

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 II of IV
(Pages 475-949)

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1 we break?

2 MR PARKER Nothing from the Plaintiff, Your Honor

3 MR HARMON Nothing, Your Honor, from the Defendant

4 THE COURT All right Let's take about 15

5 (Whereupon, a break was taken)

6 THE COURT Anything for the record before we start
7 back, Mr Murdaugh? Mr Barnes?

8 MR BARNES None, your honor

9 THE COURT Is that your first official word in a
10 live courtroom as a lawyer? Stand up when you respond

11 MR BARNES I am not exactly sure, Your Honor, if
12 the hearing last week would constitute as well

13 THE COURT I just want to let you know that you're
14 doing a good job punching those buttons

15 MR BARNES Thank you At least I have a fallback

16 THE COURT Well, you ain t got much Anything?

17 MR HARMON No, Your Honor

18 THE COURT As soon as Mr Wilson gets back in, we'll
19 start Who do we have next, Mr Parker?

20 MR PARKER Dr Heathington

21 Dr Heathington, you want to come on up? You've
22 already been sworn

23 MR WILBY Your Honor, I think Mr Parker is
24 probably going to question him up until what we covered

25 MR PARKER No, I don't -- we won't get to -- what

1 time did you say that you're going to break for lunch?

2 THE COURT About an hour

3 MR PARKER I suspect we got plenty I won't get
4 into anything objectionable If we get there before then
5 then I'll --

6 THE COURT You know when to stop Good morning,
7 Doctor

8 THE WITNESS Good morning, sir

9 (Whereupon, the jury came into open court)

10 CONTINUED DIRECT EXAMINATION

11 BY MR PARKER

12 Q Dr Heathington, when we left off yesterday I think
13 we were looking at some engineering principals that you
14 used in evaluating the crossings, is that correct?

15 A Yes, these are published documents

16 Q If you will go over this principal

17 A Obstructions in the sight triangle in any of the four
18 quadrants can result in restricted sight distance for at
19 least one approach roadway If such obstructions are
20 vegetation or other natural features they should be
21 removed The view of approaching trains at all crossings
22 will be as free from obstruction as possible At railroad
23 highway grade crossings with only passive control devices
24 it is imperative that the motorist detect the presence of
25 an approaching train as early as possible This is

1 accomplished through visual or audible means

2 Q That was out of the traffic control handbook?

3 A I believe that's correct I didn't catch where we
4 took it from

5 Q Traffic Control Devices Handbook?

6 A Yes

7 Q And the Traffic Control Devices Handbook is -- What
8 is it?

9 A Well, the MUTCD as we were saying yesterday is the
10 document adopted by the federal government back in 1935
11 It's been in existence ever since It's updated
12 regularly It was always intended and it's kind of grown
13 out of that to be a more short synopsis as what to do and
14 so forth The Traffic Control Devices Handbook is an
15 elaboration and discussion of why you do certain things
16 that the MUTCD requires It is kind of a discussion of
17 what goes on So that's put out on a regular basis, also

18 Q The next principal?

19 A Mr Riley was the administrator of the Federal
20 Railroad Administration No rational person could
21 question the need to maintain sight distances by keeping
22 railroad rights-of-way from obstructing vegetation, snow
23 accumulation, standing cars, and similar objects There
24 was a correspondence between NTSB's director whom I knew
25 at that time and Mr Riley

1 Q Next

2 A In addition, the Railroad Highway Grade Crossing
3 Handbook published by FHWA and recognized by the industry
4 as the standard of best practices states that vegetation
5 should be removed or cut back periodically Also, if
6 practical this sight distance area should be kept free of
7 parked vehicles and standing railroad cars Care should
8 be taken to avoid the accumulation of snow in this area
9 Other standard and practice manuals such as railroad
10 crossing corridor improvements emphasize this same points

11 Again, that was from Mr Riley to Jim Burnett who is
12 the NTSB Director I have worked with Mr Burnett before
13 These are the standards of care These are the standards
14 that we have

15 Where sight obstructions are present it may be
16 necessary to install active traffic control devices that
17 will bring all highway traffic to a stop before crossing
18 the tracks and will warn drivers automatically in time for
19 an approaching train

20 Q And this is -- you had spoken yesterday about the
21 book or policy on geometric design --

22 A Yes

23 Q -- of highways and streets?

24 A Yes

25 Q Is this a publication that is used by highway

1 officials across the United States?

2 A Yes As I was saying all of the State Departments of
3 Transportation and federal government makeup AASHTO They
4 are not a federal agency They are a private agency which
5 the funds are accumulated --

6 Q I think one slide back it talked about audio visual
7 clues or cues --

8 A Yes

9 Q -- to whether a train is coming?

10 A Yes, sir

11 Q And which one is primary? How do you alert a driver
12 by primary warning to whether or not a train is coming?

13 A Well, as AASHTO says and this is subscribed to by the
14 handbooks and so forth is that sight distance is a primary
15 source for safety at passive crossings It also says FRA
16 I believe is the one published this back in 1980 that
17 sound should only be considered as a secondary source for
18 safety at crossings

19 Q Next Let me ask you one other thing In the slide
20 before it talked about active traffic control devices and
21 what would we be talking about there?

22 A Technically --

23 MR HARMON Your Honor, excuse me I have an
24 objection May we approach?

25

1 (Whereupon, a bench conference was held)

2 THE COURT All right Ladies and gentlemen, y'all
3 step out just one second, please

4 (Whereupon, the jury exited the courtroom at 11 37)

5 MR HARMON May I be heard, Your Honor?

6 THE COURT All right, sir

7 MR HARMON Your Honor, our objection is that under
8 South Carolina law there is no duty on behalf of the
9 railroad to place up lights and gates Indeed, the only
10 entity that can unilaterally place up gates and lights or
11 any traffic control device at a crossing is the South
12 Carolina Department of Transportation and through these
13 series of slides what they're suggesting is if you can't
14 see, then gates and lights -- there was another slide that
15 was earlier up that they placed up here -- should be
16 placed at the crossing So, even without asking the
17 ultimate question they're putting before the jury
18 something that we believe is irrelevant in this case

19 The question is at this crossing on that day was
20 there sufficient sight distance If the jury believes
21 there wasn't, then they may go a certain way If they
22 believe there was, they will go another way Whether or
23 not there is gates and lights at this crossing we contend
24 is not something that CSX had a duty to do So, without
25 the duty if the court agrees with us regarding what the

1 statute says relating to manual traffic control devices,
2 then this testimony is irrelevant It is -- under 403 it
3 is unfairly and unduly prejudicial and so we ask that it
4 not be allowed

5 MR PARKER Thank you, Your Honor Clearly, under
6 the numerous cases in South Carolina a railroad has a duty
7 to maintain a reasonably safe grade crossing

8 THE COURT I agree with that This case is all
9 about maintaining a reasonably safe crossing

10 MR PARKER Right And if, in fact, there are sight
11 distance obstructions at that crossing --

12 THE COURT Correct Allegedly

13 MR PARKER -- they have a duty under Easterwood
14 The only South Carolina case on this is Bowman versus
15 Norfolk Southern says that they have a duty to identify
16 and take action including notifying whoever needs it to
17 In this case we agree that the exclusive authority to put
18 up -- to erect the active gates and lights lies with the
19 Highway Department They have to give their approval and
20 we agree with that, but they have a duty on their own
21 They can identify these hazardous crossings They can
22 install gates and lights They can do whatever is
23 necessary The fact that the Highway Department has to
24 approve of it has absolutely nothing to do with that duty
25 The two cases that are -- that we're aware of are

1 Easterwood and Bowman versus Norfolk Southern

2 THE COURT You got those in your file?

3 MR PARKER We do We put them -- it would be under
4 the tab that -- where they object to gates and lights
5 You might want to read Bowman and Easterwood This same
6 argument was made by CSX in the Easterwood case and was
7 rejected by the United States Supreme Court to the effect
8 that there was a footnote

9 THE COURT All right Mr Parker, direct me to
10 where are we in the book

11 MR PARKER We would have to go to the cases would
12 be CSX versus Easterwood would be under two under the
13 cases and the duty to warn part of it, that would be under
14 six, Bowman versus Norfolk Southern

15 THE COURT All right And six is a South Carolina
16 case?

17 MR PARKER Yes, Your Honor It is a US District
18 Court case that was decided by Judge Anderson

19 MR HARMON Your Honor, I know that the court wants
20 to read it Whenever the court is prepared, Mr Millberg
21 is addressing this in the motion in limine He is going
22 to address it when the court is prepared

23 THE COURT First of all, Mr Parker, point me out in
24 Easterwood where you want me to read

25 MR PARKER I'll turn to it It'll take me just a

1 second

2 MR MILLBERG I believe that's footnote 5 he is
3 talking about, Your Honor

4 THE COURT I am reading footnote five

5 MR PARKER All right You're on page eight

6 THE COURT Well, I think the law is clear that the
7 railroad can't on their own initiative put them up They
8 have to get permission from the SCDOT It's the same
9 thing as this Georgia statute is apparently saying, but
10 they still have the duty to maintain the crossings in a
11 safe and reasonable manner In this case in such
12 condition as to permit the safe and convenient passage of
13 public traffic and the footnote sort of tracks
14 Mr Parker's argument While final authority for the
15 installation of particular safety devices has long rested
16 with the state and local government, this allocation of
17 authority apparently does not relieve the railroads of
18 their duty still to take all reasonable precautions to
19 maintain grade crossing safety

20 Help me out, Mr Millberg

21 MR MILLBERG Your Honor, the Easterwood case is not
22 a South Carolina case

23 THE COURT It is a Georgia case

24 MR MILLBERG It's a Georgia case Although it's a
25 US Supreme Court case, they're talking about Georgia law

1 THE COURT That's correct

2 MR MILLBERG We're not talking about South Carolina
3 law As I mentioned the other day, Your Honor, this is
4 mighty thin authority for the proposition that he's
5 arguing He is arguing that the railroad has an
6 independent duty to put up lights and gates

7 THE COURT I don't think he is arguing they have an
8 independent duty to put up lights and gates He's arguing
9 that they have a duty to maintain a safe and reasonable
10 crossing and if they -- they have a duty that if they
11 recognize it's an appropriate place -- strike that, for a
12 signal devices, then they have to pass that information on
13 to the SCDOT who makes the ultimate decision Is that
14 your position?

15 MR PARKER Yes, sir Yes, sir Our position is
16 they have to identify and they have to take all reasonable
17 precautions If that included putting in gates and
18 lights, they would have to do that which they have done on
19 occasions in the past even though -- the way this thing
20 works is the federal government has come in and said they
21 will pay for so many gates and lights and they apply for
22 funding under section 130 for these gates and lights and
23 then the railroad generally installs them and the federal
24 government then pays for them, but -- that's why the
25 independent duty comes in because they have an independent

1 duty if -- they don't have to put in gates and lights and
2 we're not going to contend that they do have to, but they
3 have to provide a reasonably safe crossing and if that
4 included gates and lights, then it would be their duty to
5 do it

6 THE COURT Well, as I understand the law, if they --
7 if they bring it to the state's attention, then they would
8 be the ones who would -- SCDOT who would be the ones who
9 would approve it

10 MR PARKER That's correct

11 THE COURT The railroad can't do it independent

12 MR PARKER The railroad cannot install it without
13 their permission

14 THE COURT Well, I am not going to let this jury be
15 under the impression that the railroad can do it
16 automatically without state approval and I'm not going to
17 allow us to get into lights and bells -- strike that
18 lights and gates at this crossing because that's a
19 subsequent -- could be argued a subsequent remedial
20 measure because it was later done -- hadn't it been later
21 done?

22 MR PARKER The decision to do it was made before
23 this

24 MR MILLBERG The recommendation to do it was done
25 before by the DOT of which CSX had no notice, Your Honor

1 THE COURT Well, go ahead

2 MR MILLBERG If I might, Your Honor, I don't
3 dispute that the general notion to take reasonable care at
4 crossings I don't dispute that, but my point is there is
5 not a single appellate court in South Carolina that has
6 ever held that that requires the railroad to install
7 lights and gates of its own accord or to --

8 THE COURT Well, I am not going to --

9 MR MILLBERG -- or advise the DOT that they ought
10 to put up lights and gates There is no case that holds
11 that

12 THE COURT The cases all hold that you have a duty
13 to maintain a reasonable and safe crossing

14 MR MILLBERG That's right

15 THE COURT Well, if that's the duty, then it could
16 encompass making --

17 MR MILLBERG But here, Your Honor, there is a
18 statute that specifically says that the DOT has that
19 responsibility and, not just that, it goes on to say that
20 if anybody else does it they're deemed a public nuisance

21 MR PARKER It does not say that, Your Honor It
22 says they have exclusive jurisdiction to determine what
23 traffic control devices are installed It does not say
24 they have the duty It simply goes with the idea of who
25 has jurisdiction to pass on whether or not these devices

1 could be installed We don't contend that they -- that
2 the railroad could install these devices without having
3 the approval of SCDOT because that would be contrary to
4 the law

5 On the other hand, we contend that they have a duty
6 to provide a safe crossing and that may include gates and
7 lights if certain things aren't done They can do it any
8 way they want to This very argument was made and they
9 say there is not a South Carolina case and there's not a
10 reported case, but Williams -- they objected to this same
11 issue in that case It was submitted and the court did
12 not find fault with anything --

13 THE COURT I am not going to use Williams as
14 precedent

15 MR PARKER Right

16 THE COURT Then I would get reversed

17 MR PARKER I understand it s not precedent I make
18 that with that statement, but the truth is that the Bowman
19 case is the only South Carolina case that dealt with it
20 It tracked Easterwood, a United States Supreme Court case,
21 and simply because there is not a case that's passed on
22 that issue certainly is no authority that that isn't good
23 law to hold that the railroad has the duty to provide
24 whatever and install whatever devices and do whatever is
25 necessary to fulfill their duties to provide a safe

1 crossing

2 THE COURT Well, I think that you've gone way beyond
3 that duty in saying whatever I think they have a duty to
4 maintain a reasonable and safe crossing and that's been
5 established and I don't think anybody questions that
6 What does that duty require them to do? It may require
7 them to make studies to determine whether or not signaling
8 devices are necessary, but, obviously, the jury will know
9 through me as a matter of law that even if they make that
10 determination or if they recommend that determination or
11 recommend that measure that they by law can't do it
12 without SCDOT approving it Is that basically what the
13 law is?

14 MR PARKER I think that's correct, Your Honor

15 MR MILLBERG To tell you the truth, Your Honor, I
16 believe the statutes say more than that

17 THE COURT Well, I am paraphrasing it I would read
18 it verbatim Whose got the statute right in front of
19 them?

20 MR MILLBERG I've got it right here, Your Honor
21 It is 56-5-930

22 THE COURT I'll give it right back to you I guess
23 what that statute means is that SCDOT is the ultimate
24 statutory authority to determine whether or not to put the
25 traffic control devices there Is that what you're

1 saying?

2 MR MILLBERG Yes, sir, absolutely They have
3 exclusive authority to do that and you can hear in what
4 counsel is arguing that he is arguing there is a duty on
5 CSX to do it

6 THE COURT No I am not going to allow him to say
7 there is a duty to put those lights and bells up I'll
8 let him argue that there is a duty to maintain a
9 reasonable and safe crossing, and when I instruct the jury
10 I will instruct them that the railroad -- strike that
11 The railroad by law can't put those lights and bells --
12 lights and cross warnings out there until approved by
13 SCDOT and I would read the statute

14 MR MILLBERG To tell you the truth, Your Honor, I
15 think it's very misleading for this witness to be able to
16 talk about lights and gates in the context of this case at
17 this point

18 THE COURT Well, I am going to allow you to cross
19 examine him as thoroughly as you can on that, but if he is
20 opining that one of the ways of insuring that your duty of
21 maintaining a safe and reasonable crossing is the railroad
22 can consider that and then, obviously, Mr Parker, you
23 would have to -- you can't mislead the jury I mean,
24 obviously, the railroad can't put up lights and signals
25 Strike that -- can't put up the cross bars and signals

1 that we're talking about, the gates and signals without --
2 I mean, they don't have that independent right to do so
3 They can't do it until authorized by SCDOT

4 MR PARKER We agree with that, Your Honor, and
5 would not say anything other

6 MR MILLBERG Your Honor, I would ask the court --
7 just to avoid any misleading and confusion of the jury, I
8 would ask the court to consider instructing on this
9 statute as this testimony is coming in because it's very
10 misleading, and, clearly, what they are suggesting is that
11 the railroad has this duty I hate for the jury to go
12 under that misimpression for another week or 10 days or
13 however long it's going to be before they hear the court's
14 charge

15 THE COURT I don't mind telling them that there is
16 some issues in this case as to whether or not -- the issue
17 in the case is whether or not the Highway Department --
18 strike that, the railroad maintained a safe and reasonable
19 crossing I don't mind charging them that law, that
20 statute right now unless anybody disagrees with it

21 MR PARKER Your Honor, what we would suggest is
22 that they be instructed that the issue is about whether or
23 not the railroad fulfilled its duty to provide a
24 reasonable safe crossing and one of the ways they could
25 fulfill that duty is by installing additional devices such

1 as gates and lights but that the final approval of whether
2 or not those would be installed would rest with the SCDOT
3 and you can consider this evidence on that

4 THE COURT I am going to do this I am not going to
5 do it before lunch We're going to break for lunch in
6 about 35 or 40 minutes Just be very careful, Mr Parker
7 If this witness comes out and says that the railroad has
8 that duty I am going to stop him right then and there and
9 instruct the jury that is just not the law in this state
10 You can't tell us that is the law However, I will --
11 when we come back at 2 o'clock I will be glad to look at
12 any type of real intermediate charge on that particular
13 area and I'll look at whatever you propose and whatever
14 the railroad proposes and probably adopt something in
15 between to instruct the jury on this gates and lights
16 And I am going to probably just charge the statute, but I
17 will see

18 MR MILLBERG Thank you, Your Honor

19 THE COURT So, now, Mr Parker, so we're all clear I
20 am not going to let Dr Heathington tell the jury that the
21 railroad has a duty to put up these warning lights and
22 gates Obviously, the railroad has a duty to maintain a
23 reasonable and safe crossing and there are all types of
24 options to do that including that, but you've got to not
25 mislead them You got to let them know they can't do that

1 independent without approval or authorization from the
2 state

3 MR PARKER We would certainly do so, Your Honor

4 THE COURT Anything else?

5 MR MILLBERG Your Honor, I just point out that
6 there is actually an additional statute that was also --
7 it was right behind this other one It is 56-5-1020 that
8 talks specifically about railroad devices When someone
9 else does it it is a public nuisance

10 THE COURT Which one is it? 1020? Do you have one
11 that mentions railroads?

12 MR MILLBERG Yes, sir

13 THE COURT Just help me I see it I see it All
14 right That's the one we were looking at really I read
15 the other one a while ago This specifically means the --
16 it talks about railroad signage or traffic control device

17 MR MILLBERG Yes, sir

18 THE COURT But so nobody is misled we're all agreed
19 that the way it's normally done is that working in
20 conjunction with each other the railroad or the Highway
21 Department, one or the other, could suggest that it's done
22 but they can't do it until they get authorization by the
23 Department of Transportation You just can't go out there
24 and decide to do it yourself

25 MR MILLBERG Absolutely not

1 THE COURT That's what I would tell them You would
2 have to have the authorization of SCDOT

3 MR MILLBERG And it's done as -- as a matter of
4 course, Your Honor, it is done at the recommendation of
5 the DOT They're the ones that make it

6 MR PARKER That's not entirely correct

7 THE COURT Well, hold on I am going to read the
8 statute All right

9 Just beware of that, Dr Heathington You've been
10 around long enough to know how you make a judge happy and
11 how you make them mad So, don't beyond my -- you can't
12 tell this jury that that's the law I have to tell them
13 it's the law

14 THE WITNESS I have no problem with that

15 MR PARKER Your Honor, we totally agree that the
16 duty is a matter of law and that would be for the court

17 MR HARMON Is it okay Your Honor, so we don't have
18 to keep having the side bar could we have a continuing
19 objection to any testimony relating to gates or lights
20 coming from Dr Heathington or do we need to keep
21 approaching?

22 MR PARKER Your Honor, unless it is something
23 different I think they have preserved their objection as
24 to the present argument I think --

25 THE COURT Sure

1 MR PARKER -- if there was anything different from
2 that

3 THE COURT And, Mr Harmon, obviously, you and
4 Mr Parker have been wonderful by doing it by side bar and
5 we haven't had many interruptions I felt it was
6 necessary for the last one, but you're deemed protected on
7 this whole line of questioning and subject matter and
8 amply preserve the record by objecting at side bar as well
9 as now on the record and through pretrial matters

10 Mr Parker, you would agree with that, wouldn't you?

11 MR PARKER Yes, Your Honor, insofar as the
12 limitation that it would be on the grounds so stated

13 THE COURT Sure

14 MR HARMON Thank you, Your Honor

15 THE COURT That's what he is objecting to
16 (Whereupon, the jury came into open court at
17 approximately 11 58 and the Forelady spoke with the
18 court privately)

19 THE COURT All right The foreperson informed me
20 Dr Heathington, that you don't sound like you're from
21 Tennessee because you are talking too soft So, just use
22 that Use that microphone

23 THE WITNESS I'll try

24 THE COURT And, Ladies, any of you, if anybody on
25 the jury -- I forgot to tell you If you ever can't hear,

1 please raise your hand and I'll ask him to speak up a
2 little bit Thank you so much for bringing that to my
3 attention

4 Mr Parker?

5 Q Dr Heathington, when we left off we were talking
6 about the slide here that talks about where sight
7 obstructions are present it may be necessary to install
8 active traffic control devices that will bring all traffic
9 to a stop What would be considered active traffic
10 control devices?

11 A Something that can change, that is, a passive device
12 is like a stop sign, like a yield sign like a crossbuck
13 sign or something like that It stays the same always
14 An active device is something like where you see them at
15 highway intersections what we called highway traffic
16 control devices flashing light signals that we see at
17 crossings or gates with flashing light signals like we see
18 at crossings They change with whatever conditions may be
19 coming along Those are active

20 Q And the active traffic control devices, either the
21 flashing lights signals or the gate, they would be
22 activated by the train?

23 A Yes

24 Q And give a specific warning time?

25 A Yes

1 Q And let's go to the next slide

2 A In the event that it is impossible to achieve the
3 minimum sight triangle, careful consideration should be
4 given to the installation of active control devices

5 Q And the minimum sight triangle, how would that be
6 determined?

7 A That's from the standard of care that's published by
8 AASHTO and SCDOT and it's based on train speeds, motor
9 vehicle speeds, stop conditions, things of this nature

10 Q Next?

11 A You can't just keep piping new things through and
12 expect the brain to keep up With practice the brain can
13 become more efficient at carrying out multiple tasks, but
14 performance is never as good as when the tasks are carried
15 out independently The literature has a lot of things on
16 multitasking and I work in that area That's part of
17 human factors Whenever you have drivers having to do a
18 bunch of different things and coming to an intersection,
19 crossing, or whatever it may be, it's more difficult for
20 them to sort through all of them and address each one of
21 them correctly without you know, making a wrong decision
22 It doesn't mean that they're negligent or anything It is
23 just our brains are not such that we can process it all
24 like that

25 Q I hear with the blackberries and all now that all of

1 us are supposed to be multitaskers Are we very good at
2 that?

3 A And it varies from people to people In fact, I was
4 meeting with a physician recently on discussing these
5 issues --

6 MR HARMON Your Honor, I'm sorry This is kind of
7 outside of his expertise

8 THE COURT Just give us a simple example of
9 multitasking

10 THE WITNESS Okay

11 THE COURT I don't see how blackberries are --

12 THE WITNESS You may be coming up to an
13 intersection There may be a stop sign There may be a
14 pedestrian over here There may be another car coming
15 from this direction There may be somebody coming from
16 behind you -- all of these sorts of things and as I was
17 saying and I was discussing this that is the older we get
18 the less ability we have to efficiently accomplish
19 multitasking It deteriorates with age

20 Q Next

21 THE COURT I think we can all agree with that

22 MR PARKER I wasn't going to admit to it, but I'm
23 glad you are Your Honor

24 THE WITNESS It come from a physician I know

25 Q Go ahead

1 A Various factors may influence the motorist's ability
2 to hear an audible signal. Motorists with impaired
3 hearing or operating vehicles with closed windows, air
4 conditioning, a radio or stereo may not hear warning
5 signals in time to react. Therefore, although an audible
6 signal system may be desirable or even necessary, it
7 should be considered as a supplemental system and not as a
8 substitute for other devices.

9 Q Is this out of the Traffic Control Devices Handbook?

10 A That's correct. That's part of the MUTCD. It is an
11 explanation of what things means in the MUTCD.

12 Q All right.

13 A FRA has sponsored extensive research to determine the
14 most effective means of alerting motorists and pedestrians
15 of approaching trains. The reports of the research
16 focusing on audible warning devices indicate that primary
17 reliance on these devices to warn motorists is not
18 justified and that to be loud enough to warn in all
19 ordinary circumstances the sound level would have to be
20 increased greatly. The increased sound level would
21 produce intolerable community and interior cab noise.
22 These sorts of things we've known for many, many years.

23 Q Next.

24 A The train horn and certain auxiliary locomotive
25 lights are currently the only active signals given to a

1 driver at a passive grade crossing to alert the driver
2 that a train is present The sound of a train horn is
3 effective as a warning only if the driver recognizes it as
4 a train horn This recognition is affected by the
5 interior vehicle noise levels, exterior traffic noise, the
6 sound characteristics of the train horn, driver
7 expectations, and insertion loss That's what
8 Dr Lipscomb was talking about today

9 Q Is it an accepted principal in the traffic
10 engineering field that the sound -- the horn has -- is a
11 secondary warning device and the primary device at passive
12 crossings has to be your ability to see the train?

13 A Oh, yes The sound is a secondary source and the
14 primary source is being able to see sight distance

15 Q Okay

16 A For other crossings with passive protection, stop or
17 yield signs may be used after need is established by
18 traffic engineering study The study should take into
19 consideration such factors as volume and character of
20 highway and train traffic, adequacy of stopping sight
21 distance, crossing accident history, and need for active
22 control devices

23 Q Next

24 A Perhaps the most important factor in perception time
25 is the alertness or expectancy of the individual One

1 whose focus of attention is wandering here and there and
2 who has no reason to believe any hazard exists for him
3 will have more delay and difficulty in perceiving an
4 object than one who has been warned to look for the hazard
5 or who expects a hazard to appear

6 Q Next

7 A If I may comment on that one

8 Q Okay Go right ahead

9 A The research that was done over the years to
10 determine the perception reaction time were in controlled
11 experiments with people driving down the road They knew
12 that something was going to pop up and things of this
13 nature and then they measured the time it took for them to
14 react to that stimulus Now, the problem with that type
15 of research -- and this is well addressed in the
16 literature and I used to teach statistics and these sorts
17 of things -- is that they're anticipating something That
18 is a different situation than if you happen to be driving
19 along the road and not anticipating anything at all and
20 all of a sudden something pops up So, it's a different
21 situation The latter part increases the time it takes to
22 recognize, interpret, and respond and so forth

23 Q Next

24 A When drivers get the information they expect from the
25 highway and its traffic control devices their performance

1 tends to be error free When they do not get what they
2 expect or get what they do not expect errors may result
3 That's where we have the problems

4 Q And, so, in the field of looking at traffic
5 engineering at intersections and railroad grade crossings,
6 do the people responsible for providing safe crossings
7 have to consider these principals?

8 A If they want to be effective in providing safe
9 crossings, that's correct

10 Q Now, did you make a site visit to the Honey Ford Road
11 crossing?

12 A Yes, sir

13 Q And when was that?

14 A If I may get my notes out of here I made the site
15 inspection on Tuesday March 14, 2006

16 Q Have you also reviewed a number of photographs? In
17 reaching your opinions in this case, have you reviewed
18 numerous photographs?

19 A Yes, there were some photographs, not a whole lot,
20 that were taken at the scene while the train was still
21 there and so forth and then the vehicle and so forth
22 Then there were several others that were taken -- this
23 accident happened on May 30 and if I am not mistaken those
24 other photographs were taken on June 4 I believe or right
25 in about that time

1 Q Close in time to when --

2 A Yes, about three days or so, something like that

3 Four days

4 Q I want to take a number of the photographs that were
5 taken close in time to when this happened and if you will
6 walk through the crossing and tell -- as we're doing this
7 and going through it explain what you did on your site
8 inspection to evaluate this crossing and we'll start with
9 Plaintiff's Exhibit 13

10 A Okay That's just after you turn off I believe it's
11 351, 321 That's a parallel road there just up towards
12 the track and you can see that there is an advanced
13 warning sign on the right for the crossing You can see
14 faintly but they're there the advanced pavement markings
15 You can see -- you can also see there is a stop sign and a
16 crossbuck sign and while you can't hardly see that in this
17 photograph when you get up there there is a stop line
18 there

19 Q When we're talking about passive warning devices
20 we're talking about that crossbuck sign there?

21 A Yes, every sign --

22 Q All of them?

23 A -- every traffic control device you see there is by
24 definition a passive device

25 Q Let's go to 15 If you will, tell us what we're

1 looking at here

2 A This is looking to the left and this was the
3 direction from which the train came that hit Ms ~Harvey
4 At sometime or another there had been things cleaned out
5 and it has been it looks like grew up again or it wasn't
6 cleaned out good to start with up to a certain distance
7 down there and that distance I believe is about four --
8 400, 500 feet, somewhere in there I can't remember the
9 exact distance down there where you see the trees, but
10 that's grown back up again and you can see the trees in
11 there and so forth That's kind of looking in somewhat of
12 a southerly direction

13 Q Exhibit 16

14 A That's just a little further up You can see the
15 stop line there You look down there and you can still
16 see the vegetation and so forth that's grown up in that
17 area

18 Q In Exhibit 16 there's a stop line there?

19 A Yes, that's what I was saying There is a stop line
20 there

21 Q And if you will at railroad crossing is there a law
22 that says where you're supposed to stop in South Carolina
23 at railroad crossing?

24 A Well, in all of the states with the exception of
25 possibly California you're not supposed to stop closer

1 than 15 feet from the near rail nor further than 50 feet
2 from the near rail -- anywhere in there That's what the
3 uniform vehicle code says

4 Q That's the uniform law that's across the country?

5 A Yes California, if my memory serves correct,
6 permits you to stop within 10 feet

7 Q Why is it that you don't want to stop closer than
8 15 feet?

9 A To keep from getting hit Several things Sometimes
10 things come off of trains as they come through You can
11 be carrying -- and I've worked on projects like this You
12 can have steel bands around lumber carrying lumber and so
13 forth They break They come off They hang down The
14 train itself hangs over about 3-foot or so and the foul
15 zone is considered to be 4 feet on each side of the rail
16 So, you're just adding about 11 feet of protective area
17 for a safety measure if something comes off the train or
18 whatever

19 Q And the stop line -- it has to be a certain width
20 under the MUTCD?

21 A It is supposed to be 2-foot wide

22 Q And let's go to Exhibit 18 And is that just a
23 closer look at the same thing?

24 A You're just looking on across the track and you can
25 see there's housing on the right and there is houses on

1 the left and there is passive traffic control devices on
2 that side You see the back of the stop sign You see
3 the back of the crossbuck sign, and you'll see a stop
4 line If you look real close there is a stop line on the
5 other side, and it's very difficult to see and perhaps the
6 reason I know it's there is because I know it's there is
7 that there is advanced warning signs down there -- I mean
8 advanced pavement markings, I should say right on down
9 before you get to those trees down there

10 Q And the --

11 A I can show you right here

12 Q If we look in --

13 THE COURT Hold on a second

14 THE WITNESS Right in there It is advanced
15 pavement markings

16 THE COURT What do you mean by advanced pavement
17 marking?

18 THE WITNESS You know where you have an R and R and
19 an X rather, and an R and R on each side

20 THE COURT That's it right there shown?

21 THE WITNESS Yes, sir It is not very plain and it
22 needs to be refinished There is no question on that, but
23 that's what is there

24 Q And the -- as we notice in Exhibit 18 it appears that
25 the railroad track in that photograph runs at an angle to

1 the road?

2 A It's highly skewed It is 50 degrees skew on it,
3 and, of course, what you want is a 90-degree intersection

4 Q When we talk about skewed angles, could you tell us
5 what you mean by that precisely?

6 A Well, in this particular one we measured it at this
7 angle right in here would be 50-degrees and, of course,
8 this would be 180 So, you take 50 from 180 and you got
9 130-degree angle there and that makes it more difficult
10 particularly on the skewed side of the crossing to be able
11 to see an approaching train because of what's required in
12 head movement and body movement and things of this nature
13 to see down the track

14 Q This is a piece of a survey done by CSX Does this
15 show this skewed angle that we're talking about?

16 A Yes, sir It's this angle right in here That's to
17 the right of Ms -Harvey

18 THE COURT Do we have an exhibit number on that,
19 please?

20 MR PARKER We don't, but we were going to offer
21 that, Your Honor, as an exhibit at this point in time

22 THE COURT Any objection?

23 MR HARMON No objection

24 MR PARKER We're going to mark this, Your Honor, as
25 Exhibit 161

1 THE COURT One-six-one?

2 MR PARKER One-six-one

3 THE COURT No objection, 161, sketch

4 (Whereupon, Plaintiff's Exhibit No 161 was marked
5 for identification and received into evidence)

6 THE WITNESS The train was coming from this
7 direction Ms ~Harvey was going in this direction
8 That's where the impact occurred

9 Q And what is the effect of a skewed angle on sight
10 distance?

11 A Well, it makes it very difficult to detect a train
12 that's coming from this direction It takes a lot more
13 time -- when I say a lot more -- more time for head
14 movement and getting your body situated if you're trying
15 to see down the track where you can get a clear view of
16 the track it is more time consuming and so forth AASHTO
17 and everybody, obviously, states we want a 90-degree -- we
18 want it perpendicular

19 Q If it's perpendicular, then you can turn your head a
20 normal way --

21 A That's right

22 Q -- but if it's as this was a 50-degree you would have
23 to --

24 A You have to take more time to turn the head and move
25 it and so forth to get a view down that track and

1 sometimes that's almost impossible but sometimes you can
2 do it

3 Q All right Let's go to Exhibit 19 and if you would
4 tell us what was significant about this in your
5 inspection

6 A This mainly shows the vegetation in here There is a
7 house right here There is another house right in here
8 It is more down here and there is some across the road
9 You don't see that in the photograph, but this is mainly
10 showing what's there on the other side of the track

11 Q And the vegetation that we see in Exhibit 19 which
12 would be to the right of someone approaching that stop
13 sign -- a driver -- would that be a sight obstruction?

14 A Oh yes

15 MR HARMON Your Honor, I object That's not the
16 direction she was coming

17 THE COURT That's correct

18 MR PARKER Your Honor, we -- Dr Heathington is
19 going to testify -- of course, if the court rules on it --
20 about his evaluation of the entire crossing

21 THE COURT What we're looking at here on 19, though,
22 those trees would be on the other side of the track?

23 MR PARKER Absolutely

24 THE WITNESS That's correct

25 THE COURT No misleading The Plaintiff was

1 coming --

2 MR PARKER Opposite direction

3 THE WITNESS Coming in here

4 THE COURT So there is no misleading, Doctor, those
5 trees over there would not have obstructed her sight?

6 THE WITNESS Right None whatsoever These are
7 used when you have to evaluate the whole crossing

8 THE COURT I understand

9 THE WITNESS And they wouldn't have had any impact
10 on her

11 MR HARMON I'm sorry, Your Honor We need a brief
12 side bar

13 THE COURT All right Come on Don't be sorry
14 (Whereupon, a bench conference was held)

15 Q Dr Heathington, did you -- were you here when
16 Mr Tyler testified?

17 A Yes, sir

18 Q And was the direction he was traveling in the
19 direction you would be coming into this picture?

20 A He was coming from -- if I am not getting names mixed
21 up, he was coming from this direction He was going the
22 opposing direction of Ms ~Harvey

23 Q Thank you

24 MR HARMON Same objection

25 THE COURT You're protected on that quadrant

1 objection and we'll put it on the record --

2 MR HARMON Thank you, Your Honor

3 THE COURT -- when the jury goes out

4 MR HARMON Thank you

5 Q Let's look at 20 and that's just, again, coming
6 closer to the crossing and looking on down Honey Ford
7 Road?

8 A Yes He was coming in here and he said when he first
9 heard something and he had his window down is right along
10 in here

11 Q Are you talking about Mr Tyler or Mr Spell?

12 A Well, that's a good question I get the names mixed
13 up I apologize One of them with the window down and he
14 was taking an employee home

15 Q That was Mr Spell

16 A Okay I apologize

17 Q Exhibit 21 is coming from the opposite direction?

18 A Yes There is the parallel roadway down there to the
19 track

20 THE COURT For local people that's 321, is that
21 correct?

22 THE WITNESS I believe that's correct

23 Q All right Now, let's look at Exhibit 39 and if you
24 will tell us what we're looking at there

25 A That's looking to Ms ~Harvey's right which you have

1 to look down and you can get an indication of the
2 skewness If you look at this stop sign here and the
3 driver would be facing out here perpendicular to that stop
4 sign and you look at how much of a skewed angle you have
5 to try to see down there it makes it very difficult

6 Q In there is also a white building that would be
7 across the track from where Ms Harvey was approaching?

8 A Yes That could affect drivers coming from the other
9 direction

10 Q Would that building be within the railroad's
11 right-of-way?

12 A Yes

13 Q And did you make a determination as to whether or not
14 that building presented a sight obstruction at the
15 crossing?

16 A It does to people traveling in the opposite
17 direction, not to Ms ~Harvey

18 Q Let's look at Exhibit 25 and Exhibit 25 is -- if you
19 would, just tell us what that is

20 A Well, if you look at these every crossing in the
21 United States has a unique national inventory number It
22 is 6 digits with a letter No two crossings in the United
23 States no matter what they are private, public, whatever,
24 have the same number no matter where they are They don't
25 change by state or anything This right here is the mile

1 post and that's how you determine on this particular
2 railroad's track where they have allocated this crossing
3 to be on the mile post identification

4 It is something similar to what you have on the
5 interstate where you are going down and you see the mile
6 posts and so forth Normally, this is put up across the
7 country and whether this has come in and is absolutely
8 required now I can't remember It's been discussed for a
9 long time, but this an 800-number to call if you have a
10 problem It is kind of like a 9-1-1 number but it goes
11 into the railroad and you can tell them, Hey, there's been
12 an accident or something is malfunctioning Say, if you
13 had an active traffic control device and there is a
14 malfunction or something, you call them and report that
15 and they're supposed to check it out and see what the
16 problem is

17 Q And if we -- Exhibit 27, if you will just tell us
18 what that shows

19 A That's just on the south side of the road and that
20 was the stop sign we were looking at that said you could
21 tell how skewed that was There is the white building
22 If you're standing in the middle of the track looking down
23 that way you can see what it looks like

24 Q Let's look at Exhibit 32

25 A This was back where we were a while ago The train

1 was coming from this direction coming down in here and
2 Ms ~Harvey was coming in this direction That shows what
3 that looks like in there

4 Q Let's zoom in, if you will, on Exhibit 32, that
5 vegetation The vegetation that is depicted in
6 Exhibit 32, would this vegetation constitute a sight
7 obstruction to people stopping at the Honey Ford crossing?

8 A Yes, when we did the --

9 MR HARMON Objection, Your Honor

10 THE COURT What is the objection?

11 MR HARMON Lack of foundation This is beyond the
12 expert's expertise and I believe it's also -- those are my
13 objections, Your Honor

14 THE COURT Well, Mr Parker, ask it in the manner in
15 which you ask your expert for an opinion more likely than
16 not to a reasonable degree of certainty Ask him that

17 Q In your opinion to a reasonable degree of engineering
18 certainty would this vegetation present a sight
19 obstruction to a motorist at the Honey Ford crossing?

20 A Oh, I know it did because we determined it

21 THE COURT Well, you have an opinion, is that
22 correct?

23 THE WITNESS Yes, I have an opinion absolutely

24 THE COURT That's your opinion, correct?

25 THE WITNESS Yes, we did the calculations on it

1 THE COURT Okay

2 Q And this brush in here I believe that you had certain
3 measurements that were made by Mr Crews and our office of
4 that vegetation?

5 A That's correct

6 Q Location of it?

7 A Yes

8 Q And --

9 A And we used photogrammetry techniques of Mr Huett to
10 determine the heights and all other conditions of it

11 Q Tell us, if you will, what photogrammetry is

12 A Photogrammetry is being able to conduct
13 three-dimensional analysis from photographs and things of
14 this nature We can get measurements on the ground where
15 you can develop a scale A photograph doesn't have a
16 constant scale on it and so you have to come back and you
17 got a lot of computer software and things of this nature
18 I have worked with a lot of photogrammetric people across
19 the United States I work a lot with Mr Gary Huett out
20 of Indiana who has a Bachelors and Masters His specialty
21 is photogrammetry work So, we can take this and while
22 from the photograph we can't tell you how high that is and
23 we can't tell you relative to a train will that hide a
24 train, but when we get through with the photogrammetry and
25 we got the elevations of the track and he can give us the

1 elevations of all of these sorts of stuff, you can
2 actually run a train through there and you can see where
3 you see the train at So, we do that on a regular basis
4 That's just common engineering work I am not a
5 photogrammetor I know something about it I work with
6 people all my life That's part of the civil engineering,
7 but I don't specialize in photogrammetry I use other
8 people who do that

9 Q My thinking about why you can't get distances in a
10 photograph and heights and that kind of thing is if you
11 want the fish to look bigger you hold it out further when
12 you take the picture and it'll look bigger in relationship
13 to you and if you want him to look smaller you pull him
14 back?

15 A Same way If you have a wide-angle lens, everything
16 looks way off Fifty-millimeter lens is what's been
17 determined officially for a jillion years to most closely
18 represent your eye as to what you see and so forth So, I
19 can take a camera -- I do a lot of digital camera work
20 myself I can pull something up real close and maybe I'm
21 using a -- I might be using --

22 MR HARMON Your Honor --

23 THE COURT I agree

24 MR HARMON He's not an expert -- He just said he's
25 not an expert in photogrammetry

1 THE COURT Let's just move along

2 MR PARKER Okay

3 THE COURT You relied on that in rendering your
4 opinion We don't need to go into a photography lesson

5 Q Dr Heathington, we've looked at certain photographs
6 here that you've used in your evaluation -- the
7 photographs we've just gone over?

8 A Yes

9 Q Did you in doing your evaluation of the crossing
10 gather other information about the crossing?

11 A Oh, yes One -- what we had to do, of course, was to
12 take a surveyor -- a licensed surveyor -- and we
13 determined grades and the layout and physical layout to
14 dimensions and so forth -- two dimension -- and then I
15 collected such things as train volumes, speeds, timetable
16 speeds, how many trains a day that you're going to use on
17 it I observed in terms of pedestrian movements or
18 anything of this nature I got what we could get on the
19 accident history for the crossing We then measured sight
20 distances and so forth and deficiencies and so forth I
21 went and drove in that whole area to see -- one of the
22 things you want to do if you can is you'd like to
23 eliminate a grade crossing You prefer not to do it

24 In this particular case, that is not very feasible
25 because there are no other routes in that general area for

1 which you could route vehicles to close this crossing so
2 you kind of have to leave this crossing there for people
3 to get access to their houses and farms and things of that
4 nature You look at the number of tracks you got through
5 there This is a single track You look at whether or
6 not you have high-speed trains with limited sight
7 distances which you have You don't necessarily have
8 high-speed cars You could if you didn't have a stop
9 sign It would be higher than desirable, but you have
10 stop conditions required there

11 You do have passenger trains You do have school
12 buses You do have hazardous material trucks using that
13 I didn't have the data I knew because I saw propane
14 tanks and stuff in the area and then we had someone
15 testify yesterday that he operates a propane company and
16 goes in there three or four times a week So, we know
17 hazardous materials goes across it And you go through
18 all of those sorts of things You look at the diagnostic
19 team review and I had information on that

20 Q We'll get with that in a minute

21 A And you look at the geometric configurations You
22 look at horizontal curves, vertical curves, crossing
23 angles, crossing surface, conditions of that with the
24 roadway, crossing width, whether or not you have paved
25 shoulders, sight distances as we were saying, intersecting

1 roadways. You look at whether or not if you have any
2 information on where the track has been inspected by FRA
3 which would certify the maximum timetable speed that the
4 railroad has for that.

5 Q And the timetable speed for that area of track was
6 what?

7 A 79 miles an hour.

8 Q And that's for Amtrak passenger trains?

9 A Yes, sir.

10 Q And did you also determine what the average daily
11 traffic was, number of vehicles?

12 A Motor vehicles?

13 Q Yes.

14 A I think it was 320 on the latest traffic counts they
15 had. Let's see here just a second. I've got it here
16 someplace.

17 Q At the top of page two.

18 A I might have overlooked it here. I'm sorry. Right
19 at the top. 320. That's what I thought it was. 320
20 average daily traffic. That came from --

21 THE COURT Speak up a little bit.

22 THE WITNESS I'm sorry. 320. That came from an
23 average daily traffic count, the South Carolina Department
24 of Transportation. That was in 3/15/04.

25 Q And the number of trains per day? Did you determine

1 that?

2 A They had seven That's what was reported in
3 interrogatories from CSX

4 Q Why is it important to have that information?

5 A Well, obviously, as the train volume increases and as
6 the motor vehicle volume increases the opportunity for the
7 correct time-space relationship to cause an accident
8 increases -- the number of them, the frequency, and so
9 forth So, seven is not a high Volume Anything under
10 six is considered light exposure unless you have passenger
11 trains and so forth and then that rules out on that So,
12 this had seven which is a lower -- on the lower end

13 Q The train here -- we know what from the event
14 recorder in this case what the train speed was
15 approximately 47-mile per hour?

16 A That's correct

17 Q And how long -- I know it depends on the length of
18 the train, but how long will a train be at that crossing
19 as it's going 47, 50 miles an hour and a normal average
20 train How long --

21 A You mean going across it?

22 Q Going across it How long will it occupy that
23 crossing?

24 A Hold on just a moment Let me get my calculator out
25 I don't trust my memory anymore At 47 miles an hour it

1 would be doing 68 93 feet per second or roughly 69 feet a
2 second Now, a rail car -- and they vary, but on average,
3 say, is about 50 feet It can be 60 You can have real
4 long ones, but say 50 Let's say you had a 100-car train
5 I don't remember what this one was A 100-car train So,
6 you'd have 5,000 feet, and, so, if you took 5 000 feet
7 divided by 69 to pass one -- one point on the road would
8 take them 72 seconds to get by that

9 Q So --

10 A A little over a minute and so forth to come by at
11 47 miles an hour

12 Q Right So, if we had seven trains a day there may be
13 trains shorter than that there is only a train there for a
14 few minutes each day?

15 A That's right And, of course, the roadway is in the
16 neighborhood of 20 feet or so, and, so, you'd have to move
17 them for that 20 feet, but that is no big deal So the
18 point is with that few of trains and that short a time you
19 don't have -- people are not used to seeing a train every
20 time you go across that crossing and that goes back to
21 what we talked about the perception that drivers have and
22 expectancies and things of this nature

23 Q The factors that you used to evaluate the crossing,
24 are those factors accepted engineering principals?

25 A Oh, yes They're not my factors They're put out by

1 the US Department of Transportation and AASHTO and they've
2 been around -- I have been in the field for nearly a half
3 a century -- not quite and I'm aware of those for 35, 40
4 years or so

5 Q You certainly make us sound older than I think we
6 are Half a century?

7 A Well, I always laugh and say I went to school right
8 after the civil war, but I have been around a good while

9 MR PARKER Your Honor, may we approach for a
10 second?

11 (Whereupon, a bench conference was held)

12 Q Let's put up Exhibit 66 If you could blow up the
13 first part of it

14 MR HARMON Subject to the earlier objection, Your
15 Honor

16 Q Dr Heathington, these are the factors that you used
17 and I believe that we've been over this so I am not going
18 to go over all of this with you again, but are these
19 published criteria for evaluating railroad grade crossing?

20 A Yes, down at the bottom of that exhibit you have --

21 Q Go down

22 A It shows where these are published You got the
23 Railroad Grade Crossing Handbook in 1978 You got the
24 Railroad Highway Grade Crossing Handbook in '86 You got
25 AASHTO in '84 and you got again AASHTO in 1990 and then if

1 you look in the new -- you got the same thing in the
2 latest handbook that came out It just hadn't been out
3 very long

4 Q And in addition to those things do you also look for
5 other things such as the geometric configuration of the
6 roadway?

7 A Yea Those are addressed by AASHTO and grade
8 crossing handbook and so forth and what those things are,
9 that has an impact upon the safety of the crossing
10 regardless of -- can have an impact on the safety of the
11 crossing regardless of what you have at the crossing
12 regarding traffic control devices

13 Q Next go to Exhibit 68 Dr Heathington, if you will,
14 tell us what that is

15 A That's just a sight distance table that specifies by
16 train speed and motor vehicle speed and you got two things
17 there that comes important or two or three or four things
18 Anyway, based on different train speeds you have to have
19 longer sight distance Obviously, the higher the train
20 speed, the further you got to see it because it's
21 traveling a lot faster When you look at the motor
22 vehicle speeds you see up at the top that's a stop
23 condition and you got 20, 30, 40, and it goes on up to
24 70 miles an hour and the one on the very bottom where it
25 says distance along highway like if you're doing 10-mile

1 an hour the driver when the driver is 69 feet from the
2 near rail they have to see the train at that point in time
3 because that's the beginning of the non-recovery zone to
4 go through two and a half seconds of perception and
5 reaction time, bring their vehicle to a stop, and they
6 will be 15 feet from the near rail, and that's assuming
7 they were 10 feet from the front bumper That's what
8 AASHTO has used for years

9 Under the new handbook AASHTO used 8 feet instead of
10 10 feet, but, you know, 2 feet -- so, you go across If
11 you're doing 20 miles an hour you need 132 DOT rounds
12 those off and DOT will use 135 and they'll use 70 instead
13 of 69 They round everything to the closest five on the
14 thing Then over on the left where it's zero that's
15 you're stopped and that is assuming -- it doesn't say that
16 you're going to stop there because it tells when you go in
17 and read the manual which is correct if you don't not stop
18 15 foot from the near rail, then you have to add distances
19 and so forth to all this and these are minimums and may
20 not be totally accurate

21 So, you'll look and you'll see if a train is doing
22 10 miles an hour, you need to have -- I can't read that
23 real well

24 Q 240?

25 A 240 That would permit an 18-wheeler, 65-foot truck

1 to go to across Those are called clearance intervals in
2 the center -- to go across and get 15 foot clearance on
3 the other side When you get up to say a 70-mile an hour
4 speed, you got to get up to 1679 if I'm reading that
5 correctly

6 Q I think it's 1918 at 80

7 A I can't -- I'm sorry

8 THE COURT No, that's on 80 miles an hour

9 THE WITNESS On 70 miles an hour, 1679

10 MR PARKER Oh, I thought you were talking about 79

11 THE WITNESS Well, at 80 miles an hour is 1918, yea
12 So, the point is that you got to have a lot of distance
13 and that clears that, but it's based on a 2 second
14 perception-reaction time from the start and it's where you
15 see the train at that point in time It does not take
16 into account any head movements or looking in the other
17 direction or anything like that which has to be accounted
18 for So, your distances can be a whole lot longer than
19 this when you take in the actual situations that occur in
20 the field from a traffic engineering perspective

21 Q And this would be if the vehicle was stopped at
22 15 feet and the driver was 10 feet back of that?

23 A That's correct

24 Q And in looking at these things do you have to look at
25 it from where all drivers will be or people that use the

1 highway you want to give them --

2 A Absolutely And if you went through the theoretical
3 thing you could take a shorter vehicle like a van or
4 something and say, well, it doesn't have the 65-foot it
5 has to travel, but the assumption is that their
6 perception-reaction time is 2 seconds If you got
7 somebody that's slower and it's 3, 3 1/2 seconds or so
8 forth Then you see you got to go back through all of
9 those again and that's from seeing the train So, it
10 doesn't -- these have always been used to accommodate --

11 THE COURT Hold on a second Gentlemen, sit down
12 Sit down Hush Mr Wilson Mr Wilson, hush Thank
13 you

14 MR MURDAUGH She's getting sick, Your Honor

15 THE COURT What?

16 MR WILSON Ms ~Frances is getting ill

17 THE COURT Okay Let her out

18 MR PARKER May she be excused?

19 THE COURT She may

20 MS CARSON Her sugar is dropping

21 THE COURT Ma'am?

22 MS CARSON Her sugar is dropping

23 THE COURT Do we need to take a break?

24 MR PARKER I think it would probably be a good
25 time

1 THE COURT All right Hang on Everybody hang on
2 We're going to go to lunch Y'all are going to Cliff's
3 Y'all have a great lunch Don't discuss the case and
4 don't let anybody talk with you about it We'll be back
5 to start at 2 o'clock They'll handle the bill just like
6 we did yesterday Thank you All right Go back there
7 and make sure she's okay

8 (Whereupon, the jury exited the courtroom at 12 44)

9 THE COURT All right Ladies and gentlemen we had
10 sort of talked last night about working through lunch hour
11 on some of these exhibits What is y'all's lunch
12 situation? Have y'all ordered something?

13 MR WILBY No, sir

14 MR HARMON We can take care of that

15 THE COURT No, no You got to eat I don't want
16 your sugar getting that way

17 Y'all have already ordered, haven't you?

18 MR WILSON Yes

19 THE COURT What is your pleasure?

20 MR HARMON Your Honor, what I suggest is -- the
21 jury is coming back at 2 If we could be back here at
22 1 30, would that give the court --

23 THE COURT I'll do 30 minutes of it because I am not
24 going to make the jury -- That s fine

25 MR HARMON That's what I am saying That's what

1 railroad installs all --

2 THE COURT Well, I know that, Mr Parker, but I
3 can't cite Johnny Parker on railroad law

4 MR PARKER But I think that what happens in reality
5 in the testimony and we could put it in the record but
6 what they do is the Highway Department gets the money and
7 the railroad then installs all the warning devices

8 THE COURT Well, that may be, but my charge on the
9 law will be similar to what I just read to y'all which is
10 pretty much quoting Judge Joe Anderson our Federal Judge
11 in the Bowman case which he is simply nothing -- doing
12 nothing but rehashing all the law that's -- Easterwood and
13 Doremus and the other crossing cases which seems to be
14 rehashing all of them

15 All right Anything more before I bring the jury in?

16 MR PARKER Nothing from the Plaintiff

17 MR HARMON Nothing from the Defendant, Your Honor

18 THE COURT All right Who is your next witness?

19 MR PARKER Dr Heathington

20 THE COURT He's still there All right Ask him to
21 come in Dr Heathington Bring the jury in please

22 (Whereupon, the jury came into open court at
23 approximately 2 06)

24 THE COURT All right Everybody eat too much fried
25 food? Please don't fall asleep Just to let you know I

1 am trying to push it along We came back at 1 20 and have
2 been in here the last 45 minutes trying to get some more
3 stuff done so I don't have to hold you up

4 All right Mr Parker you may continue

5 MR PARKER Thank you, Your Honor

6 Q Dr Heathington, we'll now look at Plaintiff's
7 Exhibit 69 if you would Would you tell us what
8 Exhibit 69 is?

9 A That's just the sight distance chart that's published
10 in the railroad grade crossing handbook which is identical
11 in equations to the other one That's what I was saying
12 earlier They round up to the nearest five

13 Q Same information?

14 A Same information

15 Q Different source?

16 A Different source

17 Q Exhibit 70 This comes out -- This next sight
18 distance requirement come out of the Norfolk Southern?

19 A Operation Lifesaver Manual

20 MR HARMON Excuse me, Your Honor Just per your
21 ruling yesterday just renewing the objection

22 THE COURT You're protected

23 Q Let's go to the next page This, again, is just the
24 same information that we've gone over?

25 A That's correct

1 Q And the railroads -- are they knowledgeable
2 concerning these charts?

3 A Yes

4 Q And Exhibit 70-A would be the Burlington Northern
5 Santa Fe sight distance chart?

6 A Yes

7 Q And the same information?

8 A Same thing

9 MR HARMON Same thing

10 THE COURT All right Mr Parker, we're getting
11 cumulative with the same information 403 Move on

12 MR PARKER Last one That's it

13 THE COURT Thank you

14 Q Now if you would go on and put up exhibit 70-A
15 Would you tell us what exhibit 70-A is?

16 A That is the sight distance calculations from the plan
17 view that we had for this crossing in question We
18 calculated and showed on there the required sight
19 distance, how much sight distance you actually had Then
20 the difference would be the deficiencies and calculate the
21 percentage From my deposition there's been one change
22 At the time we had to have all of the stuff in -- the
23 court said we had to have it in by the certain date -- we
24 didn't have the photogrammetry work done and all we had
25 was two-dimensional So, I changed one number which I

1 said I would do in the deposition I wanted to have that
2 photogrammetry work done

3 Q If you will go through exactly what you did and how
4 you arrived at this table, what was done

5 A Just a second until I get over here to the right
6 place

7 MR HARMON And, Your Honor, I just presume I am
8 preserved on the other quadrants

9 THE COURT You are

10 Madam Forelady, Ladies and Gentlemen of the jury,
11 obviously, what this lawsuit concerns is the quadrant in
12 question which would be the southeast quadrant So,
13 really, the other quadrants aren't relevant as to the
14 issues concerning the sight on this particular quadrant,
15 but, obviously, to give opinions concerning the safety of
16 the entire crossing we'll allow some testimony about the
17 other three quadrants and that's the reason for that --
18 not to show whether the quadrant in question was, for lack
19 of a better term, good or bad, negligent or not negligent,
20 that sort of thing Okay? That's why we're sort of going
21 into the other three quadrants just sort of as background
22 and for him to form his opinion

23 With that, Mr Parker, we can move through those
24 three quadrants very quickly and then concentrate on the
25 one in issue

1 Q Let's look at the northeast quadrant and if you would
2 tell us what quadrant that would be in relationship to
3 Honey Ford Road

4 A If as Ms -Harvey pulled up and stopped it would be
5 across the track I'm sorry It would be on her right
6 That's the one that you looked at on the right That's
7 east side The track runs north to south The road is
8 not perpendicular to it It's a little off on that, but
9 it's the one on the right hand side That's the
10 northeast The one below it is the southeast That's the
11 quadrant in which is accident in question occurred

12 Q And the available sight distance there would be what
13 -- what would be --

14 A Well, the available sight distance -- I calculated
15 for three speeds plus the stopped condition which is
16 required

17 Q Let's just talk about the stopped distance

18 A Okay I don't have the one here The one where we
19 changed it after we got the photogrammetry -- Well, the
20 northeast would be correct The northeast the train
21 available would be 43 feet That's all you could see at a
22 90-degree head turn So, you needed 1896 for train speeds
23 through there That would be 79-mile-an-hour train speed

24 Q In doing these why do you -- that means that in order
25 for available sight distance the driver would only turn to

1 90 degrees?

2 A That's what AASHTO uses is 90-degree and that's what
3 we calculate things on If somebody says, Well, I looked
4 further, then you may have to look up and look down, but
5 if you take the standard head movement like so it's
6 90 degrees

7 Q And, in essence, if you will explain to us how that
8 figure was arrived at -- that 43

9 A Oh, you just simply place where the driver stopped
10 and in this particular one we took what AASHTO normally
11 uses which would be 10 feet -- Well, as an example the
12 front of the vehicle is at the stop line The distance
13 from the driver to the front of the vehicle is assumed to
14 be 10 feet That's what AASHTO uses That's been reduced
15 in the last year or two So, we go back to the stop line
16 and which was the total distance in there to where they
17 were stopped was 36 feet, and, so, then you look over and
18 you needed 1896 You only had 43, and that's because of
19 the head movement limitation You noticed the double
20 asterisk there it says available sight distance due to
21 head movement limitations as a result of the skewed
22 crossing angle because you had a 50 degrees -- that's a
23 highly skewed angle So, you're going to have to turn
24 your whole body and everything to be able to see down
25 that That's not the normal standards of care that we're

1 to use So, you had a deficiency of 97.7 percent

2 Q All right Let's go to the southeast quadrant and
3 that is the quadrant that we're -- Let's come back to
4 that We're going to come back to the southeast Let's
5 go to the southwest

6 A The southwest Then the driver would be from the
7 stop line over there would be 31 feet and then you need
8 1896 You can only see about 30 feet and you got 1866
9 deficiency You got about a 98.4 percent deficiency You
10 go to the northwest which is the one I started out saying
11 is caty-cornered across and you have 31 feet, the same one
12 in southwest You can see about 334 feet down the track
13 from that side and you have a deficiency of 1562 or
14 82.4 percent deficiency

15 Q Is this some information you used in evaluating the
16 entire crossing?

17 A Yes Now, the number that I have changed is one on
18 the southeast that we will get to because of the
19 photogrammetry

20 Q Let's go back to the southeast

21 A Okay When you calculate these from a -- if I may
22 explain, sir May I explain?

23 Q Certainly

24 A You calculate this from a plan view which is
25 two-dimensional So, you can't tell how high the

1 vegetation is Like we were looking at those photographs
2 and we don't know if that's 5-foot, 6-foot, 10-foot, or
3 what So, you have to draw where the vegetation is and if
4 you got big tall trees 30 or 50 or 60 feet that is no
5 problem because you know no question that that is going to
6 hide everything, but when you got them that's marginal and
7 you don't know then you come back in and use
8 photogrammetry techniques We did not -- because of the
9 court's deadlines we did not have time to get that done
10 until we go had to get the first stuff in

11 So, we came back and on the southeast where we have
12 here that you can see 329 feet when you come back in and
13 do the photogrammetry techniques and run the train through
14 there and when it becomes an unobstructed view which is
15 what AASHTO requires it's about 650 feet So, you can see
16 a little over 300 feet more than what we had on here
17 Now, when you get to other quadrants you see the trees are
18 up high and that sort of thing, and I should have -- right
19 up there in the southeast there would be a 65 7 percent
20 deficiency so you're a significant deficiency

21 Q Based upon what you observed at the crossing what is
22 your opinion about what CSX needed to do to provide an
23 adequate warning?

24 A Well, you've got --

25 MR HARMON Objection to the earlier argument we

1 made reserving my argument

2 THE COURT What CSX needed to do?

3 MR PARKER Should do

4 THE COURT All right I'll listen to his answer

5 Then I'll

6 THE WITNESS Well, there's various options that you
7 can do to take care of things Obviously, one thing that
8 can be done would be to clear out all of the vegetation
9 and clear all of that out where you could see and a second
10 alternative would be to come in and do a combination of
11 slowing -- not have so high train speeds and clear out as
12 much vegetation as you can get You would have some
13 problem here if you just tried to clear the vegetation
14 because you got houses in there, too, and, obviously
15 you're not going in and move all of those houses out of
16 there, and, so, it may be a combination of things to slow
17 the train down

18 If you don't want to slow the train down to where the
19 driver has adequate sight distance, then, obviously, you
20 have the look at active traffic control devices which
21 compensates for the deficiencies and sight distance

22 MR HARMON I just renew my objection

23 THE COURT Well, obviously, this is a point of
24 contention in this case and, you know, providing a
25 reasonable and safe crossing, and one of the doctor's

1 options he just said was the lights and the gates Let me
2 just tell you a little bit about that That's what we've
3 been talking about while you're not in here I just want
4 to make sure everybody understands this

5 There are some statutes in South Carolina and at the
6 conclusion of the case I will tell y'all more about this
7 in detail, but just for right now the law in South
8 Carolina is that the ultimate decision to put lights and
9 gates rests with the South Carolina Department of
10 Transportation Obviously, the railroad cannot make that
11 decision themselves and go out and do it under the current
12 law They have a duty to maintain a safe and reasonable
13 crossing That includes inspecting the crossing and if
14 they feel some of these options are necessary and then
15 they could go to the Highway Department and the ultimate
16 decision would be the Department of Transportation

17 The railroad has a duty to maintain a safe crossing,
18 but the state law just won't let them go out and put up
19 signs at any -- signs at crossings at any crossing They
20 have to have approval and they have to have the approval
21 by the South Carolina Department of Transportation If
22 that becomes an option the railroad can't do it without
23 approval from the state agency I'll give you the
24 specific language of the statute and some holdings in some
25 cases when we charge or instruct you on the law at the end

1 of the case

2 Any objection to that limited instruction,

3 Mr Parker?

4 MR PARKER None, Your Honor

5 THE COURT Mr Harmon?

6 MR HARMON None, Your Honor

7 Q Dr Heathington, let's look at Exhibit 70-B

8 MR HARMON Again, Your Honor, same objection

9 Earlier argument heading into things we discussed just for
10 the record

11 THE COURT 70-B was what?

12 Q This is a -- Dr Heathington, if you would, just tell
13 us what this is

14 A They began to do research work

15 MR HARMON May we approach on this, Your Honor?

16 THE COURT Yea Just take that off for a second

17 (Whereupon, a bench conference was held)

18 THE COURT Let the record reflect we had a side bar

19 on --

20 MR HARMON It's 70-B, Your Honor

21 THE COURT 70-B?

22 MR HARMON Yes, Your Honor

23 THE COURT All right I am going to sustain your

24 objection and both of you can put your positions on the

25 record when we take a break

1 Q Dr Heathington, we're now going to put up Exhibit
2 70-D, and, if you would, tell us what Exhibit 70-D shows

3 A That's where we took the photogrammetry techniques at
4 the height of all of the vegetation through there, took a
5 train, pulled it up there and by judgment which was my
6 judgment that was about the first position that it's
7 unobstructed which as AASHTO says you should have and it's
8 650 feet You could see part of the train further back
9 obviously, but this is the first place in my opinion
10 roughly that it becomes unobstructed

11 Q Now, if you would --

12 THE COURT Mr Parker, is this an actual photograph?
13 What is this?

14 MR PARKER No We're looking at a -- This is a
15 computer-generated photograph?

16 THE WITNESS Yes, from the photographs that were
17 taken at the time of the accident with all of the
18 photogrammetric work and the surveyors -- the licensed
19 surveyors that come out and did all of the measurements
20 and so forth It is based on that

21 Q Where is the -- would the driver be positioned in
22 that photograph?

23 A That photograph if I have my notes the driver is --
24 the driver is 4 4 feet from the front end of the van and
25 the van is approximately 6 feet or so I have got to go

1 back and get that number -- from the stop line

2 Q We'll get that later But was the purpose of this --
3 We used this figure that we saw 650 in your chart where
4 you evaluated sight distance?

5 A Let me qualify that because I've done so many of
6 these in this particular case to look at This is -- this
7 is three and a half feet high and her height was higher
8 than that in the van and I would have to go back and pull
9 my notes on that, but that's from the stop line back
10 It's a legal stop only three and a half foot high which is
11 for a -- you're doing the sight distance evaluation and
12 you evaluated for what the average driver's eye height is
13 which is three and a half feet adopted by AASHTO That's
14 been adopted 30 or 40 years ago and, so, that's where
15 that's taken from It is not taken from Ms ~Harvey's
16 viewpoint

17 Q It would be taken from the distance behind the stop
18 line required by AASHTO?

19 A Yes

20 Q That is how far?

21 A Well, they say -- what they say is you're 10 feet
22 back from your front bumper

23 Q And Ms ~Harvey was not that far back?

24 A No She was four-point -- 4 4, 4 5 feet back

25 Q Now, did you also look at the van that Ms ~Harvey was

1 in to make a determination of the status of where she was
2 hit where the vehicle was hit, and also the -- whether
3 the windows were up?

4 A Yes First of all, we always take the
5 manufacturer's --

6 MR HARMON Objection, relevancy

7 THE COURT As to whether the windows were up?

8 MR PARKER Correct

9 THE COURT I deem it to be relevant

10 THE WITNESS We take the manufacturer's

11 specification Each manufacturer puts out the

12 specification length width, height, and all of this other

13 stuff of every vehicle manufactured We have databases we

14 go in and pull that out We did all of that We took

15 Ms ~Harvey's height and as people can see you know she's

16 not a real tall person or anything like that So we

17 positioned her relative to how close --

18 Q Let me ask you --

19 THE COURT Yea, he's --

20 MR PARKER - before we get into that I asked you

21 about the van and did you look at the van as to where it

22 was hit on the van?

23 THE WITNESS Oh, yes, yes

24 Q I'm sorry I think I asked the wrong question

25 Let's put up Plaintiff's Exhibit 8

1 A One of the things you do --

2 THE COURT Well, what is the question?

3 Q The question is did you look at the van?

4 A Yes

5 THE COURT He did Now, what's the question?

6 Q Where was the van struck?

7 A It was struck roughly back where the passenger area
8 would be in the back seat It knocked the left rear wheel
9 off It hit in that general area

10 Q And if you will in this photograph if you will zoom
11 in on the window there -- the front driver's window -- and
12 could you make a determination in there -- That's not a
13 very good picture

14 A No There are some better ones than that

15 Q We'll get a better one Excuse me Put up
16 Exhibit 53 and this would show the --

17 A Window is up

18 Q On the passenger side?

19 A Yes

20 Q Exhibit 55

21 A Yes

22 Q And what does Exhibit 55 show?

23 A Well the way you determine whether or not a window
24 was rolled up when you have an impact is you go up in the
25 track --

1 THE COURT Hold on Hold on

2 MR HARMON I have an objection that's outside
3 the --

4 THE COURT He hadn't been qualified In fact, you
5 haven't offered him in any real field

6 MR PARKER Well, we will offer him in the field of
7 accident reconstruction that he's testified that he's
8 worked in and taught in and I further qualify him

9 THE COURT I haven't heard the word accident
10 reconstruction Isn't that something we can all look at
11 and determine whether it was up or down?

12 MR PARKER Well, I would hope so, but this is the
13 way people investigate accidents

14 THE COURT But you haven't qualified him as an
15 accident reconstructionist

16 Gentlemen, what is your position?

17 MR HARMON I am just objecting that he's not
18 qualified as an accident reconstructionist

19 THE COURT Sustained

20 Q Dr Heathington have you worked in the field of
21 accident reconstruction?

22 A Yes I started doing that in 1963

23 Q Are you a professional engineer?

24 A Yes, in four states

25 Q And have you in the past investigated numerous

1 accidents for the purpose of giving testimony in court?

2 A Hundreds or thousands

3 THE COURT Hundreds of thousands?

4 THE WITNESS Hundreds or thousands It s been
5 numerous ones I have been in it for nearly 40 years

6 Q And have you -- Do you know the principals involved
7 in accident reconstruction?

8 A Oh, yes I have taught that I've had courses in
9 it I have done that for like Texas Highway Department,
10 Illinois Division of Highways -- did it in consulting work
11 in universities and so forth since 1963

12 THE COURT Any voir dire on his qualifications?

13 MR HARMON No, Your Honor

14 THE COURT All right And the reason we do that
15 Madam Forelady and Ladies and Gentlemen, if I were in here
16 testifying about this collision between the train and the
17 car I can only testify about what I see or -- I can't give
18 opinions because I am a lay witness If I qualify someone
19 as an expert in a certain field, the rules of evidence
20 allow that person to give opinion testimony So he is
21 going to opine as to whether the window was up or down
22 So, he can give that opinion based on his training and
23 experience and so forth, and at the conclusion of the case
24 I'll tell you about what weight and all you give expert
25 witnesses testimony We'll have -- I'm sure the railroad

1 will have experts So, they're allowed to give opinion
2 testimony whereas if I were testifying I could not in the
3 field of accident reconstruction Okay

4 Mr Parker, ask him the opinion about the window

5 Q Doctor Heathington, in your opinion what is shown in
6 Plaintiff's Exhibit 55?

7 A Well you're showing what is a fundamental principal
8 that we all check I have done hundreds of these If you
9 can find glass particles up in the track up at the top,
10 that means the window was up when it got hit and cracked
11 and it left some of that If you go up and run your hands
12 through there or take photographs or whatever and there is
13 nothing up there then that's generally considered to have
14 been cracked some way and you go down in the side of the
15 track until you find some particles of glass and you can
16 see -- when you start looking in there and up in here and
17 you see in there you see those particles of glass, that
18 means the window was rolled up when it got hit

19 MR PARKER William, put your arrow over there

20 We're talking about particles of glass right in --

21 THE WITNESS Yes, all up in this See this here
22 When you go through all of the photographs that existed
23 you got it up in here which means it was rolled up

24 Q All right

25 A That's just a fundamental thing you do It is like

1 you look at the tail light on a car and find out if it's
2 bent or so forth to tell if the tail lights were on when
3 the impact occurred and things like that So, those are
4 just fundamental in accident reconstruction

5 Q All right Let's look at Plaintiff's Exhibit 57 It
6 shows that the door is pried open at an angle Can you
7 identify that as the driver's door?

8 A That's the driver's side, yes

9 Q And then let's go to -- and Exhibit 58 would show
10 where the window was up at that level and broken out?

11 A At least you know it's up some just from this bottom
12 part because you can see where it is If it was all the
13 way rolled down you wouldn't have this glass here

14 Q Exhibit 59 That is just showing the glass?

15 A Right Yes

16 Q The glass is up

17 A These were all up, uh-huh This wasn't broke out

18 Q Dr Heathington, at this time I'd like to ask you
19 about did you do an animation to represent what Ms ~Harvey
20 experienced on May 30, 2004?

21 A Mr Huett and I did I do the mathematics,
22 basically, and the head movements and how much of that and
23 so forth and he does all of the computer software
24 programming and video and put it all together

25 Q And as far as engineering goes if you would tell us

1 about this process of what engineering goes into it

2 A Well obviously, traffic engineering goes into it,

3 but you got to know something about human factors and you

4 got to know something about head movements and times and

5 things of this nature You got to know that everybody is

6 not the same Different people are different The older

7 you get you slow down in certain things and things of this

8 nature which we've all been doing research in for a

9 jillion years, and then much of it is just simply physics

10 You take feet per second of travel You take seconds

11 that it takes to turn your head or whatever and the

12 vehicle may be moving forward at that time or may not It

13 may be stopped It takes time to make decisions as you're

14 looking at something It doesn't occur instantaneously

15 and things like that So, you go through that and that

16 part is all traffic engineering, but a lot of it is simply

17 physics -- that mathematics part of it

18 Q You have to do acceleration rates?

19 A That's right

20 Q And things of that nature?

21 A Deceleration rates, acceleration rates Yes, that's

22 correct

23 Q And then Mr Huett would then put that into a

24 computer animation form?

25 A That's correct He has to -- you have to have

1 certain software and you need certain types of computers
2 and things of this nature to make that work right He is
3 set up and he's been doing that probably 25 or 30 years

4 Q I am going to -- at this time I would like for you to
5 walk us through the animation and if you will tell us what
6 you're looking at and so forth

7 THE COURT Hold on one second Let me see y'all at
8 side bar

9 (Whereupon, a bench conference was held)

10 THE COURT All right Are you ready to do the
11 animation?

12 MR PARKER It is Exhibit 7 Your Honor

13 THE COURT It is done through a computer animation
14 and it is sort of a recreation based on what he s
15 testified

16 THE WITNESS Before we actually turn it on, may I
17 say something -

18 MR PARKER Sure

19 THE WITNESS -- once you pull it up on the screen?

20 MR PARKER Sure

21 THE WITNESS Let's go ahead and pull it up Back it
22 up to where it s before it actually starts forward May I
23 explain how you go about setting these up?

24 Q Certainly

25 A When you do an animation what you do is you take all

1 of the available data what you have what people have said
2 that can be -- you don't want to do anything unless there
3 is evidence of that fact that something in here is
4 unreasonable or imprudent or not logical or anything like
5 that So, there are certain things that's been testified
6 about what Ms ~Harvey did or didn't do, and, so, we've
7 incorporated that sort of thing in there Obviously, no
8 one knows every exact fraction of a second that goes on
9 but what's there there is nothing unreasonable about it,
10 nothing imprudent about it It is just the normal driver
11 So we can go now

12 (Whereupon, the animation video is played)

13 THE WITNESS That's not correct That is not
14 running right

15 THE COURT All right Well let's hold on a minute,
16 fellows

17 THE WITNESS That's not right

18 THE COURT Mr Parker, what do we need to do?

19 MR PARKER I think just back it up and it is fine,
20 I think It's a computer glitch, I think

21 THE COURT Let's start it over

22 MR PARKER Start it out the way it starts

23 THE COURT All right Hold on Whoa, whoa

24 THE WITNESS Wait What's that screen down there?

25 MR PARKER That's something off the computer

1 apparently

2 THE WITNESS That shouldn't be on there

3 THE COURT Hold on a second We got it ready now?

4 (Whereupon, the animation video is played)

5 THE WITNESS No, no, that's not right

6 MR PARKER Your Honor, we'll come back to this

7 THE COURT All right Take it off since it's not
8 right, please

9 THE WITNESS It's not supposed to be jumpy

10 THE COURT Hold on Just let me handle it

11 Madam Forelady, Ladies and Gentlemen, please

12 disregard that animation, and I did it for 30 years The
13 worst thing in the world is to get in the courtroom and
14 you got everything ready to go and your computer goes --
15 we're going to get it straight

16 Y'all need a little break to get it straight?

17 MR PARKER Your Honor if we could have two
18 minutes

19 THE COURT Okay Y'all just step back there for a
20 real quick break and I'll get it straight

21 (Whereupon, the jury exited the courtroom at 2 39)

22 THE COURT William, you got it ready?

23 MR BARNES We hope, Your Honor

24 THE COURT Your first big flop All right

25 Mr Harmon, if you would, we had a side bar before we

1 started the animation Just to put on the record -- the
2 pretrial conference you said you didn't think you were
3 going to object to the animation as long as they laid a
4 foundation and I asked you at the side bar and you told me
5 that is correct that if they had laid the proper
6 foundation and there would be no objection

7 MR HARMON There is no objection That's correct,
8 Your Honor

9 THE COURT Now, Mr Parker, do you think we can do
10 it without a glitch?

11 MR PARKER We hope so, Your Honor I'm not -- I
12 can't speak to the computer

13 THE COURT You know, that's about the only time I
14 have ever heard Johnny Parker not be sure of himself

15 MR PARKER I don't know about this

16 THE COURT In all seriousness, what are we going to
17 do if it doesn't go?

18 MR PARKER Well, it worked twice correctly
19 Apparently, something about starting it up

20 THE COURT Dr Heathington said this is an Apple
21 versus Mac

22 (Whereupon, the jury came into open court at
23 approximately 2 45)

24 THE COURT Okay We'll give it another try
25 Mr Parker?

1 MR PARKER Thank you, Your Honor My able,
2 technical assistant here is getting it ready So, we'll
3 make sure it works correctly

4 THE COURT Now, please, don't blame it on him

5 MR PARKER I promise you it won't be his fault I
6 can't be of much help to him either with the computers

7 (Whereupon, the animation video is played)

8 Q Dr Heathington let's run through this again and let
9 you take us through this and tell us about what you did
10 the acceleration rates, and how you did the animation
11 using the animation

12 A Okay Let's go back before we started at the
13 beginning Go to the beginning of it What we did is we
14 took it just after you've turned from 321 going towards
15 the crossing and we let the car -- the van get up to
16 21 97-miles per hour It is nothing magic about that It
17 is the distance to the impact point is about 208 feet --
18 front bumper and near rail and you got to remember we're
19 talking here about the right part of the front bumper and
20 there is about 5-foot difference between how close the
21 right part of the bumper and the left because of that skew
22 of that 50 degrees that you have in there The driver
23 near rail and that's over on the driver's side is about
24 195 69 The time at the point of impact is 32 50 seconds
25 The train was doing 48 30 It changes some over time by

1 the time it gets up there That's how many feet it is

2 You can see the advanced warning signs are in

3 Pavement markers are in As you'll get up there you'll

4 see the stop lines in The crossbuck signs are in The

5 stop signs are in -- everything of this nature So let's

6 go ahead and when you get to the stop line and it stops,

7 then stop it Okay Hold it

8 Now, some interesting things here is that when you

9 take Ms ~Harvey's height and sitting in the van and that

10 sort of thing and the distance to the front you'll notice

11 she's not seeing -- Can you back it up just frame by

12 frame? Just keep backing frame by frame for a while?

13 Whoa Go up a frame or two Just a frame or two One

14 more Whoa, that s all right

15 Now, she's fixing to leave sight of the stop line of

16 where you are In many vehicles you can't tell where the

17 front bumper is I've got one pickup that I cannot tell

18 you any form or fashion of where that front bumper is In

19 fact a lot of times my wife gets out of the car and says,

20 Hey you need to pull up It's difficult for the driver

21 to see Let's go on up She's keeps going forward and

22 she keeps going up until it comes to zero That s where

23 she's stopped, but she's lost sight of the stop line for a

24 good little bit there

25 Okay, now she's going to move her head to the left

1 We have her head to the left first and from what I
2 remember reading in her deposition she said she looked to
3 the left So, we moved it over and took it over there and
4 that's what she can see Now we have her only - normally
5 you'll look about a second or so when you get to the final
6 resting place You don't sit there for 10 minutes and see
7 if something is coming or anything like that So you
8 don't see anything Now, come back again to the right,
9 and she goes all the way around to the right and you get
10 up here and you see how far you can see at a 90 degree --
11 This is a 90-degree head movement, and if you had that
12 door post off you'd see that white house - little white
13 house there

14 So, you see you can't see very far So we have her
15 lean up a little bit and look on down and see down the
16 tracks and she looks there for a short period of time,
17 and she moves her head back around and she hasn't seen a
18 train in either direction and she goes forward now

19 Q Dr Heathington, why would as you are approaching a
20 crossing like a reasonably prudent driver when you look
21 left and look right why don't you look back to the left?

22 A Well, as I said earlier either today or yesterday you
23 could do that for three days because when you look back to
24 the left the second time in this particular case you could
25 see the train However, if the train wasn't coming should

1 you look back to the right again and then if you didn't
2 see one there should you look back to the left again? I
3 mean, that's not a normal practice It's not -- there is
4 nothing wrong with doing that, but you don't know where
5 the train is coming from because they run both directions
6 so you're just sitting there going like this for a long
7 period of time saying has one come into sight and so
8 forth

9 So that's not what has called is acceptable design
10 or one that would meet the standards of care You should
11 not have to do that if your crossing is designed
12 correctly

13 Q The whole time after the person in this animation
14 looks and is not looking to the left again, what is the
15 train doing during that period of time?

16 A It is moving on about 46 to 47 miles an hour right on
17 up to the point of impact

18 Q Let's go back through it again and let's go back to
19 the stop line, if you would Go on back Stop it right
20 there As she's stopped at the stop line it says front
21 bumper to near rail 27 13 What part of the van is that?

22 A That's the right We used the part of the bumper
23 that's the closest to the near rail because obviously it
24 gets hit first and, so, there is about 5 or 6-foot offset
25 because of the 50 degree skewed angle in there

1 Q In other words on one side of the white line was
2 19 4 It would be approximately 25 4 on the other side?

3 A Yea

4 Q So that's the difference in the front bumper to the
5 near rail is 27 13 on the right side with the driver to
6 the near rail -- the driver --

7 A The driver is on the left-hand side uh-huh

8 Q So, you used a distance of driver behind front bumper
9 you said four-point something?

10 A I believe it s 4 5 as I had it in there That was
11 actually calculated with Mr Huett based on the
12 manufacturer's specification of the van and so forth

13 Q And so if -- how wide is the white line there?

14 A It would be supposed to go across there and I would
15 have to look to see

16 Q I am not talking about width

17 A Oh it is 2-foot wide in terms of --

18 Q Right

19 A That's specified by the MUTCD

20 Q So you would have -- on this if the front bumper is
21 27 13 and it was 19 4 for -- it would be 21 This is --
22 the vehicle is sitting at some 6 feet beyond the --

23 A Yes

24 Q -- back of the white line?

25 A That s right

1 Q How did you position the vehicle at that location?

2 A What was different -- in her deposition she testified
3 that she pulled up - she said, I pulled up past the
4 utility pole That's the utility pole So we pulled up
5 past it She said, I just got past the utility pole So
6 we pulled it up there and had her look down in that
7 direction

8 Q Now, the train at that point in time is 1377 feet
9 away?

10 A That's correct That's correct

11 Q And in order to be able to avoid that train she would
12 have to see it at that location?

13 A That's correct

14 Q Before she turns her head?

15 A That's right

16 Q And you have her --

17 A You cannot - if I may say this You cannot say,
18 Well if you don't look back again you're imprudent
19 because that's not true Otherwise you would have them
20 standing there all day long going back and forth

21 Q So you have her turning to the right?

22 A And, so, if you lean up to see down the track then
23 that adds a little time to that

24 Q And what did you base the acceleration rate on that
25 you used?

1 A We used the same thing that AASHTO uses which is
2 1 45 feet per second squared

3 Q Is that a fast rate, slow rate?

4 A That's a slower rate, but you look at her age and
5 what she said she was doing and how to anticipate that age
6 and so forth and the human factors perspective and from
7 the traffic engineering and that's about reasonable
8 That's what AASHTO uses is 1 4 You might have as much as
9 three You might take a kid that's 16 years old and he
10 may get a whole lot faster than that, but that's not what
11 you have operating here This is not unreasonable and
12 prudent This is in the standards

13 Q And is that the engineer's testimony that she was
14 approaching slowly?

15 A Yes

16 Q Did you take that into account?

17 A Oh, yes Absolutely

18 Q Right now do you have an opinion as to whether or not
19 had CSX complied with their vegetation control program she
20 would have been able to have seen this?

21 MR HARMON Objection until the proper foundation
22 has been laid He said CSX control program Your Honor
23 My objection is foundation

24 THE COURT Lay a little more foundation

25 Q Doctor Heathington, are you familiar with CSX

1 vegetation control program?

2 A Yes They've had one for a long time and they've
3 updated it some over the years

4 Q If you would, we'll put up a document that goes over
5 the specifications

6 MR WILBY Johnny, what exhibit, please?

7 MR PARKER Exhibit 95-D

8 THE COURT Hold on before you put it up Any
9 objection to 95-D?

10 MR WILBY Judge I'm getting to it right now

11 THE COURT No problem

12 MR WILBY Your Honor, that was not one of the
13 documents we were able to talk about

14 MR HARMON May we approach?

15 (Whereupon, a bench conference was held)

16 THE COURT I just made a suggestion we do it a
17 little quicker way and I think they both agreed

18 Q Dr Heathington, I am going to hand you an
19 Exhibit 95-D and I am going to ask you some questions
20 about CSX specifications

21 THE COURT I thought we decided we weren't going to
22 put that in

23 MR HARMON That's what we just decided, Your Honor

24 THE COURT That he was familiar with the program
25 that CSX has and we're just going to ask him the question

1 MR PARKER That's what I was going to do Your
2 Honor, but his specification -- I felt it would be helpful
3 for him to have the specification

4 THE COURT That's fine It's not in evidence right
5 now It is just for him to refresh his memory

6 MR PARKER Correct

7 Dr Heathington, are you familiar with the CSX
8 specifications for maintaining vegetation at grade
9 crossings?

10 THE WITNESS Yes I have read them at various
11 times That's correct They have changed them some over
12 the years

13 Q All right And if you look there that specification
14 is that they re to clear the vegetation at the road
15 crossing 300 to 600 to 900 feet depending upon --

16 A Yes They go by 30-mile-an-hour train speed,
17 60-mile-an-hour train speed, and above 60

18 Q And that specification is 300, 600, and 900?

19 A Yes sir

20 Q And they re supposed to clear the vegetation how much
21 above the ground?

22 A They're not supposed to leave anything as I recall
23 4 inches above That's the highest you want it laying on
24 the ground or anything like that, and then they cut it
25 down - they got the specific inches and so forth in here

1 They can let some of the grass grow to 36 inches in time
2 but desirable vegetation must not exceed a height of
3 18 inches and it goes into all of these different specific
4 things In fact the contractor shall treat woody species
5 and cut stumps 3 inches in diameter and greater to prevent
6 regrowth and so forth So, it gives all of these
7 different dimensions in cutting it down real low So
8 it's not -- in other words, it won't effect sight
9 distance

10 Q And you're familiar with that they changed that to
11 350 650, 950?

12 A Yes

13 Q To go out for 100 feet and then tapered?

14 A Then tapered off That's correct

15 Q For the entire width of the right-of-way?

16 A Yes sir

17 Q And did you do an animation that shows what would
18 have happened had CSX followed this program?

19 A Yes, we did It's the same animation that you saw
20 We just simply removed the trees and stuff for their
21 vegetation control program and cut them out and you can
22 see that on that same animation

23 THE COURT Hold on a second Any objection?

24 MR HARMON Just the earlier objection we raised
25 about this particular animation, Your Honor

1 THE COURT I thought we didn't have any objection to
2 the other animation

3 MR HARMON We did not -- not to -- this is the
4 second --

5 THE COURT All right As to this one?

6 MR HARMON We object May we approach Your Honor,
7 briefly?

8 THE COURT Yes, sir

9 (Whereupon, a bench conference is held)

10 THE COURT Mr Harmon remind me to put that on the
11 record

12 MR HARMON Yes Your Honor

13 THE COURT All right Get it ready

14 (Whereupon, the animation video is played)

15 Q Dr Heathington this vegetation is cleared in
16 accordance with the CSX vegetation -

17 A Yes, sir

18 Q -- clearing program?

19 A Yes sir, and their diagrams and so forth for those
20 different speeds

21 Q And that program was in effect that they were going
22 to -- committed to do this program and complete it?

23 A Yes, sir

24 Q And on May 30 2004 this was in effect?

25 A I believe that's correct -- those dates

1 Q Let me ask you in matters you've been involved in
2 have you seen and reviewed documents that -- concerning
3 the adoption of this vegetation clearing program?

4 A Oh, yes One of the original recommendations came
5 out of Stephenville, Texas That's down close to our
6 ranch

7 Q I will -- Your Honor, let me approach a minute - I
8 don't want to go afoul of the court's ruling

9 (Whereupon, a bench conference was held)

10 THE COURT Mr Parker, I am going to sustain the
11 objections on that for the reasons stated in the motions
12 in limine It may become relevant relative to certain
13 events in the trial

14 Q Go to Exhibit 38 -- excuse me, 78 I misspoke
15 Dr Heathington, Exhibit 78 -- if you can blow that up so
16 Dr Heathington and the jury can see it -- is this a
17 document -- CSX document that discusses introducing a
18 program for cutting vegetation at right-of-ways on the CSX
19 system?

20 A Yes

21 Q And it says that in here where we go down to number
22 six we'll target the southern region the first year in the
23 following states in priority due to highest incidents at
24 grade crossings per Ed Codd and South Carolina was one of
25 those states?

1 A That's correct

2 Q And they were to cut the crossing 300 feet on each
3 side of the crossing unless state requires more and the
4 full length of the right of right-of-way not to exceed
5 100 feet?

6 A Yes

7 Q And they -- in this is saying that they would remove
8 the vegetation initially for the first -- the entire width
9 of to right-of-way for 300 feet?

10 A Yes

11 Q On the date that Ms ~Frances Harvey had the collision
12 and Mr Beryl Harvey was killed did they have the
13 vegetation cleared out for 300 feet for the entire width
14 of the right-of-way?

15 A No You can go back and look on that there and see
16 it had grown It looks like at one time they may have
17 cleared something out, but it was never maintained and it
18 just grewed back up again

19 Q Next you go to Exhibit 79

20 MR HARMON Your Honor, just for the record -- I
21 know you've ruled - just to renew our earlier --

22 THE COURT You are protected on the grounds as
23 stated in the motion in limine

24 MR HARMON Thank you Your Honor

25 Q If you will read what it's saying there is this a

1 CSX memo?

2 A It says there is a possible source of state funding
3 for the initial clearing at the crossings in South
4 Carolina The state contact responsible for the section
5 130 funding is R F Jenkins at (803)737-1620 I have
6 been told they would possibly fund the initial clearing if
7 we have a program in place to maintain what is initially
8 cleared I want to get your approval to contact this
9 person or know if either of you want to handle it Please
10 let me know at your earliest convenience Thanks, Vinny

11 Q At the crossing at Honey Ford Road did they have a
12 program in place to maintain what was initially cleared?

13 A They had the program I have seen for the last several
14 years of the clearing and so forth I don't know -- I
15 don't remember if there was a program with the state where
16 the state put money into it I don't remember if that's
17 what you're asking --

18 Q My question was did any clearing get done -- if it
19 was cleared initially, did they have in place or did they
20 execute a program there to clear that vegetation and keep
21 it maintained?

22 A No There was nothing that was being done In fact
23 if you look at all of the other quadrants there and that
24 applies to the entire crossing and not just to one
25 quadrant

1 Q And if we would we'll go now to exhibit --

2 Plaintiff s Exhibit 83 Is Exhibit 83 where they decided
3 that they would go forward with the program to do the 300,
4 600, and 900 feet clearing?

5 A Yes

6 Q Let's go down to the bottom and it says as with the
7 South Carolina pilot the program applies at passive public
8 crossings unless otherwise specified and the pilot would
9 be the 100, 300 feet clearing?

10 A That was my understanding

11 Q Let's go to Exhibit 87

12 MR HARMON Again just as before Your Honor renew
13 the objection

14 THE COURT Okay You re protected

15 Q Exhibit 87 concerns the Highway Rail Grade Crossing
16 Clearing Program?

17 A Yes I can't read it very well from here You need
18 to blow it up

19 Q May 4, 2002?

20 A Yes That's correct

21 Q And then let s blow up the first paragraph It says
22 CSX is about to launch a system-wide program to clearcut
23 and control trees and vegetation at public grade crossings
24 equipped with passive warning devices The program
25 involves clearing the land at designated passive public

1 crossings to improve visibility for the motoring public

2 Is that correct?

3 A That's correct

4 Q It is anticipated that the subsequent growth of
5 vegetation in the cleared areas will be controlled through
6 the application of the chemical spray?

7 A Chemical spray yes

8 Q At the Honey Ford Road crossing was the vegetation in
9 the cleared area controlled through the application of
10 spray -- chemical spray?

11 A I can't remember if they sprayed, but it wasn't
12 controlled I'll put it that way It grew back up

13 Q And vegetation in order to keep crossings cleared and
14 sight line open for the public to see the train, do you
15 have to maintain that?

16 A Absolutely If you don't maintain it, you know, it s
17 like you're not maintaining your car, your house your
18 body, or whatever You have to maintain things

19 Q Let's go to Plaintiff s Exhibit 88 and Exhibit 88 is
20 a CSX record where on 2/24/03 they changed the program --
21 You can go down and blow up at the C crossing This would
22 be a C crossing because of the speed? 950 feet would need
23 to be cleared?

24 A Yes, that's what we put on the animation

25 Q And this is what we discussed earlier about the

1 change in the program?

2 A Yes And that's a good change I mean, it greatly
3 adds to the increased train speeds to help take care of
4 that

5 Q And let's go to Exhibit 89 -- excuse me, Exhibit 88
6 And Exhibit 88 is -- excuse me, 89

7 THE COURT Which one, 88 or 89?

8 Q Eighty-nine Excuse me Eighty-nine is -- this is
9 just a visual description of the different segments --

10 A Right

11 Q -- starting with this is 350 but it shows how they
12 proposed to do that?

13 A Yes It is just different right-of way widths

14 MR PARKER Excuse me just a minute, Your Honor

15 MR HARMON We have an objection May we approach?

16 THE COURT Which number?

17 MR HARMON One hundred Not previously discussed
18 Your Honor

19 (Whereupon, a bench conference was held)

20 THE COURT All right On Exhibit 100 we've had a
21 side bar I have listened to their objections which we'll
22 put on the record when the jury goes out I am going to
23 allow 100 We're going to redact some information in it
24 that hadn't got anything to do with this case that's not
25 relevant, and I'll allow Mr. Parker to publish it at this

1 time and then redact the information I was concerned with
2 before it's put in

3 MR PARKER Thank you, Your Honor

4 This is a memo from one employee of CSX to employees
5 of Bill Patterson with DeAngelo Brothers and copies to
6 people in vegetation management with CSX and the subject
7 is completing southern crossings Per Mike's instruction
8 and based on your estimate of a couple of months to finish
9 I am notifying you that CSX agrees to grant DeAngelo
10 Brothers a date of March 15 to finish the items under your
11 control for the crossing clearing contracts in South
12 Carolina

13 Dr Heathington, are you aware that DeAngelo Brothers
14 -- that CSX had contracted with the DeAngelo Brothers to
15 clear these crossings?

16 THE WITNESS Oh, yes DeAngelo contracts with all
17 railroads and they are a big contractor for doing this

18 Q And they were to do the program in South Carolina for
19 CSX?

20 A Yes, sir

21 Q And if they had completed this program by March 15,
22 would this crossing have been cleared to the degree that's
23 shown in the animation where the vegetation is cleared?

24 A Should have been

25 Q Do you have an opinion if it had been cleared would

1 the collision that we are here about today would it have
2 occurred?

3 A In my opinion it would not have It would have been
4 like the animation that we showed when you cleared it
5 You can see the train

6 MR PARKER Answer any questions Mr Harmon may have
7 for you

8 THE COURT All my jurors okay? Do we need a
9 bathroom break?

10 CROSS-EXAMINATION

11 BY MR HARMON

12 Q Afternoon, Dr Heathington

13 A Afternoon

14 Q You would agree with me, Dr Heathington, that we
15 want drivers to be safe at passive railroad crossings?

16 A I'm sorry I couldn't hear you

17 Q Sure You would agree with me that we want drivers
18 to be safe at passive crossings?

19 A Absolutely I am a safety engineer

20 Q And the responsibility for avoiding a collision
21 between a train and a car generally rests with the driver?

22 A Well, to the extent of moving or maneuvering the
23 individual vehicle In terms of having adequate sight
24 distance and things of this nature, no, that s not
25 correct but in terms of maneuverability of an individual

1 vehicle to avoid a collision, that's correct It is
2 primarily with the driver

3 Q All right So, my question was the responsibility
4 for avoiding a collision between a train and a car
5 generally rests with the driver Do you agree with that?

6 A Well, it depends on -- Are you talking about
7 maneuverability of the vehicles? The answer is yes If
8 you re talking about providing the standards so that the
9 motor vehicle operator knows how and where to maneuver
10 their vehicle, then the answer lies with somebody other
11 than the driver

12 Q This is not the first time I asked you that question,
13 is it, sir?

14 A No It depends on what we're talking about

15 Q I asked you this question under oath in a courtroom a
16 little less than a year ago didn't I?

17 A I don't remember It could be

18 Q Let's go to Colvin 231

19 MR PARKER Your Honor --

20 MR HARMON Put it down Put it down

21 THE WITNESS And we'd like to --

22 THE COURT Hold on Everybody be quiet I won't
23 have to worry about a diet after today

24 (Whereupon, a bench conference was held)
25

1 MR HARMON Would the court care for a copy?

2 THE COURT Yes Thank you

3 MR HARMON It is 231, lines 21 through 24

4 THE COURT All right You may proceed

5 Q If we can put up on the screen the question

6 THE COURT What are you -- This is another case that
7 Dr Heathington testified in?

8 MR HARMON Under oath in a courtroom yes, Your
9 Honor

10 THE COURT What was your question?

11 MR HARMON My question was -- and, Dr Heathington,
12 tell me if I read this correctly, the question I asked you
13 -- And the responsibility for avoiding a collision between
14 a train and a car generally rests with the driver? And
15 your answer, Generally, that's correct

16 THE WITNESS That s right That s what I said just
17 a minute ago I said generally that's correct It s
18 moving of the two vehicles Now, go ahead and read the
19 rest of my statement on that

20 THE COURT Hold on

21 MR PARKER Excuse me

22 THE COURT Hold on

23 MR PARKER We have -- I don t know how you want to
24 take this up, but we ve been provided just as
25 Dr Heathington asked to see the rest of his testimony we

1 don't have the rest of his testimony

2 THE COURT Right behind you

3 MR PARKER Thank you, sir

4 THE COURT That's not fair, is it?

5 Ladies and gentlemen of the jury, there is an
6 evidentiary rule that says when one side publishes a part
7 the other side can publish another part to complete It
8 is the rule of completion

9 Mr Parker, you ll be given ample opportunity on
10 redirect to do that unless you need to do it right now

11 MR PARKER No, Your Honor, the -- My problem is I
12 don t think --

13 MR HARMON May we approach?

14 (Whereupon, a bench conference was held)

15 THE COURT Everybody okay? We need a break? Are we
16 all right? Move along

17 MR HARMON Yes, Your Honor I will do that

18 I want to talk to you now, Dr Heathington, about the
19 Honey Ford Road crossing Now, it's true you weren't at
20 the crossing that day?

21 THE WITNESS I was -- at the time of the accident?

22 Q That's correct

23 A No, I wasn't there

24 Q The only time that you visited the crossing was on
25 March 14, 2006?

1 A Whatever the date I gave earlier, that's correct

2 Q And so, that's almost two years after the accident?

3 A That's correct

4 Q But you've had other people who you ve -- who
5 assisted you in this case, correct?

6 A That s correct

7 Q Do you know Mr Don Crews?

8 A Yes

9 Q He is an investigator?

10 A Yes

11 THE COURT Hold on Doctor you're going to have to
12 move up a little bit

13 THE WITNESS I'm sorry

14 THE COURT You're getting a little soft

15 THE WITNESS I am getting up against the wall here

16 Q He is an investigator, correct?

17 A Yes

18 Q With the Parker firm?

19 A Yes

20 Q And you ve workd with him in other cases?

21 A Yes

22 Q You've relied on his investigation in other cases?

23 A Yes

24 Q And you found his information to be reliable?

25 A Yes

1 Q And credible?

2 A Yes

3 Q And you agree he is a competent railroad
4 investigator?

5 A To my knowledge I have had no problem

6 Q Now, you know as you said on direct examination that
7 Mr Crews visited the scene a few days after the accident?

8 A I didn't say that I said we had photographs taken
9 I didn't say who did it

10 Q But you understand --

11 A That's what you're saying

12 Q But you understand that Mr Crews took those
13 photographs on June 4?

14 A That was my understanding I wasn't there I didn't
15 see it All I know is what I've heard

16 Q And you also understand that he took some video on
17 those days?

18 A Yes

19 Q And Mr Crews took some photographs from behind the
20 stop line correct?

21 A He took them from a whole series of locations in
22 there That's correct

23 Q Okay And you understand that he took some
24 photographs 70 inches behind the stop line?

25 A I don't remember the exact distances, but he took

1 them at various locations

2 Q All right And 70 inches would be approximately
3 what?

4 A Well, 12 into 72 It would be six feet

5 Q So 70 is close to six feet?

6 A Not quite

7 Q All right And Mr Crews' photographs of that
8 distance show the available visibility for a driver?

9 A It shows what it shows

10 Q And, so, you agree that standing behind the stop line
11 where Mr Crews took this photograph he was able to see a
12 man 1014 feet down the tracks?

13 A Well, I saw the photographs I didn't know there was
14 anything in the photographs until somebody started saying
15 there is somebody in it I couldn't see it

16 Q Well, my question, sir, is you understand that
17 Mr Crews was able to see a man 1014 feet down the tracks
18 while stopped at the stop line?

19 A I don't know, sir I have not talked with Mr Crews
20 about that

21 Q Okay

22 A I don't know what he said he could see or what he
23 said he couldn't see or anything of this nature I hadn't
24 worked with him

25 Q All right That hasn't already always been your

1 testimony, has it, sir?

2 A On this? Yes I don't say that I talked with him
3 about that photograph

4 Q You gave sworn testimony in this case, correct?

5 A Yes

6 Q And your lawyers were there?

7 A Yes

8 Q And you've done this many, many times, correct?

9 A Yes

10 Q And Mr Millberg over there asked you questions?

11 A Well let's read the whole thing what I said

12 Q Listen to my question

13 THE COURT Well, whoa, whoa Let's get some rules
14 right now Let s don't argue with each other He asks
15 the questions You do the answering

16 THE WITNESS Yes

17 Q My question was Mr Millberg was there?

18 A Yes

19 Q And he asked you questions?

20 A Yes

21 Q And before he asked you those questions you were put
22 under oath?

23 A Yes

24 Q Just like you were put under oath here today?

25 A Yes

- 1 Q And you swore to tell the truth?
- 2 A Yes
- 3 Q And you did tell the truth?
- 4 A Yes
- 5 Q Play -- I'm turning to now Dr Heathington's
- 6 deposition page 58, lines 18 through 24, K H O A
- 7 (Whereupon, the video was played)
- 8 THE WITNESS Yea
- 9 Q Does that read correctly your testimony?
- 10 A That's what I had heard I didn't know what it was
- 11 I didn't talk with Don Crews about that
- 12 Q Now, sir, by the way, when you went out to the site
- 13 visit who took you to the site?
- 14 A Mr Crews did or he went with me I don't know
- 15 remember if I was driving or if he was driving
- 16 Q So, you agree with me that a train is much taller
- 17 than a man?
- 18 A Sure
- 19 Q A train is approximately 15 and a half feet tall?
- 20 A Sure
- 21 Q And a train is wider than a man?
- 22 A Sure
- 23 Q A train is about 10 feet wide?
- 24 A Yes
- 25 Q So you would agree with me that if you could see a

1 man at 1014 feet down the tracks you could certainly see a
2 fifteen and a half foot, ten-foot wide train?

3 A It depends on a whole host of things

4 THE COURT Well, let's do this Answer it and then
5 you may explain your answer

6 THE WITNESS It is possible but if you just had a
7 little hole in some vegetation and stuff and that's all
8 you had you may not It depends If it was nothing
9 around it, obviously yes

10 Q So, I just want to make sure I understand your
11 testimony in front of this jury You're saying with all
12 of your engineering experience that you can't say with any
13 degree of engineering certainty whether or not you could
14 see a fifteen and a half foot train ten feet wide if you
15 could see a man a thousand feet down the tracks?

16 A I didn't say that I didn't say that You're
17 misquoting me

18 Q You're saying it is just possible?

19 A I said what?

20 Q Are you saying it's just possible?

21 A It's possible It could be impossible -- a whole
22 host of things You've got to know what the surroundings
23 are Were you looking through the peep-hole? I can see a
24 lot of things through a peep-hole in a door and see
25 something white in there I can't necessarily see

1 something else in there. It depends on the whole host of
2 things, and the main thing is the driver wouldn't be
3 picking up something small like that. The conspicuity of
4 it would be such -- it depends on the surroundings. You'd
5 have to go investigate that, do an analysis on it to see
6 what you could and couldn't do. I didn't do that.

7 Q And so you're being just as truthful about what you
8 told this jury about that as you are the rest of your
9 testimony, right?

10 A Absolutely. That's true. I have been doing this for
11 half a century.

12 Q And do you think --

13 A And I don't mind --

14 Q Sorry.

15 A You're putting words in and saying, well, doing this
16 or that. I didn't say those things.

17 THE COURT Well, let's do this. Let's just take a
18 deep breath. Let him ask his question and you answer.
19 Y'all don't talk over each other so we'll all hear it.

20 MR. HARMON Yes, Your Honor. I am moving on. I got
21 the point.

22 THE COURT You don't have to move on. I'm not
23 rushing you.

24 Q Now, a train has flashing ditch lights, correct?

25 A Yes.

1 Q And a train had headlights, correct?

2 A Well, let's qualify that The ditch lights don't
3 flash all the time It depends on the engine They could
4 be flashing when the horn is blowing and other times it is
5 on and it depends

6 Q You know this train had ditch lights and headlights
7 correct?

8 A Yes, but you said flashing ditch lights

9 Q And the ditch lights and the headlights help you to
10 see the train?

11 A Yes, as a general rule unless there is something
12 covering up the headlight

13 Q Okay I want to now continue on what we've been
14 talking about, sir Now, you know Mr Gary Huett,
15 correct?

16 A Oh, yes

17 Q And you worked with him on many occasions in the
18 past?

19 A Yes

20 Q He performed work for you in this case?

21 A Yes Well he performed work for Mr Parker's firm,
22 but I was directing what was being done and putting the
23 specifications together He was doing the computer work
24 and video work and that sort of thing

25 Q But the two of you have worked together on other

1 cases?
2 A Oh yes
3 Q With Mr Parker?
4 A Oh, yes
5 Q And he is a photogrammetry expert?
6 A Yes
7 Q And he performed a photogrammetric analysis in this
8 case?
9 A Yes
10 Q And you know that he used Mr Crews' photographs?
11 A Yes
12 Q He used a survey?
13 A Yes
14 Q And he used engineering principals?
15 A Yes
16 Q And it s true sir, on August 15 he noted -- he said
17 that his photogrammetric analysis was consistent with
18 Mr Crews' measurement of 1014 feet of visibility, right?
19 A He may have
20 Q Okay Let me -- I know you're saying he may have I
21 am just going to refresh your recollection Can you turn
22 to Defendant's Exhibit 134?
23 MR PARKER I again object It's not impeachment
24 He may have said it
25 THE COURT He just asked him --

1 MR HARMON I am not impeaching him

2 THE COURT He is not impeaching him

3 MR PARKER He is getting notes from Mr Huett He
4 doesn't know this Dr Heathington doesn't know what
5 Mr Huett has in his notes

6 THE WITNESS I haven't seen those

7 THE COURT Just ask him the question again

8 MR HARMON Sure, Your Honor I am showing this and
9 this is someone he's worked with on this case

10 THE COURT I understand What is the question?

11 MR HARMON The question was on August 15, 2005
12 Mr Huett indicated that his photogrammetric analysis was
13 consistent with Mr Crews' measurement of 1014 feet of
14 visibility?

15 THE COURT Do you know that?

16 THE WITNESS Well, he has never said anything to me
17 that it didn't fit So, I would assume among with
18 everything that we talked about and stuff that there was
19 no basic problems between Mr Crews photographs and what
20 he was able to put together and make it fit and so forth

21 Q Okay And so you wouldn't be surprised if I were to
22 show you here a document where Mr Huett in his own
23 handwriting said that on August --

24 MR PARKER Your Honor --

25 Q Said that on August 15 his photogrammetric analysis

1 was consistent with 1014 feet?

2 MR PARKER Your Honor we object to that is pitting
3 one witness against another Mr Huett will be here to
4 testify

5 MR HARMON This is an expert, Your Honor, that has
6 relied on certain people This is not pitting

7 THE COURT Would you be surprised? You may answer
8 the question

9 THE WITNESS Well, I don't really know I don't
10 remember discussing any person down there with Mr Huett
11 It's possible, I guess I just don't recall anything like
12 that So, I mean, I don't know

13 Q I am going to show you a document I am going to
14 show him Mr Huett's notes?

15 THE COURT Well Mr Huett is going to be here?

16 MR HARMON I don't know

17 MR PARKER Yes, Your Honor

18 THE COURT He is going to be here We'll take that
19 up with Mr Huett

20 MR HARMON Okay Your Honor But, again, you re
21 not saying it wasn t consistent?

22 THE WITNESS No I don t know I mean I have no
23 firsthand knowledge of what you re asking me about and I
24 am not willing to say he did or he didn't I mean --

25 THE COURT All right Move along

1 MR HARMON Okay, Your Honor I'll do that
2 Now, you also in this case performed work, correct?
3 THE WITNESS Uh-huh
4 Q And you did that as a professional engineer?
5 A Yes
6 Q And you understand the importance of sight distance?
7 A Oh yes
8 Q And you understand the importance about being
9 accurate in what you write?
10 A That's right
11 Q And you understand the importance of being accurate
12 in what you say?
13 A The same way as an attorney is
14 Q All right
15 A Supposed to be
16 Q And that's very important when you're talking about
17 sight distance, correct?
18 A Sure
19 Q Now, you prepared written conclusions in this case?
20 A That's correct
21 Q And you prepared -- you also gave a deposition under
22 oath?
23 A That's correct
24 Q And your --
25 A I said that before

1 Q -- written conclusions were prepared on August 20
2 2009?

3 A I don t remember exactly the date they were prepared
4 I finished them up in time for the deposition

5 Q Do you have a copy up there?

6 A Yes

7 Q Can you look at the date?

8 A It is 8/20/09 is what is up at the top

9 Q So, on August 20, 2009 you did your written
10 conclusions?

11 A Finished them up

12 Q And then you also gave sworn testimony on August 31,
13 2009?

14 A Whatever the date was

15 Q All right And in the written conclusions that you
16 provided to us you indicated that the sight distance was
17 329 feet?

18 A That's correct but you got to read all I testified
19 to in that deposition sir You re taking it out of
20 context when you say that by itself and you don t explain
21 what I testified to

22 Q Sir I didn't ask you any questions about your
23 deposition

24 A I understand

25 MR PARKER Your Honor --

1 THE COURT Hold on Hold on

2 MR PARKER I would object to Mr Harmon's comments
3 That was not a question That was argumentative He
4 should ask questions of the witness

5 THE COURT The rules are lawyer asks the questions
6 Witness answers questions Y all be professional with
7 each other I am not inferring that you're not Move
8 along

9 MR HARMON Yes, Your Honor My question was about
10 your written conclusions

11 THE WITNESS Yes

12 Q Do you understand?

13 A Yes

14 Q And in your written conclusions you wrote in a 15, I
15 believe, page document --

16 A That s right

17 Q -- that the sight distance at this crossing looking
18 to the left, the same direction these photographs were
19 taken, was 329 feet?

20 A That s correct and I explained in the deposition what
21 that meant and the fact that the photogrammetry hadn't
22 been completed yet So, that was all put down to what it
23 was and everything I'm not trying to hide anything

24 Q Now during your deposition you were asked what
25 assistants worked on you with this case?

- 1 A Yes
- 2 Q And you mentioned Dr Mendorf?
- 3 A That's correct
- 4 Q And he has worked with you on and off since 1969?
- 5 A That's correct
- 6 Q And he knows as much about this stuff as you do?
- 7 A That's correct
- 8 Q You've testified before that he's brilliant?
- 9 A He is brilliant
- 10 Q Right That he doesn't make mistakes?
- 11 A That's correct, based on the information that he is
- 12 provided
- 13 Q And he also calculated sight distances in this case,
- 14 didn't he?
- 15 A Yes
- 16 Q All right Now, after your deposition where you --
- 17 we've talked about what you told us you understand we
- 18 went and talked to Dr Mendorf, right?
- 19 A That's right
- 20 Q And Mr Millberg over there went down the Tennessee
- 21 and took his deposition?
- 22 A I don't know I wasn't there
- 23 Q Well, sir, you're aware that Dr Mendorf said that
- 24 the sight distance -- the unobstructed view on the date of
- 25 his deposition was 700 feet approximately?

1 A As I recall his deposition he said somewhere six to
2 700 feet or something like that and when it finally wound
3 up and it was testified to and put in on that one we
4 testified to earlier said we got it roughly 650 feet So,
5 he was about right

6 Q All right I want to turn now and talk to you about
7 required sight distance We can take that down There
8 are different federal organizations that address safety at
9 railroad crossings?

10 A That's correct

11 Q One is the United States Department of
12 Transportation?

13 A Well, they do it through the Federal Highway
14 Administration and the Federal Railroad Administration

15 Q Okay Well, you're actually anticipating my next
16 question One of the agencies they do it through is the
17 Federal Highway Administration?

18 A Yes, that's correct

19 Q And another one is the Federal Railroad
20 Administration?

21 A That's correct

22 Q And you're very familiar with those organizations?

23 A Yes

24 Q Another agency that sometimes deals with railroad
25 safety is the Federal Transit Authority?

1 A Well, that s more or less public transportation that
2 you have It used to be UMTA Urban Mass Transportation
3 Administration and, you know, like subways in Washington
4 and New York and things of this nature That's primarily
5 what they --

6 Q Okay But that's - I mean, that's in part railway
7 safety, right?

8 A Yea You normally -- it's a different agency
9 They're concerned about different things and so forth than
10 the highway agency is and the FRA

11 Q Now, all of these three agencies are different
12 agencies correct?

13 A That's right

14 Q They all have their separate agency head?

15 A Yes

16 Q Another agency is the national highway traffic safety
17 administration?

18 A That's correct

19 Q Now, these organizations from time to time also do
20 their own publications correct?

21 A That's correct

22 Q And some of them relate to railroad safety?

23 A Yes

24 Q And I looked through your report At various times
25 you ve published or cited guides or manuals from some of

1 these organizations?

2 A That s correct

3 Q And I think you told us -- I just put up there the
4 NHTSA You actually worked for them for a period of time?

5 A Yes

6 Q Now, would you agree with me Dr Heathington that
7 agencies don't always see eye to eye?

8 A That's probably the understatement

9 Q Okay would you agree with me that it's a good thing
10 for our government agencies to try to work together?

11 A Absolutely

12 Q We want them to cooperate when they can?

13 A That's correct

14 Q Okay I want to -- You're familiar with the guidance
15 on traffic control devices Can we flash up the page
16 Defendant's 114? You're familiar with this, correct?

17 A I am familiar with it I mean, it depends on what
18 you ask me about it...yes

19 Q Okay And it's published in November of 2002?

20 A Yes

21 Q Now, let's go to the executive summary and blow that
22 up, please I am going to read this I am just going to
23 ask you if I read it correctly The technical working
24 group established by the United States Department of
25 Transportation is led by representatives from the Federal

1 Highway Administration, the Federal Railroad
2 Administration, the Federal Transit Administration, and
3 the National Traffic Safety Administration Did I read
4 that correctly?

5 A Yes

6 Q The cooperation among the various representatives of
7 the TWG represents a landmark effort to enhance
8 communications between highway agencies, railroad
9 companies and authorities, and governmental agencies
10 involved with developing and implementing policies rules,
11 and regulations?

12 A That's correct That is what it said

13 Q Now, let's go back to the manual, please This 2002
14 manual -- you're familiar with clearing sight distance?

15 A That's correct

16 Q Clearing sight distance pertains to the visibility
17 available to a highway user along the track when stopped
18 at the grade crossing?

19 A Yes

20 Q And it depends upon as you said on your direct the
21 speed of the train?

22 A That's right

23 Q The characteristics of the vehicle?

24 A That's right

25 Q Including the length?

1 A Well that's -- Well, including the length, that's
2 correct Other characteristics they assume a basic
3 acceleration rate, but certainly you can -- I mean, if you
4 modify the acceleration rate, then that changes the
5 numbers in there

6 Q Okay If we could go to page six, table two -- and
7 may I approach a board over here, Your Honor? Can you see
8 one of the two, sir?

9 A Yea, I can see this one up here

10 Q Okay Great Now, this is a clearing sight distance
11 chart in that manual, correct?

12 A Yes, in that one It never was adopted per se in the
13 latest Railroad Grade Crossing Handbook that came out
14 It's treated differently It's handles it the way its
15 always been handled

16 Q Well, we'll talk about that in a minute Did I hear
17 you say that this chart has never been adopted?

18 A Not officially like the handbooks have

19 Q We'll get back to that in a moment, but this chart
20 shows the train speed -- the train speed there on the left
21 hand column, correct?

22 A That's correct

23 Q And then it has different types of vehicles A car,
24 single unit truck bus, all the way over to a 65-foot
25 double trap trailer, right?

1 A That's correct

2 Q And you would agree with me that different types of
3 vehicles have different acceleration rates?

4 A Well a lot of vehicles have -- you can have any kind
5 of acceleration rate with most vehicles If you had a
6 great big huge truck you can't do 8 feet per second
7 squared, but you take a car you can go slow You can go
8 medium You can go real fast So, it's not a constant
9 sort of thing That's what your misunderstanding about
10 all of this stuff that s being put up

11 Q Well, sir, that what I am asking you is a car would
12 have a faster acceleration rate than a 65-foot double
13 truck?

14 A That's not necessarily true

15 Q Okay

16 A It depends on who is driving it and how they drive
17 it sir

18 Q A van would be more in line with a car than a single
19 unit truck Would you agree with that?

20 A No not necessarily It depends on how one drives
21 it

22 Q Okay Haven't you previously testified under oath
23 that a van would be more in line with a car than a 65 or
24 single unit truck?

25 A The length, yes The ability to handle it, yes The

1 ability to drive it faster if you wanted to, yes

2 Q Okay

3 A Other than that, no So don't misinterpret what
4 we're saying

5 Q Now, sir, really --

6 A I realize that you're not a traffic engineer, but you
7 have to understand --

8 THE COURT Sir, sir, sir

9 THE WITNESS Oh, I'm sorry

10 THE COURT Just answer the question He can
11 interpret and you can interpret

12 Q Sir the analysis you did when you talked to the jury
13 about this sight distance your analysis used the numbers
14 for a 65-foot double truck, didn't you?

15 A Yes That's correct

16 Q Now, we can calculate on this chart the sight
17 distance for a train going the speed of 47 miles an hour,
18 right? Is that correct?

19 A Yes

20 Q Okay And if we use a car for a car that is stopped
21 right?

22 A Yes but that's totally wrong We didn't do what
23 you're saying For the evaluation of the crossing you're
24 exactly right because that's what AASHTO does and USDOT
25 For the animation we use the speed of the train, where she

1 was located, acceleration for her, and things of this
2 nature Totally two different things

3 Q Sir, if we want to calculate the clearing sight
4 distance for a train going 47-miles per hour and a car
5 that is stopped you have previously told me that that
6 sight -- clearing sight distance would be 483 5 feet,
7 correct?

8 A No, sir, but what we re saying is --

9 THE COURT No, sir No, sir Answer the question
10 Then you may explain

11 THE WITNESS Well, I don't remember telling you it's
12 483 feet It depends on a whole host of things If you
13 take the exact position of where they placed the car which
14 is 15 feet from the near rail and the driver 10 feet from --
15 the front bumper and a certain acceleration rate they
16 have, then yes, you get those numbers that you have in
17 here for a car No question on that But when you ve
18 evaluate a crossing under what AASHTO tells you to do and
19 US tells you to do -- USDOT -- you don't do that That's
20 the wrong way to evaluate a crossing

21 Now when We evaluated what happened to Ms ~Harvey I
22 did what you have here, yes, except it wasn t at those
23 locations

24 Q I am going to turn now to page 49, lines 11 through
25 17 of your deposition, and I am going to ask you if this

1 is the question that was asked and the answer that you
2 gave

3 MR PARKER Your Honor, we object

4 THE COURT The way you have to do the deposition is
5 you have to ask him the question and if he answers
6 differently then you can use the deposition

7 Q All right Sir, you previously testified that using
8 this chart that with a 47-mile-per-hour train and if we
9 look at a car that is stopped the clearing sight distance
10 is 483 5 feet correct?

11 A Based on that table and in those conditions

12 Q Is that correct?

13 A I didn't say that's what it was It depends on a
14 whole host of things You asked me if that's what is in
15 that chart Yes, that's what is in the chart, but that
16 chart --

17 Q Go back to the chart my demonstrative Okay So,
18 the publication that we talked about is the Guidance on
19 Traffic Control Devices at Rail Highway Crossings,
20 correct?

21 A That's correct

22 Q And we just established that for a 47-mile-per-hour
23 train if the car is stopped at zero the sight distance
24 would be 483 5 feet and I think we've shown it was
25 published in November of 2002?

- 1 A Yes, because you're taking everything out of context, but
2 that's correct
- 3 Q All right. Let's go now and talk about the Railroad
4 Highway Grade Crossing Handbook
- 5 A Okay
- 6 Q You're familiar with that book, right?
- 7 A Yes
- 8 Q In fact, you cited that book throughout your report?
- 9 A That's correct
- 10 Q Now, this publication came out again in 2007, right?
- 11 A That's correct
- 12 Q And your report that you prepared for this case was
13 prepared in 2009?
- 14 A That's correct
- 15 Q Now, I am going to -- if we can flash up the Railroad
16 Highway Handbook. We're going to turn to page 138. Don't
17 move there. Go back to the cover. That's the cover of
18 the book, right?
- 19 A That's correct. It is laying right there
- 20 Q Okay. Very good. And again, this is a book that
21 you've used for decades?
- 22 A Not that one
- 23 Q Not this one, but the predecessor for decades?
- 24 A Oh, yes. That's correct
- 25 Q Let's go to page 138, the handbook

1 A Yes

2 Q All right May I approach the other chart Your
3 Honor?

4 THE COURT You may

5 MR HARMON Do we need a break?

6 THE COURT Everybody okay? Anybody need a bathroom?

7 MR HARMON We're at the point where we can take a
8 break if you want, Your Honor

9 THE COURT You can keep going Don't be hesitant

10 MR HARMON Your Honor, why don't we take a brief
11 break?

12 THE COURT I think I see some people that need to go
13 to the bathroom I know one All right Don't discuss
14 Don't deliberate We're going to come back out in 10 or
15 15 minutes and go to 5 o'clock Thank you

16 Everybody else remain seated

17 (Whereupon, the jury exited the courtroom at 3 57)

18 THE COURT Mr Parker, anything for the record?

19 MR PARKER Nothing, Your Honor

20 THE COURT Mr Harmon?

21 MR HARMON No, Your Honor

22 MR PARKER May Dr Heathington be excused?

23 THE COURT You may go to restroom

24 (Whereupon, a break was taken)

25 THE COURT Mr Parker, anything for the record?

1 MR PARKER Nothing, Your Honor

2 THE COURT Mr Harmon?

3 MR HARMON No, Your Honor

4 THE COURT Bring the jury in

5 (Whereupon the jury came into open court at
6 approximately 4 13)

7 THE COURT Okay Madam Forelady we are going to go
8 about 45 more minutes so everybody can get home to cook
9 their husbands supper and cook their wives' supper
10 Right, Moose?

11 THE JUROR Huh-uh

12 THE COURT Sore subject

13 Mr Harmon?

14 MR HARMON Thank you, Your Honor

15 Dr Heathington before the break we were turning now
16 to the Railroad Highway Grade Crossing Handbook Do you
17 recall that, sir?

18 THE WITNESS Well, that's not -- that is not the
19 Railroad Grade Crossing Handbook That is whatever the
20 title of it was We have the new 2007 Railroad Grade
21 Crossing Handbook here We have that, and then there was
22 a 86 and there was 2007 and then, of course there was
23 78 but that was a special -- kind of a special
24 informational thing that they put out

25 Q No sir We've gone past the 2002

1 A Okay You're --

2 Q Okay Let me get clear

3 A I was looking at that over there

4 Q Right No I understand why there is a little bit
5 of confusion We've talked about the 2002 guidance,
6 correct from November?

7 A Yes

8 Q That's that chart?

9 A Yes

10 Q Now we're going forward to the August of 2007 Rail
11 Grade Hand Crossing Book, correct?

12 A Right

13 Q Okay And this chart that I have up there in front
14 of this screen is from the Railroad Highway Grade Crossing
15 Handbook that was published in August of 2007, correct?

16 A It is there, but it's not in the evaluation of a
17 crossing and what the standards are for sight distance
18 That's in a different section that doesn't have anything
19 to do with how you treat a grade crossing I mean I have
20 what is written right there

21 MR HARMON I'm going to object to the answer, Your
22 Honor

23 THE COURT Sir, let's start over again

24 THE WITNESS Okay

25 THE COURT Please You know, he may not be asking

1 you the question you want him to ask

2 THE WITNESS No, I --

3 THE COURT But he ask whatever questions he wants to
4 as long as they re relevant

5 THE WITNESS Okay

6 THE COURT You just have to answer his questions
7 And then I'm sorry

8 Q Sir, my simple question was this chart that is on the
9 screen is in the Railroad Highway Grade Crossing Handbook?

10 A Yes It's in there

11 Q And I am going to put a copy of this up here in case
12 the jury can't see Now, this chart that is in the
13 Railroad Highway Grade Crossing Handbook is identical to
14 the chart that was published in the November guidance,
15 correct?

16 A Yes They just reproduced the chart

17 Q Can we place those two charts next to each other
18 So, on the left or on the top, sir, is the clearing sight
19 distance chart for the Railroad Highway Grade Crossing
20 Handbook, correct? That's on the top?

21 A That's correct --

22 Q All right

23 A -- but it's not for crossing evaluation

24 Q And you've told us before that you've relied upon the
25 Railroad Highway Grade Crossing Handbook?

1 A I do I rely on that That's correct

2 Q And, so, the two charts are identical, right?

3 A That's true, but they don't have anything to do with
4 evaluation of a crossing

5 Q And we can use the Railroad Grade Crossing Handbook
6 to calculate the sight distance needed for a car stopped
7 with the train speed of -- I mean, of 47 miles per hour?

8 A For a specific distance and a specific set of
9 variables When you change that and when you don't have
10 the perception and reaction time is what they have of two
11 seconds, it's a meaningless sort of thing

12 Q Sir --

13 A And it doesn't even appear that way in the 2007 Grade
14 Crossing Handbook

15 Q Sir, the 2007 Railway Grade Crossing Handbook if we
16 calculate the sight distance for a car that's stopped,
17 47 miles per hour train, that distance is 483 5 feet as
18 well?

19 A Only for specific distances and specific perception
20 and reaction time which doesn't apply to a normal
21 crossing You got to read and understand the whole thing,
22 sir I'm sorry, but it is not as you're -- yea, it is in
23 there like that, but you're interpreting it wrong

24 Q Sir, haven't you relied upon the Railroad Grade
25 Crossing Handbook in the past?

1 A Yes

2 Q And, indeed, if I pulled out your report wouldn't I
3 see the Railroad Grade Crossing Handbook mentioned
4 throughout your report that was filed in this case?

5 A You don't find things that's not related to the
6 evaluation

7 THE COURT Sir, please answer the question

8 THE WITNESS You'll have the title, but it's what's
9 in there that's being used is the problem

10 Q You used the one from 1986, right?

11 A I don't -- well, yea

12 Q All right

13 A I don't care if you use it for '97 -- I mean 2007

14 Q Let's go back to my chart, please So, the sight
15 distance for the -- the clearing sight distance the
16 Railroad Grade Crossing Handbook would be the same
17 483 5 feet, right?

18 A Only for a specific set of numbers, sir

19 Q That's right For a specific set of numbers And
20 this manual, again, it assumes the characteristics,
21 length, acceleration, et cetera of a car, right?

22 A Yes, but it also makes other assumptions which may
23 not fit at all and the distance to stop from the near rail
24 is different

25 MR HARMON I am going to move to strike that last

1 answer

2 THE COURT I am going to ask you once again I know
3 he's not asking you the questions you want to hear You
4 got to answer his questions Mr Parker can ask you the
5 other questions

6 THE WITNESS Okay Whatever

7 Q Now, I want to turn about the manual that you talked
8 about that you relied upon that's the American Association
9 of State Highway and Transportation Officials -- AASHTO,
10 right?

11 A Yes They're the same

12 Q And you used the policy on geometric design of
13 highways and streets, right?

14 A Yes

15 Q And I believe if I look at your conclusions that is a
16 1990 publication you cited in your report?

17 A I don't understand your question

18 Q The publication, sir, that you relied upon is a 1990
19 publication?

20 A Right

21 Q And the sight distance if we were to calculate it for
22 this specific train with a car stopped at the crossing
23 would be 1128 feet?

24 A It depends on where it's parked and where it stopped,
25 sir

1 Q Well, sir, if we pull up the chart wouldn't it show
2 that for a car stopped at 15 feet from the rail that the
3 sight distance -- again, let's just do it this way The
4 chart -- excuse me The chart that's on the bottom, all
5 we have to do to get the numbers you used for AASHTO for
6 the sight distance for this specific train at 47 miles per
7 hour would be to look at the column under the 65-foot
8 double truck, right?

9 A Well, for that particular conditions, you're correct

10 Q Okay And, so, can you calculate for us, sir, using
11 the 65-foot double truck the sight distance -- clearing
12 sight distance that would be needed for a train going
13 47 miles per hour?

14 A Well, you'd have to go down -- if you assumed that
15 all the other conditions were the same you would go down
16 between the thing for 47 miles an hour and you would
17 interpolate and get that

18 Q And that number would be the number I showed earlier
19 1128 feet, right?

20 A I don't know I didn't calculate it

21 Q Well, I saw that you had a briefcase It look like a
22 new one to me Do you have a calculator in there?

23 A No I have it right here

24 Q Can you calculate it for us?

25 A I can't -- I've got to see between the 40 and 50

1 Q Okay I'll --

2 A You got -- Blow that up, if you will Okay 965 and
3 1205, is that correct?

4 Q Yes

5 A It would be about 1133 if I didn't make a mistake
6 That would be 47 miles an hour

7 Q Oh, 1133?

8 A 1132 That's interpolation between 965 and 1205

9 Q Okay If we can go back to our chart and if we can
10 change that to 1133 feet Okay And, again, as you've
11 told us earlier in your testimony both on direct and cross
12 this assumes a 65-foot tractor trailer?

13 A That's correct

14 Q Let's turn now -- We can take that down Let's turn
15 now -- I want to talk about your animation

16 If we can bring up A-1, Bob

17 Okay We're going to take it up to where it stops,
18 Dr Heathington, and then I am going to ask you some
19 questions All right? If we can proceed the animation
20 and stop it at 22 5 seconds Okay That's close enough
21 Now, at this point -- Okay Let's bring it down because
22 it's still moving Get it to zero, please All right
23 Good enough So, we're now at 22 4 seconds, right?

24 A Yes

25 Q The van is stopped?

1 A Yes

2 Q And now what's going to happen is Ms ~Harvey is going
3 to look left, correct?

4 A Yes

5 Q All right Let's have her look left and then come
6 back She looks left pretty quickly and then at about
7 18 -- Stop right there So she looks left She started
8 at 22 4 She looks left Now we're looking center at
9 18 6, right?

10 A Approximately, yes

11 Q And now what's going to happen if I understand from
12 your testimony with Mr Parker she's going to look right,
13 correct?

14 A That's correct

15 Q And then she's going to come back to center?

16 A That's correct

17 Q And she's never going to look left again She is
18 going to go straight, right?

19 A That's correct

20 Q So, it's true that for approximately 18 seconds based
21 on your animation she never looks left again?

22 A That's correct

23 Q Now, if a train is plainly visible and is in
24 hazardous proximity the driver has a duty to stop?

25 A Sure

1 Q And the driver has a duty to yield to the train?

2 A Yes As a general rule, that's correct

3 Q If the driver has ample time to look and listen, that
4 driver should stop and yield to the train?

5 A Yes

6 Q And if they have ample time to see the train and
7 stop, the driver should stop?

8 A Sure If you see the train that's in hazardous
9 proximity, you're supposed to stop No question

10 Q And you would agree with me that the driver should
11 look and listen in both directions because it's always
12 train time at the railroad crossing?

13 A Well, trains run both directions normally There are
14 a few tracks that don't

15 Q I want to go to some certain spots in this animation
16 If we can go to still 10 2 seconds Now, this is 10 2
17 seconds before the time before the point of impact, right?

18 A That's correct

19 Q And Ms ~Harvey in this animation is still stopped,
20 right?

21 A That's correct

22 Q And while stopped at this spot before the stop line
23 she's in a safe place?

24 A Yes

25 Q And if she stays at this spot she will not get hit?

1 A Well, absolutely

2 Q Now, at this point, sir, at 10 2 seconds with the
3 train at this distance away you would agree with me that
4 the train is in plain view?

5 A Not of her

6 Q Well, if Ms ~Harvey looked to the left at this time
7 the train would be in plain view?

8 A That's correct. As I've testified in my deposition,
9 sir, my grandfather used to tell me if was the biggest
10 word in the English dictionary. If you just use if you
11 can do anything in the world. If sh would have been five
12 minutes late or even two minutes later than when we come
13 up to that crossing or if she hadn't have had a stop
14 sign -- I mean, you can put a punch of ifs in and she
15 would have never got hit, but you can't design -- that's
16 what I used to tell my students. You can't design roads
17 on ifs

18 Q My question is, sir, at this point in time while
19 stopped at the stop line 10 2 seconds before -- before she
20 moves if Ms ~Harvey looked the train is in plain view?

21 A That's exactly right. If. And if it had been
22 cleared away when she looked left the first time you
23 wouldn't have had that problem either

24 Q And your animation at this point doesn't have her
25 look left at all, right?

1 A That's exactly right She's already looked left

2 Q In fact --

3 A She didn't see anything

4 Q -- what your animation shows is her doing like this,
5 right?

6 A No, that's wrong That's dead wrong

7 Q All right Let's go to 9 2

8 A Okay

9 Q By the way, at 10 2 seconds she could have avoided
10 the accident?

11 A Yea, if she hadn't moved If If she had cleared
12 the crossing she wouldn't have had that problem If is a
13 big word

14 Q At 10 2 seconds she has sufficient time to see the
15 train had she looked?

16 A That's correct And if you had cleared the crossing
17 like you should've, you know, she would have had
18 sufficient time the time she looked left If is a big
19 word and we can solve all sorts of problems with ifs

20 Q Let's go to 9 2

21 THE MEDIA SPECIALIST That is 9 2

22 Q Thank you very much Again, this is now 9 2 seconds
23 before, right?

24 A Yea That's correct

25 Q And Ms ~Harvey is still stopped at the stop line?

- 1 A That's right
- 2 Q According to your animation?
- 3 A That's right
- 4 Q And the train is 626 feet away?
- 5 A That's right
- 6 Q And, again, you'd agree with me that at this point
- 7 had she looked left the train is in plain view?
- 8 A That's right And if she had cleared the crossing
- 9 she never would have had to look right
- 10 Q And you agree at this time the accident is still
- 11 avoidable?
- 12 A Sure It would have been avoidable if you had had
- 13 the crossing done right
- 14 Q And at 9.2 seconds she has ample time to stop and see
- 15 the train?
- 16 A Absolutely And if you had the crossing cleared
- 17 correctly you wouldn't have had the problem If is a big
- 18 word It solves all sorts of problems
- 19 Q And, again, at this point in time while she's stopped
- 20 at the stop line and not moving you don't have her looking
- 21 left at all?
- 22 A No She's looked left once and there wasn't anything
- 23 over there
- 24 Q And your animation doesn't show anything about
- 25 peripheral vision at all, does it?

1 A Well, this has what you would have looking straight
2 ahead

3 Q Okay Straight ahead?

4 A Yea In other words, you do have a certain amount of
5 peripheral vision

6 Q Let's go 8 2 seconds Same question 8 2 seconds
7 she's still stopped?

8 A Absolutely

9 Q Still in a safe place?

10 A Yes

11 Q She doesn't move, there is no accident that day?

12 A That's right

13 Q All right And the train is even closer 558 feet
14 according to your animation? --

15 A That's right

16 Q And we agree that the train is still in plain view?

17 A Not to her

18 Q Had she looked left she could've seen the train?

19 A Oh, if you had had it cleared out --

20 Q All right --

21 A -- she would have saw it long before here

22 Q I am not asking about that I am asking at this
23 point, Dr Heathington, based on your animation had she
24 looked left the train in your animation -- I'm not talking
25 about reality In your animation the train is in plain

1 view?

2 A Not to her Not to her

3 Q Listen to my question

4 A I am listening to your question It's not to her

5 THE COURT Sir, hold on Go ahead

6 Q Had she looked left at this point, Dr Heathington,

7 the train is in plain view?

8 A I said yes over and over I said if -- you can use

9 if You can do anything you want to

10 Q All right Let's go now to 7 2 seconds All right

11 Now, she's starting to move according to your animation a

12 little bit, right?

13 A Yes

14 Q Lower than 1 mile per hour?

15 A Yes

16 Q The train is now less than 500 feet away?

17 A Yes

18 Q All right And, again, had she looked left at this

19 point the train is even closer in view?

20 A That's right

21 Q And there is still time for her to stop and avoid

22 this accident?

23 A If is a big word

24 Q All right

25 A Big word

1 Q And we're going to go -- let's skip six Go to 5 2
2 Now, at 5 2 seconds she's going a little less than 3 miles
3 per hour?

4 A Yes

5 Q All right And, again, you would agree with me the
6 train is in plain view there?

7 A Not to her

8 Q All right Had she looked left, sir she could see
9 the train?

10 A Yes, sir If you use the word if as I keep telling
11 over and over, you can solve any kind of problem with if

12 Q Okay Now, Doctor, you understand that Ms ~Harvey
13 has no recollection of what happened after she moved from
14 the stop line?

15 A I don't recall exactly all of that I read her
16 deposition but it's a while ago I thought as I recall
17 she said she looked left and she looked right

18 Q Oh, no, no, no I'm sorry Let me be clear here
19 Ms ~Harvey's deposition says she pulls up to the stop
20 line, looks left, looks right

21 A That was my understanding

22 Q All right And then doesn't remember anything else?

23 A I can't remember all of that I was mainly concerned
24 with what happened when she came up to the first part

25 Q Okay Now, your animation doesn't show the situation

1 where Ms ~Harvey stopped on the tracks, does it?

2 A Well, you got conflicting statements One of your
3 engineers said that she did not stop -- the one that was
4 standing up behind the young engineer in training He
5 said he turned his head down so he wouldn't see the
6 impact He put his emergency brakes on three or 400 feet
7 past the point of impact and so -- and the gentleman that
8 was up at the top or standing up behind him said she did
9 not stop

10 Q My question is this, Doctor Your animation does not
11 show the scenario with Ms ~Harvey stopping on the tracks?

12 A No, I don't think she stopped

13 Q Okay And you would agree with me that it would be
14 an imprudent thing for a driver to stop on the tracks?

15 A Well, you wouldn't want to, obviously

16 Q And you understand that's a violation of South
17 Carolina law don't you?

18 A Well, I don't know, but you wouldn't want to stop for
19 a whole host of other reasons regardless of what the law
20 was

21 Q All right Dr Heathington, it is fair to say that
22 as far as railroad lawsuits 99.9 percent of your cases
23 involving injured people have been against the railroad?

24 A No I have never said that

25 Q All right Do you recall giving testimony in the

1 Martin versus Norfolk Southern case?

2 Let me have those pages so we can show Mr Parker
3 before we impeach this witness All right?

4 MR PARKER I don't see what you're talking about,
5 Mr Harmon

6 Q Dr Heathington, I am going to show you some sworn
7 testimony from a case that you were involved in, Martin
8 versus Norfolk Southern I am going to go to page 141,
9 line 23 I am going to read a question and answer I am
10 simply going to ask you if I read the question and answer
11 correctly

12 A Could I see it, have a copy of it?

13 Q Sure Flash it up there

14 A I need to see the whole thing

15 Q All right Flash the whole thing up

16 THE COURT There it is right there

17 THE WITNESS Well, I mean, there is more to it than
18 that

19 Q All right Pull up the question, please, so I can
20 read it All right "Is it fair to say that insofar as
21 your railroad litigation that 99 9 percent of your work in
22 cases involving injured people has been on the other side
23 of the railroad company?"

24 And the answer, "That's probably correct "

25 Did I read that correctly?

1 A Yea, I didn't say it was correct I said that's
2 probably correct I have worked for the railroad some so
3 it hadn't been 100 percent

4 Q All right So, when you said probably correct,
5 you're drawing a distinction?

6 A I don't know I said over and over -- if we could
7 see the whole page where I could read all of what's said
8 then I think we'd have a better -- what the testimony
9 really was, and that is what seems to be strange to me

10 Q Well, your lawyer has a copy and whatever he wants to
11 read he can read Now, you've never given testimony -- is
12 it true that you have never given testimony favorable a
13 railroad in a crossing case?

14 A Everything I have done for the railroad has been
15 through reports, affidavits, and things like that when
16 I've worked for them

17 Q So, is it true that you ve never given testimony
18 favorable to a railroad in a crossing case?

19 A I have done reports for them as favorable to the
20 railroad I have not testified in court because
21 everything I've had has never gone to court

22 Q And 85 percent of your time is involved in railroad
23 cases?

24 A Probably somewhere in that neighborhood
25 Plaintiff's -- I don't know if it's railroad cases, but

1 plaintiff's cases, yes, 85 to 90 percent, somewhere in
2 that neighborhood

3 Q And it's true that you've worked for Mr Parker
4 before?

5 A Yes

6 Q At least 10 to 15 times?

7 A Yes

8 Q All right In this case, Dr Heathington, it's true
9 that you said, quote, that stop sign got her killed
10 Didn't you say that?

11 A I don't remember the exact wording but I said if
12 there hadn't been a stop sign there she would have been on
13 across the crossing and own the way

14 Q No, but my specific question, Doctor, is didn't you
15 testify in this case under oath that that stop sign got
16 her killed?

17 A Let me see what is said, sir

18 Q All right Let's turn to page --

19 A Because you misquote stuff all the time

20 THE COURT No, sir Whoa, whoa --

21 THE WITNESS I'm sorry

22 THE COURT No, sir That's not -- just disregard --

23 THE WITNESS I'd like to see it

24 THE COURT Sir --

25 THE WITNESS I'm sorry

1 THE COURT -- when I'm talking, please be quiet

2 THE WITNESS I'm sorry

3 THE COURT Disregard that last statement that he
4 made

5 Q Let's turn so Dr Heathington can see to page -- no,
6 we'll put it up on the screen, please, page 29 This is
7 just to refresh the witness' recollection

8 THE COURT What are we doing? Deposition?

9 MR HARMON This is deposition in this case, Your
10 Honor

11 THE COURT All right

12 MR HARMON We're just going to refresh his
13 recollection Page 29

14 (Whereupon, the video deposition portion is played)

15 MR HARMON Go up a little higher so he can see the
16 rest, please

17 MR PARKER You got the page number?

18 MR HARMON Page 29 and where he says that the stop
19 sign got her killed is line 14 We're going to back it up
20 just a little bit

21 THE MEDIA SPECIALIST We'll start at line number
22 two

23 (Whereupon, the video deposition portion is played)

24 THE WITNESS That's correct She had limited sight
25 distances When you have that and you put a stop sign in

1 it doesn't necessarily improve things That's what the
2 engineering division has always said

3 Q What is your hourly rate in this case?

4 A \$325 an hour for my time

5 MR HARMON One moment, Your Honor

6 Dr Heathington, you were here in the courtroom for
7 testimony for different people, correct?

8 THE WITNESS For some of the people, yes There
9 were some lay witnesses, yes

10 Q May I approach the witness? I am just going to ask
11 him just to read something for me You were here for the
12 testimony of Mr Dwayne Johnson on yesterday?

13 A I remember there was a name of Dwayne Johnson The
14 face and names may not go together

15 Q You're familiar -- you've given depositions in a lot
16 of cases?

17 A Oh, yes

18 Q Can you just tell us the date of Mr Dwayne Johnson's
19 deposition, please? It is right there in the front, sir

20 A That's what I'm looking for

21 MR PARKER Your Honor, we would object

22 THE WITNESS Oh, up here

23 THE COURT Hold on They got an objection

24 MR PARKER I can't understand the relevancy of
25 anything that Dr Heathington would know about this

1 deposition which he has never seen before

2 THE COURT Hold on, Dr Heathington

3 MR HARMON I am just going to ask him the date and
4 move on Two questions

5 THE COURT The date of the deposition?

6 MR HARMON That's all I am asking

7 THE COURT He can answer that

8 THE WITNESS I am looking on the front page Oh, up
9 here at the very top I was looking here

10 Q That's all right

11 A It says 10/29/09

12 Q Okay So, that was the date of Mr Dwayne Johnson's
13 deposition?

14 A That's what it says here

15 Q Okay And then for Mr James Johnson you also heard
16 testify the date of his deposition?

17 A 10/27/09

18 MR HARMON Okay Thank you I don't have any
19 further questions

20 REDIRECT EXAMINATION

21 BY MR PARKER

22 Q Dr Heathington, if you would, these charts that
23 we've seen and one is up there and we won't have to get it
24 back up there, but it's got clearing sight distance and
25 feet and it's got a car so we'll all understand exactly

1 in the design of crossings, and as I said in 1997 -- 2007
2 handbook, the new one, they go over with the diagnostic
3 sheets like we've always had in '78 and this -- this does
4 not permit you to look in both directions This does not
5 permit you to look for trains coming from both directions
6 This is said if you look down there and you see a train at
7 that distance you have time to take two seconds to decide
8 that, hey, I can go forward, and that's how much feet you
9 need and that s just informational piece That is not in
10 terms of what goes on at a crossing and how you have to
11 look in both directions to see if the train is coming from
12 this direction and if a train is coming from that
13 direction These are informational sorts of things
14 talking about when you start out that's how much space
15 That s true Those numbers are correct for that

16 Q All right And is this the Railroad Highway Grade
17 Crossing Handbook --

18 A Yes

19 Q -- that you were asked about?

20 A Yea

21 Q That Mr Harmon asked you about?

22 A Yes, this is the 2007 It came out in August of
23 2007 And if you look at -- just a second If you look
24 on page 64 it has the sample questionnaire for diagnostic
25 team evaluation That's what the diagnostic team goes

1 out -- what all do they look at in terms of sight
2 distances and so forth This -- These sort of things
3 started in the Grade Crossing Handbook of 1978 They
4 provide like on page 65 the identical -- the identical
5 ways of going and determine it has always been -- it
6 hadn't changed If you look at all of the equations,
7 they're all the same, all how you evaluate it, all the
8 same If you go into the -- we got two tables in here
9 now One is in kilometers as opposed to miles per hour
10 It is kilometers per hour So, they put the metric system
11 in Then they got the one in the English system right
12 below which is the AASHTO version They did not change --
13 regardless of what was said here, they have not changed
14 the procedures that you go through to evaluate a crossing

15 Q And in this case are you aware that a diagnostic team
16 looked at this crossing?

17 A Yes, that's my understanding

18 MR HARMON Objection, Your Honor This is
19 irrelevant May we approach?

20 (Whereupon, a bench conference was held)

21 THE COURT Sustained

22 Q Dr Heathington --

23 THE COURT Gentlemen, remind me to put that on the
24 record

25 Q -- in your animation that you did Ms ~Harvey was how

1 being -- Strike that All right Mr Parker, I am going
2 to let you either respond to that or you may proffer

3 MR PARKER I would just like to proffer testimony

4 THE COURT Absolutely

5 MR WILSON Judge, could they be excused before we
6 start the proffer?

7 THE COURT Sure

8 PROFFERED EXAMINATION

9 BY MR PARKER

10 Q Dr Heathington, at your deposition in this case when
11 you were asked about that number did you tell Mr Millberg
12 who was deposing you that that number was in error you
13 thought?

14 A Yes I said until I get the photogrammetry work done
15 I couldn't get a three-dimensional positioning of
16 vegetation, trees, and so forth, and if the trees had been
17 real high right up next to the crossing you don't have to
18 do that, but this wasn't that way and I had to have that
19 and I didn't have that because we couldn't get it done I
20 said as soon as I get that I will turn in where you can
21 have an unobstructed view of the train I turned that in
22 It was about 650 feet

23 Q Let me rephrase my question You said it may have
24 been inaccurate and I may have misphrased that and said in
25 error So, that may be the difference, but the semantics

1 aside, you notified CSX -- the attorneys -- that that
2 figure may be inaccurate and that you intended to do
3 further work on it?

4 A And that it was based on a two-dimensional document
5 and I needed the three-dimensional piece of data to be
6 able to get the accuracy up No, I put that very plainly
7 in the deposition

8 Q And did you -- This is what I'm getting at The
9 question was asked of you about errors you made in your
10 conclusions in this case and were you able to go out and
11 measure the height of that vegetation other than
12 photogrammetry at the scene?

13 A No

14 Q And why was that?

15 A It was all gone when I got there

16 MR PARKER That was it

17 THE COURT Well, that's sort of in my opinion a
18 roundabout way of getting into subsequent remedial measure
19 and I just -- I think the Rule precludes that I'm going
20 to stand by my ruling and you've proffered and you're
21 protected on the record if I am wrong

22 Anything in response to that?

23 MR HARMON I just want to be clear for the purpose
24 of the record that this accident occurred on May 30, 2004

25 THE COURT Mr Harmon, that's -- if anything is

1 MR WILBY Your Honor, 102

2 THE COURT Invoice to CSX

3 MR WILBY Yes, sir We don't have any objection to
4 the documents itself We just think it should be redacted
5 because it references Alabama, North Carolina, Tennessee

6 THE COURT Any problem with that, Mr Parker? 102
7 comes in with redacting out the states other than South
8 Carolina

9 MR PARKER Okay

10 MR WILBY 103 --

11 THE COURT Hold on one second

12 MR WILBY Yes, sir

13 THE COURT 102 admitted, redact all but South
14 Carolina All right What's next?

15 MR WILBY Your Honor, 105 deals with subsequent
16 remedial measures under 407 and corresponds with the
17 previous spreadsheet showing the crossing was cleared on
18 July 19

19 THE COURT That's a 407 objection?

20 MR WILBY Yes, sir

21 THE COURT Mr Parker?

22 MR PARKER Your Honor, if we're going to admit --
23 and the reason that now becomes they state on these
24 documents which they won't agree to it shows on May 21
25 '04 that there is a bill for the -- just nine days before

1 this -- a bill for clearing the crossing It wasn't clear
2 and they want to I guess argue that they cleared it
3 Well, is 7/19 comes in to show that it wasn't cleared

4 THE COURT Well, if they try to try that, then,
5 obviously, I will reconsider 105 either for impeachment
6 purposes or cross examination if we get to that, but I am
7 not going to allow it in as just a bald-faced exhibit
8 because I believe it violates 407, but the caveat that
9 it's not to preclude you from attempting to use it if the
10 facts present themselves

11 MR WILBY Thank you, Judge

12 THE COURT All right Let's stop right there We
13 got five minutes I'll give y'all a chance to use the
14 bathrooms and we'll start right at 9 30

15 (Whereupon, a break was taken)

16 THE COURT Mr Parker, Mr Wilby, what I'm -- I
17 don't know if the word is struggle, but what I am
18 struggling with is, obviously, 101-A -- I mean it,
19 obviously, is kept by the railroad It is kept in their
20 business -- part of their business documents or part of
21 their -- I guess business records

22 What I am trying, Mr Parker, I'm having a little
23 trouble with it is the fact that they keep it and maintain
24 it Does that automatically allow it to come in under
25 records of regularly-conducted activity? I think that's

1 You may call your next witness

2 MR PARKER The Plaintiff calls R Donald Crews

3 R DONALD CREWS, after being duly sworn,

4 testified as follows

5 THE WITNESS Ralph Donald Crews, C-R-E-W-S

6 THE COURT Mr Crews, would you please speak loudly
7 so my lady on the very far left over there can hear you?

8 THE WITNESS Ralph Donald crews, C-R-E-W-S

9 DIRECT EXAMINATION

10 BY MR PARKER

11 Q Mr Crews, you live in Hampton?

12 A Yes, sir

13 Q If you will, tell us what you do for a living

14 A I work for the law firm Peters, Murdaugh, Parker,
15 Eltzroth, and Detrick

16 Q Have been for how long?

17 A Right at 38 years

18 Q And what do you do for the law firm?

19 A Investigator

20 Q And what duties does that entail?

21 A Taking pictures, video, measurements of wreck scenes
22 and various accidents of other kinds

23 Q Documenting scenes?

24 A Yes sir

25 Q So that if you go out you try to take photographs and

1 measurements and things so that as close as possible if
2 there is something bad happening you know what the scene
3 looked like?

4 A Try to show what's visible there at the scene at the
5 time that I'm there Yes

6 Q Okay Let's go to -- Did you go to the scene of the
7 collision with Frances Harvey and where Beryl Harvey was
8 killed on May 30, 2004?

9 A Yes, sir I have been to that scene

10 Q And when did you first go there?

11 A I believe it was on the 6th -- the 2nd

12 Q June 2?

13 A June 2

14 Q All right Let's put up -- We're going to put up
15 Plaintiff's Exhibit 64 Are these measurements that you
16 took out there when you were there in close proximity
17 June 2, 2004?

18 A That was on June 4 Yes, sir

19 Q And these measurements, did you measure the distance
20 of the stop line there?

21 A Yes, sir

22 Q And on one side to the front of the stop line how far
23 is it would be towards the center of the road?

24 A That would be 25 feet, 4 inches to the near rail

25 Q And on the edge of the road?

- 1 A 19 feet, 4 inches
- 2 Q And how wide is the white line there? ,
- 3 A 2 feet approximately
- 4 Q And you measured the stop sign, the other things out
- 5 there that indicated physical land marks, pavement
- 6 markings and those types of things?
- 7 A Yes, sir
- 8 Q Let's go to the next page You measured the distance
- 9 to -- from the Highway 21 to the crossing?
- 10 A Highway 321 Yes, sir
- 11 Q Excuse me I said 21 And that was how far?
- 12 A 250 feet
- 13 Q And you measured from the railroad warning sign to
- 14 the?
- 15 A Nearest rail
- 16 Q And, again, you show another measurement of 19 feet
- 17 for the inside of the white line?
- 18 A Yes, sir, to the near rail
- 19 Q And let s go to the next page You also went and
- 20 looked at the vehicle?
- 21 A I did
- 22 Q Took numbers of photographs of it?
- 23 A Yes, sir
- 24 Q And in there you note that you did not find a radio?
- 25 A That's correct

1 Q And the heat and air -- at that point in time, the
2 air conditioner was on the off position?

3 A Right

4 Q And the back air conditioner you were not able to
5 determine the status of it?

6 A There was no knob on the switch

7 Q Okay Next page And you took a number of
8 photographs from various positions to document the scene?

9 A I did

10 Q And you went back 35 feet from the near rail?

11 A Correct

12 Q And if you would just tell us what you did

13 A I took photographs every 5 feet in both directions
14 looking south and looking north up and down the railroad
15 track from every 5 feet -- 5, 10, 15, 20, 25, 30, and 35

16 Q So that you will know when you get those photographs
17 back do you note on the back of the photograph where you
18 took that picture from?

19 A I did

20 Q And the pictures you took were -- how tall are you?

21 A About 5 5, 5'6

22 Q Whatever your eyes are the below that height is the
23 height those photographs were taken from?

24 A Correct That's about 5, 5'1

25 Q All right Next page Did you also on 6/4 measure

1 the certain -- or let's go first -- you took certain
2 pictures from 70 inches behind the stop line?

3 A Correct

4 Q And you did that with John -- you say John -- was
5 that Mr Moorman?

6 A Correct John Moorman

7 Q We'll talk about that photograph in a minute, but you
8 -- and those -- you took those from various eye heights?

9 A I took one, two, and three taken from 70 inches
10 behind stop line, my eye height, with John on the track
11 1014 feet

12 Q Okay And the next thing you did, did you go down
13 the track and measure the brush that was -- that would be
14 visible to a driver approaching that crossing from 321?

15 A Yes, I did

16 Q And if you will let's go over your measurements and
17 what you measured

18 A Thirty-eight feet at the center of the road to the
19 cable post SC-000303 and put a note brush clear for at
20 least 100 feet, 2 to 3 feet high

21 Q In other words, in the first 100 feet the brush was 2
22 to 3 feet high?

23 A Approximately, yes, sir

24 MR WILBY Your Honor, if you don't mind, Your
25 Honor, I'd ask Mr Parker not to lead him through this

1 It is his work product -- not to ask leading questions,
2 Judge
3 THE COURT Rephrase your question
4 Q Does that say what you found out there?
5 A Yes, sir
6 Q All right At 48 feet what did you find?
7 A The same -- approximately the same thing
8 Q Sixty feet?
9 A Same thing
10 Q Seventy feet?
11 A Same
12 Q Eighty?
13 A Eighty feet, you know, there was a small amount of
14 brush 4-foot high maybe, but 25 feet from the railroad
15 track
16 Q Is that an 8 or a 5? I want to be certain It looks
17 like an 8 from here is why I'm asking
18 A You talking about the feet? Eighty
19 Q Eighty feet?
20 A Eighty feet, yes, sir
21 Q Is that 28 feet from the near track?
22 A Yes, 28 feet
23 Q And you measured that distance with a tape of some
24 sort?
25 A With a tape

1 Q And you have next the same to 180 So, the brush was
2 4 feet high to 180 feet?

3 A It was mixed, you know, 3 to 4 feet high

4 Q And at 180?

5 A The brush went up to 5, 6 feet high, 30 feet from the
6 first track, but it's on an embankment that's higher than
7 the track and it measured approximately the same thing to
8 255 feet and then the bank gets higher

9 Q How high was that bank at about 255 feet?

10 A I really don't have a recollection

11 Q Well, let's look down your notes Would you have
12 made a note of it?

13 A Well, I did at 255 maybe, you know, later on, but I
14 don't know that I did there

15 Q All right At 255 you say the brush was about 6 feet
16 high?

17 A Yes, sir And at 300 the brush is about 6-foot high
18 and the bank is approximately 4 to 5 feet higher than the
19 track

20 Q Brush on top of the bank?

21 A Correct

22 Q And at 340?

23 A Same to 340, approximately 22 feet from the first
24 track Same to 392 and start of trees at 392, 28 feet
25 from the track, trees approximately 40 to 50 feet high

1 Q Next

2 A 447 feet, tree 24 feet from the first track

3 580 feet is a branch 7 to 8 feet at 20 feet from track --

4 brush, I mean, 7 to 8 feet high, 20 feet from the track

5 Q Next

6 A At 620 brush is 14 feet from track, 6-foot high more

7 or less, 700 feet it is 14 feet 800 is the same 900,

8 21 feet 1000 feet is 18 feet At 15 feet there is a

9 pine limb that's only about 8-foot above the ground

10 Q Next you have a note, The whistle post approximately
11 1500 feet?

12 A Yes, sir

13 Q Did you measure that distance?

14 A Not exactly, no They're supposed to be
15 approximately 1500 feet from a crossing and going a
16 thousand feet, more or less, it look to be another 500

17 Q That was your estimate?

18 A Yes, sir

19 Q All right And then you have film roll two?

20 A Correct Pictures four, five, six, and seven taken
21 at 62 inches, 64 inches, 66 inches, and 68 inches height
22 at 70 feet behind the stop line

23 Q Next Okay Thirty-two -- we're going to look at
24 Exhibit 32 Did you take that photograph as noted in your
25 notes?

1 A It looks like 6/4/04

2 Q And I am going to hand you the photograph,
3 Exhibit 32, and can you tell me what distance that
4 photograph was taken from the near rail?

5 A Thirty-five feet

6 Q And that is a measured distance?

7 A Yes

8 Q And you took tape -- What did you do it with? The
9 tape?

10 A Yea

11 Q And looked down the track in the direction and that
12 vegetation you talked about measuring is the vegetation we
13 see in this photograph?

14 A That's correct

15 Q And --

16 A Between the light pole and the railroad track you can
17 see the brush

18 Q Now, let's go to Exhibit 48-B Exhibit 48-B -- is
19 that a photograph that you took 70 inches behind the stop
20 line with Mr Moorman on the track?

21 A I can see the little white dot down there I'm
22 assuming that's it

23 Q And did you measure that distance?

24 A Yes, I did

25 Q And did you -- How did you measure that distance --

1 with what instrument?

2 A With a tape

3 Q With a measured tape or a rolling tape? Do you
4 remember which one you did?

5 A I'm not positive on that one which one I used

6 Q And did you look at the windows on the vehicle where
7 you've took pictures of it?

8 A I did

9 Q And were you able to make a determination as to
10 whether the windows were up or down at the time of this
11 collision?

12 A Yes, I think I have those in my notes

13 Q In your notes did it show that the windows were, in
14 fact, up on all positions?

15 A Yes

16 Q And this glass that we -- How do you make that
17 determination?

18 A Try to find glass if it's broken in the window
19 channel If there is glass left in the window channel you
20 know the glass was up to that point

21 MR WILBY Your Honor --

22 THE COURT Sustained

23 MR WILBY Thank you, Judge

24 THE COURT Disregard that last statement You can
25 testify about what you saw and found, but you can't make

1 opinions about it

2 What did you find? Don't tell us what you think it
3 indicates

4 THE WITNESS I found pieces of glass in the window
5 channel

6 Q Did you find it all around the window channel on the
7 driver's side?

8 A I don't really recall Only the photographs would
9 show what was there

10 Q All right Next Other than the -- You also took
11 videotape?

12 A That's correct

13 Q And the videotape you did at certain intervals --

14 A Yes

15 Q -- as you approached on both sides going towards the
16 crossing?

17 A Video in both directions, yes

18 Q And did you also do some work recently whereby you
19 took some photographs of a vehicle -- a van similar to --

20 THE COURT Hold on a second Are you ready to go
21 into that?

22 MR PARKER Yes, Your Honor

23 THE COURT Let me talk to the lawyers just one
24 second, please Y'all step right now

25 (Whereupon, the jury exited the courtroom at 9 57)

1 THE COURT All right Let the record reflect the
2 jury is out We're doing a proffer on the new photographs
3 that we discussed just prior to Mr Crews' testimony

4 PROFFER EXAMINATION

5 BY MR PARKER

6 Q Mr Crews, on November 5 did you --

7 THE COURT 2009

8 Q -- 2009 -- locate a van that was similar to a van
9 that was similar to the van that Ms ~Harvey was driving on
10 May 30 2004?

11 A Yes

12 Q And did you take that van to a railroad crossing?

13 A I did

14 Q And did you photograph what can be seen as you
15 approached a white line at a railroad crossing?

16 A I did

17 Q And when did you do that?

18 A On the 5th

19 Q Of November?

20 A Correct

21 Q And do those photographs accurately depict what the
22 eye could see from sitting in a van that was similar but
23 the -- Does it accurately depict what you could see from
24 sitting in that van at various distances?

25 A It did

1 Q And did you measure those distances?

2 A Yes

3 Q And did you photograph the measurements on those?

4 A I did

5 Q And do they accurately depict what a person
6 approaching a white line can see in that van at that
7 height?

8 A Correct

9 THE COURT Mr Wilby, you want to ask him any
10 questions? You want to make an argument

11 I mean, I assume, Mr Crews, the pictures are
12 reflected in Plaintiff's Exhibit 141 to 159 -- those that
13 were handed to me this morning?

14 THE WITNESS Yes, sir

15 THE COURT And 160 is I assume just some notes
16 memorializing what your measurements --

17 THE WITNESS I can't see it, sir Yes, sir

18 THE COURT And as I understand, first of all, this
19 is not the crossing in question?

20 THE WITNESS No, sir

21 MR WILBY Your Honor, I just renew my previous
22 objections

23 THE COURT Mr Parker?

24 MR PARKER Your Honor, we believe that this
25 evidence is admissible The evidence -- I mean, it is

1 what it is whether we did it, they did it, or anybody did
2 it

3 THE COURT Well, I agree with you I mean, it is
4 what it is, but in all fairness to you and to the railroad
5 we have been all together on this case for some time, and
6 I am just concerned about argument Mr Wilby made in being
7 fair to the railroad that they have not had an opportunity
8 to do anything with the photographs and I'm certainly not
9 being critical of either side of the lateness of the
10 photographs because as I've said on the record many times
11 it is a pleasure to work with all of the lawyers in this
12 case Y'all have been nothing but admirable and you are
13 an examples as to how everybody in the bar should act, but
14 I am a little concerned about the railroad not being able
15 to --

16 MR PARKER Your Honor --

17 THE COURT -- do anything other than just look at
18 them and ask questions

19 MR PARKER Your Honor, this weekend they could take
20 photographs I don't think they -- I just don't know any
21 way you can cross examine that or you could -- they could
22 do it and if we re wrong in some way and they certainly
23 have the weekend they can do whatever

24 THE COURT Well, here is what I am going to do I
25 am going to sustain their objection with this condition

1 That I'll give them -- Today is Thursday Friday,
2 Saturday Sunday, Monday, when we come back, and if it
3 becomes an issue I'll allow you to recall Mr Crews out of
4 order to put that up, give them an opportunity to look at
5 the pictures, make whatever assessments they need to make
6 If they want to make additional pictures, they can Then
7 I will reconsider the admission of these pictures at that

8 MR PARKER Thank you

9 THE COURT All right Anything else by this
10 witness?

11 MR PARKER Nothing from us I assume they may have
12 some cross

13 THE COURT Anything I need before I bring the jury
14 back?

15 MR WILBY No thanks, Your Honor

16 THE COURT Bring the jury back

17 (Whereupon, the jury came into open court at
18 approximately 10 02)

19 MR PARKER Your Honor, I do have one other matter
20 One short question

21 THE COURT Okay Mr Parker?

22 CONTINUED DIRECT EXAMINATION

23 BY MR PARKER

24 Q Mr Crews --

25 THE BAILIFF Excuse me, sir

1 THE JUROR We're missing one

2 THE COURT Thank you

3 THE FOREPERSON Bathroom

4 THE COURT No problem They teach us in judges'
5 school to always look over there and make sure I got all
6 of my jurors I just assumed I did Thank you, ma'am
7 Mr Parker?

8 Q Mr Crews, you also testified you took video and I
9 want to just -- if you would mark on this and tell us what
10 we're looking at

11 A Where I made a mark on the center line of the road

12 Q With chalk?

13 A Actually, a paint stick

14 Q That looks like 40 feet?

15 A That's what it looks like On the video when the
16 camera is leaving it you can usually see it clearer than
17 any other time, but some of them are hard to read

18 Q And let's look -- We're just going to play a little
19 bit

20 (Whereupon, the video is played)

21 Q And that video is taken at 40 feet?

22 A Looking south

23 Q And you did this for whatever distances you put down?

24 A Correct

25 MR PARKER Answer any questions that Mr Wilby may

1 have for you

2 THE COURT Mr Wilby?

3 MR WILBY Thank you, Your Honor

4 CROSS-EXAMINATION

5 BY MR WILBY

6 Q How are you doing today, Mr Crews?

7 A Pretty good You?

8 Q Good It is good to see you again Now, Mr Crews,
9 you do -- obviously, you do investigations for Mr Parker,
10 correct?

11 A For the firm, correct

12 Q Yes, sir And you do those on a regular basis?

13 A Yes

14 Q And I think -- Although you've been working for the
15 firm for about 38 years, you've actually been doing full
16 time investigations for about 20 or so years?

17 A Probably 25 or so

18 Q Okay And you testified earlier that you went to the
19 scene I think the first time on June 2 isn't that
20 correct?

21 A Yes, sir

22 Q And if we could pull up 67-D, please Mr Crews,
23 this is part of your notes and we had them up just a
24 second ago, but I just want to ask you a couple of brief
25 questions about them

1 It will be 67-D It will be the fourth page, I
2 believe, Bob Maybe one more All right Can we move
3 that around? Rotate it to the right one time I think
4 that will do it and then blow up that little section
5 there

6 So, what I think you did, Mr Crews, is you went out
7 there on June 2 and you really did sort of a brief diagram
8 of the accident scene?

9 A Correct

10 Q That was just to get the lay of the land, if you
11 will?

12 A Yes

13 Q And on that day June 2 you didn't take any
14 photographs out at the scene, correct?

15 A I really don't remember unless you've got photographs
16 with that date on them

17 Q Okay

18 A I don't remember taking any

19 Q All right But you took a few basic measurements and
20 Mr Parker took you through those, but after you left the
21 scene you went to inspect the van, I believe, isn't that
22 correct?

23 A I am not certain whether I went to see the van first
24 or to the scene or vice versa I really don't remember
25 That's been too long

1 Q Okay Well, I'll help you with that

2 A Okay

3 Q Just one thing I want to establish Maybe everybody
4 knows this, but I am not sure On this diagram, for
5 example, when you measure the stop bar and you got 19 feet
6 and you use the term the near rail and so have others
7 The near rail would be the rail closest to the stop bar,
8 correct?

9 A Correct

10 Q Okay So, when we refer to the near rail we're
11 really talking about the rail that's closest to the place
12 that you're measuring from?

13 A That's correct

14 Q Mr Crews, do you remember taking measurements of the
15 van itself?

16 A I am not sure

17 Q Okay Fair enough

18 A I usually do take some, but at that particular time I
19 don't remember

20 Q All right I can bring a document up if we need to,
21 but I'll just ask you at this point do you recall
22 measuring from the front bumper to the back of the
23 driver's seat finding 72 inches?

24 A I think I did, yea

25 Q And then do you also --

- 1 A I'm pretty sure
- 2 Q -- recall measuring from the ground to the seat where
- 3 Ms ~Harvey would have been seated at 35 inches?
- 4 A I would have to look at it now I can't remember
- 5 Q Well, let's pull up 81 The particular one I was
- 6 talking about there was measuring the height from the seat
- 7 to the ground, 35 inches Do you see that at the top?
- 8 A I see it, yea
- 9 Q Now you're confused because you're not sure that's
- 10 your handwriting?
- 11 A It doesn't look like my handwriting
- 12 Q Okay All right But you don't dispute that the top
- 13 of the -- the seat she was sitting in was 35 inches from
- 14 the ground? Does that seem about right to you?
- 15 A It's probably close I just don't know
- 16 Q All right, sir And we can pull that down You
- 17 testified in response to the document that Mr Parker had
- 18 up that the air conditioning was off at the time you
- 19 inspected the van, correct?
- 20 A Correct
- 21 Q Now, on June 4 you went back out to the scene and
- 22 that's when you took your photographs, correct?
- 23 A I know I took photographs
- 24 Q Okay
- 25 A Yes sir

1 Q And you also did detailed measurements at that time
2 Bob, at 67 It's probably the third page in if you
3 could pull that up 67-C And just kind of blow up the
4 center part of that if you don't mind, Bob

5 Now, you've seen the document before I am not going
6 to ask you but one or two questions The stop line you
7 have there, 19 feet 4 inches, and that's from the near
8 rail along the edge of the road where the arrow is drawn
9 there to the front edge of the stop bar, correct?

10 A Correct

11 Q And then I think you've got the stop sign -- you say
12 right below that it's 15 feet 6 inches along that same
13 angle with the road Do you see that?

14 Just above there, Bob

15 A No, I can't see all of it That's correct, 15 feet
16 6 inches

17 Q So, the stop sign is about 3 feet closer to the near
18 rail than the stop bar?

19 A Three to four

20 Q Okay It is maybe -- yes, sir, that's right That's
21 exactly right Now, if we could, we'll pull up
22 exhibit 68 Mr Crews, do you recognize this as one of
23 your photographs?

24 A Yes

25 Q And this is 5 feet from the near rail looking south

1 in the direction the train was coming from?

2 A It's looking south I am not sure exactly about the
3 distance I would have to look at the photograph and see
4 what was on the back of it if I put 5 feet on it

5 MR WILBY Mr Parker, do you have those?

6 MR PARKER I don't have them in the courtroom, but
7 we have them

8 Q Okay All right Let's look at the next one then,

9 69 You would agree with me, Mr Crews, that this is also
10 your photo looking south and it's a little bit farther
11 away from the near rail?

12 A It appears to be, yes, sir

13 Q And you do admit you took a photograph 10 feet from
14 the near rail --

15 A Correct

16 Q -- looking south One, correct? One photograph from
17 there?

18 A I'd have to look at my drawing and listing of
19 photographs again, but I think every 5 feet or so I did

20 MR WILBY Judge, may I approach the witness?

21 THE COURT You may Just let him look at that while
22 you're asking these questions I'm sure he takes a lot of
23 pictures It's not fair for him --

24 MR WILBY Yes, sir

25 THE COURT -- without him having something to look

1 at

2 Does that help you? Does that help out?

3 THE WITNESS Yes, sir

4 THE COURT All right Ask the question again

5 Mr Wilby

6 Q So, Mr Crews, you took one photo 5 feet south,

7 5 feet from the near rail looking south, correct?

8 A Correct

9 Q And you took one 10 feet looking south?

10 A Correct

11 Q And then you also - if we could go to the next

12 Exhibit No 70 -- you took one 15 feet from the near rail

13 looking to the south?

14 A Correct

15 Q And then Exhibit 71 you took one photograph 20 feet

16 away looking to the south?

17 A Yes, sir

18 Q Now, you notice in that picture there, Mr Crews,

19 that you can see essentially to the horizon?

20 A Yes

21 Q Did you measure that distance?

22 A No I did not

23 Q Okay And then you took another photograph,

24 Exhibit 72, and that's 25 feet from the near rail? In

25 other words --

1 A Approximately I took one 25 feet and that's moving
2 back it looks like 5 feet at the time

3 Q Yes, sir And 25 feet from the near rail can you see
4 the horizon in that photograph as well, Mr Crews?

5 A Just barely

6 Q All right, sir And 25 feet from the near rail is
7 where the stop bar begins, correct? Didn't you mention
8 that the stop bar was 25 feet?

9 A In the center of the highway it is, yes

10 Q Okay And to the right it was 19?

11 A Yea

12 Q Okay All right, sir You also took according to
13 your notes there one photograph from 30 feet from the near
14 rail?

15 A That's correct

16 Q And you took one photograph from 35 feet away --

17 A Yes

18 Q -- looking south, correct?

19 A Correct

20 Q All right And then I think if we could pull up
21 67-B-1 -- right at the top there where it references roll
22 two it indicates, sir, that you took on roll two photo
23 one, two, and three were taken from 70 inches behind the
24 stop line at your eye height with John at the track on --
25 on the track at 1014 feet?

1 A That's correct

2 Q Let's begin, if you will -- Pull up exhibit 74

3 please All right, sir that's exhibit 74

4 And, Bob, can you focus in there in to where -- yes,

5 sir

6 All right Do you see the white what we've called

7 the white dot, Mr Crews?

8 A Yes, sir

9 Q Would that be John on the track?

10 A As far as I can tell

11 Q Okay You don't recognize him on the picture?

12 A No

13 Q All right Could you back it out, please?

14 You can see you've got a mark there sort of in line

15 in the photograph with the telephone pole So, that would

16 be 70 inches behind the stop line, Mr Crews?

17 THE COURT Are you speaking about the X in the

18 photograph?

19 MR WILBY Well, I'm really -- Yes Well, I

20 referenced that, Judge, but, really, Mr Crews, I am just

21 establishing that this is one of the photographs that you

22 took 70 inches behind the stop line?

23 THE WITNESS It appears to be, yes

24 Q Okay And then the next exhibit, please, 75 And

25 you'll have to zoom in

1 And then again there is the photograph of

2 Mr Moorman --

3 A Correct

4 Q -- correct? And so this would be another one at
5 70 inches behind the stop line?

6 A Correct

7 Q All right And then the last one would be Exhibit 76
8 and there's Mr Moorman again, right, sir?

9 A Same little white dot

10 Q Yes, sir

11 A I assume it is

12 Q All right And if we blow him up I don't think we do
13 any better, but in any event that is the third picture
14 there on roll three -- one, two, three -- from 70 inches
15 behind the stop line?

16 A I think that's right

17 Q Okay Well, you didn't take any other pictures of
18 Mr Moorman, did you, besides these?

19 A No

20 Q All right And then again you took four additional
21 pictures from 70 inches behind the stop line, correct?

22 A I would have to look at my notes now

23 Q Oh, that's only fair If we could pull up 67-B-1
24 again I think it's going to be on the next page maybe

25 Okay At the bottom there

1 Also, on roll two, photographs four, five, six, and
2 seven were taken 70 inches behind the stop line?

3 A That's right

4 Q And, actually, it refers to the stop sign and line,
5 correct?

6 A It does refer to it on there

7 Q But your 70 inches is really reference to the stop
8 line?

9 A Stop line

10 Q All right, sir So, as I understand what you told
11 Mr Parker and also your notes there you took four
12 additional photographs from 70 inches behind the stop line
13 at different eye heights -- 62 inches above the ground?

14 A Yes, sir

15 Q That would be 5-foot-2 and then at 5-foot-4,
16 5-foot-6, and 5-foot-8?

17 A Correct

18 Q And so you took a total of seven photographs from
19 that position, correct, 70 inches behind the stop line?

20 A I think so That's right

21 Q And you meant for those photographs to correspond to
22 the driver's position if she were stopped with her front
23 bumper at the stop line?

24 A Yes

25 Q Now, Mr Crews, just to switch gears with you again,

1 the next time after June 4 that you were out to the scene
2 was on March 14, 2006 Do you recall that?

3 A Not by date, no

4 Q Okay Well, really, the only thing I want to ask you
5 about that is do you remember taking Dr Heathington out
6 to the scene on March 14, 2006?

7 A I remember he and I going out to the scene at some
8 date, yes

9 Q All right, sir Thank you very much

10 THE COURT Mr Parker, anything on redirect?

11 MR PARKER Nothing further, Your Honor

12 THE COURT Mr Crews, you may step down

13 MR PARKER Maybe I do have one other --

14 THE COURT Hold on

15 MR PARKER -- because there was a question asked

16 REDIRECT EXAMINATION

17 BY MR PARKER

18 Q Mr Crews, let me hand you your notes of 6/2

19 THE COURT Is that an exhibit number?

20 MR PARKER It is not our exhibit It was on their
21 exhibit list they referred to I don't remember the
22 number

23 THE COURT Mr Wilby, do you remember what it is?

24 MR WILBY Which one is it, John?

25 MR PARKER Y'all had it as 67, I believe it is

1 Defendant's Exhibit 67

2 THE COURT Thank you That's all we need for the
3 record

4 Q Mr Crews, did you make notes of the condition of the
5 windows in depositions on the vehicle on the date you went
6 and inspected it?

7 A I did

8 Q And what do those notes reflect as to whether or not
9 all of the windows were up at the time of the collision?

10 A I'll just read them all

11 MR WILBY Object to the form, Your Honor -- I mean
12 I object to the question, Your Honor

13 THE COURT Well, he can testify about what he
14 observed He can't make any opinions from his
15 observation Just tell us what you observed

16 THE WITNESS I'll just read what I wrote down

17 THE COURT Well, I don't know what you wrote Let
18 me see Where is it? I can't read your writing You can
19 read that

20

21 THE WITNESS Windshield broken out, driver's door
22 broken out Window was up Vent window closed Glass
23 broken out driver's side Two windows in rear both broken
24 out Glass in the channel middle window Channel gone
25 Rear side window found in back of van, glass broken out

1 The rear door driver's side glass broken out Rear door
2 passenger side glass good Glass good and closed or up in
3 all windows on passenger side

4 THE COURT Thank you You may step down All
5 right, sir Thank you Just hand that back to
6 Mr Parker You may step down

7 Next witness

8 MR PARKER The Plaintiff calls Ms ~Frances Harvey

9 THE COURT Mr Wilby, can y'all release Mr Crews?

10 MR WILBY Yes, sir Thank you, Mr Crews

11 MR MURDAUGH Your Honor, the Plaintiff calls

12 Ms Frances Harvey

13 THE COURT Come around, Ms ~Harvey, please Be
14 careful I want you to stand right there Put your left
15 hand on the Bible and raise your right

16 FRANCES HARVEY, after being duly sworn,
17 testified as follows

18 THE COURT Would you tell us your full name and
19 spell your last?

20 THE WITNESS Frances Harvey, H-A-R-V-E-Y

21 THE COURT I am going to pull this chair up behind
22 you You tell me when you're comfortable Do you need
23 any water or anything?

24 THE WITNESS No, sir, not right now

25 THE COURT You tell me if you need something

1 DIRECT EXAMINATION

2 BY MR MURDAUGH

3 Q Good morning, Ms ~Frances

4 A Good morning

5 Q Tell us a little bit about yourself, Ms Frances

6 Where do you live?

7 A I stay with my son in Blackville

8 Q Okay And who is your son?

9 A Gerald Harvey

10 Q Tell us about your family Ms ~Harvey

11 A Well --

12 Q Tell us about your children Are you married now?

13 A No, sir

14 Q Have you been married?

15 A Yes, sir

16 Q How long were you married for?

17 A Forty-one years

18 Q Okay And, Ms ~Frances, tell us about your children

19 A They all very good children

20 Q Tell us, you know, tell us how many children you

21 have

22 A I got three children Two of them have passed away

23 Q Okay All right And tell us the names of your

24 children Who is the oldest?

25 A Connie Carson, Michael Harvey, Gerald Harvey

1 Q Okay And is this Connie seated out there on the
2 front row?

3 A Yes, sir

4 Q All right And is that your son Gerald back there in
5 the tie?

6 A Yes, sir

7 Q All right And then that's Mike over there in the
8 blue shirt?

9 A Yes, sir

10 Q Okay And you had another child Karen?

11 A Karen but she's deceased

12 Q All right And, obviously, Beryl?

13 A Yea, Beryl

14 Q And, Mrs Frances, tell us a little bit about your
15 background Where did you grow up?

16 A Hampton County

17 Q Okay And did you finish high school, Ms ~Frances?

18 A No, sir, I did not

19 Q When did you stop?

20 A Seventh grade

21 Q And why did you stop then, Ms ~Frances Frances?

22 A My mother got sick I had to stay home and help her
23 with grandchildren

24 Q Did you help raise those?

25 A Yes, sir, I did

1 Q You got -- Have a good relationship with them?

2 A Yes, sir

3 Q Mrs Frances, let's talk about Beryl for a second

4 Tell us a little bit about Beryl's childhood

5 A Oh, he was like a regular child, get into mischief,

6 but he went to school and done other things

7 Q What was he -- as a child did he take an interest in
8 hunting and fishing?

9 A Yes he did

10 Q And where would he do that, Ms ~Frances?

11 A Well, we lived in Denmark out in the country and they
12 would go out hunting, coon hunting, and fishing at the
13 river

14 Q Now, let's back up I skipped over -- you grew up in
15 Hampton County?

16 A Uh-huh

17 Q And when did you move from Hampton County?

18 A Oh

19 Q Roughly?

20 A I have been moved away about 20 or 25 years

21 Q Have you been living in Bamberg County since that
22 time?

23 A Yea, uh-huh

24 Q Okay And you live over in the Denmark community?

25 A Well, I did when I was married

- 1 Q Okay And now where do you live, Ms ~Frances?
- 2 A I stay in Blackville with my son Gerald
- 3 Q Okay Now, Ms ~Frances, Beryl liked to hunt and fish
- 4 as a child Was he interested in sports?
- 5 A Yes, he was He played ball
- 6 Q Who did he play for?
- 7 A Denmark
- 8 Q What did he play?
- 9 A He played baseball and football
- 10 Q Was he a pretty good little athlete?
- 11 A Yes, sir, he was
- 12 Q Did you enjoy going to his games?
- 13 A Yes, sir
- 14 Q Did -- when Beryl was a child did -- was he one of
- 15 those children that liked to stay inside?
- 16 A No, sir He was on the outside
- 17 Q He wasn't a TV person?
- 18 A No sir
- 19 Q Okay And every day he was outside playing?
- 20 A Outside playing
- 21 Q Now, Ms ~Frances, we've heard the testimony in this
- 22 courtroom and we know that Beryl had a swimming accident?
- 23 A Yes, sir
- 24 Q And about how old was Beryl when that happened?
- 25 A Sixteen

1 Q And just generally, if you will, explain to the jury
2 what happened then

3 A Well, he was diving off -- jumped off a rope and he
4 broke his neck

5 Q Where was he that day?

6 A He was at the river

7 Q With friends?

8 A Yea, with a friend

9 Q All right And as a result of that wreck,
10 Ms ~Frances, what happened -- I mean as a result of that
11 accident, what happened to Beryl?

12 A They took him to Richland Memorial and he stayed in
13 there for 50-something days

14 Q And what was his condition after that accident?

15 A He was paralyzed from his chest down

16 Q Okay And couldn't move his legs at all?

17 A No

18 Q All right And did he have some use of his arms?

19 A A little bit

20 Q How about his hands?

21 A No He didn't have -- his hands, he couldn't use
22 them

23 Q Was he able to move his head and neck?

24 A Yea, yea

25 Q He could look around?

1 A Yea

2 Q Now, Ms ~Frances, despite being paralyzed and dealing
3 with that, I mean, what was Beryl's outlook there?

4 A Oh, he was -- I mean, he didn't want nobody to pity
5 him He had a good outlook on life

6 Q Did he feel sorry for himself?

7 A No, he did not

8 Q Did he ever ask why did this happen to me?

9 A No, sir, he did not

10 Q Okay As a result of that, I mean, there was some
11 things that Beryl couldn't do?

12 A Yea

13 Q And, I mean, how did he feel about having to get
14 other people to do things for him?

15 A Well, if he couldn't do it, he would ask you to help
16 him

17 Q Did he always want to try to do it himself first?

18 A Yes, he did

19 Q Ms ~Frances, how -- I want the jury to understand how
20 that accident when Beryl became paralyzed -- what effect
21 did that have on y'all's family?

22 A It brought us closer together

23 Q Why is that?

24 A I don't know, but it did I mean, we all felt that
25 we needed one another

1 Q Okay And in particular, Ms ~Frances, what did
2 Beryl's accident and his condition after that do for your
3 relationship with him?

4 A It brought me closer to him

5 Q Okay And did you and Beryl spend a lot of time
6 together?

7 A Yes, we did

8 Q How much time were y'all together, Ms ~Frances?

9 A Twenty-four hours a day

10 Q Okay You, in essence, became his arms and legs?

11 A Yea, I did

12 Q I mean, did -- for the most part did he go anywhere
13 that you weren't with him?

14 A Very seldom Very seldom

15 Q Okay Did you go many places when he wasn't with
16 you?

17 A Very seldom

18 Q I want you to talk to us a little bit about -- I mean
19 what could Beryl do for himself? I mean, could he dress
20 himself? -

21 A He could put his shirt on

22 Q Okay And did --

23 A And he could brush his teeth

24 Q And did he always want to do those things himself?

25 A Yes sir Yes, sir

1 Q Didn't want anybody helping him?

2 A No, sir

3 Q Could he dress the rest of himself, Ms ~Frances?

4 A No I had to do that

5 Q Okay Put on his shoes?

6 A Yea, I had to put them on

7 Q And was he able to bathe himself?

8 A No, I had to do that

9 Q And Ms ~Frances, toilet habits -- did you have to
10 help --

11 A I had to do that, too

12 Q Okay Let's talk a little bit about some of the
13 things that Beryl liked We've heard that Beryl was a big
14 Gamecock fan and a Miami Dolphin fan?

15 A Yes, sir he was

16 Q And did he like to dress in the colors of his team?

17 A Carolina and the Dolphins, yes, sir

18 Q And he had his hats and shirts?

19 A Yes, he did

20 Q And he had posters in his house?

21 A Yes, sir

22 Q And a lot of memorabilia around about the Dolphins
23 and the Gamecocks?

24 A Yes, sir

25 Q And if either one of those were playing ball on TV

1 what was he doing?

2 A Sitting there watching them

3 Q Cheering them on?

4 A Yes, he was

5 Q And did he like to keep up with the stats for those
6 teams?

7 A Yes, sir, he did

8 Q And tell us about Beryl's -- yours and Beryl's
9 peanuts, Ms ~Frances

10 A Well he liked being around people and I boiled
11 peanuts and bag them up and he would sell them

12 Q And would you and Beryl boil them together?

13 A Yea He would be out there with me

14 Q Where did y'all do that?

15 A In the front yard

16 Q At your house?

17 A At my house

18 Q And after you bagged them up, what would Beryl do
19 with them?

20 A He'd go to Bi-lo and he'd sell them outside and then
21 we'd take them to the auction and sell them

22 Q And did Beryl enjoy making that little bit of money
23 that he made doing that?

24 A Yes, he was

25 Q And when he would make his money, Ms ~Frances, what

1 -- what did Beryl like to do with his money?

2 A He would go do the auction and he would buy stuff to
3 resell

4 Q Okay Where would y'all go to the auction?

5 A In Blackville

6 Q How often did you do that together?

7 A We went every Friday and Saturday night

8 Q That was something y'all enjoyed doing together?

9 A Yes, sir

10 Q When you would go to the auction and make those
11 purchases what would -- what did Beryl like to do with the
12 items he purchased at the auction?

13 A Well, he would resell them or he would buy stuff for
14 me for the house We'd go to the flea market on Sundays

15 Q Where would he resell those items?

16 A At the flea market

17 Q So, he was sort of an entrepreneur in his own right?

18 A Yes, sir

19 Q Okay What else did he like, Ms ~Frances?

20 A He liked gardening He liked to plant a garden

21 Q Let s talk about that for a minute now Was he able
22 to do the garden himself?

23 A No, sir He would tell me how to do it He would
24 get my grandchildren out there -- the biggest boys -- and
25 they would do it

1 Q He would have you out there doing the planting and
2 tending to the garden?

3 A Yes, sir

4 Q Would he tell you exactly how to do it?

5 A Yes, sir

6 Q Was he -- Did he have a particular way that he liked
7 things to be done?

8 A Yes sir

9 Q And what would happen if you didn't do it exactly
10 like he wanted you to?

11 A He would tell you right He would keep after you
12 until you done it right

13 Q And did Beryl like to fish?

14 A Yes, sir he loved to fish

15 Q And that's something that you liked to do, too?

16 A Yes, sir

17 Q And did y'all enjoy doing that together?

18 A Yes, sir

19 Q And tell us now, Ms ~Frances, how it was that Beryl
20 came to be able to fish?

21 A We had a strap that we put on his hand and he would
22 put his pole under it and he would put it under his arm
23 and hold it

24 Q Is that something y'all -- that strap, is that
25 something y'all bought?

- 1 A It was fixed for him when he went to rehab
- 2 Q So something y'all made?
- 3 A Yea
- 4 Q And, now, could -- I mean, would Beryl actually pull
- 5 in the fish?
- 6 A Well, he couldn't always get them in, but he would
- 7 call one of us to come catch his fish
- 8 Q Could he fight it with the pole?
- 9 A Yes, he could
- 10 Q What would Beryl do down there fishing when he would
- 11 get hooked to a big bream?
- 12 A He would call us to tell us to come get it because he
- 13 couldn't pull it in
- 14 Q But he liked doing that?
- 15 A Yes, sir, he did
- 16 Q And could he bait his hook?
- 17 A No, sir I done that
- 18 Q Could he take the fish off?
- 19 A No, sir I done that
- 20 Q Okay So you would be right there --
- 21 A I would be right there beside him
- 22 Q -- by his side fishing and that's something that
- 23 y'all enjoyed doing together?
- 24 A Yes, sir, we did
- 25 Q Now, Ms ~Frances, Beryl -- he also had enjoyed

1 working on the computer?

2 A Yes, sir, he did

3 Q Tell us, please, ma'am how would he operate the
4 computer

5 A He had that strap and he would put a pencil in it and
6 he would work his computer

7 Q And, so, he'd take that pencil and hit the keys?

8 A Yes, sir

9 Q And he enjoyed following his statistics on the
10 internet?

11 A Yes, sir, he did

12 Q What else would he get off of the internet when he
13 was on the computer?

14 A He would buy all kind of stuff on it

15 Q Did he ever get recipes off of there?

16 A Yes, sir He got plenty of recipes off of there

17 Q All right And when he would get those recipes he
18 would want you to cook those things for him?

19 A Yes, sir We'd try them

20 Q And that was something y'all enjoyed doing together?

21 A (Witness nods head)

22 Q Now, Ms ~Frances Beryl took up a love of painting?

23 A Yea

24 Q Tell the jury, if you will -- Tell us about how Beryl
25 would do his painting, Ms ~Frances

1 A With his mouth

2 Q And I want to -- Let's understand that clearly I
3 mean, he put the paint brush in his mouth?

4 A In his mouth

5 Q Okay And from there he would get the various colors
6 to --

7 A To paint with, yea

8 Q And he -- he did that with the paint brush in his
9 mouth?

10 A Yes, sir

11 Q Do we have the next one on there?

12 He did a number of those, Ms ~Frances?

13 A Yes, sir, he did

14 Q As I understand it he started out with
15 paint-by-numbers?

16 A With the numbers

17 Q And after doing the paint-by-numbers for a period did
18 he get where he was pretty good at it?

19 A He was good at it He could paint without the
20 numbers

21 Q And, so, is this Plaintiff's Exhibit 134 one of them
22 that he did without a paint-by-number?

23 A Yes, sir That's it

24 Q And, again, that was a passion that Beryl had and
25 something he enjoyed doing?

1 A Yes sir

2 Q Okay Now, Ms ~Frances, let's go back to May 30,
3 2004

4 A Okay

5 Q That was a Sunday afternoon?

6 A Yes, sir

7 Q And tell us what you were doing -- what you had done
8 that day

9 A We had had lunch My daughter and my grandson come
10 over for lunch, and when they left he wanted to go
11 fishing We went and got gas and we bought the bait and
12 we went fishing

13 Q Now, before y'all went fishing y'all had -- you said
14 that you had had something to eat?

15 A Yea We eat supper before we left

16 Q You did eat supper?

17 A Yea

18 Q And I think I said in the opening statement,
19 Ms ~Frances, that you had cooked pork chops that day but
20 is that right?

21 A Fried chicken

22 Q Fried chicken And y'all had a good meal together?

23 A Yes, sir

24 Q Okay And you set out that day to go fishing?

25 A Yes sir

1 Q All right And you left your house in your van?

2 A Yes, sir

3 Q Talk to me a little bit about this van Tell me how
4 it was set up

5 A Well, we had a lift put in it so I could let him in
6 and out, and we had to tie things in the back where he
7 would back into them and they would lock him down

8 Q Okay So, while he was out on the ground he would
9 pull his chair on to the lift?

10 A Yea

11 Q All right And --

12 A And I would lift him up and he would back in there

13 Q That was something mechanical?

14 A Yea

15 Q Okay And then he would back into the van?

16 A Yea

17 Q And what would you do then?

18 A He would back into the locks where it would lock him
19 down in the van so the wheelchair wouldn't move

20 Q How did that lock, Ms ~Frances?

21 A Well, it had things that went between the wheels that
22 would lock in

23 Q Okay

24 A If you didn't get the wheels exactly right it
25 wouldn't lock down

- 1 Q Okay And Beryl had a motorized chair?
- 2 A Yea
- 3 Q And how did he stay in the chair?
- 4 A Seatbelt
- 5 Q Okay, Ms ~Frances, in sitting in that van I want us
- 6 to understand was Beryl facing forward the same way the
- 7 driver would face?
- 8 A No
- 9 Q Tell us how he was
- 10 A He would be sitting -- the front of the van would be
- 11 here and the seat He would back in right behind me
- 12 Q Okay So, in essence, he would be facing out what
- 13 would be the passenger side?
- 14 A Yea
- 15 Q Could he turn his head to see where the vehicle was
- 16 traveling?
- 17 A Yea
- 18 Q And could you see Beryl in your mirror?
- 19 A Yea I could
- 20 Q Okay Now, Ms ~Frances, y'all left your house that
- 21 day in your van?
- 22 A Yea
- 23 Q And where were you headed?
- 24 A We went uptown to get diesel
- 25 Q Okay Then where did you --

1 A We got bait and then we left and we went to Honey
2 Ford Road, turned to go down

3 Q Just talk about where you were going to fish that day
4 for a minute Tell us where you were going

5 A We were going by the church

6 Q Okay And that's a place where the creek comes up to
7 the bank?

8 A The creek, yea

9 Q And you could take Beryl's chair down there?

10 A Yea

11 Q All right And how long had you known about that
12 fishing hole, Ms ~Frances?

13 A We knew about it, I would say, about six or seven
14 months

15 Q Okay And had y'all been fishing out there before?

16 A Yes, we have

17 Q Pretty good fishing hole?

18 A Pretty good fishing hole

19 Q Okay Ms ~Frances, as you went down 321 you turned
20 on to Honey Ford Road?

21 A Yea

22 Q And if you will tell the jury about what you did as
23 you turned on to Honey Ford Road

24 A Well, I turned on Honey Ford Road, got up there where
25 I stopped I thought was it right I couldn't see I

1 pulled up a little bit past the light pole and I looked
2 left and I turned around and looked right I come back
3 and I didn't see anything and I thought it was safe and I
4 don't remember nothing else

5 Q All right Now, Ms ~Frances, I want to let's be
6 clear

7 Let's put up Plaintiff's Exhibit 32

8 All right Do you see the pole in that picture that
9 you pulled past that day?

10 A Yes, sir, the light pole

11 THE COURT Back up a little bit You're blocking my
12 juror

13 MR MURDAUGH I'm sorry

14 Q And Ms ~Frances --

15 THE COURT Ladies on the jury, that photo is right
16 there to your right, too, if you get blocked out

17 Q Ms ~Frances, when you stopped that day, all right,
18 were you behind the stop line?

19 A No I thought I stopped on it, but I didn't get out
20 to look

21 Q Okay

22 A But I pulled up past the pole and I looked down I
23 didn't see anything

24 Q Okay Now, Ms ~Frances, when you looked to your left
25 while you were stopped at Honey Ford Road did you think

1 that you could see a safe distance?

2 A I thought I could, but I didn't see anything

3 Q Okay Did you hear anything?

4 A No, sir, I did not

5 Q All right And, Ms ~Frances, you were in the
6 courtroom when Dr Heathington played that animation?

7 A Yea

8 Q All right And did you see that animation?

9 MR HARMON I'm sorry I will object

10 THE COURT What is your question?

11 Q My question is did you see that animation?

12 A Yes, sir

13 Q All right And did that animation accurately reflect
14 what you remember doing on May 30, 2004 up to what you
15 remember?

16 A Yea Yea

17 Q Okay And did it accurately reflect how you looked
18 left?

19 A Yea

20 Q Did it accurately reflect how you looked right?

21 A Yea

22 Q Okay And then you looked back straight ahead?

23 A Yea

24 Q All right What do you remember after that,
25 Ms ~Frances?

1 A I don't remember nothing

2 Q Okay After that, Ms ~Frances, what's the next thing
3 you remember?

4 A After the wreck? Well, I remember -- I thought I
5 heard Beryl call me, but I couldn't get to him I wiggled
6 out of the van I got on the ground and I couldn't move
7 And I remember having ants on me I don't really remember
8 anything else

9 Q Ms ~Frances, were you injured in that wreck?

10 A Yes, I were

11 Q What were your injuries?

12 A I had a broke arm, a broke neck, and a concussion

13 Q Did you go -- Were you taken to the hospital? Were
14 you flown to the hospital?

15 A Yes, sir, from what I was told

16 Q Okay And you were taken -- were you taken to
17 Richland Memorial Hospital?

18 A Yes, sir

19 Q Did you stay in there for a good while?

20 A Yes, sir~

21 Q And when you got out of there, Ms ~Frances, did you
22 go to another hospital?

23 A I went to rehab

24 Q All right And for a period in there while you were
25 at Richland Memorial Hospital were you in ICU?

1 A Yes, sir

2 Q Do you know how long that was?

3 A No, sir

4 Q Ms ~Frances, when did you first learn that Beryl had
5 died?

6 A I really can't say, but I know my children told me

7 Q Where were you when you learned that Ms ~Frances?

8 A In ICU, I think

9 Q Do you remember how you felt?

10 A Yea

11 Q Ms ~Frances, were you able to go to Beryl's funeral?

12 A No, sir

13 Q How did you feel about not being able to do that?

14 A It really hurt

15 Q The family took a lot of pictures for you?

16 A Yes, sir

17 Q And they showed those to you?

18 A Yes, sir

19 Q Ms ~Frances, what makes you think about Beryl now?

20 A Everything

21 Q Do you miss him?

22 A Yes, I do

23 MR MURDAUGH Please answer any questions Mr Harmon
24 has

25 THE COURT Do you need a break? Are you okay?

1 THE WITNESS I am okay

2 THE COURT You want some water?

3 THE WITNESS Please, sir

4 THE COURT Mr Harmon is going to ask you a few
5 questions We can wait a second We don't have to do it
6 right now Which one suits you?

7 THE WITNESS Go ahead and get it over with

8 THE COURT Just take a deep breath

9 CROSS-EXAMINATION

10 BY MR HARMON

11 Q I don't have many questions for you, ma'am, and if at
12 any point you need a break or tissue, please tell me to
13 stop Okay?

14 A Okay

15 Q I just want to clarify Can you see this from where
16 you are?

17 A It would be better out there

18 Q Okay I'll move it out here Excuse me Is this
19 okay far you, ma'am?

20 A Yea

21 THE COURT Mr Murdaugh, you can just stand right
22 there Hold on It is a little crowded We'll make it

23 Q Okay Can you see that, ma'am?

24 A Yea

25 Q What I just want to make sure I understand,

1 Ms ~Harvey, is how you all were configured in the van that
2 day Okay?

3 A (Witness nods head)

4 Q I am just going to draw Forgive my drawing I am
5 just going to draw kind of a box to symbolize your van
6 This is the direction that the van would be going, okay?
7 Do you understand so far?

8 A Yea

9 Q So, you were driving the van?

10 A Yes, I was

11 Q Okay So, I am going to put you just -- it's not --
12 right up here, okay?

13 A Okay

14 Q I am just putting you as an X right there Then if I
15 understand you correctly, Beryl would get into the vehicle
16 from this side, ma'am?

17 A The side

18 Q Okay And then he would back into the vehicle?

19 A Yea

20 Q Okay So, he was --

21 A Right behind me

22 Q Right behind you?

23 A Right behind my seat

24 Q This area right here I know it's not to scale, but
25 he was behind you?

1 A He was right behind me, yes

2 Q And so his back -- his back is towards the direction
3 the train came, is that right?

4 A Would be back towards the light pole, yes

5 Q All right So, this is his back right here?

6 A Yea

7 Q Okay So, he would have been facing the opposite
8 direction?

9 A Yea

10 Q Okay Now, if I remember correctly from some
11 previous questions we asked as y'all turned down Honey
12 Ford Road y'all were talking -- you and Beryl?

13 A Yea, I always talked to him

14 Q Okay And if you had -- if there was something going
15 on with Beryl and you had to turn to him would you turn
16 left or would you turn right?

17 A I would have never turned back until I stopped the
18 van I would pull off Find me a place, pull off, and
19 then I would shut the van off, and then I would get out of
20 my seat and take care of him

21 Q Okay So, you would -- but when you were talking to
22 him did you talk to him looking at him or looking through
23 the rearview mirror?

24 A No I would be looking straight ahead

25 Q All right And you talked earlier about when you put

- 1 him in the van there was some thing that locked?
- 2 A Locked his wheels
- 3 Q Can you tell us how you did that?
- 4 A He backed into them and it would lock
- 5 Q Did you have to do anything to lock it?
- 6 A No
- 7 Q Okay So, he was able to do that?
- 8 A Yea
- 9 Q Okay All right Now, the crossing -- when you all
- 10 were going fishing that day, ma'am --
- 11 A Yea
- 12 Q -- I think you used that several times before when
- 13 you all would go fishing?
- 14 A Yea
- 15 Q And how many times would you all go fishing down that
- 16 road towards that fishing hole?
- 17 A We might would some -- sometimes we might go twice a
- 18 week or sometimes just once a week
- 19 Q Okay The day that this tragedy happened, ma'am, it
- 20 was a sunny day?
- 21 A Yes, it was
- 22 Q And it was a clear day?
- 23 A Yes, it was
- 24 Q Now, I just want to go back to the point after you
- 25 looked left and looked right you don't remember anything

1 else?

2 A I don't remember going across the tracks, no

3 Q And, so, you said you never heard the train?

4 A I never heard the train

5 Q You say you never saw the train?

6 A I never saw the train

7 Q And you don't remember whether you -- you don't
8 remember when you proceeded across the tracks, right?

9 A No, I don't

10 Q Okay And you don't remember if you stopped on the
11 tracks?

12 A No I would never stop on the tracks, if I remember
13 it, no

14 Q But you don't remember?

15 A I don't remember

16 Q And you don't remember if your van was moving when it
17 was struck, right?

18 A No I don't remember

19 MR HARMON Your Honor, those are all the questions
20 I have Thank you very much for your time

21 THE COURT Redirect?

22 REDIRECT EXAMINATION

23 BY MR MURDAUGH

24 Q Just one Mr Harmon asked you if it was a sunny,
25 clear day?

1 A Yes

2 Q All right And was it hot that day, Ms Frances?

3 A Yes, it was

4 Q Did you have your air conditioner on?

5 A Yes, I did

6 Q And did you have your windows rolled up?

7 A Yes, I did

8 Q Were all the windows in the van rolled up?

9 A Yes, sir

10 MR MURDAUGH Thank you very much, Ms ~Frances

11 THE COURT All right You may step down You be
12 careful stepping down

13 All right Let's take our morning bathroom break
14 We got two choices today -- Frye's They have a buffet

15 THE CLERK I can get the menu downstairs

16 THE COURT Or a little restaurant downtown, my
17 friend Pam Barnwell at B & B What is today? Thursday?
18 He says on Thursday he has barbecue spareribs baked
19 chicken, smothered chicken, smothered pork chops, fried
20 chicken, fried pork chops, cabbage, rice, cornbread,
21 rolls, and for Moose they got pig feet We can do that or
22 we can go down the Fryes -- whichever suits y'all -- or we
23 can do Fryes today or do Pam tomorrow or y'all want to
24 just talk about it back there and let Mr Hiers know

25 All right Don't discuss the case Don't

1 deliberate We'll take about 15 minutes

2 Everybody else remain seated

3 (Whereupon, the jury exited the courtroom at 10 53)

4 THE COURT We'll take a short break

5 (Whereupon, a break was taken)

6 THE COURT Call your next witness

7 MR WILSON Your Honor, we're going to call

8 Mrs Angela Harvey

9 ANGELA HARVEY, after being duly sworn, testified
10 as follows

11 (Whereupon, the jury came into open court at
12 approximately 11 16)

13 THE COURT All right I understand y'all decided on
14 Pam's B & B

15 THE FOREPERSON Yes, sir

16 THE COURT I wish y'all would have decided on the
17 other place so I could have gone down there and got some
18 of that fried chicken I am going to make you smile
19 before the week is over

20 Mr ~Barnes, your witness Oh, I'm sorry

21 Mr Wilson

22 MR WILSON Thank you, Your Honor Your Honor, we
23 call Mrs Angela Harvey

24 THE COURT I have to pick on Mr ~Barnes This is
25 his first week after passing the bar I told him he had

1 to try this whole case by himself

2 Mr Wilson?

3 MR WILSON Thank you May it please the court

4 DIRECT EXAMINATION

5 BY MR WILSON

6 Q Tell the jury your name, please

7 A Angela Denise Harvey

8 Q And, Ms ~Harveyrs Harvey, are you married to Gerald,
9 Frances' son?

10 A Yes

11 Q Okay So that makes Frances your mother-in-law?

12 A Yes

13 Q And Beryl would have been your?

14 A Brother-in-law

15 Q All right Now today where does Ms ~Frances live?

16 A She lives with me and my husband

17 Q How long has Ms Frances been living with you and
18 Gerald?

19 A Since right after she came out of the hospital She
20 went to Connie's first for a little while during
21 rehabilitation and then she came to stay with us

22 Q After this wreck how long was Ms ~Frances in the
23 hospital?

24 A The wreck was at the end of May A couple of months,
25 two or three months

1 Q And of those couple of months you said she moved in
2 with her daughter Connie?

3 A Yes

4 Q Okay And about how long did she stay with Connie?

5 A About four to six weeks

6 Q And then she moved in with you and Gerald?

7 A Yes

8 Q So he's been living there ever since?

9 A Yes

10 Q Okay Now, you and Ms ~Frances must get along pretty
11 well if mother-in-law and daughter-in-law can live
12 together?

13 A Unbelievably so

14 Q How is that?

15 A I don't know She's been -- from the day that we met
16 she's just been a loving person to me She accepted me
17 into her family She's just one of the sweetest persons
18 you'll ever meet We never argue She doesn't interfere
19 in anything going on in the house She just -- actually,
20 we team up on Gerald most of the time

21 Q Do you really? Okay So, how long have you and
22 Gerald been married?

23 A Twenty-eight years

24 Q I want you to tell the jury a little bit about
25 yourself Where did you grow up?

1 A In Olar

2 Q Okay And you went to school where?

3 A I went to high school at Denmark Olar I graduated
4 from Denmark Olar in 1981

5 Q Have you had any schooling since then?

6 A I went to Denmark Tech for a little while while I was
7 working at Holland Hitch in Denmark I didn't finish, but
8 I do have some credit hours

9 Q Okay Where do you work now?

10 A I work at Southern Sales and Marketing sometimes
11 called Southern Patio in Orangeburg

12 Q Orangeburg?

13 A Rowesville

14 Q All right And how long have you and Gerald been
15 married?

16 A Twenty-eight years

17 Q Did y'all date some before that?

18 A We dated about a year and a half

19 Q So you've known Frances that whole time?

20 A Oh, yea

21 Q And you ve known Beryl and Michael and Connie that
22 whole time?

23 A Yes

24 Q Do you and Gerald have children?

25 A We have two children living and two children

1 deceased

2 Q And your two children that are living -- their names
3 and their ages?

4 A Bryan Anthony Harvey -- he is 27 -- and Timothy David
5 Harvey is 22

6 Q And so those would be Beryl's nephews?

7 A Yes, sir

8 Q And Frances' grandchildren?

9 A Yes

10 Q And, so, I guess if Frances -- Frances lives with you
11 now You and Gerald see her on pretty much a daily basis?

12 A Yes, every day

13 Q How about prior to Frances moving in with you and
14 Gerald? Did y'all see Frances regularly?

15 A Yea We -- we've only ever lived about 7 miles
16 apart So we could go over there all the time

17 Q How about Beryl?

18 A Oh, yea He's always there

19 Q All right So, tell me, do y'all have a weekly --
20 kind of weekly family gathering? What do you do?

21 A Yea We would always have cookouts and different
22 things Usually every Sunday we'd have -- everybody would
23 have dinner there at Ms ~Harvey's house

24 Q So, Sunday dinner at Frances' was the thing?

25 A Yea

1 Q Okay

2 A Good Sunday dinner

3 Q All right Describe for the jury, please, the
4 relationship between Beryl and Ms ~Frances?

5 A Not like many you'll ever see They both accepted
6 what happened unconditionally Yes, it was hard It was
7 hard to adapt to, but she -- they made do She loved him
8 unconditionally and so did he They were always close
9 It's always been a close family, but, of course, they got
10 closer after the accident

11 Q So you knew Beryl before --

12 A Just briefly before Not very long Just a couple
13 of months before it happened, yea

14 Q Okay

15 A And he -- but she just -- it was just a very loving
16 friendship They weren't just mother and son They were
17 friends

18 Q So, obviously, Beryl relied on Ms ~Frances for a lot
19 of his needs?

20 A Sure

21 Q Did it look to you like Ms ~Frances relied on Beryl
22 for things?

23 A Oh, yea They -- I mean he helped her with the
24 checkbook and things like that and would -- you know, when
25 bills would come in and he would tell her we need to do it

1 this way or that way and we'll pay this one and that one
2 is not due until so and so and we'll wait on that one a
3 little bit, you know, or whatever Yea

4 Q How about friendship and companionship?

5 A Yea They did everything together They went
6 fishing together, going to auctions They watched TV We
7 would call play Yahtzee or play cards

8 Q Okay Now, there was some testimony by Ms ~Harvey
9 that the diving accident happened when Beryl was about 16
10 Does that sound about right?

11 A Right Yea

12 Q Do you remember that he was in the hospital for
13 several months after the accident?

14 A Yea Yes, sir Two or three months, yea

15 Q And when he came home he was confined to a
16 wheelchair?

17 A Yes Has been ever since, yea

18 Q How did that accident -- how did that situation
19 affect the relationship between Beryl and Ms ~Frances?

20 A It only made it stronger I mean, there's never been
21 any animosity between them Never any arguments It was
22 -- they had -- they knew what they had to do They
23 accepted what had to be done and they were -- it was just
24 unconditional love I mean, she just did everything that
25 needed to be done, never ever once complained

1 Q Did Beryl ever complain?

2 A No

3 Q About what happened to him or what his situation was?

4 A No Beryl never complained about that

5 Q Okay How about between Beryl and his sister Connie
6 and his brother Michael and your husband, his brother
7 Gerald? How did that diving accident and his condition
8 affect their relationship?

9 A Well it made that stronger, too I mean, it really
10 brought the family together I mean, not that there was
11 anything wrong, you know, in between the family at the
12 time, but I mean --

13 Q Just got better?

14 A -- Connie was living away in California and she came
15 home and everybody just -- it just brought the family
16 together It made them even closer than they were before

17 Q Okay And you said that Ms ~Frances learned to adapt
18 and Beryl learned to adapt and the family learned to
19 adapt Tell me some of the things that y'all would have
20 to do to adapt to Beryl's condition or the family would
21 have to do to adapt to Beryl's situation

22 A Well, when Beryl first got in the accident and didn't
23 really have a way to get around and we -- first they had a
24 station wagon and then somehow Mr Harvey found a school
25 bus and we made a homemade ramp, put it on the back of the

1 school bus and we would haul him up in the back of it and
2 everybody would pile in and we'd go fishing or go to the
3 auction or go wherever Beryl wanted to go -- just go
4 riding sometimes

5 Q Did you paint the school bus or did it stay yellow?

6 A No, we didn't paint it It stayed yellow

7 Q It stayed yellow Okay

8 A We should have, though

9 Q All right There was some testimony about a thing
10 that the family came up with to put on Beryl's hand that
11 he could fish with or use a pencil or things like that

12 A Oh, yea He had -- his hands after the accident were
13 like in a relaxed position and he couldn't open them or
14 close them himself

15 Q So she couldn't use his fingers, really?

16 A He couldn't use his fingers They were a little
17 tight So if you put something a little bit big in his
18 hand he could hold it himself, but there was -- we got a
19 strap that was velcro and had and had a slit in it

20 Q Okay

21 A And he could hold his pencil or his fork and things
22 like that in his hand and then he had a clip on the side
23 of his wheelchair that we put his drinks in and we'd get
24 long straws and so he could get something to drink when he
25 wanted to

1 Q Could Beryl move himself around in the wheelchair?

2 A Yea He could --

3 Q So he could drive himself?

4 A He could use his hands He would turn his hand like
5 this or hold it like this and maneuver the wheelchair
6 around It had the little joystick on it

7 Q Did the grandkids like riding on that thing?

8 A Oh, yea The grandkids liked that ride They would
9 stand on the foot of his wheelchair or either get in his
10 lap He would ride them around As soon as my son came
11 out of the hospital he was holding him and riding him
12 around in the wheelchair He spoiled him rotten

13 Q The hand implement -- Beryl could hold a pencil?

14 A Uh-huh You could stick the pencil in the slit and
15 it would hold it

16 Q Or a stick or something to point and peck at what he
17 wanted to like a computer screen?

18 A Yea He loved getting on the computer and just
19 looking up different things, just searching the internet
20 looking up recipes trying to figure out something else to
21 cook

22 Q And there was some testimony that he could fish Did
23 you go fishing with Beryl?

24 A Oh, yea Yes

25 Q He could hold a pole?

1 A He could hold a pole

2 Q Could he get a fish in unless it was too big?

3 A He could get a little one in It couldn't be too
4 awful big, but he loved hooking them

5 Q How about crabbing or that type of stuff?

6 A Yea We used to go to Bear Island and it was flat so
7 he could get the wheelchair right up to the edge of the
8 bank and he would throw it over there and -- he could reel
9 it in like this

10 Q Just pulling the string?

11 A Pulling the string up

12 Q With the chicken neck on the end?

13 A Yea And he could reel it this way and then you'd
14 have to dip it for him, of course

15 Q All right Angela, I want you to describe -- you
16 told us a little bit, but I want you to describe Beryl's
17 personality after the diving accident and before this
18 wreck that ultimately took his life

19 A He was always outgoing He loved talking to people,
20 meeting new people, never met a stranger He loved going
21 to the auction and talking to different people, made
22 friends wherever he went He didn't like staying home
23 Of course, it was different times they had to stay home,
24 you know, if the weather was really bad or he wasn't
25 feeling well from time to time, but most of the time he

1 wanted to be out going somewhere either up in his chair,
2 on the computer

3 Q How about his sense of humor?

4 A He had a very good sense of humor He loved picking
5 at people He like picking at me especially, I think

6 Q What do you mean by that?

7 A Just anything that happened to be going on at the
8 time If I was -- you know, if I would say I worked hard
9 that day, oh, you didn't work hard that day He is just
10 always cutting up with you, telling jokes

11 Q Now, it sounds like -- You told us a little bit about
12 Beryl's involvement with the family Beryl was involved
13 with his family His family was involved with him?

14 A Oh, definitely, all the time Constantly

15 Q What kind of functions would he attend for the family
16 or with the family?

17 A We would have cookouts different football games

18 Q What do you mean by football games? You told us he
19 liked to go to a Carolina --

20 A Carolina game

21 Q Did he ever go to Carolina games?

22 A Oh, yes, yes He liked going to the children's
23 football games

24 Q When you say the children you mean yours?

25 A Grandchildren, yes, his nieces and nephews

1 Q So he would attend their ballgames?

2 A He would attend their ballgames

3 Q And graduation?

4 A Graduation

5 Q Birthday parties?

6 A Anything

7 Q Anything?

8 A Anything that was involved with the children or
9 family

10 Q School programs, all of that stuff?

11 A Yea He's been to school programs before

12 Q Okay There's been some testimony -- you said Beryl
13 liked to be around people and there's been some testimony
14 about his peanut business Was that something that kept
15 him out and in people?

16 A Yes He liked doing the peanuts Anything, you
17 know, just something to do and making a little bit of
18 money and he would get Ms ~Frances out there and get her
19 boiling those peanuts and he would get in there and help
20 them bag them up and he'd tell you how to bag them

21 Q Did he like interacting with people as much as making
22 the money?

23 A Oh, more so, definitely, yea

24 Q I want to show you some photographs that have already
25 been entered into evidence This will be Plaintiff's 117

1 I want to ask you -- Do you recognize that photograph?

2 A I do

3 Q What that's Beryl, obviously Tell us what that is

4 A That was when he graduated from high school

5 Q Okay

6 A He had to do a lot of homeschooling He went to
7 school some, but he did a lot of homeschooling and he
8 wanted to finish high school He didn't

9 Q So he was determined?

10 A He was determined he was going to get his high school
11 education

12 Q It sounds like Beryl is the kind of guy who is
13 determined to not be a burden but be a benefit?

14 A No He definitely didn't want to be a burden to
15 anybody

16 Q So he went back to school for a while Do I
17 understand that correctly?

18 A A little bit He did attend school at the school
19 house for a little while, but there would be days that he
20 couldn't go because he wouldn't be feeling well and so
21 they just decided to finish him out at homeschool

22 Q But he went to the real graduation ceremony?

23 A He definitely went to the real graduation

24 Q Tell me, what was that day like? What was the
25 family's reaction?

1 A We were just so proud of him --

2 Q Okay

3 A -- that he wouldn't give up and just to make that
4 accomplishment

5 Q How about Beryl's friends and the people that were
6 there? What were their reaction?

7 A Everybody stood up and clapped and cheered for him

8 Q Okay

9 A It was a very good day for all of us

10 Q Let me ask you if you -- I will spend a little bit of
11 time on a few of these photos Let me ask you do you
12 recognize that photo? That is Plaintiff's 119

13 A That's Easter at Ms ~Harvey's house

14 Q That's that long straw you were talking about?

15 A That's the long straw, yea

16 Q And who are the little ones?

17 A The one in the light blue shirt, the tallest one is
18 my oldest son Bryan

19 Q Okay

20 A And the other one is Connie's oldest son Kevin

21 Q And that's Ms Frances?

22 A That's Ms ~Frances

23 Q Okay Plaintiff's 120?

24 A Of course, he had to tell the kids where all the eggs
25 were

1 Q Okay That's not fair Tell me about this one
2 A This was at the zoo in Columbia Let's see Michael
3 is in the red hat to the left My youngest son David is
4 the white-headed one in the middle
5 Q Okay
6 A That is Ms ~Harvey, of course, and --
7 Q Beryl in the back?
8 A Bryan and Kevin and Beryl in the back and my husband
9 Gerald and then I am behind Mike
10 Q Okay And this was where?
11 A This was at the zoo in Columbia We just decided to
12 all pile in and go to the zoo one day
13 Q Okay 121 Tell me what that is Tell me who --
14 A This must have been around either Christmas or
15 somebody's birthday If I am not mistaken that's
16 Christmas and Bryan and Beryl had given each other baby
17 dolls for Christmas
18 Q Really?
19 A Yea
20 Q Just as a joke?
21 A Just picking at each other
22 Q And 125 here, tell me who the two little ones here
23 are
24 A That's Beryl in the back, of course, and Tristin and
25 Blair That's Michael's two children

1 Q Michael's children Okay

2 A And you see how he is looking at them He loved
3 those kids

4 Q And 127?

5 A This is Mr and Ms ~Harvey and Connie and Mike and
6 Gerald and Beryl

7 Q Okay And then the jury --

8 A That was at their house just probably one Sunday
9 afternoon

10 Q Okay And the jury has seen this, but this is 133
11 That's some of the painting Beryl had done?

12 A Yes I can't paint with my hands the way he could
13 paint with his mouth and his hands I mean, he painted
14 with his mouth most of the time and I have absolutely no
15 idea how he did that I'm not sure what got him started
16 He just saw some at store one day and decided he wanted to
17 try them and he was awesome at it

18 Q Okay Now, Angela, I want to talk just little bit
19 about the day of this wreck, May 30 of 2004 Where were
20 you when you found out about the wreck?

21 A My husband and I and my son David were at our house

22 Q Okay And when y'all got the word that something had
23 happened what did you do?

24 A We were on our way to the accident They said it had
25 happened at Honey Ford Road We were on our way there,

1 but we didn't go there We stopped at -- we saw Michael
2 and Ms ~Harvey -- Well, Michael and some of the family at
3 Eddie Chesser's house which is their cousin

4 Q That was on the way?

5 A That was on the way That was on Highway 321 on the
6 way down there

7 Q When you saw them, what happened?

8 A We stopped and we -- Michael told us, you know, about
9 what had happened and that Beryl was gone and that they
10 had taken Ms ~Harvey by helicopter to Columbia to Richland
11 Memorial

12 Q Okay And describe that -- describe that feeling

13 A I am not sure you can

14 Q How about Gerald? How did it -- what was with
15 Gerald? *

16 A He is not a very open person when it comes to
17 feelings, but it was very hard

18 Q Okay

19 A It devastated all of us

20 Q And did you go to the hospital to check on
21 Ms ~Frances?

22 A (Witness nods head)

23 THE COURT Are you okay?

24 Q Are you okay? You need a drink of water?

25 THE COURT She's fine Move along

1 THE WITNESS Excuse me We went straight on to the
2 hospital

3 Q So you and Gerald never made it to Honey Ford?

4 A No We never went anywhere When they told us they
5 had taken to the hospital we went on to Columbia

6 Q Okay Who ultimately had to tell Ms ~Frances about
7 Beryl?

8 A Gerald did

9 Q And how was that?

10 A It was very hard for him He just -- we knew she was
11 going to ask and he couldn't tell her He couldn't lie to
12 her He didn't want to lie to her

13 Q Mrs Angela, does the family -- Do y'all talk about
14 Beryl now?

15 A Oh, yea

16 Q You talk about the good things?

17 A About the good things

18 Q Talk about the memories?

19 A Yea Yea

20 Q Is that something that you talk about with Gerald and
21 Connie and Michael?

22 A Yea It's whenever anybody -- anything is going on
23 there is a Carolina football game on or Miami football
24 game on -- anytime anything is going on that makes you
25 think about him, yea, which is a lot

1 Q And I know it's hard to talk about, Mrs Angela I
2 know it's real hard to talk about, but can you tell this
3 jury and tell us what it's like for this family without
4 Beryl?

5 A There is just a deep void It's a hole that we won't
6 ever be able to fill again

7 Q Yes, ma'am

8 A He was an inspiration and he -- I mean, we didn't do
9 things because of him We did things as a family and we
10 still do, but --

11 Q That's fine

12 A -- it's not the same

13 Q I understand Mrs Angela, I think the family had
14 gone back out to the scene and put a cross up?

15 A We went a little bit before that maybe about a week
16 or so after trying to find some of the personal effects
17 out of the van and then we went approximately a month
18 later and put a cross up

19 Q Is that something that's still being maintained?

20 A Yes Yes

21 Q That's all I have

22 Answer any questions they may have

23 THE COURT No questions?

24 MR HARMON I have no questions Thank you for
25 coming

1 THE COURT Next witness

2 MR WILSON Your Honor, can I have just one moment
3 to step out?

4 THE COURT Yes

5 MR WILSON Your Honor, we'd call Mrs Ida Bolen,
6 B-O-L-E-N

7 THE COURT Mrs Bolen, good morning How are you?
8 Come on right up here for me

9 IDA M BOLEN, after being duly sworn testified
10 as follows

11 THE COURT Ma'am, would you please tell us your full
12 name and spell your last?

13 THE WITNESS Ida Mae Bolen, B-O-L-E-N

14 THE COURT Mrs Bolen, I am going to pull this chair
15 up You get comfortable Is that good?

16 THE WITNESS That's good

17 THE COURT Mr Wilson is going to ask you some
18 questions

19 MR WILSON Thank you, Your Honor

20 DIRECT EXAMINATION

21 BY MR WILSON

22 Q Mrs Bolen, do you know Frances Harvey and did you
23 know Beryl Harvey?

24 A Yes, I do

25 Q Will you tell the jury just how you first got to know

1 Ms ~Frances Harvey?

2 A When I first met Frances her husband worked for the
3 man that I worked for -- Floyd Beard Then later on later
4 years then she moved right next door to me We became
5 neighbors and good friends and most of the family and --
6 because if one did one thing, the other knew about it and
7 if one left and didn't come back on time we always
8 worried We was more like family than neighbors in a way

9 Q So y'all were closer than just neighbors?

10 A Yes

11 Q Okay And about how long before this wreck in May of
12 2004 did Frances live next door to you?

13 A I'm not exactly sure Maybe it was six months or a
14 year they were there before the wreck

15 Q Do you think it might have been longer than that?

16 A Could have been Time goes by fast and I don t
17 exactly know what date they moved in

18 Q Sure When Frances lived there with you did Beryl
19 live there with her, also?

20 A Yes, he did

21 Q Now you live over in Denmark now?

22 A Yes, I do

23 Q And that's on Carolina Highway?

24 A Yes, it is

25 Q And what do you do? What do you do? Do you work?

- 1 A Yes, I work Right now I clean houses
- 2 Q Okay
- 3 A And work at the First Baptist Church in Denmark
- 4 Q And work at the First Baptist Church?
- 5 A Yes, custodian
- 6 Q So, when Frances and Beryl moved next door to you did
- 7 you see them on a regular basis?
- 8 A Yes, I saw them practically everyday If I didn't
- 9 talk to them I saw them in passing
- 10 Q Okay
- 11 A We saw each other everyday
- 12 Q I think you said something about checking on each a
- 13 little bit other earlier I didn't quite catch what you
- 14 were saying
- 15 A Well, usually if something went on in the
- 16 neighborhood if, you know, she left and didn't come back
- 17 by the time I thought she would be I was always watching
- 18 She and Beryl always went to the auction sale on Friday
- 19 and Saturday night I knew about what time they would be
- 20 back so I always would watch when they got in
- 21 Q Okay
- 22 A And then if she was late coming in the next day I
- 23 would always tell her, say, Well, now, y'all was late
- 24 coming in last night What happened?
- 25 Q You were checking on her?

1 A Yes

2 Q Did she do the same for you?

3 A Yes, she did

4 Q Y'all just kind of looked out for each other?

5 A Yes

6 Q Now, did you know Beryl much before the diving
7 accident that he had?

8 A No I didn't know him much before then, just in
9 name, but I knew him better after they moved in next to
10 us

11 Q Okay And when CSX attorneys took your deposition
12 you told them you thought that Beryl and Frances had moved
13 there about four years before the wreck Would that sound
14 about right?

15 A Yea I would imagine so Like I said, I don't know
16 the exact date they moved in I don't know how many years
17 it was, but I know, you know, they were good neighbors

18 Q Sometime And then you started seeing them on a more
19 regular basis?

20 A Yes

21 Q So you got to know Beryl a lot better?

22 A Yes

23 Q Okay All right When you would see Frances what
24 else would you always see?

25 A I would always see Beryl

1 Q When you would see Beryl what else would you always
2 see?

3 A You would see Frances

4 Q What kind of relationship did you see between Beryl
5 and Frances?

6 A They had a very close, loving relationship You
7 didn't see one without the other and one didn't do
8 something without the other approving or whatever

9 Q How about the rest of the family? Did you see Connie
10 and Michael and Gerald and all the nephews?

11 A Yea, the family was always, you know, close knit
12 Like I said, if Beryl wanted something done the family
13 would always come around and they would make sure he had
14 it done

15 Q Okay Were there any things that Beryl did that you
16 thought were unique or things that surprised you?

17 A He always liked to garden In fact, the garden spot
18 he had is still in the same place

19 Q It is still there?

20 A It is still there

21 Q Okay

22 A I know one time -- well, just before the accident he
23 grew what they call upside down tomatoes I never heard
24 of them before he had them

25 Q Upside down tomatoes? I don't know what that is

1 What is that?

2 A It's a tomato plant in a bucket that's upside down
3 It's hanging upside down and the tomatoes grow out of the
4 bucket upside down

5 Q Does it make it taste better or something?

6 A I don't know They're good-tasting tomatoes

7 Q I hate to say I don't know

8 A And then the day before -- well, the day before the
9 accident in his garden he brought me a cabbage that
10 Saturday I cooked it that day on Sunday

11 Q So that came out of his garden?

12 A Out of his garden

13 Q Okay

14 A And we still gathered the garden after he passed
15 because he still had a good bit of stuff in there and we
16 used it

17 Q How about anything else that he did that you saw that
18 was kind of unique that surprised you?

19 A He wanted quail and he was going to do pickled quail
20 eggs That was different I never heard of that before
21 I mean, just things that he did he always enjoyed He
22 sold peanuts Frances would always boil the peanuts He
23 would go in front of Bi-lo and they could sell the peanuts
24 and they would go door-to-door and sell them and I think
25 the same day of the accident they had boiled peanuts for

1 the church -- First Baptist Church

2 Q Okay Now, Mrs Ida, have you -- have you seen
3 Ms ~Frances since this automobile wreck -- since this
4 train wreck that took Beryl's life?

5 A I saw him one time before -- Well, just before my
6 father died because my Daddy was at Laurel Bay in
7 Blackville and then it was before Christmas and I stopped
8 by there when I was going to see him and then after she
9 got -- was getting out a little bit she came by the shop
10 Freeman Auto Care to visit with us a little bit when she
11 got out

12 Q Okay

13 A And then I did see her Friday night Her son had
14 just brought her in the doctor and I got a chance to talk
15 with her then a little while

16 Q Okay

17 A But I didn't see her much before then, but I usually
18 kept up with her, but Gerald -- I saw him a good bit

19 Q So you saw Gerald a good bit?

20 A Yea, I saw him a good bit

21 Q What I am understanding you to say is that you saw
22 Ms ~Frances a couple of times after the wreck and then you
23 saw her this past Friday?

24 A Yes

25 Q Where did you see her this past Friday?

1 A She was in CVS

2 Q In?

3 A In Denmark

4 Q And was she with?

5 A She was with Gerald, her son

6 Q So y'all got a chance to stop and talk?

7 A Yea, we talked a little while

8 Q Did she talk to you about Beryl?

9 MR HARMON I'm sorry, Your Honor Objection,
10 hearsay

11 THE COURT Sustained

12 MR WILSON Just one moment, please, Your Honor

13 MR HARMON Your Honor, may we approach? I think I
14 know what they're going to ask May we approach on this?

15 (Whereupon, a bench conference was held)

16 THE COURT Any other questions, Mr Wilson?

17 MR WILBY None Thank you, Your Honor

18 MR HARMON Your Honor I have no questions for

19 Mrs Bolen

20 THE COURT That's it Is Ms Berry still alive?

21 THE WITNESS She died in '95

22 THE COURT What was her name?

23 THE WITNESS Lillian

24 THE COURT Mr Floyd has been gone a long time

25 Good to see you Take care Be careful

1 witness I think he stepped out to get him

2 MR WILSON Your Honor, we would call Sage Carson

3 CHRISTOPHER SAGE CARSON, after being duly sworn,
4 testified as follows

5 THE COURT Give us your full name and spell your
6 last, please

7 THE WITNESS Christopher Sage Carson, C-A-R-S-O-N

8 THE COURT All right Mr Carson, you need to speak
9 up so those ladies way on the back can hear

10 THE WITNESS All right, sir

11 DIRECT EXAMINATION

12 BY MR WILSON

13 Q Sage, just make sure that you speak up so that the
14 people back here on the jury can hear you, okay?

15 A Yes, sir

16 Q Have you ever been in a courtroom before?

17 A No, sir

18 Q Okay It is nothing to be nervous about Just
19 answer the questions okay? Sage Frances is your
20 grandmother?

21 A Yes, sir

22 Q Your mom is Connie?

23 A Yes, sir

24 Q And your father is Mikey?

25 A Yes, sir

- 1 Q So Beryl would have been your uncle?
- 2 A Yes, sir
- 3 Q How old are you?
- 4 A Seventeen
- 5 Q Okay At the time that your uncle Beryl was killed
- 6 you were?
- 7 A Twelve
- 8 Q And what do you do now? Do you go to school?
- 9 A Yes, sir
- 10 Q Where are you in school?
- 11 A Edisto High School
- 12 Q What year are you? What grade?
- 13 A Eleventh
- 14 Q Eleventh grade All right Prior to this wreck May
- 15 30 of 2004 with Ms Frances and Beryl and the train how
- 16 often did you see your uncle Beryl and your grandmama
- 17 Frances?
- 18 A About two or three times a week
- 19 Q Okay Just kind of tell me generally where you would
- 20 see them
- 21 A Sometimes we would go see them Beryl and my grandma
- 22 would come to my house when we have cookouts, just
- 23 different family places
- 24 Q Did you do a lot of stuff with your uncle Beryl?
- 25 A Yes, sir

1 Q Like what?

2 A Sometimes we went fishing I would go to the auction
3 sometimes with them, just all kind of things

4 Q Some people said Beryl liked to garden sometimes

5 A Yes, sir He had a garden outside in his backyard
6 and he planted cucumbers, squash, all kind of stuff

7 Q I think your aunt Angela testified that he would tell
8 people or maybe your Grandma Frances said he would tell
9 people what to do in the garden and that the grandchildren
10 would do it Were you one of those grandchildren?

11 A Yes, sir

12 Q He would supervise?

13 A Yes, sir

14 Q And did you have to do it like he wanted it?

15 A Oh, yes, sir

16 Q All right Now, was Beryl -- what was your
17 relationship with Beryl?

18 A I was his nephew

19 Q I mean, what kind of -- did y'all have -- what kind
20 of relationship did you have?

21 A We was real close I did a lot with him and things

22 Q Okay And did Beryl seem real close with the rest of
23 your family?

24 A Yes, sir Everybody was like family to him If you
25 was friends, you was pretty much family

1 Q Okay There was some testimony that the
2 grandchildren liked to ride on his wheelchair Were you
3 ever one that would sit up on that wheelchair and take a
4 ride?

5 A Yes, sir

6 Q Okay Was it fun?

7 A Yes, sir

8 Q All right

9 A I remember one time I was riding with him and
10 something happened and we both ended up falling out

11 Q Oh, really?

12 A I was on the ground and I looked at him and he was
13 sitting there laughing

14 Q All right Did somebody have to help get him back up
15 and get him in the chair?

16 A Yes, sir

17 Q Now, tell me some of the things that your uncle Beryl
18 liked to do that were kind of unique or things that
19 surprised you

20 A I remember one time I went to his house and he had
21 done went to the hardware store and got wood and stuff --
22 him and my grandma He had done made out like
23 instructions for hisself to build a swing set and had all
24 of the tools and he would tell us what to do and we built
25 it We still have the swing set in my backyard to this

1 day

2 Q Do you really?

3 A Yes, sir

4 Q And he kind of told you how to build it and what to
5 do?

6 A Yes, sir He had all the angles measured out I
7 don't know how he would do it on paper, but he did it

8 Q Okay And did somebody -- did you help with the
9 swing set?

10 A Yes, sir

11 Q Did the rest of your family?

12 A Yes, sir

13 Q How about -- I think you had told me one time about
14 your Uncle Beryl take you and David, your cousin, out to
15 play golf?

16 A Yes sir

17 Q Did Beryl play golf?

18 A He watched He couldn't do too much

19 Q Okay

20 A But he would help us out If we was doing something
21 wrong he would tell us Keep your eye on the ball and
22 stuff like that

23 Q He would follow you around the golf course?

24 A Yes, sir

25 Q Did Beryl -- Was Beryl at a lot of your functions

1 like school functions or graduations or ballgames?

2 A Yes, sir He used to come to my baseball games and I
3 believe he came to my graduation from eighth grade at
4 school

5 Q How did you like that?

6 A I liked having him there to support me

7 Q Now, after Beryl's -- after this wreck and after
8 Beryl was killed did the family go out to the scene?
9 Y'all went out and put a cross up?

10 A Yes, sir

11 Q Have you been out there with the family to straighten
12 that out or maintain to keep it up?

13 A Yes, sir, a couple of times

14 Q And that's something y'all take a lot of pride in?

15 A Yes, sir

16 Q Tell me, Sage, kind of what Beryl meant to you --
17 being a little bit younger than him, what Beryl meant to
18 you -- or being a good bit younger than him, tell me what
19 Beryl meant to you

20 A He was a special person We did a lot of things, had
21 fun together He meant a lot

22 MR WILSON That's all the questions I would have
23 Please answer any questions that Mr Wilby might have for
24 you, okay?

25 MR WILBY No questions Thank you

1 THE COURT You can step down Call your next
2 witness

3 MR PARKER The Plaintiff calls Mr Jim Scott

4 JIM SCOTT, after being duly sworn, testified as
5 follows

6 MRS MCLEOD Your Honor, may we approach for just a
7 second?

8 THE COURT Yes, ma'am

9 (Whereupon, a bench conference was held)

10 DIRECT EXAMINATION

11 BY MR PARKER

12 Q Mr Scott, where are you from?

13 A Tennessee

14 THE COURT Whereabouts in Tennessee?

15 THE WITNESS Tri-cities Tri-cities is Kingsport,
16 Bristol, and Johnson city

17 Q What have you done for a living? I guess I am not
18 going to say that you're about my age, but you're not far
19 off What have you done for a living over your life?

20 A Well, I started out as at a very young age as a milk
21 man door-to-door sales which is no longer around and from
22 there I went into the Army I enlisted in the Army in
23 1966 I spent two tours of duty in Vietnam I come back
24 and spent my last 10 months in the service at
25 Fort Campbell, Kentucky

1 I was hired by the L & M Railroad in Louisville, the
2 Nashville Railroad Company, two days prior to my departure
3 from the Army, was honorably discharged, and worked at the
4 L & M which evolved into Seaboard System which evolved
5 into CSX Transportation and I left the railroad officially
6 in 1995 So, about 25 years

7 Q During that 25 years if you would go through and tell
8 us what you did, what was your job

9 A Well, I started out as a Brakeman, Switchman
10 They're the same thing It is just depends on where
11 you're working at what you're called From there I went
12 to conductor foreman Once again, it is the same thing
13 It's the same job It just depends on where you're
14 working at as to what you're called, and from that I went
15 to locomotive engineer From locomotive engineer I went
16 to road foreman of engines which was then called an
17 exempted position In other words, I was a supervisor at
18 that time, and from road foreman of engines I went to
19 district road foreman of engines and from district I went
20 to general road foreman of engines, central region for CSX
21 Transportation, and when I retired or left the railroad in
22 1995 I was road foreman of engines

23 Q All right Tell us what a road foreman of engines
24 does

25 A Road foreman of engines is what the railroad terms a

1 front line supervisor I am the guy that teaches the
2 locomotive engineers to be engineers I teach train
3 handling and on-time performance and supervise train crews
4 on a daily basis

5 Q When you were in the position of general road foreman
6 of engines, how many engineers were under your
7 supervision, if not direct that were under you for
8 supervision through you?

9 A How many? Gosh Well, my territory ran from Toledo,
10 Ohio from Savannah, Georgia so I had a large territory --
11 probably seventeen or eighteen hundred

12 Q Then your job as road foreman of engines, do y'all do
13 efficiency tests?

14 A We do

15 Q And if you will tell us what that is

16 A Efficiency testing is where you go out and test your
17 crews to make sure they're complying with the rules and,
18 of course, it's federally mandated, federally required and
19 then you -- Sometimes they know that you're doing it and
20 sometimes they don't know that you're doing it For
21 example, if I were doing radar tests, then they wouldn't
22 know I was there

23 Q And the radar tests is to check speed?

24 A Check speed, yes, sir

25 Q And the speed on the railroad is governed by what?

1 A The railroad The timetable

2 Q And the timetable tells the engineer how fast he can
3 be operating the train?

4 A At certain areas, that's correct

5 Q And other things which you check for on efficiency
6 tests are what?

7 A Any kind of rule compliance whether it's blowing the
8 horn or lining the switch It could be anything contained
9 in the rule book You have a section -- in efficiency
10 testing you have a code that goes with each rule or
11 section of rules

12 Q And the railroad is operated to speed you said by
13 timetable and you mentioned rules That's the operating
14 rules?

15 A Operating rules, safety rules train handling rules,
16 and even your hazardous material rules may come into play

17 Q And the operating rules -- do they have a section in
18 there on the horn how it's to be operated?

19 A Yes, sir

20 Q And during efficiency tests do you look at whether or
21 not the engineer is blowing the horn appropriately?

22 A You do

23 Q And in accordance with a certain rule?

24 A That's correct

25 Q And is this something you did for years?

1 A Years and years

2 Q And in order to do that -- and we're going to talk
3 about it in a minute -- does the engine -- locomotive
4 engine -- have on it -- or the locomotive, does it have an
5 event recorder on it?

6 A Yes, sir

7 Q And what is an event recorder?

8 A An event recorder -- many people like to compare that
9 to a black box on an airplane. Actually, it's not black
10 on an airplane. It's orange, but they call it black box.
11 The railroad calls it what it is. It's a data event
12 recorder and that's what we call it. It records different
13 parameters. A number of them are required and there's
14 other events on there that they do record that is not
15 required, but it tells you what's going on and what's
16 happening.

17 Q And in the operation of the railroad is the event
18 recorder, the data off of it used to make sure that the
19 train is being operated in accordance with the rules?

20 A It is used for that purpose and there is also a
21 mechanical side to it that they use to check the
22 performance of the locomotive.

23 Q And did you go to school to learn how to utilize the
24 event recorder and utilize the data off of the event
25 recorder?

1 A I was trained by Pulse Electronics, yes, sir

2 Q And Pulse -- Who is Pulse Electronics?

3 A It is now a called Webb Tech Webb Tech bought them
4 out, I don't know, three or four years ago, but Pulse
5 Electronics was the early pioneer of data event recorders

6 Q And then they were bought out and Webb tech is the
7 present company that produces event recorders and the
8 software?

9 A Yes, sir If you didn't know it, you couldn't tell
10 the difference between a Pulse and a Webb Tech

11 Q And I believe you said you left the railroad when?

12 A 1995

13 Q And have you maintained your certification as an
14 engineer since then?

15 A Not completely I am currently certified

16 Q And --

17 A There's been gaps in there when I hadn't been

18 Q And to stay certified you have to do certain things?

19 A You do You have to go and have your check ride and
20 have your rules exam

21 Q And if you will take us through -- if we are on a
22 locomotive if you would put us through the layout of where
23 everybody sits and where the controls are and so forth on
24 a locomotive

25 A Well, the newer style locomotives -- well, I say

1 newer style They've been out since about 1988 so that
2 would be, what, 21 years old now So, that's not too new,
3 but they had what was called a desktop type of control
4 stand on them, and they would sit directly in front of the
5 locomotive engineer and the engineer is on the right side
6 of the locomotive and with the desk style, like I said,
7 everything would be laid out in front of you, and the
8 older style it was a control stand that actually was
9 sitting on the floor and it was partially in front of you
10 but wrapped around to your left and that left the window
11 in front of you open Of course, the newer style the
12 window is open, too It is just a different style control
13 stand

14 Q And there is a certain place that the engineer sits
15 on the locomotive?

16 A Right side, yes, sir

17 Q And the certain place the conductor sits?

18 A Left side

19 Q And the engineer is the one who operates the
20 locomotive?

21 A Correct

22 Q And what is the function of the conductor?

23 A The conductor is in charge of the train He is
24 supervises the administration and takes care of all of the
25 paperwork

1 Q And hauling freight -- if you are delivering freight
2 or it's a freight train, the purpose of that train if it's
3 not what's called a through-train is to do what?

4 A If it's not a through train then you're referring to
5 a local I mean, you would set off and pick up at
6 different places

7 Q That is people would -- industries would have empty
8 box cars and you would deliver full and maybe pick up
9 empties?

10 A Or the other way It could be either way

11 Q And that as you mentioned earlier a switch -- That's
12 if you had a Brakeman or Switchman he would operate the
13 switch?

14 A That among other things He would operate switches
15 that needed to be hand-thrown He would pick up set off
16 cars, couple air hoses, line switches, derails -- a number
17 of duties

18 Q And that would be -- the switch would be where you
19 could get off a main line track and go into an industry or
20 side track to let off or pick up cars?

21 A Correct

22 Q And essentially the engineer is the operator of the
23 train and the conductor is the one who is the guy that
24 does the administrative work?

25 A That's correct He supervises the train and

1 everybody on the train is subordinate to him

2 Q And in order to keep up with all of these cars -- I
3 want to put up Exhibit 107 I will hand you a copy of it
4 That is -- We're looking at a consist?

5 A Yes, sir

6 Q And if you will, explain what a consist is

7 A A consist is a listing of the train in the order in
8 which it stands Normally, you'll list the cars The
9 first car will be the first car behind the rear engine or
10 locomotive

11 Q And?

12 A And then you go right on through and it'll list each
13 car in order that it stands on the train until you get to
14 the last car and at the end of it it'll give you a summary
15 of the train itself They give you the load, the empties,
16 tonnage of the train, length of the train

17 Q This is the way you -- a conductor keeps up with
18 which cars are delivered where?

19 A Yes, sir

20 Q And Exhibit -- let's go back to the first page
21 Exhibit 107 is the consist for the train that was in the
22 crossing accident at Honey Ford Road?

23 A Correct

24 Q And you've already read the testimony of the
25 conductor Mr Bonner have you not?

1 A Yes, sir

2 Q And what 107 shows is that he started out with how
3 many cars?

4 A You're talking about before he set off?

5 Q Yes

6 A Okay According to the consist he it looks like 4 1e
7 loads, 33 empties, tons was 5500 tons, total length of
8 train was 4785 feet

9 Q And he states on the consist that he strikes off and
10 from the testimony he delivered 16 cars to Georgia
11 Pacific, is that correct?

12 A Correct

13 Q And it says picked up four empty at Georgia Pacific?

14 A That s what he wrote down, yes

15 Q And then it shows that the 17th car there was a
16 certain car and it says empty in Estill and Mr Bonner --
17 do you recall his testimony about that?

18 A Yes

19 Q What was that?

20 A He set it off

21 Q He left And by set off you mean he left the car --

22 A Yes

23 Q -- in Estill? So, at that time he had left off 17
24 cars, picked up 4 So he had a net of -- a difference of,
25 what s that, 14? 13? My math is off So, he s lost some

1 cars off of this at that point in time?

2 A He did

3 Q And let's next go to Exhibit 108 and if you would
4 tell us what 108 is

5 A 108 is a bar tonnage graph It shows the make up of
6 the train where the loads and empties are at This is
7 what the engineer gets He's required to have that before
8 he leaves Again, it shows -- if you look at it if you
9 can stop right along there that would be fine If you
10 look at the top of there it says tons and you follow it a
11 cross and it's in increments and you see 20 tons, 40 tons,
12 80, and then lines drawn down to 100 tons and then you
13 have 120, 140, right on up The little stars that are
14 asterisks they represent at what probably 2000 or
15 2 tons -- I would have to look at the bottom to tell you
16 now, but it represents how many tons -- Well, it's there
17 at the top At the top down about right there There you
18 go It says -- see the asterisk, the 4 tons, and, of
19 course, the H also 4 tons but it equal hazmat It tells
20 you that that particular car has got hazardous materials
21 in it

22 Q And then you got symbol for loaded or empty?

23 A Yes You have loads and empties That s the way he
24 tells and it helps him to understand how he needs to brake
25 that train -- in other words, what type of braking and

1 where and when and so on

2 Q And I am next going to put up Exhibit 108-A If you
3 could blow up the first part of it -- if we would go to
4 the top There we are

5 On this -- is this a document that the CSX expert
6 Mr Wolf created?

7 A Yes, sir, it is

8 Q And is this a reconstituted consist because there
9 were certain cars that were let off?

10 A Correct

11 Q And certain ones picked up?

12 A Correct

13 Q And have you reviewed this document?

14 A Yes, sir

15 Q Does it appear to be accurate?

16 A It does

17 Q And the outside length of the cars involved in the
18 consist, did you check these distances to make sure they
19 were accurate?

20 A I did

21 Q And if you would, tell us how you go about
22 determining if you have a car number what the length of
23 that car is?

24 A Well, you go to something called the Official
25 Railroad Equipment Register and it lists every rail car or

1 practically every rail car in the United States and it

2 gives the length of that rail car coupler-face to

3 coupler-face and that's the external length of the car

4 Q And, so, utilizing the register you can determine the

5 length of a train if you need that information to study

6 the movement of the train?

7 A I can Yes, sir

8 Q And here it shows two locomotives -- CSX 160 and CSX

9 264 Those were the two locomotives on the train?

10 A Correct

11 Q And the length of them being 73 2 each?

12 A Yes, sir

13 Q And then it shows there four cars that were not on

14 the consist -- the SOU526947?

15 A Yes, sir

16 MRS MCLEOD Your Honor, I am going to object to

17 Mr Parker continuing to lead his own expert

18 THE COURT Well, I understand it

19 Q What does number one up there show?

20 A It shows the car number that was picked up

21 Q And does it show the number of it?

22 A It shows the number of it and the length of it, yes,

23 sir -- the type of it You see in the center of the page

24 there you notice it says AAR car type That's how the

25 computer recognizes what type of car it is You give it

1 that

2 Q And did you check that car?

3 A I did

4 Q Make sure that was accurate and that was one of the
5 cars that was picked up at Georgia Pacific?

6 A Correct

7 Q And did Mr Bonner, the conductor, make notes of
8 those four cars?

9 A He did

10 Q Have you reviewed those notes?

11 A I did review the notes

12 Q Did you check that against Mr Wolf's figures?

13 A I checked them in the register They're accurate

14 Q And the next -- Down to car number four Were four
15 cars on the consist?

16 A Yes, sir

17 Q I'm talking about not on this consist, but were they
18 on the consist that you're looking at there or were those
19 picked up cars?

20 A Was the picked up cars on the consist?

21 Q Yea

22 A Not my by number It says picked up four empties at
23 GP, Georgia Pacific

24 Q But these are the numbers of the cars to reconstitute
25 the consist?

1 A They are

2 Q And if you went on down now do you have an
3 understanding of which car was at the crossing or at or
4 near the crossing after the collision?

5 A Yes, sir It's the one that -- That's a bit fuzzy
6 from here, but it's the one highlighted in red -- the
7 5337, as I recall

8 Q It is GPSX 5337 if I am reading that correctly I
9 can't see it real good

10 A It is highlighted I can't read it good, but that's
11 what it should be yes

12 Q And it -- Did you have a photograph that showed that
13 in the police photograph I believe it was that car was
14 located a short distance from the south edge of the
15 crossing?

16 A That's what it showed, yes, sir

17 Q And the total length of the train before that car you
18 see on the document here was 2017 7?

19 A Correct 2017 feet

20 Q Did you check those figures?

21 A I did They're accurate

22 Q And this information -- is this useful trying to use
23 the event recorder to then determine where certain
24 activities took place in relationship to the crossing?

25 A It is if you don't have a measured stop distance

1 after impact You need this type of information to
2 determine You put -- you add it to the stop on the data
3 event recorder and back into the crossing That way you
4 figure where the grade crossing it itself is at on the
5 information from the event recorder

6 Q I am going to start and get you to go over the event
7 recorder with us and we will look at what a download looks
8 like Using Exhibit 113 -- I'll hand you up a copy that
9 you can have with you and if you will look at that and
10 tell us what we're looking at

11 A This is a portion of the download -- just a small
12 portion of it There is a large amount of information
13 contained on the event recorders, but this has to do with
14 the area of the incident And if you like, I can explain
15 the columns to you

16 Q Yea If you would, just explain the columns to us

17 A Okay Well, the first one there is self-explanatory
18 It's the date and that's the date that the incident took
19 place The second one is the time and the railroad uses
20 military time and you can see the first reading at the top
21 of the page there it is reading 1905 and 13 seconds In
22 other words 7 05 pm The next one over is the distance
23 column Notice in it it says mile and it's 52 and under
24 the feet column it is reading 2248 That represents the
25 distance from point of download Had the event recorder

1 been downloaded at the incident that column would read
2 zero after the download takes place

3 So, we know from this document that the train
4 traveled 52 miles, 2248 feet from that position before the
5 event recorder was downloaded The next one is speed
6 That's miles per hour and that engineer is looking at a
7 speedometer just like you look at in your car TE and
8 KLBS that's Tractive Effort and KLBS is in thousands of
9 pounds We have to look down the page a little bit to see
10 some effort there If you look -- let's look seven lines
11 down and go over to back to the TE column we re talking
12 about and you see 30 and that's 30,000 pounds of effort
13 going to the traction motor of those locomotives to pull
14 that train The next column over to the right is ABPSI
15 Air Brake PSI -- pounds per square inch Drop on down the
16 column a little ways, a couple of seconds later or earlier
17 and we see it reading 90 It should read 90 That
18 indicates that the brakes are released So, that's where
19 it should be Next column is IBPSI, Independent Brake
20 Pounds Per Square Inch Notice it's reading zeroes all
21 the way down the page and it should be Those are
22 locomotive brakes only and they would be zero The next
23 column is EOTPSI That's End Of Train PSI You would
24 have a two-way and a train device and the engineer has
25 what's referred to as an RDU or Rear Display Unit and he

1 can see the pressure on the rear car of the train He
2 sees other things, too, but pressure is one of them and
3 that lets you know the condition of the brake pipe on the
4 rear of the train so we can tell and make sure he is where
5 he should be Notice it's reading 89 So, pretty good
6 train line there Only a one pound difference in the
7 front end and the back end So, it is a good tight train
8 line

9 The next one is throttle position If you notice the
10 first reading there in the throttle position it has a D
11 That would be for Dynamic Brake There was no use of
12 dynamic brake during this incident so it's not going to
13 read that Throttle positions reads from idle and then
14 there are eight power positions -- one being the lowest
15 that you can have and throttle eight is wide open That's
16 as good as it gets

17 Q Let me -- I am going to put up the event recorder to
18 the relevant pages that we re going to be talking about
19 Do you have your exhibits up there with you that you can
20 pull out the one?

21 A I have the other one here, yes, sir

22 Q And you have your original that you worked from?

23 A Yes, sir

24 Q Okay Did you analyze this event recorder to
25 determine where the train stopped, where the horn was

1 blown, and that type of information?

2 A Yes, sir

3 Q And in this if you -- what are we looking at here
4 insofar as the horn is concerned?

5 A Well, the horn column is showing up in the center of
6 the page there The horn column is broken down into one
7 tenth of a second increments For example, if we look
8 down towards the bottom of the page there the time is
9 19 04 and 39 seconds If we follow across to the horn
10 section there and we see that the horn began three tenths
11 of a second into that second if that makes sense to you
12 and it continues on into the next second which is on the
13 clock at reading 19 04 40 and notice we got one all the
14 way across So that means it blowed the whole second

15 This is what I am talking about here Starting here
16 It continues into this second here and also continues in
17 to the next second which is 19 04 41 and we see from that
18 that it blows, continues on for six tenths of that second
19 So, this entire horn blow right here consumes 1 9 seconds

20 Q Is there a certain method that you're supposed --
21 that CSX trains its engineers to blow the horn?

22 A There is

23 Q And how are you supposed to blow the horn?

24 A Well, operating Rule 14L covers that -- Like in
25 Larry It says that you will blow two longs, a short, and

1 a long, the last long should continue until you to occupy
2 the crossing or you repeat the signal and you start at or
3 before the whistle board

4 Q In South Carolina is there a requirement that the
5 horn be blown for 1500 feet?

6 A There is

7 Q Is that law?

8 A Yes, sir

9 Q And the engineer -- how does he know where to start
10 blowing the horn?

11 A Well, there should be a whistle board at 1500 feet
12 prior to the crossing

13 Q And that tells the engineer that prior to getting
14 there he is supposed to activate the horn?

15 A That's correct

16 Q And you say two longs, a short, and a long?

17 A That's correct

18 Q How long are each of those approximately supposed to
19 be?

20 A Well, a long historically has been five to seven
21 seconds You'll have a one to two second gap between the
22 horn signal The short is two to three seconds, again
23 with the one to two second gap between the horn signal

24 Q And did CSX when you worked for them used automatic
25 sequences to blow that sequence on the horn?

1 A No Actually, the sequencers come out after I left

2 Q Are you familiar with them?

3 A Oh, very familiar Yes

4 Q Tell us what a sequencer is and how that is used

5 A A horn sequencer is a just a big button on the floor
6 over on the engineer's side and if he is busy or just
7 don't want to fool with pressing the button to blow the
8 horn itself he can press that button on the floor one time
9 and it will start blowing a crossing signal and it will
10 continue to do that until you press the button again or
11 you can press the horn button on the control console to
12 make it stop Once you turn it on it'll do it until you
13 turn it off

14 Q The sequence on that automatic horn sequencer is
15 what? How long is the long and how long is the short?

16 A As I said five to seven seconds is long and the short
17 is two to three seconds You'll have a one to two second
18 gap where you don't have any horn In other words, you
19 have a broken pattern

20 Q And the horn here when it started off it started at
21 45 47 and ended when it was at 44 8 and 43 39 It wasn't
22 blowing at 43 39?

23 A That's correct It went off during the second of
24 19 04 41 It blowed six tenths of that second

25 Q And the distance the horn was blown was what?

1 A Well, if we take the two numbers as a whole and just
2 figure it out that way it's 139 feet

3 Q And that's from 45 47 to 43 39 or did you use 44 08?

4 A I used 44 08

5 Q Okay

6 A Let me make sure I did that I did use 44 08

7 Q Okay And at 44 08 the horn was blowing, wasn't it?

8 A That's correct

9 Q For some seconds?

10 A Yea, about six tenths of a second according to the
11 event recorder

12 Q And because there is a gap in here between 44 08 and
13 43 39 it quit blowing somewhere in there between 44 08 and
14 43 39?

15 A Correct

16 Q If you would tell us --

17 THE COURT Hold on, Mr Parker

18 MRS MCLEOD I am just going to object to him
19 continuing to lead

20 THE COURT All right Mr Parker, please ask direct
21 questions

22 Q In the feet column here, is this running? How is
23 this running?

24 A How is it running?

25 Q Yea, I mean, we see up here it starts at 5183 and

1 we're going down in feet Why is that?

2 A Because that's the reference point from the point of
3 download

4 Q And what is it -- on the other column is miles,
5 correct?

6 A Correct

7 Q - So it's reading one mile at the time and then it
8 would drop and you see it going to another mile?

9 A That's correct When it consumes 5280 feet that
10 would be a mile

11 Q And so what we're seeing here in the feet column is
12 it going from 5,280 feet down to where it would hit zero
13 and start over again?

14 A That would be a point of download That's correct

15 Q And we see there at 45 47 there's where the horn
16 started and where it quit and you said in between 44 08
17 and 43 39 and then how long is the horn off for?

18 A 8 1 seconds

19 Q And so it wasn't blown between somewhere after 44 08,
20 wherever that point is, until it picks up at after 38 59?

21 A That's correct

22 Q And you have three tenths of a blow at that time?

23 A Three tenths of that second That's correct

24 Q Is the horn blow at 45 47 -- is that a long blow at
25 that point?

1 A No No, it's not It's not at least five seconds,

2 no

3 Q And I think you said it was 1 9 seconds?

4 A 1 9 is what the event recorder says

5 Q Is that a short?

6 A Pretty close Short is two to three seconds It
7 should be

8 Q You could consider that a short?

9 A I would

10 Q And then at 38 59 it -- the horn is back on?

11 A Yes, sir

12 Q And it's on for --

13 A One point --

14 Q -- how many seconds?

15 A One point 6 seconds I'm sorry 1 7 I see another
16 one up there My mistake

17 Q So it's on for another 1 7 seconds Is that a long?

18 A No That s not a long

19 Q Is that short of a short?

20 A It is short of a short It is

21 Q So, we have the appropriate sequence was supposed to
22 be what if the horn was being blown in accordance with
23 rule 14L?

24 A Normal conditions you would start at or before the
25 whistle board You would blow two longs, a short, and a

1 long The last one is to continue until you occupy the
2 crossing or you repeat the signal

3 Q And, so, then we have another gap of sometime between
4 when the horn went off at 37 22?

5 A Yes, sir And another interesting thing happened
6 during that same timeframe In the throttle column we
7 know that he goes from number six to number eight or wide
8 open

9 Q In other words, in the throttle there at the
10 38 59 feet reading we have the -- or I guess -- excuse me
11 At 39 28 it goes into -- it goes from throttle five to
12 throttle eight --

13 A Yes, sir

14 Q -- in those two distances? And the throttle -- Tell
15 us about the throttle positions Does it go five, six,
16 seven -- like that?

17 A It starts out at one and goes through eight

18 Q So where it goes to throttle position eight the
19 engineer is doing what? What is he doing? Why would he
20 do that?

21 A To maintain the speed He is trying to maintain his
22 speed there He's went up in throttle position

23 Q He is at that point going 46 miles per hour?

24 A Correct

25 Q And we next go -- what is the gap there between --

1 that we see when the horn starts up again? It's off a
2 period of time again?

3 A Correct

4 Q How long is it off?

5 A I'm sorry Are you asking time-wise or distance?

6 Q Either or both

7 A Okay All right Just a minute, please It looks
8 like 2 1 seconds it is off

9 Q Okay Then it begins blowing again at the distance
10 of 35 86, two tenths of a second at that distance?

11 A Yes, sir It picks up again there at two tenths of a
12 second

13 Q Again, how long does it stay on at that time?

14 A That particular horn blow --

15 THE COURT Mr Parker, you took it away from him

16 MR PARKER Oh, I'm sorry I'm used to the
17 computer

18 THE WITNESS I've got it right here That
19 particular horn blow was for 4 1 seconds

20 Q And is the horn -- What time are you showing that the
21 horn is ceasing to blow?

22 A The time it stops in 19 04 51 It stops during that
23 second There is four-tenths of that second that it's on
24 and then it's off for the remainder, the last six tenths
25 At 19 04 52 it is off At 19 04 53 it's off for the first

1 eight-tenths of that second

2 Q If we go over to the next page -- it's off at -- what
3 it shows is it's blowing at the time of 19 -- it shows
4 that it's blowing at 19 5 01?

5 A Correct It goes off during that second

6 Q Excuse me It shows it's blowing at 19 500, correct?

7 A You mean -- you said 19 500

8 Q 19 500 19 05 00 it's still on?

9 A That's correct

10 Q And then at 19 05 01 it's off?

11 A That's correct

12 Q So, the last blow would be shown at 19 05 00?

13 A That's correct for four-tenths of that second, but
14 that's a continuation from the previous second

15 Q And as the time is increasing as we're going up in
16 time it's taking a time and you're increasing the minutes
17 and seconds as you go through the event recorder?

18 A It is These can be a little bit confusing I
19 should have told you earlier This particular one reads
20 from the bottom up as opposed to top down what we normally
21 see So, you can see the clock counting as you go up it
22 increases So you have to read from the bottom up

23 Q And the feet are going down as we're going from
24 bottom to top?

25 A It is because we're headed towards the point of

1 download

2 Q And the miles would be doing what?

3 A Decreasing

4 Q Let's look over on the next page and down at the
5 bottom of it You are picking up the next second on the
6 bottom?

7 A Yes, sir

8 Q No horn there?

9 A No horn

10 Q And can you tell from this when the engineer put the
11 train in the emergency after the collision?

12 A I can

13 Q Where is that position?

14 A If we look under -- remember, you can't see it up
15 there, but this is the air brake column and if you notice
16 at a time on the clock it's 19 05 05 We see 90 PSI still
17 reading indicating that the brakes are released and the
18 very next second which is 19 05 06 notice now that we've
19 dropped to 74 PSI So, we've had a reduction from 90 to
20 74 and the next second it reads 8 PSI and the next second
21 it reads zero It should He has dumped all of the air
22 In order to propagate an emergency through the brake pipe
23 you must displace at least 40 PSI in 1 2 seconds or less
24 to propagate the emergency through the brake pipe It is
25 a chain reaction If you strictly go from the head end

1 and you don't use the end of train device to help you go
2 to emergency you can do that, but that wasn't the case
3 here, and then we see this is the rear of the train here
4 and we notice that several seconds later it starts to go
5 down also and it should, and, so, it's doing exactly what
6 it's supposed to do It goes to zero, also You vent all
7 the air from the brake pipe to cause the train to go to
8 emergency That's what he's done

9 Q At the time the emergency was engaged the speed was
10 what?

11 A The speed? Let me look Let me make sure 46 miles
12 an hour on the event recorder

13 Q And we'll go to the next page And do you see a
14 position where the locomotive reaches a zero speed?

15 A Yes, sir, I do You see this is the speed indicator
16 here You can see three at the bottom and then zero but
17 it's still moving a little bit although it's less than 1
18 mile per hour It's not picking it up It has to be
19 above 1 mile per hour to pick it up in the speed column,
20 but notice in the distance column we are picking it up
21 We still see movement and it finally settles down at
22 19 05 48 and notice it reads 1183 all the way up So the
23 train has come to a complete stop

24 Q So that lets you know that after the collision the
25 train is stopped?

1 A It's completely stopped now That's correct

2 Q And on the previous exhibit I believe it showed that
3 the total length of the train before car 5337 was 2017?

4 A Yes, sir

5 Q And if you add that to the 1183, then you can locate
6 the crossing on the event recorder?

7 A You would add the length of the train that had passed
8 over the incident crossing You would add it back to the
9 number 1183 and that would put you back to the crossing
10 That's correct

11 Q Did you do that?

12 A I did

13 Q And the crossing on the event recorder then should
14 be?

15 A 3200

16 Q And if you would point out where that is on the event
17 recorder?

18 A 3200 which is not unusual -- many times you don't
19 have the exact number, but I believe we'll all agree it is
20 between 3177 and 3245 The 3200 would be between those
21 two numbers

22 Q And by locating the crossing in that way does it --
23 can you then determine how much of the horn was blown
24 before the crossing, when it was blown in relationship to
25 the crossing?

1 A Yes, you can

2 Q And were you able to determine that, in fact, the
3 horn was blown after the train crossed the south edge of
4 the crossing?

5 A It was

6 Q And if we look up there we would see that somewhere
7 between 3245 and 3177 was the collision and there was some
8 horn afterwards, after the collision?

9 A Yes, sir The horn that you see here which is 1 1
10 second that was after the collision

11 Q Now let's see what we can do to -- utilizing the
12 event recorder now can you tell us how much horn was
13 actually -- total horn was blown from the time it was
14 first activated until it reached the south edge of the
15 crossing?

16 A When you say total are you looking for time,
17 distance, or both?

18 Q I am not talking about when it commenced -- not the
19 horn blown itself, but when did it commence blowing in
20 relationship to the crossing?

21 A Just a second 1347 feet

22 Q And would it be lawful in South Carolina for an
23 engineer to start blowing the horn short of 1500 feet?

24 A No, sir You start at or before the whistle board

25 Q Did you determine here whether the whistle board was

1 located in the appropriate place?

2 A It was not

3 Q Where was the whistle board located?

4 A The survey was I believe 1357 feet and then as I
5 remember the claim agent measured it at 1390

6 Q Both of which would be short of what would be able to
7 alert the engineer to blow a horn in accordance with the
8 law?

9 A They're both in the wrong place

10 Q Now, if we go to -- I think you've gone through the
11 time sequence to determine what that was, but if we look
12 at the last blow of the horn which you see the continuous
13 numbers from 3586 to 3200 could you tell us to the south
14 edge of the crossing how much horn was blown during that
15 last blow that started at 3586?

16 A Yes, sir We see the last two tenths of a second and
17 you're using 3586 here in the distance column and that
18 blow was for 4 1 seconds because we see a one-tenth of a
19 second gap here -- and when I say here I'm talking about
20 in the distance column that looks like 3313 Maybe I
21 better look at mine It is clearer That's correct,
22 3313 It's not showing one-tenth of a second there and
23 then it picks up again in that same second It blows for
24 the final nine-tenths of that second and moves on up to
25 the next second In the distance column we're now at 3245

1 and it goes off on that second for three-tenths of a
2 second and then between there and the next reading is the
3 incident crossing It picks up again after that It's
4 now reading 3177 and we see seven-tenths of a second of
5 horn in that second and it carries over into the next
6 second with four-tenths The total of that horn blow, 1 1
7 seconds

8 Q Okay

9 A So, that last 1 1 second was after impact

10 Q Now, the total horn blown during that would be from
11 mile marker -- not mile marker, but feet 3586 to 3200 to
12 the south edge of the crossing?

13 A Yes, sir

14 Q Now, I want to next go over with you Exhibit 113-A --

15 MRS MCLEOD Your Honor, I need to see that exhibit
16 before he puts it up I don't think that's been listed

17 I don't have any objection to it

18 THE COURT Ma'am?

19 MRS MCLEOD I have no objection to it

20 THE COURT I could hardly hear you with my sounds
21 being masked

22 MRS MCLEOD With those sirens

23 THE COURT All right Move along

24 Q And I am not going -- we won't put this up because I
25 am going to hand you 113-A and this is some more of the

1 event recorder that would go with the exhibit 113 -- would
2 pick up where 113 leaves off

3 A Okay

4 Q Is that correct?

5 A That's right

6 Q Did you examine 113-A to determine whether or not the
7 train moved after the collision backwards and then
8 forward?

9 A It did

10 Q And how much did it move backwards?

11 A Sixteen feet as I recall

12 Q On the photograph I believe the police photograph
13 shows 5337 south of the crossing I believe previously
14 you had estimated it was 15 feet from the south edge of
15 the crossing?

16 A That was the best I could tell from the photograph

17 Q And the event recorder here shows that that car was
18 backed up how far?

19 A The train was backed up 16 feet according to the
20 event recorder

21 Q And that would back 5337 up 16 feet?

22 A It would

23 Q And so then the train then moved forward?

24 A Yes, sir

25 Q So, do you have an opinion as to whether 5337 -- the

1 start of 5337 -- where it would be in relationship to the
2 south edge of the crossing?

3 A It would be right at the south edge of the crossing

4 Q Let's switch over to the computer a minute if you
5 would, Bob Let's go to 114-A

6 Mr Scott, would you tell us what 114-A is?

7 A It is a page from the CSX Operating Rule Manual and
8 it concerns blowing the horn for various reasons

9 Q And I believe you've mentioned 14-L?

10 A I did

11 Q And 14-L would be up in -- where would it be? In the
12 right hand corner?

13 A Here

14 Q Right up at the top there?

15 A That's better Yes, that's 14-L

16 Q And this is just what you talked about?

17 A That s correct

18 Q There is also a rule 14-P --

19 A There is

20 Q -- that would be involved here 14-P is -- what does
21 the rule require for 14-P?

22 A Succession of short sounds It is a warning to
23 people and or animals, commonly referred to as emergency
24 horn signal

25 Q Tell us how that is supposed to be blown?

1 A It is just a staccato blast of real short blasts on
2 the horn It is design to get someone's attention that
3 you don't otherwise have

4 Q And --

5 A There was a perfect example of that that just passed
6 with the siren that we heard outside We noticed that --
7 at least I did I noticed that it changed tones there for
8 a few seconds and that's the same reason that you do this
9 with the horn on the locomotive is if you're looking at a
10 car and it's obvious to you that you don't have their
11 attention this is what you do That's what it is designed
12 to do to get their attention You change the sound of the
13 signal

14 Q All right Can we switch back over there? As the
15 train comes close to the south edge of the crossing at
16 3200, would you tell us what you see insofar as whether or
17 not an emergency horn blast was used?

18 A It was not We can see that it's perfectly capable
19 of doing so because -- notice in this one-tenth of a
20 second here we talked about there is no horn So, he did
21 let off there and come right back and, of course, he lets
22 off here and comes right back, but you would see short
23 gaps in there of one to two seconds of horn and then you
24 would see -- I'm sorry You'd see short gaps in there of
25 tenths of a second -- you know, one or two tenths and then

1 it would be off and back on one or two tenths and off So
2 that would be your emergency horn signal

3 Q And you see at 3722 on the event recorder --

4 A Yes, sir

5 Q -- the horn is stopped for four-tenths of a second

6 It is utilized for four-tenths and then stopped?

7 A Yes

8 Q And then it picks up again at 3586?

9 A Correct

10 Q If at that point an engineer had seen someone
11 approaching in hazardous proximity to a crossing should an
12 engineer quit blowing the horn?

13 A No That's where you start your emergency horn
14 signal if they're still coming and you get rid of your
15 throttle You don't want to get there any quicker than
16 what you're already going to get there

17 Q And if an engineer sees a car approaching a crossing
18 should he be increasing the throttle?

19 A No

20 Q Do you have an opinion as to whether or not this
21 engineer at this time could see the car at that point in
22 time or did he know what was going on?

23 A Well, they testified that they could see the car
24 approaching, yes

25 Q Well, why would an engineer who could see a car

1 approaching increase the throttle?

2 A Well, it doesn't make any sense unless you know
3 you've got their attention and they're going to stop

4 MRS MCLEOD I object to that That's speculation,
5 Judge

6 THE COURT Sustained Disregard that

7 Q As an expert in train operation do you have an
8 explanation as to why the engineer on this train would
9 have increased the throttle at the distance on the event
10 recorder at 3790?

11 MRS MCLEOD Same objection, Judge

12 THE COURT Well, now he is asking it the proper way
13 I'll allow it

14 Q Go ahead

15 A No sir I mean, that's showing no indication of
16 anything that's going wrong or that it looks wrong

17 Q In other words, that would be a normal operating
18 practice under normal circumstances?

19 A Normally that would be correct

20 Q And the gap that is shown in there -- Do you know --
21 in your opinion as a train operations expert do you know
22 why an engineer would quit blowing the horn if he saw a
23 vehicle approaching?

24 A No, you wouldn't You would continue to blow the
25 proper horn signal until such time that you realized that

1 you don't have their attention and then you would change
2 to the emergency horn signal

3 Q And does the rule require you to do that?

4 A Yes, it does

5 Q Now, is there an operating rule that requires
6 engineers to be -- to have -- the way they operate the
7 train anything to do with keeping a proper lookout?

8 A Well, the rules apply to all of the train crew
9 members, but, yes operating rule 34 covers that

10 Q And what does operating rule 34 say?

11 A Thirty-four just talks about keeping the proper
12 lookout as you proceed for anything that may interfere
13 with the safe passage of the train That is kind of
14 paraphrased It is longer than that, but that's the gist
15 of it

16 Q And in training engineers -- are they trained to keep
17 a proper lookout and what are they trained to do insofar
18 as vehicles approaching grade crossings?

19 A Well engineers, conductors, brakemen, everybody is
20 trained the same way as far as that goes You're all
21 required to keep the proper lookout and you're required to
22 take whatever action is necessary to avoid an incident if
23 need be

24 Q Now, Mr Scott, have you prepared a chart that shows
25 where the various landmarks are and how the horn was

1 utilized in this case?

2 A Yes, sir

3 Q And if you will go through this for us

4 A Okay All right Well, you see the horn there on
5 the left -- the horn distance and the source and we
6 already talked about those numbers The 1357 number is
7 for the whistle board come from the survey The 1390 come
8 from the claim agent, and then the train approaching the
9 incident crossing -- the first horn as we talked about
10 earlier was 1347 feet from the south edge of the crossing
11 It was for 1 9 seconds There was 8 1 seconds another
12 horn The second horn was 1 7 seconds and then no horn we
13 have 2 4 seconds The third horn was 3 2 seconds and no
14 horn was that tenth of a second that we spoke about just a
15 moment ago and you have fourth horn is 1 6 seconds and no
16 horn six-tenths of a second and then the horn after impact
17 is 1 1 seconds or about 90 feet after the south edge of
18 the crossing The incident crossing south edge is 3200 --
19 it turns out to be 3200 in the distance column --
20 3200 feet in the distance column That is according to
21 looking at the train consist and the length of the cars
22 that passed over the crossing, and that's what that is
23 based on, and we talked about during the second horn blow
24 the engineer went from throttle six to throttle eight
25 indicating everything was fine The length of the train

1 that passed over the crossing was 2017 feet The train
2 backed up to cut the crossing 16 feet The emergency stop
3 equals 1518 feet and if you could scroll on down a little
4 bit And when you do the math on that the emergency brake
5 after impact was 499 feet

6 Q Do you have an opinion as to whether or not the
7 engineer operating the train complied with the rules in
8 this case?

9 A No, sir I think I have explained a number of rule
10 violations here

11 Q And do you understand this -- Mr Cowan who was with
12 us yesterday was the engineer and the man operating the
13 locomotive Mr Stephens was an engineer training?

14 A Yes, sir He was a trainee or apprentice engineer

15 Q And Mr Bonner was the conductor?

16 A Correct

17 Q And I believe that you have testified in your
18 deposition in this case?

19 A Yes, sir

20 Q And I believe that you utilized a number that was
21 different from what the actual figures are, is that
22 correct?

23 A I did I didn't have -- when I gave my deposition I
24 didn't have the actual length of the cars which I now
25 have

1 Q Did you also make a mathematical mistake?

2 A I made a 100-foot mistake in the math, yes, sir

3 Q Are you confident that the information that you and
4 Mr Wolf agreed on is accurate?

5 A Yes, sir, according to the data recorder it's
6 accurate

7 Q And the reconstituted consist is accurate?

8 A When I checked the numbers on it, yes, sir, and I
9 qualify -- or I didn't qualify the number I checked them
10 in the railway equipment register They're accurate

11 Q Thank you Answer any questions that Mrs ~McLeod may
12 have for you

13 THE COURT All right Who is going to cross?

14 MRS MCLEOD I will, Judge

15 THE COURT Hold on one second Are we okay?

16 MRS MCLEOD I need just one minute, Judge, if I
17 could have it

18 THE COURT We're going to take a quick break for any
19 jurors Don't discuss the case Don't deliberate
20 Everybody else remain seated

21 (Whereupon, the jury exited the courtroom at 2 50)

22 THE COURT All right Mrs ~McLeod, Mr Parker,
23 we re going to take long enough for the jury to use the
24 restroom and stretch their legs We'll start right back
25 up

1 You're in the middle of your testimony so don't
2 discuss it with anybody

3 THE WITNESS Yes, sir

4 (Whereupon, a break was taken)

5 THE COURT Mr Parker, anything for the record?

6 MR PARKER Nothing, Your Honor

7 THE COURT Mrs ~McLeod?

8 MRS MCLEOD No, sir

9 (Whereupon, the jury came into open court at
10 approximately 3 07)

11 MRS MCLEOD Thank you, Judge

12 CROSS-EXAMINATION

13 BY MRS MCLEOD

14 Q Good afternoon, Mr Scott

15 A Good afternoon, ma'am

16 Q Good to see you again How are you doing? I'll make
17 my way over here Mr Scott, you're an expert witness and
18 you've been hired by Mr Parker's firm to evaluate this
19 case, correct?

20 A Yes, ma'am

21 Q And you're getting paid at an hourly rate to do that,
22 correct, sir?

23 A Yes, ma'am

24 Q And that hourly rate is \$200 per hour?

25 A Correct

1 Q And you've been in the business for a while I think
2 you said?

3 A Since 1995

4 Q Yes, sir, about 14 years?

5 A There about

6 Q Yes, sir And you've given a good number of
7 depositions?

8 A Yes

9 Q And you've testified in court before?

10 A Numerous times

11 Q And what happened in this case is that Mr Murdaugh
12 sent you some documents and things he wanted you to
13 review, correct?

14 A Yes

15 Q And you sat down in your office and you did that?

16 A Yes

17 Q And you understand, sir, that the accuracy of the
18 information you provide is very important?

19 A Yes

20 Q Correct?

21 A Correct

22 Q Because you want this jury to rely on what you have
23 to say in reaching their decision, correct?

24 A Part of it, sure

25 Q Yes, sir And you have been brought here to talk

1 about mistakes that the train crew in this case made
2 correct?

3 A Yes

4 Q First of all, I'd like to talk about some mistakes
5 that you have made in this case Let me get this chart
6 over here Let me just write up here Now, Mr Scott,
7 you remember I took your deposition back in September of
8 this year?

9 A Yes, ma'am

10 Q And I came to Tennessee to do that?

11 A You did

12 Q Bob, can you pull up exhibit 150 for me, please?

13 Now, Mr Scott, you've seen a diagram or a photograph
14 of this crossing, correct?

15 A Yes

16 MRS MCLEOD And, Bob, can you back out a little
17 bit?

18 THE MEDIA SPECIALIST Yes, ma'am

19 Q And you understand you see Highway 321 right down
20 here at the bottom, correct?

21 A Yes, ma'am

22 Q And you understand that the van was coming in this
23 direction, correct?

24 A Yes

25 Q And the train was coming down the track in this

1 direction?

2 A Correct

3 Q And it was traveling north towards Cayce, South
4 Carolina It doesn't really matter which direction, but
5 you understand it was coming this way down the track?

6 A Yes, ma'am

7 Q Bob, can you pull up exhibit 147 for me?

8 This is an actual picture of our train, not anywhere
9 related to this crossing, but this is a photograph of our
10 specific train that Mr Huett produced to us You know
11 who Mr Huett is, correct?

12 A Are you talking about Gary Huett?

13 Q Yes, sir

14 A Yes, ma'am

15 Q Because you've worked in a number of cases where you
16 have testified and Mr Heathington or Dr Heathington and
17 Mr Huett have also testified?

18 A Yes, ma'am

19 Q Okay And you see right here on this locomotive you
20 understand that the conductor sits over here on the left
21 side of the locomotive?

22 A Correct

23 Q I mean the left side if you're facing in that
24 direction -- our right And the engineer sits over here
25 on the right side?

1 A Correct

2 THE COURT Mrs ~McLeod, can you back up just a tad?

3 MRS MCLEOD I will I'm so sorry Is that better?

4 Q Now, when I took your deposition, sir, back a little
5 over a month ago you told me that the van was approaching
6 from the conductor side of the train?

7 A Yes, ma'am I was mistaken about that We got to
8 that before the end of the deposition

9 Q Yes, sir

10 A As it turns out I had worked on a case very similar
11 to this the day before and ironically enough it was also a
12 van and it was coming in the other direction

13 Q Yes, sir

14 A So, I just had my wires crossed, but yes, I did

15 Q Yes, sir And you did not realize that you had made
16 that mistake until I advised you of that, correct?

17 A That's correct Like I said, I worked on one almost
18 identical to it

19 Q Yes, sir

20 A It was even a Chevy van, as a matter of fact

21 Q Okay Well, that's good to know

22 MR PARKER Your Honor, I would ask that the comment
23 be stricken

24 THE COURT Mrs ~McLeod, no comments like that,
25 please

1 MRS MCLEOD Yes, sir

2 Now, Mr Scott, let me come back to this Let's pull
3 up Exhibit 131 and this is the download that we've been
4 looking at, correct, sir?

5 THE WITNESS Yes

6 MRS MCLEOD Can you flip to the second page of
7 that? The second page of that document?

8 THE MEDIA SPECIALIST Yes, ma'am That is page two

9 MRS MCLEOD Okay I'm with you Let me come back
10 to this because the throttle is not showing up on there
11 Do we have a copy of Mr Parker's Exhibit 1 that he used
12 with the downloader? Can we have it and put it up?

13 MR PARKER Certainly

14 MRS MCLEOD Yea, that s good, Bob

15 I want to talk to you about the throttle over here
16 which you talked about Tell the jury, Mr Scott, based
17 on your years of railroading why you would adjust the
18 throttle just during a normal trip -- how that works

19 THE WITNESS You adjust it for speed adjustments

20 Q Right And you adjust it if you're going up a hill
21 or down a hill, things like that, correct?

22 A Yes

23 Q Helps you control the speed of your train, correct,
24 sir?

25 A Yes

1 Q And your number is a little bit of a moving target
2 because this is the third number -- this is the first time
3 I have heard the 32-foot number and I've heard two other
4 numbers before

5 MR PARKER Judge --

6 THE COURT Hold on

7 MR PARKER There is no 32-foot number

8 THE COURT Hold on

9 MR PARKER I think it's an inappropriate question

10 THE COURT Just ask the question, ma'am

11 MRS MCLEOD Yes, sir

12 Mr Scott, you told the jury that right here you
13 locate -- today you locate the crossing at 3200 feet,
14 correct?

15 THE WITNESS Yes

16 Q And if you count back in seconds from 3200 feet down
17 to the place where the throttle goes from five to eight,
18 that's 10 seconds from the place you locate the crossing,
19 correct? I am just talking about from T-5 there from the
20 place they throttle up if you count up to 3200 which is
21 the place you locate the crossing, that's 10 seconds

22 A That's correct

23 Q Okay And one criticism you have of the train crew
24 is that while this emergency situation was unfolding
25 before them they were throttling up, correct?

1 A According to your event recorder they did, yes,
2 ma'am

3 Q And your criticism of that is they were not keeping a
4 proper lookout under operating rule 34?

5 A Well, that doesn't indicate the proper lookout to me,
6 no, ma'am

7 Q Okay So, that's a yes Your criticism is it
8 violates operating rule 34 And Mr Scott, you would
9 agree with me that one explanation for them throttling up
10 is because at that point Ms ~Harvey was in a position of
11 safety You would agree with me, correct?

12 A Was in a position of safety?

13 Q Yes, sir, stopped at the stop sign?

14 A If that's where she was at, yes

15 Q Yes, sir So, you would agree with me that at this
16 point when they throttle up from T-5 to T-8 if she is
17 still at a position of safety 10 seconds from the
18 crossing, then that does not indicate they were keeping a
19 proper lookout? They were proceeding appropriately,
20 correct?

21 A I'm sorry You lost me in your question Do that
22 again, please

23 Q Okay It was a really bad question I agree with
24 that You've told us that they throttled up 10 seconds
25 before the crossing, correct?

1 A Yes

2 Q And the crossing is where the collision occurred,
3 obviously, correct?

4 A Yes

5 Q And at that 10-second point when they throttled up if
6 Ms ~Harvey's van was in a position of safety at that point
7 you have no problem with the throttle position?

8 A (No response)

9 Q If this --

10 A You're saying she is stopped dead still? Well,
11 actually, I'm here -- well, go ahead, yes

12 Q Just an assumption If you assume with me at this
13 point right here if Ms ~Harvey was stopped in a position
14 of safety, then they behaved appropriately You have no
15 problem with the throttle position?

16 A If she was stopped, yea

17 Q Yes, sir

18 Can we pull up Dr Heathington's animation?

19 THE MEDIA SPECIALIST Yes, ma'am

20 Q And you can see with me and, Mr Scott, you probably
21 have never seen this, but the jury has seen it and let me
22 just help you out here This is the speed of the van at
23 this point 0 0 miles per hour

24 A Okay

25 Q And time to point of impact 8 10 seconds

1 A All right

2 MRS MCLEOD Move forward, Bob Just bump it
3 forward until the speed goes up

4 But you would agree with me that based on
5 Dr Heathington's animation her vehicle does not move from
6 the stop sign until 8 7 seconds or 8 07 seconds before
7 impact, correct?

8 A Well, that's the first time I have ever seen it I
9 mean, I don't know if it is correct or not It says what
10 it says

11 Q Yes, sir

12 A The document speaks for itself

13 Q Yes, sir, and you would agree with me that that is
14 what it says?

15 A That's what I am seeing, yes

16 Q Yes, sir So, based on Dr Heathington's animation
17 at the point where they throttled up she was still stopped
18 at the stop sign in a position of safety based on his
19 animation?

20 A Well, again, that s the first time I have seen it

21 Q Yes, sir

22 A So, that's what the document indicates or seems to

23 MR PARKER I think it shows it moving I hate to
24 say it's not stopped It going 03 miles per hour

25 MRS MCLEOD Bob, back it up for me at the stop

1 position

2 At 8 10 seconds it s at 0 miles per hour, correct,

3 Mr Scott?

4 THE WITNESS According to the screen that's correct

5 Q Yes, sir And we bumped it forward about three times
6 to show the point it started moving, correct?

7 A That's what you said, yes

8 Q Yes, sir So, just to clarify because of

9 Mr Parker's comment at 10 seconds when they throttled up
10 based on their animation her vehicle was stopped in a
11 position of safety at the stop sign?

12 A Well, you're asking me something I don't know I
13 mean --

14 THE COURT Well, assume it How about that?

15 THE WITNESS Okay All right Yes

16 Q Thank you, sir

17 Can we pull up Exhibit 130?

18 Mr Scott, this is a copy of the preliminary report
19 that you submitted in this case, correct?

20 A Yes, ma'am

21 Q Zoom it back out for me, Bob

22 The date on the document right there at the top is
23 August 21, 2009?

24 A Correct

25 Q And at the time that you produced that document to us

1 you also gave us a copy of the download with some notes on
2 it?

3 A I think that's right, yes

4 Q Yes, sir And on that download at the time of your
5 report on August 21, 2009 you indicated to us that the
6 horn started blowing 1365 feet from the crossing Do you
7 see that?

8 A Yes

9 Q And that was your opinion on August 21, 2009?

10 A That's correct

11 Q Okay And then -- You can take that down, Bob
12 Then I took your deposition on September 2, 2009,
13 correct?

14 A I don't really recall

15 Q Around about that time?

16 A So that sounds about right

17 Q It might actually have been later, but in the month
18 of September and at that time you had revised your
19 opinions, correct?

20 A Yes

21 Q And at that time you had changed your opinion to say
22 that the horn started blowing 1437 feet before impact
23 correct?

24 A That's where my -- that's where my error took
25 place --

1 Q Yes, sir

2 A -- was the 100 feet

3 Q And I think you told the jury that the reason you
4 made that -- the reason you have changed it now for a
5 third time to 3200 feet is because you did not have the
6 length of the train at the time you gave your opinion in
7 September of 2009, correct?

8 A Didn't have the exact length of the cars that were
9 picked up

10 Q Yes, sir

11 A So, yes, ma'am That was part of it Yes, ma'am

12 Q Yes, sir You're aware that we produced UMLER
13 reports in this case, are you not, Mr Scott?

14 A Yes

15 Q We produced those a good long time ago, and I'll hand
16 those up and let you see them They've been marked as
17 exhibits

18 Just for the record, Judge, they're Defendant's
19 Exhibits 35 through 38

20 Mr Scott, take a peek at those and that's an UMLER
21 report, correct, sir?

22 A Ma'am

23 Q And those UMLER reports are for the two locomotives
24 on the train involved in this accident and the four cars
25 that Mr Bonner picked up? I think the first two are the

1 locomotives and the next four are the cars

2 THE COURT Mrs McLeod, what is an UMLER report?

3 MRS MCLEOD An UMLER report, Judge, is a report
4 that you can pull on a railcar Railcars are of varying
5 lengths and it will tell you the dimensions, basically, of
6 the car -- the weight and things like that

7 THE COURT I just don't think we heard that term in
8 the trial

9 THE WITNESS UMLER is actually an acronym for
10 something else

11 Q Tell me when you're through, Mr Scott, so I don't
12 rush you

13 A Okay

14 Q Are you done?

15 A Yes

16 Q You would agree with me that those UMLER reports that
17 you have up there are for the two locomotives involved in
18 this accident and the four cars that Mr Bonner picked up
19 along the trip, correct?

20 A That's what it appears to be, yes

21 Q And you would agree with me that those UMLER reports
22 give the exact lengths and dimensions of the cars involved
23 in this accident?

24 A They do, yes

25 Q Or the four cars added on?

1 A Correct

2 Q Let me get those back from you Let's go back to
3 your middle opinion because you've given some -- By the
4 way, one document that you relied on is Plaintiff s
5 Exhibit 108-B You saw that chart put up there It had
6 the red highlighting You remember that?

7 A Yes, ma'am

8 Q You talked to the jury about it?

9 A Yes

10 Q That is not your document, correct?

11 A Correct

12 Q That is a document that our expert prepared correct?

13 A That's correct

14 Q And you are basing your opinion on a document that
15 you did not prepare but something that we prepared in this
16 case?

17 A That's correct

18 Q And you're aware that Mr Wolf has given testimony in
19 this case, correct, sir?

20 A Yes, ma'am

21 Q And you're aware that in his deposition based on that
22 chart that we put up where he located the crossing was
23 pretty close to the place you located it for the second
24 time You're aware of that, aren't you, sir?

25 A Yes

1 Q And because you've read his deposition?

2 A I have seen it, yes

3 Q Okay So, just to make sure we understand -- and let
4 me just do this in terms of horn lengths because this will
5 be easier for us The first opinion that you gave in
6 August of '09 you said we had 1365 feet of horn before the
7 accident, correct sir?

8 A Right

9 Q And the second opinion you gave in September of --
10 Let me just put -- that cap will not stay on that pen
11 That was 1437 feet of horn before impact correct, sir?

12 A Yes, ma'am

13 Q And that was pretty consistent with Mr Wolf's number
14 based on that chart that you put up that he prepared,
15 correct?

16 A I don't think I evaluated it that way, but I can go
17 back and look at it --

18 Q Okay

19 A -- if you'd like for me to

20 Q Well, you can take my word for it Now, the third
21 opinion you've given here --

22 MR PARKER Your Honor, I don't think we have to do
23 that

24 THE COURT Hold on Hold on

25 Ladies and gentlemen of the jury y'all are the ones

1 who determine the true facts You don't have to -- just
2 disregard -- Mrs ~McLeod is not going to mislead you

3 Neither is Mr Parker Disregard that

4 MRS MCLEOD I'm sorry, Judge

5 THE COURT No problem

6 MRS MCLEOD I'll try to behave myself

7 Mr Scott, the third opinion that you've given today
8 in this courtroom and this is the first -- Well, I won't
9 say that, but the third opinion that you've given today is
10 1347 feet, correct?

11 A Yes, ma'am That's when I finally come up with the
12 accurate numbers

13 Q Yes, sir And it took you three times to do that,
14 correct? Three tries?

15 A I just didn't have the correct information to begin
16 with

17 Q Mr Scott, after the accident occurred the conductor
18 broke the train apart so the emergency personnel could get
19 through to assist the Harveys You're aware of that?

20 A Yes, ma'am

21 Q And you're aware that at the time they broke the
22 train apart part of the train was on the south edge of the
23 crossing back towards Govan and part of the train was on
24 the north edge of the crossing heading in the other
25 direction, correct?

1 A Yes

2 Q And you're aware that the first car on the south edge
3 of the crossing was car number 5337, correct?

4 A Yes

5 Q And there is no doubt in your mind about that,
6 correct, sir?

7 A That's correct

8 Q And you have had that information ever since you were
9 identified in this case, correct, sir?

10 A Yes

11 Q And that's been a good long time ago -- I think
12 February of 2008?

13 A I don't recall the date, but probably

14 Q And when you -- at one point when you made one of
15 these calculations an error that you made is that you put
16 car number 5337 on the north side of the crossing instead
17 of the south edge of the crossing, correct?

18 A I did I told you that in my deposition --

19 Q Yes, sir

20 A -- that I put it in the wrong place --

21 Q You surely did

22 A -- and I went through and revised the number for you

23 Q Correct So that was another mistake that you made
24 in this case Correct, sir?

25 A Yes I mean

1 Q Okay Now, you understand -- you used to work for
2 CSX, correct?

3 A I did

4 Q And you purport to be an expert in CSX rules,
5 correct?

6 A I taught them for many years

7 Q And you understand that for a freight train -- and
8 this was a freight train -- that the track speed at the
9 Honey Ford Road crossing at the time of this accident was
10 60 miles per hour, correct, sir? For a freight train

11 A I recall the -- the train crew as I recall reported
12 it to be 50 miles per hour in that particular location

13 Q That's not my question to you, sir My question
14 is -- because you told the jury about the timetable and
15 you're familiar with the timetable because you're an
16 expert on CSX rules, correct?

17 A Yes, ma'am

18 Q And the track speed for this area of track at the
19 time of this accident was 60 miles per hour Are you
20 aware of that, sir?

21 A Well, it might very well be, but maybe not for that
22 train Certain trains have certain restrictions is what
23 I'm telling you

24 Q Yes, sir, and I understand that I'm talking about
25 track speed

1 A Yes, track speed

2 Q 60 miles per hour, correct sir?

3 A Yes, ma'am

4 Q And back at the time of your deposition in

5 September --

6 THE COURT Hold on, Mrs ~McLeod Right behind you

7 MRS MCLEOD Thank you, Sarah

8 Back at the time of your deposition in September of
9 2009 you told me that the track speed was 50 miles per
10 hour, correct, sir?

11 THE WITNESS Yes, ma'am That's what I understood
12 it to be from the train crew

13 Q Yes, sir And that would be a mistake, correct, sir?

14 A No That's what it was

15 MRS MCLEOD Let's pull up Exhibit 149 please, Bob

16 THE MEDIA SPECIALIST 149?

17 MRS MCLEOD 149, the timetable Put the first page
18 up first, if you don't mind Bob

19 You recognize this document, don't you, Mr Scott?

20 THE WITNESS Yes, ma'am

21 Q This is a timetable for the southern region, Florence
22 division effective April 1 2003 which would cover our
23 accident in May of 2004, correct, sir?

24 A Unless there is another one issued after that, yes

25 Q Yes, sir And you're an expert in CSX rules You've

1 already told the jury that, correct sir?

2 A Yes, ma'am

3 Q So, this is the document that was in effect at the
4 time of our accident in May of 2004, correct, sir?

5 A Like I said, unless there was one issued after that
6 I haven't seen it, but that's the one that was in effect
7 That's what's been produced

8 Q Yes, sir Well assume with me that this was the one
9 that was in effect at the time of this accident

10 A Very well

11 Q Would you mind flipping to the second page?

12 Can you -- can you make it a little closer for me
13 right in the middle of the page?

14 This is one of these documents that's difficult to
15 read if you have never seen one before, but you would
16 agree with me that this mile post number for our crossing
17 was S414 5, correct sir?

18 A I believe that's accurate

19 Q And if you look right there on the document right
20 there in 414 5 -- it is right around there -- this is the
21 track speed for passenger trains This is the track speed
22 for freight trains, and you would agree with me that the
23 track speed was 60 miles per hour for this track at the
24 time of the accident, correct, sir?

25 A For the track, yes

1 Q Yes, sir, and that was my question -- track speed

2 A Yes, ma'am

3 Q Now, let's go with the second two opinions you gave
4 there, sir -- the 1437 and the 1347 Let's use either one
5 of those numbers If you assume with me that one of those
6 two numbers are correct and that the train horn in this
7 accident or the train in this accident started blowing at
8 either one of those numbers, then it was a technical -- it
9 fell technically short of the 1500 feet horn statute,
10 correct, sir?

11 A Yes, ma'am

12 Q But you would agree with me that even though there
13 may have been a technical violation of that and we're
14 talking about right here 63 feet based on your second
15 number you would agree with me that that did not cause
16 this accident, correct, sir?

17 A Didn't cause it?

18 Q Yes sir You would agree with me that that one
19 second if you're talking about this number -- one second
20 of horn that could have been on the front end had nothing
21 to do with this accident If it had been blowing for that
22 one second it would not have made any difference, correct,
23 sir?

24 A Well, I'm not an audiologist, but the requirements
25 are clear, and it's intended to be heard from that

1 distance So, if it had been blown they should have heard
2 it

3 Q Yes, sir When I took your deposition you produced
4 to me an FRA study Do you remember that?

5 A Yes, ma'am

6 Q And the FRA is Federal Railroad Administration,
7 correct?

8 A Yes

9 Q And that is the entity, if you will, that's
10 responsible for the oversight of railroads, correct, sir?

11 A Yes, ma'am

12 Q And you relied on that FRA study in forming some of
13 your opinions in this case, correct?

14 A Yes

15 Q And you're aware, sir, that the FRA's research has
16 shown that the effect of a locomotive horn sounded at a
17 distance greater than one quarter of a mile which is 1320
18 feet is attenuated to the extent that it does not provide
19 adequate warning to the motorist You're aware of that,
20 aren't you, sir?

21 A It's been that way since I think 1972 in the Rubis
22 (phonetic spelling) report it said, basically, the same
23 thing -- they weren't loud enough and I agree

24 Q And the FRA study went on to say there is no need to
25 sound the horn beyond this point -- beyond 1320 feet,

1 correct, sir?

2 A Yes, ma'am

3 Q That's what FRA research shows, correct?

4 A That's what they're claiming is correct

5 Q And, so, even though we have a minimumus or a
6 technical violation of the 1500 feet if you're going right
7 there you got 63 feet short you would agree with me that
8 that would not have provided any additional warning to
9 Ms ~Harvey under the FRA research, correct, sir?

10 A Well, I mean, all I can tell you is what's required
11 I mean, it's intended to be heard from that distance --
12 1500 feet So, that's the best answer I can give you

13 Q Let's talk about the two longs, a short, and a long,
14 and you told the jury that the longs had to be certain
15 length I think you said five to seven seconds?

16 A That's the way the rules talk

17 Q And then the short -- the pause has to be one to two
18 seconds?

19 A Normally, one to two seconds

20 Q And then another long and then the short is two to
21 three seconds?

22 A Two to three, yes

23 Q Okay Can you tell me where in CSX's operating rules
24 that I will find that laid out -- the number of seconds
25 that you're required to blow for every specific horn blow?

1 A It's not laid out specifically that way That's the
2 way it's taught, but it's not put in writing that way

3 Q Yes, sir And you don't have anything that you can
4 point us to that tells you that's the proper way to blow
5 the horn, do you, sir?

6 A No They never would put it in the rule book The
7 reason why was because of liability issues

8 Q Yes, sir And not only would they -- I assume you
9 mean CSX by that not put it in the rule book -- nobody has
10 written that anywhere either, correct, sir?

11 A That's for the same reason the other railroads don't
12 either It's called liability Yes, ma'am

13 Q And the FRA is included in that, sir They do not
14 have any documentation or publication to support your
15 opinion that a long is supposed to be 5 to 7 seconds, the
16 pause 1 to 2 seconds, and a short 2 to 3 seconds, correct,
17 sir?

18 A No I showed you that in the study

19 Q Yes, sir

20 A You remember the study from 1999 that I showed you?

21 Q Okay Well, let's --

22 A It said historically the long signal had been at
23 least five seconds and that's the way I taught the rule --
24 5 to 7 seconds on the long

25 Q Yes, sir Well let's look at that

1 A That's also the way the horn sequencer blows it If
2 the railroad had not intended for the long signal to be to
3 5 to 7 seconds, the sequencer wouldn't be programmed to
4 blow that long

5 Q Let me jump to the sequencer for just a minute
6 because I was real interested in that You testified that
7 when you left the railroad in 1995 --

8 A Yes ma'am

9 Q -- that the horn sequencers were not in place,
10 correct?

11 A That's correct

12 Q And so you have not worked with the railroad since
13 horn sequencers have been in existence, I guess? Is that
14 correct?

15 A That's correct

16 Q And you agree with me that there is no railroad --
17 not CSX, not any other railroad -- that uses an automatic
18 sequencer in the operation of its locomotives? You would
19 agree with that, correct?

20 A No They're still on some of them

21 Q I'm not talking about whether they're physically
22 located on the locomotive I'm talking about actually
23 using the sequencer that might be present on a locomotive
24 You agree with me that there is no railroad that uses that
25 automatic horn sequencer to blow horns as they approach

1 railroad crossings, correct, sir?

2 A That's correct Like I told you in my deposition the
3 engineers don't like to use it They claim it blows too
4 long which it don't

5 Q Well, that's a good point Let's go there because --

6 MR PARKER Your Honor, I would ask that Mrs ~McLeod
7 hold her comments to herself --

8 MRS MCLEOD I don't mean to, Judge

9 MR PARKER -- and ask questions

10 THE COURT I know you don't mean to

11 MRS MCLEOD It is just flowing out

12 THE COURT I know

13 MRS MCLEOD I'll try to eliminate it, Judge

14 THE COURT I am going to ask you one more time

15 MRS MCLEOD Yes, sir

16 Let's do this So the sequence is two longs, a
17 short, and a long -- and I know they're not even, but
18 that's basically the general pattern, correct?

19 THE WITNESS I get the gist of it, yes

20 Q Yes, sir And you say that the long can be 5 to 7
21 seconds, correct, sir?

22 A Should be

23 Q Okay So, let's go with 7 just to give you the
24 greatest horn possible and the pause should be 1 to 2
25 seconds, correct?

1 A Yes, ma'am

2 Q So, let's go with 2 seconds on that

3 A All right

4 Q I'll go with the highest number on every one just for
5 consistency So, the long again would be 7 seconds The
6 pause again would be 2 seconds and then the short would be
7 3 seconds and 2 seconds and 7 seconds Are you with me?
8 You see what I have done there? I have just attributed
9 values to the longs and the pauses

10 A Yes, ma'am

11 Q Okay And if you add those numbers up for a train
12 traveling at 46 miles per hour as our horn was traveling
13 that would give you 30 seconds of horn, correct?

14 A I didn't do the math I can do it if you want me to

15 Q Actually, you don't really need the math All you
16 have to is 7, 7, 7 That's 21 -- 24, 25, 26, 27, 28, 29
17 So that's 30 seconds of horn, correct, sir?

18 A Looks right

19 Q Yes sir And if you take the speed that our train
20 was traveling which is 46 miles per hour and you multiply
21 that out to get the feet per second our train was
22 traveling 67 feet per second, correct, sir?

23 A 67 4

24 Q So can we round down to 67? Would that be okay with
25 you?

1 A Sure

2 Q So, if we take 67 feet per second and we multiply
3 that times 30 we would have 2010 feet of horn, correct,
4 sir?

5 A Yes, ma'am

6 Q And you would agree with me that the South Carolina
7 statute in effect at the time of this accident only
8 required you to blow 1500 feet, correct, sir?

9 A Agreed

10 Q And you would agree with me that it is not advisable
11 or suggested for the train to blow an extra 500 feet or
12 almost two football fields extra of horn correct sir?

13 A No, I wouldn't agree with you Nothing wrong with it
14 for me Safety first

15 Q Mr Scott, are you telling me that if you were
16 training locomotive engineers today that you would tell
17 them that it's permissible for them to blow the horn 30
18 seconds or 2010 feet before a railroad crossing?

19 A Well, like I said, there is nothing wrong with it

20 Q Okay Let me show you a federal regulation

21 MR PARKER Your Honor, we have an objection We
22 need to approach on this

23 (Whereupon, a bench conference was held)

24 THE COURT Y all step out one second, please

25 (Whereupon, the jury exited the courtroom at 3 40)

1 THE COURT All right, Mrs ~McLeod, the jury is out
2 Tell me what you want to do

3 MRS MCLEOD Yes, sir There is a federal horn
4 regulation It's 49 CFR 222 21 It went into effect in
5 September of 2006 after this accident and I did not ask
6 Mr Scott any questions about this federal horn statute
7 All I asked him was if he were training locomotive
8 engineers today would he train them to blow 30 seconds of
9 horn and he said that would be permissible That's his
10 standard of care and he's telling the jury that we should
11 rely on him for the standard of care in this case

12 The new federal horn regulation says that the horn
13 shall begin to be sounded at least 15 seconds but no more
14 than 20 seconds So, in Mr Scott's world if he is
15 training locomotive engineers he would be training them to
16 violate federal law and I think that goes to his
17 credentials and the basis of his knowledge and the basis
18 of his expertise in this case

19 MR PARKER He did not testify to that, Your Honor
20 He said he would not train them to do that He would
21 train them to blow at the whistle post That was his --

22 THE COURT Hold on

23 MR PARKER -- Mrs McLeod's --

24 THE COURT Read back what he said, Madam Court
25 Reporter Can you?

1 THE COURT REPORTER What part? I don't know what
2 I'm looking for

3 THE COURT It was a question right before Mr Parker
4 stood up where she was asking the witness about how he
5 would train people to blow whistles today

6 (Whereupon, the court reporter read aloud the last
7 question and answer)

8 MR PARKER Your Honor, she cannot get in the
9 backdoor a federal regulation by setting this up by asking
10 him if someone blew the horn like that and then seek to
11 impeach him with the law that was in effect at a later
12 date It would be totally impermissible to somehow allow
13 something in that became law after this You ruled this
14 out

15 THE COURT Well, I ruled it out, but now your expert
16 is saying that he would teach it today and it's not in
17 compliance the federal law I would give a limited
18 instruction to the jury that it's not to be deemed as what
19 the regulations were in effect at the time, but if he is
20 teaching today he is teaching in violation of federal law
21 they might find that of some importance in judging his
22 credibility

23 MR PARKER Your Honor, I believe that any possible
24 probative value of that would be outweighed by the
25 prejudice What they're trying to do by this is say,

1 well they shouldn't apply the law that was in existence
2 in South Carolina that they had to blow the horn for
3 1500 feet and then argue, well, they changed the law so
4 they ought not be held to the standard that was in effect
5 at the time, and that's the purpose of this So, the
6 prejudicial effect of that -- any possible credibility
7 thing would be outweighed by the prejudice

8 THE COURT Mrs ~McLeod, I'll allow you to do it
9 under these circumstance You have to tell -- you have to
10 phrase your question that obviously this regulation was
11 not in effect at the time and if he was teaching today --
12 not back in the time of the 2004 -- May 30, 2004

13 MR PARKER Your Honor, we think the prejudice comes
14 in not by that but by the fact that they want the jury to
15 say, well, let's excuse that violation of law because
16 they --

17 THE COURT I can't help how your guy answered He
18 answered that he would teach it today and if it s in
19 violation of the law -- Do you want to go there,
20 Mrs ~McLeod?

21 MRS MCLEOD Yes, sir

22 THE COURT Very, very carefully

23 MRS MCLEOD Yes, sir

24 THE COURT All right You have to be very careful
25 that it's just regulation if he's teaching today, not back

1 in 2004

2 MRS MCLEOD Yes, sir

3 MR PARKER I would ask that she ask the question
4 again

5 THE COURT Sir?

6 MR PARKER I would ask that the witness be given
7 the chance to answer the question

8 (Whereupon, the jury came into open court at
9 approximately 3 45)

10 THE COURT Mrs ~McLeod?

11 MRS MCLEOD Thank you, Judge

12 Mr Scott, let me show you a copy of 49 CFR 222 21,
13 and just to be very clear, sir, that federal regulation
14 was not in effect at the time of our accident back in May
15 of 2004 Do you have that document there with you?

16 THE WITNESS Yes, ma'am

17 Q But that is in effect today, correct, sir?

18 A Yes, ma'am

19 Q And that regulation provides that the locomotive horn
20 should begin to be sounded between 15 but no more than 20
21 seconds before the crossing?

22 A Correct

23 Q And, so, today if you were training locomotive
24 engineers to blow 30 seconds before the crossing that
25 would be in contradiction of that federal regulation,

1 correct, sir?

2 A It would be but when you asked your question I took
3 your question that we were talking about the old rule I
4 had no idea that I was going to see the new rule because
5 it wasn't in effect until September of '06 which is after
6 that So, when I answered your question I answered it
7 based on the old rule and the way it was taught So,
8 that's why I answered it that way, but you're right
9 There is 15 to 20 seconds and I think the outside is 25
10 seconds

11 THE COURT All right Let's move to another
12 subject

13 MRS MCLEOD Yes, sir

14 Mr Scott, one thing I just want to clear up If --
15 Calculate for me the distance -- How many seconds would
16 the train be from the crossing when it's at 1014 feet?
17 When the train is 1014 feet from the crossing, how many
18 seconds back is it?

19 THE WITNESS You haven't completed your
20 hypothetical

21 THE COURT No, sir No, sir Let her ask the
22 questions You do the answering

23 THE WITNESS I need something else

24 MRS MCLEOD I'll give it to him, Judge

25 At the speed the train was traveling at the time of

1 this

2 THE WITNESS Yes

3 Q Sorry about that

4 A And did you say 1014 feet, ma'am?

5 Q Yes, sir, 1014 feet

6 A 46 miles an hour?

7 Q Yes, sir

8 A Again, you want me to round it back to 67 miles per
9 hour? I'm sorry 67 feet?

10 Q That's fine That's fine

11 A Yes, ma'am That would be --

12 THE COURT Hold on one second

13 Mr Bailiff, how about ask those people to be quiet
14 out there

15 Sheriff, go take care of it for me Be nice You
16 got to be re-elected Go ahead

17 Q Have you got it for me, Mr Scott?

18 A Yes, ma'am

19 Q What is the answer?

20 A I got 15 13

21 Q So, 15 seconds would be close enough?

22 A I would round it to 15, yes, ma'am

23 Q So, when the train is 1014 feet from the crossing
24 it's 15 seconds away, correct, sir?

25 A At 46 miles per hour

1 Q Yes, sir

2 A Yes

3 Q Now, what I'd like to do, Mr Scott -- this is a
4 little bit tedious, but you and Mr Parker talked about
5 the download and I don't really need to put it back up and
6 I think there may be some confusion about exactly where
7 the horn was blown, but what I'd like to do is go with the
8 second opinion you gave in this case where you said the
9 train horn started blowing 1437 feet from the crossing
10 That was the second opinion you gave, okay, sir?

11 A Yes That's where the 100-foot mistake came in

12 Q Yes, sir So, let's put this at 1437 feet Okay?

13 A Yes, ma'am

14 Q This is 1437 feet from the crossing

15 A All right

16 Q And let's put this line over here as the crossing and
17 if you go backwards using your 1437 feet number -- not the
18 number you used today -- Well, let's start at the
19 beginning You've got on the front end 19 seconds of
20 horn, correct, sir?

21 A Yes, ma'am

22 Q And then you've got -- I'll just do it this way -- an
23 8 1 second break or pause, correct, sir?

24 A Yes

25 Q And then you have another horn blow that is 17

1 seconds, correct?

2 A Yes, ma'am

3 Q And then you've got a 2 4 second pause, is that
4 correct, Mr Scott?

5 A Yes

6 Q And then at the end you've got 7 2 seconds of horn
7 and I know there is some breaks in there and I added it up
8 so make sure I am doing it correctly In that 7 2 period
9 I've got the horn on for 5 9 seconds and off for 1 3
10 seconds

11 A Did you use the whole last horn sequence?

12 Q Yes the whole thing as if we were still using the
13 1437-foot number

14 THE COURT And the question is what?

15 Q In that last 7 2-second period the horn was on for a
16 total of 5 9 seconds and off for a total of 1 3 seconds

17 A That looks accurate

18 Q Okay And using the 1437 feet number which is the
19 number that you gave me at the deposition you located the
20 crossing at 3099, correct, sir?

21 A Yes

22 Q That's just -- that number doesn't mean anything to
23 anybody except that is just the number on the download
24 that gives us a reference point, correct, sir?

25 A That day it did, yes

1 Q Yes, sir And, so, we'll just put that on here just
2 as a reference point -- 3099 Okay, sir So, if you use
3 the 1437 feet number that you gave me at the time of your
4 deposition that would have the horn beginning to blow
5 1437 feet from the crossing and stopping right at the time
6 of impact, correct, sir?

7 A Thereabouts, yes, ma'am

8 Q Yes, sir And before your deposition you produced
9 your report and you produced a copy of a download with
10 some notations on it, correct, sir?

11 A Yes, ma'am

12 Q And at that time you told me the crossing was located
13 at 3192, correct, sir?

14 A I believe that's right

15 Q Yes, sir, and I've got a copy of it if you'd like to
16 see it So, the first location that you had for the
17 crossing -- what number did I just tell you? I forgot

18 A 3192

19 Q Very good 3192 is where you first located the
20 crossing and then the second time you located the crossing
21 at the time of your deposition it was at 3099, correct?

22 A Yes, ma'am

23 Q And today what is the revised number?

24 A 3200 Thirty-two even

25 Q So, do you think today that you got it right, sir?

1 A That's accurate, yes I now have the right numbers

2 That's correct

3 Q The horn pattern I think you take issue with,

4 Mr Scott, about the length of the pauses or the breaks in
5 the horn, correct?

6 A That and the duration of the signal itself

7 Q Yes, sir And just with respect to the pauses in the
8 horn you would agree with me that in order to blow a
9 distinct horn pattern -- two longs a short, and a long --
10 that there have to be pauses in the horn correct, sir?

11 A Yes

12 Q What I mean by that is you can't just lay down on the
13 horn and keep going all of the way to the crossing because
14 then you'd have one just really long long, correct?

15 A Yes

16 Q And the other thing is once the train crew activated
17 the horn the bell came on, correct?

18 A Supposed to, yes

19 Q Well, look at the download if you would, sir, and
20 just confirm with me on your copy of the download there
21 that once they activated the train horn for the first time
22 before this crossing the bell came on?

23 A It did

24 Q And that bell stayed on right up until that time of
25 impact, correct, sir?

1 A Correct

2 Q And it's an automatic feature on a locomotive so that
3 when they blow that horn the bell automatically rings and
4 I think maybe they have to manually turn it off, is that
5 correct?

6 A On most road locomotives are that way, yes

7 Q Now, I'm not sure what your opinion on this is Can
8 you tell me at what point in connection with the crossing
9 based on your third revised number today did the train
10 crew throw the emergency brake? How many seconds from the
11 crossing or impact did the train crew activate the
12 emergency brake?

13 A You said from impact?

14 Q Yes, sir

15 A It was after impact

16 Q From impact, yes, sir How many seconds?

17 A Oh, I see what you're saying Okay

18 Q I am just looking for seconds, Mr Scott

19 A I am counting them the second time I just want to
20 make sure

21 Q Yes, sir No, I am not rushing you at all

22 A Approximately 7 seconds

23 Q Seven seconds after impact the crew threw the
24 emergency brake based on the 3200 number that you gave us
25 today?

1 A Correct

2 Q And at the time of your deposition back a little over
3 a month ago you indicated that they had braked six seconds
4 from the time of impact, correct, sir?

5 A I believe that's right

6 Q Okay And you would agree with me as a locomotive
7 engineer because you've actually worked as a locomotive
8 engineer -- You've been on the other side of it, haven't
9 you?

10 A Yes, ma'am

11 Q You would agree with me that there is some amount of
12 judgment in determining whether or not to throw an
13 emergency brake, correct?

14 A Yes

15 Q For example, sometimes cars approach and you think
16 they're going to stop but they go, correct?

17 A Yes, ma'am

18 Q And sometimes it's vice versa Sometimes cars
19 approach and you think they're going to go but then they
20 stop, correct?

21 A I've seen that, too

22 Q And you have probably seen it a pretty good bit in
23 your years operating locomotive engines, correct?

24 A Yes, ma'am

25 Q That sometimes you think people are going to dart out

1 in front of you and they give you a heart attack when they
2 stop at the last minute, correct?

3 A I have had them do that when I blowed the emergency
4 horn signal, yes

5 Q Yes, sir And you would agree with me that you did
6 not throw the emergency brake every time you thought a car
7 was about to come out in front of you, correct?

8 A Well, if I perceived that I was going to hit it I
9 would

10 Q Yes, sir, and I'm not talking about --

11 A All the time, no

12 Q Yes, and that's a great point I wasn't trying to go
13 there with you I'm talking about if you see a car coming
14 up to the stop sign, you don't know whether they're going
15 to stop or go, correct, sir?

16 A That's right That's why you keep the proper
17 lookout, yes, ma'am

18 Q And you wait until you understand that they are in
19 imminent danger before you throw that emergency brake
20 correct, sir?

21 A Or what you perceive to be imminent I mean, it may
22 be real close or it may be way far back It just depends
23 on what you're looking at

24 Q Right What the locomotive engineer perceives,
25 correct, sir?

1 A Well, let's don't leave out the conductor because he
2 has a duty, too I mean, you know, if he sees it first,
3 then he needs to go

4 Q Good point What the train crew perceives Is that
5 a fair statement?

6 A Yes, ma'am

7 Q So, they have to throw the emergency brake based on
8 their perception of when they perceive an imminent danger
9 exists, correct, sir?

10 A Yes

11 Q And you would agree with me that if Mr Stevens or
12 Mr Bonner or Mr Cowan had thrown the emergency brake at
13 the time of impact or two seconds before impact this
14 accident still was going to happen, correct, sir?

15 A At or two seconds before? Yes You might -- you may
16 change the point of impact by a small number but, yes,
17 you'll still hit

18 Q Right, because it takes a train a really, really long
19 time to stop, correct, sir?

20 A Why, no

21 Q Well --

22 A Not according to your event recorder it didn't

23 Q Well, let's look at that because I'm not trying to
24 mince words or anything like that Look at the event
25 recorder for me and tell me based on the actual data you

1 have in front of you from the time they activated the
2 emergency brake how many feet did it take this train to
3 stop

4 A The emergency stop distance consumed 1518 feet
5 according to your event recorder

6 Q Yes, sir It took the train from the time of the
7 emergency brake to the time it came to a stop it took it
8 about five football fields to stop, correct sir?
9 300 feet times five

10 A Correct

11 Q Thank you, sir

12 MR PARKER Couple of follow-up questions

13 REDIRECT EXAMINATION

14 BY MR PARKER

15 Q Mr Scott we look here and Mrs ~McLeod has asked you
16 a lot of questions about your numbers The numbers that
17 we have here, do you and Mrs ~McLeod, the CSX expert,
18 agree that the 3200 is the south edge of the crossing?
19 You're in agreement with their expert about that?

20 A I am

21 Q He put to the point of impact being 3177 which would
22 be, of course, it would have to travel over a lane?

23 A Correct

24 Q So that would be the difference?

25 A Correct

1 Q And I think the first number you had was about 8 feet
2 off of what it actually was?

3 A That's correct, 8 feet off

4 Q And, you know, as we do this thing we can all point
5 to errors and I think as I remember looking at this
6 Mrs ~McLeod made an error It was actually 63 feet in
7 here somewhere the difference or thereabouts and she said
8 it was 53 So, that s not -- Did that affect anything
9 about -- I think you answered that as if it was correct
10 So, if you make an error, the errors are to be corrected,
11 and I think y'all got it corrected

12 Mrs ~McLeod said there was 30 seconds of horn I
13 added up the horn here, and there wasn't 30 seconds of
14 horn because that was not a horn -- the two seconds, but
15 you agreed with her --

16 MRS MCLEOD Your Honor, I object

17 THE COURT Hold on Hold on

18 MRS MCLEOD He is leading the witness

19 THE COURT He is

20 Q If you will, do you recall Mrs ~McLeod suggesting to
21 you that there was 30 seconds of horn blowing?

22 A Yes

23 Q And you said, yes, I believe?

24 A When I said yes I thought she was talking about the
25 entire distance, but the horn blowing, no

1 Q And that the horn blowing was 7, 7, correct?

2 A Yes

3 Q 3, 17?

4 A Yea

5 Q And 24, correct?

6 A That's correct

7 Q And 30 seconds is a lot different from 24 seconds?

8 A It is

9 Q And do you think Mrs ~McLeod could make a mistake
10 when she suggests to you that it was 30 seconds of horn
11 when it was only 24 seconds of horn?

12 A Sure

13 Q And Mrs ~McLeod knew that it was a mistake when she
14 put up here that 1437 feet from the crossing the horn
15 started Her expert told her that that was -- and told
16 CSX that that was a mistake Did you read the deposition?

17 MRS MCLEOD Your Honor, he is loading his witness

18 THE COURT Certainly Rephrase the question

19 Q Did Mrs ~McLeod know that this 1437 feet from the
20 crossing --

21 MRS MCLEOD Your Honor, same objection

22 MR PARKER -- based upon your reading of the --

23 Excuse me I'll rephrase it

24 MRS MCLEOD He is loading

25 THE COURT Thank you Please don t lead

1 Q Based on your reading of Mr Wolf's deposition, the
2 CSX expert, was it known that this 1437 feet from the
3 crossing where the horn started blowing was error?

4 A Yes

5 Q And people make errors?

6 A Sure

7 MRS MCLEOD Your Honor, same objection

8 Q And you make errors?

9 A I did I also corrected it

10 Q And the CSX train crew made errors?

11 A Sure

12 MRS MCLEOD Your Honor --

13 THE COURT Hold on Hold on

14 Q Please state whether the CSX train crew made errors

15 A They did

16 Q Did your errors kill anybody?

17 A No, sir

18 Q Did the CSX train crews' errors kill someone?

19 A They sure did

20 THE COURT Anything further?

21 MR PARKER Nothing, Your Honor

22 THE COURT You may step down Next witness Next

23 witness

24 MR WILSON Your Honor, we would call Dr Will

25 Glenn

1 THE COURT Come around, Dr Glenn

2 DR WILLIAM D GLENN, IV, after being duly
3 sworn, testified as follows

4 THE COURT Mr Wilson?

5 MR WILSON Thank you, Your Honor

6 DIRECT EXAMINATION

7 BY MR WILSON

8 Q Dr Glenn, can you tell us who you are?

9 A I am Dr William D Glenn, IV I am a family
10 practitioner here in Bamberg I have been here since
11 1997

12 THE COURT Speak up a little bit for me

13 THE WITNESS Yes, sir

14 Q Just speak just a tad All right So, you have a
15 family medical practice here in Bamberg?

16 A Yes, sir

17 Q Since 1997?

18 A Yes, sir

19 Q Just tell me a little bit about your background as
20 far as your education, when you became licensed to
21 practice medicine, and so on

22 A Undergraduate in Vanderbilt University, Medical
23 School University of Pennsylvania I graduated in 1992
24 Residency Ventura, California I graduated in 1995,
25 licensed to practice medicine since 1994

1 Q That's --

2 A Board Certified in Family Practice since 1995

3 Q Okay All right And have you been in medical
4 practice since then?

5 A Yes, sir

6 Q Okay Were you Beryl Harvey's primary doctor?

7 A Yes, sir

8 Q And were you also Frances Harvey's primary doctor?

9 A Yes, sir

10 Q Okay And you are aware that Beryl and Ms ~Harvey
11 were involved in an automobile train collision May 30,
12 2004?

13 A Yes, sir

14 Q Do you have an opinion to -- Beryl was a C5 Quad? Is
15 that what it's called?

16 A C5, C6 Yes, sir

17 Q And that just indicates the place on his neck where
18 the fracture took place in the diving accident?

19 A That's correct That's the functional level of where
20 the spinal cord injury took place

21 Q And you know that he was confined to a wheelchair?

22 A Yes, sir

23 Q But he was able to engage in a number of activities?

24 A Oh, yes, sir He was quite active

25 Q Limited movement with his arms and his head?

1 A Yes, sir

2 Q Normal speech?

3 A Yes, sir

4 Q Okay Do you have an opinion to a reasonable degree
5 of medical certainty whether Beryl Harvey could experience
6 pain?

7 A Yes, sir He certainly could

8 Q Okay

9 A I took care of him on a number of instances where he
10 did have pain I was quite acquainted with that

11 Q Okay And are you aware of the injuries that he
12 sustained in this wreck that ultimately led to his death?

13 A Yes, sir

14 Q Can you tell me what you're aware of?

15 A More in that he had multiple rib fractures, that he
16 had lacerated liver and multiple trauma as a result of the
17 accident

18 Q Okay And in your opinion to a reasonable degree of
19 medical certainty Mr Harvey Beryl would be able to
20 experience the pain associated with these injuries?

21 A Yes, sir

22 Q And he would be able to consciously understand that
23 pain?

24 A Yes, sir

25 Q Okay Are you aware of the injuries that Frances

1 hemorrhage

2 Q Can you tell the jury just very briefly what that
3 means?

4 A That means that her head was jolted in such a way
5 that the blood vessels inside of the brain were disrupted
6 and caused bleeding within the parietal lobe of the brain
7 right here

8 Q And do you have an opinion to a reasonable degree of
9 medical certainty as to whether that closed head injury
10 that Frances Harvey sustained would have caused her to
11 sustain or undergo any memory loss?

12 A Such a head injury was certainly consistent with some
13 degree of amnesia, yes, sir

14 Q And, Dr Glenn, you said you were Beryl's treating
15 physician Can you tell me generally about Beryl's
16 health?

17 A Well, he, of course, was confined to a wheelchair
18 since I'd met him He had been injured some years before
19 that in a diving accident when he was 16 He was able to
20 get around very well in the wheelchair with the assistance
21 of his family in terms of driving him places He would go
22 to the grocery store there in Denmark and would sell
23 peanuts

24 Q So you knew Beryl --

25 A He enjoyed going fishing and watching the fish be

1 caught and he would tell me about that He enjoyed
2 sporting events, also -- baseball

3 Q Did you see or did you know Beryl outside of the
4 office?

5 A Not personally, no

6 Q Okay All right Anything about Beryl's health that
7 would indicate to you that he could not live a normal
8 life? Other than the wheelchair and confinement there,
9 anything that he couldn't live a normal life?

10 A No, sir

11 Q Anything that would indicate to you that he would
12 have less than a normal life expectancy?

13 A Considering the limitations of the quadriplegia I
14 don't think that there was any other illnesses that would
15 have precluded him living normally

16 Q Okay

17 A I have had several patients live into their 60 s with
18 this type of medical conditions They re doing quite
19 well

20 Q Okay Thank you very much, Dr Glenn Answer any
21 questions that Mrs ~McLeod may have for you Thank you

22 CROSS-EXAMINATION

23 BY MRS MCLEOD

24 Q Good afternoon, Dr Glenn How are you doing?

25 A Good

1 there at the bottom of the page?

2 A Yes

3 Q So, that would have been something that came through
4 your office to order for Mr Harvey?

5 A Yes

6 Q And you would agree with me that between the time of
7 the diving accident in 1980 and the time of this order in
8 March 1, 2004 this is the first time that anybody had
9 requested a personal emergency response system for him?

10 A I couldn't tell you

11 Q Don't recall any other times?

12 A I don't recall any other times

13 Q Thank you, Dr Glenn I'll take that back from you

14 THE COURT Redirect, if any

15 MR WILSON Thank you, Your Honor

16 REDIRECT EXAMINATION

17 BY MR WILSON

18 Q The melanoma that Mrs ~McLeod asked you about just a
19 moment ago, Dr Glenn, you've got the oncology report
20 there still?

21 A No

22 Q I want to show -- I got it That was a spot on
23 Beryl's back?

24 A Yes, sir

25 Q And was that removed?

1 A Yes, sir

2 Q Everything went well with the removal?

3 A Yes, sir He had two surgeries He had an initial
4 incision by Dr Ross and then a re-incision and a simple
5 lymphoma biopsy by Dr Mear (phonetic spelling)

6 Q And all of that -- was it negative?

7 A Everything was negative

8 Q Would that be the reason maybe that more probably
9 that there wasn't any follow-up therapy necessary?

10 A Right We usually observe these folks with physical
11 examinations and usually yearly check of chest x-rays but
12 that's the extent of follow-up

13 Q And that's pretty common and pretty standard, isn't
14 it?

15 A That's standard therapy

16 Q And, Dr Glenn, this issue with the report that
17 Mrs ~McLeod showed you about chronic renal failure -- and
18 I'll show you that -- you were Beryl's primary physician
19 you already testified, correct?

20 A That's correct

21 Q And that's not something that you diagnosed?

22 MRS MCLEOD Your Honor, I am going to object to him
23 leading his witness

24 Q Is that -- did you diagnose Beryl as suffering from
25 that?

1 A No sir

2 Q Okay Is there anything about these issues that
3 would indicate to you that Beryl had anything less than
4 the ability other than the confinement to the wheelchair
5 and those restrictions anything less than the ability to
6 live a normal life and have a normal life expectancy?

7 A No, I don't believe that it does

8 Q Okay That's all I have, Your Honor

9 THE COURT Thank you, Dr Glenn Have a good day
10 Thank you for coming Next witness

11 MR WILSON Your Honor, we would call Mrs Linda
12 Jacobs She's seated right outside

13 THE COURT Everybody okay?

14 Come around, Mrs Jacobs How are you today?

15 THE WITNESS Fine How are you?

16 THE COURT Come right around here for me, please,
17 ma'am

18 LINDA G JACOBS, after being duly sworn,
19 testified as follows

20 THE COURT Mrs Jacobs, would you give us your full
21 name and spell your last, please?

22 THE WITNESS Linda G Jacobs, J-A-C-O-B-S

23 THE COURT Mrs Jacobs, I am going to let you sit
24 down right here You got it now? I am going to let you
25 pull up so you can speak in that Mic All right Here we

1 go Thank you, ma'am Answer Mr Wilson's questions,
2 please

3 MR WILSON Thank you, Your Honor

4 DIRECT EXAMINATION

5 BY MR WILSON

6 Q Mrs Jacobs, tell the jury where you live

7 A I live in Summerville, South Carolina at 252-D Luden
8 Drive

9 Q And did you drive up today from Summerville to
10 testify?

11 A I did

12 Q Do you have occasion to be in Denmark on a pretty
13 regular basis?

14 A Yes, I do

15 Q What is that with?

16 A My sister is ill and I'm up here quite often to help
17 her and take her back and forth to doctors appointments

18 Q And your sister is?

19 A Kay Lesley

20 Q And where does she live?

21 A 6874 Carolina Highway, Denmark, South Carolina,
22 29042

23 Q Very good And back in 2004 were you having to come
24 up pretty regularly to see your sister?

25 A Yes

1 Q And prior to 2004?

2 A Yes My dad -- my sister took care of my dad at that
3 time and he was ill So I was up pretty much trying to
4 help her with daddy

5 Q And I think your sister -- Frances and Beryl Harvey
6 moved in right next door to your sister, didn't they?

7 A Yes, they did

8 Q And about how many years did Frances and Beryl live
9 next door to your sister prior to this May 30 of 2004?

10 A I think it may have been maybe three or four years
11 from what I recollect

12 Q Okay And just to kind of orient the jury, they,
13 basically, shared a house that had been divided into two
14 apartments, didn't they?

15 A Right It was originally a business there and the
16 two apartments was made out of that one building

17 Q Okay So, Kay lived on one side and Frances and
18 Beryl on the other?

19 A Yes

20 Q And did Ida Bolen and her husband live right next
21 door?

22 A Pretty close They were the closest next door
23 neighbors

24 Q Okay Did you have occasion to see Frances and Beryl
25 on a pretty regular basis when you came up to Denmark?

1 A I usually would see them most every time I was
2 visiting my sister and my Dad

3 Q And you didn't know them prior to that time, did you?

4 A No

5 Q Beryl -- What was your impression of Beryl's
6 personality or what type of person?

7 A He was always a real friendly guy He was an
8 outgoing person He seemed to, you know, be able to
9 interact with most any of us, you know, my sister's family
10 side and seemed to enjoy being around people

11 Q Okay And I think there was some testimony about a
12 garden that he planted Would that have been, I guess,
13 right in your sister's backyard kind of?

14 A Well, kind of to the left of that building, yea

15 Q Okay

16 A You could see it from the highway

17 Q Okay All right And did you see the type of
18 connection and relationship that Beryl had with his
19 family?

20 A Oh, yes His mother took really great care of him,
21 and, I mean, they seemed to get along really well and you
22 could tell that they -- you know, they cared a lot for
23 each other They loved each other

24 Q Yes, ma'am

25 A And she did a lot, you know, just taking care of him,

1 and, I mean, I never heard them complain about anything or
2 fuss about anything

3 Q Never heard them complain about anything?

4 A Right

5 Q Okay That's all the questions I would have Thank
6 you

7 MR WILBY No questions, Mrs Jacobs Thank you

8 THE COURT You have a wonderful afternoon

9 THE WITNESS Thank you

10 THE COURT Next witness

11 MR PARKER They're calling Mr Gary Huett, Your
12 Honor He's outside

13 THE COURT Is everybody okay?

14 Is he out there?

15 THE BAILIFF No, he's not

16 MR PARKER We lost one, Your Honor

17 THE COURT You might ought to read that jury's
18 reaction to that and take a hint

19 MR PARKER He was there a while ago

20 THE COURT You didn't hear me

21 Come around, sir, please How are you today?

22 THE WITNESS Good

23 THE COURT If you would stand right here please

24 Put your left hand on the Bible and raise your right

25 GARY J HUETT, after being duly sworn, testified

1 as follows

2 THE COURT Mr Huett, would you give us your full
3 name for the record and spell your last?

4 THE WITNESS Gary James Huett, H-U-E-T-T

5 THE COURT Mr Huett, I am going to let you sit down
6 and pull this chair up and you get comfortable Thank
7 you

8 Mr Parker?

9 DIRECT EXAMINATION

10 BY MR PARKER

11 Q Mr Huett, where are you from?

12 A Nineveh, Indiana

13 THE COURT Where?

14 THE WITNESS Nineveh, Indiana It is hardly on the
15 map It is south of Indianapolis about an hour

16 Q And it is out in the country?

17 A Yea, it's country It is hills and things like that
18 Woods

19 Q What is your profession?

20 A I'm a forensic engineer in the area of computer
21 graphics and photogrammetry

22 Q And what is your education to be able to do that?

23 A Education? They didn't have that when I went to
24 college They didn't have computer graphics to speak of
25 They were pretty primitive back then, but my background is

1 in Aeronautical Engineering with a Bachelor of Science and
2 a Master of Science from Purdue University and after that
3 I did some simulations for television-guided bombs for the
4 Department of Defense

5 Q And that was a job that you did that?

6 A That was a job, yea We did animations using
7 computer, except it was just simplistic We didn't have
8 monitors We would just submit data and then get data
9 printouts and have to work at it that way Quite
10 primitive

11 Q And since in that job and since you've been in the
12 job you're in now have you written papers on computer
13 animations and how you do this type of thing that have
14 been published?

15 A Yes After working for the Department of Defense I
16 ended up working for an accident reconstruction firm and
17 there we did computer graphics for numerous types of
18 accidents, vehicular as such, and also wrote some papers
19 on photogrammetry -- I wrote a paper on photogrammetry and
20 one on computer graphics and this was submitted to the
21 Society of Automotive Engineers which is basically the
22 governing body for accident reconstructionists That's
23 the body of our peers which gives us approval as to
24 whether or not what we write and what we do regarding them
25 is pertinent

1 Q And have you had other papers published on the area
2 of computer simulations or animations?

3 A Just articles for newspapers or magazines, things of
4 that nature

5 Q And in this case you did a computer animation of this
6 -- of the collision we're here about?

7 A Yes There are actually two sides I did a
8 photogrammetric analysis and a computer animation of that

9 Q And in order to do -- What is photogrammetry? Tell
10 us what that is

11 A It's a big word Photogrammetry is -- basically, you
12 use it everyday It is -- one part of that is depth
13 perception It is the stereoscopic vision of your eyes
14 where if you took and closed one eye and tried to line up
15 your fingers it is hard to do, but with two eyes you can
16 tell how the depth of field is because they're
17 triangulating in on that

18 Photogrammetry is, basically using that in the
19 mathematical aspect of analyzing photographs say, from
20 two different perspectives to determine how deep into the
21 field of view something is or how tall it is based on
22 other reference points you may have For instance, if
23 Mr Parker here is, say, 5-foot 10 you could look over
24 from there and say that table may be three and a half feet
25 tall because he is a reference point He tells you, well,

1 that's about what height he is and if he is that height,
2 that table therefore must be that height

3 We get into it more detailed with the photogrammetry
4 as we use it here We do it mathematically or graphically
5 in the computer

6 Q And in this case were you provided information from
7 which to do an analysis using photogrammetry of the scene
8 at Honey Ford Road?

9 A Yes What we do here is we get information, for
10 instance, from a surveyor and we actually build the scene
11 to scale in the computer with three dimensional items and
12 things of that nature so you can build it and then look at
13 it from various different perspectives and once you do
14 that you can position known points and from those known
15 points you can position things in between either left or
16 right or up or down and duplicate them over the photograph
17 or a couple of photographs to find out unknown things that
18 may no longer be there

19 In this case there was some bushes that were primary
20 of concern that were no longer there but there are other
21 poles or things of that nature that we could use as
22 reference points to zero in on where those bushes were at
23 the time

24 MR WILBY Your Honor, may we approach?

25 THE COURT Yes

1 (Whereupon, a bench conference was held)

2 THE COURT I need to be without y'all about 45
3 seconds Don't even get comfortable I mean, you can get
4 comfortable

5 (Whereupon, the jury exited the courtroom at 4 37)

6 THE COURT All right Mr Huett, we have gone to
7 great lengths to try this case based solely on how this
8 crossing scene appeared on the day in question The rules
9 of evidence preclude what we call subsequent remedial
10 measures, i e , perhaps any cutting of the vegetation,
11 trees, whatever subsequent to the accident, subsequent to
12 the collision Please do not make any additional
13 references to what was not there in your analysis

14 Mr Parker, is that a fair caution to him?

15 MR PARKER Yes, Your Honor I assure you that
16 there was no intent on anyone to have that and I didn't --
17 to be honest with you, I don't -- Obviously, the jury is
18 going to be wondering why we didn't go measure the bushes

19 THE COURT They'll have to wonder that It's not
20 going to come out in this trial

21 MR PARKER Right I understand that We certainly
22 didn't -- There was no intention to do that, Your Honor

23 THE COURT I understand that

24 Is that a fair caution to the witness, Mr Wilby?

25 MR WILBY Yes, sir

1 THE COURT All right I am not fussing
2 (Whereupon, the jury came into open court at
3 approximately 4 39)

4 THE COURT Mr Parker, you may continue

5 MR PARKER Thank you, Your Honor

6 Mr Huett, in order to analyze the scene and try to
7 recreate it you had a lot of information?

8 THE WITNESS Yes

9 Q You have a lot of photographs?

10 A Primarily I used the survey as the basis for
11 information and I had to ask the surveyor to go out and
12 get some more specific information for me to do the
13 analysis, yes, and then you use the photographs and you,
14 basically, in the computer as I mentioned you'll have,
15 say, four views of the scene An overhead view, front
16 view, and the side-view, and then a perspective view
17 What I do is take the photograph and put it in the
18 perspective view, then move my camera as we call it in the
19 computer to the same view that the photo was taken from
20 and line up these reference points which in this case were
21 poles and other things of that nature -- line those up and
22 then use those to say, okay, now I'm in the same camera
23 position that this photo was taken from and the poles are
24 all lining up, therefore, other things that I want to
25 measure in the photo can now be measured

1 This is done with more than one photo Usually, it's
2 like I say the stereoscopic aspect You can triangulate
3 in on how deep in the field or how high, whatever you're
4 looking for

5 Q And this is a photograph that you used to -- one of
6 the photographs you used to be able to set the scene?

7 A Yes, it is

8 THE COURT Exhibit what, please?

9 MR PARKER Plaintiff's exhibit 32

10 Q And the reference points and things you had to
11 measure to do this if you would just go through those for
12 us

13 A Well, some of them are this pole here including the
14 height of that little label right there There is this
15 pole here There is this power pole here also with this
16 yellow guide wire There are some poles that are
17 difficult to see down here -- three poles -- and there is
18 also a pole very hard to see in this photo If you looked
19 at it closely there is what they call a telephone marker
20 pole It is one of those white and it s got an orange
21 top It's a couple of hundred feet down the tracks there

22 So, these are some of the items I sent the surveyor
23 out to get not only their position on the ground, but also
24 elevations, the heights of various things because those
25 are helpful for us to determine heights of objects down in

1 the field of view

2 Q This is another one of the photographs you used?

3 A Yes, that's another one You can see it's from a
4 little different perspective This is again what I
5 mentioned -- the triangulation aspect There is also a
6 third photograph I used in there

7 THE COURT Mr Parker, what was that last number
8 please?

9 MR PARKER Gosh, I --

10 MR HARMON Thirty-two It was Plaintiff's 32

11 MR PARKER Thirty-two was one and we'll have to
12 get --

13 THE COURT Just identify them all for the record,
14 please

15 Q You re just going from four different areas Is that
16 what you did?

17 A Well, these are three out of primarily the five that
18 I used just to give you an example

19 Q Okay Go to the next one And now what are you
20 doing here?

21 A Now we're back to the first one and you can see these
22 white lines You can see the rails Now we know the
23 position of these rails, the width of those things We
24 know the height of these poles These are the reference
25 points These are the things I created in the

1 three-dimensional world, and as I mentioned if I get my
2 camera in the right position these things should line
3 up -- the right position, the right focal length, things
4 of that nature These things should line up if I am
5 duplicating the position of that camera When these are
6 lining up and the benefit of this is you got some in the
7 foreground here and it's hard to see but that label lines
8 up there There is a label over on this post, too and
9 you've also got this here marker pole way down at the
10 depth of the field that helps us as well as these poles
11 here

12 So, this is an example of how we then superimpose the
13 3-D world over the photographic world to verify we're
14 accurate in our analysis

15 This is the next photo which has similar Again, you
16 can see we line up with our control points These are
17 what they call control or reference points, and there is
18 the third one Those also show that we're lining up with
19 good alignment of the points on all three of those photos
20 Now, this pole here, for instance, you really can't see
21 because it's behind the bushes

22 You can go to the next photo Now here is where we
23 do the actual photogrammetric analysis We can't go back
24 to the original photo because they're not in that
25 sequence, but behind this there is the bush and that bush

1 would be -- if we could go back and forth with those I
2 don't know if you can go to -- You've got those numbered
3 different

4 Q Does that help you?

5 A Yea Those are the same photo with the
6 three-dimensional laid over the top of it and you can see
7 the bush here is the same as the bush here What I did is
8 I created the three-dimensional bush in the computer
9 graphic world to duplicate the bush in this world and if I
10 triangulate on that that will show me -- that's why I did
11 this I am showing it three times here I actually did
12 it five times and then there was another point and we did
13 it even more than that

14 So, basically, the objective is to accurately
15 position that bush using this process

16 Q And why was it that bush that was of interest?

17 A Well, if you're looking at just this photo and you're
18 looking down the tracks there seems to be -- you can't see
19 the rails any longer There seems to be something
20 hindering you from seeing further down the track So,
21 that's what I was asked to do is to find out where this
22 bush was and how far it was or how close in approximation
23 to the tracks it was

24 MR WILBY Your Honor, excuse me I just want to
25 ask is there an exhibit number?

1 MR PARKER We're just using it for demonstrative --

2 MR WILBY Can we make it an exhibit?

3 THE COURT When you recross him you can

4 MR WILBY Thank you, Judge

5 Q All right And here you've moved to another

6 location?

7 A Yes, another location You can see farther down the
8 tracks because we've moved closer to the rails

9 Q And --

10 A I believe the next one is even closer Right You
11 can see that And if he did what he did before which I
12 don't know that he needs to -- he can if he wants -- where
13 you show both the raw picture and the computer graphics
14 display over the top you can see that the bush is
15 overlying the bush that's in there

16 Q What you're doing here is just making sure that you
17 have the bush in the animation at the same place it was in
18 the photograph?

19 A Yes

20 Q So once you did this and got this in did you also
21 have measurements from the surveyor of all of these things
22 that we're seeing in here other than the bush which you
23 had to locate?

24 A Yes, that's what I mentioned There were reference
25 points I asked the surveyor -- Some of them were there and

1 I asked him to go get some additional information such as
2 the heights of these poles, this label, things of that
3 nature that I could use for quantitative references as to
4 how high and how far things were and interpolate in
5 between as to where the bush might be

6 Q Okay And in addition did you have numerous other
7 photographs to refer to?

8 A There were numerous photographs These were just the
9 primary ones used There were also other photographs used
10 extensively They may not have been analyzed in this
11 great detail, but they were used for reference to verify
12 that this was accurate

13 Q And did you have an animation that was done by CSX of
14 this scene?

15 A An animation?

16 Q Yes

17 A I believe there was an expert who did an animation,
18 yes

19 Q And did you compare the animation you did to the one
20 that the CSX photogrammetry guy did?

21 A Yea They used one of the photos that was taken by
22 Mr Crews and we did analysis there It was taken at
23 70 inches past the stop bar

24 MR WILBY Your Honor, may we approach, please?

25

1 (Whereupon, a bench conference was held)

2 THE COURT Move along

3 Q As we were talking about with the animation done by
4 CSX, did you compare the location of the bush that's in
5 question and other things that were involved in the
6 animation to see how the two animations compared?

7 A Yes, in terms of the visibility aspect of the train
8 coming around the bush, I did do that

9 Q And what did you find when you did that?

10 A I found that their visibility our bush would have to
11 be moved about a foot closer to the tracks meaning it
12 would be more difficult for someone to see than where we
13 have it

14 Q In other words, in the animation that you prepared
15 the bush is one foot further from the track than in the
16 CSX?

17 A Yes Their animation made it harder to see the train
18 than what we're showing

19 Q And did it -- Was it insofar as the location and was
20 the obstructive bush and everything in the approximate
21 same location in both animations?

22 A Yes

23 Q I want to take you through the animation just a
24 minute If you will tell how the engineering -- what you
25 did and what Dr Heathington did in preparing this -- what

1 input you did and what inputs Dr Heathington had

2 A As I mentioned there's two parts to this One is I
3 do the photogrammetric analysis where I define what
4 components might be part of the animation that we don't
5 know of right off So, that's what we did with the bush
6 Then I work under Dr Heathington's direction He is a
7 reconstruction expert who will say this is what a driver
8 may experience in approaching this crossing So, he will
9 tell me what speeds to use head turns, the driver which
10 you'll see --

11 Q All right We've got the animation up that you
12 prepared?

13 A Yes

14 (Whereupon, the animation video is played)

15 Q All right It comes up Stop Back it up
16 Now we're looking from the inside of the vehicle?

17 A Yes That's the beauty of the three-dimensional
18 graphics world Once you create it you can then move
19 through it wherever you want to and in this capacity we
20 built the van to its proper specifications, put the driver
21 in the relatively proper position sitting in the van, and
22 moved through the scene to see what the driver might
23 observe as they approach the crossing

24 Q And I think in the background we see the post in
25 there that you showed?

1 A Right That's this post There's the little marker
2 post way back there This is the bush

3 Q Insofar as the vehicle is concerned, how do you
4 animate the vehicle?

5 A Well, this is a series, basically, of individual
6 frames There's 30 frames per second So the computer
7 will -- We'll put a speed to the vehicle and then tell the
8 computer to draw one picture for every 30th of a second
9 and then the computer then takes and plays those through
10 smoothly so you see an animation

11 Q And during the head movements and the way that the
12 person in the vehicle is moving and looking and so forth,
13 what did you rely on to do that?

14 A I relied on Dr Heathington telling me where to turn
15 the what I'll refer to as the camera because that's what
16 we're using here to duplicate the head movements

17 Q Let's go on And the acceleration rate that's going
18 here -- the vehicle -- how was that arrived at?

19 A Dr Heathington chose that

20 Q And that would be based on his engineering work?

21 A Yes

22 Q Okay And did you also likewise do a version in
23 which the vegetation is cleared off?

24 A Yes, we did ---

25 Q And in that -- If you would, we'll go a little ways

1 Stop right there

2 What did you do here?

3 A Dr Heathington gave me a template, I believe, that
4 was based on track speed that says there should be
5 clearance within this certain area of about 950 feet each
6 side of the crossing based on the railroad right-of-way,
7 things of that nature So, that's what we did is we
8 cleared the bushes out or foliage out according to that
9 template

10 Q And in that did you understand it's to go 100 feet
11 down and then taper off to 28 feet?

12 A Yea It is 100 feet down along the railroad
13 right-of-way and then it tapers down at an angle to
14 25 feet each side of the rails, I believe

15 Q And the speed of the train -- where did that come
16 from?

17 A That came from the event recorder taking the impact
18 speed, basically, and then averaging back about 32 and a
19 half seconds

20 Q Okay And did you use accepted engineering
21 principals in doing this -- both animations?

22 A Yes

23 MR PARKER Answer any questions that Mr Wilby may
24 have

25 THE COURT Madam forelady, ladies and gentlemen,

1 it's about 3 minutes 'til 5 Mr Wilby tells me -- and
2 I'm not going to hold him to it -- He tells me about 15
3 minutes It may be longer It may be shorter I don't
4 know Do y'all want to go on and get through with this
5 last witness tonight so we can get a fresh start in the
6 morning or do you need -- I'm getting some yes's

7 Mr Wilby?

8 MR WILBY Judge, may I -- I will need those
9 exhibits Do you have a hard copies of them?

10 MR PARKER We'll put them up there

11 MR WILBY Well, no, I --

12 THE COURT Y'all do that afterwards

13 MR WILBY We can do that afterwards?

14 THE COURT Yep Let s get his testimony We'll
15 stay late

16 THE WITNESS They were part of my deposition

17 MR PARKER They are attached to his deposition

18 THE COURT Mark, did you hear that?

19 MR WILBY Yes, sir, I did

20 CROSS-EXAMINATION

21 BY MR WILBY

22 Q Mr Huett, it is good to see you again

23 A Yes You, too

24 Q I hope you're doing well Mr Huett, you're an
25 expert in -- I think you call yourself or sometimes refer

1 to yourself as a demonstrative expert or evidence expert,
2 is that correct?

3 A Consultant

4 Q Okay And as you've testified today you also work
5 under the direction of an expert -- in this case
6 Dr Heathington?

7 A For part of this, yes

8 Q And I think you've done as you said the animation,
9 but he's given you a lot of the input into that, correct?

10 A Yes

11 Q In fact, the computer animation that you've done,
12 Mr Huett, you're trying to illustrate Heathington's
13 viewpoint or his version of how he thinks the accident
14 occurred, correct?

15 A Yes

16 Q And what he told you, I believe, is that he wanted
17 the animation to show a driver approaching the crossing
18 somewhat based on her testimony Do you recall that?

19 A Not particularly, no

20 Q Okay Do you dispute that that is what you told me
21 when I deposed you? That he was trying to show this -- a
22 driver approaching the crossing somewhat based on her
23 testimony?

24 A I'm not sure if I used somewhat I may have, but,
25 basically, I think what he was trying to do is to see what

1 a driver approaching the crossing might experience and why
2 the incident or accident occurred -- what may have caused
3 that

4 Q Are you aware that in his deposition Dr Heathington
5 testified that he doesn't know what really happened in
6 this accident? Are you aware of that?

7 A That's up to him

8 Q All right And that this animation that y'all have
9 worked on and created together is really just one
10 plausible scenario that he's come up with and you've
11 helped him to illustrate, correct?

12 A You'll have to check with him

13 Q Now, in creating this animation you relied both on
14 your photogrammetry expert and then a number of documents
15 and things that you looked at, correct?

16 A Yes

17 Q And one of the things you relied on as you showed us
18 a minute ago was Mr Crews' photographs, correct?

19 A Yes

20 Q All right If we could pull up, please, Exhibit 76
21 Now this is not one of the photographs that you
22 showed us, Mr Huett, but I believe that you've seen it
23 before, correct?

24 A Yes

25 Q And, in fact, you can see the white dot down the

1 track there That's a man at 1014 feet, correct?

2 A Yes, is my understanding

3 Q All right And you analyzed this photograph as part
4 of your photogrammetrical work, correct?

5 A Yes It's the one that Mr Fay used in the
6 animation

7 Q If we could I believe you've testified that this
8 lines up very well with your photogrammetrical analysis?

9 A Yes

10 Q Okay If we could pull up the notes which I believe
11 are Exhibit 134 and let's go to the date entry August 15,
12 2009

13 We talked about this at your deposition Can you
14 read that into the record, please, sir?

15 THE COURT Mr Wilby, whose notes are these?

16 MR WILBY I'm sorry They're Mr Huett's notes

17 THE WITNESS "Performed my photogrammetric analysis
18 on the line of sight brush, then compared it to Don Crews'
19 measurements at sight They lined up very well His 1014
20 visibility at 70 inches past stop bar is consistent '

21 Q And I believe you told me that s consistent with the
22 work that you have done correct, sir?

23 A Yes

24 Q And you would agree with me, would you not, that if
25 you can see -- we can pull that photograph back up,

1 please, Exhibit 76 If you can see a man from this
2 position 1014 feet down the track, it is reasonable to
3 assume you can see a train there, correct?

4 A I have to look at it I'm not sure exactly what
5 you're saying, but probably, yes

6 Q Well, right now set aside being a photogrammetrical
7 expert and just be a regular guy Okay? This is a
8 regular-guy question If you assume that there is a man
9 down there a 1014 feet and you can see him from this
10 position, as a regular guy if we place a train there
11 wouldn't you expect to be able to see that?

12 A Most likely, yes

13 Q Thank you, sir All right Now if we could go back
14 to the animation And can we pull that up? We'll just
15 leave it right there for now In this animation -- if we
16 could go to the stop place, Bob Okay Good Excellent
17 Now, when the van first stops there it's at 0 miles
18 per hour, of course, right?

19 THE WITNESS Yes

20 Q And you've got at 27 13 feet from the near rail?

21 A The bumper is, yes

22 Q Yes And you've got the driver then at 35 54,
23 correct?

24 A Yes

25 Q All right Now I believe that one of the parameters

1 that Dr Heathington gave you is he wanted you to place
2 the bumper of the van 6 feet behind the stop line in the
3 animation?

4 A Yes

5 Q All right And he asked you to place the front
6 bumper of the van 6 feet behind the stop line, correct?

7 A Yes

8 Q But you're not aware of any testimony from anybody
9 who said she stopped 6 feet behind the stop line, are you,
10 Mr Huett?

11 A My understanding is she's pulled up past the pole on
12 the left somewhere

13 Q Well, let me try it again Are you aware of any
14 testimony from anyone who said she stopped 6 feet behind
15 the stop line?

16 A I don't think she was that definitive

17 Q One more time

18 A I don t --

19 Q My question, sir, are you aware of anyone's testimony
20 who places her 6 feet behind the stop line?

21 A No

22 Q Now -- and we can go through this, but let's see if
23 you remember it because I know you've looked at this and
24 worked on it, but having been through this a number of
25 times when the driver stops here at 22 5 seconds she takes

1 a half second sitting there and then she takes one second
2 to look left, correct?

3 A I believe so

4 Q All right If you want me to go through it step by
5 step, I will So, if you're not comfortable doing it this
6 way, just let me know, but she takes one second to look
7 left, correct?

8 A I believe so

9 Q And then she holds that view to the left for one
10 second, correct?

11 A Yes, I think so

12 Q Would it be helpful to you if I go through it?

13 A No

14 Q Okay So, at 20 seconds, she turns She begins to
15 turn to the right to look to the right, correct?

16 A I believe so

17 Q All right And then it takes 3 5 seconds from the
18 time she begins to turn to the right until she comes to
19 the place where she stops her turn to the right, correct?

20 A Yes

21 Q And she holds that for one second?

22 A Yes

23 Q And then she leans forward and that takes two
24 seconds, correct?

25 A I believe she leans and turns at the same time

1 Q Okay That may be correct And as she does that
2 that takes two seconds?

3 A Yes

4 Q And then she holds that view for another second?

5 A Yes

6 Q All right And that gets us to 12 5 seconds before
7 impact?

8 A I haven't done the math in my head, but I'll trust
9 you

10 Q Okay And then it takes her two and a half seconds
11 to turn back to center?

12 A Yes

13 Q And then she sits there looking straight ahead for
14 two seconds without doing anything?

15 A Is it two seconds?

16 Q Yes, sir Well, actually, it's slightly less than
17 two seconds

18 A I would have to check that I don't recall that one
19 right off

20 Q Okay Well she comes back to center at 10 I
21 believe she starts to move at 8 07 seconds

22 A I don't recall that specifically I would have to
23 see We could look at it if we wanted to

24 Q Why don't we take a peek at that? Can you bump it
25 forward to -- let's bump it forward to 10 seconds where

1 she's back at center All right She stays here now and
2 let's bump it to 8 07 seconds All right She has just
3 started to move there

4 A Yea

5 Q All right sir All right That 8 10 seconds
6 represents the time it takes until the impact occurs in
7 your animation, correct?

8 A Yes

9 Q All right So, if we could just to summarize at 20
10 seconds she's looking left and begins to look right?

11 A I believe so

12 Q All right It takes her 10 seconds to go through the
13 process of looking right and coming back to center?

14 A Ten seconds saying from -- what timeframes again?

15 Q Okay She's looking left at 20 seconds She begins
16 to look right She makes her turn to the right Makes
17 her second turn to the right Comes back to the center
18 and it's 10 seconds at that point?

19 A Right

20 Q And then she stays there for about two seconds -- 1 9
21 seconds?

22 A Right

23 Q And then she moves forward at that point to the point
24 of impact which you say is about eight seconds from there,
25 correct?

1 A Correct

2 Q So, just to summarize then from 20 seconds she looks
3 right it takes 14 and a half seconds from the time she
4 stops to scan left, scan right, and begin to move forward,
5 correct?

6 A Yes

7 Q All right, sir Now, have you read anything, heard
8 anything from any witness about how long it took
9 Ms ~Harvey to look left, to look right, and then to move?

10 A No I worked under Dr Heathington's direction

11 Q This is the story that Dr Heathington asked you the
12 illustrate with this movie, correct?

13 MR PARKER Your Honor, I'll object to the question
14 I don't think that's an appropriate thing The nature of
15 the question -- the story and the cartoon

16 THE COURT Well, use animation

17 MR WILBY Okay, sir

18 This is the version that Dr Heathington asked you to
19 illustrate with your animation, correct?

20 THE WITNESS Yes

21 Q Look left, look right, take 14 and a half second to
22 do it?

23 A Yes

24 Q Now, I believe when I took your deposition,
25 Mr Huett, you told me you did not have a typical

1 timeframe that you used in your animations for a driver to
2 look left, like right, and move forward, correct? Do you
3 remember that?

4 A Yea I am not the reconstructionist

5 Q No, I'm talking about when you do your animation work
6 and when you've done animations in the past

7 A I usually work under the reconstructionist's
8 direction So it's what they choose

9 Q Well, isn't it true, Mr Huett, that you've testified
10 previously that each head turn is, basically, one second
11 and that that is a standard?

12 A Each intersection -- situation is unique

13 Q Let me ask you this Maybe this helps Do you
14 recall testifying over the years a one-second head turn
15 has been very consistent and accepted as far as your
16 experience?

17 A As far as my experience with experts most situations
18 I think that does work Here you've got a skewed crossing
19 with other factors

20 Q All right, sir And do you recall also testifying
21 that one-second head turns is accepted not only in the
22 legal industry but in computer animation industry?

23 A Well, computer animation industry is, like I say, it
24 depends on the nature of the crossing and what you're
25 doing and who's doing it They're not late for work

1 They're going fishing

2 Q All right, sir Do you recall also testifying that
3 you made presentations to the Society of Automotive
4 Engineers using the one-second head turns and no one in
5 your 18 years of experience has ever objected to that?

6 A Because of what I said Each situation is unique
7 They're not going to object to it They're not going to
8 say it is right or it's wrong It is each one is
9 appropriate to what it's doing

10 Q But in this case you didn't use the one second left,
11 one second right You created an animation that takes 14
12 and a half seconds to look left and right and then move
13 forward, correct, sir?

14 A Well, that was under Dr Heathington's direction

15 Q Now, the animated driver in your animation,
16 Mr Huett, as we've already established looks left and
17 then at 20 seconds begin to look right, correct?

18 A Yes

19 Q And the driver begins to move forward about eight
20 seconds before impact but never looks back to the left,
21 correct?

22 A Yes

23 Q So, when the animated driver begins to turn her head
24 to the right a full 20 seconds passes before impact,
25 correct?

1 A Yes

2 Q And during that 20 seconds, sir, she never looks back
3 left?

4 A Not here, no

5 Q Now, let's talk about what we can't see in your
6 animation

7 Can we bring that back up? All right Let's go
8 to -- let's go to 20 seconds or 21 seconds

9 All right At 21 seconds, sir, what we don't see is
10 a train, correct?

11 A Yes

12 Q In this video -- this first video here that you've
13 created we never see the train do we, sir?

14 A No

15 Q The video never allows you to see the train, does it?

16 A It depends on where you're looking at it

17 Q Well, in fact, if the camera or the driver looked
18 left the train would be visible at certain times along the
19 track, correct, sir?

20 A Yes, if they were closer

21 Q But the thing is this video and this camera position
22 throughout this whole animation never allows us to see
23 where the train is on this track or what distance it is
24 from the track, does it, sir?

25 A Well, you can say that based on where the driver

1 stopped or that there is an obstacle in the way

2 Q But if the driver looks left at some point she would
3 have been able to see the train, correct?

4 A She could have seen it here if the obstacle wasn't in
5 the way

6 Q Correct sir If the train is a little bit further
7 because right now you've got it almost 1500 feet away,
8 correct?

9 A 1440, yea

10 Q All right Well, let's make it real specific If
11 the train is at 1014 feet, sir, and the camera was looking
12 at it, then we might be able to see the train, correct?

13 A We are looking at it and we can't see it

14 Q But it's not at 1014 feet That's my point In
15 other words, if you bring the train to 1014 feet and you
16 have the camera look left, the train may be visible,
17 correct?

18 A No The train is at 1014 -- I'm sorry, not 1014
19 I'm getting that mixed up with 1442 Okay 1014?

20 Q Yes, sir

21 A We're not in the same position that the camera was at
22 at that point

23 Q Well the point is sir, and the only point I'm
24 trying to make is you never give us an opportunity to see
25 whether the train is visible in this video, correct, at

1 1014 feet?

2 A It seems arbitrary

3 Q Let me move on

4 THE COURT Well, just answer the question Then you
5 can explain

6 THE WITNESS I'm not --

7 THE COURT It is a yes or no question

8 THE WITNESS No

9 Q All right, sir

10 THE COURT You may explain if you want to

11 THE WITNESS We're not at 1014 -- we're not at the
12 same position the camera was at when it was visible at
13 1014 feet We're about 5 feet almost further back

14 Q I believe that it's just a couple of feet further
15 back, isn't it, sir? 27 4 inches is the back of the stop
16 bar, correct?

17 A I believe so

18 Q Right? And if you add 70 inches to that that's
19 almost 6 feet So, that would be almost 33 2 inches, I
20 believe, correct?

21 A Yes

22 Q And you've got it at 35 54 So, that's a little over
23 2 feet, correct?

24 A Yes

25 Q All right But my point, sir is if the train was

1 positioned at 1014 feet in this video when it is
2 positioned at that point the camera is not looking in that
3 direction, is it, sir?

4 A Well, there is one other thing you're not taking into
5 account

6 Q Sir -- Judge --

7 THE COURT I am going ask you one more time He is
8 asking you a specific question Then you may --

9 THE WITNESS Okay

10 THE COURT You may explain it

11 THE WITNESS All right Sorry

12 THE COURT Ask him again

13 Q If you had the train at 1014 feet the video does not
14 allow you to see it when it's in that position, does it,
15 sir? That's a simple question I am trying to ask here

16 THE COURT And then you may explain

17 THE WITNESS I am not sure I understand your
18 question exactly to answer yes or no I'm sorry

19 Q Let me try one more time At some point in this
20 video -- and maybe I am asking a bad question, but at some
21 point in this video the train is 1014 feet from the
22 crossing, correct?

23 A Yes

24 Q But when it's 1014 feet from the crossing the camera
25 is not looking in that direction, is it, sir?

1 A Correct

2 Q Thank you And the reason it's not looking in that
3 direction is that's not what Dr Heathington wanted you to
4 illustrate with this video, correct?

5 A You'd have to ask him

6 MR WILBY Judge, may I approach? I have to get a
7 couple of boards

8 Now, Mr Huett, you helped Dr Heathington determine
9 sight distance, did you not?

10 THE WITNESS I'm not sure what you mean

11 Q Well, you sent him some slides, 'I believe, at various
12 distances?

13 A I gave him some data he could evaluate, yes

14 Q Well, you presented these to me in slide form,
15 correct, sir?

16 A Correct

17 Q Is that the way you provided it to Dr Heathington?

18 A Yes

19 Q And this essentially shows a train visible at
20 750 84 feet, correct, sir?

21 A Yes

22 THE COURT Exhibit number, please

23 MR WILBY Thank you, Judge This is 145-C

24 So, you provided that to Dr Heathington, correct?

25 THE WITNESS Yes

1 Q And you provided an additional slide to him, sir, at
2 650, correct? 650 feet?

3 A Yes

4 MR WILBY And, Judge, this is Exhibit 145-B

5 And, Mr Huett, you provided these slides to help
6 Dr Heathington determine the sight distance, correct?

7 THE WITNESS Yes

8 Q Now, you also gave him a slide which is 145-A and
9 this is from 549 feet showing the train visible on the
10 track?

11 A Yes, sir

12 Q Do you see that, sir?

13 A Yes, sir

14 Q That was also a slide that you provided to him?

15 A Yes

16 Q To help him determine sight distance?

17 A Yes

18 Q Now, you didn't provide any slides with the train
19 further back than 750 feet, did you, sir?

20 A No

21 Q One thing I was interested in, sir, is that the train
22 that's animated -- this is an animated train, correct?
23 Computer generated?

24 A Computer generated

25 Q It does not appear to have very bright lights and

1 maybe it's just my imagination but the scene looks very
2 dark Is there any reason for that?

3 A Yea I'll tell you Your printer was dark, to tell
4 you the truth When I first saw those it's all muddy

5 Q Well, this is the way it looked on the electronic
6 slide that I got, sir

7 A It looks more like what it looks up on that screen
8 than the electronic slide

9 Q Well, let me do this I want to show you Exhibit 4
10 Can you pull up Defendant's Exhibit 4, please?
11 You see Defendant's Exhibit 4 there, sir?

12 A Yes

13 Q Now, would you agree that the lights on that
14 locomotive taken in broad daylight appear much brighter
15 than the lights on your animation or on these boards?

16 A Yes

17 Q Could we go to 3, too, please, sir?

18 Do you agree that the lights on this real life
19 photograph are much brighter in broad daylight than the
20 lights on your animation?

21 A Yes, but I don't see it as an issue

22 Q Well, let me ask you this, sir Do you think your
23 animation would be much more visible if the lights were
24 brighter than it appears to be in the one that you've
25 created?

1 A In the miss scenario when you can see the train, yes,
2 but if you can't see the train the lights don't make a
3 difference

4 Q Well, sir, this scenario right here has the
5 vegetation in it, doesn't it?

6 A Yes

7 Q And, so, this would be more closely resembling what
8 you call the impact scenario, correct?

9 A No The train is not behind the bush

10 Q The point is, sir, that the lights whenever the train
11 becomes visible allow you to see it, correct, sir?

12 A When it's visible

13 Q Yes And we've already been through that Your
14 impact scenario never allows us to see what we could see
15 if the camera was looking left, correct?

16 A If you take a frame with that train further back you
17 aren't going to see it either

18 Q Well, let's do that Let's look at 2, please You
19 see Defendant's Exhibit 2? Do you see the light there,
20 sir?

21 A It's coming around the corner, yes Go further back

22 Q All right Hold on just a minute, sir Do you see
23 that as partially blocked by the vegetation, correct?

24 A Yes

25 Q Now, do you have any problem understanding that that

1 is a locomotive on that track?

2 A I don't because I'm used to looking at them

3 Q All right As a regular guy and not as a
4 photogrammetrist do you think you would have any problem
5 discerning that that is a train?

6 A No

7 Q All right We can bring that down please

8 Now, the animation, sir, has the driver beginning to
9 move at 8 1 seconds

10 Can we bring the animation back up? All right

11 That's good enough

12 Now, at that point, sir, the train is 549 24 feet
13 from the crossing, correct?

14 A Yes

15 Q And the driver is looking forward, correct?

16 A Yes

17 Q Now, if the driver looks left even slightly the train
18 is going to be in plain view, correct?

19 A I'm not sure what you mean by slightly

20 Q Well, let's talk about that for a second, sir The
21 fact of the matter is you've talked about it being a screw
22 -- a skewed crossing Excuse me A skewed crossing
23 correct?

24 A Yes

25 Q And the fact is to the right it's 50-degrees To the

1 left it is 130 degrees, correct?

2 A I believe it's somewhere in there, yes

3 Q All right And, frankly, it is sort of like a clock
4 If Ms ~Harvey's van or the animated van is at 12 o'clock,
5 then the train is coming from 10 20 on the clock, correct?

6 A Okay

7 Q You agree with that?

8 A That's approximate

9 Q And so the true to her left is much, much more
10 favorable, correct?

11 A When you say favorable I am not sure what you mean

12 Q Well, I'll tell you what I mean In order to look to
13 the right you have to turn your head In fact, your
14 animated driver turns her head about 85-degrees, correct?

15 A Yes

16 Q But to the left because you have such a favorable
17 view your animated driver just turns about 40 degrees,
18 correct?

19 A I believe it is 45

20 Q 45-degrees About half of what the other one does,
21 correct?

22 A Yes

23 Q Now, the interesting thing, sir, is in your animation
24 you really can't show peripheral vision, can you?

25 A No

1 Q And so that's why you have to turn 45 degrees in this
2 situation A real driver wouldn't even have to do that,
3 would they sir?

4 A I'm not sure what you mean they wouldn't have to do
5 that

6 Q Well, a regular person sitting in a van or a car or a
7 truck doesn't have to turn the head a full 45 degrees
8 because the eyes can see further than just straight ahead?

9 A There are things there Whether they recognize and
10 define them is another issue

11 Q All right, sir But the point is all she had to do
12 was turn a little bit to the left here or use her
13 peripheral vision and she could have seen the train in
14 plain view at 549 feet, correct?

15 A I can't say that I can't say what her peripheral
16 vision would indicate

17 Q Well, you know, don't you, sir, that peripheral
18 vision is generally about 90 degrees on each side?

19 A Yes, but observing things -- you observe things
20 either getting larger, moving across your field of view,
21 or brightly colored That's not happening here

22 Q Those lights approaching are not bright-colored
23 lights, sir?

24 A They're bright

25 Q And the train moving at 46 miles an hour at an angle

1 from 10 20 on the clock is not motion, sir?

2 A It's not motion -- not much relative motion It is
3 going to be staying about the same angle If it went from
4 here across here you would catch it, but something moving
5 there -- in fact, there is a problem with intersections as
6 you approach that the angle often never changes because
7 you're both approaching So it's always in a relative
8 same angle there so you never see any relative motion to
9 catch that something is going on

10 Q But in your animation she never looks left?

11 A No

12 Q For 20 full seconds, correct, sir?

13 A Correct

14 Q Now, 'sometimes at intersections, Mr Huett, you will
15 look left and right and then as you begin to move forward
16 you continue to scan left and right, correct?

17 A Yes

18 Q And we do that every day, don't we, sir?

19 A Some of us

20 Q I mean, isn't it true that as we approach crossings
21 even before we get to the stop sign we're looking left and
22 right and so when we get to the stop sign, in fact, we've
23 already decided whether there is a train there or a car
24 there or things like that?

25 A Each person is different

1 Q Well, you do that sometimes, don't you sir? As
2 you're approaching a stop sign you're already looking to
3 the left and to the right so when you take your foot and
4 put it on the pedal on the stop pedal you've already
5 determined whether you've got a clear intersection to go
6 or not, correct?

7 A Sometimes it depends if I am in a hurry Sometimes
8 I'll do it slower and won't do that

9 Q And drivers often -- especially careful and prudent
10 drivers -- will scan back and forth as they're entering an
11 intersection, correct, sir?

12 A Yes

13 Q And you agree, don't you, Mr Huett, that if you were
14 at a stop sign at a railroad track and you looked left and
15 for whatever reason you looked back to the right and you
16 stay there for 20 seconds (pause) when you get back here
17 to move forward it would be prudent to look left again,
18 wouldn't it, sir?

19 A Possibly

20 Q But that's not what you illustrated, is it?

21 A I wasn't asked to

22 Q Whether you did it in this animation or you created
23 another animation, Mr Huett, you could have placed the
24 train on the tracks at 1014 feet to show us what could be
25 seen, correct?

1 A Yes I'd like to clarify something on that Your
2 analysis of the distance of the driver's eye being maybe
3 2 feet further is inaccurate When Don Crews mentioned --
4 he mention from the center line out Now, again, this is
5 a skewed crossing From the center line -- if the center
6 line is over here where my finger is she was over here
7 further So, when we measured the skewness of the
8 crossing means that she's further back than what you
9 stated there

10 Q So, you're saying she wasn't sitting on the center
11 line?

12 A No The driver doesn't sit on the center line

13 Q No, no, no, but that's your point She was not
14 sitting on the center line?

15 A No The driver's position -- if she were sitting on
16 the center line it would be the same -- Well, it might
17 have been the same as Don Crews', but you're sitting over
18 a little bit in your lane That's why you're not going to
19 have the same distance When the crossing is skewed she's
20 going to be further from the rails because of that

21 Q And I'm trying to make sure we're on the same page
22 Your point is Don Crews took his picture from the center
23 of the road, if you will, whereas the driver would be off
24 center a foot and a half, 2 feet?

25 A Yes as a reference point Don took it at that point

1 Q All right Let's pull up, please, just for a minute
2 photograph 74

3 All right You would agree that this is not taken on
4 the center, sir?

5 A No

6 Q And this is Don Crews' photo 70 inches behind the
7 stop line You would agree with that, wouldn't you, sir?

8 A No

9 Q You don't know one way or the other Well, assume
10 for me that that is Don Crews' photo taken 70 inches
11 behind the stop line

12 A Why?

13 THE COURT Well, because that's evidence in the
14 case He can ask you to assume things Don't argue,
15 please

16 Q If you would, please --

17 A Okay

18 Q -- focus in on it All right You see the man at
19 1014 feet there, sir?

20 A Apparently, yes

21 Q All right That's a man at 1014 feet You would
22 agree that that photograph was not taken on the center of
23 the road, correct?

24 A Yes I don't know that it was taken at 70 inches
25 though either

1 Q Well, I am asking you to assume that That's the
2 evidence in the case, sir

3 A This isn't the same photo we used before, I don't
4 believe

5 Q All right This is Mr Crews' photo I am asking
6 you to assume he took it I am asking you to assume that
7 he testified he took it 70 inches behind the stop line and
8 that there is a man 1014 feet Assuming those things you
9 would agree with me if you back it up, Bob, please, that
10 this photograph was not taken on the center line?

11 A I am not sure -- Is that the photograph that Mr Fay
12 used? It's not taken -- I agree with you, yes It's not
13 taken at the center line

14 Q All right, sir, but you agree with me that you can
15 still see 1014 feet?

16 A I don't know how far back from the center line it was
17 taken -- not from the center line, from the stop bar

18 Q I told you 70 inches, sir

19 A Okay

20 Q All right From this position you can see a man 1014
21 feet down the track You could have placed a train there
22 for us to see but you did not do that, correct?

23 A I wasn't asked to, no

24 Q That's exactly correct, sir Dr Heathington did not
25 ask you to do that, correct?

1 A Yes

2 Q In fact, illustrating it this way, putting a train at
3 1014 feet so we could see it would not illustrate his
4 version or his plausible scenario for what happened here,
5 would it, Mr Huett?

6 A No I presume if she would have seen the train she
7 wouldn't have driven on the tracks

8 Q Do you remember, sir, when I took your deposition we
9 talked about the point of impact Do you recall that?

10 A I guess, yes

11 Q You remember I asked you if Dr Midendorf has helped
12 you at all with the point of impact?

13 A He, I think, analyzed the speed tapes

14 Q And the download, the event recorder, correct?

15 A The event recorder, yes

16 Q Yes Do you remember telling me, sir, that he --
17 Dr Midendorf - told you that the impact point was at
18 3110 feet on the event recorder download?

19 A I don't recall specifically I'd have to look it up

20 Q All right Well, I'll help you with that If we
21 could -- Well, I'll just -- Can I refresh the witnesses'
22 recollection, Your Honor? Can I get a copy of his
23 deposition, please?

24 THE COURT Hold on a second -

25 THE JUROR I'm sorry

1 few minutes on the stipulation Johnny -- Mr Parker,
2 Mr Millberg can perhaps do that Well, when y'all finish
3 that I'll wait back here for y'all in chambers so we can
4 sort of get a handle on tomorrow and go from there Thank
5 you We'll start at 9 30 in the morning in trial The
6 lawyers are probably going to start before that

7 (Whereupon, the proceedings were concluded for the
8 day and were reconvened on November 13, 2009 as
9 follows)

10 THE COURT All right Let's get right to the issue
11 of the subsequent gate recommendation

12 Mr Parker you want to tell me what your position is
13 on that?

14 MR PARKER Yes, Your Honor We --

15 THE COURT Let the record reflect that we had an a
16 little pretrial -- not a pretrial We had an in-chambers
17 conference trying to streamline things and I was informed
18 that this would probably be an issue this morning

19 MR PARKER We believe that the --

20 THE COURT Tell me about the facts just a little
21 bit

22 MR PARKER The facts are on April 26 --

23 THE COURT 4/26/04?

24 MR PARKER 4/26/04 prior to the collision
25 representatives of the SCDOT went to the scene They're

1 called a diagnostic team They looked at the crossing on
2 that date and as of that date made a recommendation that
3 the gates and lights be installed and that later they
4 obtained the funding after May 30 to install gates and
5 lights which were subsequently installed

6 THE COURT The SCDOT obtained the funding?

7 MR PARKER What was that?

8 THE COURT SCDOT obtained the funding?

9 MR PARKER Yes, through the federal government It
10 is under the 130 program They obtained the funding and
11 SCDOT paid for the gates and lights CSX installed them
12 What we believe is admissible is that the recommendation
13 was made previous to the collision and the two cases that
14 we --

15 THE COURT Why did they make the recommendation?

16 MR PARKER Because they went out and evaluated it
17 using the criteria that Dr Heathington testified about

18 THE COURT Mr Millberg?

19 MR MILLBERG Your Honor, first --

20 THE COURT What rules of evidence preclude at least
21 the recommendation?

22 MR MILLBERG It is the federal statute that governs
23 these things, Your Honor -- 23 USC 409 It is actually
24 part of that same title Mr Parker mentioned

25 THE COURT About the recommendation about the

1 funding and so forth?

2 MR MILLBERG Yes, sir, Your Honor

3 THE COURT What does that statute say?

4 MR MILLBERG I've got a copy right here, Your
5 Honor I also got a couple -- some cases I'd like to hand
6 up

7 THE COURT So, the federal statute -- I think I've
8 seen that statute before It's probably got a prohibition
9 about using that in evidence in cases

10 MR MILLBERG Yes, sir In fact, it's been argued,
11 Your Honor, in this case It's been a while back

12 THE COURT Thank you It's been a while back so I
13 shouldn't remember it

14 MR MILLBERG It's been a while back and Richard
15 Ness argued it on behalf of the DOT and, actually, I've
16 got a copy --

17 THE COURT That was an order that I signed
18 precluding certain data that was collected?

19 MR MILLBERG Certain discovery, yes, sir, Your
20 Honor --

21 THE COURT I am familiar with the order

22 MR MILLBERG -- that it was based on

23 THE COURT Well, now, hold on a second You said
24 this happened on 4/26/04 and what you've handed me says
25 effective August 10, 2005

1 MR MILLBERG I think that -- that statute was in
2 effect at the time of the accident Maybe that was the
3 date it was printed or something

4 MR PARKER It was in effect, Your Honor We agree

5 THE COURT All right Let me look at it real quick

6 Mr Parker, how do we get around that? Strike that
7 How do you get around it?

8 MR PARKER Your Honor, 23 USC 409 is very precise
9 and has been -- We've got two cases -- the Shanklin case
10 and Powers versus CSX where this very issue came up and
11 the statute there states that what's prohibited is data
12 collected and compiled for the purposes of applying for
13 funds under 130 So, it would protect data compiled and
14 collected and information compiled and collected It does
15 not protect the recommendation or the decision to install
16 gates and lights This very issue was before the Shanklin
17 court that went to the United States Supreme Court

18 THE COURT You got a copy of Shanklin?

19 MR PARKER It is in your notebook under a tab on
20 that Which tab is it? Tab seven

21 THE COURT Send me to a headnote or to a paragraph

22 MR PARKER Well, I d have to get one I hadn't
23 read it in a couple of weeks, but in the case Norfolk
24 Southern actually argued in that case that the decision
25 concerning not installing gates and lights which was the

1 issue in that case they contended, well, that we'll be
2 prohibited by 23 USC 409 from making -- from offering that
3 and the court held, no, you're not prohibited. It's the
4 data and information collected to make that decision
5 that's protected.

6 In other words, the process they go through, the
7 accident reports, the things they collect, and put
8 together is protected. The decision is not protected, and
9 we also cite under that tab Powers versus CSX in which the
10 same holding with CSX that held that the decision was not
11 protected. It's the information gathered and collected
12 that's protected. Very specific about it.

13 THE COURT They hold that we are satisfied that the
14 FHWA's approval, i.e., the approval of the secretary's
15 agent of the use of passive warning devices in a
16 particular crossing is not barred from discovery or
17 admission into evidence. That's the actual approval
18 itself.

19 MR. PARKER That's correct and the agent in this
20 case is SCDOT.

21 MR. MILLBERG Your Honor, that case is in a very
22 awkward posture. What they're talking about as I recall
23 in that case is whether or not it could be shown to the
24 court so the court could determine whether or not federal
25 funding was involved or not -- not talking about putting

1 it in front of the jury More significantly, the circuit
2 court case there -- that entire discussion of federal law
3 was reversed by U S Supreme Court

4 THE COURT In what case?

5 MR MILLBERG In Shanklin

6 MR PARKER That was not reversed

7 THE COURT Well, have y'all got the U S Supreme
8 Court decision?

9 MR PARKER Yes, Your Honor We have it here

10 MR MILLBERG Your Honor, reversed and remanded
11 Besides that, Your Honor, these cases I handed up to
12 you -- there are three cases actually that are directly on
13 point

14 THE COURT The Louisiana case?

15 MR MILLBERG The Louisiana case There's two --

16 THE COURT You got something other than Louisiana
17 law?

18 MR MILLBERG I got the Malone case out of the
19 eighth circuit and the Sawyer case which is out of the
20 Mississippi Supreme Court Those cases are all identical
21 to what we've got here -- the prior recommendation and
22 subsequent installation The recommendation and then the
23 accident and the subsequent installation In all three of
24 those cases the court held that neither the subsequent
25 installation was barred by Rule 407 and that the earlier

1 decision was barred by 409

2 THE COURT 409 being?

3 MR MILLBERG 23 USC 409, the federal statute

4 THE COURT And the subsequent installation being
5 barred by --

6 MR MILLBERG By Rule 407

7 THE COURT -- subsequent remedial evidence?

8 MR MILLBERG That's exactly what --

9 THE COURT Subsequent remedial measures

10 MR MILLBERG That's exactly what those courts did,
11 affirmed all the way up through the eighth circuit and the
12 Mississippi Supreme Court That's exactly what we think
13 -- that's exactly what we urge Your Honor to do

14 THE COURT Mr Parker?

15 MR PARKER Your Honor, these do not deal with that
16 They're not on point with it Let me lay out a little bit
17 about this thing works and how the preemption works
18 because these cases deal with preemption Under Shanklin,
19 the Supreme Court case what the court held was that when
20 federal funds participate in the installation of warning
21 devices at crossings, then that is preempted There is a
22 federal regulation on it that tells you -- it's 646214
23 that says that warning devices at crossings are deemed to
24 be -- adequate warning devices are deemed to be gates and
25 lights -- that if, in fact, you're going to install using

1 federal funds some warning device other than that, then
2 there has to be an approval of the secretary of that
3 decision and that being the thing less than that would be
4 crossbuck signs which we have here, but the reason that is
5 not preempted is because federal funds did not participate
6 in the installation of the gates and lights The railroad
7 put up the crossbuck signs So, we don't have that
8 process So, there is no preemption about that decision
9 in this case

10 THE COURT Hold on a second Are you telling me
11 that federal funds were not used in the construction of
12 the crossing gates and lights?

13 MR PARKER That's not -- They were, but they were
14 not used on the passive warning devices that were out
15 there on that day If, in fact we had gone through this
16 process and the DOT had decided it didn't need gates and
17 lights, then the -- and federal funds paid for the
18 crossbucks, then you -- it would be deemed -- we could not
19 say they needed gates and lights because it would be
20 preempted because that statute -- the regulation would
21 then preempt the decision-making process and that's what
22 Shanklin holds but it does not -- Shanklin -- here we
23 have passive devices that federal funds weren't used for
24 The railroad erected the crossbuck So we can -- it is
25 not preempted and we can attack the fact that crossbucks

1 were not adequate and they needed gates and lights

2 So, that is what those cases are dealing with and I
3 would have to look and I hadn't read these closely because
4 I don't want to misstate anything, but I will but what
5 we're dealing with here is we don't have the preemption
6 that passive crossbuck signs meet federal regulations and
7 therefore we cannot attack that decision So, that's not
8 at play in this case

9 What is at play in this case and what they are
10 contending in this case is that the decision to install
11 gates and lights comes within the purview of 23 USC 409
12 We contend that it does not, that the decision is not
13 information or data compiled or collected for the purpose
14 of applying for federal funding The decision -- the
15 information they collected to do that is protected under
16 23 USC 409 -- the accident reports, the ADT, their file,
17 and they claim protection for that and we did not get
18 that That's not in there, but the decision itself is
19 not Otherwise, as the court has recognized in Shanklin
20 and in Powers in these preemption cases they could not
21 come in and say, well under 646214 the decision process
22 went through and the decision was not to install gates and
23 lights We'd never have preemption because it would never
24 come into evidence They have to get in -- and that's
25 what the court in Shanklin held -- that that decision

1 itself was not barred by 23 USC 409 because you would
2 never -- they would never be able to have the defense that
3 we went through this process and decided not to install
4 gates and lights therefore, the crossbucks are adequate
5 at that crossing They would never get there because they
6 couldn't put that decision in, and, actually, Norfolk
7 Southern made that argument in the Shanklin case that they
8 would be prohibited by 409 from doing that and the
9 Shanklin court, the sixth circuit said, no, you're not
10 You're not barred by 409 from putting in that decision

11 What you're barred from doing under 409 is putting in
12 the data collected and compiled as the statute says and
13 there is a Supreme -- a United States Supreme Court case
14 on this statute that is in the notebook under tab seven
15 What it says is you're to read this statute narrowly
16 because it is -- it is in contravention of the common law
17 so that even though you -- you have to read -- you don't
18 read it broadly so that you keep out evidence You read
19 it within the confines of the statute to apply the
20 statute, and clearly the only two cases we could find -- I
21 don't want to say these cases aren't dead on point, but
22 the only two cases that we could locate that really dealt
23 with this issue specifically were the sixth circuit case
24 in Shanklin and the district court case in Powers

25 Now, I just briefly read over the case here that

1 they've cited and my suspicion is every one of these cases
2 deal with the preemption issue, but I don't know that and
3 I wouldn't want to comment on that, but we believe that
4 the decision itself and the recommendation of the gates
5 and lights is not data or information compiled or
6 collected It is the decision It is making the decision
7 and recommendation and we don't believe that is -- comes
8 within the purview of 23 409

9 THE COURT All right Thank you, Mr Parker You
10 know -- all of you know how much I respect all of you, how
11 much y all have all gone beyond the call of duty in
12 providing the court adequate research to make decision
13 There are some tough decisions I am having to make in this
14 case and I have tried to call it as I felt like the law
15 dictated, and I have made every effort in this case to try
16 the case based on how the crossing appeared at the time of
17 the collision and I will respectfully not allow the
18 evidence concerning the subsequent installation of lights,
19 crossbucks

20 I think -- I'm making my analysis under federal
21 preemption law and, not only that, under Rule 407
22 subsequent remedial measures and not only that, more
23 importantly, a 403 analysis it being more prejudicial than
24 probative When I consider all of that collectively I am
25 of the opinion that I should not allow it in

1 Respectfully, I think you're protected on the record If
2 you need to put anything else on the record -- any of
3 you -- I'll be glad to do so

4 MR PARKER Your Honor, I would like to put on the
5 record whether I need to put anything -- We'll put
6 Mr Munn's deposition, the testimony in the record We're
7 not seeking to put in the installation that the gates and
8 lights were installed out there We're seeking to put in
9 only that on April 24, a month prior to this collision,
10 that SCDOT did an evaluation recommended that gates and
11 lights be installed at that crossing That is the sum
12 total of what we're seeking to put in, and all of that
13 took place prior to collision and we contend is not a
14 subsequent remedial measure

15 THE COURT All right For the record so you're
16 protected in Columbia, I'll just -- without any objection
17 I assume -- not going to the jury, but deposition I assume
18 would cover it as a proffer?

19 MR MILLBERG We have no objection to Mr Munn's
20 deposition being included in the record for a proffer
21 purposes only

22 THE COURT As a proffer All right Anything else?

23 MR PARKER Nothing, Your Honor

24 THE COURT Bring the jury in, please Where is
25 Mr Huett?

1 (Whereupon, the jury came into open court at
2 approximately 9 39)

3 THE COURT Good morning, Madam foreman, ladies and
4 gentlemen of the jury I hope everyone had a pleasant
5 evening Everybody smiling this morning? Everybody got
6 their coats on Breakfast okay, Mr Hair? As long as I
7 can satisfy you, I can satisfy everybody

8 Let's get started this morning and I'll meet with
9 y'all about logistics on the first break

10 Mr Parker? I'm sorry Mr Wilby

11 MR WILBY Good morning, Judge

12 THE COURT Let me just please remind you lawyers --
13 I hate to stop at the end of the day in the middle of
14 cross examination because the lawyers always go back and
15 say, well, I didn't ask so and so Please don't cover old
16 ground

17 MR WILBY I'll try not to, Judge Yes, sir Thank
18 you

19 CROSS-EXAMINATION

20 BY MR WILBY

21 Q Good morning Welcome back When we finished
22 yesterday I was asking you about where you placed -- on
23 the animation where you placed the point of impact and I
24 believe when I took your deposition you told me it was at
25 3110 feet Do you remember that?

1 A Not specifically No

2 MR WILBY All right What I'd like to do, Judge,

3 if I may is just refresh his recollection

4 THE COURT Sure Hand him his deposition

5 MR WILBY Yes, sir Thank you

6 THE COURT You got a specific line and page

7 MR WILBY Yes, sir

8 If you will turn to page 35, beginning at line 17

9 Mr Huett, I started -- just before you read it just to
10 give you the context, sir I asked you if Dr Midendorf
11 helped you to find it Is that your deposition?

12 THE WITNESS No

13 MR WILBY It's not? It is hard to find it if it's
14 not yours My bad, sir

15 I apologize, Your Honor

16 Mr Huett, what I was asking you is if Dr Midendorf
17 helped you define the point of impact and I started that
18 on page 35 at line 17 The discussion goes through page
19 36, line 16 So, if you could read that, then I'll ask
20 you a question about it

21 THE WITNESS Okay

22 Q All right Did Dr Midendorf help you define the
23 point of impact, sir?

24 A He did define the point of impact

25 Q All right And did you tell me the day I took your

1 deposition that you were using 3110 feet as the point of
2 impact?

3 A Yes

4 Q Okay Thank you, sir Now, your animation -- the
5 animation that you created did not demonstrate the horn
6 blow, did it, sir?

7 A No

8 Q All right I want you to assume with me that the
9 horn on the download -- the event recorder that
10 Dr Midendorf used to determine the point of impact --
11 that the horn starts blowing at 4547 That's the feet
12 You've defined the point of impact at 3110 Right?

13 A I believe so

14 Q And I also want you to assume that the horn on the
15 download stops blowing at 3110 Okay?

16 A I assume

17 Q Would you agree that the horn would have blown for
18 1437 feet?

19 A No

20 Q Why not?

21 A It was intermittent

22 Q Okay That's fine I'll ask the question
23 differently Assume it started here at 4547 Assume it
24 ended here at 3110 The difference between where it
25 started and where it stopped would be 1437?

1 A If your math is correct, yes

2 Q Okay Now, I believe when Dr Scott testified
3 yesterday that was one of the figures that he used and
4 you've testified or participated in cases where Dr Scott
5 has also been an expert witness, correct?

6 A Mr Scott?

7 Q Mr Scott, yes sir

8 A Yes

9 Q And also you're familiar with Dr Lipscomb, the
10 audiologist?

11 A Yes

12 Q And you've been involved with cases with
13 Dr Heathington -- other cases where Dr Lipscomb has also
14 been a witness, correct?

15 A Yes

16 Q Now, sir, you testified, I believe, yesterday that
17 you analyzed our animation, is that correct?

18 A Yes

19 Q And you found it to be very consistent with yours?

20 A Reasonably, yes

21 Q And I believe you said, in fact, the view of yours is
22 maybe one foot better than ours?

23 A In terms of visibility of the train, yes

24 Q Okay What I'd like to do then is pull up our
25 animation and take you through --

1 MR PARKER Your Honor, we'll have to approach on
2 this

3 THE COURT We got five minutes
4 (Whereupon, a bench conference was held)

5 THE COURT Move along given that instruction

6 MR WILBY Yes, sir, I think so

7 THE COURT What are we looking at now?

8 MR WILBY Your Honor, what we're going to do is run
9 through our animation

10 Mr Huett, please, if you'll just take a look at it

11 THE COURT Everybody has to understand that the
12 Plaintiff has had an animation which we've all seen This
13 is I think the first view of the railroad's animation?

14 MR WILBY Yea

15 Before we do that you'll agree, Mr Huett, that the
16 background for this animation -- the animation occurs on
17 an actual photograph taken by Mr Crews, correct?

18 THE WITNESS Yes

19 MR WILBY All right Let's run it forward all the
20 way through the first time, please

21 (Whereupon, the animation video was played)

22 Q It is your opinion, Mr Huett, if we can bring it
23 back up that your animation actually shows a better view
24 or would show a better view of the train if we could see
25 the train in your animation than this one does, correct?

1 A What do you mean by better?

2 Q Well, I mean, you just said that the vegetation is a
3 little bit closer to the tracks than ours so you have a
4 better opportunity in your animation to see the train than
5 what we've provided correct?

6 A Yes

7 Q Okay

8 Judge, would you mind if I cut the lights for this?

9 THE COURT I don't mind, but I'll let my bailiff do
10 it Hit those lights Do you know how to do that,

11 Mr Bailiff? Turn those switches down Cut them all off

12 MR WILBY Bob, if you could run it through again
13 and stop it when you first see the train appear, please

14 (Whereupon the animation video is played)

15 Q Now, Mr Huett do you see the train appearing in the
16 video there?

17 A From standing here looking at it, yes

18 Q All right And that s at 1230 feet?

19 A Yes

20 Q Now, if we were to look at your video and if your
21 video with vegetation allowed us to see what we can see
22 here assuming that your video has a better perspective
23 than ours we should be able to see your train in your
24 video a little bit better than we can see it in our video
25 at 1230 feet, correct?

1 A No

2 Q Let's move it just a little closer Right there

3 This is 1137 Do you see it there?

4 A Yes

5 Q All right And the same question -- we should be
6 able to see your -- if your video allowed us to see a
7 train at that distance we should be able to see it better,
8 correct?

9 A No

10 Q Why is that, Mr Huett?

11 A You're not looking at it from the same position
12 We're a couple of feet further back

13 Q Two feet further back?

14 A No, it's about three and a half feet

15 Q And I believe also you had a problem because the view
16 of this is taken from the center lane, right? We went
17 through that yesterday, correct?

18 A From the driver's position in the lane

19 Q All right So, you're saying that it's three and a
20 half feet further back Yours is at 35 5 feet, correct?

21 A I believe so

22 Q And we've already established the stop line is
23 27 4 inches, correct?

24 A We talked about that yesterday as being from the
25 center line or being over from the track where the driver

1 would be which may be a foot and a half or two so the
2 driver will actually be farther away at 35 and a half feet
3 than that 27 feet that you're talking about

4 Q Well, let's just use this center lane for my
5 questioning and if we're just talking about the center
6 lane, if you add 6 feet to 27 feet 4 inches, that's
7 33 feet 4 inches, correct?

8 A Yes

9 Q All right And you've already told us that your
10 video gives back a foot in terms of the vegetation
11 perspective, correct?

12 A Yes

13 Q So, give or take 1 foot, 1 foot 4 inches, or giving
14 you the benefit of the doubt -- 2 feet -- shouldn't we be
15 able to see the train in your video if your video allowed
16 us to do that a long, long way back, sir?

17 A It's not that simple The trigonometry doesn't play
18 that way You've got a bush there that's about 350 feet
19 down the tracks The train is about three or four times
20 that distance Those all come into play It's not just
21 that simple

22 Q Let's bump it just a little forward Stop it Now
23 we're at 1025 Do you see that, sir?

24 A Yes

25 Q Now you're -- again, I am not asking this as a

1 photogrammetry expert I am just asking you as a regular
2 guy You're stopped at the stop sign or at the stop line
3 or in your case as you say 6 feet behind the stop line
4 You're looking for a train when you're there Do you have
5 any problem discerning that's a train?

6 A I'm not at 6 feet from the stop bar So, we're not
7 talking apples and apples

8 Q Well, let's forget that I'll take that out Do you
9 have any problem discerning that's a train, Mr Huett?

10 A No From this position, yes Well, not --
11 essentially Someone might if they just glanced over
12 there

13 Q Well, I mean, it's sort of like if you were at
14 Mr Parker's office and you were in his conference room
15 and he popped his head around the door and he asked you a
16 question you wouldn't have to say, Mr Parker, please come
17 into the room so I can see your feet in order to know that
18 it's Mr Parker, would you?

19 A No, but that's not the same Here you got visual
20 clutter of a different nature

21 Q But you don't have a problem, do you, sir, discerning
22 that's a train when you're sitting in front of the
23 railroad tracks, do you?

24 A Someone looking quickly may have a problem seeing a
25 train

1 Q Let's bump it forward just a little bit We'll just
2 keep on coming All right We can bring that down

3 THE COURT How about some lights?

4 Q Now, Mr Huett, as I understand it you've done two
5 animations for this case The impact and the other
6 animation, correct?

7 A Yes

8 Q And as I understand it those two animations are
9 identical except for two things In the impact scenario
10 the driver looks to the right whereas in the one where
11 there is no vegetation the driver stays looking left,
12 correct?

13 A Correct

14 Q And then the other thing that's different is in one
15 there is no vegetation and in the other there is
16 vegetation, correct?

17 A Yes

18 Q Otherwise it's identical?

19 A Basically, yes

20 Q Can we bring them up?

21 I am going to show you your two animations side by
22 side As we start here at the beginning of both of them
23 you can see the van speed is the same -- 21 97 miles per
24 hour, correct?

25 A Yes

1 Q And you've got the train speed the same -- 48 30,
2 correct?

3 A Yes

4 Q And you've got the distance from the car to impact
5 208 08 in both versions?

6 A Yes

7 Q And then you have the train 2251 18 feet in both
8 versions?

9 A Yes

10 Q You've got the front bumper to the near rail
11 187 28 feet in both?

12 A Yes

13 Q You've got the driver to the near rail 195 69 feet in
14 both?

15 A Yes

16 Q And then you've got the time to point of impact 32 5
17 seconds in both, correct, sir?

18 A Yes

19 Q Now, I believe as we look at this as we run through
20 it what you're going to see is on the left is the
21 animation with no vegetation and on the right would be the
22 one with the vegetation in it, okay?

23 A Yes

24 Q So, Bob, if you don't mind, please, start it
25 (Whereupon, the animation video was played)

1 Q All right Can we stop it there, please?

2 Now, Mr Huett, just so we make sure we're all on the
3 same page here, the numbers all line up right there, don't
4 they?

5 A Yes

6 Q And you agree with me the animation on the left is
7 your animation with no vegetation?

8 A Yes

9 Q And the one on the right is your animation with
10 vegetation, correct?

11 A Yes

12 Q All right Bob, please proceed

13 Now, what we've done there, sir, is we've moved your
14 vegetation from the one that has it to the one that
15 doesn't have it and I want you to analyze that using all
16 of your photogrammetry skills and tell me if there is any
17 difference between the two?

18 A I am not sure what you're asking me

19 Q I want to know if those two images are identical,
20 sir, from your photogrammetry experience and expertise?

21 A If you could move it back and forth once or twice
22 maybe I could see better Can you do it back the other
23 way again? They're not identical because there are some
24 other trees in the background that were taken out in
25 accordance with the template

1 MR WILBY Excuse me, sir Judge

2 THE COURT All right Ladies and gentlemen of the
3 jury, just disregard that remark That has nothing to do
4 with this case

5 Q In terms of the vegetation --

6 THE COURT Hold on a second Please remember what I
7 said

8 THE WITNESS Yes, sir

9 Q In terms of the vegetation that you can see in the
10 left quadrant there where the train is approaching from
11 the trees are identical, sir? I mean, the vegetation is
12 identical?

13 A I am not sure what you're asking There is a tall
14 tree there on the left one that's not there on the right
15 one

16 Q All right In terms of the bushes?

17 A I believe so

18 Q All right Let's run it forward

19 Bob, if you don't mind, stop it at 07 seconds

20 THE MEDIA SPECIALIST That's as close as I can get
21 it

22 Q Okay Now, Mr Huett, when the driver is in this
23 position -- Can you bump it back just slightly, Bob? Bump
24 it forward We're getting too close All right That
25 will work

1 THE MEDIA SPECIALIST Sorry about that

2 Q That will work just fine Now, at that point, sir,
3 we're 8 1 seconds in your animation from impact, correct?

4 A Yes

5 Q And the driver is sitting at the stop sign or the
6 stop line or wherever you've got her positioned looking
7 straight ahead, correct?

8 A Yes

9 Q And in your animation if at this point she were to
10 glance left, that's exactly what she would see, correct?

11 A You'd probably be better off talking to
12 Dr Heathington about that

13 Q Well, you made the animation, sir, so I'd like to
14 talk to you about it That's at least what your animation
15 illustrates, correct?

16 A I can't verify that he did everything exactly as I
17 would do it I would have to check how he did it, but
18 essentially probably okay

19 Q And, frankly, Mr Huett, with the driver -- a normal
20 driver, not an animated driver sitting in that position,
21 she could probably see that train with her peripheral
22 vision, correct sir?

23 A Not sure

24 Q All right If we could have the lights back on,
25 please You can leave that right there

1 I just want to revisit one little issue with you
2 Mr Huett, when I asked you about these photographs
3 yesterday I want to make sure you understand this is not
4 the same locomotive that was involved in our accident
5 Are you aware of that?

6 A Yes

7 Q But you didn't do any study of our locomotive lights,
8 did you, for your animation?

9 A Study? I'm not sure

10 Q Yes, sir I mean, you didn't try to exactly
11 represent our lights in your animation, did you, sir?

12 A I put them in the proper position on the locomotive

13 Q But in terms of their brightness and luminosity and
14 that sort of thing that was not your goal, was it, sir?

15 A It wasn't a major goal because they weren't visible

16 Q But you'd agree they would be visible right here,
17 sir, if you put them in there?

18 A They're in there That's a very washed-out picture
19 given the lighting here and the projection and such

20 Q Yes, sir, but they're not in there like that, are
21 they, sir?

22 THE COURT You're referring to what?

23 MR WILBY This would be Defendant's Exhibit 4

24 THE WITNESS They're in there

25 Q You keep suggesting that maybe I ought to talk to

1 Dr Heathington about this and some of the other things
2 that I've asked you The truth is, Mr Huett, you were
3 asked by Dr Heathington to illustrate his view of the
4 accident, correct?

5 A Yes

6 Q And he told you or he's testified that this that
7 you've created is an illustration of one possible scenario
8 that might have happened, correct, sir?

9 A I guess so yes

10 Q And he's testified that nobody really knows what
11 happened?

12 A I don't know what he testified to, but

13 Q Well, you know there is no testimony to support the
14 driver looking right for 20 seconds, correct, sir?

15 A I don't know that

16 Q You were provided Ms ~Harvey's deposition, weren't
17 you?

18 MR PARKER Your Honor, I would object to that
19 because that's misleading Ms ~Harvey said -- testified
20 that she looked the same as in that animation She viewed
21 it So there is testimony

22 THE COURT All right Rephrase your question

23 Q Were you provided a copy of Ms ~Harvey's deposition?

24 A Yes

25 Q Okay Now, in that deposition did she say anywhere,

1 sir, that she looked left and then looked right and that
2 20 seconds passed before she entered the intersection?

3 A I didn't read the deposition very carefully I
4 looked at it generally Dr Heathington is the one who
5 reads it more specifically and gives me the direction in
6 that area

7 Q Now, you work a lot of cases with Dr Heathington,
8 correct sir?

9 A Yes

10 Q In fact, 30 to 40 cases over the last 10 to 12 years?

11 A Yes

12 Q And he sends you about 60 percent of your business,
13 correct?

14 A Yes

15 Q And tell the jury what your hourly rate is for being
16 here today?

17 A Being here in trial?

18 Q Yes, sir

19 A It is \$290 an hour

20 Q All right, sir Thank you

21 A Thank you

22 THE COURT Redirect, Mr Parker

23 MR PARKER Thank you, Your Honor

24 REDIRECT EXAMINATION

25 Q Dr Huett -- Mr Huett I caught that from

1 Mr Wilby, I guess Mr Huett, if you expect people to
2 pick up trains out of your peripheral vision do people
3 have to be able to see to the sides?

4 MR WILBY Your Honor, I object to this question

5 THE COURT He's not an expert I assume he is
6 getting ready to give opinions I'll let you come over
7 here and tell me, but that sounds like --

8 (Whereupon, a bench conference was held)

9 Q Mr Huett, if you would as part of your work have you
10 looked at peripheral vision and studied peripheral vision?

11 A Yes

12 Q If you would tell us about the ability of someone to
13 see anything with the peripheral vision and how that
14 works

15 MR WILBY Your Honor, I'll object to that line of
16 questioning unless he's going to limit it to his personal
17 experience, Judge

18 THE COURT Well, it's, also, I don't think a subject
19 that needs to be the subject of expert testimony We all
20 know what peripheral vision is

21 Mr Parker, just ask him specifically about this case
22 and if he took into account any peripheral vision, et
23 cetera, et cetera

24 Q Insofar as the facts of this case would you tell us
25 something about the ability of a driver to be able to pick

1 up a train in the peripheral vision?

2 MR WILBY Same objection

3 THE COURT Sustained You can tell us what, if
4 anything, you did in taking into consideration peripheral
5 vision in creating this animation Did you take that into
6 effect and if you did how did that come into play?

7 THE WITNESS Well, peripherally I mentioned briefly
8 yesterday, I mean, in regards to peripheral vision as a
9 vehicle is approaching the crossing and an object is
10 coming towards it whether it's a train or another car,
11 peripheral vision will pick up things moving across the
12 field of view dramatically As they're approaching
13 nothing is changing relative to your eye It's staying in
14 the relatively the same position as you move closer So,
15 it's not going to catch your vision Usually, your
16 peripheral vision is something goes by and you go, whoa,
17 what was that? This isn't happening here or something
18 gets extremely large which doesn't happen until very, very
19 close to the crossing

20 Q And if, in fact, he asked you a lot of questions
21 about the animations, the difference in the two and so
22 forth, and you testified about the 2 feet, 3 feet farther
23 back in your animation --

24 A Yes, sir

25 Q -- and that would be the case if you looked and saw

1 requires finders of facts I mean, y'all got to determine
2 what the facts are Every now and then during the trial
3 of a case the lawyers -- I'm saying this real cute --
4 every now and then -- seldom -- they can agree on
5 something These are good lawyers and they've tried to
6 agree on some things and they're going to enter into what
7 we call a stipulation

8 A stipulation is simply that they have agreed on
9 whatever they stipulate to I am not sure what it is
10 They'll tell you what it is, but that is to be considered
11 by you as an undisputed fact in the case So, that fact
12 is not in dispute You accept the stipulation as a fact
13 in the case that is agreed upon by both parties

14 MR PARKER Thank you, Your Honor We have
15 stipulated, Your Honor, that the train and locomotive
16 involved in the collision here was owned and operated by
17 CSX Transportation on the date of the collision

18 THE COURT You agree to that?

19 MR HARMON Yes, Your Honor

20 THE COURT I told you it wouldn't be a long
21 stipulation And, listen, ladies and gentlemen, I know
22 that we've been here all week, but I do commend the
23 lawyers They've acted civilly to each other They've
24 acted very respectfully to each other and I think all of
25 them have been very, very prepared and presented an

1 excellent case so far So, I commend all of them for
2 that, and I appreciate it as the Judge

3 I try cases where lawyers can't get two words out of
4 their mouth before they're fighting at each other These
5 lawyers -- I am proud of them They have acted
6 professionally and I enjoyed working with them

7 Next witness

8 MR WILSON Your Honor, we'd call Mrs Connie
9 Carson

10 THE COURT All right Let me see y'all at side bar
11 (Whereupon, a bench conference was held)

12 THE COURT Good morning

13 THE WITNESS Morning

14 THE COURT Put your left hand on the bible and raise
15 your right hand

16 CONNIE L CARSON, after being duly sworn,
17 testified as follows

18 THE COURT Would you please tell us your full name
19 and spell your last?

20 THE WITNESS Connie Lynn Carson, C-A-R-S-O-N

21 MR WILSON Thank you, Your Honor

22 DIRECT EXAMINATION

23 BY MR WILSON

24 Q Mrs Carson, if you'll just tell the jury who you
25 are, please

- 1 A I am Beryl Harvey's sister
- 2 Q Frances is your mother?
- 3 A Frances is my mother
- 4 Q Can you tell the jury where you grew up?
- 5 A I grew up between Hampton and Denmark, South
- 6 Carolina, between the two
- 7 Q Kind of between Hampton and Denmark?
- 8 A Yea
- 9 Q And where did you attend high school?
- 10 A Denmark Olar High
- 11 Q Will you tell the jury are you married?
- 12 A Yes
- 13 Q Your husband's name?
- 14 A Michael Carson
- 15 Q And do you have any children?
- 16 A I have two boys
- 17 Q What are their names?
- 18 A Sage Carson and Kevin Carson
- 19 Q And their ages?
- 20 A One is 17 and one will soon be 24
- 21 Q Okay All right Sage testified in here the other
- 22 day?
- 23 A Yes, he did
- 24 Q Now, tell the jury are you employed?
- 25 A Yes, I am

1 Q And where are you employed?

2 A I work with First Southern Methodist Church in
3 Orangeburg

4 Q How about your husband Mikey?

5 A He works with the Piggly Wiggly in Denmark, market
6 manager

7 Q Now, you are -- are you the oldest?

8 A I am the oldest

9 Q All right So, just kind of lay out for the jury the
10 children going down

11 A I am the oldest and then Gerald and then I had Beryl
12 and then Karen and then Michael

13 Q All right How much older are you than Beryl?

14 A I was four years older There was two years between
15 all of us but Michael

16 Q Okay So, you're Beryl's bigger sister?

17 A Yea

18 Q Now, Connie, just describe, you know, the
19 relationship that your family had before Beryl's diving
20 accident

21 A We were close growing up I mean, we had a family
22 that was -- I mean, my mom, basically, raised us My Dad
23 was a truck driver, but we were close We had a loving
24 relationship

25 Q So, your Dad was on the road a good bit?

1 A Yea

2 Q But your mom took care --

3 A She was our primary caregiver

4 Q Okay And, of course, you would have been 20 when
5 Beryl -- about 20 when Beryl had his diving accident?

6 A Yea

7 Q And you remember all of that?

8 A Oh, yes

9 Q And there's been testimony that that brought the
10 family a good bit closer together?

11 A A lot closer

12 Q Now, I want to talk with you a little bit about the
13 day of this train wreck that took Beryl's life Where
14 were you when you got the word that this had happened?

15 A We were home watching TV, me and my son -- my
16 youngest son -- and my husband

17 Q Had you been at your mom's house earlier that day?

18 A Yea, me and my youngest son had went to her home for
19 dinner and we just spent some time with them that morning

20 Q And did you get the see Beryl that morning, also?

21 A Oh, yea

22 Q And about what time did you go back home?

23 A It was a little after lunch His father was working
24 so we went to meet him

25 Q Okay And did you -- You said when you got back home

1 sometime later you got a telephone call, I guess?

2 A Yes

3 Q Okay

4 A It was around -- I really couldn't tell you -- around
5 six, something like that, seven I don't know

6 Q And can you tell me what happened from there?

7 A When we got the phonecall all I had to hear was there
8 was an accident and we left

9 Q Okay Did you know at that point in time what had
10 happened with Beryl?

11 A No

12 Q Okay When did you find out or when did y'all find
13 out that Beryl had been killed?

14 A When we got to the accident

15 Q Okay All right How did you know that when you got
16 to the accident scene or how did you find that out?

17 A When I had walked up I had seen one of my cousins
18 standing before you get to the accident and he had told
19 me So I went on to Michael and Michael told me

20 Q Did you see your brother at the scene, also?

21 A Michael was there, yes

22 Q Did you see your brother Beryl at the scene?

23 A I seen him laying over to the side, yes

24 Q And then from that point your mom had already been
25 transported from there?

1 A Yes, she had

2 Q And, so, did y'all turn around and head to Columbia
3 to the hospital?

4 A Yes, we did

5 Q Did you have to meet with anybody -- law enforcement
6 or coroner at the wreck scene?

7 A Michael had already talked with the law enforcement
8 which he was standing there but I couldn't tell you what
9 he said or what he asked or anything but the coroner did
10 come up and speak directly to me and tell me --

11 THE COURT No, ma'am You can't testify what he
12 said

13 THE WITNESS I'm sorry

14 Q Don't worry about what he told you So you did meet
15 with the coroner at the scene?

16 A Yes

17 Q And then you went on to Columbia?

18 A Right

19 Q I think Ms ~Frances testified she couldn't attend the
20 funeral?

21 A No, she couldn't

22 Q Could she be involved in making the funeral
23 arrangements?

24 A No, she couldn't

25 Q Who had to do all of that?

1 A I did it

2 Q Exhibit 135 which is just the death certificate, did
3 you have to obtain the death certificate for your brother
4 Beryl?

5 A Yes, I did

6 Q You had to go through the coroner's office and all to
7 do that?

8 A Yes, I did

9 Q And you had to make the funeral arrangements?

10 A Yes

11 Q Did -- was Frances able to be involved in that at
12 all?

13 A No

14 Q Connie I want to just very briefly show you -- I
15 don't have to put them up -- Exhibit No 136 Was there
16 an EMS bill that was incurred as a result of the ambulance
17 appearing on the scene with Beryl?

18 A Yes

19 Q Okay And Exhibit 137 -- was there a funeral bill
20 that was incurred in connection with the funeral for
21 Beryl?

22 A Yes

23 Q And Exhibit 138 -- is that the bill for the
24 headstone?

25 A Yes

1 Q Were those all things that you were involved in
2 taking care of --

3 A Yes

4 Q -- for the family?

5 A Yes

6 Q What did that day feel like, Connie?

7 A Just something you never want to have to go through

8 Q And you've heard the testimony in this courtroom
9 about how Beryl's not being there has left a void in your
10 family Is that how you feel?

11 A Yes

12 Q That's all the rest of your family feels?

13 A Yes

14 Q I want to -- Are you okay?

15 A Yea

16 Q I just want to show you a few pictures, Connie This
17 is 116-A Tell me who that is

18 A That's Beryl

19 Q About how old is he in that picture?

20 A He is probably four

21 Q Okay What was he like when he was that young?

22 A Rambunctious

23 Q Okay How about right here 116-B?

24 A He was probably around first grade

25 Q Just a little bit older?

1 A Yea

2 Q And right here, 116-D?

3 A A couple of few grades older

4 Q Just a little bit older And right here, 116-C?

5 A The same, a few years older

6 Q Just kind of going up a couple of years each time?

7 A Right Right

8 Q Okay And the testimony was Beryl was a pretty

9 active kid?

10 A Oh, yea, stayed busy

11 Q And 116-C -- I'm sorry, 116-E Who is that on the

12 right side?

13 A That's my youngest brother Michael and Beryl together

14 outside

15 Q Mike was on the left?

16 A Right

17 Q Beryl is on the right?

18 A Right

19 Q And I want you to tell me -- This is 122 Tell me --

20 Can you tell me where that is?

21 A That's at the Edisto Memorial Gardens in Orangeburg

22 Q Okay What is going on? Why are y all there?

23 A Me and my husband got married there

24 Q That's your wedding?

25 A Yes

- 1 Q Is that Michael on the right?
- 2 A Yes
- 3 Q And Beryl and Frances and Mr Charles?
- 4 A Right
- 5 Q What is that hat right there?
- 6 A Miami
- 7 Q Okay All right 123 What's that?
- 8 A That's -- We had a little cookout like reception for
- 9 Michael after he got married
- 10 Q So that's after Michael's wedding?
- 11 A Right
- 12 Q What is that -- That's Beryl?
- 13 A That's Beryl sitting outside with all of the people
- 14 just --
- 15 Q Is that Gerald?
- 16 A Gerald and a friend of ours and a nextdoor neighbor
- 17 Q And Beryl has got his Gamecock hat on in that one?
- 18 A Oh, yea
- 19 Q 129?
- 20 A We were just at my mom's one day and caught him still
- 21 enough to catch a picture He didn't like to take
- 22 picture
- 23 Q He didn't like pictures?
- 24 A No
- 25 Q Hard to catch him still? There's been testimony

1 about the computer That's his computer in the
2 background?

3 A Yes, sir, it is

4 Q Okay Number 130

5 A That was when he was in rehab The day he was going
6 home the nurses were cutting up with him just having a
7 good time

8 Q They look like they're having a good time That was
9 in Columbia?

10 A Yes, sir

11 Q 132?

12 A That was him with his peanuts He had just finished
13 bagging them up one day before he was fixing to go up to
14 the store to sit around and sell them

15 Q And then I want to show you 124 I want you to tell
16 me what this is

17 A That was my son's graduation

18 Q Okay And that's Kevin?

19 A Yes, sir

20 Q Kevin is your oldest?

21 A Yes, he is

22 Q Tell the jury in connection with relation to this
23 wreck when that photograph was taken?

24 A Two days before

25 Q And that's at the graduation?

1 A Yes, it is

2 Q Kevin graduated from where?

3 A Edisto High School

4 Q Beryl have close relationship with all of his
5 brothers and sisters?

6 A Yes, he did

7 Q And with Ms ~Frances, also?

8 A Yes, he did

9 Q There's been testimony that Ms ~Frances took care of
10 Beryl's needs

11 A Yes, she did

12 Q Did Beryl help take care of her?

13 A Oh, yes

14 Q Like what?

15 A He just -- He would do all the financial part I
16 mean, he would make sure everything she wanted she had and
17 he would just -- They took care of each other

18 Q Now, Connie, since this May 30 of 2004 wreck your
19 father Charles has passed?

20 A Yes, he has

21 Q When did he pass away?

22 A I want to say it was 2000 -- January of 2008

23 Q And after the automobile Ms ~Frances -- after the
24 wreck Ms ~Frances was in the hospital for a few months
25 before she could return home?

1 A Yes

2 Q And can you tell the jury since she's been able to
3 return home what kind of effect Beryl's passing has had
4 with her?

5 A It's affected her in a lot of ways I mean, she
6 worries about us more I mean, it's hard to say how it
7 affects her, but it affects her

8 Q Were you appointed as the personal representative --
9 I mean the case has been brought in your name as personal
10 representative for the estate of Beryl?

11 A Right

12 Q So you were appointed to handle the estate affairs of
13 Beryl?

14 A Right

15 MR WILSON Just one moment, please, Your Honor

16 Mrs Connie, that's all the questions I'd have

17 Please answer anything Mrs McLeod would have

18 MRS MCLEOD Nothing, ma'am, thank you

19 THE COURT Thank you, ma'am Let me get this chair

20 Next witness

21 MR PARKER Your Honor, the Plaintiff has no further
22 witnesses We may have -- I guess we need to --

23 THE COURT I understand

24 MR PARKER -- ask about certain exhibits that we
25 may need to talk about

1 The choices for lunch today are Fries or the barbecue
2 place out here Both of them have buffets and probably
3 just as quick at either one I'll let y'all make that
4 call It makes no difference to me

5 So, having said that, what we're going to do now for
6 the next to make efficient use of our time is the defense
7 is going to start presenting their witnesses and,
8 obviously, the more we get done today, the more we get
9 done I'll just leave it at that

10 Mr Millberg, you got the first witness?

11 MR MILLBERG Yes, sir I call J J Cruz He is
12 right outside

13 THE COURT Now we're changing gears The Defendants
14 will have their witnesses on direct examination so they
15 have to use direct questions Mr Parker and those will
16 now be able to lead by cross examination

17 JOSEPH J CRUZ, after being duly sworn,
18 testified as follows

19 THE COURT And come right up here and if you would
20 give us your full name and spell your last and pull up a
21 little bit

22 THE WITNESS My name is Joseph J Cruz, C-R-U-Z

23 THE COURT Your witness

24 MR MILLBERG Thank you, Your Honor

25 DIRECT EXAMINATION

1 BY MR MILLBERG

2 Q Where do you live?

3 A I live in Barnwell 360 Hutto's chapel Road in
4 Barnwell

5 Q Are you a married man?

6 A Yes, I am

7 Q Children?

8 A Yes, I do, two kids

9 Q How are you employed, sir?

10 A Presently currently I am employed with the military,
11 United States Army

12 Q What is your rank?

13 A Master Sergeant

14 Q Have you been overseas?

15 A Yes, I have

16 Q Recently?

17 A Yes A month ago I was in Kuwait Prior to that I
18 was in Iraq for a year

19 Q Before your current stint with the military how were
20 you employed?

21 A With the Department of Public Safety as a state
22 trooper

23 Q Are you going back to that?

24 A Yes, in April April of next year

25 Q Were you involved in connection with the accident --

1 the train van accident out at Honey Ford Road back on May
2 30, 2004, Sergeant Cruz?

3 A Yes, I was

4 Q Before that accident how long had you been with the
5 Highway Patrol, sir?

6 A Fourteen years

7 Q And how many years had you been investigating motor
8 vehicle collisions?

9 A For 14 years

10 Q All 14 of those?

11 A Yes

12 Q Have you had occasion in connection with your work,
13 Sergeant Cruz, to look at sight distance issues in
14 connection with motor vehicle collisions?

15 A Yes, I have

16 Q Can you tell the jury how so?

17 A Through the Academy, going through accident --
18 advanced accident and reconstruction classes up at the
19 Academy We get out into an area which is the driving
20 course of the Police Academy in Columbia and there will be
21 collisions that are staged and we'll go out there and look
22 at the staged wrecks and from there you're able to look
23 and see, judge your distances, go confirm those
24 estimations If you're just to sit in your vehicle and
25 make an estimation you confirm it by measurement and by

1 doing so you develop, you know, an ability to judge some
2 distances That's one way

3 The other way that I'm able to judge distances is by
4 being a SWAT member and being a selected marksman That's
5 a term we don't care to use but the common term is being a
6 sniper on a SWAT team

7 Q How does that come into play in terms of judging
8 distances?

9 A You have to have the ability to judge distances so
10 that you know where your bullet would hit if you were to
11 be given a command to shoot or to eliminate a target So,
12 you have to kind of know how to estimate A lot of that
13 is practice and getting out there and being familiar with
14 distances and what the size of objects at certain
15 distances

16 Q How long have you been involved in that kind of
17 serious marksmanship?

18 A I have been a marksman for over 10 years

19 Q Back in May of 2004 about how many automobile
20 collisions would you guess you've investigated over the
21 years?

22 A I would estimate about maybe 75 -- an average of 75 a
23 year

24 Q How often in those investigations would you be
25 looking at sight distance issues?

1 A Oh, of those, probably I would about 80 percent of
2 the time

3 Q More often than not?

4 A More often than not, absolutely

5 Q Now, tell us about your involvement, if you would,
6 Sergeant Cruz, in connection with this train accident
7 What was your role?

8 A I was the supervisor on duty on that day for the
9 local area for Bamberg, Barnwell, Allendale, and Hampton

10 Q And who -- did any other members of the Highway
11 Patrol report to this scene?

12 A Yes There was -- from what I can remember Lance
13 Corporal Whatley, myself, First Sergeant Wallen with the
14 Highway Patrol, Lieutenant Sims with the Highway Patrol,
15 and then a lot of other local agencies

16 Q And who was the primary investigator on the accident?

17 A The primary investigator was Lance Corporal Whatley

18 Q What was your role with respect to him?

19 A Just to assist, to assist in the collision

20 Q And just to get the hierarchy straight, would you be
21 one of his supervisors?

22 A Yes, I was his supervisor

23 Q Now, once you got out there, Sergeant Cruz, what was
24 your involvement that day?

25 A My involvement that day was to take pictures assist

1 with some of the measurements, just anything that Corporal
2 Whatley would ask of me even though I was a supervisor --
3 him being the primary investigator, you work off of him
4 and what he needs for you to do and that's how we work as
5 a team to try and clear up the collision or wreck just to
6 assist them

7 Q Did you make any personal observations of the
8 visibility of the crossing that day?

9 A Yes, I did

10 Q And can you tell the jury how you went about doing
11 that?

12 A What I did as I do with a lot of collision that takes
13 place in intersections and this being an intersection --
14 although it is a railroad track, we still classify that as
15 an intersection -- is to try and recreate or try to go
16 back and think about where what we call pre-collision
17 before the impact took place where the vehicles were at
18 the time, and, of course, we weren't there to see the
19 actual collision so you have to go by, you know, where
20 would this person have stopped

21 At this intersection there is a stop sign and there's
22 also a stop line that's paved on the road where we knew
23 the van was coming from I would go on that side of the
24 intersection -- yea, that side of the intersection which
25 would be closer to US 321 Now, I got on that intersect

1 or got where the stop line is and imagined where the
2 driver would be from that stop line if they stopped at the
3 stop line

4 The front vehicle -- if the front edge of that truck
5 was on that stop line I measured about 4 feet back or four
6 paces I am walking it off and stood there and looked
7 both ways I looked north and south as this railroad is
8 running to see if there was any obstruction in sight
9 distance

10 Q And so you were on foot when you did that?

11 A Yes, I was on foot

12 Q Stepped off about 4 feet or four paces from the stop
13 line?

14 A Yes

15 Q Going away from the railroad track and back towards
16 Highway 321?

17 A That's correct

18 Q To position yourself where you would have been short
19 of reaching the stop line and that would be your vantage
20 point you looked at?

21 A Yes

22 Q Or the vantage point you assumed and you looked from?

23 A Correct, where I would have thought the driver would
24 be

25 Q And when you looked down to the left can you describe

1 for the jury what the visibility was?

2 A As I looked down south what I saw -- First of all,
3 the train had broken in half so that the intersection was
4 clear there There is still some part of the train on the
5 south side and as I looked down the south side I'm looking
6 about what I estimate to be about a quarter mile down
7 There was still some visible sight distance

8 Q A quarter mile about 1320 feet?

9 A That is what a quarter mile is I didn't measure
10 that off, but I estimated a quarter mile which is
11 1320 feet

12 Q Yes, sir You didn't measure that?

13 A No, I did not measure that

14 Q But that was your best estimate at the time?

15 A Yes, sir

16 Q About a quarter mile?

17 A Yes, sir

18 Q Now, did you conduct this examination of visibility
19 together with Trooper Whatley or by yourself?

20 A No, I did it by myself

21 Q Now, you supervised Trooper Whatley on other wrecks,
22 haven't you?

23 A Yes I have

24 Q Do the two of you always agree on every little detail
25 of the collision?

1 A No, not on everything

2 Q From time to time in your work would you challenge
3 Trooper Whatley on this point or that point?

4 A Yes, exactly That's what I would do

5 Q Was there any disagreement with respect to the
6 visibility at the crossing?

7 A No, sir, there was none We both agreed on the sight
8 distance

9 Q Now, you did -- you conducted your examination that
10 very day?

11 A Yes, I did

12 Q Still daylight?

13 A Yes, it was

14 Q In fact, the train was still there?

15 A Yes, it was The train was still there

16 Q You were kind of looking down the side of the train?

17 A Absolutely, on the side of it

18 Q And before the day of this accident -- Let me direct
19 your attention, Sergeant Cruz to say the month of May
20 The accident was May 30?

21 A Right

22 Q So just a few weeks before the accident were you
23 familiar with this location?

24 A Yes, I am

25 Q How are you familiar with it?

1 A Because I live about five minutes from that area I
2 have driven there several times -- Well, a lot of times,
3 really -- several times during the week, you know, when
4 I'm working

5 Q Just in your normal course of being out and about?

6 A Yes

7 Q Does your family use that crossing?

8 A Yes, they do

9 Q Now, let me direct your attention like I said back to
10 May of 2004, that timeframe, sir, were you over the
11 crossing in that timeframe?

12 A Yes

13 Q And was the visibility from the stop line looking
14 down to the south to the left like you've described it was
15 the night of the accident?

16 A Yes

17 MR MILLBERG Thank you, Sergeant Cruz Those are
18 all of my questions

19 THE COURT Mr Murdaugh?

20 CROSS-EXAMINATION

21 BY MR MURDAUGH

22 Q Good morning, Mr Cruz

23 A Good morning, Mr Murdaugh

24 Q I'm sorry you're having troubles today

25 A Just a little

1 Q And we know that from you driving out there and from
2 your testimony here today that when you drove and stopped
3 out at that crossing on prior occasions that your view was
4 the same as the day you measured it on the wreck?

5 A That my view would be the same?

6 Q Yes, sir, the sight distance

7 A It would be similar

8 Q Okay So, you would have had the same or similar
9 sight distance when you stopped your vehicle?

10 A Yes, sir

11 Q Okay And, so, it would be fair to say that when you
12 were out there in your vehicle stopped at your vehicle
13 that when you stopped your vehicle you would have been in
14 a position somewhere 48 inches or so behind the stop line?

15 A That's correct

16 MR MURDAUGH Thank you

17 THE COURT Redirect, if any?

18 MR PARKER Just a minute

19 (Whereupon, the attorneys conferred)

20 Q Do you know what time you left the scene Corporal
21 Cruz?

22 A No, I do not If you want me to I can look at my
23 report Not off the top of my head

24 MR MURDAUGH Thank you

25 REDIRECT EXAMINATION

1 BY MR MILLBERG

2 Q Sergeant Cruz, Plaintiff's 48-B up there --

3 A Yes, sir

4 Q -- is that similar to the visibility that you saw the
5 day of the wreck?

6 A Minus the train

7 Q Yes, sir Other than the fact that the train was
8 still there?

9 A Right

10 Q But as far as the vegetation and so forth?

11 A It's similar

12 Q Yes, sir Now, as I understand it the place you
13 chose to go look was what you best determined where the
14 driver would have been?

15 A Yes, what I would best determine Absolutely

16 Q Sergeant Cruz, do you know the Harvey family?

17 A No, I do not

18 Q Do you have any connection to CSX?

19 A No, I do not

20 Q Thank you for being here today

21 THE COURT All right, sir I hope all is well and
22 you get rid of your sore foot

23 THE WITNESS Thank you

24 THE COURT Good to see you

25 Next witness

1 MR HARMON Your Honor, at this time we'd like to
2 call Mr Jack Cowan

3 JACK COWAN, after being duly sworn, testified as
4 follows

5 THE COURT Sir, would you give us your full name and
6 spell your last?

7 THE WITNESS My name is Jack Cowan, C-O-W-A-N

8 DIRECT EXAMINATION

9 BY MR HARMON

10 Q Mr Cowan, who was the senior engineer on the train
11 on May 30, 2004?

12 A That's right Me

13 Q Before we talk about that, sir, I'd like to talk a
14 little bit about you Where are you from?

15 A I am from Savannah, Georgia

16 Q And did you graduate from high school there?

17 A I did

18 Q What did you do after you graduated?

19 A I went to work for the railroad, believe it or not
20 I served an apprenticeship on the old Seaboard Same
21 railroad

22 Q What type of apprenticeship?

23 A Machinist apprentice for four years and after four
24 years I was a journeyman machinist

25 Q Okay Can you tell the jury what it means to be a

1 machinist?

2 A Well, a machinist for the railroad, they repair the
3 diesel engines, maintenance, overhaul, and just generally
4 fix the locomotive and keep it running, so to speak

5 Q Now, you said you were a machinist for how many
6 years?

7 A All total seven years

8 Q And what did you do after that?

9 A Well, in the 60's -- the early 60's -- they started
10 talking about a merger between this railroad and Atlantic
11 Coastline So, they anticipated -- they closed the shops
12 in Savannah So, I had to find another job So, I
13 transferred over to the transportation department

14 Q And in what role did you transfer over to the
15 transportation department?

16 A As training for a locomotive engineer

17 Q And did you become an engineer?

18 A I did

19 Q And how long have you been an engineer?

20 A Over 40 years

21 Q Sir, do you have any children?

22 A Yes, sir

23 Q How many?

24 A Three children

25 Q Any grandchildren?

1 A Five

2 Q Have you ever been a member of the armed forces?

3 A Eight years in the Air Force National Guard

4 Q What rank did you achieve?

5 A Technical Sergeant, E8

6 Q I want to turn now and talk about the responsibility
7 for safely operating a train At CSX who has the
8 responsibility for safely operating the train?

9 A Both the conductor and the engineer

10 Q Can you tell the jury what the conductor does?

11 A The conductor is responsible for the make up of the
12 train, setting off cars, and keeping the consist up to
13 date

14 Q When you say consist, what is that?

15 A The consist is each individual car, what it's
16 carrying, make sure he sets off the proper cars to the
17 industries and picks up whatever empties or loads they
18 have

19 Q Have you ever been a conductor?

20 A A short time

21 Q And then you also mentioned engineer What does an
22 engineer do?

23 A Engineer is more or less in charge of the operation
24 of the locomotive and the train, train handling and also
25 safety and operational rules and moving the train from A

1 to B

2 Q Now, are you familiar, Mr Cowan, with in the years
3 2003, 2004 what it takes to become an engineer at CSX?

4 A During that time the government got into the
5 certification of engineers They had certain criteria, so
6 to speak, of what you had to do They tested you They
7 tested your eyes, your hearing, and your ability to
8 operate a locomotive, and when you finished all of their
9 tests you were certified

10 Q All right Are you familiar with what CSX did in
11 that time to become an engineer?

12 A CSX, of course, they had to go along with the federal
13 program They entered their criteria and the government
14 had to look it over to accept it

15 Q Now, tell me about -- There's been some discussion
16 about engineering training Are you familiar with that
17 program that CSX has?

18 A Oh, yes

19 Q Can you tell the jury about it?

20 A Well, future engineers is taken from the train men
21 ranks That's the conductors They're early
22 transportation employees so they know the terrain, the
23 road, the signals, and the operation and rules They're
24 sent off to school and they have two schools One in
25 Cumberland, Maryland and one in Atlanta, Georgia The

1 schools -- they have classroom training

2 They are trained in all facets of train handling,
3 operational, you know, handling of the train safely, and
4 they are learning about locomotives, the air brake
5 systems, mechanical, electrical, and all facets that an
6 engineer is required to know

7 Q After this -- it sounds like is it kind of book
8 training at first? The first training they go through, is
9 it kind of school book training?

10 A Oh, yea, classroom and book training

11 Q Is there any hands-on training?

12 A Well, the hands-on training is afterwards After
13 they leave the school they go back to their home terminals
14 and there they learn to -- they are assigned an engineer
15 -- designated engineer trainer that they have to report to
16 and he tells them what trains to ride and they have to at
17 least ride five trips a week and then one day a week
18 they're tested One day a week they have classroom
19 instructions

20 Q Okay

21 A They have to learn to ride every type of train This
22 includes coal trains, piggyback trains, intermodal and
23 mixed freight trains

24 Q Now, when you said that the engineer rides the train,
25 is the engineer trainee operating the train when he is

1 doing this?

2 A They operate under the engineer's supervision

3 Q Now, do you know Mr Michael -- did you know
4 Mr Michael Stephens?

5 A I sure did

6 Q And how long had you known him?

7 A He was a conductor and a train man for four, five
8 years before he went into engineer training

9 Q If we can go to the photo of Mr Stephens Who is
10 this?

11 A Yes, sir That s Michael

12 Q And was he the engineer trainee operating the train
13 this day?

14 A Yes, sir He was operating it on May 30, 2004

15 Q And had you worked on a train with Mr Michael
16 Stephens when he was a conductor?

17 A Excuse me Yes, sir Several times before he had
18 operated a locomotive from Savannah to Cayce and Cayce
19 back to Savannah

20 Q Okay You can take that down

21 And on the date of this accident what was his status
22 in terms of the engineer training program?

23 A He was making his last trip of his certification
24 test He had finished all of the south runs from Jackson
25 -- Savannah to Jacksonville, Savannah to Waycross, and the

1 only test he hadn't finished was north on the Columbia
2 Subdivision

3 Q And you're aware Mr Stephens passed away several
4 years ago?

5 A Yes, sir, sure has

6 Q I want to turn now and talk about the train that you
7 all were operating that day Tell us what type of
8 locomotive you all were operating on the date of this
9 accident

10 A It is fairly new up-to-date General Electric Wide
11 Body It's called an AC which means Alternate Current
12 Generator That's 4400 horsepower It's called AC400CW
13 C means six wheel truck and W means wide body That's
14 nothing but the cab is as big as the whole train is wide

15 Q And I'd like to show you if we could turn to exhibit
16 -- I'm sorry, Your Honor May we approach? There's been
17 an earlier objection

18 (Whereupon, a bench conference was held)

19 MR HARMON Your Honor, I apologize for not saying
20 this earlier May we set up the demonstrative?

21 THE COURT Well, let's just do that in a little
22 while

23 MR PARKER Your Honor, this is the matter we had an
24 objection

25 THE COURT I know Let's just do this picture and

1 move forward

2 MR HARMON And do this later you're saying?

3 THE COURT Yes, sir

4 MR HARMON Okay Yes, sir

5 THE COURT Sit down, gentlemen

6 MR HARMON May I approach the witness, Your Honor?

7 THE COURT You may

8 Q Mr Cowan, I am showing you what's been marked as
9 Defendant's Exhibit 104 Can you tell us what that is?

10 A That's a picture of the locomotive that we were
11 operating May 30, 2004

12 Q Okay And you have seen an enlarged replica of this
13 photograph?

14 A I have

15 MR PARKER Your Honor, we would object

16 MR HARMON I'm not --

17 THE COURT Hold on All right Hold on

18 MR PARKER We have an objection based on your
19 ruling earlier

20 THE COURT Fine One second Please Let me have
21 -- Y all step out for one second

22 (Whereupon, the jury exited the courtroom at 11 25)

23 THE COURT Mr Harmon, very quickly -- and you can
24 lead or whatever you need to do for the proffer, tell me
25 where you're going

1 MR HARMON Your Honor I wasn't going to put it up
2 I just wanted to show to assist in his testimony to use
3 the demonstrative That's all I was going to ask

4 THE COURT Well, just go ahead and let's get into it
5 while we're doing it

6 PROFFERED EXAMINATION

7 BY MR HARMON

8 Q Sir, this is an enlarged replica of -- I mean, this
9 is a photograph of the train, correct?

10 A Right

11 Q The exact train y'all were operating?

12 A Exactly

13 Q And you've seen the enlarged replica of this train?

14 A I have

15 Q And would that assist the jury in understanding your
16 testimony?

17 A I think so

18 MR HARMON That's it

19 THE COURT What have we got? We've just got a --
20 you've got --

21 MR HARMON We've got a -- it's an enlarged -- not a
22 screen, but it is a scroll of the --

23 THE COURT Enlarged or the exact same size?

24 THE WITNESS Exact locomotive

25 MR HARMON It is a little bit shorter than the

1 actual locomotive

2 THE COURT What we need to do is find out the
3 measurements across the width and the height

4 THE WITNESS I've got it

5 MR HARMON Let me ask the questions for the
6 witness He knows

7 THE COURT I assume you'll lay that foundation

8 MR HARMON Yes, sir

9 THE COURT Mr Parker, what is your objection?

10 MR PARKER Our objection is that, certainly, there
11 is no evidence in the case whereby there was any man
12 standing in front of a locomotive and to bring in a
13 picture like that is totally irrelevant, and if it is any
14 relevance it's outweighed by the prejudicial value in that
15 people say, well, you know, Ms ~Harvey would have had a
16 view of this this close from this distance and there is no
17 evidence whatsoever They have the photograph and they
18 can put it up It is just as relevant but without the
19 prejudice

20 MR HARMON May I respond?

21 THE COURT If you want to

22 MR HARMON No

23 THE COURT Well, we had photographs made by your
24 investigator of a man standing a thousand -- I forgot the
25 exact distance -- down the track and I do deem it to be

1 relevant I don't think that the prejudicial value
2 outweighs the relevance of it It is just simply a
3 demonstrative example of how big the locomotive is with
4 someone standing in front of it for reference I'll allow
5 it

6 MR HARMON Can we, Your Honor, before you bring the
7 jury back in set it up so it'll go quicker? Go ahead

8 MR PARKER Your Honor, the difference is this is a
9 photograph taken with somebody right there as opposed and
10 they being here There is no evidence that they are that
11 close to a train

12 THE COURT Well, you can -- I'll allow you to,
13 obviously, cross examine him on any differences

14 MR PARKER Your Honor, I assume they'll take this
15 down immediately after testimony and not leave it up

16 THE COURT Well, unless you want it left up for your
17 cross

18 MR PARKER We'll use the one on the screen

19 THE COURT All right, sir

20 MR HARMON If it please the court, after the direct
21 if you give us five minutes we'll take it down

22 (Whereupon, a break was taken)

23 THE COURT All right Everybody ready?

24 MR PARKER Can I take just a second to look at
25 this, Your Honor? I want to look at this This is not

1 accurate We have an objection to it

2 John Moorman is about my height This guy in here is
3 a good bit higher than I am They're going to have to
4 establish this is accurate

5 MR HARMON We'll lay -- I'm sorry

6 MR PARKER And whoever this man is is not the
7 height John Moorman is I can attest to that They're
8 going to have to prove it to me because this guy here -- I
9 don't know how much taller -- I can't see, but I am 5'8
10 John Moorman may be an inch higher How much higher is
11 that?

12 MR MURDAUGH John Moorman is 5'9

13 THE COURT All right Gentlemen, hold on

14 I am going to allow it, Mr Parker You can cross
15 examine it until as they say the cows come in Bring them
16 in

17 (Whereupon, the jury came into open court at
18 approximately 11 36)

19 THE COURT You may proceed

20 MR HARMON Thank you, Your Honor

21 Q Mr Cowan, can you tell us what this Exhibit 104,
22 this demonstrative is?

23 A That's the same engine we were talking about when you
24 showed me the small picture

25 Q Okay

1 A It is a General Electric Wide Body and it gets its
2 name because the cab is as wide as the train That
3 particular picture measures 14 feet and 2 inches high

4 Q All right Let's stop there for one second

5 A Okay

6 Q With the court's permission I'd like the witness to
7 step down and step us through some of the lights and
8 things on the train, Your Honor

9 THE COURT Well, I think it would be more effective
10 -- Do you have one of those little red dots?

11 MR HARMON Thank you

12 THE COURT Everybody see the red dot?

13 Q Mr Cowan, first -- Mr Cowan, first I just want to
14 talk about the photograph before we talk about the train
15 Did you have the opportunity to measure the height of the
16 train that is in this picture?

17 A Yes, sir I did

18 Q And how tall is the train that is in this picture
19 from the bottom of the train to the top of the train? --

20 A It's 14 feet, 2 inches

21 Q Is that as tall as the train you were operating that
22 day?

23 A The specs from the catalog on a General Electric
24 Engine -- that same engine -- which is an AC4400CW which
25 is wide body, the specs on that is 15 feet high, 5 inches

1 Q Okay So, this is a little short?

2 A Almost a foot short

3 Q How wide was the train you were operating that day?

4 A The specs is General Electric specs is 14 feet --
5 excuse me, 10 feet, 2 inches

6 Q And did you have the opportunity to measure the width
7 of this train which is Exhibit 104?

8 A I was talking about the width

9 Q Yes Oh, I'm sorry Did you measure the width on
10 this one?

11 A This picture it measures 10 feet even

12 Q Okay So it's just a little bit short in width?

13 A Yea, 2 inches

14 Q All right Did you -- Who is the gentleman in the
15 picture?

16 A That's Andy Holiday

17 Q All right And did you meet Mr Holiday?

18 A I did

19 Q Did you have the opportunity to measure how tall he
20 is?

21 A In real life he is 5'8"

22 Q Okay And did you get to measure Mr Holiday in this
23 picture?

24 A He is 5'11 in that picture with the boots on

25 Q Okay So, that's my next question He is taller in

1 the picture with work boots on, correct?

2 A He has to wear CSX safety boots

3 Q Okay So, in this picture the gentleman is 5'11"?

4 A 5'11"

5 Q All right Now, using -- Nevermind So, using your

6 light can you just describe for the members of the jury,

7 Mr Cowan, the features of the train that you were

8 operating on the day of this accident?

9 A The main thing that we need to know is that the
10 headlights right in the center -- right there -- they're

11 in the center of the engine and they're on all the time

12 when the train is operating on the main line with the

13 exception when it's in the clear in a siding It can be

14 extinguished if meeting a train and both switches are

15 lined for the maintain for the opposing train

16 Q I don't think I understood that You said the lights
17 are on all the time except when?

18 A Except when clearing and a siding

19 Q What does that mean?

20 A When you meet a train the switches are lined for the
21 main line and you may extinguish your light in the siding

22 when meeting a train to keep from blinding the oncoming
23 train

24 Q Okay On the day of this accident were your lights
25 on?

1 A Yes, sir

2 Q All right Tell us about the other lights on the
3 front of this train

4 A You have two ditch lights on each side and they burn
5 the whole time you're running on the main line When the
6 horn is blown they flash back and forth and they'll do
7 this for 15 seconds after the horn is blown

8 Q Okay So the lower lights you said are ditch lights?

9 A They're called ditch lights because they shine down
10 both sides through the ditches and the whole terrain on
11 lower part of the track

12 Q Do the ditch lights automatically go on once the horn
13 is sounded?

14 A They're on all the time FRA says if the ditch
15 lights are not working on a locomotive on the main line
16 you have -- you can't exceed 30 miles per hour for the
17 whole trip

18 Q All right So, my question was the ditch lights also
19 -- I mean, flash on and off the whole time?

20 A No only when the horn is blown

21 Q Okay Does that happen automatically?

22 A Automatically

23 Q Now, I see here on the front of the train that there
24 is a kind of a black thing at the bottom It looks like
25 some type of scooper Can you describe that for us?

1 A That's called a pilot It is also a snow plow when
2 used up north Of course, it is a little heavier snow
3 plow attachment up north It's also called a pilot and
4 you know it as the cow catcher Now, this has to be at
5 least two and a half inches from the rail This is to
6 prevent any kind of debris from going up under the
7 locomotive and derailing it It has to be as high as two
8 inches -- two and a half inches where it won't hit the
9 grade crossings, but it can't be no higher than 3 inches
10 I know this from the shop as being a machinist

11 Q Okay You told us earlier that you had been a
12 machinist during the first part of your career, correct?

13 A Right

14 Q And as a machinist did you have to take apart engines
15 such as this? Maybe not this one, but train engines?

16 A Completely could tear them down and put them back
17 together every nut and bolt

18 Q Now, what is the purpose for the numbering systems
19 that are up there, sir?

20 A Are you talking about locomotive 160?

21 Q Yes, sir

22 A That identifies that particular locomotive within the
23 whole fleet of locomotives No other locomotive in the
24 CSX -- of all the locomotives in CSX none other has that
25 number

1 Q Okay Now, I also noticed that there's -- there are
2 windows up front, is that correct?

3 A That's right

4 Q Can you tell us -- tell the members of the jury where
5 the respective people who operate the train typically sit?

6 A The engineer sits on the right side of the
7 locomotive That would be your left, and the conductor
8 sits on the left side of the locomotive, and there is a
9 center seat and that particular day May 30 that's where I
10 was

11 Q Okay So, tell the jury where everyone was sitting
12 on May 30, 2004 on this train

13 A Michael Stephens was operating the locomotive He
14 was on the right side of the locomotive I was standing
15 right beside him during that trip and my conductor Jimmy
16 Bonner was sitting over here in the conductor's seat

17 Q Can you describe for the jury the instrumentation or
18 the things that are in front of you if you are actually
19 behind those windows looking out? What is in front of the
20 engineer and the conductor?

21 A The conductor has the same gauges and speedometer on
22 his side He can check my speed or the engineer operating
23 the locomotive and on the engineer side you have computer
24 screens and a speedometer as well as an engine brake which
25 operates all of the locomotives independently and then you

1 have a train brake which is called the automatic brake
2 valve which operates the brakes on the entire train as
3 well as the locomotive and, of course the throttle and
4 you have the engine bell which when you blow the horn it
5 operates all the time

6 Q Let's talk about the horn Is the horn on this train
7 pictured in this demonstrative exhibit?

8 A No, it is not It is just right behind the cab in
9 the center of the locomotive

10 Q All right Can you flash where it would be behind?

11 A I won't be able to show it, but from the top of this
12 locomotive it is something like five and a half feet
13 back --

14 Q Okay

15 A -- in the center

16 Q All right You said a horn I think you just said
17 there's a horn and there is also a bell?

18 A That's right a horn and a crossing bell

19 Q Can you tell the jury what is the difference between
20 the horn and the bell?

21 A The horn, of course, it gives you warning for the
22 crossings way off It is high decibel The bell is just
23 a regular bell and it rings all the time and it is called a
24 crossing bell You can turn the horn off and if you're
25 not in a car you can hear the bell easy

1 Q Okay When does the bell -- you said the bell is on
2 all the time?

3 A Right Now, you can hear the bell in the car, but
4 it's not as loud as the horn

5 Q Okay But does the bell -- as long as the train is
6 running do I understand you correctly that the bell is on?

7 A Only when the horn is blown

8 Q Okay So --

9 A Or if you turn it on individually

10 Q All right So when the horn goes on, the bell begins
11 to ring?

12 A Yes, automatically

13 Q And when does the bell stop ringing?

14 A When you turn it off physically

15 Q Okay So, if you're approaching a crossing and you
16 turn the horn on the first time when does the bell come
17 on?

18 A Immediately when you push the horn valve, blow the
19 horn, the bell starts immediately

20 Q And then when would the bell stop ringing?

21 A After you finished blowing the crossing you
22 physically turn the bell off

23 Q Okay All right I want to turn now and talk about
24 the day of this accident, okay?

25 A Yes, sir

1 Q What was your assignment that day?

2 A What time are you asking?

3 Q What were you assigned on the date of the accident?

4 A I'm regularly-assigned-local freight engineer on F757
5 and F756 We are assigned to run between Savannah,
6 Georgia and Cayce, South Carolina and return

7 Q And is that what you were doing on this day?

8 A That's right

9 Q Who was on the train with you?

10 A My conductor was Jimmy Bonner and he is regularly
11 assigned to this job also during this time

12 Q And who else was on the train with you?

13 A Michael Stephens was the Junior Engineer and he was
14 operating the train and it was his last run He had been
15 training for over 10 months and after this run he was
16 certified

17 Q How many times had you been down the stretch of track
18 that encompasses Honey Ford Road?

19 A Over 40 years off and on The last 18 years regular

20 Q All right As you are approaching the whistle post
21 I'd like you to tell the jury what happened

22 A Well, at first a whistle post isn't nothing but a
23 white post off to the side that lets the engineer know
24 where to operate the horn and the reason you have it is
25 because inclement weather the headlight always picks up

1 the whistle post It gives you a guide post

2 Q So, tell us what happened as you approached the
3 whistle post

4 A Mr Stephens began blowing the horn, sounding the
5 warning from the whistle post and he was blowing it all
6 the way to the crossing according to CSX operating rules

7 Q What happened next?

8 A As we approached the crossing we noticed a van coming
9 from the right moving left which is east to west This is
10 during about half-way the blowing cycle we noticed this
11 van It continued slow and as it got closer we thought it
12 was going to stop, but it continued on and paused right on
13 top of the rail

14 Q Then what happened?

15 A Collision was imminent and Michael Stephens started
16 for the brakes I told him, Put it in emergency, and to
17 make sure he did it I was going over him, but he beat me
18 to the valve and he placed the train in emergency

19 Q Now, I want to talk about what happened after the
20 collision but before we do you talk about Mr Stephens
21 blowing the horn, correct?

22 A That's right He was blowing the horn correctly

23 Q And you're familiar with CSX policy regarding horn
24 blowing?

25 A I am

1 Q I'd like to put up Plaintiff's Exhibit 114-A

2 MR HARMON May I approach, Your Honor?

3 THE COURT Do we need that anymore?

4 MR PARKER We can put it up

5 MR HARMON Okay Thank you

6 THE COURT Sir, do you need the demonstrative
7 anymore? You can put it down?

8 MR HARMON I do not need it anymore

9 MR PARKER I am going to need it

10 THE COURT You need it, Mr Parker?

11 MR PARKER Yes

12 THE COURT All right Please leave it up

13 Q Okay Is this a copy of CSX Rule 114 -- I mean 14-L?
14 Excuse me

15 A It is

16 Q Okay And can you tell us what the rule requires?

17 A It applies to road crossing blowing -- signal for
18 road crossing

19 Q All right And what does the rule require?

20 A It requires you to blow two longs, a short, and a
21 long blasts of the horn

22 Q All right So, from the whistle post --

23 A From the whistle post to the locomotive occupies the
24 crossing

25 Q Do the rules say how long the long blow is supposed

1 to be?

2 A No

3 Q Do the rules say how long the short blow is supposed
4 to be?

5 A No

6 Q Do the rules say how much time should elapse between
7 the short blow and the long blow?

8 A No

9 Q Who determines how long to blow the long and how
10 short to blow the short or how much space between the two?

11 A The horn is blown according to this rule Two longs,
12 a short, and a long Now, it has to occupy the distance
13 between the whistle post to the crossing So, if you were
14 running faster you get over the crossing quicker the
15 blowing cycle is a little shorter If you're going slow
16 they're long So, I hope that answers your question

17 Q Okay And does each engineer get to determine the
18 blowing cycle they're blowing based upon the rule?

19 A According to this rule, yes

20 Q All right Now, there's been testimony in this case
21 that there is an 8-second gap between horn blows?

22 A I have heard that

23 Q Do you believe on the day of this accident Michael
24 Stephens was blowing the horn properly?

25 A He was blowing the horn properly We took no

1 exception to the way he was blowing that crossing

2 Q Did you time the distance between the horn blows
3 while you were there on the train?

4 A No, I did not

5 Q If you had been blowing the horn would you have had
6 an 8-second gap between the blows?

7 A Every engineer blows it slightly different It is
8 just like two people walking Nobody walks the same, but
9 they get to the same place, but it's called signature
10 blowing In the old days we could tell the engineer by
11 the horn blowing

12 Q But my question was would you have had an 8-second
13 gap if you were blowing it that day?

14 A Probably not

15 Q Okay Do you believe Michael Stephens was blowing
16 the horn properly?

17 A He was blowing the horn properly

18 Q Okay You can take that down Thank you What
19 happened after the accident?

20 A After the collision Mr Bonner, the conductor, told
21 me to call the dispatcher on the emergency channel which I
22 did and he would call 9-1-1 and he was going to go back
23 and see what he could do

24 Q All right

25 A So, he went back and I called the dispatcher on the

1 emergency channel nine and he came on immediately and we
2 told him about we needed some emergency vehicles right
3 there right then and we had, you know, an accident

4 Q All right Under policy someone is supposed to stay
5 with the train and someone goes back to see what happens?

6 A That's right in case I have to move it for the
7 emergency vehicles, I have to, you know, get help of some
8 sort I am right there by the big radio

9 Q Now, one question I failed to ask you or two
10 questions Do you -- was Michael Stephens speeding that
11 day as he approached the crossing?

12 A No, he was doing 46 miles per hour

13 Q What was the speed limit?

14 A Fifty for that train Our train is 60 miles an hour
15 normally Now, if you have empties in your train it is
16 reduced to 50 We were doing 46 by our speedometer

17 Q Now, sir, how many -- approximately how many times
18 have you been on the train with the horn blowing in your
19 career -- 40-year career?

20 A That's why my hearing is slightly off --

21 Q That's --

22 A -- blowing that horn in my ear all my life

23 Q That was actually my question Do you have a -- you
24 were here with Dr Lipscomb when he testified?

25 A I have slight hearing loss It is called occupation

1 hearing loss

2 Q Okay All right Mr Cowan based upon your personal
3 observation being there on the train do you believe you,
4 Mr Stephens, the crew, did anything to cause this death?

5 A We were doing everything proper, giving the proper
6 warning

7 MR HARMON Your Honor, I'll pass the witness

8 THE COURT Mr Parker?

9 MR PARKER Thank you

10 CROSS-EXAMINATION

11 BY MR PARKER

12 Q They always told me you don't ask a lady their age
13 but I can ask you yours

14 A That's all right I am 74 --

15 Q And you --

16 A And I m in my prime

17 Q I'm 63 and I am in my prime

18 A I see that

19 Q So, let's go back here because I think somebody has
20 got something wrong about this little figure back here and
21 I'm not -- I realize that people don't get things to
22 sight, but I am 5'8 so I know how tall 5'8 is unless I
23 have shrunk I am going to stand by this and you tell me
24 how much taller this man is than I am

25 A He is a good four and a half inches taller than you