

**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. V

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Department of Transportation,.....Respondents.**

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1 RANDY D. LOMAX,

2 Having Been First Duly Sworn,

3 was Examined and Testified as Follows:

4 DIRECT EXAMINATION

5 BY MR. PURCELL:

6 Q. Mr. Lomax, how are you employed, please?

7 MR. MCLEOD: Can you pull the speaker -- the
8 microphone up a little closer, please?

9 Q. [Mr. Purcell] How are you employed, please, Mr.
10 Lomax?

11 A. With South Carolina DOT.

12 Q. How long have you been with the DOT?

13 A. Twenty-three years.

14 Q. And what is your present job with the South
15 Carolina DOT?

16 A. I am a geodetic technician associate, which
17 involves -- I'm a railroad crossing inspector.

18 Q. Okay. And how long have you been a railroad
19 crossing inspector?

20 A. About twelve years.

21 Q. Prior to being a railroad crossing inspector,
22 what were you at the DOT? What was your job?

23 A. I've done six-and-a-half years of bridge
24 inspection and about three, four years of actual
25 construction.

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1 Q. Okay. And who has been your -- or who is your
2 supervisor now as a railroad crossing inspector?

3 A. Darrell Munn.

4 Q. All right. I want to ask you some questions
5 about the crossing at Hill Road in Yemassee, South
6 Carolina. All right?

7 A. Yes, sir.

8 Q. And the time frame that I'm talking about is
9 February the 4th, 2000 -- excuse me -- February the 3rd,
10 2004, and before. And I'm limiting my questions to you,
11 Mr. Lomax, to the crossing at Hill Road; all right, sir?

12 A. Yes, sir.

13 Q. All right. Let me show you a document that is
14 Number 14. Can you tell the members of the jury what that
15 document is, please, sir?

16 MR. MCLEOD: Your Honor, may we approach the
17 bench a minute?

18 THE COURT: Yes, sir.

19 [Whereupon, an off-the-record bench conference
20 is held]

21 THE COURT: You may continue, Mr. Purcell.

22 MR. PURCELL: Thank you, Your Honor.

23 Q. [Mr. Purcell] Mr. Lomax, can you identify what
24 is Defendant's Exhibit 14, please, sir? Or CSX Exhibit
25 14.

1 A. This is up on this?

2 Q. Yes, sir.

3 A. That is the inspection manual that we go by.

4 Q. All right. And is that the inspection manual
5 that you go by?

6 A. Yes.

7 Q. And is it the inspection manual that you went by
8 when you inspected the Hill Road crossing?

9 A. Yes, sir.

10 Q. All right. Can you tell us, sir, how you
11 inspected the Hill Road crossing when you last inspected
12 it?

13 A. By according to this manual, I pulled up to the
14 stop bar, looking both directions. And looking in these
15 directions, I'm looking for any kind of obstructions.
16 Then I look for all signs, and make sure that the
17 cross-buck is in place.

18 Q. All right, sir. And are those items that you
19 outlined or you just testified about outlined in
20 Defendant's 14, the South Carolina Railroad Inspection
21 Procedure Manual?

22 A. Yes.

23 Q. Now, when you pull up to the stop bar, what kind
24 of vehicle are you in inspecting the crossing at Hill
25 Road?

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1 A. At that particular time I was in a 2000 Dodge
2 van.

3 Q. Okay. And how far back from the front of the
4 Dodge van, or the bumper of the Dodge van, are you when
5 you're doing the inspection?

6 A. The driver's seat is about seven foot.

7 Q. Seven feet back?

8 A. Right. From the bumper.

9 Q. All right. And what part of the stop bar do you
10 pull up to when you do the inspection?

11 A. The back side of the stop bar.

12 Q. Okay. Let me show you Defendant's 8, which is a
13 part of your inspection report bearing the inspection date
14 11/7/02. Is that your inspection report for the Hill Road
15 crossing on November the 7th, 2002?

16 A. Yes, it is.

17 Q. Is that your name up there?

18 A. Yes, it is.

19 Q. And is this the inspection for the westbound
20 side of the crossing?

21 A. Yes, sir.

22 Q. And that would be vehicular travel westbound?

23 A. Yes, sir.

24 Q. Now, that would be towards 68 in this particular
25 instance?

1 A. Yes, sir.

2 Q. All right, sir. Now, and did you fill out that
3 inspection report --

4 A. Yes, sir.

5 Q. -- that we're looking at? Number 8.

6 A. Yes, sir.

7 Q. And would you go down to obstructed view. And
8 what did you select there?

9 A. No.

10 Q. All right, sir. And was that the condition of
11 the crossing when you examined it on November the 7th,
12 2002?

13 A. Yes, sir.

14 Q. All right. Let me show you Defendant's Exhibit
15 55 on the screen, Mr. Lomax.

16 MR. PURCELL: Photograph 55. At twenty feet.

17 MR. POSTON: Yes, sir.

18 Q. [Mr. Purcell] Let's do a little calculation
19 here. If the back of the stop line is at eleven feet from
20 the crossing, Mr. Lomax, and you are seventeen feet back
21 -- I'm sorry -- seven feet back, you add those two
22 together to get eighteen feet; is that right, sir?

23 A. Yes, sir.

24 Q. Okay. So if you look at this photograph here,
25 Number 20, would that be the view that you would have had

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1 when you made the inspection on 11/7/02 from your Dodge
2 van, sir?

3 A. Yes, sir.

4 Q. And would that be the way you would mark it up
5 as no obstruction on the westbound lane of travel?

6 A. Yes, sir.

7 MR. PURCELL: I'll pass the witness.

8 MR. PARKER: Thank you.

9 CROSS-EXAMINATION

10 BY MR. PARKER:

11 Q. Mr. Lomax, now, you've been -- in 2004, 2003,
12 you inspected this crossing, 2002, and what you're telling
13 us is that you would go to an area twelve-and-a-half feet
14 from the near rail to determine what the sight distance
15 was?

16 A. I go up -- I -- by Lourie Law, I go to the stop
17 bar.

18 Q. Now, the -- you recognize that -- they put up
19 there the CSX Exhibit 14. And let me put --

20 MR. PARKER: If you would put that up, CSX
21 Exhibit 14, which would be our exhibit -- let me get it
22 -- Exhibit 257.

23 Q. [Mr. Parker] And this is what they asked you if
24 you went by; correct?

25 A. Yes.

1 Q. And that manual says that if there's no stop
2 line --

3 MR. PARKER: And let's go to the next page,
4 visual inspection.

5 Q. [Mr. Parker] It says that: [reading to
6 determine view obstructions on railroad rights-of-way,
7 the inspector shall stop the car at a stop line in front
8 of a railroad track; if no stop line present, with the
9 front of the car stopped at a position fifteen feet from
10 the center line of the railroad track.

11 Correct?

12 A. Yes, sir.

13 Q. And that would be twelve-and-a-half feet from
14 the near rail; correct?

15 A. Yes, sir.

16 MR. DETRICK: She didn't get it up.

17 MR. PARKER: What?

18 MR. DETRICK: She didn't get it up.

19 MR. PARKER: You didn't put it up? Which one?
20 Let's see. That's it right there, fifteen feet from
21 the center line of the railroad crossing.

22 MR. DETRICK: She didn't get it up there.

23 MR. PARKER: It's right there right now.

24 MR. DETRICK: She didn't --

25 MR. PARKER: Well, that's all right. We'll look

1 at it.

2 Q. [Mr. Parker] All right. And the fifteen feet
3 from the near rail, which would be twelve-and-a-half feet,
4 do you know what the stop line was?

5 A. No. By Lourie Law it does not --

6 Q. It doesn't say anything about stop lines, does
7 it?

8 A. Not measurements.

9 Q. No. It just says that you should inspect the
10 adequate sight distance?

11 A. [Indicates affirmatively]

12 Q. But you recognize -- CSX put up their Exhibit
13 14. That manual is out of date, isn't it? It's been
14 revised, hasn't it?

15 A. Now, that I'm not sure about.

16 Q. You don't know whether there's a new manual?

17 A. Not in the -- not on the Lourie manual.

18 Q. Well, let me hand you one.

19 [Whereupon, Mr. Parker proffers documents to the
20 witness]

21 Q. [Mr. Parker] That's the new manual.

22 MR. PARKER: And we'll put that up as -- let's
23 see what exhibit number we've got on it -- 258.

24 Q. [Mr. Parker] Do you see where it was revised
25 on --

1 A. Okay. I see that now. Yes.

2 Q. First published September 1988 and revised
3 January of 1999. See that?

4 A. Yeah, I see that now.

5 Q. Now, let's go to the visual obstruction part of
6 it. Do you see --

7 MR. PARKER: Let's blow up the visual inspection
8 part.

9 Q. [Mr. Parker] And it says here: [reading] to
10 determine view obstructions on railroad right-of-way, the
11 inspector shall stop car at stop line in front of a
12 railroad track; if no stop line present, with the front of
13 the car stopped at a position fifteen feet from the near
14 rail.

15 Do you see that?

16 A. Yes, sir.

17 Q. And the reason that it was changed from twelve-
18 and-a-half feet, because that would be an illegal stop;
19 correct?

20 A. I cannot answer that.

21 Q. Well, you're aware, are you not, that the law in
22 South Carolina is that you have to stop -- the closest you
23 can stop at a railroad crossing is fifteen feet to the
24 near rail?

25 A. Can you repeat that, please?

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1 Q. Are you aware of the statute that says that in
2 South Carolina you are required to stop within fifteen
3 feet -- not less than fifteen feet, but within fifty feet
4 of a crossing? near rail?

5 A. [No response]

6 MR. PARKER: It should be 256.

7 Q. [Mr. Parker] Do you see -- can you see the code
8 section there?

9 MR. PURCELL: Your Honor --

10 THE COURT: Okay. You can take that down,
11 Mr. Parker.

12 MR. PARKER: Okay.

13 Q. [Mr. Parker] Are you aware of that law?

14 MR. PURCELL: Your Honor, I object to him
15 cross-examining the witness on legal matters. He is
16 not an expert, he's not somebody who is necessarily
17 learned in the law, and it's a legal question. The
18 Court is going to charge the jury on what the law is.
19 It doesn't come from a witness.

20 THE COURT: You can ask him if he's aware of a
21 statute.

22 Q. [Mr. Parker] Are you aware that in South
23 Carolina motorists are supposed to stop no closer than
24 fifteen feet from the near rail of the railroad track?

25 A. Yes, sir.

1 Q. And that is -- that's what y'all go by at the
2 highway department, isn't it?

3 A. Can you repeat that, please?

4 Q. That's what you go by in making your
5 regulations?

6 A. Well, by Lourie law, I just pull -- I just pull
7 up to the stop bar.

8 Q. But the Lourie law doesn't say anything -- and
9 by Lourie law, you're talking about section 58-17-1450?
10 Y'all call it the Lourie law?

11 A. Yes, sir.

12 Q. And what it does is require you to inspect
13 crossings and if there is something you observe at that
14 crossing that would present a sight obstruction, you're
15 supposed to notify railroads like CSX?

16 A. Yes, sir.

17 Q. And you're also aware that a stop line is not
18 supposed to be closer than fifteen feet to the near rail,
19 aren't you?

20 A. Well, at the time I did this inspection, I
21 just -- I pulled up there and --

22 Q. You didn't know what it was, how far it was?

23 A. Well, by Lourie law, I'm not -- there's no
24 measurement.

25 Q. Yeah. But by y'all's regulations, the stop bar

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1 is supposed to be installed no closer than fifteen feet
2 from the near rail, isn't it? And that's by the MUTCD?

3 A. Well, see, now, I don't do any of the installing
4 or paint markings or anything like that. I just --

5 Q. You didn't know that?

6 A. I just inspect from the stop bar.

7 Q. Did you know that that was the MUTCD regulation,
8 that's been adopted by South Carolina, that the stop line
9 is supposed to be no closer than fifteen feet?

10 A. No, sir.

11 Q. Okay. Let me talk about something I think you
12 might know something about.

13 You went to a meeting with CSX in December of
14 2002. Do you recall that? December 16th, 2002.

15 A. Not that I -- not that I remember.

16 Q. All right. Let me show you a sign-in sheet for
17 that meeting and we'll see if that's your signature. Is
18 that your signature?

19 MR. PURCELL: Your Honor, may we approach?

20 THE COURT: Yes.

21 Before you answer that, just wait.

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

24 THE COURT: All right. Ladies and gentlemen of
25 the jury, there's a matter of law I need to take up

1 with the attorneys. So if you will go back to your
2 jury room we'll back with you very shortly, and from
3 there I'll let you know what we're doing for the
4 remainder of the evening.

5 Again, do not discuss this case. It wouldn't be
6 appropriate to do so at this time.

7 [Whereupon, the jury exits the courtroom at
8 5:37 p.m.]

9 THE COURT: All right. Mr. Purcell, I know
10 you're anticipating some testimony.

11 MR. PURCELL: Yes, Your Honor.

12 Our objection to the information about this
13 meeting, Your Honor, is that it was a meeting among CSX
14 officials and SCDOT officials concerned with crossings
15 that had failed the Lourie law inspection. And it was
16 a meeting to try to advance the relations between the
17 SCDOT and CSX into correcting in a more timely fashion
18 the CSX compliance with the failed crossings under the
19 Lourie law. Now, if I've stated -- misstated the
20 object of the meeting, I'm sure that Mr. Parker will
21 correct me. But that is the objective of the meeting.

22 Our objection to going into it at this point is
23 that, number one, we've talked about the Hill Road
24 crossing and I expressly limited the discussion and the
25 evidence, the testimony, that came out with this

1 witness to the Hill Road crossing, and that's the only
2 thing that we contend that's properly before the jury.

3 Now, the evidence or information about other
4 crossings elsewhere that failed the Lourie law is
5 irrelevant to the Hill Road crossing, number one; and,
6 number two, if the plaintiff seeks to present other
7 information about CSX's failure to comply with SCDOT
8 directives, it is dissimilar conduct because these are
9 crossings constitutionally impermissible because these
10 crossings all failed -- the ones that the meeting was
11 about -- and this crossing has never failed. This
12 crossing has never been the subject of a write-up by
13 the SCDOT. And all of this information is dissimilar
14 conduct, it's irrelevant, has nothing to do with Hill
15 Road. It is probative of absolutely nothing except
16 other conduct at other times.

17 MR. PARKER: It's very probative of their
18 failure to keep these crossings maintained and the
19 duration of the conduct and the fact that they, in
20 fact, did not comply even when they wrote them up.
21 Now, this crossing, if it had been -- the stop line at
22 the proper place, three feet back, it would have
23 failed. So we have -- even though they placed the stop
24 line at a place that was illegal, that had he inspected
25 this from fifteen feet it would have failed.

1 And we -- and this testimony goes to the fact
2 that they had knowledge and the -- and the highway
3 department, in order -- and we could bring it out.
4 We're not going to offer it. But if they, in fact
5 discuss --

6 MR. MCLEOD: Your Honor, I object to him
7 referring to the stop line being placed illegally, in
8 front of this witness who doesn't know what he's
9 talking about. That is incorrect. His own witness,
10 Dr. Heathington, said it was not illegal. That is
11 terribly confusing to the witness on the stand.

12 MR. PARKER: In any event, Your Honor, I'll go
13 forward. It -- maybe I -- poor choice of word. In
14 violation of the standards, which are the law --

15 MR. MCLEOD: Guidelines.

16 MR. PARKER: -- the MUTCD.

17 MR. MCLEOD: Guidelines.

18 MR. PARKER: No. It's the standard, according
19 to the statute on it. But we'll read the statute,
20 whatever it is. I won't fuss about that.

21 But what this does is shows that CSX had a long
22 history of failing to maintain sight distance in this
23 state. Mr. Lomax is familiar with it. He was at the
24 meeting when they confronted CSX about this to try to
25 get them to do better. And this is close in time --

1 it's a year before. It's December of 2002 when this
2 occurred.

3 THE COURT: Mr. Parker, this is dissimilar
4 conduct. I would agree with you if this was a railway
5 that had failed under the Lourie law. But he says he
6 was following what he understood to be the regulations.
7 He isn't going to testify to it.

8 MR. PURCELL: Thank you, Your Honor.

9 THE COURT: All right. Let's move on, y'all.

10 MR. PURCELL: Thank you.

11 THE COURT: Anything further from the jury --

12 MR. PARKER: I've got some --

13 THE COURT: -- from y'all before we bring the
14 jury out?

15 MR. PARKER: I've got some further questions.

16 THE COURT: Okay. Go ahead and make your
17 proffer.

18 MR. PARKER: Not about this. I mean, I've got
19 further cross-examination.

20 THE COURT: All right. Let's go ahead and bring
21 them back out.

22 MR. PARKER: Well, let me do -- I do want to
23 make a proffer on this section.

24 - - -

25 - - -

PROFFER

EXAMINATION

BY MR. PARKER:

Q. Mr. Lomax, you were at the meeting on -- in December of 2002 with CSX?

A. Yes, sir.

Q. And you were there when CSX had the meeting with Mr. Jenkins, who was at that time the head of the railroad, part of the SCDOT?

A. Yes, sir.

Q. And the concern there was that CSX was not correcting sight-obstructing deficiencies, among other things?

A. Yes, sir.

Q. And they were not doing it timely?

A. Yes, sir.

Q. And they were told at that meeting that -- about the fact that they were going to be assessed fines if they didn't improve their process?

A. Honestly, I don't remember all that was talked about at that time. I mean, you're talking 2002.

Q. All right. Do you remember, though, that they were told that they had outstanding deficiencies, which fines had been assessed but not levied, and if they didn't do better they were going to collect the fines against

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1 them?

2 A. Now, that I do not know.

3 Q. You don't remember that?

4 A. No, sir.

5 Q. The only thing you remember is that they were
6 called in there to require them to -- or at least hope
7 that they would live up to what the obligations were under
8 the Lourie law?

9 A. Yes, sir.

10 MR. PARKER: We think it's admissible, Your
11 Honor, but I understand the Court's ruling.

12 THE COURT: Okay.

13 And the burden is on you, Mr. Parker, to show
14 that this is the same conduct, that it's similar, that
15 it's allowed to be testified to, and I don't think you
16 have any specific instances that it is.

17 Q. [Mr. Parker] Well, I think I can -- the
18 instances that were being talked about was where they left
19 brush on the right-of-way that obstructed the motorist
20 having -- kept the motorists from having adequate sight
21 distance; is that correct?

22 A. In this meeting?

23 Q. Yes.

24 A. Yes, sir.

25 THE COURT: I think you said vegetation and

1 other. But that's okay.

2 Let's bring the jury back in.

3 [Whereupon, the jury enters the courtroom at
4 5:42 p.m.]

5 THE COURT: All right. Welcome back, ladies and
6 gentlemen.

7 Mr. Parker, you may continue, sir.

8 MR. PARKER: Thank you.

9 CONTINUED CROSS-EXAMINATION

10 BY MR. PARKER:

11 Q. Mr. Lomax, in the manual, inspection manual --
12 did I hand you one up there? Let me give you one.

13 [Whereupon, Mr. Parker proffers documents to the
14 witness]

15 Q. [Mr. Parker] There is a section in the railway
16 inspection procedure about stop signs.

17 A. Okay.

18 Q. Have you got it? Thank you.

19 MR. PARKER: And if you would just blow up the
20 first half of the page. I have some questions about
21 it.

22 Q. [Mr. Parker] All right. The manual states
23 that: [reading] the stop sign shall be limited to those
24 grade crossings selected after need is established by a
25 detailed traffic engineering study.

1 Is that correct?

2 A. Yes, sir.

3 Q. [Reading] And no stop sign shall be erected
4 without the concurrence of the director of traffic
5 engineering.

6 A. Yes, sir.

7 Q. [Reading] And that such crossing shall have the
8 following characteristics, and highway should be secondary
9 in character with low-traffic counts, train traffic should
10 be substantial, line of sight to an approaching train is
11 restricted by physical features such as -- such that
12 approaching traffic is required to reduce speed to ten
13 miles per hour or less in order to stop.

14 Is that correct?

15 A. Yes, sir.

16 Q. [Reading] And at the stop line there shall be
17 sufficient sight distance down the track to afford ample
18 time for a vehicle to cross the track before the arrival
19 of a train.

20 Correct?

21 A. Yes, sir.

22 Q. And the traffic -- do you know whether a traffic
23 engineering study was done?

24 A. No, sir.

25 Q. Did you see where the stop sign was erected at

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1 this crossing?

2 A. Yes, sir.

3 Q. Was it behind -- you couldn't see from the stop
4 sign, could you?

5 A. [No response]

6 Q. You couldn't see, a train coming, could you?

7 A. I would have to be out there at the crossing
8 itself to see.

9 Q. And if at the stop sign -- you know people stop
10 at stop signs, don't you?

11 A. No, sir, I don't.

12 Q. They stop at a stop sign and they'll stop at a
13 crossing -- at a stop line; correct?

14 A. Yes, sir.

15 Q. And they don't stop exactly on top of the stop
16 line, do they?

17 A. No, sir.

18 Q. They might stop three or four feet behind it
19 because you can't see it because of the hood of your car;
20 correct?

21 A. Yes, sir.

22 Q. And you didn't go three or four feet behind this
23 stop line to see what you could see, could you?

24 A. I pulled up to the stop bar.

25 Q. All right. But if you would have pulled three

1 feet back, you wouldn't have been able to see, would you?

2 A. I can't tell you that.

3 Q. But if you couldn't --

4 A. I'm not out there. .

5 Q. Let me ask you one other --

6 And you're aware of the -- as we talked about
7 the MUTCD that --

8 MR. PARKER: And we'll put that up, 259. And
9 let's go to the next page. And the next page. Let's
10 go to the next page.

11 Q. [Mr. Parker] All right. Let's look at stop
12 lines, what it says about stop lines.

13 And you recognize that the MUTCD is the
14 regulations governing the highway department; correct?

15 A. Yes, sir.

16 Q. It says: [reading] the stop line shall be a
17 transverse line at a right angle to the driver way
18 [phonetic] at a point where a vehicle is to stop or as
19 near to that point as possible. The stop line should be
20 placed approximately eight feet from the gate, at present,
21 but no closer than 4.6 meters or fifteen feet from the
22 nearest rail.

23 Correct?

24 A. Yes, sir.

25 Q. And if the stop line is at eleven feet nine

1 inches, then it's in violation of this regulation, isn't
2 it?

3 A. I did not put the stop line down there, so --

4 Q. I mean, I'm not saying you did. But it is in
5 violation of the regulation if it's at that distance,
6 isn't it?

7 A. Yes, sir.

8 Q. And when you put it too close to the rail, you
9 can expect people to stop farther back, can't you?

10 A. I guess so.

11 MR. PARKER: Thank you.

12 CROSS-EXAMINATION

13 BY MR. MCLEOD:

14 Q. Mr. Lomax, you don't have anything to do with
15 the placement of the markings?

16 A. No, sir.

17 Q. And you were hired and -- you do the inspections
18 under the Lourie law?

19 A. Yes, sir.

20 Q. Is that correct?

21 A. Yes, sir.

22 Q. All right. And your responsibilities under the
23 Lourie law are to see whether the signs are in place?

24 A. Yes, sir.

25 Q. And to check the visibility from the stop line?

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1 A. Yes, sir.

2 Q. All right. You checked, and all of the signs
3 were in place at this crossing?

4 A. Yes, sir.

5 Q. Correct?

6 A. Yes, sir.

7 Q. And you checked for visibility from the stop bar
8 at --

9 A. Yes, sir.

10 Q. -- at this crossing?

11 A. Yes, sir.

12 Q. I, in fact, asked you to measure a hood that
13 would have been like your car, did I not?

14 A. Yes, sir.

15 Q. And so where you would have inspected from would
16 have been seven feet back behind the stop bar?

17 A. Yes, sir.

18 Q. Now, do you have any other responsibilities --
19 he was asking you about a bunch of code sections. Your
20 job is to check, under the Lourie law --

21 A. Yes, sir.

22 Q. -- for visibility from the stop sign?

23 A. No.

24 Q. Visibility -- I mean, visibility from the stop
25 line?

1 A. Yes, sir.

2 Q. And the placement of the signs?

3 A. Yes, sir.

4 Q. I can't remember whether -- did they introduce
5 the inspection reports through you?

6 MR. PURCELL: I didn't, Your Honor, but I would
7 move its admission. 8 and 14.

8 MR. PARKER: No objection.

9 THE COURT: It's in evidence without objection.

10 [Whereupon, Defendant's Exhibit Number 8,
11 inspection reports, is admitted into evidence by the
12 Court]

13 [Whereupon, Defendant's Exhibit Number 14,
14 inspection manual, is admitted into evidence by the
15 Court]

16 THE COURT: Yes, sir..

17 Q. [Mr. McLeod] How often do you get to inspect
18 these crossings? What cycle?

19 A. We do this every three years.

20 Q. And how many years have you been an inspector?

21 A. I've been a railroad crossing inspector for
22 almost twelve years.

23 Q. And how many as an inspector in other fields?
24 For the -- I mean, even for an inspector with the highway
25 department?

1 A. Would you repeat that question?

2 Q. How many have you had a job as an inspector, be
3 it under the Lourie law or any other inspection job?

4 A. How many have I actually looked at?

5 Q. I'm sorry?

6 A. How many have I actually looked at?

7 Q. No. No, sir. I'm asking how long have you
8 been -- you said twelve years --

9 A. Yes, sir.

10 Q. -- as a Lourie law inspector?

11 A. Right.

12 Q. How many years have you been in the inspection
13 business, I reckon.

14 A. Pretty much the whole twenty-three years I've
15 been with DOT because when I was in construction, that was
16 inspecting road work and stuff, too.

17 MR. MCLEOD: Now, this might take me a minute.

18 [Whereupon, Mr. McLeod reviews documents]

19 MR. MCLEOD: Have you got your Plaintiff's
20 Exhibits with the feet and stuff over there?

21 MR. PARKER: Which one do you want?

22 MR. MCLEOD: Let me look at them.

23 MR. PARKER: Do you want the --

24 MR. MCLEOD: Well, I've got --

25 MR. PARKER: Tell me what you want and I'll hand

1 them to you.

2 MR. MCLEOD: I guess I can use my copies.

3 MR. DETRICK: Which one?

4 MR. PARKER: Which one? The manual?

5 MR. MCLEOD: Here. I'll just get mine.

6 MR. PARKER: Here it is. Here's one. Oh. You
7 wanted the pictures? I'm sorry.

8 MR. MCLEOD: I'm going to have to use yours.

9 Let me have --

10 MR. DETRICK: Which one do you want?

11 MR. MCLEOD: The one that has got the feet --

12 [Whereupon, Mr. McLeod and plaintiffs' counsel
13 confer]

14 MR. DETRICK: What feet do you want?

15 MR. MCLEOD: The one that would be twenty and
16 eighteen.

17 MR. PARKER: We can put it up for you.

18 MR. HARMON: We can get it up here.

19 MR. PARKER: We can, too.

20 MR. HARMON: Here it is. There it is.

21 THE COURT: Peden, it's up here on the screen.

22 MR. HARMON: It's up on the screen, sir.

23 MR. PARKER: There you go.

24 MR. MCLEOD: Could you come down here a minute?

25 [Whereupon, the witness complies]

1 Q. [Mr. McLeod] Now, if you had been eleven feet
2 six inches with the back of the stop bar and you add your
3 seven feet that you would be in your car seat to that --

4 Do you follow me?

5 A. Yes, sir.

6 Q. -- that would be eighteen feet six inches;
7 right?

8 A. Yes, sir.

9 Q. All right. That little thing says twenty feet
10 is the distance you would see at twenty feet?

11 A. Yes, sir.

12 MR. MCLEOD: Now, that's exhibit what?

13 MR. PARKER: 18, I think, isn't it?

14 MR. HARMON: What number is that?

15 MR. PARKER: We can look at it on those
16 photographs we've got.

17 MR. HARMON: CSX 5.55, sir.

18 MR. MCLEOD: CSX what?

19 MR. PARKER: 5.55.

20 MR. HARMON: CSX 5.55.

21 [Off the record momentarily]

22 MR. MCLEOD: Find me the one that's eighteen
23 feet.

24 MR. POSTON: Seventeen.

25 MR. HARMON: Eighteen. There it is up there.

1 MR. DETRICK: It's on the screen.

2 Q. [Mr. McLeod] All right. This one looks barely
3 the same as that. That's eighteen feet --

4 A. Yes, sir.

5 Q. -- correct?

6 And you would have been at eighteen feet six
7 inches --

8 A. Yes, sir.

9 Q. -- correct?

10 How far -- can you see to the I-95 bridge down
11 there?

12 A. Yes, sir.

13 Q. Now, let me ask you something else. Did I ask
14 you on your way down here from Columbia to go by this
15 crossing this morning?

16 A. Yes, sir.

17 MR. MCLEOD: You can get back up --

18 [Whereupon, the witness complies]

19 MR. PARKER: Your Honor, we had better approach
20 on that.

21 THE COURT: Okay. Come here for a second.

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

24 Q. [Mr. McLeod] That Number 18, which is still up
25 on the viewer -- and you can see it better with this.

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1 That little -- that post that's back there running right
2 behind, for the jury, right there [indicates], what does
3 the sign on that post say?

4 A. It's a fiber-optic-cable sign.

5 Q. What?

6 A. It's a fiber-optic-cable sign.

7 Q. That ditch: did you notice if a culvert or a
8 pipe runs under that ditch -- I mean, continue the ditch
9 under the road?

10 A. I have seen that there is one under there.

11 Q. The pipe?

12 A. Yes, sir.

13 Q. All right. Did you notice the driveway of Tommy
14 Jackson anywhere close, or you didn't?

15 A. No, sir.

16 Q. All right. Did you observe anything else out
17 there this morning? Again, I understand you're not
18 involved in placing these things. Did you see anything
19 out there that would prohibit the placement of a stop sign
20 in that area?

21 A. No, sir. Not --

22 Q. How about --

23 A. Not --

24 Q. How about a water line?

25 A. There is a water line out there.

1 Q. Now, you're talking kind of low. I'm --
2 A. There is a water line out there.
3 Q. Well, you do know that if you put down a stop
4 sign, it's necessary that you drive it in the ground,
5 isn't it?

6 A. Yes, sir.

7 Q. You know that?

8 A. Yes, sir.

9 Q. Now, that was --

10 MR. MCLEOD: I want to reference these.

11 Q. [Mr. McLeod] Plaintiff's Exhibit 17 --

12 MR. MCLEOD: And I've forgotten what the other
13 one was. Twenty-foot.

14 MR. DETRICK: It would be the next -- it would
15 be the one with --

16 MR. MCLEOD: It must be 18.

17 All right. Give me one -- just one minute.

18 [Off the record momentarily]

19 MR. MCLEOD: Nothing further, Your Honor.

20 THE COURT: All right. Mr. Purcell?

21 MR. PURCELL: Nothing, Your Honor.

22 THE COURT: All right.

23 MR. PARKER: I have a couple more questions.

24 - - -

25 - - -

RECROSS-EXAMINATION

BY MR. PARKER:

Q. Mr. Lomax, if we look at Plaintiff's Exhibit
20 --

MR. PARKER: We won't -- I will just --

Q. [Mr. Parker] Let me ask you this.

MR. PARKER: What -- can you pull up there close
to twenty? at either twenty or nineteen or eighteen?
Any of that. That's all right.

Q. [Mr. Parker] I'll just ask you from here. The
jury has seen the pictures, Mr. Lomax.

A fiber-optic line is how large?

A. I have no idea.

Q. Do you know, the fiber-optic line, if it's as
big as a half dollar --

MR. MCLEOD: He said he didn't -- Your Honor, he
said he didn't know.

MR. PARKER: Your Honor, he's testified he
couldn't put this stop sign up because of this fiber-
optic line, and that's my point.

MR. MCLEOD: Your Honor, I asked him did he --
could he testify, because I wasn't sure he could, that
you would have to drive a pipe into the ground to put
up a stop sign. That's all I asked him.

THE COURT: Okay. Mr. Parker, you can go ahead
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1 and ask the question.

2 MR. PARKER: Thank you.

3 Q. [Mr. Parker] If you don't know how large the
4 fiber-optic line is, then you don't know that that
5 prevented anybody from putting a stop sign, do you?

6 A. No, sir.

7 Q. And the water line that's there, where is it
8 located?

9 A. It's on the left side of the road, facing --

10 Q. If we were coming out Hill Street, where would
11 it be?

12 A. It would have been on the left-hand side.

13 Q. I mean, it -- the left-hand side? I'm not --

14 A. If you was coming out towards I guess that's
15 68 --

16 Q. Right. It was across --

17 A. -- if you had been stopped where we're talking
18 about, the water pipe would have been on the left-hand
19 side.

20 Q. All right. It's not on the right-hand side?

21 A. Now, that I cannot tell you.

22 Q. Well, you don't notice anything -- the stop sign
23 would be put on the right-hand side; correct?

24 A. Yes, sir.

25 Q. And you didn't see anything there that would

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1 keep you from putting up a stop sign there, did you? You
2 had a lot of room?

3 A. Again, I don't install them so --

4 Q. But you didn't yourself. And the reason you
5 went down there was, at Mr. McLeod's request, to see if
6 anything was down there that would keep you from putting
7 in a stop sign, didn't you?

8 A. He asked me to go by there and just check the
9 crossing.

10 Q. And you didn't see anything that would keep you
11 from putting a stop sign in the proper location, did you?

12 A. Now, that I cannot answer.

13 Q. Let me ask you: the MUTCD also says that you
14 can put the stop sign on the cross-buck sign, doesn't it?

15 A. Yes, it does.

16 Q. You can put a cross-buck sign there, and put the
17 stop sign right there, couldn't you?

18 A. You can.

19 Q. And one last thing. Now, the -- you said you
20 inspected this crossing seven feet back from --

21 A. From the --

22 Q. -- the stop bar?

23 A. From the stop bar.

24 Q. You know that some people drive cars that sit
25 ten feet back; correct?

1 A. Now, I don't know that.

2 Q. Well, you know that there are different size
3 vehicles, don't you?

4 A. Yes, sir.

5 Q. And if people sit ten feet back, your inspection
6 wouldn't disclose whether these people would have had
7 sight distances, would it -- would have sight distance
8 problems?

9 A. But I inspected it from my vehicle.

10 Q. But the question is you don't know if a person
11 was sitting ten feet back or either your vehicle and
12 got -- didn't get right on the line, those people wouldn't
13 have good sight distance, would they?

14 A. At the time I inspected the crossing, there was
15 no obstructions from my view.

16 Q. And that is for at twelve feet, eleven feet nine
17 inches, with seven feet -- with it being seven foot
18 behind?

19 A. Yes, sir.

20 Q. And if you happen not to fall in that exact
21 parameter, then this inspection you did wouldn't disclose
22 a sight distance obstruction, would it?

23 A. No, sir.

24 MR. PARKER: I don't have anything further.

25 THE COURT: Anything further?

1 MR. HARMON: No, Your Honor.

2 MR. MCLEOD: Just one.

3 MR. PARKER: Well, one other question I do -- I
4 forgot to ask you, Mr. Lomax.

5 Q. [Mr. Parker] Y'all do use the sight distance
6 charts from the Federal Railroad Highway Crossing Grade
7 Handbook, don't you, at the highway department?

8 A. I, don't.

9 Q. But they use it, and you're aware of it?

10 A. Yes, sir.

11 Q. And this inspection procedure y'all use doesn't
12 comply with the Federal Highway Grade Crossing Handbook,
13 does it?

14 A. I can't -- I can't -- I don't -- I can't tell
15 you that.

16 MR. PARKER: Okay. No further questions.

17 THE COURT: Mr. McLeod?

18 RECROSS-EXAMINATION

19 BY MR. MCLEOD:

20 Q. Your job is very limited? You're not involved
21 with the federal measurements and what-have-you?

22 A. No, sir.

23 Q. It's to check the visibility from that stop bar?

24 A. Yes, sir.

25 Q. Check the placement of the signs? whether they

1 are placed?

2 A. Yes, sir.

3 Q. Anything else?

4 A. And the visibility of the signs.

5 MR. MCLEOD: Thank you.

6 THE WITNESS: Yes, sir.

7 MR. PARKER: No further questions, Your Honor.

8 THE COURT: All right. Mr. Lomax, you may step
9 down, sir.

10 [Whereupon, the witness is excused and exits the
11 witness stand]

12 MR. HARMON: Your Honor, we suggest that you
13 dismiss the jury.

14 And then we'll be able to, I believe -- in
15 talking, we should be able to conclude our case
16 sometime tomorrow.

17 THE COURT: All right. Ladies and gentlemen,
18 it's that time, so I'm going to go ahead and excuse you
19 for the evening. I'm going to ask that you be back
20 tomorrow morning at 10:00 a.m., where we're going to
21 continue the trial of this case.

22 Again, you are not to begin discussing this
23 case. Again, you haven't heard all the evidence. It's
24 simply not appropriate for you to do so.

25 So with that said, ladies and gentlemen, go

1 hand. Thank you, sir.

2 [Whereupon, Mr. Smith is duly sworn by the
3 Court]

4 THE COURT: Thank you. Go ahead and take a
5 seat.

6 [Whereupon, Mr. Smith takes the witness stand]

7 THE COURT: Give us your full name for the
8 record. All right?

9 THE WITNESS: Joel Smith.

10 - - - - -

11 JOEL SMITH,

12 Having Been First Duly Sworn,

13 was Examined and Testified as Follows:

14 DIRECT EXAMINATION

15 BY MR. MCLEOD:

16 Q. Mr. Smith, could you tell me by whom you are
17 employed.

18 A. SCDOT, Hampton, South Carolina.

19 Q. Okay. And what do you do?

20 A. Right at the moment I'm a mowing supervisor.

21 Q. Okay. And what did you do on February 3rd,
22 2004?

23 A. You tell me. I --

24 Q. Were you working for the DOT, for the Department
25 of Transportation, then?

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1 A. Yes.

2 Q. All right. Are you familiar with the Hill
3 Street crossing?

4 A. Yes, sir.

5 Q. All right. Have you checked where the signs and
6 the placings and the stop bars are?

7 A. At that location?

8 Q. Yes, sir. At the Hill Street crossing.

9 A. Yes, sir.

10 Q. Let's deal just with the Hill Street crossing.

11 A. Okay.

12 Q. Have you, in fact, replaced any signs there?

13 A. Yes, I have.

14 Q. All right. Did you move the location?

15 A. No, sir.

16 Q. All right. Did you consider moving the
17 location?

18 A. No, sir.

19 Q. Why not?

20 A. There was nothing wrong with it.

21 Q. And can you tell me specifically: why do you
22 think the stop sign was placed where it was?

23 A. Because the person that put it there before me
24 thought that was the best place to put it, and it's within
25 standards.

1 Q. Would you have placed it any differently?

2 A. No, sir.

3 Q. Did you see anything closer to the railroad that
4 would prevent you from placing the stop sign there?

5 A. There's a few things there.

6 Q. Like what?

7 A. Well, you got a -- if I can recall, you've got a
8 cross-line pipe that crosses underneath the road. I feel
9 that there's an access road to the right of that stop
10 sign. You have a fiber-optic line there. You can't goof
11 around with no fiber optic within ten feet.

12 Q. What do you mean, fool around with it?

13 A. You don't want to put no sign in no area of a
14 fiber optic within ten feet.

15 Q. All right. Anything else?

16 A. Well, nothing that can ring a bell.

17 Q. Well, do you recall whether there was a ditch
18 there?

19 A. Oh, yeah, there's a ditch. That's why there's a
20 cross-line pipe.

21 Q. All right. When you have been there in the
22 past, have you ever seen any tire marks on the --

23 A. Oh, yeah.

24 Q. -- access road?

25 A. Yeah.

1 MR. MCLEOD: That's all the questions I have,
2 Your Honor.

3 THE COURT: Okay.

4 CROSS-EXAMINATION

5 BY MR. DETRICK:

6 Q. Mr. Smith, my understanding is you put the stop
7 sign almost thirty-five feet from the near rail; is that
8 correct?

9 A. No. You're wrong. I didn't put it anywhere.

10 Q. Excuse me. You didn't put it there?

11 A. Right.

12 Q. Someone else put it there?

13 A. Yes. That's what I --

14 Q. You don't --

15 A. -- said originally.

16 Q. You don't want to get blamed for putting it
17 there, do you?

18 A. I'm not worried about blame. There's no blame.
19 There's nothing wrong with that stop sign where it is.

20 Q. But I just want to get it straight with you.
21 The reason you -- it's put there, according to your
22 testimony --

23 A. Uh-huh.

24 Q. -- is because, number one, you say there's an
25 access road; right?

1 A. No. I think there is one there.

2 Q. You think there's one?

3 A. I don't know for a fact. That's CSX railroad.
4 We have no jurisdiction over that railroad.

5 MR. DETRICK: Can you get a photograph right
6 near the crossing for me?

7 Q. [Mr. Detrick] While she's doing that: that's
8 one reason you put it that far. One is the access road;
9 right? Or you didn't put it there, someone put it there.

10 A. Right.

11 Q. All right. Number two is the fiber-optic pole
12 or line underneath; right?

13 A. True.

14 Q. Right?

15 A. Yes, sir.

16 Q. That's the two reasons. Any other reasons?

17 A. And about a -- guesstimation -- thirty-two-inch
18 cross-line pipe that crosses that part of the road there.

19 Q. If you would come down here, Mr. Smith.

20 [Whereupon, the witness complies]

21 Q. [Mr. Detrick] And tell me, where is the road?

22 A. This part right here.

23 Q. Let me see.

24 A. This part right there.

25 Q. That's an access --

1 A. I don't know what it is.

2 Q. But that's what you're talking --

3 A. You would have to talk to CSX about that. I'm
4 highway, not railroad.

5 Q. All right. But that road right there that we're
6 looking at in that photograph, that's the access road
7 you're talking about?

8 A. What I think it is.

9 Q. Okay.

10 MR. DETRICK: All right. And now if you would
11 go to the one that shows the cross-buck.

12 Q. [Mr. Detrick] That's the stop sign right there,
13 isn't it, Mr. Smith?

14 A. Yeah. It looks like it.

15 Q. And it's about thirty-five feet?

16 A. Yes.

17 Q. And so what we're talking about, you're saying
18 there's nothing from that thirty-five feet forward, you
19 couldn't put it forward because of what --

20 A. Right.

21 Q. -- because of what you talk about --

22 A. Exactly.

23 Q. -- is that right?

24 A. Yes, sir.

25 MR. DETRICK: If you can't find the cross -- I

1 think we've got it from the other direction. There we
2 are.

3 Q. [Mr. Detrick] And that's the cross-buck?

4 A. Yes, sir.

5 Q. That's the one that was put there; right? The
6 railroad puts that there; right?

7 A. Yes, sir.

8 Q. And on that -- and on that cross-buck, I think
9 it refers to a fiber-optic line; right?

10 A. You're saying that refers --

11 Q. Yes, sir.

12 A. No. I don't think so.

13 Q. I think a witness testified to that. I might be
14 wrong.

15 But the cross-buck sign is there, isn't it?

16 A. It sure is. Yeah.

17 Q. And it's in the ground?

18 A. Yes, it is.

19 Q. And, I mean, you couldn't put a stop sign there
20 or at least put it on the cross-buck sign?

21 A. No, you can't. No. I have no way of putting
22 that on, and neither would the other fellow. That is
23 actually a railroad track --

24 Q. That's true.

25 A. -- sitting there.

1 Q. We'll agree on that one.

2 A. And this sign there, that's the location of that
3 crossing.

4 Q. And isn't -- the cross-buck sign, it's planted
5 right there, isn't it?

6 A. Yes, sir.

7 Q. And I think under -- y'all abide by the MUTCD.
8 That's y'all's manual y'all -- that's like the Bible for
9 y'all; right?

10 A. Guidelines, yeah.

11 Q. The guidelines. That's what you go by?

12 A. Yes, sir.

13 Q. And don't those guidelines say that you can
14 actually put a stop sign on a cross-buck sign if you want
15 to?

16 A. No.

17 Q. They don't?

18 A. Well, you can. But in District 7 we can't.

19 Q. And why does District 7 not abide by the MUTCD?

20 A. No, they do. We have a new bar-coding system.

21 MR. DETRICK: Well, let's put up -- if you would
22 go to the MUTCD. Let's take a look and see what it
23 actually says.

24 You can go back --

25 A. See, you can't mount that to there.

1 THE WITNESS: Are we through here?

2 MR. DETRICK: No. You probably better stay
3 there.

4 Q. [Mr. Detrick] Now, that's a stop sign; right?
5 Is that the MUTCD?

6 A. Yes. It sure is.

7 Q. And I think when I read it it says on there:
8 [reading] stop or yield signs installed at the highway
9 rail grade crossing may be installed on the cross-buck
10 post.

11 Is that correct?

12 A. Yes, it does.

13 Q. And so it could have been installed on the
14 cross-buck post, as far as the manual; is that right?

15 A. I don't know how they would have got it on
16 there. I mean, you ain't going to drill through it. You
17 can't weld it. I don't know how you would have got it on
18 there.

19 Q. But it also says in there you could put it near
20 to that -- it says: [reading] or on a separate post at a
21 point where the vehicle is to stop, or as near to that
22 point as practical.

23 Is that correct?

24 A. As practical.

25 MR. DETRICK: Okay. You can sit back down.

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1 [Whereupon, the witness complies]

2 Q. [Mr. Detrick] Now, as far as the stop lines,
3 you didn't put that line there, either, did you?

4 A. No, sir.

5 Q. That was there before?

6 A. Yes, sir.

7 Q. And as far as the stop lines, it's also
8 controlled by the manual; right?

9 A. Yes, sir.

10 Q. And it's supposed to be no nearer than fifteen
11 feet from the near rail; is that correct?

12 A. Approximately.

13 Q. All right. Let's look at that part of the
14 manual which y'all go by.

15 MR. DETRICK: You can come down here, unless you
16 can see it up there, Mr. Smith.

17 THE WITNESS: I can't see that.

18 MR. DETRICK: It's up to you.

19 [Whereupon, the witness complies]

20 Q. [Mr. Detrick] And I believe the regulations on
21 that -- is that the right regulation I have?

22 A. Yes, sir.

23 Q. That's the one, isn't it?

24 A. Yes, sir.

25 Q. And it says -- and it didn't say approximately.

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1 Let's go to what it really says: [reading] the stop line
2 should be a transverse line at a right angle to the
3 traveled way at a point where a vehicle is to stop or as
4 near to that point as possible.

5 Right? Am I reading it correctly?

6 A. Yeah. Guidance.

7 Q. Okay. You're right.

8 And then: [reading] the stop line should be
9 approximately 2.4 meters, which is eight feet from the
10 gate, if present.

11 A. Right.

12 Q. Then it says: [reading] but no closer than 4.6
13 meters.

14 Which is fifteen feet from the nearest rail; is
15 that right?

16 A. Yes.

17 Q. And I think y'all have that -- this, right here,
18 book with you when you go around, don't you?

19 A. Yes, sir.

20 Q. And it's mandatory that you have the book with
21 you, isn't it?

22 A. Yes, sir.

23 Q. And it's mandatory that y'all follow the book,
24 isn't it?

25 A. Yes, sir.

1 MR. DETRICK: That's all I have. Thank you,
2 Mr. Smith.

3 MR. PURCELL: No questions.

4 MR. MCLEOD: Only one question.

5 If you could put that picture you had back up
6 there about the cross-buck.

7 MR. DETRICK: The cross-buck?

8 MR. MCLEOD: Right.

9 MR. DETRICK: All right.

10 MR. MCLEOD: Well, that one will do.

11 MR. DETRICK: Do you want the cross-buck? Oh.
12 I'm sorry.

13 REDIRECT EXAMINATION

14 BY MR. MCLEOD:

15 Q. Is there a fiber-optic sign on that post there?

16 A. Yes, sir.

17 MR. MCLEOD: I have nothing further, Your Honor.

18 THE COURT: All right.

19 MR. DETRICK: Is that it, Mr. McLeod?

20 THE COURT: Yes.

21 RECROSS-EXAMINATION

22 BY MR. DETRICK:

23 Q. Do you know whether that post was there when
24 they put it -- when they put the stop sign up or not?

25 A. I couldn't tell you that.

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1 MR. DETRICK: That's all I have. Thank you.

2 THE COURT: Okay. Mr. McLeod?

3 MR. MCLEOD: Nothing further, Your Honor.

4 THE COURT: All right. Mr. Smith, you may step
5 down, sir. Thank you.

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

8 THE COURT: Any objection to Mr. Smith being
9 excused?

10 MR. PARKER: None from the plaintiff, Your
11 Honor.

12 MR. HARMON: No, Your Honor.

13 THE COURT: All right. Thank you, sir.

14 MR. MCLEOD: Thank you, sir.

15 THE COURT: Mr. McLeod, if you will call your
16 next witness.

17 MR. MCLEOD: The Defendant DOT would call Dick
18 Jenkins.

19 THE COURT: Go ahead and bring him on in, sir.

20 [Whereupon, Mr. Jenkins enters the courtroom]

21 THE COURT: Over here, Mr. Jenkins.

22 MR. JENKINS: All right. Thank you.

23 THE COURT: You're going to have to walk around,
24 sir. Walk around the court reporter, this way, if you
25 would.

1 MR. JENKINS: All right.

2 THE COURT: Thank you, sir.

3 Place your left hand on the Bible there, and
4 raise your right hand, sir.

5 [Whereupon, Mr. Jenkins is duly sworn by the
6 Court]

7 THE COURT: Thank you. If you'll please have a
8 seat.

9 MR. JENKINS: All right.

10 [Whereupon, Mr. Jenkins takes the witness stand]

11 THE COURT: State your full name for the record.

12 THE WITNESS: All right. I'm Richard F.
13 Jenkins, Jr.

14 - - - -

15 RICHARD F. JENKINS, JR.,

16 Having Been First Duly Sworn,

17 was Examined and Testified as Follows:

18 DIRECT EXAMINATION

19 BY MR. MCLEOD:

20 Q. And what is your position, Mr. Jenkins?

21 A. I'm the state traffic management engineer for
22 SCDOT.

23 Q. And what do those responsibilities entail?

24 A. Well, today I'm in charge of all the emergency
25 traffic management work that goes on at DOT and the State

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1 Emergency Management Division with the state highway
2 patrol, as well, hurricanes, terrorist activity, dam
3 failure, that kind of thing. I also do a lot with ITS in
4 terms of transportation systems, cameras, signs, shift
5 units and that kind of thing, and work with congestion
6 management and incident management.

7 Q. And how about as part of your responsibilities?
8 Under your responsibilities is the safety program?

9 A. Yes, sir. I was in charge of the highway safety
10 program from 1985 through about two years ago, until I got
11 this position, so I did highway safety engineering and
12 also rail-grade-crossing safety-project engineering.

13 Q. Now, tell the jury how that program works. I
14 think I finally got a handle on it.

15 A. All right, sir. That's the rail grade crossing
16 safety program?

17 Q. Yes.

18 A. Okay. The SCDOT is allotted a certain amount of
19 money from the Federal Highway Administration to
20 administer this program, and each state is charged with
21 looking after each of the public grade crossings in the
22 state. There are about 2500 of these crossings across the
23 state. DOT categorizes, catalogs and inventories all of
24 these crossings and looks at the characteristics at each
25 crossing, characteristics such as train speed, number of

1 trains, the paved -- whether the road is paved or not, how
2 many lanes, how many tracks, the collisions that may have
3 occurred in the last five years, the category of the
4 highway, and things such as that. All these factors are
5 worked into what's called an inventory process, and by
6 using that process we're able to look at these crossings
7 and decide what types of improvements we might want to
8 make there.

9 In general terms, we are using that federal
10 money to put in gates and lights and that kind of thing.
11 About half the crossings have gates and lights right now;
12 the other half just have passive devices, no gates and
13 lights.

14 So each year we update that information and
15 that's what helps us determine what we do in that program.
16 But also in that same rail-grade crossing-safety program,
17 we have what's known as the Lourie law, which is an
18 inspection program, and also just general railroad public
19 awareness campaigns with things like Operation Lifesaver.
20 And we work with DPS on that sort of thing, as well.

21 Q. Well, let me ask you this. The Feds give the
22 state money for safety?

23 A. Yes, sir. For that -- for several safety
24 programs, yes, sir. And that's one of them.

25 Q. That's one of them is the rail crossings?

1 A. Yes, sir.

2 Q. Now, does the Department put up any of these --
3 I mean, how does it work when you decide to do that?

4 A. Once -- the money that we're given each year
5 allows us to do about twenty-two or twenty-three of these
6 crossings, with gates and lights, in this program. We
7 have done one or two partial grade separations. We've
8 funded part of it and we've used other funds for that.
9 But those are very expensive.

10 But getting back to the rail-grade crossing,
11 signals, lights, and gates, what takes place there is that
12 the railroads operate, of course, on their right-of-way,
13 and we -- they are the ones who put in the devices. We
14 authorize them to design the signals and gates, and they
15 design them and then procure the equipment and then they
16 proceed to install it on their right-of-way. We pay them
17 for that work and then once they're installed, the
18 railroad companies maintain the signals.

19 Q. And that's -- that's with the federal money?

20 A. Yes, sir.

21 Q. Now, is there anything to prevent the railroad
22 from improving crossings on their own expenses?

23 A. No, sir. It's their right-of-way. They may
24 certainly work with it as they see fit.

25 Q. Well, maybe more -- sounds like y'all don't even

1 do it, but can DOT put up gates and lights --

2 A. No, sir.

3 Q. -- on the railroad --

4 A. No, sir. That's --

5 Q. -- grade?

6 A. That's railroad right-of-way. We don't work on
7 that.

8 Q. Why?

9 A. Well, there are certain liability issues, and as
10 far as I can determine there may even be certain federal
11 laws that only allow the railroad to do work on their
12 right-of-way. It's a dangerous area, of course.

13 Q. I think I got it.

14 A. Yes, sir.

15 Q. In other words, it's because it's the railroad's
16 right-of-way and not y'all's?

17 A. That's correct.

18 Q. Well, can the railroad do anything that it wants
19 to within its right-of-way?

20 A. Well, I'm sure within the parameters of
21 operating the railroad they can, whatever that takes. I
22 mean, they maintain their right-of-way. They could do
23 anything at all to maintain it. They do provide crossings
24 and crossing surfaces at each of the road crossings; they
25 put up the cross-bucks and maintain those at each of the

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1 crossings; and, as I said, they maintain the devices that
2 are there. So they've got their own train-signaling
3 systems on some of the railroad. So that's a good bit
4 that goes on there so there's certainly, I imagine,
5 endless possibilities as to what could take place.

6 Q. Well, can the Department of Transportation clear
7 vegetation off their right-of-way, the --

8 A. No, sir. We don't --

9 Q. -- the railroad's right-of-way?

10 A. No, sir. We don't work on railroad right-of-
11 way. Just ours.

12 Q. Can the railroad close a crossing without asking
13 DOT?

14 A. It has been done.

15 Q. Well, I can't remember whether I asked you this.
16 Specifically, can the railroad put up gates and lights
17 without DOT permission? Department of Transportation.

18 A. It has happened in the past, yes, sir.

19 Q. So is the answer to that yes or --

20 A. Yes, sir.

21 Q. You mentioned the Lourie law. Just briefly kind
22 of -- kind of explain what that is.

23 A. That's a law that Senator Isador Lourie, who was
24 a senator really in the Richland County area years ago,
25 was a safety-minded gentleman, and he wanted an inspection

1 program for all crossings. Basically, the three things
2 that he was concerned about, which are part of the law,
3 are to see if there are any sight obstructions, whether or
4 not the cross-bucks are there, and what condition they're
5 in, and whether or not a stop sign was needed at the
6 crossing. That's the three main areas of the law.

7 And the law was passed, and the task was passed
8 to DOT to fulfill the requirements of the law. That was
9 my area of responsibility. So we set up a program, an
10 inspection program. And that was actually put in place
11 around 1989 or so, and that's gone on ever since. Now,
12 this is for all public crossings in the state, the 2500 I
13 mentioned.

14 Q. Well, under that Lourie law -- because you
15 mentioned visibility?

16 A. Yes, sir.

17 Q. Is the -- or does the -- the inspectors used to
18 work for you?

19 A. Yes, sir.

20 Q. Do work for you?

21 A. Yes, sir. They did work for me at one time.

22 Q. Are they supposed to go to the stop bar and
23 check for visibility?

24 A. If I'm not mistaken, the instruction we gave
25 them was to look at sight obstructions from the stop bar

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1 and if none were there, the stop bar was not there, it was
2 fifteen feet from the nearest rail.

3 Q. But if one was there, it was at the stop bar?

4 A. Yes, sir.

5 Q. Do you know of any crossings where the stop line
6 is not adjacent to the stop sign?

7 A. There are a number of them.

8 Q. What's the purpose of a stop line?

9 A. A stop line is to tell the motorist where to
10 stop so that they may look either at an intersection or at
11 a railroad crossing to see if the way is clear to proceed.

12 Q. Have you ever been to the -- you've been to the
13 Hill Street crossing?

14 A. Yes, sir. I've been there several times.

15 Q. Could you tell the jury -- I mean, do you recall
16 where things were placed and the stop --

17 A. Fairly much so, yes, sir.

18 Q. Could you tell the jury why the stop sign would
19 be placed where it is in this -- at this crossing?

20 A. Yes, sir. In looking at it, the stop sign
21 there, I guess we're lucky to be able to fit one in
22 anywhere there. But the crossing itself is there some
23 distance from the adjacent roadway. But as you look close
24 to the track, there's also a buried fiber-optic cable
25 that's identified by a sign.

1 Generally speaking, when the railroad put these
2 cables on their right-of-way, probably in the late 80s, as
3 I remember, the guide that we had was where that sign was,
4 you could expect to have cable ten feet either side of it.
5 The cable is buried at varying depths, and so you don't
6 know exactly what the depth is, you don't know exactly
7 where it is. Now, it could -- it's most likely in a
8 conduit, probably two inches, three inches, but in some
9 cases it could be direct burial.

10 These cables carry a lot of transportation -- as
11 anybody would know, it's a real good means of
12 communicating, so you don't want to destroy or hit this
13 cable. We have cable that we put in ourselves at DOT, and
14 it's quite expensive to repair. In some cases it could
15 run \$100,000 a cut. So we instruct our folks to kind of
16 stay away from that area, which is why you wouldn't want
17 to put that stop sign in that area.

18 There is a cross-line pipe -- that means a pipe
19 that parallels the railroad track -- on the side away from
20 278 or 68, one or the other. 278, I suppose. Maybe 68.
21 I don't know whether it overlaps or not. But, anyway,
22 that is beyond that point; in other words, farther away
23 from the crossing.

24 And there appears to be -- I'm not sure but
25 there could be a parallel water line that's on still

1 farther away from that pipe, so I'm sure they were trying
2 to avoid that. And generally our procedure is to drive a
3 post in the ground probably two feet, it may go three, and
4 then attach the sign to that. So I would say that
5 certainly you take a chance on hitting some of that if you
6 drove the post in the ground, and that's probably why that
7 was done.

8 Q. How about would any consideration ever be given
9 to the driveway of mister -- of Tommy Jackson --

10 A. Well, that that's --

11 Q. -- which came that close to --

12 A. That is another factor of this. There's a fair
13 amount going on there. You don't want to -- you would
14 like not to block his driveway with whoever is stopping at
15 the crossing. So that's why you put your stop line up
16 there. The stop sign is to be placed as close as
17 reasonably possible to the place you would like someone to
18 stop, but not in all cases can you put it exactly at the
19 stopping point.

20 MR. MCLEOD: I have nothing further, Your Honor.

21 MR. PARKER: Thank you.

22 THE COURT: Mr. Parker?

23
24 - - -

25 - - -

CROSS-EXAMINATION

BY MR. PARKER:

Q. Mr. Jenkins, in your job as the -- where you were previously, being in charge of SCDOT railroad grade crossing program, you got to look at the need for having adequate sight distance, didn't you?

A. That's part of it, yes, sir.

Q. And it's very essential that a motorist at a grade crossing have adequate sight distance, isn't it?

A. It is important.

Q. And if people don't have adequate sight distance people will get killed and injured?

A. I think it's a necessary safety item, yes, sir.

Q. And to have adequate sight distance the motorist has to be able to see the train; correct?

A. That's correct.

Q. Has to be able to see it in time to have an opportunity to react to it -- either go, no go -- in a safe position; correct?

A. That's correct.

Q. And in order to do that, it's not reasonable to make the motorist stop within the right two or three or four feet to have that sight distance, is it?

A. I'm not sure what you mean.

Q. In other words, we don't know -- when people --

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1 as a traffic engineer you know that everybody doesn't stop
2 right at a stop line; might stop two, three feet behind
3 it?

4 A. They could, yes, sir.

5 Q. Because you really can't see. It depends upon
6 how -- the length of your hood and all. You can't see
7 that white line as you approach it. It disappears on you,
8 doesn't it?

9 A. You wouldn't see it on the approach but you
10 certainly would know about where it is to stop.

11 Q. You would have to make a judgment as to where it
12 stopped and you have -- in watching cars, as a traffic
13 engineer you know that some of them stop four or five feet
14 back of it, some of them may get on top of it?

15 A. That's true. But most do stop at the stop line.

16 Q. Some will, some won't, depending upon the
17 driver, isn't it?

18 A. That's correct.

19 Q. And for that reason you have to have that sight
20 distance for a distance behind the stop line to be able to
21 see the train coming, and we have to know that the person
22 can have an adequate sight distance from where a motorist
23 might possibly stop?

24 A. I'll say yes. But let me just say, Mr. Parker,
25 you must stop as near to the stop line as you can. I

1 mean, that's the place you're supposed to stop. So you
2 couldn't expect to stop thirty feet back --

3 Q. I understand.

4 A. -- and have plenty of room to see --

5 Q. True.

6 A. -- down the track.

7 Q. That wouldn't be reasonable to think you would
8 have to stop thirty feet back to see --

9 A. Well, thirty --

10 Q. -- down the track?

11 A. -- or fifteen is what --

12 Q. I mean, that's why you want that stop sign
13 closer than that?

14 MR. PURCELL: Excuse me.

15 MR. PARKER: Excuse me.

16 MR. PURCELL: Can the witness finish his answer?

17 THE COURT: Yes.

18 Q. [Mr. Parker] Go ahead.

19 A. The stop sign is to alert the person there's a
20 stop at the intersection, whether it be a railroad
21 crossing or a roadway, and it's placed as near as it can
22 be to the point there is a stop.

23 There are a number of intersections throughout
24 the state that the sign is probably forty feet back from
25 the intersection because of a store, a driveway or

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1 whatever. The stop line is then located the proper
2 distance from the travel way or the railroad track to show
3 them where to stop. So I would say not in all cases would
4 they stop at the stop sign and expect to be able to make a
5 decision to cross.

6 Q. Right. But that's why you want -- as you said,
7 you want the stop sign placed as near as practical to
8 where you want them to stop and where the stop line is?

9 A. I believe that's what the manual says, yes, sir.

10 Q. So in this case, now, you've testified about the
11 these -- about the things out there at the crossing.
12 Clearly, you were out there I guess today?

13 A. No, sir. I was out there yesterday.

14 Q. Yesterday.

15 And you could have put a stop sign in that --
16 thirty feet in there, or whatever -- let's see what the
17 distance is. We know we don't want it fifteen. You've
18 got to go fifteen feet back from the near rail. But
19 there's -- you can put a stop sign on that post where the
20 cross-buck is.

21 A. That particular post, Mr. Parker, I looked at
22 it. Certainly the manual allows that. That post is a
23 piece of cast-iron rail that -- I don't know how you would
24 mount a stop sign to that, to be honest with you.

25 Q. Well, you can drill a hole in mail, can't you --

1 in metal, can't you? You can use a drill?

2 A. Well, I don't know whether that's drillable or
3 not. But the manual permits a separate placement of the
4 sign, so that seemed to be reasonable.

5 Q. Well, something that I'm curious about. If they
6 drove that cross-buck down, made out of metal, right on
7 top of that fiber-optic line that's theirs, you couldn't
8 have put the stop sign in a similar location?

9 A. Well, I think the cross-buck was there before
10 the fiber-optic line.

11 Q. Well, how did they get it under the cross-buck?

12 A. As I say, that sign for the fiber-optic cable is
13 not necessarily right on top of it. Now, it's almost in
14 line with that cross-buck. I'll admit that to you. But
15 it could be that fiber cable is two or three feet either
16 side of that line.

17 Q. Right.

18 And so we know -- what we do know is that
19 cross-buck sign that's made out of metal is not
20 interfering with fiber-optic line, or the --

21 A. It certainly doesn't --

22 Q. -- railroad wouldn't have done it?

23 A. It does not appear to be.

24 Q. So the highway department could have done the
25 same thing?

1 A. I don't know.

2 Q. Could have figured out where to put that stop
3 sign where it wouldn't interfere with that fiber-optic
4 line?

5 A. Well, without knowing where the line was
6 exactly, Mr. Parker, I wouldn't take a chance on it.

7 Q. Contact the railroad and they'll tell where you
8 it is, won't they?

9 A. They might not know themselves.

10 Q. They can find out, can't they?

11 A. Well, I think you have to look at things that
12 are reasonable. I think it's reasonable to say that you
13 could locate the stop sign at a decent spot to alert the
14 driver and not have to take a chance on hitting the fiber
15 cable or a water line or their cross-line pipe. I mean,
16 there's no problem with where the stop sign is right now.

17 Q. And the -- there's a problem with that
18 vegetation that was there, wasn't it, those trees that
19 were there, that were blocking the view of the motorists
20 if they stopped a little bit behind the stop line, wasn't
21 it?

22 A. Well, I don't know what you mean by a little
23 bit.

24 Q. Well, if you stopped three or four feet behind
25 the stop line, you got an obstructed sight distance, don't

1 you?

2 A. I don't know whether it's three or four. I
3 think it might have been farther than that, but I -- from
4 what I saw.

5 Q. But clearly that vegetation, those trees and
6 things that were there on the date of this collision,
7 should have come down, shouldn't they?

8 A. Well, if you stopped at the stop line you could
9 see, and you could see a number of feet back behind it, so
10 if you -- depends on how far back you were you couldn't
11 see through those trees.

12 Q. But we -- as you testified, you know people
13 stopped four or five feet behind the stop line?

14 A. I think they would have been fine looking down
15 the track.

16 Q. And if they stopped six feet, if they missed by
17 a foot -- we don't want people to get killed because you
18 miss a distance by a foot or so, do you?

19 A. That's true.

20 Q. And you use -- in the highway department, that's
21 the reason y'all use the Federal Highway Grade Crossing
22 Handbook sight distance charts; correct?

23 A. Well, that's not using the Lourie inspections.

24 Q. I understand that. But you use them in
25 evaluating crossings?

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1 A. That is some of what we do. Yes, sir.

2 Q. And these standards -- the railroad should
3 comply with the sight distances in the Railroad Highway
4 Grade Crossing Handbook, shouldn't they?

5 A. Yes, sir.

6 Q. And they should be providing the public with
7 those sight distances so we have safe crossings in this
8 state?

9 A. If you stopped at the stop line you would have
10 met those criteria.

11 Q. But it all depends on where you stop, isn't it?

12 A. That's very true.

13 Q. And you were involved in trying to get the
14 railroad to improve the sight distance at railroad grade
15 crossings in South Carolina, were you not?

16 A. Yes, sir.

17 MR. PURCELL: Your Honor, may we approach?

18 THE COURT: Yes.

19 [Whereupon, an off-the-record bench conference
20 is held]

21 THE COURT: Ladies and gentlemen of the jury,
22 there's a matter of law I need to take up with the
23 attorneys so I'm going to send you back to your jury
24 room just for a brief moment. We'll be back with you
25 shortly. Again, do not begin discussing this case.

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1 It's not appropriate to do so at this time. Thank you.

2 [Whereupon, the jury exits the courtroom at
3 12:24 p.m.

4 THE COURT: All right. Mr. Purcell, I think you
5 need to go ahead and put your objection on the record?

6 MR. PURCELL: Yes, Your Honor.

7 Mr. Parker is beginning a line of inquiry of Mr.
8 Jenkins which concerns crossings with Lourie law
9 problems, or deficiencies that did not meet the Lourie
10 law specifications, and we went over that yesterday
11 what the inspection manual requires. And this was in
12 2002 that Mr. Jenkins and others met to meet to
13 determine how best to communicate with CSX these
14 deficiencies so that they might be corrected in a more
15 timely fashion. And in that regard, there was a
16 meeting that was held -- this was the meeting about
17 which Mr. Lomax was asked yesterday -- and Mr. Jenkins
18 and CSX jointly came to an agreement about how they
19 would handle the inspection process and communicating
20 the results of that inspection process for these
21 nonconforming crossings.

22 And that's the subject of his testimony about
23 which we are concerned and object, because we feel this
24 is a conforming crossing; that is, it met and passed
25 the requirements of the Lourie law. And to go into

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1 dissimilar crossings, which was the subject of this
2 meeting, which was the subject of the matter that Mr.
3 Parker is about to inquire about, I feel, without
4 having heard the line of inquiry, we find -- we feel is
5 objectionable.

6 MR. PARKER: I guess we ought to hear the
7 question -- the answer, I should say.

8 THE COURT: Okay.

9
10 PROFFER

11 EXAMINATION

12 BY MR. PARKER:

13 Q. Mr. Jenkins, I asked you were you involved in
14 trying to get the railroad to provide better sight
15 distance for motorists in South Carolina. Did you do
16 that?

17 A. Yes, sir.

18 Q. And did you meet with CSX?

19 A. I met with both railroads on that. Yes.

20 Q. Did you advise CSX that they needed to clear the
21 entire width of their right-of-way to provide adequate
22 sight distance?

23 A. I know that we had to come to an understanding
24 of just how much right-of-way. I don't know whether we
25 said the entire right-of-way or not.

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1 Q. Let me --

2 A. And I'm not recalling it, but you may have
3 something that says otherwise.

4 Q. I do.

5 I think you've previously testified that you did
6 that. And I'll call your attention --

7 MR. PARKER: Let me get the page number. I'm a
8 little short here today.

9 [Whereupon, Mr. Parker reviews documents]

10 MR. PURCELL: May we inquire? This is the
11 deposition in what case?

12 MR. PARKER: In the Webb case and the Meredith
13 case.

14 MR. PURCELL: The Webb case and the which case?

15 MR. PARKER: Meredith. It's not a CSX case.

16 Q. [Mr. Parker] Let me get you, if you will --

17 MR. PARKER: I'm going to -- looking at the Webb
18 vs. CSX.

19 Q. [Mr. Parker] And you can read your previous
20 testimony, Mr. Jenkins, there, and then I --

21 A. All right, sir.

22 Q. -- and then I can ask you some questions about
23 it.

24 A. Any particular -- let's see, Mr. Parker.

25 Q. I think we're talking --

1 A. Let me see where we are here.

2 Q. -- about your discussions with CSX about
3 clearing the crossings.

4 A. Let me find it here.

5 MR. PURCELL: Can I look at it --

6 MR. PARKER: Certainly.

7 MR. PURCELL: -- with Mr. Jenkins?

8 MR. PARKER: Go right ahead.

9 THE WITNESS: I'm trying to find it here. Just
10 a minute.

11 [Whereupon, Mr. Parker and Mr. Purcell confer]

12 [Whereupon, the witness and Mr. Purcell review
13 documents]

14 MR. PURCELL: Your Honor, he doesn't say that in
15 his deposition.

16 MR. PARKER: Let me show you page 12. Right
17 here..

18 MR. PURCELL: Is this the same deposition, or a
19 different one?

20 MR. PARKER: No. This is from Meredith.

21 MR. PURCELL: Well, you know, Judge, we're going
22 to get -- we're going to get --

23 MR. PARKER: I certainly have a right to
24 cross-examine him on a prior --

25 THE COURT: Just give him the proper deposition

1 and the page and let him take a look at it.

2 MR. PARKER: Well, it pretty well says that in
3 both of them.

4 MR. PURCELL: Well, it --

5 THE WITNESS: I don't think it said in this
6 one --

7 THE COURT: Well, he didn't --

8 THE WITNESS: -- but let's take a look at it.

9 THE COURT: He didn't think he said it in the
10 Webb case, so --

11 THE WITNESS: Take a look at that one, Mr.
12 Parker.

13 MR. PURCELL: Judge, we object to --

14 MR. PARKER: Right here.

15 MR. PURCELL: -- a co-defendant -- the attempt
16 of a co-defendant to open the door on an irrelevant
17 area when Mr. Parker uses a deposition from -- is it a
18 Norfolk Southern case, Mr. Parker?

19 MR. PARKER: Yes.

20 MR. PURCELL: Meredith against Norfolk-Southern.

21 MR. PARKER: It's the same witness.

22 THE WITNESS: Let me -- I'm going to have to
23 review this one. Wait just one second.

24 MR. PARKER: If you look there, I think it's
25 page 11 and 12.

1 [Whereupon, the witness reviews documents]

2 MR. PURCELL: And with all due respect to Mr.
3 Parker, he attempts to get the witness to say that in
4 this testimony, but the witness never says that in this
5 testimony. He never says --

6 MR. PARKER: Well, I would -- I would --

7 MR. PURCELL: -- I recommend --

8 THE COURT: Well, okay, gentlemen. Let's just
9 let Mr. Jenkins read what --

10 MR. PARKER: That's exactly --

11 THE COURT: -- his prior testimony was.

12 THE WITNESS: Judge, I'll attempt to read this
13 that they're talking about. Okay?

14 THE COURT: Do you want to -- we can take a few
15 minutes, so you feel comfortable, and kind of look
16 before and afterwards.

17 THE WITNESS: I'm fine.

18 THE COURT: I know you're kind of sitting here
19 with everyone watching you.

20 THE WITNESS: This is fine. I don't mind it.

21 THE COURT: Okay.

22 THE WITNESS: All right. Here we go. And this
23 is on page 12 of the Webb, Mr. Parker, or whatever?

24 MR. PARKER: Right.

25 THE WITNESS: Okay.

1 A. Question -- let me make sure I start at the
2 right point --

3 [Reading] I believe that you previously
4 testified --

5 THE WITNESS: It's okay for me to read what Mr.
6 Parker -- I can read for him?

7 THE COURT: Absolutely.

8 THE WITNESS: Okay.

9 THE COURT: It is not a problem. It's their
10 proffer. Sure.

11 A. [Reading] I believe that you previously
12 testified that at one point in time, or at some points in
13 time, you have recommended that the railroad clear the
14 entire width of the right-of-way.

15 Answer: [reading] that has been discussed, yes,
16 sir. That would be your recommendation at crossings, that
17 they clear the entire width of right-of-way for a certain
18 distance to provide adequate sight distance.

19 Answer: [reading] probably in an ideal
20 situation it would be. I'm, in some cases, not certain of
21 how much right-of-way they have. They certainly know how
22 much they have. But certainly you would like to have the
23 clearest view you could get.

24 Question: [reading] and you I guess are aware
25 that CSX has instituted a program to clear the

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1 right-of-way for either 300, 600, 900 feet, depending on
2 train speed. Yes, sir. I understand they have a kind --
3 have a wholesale right-of-way clearing program going on.

4 Is that what you want me to read?

5 Q. [Mr. Parker] Well, I really didn't want to you
6 read it. I wasn't going to ask you about it other than
7 the fact you said you didn't --

8 A. Well, I see here, Mr. Parker, I did say an ideal
9 situation; it would be.

10 Q. Right.

11 Well, I mean, you did, in fact, discuss with
12 them the need for them clearing the entire width of the
13 right-of-way?

14 A. That was discussed.

15 Q. And that was with CSX and that was before
16 February the 3rd of 2003?

17 MR. DETRICK: Four.

18 MR. PARKER: Four. Excuse me.

19 Q. [Mr. Parker] Four. Four.

20 A. Four. That's when this --

21 Q. That collision took --

22 A. -- collision occurred.

23 Q. This was before that when you discussed it?

24 A. Yes, sir, it was before that. Uh-huh.

25 MR. PARKER: Okay. Thank you. That would be

1 our question.

2 MR. PURCELL: Your Honor, that's not really the
3 question they asked. The question they asked was was
4 this a recommendation of the SCDOT. And Mr. Jenkins
5 fairly said: in an ideal world, you know, you would
6 like all the crossings -- railroad crossings cleared.
7 I mean, in an ideal world you'd like all the railroad
8 crossings that are not grade separated closed, but
9 that's not the situation that we have here.

10 The question is whether this instance -- whether
11 this instance of the Lourie law being followed, not
12 being violated, presents a situation which they can
13 bring up something that he didn't recommend. This was
14 Mr. Parker's statement that, that would be your
15 recommendation. It's not -- he made it seem in the
16 question, and is apparently going to try to make it
17 seem to this jury, that this was the recommendation of
18 the SCDOT, when it clearly has not been that they go
19 out and clear all of their right-of-way. He's just
20 talking about an ideal situation. And this is in a
21 Norfolk Southern -- in a Norfolk Southern deposition.

22 MR. PARKER: Your Honor, the purpose of the
23 testimony is to show that the SCDOT had discussions
24 with CSX about their need to clear the rights-of-ways
25 to provide adequate safe distance -- sight distance.

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1. And I believe that Mr. Jenkins will testify that, in
2 fact, he did so. And, again, that goes to the urgency
3 of them clearing these crossings.

4 MR. PURCELL: It doesn't go to that, Judge. It
5 goes to the urgency of clearing this crossing. It goes
6 to the -- Mr. Parker's belief that all rights-of-way
7 everywhere should be cleared. It's not about this
8 crossing. That's my objection. It's not about this
9 crossing, and it's not about a recommendation that came
10 forward from the SCDOT that would apply to this
11 crossing.

12 There were discussions.

13 THE COURT: Right.

14 MR. PURCELL: Just because there were
15 discussions --

16 THE COURT: Right.

17 MR. PURCELL: -- doesn't mean it sets forth a
18 standard of negligence which we can now apply against
19 CSX.

20 THE COURT: I don't think he's setting it as a
21 standard of negligence. He's just saying they had
22 discussions about it.

23 MR. PURCELL: I think Mr. Parker is the one that
24 said --

25 MR..PARKER: I'm not going to ask him if that

1 was a standard of negligence. I'm going to ask him
2 what he told them and what they said.

3 MR. PURCELL: And, in fairness, it's not the
4 witness' testimony that he told them they needed to
5 clear the whole right-of-way. They were --

6 THE COURT: No. I think he said it was ideal.
7 But I think he can answer that. And I think he's read
8 clearly the two depositions, and I think he clearly
9 understands possibly the words Mr. Parker is trying to
10 put in his mouth and what he actually said.

11 Is that -- Mr. Jenkins?

12 THE WITNESS: I think I do, yes, ma'am.

13 MR. PURCELL: And this was in connection, as I
14 read the transcripts, Your Honor, with our crossing-
15 clearing programs at passive crossings, which would
16 involve substantial rights-of-way being cleared, and
17 it's not about the DOT coming forth with a separate
18 recommendation.

19 So that's the basis of our objection.

20 THE COURT: All right. I think it's fair game
21 as long as we don't get into and start talking about a
22 bunch of other crossings and a bunch of the other
23 noncompliant crossings.

24 MR. PARKER: I'm not going to --

25 THE COURT: I think if it's as limited as what

1 it is, I'm confident Mr. Jenkins, as a witness, is
2 going to testify as to how he testified in the past.
3 Okay?

4 THE WITNESS: I'll do my best.

5 THE COURT: Okay. All right.

6 MR. PURCELL: Thank you, Your Honor.

7 THE COURT: All right. Anything further before
8 I bring the jury back out? All right. Let's --

9 MR. PARKER: Nothing for the plaintiff, Your
10 Honor.

11 THE COURT: Let's go ahead and bring them out.

12 Mr. Parker, if you go any farther than what this
13 proffer was, I'm going to stop you. Okay?

14 [Whereupon, the jury enters the courtroom at
15 12:36 p.m.]

16 THE COURT: Welcome back, ladies and gentlemen
17 of the jury.

18 Mr. Parker, if you'll continue, sir.

19 MR. PARKER: Thank you.

20 CONTINUED CROSS-EXAMINATION

21 BY MR. PARKER:

22 Q. Mr. Jenkins, prior to February 3rd, 2004, did
23 you meet with officials with CSX railroad about the
24 clearing of rights-of-ways on -- at grade crossings?

25 A. Yes, sir.

1 Q. And when you met with them did you have
2 discussions with them about their need to clear the
3 rights-of-ways to provide adequate sight distance?

4 A. Yes, sir.

5 Q. And did you in those discussions recommend that
6 they needed to clear the rights-of-ways to provide
7 adequate sight distance?

8 A. Yes, sir.

9 MR. PARKER: I don't have anything -- one more
10 question.

11 Q. [Mr. Parker] We had the inspection manual, that
12 was put up by CSX, about the -- that under your railroad
13 inspection procedure where you send your inspectors out,
14 about the fact that they -- if there was no stop line,
15 they were supposed to -- the inspector was to drive up to
16 fifteen feet from the center line of the railroad. Do you
17 recall that --

18 A. Yes.

19 Q. -- used to be?

20 A. Yes, sir.

21 Q. Do you recall that that was changed because, in
22 fact, that would have not complied with the stopping
23 distances under the -- for installation of stop lines and
24 the state law about where you're supposed to stop?

25 A. I think we went to nearest rail. But if you

1 look at just from -- that is, if no stop sign exists -- no
2 stop line exists. Most every crossing I've seen has a
3 stop line now. But because it's part -- actually, that
4 stop line is part of the rail-grade crossing marking
5 that's on the street.

6 But I do recall that, and it is in that little
7 manual. So, yes, sir.

8 Q. But you changed it to fifteen feet from the near
9 rail? Revised it?

10 A. Yes, sir. And I -- that measurement is noted in
11 the manual. The federal manual is an approximate
12 distance, so --

13 Q. Fifteen feet from the near rail is where the
14 stop line should be installed?

15 A. Yes, sir. Given as an approximate.

16 Q. I believe it says it has to be, doesn't it?

17 A. No, sir.

18 Q. Let me get that, because I don't -- we don't --
19 I don't want to --

20 A. Now, I will -- now, in the guide for the
21 inspection it says fifteen feet if no stop line present.
22 But that actually comes from the MUTCD where the drawing
23 or the schematic says that the stop line shall be fifteen
24 -- approximately fifteen feet from the rail. So I'll
25 acknowledge that in the manual, the inspection manual, the

1 two things we're talking about here.

2 Q. Right.

3 Let me -- just so we'll be sure about this, I'm
4 going to hand you the proper section of the MUTCD.

5 [Whereupon, Mr. Parker proffers documents to the
6 witness]

7 Q. [Mr. Parker] And doesn't it say that the stop
8 line should be placed approximately eight feet from the
9 gate, at present, but no closer than fifteen feet from
10 the --

11 A. I think that -- yes, sir, I will acknowledge
12 that. I think you need to realize it does say
13 approximately.

14 Q. Well, I mean, the approximately applies to the
15 eight feet from the gate, doesn't it?

16 A. No, sir. It applies to both of them.

17 Q. Well, that's how you read it?

18 A. Well, let's look at --

19 THE WITNESS: Have you got a -- have you got
20 your MUTCD here?

21 MR. PARKER: Yeah.

22 THE WITNESS: I'll go get one.

23 MR. PARKER: No. It's right here.

24 THE WITNESS: No. I want the drawing. I'll
25 show you what it says. I mean, I got to go out to my

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1 car and get it.

2 MR. PARKER: That's it.

3 THE WITNESS: No. That's the dynamic envelope.
4 Let's go back and --

5 MR. PARKER: Look and see. I've got the --

6 THE WITNESS: Hold it a minute. Hold it.

7 MR. PARKER: -- whole thing here, and they can
8 get it for you.

9 THE WITNESS: Let's take a look. Using an old
10 manual here, Mr. Parker.

11 MR. PARKER: Oh. You want the --

12 THE COURT: Mr. Parker, I think Mr. Detrick has
13 the whole manual there.

14 MR. PARKER: We've got --

15 THE WITNESS: I've got -- here's the drawing.
16 This is fine. I got it right here. I got it, Mr.
17 Parker.

18 MR. PARKER: Okay.

19 A. What I'm saying here is this: if you look at
20 the drawing which details the grade-crossing marking --

21 MR. PURCELL: Can we --

22 THE COURT: Sir, if you --

23 MR. PURCELL: -- use the Elmo so the jury can
24 see what the witness is talking about?

25 THE COURT: That would be great.

1 THE WITNESS: All right. Where do you want --

2 THE COURT: Let's go ahead and put it on the
3 Elmo so we can all see it.

4 THE WITNESS: Is this the Elmo?

5 THE COURT: Yes, it is, sir.

6 THE WITNESS: Is that what -- how did it get
7 that name? Elmo? I thought that was something on
8 Sesame Street.

9 A. All right. It might be a little hard for y'all
10 to see, but I'll point it out to you.

11 MR. POSTON: I'll zoom it in.

12 THE WITNESS: Oh. Okay.. Good. A technical
13 man.

14 MR. POSTON: Which way do you want it?

15 THE WITNESS: That's good. That's fine. And
16 just a little -- what I'm looking for is right there.
17 Okay. That's good. Great. The Elmo.

18 MR. POSTON: That's the brand name.

19 THE WITNESS: That's neat.

20 A. Now, this actually says -- this is the stop line
21 we're talking about. And I just want everybody to realize
22 that is part of this marking here that you see on the
23 roadway -- and it's present whether you've got a stop sign
24 or not -- but it does say approximately 4.6 meters or
25 fifteen feet. That's where that word comes from in the

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1 wording that you have.

2 Q. [Mr. Parker] I got you.

3 A. Okay?

4 Q. I think you're correct.

5 A. All right.

6 Q. Thank you.

7 A. I keep this on my bedside table. It's very good
8 reading when you -- on a sleepless night.

9 Q. Mr. Jenkins, the --

10 A. Yes, sir.

11 Q. -- under the state law, the motorist is supposed
12 to stop from fifteen to fifty feet; correct?

13 A. That's for a stop sign. Yes, sir.

14 Q. And can't get closer than fifteen feet --

15 A. Well, again --

16 Q. -- under the law?

17 A. -- the motorist is -- again, you need to stop
18 where you can see to make your decision. So that's what
19 you need to key on.

20 Q. Right. And the most --

21 A. That's --

22 Q. Excuse me.

23 A. Well, I just want to tell you, we've had some
24 discussions about maybe renewing or kind of regenerating
25 that state law because it's not really quite what the

1 national manual says or indicates. But that being the
2 case, it's just a slow process with the legislative
3 scheme, but --

4 Q. But it is the state law?

5 A. It is state law. It just needs -- it needs a
6 little modification.

7 Q. And the average motorist doesn't know anything
8 about time-distance relationships, do they?

9 A. I wouldn't think so.

10 Q. And that's what you need to know to be able to
11 determine where to stop and whether you have a safe sight
12 distance, isn't it?

13 A. I don't know whether the average motorist needs
14 to make a calculation or not, Mr. Parker. I think the
15 average motorist, just from driving experiences, can judge
16 where the best place is to stop and see. You certainly
17 don't want to make any movement unless you can see what's
18 going on.

19 MR. PARKER: Thank you.

20 THE WITNESS: Yes, sir.

21 CROSS-EXAMINATION

22 BY MR. PURCELL:

23 Q. Mr. Jenkins, the second part of that statute
24 that Mr. Parker asked you about, the fifteen to fifty,
25 says you should stop there but not proceed until it's safe

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1 to do so; isn't that right, sir?

2 A. Yes, sir. That's correct.

3 Q. And you expect motorists to stop at the stop
4 line when there is one there; isn't that right, sir?

5 A. I would stop there. And even in that case, if
6 you couldn't see clearly don't make a move until you can.

7 Q. And that's a motorist's responsibility under the
8 law, isn't it, sir?

9 A. Yes, sir.

10 Q. And you've seen this -- the photographs of this
11 crossing, and specifically the one at twenty feet from the
12 near rail that's there on your monitor, haven't you, sir?

13 A. I have seen that drawing, yes.

14 Q. And the inspection that was done by your
15 inspector, Randy Lomax, at the end of 2002 concerning this
16 crossing, under the Lourie law you believe is a correct
17 inspection, don't you, sir?

18 A. Yes, sir.

19 Q. It shows there were no obstructions, and you
20 believed this was a safe crossing at that time, don't you,
21 sir?

22 A. According to his inspection.

23 Q. And your view of this photograph comports or
24 agrees with his inspection in November of 2002, doesn't
25 it?

1 A. Yes, sir.

2 Q. Assuming here that the stop bar is between,
3 let's see, two feet, between nine and eleven feet plus
4 some inches on both the dimensions; all right, sir?

5 A. Yes, sir. I think I was given the measurement
6 of something like twelve feet in one case.

7 Q. All right, sir. Well, that would put his van,
8 Chrysler van that he inspects in, about seven feet beyond
9 that point, which would be between eighteen --

10 A. Some --

11 Q. -- and twenty feet?

12 A. Somewhere in the neighborhood. Yes, sir.

13 Q. Right.

14 And you think it was a safe crossing under the
15 Lourie law, don't you, sir?

16 A. Yes, sir.

17 Q. And the inspections are made from there; right?

18 A. That's correct.

19 Q. Now, let me ask you, sir, the two-foot stop bar:
20 you would agree with me that that two-foot stop bar is
21 larger than a parking-lot stripe, wouldn't you?

22 A. The stripe that would separate the cars when
23 they're parked?

24 Q. Yes, sir.

25 A. Yes, sir.

1 Q. And you can see that from a lot farther off,
2 can't you?

3 A. That's the reason it's that wide.

4 Q. Okay. Because you can see it from a long way
5 off; isn't that right?

6 A. Yes, sir.

7 Q. And it doesn't fade out the way parking-lot
8 stripes do when you take a picture of them, does it?

9 A. That's a thermoplastic line. It's not paint.

10 Q. Very good.

11 MR. PURCELL: Nothing further.

12 RE-CROSS-EXAMINATION

13 BY MR. PARKER:

14 Q. Mr. Jenkins --

15 A. Yes, sir.

16 Q. -- that line as you get farther away and you get
17 at a greater angle, just like on the pavement with the
18 center lines, this stripe is going to disappear to
19 somebody that would be approaching parallel to that line,
20 wouldn't it?

21 A. You can't see them forever. That's correct.

22 Q. And there's a finite distance from where you can
23 see them?

24 A. That's true.

25 Q. And the less that angle is between the line and

1 the eye where you're viewing it from, as it goes down then
2 it becomes invisible, doesn't it?

3 A. In other words, the farther you get away, it
4 disappears.

5 Q. Thank you.

6 A. I would agree with that.

7 MR. MCLEOD: I think just a couple of questions.

8 REDIRECT EXAMINATION

9 BY MR. MCLEOD:

10 Q. Would you venture to guess how long that
11 railroad has been there and that cross-buck?

12 A. How long the railroad has been there, Mr.
13 McLeod?

14 Q. Yeah.

15 A. I would probably say over a hundred years. I
16 don't know about the cross-buck but it's been there a
17 while, too.

18 Q. Well, would you venture a guess on how long
19 fiber optic has even been invented?

20 A. I know CSX and Norfolk Southern were putting
21 that in probably in the mid to late '80s -- fiber optic
22 has been around for probably fifty years -- but came into
23 being as a transportation medium of communication at that
24 time.

25 MR. MCLEOD: I have nothing further, Your Honor.

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1 MR. PARKER: Nothing further, Your Honor.

2 THE COURT: All right. Mr. Jenkins, you may
3 step down, sir. Thank you.

4 THE WITNESS: Thank you, ma'am.

5 [Whereupon, the witness is excused and exits the
6 witness stand]

7 MR. PARKER: Thank you, sir.

8 [Whereupon, Mr. McLeod confers with counsel]

9 MR. MCLEOD: All right. May he be excused?

10 THE COURT: I think he may. No objection;
11 correct?

12 MR. PARKER: No objection.

13 THE COURT: You are excused, Mr. Jenkins.

14 THE WITNESS: Thank you, Judge.

15 THE COURT: Thank you, sir.

16 THE WITNESS: Thank you.

17 THE COURT: All right. Mr. McLeod, would you
18 like to call your next witness, sir.

19 MR. MCLEOD: We call Rick Reynolds.

20 THE COURT: Reynolds? All right. Go ahead and
21 bring Mr. Reynolds out.

22 [Whereupon, Mr. Reynolds enters the courtroom]

23 THE COURT: All right. Sir, if you'll just come
24 forward here this way. Right here through the middle
25 is fine. Right around the court reporter here, in the

1 red, right on up here.

2 [Whereupon, Mr. Reynolds complies]

3 THE COURT: And underneath this, sir, is a
4 Bible. If you will place your left hand on the Bible
5 and raise your right hand.

6 [Whereupon, Mr. Reynolds is duly sworn by the
7 Court]

8 THE COURT: Thank you, sir. If you would sit
9 down, and give us your full name for the record.

10 [Whereupon, the witness takes the witness stand]

11 THE WITNESS: Richard Kirby Reynolds.

12 - - -

13 RICHARD K. REYNOLDS,

14 Having Been First Duly Sworn,

15 was Examined and Testified as Follows:

16 DIRECT EXAMINATION

17 BY MR. MCLEOD:

18 Q. Mr. Reynolds, where were you employed on
19 February the 3rd, 2004?

20 A. South Carolina Department of Transportation.

21 Q. Now, you are no longer with them?

22 A. No, sir.

23 Q. Now, did you oversee Hampton County as the
24 resident maintenance engineer?

25 A. Yes, sir.

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1 Q. Are you familiar with the Hill Street crossing?

2 A. Yes, sir.

3 Q. Can you tell me why the stop sign is placed as
4 it is at that crossing?

5 A. Let's see. There is an access road; there is a
6 culvert, drainage culvert, beside the access road; and
7 there is a fiber-optic line to the edge of the culvert.

8 Q. Do you think that stop sign is placed as close
9 as practical to the railroad track?

10 A. Yes, sir.

11 Q. And to the stop sign?

12 A. Sir?

13 Q. I mean, and to the cross [phonetic] line?

14 A. Yeah. The stop sign is placed -- because you've
15 got the access road you can't put it in the middle of the
16 access road, you got the culvert right to the side of the
17 access road, and then you got your fiber-optic line beside
18 the culvert, so we had to put the stop sign -- or they put
19 the stop sign outside the ten-foot range of the fiber-
20 optic line.

21 Q. You think it's correctly placed?

22 A. Yes, sir.

23 MR. MCLEOD: That's all I have, Your Honor.

24 - - -

25 - - -

CROSS-EXAMINATION

BY MR. DETRICK:

Q. Mr. Reynolds, if it hadn't had been an access road, would you have put it there?

A. Yes, sir. Probably so.

Q. Okay. And you didn't check with the railroad to see whether there really was an access road there?

A. There was an access road there.

Q. You didn't check with the railroad?

A. No. But you can tell where the cars or trucks have been going down it.

Q. As far as the -- you saw -- when you was out there, you saw that line, didn't you? That stop line?

A. Yes, sir.

Q. Okay. And I believe we've all been -- the jury has heard that the MUTCD recommends that you put the stop line within fifteen feet of the near rail? approximately there? Is that right?

A. Yes, sir.

Q. Okay. And I believe it's your -- been your testimony before that the reason -- the only reason you know of that they wouldn't have put -- wouldn't have been put closer is because of a problem with visibility at fifteen feet; isn't that right?

A. I don't remember.

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1 Q. Was there any other reason other than visibility
2 that you would put that stop line closer?

3 A. Closer than fifteen feet?

4 Q. Closer than fifteen feet to the near rail.

5 A. Not that I recollect. I mean --

6 Q. Okay. So what we have here is the choice y'all
7 had with the DOT to either put the stop line at the
8 fifteen feet, which is what the MUTCD required or, because
9 of the obstructions out there, put it closer. That's the
10 two choices y'all had; right?

11 A. If I understand you correctly, yes.

12 Q. Okay. And what the railroad then has done is
13 have you where you've got two unsafe choices: one at
14 fifteen feet --

15 MR. PURCELL: Your Honor, I'm going to object to
16 that. It's argument, it's inappropriate questioning,
17 it mischaracterizes the evidence the jury has heard for
18 two-and-a-half weeks, or seems like two-and-a-half
19 weeks, about.

20 THE COURT: Okay. Mr. Detrick, go ahead and ask
21 your question, sir.

22 MR. DETRICK: Thank you.

23 Q. [Mr. Detrick] Mr. Reynolds, as I understand
24 your testimony, what you -- you would have put the stop
25 line at fifteen feet except you've got a visibility

1 problem out there at the crossing; isn't that correct?
2 Visibility would have been the problem?

3 A. I don't remember any visibility problem.

4 Q. If you -- you don't remember any because you
5 don't remember. But all right. Let's go on any. You
6 would have put it at fifteen feet at any crossing,
7 wouldn't have been a visibility problem. To put it closer
8 would have been a visibility problem; right?

9 A. I don't understand what you're saying, sir.

10 Q. Well, let me hand you your deposition. Okay?

11 [Whereupon, Mr. Detrick proffers documents to
12 the witness]

13 Q. [Mr: Detrick] What I'm trying to get at, Mr.
14 Reynolds, is the times you would have put it closer than
15 the fifteen feet, as recommended by the MUTCD, if you're
16 putting it closer it would have been because there was
17 some visibility problem to make it where you have to put
18 it closer; is that true?

19 A. I assume so. I mean, I still don't understand
20 what you're saying.

21 Q. All right. I'm sorry. I'll try to be clear.
22 Okay?

23 A. Please.

24 THE COURT: Why don't you -- Mr. Detrick, why
25 don't you try to rephrase it, sir.

1 MR. DETRICK: All right.

2 Q. [Mr. Detrick] The standard that you use -- what
3 you want to do out there is follow the MUTCD --

4 A. Right.

5 Q. -- to put it at fifteen feet; isn't that right?

6 A. Right.

7 Q. Okay. And --

8 MR. PURCELL: Your Honor, I mean, we've already
9 had another witness, who's a highway engineer, testify
10 just previously it's approximately fifteen feet. And I
11 would object to the question about what the MUTCD says,
12 because the witness has just showed us on a --

13 THE COURT: That it's an approximation. I
14 understand.

15 Okay. Mr. Detrick, just ask him the question
16 and give him the full background.

17 Q. [Mr. Detrick] We understand, and we're not
18 arguing with the fact that the MUTCD says it's an
19 approximation. But when you're going out there, what
20 you're wanting to do is put it at fifteen feet; isn't that
21 correct?

22 A. Approximately.

23 Q. That's right. Right in that area.

24 And if you're putting it any closer than fifteen
25 feet, then that would be because there's some problem

1 there with visibility where you have to put it closer?

2 A. Right off the top of my head, I don't remember
3 how far it was.

4 Q. I'm not talking about -- I understand you
5 testified you don't remember this crossing. But I'm
6 saying on any crossing, you're going to put it any closer
7 when you're going out there, then you -- what you would
8 have -- the reason you would put it closer is because
9 you've got an obstruction or a visibility problem closer
10 to the near rail; is that correct?

11 A. I reckon.

12 MR. DETRICK: Okay. That's all I have. Thank
13 you.

14 MR. PURCELL: No questions.

15 MR. MCLEOD: Only one.

16 REDIRECT EXAMINATION

17 BY MR. MCLEOD:

18 Q. Have you seen tire tracks out there, on this
19 railroad right-of-way, going by the fiber-optic line?

20 A. Yes, sir.

21 MR. MCLEOD: That's all the questions I've got,
22 Your Honor.

23 THE COURT: Mr. Detrick, anything?

24 MR. DETRICK: I don't have anything. Thank you
25 very much.

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1 THE COURT: All right. Anything, Mr. Purcell?
2 No?
3 MR. PURCELL: No, Your Honor. Thank you.
4 THE COURT: You may step down, sir.
5 [Whereupon, the witness is excused and exits the
6 witness stand]
7 THE COURT: May Mr. Reynolds be excused? Any
8 objection?
9 MR. HARMON: No, Your Honor.
10 THE COURT: All right. You're excused, sir.
11 THE WITNESS: Free to go?
12 THE COURT: Thank you.
13 All right. Mr. McLeod, anything further, sir?
14 MR. MCLEOD: Nothing, Your Honor. The defendant
15 rests.
16 THE COURT: All right. Ladies and gentlemen, at
17 this time, as well, the South Carolina DOT also rests.
18 Let me see the attorneys very briefly about
19 scheduling.
20 [Whereupon, an off-the-record bench conference
21 is held]
22 THE COURT: All right. Ladies and gentlemen of
23 the jury, we were just talking about scheduling for the
24 remainder of this case. I will tell you this: I have
25 a number of matters of law that I need to take up with

1 didn't want to play 4-C because it has sound. It's
2 only a little over a minute. 4-A and B are fine. And
3 when there's a break, I'll look at 4-C and --

4 THE COURT: Okay. Make sure they're comfortable
5 with those.

6 MR. HOLMES: Just to double check.

7 MR. WRAY: That's it.

8 - - - - -

9 MOTION FOR A DIRECTED VERDICT

10 MR. PARKER: Your Honor, we also have a motion -
11 for a directed verdict. So if the evidence is
12 susceptible with only inference, and that is that the
13 negligence of both of the defendants contributed as a
14 proximate cause to Lillian Colvin's injuries and that
15 under the evidence, even in the light most favorable to
16 the defendants, that each of their negligence played
17 some part in contributing to this collision which
18 injured Lillian Colvin, and it doesn't matter what
19 part, but if it played any part, each of their actions
20 of negligence. I think the negligence here is clear in
21 failing to clear the right-of-way to provide adequate
22 sight distance, and the negligence is clear in failing
23 to provide -- or put the traffic-control devices at the
24 proper place.

25 I think we would be entitled to a directed

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1 verdict if CSX was negligent in failing to clear the
2 right-of-way, and failing to provide an adequate sight
3 distance, and that the jury be charged that CSX was
4 negligent and be charged that DOT was negligent, and
5 then leave it as a question whether or not -- where
6 they stopped would be the question that the jury would
7 decide.

8 THE COURT: Mr. Wray?

9 MR. WRAY: Your Honor, obviously there is
10 evidence from which this jury could conclude that there
11 was absolutely no negligence by CSX whatsoever that
12 contributed to this accident as a proximate cause and
13 they could conclude there was simply no negligence,
14 period. And evidence in the case and the photographs
15 introduced in evidence show that from the stop line --
16 and there is testimony that that is the place you stop
17 under South Carolina law -- there is sight distance of
18 2,000 feet. Even if you back up to where Ms. Colvin
19 said she stopped, there's more than ample sight
20 distance, we contend. And a jury could find that, from
21 the evidence in this case, and there would be no basis
22 for a negligent finding.

23 As to the short whistle, of course, the jury can
24 disregard the event recorder, I suppose, and could find
25 that there was no short whistle, number one. But,

1 number two, they clearly could find that it was not a
2 proximate cause of the accident, for all the reasons we
3 discussed yesterday in connection with our motion for a
4 directed verdict.

5 So while we submit there is no issue of fact for
6 the jury, we submit, in our favor, that the Court
7 should have granted our directed verdict motion. But
8 certainly there are issues as to the defendant's
9 negligence, breach, and proximate cause that would be
10 for the jury, considering the evidence in the light
11 most favorable to CSX.

12 MR. PARKER: I would agree with him that there's
13 issues about proximate cause. There are no issues but
14 that they didn't blow the horn as required by law, and
15 we would be entitled to a directed verdict on that.
16 And there are no issues but that they were negligent
17 failing to cut the crossing. There is no issue about
18 that, because they've admitted it. In fact, I think
19 Mr. Harmon said in his opening statement that he should
20 have cut the crossing. And the evidence -- clearly,
21 all of the evidence shows that they should have cut
22 that crossing. So really the only question is is
23 whether or not their negligence is a proximate cause.

24 MR. WRAY: Again, we are here on the light most
25 favorable to the defendant. Mr. Wooden testified and

1 Mr. Cummings testified that they believe he did begin
2 sounding at the whistle post, which would be in
3 compliance with South Carolina law. That is an issue
4 of fact.

5 Second, Mr. Harmon said in opening statement
6 that in accordance with our crossing-clearing program,
7 when they got to this quadrant it should have been
8 cleared but for the landowner dispute, not that it
9 should have been cleared because otherwise there wasn't
10 appropriate sight distance. And we made very clear
11 that we contented there was appropriate sight distance,
12 notwithstanding the fact that the program had not been
13 followed because of the landowner dispute. So the
14 motion should be denied, Your Honor.

15 THE COURT: Respectfully, I am going to deny the
16 directed verdict motions to CSX. I do think -- taking
17 the evidence in the light most favorable to CSX, I
18 think there was adequate evidence and testimony as to
19 the stop at the stop bar, and I think it needs to go to
20 a jury. I think it is a jury issue.

21 Mr. McLeod, do you have a motion?

22 MR. MCLEOD: I was just -- I was just going to
23 get up and say there's been nothing has happened since
24 I asked my motion -- I mean, made my motion for a
25 directed verdict, and you said it was a jury issue, so

1 I don't --

2 THE COURT: Okay.

3 MR. MCLEOD: But I thought you were saying that
4 the motion was denied. I couldn't hear you.

5 THE COURT: Okay. I did as to CSX.

6 Mr. Parker, you also made a motion as to DOT,
7 didn't you?

8 MR. PARKER: As to DOT, yes, ma'am.

9 THE COURT: Okay.

10 MR. MCLEOD: I say, Your Honor, I --

11 THE COURT: I'm sorry.

12 MR. MCLEOD: There's been no -- there's been no
13 evidence, since I made my motion for a directed
14 verdict, in favor of the defendant SCDOT. Nothing has
15 happened since.

16 THE COURT: And you're correct, sir.

17 MR. MCLEOD: And Your Honor ruled --

18 THE COURT: And I appreciate --

19 MR. MCLEOD: -- whether I liked it or not, that
20 you thought it was a jury issue at that time and I
21 would assume, unless you've changed your mind, that
22 that's still the case.

23 THE COURT: You are exactly right. And, again,
24 but taking the evidence in the light most favorable,
25 again, same thing. I'm going to go ahead and deny the

1 motion for a directed verdict as to the DOT.

2 Anything else, y'all, we need to do before we
3 start doing the jury charges? Any --

4 I'm sorry, Mr. McLeod. Anything further before
5 we go to the jury charges?

6 MR. MCLEOD: No, Your Honor.

7 MR. PARKER: Your Honor, one other thing I
8 wanted to bring up. We anticipate, because of some of
9 the questioning, that they are going to attempt to
10 argue that -- whether Mr. Crews did take a video from
11 where she said she stopped. Ms. Colvin was in the
12 hospital with her daughter and could not get out there
13 until after she -- the crossing had been cut. It was
14 cut February the 27th. And it would be -- if they, in
15 fact, argue that, we want to put up Ms. Colvin to
16 testify that she didn't go out there until after the
17 vegetation was cut and could not get a picture of that.
18 If they're not going to argue that, we don't need to do
19 that but if they're going to argue that, we need to do
20 that.

21 MR. WRAY: I have no idea. Mr. Harmon is going
22 to do the closing. I don't know what he's going to
23 argue. He's going to argue whatever is within the
24 evidence, I assure the Court of that. But I don't know
25 how to respond to his comment, because I'm not quite

1 THE COURT: Well, he had to orient the photo.
2 He had to say that this is a fair and accurate
3 representation --

4 MR. WRAY: Correct.

5 THE COURT: -- of the photographs at the time
6 they were taken.

7 MR. PARKER: Well, we'll just take Dr. Manning's
8 testimony where we admitted it in his deposition.

9 THE COURT: You could certainly do that I guess
10 in rebuttal, couldn't you?

11 MR. PARKER: We sure can.

12 THE COURT: Absolutely. And he could put them
13 in that way.

14 MR. WRAY: I think that's it. Did you want to
15 take a break?

16 THE COURT: Okay. Y'all, let's just take five
17 minutes, and then we'll go to the jury charge.

18 [Whereupon, a recess is taken from 4:46 p.m. to
19 4:52 p.m.]

20 - - - - -

21 CHARGE CONFERENCE

22 THE COURT: All right, gentlemen. Let's go.
23 We're going to start with the plaintiffs first.

24 The first one I have is: [reading] a railroad
25 corporation has a duty to maintain a reasonably safe

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1 grade crossing.

2 Any objection to that?

3 MR. WRAY: We're going to start out on a roll.
4 No objection,

5 THE COURT: The next one is: [reading] a
6 railroad corporation has a duty to maintain its right-
7 of-ways and highway-railroad grade crossings in a
8 reasonable, safe condition. If a railroad corporation
9 negligently allows vegetation to grow on its right-of-
10 way adjacent to the crossing, to such an extent that it
11 obscures or obstructs the vision of a driver of a motor
12 vehicle using the roadway, is liable to anyone who is
13 injured in a collision if the obstructing vegetation
14 contributed as a proximate cause to the collision.

15 And that came from Lowery vs. Seaboard. Any
16 objection there?

17 MR. WRAY: Our roll has stopped. I object. The
18 first part obviously is similar to charge number 1, and
19 I have no objection there.

20 Your Honor, do you mind if we remain seated
21 while we do this?

22 THE COURT: Absolutely.

23 MR. WRAY: The last part I do not believe is a
24 correct statement of the law, and I do not believe it's
25 cited in Lowery, although I can pull it up and look at

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1 it. But the comment about it is liable for anyone who
2 is injured in a collision if the obstructing vegetation
3 contributed as a proximate cause to the collision,
4 obviously there could be other defenses to that claim.
5 They're not liable merely because there is obstructing
6 vegetation, and so I don't believe that part of the
7 charge is a correct statement.

8 THE COURT: Well, do we have a copy of the case?
9 Does someone have a copy of the case? I believe --

10 I saw Gray gave us everything, didn't you?

11 MR. PARKER: I think we must have passed it up.
12 But I am well familiar with that case, and even though
13 that's not specific language out of that case. That is
14 an obstructive-vegetation case in which that is the
15 holding of the case, even though it might not be the
16 specific language. My memory of the case is it's not
17 the specific language.

18 THE COURT: Gray, can you point her to the
19 portions where you got it from? Or do you even know?

20 MR. PARKER: I don't see our --

21 MR. HOLMES: I didn't highlight it.

22 THE COURT: You didn't highlight it?

23 MR. WRAY: I've got the case, and I don't see
24 that language anywhere in it. It was an obstructive-
25 view case, in addition to --

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1 THE COURT: Okay. Gray, why don't you give it
2 to Aaron to look at so she can find it, if she can.

3 [Off the record momentarily]

4 THE COURT: Okay. So do we all agree? How far
5 does it go? It says: [reading] a railroad corporation
6 has a duty to maintain its right-of-ways and highway-
7 railroad grade crossings in a reasonable, safe
8 condition.

9 Which, of course, is the same thing that the
10 first one charged.

11 MR. WRAY: Yes, ma'am. No problem with that
12 language. But I think --

13 THE COURT: Okay. Now --

14 MR. WRAY: -- it's covered --

15 THE COURT: Okay. Now, let's go to the second
16 part. Does it actually state in Lowery that it says if
17 a railroad corporation negligently allows vegetation to
18 grow in it's right-of-way adjacent to the crossing, to
19 such an extent that it obscures or obstructs the vision
20 of the driver of a motor vehicle using the roadway, it
21 is liable?

22 MR. PARKER: It does not say that. It says that
23 there was sufficient evidence to go to the jury because
24 the motorist could not see down the track in the
25 direction in which the train approached because of the
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1 high weeds growing on the right adjacent to the
2 crossing, and he proceeded until he could see past the
3 weeds, when he was able to see the train it was too
4 late.

5 THE COURT: But it was to the facts of the case
6 specific.

7 MR. PARKER: That's correct. But they didn't
8 specifically -- that's the inference, not the --

9 THE COURT: Right.

10 MR. PARKER: -- specific language.

11 THE COURT: Okay. Y'all, I can tell you, I'm
12 looking at -- I've got forty requests to charge from
13 the plaintiff, I have seventy-nine from CSX. And Mr.
14 McLeod, in an effort of being brief, and I --

15 MR. MCLEOD: About thirty.

16 THE COURT: -- appreciate that, has, you say,
17 thirty. Unfortunately, I only have twenty-five here,
18 so you have a few more than I thought.

19 MR. MCLEOD: The others were e-mailed, Your
20 Honor, and I -- they just -- these two fellows got
21 them. They apparently just didn't get to your office.

22 THE COURT: Okay. Well, hopefully we're getting
23 copies of them. Okay.

24 Well, Mr. Parker, I'm not going to charge
25 anything that isn't from the case that doesn't give us

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1 a -- or a general charge.

2 MR. PARKER: Your Honor, we would also --
3 obviously, the Webb case says in that case that -- and
4 I would have to pull it out. But it's clear in there
5 that the railroad has a duty to maintain adequate sight
6 distance and --

7 THE COURT: And you've got that in one of your
8 request to charge.

9 MR. PARKER: Well, we --

10 THE COURT: It's coming.

11 MR. PARKER: I don't think he cited -- they
12 cited to the Webb case, but that's the language of it.
13 And we'll have to pull that out and --

14 THE COURT: Actually, I know there was at least
15 one in the -- to the Webb case. And it may not be that
16 specific one, but --

17 MR. PARKER: I don't know that --

18 THE COURT: It might be the defendants. I don't
19 know. And it may have been Mr. McLeod's. But y'all,
20 let's just keep going and see.

21 MR. PARKER: All right.

22 THE COURT: Number 3. This is: [reading] when
23 vegetation at a railroad crossing is such that it
24 obstructs a motorist's view of an oncoming on-track
25 equipment, the railroad has a duty to exercise added

1 care in the operation of timing as the train approaches
2 and crosses the crossing.

3 I don't quite understand that. I mean, I don't
4 understand what the: [reading] when vegetation at a
5 railroad crossing is such that it obstructs a
6 motorist's view of an oncoming on-track equipment.

7 Something is missing there.

8 MR. MCLEOD: Mine says --

9 MR. PARKER: It should say train.

10 MR. MCLEOD: Oncoming train, is what mine says.

11 THE COURT: Oncoming train.

12 All right. Mr. Wray?

13 MR. WRAY: I object, Your Honor. I don't
14 believe that's the law. It doesn't have -- the
15 railroad doesn't have added -- a duty to exercise added.
16 care. And I don't even know what, in the operation of
17 timing of a train means, and that statement makes no
18 sense to me.

19 [Whereupon, the Court and law clerk confer]

20 THE COURT: Okay. But it's specific as to that
21 case. It says the engineer, correct --

22 MR. WRAY: That's right --

23 THE COURT: -- is an added care.

24 MR. WRAY: -- be exercised by the engineer.

25 The charge says something about added care due

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1 to vegetation.

2 THE COURT: Okay. Well, I can tell you as of
3 right now, unless there is some other portion of it
4 that is appropriate, I'm not seeing it in context of
5 this.

6 MR. PARKER: I think it says when -- exactly
7 what it says, Your Honor: [reading] when vegetation at
8 a crossing is such that it obstructs a motorist's view
9 of an oncoming train, the railroad has a duty to
10 exercise added care in the operation of timing of its
11 train as the train approaches the crossing and crosses
12 the crossing.

13 THE COURT: I can tell you the quote that she's
14 telling me from the case, it says: [reading] defendant
15 admitted that the engineer and other crew were under a
16 duty to exercise added care on this occasion.

17 MR. WRAY: Correct.

18 THE COURT: Which would be specific to this
19 case --

20 MR. WRAY: Correct.

21 THE COURT: -- I'm presuming.

22 MR. WRAY: That's right. It's not a general
23 statement of law applicable to any time there's a
24 grade-crossing accident.

25 THE COURT: I mean, in this case we're talking

1 about -- this is Gleaton vs. Southern. It has to do
2 with there were boxcars that were parked beside the
3 track and some poles that were causing them to be --
4 the view to be obstructed. It wasn't specific as to
5 vegetation. It was as to boxcars.

6 MR. PARKER: Well, I mean, it doesn't matter
7 what blocks the view. That's to view obstruction. It
8 doesn't matter if it's vegetation, if it's boxcars, if
9 it's house trailers, or whatever blocks the view.

10 THE COURT: Okay. Mr. Parker, it's just not,
11 clearly, from the case. If you can give me a direct
12 quote from the case and something that's applicable, I
13 mean, I'll charge it.

14 Number 4. [Reading] It is the duty of the
15 railroad to give such warning as may be reasonably
16 sufficient in view of the situation and surroundings to
17 put individuals using the highway on their guard of the
18 presence of a train.

19 Mr. Wray, is there anything objectionable about
20 that?

21 MR. WRAY: I was trying to put my hands on the
22 case real quick. I believe the Court will charge the
23 statute. I assume this is talking about the duty to
24 warn using the locomotive horn or the bells.

25 MR. PARKER: I don't think so. It's talking

1 about the duty to warn, period.

2 MR. WRAY: Like I said, I don't have the case.
3 I might can grab it, but --

4 MR. PARKER: We've got it here.

5 THE COURT: Well, I can tell you, as of right
6 now I don't see anything that's offensive about the
7 charge other than it may be somewhere else talking to
8 the same thing. So, I mean, I think as it stands right
9 now, unless it's covered somewhere else --

10 Number 5. [Reading] Where a railroad crosses
11 a --

12 And it should be public highway.

13 -- [reading] a motorist using the highway has
14 the right to use the crossing just as much as a
15 railroad -- as the railroad has a right to use it, and
16 it is the common-law duty of the railroad to give such
17 signals and to take such in its actions, not
18 precaution, as are reasonably sufficient to protect
19 travelers using the crossing.

20 There is mutual duty on the traveler and the
21 railroad to exercise due care, is what the actual quote
22 is.

23 MR. WRAY: That's correct, Your Honor, and --

24 THE COURT: And I'm going to quote it as it's
25 actually supposed to be, with my inclusions in it.

1 But, I mean, it's good law. It's fair.

2 MR. WRAY: My objection was that the case is
3 selectively quoted, and that's not the language from
4 the case.

5 THE COURT: Okay. Well, obviously I have
6 inserted the proper language. So we've got it. All
7 right.

8 Number 6. [Reading] While a train generally
9 enjoys a right superior to that of a motorist at a
10 highway crossing, this does not relieve the railroad
11 company of -- and it says -- its duty to use reasonable
12 and ordinary caution to prevent accidents at such
13 crossings, and this degree of care may be affected by
14 obstructions which prevent the track from being seen as
15 a train approaches.

16 And I can tell you the only problem I have with
17 this is what it should say is: while a train generally
18 enjoys a right superior to that of a motorist at a
19 highway crossing, this does not relieve the railroad
20 company of reasonable and ordinary caution. I mean,
21 they just inserted that, its duty to use. So we're
22 just going to take out that, its duty to use.

23 The paragraph, then, does go on at the very end
24 to say: [reading] both the traveler and the railroad
25 company are charged with the same degree of care, the

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1 one to avoid being injured, and the other to avoid
2 inflicting injury. The care of each must be
3 commensurate with the risk and danger involved. The
4 greater the risk, the greater the care.

5 That's the following -- that's the remainder of
6 the paragraph for that case.

7 MR. WRAY: I agree with that. And the other
8 part we object to, Your Honor, is the first sentence
9 which says: [reading] while a train generally enjoys a
10 right to superior.

11 What the case actually says is: [reading] the
12 right of a railroad company at a highway crossing is
13 superior to that of a motorist, but this superior right
14 --

15 And then it goes into the quote:

16 -- [relieve does not relieve the railroad
17 company of a duty to use reasonable, et cetera.

18 So the case --

19 THE COURT: Aaron, do you have that?

20 THE LAW CLERK: Uh-huh, I do.

21 THE COURT: So I'm going to have Aaron write
22 that in. Okay? The very --

23 MR. WRAY: Yes.

24 THE COURT: At the beginning.

25 MR. WRAY: Thank you.

1 [Whereupon, the Court and law clerk confer]

2 THE COURT: Okay. Number 7, short of me reading
3 the whole thing --

4 [Whereupon, the Court reviews documents]

5 THE COURT: Have you pulled the CJS on this?
6 Have you --

7 MR. WRAY: I couldn't find it, because there was
8 no cite to it, so --

9 THE COURT: We couldn't find it, either.

10 MR. WRAY: Yes. We couldn't find it, but
11 obviously I object to it. It's not the law of South
12 Carolina.

13 THE COURT: Yeah.

14 MR. WRAY: It's some general statement of law
15 from CJS.

16 THE COURT: I will also tell you, too, in
17 reading it, Mr. Parker, I think you have just about
18 everything that's in here. I think you've got it in
19 other charges, too.

20 All right. Number 8.

21 [Whereupon, the Court reviews documents]

22 THE COURT: Obviously, it came from Carter vs.
23 Atlantic Coast. But it's an accurate, fair charge,
24 from what I see.

25 MR. WRAY: Is this from Cook? I think you said

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1 Carter.

2 THE COURT: Actually, it's Cook, but it's Cook
3 quoting Carter.

4 MR. WRAY: Okay. Give me one second.

5 [Whereupon, Mr. Wray reviews documents]

6 MR. WRAY: Yes, ma'am. I think that one was
7 accurately taken from the case.

8 THE COURT: I think it was fine.

9 Mr. McLeod, you need to weigh in, sir, if you
10 object to any of these. Okay?

11 MR. MCLEOD: [Indicates affirmatively]

12 THE COURT: Thank you.

13 All right. Number 9. [Reading] A driver of a
14 motor vehicle is under no absolute duty to stop, look,
15 and listen before going on the track unless the
16 exercise of ordinary care and prudence under all the
17 surrounding facts and circumstances require the
18 adoption of such a course.

19 MR. WRAY: And then I think the case goes on to
20 say: [reading] it is upon you, members of the jury, to
21 determine whether the attempt of the driver to cross
22 without looking and listening effectively was
23 exercisable or culpable.

24 MR. PARKER: That's not applicable because
25 there's not -- there's no --

1 THE COURT: Contributory negligence.

2 MR. PARKER: -- no negligence in this case.

3 THE COURT: There's no contributory negligence.

4 MR. PARKER: Right.

5 THE COURT: That's just --

6 MR. WRAY: I don't disagree with that, but I
7 think there is still -- the Court has got to charge the
8 jury on the duties of the motorist so the jury can
9 assess whether the motorist's negligence, in this case
10 Ms. Colvin --

11 THE COURT: Is it sole negligence.

12 MR. WRAY: Correct. So --

13 MR. PARKER: That is --

14 MR. WRAY: We're not offering it to establish
15 contributory negligence. We're offering it in support
16 of our defense for sole negligence or intervening
17 negligence by Ms. Colvin.

18 MR. PARKER: But I think you would just -- you
19 would charge the duties of the driver. Under those
20 circumstances, not in that language, that would -- the
21 contributory negligence.

22 MR. WRAY: Well, I disagree.

23 THE COURT: Well, let's do this.

24 [Whereupon, the Court and the law clerk confer]

25 THE COURT: All right. Number 10.

1 MR. WRAY: No objection.
2 THE COURT: Okay. Number 11.
3 MR. WRAY: No objection.
4 THE COURT: I can tell you that it seems --
5 okay. It seems to be the same thing as what's going to
6 be the next one --
7 MR. WRAY: Yes. I think it's --
8 THE COURT: -- and it appears --
9 MR. WRAY: I don't agree with 12, but 11 is
10 okay.
11 THE COURT: Mr. Parker, do you want to -- you
12 don't agree with 12?
13 MR. PARKER: I don't think they are the
14 same at all. One says that, correctly says that:
15 [reading] rules imposed by defendant may be deemed the
16 defendant's idea of a standard of care violated.
17 And then the other one says that: [reading] the
18 operating rules --
19 Which were violated here.
20 -- [reading] is, by employees imputable to
21 railroad, considered as evidence of negligence.
22 I think both of those are correct statements of
23 law.
24 MR. DETRICK: Applicable to the facts of this
25 case.

1 MR. WRAY: I don't believe the case talks about
2 imputing negligence but I -- the Eastern Brick case
3 that they cite certainly does talk about internal rules
4 and that being evidence of the standard of care or may
5 be considered evidence of negligence. I didn't object
6 to that charge. I do object to number --

7 THE COURT: 12.

8 MR. WRAY: -- 12, which I do not believe the
9 case says.

10 THE COURT: Well, Aaron, does it have the is
11 imputable?

12 Is that your problem, Mr. Wray?

13 MR. WRAY: Yes, ma'am. And I don't believe
14 that's a correct statement of the law.

15 THE COURT: Let me --

16 MR. WRAY: There may be certain things that are
17 imputable to the railroad but if Mr. Wooden did
18 something completely outside of what he was supposed to
19 do, that wouldn't be imputable to us.

20 [Whereupon, the Court and law clerk confer]

21 THE LAW CLERK: Have y'all found -- do you know
22 the case cite?

23 MR. PARKER: It says -- the quote says:
24 [reading] recognizing the principle of self-imposed
25 rule may well be deemed a defendant's own idea of a

1 standard of care required and, if violated, constitute
2 evidence of negligence.

3 And it cites Judge Russell, but he cites a
4 number of South Carolina cases.

5 THE COURT: What he is objecting to is the word
6 imputable.

7 MR. WRAY: Correct.

8 THE COURT: I'm assuming that it's not a proper
9 quote from it.

10 So, Aaron, just find the proper one.

11 MR. PARKER: Well, let's see. It says -- well,
12 exactly what it says is: [reading] recognizing the
13 principles of self-imposed rules --

14 That's the operating rules.

15 -- [reading] may well be deemed a defendant's
16 own idea of the standard of care required, if violated
17 constitutes negligence.

18 THE COURT: So just take out the imputable, and
19 put in what is appropriate.

20 THE LAW CLERK: Okay.

21 THE COURT: She is just going to take out the
22 word imputable and put what it actually is in there.

23 All right. Number 13. Any objection to that?

24 MR. WRAY: I think 13 was already covered by
25 the one we gave earlier about the duty to warn. I

1 believe --

2 THE COURT: Which number was that?

3 MR. WRAY: Let's see.

4 [Whereupon, Mr. Wray reviews documents].

5 MR. WRAY: Number 4 talks about the duty to give
6 warning.

7 MR. PARKER: That's a different thing. This is
8 the horn signal. The other one is about general-
9 warning duty.

10 MR. WRAY: If the Court feels it's not duplicate
11 or already covered, I believe it does -- I believe the
12 case does contain that language. My objection would be
13 that it's already covered.

14 THE COURT: Okay. Well, right now let me just
15 look at it and see -- if we end up repeating that over
16 and over, obviously we're not going to do it. But as
17 it stands, I'm going to go ahead and charge it.

18 Number 20.

19 MR. WRAY: Are we on 13?

20 THE COURT: I'm sorry. Mine are numbered how
21 Gray originally gave them to me.

22 Number 14: [Reading] A railroad corporation may
23 be required to use a flagman.

24 I think we need to look, y'all, at -- I couldn't
25 find the -- somewhere in here, and correct me if I'm

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1 wrong, I'm not sure if it was the plaintiff's or if it
2 was possibly in yours, Mr. Wray, I think we went
3 through and said the options that they had, they give
4 you the flagman, they give you flashing -- you know,
5 the gates.

6 MR. WRAY: That was the testimony of Dr.
7 Heathington.

8 THE COURT: Okay. But I think y'all have --
9 someone has it in their charge, I do recall seeing it,
10 and I'm not sure who does.

11 MR. WRAY: I don't recall that in ours, but I'll
12 look. I swear there's not. I usually don't submit a
13 flagman charge.

14 MS. AMUNDSON: Your Honor, I believe it might be
15 in ours.

16 THE COURT: It might be in yours? I know I've
17 read it.

18 MS. AMUNDSON: I think it might be.

19 THE COURT: Okay. Let me look at yours, which
20 number it possibly could be, because I think yours was
21 just more complete.

22 [Whereupon, the Court reviews documents]

23 THE COURT: Ashley, if you can find it, if you
24 find it before I do -- I'm looking at it.

25 [Whereupon, the Court reviews documents]

1 THE COURT: I don't see it in yours, but I could
2 have sworn I saw it through someone.

3 Well, this is what we're going to do, obviously.
4 I'm going to leave it in until and unless we find it
5 when we go through the others. Okay?

6 MR. WRAY: I do have an objection to that one.
7 We'll just flag it for now.

8 THE COURT: Okay. What is your objection?

9 MR. WRAY: Well, I don't believe the language
10 "on account of extraordinary danger" would be
11 appropriate.

12 THE COURT: Okay. And I -- give me -- does
13 someone have a copy of the case?

14 MR. PARKER: It's attached there to --

15 THE COURT: This is Myers vs. Atlantic
16 Coastline.

17 MR. PARKER: Let's see.

18 THE COURT: This is number 14. I don't know if
19 this is one -- actually, my note was -- I've got it
20 under Gray's old listings but I had that this was the
21 same, their old number. But I of course can't find it
22 in here now.

23 MS. AMUNDSON: And, Your Honor, I don't know if
24 it was the one that you were thinking of, but our
25 number 20 might be --

1 THE COURT: Pretty close?

2 [Whereupon, the Court and law clerk confer]

3 MR. PARKER: It's the -- down at the -- it says,
4 ordinary prudence. It says: [reading] the duty of a
5 railroad common law --

6 THE COURT: Which case are we on, Mr. Parker?

7 MR. PARKER: The Myers case --

8 MR. WRAY: What page?

9 MR. PARKER: -- at page 4.

10 It says: [reading] the duty of a railroad at
11 common law and outside of any statutory requirements
12 to give such signals at public crossing as may be
13 reasonably sufficient in view of the peculiar situation
14 surrounding at the time and as will give the public
15 and individuals warning of the approach and guard
16 against -- guard them against danger. Ordinary
17 prudence might require a particular crossing to be
18 flagged at certain times, and others not, on account of
19 circumstances of extraordinary danger.

20 THE COURT: Well, which one are you stating it's
21 as to?

22 MR. PARKER: That's the quote of -- that's
23 number 14.

24 THE COURT: Okay. So you want to put the whole
25 quote in?

1 MR. PARKER: Well, either -- and I -- the
2 language we used said the same thing, it just says it
3 in a simpler way.

4 MR. WRAY: Well, that's my objection. I think
5 it takes it out of context. If you're going to use the
6 language from the Myers case, then I think you have to
7 start after the paragraph that says: [reading] the
8 duty of the railroad at common law and outside of any
9 statutory requirements to give such signals at public
10 crossing as may be reasonably sufficient -- et cetera
11 -- ordinary prudence might require a particular
12 crossing to be flagged at certain times and not others.

13 And that's not in their charge.

14 MR. PARKER: That's fine to put -- I would leave
15 out the part that says it's the duty of the railroad at
16 common law, because that doesn't mean anything to the
17 jury. But, you know, I have no objection to that.

18 MR. WRAY: I don't have a problem if you want to
19 say it's the duty of the railroad to give such signals
20 at a public crossing that may be reasonably sufficient.
21 Although, again, I think we've covered it. But it's
22 really out of context, like I said, because they
23 submitted a charge that says railroad may be required
24 to use a flagman, and the case says ordinary prudence
25 might require it sometimes and other times not.

1 THE COURT: Okay.

2 MR. PARKER: It says: [reading] under the

3 surrounding circumstances, and on account of the

4 ordinary --

5 THE COURT: Okay. This is what we are going to

6 do. We're going to quote it from the case, and what

7 I'm going to do is this --

8 [Whereupon, the Court and law clerk confer]

9 [Off the record momentarily]

10 MR. WRAY: 15, Your Honor, there is no objection

11 except as to the provisions which are inapplicable,

12 number 1 and --

13 THE COURT: Which is 1 and 2?

14 MR. WRAY: Yes, ma'am. There's no electric or

15 mechanical signal at a crossing gate. 3 and 4

16 certainly would apply. Part B would not apply.

17 THE COURT: Right.

18 MR. WRAY: No objection to 2715.

19 THE COURT: All right. Give me a --

20 MR. WRAY: I'm sorry. Charge number 16.

21 THE COURT: No objection?

22 MR. WRAY: I assume that you're going to charge

23 the statutes that we requested. Well, I guess I'll

24 state it that way, since Mr. Parker chuckles.

25 But my -- our position is that although the

1 pertinent statutes ought to be charged, if you're not
2 going to charge the stop-line statute then I certainly
3 will object to any of those statutes.

4 THE COURT: Obviously. But isn't this -- isn't
5 15 -- 15 is the same. I'm sorry.

6 MR. WRAY: No, ma'am. That's --

7 THE COURT: Oh. It's two. It's 15 together.
8 I'm sorry. There was two fifteens, is what it comes
9 down to. Correct?

10 MR. MCLEOD: Your Honor, I submitted a number of
11 sections, and I -- and I put with it, behind them, the
12 one that said: [reading] I charge you that you should
13 read all of these sections from South Carolina law
14 together and interpret them -- and interpret them as
15 you find the facts to be.

16 Which I think is that last week they found some
17 case and said it had very similar language in it. The
18 case -- that case law said that they all should be read
19 together.

20 THE COURT: I can't remember what that was, but
21 we read it.

22 MR. MCLEOD: It was a -- Ron found one that I
23 think he said it was --

24 THE COURT: I thought it one of Mr. Parker's
25 cases, but I could be wrong. Okay. That's fine.

1 Obviously, we've got that.

2 Number 16. Mr. Wray?

3 MR. WRAY: I'm sorry, Your Honor. I thought we
4 had covered it.

5 THE COURT: We're fine. I'm sorry.

6 MR. WRAY: Well, my point on 16 --

7 THE COURT: As long as your statutes are
8 charged, you're okay with this?

9 MR. WRAY: I think they all ought to be charged.
10 If they are not all going to be charged, then I do
11 object to those selectively being charged.

12 THE COURT: Okay.

13 MR. WRAY: 17, Your Honor, we have no objection.

14 THE COURT: 18?

15 MR. WRAY: 18 I object to. It talks about
16 duties or a non-delegable duty to an independent
17 contractor. If this were a case or a situation in
18 which the crossing had been cut and the specifications
19 -- or, I'm sorry -- the height wasn't correct, then I
20 believe this charge might be applicable. Here there's
21 a -- the crossing was not cut at all because of the
22 landowner dispute. It really had nothing to do with
23 DeAngelo Brothers other than they informed CSX that
24 there had been a dispute and until it was resolved that
25 the crossing couldn't be cut.

1 THE COURT: Well, you know, in looking at your
2 case, you told me all along that y'all's position has
3 been is that you told DeAngelo Brothers to go back and
4 cut it, and they say they never heard it. So why
5 doesn't this apply?

6 MR. WRAY: Well, I don't believe that the
7 negligence at issue here is the negligence of DeAngelo
8 Brothers. So I guess what I'm making -- his allegation
9 is that it was CSX's failure to comply with its own
10 program.

11 MR. PARKER: Well, the problem is they say they
12 want to blame it on DeAngelo Brothers. And they don't
13 have a right to do that.

14 THE COURT: I think it's fair.

15 MR. WRAY: And then I guess --

16 THE COURT: Is it an accurate quote, though, my
17 question is, of the case?

18 MR. WRAY: The top part I believe is from the
19 Simmons case, the bottom part from the Alexander case.
20 I don't --

21 MR. PARKER: That is -- what it is is changed
22 just -- that was -- rather than cutting, it was -- I
23 think it was --

24 MR. HOLMES: Spraying.

25 MR. PARKER: -- spraying weeds instead of

1 cutting. But it's the same facts.

2 THE COURT: So, Mr. Wray, what is the problem
3 with the last sentence?

4 MR. WRAY: Well, I would have to look at the
5 case, Your Honor. I don't believe that was provided to
6 us originally in the set. If I can look at Alexander
7 real quick, assuming I've got it here, and make sure
8 that's what it says.

9 [Whereupon, Mr. Wray reviews documents]

10 THE COURT: Have you had a chance -- you're
11 looking it up, Mr. Wray, right now?

12 MR. WRAY: I am, Your Honor.

13 THE COURT: I appreciate it.

14 MR. WRAY: I've got the case and --

15 [Whereupon, Mr. Wray reviews documents]

16 MR. WRAY: It looks like the case was talking
17 about -- just in skimming it -- the defendants or the
18 railroad's independent contractor in that case sprayed
19 some chemicals along its roadbed that caused damage or
20 killed crops of the plaintiff, which obviously is not
21 our situation here.

22 I'm looking for the language that they quote
23 that says we have a non-delegable duty to maintain
24 vegetation on a right-of-way. Maybe Mr. Parker can
25 point me to the language.

1 MR. HOLMES: It's not an exact quote, but
2 it's -- that's for the holding.

3 MR. WRAY: It certainly in that case appears
4 that the railroad was held liable because its
5 contractor sprayed some chemicals that killed some
6 crops. We don't have that here. I don't see the
7 language that they're relying upon.

8 THE COURT: Gray, where did you get that from?

9 MR. HOLMES: Your Honor, there's -- I would have
10 to look back through the opinion. Mr. Parker just
11 handed it back to me. But the -- it isn't an exact
12 quote from the case. But in the case they went through
13 and they talked about the contractual obligations of
14 their contractor, and then they went on to hold that
15 the railroad had a duty to maintain the vegetation and
16 that that was a non-delegable duty and so they were
17 responsible for what their I guess independent
18 contractor or contractor did in spreading these
19 chemicals beyond the road bed and damaging I believe it
20 was a cotton crop on the side of the highway. So it's
21 the same. I mean, you would be -- it's the same people
22 doing the same thing, it's just property damage versus
23 an injury.

24 MR. WRAY: Well, what the case says, again based
25 on my hurried reading, is that the railroad couldn't

1 escape liability for damaging this man's crops just
2 because they hired somebody else to do it. It doesn't
3 say that we have -- as the charge says, that we have a
4 non-delegable duty to maintain the vegetation on the
5 right-of-way to provide the motorist with a safe sight
6 distance.

7 THE COURT: I don't think it says that. You're
8 talking about the second sentence?

9 MR. WRAY: The second paragraph of charge number
10 18.

11 THE COURT: Right.

12 MR. WRAY: It says: [reading] the Defendant CSX
13 Transportation Inc. has a non-delegable duty --

14 THE COURT: Right.

15 MR. WRAY: -- [reading] to maintain the
16 vegetation on its right-of-way --

17 THE COURT: That's not the one I have.

18 MR. WRAY: I'm sorry. That's the one I've got.

19 THE COURT: Okay. Gray, I don't know.

20 MR. HOLMES: Your Honor, it's number 18.

21 THE COURT: What I've got is: [reading] a
22 corporation which owes the non-delegable duty is
23 vicariously liable for negligent acts of the
24 independent contractor.

25 MR. HOLMES: That's from the Toomey case, Your
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1 Honor. And the --

2 THE COURT: I'm sorry. Have I got the wrong
3 case? I mean, are we looking at the wrong charge?

4 MR. WRAY: They added --

5 MR. HOLMES: You are, Your Honor.

6 MR. WRAY: -- a paragraph, apparently, from what
7 you've got.

8 MR. HOLMES: At the top it's plaintiff's charge
9 number 18. It was given to you earlier today.

10 MR. MCLEOD: Mine has the second paragraph, Your
11 Honor.

12 [Off the record momentarily]

13 THE COURT: The copy I have doesn't have the
14 second paragraph. All it's got is the first.

15 MR. HOLMES: Your Honor, all the charges we're
16 going by are numbered. I provided numbered -- charges
17 that are numbered in the back --

18 THE COURT: I saw that. The problem was, Gray,
19 is I looked at these last night, and you gave those to
20 us this morning, and so all of my notes were written
21 on your previous ones. So what my law clerk did was
22 she went back, because you rearranged the order of what
23 you did, and evidently you added or subtracted, so she
24 just -- she wrote down what the new number is, and
25 that's why -- and then she put them in the new-number

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1 order so I could go along with y'all. But I needed my
2 notes with them, is what I'm doing. So I may be
3 missing something, I guess is my problem.

4 You have a problem with the second paragraph?

5 MR. WRAY: Yes, ma'am.

6 THE COURT: It isn't even on mine, so I think
7 we're safe in that it isn't going to be charged unless
8 it's actually on my copy. But I think we need to be
9 careful, obviously.

10 [Reading] The Defendant CSX has a non-delegable
11 duty to maintain the vegetation on its right-of-way to
12 provide the motorist with a safe sight distance.

13 Okay. No, I'm not going to charge that.

14 MR. PARKER: Your Honor, in addition to we
15 believing that's what the case says without -- it's not
16 a direct quote. But Mr. Smith, the vice president of
17 engineering -- and they've admitted they have the duty
18 to provide a safe sight distance.

19 THE COURT: I think that is adequately going to
20 be stressed, and already is, in these charges. I mean,
21 there are some that are more than duplicative, and I
22 don't think there's any question.

23 MR. PARKER: But there's none that say that they
24 have a duty to maintain a safe sight distance, which is
25 what the railroad has admitted they have. And they

1 should be charged that.

2 THE COURT: Okay. Number 19.

3 MS. AMUNDSON: Your Honor, with regard to number
4 19 -- number 19 and 20 we don't have any problem with
5 what they say, and we think they're fair depictions of
6 what's in the case law, but they're so similar maybe we
7 could just use one of them or combine them in some way.

8 THE COURT: This is 19 and 20?

9 MS. AMUNDSON: And 20.

10 THE COURT: Okay.

11 MR. WRAY: Well, Your Honor, again, to be clear,
12 you've got -- my 19 is different than the one we got
13 yesterday, so I'm not sure what you have. Make sure
14 you've got the right one.

15 MR. MCLEOD: I've got the South Carolina
16 Department of Transportation --

17 THE COURT: Is it the same one?

18 THE LAW CLERK: One sentence.

19 THE COURT: Is it one sentence?

20 THE LAW CLERK: And they cut off --

21 MR. WRAY: Yes, ma'am.

22 THE LAW CLERK: See where that paragraph --
23 right. They cut off the second part.

24 THE COURT: So they took off --

25 THE LAW CLERK: It stops at you.

1 THE COURT: Okay.

2 MR. WRAY: I guess if DOT has no objection, I
3 really don't have a dog in that fight. But I don't
4 think this is a case about the State's highways. But I
5 leave that to them.

6 THE COURT: Okay.

7 MR. MCLEOD: I might add, Your Honor, that
8 number 20, which it -- to my recollection it was
9 dealing with roads, the case. But, I mean, I still
10 think it's probably a general rule of law.

11 THE COURT: Okay. Well, what I'll do, then, if
12 this is okay -- where do you want me to put the
13 beginning of 19 and 20? I think you're right as just
14 to that first sentence. It says the same thing.

15 MS. AMUNDSON: I think if we got -- if we got
16 rid of 19, Your Honor, that 20 --

17 THE COURT: That 20 covers it.

18 MS. AMUNDSON: -- encompasses --

19 THE COURT: The whole thing. Okay.

20 MR. WRAY: Is that what we are going to do?

21 THE COURT: That's what we're going to do unless
22 Mr. Parker has an objection.

23 MR. PARKER: No objection.

24 THE COURT: Number 21. Ashley?

25 MS. AMUNDSON: Your Honor, I don't believe that

1 we have an objection to this one.

2 THE COURT: Okay. This is 21?

3 MS. AMUNDSON: Yes, ma'am.

4 THE COURT: Okay.

5 MR. WRAY: No objection.

6 THE COURT: Okay. 22?

7 MR. WRAY: No objection from us.

8 THE COURT: Mr. McLeod? I'm charging the
9 statute.

10 MR. MCLEOD: No objection.

11 MS. AMUNDSON: No objection, Your Honor.

12 THE COURT: Number 23.

13 MS. AMUNDSON: Your Honor, I'm just taking a
14 look at this case, but I believe that it has to do with
15 sidewalks and --

16 THE COURT: It has to do with a pedestrian,
17 actually. And apparently the pedestrian was looking up
18 at the stoplight, watching that, and fell on something,
19 or something in the road. I mean, the whole case
20 really talked about contributory negligence. I mean,
21 that was the point of it, but --

22 MR. PARKER: We would cite -- that's the general
23 law, and they have numerous cases that say the same
24 thing.

25 THE COURT: Okay. What are the other cases it

1 cites to?

2 MR. PARKER: We'll have to bring you another
3 one.

4 THE COURT: I'm assuming that it should in this
5 case.

6 MR. PARKER: We'll bring you one where they say
7 that a defective road -- but I'm confident that is an
8 accurate statement of the law.

9 THE COURT: Okay. Well, Gray, I'm going to
10 leave it to you to --

11 MR. HOLMES: Got it.

12 THE COURT: -- show me where it's referenced.
13 Okay?

14 [Off the record momentarily]

15 THE COURT: Okay. The next one, which is
16 plaintiff's number 24, is very similar, Aaron tells me,
17 to CSX's number 8.

18 THE LAW CLERK: It was actually like --

19 THE COURT: This is: [reading] the rule is that
20 a traveler is not bound to see or to hear but is bound
21 to make all reasonable effort to see and to hear that
22 an ordinarily prudent person would under like
23 circumstances.

24 Okay. Let me look at their 8.

25 [Whereupon, the Court reviews documents]

1 THE COURT: No. This is on plaintiff's. It's
2 not defendants' 8. This would be -- it's on
3 plaintiff's 8. [Reading] A traveler reaching a
4 railroad crossing before attempting to go --

5 I'm looking back, y'all, at plaintiff's 8.

6 -- [reading] must use his senses of sight and
7 hearing.

8 Is there a reason why we can't just put these
9 two together? It appears that we should be able to put
10 24 and 8 together. They obviously both come from Cook
11 vs. Atlantic Coastline.

12 MR. PARKER: Your Honor, we can put those
13 together. Just put them together would be fine --

14 THE COURT: Okay. Do you have any problem with
15 that?

16 MR. WRAY: No, ma'am.

17 THE COURT: Looking back, Mr. Wray, we've
18 already agreed that 8 is fine, and this seems to --
19 it's very close. It's kind of the same language. So
20 what I'm just going to ask Aaron to do is just put them
21 together so they read together.

22 [Off the record momentarily]

23 THE COURT: Okay. Number 25. This is where we
24 start asking and doing a lot as to proximate cause.

25 MR. WRAY: Yes, ma'am.

1 THE COURT: I think everyone has kind of done a
2 lot of requests. I do the standard proximate cause
3 charge, which I think is really lengthy, in our book.
4 We can go through these. And I will tell you that all
5 of these are already, for the most part, in the
6 proximate cause charge so what I'm going to do is I
7 will make sure that if the language is a little bit
8 different, that it is covered in the general proximate
9 cause charge. Okay?

10 MR. WRAY: That's agreeable, Your Honor.

11 THE COURT: We're not going to repeat it ten
12 times. Okay?

13 MR. WRAY: That's fine.

14 THE COURT: Okay.

15 MR. HOLMES: Judge, one of them --

16 THE COURT: Yes, sir?

17 MR. HOLMES: -- have the defendants' quotes, and
18 they are accurate quotes from the Bryant case on
19 proximate cause. Our only real argument with those is
20 going to be that in those cases you're talking about a
21 specific defendant, and so it uses the word the
22 defendant's proximate cause, but in this case you have
23 either proximate cause of either defendant.

24 THE COURT: Right.

25 MR. HOLMES: So that's really going to be where

1 the argument is going to be with it.

2 THE COURT: That's the only concern you have?

3 Okay.

4 [Off the record momentarily]

5 THE COURT: And that's a good point, Gray. How
6 do you want me to refer to -- you know, we often talk
7 about the plaintiff, you know, and the plaintiff and he
8 and she. And this is a guardian case, so, you know,
9 technically it's the grandfather. How are we --

10 MR. PARKER: By Lillian Colvin.

11 MR. HOLMES: I believe I put that in our charges
12 that I put in, that Lillian Colvin's injuries, and also
13 we put in about the proximate causes and that there can
14 be more than one proximate cause for her injuries.

15 THE COURT: Right.

16 MR. HOLMES: And I believe that's -- I don't
17 have the -- they're all under the -- I think we all
18 cite to the same case, the Madison and Bryant vs.
19 Babcox, in our cases for the same principles. But I
20 think that the wording is just slightly different,
21 because I put in the word defendants --

22 THE COURT: Right.

23 MR. HOLMES: -- and just took out the word --

24 THE COURT: And, again, like I said, I can tell
25 you the Madison case I'm assuming is where ours came

1 from in the charge book, because my charge is -- it has
2 all this.

3 MR. WRAY: I'm sure your proximate charge --
4 proximate cause charge will be fine.

5 THE COURT: Okay.

6 [Whereupon, the Court and law clerk confer]

7 THE COURT: All right. The next one: again,
8 foreseeability, that's in the charge.

9 Number 27. I can tell you that this is in the
10 charge, but I'm going to double check to make
11 absolutely sure.

12 Mr. Wray, do you have any problem with that?
13 27?

14 MR. WRAY: I don't have any problem with the
15 first paragraph and the last paragraph. I'll have to
16 think about the middle one.

17 THE COURT: I can tell you that it's in my
18 general charge. But that really is the issue that this
19 comes down to before this jury. I mean, if y'all
20 really wanted to and we agreed to, we could tee it up
21 in front of this jury of, you know, do you believe Ms.
22 Colvin was the, you know, sole cause of this accident
23 and, you know -- and then go ahead and ask her, do
24 you believe it was the sight-line issue. I mean, I
25 guess -- do you see what I'm saying? I mean, this

1 truly is the issue. .

2 MR..WRAY: Well, it's the issue, in part,
3 because the issue to us is whether we were negligent
4 at all.

5 THE COURT: Right.

6 MR. WRAY: They could find it was her sole
7 negligence.

8 THE COURT: Right.

9 MR. WRAY: So I would respectfully disagree in
10 part, because I think they could also find that we were
11 not negligent at all, that we properly maintained the
12 crossing. So it is one of the issues --

13 THE COURT: Right.

14 MR. WRAY: -- for the jury.

15 My objection -- again, I don't have a problem
16 with the first paragraph --

17 THE COURT: And the last one, because it's --

18 MR. WRAY: -- that's a correct statement of the
19 law. I believe the last paragraph is a correct
20 statement. My objection comes in with the middle
21 paragraph: [reading] in order to compel this defense,
22 the evidence must show that the defendants' actions did
23 not contribute even in part as a proximate cause of the
24 collision.

25 I assume that's covered by your --

1 THE COURT: It is in my normal charge.

2 MR. WRAY: -- general proximate cause charge.

3 THE COURT: It is.

4 MR. WRAY: So I object to that language.

5 MR. HOLMES: Well, Your Honor, of course the
6 duty issue is going to be taken care of in the actual
7 verdict form before they ever get to proximate cause.

8 THE COURT: Right.

9 MR. HOLMES: So I don't -- I think it's
10 inappropriate.

11 MR. PARKER: I think it needs to be in there
12 because it focuses the jury on what their decision has
13 to be. I mean, it certainly may be in some other part
14 of the charge, but it needs to be in there when we
15 charge them concerning proximate causes.

16 THE COURT: All right. Well, let's just --
17 we'll go through --

18 And I'm going to look, Mr. Wray, at my charge,
19 because I think it does cover any concurring causes.
20 But I want to make absolutely sure.

21 Number 28.

22 MR. WRAY: No objection from us.

23 MR. PARKER: No objection.

24 THE COURT: No objection? All right.

25 Number 29. I went back and I just compared this

1 to Anderson. I think the wording is a little
2 different, and I made sure it was specific, but what I
3 did is I went and did it exactly as to Anderson's.
4 Just: [reading] when a person is injured by the
5 negligent acts of another, the injured person is
6 entitled to be fully compensated for all injuries
7 directly or proximately resulting from any negligent
8 acts by the defendant. In determining the amount of
9 compensation for injuries suffered by Lillian, you
10 may consider an award past, present, and future damages
11 for --

12 The only one that I see as duplicative is number
13 3.

14 And then at the end, again, I'm going to say --
15 at the end I'm going to say: [reading] the plaintiff
16 bears the burden of proving these, you know, damages by
17 the preponderance of the evidence again.

18 MR. WRAY: The two objections I have, Your
19 Honor, I would --

20 THE COURT: Yes, sir.

21 MR. WRAY: -- I would ask that you insert, after
22 that second sentence, in determining the amount of
23 compensation for injuries suffered by Lillian Colvin, I
24 would ask that you insert: if any, you may consider an
25 award of past, present and future damages.

1 Then as to the subtitle, I object to number 1.
2 There's no evidence that she lost income. There is
3 evidence of loss of earning capacity through Dr.
4 Heckor. Loss of income, as I understand it, would mean
5 that she had lost some money, that she was working at
6 the time this event occurred, and she couldn't work
7 for --

8 MR. PARKER: Well, we can change that. Just
9 strike out 1 but leave 3 in, and that takes care of it.

10 MR. WRAY: I think 2 and 3 are appropriate under
11 the evidence.

12 4 I object to because she suffered no out-of-
13 pocket expenses.

14 5 I object to for the grounds that we've talked
15 about numerous times. She did not --

16 THE COURT: Hold on a second.

17 MR. WRAY: Yes, ma'am.

18 THE COURT: Mr. Parker, were there any out-of-
19 pocket expenses?

20 MR. PARKER: Yes, there are out-of-pocket
21 expenses. There's \$277,000 worth of medical expenses.

22 THE COURT: Well, that's going to be covered
23 here under medical bills. What else besides that?

24 MR. PARKER: They could award her money for
25 traveling and going back and forth and doing -- to

1 these doctors, and everything else, if they wanted to.
2 I doubt if they will, but they could.

3 MR. WRAY: There's no evidence Lillian Colvin
4 incurred those expenses, and that -- again, it plays
5 into that objection.

6 MR. PARKER: Well, I'm not going to argue
7 about -- take it out.

8 THE COURT: And then 5 is the one we have
9 discussed many times. We do not believe it's
10 appropriate to award medical expenses, including
11 physicians and medicines, in this case.

12 MR. PARKER: Your Honor, let's go back up. The
13 language he wanted -- it would not be appropriate to
14 say that in determining the amount of compensation for
15 injuries suffered by Lillian Colvin, if any. It's
16 undisputed that she suffered injuries, so that would
17 not be appropriate.

18 MR. WRAY: I guess my reaction would be if we
19 didn't have these other elements in here that I think
20 are improper, I probably would not object to that
21 language. But the suggestion is that they can award
22 her money for each of these items, and I don't think
23 that's right. They could determine on some of them
24 that the amount is zero.

25 MR. PARKER: It just says in determining the
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1 amount of compensation for injuries suffered by Lillian
2 Colvin, you may consider these things. They may not
3 award anything.

4 THE COURT: Y'all, I'm going to charge it just
5 as Anderson has written it. Okay?

6 MR. WRAY: Okay. And are you going to take out
7 1, 4 --

8 THE COURT: I'm going to take out 1, 4.
9 Anything else, Mr. Wray? Keep going.

10 MR. WRAY: Number 5, which we've discussed.

11 THE COURT: Obviously I know your reasoning for
12 that.

13 MR. MCLEOD: And I think, Your Honor, we had
14 better ditto that.

15 THE COURT: Okay.

16 MR. WRAY: And I'm not sure what the evidence
17 was on apprehension, which is 13, and anxiety, which is
18 14, and the emotional injury, number 15, but --

19 MR. PARKER: There's huge amounts of evidence.

20 MR. WRAY: That would be our objections, Your
21 Honor.

22 THE COURT: Okay. So your objection is as to
23 emotional injury and what else? I think there was
24 adequate evidence of emotional injury. What else, Mr.
25 Wray, besides that?

1 MR. WRAY: Number 13, apprehension; number 14,
2 anxiety; 15, emotional injury; and 16, psychological
3 injury.

4 THE COURT: You said psychological injury?

5 MR. WRAY: Yes, ma'am.

6 THE COURT: Wasn't there a lot of testimony
7 about depression?

8 MR. PARKER: There was a huge amount of
9 testimony.

10 THE COURT: Wasn't there a lot about depression?

11 MR. WRAY: I believe Dr. McArthur testified, in
12 part, about depression. But, again, that's covered by
13 17, which I did not mention.

14 MS. AMUNDSON: And, Your Honor --

15 THE COURT: Yes?

16 MS. AMUNDSON: -- the DOT also joins in that
17 objection.

18 THE COURT: All right. Well, as it stands, I'm
19 taking out 1 and 4 and I'm leaving the rest. And then
20 at the end, of course, I'm saying: [reading] the
21 plaintiff bears the burden of proving these elements by
22 a preponderance of the evidence.

23 All right. 30?

24 MR. WRAY: No objection.

25 THE COURT: Okay. 31. Okay. I can tell you

1 that obviously I'm kind of looking at an all-inclusive
2 punitive damages charge. And I will tell you, someone
3 had a good one.

4 MR. WRAY: I hope it was mine.

5 THE COURT: You know, I hate to tell you, but I
6 don't think it was. I think I've got to attribute it
7 to Gray, and I've got to attribute it to being number
8 32. I will tell you this, in Judge Goodstein's
9 defense, as to clear and convincing, while she may have
10 -- when she read it -- took a couple of editorial
11 liberties, I understand how that charge got messed up
12 when it came out of her mouth. If you read her book
13 the way it is, I understand how that happened. I mean,
14 it really is confusing.

15 MR. PARKER: Well, they asked -- when Justice
16 Pleicones asked me, while we were arguing Williams,
17 about where Judge Goodstein -- I said, well, I think
18 she probably got it at one of y'all's judicial seminars.
19 He didn't like that.

20 MR. WRAY: He actually said, where did it take
21 place, on Mars? I believe that was the direct quote.

22 MR. PARKER: Well, neither side wanted that
23 charge.

24 THE COURT: I hate to tell you this: you know,
25 when you're a brand new judge, you go to a three-day

1 judges school, just locally, put on by other circuit
2 court judges, and also a chief justice comes and they
3 give you a book of charges and we try to somewhat
4 standardize them. And I can tell you I understand what
5 happened with that. I mean, I do think -- she didn't
6 read it verbatim, and I think that's where the problem
7 came in. But I kind of understand why it was
8 confusing. I don't think it was written well to start
9 with, to be truthful. So it just wasn't.

10 So number 31 is already in my punitives charge,
11 so -- I'm sorry. That was -- I've got two -- I don't
12 know why I have two thirty-ones.

13 THE LAW CLERK: Because it was in there twice.

14 THE COURT: Because it was in there twice?

15 THE LAW CLERK: It was number 15 and 37 in the
16 old one.

17 THE COURT: Okay. Evidently it was very
18 important to Gray, so he put it in twice. It's already
19 in the punitives charge.

20 Number 32, I think the way it reads -- and just
21 make sure, Mr. Wray, that you don't have a problem with
22 32 because --

23 MR. WRAY: Yes, ma'am. My objection to 32, as
24 we talked about before Dr. Wolf took the stand, it's
25 our position that the Gamble factors, which are listed

1 at the bottom of this charge, are factors to be applied
2 by Your Honor, in the event there is a punitive damage
3 award, in determining whether it can constitutionally
4 stand. They are not factors that need to be charged to
5 the jury. And, in fact -- I don't have the case with
6 me -- there is a case that says it's discretionary with
7 the Court --

8 THE COURT: Whether or not to charge Gamble.

9 MR. WRAY: So I certainly don't dispute that
10 these factors have been charged and are charged, have
11 been charged in railroad grade crossing cases, but --

12 THE COURT: I can tell you what I've seen, Mr.
13 Wray. There's the one that actually says these are --
14 it comes down to being basically four factors verses
15 the seven Gamble factors. And I can tell you that what
16 I've seen, again, just like you've said, I think a lot
17 of judges are charging the seven factors.

18 MR. WRAY: That's right. And I think we
19 submitted a charge that has the four factors in there,
20 or three factors, whatever they are. But --

21 THE COURT: Well, you know, we'll get to that
22 and look at it. I will tell you that one of my
23 concerns on the one that does charge the four factors
24 is it looks at whether or not someone was punished by
25 any other government, you know, fines, regulations or

1 anything, which is an issue in this case because
2 apparently y'all were noticed but no fines were paid.

3 MR. WRAY: Well, actually, that's not correct.
4 There's been no evidence introduced on -- of that in
5 this trial.

6 MR. PARKER: Well, we were not allowed to. We
7 were barred from producing it, introducing it.

8 MR. WRAY: Well, that --

9 THE COURT: It doesn't seem fair, I guess is my
10 point.

11 MR. WRAY: Well, we can look at that when we get
12 to it. I think the --

13 THE COURT: You know, maybe --

14 MR. WRAY: -- charge language says, and I think
15 it comes out of BMW, perhaps, or State Farm. But I
16 believe it was BMW. It says that one of the factors
17 the jury can look at is the comparable penalties that
18 could be assessed. Not necessarily that were assessed,
19 or not -- certainly we believe inappropriate of what we
20 were assessed in other occasions at other crossings.
21 But the factor I believe as set out -- and we'll come
22 to that when we get to our charges -- I think deals
23 with they can look at what the punishment would be
24 under other provisions of law.

25 THE COURT: Okay. We'll get to your charge and
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1 we'll look at it, and after we do that then we'll
2 determine. Obviously, punitive damages are going to be
3 charged just based on me denying your directed verdict
4 motion as to punitive damages. So we'll just get
5 together and we'll figure out the one that we all can
6 kind of live with.

7 MR. WRAY: And is it your plan to charge the
8 Gamble factors, currently?

9 THE COURT: Currently, no. I'm reserving
10 judgment until we get to your set of request to charge,
11 and then we'll take a look at it. Okay?

12 MR. WRAY: Okay. Thank you.

13 THE COURT: 33. Again, I think it's already in
14 the punitive damages charge, and it will be in there in
15 some form or fashion.

16 Number 34, same thing.

17 Any objection to that, Mr. Wray? I mean, I
18 think it's pretty standard.

19 MR. WRAY: I think we have a charge very similar
20 to that.

21 THE COURT: Okay. 35. Again --

22 MR. WRAY: Yes. I think, again, we have one
23 very similar to that. We'll just need to select which
24 one you feel is more appropriate.

25 THE COURT: All right. I don't know if -- Gray,

1 you've got to come show me if these are still some
2 requests to charge or not.

3 [Off the record momentarily]

4 THE COURT: All right. The next one we're going
5 to do is CSX's? Or maybe we should go to Mr. McLeod's,
6 because they're shorter.

7 MR. WRAY: Yes, ma'am. I was going to suggest
8 that.

9 THE COURT: Thank you.

10 [Whereupon, the Court and law clerk confer]

11 THE COURT: Mr. McLeod, we're going to do yours
12 next.

13 [Off the record momentarily]

14 THE COURT: All right. Number 1. Okay. That's
15 in my general, actually at the very-end, charge. So
16 it's already in there.

17 MR. PARKER: This is the one -- we don't have
18 numbers. But the one about the apportionment? Are we
19 looking at apportionment of damages?

20 THE COURT: No.

21 MR. WRAY: Do you have yours numbered?

22 MR. MCLEOD: Well, this is the -- this is the
23 one with -- it's the section -- oh. Wait a minute.

24 MR. PARKER: We don't have the same numbers, so
25 we don't know what we're looking at. Which charge is

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1 this one?

2 MR. MCLEOD: This is just the general --

3 MR. PARKER: About sympathy?

4 THE COURT: I've got this one. This is the one
5 you have no friends to reward or enemies to punish.

6 Is that right, Peden? Is that the right one?

7 MR. MCLEOD: Yes.

8 MS. AMUNDSON: Yes.

9 MR. HOLMES: The Amger cite?

10 THE COURT: Yeah. Actually, let's just go to
11 the cite. That will make it so you can reference --

12 MR. PARKER: We've got that. We're probably in
13 the right order. I assume that's in your general
14 charge.

15 THE COURT: It's in my general charge, at the
16 end, actually.

17 Number 2. And I'm assuming this is an accurate
18 quote of the law, Mr. McLeod. Yes?

19 MR. PARKER: That's -- that -- in this case
20 there would have to be some evidence of the exercise of
21 discretion, and there's not been any. There's no
22 evidence that anyone exercised any discretion here.

23 MR. MCLEOD: Your Honor, I mean, it's -- in
24 fact, that's about -- that's about all our case was
25 about. I mean, they said they were going to place it

1 between here and there, and they decided, you know,
2 that they couldn't put it on the cross-buck. And, you
3 know, it's -- I think it's about total discretion.

4 MR. PARKER: They did not say that at all. They
5 said that -- they said that, here's why we think, at a
6 later date, looking at it. They didn't bring anybody
7 in to testify about what they did out there. None of
8 these people knew what they did or why they did it.
9 They didn't call any witness to say that they exercised
10 discretion in placing these signs.

11 MR. MCLEOD: Well, I thought one of --

12 THE COURT: I think they did, as well, Mr.
13 McLeod.

14 MR. MCLEOD: I thought one of them -- one of
15 them said that they could have put it here, could have
16 put it there, but --

17 THE COURT: When we talked about it we said it
18 could have been put up on, you know, the buck signs.
19 But they didn't do it there. They didn't --

20 MR. PARKER: They said they could have. But
21 these people had no knowledge. Mr. Smith testified
22 that all he did was replace a sign that was already
23 there, and no witness at all came into court and
24 testified about why the sign was placed there.

25 MR. MCLEOD: Because they don't know exactly,

1 you know, who -- they were put up years ago. He had
2 the discretion, and I asked him did he have the
3 authority, to change them and move them and he -- he
4 said, yes, he had the authority, and he thought they
5 were in a good place.

6 THE COURT: And this is Mr. Jenkins; correct?

7 MS. AMUNDSON: No, Your Honor.

8 THE COURT: No?

9 MS. AMUNDSON: I believe he is talking about Mr.
10 Smith, Joel Smith, the gentlemen that came in with the
11 DOT --

12 THE COURT: Right.

13 MS. AMUNDSON: -- vest on. He wasn't the one
14 who replaced the sign I believe back in 2002. And then
15 of course several witnesses discussed the configuration
16 of the crossing with the ditch and fiber-optic lines.

17 THE COURT: I think it's appropriate, and I'm
18 going to charge it.

19 Number 3.

20 MR. PARKER: We don't think that that is an
21 appropriate statement of the law but we -- maybe we can
22 address that tomorrow because we need to look --

23 THE COURT: You'll be what?

24 MR. PARKER: -- up the Steinke case.

25 We don't think that that is an appropriate

1 statement of the law; that there's a case on the thing
2 with -- the bungee jump case where they sued the bungee
3 jump.

4 THE COURT: Right.

5 MR. PARKER: We need to look at that.

6 THE COURT: The Myrtle Beach case; is that --

7 MR. PARKER: Right.

8 THE COURT: Okay. That Ken Suggs brought? Is
9 that what it is?

10 MR. MCLEOD: We attempted --

11 THE COURT: The Ken Suggs case?

12 MR. MCLEOD: I thought this was a -- an
13 identical statute, the law on regulatory inspection and
14 negligent inspection. If it isn't, Your Honor, we just
15 ask that that section be charged.

16 THE COURT: Well, why don't we do this. You
17 want to pull the --

18 MR. PARKER: Pull that case and look at it. I'm
19 not --

20 THE COURT: It's the Steinke case, is it? Do
21 you --

22 MR. PARKER: Yeah.

23 MR. HOLMES: Yes.

24 MR. PARKER: It's S-T-A-N-K-E.

25 MS. AMUNDSON: I believe I might have a copy of
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1 it with me.

2 THE COURT: Why don't you -- when we finish
3 going through it, let's see if you can pull it. If you
4 don't mind giving a copy to Aaron and possibly Mr.
5 Parker so he won't have to look it up, as well.

6 MR. WRAY: I think it's S-T-E-I-N-K-E.

7 MR. PARKER: It is. You're right. He's right.

8 THE COURT: T-A-R -- I'm sorry -- N-K-E?

9 MR. HOLMES: It's S-T-E-I-N-K-E.

10 THE COURT: S-T-E-I. Okay.

11 MR. WRAY: This is an aside, off the record.

12 [Off the record momentarily]

13 THE COURT: All right. Number 4.

14 MR. PARKER: We don't believe that's applicable,
15 Your Honor. There's no laws -- adoption, enforcement,
16 in compliance with any law.

17 MS. AMUNDSON: Your Honor, there have been
18 allegations -- not just about enforcement or adoption,
19 but compliance with the laws. Obviously there are
20 statutes that are applicable in this case, and the
21 allegations are that the Department of Transportation
22 did not abide by the statutes that are applicable and
23 the --

24 MR. MCLEOD: MUTCD.

25 MS. AMUNDSON: -- the MUTCD. Even though that's

1 not our -- even though our position is that we fully
2 comply with all statutes, this is --

3 THE COURT: Well, the word rule is in here, and
4 I'm assuming that would be -- the MUTCD would be a
5 rule; correct?

6 MS. AMUNDSON: Yes, Your Honor.

7 MR. PARKER: Your Honor, the -- this -- the
8 import of this exception is where you don't adopt the
9 law or if you fail to enforce a law. And it just has
10 nothing to do with this. They cannot -- they cannot --
11 according to this, if they violate their own
12 regulations and cause injury, there would be no loss.
13 That's not the import of this. What this says is if
14 you don't adopt a regulation, you can't be held liable
15 for loss resulting from the failure to adopt the
16 regulation or failure to enforce the regulation. This
17 has nothing to do with this case.

18 MR. MCLEOD: Well, Your Honor, it clearly says
19 compliance, including among other things, rules,
20 regulations. It's -- in fact, I've argued that you
21 should have granted a summary judgment and a couple of
22 directed verdicts on it. I mean, they are saying that
23 they haven't complied with the manual on uniform
24 traffic control devices from -- well, all of the people
25 that I had, and Dr. Heathington, I got -- he -- I near

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1 bout learned how to say it from him.

2 THE COURT: Okay. As it stands right now, I'm
3 going to charge it because I do see where we're talking
4 about y'all's I guess failure to enforce the MUTCD.

5 MR. PARKER: That's talking about -- they're
6 not -- this is talking about when you enforce the --
7 somebody's charged them -- somebody else with this --
8 the agency not enforcing the law. It's not that the
9 agency didn't comply with the law and use their manuals
10 appropriately, it just -- I mean, if you read it in
11 that way, they could never be liable.

12 MR. MCLEOD: Well, it's an exemption to the Tort
13 Claims Act.

14 MR. PARKER: No, no. You would never be liable.

15 MR. MCLEOD: If you read the --

16 THE COURT: Well, quite frankly, this is kind of
17 what the Platt case says.

18 MR. MCLEOD: -- read the plain language --

19 THE COURT: -- what the Platt Court adopted.

20 MR. PARKER: It may be. They're way beyond what
21 I think the Supreme Court -- but that is, right now,
22 what they did. But not in that respect. They just
23 said that the Highway Department doesn't have any duty
24 to individuals, which I think is wrong. But that
25 clearly is not saying the Department doesn't have to

1 follow their own regulations. I mean, that's what they
2 wanted in that argument: we don't have to follow our
3 regulations.

4 MR. MCLEOD: It's in black -- it's in black and
5 white, Your Honor. It's an exception. I think you can
6 read it. It's plain words, and if a statute can be
7 understood with the plain meaning of the words, you
8 don't need to look any further.

9 MR. PARKER: It's adoption, it's --

10 THE COURT: Well, let me ask you. What did you
11 not do, or fail to do, in reliance on your own rules?
12 I mean --

13 MR. MCLEOD: It's not -- it's: [reading]
14 failure, enforcement or compliance of any law and going
15 through -- and not limited to any charter, provision,
16 resolution, rule, regulation, written -- or written
17 policy.

18 THE COURT: I thought it's your position that
19 you did comply with everything.

20 MS. AMUNDSON: It is our position.

21 THE COURT: That's what I thought.

22 MS. AMUNDSON: Although the allegation has been
23 made that the Department of Transportation failed to
24 make an inspection as they are required to do under
25 State law.

1 THE COURT: Okay.

2 MR. MCLEOD: There are allegations that we
3 failed there, and we failed to follow the uniform
4 traffic manual, and that's -- that's a regulation.

5 MR. HOLMES: But that's not the failure to
6 enforce the law. That's the failure --

7 THE COURT: I think we're talking about
8 compliance, aren't we --

9 MR. MCLEOD: Well --

10 MR. HOLMES: Well, Your Honor, when they talk
11 about --

12 THE COURT: -- in this case?

13 MR. HOLMES: -- about compliance, they're saying
14 if the legislature adopts a law that puts that stop
15 sign in the middle of the railroad right-of-way and
16 then the DOT enforces that, that that would be where
17 they have an exception from compliance with what the
18 law is and that they can't be sued for following the
19 law. But that just isn't an issue in this case.

20 THE COURT: Y'all may need to find me some case
21 law to give this some context in this case, because
22 it's starting to sound to me like it doesn't apply.

23 MS. AMUNDSON: Okay.

24 THE COURT: I mean, I understand it's a charge
25 on the law. I'm just not so sure I see it. But find

1 me something and just -- as of right now I'm not going
2 to charge it unless, Ashley, you raise this back up
3 again tomorrow and say, I need you to look at this
4 again and let me show you why, and this is why. Okay?

5 MS. AMUNDSON: Okay. I'll take a look at that.

6 THE COURT: Okay.

7 MR. WRAY: I can't remember, Your Honor, if it's
8 Adkins vs. Varn that addresses that issue or not.
9 Somebody might look at that.

10 THE COURT: Adkins vs. Varn? Okay.

11 MR. WRAY: I believe it's A-D-K-I-N-S. But it's
12 been a long time since I did that.

13 THE COURT: Okay. All right. Number 5.

14 MR. PARKER: Your Honor, we think that this
15 would be covered by the sole negligence charge, that it
16 would apply -- I mean, they either -- if Tonia is
17 solely negligent and caused it, then we don't need this
18 in because they're not liable unless they were
19 negligent. I mean, it just doesn't make -- I mean,
20 there's no claim of criminal action of that third
21 person.

22 MS. AMUNDSON: Your Honor, I believe the reason
23 we put this in there was because we believe that Tonia
24 Colvin's negligence was the sole cause of the accident.

25 THE COURT: Or was an intervening cause; is

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1 that -- I think -- wouldn't that be covered, though, as
2 far as proximate cause, in the proximate cause charge?

3 MR. MCLEOD: Well, it might be, Your Honor, but
4 I mean, it says: [reading] the Department is liable
5 for loses or the criminal act.

6 That would be Tonia Colvin.

7 Further: [reading] and not limited to criminal
8 action.

9 I mean, it is a statutory exemption written by
10 the general assembly, and I think we ought to be
11 entitled to it.

12 THE COURT: I don't think it's in context to
13 this case, though, as one of the exemptions.

14 MR. HOLMES: Your Honor, and there is a charge
15 on intervening acts.

16 THE COURT: There is.

17 MR. HOLMES: I think there's been one proposed
18 by the DOT and one from --

19 MR. MCLEOD: Your Honor, intervening negligence
20 starts off with your admitting that you got negligence
21 on your own part and there's a further intervening
22 negligence. I mean, this is an act of another party,
23 who's not the defendant.

24 THE COURT: That's what we said. They could
25 find that she was solely negligent. Ms. Colvin.

1 MR. MCLEOD: I'm sorry. I -- she's either going
2 to have to help more, or I'm going to have to move up.

3 THE COURT: I'm sorry --

4 MR. MCLEOD: What did you say?

5 THE COURT: I mean, I understand what you're
6 trying to say. And it's not just intervening act. I
7 mean, this jury could find that this was directly a
8 result of --

9 MR. MCLEOD: Direct.

10 THE COURT: -- Ms. Colvin drinking. I mean,
11 they could find it and they could --

12 MR. MCLEOD: Correct.

13 THE COURT: -- they could find that there was no
14 negligence on behalf of CSX --

15 MR. MCLEOD: Correct.

16 THE COURT: -- or DOT.

17 MR. MCLEOD: And we're entitled to the exemption
18 that the law gives us.

19 THE COURT: But that's not really what we're
20 speaking to. That really has to do with either as a
21 sole negligence or an intervening act. I mean, I
22 understand how you're trying to use it, Mr. McLeod.

23 MR. MCLEOD: It's not an intervening -- I'm not
24 talking about an intervening --

25 THE COURT: I know. And as I said --

1 MR. MCLEOD: -- negligence. We got a --

2 THE COURT: -- we talked about it could be her
3 sole negligence. It could be strictly because of her
4 driving out in front of this train.

5 MR. MCLEOD: Correct. An act of a person other
6 than us.

7 MR. HOLMES: And that would be sole negligence,
8 Your Honor. It wouldn't be an exception of the Tort
9 Claims Act.

10 THE COURT: Yeah.

11 MR. MCLEOD: Well, sole negligence, Your Honor,
12 might be -- might be talking about the same thing. But
13 we have a written statute of the State of South
14 Carolina that says it by statute, that is the law, and
15 I think we're entitled to have it charged.

16 MR. HOLMES: Then why do you apportion
17 liability? I mean, if you read this, it's going --
18 just going to make it confuse the jury, and then we're
19 going to have an apportionment at the end.

20 THE COURT: I mean, it's going to obviously be
21 clear in the verdict form, so they're going to
22 understand what they're looking at.

23 MR. MCLEOD: Well, my point, Your Honor, is that
24 the legislature set out certain specific exemptions,
25 and surely -- I mean, it absolutely applies. But

1 surely we are entitled to have the law that the -- a
2 law that's written as an exemption to the Tort Claims
3 Act charged to the jury.

4 THE COURT: Okay. Mr. McLeod, I do think it's
5 innocuous. I'm just going to go ahead and charge it.
6 I'll charge it. I understand what you're saying. I
7 don't know if it's proper using it for this, but it
8 says the same thing.

9 All right. Number 6.

10 MR. PARKER: Your Honor, how about could we cut
11 out but not limited to the criminal actions of a third
12 person? There's no evidence of that.

13 THE COURT: Yeah.

14 MR. WRAY: I didn't hear what you said.

15 THE COURT: He wants to take out, on charge
16 number 5, the ending portion that says: [reading]
17 including but not limited to the criminal actions of
18 third persons.

19 MR. WRAY: Well, again, this charge doesn't
20 apply to me, but I disagree. I don't want it to go
21 without me saying that.

22 I disagree with Mr. Parker's comment that
23 there's no evidence of that here. If the jury found
24 that she was driving while impaired, that would be a
25 criminal act.

1 MR. PARKER: There's been no evidence of the
2 impairment.

3 MR. WRAY: Well, I disagree.

4 THE COURT: Okay.

5 MR. WRAY: And so, I mean, I don't have an
6 argument one way or the other about that particular
7 charge --

8 THE COURT: Oh, because yours is coming that you
9 want charged, obviously, the statute --

10 MR. WRAY: Yes.

11 THE COURT: -- on impairment and drinking and
12 driving.

13 MR. WRAY: Yes, ma'am.

14 THE COURT: I understand where you're going with
15 this.

16 MR. MCLEOD: Well, again, Your Honor, that's
17 part of the word -- I mean, the whole -- of the
18 statute. And --

19 THE COURT: Mr. McLeod, I'm going to charge it.
20 Okay. Number 6.

21 MR. PARKER: We don't have any objection.

22 THE COURT: Okay. Number 7.

23 MR. PARKER: I don't think it's applicable
24 because it says proper lookout for other persons or
25 objects upon the highway. It has no relevance to the

1 case --

2 MR. MCLEOD: I really was trying to get to, I
3 guess, a more general one on that.

4 THE COURT: I understand. And it's --

5 MR. MCLEOD: Or she and I together were, I mean.

6 THE COURT: I can tell you that I think CSX's
7 charge number 29 is almost the exact same thing, and it
8 appears that that's where we're going with this, so --

9 MR. WRAY: That's correct. And our charge is
10 specific to a railroad crossing.

11 THE COURT: Okay. So we'll charge that. It's
12 the same thing, Mr. McLeod. So we're not going to
13 charge Mr. McLeod's 7. But it appears it's encompassed
14 already in number 29.

15 All right. Number 8.

16 MR. PARKER: I suspect Mr. Wray would disagree
17 with that. 49CFR213.37, it absolutely has nothing to
18 do with crossing accidents. It has to do with
19 vegetation on or near the rail bed, and every Court
20 that has looked at it says it has nothing to do with a
21 crossing case.

22 MR. WRAY: I agree that it's inappropriate.

23 THE COURT: Okay. I'm not charging 8.

24 Number 9.

25 MR. PARKER: I agree with that one.

1 MR. WRAY: Well, number 9 we talked about
2 yesterday. The citation is to 1440. Mr. Parker
3 conceded he's not bringing any claim under 1440, he's
4 not relying on 1440, so the charge is inappropriate.
5 If he's going -- if you're going to charge 1440, I
6 might agree to withdraw my objection. Let's charge all
7 of 1440, including the part that says that if the
8 person who has charge of the injured party is grossly
9 negligent then it's an absolute part of the claim. If
10 you'll charge the full statute, I have no problem with
11 the first part of the statute.

12 THE COURT: Mr. Parker?

13 MR. PARKER: We haven't asked for that charge.

14 THE COURT: Okay. It's not going to be charged.

15 Number 10. This is the one that I understand --
16 Mr. Parker, you objected to this before.

17 MR. PARKER: We certainly do. It has no
18 applicability. It applies to an intersection where the
19 roads intersect, and we argued this and all -- it says
20 then at the point nearest the intersecting highway. It
21 has no relevancy to a railroad crossing.

22 THE COURT: Mr. Wray, I know what you argued
23 your last --

24 MR. WRAY: Yes, ma'am.

25 THE COURT: It actually does. I believe --

1 which case was it that says basically you can charge
2 all the competing charges and they can --

3 MR. WRAY: That's right.

4 THE COURT: -- you have to look at them all
5 together? And I think Mr. McLeod has got a charge
6 coming that says that.

7 MS. AMUNDSON: Yes, Your Honor.

8 MR. MCLEOD: In fact, I thought that was -- you
9 know, if you charged them -- admittedly, now, if you
10 take them all separate, then that should be charged.
11 But all of them, they should all be read together.

12 THE COURT: Okay.

13 MR. WRAY: That's correct.

14 [Whereupon, the Court and law clerk confer]

15 MR. PARKER: Your Honor, I certainly object to
16 that because there is no crosswalk, there's no --
17 you're not -- the law requires you to stop at a
18 railroad crossing between fifteen and fifty feet.
19 And this section has absolutely no application to a
20 railroad crossing. It only applies to a highway
21 intersection, which it clearly says: [reading] it
22 says where -- then the point nearest the intersecting
23 highway, not intersection railroad.

24 THE COURT: This one doesn't say intersection,
25 highway.

1 MR. PARKER: It sure does. It says --

2 THE COURT: No, I'm sorry. Down to the bottom
3 it does. Okay. I'm going to charge it. We saw the --

4 What case was it, Mr. Wray?

5 MR. WRAY: It was the Henning case that we
6 provided to the Court.

7 THE COURT: Thank you. All right. Number 11.

8 MR. PARKER: We have no objection.

9 THE COURT: Number 12. We've all talked about
10 this. They all need to be read together.

11 Number 13.

12 MR. PARKER: Well, I really don't think that's a
13 charge for the jury. That's the way that you interpret
14 the statutes, or can interpret the statutes, that are
15 not clear. But where a statute is clear on its face,
16 such as this is, then it needs no interpretation.

17 THE COURT: I can tell you, though, in the
18 Henning case it basically says this exact thing, is
19 that you've got to interpret them all together. I
20 mean, that's what it says.

21 MR. PARKER: Well, I don't think that the jury
22 has to be charged on the law. They don't interpret the
23 law, the Court does.

24 MR. MCLEOD: Well, Your Honor, your charge is
25 instructing the jury, and any way you can assist --

1 THE COURT: You would hope it is, wouldn't you?

2 MR. MCLEOD: -- the jury in reaching a proper
3 verdict is certainly proper.

4 THE COURT: Okay. I'm going to charge it.

5 Number 13. It's a code section.

6 MR. PARKER: We object to that because, again,
7 it applies to intersecting highways and has no
8 applicability to a railroad crossing.

9 THE COURT: Okay. Mr. Wray, are you weighing in
10 on this?

11 MR. WRAY: I think it's a proper charge, Your
12 Honor, for the reasons we discussed earlier.

13 THE COURT: I think this is -- this also was
14 covered in the Henning case; am I correct?

15 MR. WRAY: Yes, ma'am. Well, I'm not going to
16 say that for sure. I'm not --

17 THE COURT: You don't know.

18 MR. WRAY: -- positive about that.

19 MR. MCLEOD: I think it was, Your Honor.

20 THE COURT: Were you in that, Mr. McLeod?

21 MR. MCLEOD: No. No, ma'am.

22 THE COURT: Did you pass this law?

23 MR. MCLEOD: I may have -- I got all my --

24 THE COURT: Did you pass this law, is what I
25 want to know.

1 MR. MCLEOD: I got all of my information from
2 this team of lawyers right here.

3 MR. PARKER: Your Honor, it just says:
4 [reading] every stop sign should be erected as near as
5 practical to the nearest line of the crosswalk or the
6 near side of the intersection; if there is no
7 crosswalk, then as close as practical to the nearest
8 line of the roadway.

9 It's got absolutely nothing to do with railroad
10 crossings.

11 MR. MCLEOD: It's talking about intersections.

12 THE COURT: A railroad crossing, not an
13 intersection?

14 MR. WRAY: Well, I would point out --

15 MR. MCLEOD: Yeah. A railroad crossing is in an
16 intersection.

17 MR. WRAY: I would point out -- I didn't bring
18 my notes with me today. I should have. I didn't know
19 we were going to get to the charge. But I will assure
20 you that in Dr. Heathington's direct exam, he put up
21 multiple slides which he talked about as a basis for
22 his opinion in this case that the railroad and DOT were
23 negligent, and he put up slides and talked about
24 intersecting highways and compared them to railroad
25 crossings.

1 MR. PARKER: Only as so far as sight distance,
2 not about what you do. It doesn't matter what that is.
3 This statute clearly has absolutely nothing to do with
4 a railroad crossing.

5 THE COURT: Actually, though, when you read it
6 where it is, it's smack in the middle of the railroad
7 crossing information. And I'm not going to talk about
8 the legislature's placement. They go find a number
9 that they can insert something, is pretty much how it's
10 done.

11 But I'm going to go back and look at it again.
12 I remember that this was a -- this was something we
13 looked at, Mr. Parker, in the motion in limine --

14 MR. PARKER: Yes.

15 THE COURT: -- after we discussed this. And it
16 was -- I believe this is the one that I held out that I
17 wasn't convinced on. There was three of them we talked
18 about. Two of them I thought were absolutely fair
19 game. One of them I was not convinced on or not sure.
20 I think it was 2730.

21 MR. WRAY: I think that's right.

22 MR. PARKER: Your Honor, it says here, in direct
23 contravention of the law, that if there is no crosswalk
24 then you erect the stop sign as close as practical to
25 the nearest line of the roadway. Well, that would be

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1 you -- what they're saying, you would erect the stop
2 sign right at the rail. And that clearly doesn't apply
3 to this. I mean --

4 MR. MCLEOD: Your Honor, that's why these -- all
5 of these statutes have to be read together, as
6 apparently as the Henning case figured out, because
7 they -- I would say that about all the statutes are
8 totally isolated. They won't make much sense.

9 THE COURT: Mr. McLeod, let me sleep on it
10 again. I can tell you, again, in my motion in limine I
11 remember ruling specifically that there was three that
12 Mr. Parker wanted kept out. Two of them I think were
13 clearly applicable. This one I'm not so sure because,
14 again, it doesn't seem to get to railroad crossings and
15 it doesn't exactly read -- I understand Mr. Parker's
16 argument of how do you put it to the nearest roadway.

17 MR. WRAY: And I did look at your -- this was
18 the one that you --

19 THE COURT: This was the one that I just wasn't
20 convinced on?

21 MR. WRAY: Yes, ma'am.

22 THE COURT: I just -- unless someone can help
23 me -- I don't see how the jury takes this and applies
24 the facts of this case to this and comes up with
25 anything.

1 MR. MCLEOD: She's looking. She also reads a
2 lot faster than me, Your Honor.

3 THE COURT: All right. Well, what I'm going to
4 do is this. Right now it's going to be a no, unless
5 you convince me otherwise. Tomorrow morning this will
6 be another one that you just bring back up to me.
7 Okay?

8 All right. Number 14. I've already gotten the
9 charge, so obviously -- we've already charged this.
10 It's 2710. It's just the first portion of it; correct?

11 MR. WRAY: That's correct.

12 THE COURT: Correct? Okay.

13 MR. WRAY: It was in through Mr. Parker's
14 charges.

15 THE COURT: Yes.

16 Number 15, does anybody dispute?

17 MR. PARKER: I don't dispute that. That's a
18 fine charge to me.

19 Now, we object to the next one, which is -- part
20 of the next one.

21 THE COURT: Let's go to number 16.

22 MR. PARKER: And we don't object to the first
23 part. The second part we do because it says that --
24 and I'll have to look at the section, but I don't
25 believe that it says that the road -- where the road

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1 user should stop. I would have to look and see if
2 that's the exact quote.

3 THE COURT: You're going to pull it? The MUTCD
4 right there, Section 2(B)(06).

5 MS. AMUNDSON: I'm looking for it right now.

6 THE COURT: Perfect. Thank you.

7 [Whereupon, Ms. Amundson reviews documents]

8 MS. AMUNDSON: Your Honor --

9 THE COURT: Exact verbatim?

10 MS. AMUNDSON: -- there is a bold section at the
11 top of 2(b)(16) and then there is further guidance
12 underneath, and that particular sentence is down here
13 in the underneath part. And I can pull that other one
14 that references --

15 THE COURT: It says see Section 2(b)(16)?
16 That's what you're pulling?

17 MS. AMUNDSON: Yes.

18 MR. PARKER: Well, 3(b)1(6)(c) is the correct
19 section. It says you should stop -- it doesn't say
20 where you -- you are to stop behind the stop line. It
21 doesn't say exactly where you're supposed to stop. And
22 that is the correct section. The stop lines were used
23 should -- where they should be -- should stop. What
24 you're supposed to do is stop behind the stop line.

25 THE COURT: Okay. Mr. Parker, I missed where

1 that's different than what this says.

2 MR. PARKER: Well, stop lines where used to
3 supplement a stop sign should be located at a point
4 where the road user should stop. And that's not what
5 it says. It says they should stop behind the stop
6 line. That's two different things.

7 THE COURT: Oh. I think you're mincing words.
8 And I understand why you're saying that. Mr. Parker,
9 if you would look at this portion of the 2(b)(06),
10 though, it says strictly what her quote is. It's right
11 there.

12 MR. PARKER: 3(b)(16)?

13 THE COURT: Under the guidance -- yes. Under
14 the guidance section.

15 MR. PARKER: No. The guidance part is not part
16 of the MUTCD.

17 THE COURT: I understand. But I can tell you
18 this -- what did you find on that section? What is
19 3(b)(16)?

20 MR. MCLEOD: I haven't got it in front of me.
21 But what does he mean the guidance part isn't what a --
22 a part of it?

23 MR. PARKER: Well, it's just as Mr. Jenkins
24 said, it's not --

25 MR. MCLEOD: Well, it's got a manual, Your

1 Honor.

2 MR. PARKER: But it's not --

3 MR. MCLEOD: It has standards in some place,
4 guidance in another.

5 MR. PARKER: It's not the regulation. You can
6 only charge the regulation. I agree that the
7 regulation, which is 3(b)(16), is proper charge. But
8 the guidance is not proper charge.

9 THE COURT: And your problem with it, Mr.
10 Parker, is is that this says you should stop at the
11 stop -- before the stop line versus on the stop line?

12 MR. PARKER: It says, the MUTDC clearly says in
13 3(b)(16), which was the previous charge, is that stop
14 lines indicate the point behind which vehicles are
15 required to stop in compliance with other traffic-
16 control signals.

17 Now, I totally agree with that. What I disagree
18 with is then charge the guidance part that says:
19 [reading] should be located at a point where the road
20 user should stop.

21 Which technically is correct. But it doesn't
22 say where in relationship to that stop line they should
23 stop, which is in 3(b)(16), which is the applicable
24 regulation. And that -- the guidance is not part of
25 the regulation.

1 THE COURT: Okay. But the problem I have with
2 this is what you're stating doesn't say in 16, does say
3 it in 17 -- or in 16. So 15 -- I'm sorry. Now I'm
4 talking to the MUTCD versus the request to charge. If
5 you charge 15, and then 16, I think it's appropriate
6 because number 16 talks about stop lines in addition to
7 stop signs, which is what we have here, and your
8 concern is already covered --

9 MR. PARKER: That's correct.

10 THE COURT: -- in 15.

11 MR. PARKER: That's correct.

12 THE COURT: So it really is already covered in
13 15, but --

14 MR. PARKER: It's already covered.

15 THE COURT: But it doesn't address a stop sign
16 accompanied with a stop sign -- a stop line, I'm sorry,
17 accompanied with a stop sign. And I'm assuming that's
18 why you want it in; is that correct?

19 MR. PARKER: Well, yeah. The stop signs is
20 fine. The first part I said is fine. It's the second
21 paragraph we object to.

22 THE COURT: I'm going to charge it. I think
23 it's appropriate.

24 MR. PARKER: You're going to charge it?

25 THE COURT: I am.

1 Number 17.

2 MR. PARKER: We don't think that's applicable.

3 THE COURT: Y'all want to pull that? Section
4 8(a)(02).

5 MS. AMUNDSON: Your Honor, the rationale behind
6 this one is just the --

7 THE COURT: It's a general rule that just says
8 we can't dictate at every single crossing that everyone
9 has X, Y and Z, a stop sign here, a stop line here,
10 cross-bucks, and flashing lights and gates. I mean --

11 MS. AMUNDSON: Exactly.

12 THE COURT: I don't have the MUTCD in front of
13 me, though, so is that kind -- is this like an
14 explanation or is this actually one of the guidelines?

15 MS. AMUNDSON: I'm going to pull it right now.
16 I'm not sure.

17 [Whereupon, Ms. Amundson reviews documents]

18 MS. AMUNDSON: The section that this comes from
19 is called Use of Standard Devices, Systems and
20 Practices, and it does because of the -- the same thing
21 that's here --

22 THE COURT: Yes.

23 MS. AMUNDSON: -- the large number of variables.
24 It's just general guidance.

25 MR. PARKER: Your Honor, that gives the jury no

1 guidance whatsoever in deciding this case, and we just
2 don't think it's applicable.

3 THE COURT: Is there another charge in here that
4 says that there's no requirement there be gates and
5 lights on every single crossing?

6 MS. AMUNDSON: I'm not sure. I don't recall
7 that. It might be.

8 MR. WRAY: It sounds like something I might have
9 said.

10 MS. AMUNDSON: I think so. Yes.

11 THE COURT: Did Mr. Wray say that?

12 MS. AMUNDSON: Possibly.

13 MR. MCLEOD: It's quite likely.

14 THE COURT: Okay. Well, then, let's do this.
15 I'm going to go ahead and we're going to write check
16 CSX's charge, because I think you did say that, which
17 means the same thing and says the same thing.

18 Okay. Number 18.

19 MR. PARKER: Your Honor, that -- again, it's not
20 applicable to this case. It's a general statement of
21 what the purpose of traffic control devices -- I don't
22 think it's applicable to this case.

23 MR. MCLEOD: I guess it's -- it is sort of a
24 trying to get the jury to understand what this manual
25 is about. That's all. But I don't know that it's

1 imperative.

2 THE COURT: Okay. Well, why don't you just
3 argue it to the jury instead, and we'll take it out.

4 Number 19.

5 And so, Mr. McLeod, you're going to withdraw it;
6 right? Number 18?

7 MS. AMUNDSON: Yes, Your Honor.

8 THE COURT: Okay. Thank you.

9 Number 19.

10 MR. WRAY: Number 19, Your Honor, I guess comes
11 to me. Mr. Parker probably likes it, but he may --

12 MR. PARKER: I think it's an accurate statement
13 and -- even though it's not complete. But I believe it
14 says that the railroad and the authority, governmental
15 authority, have joint responsibility.

16 MR. WRAY: Well, actually, the regulation
17 doesn't say what's set forth here. This 213.233 talks
18 about track inspections, meaning inspecting the track's
19 structure, not crossings for vegetation. It
20 specifically says: [reading] each inspection shall be
21 made on foot or while riding over the track at a
22 vehicular speed that allows the person making
23 inspection to visually inspect the track structure for
24 compliance with this part.

25 I'm not sure why my good friend is trying to

1 saddle over my way, but you can't do it with this
2 regulation because it doesn't apply.

3 THE COURT: All right. Do y'all want to
4 withdraw it?

5 MR. MCLEOD: Let me ask my chief counsel.

6 [Whereupon, Mr. McLeod and Ms. Amundson confer]

7 MR. MCLEOD: Well, maybe I'm not understanding.
8 And, admittedly, Ron certainly has -- is a lot more
9 versed in railroad law. But it says 49CFR213.37 --

10 MR. WRAY: Well, that's not the cite. Maybe
11 that's part of my problem. Your cite says 213.233.

12 MR. MCLEOD: Oh.

13 MR. WRAY: That's what I was looking at. I
14 don't have 213.37, because it's not cited.

15 MR. MCLEOD: Oh. That -- maybe that's an
16 accident, then. Well, wait a minute.

17 MR. PARKER: It hasn't --

18 MR. MCLEOD: There must have been two.

19 MR. WRAY: I think Mr. Parker and I both agree
20 it has nothing to do with the case, and the problem --
21 just like in Williams. In Williams they found -- there
22 was a regulation charge that didn't apply, and they
23 ended up saying it was harmless error because --

24 THE COURT: Right.

25 MR. WRAY: -- of other circumstances.

1 We're about to charge another regulation that
2 doesn't -- it does not apply to this situation. I
3 think Mr. Parker agrees.

4 MR. PARKER: I would agree with that.

5 THE COURT: All right.

6 MR. MCLEOD: Mr. Parker, you're agreed --

7 MR. PARKER: I agree --

8 THE COURT: Mr. McLeod is going to withdraw
9 it. Or I should say your chief counsel is going to
10 withdraw it.

11 MR. MCLEOD: That's right. Whatever my chief
12 counsel says.

13 THE COURT: Your chief counsel is going to
14 withdraw it.

15 MR. PARKER: The next two -- the next one has no
16 applicability, either. The federal -- there's no
17 federal regulation dealing with vegetation at grade
18 crossings.

19 MR. WRAY: I would agree.

20 THE COURT: All right. I won't charge it.
21 Number 21 -- unless y'all need to weigh in, y'all.

22 Number 21.

23 MR. WRAY: Well, 20 -- I'm sorry. 21 doesn't
24 apply here.

25 MR. PARKER: This regulation -- 49CFR213.5?

1 MR. HOLMES: No. It's 15 --

2 MR. WRAY: No. I'm on 58171350.

3 [Whereupon, Mr. Parker and Mr. Holmes confer]

4 MR. WRAY: This is the one I talked to you about
5 yesterday in connection with the Crawford case. It
6 talks about maintaining the planks or timber.

7 MR. PARKER: We agree with that.

8 THE COURT: Okay. That's gone.

9 22. Well, that's already been charged ad
10 nauseam in the plaintiffs. They did a good job
11 covering it.

12 Number 23.

13 MR. PARKER: That, again, public duty rule is
14 something for the Court, not --

15 THE COURT: Exactly.

16 MR. PARKER: -- the jury.

17 THE COURT: They won't know what to do with
18 that, Mr. McLeod.

19 Number 24.

20 MR. WRAY: Again, a nice -- I don't think it
21 would be appropriate for the Court to charge the jury
22 that our negligent failure to maintain a safe crossing
23 violated some statutory duty and, further, to say here
24 CSX violated its duty.

25 MR. PARKER: I agree with that one.

1 THE COURT: All right. Number --

2 MR. WRAY: If I didn't know better, I would
3 think my friends got together and conspired against me.
4 But I'm sure they wouldn't do that.

5 But that charge is inappropriate.

6 THE COURT: Okay. Number 25, it won't be
7 charged. No, that was number 24.

8 Number 25.

9 MR. PARKER: We don't think that's applicable to
10 this case. It's talking about -- I guess it's talking
11 about where -- somebody arguing about where some sign
12 was placed or something, and who did it.

13 THE COURT: Some offending sign. Mr. Wray is
14 looking at where this one comes from, too.

15 MR. WRAY: Well, no. I'm looking at -- I'm not
16 understanding the argument. I thought there was an
17 allegation in this case about where the stop line, in
18 particular --

19 MS. AMUNDSON: That's exactly why we have it in
20 here.

21 MR. MCLEOD: Well, that's my --

22 MR. PARKER: That's not who placed it. This is
23 talking about who placed it --

24 MR. WRAY: Well --

25 MR. PARKER: [Reading] Shall be presumed to have

1 been placed there by the official action or direction
2 of the authority.

3 We're not contesting any authority to place the
4 signs.

5 MR. WRAY: I would join -- despite the earlier
6 lobs my way, I'm going to join my good friend in saying
7 this is clearly applicable given the allegation in this
8 case that the stop line was inappropriately placed
9 because it was -- the rear side of the line was at
10 eleven feet nine inches instead of being at fifteen, as
11 Mr. Parker contends. This statutes says as long as
12 you're approximately where the law says it is, it's in
13 compliance. I think it clearly applies.

14 MR. PARKER: I don't think it does at all.

15 THE COURT: All right. I'm going to go ahead
16 and charge it.

17 Number twenty -- sorry -- six.

18 MR. PARKER: That doesn't apply. I mean, I
19 don't have any problem charging it, but it would be an
20 improper charge of the law.

21 MR. WRAY: I thought they had a charge exactly
22 like this, Your Honor, that we said okay on.

23 MR. PARKER: Now, tracks --

24 MR. WRAY: Yeah, I think you're looking -- this
25 is cite 15-78-100 dealing with the --

1 THE COURT: No.

2 MR. WRAY: -- apportionment of liability?

3 MS. AMUNDSON: No. This is number --

4 THE COURT: No. This is 49CFR2132.

5 MS. AMUNDSON: -- 49CFR --

6 MR. WRAY: I don't have that one.

7 MS. AMUNDSON: I think --

8 MR. PARKER: This is talking about the federal
9 regulation regarding track safety standards and
10 preempts, any state law concerning the essential local
11 safety hazards. This has no applicability.

12 MR. WRAY: That one didn't come my way, so --

13 MS. AMUNDSON: Your Honor, I think we could
14 agree to withdraw this in light of some of the other
15 ones that we've already taken out. I don't think it's
16 adding anything.

17 THE COURT: All right. Number 27.

18 MR. WRAY: There's -- I don't need to see it.

19 THE COURT: Okay. 27.

20 MR. WRAY: I'm concerned I'm now off, because I
21 apparently missed the last one. What is 27?

22 MR. PARKER: 27 is 1578100.

23 MS. AMUNDSON: Yes.

24 MR. PARKER: I thought that was already in.

25 THE COURT: It's actually already in there

1 earlier.

2 MR. WRAY: I believe it was in the plaintiff's
3 charge.

4 MR. PARKER: It was in the plaintiff's charge,
5 and in one of theirs, I believe.

6 THE COURT: It was already in there.

7 MR. PARKER: The second one, we don't have
8 any objection to that because they were and should be
9 added that -- charged that both defendants contend the
10 negligent actions of Tonia Colvin were the sole cause.

11 THE COURT: Where is -- are we on 28, Mr.
12 Parker?

13 MR. PARKER: I assume: I'm on the one behind --

14 MS. AMUNDSON: Yes.

15 MR. PARKER: -- that. Tonia Colvin.

16 MS. AMUNDSON: I believe he's talking about the
17 second paragraph of that number 28.

18 MR. PARKER: Well, I'm really talking about the
19 first paragraph, too. It says: [reading] I charge you
20 that both defendants contend that the negligent actions
21 of Tonia Colvin were -- it should say sole cause of the
22 collision. In other words, that Tonia Colvin's
23 negligence was the sole proximate cause of the
24 plaintiff's injuries if, in fact, you -- if, in fact,
25 you find that the negligent actions of Tonia Colvin

1 were the sole proximate cause of the collision, you
2 should render your verdict in favor of --

3 MR. MCLEOD: I believe we must have them mixed
4 up again. What number --

5 MR. PARKER: You don't have numbers on them,
6 Peden.

7 THE COURT: This one is -- this one is from
8 Anderson's request to charge 20-4.

9 MR. PARKER: No.

10 THE COURT: Isn't that correct?

11 MR. PARKER: I don't have that one. The one I
12 have is just as I read to you.

13 MS. AMUNDSON: Is there a citation on it?

14 THE COURT: Yeah. It's --

15 MR. PARKER: There's no citation.

16 MR. WRAY: It just says: [reading] I charge you
17 that both the defendants contend that the negligent
18 actions of Tonia Colvin were the cause of the
19 collision. That's the one I have.

20 MR. PARKER: I have -- that's the one I have,
21 too.

22 THE COURT: I don't even have that.

23 MS. AMUNDSON: Your Honor, I believe that we had
24 the numbering confusion. I think that the one -- the
25 stack that we gave you today, the one that they are

1 talking about, is number 31.

2 THE COURT: 31?

3 MS. AMUNDSON: Yes, Your Honor.

4 THE COURT: Okay.

5 [Whereupon, the Court reviews documents]

6 THE COURT: Okay. So Mr. Parker, you want to
7 put in sole cause?

8 MR. PARKER: Right. In other words, I think if
9 you're going to charge that, you should put that:
10 [reading] I charge the above defendants contend that
11 the negligence actions of Tonia Colvin were the sole
12 cause of --

13 THE COURT: Right.

14 MR. PARKER: -- [reading] the collision.

15 In other words, that Tonia Colvin's negligence
16 was the sole proximate cause of the plaintiff's injury.

17 And I think right there would be a good place to
18 charge the concurrent proximate cause. Instead of the
19 plaintiff's, it should say Lillian's injuries --
20 Colvin's injuries. And then charge concurring
21 proximate cause. And then you can charge: [reading]
22 if you did, in fact, find that the negligence
23 [phonetic] action of Tonia Colvin was the sole
24 proximate cause --

25 THE COURT: Got you.

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1 MR. PARKER: -- [reading] then you can render a
2 verdict for the defendants.

3 THE COURT: Okay.

4 MR. PARKER: And that also: [reading] but if
5 you find that the defendants were a concurring
6 proximate cause, your verdict would be for Lillian
7 Colvin.

8 We want the contrary charge.

9 [Whereupon, Mr. Parker and Mr. Holmes confer]

10 MR. PARKER: Yes, that would be -- I just got
11 corrected. If either Defendants' actions contributed
12 in part, then that defendant would be liable to Lillian
13 Colvin.

14 THE COURT: Okay. So that was -- I don't know
15 how to do this. It was my 31. What numbers are
16 y'all's?

17 MR. WRAY: 28.

18 THE COURT: That was your 28?

19 MS. AMUNDSON: That was our -- I'm sorry. I
20 think that the previous version, it was numbered number
21 28.

22 THE COURT: I just need it clear for the record.
23 We just need to all be on the same page of what it was.

24 MR. HOLMES: We can mark ours 31. I think --

25 THE COURT: Let's just make it 31, because it

1 will be mine and that's how I'm going to charge it.

2 Okay?

3 MR. WRAY: Okay.

4 THE COURT: All right. What do you have next,
5 then?

6 MS. AMUNDSON: Well, we do have one number 28
7 that's different. I'm not sure whether the other
8 parties have received it, so I'll give you the cite.
9 It's to Anderson, Section 20-4.

10 THE COURT: Right.

11 MR. WRAY: Intervening cause charge?

12 MS. AMUNDSON: Intervening cause.

13 THE COURT: Yes.

14 MR. PARKER: We've got it.

15 MS. AMUNDSON: Okay.

16 MR. PARKER: We don't think there's any evidence
17 of any intervening cause.

18 THE COURT: How could this be an intervening
19 cause?

20 MR. WRAY: Because the claim is that we were
21 negligent in failing to maintain the crossing --

22 THE COURT: That would be --

23 MR. WRAY: -- for us.

24 THE COURT: That would be you would, [a], have
25 to be negligent.

1 MR. WRAY: That's right.

2 THE COURT: Okay.

3 MR. WRAY: And the jury could find that even
4 though we were negligent --

5 THE COURT: And providing an adequate --

6 MR. WRAY: -- her negligence --

7 THE COURT: Okay. Even if you are negligent in
8 providing an adequate sight distance.

9 MR. WRAY: That's right.

10 MR. PARKER: It could not be that because the --
11 that act -- it can't happen without their act. An
12 intervening act has to be something that supercedes.
13 It can't possibly supercede.

14 MR. WRAY: I disagree. My only comment about
15 the charge is it's specific to South Carolina
16 Department of Transportation. I think you have to say
17 the defendant, or otherwise you'll have to give another
18 charge for CSX. But I think it clearly is applicable.
19 It is part of our defense in this case.

20 MR. PARKER: It can't be an intervening cause
21 because it -- if it's foreseeable that -- if you
22 provide improper sight distance, it's foreseeable that
23 somebody may be injured. If somebody gets injured by
24 it, it can't be a superceding and intervening cause.
25 It can only be an intervening cause if it supercedes

1 the negligence of the defendant. It can only be a
2 concurrent cause here. They could find sole cause.

3 THE COURT: It could be a sole cause.

4 MR. PARKER: It could be a sole cause. It
5 cannot be an intervening cause.

6 THE COURT: Well, I'm not sure. If it can be a
7 sole cause, why can't it be an intervening cause?

8 MR. PARKER: Because if it's a sole cause, then
9 their negligence didn't contribute to it.

10 THE COURT: Oh. I understand what you're
11 saying.

12 MR. PARKER: But in addition to that, Mr. McLeod
13 wants you to charge the jury that Tonia's actions were
14 the superceding and intervening cause of the collision.

15 THE COURT: Okay. What I can tell you is I'm
16 going to just charge my standard on sole cause,
17 proximate cause. I think it covers this, and
18 particularly because you've tailored this also to
19 y'all. I've taken out all the tailoring.

20 Yes, Mr. McLeod?

21 MR. MCLEOD: Well, that's fine. But what we
22 understand -- where we'll understand what you're
23 getting at, because you said it's not applicable: I
24 mean, say I've got a sign that, you know, it's been up
25 there apparently for years and years and years, and

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1 they find that it's in the wrong place, and then along
2 comes Ms. Colvin and runs out in front of the train?

3 MR. PARKER: Then she's the sole cause. Your --

4 MR. MCLEOD: She's --

5 MR. PARKER: It's not -- it's not an intervening
6 cause. It would be the sole cause. And that's what
7 you --

8 MR. MCLEOD: There can -- there can be a
9 different thing between a sole cause and an intervening
10 cause.

11 MR. PARKER: There can be, but not under the
12 facts of this case. Under the facts of this case --

13 MR. MCLEOD: Well, I disagree with you about
14 that.

15 MR. PARKER: Well, that's fine.

16 MR. MCLEOD: But, I mean, if you're going to
17 charge general intervening cause, I think that's
18 covered.

19 THE COURT: I guess my question would be is as
20 she pulls up, she can't see because she doesn't have
21 adequate sight distance, and pulls out anyway, how does
22 that work when we've got joint and several liability?

23 I mean, I don't -- I understand what your point
24 is, Mr. Parker.

25 MR. PARKER: It can't be -- if they are liable,

1 did have -- were negligent, then it can't be an
2 intervening cause because the intervening act has to
3 not be foreseeable. In other words, something has got
4 to happen that's not foreseeable --

5 THE COURT: Right.

6 MR. PARKER: -- for it to be an intervening
7 cause.

8 The fact that she didn't have safe sight
9 distance because they didn't cut the vegetation is
10 certainly foreseeable. So, therefore, you can't have
11 an intervening cause under those circumstances. The
12 only thing they can have here is if the jury believes
13 that she was in a place she could have seen, and the
14 vegetation didn't have anything to do with, she was
15 solely the cause. That's not an intervening cause.

16 MR. HOLMES: Judge, I think I confused the two
17 earlier when I was talking about -- I was talking -- I
18 said intervening cause when I was talking about sole
19 cause.

20 THE COURT: I'm going to go back and let me go
21 look at my standard intervening charge. I can tell you
22 I'm not going to charge 28 as it is. Let me go back
23 and just look at the intervening-act charge and see if
24 it's appropriate. This might be another one that you
25 want to put on your list that we need to visit again

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1 tomorrow. And I'm saying this because you really do
2 need to remind me. And Aaron is putting these on her
3 list, too, that she's going to remind me, as well.

4 MR. WRAY: The only other comment I want to
5 make, which doesn't pertain to this charge, is you
6 commented a moment ago that there is joint and several
7 liability here under the Tort Claims Act --

8 THE COURT: Except for --

9 MR. WRAY: -- and here they're joint and
10 several. That's why we have the apportionment.

11 THE COURT: And I appreciate that, and I
12 apologize. I understand.

13 MR. PARKER: There's joint liability.

14 THE COURT: Yes.

15 MR. PARKER: There's not several --

16 THE COURT: It's not joint and several. I
17 understand.

18 Okay. Number 29.

19 MR. PARKER: That's, again, intervening cause,
20 which we think is the same thing.

21 THE COURT: Okay. Let me just go look at it.

22 [Whereupon, the Court reviews documents]

23 MR. PARKER: We think that's a correct statement
24 of the law. It's just not applicable, as we argued
25 before.

1 THE COURT: No.

2 MR. PARKER: This is the same charge in a
3 generic sense.

4 THE COURT: Yeah.

5 MR. PARKER: But it is an accurate statement of
6 the law. It's just not -- doesn't apply to the facts
7 of this case.

8 THE COURT: Okay. Let me just look at that.

9 Okay. Number 30.

10 MR. PARKER: I assume that's in your --

11 THE COURT: Yeah.

12 MR. PARKER: -- general charge.

13 THE COURT: Yeah. It's a proximate cause.

14 MR. PARKER: And 31.

15 THE COURT: Yes.

16 MR. WRAY: That was 31? Are we going back to
17 the one about Tonia Colvin, sole negligence?

18 MR. PARKER: No. That one was before on mine.

19 MR. WRAY: I know. But I think we said we were
20 going to use that as 31.

21 THE COURT: We would supplement that one. We
22 fixed 31. We're charging it as fixed.

23 MR. PARKER: Tell me that again. I didn't
24 follow.

25 MR. HOLMES: We have --

1 THE COURT: This was your number 27 or -- I'm
2 sorry, 28. You had two 28s. 27.

3 THE LAW CLERK: I think it was --

4 MR. WRAY: It was 28.

5 THE COURT: 28. Okay.

6 MR. WRAY: And you said it was 31, so we were
7 going to treat it as 31.

8 THE COURT: We're going to treat it as 31.

9 MR. HOLMES: And could you read which one you're
10 starting off -- the first sentence of the one that --

11 THE COURT: [Reading] I charge you that both the
12 defendants contend that the negligent actions of Tonia
13 Colvin were the sole cause of the collision.

14 This is the one that Mr. Parker went through and
15 he wanted to make sure everything said sole cause, sole
16 proximate cause.

17 MR. HOLMES: Okay. That was 31. But you're not
18 going -- you're not making two -- I thought you said
19 you were making a second 28 a second ago.

20 THE COURT: No. I'm not.

21 MR. HOLMES: Okay.

22 THE COURT: I think there was a second 28 which
23 was the one we were just talking about regarding
24 intervening cause.

25 MR. HOLMES: So our number 32 is going to be the
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1 burden of proof is on the plaintiff, proof --

2 THE COURT: Yes.

3 MR. WRAY: That's right.

4 MR. HOLMES: Okay.

5 MR. PARKER: And we think it's in the general
6 charge.

7 THE COURT: It's in the general charge.

8 MR. PARKER: We just don't think that has any
9 applicability under the facts. We're not talking about
10 -- it's talking about to avoid colliding with other
11 vehicles and pedestrians and constructions on the
12 roadway.

13 THE COURT: I can tell you that what this says
14 we actually really already have in a lot of the
15 plaintiff's charge. It basically says that, you know,
16 the plaintiff has the duty to go out and see and look
17 and, you know, take it all in. And I think for the
18 most part it's already charged not exactly as this, but
19 I think it's covered pretty well already.

20 Number 34, y'all?

21 MR. PARKER: We object. It has no
22 applicability. It's talking about stop signs at
23 intersecting highways, yielding the right-of-way to
24 approaching traffic. The only traffic on the track is
25 the train, and the train sections deal with this, not

1 this section.

2 MR. MCLEOD: Your Honor, that's another one I
3 think ought to be all read together. I mean, it's an
4 intersection. A railroad is an intersection like a
5 highway is an intersection. And of course the
6 important part of it is the stop sign and the stopping
7 -- stopping at a clearly-marked stop line.

8 MR. WRAY: I agree with Mr. McLeod.

9 THE COURT: Mr. Wray, is this one of the ones
10 that was charged in conjunction in the Henning case --

11 MR. WRAY: Yes.

12 THE COURT: -- that they were all done together?

13 MR. WRAY: Yes, ma'am.

14 MR. PARKER: The Henning case --

15 THE COURT: Do you have -- do you have that case
16 again?

17 MR. PARKER: -- the Henning case didn't deal
18 with the railroad.

19 MR. WRAY: It sure did. It was a railroad case.

20 MR. PARKER: This was charged in that railroad
21 case?

22 MR. WRAY: Yes. That was the case we handed up
23 probably --

24 MR. PARKER: I remember the case.

25 MR. WRAY: -- probably with Dr. Heathington's

1 testimony.

2 THE COURT: Yeah.

3 MR. PARKER: Well, I remember the case.--

4 MR. WRAY: Of Union Pacific.

5 MR. PARKER: -- our motion in limine.

6 I don't -- I -- I'm going to have to -- need to
7 look at that, because I can't see how in the word you
8 could charge this kind of statute on -- tell the jury
9 that she's got to treat the railroad track as a
10 highway, and the statute should say otherwise.

11 MR. WRAY: That is because it should say --

12 THE COURT: Go ahead and someone pull the
13 Henning case again.

14 And I know you gave it to me, Mr. Wray, but, you
15 know, where it is now is --

16 MR. WRAY: I don't know if I still have it here
17 today, but I'll see if I do.

18 THE COURT: Okay.

19 [Off the record momentarily]

20 MR. WRAY: Your Honor, do you want --

21 THE COURT: Oh. You do.

22 MR. WRAY: Do you want to make copies, or do you
23 want to just look at mine, or how do you want to do it?
24 I think this is the only one we've got.

25 THE COURT: Actually, give it to Aaron. She'll

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1 go make a copy of it.

2 [Whereupon, Mr. Wray proffers documents to the
3 law clerk]

4 THE COURT: All right. Number 35.

5 MR. PARKER: That's already been charged.

6 THE COURT: I think it's already been charged.

7 MR. PARKER: And the last one is in the general
8 charge.

9 THE COURT: I've got a number 37.

10 MR. WRAY: I don't have any others.

11 THE COURT: We've already --

12 MR. PARKER: We don't, either.

13 THE COURT: I think we've already talked about
14 this. This is saying that they need to -- Mr. Parker,
15 you've already got it in your charge -- basically
16 saying that if you find that both CSX and DOT, you have
17 to apportion damages between the two. That's already
18 in there.

19 Number -- I've got a 36. Or did I miss it? Oh.
20 You already -- that was already in there.

21 MS. AMUNDSON: Yes.

22 THE COURT: So that's fine. Okay. All right.
23 We aren't talking about the verdict form tonight.

24 MR. WRAY: We're going to take up ours tomorrow?

25 THE COURT: You got it. Okay. Mr. Wray, let's

1 get yours.

2 MR. WRAY: I'm sorry. That's what I was asking.
3 I thought you said you wanted to do them tomorrow. We
4 can run through any of these --

5 THE COURT: We've already covered?

6 MR. WRAY: These, of course, are covered by your
7 general charge. I believe those are the --

8 THE COURT: Okay. Number 1 --

9 MR. WRAY: I had a trial one time where the
10 judge didn't charge some basic principle and he said,
11 well, you didn't ask me to. So, yes. I assume you're
12 going to charge them on duty, breach, and proximate
13 cause?

14 THE COURT: Right. So that takes out what
15 numbers?

16 MR. WRAY: Well, let's walk through them.

17 THE COURT: It takes out 1, 2, 3 --

18 MR. WRAY: 4 is a little different, although I
19 think this is from Anderson's charge book. I don't
20 know if you use that specific language or not.

21 THE COURT: I've got -- just I wrote a note on
22 here just to make sure that's in my general charge, the
23 language. And I had said the same for number 3. So I
24 think we'll just make sure it's in there. Okay?

25 MR. WRAY: Yes, ma'am. On 5, I --

1 THE COURT: Number 5.

2 MR. WRAY: Well --

3 MR. PARKER: That is an incorrect statement of
4 the law because it implies that CSX doesn't have a duty
5 to inspect for vegetation and control vegetation.

6 MR. WRAY: I don't agree that it's an incorrect
7 statement of the law. But I think the simplest thing
8 to do is for you to charge 14 and 15, then we don't
9 have any question about it.

10 THE COURT: Okay.

11 MR. PARKER: Well, the --

12 MR. WRAY: You can just read the statute, suits
13 me.

14 MR. MCLEOD: Your Honor, I had the same note
15 that they have -- you know, they've got a duty to it.

16 MR. WRAY: I have no problem just reading the
17 statute.

18 MR. PARKER: Well, I think if you're going to
19 charge that, you have to charge the -- in conjunction
20 with that, that the railroad has a duty to inspect and
21 control obstructive vegetation on their crossings.

22 MR. WRAY: You've already got in the plaintiff's
23 charges what our duty is at our crossings, and you're
24 going to read those charges. All I'm asking for here
25 is the statute. Mr. Parker is now saying, I want to

1 add something that's not in the statute.

2 THE COURT: We're going to read 1450. And Mr.
3 Parker, if you have an additional request to charge
4 that you want to add on, then we can do that. But
5 we're going to read 1450.

6 MR. PARKER: Well, in conjunction with that we
7 want the jury charged about the railroad's duty to
8 control vegetation on the right-of-way. Those were the
9 ones we passed up that the Court -- because it wasn't
10 an exact quote out of the case.

11 THE COURT: Okay. Well, then, let's go through
12 these that are actually before us and if you have an
13 additional proposed charge in response to this, you
14 need to give me the exact quote from the case that's
15 appropriate. If it's an exact quote and it's the law,
16 we'll charge it.

17 Number 6.

18 MR. HOLMES: Your Honor, that charge is correct
19 from the point where you get to: [reading] you may
20 consider.

21 That's where the quote picks up in the case.

22 THE COURT: You mean you're fine with, you may
23 consider, and below? I mean, is there any problem with
24 just the portion where it starts: [reading] regulatory
25 standards are relevant to show the reasonableness of a

1 party's conduct?

2 MR. PARKER: We have no objection to you may
3 consider relevant standards, if you strike out the
4 first part of it, the various sources to determine
5 whether the defendant breached a duty. That's fine
6 with us.

7 MR. MCLEOD: But, Your Honor, I assume that he's
8 referencing the Lewrey [phonetic] law, you know, the
9 inspection law, that --

10 MR. PARKER: He's trying to say that they did --
11 if they went out and inspected it, the Highway
12 Department, no matter how bad they did it, and that the
13 railroad would have no liability. That's simply not
14 the law.

15 MR. WRAY: That's not what I'm saying and that's
16 not what the charge says. Mr. Parker submitted a
17 charge that said our internal rules can be evidence of
18 the standard of care and our violation can be evidence
19 of negligence. This charge says that regulatory
20 standards are something they can consider, and they can
21 consider compliance with regulatory standards bearing
22 upon the question of negligence. This law says -- as
23 they conceded, this is correctly taken from the case.

24 MR. PARKER: We have no problem with charging
25 regulatory standards of law. The problem we have is it

1 says CSX is -- evidence of this compliance.

2 THE COURT: That's okay. I'm going to take out
3 the first sentence.

4 MR. WRAY: I just put that in to give it a
5 little context. But that's fine. We can argue that
6 to the jury.

7 THE COURT: In an ideal world, people would give
8 jury instructions that gave context but then actually
9 quoted properly. The problem is they don't, which is
10 why I'm just finding that it's easier just to strictly
11 state this is what it is. I mean, quite frankly, I do
12 think they need context to make them meaningful. But
13 the problem is too much editorial liberties are taken,
14 and to fight over it takes too long. I mean, we've
15 been doing this since 4:30.

16 MR. WRAY: Yes, ma'am. And on number 7 --

17 THE COURT: Yeah.

18 MR. WRAY: -- I understand that there was some
19 objection to that. I would simply ask that the Court
20 charge the statutes, 930, 940 and 20 and 2715, some of
21 which I think were already covered by Mr. McLeod. But
22 to the extent they weren't --

23 THE COURT: Which ones were covered? Do you
24 know?

25 MR. WRAY: I don't recall.

1 [Off the record momentarily]

2 MR. MCLEOD: I'm pretty sure 940 was. I think
3 that's the one that said proximately or proximate.

4 MR. WRAY: No. Actually, 930 and 940 I don't
5 think were covered. Maybe --

6 THE COURT: Was 930 covered, Ron?

7 MR. PARKER: I think it was covered.

8 MS. AMUNDSON: I believe 930 has been covered.

9 MR. WRAY: Okay. Maybe 930 was.

10 MS. AMUNDSON: I think that --

11 MR. WRAY: I believe 940 was not.

12 THE COURT: So 940?

13 MR. WRAY: Yes, ma'am.

14 THE COURT: What about 1020?

15 MR. WRAY: 1020 has not yet been charged.

16 THE COURT: And 2715?

17 MR. WRAY: 2715?

18 MR. PARKER: We don't think that 56-5-1020 --

19 MR. WRAY: Yes. I think 2715 was --

20 MR. PARKER: -- has any application.

21 MR. WRAY: I'm sorry. 2715 I believe was
22 covered by Mr. Parker's charge.

23 THE COURT: Okay.

24 MR. PARKER: 56-5-1020 is unauthorized signs
25 and signals. The testimony in this case is, from Mr.

1 Jenkins, the railroad can put up whatever signs and
2 signals they want on their right-of-way. In fact,
3 he testified that could put up gates and lights but
4 they -- and they have done it.

5 THE COURT: That still doesn't change the law.

6 MR. WRAY: That's exactly right. I don't care
7 what Mr. Jenkins said, the statute is the statute and
8 the Court needs to charge the law.

9 MR. PARKER: Well, you know, this says
10 unauthorized signs. What he said was they have --
11 they do authorize them. They're not unauthorized. He
12 said gates and lights, that they aren't unauthorized.

13 THE COURT: I'm going to charge it. It's what
14 the law says it is.

15 MR. WRAY: So 940 and 1020 out of --

16 THE COURT: Yes.

17 MR. WRAY: -- those two, Your Honor --

18 THE COURT: On this section.

19 MR. WRAY: -- you're going to charge the statute
20 as --

21 THE COURT: Yes.

22 MR. PARKER: As you say, 15 is already --

23 THE COURT: Yes.

24 MR. WRAY: Yes.

25 THE COURT: Number 8.

1 MR. WRAY: I think that's covered by what we
2 just discussed.

3 THE COURT: I think it does, too.

4 MR. WRAY: If you'll just read the statutes.

5 THE COURT: So you're going to withdraw that.

6 MR. WRAY: 9 we've got, 10 -- yes.

7 THE COURT: Number 9 is already covered.

8 Actually, 1020 is what we're putting in here, so --

9 MR. WRAY: Yes, ma'am.

10 THE COURT: Just so Aaron doesn't have to go
11 find it. Okay.

12 Number 9. Oh. This is 1020. I'm sorry. So
13 that covers it. So withdraw 9.

14 Number 10.

15 MR. WRAY: Number 10 I believe we have probably
16 the same objection, so I would just ask you to charge
17 56-5-1010 and 58-17-1390, which deal with the
18 responsibility to install the cross-bucks.

19 MR. PARKER: There's no issue about their duty
20 to install the cross-bucks. That's not applicable.

21 MR. WRAY: Well, it is applicable because the
22 jury needs to be told what the various responsibilities
23 are of the various parties and this statute -- these
24 two statutes talk about what the railroad's
25 responsibility is in terms of installing devices, in

1 this case a cross-buck at a crossing.

2 MR. PARKER: That would be totally improper to
3 charge that because they want to argue, well, that's
4 all -- by law, that's the only thing we have to do,
5 which is not correct because the law is that they have
6 to install appropriate warning devices.

7 THE COURT: Well, we're charging that.

8 MR. WRAY: That's right. All I'm asking is for
9 the statutes that say what we're supposed to do. I'm
10 not sure why there's an objection. This is a statutory
11 duty --

12 MR. PARKER: There's no question that they
13 installed cross-bucks. There's no issue about it.

14 THE COURT: All right. Well, I'll look at it in
15 conjunction with the other.

16 Number 11. I've got this is the same as number
17 8, which was withdrawn.

18 MR. WRAY: Well, it's a different charge. On 8
19 we agreed to read the statutes, I think, in lieu of it.

20 THE COURT: Yeah.

21 MR. WRAY: On this one I'm asking the Court to
22 charge them that if there was a decision made not to
23 put in gates and lights, that cannot be a basis for
24 liability for CSX.

25 MR. PARKER: No evidence of that. And it would

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1 be an improper charge on the facts, in any event.

2 THE COURT: Wouldn't this have to do with if CSX
3 went to them and said, I want you to put gates and
4 lights up and they said, no, it's not appropriate?

5 MR. WRAY: I don't think so. I mean, what it
6 gets to is -- and I think there is evidence to support
7 the charge. Mr. Jenkins talked about the process they
8 undergo, the funding that's available, and the criteria
9 they look at. Obviously, there's no question in the
10 case there were no crossings -- gates and lights put at
11 this particular crossing.

12 MR. PARKER: I would think --

13 MR. WRAY: So --

14 MR. PARKER: Excuse me.

15 MR. WRAY: So my point is that there obviously
16 was some consideration given. I don't know that he
17 spoke specifically about Hill Road crossing. But he
18 talked about how they do it, there was none put here,
19 and we think the jury should be told that that's not a
20 basis for liability against CSX.

21 MR. PARKER: Your Honor, if we've been
22 restricted the language out of cases -- I want to see
23 one, language out of a case that says that.

24 MR. WRAY: Well, I've got the language right
25 there. I quoted it. It would be ludicrous to hold a

1 railroad liable based on the government's decision as
2 to what safety devices would be at a crossing. That's
3 the language.

4 MR. PARKER: There's not been any --

5 MR. WRAY: Yeah, I --

6 MR. PARKER: -- that's from the East District of
7 Missouri.

8 MR. WRAY: It suits me fine if you'll just read
9 that quote, if that's Mr. Parker's -- you can charge
10 them that.

11 MR. PARKER: That is -- there's been absolutely
12 no evidence in this case to support that charge. It is
13 a charge on the facts. It's absolutely an incorrect
14 statement of the law. It's an issue for the jury to --

15 MR. MCLEOD: I hate to jump on my friend, but I
16 think it is a little incorrectly stated.

17 MR. WRAY: I can provide you with many other
18 cases that hold that same proposition, but I'll leave
19 it in your discretion.

20 THE COURT: Why don't you find something else,
21 if you can. I understand that --

22 MR. PARKER: That's a charge -- that's charging
23 them that SCDOT decided not to put up safety -- gates
24 and lights at this crossing; therefore, they're not
25 liable. And that's not the -- no facts, none, that's

1 been -- it's a charge on actually --

2 THE COURT: Well, didn't we -- isn't there a
3 charge somewhere in here that says just because there
4 aren't gates and lights at this crossing does not mean
5 that either the railroad or DOT is responsible? Don't
6 we have a charge like that in here, I mean, just that
7 sole fact cannot make them liable? I could have sworn
8 there was a charge like that in here. No?

9 MR. WRAY: I'm not sure if we have it in that
10 language.

11 THE COURT: Well, of course, that's my
12 paraphrasing. But --

13 MR. MCLEOD: I think it's -- maybe what you're
14 thinking about is the railroad I don't think has any
15 statutory duty to install gates and lights by statute.
16 Now, whether they have a duty of, you know, due care or
17 something is a different deal. If I understood Mr.
18 Jenkins right, I mean, they can -- they can put them
19 up. The program pays the -- you know, it's federal
20 money, and the State selects -- they try to rate them,
21 and then actually the federal government does the
22 paying for it.

23 THE COURT: Right.

24 MR. MCLEOD: I think what Ron is trying to get
25 at is say that they have no -- they have no statutory

1 duty to put up gates and lights. And I think that's
2 correct.

3 MR. PARKER: But that has no relevance to what
4 we are here about. They have a common-law duty. It
5 doesn't matter where the duty comes from and what the
6 jury decides.

7 MR. WRAY: We don't have a common-law duty to
8 put up gates and lights.

9 MR. PARKER: Well, that's where we got a -- you
10 have a common-law duty to give appropriate warning, and
11 one way of warning may be with gates and lights.
12 Obviously, we have a disagreement on that.

13 THE COURT: Okay. I think you need to pull that
14 case, Mr. Wray --

15 MR. WRAY: Sure.

16 THE COURT: -- and find something in it, that
17 specifically addresses it with a quote, other than the
18 ludicrous comment.

19 MR. WRAY: I said I like that fine. I will look
20 back. But I will find some other cases that say the
21 same thing.

22 THE COURT: You're going to get back to me on
23 that.

24 Y'all, let's go ahead and if you don't mind
25 let's just take five quick minutes.

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1 MR. WRAY: Sure.

2 [Whereupon, a recess is taken from 7:15 p.m. to
3 7:22 p.m.]

4 THE COURT: Mr. Wray?

5 MR. WRAY: We were going through and as we got
6 partially through, Your Honor, there are a number of
7 these that are -- have already been covered or are
8 pending your ruling on certain things, and I'll just
9 walk through the ones that we went through that fall
10 into that camp.

11 Number 13, number 14 --

12 THE COURT: If you don't mind, just give me
13 one quick second, because I'm just striking through
14 them as -- okay.

15 MR. WRAY: 13 and 14 we presume will be covered
16 by your general charge.

17 THE COURT: Right. 15, as well.

18 MR. WRAY: 15 I wasn't sure, but since you
19 confirmed that, that's fine.

20 16 I would assume is covered.

21 THE COURT: It's already covered.

22 MR. WRAY: 17.

23 THE COURT: 17 is already covered. 18 is
24 already covered.

25 MR. WRAY: Well, 18, 19, 20 and 21 deal with the

1 intervening act --

2 THE COURT: Intervening act.

3 MR. WRAY: -- which is a question that you're
4 looking at.

5 THE COURT: Which he objects to. Exactly.

6 MR. WRAY: Obviously it just needs to be charged
7 once, either Mr. McLeod's charges or my charges, if you
8 decide to charge it.

9 22 I assume is covered by your general charge,
10 as is 23.

11 THE COURT: Hold on a sec. Okay. Yes. 22 is
12 already in.

13 MR. WRAY: Yes, ma'am. I assume --

14 THE COURT: 23 is already in.

15 MR. WRAY: 24 I presume is covered.

16 THE COURT: Yeah, already in.

17 MR. WRAY: 27 Mr. Parker said no objection to,
18 and you agreed. I don't know if Mr. McLeod has any
19 objection. I assume he doesn't.

20 MR. MCLEOD: No objection.

21 THE COURT: Okay.

22 MR. WRAY: 28 is essentially the same as 27, so
23 we withdraw it.

24 THE COURT: Okay.

25 MR. WRAY: 29 -- I'm sorry. 31. And the reason

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1 I'm skipping is we need to come back to the ones we had
2 problems with.

3 THE COURT: Got you. 31.

4 MR. WRAY: 31 you've already covered, 33 you've
5 already covered, 34 you've already covered, and 35
6 you've already covered. That is as far as we got on
7 that list.

8 And then to go back to the ones: 25 is one that
9 we had that deals with the right to presume that
10 someone will obey the law. I thought Mr. Parker had
11 one similarly, but he says he did not. If he does not,
12 then we'll probably withdraw 25. I'll just look at
13 that overnight.

14 THE COURT: Okay.

15 MR. WRAY: I may be mistaken. I thought I had
16 seen one like that.

17 26 Mr. Parker said he had an objection to, so we
18 need to deal with that one.

19 MR. PARKER: Absolutely. It says --

20 THE COURT: Just give me a second to read it.

21 MR. PARKER: Excuse me.

22 [Whereupon, the Court reviews documents]

23 THE COURT: Okay, Mr. Parker.

24 MR. PARKER: Your Honor, it's just not
25 applicable to the facts of this case, and we -- no one

1 has said that -- this says that if Ms. Colvin saw the
2 train and just passed in front of it. But there's just
3 absolutely no evidence to support that. All the
4 evidence is contrary. She didn't see it. The jury
5 shouldn't be charged something that's not applicable to
6 the fact. They can argue that she was negligent in not
7 seeing it.

8 MR. WRAY: Number one, and I don't think it's
9 contested, it's almost a direct quote from the case.
10 But the issue about whether or not it's applicable,
11 clearly it is. We have evidence in the case that she
12 should have seen and heard the train approaching as did
13 everyone else. It says if one sees; it doesn't say she
14 saw it. It says if one sees or hears it, even though
15 you didn't comply with the statute you still don't have
16 the right to pull out in front of the train. And that
17 failure to sound the bell -- and that's the very issue
18 in the case on the proximate cause of failing to sound
19 the horn, is did the failure to sound it at 1500 feet
20 proximately cause this event. And this case speaks
21 specifically to that point. As I said, we took the
22 language right from the case.

23 MR. PARKER: There's just no evidence to support
24 their charge.

25 MR. WRAY: Sure there is. There's evidence that
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1 the train was there to be seen and was there to be
2 heard.

3 MR. PARKER: No. But this says when one saw it.

4 MR. WRAY: No. It says if. I agree if it said
5 but when she saw it, then you would have a proper
6 objection. But when it says if she saw it, she doesn't
7 have the right to pull out just because they didn't
8 give 1500 feet. The jury doesn't have to believe her
9 testimony.

10 MR. PARKER: If they don't, then they won't find
11 for her, I'm sure.

12 MR. WRAY: Well, she's not the plaintiff.

13 MR. PARKER: Or find for Lillian.

14 MR. WRAY: If she was the plaintiff, I wouldn't
15 have this problem.

16 [Off the record momentarily]

17 [Whereupon, the Court and law clerk confer]

18 THE COURT: All right. Y'all, I'm going to have
19 to read Osteen. Aaron read it and the way it looks, it
20 looks like it's more fact specific as to this charge.
21 I know they went on to say that it was okay. But it
22 looks like it was very fact specific, and I don't -- I
23 don't know, so I just -- I need to read the whole
24 thing.

25 MR. WRAY: The next one, Your Honor, that we had

1 an objection to, was 29. We talked about this a little
2 earlier with one of Mr. McLeod's charges. In fact --

3 THE COURT: 27. Were we -- is it in or out?

4 MR. WRAY: I think that covered that earlier. I
5 went down to 35 of those that we were either in
6 agreement with or were covered by the general charge.
7 I'll have to go back and look at 27.

8 MR. PARKER: We agreed that --

9 MR. WRAY: 27 was no objection.

10 THE COURT: It's okay? Okay.

11 MR. PARKER: Right.

12 MR. WRAY: 28 was in the general charge.

13 THE COURT: It's already -- got you. Okay.

14 What are we on now?

15 MR. WRAY: 29.

16 THE COURT: Okay, sir.

17 MR. WRAY: And this is one Mr. McLeod I think
18 had submitted, as well. Mr. Parker said his objection
19 was it deals with keeping a proper lookout on the
20 highway.

21 THE COURT: The same one that we already charged
22 with Mr. McLeod; right? I know, Mr. Parker, you object
23 to it, but is it the same?

24 MR. WRAY: I don't think you charged it.

25 MR. PARKER: I thought you didn't charge it

1 because it didn't apply. It was dealing with vehicles
2 on the roadway and the lighting with pedestrians and
3 objects on the road.

4 MR. WRAY: Well, the principle of law we want --
5 and you can strike "upon the highway" if that's the
6 objection -- is the duty of a motorist to look and
7 observe. If the objection is to the words upon the
8 highway --

9 MR. PARKER: We already have a charge in that
10 the motorist has the duty to keep a proper lookout. We
11 don't object to that charge, because it's applicable
12 and it's good law, that a motorist has a duty to keep a
13 proper lookout. It's all the rest of this stuff that
14 we object to.

15 MR. WRAY: Well, all the rest is applicable to
16 this case. But as I said, the objection, as I
17 understand it, is that it refers to the highway. I
18 have no objection in striking the language upon the
19 highway. Not the duty to look and observe.

20 THE COURT: Okay. I can tell you, though, that
21 is already charged. That was in the plaintiff's
22 charges.

23 MR. PARKER: We put a charge in on proper
24 lookout.

25 THE COURT: It was the duty to look, listen --

1 or look here and something.

2 MR. PARKER: We put in the applicable law about
3 keeping a proper lookout.

4 THE COURT: Mr. Wray, let's go back and look
5 already in plaintiff's charge. But I believe it was
6 covered.

7 MR. WRAY: I believe there was a general -- more
8 general statement of the law that's more specific, and
9 we think it's appropriate. But we'll look at it.

10 30 Mr. Parker said he objected to, as well.

11 THE COURT: What's your objection?

12 MR. PARKER: Because it's -- if they want to put
13 in there if a -- they charge a motorist's vision is
14 obstructed by -- by the vegetation must exercise care
15 commensurate with the conditions of travel, I don't
16 have any objection to it.

17 THE COURT: Okay. No. This is the charge as it
18 is. And it's very close to number 36. I think it's a
19 proper statement of the law. I don't think it needs to
20 say vegetation. I think it can just say in favorable
21 conditions.

22 MR. WRAY: 32 Mr. Parker also objected to,
23 again, because of reference to highway. We talked
24 about that earlier with the other statutes you're going
25 to charge.

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1 MR. PARKER: I think that's covered in the duty
2 of the motorist at a railroad crossing that's always in
3 the -- we submitted about the duty of a motorist at a
4 highway grade crossing, which is applicable here, not
5 the duty at an intersecting highway.

6 THE COURT: I do think it's similar. Aaron's
7 got down here that it is similar to 30, 31, and one of
8 the plaintiff's charges, which I think was one of the
9 first ones.

10 MR. WRAY: I apologize, Your Honor.

11 THE COURT: That's okay.

12 MR. WRAY: I skipped one that I should have gone
13 through.

14 Number 12, which is section 58-15-1625. It says
15 the authority to post a highway grade crossing rests
16 with the Department of Transportation. Mr. Parker said
17 he objected to it and I said, well, you elicited
18 testimony from Dr. Heathington that one of the options
19 here was to close this crossing. If we hadn't had that
20 testimony, I wouldn't request this charge.

21 MR. PARKER: He made -- he made no statement
22 that they should close the crossing.

23 THE COURT: No. He said he -- that's one of the
24 things you can do, is what he --

25 MR. PARKER: Right.

1 THE COURT: -- and he said --

2 Isn't that when he went through and said you can
3 close it, you can flag it, you can crossing-gate it?

4 MR. WRAY: That's correct.

5 MR. PARKER: He made no recommendation that they
6 close it, Your Honor.

7 THE COURT: Not as to specifically. But I
8 understand what Mr. Wray is saying.

9 MR. WRAY: Yes, ma'am. So we would ask the
10 statute be charged.

11 THE COURT: Okay.

12 MR. WRAY: And, again, it suits me if you just
13 read the statute. I tried -- I mean, it's a long
14 statute, so I tried to just summarize it. But if
15 there's an objection to the way I summarized it, you
16 can just read the statute.

17 THE COURT: Okay. Keep going. What number are
18 we on?

19 MR. WRAY: That's as far as we got with
20 reviewing them.

21 We're now on 36.

22 THE COURT: Do you want me to take just a minute
23 to see what we can strike? Actually, I can tell you,
24 maybe I can also go through -- I say that.

25 MR. HOLMES: I think you just said 30, when 36

1 was --

2 THE COURT: I'm sorry?

3 MR. HOLMES: Didn't you say just a second ago
4 that 30 covered 36?

5 THE COURT: It's similar to it.

6 MR. WRAY: Well, it's a little bit different. I
7 thought you said you weren't going to charge 30 because
8 you thought it was already covered. So we certainly
9 would ask for 36.

10 MR. PARKER: I think she said she was going to
11 charge it.

12 THE COURT: I am going to charge 30.

13 I thought this whole look-and-listen thing was
14 already charged in the plaintiffs. And I mean I hate
15 to say it's getting long on the hour, so I think we're
16 all getting a little bit tired, but --

17 MR. WRAY: Well, that's why I -- I would ask
18 that we then come back either in the morning and do it,
19 or after the plaintiff rests, because we're not going
20 to argue and charge until Thursday.

21 THE COURT: Right. Until the following day
22 anyway.

23 MR. WRAY: What I don't want to happen --

24 THE COURT: That's absolutely fine with me. But
25 what I don't want is any of y'all upset if you do not

1 go home with a copy of the charge, you know, when we
2 leave here. Because I can tell you right now, we're
3 going to be inserting this stuff as we go along and
4 we're not going to have junk floating around
5 everywhere. So just as long as y'all are okay with
6 that. I mean, you will know when we leave what I'm
7 going to charge. I mean, I think I'm pretty thorough
8 as to what -- I think y'all know what I'm going to
9 charge.

10 MR. WRAY: Well, my concern is I just don't want
11 us, because of the lateness of the hour --

12 THE COURT: I understand. To get tired.

13 MR. WRAY: -- reach a point where we're just
14 saying, this one is covered, this one is already done.
15 So --

16 THE COURT: Mr. Wray, I agree with you.

17 MR. WRAY: -- I know you --

18 THE COURT: Let me -- let me do this. Can I go
19 through and it might speed things along and -- let me
20 just see if there's any --

21 MR. WRAY: Well, one thing we will do is look at
22 them overnight and if there are some that I believe
23 we've already covered, either through Mr. McLeod or
24 maybe even through Mr. Parker's, we'll take those out
25 and that will short circuit --

1 THE COURT: I think -- yeah.

2 MR. WRAY: -- it a little bit.

3 THE COURT: I've got number 41, that it's
4 already in the plaintiff's requests.

5 Number 43, it's already in.

6 MR. PARKER: Your Honor, 44 is already in.

7 THE COURT: 44 is already in.

8 Number 45. I can tell you that portions of this
9 -- don't do anything, but let's talk about 45 tomorrow.
10 Okay?

11 MR. WRAY: Okay.

12 THE COURT: And where did they come from?

13 MR. WRAY: I was just thinking that myself. We
14 don't have a cite there. It might be from the driver
15 manual.

16 THE COURT: I like it: [Reading] It is always
17 train time at a railroad crossing.

18 MR. WRAY: Well, it's actually from a case.

19 THE COURT: I actually like that.

20 MR. WRAY: I'm sorry. It got cut off.

21 THE COURT: Where did it come from?

22 MR. WRAY: It says -- the cites are Robertson
23 vs. Atlantic Coastline case, Chisholm vs. Seaboard
24 Airline, and Graham vs. Seaboard Airline. And I think
25 they were in the notebooks we gave Aaron.

1 THE COURT: Okay.

2 MR. WRAY: I do see it. For some reason it
3 didn't print out on this one.

4 [Whereupon, the Court and the law clerk confer]

5 THE COURT: Number 48 is already in the charge;
6 number 49 is already in; number 50 is already in the
7 charge; number 51 is already in the charge; number 52
8 is in the charge, but I'm going to make sure the exact
9 language is in it. Okay?

10 MR. WRAY: Yes, ma'am.

11 THE COURT: It's one of the ones I know that I
12 use as standard.

13 53 is in my regular charge; 54 is, though we
14 talk about the reduction of present day value. I can
15 tell you that in my charge it's just one line, of
16 course, you must reduce any award, you know, to present
17 day value. This explains it a little better so I'm
18 going to have Aaron go ahead and insert that.

19 MR. WRAY: Okay. 55 and 56 were the issue we've
20 been wrestling with about what --

21 THE COURT: Right.

22 MR. WRAY: -- deal with medical bills. We can
23 talk about that tomorrow.

24 THE COURT: And we'll talk about it.

25 Mr. Parker, do you have any thoughts about

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1 separating that out on a verdict form?

2 MR. PARKER: We have it -- we'll have it
3 separated out on the verdict form.

4 THE COURT: You do? Okay.

5 All right. Number -- I can tell you 57 is
6 already in my charge; 58 is already in the charge; 59
7 is already in the regular punitive damages charge;
8 number 60 is already in the charge; 61 is already in
9 the charge; 62 is already in the charge. Maybe it was
10 this clear and convincing charge.

11 MR. PARKER: We've already --

12 THE COURT: We've already -- we've already
13 talked about this?

14 MR. PARKER: Yes.

15 MR. WRAY: And there was a charge on clear and
16 convincing. I do recall that.

17 THE COURT: Actually, Mr. Wray, I may take it
18 back. I wrote on this one, this is the best one.

19 MR. WRAY: Yes. Well, this is coming from Judge
20 Anderson. It's not my work, although I appreciate the
21 comment, but I believe that is a more complete
22 statement than the one --

23 THE COURT: This one is actually quite clear. I
24 don't think Judge Anderson always is but --

25 MR. WRAY: There was plaintiff's charge number

1 32, which included the Gamble factors.

2 THE COURT: Right.

3 MR. WRAY: And ours is a little different. Of
4 course, we don't have the Gamble factors --

5 THE COURT: What number is this?

6 MR. WRAY: Plaintiff's charge number 32 talks
7 about its duty to find punitive damages by a clear and
8 convincing evidence, and then it has a short statement
9 as to what that means. I think we would request number
10 63 in lieu of plaintiff's number 32.

11 THE COURT: Okay. We'll just have to look at
12 those. Okay.

13 MR. WRAY: 64 may --

14 THE COURT: I've already got it.

15 MR. WRAY: -- also be covered by one of your
16 charges.

17 THE COURT: I've already got my standard.
18 Number 70 is already in my standard charge.

19 MR. WRAY: Are we skipping over the others in
20 between there for now?

21 THE COURT: No. Well, when I say no, I just
22 can't swear to it until I actually go through it and
23 make sure each one of them are in there. So that means
24 I just have to look at them. I'm still looking. And I
25 can tell you, I don't think I --

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1 [Whereupon, the Court reviews documents]

2 THE COURT: Okay. Let's do this. Where did we
3 leave off, y'all, just so we know where we're going to
4 start tomorrow? And obviously I pulled some, and Mr.
5 Wray is going to go back and he's going to pull some
6 that --

7 MR. WRAY: Yes, ma'am.

8 THE COURT: -- are already covered. But let's
9 just talk --

10 MR. WRAY: I'll look at them.

11 THE COURT: Let's all make sure we're on the
12 right number of where we are starting tomorrow.

13 MR. WRAY: We had worked through 36.

14 THE COURT: Worked through 36.

15 MR. WRAY: I'm sorry. We were on number 36. We
16 completed 1 through 35.

17 THE COURT: Right. We have not done 36 yet.

18 MR. WRAY: Yes, ma'am.

19 THE COURT: Okay.

20 MR. WRAY: And I will look tomorrow, and I'll
21 come in and let you know the ones that we think are
22 covered by something already approved. We can pull
23 those out. And then to the extent -- obviously, you've
24 just told us several that are covered by your general
25 charge.

1 THE COURT: Right.

2 MR. WRAY: And if they are, that's fine, as

3 well. And we'll just deal with the handful that's

4 left.

5 THE COURT: Okay.

6 MR. WRAY: I understand you have something in

7 the morning and the jury is not coming until 11:30.

8 What time do you want us to be here?

9 THE COURT: Why don't y'all be here at about

10 11:15 or so. The only thing that I have a slight

11 concern is obviously I need to look at Mr. Huett's

12 deposition. And, obviously, if I don't allow it in or

13 don't allow him to testify, Mr. Parker is going to want

14 to make a proffer of his testimony.

15 MR. PARKER: We hope we're going to get Dr.

16 Heathington here if -- put me on notice.

17 THE COURT: Okay. So that would take care of

18 it, then?

19 MR. PARKER: Well, I guess so. We'll have two.

20 We may call both of them; we might call one of them.

21 THE COURT: All right. Y'all, why don't you be

22 here by 11:15.

23 [Off the record momentarily]

24 MR. WRAY: And that reminds me, Your Honor, one

25 other thing that --