHEREFORE, having fully answered, Defendant CSX
Transportation, Inc prays that the Complaint be dismissed, and
that Defendant CSX Transportation, Inc be discharged without
further costs

This 26 day of June, 2006



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SC Bar No 8000
J Arthur Davison
SC Bar No 1601
Elizabeth A McLeod
SC Bar No 72660
Attorneys for Defendant
CSX Transportation, Inc

OF COUNSEL
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This 26 day of June 2006

Mam C. Kelly

STATE OF SOUTH CAROLINA)
)
COUNTY OF BAMBERG) CIVIL ACTION NO 06-CP-05-107

CONNIE CARSON as Personal)
Representative of the Estate)
Of BERYL HARVEY,)

Plaintiff

V

CSX TRANSPORTATION, INC and)
SOUTH CAROLINA DEPARTMENT OF)
TRANSPORTATION)

Defendants

AMENDED ANSWER OF DEFENDANT CSX TRANSPORTATION, INC

NOW COMES Defendant CSX Transportation, Inc and files its
Amended Answer as follows

FIRST DEFENSE

The sole proximate cause of any injuries Plaintiff alleges was the negligence of a person or persons other than this Defendant, with the result that Plaintiff is not entitled to any recovery from this Defendant

SECOND DEFENSE

This Defendant did not commit any malicious, willful, wanton or reckless act. Therefore, any award of punitive damages is barred.

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Plaintiff's claim for punitive damages against this Defendant should be dismissed because the imposition of punitive damages against this Defendant would violate its constitutional rights, including, but not limited to, its rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution, the Ex Post Facto Clause of Article I, Section 10 of the United States Constitution, and the parallel provisions of the Constitution of the State of South Carolina

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FIFTH DEFENSE

The Eighth Amendment to the United States Constitution, which prohibits the imposition of excessive fines, bars plaintiff's claims for punitive damages against this Defendant, as does the South Carolina Constitution

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TWELFTH DEFENSE

Venue in Bamberg County is improper

THIRTEENTH DEFENSE

To the extent that the damages and injuries of the plaintiff were the direct and proximate result of negligent, reckless and willful conduct on the part of the plaintiff's decedent, which combined and concurred with any negligence on the part of this Defendant, which is specifically denied, and to the extent the alleged injuries and damages to the plaintiff

would not have occurred if the plaintiff's decedent had not been guilty of such negligence and recklessness, the plaintiff's claims are barred in whole or in part. The complaint is barred to the extent the plaintiff's decedent's contributory negligence and recklessness is more than 50% of the total negligence in this action. The plaintiff's recovery should be reduced by the percentage of the plaintiff's decedent's negligence and recklessness to the extent that such negligence and recklessness is 50% or less than the total negligence in this action.

FOURTEENTH DEFENSE

Defendant CSX Transportation, Inc. responds to the specific allegations of the Complaint as follows:

1. This Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1.

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stop sign This Defendant denies the remaining allegations of paragraph 3

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DEMAND FOR JURY TRIAL

Defendant CSX Transportation, Inc hereby demands a trial by jury of twelve

WHEREFORE, having fully answered, Defendant CSX Transportation, Inc prays that the Complaint be dismissed, and that Defendant CSX Transportation, Inc be discharged without further costs

This 28th day of June, 2006



Mark C Wilby
SC Bar No 8000
J Arthur Davison
SC Bar No 1601
Elizabeth A McLeod
SC Bar No 72660
Attorneys for Defendant
CSX Transportation, Inc

OF COUNSEL
FULCHER HAGLER LLP
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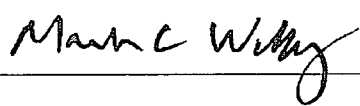
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by depositing said copies in the United States mail with
adequate postage affixed thereto to ensure proper delivery

This 28 day of June, 2006



STATE OF SOUTH CAROLINA)

COUNTY OF BAMBERG)

CONNIE CARSON as Personal)
Representative of the Estate of BERYL)
HARVEY,)

Plaintiff,)

vs)

CSX TRANSPORTATION, INC AND)
SOUTH CAROLINA DEPARTMENT OF)
TRANSPORTATION)

Defendant(s))

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO 06-CP-05-107

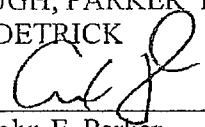
**AMENDED
SUMMONS
(Jury Trial Requested)
(Survival Action)**

TO THE DEFENDANTS ABOVE NAMED

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your Answer to said Complaint on the subscribed at their office, 101 Mulberry Street, Hampton, South Carolina within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in this Complaint

PETER, MURDAUGH, PARKER, ELTZROTH
& DETRICK

BY


John E. Parker

R. Alexander Murdaugh
P O Box 457
Hampton, SC 29924
(803) 943-2111

~and~

J. Christopher Wilson
WILSON LAW FIRM
P O Box 1150
Bamberg, SC 29003

Hampton, South Carolina
August 20, 2008

ATTORNEYS FOR PLAINTIFF

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BAMBERG	)	CIVIL ACTION NO 06-CP-05-107
	)	
CONNIE CARSON as Personal	)	
Representative of the Estate of BERYL	)	
HARVEY,	)	
	)	AMENDED COMPLAINT
	)	(Jury Trial Requested)
Plaintiff,	)	(Survival Action)
	)	
vs	)	
	)	
CSX TRANSPORTATION, INC AND	)	
SOUTH CAROLINA DEPARTMENT OF	)	
TRANSPORTATION	)	
	)	
Defendants	)	

2006 APR 25 PM 10 52

The plaintiff complaining that the defendant alleges

1 The Plaintiff has been duly appointed Personal Representative of the estate of Beryl Harvey by the Bamberg County Probate Court, and he brings this action for the injuries suffered by Beryl Harvey on behalf of the Estate of Beryl Harvey

2 The Defendant, CSX Transportation, is a corporation organized and existing under the laws of a state other than the State of South Carolina. The defendant South Carolina Department of Transportation is a governmental agency and this action is brought pursuant to the South Carolina Tort Claims Act

3 On or about the 30th day of May, 2004, Beryl Harvey was a passenger in an automobile traveling Northeast on Honey Ford Road in Bamberg County, South Carolina. The automobile in which Beryl Harvey was a passenger approached a railroad crossing that intersects Honey Ford Road

4 As the driver of the automobile approached the railroad crossing she stopped on or for a stop sign and looked to the left in a southerly direction, the view was obstructed by trees and other vegetation, because of the obstructed view of approaching trains the Honey Ford Road crossing is a dangerous crossing

5 Before the automobile in which the Plaintiff was a passenger cleared the tracks, the car was struck by a train that was traveling in a westerly direction, the train was owned and operated by the Defendant CSX by its employee. As a result of this collision, the Plaintiff was severely injured, and did thereafter die.

6 The Defendant, CSX Transportation, owns the railroad track that crosses Honey Ford Road in Bamberg County and has a duty to warn the public of approaching trains traveling along its tracks and to inspect its railroad crossings for the presence of dangerous and hazardous conditions such as the trees and vegetation that obstructed the view of oncoming trains. The Defendant, CSX Transportation, has a duty to properly maintain its right-of-way.

7 The crossing did not have traffic control gates or signals, CSX should have installed gates and signals at this crossing.

8 The Defendants, by and through the acts and/or omissions of their agents, servants, and employees, were negligent, careless, reckless, grossly negligent, willful and wanton at the time and place above mentioned in the following particulars:

AS TO DEFENDANT CSX TRANSPORTATION, INC.

- a) In maintaining an unreasonably hazardous and unsafe crossing,
- b) In failing to inspect the crossing for unsafe and hazardous conditions,
- c) In allowing trees and other vegetation to grow near the crossing in such a manner as to obstruct the traveling public's view of trains approaching,
- d) In failing to take steps to warn the public that the view of approaching trains was obstructed,
- e) In failing to install and maintain adequate warning devices at the crossing,
- f) In failing to adequately sound a bell or horn prior to entering the crossing in violation of Section 58-15-910 of the South Carolina Code of Laws
- g) In failing to properly maintain its right of way at this crossing when CSX knew or should have known that the trees and vegetation were obstructing the view of approaching trains,

- h) In violating its own rules for the maintenance of its right of way, and the operation of its locomotive,
- i) In failing to flag the crossing,
- j) In traveling at an excessive rate of speed

AS TO DEFENDANT SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

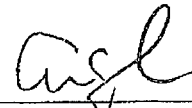
- a) In failing to properly erect proper traffic control devices
- b) On failing to maintain a safe and serviceable highway

9 As a result of the above conduct of the defendants Beeryl Harvey sustained serious and severe injuries which resulted in his death, resulting in damages to him

WHEREFORE, the Plaintiff prays for judgment against the defendants in a sum sufficient to adequately compensate the Plaintiff for actual damages, for punitive damages, and for the costs of this action

PETERS, MURDAUGH PARKER ELTZROTH
& DETRICK

BY



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Bamberg, SC 29003

ATTORNEYS FOR PLAINTIFF

Hampton, South Carolina
August 20, 2008

THIRD DEFENSE

Plaintiff's claim for punitive damages against this Defendant should be dismissed because the imposition of punitive damages against this Defendant would violate its constitutional rights, including, but not limited to, its rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution, the Ex Post Facto Clause of Article I, Section 10 of the United States Constitution, and the parallel provisions of the Constitution of the State of South Carolina

FOURTH DEFENSE

The statutes and common law of the State of South Carolina which authorize the imposition of aggravated, exemplary, or punitive damages are contrary to the Constitution of the United States and to the South Carolina Constitution, and are therefore unenforceable inasmuch as they allow for the deprivation of property without due process of law, and deny this Defendant equal protection of the laws by providing fewer protections for civil litigants than the criminal statutes which provide for the imposition of monetary fines

FIFTH DEFENSE

The Eighth Amendment to the United States Constitution, which prohibits the imposition of excessive fines, bars plaintiff's claims for punitive damages against this Defendant, as does the South Carolina Constitution

SIXTH DEFENSE

The statutes and common law of the State of South Carolina that authorize the imposition of aggravated, exemplary or punitive damages are contrary to the Constitution of the United States and to the South Carolina Constitution, and are therefore unenforceable in as much as the statutes are impermissibly vague, imprecise and inconsistent

SEVENTH DEFENSE

Unless this Defendant's liability for punitive damages and the appropriate amount of punitive damages are required to be established by clear and convincing evidence, any award of punitive damages would violate this Defendant's due process rights, guaranteed by the Fourteenth Amendment to the United States Constitution and by the South Carolina Constitution, and would be improper under the common law and public policies of the State of South Carolina

EIGHTH DEFENSE

Defendant CSX Transportation, Inc owed no legal duty to Plaintiff that was violated in reference to the subject incident

NINTH DEFENSE

Some or all of Plaintiff's claims are preempted by state law Therefore, Plaintiff cannot recover against this Defendant for such claims, and these claims should be dismissed

TENTH DEFENSE

Some or all of Plaintiff's claims are preempted and/or precluded by federal law, rules and regulations. Therefore Plaintiff cannot recover against this Defendant for such claims, and these claims should be dismissed.

ELEVENTH DEFENSE

Some or all of Plaintiff's claims, including but not limited to those which may seek recovery based upon any alleged failure of this Defendant to insure adequate signals or warning devices at the grade crossing in question, or any alleged violation of speed restrictions, are preempted by federal law pursuant to the 49 USC § 20106 and the Highway Safety Act of 1973 (23 USC § 130, et seq), as amended, and the regulations issued by the Secretary of Transportation pursuant thereto. Therefore, Plaintiff cannot recover against this Defendant for such claims, and these claims should be dismissed.

TWELFTH DEFENSE

Venue in Bamberg County is improper.

THIRTEENTH DEFENSE

Defendant CSX Transportation, Inc responds to the specific allegations of the Amended Complaint as follows:

1. This Defendant admits that plaintiff was appointed personal representative as indicated in paragraph 1 and that she has initiated this action, but denies all remaining allegations.

contained in paragraph 1 and denies that plaintiff is entitled to any recovery or relief in this action

2 In response to paragraph 2, this Defendant admits it is a corporation organized and existing under the laws of a state other than South Carolina, and is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 2

3 In response to paragraph 3, this Defendant admits that on May 30, 2004 Beryl Harvey was a passenger in a van that approached the railroad crossing intersecting Honey Ford Road in Bamberg County, which crossing was well-marked and guarded by a stop sign. This Defendant denies the remaining allegations of paragraph 3

4 This Defendant denies the allegations contained in paragraph 4

5 In response to paragraph 5, this Defendant admits the driver of the van in which Beryl Harvey was a passenger failed to properly stop, look and listen, failed to yield the right of way, and pulled in front of this Defendant's open and obvious train, resulting in fatal injuries to Beryl Harvey. This Defendant denies the remaining allegations of paragraph 5

6 In response to paragraph 6, this Defendant admits it owns the railroad track that crosses Honey Ford Road in Bamberg

County, and that it fulfilled all duties owed by it at the time of the subject accident. This Defendant denies the remaining allegations of paragraph 6.

7 In response to paragraph 7, this Defendant admits the crossing did not have active gates or lights. By way of further response, this Defendant states the crossing was properly marked in full compliance with all applicable law, and Plaintiff's claims to the contrary are preempted by law. This Defendant denies the remaining allegations of paragraph 7.

8 This Defendant denies the allegations of paragraph 8, including all subparts.

9 This Defendant denies the allegations contained in paragraph 9.

10 This Defendant denies each and every other allegation of the Amended Complaint not specifically admitted herein.

DEMAND FOR JURY TRIAL

Defendant CSX Transportation, Inc. hereby demands a trial by jury of twelve.

WHEREFORE, having fully answered, Defendant CSX Transportation, Inc. denies that plaintiff is entitled to any relief or recovery in this action, prays that the Amended Complaint be dismissed, and requests that Defendant CSX Transportation, Inc. be discharged without further costs.

This 2nd day of August 2008

Elizabeth A McLeod
Mark C Wilby
SC Bar No 8000
Elizabeth A McLeod
SC Bar No 72660
Attorneys for Defendant
CSX Transportation, Inc

OF COUNSEL
FULCHER HAGLER LLP
POST OFFICE BOX 1477
AUGUSTA, GA 30903-1477
(706) 724-0171

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that I have this day served a copy of the foregoing Answer of Defendant CSX Transportation, Inc to Amended Complaint upon the following

John E Parker, Esq
Peters, Murdaugh, Parker, Eltzroth & Detrick, PA
Post Office Box 457
Hampton, SC 29924

J Christopher Wilson
Wilson Law Firm
P O Box 1150
Bamberg, SC 29003

Michael S Pauley
Vinton D Lide & Associates, LLC
P O Box 2189
Lexington, SC 29072-9155

John C Millberg
Millberg, Gordon & Stewart, P L L C
1101 Haynes Street, Suite 104
Raleigh, NC 27604

by depositing said copies in the United States mail with adequate postage affixed thereto to ensure proper delivery

This 22nd day of August, 2008

Eyal A. McLeod

THIRD DEFENSE

Plaintiff's claim for punitive damages against this Defendant should be dismissed because the imposition of punitive damages against this Defendant would violate its constitutional rights, including, but not limited to, its rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution, the Ex Post Facto Clause of Article I, Section 10 of the United States Constitution, and the parallel provisions of the Constitution of the State of South Carolina

FOURTH DEFENSE

The statutes and common law of the State of South Carolina which authorize the imposition of aggravated, exemplary, or punitive damages are contrary to the Constitution of the United States and to the South Carolina Constitution, and are therefore unenforceable inasmuch as they allow for the deprivation of property without due process of law, and deny this Defendant equal protection of the laws by providing fewer protections for civil litigants than the criminal statutes which provide for the imposition of monetary fines

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The Eighth Amendment to the United States Constitution, which prohibits the imposition of excessive fines, bars plaintiff's claims for punitive damages against this Defendant, as does the South Carolina Constitution

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Unless this Defendant's liability for punitive damages and the appropriate amount of punitive damages are required to be established by clear and convincing evidence, any award of punitive damages would violate this Defendant's due process rights, guaranteed by the Fourteenth Amendment to the United States Constitution and by the South Carolina Constitution, and would be improper under the common law and public policies of the State of South Carolina

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Defendant CSX Transportation, Inc owed no legal duty to Plaintiff that was violated in reference to the subject incident

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Some or all of Plaintiff's claims are preempted by state law Therefore, Plaintiff cannot recover against this Defendant for such claims, and these claims should be dismissed

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TWELFTH DEFENSE

Venue in Bamberg County is improper.

THIRTEENTH DEFENSE

Frances Harvey's negligence will be imputed to this Plaintiff to reduce or bar Plaintiff's recovery under the principles of comparative and contributory negligence.

FOURTEENTH DEFENSE

Frances Harvey's gross negligence and reckless conduct will be imputed to this Plaintiff to reduce or bar Plaintiff's recovery under the theories of comparative and contributory negligence

FIFTEENTH DEFENSE

Defendant CSX Transportation, Inc responds to the specific allegations of the Amended Complaint as follows

1 This Defendant admits that plaintiff was appointed personal representative as indicated in paragraph 1 and that she has initiated this action, but denies all remaining allegations contained in paragraph 1 and denies that plaintiff is entitled to any recovery or relief in this action

2 In response to paragraph 2, this Defendant admits it is a corporation organized and existing under the laws of a state other than South Carolina, and is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 2

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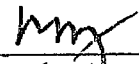
10 This Defendant denies each and every other allegation of the Amended Complaint not specifically admitted herein

DEMAND FOR JURY TRIAL

Defendant CSX Transportation, Inc hereby demands a trial by jury of twelve

WHEREFORE, having fully answered, Defendant CSX Transportation, Inc denies that plaintiff is entitled to any relief or recovery in this action, prays that the Amended Complaint be dismissed, and requests that Defendant CSX Transportation, Inc be discharged without further costs Defendant CSX Transportation, Inc requests such other relief as this Court deems just and proper

This 26th day of October, 2009



Mark C. Wilby
SC Bar No 8000
Elizabeth A McLeod
SC Bar No 72660
Attorneys for Defendant
CSX Transportation, Inc

OF COUNSEL
FULCHER HAGLER LLP
POST OFFICE BOX 1477
AUGUSTA, GA 30903-1477
(706) 724-0171

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that I have this day served a copy of
the foregoing Amended Answer of Defendant CSX Transportation,
Inc to Amended Complaint upon the following

John E Parker, Esq
Peters, Murdaugh, Parker, Eltzroth & Detrick, PA
P O Box 457
Hampton, SC 29924

J Christopher Wilson
Wilson Law Firm
P O Box 1150
Bamberg, SC 29003

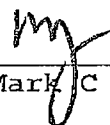
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Bamberg, SC 29003

John C Millberg
Millberg, Gordon & Stewart, P L L C
1101 Haynes Street, Suite 104
Raleigh, NC 27604

by depositing said copies in the United States mail with
adequate postage affixed thereto to ensure proper delivery

This 26 day of October, 2009



Mark C Wilby

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF BAMBERG)

Connie Carson as Personal Representative of the)
Estate of Beryl Harvey)

CASE NOS 2006 CP-05 0034, and -107

☐ Plaintiff,)

v)

MOTION INFORMATION FORM
AND COVER SHEET

CSX Transportation, Inc and South Carolina)
Department of Transportation)

☒ Defendants)

Plaintiff's Attorney
Alexander Murdaugh, Esq
Peters Murdaugh Parker Eltzroth & Detrick, P A
Post Office Box 457, Hampton, SC 29924
phone 843-943-2111 fax 843-943-3943
e-mail other

Defendant CSX Transportation, Inc s Attorneys
Elizabeth A McLeod, Esq , Mark C Wilby, Esq
Fulcher Hagler LLP, P O Box 1477
Augusta, GA 30903-1477
phone 706-724-0171 fax 706-396-3631
e mail emcleod@fulcherlaw.com other

☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

SECTION I Hearing Information

Nature of Motion Motion in Limine

Estimated Time Needed 15 Minutes

Court Reporter Needed ☒ YES / ☐ NO

SECTION II Motion Type

☐ Written motion attached

☐ Form Motion

I hereby move for relief or action by the court as set forth in the attached proposed order

October 27, 2009

Signature of Attorney for ☐ Plaintiff / ☐ Defendant

Date submitted

SECTION III Motion Fee

☒ PAID - AMOUNT \$50.00

☐ EXEMPT ☐ Rule to Show Cause in Child or Spousal Support

(check reason) ☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court, or, reduced to writing from motion made
in open court per judge's instructions

Name of Court Reporter

☐ Other

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order

☐ Other

JUDGE

CODE _____ Date

CLERK'S VERIFICATION

Collected by _____

Date Filed

☐ MOTION FEE COLLECTED _____

☐ CONTESTED - AMOUNT DUE _____

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BAMBERG	)	

CONNIE CARSON as Personal	)	
Representative of the Estate	)	CIVIL ACTION NO 06-CP-05-0034
Of BERYL HARVEY,	)	
Plaintiff,	)	
v	)	
CSX TRANSPORTATION, INC and	)	
SOUTH CAROLINA DEPARTMENT OF	)	
TRANSPORTATION	)	
Defendants	)	

CONNIE CARSON as Personal	)	
Representative of the Estate	)	CIVIL ACTION NO 06-CP-05-107
Of BERYL HARVEY,	)	
Plaintiff	)	
v	)	
CSX TRANSPORTATION, INC and	)	
SOUTH CAROLINA DEPARTMENT OF	)	
TRANSPORTATION	)	
Defendants	)	

**DEFENDANT CSX TRANSPORTATION, INC 'S MOTION IN LIMINE AND
SUPPORTING MEMORANDUM OF LAW**

NOW COMES Defendant CSX Transportation, Inc ("CSXT") and states as follows in support of its motion in limine

I BACKGROUND

This matter is before the court as a result of a crossing accident that took place near Denmark, South Carolina. Connie Carson filed these actions against CSXT as the representative of the estate of Beryl Harvey, alleging that the incident was caused by CSXT's negligence and reckless conduct.

On May 30, 2004, Frances Harvey was traveling south on Highway 321 in a conversion van, just outside of Denmark, South Carolina (See Frances Harvey Dep at p 10 22-11 17) Her son, Beryl Harvey, was seated directly behind her (See Frances Harvey Dep p 7 15-19) Beryl Harvey was confined to a wheelchair, having suffered a spinal cord injury in a diving accident when he was 16 years old (See Frances Harvey Dep p 29 3-11) The passenger seat directly behind the driver's seat had been removed creating space for the motorized wheelchair that Beryl used (See Frances Harvey Dep p 7 20-8 2) The purpose of the trip was to go to a pond located on Honeyford Road to fish (See Frances Harvey Dep p 10 22-24)

Shortly after making a right off of Highway 321 onto Honeyford Road, Mrs Harvey encountered a railroad crossing (See Frances Harvey Dep p 11 10-17) The crossing was well marked with crossbucks, a white stop bar, a large railroad road marking, and a stop sign along with a yellow railroad advance warning sign (See Frances Harvey Dep p 11 18-12 22) Upon reaching the crossing, Mrs Harvey believes that she stopped the vehicle and "looked down the railroad track on my left, and then [] turned and [] looked down the right and turned back around " (See Frances Harvey Dep p 16 11-13) Mrs Harvey cannot recall what happened after this moment (See Frances Harvey Dep p 16 15-22)

The train crew consisted of Engineer Jack Cowan, Conductor Jimmie Bonner, and Engineer Trainee Michael Stephens (See Michael Stephens Dep p 9 10 11) Stephens was operating the locomotive (See Stephens Dep p 6 25-7 8, 9 10-17) The train was traveling north from Savannah, GA to Cayce, SC (See Jack Cowan Dep p 5 22-25, See Stephens Dep p 33 10-12) As the train approached the crossing at Honeyford Road,

Stephens began to blow the whistle at the whistlepost (See Stephens Dep p 10 17-22) The train crew first saw Mrs Harvey's vehicle approximately 750 feet from the crossing (See Cowan Dep p 8 4-7) The train was traveling approximately 47 miles per hour at this point (See Stephens Dep p 33 10-22, Exhibit 3) According to Cowan, they assumed the van would stop by the way it approached the crossing However, Mrs Harvey pulled out in front of the train instead (See Cowan Dep p 5 22-6 11) Stephens testified that she "stopped momentarily" before she "pulled onto the crossing and stopped on the tracks " (See Stephens Dep p 10 15-24) Bonner similarly testified that he looked forward and saw the van stopped on the tracks (See Bonner Dep p 12 3-10) As a result of the collision, Mrs Harvey was injured in the accident and Beryl Harvey was killed

CSXT now files this motion in limine to exclude from the trial of this case certain evidence and testimony as outlined below

II - ARGUMENT

A Subsequent Remedial Measures

CSXT seeks the exclusion of any evidence of, or reference to, the installation of additional signal devices and any cutting or clearing at the Honeyford Road crossing following the Harvey accident on the grounds that such evidence amounts to subsequent remedial measures At issue is the condition of the crossing *at the time of the accident*, not afterwards Under S C R Evid 407,

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment

The Notes to S C R Evid 407 explain that the Rule is derived from the corresponding federal rule. The South Carolina Supreme Court has explained the reach of Rule 407 by finding that the rule “bars the introduction of any change, repair, or precaution that under the plaintiff’s theory would have made the accident less likely to happen.” Webb v CSX Transportation, Inc., 364 S C 639, 653, 615 S E 2d 440, 448 (2005)

Rule 407 embodies the principle that subsequent remedial measures are poor and misleading proof of negligence. In re Air Crash Disaster, 86 F 3d 498, 529 (6th Cir 1996). The rule allows a jury to focus on the evidence that is relevant to the act that serves as the basis of the lawsuit, namely, the conditions as they were at the time of the accident. Cook v McDonough Power Equipment, Inc., 720 F 2d 829, 831 (5th Cir 1983), Worthy v Jonesville Oil Mill, 77 S C 69, 73-74, 47 S E 634, 635-636 (1907) (quoting Columbia and Puget Sound Railroad Company v Hawthorne, 144 U S 202, 207 (1892)). Furthermore, the Rule is grounded in the “social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety.” Fed R Evid 407 advisory committee’s notes (1972)

In Mitcham v Illinois Central Gulf Railroad Co., 515 So 2d 852 (Miss 1987), the Supreme Court of Mississippi found that, in light of the numerous photographs that fairly and accurately depicted the condition of a railroad crossing involved in a train accident, evidence that the railroad company had further cleared the crossing and installed lights were properly excluded as subsequent remedial measures. Id. at 857. Similarly, in the instant case, evidence that lights and gates were installed at the Honeyford Road crossing following the Harvey accident should be excluded under Rule 407.

In the same vein, any cutting or clearing at the crossing after the accident represents an additional remedial measure which should not be used in the determination of any negligence on the part of CSXT. Webb, 364 S. C. at 653-654 (finding that evidence of clean cutting at a railroad crossing after an accident is inadmissible under Rule 407 where the action of clearing the crossing would have made the accident less likely to happen under plaintiff's theory of the case and other evidence existed regarding the condition of the crossing at the time of the accident). Allowing evidence of this nature to be heard by a jury completely eviscerates the policy principles underlying Rule 407 and would only serve to encourage avoidance of remedial measures in the future. See Flaminio v. Honda Motor Co., 733 F.2d 463, 467 (7th Cir. 1984) (stating that a major purpose of Rule 407 is to promote safety by removing the disincentive to make repairs after an accident that would exist if the accident victim could use those measures as evidence of the defendant's liability). In the instant case, the admission of evidence of post-accident upgrades and maintenance would unduly prejudice CSXT by encouraging the jury to draw the very inference forbidden by Rule 407—that subsequent remedial action is full proof of negligence.

Of note, CSXT participated in the installation of additional warning devices pursuant to a voluntary agreement with the SCDOT. CSXT is aware that several courts have held that Rule 407 protection is extended only where a defendant acted voluntarily, and did not undertake "remedial action mandated by superior governmental authority." O'Dell v. Hercules Inc., 904 F.2d 1194, 1204 (8th Cir. 1990), cf. Taylor v. St. Louis Southwestern Ry. Co., 746 F.Supp. 50, 52-53 (D. Kan. 1990), see also Rozier v. Ford Motor Co., 573 F.2d 1332, 1343-1344 (5th Cir. 1978). However, in the instant case, the

installation of lights and gates at the Honeyford Road crossing was not a mandate issued by a governing authority, but was instead the product of a cooperative relationship between CSXT and SCDOT. Therefore, the protection afforded evidence of subsequent remedial measures should be extended to the actions taken by CSXT after the Harvey accident.

CSXT anticipates that Plaintiff will argue that evidence of the installation of lights and gates and cutting and clearing at the crossing are admissible under the exception to Rule 407 which allows admission of subsequent measures to show the conditions existing at the time of the event or accident. S.C.R. Evid. Rule 407 Notes. However, this exception may not be employed by a party when ample evidence exists to otherwise assist a jury in perceiving the existing conditions. Webb, 364 S.C. at 653 (finding that evidence of clear cutting at a railroad crossing was not necessary for the jury to understand the conditions at the time of the accident where there were numerous witnesses, photos, and two videos demonstrating the condition of the crossing at the time of the accident). This exception is not available to Plaintiff in the case sub judice as more than enough evidence exists in the form of photographs, videos, and witness testimony regarding the condition of the crossing at the time of the Harvey accident.

In addition to Rule 407, CSXT also relies on S.C.R. Evid. 403 to exclude evidence of the installation of lights and gates as well as cutting or clearing at the Honeyford Road crossing. As alluded to above, evidence of subsequent remedial measures tends to mislead juries and confuses the issues to be tried. Grenada Steel Industries, Inc. v. Alabama Oxygen Co., Inc., 695 F.2d 883, 889 (5th Cir. 1983) (evidence of subsequent repairs is properly excluded under Rule 403 when it lacks

probative value and injects the dangers of confusing and misleading the jury) Specifically, evidence of subsequent remedial measures distracts the jury from determining whether CSXT was negligent in the maintenance of the Honeyford Road crossing at the time of the accident Therefore, CSXT requests that the Court exclude any and all references to changes made at the Honeyford Road crossing subsequent to the Harvey accident

B Alleged Duty to Install Traffic Control Devices at the Crossing

CSXT anticipates that Plaintiff will attempt to present evidence via expert witnesses and otherwise suggesting that CSXT had a duty or obligation to install different or additional traffic control devices at the Honeyford Road crossing, or that CSXT could have installed traffic control devices in an effort to create an inference of a duty Such evidence is inadmissible and should be excluded

To begin, it should be noted that CSXT had no such legal duty Pursuant to S C Code § 56-5-930, the SCDOT has the responsibility for placing and maintaining traffic-control devices upon all state highways¹ Although local authorities also can place and maintain traffic-control devices upon highways in their jurisdiction if they obtain permission, see S C Code § 56-5-940, the SCDOT has exclusive jurisdiction over the roadway, and CSXT is statutorily barred from installing any traffic control devices at public grade crossings “No person shall place, maintain or display upon or in view of

¹South Carolina's delegation of this authority to the SCDOT is consistent with federal policy and the practice in other states The Manual On Uniform Traffic Control Devices 2000 (‘MUTCD’) which is incorporated by reference in the Code of Federal Regulations, 23 CFR Part 655, Subpart F, provides in Section 1A.07 that ‘the responsibility for the design, placement, operation maintenance and uniformity of traffic control devices shall rest with the public agency or the official having jurisdiction’ The MUTCD further provides in Section 1A.08 that traffic control devices may be placed only as authorized by a public authority Finally while suggesting that public authorities consult with railroads concerning traffic control devices at crossings, the MUTCD provides, in Section 8A.01, that the highway agency or authority with jurisdiction and the regulatory agency with statutory authority if applicable jointly determine the need and selection of devices at a highway rail grade crossing’

any highway any unauthorized sign, signal marking or device which (a) purports to be or is an imitation of or resembles an official traffic-control device or railroad sign or signal

” S C Code § 56-5-1020

More importantly, the issue of who was legally responsible for traffic control devices is an issue of law for the Court and is not a proper subject of expert opinion. See e.g., Dawkins v Fields, 354 S C 58, 66, 580 S E 2d 433, 437 (“In general, expert testimony on issues of law is inadmissible”) Simply put, the Court should not allow expert testimony purporting to instruct the Court and jury on the law

C Reference to any alleged violation of S C Code Ann § 58-15-910

CSXT anticipates that Plaintiff will argue that the train crew involved in the accident violated S C Code Ann § 58-15-910 in support of a finding of negligence. At the time of the accident, § 58-15-910 “require[d] a train to sound its bell and whistle beginning 1,500 feet before a crossing and continuing until the engine ha[d] crossed the intersection.” Webb, 364 S C at 650. Nonetheless, any evidence of an alleged violation should be excluded on the grounds that there is no causal link between the alleged violation and the Harvey accident. Furthermore, the recent preemption of § 58-15-910 by federal regulation 49 C F R § 222.21 makes any reference to violations of the state statute impermissible during the assessment of punitive damages.

Evidence of a party’s failure to perform a legal duty is irrelevant and prejudicial where there is no evidence indicating that the failure to perform proximately caused the plaintiff’s injury. See Webb, 364 S C at 648-650 (holding that it was reversible error to admit evidence that CSXT had violated S C Code Ann § 58-17-3420 by failing to maintain bridge where the failure was not a proximate cause of the plaintiff’s accident).

In the instant case, there is no evidence that an alleged violation of § 58-15-910 was a proximate cause of the Harvey accident. According to Plaintiff's expert, the engineer began blowing the locomotive horn at least 1,437 feet prior to the crossing. (See Jim Scott Dep. at p. 119-121-13). The horn began sounding nearly 20 seconds prior to the collision. (See David M. Lipscomb Dep. at p. 38-25-39-4). At least one eyewitness has testified that he heard the locomotive horn blowing prior to the collision. (See Bennie Spell Dep. at p. 8-24-9-9).

Even with the horn from the train beginning to blow nearly 20 seconds prior to the collision, Plaintiff and her expert audiologist contend that Frances Harvey did not, and could not, have heard the locomotive horn until the collision was imminent and unavoidable. (See David Lipscomb Dep. at p. 40-12-41-20, see also Frances Harvey Dep. at p. 16-23-24). Under Plaintiff's theory of the case, the train crew's alleged violation of § 58-15-910 could not have been a proximate cause of the accident. If Mrs. Harvey was unable to hear the horn as it was blown from a distance of 1,437 feet, the crew's alleged failure to blow that horn at 1,500 feet, as required by South Carolina statute, could not have contributed to the accident.² See Petre v. Norfolk S. Ry. Co., 458 F. Supp. 2d 518, 534-535 (N.D. Ohio 2006) (finding illogical the notion that train crew's three second delay in sounding whistle, though a violation of state statute, prejudiced plaintiff's ability to hear whistle where evidence indicates that plaintiff did not hear the whistle from the train at any time) (compared to a one second delay in the case sub judice). Accordingly, any reference to § 58-15-910 should be excluded.

² The Federal Railroad Administration established the current federal horn regulations after noting that "[r]esearch has shown that the effect of a locomotive horn sounded at a distance greater than ¼ mile from a grade crossing is attenuated to the extent that it does not provide adequate warning to the motorist. There is thus no need to sound the horn beyond this point." 70 Fed. Reg. 21844, 21858 (April 27, 2005).

Furthermore, in blowing the horn, the engineer's actions in the instant case exceeded the durational requirements of current federal regulations governing the sounding of locomotive horns at crossings. In pertinent part, 49 C.F.R. § 222.21 provides "[T]he locomotive horn shall begin to be sounded at least 15 seconds, but no more than 20 seconds, before the locomotive enters the crossing."³ 49 C.F.R. § 222.21(b)(2). These federal regulations, which took effect on June 24, 2005, see 70 Fed. Reg. 21844 (Apr. 27, 2005), expressly preempt state law provisions like S.C. Code Ann. § 58-15-910, see 49 C.F.R. § 222.7, see also 49 U.S.C. § 20106, United Transportation Union v. Foster, 205 F.3d 851, 862, n. 20 (5th Cir. 2000) (noting that, once enacted, federal locomotive horn use regulations would clearly preempt state law). Because the train crew's use of the horn conformed to 49 C.F.R. § 222.21, CSXT respectfully contends that the Court should preclude Plaintiff from relying upon the alleged violation of a preempted state statute as support for any theories of negligence.⁴

In the event that the Court finds that § 58-15-910 has not been preempted by 49 C.F.R. § 222.21 on the issue of negligence in this case, Plaintiff may not present any

³ Also noteworthy, 49 C.F.R. § 222.21(b)(3) provides that "locomotives traveling at speeds in excess of 60 mph shall not begin sounding the horn more than one quarter mile (1,320) feet in advance of the nearest public highway rail grade crossing, even if the advance warning provided by the locomotive horn will be less than 15 seconds in duration." Thus, in many instances the current federal regulations actually require train crews to engage in conduct which violates the preempted requirements of § 58-15-910.

⁴ At least one federal court has explained that the purpose of creating uniform federal horn regulations would be undermined if a Plaintiff is allowed to argue that a horn in compliance with federal regulations provided inadequate warning.

Since a horn's essential function is to warn others of a train's approach, it is hard to imagine a circumstance in which one could conclude that the horn was loud enough to function [i.e., satisfied § 229.129's decibel requirement] but not adequate to warn. To hold Union Pacific liable in this case because of a horn that functioned at or slightly above the required decibel level would, in effect, create a rule requiring every train to vary the horn's decibel level depending on the buildings and geographic features surrounding each crossing. Not only would this be nearly impossible to achieve, it would undermine the Congressional goal of uniformity.

argument relying upon the alleged violation of § 58-15-910 as support for her punitive damages claims. Punitive damages are appropriate only when the defendant has committed misconduct in “willful, wanton, or in reckless disregard” of the plaintiff’s rights. Longshore v. Saber Sec. Services, Inc., 365 S.C. 554, 564, 619 S.E.2d 5, 11 (S.C. App. 2005). Before a jury may consider the assessment of punitive damages, a trial judge must assess the culpability of a defendant’s conduct to determine whether an award is available against a defendant. Id. (quoting South Carolina Farm Bureau Mut. Ins. Co. v. Love Chevrolet, Inc., 324 S.C. 149, 152, 478 S.E.2d 57, 58 (1996)). Likewise, punitive damages are also subject to the Due Process Clause of the U.S. Constitution and may not be awarded against a party that failed to receive fair notice of the wrongful conduct and severity of penalty that the State may impose. Atkinson v. Oikin Exterminating Co., 361 S.C. 156, 164-165, 604 S.E.2d 385, 389 (2004), see also BMW of North America, Inc. v. Gore, 517 U.S. 559, 574 (1996). Specifically, the Due Process Clause forbids the imposition of punitive damages which do not further the “State’s legitimate interest in punishing unlawful conduct and deterring its repetition.” Philip Morris USA v. Williams, 549 U.S. 346, 352, 127 S.Ct. 1057, 1062 (2007) (quoting Gore, 517 U.S. at 568). South Carolina courts have determined that punitive damages are intended “to punish a wrongdoer and to deter like conduct.” Longshore, 365 S.C. at 564, see also James v. Horace Mann Insurance Co., 371 S.C. 187, 193, 638 S.E.2d 667, 670 (2006).

In the instant case, the alleged violation arose under a South Carolina statute that has since been preempted by the federal regulations contained in 49 C.F.R. § 222.21. As noted above, CSXT was in compliance with current federal regulations. Therefore, allowing plaintiff to introduce evidence of an alleged violation of § 58-15-910 in support

of the assessment of punitive damages would obviate the policy rationale of deterrence as the conduct alleged would now be legal under the superseding federal laws. Stated differently, punishing CSXT for conduct that is not unlawful, wrongful, or unsafe fails to meet the purposes of punitive damages. Furthermore, CSXT's conformity with the federal regulations defeats any argument that an alleged violation of the South Carolina statute represents willful, wanton, or reckless disregard of the Plaintiff's rights.⁵

D Reference to Grade Crossing Handbook

CSXT anticipates that Plaintiff will present evidence relating to a Railroad Highway Grade Crossing Handbook (the "Handbook") in an attempt to equate the guidelines in the Handbook to a governmental standard of care relating to the design and maintenance of railroad grade crossings. In particular, the Handbook contains guidelines and calculations which purport to yield minimum sight distance requirements for a motorist traveling towards a grade crossing.

This Handbook, although published by the United States Department of Transportation, is not, according to its own disclaimer, a government standard with regard to grade crossings. The Handbook's guidelines have not been promulgated, endorsed, or accepted by any federal government body, but are merely the "opinions of the author" (Handbook at Foreword).

Furthermore, South Carolina has neither adopted nor endorsed the use of the Handbook's guidelines or its supposed minimum sight distance requirements. To the contrary, South Carolina has adopted a different statutory and regulatory standard

⁵ Any court reviewing a punitive damages award should consider the degree of reprehensibility of the defendant's conduct. Mitchell, Jr. v. Fortis Insurance Company, 2009 WL 2948558 (S.C. 2009) (decided Sept. 14, 2009). Reprehensibility is perhaps the most important indicium of the reasonableness of a punitive damages award. Id. (quoting Gore, 517 U.S. at 565). In the instant case, CSXT's compliance with federal regulations does not logically constitute reprehensible behavior.

governing motorists' sight distances at railroad crossings. As such, the Handbook, and any testimony based on the Handbook, should be excluded.

S.C. Code § 58-17-1450 gives licensed state inspectors the discretion to determine whether the particular railroad crossing comports with the safety measures imposed by South Carolina law. The South Carolina crossing inspectors rely on the SCDOT View Obstruction Inspection Guidelines, which materially differ from the Handbook. As such, the Handbook has no relevance.

CSXT admits that evidence of industry standards and specifications need not carry the force and effect of law in order to be considered by an expert testifying to the applicable standard of care. However, by its own terms, the Handbook is neither a standard, specification, nor a regulation. In fact, the Handbook is replete with disclaimers to this effect:

The United States Government assumes no liability for [the Handbook's] contents or use thereof. The contents of this report reflect the views of the author, who is responsible for the accuracy of the data presented herein. The contents do not necessarily reflect the official policy of the Department of Transportation. This report does not constitute a standard, specification, or regulation.

(Foreword and Front Cover of "Railroad-Highway Crossing Handbook" 2d ed. (1986), Federal Highway Administration, United States Department of Transportation). Under these circumstances, any testimony or argument suggesting that the Handbook is evidence of the applicable standard of care must be excluded as inaccurate, irrelevant, and highly prejudicial. See Dixon v. Mid-South Rail Corp., 580 So.2d 438, 440 (La. App. 2d Cir. 1991) (noting that the Handbook is "not law or industry standard, but was written and compiled for use by professionals who design railroad crossings of highways"). The dangers associated with allowing into evidence documents which appear to be sanctioned

and endorsed by the government have been identified because of the potential of such materials to “indubitably influence the jury” Cortes v. Moyers Exploration Co., 758 F. Supp. 1182, 1185 (S.D. Tex. 1991). Here, despite the fact that the Handbook does not represent the policy or views of the Department of Transportation, it bears the Department’s insignia and thus appears authoritative. Consequently, to allow the Handbook to be admitted as evidence would unduly prejudice CSXT by giving the jury the erroneous impression that the document speaks with the force of a governmental regulation.

E Evidence of Conditions at Other Crossings or Other Accidents, Near Misses, or Occurrences

CSXT anticipates that Plaintiff will attempt to introduce evidence of (1) other accidents, near misses, or occurrences at Honeyford Road and other crossings, (2) fines and deficiency notices issued by the SCDOT with reference to other crossings, and (3) conditions at other crossings such as the overgrowth of vegetation. All of this proposed evidence is irrelevant, highly prejudicial, and inadmissible.

1 Other Accidents/Occurrences at Honeyford Road or Other Crossings

To begin, Plaintiff may not “admit evidence of other accidents at other crossings to prove this accident occurred as the result of CSXT’s negligence.” Webb, 364 S.C. at 655. More generally, evidence of other accidents is both irrelevant and prejudicial and should be excluded. See id., see also S.C.R. Evid. 401-404. As the South Carolina Supreme Court has explained, “[b]ecause evidence of other accidents may be highly prejudicial, ‘[a] plaintiff must present a factual foundation for the court to determine that the other accidents were substantially similar to the accident at issue’” before such evidence may be admitted. Whaley v. CSX Transp., Inc., 362 S.C. 456, 483, 609 S.E.2d

286, 300 (2005) (quoting Buckman v Bombardier Corp., 893 F Supp 547, 552 (E D N C 1995)), see also Renfro Hosiery Mills Co v Nat'l Cash Register Co., 552 F 2d 1061, 1068-69 (4th Cir 1977) Accordingly, CSXT requests the Court to preclude any evidence of, or reference to, other accidents as part of Plaintiff's case-in-chief unless and until Plaintiff satisfies "a high standard of similarity" Renfro, 552 F 2d at 1068

Indeed, even evidence of a prior accident at the Honeyford Road crossing would not be admissible absent "some special relation between them which would tend to prove or disprove some fact in dispute" Cf. Biewer v Morris, 269 S C 607, 610, 239 S E 2d 318, 319 (1977), see also White v Seaboard Coast Line R. Co., 139 Ga App 833, 837, 229 S E 2d 775, 778 (1976) (holding that evidence of other accidents at the subject crossing was properly excluded) In this regard, the mere fact that two accidents occur at the same place standing alone, does not make them substantially similar See e.g., Green v Sparks, 232 S C 414, ___, 102 S E 2d 435, 445 (1958) (holding that trial court properly excluded evidence of prior accident where "the only identifying factor was that the place was substantially the same")

Where the requisite substantial identity of facts is not present, the probative value of such prior accident evidence will be outweighed by its prejudicial or misleading nature, and the evidence should be excluded For example, in First Security Bank v Union Pacific R R Co., 152 F 3d 877, 880 (8th Cir 1998), the court excluded evidence of three prior accidents at the crossing in question because the evidence lacked substantial similarity of conditions to make it probable that the same causes produced the same result Two of the prior accidents were excluded because "the vehicles involved were traveling westward rather than eastward, *giving the drivers an entirely different*

perspective of the crossing” Id (emphasis added) Additionally, in one of the accidents, the driver was “traveling directly into the late afternoon sunlight when the collision occurred” Id

Similarly, in Mitcham v Illinois Central Gulf Railroad Co., 515 So 2d 852 (Miss 1987), the court excluded evidence of three prior accidents at the crossing that had occurred within eighteen months prior to the date of the collision The evidence was offered by the plaintiff to show that the crossing was ultrahazardous, and that the railroad was aware of the prior accidents but took no action to remedy the situation In considering the admissibility of this evidence, the court stated that “[i]n general, the admissibility [of prior accidents] is limited to conditions of permanency and the evidence must show that former accidents happened under substantially the same circumstances as those existing at the time of the accident” Id at 856 The court found that the prior accidents “lacked the requisite permanence of conditions, in that the conditions of the crossing that would have been put into issue; the height of vegetation on ICGRR’s right-of-way, change with the seasons” Id “Under these circumstances the evidence was not admissible to show either the existence of a dangerous condition or knowledge of hazardous circumstances” Id

Also instructive is Miller v Norfolk and Western Railway Co., 178 F 3d 1295, 199 WL 196554 (6th Cir 1999), where the court excluded evidence of two prior accidents due primarily to the fact that they both involved different quadrants of the crossing In concluding that the prior accidents were sufficiently dissimilar to the one at issue, the court reasoned that “[i]t is only logical to conclude that *the time of day the kind of day, and the direction of the vehicles are factors absolutely necessary to meeting the*

burden of showing substantial similarity in circumstances” Id at *6 (quoting Roundtree v Seaboard Coastline R.R. Co., 418 F Supp 220, 223 (M.D. Fla. 1976)) (emphasis added) “*We think the identity of accident quadrants is a necessary element of substantial similarity*”” Id (emphasis added) See also Mang v Norfolk and Western Railway Co., 782 F.2d 1042, 1985 WL 14083 (6th Cir. 1985) (“the direction of the vehicles are factors absolutely necessary to meeting the burden of showing ‘substantial similarity’ in circumstances”)

In another case directly on point, Langston v Missouri Pacific Railroad Co., 99 F.3d 1150, 1996 WL 594279 (10th Cir. 1996), the court applied the “substantial similarity” test and excluded evidence of prior accidents at the crossing. The court found that the prior accidents shared no similarities other than that a collision occurred at the same crossing. Id at *3-4. The court noted that “the fact that a collision occurred, standing alone, is insufficient to establish negligence of either of the parties involved.”

Id at 3 (quoting St. Louis - San Francisco Ry. Co. v Powell, 385 P.2d 465, 469 (Okla. 1963)). More importantly, the court rejected plaintiff’s argument that the substantial similarity rule should be relaxed when the evidence is used to prove notice or awareness of dangerous conditions requiring additional signals and warning signs. Id at *5. The court further rejected plaintiff’s argument that any differences in the circumstances surrounding the prior accidents go merely to the weight of the evidence. Id. The court reasoned that where the dangerous nature of the crossing is the primary and dispositive issue, “a high degree of similarity will be essential.” Id. “Because the jurors were asked to determine whether the crossing was dangerous, it was reasonable for the trial court to consider the potential impact evidence of prior accidents would have on that

determination - - *even if the evidence was clothed in the garb of notice* ” Id at *3 (emphasis added) See Babish v National Railroad Passenger Corporation, 1990 U S Dist Lexis 4157 (E D Pa 1990) (“In spite of the specific purpose for which the prior accidents are sought to be introduced, it is clear that there must be a fundamental similarity of conditions and facts between the prior accidents and the accident in the lawsuit ”)

The court excluded evidence of prior accidents at the same crossing for similar reasons in Kelsay v Consolidated Rail Corporation, 749 F 2d 437 (7th Cir 1984) In excluding this evidence, the court relied on several factors First, the court noted that the circumstances of the prior accidents, although similar, also included significantly different facts For example, the train in one of the accidents was traveling approximately 10 mph faster than the subject train Id at 444 There also was a significant difference in the age of the drivers involved in the accidents, and the visual obstructions from the foliage near the crossing may have changed Id -Second, there was no evidence that the survivors of either of the two prior accidents ever filed a claim or lawsuit The court stated that “[w]hile certainly not conclusive, the lack of any such evidence may suggest that the accidents were the fault of the drivers ” Id The court recognized that if these prior accidents were admitted, the jury might infer that the crossing was ultrahazardous simply from the mere existence of the two accidents Id The court also noted that the remoteness in time of the other accidents “would further increase the danger of unfair prejudice to defendants because of the difficulty of having to marshal evidence in three cases to establish an adequate defense to this case ” Id

Numerous other decisions support excluding prior accident evidence. See, e.g., Gardner v. Southern Railway Systems, 675 F.2d 949 (7th Cir. 1982) (excluding evidence of a prior accident at the crossing occurring 15 months before the subject accident, the trial court found that the conditions and surrounding circumstances were different, at least in some respects, and because the jury might have inferred from the evidence of the prior accident alone that ultrahazardous conditions existed at the crossing and were the cause of the later accident without those issues ever having been proved), Kuper v. Chicago and North Western Transp. Co., 290 N.W.2d 903 (Iowa 1980) (excluding evidence of two prior accidents because they occurred at different times and under different weather conditions, even though the vehicles were all approaching the crossing from the same direction).

Of course, CSXT recognizes that evidence of other accidents or occurrences *may sometimes* be admitted for the limited purpose of supporting a claim for punitive damages. Cf. Webb, 364 S.Ct. at 655, 615 S.E.2d at 449 (emphasis added). However, “[a] defendant’s dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages.” State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 422 (2003). Furthermore, the use of punitive damages “to *punish* the defendant for harming persons who are not before the court (*e.g.*, victims whom the parties do not represent)” violates the Due Process Clause. Philip Morris, 549 U.S. at 347. Consequently, evidence of dissimilar accidents or occurrences is both irrelevant and prejudicial, irrespective of whether it is offered to prove negligence or in support of a claim for punitive damages.⁶ Cf. Durham v. Vinson, 360 S.Ct. 639, 652, 602

⁶In this regard, it perhaps bears noting that evidence of out of state conduct which is dissimilar and unrelated to the alleged conduct giving rise to the suit is never admissible even in support of a claim

S E 2d 760, 767 (2004) (holding that trial court erred by allowing evidence of “misconduct towards a third party” during the punitive damages phase of the trial)

2 Near Misses at Honeyford Road or Other Crossings

Plaintiff may seek to introduce evidence regarding near misses at Honeyford Road and other crossings. This evidence should be excluded from trial under Rules 402 and 403, S C R Evid, on the grounds that it is irrelevant to the issues of this case and any probative value which attaches to such evidence is substantially outweighed by the dangers of unfairly prejudicing and misleading the jury, confusing the issues, and delaying trial.

Case law plainly supports the exclusion of such evidence. For example, in Rothermel v Consolidated Rail Corp., 1998 WL 110010 (Del Super Jan 21 1998), the court excluded reports of “near misses” and evidence of complaints made to city officials that a railroad crossing was unsafe. In so ruling, the court recognized the danger of collateral issues creeping into the trial and the potential for the jury deciding the case on factual matters other than the case at hand. Id. at *1. According to the court, “[n]ear misses and complaints about near misses do not provide the trier of fact with anything other than that a tragedy almost occurred. Such complaints do not offer the finder of fact any evidence as to who was at fault in the prior incidents. Even assuming that the railroad was at fault in the prior accidents, there is no showing that the railroad’s prior negligence is relevant or material to the allegations of negligence in this case.”

Id. at *3 (emphasis added). Thus, the court excluded the evidence based on a relevance and prejudice analysis. Id.

for punitive damages. See, e.g., Atkinson, 361 S C at 167-68 (quoting Campbell, 538 U S at 422-423), see also Campbell, 538 U S at 421-22 (explaining that a State may not impose punitive damages “to punish a defendant for unlawful acts committed outside of the State’s jurisdiction.”)

Similarly, in Sawyer v. Illinois Central Gulf Railroad Co., 606 So.2d 1069 (Miss. 1992), the Mississippi Supreme Court upheld the exclusion of “near miss” evidence on the grounds that the proffered testimony was not sufficiently qualified. “[T]o be admissible, prior-accident— *and certainly near-miss testimony* — must be carefully qualified.” Id. at 1075 (emphasis added). The court explained “the fact of a near miss, and, for that matter, a hit, in and of itself proves very little and indeed may be quite prejudicial. The fact that an accident almost occurs at a particular location does not necessarily imply any fault or neglect on the part of the person in control of the premises.” Id. The court concluded that the testimony was inadmissible. Id. at 1076. Accord Cox v. CSX Transportation, Inc., 887 F.2d 1086, 1989 WL 119375 (6th Cir. Oct. 12, 1989) (evidence of prior near misses at same crossing was properly excluded), Cartel v. Missouri Pacific Railroad Co., 284 Ark. 278, 681 S.W.2d 314 (1984) (same).

Accordingly, in the present case, plaintiff should be precluded from offering evidence of near misses.

3 Conditions at Other Crossings & SCDOT Fines/Deficiency Notices

Similarly, CSXT anticipates that Plaintiff will attempt to use evidence of SCDOT fines/deficiency notices and vegetation problems at other crossings in an effort to show that CSXT was aware of vegetation problems at other crossings in South Carolina and at the Honeyford Road crossing. This argument overlooks the fact that each crossing is unique, and evidence of conditions at other crossings does not make it any more or less probable that conditions at the Honeyford Road crossing were dangerous, much less that CSXT *knew* about any such danger.

This evidence bears no causal relation to the Harvey accident. Rather, Plaintiff impermissibly seeks to admit evidence of conditions at other crossings in an attempt to establish CSXT's "character" in order to show action in conformity therewith." See S.C.R. Evid. 404(b). Absent a strong showing of substantial similarity *and* relevance, the Court should not allow the admission of such misleading and prejudicial evidence. Cf. Whaley, 362 S.C. at 483, 609 S.E.2d at 300 (noting that "[e]vidence of similar accidents, transactions, or happenings is admissible" only if there "is some special relation between them tending to prove or disprove some fact in dispute").

More generally, it has long been the law in South Carolina that a defendant's conduct on other occasions is not admissible to prove negligence. See, e.g., Holcombe v. W.N. Watson Supply Co., 171 S.C. 110, ___, 171 S.E. 604, 606 (1933), *see also* Norfolk S. Ry. Co. v. Thompson, 208 Ga. App. 240, 247, 430 S.E.2d 371, 378 (1993) ("[T]he conduct of the parties in other transactions is generally irrelevant"). Indeed, evidence of "a defendant's prior acts or omissions 'is of slight probative value and tends to distract the trier of fact from the main question of what actually happened on a particular occasion.'" Jones v. S. Pac. R.R., 962 F.2d 447, 449 (5th Cir. 1992) (holding that evidence of engineer's prior safety violations was inadmissible). Put plainly, "the law will not consider evidence that a person has done a certain act at a particular time, as probative of a contention that he has done a similar act at another time." Williams v. Atl. Coast Lumber Corp., 136 S.C. 423, ___, 134 S.E. 390, 394 (1926).

In accord with these principles, the South Carolina Supreme Court has already ruled that evidence of SCDOT deficiency notices pertaining to other crossings is "relevant, *if at all* only to punitive damages." Webb, 364 S.C. at 655, 615 S.E.2d at 449.

(emphasis added) Likewise, this Court should not permit Plaintiff to rely upon evidence of conditions or happenings at other crossings as somehow constituting proof of negligence

Perhaps most importantly, evidence of SCDOT fines and deficiency notices has no place in this case since no evidence exists that the SCDOT fined CSXT or notified CSXT of problems with the Honeyford Road crossing. Inspection reports actually indicate the opposite. Accordingly, this type of evidence lacks the necessary nexus for admissibility. Atkinson, 361 S.C. at 167-168 (citing Campbell, 538 U.S. at 422-423).

F Other Crossing Accidents or Rule Violations involving Crew

Members

As noted above, CSXT anticipates that Plaintiff may seek to introduce evidence regarding other crossing accidents involving the train crew or rule violations by the crew unrelated to the accident at issue. In addition to relevancy and prejudice arguments under S.C.R. Evid. 401-403, such evidence should be barred on the basis that it constitutes inadmissible character evidence in contravention of S.C.R. Evid. 404.⁷ Under Rule 404(b), “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Any attempt by Plaintiff to introduce such evidence tends to encourage the impermissible conclusion that the train crew members have an innate tendency to cause crossing accidents or violate rules.

See also Munley v. Carlson, 125 F. Supp. 2d 1117 (N.D. Ill. 2000) (granting defendant’s motion in limine to exclude prior, unrelated, disciplinary actions against him).

⁷ See Holcombe, 171 S.C. 110 (1933) (finding evidence that decedent tended to walk more in the road than he would in the side of the road on several occasions was inadmissible character evidence in claim filed for decedent’s death as a result of being struck by defendant’s truck).

in his capacity as a police officer where such evidence would be offered to prove that he acted in conformity therewith in present excessive force action), Jones v S Pac R R., 962 F 2d 447, 449 (5th Cir 1992) (holding that evidence of engineer's prior safety violations was inadmissible)

G Irrelevant Quadrants

CSXT anticipates that Plaintiff will make reference to alleged sight distance and alleged obstruction problems with quadrants at the crossing other than the one involved in this accident. There is no dispute that the only quadrant relevant to this accident is the southeast quadrant. See Whatley Dep Ex 1. As such, any evidence regarding other quadrants is irrelevant, potentially confusing, and unduly prejudicial to CSX. See, e.g., Miller v Norfolk & W Ry Co., No 97-3213, 1999 WL 196554, at *9-16 (6th Cir Apr 1, 1999) (affirming trial court's decision limiting expert's "evaluation of the crossing, and his testimony concerning it, to conditions which would affect a southbound driver's ability to detect and avoid collision with an oncoming eastbound train" because "the evidence of sight obstructions in other quadrants would not have affected [the driver's] ability to discern the oncoming train" and thus "was not relevant to the issue at hand")

Similarly, CSXT anticipates that Plaintiff will attempt to introduce evidence and testimony regarding a signal shack in the northwest quadrant of the crossing along with other alleged sight obstructions and deficiencies in the area of the crossing. Any evidence or argument that the signal shack or other conditions obstructed a motorist's ability to view an oncoming train is wholly irrelevant to the accident in the instant case and should be ruled inadmissible. See Bickley v Norfolk & Western Ry Co., 187 F 3d 634, *4 (6th Cir 1999) (unpublished opinion) (finding testimony of rate-of-speed was

irrelevant because it dealt with the view from the southwest quadrant, while the accident implicated the view from the northwest quadrant) Stated simply, evidence regarding any quadrants other than the southeast quadrant is irrelevant and should be excluded See S C R Evid 401-403

H Federal Railroad Administration (“FRA”) Audits of Safety Assurance

CSXT anticipates that Plaintiff will attempt to present documents from the FRA which concern CSXT generally, but do not address conditions at the Honeyford Road crossing More specifically, the FRA audited CSXT in 1997 and again in 2000 with a resulting Safety Compliance Agreement (“agreement”) The 1997 audit was prompted by five incidents, none of them in South Carolina The 2000 audit followed three other incidents, none of which occurred in South Carolina In its audit reports, the FRA expressed concerns about various conditions at CSXT However, the FRA prefaced its remarks about track conditions by acknowledging that a major portion of CSXT’s track was in good condition and *fully compliant* with federal track safety standards (Executive Summary, p vii)

As noted above, evidence which does not pertain to the Honeyford Road crossing is both irrelevant and prejudicial S C R Evid 401 403 In addition, such FRA documents constitute inadmissible hearsay Although S C R Evid 803(8) excepts certain public records and reports from the hearsay rule, FRA reports do not fall within this exception To the contrary, S C R Evid 803(8) specifically provides that “investigative notes involving opinions, judgments, or conclusions are not admissible ” The Notes to S C R Evid 803(8) further explain that the Rule should be interpreted in a manner “consistent with prior state practice ” It has long been the law in South Carolina

that government reports containing conclusions, as opposed to bare facts, are inadmissible

The principle which seems fairly deducible from them is that a record of a primary fact made by a public officer in the performance of official duty is or may be made by legislation competent prima facie evidence as to the existence of that fact, but that records of investigations and inquiries conducted, either voluntarily or pursuant to requirement of law, by public officers concerning causes and effects and involving the exercise of judgment and discretion, expressions of opinion, and making conclusions are not admissible as evidence as public records

State v Homewood, 241 S C 231, ___, 128 S E 2d 98, 105 (1962) (citation omitted)

Here Plaintiff likely will seek to admit FRA reports, which are investigative and evaluative in nature and which contain opinions, judgments, and conclusions regarding unrelated conduct and conditions. Consequently, these documents constitute inadmissible hearsay.

Moreover, the audits and reports at issue constitute inadmissible character evidence. S C Rule of Evidence 404 (b) provides that evidence of other wrongs or acts cannot be used to prove action in conformity therewith. It is settled law in South Carolina that "in actions based on negligence it is irrelevant to prove that the plaintiff or the defendant has on similar occasions been careful or negligent, in like manner it is irrelevant to show that either party has hitherto had the reputation of being prudent or negligent." Holcombe v Watson Supply Co., 171 S C 110, 171 S E 604, 606 (1933). In Holcombe, the Supreme Court of South Carolina affirmed the trial court's exclusion of evidence of the plaintiff's past habit to negligently cross a particular intersection. Id. at 605-606. In holding that such evidence was inadmissible to show negligence on the night in question, the Court acknowledged that "[e]vidence of habit is frequently rejected when offered for the purpose of showing that a person acted in accordance with such habit on a

particular occasion, especially where direct evidence is or can be produced, or the act is otherwise fully proved ” Id

Similarly, in Williams v Atlantic Coast Lumber Corp., 136 S C 423, 134 S E 390 (1926), the Supreme Court upheld the exclusion of evidence regarding other prior instances in which the defendant had cut and left large quantities of lumber on other land. Plaintiff argued such evidence was probative to show defendant had acted in conformity therewith on the occasion in question. Id at 394. In rejecting this argument, the Court declared that “the law will not consider evidence that a person has done a certain act at a particular time, as probative of a contention that he has done a similar act at another time ” Id (citations omitted)

South Carolina recognizes an exception to this exclusionary rule when “it appears to the court that the conditions and the time were *approximately the same* ” Laney v

Atlantic Coastline R Co., 211 S C 328, 332-333 45 S E 2d 184, 186 (1947). In Laney,

the trial court admitted evidence that prior to the subject fire giving rise to the plaintiff’s property damage claim, defendant’s engine had emitted sparks on other occasions while undertaking similar shifting operations. Id. However, the court’s decision to admit such prior conduct evidence was based on the fact that the other fires related to the operation of the *same* engine while shifting on the *same* track along the side of the *same* platform at the *same* place at or near the *same* time. Id at 187. While admitting evidence of this conduct under substantially identical circumstances, the court acknowledged the general rule in South Carolina against the admission of such evidence. “For that reason, and others having to do with the practical inconvenience of trying a number of collateral issues at the same time, the rule is that it is within the discretion of the court except

under special circumstances, to reject evidence of former acts or occurrences as proof that a particular act was done or a certain occurrence happened ”

Id at 186

Relevant authority outside this jurisdiction further supports CSXT’s position. For example, in Crawford v Yellow Cab Company, 572 F Supp 1205 (N D Ill 1983), the District Court held that a summary of the driving records of 4,400 past and present Yellow Cab drivers was inadmissible to show that defendant had a reputation for negligently entrusting its vehicles to drivers and had acted in conformity with that reputation in leasing a cab to one of its employees, Mr. Slein, who was involved in the subject accident. Id at 1208. In refusing to admit this “bad act” evidence, the court noted that “negligence at a particular time or place cannot be established by evidence of similar but disconnected acts of negligence at other times or places, or by defendant’s general reputation for carelessness.” Id. The court further rejected plaintiff’s argument that the evidence was admissible to show that defendant’s entrustment of its taxicab to Slein was a willful and wanton act “consistent with its corporate practice and policy of indifference to the duty to safely entrust vehicles.” Id at 1209. “There is a significant difference between using character evidence to show a specific criminal intent in a specific instance and using it to demonstrate an alleged generalized corporate pattern or practice.” Id. Finding no authority to support the admission of the summary as evidence of defendant’s “intent” or “corporate pattern,” the court concluded that the evidence was inadmissible for such a purpose. Id.

Other courts are in accord. See Treece v Hochstetler, 213 F.3d 360 (7th Cir 2000) (district court properly excluded evidence of defendant’s prior bad acts of

soliciting bribes and filing false police reports because the bribe involved in the case at issue did not have a strong resemblance to the prior bad acts), Munley v. Carlson, 125 F Supp 2d 1117 (N D Ill 2000) (granting defendant's motion in limine to exclude prior, unrelated, disciplinary actions against him in his capacity as a police officer where such evidence would be offered to prove that he acted in conformity therewith in present excessive force action), Fisher v. American General Finance Co., 2002 WL 31760189 (4th Cir 2002) (trial court erred in admitting prior bad acts evidence against defendant where prior bad act of falsifying personal property of loan applicants was dissimilar to current charge of falsifying the description of the property securing the loan because such prior act served only to prove a generalized intent to commit dishonest acts)

The United States Supreme Court decision in State Farm Mutual Ins. Co. v. Campbell, 538 U S 408, 123 S Ct 1513, 155 L Ed 2d 585 (2003), further supports exclusion of plaintiff's proffered evidence since plaintiff can establish no correlation between the out-of-state deficiencies noted in the FRA audits and the alleged defects complained of at the Honeyford Road crossing. In Campbell, the Supreme Court held that dissimilar and out-of-state conduct evidence *must have a nexus* to the specific harm suffered by the plaintiff to be admissible. Id. at 422. Plaintiffs in Campbell were insureds who brought an action against their automobile liability insurer for bad faith refusal to settle a claim. Id. 412-414. At trial, the court permitted plaintiffs to introduce evidence of dissimilar out-of-state conduct by State Farm pertaining to nationwide business practices in settling claims. Id. at 415. The Supreme Court held that the evidence regarding State Farm's alleged national scheme to defraud its insureds in its nationwide operation bore no relation to the plaintiffs' claims and, therefore, was irrelevant in determining the

reprehensibility of the defendant Id at 422 In excluding evidence of the perceived deficiencies of State Farm's nationwide operations, the Court reasoned as follows

[A]s a general rule, a state does not have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the state's jurisdiction Lawful out of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff

Id (emphasis added) To allow such evidence at trial would be to condemn the defendant for its nationwide policies rather than for the conduct directed toward the plaintiffs Id at 420

Under Campbell, consideration of FRA reports and audits would result in the jury condemning CSXT for certain out-of-state deficiencies unrelated to this incident rather than for its conduct at the time and place in question Since the incidents and concerns addressed in the FRA audits lack any similarity to, or nexus with, plaintiff's claims, the audits and reports should be excluded

The FRA audits and agreement also should be excluded under S C R Evid Rule 406, which governs the admissibility of "habit" evidence "Evidence of the habit of a person or of the routine practice of an organization, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice "

While there is very little South Carolina case law on point, courts in other jurisdictions have been reluctant to admit such evidence in the context of routine business patterns and practices In Bridges v CSX Transportation, Inc., 845 S W 2d 760

(Tenn App 1992), the trial court admitted evidence of CSXT's alleged pattern and practice of hiding injured employees, hiding defective equipment and discouraging the reporting of on-the-job injuries. The Tennessee Court of Appeals reversed the trial court's decision, holding that such evidence did not constitute "habit" evidence under Rule 406. *Id.* at 763. In excluding this evidence, the court acknowledged the overall danger in considering such custom or habit evidence. "[C]ourts recognize the danger of such evidence, regarding custom or habit, and do not look on it with favor, and, to be admissible, its relevancy and probative value must clearly appear." *Id.* at 765. Regarding the limited admissibility of habit or routine business practices, the court noted as follows:

The key element of proof of either habit or routine practice is regularity. The habit or practice must have been repeated sufficiently and frequently to have become routine. Accordingly, an act done a few times should not be viewed as a habit or routine practice. Greater regularity is required. Many courts use the phrase "semi-automatic" to describe the kind of conduct arising to the level of habit.

Id. (emphasis added). See also State v. Brown, 344 S.C. 70, 74, 543 S.E.2d 552, 554

(2001) ("Habit has been described as conduct that is 'situation-specific' or 'specific, particularized conduct capable of almost identical repetition'") (other citations omitted).

A similar result was reached in Simplex, Inc. v. Diversified Energy Systems, 847 F.2d 1290 (7th Cir. 1988), upholding the exclusion of evidence of defendant's allegedly routine business practices. In Simplex, the Seventh Circuit affirmed the trial court's decision to exclude evidence of defendant's allegedly routine practice of "late deliveries and defective performance pursuant to Rule 406." *Id.* at 1293. In relevant part the court said:

We are cautious in permitting the admission of habit or pattern-of-conduct evidence under Rule 406 because it

necessarily engenders the very real possibility that such evidence will be used to establish a party's propensity to act in conformity with its general character. Moreover, such collateral inquiries threaten the orderly conduct of trial while potentially coloring the central inquiry and unfairly prejudicing the party against whom they are directed.

Id. The court acknowledged that to obtain a Rule 406 inference of the routine practice of a business, "the offering party must establish the degree of specificity and frequency of uniform response that ensures more than a mere 'tendency' to act in a given manner, but rather, conduct that is 'semi-automatic' in nature." Id.

The Fourth Circuit in Wilson v. Volkswagen of America, Inc., 561 F.2d 494, 511 (4th Cir. 1977) (superseded by statute on other grounds, see Va. Code § 46-2-1094(E)), further provided the following guidance on the introduction of habit evidence:

It is only when the examples offered to establish such pattern of conduct or habit are "numerous enough to base an inference of systematic conduct" and to establish "one's regular response to a repeated specific situation" or, to use the language of a leading text, where they are "sufficiently regular or the circumstances sufficiently similar to outweigh the danger, if any, of prejudice and confusion," that they are admissible to establish a pattern or habit. In determining whether the examples are "numerous enough" and "sufficiently regular," the key criteria are "adequacy of sampling and uniformity of response."

Clearly, Rule 406 does not support the introduction of the FRA audits on the basis that it was CSXT's pattern and practice to inadequately maintain its tracks. The audits themselves state that "[a] major portion of CSXT track is in good condition and fully compliant with federal track safety standards" (Executive Summary at p. ix). The 2000 Audit said:

It is important to note the FRA views the track audit as a proactive measure to improve track safety. CSXT did not have a fatal train accident in either 1998 or 1999. In fact,

CSXT was the only major railroad in the country that did not have a single employee fatality in 1999, a remarkable achievement given the vast size of the railroad

(2000 Audit, p 2) Thus, these documents themselves establish that they are not evidence of a “regular response to a repeated specific situation ” As such, the court should prohibit the introduction of this evidence under Rule 406

I Diagnostic Team’s April 2004 Recommendation to Install Gates/Lights

In April 2004, just prior to the Harvey accident, a diagnostic team from the SCDOT inspected the crossing and recommended that gates and lights be installed⁸ CSXT expects that Plaintiff will attempt to offer evidence of the diagnostic team’s activities and its April 2004 recommendation CSXT respectfully contends that any reference to the diagnostic team’s report is inadmissible under 23 U S C § 409, which provides

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway highway crossings, pursuant to sections 130, 144, and 148 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data

By its terms, § 409 precludes the admission of the diagnostic team’s report, which was completed for the purpose of evaluating and planning crossing safety enhancements pursuant to 23 U S C § 130 In accord with § 130, SCDOT officials conducted a survey

⁸SCDOT officials have offered deposition testimony regarding the diagnostic team’s activities and SCDOT’s resultant request for federal funding to upgrade the Honeyford crossing however this testimony has not yet been transcribed CSXT will supplement its arguments with appropriate references to this testimony once transcripts are available

and included the Honeyford crossing on a list of crossings the State proposed to upgrade with federal funds See 23 U S C § 130(d) & (g) The federal government then approved the use of § 130 funds to install gates and lights at the Honeyford crossing Accordingly, the diagnostic team's April 2004 report falls squarely within the purview of § 409 and should be excluded

Furthermore, "[t]he plain language of [§ 409] excludes from evidence all data compiled for purposes of highway and railroad crossing safety enhancement and construction for which a state receives federal funding " Robertson v Union Pac R R Co., 954 F 2d 1433, 1435 (8th Cir 1992) Congress promulgated § 409 "to facilitate candor in administrative evaluations of highway safety hazards and to prohibit federally required record-keeping from being used as a tool in private litigation " Id (internal citations and quotations omitted) Consequently, "[u]nder § 409, the evidence presented at trial should be the same as if no upgrades had been planned " St Louis Southwestern Ry v Malone Freight Lines, Inc., 39 F 3d 864, 867 (8th Cir 1994) - - - -

Accordingly, CSXT requests the Court to exclude not only the diagnostic team's report, but also any documents or photographs prepared by the diagnostic team, and any testimony from diagnostic team members or other witnesses regarding the diagnostic team's activities or ultimate recommendations See Robertson, 954 F 2d at 1435 (explaining that expert testimony which relies upon material which is inadmissible pursuant to § 409 should also be excluded), Powers v CSX Transp Inc., 177 F Supp 2d 1276, 1279-80 (S D Ala 2001) ("It is well settled that a plaintiff may not circumvent Section 409 by asking a witness to testify to matters the witness learned from documents protected by Section 409 ")

Furthermore, as CSXT has argued elsewhere, the installation of the gates and lights constitutes a subsequent remedial measure. The Court should not allow Plaintiff to evade Rule 407, SCRE, merely because the upgrades were contemplated before the accident. In Webb v. CSX Transp., Inc., 364 S. Ct. 639, 653, 615 S. E. 2d 440, 448 (2005), the South Carolina Supreme Court explained that the motives underlying remedial actions are irrelevant to an assessment of their admissibility—in other words, the remedial action need not have been taken in response to the events giving rise to the plaintiff's suit for Rule 407 to apply. Consequently, the fact that upgrades were recommended before the accident does not render the subsequent installation of gates/lights by SCDOT and CSXT admissible.

Likewise, to allow Plaintiff to evade Rule 407 by presenting evidence that upgrades were planned prior to the accident would encourage the jury to draw the very prejudicial inference that Rule 407 forbids—that subsequent remedial measures constitute proof of negligence. Moreover, even if the diagnostic team's report does not technically fall within the purview of Rule 407, CSXT respectfully contends that the report is plainly prejudicial and therefore subject to exclusion under Rule 403, SCRE. See Raymond v. Raymond Corp., 938 F. 2d 1518, 1523 (1st Cir. 1991) (upholding exclusion of product design modifications which were “on the drawing board” at the time of the accident). At issue is whether conditions at the crossing provided adequate safety at the time of the accident. The fact that crossing upgrades had been recommended is only “marginally relevant” to that question, while posing a plain risk that the jury will be misled into concluding that the diagnostic team's recommendation is, standing alone, proof of negligence. Id. Accordingly, CSXT requests the Court to exclude any reference

to the diagnostic team's April 2004 report

J Reference to Railroad Crossing Clearing or Brush-Cutting Programs

CSXT also believes Plaintiff will attempt to offer evidence regarding (1) a crossing-clearing program instituted by Union Pacific in 1997, (2) a similar program instituted by CSXT in 2000 which was ongoing at the time of the accident at issue in this case, and (3) a "PowerPoint" presentation presented by DeAngelo Brothers, Incorporated, ("DBI") as part of its successful efforts to obtain a contract to perform crossing-clearing for CSXT

Initially, it should be noted that all of the above "evidence" is hearsay and, thus, should be excluded S C R Evid 801(c) Regardless, Plaintiff's speculation that adoption of a program similar to Union Pacific's would have made the Honeyford Road crossing safer is unsupported by any evidence whatsoever Absent any factual foundation, evidence regarding Union Pacific's program is irrelevant Likewise, any expert testimony on this point would amount to nothing more than the expert's *ipse dixit* and should not be allowed See, e.g., Young v Tide Craft, Inc., 270 S C 453, 468, 242 S E 2d 671, 678 (1978) ("The opinion of the expert 'must be based upon facts sufficient to form a basis for an opinion'")

Moreover, this evidence, especially DBI's sales-pitch that adoption of a crossing-clearing program would "save lives," is highly prejudicial Plaintiff wishes to use this evidence to imply that CSXT's grade crossings were unsafe in general and, therefore, that the Honeyford Road crossing was unsafe at the time of the accident As noted *supra*, this is precisely the type of inferential pathway forbidden by S C R Evid 404(b) As stated above, evidence of conditions at other crossings is inadmissible See Webb, 364 S C at

655, 615 S E 2d at 449 Accordingly, CSXT's actions or omissions with respect to other crossings—much less *Union Pacific's* unrelated conduct—bear no relevance to this case Consequently, Plaintiff's anticipated evidence of crossing clearing or brush-cutting programs, coupled with inevitable references to "saving lives," promises to imbue the jury with prejudicial, distracting, and irrelevant matter As a result, any evidence of, or reference to, CSXT's or Union Pacific's crossing-clearing or brush-cutting programs, including the scope, origins, financing, or contracting of such activities, should be excluded

Furthermore, although evidence of prevailing industry standards or safety practices is generally admissible, see, e.g., Elledge v. Richland/Lexington School Dist. Five, 341 S C 473, 477, 534 S E 2d 289, 290-91 (S C App 2000), attempting to pass off Union Pacific or CSXT programs as evidence of an industry-wide standard or practice "is terribly misleading." See Alevromagiros v. Hechinger Co., 993 F 2d 417, 422 (4th Cir 1993) (affirming exclusion of evidence of allegedly safer competing product in products liability case and noting that the "jurors easily could have been misled or confused by the assumption that one competing product represented the relevant industry-wide standard"), see also Handley v. Union Carbide Corp., 804 F 2d 265, 273-274 (4th Cir 1986) (rejecting argument that company's status as an "industry leader" demonstrated that its internal safety rules constituted an industry-wide safety standard) Plaintiff has no evidence to support any inference that the Union Pacific or CSXT programs reflect universal or accepted standards throughout the larger railroad industry In sum, Plaintiff's attempt to use the Union Pacific and CSXT crossing-clearing programs as proof of negligence is improper and should not be permitted

Plaintiff may also attempt to introduce evidence regarding an indemnity relationship between DBI and CSXT. To admit evidence regarding the existence of the indemnity agreement between DBI and CSXT would be tantamount to putting the issue of CSXT's insurance coverage before the jury. Under South Carolina law, "[e]vidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully." S.C. R. Evid. 411. To illustrate the point, in Landry v. Hilton Head Plantation Prop. Owners Ass'n, 317 S.C. 200, 202, 452 S.E.2d 619, 620 (S.C. Ct. App. 1994), plaintiffs sued their homeowners' association and a landscaper hired by the association to maintain common areas in their residential development. Plaintiffs sought to admit evidence of a liability insurance clause in the maintenance contract between the homeowners' association and the landscaper. Id. at 206, 452 S.E.2d at 622. Upon noting that "the existence and contents of a defendant's liability insurance policy may not be disclosed to the jury," the Court of Appeals upheld the trial court's decision to exclude evidence of the insurance clause, concluding "that the prejudicial effect of its admission would have far outweighed any possible probative value." Id.

Although Plaintiff has not named DBI as a defendant in this action, the instant situation is analogous. Put plainly, admitting evidence of communications between DBI, DBI's insurers, and CSXT regarding any indemnity agreement would be tantamount to injecting the issue of liability insurance coverage into the trial of this case. Consequently, any reference to evidence of these communications would unfairly prejudice CSXT's defense.

K Photographs of decedent at accident scene and coroner's office

CSXT anticipates Plaintiff may attempt to introduce gruesome photographs of the accident scene and at the coroner's office specifically focusing on the deceased, Beryl Harvey. Under Rule 403 of the S C R Evid, 'although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.' These photographs have little probative value, but great potential to prejudice the jury in favor of Plaintiff.

Significant evidence exists in the instant matter regarding the accident scene and Beryl's injuries. The sheer volume of evidence regarding Beryl's injuries, including medical reports and witness testimony, reduces the probative value of photographs of the decedent. Smalls v South Carolina Department of Education, 339 S C 208, 224, 528 S E2d 682, 690 (S C App 2000) (affirming that trial court's decision to exclude, in a wrongful death action, photographic evidence of the damage to an automobile that struck a pedestrian where other testimony presented at trial described the damage to the vehicle), Radford v Seaboard System Railroad, Inc., 828 F 2d 1552, 1555 (11th Cir 1987) (finding that photographs taken of an accident scene between a train and automobile offered to show the position of the train and condition of the crossing contained low probative value where there existed testimony from other witnesses of these facts).

As noted above, evidence that has low probative value is subject to exclusion if the unfairly prejudicial effect is, in comparison to the probative value, substantially greater. S C R Evid Rule 403. "To constitute unfair prejudice, the photographs must create an undue tendency to suggest a decision on an improper basis, commonly an

emotional one” State v. Jackson, 364 S C 329, 334, 613 S E 2d 374, 376 (2005) As the photographs in question in the instant case are particularly gruesome and would be introduced only in hopes of making a jury more susceptible to decisions based on emotion, rather than rational thought, they should be excluded from evidence⁹

L Reference to Memorials Erected at or near Crossing

CSXT anticipates Plaintiff may attempt to introduce evidence that a memorial dedicated to the decedent was erected at or near the Honeyford Road crossing The Court should preclude such evidence since wholly irrelevant to any issues involved in this case Furthermore, even if deemed relevant, admission of such evidence would have an unfairly prejudicial effect against CSXT in violation of S C R Evid Rule 403

M Any reference to the financial status of the parties

Comments or evidence concerning the relative standing of the parties or a defendant’s corporate status, size, wealth, or “power” are wholly irrelevant to issues of liability and plainly prejudicial¹⁰ See Shiner v O W S & Assocs, 253 S C 232, 237, 169 S E 2d 621, 623 (1969) (noting that admission of evidence of party’s wealth was erroneous), Williams v South Carolina Farm Bureau Mut Ins Co, 251 S C 464, 472-73, 163 S E 2d 212, 216 (1968) (holding that plaintiff’s arguments regarding the defendant’s wealth were improper), see also Shaps v Provident Life & Acc Ins Co, 244 F 3d 876, 886 (11th Cir 2001) (noting general rule that “a jury should not be advised about the wealth or poverty of the parties”), Gonzalez v Volvo of Am Corp, 752 F 2d 295, 298 (7th Cir 1985) (plaintiff’s counsel’s argument during closing statements in

⁹ Photographs that are introduced to arouse the sympathy of jurors or are not necessary to substantiate facts should be excluded from evidence Peagler v Atlantic Coast Line Railroad Company, 107 S E 2d 15, 27 (S C 1959), State v Livingston, 282 S C 16 (1984)

¹⁰ References to the “nature or size” of a party’s law firm are likewise improper See, e.g. Sanders v Johnson 859 S W 2d 329, 332 (Tenn App 1993)

wrongful death action regarding defendant's corporate status and wealth was grossly immoderate and has great likelihood of influencing jury improperly), City of Cleveland v. Peter Kiewit Sons' Co., 624 F.2d 749, 756 (6th Cir. 1980) (noting counsel's "pervasive misconduct" and continuous references to the size and power of defendant), cf. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 492 (1993) (O'Connor, J., dissenting) (noting that courts "have authority to recognize the special danger of bias" that arises from the jury's consideration of a defendant's wealth or corporate status). Neither is it appropriate for a plaintiff to attempt to arouse the sympathy of the jury with references to his own financial straits or difficulties. See e.g., Gause v. Livingston, 251 S.C. 8, 13, 159 S.E.2d 604, 607 (1968) (holding that admission of guardian ad litem's testimony that she was minor's "sole support" and the mother of six children constituted reversible error).

Of course, CSXT recognizes that evidence of a defendant's financial condition is generally admissible in determining an appropriate award of punitive damages. See, e.g., Bryant v. Waste Mgmt., Inc., 342 S.C. 159, 169-70, 536 S.E.2d 380, 386 (S.C. App. 2000). However, evidence of a party's financial condition is only one factor in a jury's analysis of the award of punitive damages and should not be controlling. Welch v. Epstein, 342 S.C. 279, 308, 536 S.E.2d 408, 423 (S.C. App. 2000). Information related to a party's wealth has a tendency to persuade a jury to make a prejudicial decision based on a comparison of the parties' financial status, rather than one based on the evidence presented at trial regarding the alleged tort.

Of particular note, the United States Supreme Court has explained that "presentation of evidence of a defendant's net worth creates the potential that juries will

use their verdicts to express biases against big businesses ” Campbell, 538 U S at 417
 Indeed, while recognizing that a jury may properly consider a defendant’s “ability to pay”
 in awarding punitive damages the South Carolina Court of Appeals has itself noted that
 evidence of net worth is of “questionable utility ” Bryant, 342 S C at 170 n 22, 536
 S E 2d at 386 n 22 (quoting Herman v Sunshine Chem Specialties, 133 N J 329, 627
 A 2d 1081, 1090 (1993)) Consequently, CSXT requests the Court to exercise its
 authority to prevent the prejudicial effects of evidence or remarks designed to highlight
 disparities between the parties in wealth or status

N Any attempts to disparage CSXT or defense counsel

As courts have recognized, railroad corporations have long been the victims of
 popular prejudice

[J]uries may generally assess an amount of damages against railway
 corporations which, in similar cases between individuals, would be
 considered unjust in the extreme It is lamentable that the popular
 prejudice against these corporations should be so powerful as to taint the
 administration of justice, but we cannot close our eyes to the fact

TXO, 509 U S at 490-91 (O’Connor, J , dissenting) (quoting Illinois Cent R Co v
Welch, 52 Ill 183, 188 (1869)) In this regard, comments or remarks designed to arouse
 the passions or prejudices of the jury against a corporate defendant are plainly prejudicial
 To illustrate, in Hubbard v Rowe, 192 S C 12, __, 5 S E 2d 187, 192 (1939), the South
 Carolina Supreme Court held that the trial court erred by allowing plaintiff’s counsel to
 argue that the requested verdict “would not be more than a nickel ’ or “pocket change” to
 the corporate defendant In further addressing counsel’s improper arguments, the Court
 explained

[T]he defendant company is a large corporation and that it is said to be very
 wealthy It was charged by Hubbard that this company had destroyed his eyesight

in part, or perhaps entirely, by its negligent and careless acts alleged and testified to by him. Naturally, then, this was a case where sympathy for the plaintiff could be easily aroused, and strong feeling incited against the company for having carelessly blinded the respondent, as was claimed by him, a young man with most of life ahead of him. And this is undoubtedly what happened when the company was held up to the jury in argument of counsel as caring less for human suffering than for the saving of money, etc. We have no doubt that the jury was greatly influenced by such argument--to the extent even of affecting the amount awarded, as a jury cannot exercise, when so influenced, an unbiased judgment as to the merits of the case, so essential to a fair and impartial trial.

Id. at ___, 5 S E 2d at 193. Comments by counsel intended to disparage CSXT by portraying it as a soulless corporation "caring less for human suffering than for the saving of money" are improper and unprofessional, and the Court should not countenance such remarks or argument. Id.

Similarly, CSXT anticipates that Plaintiff's experts will opine that CSXT has a "corporate culture" or "state of mind" of ignoring public safety. Such evidence simply has no place in a negligence case, where intent is not at issue. As the Fourth Circuit has aptly explained, in negligence actions, "the issue is generally not the defendant's state of mind. Rather the fact finder must determine whether the defendant was acting as a reasonable person would have acted in similar circumstances." Sparks v. Gilley Trucking Co., 992 F.2d 50, 52 (4th Cir. 1993) (concluding that evidence of the plaintiff's prior speeding convictions was inadmissible). Indeed, in submitting testimony regarding CSXT's alleged "corporate culture" or "state of mind," Plaintiff would merely be presenting character evidence in clear contravention of S.C.R. Evid. 404(b).

O Discovery Disputes

CSXT anticipates that, at trial, reference may be made to discovery disputes or issues that arise or have arisen including the need to file motions to compel to procure certain documents. Any evidence, arguments, references, or statements concerning

discovery disputes or issues are wholly irrelevant and have no bearing on issues for determination by the jury See S C R Evid 401, see also General Motors Corporation v Moseley, 213 Ga App 875, 878-879, 447 S E 2d 302 307 (1994) (finding improper counsel's remarks that defendant attempted to hide information throughout the discovery period), *abrogated in part on other grounds by Webster v Boyett*, 269 Ga 191, 496 S E 2d 459 (1998), Waters v Genesis Health Ventures, Inc., 400 F Supp 2d 814, 818 (E D Pa 2005) (noting that hostility or disputes related to the production of documents is entirely irrelevant and that "[a]rguments by either side about the completeness of the production of documents will not be tolerated" at trial), Empire Gas Corporation v American Bakeries Co., 646 F Supp 269, 274-276 (N D Ill 1986) (finding references to discovery disputes were irrelevant, prejudicial, and threatened to "divert[] the jury's attention" from the issues in the case) Attempts to bring discovery disputes or issues to the attention of the jury serve as a distraction as well a veiled attempt to disparage defense counsel and should be barred from reference or argument in the presence of the jury S C R Evid 402 and 403

P CSXT Executive Pay

Finally, CSXT expects Plaintiff to question witnesses and present evidence regarding the compensation of CSXT's corporate officers, executives, and high-ranking employees CSXT's executives are paid using an incentive-based system which rewards employees for increases in the company's net profit CSXT anticipates that Plaintiff will refer to this compensation scheme in an attempt to show that defense witnesses have a financial incentive to offer testimony favorable to the defense

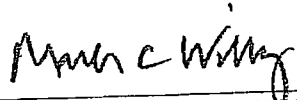
To allow evidence of CSXT's incentive-based compensation of its executives during the liability phase of the trial would unfairly prejudice CSXT by injecting irrelevant and misleading information regarding CSXT's financial standing into the case Shaps, 244 F 3d at 886 (noting general rule that "a jury should not be advised about the wealth or poverty of the parties")

CSXT's decisions with respect to executive compensation are not representative of illegal action, occurred outside the State of South Carolina, and are completely and wholly unrelated to the conduct which allegedly caused decedent's accident Campbell, 538 U S at 421. Consequently, to allow Plaintiff to urge the jury to punish CSXT for its conduct with respect to executive pay would prejudice the defense in the extreme. Accordingly, the Court should exclude all evidence of, or reference to, the compensation of any of CSXT's corporate officers, executives or high-ranking employees.

III CONCLUSION

For the foregoing reasons, CSX Transportation, Inc respectfully requests that its motion in limine be granted.

This 27th day of October, 2009


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This 27 day of October, 2009

Marc C. Wilky

STATE OF SOUTH CAROLINA)

COUNTY OF BAMBERG)

IN THE COURT OF COMMON PLEAS

CONNIE CARSON as Personal
Representative of the Estate of
BERYL HARVEY,

Plaintiff

vs

CSX TRANSPORTATION, INC and
SOUTH CAROLINA DEPARTMENT
OF TRANSPORTATION,

Defendants

CIVIL ACTION NO 06-CP-05-0034

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JAMES L. HERS
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CONNIE CARSON as Personal
Representative of the Estate of
BERYL HARVEY,

Plaintiff

vs

CSX TRANSPORTATION, INC and
SOUTH CAROLINA DEPARTMENT
OF TRANSPORTATION,

Defendants

CIVIL ACTION NO 06-CP-05-107

DEFENDANT CSX TRANSPORTATION INC 'S RESPONSE
TO PLAINTIFF'S MOTION TO STRIKE

This case arises from a railroad crossing collision in Denmark, South Carolina. The collision occurred on May 30, 2004, when Frances Harvey drove her van onto a CSXT railroad grade crossing, which intersects Honeyford Road, directly into the path of CSXT freight train no F75730. The train unavoidably struck the van, ejecting Beryl Harvey ("Beryl"), a quadriplegic confined to a wheelchair, and his mother, Frances Harvey ("Frances"), from the vehicle. Frances and Beryl sustained injuries in the accident, Beryl's were fatal. The pending wrongful death and survival actions on behalf of the estate of Beryl Harvey against CSX and the South Carolina Department of Transportation assert claims for compensatory and punitive damages against the

Defendants Beryl left no surviving spouse or issue Therefore, as Beryl's lone surviving parent, Frances Harvey is the sole beneficiary of both claims

THE CONTRIBUTORY NEGLIGENCE OF FRANCES HARVEY, THE SOLE BENEFICIARY OF THE DECEDENT'S ESTATE, IS A DEFENSE TO THE WRONGFUL DEATH AND SURVIVAL ACTIONS

A) Wrongful Death

South Carolina's Wrongful Death statute provides a cause of action "for the benefit of the wife or husband and child or children of the person whose death shall have been so caused, and, if there be no such wife, husband, child or children, then for the benefit of the parent or parents " S C Code Ann § 15-51-20 (1976) Here, Beryl died intestate, leaving no surviving spouse or children Additionally, Beryl's father, Charles Harvey, died after Beryl's death and after the instant suit commenced Nevertheless because Frances Harvey is Beryl's sole surviving parent, she is also the sole wrongful death beneficiary

South Carolina law confirms this conclusion In Morris v Spartanburg Ry, Gas & Elec Co, 70 S C 279, 49 S E 854 (S C 1904), the Supreme Court held that the death of a beneficiary during the pendency of a wrongful death action does not abate the action Id at 281-82, 49 S E at 855 Instead, the action is continued "for the benefit of whoever may be entitled to participate in the distribution of such recovery as may be had " Id The Court also noted that the father in Morris, as the sole surviving parent of a wrongful death decedent "would have been the sole beneficiary in the event of his being alive at the time of recovery of damages " Id See also Elkin v S Ry, 156 S C 390, 394, 153 S E 337, 339 (S C 1930) (affirming Morris and stating "it seems to be generally conceded that, where one or more of the several beneficiaries in the same class die, the right of action abates as to them and survives for the exclusive benefit of the remaining beneficiaries of the same class")

In the instant case, at the time of Beryl's death, both of his parents were living and were therefore entitled to share the proceeds, if any, of this wrongful death suit The death of Charles left Frances as Beryl's sole surviving parent and also extinguished any interest Charles had in

this wrongful death suit. Thus, the precise scenario described by the Morris Court is present here, namely, Frances is the sole beneficiary because she is the only parent alive at the time of recovery of damages.

Other jurisdictions are in accord. See, e.g., Walsh v. Bressette, 51 R.I. 354, 358, 155 A.1, 3 (R.I. 1931) (“the class which is to participate in the recovery is closed and the beneficiaries determined not when the death occurs but when judgment is entered”), Wackenhut Corr. Corp. v. de la Rosa, ____ S.W.3d ____, 2009 WL 866791, at *31 (Tex. App. 2009) (concluding that the death of a wrongful death beneficiary before trial precluded his recovery), Lornson v. Siddiqui, 302 Wis.2d 519, 541, 735 N.W.2d 55, 66 (Wis. 2007) (concluding that ‘a claimant’s cause of action does not survive the claimant’s death before judgment’).

As the sole wrongful death beneficiary, Frances’ contributory negligence is a defense to this claim. It is settled law in South Carolina that “the contributory negligence of a beneficiary under [the wrongful death statute] will bar recovery so far at least as that beneficiary is concerned.” Wilson v. Clarendon County, 139 S.C. 333, 335-6, 138 S.E. 33, 34 (S.C. 1927). This law is based on the equitable principle that “[n]o one is allowed to take advantage of [her] own wrong.” Wilson, at 336, 138 S.E. at 34 (quoting Sandel v. State, 115 S.C. 168, 175, 104 S.E. 567, 569 (S.C. 1920)). See also Cirsosky v. Smathers, 128 S.C. 358, 122 S.E. 864 (1924) (affirming Sandel and concluding that recovery under the wrongful death statute is barred by the contributory negligence of the statutory beneficiaries). Similarly, in Hall v. U.S., 381 F.Supp. 224, 226 (D.S.C. 1974), the Court recognized that “it is well established in South Carolina that a parent, or other beneficiary suing under the wrongful death statute can be barred from recovery by his own contributory negligence.” Id. (citing Wilson, emphasis added). This bar to recovery for a contributory negligent beneficiary applies

to every case under the [wrongful death statute], whether the relation of the deceased and the next of kin guilty of contributory negligence was that of parent and child, husband and wife, brother and sister, or whatever other relationship, where the deceased was in the care of the next of kin, and whether or not the deceased was an adult or minor.

Hall, 381 F Supp at 226 See also Aetna Cas & Sur Co v Curley, 585 A 2d 640, 645 (R I 1991) (concluding that wrongful death claim is barred by the contributory negligence of the sole beneficiary)

Furthermore, while Frances is not the named plaintiff in the instant action, her claim is still barred by her contributory negligence. The plaintiff in this suit is Beryl's Personal Representative, Connie Carson ("Carson"). Carson is a proper plaintiff under S C Code Ann § 15-51-20 which states in pertinent part, "[e]very such action shall be brought by or in the name of the executor or administrator of such person." Nonetheless, the real party in interest is Frances, for whose sole benefit the action is being prosecuted. According to Glenn v E I DuPont De Nemours & Co, 254 S C 128, 140, 174 S E 2d 155, 161 (S C 1970), "[t]he right of action is, of course, vested by statute in the personal representative, who is only a trustee for the beneficiaries, the beneficiaries, in a sense, being the real parties in interest." Thus, Carson is essentially serving as Frances' trustee in this suit. Therefore because Frances is the real party in interest in the suit and the sole beneficiary, her negligence in causing the collision out of which the suit arose bars any recovery in this claim.

B) Survival Action

South Carolina's survival statute provides that causes of action for "any and all injuries to the person" survive to the personal representative of the deceased person. S C Code Ann § 15-5-90 (1976). Survival actions generally cover medical expenses, conscious pain and suffering, and funeral expenses. Smalls v S C Dep't of Educ, 339 S C 208, 216, 528 S E 2d 682, 686 (S C Ct App 2000), see also S C Code Ann § 15-5-100 (1976) (funeral expenses may be recovered in a wrongful death action or a survival action, but not both). In the instant case, damages under the survival action will be limited to Beryl's conscious pain and suffering, if any, (and perhaps funeral expenses if not recovered under the wrongful death action) because he died at the site of the collision and there were no medical expenditures related to his fatal injuries.

Damages in a survival action are awarded for the benefit of the decedent's estate, rather than for the benefit of the decedent's family as is the case with wrongful death damages. Scott v

Porter, 340 S C 158, 170, 530 S E 2d 389, 395 (S C Ct App 2000) Consequently, South Carolina's Probate Code, S C Code Ann § 62-1-100 et seq (1976), controls the distribution of survival damages because Beryl died intestate According to the Probate Code, because Beryl died without a surviving spouse or issue, his parents are the sole beneficiaries of his estate S C Code Ann § 62-2-103(2) (1976) As in wrongful death actions, the heirs or beneficiaries of the decedent's estate, rather than the personal representative, are the real parties in interest See Cowan v Pac Gamble Robinson Co., 232 F Supp 403, 404 (D Mont 1964) (noting that beneficiary is real party in interest in a survival action) Thus, while Carson is properly named as the plaintiff in the survival action, Frances is the real party in interest because she is Beryl's sole surviving parent

For the same reasons and based on the same legal precedent referred to in Section II A above, and because Frances is the sole surviving beneficiary, her contributory negligence is a defense to the survival claim The misconduct of a beneficiary which causes the decedent's death will bar recovery in a survival action as well as in a wrongful death action "Survival actions are like wrongful death actions in that some types of misconduct by a beneficiary defeat recovery of damages for that beneficiary in a survival action because such conduct is deemed to relinquish the right to a distributive share" F Patrick Hubbard & Robert L Felix, The S C Law of Torts, 621 (2d Ed 1997) See also Curley, 585 A 2d at 645 (R I 1991) (concluding that survival claim is barred by the contributory negligence of sole beneficiary), Moore v Kinney, 315 So 2d 340, 342 (La Ct App 1975) (barring parent's survival claim based on the "public policy which forbids one to reap benefit from his own misconduct") In Curley, the Rhode Island Supreme Court concluded

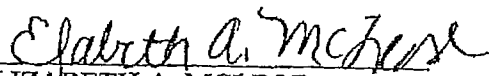
to maintain an action pursuant to [the survival statutes], when any award would go to the tortfeasor responsible for the wrongful death of the decedent, cannot be tolerated Such an action would permit the wrongdoer to benefit from her own wrong and would violate the public policy of this jurisdiction

585 A 2d at 645 (emphasis added) For the same policy reason recovery is denied to a negligent beneficiary under the wrongful death statute the court denied recovery under the survival statute

Id. See also Wooten v. Amspacher, 279 S C 325, 326, 307 S E 2d 232, 233 (S C 1983) (applying evidentiary ruling in a wrongful death case to a survival case, establishing the propriety of applying similar treatment to the two types of actions)

While the South Carolina Supreme Court has yet to address this precise issue in the context of a survival action, sound public policy concerns discussed by the Court in Wilson and Sandel, recognized as authoritative in The S C Law of Torts, and followed in Curley and Moore, dictate that Frances Harvey, as the sole beneficiary under the survival action, should not benefit from her own wrongdoing. As such, a finding of contributory negligence of Frances Harvey should be a defense to any recovery under the survival cause of action.

This the 4th day of November, 2009


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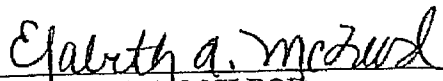
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This 4th day of November, 2009


ELIZABETH A MCLEOD

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF BAMBERG	)	IN THE COURT OF COMMON PLEAS
	)	
CONNIE CARSON as Personal	)	
Representative of the Estate of	)	
BERYL HARVEY,	)	CIVIL ACTION NO 06-CP-05-0034
	)	
Plaintiff	)	
vs	)	
	)	
CSX TRANSPORTATION, INC and	)	
SOUTH CAROLINA DEPARTMENT	)	
OF TRANSPORTATION,	)	
	)	
Defendants	)	

CONNIE CARSON as Personal	)	
Representative of the Estate of	)	
BERYL HARVEY,	)	
	)	CIVIL ACTION NO 06-CP-05-107
Plaintiff	)	
vs	)	
	)	
CSX TRANSPORTATION, INC and	)	
SOUTH CAROLINA DEPARTMENT	)	
OF TRANSPORTATION,	)	
	)	
Defendants	)	

DEFENDANT CSX TRANSPORTATION, INC 'S TRIAL BRIEF

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INTRODUCTION

This case arises from a railroad crossing collision in Denmark, South Carolina. The collision occurred on May 30, 2004, when Frances Harvey drove her van onto a CSXT railroad grade crossing, which intersects Honeyford Road, directly into the path of CSXT freight train no F75730. The train unavoidably struck the van, ejecting Beryl Harvey ("Beryl"), a quadriplegic confined to a wheelchair, and his mother, Frances Harvey ("Frances"), from the vehicle. Frances and Beryl sustained injuries in the accident. Beryl's were fatal. The pending wrongful death and survival actions on behalf of the estate of Beryl Harvey against CSX and the South Carolina Department of Transportation assert claims for compensatory and punitive damages against the Defendants. Beryl left no surviving spouse or issue. Therefore, as Beryl's lone surviving parent, Frances Harvey is the sole beneficiary of both claims.

I DUTIES OF DRIVERS, RAILROADS AND THE SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION AT RAILROAD CROSSINGS

South Carolina law imposes duties on all the parties involved in this matter with respect to the Honeyford Road railroad crossing. For example, both railroads and drivers have reciprocal duties regarding crossings. "It is elementary that a railroad company and a highway traveler have correlative duties which require both to exercise at least average care and prudence in such cases." Taylor v. Atl. Coast Line R.R. Co., 217 S.C. 435, 442, 60 S.E.2d 889, 891 (S.C. 1950). The South Carolina Supreme Court has described the two duties as "one to avoid being injured and the other to avoid inflicting injury." Truett v. Atl. Coast Line R.R. Co., 206 S.C. 144, 150, 33 S.E.2d 396, 398 (S.C. 1945). One of the principal cases for defining duties at railroad crossings was Chisholm v. Seaboard Air Line Ry., 121 S.C. 394, 114 S.E. 500 (S.C. 1922), which explained that the parties are charged with a "mutual duty of keeping a lookout for danger and the degree of vigilance required of both is in proportion to the known risk." Id. at 401, 114 S.E. at 503.

A) Driver's Duties

The specific duties for a driver approaching a railroad crossing come from both statutory and common law. First, statutory law requires a driver to yield the right-of-way to an approaching train that is plainly visible and in hazardous proximity to the crossing. Under South Carolina law, a driver must stop the vehicle between 15 and 50 feet from the nearest rail whenever 1) an approaching train within 1500 feet of the crossing gives an audible signal, and the train poses a hazard because of its proximity, or 2) an approaching train is "plainly visible and in hazardous proximity to the crossing." S.C. Code Ann. § 56-5-2710(a) (2006). In either case, the driver "shall not proceed until he can do so safely." *Id.* Drivers are also not permitted to stop or park their vehicles on the railroad tracks unless it is at the express direction of a police officer or other traffic controller. S.C. Code Ann. § 56-5-2530 (A)(1)(h) (2006).

Furthermore, when stop signs are erected at railroad grade crossings, "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." S.C. Code Ann. § 56-5-2715 (2006). Pursuant to S.C. Code Ann. §§ 56-5-2740 and 56-5-2330 (2006), every driver of a vehicle approaching a stop sign shall stop "at a clearly marked stop line." "After having stopped, the driver shall yield the right-of-way to any vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard during the time when the driver is moving across or within the intersection." S.C. Code Ann. § 56-5-2330(b).

South Carolina common law also imposes duties on the driver to look and listen in both directions for an approaching train before attempting to cross. Connelly v. S. Ry. Co., 249 S.C. 363, 154 S.E.2d 569, 572 (S.C. 1967). The driver must perform this safety check to the best of his abilities and "he must look and listen at a place and in a manner that will make the use of his senses effective." *Id.*, Russell v. Seaboard Air Line R.R. Co., 246 S.C. 516, 144 S.E.2d 799, 803-04 (S.C. 1965) ("[O]n reaching a railroad crossing and before attempting to go upon the track, he must look and listen in both directions for approaching trains, [he] must look and listen at a place and in a manner that will make the use of his senses effective.") The

rule is that a driver "is not bound to see or to hear, but he is bound to make all reasonable effort[s] to see and to hear that an ordinarily prudent man would make under like circumstances" Cook v Atl Coast Line R.R. Co., 196 S C 230, 241, 13 S E 2d 1 6 (S C 1941) See also Crosby v Sawyer, 291 S C 474, 476, 354 S E 2d 387, 388 (1987) ("His duty is not merely to look but to observe, he must look in such an intelligent and careful manner as to enable him to see what a person exercising ordinary care and caution could see under like circumstances") Even when a train is not immediately visible, the driver must exercise due care because "it is always train time at a railroad crossing" Breeden v Rockingham R.R. Co., 193 S C 220, 224, 8 S E 2d 366, 368 (S C 1940) Further, "[t]he very presence of such a crossing is notice to the person approaching or attempting to cross it of the danger of colliding with a passing engine or train" Robison v Atl Coast Line R.R. Co., 179 S C 493, 501, 184 S E 96, 100 (S C 1936)

The driver's normal duty to look, listen, and generally exercise proper caution may be modified only by unusual or hazardous conditions To weigh the circumstances against the duty of the driver, the court asks "Could the traveler by the reasonable use of his senses in the performance of his duty to look and listen under the circumstances surrounding him have discovered the proximity of the approaching train in time to avoid the accident?" Chisholm, 121 S C at 403, 114 S E at 503 "If [a traveler] fails to exercise such ordinary care, he incurs whatever danger he could thereby have discovered and avoided, and, if such failure results in injury, he is left without a remedy" Robison, 179 S C at 501, 184 S E at 100

Where the evidence shows that the driver of an automobile inexplicably entered a crossing in the path of a clearly visible train, South Carolina courts have found the driver's conduct to be the sole proximate cause of the accident See Gibson v Atl Coast Line R.R. Co., 110 S C 331, 332, 96 S E 519, 520 (S C 1918) In Gibson, the court held that "[t]he sole proximate cause of plaintiff's injury was his lack of care and his failure to observe the ordinary precaution in crossing the railroad track," where "[t]he plaintiff saw the train crossing and actually occupying the track," and could have stopped, but did not do so Id at 332, 96 S E at 520 The court held that "[t]he only inference that can be drawn from the evidence is that not the

failure to have gates or a watchman at the crossing or the high rate of speed of the train, but the careless, reckless conduct of the plaintiff, was the cause of his injury” Id at 333, 96 S E at 520 (emphasis added) See also Wingate v Seaboard Air Line R.R. Co., 244 S C 332, 337, 137 S E 2d 258, 260 (S C 1964) (holding that the trial court should have directed a verdict for the railroad where the accident occurred on a clear day, the deceased had no impairment to his sight or hearing, there was nothing to distract the deceased’s attention, he approached the crossing (with which he was thoroughly familiar) at a speed of 5 to 15 miles per hour and had ample unobstructed view of the approaching train), Poole v S Ry Co., 250 S C 213, 218, 157 S E 2d 175, 178 (S C 1967) (stating “It is obvious that the primary and efficient cause of the collision if not the sole proximate cause thereof, was the conduct of [the driver] in approaching the crossing, of which she was fully aware, without reducing her speed and while driving with dim lights In the absence of anything which would reasonably put the appellant on notice to the contrary, it was entitled to presume that motorists using the highway would obey the law and exercise due care”), Wannamaker v S Ry Co., 191 S C 86, 96, 3 S E 2d 811, 815 (S C 1939) (affirming directed verdict for railroad where there was no explanation for the gross negligence of the plaintiff in going on the crossing in full view of the approaching train)

Moreover, if a driver fails to exercise even “slight care,” and as a result he crosses the tracks in front of an oncoming train, he is guilty of gross negligence Russell, 246 S C at 525, 144 S E 2d at 804 “[A] traveler who enters upon a conspicuously marked crossing, or one which he is familiar with, in the path of an oncoming train when had he but looked or listened, he [would] have discovered it, is guilty of gross contributory negligence and recklessness as a matter of law” Id Gross negligence, as opposed to ordinary or simple negligence, “is the intentional, conscious failure to do a thing that is incumbent upon one to do, or the doing of a thing intentionally that one ought not to do” Carter v Atl Coast Line R.R. Co., 192 S C 441, 447, 7 S E 2d 163, 166 (S C 1940) “It is equally as well settled in this state that when one undertakes to go over a crossing in front of an immediately approaching train, he is guilty of gross contributory negligence as a matter of law” Howell v S Ry Co 192 S C

152, 154, 5 S E 2d 860, 861 (S C 1939) See also Isgett v Atl Coast Line R R Co, 328 F 2d 364 (4th Cir 1964) (a driver's failure to move out of the way of an oncoming train is deemed gross contributory negligence)

B) Railroad's Duties

Railroads also have several statutory and common law duties regarding highway grade crossings. First, the railroad is responsible for "construct[ing] and maintain[ing] grade crossings meeting the requirements of the authorities responsible for such highways" S C Code Ann § 58-15-2110(a) (2008). Specifically, the railroads are required to "construct and maintain the crossings to meet the specifications of the Department of Transportation" S C Code Ann § 58-15-2120 (2008). The railroad is also responsible for placing and maintaining at every crossing "railroad at grade standard cross-buck signs" S C Code Ann § 56-5-1010 (2006). Additional signage is required under S C Code Ann § 58-17-1390 (1976) which states as follows

[e]very railroad corporation shall cause signs to be placed and constantly maintained alongside of each public road or street where it is crossed by the railroad on the same level. Each such sign shall be elevated so as to be easily seen by travelers and on each side of it shall be printed in large letters the word "Railroad Crossing" unless the railroad corporation elects to place two of such signs at each crossing, one on each side of the track in which case each of such signs may have thereon in large letters, only on the side facing the traffic approaching the crossing, the words "Railroad Crossing"

(quotations in original)

Second, the railroad's engine must be equipped with a bell or whistle, and the engineer, conductor, or fireman must activate it at least 500 yards from the crossing and continue doing so until the engine passes the crossing. S C Code Ann § 58-15-910 (1976). If an oncoming train fails to give the warning prescribed by § 58-15-910 and that failure proximately causes the injury, the railroad may be liable for damages. S C Code Ann § 58-17-1440 (1976). However, as stated above, a railroad is not liable unless the failure to give the signals is the proximate cause of the injury. See Truett, 206 S C at 149, 33 S E 2d at 398 (The South Carolina Supreme Court rejected plaintiff's contention that the railroad's failure to blow the whistle was a cause of

the accident, finding that "[t]he ringing of the bell or blowing of the whistle would not have given appellant any more warning or information than he already had ") The railroad is also not liable under § 1440 for failure to give the required signals if "the person injured or the person having charge of his person or property was at the time of the collision guilty of gross or willful negligence or was acting in violation of the law and that such gross or willful negligence or unlawful act contributed to the injury " Id., Cent. of Ga. Ry. v. Walker Truck Contractors, 270 S C 533, 539, 243 S E 2d 923, 926 (S C 1978), Baxley v. Atl. Coast L. R. R. Co., 193 S C 429, 437-38, 8 S E 2d 744, 748 (S C 1940)

Furthermore, "[w]hile the railroad is required to give the statutory crossing signals, the failure of the railroad to give such signals does not relieve a traveler of the duty to exercise due care to observe the approach of trains at the crossing " Wingate, 244 S C at 336, 137 S E 2d at 259 In Wingate, the South Carolina Supreme Court reversed the lower court's judgment and found in favor of the railroad, despite the fact that the railroad had failed to give the required warning signals, because it found that the driver could have avoided the accident if he had exercised even slight care "[t]here is no explanation of his driving into the path of the train under the foregoing circumstances except that he failed to exercise even slight care for his own safety Under the circumstances such would constitute contributory gross or willful negligence and bar recovery by the plaintiff " Id. at 337, 137 S E 2d at 260

Third, the railroad has a common law duty, along with the driver, to keep a lookout for danger and to warn drivers by giving "such signals as may be reasonably sufficient, in view of the situation and surroundings " Chisholm, 121 S C at 402, 114 S E at 502, see also Doremus v. Atl. Coast Line R. R. Co., 242 S C 123, 133, 130 S E 2d 370, 375 (S C 1963) However, "a railroad train by reason of its character and momentum and the requirements of public travel by means thereof has the right of way at such crossings " Chisholm, 121 S C at 402, 114 S E at 502

Finally, a railroad generally has no duty to slow the train as it approaches a crossing Upon seeing a car approach a crossing, the train crew has "a right to assume that the driver [is] in

possession of his faculties and [will] stop in a position of safety' Bramlett v S Ry Co, 234 S C 283 289-90, 108 S E 2d 91, 94 (S C 1959) Additionally, a railroad does not breach any duty to slow or stop its train upon seeing a person approaching the track, unless the collision becomes apparent for a sufficient amount of time to avoid the injuries Id at 291, 108 S E 2d at 95 (affirming judgment as a matter of law in favor of the railroad)

C) South Carolina Department of Transportation's Duties

The South Carolina Department of Transportation ('SCDOT') has the authority to order the construction of grade crossings, which obligates the railroad to build and maintain the crossing in conformity with SCDOT's safety standards S C Code Ann § 58-15-2120 Once the crossing has been built, SCDOT is responsible for periodic inspections of the crossing to check for hazards

All railroad crossings on public highways must be inspected for conditions which unsafely obstruct a motorist's view of approaching trains, for the presence of crossbucks prescribed by 58-17-1390, and for the presence of stops signs authorized by law to be placed at railroad crossings

S C Code Ann § 58-17-1450 (2008) If the SCDOT inspector identifies a hazard at the crossing or within the railroad's right of way, the inspector has a duty to report the hazard to the Deputy Director of Engineering within the department, who then notifies the railroad of the work that needs to be done or notifies the local governing body that a stop sign is needed Id The railroad has 60 days to remove objects obstructing a motorist's view of the train, 30 days to secure or maintain existing crossbuck signs, and 10 days to install new crossbucks Id The person who initially performed the inspection is responsible for performing follow-up inspections to verify that the hazard has been removed or repaired Id Here, the required inspections were performed at the Honeyford Road crossing and no obstructions to view were found by the state inspectors

The SCDOT is also responsible for "plac[ing] and maintain[ing] such traffic-control devices upon all state highways as it shall deem necessary to regulate, warn or guide traffic" S C Code Ann § 56-5-930 (2006) South Carolina defines 'official traffic-control devices' as "[a]ll signs, signals, markings and devices placed or erected by authority of a

public body or official having jurisdiction for the purpose of regulating, warning or guiding traffic ” S C Code Ann § 56-5-540 (2006) Finally, regarding determining which traffic-control devices will be used at a given grade crossing, The Manual on Uniform Traffic Control Devices, which the SCDOT adopted as its official traffic control manual as of May 1, 2004 pursuant to S C Code Ann § 56-5-920 (2006), states “[t]he highway agency or authority with jurisdiction and the regulatory authority with statutory authority, if applicable, jointly determine the need and selection of devices at a highway-rail grade crossing ” The Manual on Uniform Traffic Control Devices 8A-1 (2003) Thus, determining which traffic-control device is best suited to any given railroad grade crossing is in the discretion of the SCDOT

II THE CONTRIBUTORY NEGLIGENCE OF FRANCES HARVEY, THE SOLE BENEFICIARY OF THE DECEDENT’S ESTATE, IS A DEFENSE TO THE WRONGFUL DEATH AND SURVIVAL ACTIONS

A) Wrongful Death

South Carolina’s Wrongful Death statute provides a cause of action “for the benefit of the wife or husband and child or children of the person whose death shall have been so caused, and, if there be no such wife, husband, child or children, then for the benefit of the parent or parents ” S C Code Ann § 15-51-20 (1976) Here, Beryl died intestate, leaving no surviving spouse or children Additionally, Beryl’s father, Charles Harvey, died after Beryl’s death and after the instant suit commenced Nevertheless, because Frances Harvey is Beryl’s sole surviving parent, she is also the sole wrongful death beneficiary

South Carolina law confirms this conclusion In Morris v Spartanburg Ry, Gas & Elec Co, 70 S C 279, 49 S E 854 (S C 1904), the Supreme Court held that the death of a beneficiary during the pendency of a wrongful death action does not abate the action Id at 281-82, 49 S E at 855 Instead, the action is continued “for the benefit of whoever may be entitled to participate in the distribution of such recovery as may be had ” Id The Court also noted that the father in Morris, as the sole surviving parent of a wrongful death decedent “would have been the sole beneficiary in the event of his being alive at the time of recovery of damages ” Id See also

Elkin v S Ry, 156 S C 390, 394, 153 S E 337, 339 (S C 1930) (affirming Morris and stating "it seems to be generally conceded that, where one or more of the several beneficiaries in the same class die, the right of action abates as to them and survives for the exclusive benefit of the remaining beneficiaries of the same class")

In the instant case, at the time of Beryl's death, both of his parents were living and were therefore entitled to share the proceeds, if any, of this wrongful death suit. The death of Charles left Frances as Beryl's sole surviving parent and also extinguished any interest Charles had in this wrongful death suit. Thus, the precise scenario described by the Morris Court is present here, namely, Frances is the sole beneficiary because she is the only parent alive at the time of recovery of damages.

Other jurisdictions are in accord. See, e.g., Walsh v Bressette, 51 R I 354, 358, 155 A 1, 3 (R I 1931) ("the class which is to participate in the recovery is closed and the beneficiaries determined not when the death occurs but when judgment is entered"), Wackenhut Corr Corp v de la Rosa, ____ S W 3d ____, 2009 WL 866791, at *31 (Tex App 2009) (concluding that the death of a wrongful death beneficiary before trial precluded his recovery), Lomson v Siddiqui, 302 Wis 2d 519, 541, 735 N W 2d 55, 66 (Wis 2007) (concluding that "a claimant's cause of action does not survive the claimant's death before judgment")

As the sole wrongful death beneficiary, Frances' contributory negligence is a defense to this claim. It is settled law in South Carolina that "the contributory negligence of a beneficiary under [the wrongful death statute] will bar recovery so far at least as that beneficiary is concerned." Wilson v Clarendon County, 139 S C 333, 335-6, 138 S E 33, 34 (S C 1927). This law is based on the equitable principle that "[n]o one is allowed to take advantage of [her] own wrong." Wilson, at 336, 138 S E at 34 (quoting Sandel v State, 115 S C 168, 175, 104 S E 567, 569 (S C 1920)). See also Cirsosky v Smathers 128 S C 358, 122 S E 864 (1924) (affirming Sandel and concluding that recovery under the wrongful death statute is barred by the contributory negligence of the statutory beneficiaries). Similarly, in Hall v U S, 381 F Supp 224, 226 (D S C 1974), the Court recognized that "it is well established in South Carolina that a

parent, or other beneficiary, suing under the wrongful death statute can be barred from recovery by his own contributory negligence” Id. (citing Wilson, emphasis added) This bar to recovery for a contributorily negligent beneficiary applies

to every case under the [wrongful death statute], whether the relation of the deceased and the next of kin guilty of contributory negligence was that of parent and child, husband and wife, brother and sister, or whatever other relationship, where the deceased was in the care of the next of kin, and whether or not the deceased was an adult or minor

Hall 381 F Supp at 226 See also Aetna Cas & Sur Co v Curley, 585 A 2d 640, 645 (R I 1991) (concluding that wrongful death claim is barred by the contributory negligence of the sole beneficiary)

Furthermore, while Frances is not the named plaintiff in the instant action, her claim is still barred by her contributory negligence The plaintiff in this suit is Beryl’s Personal Representative, Connie Carson (“Carson”) Carson is a proper plaintiff under S C Code Ann § 15-51-20 which states in pertinent part, “[e]very such action shall be brought by or in the name of the executor or administrator of such person” Nonetheless, the real party in interest is Frances, for whose sole benefit the action is being prosecuted According to Glenn v E I DuPont De Nemours & Co, 254 S C 128, 140, 174 S E 2d 155, 161 (S C 1970), [t]he right of action is, of course, vested by statute in the personal representative, who is only a trustee for the beneficiaries, the beneficiaries, in a sense, being the real parties in interest” Thus, Carson is essentially serving as Frances’ trustee in this suit Therefore, because Frances is the real party in interest in the suit and the sole beneficiary, her negligence in causing the collision out of which the suit arose bars any recover in this claim

B) Survival Action

South Carolina’s survival statute provides that causes of action for “any and all injuries to the person” survive to the personal representative of the deceased person S C Code Ann § 15-5-90 (1976) Survival actions generally cover medical expenses, conscious pain and suffering, and funeral expenses Smalls v S C Dep’t of Educ, 339 S C 208, 216, 528 S E 2d 682, 686

(S C Ct App 2000), see also S C Code Ann § 15-5-100 (1976) (funeral expenses may be recovered in a wrongful death action or a survival action, but not both) In the instant case, damages under the survival action will be limited to Beryl's conscious pain and suffering, if any, (and perhaps funeral expenses if not recovered under the wrongful death action) because he died at the site of the collision and there were no medical expenditures related to his fatal injuries

Damages in a survival action are awarded for the benefit of the decedent's estate, rather than for the benefit of the decedent's family as is the case with wrongful death damages Scott v Porter, 340 S C 158, 170, 530 S E 2d 389, 395 (S C Ct App 2000) Consequently, South Carolina's Probate Code, S C Code Ann § 62-1-100 et seq (1976), controls the distribution of survival damages because Beryl died intestate According to the Probate Code, because Beryl died without a surviving spouse or issue, his parents are the sole beneficiaries of his estate S C Code Ann § 62-2-103(2) (1976) As in wrongful death actions, the heirs or beneficiaries of the decedent's estate, rather than the personal representative, are the real parties in interest See Cowan v Pac Gamble Robinson Co, 232 F Supp 403, 404 (D Mont 1964) (noting that beneficiary is real party in interest in a survival action) Thus, while Cason is properly named as the plaintiff in the survival action, Frances is the real party in interest because she is Beryl's sole surviving parent

For the same reasons and based on the same legal precedent referred to in Section II A above, and because Frances is the sole surviving beneficiary, her contributory negligence is a defense to the survival claim The misconduct of a beneficiary which causes the decedent's death will bar recovery in a survival action as well as in a wrongful death action "Survival actions are like wrongful death actions in that some types of misconduct by a beneficiary defeat recovery of damages for that beneficiary in a survival action because such conduct is deemed to relinquish the right to a distributive share" F Patrick Hubbard & Robert L Felix, The S C Law of Torts, 621 (2d Ed 1997) See also Curley, 585 A 2d at 645 (R I 1991) (concluding that survival claim is barred by the contributory negligence of sole beneficiary), Moore v Kinney, 315 So 2d 340, 342 (La Ct App 1975) (barring parent's survival claim based on the "public

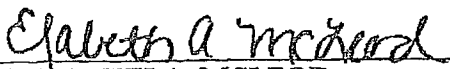
policy which forbids one to reap benefit from his own misconduct') In Curley, the Rhode Island Supreme Court concluded

to maintain an action pursuant to [the survival statutes], when any award would go to the tortfeasor responsible for the wrongful death of the decedent, cannot be tolerated Such an action would permit the wrongdoer to benefit from her own wrong and would violate the public policy of this jurisdiction

585 A 2d at 645 (emphasis added) For the same policy reason recovery is denied to a negligent beneficiary under the wrongful death statute, the court denied recovery under the survival statute Id See also Wooten v Amspacher, 279 S C 325, 326, 307 S E 2d 232, 233 (S C 1983) (applying evidentiary ruling in a wrongful death case to a survival case, establishing the propriety of applying similar treatment to the two types of actions)

While the South Carolina Supreme Court has yet to address this precise issue in the context of a survival action, sound public policy concerns discussed by the Court in Wilson and Sandel, recognized as authoritative in The S C Law of Torts, and followed in Curley and Moore, dictate that Frances Harvey, as the sole beneficiary under the survival action, should not benefit from her own wrongdoing As such, a finding of contributory negligence of Frances Harvey should be a defense to any recovery under the survival cause of action

This the 5th day of November, 2009


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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that I have this day served a copy of the foregoing upon the
following

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via Facsimile and by depositing said copies in the United States mail with adequate postage
affixed thereto to ensure proper delivery

This 5th day of November, 2009

Elizabeth A. McCreesh

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BAMBERG	)	C/A NO 2006-CP-05-0034
	)	(Wrongful Death)
CONNIE CARSON AS PERSONAL	)	
REPRESENTATIVE OF THE	)	C/A NO 2006-CP-05-107
ESTATE OF BERYL HARVEY,	)	(Survival Action)
	)	
	)	
Plaintiff,	)	
	)	
-VS-	)	
	)	
CSX TRANSPORTATION, INC	)	
	)	
Defendant	)	

**PLAINTIFF'S MOTION FOR JUDGMENT NOT WITHSTANDING THE VERDICT,
MOTION FOR NEW TRIAL, AND MOTION FOR NEW TRIAL NISI ADDITUR**

Plaintiff hereby moves this Court for a judgment notwithstanding the verdict on both of the above-captioned cases pursuant to SCRCP 50(b), for a new trial on both of the above-captioned cases pursuant to SCRCP 59, and for a new trial nisi additur pursuant to SCRCP 59

The grounds for the motion for judgment not withstanding the verdict motions are as follows

1 The court erred in failing to direct a verdict in favor of Plaintiff and against Defendant CSX Transportation, Inc ("CSX") on the issue of negligence in failing to sound the horn because CSX admitted to failing to sound the horn in accordance with S C Code Ann § 58-15-910, and because the evidence was only susceptible of the inference that CSX violated S C Code Ann § 58-15-910

2 The court erred in failing to direct a verdict in favor of Plaintiff and against CSX on the issue of negligence because CSX admittedly failed to clear the subject crossing in accordance with its own standards, the CSX Crossing Clearing Program and because the

evidence was only susceptible of the inference that CSX was negligent in failing to clear vegetation at the crossing in accordance with its standards

The grounds for the motion for new trial on both of the above-captioned cases are as follows

1 The court erred in excluding evidence that the subject crossing was cut after this collision in order to impeach the testimony of witness, Jack Cowan, that CSX had been keeping its crossings cleared for a number of years prior to the collision

2 The court erred in failing to admit Plaintiff's Exhibit 105 into evidence which contained evidence the crossing was cleared on July 19, 2004, shortly after the collision for purposes of impeaching CSX's position that there were no sight distance obstructions at the crossing

3 The court erred in sustaining CSX's objection and in failing to allow Plaintiff to use CSX's Exhibit 134 in Plaintiff's closing argument where the exhibit was admitted into evidence without objection, and in not allowing Plaintiff to use CSX's Exhibit 134 to show that the crossing vegetation was cleared after the collision which necessitated the need for photogrammetry to recreate the conditions at the time of the collision

4 The court erred in allowing the jury to impute Frances Harvey's negligence to both the wrongful death and survival action when the law of South Carolina does not allow imputation of negligence in one-half of the survival action which passed by intestacy to the innocent siblings of Beryl Harvey

5 The court erred in failing to instruct the jury in response to its question that it was required to award some amount of damages on the survival action since there was no evidence but that Beryl Harvey suffered conscious pain and suffering, and because the evidence was

susceptible of only one inference and that was the estate suffered damages for medical and funeral expenses

6 The court erred in failing to charge S C Code Ann § 56-5-2715 in its entirety when the portion deleted by the court was applicable to the issues in the case

7 There was not any evidence or inference from the evidence to support the jury's verdict of \$0 damages on the survival claim

8 The court erred in excluding as a subsequent remedial measure the SC Department of Transportation Diagnostic Team's recommendation to install gates and lights at the Honeyford Road crossing on April 24, 2004

The Plaintiff's grounds for a new trial nisi additur are as follows

1 The jury found CSX negligent and that its negligence proximately caused Beryl Harvey's death. Due to the jury's finding, Plaintiff was entitled to some damages in the survival action because the evidence is susceptible only of the inference that Beryl Harvey suffered some conscious pain and suffering prior to his death and funeral and medical expenses were incurred by his estate as a result of his death. Plaintiff requests that the court award appropriate damages, subject to the defendant's right to elect a new trial.

BY



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Bamberg, South Carolina
November 25, 2009

STATE OF SOUTH CAROLINA)
)
COUNTY OF BAMBERG)

I, J Christopher Wilson, attorney for Plaintiffs in the cases of Connie Carson, as Personal Representative for the Estate of Beryl Harvey v CSX Transportation and the South Carolina Department of Transportation, Case No 06-CP-05-34, 107, and do hereby certify that I have served the foregoing Plaintiff's Notice of Motion for JNOV and Motion for a New Trial and New Trial Nisi Additur in the above matters by mailing a copy of the same by first class mail, postage prepaid to the attorney(s)/person(s) at the address(es) indicated as follows

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Bamberg, S C
November 25, 2009

STATE OF SOUTH CAROLINA)
COUNTY OF BAMBERG)

IN THE COURT OF COMMON PLEAS

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

Plaintiff,

vs

CSX Transportation, Inc., and South
Carolina Department of Transportation,

Defendant.

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

Plaintiff,

CSX Transportation, Inc., and South
Carolina Department of Transportation,

Defendants

**MOTION INFORMATION FORM
AND COVER SHEET**

Case # 06-CP-05-107

**MOTION INFORMATION FORM
AND COVER SHEET**

Case #2006-CP-05-0034

name, S.C. Bar no. and address of Plaintiff's atty.

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X **MOTION HEARING REQUESTED** (attach written motion and complete **SECTIONS I and III**)
 FORM MOTION, NO HEARING REQUESTED (complete **SECTIONS II and III**)

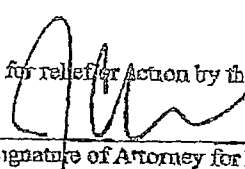
SECTION I Hearing Information

Nature of Motion. Notice of Motion for INOV and Motion for New Trial and New Trial Nisi Additur
Estimated Time Needed. 20 minutes Court Reporter Needed. NO

SECTION II Motion Type

X Written motion attached
 Form Motion—

I hereby move for relief from action by the court as set forth in the attached proposed order


Signature of Attorney for Plaintiffs

11/25/09
Date submitted

SECTION III Motion Fee

X PAID-AMOUNT 25.00

EXEMPT _____ Rule to Show Cause in Child or Spousal Support
(check reason) _____ Domestic Abuse or Abuse and Neglect
_____ Indigent Status _____ State Agency v Indigent Party
_____ Sexually Violent Predator Act _____ Post Conviction Relief
_____ Motion for Stay in Bankruptcy
_____ Motion for Publication _____ Motion for Execution (Rule 69, SCRCP)
_____ Proposed order submitted at request of the court, or, reduced to
writing from motion made in open court per judge's instructions
Name of Court Reporter _____
_____ Other _____

JUDGE'S SECTION

_____ Motion Fee to be paid upon filing of the attached order
_____ Other _____

JUDGE
CODE _____ Date _____

CLERK'S VERIFICATION

Collected by _____

DATE FILED _____

_____ MOTION FEE COLLECTED _____

_____ CONTESTED-AMOUNT DUE _____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BAMBERG	)	C/A NO 2006-CP-05-0034
	)	(Wrongful Death)
CONNIE CARSON AS PERSONAL	)	
REPRESENTATIVE OF THE	)	C/A NO 2006-CP-05-107
ESTATE OF BERYL HARVEY,	)	(Survival Action)
	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	
	)	
CSX TRANSPORTATION, INC	)	
	)	
Defendant	)	
	)	

**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION
FOR JUDGEMENT NOTWITHSTANDING THE VERDICT, MOTION FOR NEW
TRIAL AND MOTION FOR NEW TRIAL NISI ADDITUR**

Plaintiff, Connie Carson as Personal Representative of the Estate of Beryl Harvey ("Plaintiff"), submits this memorandum of law in support of its Motion for Judgment Notwithstanding the Verdict ("JNOV"), New Trial and New Trial *Nisi Additur*. For the reasons explained below, Plaintiff's motion should be granted.

I PLAINTIFF'S MOTION FOR NEW TRIAL NISI ADDITUR OR, ALTERNATIVELY, A NEW TRIAL SHOULD BE GRANTED

Plaintiff first moves for a new trial *nisi additur*. The grant or denial of new trial motions rest within the sound discretion of the circuit court. *Swicegood v Lott*, 379 S C 346, 355, 665 S E 2d 211, 216 (Ct App 2008). "The trial court has sound discretion when addressing questions of excessiveness or inadequacy of verdicts and its discretion will not be disturbed, absent or abuse of discretion." *Dillon v Frazer*, 383 S C 59, 63, 678 S E 2d 251, 253 (2009).

In this case, the jury found Frances Harvey 60% negligent and CSX Transportation, Inc ("CSXT") 40% negligent for the collision that occurred on May 30, 2004. After allocating the

percentages of negligence to both Plaintiff and CSXT, the jury asked the Court if it had to award damages on the survival action claim if it concluded that CSXT's negligence caused the collision. The Court instructed the jury that it would have to award damages if it concluded that Beryl Harvey experienced conscious pain and suffering. Consequently, the jury returned a verdict on the survival action for zero damages. The undisputed and uncontested evidence presented in this case is that Beryl Harvey endured conscious pain and suffering prior to his death, and Plaintiff objected to the instructions the Court gave to the jury because under the evidence, some damages had to be awarded. The Court commented in overruling Plaintiff's objection that it would deal with this issue by additur.

CSXT correctly notes in its memorandum that *Stevens v. Allen*, 342 S.C. 47, 536 S.E.2d 663 (2000), provides guidance as to a jury assessing liability against a defendant but awarding plaintiff zero damages. This outcome is inconsistent and contrary to South Carolina law. *Id.* at 53, 536 S.E.2d at 666. "[I]f a jury finds the plaintiff has failed to prove damages proximately caused by the defendant's negligence then its verdict should be for the defendant." *Id.*

CSXT cites *Stevens* for the proposition that Plaintiff was required to object to the jury's verdict and move to resubmit the case on the issue of damages. Otherwise, according to CSXT, Plaintiff waived any objection to the jury's verdict. However, the facts of this case differ from *Stevens*. There, the jury returned a verdict finding both the plaintiff and defendant 50% negligent, but awarded Plaintiff "zero damages." *Id.* at 48, 536 S.E.2d at 663. *Stevens* requested the trial court resubmit the case to the jury on the issue of damages as a result of the inconsistent verdict. *Id.* Ultimately, the trial judge denied Plaintiff's motion to resubmit, which the Supreme Court subsequently held should have been resubmitted on the issue of damages. *Id.*

Here, the jury, on its own initiative, asked the Court whether it was required to award damages for the survival action claim considering its responses to previous questions on the Verdict Form. Plaintiff timely made an objection to the Court's proposed response prior to submitting it to the jury. CSXT contends that *Stevens*, and other cases, required Plaintiff to object again after the jury returned its verdict of zero damages. CSXT misreads *Stevens*. *Stevens* only holds that a verdict for zero damages is improper. Because of the improper verdict, and the Court's incorrect instruction to the jury, Plaintiff is entitled to a new trial *nisi*.

If the Court denies the motion for new trial *nisi additur*, Plaintiff moves for a new trial absolute. A circuit court may grant a new trial absolute on the ground that the verdict is excessive or inadequate. *Rush v. Blanchard*, 310 S. Ct. 375, 379, 426, 5 E.2d 802, 805 (1993). As explained above, the jury found CSXT liable for Beryl Harvey's death but awarded zero damages. The evidence established that on the survival action Beryl Harvey suffered conscious pain and suffering for which some damages had to be awarded. In addition, the estate suffered loss for funeral and medical expenses. The court in *Stevens* noted "[i]f the jury cannot reach a consistent verdict, the trial court may then order a new trial *nisi* or new trial absolute." *Stevens v. Allen*, 342 S. Ct. 47, 53, 536 S. E.2d 663, 666 (2000).

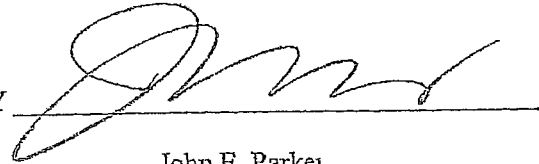
CONCLUSION

Based on the undisputed evidence of Beryl Harvey's conscious pain and suffering prior to his death, and the damages to the estate for funeral and medical expenses, Plaintiff's Motion for New Trial *Nisi Additur* or New Trial Absolute on the survival action damages should be granted.

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ATTORNEYS FOR PLAINTIFF

Hampton, South Carolina
December 17 2009

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF BAMBERG)

CONNIE CARSON as Personal)
Representative of the Estate) CIVIL ACTION NO 06 CP 05-0034
of BERYL HARVEY,)
Plaintiff,)
v)
CSX TRANSPORTATION, INC and)
SOUTH CAROLINA DEPARTMENT)
OF TRANSPORTATION,)
Defendants)

CONNIE CARSON as Personal)
Representative of the Estate) CIVIL ACTION NO 06-CP-05-107
of BERYL HARVEY,)
Plaintiff,)
v)
CSX TRANSPORTATION, INC and)
SOUTH CAROLINA DEPARTMENT)
OF TRANSPORTATION,)
Defendants)

**DEFENDANT CSX TRANSPORTATION, INC 'S RESPONSE TO PLAINTIFF'S
MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, MOTION FOR
NEW TRIAL, AND MOTION FOR NEW TRIAL NISI ADDITUR**

Defendant CSX Transportation, Inc ("CSXT ") hereby responds to Plaintiff's motions for judgment notwithstanding the verdict ("JNOV"), new trial, and new trial *nisi additur* as follows
For the reasons explained below, Plaintiff's motion should be denied in its entirety

I PLAINTIFF'S MOTION FOR JNOV SHOULD BE DENIED

A Legal Standard Applicable to Motion for JNOV

The JNOV movant's burden to establish error in the jury's verdict is a heavy one. In ruling on a motion for JNOV, the Court is required to view the evidence and all inferences that

can reasonably be drawn therefrom in the light most favorable to the non-movant McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). Accordingly, Plaintiff's motion should be denied where either the evidence yields more than one inference or its inference is in doubt.¹ Id. Such is the case here.

B The Court Did Not Err in Denying Plaintiff's Motion for Directed Verdict on Her Claim for Negligence *Per Se*

First, Plaintiff contends that she is entitled to JNOV on her short-whistle claim brought pursuant to S.C. Code Ann. § 58-15-910. Plaintiff claims that CSXT "admitted" to failing to sound the horn as required by the statute. However, at trial the Court heard testimony from CSXT's train crew, who testified that they blew the locomotive horn and rang the bell upon their approach to the crossing.¹ Furthermore, even assuming *arguendo* that CSXT "admitted" noncompliance with § 58-15-910, the Court properly refused to direct a verdict on Plaintiff's claim for negligence *per se* because the issue of proximate cause presented a question for the jury. See Rowe v. Fick, 250 S.C. 499, 505, 159 S.E.2d 47, 50-51 (1968) (concluding that trial court properly submitted issue of negligence *per se* to the jury where the matter of proximate cause presented a jury question). "In order to recover for negligence *per se* in this case [Plaintiff] must prove an alleged duty, breach thereof, *and* the causal connection between [CSXT]'s negligence and her injury before she is entitled to damages." Diopkin v. Beachwalk Villas Condominium Ass'n, Inc., 373 S.C. 360, 363, 644 S.E.2d 808, 810 (2007).

¹Of note, although Plaintiff presented expert testimony to the effect that the train's event recorder download showed that the horn was sounded slightly more than 1,350 feet from the crossing (rather than the 1,500 feet required by § 58-15-910), the jury was free to disregard this evidence. Cf. Webb v. CSX Transp., Inc., 364 S.C. 639, 651, 615 S.E.2d 440, 447 (2005) (noting that jury may properly disregard expert testimony) (citing State v. Johnson, 66 S.C. 23, 44 S.E. 58 (1903)), see also State v. Register, 323 S.C. 471, 481, 476 S.E.2d 153, 159 (1996) (explaining in reference to DNA testing that "[t]he jury should be allowed to make its own determination as to whether it believes the statistics are reliable. The jury is free to believe or disbelieve the experts and the statistics.")

“[W]hether or not such breach contributed as a proximate cause to plaintiff’s injury is ordinarily a question for the jury.” Gray v. Barnes, 244 S.C. 454, ___, 137 S.E.2d 594, 598 (1964). Such was the case here. Plaintiff’s own audiologist, Dr. David Lipscomb, testified that Frances Harvey did not hear the horn and that she would not have heard a horn blown in accordance with § 58-15-910. Furthermore, even according to Plaintiff’s own train operations expert, Mr. Jimmy Scott, the train crew began blowing the locomotive horn more than 1,350 feet from the crossing. Given this evidence that Frances Harvey did not react to a horn blown more than 1,350 feet away from the crossing, the jury could reasonably have concluded that the train crew’s alleged failure to blow the horn at a greater distance played no role in the accident. Cf. Petre v. Norfolk S. Ry. Co., 458 F. Supp. 2d 518, 535 (N.D. Ohio 2006) (“It is illogical to conclude that the 3-second delay in sounding the whistle prejudiced Mrs. Petre’s ability to hear the whistle (when it would have been much further from the crossing), since she did not appear to hear the whistle when the train was upon her”), *aff’d*, 260 Fed. Appx. 756, 2007 WL 4443254 (6th Cir. Dec. 14, 2007). Thus, even accepting Plaintiff’s own evidence as true, there was ample evidence from which the jury could have concluded that the train crew’s alleged violation of § 58-15-910 bore no causal relationship to the accident. Consequently, it would have been error to grant Plaintiff a directed verdict on her claim for negligence *per se*.

Regardless, Plaintiff’s argument is a *non sequitur*. The jury concluded that CSXT was negligent and that such negligence was a proximate cause of the accident, but nevertheless returned a defense verdict on Plaintiff’s wrongful death claim based on Frances Harvey’s comparative negligence. The “determination of the degrees of negligence attributable to the plaintiff and the defendant presents a question of fact for the jury to decide.” Fairchild v. South Carolina Dep’t of Transp., 385 S.C. 344, ___, 683 S.E.2d 818, 828 (2009). In comparative

negligence cases, the Court may only grant a directed verdict "if the sole reasonable inference from the evidence is that the non moving party's negligence exceeded fifty percent." *Id.* As a result, the presence of a jury question regarding the issue of contributory/comparative negligence precluded the Court from granting Plaintiff a directed verdict in the instant case. Accordingly, Plaintiff's motion for JNOV should be denied.

C The Court Did Not Err in Denying Plaintiff's Motion for Directed Verdict on her Vegetation Claim

Likewise, the Court properly denied Plaintiff's motion for directed verdict on her obstructive vegetation claim, and there is no basis for granting a JNOV on this ground. The jury received voluminous evidence regarding the sight distance at the crossing, including photographs and measurements taken by Don Crews, Plaintiff's counsel's investigator, which revealed a view of at least 1,014 feet down the tracks from a driver's vantage point at the stop line. Notwithstanding this evidence, Plaintiff contends that the Court should have granted a verdict in her favor because CSXT "admittedly" failed to clear the crossing in accord with its own rules and regulations, crossing-clearing program and maintenance of way requirements.

This argument is meritless. First, CSXT made no such admission, and there was ample evidence from which the jury could have concluded that the crossing was adequately maintained. More to the point, although a violation of company rules or regulations may constitute evidence bearing on the issue of negligence, such a violation is not dispositive of the question of whether the defendant breached its legal duty. *See Araujo v. S. Bell Tel. & Tel. Co.*, 291 S.C. 54, 57, 351 S.E.2d 908, 910 (Ct. App. 1986) (noting that although "company rules are admissible as evidence of negligence" "at the same time the question of whether a defendant owes a duty, the breach of which may constitute negligence is a question of law, not of fact"). In other

words, evidence that a defendant has failed to comply with its internal guidelines does not constitute evidence of “unreasonableness per se” and the jury is free to assign ‘whatever weight’ it wishes to the company’s internal rules in evaluating the reasonableness of the defendant’s conduct. See Caldwell v. K. Mart Corp., 306 S. Ct. 27, 32, 410 S. E. 2d 21, 24 (Ct. App. 1991). As CSXT repeatedly argued at trial, CSXT’s crossing-clearing program and other initiatives were designed to make safe crossings like the Honeyford Road crossing even safer. Here, the jury had ample evidence from which to conclude that CSXT provided adequate sight distance at the crossing irrespective of CSXT’s alleged noncompliance with its internal guidelines. Accordingly, the Court properly denied Plaintiff’s motion for directed verdict on her vegetation claim.

Moreover, as pointed out *supra* with respect to Plaintiff’s claims for negligence *per se*, jury issues of proximate cause and contributory/comparative negligence precluded the Court from granting Plaintiff a directed verdict. Thus, Plaintiff’s arguments in favor of JNOV fail, and her motion should be denied.

II PLAINTIF’S MOTION FOR NEW TRIAL SHOULD BE DENIED

A Legal Standard Applicable to Motion for New Trial

In the alternative to her request for JNOV, Plaintiff seeks a new trial. In so doing, Plaintiff takes issue with various evidentiary rulings made by the Court. Plaintiff also complains of infirmities in the Court’s jury instructions. Finally, Plaintiff also argues that the jury’s verdict of \$0.00 on her survival action is against the weight of the evidence and requires either a new trial or an award of damages by the Court. In essence, this amounts to an implicit argument that the jury’s verdict awarding zero damages is internally inconsistent and therefore must be set aside.

The grant or denial of a new trial rests within the Court's discretion. Creighton v. Coligny Plaza Ltd. P'ship, 334 S.C. 96, 113, 512 S.E.2d 510, 519 (Ct. App. 1998). Of interest here, "[t]he admission or exclusion of evidence is a matter within the sound discretion of the trial court and absent clear abuse, will not be disturbed on appeal." Gamble v. Int'l Paper Realty Corp., 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996). Thus, in order for an evidentiary ruling to warrant a new trial, the appellant "must show both the error of the ruling and resulting prejudice." Recco Tape & Label Co. v. Barfield, 312 S.C. 214, 216, 439 S.E.2d 838, 840 (1994).

Likewise, an erroneous jury charge—or the failure to give a requested charge—will not justify disturbing the jury's verdict absent proof of prejudice. See Stokes v. Spartanburg Reg'l Med. Ctr., 368 S.C. 515, 520, 629 S.E.2d 675, 678 (Ct. App. 2006) ("An erroneous jury charge will not result in a verdict being reversed unless the charge prejudiced the appellant's case"), see also Koutsogiannis v. BB & T, 365 S.C. 145, 149, 616 S.E.2d 425, 428 (2005) ("To warrant reversal, the refusal to give a requested charge must have been erroneous and prejudicial."). Here, Plaintiff cannot establish prejudicial error in either the Court's evidentiary rulings or its jury charges, and she has waived her argument that the jury's verdict was inconsistent.

B. The Court's Evidentiary Rulings Were Proper

First, Plaintiff argues that the Court erred in excluding evidence of crossing-clearing activity at the crossing following the accident. The Court excluded this evidence pursuant to Rules 403 and 407, SCRE. These rulings were well within the Court's discretion. In Webb v. CSX Transp., Inc., 364 S.C. 639, 653, 615 S.E.2d 440, 448 (2005), a similar case, the South Carolina Supreme Court concluded that evidence of post-accident crossing-clearing activity fell within the purview of Rule 407 and was inadmissible. In this regard, Plaintiff's argument that evidence of crossing-clearing activity was necessary to "impeach" testimony by CSXT witnesses

that the crossing was safe is ill-founded. Although Rule 407 allows the admission of subsequent remedial measures for the purpose of 'impeachment', see S C R Evid 407, that exception does not apply when "the sole value of the impeachment rests on the impermissible inference that the subsequent measures are admissible evidence of prior negligence." Herzog v Lexington Township, 167 Ill 2d 288, 301 NE 2d 926, 933 (1995). Here, CSXT argued only that sight distances at the crossing were adequate—neither CSXT nor any of its witnesses contended that sight distances at the crossing could not have been improved upon or increased. In essence, Plaintiff contends that, because CSXT contested her negligence claims, she was entitled to "impeach" CSXT's contentions with evidence of subsequent remedial measures. Under Plaintiff's logic, Rule 407's impeachment exception would swallow the rule.

Just as evidence of subsequent remedial measures is not considered sufficiently probative to be admissible to prove prior negligence, that evidence is not admissible for impeachment where the sole value of the impeachment rests on that same impermissible inference of prior negligence.

Allowing such evidence in these circumstances would swallow the general rule prohibiting the introduction of subsequent remedial measures and frustrate the policy considerations that support it. In every case, a defendant will dispute that his prior conduct was negligent. Once a defendant disputes his or her negligence at trial, a plaintiff could always seek to introduce evidence of subsequent remedial measures under the guise of impeachment. Thus, the general rule of excluding evidence of subsequent remedial measures would be swallowed by the impeachment exception. Furthermore, contrary to the policies supporting the general rule, parties to lawsuits would be discouraged from making improvements for fear that such actions would be used against them at trial.

Id. at 301-02, 657 NE 2d at 933, see also Flaminio v Honda Motor Co., 733 F 2d 463, 468 (7th Cir. 1984) ("Although any evidence of subsequent remedial measures might be thought to contradict and so in a sense impeach a defendant's testimony that he was using due care at the time of the accident, if this counted as 'impeachment' the exception would swallow the rule.")

Simply put, Plaintiff proposed at trial to use evidence of CSXT's subsequent remedial activity for the very purpose Rule 407 proscribes. Regardless, even if Rule 407 did not bar evidence of the crossing clearing, the Court properly concluded under Rule 403 that evidence of CSXT's subsequent remedial measures would unduly prejudice CSXT. Evidence which is not rendered inadmissible by Rule 407 may nevertheless be excluded under Rule 403 if the Court determines that the evidence lacks probative value or threatens to confuse or mislead the jury. See Grenada Steel Indus., Inc. v. Alabama Oxygen Co., Inc., 695 F.2d 883, 889 (5th Cir. 1983), see also Raymond v. Raymond Corp., 938 F.2d 1518, 1525 (1st Cir. 1991).

Similarly, Plaintiff claims that the Court should have allowed Plaintiff to use a portion of CSXT Exhibit 134 during her closing argument which referred to post-accident brush cutting at the crossing. This document consisted of handwritten notes by Gary Huett, a retained expert who created Plaintiff's animation. Although the parties stipulated to the admissibility of Mr. Huett's notes, CSXT never offered into evidence the portion of Mr. Huett's notes which referred to CSXT's subsequent remedial activity. When Plaintiff attempted to refer during her closing argument to a portion of the document which was never admitted into evidence during the trial, CSXT timely objected. Regardless, the Court acted well within its discretion when it concluded that any reference to CSXT's subsequent remedial measures was barred under Rules 403 and 407. In sum, the Court's rulings with respect to CSXT's brush-cutting activities after the accident were proper and did not prejudice Plaintiff.

Plaintiff also contends that the Court should have admitted evidence that in April 2004—just prior to the accident—the South Carolina Department of Transportation (“SCDOT”) recommended the installation of gates and lights at the Honeyford crossing. Of interest here, the Court excluded evidence that gates and lights were actually installed at the crossing subsequent

to the accident. The Court concluded that these subsequent remedial measures were inadmissible under Rules 403 and 407, SCRE, and Plaintiff does not challenge that ruling here.

Having essentially conceded that evidence of these subsequent remedial measures was properly excluded, Plaintiff can hardly argue that the Court should nevertheless have admitted evidence of the SCDOT recommendation. Rather, allowing Plaintiff to evade Rule 407 by presenting evidence that upgrades were planned prior to the accident would have invited the jury to draw the very prejudicial inference that Rule 407 forbids—that subsequent remedial measures constitute proof of negligence. Moreover, even if the SCDOT recommendation did not technically fall within the purview of Rule 407, the Court properly concluded that the report was plainly prejudicial and therefore subject to exclusion under Rule 403, SCRE. See Raymond, 938 F.2d at 1523 (upholding exclusion of product design modifications which were “on the drawing board” at the time of the accident).

Perhaps more importantly, Plaintiff neglects to address the fact that the Court also concluded that the SCDOT recommendation was inadmissible under 23 U.S.C. § 409, which provides

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 148 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

By its terms, § 409 precludes the admission of the SCDOT recommendation, which was completed for the purpose of evaluating and planning crossing safety enhancements pursuant to 23 U.S.C. § 130. In accord with § 130, SCDOT officials conducted a survey and then included

the Honeyford crossing on a list of crossings the State proposed to upgrade with federal funds. See 23 U.S.C. § 130(d) & (g). The federal government then approved the use of § 130 funds to install gates and lights at the Honeyford crossing. Accordingly, the SCDOT's April 2004 report fell squarely within the purview of § 409 and was properly excluded.

Furthermore, "[t]he plain language of [§ 409] excludes from evidence all data compiled for purposes of highway and railroad crossing safety enhancement and construction for which a state receives federal funding." Robertson v. Union Pac. R.R. Co., 954 F.2d 1433, 1435 (8th Cir. 1992). Congress promulgated § 409 "to facilitate candor in administrative evaluations of highway safety hazards and to prohibit federally required record-keeping from being used as a tool in private litigation." Id. (internal citations and quotations omitted). Consequently, "[u]nder § 409, the evidence presented at trial should be the same as if no upgrades had been planned." St. Louis Southwestern Ry. v. Malone Freight Lines, Inc., 39 F.3d 864, 867 (8th Cir. 1994). In sum, the Court properly excluded evidence of the SCDOT recommendation pursuant to § 409. More generally, Plaintiff has failed to show that any of the Court's evidentiary rulings were erroneous, much less that she suffered any prejudice as a result.

C The Court's Jury Instructions Were Proper, and Plaintiff has Waived All Objections to the Jury's Verdict

Next, Plaintiff argues that the Court erred "in allowing the jury to impute Frances Harvey's negligence to both the wrongful death and survival action." Here, Plaintiff is simply mistaken. The Court did not instruct the jury to apply comparative negligence principles to the survival action. Instead, the Court required the jury to reach a damages verdict on Plaintiff's survival claims even if it found that Frances Harvey was more than 50% responsible for the accident.

Plaintiff also complains that the Court should have instructed the jury that it was required to award some amount of damages on the survival action because the evidence demonstrated that the estate was entitled to recover for Beryl Harvey's pain and suffering, medical expenses, and funeral expenses. In the alternative, given the jury's finding that CSXT was negligent, Plaintiff urges the Court to grant new trial *msi additur* and "award appropriate damages."

Of interest here, during its deliberations, the jury asked the Court whether it had to award damages in the survival action if it concluded that CSXT's negligence caused the accident. The Court responded by indicating that the jury would have to award damages if it concluded that Beryl Harvey experienced conscious pain and suffering. However, when the jury then returned a zero damages verdict, Plaintiff did not object.

In this regard, CSXT recognizes that "a verdict finding the defendant liable but awarding zero damages [is] inconsistent or incomplete." Stevens v. Allen, 342 S. Ct. 47, 50, 536 S. E. 2d 663, 664 (2000). Consequently, when the jury returned a zero damages verdict on the survival action, Plaintiff could have requested the Court to resubmit the verdict to the jury "with instructions to either find for the defense or award some amount of damages." Id. However, despite the Court's clear invitation, Plaintiff did not object to the jury's verdict and instead consented to the Court's discharge of the jury. As a result, Plaintiff has waived any objection to the jury's verdict. See Dykema v. Carolina Emergency Physicians, P.C., 348 S. Ct. 549, 553, 560 S. E. 2d 894, 896 (2002) ("The trial court held the jury's failure to award actual damages against Companion mandated the grant of JNOV to Companion. We disagree. We find Companion's failure to object prior to discharge of the jury results in a waiver of the right to challenge the verdict.") A party may not "allow the jury to be discharged in the face of an obviously defective verdict, which could easily be corrected upon resubmission to the jury, in the hopes of gaining a

reversal on appeal' Id. Likewise, "the law imposes no duty upon the trial judge to reject an inconsistent verdict in the absence of an objection by either party" Longshore v. Sabel Sec. Servs., Inc., 365 S.C. 554, 563, 619 S.E.2d 5, 10 (Ct. App. 2005), see also Smith v. Phillips, 318 S.C. 453, 455, 458 S.E.2d 427, 429 (1995) ("[T]here is no duty imposed on the trial judge to question a jury's verdict of liability, but no damages unless requested to by a party.") Accordingly, now that the jury has been discharged Plaintiff cannot complain that the jury's verdict was defective.

Nor may Plaintiff request the Court to award damages via a new trial *nisi additur* or *remittitur*. "South Carolina law requires the jury to be the sole judge of issues of fact, including the issue of damages" Krepps ex rel. Krepps v. Ausen, 324 S.C. 597, 609, 479 S.E.2d 290, 296 (Ct. App. 1996). Thus,

[t]o permit the court to correct or construe a jury finding of no damages would, as a practical matter, displace the jury as the fact finder by allowing the court either to decide how the jury viewed the facts or to substitute its own view of the facts when the jury's verdict is uncertain. Under our law, where the case is tried to a jury, the judge cannot perform the jury's function for it. If the jury renders an ambiguous verdict, the court must resubmit the case to the jury, not act as a substitute for the jury.

Id. Accordingly, having waived her right to request that the case be resubmitted to the jury, Plaintiff cannot now ask the Court to substitute itself for the jury and award damages via new trial *nisi additur*.

Finally, CSXT addresses Plaintiff's argument that the Court erroneously failed to charge S.C. Code Ann. § 56-5-2715 "in its entirety." Section 56-5-2715 provides

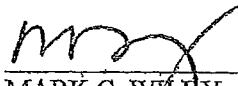
The Department of Transportation, and local authorities with the approval of the Department of Transportation, may designate particularly dangerous highway grade crossings of railroads and erect stop signs thereat. When such signs are erected, the driver of any vehicle shall stop within fifty feet, but not less than fifteen feet, from the nearest rail of the railroad and shall proceed only upon exercising due care.

At trial, the Court charged the jury on the portions of § 56-5 2715 pertaining to the motorist's duty to stop, but omitted the reference to SCDOT designation of "particularly dangerous" crossings

Notably, Plaintiff provides no explanation for her claim that this omission somehow prejudiced her. In any event, the Court's charge was not erroneous. The omitted portion of the statute was irrelevant to the issues of negligence, comparative negligence, proximate cause, and compensatory damages, which the jury was called upon to resolve. Apparently, Plaintiff contends that the Court should have instructed the jury that the SCDOT had determined the Honeyford Road crossing to be "particularly dangerous." Quite aside from the fact that the presence of stop signs at the crossing is not tantamount to such an administrative conclusion, Plaintiff was hardly entitled to an instruction to that effect from the Court. It was for the jury alone to decide whether the crossing provided adequate safety, and charging the jury on the omitted portion of § 56-5-2715 would not have been of substantive benefit to that determination. Consequently, the Court's decision not to charge § 56-5 2715 in its entirety presents no reason to disturb the jury's verdict.

In sum, for all of the foregoing reasons, the Court should **DENY** Plaintiff's motions for JNOV, new trial, and new trial *nisi additur*.

This 7th day of December, 2009



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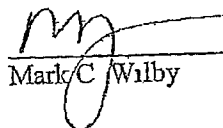
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served on opposing counsel by
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This 7th day of December, 2009


Mark C Wilby

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BAMBERG	)	
CONNIE CARSON as Personal	)	
Representative of the Estate	)	CIVIL ACTION NO 06 CP-05 0034
of BERYL HARVEY,	)	
Plaintiff	)	
v	)	
CSX TRANSPORTATION, INC	)	
Defendant	)	

CONNIE CARSON as Personal	)	
Representative of the Estate	)	CIVIL ACTION NO 06 CP-05-107
of BERYL HARVEY,	)	
Plaintiff	)	
v	)	
CSX TRANSPORTATION, INC	)	
Defendant	)	

**DEFENDANT CSX TRANSPORTATION, INC 'S SUPPLEMENTAL BRIEF IN
RESPONSE TO PLAINTIFF'S POST-TRIAL MOTIONS**

Defendant CSX Transportation, Inc ("CSXT") hereby files this supplemental brief in response to Plaintiff's motions for judgment notwithstanding the verdict ("JNOV"), new trial, and new trial *nisi additur*. For the reasons explained in CSXT's original response to Plaintiff's motions and supplemented below, Plaintiff's motions should be denied in their entirety.

First, the Court should reject Plaintiff's argument that the jury's verdict of zero damages on the survival action is "inadequate" and therefore subject to the remedy of new trial *nisi additur* or *remittitur*. In actuality, a verdict finding the defendant liable but awarding zero damages is not inadequate but instead arguably "inconsistent or incomplete." Stevens v. Allen, 342 S.C. 47-50, 536 S.E.2d 663, 664 (2000).

In the present case, Plaintiff essentially contends the jury's intent is unclear since the verdict form reflects findings that CSXT acted negligently and that such negligence proximately caused the accident, yet simultaneously awards Plaintiff zero damages. However, the jury's zero damages verdict could easily reflect a finding that Beryl Harvey did not suffer any conscious pain and suffering. Such a finding would entitle CSXT to a defense verdict.¹² See *id.* at 52, 536 S.E.2d at 665 (citing Camp v. Petroleum Carrier Corp., 28 S.E.2d 683, 685 (S.C. 1944)).

When Plaintiff contends a zero damages verdict is "facially inconsistent," the proper remedy for such a verdict is resubmission to the jury with instructions to "find in the defendant's favor or award the plaintiff at least some nominal amount of damages." *Id.* at 53, 536 S.E.2d at 665-66. Only if the jury cannot reach a consistent verdict after such resubmission is the Court authorized to "order a new trial nisi or a new trial absolute." *Id.* at 53, 536 S.E.2d at 666. As CSXT explained in its initial response to Plaintiff's post-trial motions, the Court does not have the authority "to 'correct' or 'construe' a jury finding of no damages" because to do so would displace the jury.

¹In this regard, CSXT respectfully argues that, contrary to Plaintiff's contention, the evidence authorized the jury to conclude that Beryl Harvey, a quadriplegic, did not in fact experience conscious pain and suffering prior to his death. Furthermore, despite Plaintiff's argument to the contrary, the Court did not err in instructing the jury that it did not have to reach the issue of damages on the survival action if it concluded that Beryl Harvey did not experience conscious pain and suffering. The Court's instruction was an accurate statement of the law. *Stevens*, 342 S.C. at 52 n.4, 536 S.E.2d at 665 n.4 ("[I]f the plaintiff fails to prove the decedent endured conscious pain and suffering, then the jury must return a verdict for the defense. ").

²Of course, CSXT is aware of Plaintiff's argument that she is entitled to an award of funeral expenses in the survival action. However, during closing argument Plaintiff's counsel assigned the decedent's funeral expenses to the wrongful death action. Thus, Plaintiff cannot now argue that funeral expenses warrant an award of actual damages in the survival action. In South Carolina, funeral expenses are recoverable in either a wrongful death action or a survival action, but not both. See *Weaver v. Lentz*, 348 S.C. 672, 681, 561 S.E.2d 360, 365 (Ct. App. 2002) (noting that funeral expenses are recoverable in a wrongful death action); *Gomillion v. Forsythe*, 62 S.E.2d 297, 303 (S.C. 1950) (noting that funeral expenses paid by the beneficiary are a proper element of damages in a wrongful death action); *Petite v. Columbia & G.R. Co.*, 29 S.C. 303, ___ 7 S.E. 515, 523 (S.C. 1888) (holding that funeral expenses were recoverable in wrongful death action); see also S.C. Code § 15-5-100 (noting that claim for funeral expenses may be brought in either wrongful death or survival action, but not both). Consequently, the Court did not err in allowing Plaintiff to assign the funeral expenses to the wrongful death action. Regardless, Plaintiff can hardly complain that error resulted from her own election to seek the recovery of funeral expenses in the wrongful death action.

by allowing the court either to decide how the jury viewed the facts or to substitute its own view of the facts when the jury's verdict is uncertain. Under our law, where the case is tried to a jury, the judge cannot perform the jury's function for it. If the jury renders an ambiguous verdict, the court must resubmit the case to the jury, not act as a substitute for the jury.

Kiepps ex rel. Kiepps v. Ausen, 324 S.C. 597, 609, 479 S.E.2d 290, 296 (Ct. App. 1996)

Consequently, having failed to request the Court to resubmit the matter to the jury, Plaintiff cannot now request new trial *nisi additur*.

Indeed, as CSXT has already explained, Plaintiff has waived any objection to the jury's purportedly inconsistent verdict by failing to request the Court to resubmit the matter to the jury. "It is well established that where a verdict is *objectionable as to form*, the party who desires to complain should call that fact to the Court's attention when the verdict is published. Otherwise, the right to do so is waived." Limehouse v. S. Ry. Co., 216 S.C. 424, ___, 58 S.E.2d 685, 688 (1950) (emphasis added). In Limehouse, the jury returned a verdict of zero actual damages, yet awarded \$1,500.00 in punitive damages. Id. at ___, 58 S.E.2d at 687. The South Carolina Supreme Court concluded that the railroad had waived its right to object to the verdict where defense counsel "did not expressly complain of the form of the verdict before the jury was discharged. The only action taken by them was to note a motion for judgment non obstante veredicto." Id. at ___, 58 S.E.2d at 688. The Court went on to explain that an objection to an inconsistent verdict must be made prior to the discharge of the jury—a motion for new trial made after the jury has been discharged will not suffice. See id. at ___, 58 S.E.2d at 689 ("The appellant, instead of making its objection to the form of the verdict as soon as it was read, waited until the jury separated and then urged the alleged irregularity as a ground for a new trial. This was too late.")

More recently, the Supreme Court has reaffirmed this principle, holding that Limehouse and like-minded cases

are consistent with our recent opinion in Stevens v. Allen, 342 S. Ct. 47, 536 S. E. 2d 663 (2000), in which we held a verdict finding the defendant liable but awarding zero damages is inconsistent or incomplete and that, *when the issue is raised*, the matter should be resubmitted to the jury with instructions to either enter a verdict for the defendant or award some amount of damages.

Dykema v. Carolina Emergency Physicians, P.C., 348 S. Ct. 549, 554, 560 S. E. 2d 894, 896 (2002)

(emphasis original) In Dykema, the jury returned an inconsistent verdict which awarded punitive damages but no actual damages, the Court concluded that the appellant had waived any objection to the verdict by failing to raise the issue until it filed a post-trial motion for JNOV “ten days after the verdict was returned.” Id. at 553, 560 S. E. 2d at 896. Such is the case here as well.

In this regard, the Court should reject Plaintiff’s argument that she sufficiently preserved the issue by objecting to the Court’s instruction to the jury that it did not need to reach the issue of damages on the survival action if it concluded that Beryl Harvey did not experience conscious pain and suffering. At this point, the jury had not returned a verdict of any kind, much less an inconsistent, ambiguous, or incomplete one. Consequently, Plaintiff’s objection did not and could not have addressed the issue of the jury’s zero damages verdict. At any rate, following the verdict, Plaintiff allowed the jury to be discharged without objection. In so doing, Plaintiff waived all objections to the verdict. See id. at 553, 560 S. E. 2d at 896 (“Companion’s failure to object prior to discharge of the jury results in a waiver of the right to challenge the verdict.”)

A party may not “allow the jury to be discharged in the face of an obviously defective verdict which could easily be corrected upon resubmission to the jury, in the hopes of gaining a

reversal on appeal.”³ Id. Yet that is exactly what Plaintiff seeks here. Rather than timely requesting the Court to resubmit the matter to the jury, Plaintiff waited until after the jury’s discharge, hoping for a second bite at the apple with a new and perhaps more favorable jury. The Court should not allow this result, which would contravene not only Dykema but nearly 100 years of settled South Carolina jurisprudence. See id. at 554, 560 S.E.2d at 896 (citing Washington v. Whitaker, 317 S.C. 108, 451 S.E.2d 894 (1995), Deese v. Williams, 237 S.C. 560, 118 S.E.2d 330 (1961), Limehouse, 216 S.C. 424, 58 S.E.2d 685 (1950), McAlister v. Thomas & Howard Co., 116 S.C. 319, 108 S.E. 94 (1921), & Bethea v. Western Union Telegraph, 97 S.C. 385, 81 S.E. 675 (1914)). In sum, Plaintiff has waived the right to object to the verdict and thus is not entitled to JNOV, new trial *mis additur*, or new trial absolute.

In the alternative, CSXT respectfully contends that the jury’s finding that Frances Harvey was more than 50% at fault for the accident precludes Plaintiff from any recovery in the survival action. In this regard, CSXT contends that a negligent heir/beneficiary should not be allowed to inherit from the decedent’s estate when the heir/beneficiary’s negligence caused the decedent’s death. See Aetna Cas. & Sur. Co. v. Curley, 585 A.2d 640, 644-45 (R.I. 1991) (concluding that negligent heir/beneficiary was barred from recovery in survival action), cf. Overstreet v. Kentucky Cent. Life Ins. Co., 950 F.2d 931, 939-40 (4th Cir. 1991) (concluding that negligent beneficiary is not entitled to life insurance proceeds) (citing Quick v. United Benefit Life Ins. Co., 287 N.C. 47, 213 S.E.2d 563 (1975)). In wrongful death cases, the South Carolina courts have long held that beneficiaries “cannot hold [a] defendant liable to them for the consequence of their own negligence. No one is allowed to take advantage of his own wrong.” See e.g.,

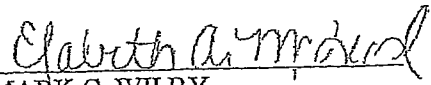
³Likewise, the law imposes no duty upon the trial judge to reject an inconsistent verdict in the absence of an objection by either party.” Longshore v. Saber Sec. Svcs., Inc., 365 S.C. 554-563, 619 S.E.2d 5, 10 (Ct. App. 2005) see also Smith v. Phillips, 318 S.C. 453-455, 458 S.E.2d 427-429 (1995) (“[T]here is no duty imposed on the trial judge to question a jury’s verdict of liability, but no damages, unless requested to by a party.”)

Hall v United States, 381 F Supp 224, 227 (D S C 1974) (quoting Sandel v State, 115 S C 168, 175, 104 S E 567, 569 (1920)) CSXT respectfully urges that this equitable principle should apply equally to bar Frances Harvey's attempt to recover in the survival action

Of course, CSXT is aware of Plaintiff's contention that Frances Harvey is not the sole beneficiary of the survival action. Nonetheless, the Court should reject this argument. Beryl Harvey died intestate, leaving no surviving spouse or children. Beryl's father, Charles Harvey is deceased. As a result, Frances Harvey, as Beryl Harvey's sole surviving parent, is the sole beneficiary of the survival action. Thus, Frances Harvey is the real party in interest in the survival action and her comparative negligence bars Plaintiff from obtaining any recovery on her behalf.

Accordingly, for all of the foregoing reasons, the Court should **DENY** Plaintiff's motions for judgment notwithstanding the verdict, new trial, and new trial *msi additur*.

This 30th day of December, 2009


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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served on opposing counsel by
e mail and regular mail

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This 30th day of December, 2009

Claretha G. McVese

1 that was a statute in effect and you're going to argue
2 that you complied with it and they're going to argue that
3 you didn't comply with it It's like a --

4 MR PARKER No They admit they didn't comply with
5 it

6 THE COURT Well - and then I'll have to deal with
7 whether or not the violation of that statute I can charge
8 that it is negligence per se and evidence of recklessness
9 I'll just in my charge I assume that's where I will
10 address your concerns

11 MRS MCLEOD Yes, Judge However, I do think that
12 are some circumstances under which they can make an
13 argument and open the door to introduction of evidence of
14 the new horn regulation that was enacted after this
15 accident

16 THE COURT Well, if they do that, I assume that you
17 want to get that in

18 MRS MCLEOD I do

19 THE COURT I assume that Mr Parker is going to
20 dance clear of that I'll just have to wait and hear

21 MRS MCLEOD Judge, what we have left --

22 THE COURT Is that a subsequent remedial law?

23 MRS MCLEOD A different issue, Judge I think the
24 only two things we have left in our omnibus motion in
25 limine are subsequent remedial measures and CSX's duty to

1 install traffic control devices at the crossing

2 Mr Millberg is going the take you through those

3 THE COURT Well, subsequent remedial measures --

4 Haven't I heard through pretrial that later the crossing
5 was equipped with arms and lights and et cetera?

6 MR MILLBERG Yes, sir

7 MRS MCLEOD Yes, sir

8 THE COURT Well, the rule is pretty clear on
9 subsequent remedial measures, but I'll be glad to hear
10 from you

11 MR MILLBERG We think it is pretty clear, Your
12 Honor, to exclude the subsequent installation of lights
13 and gates and there is also evidence that there was
14 additional cutting of vegetation post-accident and we
15 think that under the rule and under Webb those ought to be
16 excluded pretty plainly

17 THE COURT Well, Mr Parker, I am just going to ask
18 you if you even think you're going there don't do it in
19 front of the jury and let me hear from you

20 MR PARKER Your Honor, they forgot one important
21 issue and that is the decision to put in gates and lights
22 was made before this -- April 24 That's what we're going
23 to put in not that they put them in, but the decision was
24 made to put them in

25 THE COURT I am going to ask you before we get into

1 that area, let me do it outside --

2 MR PARKER Sure

3 THE COURT -- of the presence of the jury and do me
4 a proffer

5 MR PARKER Sure

6 THE COURT I assume that precludes anybody wanting
7 to go out and look at the scene because now they got the
8 crossing bars up and all that?

9 MRS MCLEOD Yes sir

10 MR MILLBERG Yes, sir

11 THE COURT I'll listen to that if that becomes an
12 issue

13 MR MILLBERG Certainly, we'd like to be heard on
14 that point at the appropriate time

15 THE COURT Oh, absolutely That's not precluding
16 it I am simply saying as in limine don't mention it in
17 the presence of the jury until we have an opportunity to
18 develop testimony and or argument on it Now there was
19 another subsequent remedial -- there was --

20 MR PARKER We would agree on the cutting unless as
21 they say open the door and they under -- as the court said
22 in Webb it's inadmissible unless it's admissible under the
23 other exceptions under 407 such as impeachment If they
24 get up and say, well, we have plenty of vegetation cut
25 there and we did it right the fact that they came out

1 there two months later and then cut it impeaches that
2 evidence

3 THE COURT Just before we get into anything that was
4 done after the collision --

5 MR PARKER Sure

6 THE COURT -- I want to do it outside of the
7 presence of the jury

8 MR WILBY Judge, may I address that one point? If
9 you don't want it, then that's fine I just --

10 THE COURT Mr Wilby, I am not being rude Go
11 ahead

12 MR WILBY I'll be brief We're not going to say
13 that -- the facts are the crossing was cut before the
14 accident a couple of times We're not going to say that
15 it was in compliance at that time or that it was cut
16 exactly right because Mr Parker is correct then there
17 couldn't wouldn't have been any need to come later on and
18 cut, but the facts are going to develop -- in fact,
19 they've already developed because Mr Parker has taken a
20 witness' deposition and there are documents associated
21 with that, but anyway, those are the facts and --

22 THE COURT The facts are that it was not cut in
23 compliance with the regulations --

24 MR WILBY Yea, I mean, it's clear --

25 THE COURT -- or policies and procedure?

1 MR WILBY Yes, sir It's clear that it was cut I
2 mean even Dr Heathington says that there were stumps,
3 trees that were cut There is no doubt about that, but
4 when you look at the photographs when Mr Parker will take
5 us through that it is clear that it s not in compliance
6 with our specifications and so more work had to be done
7 but we're not going to say that this was a perfect
8 crossing or that it was cut in compliance The evidence
9 will develop that it was cut I don't think that opens
10 the door to them coming in and saying, Aha you said it
11 was cut, but you came back later and cut it

12 THE COURT I am just saying, fellows, if you try to
13 get in anything -- either side -- that happened after the
14 date of the collision I will do it outside of the presence
15 of the jury as far as any remedial events Obviously, how
16 the people suffered afterwards and all that that's a
17 different story

18 MR MILLBERG Your Honor, if I might approach I got
19 a case that kind of deals with this issue that Mark was --
20 that Mr Wilby was talking about

21 THE COURT Always good to have a case Was this one
22 published?

23 MR MILLBERG This one is published in the great
24 State of Illinois

25 THE COURT You weren't here this morning when I had

1 to rely on Illinois law

2 MR MILLBERG I heard that Illinois law being cited
3 It says it pretty clearly right there

4 THE COURT Well, the rule on subsequent remedial
5 remedies and measures says what it says

6 MRS MCLEOD And, Your Honor, your ruling also just
7 to make sure for the record it would encompass the
8 April 2004 decision to install lights and gates before
9 this accident We'll to have to take that issue up with
10 you outside of the presence, correct?

11 THE COURT Yes, ma'am

12 MRS MCLEOD I am getting him off his game, Judge
13 I am getting him all out of order

14 THE COURT I won't hold that too much against you

15 MRS MCLEOD Page 24

16 MR MILLBERG Page 24 of the omnibus --

17 THE COURT All right Let me get that Irrelevant
18 quadrants

19 MR MILLBERG Your Honor what's relevant --

20 THE COURT It sounds like a hurricane

21 MR MILLBERG What's relevant to this case is what
22 was in the quadrant in question

23 THE COURT And that would be the south --
24 southeast?

25 MR MILLBERG Southeast And that is fair game and

1 everybody can talk about what was there, what you could
2 see, whether that was adequate or not adequate What
3 counsel wants to do through his expert witness Heathington
4 is talk about every other possible thing that has about
5 this crossing that has nothing to do with this quadrant
6 For instance, he wants to talk about there is a
7 building -- a signal shack -- caty-cornered in the
8 northwest quadrant That would be something of an
9 obstruction if that was the quadrant in question, but that
10 doesn't have anything to do with this accident It
11 clearly cannot be --

12 THE COURT When was that picture taken? 6/4?

13 MR MILLBERG This picture was taken 6/4 by
14 Plaintiff's investigator when the accident was May 30
15 So, it is about four days after

16 THE COURT Are we going to have any dispute over
17 that accurately depicting the way it looked on the date?

18 MR MILLBERG Not from our side I think not

19 MR PARKER We don t have any dispute

20 THE COURT Okay So what you're saying is what
21 happens in all other three quadrants is not relevant to
22 what was in the southeast quadrant

23 MR MILLBERG Yes, sir It couldn't have possibly
24 caused this wreck

25 THE COURT Well, Mr Parker?

1 The defendant's lawyers are an advocate for the railroad
2 and they will present their opening statements and final
3 arguments in the light most favorable to them, but it is
4 not evidence The only evidence that you can consider
5 comes from the witness stand as it is presented during the
6 trial of the case and or from the relevant exhibits that
7 may be introduced into the trial of the case

8 I ask that you pay close attention and we will
9 commence now, and, like I said, if you have any problems
10 and you get cold or uncomfortable, you just raise your
11 hand and I'll take care of you

12 Any objections to my opening remarks by the
13 Plaintiff?

14 MR PARKER None, Your Honor

15 THE COURT By the Defendant?

16 MR HARMON None, Your Honor

17 THE COURT All right Mr Plaintiff

18 MR MURDAUGH May it please the court, Your Honor

19 THE COURT Mr Murdaugh

20 OPENING STATEMENT

21 MR MURDAUGH Good morning I am Alex Murdaugh
22 I m from down the road born and raised down in Hampton
23 and practice in a firm that my great granddaddy started
24 back in 1910 I practice with Johnny Parker who is seated
25 here William Barnes works with us and working in this

1 case with Chris Wilson who practices here in Bamberg I
2 am glad to be here with you today

3 Judge told you we've been working on this case for a
4 long time We've been at it now for several years Over
5 the course of getting to today spent a lot of time going
6 around the country getting to know Mr Wilby and
7 Mrs ~McLeod from Augusta, Mr Millberg from Raleigh We
8 spent a lot of times with them They're good lawyers
9 And although I disagree with them, I've enjoyed working
10 with them Mr Harmon hadn't been in this case until last
11 week, but he's an outstanding lawyer too --

12 MR HARMON Your Honor I object

13 MR MURDAUGH -- and I very much look forward to
14 working with him

15 MR HARMON Excuse me

16 THE COURT Hold on a second That's irrelevant as
17 to when --

18 MR HARMON And it's not accurate either

19 MR MURDAUGH Well -

20 THE COURT Hold on Gentlemen It doesn't make any
21 difference when lawyers join the case That has nothing
22 to do with this trial Move along

23 MR MURDAUGH Nonetheless I look forward to working
24 with Mr Harmon in this case, also I want to introduce
25 you to Mrs Frances Harvey

1 Hold your hand up, Frances

2 This is Frances Harvey from here in Denmark. You're
3 going to hear a lot of testimony about Mrs. Frances --
4 grew up and was born and raised and spent most of her life
5 in Hampton and Bamberg counties. She had a family.
6 That's her daughter Connie seated beside us and
7 Mrs. Frances is a fine lady. You'll hear her testify, but
8 Frances dropped out of school at an early age to help --
9 her mom was sick and help take care of all of her
10 siblings. She'll tell you about all of that. She is a
11 wonderful lady. I look forward to putting her up and
12 letting her testify.

13 I want to introduce you to up on the screen an
14 extraordinary person. This is Beryl Harvey who we -- all
15 right. That's who we're here about today. Beryl really
16 was an extraordinary person. You see him seated there.
17 You can see him -- got his Gamecock hat on. But Beryl when
18 he was born -- you'll hear his mama testify -- he was a
19 mischievous little fellow and he was always active, busy
20 getting into everything, never sat inside, wasn't one to
21 hang in there and watch TV. He was outside playing and
22 going and doing.

23 He developed a love for the outdoors at a very early
24 age and you're going to hear about how he loved to hunt
25 and fish and he had a pellet gun when he was a young man.

1 and go out and shoot squirrels and birds and you'll hear
2 Mrs Frances talk about what how she d have to cook what
3 Beryl would bring in her house She didn't like it but
4 she'd do it and he really loved the outdoors

5 Now, at an early age when Beryl was about 16 years
6 old he had an unfortunate accident and he was out swimming
7 at one of the local creeks and he was on a rope and went
8 off the rope It was shallow and broke his neck and it
9 left Beryl -- it left him paralyzed He endured a lot of
10 pain there and it left him paralyzed Despite the fact
11 that Beryl was dealt this hand and he was paralyzed - He
12 had no use of his legs limited use of his arms, really,
13 not a lot of use of his hands -- Beryl never said, Why me?
14 He never got down He stayed positive He was a happy
15 person and you're going to hear about all of the ventures
16 that Beryl got into

17 One of the things about that accident is that it
18 really brought this family close together and Mike and
19 Gerald are going to be here and you'll hear from a lot of
20 the family members but that accident really made this
21 family close -- particularly Frances and Beryl I mean
22 Frances at that point in time became Beryl's arms and legs
23 and she had to do for him She had to do things that you
24 would never think that you would have to do but she loved
25 doing it and you re going to hear her talk about Beryl was

1 her life and she loved doing those things

2 You're going to hear you would never see Frances
3 without Beryl and this family -- and as they got close
4 together it was a creative family. They developed ways
5 for Beryl to enjoy the things - to be able to continue to
6 enjoy the things that he enjoyed. They developed -- they
7 came up with an implement that wrapped around -- as I told
8 you he had limited use of his arms, but they developed an
9 implement that Beryl would put on his hands and he could
10 hold a fishing rod and go fishing and pull in a fish and
11 fight a fish on a cane pole. He would put a pencil in
12 there and peck away on a computer and get on that internet
13 and follow the statistics of the Miami Dolphins and the
14 Carolina Gamecocks that he loved.

15 One of the things that Beryl learned to do - Beryl
16 learned to paint with his mouth. He would take a
17 paintbrush and it started out he would do these paint by
18 numbers and put the paint brush in his mouth and dip the
19 paint and paint what we see up here and he got so good at
20 it that he later did some that weren't paint by numbers.
21 This is one of them.

22 He was really a remarkable fellow and you're going to
23 hear testimony about how he and Frances loved to go to the
24 flea markets. They loved to go to the auctions and at the
25 auctions he would buy things in bulk and then they would

1 go to the flea markets and they'd sell it and his nickname
2 was Peanut Man He loved to boil the peanuts and he would
3 go up and take him up to the grocery store in Denmark and
4 he'd sell his peanuts, and so Beryl was an innovative
5 fellow and he never dwelled on what his handicap was
6 because he didn't see it as a handicap

7 Now, Your Honor told you this case is about a wreck
8 that was involving Beryl and Frances and the train All
9 right Let's go -- This is a diagram of Honey Ford
10 crossing over in Denmark As you can see you see that's
11 Honey Ford Road right there and you can see the tracks,
12 obviously, and you see one of the things here is you see
13 that the highway approaches the train not at a right
14 angle not straight away, but at a skewed angle all
15 right, and you can see 321 would be on the bottom of the
16 screen, all right and the Honey Ford community and Tyler
17 Estates would be on down Honey Ford Road at the top All
18 right This would be looking at the Honey Ford crossing
19 as you turn off of 321, all right and you can see the
20 crossing ahead and you see where it doesn't approach it at
21 a right angle but at a skew and that diagram we showed you
22 was out of a survey that was done and so it's an accurate
23 representation of the way that crossing is skewed

24 All right As you proceed down Honey Ford Road this
25 would be over to the left You can see the tracks

1 straight ahead That's moving closer to the tracks at
2 Honey Ford Road Again, moving on up there All right
3 And this is a picture - Is that 32? This is a picture
4 that was taken at 35 feet back from the near rail
5 Thirty-three That would just be to the right, looking to
6 the right

7 Now, on May 30, 2004 at the crossing that we see
8 there it started out like any other good day You're
9 going to hear testimony from Frances that they had had a
10 good day They boiled peanuts, taken them to the church,
11 that they had had a good afternoon She and Beryl had had
12 a good low country supper - I think peas and rice and
13 macaroni and had a good day and they were going to go
14 fishing There's a -- out past the tracks there there's a
15 little place called Honey Ford Church and the creek comes
16 right up to the bank there and it was -- it's a place down
17 there where Beryl could take his wheelchair and go down
18 and fish in that creek and that's what they were doing
19 They had a nice relaxing day and they were headed to the
20 fishing hole and they turned on Honey Ford Road

21 Thirteen And they proceeded down Honey Ford Road
22 and they got on up there and approached it All right
23 And you're going to hear Frances testify she got -- she
24 just cleared this telephone pole and she got where this
25 telephone pole -- she was just clear of it and in -- while

1 she was there that day Ms ~Harvey is going to tell you
2 that she stopped She looked left She looked right
3 Because of that skewed crossing when you look right you
4 don't see very far so she looked hard to the right Then
5 she came back to straight ahead and she started to proceed
6 across that crossing

7 Now, when she had looked left what she was looking at
8 was this vegetation Now unbeknownst to her because she
9 was looking at the vegetation and it seemed to her that
10 she could see a safe distance down that track, Ms ~Harvey
11 began proceeding across the crossing Unbeknownst to her,
12 all right when she looked left, all right then she
13 looked back to the right -- unbeknownst to her because of
14 that vegetation the whole time that she looked to the
15 right and looked hard to the right a train was coming down
16 those tracks at 47 miles an hour and so the whole time
17 that she s going through her movements looking to the
18 right that train is coming

19 You re going to hear testimony from engineers in this
20 case and they'll explain to you about how for every mile
21 an hour basically, the train is moving 1 47 feet I think
22 it is but that whole time that she was looking to the
23 right and coming back and proceeding across that crossing
24 because she had looked and thought it was safe that train
25 was coming to that intersection closing that time-space

1 relationship

2 Bam Train hit that vehicle, all right, and we are
3 going to show you what's called an animation All right
4 We can't go back and recreate the scene so we have had
5 experts come in to recreate what happened out there at
6 Honey Ford Road that day and you're going to see it It
7 is an animation that s going to show Frances Harvey
8 driving up to the scene and you're going to see what could
9 see and it's going to show you how she looked to the
10 left -- and they've recreated the vegetation You're
11 going to hear him testify about how he recreated what you
12 see in these photographs, all right and it's going to
13 demonstrate for you and show you how she looked, looked
14 back to the right, looked down that track and it's going
15 to show you how that train is coming towards that
16 intersection the whole time unbeknownst to her because
17 when she looked what she saw was vegetation She had
18 cleared that telephone pole and that's what she was
19 looking at

20 Now, go to six Now, that day out there Ms ~Harvey s
21 van was knocked down the tracks This is on the right
22 hand side Remember as we approach this would be over to
23 the right And that train hit that van and did this to it
24 and you're going to hear testimony how Mrs Frances was
25 laying down by the van and you'll hear testimony where

1 Beryl was over off to the side and Beryl unfortunately,
2 was killed as a result of this collision and Mrs Frances
3 was air-vac ed out by a helicopter, flown to Richland
4 Memorial Hospital or - yea, Richland Memorial Baptist
5 What do they call it? Richland Baptist Columbia Richland
6 something -- whatever it is She was flown to the
7 hospital She spent several weeks in ICU up there and
8 stayed in the hospital 50 some odd days All right
9 You'll hear that testimony

10 Now while Frances was laying there -- and you're
11 going to hear testimony from some people who came to the
12 scene quickly, and what Frances was doing - Frances main
13 concern while she was laying out there with those severe
14 injuries is she wanted to get to her son and she couldn't
15 get to her son, but she wanted to get to Beryl, and you're
16 going to hear that testimony You're going to hear
17 testimony about how Beryl was laying over in the bushes
18 and laying in the briars and he was moaning and groaning
19 and he was hollering, Mama -- calling for his mama before
20 he died

21 Now, a couple of things I just want to talk to you
22 about out there that day is you re going to hear testimony
23 from Frances that she didn t hear a horn that day All
24 right And why didn t Frances hear that horn? Well
25 there is a couple of reasons Number one is that the

1 railroad had not blown the horn the way they were supposed
2 to. You can see what we have up here. South Carolina law
3 requires a horn to be blown 500 yards, 1500 feet from the
4 intersection and to be blown continuously until it gets to
5 the crossing, and that's what they were supposed to do.
6 They were supposed to start blowing that horn that day at
7 1500 feet and blow it continuously through the crossing
8 and they didn't do that. They did not follow the law when
9 they blew their horn that day, and you're going -- that's
10 going to be confirmed through the event recorder which is
11 a black box. You have all heard of a black box. That's
12 going to be confirmed by the event recorder. That's going
13 to be confirmed by Bennie Spell when he testifies.

14 When they started blowing that day they didn't start
15 blowing at 1500 feet. They started blowing shorter than
16 that. They were inside of that when they blew and after
17 they blew initially inside of that they had an 8-second
18 gap. An 8-second gap that day with no horn and they
19 didn't blow the horn the way they were supposed to, and
20 you're going to hear testimony how there was a couple of
21 beeps from the horn and then there was a long gap.
22 Mr. Spell is going to testify there was a long gap and
23 then right before -- right before the train hit her car he
24 laid down on it. An 8-second gap in there where they
25 didn't blow the horn.

1 All right. Another thing to think about why she
2 didn't hear it, you may -- I remember there was a Lincoln
3 Continental commercial -- and you're going to hear
4 testimony from an audiologist. That's another expert on
5 noises and sounds and you're going to hear testimony from
6 him how in order to hear something that -- in order to
7 hear that horn that it's got to get to a certain level
8 above what's called the ambient sound inside of that
9 vehicle. That ambient sound is just noise that's
10 generated routinely, for example, from the air conditioner
11 or from the motor, any noise, and that horn has to get
12 above that ambient sound, and it's got to penetrate the
13 shell of that vehicle.

14 Y'all may remember there was a Lincoln Continental
15 commercial where they're talking about how quiet the car
16 was and pulled it up and you could see the person sitting
17 in the Lincoln Continental and the train is going by and
18 they had it at the crossing and the train is going by and
19 you couldn't hear anything and they rolled the window down
20 and you could hear the train and you are going to hear
21 testimony from the expert as to why Frances couldn't hear
22 that horn that day and how they didn't blow it the way the
23 law requires.

24 Why didn't she see the train? As we've talked about
25 that vegetation is there and what the law requires in

1 South Carolina is that you stop at the stop line within 15
2 or 50 feet of the crossing. Fifteen or 50 feet you
3 legally stop and Frances said she pulled past that pole
4 and she was headed up to the stop line and that she
5 stopped in there. Now, one of the things -- and you're
6 going to hear testimony on this -- because of the hood of
7 your car and the distance that you are back as you
8 approach that stop line you hit a certain point and it
9 disappears from view and so you do your best in your
10 estimate but you can't see it.

11 All right. Now, we're going to go into some detail
12 on this vegetation, but the vegetation is why Frances
13 Harvey couldn't see that train. Now, South Carolina, when
14 you negligently cause someone to suffer conscious pain and
15 suffering or wrongful death and you're negligent in doing
16 that, then you're liable. That's why we're here today.
17 That's the whole reason why we're here today because the
18 railroad was negligent in causing the wrongful death of
19 Beryl Harvey and causing him to suffer conscious pain and
20 suffering prior to his death.

21 All right. Now why are they liable? Why is the
22 railroad liable to the Harvey family for this case? All
23 right. There are several reasons. Number one is they
24 violated the law that we showed you 58-15-910. That's
25 South Carolina code that the Judge is going to charge you

1 on that, and I've already told you how they violated that
2 They violated the law in failing -- the law requires the
3 railroad to provide an adequate sight distance at their
4 crossing Because of that vegetation being grown up they
5 failed to provide an adequately safe crossing and an
6 adequate sight distance They violated their own rules

7 All right They violated what's called rule 14-L
8 which -- and you'll hear the testimony about the way the
9 horn is supposed to be blown and the certain blasts that
10 are supposed to be blown and how that's supposed to be
11 blown continuous through the crossing and they didn't do
12 that and so they violated their own rule They also
13 violated their own rule or their own program in regards to
14 the vegetation All right The vegetation that was out
15 there and grown up that day was grown up because they
16 violated their regulation I am going to talk to you in a
17 minute about the details of that

18 Now despite the fact that they violated all of these
19 things that I've talked to you about all right -- and I
20 challenge them to show you that they didn't violate the
21 things that I have sat here and told you that they
22 violated I challenge them to show you that they didn't
23 do those All right What did they do in this case? All
24 right They blamed Frances They say that this was
25 Frances Harvey's fault All right

1 What they do -- what they re going to rely on when we
2 were involved in this case we sent investigator out there
3 to document this scene You re going to hear him testify,
4 and he went out and documented this scene He measured
5 how far back -- and this is while Frances is in ICU up in
6 Columbia and he went and measured the van and the van from
7 the front end to the seat was 5 feet 10 inches So, he
8 went out to Honey Ford crossing on June 4, 2004 and he
9 took a photo If the van had been perfectly placed at the
10 bumper -- I mean, if the bumper was perfectly placed at
11 the stop line 5 feet, 10 inches which is 70 inches then
12 you have this photo and to demonstrate it he had someone
13 that was working with us at the time and put him on the
14 tracks to show that you could see that person at
15 1 014 feet down the track and they're going to tell you
16 that that is sufficient

17 All right Let's go to 32 Now, this photo is at
18 the same crossing and this is at 35 feet So, you go from
19 70 inches behind the stop line You ll hear testimony
20 that the stop line is 25 feet 4 inches from the crossing
21 It is 2 feet wide So, it's 27 feet 4 inches, 5 feet
22 10 inches It is 32 feet, 10 inches where the gentleman
23 was standing on the track 32 feet 10 inches If you go
24 back to 35 feet, 2 feet, 2 inches further back then your
25 sight distance becomes restricted to what you see here

1 2 feet 2 feet

2 So, what they are telling you is that because 2 feet
3 back you can't see and from 70 inches you see a thousand
4 feet that Frances should be punished, and you're going to
5 see testimony that the further you get back from the
6 crossing the less you can see All right And so
7 exhibit 32 shows from 35 feet as compared to the photo
8 they're going to make a big deal about it's 2 feet,
9 2 inches different

10 Now, sometime in 2001 CSX instituted a program
11 whereby they were going to cut the crossing for either the
12 full length of the right-of-way All right That's at
13 the tracks On both sides they have a right-of-way So
14 they're going to cut it the full length of the
15 right-of-way for 100 feet max for 300 feet out All
16 right You're going to hear some testimony that the
17 evidence is going to show that they did this and that
18 there was some cutting done out there back in 2001 and
19 some things were removed for 100 feet back or the length
20 of the right-of-way I hear which is 50 feet for 300 feet
21 down the crossing

22 All right Now in 2002 -- in 2002 CSX instituted in
23 order to provide a safe crossing to the traveling public,
24 all right -- In 2001 they cut it In 2002 they changed
25 that program so that the traveling public would have safe

1 crossings They instituted a program whereby they were
2 going to cut again at the full length of the right-of-way
3 up to a hundred feet or the length of the right-of-way for
4 300 feet out, 600 feet out, or 900 feet out depending on
5 the track speed If it was less than 30-miles an hour, it
6 would be 300 If it was 30 to 60 they would cut it out
7 600 feet from the crossing and if it was greater than 60
8 they would cut it out 900 feet All right And you're
9 going to hear testimony that the track speed at Honey Ford
10 crossing is greater than 60 miles an hour So they were
11 supposed to cut that crossing for 900 feet -- 900 feet
12 that they were supposed to cut it from the crossing and
13 you can see the photograph taken in '04 that that wasn't
14 done

15 Now, all right, and we're going to prove what I am
16 telling you We're going to prove this with the testimony
17 and by their own documents, all right, and we re going to
18 prove that in this case Now, that was in 02 In 2003
19 they decided -- in 2003 they changed it one more time
20 All right Let's zoom in down there to crossing "C" I
21 think it is All right And you see that they changed
22 the program and even though they hadn't done what they
23 said they were going to do they changed the program and
24 they said instead of cutting that down to 900 feet we're
25 going to cut it out to 950 feet All right And they

1 said that instead of cutting that entire length of the
2 right-of-way they were going to cut that right-of-way for
3 100 feet and then at 100 feet the cutting was going to
4 taper so that -- zoom in on the one on the left is the
5 appropriate one You can see the lines the way the
6 cutting was supposed to be done This shows a 50 foot
7 right-of way which we have and you see the line to the
8 right and it shows - and it was supposed to be cut for
9 950 feet tapered to 28 feet from the near rail So, in
10 other words when you got out to 950 feet it should have
11 been cut all of the way out 28 feet from that crossing for
12 950 feet from the crossing

13 Now this program was to be completed by
14 December 3 -- December 31 of 2003 This wreck happened
15 may 30 of '04 Their program that they set up to provide
16 safe crossings to the people of South Carolina, Bamberg
17 County, was supposed to be completed by December 31 of
18 2003 All right And so in exhibit 32 -- Let s go to 32
19 Under their own program what you see here should be been
20 clear and it should have been cut to 4 inches and so that
21 wall of vegetation that you see should not have been
22 there It should have been gone

23 Now, was it done by 2003? No We know it wasn't
24 All right Now, in early 04 they extended that deadline
25 or in late '03 they extended that deadline All right

1 They said they didn't get it done. Even though that was
2 the program that's when they said it needed to be done so
3 that the people would have a safe crossing. They extended
4 that deadline and they extended that deadline to March 15,
5 '04. This wreck happened May 30 of '04. All right? And
6 so was it cut? Was it cut by their deadline on March 15?
7 No. The wall of vegetation stayed there and it was there
8 on May 30, 2004 when Frances and Beryl went to Honey Ford
9 crossing and because they didn't cut it the way their own
10 program said to cut it, Frances Harvey could not see that
11 train, and because they didn't blow the way they were
12 supposed to she couldn't hear that train and this wreck
13 happened and Beryl Harvey was injured and he died.

14 Now, upon their commitment -- upon their commitment
15 to implementing and instituting this program CSX because
16 they didn't -- they didn't want to buy the equipment and
17 go out and have the people and get the equipment necessary
18 to do this, all right, and buy that equipment to do all of
19 these crossings and spend that money all right and pay
20 the people to cut these crossings they went and hired a
21 company called DeAngelo Brothers. All right. They hired
22 DeAngelo Brothers to do this work. All right.

23 One thing I want to point out to you -- and you'll
24 hear a charge from this -- their duty at this crossing to
25 provide an adequate sight distance and to make it safe for

1 the traveling public is a non-delegable duty. All right.
2 Non-delegable duty and that means they can't give it --
3 they can't blame somebody else because they hired them to
4 do it. It's their responsibility and you're going to hear
5 testimony that the law requires them and that they have
6 track inspections out there two times a week -- two times
7 a week and that they knew -- they knew that that work
8 wasn't being done like they promised -- like they promised
9 to provide to cut it to provide a safe crossing and they
10 knew it wasn't cut because they had people out there two
11 times a week, hadn't followed their own program and they
12 knew it and they knew that it wasn't done.

13 Now what did they do? All right. They knew it
14 wasn't a sufficient sight distance because it hadn't been
15 cut the way their program said it was supposed to be cut.
16 All right. So, they knew that that vegetation was grown
17 up and they knew it looked like that and they knew they
18 hadn't met the deadlines. What did they do? Did they
19 slow down? Did they slow the train when they're going
20 through this crossing to give people more time? No. Did
21 they flag the crossing, put somebody out there so that
22 people would have an idea that they were coming through?
23 No. Business as usual. They didn't change a thing. They
24 didn't meet their own policy that they implemented to make
25 the crossing safe and they didn't change a thing. They

1 didn't even blow their horn They didn't even blow the
2 horn the way they're supposed to on May 30, 2004 and
3 that's why we're here

4 I want to thank you It is no small commitment what
5 y'all have - are doing here and I can t tell you how
6 important that your service is to the Harvey family and us
7 and we appreciate your time Now at the end of this
8 trial -- and we will put up the evidence and you will hear
9 the evidence and the testimony that I have talked to you
10 about here today, and at the end of this trial either
11 Mr Parker or I will get back up and talk to you and go
12 back over this evidence and we'll be asking that you
13 return a verdict in this case in favor of the Harvey
14 family Thank you

15 MR HARMON May I have a brief moment to set up the
16 courtroom?

17 THE COURT Certainly Everybody okay? Okay on the
18 bathroom? Comfortable? Okay I ain t worried about you
19 I am worried about that young lady Just kidding

20 On these bigger cases they all have a lot of exhibits
21 and sometimes it takes them a few minutes to get them
22 organized before they do their opening statements Please
23 bear with us

24 MR HARMON May it please the court

25 THE COURT Yes, sir

2 MR HARMON Counsel Good morning members of the
3 jury As you may remember or may not remember my name is
4 Jon Harmon and I am pleased to be here today representing
5 CSX transportation We heard a lot from Mr Murdaugh and
6 there is something that he suggested that I totally agree
7 with and that's this It's a sad day, a very sad day
8 whenever any mother loses a son or a brother or sister
9 loses another sibling No matter how the loss occurs, in
10 a real sense it is a tragedy

11 Now, none of us in this courtroom here today
12 personally experienced Ms -Harvey's and her daughter's and
13 their family's tragedy but as parents as brothers or
14 sisters in a family, and as members of society we're all
15 sorry that it happened We all wish this tragedy never
16 happened But there is something else I think we all can
17 agree upon as well and that s this It would be wrong, it
18 would be unjust to hold someone responsible for causing
19 the death of another human that they did not cause No
20 matter how tragic, no matter how heart-wrenching the loss,
21 our sense of justice would say it's not right, it's not
22 fair to hold someone responsible for causing someone to
23 pass from this life to the next if they didn't cause it
24 Members of the jury you're being asked to lay the
25 blame for Mr Beryl Harvey's tragic death at the feet of

1 CSX, Mr. Michael Stephens who was operating the train and
2 the crew members. Now, if CSX and the crew members caused
3 it, then that's exactly what you should do, but what I am
4 going to show you in this case and what the evidence is
5 going to show is that despite this tragic loss of a
6 valuable member of the community and of the Harvey
7 family -- Mr. Beryl Harvey -- that CSX nor the crew caused
8 this accident and that it, indeed, was avoidable.

9 I suspect you all have heard the saying seeing is
10 believing. Well, when it comes to a railroad crossing
11 such as this seeing is safety. What do I mean by that?
12 Well, when the driver comes to a crossing like this and
13 stops where the state says to stop, if the driver can
14 see a good ways down the track then the driver is in a
15 safe place as long as the driver is paying attention and
16 not distracted. If the driver pulls up to a crossing such
17 as this and stops where the state says to stop and can
18 see, then it is the driver who is in total control. The
19 driver gets to determine on that day at that crossing
20 whether or not there is going to be an accident. Members
21 of the jury, if the driver stops where the state says to
22 stop and can see, then the driver gets to determine
23 whether or not to put herself or anyone else in the
24 vehicle in harm's way.

25 So the central question you all have to answer in

1 this case is on May 30, 2004 at the Honey Ford Road
2 crossing stopping where the state says to stop should you
3 have seen a 15 and a half foot 10-foot wide train? On
4 the date of this accident or I should say even after this
5 accident there were at least three professionals who
6 looked at that very precise issue Two of them looked at
7 it on the day of the accident within half an hour to an
8 hour Another one within several days of the accident and
9 what did these professionals have to say?

10 The South Carolina Highway Police Department because
11 it was an accident at this crossing came to the scene
12 along with the emergency responders and after the scene
13 was secured and Ms ~Harvey and her son were attended to by
14 the EMS folks they conducted an investigation to see how
15 this could happen and two independent --

16 MR PARKER Your Honor we have an objection we need
17 to take up on the side bar I thought we had taken care
18 of it

19 (Whereupon, a bench conference was held)

20 THE COURT Good lawyers will do this When they
21 have an objection that they think is not within or without
22 the rules they will ask me to go over to the side bar and
23 gentlemanly talk about it These are great lawyers
24 That's what they did We'll move right along

25 MR HARMON So as I was getting ready to say two

1 professionals from the South Carolina Highway Patrol
2 Department went out within an hour and were at this scene
3 and they were determining what could you see and how did
4 this happen Two of them independently stopped short of
5 where the state said to stop and looked in the direction
6 of the train and both of these officers indicated there
7 was plenty of sight distance, that if you were stopped
8 there and you were paying attention and you were looking
9 you should have seen an oncoming train

10 Within several days after this accident there was a
11 competent railroad investigator with over 20 years of
12 experience looking at railroad crossing accidents and
13 looking to see what you see at crossings such as this
14 Now, this competent investigator wasn't from CSX This
15 competent railroad investigator came from the Plaintiff's
16 law firm and he went out to this crossing and he stopped
17 at the stop line and backed up Knowing that a picture is
18 worth a thousand words he took a picture, but before he
19 took a picture he sent a man down the tracks to see how
20 far you could see

21 Defendant's 76, please This is a photograph, again
22 that was taken by Ms ~Harvey's lawyers and if you see this
23 photograph you can see here in the distance if we can zone
24 in on it this white dot Okay? You can back up now
25 That is, again, a photograph they took from a vehicle that

1 would have been stopped at the stop line and you can see,
2 members of the jury, what you didn't hear in the opening
3 over three and a half approximately football fields down
4 the tracks Three and a half football fields
5 approximately You can bring that down

6 On May 30 2004 Mr Michael Stephens was operating
7 his train coming down the stretch of tracks He was
8 operating below the speed limit As he got closer to the
9 crossing he saw a tan van pull up and momentarily stop
10 He could see the van It stands to reason that the van
11 could see him as well Then as he came closer and he's
12 blowing his horn the van pulls out in front of the train
13 and stops, and when that van pulled out in front of the
14 train and stopped on that tracks there wasn't anything
15 Michael Stephens could do to avoid that accident

16 Now, I introduced myself to you and I want to
17 introduce you before I talk a little bit more to you all
18 the members of my team Sitting here -- seated here with
19 me is Mrs Beth McLeod, Mr Mark Wilby and Mr John
20 Millberg We are all pleased to be here today to
21 represent CSX

22 Now, on -- you all know CSX It operates the trains
23 It has track throughout South Carolina and throughout the
24 southeastern parts of the United States To safely
25 operate the train on each train there is an conductor and

1 an engineer On this particular train that day there were
2 actually three people who were on the train to safely
3 operate it A senior engineer a conductor, and an
4 engineer in training who was on the last trip of his
5 training by the name of Mr Michael Stephens

6 Now, I would like to introduce you to Michael
7 Stephens but, unfortunately I can't Several years after
8 this accident through reasons unrelated to work he
9 tragically passed away, but here today is the senior
10 engineer on the train that day Mr Jack Cowan

11 Mr Cowan, would you stand?

12 Mr Cowan has been an engineer - a senior engineer
13 with CSX for a long, long time He was on the train that
14 day He's from Savannah, Georgia, has three grown
15 children and five grandchildren You'll likely get to
16 hear from him at some point in time during this trial

17 Now, what I want to talk to you all about now is the
18 burden of proof His Honor talked about it momentarily or
19 before we started openings and as you heard this is a
20 civil case and the Plaintiffs in this case have the burden
21 of proof They have to prove to you by a preponderance of
22 the evidence each and every element of their claims I
23 want to explain to you what the elements of their claims
24 are There really three parts to them

25 First, they have to prove to you negligence

1 Negligence means failing to act as a reasonably prudent
2 person would in the same or similar circumstances The
3 second thing they have to prove is that that negligence
4 actually caused this accident at this crossing on May 30
5 2004 I am going to talk to you more about this, but it's
6 important to recognize that it is not enough for them to
7 prevail to point to different things that they contend may
8 be wrong or even negligent They have to show -- they
9 have to prove that that negligence actually caused this
10 accident at this crossing with this driver

11 Then the third thing they have to show is damages
12 There is not going to be any dispute that Mr Beryl Harvey
13 was tragically killed at this crossing There is not
14 going to be any dispute that Mr Beryl Harvey was a
15 valuable member of the Harvey family I want you to
16 understand something about causation, Members of the jury,
17 because you've heard a lot and you're going to hear a lot
18 of allegations in this trial about bad things that they
19 contend CSX did but it is important for you all to do
20 something that I tell some of my children when I am out in
21 the yard playing with them and that's this Please keep
22 your eye on the ball Please keep your eye on the ball
23 We're here to talk about things that caused this accident
24 on May 30 2004 with Ms ~Harvey and if you understand that
25 you re going to see that there are things that caused the

1 accident which we're here to talk about and you re going
2 to hear about a lot of things that didn t cause this
3 accident at this crossing

4 Let me give you an illustration that may help
5 Suppose a car pulls up to a red light and it stops While
6 stopped at the red light a truck comes barreling behind
7 the car and smashes into the car that's stopped at the red
8 light I believe we would all say that the truck caused
9 the accident If it turned out that we found out later
10 that the car had expired tags a broken wiper unpaid
11 parking tickets, we would all say those are things that
12 need to be fixed, but they did not cause this accident at
13 this crossing with that car This truck

14 In the same way you have heard and you will hear
15 during this trial things that they re going to contend are
16 wrong negligent, but they did not cause this accident at
17 this crossing and I want to talk to you about some of
18 those things you re going to hear You've heard about the
19 horn You've heard about the crossing clearing program
20 but what the evidence is going to show is that those
21 things did not cause this accident on May 30 2004 -- that
22 because you could see -- it was over three and a half
23 football fields approximately of sight distance - the
24 driver can always be safe

25 Now, what I want to talk to you now about the kind of

1 how we got to where we are and how this case unfolded and
2 as you heard on May 30, 2004 Ms -Harvey left her house I
3 think it was around 6 p m She got Beryl in the tan van
4 and they were going to go fishing They left the house
5 and they stopped someplace to get gas The favorite
6 fishing spot for them was along Honey Ford Road They
7 came down Honey Ford Road in this direction and made a
8 right along Honey Ford Road They came up and stopped
9 short of the crossing

10 Traveling down the tracks that day was a CSX train
11 Michael Stephens was the engineer in training on the train
12 along with a senior engineer Mr Cowan and Mr Jimmy
13 Bonner He is on the tracks He approached the whistle
14 post and he begins blowing the horn As he gets further
15 closer to the crossing he sees a tan van pull up and
16 momentarily stop He s blowing the horn The van then as
17 he gets closer pulls onto the tracks and stops He begins
18 going into emergency blow blowing loud Some people call
19 it being wide open to get the driver s attention

20 On the other side of the tracks that day approaching
21 the Honey Ford Road crossing was a gentleman by the name
22 of Bennie Spell Mr Spell may have been the last person
23 to cross it before the accident this way had dropped off
24 a worker and was turning around to come across the
25 crossing He was about 100 yards from the crossing when

1 he heard the train horn blow very loud two times He got
2 closer to the crossing and he saw the tan van on the other
3 side He wasn't fixated or focused on the tan van and as
4 he got closer he heard the horn go wide open Shortly
5 thereafter there was a crash

6 The emergency responders were called to the scene --
7 people from EMS people from the South Carolina Highway
8 Patrol Department The EMS folks tended to Ms ~Harvey and
9 Mr Beryl Harvey After the scene was secured police
10 officers began their duty and as part of it they went to
11 this stop line backed up and looked down in the
12 direction of the train to see what they could see and they
13 were perplexed because they could see a long ways down the
14 tracks

15 Now, tragically - and no one is here to minimize the
16 Harvey's loss Tragically, Mr Beryl Harvey died there
17 that day at the scene, but the question is what caused
18 this accident? We believe the evidence is going to show,
19 Members of the Jury that on that day it was more than
20 sufficient sight distance to see an oncoming train and
21 that if you can see the driver you can always be safe

22 Now I want to talk to you a little more specifically
23 about the witnesses but before I do I want to talk to you
24 about different responsibilities that different entities
25 have at a crossing such as this The South Carolina

1 Department of Transportation has a duty, the railroad
2 does and as well as does the driver

3 First the South Carolina Department of
4 Transportation The South Carolina Department of
5 Transportation is responsible for putting up the traffic
6 control devices that you see at stop signs and stop lines
7 and things of that nature They re the only ones who
8 unilaterally by themselves can put up traffic control
9 devices, stop lines, stop signs, and things of that
10 nature The South Carolina Department of Transportation
11 also is responsible for doing various inspections along
12 railroad crossings

13 Now, the railroad as you know, also has a
14 responsibility First the railroad has to operate their
15 trains safely - not speeding, blowing the horn, giving
16 the driver sufficient warning The railroad, also,
17 Members of the Jury places up a warning sign near the
18 crossing called the crossbucks I am sure that most of
19 you all have seen them at railroad crossings And the
20 third thing that the railroad does is to make sure that
21 when a driver pulls up to the crossing and stops where the
22 state says to stop that they can safely see, that they can
23 see a long ways down the tracks

24 Now, you've heard a lot from Mr Murdaugh regarding
25 CSX s crossing clearing program I want to talk to you

1 about that Towards the end of 2000, beginning of 2001,
2 CSX endeavored to do something that was groundbreaking,
3 that is to make safe crossings even safer and they were
4 to do that across several thousand crossings in South
5 Carolina and other states The program was designed --
6 now CSX already had in place programs to spray weeds,
7 brush cutting and weed cutting but this one was
8 different in that they were actually going to cut back
9 trees from the crossing a certain distance down the tracks
10 and away from the tracks

11 Now, the program as it was implemented across the
12 whole system - thousands of crossings -- was not perfect
13 There were delays with contractors There were delays in
14 getting things done that they wanted to get done, but
15 remember what I told you about there are things that we're
16 talking about related to this accident at this crossing
17 and things that don't This crossing was cut prior to
18 this accident and you're going to hear evidence to show
19 that it was cut We all know in the south weeds and brush
20 go up and you're going to hear that there was way -- weed
21 spraying and cutting that continued thereafter The
22 central question is on May 30, 2004 while stopped at the
23 stop line how far could you see down the tracks and we
24 believe the undisputed evidence is going to show that you
25 could see a long ways down

1 Now, the third person who has responsibilities at a
2 crossing is the driver. As you all know from going to
3 school and having driver's ed, I suppose at a crossing
4 you're supposed to stop, look, and listen. As well at a
5 crossing it is important that you as a driver, always yield
6 for the train. Unlike cars, trains cannot stop on a
7 moment's notice. Indeed, when a train puts its emergency
8 brake on, it takes a third of a mile of a train going at a
9 normal speed to stop. That's why the law in South
10 Carolina is if the driver should see the train, the driver
11 has to yield or stop for the train. The third thing that
12 the driver has a responsibility to do is to not stop on
13 the tracks.

14 Now, let me talk to you about the witnesses and after
15 I do that I'll be pretty much done. I appreciate y'all's
16 patience with me. You're going to hear from a lot of
17 different witnesses and I am not going to talk to you
18 about all of them, but there are really three different
19 types, categories of witnesses that I'd like to talk to
20 you all about. The first: Witnesses who were there
21 during the accident. The second category is witnesses --
22 I should say responders to the accident, and then the
23 third category are folks I am just going to put together
24 who came after -- days, weeks, and in some cases years
25 after the accident.

1 All right Let s talk about folks who were there
2 during the accident There were five people that you re
3 going to hear from in this case who were there at the
4 scene to hear and see Mrs Frances Harvey, Mr Michael
5 Stephens, Mr Jack Cowan, Mr Bonner and then Mr Bennie
6 Spell

7 Now, Ms ~Harvey -- as I told you, Members of the
8 Jury, I want to make sure you understand what this case is
9 not about from our standpoint This is not about whether
10 Ms ~Harvey loved her son She loved Beryl Harvey very,
11 very much This is case is not about whether Ms ~Harvey
12 is a bad person It's not about that She's not This
13 case is not about whether Mr Beryl Harvey was a valuable
14 member to their family He was But because this case
15 has been brought we're going to have to ask some questions
16 about Ms ~Harvey on the day of the accident simply what
17 happened and Ms ~Harvey's testimony I believe is going to
18 be that she pulled up to this crossing that she was very
19 familiar with, looked left, looked right, didn t see a
20 train, and doesn't remember anything else -- doesn t
21 remember whether or not she stopped on the tracks, doesn't
22 remember moving from there towards the tracks doesn t
23 remember anything else

24 Now, fortunately, there are people who do remember
25 The members who are on the train that day -- Michael

1 Stephens -- I told you you would hear from him -- before
2 he passed away he gave deposition testimony that the
3 Plaintiff's took of him and they asked him questions and
4 we'll read portions of that in It may be sometimes
5 difficult to listen to reading in of depositions but
6 you'll get to hear it, and his testimony is as he was
7 pulling closer to the crossing he saw the tan van come up
8 momentarily stop, and then go on the tracks and stop

9 You'll also hear from Mr Jack Cowan Now these
10 gentlemen were all in the front of the train --
11 Mr Michael Stephens in the center as the person operating
12 it Mr Cowan a little bit to his right, and then
13 Mr Bonner on the left side Mr Cowan saw the vehicle
14 pull up to the tracks and he'll explain to you he saw it
15 stop on the tracks Mr Bonner whose attention wasn't
16 focused to the right but to the left saw the vehicle once
17 it was on the tracks and stopped You all after hearing
18 all of the testimony will decide what happened here

19 The fifth witness who was there I've talked to you
20 about already his name is Mr Bennie Spell and I ask you
21 to listen to Mr Bennie Spell You've heard the
22 allegations that there was no horn blowing and we didn't
23 blow it properly and I'll talk to you about that in a
24 moment After you listen to Mr Bennie Spell about this
25 horn ask yourself if adequate warning was given regarding

1 the blowing of the horn

2 Now the next group of witnesses that you're going to
3 hear from are the responders and you may hear from
4 different emergency personnel who came to the crossing to
5 tend to Ms ~Harvey and to tend to Beryl Harvey Some of
6 the testimony that you're going to hear on that may be
7 difficult to listen to because Mr Harvey tragically died
8 there at the crossing and you'll get to hear from those
9 folks You'll also get to hear from at least two
10 officers -- two men with the South Carolina Police
11 Department One is Officer Whatley The second one is
12 Corporal Cruz Both of these men have experience in
13 investigating accidents like this and they will both tell
14 you what they did to examine the sight distance as part of
15 their investigation in the line of their duty Both of
16 them will explain to you that they went to the stop line,
17 pulled back and looked down the crossing to see how far
18 and that you could see a long ways down the track They
19 couldn't understand how a train could have been missed on
20 that day at this crossing

21 Now, there are folks who came after the accident and
22 I talked to you about one of them His name is Mr Don
23 Crews -- again, an investigator with the Plaintiff's law
24 firm, and you're going to see a lot of photographs
25 Probably most of the photographs you're going to see in

1 this case were taken by him and I showed you once on the
2 screen -- this is just a still of the same one -- a
3 photograph taken behind the stop line 70 inches behind the
4 stop line and that -- again, that is a 5-foot-9 man
5 dressed in a white shirt who can be seen at over
6 1,000 feet, close to three and a half football fields
7 away

8 One of the questions you'll have to ask yourself is
9 if you could see a 5 foot-9 man stopped where the state
10 said to stop, how far could you see a 15 and a half foot,
11 10-foot wide train with its lights on?

12 Now there are two -- at least two other witnesses
13 you re going to hear who came afterwards and these are two
14 witnesses they will call as experts Each side may or may
15 not call different experts One of the experts they've
16 retained is a gentleman by the name of Dr Kenneth
17 Heathington Dr Heathington regularly goes around and
18 testifies against railroad companies and he is going to
19 come in here and he is going to tell you that the sight
20 distance here was inadequate He is going to say a whole
21 bunch of other bad things about the railroad crossing
22 CSX, and I ask all that you do is that you listen to his
23 testimony both on direct and cross and ask yourself does
24 it make sense what he is saying

25 The other witness you're going to hear from at least

1 as an expert is a gentleman by the name of Jimmy Scott
2 Now, Mr Scott actually used to work for CSX He no
3 longer does and he's -- part of his living is to go around
4 and testify in cases and he'll -- testifies regularly
5 against the railroad and he'll say that the crew did a
6 whole bunch of things wrong in his opinion, that the horn
7 wasn't blown properly, and he may say other things as
8 well

9 Let me talk to you about the horn for a moment
10 Mr Michael Stephens began blowing this horn at the
11 whistle post that was erected along the track It is true
12 that horn was not starting to be blown at 1500 feet That
13 whistle post was short by 63 feet or so So, technically,
14 he did not start blowing his horn at 1500 feet One of
15 the things you're going to have to ask is did that make a
16 difference in this accident because the evidence is going
17 to show that Ms ~Harvey never heard the horn She didn't
18 hear it at 100 feet, 200 feet, 300 feet, or 1400 feet

19 Now, there are people at the crossing who did and so
20 one of the things you're going to have to answer is did
21 this short whistle as they'll call it or this gap have
22 anything to do with causing this accident if she never
23 heard the horn anyway? What we believe the evidence is
24 going to show is that the relevant time period when it was
25 important when it was giving adequate warning that Michael

1 Stephens was on the horn blowing and that there was a horn
2 being sounded to be heard and that there was a train there
3 to be seen

4 Now, there will be other witnesses, and again I am
5 not going to go through it because I appreciate the
6 attention that you all have given me, but I'll have
7 another opportunity when we finish all of the evidence and
8 I ask that you listen to all of the evidence in this case
9 You're going to hear from witnesses who live near the
10 crossing who think the crossing doesn't provide adequate
11 sight distance You're going to hear from -- They'll call
12 those witnesses You'll hear from witnesses that we'll
13 call who live near there who say that they do What I ask
14 you to do is I ask you to listen all of the testimony
15 Listen to everything and try to decide some things that
16 are undisputed because we believe when I am standing up
17 here seven days eight days, however long it takes to try
18 this case that it will be undisputed that this photograph
19 that was taken by their investigator -- that it will be
20 undisputed that you can see almost three and a half
21 football fields down the track on the day of this accident
22 stopped before the stop line or at the stop line but you
23 all as the Judge said are the triers of the fact and you
24 get to determine having heard everything what the facts
25 are

1 Now, as I said a moment ago when I stand up here the
2 next time I believe that you'll be persuaded of three
3 different things. First of all that CSX, Michael
4 Stephens, and the crew -- that they were not negligent.
5 Secondly Ladies and Gentlemen of the Jury, that CSX nor
6 crew did anything to actually cause this accident at this
7 crossing with this driver on May 30, 2004 and, lastly,
8 that on May 30, 2004 a driver stopping where the state
9 said to stop could see a long ways down the track and that
10 if you as a driver can see you can always be safe, and as
11 a driver if you can see, then you are in control.

12 Thank you for your time and attention in advance,
13 Ladies and Gentlemen of the Jury

14 THE COURT All right We're going -- we've been
15 going about an hour and a half We're going to take our
16 first morning break I would like for you to do three
17 things Number one, select a foreperson among the 12 of
18 you Number two, do not discuss the case at all Number
19 three, I am going to send a menu back for you to go ahead
20 and select what you would like for lunch so we don't have
21 to wait until we get there at lunch time Does everybody
22 want to go to lunch? Some of you may not want to eat on
23 the county's dime We either all got to go or none of us
24 got to go All right I'll buy everybody's lunch

25 So, let's -- it'll take just a few extra minutes to

1 do that so the break will be about 15 minutes Does
2 anybody need a cigarette? Good If we do, then I have to
3 send a bailiff down with you and all of that Anyway
4 have a very -- not that I don't trust you That's just
5 the law

6 All right Everybody else remain seated, please

7 Y'all step back to the jury room and do those three
8 things for me

9 (Whereupon the jury exited the courtroom at
10 11 o'clock)

11 THE COURT All right Mr Parker, you said we had a
12 motion in limine as to the first witness, is that correct?

13 MR PARKER Yes Your Honor

14 THE COURT Do you need - Would y'all rather go to
15 the bathroom before we do that or are you comfortable to
16 do it now?

17 MR PARKER We can go ahead and do it now Your
18 Honor, before we do that I would like to move for a
19 directed verdict at this stage on the issue of negligence
20 of CSX Mr Harmon admitted in his opening statement that
21 they violated the statute 58-15-910 in that they failed to
22 blow the horn the sufficient distance required by law and
23 even though it's an issue as to proximate cause we would
24 be entitled to a directed verdict on negligence based on
25 the opening statement that, in fact, the jury should be

1 MR PARKER Right This is the senior, I believe
2 the older gentleman He testified in his deposition --

3 THE COURT I don't mean to interrupt you The older
4 Mr Breland is a first responder?

5 MR PARKER Yes he was with the Fire Department, I
6 believe and he arrived there but at some previous
7 occasion he had come to that crossing and he said he
8 wasn't paying attention and almost was hit with the train
9 and we do not believe that that testimony would be
10 admissible in any way in this case and we would move in
11 limine to prevent any questioning concerning that

12 THE COURT Mr Harmon?

13 MR WILBY Your Honor may I?

14 THE COURT Mr Wilby?

15 MR WILBY I think near misses whether anybody --
16 any witness -- talks about them they have to be
17 substantially similar and so we do not plan to draw that
18 information out

19 THE COURT Good

20 MR WILBY But, Judge I would like to at this point
21 with Mr -- both Brelands actually Your Honor has
22 indicated that you want to try this case based on the
23 condition of the crossing on the day in question

24 THE COURT That's correct Particularly with the
25 first responders

1 MR WILBY With the first responders yes, sir and
2 the point I want to make is Mr Breland - the younger
3 Mr Breland, I believe, has testified under oath that when
4 he was there that day he did not look at the sight
5 distance for the accident on that day when he was there
6 He has testified at his deposition that he had been there
7 on prior occasions and that on prior occasions he had some
8 testimony about what he could see I have no problem with
9 that as long as he's talking about a condition that is the
10 same on the day he gives the testimony or when he sees it
11 In other words, Your Honor, if he was testifying about an
12 occasion before the crossing had been cut or any work had
13 been done out there that evidence would not be relevant
14 to this case In other words, he's got to talk about his
15 observations concerning the same conditions that existed
16 at the time of the crossing

17 THE COURT Mr Wilby I am going to try this case
18 based on May 30, 2004 and how it was on that particular
19 day as to particularly the first responders and those type
20 of people I don't see how in the world I am going to let
21 that in

22 MR WILBY Thank you, Judge

23 MR PARKER Your Honor, we don't contend, but,
24 obviously, people who saw this crossing and the condition
25 two weeks prior or a month prior is going to be

1 substantially the same

2 THE COURT Well, that's a whole different ballgame,
3 but if we're talking about over the period of his life
4 or --

5 MR PARKER Oh, no We're not going to ask anything
6 before it was cut They cut it in 2001, and, certainly
7 it would - anything we would attest to would be --
8 actually, after they cut it in 2001 anything earlier would
9 have been better In other words sight distance would be
10 greater because it was cleared out and it was allowed to
11 grow back up So, we agree we have to prove the
12 conditions were substantially similar

13 MR WILBY May I address one other point Judge?

14 THE COURT Yes, sir

15 MR WILBY I'll be very quick

16 THE COURT Mr Wilby, I am not cutting you off

17 MR WILBY I'm always concerned about you because
18 you want to move us and I understand that Judge, but this
19 photograph -

20 THE COURT I don't want to move it to hurt your
21 client

22 MR WILBY Yes, sir

23 THE COURT What number is that, please?

24 MR WILBY This is number 75, Your Honor

25 THE COURT Defendant?

1 MR WILBY Defendant's 75 This is another
2 photograph of the man at 1,014 feet

3 THE COURT Okay

4 MR HARMON Okay I could get the other one, but in
5 any event the parties agree that this is - this
6 accurately reflects the condition of the crossing on the
7 day of the accident That's what we're dealing with, and
8 so Mr Parker says Well, if a witness was there a month
9 before it's the same A lot of these witnesses have lived
10 there their whole lives and so the fact is they may
11 have been there a month before They may have been there
12 two years before, and it all sort of gets mixed up, and
13 the point I was trying to bring to Your Honor's attention
14 is that the witness needs to be able to testify if they're
15 going to make observations about the crossing that -

16 THE COURT I am listening

17 MR WILBY -- they're talking about the conditions
18 of the crossing at the time of the accident So if a
19 witness comes -

20 THE COURT Well Mr Wilby, you're familiar with
21 Rule I think 403

22 MR WILBY Yes sir

23 THE COURT That's not only prejudicial versus
24 probative, but it also talks about cumulative evidence and
25 that sort of thing and I am not going to sit up here and

1 listen to people talk about how that crossing looked all
2 of their lives We got a photograph and we all agree how
3 it looked on the day in question It is going to be
4 pushing it to get away from that No sense in beating a
5 dead horse to death if everybody agrees on what it looked
6 like that day in question If we get to the punitive
7 aspect of it -- if we get to the punitive aspect of it,
8 then we talk about similar -- it just may become relevant
9 then but --

10 MR WILBY Okay, Judge

11 THE COURT I am just not going to let a lot of
12 cumulative evidence in If we all agree that that is the
13 way it looked on May 30, 2004, I am not going to be real
14 patient about letting a lot of other stuff in I don't
15 mean patient I am going to be compliant with the Rule
16 How about that?

17 MR WILBY Thank you, Judge

18 (Whereupon a break was taken)

19 THE COURT Mr Parker, anything before we begin?

20 MR PARKER Nothing

21 THE COURT Mr Harmon anything for the record
22 before we start back?

23 MR HARMON No, Your Honor

24 THE COURT Where is Mr Wilson? All right

25 Bring the jury in, please

1 Mr Parker, you may call your first witness

2 MR MURDAUGH The Plaintiff calls Charlie Breland

3 THE COURT All right Call Mr Breland He is
4 outside

5 Come around, sir, please Good morning How are
6 you?

7 THE WITNESS Fine

8 THE COURT Everything well?

9 THE WITNESS Yes, sir

10 CHARLES H BRELAND, III after being duly sworn,
11 testified as follows

12 THE COURT Have a seat Pull up to the microphone
13 and speak distinctly, please

14 DIRECT EXAMINATION

15 BY MR MURDAUGH

16 Q All right Mr Breland tell us -- your name is
17 Charlie Breland?

18 A Charles H Breland III

19 Q All right Tell me by whom are you employed now?

20 A South Carolina Highway Patrol

21 Q How long have you been employed with the highway
22 patrol?

23 A Almost five years

24 Q Before that where were you employed?

25 A With Denmark Public Safety

- 1 Q How long were you employed as a public safety officer
2 in Denmark?
- 3 A About three and a half years
- 4 Q Where do you live, Mr Breland?
- 5 A I live in Denmark
- 6 Q How long have you lived in Denmark?
- 7 A All my life
- 8 Q Born and raised?
- 9 A Born and raised
- 10 Q You got a family?
- 11 A Yes, sir
- 12 Q Are you married?
- 13 A Yes, sir
- 14 Q You got children?
- 15 A One kid
- 16 Q How old?
- 17 A Four months old yesterday
- 18 Q All right Boy or girl?
- 19 A Little boy
- 20 Q And now do you currently serve as a volunteer
21 fireman?
- 22 A Yes I do
- 23 Q How long have you been serving as a volunteer
24 fireman?
- 25 A Almost 14 years

1 before May 30 was the vegetation at the crossing the same
2 as it was on May 30?

3 MR. MILLBERG: Same objection, Your Honor.

4 THE COURT: All right. Madam Forelady, Ladies and
5 Gentlemen, let me go ahead and get this out of the way in
6 the very beginning. When this guy is answering questions
7 from the Plaintiff he is on direct examination. When the
8 lawyer is asking questions on direct examination the rules
9 say he can't ask leading questions. Isn't your name Patsy
10 Chassereau? That's a leading question. He has to ask
11 direct questions. What is your name? And of course now
12 when they cross-examine him they can ask leading
13 questions. That's what they're objecting to.

14 So, let's get it -- groundwork laid. No leading
15 questions on direct, only on cross.

16 MR. MILLBERG: Also with respect to the relevancy
17 and time, Your Honor.

18 THE COURT: Well, we've had a sidebar. I am allowing
19 him to testify about his observations during the month of
20 May and late April of 2004.

21 Q: Now, Mr. Breland, in April and May of 2004 was the
22 vegetation on your prior visits the same as the vegetation
23 on May 30 of '04?

24 A: Yes, sir, it was.

25 Q: Okay. And had it been that way for a substantial

1 Q All right Let's just proceed

2 THE COURT Mr Murdaugh, how about each time we
3 change it just for the record make a reference to the
4 exhibit number

5 Q That s exhibit 13 That last was exhibit 14, and
6 this is Plaintiff's Exhibit 15 and this is proceeding
7 towards the tracks still Mr Breland?

8 A Yes

9 Q Okay

10 THE COURT And for the jury's understanding, these
11 exhibits were taken when? Is there a date on them?

12 MR MURDAUGH Yes sir These were taken - Some of
13 them were taken at different times Some of them were
14 June 4 but all in close proximity to the wreck

15 THE COURT All right Is everybody agreeable with
16 that?

17 MR WILBY Yes, sir

18 THE COURT All right And I think at pretrial we've
19 all agreed these are an accurate depiction of how the
20 scene would have looked on the day of May 30 2004, is
21 that correct? Gentlemen?

22 MR PARKER Yes, sir

23 MR MURDAUGH Yes, sir

24 MR WILBY Yes sir

25 THE COURT So, Ladies and Gentlemen of the Jury

1 even though they may not have been taken on May 30 or they
2 may have been taken a couple of days after everybody has
3 stipulated or agreed that that is a true and accurate
4 representation as to how the scene actually looked on the
5 day in question Okay?

6 Q Go to exhibit 32 Thirty-five Exhibit 32 Again
7 this is just another picture at the crossing Plaintiff's
8 exhibit 16

9 A Yes, sir

10 Q And this is Plaintiff's Exhibit 32 Would this be
11 stopped at the crossing or this would be a picture taken
12 at the crossing?

13 A Yes sir, it would be

14 Q And 321 would be to our left?

15 A Yes sir

16 Q And Honey Ford community would be to the right?

17 A Yes, sir

18 THE COURT Mr Murdaugh, we're getting ready to get
19 another objection Please no leading

20 Q Where would the Honey Ford community be in this
21 picture?

22 A Honey Ford would be back to the right

23 Q And where would 321 be in this picture?

24 A Back to the left

25 Q Okay All right And, so in this picture in the

1 A I approached the accident scene itself

2 Q All right And let's go to Exhibit 1

3 We've all agreed on these, Your Honor

4 All right And is this -- What is this a photograph

5 of?

6 THE WITNESS The scene taken after, it looks like

7 Q All right And where is the -- I mean, is that what

8 the scene looked like that day?

9 A No, sir

10 Q Is this the scene at the wreck?

11 A That's the scene of the wreck, yes, sir, it is

12 Q All right And in there you see a fire truck?

13 A Yes, sir

14 Q Is that the fire truck you drove out there?

15 A Yes sir it is

16 Q And based on your testimony earlier that's not where

17 you parked it?

18 A No sir I did not park it there

19 Q Okay All right During that day did it -- Was

20 there a necessity to reposition the fire trucks?

21 A Yes, sir, it was

22 Q And did the emergency vehicles move around that day,

23 also?

24 A Yes, sir, they did

25 Q Let's go do the next exhibit And this is just

1 another view of the scene Is this Plaintiff's Exhibit 2?

2 Is that correct?

3 A Yes, sir

4 Q And you can see the train in there?

5 A Yes sir

6 Q Let s go to 3 All right Did you see the van that
7 day of the wreck?

8 A Yes sir, I did

9 Q Tell us where on the crossing that van is

10 A It's on the Honey Ford side of the crossing facing
11 back towards Govan

12 Q All right Now, as you cross the crossing on Honey
13 Ford would it be on the right or the left -- the van?

14 A It would be on the right

15 Q Okay Plaintiff's Exhibit 4, does that just
16 accurately depict what the scene looked like that day?

17 A Yes, sir

18 Q Go to Plaintiff's Exhibit 5 That's more pictures of
19 the scene Is that out there that day?

20 A Yes sir it is

21 Q You can see Who do you see in that photograph? I
22 mean not specifically but tell me who those people are

23 A Sheriff s Office Police Department, and it looks
24 like the Fire Department in the back

25 Q Six Now, when you got out there did you go to

1 Ms ~Harvey?

2 A Yes, sir, I did

3 Q All right And show us, if you will, in Plaintiff's

4 Exhibit 6 -- I'll give you this little pointer Let me

5 make sure it works Show us if you will where Ms ~Harvey

6 was located on May 30, 2004?

7 A She was laying right there

8 Q And what was her condition Mr Breland?

9 A She appeared to be in severe pain

10 Q All right And did you approach her?

11 A Yes, sir, I did

12 Q Did you talk to her?

13 A Yes, sir, I did

14 Q All right And what was -- What was Ms ~Harvey

15 saying that day?

16 A She was just complaining of her injuries and asking

17 about her son

18 Q What was she asking about her son?

19 A If he was all right

20 Q Was she bleeding?

21 A Yes, sir, she was

22 Q And what treatment did you provide to Ms ~Harvey?

23 A I held her head until EMS got there and once EMS got

24 there I helped to put the C-collar on

25 Q What is the C collar?

1 A It holds your neck in place

2 Q In the photograph if you will, show us where -

3 Let's go to -- Can you see in Exhibit 6 where Beryl Harvey
4 was?

5 A He was back in this area

6 Q Okay And did you go to Mr Harvey?

7 A No, sir I didn't

8 Q All right Did you get -- did you talk to
9 Mr Harvey?

10 A No, sir

11 Q Did you hear Mr Harvey say anything?

12 A You couldn't hear him say anything He was just
13 moaning

14 Q He was moaning?

15 A Yes sir

16 Q And did you see him?

17 A No, sir I didn't

18 Q What was your impression when you heard him moan?

19 A He was in pain

20 Q Now, did you remain at the scene or did you leave the
21 scene at some point thereafter?

22 A I left the scene briefly while they transported
23 Ms ~Harvey to the church up the road to wait on the
24 helicopter to come land

25 Q Why was she transported to the church?

1 A For a safe landing zone to be flown out to the
2 hospital

3 Q All right And, now, let's go to Plaintiff's
4 Exhibit 7 That is just out at the scene that day,
5 Mr. Breland?

6 A Yes, sir

7 Q Plaintiff's Exhibit 8 Again, tell us what that is

8 A It's a picture of a van

9 Q All right And you see the law enforcement personnel
10 in that photograph?

11 A Yes, sir

12 Q Let go to Plaintiff's Exhibit 9 Identify that
13 Just tell us about that -- same thing?

14 A Same thing Highway Patrol

15 Q Okay Ten

16 MR. MILLBERG Your Honor, may we approach, Your
17 Honor?

18 THE COURT All right Take that one down Have
19 you all agreed on that?

20 MR. MILLBERG That one was fine I would like to
21 talk to the court about the next one

22 MR. MURDAUGH Eleven and twelve?

23 MR. MILLBERG Yes, sir

24 MR. MURDAUGH They're not going to be --

25 MR. MILLBERG Nevermind, Your Honor

1 highway patrolman and your experience as a driver can you
2 tell us what happens as a vehicle approaches a stop line?

3 MR MILLBERG Objection, Your Honor

4 THE COURT He's not qualified as -- Is that asking
5 for an opinion - expert opinion?

6 MR MURDAUGH No, sir That's asking him from his
7 personal experience

8 THE COURT What does a person do when?

9 MR MURDAUGH Not what a person does What he's
10 observed

11 MR MILLBERG It is irrelevant

12 THE COURT Sustained

13 Q All right Now, Mr Breland on - prior to -- on
14 your occasions out there in April and May of '04, all
15 right, and you would come to that crossing how far could
16 you see down the tracks?

17 A Approximately about 400 to 450 feet

18 Q All right And does Exhibit 32 give a general
19 indication there?

20 A No sir

21 Q All right Now, Mr Breland, if you stopped your
22 vehicle at the stop line what would your vision be?

23 A You could see about 400 feet down the track

24 Q What would you have to do to improve that vision?

25 A You would have to pull up past the white line in

1 order to see a good distance down the track

2 Q All right So when you stopped your vehicle on
3 those occasions prior to May 30 -- April and May of 04 --
4 and stopped your vehicle behind the stop line could you
5 see what you believed was a safe distance?

6 A No, sir, I couldn't

7 Q All right What did you have to do Mr Breland, to
8 be able to see a safe distance?

9 A Pull forward past the white line

10 Q All right Let's put up -- What is the exhibit?
11 What is the one they had blown up?

12 MR WILBY Are you looking for the white dot? That
13 would be our 76, I believe

14 MR HARMON Your 32

15 MR WILBY Our 76 would work

16 Q All right Now this is a picture --

17 THE COURT That's 48 B --

18 MR MURDAUGH Yes, sir

19 THE COURT -- for the record

20 Q The testimony in this is -- Let's get the laser You
21 see the white spot on the track?

22 THE COURT There is no testimony to that so far

23 That's opening statement That's not evidence

24 MR MURDAUGH That's fine

25 All right Now you see in this scene -- You

1 recognize the picture?

2 THE WITNESS Yes, sir

3 Q You're at Honey Ford crossing?

4 A Yes, sir

5 Q All right Do you see the spot on the track?

6 A Yes, sir

7 Q Okay Now, this picture, I'll represent to you, was

8 taken from 70 inches behind the stop line On your

9 experience when you pulled up and you stopped at or near

10 the stop line in April and May, did you have a sight

11 distance of this far?

12 A No, sir, you didn't

13 Q All right And what would you have to do to get a

14 sight distance of that far?

15 A You would have to pull forward past the white line

16 Q All right Your bumper -- Where would your bumper be

17 in relation to the white line to be able to see this far

18 in your vehicle?

19 A Past the white line

20 Q What kind of vehicle did you drive?

21 A Chevrolet S-10

22 Q Regular pickup truck?

23 A Regular pickup

24 Q Now, Mr Breland - and we showed some photographs

25 What happens to your vision and your sight distance as you

1 get closer to the track?

2 A As you get closer to the track?

3 Q Yes sir

4 A As you get closer you can see greater distance down
5 the track

6 Q Conversely as you get back?

7 A Distance diminishes

8 MR MURDAUGH All right Please answer any
9 questions that Mr Millberg has

10 THE COURT Mr Millberg?

11 MR MURDAUGH Your Honor, just as a technical matter
12 let me move into evidence Exhibits 13 14, 15

13 THE COURT As I understand we've agreed on those and
14 we don't have to go through the process

15 Mr Wilby, somebody these exhibits that we've all
16 agreed upon there is no need -- They're in evidence, is
17 that correct?

18 MR HARMON All the exhibits they went through just
19 then, yes

20 THE COURT All right So we're good to go All
21 right Mr Millberg is on cross examination So, he can
22 lead

23 CROSS-EXAMINATION

24 BY MR MILLBERG

25 Q Good morning sir

1 THE COURT Good morning Oh I thought you were
2 talking to me

3 Q Mr Breland, as I understand it sir, you are a state
4 trooper now?

5 A Yes, sir, I am

6 Q But at the time of this accident you were not yet a
7 state trooper, correct?

8 A No, sir

9 Q And your role in connection with this accident was as
10 a member of the Denmark Fire Department?

11 A Yes

12 Q So, your role in going to this accident was as an
13 emergency responder to help tend to folks control
14 traffic that kind of thing?

15 A Yes, sir

16 Q Correct?

17 A Yes, sir

18 Q You did not go there to investigate this accident,
19 correct?

20 A No sir

21 Q There were other state troopers who were state
22 troopers at the time who went to the scene for the purpose
23 of investigating the accident is that correct, sir?

24 A Yes, sir

25 Q Okay Now if we could get the diagram

1 THE COURT Which is exhibit what?

2 MR WILBY It is like 150, Your Honor

3 MR MILLBERG 150 Can we get that up on the
4 screen?

5 Now, as I understand it, sir, you approached the
6 crossing from Highway 321 correct?

7 THE WITNESS Yes

8 Q And pulled up in this direction is that correct?

9 A Yes sir

10 Q And as I understand it the van that was involved in
11 the wreck was found over in this area?

12 A Yes, sir

13 Q Is that correct?

14 A Yes, sir

15 Q That would be the north side of the road, is that
16 correct?

17 A Yes

18 Q And the west side of the railroad track? Sir is
19 that correct?

20 A Yes, sir, it is

21 Q Right over there Now, as a first responder who was
22 going to tend to folks that's where your attention was
23 isn't it?

24 A Yes sir

25 Q Your attention was on where the van was and the

1 people that were on the ground?

2 A Yes, sir

3 Q That was your focus, correct? Now, you understand
4 that the train involved in this accident came from down
5 here, correct?

6 A Yes, sir

7 Q Came from the south heading north, correct?

8 A Yes, sir

9 Q And that area which would have been down to your
10 left -- that was not the area that you were focused on on
11 the date of the accident, was it?

12 A No, sir, it's not

13 Q In fact you told us when you took your deposition
14 you never even looked down there?

15 A No, sir

16 Q We were asking you about what the vegetation was like
17 down there on the day of the accident and you said I
18 didn't even look down there on the day of the accident
19 Do you recall that?

20 A Yes, sir

21 Q And that's correct, isn't it, sir?

22 A Yes, sir

23 Q Now, there were others out there charged with the
24 responsibility of inspecting the scene and looking for
25 obstructions to view and that kind of thing, weren't they?

1 A Yes, sir

2 Q You know that as a trooper that that is one of the
3 things that troopers do when they go investigate wrecks,
4 correct?

5 A Correct

6 Q One of the things they look for is obstructions to
7 view, correct?

8 A Correct

9 Q And you know that Trooper Whatley --

10 MR. MURDAUGH: Objection to --

11 THE COURT: Sustained. You can't put witnesses

12 Q Now, in any event that was not something that was on
13 your agenda that day, correct?

14 A No, sir, it wasn't

15 Q Now, can we get Defendant's Exhibit 76 up, please?

16 Now, you've indicated that -- You've heard counsel
17 represent that these photographs show what it looked like
18 the date of the accident, correct?

19 A Yes

20 Q And that is what it looked like the date of the
21 accident, isn't it?

22 A Yes, sir

23 Q Okay. Now, you didn't make any measurements out
24 there the day of the accident, did you?

25 A No, sir

1 Q You didn't make any photographs?

2 A No, sir

3 Q You weren't there when this photograph was taken?

4 A No, sir

5 Q So, if it's testified to that this photograph was
6 taken actually about 6 feet back behind the stop line,
7 that's just something you don't have any knowledge about
8 one way or the other?

9 A I couldn't say

10 Q And if, in fact, that little white dot that counsel
11 asked you about way on down the track -- if, in fact,
12 that's a person that went down the track and they measured
13 that distance and they measured that distance from the
14 crossing down to that person way down there was over a
15 thousand feet you wouldn't know anything about that. You
16 weren't there when that was done?

17 A No, sir

18 Q But you do know that that is what the area looked
19 like the day the accident happened?

20 A Yes. That's what the vegetation looked like the day
21 that the accident happened.

22 MR. MILLBERG: Thank you.

23 THE COURT: Redirect, if any.

24 REDIRECT EXAMINATION

25

1 BY MR MURDAUGH

2 Q You had been out there a number of times in April and
3 May?

4 A Yes, sir

5 Q And when you stopped your vehicle behind the stop
6 line could you see that 1014 feet?

7 A No, sir

8 MR MILLBERG Objection Repetitious, Your Honor

9 THE COURT Overruled

10 Q Could you see that?

11 A No, sir You couldn't

12 Q And to see this -- I want the jury to understand To
13 see this --

14 THE COURT No, sir Just ask the question

15 Q -- as this photograph shows what you would you have
16 to do?

17 A You had to pull up where your bumper is past the
18 white line

19 Q Thank you

20 THE COURT Thank you You may step down Next
21 witness

22 MR MURDAUGH Charles Breland

23 THE COURT Is he excused from his subpoena
24 gentlemen, ladies?

25 MR MURDAUGH Yes, sir

1 MR MILLBERG Yes, sir

2 THE COURT Okay You're excused

3 Mr Breland, come up and have a seat for me, please,

4 sir

5 CHARLES BRELAND, JR , after being duly sworn,

6 testified as follows

7 DIRECT EXAMINATION

8 BY MR MURDAUGH

9 Q All right Mr Breland, tell the jury a little bit
10 about yourself Where are you from?

11 A Denmark

12 Q How long have you lived in Denmark?

13 A Fifty-five years

14 Q How old are you?

15 A Fifty-five

16 Q You lived in Denmark your whole life?

17 A Yes, sir, pretty much

18 Q All right You got a family?

19 A Yes, sir

20 Q Tell us about that

21 A I got a wife and three children

22 Q How long have you been married, Mr Breland?

23 A Thirty-seven years Two new grandchildren

24 Q All right You got children?

25 A Yes, sir One of them just left out of here

1 Q All right How many others you got?

2 A I have a daughter She's 32 and then I have a
3 younger son He is 20

4 Q What do you do for a living, Mr Breland?

5 A We're in the propane gas business is our family
6 business

7 Q How long have y'all been doing that?

8 A Daddy has been in business about 56 years

9 Q Okay And have you always been in the gas business?

10 A I was a state trooper for a while

11 Q When were you a state trooper?

12 A '84 until '87

13 Q Okay All right And you live over in Denmark?

14 A Yes, sir

15 Q All right Do you have the occasion or have you had
16 the occasion to cross Honey Ford Road?

17 A Yes, sir, several times

18 Q Tell me why that is

19 A We have -- We sell propane gas and do heating and air
20 conditioning and we have a lot of customers down Honey
21 Ford Road

22 Q All right And are you familiar with Honey Ford
23 crossing?

24 A Yes, sir

25 Q All right And weeks before May 30 of 2004 how many

1 times a week would you cross Honey Ford Road?

2 A That time of year probably three or four times a
3 week, sometimes more, sometimes a little less

4 Q All right And for how long have you been doing
5 that, Mr Breland?

6 A Thirty-seven years

7 Q Okay And, now, in the year -- in the year or so
8 prior to May 30, 2004 had the vegetation at Honey Ford
9 crossing changed?

10 THE COURT Hold on, now Hold on

11 MR MILLBERG Objection, Your Honor

12 THE COURT Sustained Limit it to April and May

13 MR MURDAUGH All right

14 THE COURT April and May of '04

15 Q So, in April and May of '04 had the vegetation at
16 Honey Ford crossing changed any from the day of May 30,
17 2004?

18 A No, sir

19 Q Okay Now, do you also serve as a volunteer fireman?

20 A Yes sir

21 Q How long have you been doing that, Mr Breland?

22 A Thirty-six years

23 Q And in that -- is that the capacity that you
24 responded to the wreck on the May 30, '04?

25 A Yes, sir

1 Q All right Tell us about that day, may 30 '04 Was
2 it a hot day?

3 A It was a hot day I had just left the fire station
4 with my walkie-talkie My pager went off

5 Q Tell me -- I mean, tell me what the pager alerted you
6 to?

7 A A vehicle versus train

8 Q All right Let's go to Exhibit 13 And you
9 responded to that scene?

10 A Yes, sir

11 Q All right And did you -- you rode out there on the
12 fire truck or did you drive a fire truck?

13 A I rode

14 Q Okay And where was your fire truck, I mean, in
15 relation to -- were you -- your truck the first one there?

16 A My truck was the first truck out, yes, sir

17 Q Okay And was there a lot out there going on up
18 around the crossing?

19 A Yes, sir EMS was out there There was a couple of
20 other vehicles

21 Q Now, did you immediately that day -- where we can see
22 -- did you immediately that day when y'all parked out
23 there did y'all park up at the crossing?

24 A No, sir We stopped I was Captain at the time and
25 we -- I stopped the fire truck back until I could assess

1 the situation and see, you know, what the train was
2 carrying before I advanced too close

3 Q I understand Now, Mr Breland, one of the things in
4 these photos -- Let's go to Exhibit 14 Let's just go
5 through the crossing, and you're familiar with the
6 crossing Is that -- is that looking to your left?

7 A Yes, sir

8 Q All right And, Mr Breland, generally speaking --
9 let's go to 15 Generally speaking, as you get closer to
10 the crossing, all right, what happens to your sight
11 distance down the track?

12 A The closer you get the further you can see

13 Q All right And the converse of that, what happens
14 the further you get back from the crossing?

15 A The less visibility you have

16 Q All right, sir Now, what did you do at the scene
17 that day?

18 A The first thing I did was went to -- once we
19 repositioned the truck and found out, you know, that it
20 was safe for us to do so we repositioned the truck as
21 close to the stop line as we could get and then I exited
22 the truck and went to Ms ~Harvey She was laying out by
23 herself to see, you know, if I could administer any care
24 to her

25 Q What was Frances -- I mean, tell us -- Let's go to

1 the Exhibit 1 Just go through what the scene looked
2 like Let's go to exhibit 6, William All right And is
3 this on the scene out there?

4 A Yes, sir

5 Q And tell us -- Show us, if you will, where you went,
6 Mr Breland There is a pointer

7 A Somewhere right in that area right in here

8 Q What were you doing?

9 A Like I say, I went to check on Ms ~Harvey She was
10 laying there by herself Nobody was there EMS was on
11 the other side of the vehicle with her son

12 Q And what was her condition there?

13 A She was in a lot of pain and she had got into -- she
14 was laying in a fire ant bed and the ants were on her We
15 tried to get the ants off of her

16 Q Were y'all able to get the ants off of her?

17 A We did the best we could, yes, sir

18 Q All right, sir And, I mean, what did she say to
19 you? What was she worried about out there?

20 A She was worried about her son

21 Q What was she saying?

22 A That was the first thing she asked me was how was
23 Beryl

24 Q Okay And did you see Beryl?

25 A Not at that time, but I did shortly after the

1 incident

2 Q All right Now, if you will, show us please in
3 Plaintiff's Exhibit 6 where Beryl was laying that day?

4 A Somewhere in that neighborhood right over in there

5 Q All right And at some point in time did you go to
6 Beryl and did you see Beryl?

7 A Yes, sir

8 Q Okay And did you talk to Beryl that day?

9 A No, sir

10 Q All right Did you hear Beryl say anything?

11 A No, sir He was moaning and then I started -- I
12 heard him start gurgling some I could tell he was in a
13 lot of pain

14 Q All right Now, while we're on this for a second,
15 Mr Breland, did you know Beryl Harvey?

16 A Yes, sir

17 Q Tell the jury if you will how you knew Mr Harvey

18 A His mom and Dad purchased propane gas from us for
19 years and then -- Well, I know his whole family I have
20 just known him through the years He is a big Carolina
21 fan He used to have the Gamecock flag all around his
22 house He was also a Miami Dolphins fan He used to wear
23 the t-shirt all the time -- the jersey He was a good
24 guy

25 Q Was he well known around Denmark?

1 A Yes, sir

2 Q Did you buy peanuts from him?

3 A Yes, sir As a matter of fact, they had delivered
4 peanuts that day to my church

5 Q When you say they, who are you talking about?

6 A Beryl and his mother

7 Q Now, Mr Breland, did you -- I mean, do you have some
8 knowledge of the diving accident that Beryl was in?

9 A Yes, sir As a matter of fact I went to the scene
10 there, also, and helped patch him the day that he -- I was
11 chief of the rescue squad at that time and went out to the
12 river the day he had his accident Yes, sir

13 Q Okay All right You testified a minute ago at that
14 at some point out there that you repositioned the fire
15 truck?

16 A Yes, sir

17 Q Let's go to Exhibit 2 and 3 with the fire trucks on
18 it Is that the fire truck that you were in that day?

19 A No, sir

20 Q All right And is that the fire truck you rode out
21 there in that day?

22 A No, sir

23 Q Is that the one you repositioned that day?

24 A No, sir

25 Q All right And this would have been later in the

1 day?

2 A Yes, sir

3 Q All right Describe, if you will, the one that you
4 were in

5 A It's an International It is 301 -- truck 301

6 Q Does it got a flat front like that?

7 A No, sir It's got an extended It's like I said,
8 International It's got the extended hood and then it
9 also has a bumper on the front of it that has a hose lay
10 and a draft fitting to draft out of ponds and stuff

11 Q All right When you repositioned the fire truck that
12 day, where did you reposition it to?

13 A I pulled it closer to the scene I tried to stop as
14 close, you know, in the vicinity of the stop line I
15 didn't go above it

16 Q All right And that's on May 30, 2004?

17 A Yes, sir

18 Q All right And on May 30 2004 when you repositioned
19 that fire truck did you look to your left?

20 A Yes, sir

21 Q All right If you will -- Let's go to Exhibit 32
22 Now, that day when you looked to your left, Mr Breland,
23 could you see a long ways down the track?

24 A Hundred to 150 yards

25 Q Okay And let's go to right there Just zoom in

1 right there, William Let's go out a little bit more
2 Let's look at this picture close up From however far you
3 could see, I mean, was the vegetation as shown here?

4 A Yes, sir That looks pretty much like it, yes, sir

5 Q Okay Now let's go to -- all right Mr Breland,
6 let me ask you this Let's go to there, Plaintiff's
7 exhibit 48-B All right Look down the track Do you
8 see anything on the track down there? See that white
9 spot?

10 A I see the white spot, yes, sir

11 Q All right And, now, let me ask you this,
12 Mr Breland You have been out there many times before on
13 your gas truck?

14 A Yes, sir

15 Q All right And what was your practice when you
16 approached that crossing to stop?

17 A I would always stop at the stop line like you're
18 supposed to because of CDL driver's license and what DOT
19 requires, but to see down the track at that distance you
20 would have had to pull further up to the track

21 Q Okay So, you see that white spot on the track?

22 A Yes, sir

23 Q All right And could you see -- could you see that
24 far down the track from the times you were out there
25 before when you stopped your vehicle at the stop line?

1 A No, sir not at the stop line

2 Q Okay Where would you have to position your
3 vehicles, Mr Breland to be able to see as far shown as
4 in Exhibit 48-B?

5 A I would have had to eased up closer to the tracks

6 MR MURDAUGH Please answer any questions that

7 Mr Millberg has

8 THE COURT Mr Millberg?

9 MR MILLBERG Yes, sir

10 CROSS-EXAMINATION

11 BY MR MILLBERG

12 Q Good afternoon, Mr Breland

13 A Hey, now How are you doing?

14 Q I'm fine As I understand it, sir, you went there
15 that day with the fire department?

16 A Yes, sir

17 Q And your purpose that day primarily was to check on
18 the folks that were involved in the collision?

19 A Yes, sir

20 Q And, in fact you did that?

21 A Yes, sir

22 Q Spoke to Ms ~Harvey?

23 A Yes, sir

24 Q By the time you got there, sir Mr Harvey was pretty
25 well unconscious, wasn't he?

1 A He was moaning You know, like I say, he was moaning
2 and then he started gurgling I am not sure about his
3 conscious state I don't know that I could say that

4 Q Now, as far as the distance that you testified to you
5 said that you thought maybe you could see 100 to 150 yards
6 down the track?

7 A Yes, sir

8 Q Now, as I understand it sir, that is but an
9 estimate?

10 A Yes, sir

11 Q Correct? You didn't make any measurements out there
12 that day?

13 A No, sir

14 Q Can we get Exhibit 76 up, please? Defendant's 76
15 As I understand your testimony and what everyone else has
16 said is that this photograph does show the vicinity as it
17 looked that day May 30, 2004, is that correct, sir?

18 A Yes, sir

19 Q And as far -- you weren't there when that photograph
20 was taken?

21 A No, sir

22 Q And you can't tell us exactly where it was taken
23 from, sir?

24 A No, sir

25 Q But if, in fact, the person that took it says that

1 they were about 6 feet behind the stop line you wouldn't
2 have any reason to bicker with them about that, would you,
3 sir?

4 A No, sir

5 Q And if, in fact, what they testified to is that that
6 white dot that you were asked about down there --

7 A Yes, sir

8 Q -- that if that, in fact, was over a thousand feet
9 down the track and they measured that, you wouldn't have
10 any reason to bicker with that?

11 A Repeat that question, please

12 Q If the testimony of the Plaintiff's investigator that
13 took the photograph --

14 A Uh-huh

15 Q -- is that that white dot is a person that he sent
16 down the track and that they measured how far away that
17 was from the crossing --

18 A Right

19 Q -- and that they measured that and that was over a
20 thousand feet down there, you wouldn't bicker with the
21 measurement, would you?

22 A No, sir but I couldn't have seen that from where I
23 was at

24 Q Yes, sir But, apparently, you can see it from
25 wherever this photograph was taken?

1 A Yes, sir

2 Q And that, in fact, is what the vegetation looked like
3 at the time of the accident?

4 A Yes, sir

5 MR MILLBERG Thank you, sir

6 THE COURT Redirect, if any

7 REDIRECT EXAMINATION

8 BY MR MURDAUGH

9 Q I want to understand clearly how many times you
10 crossed Honey Ford Road in the weeks to a month prior to
11 May 30, 2004

12 A How many times?

13 Q Yes, sir, approximately, serving your gas business
14 out there

15 A Normally two, three, four time a week at least

16 Q Okay That's every week leading up to May 30?

17 A Yes, sir

18 Q All right And when you would stop your vehicle out
19 there as you testified earlier, is that -- could you see
20 what is shown in this photograph?

21 A If I pulled up to the railroad track, yes, sir

22 THE COURT That s 48-B for the record Thank you
23 You may step down

24 MR MILLBERG May I follow up one question?

25 THE COURT No, sir My rule is no recross I'll

1 treat everybody the same That's discretionary with the
2 court

3 You may step down Next witness

4 MR MURDAUGH The state calls Bennie Spell

5 THE COURT Hold on How many people have cars
6 that -- I can let you drive your own cars up there or I
7 can let you ride in police cars It would probably be
8 nicer to ride in your own cars

9 Come around, Mr Spell

10 Do we have cars enough?

11 Mr Parker, Defendants collectively, do y'all have
12 any objection to them riding -- gathering together and
13 riding together?

14 MR HARMON No, Your Honor

15 MR PARKER No, Your Honor

16 BENNIE SPELL, after being duly sworn, testified
17 as follows

18 THE COURT Good morning Good afternoon Have a
19 seat right there for us, please State your full name for
20 the record spelling your last

21 THE WITNESS Bennie Spell, S-P-E-L-L

22 THE COURT How is everything in the big city?

23 THE WITNESS It s fine

24 DIRECT EXAMINATION

25

1 BY MR MURDAUGH

2 Q Mr Spell, where are you from?

3 A Denmark, South Carolina

4 Q How long have you been living in Denmark?

5 A All my life

6 Q All right Now, do you live in Denmark near the
7 Honey Ford crossing?

8 A No, sir

9 Q All right Just where in Denmark do you live, sir?

10 A Between Sweden and Finland

11 Q Just so -- I think probably everybody knows that, but
12 just so that the jury understands, where is that?

13 A Highway 49 behind Rock's Country Store about a mile
14 across from Judge Early's farm

15 THE COURT And it is between Finland and Sweden
16 Everybody knows that

17 Q Now, Mr Spell, do you remember May 30, 2004?

18 A If that's when the wreck happened I remember it real
19 good

20 Q Okay And that was the wreck -- When you say the
21 wreck --

22 A The train wreck --

23 Q Okay

24 A -- with Ms -Harvey and her son

25 Q All right, sir On that day May 30, 2004 were you

1 out at Honey Ford crossing?

2 A Yes, sir

3 Q All right And what was the reason why you were out
4 at Honey Ford crossing, Mr Spell?

5 A I plant a little garden I had to carry one of my
6 helpers home

7 Q Okay All right And where were you that day? Were
8 you going or were you coming?

9 A I was coming back

10 Q Okay And, so, you were -- Let's bring up Exhibit 19
11 and 20 Do you recognize the crossing there --

12 A Yes, sir

13 Q -- Mr Spell? Let's go to 20 which is a little
14 further back, I think All right Is that the crossing
15 at Honey Ford Road?

16 A That's got to be it, yes, sir

17 Q All right Let's back out just to get him oriented

18 Let's go to 13 All right Now, I'll tell you,

19 Mr Spell, this is turning off of 321 on to Honey Ford
20 Road Do you recognize the crossing there?

21 A Right

22 Q Okay sir And on that day your testimony is that
23 you were on the other side of the tracks?

24 A That's correct

25 Q All right Headed back out to go home?

1 A Right

2 Q And let's go to, what was it, Plaintiff's Exhibit 20

3 All right Now, Mr Spell from reading the deposition I

4 know that's not a crossing that you use with regularity?

5 A Not very often, no

6 Q Okay And, in fact, you hadn't been out on that

7 crossing a whole lot in the last 20 years?

8 A Not really, not in the last 20 years

9 Q All right, sir Now, what was the weather like that
10 day May 30, 2004?

11 A It was fine It was clear

12 Q Was it a hot day?

13 A It was pretty warm

14 Q All right And in your vehicle that day as you were
15 traveling did you have your windows down?

16 A I had my passenger window down -- I mean, the
17 driver's window down The passenger window was up I had
18 the air condition on

19 Q Okay And was it all the way down?

20 A All the way down, driver's side

21 Q All right Now, as you approached -- Tell us what
22 happened as you approached Honey Ford crossing Did you
23 hear a train?

24 THE COURT Mr Murdaugh, let s get it established
25 which way were you coming?

1 THE WITNESS I was coming east to west Wait a
2 minute West to east

3 Q Yes, sir That's it

4 A I was coming back this way

5 THE COURT Back this way?

6 THE WITNESS Yes, sir

7 THE COURT The opposite side that the Harvey vehicle
8 was coming?

9 THE WITNESS That's right I was meeting the Harvey
10 vehicle

11 THE COURT All right Go ahead

12 Q All right, sir Tell us about that day when you
13 pulled up to the crossing

14 A When I came around that curve -- that little curve in
15 the road right there I was coming back this way I wasn't
16 in no hurry, and there was two ladies -- I believe it was
17 two ladies and three children in that house right there on
18 the right coming this way and I came around that curve
19 there and I was about where that tree is closest to the
20 road on the left right there I heard the train whistle go
21 off and then -- Well, I heard the train whistle twice and
22 about that time I waved at those people in the yard and I
23 was driving slow and I stopped pretty good distance from
24 the railroad track and the next thing I know a little bit
25 later -- a few seconds, five or six I don't know

1 exactly -- the engineer sat down on that horn and I just
2 looked at him because I hate loud noises and I heard about
3 the time he got in front of me, you know a second or so I
4 heard a noise and I looked down to the left and I saw
5 something flashing I couldn't tell what it was to tell
6 you the truth It flashed across the track down the track
7 a good little ways and that was it

8 Q Mr Spell, if you will, I am just going to give you
9 this pointer right here If you will, just push that
10 button and it makes that red dot come up Show us where
11 in that photograph you stopped your vehicle prior to the
12 crossing that day?

13 A Right about there

14 Q All right So, a little bit back from the crossing?

15 A Yea

16 Q All right Now, let's go back to your testimony
17 When you first heard that horn, all right, you were going
18 slow?

19 A Yea, I was going slow

20 Q You had your window down?

21 A Yea

22 Q All right And tell us -- tell us about that horn
23 How many times did you hear it blow?

24 A I heard it blow twice The whistle is what I call
25 it It might have been a horn I call it a whistle, but

1 whatever

2 Q Okay Yes, sir

3 A I heard it twice and then I got up -- I got stopped
4 then and then I heard the whistle just sit down on it I
5 was looking at the engineer then -- I reckon it's what you
6 call the engineer -- whoever is driving that train

7 Q Okay

8 A And I didn't see nothing I couldn't even tell that
9 was the car -- the van or anything flash in front of me
10 really I looked around

11 Q All right Let's back up a little bit As you
12 pulled up to this crossing and you looked across this
13 crossing all right, did you see another vehicle?

14 A When I pulled up to it, no, I did not

15 Q All right At any point in time did you see another
16 vehicle across the tracks?

17 A Yes, sir, I did When I was about where -- right
18 along in there I saw a vehicle between there and the
19 highway -- between the track and the highway I don't
20 know how far

21 Q Okay Between the track and the highway you're
22 referring to Highway 321?

23 A Right

24 Q All right So, when you saw it there was no doubt in
25 your mind it was on the other side of the track?

1 A Oh, it was definitely a good little ways on the other
2 side of the track

3 Q Okay and --

4 A I would say roughly half way, but I don't know exact
5 because I couldn't see all of it because it's kind of a
6 drop off

7 Q All right And at that point in time -- so you don't
8 know exactly where the vehicle was across the tracks?

9 A No, I do not know exactly where it was No

10 Q Okay All right And when you saw it, was it moving
11 or could you tell?

12 A I couldn't tell

13 Q Okay And, so, as we sit here today when you looked
14 at it you don't know if it was stopped or moving?

15 A I could not tell you, no, sir

16 Q And you don't know exactly where it was between the
17 tracks and 321?

18 A No

19 Q You just know -- but you are certain that it was on
20 the other side of the tracks from you?

21 A Oh definitely, roughly in there somewhere around
22 half-way, I would say but I am not sure It is in
23 between there

24 Q Due to that distance could you see the driver's face?

25 A No way

1 Q Okay Now, after you heard those two beeps -- the
2 two beeps of that horn -- did you hear it anymore for a
3 while?

4 A Not for a little while, no

5 Q All right And how much time would you estimate from
6 when that horn beeped twice and then some time went by and
7 you heard it again, how much time elapsed?

8 A I guess five or six seconds, in that neighborhood

9 Q Okay All right And when did you hear the horn
10 again?

11 A When he got about from here to the back of the
12 courtroom I could see the engineer

13 Q Okay When he got from here to the back of the
14 courtroom from where?

15 A From where I was sitting -- to the right of where I
16 was sitting with my truck

17 Q Okay How far before the train hit Ms ~Harvey's
18 vehicle did it start blowing that horn again?

19 A I don't think it ever stopped

20 Q No What I'm talking about is you heard two beeps
21 and then there was five to six seconds --

22 A Right

23 Q -- and then he started again When he started again
24 how long was it before he hit Mrs Harvey's vehicle?

25 A Oh I'd say a second or two, in that neighborhood

1 It wasn't long

2 Q So after the gap when he got back down on it he was
3 right at the crossing?

4 A He was getting close, right

5 Q Now, tell us what happened Did you see the van
6 again from when you first saw it until it got hit?

7 A Nope I didn't see it get hit even

8 Q Did you see the van go on to the tracks?

9 A No, sir

10 Q All right Tell us what the next thing you saw was,
11 Mr Spell

12 A I saw the train go on past the track and then I saw
13 something flashed to the left down the track I reckon
14 150 feet, 200 feet, a good little distance down there

15 Q Now, did you get out of your vehicle? What did you
16 do when you realized that a van had been hit, Mr Spell?

17 A I didn't know the van had been hit I just saw the
18 train stopping so I knew something had been hit That's
19 what happened

20 Q Okay And when you went up there -- I mean, when did
21 you realize it had been a wreck?

22 A When he slammed on brakes when it started sliding or
23 whatever stopping

24 Q All right, sir, and what did you do?

25 A I put my truck in park and cut it off and got out

1 and -- I don't know if I had a walking stick or not
2 because I just got out of the hospital with a staph
3 infection in my left foot and I mosied down that track to
4 see what was going on

5 Q Sounds like you were having a little bit of trouble
6 getting around that day?

7 A Oh, I had a lot of trouble I wasn't supposed to be
8 driving or out of the bed

9 Q Yes, sir

10 A I was supposed to be in hospital but I checked myself
11 out That's the truth

12 Q Did you call 9-1-1?

13 A Yes, sir, two or three times Four times, I think

14 Q Did you get through?

15 A I must have They finally got there It seemed like
16 a long time, but it wasn't that long

17 Q All right And you went up to the scene, Mr Spell?

18 A I didn't get quite to the scene because I had to stop
19 three or four times I remember that

20 Q All right sir Could you see where Frances Harvey
21 was?

22 A Yes, sir

23 Q All right And in this photograph where was she?

24 A Right there

25 Q All right Could you see her, Mr Spell?

1 A Yes, sir

2 Q All right I mean, what did she look like?

3 A She looked like she was in a bunch of pain and her
4 neck looked like it was broke

5 Q Okay And did you go talk to her?

6 A I got just about to her and I told her to, Please sit
7 down and just be still

8 Q Did she say anything to you?

9 A Nothing

10 Q Okay Now, did you see Beryl that day, Mr Spell?

11 A Yes, sir

12 Q All right Tell us what Beryl looked like that day

13 A Rough He was in a bunch of briars over there, and I
14 had that staph infection and taking Coumadin I'm not
15 supposed to get cut or anything so I couldn't have got to
16 him no way I couldn't have helped him

17 Q Sure I understand that Could you tell if Beryl
18 was injured?

19 A Oh, yea

20 Q How could you tell that?

21 A He looked like he was in a knot, but I never did get
22 back -- a little further than me to you

23 Q What did do you mean by a knot, Mr Spell?

24 A Well, he was all piled up

25 Q Okay

1 A I couldn't see his whole body

2 Q Yes, sir Did you hear him say anything?

3 A Yea

4 Q What did he say, Mr Spell?

5 A Mama

6 Q He was hollering Mama?

7 A That's all he ever said that I could hear

8 MR MURDAUGH Please answer any questions Mr Wilby

9 has

10 CROSS-EXAMINATION

11 BY MR WILBY

12 Q Mr Spell, how are you today?

13 A Pretty good, sir

14 Q Thank you for coming in

15 A I got up this morning

16 Q You got up this morning?

17 A That's right

18 Q Does anyone have a marker by any chance? I am not a
19 good writer, but I'll do the best I can If we could, do
20 you mind pulling up your picture of I think it was your
21 number 20?

22 All right Mr Spell, I believe what you've told us
23 and you correct me if I am wrong is that when you came
24 around the curve right about where that tree is --

25 THE COURT You're blocking those back there

1 MR WILBY I'm sorry I'll move out of the way
2 The tree right here -- is that the one that you're
3 referring to?

4 THE WITNESS Yes, sir

5 Q And when you came around and you got to that tree is
6 that where you first heard the horn?

7 A Time I passed that tree The time to -- that's where
8 I saw the car, the last time I saw the van, rather

9 Q Okay And then right after that you heard a second
10 whistle?

11 A Right

12 Q Real short? I mean, close together in time?

13 A Yes, like you always hear at the train crossing

14 Q Okay But you heard one whistle and then a second or
15 two later you heard a second whistle?

16 A That's correct

17 Q When you heard those first two whistles, Mr Spell,
18 is that also when you saw Mrs -- Well, you didn't know
19 who it was, but you saw the vehicle on the other side of
20 the tracks?

21 A It was in a second I believe I saw the vehicle
22 before that really and then I saw, yes, sir

23 Q All right So you heard the whistle You heard a
24 second whistle

25 A Right

1 Q And those were loud whistles to you, correct?

2 A Oh, yea, they were loud Yes, sir

3 Q In fact, that's the reason you stopped about 50 yards
4 back, correct, because of the loud noise?

5 A Yea I knew the train was coming, yes

6 Q All right And you don't like loud noises?

7 A That's true

8 Q All right, sir So, you stopped and then right about
9 that time when you got your vehicle to a stop that's when
10 he went wide open on the horn?

11 A That's correct

12 Q And all that took from the time of the second whistle
13 took until he went wide open you said was maybe five or
14 six seconds?

15 A In that neighborhood, yes, sir

16 Q Okay I mean, you're just guessing?

17 A Right, because I don't wear a watch even

18 Q Yes, sir Now, do you know -- you didn't hear a horn
19 before those first two whistles?

20 A No, I didn't hear it before that

21 Q But you don't know whether he blew or not before
22 that, do you?

23 A I don't know whether he blew or not

24 Q All right, sir Now, when that horn went wide open
25 your focus was no longer on the crossing, correct?

1 A You're right

2 Q Because you were wondering why all of that noise was
3 coming from that engine?

4 A That's exactly right

5 Q And that's when the accident occurred, correct?

6 A Shortly after that, yea

7 Q Well, when he went wide open, Mr Spell, the accident
8 happened very soon after that?

9 A Right

10 Q Okay I am just going to try to recap it So, you
11 got one whistle and then a second or two later you get the
12 second whistle, right?

13 A Right

14 Q All right And that's all by that tree and then
15 about the time that you hear that first whistle when you
16 come around that tree that's when you notice the vehicle
17 on the other side of the crossing?

18 A Right

19 Q And you couldn't tell -- You knew it was somewhere
20 between 321 and the railroad tracks?

21 A Correct

22 Q All right, sir And then you said your estimate is
23 the third whistle was about five seconds later, is that
24 fair?

25 A Five to six

1 Q Okay Five to six seconds later So these are all
2 one to two, five to six seconds later, and then he goes
3 wide open, right?

4 A That's correct

5 Q And then the accident happens within a few seconds?

6 A I would say two seconds is what I would guess

7 Q All right Okay, sir Now, as you were approaching
8 the crossing that day before you actually brought your
9 vehicle to a stop the train would have been coming from
10 your right, isn't that right, Mr Spell?

11 A That's correct

12 Q And all of the windows on the right side of your
13 vehicle were closed You had the AC on in your car
14 That's what you normally do?

15 A Right

16 Q Now you had been over this crossing prior to the
17 accident when you dropped off the man that you were
18 dropping off?

19 A Approximately, seven or eight minutes before that

20 Q Seven or eight minutes prior to the accident?

21 A (Nods yes)

22 Q When you stopped there at the crossing heading in the
23 same direction that Ms ~Harvey was, did you stop?

24 A Oh yes sir

25 Q Did you stop at the stop line where the law requires

1 you to? Did you --

2 THE COURT Hold on Yes or no?

3 THE WITNESS Yes, sir

4 Q Did you look in both directions?

5 A Yes, sir

6 Q Did you have any problems seeing that day?

7 A No, sir

8 Q Have you ever had any problems -- I know that you
9 haven't been out there a lot, but have you ever had any
10 problems at that crossing?

11 A No, sir

12 Q Were you able to see as you stopped there that day 10
13 minutes before -- were you able to see far enough down the
14 tracks where you felt like it was safe for you to cross?

15 A Oh, yea If I hadn't, I wouldn't have crossed

16 MR WILBY All right sir Thank you very much

17 REDIRECT EXAMINATION

18 BY MR MURDAUGH

19 Q And, Mr Spell --

20 A Yes, sir

21 Q -- when you went through there earlier and you saw
22 what you said was a safe distance, there wasn't a train
23 coming then, was it?

24 A No

25 Q All right And you don't know how far you could see,

1 do you?

2 A I could see as far as I needed to

3 Q Yes, sir without a train coming? There wasn't a
4 train coming then?

5 A No, there wasn't no train coming Not when I was
6 going through

7 Q And you had your window down when you heard that
8 whistle, Mr Spell?

9 A That's correct

10 MR MURDAUGH Thank you

11 THE COURT All right Can I release him from his
12 subpoena?

13 MR WILBY He would like that

14 THE COURT How about will y'all allow that?

15 MR WILBY Yes, sir

16 THE COURT And let him go back to Finland and
17 Sweden Do you know where that is Mr Wilby?

18 MR WILBY Well, sir I've seen your farm Let me
19 just say that

20 THE COURT How are you doing?

21 THE WITNESS I am doing pretty good I got up this
22 morning

23 THE COURT Thank you for coming

24 THE WITNESS Who wants this pen?

25 THE COURT I want it

1 LAKEISHA REED, after being duly sworn, testified
2 as follows

3 THE COURT Do me a big favor How about stand up?
4 I am going to slide this chair up a little bit for you
5 Is that too close?

6 THE WITNESS That's fine

7 THE COURT Mr Murdaugh is going to start off by
8 asking you some questions and then the other side will ask
9 you some

10 THE WITNESS Okay

11 THE COURT If you need anything, I'm right here

12 THE WITNESS All right

13 THE COURT I won't let them bother you

14 DIRECT EXAMINATION

15 BY MR MURDAUGH

16 Q Ma'am, you are Lakeisha Reed?

17 A Yes, sir

18 Q Ms Reed, where are you from, ma'am?

19 A Denmark, South Carolina

20 Q How long have you lived in Denmark, South Carolina?

21 A Thirty-two years

22 Q How old are you?

23 A Thirty-two

24 THE COURT Mr Murdaugh, these women might not like
25 answering that

1 Q She's good and young So you lived in Denmark your
2 whole life?

3 A Yes

4 Q Where -- Do you have family, Ms Reed?

5 A Yes, I do

6 Q Tell us a little bit about that Are you married?

7 A Divorced now

8 Q Okay And does your family live around here?

9 A Yes, sir

10 Q Where do they live?

11 A Some in Govan and some in Denmark

12 Q So, you got most of your family right here in the
13 county with you?

14 A Yes, sir

15 Q All right And where do you live now, Ms Reed?

16 A 75 Honey Ford Road, Denmark

17 Q How long have you lived -- What is that address
18 again, Ms Reed?

19 A 75 Honey Ford Road

20 Q Okay And how long have you lived at 75 Honey Ford
21 Road?

22 A This time around about 10 years

23 Q Okay All right So, you were living at 75 Honey
24 Ford Road May 30, 2004, the day of the train wreck?

25 A Yes, sir

1 Q The train-vehicle wreck I am just going to show you
2 some photographs, Ms Reed This is Plaintiff's
3 Exhibit 13 It is going to pop up in just a second All
4 right And is this Honey Ford Road, Ms Reed?

5 A Yes, it is

6 Q All right And in that photograph can you see where
7 you live exactly?

8 A Not quite

9 Q I am going to show you another exhibit which is
10 Plaintiff's Exhibit 14 All right Can you see your
11 house in that photograph?

12 A No, sir

13 Q All right But can you see the area where your house
14 would be?

15 A Yes, sir

16 Q All right I am going to give you -- What did we do
17 with that pointer?

18 MR PARKER Top pocket

19 Q I am going to give you that pointer, Ms Reed Push
20 that little button and it makes that red thing

21 THE COURT That's pretty fancy

22 THE WITNESS Yes sir

23 THE COURT Show us where you live

24 THE WITNESS Behind

25 THE COURT Behind the post?

1 THE WITNESS In the yard See the blue house here?

2 THE COURT Yes, ma'am

3 THE WITNESS I am in that yard to the left

4 Q So your house -- Would your house be behind those
5 bushes that are shown on the other side of the tracks?

6 A Yes, in front on the other side, yes

7 Q Okay Let me just show the pointer just to make sure
8 because I've been out there All right This is Honey
9 Ford Road right here?

10 A Yes

11 Q All right And 321 would be back at the bottom of
12 that picture, is that correct?

13 A Yes, sir

14 Q Just to get ourselves oriented here All right And
15 would your house be in that area behind those bushes?

16 A Yes

17 Q All right So, to get to your house you would cross
18 over the tracks and turn left behind those bushes?

19 A Turn left, yes

20 Q Okay What do you do now, Ms Reed?

21 A When I go home?

22 Q No, no I mean, what do you do?

23 THE COURT What kind of work do you do?

24 THE WITNESS Oh, I'm unemployed right now

25 Q All right But you're studying?

- 1 A I am going to school
- 2 Q Okay Are you studying now?
- 3 A Yes, sir
- 4 Q Where do you go to school?
- 5 A Denmark Tech
- 6 Q What are you studying?
- 7 A Office Administrative Technology
- 8 Q How much longer do you got?
- 9 A About six months
- 10 Q Good for you Now, do you remember the day of May
- 11 30, 2004?
- 12 A Yes, sir
- 13 Q All right And since you were living there at that
- 14 time did you travel Honey Ford crossing on a daily basis?
- 15 A Yes, I do
- 16 Q All right Were you familiar with the crossing?
- 17 A Yes, sir
- 18 Q Were you familiar with the vegetation at the
- 19 crossing?
- 20 A Yes, sir
- 21 Q All right Now, Ms Reed, tell us when you navigated
- 22 Honey Ford crossing when you turned off of 321 and you
- 23 would be going towards the tracks, is what we see in the
- 24 picture represent the vegetation out there?
- 25 A Yes

1 Q All right And does that represent the vegetation as
2 it was on May 30, 2004?

3 A Yes, sir

4 Q All right And what did you do as you turned off of
5 321 to go to your house? Tell us how you would navigate
6 that crossing

7 A Actually, you would stop to the line, but you cannot
8 see because of the bushes there You cannot see to your
9 left

10 Q Zoom in on that

11 A So then I would proceed to go up and sometimes I
12 would even have to wind my windows down to actually listen
13 for the train to make sure that nothing was coming

14 Q All right Now, if you stopped back behind the line
15 during that time -- I mean, you're talking about prior to
16 May 30 of 2004 up to May 30 of 2004, is that correct?

17 A Yes

18 Q All right And if you stopped at that line what
19 would block your view down the tracks?

20 A The bushes

21 Q All right Are the bushes shown?

22 A Yes

23 Q Okay Now again, so I understand what would you
24 have to do to be able to see down that crossing?

25 MR HARMON Objection Asked and answered

1 THE COURT Overruled What was the question?

2 Q What would you have to do -- You testified that if
3 you stopped at the line you couldn't see because of the
4 vegetation What would you have to do to be able to see
5 down to your left at Honey Ford crossing?

6 A You would have to ease up some more and look to the
7 left and then proceed Like I said, sometimes I would
8 have to wind my windows down to make sure, of course, I
9 didn't hear the train because you could not see because of
10 the trees there -- the bushes

11 Q All right And you're talking about rolling your
12 windows down and doing all that You felt like you needed
13 to do that at that crossing?

14 A Yes

15 Q All right And, Ms Reed, what was your practice --
16 Did you take those steps -- did you roll your windows down
17 and do any of those other things at any other crossing?

18 A No, I don't

19 Q No other crossing that you navigate did you take
20 those steps?

21 A No, sir

22 Q Okay And why did you take those steps at Honey Ford
23 crossing?

24 MR HARMON Objection, Your Honor Asked and
25 answered

1 THE COURT All right That's been asked and
2 answered

3 Q All right now, Ms Reed, the day of the wreck what
4 were you doing?

5 A Actually, I was inside getting ready to go out with
6 my family when the accident took place

7 Q Y'all were going to Walmart?

8 A Yes, sir

9 Q All right Who was with you?

10 A At the time my mother and my children -- my two
11 children

12 Q Okay And tell me how you learned about the
13 collision

14 A I was still on the inside I was getting dressed and
15 when I heard them -- you know the kids They were coming
16 to the door and they were beating on the door and my
17 mom -- she was getting ready to go outside and they're
18 like, The train -- The train has hit somebody We were
19 like, Yea, right They were like, No we're not playing
20 They were riding their bikes and we walked out the front
21 door and when we got to the edge of my yard, of course,
22 you know, the accident had taken place

23 Q Okay And what did you do?

24 A When I got to the edge of the yard I proceeded to go
25 across the road and the van was there where it had

1 collided and -- Yea

2 Q I am going to show you Plaintiff's Exhibit 6 Is
3 that what the scene looked like that day?

4 A Yes, sir

5 Q All right And in relation to this picture your
6 house would have been back across the street?

7 A Yes

8 Q When you walked out there, Ms Reed, tell me what you
9 saw

10 A We saw the van, of course, there

11 THE COURT Hold on one second One second Get her
12 some water

13 (Whereupon, the bailiff handed a juror some water)

14 THE COURT Are you okay?

15 THE JUROR I am good Thank you

16 Q Okay And when you got out and you saw what was
17 shown what is on Plaintiff's Exhibit 6, Ms Reed, tell us
18 -- show us, if you will, in there generally where
19 Ms ~Harvey and her son were

20 A That looks -- that's where it was

21 Q Okay

22 A And, of course, I was not quite that close I was
23 further back You wouldn't be able to see, you know, and
24 she was still in the van, of course and her son was
25 actually thrown out of the van

1 Q Okay

2 A And he was thrown in like some shallow bushes over in
3 that area somewhere, and, of course, it was kind of
4 devastating so I didn't want to actually get that close,
5 but from where I was standing, of course, you could hear
6 him you know groaning, moaning, pain, of course, but
7 that's

8 Q All right Now I think your testimony was that your
9 mom was with you that day?

10 A Yes

11 Q Did she go up to the scene?

12 A She did

13 Q Okay And did she go to Ms ~Harvey or Mr Harvey?

14 A She went closer than I did, yes

15 Q All right And what did she do?

16 A In the process of her standing out she was talking to
17 Ms ~Harvey because she -- Ms ~Harvey wanted to know how
18 her son was at the time and we really didn't know the
19 state that he was in so my mom -- she was asking my mom
20 could she help her to get out of the van and my mom told
21 her no because the simple fact --

22 MR HARMON Your Honor, we're getting into some
23 hearsay here

24 THE COURT Just testify to what you heard Ms ~Harvey
25 say Nothing else Not what you heard your mom said or

1 anything like that

2 THE WITNESS Okay She was asking for her son, and,
3 you know, of course, we couldn't move her or anything

4 Q Okay Going back to the crossing, Ms Reed, you
5 recognize the crossing here?

6 A Yes

7 Q All right And you see that dot on the track in that
8 photograph?

9 A Yes

10 Q Okay now, prior to May 30 2004 the times that you
11 crossed that crossing, all right, if you stopped your
12 vehicle at that stop line or behind that stop line could
13 you see down there to where that dot is?

14 A No

15 Q And why couldn't you see down there to where that dot
16 was?

17 A Because of the bushes, the trees

18 Q And what would you have to do prior to May 30, 2004
19 to be able to see as far as that dot is in that picture?

20 A You would have to actually proceed up some and look
21 to the left

22 MR MURDAUGH Thank you Please answer any
23 questions --

24 THE COURT Ms Reed, I will ask you to answer
25 questions from Mr Harmon

1 MR HARMON Thank you, Your Honor

2 CROSS-EXAMINATION

3 BY MR HARMON

4 Q Afternoon, Ms Reed Do you know, ma'am any of the
5 members of the Harvey family?

6 A Not directly, no, sir

7 Q Okay Did you go to school with Mr Scott Chesser?

8 A Yes

9 Q He is a member of the Harvey family?

10 A Like I said not directly, but, you know

11 Q He's the nephew, correct?

12 A I think so, yes

13 Q And he came to your house on the day of the accident?

14 A He was out there

15 Q Now, I want to show you -- By the way, at the time of
16 your deposition you indicated that you wore glasses Do
17 you still wear glasses?

18 A Sometimes

19 Q And without your glasses you have problems seeing far
20 away, correct?

21 A Yes

22 Q What is your mother's name that you mentioned here
23 earlier, ma'am?

24 A Elizabeth Banks

25 Q Does she go by any other name?

1 A Michelle

2 Q Michelle? Okay And you're friends with

3 Ms Lakeisha Dickerson, is that right?

4 A Classmates We were neighbors, yes

5 Q She lived along the crossing as well?

6 A Yes

7 Q Now, if we can go to Defendant's 70, ma'am, I am
8 going to show you some photographs You've seen some of
9 the photographs These were photographs that were taken
10 by the Plaintiff's investigator and this is a view of the
11 crossing as you get closer, correct?

12 A Uh-huh

13 Q You have to say yes or no, ma'am

14 A Yes Yes

15 THE COURT Please say yes She's taking it down

16 THE WITNESS Okay I'm sorry

17 Q That's all right People do that all the time And
18 that little bump -- You see that little hill down there
19 towards the end?

20 A Yes

21 Q Okay Now this is coming from the Govan direction,
22 correct?

23 A Yes

24 Q And you would agree with me as you get closer to the
25 tracks you can see further down the tracks?

1 A You can't see that far down that track because the
2 trees and the bushes were there

3 Q But I am asking you at this location you don't know
4 how far this photo was taken back from the tracks,
5 correct?

6 A No I don't know how far back it is

7 Q Let's go to 71, please All right Now this is one
8 a little bit further back from the tracks This is,
9 again, a view of the crossing, correct?

10 A Yes, it is

11 Q And if we go to 72 Again, this is a little bit
12 further back, correct, from the crossing?

13 A They about look the same

14 Q Okay Now, let me ask you this, ma'am You've never
15 gone out to the crossing and taken any types of
16 measurements to see how far you can see down the tracks
17 is that right?

18 A No, sir

19 Q And in the times that you crossed the crossing do you
20 typically stop on the tracks?

21 A No I don't stop on the track, no

22 MR HARMON Your Honor, I would pass the witness

23 THE COURT Anything on redirect, if any?

24 MR MURDAUGH No, sir

25 THE COURT Ms Reed, guess what? You may leave

1 THE WITNESS Okay

2 THE COURT Thank you for coming You have a -- Good
3 luck in school

4 THE WITNESS Thank you

5 THE COURT Next witness, please

6 MR MURDAUGH La-Keisha Washington

7 THE COURT Ms Washington, if you would come right
8 up here, please, ma'am

9 LA-KEISHA WASHINGTON, after being duly sworn
10 testified as follows

11 THE COURT I am going to pull this chair up behind
12 you and you just get wherever you feel comfortable Is
13 that okay?

14 THE WITNESS Yes, sir Thank you

15 THE COURT Give us your full name and spell your
16 last for the record

17 THE WITNESS La-Keisha Dickerson Washington,
18 W-A-S-H-I-N-G-T-O-N

19 DIRECT EXAMINATION

20 BY MR MURDAUGH

21 Q Ms Washington, where do you live?

22 A 2459 Schofield Road, Olar, South Carolina

23 Q Okay And where are you from, Ms Washington?

24 A Olar

25 Q All right And you grew up there?

1 A Yes

2 Q All right That would be here in Bamberg County?

3 A Yes

4 Q Did you have occasion to live over on Honey Ford
5 Road?

6 A Yes

7 Q When did you live on Honey Ford Road, Ms Washington?

8 A I moved there in 2000

9 Q Okay And lived there for how long?

10 A Up 'til 2006

11 Q Okay All right And tell us a little bit about
12 yourself You live in Denmark Your family -- Tell us
13 about your family

14 A I have three children, married but single now

15 Q How old are your children, Ms Washington?

16 A The middle one turned 10 today The oldest one will
17 turn 13 next Tuesday and my baby is 3

18 Q I have a 10 and a 13-year-old myself Now I am
19 going to show you some photographs, Ms Washington

20 That's Plaintiff's Exhibit 13 Okay And is this Honey
21 Ford Road?

22 A Yes, sir

23 Q Is that headed towards where you live between 2000
24 and 2006?

25 A Yes, sir

1 Q All right And if you will, you have a little
2 pointer right here Push that little button Show us in
3 that photograph if you will, please, ma'am, where you
4 lived from 2000 to 2006

5 A Right there

6 Q Okay That's in that house across the tracks?

7 A Yes

8 Q On the right?

9 A Yes

10 Q And, so, in the weeks and months preceding May 30,
11 2004, did you have the occasion to cross Honey Ford Road
12 on a daily basis?

13 A Yes

14 Q I mean cross the tracks at Honey Ford Road on a daily
15 basis?

16 A Yes, sir

17 Q All right And probably a couple of times a day?

18 A Yes, sir

19 Q All right Ms Washington, were you home on the day
20 of the Harvey collision with the train?

21 A No, sir

22 Q Where were you?

23 A At a baseball game

24 Q Where was the baseball game?

25 A Olar

1 Q Okay And how did you come to learn of the train
2 wreck?

3 A Someone coming from 321 told me when they got to the
4 game

5 Q Okay And did you go back to your house that day?

6 A Yes, sir

7 Q All right And was the -- Were you out there when
8 everything was going on?

9 A No, sir

10 Q All right So, by the time you got home were there
11 still emergency vehicles or anything there?

12 A The police The van was still there That's pretty
13 much it

14 Q Okay But all of the people were gone?

15 A Yes, sir

16 Q All right And Plaintiff's Exhibit 6 -- does that
17 accurately show where the van was when you saw it?

18 A Yes, sir

19 Q Okay And I mean as far as people in there, they
20 were gone at the time?

21 A Yes

22 Q Was the train gone?

23 A Yes

24 Q Okay All right So it was sometime later --

25 A Yes

1 Q -- when you returned All right I want to talk to
2 you a little bit about your experience in traveling across
3 Honey Ford Road when you were going across it a couple of
4 times a day back then in the weeks and months prior to May
5 30, 2004 Tell us, if you will, please, what your
6 practice was when you navigated -- Let's put this back up
7 -- when you navigated the crossing at Honey Ford Road
8 What was your practice?

9 A Well, I come on my way home I never stopped to that
10 line because you could never see I always had to pull
11 further up to the railroad track

12 Q All right Now, Ms Reed (sic), I want to ask you do
13 you recognize what is shown in Plaintiff's Exhibit 32?

14 A The railroad track

15 Q Okay Do you see that vegetation on the railroad
16 track?

17 A Yes

18 Q Is that the condition of the vegetation as it existed
19 for the weeks and couple of months up 'til May 30, 2004?

20 A Yes

21 Q All right And is that what it looked like on May 30
22 of '04?

23 A Yes

24 Q All right And if you pulled up to the stop line --
25 Finish telling me now what was your practice -- You said

1 you didn't stop at the line?

2 A No, sir

3 Q All right And why did you not stop at the line at
4 Honey Ford Road?

5 A Because you could never see

6 Q All right And let's pull that vegetation up Why
7 could you not see if you stopped at the stop line or
8 behind the stop line, Ms Reed -- Ms Washington?

9 A Because of the brushes

10 Q Okay And by brushes is that the vegetation shown in
11 Plaintiff's Exhibit 32?

12 A Yes, sir Yes sir

13 Q Okay Now, in order for you to be able to see down
14 the tracks where you felt it was safe tell us what you
15 would do

16 A I would pull up close to the railroad track where I
17 could see on my left

18 MR MURDAUGH Thank you Please answer any
19 questions that Mr Harmon has

20 THE COURT Mr Harmon?

21 MR HARMON Thank you, Your Honor

22 CROSS-EXAMINATION

23 BY MR HARMON

24 Q Good afternoon, Ms Washington Now, I want to show
25 you a photograph You told us a moment ago that it wasn't

1 your practice to stop at the stop line, correct?

2 A Yes

3 Q Can you go to Defendant's 76, please? Now, this is a
4 photograph that was taken 6 feet approximately behind the
5 stop line and is your testimony that you never stopped
6 here to take a look, is that correct?

7 A Yes

8 Q And do you see -- Can I have the pointer, please?

9 THE COURT Here it is right here

10 Q You see this white spot here?

11 A Yes, sir

12 Q All right You don't have any idea how far down the
13 tracks that particular person is, do you?

14 A No, sir

15 Q And I take it that you've never been out to the
16 crossing and done any type of measurements to see how far
17 you can actually see?

18 A No, sir

19 Q Would you agree with me that estimating how far
20 something is away can be difficult?

21 A Yes

22 Q All right In other words, if I asked you how far
23 that wall was or asked other folks we may get a lot of
24 different answers, right?

25 A Yes

1 Q Now let's go to Defendant's 4 Do you remember -- I
2 wasn't there, but you had a deposition you gave?

3 A Uh-huh

4 Q Remember that? You have to say yes or no

5 A Oh, yes I'm sorry

6 Q That's okay People do it all the time And
7 remember you were asked questions about this photograph
8 and you said this is how it looked on the day of the
9 accident? Remember that?

10 A Yes

11 Q Okay So, this is a view and this one actually has a
12 train in it of the way it looked on the day of the
13 accident, correct?

14 A Yes

15 MR HARMON Your Honor, I pass the witness

16 THE COURT Mr Murdaugh anything else?

17 MR MURDAUGH No, sir

18 THE COURT All right

19 MR MURDAUGH Thank you, Ms Washington

20 THE COURT Are you kin to Wilby Dickerson?

21 THE WITNESS Yes, sir My cousin

22 THE COURT I know Wilby Tell him I said Hey

23 THE WITNESS I will

24 THE COURT Next witness

25 MR MURDAUGH Mr Leon Tyler

1 MR WILBY Your Honor, can we approach?

2 THE COURT Yep I was waiting for that

3 (Whereupon, a bench conference was held)

4 THE COURT All right What is the name of the
5 witness?

6 MR MURDAUGH Leon Tyler

7 THE COURT Mr Leon Tyler Mr Tyler, how are you
8 doing?

9 THE WITNESS I am doing fine How about you?

10 LEON TYLER, after being duly sworn, testified as
11 follows

12 THE COURT Give us your full name for the record and
13 spell your last

14 THE WITNESS Leon Tyler T-Y-L-E R

15 THE COURT Mr Tyler, I'm going to slide this chair
16 up for you now so you can get situated Can you sit in
17 that chair?

18 THE WITNESS Oh, yea It is a little tight

19 THE COURT I ain't going to say nothing about that

20 THE WITNESS Okay

21 THE COURT All right Mr Murdaugh?

22 DIRECT EXAMINATION

23 BY MR MURDAUGH

24 Q All right Mr Tyler, where do you live, sir?

25 A Denmark, South Carolina, Honey Ford Road

1 Q All right Where on Honey Ford Road, Mr Tyler?
2 A 1780 Honey Ford Road
3 Q Is that on down Honey Ford Road from 321?
4 A Yes sir
5 Q All right, sir How long have you lived in the Honey
6 Ford community?
7 A About 60 years
8 Q Okay And have you lived in that same location?
9 A Yes, sir
10 Q Same house that long?
11 A Yes, sir
12 Q All right
13 A No, not the same house but the same location
14 Q Okay All right And tell us a little bit about
15 yourself, Mr Tyler Are you married?
16 A I am married I am a farmer I retired
17 Q How long have you been married, Mr Tyler?
18 A Forty-eight years
19 Q Okay And you got children?
20 A I have five I had five children I lost one
21 Q All right Do they live in Denmark?
22 A No, sir One lives in South Carolina The rest of
23 them is Virginia, California, and Atlanta
24 Q All right, sir And I am going to show you
25 Plaintiff's Exhibit 13 sir Is that the crossing out at

1 Honey Ford Road?

2 A Yes, sir

3 Q All right Now, if you will, were you using that
4 crossing or going across that crossing at Honey Ford Road
5 on a daily basis back in April and May of '04?

6 A Yes sir

7 Q All right Do you remember May 30 of '04 when the
8 Harvey van was hit by a train?

9 A Yes, sir

10 Q Okay And if you will, Mr Tyler is that what is
11 shown in Plaintiff's Exhibit 32?

12 A Uh-huh

13 Q Accurately depict the crossing out there May 30 of
14 '04 -- in April and May of '04?

15 A Uh-huh

16 THE COURT Say yes or no

17 THE WITNESS Yes sir

18 Q Okay And you see that vegetation along the tracks
19 there, Mr Tyler?

20 A Yes, sir

21 Q All right Is that the same as it would have been in
22 April and May of '04?

23 A Yes, sir

24 Q All right, sir, and Mr Tyler -- Let's put up -- as
25 you pulled up back in April and May of '04 if you pulled

1 your vehicle up and you stopped at the stop line --

2 A Yes, sir

3 Q -- okay? If you were stopped at the stop line or
4 behind it with your vehicle and you looked to your left,
5 what could you see?

6 A You could see about 500 feet down there

7 Q Okay All right That's your estimate?

8 A Yes, sir

9 Q All right And what would keep you from seeing more
10 than 500 feet or so?

11 A All of that growth It had grown up

12 Q All right

13 A Weeds and bushes

14 Q Okay And let's go to 48 This is a picture from 70
15 inches -- just 70 inches behind the stop line You see
16 that dot on that track down there?

17 A Where? Way down there?

18 Q Yes, sir

19 A Yes sir I see

20 Q All right If you stopped at the stop line --
21 stopped at the stop line with your vehicle -- your bumper
22 on the stop line or behind it, could you see as far as
23 that dot?

24 A No, sir There was no way

25 Q Okay And, again why is that?

1 A It is grown up

2 Q All right Now, Mr Tyler, in the couple of months
3 prior to the Harvey collision in April or May of '04 did
4 you have the occasion to be at this crossing when a train
5 was coming?

6 A Yes, sir

7 Q All right, sir And on that day which direction was
8 the train coming from?

9 A Coming from Govan side

10 Q Okay And which way were you coming from?

11 A I was coming from 321

12 Q Headed home?

13 A Yes, sir

14 Q Okay And, so, if you will, please, that day when
15 that train was coming, Mr Tyler, what did you do? Where
16 did you stop that day?

17 A I stopped on the line where I thought it was safe

18 Q All right And when you stopped how far could you
19 see?

20 A About 500 feet down there

21 Q Okay And you looked to your left?

22 A I looked to my left I looked to my right I didn't
23 hear anything I didn't see anything I began to take
24 off Then the train -- I saw the train out of the corner
25 of my eye

1 Q You took off towards the track?
2 A Yes, sir
3 Q Okay And where was the train when you saw it?
4 A The train was right there I hit my gas and got on
5 across the track
6 Q How close did it come to hitting you, Mr Tyler?
7 A It came pretty close
8 Q Okay
9 A Yes sir
10 Q All right And if you hadn't gunned your engine,
11 what would have happened to you?
12 A It probably would have hit me
13 Q All right, sir And now that day when you -- I just
14 want to make sure that we understand When you stopped
15 that day were you being safe?
16 A Yes I thought I was safe where I stopped at
17 Q Okay And you looked to your left?
18 A I looked to my left I looked to my right I didn't
19 hear anything I didn't see anything I took off and out
20 of the corner of my eye I saw the train
21 Q Did the train -- did the train blow the horn?
22 A Then he blowed the horn
23 Q Sir?
24 A Then he blowed the horn after I got on the track
25 Q Okay At the last minute?

1 A Yes, at the last minute

2 Q Did he blow it before that?

3 A I didn't hear anything before that

4 MR MURDAUGH Please answer any questions --

5 THE COURT Mr Harmon? I'm sorry Whoever

6 MR WILBY Just a second

7 THE COURT Mr Wilby

8 MR WILBY Yes, sir Thank you, Judge

9 CROSS-EXAMINATION

10 BY MR WILBY

11 Q Mr Tyler, good afternoon, sir

12 A Good afternoon

13 Q How are you?

14 A Doing fine How about you?

15 Q I am doing fine Can we pull up 76, please? And,

16 Mr Tyler, you've been out to the crossing before because

17 you live in that area?

18 A Yes, sir

19 Q And whenever you've been out there have you ever done

20 any measuring down the track?

21 A No, sir

22 Q All right And you've said a minute ago that the man

23 was a long way down there or that white dot is a long way

24 down the track?

25 A Yes, sir

1 Q If you didn't know how far it was would you be able
2 to guess how far that is, sir?
3 A I would say about a thousand feet down there
4 Q You would be pretty close
5 A Uh-huh
6 Q Sir, the thing about it is do you remember
7 Mrs Ballard out there? Do you see Mrs Ballard in the
8 back?
9 A Yea Uh-huh
10 Q Do you remember Mrs Ballard showed you this
11 photograph and you remember you told her that this is
12 exactly how it looked on the day of the accident?
13 A Right
14 Q What kind of vehicle do you drive, sir?
15 A A truck
16 THE COURT Hold on
17 MR MURDAUGH Objection
18 THE COURT What is the objection?
19 MR MURDAUGH Are you talking about a deposition?
20 MR WILBY No I was just talking about a
21 conversation
22 THE COURT Go ahead
23 Q What kind of vehicle?
24 A I drive a Ford truck
25 Q All right, sir And you say you always stop on the

1 stop line?

2 A Yes sir

3 Q All right And did you know Mr Tyler, when you
4 talked to these gentlemen -- did you know that their
5 investigator had taken this picture within a couple of
6 days after the accident and they had actually sent a man
7 down there to measure how far it was? Did you know that?

8 A No, I didn't

9 Q Well, they did that, sir and they actually took that
10 photograph from just under 6 feet behind the stop line
11 Isn't that about where you would be when you stopped at
12 the stop line?

13 A Well, I stop on that line

14 Q And you're sitting in your front seat when you're
15 there?

16 A Yes, sir

17 Q And, so, when they got the photograph -- when they
18 had the man from their office take this photograph from
19 6 feet behind the stop line they measured that That is
20 1 014 feet Did they explain that to you, sir?

21 A No, sir

22 Q Now do you remember telling Mrs Ballard that you
23 had a near miss when you were 18 years old?

24 A Yes, I did

25 Q All right And then when you talked to her last

1 might I think that you told her you had a near miss either
2 in '03 or early '04?

3 A Yes, sir

4 Q Is that what you remember?

5 A Yes, sir

6 Q So, it wasn't a month before the accident was it,
7 sir?

8 A A couple of months before the accident

9 Q All right And let's see Your Honor, I think
10 that's all I have

11 THE COURT All right Hold on

12 MR WILBY Thank you Mr Tyler

13 THE WITNESS You're welcome

14 REDIRECT EXAMINATION

15 BY MR MURDAUGH

16 Q Mr Tyler, in light of Mr Wilby's questioning you
17 about the near miss, have you had another occasion at that
18 crossing where you almost got hit by the train?

19 A Yes, sir

20 Q All right And in that occasion were you coming from
21 the same direction?

22 A No, sir I was coming from the other way

23 Q All right

24 A From my house

25 MR WILBY Your Honor, we would -- sorry

1 Objection, Your Honor Irrelevant He was 18 years old
2 at the time coming --

3 THE COURT No, sir, he said other ones now You've
4 opened the door back as far back as when he was 18 Are
5 you talking about something other than when he was 18?

6 MR MURDAUGH I'm just talking -- No, sir I'm
7 talking about that Mr Wilby asked the question --

8 THE COURT Overruled Ask the questions

9 Q Now in light of that let's talk about coming from
10 the other direction?

11 A Uh-huh, yes, sir

12 Q All right In the other - When you were coming from
13 the other direction, okay?

14 A Yes, sir

15 Q The other time that the train almost hit you at that
16 crossing on that day did you stop?

17 A Yes, sir I stopped

18 MR WILBY Your Honor, may we approach?

19 THE COURT Yea

20 (Whereupon, a bench conference was held)

21 THE COURT Ask the question

22 Q All right, sir Mr Tyler, on that day when you were
23 coming --

24 THE COURT Well, what is that day?

25 Q On the day that we're talking about the other time

1 that you almost got hit

2 THE COURT When is that?

3 Q When was that, Mr Tyler?

4 A Well, it was during the spring, too during the
5 summer like

6 Q Okay

7 THE COURT Do you remember what year?

8 THE WITNESS It's been a long time

9 THE COURT Was it two years ago one year ago or 20
10 years ago?

11 THE WITNESS This was about five years ago

12 Q From now?

13 A Yes, sir

14 Q Okay So, it would have been -- would it have been
15 within a year or so of the Harvey wreck? A year before
16 the Harvey wreck?

17 A Well the first time -- I mean the time I told you
18 about coming from 321 --

19 Q Yes sir

20 A -- that was a couple of months before the Harvey
21 wreck

22 Q And --

23 A This other time is about a year before the wreck

24 Q Okay So about a year before the Harvey wreck All
25 right And it was in the spring time?

1 A Right

2 Q All right So the crossing would have been at about
3 the same growth, had about the same vegetation?

4 A That's right

5 Q All right And you were coming from the other
6 direction?

7 A That's right

8 Q Now, coming from that direction --

9 A There is a lot of vegetation on that side, too

10 Q All right On that day did you stop at the stop
11 line?

12 A Yes, sir, I did

13 Q All right Now, I am trying to find a picture to
14 show from that direction, Mr Tyler, but if you stopped at
15 the stop line from that direction or -- from where you
16 stopped that day and you looked to your right was there
17 vegetation?

18 A Yes, sir You couldn't see 500 feet that way

19 Q So, you couldn't see on either side of this crossing?

20 A No sir

21 Q All right And on that day you looked to your right?

22 A I looked to my right I didn't --

23 MR WILBY Your Honor --

24 THE COURT Hold on

25 MR WILBY Leading questions

1 THE WITNESS I didn't see anything I looked to my
2 left

3 THE COURT Held on Mr Tyler

4 MR WILBY He is leading the witness Your Honor

5 THE COURT Sustained Rephrase your question,
6 Mr Murdaugh

7 MR MURDAUGH Okay Pull exhibit 19 up

8 Okay All right Would that show the direction that
9 you're talking about this other time --

10 THE WITNESS Yes, sir

11 Q - out there?

12 A Yes sir

13 Q All right And what vegetation -- Is the vegetation
14 that would have been blocking your view that day shown?

15 A Yes, sir

16 Q All right, sir And that day you would have been
17 stopped back behind the stop line?

18 A Right

19 Q Okay And you looked -- Did you look to your right?

20 A I looked to my right I looked to my left

21 Q Okay

22 A I didn't see anything or hear anything I pulled out
23 there and there the train was

24 Q Okay

25 THE COURT All right You may step down

1 MR MURDAUGH Thank you

2 THE COURT Next witness

3 Mr Tyler, have a good trip May he be released from
4 his subpoena?

5 MR MURDAUGH Yes, sir

6 THE COURT Next witness

7 MR MURDAUGH Your Honor, we call Dwayne Johnson

8 DWAYNE JOHNSON, after being duly sworn,
9 testified as follows

10 THE COURT Mr Johnson, would you give us your full
11 name for the record and spell your last?

12 THE WITNESS Dwayne Johnson, J-O-H-N-S-O-N

13 THE COURT Mr Johnson I am going to pull that up
14 for you to get comfortable

15 Mr Murdaugh?

16 DIRECT EXAMINATION

17 BY MR MURDAUGH

18 Q All right Mr Johnson, if you would please, tell
19 us where you live, sir

20 A I live on 1496 Honey Ford Road

21 Q Is that down Honey Ford Road from this crossing?

22 A Yes, it is

23 Q All right sir And how long have you lived there,
24 Mr Johnson?

25 A Eighteen years

1 Q Okay And how long have you lived in the Honey Ford
2 community?

3 A Eighteen years

4 Q All right And how long have you lived in Denmark?

5 A Forty-two years

6 Q Your whole life?

7 A Yes, sir

8 Q You were born and raised in Denmark?

9 A Yes sir

10 Q Did you go to school in Denmark?

11 A Yes sir

12 Q Did you finish Denmark Olar High School?

13 A Yes sir

14 Q All right, sir And you got a family?

15 A Yes sir

16 Q Mr Johnson tell us about that

17 A My wife is Audrey Johnson I have an adopted son 20
18 years old

19 Q Okay Now, you've been living at Honey Ford Road for
20 20 years Do you cross the tracks at Honey Ford Road on a
21 daily basis?

22 A Everyday

23 Q All right And did you cross the tracks on a daily
24 basis back in May of '04?

25 A Yes, I did

1 Q All right, sir, and do you recall the collision
2 between the train and the Harvey vehicle back in May of
3 '04?

4 A I heard about it

5 Q All right, sir And do you remember that time -- I
6 mean, do you remember the timeframe when it happened?

7 A I don't remember the date and time, but I remember it
8 happening

9 Q All right, sir Now, do you remember crossing Honey
10 Ford crossing in the weeks and months prior to the Harvey
11 collision?

12 A Yes

13 Q All right, sir And, Mr Johnson, if you pulled up
14 at Honey Ford Road -- 32 -- and stopped at the stop line
15 or behind the stop line in April or May of '04 how far
16 could you see down those tracks?

17 A If I stopped behind the line I could see about four
18 or 500 feet down the track

19 Q Okay, sir And, Mr Johnson why was it that you
20 couldn't see down the tracks?

21 A Because they had a lot of growth up there and you
22 just couldn't see down there

23 Q All right Is that the vegetation shown in this
24 photograph, Plaintiff s Exhibit 32?

25 A Well, the way the picture is shown now I was a little

1 further back

2 Q All right And let s go to the exhibit with the
3 spot Now let me ask you this Mr Johnson You see the
4 spot on this track -- the little white spot down there?

5 THE COURT Show it to him

6 Q I'm going to get over here in front of the thing
7 You see the arrow -- you see that little white dot?

8 A Yea, I see that

9 Q All right Now in April or May of 2004,
10 Mr Johnson, if you stopped your vehicle with the bumper
11 at or behind the stop line at Honey Ford crossing could
12 you see as far as that dot down that track?

13 A If that's four or 500 feet The only thing I could
14 see is about four or 500 feet down the track

15 Q All right And, so does that look in this picture
16 to you -- that dot on the track -- does that look further
17 than four or 500 feet?

18 A I think so Just the picture is just up close

19 Q All right, sir Now, in April or May of '04 did you
20 have an occasion when you were at Honey Ford crossing when
21 there was a train coming?

22 A About two weeks before that

23 Q Two weeks before what?

24 A The accident

25 Q Okay The accident being the wreck on May 30 of 04?

1 A Yes

2 Q All right And on the day that you were out there
3 with a train did you pull up there towards the crossing?

4 A Well, I stopped at behind the white line and I looked
5 to the left I pulled up 500 feet down the track a safe
6 position I can see and then I looked to my right and then
7 when I was getting ready to cross I glanced up and out of
8 the corner of my eyes there was a train I had to back
9 up

10 Q All right So, let's walk through this In a couple
11 of weeks prior to this did you get -- I want to just go
12 through this slowly Did you pull up to the stop line?

13 A Yes

14 Q All right Did you look to your left?

15 A I looked to my left

16 Q All right And on that day where were you stopped?

17 MR HARMON Your Honor, I'm sorry The question has
18 been asked and answered We're going through it the
19 second time

20 THE COURT I am going to give him a little leeway
21 one more time

22 MR MURDAUGH Well -- okay Thank you Your Honor
23 Where were you stopped that day?

24 THE WITNESS I was stopped behind the white line

25 Q And you looked to your left?

1 A I looked to my left
2 Q And did you see a train?
3 A No, I didn't
4 Q All right And did you look to your right?
5 A I looked to my right and I had to kind of look up to
6 look down the track
7 Q Now, after you looked left and right and didn't see a
8 train did you proceed?
9 A Yes, I did
10 Q All right And when did you see the train?
11 A When I look at it coming I had to hurry up and back
12 up
13 Q All right How did you see the train?
14 A Out of the corner of my eyes I figure I was in a
15 safe spot when I looked to the left
16 Q All right And how close was the train to hitting
17 you when you stopped and backed up?
18 A It was close enough I had to hurry up and back up
19 Q If you hadn't hurried and backed up what would have
20 happened?
21 A I would have been just like Mr Harvey
22 Q Okay Did you -- Did the horn -- Did you hear the
23 horn blow that day?
24 A I --
25 MR HARMON Objection Your Honor Excuse me

1 Objection Relevancy We don't know whose train this
2 was We don't know -- it's not the same crew So my
3 objection is relevancy

4 THE COURT Overruled

5 Q Did you hear a horn that day, Mr Johnson?

6 A I didn't hear a horn

7 Q Were you listening?

8 A Yes, I was

9 MR MURDAUGH Thank you Please answer any
10 questions

11 THE COURT Mr Harmon?

12 MR HARMON Thank you, Your Honor

13 THE COURT Your witness

14 MR HARMON Can we keep up Plaintiff's 48-B that you
15 earlier had up, please? Thanks

16 CROSS-EXAMINATION

17 BY MR HARMON

18 Q Good afternoon, Mr Johnson

19 A Good afternoon

20 Q On direct examination do you remember being asked
21 questions about this photograph just a moment ago?

22 A Yes

23 Q I wrote down what you said You were asked by
24 Mr Murdaugh if you could see all the way down to that
25 white dot and you said, 'If that is 400 to 500 feet, that

1 is all I could see "

2 A Right

3 Q Right? Okay So if the dot there is four to

4 500 feet you could see it is what you're saying?

5 A If it is four to 500 feet

6 Q Okay And then if it is beyond four to 500 feet what

7 you're telling us then is you wouldn't see it?

8 A Exactly

9 Q Did anyone suggest to you --

10 A No No they didn't

11 Q Excuse me Let me finish my question

12 THE COURT Hold on

13 Q Did anyone suggest to you that all you're supposed to

14 be able to see is four to 500 feet?

15 A Huh-uh

16 Q All right And would you agree with me that it can

17 be difficult to estimate how far things off are in a

18 distance?

19 A I can't agree with you on that

20 Q I'm sorry I couldn't hear you

21 A I can't agree with you on that

22 Q Okay So you believe you can estimate with

23 precision how far certain things are away?

24 A Yes

25 Q Okay There is a stop line at Honey Ford Road

1 crossing, right?

2 A Yes, it is

3 Q How far is the stop line from the front rail of the
4 track?

5 A It s not too far back

6 Q How many feet?

7 A I can't really estimate that

8 Q I thought you just told me that you could estimate --

9 A I can t estimate how close it is

10 Q Is it 2 feet? 5 feet?

11 A I can't estimate that

12 Q So you have no estimation --

13 A I can't estimate how close that line is to that
14 track

15 Q Let me get the question out and you can answer I
16 promise to let you answer it, but I have to for the record
17 get the question out Do you understand?

18 A Yes

19 Q Okay So my question is you cannot estimate for us
20 how far the stop line is at this crossing is to the front
21 rail Is that what you're telling us?

22 A I can tell you that that line is too close That's
23 all I can tell you

24 Q Okay and how -

25 THE COURT Now hold on a second He has asked you a

1 very specific question Can you estimate from the white
2 stop line to the near rail?

3 THE WITNESS No, I can't

4 Q All right And, so, you're telling us that you
5 cannot estimate how far it is from that white line to the
6 rail but you can estimate with precision how far several
7 hundred feet is down the track? Is that what you're
8 telling us?

9 A Again, I can pull up to the track to a close safe
10 spot

11 Q Sir, that's not my question My question is are you
12 telling this jury that you can't estimate from the stop
13 line to the rail but you can estimate four to 500 feet
14 with precision?

15 A The only thing I can estimate --

16 THE COURT Sir, answer the question and then you may
17 explain

18 Q Is that your testimony?

19 A That's my testimony

20 MR HARMON I don't have any further questions

21 THE COURT Redirect if any

22 REDIRECT EXAMINATION

23 BY MR MURDAUGH

24 Q You can just leave that up We're talking about
25 estimating Mr Harmon is asking you to estimate how far

1 the stop line is from the crossing Is the stop line in
2 this photograph?

3 A No, it's not

4 Q Is it possible for you to look at this and
5 estimate --

6 A No, it's not

7 Q -- how far it is?

8 A No, it s not

9 Q All right Now, let's pull up Plaintiff's
10 Exhibit 32 All right Is this representative of the
11 vegetation as you remember it if you stopped at or behind
12 the stop line?

13 A Say that again now

14 Q Is this photograph representative of what was shown
15 if you were at or behind the stop line?

16 A On the photo that would be a little further back

17 Q Okay All right And is there any doubt in your
18 mind when you stopped at that stop line in April or May of
19 '04 that what you could see was four or 500 feet?

20 A Yes

21 MR MURDAUGH Thank you

22 THE COURT You may step down May he be excused?

23 MR HARMON Yes your honor

24 THE COURT Mr Johnson, thank you Are you kin to
25 the Roundtrees?

1 THE WITNESS Yes

2 THE COURT Who is your Daddy?

3 THE WITNESS James Johnson

4 THE COURT Tell him I said hello All right Next
5 witness

6 MR MURDAUGH I call James Johnson

7 JAMES JOHNSON, after being duly sworn, testified
8 as follows

9 THE COURT State your full name for the record and
10 spell your last

11 THE WITNESS James Johnson

12 THE COURT All right I'll let you sit down I'm
13 right behind you Now I got the chair behind you Is
14 Goings your brother? Is Goings Roundtree your brother?

15 THE WITNESS Yes, sir

16 THE COURT Your witness

17 DIRECT EXAMINATION

18 BY MR MURDAUGH

19 Q Mr Johnson, where are you from sir?

20 A Denmark

21 Q And how long have you lived in Denmark, sir?

22 A About, as a matter of fact, all my life

23 Q All right, sir And do you have the occasion to go
24 across to go down Honey Ford Road, sir?

25 A Right

1 Q All right And if you will, please, did you have the
2 occasion to go down Honey Ford Road back in April, May of
3 2004?

4 A Right

5 Q All right sir What was your reason for going down
6 Honey Ford Road sir?

7 A I got a farm down from Honey Ford Church I go there
8 about every day

9 Q How long have you been farming, Mr Johnson?

10 A About 50 years

11 Q Long time?

12 A Long time

13 Q What do you plant, sir?

14 A I plant corn, soybeans, and a big garden

15 Q Big garden? Something you like doing?

16 A Oh, yea

17 Q All right, sir And, now, Mr Johnson, when you
18 would go across Honey Ford crossing back in April and May
19 of 2000 -- and you've been going there a lot longer than
20 that, haven't you, sir?

21 A Oh, yea

22 Q All right But let's just talk about the several
23 months preceding -- Do you remember the wreck out there
24 between the train and the Harvey vehicle?

25 A Yes, I do

1 A Yea

2 Q Okay Now, Mr Johnson, when -- In the months
3 leading up to May of 2004 did the vegetation and the
4 growth out there at the crossing change any in those
5 couple of months?

6 A No It was grewed up

7 Q Okay And it didn't change in the weeks and months
8 leading up to May of '04 substantially?

9 A No

10 Q Okay Now, Mr Johnson back in April and May of
11 2004 if you pulled your vehicle - stopped that vehicle
12 behind that white line --

13 A Yes, sir

14 Q -- okay, sir, and you looked to your left --

15 A Right

16 Q -- how far could you see?

17 A You could see about 400 feet

18 Q All right, sir And let's get -- Look on the board,
19 sir, Plaintiff's Exhibit 32 Do you recognize that?

20 A Yes

21 Q All right, sir And do you see the vegetation along
22 the tracks there, sir?

23 A Yea

24 Q All right, sir Let's go to -- All right and --

25 Let's go to Plaintiff's Exhibit 48-A Now, let's look at

1 this picture a little bit closer to the tracks Do you
2 see that white spot on the picture?

3 A Yes, I do

4 Q All right The little spot down there?

5 A Right

6 Q Now back in April or May of 2004 Mr Johnson, if
7 you stopped your vehicle behind that stop line could you
8 see as far as that white spot is in that photograph?

9 A No

10 Q All right, sir Why couldn't you see that far?

11 A Because it is growed up bushes and stuff

12 Q All right So, now, Mr Johnson, in April or around
13 April or May or the few months leading up to May 30 of
14 2004 did you have the occasion to be at Honey Ford Road
15 coming from 321 with a train coming?

16 A Yea

17 MR HARMON Objection, Your Honor I have an
18 objection I can make at side bar

19 (Whereupon, a bench conference was held)

20 THE COURT All right Madam Forelady, ladies and
21 gentlemen how about walk out one second Let me take
22 something up out to of your presence Then we'll come
23 back out and finish this witness and then we'll take our
24 afternoon break after that This will not be long Step
25 out

1 (Whereupon, the jury exited the courtroom at 3 03)

2 THE COURT All right Mr Harmon, give me your
3 objection that you made at side bar, please Hold on
4 All right Now that the jury is out

5 MR HARMON Your Honor, do we want to do this in the
6 presence of the witness?

7 THE COURT Well I am either going to let him answer
8 or not What we say is not --

9 MR HARMON Your Honor, my objection is earlier the
10 Court indicated that near misses or things they could show
11 for April or May of 2004 the court would consider
12 Mr Johnson has given testimony under oath page 43, lines
13 7 through 15 -- excuse me, 17 - and he's testified under
14 oath in this case that the near miss occurred in March of
15 '04 and I just believe this testimony -- the court has
16 already indicated it's cumulative and it's beyond the
17 period of time that would be relevant and so my objection
18 is this is cumulative It is irrelevant because of the
19 time period and I would point out to the court you know,
20 regardless of what folks say the end of May 2004 and March
21 when we're not fully in spring -- who knows when in
22 March -- it's different So, the witness said it was in
23 March This happened almost in June The court said
24 April and May so I ask that his testimony on the near miss
25 be excluded

1 THE COURT All right Well, we are trying this case
2 based on how the scene appeared to be around the time of
3 the accident in question or the wreck in question -- May
4 30, 2004 -- as to vegetation and as to how it looked
5 accurate depiction of the scene, et cetera, et cetera I
6 have been letting the witnesses talk about April or May
7 We're talking about a different subject We're talking
8 about near misses As I understand the law on near misses
9 they're admissible to demonstrate a dangerous condition at
10 a crossing and there may be some difference in that than
11 trying to establish what the vegetation looked like at the
12 time of the wreck We're talking about a March which is
13 one month off of my sort of guidepost dealing with the
14 vegetation

15 Y'all opened the door on another witness with a near
16 miss 18 -- when he was 18 years old some years ago I am
17 going to allow it I don't find it to be cumulative
18 We've only had one other near-miss witness That's
19 Mr Leon Tyler, but it is getting to be cumulative as to
20 vegetation and all and how it looked Unless we got
21 something different with new witnesses, Mr Johnson is
22 going to be the last one on that subject

23 So, I will allow the near miss We're going to
24 finish this witness cross examine, and then we're going
25 to take a break and let's get into another subject

1 MR MURDAUGH Yes sir

2 THE COURT Bring the jury in I'm sorry Hold on

3 Mr Harmon, I don't need to mean to cut you off Is
4 there anything else you need to put on the record --

5 MR HARMON Just for the purposes of the record,
6 Your Honor, I believe that the standard is the Plaintiff's
7 burden is to show substantial similarity, and I don't
8 believe given the differences in the seasons that we know
9 that the witness has already said under oath that simply
- 10 saying it looked the same is sufficient to meet the burden
11 of proof regarding substantial similarity

12 THE COURT Well, I think that goes to the weight as
13 opposed to the admissibility and, Mr Harmon he is fair
14 game for your excellent cross examination which you have
15 already demonstrated to me that you do very well

16 MR HARMON Yes, Your Honor Thank you
17 (Whereupon, the jury came into open court at
18 approximately 3 07)

19 Q Mr Johnson, back in the -- around the months leading
20 up to May 30, 2004, did you have occasion to be at Honey
21 Ford crossing with a train coming?

22 A Yes

23 Q All right, sir And I think you were coming from
24 321?

25 A Right

1 Q All right And the train was coming from your left?

2 A Right

3 Q All right Tell us what you did that day Did you
4 stop?

5 THE COURT Just tell us what you did that day

6 THE WITNESS Yea I stopped I stopped to the white
7 line and the stop sign I looked to my left I looked to
8 my right I didn't see anything so I started across and I
9 hear the train blowing and it was right up on me If he
10 had blowed further down that track it wouldn't have been
11 no problem I would have heard it real good

12 Q All right, sir Now, that day that this almost
13 happened to you, tell us what your habit is in the
14 springtime What is your practice as far as riding with
15 your windows up or down?

16 A Well, summer or winter I have my windows cracked

17 Q Year around?

18 A Yea, I have them cracked some

19 Q How far do you keep it cracked, Mr Johnson?

20 A Maybe about five or six inches

21 Q Okay, sir And you had it cracked that day?

22 A Yes

23 Q All right So, Mr Johnson, as you -- after you
24 looked left, looked right, pulled up to the crossing, when
25 you heard the train did you look then?

1 A Oh yea

2 Q At that point did you see the train?

3 A No, I didn't see it then

4 Q No, I'm talking about when it blew after you had
5 taken off?

6 A Oh I seen it then

7 Q All right, sir And how close was it to you at that
8 point?

9 A Well, it was about four or 500 feet

10 Q No, I'm talking about right when you pulled up on the
11 crossing?

12 A Oh, it wasn't very far

13 Q Okay Now did you stop or did you take off?

14 A I stopped Then I took off

15 Q Okay All right, sir No, I know you stopped, but
16 when you saw the train and -- After you had stopped and
17 looked and you had started to go and then you heard it and
18 realized that it was about to hit you did you stop or did
19 you go on across?

20 MR HARMON He is leading his own witness, Your
21 Honor

22 THE COURT Hold on a second

23 THE WITNESS I took on off

24 MR HARMON Objection is leading

25 THE COURT Sustained

1 Q Tell us what you did, Mr Johnson

2 A I stopped Like I said, I stopped to the line and
3 the stop sign

4 Q Yes, sir

5 A And I started across I hear the train blowing It
6 was right on me So I might as well take on across If I
7 had turned around I would have got hit

8 Q All right sir, and now the day of the Harvey
9 collision, all right, that had just happened?

10 A Yea When I got along there it was done happened

11 Q You re talking about when you came through the day of
12 the wreck, the Harvey case had already happened?

13 A Yea

14 Q Okay, sir All right Please answer any questions
15 that Mr Harmon has Thank you

16 CROSS EXAMINATION

17 BY MR HARMON

18 Q Afternoon sir

19 A How are you?

20 Q We just heard from Mr Dwayne Johnson

21 A Right

22 Q And that's your son?

23 A Right

24 Q Now, it s your testimony that you -- when you stopped
25 back then you could see 400 to 500 feet Is that what

1 you're saying?

2 A Yes

3 Q Did you talk with your son about that?

4 A No, I haven't

5 Q Okay But it's your testimony that by your sight
6 estimate you could see four to 500 feet?

7 A Correct

8 Q You would agree with me that you've never gone out
9 there and measured or anything like that, right?

10 A No

11 Q Now, you talked a moment ago with Mr Murdaugh about
12 this near miss right?

13 A Right

14 Q And you said that the train as you were going across
15 you thought it was pretty close, right?

16 A Right

17 Q You told us before in your deposition that pretty
18 close was two to four football fields away, right?

19 A Right

20 Q So, you had plenty of time -- you got out of the way
21 of this train that was two to four football fields away
22 right?

23 A I just did made it cross

24 MR HARMON Your Honor I pass the witness

25 THE COURT Mr Murdaugh anything on redirect?

1 MR MURDAUGH Quick question, Your Honor

2 REDIRECT EXAMINATION

3 BY MR MURDAUGH

4 Q Mr Harmon was asking you about two to four football
5 fields What I want to know is the day that you were
6 talking about when you saw the train out there, did the
7 train almost hit you?

8 A Yes, it did

9 Q Okay

10 THE COURT Thank you You may step down Now is
11 Herman your brother, was your brother?

12 THE WITNESS Yes, sir

13 THE COURT You know Herman was my buddy for a long
14 time He has passed didn't he?

15 THE WITNESS Yea

16 THE COURT About four or five years ago?

17 THE WITNESS Six years ago

18 THE COURT Is Goings still alive?

19 THE WITNESS Yes

20 THE COURT You tell Goings I said hello

21 THE WITNESS Will do

22 THE COURT You got another short witness

23 Mr Murdaugh?

24 MR MURDAUGH I don t think so, Your Honor Not
25 now

1 testimony will get us to that point of whether we're going
2 to do it or not I think probably we can get to the point
3 before that, but I just want to let the court know

4 MR PARKER I think we will By the time we get to
5 any of this probably it would be a good time to break We
6 got about an hour's testimony Then we can get these
7 documents We'll get to a point We won't get into
8 anything that he will object to

9 THE COURT How is that?

10 MR HARMON Fine

11 (Whereupon, the jury came into open court at
12 approximately 3 36)

13 MR PARKER Thank you, Your Honor The Plaintiffs
14 call Dr Heathington

15 Dr Heathington, would you come up here and be sworn?

16 KENNETH W HEATHINGTON, after being duly sworn
17 testified as follows

18 THE COURT Mr Parker?

19 DIRECT EXAMINATION

20 BY MR PARKER

21 Q Please state your full name

22 A Kenneth Wayne Heathington

23 THE COURT Spell your last name, please

24 THE WITNESS H-E-A-T H-I-N-G-T-O-N

25 Q Mr Heathington, I am going to call you

1 Dr Heathington but you're not a medical doctor?

2 A No I'm an engineer

3 Q And you have a doctorate degree in engineering?

4 A Yes sir

5 Q And where do you live?

6 A I live at 7653 Charlton Drive, Knoxville, Tennessee,
7 37920

8 Q If you would, tell us about your educational
9 background

10 A I have a Bachelor's and a Master's from the
11 University of Texas at Austin I graduated with a
12 Bachelors in '61, graduated with a Master's in '66 and my
13 first degree was in Petroleum Engineering My Master's
14 was in Civil Engineering with a major in the Highway Field
15 and Traffic Engineering and Highway Safety and that sort
16 of thing and I've been practicing in it all my life

17 Q After you had your master's degree, where did you go?

18 A I went to Northwestern University and did my Ph D in
19 Civil Engineering and again in Traffic Engineering,
20 Transportation Planning and Highway Safety and so forth
21 in that area

22 Q And after you had your education did you work in the
23 field of traffic engineering?

24 A Yes I began working for the Texas Highway
25 Department in 1963 and I did my Master's degree I

1 already had my Bachelor's and I was working on my Master's
2 part time, and so, I did that and I spent about roughly
3 three and a half years with the Texas Highway Department
4 in the highway design and working in highway safety, that
5 sort of thing. The guy that I worked for which is Paul
6 Tutt, Sr., was kind of the state safety engineer and
7 traffic engineering and so forth. I worked in that
8 division, as I said, for about three and a half years.

9 Then when I went to Illinois I became I think a Civil
10 Engineer III, for the Illinois Division of the Highways
11 the expressway surveillance project. We control all of
12 the freeways in the Chicago area. We did all of the ramp
13 metering, all of the accidents, delays, things of this
14 nature, rerouting people and handling all of those sorts
15 of things in Chicago, and that's not an insignificant
16 problem to do that in the Chicago area. I worked with
17 them until I took a position with Purdue University as a
18 faculty member. I went there in 1969 and I stayed there
19 as a faculty member, again teaching in geometric design
20 of highways and highway safety and computer animation and
21 simulation and things like that, transportation planning.

22 Then I went to the University of Tennessee in the
23 fall of 1972 and went there as Director - as Professor of
24 Civil Engineering and Director of the Transportation
25 Center which did research in all areas of transportation.

1 It was a university-level center where we worked with all
2 the campuses across the state and all of the colleges
3 within the campus there at the Knoxville campus of the
4 University of Tennessee, and then I took a leave of
5 absence about 1978 to '79 and became an Associate
6 Administrator for the National Highway Traffic Safety
7 Administration where I was on the leave of absence for the
8 University of Tennessee and I was technically responsible
9 for all of the traffic safety programs throughout the
10 United States. We had funding that we give to states and
11 to the government's highway safety program and things like
12 that and I had responsibility for that with the division I
13 had and I came back to the University of Tennessee, and
14 then I became Associate Vice President for Research where
15 I had to look after the research of all of campuses --
16 Knoxville campus, the medical units in Memphis, the Martin
17 campus, Chattanooga campus, Space Institute, and Telahoma
18 and so forth, and then I became president of the
19 University of Tennessee Research Corporation which handled
20 all of the technology that was discovered from research
21 and things of this nature at the university -- all of that
22 and then I became -- All of these were being done
23 simultaneously

24 Then I became Director of the University Venture
25 Capital Center. We were taking technology that we

1 invented within the university and we were creating new
2 firms and we had contracts with venture capital firms to
3 invest in those firms and so forth and that was mainly at
4 the -- set and structured from the governor of Tennessee
5 which was Lamar Alexander then and we were doing a lot of
6 work in economic development for the state of Tennessee
7 Then I retired from those positions

8 Q During this whole time --

9 THE COURT Mr. Parker, hold on one second.

10 MR. PARKER Excuse me.

11 THE COURT Ladies on the back, can y'all hear him?
12 Everybody hear okay?

13 THE WITNESS This may help a little bit if I get a
14 little closer.

15 THE COURT It does. Thank you.

16 Q During all this time that you were at the University
17 of Tennessee, did you teach engineering?

18 A Yes. When I first went there I taught one, sometimes
19 two, courses a semester, and, obviously, as all of these
20 other positions you had to fill out of those and they were
21 simultaneously and things of this nature and you got to
22 teach less and less and you would go lecture in a lot of
23 the courses because in my background in accident
24 reconstruction, traffic engineering, human factors, things
25 of this nature, railroad grade crossings and stuff like

1 that, and I was doing a lot of research all through that
2 whole period of time with the university and I would go
3 lecture and then I would often teach one course a
4 semester, maybe one course a year, but I had Ph D students
5 getting their degrees under me all that time, Master
6 students working under me and I was directing research and
7 so forth

8 Q As part of the research that the transportation
9 center did at the University of Tennessee did you do
10 research concerning railroad grade crossings?

11 A Oh, yes We probably did more than anybody else at
12 that period of time anywhere in the United States or
13 anywhere and some of the stuff we did is now in practice
14 and accepted in the MEPCD and so forth and so we did a lot
15 of research I started doing research work in railroad
16 grade crossings when I was at Purdue, and, basically part
17 of my Ph D dissertation was in human factors, route
18 deviations, and changeable message signs and things of
19 this nature It didn't deal specifically with rail grade
20 crossing and then we moved that knowledge at Purdue into
21 railroad grade crossing research and so forth and then
22 that continued and the Federal Highway Administration came
23 to me in, I guess, about 1980 somewhere along in there --
24 81 -- and had a big project that we did evaluating all
25 types of traffic control devices to put in and we would go

1 install them at crossings and evaluate them and to see how
2 they worked and so forth

3 Q Have you published in scientific journals papers on
4 railroad safety in the areas of driver behavior at
5 railroad crossing and that type of thing?

6 A Yes, sir

7 Q Tell us about some of the things that you've
8 published

9 A Well, I don't keep that many in each category, but
10 I've published about 170, 175 papers and books and so
11 forth in my lifetime I still get invitations to do that
12 I just don't have the time anymore to write those One
13 thing that we published a good bit on and the peripheral
14 part of it that's now high speed corridors We did
15 research on four quadrant gate systems and so now when you
16 have over about a 90-mile an hour -- 85 to 90-mile an hour
17 train speed -- the Federal Government then requires that
18 you put in four quadrant gate systems and in some of the
19 ones in California which is a passenger service trolley
20 lines and so forth they're using four quadrant gate
21 systems We did research for three or four years or so on
22 that area and published that -- four quadrant flashing
23 light signal systems and in some of the crossings we
24 evaluated we took out all of the railroad grade crossing
25 type of traffic control devices that you have and put

1 highway traffic signals in and everything was controlled
2 You didn't -- When a motor vehicle operator came up to the
3 crossing they didn't know that you were coming to a grade
4 crossing There was no signs to indicate that or signals
5 or anything It was just like an intersection here in
6 town

7 Some of that dealt with what type of constant warning
8 times I know as I was reading something in one of the
9 new manuals the other day where they were discussing and I
10 had written some papers on that about when people start
11 violating stuff and once you get a set of gates to stay
12 down for about 30 seconds to 40 seconds and they don't see
13 a train coming people will start driving around the gate
14 arms and that's just -- so, you know you don't want
15 failures That's the main thing You don't want a
16 malfunction of the gates or you don't want a false
17 activation and things like that because people won't just
18 sit there all day waiting for the gates to go up if there
19 is no evidence of a train coming or anything like that
20 So, there is all sorts of things like that published over
21 the years

22 Q And did you also -- have you hosted and has the
23 University of Tennessee posted a symposium on railroad
24 safety?

25 A Yea I started that when I was director many, many

1 years ago That's kind of gone by the wayside They
2 haven't kept up with that, but we had it for several years
3 and it was about every two years we would have an
4 international symposium and they'd come in from all over
5 the world and present research papers and projects and so
6 forth in railroad grade crossings and what had been being
7 done in various countries

8 Q These were people from railroads industry highway
9 department?

10 A You have highway departments --

11 Q Legal things?

12 A -- federal government, people from Japan or
13 Australia Just all sort of places would come in and
14 present papers and so forth Canada You'd have
15 railroads You would have highway departments You would
16 normally have about 125 to 150, 175 people

17 Q And did you serve on a task force for railroad safety
18 in Tennessee?

19 A Yes I served for the Tennessee DOT for a while -- a
20 member of a task force looking at the issues regarding
21 safety at railroad highway grade crossings in the state of
22 Tennessee

23 Q As part of your job -- what is your present company
24 called?

25 A It's called Applied Research Associates Incorporated

1 We formed that in 1974 along with -- it was six of us that
2 were faculty members at the University of Tennessee One
3 of them was my wife Dr Betty Heathington She was also a
4 faculty member and administrator at the University of
5 Tennessee, and then my wife and I purchased the rights of
6 that from our friends who were part of it in 1979, I
7 think, and we used that ever since

8 Q Is part of what you do now do you evaluate railroad
9 grade crossings?

10 A That's one We work in several areas of highway
11 safety Any kind of design of a highway railroad grade
12 crossing -- we do a lot of work in that area
13 Construction zone accidents, pedestrian accidents,
14 anything that deals with the highway -- we don't work in
15 airline safety We don't work in water safety or other
16 sorts of things It is all highway-related type of
17 safety

18 Q Part of that job with what you do is testifying like
19 you are in court here today?

20 A That's correct

21 Q And now you've talked about the MUTCD and, if you
22 will, tell us what that is

23 A The MUTCD is the Manual on Uniformed Traffic Control
24 Devices If you go back far enough in this country
25 actually prior to 1935 you could have rectangular stop

1 signs in Mississippi and you could have different shape of
2 a sign for a stop sign in another state and obviously,
3 there was a lot of concern about people as they began to
4 travel more and more and more between states and things of
5 this nature that, you know, if you're supposed to stop you
6 want to see the same sign in California that you do in
7 Texas or Michigan or wherever

8 So in 1935 the federal government adopted the Manual
9 on Uniformed Traffic Control Devices Now, of course,
10 it's changed over the years or added to it It started
11 out really kind of small and it is real big now and they
12 adopted that and then that's been -- it had to be adopted
13 by states and be applicable to streets and roads and so
14 forth within a state or you have a restriction -- severe
15 restriction on the amount of federal funds that you can
16 receive from the federal government for assistance in
17 building construction and maintaining streets and roads
18 and signals and so forth

19 So, it's been around a long time You get a version
20 out about every four or five years You'll have a few
21 changes and so forth

22 Q Have you done any work on the MUTCD?

23 A Well, some of the things that s in there on like four
24 quadrant gate systems that came out of our research at the
25 University of Tennessee

1 Q And I think you also talked about the human factors?

2 A Yes

3 Q What is that? What is that the study of?

4 A Well, human factors is taught primarily in three
5 areas of university. It's taught in a psychology
6 department. It's taught in industrial engineering
7 primarily and you have it as a part of traffic engineering
8 and civil engineering. You get industrial engineering --
9 they're concerned with factories -- say, assembly lines at
10 General Motors or things of this nature and the human
11 relationship of people and what they're able to do with
12 machines and things of this nature and psychology is a
13 thinking process and what maybe drugs can do to you and a
14 whole host of things.

15 In civil engineering and traffic engineering you're
16 concerned with the interaction of three things. The
17 automobile, the person who is operating it, and the
18 roadway. And we teach all of our students you have to
19 know those relationships and what can happen and what to
20 anticipate from a driver and how are they going to handle
21 their vehicle and what is the difference between a car or
22 a van or 18-wheeler, whatever. What do you do with that?
23 That comes into play on how you design the roadway.

24 I used to teach geometric design of roadways at
25 Purdue, and, so, that's what we work in. That's what I

1 work in I don't work in aircraft manufacturing or human
2 factors there or anything like that It is all with the
3 driver, motor vehicle, and the roadway and how those
4 interrelate So you have to have certain perception
5 reaction times You have to have certain radius of
6 curvatures You have to have certain vertical curves, and
7 certain sag vertical curves, and you talk about
8 conspicuities and you have to be able to see things,
9 recognize things You look at the impact on the amount of
10 darkness with something where something's not clear and
11 this sort of thing and headlights and all of this Well,
12 it all comes in the human factors aspect of what you can
13 see and what you can recognize and what you would know to
14 do and how you would interpret that and things of this
15 nature and that's what I have been working and my -- I
16 started working that in 1963 when I started working as a
17 traffic engineer and when I was at Northwestern one of my
18 professors was Dr Gus Rath who is on my committee He
19 and I published some papers together He had a Ph D in
20 Psychology and Ph D in Industrial Engineering and his
21 specialty was human factors Of course, I studied under
22 him He was one of my advisers and so I had formal
23 training, so to speak, and I had been working in it all my
24 life

25 Q In order to design safe highways, safe railroad

1 crossings, do you have to take into consideration this
2 study of human factors?

3 A If you don't you'll kill people

4 Q And --

5 A It is a fundamental principal

6 Q -- you mentioned something about geometric design
7 Is there a policy on geometric design in the United
8 States?

9 A Yes The American Association of State Highway and
10 Transportation Officials -- AASHTO -- publishes on a
11 regular basis manuals on geometric design of highways
12 That's adopted by the federal government, although ASHTO
13 is an independent agency It's not a governmental agency,
14 however, its membership is composed of the federal
15 government and of the highway departments or departments
16 of transportation of all the states throughout the United
17 States, and, so, you're required whenever you're going to
18 spend federal funds on a road you have to incorporate the
19 minimum standards They have minimum and desirable and so
20 forth You have to incorporate the minimum standards for
21 that or you don't qualify for the federal funds

22 Q And these things like in the policy on geometric
23 designs, the AASHTO manual, are these accepted engineering
24 principals in the United States?

25 A Well, they're required by the federal government if

1 you're going to spend their money. Yes. And all the
2 states -- I'll put it this way. I don't know of a single
3 state that doesn't use AASHTO in designing their roadways.
4 There might be some, but, I'm not aware of them, and I'm
5 aware of most of the states in the United States. I have
6 worked in all of those. So, no, that's a fundamental
7 principal.

8 Q And another manual that is used in the area of
9 railroad grade crossing safety would be the Federal
10 Highway Railroad Grade Crossing Safety Manual?

11 A Yes, Railroad Highway Grade Crossing Handbook.
12 There's now been three out. One just came out recently.
13 The first one was in 1978, I believe. Then you had one in
14 1986 and then you had one recently which could have been
15 2008 or somewhere along in there. It hadn't been out too
16 long and it will change a little bit, but it, basically,
17 has remained the same.

18 As an example, for many years the stopping distance
19 -- the distance it takes a vehicle to stop once you've
20 completed the perception reaction times and, say, applied
21 your brakes was the velocity squared divided by 30 is the
22 coefficient of the friction between the road and the car.
23 AASHTO changed that in the 1990, '91, or so version to
24 11.2 feet per second squared and says that will be a
25 comfortable deceleration. It is a whole lot faster.

1 deceleration than what we're driving down the road and we
2 stop and we might stop at three or five feet per second
3 squared or sometimes even slower depending on how old you
4 are and a whole host of things and how you're driving and
5 things of this nature and they put a lot -- One of the
6 problems that we took away from the skidding distance,
7 most motor -- most motor vehicles nowadays have antilock
8 brakes and so you don't have the same principals of
9 determining what the speed was from skid marks as you did
10 many years ago

11 I used to -- I have run a jillion tests on skidding
12 vehicles and calculating speeds and knowing what the speed
13 was when the skid started and all of this sort of thing,
14 but you don't have that hardly anymore You have to have
15 an older vehicle and so it's more or less taken with
16 deceleration rates that you can anticipate from antilock
17 brakes

18 Q We're here talking about a railroad grade crossing
19 collision between a train and a car and involved in that
20 is the relationship -- the time-space relationship between
21 the train and the automobile?

22 A That's correct

23 Q And if you would give us -- Tell us a little
24 explanation about what takes place in that time-space
25 relationship

1 A Well, obviously, for a given time a motor vehicle
2 operator can do certain things and if that time is short
3 enough they can't do anything The time is gone So,
4 whenever you have the right time space relationship
5 between a train and a car and let's say they're
6 approaching one another and the car can't see the train or
7 can't detect the train for whatever reason, then you're on
8 a collision course and that train has to be detected in a
9 certain period of time to go through perception reaction
10 times, get your vehicle stopped, and that's been around
11 for a long time and those standards have been in AASHTO --
12 not only they are in AASHTO as well as in the grade
13 crossing handbooks, it's been in the handbooks and then
14 you use those to determine, Should I go to active traffic
15 control devices? Do I need flashing light signals? Do I
16 need gates with flashing light signals? There is a whole
17 bunch of things you go through and there is criteria on
18 all of that -- train volumes, train speeds, motor vehicle
19 volumes motor vehicle speeds, sight distance
20 restrictions, and there are sight distance standards for
21 all of the different speeds that trains may have and the
22 different speeds that a motor vehicle may have and also
23 from a stop position of a motor vehicle and those are kind
24 of minimum standards It doesn't mean that you may not
25 need more than that, but those are minimums that you ought

1 to have, and, so, you go through those calculations and do
2 the evaluations of crossing and things to see what you do
3 have and what you don't have

4 I mean, to make something elementary, you know, I am
5 not a cook, but if you're going to bake a cake it takes so
6 much whatever and if you don't put that in there, well, it
7 probably won't taste very good Well, if you don't have
8 the right standards put in for a grade crossing whenever
9 the train and the car is in the right time-space
10 relationship, that's when you can get hit and have deaths
11 and have injuries

12 Q If we take a train, say, at 50 miles an hour, it's
13 traveling at so many feet per second?

14 A 1 4667 times miles per hour

15 Q Seventy -- fifty would be --

16 A Yea

17 Q -- approximately 74 feet, somewhere along in there if
18 my math is right?

19 A Uh-huh

20 Q So, if the train is traveling at 74 feet per second
21 and then the person approaching that crossing will need a
22 certain sight distance to be able to see, perceive that
23 train, and avoid a collision with it?

24 A That's correct The tables come out in two versions
25 I don't mean two versions, but two different scenarios

1 One is you have time to go -- You see the train and you
2 have time to go through perception-reaction time, bring
3 your vehicle to a stop 15 feet from the near rail, and let
4 the train go by, and the other one is when you can see it
5 and you have standards where that same one is called
6 clearance intervals It permits you go on through and
7 clear by 15 feet on the other side and then you have the
8 same sort of thing from a stopped position and that s very
9 different

10 The sight distances go up when you have a stop
11 condition because you have to see it, detect it, and then
12 accelerate and go across and clear on the other side and
13 you can be driving 10 miles an hour and it takes you a lot
14 less time than if you have to start from a stop and go
15 across on that distance and then you have to really look
16 at that very carefully because depending on where you
17 stop, where you can see and things of this nature will
18 determine whether or not you'll see it

19 It is like -- and the standards that you have in the
20 AASHTO they do not take into account the full time that a
21 driver needs We heard testimony in here this afternoon
22 where a person says I looked to the left and I looked to
23 the right and that's what you're supposed to do, but the
24 standards that's been published forever only calculates
25 the time from when you see the train It does not allow

1 you any time to look in another direction for the
2 standards as published They're called minimum standards

3 So, if you're looking this way and you don't see the
4 train, you got to add sometimes several seconds to look
5 over here to the right and see what you can see there and
6 then come back again Now, you can say, well, you should
7 have looked over here again So you looked back over
8 here again You don't see anything You say, well, you
9 should look over here again, and, so, you sit there all
10 day long going like this you know, Can I see anything?

11 Obviously, that doesn't happen So, basically, you
12 got one look in each direction is what normally occurs and
13 that's why you got to have that distance Let's say you
14 looked left first You got to have enough distance to
15 give you time to move all the way and make sure there is
16 nothing coming from the other side, come back around,
17 decide it's time to go forward, go forward, and clear on
18 the other side before that train can get to you and hit
19 you That's where you have problems if you don't have
20 those distances

21 That's not an insignificant distance If you got a
22 70-mile-an-hour train or a 79-mile-an-hour train, you may
23 need 1800 feet or 1900 feet You're not talking about
24 four or 500 feet You're talking about long distances
25 because it takes time to look and that train is moving at

1 a pretty fast clip coming in So, that's why you have to
2 apply these standards to crossings

3 Q Using these -- excuse me

4 MR HARMON Excuse me I'm sorry to interrupt, Mr
5 Parker I have an objection that I'd like to take up at
6 side bar

7 (Whereupon, a bench conference was held)

8 Q Dr Heathington, you evaluated the Honey Ford
9 crossing here in Bamberg County?

10 A Yes, sir

11 Q And did you use these texts and the things that you
12 referred to here in looking at it and to evaluate and did
13 you use accepted engineering criteria?

14 A Yes, I always do that

15 Q I want to talk with you about some of those now You
16 mentioned something about perception-reaction time I am
17 going to put up a slide Let's talk about that a little
18 bit about perception and reaction times and those types of
19 things and why you need to understand that to evaluate a
20 crossing

21 A Well, that's what we teach students and that's what I
22 was taught 100 years ago as a student and it's just an
23 easy way to explain what perception and reaction time is
24 Perception and reaction time is normally based about four
25 categories -- four parts of which none of those

1 individually have we ever been able to measure Until we
2 can record inside of your brain, we won't be able to do
3 that, but first you perceive something and perception will
4 -- can change It's not a constant

5 I can give many examples that I run into from, say,
6 up in Montana and so forth when a moose crosses the road
7 at night up in the mountains and it's dark and you can't
8 see it and it's black and you can't even perceive it for a
9 while I mean, it's very difficult

10 Q Down here we have deer not moose

11 A Huh?

12 Q Down here we have deer, not moose

13 A Deer Well, you can have the same thing In Texas
14 you can have a cow going across the road Anyway, you
15 have to perceive it and then the second part of that is
16 interpretation What is it? Is it a deer? Is it a
17 person? Is it a car without the lights on maybe or
18 something? You got to interpret what it is "E" is
19 called evaluation You have to determine as a driver what
20 am I going to do? Am I going to swerve to the left? Am I
21 going to swerve to the right? Am I going to try to put my
22 brakes on and stop? Am I going to try to speed up?

23 I got hit by a wild hog a couple of years ago in
24 Texas It came out of the woods at night I was on the
25 way to the airport It was early in the morning about

1 four or 5 o'clock, dark as it could be I never saw it at
2 all It hit real hard I doubt if it lived It tore up
3 the front of my pickup So, you know I didn't have time
4 to decide to do anything I didn't know it until it hit
5 Well, I saw just a glimpse of it right before it hit the
6 front of my pickup

7 Then "V" is volition It's simply doing it You
8 take your foot off the accelerator pedal and put it on the
9 brake or turning the steering wheel to the right or
10 turning the steering wheel to the left or pushing the
11 accelerator pedal all of the way down

12 I have done a lot of research and measured PIEV of
13 different people under different situations We've done
14 it at railroad grade crossings We've done it in various
15 situations some controlled and some not controlled

16 The way you would do that is where we had controlled
17 situations and people driving we would instrument the car
18 and we would know when the stimulus came up whatever it
19 may be, a traffic signal or whatever and then the
20 recording device would record when the brake pedal was hit
21 and so we would know how long it took for the whole thing
22 We don't know how much was "P " We don't know how much
23 was "I" or how much was "E" or how much was "V," but we
24 know what the sum total was

25 In fact, I have had some at railroad grade crossings

1 where we were doing all of this by video cameras mounted
2 on the side of the road and we've had them as high as
3 fourteen seconds from the time the signal came on until
4 the brake lights came on So, things are not constant

5 Now, AASHTO has used two and a half seconds as a
6 standard for I guess as long as I can remember at railroad
7 grade crossings, particularly passing crossings There's
8 a lot of research papers that's been out for years that
9 says that's way too short, we ought to increase that to
10 three, three and a half seconds In fact, the Federal
11 Highway Administration published a paper in 1979 -- in
12 fact, a friend of my published it -- and said it ought to
13 be five seconds and at a minimum -- and everybody -- the
14 reason why they resisted increasing it, that increases the
15 costs of construction because you have to have longer
16 sight distances You have to different geometrics because
17 you've got to take into account these additional times it
18 takes people to do something and so everybody has thought
19 for a long time that two and a half seconds is too short
20 and it is on a lot of things There is no question on
21 that)

22 Now we used -- if I can give you an example, on a
23 highway traffic signal when you're in a town some place
24 and you come up we cut that to one and a half seconds and
25 it's not as long as at a grade crossing and the reason we

1 do that is that when you're coming up on a highway
2 intersection you know if it goes from green to yellow
3 you're going to have to stop and then it goes to red
4 Now, when you're going up and the yellow comes on, there
5 are several things you have to go through to evaluate
6 How close am I to the intersection? Do I have time to go
7 through on this yellow that's up there? If I put my
8 brakes on will I slide out in the middle of the
9 intersection and get hit from the side by somebody coming
10 through on the green? And over the years we've changed
11 how we operate all of that sort of stuff

12 First of all, in the manual there is a minimum yellow
13 that you have It's based on the speed on that highway
14 All yellows are not supposed to be -- don't necessarily
15 need to be the same length It might be as short as a
16 second and a half It might be up to three seconds or
17 something Then most states have adopted a policy which
18 in my opinion is pretty good There is an all red on an
19 intersection for about a second Some are a second and a
20 half or so So it shuts everybody down Now, you never
21 will know it if you're not looking for it When you get
22 your red you don't know it but the other side has still
23 got their red for a second or so and that's for a safety
24 factor and so we do that I can remember when we didn't
25 have that and we put all of that in I certainly support

1 that

2 So, it's a very complex sort of thing and it's not
3 simple to say, well you can just look over there and see
4 that or you just move your head like this and you'll know
5 that That's not true, and that means people don't really
6 understand a how all of this stuff with a driver and with
7 a motor vehicle and with the roadway system and how it's
8 designed

9 Q Dr Heathington, I want to go through with you now
10 some of the principals that you used in evaluating the
11 crossing, and, if you will, just go through these as we
12 click them up

13 A Okay Well, inefficient operation and accidents
14 usually occur where the chances for information handling
15 efforts are high At locations where design is deficient
16 the possibility of error and inappropriate driver
17 performance increases That s correct That is from
18 AASHTO and whenever it's not clear it takes you longer to
19 decide what to do, then that's a problem, or if you can't
20 see in time of what to do, and, again, as I go back to
21 there was two people in here that said they looked to the
22 left or and they looked to the right and they got up close
23 to the track and heard the train That's what happens
24 when you don't have enough clearance to be able to see far
25 enough the first time you look, say, to the left or right

1 or whatever

2 Q Yes sir Thank you

3 A The majority of motorists will drive in an orderly
4 and safe manner if they are provided with clear, reliable
5 information and guidance

6 That's true The majority of people you won't have a
7 problem Every once in a while you'll have somebody drunk
8 or drugs or whatever, yes, but that's not the majority of
9 people out there on the road

10 We all have our limitations Some people have better
11 eyesight than others Some people have better hearing
12 than others Some people have better perception than
13 others As I always taught my classes and I was taught
14 the same things, as I said, about 100 years ago, you have
15 to design roadways based on how people operate their
16 vehicles who have driver's licenses So, whenever we set
17 the standards for driver's licenses in a state which is,
18 essentially similar throughout all states, we can't
19 require more than what those people who are getting those
20 driver's licenses are able to do or expected to do in a
21 reasonable fashion

22 When positive guidance is applied to design,
23 competent drivers using well-designed highways with
24 appropriate information displays can perform safely and
25 efficiently Properly designed and operated highways in

1 turn provide positive guidance to drivers

2 Positive drivers is something that's in traffic
3 engineering that is very, very important that we teach our
4 students and we try to practice when we get out As an
5 example, what's not normally anticipated but we still have
6 some in the United States is left-hand exit ramps from a
7 freeway That's not a common thing you have across the
8 country, and I remember when I was a student at the
9 University of Texas, California, and then it was -- You
10 got to remember that money -- You could get a lot more
11 done for a smaller amount of money then than you can now
12 They spent like five to \$10 million to do away with a
13 left-hand exit ramp and put it over on the right-hand side
14 which is consistent with what the practice is

15 So, whenever you change the design of a highway and
16 something is there that's not anticipated to be there by a
17 driver, that's when you can have serious problems You
18 can get people seriously injured or killed That's what
19 that's talking about there You want positive guidance so
20 they know where to go, what to do, where to turn their
21 vehicle, and this sort of thing

22 Q Let me ask you about that When you say --

23 A I might add -- if I could add one thing?

24 Q Sure

25 A That's why you have stop ahead signs If you come up

1 to an intersection and you have a stop sign and you can't
2 see that thing far enough ahead, that's why you put a stop
3 ahead sign in to alert the driver that you got a stop
4 ahead of you That's what we're trying to do is give
5 positive guidance

6 Q What positive -- If a driver is approaching a
7 railroad grade crossing, does that driver have an
8 expectancy that if he stops at that crossing he'll be able
9 to see the train coming from a safe distance?

10 A Absolutely That's what should be provided to him
11 If the train happens to be coming and you can't see it
12 that's how you get people killed and injured

13 Q Because they expect to be able to see it from a safe
14 distance?

15 A Absolutely A driver -- You may need 1200 feet at a
16 crossing Nobody in this room I would guess -- even me --
17 can tell you for every speed of every train and everything
18 exactly how many feet that you have to have, but that's
19 all calculated mathematically based on that train The
20 train is not going to slow down as a general rule It's
21 not going to speed up It's not going to swerve to the
22 left It's not going to swerve to the right or anything
23 like that It all depends on the driver

24 On a highway intersection both parties can slow down
25 Both parties can speed up Both parties can swerve to the

1 right Both parties can swerve to the left You've cut
2 that by 50 percent at a grade crossing and by cutting it
3 by 50 percent that means that the one element that's left
4 that can have a chance to avoid the accident has to be
5 informed correctly and on time If you don't, the other
6 one can't compensate for what this one is not able to do

7 A common characteristic of many high-accident
8 locations is they place large or unusual demands on the
9 information processing capabilities of drivers
10 Inefficient operation and accidents usually occur where
11 the chances for information handling errors are high At
12 locations where design is deficient the possibility of
13 error and inappropriate driver performance increases

14 That's exactly right That's what happens When you
15 get the right time-space relationship say, on a grade
16 crossing between a train and a motor vehicle, that's when
17 you get injuries and deaths and you got these inefficient
18 operations You've got to have -- they've got to know
19 what to do at each point along the way

20 Q And what is the -- in a passive crossing as this one
21 is at Honey Ford, how is a driver warned of the approach
22 of a train?

23 A They only got two ways Sight and sound If you
24 can't hear the train and if you can't see the train, you
25 have no warning

1 Q And in order to see the train you have to see it with
2 the correct distance?

3 A That's right As AASHTO says, you have to have an
4 unobstructed view You do not take a pair of binoculars
5 I couldn't see all this from the courtroom when you was
6 looking at all those photographs I couldn't see that,
7 but you don't have the drivers taking binoculars and
8 looking like this and saying I got to see if there a train
9 through those bushes down there or whatever You got to
10 have -- as AASHTO says it has to be unobstructed Period
11 You have to have clear visibility

12 Expectancies are formed by the driver's experiences
13 and training Situations that generally occur in the same
14 way and successful responses to these situations are
15 incorporated into the driver's stores of knowledge
16 Expectancies relates to the driver's readiness to respond
17 to common situations in predictable and successful ways
18 It affects how drivers perceive and handle information and
19 modify the speed and accuracy of their responses

20 That's very true If you go and you have the same
21 thing over and over and over and over again, then you
22 expect people to perform a certain way If I may give an
23 example of some research that we did at the University of
24 Tennessee -- one of my graduate students did and we
25 published papers and thesis there -- we calculated the

1 accident rates at about 200-and-some-odd crossing randomly
2 selected throughout the United States and we took the
3 train speeds, train volumes, whatever

4 The highest rate -- not the number of accidents, but
5 the highest rate occurred at crossings with the lowest
6 train volume and the lowest motor vehicle volume and so
7 forth The highest rate The lowest rate occurred where
8 you had the highest number of trains I think some of
9 ours had a up to 100 trains a day at a crossing

10 It illustrates this point here If you came across
11 the crossing on a regular basis for a long time and almost
12 never encountered a train or something because of the low
13 volume and things of this nature, you're not
14 subconsciously anticipating meeting a train there and so
15 that's why you've really got to take care of those
16 situations where the anticipation is not what you would
17 like for it to be because drivers tend to go with what
18 it's talking about here is --

19 THE COURT Hold on a second Everybody okay?

20 Q All right Next slide

21 A Reinforced expectancies help drivers respond rapidly
22 and correctly Unusual, unique, or uncommon situations
23 that violate expectancies may cause longer response times,
24 inappropriate response times, or errors which means if we
25 have errors we can have accidents which can result in

1 death and injuries

2 Because drivers can only attend to one visual
3 information source at a time they integrate the various
4 information inputs and maintain an awareness of the
5 changing environment through an attention-sharing process
6 Drivers sample visual information obtained in short
7 duration glances, shifting their attention from one source
8 to another They make some decisions immediately and
9 delay others They rely on judgment, estimation, and
10 prediction to fill in gaps

11 So, people are expecting certain things Say, take a
12 view right quick and if they move their head a little
13 bit -- as an example, if your eyes are about 20 degrees
14 off from where your nose is the visual acuity that you
15 have is roughly about -- instead of 20/20, 2200 2200 in
16 most states is legally blind So, if it's out of the
17 corner of your eye it has to be real pronounced, you know,
18 real bright, real fast, or something like this or you
19 won't necessarily pick it up You might, but not
20 necessarily

21 So, we have what is called in our field conspicuity
22 Conspicuity means the ability to see it and recognize it
23 and understand what it is Then we have what we use
24 something called visual clutter If you've got all of
25 these things coming up the human mind tends to go to

1 whatever is the most attractive I don't mean in terms of
2 looks, but it's either flashing or it's doing something to
3 get your attention Your mind will just automatically go
4 to that

5 So, that's what you got to be real careful of and
6 that's what we try to take care of at intersections and
7 things of this nature We don't want something
8 conflicting with the traffic signals where they can't see
9 what they are or anything like you'll get into some areas
10 where they'll have these big signs on the side of the road
11 with all of these letters and all of this stuff on
12 advertising the local beer joint or grocery stores or
13 whatever and your mind will go over there and look at that
14 and try to start reading it and so that's not a good thing
15 to have when you want them to look at a specific traffic
16 control device ahead of them

17 Throughout the driving task drivers perform several
18 functions almost simultaneously They look at information
19 sources, make numerous decisions and perform necessary
20 control actions Sources of information, some needed,
21 others not, compete for their attention Needed
22 information must be in the field of view, be available
23 when needed, be in a usable form, and be capable of
24 getting the driver's attention

25 That's what I was just saying It is the same thing

1 You got to be able to recognize it It is -- The
2 conspicuity of it has to be excellent It has to compete
3 over everything else Otherwise, if you don't, you can
4 have problems It doesn't mean that everybody will have a
5 problem, but if you got a small number and you kill one or
6 two, that's bad in my opinion

7 Design should take driver reaction times into
8 account It should be recognized that driver's vary in
9 their response and take longer to respond when decisions
10 are complex or features are unexpected Clear sight lines
11 and adequate decision sight distances provide margins for
12 error

13 That s true We got to have those sight lines and
14 sight distances that needs to be there If we don't have
15 those an inappropriate decision can be made which can
16 result in injuries or death

17 Sight distance is of primary consideration at
18 crossings without signals or gates The condition at a
19 railroad grade crossing is comparable to that of
20 intersecting highways where a corner sight triangle must
21 be kept clear of obstructions

22 Every once in a while you'll pull up to an
23 intersection someplace and they may have vegetation,
24 trees, buildings, or whatever and you can't see and you
25 keep easing out and the only thing that s kind of helping

1 you is that the person coming from the other side has
2 control over their vehicle to stop just like you do, but
3 when you get to a grade crossing that's not true You're
4 the only game in town so to speak, that can do much with
5 it

6 The operator of a vehicle approaching an intersection
7 at grade should have an unobstructed view of the whole
8 intersection and a length of the intersecting highway
9 sufficient to permit control of the vehicle to avoid
10 collisions

11 That s critical You've got to have that sight
12 distance If you don t have that sight distance along the
13 highway or along the rail or along the track, you're going
14 to have accidents when the right time-space relationship
15 comes up between the train and the motor vehicle

16 The primary objective in designing a grade crossing
17 is to provide adequate sight distance for the motorist to
18 make an appropriate decision as to whether to stop or to
19 proceed and not only is that where to stop or proceed, but
20 if they stop automatically because it is a stop sign, stop
21 line, or something there, you've got to have enough sight
22 distance for them to make an intelligent decision as to
23 whether to go forward or stay stopped

24 Speeds of the two vehicles, train and motor vehicle
25 define the distances at which a driver must be able to see

1 a train

2 That's what I have been saying, you know It is the
3 time-space relationship and what they are relative to one
4 another and what the speeds are

5 Obstructions in the sight triangle in any of the four
6 quadrants can result in restricted sight distance for at
7 least one approach roadway If such obstructions are
8 vegetation or other natural resources they should be
9 removed

10 Q And the Federal Highway Grade Crossing Handbook, does
11 it and the sight distance chart in order to achieve what
12 the sight distance is do you have to remove the vegetation
13 as described in these documents?

14 A No It says you can add active traffic control
15 devices like gates or flashing light signals and so forth
16 to compensate for it It depends on where it is If it's
17 a flashing light signal, obviously, if it's flashing, you
18 got to stop However, you re permitted to go if you -- if
19 you think it's safe to go Well, if you have those
20 obstructions that even if after you stop at the flashing
21 light signal that you can't see whether it's a stop sign
22 or anything else, you got problems A gate system you
23 can't drive around the gate arms which rightly so, and,
24 so, that's really when you have restricted sight distances
25 and they're severe to come up then gates are the more

1 appropriate way to go

2 MR HARMON Your Honor, I'm sorry to interrupt May
3 we approach?

4 (Whereupon, a bench conference was held)

5 THE COURT Madam forelady and ladies and gentlemen,
6 I wanted to go to 5 o'clock with y'all but we're at a
7 point where I have to review a number of documents, so to
8 speak to determine whether or not they're relevant to this
9 trial That's going to take us about an hour to do that
10 Maybe longer than that I don't want y all sitting back
11 there while I'm doing this It is 4 30 4 35 now I
12 think the most efficient way so we can speed thing up in
13 the morning is let us stay and do that after y'all have
14 left We'll break a little bit earlier today I wanted
15 to go to 5 with the jury and then do that, but we're at a
16 point where we've just got to do that So, I am going to
17 dismiss you for the evening

18 Mr Hiers, breakfast? What is on the agenda?

19 THE CLERK Whatever they'd like

20 THE COURT All right We had sausage biscuits, et
21 al , this morning We can do doughnuts tomorrow, fruit,
22 or back to Hardee biscuits Any particular choice? Well
23 Hardees is easiest for us because Mr Heirs can just go
24 right across the street We'll do that one more morning
25 and then we may do something else the next day Is

1 If we skipped this crossing under the logging program in
2 2000, Mr Parker might have something to talk about, but
3 what we did is we cut it under the pilot program which did
4 apply in 2001 It was cut again in 2003 He wants to use
5 this document and say we skipped this crossing in 1999
6 when, in fact, this program was never even introduced at
7 this crossing So, it's -- I mean, if we wants to admit
8 it, Judge, it violates everything It is remote It
9 violates Campbell

10 THE COURT You are you saying that you object to him
11 admitting it?

12 MR WILBY No, no, no I object to it

13 THE COURT You might let him put it in I'll tell
14 you it looks awfully -- I have just got problems,
15 Mr Parker with it being in 1999 We're talking about a
16 2004 crossing I have reread Webb up here while y all
17 were fussing -- not fussing while y'all were putting up
18 your witnesses about the bridge I'll just have -- I'll
19 have to sleep on that one It looks questionable to me

20 MR WILBY Next, Your Honor, 75 I have highlighted
21 that Your Honor, we think --

22 THE COURT You know, fellows, I just got burned bad
23 up there in Columbia I am gun shy I say that
24 respectfully for the record

25 MR WILBY Seventy-five, Your Honor I highlighted

1 Again, there is the reference to the Union Pacific
2 Railroad and this reference is essentially DeAngelo
3 Brothers -- DeAngelo Brothers contract with Union Pacific
4 and down at the bottom again I highlight "DeAngelo
5 advises UP has experienced a 50 percent decrease in payout
6 and a 30 percent reduction in crossing accidents " DBI is
7 trying to solicit CSX business

8 Your Honor, Webb specifically talks about referencing
9 the conduct of other railroads They were talking about
10 Union Pacific in the Webb case even though they don't
11 mention it by name and we have the briefs to prove that,

12 Your Honor So, we think that that runs afoul of Webb

13 MR PARKER Your Honor, we don't believe it does
14 What this memo is and Mr McMaster -- we've taken his
15 deposition and we'll publish it, if necessary I don't
16 think they contend this is not a business record, but what
17 this has done is this is a memo that Hugh Hopkins who is
18 the Chief Engineer Maintenance for CSX and what he does
19 here is this is a recognition that they needed to clear
20 their crossings They're looking at how much it costs to
21 clear their crossings and projecting out what it will be
22 Secondly, it is a recognition and they're being put on
23 notice that they can have a 30 percent reduction in
24 crossing accidents if they clear the vegetation as they're
25 supposed to be off the right-of-way

1 This goes directly to and I don't disagree that a
2 limiting instruction should be utilized with this This
3 document was allowed in under Williams case with that
4 limiting instruction

5 THE COURT Limiting instruction as for use for what?

6 MR PARKER Only for punitive damages

7 THE COURT Well, if I bifurcate it, then we don't
8 have to worry about it unless the jury finds willful and
9 wanton negligence

10 MR PARKER Well they would have to consider it on
11 willfulness Limit it to willfulness

12 THE COURT When is it dated? What is the date --
13 the effective date?

14 MR PARKER The testimony indicates -- we can date
15 it with the next exhibit that's in April of 2000

16 THE COURT 2000?

17 MR PARKER Yes

18 MR WILBY Your Honor, I would also point out that
19 this document makes specific reference to the conduct and
20 experience of the UP

21 THE COURT UP is Union Pacific?

22 MR WILBY Yes, sir And it talks about a 50
23 percent decrease in their payouts and a 30 percent
24 reduction in their crossing accidents So, it's talking
25 about the settlement and conduct of other cases involving

1 an entirely different railroad

2 MR PARKER We have -- It's not relevant insofar as
3 whether that's true, not true What it did was put CSX on
4 notice that in order to reduce these crossing accidents
5 they needed to clear their rights-of-way for sufficient
6 sight distance and that's why it goes to punitive damages
7 in this case and willfulness because with this knowledge
8 then if they -- with this knowledge don't clear it, then
9 you can consider it willful

10 MR WILBY Your Honor if I may, the real evidence
11 in this case is that we implemented a program in 2002
12 which we continued in 2003 -- a crossing pilot program and
13 crossing clearing program and, so, you know, Mr Parker
14 likes to talk about notice Everything is notice

15 Well, we're already on notice We're already
16 implementing these particular projects, Your Honor He is
17 not putting this in for notice even though that's what he
18 says The documents are prejudicial and we think they
19 violate Webb and Campbell We think that's exactly what
20 the court addressed in Webb

21 THE COURT Well, Webb talks about 200 notices of
22 deficiency received by CSX from the South Carolina
23 Department of Transportation for a period of between '95
24 and 2002 It says it is unclear at what point or on what
25 ground the court admitted the exhibit It is the

1 appellate's burden to present a sufficient record for
2 appellate review CSX has not met this burden with regard
3 to the compilation, although we note these records would
4 be relevant if at all only to punitives Then it talks
5 about two other lawsuits involving two other crossings
6 It appears from the record that the extensive evidence of
7 these accidents was admitted without any instructions
8 limiting the jury to considering them in the context of
9 punitive damages The evidence may be -- may be
10 admissible at a subsequent trial in aid of plaintiff's
11 punitive claim

12 MR WILBY And then it goes on the next page, Judge,
13 where it talks about the conduct not related to the harm
14 suffered by the plaintiffs

15 THE COURT That's on the Webb

16 MR WILBY Yes, sir It's also on Webb And it
17 talks about the introduction of acts in other jurisdiction
18 including CSX and other railroads and this is where the
19 court --

20 THE COURT Where are you reading that?

21 MR WILBY Your Honor, it's page 639 of the opinion
22 There's a section on punitive damages at the very end Do
23 you see it?

24 THE COURT I do

25 MR WILBY This is where the court essentially warns

1 us I suppose, Evidence should be meted on this issue and
2 it should be only if it's closely scrutinized for it's
3 relationship to the particular harm " That s in the
4 context of the conduct of other railroads

5 THE COURT Well, what I was thinking of doing is
6 send it to the jury on the issue of actual damages,
7 comparative negligence, and with the specific finding do
8 you find that the railroad's conduct -- if you find that
9 the railroad was negligent, do you find by clear and
10 convincing evidence that their level of conduct rose to
11 that of willful, wanton, reckless disregard for the rights
12 of others If they did that, then you come back and have
13 a separate hearing on punitives where all of this would
14 come in perhaps on the issue of punitives -- net worth, et
15 cetera, et cetera

16 Mr Parker says I need to put it in now because
17 without it it's not any evidence of recklessness in the
18 regular case It is sort of a catch -- I mean, a dilemma
19 here That's what I'm thinking, but I don't want to get
20 reversed either and I've gotten pretty clear guidance by
21 the court in Webb

22 MR PARKER Your Honor, I think that if we take an
23 appropriate --

24 THE COURT Limiting instruction

25 MR PARKER -- limiting instruction, I think that's

1 what the court said We did the same thing in Orangeburg
2 in the Williams case Even though it's not a reported
3 case the Supreme Court approved that This very document
4 was admitted in that case, was passed on I'm sure that
5 there was -- I would have to go back I don't want to
6 misquote anything, but I'm positive that they raised these
7 same objections in Williams, but I would have to review
8 the record and state that with certainty but I am positive
9 that this line of documents that they raised this same
10 argument in the Supreme Court which was rejected

11 MR MILLBERG If I might, Your Honor?

12 THE COURT You may Gentleman, I am not being rude
13 by checking my e-mails My son's mother-in-law is on her
14 deathbed right now I am just making sure she's -- my
15 son's mother-in-law Go ahead

16 MR MILLBERG We certainly think the case ought to
17 be bifurcated if that's at all possible, Your Honor

18 THE COURT Well, it's possible It is
19 discretionary

20 MR MILLBERG And we're going to suggest after the
21 research we did last night and I understand that what the
22 court was concerned with yesterday was this notion --

23 THE COURT Well, I was and I think that you've
24 answered that question for me

25 MR MILLBERG Okay So, to let it in -- to let this

1 evidence in with a limiting instruction is the same thing
2 we said yesterday I think that we've answered the
3 question I think it ought to be bifurcated

4 THE COURT Well, I am tending to lean right now with
5 Webb as guidance for bifurcating the proceeding I'll let
6 y'all know in the morning

7 MR PARKER Your Honor, I would like to say
8 something The law that they submitted -- that I also had
9 the opportunity to read the law that they submitted that
10 they contended said that willfulness was no longer
11 relevant on the issue of -- would not overcome a showing
12 of simple negligence, these cases do not hold that That
13 was absolutely do not hold that and you have to read those
14 cases carefully because --

15 THE COURT Well, I read them I thought, pretty
16 carefully this morning

17 MR PARKER They do not hold that and one of them
18 the issue was not preserved, and, therefore they said the
19 charge -- nobody objects to the charge so they didn't read
20 it and then the Cantrell case is distinguishable and I
21 will, in fact, get that and look at it a second

22 THE COURT Well, I am not going to make you argue
23 that right now Let's finish --

24 MR PARKER All right

25 THE COURT -- the exhibits and then I'll let y'all

1 come back to Dr Heathington after we do these couple this
2 morning So, that's why he is not coming back up

3 Mr Parker?

4 MR MURDAUGH Yes, sir, Your Honor We'd like to
5 call Lavern Battle

6 THE COURT Good morning, ma'am If you would come
7 right up here please How are you doing today?

8 THE WITNESS Fine Thank you

9 THE COURT If you would stand up here and put your
10 left hand on the Bible and raise your right

11 LAVERN BATTLE, after being duly sworn, testified
12 as follows

13 THE COURT Ma'am, would you please state your full
14 name and spell your last?

15 THE WITNESS Excuse me Lavern Battle, B-A-T-T-L-E

16 THE COURT If you would, please answer any questions
17 Mr Murdaugh may have followed by defense counsel

18 DIRECT EXAMINATION

19 BY MR MURDAUGH

20 Q Ms Battle, where are you from, ma'am?

21 A Originally from upstate New York, Buffalo, New York

22 Q All right I mean, tell us, where do you live now,
23 ma'am?

24 A I stay in Snellville, Georgia right below Atlanta,
25 Georgia

1 Q What do you do in Atlanta, Georgia?

2 A I am an armored car driver guard

3 Q Okay How long have you been doing that, Ms Battle?

4 A Four years

5 THE COURT I'm sorry You do what?

6 THE WITNESS Armored car driver

7 THE COURT Armored car driver?

8 THE WITNESS Uh-huh And guard Driver guard

9 THE COURT You bring any of that money with you to
10 Bamberg?

11 THE WITNESS No, sir No, sir

12 Q Ms Battle, in the course of your life have you had
13 the occasion to live in Denmark, South Carolina?

14 A Yes

15 Q When did you live in Denmark?

16 A From '89 to 1995 exactly

17 Q Okay And do you currently have any family in
18 Denmark, South Carolina?

19 A Yes, I do

20 Q And who is that?

21 A My mother Vera Battle

22 Q And how long has Mrs Battle lived in Denmark?

23 A She moved back to Denmark in 1983

24 Q All right And where does Mrs Battle live?

25 A She lives on Honey Ford Road

1 Q All right And how long has she lived there?

2 A Before she moved back in '83, all her life, but since
3 '83 she's been back

4 Q And I show you Plaintiff's Exhibit 19 In
5 Plaintiff's Exhibit 19 can you see your mother's house in
6 that photograph?

7 A No It's actually on the other side of the trees

8 Q Okay And even though you can't see it, can you
9 please explain to the jury -- I will give you this pointer
10 -- where your mother's house is?

11 A Okay There it is right over there, right in that
12 area right on the other side of the church

13 Q Is it right next to that house?

14 A Yes, right over

15 Q All right And on back in April and May of 2004 do
16 you recall a vehicle train wreck?

17 A Yes, I do

18 Q All right And where were you on the day of that
19 train wreck?

20 A I was actually at my mother's house visiting We
21 were sitting in her living room

22 Q Okay Now, Ms Battle, since your mama has been
23 living there and you have been living somewhere else, how
24 often would you visit -- how often would you visit your
25 mom?

1 A Weekly

2 Q Okay Every week you came?

3 A Yes, on the weekends Actually, I would come down on
4 Friday and stay over 'til Sunday and go the church with
5 her

6 Q Okay And was it fair to say that you were familiar
7 with the Honey Ford crossing?

8 A Oh, yes, very fair

9 Q All right Now, Ms Battle, in the months leading up
10 to the train vehicle wreck that you're talking about had
11 the vegetation at Honey Ford crossing changed in any way?

12 A No

13 MR MILLBERG Objection, Your Honor

14 THE COURT What is the objection?

15 MR MILLBERG Relevancy in time

16 THE COURT Sir?

17 MR MILLBERG Relevancy in time

18 THE COURT That's overruled

19 MR MILLBERG And leading

20 THE COURT That's overruled Anything else?

21 MR MILLBERG No, sir

22 Q Now, Ms Battle, what was your practice when you
23 would navigate Honey Ford crossing? What was your
24 practice -- When you were leaving 321 going to your mom's
25 house, what was your practice where to stop?

1 A When I would turn onto Honey Ford Road I would come
2 up to the crossing and stop There has always been a line
3 to show you to indicate where to stop I would stop at
4 that crossing and I would look left and right and proceed

5 Q Okay All right And is this Plaintiff's Exhibit 32
6 out at Honey Ford crossing -- Would this represent the
7 view looking to the left?

8 A Yes

9 Q Okay All right And if you stopped at -- If you
10 stopped near the stop line, would this view represent what
11 you could see back at that time?

12 A Yes

13 Q Now, Ms Battle, on the day May 30, 2004, the day the
14 train hit the vehicle, what were you doing?

15 A Just sitting around with my mom at the house

16 Q Okay And where were you?

17 A Sitting in the living room on Honey Ford Road at my
18 mom's

19 Q Okay And what were y'all doing? Just talking?

20 A Just talking Relaxing and talking That's about
21 it

22 Q Was the door open that day?

23 A Oh, yea The door was open It was a nice day The
24 door was open and we was just sitting there

25 Q And then who was with you that day?

1 A On that day was me, my mom, my sister, and my two
2 sons was there and I think my sister had her
3 grandchildren with her

4 Q Okay Now, and tell me how you learned about the
5 collision between the train and the vehicle

6 A Well, we were sitting there and I heard this loud --
7 it was like a loud sound, but it was like a screeching
8 like something (indicating), you know I can't really
9 tell you exactly, but then I heard a bam and it sounded
10 like everything came together and then a horn like
11 (indicating) Everything just actually rolled in together
12 and it caught all of our attention At that time my
13 mother was like, The train hit something

14 Q Now, you said that day that your sons were with you?

15 A Uh-huh

16 Q At the time that you heard that impact was your son
17 at the house with you?

18 A My oldest son had just left He just left and he was
19 going uptown to Denmark with a friend and when my mom said
20 the train hit something the first thing that came to my
21 mind is, Oh my God, because my son had just left so I took
22 off I ran down there and when I got down there it was a
23 few other people out there and the train was across the
24 track and it hit something

25 Q Okay And did you at that time see the van?

1 A Yes, I did

2 Q Okay And did you see either Ms ~Harvey or her son
3 out there that day?

4 A I didn't see her son, but I glanced at Ms ~Harvey I
5 didn't look at her long I just glanced at her because I
6 didn't know what I was going to see So, I just glanced
7 and turned my head

8 Q Okay And did you talk to her that day?

9 A No, sir

10 Q Okay And did you go any closer?

11 A No, I didn't

12 Q All right And did you talk to anyone out there that
13 afternoon about, you know, any of the train crew?

14 A No, I didn't

15 Q And did you talk to any police officers?

16 A No

17 Q Now, prior -- within -- within two months of May 30,
18 2004 had you ever had an occasion to be at Honey Ford
19 crossing with a train coming?

20 A Yes, I have

21 Q All right And if you will, please, on that day --

22 THE COURT Well, be specific about what day

23 MR MURDAUGH Sir?

24 THE COURT What day?

25 MR MURDAUGH Approximately --

1 THE COURT When was it?

2 Q When was it?

3 A It was actually in April Towards the beginning of
4 April 2004

5 Q Okay And on that day, Ms Battle, where were you
6 coming from?

7 A I was actually coming from Columbia --

8 Q Okay

9 A -- coming to visit my mom

10 Q Okay And let's put up 13 As you approached --
11 Does Plaintiff's Exhibit 13 show that crossing, is that
12 correct?

13 A Yes

14 Q All right And that day when you were out there with
15 the train, Ms Battle, where did you stop your vehicle?

16 A I stopped at the crossing, the white line in the
17 road

18 Q All right And did you look to the left?

19 A Yes, I did

20 Q And did you look -- when you looked to the left, does
21 exhibit 32 accurately depict what you saw?

22 A Yes, sir

23 Q All right And after you looked to the left -- When
24 you looked to the left did you see anything?

25 A No, I didn't

1 Q Okay And were you being careful?

2 A Very

3 Q Okay And I mean, you were looking as good as you
4 could?

5 A Yes, sir

6 MR MILLBERG Object to leading, Your Honor

7 THE COURT All right Quit leading

8 Q Did you look to the right, Ms Battle?

9 A Yes, I did

10 Q All right And then what did you do?

11 A I just went on across the road across the tracks

12 Q Okay And tell us what happened

13 A When I got to the track -- Actually, after I looked
14 to the left and then I looked to the right I went to go
15 across the track When I got right on the track my front
16 end got on the track the train was coming and I just
17 gunned it across the track, but I stopped as soon as I got
18 over the track I never heard that horn I had my window
19 up, but I never heard a horn until he came across behind
20 me and I was shaken up pretty good So I just sat there
21 for a minute I couldn't believe it I said, Oh my God,
22 I never heard him toot I never saw the light because I
23 looked for the light and some noise -- the horn

24 Q All right Now, I want to show you -- Now, you see
25 that white spot on the tracks down there, Ms Battle?

1 A Yes

2 Q Okay You see that down there?

3 A Yes

4 Q Now, on the day that you're talking about when you
5 were stopped at the stop line, could you see that far?

6 A No

7 Q And what would you have to do? Where would you have
8 to position your vehicle to be able to see as far as what
9 you see that white spot in that picture?

10 A I would have to move up to the track closer --

11 Q Okay

12 A -- in order to see that

13 Q All right

14 A Definitely

15 Q One last thing Let's go back to the day of the
16 Harvey train automobile collision

17 A Okay

18 Q Prior to hearing the train strike that vehicle, did
19 you hear it blow the horn right before that?

20 A I never heard a horn

21 Q Okay Please answer any questions Mr Millberg has

22 MR MILLBERG Thank you, Your Honor

23 CROSS-EXAMINATION

24 BY MR MILLBERG

25 Q Good morning, Ms Battle

1 A Good morning

2 Q As I understand it, ma'am, you were living in
3 Columbia at the time of this incident, is that correct?

4 A Yes

5 Q And you were in town to -- down in Denmark to visit
6 your mother?

7 A Yes

8 Q That's what took you to her home that morning?

9 A Yes

10 Q That's why you were there?

11 A Uh-huh

12 Q You had your two sons with you, is that correct?

13 A Yes

14 Q Now, did you have a chance to speak with any lawyers
15 this morning before testifying?

16 A I talked to Mr Wilson

17 Q Mr Wilson?

18 A Uh-huh

19 Q Counsel for the Plaintiffs?

20 A Yes

21 Q And were you over at Mr Wilson's office this morning
22 with him?

23 A Yes

24 Q And have you known Mr Wilson before this incident
25 ma'am?

1 A No

2 Q Just know him in connection with this case?

3 A What do you mean?

4 Q You just met him in connection with this case?

5 A Yes, uh-huh

6 Q Now, could we get exhibit 76 up, please --

7 Defendant's 76? Now, did counsel show you this photograph
8 before you got on the witness stand today, Ms Battle?

9 A No

10 Q Had you seen this photograph before?

11 A A few minutes ago That's about it

12 Q That's the first time?

13 A Uh-huh

14 Q Did anybody explain to you that this photograph was
15 taken by their people, by their investigator?

16 A No

17 Q And has it been explained to you that that white dot
18 is a measured distance of over a thousand feet down there?

19 A No

20 Q And did Mr Wilson explain to you that this
21 photograph was taken from a spot actually 6 feet before
22 you get to the stop line?

23 A Actually, he never explained to me because he never
24 showed it to me

25 Q Nothing about that?

1 A No, sir

2 Q And would it surprise you to know that actually that
3 picture is taken more than 30 feet from the railroad
4 track? You just wouldn't have any way to know about that?

5 A No

6 Q Now, with respect to -- and you have never made any
7 measurements of how far you could see?

8 A I just estimate, basically

9 Q Yes, ma'am Any of your testimony in that respect
10 about how far you can see is just an estimate and that's
11 it?

12 A Yes I just estimate a few hundred feet that I could
13 see I mean, just by going over it as much as I did

14 Q Just by eyeballing it?

15 A Yes I can't really say

16 Q And if we wanted to know you know exactly how far
17 you could see down the track we could get a more accurate
18 number than your estimate by somebody actually going out
19 and measuring?

20 A It would have to be

21 Q Yes, ma'am Now, this incident that you spoke of
22 earlier from April --

23 A Uh-huh

24 Q -- some five years ago --

25 A Uh-huh

1 Q -- how do you recall the date of that five years
2 later?

3 A I cannot recall an exact date I know it was in
4 April because I know it was after my birthday and after
5 the holidays and from me going down there I had on a light
6 jacket It is kind of cool, but I recall it because just
7 being reminded what happened on May just brought it back
8 to my memory that it just happened to me and that's why

9 Q Now, Ms Battle, you said you were in your living
10 room talking with your mother?

11 A Yes

12 Q Is that right?

13 A Yes

14 Q And you heard -- You were able to hear the crash?

15 A Uh-huh

16 Q Is that right?

17 A Yes

18 THE COURT Ma'am, Ms Battle, do me a favor Either
19 say yes or no This court reporter has to take everything
20 down

21 THE WITNESS Okay

22 Q And your mother was right there with you?

23 A Yes

24 Q Is that correct? Do you know of any reason why your
25 mother would be able to hear the train whistle and you

1 wouldn't be able to?

2 A I don't know Well, I could say this She is there
3 She lives there all the time So, she might be used to
4 it I can't tell you That's the only thing I can come
5 up with

6 Q And as far as this incident of your own that you
7 talked about, you never reported that to anyone, did you?

8 A Oh, no

9 Q You didn't report it to anyone at CSX?

10 A I didn't even tell my mother

11 Q Or highway patrol?

12 A No

13 Q Highway department?

14 A No

15 Q Thank you for coming today

16 A Thank you

17 REDIRECT EXAMINATION

18 BY MR MURDAUGH

19 Q In light of Mr Millberg's questions about that
20 distance -- I am not going to ask you to estimate a
21 distance, but when you stopped your vehicle the day that
22 train almost hit you and you stopped your vehicle behind
23 the stop line could you see as far as that white dot?

24 A Truthfully, no

25 Q Thank you

1 THE COURT You may step down May she be released
2 from her subpoena?

3 MR MURDAUGH She may

4 MR MILLBERG No objection Yes, sir

5 THE COURT You go back and drive that armored car
6 Be careful

7 THE WITNESS Thank you

8 THE COURT Next witness

9 MR PARKER The Plaintiff calls Dr David Lipscomb
10 DAVID M LIPSCOMB, after being duly sworn,
11 testified as follows

12 THE COURT Now, before you sit down would you tell
13 us your name and spell your last name?

14 THE WITNESS My name is David Melton Lipscomb,
15 L-I-P-S-C-O-M-B

16 THE COURT Thank you

17 THE WITNESS Thank you, sir

18 THE COURT Are you comfortable?

19 THE WITNESS I am fine

20 THE COURT If you need anything, let me know

21 DIRECT EXAMINATION

22 BY MR PARKER

23 Q Dr Lipscomb, where do you live?

24 A My home is in Stanwood, Washington It is a small
25 community about an hour's drive north of Seattle

1 Q And how long have you lived out there?

2 A I moved out there in 1988

3 Q And if you will tell us something about your
4 educational background, where you went to school and so
5 forth

6 A Yes My undergraduate and master's level work was at
7 the University of Redlands in Southern California Then I
8 took some post-master's work -- excuse me -- at Perdue in
9 West Lafayette, Indiana and then worked for a while and
10 returned to the University of Washington to complete my
11 Ph D in 1966

12 Q And what is your Ph D in?

13 A The study is hearing science I am trained as an
14 audiologist That's a person who tests hearing and helps
15 people who have hearing impairments, but then going to the
16 science side I did that because I was interested in
17 research and teaching which then I conducted for a number
18 of years

19 Q Do you have a special interest in hearing for some
20 reason?

21 A I do because, you know, if you're kind of goofy you
22 go into psychology I have had a life-long hearing
23 impairment so I could identify with people who have
24 hearing difficulties and I wouldn't be surprised if I
25 might have to ask for a repetition now and then because

1 even with hearing aids I'm not completely corrected

2 Q And did you teach audiology for a number of years?

3 A I did I was in -- a member of the faculty of the
4 Department of Augiology and Speech Pathology at the
5 University of Tennessee

6 Q And how long did you teach there?

7 A Almost 25 years at the university

8 Q And in order to understand some of your testimony you
9 talked about the science of hearing Does that involve
10 principals of physics?

11 A Yes, that part of physics that involves acoustics or
12 the study of sound, the measurement of sound, and the
13 prediction of various qualities of sound Then on the
14 other side the psychological side, so-called
15 psycho-physics and psycho-acoustics, we then apply that
16 science to the human response to sound

17 Q If you will, talk with -- Have you written on these
18 subjects and published papers and books on those subjects?

19 A Yes, I have

20 Q And what have you published -- what type books and so
21 forth?

22 A All of these are text or reference books, but I have
23 five books in print and then I have published more than 40
24 professional journal articles and then quite a number --
25 because of the topic of noise was very topical and that's

1 one of the things I was doing, I published rather widely
2 in the lay publications, too such things as the Rotarian
3 which is a magazine of interest to people who are members
4 of Rotary International

5 Q And if you will tell us some of the principals
6 involved in which determine what you hear I think all of
7 us we know that we hear things, but we probably don't know
8 why we hear them So, sort of walk us through that if you
9 would

10 A I'll try Actually, the sound is a vibration that is
11 normally carried through the air -- the so called elastic
12 medium because it has the capability of expanding and
13 collapsing, and once that sound occurs, then it travels in
14 a predictable manner according to the mathematics and the
15 applications in this science of physics or acoustics
16 Then when it comes into the vicinity of an individual, it
17 then enters the ear and becomes a perceived stimulus that
18 upon which an individual may conduct some kind of a
19 response or at least be aware of that sound if the sound
20 is sufficiently loud and if the sound is understandable or
21 recognizable

22 Q The sound would travel by sound waves, is that
23 correct?

24 A That's correct When I use the term of expanding and
25 collapsing, it is the alternate expansion and motion that

1 in the particles in the air that are moved from one place
2 to another So, when I say something the particles near
3 my mouth don't reach your ear, but they collide and carry
4 through the concept of waves or variability to your ear

5 Q And that vibrates the eardrum?

6 A It will set what we call the tympanic membrane or the
7 eardrum head in motion and then that starts a chain of
8 events that triggers a response mechanism in what we call
9 the inner ear and then the nerve pathways carry to the
10 brain where the perception takes place

11 Q And have you studied locomotive horns?

12 A I have measured maybe 300 different locomotive horns
13 over a period of time using precision sound measurement
14 and sound analysis equipment

15 Q And have you also studied whether or not what a
16 driver inside of a vehicle can hear from a locomotive
17 horn?

18 A Yes

19 Q And have you done numbers of tests on that?

20 A I have

21 Q And if you will tell us what principals are involved
22 in doing those tests?

23 A There are really three factors that -- I sound like a
24 Baptist preacher with three different points, but the
25 first is the sound level of the horn itself

1 THE COURT Dr Lipscomb --

2 THE WITNESS I'm sorry?

3 THE COURT -- all of us go to Baptist churches and
4 all of our preachers have about 10 points so we're glad to
5 hear it is only three

6 THE WITNESS Gee, I hadn't been in a Baptist church
7 for a while They must be long sermons

8 THE COURT They are That's why we like to have
9 three points instead of ten I am just cutting up with
10 you Glad to have you in the south

11 THE WITNESS Absolutely A little levity helps

12 THE COURT Absolutely

13 THE WITNESS So, the first point is the sound level
14 of the horn and that is designated with the acoustic term
15 decibels and we're familiar with that term It is a
16 technically-loaded term that we use to understand in
17 decibels what the sound level would be of that horn For
18 example, if it is a 100-decibel horn that would be
19 perceived as being louder than a 90-decibel horn The
20 larger the decibel number, the louder we will perceive the
21 sound to be So that's the first thing -- the sound level
22 of the horn over various distances that we're interested
23 in

24 The second is the -- what we call sound isolation or
25 attenuation of the shell of the vehicle because when a

1 person, say, driving a car is in a closed vehicle, then it
2 offers resistance to the sound level that is coming from
3 the horn So, we have to determine how much that sound is
4 attenuated or reduced Typically, 30 decibels which means
5 that the sound power is reduced by a factor of 1000
6 Inside is one thousandth the amount of sound energy that
7 struck the vehicle as an example

8 The third area is a competing noise inside of the
9 vehicle The motor noise, air conditioning fan noise, if
10 there is any conversation, entertainment systems, and so
11 on all contribute to the competing noise for the incoming
12 signal So, you can see then how we can determine what an
13 individual can or should hear by knowing what the sound
14 level of the horn is, how much it is reduced in coming
15 into the vehicle, and how much it has to overcome in terms
16 of competing sound

17 Q In order for someone to hear something is there a
18 certain level above competing noises that the sound has to
19 be?

20 A Yes, sir There is actually an international
21 standard that establishes that in order for a person not
22 only to hear a warning sound but to be alerted -- that is,
23 to be taken from one posture to listening and being aware
24 and alert to the presence of the warning and that is a
25 criteria level of at least 9 or 10 decibels above the

1 competing or background noise That's when the sound
2 becomes significant to an individual and you would expect
3 them to be alerted and cause them to leave or depart from
4 the visual emphasis that all drivers use and to attend
5 more to the acoustical input

6 Q The chart here on Plaintiff's exhibit 116 is this the
7 comparison of different levels of warning that various
8 organizations use to make that determination of the
9 differentiation between the background noise and the
10 sound?

11 A That's correct There is a range You can see over
12 here there is a rather sizable range of what we call the
13 signal-to-noise relationship that is necessary for
14 individuals to be alerted to a sound or sometimes people
15 use another term called detection That's just being
16 aware of the presence of the sound which does not really
17 serve an alerting purpose, and, so, we see some lower
18 signal-to-noise ratios in this chart where people are
19 talking about detecting a sound or potentially detecting a
20 sound, but we really need to be alerted and the
21 international organization of standards has a multi-level
22 criteria and that's what I use -- the 10 decibel
23 signal-to-noise ratio

24 So, if the competing noise is 60 decibels as an
25 example, then to alert the driver the horn would need to

1 penetrate the vehicle and arrive at a at least 70-decibel
2 level That's a rather critical concept because the
3 driver may hear something, but it doesn't have meaning or
4 it doesn't attract the driver s attention away from the
5 visual emphasis that they're using

6 Now, there are numerous other approaches There is
7 nine for some of the people They were dealing with
8 sirens, and this kind of approach is what we call
9 non-specific that regardless of what the signal is then
10 you'll need at least a 9- or 10-decibel signal-to-noise
11 criteria, and you can see that other standards like the US
12 Department of Defense uses a plus-20 You have to have a
13 much higher sound level of the warning sound above the
14 background and that's because it's using a little beep
15 tone It is referring to the kind of patient signal or
16 the beep tone that you may hear in the cockpit of an
17 aircraft, and, so, when it's a more narrow kind of sound
18 you need a higher signal-to-noise ratio That's the
19 reason they use that

20 When you have a broadband sound like a train horn and
21 you have a broadband type of background or competing
22 noise, then the 9- or 10-decibel is the most commonly
23 used, but there are other people in the literature who
24 have used numerous other criteria -- some more restrictive
25 than I, others less

1 Q For example, while you were talking the fan came on
2 here and all of a sudden it appeared to me that you were
3 speaking less loudly and it just went off and I will hear
4 you in a louder voice Is that an example of what we're
5 talking about here?

6 A Exactly What that was experienced is what we call
7 masking or covering of one sound by another If you're
8 holding a conversation, say, on a street corner and a
9 large truck passes by, you may even have to stop talking
10 until the truck is gone because it covers up what you are
11 saying

12 Q And in this case did you do any testing of the
13 locomotive horn of the vehicle?

14 A In this case I did not

15 Q And in order to reach your opinions do you need to do
16 that testing?

17 A Not particularly, because, again, we're talking about
18 non-specificity There s a very common sound level of
19 horns It is useful to measure the horn, but if you can't
20 then you use other evidence like previous tests that have
21 been done of the same kind of horn This was a specific
22 make, model, and style of horn

23 Q And what was the horn -- if you will explain to us
24 what -- where the horn is located and what it does

25 A Yes There was so-called five-chime horn It had

1 five trumpets and three of them are normally facing
2 forward in the normally-forward direction of the
3 locomotive Two are facing backwards In this particular
4 case the horn was placed midway on the locomotive Rather
5 than on the front of the cab it was about 40 feet towards
6 the rear in the middle of the locomotive

7 Q And is that significant in any way the fact that it's
8 placed 40 feet back insofar as someone being able to hear
9 the sound?

10 A Well, placement can be critical or it can be very
11 important at least, and, so, the placement of the horn
12 anywhere but right on the front of the locomotive means
13 that at least within the near field within say like 200 to
14 250 feet of the shell or the body of the locomotive
15 actually interferes with the sound that's trying to reach
16 the motorist who is approaching the crossing

17 Q And are there federal regulations that deal with the
18 sound level that a locomotive horn has to emit?

19 A Yes As is true in many types of federal
20 regulations, they have a minimum standard It must at a
21 distance of 100 feet to the front of the locomotive in its
22 direction of travel produce a sound level measured at that
23 point of at least 96 decibels on what we call the "A"
24 scale When you use the term DBA, that's our shorthand
25 for saying that the measurement equipment has been

1 adjusted to approximate the type of what we call frequency
2 response of the human ear

3 So, that's why under these circumstances we use the
4 so-called "A" weighting So, the Federal Railroad
5 Administration has established that there should be a
6 minimum of 96 DBA You can have more, but a minimum of
7 96

8 Q And for examining and your opinions in this case did
9 you make an assumption that the locomotive horn was 100
10 DBA?

11 A I tend to -- I've measured so many and I have
12 averaged them and the average sound level at 100 feet of
13 the locomotive horns that I have tested is 100 or 101
14 decibels, yes

15 Q And as Ms ~Harvey in this case approached and stopped
16 and started and was doing her looking or whatever, do you
17 have an opinion as to whether or not she would have been
18 able to hear the locomotive horn as it approached?

19 A I do

20 Q What is that opinion?

21 A Well, actually, I use the criteria of being alerted
22 She may have heard something It is hard to tell, but
23 there's every reason to believe based on the experience I
24 have and the assumptions that I've made in this case that
25 Ms ~Harvey would have been unable -- would not have been

1 alerted by the train horn at least until approximately the
2 moment of impact

3 Q And what is -- what did you rely on and what evidence
4 and facts did you take into consideration to reach that
5 opinion?

6 A She was driving a 1987 Chevrolet van That is a very
7 difficult vehicle to find and I was unable to find one,
8 but I have measured very similar vehicles, Chevrolet vans
9 So I applied that information and usually you'll find that
10 those will reduce, as I said earlier, the outside to
11 inside sound by about 30 decibels and I also know that the
12 competing noise where you're looking only at the sound of
13 the engine and the heater or air conditioning fan for a
14 vehicle like that would be 65 or 68 DBA So, I can put
15 all that information together and determine whether the --
16 at any time prior to impact the sound level of the horn
17 reached this criteria level which was 10 decibels signal
18 to noise ratio

19 Q In your opinion did Ms ~Harvey have an alerting sound
20 to alert her prior to the collision -- in time prior to
21 the collision to avoid it?

22 A No, she did not

23 Q And the -- other than the sound measurements you've
24 taken in the past is there anything else that you need to
25 know to reach that opinion?

1 A No I made the assumption that the horn was greater
2 in sound amplitude than the minimum that's required I
3 estimated 100 decibels I estimated 30 decibel outside to
4 inside reduction It could be 32, 34 In many vehicles
5 -- modern vehicles -- it's higher than 30 decibels, but to
6 be conservative I used 30

7 So, if you have -- at 100 feet at the speed this
8 train was going it was a little bit less than one a half
9 second prior to impact if you relied on the 100-foot
10 distance So, if you at 100 feet have a 100 decibel
11 signal horn, the shell of the van reduces that signal like
12 30 decibels That means that available to the ear of the
13 driver -- in this case Ms ~Harvey -- there would be 70
14 decibels of sound -- 100 minus 30 -- and the operating
15 vehicle engine noise, air conditioning noise on a medium
16 setting would be 65 or 68 decibels So, the signal to
17 noise ratio at a 1 and half seconds roughly prior to
18 impact was only about three to five decibels --
19 insufficient to be alerting to the driver That's why I
20 gave the opinion that I did

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

23 THE COURT Mrs McLeod?

24 MR PARKER Excuse me

25 THE COURT Hold on

1 Q Sometime you can hear something in a house that you
2 couldn't hear in a vehicle Can you tell us why that is
3 or somewhere if a horn -- if a locomotive horn was sounded
4 and you were in the vehicle you might not hear it but in a
5 house you might hear it Could you tell us the difference
6 in why that would occur?

7 A Actually, I have a publication that lists nine
8 reasons that an individual in a house or out in a yard
9 would hear a warning sound like a horn before a person
10 would or easier than a person would driving a vehicle I
11 have the same experience I live about a mile from the
12 railroad tracks My home is elevated, oh, I don't know,
13 maybe 50 to 75 feet over the height of the tracks Sound
14 rises So that gives me an advantage in my home In
15 addition to that houses and their construction is not as
16 sound proof or sound treated as an automobile is, and, so,
17 where you may get a 30-decibel reduction with an
18 automobile you may only get 10 or 15 reduction in these
19 lower-pitched sounds with a house

20 Usually, the background sound in a house is lower
21 So, all of those combine to make it more favorable for a
22 person to be aware of the presence of a horn, and that's
23 why I oftentimes I'm asked, well, why can I hear it in my
24 house and the driver was unable to be alerted by the horn
25 and that's why because the lay of the land is different

1 It could be that the train horn is louder The reduction
2 of the house -- the shell of the house is not as great
3 Usually, there is not as high a background level in a home
4 as there is in an automobile with the motor and the fan
5 noise So, all of that combined will give you an
6 advantage -- maybe 30- to 40-decibel advantage if you're
7 in your house compared to being in a vehicle

8 Q One other question Did you review the deposition
9 testimony of Mr Spell -- a witness in the case?

10 A Yes, I did

11 Q And could you tell us the difference in being able to
12 hear something -- he has testified that he had his
13 driver's window down and why he may be able to hear
14 something that somebody with the windows up wouldn't hear
15 it?

16 A Yea See, the evidence is that the Harvey vehicle
17 had all of the windows closed So, it was, as I said, a
18 closed or sealed compartment for the occupants Mr Spell
19 was approaching from the other direction and had his -- he
20 said he always leaves his window open -- driver's
21 window -- even if he is running the air conditioning and
22 so with the window open the ability of the sound to come
23 into the car is enhanced over and above what would happen
24 if you had a closed vehicle So, the real parameter that
25 was at play in Mr Spell's observation and his testimony

1 was that his window was open

2 Q One other question Have you done any testing on
3 diesel engines? Where the vehicle has a diesel engine as
4 opposed to gasoline?

5 A I have

6 Q And what's the relative noise to the two different
7 types engines?

8 A Well, the outside noise of a diesel engine is
9 appreciably higher than a gasoline engine The inside
10 noise depends upon how that engine is isolated
11 acoustically Sometimes it's not so loud and other times
12 it is quite loud

13 MR PARKER Answer any questions that Mrs ~McLeod
14 may have for you

15 THE COURT Mrs McLeod?

16 MRS MCLEOD Thank you, Judge

17 THE COURT All my jurors still okay?

18 MRS MCLEOD May it please the court

19 CROSS-EXAMINATION

20 BY MRS MCLEOD

21 Q Are you doing all right this morning, Dr Lipscomb?

22 A Thank you for moving closer

23 Q Good You come to us from the great state of
24 Washington, I think?

25 A I am

1 Q Okay We are glad to have you here today in the
2 rain That's a pretty good haul for you Now, I think
3 you told the jury earlier that you are an audiologist,
4 correct?

5 A That's by training, yes, originally

6 Q You are not a traffic engineer?

7 A No

8 Q And you're not schooled in crossing design?

9 A That's correct

10 Q And you don't have any opinions regarding the signs
11 located at this crossing?

12 A That's correct

13 Q And you're not going to give any expert opinions
14 regarding sight distance or visibility at this crossing?

15 A The only way that works in and I never quantify or
16 measure sight distance, but we know that if visibility is
17 affected, then audibility becomes much more important

18 Q So, you're -- and I think you told me when I took
19 your deposition that you're not capable of making a
20 determination regarding sight distance?

21 A I wouldn't know where to begin

22 Q You have no expertise in train handling, correct?

23 A I'm sorry?

24 Q Train handling

25 A No That would be dangerous

1 Q So, you can't tell the jury whether or not this train
2 crew on this particular day behaved properly, correct?

3 A That's not my role

4 Q Okay Now, Mr Parker talked to you some about
5 federal law and the decibel level requirements for a
6 locomotive, correct?

7 A That's correct

8 Q And I think you told the jury that the minimum
9 decibel level for a locomotive horn is 96 decibels?

10 A Correct

11 Q And what you didn't tell the jury is that there is
12 also a maximum decibel level, correct?

13 A There is a recent revision of that regulation,
14 correct

15 MR PARKER Your Honor, we would have an objection
16 to that

17 THE COURT State it

18 MR PARKER We'll have to have a side bar

19 (Whereupon, a bench conference was held)

20 Q Dr Lipscomb, what was the maximum decibel level for
21 a locomotive at the time of this accident?

22 A The legal maximum was 110 decibels

23 Q Yes, sir

24 THE COURT Hold on a second We got some competing
25 decibels right now

1 MRS MCLEOD That's a masking noise, judge

2 THE COURT It was masking you

3 Q So, Dr Lipscomb, I think you've established for the
4 jury that at the time of this accident the minimum decibel
5 level for a train horn was 96 decibels and a train horn
6 under federal law was not allowed to blow louder than 110
7 decibels?

8 A That's correct It was an oversight by me to not
9 mention that Usually, because it s something that I very
10 seldom measure I don't think about it very often

11 Q Yes, sir And you assumed in our case that this
12 train horn on this particular day complied with federal
13 regulation?

14 A That was my assumption

15 Q In other words, you have no information that our
16 train horn did not comply with federal regulations on the
17 date of the accident?

18 A Yes, ma'am That's correct

19 Q Dr Lipscomb, there is a reason that there is a
20 maximum decibel level requirement correct?

21 A It's a new requirement, but --

22 THE COURT No, sir We're talking about on the date
23 in question, May 30, 2004

24 Q Yes, sir There is a reason there was a maximum
25 decibel level in effect at that time, correct?

1 A That's correct It was right at the time of this
2 collision was when the new regulation was going into
3 effect

4 Q Okay Well, I am asking you about the regulation in
5 effect at the time of the accident My question to you is
6 there is a reason there was a maximum decibel level in
7 effect at that time, correct?

8 A That's correct

9 Q And the reason is that a horn louder than 110
10 decibels would be disruptive to a community, correct?

11 A Even lower than 110 can be disruptive, but they have
12 just simply made that regulation for what the maximum
13 could legally be

14 Q Yes, sir And I think you told me at the time of
15 your deposition that a louder noise might actually knock
16 people out of their beds I think that's the term you
17 used

18 A I may have used some kind of allusion like that

19 Q And it would also be detrimental to the train crew
20 who is inside of that locomotive, correct?

21 A In modern locomotives, no, but in locomotives before,
22 say, the early 1990's, the late 1980's it could have been

23 Q Now, I think you told the jury earlier that your
24 opinions in this case are based on some assumptions,
25 correct?

1 A That's correct

2 Q You made some assumptions about Ms ~Harvey's vehicle,
3 correct?

4 A I did

5 Q And you made some assumptions about this particular
6 train horn on this particular locomotive?

7 A I did

8 Q That's because you have not done any testing related
9 to this particular train horn?

10 A That's correct

11 Q And you have not done any testing related to this
12 particular vehicle?

13 A That's correct

14 Q And you've not done any testing on a similar or
15 exemplar vehicle out at the Honey Ford Road crossing?

16 A We tried We tried to find one We simply were
17 unable to find anything that would serve as what we would
18 call a surrogate or replacement vehicle

19 Q Yes, sir And you have not even been to the scene of
20 the accident, correct?

21 A I have not I have let the photographs serve The
22 only reason I need to be there is, number one, to say that
23 I was there, and, number two to evaluate if there are any
24 acoustical influences like some kind of a large building
25 interposed between the train and the vehicle Photographs

1 were sufficient for me to make that determination

2 Q You have not laid eyes on the van involved in this
3 accident, correct?

4 A I have not what? I'm sorry

5 Q Laid eyes on the van involved in this accident?

6 A Only by photographs

7 Q Yes, sir And, certainly, you were not there at the
8 time this accident occurred?

9 A That's correct

10 Q Now, I think you said earlier that our locomotive had
11 a five-chime horn, correct?

12 A That s what I said, yes

13 Q And we've established that you have not done any
14 testing on this particular locomotive horn, but testing of
15 a locomotive horn is important, isn't it, Dr Lipscomb?

16 A It can be I, of course, looked at the sound levels
17 of five-chime horns in my records to determine what the --
18 and the highest level I found is 100 as measured from a
19 distance of 100 feet

20 Q Yes, sir, but testing of the horn is important
21 because the top of the locomotive has a configuration that
22 is unique to that particular locomotive, correct?

23 A Typically yes

24 Q And you have not seen the locomotive involved in this
25 accident?

1 A Only by photograph

2 Q Yes, sir And you couldn't see the placement of the
3 train horn in that photograph, correct?

4 A I could not because it was not photographed in such a
5 way that the horn even showed So, if the horn was not
6 visible in the photographs that I saw, I knew that the
7 placement would be mid-locomotive simply because that's
8 the way they always are

9 Q Yes, sir I think, Dr Lipscomb, you remember when I
10 took your deposition back on September 22?

11 A I do

12 Q Just a little over a month ago correct?

13 A Seems like longer than that

14 Q Yes, sir And I couldn't make it out to Washington
15 so I had to take your deposition over the telephone, sir
16 Do you remember that?

17 A I do

18 Q That's the reason if we have to play the video it
19 sounds like my voice is a little bit in a bucket, but at
20 that time on September 22 of 2009 just a little over a
21 month ago you told me that you do not know the location of
22 this horn on this particular locomotive?

23 A Not specifically Now, I knew that it wasn't on the
24 front

25 Q Yes, sir And that's not what you told me at the

1 time of your deposition At the time of your deposition
2 you told me there are several different possible
3 locations -- the front or midway and you did not know the
4 location of the horn That's what you told me September
5 22, 2009?

6 A I didn't know the exact location That's true

7 Q And you still don't today, do you, sir?

8 A No, sir No, ma'am

9 Q You're making an assumption about that aren't you?

10 A Yes, based on not being able to see it on the front
11 That s correct

12 Q Now, you didn't really talk today about the duty
13 cycle, but we did discuss that some at your deposition,
14 and correct me if I am wrong because I am not a science
15 person, but you talked about a duty cycle, correct?

16 A I did

17 Q And a duty cycle is the time from the first point the
18 horn sounds until the last time it sounds in a blowing
19 cycle, correct?

20 A That's correct

21 Q And I think you told me at the time of your
22 deposition that in this particular case on the day of the
23 Harvey accident the time from the beginning the horn first
24 sounded to the time it last sounded was 20 7 seconds,
25 correct?

1 A No I think it was 40 6 -- 46 or something It
2 wasn't 20

3 Q One more time now I'm asking you a very specific
4 question From the time the locomotive horn first sounded
5 at the time of this accident --

6 A Oh, 20 seconds? I thought you were talking about
7 duty cycle I'm sorry

8 Q Okay Let's make sure that we're all on the same
9 page because maybe I asked you a bad question, but from
10 the time on the day of this accident this locomotive out
11 there May 30, 2004 from the time it first started sounding
12 the locomotive horn until the time it last sounded 20 7
13 seconds elapsed, correct?

14 A That's correct Yes

15 Q Okay Very good

16 A I'm sorry I misunderstood your question

17 Q Yes, sir That's fine And I think your opinion is
18 that for a duty cycle to be appropriate the horn should be
19 on 70 to 80 percent of the time during that duty cycle?

20 A Yes With this type of a signal I think I told you
21 also that with some of these beeping kinds of sounds
22 you'll get a 50 percent duty cycle half-on half-off but
23 with a rapid rate

24 Q Yes, sir And just to give the jury an example
25 because it helps me figure it out in my own mind if you

1 have 10 seconds of horn -- and this is just a hypothetical
2 because we had 20 seconds, but if you had 10 seconds and
3 the horn is on for 7 seconds of that period and off for
4 the other 3 you have a 70 percent duty cycle?

5 A That's it

6 Q Okay Good I am going to do some math so you're
7 going to have to work with me on this because math is not
8 my strong suit either

9 A Oh, I didn't bring my calculator

10 Q You won't need it You can do it all in your head
11 You have a copy of the download there, correct, Dr
12 Lipscomb?

13 A I do

14 Q What --

15 THE COURT What is a download?

16 Q Can you explain to the jury what a download is?

17 A Yes This is a printout that was taken by the event
18 recorder and then downloaded into a computer and then
19 printed to indicate various parameters and others will
20 discuss many of those I'm sure, but the one I'm interested
21 in is this column that has the -- the activity of the
22 horn

23 Q Yes, sir And that download or event recorder as it
24 is sometimes called tells you when the horn is blowing and
25 when the horn is not blowing?

1 A Yes and there are different varieties

2 Q Yes, sir

3 A Sometimes they give you much more information than
4 others

5 Q Now, I want to focus on the last 7 2 seconds before
6 impact, okay, Dr Lipscomb?

7 A All right

8 Q And the train I think you will agree was traveling
9 46 miles per hour during the last 7 2 seconds before this
10 accident, correct?

11 A That's my understanding

12 Q Okay And that's what's reflected on the download in
13 your hand?

14 A It is

15 Q Okay And in order to get the feet per second that
16 the train was traveling what you do is you take 46 miles
17 per hour and you multiply that number times 1 467,
18 correct?

19 A Approximately, yes

20 Q Okay And that gives you the feet per second that
21 the train was traveling at the time -- at that time?

22 A That's right

23 Q And I have multiplied it out on my calculator because
24 I am not doing it here in front of the jury because I
25 would get it wrong and the train was traveling 67 482 feet

1 per second Would you agree with me that that is in the
2 ballpark?

3 A That looks about right

4 Q Okay And what you do in order to find out where the
5 train was in that last 7 2 seconds is you multiply the 7 2
6 seconds times your feet per second which is 67 482 and I
7 got 485 feet Does that sound about right to you,

8 Dr Lipscomb?

9 A Yes I think you can check that on this because it
10 actually has the distance on that --

11 Q Yes

12 A -- in feet

13 Q Very good So, that's approximately correct, right?

14 A Yes

15 Q Would 7 2 seconds back from the crossing -- if you go
16 back 7 2 seconds the train is at 485 feet from that
17 crossing, correct?

18 A Correct

19 Q And during the last 7 2 seconds -- the 7 2 seconds
20 right before the accident occurred the horn was on 5 9
21 seconds and off 1 3 seconds, is that correct?

22 A I'll take your word because I don't have that
23 information

24 Q Count it right up for me if you need to, sir I want
25 to make sure we're right on that

1 A I'll accept that

2 Q Okay You think that's correct?

3 A It's close if not correct

4 Q Okay So, in the last 7 2 seconds the horn was on
5 5 9 seconds and off 1 3 seconds?

6 A Yes

7 Q And that's in the time right before impact?

8 A Yes

9 Q And under your duty cycle that would mean that the
10 train horn was on for 82 percent of the last 7 2 seconds?

11 A That's correct

12 Q But yet Ms ~Harvey has testified that she never heard
13 the horn blowing during that period

14 A Yes, that's not unusual

15 Q Now, Dr Lipscomb, I think -- I'm going to do just a
16 basic summary on this So, correct me because, again,
17 you're the scientist, but I think you've basically told
18 the jury that a normal person -- me -- at a normal
19 crossing in a normal car -- my minivan, my Toyota
20 minivan -- that if I was stopped there with my windows
21 rolled up I could not hear the train horn Is that your
22 testimony?

23 A No I don't say that you can't hear it

24 Q Okay

25 A I make the distinction between being able to hear it

1 and being alerted --

2 Q Yes, sir

3 A -- to the horn So, there is that 10-decibel
4 variable that's interposed that is used because drivers of
5 vehicles need to be let me say startled away from using
6 the eyes So, it's really very difficult to imagine
7 unless you've had that experience and many people have to
8 be surprised that the train was very, very close and they
9 didn't hear the horn

10 Q And I'm not trying to be tricky I am just trying to
11 basically summarize Let me see if I can do it a little
12 better A normal person like me in a normal car -- my
13 Toyota minivan -- stopped at a crossing let's say would
14 have a very difficult time hearing a train horn That's
15 your testimony, correct?

16 A That's correct

17 Q Or discerning it or being alerted to it or however
18 you want to put it

19 A And it depends, of course -- you'll accept it depends
20 on the distance --

21 Q Yes, sir

22 A -- because if the horn is very close the sound level
23 and the perceived loudness would be greater and if the
24 horn is farther away -- every time you double the
25 distance, say, from 50 to 100 feet the sound level that

1 impacts an automobile would be six decibels lower and
2 double it again and it s another six decibels So, you
3 lose warning sounds rather rapidly over distance and, so,
4 I just wanted to interpose that, but your point is, yes, I
5 would say that most individuals who are not just sitting
6 there watching a train approach would be unable or at
7 least would not be alerted until that train came within
8 one or two seconds --

9 Q Now, you --

10 A -- in most cases

11 Q You remember I asked you about a possible solution to
12 this problem Do you remember that?

13 A Yes

14 Q And your proposed solution is not for drivers to
15 stop, look, and listen at a railroad track In fact, I
16 think you testified that a driver who does not stop at a
17 stop sign but instead moves on across a crossing has a
18 better chance of hearing the train horn than one who stops
19 at the stop sign?

20 A It depends on the various conditions If you stop at
21 a stop sign and then accelerate it is going to be more
22 noisy inside of the vehicle, and, therefore, if you are
23 moving at a constant speed -- I don't advocate running
24 stop signs, but if you did not stop then the acceleration
25 noise would be lower and the competing noise would be

1 lower

2 Q Yes, sir And I think through all that we got a yes
3 that it's your testimony that if a driver does not stop at
4 a stop sign but instead moves on through the stop sign
5 that driver has a better chance of hearing a train horn
6 than one who stops at the stop sign That was your
7 testimony, correct?

8 A Right There is no guarantee that they would be
9 alerted then, but the chances are better That's correct

10 Q Now, let's talk about the solution that you proposed
11 to me because it was real interesting to me The solution
12 you proposed was to use a GPS device, correct,

13 Dr Lipscomb?

14 A No

15 Q No?

16 A No I use GPS as an example of some kind of an
17 electrical signal that would penetrate an automobile, but
18 I was really talking about a radio signal, short-range
19 radio signal that would be located in the locomotive,
20 broadcast out towards the front, and then would cause a
21 response inside -- the equipment inside of the vehicle and
22 I just said vehicles have radios, they have GPS, they have
23 a lot of different kinds of external signals -- XM radios,
24 for example -- that with a very small antenna if you even
25 needed an antenna there would be the activation of a

1 circuit inside No, I did not propose using a GPS

2 Q Okay Well, let's see if we can play your video clip
3 because I think I may have gotten that wrong and I --

4 MR PARKER Your Honor, I have an objection

5 THE COURT What is the objection?

6 MR PARKER The only purpose of using the deposition
7 would be for impeachment He s testified consistently
8 with the deposition

9 THE COURT She says he hadn t so I am going to allow
10 it

11 MRS MCLEOD Bob, can you pull up Dr Lipscomb --

12 THE COURT Before you do that, Madam Forelady and
13 ladies and gentlemen of the jury, let me just tell you
14 about depositions You've heard that name or that word
15 mentioned a lot When a lawsuit is filed the plaintiff
16 starts it off by filing what is called a summons and
17 complaint The defendant has to respond to it by filing
18 an answer so you know what we're doing

19 The next step in pretrial matters is what we call
20 discovery Each side can ask the other side who all of
21 their witnesses are so there is no surprise witnesses, and
22 then in addition to that among other things they can take
23 a deposition of each potential witness In other words,
24 that potential witness goes before the lawyers and with a
25 court reporter present the lawyers can ask them any

1 relevant questions concerning the litigation about what
2 they're going to testify to in the courtroom

3 Those questions and answers are reduced to a
4 transcript in a booklet form and I'll bet there must be a
5 hundred of them lying around here, but, anyway, so the
6 lawyers can anticipate what the witness is going to say
7 during the trial of the case Our rules allow depositions
8 to be used for a number of reasons -- if a witness is not
9 present, if a witness has died, just a number of reasons
10 depositions can be used

11 Another way of using a deposition is sometimes a
12 lawyer will ask the witness a question during the trial of
13 the case and sometimes their answers may be different than
14 what they said at the deposition so the lawyer can then
15 read the deposition question and answer to question the
16 witness on the witness stand about his earlier response
17 So, that's what we're doing by using the deposition in
18 this matter at this particular point in time So, you'll
19 hear the word deposition a lot That's what it is It's
20 a court sworn statement by a witness answering the
21 lawyer's answers outside of the presence of the courtroom
22 and before the trial starts

23 MRS MCLEOD Thank you so much, Judge

24 Let's go to 46 line 13

25 (Whereupon the video is played)

1 Q Dr Lipscomb, I don't want to mislead you or the
2 jury, but I understood you were talking about a GPS device
3 and a sensor So the jury has heard it --

4 MR PARKER Your Honor, that was my objection
5 because there was nothing contradictory and she submitted
6 to the court that it contradicted his testimony It was
7 exactly the same

8 THE COURT Well, you know, Mr Parker, we got 12
9 people over there who will decide what the true facts are
10 I'll let them make that decision

11 Q Now, Dr Lipscomb, I think you told the jury that as
12 an audiologist you have a special interest in hearing,
13 correct, sir?

14 A I do

15 Q And you've studied did it for a long time and done a
16 lot of work in the area, correct?

17 A I have

18 Q And you agree with me that distractions in a vehicle
19 can affect whether a person is paying attention and hears
20 a train horn, correct?

21 A Yes That's true

22 Q For example --

23 A And concentration Studies have shown that if a
24 person is in a simulated driving experience their response
25 to a warning signal comes -- requires an additional 10

1 decibels and this is where this 10 decibels has come from

2 Q Sure

3 A Requires the additional sound level because they're
4 focused or concentrating on the driving task

5 Q Okay For example, conversation in a vehicle is a
6 distraction?

7 A It can be

8 Q Now, you're an expert witness and you rely on a lot
9 of things in forming your opinion, correct?

10 A I try to, yes

11 Q Yes, sir And part of that is your expertise and
12 knowledge, correct?

13 A Yes

14 Q And part of the other information you get are
15 documents and depositions that the attorneys send you to
16 read in connection with a specific case?

17 A Yes

18 Q And Mr Murdaugh sent you some documents in this
19 case, correct?

20 A Yes

21 Q And he sent you some depositions in this case,
22 correct?

23 A Yes

24 Q And we went over his letter and I think in his letter
25 he said he sent you the depositions of all fact witnesses

1 You remember we read that together?

2 A Yes That was what came In fact, I have a copy of
3 the letter

4 Q Yes, sir And I assume that you've read Ms ~Harvey's
5 deposition?

6 A I did

7 Q Okay At the time I took your deposition on
8 September 22 a little over a month ago at the time you
9 gave me all of these opinions that you're giving here
10 today you had not yet read Ms ~Harvey's deposition at that
11 time?

12 A Well, you know, I may have misspoken because if I
13 hadn't read it then I haven't read it

14 Q Well, instead of pulling the video up do you have a
15 copy of your deposition right there?

16 A I do

17 Q Look with me, Dr Lipscomb, to page 70 just to
18 refresh your recollection Seventy Are you there
19 already?

20 A Yes Did you say seven?

21 Q Seventy I thought you were awfully close to the
22 front there

23 THE COURT Seventy

24 Q Can I help you find it, Dr Lipscomb?

25 THE COURT You see that page number right there? Go

1 to 7-0

2 THE WITNESS Go to 70? Oh, I'm off by a factor of

3 10 Here we go

4 THE COURT What line, please, ma'am?

5 Q Lines 16 through 18 Read with me right there the
6 question and answer, Dr Lipscomb

7 A I said I did not

8 Q Had not read it?

9 A I had not

10 Q So, still today five years after this accident you're
11 talking about Ms ~Harvey's accident and what she could
12 have heard and you have not read her deposition testimony?

13 A I have not

14 Q Okay I want you to assume with me that Mrs Harvey
15 is going to testify that her son Beryl was seated right
16 behind her driver's seat, okay?

17 A Yes

18 Q And I want you to assume with me that she'll testify
19 for this jury that his left side was towards her seat
20 His back would have been facing towards the train, okay?

21 And I want you to assume with me that Ms ~Harvey and Beryl
22 were talking at the time right before the accident You
23 would agree with me that that conversation could be a
24 distraction that would prevent her from attending to the
25 sound of this train horn?

1 A That's possible

2 Q And you've already given testimony to this jury here
3 today that conversation is a distraction correct?

4 A It can be, yes

5 Q Right And they were talking right as she pulled up
6 to the railroad track You would agree with me that that
7 would be a distraction if she gives that testimony to this
8 jury?

9 A That would be a possibility

10 Q Yes, sir Now, if you're at a train track you know
11 there is a possibility that a train will be coming,
12 correct?

13 A Always Sure

14 Q And it would be prudent if you're a driver at a train
15 track and you hear a noise to stop and determine what that
16 noise is, correct?

17 A We don't always do that but some people would, yes

18 Q Yes, sir Prudent reasonable people would do that if
19 they're stopped at a train track?

20 A If you hear something, sure

21 Q Yes, sir, or if you're just there you would pay
22 attention to the noises there, correct?

23 A Correct

24 Q Because it's always train time at a railroad track,
25 correct, Dr Lipscomb?

1 A It can be

2 Q Yes, sir Now, it's your understanding in this case
3 that Mrs Harvey's vehicle was stopped on the train tracks
4 at the time of the accident

5 A Well, the information is incomplete Some say she
6 was stopped on the track Some say not So, I am not
7 exactly sure

8 Q Yes, sir A month ago when I took your deposition
9 you told me that it was your understanding that Ms ~Harvey
10 was stopped on the train tracks at the time of this
11 accident?

12 A That was from reading Mr Cowan's -- the engineer's
13 -- the lead engineer's statement

14 Q Mr Cowan right over there, correct?

15 A Yes

16 Q And --

17 A I don't know I don't know him, but --

18 Q Yes, sir Well --

19 A -- I'll accept your designation

20 Q -- that's him And you don't have any information to
21 the contrary, correct, Dr Lipscomb?

22 A That's correct

23 Q So, the only information you have comes from
24 Mr Cowan's statement?

25 A Yes

1 Q Okay Emergency horn blow You told me a little bit
2 about an emergency horn blow at the time of your
3 deposition?

4 A Sequence, yes

5 Q Yes, sir And you told me the proper way to do it if
6 you're going to give warning to a motorist and you think a
7 motorist is in danger is to hit the horn one second on,
8 one second off, one second on, one second off -- sort of a
9 beep, beep, beep, correct?

10 A Approximately, yes, because if you do it real fast
11 you deplete the amount of air available to the horn and
12 actually by my measure reduce the sound output of the
13 horn

14 Q Exactly That's my point If you do it in
15 increments of less than one second you can actually reduce
16 the decibel level or the sound to a motorist approaching
17 at crossing --

18 A Yes That's --

19 Q -- correct?

20 A -- what I've found, yes

21 Q And I think you also told me that that is about as
22 comfortably fast as a locomotive engineer can do that,
23 correct?

24 A Yes, because they either have a button or a handle
25 that they pull the handle or press a button and unless

1 you're going like that which is not really comfortable --

2 Q Close to impossible, probably

3 A -- then a one-second cycle is usually what most
4 people would use

5 Q Now, again, you're an audiologist here to talk about
6 what could be heard at this train track, correct?

7 A Correct

8 Q And we already talked about what documents and
9 depositions Mr Murdaugh sent you, correct?

10 A That's correct

11 Q You have not read a copy of Mr Bennie Spell's
12 deposition testimony either, have you?

13 A I have now

14 Q You have now?

15 A Yes, ma'am

16 Q Okay But at the time of your deposition a little
17 over a month ago when you had formed all of your opinions
18 in this case you had not read the deposition testimony of
19 Bennie Spell, is that correct?

20 A I had not

21 Q And you understand that Bennie Spell is the only
22 person who was at that crossing on the day of the accident
23 other than the Harveys and the train crew, correct?

24 A That's correct

25 Q But yet you had not read his deposition in giving

1 your opinion about what could be heard on that day?

2 A By him?

3 Q Yes, sir

4 A Yes That's correct

5 Q Now, you didn't get to meet Mr Spell yesterday, did
6 you, sir?

7 A I did not

8 Q He was here in the courtroom and I hate that you
9 didn't meet him because he was a treat for all of us but
10 the jury heard what he had to say

11 Bob, can you pull up Defendant's Exhibit 15 for me?

12 Now, Mr -- you didn't hear Mr Spell but the jury
13 did and they know what he had to say and just to give you
14 a little background --

15 MR PARKER Your Honor, we would object to the
16 comments about -- like that We don't think that's
17 appropriate

18 THE COURT That's correct Disregard that comment
19 about Mr Spell They did hear him

20 MRS MCLEOD Okay Okay I'm with you I didn't
21 know what you were talking about Sorry, Judge

22 I want you to assume with me that Mr Spell was with
23 us yesterday and he testified that he was coming in this
24 direction in this photograph on the day of the accident,
25 okay, Dr Lipscomb?

1 A That's my understanding

2 Q Okay Because you've now read his deposition Very
3 good

4 MR PARKER Your Honor, I would object --

5 THE COURT Hold on

6 MR PARKER -- to the comments

7 THE COURT What is the comments?

8 MR PARKER The comment is very good that he's now
9 read it and the extraneous comments I think that you
10 have to ask a question and we would object to the form of
11 the question and that's not an appropriate question

12 THE COURT Rephrase your question

13 MRS MCLEOD Yes, sir, I'll do it

14 Dr Lipscomb, I want you to assume with me that
15 Mr Spell testified that he first heard the train horn
16 blow twice right around this curve back here, okay,
17 Dr Lipscomb?

18 THE WITNESS I think he said 50 yards or
19 thereabouts, half a football field

20 Q I'm talking about his testimony in this court here
21 yesterday that you didn't hear

22 A Oh, I'm sorry I was talking about the deposition

23 Q Thank you, sir I want you to assume with me that

24 Mr Spell told this jury that he first heard the train
25 horn right here around this curve in the crossing, okay?

- 1 A All right
- 2 Q And I want you to assume with me that he heard it
- 3 blow twice, okay?
- 4 A That was my understanding
- 5 Q And you would agree with me that not as an expert on
- 6 visibility or anything like that, but just as a normal
- 7 person in the world and a normal driver that Mr Spell
- 8 when he was back here around this curve would not have
- 9 been able to see any train way up here on this train track
- 10 approaching, correct?
- 11 A That's correct Well, I guess I really don't know
- 12 Q Okay I want you to assume with me that Mr Spell
- 13 testified that he was driving slow and he did not like
- 14 loud noises, and I further want you to assume with me that
- 15 Mr Spell testified that because he does not like loud
- 16 noises he stopped his vehicle back here at this white line
- 17 about 50 yards from the crossing Are you with me?
- 18 A That's correct That's what he testified to in his
- 19 deposition, too
- 20 Q And at this time I want you to assume with me that
- 21 Mr Spell testified that he heard the engineer lay down on
- 22 the horn right there when he was stopped back about
- 23 50-yards from the railroad track
- 24 A Yes, I remember that
- 25 Q You would agree with me, Dr Lipscomb, that if

1 Mr Spell heard this train horn out there on the day of
2 the accident stopped back 50 yards from the track and
3 stopped -- and as he was coming around this curve that it
4 would be reasonable to assume based on your education and
5 experience in audiology and hearing that Mrs Harvey also
6 could have heard the horn stopped on this side right
7 around the area of the stop bar?

8 A Not true because there is one major difference His
9 window was open Her windows were closed

10 Q Let me give you some other facts that might bring us
11 along with that I want you to assume with me that

12 Mr Spell testified that he was driving his work truck
13 He had taken his worker home at the time of the accident

14 A That's my understanding

15 Q By the way, you don't know whether his vehicle was a
16 diesel or a regular truck or anything like that, do you?

17 A I don't remember seeing that it was

18 Q Okay And I want you to assume with me that he
19 testified that he had his air conditioning running?

20 A Yes, I knew that

21 Q Yes, sir And assume with me that he had his
22 driver's side window down but his passenger's side window
23 up Are you with me?

24 A That's what I understand

25 Q Okay And the train would have been approaching from

1 his right side

2 A That's correct

3 Q And on the right side that window would have been
4 closed, correct?

5 A Right

6 Q And based on what you've told the jury about
7 deflection and all this other stuff, that window would
8 have been a deflection of the train horn on that side of
9 his vehicle?

10 A On the passenger side, sure

11 Q Yes, sir And that's -- on that side his window was
12 up?

13 A That's correct

14 Q Okay

15 A That's what I understand

16 Q Now, going back to what you've read and what you
17 haven't seen, you were here this morning --

18 THE COURT Hold on a second Gentlemen, please

19 Q You were here this morning in the courtroom when
20 Lavern Battle testified, correct?

21 A I did I couldn't hear her too well

22 Q Yes, sir She testified that at the time of the
23 accident she was at her mother's house on Honey Ford Road
24 Do you recall that?

25 A Yes, I do recall that

1 Q And Mr Murdaugh showed her a picture similar to
2 this, but she told us that her mother's house was back
3 behind these trees around the curve on further back from
4 where Mr Spell heard the train horn Do you recall that,
5 Dr Lipscomb?

6 A Vaguely, yes

7 Q Yes, sir And she and her mother were in the house
8 at the time of the accident Going back to what documents
9 and depositions you've been provided, have you ever seen
10 the deposition of Vera Battle? Vera Battle, Have you
11 heard that name? Let me see if I can help you with that
12 Her deposition was taken about two weeks ago by
13 Mr Wilson -- Plaintiff's counsel

14 A If it's that recent, no, I have not

15 Q Okay So, you've never heard her name before or
16 don't know anything about what she had to say?

17 A Not that I recall, no

18 Q I want you to assume with me as Lavern Battle
19 testified this morning that she and her mother were at her
20 mother's house on Honey Ford Road at the time of the
21 accident, and I want you to assume with me that
22 Mrs Battle -- Vera Battle, the mother, not the daughter
23 who was here -- had testified that they were visiting and
24 talking at that time Okay?

25 A Yes

1 Q And I want you to further assume with me that they
2 were watching TV and had the TV on at the time this
3 accident occurred

4 A All right

5 Q Now, those would be competing sounds and masking
6 sounds based on your testimony to the jury during direct
7 examination?

8 A Potentially they could Sure

9 Q Yes, sir And those are the kind of things that you
10 think would or perhaps could prevent somebody from hearing
11 a noise?

12 A That's possible

13 Q Yes, sir And you talked about the shell of a
14 vehicle being something that could prevent somebody from
15 hearing a noise, correct?

16 A Yes

17 Q And the same thing for the shell of a house You
18 would agree with that, Dr Lipscomb?

19 A As I had pointed out that the house is not nearly as
20 effective in isolating a person from the incoming sound

21 Q Yes, sir You're telling the jury that the shell of
22 a car isolates sounds more than the shell of a house?

23 A Significantly more --

24 Q Okay

25 A -- unless the house is built like a hospital

1 Hospitals are very, very specially constructed in order to
2 keep outside sound outside

3 Q Yes, sir And these trees right back here you would
4 agree with me that that would be something that could help
5 deflect or block sound, also?

6 A Now, trees -- unless you have a very, very thick wood
7 where you can't see through for 100 to 150 feet there can
8 be some reduction by the trees, but occasional trees like
9 that, they're really not a good sound -- they're a visual
10 barrier and that's why people plant trees along highways,
11 but they don't reduce the sound

12 Q Did you tell the jury earlier that visibility makes
13 audibility more difficult? Did you make some statement
14 like that?

15 A No What I said was that if visibility is affected
16 audibility becomes more important

17 Q Okay Well, that's a good point So, this big clump
18 or block of trees right here would not have blocked any
19 sound from this train horn to Mrs Battle's house, is that
20 your testimony?

21 A Probably not If so, just a very, very small amount
22 A fraction of a decibel, perhaps

23 Q Yes, sir So you would agree with me that whatever
24 trees or vegetation or bushes or grass that might have
25 existed to Ms ~Harvey's left between her vehicle and the

1 train would not have masked or blocked any sound from that
2 locomotive horn either? You would agree with that?

3 A That's true unless you have a very, very thick woods

4 Q I want you to assume with me that when Mr Wilson
5 took Mrs Battle's testimony about two weeks ago she
6 testified that they were sitting in the living room
7 watching TV and running off at the mouth and finally we
8 heard the train horn blowing and I said, That train is
9 blowing mighty long You would agree with me that if
10 Ms Battle gave that testimony and she could hear that
11 train horn in her house on Honey Ford Road around this
12 curve behind these trees in her living room that it would
13 be reasonable to assume that Ms ~Harvey also could have
14 heard the train horn at that crossing on the day of the
15 accident?

16 A No, it would not be reasonable It would not be
17 technically correct

18 Q Thank you so much, Dr Lipscomb

19 THE COURT Redirect?

20 MR PARKER Thank you, Your Honor

21 REDIRECT EXAMINATION

22 BY MR PARKER

23 Q Mrs ~McLeod, I guess neglected to fully inform you
24 about Ms Battle's testimony because what she said and
25 I'll read you the question put to her and the answer

1 Okay All right And when you say you heard the train
2 whistle blowing for a long time, was that before or after
3 y'all had realized something had happened?

4 It was after we had realized something had happened

5 So and I am reading from the question and answer from
6 Ms Battle's deposition on page 15

7 MRS MCLEOD Your Honor, under the rule of
8 completeness I'd like to read an additional portion

9 THE COURT You may

10 MRS MCLEOD Mrs Battle -- when we took her --
11 Well, when Chris Wilson took her deposition on page 11 she
12 testified, My girls was visiting me at the time We were
13 sitting in the living room watching TV and running off at
14 the mouth and we were having a good time talking and
15 finally we heard the train horn blowing and I said, That
16 train horn is blowing mighty long, and we got up and we
17 went to the door and I looked and the cars were backed up
18 That's the rest of it, Judge

19 THE COURT Thank you

20 Q Now, let me ask you a couple of other questions
21 Mrs ~McLeod said that the horn was blowing for 20 seconds
22 She made it as a statement to you Was that horn blowing
23 20 seconds?

24 A No There was a lengthy break and she was talking
25 about the last 7 2 seconds, I believe

1 Q And it was off -- the horn was off for how long?

2 A Right at eight seconds that there was no horn as it
3 was approaching

4 Q And this 485 feet -- you can't tell from your looking
5 at the event recorder whether that was past the crossing
6 or not She indicated that 485 feet was before the
7 crossing?

8 THE COURT Hold on Ma'am?

9 MRS MCLEOD I object, Your Honor He is leading
10 his own witness

11 THE COURT Sustained Rephrase it

12 Q Can you tell us whether or not you could determine
13 from the event recorder where the crossing was located?

14 A I could not I do not usually try to do that because
15 there are other parameters So, all I know is what
16 duration the horn was on and where this movement was in
17 relation to the crossing is something other people
18 determine

19 Q And can you tell whether that 485 feet that the horn
20 was on was before or after the crossing?

21 A No

22 Q And the only thing you can tell is that's the length
23 of time the horn was on?

24 A That's all the information that's on this

25 Q Mrs ~McLeod asked you about possible solutions that

1 you could give to us about this and would one possible
2 solution be to clear the vegetation so somebody could see
3 the train?

4 MRS MCLEOD Your Honor I object He is leading
5 his own witness

6 THE COURT Sustained

7 Q What are the possible solutions other than having
8 some electronic signal that would aid a person at that
9 crossing as it comes up to it to be able to see and detect
10 a train?

11 THE COURT Well, now, Mr Parker, he can't testify
12 other than audiology situations He can't go into
13 everything else You hadn't qualified him other than
14 hearing, have you?

15 MR PARKER No, sir, but I think that given his
16 background and experience -- What we're talking about here
17 and I think it is part of his background because we don't
18 live in a world --

19 MRS MCLEOD Your Honor, I think we need to take
20 this up at the side

21 THE COURT All right Let me see y'all at the side
22 (Whereupon, a bench conference was held)

23 Q Dr Lipscomb, the primary -- if you will, tell us how
24 someone who approaches a crossing what the primary warning
25 to the motorist has to be?

1 A That would be vision

2 Q In other words the motorist has to be able to see and
3 perceive that there is a train coming?

4 MRS MCLEOD Your Honor, I object He is leading
5 again

6 THE COURT Sustained

7 Q State whether or not -- Why is visual the primary
8 warning?

9 A Well, of course, in our training we deal with all
10 senses in the study of what we call psychophysics, human
11 response to visual stimuli, lights, and hearing, and
12 auditory or acoustic So, from that standpoint then, of
13 course, I'm able to evaluate, say, the interaction between
14 visual and auditory For example, if you see a train
15 coming down the track, you'll hear it sooner because the
16 eyes and ears work together So, anything that would
17 enhance either the auditory or the visual awareness at the
18 time that you're approaching the crossing would be
19 worthwhile

20 Q If the motorist is approaching the crossing doesn't
21 have any visual clue or cue, does it then become harder
22 for that person to hear or be alerted?

23 A That's really true because the visual and auditory
24 senses -- that's one of the reasons that we use this
25 rather sizable signal-to-noise ratio because if we have to

1 rely only on hearing and even though I'm very sold on the
2 ear and hearing, I know it has severe limitations in this
3 context and if we rely only on hearing it's much more -
4 difficult to avoid such instances as has brought us
5 together today

6 Q And if, in fact, you can't hear or you can't see the
7 train, then you would suggest as you were questioned about
8 other ways of warning the motorist?

9 MRS MCLEOD Your Honor, I object He is leading
10 the witness again

11 THE COURT Sustained

12 Q What would you suggest if the motorist can't see or
13 hear the train?

14 A Well, of course, if you have active warnings at the
15 crossing --

16 MRS MCLEOD Your Honor, I object He's already
17 testified

18 THE COURT Sustained

19 MR PARKER Thank you Answer -- Well, no other
20 questions Thank you

21 THE COURT All right You may step down May he be
22 released from his -- Gentlemen, may he go back to
23 Washington?

24 MR PARKER Yes, sir

25 THE COURT I don't know if you can get to Washington