

**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. VI

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1 MR. WRAY: Yes, ma'am.

2 - - - - -

3 RENEWED MOTION FOR A DIRECTED VERDICT

4 MR. WRAY: For the record, I want to renew our
5 motion for a directed verdict. And I hope we can do
6 the same thing we did yesterday. I would incorporate
7 all of the arguments and grounds as stated at the close
8 of the plaintiff's case --

9 THE COURT: Yes, sir.

10 MR. WRAY: -- for all of the reasons stated at
11 the time. We submit there is insufficient evidence to
12 support the plaintiff's claim, even taking the evidence
13 in the light most favorable to the plaintiff, and we
14 would ask the Court to direct a verdict in our favor,
15 CSX Transportation's favor, for all of the grounds
16 we've previously stated. Unless Mr. Parker objects, I
17 will not go through all those one-by-one again; just
18 make those same arguments.

19 MR. PARKER: No objection.

20 THE COURT: All right. Thank you, Mr. Parker.

21 Again, I deny that motion on the same grounds,
22 as well, sir. I think there was adequate evidence
23 produced in a light most favorable to the nonmoving
24 party, and I do think that there was evidence where
25 this jury could find that CSX was negligent as to --

1 MR. MCLEOD: Obviously, for the record, we
2 ditto.

3 THE COURT: Yes, sir.

4 -- as to the three issues, as well as your
5 question as to punitive damages.

6 And, Mr. McLeod, the same thing, sir. Again, I
7 respectfully deny your motion, as well, sir.

8 With that said, y'all, can we go ahead and take
9 about five minutes?

10 Mr. Harmon, you decide on those photos, if
11 you're fine, and then we'll go straight into the
12 charges. Okay?

13 MR. HARMON: Yes, ma'am.

14 [Whereupon, a recess is taken from 3:38 p.m. to
15 3:46 p.m.]

16
17 CHARGE CONFERENCE

18 THE COURT: All right. Mr. Wray, we were on
19 number 36?

20 MR. WRAY: Your Honor, I will proceed however
21 you desire. I thought --

22 THE COURT: You tell me where we ended.

23 MR. WRAY: Well, what I wanted to do, because
24 there were several that even 435 --

25 THE COURT: That you could pull --

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1 MR. WRAY: Well, no. That you had questions
2 about or -- and I would just propose to run through one
3 or two --

4 THE COURT: I don't want to revisit them,
5 because we are going to have to go back and revisit
6 everybody's anyway because there were issues that y'all
7 were going to get back to me on other ones.

8 MR. WRAY: Yes, ma'am.

9 THE COURT: So let's just pick up, if you don't
10 mind, from 36 and then we'll go back on anything we had
11 an issue on.

12 MR. WRAY: Okay.

13 THE COURT: If that's okay.

14 MR. WRAY: Yes, ma'am.

15 THE COURT: All right.

16 MR. WRAY: All right. 36, then.

17 THE COURT: Yes.

18 MR. WRAY: I don't know if there is any
19 objection or not.

20 MR. PARKER: 36? You had already had one in
21 that was the same thing.

22 THE COURT: I think I've also got it in the
23 plaintiff's requests --

24 MR. PARKER: That's correct.

25 THE COURT: -- is my understanding. Correct?

1 MR. PARKER: That's correct.

2 THE COURT: Okay. Number 37.

3 MR. PARKER: We object that that's not a correct
4 statement of the law. We believe that you've already
5 got 56-5-2710 in the charge, which is a direct
6 statement of the law.

7 MR. WRAY: I disagree, and we've got the cases
8 right here, that the law is that the train has the
9 right-of-way --

10 THE COURT: Correct me if I'm wrong. I think on
11 the beginning of one of the plaintiffs we do have where
12 it states that. And then it goes on; correct?

13 MR. PARKER: It states -- what it does, section
14 56-5-2710 says the train has the right-of-way under
15 these conditions: a horn blown continuously for 1500
16 feet before the crossing; and that the train is plainly
17 visible.

18 And that's the law. And I agree with that. If
19 those conditions -- and that's the correct charge. But
20 they don't have the right-of-way when they don't blow
21 the horn and when they obstruct the vegetation and the
22 train is not plainly visible. Obviously, that's our
23 argument in the case. This is taken out of context.

24 THE COURT: All right. Mr. Wray, you need to
25 pull these three cases and show me these three cases

1 where it says straight out that this is the law.

2 MR. WRAY: Yes, ma'am.

3 THE COURT: Mr. Purcell --

4 MR. WRAY: Well, the first case --

5 THE COURT: Just find it on your case and
6 highlight it for me, if you don't mind.

7 MR. WRAY: I believe we did that already with
8 the one that we gave Aaron yesterday.

9 THE COURT: Aaron, do you have it?

10 [Off the record momentarily]

11 MR. WRAY: I had Arnold first, on page 731.

12 THE COURT: Arnold?

13 MR. WRAY: And the court says: [reading] the
14 right of a railroad company at a highway crossing is
15 superior to the right of a traveler on a highway.

16 MR. PARKER: Well, we agree with that under the
17 conditions set forth in 56-5-2710.

18 MR. WRAY: This case doesn't talk about 56-5-
19 2710 at all.

20 THE COURT: Well, Mr. Wray, I will charge what
21 you just read, but that doesn't say what this says.

22 MR. WRAY: Well --

23 THE COURT: I know it's your interpretation, but
24 it's --

25 MR. WRAY: I'll be happy just for you to say the

1 right of railroad --

2 THE COURT: Find the next -- find Chisholm.

3 Does Chisholm say the law gives a train the right-of-
4 way?

5 MR. WRAY: It says: [reading] a railroad grade
6 crossing is in itself a warning of danger both to
7 employers of the railroad in charge of trains and the
8 travelers from the highway. But since a railroad train
9 by reason of it's character of momentum and the
10 requirements of public travel by means thereof has the
11 right-of-way at such crossings, it is the common law
12 duty of the railroad company to give such signals as
13 may be reasonably sufficient.

14 So, again, we've got the charge on reasonable
15 signals.

16 Your Honor, that --

17 THE COURT: I think we've read all of that
18 portion on another charge, didn't we?

19 MR. PARKER: We've read -- we haven't -- if
20 you're going to charge that they have the right-of-way,
21 they have the right-of-way under the conditions of 56-
22 5-2710. And clearly the statute says --

23 THE COURT: Give me -- someone give me 57 --

24 MR. PARKER: 56-5-2710?

25 THE COURT: Yeah. I want 2710. Oh, you have

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1 it, Aaron, don't you?

2 MR. PARKER: It's in our charges, Your Honor.

3 THE COURT: Let me just read it real quick. Or
4 does anyone have -- does anyone have the code section
5 right there?

6 MS. AMUNDSON: I don't think I have --

7 THE COURT: I don't have it.

8 [Off the record momentarily]

9 THE COURT: I don't think 2710 says the same
10 thing.

11 MR. PARKER: Well, I think it's exactly -- it
12 says: [reading] must stop -- driver shall stop within
13 fifty feet and not less than fifteen feet from the
14 nearest rail of the railroad and shall not proceed
15 unless he can do so safely, and the foregoing
16 requirements shall apply. And in this case the two
17 things that -- a railroad train approaching within
18 approximately 1500 feet of a highway crossing, if it's
19 a signal audible from such distance that train by
20 reason of speed or nearness to the crossing is a --

21 THE COURT: Well, I can read the code section.

22 MR. PARKER: -- hazard before an approaching
23 train is plainly visible and in hazardous proximity to
24 the crossing.

25 THE COURT: Again, is there any language in any
/

1 of the cases that says that the train has the right-of-
2 way at a railroad crossing given any circumstances?

3 MR. WRAY: It says: [reading] the right of a
4 railroad company at a highway crossing is superior to
5 the right of a traveler from a highway.

6 You can just read that --

7 THE COURT: Okay. Well, let's just read that.

8 MR. WRAY: That's a direct quote from --

9 THE COURT: It's superior to.

10 MR. HARMON: The whole quote, Your Honor, is:
11 [reading] the right of a railroad company at a highway
12 crossing is superior to the right of a traveler upon a
13 highway but this superior right does not relieve the
14 company of reasonable and ordinary caution.

15 THE LAW CLERK: That is in plaintiff's charge.

16 THE COURT: Okay. That's already in one of the
17 plaintiff's charges.

18 MR. PARKER: Well, we've already charged that,
19 yeah.

20 THE COURT: Well, it's already in there, then,
21 y'all. So if that's what we are going to charge -- as
22 long as that whole thing is in there, then that's fine.

23 MR. WRAY: It's not all in there. They cropped
24 the first sentence.

25 THE LAW CLERK: We put it back in.

1 THE COURT: We put it -- we put it back in.

2 MR. WRAY: All right. Well, then, no problem.

3 THE COURT: It's back in.

4 MR. WRAY: Then we're covered. Thank you.

5 THE COURT: Thank you.

6 MR. WRAY: And then 38 I assume -- is there some
7 objection to that --

8 MR. PARKER: It is --

9 MR. WRAY: -- highway right-of-way?

10 MR. PARKER: It is because it doesn't apply to
11 trains. 6-5-2710 applies to trains and motorist
12 vehicles. It's got no applicability to this case.

13 MR. WRAY: Well, somebody has to have the right-
14 of-way, whether it's --

15 MR. PARKER: Well, the train has the right-of-
16 way under those conditions. That's the law.

17 MR. WRAY: Well, I would appreciate it if I
18 could finish my comment.

19 MR. PARKER: Certainly.

20 MR. WRAY: Either the car or the train has to
21 have the right-of-way. The statute that you cited says
22 if it's blown approximately 1500 feet before the
23 crossing. And it was blown approximately 15 [sic] feet
24 before the crossing. But obviously the Court has got
25 to define for the jury something on what right-of-way

1 means.

2 MR. PARKER: I think they clearly understand the
3 train has got the right-of-way if it blows the horn for
4 1500 feet, approximately, as the statute says and if
5 it's plainly visible, they have the right-of-way. We
6 don't contest that. But those are the only conditions
7 they have the right-of-way on. If they don't comply
8 with the law, they don't have the right-of-way.

9 MR. WRAY: I guess --

10 THE COURT: Let me ask you this: Aaron, in that
11 charge, in the plaintiff's charge, does it say that one
12 has the superior right-of-way? What does it say?
13 What's the actual terminology, the use of a right-of-
14 way? I'm not sure it did, is my question.

15 MR. WRAY: Well, let me say this. The charge
16 that I submitted doesn't say the train has the right-
17 of-way. It just defines right-of-way. It doesn't say
18 I charge you that the train has the right-of-way in
19 number 38. It just defines what it is.

20 THE COURT: But, again, you've got to put some
21 context for the charge. Why are we defining right-of-
22 way if we're not using the word right-of-way?

23 MR. WRAY: Well, I guess in light of the
24 modification to 37, you wouldn't have --

25 THE COURT: Right. You wouldn't need --

1 MR. WRAY: I think it says superior right --

2 THE COURT: -- 38. That's why I asked her in
3 the earlier charge that we're going to -- that we've
4 agreed is going to encompass the whole thing, I just
5 asked Erin if the word right-of-way is in there. And
6 if it is, then I'll charge it as to explain it. But it
7 appears from what she just said, it does not. I think
8 it says it has a right superior to.

9 Is that correct?

10 THE LAW CLERK: Right of the railroad is
11 superior to the right of a traveler.

12 THE COURT: Superior to. So I don't think this
13 is necessary, because we don't use the word right-of-
14 way. But if it's coming farther down here, then we'll
15 certainly charge it. Okay?

16 The next one I have is number 39. It says the
17 train-time quote.

18 MR. WRAY: Yes, ma'am.

19 MR. PARKER: I think if you -- you would have to
20 charge the whole quote, and that is: [reading]
21 presence of railroad crossing, notice to a person
22 approaching, attempt to cross it, of danger of
23 colliding with a passing engine of train.

24 MR. WRAY: I have no problem with charging the
25 entire quote --

1 THE COURT: Okay. So let's do it again.

2 [Reading] The very presence of a railroad crossing --

3 Is that correct?

4 MR. HARMON: It's just presence. Presence of
5 railroad crossing. It's actually one of the head-notes
6 in the case.

7 THE COURT: [Reading] Railroad crossing is
8 notice to --

9 It doesn't say the person as opposed to any
10 motorist.

11 MR. HARMON: It says person.

12 THE COURT: Okay. [Reading] Is notice to the
13 person, approaching or attempting to cross it, of the
14 danger of colliding with a passing engine or train.

15 Is that correct? That's the correct language;
16 correct?

17 MR. WRAY: And, Your Honor, I think I have this
18 somewhere later on. It would suit me if we just do it
19 with 39 and then I can withdraw my later one.

20 THE COURT: Wonderful. All right.

21 MR. WRAY: You recall we talked about it
22 yesterday. The first sentence in that paragraph says
23 that: [reading] it's been well-said that it is always
24 train time at a railroad crossing. The law regards a
25 railroad crossing as a place of danger. The very

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1 presence of such a crossing is notice to the person,
2 approaching or attempting to cross it, of the danger of
3 colliding with a passing engine or train.

4 And I would just ask the Court just to read the
5 entire --

6 THE COURT: Okay. And actually Aaron had
7 already pulled that, and she actually liked it, as
8 well. And that's where we got our train-time quote.
9 So y'all --

10 MR. PARKER: Well, I don't think that that's
11 necessarily correct, but the -- I don't know whether
12 that's a good charge of the law. I think the law would
13 be more neutral to read the presence of railroad
14 crossing is notice to person approaching.

15 Everything that's said in a case is not
16 chargeable to a jury, because the holding -- that's not
17 a holding in that case. That's -- you know, it's
18 something said, clearly, in that case. But I think
19 that the point of it is that the presence of the
20 railroad crossing gives notice that you may -- that
21 there may be a train coming. We don't disagree with
22 that. But to say it in a way that gives it undue
23 emphasis we don't think is correct. We don't think
24 that is the law. We think that is dicta in that case.
25 It's not a holding in that case that it's train time at

1 a crossing.

2 THE COURT: You know what it seems to mirror a
3 little bit is the MUTCD language. You know, I think
4 there was a lot in the MUTCD that said, you know,
5 there's always danger at a railroad crossing. I mean,
6 I think that's -- I think a part under the guidelines,
7 or it's something that you read or asked about.

8 All right. Well, I'm going to read the whole
9 quote. I just -- I think it's fair in context.

10 MR. PARKER: Your Honor, I am going to leave
11 this with Mr. Holmes and if I can be excused?

12 THE COURT: Absolutely.

13 MR. PARKER: And thank you.

14 THE COURT: Absolutely. See you in the morning.

15 MR. PARKER: In the morning. Thank you.

16 [Whereupon, Mr. Parker exits the courtroom at
17 4:01 p.m.]

18 [Off the record momentarily]

19 THE COURT: Okay. Number 40, Mr. Wray.

20 MR. WRAY: Is there any objection?

21 MR. HOLMES: Yes, Your Honor. I don't see where
22 this is applicable to this case. It's talking about
23 when a motorist is injured.

24 MR. WRAY: We'll withdraw that one. I think Mr.
25 Harmon is correct.

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1 THE COURT: Okay.

2 MR. WRAY: 41, Your Honor, is covered by one of
3 the plaintiff's you've already said you are going to
4 charge, so we'll withdraw 41.

5 THE COURT: Right. Okay.

6 MR. WRAY: 42, as you mentioned yesterday --

7 THE COURT: Oh. I'm sorry, Mr. Wray. I'm off
8 one. I apologize. Okay. I'm sorry. I was looking at
9 the wrong one.

10 Now we're on 42, sir. I'm sorry.

11 MR. WRAY: Yes, ma'am.

12 42 you commented yesterday you thought was
13 covered. I looked back at the charges last night and I
14 don't think it is covered -- or at least it was not
15 stated to the proposition as broadly as we've stated
16 here -- and we would like our charge submitted.

17 THE COURT: Because basically it's the same as
18 number 26. And is that Plaintiff's 26, Aaron, do you
19 know, or is it --

20 THE LAW CLERK: I think it was theirs that you
21 had -- they had taken a part of the --

22 THE COURT: The plaintiff? Is that what you're
23 saying? It was part of plaintiff? or CSX's?

24 THE LAW CLERK: I think CSX's.

25 THE COURT: Okay. Let's look at number 6 of

1 CSX, then.

2 MR. HOLMES: 6, or 26?

3 THE COURT: I'm sorry. 26. You're right. I'm
4 sorry, Gray.

5 I don't -- do I have that? I think you have
6 that.

7 [Off the record momentarily]

8 THE LAW CLERK: I think if you did that whole
9 quote.

10 THE COURT: What is the whole quote?

11 THE LAW CLERK: That was the one we had a debate
12 about, too, with the jury charge. That was the really
13 confusing case.

14 THE COURT: Oh. It's the Epstein case.

15 THE LAW CLERK: Where it talks about, also talks
16 about, gross negligence.

17 THE COURT: Right.

18 Okay. What do you propose we do as far as the
19 total charge? Because 26 apparently goes to some of
20 this.

21 THE LAW CLERK: If you -- if you do 26 -- and
22 the only thing missing -- I'm going to say if you do
23 this quote, you don't need 26 because it's actually the
24 part where it talks about if one sees or hears a train
25 and then -- it's more based on proximate cause. Do you

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1 know what I'm talking about?

2 MR. WRAY: Yes. I would agree 26 I had a
3 question mark on. You had not said yesterday -- if
4 you'll charge 26, I'll withdraw 42. I do agree. But I
5 want one or the other.

6 THE COURT: All right.

7 MR. HOLMES: Well, Your Honor, I mean, the
8 evidence in the case is that it's undisputed that the
9 bell wasn't sounded in compliance with the statute. I
10 mean, I don't see where you can charge 26 when they've
11 admitted that they didn't comply.

12 MR. WRAY: That's the discussion we had
13 yesterday. The case specifically talks about the fact
14 that you don't sound the bell or horn does not excuse
15 somebody --

16 THE COURT: Right.

17 MR. WRAY: -- from them pulling out and just
18 saying, well, I've got no responsibility because you
19 didn't sound the horn properly. It says if one sees,
20 it doesn't say that she saw or heard it. It says if
21 she sees or hear it. Just the mere fact that they
22 didn't comply with the statute doesn't relieve her of
23 her responsibility.

24 MR. HOLMES: That's right, Your Honor. I'm
25 sorry. I did misread that. But actually I think the

1 argument would be there's been no -- there's been no
2 evidence that she did see or hear the train. I mean,
3 all there has been is speculation as to that. And they
4 didn't put forth anything in their case to say that she
5 saw it or heard it.

6 THE COURT: Well, the only way you could get
7 that testimony is through Ms. Colvin, and she is
8 maintaining that she didn't. So --

9 MR. HOLMES: They could have gotten it through a
10 passenger in the car, Your Honor. I mean, the only
11 evidence that was put forward was that there was
12 another person out there --

13 THE COURT: Who didn't see or hear anything.

14 MR. HOLMES: -- that was at a different angle,
15 that didn't -- that was able to see the train. The
16 testimony from Mr. Terry was that he didn't see it or
17 hear it until she was hit.

18 THE COURT: I think based on circumstantial
19 evidence this jury could conclude that she saw the
20 train, she decided to go and she thought she could
21 either get past it or beat it in some way and that she
22 pulled out. I mean, I think there is circumstantial
23 evidence that could suggest that.

24 MR. WRAY: That's correct. So we would ask Your
25 Honor will just charge 26, and we'll withdraw 42.

1 THE COURT: Okay.

2 MR. HOLMES: And can I take a look at the actual
3 language from Epstein --

4 THE COURT: Absolutely. I'm going to -- as it
5 stands right now, though, I'm going to charge it
6 unless, Gray, you find that it's not a proper quote.
7 Okay?

8 MR. HOLMES: Thank you, Judge.

9 THE COURT: So we're going to charge that, but
10 we are going to withdraw 42. Okay, Mr. Wray?

11 MR. WRAY: Yes, ma'am.

12 THE COURT: All right.

13 MR. WRAY: 43 is covered by one you did already.

14 THE COURT: It's already in.

15 MR. WRAY: Yes, ma'am.

16 THE COURT: The same with 44.

17 MR. WRAY: 44, my issue was that our charge was
18 more comprehensive. It's taken directly from Anderson.
19 I agree you don't need to charge it twice, but I will
20 ask you to charge our 44 instead of --

21 THE COURT: I've got number 29 and number 32
22 that it's similar to.

23 MR. WRAY: Of ours? I've got --

24 THE COURT: I don't know. I can't tell --

25 MR. WRAY: I've got it as similar to Plaintiff's

1 8 and 24.

2 THE LAW CLERK: It would be theirs that I was
3 commenting on because --

4 THE COURT: We've got 29 and 32.

5 THE LAW CLERK: -- but it's probably similar to
6 the plaintiffs.

7 I mean, I could look at -- which one did you
8 say? Plaintiffs --

9 MR. WRAY: I've got it matched up with
10 plaintiff's 8 and 24, but theirs is not quite as
11 comprehensive as ours so I would ask that we charge our
12 44 instead of their 8 and 24. It's the same basic
13 principle.

14 THE COURT: It's the same thing, it's just more
15 inclusive?

16 MR. WRAY: Yes, ma'am.

17 MR. HOLMES: I'm missing my 24. But as I
18 understand it, Your Honor, we actually gave the direct
19 quotes out of the case when we went through and did 8
20 and 24, rather than Judge Anderson's --

21 THE LAW CLERK: You put them together, 8 and 24,
22 as one --

23 MR. WRAY: That's right.

24 THE COURT: Yeah, we -- right.

25 [Off the record momentarily]

1 THE COURT: I can tell you, I hate the part
2 where Judge Anderson writes that someone is guilty of
3 negligence. But --

4 [Whereupon, the Court and the law clerk confer]

5 THE COURT: I think the whole thing applies to a
6 highway, doesn't it?

7 MR. HOLMES: I believe Anderson's request to
8 charge pertains to a highway --

9 THE COURT: Right.

10 MR. HOLMES: -- and the charges that we
11 submitted are specific to railroad cases.

12 THE COURT: Right. And it came from a case?

13 MR. HOLMES: Yes, Your Honor. I don't have my
14 24, but that's my memory of it is that it was a quote
15 and that we changed it actually to match up because --

16 MR. WRAY: And that's correct. I don't take
17 issue with that.

18 THE COURT: Okay.

19 MR. WRAY: And 44 does speak about highways, and
20 I think we touched upon that yesterday.

21 THE COURT: Right.

22 MR. WRAY: I don't mind taking out the language
23 that refers specifically to highway, but the principle
24 I want charged is the duty to look and observe even if
25 there are unfavorable conditions. And, again --

1 THE COURT: Okay. I think when we combined 8
2 and 24 we did that.

3 MR. WRAY: Okay.

4 THE COURT: I think we did.

5 MR. WRAY: All right.

6 [Off the record momentarily]

7 THE COURT: So just if we add the middle portion
8 of yours, Ron?

9 MR. WRAY: Yes, ma'am. That would be fine.

10 THE COURT: Okay. So let's go ahead and do
11 this. Let's just add that.

12 MR. WRAY: 45, Your Honor, is the one we talked
13 about earlier that I told you I had one that talked
14 about train time and you said you were going to modify
15 the earlier charge to --

16 THE COURT: So we're going to put the train time
17 one on, so we don't need this?

18 MR. WRAY: That's right. 45 I don't need.

19 THE COURT: Okay.

20 MR. WRAY: 46.

21 MR. HOLMES: Your Honor, of course, we object to
22 this. There has been no evidence that Ms. Colvin was
23 impaired. This has no relevance to this case. All
24 there has been is -- and they said they were going to
25 put forward an expert that was going to tie all this

1 together and talk about the combination of these drugs
2 and alcohol, but there was no testimony to that. I
3 mean, there's been nothing but talk about what a
4 warning label says, that there could be -- you could
5 suffer dizziness, drowsiness, all these conditions.
6 But there's been no testimony that that happened here.
7 There's no one that confirmed any erratic driving.
8 There is no one that says she pulled forward --

9 THE COURT: Well, the simple fact that she
10 pulled out in front of a train, let's say for
11 argument's sake that she saw it, would be considered
12 not maybe erratic but not good driving.

13 MR. WRAY: That's correct.

14 THE COURT: Unusual driving.

15 MR. HOLMES: But you're kind of deciding the
16 whole issue of the case, by putting that in there, if
17 you make that assumption.

18 MR. WRAY: No. The jury may conclude --

19 THE COURT: No. It's for the --

20 MR. WRAY: -- she wasn't impaired.

21 THE COURT: It's for the jury to determine.

22 MR. HOLMES: And, Your Honor, the other issue
23 is, I mean, these charges say that she has to be
24 materially and appreciably impaired.

25 THE COURT: But that's for them to decide.

1 MR. WRAY: That is correct.

2 THE COURT: That isn't for us to decide.

3 MR. HOLMES: There has to be some evidence for
4 them to decide that, and there is nothing that's been
5 provided where they could determine that. There has
6 been no testimony that would raise that conclusion. I
7 mean, the only testimony as to the amount of alcohol
8 and the -- how it would impair someone is that under
9 our law she's not presumed to be impaired and that she
10 had a low blood alcohol level.

11 THE COURT: The problem, though, is the BAC
12 doesn't take into account the mixture of the alcohol
13 and any narcotic. It just measures the alcohol.

14 MR. WRAY: That's right. And the law doesn't
15 require her to be legally drunk to be impaired --

16 THE COURT: Obviously.

17 MR. WRAY: -- and that's our next charge.

18 THE COURT: I can tell you, Gray, I'm inclined
19 to charge this. I do understand your issue about there
20 was no expert testimony linking it up. But I don't
21 think a jury needs it. I think with common sense they
22 can look at it and say if someone has drank two wine
23 coolers and taken a Darvocet and a muscle relaxer --

24 MR. JACOBSON: Your Honor, may I approach with a
25 couple of charges on that?

1 THE COURT: Sure.

2 MR. JACOBSON: They may be Johnny-Come-Lately
3 charges. But that bears on this issue, too. And,
4 of course, we would observe our objection to having
5 any evidence coming in about the alcohol and drugs at
6 all --

7 THE COURT: Right.

8 MR. JACOBSON: -- because as I recall the
9 evidence, nobody actually said that she was impaired.
10 All the witnesses stated that she wasn't impaired. But
11 I think it's important to let the jury know that in
12 South Carolina it's not against the law to drink and
13 drive.

14 THE COURT: Oh, I agree with you, Mr. Jacobson.

15 MR. JACOBSON: That's a fair charge. And it's
16 only -- that would appreciably affect the -- materially
17 affect their faculties.

18 THE COURT: I will tell you this. I more than
19 agree with you. And if I charge this, I will charge
20 these, definitely --

21 MR. JACOBSON: All right. Now --

22 THE COURT: -- I think they go hand in hand.

23 MR. HOLMES: Your Honor, you don't think we
24 could just work out -- I don't think there needs to be
25 four charges on it. I think -- could we maybe work

1 something out where we could incorporate these?

2 THE COURT: I will read them as if they all read
3 as a section. And I can tell you, what we're going to
4 do after this is we're going to kind of try to group
5 these things together. As Mr. McLeod suggested, when
6 we read all the statutes together, obviously we will
7 read these together all having to do with alcohol. I
8 mean, I would like for the jury to be able to make some
9 sense of the jury charge, and I think we're going to
10 have to do that.

11 MR. JACOBSON: It's been a long time since I've
12 tried a DUI case, Your Honor, but I believe that the
13 amount of alcohol in -- based on the BA results that
14 came in during this particular case, I think there's
15 actually a presumption that she was not under the
16 influence of alcoholic beverages, and they should be
17 charged on that. It was one-fifth of the amount --

18 THE COURT: Right.

19 MR. JACOBSON: So I think we ought to give that
20 charge as a presumption based on that BA level, she is
21 not presumed to be under the influence of alcohol.

22 THE COURT: But the problem is -- and I would
23 agree with you except that it doesn't, again, take into
24 account the narcotics that were mixed --

25 MR. WRAY: That's right.

1 THE COURT: -- with the alcohol. All of that
2 goes into the impairment.

3 MR. JACOBSON: That would go -- that would
4 address at least the alcohol.

5 THE COURT: True.

6 MR. JACOBSON: We have in evidence --

7 THE COURT: True.

8 MR. JACOBSON: -- the BA result, and I think the
9 jury should be charged at least in South Carolina,
10 based on the alcohol alone, that that would be the
11 presumption she would not be impaired.

12 THE COURT: Okay. Are you going to get me the
13 proposed charge? You-all are going to find that and
14 give them a copy of it and --

15 Chuck, there should be a copy of one back here
16 in this room.

17 MR. WRAY: I gave you mine, Your Honor.

18 THE COURT: Oh. I'm sorry.

19 MR. WRAY: She is welcome to look at it, if you
20 would like.

21 THE COURT: It's still in my lap.

22 [Whereupon, the Court proffers documents to Mr.
23 Jacobson]

24 MR. JACOBSON: Thank you.

25 MR. MCLEOD: May I ask the Court a question?

1 THE COURT: Yes, sir.

2 MR. MCLEOD: You said that this charge -- I've
3 got theirs here -- it is not against the law of South
4 Carolina to drink and drive, and the rest of it -- did
5 you say you're going to charge that?

6 THE COURT: Yeah. That's proper. It's not
7 against the law to drink and drive.

8 MR. MCLEOD: Well, the testimony in the case is,
9 you know, is drinking and driving and a mixture of
10 drugs.

11 THE COURT: Right.

12 MR. MCLEOD: You don't think it's a little
13 misleading just to say that --

14 MR. HOLMES: Your Honor, they are charging --
15 we're charging exceptions to the Tort Claims Act that
16 we said yesterday weren't applicable but that we would
17 just put them in them for continuity. And I don't
18 think that charging the law --

19 MR. MCLEOD: I was trying to work on something
20 else, but then I just heard drink and drive and --

21 THE COURT: Uh-huh.

22 MR. MCLEOD: That really doesn't fit the
23 testimony. If you're going to wind them all up
24 together, it will probably be taken care of.

25 THE COURT: I think we are going to wind them up

1 all together, but I -- what we don't want to happen is
2 I don't want this jury to think just because she had
3 had two wine coolers that she was drunk, because that's
4 -- you know, and that she -- that violated a law,
5 because it doesn't. So that's the point of this
6 charge.

7 Mr. McLeod, I think what I'm going to do is I
8 will --

9 MR. MCLEOD: I think if you're going to --

10 THE COURT: I'll do it all together.

11 MR. MCLEOD: Yeah. If you're going to charge
12 one that -- you know, that they can be impaired and --
13 with substances other than -- I mean, like drugs or
14 whatever else.

15 MR. WRAY: That's --

16 MR. JACOBSON: Matter of fact, Your Honor -- as
17 a matter of fact, they --

18 MR. MCLEOD: Then I -- let me sit down and hush.

19 MR. JACOBSON: As a matter of fact, it's not
20 against the law in South Carolina to take alcohol, do
21 drugs, do them all together. There's no law against
22 doing all of that and driving in South Carolina. There
23 isn't. The only law is against doing it to the --

24 THE COURT: Right.

25 MR. JACOBSON: -- the extent you become

1 impaired, and we would ask for a charge on that, too.

2 THE COURT: Well, no. You've got that already
3 in your charge.

4 MR. JACOBSON: Does it say just alcohol, or say
5 alcohol and drugs?

6 THE COURT: As to which portion of it?

7 MR. JACOBSON: Let me see.

8 THE COURT: Well, I can tell you 56-5-2930 -- I
9 mean, it does. It clarifies. It says to the extent.
10 If they're under the influence to the extent that their
11 faculties are materially and appreciably impaired.

12 MR. JACOBSON: Well, but I --

13 THE COURT: It's not an absolute.

14 MR. JACOBSON: But the charge I asked for: it's
15 not against the law of South Carolina to drink and
16 drive. And in this case there's evidence of drinking
17 and taking drugs together, so I would ask the Court --
18 the Court to instruct the jury that it's not against
19 the law in South Carolina to drink, to take medication,
20 and to take both together and drive. There is no law
21 against that. A person is only guilty of driving under
22 the influence of those intoxicants --

23 THE COURT: If it impairs them. I mean --

24 MR. JACOBSON: -- substances. Yeah.

25 But I want you to include not only to drinking

1 and driving, but to drink, take medication, to take
2 them both separately or together, and drive. There's
3 no law against any of that. There's only one crime
4 prohibited, and that is to taking those -- ingesting
5 those substances and then driving under the influence
6 if their abilities -- right?

7 MR. WRAY: And that would be our objection. If
8 you're going to give the first part of the charge that
9 Mr. Jacobson requested, then you need to add the clause
10 in: [reading] so long as it does not materially impair
11 the driver's --

12 MR. JACOBSON: Yeah.

13 MR. WRAY: -- [reading] ability..

14 THE COURT: Oh. It clearly says that.

15 MR. JACOBSON: I agree -- I agree with that.

16 THE COURT: It clearly says that. There's no
17 question.

18 MR. WRAY: Well, all I saw was that it's not
19 against the law to drink and drive, period.

20 THE COURT: No. It says: [reading] a person is
21 guilty of driving under the influence only if his
22 abilities are impaired by alcohol --

23 MR. JACOBSON: And/or drug -- and/or drugs.
24 Right.

25 THE COURT: Yeah. I'm sorry.

1 MR. HOLMES: Medications.

2 MR. JACOBSON: And on medications. Right.

3 MR. WRAY: And, again, I think that's covered by
4 our 47. But you can look at them all together.

5 THE COURT: It's covered by your 47?

6 MR. WRAY: Yes, ma'am. We say specifically the
7 law is --

8 THE COURT: Your 46, or 47?

9 MR. WRAY: 46 --

10 THE COURT: Oh, here we go. We haven't even hit
11 47. Okay.

12 MR. WRAY: That's right. 47 then speaks to the
13 point. Mr. Jacobson is getting to: the motorist
14 violates the law if she consumes alcohol or drugs,
15 including prescription medication, to the extent she
16 cannot drive a motor vehicle with reasonable care or if
17 she cannot drive as a prudent person would -- prudent
18 driver would.

19 That speaks to that point.

20 THE COURT: They both say the same thing.

21 MR. JACOBSON: They say similar, but I think
22 there may be some people on the jury that actually have
23 this notion that it's against the law to drink and
24 drive. And I think that this was -- this was taken out
25 of State vs. Shepard, Your Honor.

1 THE COURT: Right.

2 MR. JACOBSON: This is still good law.

3 THE COURT: All right. What we're going to do
4 is this. We are going to take all, now, four of these,
5 and we are going to put them together so they make some
6 sense. I'm not going to repeat anything that's
7 repeated in both. But in all fairness, I'm going to
8 make sure that all of them are done together. Okay?

9 MR. WRAY: That's fine.

10 [Whereupon, the Court and the law clerk confer]

11 MR. WRAY: All right. Your Honor, we can make
12 some progress here. 49 --

13 THE COURT: 48 was already in the damages
14 charge, so that's fine; correct?

15 MR. WRAY: Yes, ma'am.

16 THE COURT: 49 is gone? 49?

17 MR. WRAY: 48 is covered.

18 THE COURT: 49?

19 MR. WRAY: 49 is covered by your general charge.

20 THE COURT: 50 is covered.

21 MR. WRAY: 50. Yes, ma'am.

22 THE COURT: 51 is already in my charge.

23 MR. WRAY: Yes, ma'am.

24 THE COURT: Obviously, mathematical certainly.

25 MR. WRAY: 52 is covered.

1 THE COURT: All right. 55. I understand why
2 you submitted this. Obviously, we're going to note it
3 for the record. Obviously, I'm not going to charge it,
4 based on my prior ruling.

5 MR. HOLMES: 53 and 54, are those --

6 THE COURT: Oh. I'm sorry. I'm sorry. We have
7 to go back, I believe.

8 52 is in my standard charge, y'all.

9 MR. WRAY: Yes.

10 THE COURT: I'm sorry.

11 MR. WRAY: And I have 53 --

12 THE COURT: I didn't mean to jump. 53 --

13 MR. WRAY: 53 and 54, as well.

14 THE COURT: And those are all in my standard
15 charge. Okay?

16 MR. WRAY: Yes, ma'am. 55 we will submit.

17 THE COURT: I wanted to make sure -- 54 -- why
18 do I think we already reached this? 54 is talking
19 about reducing it to present day value. And my normal
20 charge only has one line as to this -- and I actually,
21 Mr. Wray, like this -- so I'm going to go ahead and add
22 that in my portion. And I just want to make sure you
23 know that -- I think we've already done this one.

24 THE LAW CLERK: Well, because yesterday at the
25 end we kind of went through, and that's why --

1 THE COURT: We did skip through on some of
2 these, and I apologize.

3 MR. WRAY: That's right.

4 THE LAW CLERK: It might be repeating it.

5 THE COURT: All right. 55, then, is what we are
6 on; right?

7 MR. WRAY: Yes, ma'am.

8 THE COURT: And that was what I just stated we
9 talked about. This is the claim for the medical
10 expenses that are incurred by allegedly Ms. Tonia
11 Colvin --

12 MR. WRAY: That's correct.

13 THE COURT: -- which she hasn't paid.

14 MR. WRAY: That's correct.

15 THE COURT: All right. So that's not coming in.
16 Obviously if I'm not charging 55, 56 doesn't come in.

17 MR. WRAY: Well, 56 is a little bit different
18 because of the issue -- again, to make sure my position
19 is preserved: they do have a verdict form -- and I
20 think you are inclined to do this. I'm getting ahead
21 of myself. I don't know what we're going to do on the
22 verdict form. But you indicated, at least earlier in
23 the trial, that you might have a specific line to put
24 down for medical expenses.

25 THE COURT: Right.

1 MR. WRAY: If you do that and they award those
2 expenses in this case, then you have deprived us of our
3 comparative negligence --

4 THE COURT: Negligence --

5 MR. WRAY: -- defense as to that claim, because
6 it is Ms. Colvin's claim and we do have a defense to
7 any claim she may have of comparative negligence. We
8 don't have it to Lillian's claim and so --

9 THE COURT: Right.

10 MR. WRAY: -- and that's why I objected to all
11 this coming in, because I think it's going to be very,
12 very confusing. I understand the Court's concern to
13 start talking about comparative negligence --

14 THE COURT: Comparative --

15 MR. WRAY: -- only as to this one item of
16 damages. But that's why we wanted all that evidence
17 out, because we think under the law it's not properly
18 admitted. Now it's come in, so now I've got to deal
19 with it in the jury charge because if they're going to
20 be told --

21 THE COURT: I think our only reason for putting
22 it in was is if for some reason the court decides that
23 it wasn't appropriate, y'all are just going to take
24 that portion out, correct, I mean, as far as any award?

25 MR. HOLMES: That's what the case -- the earlier

1 cases did address this issue, is the court just
2 remitted the amount that they found to be medicals.
3 And that's why we thought it would be a good idea to
4 put in the actual amount, because this way there would
5 be no question as to what that amount was if the court
6 finds that they -- that she can't recover. I can't
7 remember the exact -- it was Tucker, Mills --

8 THE COURT: Right.

9 MR. HOLMES: -- or one of those --

10 THE COURT: Yeah. It was back in nineteen --

11 MR. HOLMES: There are two different ones.

12 There's one from --

13 THE COURT: -- like sixteen and --

14 MR. HOLMES: -- in nineteen --

15 THE COURT: -- for a 15-dollar bill and -- or a
16 15-dollar bill that the daddy paid.

17 MR. HOLMES: Yeah.

18 MR. WRAY: But here's the problem with that
19 approach. I understand what Mr. Harmon is saying.
20 Let's assume the jury returns a verdict for the
21 plaintiff and further assume that the jury awards an
22 item as an element of damages, the medical bills.

23 THE COURT: Right.

24 MR. WRAY: We go up on appeal --

25 THE COURT: Right.

1 MR. WRAY: -- and the court says that wasn't
2 error, the Court -- that Your Honor properly allowed
3 that claim to go to the jury, what we never get the
4 chance to litigate what is our comparative defense to
5 that claim. They can set aside and -- I'm sorry. I
6 stated it backwards. The court --

7 THE COURT: Well, if there was a proper claim,
8 there would be no comparative negligence, then.

9 MR. WRAY: I'm sorry. I stated it backwards.

10 Let's assume the court, on appeal, says you were
11 in error --

12 THE COURT: Right..

13 MR. WRAY: -- and it should not have been
14 submitted as part of this claim.

15 THE COURT: Right.

16 MR. WRAY: And then under Mr. Holmes' approach
17 they say, well, we'll just take the two fifty -- I
18 think the medical bills are about two fifty -- we'll
19 just take that off and reduce it from whatever the
20 judgment turns out to be.

21 THE COURT: Right.

22 MR. WRAY: That means we never got the chance
23 to litigate our comparative defense as to that claim
24 because they will just set off the two fifty. It
25 might --

1 THE COURT: It will be setting off the whole
2 amount, though, as opposed to just a potentially
3 comparative amount. Let's say they assigned her, you
4 know, thirty percent of fault and you seventy percent
5 at fault. You know, they're -- they are the ones
6 losing out, quite frankly, by not charging the
7 comparative. Does that make sense?

8 MR. HOLMES: It would have to be retried.

9 THE COURT: Pardon?

10 MR. HOLMES: It would have to be retried, if
11 that was the case, if they found that it was only --
12 that that right was only with Ms. Colvin.

13 THE COURT: Right.

14 MR. HOLMES: And then that issue is going to
15 have to be retried.

16 MR. WRAY: I may not be stating it correctly,
17 but I understand --

18 THE COURT: No. Ron, explain it to me, because
19 I understand -- I guess I don't understand.

20 MR. WRAY: Well, I think my example -- I think
21 you were correct. My example didn't work out quite
22 right.

23 THE COURT: Right. I mean, because they're
24 basically -- that would be like imputing all the fault
25 to Ms. Colvin, based on backing the whole thing out

1 unless, like you said, you just retried the whole
2 thing.

3 Now, her case has not been tried; correct?

4 MR. WRAY: I think I had it right the first way
5 I was going. If they were to say the claim was
6 properly litigated in this case and affirm the amount
7 awarded, the 250,000, let's say, hypothetically, that
8 amount would have been reduced or we would not have had
9 the opportunity to reduce that amount by her
10 comparative fault. So I had it right the first way I
11 was going.

12 And that's our objection. It clearly is her
13 claim. There's no question about that. All the cases
14 we cited said that. Mr. Holmes says, well, even though
15 it's her claim, the remedy is on appeal. If they gave
16 her damages for that that are improper, the court just
17 sets that -- sets aside that amount.

18 THE COURT: Right

19 MR. WRAY: Well, they're not entitled to that
20 amount, and so if the court upholds or allows that
21 claim and says she can recover in this action, the
22 \$250,000, then we never got the chance to litigate our
23 comparative defense as to those bills. That's my
24 objection.

25 MR. HOLMES: Your Honor, the --

1 THE COURT: Mr. Jacobson, are you following
2 this?

3 MR. HOLMES: I understand what he is saying, Your
4 Honor, but I just don't see where -- if the -- if the
5 right is with Lillian, and we're correct under the law,
6 then how would there be any sort of comparative --

7 THE COURT: Comparative aspect. And --

8 MR. HOLMES: -- defense against her.

9 THE COURT: -- that's what I asked him. But
10 that's assuming, as you said, that obviously the case
11 law, as it is, is that it is only a claim of the mama
12 and that it would have to be comparative. But I think
13 at that point we're back to you still have to back the
14 whole thing out or retry it.

15 MR. WRAY: Yeah. I didn't think that was
16 disputed. I didn't appreciate that earlier. I thought
17 they acknowledged that the right was not with Lillian;
18 they just thought that the guardian should have the
19 right in this proceeding to bring it, as well.

20 Anyway, we've talked about that enough. I've
21 objected throughout the trial. I understand the Court's
22 concern. And I don't, quite frankly, have a good
23 solution other than --

24 THE COURT: I wish we all had a better one.

25 MR. WRAY: Yes. Well, except the charge for

1 comparative as to that aspect of the claim. So --

2 THE COURT: Well, Mr. Holmes --

3 MR. MCLEOD: Your Honor, I -- you know, I would
4 let -- of course, that's -- I don't know whether the
5 jury would understand it but you might can try because,
6 I mean, I agree with --

7 THE COURT: And I'm thinking maybe the same thing
8 --

9 MR. MCLEOD: -- his argument it's difficult.

10 I don't know how you can do it unless if you say,
11 jury, insofar as the medical expenses up to her age
12 eighteen are concerned --

13 THE COURT: Are bills that are the --

14 MR. MCLEOD: -- you must consider --

15 THE COURT: Okay. Or just say, are bills
16 responsible by the parent or the mama and so it's truly
17 her claim. I mean, I could really separate it out. I
18 mean, I could do that.

19 MR. MCLEOD: But if you -- but if you put it in
20 there, which you decided to do, I think you've got to
21 put in there to -- his -- those expenses or whatever
22 until she is eighteen, you have to consider any
23 comparative negligence, if there was any.

24 THE COURT: Well, I understand what the charge
25 would be as to comparative negligence, if we put it in

1 there, but --

2 MR. JACOBSON: I think it would be awfully
3 confusing to the jury at this point, Your Honor, to
4 start by charging comparative negligence. I think --

5 MR. MCLEOD: I think -- I think usually you're
6 right, but --

7 MR. JACOBSON: -- the easiest way is to see what
8 the jury does and back it out.

9 MR. MCLEOD: I think it's incurable if you don't.

10 MR. JACOBSON: Well, if we have -- if we have
11 that number, that number -- that may actually save us
12 some additional time in trying the mother's case. And
13 then you can -- already have those damages assessed, or
14 those medical expenses, and in the mother's case you
15 could just -- then you can charge comparative
16 negligence. So actually that may help us in the
17 subsequent case.

18 THE COURT: They're not going to agree to that.

19 MR. WRAY: -- don't get to recover them again.
20 If they get them in this case --

21 THE COURT: No, no, no, no, no, no. I think --

22 MR. JACOBSON: May be backing them out in this
23 case, but at least we have -- at least that issue is
24 collaterally estopped in the mother's case and then the
25 only issue you would be arguing in that case is --

1 THE COURT: Would be negligence. Would be
2 comparative negligence.

3 MR. JACOBSON: -- comparative negligence. At
4 least we have that number and we wouldn't have to argue
5 that again.

6 THE COURT: I don't know. Can you do that?

7 MR. WRAY: No.

8 THE COURT: I don't think you can.

9 MR. WRAY: She's got to bring her own. And she
10 does have her own case. And she's got to be the
11 plaintiff.

12 THE COURT: Right.

13 MR. WRAY: They can't assign her a percent of
14 negligence in a case in which she's not a party and then
15 we apply it to some other case. If she were a party we
16 could do that. Of course, she couldn't then bring
17 another action.

18 THE COURT: Right.

19 MR. WRAY: But, no --

20 THE COURT: I don't think we can just -- I don't
21 think you can just assume the damage is all -- I think
22 it would have to be retried in the mama's case as to
23 that portion. Obviously what the plaintiffs are hoping
24 is their verdict is going to be so good that they're not
25 going to worry about backing out \$250,000. I mean,

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1 that's really what they're doing.

2 MR. WRAY: I understand.

3 THE COURT: That's where they're going with it,
4 so --

5 MR. WRAY: We talked about it early on. That's
6 again, where they're taking it. I think the law is
7 pretty clear that when an improper element of damages is
8 allowed in a claim -- and if we're right -- we may be
9 wrong. If we're right, I think they taint the whole
10 verdict. And that's the risk they run.

11 THE COURT: You think they take the whole
12 verdict?

13 MR. WRAY: I said taint.

14 MR. HOLMES: Taint.

15 THE COURT: Oh.

16 MR. WRAY: Taint the whole verdict.

17 THE COURT: Taint the whole verdict.

18 MR. WRAY: But I understand you're trying to
19 alleviate that, at least to some degree, by having a
20 separate line item. And we object to it, but --

21 THE COURT: You object to a separate line item?

22 MR. WRAY: No. We object to the claim being
23 submitted to the jury at all.

24 THE COURT: I understand that.

25 MR. WRAY: That's all.

1 THE COURT: But -- okay. But you don't have a
2 problem with it being a separate line item on here?

3 MR. WRAY: Well, if you are going to allow the
4 claim to go --

5 THE COURT: Right. You want the comparative
6 negligence charge. But if I'm not going to charge the
7 comparative negligence --

8 MR. HOLMES: Your Honor, I would only point out
9 that this is the way it's been two times by the South
10 Carolina Supreme Court. I mean, the only authority
11 there is out there, they did it this way --

12 THE COURT: And so they --

13 MR. HOLMES: -- the South Carolina Court.

14 THE COURT: So they could back it out?

15 MR. HOLMES: They didn't even have the line item.
16 They went in, looked at the evidence, and said this --

17 THE COURT: And then pulled it out themselves?

18 MR. HOLMES: Yeah. And they gave the plaintiff
19 the option. They said you can either retry your case --

20 THE COURT: The whole case?

21 MR. HOLMES: -- or you can remit this amount of
22 the verdict.

23 THE COURT: All right. As of right now I'm not
24 going to charge it. But I'm just wondering. When I
25 look at this entire charge, I'm wondering if we can

1 somehow say, okay. I just don't know. I mean, I'm
2 looking at this right now. This is easily going to be
3 an hour-long charge and I'm a little concerned about
4 them understanding, you know, all of a sudden, listen.
5 Although y'all have argued very well that, you know,
6 obviously she is the cause of the accident. So --

7 All right.

8 MR. WRAY: 57, Your Honor, I have, as you
9 indicated, it was covered by your general charge.

10 THE COURT: It is.

11 MR. WRAY: 58, the same --

12 THE COURT: And I can tell you, Aaron, just -- I
13 have a little portion of it. I do like the last -- the
14 last sentence of it, Mr. Wray, I'm going to put in my --
15 make sure it's in my charge, because I've got to make
16 sure it's in the charge somewhere. Okay?

17 MR. WRAY: Okay.

18 THE COURT: Obviously, they -- because I'm going
19 to have both in the converse, as well. Okay?

20 MR. HOLMES: And, Your Honor, and then if you --

21 THE COURT: Obviously, the converse would need to
22 be in there.

23 MR. HOLMES: Well, but on 57 my only concern
24 would be if we're going to -- if we're going to add that
25 last sentence, there's no reason why we need to say

1 defendants when we're talking about punitive damages.

2 MR. WRAY: I agree with that.

3 THE COURT: You are exactly right.

4 [Whereupon, the Court and the law clerk confer]

5 [Whereupon, Mr. Holmes and Mr. Wray confer]

6 THE COURT: And, Gray, I wanted to be just clear
7 about -- I'm sorry. I want to be clear about how we're
8 wording this throughout, because usually I say like, the
9 plaintiff or -- and, I mean, I hate to say I can't make
10 it gender neutral, but it sounds so ridiculous when you
11 say they when you're talking about one person. Although
12 we are talking about a guardian and her.

13 MR. HOLMES: Your Honor --

14 THE COURT: I guess I understand Johnny has
15 suggested saying Lillian Colvin. Do y'all have an
16 objection to that, or is there any issue with that? I'm
17 just talking about language as I read through it, just
18 in the standard charge it always refers to.

19 MR. WRAY: I understand what you're saying, but I
20 guess it depends on what you're talking about. Certain
21 damages are awarded to the plaintiff.

22 THE COURT: Right.

23 MR. WRAY: And certainly if you're talking about
24 the injuries --

25 THE COURT: Right.

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1 MR. WRAY: -- which would be the injuries to
2 Lillian.

3 THE COURT: Right.

4 MR. WRAY: But I think plaintiff is fine. I do
5 agree with Mr. Holmes on 57. We would just --

6 MR. HOLMES: Your Honor, I was going to -- I was
7 trying to talk this out with Ron just a second ago. But
8 I was thinking that if you said even if you find the
9 defendant CSX Transportation is a -- or the Defendant
10 CSX Transportation was negligent and a proximate cause
11 of Lillian Colvin's injuries, you do not have to award
12 punitive damages against CSX.

13 THE COURT: Okay. Aaron, did you follow that?
14 Okay. We got it.

15 THE LAW CLERK: Say it again.

16 THE COURT: Gray, I'm sorry. I had already given
17 it to her. Just say it one more time so she can go
18 through it.

19 MR. WRAY: Well, I just -- I mean, I don't know
20 that I had a problem with what you said, but it's
21 probably much more simpler just to strike the words the
22 defendants are liable, and just write CSX is liable. So
23 it would say: in other words, even if you find that CSX
24 Transportation is liable for the plaintiff's injuries,
25 you do not have to award punitive damages.

1 MR. HOLMES: My only concern is that they don't
2 have to be the only -- I mean, the DOT could be liable,
3 too, and you could still award punitive damages against
4 CSX. That's why I was saying a proximate cause, or that
5 their negligence -- that Defendant CSX is liable as a
6 proximate cause of Lillian Colvin's injuries.

7 MR. WRAY: Well, they don't even talk about
8 punitive damages unless they find us liable.

9 MR. HOLMES: Well, but they don't have to find
10 CSX liable for all of Lillian's injuries in order to
11 award punitive damages. They don't have to be the only
12 defendant liable --

13 THE COURT: I understand.

14 MR. WRAY: I follow him.

15 THE COURT: Okay. You're following him now?

16 Okay. So you are going to need to tell Aaron
17 now, again, how you want it to read.

18 THE LAW CLERK: I have if you find -- even if you
19 find that CSX is liable as a proximate cause of
20 Lillian's injuries, you do not have to award punitive
21 damages.

22 MR. WRAY: How about: even if you find that
23 CSX's negligence was a proximate cause of the
24 plaintiff's injuries?

25 Does that suit you?

1 MR. HOLMES: That's fine.

2 THE COURT: Okay.

3 MR. HOLMES: So we're using the word a, not the;
4 right?

5 THE COURT: Yes. A proximate cause. Yes.

6 MR. WRAY: 58 I believe was already covered.

7 THE COURT: Is already in the charge.

8 MR. WRAY: 59 I believe you said was covered.

9 THE COURT: I'm assuming we pulled it out,
10 because I don't have it anymore, so -- okay. 60 is
11 already covered. 61 is already covered. 62 is already
12 covered.

13 And now we go to 63. This is the one where I
14 said I like the language, Mr. Wray, and you were trying
15 to take credit for it yesterday and I said, but I think
16 I did. And, actually, it's just Anderson's request to
17 charge.

18 MR. WRAY: I didn't mean to take any credit.
19 This is Judge Anderson's.

20 THE COURT: Yes. Like I said, I'm going to go
21 ahead and I'm just going to use the clear and convincing
22 just to make sure we don't have any Williams case mess-
23 ups. Okay?

24 All right. Number 65?

25 MR. WRAY: 64 would be next, Your Honor.

1 THE COURT: Sorry.

2 MR. WRAY: I was trying to look. The plaintiff
3 had one --

4 THE COURT: Oh. I've already got this in mine.

5 MR. WRAY: You do have it covered --

6 THE COURT: Yes.

7 MR. WRAY: -- by your general charge?

8 THE COURT: Yes.

9 MR. WRAY: Okay. That's fine.

10 THE COURT: Number 65.

11 MR. HOLMES: Your Honor, I would have to look at
12 the exact language of State Farm on that. I don't
13 agree. I mean, they do need to consider the wealth of
14 the defendant in deciding whether or not the amount of
15 punitive damages will be sufficient to deter their
16 conduct. Obviously a person with a 100-dollar net worth
17 is going to be deterred by a 50-dollar award, where if
18 somebody is worth --

19 THE COURT: I thought the question was ability to
20 pay. I thought it was ability to pay, not wealth or
21 size. Am I wrong?

22 MR. WRAY: That's one of the Gamble factors --

23 THE COURT: Right.

24 MR. WRAY: -- could certainly --

25 THE COURT: Okay. Well, is this an exact quote

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1 from State Farm?

2 MR. WRAY: We're going to find it right now. I
3 believe if it's not, it's pretty close.

4 THE COURT: [Off the record momentarily]

5 MR. WRAY: The exact quote on the case says:
6 [reading] the wealth of the defendant cannot justify an
7 otherwise unconstitutional punitive damages award.

8 And then it quotes from Gore and it says:
9 [reading] the fact that BMW is a large corporation
10 rather than an impugneous individual does not diminish
11 it's -- fair notice of demand that the several states
12 can impose on the conduct of its business.

13 THE COURT: Well, what about, then, just taking
14 out the first sentence?

15 MR. HOLMES: Your Honor, if you read on in the
16 case, it says wealth provides an open-ended basis for --
17 awards when the defendant is wealthy. That does not
18 make its use unlawful or inappropriate. It simply means
19 that this factor cannot make up for the failure of other
20 factors, such as reprehensibility.

21 MR. WRAY: Well, that's from the concurrence in
22 Gore, not from the majority.

23 MR. HOLMES: Your Honor, I think that it would
24 make sense and explain that language that's in the
25 majority's opinion. This isn't an exact quote, and I

1 think that it's -- and then it doesn't say -- it's not
2 improper for them to consider, which is what this is
3 saying.

4 THE COURT: Yeah.

5 Well, I think the last -- the last sentence is
6 okay, though, because it's not saying that. I don't see
7 why we can't just charge it, taking out the first
8 sentence. If you conclude that punitive damages are
9 appropriate, you may not award more than what is
10 reasonable and proportional simply because of CSX
11 Transportation's wealth or size.

12 I mean, I think that's proper.

13 MR. HOLMES: Well, Your Honor, we've already
14 charged them that they can't award any more than what's
15 appropriate and reasonable and that it has to be related
16 to the actual harm suffered by Lillian. I don't see
17 where -- they've already been instructed that they have
18 to do what's reasonable and that it has to be
19 proportional to the actual injuries.

20 MR. WRAY: I wouldn't have a problem with it if
21 they hadn't called Dr. Wood to the stand for the sole
22 purpose of putting up our balance sheet and talking
23 about how much money we make per day, per hour, per
24 week, per year.

25 THE COURT: Let me tell you what I'm going --

1 MR. WRAY: The jury needs to be told that's not
2 the basis.

3 THE COURT: Okay. What I'm going to do is I'm
4 going to put this in with obviously the other portion on
5 punitive damages and just make sure that it reads in all
6 fairness. But I'm not going to read the first line, I
7 can tell you that right now, Gray --

8 MR. HOLMES: Okay.

9 THE COURT: -- because I don't think that's the
10 law. Okay?

11 MR. HOLMES: Your Honor, if we're moving on to
12 66, I think we've charged that already.

13 MR. WRAY: Which one do you think that's covered
14 by, Gray?

15 MR. HOLMES: I put in one of mine was a quote
16 from --

17 THE COURT: Yeah. I think it is in the punitive
18 damages charge.

19 MR. WRAY: I believe that's covered by
20 plaintiff's 34 and 35.

21 THE COURT: Okay. So we're going to withdraw 66;
22 correct?

23 MR. WRAY: That's fine.

24 THE COURT: Okay. 67. Mr. Holmes?

25 MR. HOLMES: Your Honor, I would have to see the

1 actual language of these cases. They're from 1922. I
2 think that you've already charged the jury as to -- that
3 they are supposed to be fair and impartial decision
4 makers.

5 THE COURT: I think we do need to address
6 something about CSX being a business, just like -- I
7 think there is a charge that Mr. McLeod had about the
8 DOT.

9 MR. HOLMES: Well, and I think it's covered by
10 you have no --

11 THE COURT: As a statute?

12 MR. HOLMES: -- friends to award or enemies to
13 punish or --

14 THE COURT: No, not that one. No, no, no. We're
15 talking about there was a different one. There actually
16 is a statute in regards to governmental entities, I
17 think is what it was.

18 MR. WRAY: Yeah. The statute says that --

19 THE COURT: Yes.

20 MR. WRAY: -- a governmental entity is liable for
21 it's torts in the same --

22 THE COURT: Just like everybody else.

23 MR. WRAY: -- as a private individual.

24 THE COURT: Right.

25 MR. WRAY: This charge -- in fact, I would have

1 thought this is covered by your general charge, because
2 I've never tried a case with a corporate defendant where
3 the Court didn't say --

4 THE COURT: Right.

5 MR. WRAY: -- just because they're a corporation
6 they are treated the same in the eyes of the law and
7 they're entitled to the same fair treatment you would
8 give an individual company.

9 THE COURT: I can tell you I do have a standard
10 charge on treating, you know, corporations as if they're
11 like anybody else.

12 [Whereupon, the Court and the law clerk confer]

13 MR. WRAY: So it may be covered by your general.
14 I just want to make sure --

15 THE COURT: I just want to make sure it's in
16 there. Okay?

17 MR. WRAY: Yes, ma'am. And that's my concern.
18 It doesn't have to be worded exactly as I've got it
19 here, but we need that statement.

20 [Whereupon, the Court and the law clerk confer]

21 THE COURT: Okay. Number 68. I think this is
22 already in the standard charge, I mean, basically the
23 same thing that you're trying to say.

24 MR. HOLMES: So that's out?

25 MR. WRAY: You're saying that it's covered, not

1 that it's out, that you believe it's --

2 THE COURT: Right. I think it's covered.

3 MR. WRAY: Okay. Well, we'll --

4 THE COURT: [Reading] You may not award punitive
5 damages if you believe that reasonable people could
6 disagree.

7 Well, we've already told them that they have to
8 unanimously agree by clear and convincing evidence that
9 they've met the applicable standards for punitive
10 damages. So I think it's pretty general. But it's
11 already in, so --

12 MR. WRAY: Okay.

13 THE COURT: -- I don't think we need it.

14 69?

15 MR. WRAY: 69 is the point I was arguing at the
16 directed verdict stage. You can't base a punitive
17 damages award unless there is fair notice of the
18 conduct. And here we have an inspection done by the
19 DOT, which found no obstruction, and that was
20 communicated to CSX.

21 THE COURT: They're going to say that the notice,
22 though, was not clearing it and not clearing it for --

23 MR. HOLMES: That's true, Your Honor. And Mr.
24 Poston testified as to his duty and what he's out there
25 to inspect and that he was not aware of the correct

1 standards. Based on his testimony, there weren't any
2 clear standards from CSX. What he did say, it appears
3 they were violated.

4 I just don't see how this would be applicable to
5 the case. I think it's going to do nothing more than
6 just confuse the jury.

7 MR. WRAY: Well, obviously they can argue
8 whatever the inferences can be drawn from the testimony.
9 I'm not disputing that. My point here is that the jury
10 needs to be told that under the law, punitive damages
11 aren't appropriate where a defendant reasonably relied
12 on -- sure, this is the State imposing punitive damages,
13 keep in mind. And the State should not be permitted to
14 impose punitive damages when it is affirmatively said,
15 we've looked at this crossing and the vegetation is
16 okay.

17 I'm not talking about the other points he's
18 getting to. That's a separate basis for a punitive
19 award, if the jury gets to that point.

20 THE COURT: But it says on here you may not award
21 punitive damages.

22 MR. WRAY: If they find that CSX reasonably
23 relied on the State's -- and in this case it's the
24 Department of Transportation's -- assurances about the
25 conduct.

1 MR. HOLMES: And, Your Honor, I would also have
2 to look at these cases to see what the -- I know in some
3 states that the right to punitive damages, the punitive
4 damages actually go to the State. And so there may be
5 that, in that case, that if you rely on what somebody
6 from the State actually tells you, or from the
7 government, that you would have some protection --

8 THE COURT: That the State couldn't --

9 MR. HOLMES: -- from the --

10 THE COURT: -- get it back?

11 MR. HOLMES: That's right.

12 But I don't see where this would apply,
13 especially considering that their -- that under -- the
14 evidence under Mr. Poston's testimony is certainly
15 acceptable that they violated their own standards of
16 conduct, that they knew, were required, to make this
17 crossing safe.

18 MR. MCLEOD: Your Honor, I see, you know, where
19 he's getting at but I don't -- my understanding of it is
20 only if there's a deficiency found does DOT notify them.
21 And -- well, do you understand what I'm trying -- I
22 don't believe it would be direct -- I don't know how you
23 want to --

24 MR. HOLMES: Your Honor, I think I agree with Mr.
25 McLeod.

1 MR. MCLEOD: I hate to rely on it and didn't get
2 it. I mean, there is no -- nothing is set out saying,
3 you fellows passed inspection. Do you follow what I'm
4 saying?

5 THE COURT: Not really, because what they are
6 saying is that inspection that was done I think was the
7 year earlier, or something, basically said it complied.
8 I mean, that was what all that testimony was about,
9 wasn't it?

10 MR. WRAY: That's right.

11 THE COURT: Is that what you're saying?

12 MR. HOLMES: I think what Mr. McLeod is saying is
13 that they didn't -- they don't give their stamp of
14 approval to CSX.

15 THE COURT: Right.

16 MR. HOLMES: They do their own check and then
17 they keep it themselves, and if they find a violation
18 they go out and say something to CSX and then they put
19 them on notice and they have so many days to correct it.
20 So he's saying that there has been no assurance from the
21 DOT that the crossing complies.

22 MR. WRAY: We had testimony in this case, from
23 the DOT inspector who was there, that he inspected it
24 and it complied. He affirmed that.

25 MR. HOLMES: But I think that the distinction

1 here is that he didn't then go to CSX and say, hey,
2 y'all passed. And I think that's what Mr. McLeod was
3 saying --

4 MR. MCLEOD: Yeah. I just don't want to mess it
5 up on some minor thing like this, because I think he
6 testified that if there was -- they inspected it, and if
7 there was a deficiency, they notify you. And that
8 wouldn't -- if you didn't get that notification --

9 THE COURT: Oh. I see.

10 MR. MCLEOD: -- they wouldn't have --

11 THE COURT: I see.

12 MR. WRAY: That's right. And then you can't base
13 a punitive damages award on something we had no fair
14 notice of that was somehow --

15 MR. MCLEOD: That might be true. But you can't
16 say you had --

17 THE COURT: The problem, though, the way this
18 reads, it basically says is that you can't award
19 punitive damages. I mean, if this is the actual
20 correct, you know -- if this is correct, then you're
21 right, I should have directed a verdict as to punitive
22 damages, if that makes sense.

23 MR. WRAY: Is that an acceptance for our motion
24 for reconsideration?

25 THE COURT: No.

1 MR. JACOBSON: Your Honor, come on. Nobody --

2 THE COURT: It's not proper. You're just saying
3 that this cannot be one of the considerations they use
4 in determining whether or not punitive damages are
5 appropriate. And the problem is is this charge doesn't
6 say that. It basically says if you find that the DOT --
7 if you believe the testimony that DOT, you know, told
8 them it was in compliance, then you can't award punitive
9 damages. That's what it says. And that's not proper.

10 MR. WRAY: Well, I think that's what the law is.
11 But I appreciate the Court's concern about it, and we
12 can move on to the next one.

13 MR. HOLMES: Your Honor, we --

14 MR. WRAY: We would ask that it be submitted, and
15 I understand you're not going to submit it.

16 THE COURT: If you can rewrite it, Mr. Wray, that
17 we're talking about just that portion. I mean, I --
18 that's -- I don't know how you took it, if you took it
19 as a direct quote. But if you say something like you
20 cannot --

21 MR. WRAY: No.. The quotes that it's based on are
22 set forth below if that's the language that the charge
23 is based on.

24 THE COURT: Yeah.

25 MR. HOLMES: Your Honor, the other thing I think

1 that would be confusing is that we do have the DOT as a
2 defendant, and then we're talking about their actions
3 and punitive damages, and there's been no testimony that
4 the DOT informed CSX of anything.

5 THE COURT: It's just they just inform them if
6 they're not complying.

7 MR. HOLMES: In this case that is cited, U.S. vs.
8 Clark, it says: [reading] when a government official
9 tells the defendant that certain activity is legal.

10 THE COURT: Well, it says informed. But, yeah.
11 You're reading the case; right?

12 MR. HOLMES: Yes. The quote, I mean, it's saying
13 that there has to have been some sort of affirmative
14 action, and I don't see where there has been any
15 testimony as to that in this case.

16 THE COURT: I can tell you, Mr. Wray, as it's
17 written it's not appropriate. If you can come up with
18 something that would apply as you're trying to state it,
19 I'll look at it. I understand where you're going. But
20 as it reads, basically it says that, you know, they
21 weren't informed so therefore there's no punitive
22 damages in this case. So we're not going to charge it
23 unless you give me something different --

24 MR. WRAY: I understand.

25 THE COURT: -- that reads as you want to say it.

1 Okay. I've got number -- I'm sorry -- number 70?

2 MR. WRAY: Yes, ma'am. I think you covered that.

3 THE COURT: We already did it. Yeah.

4 71? I think we already -- did we not already say
5 somewhere that obviously a violation of a statute is
6 evidence of gross negligence?

7 MR. WRAY: Only as to the negligence claim. We
8 did have a charge saying that while violation is
9 negligence per se, you must still find that it was a
10 proximate cause. This one speaks specifically to the
11 punitive aspect of that claim. It says even if you
12 found the violation of a statute, that fact alone does
13 not justify punitive damages.

14 THE COURT: That's clearly the law.

15 MR. WRAY: Yes, ma'am.

16 THE COURT: It's just one thing that they can use
17 to consider.

18 MR. WRAY: That's right.

19 THE COURT: I've never seen it quite written like
20 this. But, I mean, it's good law; right? I mean, it's
21 just --

22 MR. HOLMES: I agree with that, Your Honor, but,
23 I mean, I do think that it's confusing the way that it
24 reads. And I think that we could incorporate that into
25 the prior charge that we were talking about, about how

1 the --

2 MR. WRAY: Well, no.

3 MR. HOLMES: -- violations that you have to show
4 proximate cause.

5 MR. WRAY: Well, that's going to be --

6 MR. HOLMES: That's the one that's already been
7 covered.

8 MR. WRAY: I'm sorry. That's --

9 THE COURT: No. That's going to be in the
10 negligence portion --

11 MR. WRAY: That's right.

12 THE COURT: -- that ain't going to be when we get
13 down to punitives because, again, then we're talking
14 about a different standard.

15 All right. What I'm going to do is this. Some
16 version of this is going to end up in the punitives
17 portion, Mr. Wray.

18 MR. WRAY: Thank you. And 72 is the one we just
19 spoke about on fair notice. And I think that's
20 appropriate, particularly if you're not going to charge
21 my other one about --

22 THE COURT: Hold on one second. I'm sorry. I'm
23 still back on 71. I apologize.

24 MR. WRAY: Sure. I'm sorry.

25 THE COURT: Give me one second.

1 All right. Number 72.

2 MR. WRAY: Yes, ma'am. 72, like I said, if we're
3 going to take out the one I asked earlier about the DOT
4 informing us of our conduct, then this one I think is
5 very important because it -- you have to have fair
6 notice of what your conduct is, to be in violation of
7 the law, to be punished with punitive damages.

8 THE COURT: I mean, I think that's fair game, Mr.
9 Holmes. I mean, that's what your whole case has been
10 about, as to punitives, has been about notice.

11 MR. HOLMES: Yes, Your Honor. I would just like
12 to look at it and possibly do a direct quote from one of
13 the cases.

14 MR. WRAY: Well, I've got the quote right there,
15 BMW vs. Gore: [reading] elementary notions of fairness
16 that enshrine our constitutional jurisprudence dictate
17 that a person receive fair notice of the conduct that
18 was subjected to punishment.

19 MR. HOLMES: I'm fine with that quote.

20 THE COURT: Is that okay?

21 [Off the record momentarily]

22 MR. WRAY: I think 73 is covered by --

23 THE COURT: Okay. So we are going to do -- okay.

24 [Whereupon, the Court and the law clerk confer]

25 MR. WRAY: I think 73 is covered by plaintiff's

1 34.

2 THE COURT: That is already covered, yes, sir.

3 74.

4 MR. WRAY: If you are going to charge the Gamble
5 factors, then I ask that you charge this, as well.

6 MR. HOLMES: Your Honor, didn't you state
7 yesterday that there were -- that you were going charge
8 the four factors rather than the --

9 THE COURT: Well, I don't know. Is that what
10 y'all want to do?

11 The one I have is the four factors; right, Aaron?
12 Do you want to read it to them? Maybe it would be -- in
13 all fairness, y'all would like to look at all of them
14 and then determine which one you prefer.

15 MR. WRAY: Sure.

16 MR. HOLMES: Can we just say we're going to come
17 back to that after we --

18 THE COURT: No. Aaron is going to read it right
19 now for you, I think.

20 THE LAW CLERK: Do you want me to read just the
21 four, or that one?

22 THE COURT: Just the four. It just says you are
23 to consider -- I think it says something like something
24 you are to consider, and then --

25 THE LAW CLERK: [Reading] Before awarding

1 punitive damages, you must consider and weigh four
2 elements which may be pertinent to the facts of the
3 case. You must first consider the relationship between
4 any punitive damage award and the harm caused. Any
5 penalty imposed should take into account the
6 reprehensibility of the conduct, the harm caused, the
7 defendant's awareness of the conduct's wrongfulness, the
8 duration of the conduct, and any concealment. Thus, any
9 penalty imposed should bear a relationship to the nature
10 and extent of the conduct and the harm caused, including
11 the compensatory damage award made by you. Secondly,
12 any penalty imposed should take into account, as a
13 mitigating factor, any other penalty that may have been
14 imposed or which may be imposed for the conduct
15 involved, including any criminal or civil penalty, or
16 any other punitive damage awards arising out of the same
17 conduct. Next you should consider whether the award and
18 the amount of any punitive damages award may deprive the
19 defendant or any profits --

20 THE COURT: Of any profits.

21 THE LAW CLERK: -- [reading] of any profits
22 derived from the improper conduct and whether the ill-
23 gotten profits should be properly awarded to the
24 plaintiff. Finally, any award of punitive damages must
25 be limited to punishment and thus may not affect

1 economic bankruptcy. To this end, the defendant's
2 ability to pay any punitive damage award should be
3 considered. However, the economic bankruptcy factor is
4 not an absolute bar to an award of punitive damages.

5 And then --

6 THE COURT: No.

7 MR. PURCELL: Aaron, as you read it, it said
8 under the first criteria: [reading] thus any penalty
9 imposed should bear a --

10 Did you say a reasonable relationship?

11 THE LAW CLERK: It should be a relationship. Not
12 reasonable.

13 MR. WRAY: We would ask that reasonable be
14 inserted there. I think otherwise, Your Honor, that
15 charge is fine. It actually incorporates our 74,
16 everything that she -- everything that's in our 74 was
17 in what she read, any my only objection would be the
18 last part that talks about you cannot -- the bankruptcy,
19 or the -- I don't remember if it was talking --

20 THE COURT: Cannot --

21 MR. WRAY: -- about the financial size of the
22 defendant -- I do object to that language. But the rest
23 is fine.

24 [Whereupon, the Court and the law clerk confer]

25 MR. HOLMES: And, Your Honor, I don't -- I'm not

1 as quick on the uptake. I think I would have to take a
2 look at the charge. But I do agree that it did
3 incorporate everything in 74.

4 THE COURT: Okay. Gray, you remember this was
5 the one we were talking about, you know, there's either
6 the four elements or the seven Gamble factors. And just
7 like Mr. Wray pointed out, there are plenty of judges
8 that charge the Gamble factors. Although when you read
9 the Gamble case, Gamble v. Stevens, it really says this
10 is what the Court needs to look at in hindsight to
11 decide whether or not, you know, an award of punitive
12 damages was appropriate. And it talks specifically
13 about the seven factors. And it, you know, of course
14 considers whether or not a judge has to consider every
15 one of them and make a ruling on each one of them. So I
16 think that's why it's more specific as to that.

17 I can tell you this is what they gave us in the
18 charge book. So to quote my good friend Diane
19 Goodstein, this is what they've given us.

20 So as long as y'all don't object. Obviously
21 there's nothing overly objectionable about that,
22 specifically.

23 MR. WRAY: The portion at the end is the only
24 part I have a problem with.

25 THE COURT: Right. He says the last line. But,

1 again, I think that's the law.

2 MR. WRAY: All right. 75 I assume they like.

3 MR. HOLMES: That's fine.

4 THE COURT: Hold on a sec. I think -- isn't that
5 already in there, the degree of the reprehensibility of
6 the defendant's conduct?

7 MR. HOLMES: I think that the difference is is
8 this says it's the most important factor.

9 MR. WRAY: That's right. It says -- the one you
10 just read --

11 THE COURT: The most important. Okay.

12 MR. WRAY: -- says you can take that into
13 account. This one says that's the most important factor
14 to consider, which is what BMW says.

15 THE COURT: All right. Do you want it charged?

16 MR. WRAY: Yes, ma'am.

17 THE COURT: Okay.

18 MR. WRAY: 76 is similar to plaintiff's 35, but
19 not quite the same because we believe it should be
20 limited to the State of South Carolina.

21 MR. HOLMES: Didn't I put in a --

22 THE COURT: Yes.

23 MR. HOLMES: -- charge that --

24 THE COURT: Yours I think is pretty darn the same
25 thing. It just has to be --

1 MR. WRAY: I don't -- well, I'm not putting my
2 finger on it. 35 says it must be -- I'm sorry. It
3 says: [reading] may not use evidence of out-of-state
4 conduct to punish a defendant for action that was lawful
5 in that jurisdiction.

6 My point is ours is a subtle difference. It says
7 that they may only consider misconduct that has an
8 impact on the citizens of this state. The plaintiff's
9 charges says you can't consider --

10 THE COURT: Outside conduct.

11 MR. WRAY: -- conduct that happened somewhere
12 else, and we're saying affirmatively you can only
13 consider conduct that will impact you.

14 THE COURT: I understand. You're just saying
15 affirmatively.

16 Do you care, Gray?

17 MR. HOLMES: Well, in mine is the direct quote.
18 I just prefer the direct quote from the case. That's --

19 THE COURT: I think in all fairness we're going
20 to quote what comes from the case so we'll leave --

21 77.

22 MR. HOLMES: I think we've already --

23 THE COURT: That's in there already, that it's
24 got to be proportionate.

25 Number 78.

1 MR. HOLMES: I think we've already charged that.

2 THE COURT: Where?

3 MR. HOLMES: Where we said that it has to be
4 reasonably related to the actual harm that's suffered in
5 the case. And then also when you talk about the
6 bankruptcy rule, that we -- that it was in that charge.

7 MR. WRAY: I respectfully disagree. I think
8 it's --

9 THE COURT: All right, Mr. Wray, let me do this.
10 I'm going to put it somewhere in there that it's all a
11 portion of it. But I'm not going to beat a dead horse.
12 If it's five different ways of saying something, I'm
13 probably going to choose my own way and I'm going to
14 charge it. Okay? But I'm going to sure -- make sure
15 it's in. Okay?

16 MR. WRAY: Yes, ma'am.

17 THE COURT: Okay.

18 MR. WRAY: And 79, just as a statement of
19 stipulation that we entered into.

20 THE COURT: I think we need to -- I think we need
21 to say that, Gray, though, because it needs to be clear
22 to the jury because what -- I don't want them on appeal
23 coming back and saying, listen, they may have awarded
24 punitive damages based on the short horn or the improper
25 horn or both.

1 MR. WRAY: That's right.

2 THE COURT: Okay?

3 MR. HOLMES: And, Your Honor, I think that if we
4 could do it just in -- you know, just a shorter blurb,
5 just that any -- if you should award punitive damages
6 against CSX, you are not to consider in that award CSX's
7 alleged misconduct relating to the horn.

8 MR. WRAY: If you would like to say it some way
9 better than what I've got, that's fine. The general
10 principle needs to be --

11 THE COURT: I understand.

12 MR. WRAY: -- instructed to the jury.

13 THE COURT: Okay. Some form of this, Aaron.
14 Okay.

15 MR. JACOBSON: Would you go so far as also saying
16 that the horn can be used for negligence? Just a
17 reminder that they factor?

18 THE COURT: I think you've done a good job of
19 that in your entire case.

20 MR. JACOBSON: May I approach, Your Honor, on
21 that? There are several things we would be able to pull
22 out for you.

23 THE COURT: Right. And we also need to talk
24 about a couple of other things now. We need to go back,
25 because there are things that y'all were going to get

1 back to me about, and then we need to talk about
2 intervening causes.

3 And do you want to take a minute, Mia? I want to
4 take a minute, just like five, if that's okay.

5 [Whereupon, a recess is taken from 4:59 p.m. to
6 5:25 p.m.]

7 THE COURT: Going through what we needed to cover
8 from yesterday that we were going to revisit. Okay.

9 MR. WRAY: What are we looking at, Your Honor?
10 Our charges, the plaintiff's charges?

11 THE COURT: We're going back to the plaintiff's
12 charges.

13 MR. WRAY: Okay.

14 THE COURT: Y'all, go to -- okay. I'll just tell
15 you this -- oh. Wait a minute.

16 [Whereupon, the Court and the law clerk confer]

17 THE COURT: Okay. This is plaintiff's charge
18 number 6. Basically, we were going to try -- we're
19 going to do the whole quote, okay, which is just:
20 [reading] the right of a railroad company at a highway
21 crossing is superior as to the right of a traveler upon
22 a highway but this superior right does not relieve the
23 railroad company of reasonable and ordinary caution to
24 prevent accidents at such crossing, and this degree of
25 care may be affected by obstructions which prevent the

1 track from being seen as the train approaches.

2 It goes on, and we're going to go on, where it
3 continues to say: [reading] both the traveler and the
4 company are charged with the same degree of care, the
5 one to avoid being injured and the other to avoid
6 inflicting injury. The care of each must be
7 commensurate with the risk and danger involved. The
8 greater the risk, the greater the care.

9 Okay? That's the exact quote. Is that all
10 right?

11 MR. WRAY: Okay.

12 THE COURT: Okay. If you object to it, you need
13 to jump in. Okay?

14 MR. WRAY: Okay.

15 THE COURT: All right. The next one -- I'm
16 sorry. That's plaintiff's. Okay. Sorry.

17 [Whereupon, the Court and the law clerk confer]

18 THE COURT: Charge number -- plaintiff's request
19 number 9 --

20 THE LAW CLERK: And it's their circled numbers.

21 THE COURT: Right. I'm doing their circled
22 numbers, exactly, on the right.

23 Number 9: Gray, this one was just completely
24 taken out of context. And we already state this exact
25 same thing, is that basically everyone needs to use

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1 ordinary care of a normal, reasonable, prudent person.

2 MR. HOLMES: Where is that stated? Where is the
3 other one that --

4 THE COURT: Where is the other one what?

5 MR. HOLMES: You said that you've already stated
6 it in another charge.

7 THE COURT: We've said it. It says you're
8 supposed to exercise ordinary care and prudence given
9 all the facts, which is the same thing that I just read.
10 I mean, it's saying the same thing five different times,
11 five different ways. It says you both have a duty to do
12 what's fair and do what's safe and to use due care. So
13 I think it's already in there.

14 All right. The next one I have, y'all, just so
15 we are clear. And I just want to make absolutely sure.
16 This is 56-5-2710. Okay? I'm going to read, obviously,
17 subsection A. We're going to take out section 1 and 2,
18 because they don't apply in this case.

19 Do y'all have 2710 on --

20 MR. WRAY: Yes, ma'am.

21 THE COURT: Okay. We're going to take 1 and 2
22 out. We're going to charge 3 and 4, number 3 and 4, not
23 number 5. And then B doesn't apply. Is that correct?

24 MR. WRAY: Yes, ma'am.

25 THE COURT: Are we okay? I mean, I think that's

1 what the statute is and that's what applies to the facts
2 in this case.

3 MR. WRAY: That's correct.

4 MR. HOLMES: I'm sorry, Judge. Would you repeat
5 that? I --

6 THE COURT: Okay. We're going to charge 2710.
7 We're going to charge A, 3, 4, and that's it.

8 MR. HOLMES: Okay.

9 THE COURT: Okay?

10 MR. WRAY: That's correct.

11 THE COURT: All right. And the next one I have
12 is 23.

13 Gray, you were going to go find me some cases
14 that this was used for, and you were going to find me
15 some motorist road cases as opposed to the pedestrian
16 looking up at the light and tripping.

17 MR. HOLMES: Judge, I think I did find a case.
18 Or actually I got the head-note from a case using that
19 language. Well, here's one. I don't think it's the one
20 that I had, though. It -- [reading] motorist on highway
21 open to public has a right to assume that it's
22 reasonably safe for travel, free of unlawful
23 obstructions.

24 MR. WRAY: And I think that's --

25 MR. HOLMES: And that's Varner vs. Ballenger

1 Paving Company [phonetic].

2 THE COURT: They were driving on the roadway?

3 MR. HOLMES: It says: [reading] a motorist on
4 highway.

5 THE COURT: Well, what are the facts of it? I
6 mean, was there a depression, was there --

7 MR. HOLMES: It's a construction case. It's
8 against an actual construction company. It would be the
9 duty.

10 MR. WRAY: I guess my point, Your Honor, there's
11 no allegation in this case that the street was not safe.

12 THE COURT: Right.

13 MR. WRAY: The allegation is that the crossing
14 was unsafe. We've got plenty of charges on that. I
15 thought they were objecting to all the ones where I had
16 something to do with highway in it. This talks about a
17 safe street. This case doesn't involve a problem

18 street.

19 THE COURT: All right. Gray, right now I'm not
20 going to charge it, again, unless you --

21 MR. HOLMES: Okay, Your Honor.

22 THE COURT: I mean, just because it's a
23 pedestrian case. It has to do with walking. It's a
24 great case if you're tripping, in Charleston, on slate.
25 I'm pretty sure I used it.

1 [Whereupon, the Court and the law clerk confer]

2 THE COURT: All right, y'all. Sorry I'm just
3 skipping around a little bit.

4 It's plaintiff's charge number 14 asking about a
5 railroad may be required to use a flag-man. And then
6 someone also requested, within Myers, a little bit more.
7 So what I propose to charge is the Myers quote, which
8 is: [reading] it is the duty of the railroad to give
9 such warning as may be reasonably sufficient in the view
10 of the situation and surroundings to put individuals
11 using the highway on their guard of the presence of a
12 train.

13 [Whereupon, the Court and the law clerk confer]

14 THE COURT: So the question is do you want number
15 4 that we agreed to yesterday or do you want the Myers
16 and the entire language?

17 THE LAW CLERK: So 4 or 14 of the plaintiff's
18 charges.

19 THE COURT: Sorry, y'all.

20 [Whereupon, the Court reviews documents]

21 THE COURT: Y'all, I can tell you that I actually
22 like plaintiff's number 4 better where it just says it's
23 the duty of the railroad to give such warning as may be
24 reasonably sufficient, in view of the situation and
25 surroundings, to put individuals using the highway on

1 their guard of the presence of a train.

2 MR. WRAY: I agree.

3 THE COURT: Okay? That's what I'm going to
4 charge on that one.

5 MR. HOLMES: Your Honor, I believe that the quote
6 from Myers is talking about the duty when there is
7 extraordinary danger at a crossing. And Dr. Heathington
8 testified that this was a -- I think he used the word
9 ultra-hazardous crossing. I don't think that the two
10 charges are the same.

11 THE COURT: All right. Well, if you want --
12 Gray, if you want the more inclusive language, I'll do
13 it.

14 MR. WRAY: If that's what you are going to do --
15 and this is the point we talked about yesterday -- then
16 you need to read the whole quote from the case.

17 THE COURT: Well, I'm going to put underneath it,
18 ordinary prudence might require.

19 MR. WRAY: To be applied at certain times and not
20 others.

21 THE COURT: Right. Oh. No. I'm doing that one.

22 MR. WRAY: Okay.

23 THE COURT: On account of the circumstances of
24 extraordinary danger.

25 No. I'm going to read the whole thing. I'm not

1 so sure, Gray, that's what you want, but I'm going to
2 read it all.

3 MR. HOLMES: I'm not sure what it is that you're
4 reading.

5 THE COURT: It's going to be the whole quote from
6 Myers: [reading] it is the duty of a railroad at common
7 law to give such signals at a public crossing as may be
8 reasonably sufficient, in the view of the peculiar
9 situation and surroundings at the time, and as will give
10 the public and individuals warning of the approach and
11 guard them against danger. Ordinary prudence might
12 require a particular crossing to be flagged at certain
13 times and not others on account of the circumstances of
14 extraordinary danger.

15 Just leave it at that. Okay?

16 MR. HOLMES: Yes, Your Honor.

17 [Whereupon, the Court and the law clerk confer]

18 THE COURT: Okay. Now I'm going back to number
19 27.

20 MR. WRAY: Plaintiff's?

21 THE COURT: Right. I'm sorry. We're still on
22 plaintiff's.

23 Basically, we're still talking about concurring
24 causes in this one. And I'm not going to -- I'm not
25 going to put in the specifics in the middle that was in

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1 the plaintiff's request to charge number 26, but I am
2 going to give my concurring-causes charge. Okay?

3 MR. HOLMES: For 26 or --

4 THE COURT: For number 27. In other words, it's
5 already in my charge. Does that make sense?

6 [Whereupon, the Court and the law clerk confer]

7 THE COURT: Okay. The next one I have -- no.
8 There's nothing wrong with that.

9 And, again -- okay. Nothing wrong with that,
10 because we know which punitives we're putting in. So
11 that one is taken care of. So we're done with that.

12 Okay. Now we're going back to the defendant's
13 request to charge -- CSX's, sorry -- that we started on
14 yesterday that there were some things that y'all were
15 going to get back to me.

16 [Whereupon, the Court and the law clerk confer]

17 THE COURT: Okay, y'all. On CSX's request to
18 charge number 5, we were going to charge the statute 58-
19 17-1450, which is lengthy. It's a long code section, so
20 I guess -- I've got the highlighted requested portions
21 from y'all, but I think Gray needs to take a look at it.

22 MR. WRAY: Yes, ma'am. I agree with you.
23 Hopefully we can reach some accommodation --

24 THE COURT: On this one.

25 MR. WRAY: -- and you can read just the pertinent

1 parts --

2 THE COURT: Yes.

3 MR. WRAY: -- because that statute may take five
4 minutes to read just by itself.

5 THE COURT: Yeah.

6 Gray, why don't you go ahead and grab -- we just
7 need to -- while I'm packing up, you need to put this
8 one down as you need to read it. Actually, let's just
9 do this. I'm going to give you, just don't walk out
10 with, the highlighted portion that they --

11 MR. HOLMES: Do you want me to give it right
12 back --

13 THE COURT: -- this is the highlighted portion
14 that they want. I think just highlight for me in
15 another color the ones you want. Okay? And then if
16 there's an argument about what they have -- obviously we
17 are going to charge what you both think is applicable.
18 Okay?

19 Y'all, on 56-5-1020, it talks about unauthorized
20 sign signals or like devices prohibited. It starts out
21 that: [reading] no person shall place, maintain, or
22 display upon or in view of any highway, any unauthorized
23 sign, signal, marking, or device which, [a], purports to
24 be or is an imitation of or resembles an official
25 traffic control device or railroad sign or signal; [b],

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1 attempts to direct the movement of traffic; or, [c] --
2 and that doesn't -- it just says hides from view, or
3 some kind of advertisement.

4 Y'all, I don't see where this applies, really.

5 MR. WRAY: Well, that's the whole point that
6 we're making about whether we have the right and
7 authority to install anything. It says no person shall
8 place any unauthorized device which purports to be an
9 official traffic control device. That's what gates and
10 lights are. They are a form of traffic control devices.
11 It's directly relevant.

12 THE COURT: So you're saying just end it after
13 [b]?

14 MR. WRAY: That would be fine. And then you
15 could pick up -- you don't need to read the part about
16 direction on private property. That doesn't apply.

17 Pick up down at the bottom: every prohibited sign is
18 hereby declared to be a public nuisance.

19 THE COURT: How is that relevant?

20 MR. WRAY: Because it speaks to, again, why we
21 can't do it. If we went out and did it without getting
22 authority and approval, then it would be declared a
23 public nuisance.

24 THE COURT: Okay. I'll charge that, Mr. Wray.
25 Obviously just not the middle section. That doesn't

1 have any applicability.

2 MR. WRAY: I agree with that.

3 MR. HOLMES: And, Your Honor, which code section
4 are you referring to?

5 THE COURT: 1020, I think.

6 MR. WRAY: Yes, ma'am.

7 THE COURT: Yes. 1020. All right. I'm on --

8 MR. HOLMES: What all -- what all parts did you
9 say you were going to --

10 MR. WRAY: She is going to take out subsection C.

11 THE COURT: I'm going take out the first line
12 that includes 3[b]. We're taking out -- you're right --
13 we're taking out [c]. And then the last sentence we are
14 keeping in: [reading] every such prohibited sign,
15 signal, or marking.

16 All right. Number 12.

17 MR. WRAY: You skipped past number 11. Are you
18 coming back to that or --

19 THE COURT: Sorry.

20 MR. WRAY: You had asked me to take a stab at
21 drafting something else, which I did.

22 THE COURT: Okay. Let's see what it is.

23 MR. WRAY: Which I suspect will be no less
24 objectionable. But I'll try.

25 THE COURT: Okay.

1 [Whereupon, Mr. Wray proffers documents to the
2 Court]

3 MR. WRAY: This is taken directly from the case
4 we cited, the first case, the Price case.

5 THE COURT: Got you.

6 MR. WRAY: And I can give you the Price case if
7 you want to look at it. It's taken directly from that.
8 Although it is, of course --

9 THE COURT: At a railroad crossing; correct?

10 MR. WRAY: That's right. And we would be content
11 to substitute that 11 -- for the 11 we had submitted.

12 MR. MCLEOD: Well, I think it might -- let's see
13 it -- I charge you that a railroad has no duty to
14 install.

15 Any other warning devices y'all want to install
16 on y'all's right-of-way y'all can do. In fact, as I
17 understand it, DOT can't. Let me try to think --

18 MR. HOLMES: Judge, I would like to have an
19 opportunity to review this case, the Price vs. National
20 Railroad, if that's -- see if we can just get it --

21 MR. MCLEOD: We need to get it where --

22 THE COURT: All right. What I'm going to do is
23 this, then, y'all. We're going to -- is it the law that
24 they don't have a duty to request?

25 MR. WRAY: That's right. In fact, that's -- I

1 talked about it at the directed verdict stage. I cited
2 the Gaulman [phonetic] case to you, which --

3 THE COURT: Which says --

4 MR. WRAY: -- admittedly, was not a railroad
5 crossing case. It was a case that dealt with whether
6 there's a duty to install a stop sign. Well, this is an
7 analogous situation.

8 THE COURT: No. Except that we have a railroad,
9 so we have a third party that's responsible. In just a
10 regular intersection case, who is the third party
11 responsible?

12 MR. WRAY: It wasn't a regular intersection. It
13 was a road leading out of a subdivision.

14 THE COURT: Okay. So it was a developer case?

15 MR. WRAY: That's correct. The developer --

16 THE COURT: So did the developer have a
17 responsibility --

18 MR. WRAY: To put up a stop sign before you lead
19 into --

20 THE COURT: Or to request. You're saying he
21 doesn't have either duty?

22 MR. WRAY: That's what the Gaulman [phonetic]
23 case said. I read that language at the directed verdict
24 stage. It said --

25 THE COURT: Okay. I don't remember every last

1 thing that you read, I can assure you of that.

2 MR. WRAY: Yes, ma'am.

3 It said they had no duty to do it or to cause it
4 to be done. And I read that. I don't know if I still
5 have that case, but I may have it here.

6 THE COURT: Does that comply with the MUTCD?

7 MR. MCLEOD: Well, Your Honor, the --

8 THE COURT: Does that --

9 MR. MCLEOD: -- way I read it, I mean, it's -- it
10 seems like it's putting the duty on DOT to install them,
11 too. And I --

12 MR. WRAY: Let me be clear, to assuage my good
13 friends and peers. I don't believe the DOT has any
14 duty. If he wanted a charge on it --

15 MR. MCLEOD: No. They don't.

16 MR. WRAY: -- that would suit me fine, too.

17 I'm not suggesting that DOT has a duty to do a
18 thing. In fact, as I said at the DV stage, I believe
19 they are immune from liability for not putting in gates
20 and lights. So I don't think either defendant has a
21 duty. I'm just submitting a charge that pertains to my
22 client. If he wants to submit one that pertains to his
23 client, that's acceptable, too.

24 MR. MCLEOD: Well, this one just sort of implies
25 to me that DOT should have a duty. Maybe if you read

1 this in conjunction with that regular one that is sort
2 of the general one, that it's the duty of the railroad
3 to maintain a safe crossing, whatever that requires,
4 maybe I --

5 THE COURT: No. I see what you're saying, Mr.
6 McLeod. I see what you're saying.

7 MR. MCLEOD: But I don't know --

8 MR. WRAY: And that's fine, too. I think you do
9 have a charge that says it's our duty to -- plaintiff's
10 number 1: [reading] a railroad corporation has a duty
11 to maintain a reasonably safe grade crossing. I charge
12 you that a railroad has no duty to install or to request
13 that SCDOT install additional or different warning
14 devices at a railroad crossing.

15 That would suit -- just add it to number 1.

16 THE COURT: Add it to defendant's number 1?

17 MR. WRAY: No, ma'am. Plaintiff's number 1.

18 THE COURT: Plaintiff's number 1.

19 MR. WRAY: Which talks about the duties to
20 maintain a reasonably safe grade crossing, if that's Mr.
21 McLeod's --

22 MR. MCLEOD: Well, if you're going to -- if
23 you're going to charge this one like that, that charge
24 part ought to come afterwards.

25 THE COURT: Okay. Give me plaintiff's number 1.

1 MR. HOLMES: And, Your Honor, would I be able to
2 have a shot of drafting something myself that -- and try
3 to see if I could e-mail it, see if it -- something that
4 will work?

5 THE COURT: Okay. The problem is is that they
6 are all going to argue about it. And, obviously --

7 MR. MCLEOD: Well, maybe we -- maybe we can say,
8 I charge you that the railroad nor the South Carolina
9 Department of Transportation. I charge you that a
10 railroad nor --

11 THE COURT: I charge you that neither a railroad
12 nor the DOT has a duty.

13 MR. MCLEOD: -- has a duty to install --

14 MR. JACOBSON: Your Honor, then who does have
15 that duty? I mean, they don't just miraculously appear
16 at intersections.

17 MR. MCLEOD: Additional warning devices, other
18 than what I've already read you the law on.

19 THE COURT: What they deem appropriate. I mean,
20 that's really what it is: rather than what they deem
21 appropriate.

22 MR. MCLEOD: Ma'am? I couldn't hear you.

23 THE COURT: What I was saying is is the problem
24 is that only goes to DOT, not to CSX.

25 MR. JACOBSON: Your Honor, this request to charge

1 also talks about the Hill Road Crossing. It's case
2 specific.

3 THE COURT: That I already took out.

4 MR. JACOBSON: Oh. Okay.

5 THE COURT: I already took that out.

6 MR. JACOBSON: Okay. And then --

7 THE COURT: What about we just say I charge you
8 that neither the railroad nor the DOT has the duty --
9 well, I think the --

10 MR. JACOBSON: Is that just a blanket statement,
11 Your Honor? It doesn't seem like that could be --
12 possibly be the law, that neither one has the duty.

13 THE COURT: Well, it isn't the law. I know it's
14 your position it's the law of the DOT, but then
15 obviously then they should have been granted directed
16 verdict if that, in fact, is the law.

17 So I charge you that --

18 MR. HOLMES: Your Honor, in the case that's
19 cited, it actually -- it talks about upgrading. It
20 says: [reading] railroads have no duty to upgrade
21 traffic warning devices even at such crossings.

22 THE COURT: Well, why don't we just say that?
23 Why don't we just say that?

24 MR. WRAY: Well --

25 THE COURT: I mean, that would be applicable to

1 this case. I mean, what we've got, obviously, is cross-
2 bucks, a stop sign, and a stop line.

3 MR. JACOBSON: But there was some testimony from
4 our expert that says there should have been something
5 even more, there should have been a gate, and that
6 was --

7 THE COURT: Again, it isn't their duty, though.

8 MR. WRAY: That's right. I mean, I'm just
9 reading from the case. As I told you, it's a direct
10 quote: [reading] the railroad defendants have no duty
11 either to install or to request that DOT install
12 additional or different warning devices at the crossing.

13 That's what I thought you told me to do last
14 night was find a case that --

15 THE COURT: Yes.

16 MR. WRAY: -- some different language.

17 MR. JACOBSON: That's case specific to -- in this
18 particular case they're asking for upgrades.

19 MR. WRAY: And that's what you're asking for
20 here. This crossing has cross-bucks only --

21 THE COURT: It's a passive crossing. Exactly.

22 MR. WRAY: -- and you want it upgraded, or your
23 expert does, to gates and lights.

24 MR. JACOBSON: Right.

25 MR. WRAY: That's what --

1 MR. JACOBSON: And that's -- and it's something
2 that should have been done. In this particular case,
3 the Price case, apparently the court felt that that
4 wasn't necessary because there may not have been any
5 testimony whatsoever that that was necessary.

6 MR. WRAY: No. It's not -- it's the question of
7 whether there's an obligation to do it, is what the
8 court was addressing, whether it's necessary or not.
9 You can't have liability without an obligation. And --

10 MR. JACOBSON: Your Honor, there may be a --
11 there may be a duty to at least request. I don't know
12 about install, but there may be a duty to request DOT do
13 it.

14 MR. WRAY: Well, I'll read it again: [reading]
15 railroad defendants has no duty either to install or to
16 request.

17 MR. JACOBSON: In that case. In the Price case.

18 MR. WRAY: That's right.

19 MR. JACOBSON: In that case, because apparently
20 there was no -- there probably was no evidence that
21 that's what was necessary to make it a safe crossing.
22 It's case specific. It's not -- it doesn't apply to
23 this case.

24 MR. MCLEOD: What did Your Honor say -- what was
25 wrong with saying: I charge that the railroad and DOT

1 has no duty to install additional warning devices other
2 than -- and this would refer to the cross-bucks and the
3 stop sign and the -- other than the warning devices,
4 which I have charged you on the law earlier?

5 MR. HOLMES: Your Honor, we're already charging
6 what the DOT's duties are.

7 THE COURT: All right.

8 MR. HOLMES: We're charging that through the
9 statutes.

10 MR. JACOBSON: I think the general charge about
11 reasonable measures -- to be taken -- to have the
12 intersection reasonably safe is sufficient. Otherwise,
13 they start getting into particular instances. The jury
14 may believe everything that our expert says and say that
15 there was a duty for the railroad to request that this
16 be done. On the other hand, the jury may find that in

17 this particular case the passive crossing was safe in
18 and of itself. I'm just afraid that if you charge --
19 this is misleading because this is based upon evidence
20 presented during this particular case.

21 MR. WRAY: Well, I guess I'm confused, then. We
22 just talked about a charge earlier that you were
23 inclined not to give, and then we went back and said we
24 were going to give, that talks about flagging a
25 crossing. That's specific to that case.

1 THE COURT: No, we talked -- no, no, no, no, no.
2 We talked about that as one of the things. We took out
3 the flagging issue. We just said measures.

4 MR. WRAY: Okay.

5 THE COURT: And, I mean, that's what we're doing.

6 Y'all, I can tell you right now, I think -- I
7 think it is already covered when we talk about that
8 there are different measures, unless, Mr. Wray, you come
9 up with something overnight.

10 MR. WRAY: Well, this is the best I -- I spent
11 last night looking at this, and I found a case.

12 THE COURT: Isn't good enough. We need to do a
13 little more.

14 MR. WRAY: I'm sorry.

15 THE COURT: Okay.

16 MR. MCLEOD: I'm sorry. I didn't mean to mess

17 you up, but it looked like it was hitting me. But I was
18 hitting you, so --

19 MR. WRAY: Had nothing to do with you.

20 THE COURT: All right. Number 12, y'all. I
21 mean, are we just going to charge the statute on this?

22 MR. WRAY: Well, again, this is one where the
23 statute -- actually, I've probably got it in my book. I
24 think we need to read the whole thing. I was just
25 trying to make a simple point. The statute says:

1 [reading] notwithstanding any other provision of law,
2 the Department of Transportation may order legally
3 closed and abolished, as a public way, a grade crossing
4 in existence, et cetera.

5 I don't know --

6 THE COURT: So they have the authority.

7 MR. MCLEOD: But it says may --

8 THE COURT: So you're just arguing it in the
9 converse --

10 MR. MCLEOD: It says may --

11 THE COURT: -- no one else has the authority. Is
12 that what you're saying?

13 MR. WRAY: Yes. My point was -- and we talked
14 about this yesterday -- Dr. Heathington said there's
15 many things you can do.

16 THE COURT: Oh, I know. You could flag it, you
17 could close it, you can -- gates and, you know, signals
18 it.

19 MR. WRAY: That's right. And all I want the jury
20 to know is what the law is on grades and crossings.

21 THE COURT: All right. Give me that piece, and
22 I'm just going to charge the law.

23 MR. WRAY: That's fine.

24 THE COURT: Okay?

25 MR. MCLEOD: You're not -- I mean, you're --

1 okay. I just don't like the solely --

2 THE COURT: Only you have the authority to do
3 it --

4 MR. MCLEOD: I mean, I don't like --

5 THE COURT: -- is the point.

6 MR. MCLEOD: -- the solely. And the other thing
7 says may close under certain circumstances.

8 THE COURT: It says may.

9 MR. WRAY: That's right.

10 MR. HOLMES: Your Honor, there's one sentence
11 that if you're going to charge the whole thing:
12 [reading] the authority of the Department legally to
13 close and abolish grade crossings is in addition to
14 authority granted by law to other state agencies or to
15 local units of governments.

16 I don't see where that would be relevant to this.

17 THE COURT: I'm not putting it in there.

18 MR. HOLMES: Okay.

19 THE COURT: All I'm going to charge is:
20 [reading] notwithstanding any other provision of law,
21 the DOT may order legally closed and abolish as a public
22 way, within the limits of a railroad right-of-way, a
23 grade crossing, upon a finding that the enhancement of
24 public safety resulting from such closing outweighs any
25 inconvenience caused by the increased circuitry of

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1 highway routes.

2 That's appropriate.

3 MR. WRAY: That's fine.

4 THE COURT: Okay? That's what we are going to
5 charge.

6 MR. WRAY: And, Your Honor, I had a question
7 about 15.

8 THE COURT: Hold on a sec. Let me see if -- I'm
9 sorry.

10 [Whereupon, the Court and the law clerk confer]

11 THE COURT: All right. What was 15 that we had
12 to --

13 MR. WRAY: 15 is one you said is covered by your
14 general charge. And I'm sure the first sentence is. My
15 question was, really, the last sentence: [reading] in
16 our state, just because there is an injury does not mean

17 there is negligence.

18 Is that included in your --

19 THE COURT: Oh, yeah.

20 MR. WRAY: All right. Then I'm fine.

21 [Whereupon, the Court and the law clerk confer]

22 THE COURT: Okay. What number are we on? I'm
23 working off of two different lists now.

24 MR. WRAY: The next one I had, Your Honor, that
25 you were -- raised a question about or held over was --

1 highway routes.

2 That's appropriate.

3 MR. WRAY: That's fine.

4 THE COURT: Okay? That's what we are going to
5 charge.

6 MR. WRAY: And, Your Honor, I had a question
7 about 15.

8 THE COURT: Hold on a sec. Let me see if -- I'm
9 sorry.

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11 THE COURT: All right. What was 15 that we had
12 to --

13 MR. WRAY: 15 is one you said is covered by your
14 general charge. And I'm sure the first sentence is. My
15 question was, really, the last sentence: [reading] in
16 our state, just because there is an injury does not mean
17 there is negligence.

18 Is that included in your --

19 THE COURT: Oh, yeah.

20 MR. WRAY: All right. Then I'm fine.

21 [Whereupon, the Court and the law clerk confer]

22 THE COURT: Okay. What number are we on? I'm
23 working off of two different lists now.

24 MR. WRAY: The next one I had, Your Honor, that
25 you were -- raised a question about or held over was --

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1 begins with 18, 19 and 20, which were the intervening
2 cause charges.

3 THE COURT: All right, y'all: I can tell you
4 that I looked at this, reread Anderson's Request to
5 Charge. And applying the facts to this case, I do think
6 this jury could find that Ms. Colvin's negligence was an
7 intervening cause -- I think her failure to stop,
8 allegedly, at the stop line -- because if she had pulled
9 up to the stop line, according to y'all's testimony she
10 should have been able to see far enough --

11 MR. WRAY: Their expert -- if she was at the stop
12 line she would have seen, no problem, 2,000 feet, I-95.
13 So that's not disputed. The question is where did she
14 stop.

15 THE COURT: I understand that. But I do think
16 they could find intervening negligence. I think it's
17 appropriate, and I'm going to charge it, Gray.

18 MR. HOLMES: Your Honor, I would just say that
19 the intervening negligence would have to be
20 unforeseeable. I mean, it would be absolutely
21 foreseeable that someone would not stop at that stop
22 line if it's placed out of accordance with the
23 regulations. I mean, it's within two feet of a foul
24 zone. People testified --

25 THE COURT: It's within two feet of a foul zone.

1 But it's a statute and a requirement to stop at a stop
2 line, so I don't think it's -- I think you expect people
3 to stop at a stop line. Additionally, I don't think
4 they -- I don't think it is foreseeable that she would
5 be drinking and using, you know, narcotics, and on the
6 road. I don't think that's foreseeable, or at least
7 shouldn't be.

8 MR. HOLMES: Your Honor, I think that there was
9 testimony from the DOT's engineer that said you don't
10 expect for people to stop right at the stop line.

11 MR. MCLEOD: No, ma'am. He said --

12 MR. HOLMES: He said it was an approximation --

13 MR. MCLEOD: He said have you ever -- words to,
14 have you ever heard of someone stopping at a stop sign,
15 and he answered yes to that.

16 MR. HOLMES: And he was asked several questions
17 about how you can't judge the distance between the front
18 of your car and your bumper in relation to the stop
19 line, and that people often stop well behind it and past
20 it. And so, I mean, the testimony is that it would be
21 foreseeable. Dr. Heathington testified to that.

22 MR. MCLEOD: I don't recall that.

23 MS. AMUNDSON: I don't believe that's what he
24 testified to. I think he testified that it's possible
25 that someone would stop maybe two feet behind, but not

1 four or five feet as I believe the questions were trying
2 to get him to say.

3 THE COURT: The cross-buck was how far behind the
4 cross line?

5 MR. WRAY: Six feet.

6 THE COURT: Six feet.

7 MR. WRAY: It wouldn't matter anyway, because
8 Your Honor had it correctly analyzed. That only goes to
9 where she stopped. It's not foreseeable that she would
10 be drinking and using narcotics, that the jury could
11 find impairment. If they don't find that, then that's
12 their discretion, but --

13 THE COURT: I think intervening cause -- I think
14 the jury could find an intervening cause, so I'm going
15 to go ahead and charge it.

16 That, Mr. Wray, is as to what -- what ones did
17 y'all want on the intervening?

18 MR. WRAY: We had 18, 19, 20 and 21. And you can
19 just pick the language out that -- and Mr. McLeod also
20 has an intervening negligent charges. So we don't need
21 them twice, but whatever language you think --

22 THE COURT: We'll just do whatever version.
23 Actually, what I was going to do -- I'm not going to
24 charge all of Anderson's but I'm going to charge two
25 portions of Anderson that I think adequately lays it out

1 and explains it. So --

2 MR. WRAY: That's fine.

3 THE COURT: That's what I chose to do, and it's
4 just -- that's when I looked at him reading the whole
5 thing.

6 MR. JACOBSON: Judge, does that cover superceding
7 as well as intervening, or is it just the intervening?
8 Does it have to supercede in addition to intervene? I
9 would think it would. Just intervene isn't enough. It
10 has to intervene and supercede.

11 THE COURT: Well, it would be intervene to the
12 point that it would cut off the first negligence --

13 MR. JACOBSON: But it says --

14 THE COURT: -- it would cut off the liability.

15 MR. JACOBSON: It does -- it does --

16 THE COURT: I think the language in it --

17 MR. JACOBSON: It does say supercede.

18 THE COURT: Okay. Let me look.

19 MR. JACOBSON: Okay. If that's the language is
20 in there, okay.

21 THE COURT: Yeah, it's in there, Chuck.

22 MR. JACOBSON: Okay. Good. Thank you.

23 THE COURT: Yeah. I can tell you that I'm going
24 to charge the portion of Anderson's. It's going to say:
25 [reading] an intervening act of a third person breaks

1 the chain of causation and obvious liability for the
2 original breach of duty if it is a superceding cause.
3 Okay? So it's got the superceding language in it.

4 MR. JACOBSON: Good.

5 [Whereupon, the Court and the law clerk confer]

6 THE COURT: All right. What was the next -- I
7 hate to say -- I don't know why I'm now -- okay, which
8 takes us to what?

9 MR. WRAY: The next one I had a question about
10 was 25 that you had flagged.

11 THE COURT: Okay.

12 MR. WRAY: And you could take out the specifics.

13 THE COURT: Yeah.

14 MR. WRAY: If that is objectionable, you could
15 say motorist --

16 THE COURT: [Reading] In the absence of anything
17 which would reasonably put the railroad on notice to the
18 contrary, it was entitled to presume that motorists
19 using the highway would obey the law and exercise due
20 care.

21 MR. WRAY: That's fine.

22 THE COURT: Yes. Okay.

23 The next? All right. This is the one we talked
24 about I think earlier. It's number 27 that I had, the
25 negligence per se charge.

1 MR. WRAY: That's right. You said --

2 THE COURT: Violation of a statute is --

3 MR. WRAY: You said you were going to charge 27.

4 And we went through 28.

5 THE COURT: Exactly. Okay.

6 MR. WRAY: That's correct.

7 THE COURT: Okay. Number 30.

8 MR. HOLMES: Your Honor, number 30 I believe we
9 went over a charge --

10 THE COURT: Yeah. It was --

11 MR. HOLMES: -- with that language in it a little
12 earlier.

13 THE COURT: -- similar to 36, is what I thought.

14 I think we both agreed we were going to do the
15 innocuous for both. It was each of them had a duty. I
16 think -- which number was it? It was on plaintiff's

17 charge. I think we all agreed that that's what we were
18 going to charge.

19 MR. WRAY: I guess I'm not entirely clear if that
20 language -- if it does appear in one of the plaintiff's
21 charges, I certainly --

22 THE COURT: It's not going to say specific as to
23 vision. It's going to be given all the circumstances
24 of, you know, what's there at the time.

25 MR. HOLMES: And I think that was in the whole

1 charge that we went through about the railroad having a
2 superior --

3 THE COURT: Exactly.

4 MR. HOLMES: -- right.

5 THE COURT: And I can't remember what that was.
6 It was -- 4, 6 or 7. Yeah, it was -- I'm sorry --
7 plaintiff's 6.

8 MR. WRAY: Okay. I see that. That's fine.

9 THE COURT: All right. Number 32 I had -- it's
10 already in. It's similar to 30 and 34 of the
11 plaintiff's charge. It's the same thing as we just
12 talked about as 6.

13 Okay. Is that all of the defendants'?

14 MR. WRAY: The only question I had remaining was
15 you were reserving ruling on whether you were going to
16 charge 2730, which was the ones from the motion in

17 limine hearing that you have also reserved.

18 THE COURT: 2730? I'm sorry.

19 MR. WRAY: I think that's right. Let me look.

20 MS. AMUNDSON: Your Honor, we had a -- we had a
21 charge I believe that you were going to look back on --

22 THE COURT: Right. We haven't gotten to yours
23 yet. We're coming. I think there were a few of yours,
24 actually, we need to look at.

25 MS. AMUNDSON: Okay. I was just going to say

1 there --

2 THE COURT: Yeah. I'm not forgetting yours.

3 MS. AMUNDSON: -- was more than --

4 THE COURT: I'm not forgetting yours.

5 MS. AMUNDSON: Okay.

6 MR. WRAY: 2730 is the one that -- from the prior
7 hearing that you said you weren't quite sure about --

8 THE COURT: And correct me --

9 MR. WRAY: -- and it talks about erection of stop
10 sign.

11 THE COURT: Y'all said it applied; they're saying
12 it's because it's not a highway -- I mean, it only
13 applies to a highway, I'm sorry, that this is a railroad
14 crossing.

15 MR. WRAY: That's right.

16 THE COURT: You know, we talked about, I believe
17 -- was it charged in the Henning case? And was that a

18 sight-line obstruction case?

19 MR. WRAY: It was a sight obstruction case, but I
20 don't remember if that particular --

21 THE COURT: Was addressed?

22 MR. WRAY: I don't -- I don't think it was, Your
23 Honor, because I think that the statutes that were in
24 play in that case were, in our state, 2710, 2715, and --

25 THE COURT: 2730 --

1 MR. WRAY: -- and the other one was a stop line.

2 THE COURT: -- or 40 --

3 MR. WRAY: Yeah.

4 THE COURT: Again, I don't remember specifically
5 what it says.

6 What is the reason why you don't want it, Gray?

7 MR. HOLMES: Your Honor, it's talking about
8 placing stop signs at the entrances of the highway.

9 THE COURT: Right.

10 MR. HOLMES: I believe we already have charges
11 about the actual duty about where you place --

12 THE COURT: Right.

13 MR. HOLMES: -- the stop sign in relation to the
14 railway. And I don't believe --

15 THE COURT: This is the one where it says it
16 talks about assigning it to like the nearest crosswalk.

17 And obviously that doesn't apply.

18 MR. WRAY: I agree. I think the last sentence
19 would not be charged.

20 THE COURT: Read it to me, Ron.

21 MR. WRAY: [Reading] The Department of
22 Transportation with reference to state highways and
23 local authorities in reference to other highways under
24 their jurisdiction may designate through highways and
25 erect stop signs at specified entrances thereto or may

1 designate any intersection as a stop intersection and
2 erect light signs at one or more entrances to such
3 intersections.

4 That's all I think the jury really --

5 THE COURT: Well, let me ask you this. What's
6 the question? Don't we all we agree that we know she at
7 least stopped at a stop sign? I know we don't agree
8 after that, but don't we all agree she stopped at the
9 stop sign?

10 MR. WRAY: That's correct.

11 THE COURT: And I know they're still alleging
12 that at the stop sign she couldn't appropriately see,
13 and they explained why that is, but isn't the question
14 whether or -- doesn't that section go to whether or not
15 someone is supposed to -- well, I guess it's not they're
16 supposed to stop, it's what DOT is supposed to do that
17 you could go ahead and put a stop sign.

18 I guess my question -- I don't understand what
19 point of contention there is.

20 MR. HOLMES: Your Honor, I believe it's already
21 been charged that the Highway Department, where they're
22 to place the signs, and then I think --

23 THE COURT: And they can place them.

24 MR. HOLMES: -- all that. And this would do
25 nothing more than confuse the issue. And the Henning

1 case, while it does -- I mean, you could read it to say
2 that the statutes will be read together. It wasn't
3 argued that they shouldn't be -- that they didn't apply
4 it all --

5 THE COURT: Oh. And I understand that.

6 MR. WRAY: Your Honor, I'll withdraw my request.

7 THE COURT: Okay. On this one?

8 MR. WRAY: Yes.

9 THE COURT: So we're not going to charge it.
10 What number was that?

11 MR. WRAY: 33.

12 THE COURT: Thank you. All right. Any other
13 ones, y'all?

14 MR. WRAY: That was all I had a note on my list,
15 Your Honor. But if you don't mind, I would like to make
16 sure and review with you the statutes that I have listed
17 that you are going to charge, to make sure --

18 THE COURT: Aaron, just make sure we have them.
19 Okay?

20 MR. WRAY: I've got that you have indicated you
21 will charge 930, 940, 1010, 1020.

22 [Off the record momentarily]

23 MR. WRAY: All right. 2330.

24 THE LAW CLERK: Do you know what number that was?

25 MR. WRAY: It was actually DOT's charge number 34

1 and our charge number 31.

2 THE COURT: Okay. Is that the one that --

3 MR. WRAY: That's the one that says you stop at
4 the stop line, 1330. And if it helps you any, it should
5 be in there with 2710 and 2715. That's the ones you
6 said you were going to read all together.

7 THE COURT: Right.

8 MR. WRAY: So have we located -- is that in the
9 charge? 2230?

10 [Off the record momentarily]

11 THE COURT: What number was it? I'm sorry.

12 MR. WRAY: It was our charge number 34 -- I'm
13 sorry -- our charge number 31. DOT's charge number 34.

14 THE COURT: I don't have it in my stack.

15 [Off the record momentarily]

16 THE COURT: You don't have it?

17 THE LAW CLERK: Huh-uh.

18 MR. HOLMES: I have it struck through.

19 THE COURT: Well, pull out, then, CSX's 31 and
20 see, if you can't find DOT's.

21 MR. WRAY: I've actually got a checkmark on DOT's
22 34, which is where that came from, and on ours --

23 MR. HOLMES: And I have a question mark. So --

24 THE COURT: Yeah. It's good to charge, is what
25 I've got. Yeah.

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1 MR. WRAY: 2230 is covered.

2 THE COURT: Yes.

3 MR. WRAY: Then the next two were 2710 and 2715,
4 and then 2740.

5 MR. HOLMES: 2330 and then --

6 MR. WRAY: 2710, the pertinent provisions, which
7 were A-3 and A-4. And 2715. And the next one I have is
8 2740.

9 THE LAW CLERK: Do you know the number? I --

10 MR. WRAY: It was our charge number 31, DOT's
11 charge number 10.

12 THE LAW CLERK: Yes.

13 MR. WRAY: And then charging titles. Title 58-
14 15-910, which was the plaintiff's charge; 58-17-1390;
15 and then the last one is 1450, which we discussed
16 earlier, that I believe Judge Mullen asked Mr. Holmes to
17 highlight whatever additional --

18 THE COURT: Yes.

19 MR. WRAY: -- language he wants charged.

20 And those are the statutes I had down, Your
21 Honor. Covered all the rest of my charges.

22 THE COURT: Okay. Well, now let's got through
23 DOT's. Your number 3, Ashley, it was the Steinke case?

24 MS. AMUNDSON: Yes, ma'am.

25 THE LAW CLERK: And then I had a question. I'm

1 sorry. I also had 1625, which I think that's just
2 another that --

3 MR. WRAY: I think you're right. Is that the one
4 about closing crossing?

5 THE COURT: Yes.

6 MR. WRAY: Yes.

7 THE COURT: Yes.

8 MR. WRAY: You're correct. Thank you.

9 MR. MCLEOD: Which number?

10 THE LAW CLERK: It was 5815 -- oh. They are
11 number 12, charge number 12. But it was 58-15-1625, and
12 it was just the highlight -- the -- about the first and
13 second -- or, actually, just the first highlight.

14 MR. WRAY: Thank you.

15 THE COURT: Okay. The Steinke case. Your
16 request to charge number 3.

17 MS. AMUNDSON: Yes, Your Honor. And I believe we
18 provided that case yesterday.

19 THE COURT: I'm looking at it. Yeah.

20 MS. AMUNDSON: We just think this is applicable
21 because one of the allegations in the complaint was
22 negligent inspection and failure to make an inspection
23 at the crossing in accordance with the statute. And we
24 just think this is appropriate.

25 THE COURT: Okay. Gray? This is the Bungie

1 case?

2 MR. HOLMES: Yes, Your Honor. And at the end of
3 that case I believe that the holding was that if there
4 is gross negligence in the failure to inspect properly,
5 that you would not enjoy immunity. And so I would just
6 like to be able to submit something that would reflect,
7 I guess, the holding in Steinke -- or Steinke. How do
8 you pronounce that?

9 MR. WRAY: Steinke.

10 MR. HOLMES: Steinke.

11 THE COURT: Well, I think basically it came down
12 to they said that there was a special duty because this
13 was a -- because the plaintiffs are a protected class.
14 Yeah. [Reading] When an applicable exception contains
15 the gross negligence standard, then any other relevant
16 exception must be read in the light of that standard.

17 Why can't we just say what that says, [reading]
18 unless --

19 MR. HOLMES: [Reading] Unless you find that --

20 THE COURT: -- [reading] unless you find that the
21 DOT was grossly negligent.

22 MR. HOLMES: Or that there is a conscious failure
23 to.

24 THE COURT: Okay.

25 MR. HOLMES: Or gross -- either one is fine.

1 MS. AMUNDSON: I'm sorry. I don't have a copy of
2 the case anymore so if you don't mind just telling me
3 what that says, that would be great.

4 THE COURT: Hold on. I'm sorry. Ashley, I'll
5 give it back to you.

6 MS. AMUNDSON: Oh. That's okay.

7 THE COURT: Why can't we say -- just keep what
8 Ashley has got except say: unless you, the jury, find
9 that South Carolina Department of Transportation was
10 grossly negligent in this regard -- which means in
11 reference to either inspection, failing to inspect, or
12 make adequate -- all that?

13 MS. AMUNDSON: Where there be -- will there be an
14 instruction that tells them what gross negligence is?
15 Is that going to be part of your general charge?

16 THE COURT: There should be when it comes to --

17 MR. HOLMES: Punitives.

18 THE COURT: It should be in the punitives charge.

19 MS. AMUNDSON: I just wanted to make sure that
20 they --

21 THE COURT: Yeah.

22 MS. AMUNDSON: -- understand that.

23 THE COURT: You wanted me to --

24 MR. HOLMES: Well, you can use reckless.

25 MR. WRAY: Let's be clear about one thing. Gross

1 negligence is not sufficient for punitive damages. So I
2 hope you're not going to charge them that gross
3 negligence will get them there, because that only
4 applies to me. These folks don't care about gross
5 negligence --

6 THE COURT: I understand.

7 MR. WRAY: -- except as it applies in the Tort
8 Claims Act.

9 MR. HOLMES: Yeah. That's what we're talking
10 about.

11 MR. WRAY: I understand. But you said won't it
12 be charged by -- won't it be covered by your punitive
13 charge, and I thought the Court --

14 THE COURT: No. The punitive charge says
15 reckless, wilful and wanton. That's what the punitive
16 charge says.

17 MR. WRAY: Then I'm okay. I just wanted to make
18 sure.

19 MR. HOLMES: You can use conscious failure or
20 reckless.

21 THE COURT: Well, let's just use reckless.

22 [Whereupon, the Court and the law clerk confer]

23 THE COURT: Okay. Ashley, number 4.

24 MS. AMUNDSON: Okay. Your Honor, I believe that
25 you said yesterday that you wanted me to bring --

1 THE COURT: Yes.

2 MS. AMUNDSON: -- a case on this.

3 THE COURT: Yes. You were going to bring the
4 Atkins case, I think it was.

5 MS. AMUNDSON: I did.

6 THE COURT: And what does it say?

7 MS. AMUNDSON: Do you have that already, or --

8 THE COURT: I don't. But just tell me.

9 MS. AMUNDSON: Okay. In that case they discuss
10 this subsection 4 and they say that the -- they discuss
11 statutory instruction and say that the words must be
12 given their plain and ordinary meaning without resorting
13 to a subtle or a forced compliance which limits or
14 expands the statute's operation.

15 It later says: [reading] the provisions in 15-
16 78-60, subsection 4, are clear and unambiguous on their
17 face and are not subject to judicial interpretation.

18 MR. MCLEOD: Well, Your Honor, I didn't even know
19 about that, and that's what I said yesterday.

20 MR. HOLMES: Your Honor, we're not arguing that
21 there is anything vague or ambiguous about it or -- it
22 just simply doesn't apply. And the case that they are
23 discussing, the Varn case, is -- it's talking about a
24 dogcatcher not going out and getting a dog and enforcing
25 a local ordinance --

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1 THE COURT: Right.

2 MR. HOLMES: -- that then chased a kid out in
3 front of a car.

4 THE COURT: Right.

5 MR. HOLMES: In this, we're not citing the DOT
6 for their failure to enforce a law.

7 MS. AMUNDSON: Right. But that's only a part of
8 this exception to liability --

9 THE COURT: It says compliance with.

10 MS. AMUNDSON: -- to the Tort Claims Act to
11 compliance.

12 THE COURT: It also says compliance of any law.
13 And I think that's where your concern is.

14 MS. AMUNDSON: Yes, Your Honor.

15 MR. HOLMES: But, Your Honor, when they're
16 talking about compliance with a law, what they're
17 talking about --

18 THE COURT: Is getting someone else to comply
19 with the law. Is that what you are saying?

20 MR. HOLMES: Well, no. If there is a law that
21 is -- that is put in place by the legislature that the
22 DOT is bound to follow, you can't then go and sue the
23 DOT for following a regulation --

24 THE COURT: Right.

25 MR. HOLMES: -- for complying with that law.

1 MS. AMUNDSON: Well, that's exactly what we're
2 talking about --

3 THE COURT: That is exactly what y'all are
4 arguing.

5 MS. AMUNDSON: -- Your Honor.

6 I mean, even Dr. Heathington said that our stop
7 sign was placed in accordance with state law. And we --
8 also, there has been testimony that we complied with the
9 MUTCD --

10 THE COURT: Right.

11 MS. AMUNDSON: -- that's the very thing that
12 we're being sued for.

13 MR. HOLMES: Your Honor, the testimony is they
14 did not comply with the MUTCD. And we're not suing them
15 for complying with the MUTCD, which would be --

16 THE COURT: You mean for not complying.

17 MR. HOLMES: -- what this section --

18 No. For complying. This thing says: [reading]
19 the South Carolina Department of Transportation is not
20 liable for a loss resulting from, compliance with, any
21 law or failure to adopt or enforce any law.

22 MS. AMUNDSON: Well, yesterday we had testimony
23 from Dick Jenkins from the DOT and he got up and he
24 showed on the overhead that diagram that showed that
25 it's approximately fifteen feet. There has been

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1 testimony on the stand that they believe that this has
2 been approximately fifteen feet and, therefore, in
3 compliance with the MUTCD.

4 And of course as I stated earlier, the stop sign
5 is in accordance with that fifteen to fifty --

6 THE COURT: Right.

7 MS. AMUNDSON: -- foot requirement under the
8 statute.

9 MR. HOLMES: Your Honor, but it's not -- we're
10 not suing them for following the law; we're suing them
11 for not following --

12 MS. AMUNDSON: But I think --

13 MR. HOLMES: -- the law.

14 MS. AMUNDSON: There's enough evidence that I
15 think if the jury questioned it, then this should be
16 part of their deliberation process.

17 MR. HOLMES: I think if the charge was tailored
18 to where, I mean, there wasn't a bunch of language in
19 here that we're not talking about.

20 THE COURT: So you want to just do: for loss
21 resulting from compliance with the law or any with any
22 law? Is that what you're saying? Or is it --

23 MR. HOLMES: I just don't see that there's any --

24 THE COURT: -- for the failure?

25 MR. HOLMES: -- where there's been -- we're

1 certainly not suing them for complying with the law.
2 The allegation is that they didn't comply with their own
3 standards. I mean, that's the only allegation that
4 there is. There's nothing -- there's no allegation in
5 the complaint saying that the South Carolina Department
6 of Transportation complied with the law and that because
7 of that compliance that they're liable to us. It
8 doesn't have -- I don't see where it has any sort of
9 relevance to this case.

10 MR. JACOBSON: It's almost similar to the
11 government to carry out administerial function. They're
12 just -- if they're just complying with the law or
13 enforcing the law, there is no liability. But that's
14 not what this case is all about. This is an allegation
15 that they failed to -- failed to comply with their own
16 regulations.

17 MS. AMUNDSON: I don't think that this exception
18 is limited to administerial duties. I mean, you also
19 have words like adoption and enforcement, which are not
20 administerial --

21 MR. HOLMES: -- didn't say that they -- that
22 there was anything wrong with them adopting that
23 standard. I mean, that's -- I mean, that's what this is
24 about. It's about -- it's saying they're not liable for
25 a loss resulting from the adoption, enforcement, or

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1 compliance with any law or failure to adopt or enforce
2 any law. And there's no one for them to go out there
3 and actually enforce the stop sign issue against. And
4 the rest, I mean, certainly wouldn't have any sort of
5 bearing on the case.

6 THE COURT: Ashley, how do we tailor it to apply
7 to this case specifically?

8 MS. AMUNDSON: Well, I mean, I think that we
9 would be okay with getting rid of some of the other
10 language in here as long as the part about compliance
11 with any law, regulation, et cetera, is left in here.
12 And we're okay with getting rid of adopting, enforcing.

13 THE COURT: Okay. So from -- okay.

14 MR. HOLMES: And I think we already covered that,
15 Your Honor, when we were talking about the standard of
16 care about, your compliance with the law.

17 THE COURT: All right. Ashley, just show me what
18 you propose to do. So it would be: you're not liable
19 for loss resulting from compliance with any law --

20 MS. AMUNDSON: Including but not limited to any
21 charter, provision, ordinance, resolution, rule,
22 regulation or written policy.

23 THE COURT: Do we need to say charter, provision?

24 MS. AMUNDSON: No. We can get rid of --

25 THE COURT: Limited to --

1 MS. AMUNDSON: Well, rules, regulations or
2 written policy?

3 THE COURT: That seems to be what would be
4 applicable.

5 Mr. McLeod, you don't remember this, but you
6 argued this in front of me in Colleton County on a case
7 where the County sent out notice to police officers that
8 said this woman hadn't paid a traffic ticket when she,
9 in fact, had. Do you remember this? I know it was you
10 and not your son.

11 MR. MCLEOD: I can't remember it, but --

12 THE COURT: You were -- this was one --

13 MR. MCLEOD: -- I also --

14 THE COURT: This was one of many exceptions you
15 tried to argue, is what I recall. But anyway --

16 All right. Y'all, I'm --

17 MR. HOLMES: Your Honor --

18 THE COURT: -- going to charge it taking out the
19 other.

20 All right. Ashley, number 13.

21 MR. HOLMES: Your Honor, I'm still not sure what
22 it is that you're charging on --

23 THE COURT: Number 4: [Reading] The South
24 Carolina Department of Transportation is not liable for
25 a loss resulting from compliance with any law, including

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1 but not limited to, any rule, regulation, or written
2 policies.

3 Although, I can tell you, the way it reads now,
4 Ashley, that doesn't make sense.

5 MR. HOLMES: I mean, that's --

6 THE COURT: It doesn't make sense now.

7 MR. JACOBSON: The problem is they're trying to
8 take -- they're trying to take law to apply -- it
9 doesn't apply to this case because the case from which
10 the law was taken is so different from this case. It's
11 the exact opposite. That's why that -- that's why that
12 provision doesn't have any -- shouldn't be charged.

13 MS. AMUNDSON: I don't know that that -- I mean,
14 that case was not meant to be the one and only case.
15 This is statutory, and the Tort Claims Act is meant to
16 be construed literally in favor of the government, and I
17 do think it is applicable.

18 MR. HOLMES: Your Honor, I think I used the
19 example --

20 THE COURT: But you're talking about loss
21 resulting from compliance with any law. So you're
22 saying that you-all complied with the Lourie law and the
23 statute and the MUTCD?

24 MS. AMUNDSON: Correct.

25 THE COURT: They're not saying, though, you

1 didn't comply with those. What they're saying is it
2 still was bad placement.

3 I mean, isn't that what you're saying?

4 MR. HOLMES: Well, what -- well, I guess what
5 this defense would be would be to say if there was a law
6 put out there saying, okay, you have to place this stop
7 sign on the railroad track, and then the DOT goes and
8 puts -- pursuant to the law, goes and complies with the
9 law, does what they're supposed to do --

10 THE COURT: Puts it on the railroad track.

11 MR. HOLMES: -- puts it on the railroad track,
12 somebody stops at it and gets hit by a CSX train, then
13 they can't be sued for doing what they're bound to do.

14 THE COURT: Right.

15 MR. HOLMES: And that's the application of this,
16 and that's why it has no -- it has no bearing here. I

17 mean, the whole issue is -- isn't that they did
18 something that they were bound to do; it was that they
19 didn't place the stop line in accordance with the
20 regulation.

21 MS. AMUNDSON: Well, I disagree with that.

22 THE COURT: Well, she does, because she says it
23 was within the approximation that it was required to do
24 under the MUTCD. Correct? Right?

25 MS. AMUNDSON: Yes, Your Honor.

1 THE COURT: The problem is what you are saying
2 right there doesn't apply to this charge. What you're
3 saying is something different, but it doesn't apply to
4 this charge.

5 MR. HOLMES: And it would go in with the charges
6 that we've already had where we are talking about there
7 -- you know, if they're saying they complied with the
8 law --

9 THE COURT: Yeah.

10 MR. HOLMES: -- then that goes in with the other
11 charge we were talking about, the standard of care and
12 those different things, where it says that you look to
13 those issues.

14 THE COURT: Right.

15 I mean, your argument is is that you complied
16 with the MUTCD and you complied with the statutes and
17 you put it where it was supposed to be.

18 MS. AMUNDSON: Correct.

19 THE COURT: I mean, that's --

20 MS. AMUNDSON: But they're saying that this
21 person sustained injuries despite -- I mean, there's
22 some discretion in where you can place the signs. And
23 we complied with the statute and the MUTCD, but yet this
24 person sustained damages and they're wanting to make us
25 liable for that.

1 MR. JACOBSON: Well, it's a question of fact
2 whether they did place it approximately within the
3 fifteen feet. They were -- our allegation is they're
4 off four feet, which isn't really approximate at all.

5 THE COURT: Okay. I don't -- Ashley, I don't
6 think it applies in this.

7 Let's go on to number 13. Oh. This is 2730, and
8 we already charged that.

9 MR. WRAY: Actually, I think --

10 THE COURT: We're not --

11 MS. AMUNDSON: I have that one marked out, as
12 well, Your Honor.

13 THE COURT: That we are not charges 2730?

14 MS. AMUNDSON: That's right.

15 MR. WRAY: I think that's right.

16 MS. AMUNDSON: We took care of that during CSX
17 charges.

18 [Whereupon, the Court and the law clerk confer]

19 THE COURT: This is the one, again, the motion in
20 limine, the one that we hung out there, and we are still
21 deciding on --

22 MS. AMUNDSON: We did not --

23 THE COURT: -- and we decided y'all withdrew it.

24 MR. WRAY: That's right.

25 THE COURT: Okay. Number 17. We thought this

1 was already in CSX's charge, but --

2 MR. WRAY: I don't believe it is, Your Honor.

3 THE COURT: I don't think it is, either. I'll go
4 ahead and charge it. I mean, it's true there are
5 significant variables. And it's according to -- and
6 just so I've got it -- it's the manual? Is it the
7 manual?

8 MS. AMUNDSON: Yes, Your Honor.

9 THE COURT: -- manual uniform --

10 MS. AMUNDSON: Traffic control devices.

11 THE COURT: Okay. Traffic control devices.

12 Okay. Then we talked about your 28. But as I
13 told you, I'm going to charge the intervening --

14 MS. AMUNDSON: Yes, Your Honor.

15 THE COURT: -- cause charge.

16 MS. AMUNDSON: That's fine.

17 THE COURT: So we're not going to do this one.

18 Okay?

19 MS. AMUNDSON: That's fine.

20 THE COURT: I'm assuming this is a portion of it.

21 MS. AMUNDSON: I think it's fairly similar to
22 what you're going to charge --

23 THE COURT: Got you. And the same thing with
24 number 29; correct?

25 MS. AMUNDSON: Yes, Your Honor.

1 THE COURT: Okay. So those are gone.

2 Is that everything, Ashley?

3 MS. AMUNDSON: I think so.

4 MR. HOLMES: Your Honor, I actually had down that
5 you were going to look at charge 34 to see if we were
6 going to keep that entire charge --

7 THE COURT: What was 34?

8 MR. HOLMES: -- or just the first sentence.

9 THE COURT: Is this DOT's?

10 MS. AMUNDSON: Yes, Your Honor.

11 MR. HOLMES: Yes, Your Honor.

12 THE COURT: Okay.

13 MS. AMUNDSON: I had yesterday that you had said
14 that you were planning on charging it but it was --

15 THE COURT: This is number 4?

16 MR. HOLMES: 34.

17 MS. AMUNDSON: It's number 34, and we discussed
18 it --

19 THE COURT: Oh. I'm sorry.

20 MR. WRAY: It also was one I mentioned on my
21 list, 2330.

22 [Off the record momentarily]

23 MR. HOLMES: And, Your Honor, I believe that --
24 yesterday what we were talking about was charging the
25 first sentence: [reading] every driver of a vehicle

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1 approaching a stop sign shall stop at a clearly marked .
2 stop line.

3 And the question was whether or not the rest
4 applied because it said it shall yield the right-of-way
5 to approaching traffic.

6 THE COURT: All right. Mr. Wray, where were you
7 on this?

8 MR. WRAY: Well, I thought they had -- the
9 statute obviously goes on for several sections. They
10 had put in the pertinent language, and I'm fine with the
11 way they've got it.

12 THE COURT: Gray, what's the problem with the
13 rest of the -- just the next line?

14 MR. HOLMES: Just because I don't think a train
15 would -- I think that's applying to traffic as in
16 vehicles at an intersection.

17 THE COURT: I don't think traffic is just as to
18 vehicles.

19 MS. AMUNDSON: No.

20 THE COURT: If it just had said vehicles on the
21 roadway, I mean, then that would be vehicles. Well, I
22 don't know. Is a locomotive a vehicle? I don't think
23 so, but --

24 MR. WRAY: No. But --

25 THE COURT: Not going to define -- this says

1 traffic --

2 MR. WRAY: That's right.

3 THE COURT: -- and I think traffic is traffic.

4 So I think it's appropriate. Okay.

5 MR. HOLMES: So is that all of 2330, then, that
6 is being charged?

7 THE COURT: That's it. Unless you want more,
8 Gray. Is there something else on it that you need?

9 MR. HOLMES: No. I wanted to make sure --

10 THE COURT: That it was just going to stop right
11 there and that was it?

12 MR. HOLMES: Okay.

13 MR. WRAY: Your Honor, the only other thing that
14 I have charge-related is at various times during the
15 trial, of course you gave the jury an instruction on
16 punitive damages only.

17 THE COURT: Yes.

18 MR. WRAY: And I'll be happy to draft something
19 up for you to include. I'm sure it will not be
20 acceptable, so maybe you and Aaron can draft something
21 up. But the point I want charged is something like
22 that: at various times during the trial, I informed
23 you --

24 THE COURT: You heard me --

25 MR. WRAY: -- that certain evidence can only be

1 considered for punitive damages and as you go to the
2 jury room you must keep that in mind and only consider
3 that evidence as I instructed you.

4 THE COURT: And I agree with you and I actually,
5 to that end, was thinking the same thing. I think it
6 would more appropriately -- or most appropriately come
7 just after I finish charging the punitives, if that's,
8 you know, okay with y'all. I mean, that just seemed
9 like the natural place. And so I just want to remind
10 you, remember, I think it was five times during the
11 trial of the case that I broke and said, all right, this
12 evidence is only to be considered for punitive damages
13 purposes. So --

14 MR. WRAY: And I -- go ahead.

15 THE COURT: I think it better goes there than
16 after negligence because it really doesn't make sense
17 after the negligence --

18 MR. WRAY: Well, I was actually going to suggest
19 that --

20 THE COURT: Yes.

21 MR. WRAY: -- your way is probably better. But I
22 was thinking that maybe you would say that before you
23 got into the punitive charge: I'm now going to charge
24 you on punitive damages but before I do that I want to
25 remind you that during the trial we discussed certain

1 evidence and you can only consider it for that purpose,
2 and now let me tell you what the law is.

3 THE COURT: The only things is I don't think
4 they'll have a context for it if they don't know what
5 punitive damages are and what that means. And that's
6 the only reason why it makes, I think, better sense to
7 put it afterwards because then they will know what I'm
8 referring back to, because if I say all the rest of
9 this -- do you see what I'm saying?

10 MR. WRAY: That's fine, Your Honor.

11 THE COURT: I kind of think it should come
12 afterwards, but --

13 MR. WRAY: Okay.

14 THE COURT: Mr. Wray, you've already given me two
15 copies of it, but I want to make sure I've got another
16 copy.

17 [Whereupon, the Court reviews documents]

18 THE COURT: Okay. Mr. Gray, did you have a
19 chance -- Mr. Gray; sorry. Mr. Holmes, did you get a
20 chance -- everyone is going to lose their names by the
21 time this is over. Did you look at the one where we
22 were designating? I think it was -- was it 920 or 930?

23 MR. HOLMES: That's what I was looking at right
24 now.

25 THE COURT: Right. Okay. Were you able --

1 MR. HOLMES: I got -- I got a pink highlighter so
2 that I could --

3 [Off the record momentarily]

4 MR. WRAY: It was actually 1450 that we're
5 working on, and I'll be happy to look at it.

6 MR. JACOBSON: Your Honor, prior to the break I
7 had asked you to consider charging 56-2-950 --

8 THE COURT: Yes.

9 MR. JACOBSON: -- B-1.

10 THE COURT: Yes. This was the -- as to the
11 presumption that if you blow less than I think it's a
12 .05 --

13 MR. JACOBSON: That's right.

14 THE COURT: -- Mr. Jacobson, that -- there it is
15 right here. I'm sorry. It's 56-520-950.

16 MR. JACOBSON: Right. The only section one would
17 apply to this particular case.

18 THE COURT: What really worries me about this is
19 it says: in the criminal prosecution.

20 MR. WRAY: That's right.

21 MR. JACOBSON: Well, you don't have -- well, you
22 could also state that in -- well, you're charged 56-5-29
23 -- you've been asked to charge 56-5-2930, and what this
24 particular code section says is when you're dealing with
25 section 56-5-2930. And 56-5-2930 is a criminal statute,

1 Your Honor.

2 THE COURT: I understand.

3 MR. WRAY: Here's the problem, though. This
4 language is for criminal prosecutions, as you just said,
5 in which the burden of proof is beyond a reasonable
6 doubt. The burden of proof here is by a preponderance
7 of the evidence. That's what the jury is going to
8 consider in determining whether she was impaired or not.
9 And so the statute simply isn't applicable to a civil
10 action in which the jury question is whether she was
11 impaired by the combination of alcohol and drugs.

12 MR. JACOBSON: Well, that's this --

13 THE COURT: Your argument, Mr. Wray, would be
14 that she could be impaired even with less than --

15 MR. WRAY: Absolutely.

16 THE COURT: -- a .05?

17 MR. WRAY: You surely charge them that it's
18 conclusively presumed.

19 MR. JACOBSON: That's covered, Your Honor. In
20 the statute it says: [reading] the provision of this
21 section must be construed as limiting to the
22 introductions -- shall not be construed as limiting the
23 introduction of any other evidence appearing upon the
24 question of whether or not the person was under the
25 influence of alcohol, drugs, or a combination of them.

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1 That's covered in the statute. The jury has to
2 be charged -- if -- the jury has to be charged with what
3 is meant by these different numbers that have come in.
4 There is evidence of that.

5 THE COURT: No. Actually, I don't think they do.
6 I think that y'all are lucky in that the sheet that --
7 the Hampton Regional Medical Center said that was
8 designed for someone that came in, as a result of an
9 accident; that was DUI. I mean, I think quite frankly
10 y'all could have actually had that redacted and that
11 would have been something to consider. But --

12 MR. JACOBSON: Well, the whole thing -- Your
13 Honor, if you look at the code section, 56-5-2930,
14 you're talking about people being guilty; it's unlawful
15 to operate a motor vehicle. These are all criminal
16 statutes. 56-5-2950 is always used in conjunction --
17 charged in conjunction with that statute, and to charge
18 one without charging the other doesn't make any sense.

19 THE COURT: But the only difference that this
20 doesn't take into account is that we're talking, of
21 course, alcohol and -- and -- narcotics. So I don't
22 think -- I don't think I can charge them that just
23 because her BAC level was less than .5 means that she
24 was presumptively not impaired.

25 MR. JACOBSON: No. That's not what it says. I

1 specifically highlighted the next page, the applicable
2 section. Keep on reading, Your Honor, the second --
3 the next page. Do you see where it keeps on going? It
4 says -- it explains that. It says: [reading] the
5 provisions of this section must not be construed as
6 limiting the introduction of any other evidence bearing
7 upon the question of whether or not the person was under
8 the influence of alcohol or drugs or a combination of
9 them.

10 This case explains what that is all about.

11 MR. WRAY: No. That just sets forth a rule of
12 evidence saying that just because you're at .5 doesn't
13 mean that the Court can let in other evidence to suggest
14 you are impaired. That's an evidentiary concern. It
15 wouldn't be proper to charge the jury. This statute
16 doesn't apply to a civil action.

17 MR. JACOBSON: In that case, 56-5-2930 may not
18 apply to a civil action.

19 MR. WRAY: No. That's like saying that in an
20 automobile accident case --

21 THE COURT: If you run a red light you're not --

22 MR. WRAY: Correct. And you wouldn't charge the
23 red light statute or the --

24 THE COURT: Exactly.

25 MR. WRAY: -- speeding statute, because they're

1 criminal statutes.

2 THE COURT: No. They're criminal --

3 MR. JACOBSON: There is evidence in this case,
4 Your Honor, about the alcohol level and I think the jury
5 should be charged what the law is with regards to
6 interpretation of what that means.

7 And it does go on to say that: [reading] the
8 provision of this section must not be construed as a
9 limiting introduction of any other evidence --

10 THE COURT: I guess, Chuck, what it doesn't call
11 into account, though -- because it says in the criminal
12 prosecution for a violation of whatever related to
13 driving a vehicle -- and it says -- under the influence
14 of alcohol, drugs, or a combination. But then it goes
15 down and it says: [reading] if the alcohol
16 concentration was, at the time, five-one-hundredths of
17 one percent or less, it is conclusively presumed that
18 the person was not under the influence of alcohol.

19 But it doesn't talk about the combination of the
20 alcohol and the drugs, where the first part [b] does.

21 MR. JACOBSON: Frankly, Your Honor, I believe in
22 this particular case, since the alcohol was less than
23 .05, I think that really that all that evidence should
24 be struck, because there is not evidence that the -- if
25 you look at the statute, that it's conclusively presumed

1 that the person was not under the influence of alcohol
2 at all.

3 THE COURT: But then how do you not take that in
4 conjunction with the narcotics and the muscle relaxants
5 and everything else that was taken? because it's not
6 just the BAC level. All that measures is alcohol. It
7 doesn't measure the combination of narcotics with
8 alcohol causing --

9 MR. JACOBSON: Right.

10 THE COURT: -- impairment.

11 MR. JACOBSON: And what my position would be,
12 Your Honor, is this. In this particular case since the
13 level of alcohol was less than five one hundredths of
14 one percent, since it's -- since the statute states that
15 it's conclusively presumed --

16 THE COURT: That that alone --

17 MR. JACOBSON: -- that the --

18 THE COURT: -- that that alone is presumed to be
19 not under the influence.

20 But the problem is we don't have that here. We
21 don't have that alone. We have drugs combining with it.
22 I mean, that's what I think that --

23 MR. JACOBSON: And I think -- in this particular
24 case I think since the -- I think in this particular
25 case since the alcohol level was so low, it was an error

1 to submit that question to -- at all to the jury because
2 it was so negligible. The amount of alcohol in this
3 case was so negligible --

4 THE COURT: What was -- what was error to submit
5 what to the jury? Because you're -- the plaintiffs put
6 in that BAC level. They didn't. You-all put it in.

7 MR. WRAY: That's correct. Withdrew the
8 objection, and announced it in opening statement.

9 THE COURT: They couldn't establish the chain, if
10 you remember. We had a motion in limine we heard for an
11 entire day. They couldn't establish the chain. I said
12 the BAC wasn't coming in. That's what I ruled. And Mr.
13 Parker is the one that chose to put it in. So he's the
14 one that put the BAC in.

15 MR. JACOBSON: Well, since it's in, Your Honor,
16 we would ask the jury to be charged that it's
17 conclusively presumed it is not under the influence of
18 alcohol at all.

19 THE COURT: Is not under the -- the problem,
20 again, is it does not take into account the drugs along
21 with the alcohol.

22 MR. JACOBSON: I think that you have to have a
23 certain amount of alcohol in your system -- under the
24 law -- I think you have -- to even to combine with the
25 drugs. Under the statutes, if you have such a low

1 alcohol --

2 THE COURT: But, see, the thing is I don't think
3 you can say that. I think a jury could determine that
4 two wine coolers and a narcotic and a muscle relaxant
5 and possibly some codeine -- I'm not sure if I'm mixing
6 what we had in the hearing versus what we heard here at
7 trial. But I think that was -- the testimony was is
8 that --

9 MR. WRAY: That's for a jury trial.

10 MR. JACOBSON: But what if the alcohol level was
11 so low that it wasn't even enough to mix with the other
12 drugs to --

13 THE COURT: Well, maybe the Darvocet, the muscle
14 relaxant and the cough syrup, those three alone were
15 enough to cause her to be impaired.

16 MR. JACOBSON: Well --

17 THE COURT: I mean, taking the alcohol completely
18 out of it, it's possible that those three together,
19 combined, could have made her impaired.

20 MR. JACOBSON: And that's why I think the
21 defendants are protected by this particular provision
22 that's also in the statute. Says: [reading] a
23 provision of this section must not be construed as
24 limiting the introduction of any other evidence bearing
25 upon the question of whether or not the person was under

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1 the influence of alcohol or drugs or a combination of
2 them. That's the catchall that protects them. That's
3 in the statute.

4 So even in a criminal case, even if --

5 THE COURT: Well, it says limiting the
6 introduction of any other -- if it said the provisions
7 of the sections must not be construed as conclusively
8 determining, I mean, that would be -- have to be the
9 language. It would have to say conclusively -- or do we
10 conclusively determine that someone was not impaired or
11 under the influence, then I would agree with you. But
12 it doesn't say that.

13 MR. JACOBSON: It says the provisions of this
14 section -- in other words, the -- it says, the fact that
15 -- the way I interpret that is this: notwithstanding
16 the fact that if the alcohol level is so low this
17 conclusively presumed that a person was not under the
18 influence of alcohol -- notwithstanding that fact --
19 that doesn't preclude evidence or limit the introduction
20 of any other evidence bearing upon the question of
21 whether or not the person was under the influence of
22 alcohol, drugs, or a combination of them.

23 So although -- if it was talking -- if it was
24 alcohol alone, Your Honor --

25 THE COURT: You're right. It wouldn't --

1 MR. JACOBSON: It wouldn't make a difference.
2 But in this -- but in this particular case, I think the
3 jury ought to be told that alcohol -- if this were just
4 a case of alcohol alone, it's conclusively presumed that
5 the person was not under the influence of alcohol;
6 however, in this case there is evidence of alcohol,
7 drugs, or a combination of them, if -- you can take all
8 of that into consideration. And that's what that
9 provision does. It's a catchall. It allowed the
10 introduction of other evidence in this case. And I
11 think the jury ought to be -- the law tells a jury --
12 there's a statute that tells a jury the -- how that
13 blood alcohol level is supposed to be interpreted.

14 MR. HOLMES: And, Your Honor, the other thing,
15 with the testimony that she could have taken the
16 medications at 6:30 in the morning, they could also very
17 easily determine that she was only under the influence
18 of alcohol at that time. And so that would be the only
19 evidence. And if they can infer that, then they ought
20 to be able to know that under South Carolina law you're
21 presumed to be not under the influence of alcohol if
22 you're at that level.

23 And, I mean, and I understand what you're saying,
24 that there is the possibility of having this
25 combination. But that would be covered by the other

1 statute that you're charging. And so, I mean, while
2 that's one possible conclusion that the jury could come
3 to, that there was a combination, they could also very
4 easily come to the conclusion that having taken these
5 things at 6:30 in the morning, there never having been
6 any history of side effects or any problems like that,
7 that she would not at all be under the influence of
8 these opiates. And especially considering, also,
9 there's only a presumptive positive --

10 THE COURT: As to the opiates.

11 MR. HOLMES: -- as to the opiates at the time
12 that her blood alcohol was tested, as well.

13 MR. JACOBSON: Your Honor, you're going to be
14 charging 56-5-2930. You're going to be charging that.
15 I would only ask you to include the following language:
16 I further charge you, the jury, that in considering
17 whether or not the -- that plaintiff was operating her
18 vehicle in violation of 56-5-2930, I charge you that a
19 violation of 56-5-2930 -- driving a vehicle under the
20 influence of alcohol, drugs, or a combination of alcohol
21 and drugs, the alcohol concentration at the time of the
22 test, as shown by the chemical analysis of the bodily
23 fluids, gives rise to the following: number one, the
24 alcohol concentration was at that time five one
25 hundredths of one percent or less, it is conclusively

1 presumed that the person was not under the influence of
2 alcohol. Provisions of this section must not be
3 construed as limiting the introduction of any other
4 evidence appearing upon the question of whether or not
5 the person was under the influence of alcohol, drugs, or
6 a combination of them.

7 MR. WRAY: The statute couldn't be clearer. It
8 says it only applies in a criminal prosecution. So that
9 ends it right there. But beyond that --

10 THE COURT: Well, y'all -- go ahead.

11 MR. WRAY: Well, you've nailed it. I don't need
12 to say anything else. It only speaks to the alcohol
13 concentration, and there's evidence in this case there
14 was more than alcohol in her system. So it doesn't
15 apply, by it's very definition, and it doesn't address
16 the situation that the evidence in this case presents,
17 which is the combination of alcohol and drugs.

18 THE COURT: Y'all, let me sleep on it, because I
19 am listening to Gray's argument where he says this jury
20 could find, like he said, that she took all these other
21 drugs at 6:30 in the morning and so by the time this
22 accident occurred, that, [a], that didn't affect her and
23 that the only thing she had had was the --

24 MR. JACOBSON: Alcohol.

25 THE COURT: Yeah.

1 -- the two wine coolers in the afternoon or in
2 the late morning, whenever.

3 MR. WRAY: She said she took some of her
4 medication at 6:30.

5 THE COURT: Right.

6 MR. WRAY: She said she took her Darvocet at
7 around 11:00 or 12:00 --

8 THE COURT: Right.

9 MR. WRAY: -- when she was cleaning up and when
10 she drank the alcohol.

11 MR. HOLMES: Judge, I think that the jury could
12 either find that she took it at 6:30 in the morning or
13 that she took it at 11:00 or 12:00. They -- she said
14 she came home and started cleaning, that she took it as
15 soon as she got home. Then later they said, well,
16 wasn't that when you were cleaning, and she said yes.
17 So it's for the jury to determine what time that was.

18 MR. JACOBSON: And this also gives a -- this also
19 gives the jury additional information to explain what
20 that provision meant on the record that came in talking
21 about less than a certain percentage was less than the
22 presumption of intoxication. Do you know what I'm
23 talking about?

24 THE COURT: Uh-huh.

25 MR. JACOBSON: So this -- that further

1 illustrates it.

2 THE COURT: Yeah.

3 MR. JACOBSON: And there was no -- and there was
4 no objection to that coming in, Your Honor.

5 THE COURT: Okay. Y'all, let's talk about the
6 verdict form. And was there anything else, other than
7 Gray now --

8 Did you get a chance, Mr. Wray, to look at his
9 designated portions of I think it was 920?

10 MR. WRAY: Yes.

11 THE COURT: And are you okay with it?

12 MR. WRAY: I'm sorry. It wasn't 920. It's 1450.

13 THE COURT: I'm sorry.

14 MR. WRAY: And he highlighted the first sentence,
15 and that's fine.

16 THE COURT: Is that okay?

17 MR. WRAY: Yes, ma'am. And then you've got --

18 THE COURT: And I am searching right now for your
19 punitive damages charge that I've been given all along,
20 and I want -- I just -- and I don't know if you have
21 another copy of it. I just want to pare it almost the
22 exact same thing so they understand that that's what I'm
23 talking about, like I did the five other times, because
24 I just think in all fairness -- and I'm sorry. I'm sure
25 it's somewhere here. It's just where it is is the

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1 question.

2 [Whereupon, the Court and the law clerk confer]

3 THE COURT: All right. This is what we are going
4 to do. For those of you-all that are arguing charges
5 that we have a few other issues on, why don't we all be
6 here -- I told them to come at what time? 9:00? The
7 jury is coming in at 9:30. What time are the lawyers --
8 what time are the other lawyers coming in? 9:30?

9 MR. WRAY: 9:00.

10 THE COURT: 9:00?

11 MR. WRAY: I believe that's what you told us.

12 THE COURT REPORTER: You did. I wrote it down.

13 MR. WRAY: I will present you with another copy.

14 [Whereupon, Mr. Wray proffers documents to the
15 Court]

16 [Off the record momentarily]

17 THE COURT: Okay. Let's talk about the verdict
18 form, y'all.

19 Okay. I will tell you this. I'm not sure whose
20 was whose, but I had a good guess -- at least I think it
21 was a good guess of whose was who. And I will tell you
22 I'm actually surprised, because I think they are all
23 pretty close to the same, which really was shocking to
24 me.

25 MR. WRAY: Not far off.

1 THE COURT: Yeah.

2 I will tell you the most simplistic, straight-
3 forward one I think is what I believe to be the
4 plaintiff's one that just doesn't say special
5 interrogatories on it, I guess --

6 I'm guessing that's yours; is that correct, Gray?

7 MR. HOLMES: Your Honor, mine would be the one
8 that includes the medical --

9 THE COURT: Right.

10 MR. HOLMES: -- bills.

11 THE COURT: Okay. Do you find that Defendant CSX
12 Transportation was negligent. Do you find that
13 negligence was a proximate cause of Lillian Colvin's
14 injuries. Do you find that the Defendant The South
15 Carolina Department of Transportation was negligent. Do
16 you find that the DOT's negligence was a proximate cause
17 of the injuries. Okay? Then it properly apportions
18 fault, which is required under the statute. No?

19 MR. WRAY: I disagree with that.

20 THE COURT: What?

21 MR. WRAY: It does have to be apportioned. But
22 the way they've got it done is assigning percentages of
23 fault, not assigning apportion of monetary liability,
24 which is what the statute requires. And that's what Mr.
25 McLeod submitted, and that's what we submitted.

1 THE COURT: Okay. So we just --

2 MR. WRAY: Right. The statute specifically says
3 the jury must apportion the --

4 THE COURT: Monetary liability.

5 MR. WRAY: -- monetary liability against each
6 defendant against whom liability is found.

7 And that could be significant. There is a
8 difference. And so this -- I don't believe it's correct
9 as to --

10 THE COURT: So what word do you want to use
11 instead of fault?

12 MR. WRAY: Well, I mean, I would just suggest
13 either Mr. McLeod's version or ours, which says state
14 the actual damages sustained by the plaintiff and then
15 how much do you attribute to CSX and how much do you
16 attribute to DOT.

17 THE COURT: Okay. Hang on.

18 [Whereupon, the Court reviews documents]

19 MR. WRAY: I think the way we worded it --

20 THE COURT: Where is your -- I'm not sure I have
21 yours. Which one is yours, Ron?

22 MR. WRAY: Mine is the one that has, in the first
23 page, a box. It says: [reading] if you checked box A,
24 stop and deliberate no further. If you checked box B,
25 answer the following. And I've 2 and 2-A.

1 THE COURT: Well, wait a minute. Okay. I think
2 this is it.

3 MR. WRAY: I've got one, Your Honor.

4 THE COURT: No. I've got -- no, no, no. I don't
5 need an extra one. I've already got what appears to be
6 four.

7 MR. WRAY: Yes, ma'am. Mr. McLeod gave you two,
8 I think.

9 THE COURT: Okay. So what portion of yours?
10 What sections?

11 MR. WRAY: It would be -- well, question 4 tells
12 them to state --

13 THE COURT: Number 4: [reading] state the total
14 amount of damages.

15 MR. WRAY: That's right. And then the number 5
16 then says if you found damages, then state how much CSX
17 -- it actually says: [reading] indicate the amount of
18 damage you have determined should be apportioned to CSX
19 and/or the South Carolina Department of Transportation,
20 which is what the statute says.

21 THE COURT: Okay. So you just want to put your
22 number 5 in?

23 MR. WRAY: Yes, ma'am.

24 THE COURT: Okay. So you want to put your number
25 5.

1 MR. WRAY: It would actually be after -- if you
2 are using the plaintiff's one, it would be after their
3 number 6 where they state a total amount of damages.

4 THE COURT: Got you. Okay.

5 MR. HOLMES: Your Honor, I'm not disputing what
6 Ron is saying, but could I grab the code to take a look
7 at --

8 THE COURT: Sure. Sure. Grab it. Aaron --

9 I guess -- y'all, I hate to say this, but since
10 she doesn't have this, whoever is closest to
11 approximate, that they're going to be the one that's
12 going to fix it. She doesn't have it typed up. Not
13 that I doubt her typing ability. I hear she's a really
14 good typist. But that's not her job, hopefully.

15 [Off the record momentarily]

16 MR. WRAY: Is Gray looking for the statute?

17 THE COURT: Yes.

18 MR. WRAY: I've got it right here.

19 THE COURT: So you want to put in -- okay. So
20 we'll make this number 5, we'll make this number 6.
21 Okay.

22 Gray, he found it, as well.

23 MR. HOLMES: Okay.

24 MR. WRAY: And I'll just -- I'll read it and let
25 Mr. Holmes look on with me. It says: [reading] in all

1 actions brought pursuant to this chapter -- meaning the
2 Tort Claims Act -- when an alleged joint tortfeasor is
3 named as party defendant in addition to the governmental
4 entity, the trier of fact must return a special verdict
5 specifying the proportion of monetary liability of each
6 defendant against whom liability is determined.

7 So that's what our form says.

8 MR. HOLMES: Well, Your Honor, actually, it says
9 the proportion of a monetary liability, not apportion.

10 MR. WRAY: That's what I said.

11 THE COURT: He said proportion.

12 MR. HOLMES: Well, but you would still do a
13 percentage rather than the total amount of the --

14 THE COURT: Mr. Wray, what are you going to
15 argue?

16 MR. WRAY: That his form says percentage of
17 fault. That's different than proportion of monetary
18 liability.

19 THE COURT: But why still can't we do it as a
20 percent?

21 MR. WRAY: Because -- well, we could do it as a
22 percentage of the damages. It would be --

23 THE COURT: You want to say: that percentage of
24 the damages?

25 MR. WRAY: Well, I think it's confusing. But, I

1 mean, I think it's simpler just to say how much damages
2 do you award against CSX; how much damages do you award
3 against DOT. I don't know why that's confusing or why
4 they have a problem with it. The number is going to be
5 the same because they're going to answer the question
6 what's the total amount of actual damages.

7 THE COURT: So, in other words, it's just going
8 to be a number, a dollar figure, as opposed to?

9 MR. WRAY: They'll just have to break it down,
10 how much given that's the responsibility of CSX and how
11 much is the responsibility of DOT -- which is what the
12 statute requires -- and the total of my actual damages
13 isn't going to change.

14 MR. HOLMES: Well, and it seems to me, Your
15 Honor, you would actually -- you would do it as a
16 percentage of fault and have them determine one time
17 what the total amount of damages is and we could just
18 change percentage fault to the percentage proportion of
19 liability or monetary liability, or whatever it is. A
20 percentage --

21 THE COURT: Ron, can we do that? The only reason
22 why I worry about this is I don't want them for some
23 reason to start -- when they start messing with numbers,
24 they end up sticking a punitive damages number up there
25 and start dividing that up or there being some -- that's

1 the only thing I worry about, because God only knows
2 what they're going to do with these numbers. I mean --

3 MR. WRAY: Well, they --

4 THE COURT: Do you see what I'm saying?

5 MR. WRAY: Yes, ma'am. I'm trying to think. I
6 guess you could say -- well, yeah, I --

7 THE COURT: What is a percentage of what? You
8 tell me the language that you're comfortable with. But
9 I do think we need to be more careful as to percentage.
10 But you need to tell me percentage of what.

11 MR. WRAY: Why don't we say this. Under their
12 form: if you answered yes to question one and question
13 three, then please apportion the damages between the
14 defendants.

15 THE COURT: Okay. The damages between the
16 defendant. Okay. When apportioning damages -- is that
17 what you want to say? You have to keep going on in
18 their sentence. When apportioning damages, you are
19 required to assign a percentage of damages --

20 Is that what you want again?

21 MR. WRAY: That's right.

22 THE COURT: -- between each of the defendants.
23 The total amount of damages must add up to a total of a
24 hundred percent?

25 MR. WRAY: No. It would be the total percentage

1 you assign must add up to a hundred percent.

2 THE COURT: The total -- okay -- percentage you
3 assign -- the total --

4 MR. HOLMES: How about the total of the
5 percentages you assign?

6 MR. WRAY: That's fine.

7 THE COURT: Okay. The total -- Gray, you're
8 writing this down. So you're going to fix it?

9 MR. HOLMES: I'm doing my best.

10 THE COURT: Okay. Well, no, I'm doing it, too,
11 so if I can hand you this --

12 The total -- did we say of the percentages you
13 assign? [Reading] The total of the percentages you
14 assign must add up to a total of a hundred percent.

15 Gray, is that what you have?

16 MR. HOLMES: Yes, Your Honor.

17 THE COURT: Ron, is that okay?

18 MR. WRAY: Yes. That part is. Once we have
19 rewritten it --

20 THE COURT: Let's keep going.

21 MR. WRAY: -- maybe we can read it --

22 THE COURT: Keep going.

23 MR. WRAY: -- all the way through. And I would
24 say --

25 THE COURT: You may apportion any number of

1 percentages --

2 MR. HOLMES: I would say any percentage of
3 damages.

4 THE COURT: Right. Percentage -- yes. Is that
5 what you want to say, percentage of damages? Or
6 percentage?

7 MR. WRAY: I would just say you may apportion any
8 number between zero percent and a hundred percent.

9 THE COURT: Okay. Any number between zero
10 percent and a hundred percent to either defendant so
11 long as the number totals --

12 MR. WRAY: So long as --

13 THE COURT: -- a hundred percent.

14 MR. WRAY: -- the total percentage.

15 THE COURT: Right. As long as the total
16 percentage equals a hundred percent. That makes sense.

17 MR. WRAY: And then on the boxes, if we just
18 say --

19 THE COURT: We find --

20 MR. WRAY: -- I would just say CSX
21 Transportation.

22 THE COURT: Yeah.

23 MR. WRAY: It doesn't have to say we find fault.
24 Just say percentage CSX, percentage DOT.

25 THE COURT: Okay.

1 MR. MCLEOD: Your Honor, maybe I'm missing
2 something, but suppose when you ask -- you're asking
3 question two and question three. Suppose they answer no
4 to -- I mean, yes to answer questions one and three?
5 What I'm looking for is if they answer one --

6 THE COURT: If they answer yes to one but not
7 three?

8 MR. MCLEOD: How about no --

9 MS. AMUNDSON: But not the other.

10 MR. MCLEOD: And we --

11 THE COURT: Right. Well, then, why can't we just
12 write --

13 MR. MCLEOD: I mean, you're supposed to answer no
14 to the proximate cause. If they say no on proximate
15 cause, for example, the department of --

16 THE COURT: Actually, you're right. It should be
17 two and four.

18 MR. WRAY: That's exactly right. Mr. McLeod
19 makes --

20 THE COURT: You're right. It should be two and
21 four.

22 MR. WRAY: -- a great point.

23 Well, it's -- well, actually, it's got to be all
24 of them. They couldn't answer no to one, yes to two, no
25 to three, yes to four, and then apportion anything.

1 THE COURT: Right.

2 MR. WRAY: There would be no liability.

3 THE COURT: Right.

4 MR. WRAY: Which is why, quite frankly -- and Mr.
5 McLeod did this first and I piggybacked on him. The
6 first question they ought to answer is is anybody
7 liable. They don't need to go through and answer all
8 these other questions unless -- and we structured it
9 that way. Tell us whether anybody is liable and, if
10 they are, then answer the rest of the questions. And
11 then our questions were similar to Mr. Holmes.

12 THE COURT: I actually think that's more
13 confusing, though.

14 MR. HOLMES: It just adds another step that might
15 be unnecessary. We can change it to say if you answered
16 yes to the preceding questions.

17 MR. WRAY: Well, it would be all. It would
18 say -- I guess it would say, if you answered yes to all
19 of the preceding questions.

20 THE COURT: No. But what happens --

21 MR. HOLMES: Questions one through four.

22 THE COURT: Guys, what happens, though, if they
23 find that there is negligence as to CSX but not DOT --
24 so they would still answer number 5, if they answer yes
25 to one and two but not three and four. They would just

1 have to assign a hundred percent to CSX. Do you see
2 what I'm saying? I think there needs to be a drive-line
3 that says --

4 MR. WRAY: Well, that's why I was saying I think
5 you need to flip the order. They need to answer one
6 through four, then answer six: what's the total amount
7 of actual damages.

8 THE COURT: Right.

9 MR. WRAY: Then what's currently five would be
10 six --

11 THE COURT: I agree with you.

12 MR. WRAY: -- and it would say, if you answered
13 yes to all of questions one, two, three, and four, then
14 you apportion the percentage of --

15 MS. AMUNDSON: Number five.

16 MR. WRAY: -- damages.

17 MR. JACOBSON: What if you say if you answered
18 yes to questions two and four?

19 MR. WRAY: Then there is no apportionment because
20 then they would have found for the DOT.

21 MR. HOLMES: If you answered yes to two and four.

22 MR. JACOBSON: Two and four. Two and four --

23 THE COURT: Not if you list as to two and four.

24 MR. JACOBSON: -- is proximate cause.

25 MR. WRAY: I understand. I'm sorry. They might

1 answer one no.

2 THE COURT: Right. Well, what it is is they may
3 answer one and two yes, but not three and four.

4 MR. HOLMES: That's right. I mean, if they --

5 MR. WRAY: And that's part of the problem I had
6 with the form.

7 MR. JACOBSON: You have to answer --

8 MR. WRAY: Do you find that CSX was negligent.
9 Let's assume they answer no.

10 THE COURT: Right.

11 MR. WRAY: They think they've then got to answer
12 two. What if they say, do you find that it was
13 proximate cause -- and I understand they shouldn't do
14 that.

15 MR. MCLEOD: I think it's confusing --

16 MR. WRAY: But they may --

17 MR. MCLEOD: -- and I think you need to --

18 MR. WRAY: -- answer that one yes. What do we do
19 with the verdict then? We find no negligence but we do
20 find proximate cause.

21 MR. HOLMES: We could put out beside one, beside
22 no, say if you answered no please go directly to
23 question three.

24 MR. WRAY: Yeah. And that's where I've -- the
25 way I've seen it done. Again, that's why my form I said

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1 if you answered yes, then answer the proximate cause
2 question.

3 THE COURT: Right. Go to question number three.

4 MR. WRAY: Because they don't need to answer --
5 I'm concerned. And I know you're going to do a great
6 job, but it's going to be an hour charge and then you're
7 going to whip out the verdict form and they're going to
8 think, we've got to answer all of these questions.

9 THE COURT: Yeah.

10 MR. WRAY: And the truth is they don't.

11 THE COURT: Oh. No. I mean, obviously you need
12 to have drive-lines that just say, if you answered no to
13 this, you know, you --

14 MR. MCLEOD: I'll tell you what. It took me
15 about three hours trying to figure these -- this thing
16 out.

17 THE COURT: Okay. Could I ask you a question?
18 Is there any reason why we can't combine one and two
19 into one question?

20 MR. WRAY: We want it separate.

21 THE COURT: I assume you do.

22 MR. WRAY: And I assume --

23 And interestingly enough, Gray, you wanted it
24 separate, too.

25 MR. WRAY: I assume they do. They submitted it

1 that way, as well.

2 MR. HOLMES: I would probably like to have it
3 together, but I just assumed they wouldn't.

4 THE COURT: I understand. I understand.

5 MR. WRAY: Because the jury could find in this
6 case --

7 THE COURT: Oh. That someone was negligent but
8 that wasn't the proximate cause.

9 MR. WRAY: That's exactly right.

10 THE COURT: I agree. Okay.

11 Okay. So let's just do it where they've got
12 enough direction that they know what to do. Okay.
13 We're going to do one, two, three and four. And then
14 we're going to do -- number six is going to be number
15 five. And then we're going to go to number six, Gray.
16 It says: [reading] if you answered yes to questions one
17 and two or one and two and three and four --

18 MR. WRAY: I don't think they need to do that,
19 Your Honor.

20 MR. MCLEOD: No.

21 THE COURT: No.

22 MR. MCLEOD: I don't think so, either.

23 MR. WRAY: If they haven't found against both of
24 us, they don't need to apportion anything. They will
25 have already answered what's the actual damages. And

1 whichever one of us is on the hook, if only one of us is
2 on the hook, will pay the actual damage award. So I
3 don't think they need to have the opposite there. It's
4 if you answered yes to all of questions one, two, three
5 and four, then you do the apportionment. That's the
6 only time they're going to do the apportionment. If
7 either one of us is found --

8 THE COURT: Oh. I see what you're saying,
9 because if for some reason DOT is not there, they don't
10 need to apportion --

11 MR. WRAY: That's right.

12 THE COURT: -- that you're responsible for the
13 whole thing.

14 MR. WRAY: That's right.

15 THE COURT: That makes sense.

16 MR. JACOBSON: But if you -- if you do -- if you
17 would say -- like question number two, if you say, if
18 you -- if your answer is yes, do you find proximate
19 cause; and on number four if you would say, if you find
20 yes, do you find proximate cause. And then when you get
21 to the next question, you only have to say if you
22 answered yes to two and four, then please apportion
23 fault to the defendants. Do you know what I mean?

24 THE COURT: Uh-huh.

25 MR. HOLMES: You either need to do two and four,

1 or one through four.

2 MR. WRAY: Yeah. I --

3 MR. JACOBSON: You can't apportion that because
4 you already said under number two if you find yes,
5 answer this one, under number four it's if you answered
6 yes to number three, answer this one. So that
7 presupposes a positive answer to one and two either way.

8 MR. WRAY: So what's the objection of just saying
9 if you've answered yes to one, two, three and four?

10 THE COURT: Okay. Let's just do it that way.

11 MR. JACOBSON: If you answer yes to questions one
12 through four.

13 Your Honor, on damages -- I hate to complicate
14 this -- but should the say state the total amount of
15 compensatory damages, because there's no --

16 THE COURT: Yeah. It should say either -- I
17 would say actual damages.

18 MR. JACOBSON: I would prefer compensatory.

19 THE COURT: You want compensatory?

20 MR. JACOBSON: Actual is so confusing to juries.

21 MR. MCLEOD: Well, if you do that, you don't give
22 them any directions if they've answered no. You go
23 right straight and tell them, give us a hundred percent
24 of the damages. And one of -- and whoever got the no
25 answer is supposed to be able to walk out of here.

1 MR. HOLMES: But if they answered no to one, they
2 don't answer that question.

3 THE COURT: They don't have to answer it if they
4 answered no to one, because there wouldn't be any
5 assignment.

6 MR. MCLEOD: Well, if -- all right. Say they
7 answered three yeses and one no --

8 THE COURT: Then they don't even answer what is
9 going to become number six.

10 It's going to become number six? That's the
11 total amount of damages.

12 MR. HOLMES: Go show him, Gray, what we're
13 talking about.

14 [Whereupon, Mr. Holmes, Mr. McLeod, and Ms.
15 Amundson confer]

16 THE COURT: All right. So y'all are in
17 agreement. We -- no?

18 MR. MCLEOD: I was just going to say he told me
19 that they were going to put right here, if you answered
20 yes go to this one; if not -- I mean --

21 THE COURT: Okay. Well, Gray is going to fix it
22 tonight. Y'all have got to look at it again tomorrow
23 morning, no question.

24 MR. HOLMES: I'll e-mail it tonight.

25 MR. WRAY: If he can e-mail it tonight, I'll go

1 ahead and look at it and we'll come in prepared to talk
2 about it in the morning.

3 THE COURT: Obviously.

4 MR. HOLMES: Your Honor, I also will probably put
5 in a paragraph before we get to number five saying if
6 you answered no to all the preceding questions, go no
7 farther.

8 THE COURT: Yeah. Absolutely. Absolutely.

9 MR. HOLMES: And for number -- what we are making
10 number five, we're doing the state the total amount of
11 compensatory damages? Or how are we going --

12 THE COURT: I mean, you can do actual,
13 compensatory. I can tell you, in the charge I call them
14 both. Chuck thinks the actual damage is confusing. I
15 think compensatory damage is confusing. You know --

16 MR. MCLEOD: I think you had better put actual.

17 THE COURT: -- in other words, unless they sit
18 back and say it means compensate.

19 You use actual, don't you?

20 MR. WRAY: Yes.

21 MR. MCLEOD: Well, I mean, all charges are
22 usually actual.

23 THE COURT: See.

24 MR. JACOBSON: I always find that juries don't
25 understand that --

1 MR. MCLEOD: I think the judge -- juries --
2 people understand better actual is punitive, than they
3 do --

4 THE COURT: I agree. I actually agree with you,
5 Mr. McLeod. I know, Chuck, that's your argument.

6 MR. JACOBSON: I never liked -- I never liked
7 jury -- I never like to go to a jury with actual damages
8 because they always think that that doesn't include non
9 economic losses. For some reason they always seem to
10 think that actual is just economic loses. So, I mean,
11 and then the next number seven you said does your
12 verdict include compensation for medical bills, so
13 you're already talking -- if you want to put down
14 actual, compensatory damages --

15 THE COURT: Okay. Then just put in -- let's just
16 do actual, compensatory. I call it both in the charge.

17 MR. JACOBSON: Right. Actual, compensatory.

18 THE COURT: I'm with Mr. McLeod. I like actual
19 better. I think that's an easier word than --

20 MS. AMUNDSON: Yes.

21 THE COURT: I mean, they have to think
22 compensatory means compensate, I mean, but --

23 MS. AMUNDSON: Yes. Exactly.

24 THE COURT: Don't want anyone to think too hard.

25 Okay. Now, let's go on. Are we okay with number

1 7, which -- yeah.

2 MR. WRAY: No, ma'am.

3 THE COURT: Okay. What do we need to say?

4 MR. WRAY: As well, I mean, my objection is that
5 it shouldn't be on the verdict at all because they're
6 not entitled to it --

7 THE COURT: I understand, but --

8 MR. WRAY: -- but if you do --

9 THE COURT: -- other than that, what else do you
10 have an objection to as far as the language is
11 concerned?

12 MR. WRAY: I don't have any objection to the
13 wording. I object to the general -- as we've talked
14 about.

15 THE COURT: Got you.

16 Okay. Number 8.

17 MR. WRAY: On number 8, Your Honor, I think the
18 question is just do you find that she's proved by clear
19 and convincing evidence that they are entitled to
20 punitive damages. I don't think you need to write in
21 your verdict form --

22 THE COURT: Actually, I think -- I kind of agree.
23 I wrote in there do you find by a clear and convincing
24 evidence that she is entitled to punitive damages
25 against CSX.

1 MR. WRAY: That's right. And I'm not -- Lillian
2 Colvin is the plaintiff. The other point, Your Honor,
3 is --

4 THE COURT: Hold on. Hold on.

5 MR. WRAY: Okay.

6 THE COURT: So, Gray, so you want: do you find
7 by a clear and convincing evidence that plaintiff is
8 entitled to punitive damages against CSX? Okay?

9 MR. HOLMES: That's correct.

10 THE COURT: Okay. And I think the rest of it is
11 fine.

12 MR. WRAY: The other point, Your Honor --

13 THE COURT: We need a date line on this, too,
14 Gray. Underneath the foreperson, just a date.

15 MR. HOLMES: Okay.

16 THE COURT: Yes, sir?

17 MR. WRAY: We request -- our form had a question
18 2-B that requires the jury to specify the basis of
19 negligence whether it be the vegetation, the failure to
20 sound the horn, or the failure to install gates and
21 lights. And we ask that the verdict form include that
22 underneath the questions regarding CSX so that if we are
23 correct that -- there have been claims submitted to the
24 jury that were not properly submitted -- we do not get a
25 result on appeal that says it was a general verdict form

1 and there was sufficient evidence on the vegetation
2 claim to uphold the verdict, which is what happened in
3 the Williams case. The court found in that case that
4 there was an erroneous charge and an erroneous claim
5 submitted to the jury. But even though we requested a
6 special verdict form and it was denied, they said there
7 was other evidence to support the verdict. It's
8 critically important to us that the jury be asked to
9 tell CSX, if they find liability against us, what the
10 basis of that liability is so that if we have to appeal
11 the case we would have a clear record of what the jury
12 considered and what the jury denied.

13 MR. JACOBSON: Your Honor, you've already charged
14 the jury -- by this time you've already charged the jury
15 not to consider that evidence, and by bringing it to
16 their attention on the verdict form just hammers it in.
17 I mean, are you going to put on the verdict form, in
18 considering whether or not to charge -- in considering
19 whether or not to find the defendant CSX was negligent
20 and you are to consider the actual -- the testimony
21 during the case that there was evidence that they
22 disregarded the blah-blah-blah?

23 I mean, I think to actually refer to evidence in
24 the case on this verdict form would be improper after
25 you've already charged them what evidence they can

1 consider or not. I really have some problems with
2 number 8 asking -- saying that they have to find by
3 clear and convincing evidence, when you're already
4 charging that, the fact that you're -- that all they
5 have to show is that they've constituted a conscious
6 disregard. But to charge the level of the evidence,
7 again, is -- I think just highlights it.

8 MR. WRAY: The very reason for a special verdict
9 form is so that the appellate court will know --

10 THE COURT: Exactly.

11 MR. WRAY: -- and we all will know --

12 THE COURT: What the basis --

13 MR. WRAY: -- what the basis of liability was.

14 THE COURT: I can tell you, though, Mr. Wray, I
15 am not inclined to charge by separating out the
16 different parts of negligence. I just --

17 MR. WRAY: How will we know, then, if we get a
18 verdict, whether the jury returned it on a claim that
19 was improper, potentially? We're going to be in the
20 same --

21 THE COURT: Well, I guess the whole case is going
22 to be thrown out, then, and we're going to try it all
23 over again.

24 MR. WRAY: No. What they will say is, as they
25 did in Williams, that there is enough evidence on the

1 vegetation --

2 THE COURT: To base it on.

3 MR. WRAY: -- claim, for example, that the jury
4 could have based its finding on that alone. And so we
5 are precluded --

6 THE COURT: But what happens, though -- what
7 happens, Mr. Wray, if this -- what happens if now you're
8 talking -- what happens if they say, we think it's
9 ninety -- we think it's ninety-nine percent vegetation
10 and one percent failure to properly sound the horn?

11 MR. WRAY: They're not going to assign a
12 percentage, though. They're just going to check a box
13 as to which applies and which -- well, they'll just
14 check the ones that apply. There is no percentage.
15 That doesn't matter.

16 THE COURT: No, no, no, no, no. But what I'm
17 saying is I don't see it as appropriate.

18 MR. JACOBSON: During the trial of the case, Your
19 Honor, you've already told the jury about five different
20 instances: jury, we're going to be presenting some
21 evidence right now. You're not to consider this
22 evidence on the issue of liability, it's just on the
23 issue of punitive damages.

24 THE COURT: That's not what we're talking about.

25 MR. WRAY: This has nothing to do with punitive

1 damages. This is --

2 THE COURT: That's not what we're talking about,
3 Chuck.

4 MR. WRAY: -- the verdict on liability for actual
5 damages.

6 And all I want the form to reflect is what --

7 THE COURT: Is your -- your concern is the gates
8 and lights; correct? That's what your concern is, is
9 the gates and lights?

10 MR. WRAY: That's correct.

11 THE COURT: I mean, obviously that's where you're
12 going.

13 MR. WRAY: That's correct. If the jury were to
14 say that we --

15 THE COURT: But, again, what happens if
16 this, though, Mr. Wray -- what happens, again, like
17 I said -- let's just say even though this doesn't
18 assign percentages, what happens if they find CSX
19 ninety-nine -- let's say that basing on their looking at
20 your negligence they say really the gross, gross
21 majority of this is the vegetation, but they also on
22 yours check off the failure to install gates and lights.
23 That would throw the whole thing out, even though under
24 the Williams case the whole thing would be sustained?

25 MR. WRAY: Well, not under the Williams case it

1 would be sustained. All the court said in Williams was
2 that there was no way to determine whether the jury
3 considered the improper claim. That's why we want it
4 specified, because without it there's no way for the
5 appellate court to tell. There's no way for us to
6 demonstrate to the appellate court. Because what you're
7 saying is exactly correct. Let's assume they thought it
8 was -- overwhelming majority, was vegetation but they
9 also thought that we were -- should be liable for
10 failure to install gates and lights. That, under our
11 view -- and I understand you have ruled -- our view
12 would be an improper basis to return a verdict against
13 CSX. And it would require, it would mandate, if the
14 appellate court agreed with us, that the gates-and-
15 lights claim should have never been submitted, that
16 evidence shouldn't have been allowed, it would require a
17 new trial. And that's the only way we can protect our
18 rights, because if we don't do that, then when we get to
19 Columbia, then the Court is going to have to see if it
20 can find --

21 THE COURT: Well, what it is going to do is read
22 the entire record and see what -- the evidence was
23 produced.

24 MR. WRAY: But they won't know what the jury
25 based their award on. That's the critical point.

1 MR. HOLMES: Your Honor, we're making just a --
2 already a very long and complicated verdict form. It
3 just would even more complicate it.

4 THE COURT: Yeah. I can tell you, I'm not
5 inclined to draw attention to specific acts. I mean,
6 we're talking in certain -- now we're starting to
7 comment on --

8 MR. WRAY: And that's -- to be honest with you,
9 that's the very point. Justice Pleicones -- I know he
10 was the dissenter. But that's the very point he spoke
11 to. He said CSX, in the Williams case, asked for a
12 special verdict form to prevent just this problem. The
13 court then applied the general verdict rule to affirm
14 the verdict in that case, even though we had requested
15 it and even though they couldn't determine whether --
16 and they -- in the opinion they said that one of the
17 claims that went to the jury was improper. They said
18 Judge Goodstein had made a mistake, but they affirmed it
19 because they said, we can't determine whether that
20 improper claim formed a basis for the jury's verdict or
21 not.

22 THE COURT: Right.

23 MR. WRAY: We're going to be in that same
24 position if we don't have these questions answered, and
25 it's not fair.

1 MR. JACOBSON: Well, it doesn't sound like the
2 court reversed the -- it doesn't sound like the
3 appellate court reversed the trial court for failing to
4 do a special interrogatory, either.

5 MR. WRAY: I agree with that a hundred percent.

6 THE COURT: I understand why Mr. Wray wants it,
7 though.

8 MR. WRAY: It's very, very important because of
9 the way our appellate court rules work with reviewing a
10 general verdict.

11 THE COURT: I can tell you right now, all I know
12 is, Gray, are you're going to have a way that if I sleep
13 on this and change it -- and I know I've got the
14 Williams case somewhere. But, respectfully, I know
15 Justice Pleicones was the dissenter, but I also think he
16 is incredibly bright and --

17 MR. HOLMES: What I can do is --

18 THE COURT: Yeah.

19 MR. HOLMES: -- I could bring my computer
20 tomorrow morning --

21 THE COURT: Right.

22 MR. HOLMES: -- if there are some changes that
23 need to be made --

24 THE COURT: We can do it.

25 MR. HOLMES: -- I can e-mail --

1 THE COURT: Perfect.

2 MR. HOLMES: -- and then they could be printed
3 here.

4 THE COURT: Let's do that, just to see. And,
5 actually, grab me -- if you've got a copy of the
6 Williams case right there you can hand me. You've
7 probably have given it already to me, but -- I know you
8 have. But someone has.

9 MR. WRAY: I did earlier, and I don't believe I
10 have another copy with me today.

11 [Off the record momentarily]

12 MR. WRAY: We need to deal with an issue with the
13 exhibits because, like the evidence, certain exhibits
14 related to punitive damages only.

15 THE COURT: Okay. Hold on a second.

16 [Off the record momentarily]

17 THE COURT: Okay. Y'all figure out what you can
18 do, and then let's finish up if we can.

19 MR. WRAY: Yes, ma'am. We don't need to resolve
20 this matter. I just wanted to bring it to your
21 attention.

22 THE COURT: Yes.

23 MR. WRAY: As I was saying, like the evidence
24 from the witness stand, there were a number of exhibits
25 that the Court admitted that went only to the issue of

1 punitive damages.

2 THE COURT: Right.

3 MR. WRAY: It's our position that when the
4 exhibits are sent back into the jury room --

5 THE COURT: They need to be separated?

6 MR. WRAY: That's correct. Because it would be
7 improper for the jury to review --

8 THE COURT: I think --

9 MR. WRAY: -- the punitive damages only.

10 THE COURT: -- that's fair. Absolutely.
11 Absolutely.

12 MR. WRAY: So I believe where the unfortunate
13 squabble is going to come up with Mr. Parker is which of
14 those are only punitive damages and which are not. So I
15 will -- I've done a list myself.

16 THE COURT: A lot of them he's going to say go to
17 negligence, as well. You and I both know that.

18 MR. WRAY: That's right. That's exactly what
19 he's going to say.

20 So I don't know what we'll be able to agree on.
21 Maybe we will be able to agree on some and then you'll
22 have to rule on the other.

23 THE COURT: Okay.

24 MR. WRAY: But I would ask them to review, and
25 I'll mention to --

1 THE COURT: Well, let me ask you: can we not
2 pull out the ones that are clearly punitive damages
3 only?

4 MR. WRAY: Well, I don't think they will agree on
5 which ones. But the ones that I have numbered fall
6 between 64 and 123, so there's none up to that point and
7 there's none after that point.

8 THE COURT: I guess why can't -- why isn't it
9 easier than that? Because I only gave the punitive
10 charge five times, at y'all's request. I mean, that was
11 on your cuing. So it couldn't be that much that is only
12 as to punitives. Do you see what I'm saying?

13 MR. WRAY: Yes, ma'am.

14 THE COURT: But?

15 MR. WRAY: But you recall that one of the times
16 you gave the charge was before Dr. Heathington launched
17 into that whole --

18 THE COURT: Oh. Okay.

19 MR. WRAY: -- thing where they showed every CSX
20 document. And Mr. Parker actually read it, and Mr.
21 Heathington just stood there and said yeah --

22 THE COURT: Yeah.

23 MR. WRAY: -- as I recall.

24 THE COURT: Which accounted for probably fifty
25 documents.

1 MR. WRAY: So you're correct. You didn't have to
2 give the charge that many times but when you gave the
3 charge, there was a body of evidence that came in behind
4 it.

5 THE COURT: Okay.

6 MR. WRAY: And so I would ask that they look at
7 it, I'll -- I've already looked at it, and we'll see
8 what we can agree on, if anything. I don't know if Mr.
9 Parker will agree anything is purely punitive damages.
10 But if not, then the Court is going to have to rule
11 because it certainly would be inappropriate and
12 inconsistent with what you told the jury if they went
13 back in the jury room and got out the punitive evidence
14 and said, well, let's look at these documents first and
15 see what is going on.

16 THE COURT: Well, then, also, I would think that
17 I would need to -- after I read the -- after the
18 punitives charge, then when I read this -- remember,
19 there was evidence. I'm going to have to say: there
20 was also some evidence that was only to be considered in
21 the form of exhibits, and those are going to be
22 separated out for you when it comes back to the jury
23 room. I mean, I think I have to do that so they
24 understand why they're separated.

25 MR. WRAY: That's exactly right. And they will

1 have to be told: and I instruct you that you are not to
2 open those exhibits or to review them unless you have
3 determined that an award -- unless you have found
4 negligence and are considering the issue of punitive
5 damages.

6 THE COURT: I think that's fair. Absolutely.

7 MR. HOLMES: Judge, I think this is going to take
8 a while tomorrow, because there's going to be -- I mean,
9 a lot of these things are going to go to the actual
10 issue of notice because they're related to South
11 Carolina --

12 THE COURT: When you say it's going to take a
13 while, are you saying it's going to take a while for
14 me to rule, or is it going to take a while for you two
15 to agree or to decide, because neither one of you are
16 doing --

17 MR. HOLMES: I would say we're going to have to
18 argue a bunch of them, I mean, because a lot of them are
19 talking about vegetation problems in the state of South
20 Carolina, which -- and they encompass other areas. So
21 while you might not be able to consider --

22 THE COURT: Well, wait a minute, Gray. We're
23 talking about vegetation problems in South Carolina?
24 Unless you show that those were similar to this
25 crossing, they're for punitive damages purposes only.

1 MR. WRAY: That's correct.

2 THE COURT: So unless you were specific and said,
3 wait a minute -- and I don't think there was very many.
4 I didn't hear any testimony, really, about similar
5 crossings. I'm just telling you right now, I would rule
6 that those were for punitive damages purposes only.

7 MR. WRAY: That's correct. And, in fact, when
8 Dr. Heathington testified, all these exhibits that I've
9 just mentioned, the vast majority of them came in after
10 you gave that charge.

11 THE COURT: Right.

12 MR. WRAY: That's the only reason you would give
13 that charge is because the evidence only went to that
14 purpose. So I'm certain that Mr. Parker won't share my
15 agreement on that point --

16 THE COURT: I'm sure he won't, either. But I can
17 tell you this: y'all can go through these while he is
18 doing his closing and Mr. Harmon is doing his closing.
19 They won't be involved, hopefully.

20 MR. WRAY: And, Your Honor, I did have one other
21 question. I don't know what your policy is. Once the
22 arguments are completed and the jury retires, do you
23 dismiss the alternates immediately and so they do not
24 hear any of the deliberations?

25 MR. HOLMES: That's my understanding of how --

1 THE COURT: That's normally how I do, you know,
2 typically.

3 MR. WRAY: I believe --

4 THE COURT: I mean, if there is a chance
5 obviously this jury won't reach a verdict tomorrow, and
6 there's -- something I guess could happen. But the
7 problem is this. You have to because let's say if
8 something happened to one of them, then the alternates
9 wouldn't have been in there to hear the other
10 discussion. So I don't think you have any other choice.

11 MR. WRAY: I agree with that. That's not where
12 my issue is coming -- my question to you is I don't know
13 what your policy or rule is in terms of contact with the
14 alternates. Once they are dismissed and they leave the
15 courthouse, I know some lawyers --

16 THE COURT: Jump out --

17 MR. WRAY: -- contact the alternates and say,
18 what did you think about the case. I don't know if you
19 have a rule or a prohibition against it. But --

20 THE COURT: I don't think there is any -- I don't
21 think there is any rule or prohibition in the rules
22 against it; right?

23 MR. WRAY: I don't know of one.

24 THE COURT: And I may help you settle the case,
25 one of you or both of you.

1 MR. WRAY: Yeah. I don't know of any
2 prohibition, but I -- some judges I know say, I don't
3 want you contacting any member, even the alternates --

4 THE COURT: Until the jury comes back.

5 MR. WRAY: -- until the verdict is announced.

6 And I didn't want to -- I'm not suggesting that
7 we plan to do that. I don't know any of the folks. But
8 I know that they probably know some of the jurors --

9 THE COURT: Right.

10 MR. WRAY: Obviously, if it's okay for them, it
11 would be okay for us if we chose to do it.

12 THE COURT: Do you both want to do it, is my
13 question. Do you both want to be able to do it?

14 MR. HOLMES: Your Honor, the way it's normally --
15 that I -- the only way I've seen it done is that the
16 jury is brought in, the alternate is brought in at the
17 end --

18 THE COURT: No. We've talked about that. The
19 alternates are dismissed. But his question only is is
20 that do you both want to agree that if you want to, once
21 they are dismissed, the alternates, you can contact them
22 or do you want to wait.

23 MR. HOLMES: I don't think there's any rule
24 against anybody contacting them. I think that they
25 are -- what they are told is, look --

1 THE COURT: They're told you may or may not want
2 to --

3 MR. HOLMES: -- you may be contacted by somebody.

4 THE COURT: -- talk to them.

5 MR. HOLMES: If you don't want to talk to them,
6 you don't have to.

7 THE COURT: Well, of course. Gray, I'm going to
8 say that. That's always within their prerogative. But
9 what he's saying is y'all need to play on the same page.
10 Either you both are going to have the ability. I mean,
11 quite frankly, Gray, you're probably in a better
12 position to be able to get some information from them
13 than they are so I would think that you would want it,
14 just based on --

15 MR. HOLMES: I'm not saying that there's -- that
16 there's any sort of prohibition on it. I wasn't saying
17 that at all. I was just saying --

18 THE COURT: Gray, I'm asking what you want. Do
19 you want to be able to contact them or not?

20 MR. HOLMES: I don't care.

21 THE COURT: If you say no, then no one does. If
22 you say yes, then everybody can.

23 MR. HOLMES: It's fine. It's fine if everybody
24 wants --

25 THE COURT: You want it?

1 MR. HOLMES: -- wants to call. It doesn't matter
2 to me.

3 THE COURT: Do you want it?

4 MR. WRAY: I'll talk with Mr. Harmon and our team
5 and see if we -- we can tell you in the morning if we
6 have --

7 THE COURT: Okay. And why don't you talk to,
8 also -- you know, and just decide.

9 Mr. McLeod, do you weigh in on this? Do you have
10 a thought?

11 MR. MCLEOD: Well, Your Honor, I can -- I can
12 tell you they've got -- well, I just tried one over
13 here, and -- but noted a motion for a new trial. Well,
14 they had talked to some jurors, and the next thing, I
15 get a motion for a new trial for undue influence on a
16 jury. Well, of course, I didn't know the first one of
17 them.

18 THE COURT: Right.

19 MR. MCLEOD: It took me --

20 MR. HOLMES: It had nothing to do with --

21 MR. MCLEOD: It took me four days to get
22 affidavits from --

23 MR. HOLMES: Your Honor, it -- that didn't deal
24 with alternates or anything like that.

25 MR. MCLEOD: It didn't deal with what?

1 MR. HOLMES: With alternates. We're talking
2 about alternates.

3 MR. MCLEOD: Oh. Alternates?

4 THE COURT: I mean, I don't know. I look at
5 it -- Gray, I look at it this way. It's information
6 that y'all can gain. It's kind of like -- you know, is
7 they send notes during the trial, you know, questions.
8 It kind of tells you where they're going. And it also
9 sometimes is an impetus to settle some cases. At least
10 in Beaufort we tell some attorneys that: I hope you're
11 reading into this exactly what they're asking because it
12 ain't looking good for you, so you either need to take
13 what they're offering or, you know, you need to, you
14 know, withdraw any offer you've made, because it's
15 looking real good.

16 So it's information, and that's how I look at it.
17 But --

18 MR. WRAY: And my question was simply whether you
19 had some strong feeling --

20 THE COURT: I don't.

21 MR. WRAY: -- about it, and I wanted to abide by
22 what you --

23 THE COURT: As long as y'all play by the same
24 rules, I'm fine. So if y'all want to do it, then that's
25 absolutely fine. I mean, obviously, just like we said,

1 we know that no one is going to harass them. And, I
2 mean, I give a real good instruction on, you know --
3 don't go beat them up. But, you know what I'm saying?
4 I don't know. If there's any beating up, it might be
5 after the verdict and not before. So, anyway.

6 All right. Gray, you are taking care of the
7 verdict form.

8 MR. HOLMES: Yes, ma'am.

9 THE COURT: Y'all, just so I'm clear of what I'm
10 considering, I'm considering 56-5-2950, which is the .05
11 and less percentage as to a presumption of non
12 impairment.

13 Mr. Wray, your apportionment under the different
14 types of possible negligence, the vegetation, the
15 failure to properly sound the horn, and the failure to
16 install lights and gates.

17 MR. WRAY: Not apportionment, just --

18 THE COURT: I'm sorry. Not apportionment.
19 You're right. Just whether or not they considered it.

20 MR. WRAY: That's correct. I don't want them to
21 assign any percentages in there. I just want to know
22 whether that was the basis.

23 THE COURT: I got it. And what else?

24 MR. WRAY: I think that was it.

25 THE COURT: I think that was it, as --

1 MR. WRAY: Well, actually, you said we were going
2 to do the separating exhibits. So that was it.

3 THE COURT: Right. I can tell you, you know, in
4 your argument -- in looking at these, Gray, tomorrow,
5 when y'all look at the exhibits, whether or not they go
6 to negligence or liability, I mean, the negligence
7 should be -- this is what they argued on their
8 bifurcation motion, that was, you know, we should be
9 looking at the negligence of this crossing and whether
10 or not this crossing was appropriate. So keep that in
11 mind. Okay?

12 MR. HOLMES: I'll keep it in mind as --

13 THE COURT: Keep it in mind.

14 MR. HOLMES: -- I'm going through the exhibits.

15 MR. WRAY: What time -- you mentioned that you
16 might want those for a standard charge --

17 THE COURT: I think y'all need to be here earlier
18 than what we're presuming, I'm guessing. And, you know,
19 I hate to say this, because obviously this morning --
20 how about y'all being here by -- can we do about 8:30?
21 Can y'all do that?

22 MR. WRAY: Whatever time you want, that's fine.
23 8:30?

24 THE COURT: Let's do 8:30. Okay?

25 [JURY TRIAL ADJOURNS AT 7:59 P.M.]

PROCEEDINGS

THE COURT: Good morning, everyone. I would like to say this will be the final day, but of course we don't know that. Anyway, I trust everyone slept well, hopefully.

I just wanted to go through -- there's a few housekeeping matters that I know we need to get to before we go ahead and finish. And I know Aaron is just finishing up on the charge, as well.

In talking about the verdict form last night, Mr. Wray asked for some special interrogatories as to each potential negligence on behalf of CSX. That was vegetation, failure to sound the horn properly, and the gates-and-lights argument.

I went back and reread the Williams case and looked at what Justice Pleicones said in the dissent, and we talked about the two-issue rule, and I -- Gray and Ron and I looked at it.

Mr. Parker, what is y'all's position on the issues? I mean, I normally would not do that. And I'm looking at it the way it is.

MR. PARKER: We don't believe that it's necessary to do that. Of course, it's within the Court's discretion about that, about how to submit the verdict form to the jury, but we don't see any --

1 because we've never made the argument, nor has it ever
2 been our position that they have to put up gates and
3 lights at this crossing.

4 THE COURT: Right.

5 MR. PARKER: The question is whether -- I think
6 the proper question, if you were going to submit one,
7 would be did they -- failure to warn, and that that
8 would be the proper question.

9 THE COURT: And that's what the gates and lights
10 go to.

11 MR. PARKER: It goes to the warning.

12 THE COURT: Okay. Okay.

13 MR. PARKER: They don't have to put up gates and
14 lights. We've never contended that --

15 THE COURT: Right.

16 MR. PARKER: -- and won't argue it.

17 THE COURT: Exactly. And obviously the statute
18 states that they don't have to. And we're charging
19 that statute that, Mr. Wray, you know, asked to,
20 because the DOT is the only one that has the power to
21 do that.

22 Okay. I just want to make sure we're not
23 running afoul. I know --

24 MR. PARKER: The testimony, of course, from Mr.
25 Jenkins was they would have allowed them to put up

1 gates and lights, and they have put up gates and
2 lights.

3 THE COURT: Right.

4 But, actually, it really doesn't matter what he
5 says, because --

6 MR. PARKER: And we don't --

7 THE COURT: -- he can't say they can violate the
8 law.

9 MR. PARKER: We don't think the -- you know, the
10 statute doesn't prohibit them from putting up gates and
11 lights. It just says you can't do it without the
12 permission of the SCDOT.

13 THE COURT: They can't do it themselves,
14 unilaterally.

15 MR. PARKER: Correct.

16 THE COURT: Okay. Mr. Wray?

17 MR. WRAY: And that was the charge I requested,
18 Your Honor, and that was the reason for the request on
19 the verdict form --

20 THE COURT: Right.

21 MR. WRAY: -- because there has been evidence
22 introduced by the plaintiff that would suggest to this
23 jury that they could base their liability finding on
24 the fact that we didn't install gates and lights. I
25 understand Mr. Parker saying that's his position. But

1 he certainly introduced evidence on the point, and I
2 don't believe the jury, having heard what Dr.
3 Heathington said about the options you have to make the
4 crossing safer, one of which was install gates and
5 lights, that they are going to appreciate the fact that
6 Mr. Parker is not making that claim, when he introduced
7 that very evidence.

8 So we think it's critically important,
9 particularly for the purposes of appellate review. If
10 we are correct that that evidence should not have been
11 permitted, it should not have been introduced, we
12 believe that's the only way to protect our rights on
13 appeal is for the jury to say whether that influenced
14 them or not.

15 They may not check that box and if they don't,
16 then that won't be an issue on appeal. If they do
17 check that box, then it would be a basis, in our view,
18 for a potential reversal if the evidence was improperly
19 allowed.

20 THE COURT: The problem is, though, we're
21 arguing about two different things. You're arguing
22 it's failure to put up gates and lights, and Mr. Parker
23 is arguing a failure to warn; correct? And, again, his
24 intention is is that -- and as he said, according to
25 the statute you aren't required to put up gates and

1 lights. You're just required to make -- do, you know,
2 all things reasonably necessary to make it a safe
3 crossing.

4 MR. PARKER: There's no statute requiring them to
5 put up gates and lights.

6 THE COURT: Right.

7 MR. WRAY: I understand that. And there's no
8 case law -- and there's no statutory duty --

9 He has conceded that.

10 THE COURT: Right.

11 MR. WRAY: -- and there's no case law, there's
12 no common law duty, for the railroad to put up gates
13 and lights. So when he says I'm arguing failure to
14 warn, well, it has to be failure to warn to comply with
15 some duty that you have. The duty on warning is to
16 sound the bell and whistle. There's no cases that say
17 the duty to warn includes the duty to put up gates and
18 lights at a crossing. And that's where the problem
19 arises, Your Honor. And that's why, again, it's not a
20 detailed -- it's not going to take the jury very long
21 if they find against us. It's just saying, what was
22 the reason you found against CSX, and then when we go
23 up on appeal everybody will know.

24 THE COURT: But the third one that you put,
25 gates and lights, wouldn't be proper before them

1 because that's not what he's arguing.

2 MR. WRAY: But that's the evidence he
3 introduced.

4 MR. PARKER: No. The evidence we introduced is
5 that the crossing, if they didn't cut the vegetation to
6 provide sight distance, then it needed gates and
7 lights.

8 MR. WRAY: If they didn't cut the crossing to
9 provide sight distance, then they're going to find us
10 liable so we don't need that -- and that was the point
11 we were making. That evidence was --

12 THE COURT: Right.

13 MR. WRAY: -- improper. Either there's proper
14 sight distance or there's not.

15 THE COURT: Mr. Wray, the other thing I looked
16 at and thought about was it still doesn't avoid the
17 appellate court's review of the different issues.
18 They're still going to have to do it unless the only
19 thing they come back on is the gates-and-lights issue,
20 which I don't think this -- I don't think this jury
21 can.

22 So, anyway. All right. I can tell you right
23 now I still think they are going to have to review it.
24 And I certainly acknowledge what Justice Pleicones is
25 trying to do in his dissent in the Williams case. I

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1 mean, it makes sense. But I can tell you, I don't
2 think it's going to serve any useful purpose here. I
3 think regardless, they're going to have to -- they're
4 going to have to go through and look at it, I mean,
5 either way, unless, again, --

6 I would have less a concern if we could agree on
7 that third one as to gates and lights. Again, that's
8 not exactly what Mr. Parker is arguing. It's not that
9 they should have put up gates and lights, it's that
10 they should have warned.

11 Correct, Mr. Parker?

12 MR. PARKER: That's correct.

13 THE COURT: So I don't think you can tailor --

14 MR. PARKER: And I have no objection to a
15 special interrogatory about didn't they give
16 appropriate warning.

17 THE COURT: Would you -- I mean, Mr. Wray, would
18 you prefer to do that?

19 MR. WRAY: No, ma'am. I don't think that
20 answers the question because the -- if the question is
21 just did they fail to give appropriate warning, that
22 might be the failure to sound the horn at 1500 feet.
23 So that doesn't tell us anything, whether they
24 considered what we believe was an improper claim, and
25 evidence that should not have been submitted. And so

1 we believe the only way to answer that question of
2 whether the jury considered that evidence and whether
3 it influenced their decision is to ask that specific
4 question. That's the only way we will know.

5 And as we talked about earlier, what Justice
6 Pleicones I think had correctly analyzed is the
7 two-issue rule is designed where you don't object and
8 you just let a general verdict form go back to the jury
9 and there are a host of issues that could have
10 supported the verdict, one of which was proper and one
11 of which was improper, then the court will affirm,
12 assuming that the jury relied on the proper ground.

13 Here our contention is there is a potential
14 improper ground upon which the jury could find
15 liability against CSX, and there's no way for us to
16 know that or for the appellate court to know that,
17 unless the jury tells us. And so we believe it's
18 critical that they be asked that question. If they
19 don't check the box, then it's no issue. If they check
20 the box, then the issue is was it properly submitted or
21 not. If it was properly submitted, we've still got no
22 issue. But we won't be able to protect our appellate
23 rights without knowing the answer to that question.

24 THE COURT: The problem is is that we're
25 fighting over two different really issues, it sounds to

1 me, as far as the duty to warn versus what you say is a
2 requirement to put up gates and lights. So based on
3 the argument -- I understand you respectfully disagree
4 as to that portion of the verdict form. It's my
5 understanding that both Gray Holmes, for the plaintiff,
6 and you, Mr. Wray, have worked hard on the verdict form
7 overnight to make sure that, other than that, you all
8 are in agreement.

9 And Mr. McLeod, as well; correct, sir?

10 MR. MCLEOD: Well, one of my associates has got
11 much better sense than me. I just showed it to Ron,
12 and he agreed. I haven't had a chance to get over
13 there. But in number six, she suggested that you
14 answer yes to question two and four only -- take care
15 of it.

16 MR. WRAY: And that just makes it consistent
17 with the other places on the form where we're referring
18 to two and four.

19 THE COURT: Gray, why doesn't that work?

20 MR. HOLMES: That does work. That's what --
21 this is what Mr. McLeod asked for yesterday. I had it
22 the other way before.

23 THE COURT: So you want this, as well?

24 MR. HOLMES: It's fine with me to take out one
25 and three. Yesterday he didn't want to take it -- he

1 wanted it to say one and three.

2 THE COURT: He, today, is deferring --

3 MR. HOLMES: Yeah. So --

4 THE COURT: -- to his co-counsel.

5 MR. MCLEOD: I told you, Gray, she's smarter
6 than I am.

7 MR. HOLMES: That's fine with me.

8 THE COURT: All right. Mr. McLeod, I appreciate
9 that.

10 So, Gray, you'll fix that before we go ahead.

11 And I believe we also agree, Mr. Wray and Mr.
12 Holmes, and -- oh, Mr. McLeod, you were there, as well.
13 When I explain the verdict form, which I always do at
14 the very end of the charge, we're going to go ahead and
15 flash it on here or I'm going to step down and I'm
16 going to walk through the steps with them just to
17 explain it to them. I think it makes better sense,
18 certainly, and hopefully, you know, we'll have the
19 chance that all of them will understand it. Okay?

20 MR. WRAY: Yes, ma'am.

21 THE COURT: Yeah.

22 MR. WRAY: And if Mr. Holmes will just make that
23 modification, and if he can get it to --

24 THE COURT: Yes, sir.

25 MR. WRAY: -- Bob back here, we'll take care of

1 scanning it in and putting it up when you get to that
2 point.

3 But let me make sure of one other thing, though,
4 because --

5 THE COURT: Yes, sir.

6 MR. WRAY: -- you asked about the verdict.

7 I did object today, and we do still object, to
8 the question on the medical bills for all the reasons
9 we've stated.

10 THE COURT: Didn't -- weren't you -- there was
11 obviously the verbiage, and my understanding was you
12 differed in the all medical bills up to the age of
13 eighteen. And I understand Gray's argument is only the
14 medical bills that have been incurred to date, and that
15 some of that --

16 MR. HOLMES: We fixed that.

17 MR. WRAY: Yeah. He corrected that. The
18 language --

19 THE COURT: He corrected that. Okay.

20 MR. WRAY: -- the language as he's got it is
21 consistent with what I suggested, subject to our
22 objection. I just wanted --

23 THE COURT: I understand.

24 MR. WRAY: -- to be clear. I'm not in agreement
25 that question seven should be asked at all --

1 THE COURT: I understand.

2 MR. WRAY: -- because we don't believe that
3 claim should be submitted to the jury.

4 THE COURT: Okay. Without --

5 MR. WRAY: And the other thing --

6 THE COURT: -- a comparative negligence charge;
7 correct?

8 MR. WRAY: That's correct.

9 THE COURT: All right.

10 MR. WRAY: And then the other thing, Your Honor,
11 I would ask to make a court exhibit our requested
12 verdict form, which includes the special interrogatory
13 that we had asked for.

14 THE COURT: Absolutely. Why don't you come
15 bring it to Mia, and she'll do that.

16 Gray, will you make sure that once this gets
17 printed, if we're going, that you make sure I get a
18 copy of it so I can look at it just a little bit ahead?

19 MR. HOLMES: Judge, what I was going to do -- we
20 talked about it yesterday -- which was make the
21 changes, e-mail to Aaron, and then Aaron can print it.

22 THE COURT: And Aaron can print it.

23 [Off the record momentarily]

24 MR. HOLMES: And, Judge, as well, we also wanted
25 just to make sure as far as the charges -- I know we

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1 still have one that we needed to go over --

2 THE COURT: Right.

3 MR. HOLMES: -- but we just wanted to be sure
4 that all our objections are protected on the record,
5 and if we need to restate them at some point today -- I
6 know that we did make a record of the objections we
7 made, but if there's anything further that we need to
8 do --

9 THE COURT: Mr. Wray, I mean, do y'all think --
10 I think you-all adequately protected your record
11 yesterday. Clearly, after I charge I'm going to, you
12 know, send them out and say, all right, guys, is there
13 anything -- obviously submit your prior objections or
14 anything erroneous or anything I left out.

15 MR. WRAY: That's correct. I believe that to
16 the extent you charge something that we already talked
17 about and you overruled an objection, that --

18 THE COURT: I think it's there.

19 MR. WRAY: -- that should already be addressed
20 and we just incorporate the prior arguments. But if
21 there is something else that comes up today during the
22 charge, obviously, I think either side would need to
23 bring it to your attention.

24 THE COURT: Okay. Well, also --

25 MR. HOLMES: As long as it's good for all

1 parties.

2 THE COURT: Okay. And I'll also highlight one
3 thing, Mr. Wray. You had a lot of requests to charge
4 as to punitive damages. And I guess my question is is
5 most of them -- and almost all of them are yours, and
6 they would go after my normal what I -- punitive
7 damages charge. I want to make absolutely sure you
8 still want all those and you are asking for all those
9 because it, in fact, could highlight punitive damages
10 by being -- that portion becoming so large.

11 MR. WRAY: Well, I believe that --

12 THE COURT: Do you understand? I mean, I'm not
13 repeating anything. I'm not repeating anything twice.
14 But you've asked for a lot of case law inserted there,
15 and I just want to make absolutely sure that's what you
16 want to do.

17 MR. WRAY: I understand. I believe we --

18 THE COURT: Okay.

19 MR. WRAY: We do request those because of the
20 constitutional issues that arise with a punitive
21 damages verdict.

22 Your Honor, one other thing Mr. Parker and I
23 discussed this morning. In evidence are Plaintiff's
24 Exhibits 181 through 231, which are a series of
25 photographs that were taken by Mr. Hedden.

1 THE COURT: Yes, sir.

2 MR. WRAY: We have agreed, both sides -- Mr.
3 Parker had introduced, and on the stand up there next
4 to Mia, are photocopies of the photographs. We have
5 the actual photographs, and we've agreed to substitute
6 the actual photographs for 181 to 231.

7 THE COURT: So you want the actuals to go back
8 to the jury?

9 MR. PARKER: That's correct.

10 THE COURT: So they're the clearest copies. I
11 think that's good. Okay.

12 One other thing, y'all. We discussed, as a
13 request to charge -- I think it was Mr. Jacobson asked
14 for 56-5-2950 in conjunction with the impairment
15 statute. And I can tell you that I have gone over this
16 and over this and over this, and I will tell you what
17 he is looking for is 2950, subsection B and 1. I can't
18 get past that B starts in the criminal prosecution for
19 violation of 2930, 2933, and 2945. Again, it says the
20 criminal prosecution as to that presumption.

21 Mr. Jacobson, I know you respectfully disagree,
22 and we argued about this yesterday for a good half
23 hour. I can tell you I have looked at it, I have
24 looked at it, and I have looked at it, and I just
25 do not think it's appropriate. I think it's absolutely

1 clear in the statute that it only applies for a
2 criminal prosecution, so I don't think it's
3 appropriate.

4 And, additionally, we also had the discussion
5 yesterday -- and I'll just put it on the record again,
6 because I don't want to argue about this anymore. But,
7 again, this talks about specifically the BAC level,
8 which does not include the mixture of any potential
9 narcotics or other medications in addition to alcohol.
10 So with that said, I don't think it's a proper charge.
11 And I conferred with minds that are much, much greater
12 than mine on this, because I can tell you, I understand
13 the importance to y'all of this. But, again, I just --
14 I don't think it's appropriate. So with that said --

15 MR. HOLMES: Your Honor, can we just quickly
16 state our argument just on the record very quickly?

17 THE COURT: If it's new, as opposed to
18 yesterday. Because, like I said, we argued this for a
19 long time, and Mr. Jacobson did a very good job.

20 MR. HOLMES: Your Honor, our only argument would
21 be that we're charging 29 -- 56-5-2930, and that this
22 56-5-2950(b) is actually talking about a violation of
23 section 56-5-2930 and give the presumptions. I don't
24 think that there's any other way that you're going to
25 construe a violation of Section 56-5-2930. And the

1 burden of proofs are different. But that's going to be
2 part of your instruction that in a civil case the
3 burden of proof is by a preponderance of the evidence,
4 and --

5 THE COURT: Right.

6 MR. HOLMES: -- and I don't think that it would
7 affect, since we're not telling them anything about --
8 the statute doesn't address the burden of proof and say
9 that it's specific to the burden of proof in a criminal
10 case.

11 THE COURT: Right.

12 MR. HOLMES: And so we think it would apply here
13 and that we would get those same presumptions. And we
14 also think that since this is part of the general
15 charges -- and we've been saying this all along, that
16 we're charging all these charges together -- that all
17 the parts of the statute should be charged together. I
18 mean, it's clearly part of that line of statutes
19 talking about driving when impaired or driving while
20 intoxicated. And certainly the jury could find that
21 there was no impairment from drugs and that the only
22 thing that could possibly have caused any impairment
23 would be the alcohol and she would be presumed -- she
24 would have benefit of the presumption, under the law,
25 that she was not impaired based on her blood alcohol

1 content.

2 THE COURT: I think they can come up to that
3 conclusion without the presumption. And, respectfully,
4 again, I understand how important it is and why you
5 want it so badly, but I just -- I don't think it's
6 appropriate. I just don't. It's for criminal
7 prosecutions and I just -- I don't think it's
8 appropriate.

9 Additionally, I'll say -- because CSX didn't
10 object to it -- I mean, it's the presumption of it
11 being less than 0.05, and it's actually written on the
12 BAC that was returned at Hampton Medical Center. So,
13 quite frankly, you got it in and they didn't object to
14 it and probably should have. So, quite frankly, if
15 it's going to be in front of the jury anyway, I'm just
16 not going to charge it. So with that said, y'all,
17 again, I thought about this at length.

18 So with that said, anything else that we really
19 need to take up?

20 And Mr. Wray and Mr. Holmes, y'all went through,
21 I know, the exhibits. And you were talking about what
22 comes in for punitive damage purposes versus both. And
23 I can tell you right now, if it's going to take five
24 minutes, we can take it up, but I'm thinking we're not
25 going to take it up right now. I think we can do it --

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1 or we're going to have to do it later.

2 MR. WRAY: Yes, ma'am. Maybe what we ought to
3 do is after closing arguments, I assume lunch will be
4 here. They can go back and begin lunch, we can take up
5 that issue, and then the exhibits can go back --

6 THE COURT: Possibly.

7 MR. WRAY: -- and then they can start
8 deliberating.

9 THE COURT: Okay. Which I think --

10 MR. PARKER: Your Honor, one of the things that
11 -- they were going to crop out what they thought was
12 objectionable in Dr. Manning's photos.

13 THE COURT: Yes.

14 MR. PARKER: I don't know if they have or not.

15 MR. WRAY: We did do some. I thought you said
16 you were going to have your folks --

17 MR. PARKER: Well, hopefully -- can we see
18 those? Because we want to introduce those.

19 MR. WRAY: We looked at the ones where we had
20 them at the stop line, which were the ones we used, and
21 we did crop those.

22 THE COURT: Y'all, while they're looking over
23 that, anyone else? I know, Mr. Harmon, you're doing
24 the opening -- or you're doing the closing, sorry.

25 Let's just take five minutes, as long as there's

1 nothing else we need to put on the record.

2 I will also tell everyone, too -- and I'll tell
3 you this when we come back -- you know, obviously, when
4 I charge the jury we lock the doors and people don't
5 move. But out of all respect for the attorneys,
6 obviously this is an important case to both sides, I
7 don't want -- and I say this for the lay-people back
8 here, not the people who work here. During a closing
9 argument, I know they're going to be long but I don't
10 want people coming in and out. It's just disrespectful
11 to these lawyers. So if you are here, stay here and
12 stay seated and don't move around too much. All right?
13 Again, it's disrespectful. These lawyers have worked
14 very hard, so I want to make sure that this jury is
15 paying attention to what they're saying and not one of
16 y'all walking out the back door. Okay?

17 So let's go ahead and take five minutes, and
18 we'll be back. Okay?

19 [Whereupon, a recess is taken from 9:50 p.m. to
20 9:57 p.m.]

21 MR. PARKER: Your Honor, let me bring one thing
22 to the Court's attention. During the damages portion
23 of my argument, I want Lillian in the courtroom but I
24 want her to be escorted out after I make the liability
25 part of it. And you said nobody to leave the

1 courtroom, so I just wanted to make sure --

2 MR. HARMON: No objection.

3 MR. PARKER: -- that was all right.

4 THE COURT: Not a problem at all. Not a problem
5 at all. I was more worried about people on opposing
6 sides moving around. I hate to say I've seen it done
7 way too much.

8 All right. I will also tell you, too, Mr.
9 Harmon, I may -- depending on how long Mr. Parker goes,
10 we may take a break in between.

11 MR. HARMON: You know, that would actually --

12 THE COURT: I don't want you to be overly
13 expectant. I think sometimes --

14 MR. HARMON: Right. No, I --

15 THE COURT: -- defense counsel is, I'm ready to
16 go, I'm ready to go.

17 MR. HARMON: Yeah. I think that would actually
18 be fine. It will give us a few moments to move --

19 THE COURT: Yeah.

20 MR. HARMON: -- things around.

21 THE COURT: Yeah. I just didn't want to, you
22 know, kind of burst anyone's bubble, so -- okay. Just
23 to let you know.

24 All right. Anything further, y'all, before we
25 bring the jury in this morning?

1 MR. PARKER: Nothing from the plaintiff.

2 THE COURT: Anything --

3 MR.. HARMON: Nothing from the defendant.

4 THE COURT: Mr. McLeod, anything before I bring
5 the jury in?

6 MR. MCLEOD: No, Your Honor.

7 THE COURT: And are you going to do the closing,
8 or is your -- well, you know what? I hate to say this,
9 but up until the time you actually have to stand up and
10 walk there, it could be you.

11 MS. AMUNDSON: We would be in trouble.

12 THE COURT: He may stand up and say, I defer to
13 her again. So, anyway. All right, y'all.

14 Let's go ahead and bring them in.

15 [Whereupon, the jury enters the courtroom at
16 9:58 a.m.]

17 THE COURT: Good morning. Welcome back, ladies
18 and gentlemen. Thank you for being here so promptly.

19 At this time you're going to hear the closing
20 arguments from each parties in this case. After that
21 you're going to hear my charge on the law, and then at
22 that point I anticipate hopefully lunch will be here.
23 Y'all will eat lunch and then you will begin your
24 deliberations. So I just wanted y'all to know kind of
25 how we're going to proceed today.

1 on February 3rd, 2004, not other places, other times
2 five, six, seven years earlier. We're here to talk
3 about what caused this accident. And what this shows
4 is that the Hill Road crossing was a safe crossing.
5 There was an unfortunate accident, and no one is going
6 to dispute -- no one of us wanted this accident to
7 happen, nobody. But we've got to figure out what
8 caused it. And what caused this accident was an unsafe
9 choice to leave a safe place.

10 Now, I want to talk to you about the unsafe
11 choice. Okay? And you remember in opening I shared
12 with you-all that making an unsafe choice does not make
13 you a bad person and that we weren't here to try to say
14 that because Ms. Colvin made an unsafe choice, she
15 doesn't love her children, that she's a bad person.

16 And, frankly, Ms. Colvin's drinking habits, Ms.
17 Colvin's use of prescription drugs, that would be none
18 of our business but for the fact that she -- excuse me
19 -- Mr. Willie Homer Stephens has brought a claim
20 claiming that it wasn't her who caused the accident,
21 that it was Ned or it was other things, trees. So when
22 the claim was brought we had to look and determine why
23 she made this choice at the crossing, and I would
24 submit to you that there is an abundance of evidence to
25 determine that.

1 If we can go to the next point.

2 During Ms. Colvin's cross-examination there were
3 certain things she admitted. And we've entitled this,
4 what Ms. Colvin knew about driving, her prescription
5 drugs, and alcohol, before the accident. She admitted
6 and she knew that Darvocet and tizanidine may cause
7 dizziness, drowsiness and blurred vision. That's what
8 she admitted on cross-examination. I suspect y'all
9 remember that. She also admitted that the warning
10 label for each, the Darvocet and tizanidine, warned
11 against driving after using these products solely. She
12 admitted that it is a very bad idea to mix her
13 prescription drugs with alcohol. She also admitted
14 during her cross-examination that failing to follow
15 warnings and instructions for these drugs could be
16 dangerous. This is all that Ms. Colvin knew and was
17 aware of before Lillian got in the car before the date
18 of this accident.

19 And then we asked some questions about what
20 happened on that day. Ms. Colvin told us that while
21 she was cleaning up that day -- and we'll talk about in
22 a moment when that was -- that she took Darvocet, she
23 took her tizanidine, she also had alcohol. And you may
24 remember -- I didn't write it up here because she said,
25 after I asked her about it, she couldn't really

1 remember one way or the other -- but the hydrocodone,
2 which is more powerful than these, she had gotten a new
3 prescription of it I think two weeks earlier. But we
4 didn't put that up there. And then she was not sure
5 about her codeine cough syrup, even though earlier she
6 had testified otherwise.

7 Now, all of this was in Ms. Colvin's system.
8 You remember Mr. Peden McLeod's questions of Mr. Terry
9 about Ms. Colvin drinking when she had free time and
10 her favorite choice of alcoholic beverages. Again,
11 that would be no one's business -- we're not here to
12 question that -- but it affects the decision that was
13 made, because we know while cleaning up she took all of
14 these things.

15 You may remember that Ms. Colvin, when I asked
16 her, well, when were you cleaning up, and I confronted
17 her with her testimony that occurred two weeks earlier
18 where she said, I don't remember, but she admitted that
19 her usual practice in cleaning up was to clean up while
20 she was preparing dinner for the kids who were coming
21 home, and that that would be around 3:30 to 3:45. Mr.
22 Willie Homer Stephens told us that before Tonia left
23 that day -- Ms. Colvin, excuse me, left that day to go
24 pick up Carlos Terry, they had a meal there and then
25 she left. Folks, the reasonable inference from this is

1 that Ms. Colvin was cleaning up later in the afternoon,
2 had this, and then left the house with all of this in
3 her system, with young Lillian in the seat.

4 Now, as members of this jury, I said earlier
5 that your -- what is the truth about what happened.
6 And many times, following the truth is not easy. Many
7 times it's not comfortable to follow what the truth is.
8 But, ultimately, following what the truth is has a
9 freeing effect. And in this case you're going to need
10 to consider all of the evidence and follow to the
11 truth, even if it makes you uncomfortable and even if,
12 even if, in your own heart you have a great deal of
13 sympathy and apathy, as we all do, for Lillian.

14 But the truth is, members of the jury, that Ms.
15 Colvin was in a safe place, and the unchoice [sic] was
16 made -- whether for this reason or for other reasons,
17 an unsafe choice was made -- and those are the only
18 things that caused the accident on February 3rd, 2004.

19 Can we go back to the verdict form, please.

20 Now, members of the jury, I believe, as I think
21 I told you earlier, the first issues you've got to deal
22 with are what's called liability, who's responsible.
23 Mr. Parker would have you to believe that many people
24 are responsible. I believe the evidence shows that
25 there is a cause, there is one reason, and there is one

1 truth about what happened on February 3rd, 2004. Do
2 not compromise what you believe the truth is -- and
3 we'll talk about this in a moment -- for sympathy or
4 for fear or for other things that have been interjected
5 into this case. Follow what the truth of the evidence
6 shows and we believe if you follow the evidence, you
7 will see that CSX did not cause this accident. They
8 did not cause Ms. Colvin to make an unsafe choice to
9 leave a safe place on February 3rd, 2004.

10 Now, you can take that down.

11 I want to talk to you now about something else
12 and put all of this kind of into context.

13 Let's go to the slide here.

14 I labeled this, what's going on here. And I'm
15 going to step you through from before the accident, all
16 the way to the request for all the money damages that
17 Mr. Parker just made up here, and see if you can put
18 together in context what's going on.

19 The first slide. Oh, can I control this?

20 MR. POSTON: Yes, sir.

21 MR. HARMON: All right. Thank you.

22 Before the accident -- let's talk a little about
23 Mr. Terry. Mr. Terry, as I told you, sees that Ms.
24 Colvin usually stops at the stop line when she's
25 crossing that crossing. That's what she does. Ms.

1 Colvin agreed that she was aware there was a stop line
2 there. And we know, members of the jury, that at the
3 stop line you can see all the way down to the I-95
4 bridge. There is more than enough sight distance for
5 anyone.

6 On the day of the accident -- now, pay attention
7 to this, because you may think I'm showing it for one
8 reason, but I'm showing it to you really for another.
9 You remember the testimony of Lon Hoover, and he said
10 after the accident Ms. Colvin leaves her vehicle to go
11 argue with Mr. Terry. That seems odd.

12 Then Jimmy Williams, a friend of her, says
13 although -- remember what happens at the scene.
14 Lillian is air-lifted to MUSC. Okay? She's
15 unconscious. And Ms. Colvin goes to the hospital with
16 Mr. Terry, relatively minor injuries they have, and
17 then she says to Jimmy Williams, no one's seriously
18 hurt.

19 We know on that day that both the EMS folks
20 indicated there's a strong smell of alcohol and she
21 tests positive for opiates. So why am I saying this?
22 What I'm not saying, what I am not saying, is that Ms.
23 Colvin doesn't love her daughter or anything like that.
24 What I'm saying is this is very unusual. Why would you
25 leave your daughter in the car and you go argue with

1 your boyfriend? Why are you saying, no one is
2 seriously hurt, at the hospital? It shows, in part,
3 that maybe the judgment on that time wasn't exactly
4 right.

5 Next, the accident is on February 3rd, 2004.
6 And then the investigation is begun by Mr. Don Crews,
7 who works for the firm, and we know he works for the
8 firm. He's an experienced investigator, no question
9 about that, been doing it over twenty years. In fact,
10 I think he told me on cross that he had been doing it
11 closer to thirty, in a part-time capacity. And Mr.
12 Crews has investigated accidents at railroad crossings
13 before. He understands line of sight at railroad
14 crossings.

15 You remember the -- this demonstrative we went
16 through with Mr. Crews. And on February 5th, Mr. Crews
17 -- you will have this in the jury room as Defendant's
18 Exhibit 4-A. And on the 5th he goes out and takes
19 thirteen minutes and twenty seconds of video footage.
20 It's a general survey video. He does everything: he
21 does the car; he goes out to the scene; does shots
22 everywhere; kind of a broader approach -- you all have
23 seen an investigator show -- narrowing it down to the
24 final result.

25 Then he goes back out there the next day,

1 needing more time, of course. Spends ten minutes and
2 fifteen seconds of video time. He's there a lot longer
3 but in terms of video time, ten minutes and fifteen
4 seconds. And he takes views every two feet. Starts at
5 two feet, line of sight, four feet, over thirty
6 different views of the line of sight going from two
7 feet all the way back to 320 feet. Importantly,
8 February 5th, no one is talking on the video. February
9 6th, no one is talking on the video.

10 We know that Ms. Colvin hired a lawyer several
11 days after this accident. On February 10th, Mr. Crews
12 goes out there to take a second look at things, and the
13 video time he takes is a minute -- much shorter -- a
14 minute and forty-eight seconds. And there are two
15 specific views where he's trying to capture the line of
16 sight. Only two.

17 By this date, members of the jury, Mr. Crews
18 knows the vehicle that Ms. Colvin was driving. You
19 remember when I went up there and I wrote ninety equals
20 7.5 feet? He knows that Ms. Colvin's body is ninety
21 inches back from the front bumper, or 7.5 feet. Ninety
22 inches.

23 Let's listen to what you hear Mr. Crews, where
24 he takes these two views from on February 10th, a week
25 after this accident.

1 Let's roll that.

2 [Whereupon, excerpt of video is played for the
3 jury as follows]

4 Ninety inches behind the stop sign.

5 MR. HARMON: Stop.

6 [Whereupon, excerpt of video concludes]

7 MR. HARMON: All right. Oh.

8 MR. POSTON: I got it.

9 MR. HARMON: That's okay.

10 MR. HARMON: Play it again and then we'll -- and
11 then stop it.

12 [Whereupon, video is played for the jury as
13 follows]

14 Ninety inches behind the stop sign.

15 [Whereupon, excerpt of video concludes]

16 MR. HARMON: All right. So he's talking -- he's
17 now, for the first time on these cameras, talking and
18 he's saying ninety inches behind the stop line
19 [phonetic], which would mean she stopped with her front
20 bumper at the stop sign. Which we all know that's
21 where she stopped. There's no dispute of that.

22 And now he's going to tell us what he believes
23 the line of sight would be if she stopped at the stop
24 sign.

25 Go ahead.

1 [Whereupon, video is played for the jury as
2 follows]

3 From the center of Hill Street.

4 [Whereupon, excerpt of video concludes]

5 MR. HARMON: There's the mark in the road he put
6 to record it.

7 [Whereupon, excerpt of video is played for the
8 jury as follows]

9 You can see to my right, or north, towards
10 Hampton approximately 120 feet. We measured that with
11 a ruler. The driver would have, looking north towards
12 Hampton, ninety inches behind the stop bar.

13 MR. HARMON: Stop.

14 [Whereupon, excerpt of video concludes]

15 MR. HARMON: Ninety inches behind the stop bar.
16 That means he is measuring where Ms. Colvin, her line
17 of sight, would be if she had stopped at the stop line.

18 Play it again, please.

19 [Whereupon, excerpt of video is played for the
20 jury as follows]

21 -- which would be at least --

22 [Whereupon, excerpt of video concludes]

23 MR. HARMON: Play it back from the beginning,
24 just this clip, please.

25 I'm just going to let it run this time, members

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1 of the jury.

2 [Whereupon, excerpt of video is played for the
3 jury as follows]

4 Ninety inches behind the stop sign, from the
5 center of Hill Street. You can see to my right, or
6 north, towards Hampton approximately 120 feet. We
7 measured that with a ruler. The driver would have,
8 looking north towards Hampton, ninety inches behind the
9 stop bar, which would be at least 1550 feet because you
10 can see the whistle post.

11 [Whereupon, excerpt of video concludes]

12 MR. HARMON: Okay. So what I would submit to
13 you this shows, members of the jury, is that on
14 February 10th, a week after this accident, it was known
15 that Ms. Colvin stopped at the stop sign and then she
16 stopped at the stop bar.

17 So the results of the investigation: by
18 February 10th, Ms. Colvin stopped at the stop line.
19 With her front bumper at the stop line her body would
20 be ninety inches, or 7.5 feet, behind the stop line.

21 Again, remember Mr. Crews has measured. And
22 you'll see it in evidence. He has written out ninety
23 inches from the front of her bumper to her seat and
24 then she could see well past the whistle post at that
25 point.

1 So problems, the plaintiff problems: first,
2 there are no sight-distance issues, members of the
3 jury. Stopped at the stop line. Nobody has come into
4 this court, no one, and could say that if you stop
5 where the State tells you to stop, there are any sight
6 distance issues. Recall the State inspected this and
7 said there were no view obstructions if you do what the
8 State says to do. The trees are not a factor. Second
9 issue: we've got no sight-distance issues, but we have
10 driver issues. Ms. Colvin's perception, judgment, and
11 reaction times were affected.

12 So those two things mean no case. So what
13 happens? Lawsuit solutions: first -- we're going
14 to talk about these -- bring on the experts; secondly,
15 the smoke screen -- and I'll tell you what I mean by
16 that -- and thirdly, nonsense, fear and manipulation.

17 Let's talk about lawsuit solutions first: bring
18 on the experts, these experts that the plaintiff
19 brought. And there was a lot of them paid solely for
20 the purposes of this lawsuit. Secondly, remember none
21 of them were there when this accident happened.

22 Do you remember at the beginning of this case,
23 and I told you we were going to bring to you the
24 witnesses -- I think I actually wrote it up here.

25 Yeah. At the beginning of the case a few weeks ago I

1 told you we were going to bring you the witnesses who
2 saw something, who knew something and heard something.
3 Do y'all remember that? And that's what we endeavored
4 to do.

5 Every side gets to decide during, before trial
6 if they're going to talk to experts and consult. But
7 everybody gets to decide who we're going to bring to
8 tell you what happened. And, we brought you the people
9 who were there. What they brought was an onslaught of
10 people who never were there, who saw Lillian in some
11 instances for two hours and were rendering opinions
12 that she would never, ever live independently. Many of
13 these experts, as you will see, routinely work together
14 in lawsuits.

15 And then lastly, some of the experts are experts
16 on how to manipulate juries. Let's talk about these
17 experts, bring on the experts. This is the array of
18 experts that came to you in the plaintiff's case. And
19 what was very interesting, in the same way we heard
20 during the closing argument of Mr. Parker, there was an
21 onslaught of people to come here who knew nothing about
22 what happened at the accident. Seems to me that you
23 would want to put up the people who were there to tell
24 -- Ms. Colvin, tell us what happened. But, no. We had
25 an onslaught of all of these experts who came in here.

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Lillian Colvin claims that she's been injured or damaged by the actions of the defendants. In bringing this lawsuit, Lillian Colvin claims that the defendants should compensate her for her injuries or damages..

Ladies and gentlemen, to determine the facts in this case, you will have to evaluate the credibility or the believability of the witnesses. I have already discussed with you at the beginning of this case some of the things that you may consider as you decide whether or not to believe a witness' testimony about a particular matter. You can believe as much or as little of each witness' testimony as you think proper. You may believe the testimony of a single witness against that of many witnesses, or just the opposite.

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