

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2009-126526

Willie Homer Stephens, Guardian ad Litem
for Lillian C., a minor.....Petitioner,

v.

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

APPENDIX – Vol. I

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S.C. Supreme Court

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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

**APPEAL FROM HAMPTON COUNTY
Court of Common Pleas**

Carmen Tevis Mullen, Circuit Court Judge

Case No.: 2004-CP-25-00267

**Willie Homer Stephens, Guardian ad Litem
for Lillian C., a minor Appellant,**

v.

**CSX Transportation, Inc. and the South Carolina
Department of Transportation,.....Respondents.**

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STATE OF SOUTH CAROLINA)

COUNTY OF HAMPTON)

Willie Homer Stephens, Guardian ad Litem
for Lillian Colvin, a minor,)

Plaintiff,)

v.)

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

Defendants.)

IN THE COURT OF COMMON PLEAS

ORDER

C.A. NO.: C.A. No. 04-CP-25-267

FILED
2009 MAR 30 PM 3:10
MYLINDA D. NETTLE
CLERK OF COURT
HAMPTON COUNTY, S.C.

This matter is before me on Plaintiff's Motion for Judgment Notwithstanding the Verdict ("JNOV") and/or Motion for New Trial. I heard Plaintiff's post-trial motions in Hampton County on September 11, 2008. Counsel for all parties attended the hearing. At the hearing, I requested that Plaintiff order certain portions of the transcript so that I could correctly and fully address certain arguments made by counsel. I have been provided with the transcript portions ordered by Plaintiff. Based upon the arguments of counsel, the parties' submissions, and the record before me, I find that Plaintiff's Motions should be denied.

I. PLAINTIFF'S MOTION FOR JNOV

In ruling on a motion for JNOV, as in ruling on a motion for directed verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motion. Lynch v. Toys "R" Us Delaware, Inc., 375 S.E. 604, 654 S.E.2d 541, 548 (Ct. App. 2007). "A motion for judgment *non obstante veredicto* should not be granted if the evidence is susceptible to more than one reasonable inference." Henderson v. St. Frances Community Hospital, 303 S.E. 177, 399 S.E.2d 767, 768

(1990). If the evidence yields more than one inference, or if the inferences to be drawn from the evidence are in doubt, the motion for JNOV must be denied. Lynch, 654 S.E.2d at 548.

Considering the evidence in the light most favorable to CSXT, I find there is evidence to uphold the jury's verdict. With respect to the short whistle claim, Ned Wooden, the train's engineer, and Calvin Cummings, the train's conductor, both testified that the horn was properly sounded at the whistle post, which was located over 1,500 feet from the crossing. Witness Larry Biser also testified that he heard the horn blowing at the BP store which was located beyond the I-95 overpass and over 2,000 feet from the crossing. This testimony is sufficient to uphold the jury's verdict.

Regarding the vegetation claim, the jury received voluminous evidence concerning the site lines at the Hill Road crossing, including multitudes of photographs and videotape taken at the scene in the days following the accident. The jury heard from multiple witnesses who testified that Ms. Colvin stopped at the stop line, and it was undisputed that from the stop line a motorist had vision down the tracks to the I-95 overpass located approximately 2,000 feet from the crossing. Plaintiff's own expert, Dr. Heathington, and Plaintiff's witness, Carlos Terry, agreed there were no vision obstructions from the stop line and that a motorist could see an approaching train.

Additionally, the jury received evidence that the SCDOT inspected the Hill Road crossing in compliance with its statutory obligations, and the crossing passed inspection under state law. Randy Lomax, the SCDOT inspector, specifically testified that there were no obstructions at the crossing. SCDOT official Dick Jenkins likewise confirmed that this was a safe crossing and that it was in compliance with state law. The jury, having seen the photographs, videotape, and heard all the testimony regarding the site view at the crossing had a

sufficient basis to support its findings that CSXT was not negligent in terms of the vegetation maintenance at the Hill Road crossing.

Next, I note that on both the short whistle claim and the vegetation claim, it would have been inappropriate for me to have granted a directed verdict for Plaintiff because the issue of proximate cause, as Plaintiff conceded, was a question for the jury. In order to direct a verdict for the Plaintiff, I would have had to find there was no jury issue on any element of Plaintiff's negligence claim. This would have required me to find duty, breach and proximate cause as a matter of law. The issue of proximate cause, however, is almost always one for the jury, and only in the rarest of cases can the Court decide the question of proximate cause as a matter of law. See Platt v. CSX Transp., Inc., 379 S.C. 249, 665 S.e.2d 631 (Ct. App. 2008). Plaintiff did not contest that the issue of proximate cause on both the short whistle and vegetation claims were questions for the jury.

At the hearing on Plaintiff's motions, Plaintiff also argued that I erred in denying his motion for directed verdict, contending that because CSXT had entered into a stipulation that the event recorder download was accurate, I should have directed a verdict on negligence for Plaintiff and submitted only the issue of proximate cause to the jury. Contrary to Plaintiff's argument, however, at the time Plaintiff moved for directed verdict at the close of SCDOT's case, no such stipulation had been entered into by the parties. As the transcript reflects, it was not until Plaintiff's rebuttal case that the parties made their stipulation on the accuracy of the event recorder. Had Plaintiff renewed his motion for directed verdict at the close of all the evidence (i.e. Plaintiff's rebuttal), I would have been presented with a different issue than that actually raised by Plaintiff at trial when he made his motion at the close of SCDOT's evidence. However, Plaintiff did not do so. Thus, I could not have erred in denying Plaintiff's motion on a

basis never stated at trial and not even available to Plaintiff until the conclusion of Plaintiff's rebuttal case.

I also note that Plaintiff did not object to the verdict form, which specifically allowed the jury to separately answer questions on negligence and proximate cause. If, as Plaintiff now contends, there was no issue of negligence on the short whistle claim, and the only issue on that claim that should have been submitted to the jury was proximate cause, it was incumbent on Plaintiff to raise this issue and to object to the verdict form. On the contrary, Plaintiff objected to the special verdict form requested by CSXT and was asked by me to assist in drafting the verdict form, which they in fact did. Subsequently, all parties agreed to the revised verdict form which was ultimately submitted to the jury. Plaintiff's failure to voice any objection to the verdict form, which they in fact helped draft, is an additional waiver on this point. Accordingly, for all the foregoing reasons, Plaintiff's Motion for JNOV is denied in its entirety.

II. PLAINTIFF'S MOTION FOR NEW TRIAL

In the alternative to his motion for JNOV, Plaintiff has filed a motion for a new trial. In so doing, Plaintiff advances two principal grounds, those being alleged errors in my evidentiary rulings and alleged error in the jury charge. The grant or denial of a new trial motion rests within the discretion of the trial judge. Creighton v. Coligny Plaza Ltd. P'ship, 334 S.C. 96, 113, 512 S.E.2d 510, 519 (Ct. App. 1998). It is the duty of the court to sustain verdicts when a logical reason for reconciling them can be found. Daves v. Cleary, 355 S.C. 216, 231, 584 S.E.2d 423, 430 (Ct. App. 2003). A jury's verdict should be affirmed if it is possible to do so and carry into effect the jury's clear intention. Daves, 355 S.C. at 234; 584 S.E.2d at 432.

With respect to Plaintiff's Motion for New Trial regarding admission or rejection of evidence at trial, I find no merit to this motion. A ruling on the admissibility of evidence is within

the sound discretion of the trial court and will not be reversed absent an abuse of discretion. Jamison v. Ford Motor Company, 373 S.C. 248, 268, 644 S.E.2d 755, 765 (Ct. App. 2007). A new trial is not proper unless there has been a showing of prejudice. Id. at 373 S.C. 248, 261, 644 S.E.2d 755, 761 (complaining party must prove both the error and the resulting prejudice). "To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof." Id. Finally, there is no error and a new trial is not warranted where the evidence excluded is merely cumulative of other evidence permitted by the court. See Rule 403, SCRE (allowing evidence to be excluded if its probative value is outweighed by consideration to the needless presentations of cumulative evidence); Commerce Center of Greenville, Inc. v. W. Powers McElveen and Associates, Inc., 347 S.C. 545, 559, 556 S.E.2d 718, 726 (Ct. App. 2001) ("generally, there is no abuse of discretion where the excluded testimony is merely cumulative of other evidence proffered to the jury.").

I considered each of the evidentiary issues raised by Plaintiff during the trial. I also considered these matters in connection with Plaintiff's post-trial motions. Having carefully considered these issues, I adhere to my prior rulings with respect to the evidentiary issues raised by Plaintiff as the basis for his new trial motion, finding no error or prejudice suffered by Plaintiff. Accordingly, Plaintiff's Motion for New Trial on this basis is denied.

Plaintiff also claims error and seeks a new trial on the basis that I limited the jury's consideration of certain exhibits, such that they could only be considered for punitive damage purposes. Plaintiff claims that the jury should have been entitled to consider these exhibits on the issues of both negligence and punitive damages. I note that prior to introduction of each of the exhibits referenced by Plaintiff, I gave a limiting instruction to the jury instructing them that the

exhibits could only be considered for purposes of punitive damages, and for no other purpose.¹ The instruction given by me was reviewed by the parties prior to it being given to the jury, and Plaintiff did not object. Further, Plaintiff did not object when the instruction was given to the jury in connection with the introduction of the exhibits. I find that the limitation of these exhibits for punitive damages only purposes was proper. Accordingly, Plaintiff's Motion for New Trial on this basis is denied.

Finally, Plaintiff claims error and seeks a new trial based upon the jury charge. A jury charge is proper if it is confined to the issues made by the pleadings and supported by the evidence. Bethea v. Pedro Land, Inc., 290 S.C. 341, 347, 350 S.E.2d 392, 396 (Ct. App. 1986). When reviewing a jury charge for alleged error, the court must consider the charge as a whole, in light of the evidence and issues presented at trial. Stokes v. Spartanburg Reg'l Med. Ctr., 368 S.C. 515, 520, 629 S.E.2d 675, 678 (Ct. App. 2006). An erroneous jury charge will not result in a verdict being reversed unless the charge prejudiced the appellant's case. Id. To warrant reversal, the refusal to give a requested charge must have been erroneous and prejudicial. Koutsogiannis v. BB & T, 365 S.C. 145, 149, 616 S.E.2d 425, 427-28 (2005); Dalon v. Golden Lanes, Inc., 320 S.C. 534, 540, 466 S.E.2d 368, 372 (Ct. App. 1996). In determining prejudice, a charge to the jury should be considered in its entirety. Koutsogiannis, 365 S.C. at 149, 616 S.E.2d at 427-28. Further, to the extent that no objections were made to the specific charges identified as error by Plaintiff, they cannot be argued as the basis for a new trial. Lundy v. Lititz Mutual Ins. Co., 232 S.C. 1, 100 S.E.2d 544, 548 (1957) ("If appellant thought these instructions violated . . . the Constitution, which we are inclined to think they did, counsel should have made timely objection when the

¹ I also note that CSXT sought bifurcation to avoid this very problem of struggling with what evidence the jury could consider for punitive damages purposes only and what could be considered on both liability and punitive damages. Plaintiff opposed this motion, insisting that a limiting instruction, like the one I ultimately gave, would be sufficient. I denied CSXT's motion but did give the limiting instruction that Plaintiff agreed was appropriate.

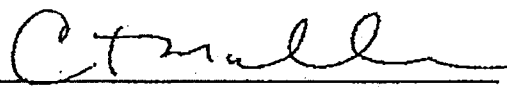
jury was excused at the conclusion of the main charge. They waived the objection by failing to do so.").

I reviewed the jury charge and the issues raised by Plaintiff, and find no basis for granting a new trial. The charge, as a whole, fairly and accurately represented the law of South Carolina and the charges given were proper in light of the evidence introduced at trial. The charges Plaintiff contends I erred in not giving were either covered by the substance of other charges given by me or were not proper statements of law. See Proctor v. Dep't of Health & Envtl. Control, 368 S.C. 279, 310, 628 S.E.2d 496, 513 (Ct. App. 2006) ("When instructing the jury, the trial court is required to charge only the current and correct law of South Carolina.").² Plaintiff also contends I should not have charged certain statutes and other principles of South Carolina law included in the charge. However, I find that each charge given was proper, was necessitated by the evidence introduced at trial, and properly stated South Carolina law. I find no prejudice resulting from the jury charge. Thus, Plaintiff's Motion for New Trial on this basis is denied.

For all of the foregoing reasons, Plaintiff's post-trial motions are denied in their entirety.

IT IS SO ORDERED.

3-30, 2009
Haydon, SC


Carmen T. Mullen
Circuit Judge

² For example, Plaintiff contends I should have charged Section 56-5-2950. This statute was discussed at length at trial. By its very wording, the statute applies only in criminal prosecutions. Thus, to use it in a civil proceeding, where the burden of proof is the preponderance of the evidence and not beyond a reasonable doubt, would have been inappropriate. Further, the statute refers to presumptions regarding blood alcohol level, whereas the evidence in this case showed Ms. Colvin had combined the use of both alcohol and prescription drugs. Additionally, Plaintiff can show no prejudice given that I did charge, at Plaintiff's request, that it is not unlawful in this State to drink and drive, it is only unlawful to drive while impaired or under the influence. Thus, I correctly refused the requested charge.

STATE OF SOUTH CAROLINA
COUNTY OF HAMPTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NO: 2004CP2500267

Willie Stephens vs. Csx Transportation

CHECK ONE:

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a),
SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other:
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy:
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____

IT IS ORDERED AND ADJUDGED:

☒ See attached order;

☐ Statement of Judgment by the Court:

ORDER DENYING JNOV

Dated at Hampton, South Carolina, this 28TH DAY OF APRIL, 2009.

Court Reporter:

PRESIDING JUDGE -

This judgment was entered on the , and a copy mailed first class this , to attorneys of record or to parties (when appearing pro se) as follows:

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CPFORM4M

FILED
2009 APR 28 AM 11:02
MYLINDA D. HETTLER
CLERK OF COURT
HAMPTON COUNTY, S.C.

Samuel L Tarry Jr McGuire Woods Llp 901 East
Cary St. Richmond, VA 23219

ATTORNEY(S) FOR THE PLAINTIFF(S)

SCRCP APP-24/FORM 4

ATTORNEY(S) FOR THE DEFENDANT(S)

Mylanda A Nettles

Mylanda Nettles - Clerk of Court

STATE OF SOUTH CAROLINA)
COUNTY OF HAMPTON)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NO. 04-CP-25-267

Willie Homer Stephens, Guardian ad
Litem for Lillian Colvin, a minor,)

VERDICT FORM

Plaintiff,)

vs.)

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

Defendants.)

FILED

AUG 14 2008 at 9:30pm

CLERK OF COURT
HAMPTON COUNTY

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

 YES (If you answer YES, go to Question 2)

✓ NO (If you answer NO, go to Question 3)

2. Do you find that the Defendant CSX Transportation, Inc.'s negligence was a proximate cause of Lillian Colvin's injuries?

 YES (If you answer YES, go to Question 3)

 NO (If you answer NO, go to Question 3)

3. Do you find that the Defendant the South Carolina Department of Transportation was negligent?

 YES (If you answer YES, go to Question 4)

✓ NO (If you answer NO, see INSTRUCTION 1)

4. Do you find that the Defendant the South Carolina Department of Transportation's negligence was a proximate cause of Lillian Colvin's injuries?

 YES (If you answer YES, see INSTRUCTION 1)

 NO (If you answer NO, see INSTRUCTION 1)

INSTRUCTION 1: IF YOU ANSWERED YES TO QUESTIONS 2 OR 4, PLEASE ANSWER QUESTION 5. IF YOU DID NOT ANSWER YES TO EITHER QUESTION 2 OR 4, THE FOREPERSON SHOULD SIGN THE VERDICT FORM AND INFORM THE BAILIFF THAT YOU HAVE FINISHED YOUR DELIBERATIONS.

5. State the total amount of actual/ compensatory damages to be awarded to the Plaintiff:

\$ _____

PROCEED TO QUESTION 6.

6. If you answered YES to Questions 2 and 4 then please apportion the damages between the Defendants. When apportioning damages, you are required to assign a percentage of the damages between each of the Defendants. The total of the percentages you assign must add up to a total of 100%. You may apportion any percentage between 0% and 100% to either Defendant so long as the total number equals 100%.

_____ % Defendant CSX Transportation, Inc.

_____ % Defendant South Carolina Department of
Transportation

Total: 100 %

7. Does your answer to Question 5 include compensation for the medical bills or other medical expenses incurred to date for Lillian Colvin's injuries or medical bills or other medical expenses to be incurred for Lillian Colvin's injuries prior to Lillian Colvin reaching 18 years of age? If so, please state the amount you awarded for medical bills incurred to date.

_____ YES in the amount of \$ _____

_____ NO

PROCEED TO QUESTION 8.

8. Do you find by clear and convincing evidence that the Plaintiff is entitled to an award of punitive damages against Defendant CSX Transportation, Inc.?

_____ YES (If you answer YES, go to Question 9)

_____ NO (If you answer NO, do not answer Question 9)

9. If you answered yes to Question 8, please state the amount of punitive damages to be awarded against CSX Transportation, Inc.

\$ _____

THIS IS OUR VERDICT:

For the Defendant
Foreperson

August 14, 2008

Tracy Lundy

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF HAMPTON)

CIVIL ACTION NO.: 04-CP-25 -267

Willie Homer Stephens, Guardian ad
Litem for Lillian Colvin, a minor,

Plaintiff,

vs.

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

Defendants.

SUMMONS
(Jury Action Demanded)
(Automobile-Train Wreck)

2004 APR 27 PM 3:37

FILED

TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to said Complaint on the subscribed at their office, 303 First Street, East, Hampton, South Carolina, within thirty (30) days after the service hereof; exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in this Complaint.

Carl H. Jacobson, Esquire
URICCHIO, HOWE, KRELL, JACOBSON,
TOPOREK, THEOS, & KBIGH, P.A.
P. O. Box 399
Charleston, SC 29402-0399
Phone (843) 723-7491

-And-

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April 26, 2004

ATTORNEYS FOR PLAINTIFF

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF HAMPTON)

CIVIL ACTION NO.: 04-CP-25-267

Willie Homer Stephens, Guardian ad
Litem for Lillian Colvin, a minor,

Plaintiff,

vs.

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

Defendants.

COMPLAINT

(Jury Action Demanded)

(Automobile-Train Wreck)

2004 APR 27 PM 3:38

The Plaintiff would respectfully show:

1. The Plaintiff is the duly appointed Guardian ad Litem, and he brings this action on behalf of Lillian Colvin, a minor.

2. The Defendant, CSX Transportation, is a corporation organized and existing under the laws of a state other than the State of South Carolina. The Defendant CSX owns property and transacts business in Hampton County, South Carolina.

3. The Defendant, South Carolina Department of Transportation, is an agency of the State of South Carolina.

4. On or about the 3rd day of February 2004, Lillian Colvin was a passenger in an automobile traveling south on Hill Street in the Town of Yemassee, Hampton County. The automobile in which Lillian Colvin was a passenger approached a railroad crossing that runs perpendicular to Hill Street; a stop sign is located in advance of the railroad crossing. The driver of the automobile stopped for the stop sign.

5. From the stop sign the view of the driver to the right was obstructed by vegetation. The driver of the automobile after stopping approached the railroad crossing and looked to the right in a westerly direction, but the view to the west was obstructed by trees and over vegetation.

6. Before the automobile in which the Plaintiff was a passenger cleared the tracks, the car was struck by a train that was traveling in an easterly direction; the train was owned and operated by the Defendant CSX; as a result of this collision, Lillian Colvin was severely injured.

7. The Defendant, CSX Transportation, owns the railroad track that crosses Hill Street in the Town of Yemassee and has a duty to warn the public of approaching trains traveling along its tracks and to inspect its railroad crossings for the presence of dangerous and hazardous conditions such as the trees and vegetation that obstructed the driver's view of oncoming trains.

8. The Defendant, South Carolina Department of Transportation, has the duty to inspect railroad crossings for the presence of dangerous and hazardous conditions, and to erect proper traffic control signs.

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

AS TO THE DEFENDANT, CSX TRANSPORTATION, INC.

- a. In maintaining an unreasonably hazardous and unsafe crossing;
- b. In failing to inspect the crossing for unsafe and hazardous conditions;
- c. In allowing trees and other vegetation to grow near the crossing in such a manner as to obstruct the traveling public's view of trains approaching;
- d. In failing to take steps to warn the public that the view of

approaching trains was obstructed;

- e. In failing to maintain adequate warning devices at the crossing;
- f. In failing to adequately sound a bell or horn prior to entering the crossing;
- g. In failing to properly maintain its right of way at this crossing when CSX knew or should have known that the trees and vegetation were obstructing the view of approaching trains; and
- h. In violating its own rules for maintenance of its right of way.

**AS TO THE DEFENDANT, SOUTH CAROLINA DEPARTMENT
OF TRANSPORTATION**

- a. In failing to adequately inspect the crossing for unsafe and hazardous conditions;
- b. In failing to exercise reasonable care in inspecting the crossing to discover defects; and
- c. In placing the stop sign in an improper location in violation of its own criteria for the placement of stop signs.

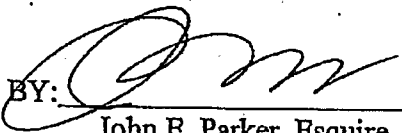
10. As a result of the wrongful acts of the Defendants, Lillian Colvin suffered serious and severe injuries including severe brain damage which resulted in her being in a coma. She has incurred substantial medical expenses, and her earning capacity has been diminished. The Plaintiff has suffered pain, mental anguish, and all of the damages which accompany being severely injured. Because of the conscious disregard of her rights, Lillian Colvin is entitled to an award of punitive damages.

WHEREFORE, Plaintiff prays that he be awarded a judgment for actual damages, punitive damages, and the cost of this action.

Carl H. Jacobson, Esquire
URICCHIO, HOWE, KRELL, JACOBSON,
TOPOREK, THEOS, & KEIGH, P.A.
P. O. Box 399
Charleston, SC 29402-0399
Phone (843) 723-7491

-And-

PETERS, MURDAUGH, PARKER,
ELTZROTH & DETRICK, P.A.

BY: 

John E. Parker, Esquire
303 First Street, East
P.O. Box 457
Hampton, SC 29924
Phone (803) 943-2111

April 26, 2004

ATTORNEYS FOR PLAINTIFF

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF HAMPTON)

CIVIL ACTION NO. 04-CP-25-267

WILLIE HOMER STEPHENS,)
Guardian ad Litem for Lillian)
Colvin, a minor,)

Plaintiff)

v.)

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

Defendants)

FILED
2004 MAY 28 AM 11:08
MYLINDA D. NETTLES
CLERK OF COURT
HAMPTON COUNTY, S.C.
BY SEA

ANSWER OF DEFENDANT CSX TRANSPORTATION, INC.

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

FIRST DEFENSE

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

SECOND DEFENSE

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

THIRD DEFENSE

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

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

FOURTH DEFENSE

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

FIFTH DEFENSE

Plaintiff's claims for punitive damages against this Defendant are barred by the Eighth Amendment to the United States Constitution, which prohibits the imposition of excessive fines, and by the South Carolina Constitution.

SIXTH DEFENSE

The statutes and common law of the State of South Carolina which authorize the imposition of aggravated, exemplary or punitive damages are contrary to the Constitution of the United

States and to the South Carolina Constitution, and are therefore unenforceable in as much as the statutes are impermissibly vague, imprecise and inconsistent.

SEVENTH DEFENSE

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

EIGHTH DEFENSE

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

NINTH DEFENSE

Plaintiff's claims, insofar as they may seek recovery based upon any alleged failure of this Defendant to insure adequate signals or warning devices at the grade crossing in question, or any alleged violation of speed restrictions, are preempted by federal law pursuant to the Railroad Safety Act of 1970 (45 USC § 434) and the Highway Safety Act of 1973 (23 USC § 130, et seq), as amended, and the regulations issued by the Secretary of

Transportation pursuant thereto. Therefore, Plaintiff cannot recover against this Defendant for such claims, and these claims should be dismissed.

TENTH DEFENSE

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

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

2. In response to paragraph 2, this Defendant admits it is a corporation organized and existing under the laws of a state other than South Carolina, and it owns property in Hampton County. This Defendant denies the remaining allegations of paragraph 2.

3. This Defendant admits the allegations contained in paragraph 3.

4. This Defendant admits the allegations contained in paragraph 4.

5. This Defendant denies the allegations contained in paragraph 5.

6. In response to paragraph 6, this Defendant admits that the driver of the automobile in which Plaintiff was a passenger failed to yield the right of way to this Defendant's open and obvious train, and pulled out from the stop sign in front of

same, causing a collision in which Lillian Colvin sustained injuries. This Defendant admits that the train was traveling in a easterly direction, and was owned and operated by Defendant CSX Transportation, Inc. This Defendant denies the remaining allegations of paragraph 6.

7. In response to paragraph 7, this Defendant admits it owns the railroad track that crosses Hill Street in the town of Yemassee, and that it fulfilled all duties owed by it at the time of the subject accident. This Defendant denies the remaining allegations of paragraph 7.

8. This Defendant admits the allegations contained in paragraph 8.

9. This Defendant denies the allegations of paragraph 9, including all sub parts.

10. This Defendant denies the allegations contained in paragraph 10.

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

WHEREFORE, having fully answered, Defendant CSX Transportation, Inc. prays that the Complaint be dismissed, that all costs be cast upon the Plaintiff, and that the matters raised herein be tried by a jury of twelve.

This 26th day of May, 2004.

OF COUNSEL:

FULCHER, HAGLER, REED,
HANKS & HARPER, LLP
POST OFFICE BOX 1477
AUGUSTA, GA 30903-1477
(706) 724-0171



J. Arthur Davison
SC Bar No. 1601
Attorney for Defendant
CSX Transportation, Inc.

CERTIFICATE OF SERVICE

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

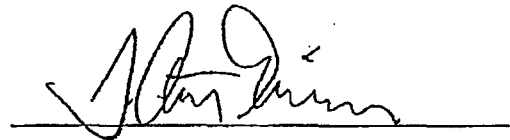
John E. Parker, Esq.
Peters, Murdaugh, Parker, Eltzroth & Detrick, PA
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Carl H. Jacobson, Esq.
Uricchio, Howe, Krell, Jacobson, Toporek,
Theos & Keigh, PA
Post Office Box 399
Charleston, SC 29402-0399

Peden B. McLeod, Esq.
McLeod, Frasier & Cone, PA
Post Office Box 230
Walterboro, SC 29488

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

This 26th day of May, 2004.



FULCHER HAGLER LLP
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
ATTORNEYS AT LAW

DAVID H. HANKS, P.C.
ROBERT C. HAGLER, P.C.
MICHAEL B. HAGLER, P.C.
JAMES W. PURCELL, P.C.
J. ARTHUR DAVISON, P.C. (S.C. ALSO)
MARK C. WILBY, P.C. (S.C. ALSO)
N. STATEN BITTING, JR., P.C. (FLA. ALSO)
DAVID P. DEKLE, P.C.
SCOTT W. KELLY, P.C.
ELIZABETH A. MCLEOD, P.C.
BARRY A. FLEMING, P.C. (S.C. ALSO)
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WILLIAM M. FULCHER (1902-1993)
GOULD B. HAGLER (RETIRED)
WILLIAM C. REED (RETIRED)
RONALD C. GRIFFETH (1935-1998)

SONJA R. TATE (S.C. ALSO)
M. DREW DEMOTT (S.C. ALSO)
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ROBERT T. HOHLAR (S.C. ALSO)
CHRISTOPHER J. HUDSON
DEATRICE L. KENNEDY
TANYA D. JEFFORDS

May 26, 2004

J. Arthur Davison
Direct FAX No.: (706) 396-3619
E-Mail: adavison@fulcherlaw.com

Ms. Mylinda D. Nettles
Clerk of Court, Hampton County
Post Office Box 7
Hampton, SC 29924

RE: Willie Homer Stephens, Guardian ad Litem for Lillian
Colvin v. CSX Transportation, Inc. and South Carolina
Department of Transportation
In the Court of Common Pleas, County of Hampton
Civil Action No. 04-CP-25-267
Our File No.: 93/363

Dear Ms. Nettles:

Enclosed for filing please find an original and copy of the Answer of Defendant CSX Transportation, Inc. in the above-referenced case. Please acknowledge receipt of same on the enclosed copy and return to me in the self-addressed stamped envelope provided for your use. Thank you.

Yours very truly,


J. Arthur Davison
For the Firm

JAD/ccs
Enclosures

cc: John E. Parker, Esq. (w/encl.)
Carl H. Jacobson, Esq. (w/encl.)
Peden B. McLeod, Esq. (w/encl.)

STATE OF SOUTH CAROLINA)
COUNTY OF HAMPTON)
WILLIE HOMER STEPHENS,)
Guardian ad Litem for Lillian)
Colvin, a minor,)

Plaintiff,)

vs.)

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

Defendants.)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION #04-CP-25-267

ANSWER

(Jury Trial Demanded)

BY: 
MYLINDA D. NETTLETON
CLERK OF COURT
HAMPTON COUNTY, SC

2004 JUN 18 AM 11:16

FILED

The Defendant South Carolina Department of Transportation, answering the Complaint herein, would show this Honorable Court as follows:

1. This Defendant denies each and every allegation of the Complaint not hereinafter specifically admitted.
2. This Defendant admits upon information and belief the allegations of paragraphs 1 and 2 of said Complaint.
3. This Defendant, admits the allegations of paragraph 3 of said Complaint.
4. Answering paragraph 4 of said Complaint, this Defendant admits that Hill Street in Yemassee, South Carolina crosses a railroad track and that a stop sign is located in advance of the railroad crossing. This Defendant denies the remaining allegations contained in paragraph 4 of said Complaint and would require strict proof thereof.
5. This Defendant denies the allegations contained in

paragraph 5 of said Complaint and would require "strict" proof thereof.

6. Answering paragraph 6 of said Complaint, this Defendant admits the car in which the Plaintiff was a passenger was struck by a train owned and operated by CSX Transportation, Inc. that was traveling in an easterly direction. This Defendant is without sufficient information to form a belief as to the truth of the remaining portion of paragraph 6 and accordingly denies same.

7. This Defendant admits upon information and belief the allegations contained in paragraph 7 of said Complaint.

8. Answering paragraph 8 of said Complaint, this Defendant alleges that the allegations therein are conclusions of law and not statements of fact and require no answer by this Defendant.

9. This Defendant denies the allegations contained in paragraph 9 and its subparts of said Complaint and would require strict proof thereof.

10. This Defendant denies the allegations contained in paragraph 10 of said Complaint and would require strict proof thereof.

**FURTHER ANSWERING THE COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO
THIS DEFENDANT STATES AS FOLLOWS:
(Failure to State a Claim)**

11. This Defendant incorporates paragraphs 1 through 10 above as if herein specifically rewritten.

12. Plaintiff's Complaint fails to state a claim upon which relief can be granted and, therefore, should be dismissed.

FURTHER ANSWERING THE COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO
THIS DEFENDANT STATES AS FOLLOWS:
(Intervening Negligence)

13. This Defendant incorporates paragraphs 1 through 10 above as if herein specifically rewritten.

14. Upon information and belief, any injuries or damages allegedly suffered by the Plaintiff, if any, were due to and proximately caused by the negligence of a party other than this Defendant and that such is a complete bar to the Plaintiff's recovery against Defendant South Carolina Department of Transportation.

FURTHER ANSWERING THE COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO
THIS DEFENDANT STATES AS FOLLOWS:
(Comparative Negligence and Common Enterprise)

15. This Defendant incorporates paragraphs 1 through 10 above as if herein specifically rewritten.

16. This Defendant alleges that the injuries and damages as were sustained by Plaintiff, if any, were due to and proximately caused by the negligence, carelessness, recklessness, wilfulness and wantonness of a party other than this Defendant, combining and concurring with the alleged negligence, carelessness, recklessness, wilfulness and wantonness of this Defendant, if any, and contributing to the said alleged injuries and damages to the Plaintiff as the proximate cause thereof and without which said injuries and damages would not have occurred, and that the negligence, carelessness, recklessness, wilfulness and wantonness

of the Plaintiff's driver is imputed to the Plaintiff by reason of common enterprise and that the negligence, carelessness, recklessness, wilfulness and wantonness of said driver and of Plaintiff is greater than the negligence, carelessness, recklessness, wilfulness and wantonness of this Defendant, and, in the alternative, that any recovery should be reduced in proportion to the negligence, carelessness, recklessness, wilfulness and wantonness of the Defendant South Carolina Department of Transportation, the Plaintiff's driver and the Plaintiff being negligent, careless, reckless, wilful and wanton in some, one, or all of the following particulars, to wit:

- (a) In failing and refusing to keep a proper look out;
- (b) In failing and refusing to take evasive action to avoid the collision;
- (c) In failing to take steps for Plaintiff's safety;
- (d) In failing to do anything whatsoever to avoid the collision;
- (e) In failing to take proper steps in an emergency to avoid the collision;
- (f) In failing to avoid said collision even though Plaintiff and Plaintiff's driver had the last clear chance to avoid said collision;
- (g) In failing to use that degree of care and caution that a reasonably prudent person would have used under the circumstances then and there prevailing;
- (h) In operating said vehicle in such a manner as to display a reckless disregard for the lives and property of others;
- (i) In failing to observe the oncoming train before crossing the railroad tracks;

(j) In failing and omitting to use due care;

FURTHER ANSWERING THE COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO
THIS DEFENDANT STATES AS FOLLOWS:
(S.C. Tort Claims Act)

17. This Defendant incorporates paragraphs 1 through 10 above as if herein specifically rewritten.

18. This Defendant is not liable for any loss to Plaintiff as it is not liable for any loss resulting from the design of highways or other public ways, as provided in South Carolina Code of Laws Section 15-78-60(15), 1976 as amended.

FURTHER ANSWERING THE COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO
THIS DEFENDANT STATES AS FOLLOWS:
(S.C. Tort Claims Act)

19. This Defendant incorporates paragraphs 1 through 10 above as if herein specifically rewritten.

20. At the time of the incident alleged in the Complaint this Defendant did not have actual or constructive notice of the alleged defect in the roadway and therefore, pursuant to South Carolina Code of Laws Section 15-78-60(15), 1976 as amended it is not liable to the Plaintiff for a loss resulting therefrom.

FURTHER ANSWERING THE COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO
THIS DEFENDANT STATES AS FOLLOWS:
(S.C. Tort Claims Act)

21. This Defendant incorporates paragraphs 1 through 10 above as if herein specifically rewritten.

22. In accordance with South Carolina Code of Laws Section

15-78-60(15), 1976, as amended this Defendant is not liable to the Plaintiff as it is not liable for any loss resulting from the absence of any sign or warning device placed or not placed as a result of a discretionary decision of this Defendant.

**FURTHER ANSWERING THE COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO
THIS DEFENDANT STATES AS FOLLOWS:
(S.C. Tort Claims Act)**

23. This Defendant incorporates paragraphs 1 through 10 above as if herein specifically rewritten.

24. This Defendant is not liable for any loss resulting from an act or omission of a party other than an employee, as is provided in South Carolina Code of Laws Section 15-78-60(20), 1976 as amended.

**FURTHER ANSWERING THE COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO
THIS DEFENDANT STATES AS FOLLOWS:
(S.C. Tort Claims Act)**

25. This Defendant incorporates paragraphs 1 through 10 above as if herein specifically rewritten.

26. In accordance with South Carolina Code of Laws Section 15-78-60(13), 1976, as amended this Defendant is not liable for any loss to the Plaintiff as they are not liable for any loss resulting from regulatory inspection, power or functions, including failure to make an inspection, or making inadequate or negligent inspection of any property.

**FURTHER ANSWERING THE COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO
THIS DEFENDANT STATES AS FOLLOWS:
(S.C. Tort Claims Act)**

27. This Defendant incorporates paragraphs 1 through 10 above as if herein specifically rewritten.

28. In accordance with South Carolina Code of Laws Section 15-78-60(15), 1976, as amended this Defendant alleges that it is not liable to the Plaintiff as it is not liable for a loss resulting from failure to initially place any sign, signal or warning devices when the failure is the result of a discretionary act of this Defendant.

**FURTHER ANSWERING THE COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO
THIS DEFENDANT STATES AS FOLLOWS:
(S.C. Tort Claims Act)**

29. This Defendant incorporates paragraphs 1 through 10 above as if herein specifically rewritten.

30. In accordance with South Carolina Code of Laws Section 15-78-60(5), 1976, as amended this Defendant alleges that it is not liable to the Plaintiff as it is not liable for a loss resulting from the exercise of discretion or judgment by this Defendant or the employee or the performance or failure to perform any act or service which is in the discretion or judgment of this Defendant or its employee.

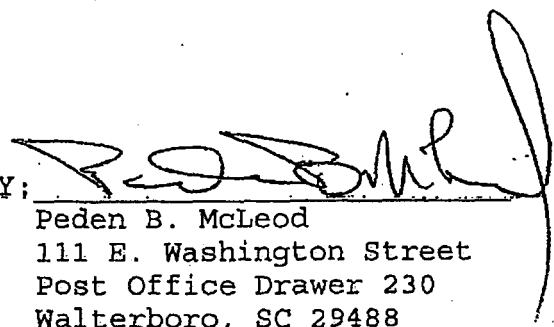
FURTHER ANSWERING THE COMPLAINT
AND AS AN AFFIRMATIVE DEFENSE THERETO
THIS DEFENDANT STATES AS FOLLOWS:
(S.C. Tort Claims Act)

31. This Defendant incorporates paragraphs 1 through 10 above as if herein specifically rewritten.

32. That any recovery as may be obtained by Plaintiff herein is limited by the ceiling placed thereon by Section 15-78-120(a) of the South Carolina Tort Claims Act, that punitive damages are not allowed by Section 15-78-120(b) of said act, that the State's waiver of immunity is thusly limited and conditioned, and this Court lacks jurisdiction to award any sum against said Defendant in excess of said statutory ceiling and to award punitive damages against said Defendant.

WHEREFORE, having fully answered the Complaint herein, the Defendant South Carolina Department of Transportation respectfully request that this action be dismissed with prejudice and the costs incurred in defending the action be paid by the Plaintiff.

MCLEOD, FRASER & CONE

BY: 

Peden B. McLeod
111 E. Washington Street
Post Office Drawer 230
Walterboro, SC 29488
(843) 549-2516
Attorneys for the Defendant
South Carolina Department
of Transportation

Walterboro, South Carolina

06/17

, 2004

STATE OF SOUTH CAROLINA

COUNTY OF HAMPTON

WILLIE HOMER STEPHENS,
Guardian ad Litem for LILLIAN
COLVIN, a minor,

Plaintiff,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS
CIVIL ACTION #04-CP-25-267

CERTIFICATE OF SERVICE
BY MAILING

BY

MYLENA D. NETTLES
CLERK OF COURT
HAMPTON COUNTY, SC

2004 JUN 18 AM 11:15

FILED

I hereby certify that a copy of the document(s) set forth below was served by me on counsel listed below by mailing a copy of same, postage prepaid and properly addressed, and deposited in the United States Post Office at Walterboro, South Carolina on this the 17th day of June, 2004.

DOCUMENT(S) SERVED:

Defendant South Carolina Department of
Transportation's Answer to Plaintiff's
Complaint.

COUNSEL SERVED:

Carl H. Jacobson, Esquire
URICCHIO, HOWE, KRELL, JACOBSON, TOPOREK,
THEOS & KEIGH, P.A.
Post Office Box 399
Charleston, SC 29402-0399

John E. Parker, Esquire
PETERS, MURDAUGH, PARKER, ELTZROTH &
DETRICK, P.A.
Post Office Box 457
Hampton, SC 29924

J. Arthur Davison, Esquire
FULCHER HAGLER LLP
Post Office Box 1477
Augusta, GA 30903-1477

Heidi C. Button

SWORN to before me this

17th day of June, 2004.

Heidi C. Button (SEAL)

Notary Public for South Carolina

My commission expires 11/14/04.

MCLEOD, FRASER & CONE

W. J. McLEOD, JR.
(1906-1994)
DONALD H. FRASER
PEDEN B. McLEOD
GEORGE W. CONE

ATTORNEYS AT LAW
111 E. WASHINGTON ST.
P.O. DRAWER 230
WALTERBORO, S.C. 29488-0003

TELEPHONE
(843) 549-2516

TELECOPIER
(843) 549-2306

THOMAS L. HOWARD
J. REAVES McLEOD

June 17, 2004

The Honorable Mylinda D. Nettles
Hampton County Clerk of Court
Post Office Box 7
Hampton, SC 29924

Re: Willie Homer Stephens, Guardian ad Litem for Lillian Colvin,
a minor vs. CSX Transportation, Inc. and South Carolina
Department of Transportation
Case No. 2004-CP-25-267
MFC File No. 31320-04

Dear Ms. Nettles:

Enclosed for filing please find the original and one copy of Defendant South Carolina Department of Transportation's Answer to the Plaintiff's Complaint and Certificate of Service for the above referenced matter. Please return the filed copy to me in the self-addressed envelope I have enclosed for your convenience.

If you have any questions regarding the enclosed, please do not hesitate to call me. Thank you for your attention in this matter.

Yours truly,

MCLEOD, FRASER & CONE



Peden B. McLeod

PBM/hcb
Enclosures

STATE OF SOUTH CAROLINA

COUNTY OF HAMPTON

IN THE COURT OF COMMON PLEAS

Willie Homer Stephens, Guardian ad Litem for
Lillian Colvin, a minor,

☒ Plaintiff,

CASE NO.

04-CP-25-267

v.

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

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

☐ Defendant.

Plaintiff's Attorney:

John E. Parker, Esquire Bar No. 4442
Address: 101 Mulberry Street East
P.O. Box 457
Hampton, SC 29924
Phone: (803) 914-2004 Fax: (803) 914-2014 E-
mail: jpark@pmped.com

Defendant's Attorney:

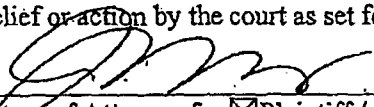
James Purcell, Esquire,
Address: P.O. Box 1477
Augusta, GA 30903-1477
Phone: (706) 724-0171 Fax: 706-396-3613
E-mail: other:

- ☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order

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


Signature of Attorney for ☒ Plaintiff / ☐ Defendant

August 22, 2008

Date submitted

SECTION III: Motion Fee

- ☒ PAID -- AMOUNT: \$25.00
☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached
order.
☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

- ☐ MOTION FEE COLLECTED: _____
☐ CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF HAMPTON)

CIVIL ACTION NO.: 04-CP-25-267

Willie Homer Stephens, Guardian ad
Litem for Lillian Colvin, a minor,)

Plaintiff,)

vs.)

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

Defendants.)

PLAINTIFF'S MOTION FOR JUDGMENT
NOTWITHSTANDING THE VERDICT
AND/OR MOTION FOR NEW TRIAL

2008 AUG 22 AM 9:58

CLERK OF COURT
HAMPTON COUNTY, S.C.

Plaintiff hereby moves this Honorable Court for a judgment not withstanding the verdict pursuant to SCRCF 50(b) and/or a new trial pursuant to SCRCF 59. The grounds for the motion for judgment not withstanding the verdict motions are as follows.

1. The court erred in failing to direct a verdict in favor of Plaintiff and against Defendant CSX Transportation, Inc. on the issue of negligence because Defendant CSX Transportation, Inc. admittedly failed to sound the horn in accordance with S.C. Code Ann. § 58-15-910.
2. The court erred in failing to direct a verdict in favor of Plaintiff and against Defendant CSX Transportation, Inc. on the issue of negligence because Defendant CSX Transportation, Inc. admittedly failed to clear the subject crossing in accordance with its own rules and regulations, the CSX Crossing Clearing Program, and the Maintenance of Way requirements.

The grounds for the motion for new trial are that the court erred as follows.

3. In excluding the deposition testimony of David Mickens concerning the dangerous sight obstructions on the AMH Line near the Hill Road Crossing.
4. In allowing Defendant CSX Transportation, Inc. in cross examining David Lipscolmb to pit the testimony of witnesses who had their windows down in their vehicles and who heard the horn against Tonia Colvin's testimony about not hearing the horn when only the driver's window was cracked.
5. In allowing Defendant CSX Transportation, Inc. to cross examine Dr. Kenneth Heathington by pitting the testimony of Ned Wooden and Calvin Cummings against the testimony of Tonia Colvin.
6. In not allowing the jury to consider Plaintiff's Exhibits 66, 67, 69, 70, 76, 77, 79, 81, 89, 92, 93, 97 and 128 which were relevant to both negligence and punitive damages until the jury determined whether it would award punitive damages.
7. In excluding the testimony of Anna Sue Rivers and Betty Ruth Crews when their testimony was relevant and admissible to impeach Defendant CSX Transportation, Inc.'s position that it did not cut the subject crossing because of landowner issues.
8. In excluding evidence that the subject crossing was cut shortly after this collision in order to impeach Defendant CSX Transportation, Inc.'s position that the crossing was not cut because of landowner issues.

9. In failing to charge the following charges:

- a. Plaintiff's Request to Charge No. 2 stating that Defendant CSX Transportation, Inc. has a duty to maintain its right of way at grade crossings in a reasonably safe condition so as not to obstruct a motorist's vision of approaching trains.
- b. Plaintiff's Request to Charge No. 3 stating the railroad has a duty of added care when a motorist's view is obstructed at a railroad crossing.
- c. Plaintiff's Request to Charge No. 9 stating that a driver of a motor vehicle is under no absolute duty to stop, look, and listen before going on the track at a railroad crossing unless the exercise of ordinary care and prudence under all the surrounding facts and circumstances requires the adoption of such a course.
- d. In failing to charge S.C. Code Ann. § 56-5-2350 regarding the presumptions regarding impairment and blood alcohol level in light of the court charging S.C. Code Ann. § 56-5-2330 and S.C. Code Ann. § 15-78-60(20).

10. In charging the following charges:

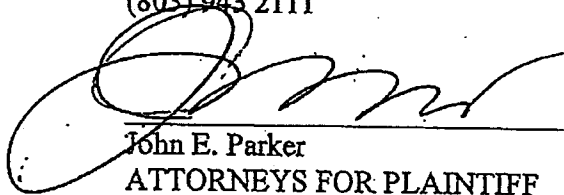
- a. The law of intervening and superseding negligence when as a matter of law there could be no intervening or superseding negligence under the testimony.

- b. S.C. Code Ann. § 56-5-2330 which applies to intersecting highways and not railroad highway grade crossings and which conflicts with S.C. Code Ann. § 56-5-2715 and the MUTCD.
- c. S.C. Code Ann. § 56-5-2340 which applies to intersecting highways and not railroad highway grade crossings and conflicts with S.C. Code Ann. § 56-5-2715 and the MUTCD.
- d. S.C. Code Ann. § 56-5-2930 because there was no evidence that Tonia Colvin was impaired.
- e. S.C. Code Ann. § 56-5-950 because this section was not applicable under the facts and was prejudicial because the charge of this section was confusing to the jury.
- f. S.C. Code Ann. § 56-5-1010 which requires railroad companies to erect cross buck signs at highway grade crossings because there was no issue in the case about the erection of cross buck signs.
- g. S.C. Code Ann. § 56-5-1020 concerning the unauthorized placement of signs because there was no issue concerning unauthorized signs.
- h. S.C. Code Ann. § 58-17-1390 which requires erection of cross buck signs. This section is not applicable to the facts of this case because there was no issue about the erection of cross buck signs.

- i. S.C. Code Ann. § 58-15-1625 concerning the authority of the Defendant SCDOT to close crossings when this section is irrelevant to this case.
- j. S.C. Code Ann. § 15-78-60(5) when there was no evidence that the Defendant SCDOT exercised any discretion in the placing of the stop sign and stop line.
- k. S.C. Code Ann. § 15-78-60(20) which exempts the Defendant SCDOT from liability for the criminal acts of third parties when there was no evidence of criminal acts by a third party.
- l. CSX Request to Charge No. 45 which stated "it is always train time at the crossing" because this places a higher duty on the motorist than on the railroad when the duties are mutual.

PETERS, MURDAUGH, PARKER,
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John E. Parker
ATTORNEYS FOR PLAINTIFF

August 22, 2008

1 in this case that she stopped at a place she didn't
2 stop, they're going to contend that she ignored a wide-
3 open train coming at her and just decided to pull in
4 front of the train, I guess. Ask yourself if that
5 makes any sense whatsoever.

6 Here's an important fact to think about. Why
7 would you stop once where you can't see. Why wouldn't
8 you just go on. Why do you stop again, if you weren't
9 going to look. And I think the evidence is clear that
10 she stopped the second time. On her passage to where
11 she stopped, her view was obstructed. She had gotten
12 to where she thought she could make a safe -- move
13 forward safely, and she did it. She simply did not
14 know about this time-space relationship to know that
15 you needed, at this crossing, a farther distance than
16 she could see. And that's why Lillian received this
17 terrible injury that she received.

18 The evidence will be that Tonia Colvin has a
19 chronic back problem. She's had it for years, had it
20 years prior to this. For that back problem, she takes
21 pain medication, muscle relaxants, and she took some --
22 she took a Darvocet that day, she took a muscle
23 relaxant that day, and she drank two wine coolers
24 eleven, twelve o'clock, somewhere in that vicinity.
25 And they are going to contend in this case, even though

1 And this is not -- this is not drawn to scale. I'm
2 just trying to give you-all an idea of what happened.
3 There are trees on this side of the tracks; there were
4 some trees here; there were some trees here. And Mr.
5 Parker showed you where Ms. Colvin first stopped. And
6 I'm going to talk about that in a moment. And then
7 there were some trees over here.

8 The contractor's instructions were, when you go
9 out to the crossings to do these clearings, if a
10 landowner disputes it, don't get into a fight, report
11 it up-chain and then continue going down and clearing.
12 So the contractors came out about four months before
13 this accident and they cleared the trees on that side,
14 they cleared the trees on that side, they cleared trees
15 over here. When they came to clear the trees right
16 over on this side, there was a homeowner who lived
17 here. And, again, this is not to scale. His name was
18 Tommy Jackson. And Mr. Jackson came out and raised all
19 kinds of cane, saying that these trees were on his
20 property and that CSX shouldn't be cutting them. Per
21 their instructions, the contractor did not get into a
22 dispute with Mr. Jackson but continued on down the
23 road, and those trees weren't cut then. Members of the
24 jury, they should have been, because Mr. Jackson did
25 not own the land that he was claiming those trees were

1 on. So those trees weren't cut.

2 But what you are going to see, members of the
3 jury, is that the trees had nothing to do with the
4 accident that occurred in this case. You noticed, when
5 you saw during the plaintiff's opening, the pictures
6 they showed you leading up to the crossing. They
7 showed you a picture of where Ms. Colvin stopped at the
8 stop sign, but they didn't show you any pictures
9 farther as she stopped a second time, as she is
10 supposed to do, because when she came past the stop
11 line and stopped at the stop line, the evidence shows
12 that the trees are not an issue. Stopped at or near
13 the stop line, the trees are not an issue at all. So
14 the trees, although they should have been cut when
15 those contractors came out, they did not have anything
16 to do with the accident. The trees go into the box of
17 things that did not cause the accident, because,
18 members of the jury, we believe it will be undisputed
19 in this case that when you stop at or near that stop
20 line, you can see down the tracks a long, long ways.
21 And stopped at the stop line on February 3rd, 2004, Ms.
22 Colvin should have seen the train; and if you saw the
23 train, you should have waited for the train to pass;
24 and trying to cross that day was an unsafe choice.

25 So that's the crossing-clearing program, members

1 has a landscaping business. He was driving up 68 this
2 way, and he'll tell you that as -- he'll tell you that
3 as he was approaching the crossing, before he could see
4 the crossing, coming on the road, he heard the train
5 loud and clear. He'll explain to you, as well, that as
6 a retired marine, he has some hearing difficulties. He
7 heard the train.

8 You are also going to hear from Mr. Dusty -- or
9 Larry Biser, the plant manager. Mr. Biser will tell
10 you that at various points, beginning at when he got
11 into -- he was in the parking lot at the Dixie Poly
12 Drum plant, he heard the train. He heard it here, and
13 he heard it at different points, as he was proceeding
14 up to the crossing.

15 The evidence is going to show, members of the
16 jury, that the only person who didn't hear the train
17 coming up to this crossing was Ms. Colvin, or the
18 people inside the vehicle; that the people who were
19 there surrounding her heard the train blowing well in
20 advance of the crossing.

21 Now, there has been a big deal made. You heard
22 Mr. Parker talk about what he called the short whistle.
23 And he's right. Under the law, 1500 feet before you
24 approach the crossing, the whistle is supposed to start
25 blowing at that point in time. There is this black box

1 on the train, kind of like -- it's called an event
2 recorder. But if you can imagine like a plane, the
3 black box tells you information about what happened,
4 and Ned Wooden believed that when he got to 1500 feet,
5 he was blowing it at what's called the whistle post,
6 the big post in the ground when they start blowing. He
7 believed he did. It turned out he didn't. He was a
8 few seconds late in blowing that horn, members of the
9 jury, and there won't be any dispute about that.

10 But what I want you to ask yourself, when you
11 hear this evidence about the horn, is how did the horn
12 cause this accident when all of these witnesses around
13 the car heard the horn well in advance of this crossing
14 and the evidence will show that the people inside the
15 car didn't hear the horn until the train essentially
16 hit the car? Again, members of the jury, the horn --
17 and I'm not suggesting that it's not important, it's
18 very important -- he missed it by a few seconds. But
19 the horn did not cause this accident, when the horn was
20 being blown and everyone else around it heard it.

21 See, members of the jury, what we believe the
22 evidence is going to show is that the witnesses who
23 were there heard the horn, and the driver did not. The
24 witnesses who were there saw where Ms. Colvin stopped
25 at the stop line, and the driver says she did not. You

1 confirmed that CSX owned the right-of-way?

2 MR. PURCELL: Whatever the date of the e-mail
3 is, it is. I mean, it is what it is, is I guess what I
4 would say to that e-mail, Your Honor.

5 THE COURT: All right. The point is this, Mr.
6 Jackson: I can't have you testifying in any way,
7 shape, or form that CSX, or anyone, subsequently came
8 out and cut this quadrant --

9 Do you understand that?

10 MR. JACKSON: That's fine with me.

11 THE COURT: -- because it wouldn't be
12 appropriate for the jury. Do you understand that?

13 MR. JACKSON: Yes, ma'am.

14 THE COURT: It's almost as if it's somehow an
15 admission. Do you understand that?

16 MR. JACKSON: Yes, ma'am.

17 THE COURT: All right. Gentlemen, I hope we're
18 clear on this.

19 MR. PURCELL: We're clear on that, Judge.

20 The only thing I'm unclear on is the fact that
21 Mr. Detrick wants to bring out that there were
22 officials who came out later in connection with the
23 subsequent remedial measures, had discussions with Mr.
24 Jackson to show him the plats, to show him the surveys,
25 in preparation for cutting. And the only way that 407

1 MR. PURCELL: Well, Your Honor, it's the shortly
2 after this wreck. It's by the railroad that they --
3 you know, then it's how did they --

4 THE COURT: Why can't you just say, Mr. Detrick,
5 isn't it correct and isn't it true that the railroad
6 owned this right-of-way. Is there any question, any
7 doubt in your mind, that the railroad owned this
8 right-of-way. No.

9 I mean, that's the only way not to bait it.
10 Okay?

11 MR. DETRICK: All right.

12 THE COURT: That's what we're going to have to
13 do. You're going to get dangerously close. If you get
14 into remedial measures, you and I both know --

15 MR. PARKER: Your Honor, I --

16 THE COURT: -- it's possible that it can be
17 overturned based on that.

18 MR. PARKER: Even though we might -- not with
19 this witness, but clearly in the opening statement --
20 by the opening statement saying this crossing was safe,
21 it didn't need cutting, is what he said in the opening
22 statement, it was only -- it was safe, but we wanted to
23 make it safer. If it was safe, it didn't need cutting.
24 The fact that they came back and cut it impeaches their
25 position they've opened in opening statement.

THOMAS M. JACKSON,
Having Been First Duly Sworn,
was Examined and Testified as Follows:

DIRECT EXAMINATION

BY MR. DETRICK:

Q. Mr. Jackson, where do you live?

A. 84 Hill Road, Yemassee.

Q. Okay. And I believe you've lived in the
Yemassee area all of your life?

A. All my life.

Q. Have you lived right there at Hill Street?

A. Fourteen years.

Q. Okay. And I believe your family lived in that
area, too?

A. For many, many years.

Q. What do you do, Mr. Jackson?

A. I'm a self-employed house painter.

Q. Now, as far as -- tell the jury kind of -- if
you would describe where your residence is in regard to
Hill Street, the Hill Street railroad crossing.

A. Well, Hill Street goes right between me and
Dixie Poly Drum. I'm off the road probably a hundred
yards. I have a mobile home in a field out there. Hill
Street is here, the railroad is here, just like this.

Q. Going down -- going towards Yemassee on 68, take

1 a left on Hill Street and you're to the left --

2 A. Yes, sir.

3 Q. -- of the crossing; is that correct?

4 A. You take a -- well, if you're coming from
5 Hampton, you take a left and then another left. Coming
6 from Yemassee, right and then left.

7 Q. Okay. Now, prior to -- I think in sometime in
8 like September, 2003, did you see some cutting near your
9 residence?

10 THE WITNESS: Your Honor --

11 Q. [Mr. Detrick] This is prior -- this is
12 September --

13 A. I don't want to say the wrong thing here. Yes.
14 Yes, sir.

15 Q. All right. And tell us about that.

16 A. Well, I was sitting in my chair watching TV.
17 And I have my chair situated where I can look out my door,
18 out my window. And I saw some activity going on across
19 Hill Road at the Poly Drum. People were cutting trees
20 down. Well, I didn't think nothing of it. They kept
21 getting closer, closer, and closer. Finally, I told my
22 wife, I said, I believe they're coming over here on our
23 side. Well, sure enough, I had went to the kitchen to do
24 something. I come back, and they was already whacking on
25 them.

1 I jumped in my truck, went down there, started
2 raising cane. I said, what's going on. And I believe it
3 was a Hispanic man -- he didn't understand me -- I said,
4 get your supervisor, get whoever over here, and get him
5 over here now. He come over. He told me that he was a
6 contractor, or subcontractor or something, with CSX and
7 they were here to thin these trees out. I said, no, sir;
8 no; these trees belong to us. And he said, that's no
9 problem, sir; we run into this all the time. He was very
10 nice. He said, we'll pack up and leave. And he did.

11 Q. Okay. And when did this occur, now?

12 A. It was sometime in September, if I'm not
13 mistaken, Mr. Detrick. September.

14 Q. Okay. And those trees you were talking about,
15 you thought they was on your property --

16 A. Yes, sir. I --

17 Q. -- is that correct?

18 A. My family has been paying taxes on all that for
19 forty-odd years.

20 Q. And tell us kind of what those trees -- describe
21 these trees for the jury that you're talking about.

22 A. Well, it was a lot of -- mostly scrub Maples,
23 Gums, things like that. But there were some very huge
24 Live Oak trees on there, that they cut down, that had been
25 there for years. I think there was three or four of them,

1 and they -- they're just all gone.

2 Q. Okay. And, now, during this time, you told them
3 to stop. And then did they come back later to talk with
4 you about this?

5 A. Correct.

6 Q. I think you called someone, didn't you?

7 A. Oh. Yes. Right after I got them to stop, I
8 called the road master, David Poston.

9 Q. David Poston?

10 A. David Poston. He came immediately.

11 Q. Did you know Mr. Poston?

12 A. I know him well.

13 Q. Who does he work for?

14 A. CSX.

15 Q. Okay. And did he come to -- came over?

16 A. He came straight on. I asked him what was going
17 on. He said he would have to check the plats, maps, or
18 whatever, and he would get back with me.

19 Q. Okay. And, now, this was like -- I think you
20 had told me the Shrimp Festival will give --

21 A. I can't --

22 Q. -- you an idea of when it was?

23 A. Yes. Yes, sir.

24 Q. Okay. Now, did you -- did you, after that,
25 contact Mr. Poston, or anyone with CSX, to see whether

1 they had made any determination about whether they were
2 going to cut that crossing there?

3 A. I run into him. I was helping a buddy on a job
4 one Sunday paint a house. This was after the first of the
5 year, that following September. And he come by, just
6 looking. You know, messing around. And I said, David,
7 did they decide what they were going to do with the trees.
8 He said, they're not going to do anything.

9 Q. So let's get this time frame straight now. You
10 said first off they came out there like in September, or
11 somewhere in there, in 2003?

12 A. It was --

13 Q. Is that correct?

14 A. It was September.

15 Q. And Mr. Poston said he was going to check into
16 it?

17 A. Correct.

18 Q. And then you saw Mr. Poston after the first of
19 the year?

20 A. I think it was in February, if I'm not mistaken.

21 Q. So that would be February of 2004?

22 A. Yes, sir.

23 Q. Okay. So -- or either January, somewhere in
24 that --

25 A. Yes, sir.

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1 Q. -- neighborhood; is that correct?

2 A. First of the year.

3 Q. Okay. And it's before the wreck we're here
4 about today; is that correct?

5 A. Correct.

6 Q. And you saw Mr. Poston. And where did you see
7 him at?

8 A. One of them little subdivisions up there. I
9 can't think of the name of it. Alvin Session own it.
10 But, anyway, he just come by, and that's when I asked him,
11 you know, if he -- they had made a decision. He said,
12 they're not going to do anything.

13 Q. They weren't going to do anything about cutting
14 that crossing?

15 A. That's what he said.

16 Q. And the cutting -- now, when you're talking
17 about the area that he said they weren't going to do
18 anything about cutting, describe to the jury where that
19 was.

20 A. It was the tree line that goes all the way down
21 parallel to the railroad track.

22 Q. Okay. So it was your understanding they had
23 made a decision; is that correct? That CSX had made a
24 decision?

25 A. According to him. And he's the road master.

1 Q. Okay. Now, I think as you know we're here about
2 a wreck. And you know about that wreck; is that correct?
3 It happened February the 3rd, 2004?

4 A. I sure do.

5 Q. Now, how -- tell us, the jury -- you came upon
6 it; is that correct?

7 A. Yes, sir.

8 Q. Tell us about what you saw.

9 A. Well, me and my wife had been up the street, at
10 Simon Jenkins' store, shopping. And we left there and
11 started back to the house. And I saw the train, the
12 engine, slowing to a creepy stop at the Willis Street
13 crossing. And I told my wife, I says, it looks like we're
14 going to have to go around, because it's usually a long
15 train.

16 Well, when we got to my crossing, Hill Street,
17 Hill Road, I saw a man in the road. And out of the corner
18 of my right eye -- I told Sharon, I said, that train has
19 done hit that vehicle there. So I pulled over. I got
20 out. The first thing I saw was Ms. Colvin all bloody,
21 face and mouth, and next thing I saw was that little girl
22 slumped over in the seat.

23 Q. Slumped over in the seat?

24 A. Yes, sir.

25 Q. And so what did you do, if anything?

1 A. Well, there was a gentleman there. I walked up
2 to him. He had a cell phone in his hand. And I asked him
3 if he had called 911, and he said, yes, they were on --

4 Q. He called 911?

5 A. Yeah. And they were on the way.

6 Q. Okay. And you didn't actually see the wreck
7 itself; is that correct?

8 A. No, sir. It had already happened when I got
9 there.

10 Q. And was it -- you said the train was stopping
11 when you first saw it?

12 A. It had just about come to a stop at Willis
13 Street crossing.

14 Q. And where in relation -- had it gotten to Willis
15 Street, or was it --

16 A. Yeah. It was -- the engine was right at the
17 crossing..

18 Q. And when we talk about Willis street, what
19 crossing -- what are you talking about?

20 A. If you leave my house and go to Yemassee, it
21 would be the first one on the left.

22 Q. So it's the next crossing down?

23 A. Yeah. It's on Willis Street. That's where the
24 crossing is at.

25 Q. Now, obviously, you had lived in this area for

1 all these years; is that correct?

2 A. Correct.

3 Q. So you're familiar with the crossing, and with
4 the trees and stuff, there at the area --

5 A. Yes.

6 Q. -- is that right?

7 A. Yes, sir.

8 MR. DETRICK: And let's go through some
9 photographs here.

10 Mr. Jackson, why don't you come down here so you
11 can see.

12 THE WITNESS: Okay.

13 [Whereupon, the witness complies]

14 Q. [Mr. Detrick] I'm going to show you some
15 photographs, and I want you to tell the jury whether they
16 accurately reflect what the area was like prior to
17 December the 3rd, 2004. Is that -- do you recognize that?

18 A. Yeah. That's the road to Dixie Poly Drum.

19 MR. DETRICK: Okay. Go ahead. You can go back.

20 Q. [Mr. Detrick] And does that accurately look
21 like it was?

22 A. Yes, sir.

23 MR. DETRICK: Go back to the next one.

24 Q. [Mr. Detrick] And you recognize I think --

25 A. That road to the left goes to Poly Drum.

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1 MR. DETRICK: Okay. And go forward --

2 Q. [Mr. Detrick] We're getting closer to the
3 crossing; is that correct?

4 A. Correct.

5 Q. Okay. And I believe your house is to the right;
6 is that right?

7 A. Yes, sir. You can see the road right there.

8 MR. DETRICK: Go ahead, if you would, please.

9 Q. [Mr. Detrick] Now --

10 A. That's my driveway right there.

11 Q. And the driveway you're talking about would be
12 to your right; is that correct?

13 A. Correct.

14 Q. You live back in there?

15 A. Yes, sir. About a hundred yards back up in
16 there.

17 Q. All right. And that's the stop sign that was
18 present at that time and the location --

19 A. Yes, sir.

20 Q. -- of it; is that right?

21 A. Yes, sir.

22 MR. DETRICK: All right. Go ahead.

23 Q. [Mr. Detrick] Now, what we have done is gone
24 back away from the crossing. And you see the fifty feet
25 right there; is that right?

1 A. Yes, sir, I see it.

2 Q. And prior to December -- February the 3rd, 2004,
3 is that the way it looked at about fifty feet from the
4 crossing?

5 A. Yes, sir.

6 Q. And those are the trees that were right in
7 there?

8 A. Yes, sir.

9 MR. DETRICK: Okay. Go ahead. We're going to
10 continue forward.

11 Q. [Mr. Detrick] Now, you approach the crossing.
12 And that's that stop sign that was there; right?

13 A. Correct.

14 Q. And if you stopped at the stop sign, is that
15 what you would look at, or even worse than that?

16 A. Yes, sir.

17 Q. Okay. Can you see a train coming from there --

18 A. You could --

19 Q. -- Mr. Jackson?

20 A. As far as you could see from right there. Maybe
21 a hundred yards, if that.

22 Q. If that?

23 A. If that.

24 MR. DETRICK: Okay. You can go ahead, if you
25 would.

1 Q. [Mr. Detrick] And this is just getting a little
2 bit closer?

3 A. Right.

4 Q. And you can see those trees. Now, where were
5 them big old trees you were worried about?

6 A. They're farther down the line.

7 MR. DETRICK: All right. If you would --

8 Q. [Mr. Detrick] And I think this just shows that
9 the stop sign is thirty-six feet from the near rail; is
10 that correct?

11 A. Yes, sir.

12 Q. Okay. And your house would be to the right,
13 back away --

14 A. Correct.

15 Q. -- from that; is that correct?

16 A. That's correct.

17 Q. And that shows -- does that show the view you
18 would see if you were standing at the stop sign prior to
19 and on February the 3rd, 2004?

20 A. Yes, sir.

21 MR. DETRICK: And if you would continue on.

22 Q. [Mr. Detrick] And, now, this is thirty-four
23 feet from the near rail. Does that show the view you
24 would have seen with all those trees in the way?

25 A. Yes, sir.

1 Q. And if you continue closer, I think there's some
2 cross-bucks; is that right?

3 A. Yes.

4 Q. Obviously, when you're parked at a stop sign and
5 you're -- as a passenger, driver, you're going to be
6 farther away from where your front bumper is going to be;
7 is that right?

8 A. Correct.

9 MR. PURCELL: Object to the form of the
10 question. I don't mind Mr. Detrick leading on his
11 preliminary questions, but it's gone too far, Judge.

12 THE COURT: Okay. Sustained. Let's not lead
13 him.

14 MR. DETRICK: Thank you, Your Honor.

15 Q. [Mr. Detrick] Mr. Jackson, I want to be clear.
16 Now, you've lived in that area. That's what it looked
17 like; is that correct?

18 A. Yes, sir.

19 Q. And that's an accurate photograph?

20 A. Yes, sir.

21 MR. DETRICK: Okay. Go ahead and go forward.

22 Q. [Mr. Detrick] And I think as we're getting
23 closer, you still -- there just thirty-two feet from the
24 near rail. Is the view still obstructed by that, in your
25 opinion?

1 MR. PURCELL: Object to the form of the
2 question. It is leading, and assumes facts not in
3 evidence.

4 THE COURT: Okay. Mr. Detrick, you just need to
5 ask him specifically a question. Let's not lead him.

6 MR. DETRICK: I'm sorry, Your Honor. I didn't
7 hear you.

8 THE COURT: Don't lead him, sir.

9 MR. DETRICK: Okay.

10 THE COURT: Sustained.

11 Q. [Mr. Detrick] What can you see from thirty-two
12 feet, Mr. Jackson, down --

13 A. You can see down the rail a ways, but as you --
14 as you can see for yourself, it's -- you can't see far.

15 Q. And, of course, the closer you get in that --
16 you see a little better.

17 MR. DETRICK: If you would, Felicia, go ahead.

18 Q. [Mr. Detrick] And that is thirty feet from the
19 near rail. Is that how it looked?

20 A. Yes, sir.

21 Q. Okay. And how is your view from there, Mr.
22 Jackson?

23 A. The closer you get, the farther you can see.

24 Q. Okay. Is it still -- you're still looking down
25 there. Could you still see -- if you're sitting there,

1 are trees interfering with your view in any way?

2 A. Well, Mr. Detrick, that depends on who you are,
3 you know. Yes, you -- it would interfere, yes, sir.

4 MR. DETRICK: And I think let's go on farther,
5 Felicia. I want the jury to --

6 Q. [Mr. Detrick] Does this accurately reflect what
7 it looked like --

8 A. Yes, sir.

9 Q. -- as you got closer to the crossing?

10 MR. DETRICK: All right. Go ahead a little bit
11 farther, Felicia. Is that 20?

12 MS. GERRARD: Do you want to go to 20?

13 Q. [Mr. Detrick] And obviously if you're getting
14 closer, you can see a little better?

15 A. Yes, sir. All the time.

16 MR. DETRICK: Okay. And go ahead.

17 Q. [Mr. Detrick] Is that the way it looked?

18 A. Yes, sir.

19 Q. Okay. And now we're at twenty-two feet?

20 A. As you -- you can see better and better.

21 Q. Can you still -- the view is still --

22 A. It's -- it's --

23 Q. -- interfered with?

24 A. It's obstructed some farther down. But like I
25 say, the closer you get to the rail, the more you can see.

1 MR., DETRICK: You can go ahead and go through
2 it.

3 Q. [Mr. Detrick] And I think that's where that --
4 is that where the cross-buck sign was?

5 A. The cross-arm. Yes.

6 Q. And is that where it was?

7 A. Still there.

8 Q. Still there.

9 Okay. And now, of course, you're getting a
10 little bit closer?

11 A. Yes. You can see 95 now.

12 Q. Okay. And that's right there if -- if you're
13 sitting at the area of that -- where that cross-bucks are
14 and where the driver would see. Is that what they would
15 look down and see?

16 A. Yes, sir.

17 Q. Okay. And obviously the front bumper is going
18 to be farther up?

19 MR. PURCELL: I'm going to object to the form of
20 the question. It's a leading question.

21 THE COURT: Sustained. Don't lead him, please.

22 MR. DETRICK: Yes, ma'am.

23 Go ahead, and we'll go on.. I want to go --

24 Q. [Mr. Detrick] And is this -- as we're getting
25 closer, that's the way it looked, is it not, Mr. Jackson?

1 A. Correct.

2 MR. DETRICK: Okay. You can go ahead. And
3 continue to go ahead.

4 Q. [Mr. Detrick] Now, we've heard the white line.
5 Was that white line there then?

6 A. That's it. Yes, sir, it was there.

7 Q. And was that white line at the same distance, I
8 guess from the rail there, at the time just before the
9 wreck?

10 A. Right where it's at.

11 Q. All right. Now, what do you think about the
12 white line? Or what is your opinion of that --

13 A. My opinion, it's too close.

14 MR. PURCELL: Your Honor, this witness is not
15 shown to be an expert on anything that I'm aware of.

16 THE WITNESS: He asked my opinion.

17 THE COURT: Okay. Hang on a second, y'all.

18 MR. PURCELL: About white lines? I don't know.

19 THE COURT: He can talk about his experience and
20 what he sees and he knows, Mr. Purcell.

21 THE WITNESS: Thank you.

22 Q. [Mr. Detrick] Well, tell the jury -- Mr.
23 Jackson, you say you thought it was too close. Why?

24 A. If you had to sit there sometimes when the train
25 is coming by, you would know why.

1 Q. What you mean?

2 A. It scares you.

3 Q. Okay. So if you're sitting there, it will scare
4 you?

5 A. Yes, sir. Especially on the other side.

6 MR. PURCELL: Your Honor, I'm going to ask the
7 Court to instruct the jury not to consider anything the
8 witness says that doesn't have to do with the crossing
9 on this side. It's clearly irrelevant.

10 THE COURT: Okay. Respectfully, obviously let's
11 limit it to where it is from this side that the
12 accident occurred. Okay?

13 Ladies and gentlemen, you are to disregard any
14 other comments. We're focusing on here exactly what
15 happened at this point.

16 MR. DETRICK: That's all I have about that.

17 Mr. Jackson, you can step back up there.

18 THE COURT: Take a seat again, Mr. Jackson.

19 [Whereupon, Mr. Jackson complies]

20 Q. [Mr. Detrick] Oh. Let me ask you this. I'm
21 sorry. Yeah, y'all have pointed out -- I was going to ask
22 you, but I want to make sure. I apologize.

23 Does this -- living there all these years, has
24 there ever been a road in this area where you lived near
25 the crossing, near that track?

1 A. A road?

2 Q. A road.

3 A. No, sir, not as I know of.

4 Q. Ever been an access road there?

5 A. No, sir, not as I know of.

6 Q. Now, we're looking I think it's Exhibit --

7 MR. DETRICK: What number is that exhibit?

8 MS. GERRARD: This is 20.

9 MR. DETRICK: 20?

10 Q. [Mr. Detrick] All right. Is that -- is there a

11 road right there? Is that a road?

12 A. I wouldn't say -- it looks to me just like part

13 of the bed. That's what I always considered it.

14 Q. And that's the way it's looked as long as you've

15 been there?

16 A. Yes. Yes, sir.

17 Q. And you don't know anything about any access

18 road?

19 A. No, sir.

20 Q. And when you go to the right of you, you've got

21 the -- obviously, you've got the trees right there; right?

22 A. Correct.

23 Q. And then to the right of that is going to be

24 your driveway; is that correct?

25 A. Yes, sir.

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1 Q. So there's obviously no road through the trees?

2 A. No, sir.

3 Q. And then the only road would be your driveway?

4 If you call that a road.

5 A. Yes, sir.

6 Q. Okay. And, of course, that driveway would be to
7 the right of the stop sign; is that correct?

8 A. Correct.

9 Q. If we looked at -- looking -- as we're looking
10 in this photograph?

11 A. Right.

12 MR. DETRICK: All right. Step back.

13 Q. [Mr. Detrick] Now, we know that they came --
14 according to your testimony -- in September, and you
15 stopped them from cutting them because you thought it was
16 your land; is that correct?

17 A. Yes, sir.

18 Q. And then a CSX representative told you not to
19 worry about it, they weren't going to cut it; is that
20 correct?

21 A. That's right.

22 Q. Okay. Did they, later on, confirm to you that
23 the -- that CSX did own that right-of-way?

24 A. Yes, sir.

25 Q. Okay. And so that -- the trees and that stuff

1 that we've been seeing in these photographs, that was
2 owned by CSX; is that correct?

3 A. That's correct.

4 Q. And that's been confirmed to you since then?

5 A. Yeah. Yeah. Yes, sir.

6 Q. And as far as the trees and stuff there, tell us
7 what objection you actually had to them cutting it.

8 A. Well, you have to live there to know that when
9 they cut them, they took away my noise barrier.

10 MR. PURCELL: Your Honor, I object to this
11 question. I object to the witness --

12 THE COURT: All right. Sustained.

13 Again, ladies and gentlemen, it's not a proper
14 question.

15 MR. PURCELL: And at this time, I would like to
16 approach the bench --

17 THE COURT: I understand.

18 MR. PURCELL: -- for a motion.

19 THE COURT: I understand. Ladies and gentlemen
20 -- all right.

21 [Whereupon, a bench conference is held, as
22 follows]

23 MR. PURCELL: We're probably going to move for a
24 mistrial.

25 THE COURT: And I understand. I'm going to note

1 it for the record, obviously.

2 I'm going to go ahead and finish with this
3 witness, Mr. Detrick, and then we'll have a discussion.
4 Okay? But it's noted for the record.

5 MR. DETRICK: The question I was going into is
6 he had no objection other than he wanted to be paid for
7 his trees and he wanted -- this is before, now. I
8 wasn't talking about after. They wanted a barrier, for
9 sound, before, not after. That's the question.

10 THE COURT: You're not going into it.

11 MR. DETRICK: I mean, I won't ask -- that was
12 the purpose of the question.

13 THE COURT: Move on. Okay?

14 [Whereupon, bench conference concludes]

15 MR. DETRICK: That's all I have, Mr. Jackson.
16 Answer any questions they may have.

17 THE COURT: Mr. Purcell?

18 MR. PURCELL: Thank you, Your Honor.

19 CROSS-EXAMINATION

20 BY MR. PURCELL:

21 Q. Mr. Jackson, I want to make perfectly clear to
22 you that my questions deal with the condition of the
23 crossing on and before February the 3rd, 2004.

24 A. Yes, sir.

25 Q. Okay?

1 A. Yes, sir.

2 Q. Do we have that understanding that that's what
3 we're talking about?

4 A. No problem.

5 Q. And that when I talk to you about the condition
6 of the crossing or the condition of the trees, we are
7 talking about as they existed on the date of the accident
8 and before. Okay?

9 A. Yes, sir.

10 Q. And as of the date of that accident on February
11 the 3rd, 2004, those trees had been there for forty-
12 something years and nothing had ever happened; isn't that
13 right?

14 A. Correct.

15 Q. And you thought it was a safe view at that
16 crossing, didn't you, sir?

17 A. I did at one time, yes, sir.

18 Q. Yes, sir.

19 But at the time we took your deposition in May
20 the 19th of 2005, you told us it was a safe view at the
21 crossing, didn't you, sir?

22 A. If you say I did, then I did.

23 Q. And you believed that, when you made that
24 statement under oath, didn't you, Mr. Jackson?

25 A. Yes, sir.

1 Q. And it was a safe crossing, and the reason that
2 you felt like it was a safe crossing, Mr. Jackson, is that
3 you knew of no grade-crossing accident that had ever
4 happened in those forty years; isn't that right, sir?

5 A. Not to my knowledge, no, sir.

6 Q. Yes, sir.

7 And, as a matter of fact, there is traffic on
8 Hill Road that services the Dixie Poly Drum plant, isn't
9 there, sir?

10 A. Correct.

11 Q. And there are eighteen-wheelers that go across
12 that track. And, as I say, all my questions are as of
13 February 3rd, 2004. And there were eighteen-wheelers
14 going across that track, weren't there, sir?

15 A. Yes, sir.

16 Q. Sixty-five-foot trucks; right, sir?

17 A. Yes, sir.

18 Q. And those eighteen-wheelers never had any
19 problem at that crossing, did they, sir?

20 A. No, sir.

21 Q. And you've never had any problems with the trees
22 blocking the view of the train approaching when you go to
23 the stop sign where you stopped, do you?

24 A. I never had, no, sir.

25 Q. Never had a problem.

1 And from the stop sign, you could see the rail
2 with no problem, isn't that true, sir?

3 A. Some of it.

4 Q. Okay. And depending on what time of the year it
5 was; right, sir?

6 A. That's true, too.

7 Q. And in February of 2004, of course, the trees --
8 the leaves were off the trees and you could see various
9 views through the trees, couldn't you, sir?

10 A. Yes, sir.

11 Q. And as a matter of fact, if you looked at that
12 picture that was taken from about sixty feet -- from the
13 ones Mr. Detrick showed -- you could see windows -- you
14 can see windows where you can see the trees; isn't that
15 right sir?

16 A. [No response]

17 Q. Take a look at sixty feet there, if you would,
18 please, Mr. Jackson.

19 A. [Witness reviews documents]

20 Q. That's at sixty feet. You could see the train
21 coming through the trees there, if you looked, couldn't
22 you, sir?

23 A. Yes, sir, you could.

24 Q. And if you go to fifty feet, you can see -- you
25 have opportunities to see, as well, can't you?

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1 A. You've got some openings in there.

2 Q. Yes.

3 In addition to that, these photographs are very
4 narrow by their nature, aren't they, Mr. Jackson?

5 A. Yes, sir.

6 Q. And they don't show what view is available to
7 you as you come closer to the crossing of the track, do
8 they, sir?

9 A. No, sir.

10 Q. Okay. Very good.

11 Let's see. I think I would like to show you a
12 different group of photographs, since you're standing now,
13 Mr. Jackson, and get the jury oriented to your house.

14 And these were the same photographs we showed
15 you at your deposition?

16 A. Right.

17 Q. And if you look there at photograph number one
18 from your deposition, that's your sister's mailbox there
19 on the right, isn't it?

20 A. Correct.

21 Q. And two takes us closer to Jackson Road as we're
22 traveling down --

23 A. Hill Road.

24 Q. -- Hill Road. I'm sorry?

25 A. Hill Road.

1 Q. That -- to the Jackson Estates --

2 A. Right.

3 Q. -- as we travel down Hill Road.

4 Then number three is a picture taken from Dixie
5 Poly Drive. And that would be your house there in the
6 background; correct, sir?

7 A. Yes, sir.

8 Q. And then on number four we're still on Hill
9 Road, but we're moving closer to the railroad crossing.
10 And that warning sign was there on February the 3rd, 2004,
11 wasn't it, sir?

12 A. Yes, sir.

13 Q. And if you move closer and look at photograph
14 number five from your deposition, the railroad-crossing
15 sign was there on February the 3rd, 2004, wasn't it, sir?

16 A. Yes, sir.

17 Q. And that's your driveway there to the right on
18 that photograph; isn't that right, sir?

19 A. Yes, sir.

20 Q. And then if you look closer at photograph number
21 six from your deposition, you see the line there is not a
22 stop line, is it, sir? It's part of the railroad-crossing
23 head sign, isn't it?

24 A. Right.

25 Q. And you can see the two stop lines ahead, as

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1 well as the cross-bucks, can't you, sir?

2 A. Yes, sir.

3 Q. And then look at photograph number seven. That
4 would be your driveway coming into Hill Road, wouldn't it,
5 sir?

6 A. That's correct.

7 Q. And then if you look at number eight, that would
8 be the crossing sign, as well as the stop line there,
9 isn't it, sir?

10 A. Yes, sir.

11 Q. And then look at nine. That's toward 95,
12 looking close to the -- close to the road, isn't it, sir?

13 A. Yes, sir.

14 Q. And you can see all the way down to 95 from
15 there, can't you?

16 A. From the stripe?

17 Q. Yes, sir.

18 A. Yes.

19 Q. And you can see -- then those trees on the right
20 are the ones we've been referring to today?

21 A. That's correct.

22 Q. And that was the way it looked on February the
23 3rd, 2004, wasn't it, sir?

24 A. Yes, sir.

25 Q. All right. Then if you look at photograph

1 number ten from your deposition, that is a wider view just
2 showing your house there on the right --

3 A. Yes, sir.

4 Q. -- through the trees; right, sir?

5 A. Yes, sir.

6 Q. And if you look at number twelve, that would be
7 your house looking from the railroad track?

8 A. Yes, sir.

9 Q. That's your trailer through the trees, isn't
10 it --

11 A. Yes, sir.

12 Q. -- isn't it, sir?

13 Let's go to number twenty-one. And that would
14 be the way the crossing looked, as taken from the railroad
15 tracks, on the date of the accident, wasn't it, sir?

16 A. Yes, sir.

17 Q. It was a clear day that day, February 3rd, 2004,
18 wasn't it?

19 A. Yes, sir, it was.

20 Q. It wasn't cloudy?

21 A. No, sir.

22 Q. Those photographs that were shown you earlier
23 were kind of taken on a cloudy or overcast day, it
24 appears. It wasn't that kind of day was it?

25 A. No. It was a pretty day that day.

1 Q. All right, sir. Let's go, then, to some
2 photographs that are stills of a video that Mr. Crews made
3 that you were shown on the date of your deposition. And
4 they're a little bit grainy, but I think you can see the
5 photograph that was taken from eighteen feet.

6 MR. PURCELL: That one. Actually, I think that
7 was taken at two feet. I think if you go back to the
8 next photograph, Bob. They go sequentially, starting
9 at two feet. Just go, if you would, to eighteen feet.
10 There we go.

11 Q. [Mr. Purcell] And that would be what you would
12 be able to see at eighteen feet; right?

13 A. Yes, sir.

14 Q. And your front bumper at eleven feet -- not on
15 the stop line. But if you feet -- if you sit seven feet
16 back, you would be able to have that view at eighteen
17 feet, wouldn't you?

18 A. Yes, sir.

19 Q. And tell the members of the jury what that
20 bridge is in the background there.

21 A. Oh. That's I-95.

22 Q. Okay. So if you stop at the stop line, you can
23 see it clearly? You can see 95 clearly?

24 MR. PARKER: I object. That's not factual,
25 because the stop line in front of it is nine feet nine

1 inches. Mr. Purcell knows that.

2 MR. PURCELL: That's true. I said if you stop
3 at the back at eleven feet -- it goes from nine to
4 eleven -- excuse me, Your Honor. It goes from nine
5 feet to eleven feet. And then if you put your bumper
6 right at the time, that's eleven feet, and then you sit
7 seven feet back in a Ford Explorer, meaning eighteen
8 feet. And my question is --

9 THE COURT: I want to make sure it's clear for
10 Mr. Jackson.

11 MR. PURCELL: Yes, Your Honor.

12 MR. PARKER: He doesn't know what these
13 measurements are. But if he stopped at the back of the
14 stop line he would have stopped at eleven nine, plus
15 seven-and-a-half feet, which is not in that photograph.

16 MR. PURCELL: I think that's eighteen feet.

17 But, anyway, I think it's a fair question to the
18 witness, Your Honor.

19 THE COURT: All right. You may want to repeat
20 the question for Mr. Jackson --

21 THE WITNESS: Please.

22 THE COURT: -- unless he can go ahead and answer
23 it.

24 Q. [Mr. Purcell] All right. Well, let's say if
25 you're eight -- if you're sitting right there --

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1 A. Okay.

2 Q. -- and say your front bumper is at eleven feet,
3 or on the stop line between nine and eleven feet, and you
4 add seven feet from that distance to get eighteen feet,
5 you would agree that you can see the I-95 bridge, can't
6 you?

7 A. Am I looking at feet back now?

8 Q. Yes, sir.

9 A. Yes, you can see it.

10 Q. As a matter of fact, you can see all the way to
11 the I-95 overpass at that view, can't you? Eighteen feet?

12 A. Yes, sir.

13 Q. And that was the way it looked on February the
14 3rd, or let's say February the 6th, the date of Mr. Crews'
15 videotape; right, sir?

16 A. Yes, sir

17 Q. And the I-95 overpass is over 2200 feet from the
18 crossing, isn't it, sir?

19 A. I wouldn't know that, now.

20 Q. Okay. Well, it's about half a mile, isn't it?

21 A. I would say every bit of it.

22 Q. Okay.

23 A. I've walked it.

24 Q. Okay. So it's every bit of a half mile to the
25 point that you could -- you could even see a train coming

1 from a half mile, couldn't you?

2 A. Yes, sir.

3 Q. All right, sir. And that's why you stop there,
4 isn't it?

5 A. Yes, sir.

6 MR. PURCELL: All right, sir. I think you can
7 resume the stand now, Mr. Jackson.

8 THE WITNESS: Thank you, sir.

9 MR. PURCELL: I don't think I'm going to have
10 some other -- any other photographs for you.

11 [Whereupon, the witness re-takes the witness
12 stand]

13 Q. [Mr. Purcell] Now, on September -- let me show
14 one other photograph. Let's -- in view of the objection
15 that was raised about eighteen feet, let me take you to
16 the photograph that you previously looked at and let's see
17 if we can go two feet farther back, to twenty feet. And
18 you can still see the I-95 overpass at twenty feet, can't
19 you, sir?

20 A. That's twenty feet there?

21 Q. Yes, sir.

22 A. Yes, you can see it.

23 Q. All right, sir. Very good. Thank you very
24 much, Mr. Jackson.

25 Let me direct your attention, then, to the 2003

1 cutting of the other quadrants. You know what I mean by
2 quadrants? I mean other parts of the crossing at Hill
3 Road by the --

4 A. On my side?

5 Q. I'm talking about the other three quadrants.
6 I'm talking about 2003, about the time of -- which
7 festival was it?

8 A. Shrimp.

9 Q. The Shrimp Festival?

10 A. Yes, sir.

11 Q. Well, they were cutting across the road on the
12 Dixie Poly Drive --

13 A. Correct.

14 Q. -- side; right?

15 A. Correct.

16 Q. And you didn't go down there and -- well, you
17 expressed yourself forcefully; right?

18 A. Well, I wouldn't say forcefully. My language
19 wasn't too good, but --

20 Q. All right, sir. Well, I think you said you were
21 raising hell; correct?

22 A. Exactly.

23 Q. And you felt very strongly about your position,
24 didn't you, sir?

25 A. Yes, sir.

1 Q. And you felt strongly about your position when
2 you spoke to Mr. Poston, whom you knew; right?

3 A. Yes, sir. I wanted to know what was going on.

4 Q. Right.

5 And you were convinced that those trees belonged
6 to you. Not only did they belong to you, but that had --
7 you and your family had actually planted some of them;
8 right?

9 A. Yes, sir.

10 Q. And they had been there for forty years only --
11 even though you had only been living there about fifteen
12 or so; right?

13 A. Me, yes, sir.

14 Q. Okay. But you knew about the trees, you knew
15 about the property, because you had been going there for
16 more than the time that you had been living there; isn't
17 that right?

18 A. Yes, sir.

19 Q. And some of those trees even had boards in them?

20 A. Yeah. I built a fort in there when I was a boy.

21 Q. All right. So you knew about the property for
22 that long, didn't you, sir?

23 A. [No response]

24 Q. And the railroad track had been along there for
25 the forty years preceding the February 3rd, 2004 accident,

1 hadn't it, sir?

2 A. Been there all of my life.

3 Q. All right, sir. I want to direct your attention
4 to the time that you came up on the accident, after it had
5 occurred, and met the people there at the crossing. Now,
6 can you tell us whether the train, when you arrived at the
7 scene, was blocking the crossing or not, Mr. Jackson?

8 A. Definitely.

9 Q. Definitely blocking --

10 A. Yes, sir.

11 Q. -- the crossing?

12 Now, it's fair to say that your attention was
13 focused on the accident and not where the train stopped?

14 A. Correct.

15 Q. You were concerned about giving whatever aid you
16 could to the people at the scene; right?

17 A. That's correct.

18 Q. Do you know Dusty Biser?

19 A. I sure do.

20 Q. Was he the one you spoke with there at the --

21 A. No, sir.

22 Q. -- at the railroad crossing?

23 A. No, sir.

24 Q. And the focus of your thoughts, and that sort of
25 thing, was not the train or the train operations or the

1 stopping point, or any of those things, but what had
2 happened at the accident scene; isn't that right, sir?

3 A. That is correct.

4 Q. And you know Chief Hagy, don't you?

5 A. Oh. Yes, sir.

6 Q. And you weren't involved in any investigation of
7 this incident, were you, sir?

8 A. No, sir.

9 Q. And you would certainly defer to Chief Hagy
10 about accident distances of vehicles, and stopping,
11 wouldn't you?

12 MR. DETRICK: Your Honor, I object to that.

13 THE COURT: Basis?

14 MR. DETRICK: Pitting one witness against the
15 other. He's already testified what his knowledge is.

16 MR. PURCELL: I don't see that as a basis for an
17 objection.

18 THE COURT: All right. Overruled.

19 You can go ahead and ask it, Mr. Purcell.

20 Q. [Mr. Purcell] You know Chief Hagy, and you know
21 that he investigates accidents in your community, don't
22 you?

23 A. Yes, sir.

24 Q. And you would defer to him on accident
25 investigations, of this accident or any other, wouldn't

1 you --

2 A. Yes, sir.

3 Q. -- over yours, because you're not a trained
4 accident investigator?

5 A. That's correct.

6 MR. PURCELL: Thank you, Mr. Jackson.

7 THE COURT: Any redirect, Mr. Detrick?

8 MR. DETRICK: Yes, ma'am. I've got a few
9 questions.

10 MR. PURCELL: Is Mr. McLeod going to get a turn?

11 THE COURT: I apologize, Mr. McLeod. You're
12 over there. And I apologize.

13 Would you please answer any questions --

14 MR. MCLEOD: No questions, Your Honor. I'm
15 accustomed to dragging along.

16 THE COURT: Mr. Detrick?

17 REDIRECT EXAMINATION

18 BY MR. DETRICK:

19 Q. Mr. Jackson, I just want it to be clear. Now,
20 all of the questions that you were asked by -- all your
21 answers have been before February 3rd, 2004; is that not
22 correct?

23 A. Yes, sir.

24 Q. Okay. Now, as far as the -- I think that Mr.
25 Purcell has shown you some photographs. I think it's

1 sixty feet. You get to the wrong place in that sixty
2 feet, you can't see nothing but trees; isn't that right?

3 MR. PURCELL: I object to the form of the
4 question as leading.

5 MR. DETRICK: Okay.

6 THE COURT: Okay. Again, gentleman, let's try
7 not to lead.

8 Q. [Mr. Detrick] As far as where you could see,
9 does it depend upon where you're actually sitting or your
10 car is?

11 A. That has a lot to do with it, you know, because
12 there's potholes in the trees and so forth, you know,
13 where you can see some of the train here, and some of it
14 there.

15 Q. And I believe he showed you one photograph, and
16 he had it where it looked like we were looking straight
17 down where the white line was. I don't remember what
18 exhibit number it was. Do you remember that photograph --

19 A. Yes, sir, I --

20 Q. -- he showed you?

21 A. Yes, sir, I remember it.

22 Q. And if you're sitting there where he was showing
23 you there; where would your actual bumper be?

24 A. Right close to the railroad.

25 Q. Right almost on the track --

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1 A. Yes, sir.

2 Q. -- if not on the track?

3 MR. PURCELL: Object to the form of the
4 question. It's leading.

5 THE COURT: Okay. Let's not lead him, Mr.
6 Detrick.

7 Q. [Mr. Detrick] Where would it be?

8 A. Close to the railroad track.

9 Q. Okay. Let's go -- he also asked you some
10 questions about the quadrants where they had been cutting
11 before. Remember those questions?

12 A. Yeah. I don't know nothing about no quadrants.

13 Q. Well, the cutting they had done before where
14 they got to your side and you stopped them.

15 A. That's a whole lot easier.

16 MR. DETRICK: If you would, Felicia, find this
17 other photograph. That's the ones I keep on my --

18 [Whereupon, Mr. Detrick and Ms. Gerrard confer]

19 MR. DETRICK: All right. Come on, Mr. Jackson.

20 [Whereupon, the witness complies]

21 MR. DETRICK: This, I believe, is Exhibit Number
22 22, for the record, Your Honor.

23 Q. [Mr. Detrick] And do you recognize that?

24 A. Yeah. That's one of those big oaks they cut
25 down.

1 Q. All right. Now, this is on the other -- this is
2 on --

3 A. No. That's the Poly Drum side.

4 Q. That's right.

5 A. Yeah.

6 Q. That's on the Poly Drum side.

7 A. Right.

8 Q. And is that the way it looked prior to February
9 3rd, 2004, on that particular -- to the Poly -- on the
10 Poly Drum side?

11 A. Yes, sir. They had already cut that.

12 Q. Okay. And they also -- and they cut -- they
13 left those trees up there at the end that's shown in that
14 photograph, didn't they?

15 A. Yes, sir.

16 MR. PURCELL: Objection to leading.

17 THE COURT: Mr. Detrick, don't lead.

18 MR. DETRICK: And go through here. Let's go
19 through the other -- have you got anymore photographs?

20 MS. GERRARD: No.

21 MR. DETRICK: That's the only ones?

22 [Whereupon, Mr. Detrick and Ms. Gerrard confer]

23 Q. [Mr. Detrick] But that's the way it looked
24 prior to -- on the Poly Drum side, and that's -- is that
25 another view of it?

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1 MR. PURCELL: Objection, leading.

2 Q. [Mr. Detrick] What does that show? That's on
3 the Poly Drum side?

4 A. Yes, sir. The same.

5 Q. Does that look like it?

6 A. Same.

7 MR. DETRICK: Go ahead, Felicia.

8 A. The same.

9 Q. [Mr. Detrick] Do they look --

10 A. The same.

11 Q. Is that an accurate photograph?

12 A. Yeah. Correct.

13 MR. DETRICK: Okay. That's it. You can go on
14 back up.

15 [Whereupon, the witness complies]

16 MR. DETRICK: Your Honor, for the record, that
17 was Exhibits 22 through 25.

18 THE COURT: Thank you.

19 Q. [Mr. Detrick] You were questioned in your
20 deposition. I think Mr. Purcell was asking you about it
21 was a safe crossing. You said that was your opinion then.
22 What is your opinion now about it?

23 A. I --

24 MR. PURCELL: Objection.

25 Q. [Mr. Detrick] -- on February 3rd, 2004?

1 THE COURT: Hold on a second. Objection?

2 MR. PURCELL: Objection, Your Honor.

3 THE COURT: Basis?

4 MR. PURCELL: Basis is February 3, 2004

5 accident. Testimony was taken in May. Anything that
6 happened subsequent to that, that changed his opinion,
7 is not relevant, germane. He's been living there forty
8 years, or he's been familiar with it for forty years.
9 He expressed that opinion in May as to the condition of
10 the crossing in February the 4th -- I'm sorry --
11 February the 3rd, 2003 [sic]. He's not been shown to
12 be an expert in highway traffic engineering or any
13 other subject that --

14 THE COURT: Mr. Purcell, respectfully, sir,
15 overruled. He can give his opinion, and you can
16 cross-examine him and impeach him on any change.

17 THE WITNESS: Repeat the question, please.

18 Q. [Mr. Detrick] We're talking about your opinion
19 prior to February 3rd, 2004. Now, your opinion about
20 whether or not --

21 A. I thought it was a safe crossing, until I saw
22 that little girl slumped over in the seat of that truck.
23 That changed my mind about it.

24 MR. DETRICK: That's all the questions I have.

25 Thank you.

1 THE COURT: Mr. Purcell?

2 MR. PURCELL: Thank you, Your Honor.

3 RECROSS-EXAMINATION

4 BY MR. PURCELL:

5 Q. Mr. Jackson, your deposition was taken in May --

6 A. Yes, sir.

7 Q. -- of 2005. And at page 19 -- I'm sorry. Yes,
8 page 19, line 21. You remember us being there taking your
9 deposition, don't you?

10 A. Very well.

11 Q. And you told us the truth there, didn't you?

12 A. I hope I did.

13 Q. Okay. And go to the next page, or the next page
14 -- let's see. Page -- and you said --

15 MR. POSTON: Page 20.

16 MR. PURCELL: Yes, 20.

17 Q. [Mr. Purcell] -- that you thought it was a safe
18 view at that crossing; isn't that right, Mr. Jackson?

19 A. Yes, sir. I guess I did, if it's there.

20 Q. Okay. And that was in May, wasn't it?

21 A. I'm not sure of the time, month, or whatever.

22 Q. Well, let me ask you this, Mr. Jackson. If you
23 stopped at the stop bar --

24 A. The stripe?

25 Q. White line. Yes, sir. I'm sorry.

1 -- the stop line, the trees aren't an issue at
2 all, are they?

3 A. You can see all the way down to I-95.

4 MR. PURCELL: Thank you, sir.

5 MR. MCLEOD: No questions, Your Honor.

6 THE COURT: Thank you, sir. Mr. Detrick?

7 MR. DETRICK: Mr. Jackson --

8 THE COURT: Are you done, Mr. Purcell?

9 MR. PURCELL: Yes, Your Honor.

10 THE COURT: I presumed. Okay.

11 MR. DETRICK: I think Mr. McLeod said he's got
12 no questions.

13 THE COURT: I saw that one.

14 FURTHER REDIRECT EXAMINATION

15 BY MR. DETRICK:

16 Q. And, now, if you go farther back away from that
17 stop line, then your view is not good, is it?

18 A. No. It's grown back up.

19 MR. DETRICK: That's all I have.

20 THE COURT: Anything further? All right. Mr.
21 McLeod?

22 MR. MCLEOD: Nothing, Your Honor.

23 THE COURT: May Mr. Jackson step down now,
24 y'all? Any objection to him being excused from anyone?

25 MR. PURCELL: No, Your Honor.

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1 THE COURT: All right. You may be excused, Mr.
2 Jackson. Thank you, sir.

3 THE WITNESS: I can go home?

4 THE COURT: You may go home, sir.

5 THE WITNESS: Thank you. Thank you, Judge.

6 THE COURT: Go home. Thank you, sir.

7 [Whereupon, the witness is excused and exits the
8 witness stand]

9 THE COURT: Y'all come here just very briefly.

10 [Whereupon, an off-the-record bench conference
11 is held]

12 THE COURT: Ladies and gentlemen of the jury, at
13 this time we are going to go ahead and take a lunch
14 break. It is almost quarter to 2:00, and I think now
15 is a good time. What I'm going to do is I'm going to
16 ask, ladies and gentlemen, that you be back at right at
17 three o'clock. We're breaking a little late for lunch
18 today. And I will tell you that normally we are going
19 to try to break somewhere between 12:30 and 1:00 every
20 day. We'll try to take about an hour lunch break.

21 There are a few matters that I need to take up with
22 these attorneys over the lunch break today, though, so
23 I don't want you sitting and waiting, if I don't have
24 to. So with that said, ladies and gentlemen,
25 respectfully, if you'll just be back in your jury room

DIRECTION EXAMINATION

Q. Dr. Heathington, I believe when we left off yesterday you were talking about your evaluation of the crossing at Hill Road. And on Exhibit 55 we were over on the second page, I believe, and up in the area where you had gone over the daily volume of traffic, the daily volume of railroad traffic, and timetable speed, and I believe you were fixing to talk about highway speed limit.

Q: And what was the highway speed limit on Hill Road at that time?

[Whereupon, the witness complies]

THE WITNESS: I think we forgot our --

MR. PARKER: The laser pointer?

THE WITNESS: The laser pointer.

[Off the record momentarily]

A. According to 56-5-1520 of the South Carolina code, it would be fifty-five mile an hour. It's not posted for that type of road. The police report had it at

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1 thirty-mile an hour, although there was not one posted.
2 And there is an advisory speed around a curve just a
3 little piece before you get to the crossing. The advisory
4 speed is forty-five mile an hour. So as a traffic
5 engineer, I would assume that they're not asking -- well,
6 I know they're not asking you to increase your speed, so
7 the speed limit should be not more than forty-five mile an
8 hour. So reducing it from fifty-five to forty-five, as an
9 advisory, is normal.

10 Q. [Mr. Parker] All right. And I think you said
11 there were a few pedestrians?

12 A. Yes.

13 Q. And we talked about the accident. And the sight
14 distance you looked at?

15 A. Yes. There's a severe reduction in sight
16 distance.

17 Q. And that's due to the vegetation. And then you
18 say also due to head-movement limitations?

19 A. Yes.

20 Q. Would you explain that?

21 A. Whenever you're traveling down a road, the
22 normal assumption that we do in all of our calculations,
23 that you've got about a ninety-degree is the maximum
24 you're going to have as you're moving your car, of being
25 able to see. And the visibility -- even on the problem of

1 that, once you get about ten to twenty degrees beyond your
2 nose, you've got like 2200 visibility. And that's legally
3 blind in some states. It may be in South Carolina.

4 And so you take ninety degrees. Well, what
5 happens is that when you're traveling on South Carolina
6 68, which is parallel to the track, and if a train is
7 moving in the same direction that you are, it's behind
8 you, you're not going to pick up that train. So when you
9 make that turn, there's only fifty-five feet from the edge
10 of that road until you get to the track.

11 Well, even at ten mile an hour, the non-recovery
12 zone begins at seventy feet away. And you do have a stop
13 sign there. By the time you get around and turn and get
14 your head where you can have a ninety-degree head movement
15 to see that train, you're almost on the track. And if
16 you've got say a twenty-foot car or so, the time you make
17 the --

18 And so that's why this term was used in our
19 literature -- and as a practicing traffic engineer. So
20 head-movement limitations can have an impact on this
21 crossing, primarily coming from the other direction than
22 Ms. Colvin was coming.

23 Q. And that traveling on 68, those head-movement
24 limitations would be from each direction?

25 A. Yes. As long as the train is traveling in your

1 thirty-mile an hour, although there was not one posted.
2 And there is an advisory speed around a curve just a
3 little piece before you get to the crossing. The advisory
4 speed is forty-five mile an hour. So as a traffic
5 engineer, I would assume that they're not asking -- well,
6 I know they're not asking you to increase your speed, so
7 the speed limit should be not more than forty-five mile an
8 hour. So reducing it from fifty-five to forty-five, as an
9 advisory, is normal.

10 Q. [Mr. Parker] All right. And I think you said
11 there were a few pedestrians?

12 A. Yes.

13 Q. And we talked about the accident. And the sight
14 distance you looked at?

15 A. Yes. There's a severe reduction in sight
16 distance.

17 Q. And that's due to the vegetation. And then you
18 say also due to head-movement limitations?

19 A. Yes.

20 Q. Would you explain that?

21 A. Whenever you're traveling down a road, the
22 normal assumption that we do in all of our calculations,
23 that you've got about a ninety-degree is the maximum
24 you're going to have as you're moving your car, of being
25 able to see. And the visibility -- even on the problem of

1 that, once you get about ten to twenty degrees beyond your
2 nose, you've got like 2200 visibility. And that's legally
3 blind in some states. It may be in South Carolina.

4 And so you take ninety degrees. Well, what
5 happens is that when you're traveling on South Carolina
6 68, which is parallel to the track, and if a train is
7 moving in the same direction that you are, it's behind
8 you, you're not going to pick up that train. So when you
9 make that turn, there's only fifty-five feet from the edge
10 of that road until you get to the track.

11 Well, even at ten mile an hour, the non-recovery
12 zone begins at seventy feet away. And you do have a stop
13 sign there. By the time you get around and turn and get
14 your head where you can have a ninety-degree head movement
15 to see that train, you're almost on the track. And if
16 you've got say a twenty-foot car or so, the time you make
17 the --

18 And so that's why this term was used in our
19 literature -- and as a practicing traffic engineer. So
20 head-movement limitations can have an impact on this
21 crossing, primarily coming from the other direction than
22 Ms. Colvin was coming.

23 Q. And that traveling on 68, those head-movement
24 limitations would be from each direction?

25 A. Yes. As long as the train is traveling in your

1 direction, that's when you have the problems. If the
2 train is coming facing you, obviously you don't have that.

3 Q. And the next item you have on there is whether
4 you can eliminate the grade crossing. I believe you've
5 talked about that.

6 A. Yeah.

7 Q. Multiple main-line tracks, you didn't have?

8 A. Right.

9 Q. And high-speed trains with limited sight
10 distance you state you did have?

11 A. You're at fifty -- forty-nine mile an hour,
12 right at fifty, in a -- in a rural area, but you have
13 severely limited sight distances. So the train speeds
14 that you're having for that crossing, given the limitation
15 on sight distances, is very severe.

16 Q. And the --

17 A. Motor-vehicle speeds, it's partially -- you
18 would not have a moderately high ADT. You normally need
19 to get up around 1800 or so, 2,000, somewhere in that
20 neighborhood, to have a moderately high ADT. Speeds could
21 be higher than desirable if the speed is fifty-five mile
22 an hour. I did not observe anybody traveling at fifty-
23 five mile an hour for the two days I was out there. But
24 thirty-five or forty mile an hour on approach speed, you
25 could have that.

1 Q. But you also have a stop sign; is that correct?

2 A. Yes, that's correct.

3 MR. HARMON: Your Honor, I'm sorry to interrupt,
4 but you've ruled on relevant conditions at the crossing
5 in the motion in limine. We're going through a lot of
6 these, coming from the other direction, some of the
7 other things we're about to go through here, so I
8 object, based on your ruling earlier.

9 MR. PARKER: Your Honor, we believe this is
10 relevant to his evaluation of the crossing. Either he
11 doesn't evaluate the crossing from the standpoint of
12 where the collision occurred, but you have to look at
13 the entire crossing --

14 MR. HARMON: May we approach, then?

15 THE COURT: Sure.

16 [Whereupon, an off-the-record bench conference
17 is held]

18 MR. MCLEOD: Your Honor, I think we'll move,
19 also, for an objection.

20 Q. [Mr. Parker] Dr. Heathington, when we left off,
21 I believe we were down to passenger trains -- there are
22 not any -- and school buses. Did you gather information
23 on how many school buses --

24 A. Yes. That came --

25 Q. -- use the crossing?

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1 A. -- from the county supervisor, Lewis Ramsey, and
2 they had four a day during the time of the -- for that
3 school year. And it's gradually gone up over the years.

4 Q. And do hazardous-material trucks use that
5 crossing?

6 A. Yes. I would expect that to occur. There are
7 propane tanks all in the area, and obviously they have to
8 have deliveries made to them.

9 Large trucks are coming across. I observed them
10 while I was there. I have photographs of them. So you
11 have some large tractor-trailer trucks --

12 Q. And then you have a --

13 A. -- using that crossing.

14 Q. Did you look and see whether they had an
15 accident history there?

16 A. They did not. No official records show that
17 there's been prior accidents there.

18 Q. And it's unknown whether or not there was a
19 diagnostic team review?

20 A. I have no information one way or the other on
21 that.

22 Q. And then you found there was a combination of
23 conditions at the crossing?

24 A. Oh, yes. You've got geometrics, and sight
25 distances, and things of this nature. All can come

1 together to create a very serious safety problem.

2 Q. And did you also look at the geometric
3 configurations of the crossing?

4 A. Yes, sir.

5 MR. PARKER: Go to the next one.

6 Q. [MR. PARKER] And if you would go through the
7 geometric configurations.

8 A. You have horizontal curves. That's just simply
9 horizontally. And you have some of those. You have some
10 on both approaches. That's where I was talking about the
11 advisory speed curve to drop the speed to forty-five mile
12 an hour a little bit upstream from that. And of course
13 you have the turning movements, which are essentially
14 ninety-degree turning movements from the parallel roadway,
15 which is South Carolina 68. Then you have vertical
16 curves. We have the numbers calculated and they're over
17 on a table, on a board, I did. Crossing angle is
18 approximately eighty-eight degrees. It's only at the
19 track. And then, see, if you're coming in from the
20 parallel road and other parts, it'll be more than that,
21 but right at the track it's approximately eighty-eight
22 degrees.

23 Crossing surface is pretty rough. It's due to
24 the hump in the roadway over the track.

25 With the roadway, the effective width -- and you

1 measure the effective width before you look to see where
2 tire tracks and stuff normally are. It was about sixteen
3 feet. The crossing width was about -- effective width was
4 about twenty-one feet eight inches.

5 There was no paved shoulders for lateral
6 movement. You have to go in the dirt. If you get up
7 close to the crossing, you drop off in some drop-offs.

8 Sight distances are severely limited just due to
9 vegetation, head movement limitations. And that's all
10 done in the exhibits that we have in a report.

11 Intersecting roadways: yes, there's some on
12 both sides. You have South Carolina 68 on one side, you
13 have a driveway going to a house on the other side, you
14 have the driveway going into the employment location where
15 this gentleman was picked up.

16 You have steep drop-offs near the track. If you
17 get over too close you could drop off in that, and you
18 won't get out unless somebody pulls you out.

19 I don't know if -- I have no record of whether
20 or not FRA ever inspected the track to see if it had the
21 characteristics to comply with the timetable speeds
22 established by the railroad. The Federal Railroad
23 Administration has standards for that. I don't know if
24 that track complies with it or not, one way or another.

25 Complex driving requirements, yes. You have

1 multitasking that's required of drivers that's due to the
2 geometrics of the roadway system and to the location of
3 the stop signs and stop lines and things of this nature.
4 It's not a simple driving task on that crossing.

5 Safety problems at night, yes, you would have --
6 Well, let me go back to visual clutter. I'm
7 sorry. Yes. You have a large number of signs in
8 different locations, and so forth. You also have some
9 motor vehicles on SC-68 that you may be paying attention
10 to, also. Anything that would attract the attention of a
11 motor vehicle operator and get their eyes looking at that,
12 it would be visual clutter. In other words, it's pulling
13 the driver -- competing for the driver's attention, I
14 should say, on this sort of thing.

15 Safety problems at night, yes. You wouldn't be
16 able to pick up the headlight of the train, depending upon
17 the time-space relationship of the motor vehicle and the
18 train, until it got very close to the crossing.

19 Traffic control devices at the track were
20 cross-buck signs and stop signs. There were advance
21 warning signs or advance pavement markings. There was no
22 centerline markings. And you would not anticipate that.
23 When you only got about sixteen feet wide, people have to
24 take up more than eight feet in a lane, normally. And so
25 that's -- you would create problems by putting it in, even

1 though that's what you would like to have.

2 Center line markings, no; no-passing markings,
3 no; stop line, yes; stop-ahead sign, yes.

4 I did not observe any conflicting or nonstandard
5 traffic-control devices. That means is there something
6 there that the MUTCD does not recognize, a type of sign or
7 something of this nature. Sometimes we will see maybe a
8 stop sign that's not an octagon shape, red, white letters
9 and so forth, or something else, and -- but I didn't
10 observe any of those.

11 Condition of the traffic-control devices: they
12 were fair. They were very inappropriate, in dangerous
13 locations. I mean, that was in my opinion very, very bad.

14 Q. And that is the what -- what was very, very bad?

15 A. Well, the stop sign. I have no idea why that
16 was done at all. The stop line was not correctly placed,
17 according to the MUTCD, and which are the -- the MUTCD
18 follows, normally, the traffic regulations. And so those
19 were out of place and in my opinion placed a very
20 difficult driving maneuver on the part of the motor
21 vehicle operator.

22 There were whistle posts. One was fifteen
23 forty-four feet northwest of the crossing. That was from
24 where the train was coming from. And the other one is
25 fourteen eighty-six feet southeast of the crossing, and

1 that was to the driver's left on that.

2 Q. The whistle post is where the locomotive
3 engineer is required to start blowing the horn on the
4 locomotive?

5 A. Yes. That's where it gives -- it's like an
6 advance-warning sign to a motor vehicle operator. It
7 warns them of something. And so it tells them a crossing
8 is coming up, and that's when they start exercising the
9 whistle-blowing.

10 Q. Now, did you evaluate the sight distance at the
11 crossing?

12 A. Yes, sir.

13 Q. I've got Exhibit 59 -- and I think we can
14 probably hold it up here where the jury can see it -- and
15 would like for you to explain to the jury what you've done
16 with Exhibit 59.

17 A. Can I be over in this area?

18 Q. Yeah, that's fine.

19 A. If you're looking at this, it's hard to see.
20 But this is the road on which Ms. Colvin approached the
21 track. This is the track going up and down this way here.
22 And South Carolina 68 is over here on this side, running
23 roughly parallel to the track. Well, we went through and
24 we calculated what the available sight distance would be
25 at the time of the accident in question. And we took

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1 photographs that had been taken, and things of this
2 nature, and told the surveyor that he was to put those
3 trees back in, from the determination going to stumps or
4 whatever --

5 MR. HARMON: Excuse me, Your Honor.

6 A. -- different ways he had.

7 MR. HARMON: Excuse me, Your Honor. Could we
8 have a sidebar?

9 THE COURT: Yes.

10 [Whereupon, an off-the-record bench conference
11 is held]

12 Q. [Mr. Parker] Dr. Heathington, you had -- a
13 survey was done. And in order to enable you to do this
14 sight distance, the surveyor put the trees on the survey?

15 A. Yes. We told them to put all the trees,
16 everything that was there at the time of the accident.
17 Just go -- we tell that to every surveyor, just talk with
18 people in the area and so forth and make sure that
19 everything is as close as it possibly could be at the time
20 of the accident. And then from that, then you have an
21 accurate layout of what that crossing looks like to scale.

22 This surveyor we had, it was done at one inch
23 equals sixty feet. So we went back and we got several
24 determinations. We go back to the -- the actual speed
25 limit, fifty-five mile an hour. I don't think anybody is

1 going to be driving that fast, personally, there. But we
2 calculated it anyway, and we calculated it down at like
3 forty, thirty, and so on, down. We calculated it at the
4 stop sign. And we calculated it if you had stopped
5 fifteen feet from the near rail, under the AASHTO
6 standards, and we actually -- we did that, also.

7 And to get those numbers now of each one to what
8 is required, and so forth on this, will be -- the solid
9 lines will be what is required. And you can't hardly see
10 on this the dash lines. But that's what's available.
11 That's what you can see from those different points in
12 here. And if we could go to the table that has the
13 numbers on it, then we can show for each one --

14 By the way, if I might mention one more thing.
15 That's the north quadrant when we look at this table; and
16 that's the south quadrant; that would be the east
17 quadrant; and that would be the west quadrant. And that's
18 how we refer to them in the table that we show.

19 MR. PARKER: Let's put up Exhibit 56.

20 THE WITNESS: No, that's --

21 MR. PARKER: That's the AASHTO. Do you want --

22 THE WITNESS: I want the -- I guess DOT. The
23 same thing, but get the USDOT.

24 MR. PARKER: 57.

25 THE WITNESS: There we go. That's easier to

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1 read.

2 A. When you look at what's required, these numbers
3 along the bottom --

4 MR. PARKER: Ken, can you step up? I don't
5 think the people down on this side can see you.

6 THE WITNESS: Oh. Okay. I don't think we have
7 that there right now.

8 MR. PARKER: Okay.

9 A. These numbers along the bottom is defined as the
10 beginning of the non-recovery zones for certain speeds.
11 As an example, the beginning of the non-recovery zone for
12 a ten mile an hour motor vehicle speed is seventy feet;
13 the beginning of the non-recovery zone at twenty mile an
14 hour, for a twenty-mile-an-hour vehicle, is 135 feet; for
15 thirty mile an hour, two twenty-five; forty mile an hour,
16 three forty; for fifty mile an hour, four ninety; for
17 sixty mile an hour, six sixty; so on, up.

18 Now, these numbers inside here are called the
19 clearance intervals. Let me go back one second here. If
20 a person can detect a train at this point, that gives that
21 person the ability to go through two-and-a-half seconds of
22 perception-reaction time, which is what has been used for
23 years, although a lot of people argue it from research
24 that it should be longer than that. But that's been used
25 by the federal government for years, two-and-a-half

1 seconds of perception-reaction time, skid the distance to
2 a stop from -- if it's ten mile an hour, skid the distance
3 to a stop and your front bumper will end up at fifteen
4 feet from the nearest rail. All of these numbers have the
5 drivers ending at fifteen feet from the nearest rail.
6 That's the standards that you go by.

7 Now, what it also says, if you're doing thirty
8 mile an hour and a train is doing sixty and you observe
9 that train when it's 595 feet from the crossing, you can
10 technically -- as a sixty-five-foot truck, if you don't
11 slow down, you can go straight on through and your rear
12 bumper will be fifteen feet on the other side of the near
13 rail on that side. So they give you a fifteen-foot
14 interval on each side, is how all the calculations are
15 done and that sort of thing. If you're doing forty mile
16 an hour, you need to see it at three twenty-five.

17 Now, what you'll see here is because the motor
18 vehicle is going slower, you'll notice these sight
19 distances increase as the motor vehicle is traveling
20 slower, because you're not moving as fast so it takes you
21 longer to get across these distances and so forth. So in
22 this particular accident, the maximum timetable speed is
23 forty-nine mile an hour, is what you're evaluating for
24 this crossing. And then you can go -- and we did
25 calculations all the way from a stopped condition, which

1 would be fifteen feet from the near rail, all the way up
2 to about fifty-five mile an hour.

3 Q. And here we would be at zero, as a stop sign.
4 And so it would be from zero from a stopped position?

5 A. Yes.

6 Q. And that stopped position is fifteen feet from
7 the near rail, meaning the closest rail?

8 A. That's where your front bumper is. The driver,
9 under AASHTO, would be ten foot from the front bumper.
10 Which we'll use twenty-five feet.

11 If we could show, if it's available, that
12 exhibit that has the non-recovery zone and the hazard.

13 Q. We'll get to that in a while.

14 A. Okay.

15 Q. We'll come back to that.

16 A. But that explains that.

17 Q. But the zero miles per hour would be what we
18 were dealing with in the quadrant that Ms. Colvin was
19 coming from?

20 A. Yes.

21 Q. And this is -- this required sight distance is
22 for a tractor-trailer truck?

23 A. No. This is a clearance interval. This right
24 in here is where -- well, you need to see that, but if you
25 don't pick it up at this point, or where -- then you've

1 got problems. And this -- you have to look at it in this
2 way -- and I've been working over forty-five years in this
3 area -- everybody doesn't have the same perception-
4 reaction time, everybody doesn't have the same
5 acceleration. And these are not the most conservative
6 numbers that you could have. And I'm going to -- people
7 are slower than this in a lot of cases. We have a lot in
8 the literature, people I know personally who have done
9 research, that would argue that this perception-reaction
10 time should be increased all the way up to five seconds or
11 so. And that's going back to 1979. And one of my
12 associates was publishing that when I was with USDOT.

13 And so while this technically applies to sixty-
14 five-foot truck, that doesn't mean that a motor-vehicle
15 operator driving a car or pickup necessarily has a big
16 safety factor.

17 Q. But if you have -- zero miles per hour is the
18 actual -- is with a vehicle being fifteen feet from the
19 nearest rail, stopped?

20 A. If it's stopped.

21 Now, we had to take it in a different situation
22 because these stop conditions -- that's two different
23 things. But this crossing the stop sign was thirty-six
24 feet, not fifteen feet, so you've got a different
25 situation on the thing.

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1 Q. But if you stopped at this -- the chart is for
2 fifteen feet?

3 A. Yes. That's basically what this is.

4 Now, it gives you some provisions that if this
5 distance is a lot farther away, then these distances
6 increase.

7 MR. PARKER: Let's go back to 56.

8 Q. [Mr. Parker] And 56 is another -- the same
9 chart but it comes from a different source?

10 A. Yes. The equations are identical. The USDOT
11 rounds all their numbers up to five, or zero. And this is
12 AASHTO, American Association of State Highway and
13 Transportation Officials. They just put the actual number
14 in. Like you'll see sixty-nine here. USDOT puts in
15 seventy. They put 132 in here; USDOT puts 135. And what
16 we're doing, a foot or two, I mean, that's the same. The
17 equations are identical. And they tell you in the
18 handbook: we round up to the nearest five.

19 MR. PARKER: All right. Let's look at 58.

20 Q. [Mr. Parker] 58 is a sight distance chart.
21 Where did it come from?

22 A. This one came out of a -- from the operational
23 lifesaver manual of Norfolk-Southern. And it's just the
24 same thing as USDOT. It's just a repeat of that same
25 thing.

1 Q. And these sight-distance charts, are these
2 recognizing traffic engineering?

3 A. Well, that's what we do in evaluating. That's
4 what -- when you go out and have a diagnostic study,
5 that's what you use. It's --

6 Q. Why would you evaluate the crossing with a
7 sixty-five-foot truck rather than an automobile?

8 A. Well, you have trucks. I've observed probably
9 close to a sixty-five-foot truck coming across it myself
10 on this particular one. And so you don't design roadways
11 unless you have restrictions. If you wanted to restrict
12 trucks or something and say you can't have anything but a
13 fifteen-foot long vehicle, then you might do that. I've
14 never seen that done. But it's always you design on
15 whatever your vehicles are.

16 Now, these are not designed for when you get
17 permits to have wide loads or long loads or something.
18 These are not designed for those.

19 MR. PARKER: Let's next go to Exhibit 60.

20 Q. [Mr. Parker] And did you chart on Exhibit 60
21 the available -- required and available sight distances?

22 A. Yes, sir.

23 Q. And if you will go to --

24 A. This is the north quadrant, which I showed a
25 while ago. Actually, that was the quadrant in which the

1 accident in question occurred. If you're doing fifty mile
2 an hour, the driver's position should be 490 feet at the
3 beginning of the non-recovery zone, train required is 554
4 feet. You can actually see eighteen feet down the track
5 from that position. So you've got a deficiency of 96.8
6 percent deficiency. Obviously, that's high. My
7 experience over the years has been you might could have a
8 five percent or ten percent deficiency and not be real
9 serious, but when you get up above about twenty, twenty-
10 five percent, then that's when I start seeing accidents
11 occur, in my lifetime in working.

12 At forty mile an hour those are the driver
13 positions and what's required. You've got a 96.3 percent
14 deficiency; thirty mile an hour, you've got a 95.7
15 deficiency; at twenty mile an hour, you got a 94.9; at ten
16 mile an hour, you got a 94.2. If you are stopped at a
17 stop sign, you got a 93.5 percent deficiency. If you're
18 stopped with the front bumper fifteen foot to the near
19 rail, you got a 68.8 percent deficiency.

20 And in the east quadrant, which would be the one
21 to the left, you've got similar sort of things. And down
22 from a stopped position, it's a little better to the left,
23 it's 35.2.

24 Now, if we can go to the other two.

25 If you go to the south quadrant you've got these

1 sorts of, as you can see, very high percentage -- except
2 one area in here -- of deficiency. Now, if you're
3 stopped, you're all right. The other side, if you're at a
4 stopped position you've got adequate sight distance. If
5 you look on the west, at stopped you've got -- still got
6 19.2 percent deficiency, and that's due to trees and
7 vegetation.

8 Q. In your evaluation of the crossing, was there
9 adequate sight distance in the quadrant from which Ms.
10 Colvin was coming --

11 MR. PARKER: Let's go back to the other page.

12 Q. [Mr. Parker] -- for her to be able to see and
13 avoid a train?

14 A. With the exception of when you're stopped
15 fifteen foot from the nearest rail, you're above ninety
16 percent deficiency. I mean, that's huge. That's almost
17 like being blind. And it only dropped to sixty-eight
18 percent, even when your front bumper is fifteen feet from
19 the nearest rail, and that's because of the trees and
20 vegetation.

21 MR. PARKER: Let's put up Exhibit 61.

22 Q. [Mr. Parker] Is it necessary to have, because
23 of the fact -- and I think you testified earlier the train
24 can't stop and the train -- if you would just tell us
25 about Exhibit 61, and the relative energy in a train, and

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1 then what happens.

2 A. Well, and I've done some research in all of
3 this, including some other stuff, over the years. Trains
4 have enormous weight. And the momentum of something is
5 simply the velocity times its weight. And people, most
6 people, don't realize what kind of momentum can be
7 associated with a train, so I had the bright idea one time
8 of why don't I just compare all the different types of
9 transportation so I can show people what they might be.

10 So if you've got a forty-car train, that's two
11 engines, that's not a big train at all. That would be
12 it's weight, fully loaded. Momentum would be this, and
13 it's traveling, actually traveling -- when it's traveling
14 forty mile an hour.

15 Now, if you wanted to have a seven thirty-seven
16 three-hundred airplane, how fast would it have to be going
17 to have the same momentum as that train. That 737
18 airplane has to be doing 1687 miles an hour. A
19 tractor-trailer truck with 80,000 pounds on it, 40 tons,
20 it would have to be doing almost 5,700 miles an hour to
21 have the same momentum as the train. If you're driving a
22 1999 Lincoln Town Car, it would have to be doing right at
23 114,000 miles an hour to have the same momentum as that
24 train. And if you're on a Harley Davidson, you would have
25 to be doing almost a thousand times the speed of sound to

1 have the same momentum as that. And a SeaRay boat, 1999
2 SeaRay boat -- I did this several years ago -- you would
3 have to have 151,867 miles an hour.

4 So the point is you want whatever it takes.
5 It's very serious when you have a deviation from the
6 standards of care that we know for crossings, because the
7 consequences of being impacted by a train are horrendous.
8 And that's a real problem. You don't have fender benders,
9 normally, with a train and a car.

10 Q. Let's go to the next exhibit, which is 62. And
11 does this compare the various warning devices?

12 A. Yeah. If you go from passive to flashing
13 lights, if you have a passive crossing and you put in
14 flashing-light signals --

15 MR. HARMON: Your Honor, just to -- I'm sorry to
16 interrupt. But just to renew our objection. I
17 understand the Court's rulings for this particular
18 exhibit.

19 THE COURT: I haven't seen this exhibit before
20 now.

21 [Whereupon, an off-the-record bench conference
22 is held]

23 THE COURT: Ladies and gentlemen, at this time
24 we're going to go ahead and take just a short break so
25 I can discuss a matter of law with the attorneys.

1 duty to do it, then why -- how is this evidence
2 relevant?

3 THE COURT: There's no --

4 MR. HARMON: If we don't have a duty to put it
5 up --

6 THE COURT: I'm sorry. Go ahead.

7 MR. HARMON: I'm -- no. Please go ahead.

8 THE COURT: No, go ahead. No, you go ahead.

9 MR. HARMON: I was going to say if we don't have
10 a duty to do it, then how is the evidence relevant?
11 And so -- yeah. I mean, we can't be liable for
12 something that's not a breach of our duty.

13 MR. PARKER: Your Honor, the duty is to give
14 adequate warning at this crossing. How they do it is
15 up to CSX. They could do it in a number of ways. One,
16 they could do things to alleviate the sight-distance
17 problems. They can do all kinds of things, but their
18 duty is to provide a safe and reasonable crossing and
19 to provide adequate and safe warnings.

20 And we're not -- the jury will decide that issue
21 about what is an adequate and appropriate and non-
22 negligent warning. And this gates and lights goes to
23 that issue. That's one way they could have done it.
24 They could have given an adequate warning there by
25 posting gates and lights.

1 And the -- in the law part of it, CSX -- and
2 this is a gray area. And what the code section says is
3 that they cannot put up traffic-control devices without
4 permission of the SCDOT. They can put them up, but
5 they have to get permission. And the gray area in this
6 is of course CSX is here today claiming that the
7 crossing is the SCDOT's but really, what they normally
8 claim, is that they control the crossing two-and-a-half
9 feet outside the rail at the crossings. And that is
10 basically the appropriate railroad law in this state is
11 that -- so it is -- and the MUTCD, which is part of the
12 law, says that they have a joint responsibility at
13 railroad crossings.

14 So there is -- I think that's all accurate and
15 where we are. I agree with Mr. Harmon that the code
16 section that he quoted says that people who put up
17 traffic-control devices have to have permission.

18 THE COURT: Right.

19 MR. PARKER: It really says local authorities.
20 I don't know whether the railroad is a local authority.

21 MR. HARMON: Two things, and I think it could be
22 illustrated by Mr. Parker's argument. First of all,
23 Your Honor, you've ruled that there is no joint
24 responsibility at this crossing, in the motions in
25 limine. So, secondly, let's assume that we wanted to

1 put up gates and lights. Could we unilaterally do it?
2 And the answer under South Carolina law is no. If we
3 wanted to put it up, and even if we went to get their
4 permission and they said no, we cannot put it up. And
5 so it seems to me that suggesting -- just the
6 suggesting that it should have gates and lights
7 suggests that CSX, we could put those up. And the law
8 is contrary to that. We don't have -- you can't --
9 because we can't do it unilaterally, you can't say we
10 have a duty to do it.

11 And so creating this structure where, well,
12 even if it had -- even if we believe she was in the
13 right spot, you -- there should have been gates and
14 lights here, which is really what this is all going to.
15 All these other irrelevant conditions which the Court
16 has respectfully allowed them to testify, other
17 quadrants --

18 THE COURT: And I can tell you that obviously
19 I've let him go some. And that's what -- my concern is
20 where this all ties in, is if we're talking about this
21 being an ultra-hazardous crossing, and because of all
22 these other reasons it needs to be an active crossing,
23 that's what isn't fair. And I understand your argument
24 with that. I understand that you're trying to say that
25 because, you know, there are school buses that go over

1 it and there are, you know, tanker trucks that go over
2 it, that that is yet another thing. But it doesn't
3 play into this accident --

4 MR. HARMON: Exactly, Your Honor.

5 THE COURT: -- and what has caused this problem.

6 MR. HARMON: Exactly. So the jury is now left
7 with all these other things that have been allowed to
8 come in -- hazardous materials going across there;
9 school buses; oh, my goodness, our children are going
10 across; talking about the curve from another direction
11 -- that has nothing to do with this accident.

12 THE COURT: Well, I agree with that.

13 MR. HARMON: The jury --

14 THE COURT: And I will tell you he doesn't need
15 to be testifying, you know, from different directions,
16 what matters.

17 MR. HARMON: Yes. And so now, you know, the
18 jury is left with -- you know, really what they want
19 the jury to hear is, you know what, all this stuff
20 going on at this crossing, whether or not it affected
21 this accident, this thing needs gates and lights. And
22 that is not the law, and that's what -- why I've been
23 objecting to all of this evidence relating -- that's
24 coming from Dr. Heathington that this should be an
25 active crossing.

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1 three minutes, if y'all don't mind.

2 MR. HARMON: Yes, Your Honor.

3 THE COURT: Y'all do the same, and we'll be
4 back. Okay?

5 [Whereupon, a recess is taken from 3:29 p.m. to
6 3:39 p.m.]

7 THE COURT: All right. Y'all are standing, so I
8 presume we need to put something on the record.

9 MR. HARMON: No, we don't need to put anything
10 on the record, Your Honor.

11 What we need to do, I think, is: during the
12 break, Mr. Parker came over and talked to me about the
13 next series of exhibits that they're going to be
14 putting into evidence.

15 And they really -- and correct me if I'm wrong,
16 sir -- they really all deal with issues regarding
17 punitive damages. We have an objection to -- I don't
18 want to say all of them, but virtually all of these
19 exhibits.

20 What I propose to do, rather than bring the jury
21 in here and do this stop-and-go is that if we can just
22 put on the record our objections to these particular
23 exhibits, and then he can go through them. If the
24 Court agrees, and there's no objections, that those --
25 our objections to them are preserved.

1 THE COURT: This is Number 88?

2 MR. PARKER: Yeah. It says: [reading] the
3 problem trees and brush on the CSX right-of-way
4 interfere with train sight and sight of the motor-
5 traveling public at crossings.

6 Clearly deals with road crossings.

7 MR. PURCELL: That part of it does. But the
8 memo is also talking about the grade crossing-clearing
9 program -- which as I recall literally grinds stumps
10 down to the ground -- in that first paragraph up there.
11 It's talking about two different things: the grade
12 crossing program, and the logging program.

13 MR. PARKER: We have no disagreement about there
14 were two different programs. And that's not -- the
15 question, though, is is this document relevant on
16 punitive damages, and willfulness. It shows that, in
17 fact, they know they hadn't allocated enough money to
18 do what they say they were going to do; and that is,
19 that they knew that the trees and brush were
20 interfering with site of the motoring-traveling public.

21 MR. PURCELL: Mr. Parker has heard Mr. McMaster
22 give the answer that he gives to that explanation. He
23 doesn't like it, but he's heard it. And that's one --
24 the only explanation he's gotten, other than his
25 inferences from this document, which is they recognize

1 they didn't have enough money to do it, and they knew
2 they had to do it. The logging program was never in
3 place here. It's dissimilar, uncharged conduct. And
4 it is absolutely constitutionally impermissible to have
5 this kind of evidence against CSX and make the kind of
6 allegations that we weren't allocated money. In 1999,
7 I might add. This is -- this is preposterous.

8 THE COURT: Well, let me ask you this. Is this
9 part of what you went through in the Webb case and you
10 put up?

11 MR. PARKER: Yes, Your Honor. This document was
12 introduced in Webb.

13 THE COURT: And I don't see -- was it even
14 addressed in the opinion? I mean --

15 MR. PARKER: There was nothing about this
16 document in the opinion.

17 MR. WRAY: Well, I disagree. I don't think that
18 it was specifically mentioned by name, but I think it
19 clearly falls within the type of evidence the Court was
20 talking about.

21 THE COURT: Well, why don't you draw me straight
22 to it in the order --

23 MR. PURCELL: Next paragraph.

24 THE COURT: -- or in the opinion.

25 MR. WRAY: On page 12 of the printed opinion,

1 and it looks like page 450 in the case cite:
2 [reading] it is clear that much of the evidence of
3 acts in other jurisdictions, including CSX and other
4 railroads, and of acts unrelated to crossing safety in
5 South Carolina admitted in this trial is not
6 constitutionally permissible under Campbell.

7 And this is the type of evidence.

8 MR. PARKER: That is not correct. In the
9 Williams case, which had been affirmed in a non-
10 published opinion, the Court specifically -- when, in
11 fact, Mr. Wray argued that case, the Court specifically
12 did not rule any of this evidence inadmissible. Even
13 though the judge charged the jury incorrectly on clear
14 and convincing evidence, there was no -- in that case,
15 all of -- they made the same arguments they made in
16 Webb. And, of course, they reversed punitive damages.
17 But there has never been any ruling, by any court that
18 I'm aware of, that said any of this evidence was
19 inadmissible. If it was, we wouldn't be putting this
20 evidence up.

21 The court -- in the Webb case, I believe the
22 evidence they were talking about was the evidence of
23 other accidents in other states, which we've recognized
24 as being a problem once the State Farm v. Campbell came
25 out -- or potential problem. We didn't put that same

1 evidence in in the Williams case.

2 MR. WRAY: Well, I don't think we have a
3 disagreement. There's no case that specifically cites
4 this document by name. But that, I believe, falls
5 within the category of documents we were talking about,
6 and appealed in Webb, as improperly coming in. And the
7 Court, in the sentence I just said, said things dealing
8 with acts in other jurisdictions -- which this does --
9 including CSX and other railroads -- so it didn't get
10 around it by saying, well, it dealt with CSX -- and of
11 acts unrelated to crossing safety in South Carolina,
12 which, again, as Mr. Purcell pointed out, this doesn't
13 have anything to do with crossing safety in South
14 Carolina. It's not constitutionally permissible.

15 Now, in Williams, as Mr. Parker said, it was an
16 unpublished decision, which means it has no
17 precedential value. I don't recall specifically what
18 the Court said, if anything, about specific items of
19 evidence like this, because they reversed the punitive
20 damages award based on improper jury charge. Now, it
21 may be there is some language in there. I'm not going
22 to dispute Mr. Parker.

23 MR. PARKER: Now, they affirmed all the
24 evidentiary rulings at trial. They did not find any
25 error in the evidentiary rulings. But it's a very

1 limited opinion. It just goes down -- goes by
2 categories. They did not raise any issue on appeal
3 about this document, to start with, that I can recall,
4 even though they raised some of these documents.

5 MR. WRAY: I don't believe --

6 THE COURT: All right. Well, let's just --

7 MR. WRAY: -- that's correct.

8 THE COURT: Y'all, let's just start going
9 through them.

10 The only comment I would have on this first
11 document, Mr. Purcell, is I don't think it is specific
12 to Rincon, Georgia, because it goes down and says that:
13 we forward a listing of over 300 loggers, and they're
14 located in various states near CSX lines.

15 I mean, they're talking about more than just
16 Georgia.

17 MR. PURCELL: They're talking about more than
18 just South Carolina, too, Judge.

19 THE COURT: They are. That would include South
20 Carolina. So it's not to the exclusion of South
21 Carolina. That's my only concern.

22 Okay. Let's go to Number 65.

23 And I can tell you on these what I want to do is
24 look at them, and I want to see in the totality what
25 they are and what they're doing, because what I'm

1 guessing is your major exception is that these are
2 sixty-two documents that say the same thing over and
3 over and over again. And your argument is not only is
4 it irrelevant but it's cumulative. But I guess --

5 MR. PURCELL: Your Honor, this --

6 THE COURT: -- that's what you do. Yes?

7 MR. PURCELL: Your Honor, this operation public
8 safe crossing was a proposal -- this is a conceptual
9 document that Mr. Vaccarello proposed. It was never --

10 THE COURT: And who is Mr. Vaccarello again?

11 MR. PURCELL: Mr. Vaccarello our -- was in
12 charge of vegetation control for the company in 1999,
13 Your Honor. And this was a conceptual document he
14 proposed, operation safe crossing. He was suggesting a
15 way to handle vegetation management. It was not
16 adopted. There were many proposals, as you'll see, or
17 several proposals you'll see through the course of
18 these documents, none of which were ultimately adopted
19 except the one that addresses this crossing.

20 Now, Mr. Parker likes to use this to talk about
21 the fact that we were attempting to get the federal,
22 state, and local organizations to handle the funding
23 after we did the initial cutting. You know, it's more
24 bad acts, 404(b) kind of stuff he likes to taint and
25 infect the jury with, about what a bad corporation we

1 are and how we're going to save money with the Union
2 Pacific's Santa Fe -- I'm sorry, Union Pacific,
3 Southern Pacific railroad experience. And, of course,
4 that harkens back to the Union Pacific letter which
5 says it's a no-brainer to do this. And that's that
6 document.

7 Number 66, Your Honor, is a study of the
8 crossing-clearing program, once again in 2000. It's a
9 conceptual document. It talks about what other
10 railroad companies are doing, Burlington Northern,
11 Santa Fe, Norfolk Southern, Union-Pacific, the costs
12 involved, and how much it might be for CSX to do it.
13 They're studying the program, they're trying to come up
14 with costs. You'll see their cost estimates are wildly
15 under the amount of money that it took to eventually do
16 the sort of crossing-clearing program that ultimately
17 was adopted. As I say, it's the other railroad kind of
18 evidence that we think the Supreme Court was talking
19 about in the Webb case. Page 67, you've already had
20 the --

21 Exhibit 67 --

22 THE COURT: I've read this.

23 MR. PURCELL: -- you've already had the
24 opportunity to see. This is the sales pitch from our
25 salesman, the DeAngelo Brothers, who tell us that we're

1 going to save money, save lives, you know, grow hair,
2 and everything else, and might be possible if we just
3 buy what they're selling.

4 THE COURT: Okay.

5 MR. PURCELL: Number 68 is the Union Pacific
6 document. They say it's a no-brainer. They say
7 they've cut, reduced collisions by twenty-seven
8 percent. I think the Supreme Court has already spoken
9 to this. I would point out for the Court that the
10 territory over which the Union Pacific railroad runs is
11 vastly different from the territory over which CSX runs
12 with our verdant vegetation in this temperate climate.

13 On Plaintiff's Exhibit 69, I feel uniquely able
14 to speak to this exhibit, it being an e-mail from me
15 to -- after Ken Heathington testified in the Hartley
16 case in the year 2000. I didn't know I was going to
17 have to be dealing with it eight years later, but here
18 we are. In any event, it should be considered in
19 connection with Plaintiff's Exhibit 70. And what
20 happened was we had a trial called Hartly against CSX.
21 And Dr. Heathington was on the stand testifying that
22 these crossings had once been clear but they were, he
23 said, quote, now all grew up, end quote, in front of
24 the jury, the Allendale County jury, trying the case in
25 Bamberg because the courthouse had burned.

[Whereupon, Dr. Heathington re-takes the witness stand]

THE COURT: I am just going to remind you, sir, that you are now under oath for a third time, and just remind you of that obligation, sir.

DR. HEATHINGTON: I'm going to turn this thing
on --

THE COURT: Yes, sir. I appreciate that.

Ladies and gentlemen, I will also tell you that we have already also given him a microphone so if he gets up and moves around, hopefully y'all will not have any trouble whatsoever hearing him. All right?

KENNETH HEATHINGTON, PH.D.,

Having Been Previously Sworn,
was Examined and Testified as Follows:

CONTINUED DIRECT EXAMINATION

BY MR. PARKER:

Q. Dr. Heathington, when we left off yesterday, we were starting to get into some documents that are CSX documents about rights-of-ways and CSX's handling of rights-of-ways and cutting of sight distance at railroad grade crossings.

Do you have an opinion as to whether or not CSX, back before the crossing-clearing program, had an adequate

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1 program to deal with clearing rights-of-way for adequate
2 sight distance for motorists?

3 A. I have an opinion on that, yes, sir.

4 Q. And in forming that opinion, have you reviewed a
5 number of documents that bear on that subject and did you
6 utilize these documents in forming your opinion?

7 A. Yes, sir.

8 Q. And do you have an opinion as to whether or not
9 CSX, once they instituted the crossing-clearing program,
10 adequately executed that program to provide safe sight
11 distance?

12 A. I have an opinion on that, yes.

13 Q. And in reviewing these documents, did you
14 utilize these documents in forming that opinion?

15 A. Yes, sir.

16 Q. All right. We're going to first start with
17 Plaintiff's Exhibit 64.

18 MR. PARKER: If you would put that on the
19 screen, please.

20 And you can come down, if you will, and we'll
21 talk about these documents.

22 Q. [Mr. Parker] Plaintiff's Exhibit 64 is a
23 document from mister -- out of Mr. McMaster's file, that
24 was from Ron Foster, an employee of CSX, to a number of
25 people. And if you would, let's look down at the bottom

1 portion. And in Exhibit 64, if you would just read that
2 out loud to the jury, the first paragraph.

3 A. [Reading] As all of you know, there isn't enough
4 money to cut and kill all the brush and trees along our
5 right-of-way, even on a three-year cycle; therefore, we
6 need to develop other methods to attempt to control and
7 correct our problem with vegetation. The following is one
8 way suggested by Tom Schmidt.

9 Q. Next paragraph, please.

10 A. [Reading] Tom forwarded a listing of over 300
11 loggers that are located in various states near CSX lines.
12 Most of the names on this list produce logs, that are used
13 by the saw mills, that produce crossties for CSX. Tom's
14 idea is to have various loggers remove trees along our
15 right-of-way and supply these logs to saw mills for
16 crossties.

17 Q. Next paragraph.

18 A. [Reading] I need you to consider this option to
19 remove trees at specific areas, keeping in mind access to
20 the site and safety concerns.

21 Q. And the next paragraph.

22 A. [Reading] While we may have safety reservations
23 for this type of work on the property, this would be an
24 excellent way to remove trees at little or no cost to us.
25 If there are areas you decide should work, contact me and

1 I'll arrange for the agreement, specification, and
2 loggers. We'll consider giving them the trees and
3 hopefully this would offset their cost to remove, and our
4 flagging expense. Please forward your areas to me, along
5 with other comments or suggestions, on ways to improve the
6 brush/vegetation control.

7 Q. As a traffic engineer, is this an appropriate
8 way to maintain safe sight distance at railroad grade
9 crossings?

10 A. Yes. That's one way. Yes, absolutely.

11 Q. And if, in fact, it was executed, given the fact
12 that you're giving the trees away, do you have an opinion
13 as to whether or not it would be effective?

14 A. Well, if you can get people to do it and if they
15 will perform the contract as required, I have basically no
16 problem with that method. But you want to proceed with it
17 and get it done, and that's one of the critical things.

18 MR. PARKER: Next is Exhibit 65.

19 Q. [Mr. Parker] Exhibit 65 is a document to Mr.
20 McMaster from V.B. Vaccarello, and it's entitled operation
21 public safe crossing. And if you would, would you publish
22 the first section of that document.

23 A. [Reading] The following program is a three-year
24 plan to cut all crossings out of phase and have the local
25 cities and municipalities maintain them, after the three

1 years, with federal and state funding. Initially, CSXT
2 engineering, train control, legal, environmental
3 departments set up a budget to get started. We would seek
4 help from the federal and state levels. We will implement
5 a three-year program to clear-cut all public crossings
6 under federal and state guidelines.

7 Q. And in year one, what were they supposed to do?

8 A. [Reading] Clear-cut all trees and brush. Normal
9 length is 300 feet on each side of the road crossing, for
10 a total of 600 feet; i.e., the need to -- it's handwritten
11 -- the need to adjust for speed. After all the trees and
12 brush is cut, all stumps are to be treated with chemicals
13 to reduce the regrowth.

14 Q. Year two?

15 A. [Reading] Year two is dedicated to maintaining
16 the crossing. Two applications are made in year number
17 two, as follows: first spray is to get rid of all
18 broadleaf plants and high-growing weeds. This takes place
19 normally in May, depending on climate of area of work.
20 All chemical treatments to crossing must promote the
21 growth of grass. Second visit to crossing is before
22 school starts back. All crossings are mowed or sprayed,
23 depending on plans, terrain, and conditions. This can be
24 supported by federal, state, and local organizations.

25 Q. And year three?

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1 A. Year three --

2 [Off the record momentarily]

3 A. Okay. [Reading] Year three the federal, state,
4 and local levels would handle the budgets to maintain the
5 crossing with the support of CSXT. They would be
6 responsible for the ongoing program initiated by CSXT.
7 Case studies of other railroads, for example, the UPSP,
8 has showed a twenty-five to thirty-percent savings on
9 costs associated with accidents at crossings due to the
10 cutting of vegetation at railroad crossings. This is not
11 taking into consideration the public image and the media
12 blitz of such an effort. I think this is worth
13 consideration, even if changes and modifications need to
14 be made to the plan.

15 MR. PARKER: And next.

16 Q. [Mr. Parker] This was dated 7/23/99?

17 A. I believe that's correct. These started about
18 1999. I do remember it on there. Yeah. 7/23/99.

19 Q. And the -- as you've stated earlier, what is
20 the -- in order for a railroad to properly provide for
21 safe crossings, what should be done at the crossings?

22 A. Well, you've got two or three things you can do.
23 One is is that you can clear out the sight obstructions.
24 Sometimes that may be a building, it could be parked rail
25 cars, it could be trees and vegetation. It could be a

1 whole host of things. If those cannot be done, then you
2 can use traffic-control devices to compensate for the
3 deficiencies, such as active traffic-control devices, to
4 compensate for the deficiencies that you have in sight
5 distances.

6 Q. And let's next go to five thirty --

7 A. Oh.

8 Q. Excuse me.

9 A. Could I add one point?

10 Q. Sure.

11 A. Obviously, you could stop and flag a crossing
12 with a train. Obviously, you could slow the train down to
13 where the speed of that train complied with the required
14 sight distance that you have to have. So there's a whole
15 bunch of options you've got and removal is one good one,
16 and there's no question on that.

17 Q. Let's go now to Plaintiff's Exhibit 66. And
18 this is a memo to Mr. Hopkins from Mr. McMaster, and it's
19 dated 5/30/2000. And in this they are looking at cutting
20 all of the passive public crossings across their system.
21 And it again looks at what the Union Pacific railroad was
22 doing?

23 A. Yes.

24 Q. What it cost?

25 A. [Reading] Cost to cut passive-public crossings.

1 We have a total of 8,803 passive-public crossings across
2 our system. UP pays their contracts on an average \$800
3 per crossing for all crossing clearing. Since we are only
4 pricing passive-public crossings, reduced number of
5 crossings, increased travel time between crossings, and
6 heavier brush, an estimate per crossing of 1,000 to 1200
7 per crossing is in the ballpark total system cost of 10.6
8 million.

9 MR. PARKER: And the next -- paragraph 2 is the
10 only one we want to look at.

11 A. [Reading] Cost to maintain passive-public
12 crossings, UP pays their contractors 350 per crossing to
13 maintain by spray application promoting low ground cover.
14 I believe this price could be held for our maintenance
15 cost total system cost of 3.08 million.

16 MR. PARKER: Next page.

17 A. [Reading] Other railroad policies --

18 MR. PARKER: I'm not up with you --

19 THE WITNESS: Oh. I'm sorry.

20 MR. PARKER: -- Dr. Heathington. We're going to
21 the next page here.

22 Q. [Mr. Parker] And second page, Mr. McMaster is
23 describing their present policy for work around crossings?

24 A. Yes.

25 Q. And if you will publish that.

1 A. [Reading] Brush cutting: use on-track brush
2 cutters full reach of the machine, approximately twenty-
3 nine feet from center line. Occasionally, off-track mower
4 clears grasses and small brush, primarily corn field, to
5 FBU.

6 Q. Confine to FBU?

7 A. I'm sorry. Confined to FBU. Yeah.

8 [Reading] Brush spray: all main-line tracks are
9 sprayed twelve-foot each side of the center line. Each
10 crossing quadrant is further increased to thirty feet each
11 side of a distance of 200 feet prior and 200 foot beyond
12 the crossing.

13 And then they have a note in here that Ohio
14 requires -- or is 600 feet, which is -- different states
15 have different requirements.

16 Q. And your opinion following -- if, in fact, CSX
17 followed this policy, would they be providing adequate
18 sight distance?

19 A. Yes, if they clear them out all out. It depends
20 on how they have located their traffic-control devices at
21 the crossing, per se, yes.

22 Q. And if they cleared the crossing so that you had
23 300 -- 200 feet, would that be an adequate sight distance?

24 A. It depends on -- as a general rule, it helps a
25 whole lot. And it depends on how you have things placed.

1 Now, if you place your stop sign or whatever too far back,
2 that might not solve your problem until -- and it's a
3 function of the speed of the train. But given that the
4 traffic-control devices are handled correctly, then, yes,
5 you could make a big --

6 Q. And did this -- whatever this policy is, does it
7 need to provide the sight distances in the charts that you
8 went over?

9 A. Yes.

10 Q. And if, in fact, it did not provide those
11 distances, it would be inadequate?

12 A. That's correct.

13 MR. PARKER: Let's look at Exhibit 67.

14 Q. [Mr. Parker] Exhibit 67: are you familiar with
15 that document, which was a DeAngelo Brothers' presentation
16 to CSX?

17 A. Yes. I've seen all these documents over the
18 years.

19 Q. And let's, if you will, go to the second page.
20 And in this document is DeAngelo Brothers discussing, with
21 CSX, adopting a program to clear the rights-of-ways on
22 CSX's railroad?

23 A. Yes, sir. DeAngelo Brothers is one of the big
24 contractors, across the United States, with railroads for
25 clearing.

1 MR. HARMON: Excuse me. Objection. Lack of
2 foundation.

3 MR. PARKER: I don't understand the objection.

4 THE COURT: I don't, either.

5 Do y'all want to come up for a second?

6 [Whereupon, an off-the-record bench conference
7 is held]

8 Q. [Mr. Parker] Dr. Heathington, if you would, the
9 goals and objectives, if you would publish that part of
10 it.

11 A. [Reading] Objective: to reduce the CSX
12 railroad's liability at all grade-level road crossings by
13 improving something of -- can't get that -- by improving
14 the something of sight for motorists to improve --

15 Q. Line of sight?

16 A. Line of sight for motorists, to improve line of
17 sight at all CSX railroad grade crossing -- grade-level
18 road crossings by removing all vegetation that obstructs
19 motorists' line of sight.

20 Q. And should CSX have been removing the
21 obstructing vegetation along the motorists' line of sight
22 on its rights-of-ways?

23 A. Absolutely.

24 Q. And the objectives and goals of doing that are
25 what?

1 A. Well, you have a lot of benefits. You can save
2 lives, you can save money on lawsuits, you can improve
3 public relations, and you can boost the CSX employee
4 morale.

5 Q. And the objective and goals that are down below
6 would be?

7 A. Find the safest, most effective way to
8 accomplish objective and goal, both short and long term;
9 assure quality standards are maintained.

10 Q. And the objectives and goals and how to
11 accomplish?

12 A. Clear crossings by either chemically or
13 mechanically, removing all tall-growing vegetation that
14 obstructs line of sight for motorists at grade-level road
15 crossings.

16 Q. And let me ask you: on the line that would be
17 the AMH line in Hampton County, in 1999 was CSX providing
18 adequate sight distance at the road crossings on this
19 line?

20 A. No.

21 Q. And did you inspect it and look at those in that
22 time frame?

23 A. I have looked and inspected numerous crossings
24 all up and down this line over the last ten, twelve,
25 thirteen years or so.

1 MR. PARKER: And the next page.

2 Q. [Mr. Parker] What has been done in the past.
3 DeAngelo Brothers advised CSX what?

4 A. [Reading] Trees and tall-growing woody
5 vegetation have been left to grow tall and obstruct line
6 of sight for motorists. Spray-trains and/or trucks have
7 attempted to spray herbicides wide as they were spraying
8 main line from on-track. The use of non-selective
9 residual chemicals created bare ground, doing nothing to
10 control tall-growing trees and woody vegetation.

11 Q. And what has been done -- or what problems has
12 that caused in the past?

13 A. [Reading] Motorist line of sight was not
14 improved. Erosion of soil occurred due to all low-growing
15 vegetation being removed. By removing the low-growing
16 desirable vegetation, more woody and tall-growing species
17 are encouraged, thus leading to an increased line-of-sight
18 problem.

19 MR. PARKER: Let's go to --

20 Q. [Mr. Parker] Asked then, has been done in the
21 past. And what does the presentation say?

22 A. [Reading] The railroad recognized the problems
23 that poor past vegetation-management decisions -- poor ...
24 past vegetation-management decisions at grade level
25 crossings have created dense, large, tall-growing, woody

1 species at crossings; very poor sight line-of-sight for
2 motorists; public and financial pressure, due to the high
3 amount of crossing accidents and fatalities. The railroad
4 takes action to address these problems. This was a
5 milestone move in the process of some day --

6 And I can't read that last.

7 Q. Okay.

8 MR. PARKER: Now, let's go to 69, if you will.

9 I think that's all we were going to publish from
10 Exhibit 60 -- 67. Excuse me.

11 Now, let's go to Exhibit 69, if you will.

12 Q. [Mr. Parker] Exhibit 69 is a document to
13 Mr. Vaccarello.

14 MR. PARKER: And let's go to the next page.

15 THE COURT: Okay. Mr. Parker?

16 MR. PARKER: Yes?

17 THE COURT: We need to go on to Number 71.

18 [Whereupon, an off-the-record bench conference
19 is held]

20 Q. [Mr. Parker] Dr. Heathington, in the year 2000,
21 did you inspect certain crossings in Hampton County along
22 the AMH line?

23 A. I inspected several crossings. I don't remember
24 the exact year, but it was right in that time frame.

25 Q. And you have reviewed a document whereby those

1 crossings are listed --

2 A. Yes, sir.

3 Q. -- is that correct?

4 And did these crossings -- all of the crossings
5 that are listed, did they have obstructing sight-distance
6 vegetation on the right-of-way?

7 A. That's correct.

8 Q. And at these crossings, did you go out and
9 photograph these crossings?

10 A. Yes. Don Crews and I went out together and took
11 measurements and photographs and so forth.

12 Q. And in each of these crossings that are listed
13 in Exhibit 69, were there sight distance -- unsafe sight-
14 distance obstructions at each of these crossings on the
15 AMH line?

16 A. Yes.

17 MR. PARKER: Your Honor, we would offer that.

18 THE COURT: Mr. Parker, come here for a moment.

19 [Whereupon, an off-the-record bench conference
20 is held]

21 Q. [Mr. Parker] All right. Dr. Heathington, on
22 Exhibit 69, this is a memo that lists certain crossings in
23 Hampton County?

24 A. Yes.

25 MR. PARKER: Go on to the next bullet.

1 [Whereupon, Mr. Parker and Mr. Detrick confer]

2 Q. [Mr. Parker] Are these the crossings that you
3 visited in Hampton County?

4 A. Yes. I would have to verify those numbers, but
5 here it says, according to my notes: [reading]
6 Heathington mentioned the following crossings.

7 And so unless he copied them down wrong, those
8 would be the ones I looked at.

9 MR. PARKER: And then go down below.

10 Q. [Mr. Parker] And if you will read the note that
11 was on that document.

12 A. [Reading] If, for selective cut, just these
13 crossings, and something happens at one of -- one you
14 skipped for just -- or just --

15 Q. Is that you just?

16 A. I can't -- [reading] at one for skipped, or just
17 -- you -- you, Y-O-U. Yeah, I think that's a Y-O-U --
18 [reading] you just opened yourself for liability.

19 Q. And we don't need to read --

20 A. Okay.

21 Q. -- the rest of it. The rest of it just --

22 A. What basically -- oh. I'm sorry. Okay.

23 Q. Okay. And these are the crossings that you
24 looked at. And was -- CSX obviously, according to this
25 document, were aware of those crossings that needed to be

1 cut?

2 A. Yes. I had testified to that before.

3 MR. PARKER: And let's now go to Exhibit 70.

4 Q. [Mr. Parker] Exhibit 70, is that a document
5 that coincides with the previous document and shows that
6 the crossing number at milepost 55.93 is what we're
7 looking at?

8 MR. PARKER: And scroll down.

9 A. Yes.

10 Q. [Mr. Parker] And this is on Highway 68,
11 parallel to the railroad?

12 A. Yes, sir. South Carolina 68 runs parallel to
13 the track.

14 Q. And on that, the employee of CSX reviewing this
15 confirmed that all four quadrants were bad at this
16 crossing?

17 A. Yes, sir.

18 Q. And they figure what they need about stop bars
19 and so forth?

20 A. No stop bars needed.

21 MR. PARKER: All right. Let's, next, go to the
22 next page.

23 Q. [Mr. Parker] This is at milepost 457.07?

24 A. Yes, sir.

25 Q. At each crossing on CSX's railroad is there a

1 milepost and a line number that allows you to identify the
2 crossing?

3 A. Yes. All railroads -- every crossing in the
4 United States has a unique crossing number. It's a six-
5 digit number with a letter. The leading one may be zero
6 and they leave that off but it's six digits with a letter.
7 And every railroad has their milepost nomenclature or
8 listing where they keep track of where these are.

9 Q. And the AMH-457, is this crossing -- the
10 crossing in -- that we're dealing with is AMH-444.1 or 10;
11 is that correct?

12 A. AMH -- prefix AMH low MP-457 feet from 342 this
13 milepost [phonetic]. This division, it's the subdivision
14 Augusta, 45 county, 049 city, in or near the state,
15 Hampton, Varnville, initial agency.

16 It identifies where all of this is here, yes,
17 sir.

18 Q. But this one was near Varnville, four --

19 A. Yes, right there is Varnville. It's South
20 Carolina, Hampton, near Varnville.

21 Q. And I believe that's where we are here today is
22 at Varnville?

23 A. I'm not from here, so I'm assuming -- I don't
24 know for sure.

25 Q. All right. The -- it says down on the bottom

1 that Highway 68, parallel railroad?

2 A. Yes. That's correct.

3 Q. Northeast and northwest, bad two quadrants only?

4 A. Yes.

5 Q. And so there were two quadrants at this crossing
6 that were --

7 A. That's right.

8 Q. -- were bad?

9 A. That's correct. Uh-huh.

10 MR. PARKER: And the next one, Number 3.

11 Q. [Mr. Parker] And if we will, this is just
12 another milepost 462.16. And it -- as it states down at
13 the bottom, that at this location where you had pointed
14 out to CSX that there was inadequate sight distance or
15 unsafe sight distance, they agreed that they had a bad
16 quadrant at that location?

17 A. That's correct.

18 Q. And on Exhibit four six -- excuse me. Next, at
19 milepost 463, there were -- it said that they had one
20 quadrant I assume there that has a problem with it?

21 A. They're saying one quadrant bad, one quadrant we
22 have 300 feet sight distance at stop bar.

23 Q. Is 300 feet -- assuming that track is a forty-
24 nine-mile an hour train speed?

25 A. If you're at a stopped condition, no, if you

1 only got 300 feet. At a forty-nine-mile, you'll need
2 around close to 1200 feet.

3 Q. And they took pictures? The CSX employee took
4 pictures of this bad crossing?

5 A. I can't remember.

6 Q. It says on that picture --

7 A. Oh.

8 Q. -- number 26 on roll one?

9 A. Yeah. Picture 26 on roll one, picture number
10 one on second roll.

11 MR. PARKER: Let's go to the next one. And
12 let's just go to the bottom.

13 Q. [Mr. Parker] This is milepost 464. And they
14 noted on here that there was blockage in three quadrants?

15 A. Yes.

16 Q. I think all four -- well, three quadrants? Two,
17 three, and four?

18 A. There's three quadrants there. You've got
19 blockage here, too.

20 Q. Then at milepost 467: and under here they are
21 stating they're going to clear --

22 A. Yeah.

23 Q. -- five, six, seven, and eight --

24 A. Yes.

25 Q. -- of the southwest, southeast, northeast and

1 northwest?

2 A. Yeah.

3 Q. And I guess the numbers are related to pictures?

4 A. Well, it says it does not need cut if cut --

5 Q. I'm talking about up at the top it says number
6 five, six, seven and eight. And then over to the side it
7 says, took pictures --

8 A. Pictures to where -- something.

9 Q. Stop bar?

10 A. Stop bar. Yeah. Can't read the writing real
11 well.

12 Q. And on milepost 470.58, again they say all four
13 quadrants?

14 A. All four quadrants. Yeah. That's correct.

15 Q. At milepost 471 --

16 A. Yeah.

17 Q. -- they said the northwest quadrant was bad, the
18 bad quadrant that needed cutting?

19 A. Yes.

20 Q. At milepost 471, northwest and northeast need
21 cutting?

22 A. Yes. [Reading] Need cut.

23 Q. And all of these crossings that you pointed out
24 as being deficient in sight distance, CSX recognized that
25 these crossings needed cutting and were, in fact, sight

1 distance obstructed by trees and tall-growing vegetation?

2 A. Yes, sir.

3 Q. And is this what was being told to CSX by
4 DeAngelo Brothers in that presentation? Is that what you
5 saw?

6 A. That's correct.

7 MR. PARKER: Let's go to Exhibit 71.

8 Q. [Mr. Parker] And in that Mr. Schmidt is
9 advising -- on December 27th, 2000 -- Mr. Vaccarello that
10 they want to go and move ahead with the clear-cut crossing
11 plan?

12 A. Yes. That's December 27th of 2000.

13 Q. And the first states that's mentioned in here
14 are Georgia, North Carolina, South Carolina and Alabama?

15 A. Yes.

16 MR. PARKER: And next go to 72.

17 Q. [Mr. Parker] In Exhibit 72, Mr. Schmidt, again,
18 to a number of people. Go ahead and publish that, if you
19 will, please.

20 A. [Reading] One of our objectives for 2001 is to
21 establish and accelerate a program to clear-cutting 250
22 feet each side of crossings for the full width of the
23 owned right-of-way. Vegetation at grade crossings,
24 particularly passive-warning devices, cross-bucks, public
25 crossings, and beginning in the Carolinas, Alabama, and

1 Georgia. In discussions with risk management, Ed Codd, we
2 considered the idea of having our road-master track
3 inspectors periodically inspect crossing, again,
4 especially the cross-buck crossings, for sight distance
5 and documenting their assessment. Of course, this works
6 both ways. If it is thoroughly inspected and passes --

7 Q. Excuse me. Have you misread that?
8 Thoughtfully?

9 A. I'm sorry. I may have.

10 Q. [Reading] If it is thoughtfully --

11 A. [Reading] If it is thoughtfully inspected, and
12 passes muster, we have a good defense. If it doesn't pass
13 muster and we don't take remedial action, our
14 vulnerability is increased. I would expect that we would
15 have to take action. Would you guys mull this over as to
16 both the wisdom of doing this and how we would go about
17 it. I would envision no more than a monthly or perhaps
18 quarterly inspection, so it shouldn't be an excessive
19 burden. P.S. Please give me your thoughts.

20 MR. PARKER: Exhibit 73.

21 Q. [Mr. Parker] Exhibit 73 is from Mr. Vaccarello
22 to Mr. McMaster. And in this -- also from Mr. Vaccarello
23 to Mr. Schmidt. And in this document, they're looking at
24 the total grade crossings on CSXT's system?

25 A. Yes.

1 Q. And the total active crossings is eleven
2 thousand two sixteen?

3 A. Yes.

4 Q. And then the total passive public grade
5 crossings, 8,472?

6 A. Yes.

7 Q. And the next item says: we will target all
8 passive public grade crossings, which only 90 percent of
9 them will need to be cut, which comes to 7,624?

10 A. That's correct.

11 Q. And it says: [reading] we will target the
12 southern region for the first year, and the following
13 states in priority due to the highest incidents at grade
14 crossings per Ed Codd?

15 A. Right.

16 Q. And that says --

17 A. North Carolina.

18 Q. North Carolina, South Carolina --

19 A. South Carolina --

20 Q. -- Georgia, and Alabama?

21 A. Georgia and Alabama. Uh-huh.

22 Q. And they were going to cut 300 feet each side of
23 the crossing for the full width of the right-of-way --

24 A. Right-of-way --

25 Q. -- not to --

1 A. -- exceed 100 feet.

2 Q. -- exceed 100 feet?

3 And then they talk about the budget --

4 A. Yeah.

5 Q. -- for doing this, and that they're --

6 A. They're going to --

7 Q. -- going to issue a competitive bid process, to
8 each subdivision, to be the most cost-effective?

9 A. Yes.

10 Q. And the last item there says: [reading] safety,
11 quality, and price; and the bitterness of poor quality
12 remains long after the sweetness of low price is
13 forgotten?

14 A. That's right. I remember that.

15 MR. PARKER: Next is 74.

16 Q. [Mr. Parker] Exhibit 74 is the -- is dated --
17 from Mr. Vaccarello, dated January 8, 2001. And up top:
18 [reading] the new priority, by state, is South Carolina
19 number one?

20 A. Yes.

21 Q. And that says: [reading] as directed by Mr. Ed
22 Codd?

23 A. Yes.

24 MR. PARKER: Number 75. Exhibit 75.

25 Q. [Mr. Parker] And this is from Steve Ramsey to

1 Mr. Vaccarello and Mr. McMaster. And if you would publish
2 that.

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

12 MR. PARKER: Next. Exhibit 76.

13 Q. [Mr. Parker] And the first page is a fax, dated
14 3/12/01, to Vinnie Vaccarello; and the subject, Timber
15 Management; and the sender, Karen Edwards, for John; is
16 that correct?

17 A. Yes. Right here.

18 MR. PARKER: And then let's go to the next page.

19 Q. [Mr. Parker] And this is a letter to Mr.
20 Vaccarello, the manager of engineering programs for CSX
21 Transportation?

22 A. Yes.

23 Q. And if you will just publish this letter.

24 A. [Reading] It has been brought to our attention
25 that Timber Management, of Palestine, Texas, is being

1 considered for the CSX railroad crossing contract. I am
2 somewhat concerned with the type of job he will do for
3 you, since our service company, Advanced Contracting and
4 Hedging, Incorporated, has had a bad experience with this
5 company. On September 8th and 9th, 2000, we went to do a
6 paid demo job for Mac McCullum, with Timber Management,
7 for the Union Pacific railroad in Mineral Wells
8 [phonetic], Texas. Mr. McCullum was to pay us \$150 per
9 hour, plus arrange the mobilization to and from the site.
10 As of this date, Timber Management has not paid its debt
11 to our company or to the hauling company, Fleetwood
12 Transportation. Now Fleetwood Transportation is
13 threatening to take us to court to get their money,
14 because we owed the tractor and --

15 Q. [Reading] Because we owned --

16 A. -- [reading] because we owned the tractor and
17 because Mr. McCullum refused to pay them. We have
18 contacted Mr. McCullum about his outstanding debt on
19 several occasions. He said he would not pay the handling
20 invoice because they charged --

21 Q. Is that hauling? Hauling invoice?

22 A. Hauling invoice -- I'm sorry.

23 -- [reading] hauling invoice because they
24 charged him too much, but would pay a reasonable amount.
25 Mike asked him to take care of their bill as soon as

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1 possible so they would stop calling us. He said he would,
2 as well -- he said he would, as well as our invoice. This
3 was on January 19th, 2001. We have a copy of our weekly
4 production report with his signature verifying the hours
5 were accurate. Copy attached.

6 Q. Next sentence.

7 A. [Reading] I just thought you should know the
8 type of company you will be dealing with.

9 Q. And that's signed by Mr. John W. --

10 A. Yeah. Edwards --

11 Q. -- Edwards, president and CEO?

12 A. Oh. Yes, sir.

13 MR. PARKER: Next we publish Exhibit Number 77.

14 Q. [Mr. Parker] And this is a memo from Buddy
15 Powell, of CSX, to Mr. McMaster with CSX?

16 A. It was to Steve Ramsey from Mike McMaster here.

17 Q. Okay. And originally from Powell to McMaster?

18 A. I'm trying to see. Originally from Powell to
19 McMaster.

20 MR. PARKER: Okay. And let's go to the next
21 page. If you will blow that up.

22 Q. [Mr. Parker] And does this show the various
23 bids to clear the crossings in South Carolina?

24 A. Yes. They had one, two, three, four, five --
25 five different groups that bid on these. And these are

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1 the estimated total costs and what they have on each area
2 and so forth.

3 Q. And the total for B. Johnson was one million
4 seventy-seven seven ninety-eight?

5 A. Yes. Right.

6 Q. For Timber Management, four thirty-seven?

7 A. Yes.

8 Q. For UtilCo., one million seventy-eight two
9 hundred?

10 A. Yeah.

11 Q. DeAngelo Brothers, two million two hundred
12 and --

13 A. Sixty-nine. Sixty nine, I think.

14 Q. Asplundh --

15 A. Yeah.

16 Q. -- seven hundred and forty one?

17 A. Sixty. Sixty-one. I think it's seven sixty-one
18 zero five zero. Yeah. Okay.

19 Q. Yeah.

20 MR. PARKER: And the next page.

21 Q. [Mr. Parker] And here someone is Mr. Ramsey,
22 and from McMaster to Ramsey is the handwritten note that
23 the six bids, with the low being of four thirty-seven
24 thousand, the high of 2.3 million?

25 A. Yes.

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1 Q. Do you find any -- knowing about clearing
2 vegetation, is that an acceptable gap in bids?

3 MR. HARMON: Objection. Objection. It exceeds
4 this expert's expertise. Not within the realm of his
5 opinions.

6 THE COURT: Okay.

7 Q. [Mr. Parker] Let me ask you this. Are you
8 familiar with what it costs to clear road crossings?

9 A. To a certain extent. I've cleared --

10 THE COURT: Okay.

11 A. -- a lot of --

12 THE COURT: Hold on a second. Y'all come
13 approach.

14 [Whereupon, an off-the-record bench conference
15 is held]

16 THE COURT: Your objection is sustained.

17 Q. [Mr. Parker] Dr. Heathington, next go to
18 Exhibit 78. April 11th, 2001, was the contract awarded to
19 Timber Management and Mr. McCullum that was the low bidder
20 at four thirty-seven?

21 A. Yeah. They awarded it to Timber Management.

22 Q. And that was the same contractor that Mr.
23 Edwards had written --

24 A. Yes.

25 Q. -- to CSX telling him he wanted him to know what

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1 kind of contractor he was dealing with?

2 A. That is correct.

3 MR. PARKER: Exhibit 79 is next, is we'll go to.

4 Q. [Mr. Parker] And this is from Mr. Vaccarello to
5 Ray --

6 A. Yes.

7 Q. -- Zenisek. And it says: [reading] clearing
8 all passive public crossings in South Carolina, starting
9 as early as 5/1/01, or as late as 5/14/01?

10 A. That's correct.

11 Q. And Timber Management is the contractor?

12 A. Yes.

13 Q. And they will be cutting all passive crossings
14 on the Columbia sub starting in Columbia, working south?

15 A. Yes.

16 Q. And they will work four days a week, ten hours a
17 day. They will start with one four-man crew and add
18 additional crews as it goes on?

19 A. Yes.

20 Q. And then the other items talk about the
21 kinds of --

22 A. Yes.

23 Q. -- types of equipment --

24 A. Yeah.

25 Q. -- they're using?

1 MR. PARKER: Then let's go down to the bottom of
2 the document.

3 Q. [Mr. Parker] And it states: [reading] Ray, we
4 will be cutting all passive public crossings using outside
5 contractor, Timber Management, to clear vegetation on
6 either side of the crossing full length of the
7 right-of-way for sight distance?

8 A. Yes.

9 MR. PARKER: Exhibit 80.

10 Q. [Mr. Parker] And Exhibit 80 is a document to
11 Mr. Vaccarello, CSX Transportation --

12 A. Timber Management.

13 Q. -- vegetation management from --

14 A. Yes.

15 Q. -- Timber Management?

16 A. Yes.

17 Q. And it's dated April 30th, 2001?

18 A. Yes.

19 Q. And in there -- I believe rather than publishing
20 the whole document -- he says he will commence clearing
21 crossing at Savannah -- it says South Carolina on the
22 Columbia or Charleston sub on June 4th, 2001 --

23 A. I'm trying to find --

24 Q. -- is that correct?

25 A. I'm trying to find that particular paragraph.

1 Q. The third paragraph.

2 A. Third?

3 Q. Right there. Yeah.

4 A. Yeah.

5 [Reading] I believe we will commence clearing
6 crossings at Savannah, South Carolina, on the Columbia or
7 Charleston subs, CSX's choice, June 4th, 2001. I believe
8 my estimate of time for completion on the attached list to
9 be quite accurate.

10 MR. PARKER: And let's go to the next page.

11 Q. [Mr. Parker] And it says: [reading] the
12 following is a bid for vegetation-management highway grade
13 crossings for the following subdivisions?

14 A. Yes.

15 Q. And it gives the time to complete the crossing?
16 158 days?

17 A. That's correct.

18 MR. PARKER: Let's next go to Exhibit 81.

19 Q. [Mr. Parker] Exhibit 81 is a memo from Mr.
20 Vaccarello to Mr. Ramsey entitled current logging
21 operations along the rights-of-ways of the passive public
22 crossing-clearing project states?

23 A. Yes.

24 MR. PARKER: And then let's go down to --

25 Q. [Mr. Parker] It says: [reading] the current

1 logging operations along the rights-of-ways in passive-
2 public crossing-clearing project states the following is a
3 list of current subs being logged or will start being
4 logged for the following reasons, all being safety, and
5 the first one being to open up sight distance at the
6 crossing?

7 A. Yes.

8 Q. And then there's a number of other things
9 that -- along this. And it says: [reading] five: CSXT
10 does not make any money from this program. It is strictly
11 safety driven.

12 A. That's correct.

13 Q. And then it says: [reading] the following are
14 currently being worked on.

15 And it lists the subs that are being worked on?

16 A. Yes.

17 Q. And one of those subs is the Augusta sub?

18 A. Right here.

19 Q. And the Augusta sub would be the sub on which
20 Hill Road would be located?

21 A. That's correct. It's through here [indicates].

22 Q. And it states at the bottom that -- again, that
23 they're going to start the work as of 5/1/01 or as late as
24 5/14 and that --

25 A. Yes.

1 MR. PARKER: And -- okay. Okay. Let's go to
2 Exhibit 83.

3 Q. [Mr. Parker] Exhibit 83 is to Mr. Vaccarello
4 again, and this is from Mr. McCullum of Timber Management?

5 A. Yes.

6 MR. PARKER: And the next page.

7 Q. [Mr. Parker] And Mr. Vaccarello is sent a
8 letter by Mr. McCullum, of Timber Management: [reading]
9 that due to CSX making a budget cutback, I would like to
10 extend the beginning date for clearing the South Carolina
11 highway rail grade crossings from June 4th to July 9th,
12 2001.

13 Is that correct?

14 A. Yes.

15 Q. And it says: [reading] I believe we will be
16 completed with the cutting and clearing before the end.
17 And as I understand it, even if the work is completed, I
18 have to wait until January 1st, 2002, before I can invoice
19 the last 147,000, or approximate thereof, of which we'll
20 be paid within thirty days of the invoice.

21 A. Yes.

22 Q. Is that correct?

23 A. Yes.

24 MR. PARKER: Next go to Exhibit 84.

25 Q. [Mr. Parker] And Exhibit 84 shows for the

1 Augusta subdivision they're going to start on September
2 the 5th and they're going to finish on October the 9th, in
3 three weeks, for Hampton County and Allendale?

4 A. That's correct. They're supposed to have been
5 currently working at that time.

6 MR. PARKER: Next go to Exhibit 85.

7 Q. [Mr. Parker] Exhibit 85 is a memo from Mr.
8 Cantrell to Tom Smith. And if you will publish that.

9 A. [Reading] Tom, during the -- during the cost of
10 risk sessions held by the senior leadership team last
11 week, the subject of brush-cutting at intersections was
12 reviewed. We have been asked to put together a systematic
13 plan to clear-cut all non-signalized crossings over some
14 reasonable length of time but probably not more than two
15 years. Can you develop a plan to accomplish this, with
16 Steve Ramsey's input, prior to the annual budgeting
17 process. Could you have a draft ready to discuss by
18 August 20. Let me know.

19 MR. PARKER: Next let's go to Plaintiff's
20 Exhibit 86.

21 Q. [Mr. Parker] Is -- Exhibit 86 is a memo from
22 Steve Ramsey to Mr. Vaccarello?

23 A. Yes.

24 Q. The subject: [reading] vegetation control grade
25 crossing, state of South Carolina?

1 A. Yes.

2 Q. And it states, in the original message from Mr.
3 Thomason to Steve Ramsey, that: [reading] per our
4 telephone conversation yesterday, listed below in priority
5 are the subdivisions in South Carolina we would like for
6 you to consider and reference to the above subject matter.

7 And the first one in South Carolina being the
8 Augusta subdivision?

9 A. Yes.

10 Q. And someone apparently has renumbered those
11 to --

12 A. Somebody, yes.

13 Q. -- and put south-end sub first, and apparently
14 Augusta second?

15 A. That's what appears to be handwritten in.

16 Q. And the Augusta subdivision is the one that you
17 saw those deficient sight-distance crossings at in 2000?

18 A. Yes, sir. That's -- I looked at several in
19 there.

20 Q. Next look at Plaintiff's Exhibit 88. And up at
21 the top it states that: this one applies only to logging
22 operations, and this is a white-paper tree program, and
23 it's dated September 12th, '01. And this document, as we
24 saw earlier, they had a logging program and were --

25 A. Clear-cutting.

1 Q. -- also going to institute a crossing-clearing
2 program?

3 A. Yes. Had both; two programs.

4 MR. PARKER: And then let's go down to the
5 bottom of the page.

6 Q. [Mr. Parker] And the purpose of the program --

7 MR. PARKER: Let's go back up top.

8 Q. [Mr. Parker] It says: [reading] the program
9 for clearing trees and brush on CSXT's transportation by
10 the utilization of loggers.

11 A. Loggers.

12 Q. And the first thing is: [reading] the purpose
13 of this program is primarily to improve railway safety by
14 increasing visibility, reducing storm damage caused by
15 fallen trees, and improving drainage.

16 Is that correct?

17 A. That is correct.

18 MR. PARKER: Let's next go to Exhibit 89.

19 Q. [Mr. Parker] And this is -- 89 is from Mr.
20 Vaccarello to Mike McMaster, dated September --

21 A. Yeah.

22 Q. -- 21st, 2001?

23 A. Yes. That's correct.

24 Q. And if you will publish that.

25 A. [Reading] After Timber Management manually cuts

1 all passive public crossings in South Carolina, we will
2 have them spray all quadrants with a chemical formulation
3 that will induce low-growing grasses, Bermuda grass,
4 centipede grass, to choke out woody species. This will be
5 a pilot program to see if we can meet our goal without
6 spending money to seed the areas. If successful we will
7 reduce our maintenance cost over time dramatically, while
8 saving lives.

9 Q. And if they did cut the passive crossings to
10 provide sight distance and then plant these grasses and
11 get them to choke out the woody species, would that, in
12 fact, save lives?

13 A. Yes, it can. It depends on how good a job they
14 do with it. If they do what they're supposed to do, yes.

15 MR. PARKER: And the next one is Exhibit 90.

16 Q. [Mr. Parker] And this one is entitled -- from
17 Mr. McMaster to Mike Savin, passive public crossing
18 program bullet points; is that correct?

19 A. Yes.

20 Q. The purpose of the program was what?

21 A. Was primarily to improve railroad safety by
22 increasing visibility at passive public crossings.

23 Q. Right. And this is the same program to cut for
24 a distance 100 to 300 --

25 A. Yeah.

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1 Q. -- on each side of a road crossing?

2 And the current program says -- and I think it's
3 supposed to be presently, but it says presenting we are
4 working in South Carolina --

5 A. South Carolina.

6 Q. -- Timber Management, and have completed 155
7 crossings to date?

8 A. 155 crossings to date. That's correct.

9 MR. PARKER: Exhibit 92. Excuse me. We've
10 got -- let's go to the Exhibit 95.

11 Q. [Mr. Parker] Exhibit 95 is from Mr. McMaster to
12 Steve Ramsey and others --

13 A. Yes.

14 Q. -- is that correct?

15 And it's dated December 11th, 2001. And it
16 says: [Reading] Steve, I'm somewhat puzzled. Since this
17 is a legal- and risk-management program, should you review
18 the South Carolina specifications to see if you have any
19 recommended change to the specs. I do have several.
20 First crossing to be inspected for compliance to
21 specifications and accepted before payment will be
22 approved.

23 A. That's right.

24 Q. [Reading] If the crossing fails to be found in
25 accordance with the specifications, it must be -- it must

1 immediately be corrected within five days, with the cost
2 of reinspection born by the contractor.

3 Is that correct?

4 A. That is correct.

5 Q. And in this the 300, 600, and 900 feet, based on
6 information given by a specific crossing, will be the
7 distances to be cleared?

8 A. Yes.

9 Q. It says: [reading] crossing must be worked
10 consecutively along the sub and continuously, without
11 breaks, excluding weekends or holidays --

12 A. Yes.

13 Q. -- is that correct?

14 A. That's correct.

15 Q. [Reading] Schedule must be submitted at the
16 beginning of the program, listing equipment number, VIN,
17 and updated weekly, based on progress. If progress falls
18 behind schedule, number of crews to be increased.

19 A. That's correct.

20 Q. The cost must be split: [a], the cost of
21 clearing tree stumps; and, [b], cost for first --

22 MR. HARMON: Your Honor --

23 Q. [Mr. Parker] -- is that correct?

24 A. That's correct.

25 MR. HARMON: Could we take that down for a

1 moment?

2 THE COURT: Sure. Let's go ahead and take it
3 down.

4 If y'all will come forward.

5 [Whereupon, an off-the-record bench conference
6 is held]

7 MR. PARKER: Next, Number 96.

8 Q. [Mr. Parker] And this is a CSX document;
9 correct?

10 A. Yes.

11 Q. And it deals with the vegetation control at
12 highway railroad crossings?

13 A. Yes.

14 Q. And the team members are Mr. McMaster, Mr.
15 Ramsey, a Mr. Hoss, and a Cindy Craig Johnson, from the
16 law department?

17 A. That's correct.

18 Q. And the strategies were concern about safety?

19 MR. HARMON: Your Honor, again --

20 THE COURT: Okay. Let's go ahead and pull this
21 down for a moment.

22 Y'all come up for just a second.

23 [Whereupon, an off-the-record bench conference
24 is held]

25 Q. [Mr. Parker] Dr. Heathington, let me see if --

1 if you would just look at this document and tell when
2 they were supposed to complete the crossing-clearing
3 program by.

4 A. Give me just a second.

5 [Whereupon, the witness reviews documents]

6 A. [Reading] Complete southern half of system in
7 2002 and complete northern half of system in 2003.

8 Q. [Mr. Parker] And on page 2 of Exhibit 96 --

9 MR. PARKER: If we could go to page 2 of Exhibit
10 96.

11 MR. HARMON: Excuse me, Your Honor. The same
12 issue.

13 THE COURT: Let's move past that. You can come
14 back to that, Mr. Parker.

15 MR. PARKER: I'll just get him to publish part
16 of it.

17 Q. [Mr. Parker] Under the analysis, it states:
18 [reading] South Carolina partially completed in 2001 with
19 different spec. Problem with contractor.

20 A. Yes.

21 Q. Did I read that correctly?

22 A. Yes. [Reading] South Carolina partially
23 completed 2001 with different specifications. Problem
24 with contractor.

25 MR. PARKER: Next put up Exhibit 97.

1 Q. [Mr. Parker] Exhibit 97 is a document from CSX,
2 Mr. Wilson, senior director of labor relations --

3 MR. PARKER: And let's scroll on down.

4 Q. [Mr. Parker]. -- to a number of people. And it
5 says: [reading] this letter is notification of the
6 carrier's intent to contract initial clear-cutting of each
7 side of various public-passive crossings located on the
8 FBU --

9 That would be the Florida Business Unit --

10 A. That --

11 Q. -- [reading] southwest and central regions of
12 CSX, southern midwest, and central regions of SCX X system
13 [phonetic]. This is a new project by CSXT. And that
14 involves the clearing of land at grade crossings protected
15 by passive protection cross-bucks. This project involves
16 the clearing of land that has not previously been cleared
17 by the railroad to improve the visibility of the motoring
18 public at these grade crossings.

19 MR. PARKER: And over on the third -- let's go
20 to the fourth page.

21 Q. [Mr. Parker] Up top it says: [reading] the new
22 program contemplates the removal of trees and clearing of
23 property at some highway grade crossings for passive
24 protection. [B], the program's specification requires the
25 use of specialized equipment that CSXT currently does not

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1 own or operate. The capital investment to purchase the
2 equipment required to perform the clearing work would
3 total \$12,260,000 and the cost is based on the following
4 approximate equipment needs and costs.

5 And then they list --

6 A. Right.

7 Q. -- the equipment --

8 A. Yeah.

9 Q. -- is that correct?

10 A. That's correct.

11 Q. And it says, below the equipment: [reading] the
12 purchase of this equipment is not justified because CSX
13 will not need the equipment in the future. Once the land
14 is cleared, it will be maintained by spraying a subsequent
15 brush-cutting. In addition, the cost of acquiring this
16 equipment, its estimated maintenance would be
17 approximately \$3,065,000 annually. This assumes the
18 equipment would be used by experienced operators for no
19 more than forty hours per week; that they have looked into
20 leasing the equipment, but could not.

21 And then they also -- the next page says:

22 [reading] we believe the operation of this equipment will
23 require fifteen to twenty skilled equipment operators.
24 The equipment operators for the companies that perform
25 this type work typically go up to two years of training,

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1 progressing through a series of positions including
2 laborer and hand-tool operator, groundsmen, spotter,
3 apprentice, equipment operator, operating a number of
4 types of light and heavy equipment for a period of two to
5 four months under the direct supervision of a qualified
6 operator, in order to operate the equipment properly and
7 safely. And then, additionally, it is contemplated that
8 after clearing the trees at the crossing program, that the
9 successful contractor will treat the cleared areas with
10 chemical spray. This will require additional equipment,
11 licenses or permits, and expertise that CSXT and employees
12 do not currently have.

13 And then they -- next is: [reading] the capital
14 investment to purchase the equipment required to perform
15 the chemical application work would cost approximately
16 two-million dollars, based upon the following --

17 A. Yes.

18 Q. -- approximate equipment needs and costs.

19 A. Yes.

20 MR. PARKER: And let's go now to Exhibit 99.

21 Q. [Mr. Parker] Exhibit 99 is a memo to Mike
22 Ruehling, from Steve Ramsey, director of grade crossing
23 safety, concerning highway railroad grade-crossing program
24 clearing program?

25 A. Yes.

1 Q. And in this, it -- CSX says that it is going to
2 clear the grade crossings at passive grade crossings and
3 are --

4 A. With passive --

5 Q. -- going to employ DeAngelo Brothers; is that
6 correct?

7 A. Yes.

8 Q. And that each crossing will be cleared for
9 certain distances. And if you would just read that.

10 A. [Reading] 300 feet for maximized authorized
11 track speed of thirty mile an hour or less, 600 feet for a
12 maximized authorized speed of thirty to sixty mile per
13 hour, and 900 feet for a maximum authorized track speed of
14 greater than sixty mile per hour.

15 MR. PARKER: And next put up 100.

16 Q. [Mr. Parker] Exhibit 100 is from Jane Covington
17 to a number of people. It's dated May 31st, 2002. And in
18 this document, they clarify there's two programs: one
19 that's a crossing clearing program; and the other, the
20 logging program. Is that correct?

21 A. Yes, that's correct. Two program -- they've had
22 two programs for a while.

23 Q. And it says: [reading] we are working to be
24 sure there is a clear line of sight at crossings without
25 active warning devices.

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1 A. Yes.

2 MR. PARKER: And next, Exhibit 102.

3 Q. [Mr. Parker] And in Exhibit 102, which is from
4 Mr. McMaster to a number of other people, it states in --
5 it changes the distances to be cleared and the method of
6 clearing, and it's dated 2/24/03?

7 A. Yes, 2/24/03. Uh-huh.

8 Q. If you would just go through what the change was
9 made and --

10 A. Okay. [Reading] Area to be cleared, width of
11 right-of-way to a distance of a hundred foot from the edge
12 of traveled surface, point A. In addition, clear from a
13 point located twenty-eight feet from center line of track
14 at 350-foot down the track point being measured from edge
15 of traveled surface on a straight line to point A located
16 at the cleared edge of the right-of-way 100 foot from the
17 travel surface.

18 Me? Huh?

19 Q. I think we can go with that.

20 Let me ask you what the change was. They were
21 going to clear the first 100 feet of the entire
22 right-of-way and then taper it to twenty-eight feet?

23 A. They tapered it down, right.

24 Q. And it would be -- rather than 300, 350, 650,
25 and 950?

1 A. Yeah. Yes.

2 Q. For the full width of the right-of-way, up to a
3 hundred feet?

4 A. That's correct.

5 MR. PARKER: And we're next going to put up
6 Exhibit 103. And this is --

7 MR. HARMON: Your Honor, I believe you ruled on
8 foundational earlier.

9 MR. PARKER: Your Honor, we'll approach on that.

10 THE COURT: Go ahead and take that down.

11 [Whereupon, an off-the-record bench conference
12 is held]

13 MR. PARKER: If you will put up Exhibit 103.

14 Q. [Mr. Parker] Dr. Heathington, this is again
15 from Mr. McMaster to Mr. Mahon. If you will, in the body
16 of it, just publish what it says.

17 A. [Reading] Yeah. Works for me. Not sure what
18 can be done to resolve the matter to make Mr. Wyndham
19 happy, as one option not available is leaving vegetation
20 behind. Our specifications have recently been revised,
21 requiring less acres to be cut, while improving sight
22 distance. And hopefully the trees in question are outside
23 the new specifications. If they are within the area
24 required to be cut, then it is our plan to have them
25 removed. I do appreciate your assistance.

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1 MR. PARKER: Exhibit 104.

2 Q. [Mr. Parker] And 104 just graphically shows --

3 A. Yeah.

4 Q. -- the changes to --

5 A. Yeah.

6 Q. -- where it should be cut and how to be cut?

7 A. This is where they cut it a hundred feet up, and
8 then they cut a triangle through here. And that's how
9 they changed it on each one of these, depending on the
10 width of the right-of-way and so forth.

11 Q. And this would be where they have a hundred feet
12 right-of-way and they were going to require 650, how they
13 would do it?

14 A. That's right.

15 MR. PARKER: Exhibit 106. Excuse me. That's
16 the wrong one. It's 105.

17 [Whereupon, Mr. Parker and Ms. Gerrard confer]

18 Q. [Mr. Parker] 106 says from Mr. Goedde, Kelly
19 Goedde, to Mr. Patterson. It says: [reading] I am
20 requesting more cooperation by DeAngelo Brothers on the
21 crossing-clearing contract. While the first half of the
22 year has been more wet than normal, missed deadlines and
23 missing updated reports have been pushing the limits of
24 CSX's management. Personally, as production manager, I
25 need to be routinely, weekly, informed about the progress

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1 of the contract. And issues of piled debris have lingered
2 much longer than acceptable. As well, the contract
3 official deadline has passed. The subdivision completion
4 says all possible work will be done in the south by June
5 30, not including width, injunctive, or disputed
6 crossings. How close are you to the schedule of the
7 deadline of June 30 being met. What do you anticipate
8 the time line for another division.

9 And it goes on to say: [reading] I find
10 DeAngelo has very hard-working, quality crews. For
11 various recurring reasons, production is not at the level
12 we at CSX anticipated. I write this e-mail, as I have
13 many responsibilities to CSX. Some of my accountability
14 rests in you. I need dependable contractors doing safe,
15 quality, correct, and cost-effective work. I know
16 DeAngelo and affiliates have done this level of work in
17 the past. I am not seeing these results as this program
18 progresses. Our production from DeAngelo be more
19 predictable in the future.

20 MR. PARKER: And 107.

21 Q. [Mr. Parker] And Exhibit 107 is a comparison to
22 show the money that was saved by changing the
23 specifications.

24 A. Yeah.

25 Q. Is that correct?

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1 A. Yes.

2 Q. From 600 to 650, they say from four thousand one
3 seventy-two --

4 A. Yeah.

5 Q. -- thirty-seven fifty-five?

6 A. You can see the differences there.

7 MR. PARKER: And Exhibit 108.

8 Q. [Mr. Parker] And 108 is a memo from Mr.
9 McMaster to Kelly Goedde, the gentleman we were just
10 talking about.

11 A. Yes.

12 Q. And in that: [reading] Bill or Wayne, there are
13 over 300 crossings that have failed inspections that need
14 to be addressed. Per the contract, these were required to
15 be in compliance within a fixed number of days. I have
16 also heard DeAngelo is choosing to ignore these crossings
17 because of disputes with the HDR inspection. Understand
18 this delay, if true, is not acceptable and is in breach of
19 contract. I expect a plan with a schedule for correction
20 to be put together to address every failed crossing. If
21 there is a dispute with the crossing, document the
22 disputes and forward to me. However, my expectations of
23 cleared crossings are it's either in compliance or it
24 fails, defined per specs, with no judgmental leeway.
25 Continued inaction to immediately bring these crossings

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1 into compliance will affect future awards of other states,
2 as I do not intend to allow continued breach, nor will I
3 allow additional work to be awarded without completion of
4 the current crossings within your control.

5 And that's dated September the 17th, 2003?

6 A. That's correct.

7 MR. PARKER: And, Your Honor, we have stipulated
8 that this crossing was initially cleared on September
9 the 10th, 2003.

10 MR. HARMON: That's correct, Your Honor.

11 THE COURT: Thank you.

12 Q. [Mr. Parker] From Kelly Goedde --

13 MR. PARKER: To the next memo, 109.

14 Q. [Mr. Parker] It's from Mr. Goedde to Mr.
15 Patterson, and it states: [reading] in regard to phone
16 conference and subsequent conversations about
17 specification relief on wet crossings, we at CSX do not
18 find it justifiable to leave a crossing not cut because of
19 matters of inconvenience. We need to assure every method
20 possible has been exhausted before leaving a crossing out
21 of spec. The program's intent is for increased visibility
22 for public safety.

23 MR. PARKER: Go to 110.

24 Q. [Mr. Parker] Exhibit 110 is dated September the
25 3rd, 2003. And down at the bottom it says: [reading] Mr.

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1 McMaster, my crews working on the Augusta sub in South
2 Carolina are near completion and we will be strategically
3 placed to begin work on the southern end on the Columbia
4 sub by next week, if we can have your permission.

5 So on September the 3rd, from Mr. Patterson to
6 Mr. McMaster, it was indicated that they were near
7 completion of the Augusta sub, which would -- if the
8 Augusta sub was completed, would the Hill Street crossing,
9 with the obstructing vegetation of sight distance at Hill
10 Road, have been removed prior to February 3rd, 2004?

11 A. Yes.

12 MR. PARKER: Let's now go to Exhibit 112.

13 Q. [Mr. Parker] Exhibit 112 is an e-mail that
14 starts -- let's start down at the bottom. From Bill
15 Patterson to Kelly Goedde, is that correct, at the bottom?

16 A. Yeah.

17 MR. PARKER: Let's scroll up, please.

18 A. Okay. From Bill Patterson to Kelly Goedde.

19 Q. [Mr. Parker] And let's start -- it's from Mr.
20 Patterson to Mr. Goedde, and it says: [reading] Kelly, we
21 have cut everything on these crossings except the
22 following areas. And it says: [reading] crossing
23 milepost 444.10, did not cut quad A. Landowner claims
24 that it's private property, Tommy Jackson, 84 Hill Road,
25 Yemassee, South Carolina.

1 Correct?

2 A. Yeah, that's correct. It's the one in question.

3 Q. And then Mr. LeMaster -- goes from Mr. LeMaster
4 to Mr. Patterson. He tells him that he's looked in the
5 viewer and saw no lease agreement at this location, the
6 right-of-way as shown on the val map should be correct.
7 Have you had the opportunity to show Mr. Jackson the val
8 map. Does he assert that he has a deed that conflicts
9 with the right-of-way shown on the val map. If so, please
10 ask him to produce a copy so that we can correct our
11 records. If he has no such claim, we will plan to cut the
12 right-of-way to our project specifications.

13 A. Yes, sir.

14 Q. And then going on up from Mr. Patterson to
15 Mr. LeMaster. And the document there showed: [reading]
16 John, this crossing should be changed to private, since it
17 goes to Mr. Jackson's house only. It's a private drive
18 and not a public road; therefore, we do not believe it
19 should not be part of the project.

20 Correct?

21 A. That's right. I don't know where that came
22 from, but that's what it says.

23 Q. That's what it says, but that's not correct?

24 A. That's not correct, no.

25 Q. And the next entry says: [reading] our crossing

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1 inventory shows that 633468-F is a public crossing. In
2 fact, the inventory lists the highway as being Hill Road.
3 and SR-53 state road.

4 Is this information correct?

5 A. That's supposed to be 63. And it is a public
6 crossing, and it is Hill Road, and it's South Carolina 63
7 state road.

8 Q. And that is Hill Road they're talking about a
9 public road?

10 A. That's right.

11 Q. And clearly by October 13th --

12 A. They knew what it was.

13 Q. -- CSX knew it was a public crossing and knew
14 Mr. Jackson did not own the right-of-way where the trees
15 were located; is that correct?

16 A. That is correct.

17 MR. PARKER: Next, go to Exhibit 114.

18 Q. [Mr. Parker] And Exhibit 114 is an inspection
19 -- a grade-crossing vegetation-management crossing
20 certification report for --

21 A. Yes.

22 Q. -- the Augusta subdivision for Hill Road AMH-
23 F444.10?

24 A. Yes. That's the crossing number there.

25 Q. And it says: [reading] I have inspected the

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1 highway rail grade crossing certified above and --

2 A. Have found, I think it is.

3 Q. -- [reading] and have found that the work has
4 not been completed in compliance with the project
5 specifications, Exhibit A, that the following additional
6 work is required.

7 A. Is required. That's correct.

8 Q. And even though it said on the e-mail quadrant
9 A, actually, the quadrant that was not cut is quadrant D?

10 A. Yeah. This here [indicates].

11 Q. And that's D? A, B, C, D?

12 A. I believe that's correct, yeah.

13 Q. And it shows that they were to cut the crossing
14 for a hundred feet in all quadrants?

15 A. Did not cut to specs, so forth, debris, stumps.
16 Yeah. So it shows all of what -- it had some cutting
17 here, had some cutting here, still had -- that's that big
18 pine tree right there.

19 Q. No cutting in that quadrant?

20 A. Yeah.

21 Q. And no cutting in the quadrant --

22 A. And this right in here is the quadrant in
23 question.

24 Q. And the specifications of the crossing-clearing
25 program -- had they been adhered to -- this crossing would

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1 have been cleared, in the direction from which the train
2 came, for a distance of a hundred feet back for a hundred
3 feet --

4 A. Right.

5 Q. -- and tapered to twenty-eight feet?

6 A. Yeah. As it says here for all these quadrants
7 A, B, C, and D: [reading] did not cut to specifications.

8 So the inspection showed that it was not cut to
9 specifications in any quadrant.

10 MR. PARKER: Exhibit 115.

11 MR. HARMON: Your Honor, can we approach before
12 115 is shown?

13 THE COURT: Sure.

14 [Whereupon, an off-the-record bench conference
15 is held]

16 MR. PARKER: Let's go to Exhibit 116.

17 Q. [Mr. Parker] Dr. Heathington, Exhibit 116 shows
18 that the CSX crossing-clearing program, progress of
19 program by the end of 2003, twelve states will be complete
20 and South Carolina being one of them?

21 A. That's correct.

22 MR. PARKER: Exhibit 120-A.

23 Q. [Mr. Parker] Is this the CSX vegetation
24 management guide that was in existence in 2000?

25 A. Yes. I believe that's the date that it was in.

1 MR. PARKER: And I want to go to the next page.

2 Q. [Mr. Parker] CSX management guide shows that in
3 this picture that we'll look at in a minute, the problem
4 is brush-blocking visibility at road crossings?

5 A. That's correct.

6 Q. And it tells how to solve that problem with
7 various pieces of equipment?

8 A. Yes.

9 Q. And the example of the problem?

10 A. They show a crossing. And it's taken from along
11 the track. That's the road coming across there. But it's
12 showing all the trees and vegetation that's blocking the
13 sight of the motor-vehicle operator.

14 Q. And is this crossing similar to the -- being
15 drawn up at the one at Hill Road in Yemassee?

16 A. Yes, that's correct. I mean, all the quadrants
17 are not the same. But like Ms. Colvin was coming from
18 this direction going across, then all the trees like this
19 were in there. These were farther back on this side. And
20 that's where South Carolina 63 is going, along in there.

21 MR. HARMON: Objection.

22 Q. [Mr. Parker] That's the --

23 MR. HARMON: Objection.

24 THE COURT: Okay. Hold on.

25 MR. HARMON: This is not the crossing, Your

1 Honor.

2 THE WITNESS: No, no, no. I'm saying --

3 MR. PARKER: He's not saying that.

4 THE WITNESS: I'm not saying that. I'm just
5 saying -- I thought the question that was asked was is
6 this similar, and I was pointing out the differences
7 between this and what was at Hill Road. That was my
8 intent. It was.

9 MR. PARKER: Next go to Exhibit 121 and page 2.

10 Q. [Mr. Parker] And on Exhibit 121, does it show
11 that this was sent to Mr. Thomas Courson, Thomas H
12 Courson, P.O. Box 563, Yemassee, South Carolina?

13 MR. PARKER: We'll blow it up.

14 A. Let me get to where I can get right here. Here
15 we go. Right --

16 Q. [Mr. Parker] Courson.

17 A. Right there. Uh-huh. Yes.

18 MR. PARKER: Next, want to look at Exhibit 122.

19 Q. [Mr. Parker] And this is a maintenance-of-way
20 instruction for controlling vegetation on CSX's
21 right-of-way?

22 A. Yes. It was issued 5/30/96.

23 MR. PARKER: Okay. Let's go to the second page,
24 under J.

25 Q. [Mr. Parker] And under J it says that -- excuse
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1 me.

2 [Whereupon, Mr. Parker and Ms. Gerrard confer].

3 MR. PARKER: I'm Sorry. My mistake. Page 5.

4 Q. [Mr. Parker] Okay. Page 5 states that main
5 lines will be sprayed by work train and so forth, and
6 talks about spraying the pattern --

7 A. Yes.

8 Q. -- normally, and what's -- wider-pattern areas
9 include the following: that the main-line road crossing
10 shall be sprayed thirty feet from track center --

11 A. Yes.

12 Q. -- minimum of 200 feet each side of crossing,
13 unless further required by state law?

14 A. Yes.

15 Q. And the crossing at Hill Road, did it have
16 vegetation and trees growing closer than the distance
17 thirty feet from the near rail?

18 A. Yes.

19 Q. And was it in violation of this policy that
20 existed back in 1996?

21 A. Yes. That was measured by Mr. Crews.

22 Q. And did it measure to be as low as sixteen to
23 eighteen feet?

24 A. That's correct.

25 MR. PARKER: Exhibit 123.

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1 Q. [Mr. Parker] And Exhibit 123, is this an e-mail
2 from Mr. Goedde to Mr. Patterson dated January 9th, 2004?

3 A. Yes.

4 Q. And did they at that point in time extend
5 DeAngelo Brothers' contract for South Carolina --

6 A. Yeah.

7 Q. -- to be completed by March 15th --

8 A. 15th.

9 Q. -- 2004?

10 A. That's correct.

11 MR. PARKER: Dr. Heathington, if you will go
12 around and take the stand. I need to follow up with
13 another line of questions.

14 THE WITNESS: Good.

15 MR. PARKER: Thank you.

16 [Whereupon, the witness complies]

17 Q. [Mr. Parker] Dr. Heathington, if the crossing-
18 clearing program that CSX committed to doing had been done
19 at Hill Road, do you have an opinion as to whether or not
20 the wreck in which Lillian Colvin was injured would have
21 occurred?

22 A. Yes.

23 Q. And what is your opinion?

24 A. It wouldn't have occurred if it had been open.
25 You'd been able to see the train.

1 Q. And if you would just describe how you
2 understand, and your opinion, about what happened and why
3 it happened at Hill Road.

4 A. You're talking about the accident in question?

5 Q. The accident. The collision itself.

6 A. When Ms. Colvin came out of where she had picked
7 up this person getting off work -- as we looked at some
8 photographs in earlier testimony here -- and made a
9 left-hand turn. And everything that I have been able to
10 read and understand, she didn't go real fast or anything
11 of this nature. Accelerated up to a speed, and come to a
12 stop at the stop sign. And that's what she testified to
13 in her deposition.

14 Well, when you look at the stop sign, that will
15 put her, herself, if her front bumper is at the stop sign,
16 about seven -- I believe 7.5, approximately that, feet
17 from the front bumper where she is physically sitting.
18 Well, when you look out in that direction, there's nothing
19 there but trees, and they're not too far off the roadway
20 so you don't see anything. And then she testified that
21 she pulled up to near the cross-buck sign. And when you
22 pull up near to the cross-buck sign -- I believe that my
23 memory serves me correct; and it's been a good while since
24 I read it -- that she pulled up where she could see about
25 300 or 400 feet or so down the track. Well, when you pull

1 up to near the cross-buck sign -- that's another
2 identifying mark she had -- you can see about 400,
3 roughly, in that neighborhood, 350 to 400 feet down the
4 track. And there was no train in view there. And so --
5 and she looked to the left the first time she stopped, and
6 then she said she looked to the left the second time she
7 stopped. And so then she pulled on forward and, of
8 course, got hit by the train.

9 Q. The -- have you prepared an animation of the
10 events as described in the testimony?

11 A. Yes. Working with Mr. Gary Hewitt, who is the
12 computer and photogrammetry analyst expert that we've been
13 working with for years, he did the actual transferring
14 information we were giving him onto the computer and to
15 the videos and things of this nature.

16 Q. Did you do the engineering work?

17 A. Yes.

18 Q. In preparing the animation, did you use the
19 survey that is shown on Exhibit 59 to get the distances
20 and so forth?

21 A. Yes. And I would add that Mr. Hewitt has a
22 bachelors and masters degree in engineering from Purdue
23 University, where I used to be a faculty member, and he's
24 equally as capable of doing these sort of things as I am.

25 And so -- and so, yes. We calculated it all.

1 We sent all that to him, and we checked the numbers and so
2 forth.

3 Q. And did you take the speed of the train from the
4 event recorder?

5 A. Yes. He took the speed of the train from the
6 event recorder, and took the actual speed. Because it was
7 slowing down some as it come up. It didn't have a
8 constant speed all -- from all the way up. And he took
9 the actual off the event recorder itself, by the recording
10 on it.

11 Q. And for Ms. Colvin, did you assume normal rates
12 of accelerations from stop signs and so forth?

13 A. Yes. We did not put a high acceleration rate.
14 We put two feet per second squared. AASHTO will use, like
15 for a truck or something, 1.47. It's slower than that.
16 If you had -- and I'm not trying to be derogatory -- an
17 eighteen-year-old kid with a Corvette, they certainly
18 might go more than two feet per second squared. But the
19 point is that's about a normal for somebody who's not in a
20 big hurry or anything of this nature.

21 MR. PARKER: Your Honor, we would offer the
22 animation into evidence.

23 MR. HARMON: Your Honor, we just raise the same
24 earlier objections, and note it's only for
25 demonstrative purposes and won't go into evidence.

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1 THE COURT: Of course. Are you prepared now to
2 begin it?

3 MR. PARKER: Do you want to charge --

4 THE COURT: I'm going to do the charge, yes.

5 MR. MCLEOD: Note mine, too, Your Honor.

6 Thank you. I appreciate it, Mr. McLeod.

7 Ladies and gentlemen of the jury, this video
8 animation that we are now going to play for you
9 represents only a re-creation of one party's version of
10 the events. In other words, this has been created by
11 the plaintiffs and the plaintiffs' expert. And
12 understand that it may call attention to any
13 assumptions upon which the re-creation is based. In
14 other words, they may take the facts as they believe
15 them. All right, ladies and gentlemen? So please
16 understand that, that it is created and determined and
17 made by the plaintiffs. And, again, it is for
18 demonstrative purposes only. Okay?

19 Anything further, as far as any instruction,
20 from anyone?

21 MR. HARMON: No, Your Honor. Thank you.

22 THE COURT: All right. Are we ready to go
23 ahead, Mr. Parker?

24 MR. PARKER: We are ready to go ahead.

25 Dr. Heathington, I hate to make you step down

1 . again, but you might just step down and point out what
2 we are talking about.

3 [Whereupon, the witness complies]

4 Q. [Mr. Parker] If you would tell the jury what
5 we're going to be looking at and so forth.

6 THE WITNESS: Could it be possible to turn some
7 of these lights off, or do we have to leave those on?
8 It'll give a better --

9 [Off the record momentarily]

10 [Whereupon, the animation is played for the
11 jury]

12 A. This begins where Ms. Colvin is coming from
13 the --

14 [Whereupon, the animation is paused]

15 THE WITNESS: Can we hold it a minute? Don't --
16 back it up.

17 [Whereupon, the animation is played for the
18 jury]

19 A. This starts where Ms. Colvin is coming out from
20 the --

21 [Whereupon, the animation is paused]

22 THE WITNESS: No. Can we back it up? Go back
23 to the front.

24 MR. PARKER: It won't back up?

25 MS. GERRARD: No. Okay.

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1 [Whereupon, the animation is played for the
2 jury]

3 A. Okay. This begins where Ms. Colvin has picked
4 up a person and is coming out to Hill Road and will make a
5 left turn to go toward the crossing. And one can see from
6 here that's the house that was in question about arguing
7 over who owned the land, and so forth, and where the
8 right-of-way came to. It's over in that area there. And
9 so we pulled her out to the left, accelerate about two
10 feet per second squared, get up to speed.

11 And all of this will be recorded, be shown on
12 here so we can stop it at any place. But I want to let it
13 go through once all the way, and then show the overhead,
14 and then I want to come back and explain some things
15 that's on it.

16 [Whereupon, the animation is paused]

17 THE WITNESS: So if we can, let's just go ahead
18 and show the whole thing without stopping.

19 [Whereupon, the animation is played for the
20 jury]

21 THE WITNESS: No. Something is wrong. It's not
22 running right. It doesn't stop like that. It's not
23 right.

24 MR. PARKER: We've got a little technical
25 difficulty, Judge.

1 3:06 p.m.]

2 THE COURT: All right. Let's go ahead and bring
3 them in.

4 Y'all, do we have everyone we need?

5 [Whereupon, the jury enters the courtroom at
6 3:07 p.m.]

7 THE COURT: All right. Welcome back, ladies and
8 gentlemen of the jury. I trust you got something to
9 eat or drink and you've refreshed yourselves.

10 I believe we've got our technical difficulties
11 worked out.

12 Dr. Heathington?

13 THE WITNESS: If we can cut these lights out
14 again --

15 Q. [Mr. Parker] Dr. Heathington, we had a little
16 computer glitch there. And what occurred?

17 A. Well, it was being pulled off of a CD, and the
18 rate at which you can pull data off of a CD is not fast
19 enough for a movie, on certain computers. This apparently
20 is one of them. And so if you pull it off the hard disk
21 that's on the computer, then everything works all right.
22 And so what we -- it was already on the hard disk, but she
23 was using the CD. So we took the CD out. This is being
24 run off the hard disk. Same thing. It's just from a
25 different media that it's pulling it from -- database,

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1 rather.

2 Now, as I explained this earlier -- so I don't
3 see reason why we can't just go ahead and run this one all
4 the way through.

5 [Whereupon, the animation is played for the
6 jury]

7 Q. [Mr. Parker] The first stop is the stop sign?

8 A. Yes. We'll go through this next time and I'll
9 explain each one, but I wanted to get a feel for what
10 actually --

11 [Whereupon, the animation is paused]

12 THE WITNESS: Now, let's go back to the
13 beginning of this one, and I'm going to tell you when
14 to stop it. When the mile her hour on the speed of the
15 motor vehicle hits zero, or right before it hits zero,
16 stop it.

17 [Whereupon, the animation is played for the
18 jury]

19 THE WITNESS: Whoa. Okay. Hold it. Hold it.

20 A. Now, her front bumper is 36.59 here, as you can
21 see, to near rail. The stop sign is approximately thirty-
22 six feet from the near rail, right at that. So she's
23 right at the stop sign. The driver herself to the near
24 rail is about 44.09 feet. She's about 22 seconds, 22.67
25 seconds, from impact.

1 The train, at this point, is doing 44.69 mile
2 per hour. And it's 1432.32 feet from the point of impact..
3 So it's a good little ways. It's over a quarter of a mile
4 back up the track.

5 Now, she stopped, and she -- Ms. Colvin
6 testified in her deposition that she looked to the right
7 and she looked to the left and then she eased up to about
8 the cross-buck sign, which you can see about three or 400
9 feet down the track, and stopped again.

10 Now, they had her go through -- in her
11 deposition, they had her go through head movements. And
12 we -- and her deposition was a video, so I had Mr. Hewitt
13 put a clock on the video and we measured the time that it
14 took for her to move her head to the left and move her
15 head to the right and come back again and then take --
16 just make the decision to go forward. And so these times
17 that we're using for head movements are the ones that's
18 recorded in her deposition, which she testified that
19 that's what she did. She said it's normal. Said, I
20 looked at this, and looked at this.

21 And we have a clock. If we need to show that, I
22 have that on the computer, also.

23 [Whereupon, the animation is paused]

24 THE WITNESS: Now, let's go up a little farther.
25 She's going up -- just go a little farther. Whoa.

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1 Hold it. Back up a little bit.

2 [Whereupon, the animation is played for the
3 jury]

4 A. She's still stopped.

5 THE WITNESS: No. No. Can she do it frame by
6 frame? Look at the panel right in here and see if this
7 won't back up.

8 [Off the record momentarily]

9 [Whereupon, the animation is played for the
10 jury]

11 A. Now she's looking to the left. And that's how
12 far she can see up the track looking to the left.

13 [Whereupon, the animation is paused]

14 THE WITNESS: Now let's go ahead and go on
15 forward. Get ready to hold it. No. Keep going. Now
16 hold it.

17 [Whereupon, the animation is played for the
18 jury]

19 A. Now, that's how far -- when she eases up she's,
20 you'll notice, eighteen feet. The cross-buck signs are
21 approximately seventeen feet from the near rail, so she's
22 about a foot from the cross-buck sign. The driver to
23 impact is 25.50 seconds, time to impact is 10.43. The
24 train is 645 feet point 74. That tree right there is
25 approximately 400 feet. So she can see somewhere right

1 along in here [indicates], depending on where you're
2 looking at the near rail, which is not quite as good --
3 the far rail to the center and so forth. I think when you
4 calculate it off the plan view, if my memory serves me
5 correct, I think that's about 357 or 58, somewhere along
6 in there. Or 360. And so it's all right in that -- in
7 that ball park.

8 THE WITNESS: Okay, go ahead.

9 Q. [Mr. Parker] She doesn't see a train?

10 A. No.

11 THE WITNESS: Stop it. There you go.

12 [Whereupon, the animation is paused]

13 A. Now, once you get up this far, on the left-hand
14 side there's enough trees gone that you can see a pretty
15 good distance up there. I don't know how far that is -- I
16 didn't measure it -- but you can see that far up there.

17 THE WITNESS: Okay. Keep going.

18 A. She comes around, and she has to make the
19 decision to go forward. And she goes forward and, of
20 course, she's hit.

21 [Whereupon, the animation is paused]

22 THE WITNESS: Okay. Now, let's go to the
23 overhead, and then just hold it when you get it on
24 start. Now, just hold this.

25 MS. GERRARD: Bring it to --

1 THE WITNESS: Yeah. Bring it all the way to --
2 I was going to say, I couldn't find the car.

3 [Whereupon, the animation is played for the
4 jury]

5 A. There's Ms. Colvin's car coming out. Now, what
6 you do, you're -- this is a bird's-eye view or an overhead
7 view, as we call it. And she will come down and go
8 through it. Now, when she gets in here and look -- we put
9 a yellow line at the time she's looking so that you can
10 see where she can see, and then you'll be able to see
11 whether or not you can see a train; if a train is in this
12 picture, how far apart the yellow line is.

13 Now, one thing to keep in mind, if that train
14 crosses that yellow line, you can see it; but if that
15 train doesn't cross that yellow line, you're not going to
16 see it.

17 THE WITNESS: Okay. Let's go.

18 A. And we have her stop at the same place. It's
19 identical to the other one, except it's an overhead.

20 [Whereupon, the animation is paused]

21 THE WITNESS: And just play it all the way
22 through this time.

23 [Whereupon, the animation is played for the
24 jury]

25 A. She's fixing to stop at the stop sign. That's

1 what she can see. That's what she can see. Then she
2 comes on forward, eases on forward, to the cross-buck
3 signs and she looks to the right and she looks to the left
4 and she goes across and she gets hit.

5 [Whereupon, the animation is paused]

6 THE WITNESS: Okay. Now, let's go back up and
7 we're going to stop it at these various places. Now,
8 when the yellow line goes to the right, stop it. Now
9 freeze it. Oh. Back up until we've got the yellow
10 line on it. There you go. Hold it.

11 [Whereupon, the animation is played for the
12 jury]

13 A. Now, the train is a little over a quarter of a
14 mile away, 1473 -- we saw that a while ago, when she was
15 looking out -- and she can only see -- that tree is about
16 roughly 400 feet, in that neighborhood, 390, 400, right in
17 there. And that's only as far as she can see on the
18 track.

19 [Whereupon, the animation is paused]

20 THE WITNESS: Okay. Keep going now. Okay.
21 Hold it. Back up. Back up to the first yellow --
22 whoa. Hold it right there.

23 [Whereupon, the animation is played for the
24 jury]

25 A. Now, the train is very close. The train is 618

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1 feet away. And she's able to see just a little bit over
2 400 feet right in here.

3 [Whereupon, the animation is paused]

4 A. And that was her testimony in her deposition,
5 three or 400 feet. Well, a football field is 300 feet
6 long. As a person sitting in a car, a layperson, who
7 doesn't really, you know, necessarily understand all the
8 distances and train speeds and things of this nature, if
9 you look beyond a football field or a little farther and
10 you don't see a train coming, that looks all clear to you.
11 At least it would to me. And, I mean, I'm in the area, so
12 I know a little bit more about what to look for and what
13 to expect. And so if the train had been up here, she
14 would have caught it.

15 Now, there's one other point that needs to be
16 made here. Some people will say, well, if she would just
17 not been in -- moved quite as fast, she would have seen
18 the train. Well, you can't stop, when you have sight-
19 distance restrictions, and be assured that you're going to
20 improve the safety. If that train was way back here,
21 literally at several hundred mile or more away, she could
22 have sat there for half a day and then when she got ready
23 to move, the train would be right here.

24 So whenever you have sight-distance restrictions
25 there are no safe, assured ways of moving your vehicle

1 through that crossing. That's why we have the standards
2 for sight distances and so forth, because there's no way
3 to make it safe without some other form of traffic-control
4 device to control it. And so simply being slower or
5 whatever, if she had not have stopped at the stop sign, or
6 if she had not have stopped at the cross-buck signs, one
7 of them, she would have been all the way across and never
8 got hit.

9 Q. [Mr. Parker] Let me ask you: in looking at
10 sight distance and applying the standards and traffic
11 engineering judgment, can you have a crossing that you can
12 get to a place somewhere at the crossing and you can see,
13 and is that acceptable?

14 A. That's not acceptable. There's always some
15 place, some place, that you could stop to see. I have
16 seen people go up and stand in the middle of the track and
17 say, I can look down there and I can see a half a mile
18 away. Well, I've never recommended anybody that you stop
19 between the rail and see if a train is coming. That's the
20 wrong place to be, obviously. And so you don't never know
21 where those are. And a layperson driving a car has no
22 idea where that ought to be. And so that's why the
23 standards are such that as long as you're driving
24 reasonably and prudent, it doesn't make any difference if
25 you look left first, right first, or stop once, not stop,

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1 or don't stop, or if it's a traffic-control device you do
2 stop. But if the standards are there, it's clear and you
3 can see. And that's why you have to have the standards.
4 If you don't, you create --

5 Let me back up. All crossings all right -- by
6 engineers are considered to be hazardous. No ifs, ands
7 and buts about that. There are some crossings that are
8 considered to be extra hazardous. So whenever you limit
9 what a person can see so that they don't have an idea that
10 a train is anywhere around here, that -- it is considered
11 an extra-hazardous crossing. That means you're at risk
12 when you're using it and some time or other the right
13 time-space relationship will come up and that's when you
14 get hit.

15 If she had been thirty seconds earlier, or even
16 ten seconds earlier, been no problem. If she would have
17 been thirty seconds slower coming out, there would have
18 been no problem. But the right time-and-space
19 relationship came up. And that will come up every -- it
20 might be another ten years before it comes up, might be
21 five years, it could be the next day. I've seen them in
22 all sorts of things. There are no models that predicts
23 the rate.

24 Q. Let me ask you: at this point in time, you gave
25 -- said there was no history of any other collisions at

1 that location and that the average daily traffic rate I
2 think was somewhere around high two hundreds, number of
3 trains at the time about eight per day. What's the odds
4 of encountering a train, at that location, by a car?

5 A. There is -- you can go through a model, and for
6 that slow a distance, it would have -- that small number
7 of trains, and I didn't calculate that, as I recall, it
8 might be twenty years before you're supposed to have an
9 accident. However, what the model does not take into
10 account, which was developed by U.S. DOT and published by
11 them, it doesn't take into account restricted sight
12 distances or geometrics or things of this nature. It's
13 just based on speeds and volumes of both highways, and the
14 other, and it also takes into account prior accident
15 history on the thing.

16 THE WITNESS: Okay. Let's go on through that.

17 A. Now, we went and I gave to Mr. Hewitt one of the
18 charts that we had while ago on what CSX's program was for
19 cutting the trees at that point in time, and gave that to
20 him, of which he programmed in here on it.

21 THE WITNESS: Now, let's go to the next one,
22 which I believe would be number 6. No. You've got to
23 go back.

24 [Whereupon, the animation is played for the
25 jury]

1 A. Now, this one we've taken the trees out, as
2 their program would have -- I wouldn't say would have
3 called for -- their program did call for. It just wasn't
4 done.

5 [Whereupon, the animation is paused]

6 THE WITNESS: And so let's go and run this one.
7 Hold it. Stop. Back up. Back up. Now look -- back
8 up. No. Go back. You're going forward. There you
9 go. Back up. Now, to the right. When the head is to
10 the right -- no, no. Back up, back up, back up, back
11 up. Back up.

12 MR. PARKER: She's trying.

13 THE WITNESS: Okay. Go forward now. And when
14 the head goes to the right, stop it. There you go.
15 Stop it.

16 [Whereupon, the animation is played for the
17 jury]

18 A. Now, even if the stop sign -- because of these
19 trees down here, which would exist under their program,
20 and because of the location of this stop sign thirty-six
21 feet back from the track -- which to me, as an engineer, a
22 licensed engineer in certain states, that's foolish. This
23 puts people in danger. And you --

24 [Whereupon, the animation is paused]

25 Q. [Mr. Parker] Does that violate the standard of

1 care and the MUTCD, and all the standards, to put that
2 stop sign in that location?

3 A. Absolutely. For years -- if I may explain how
4 that's done. For years you had to have an engineering
5 study before you could put a stop sign in. And then
6 Congress, in a political manner, passed in about 1991 or
7 '92 that public bodies could go without an engineering
8 study and install stop signs and yield signs. Now, many
9 of us argued against that, but we were unsuccessful. In
10 the political process, you don't always get what you want.

11 Q. Where is a stop sign supposed to be erected?

12 A. It should be -- well, you can have a variation.
13 But the MUTCD says the stop line will be no closer than
14 fifteen foot from the near rail. My preference is to put
15 the stop sign and the stop line, if you put one in,
16 fifteen feet from the near rail. You want to get it as
17 close as legal because you have better visibility, should
18 have better visibility, on this sort of thing. And so
19 that's the most appropriate, from the engineering point of
20 view, that you put it.

21 Now, sometimes you can put it fifteen foot from
22 the near rail. And in this particular situation, that
23 wouldn't be true. You still wouldn't have total -- you're
24 a lot better, but wouldn't have total acceptable sight
25 distance even if it was fifteen foot. But it would be a

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1 whole lot better than what was out there.

2 THE WITNESS: Okay. Let's go forward.

3 [Whereupon, the animation is played for the
4 jury]

5 A. Now, she's pulling up to the cross-buck sign.

6 THE WITNESS: And when she turns to the right,
7 stop it.

8 [Whereupon, the animation is paused]

9 A. Now, you can see the train. See what happens
10 when you took the trees out.

11 THE WITNESS: And so, therefore, now go ahead
12 and run it.

13 [Whereupon, the animation is played for the
14 jury]

15 A. And we would assume if -- this is an assumption
16 that if she had seen it, and it was clearly visible, she
17 would have sat there until the train went by.

18 [Whereupon, the animation is paused]

19 THE WITNESS: Okay. Now, let's go to the
20 overhead on this same thing.

21 A. Now, this is with the trees cleared, as you can
22 see.

23 [Whereupon, the animation is played for the
24 jury]

25 THE WITNESS: And then when she -- when the

1 yellow line gets to the right, stop it. Hold it. Back
2 it up just -- whoa.

3 [Whereupon, the animation is paused]

4 A. Now, the train is still, at that particular
5 point in time, 1400, about a quarter of -- over a quarter
6 of a mile.

7 THE WITNESS: Okay. Go to the next.

8 MR. PARKER: Well, that's all right.

9 Q. [Mr. Parker] Let me ask you about that.
10 Actually, the sight line there goes out of the photograph
11 there?

12 A. Yes. The train is back up here.

13 Q. And so you have --

14 A. And this --

15 Q. -- greatly increased sight distance?

16 A. This was about 400 feet right along in here
17 where that tree was, that big pine tree, and so you're
18 seeing way on down the track here.

19 THE WITNESS: Okay. Let's go to the next one.

20 [Whereupon, the animation is played for the
21 jury]

22 A. Now, you notice the train is in view.

23 THE WITNESS: Hold it. Just stop it there for a
24 minute.

25 [Whereupon, the animation is paused]

1 A. Now, whenever that train, as I said earlier,
2 crosses that yellow line, that means her line of sight --
3 the train has crossed in her line of sight. And, of
4 course, before the -- this illustrates that if you had
5 taken out the trees, what would happen. And if you don't
6 take out the trees, then this is all blocked back up in
7 here while the train is very close. If my memory serves
8 me correct, it was about 600-and-something feet away when
9 she was -- could see as far as she could there.

10 THE WITNESS: Okay. Go ahead and go.

11 Q. [Mr. Parker] From the documents you reviewed
12 from CSX, were they aware of these engineering principles
13 back as far as 1999, and the need for safe sight distance?

14 A. Oh, yes. In fact, my personal knowledge is that
15 I have lectured on this subject at conferences where
16 essentially all the railroads were there, and where we
17 talked about all of this sort of stuff, going back to 1980
18 or before. This has been around for as long as I've been
19 in the field. Not the exact numbers. They've increased
20 the requirements over the years. But as far back as 1954,
21 I think. That's the earliest reference I have, in my
22 personal library, AASHTO is saying what you had to have
23 for sight distances and so forth.

24 Q. Based on your review of the crossing and the
25 limited sight distance by CSX not complying with the

1 vegetation-management program, do you have an opinion,
2 based on that, whether or not this crossing needed gates
3 and lights?

4 MR. HARMON: Objection.

5 THE COURT: Basis? Pardon?

6 MR. HARMON: Objection, Your Honor, based on the
7 reason we stated earlier at the sidebar. You're going
8 to instruct -- may we approach?

9 THE COURT: Yes, please.

10 [Whereupon, an off-the-record bench conference
11 is held]

12 Q. [Mr. Parker] Dr. Heathington, let me ask you
13 another question. Based upon the fact that CSX had not
14 cleared out the vegetation in accordance with what it said
15 it was going to do, do you have an opinion as to whether
16 or not -- in order for a motorist to have adequate warning
17 at that crossing, in those conditions where they existed
18 on February 3rd, 2004, did the crossing need to be
19 equipped with gates and lights or some other warning
20 device?

21 A. There's three ways that that could have been
22 handled, if you're not going to cut the trees. One is
23 that you can have what is called stop and flag. That
24 means every train that came through there would stop at
25 the crossing, a person get off the train, go out and stop

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1 all the cars that's coming, and, you know, the train goes
2 through. Now, if you've got a whole lot of those sorts of
3 things, obviously it takes days to get down the track very
4 far.

5 The other thing you can do is slow -- you have a
6 slow order. It's called a slow order. You can put a slow
7 order in and find out and determine what speed that that
8 train could be and have adequate sight distance, which is
9 not going to be very high. I didn't calculate that. But
10 you may be talking about ten mile an hour, fifteen mile an
11 hour, or something in that nature. But you could do that.

12 However, the best thing to do, obviously, is to
13 put in accurate traffic-control devices which notifies the
14 motorists that a train is coming. And you're not -- in
15 fact, that's what the purpose of active traffic-control
16 devices are for, is to compensate for having restrictions
17 on sight distance where you can't see. That's the purpose
18 of them, among other things. But that's one of the main
19 purposes, yeah.

20 Q. And are people going to get hit by trains if you
21 can't see the train?

22 A. In time, that's exactly right. There will be a
23 correct time-space relationship come up every so often,
24 and there's no -- there's no model that will predict how
25 often that occurs. But it will occur, and it has occurred

1 here.

2 Q. And if CSX had cleared the right-of-way as they
3 said they would do and as they committed to do, in your
4 opinion would Lillian Colvin have been injured on
5 2/3/2004?

6 A. She'd never been impacted by the train;
7 therefore, if you're not impacted by the train, you
8 wouldn't have been injured.

9 Q. Okay. Now, let me ask you one other thing about
10 the stop line that was there and I think is shown on the
11 overhead and on the other animation. What was the
12 distance of the stop line?

13 A. It was about ten foot, roughly, from the near
14 rail. And it was right in here, about ten foot. And I
15 did have an exhibit that I pulled out of the MUTCD which
16 says it shall not be closer than fifteen foot.

17 This is the Millennium Edition of the Manual on
18 Uniform Traffic Control Devices, which has to be adopted
19 by states in order to be eligible to receive federal
20 funding for highways. That's been a requirement ever
21 since I've been in the field. And the MUTCD was developed
22 under congressional authorization in 1935, so it's been
23 around a while. It's to have uniformity throughout the
24 United States. That's the purpose of it.

25 In Section 8B.17, which is in -- they have

1 chapters in the MUTCD, and chapter 8 is for railroad
2 highway grade crossings. Then they'll have a chapter on
3 construction zones, and then they'll have a chapter on
4 something else, and so forth. Which chapter 8 is for
5 railroad highway grade crossings. And in that it reads:
6 [reading] the stop line should be a transverse line at a
7 right angle to the travel way at a point where a vehicle
8 is to stop, or as near to that point as possible. The
9 stop line should be placed approximately 2.4 meters or
10 eight foot from the gate -- if present; they're talking
11 about gates with flashing-light signals -- but no closer
12 than 4.6 meters, fifteen feet, from the nearest rail.

13 So that's been a standard as long as I can
14 remember, and I've been in the field forty-five years.

15 Q. And why is that the standard?

16 A. Because of a whole host of reasons: to give you
17 proper time to react; to see and adjust; and anything
18 coming from the train or whatever; other motor vehicles
19 turning in the area that's coming across; and things like
20 this. It's been a safety standard, as I say, for as long
21 as I've been around.

22 MR. PARKER: All right. If we can put up 125,
23 Exhibit 125.

24 Q. [Mr. Parker] And is that a photograph that you
25 took -- didn't take, but that you created, I should say?

1 A. That's correct.

2 Q. And tell us what you did there and the purpose
3 of it.

4 A. I took a photograph of an exemplar vehicle to
5 Ms. Colvin's, and then I asked y'all to obtain a
6 photograph of the gentleman who was riding with her. And
7 what we wanted to find out was could it be possible if --
8 when she stopped where she did, would it be possible for
9 him to be blocking her view, as opposed to the trees. And
10 as you can see, the trees is what blocks the view of the
11 train, not the gentleman sitting there. And we asked
12 specifics about where does he normally sit, is he a big
13 guy, does he push the seat back and so forth, and all
14 these sorts of things. And that's putting it in one, in
15 an exemplar vehicle, that I took a photograph of.

16 Q. All right. I want to talk with you a minute
17 about some statutes of the law in South Carolina. And
18 Section 56-5-2710 talks about when you have to stop at a
19 railroad crossing, what you have to do, so forth. If you
20 will just explain that to us.

21 A. Well, this comes from the Uniform Vehicle Code.
22 The Uniform Vehicle Code is a code that's been published
23 by the federal --

24 MR. HARMON: I'm sorry. I'm sorry to interrupt.

25 Excuse me.

1 Again, objection. This Court will instruct the
2 jury on the law.

3 THE COURT: Sustained.

4 MR. MCLEOD: Note mine, too.

5 Q. [Mr. Parker] If you will, you can just read the
6 statute as to what it says.

7 A. Okay.

8 MR. HARMON: Same objection, Your Honor. You
9 are going to instruct the jury on the law. We do not
10 need Dr. Heathington to instruct the jury or read the
11 law.

12 MR. PARKER: Your Honor, I think that we are
13 entitled to publish the statute to the jury.

14 MR. HARMON: Your Honor, there are multiple
15 statutes, as you know.

16 THE COURT: I understand that. Y'all come here
17 for a second.

18 [Whereupon, an off-the-record bench conference
19 is held]

20 Q. [Mr. Parker] Dr. Heathington, if you would just
21 go over section 56-5-2710, as to what the law requires
22 about a person driving a vehicle approaching a railroad
23 grade crossing. And you can read it or --

24 A. [Reading] Whenever any person driving a vehicle
25 approaches a railroad grade crossing, under any of the

1 circumstances stated in this section, the driver of the
2 vehicle shall stop within fifty feet but not less than
3 fifteen feet from the nearest rail of the railroad and
4 shall not proceed until he can do so safely. The
5 foregoing requirements shall apply when a clearly visible
6 electric or mechanical signal device gives warning of the
7 immediate approach of a railroad train; a crossing gate is
8 lowered, or when a flagman gives or continues to give a
9 signal of the approach or passage of a railroad train; a
10 railroad train approaching within approximately 1,500 feet
11 of a highway crossing emits a signal audible from such
12 distance and the train, by reason of its speed or nearness
13 to the crossing, is an immediate hazard; four, an
14 approaching railroad train is plainly visible and is in a
15 -- and is in hazardous proximity to the crossing. No
16 person shall drive any vehicle through, around, or under
17 any crossing gate or barrier at a railroad crossing while
18 the gate or barrier is closed or is being opened or
19 closed.

20 Q. All right. So, number one, there was no clearly
21 visible electrical or mechanical signal device --

22 A. That's correct.

23 Q. -- at the crossing?

24 Number two, there was not a crossing gate or a
25 flagman?

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1 A. That's correct.

2 Q. Number three, a railroad train approaching
3 within approximately 1500 feet of the crossing emits a
4 signal audible from such a distance the train, by reason
5 of its speed or distance to the crossing, is an immediate
6 hazard?

7 A. Correct.

8 Q. Did they give a warning from 1500 feet in this
9 case?

10 A. No.

11 Q. And you got that from the event recorder?

12 A. The signal, yes, come from that and from Dr.
13 Lipscomb's analysis.

14 Q. And the approaching train, railroad train, is
15 plainly visible that is in hazardous proximity to the
16 crossing?

17 A. Yes.

18 Q. Was it plainly visible, this train?

19 A. No. We've shown that in the animation.

20 MR. PARKER: Let's go to the next section.

21 Q. [Mr. Parker] Section 56-5-2750 is the stop
22 required at designated railroad grade crossing?

23 A. Yes.

24 Q. And if you will tell us what that says.

25 A. [Reading] The Department of Transportation

1 errors are high. At locations where design is deficient,
2 the possibility of error and inappropriate driver
3 performance increases.

4 Q. In other words, in order for a motorist to be
5 able to avoid a hazard, it needs to be -- whatever the
6 traffic situation is, needs to be designed so they can
7 recognize the hazard?

8 A. Absolutely.

9 MR. PARKER: Next.

10 A. [Reading] The majority of motorists will drive
11 in an orderly and safe manner if they are provided with
12 clear, reliable information and guidance.

13 That's from the traffic control devices handbook
14 which is the collaboration book that they put out on the
15 MUTCD.

16 Q. [Mr. Parker] And was Ms. Colvin provided with
17 clear, reliable information in this case?

18 A. The only information that she was provided was
19 that there was no train coming.

20 Q. And that was -- was that reliable information?

21 A. Not hardly.

22 MR. PARKER: Next.

23 A. [Reading] When positive guidance is applied to
24 design --

25 And that's a term we use in engineering design.

1 I taught geometric design of highways in colleges.

2 [Reading] When positive guidance is applied to
3 design, competent drivers using well-designed highways
4 with appropriate information displays can perform safely
5 and efficiently. Properly designed and operated highways,
6 in turn, provide positive guidance to drivers.

7 This, again, is from AASHTO.

8 Q. [Mr. Parker] All right.

9 A. [Reading] A common characteristic of many high-
10 accident locations is that they place large or unusual
11 demands on the information-processing capabilities of
12 drivers. Inefficient operation and accidents usually
13 occur where the chances for information-handling errors
14 are high. At locations where design is deficient, the
15 possibility of error and inappropriate driver performance
16 increases.

17 This, again, is put out by AASHTO. The "this"
18 has application to the crossing in question. The reason
19 that you haven't had more accidents there, in my opinion,
20 than you have --

21 MR. HARMON: Objection.

22 A. -- is you don't have a high --

23 MR. HARMON: Objection. Excuse me. That calls
24 for rank speculation. He is going to now say why there
25 haven't been more -- there's been no accidents but

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1 this. And now he's going to say why? in the past?
2 That's speculation. He has no basis to opine about
3 that, Your Honor.

4 THE COURT: Okay. Overruled.
5 You can go ahead and testify to it.

6 A. We have forecasting models on this. You have a
7 low-traffic volume, and you have lower train volumes. And
8 if you had high-traffic volumes and high-train volumes,
9 you would have a whole host of problems here all the time.

10 Q. [Mr. Parker] Part of this is as you're driving
11 down the highway, you've got to take in a lot of
12 information?

13 A. Yes. I taught courses in this for a few years.
14 Twenty-five.

15 Q. And in order to design safe highways, you have
16 to recognize the limitations of humans to multitask?

17 A. That's the whole purpose of design engineers.
18 As I say, I taught in this area for a long time -- worked
19 in this area for highway departments -- and if you don't
20 understand how a motor vehicle operator operates their
21 vehicle, you will not be a good design engineer.

22 MR. PARKER: The next one.

23 A. Expectancies -- and that's something that's
24 utilized in our field quite extensively.

25 [Reading] Expectancies are formed by the

1 driver's experience and training. Situations that
2 generally occur are the same way, and successful responses
3 to these situations are incorporated into the driver's
4 stores of knowledge. Expectancy relates to the driver's
5 readiness to respond to common situations in predictable
6 and successful ways. It affects how drivers perceive and
7 handle information and modify the speed and accuracy of
8 their responses.

9 Typical example given in design manuals and so
10 forth is that we normally, driving down an interstate,
11 expect the exit ramp to be on the right. Every once in a
12 while, you'll find it on the left. Some states,
13 California being one, has spent millions of dollars to
14 remove left-hand exit ramps and put them on the right-hand
15 side. That's what is expected. And when you have like a
16 six- or eight-lane facility and you have a left-hand exit
17 ramp, you have problems with lane shifting and all sorts
18 of things.

19 And so a person may have come across a crossing
20 many times and never encountered a train there, and the
21 expectancy that's buried in their mind -- from a human-
22 factors perspective -- is that they're not anticipating
23 seeing a train. That's just common.

24 If you always go out and every morning your car
25 starts and then one morning it doesn't start, you haven't

1 expected that. And so expectancy is a very critical
2 element of the human-factors aspects of vehicle operation.

3 MR. PARKER: Next.

4 A. [Reading] Reinforced expectancies help drivers
5 respond rapidly and correctly. Unusual, unique, or
6 uncommon situations that violate expectancies may cause
7 longer response times, inappropriate responses, or errors.

8 And certainly if we don't obtain what we are
9 expecting and we get in a weird situation, then it takes
10 time to determine what on earth is going on and what to
11 do, and we'll make errors.

12 Q. [Mr. Parker] And the expectancy is -- for most
13 drivers would be that if you can see three or 400 feet,
14 you --

15 A. Oh, absolutely. If you can see a football
16 length or more, most people will say, well, you know, I
17 don't see it coming there; I can get across there.

18 MR. PARKER: Next.

19 A. [Reading] Because drivers can only attend to one
20 visual information source at a time, they integrate the
21 various information inputs and maintain an awareness of
22 the changing environment through an attention-sharing
23 process. Drivers sample visual information obtained in
24 short, duration glances, shifting their attention from one
25 source to another. They make some decisions immediately,

1 and delay others. They rely on judgment, estimation, and
2 prediction to fill in gaps.

3 That's, again, from AASHTO. As I think I said
4 here a day or so ago, an illustration, just a simple
5 illustration, is when we watch the news channel or
6 something and people are talking, they have things
7 scrolling across the bottom. You shift from one to the
8 other all the time, but each time you shift you lose a
9 piece of information. You can't comprehend both of them
10 simultaneously.

11 Q. [Mr. Parker] As we travel on a highway down the
12 road and we're looking out for intersections and watching
13 for traffic at intersecting roads, if that car does
14 nothing unusual, until it does something unusual do we --
15 from a human-factors standpoint, does that excite anything
16 in the brain that causes us to make memories and that type
17 thing?

18 A. Not at all.

19 Q. And if you were asked today did you pass a car
20 at the intersection up -- the immediate intersection up
21 the street, would you ever be able to remember that?

22 A. I do not remember it, and I drove down here this
23 morning.

24 Q. And do you remember any cars you passed?

25 A. No, I don't.

1 MR. PARKER: Next.

2 A. [Reading] Throughout the driving task, drivers
3 perform several functions almost simultaneously. They
4 look at information sources, make numerous decisions, and
5 perform necessary control actions. Sources of
6 information, some needed, others not, compete for their
7 attention. Needed information must be in the field of
8 view, be available when needed, be in a usable form, and
9 be capable of getting the driver's attention.

10 In other words, to translate this to the
11 crossing in question -- this is from AASHTO, again -- that
12 train has to be available when you need to see it. You
13 can't have it available at some other time. It has to be
14 there when you need it. And that's why the standards for
15 sight distance so forth have been published for a lot of
16 years; many, many years.

17 Q. [Mr. Parker] And can you have a safe place at a
18 crossing where there's only three or four or five feet
19 where you could stop and see a train?

20 A. Not at all. And you can't have a safe crossing
21 if there's only just a certain limited number of locations
22 where you can be where you could detect the train. It's
23 got to go open in that. That's what the sight distance
24 standards are. From a certain point back, like where the
25 beginning of a non-recovery zone is, you've got to be able

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1 to see that whole width in there on both sides, because
2 trains come from both directions.

3 Q. And have you studied where people stop at stop
4 lines -- stop lines and stop signs and all of this?

5 A. Oh, yes.

6 Q. And do people stop at different places at
7 different times, depending on the individual?

8 A. That's correct. And so the type of vehicle
9 they're driving, how much they can see over the hood, how
10 well they have a feel for it.

11 Normally, people don't get up to where --
12 whatever you have for them to park. You will see things
13 that's promoted to put in your garage to bring you up
14 closer to the wall where you can stop and so that you know
15 where you are, and things of this nature.

16 We cannot judge extremely accurate, say, to a
17 foot or something, where our front bumper is. I have one
18 vehicle that I'm not sure I can tell you within three foot
19 where it is. The hood is real high, I can't see over the
20 end of it, and it's really difficult to know exactly where
21 the front of your pickup is.

22 MR. PARKER: Next.

23 A. [Reading] Design should take driver reaction
24 times into account. It should be recognized that drivers
25 vary in their response, and take longer to respond when

1 decisions are complex or features are unexpected. Clear
2 sight lines and adequate decision sight distances provide
3 margins for error.

4 And so you've got to have the sight lines.
5 You've got to have that, particularly at a passive
6 crossing. It's a different situation if you have an
7 active crossing.

8 MR. PARKER: Next.

9 A. That's from AASHTO, as well. This is also from
10 AASHTO, for rural roads. This goes back to 1954.

11 [Reading] Sight distance is of primary
12 consideration at crossings without signals or gates. The
13 condition at a railroad grade crossing is comparable to
14 that of intersecting highways where a corner-sight
15 triangle must be kept clear of obstructions.

16 Not supposed to have any obstructions. And that
17 was in 1954, and I didn't start in the field until 1963,
18 and so almost ten years before I started. And it may have
19 been published long before then. I don't know. That's
20 the farthest I've gone back, '54.

21 MR. PARKER: Next.

22 A. [Reading] The operator of a vehicle approaching
23 an intersection at grade should have an unobstructed view
24 of the whole intersection and a length of the intersecting
25 highway sufficient to permit control of the vehicle to

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1 avoid collisions.

2 Now, in the whole text, that other one said this
3 is the same as an intersection. And what they're showing
4 you in that same design manual is that it should have an
5 unobstructed sufficient -- the total vehicle to avoid
6 question. Whole -- should have an unobstructed view of
7 the whole intersection.

8 Q. [Mr. Parker] And was there an unobstructed view
9 of the intersection of the railroad track at Hill Road?

10 A. Well, you may not pick up your train. You may
11 be picking up something else. You can only see the top of
12 the train and not realize what it is. They want an
13 unobstructed view. And I agree with them. I don't
14 disagree with that at all.

15 Q. And was there an unobstructed view at Hill Road?
16 Did you have --

17 A. It was totally obstructed. At the stop sign,
18 you couldn't see anything.

19 The primary objective in designing a grade
20 crossing is to provide adequate sight distance for the
21 motorist to make an appropriate decision as to whether to
22 stop or to proceed. That came out of Norfolk Southern's
23 Life-safer grade-crossing collision investigation. They
24 have a manual which they give to their people to
25 investigate collisions at grade crossings.

1 MR. PARKER: Next.

2 A. [Reading] Speeds of the two vehicles, train and
3 motor vehicle, define the distances at which a driver must
4 be able to see a train.

5 Again, that came from Norfolk Southern's --

6 Q. [Mr. Parker] And that's the time-space
7 relationship?

8 A. That's what I was talking about. And that's --
9 we looked at the charts, when we were going through the
10 sight-distance deficiencies for this crossing, where it
11 showed you from FHWA and from AASHTO where you have the
12 non-recovery zones and things of this nature. That's what
13 they're talking about here.

14 MR. PARKER: Next.

15 A. [Reading] Obstructions in the sight triangle in
16 any of the four quadrants can result in restricted sight
17 distance for at least one approach roadway. If such
18 obstructions or vegetation or other natural features, they
19 should be removed.

20 Again, that's a Norfolk Southern, in their
21 investigation manual.

22 [Reading] The view of approaching trains at all
23 crossings will be as free from obstruction as possible.

24 That's the Illinois Central maintenance-of-way
25 rules.

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1 [Reading] At railroad highway grade crossings
2 with only passive control devices, it is imperative that
3 the motorist detect the presence of an approaching train
4 as early as possible. This is accomplished through visual
5 and/or audible means.

6 And that's the traffic-control devices handbook,
7 which is a supplement to the MUTCD.

8 MR. PARKER: Next.

9 A. At railroad -- oh.

10 [Reading] No rational person could question the
11 need to maintain sight distance by keeping railroad
12 rights-of-way free from obstructing vegetation, snow
13 accumulations, standing cars, and similar objects.

14 Q. [Mr. Parker] Is that what --

15 A. What is -- now, I knew these people, know them
16 real well. This was sent to Mr. Burnett, who was
17 chairman, and I've worked with him before -- chairman of
18 the National Transportation Safety Board. And he had sent
19 kind of a scalding letter to Mr. Riley, who was
20 administrator of FRA, saying, you're not keeping all these
21 crossings cleared. And Mr. Riley sent him back a letter
22 and says, no rational person could question the need to
23 maintain sight distances. So Mr. Riley is saying, no, no,
24 no; we agree with you and so forth on that.

25 MR. PARKER: Next.

1 A. And Mr. Riley went on to say: [reading] in
2 addition, the railroad highway grade crossing handbook,
3 which we've had now the second edition, published by FHWA
4 -- that's the Federal Highway Administration -- and
5 recognized by the industry as the standard of best
6 practices, states that vegetation should be removed or cut
7 back periodically. Also, if practical, this sight-
8 distance area should be kept free of parked vehicles and
9 standing railroad cars. Care should be taken to avoid the
10 accumulation of snow in this area. Other standard and
11 practice manuals such as railroad-crossing corridors
12 improvements and --

13 Emphasize the same points. And the handbook is
14 where I took the -- that we showed up here, the sight
15 distance charts, of what you had to have for sight
16 distances. That's where it comes from, is that one there.

17 MR. PARKER: Next.

18 A. [Reading] Where sight obstructions are present,
19 it may be necessary to install active traffic-control
20 devices that will bring all highway traffic to a stop
21 before crossing the tracks and will warn drivers
22 automatically in time for an approaching train.

23 That's, again, from AASHTO. And all they're
24 saying is, you know, an active device warns motorists of
25 an approaching train. Passive crossing, you don't have

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1 that.

2 Q. [Mr. Parker] Okay.

3 A. This is the first railroad grade crossing
4 handbook of 1978. Says: [reading] in the event that it's
5 impossible to achieve the minimum sight triangle, careful
6 consideration should be given to the installation of
7 active control devices.

8 Now, this was a research study done in the
9 medical field. What they did is they gave drivers Task A
10 to do, and they measured the voxle. The voxle is the
11 measure of brain activity. I'm not a medical doctor. But
12 it measures the brain activity. And they had them do Task
13 A, and it measured something like thirty-seven voxles.
14 They had them do Task B, and it measured about thirty-
15 seven voxles. And then they had them to try to do both of
16 them at the same time. You'll think, hey, I'm going to
17 get seventy-four. They got forty-three, forty-four, right
18 along in there, voxles.

19 And the point that they're making is that when a
20 driver has to do more than one thing, then that's when you
21 do not get the attention to all of it as you need to get.
22 And it says you can't just keep piping new things through
23 and expect the brain to keep up.

24 With practice, the brain can be more efficient
25 at carrying out multiple tasks, but performance is never

1 as good as when the tasks are carried out independently.
2 And that's what we have to be concerned about at a
3 crossing. We only want a driver to be able to see a train
4 clearly, or see the signals clearly, that a train is
5 coming and not have to worry about anything else.

6 Q. They would be worried about whether or not
7 you're going to stop in the right one or two feet?

8 A. That's right. That's correct. And, again, that
9 was in there.

10 [Reading] Various factors may influence the
11 motorist's ability to hear an audible signal. Motorists
12 with impaired hearing, or operating vehicles with closed
13 windows, air-conditioning, a radio or stereo, may not hear
14 warning signals in time to react. Therefore, although an
15 audible signal system may be desirable or even necessary,
16 it should be considered as a supplemental system and not
17 as a substitute for other devices.

18 That's the traffic-control devices handbook in
19 1983. And that was coming out of research that was done
20 in the early 70s.

21 [Reading] FRA has sponsored extensive research
22 to determine the most effective means of alerting
23 motorists and pedestrians of approaching trains.

24 FRA is the Federal Railroad Administration.

25 [Reading] The reports of the research focusing

1 on audible warning devices indicate that primary reliance
2 on these devices to one motorist is not justified and that
3 to be loud enough to warn in all ordinary circumstances,
4 the sound level would have to be increased greatly. The
5 increased sound level would produce intolerable community
6 and interior cab noise.

7 Q. And is that --

8 A. That was published in 1980.

9 Q. Does that increase the necessity for a safe
10 sight distance?

11 A. Well, that's why they say sight distance is the
12 primary consideration at passive crossings.

13 [Reading] The train horn and certain auxiliary
14 locomotive lights are currently the only active signals
15 given to a driver at a passive grade crossing to alert the
16 driver that a train is present. The sound of a train horn
17 is effective as a warning only if the driver recognizes it
18 as a train horn. This recognition is affected by the
19 interior vehicle noise levels, exterior traffic noise, the
20 sound characteristics of the train horn, driver
21 expectations, and insertion loss.

22 That's from the safety study, safety at grade
23 crossings, and put out by the National Transportation
24 Safety Board. The safety board said a lot of accidents --
25 published information on all of these, and their

1 conclusion is is that -- the same as FRA and others, that
2 sound is not a reliable source for safety.

3 [Reading] A stop sign should be erected at the
4 point where the vehicle is to stop, or as near thereto as
5 following, may be supplemented with a stop line and/or the
6 word stop on the pavement, as showing --

7 This on the MUTCD in 1988. You can put a stop
8 sign in a crossing.

9 Q. Let me ask you that. Did you see any reason
10 that the stop sign in this case couldn't have been put at
11 fifteen feet?

12 A. Oh. There's no reason. I've been there like
13 three times now, and there's no reason why you can't put
14 the stop sign where it ought to go. In fact, you've
15 created a severe hazard for any motor vehicle operator who
16 is stopping at the cross sign that was installed. That
17 made it worse. And so there's no reason why you can't put
18 it where it's supposed to go.

19 Q. And this is the same manual of uniform traffic
20 control devices that you read that the stop line is
21 supposed to be at fifteen feet, not at --

22 A. Well, I think it's in -- it'll be in this one,
23 too. But this is 1988. The one I was reading out of was
24 the millennium edition, 2000. So, I mean, it's several
25 years earlier, the same -- but it has the same stuff in

1 it.

2 MR. PARKER: Next.

3 A. [Reading] For all highway rail grade crossings
4 where stop or yield signs are installed, the placement
5 shall conform to the requirements of the MUTCD section
6 2B-9, location of stop sign and yield sign. Stop-ahead or
7 yield-ahead advance-warning signs shall also be installed.

8 And, again, that's on the MUTCD in 1988.

9 Q. [Mr. Parker] And that is, you want the stop
10 sign where you want people to stop?

11 A. That's exactly right. And you can't have it
12 closer than fifteen foot to the near rail.

13 [Reading] For other crossings with passive
14 protection, stop or yield signs may be used after need is
15 established by a traffic engineering study. The study
16 should take into consideration such factors as volume and
17 character of highway and train traffic adequacy of
18 stopping sight distance, crossing accident history, and
19 need for active traffic-control devices.

20 Again, that was in 1988. And that's when
21 Congress then came along and said, oh, you don't have to
22 worry about that; that's just a bunch of engineers
23 talking. And so then they fixed it where you can put
24 people in severe hazardous locations by not paying any
25 mind to what you're doing out in the fields.

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1 MR. PARKER: Next.

2 A. [Reading] Perhaps the most important factor in
3 perception time is the alertness or expectancy of the
4 individual. One whose focus of attention is wandering
5 here and there, and who has no reason to believe any
6 hazard exists for him, will have more delay and difficulty
7 in perceiving an object than one who has been warned to
8 look for the hazard or who expects the hazard to appear.

9 And, again, that's from Standard Baker. He was
10 at Northwestern University when I was there many, many,
11 many years ago. And he had a book on perception-reaction
12 in traffic accidents and put out a traffic investigation
13 manual.

14 It's what you expect. And if you've come across
15 several times and you've never seen a train, you're not
16 expecting -- and then you can't see it. And if you can
17 see over a length of a football field and you still don't
18 see a train, you're not anticipating something. From a
19 human-factors perspective, my opinion is that you wouldn't
20 be anticipating one coming if you've looked that far and
21 didn't see it.

22 [Reading] When drivers get the information they
23 expect from the highway and the traffic-control devices,
24 their performance tends to be error-free. When they do
25 not get what they expect or get what they do not expect,

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1 errors may result.

2 I used to always make my students read that over
3 and over. That's from a policy on geometric design of
4 highways, 1984. And if they get what they expect, you're
5 all right, but if they get something they don't expect or
6 don't get what they do expect, that's when you have
7 problems.

8 Q. [Mr. Parker] Dr. Heathington, in your opinion,
9 if CSX and the SCDOT had complied with these engineering
10 standards, do you have an opinion as to whether or not the
11 collision on February 3rd, 2004, would have occurred?

12 A. If they had had their trees cut down like their
13 policy called for, she would have detected the train, so
14 they never would have hit.

15 Q. If the stop sign had been properly --

16 A. Should have put -- oh, it should have been put
17 up, yeah. Even -- if you put the stop sign at fifteen
18 feet, there is some sight-distance restrictions way down
19 there. It wouldn't have taken cutting out much trees to
20 have a complete zero deficiency.

21 MR. PARKER: Answer any questions that Mr.
22 Harmon may have for you, Dr. Heathington.

23 MR. HARMON: Is it okay to get the lights, Your
24 Honor.

25 THE COURT: Absolutely.

1 MR. HARMON: And may I get the easel before I
2 start?

3 THE COURT: Murphy, can we put the lights back
4 up, sir?

5 MR. HARMON: May I get the easel before I start?

6 THE COURT: Absolutely, sir.

7 Mr. Harmon, do you need to move any of that so
8 that the jury can see that easel? or can they see
9 through it? or are you okay?

10 MR. HARMON: You know what -- thank you, Your
11 Honor. Maybe I do. I'll tell you what I'll do. I'm
12 going to need that. I'll move the easel maybe --

13 THE COURT: All right.

14 MR. HARMON: Good afternoon, Dr. Heathington.

15 THE WITNESS: Good afternoon.

16 MR. HARMON: I don't think we've officially met
17 before. My name is Jon Harmon.

18 CROSS-EXAMINATION

19 BY MR. HARMON:

20 Q. Sir, I want to ask you some questions about this
21 crossing, this accident, involving this driver. Okay?

22 A. That's fine.

23 Q. So you would agree with me that we want to avoid
24 accidents at crossings?

25 A. Absolutely.

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