CLERK
SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

770258

NORFOLK AND WESTERN RAILWAY COMPANY,

Appellant

V.

LUCY M. GREENFIELD, ADMINISTRATRIX OF
THE ESTATE OF CHARLES WILBUR GREENFIELD,

Appellee

APPENDIX TO APPELLANT'S BRIEF

W. W. WHARTON
GLENN M. HODGE
Of Wharton, Aldhizer & Weaver
90 North Main Street
P. O. Box 809
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Counsel for Appellant

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RECORD NO. 770258

[1] MOTION FOR JUDGMENT

COMES NOW, the plaintiff, and avers to this Honorable Court as follows:

1. That the plaintiff is the Administratrix of the Estate of Charles Wilbur Greenfield, deceased, who at the time of his death was a resident of Warren County, Virginia;

2. That on July 30, 1974, the Norfolk and Western Railway Company owned and maintained a railroad track in Warren County, Virginia, that extended in a northerly-southerly direction along the company's right-of-way. At Success, Warren County, Virginia, there exists State Route 661 which crosses over the railroad tracks, which crossing is used by motorists to cross said tracks;

3. That the aforesaid roadway crossing at Success, Virginia, is maintained by the defendant and has been maintained by the defendant for many years prior to July 30, 1974;

4. That the defendant is, and was at all times hereinmentioned, a corporation duly organized, existing and doing business under and by virtue of the Laws of the State of Virginia;

5. That at all times hereinmentioned, and for many years prior thereto, the defendant was continuously engaged in the rail- [2] road business by furnishing transportation to its various customers. In furtherence

of its business, the defendant erected and maintained railroad tracks along its right-of-way through the County of Warren, State of Virginia;

6. That the defendant knew, or in the exercise of reasonable care, should have known, that motorists frequently used said crossing. The defendant had the following duties:

a. To provide its locomotive engine with a bell of ordinary size and a steam whistle or horn as required by law;

b. To give warning of the approach of the trains to said crossing by sounding the horn or whistle and ringing a bell, as required by law;

c. To keep the railroad right-of-way clear of trees and brush for One Hundred (100) feet on each side of a public road crossing, as required by law;

d. To equip and maintain the locomotive engines used in the transportation of trains with electric headlights or other headlights of not less than Five Hundred (500) candle power with the aid of a reflector, as required by law;

e. To maintain said crossing in a reasonably safe condition, and to afford reasonable approaches to and over the railroad tracks so that motorists could cross said tracks in reasonable safety;

f. To keep the railroad right-of-way clear of

brush, trees and growth so that motorists using said crossing would have a reasonable opportunity to see and know of the approach of trains along said tracks;

g. To keep a proper lookout for motorists traveling along the road on each side of said railroad right-of-way and to see and observe the approach of automobiles and other traffic to and over said crossing;

[3] h. Upon seeing and observing motorists and other traffic approach said crossing for the purpose of going from one side of the railroad tracks to the other side, to sound a warning bell, whistle or a horn of the approach of a train in the dangerous proximity of a train to the crossing;

i. To approach the crossing at a rate of speed which was not excessive or unreasonable under all the circumstances existing at the time of the accident;

j. To give adequate, reasonable and timely warning of the approach of its train to the grade crossing;

k. To provide, in addition to a crossbuck sign, adequate warnings, sugh as gates, flagmen or lights;

7. That on July 30, 1974, the defendant violated its duties as aforesaid and was negligent in the following respects:

a. The defendant failed to provide the locomotive engine with a bell of ordinary size and a steam whistle or horn;

b. The defendant failed to give warning of the approach of a train to said crossing by sounding a horn or whistle and ringing a bell, as required by law;

c. The defendant failed to clear from its right-of-way trees and brush for One Hundred (100) feet on each side of the public road crossing as required by law;

d. The defendant failed to provide the locomotive with electric headlights, or other headlights of not less than Five Hundred (500) candle power with aid of a reflector, as required by law;

e. The defendant failed to maintain said crossing in a reasonably safe condition and to afford reasonable approaches over and to the railroad tracks so that motorists could cross said tracks in reasonable safety;

f. The defendant failed to keep the railroad right-of- [4] way clear of brush, trees and growth so that motorists using said crossing would have a reasonable opportunity to see and know of the approach of trains along said tracks;

g. The defendant failed to keep a proper lookout for motorists traveling along the road on each side of said railroad right-of-way and to see and observe the approach of motor vehicles and other traffic to and over said crossing;

h. The defendant failed, upon seeing and observing motorists and other traffic approach said crossing

for the purpose of going from one side of the railroad tracks to the other side, to sound a warning bell, whistle or horn of the approach of a train in a dangerous proximity of a train to the crossing;

i. The defendant failed to approach the crossing at a rate of speed which was not excessive or unreasonable under all the circumstances existing at that time;

j. The defendant failed to give adequate, reasonable and timely warning of the approach of its train to the grade crossing; and,

k. The defendant failed, under all the circumstances then existing, to provide, in addition to a crossbuck sign, adequate warning such as gates, falgmen, or lights.

8. That the defendant had a duty to make inspections of the railroad crossing in question to determine what was necessary to make the crossing safe for motorists and other traffic, and the defendant failed in this duty to make such an inspection even though it knew or should have known, that State Route 661 was being altered;

9. That on July 30, 1974, Charles Wilbur Greenfield drove and operated his automobile in an easterly direction over State Route 661 and drove said automobile onto said railroad crossing at Success, Warren County, Virginia. As a direct and proximate [5] result of the negligence of the defendant as aforesaid, said railroad

train was driven with great force and violence into and against the automobile operated by Charles Wilbur Greenfield while said automobile was on said crossing;

10. That the death of Charles Wilbur Greenfield was a direct result of the negligence of the defendant;

11. That the decedent is survived by Mrs. Lucy M. Greenfield, his widow, Bertha A. Greenfield, daughter, Judy M. Greenfield, daughter, Nancy L. Greenfield, daughter, Robin B. Greenfield, daughter, and Walter L. Greenfield, son, and as a result of the death of decedent, they have suffered and will forever continue to suffer great and lasting sorrow, solace and mental anguish;

12. That the decedent is survived by those persons named in paragraph 11 of this Motion for Judgment and said persons were dependent on the decedent for support, services, protection, care and assistance, and were being supported by him prior to his death, and who, as a result of his death, have been denied any further financial pecuniary support, services, protection, care and assistance by the decedent;

13. That as a result of the death of the decedent, plaintiff was compelled to and did spend a certain sum of money in excess of Five Hundred Dollars ($500.00) for his funeral.

WHEREFORE, your plaintiff moves this Honorable Court for judgment against the defendant for the sum of

One Million Four Hundred Eighty-seven Dollars ($1,000,487.00) with interest thereon until paid, and the costs of this action.

LUCY M. GREENFIELD,
ADMINISTRATRIX

By /s/ Edward F. Greco
Counsel

[Filed January 23, 1975]

* * * * *

[29]
GROUNDS OF DEFENSE AND PLEA OF CONTRIBUTORY NEGLIGENCE

Grounds of Defense:

(1) Paragraphs 1, 2, 3, 4, and 5 of plaintiff's Motion for Judgment are admitted.

(2) Paragraphs 6, 7, 8, 9, and 10 of said Motion for Judgment are denied.

(3) Defendant does not have sufficient information or knowledge to either admit or deny the allegations contained in paragraphs 11, 12, and 13 of said Motion for Judgment.

(4) All allegations of negligence contained in said Motion for Judgment are denied.

Plea of Contributory Negligence:

Without admitting negligence on its part, but expressly denying the same, the defendant says that Charles Wilbur Greenfield was guilty of negligence which proximately caused or contributed to the injuries allegedly

resulting in his death, and, therefore, plaintiff is barred from any recovery in this action.

NORFOLK AND WESTERN RAILWAY COMPANY
By Counsel

[Filed February 12, 1975]

* * * * *

INSTRUCTIONS GRANTED

[71] INSTRUCTION NO. 1

The jury are the sole judges of the weight of the evidence and of the credibility of the witnesses, and the jury has the right to discard or accept the testimony or any part thereof of any witness which the jury regards proper to discard or accept, when considered in connection with the whole evidence in the case; but the jury has no right arbitrarily to disregard the credible testimony of a witness. And in ascertaining the greater weight of the evidence and the credibility of witnesses, the jury may take into consideration the demeanor of the witness on the witness stand: his apparent candor or fairness; his bias, if any; his intelligence; his interest, or lack of it, in the outcome of the case; his opportunity, or lack of it, for knowing the truth and for having observed the facts to which he testifies; any prior inconsistent statements by the witness if proven by the evidence. And from all these and taking into consideration all the facts and circumstances of the case, the jury are to determine the

credibility of the witnesses and the greater weight of the evidence.

[72] INSTRUCTION NO. 2

A verdict must not be based in whole or in part upon surmise, conjecture or sympathy for either of the parties, but must be based solely upon the evidence and the instructions of the Court.

[73] INSTRUCTION NO. 3

The term "greater weight" or the term "preponderance of the evidence" does not necessarily mean the greater number of witnesses, nor does it mean beyond a reasonable doubt. It is that evidence which is most convincing and satisfactory to the minds of the jury. The testimony of one witness in whom the jury has confidence may constitute the greater weight of the evidence.

[74] INSTRUCTION NO. 4

"Negligence" is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person would not have done under the existing circumstances.

[75] INSTRUCTION NO. 5

"Reasonable care" or "ordinary care" is a relative term and varies with the nature and character of the situation to which it is applied. The amount or degree of diligence and caution which is necessary to constitute

reasonable or ordinary care depends upon the circumstances and the particular surroundings of each specific case. The test is that degree of care which an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury to another or to himself.

[76] INSTRUCTION NO. 6

The Court instructs the jury that it was the duty of the defendant railroad:

1. To clear from its right of way trees and brush for 100 feet on each side of public road crossings at grade when such trees or brush would otherwise obstruct the view of approaching trains.

2. To approach the crossing at a rate of speed which was not excessive or unreasonable under all the circumstances existing at the time.

3. To keep a reasonable lookout for vehicles approaching the crossing.

4. To give adequate, reasonable and timely warning of the train to its crossing by sharply sounding a whistle or horn at least twice at a distance of not less than 300 yards nor more than 600 yards at a place where the railroad crosses Route 661.

If you believe from a preponderance of the evidence that the defendant railroad violated any one or more of the foregoing duties then the defendant was guilty of negligence; and if you further believe from the evidence

that such negligence was a proximate cause of the collision, then unless the plaintiff was guilty of negligence which proximately contributed to the cause of his death, you shall find your verdict in favor of the plaintiff.

[77] INSTRUCTION NO. 7

The Court instructs the jury that the railroad was not required to place any warning devices or signals at the crossing except for a sign easily seen by travelers from both directions on the highway, containing in capital letters at least 5 inches high, the inscription "railroad crossing" which sign is commonly referred to as a "crossbuck" sign.

[78] INSTRUCTION NO. 8

The Court instructs the jury that even though you may believe from the evidence that the railway left trees and brush on its right of way within 100 feet of the public road crossing, unless you further believe that such trees and brush obstructed the view of the approaching train to such an extent that it was the sole proximate cause of the collision you cannot find for the plaintiff on plaintiff's alleged negligence of the defendant to clear the right of way.

[79] INSTRUCTION NO. 9

Where the defendant relies upon contributory negligence of the plaintiff as a defense, such contributory

negligence is not presumed but the burden is upon the defendant to prove by a preponderance of the evidence that the plaintiff was guilty of such negligence and that any such negligence proximately contributed to cause the collision; and unless the defendant thus proves the existence of such negligence or unless any such negligence appears from the plaintiff's own evidence or can be fairly inferred from all the circumstances of the case, then you cannot find the plaintiff guilty of contributory negligence.

And if the jury are uncertain as to whether the plaintiff was guilty of contributory negligence, or if you believe that it is just as probable that the plaintiff was not guilty of any such negligence as it is that he was, then you cannot find the plaintiff guilty of contributory negligence.

[80] INSTRUCTION NO. 10

Where the plaintiff claims that the defendant railroad failed in any duty as set forth in other instructions of the Court, the burden is upon the plaintiff to prove any such alleged failure by a preponderance of the evidence; and unless you believe that the plaintiff has proven by a preponderance of the evidence that the defendant failed to perform any such duty then you cannot find that the defendant was negligent in that respect.

And if the jury are uncertain as to whether any such negligence has been thus proven by a preponderance of

the evidence, or if you believe that it is just as probable that the defendant was not guilty of any such negligence as it is that he was, then you shall return your verdict in favor of the defendant.

[81] INSTRUCTION NO. 11

The mere fact that there has been an accident and that as a result thereof plaintiff's decedent was killed, does not of itself entitle the plaintiff to recover. In order to recover against the defendant the burden is upon the plaintiff to prove by a preponderance of the evidence that the defendant was negligent and that any such negligence was the sole proximate cause of the accident.

And if the jury are uncertain as to whether any such negligence has been thus proven by a preponderance of the evidence, or if you believe that it is just as probable that the defendant was not guilty of negligence which was the sole proximate cause of the accident as it is that it was, then you shall return your verdict in favor of the defendant.

[82] INSTRUCTION NO. 12

A railroad track is itself a proclamation of danger and it is the duty of an automobile driver in approaching a crossing to exercise reasonable care proportioned to the known danger, to use his eyes and ears, looking and listening in both directions, and when about to cross the

track to look and listen at a time and in such a manner so as to make these acts effective. And if such looking and listening does or would warn him of the near approach of a train, then it is his duty to keep off the track until the train has passed.

And if you believe from the evidence that the plaintiff's decedent violated the foregoing duty, then he was negligent; and if you further believe that any such negligence proximately caused or contributed to cause the collision, then you shall return your verdict in favor of the defendant, and this is true even though you may believe the defendant was also negligent.

[Not numbered in Record; here designated 82a for reference]

INSTRUCTION NO. 13

The Court instructs the jury that the duty of an automobile driver approaching tracks where there is restricted or obstructed vision to stop, look and listen and to do so at a time and place where stopping and where looking and where listening will be effective is a positive duty. And if the jury believe from the evidence in this case that the decedent Greenfield failed in this duty, then he was guilty of such contributory negligence as will precent a recovery in this action.

[83] INSTRUCTION NO. 14

The Court instructs the jury that it was the duty

of the defendant railroad to provide each locomotive or diesel engine passing upon its road with a bell of ordinary size and steam whistle or horn, and such whistle or horn shall be sharply sounded at least twice at a distance of not less than 300 yards or more than 600 yards from where the railroad crosses public highway No. 661.

If you believe from a preponderance of the evidence that the defendant railroad failed to give the foregoing signals as required by law, then the defendant railroad was guilty of negligence and if you further believe from such evidence that any such negligence proximately caused the death of the decedent, then you shall return your verdict in favor of the plaintiff, regardless of whether the decedent was guilty of negligence which was a contributing proximate cause of the accident. Contributory negligence, if any, is not a bar to recovery and must be considered in mitigation of damages.

[84] INSTRUCTION NO. 15

The Court instructs the jury that if you believe from a preponderance of the evidence that the railroad sounded signals set forth in Instruction No. 14, then it was the duty of the decedent, Greenfield, to stop within 50 feet but not less than 15 feet of the nearest rail of the railroad and not to proceed until he could do so in safety. If you find that the decedent failed in the foregoing duty he was guilty of negligence and if you find

that such negligence, if any, proximately contributed to the accident, you must return a verdict for the defendant.

[85] INSTRUCTION NO. 16

The Court instructs the jury that the life expectancy table introduced in evidence is to be considered by you as an aid in determining life expectancy, but it is not in any way conclusive or binding. You should consider it along with all the other evidence relating to the health, constitution and habits of the decedent in your determination of his life expectancy.

[86] INSTRUCTION NO. 17

If from the evidence and the other instructions of the Court you find your verdict in favor of the plaintiff, you may award such damages as to you may seem fair and just, and in assessing the damages you may ascertain the same with reference to the following:

1. Compensation for reasonably expected loss of the income of the decedent and services, protection, care and assistance provided by the decedent, fixing such sum with reference to the probable earnings of the deceased for the duration of his life expectancy if he had not been killed and in view of his health, age, business capacity and experience.

2. Compensation for sorrow, mental anguish, solace, which may include society, companionship, comfort,

guidance, kindly offices and advice of the decedent to his wife, Lucy M. Greenfield, his daughters, Bertha A. Greenfield, Judy M. Greenfield, Nancy L. Greenfield, and Robin B. Greenfield, and his son, Walter L. Greenfield.

3. Reasonable funeral expenses.

The jury shall in its discretion make such allocation of the sum awarded as it deems proper between the following survivors of the deceased - his wife, Lucy M. Greenfield, his daughters, Bertha A. Greenfield, Judy M. Greenfield, Nancy L. Greenfield, and Robin B. Greenfield, and his son, Walter L. Greenfield.

[Filed July 23, 1976]

* * * * *

INSTRUCTIONS REFUSED

[87] INSTRUCTION NO. A

The Court instructs the jury that if you believe from the evidence that the engineer of the train sounded signals set forth in Instruction No. _____, no further warning need be given of the train's approach to the crossing.

[88] INSTRUCTION NO. B

The Court instructs the jury that if you believe from the evidence that the engineer of the train blew for the crossing at the whistle post and then continued to blow or to ring the bell until the crossing was reached as the statute requires, no further warning need be given

of the train's approach to the crossing.

[89] INSTRUCTION NO. C

The Court instructs the jury that, at the crossing of a railroad and highway, the rights and obligations of the railroad company and travellers on the highway are reciprocal, but it is the privilege of the company that its trains shall have the right of way, and that all persons on the highway shall yield precedence to the trains.

[Filed July 23, 1976]

* * * * *

TYPED COPY OF JURY VERDICT

[91] 7/23/76

[✓] 1. We the jury find for the Plaintiff in the sum of $350,000. and apportion this amount as follows:

100,000	wife -	Lucy M. Greenfield
50,000	Daw	Bertha A. Greenfield
50,000		Judy M. Greenfield
50,000		Nancy L. Greenfield
50,000		Robin B. Greenfield
50,000		Walter L. Greenfield

[ ] 2. We the jury find for the Defendant

/s/ Joe B. Corbin
Foreman

[Filed July 23, 1976]

* * * * *

JUDGE'S MEMORANDUM DATED SEPTEMBER 14, 1976

(Designated in Record as "Copy of letter to the Attorney for Defendant from the Judge")

[199] After review of the record, the transcript of the

trial, the memoranda filed by counsel and argument of counsel, I am of the opinion that:

1. There was sufficient evidence for the jury to determine that the statutory signals were not given and that the defendant was guilty of other acts of negligence. Even though no one observed the decedent as he approached the crossing until he was 18 feet therefrom, under the facts of this case it was a question for the jury to determine whether the decedent was guilty of negligence which was a proximate cause of the accident. As stated in Kimball and Fink vs. Friends Adm., 95-BA-125, and cited at Page 22 of the memorandum filed by the plaintiff, "It is true that he was bound to use reasonable care to avoid getting into a position in which he could not escape a collision. But the fact that he did get into such position is not conclusive evidence that he was there by his own negligence. He may have been there in consequence of the defendant's negligence, and because he was misled by it. Whether he used due care to ascertain if a train was approaching depended upon inferences from facts to be found by the jury". Consequently, the motions of the defendant to strike the evidence of the plaintiff on these grounds properly were denied.

2. Having ruled that there was sufficient evidence upon the failure to give the required signals to present a question for the [200] jury, the granting of Instruction No. 14 was correct. The jury was properly and adequately instructed and it was not error to refuse to grant Instructions A, B and C offered by the defendant or to grant Instructions 6, 9 and 17 offered by plaintiff.

3. Defendant argues the award was in excess of the loss of earnings of the decedent and cites this as its only grounds that the award was excessive. However, the statute enumerates many other elements which the jury may consider in arriving at its award. The statute states that the award shall be distributed to the "--surviving spouse, children, and grandchildren of the deceased --" without limiting "children" to those supported by or dependent upon the deceased. The award "-- is not so excessive as to shock the conscience of this court".

4. Defendant offered no evidence to prove that a fair trial could not be granted both parties in support of its motion for a change of venue. After lengthy and extensive questioning by the court on voir dire, not one juror indicated that he could not render a fair and impartial trial. Moreover, after the voir dire, defendant did not renew its motion for a change of venue.

5. The objection by the defendant to the statement by witness Grubbs "They were cut the evening of the last accident" (Tr. 56) was to the fact that the bushes had been cut since the date of the accident in question and the jury was instructed to "So, just disregard his answer to the question in regard to bushes that were cut, etc." (Tr. 57). Defendant did not object to the statement "last accident" or request that the jury be instructed specifically to disregard that portion of the statement nor did it move for a mistrial at that time. The jury was not prejudiced and defendant waived its objections.

For the reasons stated herein, in the record and in the memorandum filed by counsel for the plaintiff, the motion by counsel for the defendant that the verdict be set aside is denied.

Counsel for the plaintiff shall present an Order in accordance with this ruling of the court.

/s/ Duncan C. Gibb

[Filed September 15, 1976]

* * * * *

[201] FINAL ORDER

On September 9, 1976, came the plaintiff and the defendant, by their respective attorneys, and were heard on the defendant's motion to set aside the verdict of the jury rendered in this Court on July 23, 1976, and the Court having considered the motion heretofore submitted to set aside the verdict, is of the opinion that the motion should be and it is hereby overruled. The Court stated in an opinion dated September 14, 1976, that:

> "1. There was sufficient evidence for the jury to determine that the statutory signals were not given and that the defendant was guilty of other acts of negligence. Even though no one observed the decedent as he approached the crossing until he was 18 feet therefrom, under the facts of this case it

was a question for the jury to determine whether the decedent was guilty of negligence which was a proximate cause of the accident. As stated in Kimball and Fink vs. Friends Adm., 95-BA-125, and cited at Page 22 of the memorandum filed by the plaintiff, "It is true that he was bound to use reasonable care to avoid getting into a position in which he could not escape a collision. But the fact that he did get into such position is not conclusive evidence that he was there by his own negligence. He may have been there in consequence of the defendant's negligence, and because he was misled by it. Whether he used due care to ascertain if a train was approaching depended upon inferences from facts to be found by the jury". Consequently, the motions of the defendant to strike the evidence of the plaintiff on these grounds properly were denied.

[202] 2. Having ruled that there was sufficient evidence upon the failure to give the required signals to present a question for the jury, the granting of Instruction No. 14 was correct. The jury was properly and adequately instructed and it was not error to refuse to grant Instructions A, B and C offered by the defendant or to grant Instructions 6, 9 and 17 offered by plaintiff.

3. Defendant argues the award was in excess of the loss of earnings of the decedent and cites this as its only ground that the award was excessive. However, the statute enumerates many other elements which the jury may consider in arriving at its award. The statute states that the award shall be distributed to the "-- surviving spouse, children, and grandchildren of the deceased--" without limiting "children" to those supported by or dependent upon the deceased. The award "--is not so excessive as to shock the conscience of this court".

4. Defendant offered no evidence to prove that a fair trial could not be granted both parties in support of its motion for a change of venue. After lengthy and extensive questioning by the court on voir dire, not one juror indicated that he could not render a fair and impartial trial. Moreover, after

> the voir dire, defendant did not renew its motion for a change of venue.
>
> 5. The objection by the defendant to the statement by witness Grubbs "They were cut the evening of the last accident" (Tr. 56) was to the fact that the bushes had been cut since the date of the accident in question and the jury was instructed to "So, just disregard his answer to the question in regard to bushes that were cut, etc." (Tr. 57). Defendant did not object to the statement "last accident" or request that the jury be instructed specifically to disregard that portion of the statement nor did it move for a mistrial at that time. The jury was not prejudiced and defendant waived its objections.
>
> For the reasons stated herein, in the record and in the memorandum filed by counsel for the plaintiff, the motion by counsel for the defendant that the verdict be set aside is denied."

Accordingly, it is ADJUDGED and ORDERED that the plaintiff, Lucy M. Greenfield, Administratrix of the Estate of Charles Wilbut Greenfield, shall recover against the defendant, Norfolk and Western Railway Company, the sum of $350,000.00, in accordance with the jury's verdict, with interest thereon from July 23, 1976, as well as the costs of this proceeding, to all of which action [203] of the Court the defendant, by counsel, objects and excepts.

It appearing to the Court that Bertha A. Greenfield, Judy M. Greenfield, Nancy L. Greenfield, Robin B. Greenfield and Walter L. Greenfield are infants under the age of 18 years, it is ORDERED that the monies received in payment of the judgment shall, after payment of costs, counsel fees, and other expenses of the litiga-

tion, be distributed by the Administratrix to Lucy M. Greenfield and to The Farmers and Merchants National Bank, Winchester, Virginia, upon qualification as Guardian for each of the said infants in the same proportion as directed by the jury verdict.

And the defendant having stated its intention to apply to the Supreme Court of Virginia for a writ of error and supersedeas to the judgment of this Court, it is further ORDERED that execution on said judgment is suspended for a period of four months from this date, provided the defendant, or someone for it, within thirty days from this date shall give bond in the penalty of $400,000.00, with surety approved by the Clerk of the Court and conditioned according to law, said suspension of judgment being further conditioned on defendant's filing a Notice of Appeal and Assignment of Error within thirty days from the date of entry of this order.

It is further ORDERED that the Transcript of the trial in this case prepared by Court Reporting Service dated July 28, 1976, together with the Correction to Transcript prepared by Court Reporting Service dated August 23, 1976, previously filed with the papers in this action are hereby made a part of the record.

ENTER:

/s/ Duncan C. Gibb
Judge
Date: November 4, 1976

[Filed: November 4, 1976]

[206] ASSIGNMENT OF ERROR

Pursuant to the order entered in this case on November 4, 1976, the defendant, Norfolk and Western Railway Company, for its Assignment of Error, states:

(1) The Court erred in overruling defendant's motion to strike plaintiff's evidence at the conclusion of plaintiff's evidence and enter summary judgment for the defendant, because plaintiff's evidence was insufficient as a matter of law for the jury to find that the defendant failed to give the statutory crossing signals or that the defendant was negligent.

(2) The Court erred in overruling defendant's motion for summary judgment at the conclusion of the evidence, because the evidence showed that the defendant gave the statutory crossing signals, that the defendant was not negligent, and that the plaintiff's decedent was guilty of contributory negligence as a matter of law.

(3) The Court erred in refusing to give defendant's Instructions A, B, and C, because the law and evidence warranted giving these instructions and for reasons set forth in the record.

(4) The Court erred in granting Instructions 6, 9, 14, and 17 as given over defendant's objection because there was no evidence to support the granting of these instructions and for [207] reasons set forth in the record.

(5) The Court erred in overruling the defendant's

motion to set aside the verdict as being excessive.

(6) The Court erred in overruling defendant's motion for a change of venue and in failing to grant a continuance because of prejudicial pre-trial publicity.

(7) The Court erred in overruling defendant's objection to the admission of certain evidence concerning a subsequent accident at the crossing in question, as set forth in the record, which was prejudicial to the defendant.

(8) The verdict was contrary to the law and evidence in that there was no evidence to show that defendant failed to give the statutory crossing signals, there was no evidence of defendant's negligence, and the evidence showed plaintiff's decedent to be guilty of contributory negligence as a matter of law.

NORFOLK AND WESTERN RAILWAY COMPANY
By Counsel

[Filed November 26, 1976]

PLAINTIFF'S EXHIBITS

#1 through #11, Photographs, have not been reproduced for this Appendix, but are found in the Record.

[Filed July 23, 1976]

Pl. Ex #12
7-23-76

Certificate of Birth

State of West Virginia,
County of Berkeley, ss:

I, E. C. DUNHAM, Clerk of the County Court of Berkeley County aforesaid, and custodian of the Records of Vital Statistics therein, do hereby certify that I have examined said records, and that they disclose the following facts concerning the birth of

Charles Wilbur Greenfield	White Male
Name of Child, if named when recorded	White - Colored - Male - Female
Mar 24 1944	Martinsburg
Date of Birth	Place of Birth
Wilbur Henry Greenfield	Mary Elinor Rockwood
Name of Father as Recorded	Name of Mother as Recorded
1-1-44	No. 13 Page C-6
Date Certificate Filed	Recorded in Record of Births

In testimony whereof I have hereunto set my hand and seal of said Court at Martinsburg, this 31 day of Mar, 19 65

E C Dunham
Clerk County Court, Berkeley County, W. Va.

#12 BIRTH CERTIFICATE OF VICTIM

Pl. Ex #13 7-23-76

Short Form 1040A U.S. Individual Income Tax Return

Department of the Treasury Internal Revenue Service **1973**

Name (If joint return, give first names and initials of both) Charles W. & Lucy M.	Last name Greenfield	COUNTY OF RESIDENCE Warren	Your social security number 236 66 1996
Present home address (Number and street, including apartment number, or rural route) Rt. 11 2 Box 145			Spouse's social security no. 225 42 3352
City, town or post office, State and ZIP code Front Royal VA. 22630	Place label within block	Occupation: Yours ▶ Chief Metal; Spouse's ▶ Clerk	

Filing Status—check only one:

1 ☐ Single
2 ☑ Married filing joint return (even if only one had income)
3 ☐ Married filing separately. If spouse is also filing, give spouse's social security number in designated space above and enter full name here ▶
4 ☐ Unmarried Head of Household
5 ☐ Widow(er) with dependent child (Year spouse died ▶ 19__)

Exemptions Regular / 65 or over / Blind

6a Yourself ☑ ☐ ☐
b Spouse ☑ ☐ ☐
Enter number of boxes checked ▶ 2
c First names of your dependent children who lived with you Bertha Judy Nancy
Enter number ▶ 3
d Number of other dependents (from line 26) ▶
7 Total exemptions claimed ▶ 5

8 **Presidential Election Campaign Fund.**—Check ☐ if you wish to designate $1 of your taxes for this fund. If joint return, check ☐ if spouse wishes to designate $1. Note: *This will not increase your tax or reduce your refund.* See note on back.

Attach Copy B of Forms W-2 and Check or Money Order here

9	Wages, salaries, tips, and other employee compensation (Attach Forms W-2. If unavailable, attach explanation.)	9	7641 79
10a	Dividends (See instructions on page 3.) $_____, 10b Less exclusion $_____, Balance ▶	10c	
11	Interest income	11	
12	Total (add lines 9, 10c, and 11) (Adjusted Gross Income)	12	7641 79

- If you want IRS to figure your tax, skip the rest of this page and see instructions on page 3.
- If line 12 is under $10,000 find tax in Tables 1–12 and enter on line 17. Skip lines 13 through 16.

13	If line 12 is $10,000 or more, enter 15% of line 12 but not more than $2,000 ($1,000 if line 3 checked)	13	
14	Subtract line 13 from line 12	14	
15	Multiply total number of exemptions claimed on line 7 by $750	15	
16	Taxable income (subtract line 15 from line 14) (Figure tax on amount on line 16 using Tax Rate Schedule X, Y, or Z, and enter on line 17.)	16	

#13 INCOME TAX RETURN FOR 1973

#13 INCOME TAX RETURN FOR 1973 (continued)

RCG 6/24/26

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17	Tax, check if from: ✓ Tax Tables 1–12 OR ☐ Tax Rate Schedule X, Y, or Z	17	352	00
18	Credit for contributions to candidates for public office (see instructions on page 4)	18		
19	Income tax (subtract line 18 from line 17). If less than zero, enter zero	19	352	00
20a	Total Federal income tax withheld (attach Forms W-2 to front) — 20a: 1071 94			
b	Excess FICA tax withheld (two or more employers—see instructions on page 4) — b:			
c	1973 estimated tax payments (include amount allowed as credit from 1972 return) — c:			
21	Total (add lines 20a, b, and c)	21	1071	94
22	If line 19 is larger than line 21, enter BALANCE DUE IRS — Pay in full with return. Write social security number on check or money order and make payable to Internal Revenue Service ►	22		
23	If line 21 is larger than line 19, enter amount OVERPAID ►	23	689	94
24	Amount of line 23 to be REFUNDED TO YOU ►	24	689	94
25	Amount of line 23 to be credited on 1974 estimated tax ► 25			

Other Dependents

(a) NAME	(b) Relationship	(c) Months lived in your home. If born or died during year, write B or D.	(d) Did dependent have income of $750 or more?	(e) Amount YOU furnished for dependent's support. If 100% write ALL. $	(f) Amount furnished by OTHERS including dependent. $

26 Total number of dependents listed in column (a). Enter here and on line 6d ►

Note: 1972 Presidential Election Campaign Fund Designation.—Check ☐ if you did not designate $1 of your taxes on your 1972 return, but now wish to do so. If joint return, check ☐ if spouse did not designate on 1972 return but now wishes to do so.

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct and complete. Declaration of preparer (other than taxpayer) is based on all information of which he has any knowledge.

Sign here

► Your signature — Date 1/29/74

► Spouse's signature (if filing jointly, BOTH must sign even if only one had income) — Date 1/29/74

► Preparer's signature (other than taxpayer) — Date

Address (and ZIP Code) — Preparer's Emp. Ident. or Soc. Sec. No.

#15 LIFE EXPECTANCY TABLE

ARTICLE 1.

Laws, Public Records, etc., as Evidence.

§ 8-263. This Code, the acts, etc., to be evidence.

Law Review.—For a survey of the Virginia law on evidence for the year 1961-1962, see 48 Va. L. Rev. 1502. For note on impeaching one's own witness, see 49 Va. L. Rev. 996.

§ 8-263.1. Table of life expectancy.—Whenever, in any case not otherwise specifically provided for, it is necessary to establish the expectancy of continued life of any person from any period of such person's life, whether he be living at the time or not, the following table shall be received in all courts and by all persons having power to determine litigation as evidence, with other evidence as to the health, constitution and habits of such person, of such expectancy represented by the figures in the following columns:

Age	Both Sexes	Male	Female
0	69.9	66.6	73.4
1	70.7	67.6	74.0
2	69.8	66.7	73.1
3	68.9	65.8	72.2
4	67.9	64.8	71.2
5	67.0	63.9	70.3
6	66.0	62.9	69.3
7	65.0	62.0	68.3
8	64.1	61.0	67.3
9	63.1	60.0	66.4
10	62.1	59.0	65.4
11	61.1	58.1	64.4
12	60.1	57.1	63.4
13	59.2	56.1	62.4
14	58.2	55.1	61.5
15	57.2	54.2	60.5
16	56.3	53.2	59.5
17	55.3	52.3	58.5
18	54.4	51.4	57.6
19	53.4	50.4	56.6
20	52.5	49.5	55.6
21	51.5	48.6	54.7
22	50.6	47.7	53.7
23	49.7	46.8	52.8
24	48.7	45.8	51.8
25	47.8	44.9	50.8
26	46.8	44.0	49.9

#15 LIFE EXPECTANCY TABLE (continued)

Age	Both Sexes	Male	Female
27	45.9	43.1	48.9
28	45.0	42.2	48.0
29	44.0	41.2	47.0
30	43.1	40.3	46.1
31	42.1	39.4	45.1
32	41.2	38.5	44.2
33	40.3	37.5	43.2
34	39.3	36.6	42.3
35	38.4	35.7	41.3
36	37.5	34.8	40.4
37	36.6	33.9	39.5
38	35.7	33.0	38.5
39	34.8	32.1	37.5
40	33.9	31.2	36.7
41	33.0	30.3	35.8
42	32.1	29.4	34.9
43	31.2	28.6	34.0
44	30.3	27.7	33.1
45	29.4	26.9	32.2
46	28.6	26.0	31.3
47	27.7	25.2	30.4
48	26.9	24.4	29.5
49	26.0	23.6	28.7
50	25.2	22.8	27.8
51	24.4	22.0	26.9
52	23.6	21.3	26.1
53	22.8	20.5	25.3
54	22.1	19.8	24.4
55	21.3	19.1	23.6
56	20.5	18.4	22.8
57	19.8	17.7	22.0
58	19.1	17.0	21.2
59	18.4	16.3	20.4
60	17.7	15.7	19.6
61	17.0	15.1	18.8
62	16.3	14.5	18.1
63	15.6	13.8	17.3
64	15.0	13.3	16.6
65	14.3	12.7	15.9
66	13.7	12.2	15.2
67	13.1	11.6	14.5
68	12.5	11.2	13.8
69	12.0	10.7	13.2
70	11.4	10.2	12.5
71	10.9	9.7	11.9
72	10.3	9.3	11.2
73	9.8	8.8	10.6
74	9.3	8.4	10.0
75	8.8	7.9	9.4
76	8.3	7.5	8.9
77	7.8	7.1	8.3
78	7.3	6.7	7.8
79	6.9	6.3	7.3
80	6.4	5.9	6.8

#15 LIFE EXPECTANCY TABLE (continued)

Age	Both Sexes	Male	Female
81	6.0	5.6	6.3
82	5.6	5.2	5.9
83	5.2	4.9	5.5
84	4.8	4.5	5.1
85	4.5	4.2	4.7

(1966, c. 472.)

Effective date. — This section became effective April 4, 1966.

The table is to be considered as evidence. Edwards v. Syrkes, 211 Va. 600, 179 S.E.2d 902 (1971).

But it is not conclusive or binding. Edwards v. Syrkes, 211 Va. 600, 179 S.E.2d 902 (1971).

And should be considered with other evidence.—It is the duty of the court, when so requested in an action for wrongful death, to tell the jury that a mortality table introduced into evidence is to be considered by them, but it is not conclusive or binding. It shall be considered along with all the other evidence relating to the health, habits, and other circumstances of the person which may tend to influence his life expectancy. Edwards v. Syrkes, 211 Va. 600, 179 S.E.2d 902 (1971).

Reading section to jury.—The objection now made to the action of the trial court in permitting counsel for the plaintiff to read to the jury from this section, it being the table of life expectancy, does not appear to have been voiced in the court below. While this method of introducing the life expectancy table in evidence is unusual, and not an approved procedure, it does not here constitute reversible error. State Farm Mut. Auto. Ins. Co. v. Futrell, 209 Va. 266, 163 S.E.2d 181 (1968).

Instruction in wrongful death action.—In a wrongful death action, the jury should be instructed, if requested, substantially as follows: "The court instructs the jury that the life expectancy table introduced in evidence is to be considered by you as an aid in determining life expectancy, but it is not in any way conclusive or binding. You should consider it along with all the other evidence relating to the health, constitution, and habits of the decedent in your determination of his life expectancy." Edwards v. Syrkes, 211 Va. 600, 179 S.E.2d 902 (1971).

[Filed July 23, 1976]

DEFENDANT'S EXHIBITS

#1 through #9, Photographs, have not been reproduced for this Appendix, but are found in the Record.

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1. (Motion in Chambers Prior to Commencement of Trial)
2. COURT: All right, Mr. Wharton.
3. MR. WHARTON: Your Honor, there's been in several of the
4. papers, well, one of them last week; and it
5. was the headline article on the first page
6. about the suit being here for a million or
7. so dollars; followed by broadcasts on the
8. local radio; followed by an article about
9. the Board of Supervisors saying that this
10. was a dangerous crossing and so on, and
11. asking that signal lights be erected; fol-
12. lowed by a picture, which I'm advised was
13. in the Warren Sentinel paper of the cross-
14. ing; followed by a further announcement
15. even this morning on the radio, I'm advised,
16. that the case was to be tried and the amount
17. of the suit and the fact that everyone con-
18. siders it a dangerous crossing. In light
19. of that, we would ask for a change of ven-
20. ue. We think it is certainly inflammatory
21. and would be hard for the jury to erase
22. this from their minds, what the governing
23. body of the county has voiced about this
24. crossing, and for that reason we feel that

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1. a change of venue, either by the change of
2. the place for the trial being held or a
3. different jury, or if not, a continuance
4. until such time as this thing has cooled
5. off. This first started in the paper about
6. a week ago. I made no motion at that time,
7. I thought it would be one time and quiet
8. down. It was even on W.S.V.A. News, that's
9. not the name of it now, but the Harrison-
10. burg station.
11. COURT: All right, Mr. Greco.
12. MR. GRECO: Well, Your Honor, I don't know about the
13. Harrisonburg station, I don't know whether
14. anybody up here listens to it or if they
15. would receive it anyway, but . .
16. COURT: Are we talking about T.V. or radio?
17. MR. WHARTON: We're talking about radio, sir. I don't
18. know that it's been on T.V., I mean, I'm
19. speaking of radio.
20. MR. GRECO: I'm not aware of any radio communications,
21. I have never heard this case being broad-
22. cast on the radio, but I have read every
23. newspaper account of it, and I have seen no-
24. thing prejudicial to either side, for that

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1. matter, in the articles. Now, several
2. articles that Mr. Wharton mentioned did
3. state the amount sued for, but that's a
4. matter of public record. It can be stated
5. in the summations, the amount sued for, and
6. it's not inadmissible in evidence. And
7. there is one newspaper article that mention-
8. ed that the plaintiff contended the railroad
9. company was negligent on two grounds, I be-
10. lieve, and it said the railroad contended
11. the plaintiff was guilty of contributory
12. negligence. There was nothing prejudicial
13. that the plaintiff can see in any of these
14. articles. And, of course, the jury is al-
15. ways instructed that it's what they hear on
16. the witness stand here in court, that's
17. what they base their verdict on and not any-
18. thing outside of court. And for that rea-
19. son the plaintiff would oppose the contin-
20. uance. This case has dragged on for, this
21. is almost two years now, and to get right
22. down to it, there's no guarantee they won't
23. kill someone else out at that crossing
24. either and this case could go on indefinitely.

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1. COURT: Do you object to the change of venue or a
2. change of venire?
3. MR. GRECO: Yes sir.
4. COURT: Mr. Wharton, what specifically in the news-
5. paper and radio accounts do you consider to
6. be prejudicial?
7. MR. WHARTON: I specifically refer to the action of the
8. Board of Supervisors, the action they have
9. taken in this article that was in the paper
10. yesterday or the day before. This was in
11. the Northern Virginia Daily on July 21,
12. 1976, "Signals Due at Warren Crossing.
13. The Warren County Board of Supervisors
14. adopted a resolution requiring the installa-
15. tion of flashing lights at the railroad
16. crossing . ." In other words, that in it-
17. self would indicate that they had to make
18. us do something that there was some obliga-
19. tion on our part to do. In other words,
20. while the statute is entirely to the con-
21. trary - in other words, the statute is that
22. if they ask us to, it's something entirely
23. different. This indicates that they are
24. making us do something we should have done.

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1. COURT: But if they do request it, aren't you
2. required to do it?
3. MR. WHARTON: Yes. They have to furnish part of it, but
4. yes. It says, "All the possibilities were
5. discussed and the members agreed this cross-
6. ing was particularly in need of signals be-
7. cause two deaths have occurred there in a
8. short time. They said there were, however,
9. other unmarked crossings in the County."
10. In other words, this would certainly indi-
11. cate to anyone reading this, that wasn't
12. entirely familiar with the statute, that
13. we were negligent in not having put up
14. some type of signal and we had to be call-
15. ed upon by them to do what we ourselves
16. should have done, which is not - I think
17. it's highly prejudicial. Your Honor, if
18. for no other reason, . .
19. COURT: Suppose no member of this venire has read
20. any of those papers or listened to the
21. radio?
22. MR. WHARTON: Well, there's another paper that I don't
23. have.
24. COURT: Suppose we have all blind, deaf members of

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1. the jury?
2. MR. WHARTON: I think they would almost have to . .
3. COURT: Well, is it the duty of you to produce evi-
4. dence or on the voir dire to bring this for-
5. ward?
6. MR. WHARTON: I don't think so. This has received wide
7. publicity . .
8. COURT: There's no evidence that either of these
9. papers are widely read.
10. MR. WHARTON: I would be glad to - I think the Court
11. would take notice that the Northern Virginia
12. Daily and the other paper here is, and it's
13. been on the radio, so I'm advised, and a
14. picutre of this crossing in yesterday's
15. paper, which I have not been able to get a
16. hold of this morning. The Clerk advised me
17. of that. I just happened to mention it to
18. him this morning about all this publicity
19. and he advised me it was a picture in the
20. paper yesterday.
21. COURT: It was in yesterday's Warren Sentinel.
22. MR. WHARTON: Yes sir. I'd just say this, if it was a
23. continuance I realize it would have to be
24. at our cost until either one of two things:

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1. it would either cool down or quiet down
2. or . .
3. COURT: What would prevent the same thing happening
4. the week before the next trial?
5. MR. WHARTON: I don't think it would be possible for them
6. to pick it up again. If they did, well, I
7. would certainly ask for a change of venue,
8. because, in other words, this thing has
9. been on the radio, I've heard it myself on
10. one occasion and other people have told me,
11. and I think it was on the radio again this
12. morning. Did you listen to the radio this
13. morning by any chance?
14. CLERK: I did.
15. MR. WHARTON: Was it on there this morning?
16. CLERK: It was.
17. MR. GRECO: I might point out that every case we try
18. here is on the radio from what I understand.
19. MR. WHARTON: But this is a situation that's a little bit
20. different. The play up on this, if Your
21. Honor please, is about the dangerous cross-
22. ing. In other words, "Members agreed that
23. this crossing is particularly in need of
24. signals because two deaths have occurred

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1. there in a short time."
2. COURT: Now, what is prejudicial to either party
3. that would call for a change . .
4. MR. WHARTON: It would indicate that if we had a signal
5. up there - this article indicates that it
6. was incumbent upon us to put it up and
7. would indicate that if it was there . .
8. COURT: Not that sentence that you just read.
9. MR. HODGE: Your Honor, I think two things on this one.
10. One, it indicates that the two accidents
11. make it a dangerous crossing. Now, we're
12. concerned with the first accident at the
13. present time. This action being taken
14. and the legislative determination by the
15. Board of Supervisors is as to matters that
16. have occurred since this accident. And
17. there is no showing that this condition
18. that they're basing their determination on
19. now was in existence at the time of this
20. accident. And, secondly, I think factually
21. it's incorrect because they're talking about
22. two accidents occurring in the short time
23. that the crossing has been open and it's my
24. understanding from the records that this

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1. crossing has been open out there, the cross-
2. ing has been there close to fifty years.
3. And probably what they're referring to,
4. from the information I have, is that since
5. there was some work done on the crossing,
6. widening it; there was additional work done
7. to a recreational area out there and expan-
8. sion; that the traffic has increased. But,
9. that was all primarily, I believe, after
10. this accident that we're talking about. So,
11. they would be making a determination on
12. facts that didn't exist at the time of this
13. accident.
14. MR. LARGENT: Your Honor, let me see if we can bring this
15. to a conclusion. I can understand Mr. Whar-
16. ton's concern, but we're going to be trying
17. it on the facts of this case and it's also
18. going to be tried on instructions based on
19. what they are required to have at that
20. crossing. Now, if you follow this line of
21. argument as to the venue, the change of
22. venue, I don't know whether you'd ever get
23. a case tried. This is not unusual for the
24. newspapers to write about things such as

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1. that. As I see it they have strictly limit-
2. ed the basis of their plea on their opinion.
3. There really is no evidence of the fact
4. that it would be prejudicial, and I don't
5. think it is. If you add that to what's
6. going to be introduced as evidence in this
7. case and the instructions in this case, it
8. seems to me that that takes care of it.
9. MR. WHARTON: Your Honor, all of us have tried cases
10. where there's been a lot of publicity and
11. we know we have a lot of publicity. It is
12. seldom that the publicity goes to the very
13. heart of this where the governing board is
14. talking about - anyone reading this, it
15. would indicate that it was incumbent upon
16. us, whether requested to or not, to install
17. signals. I think it's highly prejudicial.
18. COURT: I will deny your motion at this time. I
19. don't think you have presented sufficient
20. evidence to show that the articles have
21. been prejudicial.
22. MR. WHARTON: I'd like to make both of these articles part
23. of the record with leave to make as a part
24. of the record the newspaper which was pub-

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1. lished, and I have not seen, showing a
2. picture of the crossing, which I understand
3. was in yesterday's paper of the Warren Sen-
4. tinel.
5. COURT: Are there any objections to that?
6. MR. GRECO: Well, I'd object to it, Your Honor. If he
7. hasn't seen it I can't see how he can claim
8. it's prejudicial.
9. COURT: It's difficult to offer these things when
10. you haven't presented them to the Court.
11. MR. WHARTON: I've presented these two to the Court.
12. COURT: Yes, but I mean the other one . .
13. MR. WHARTON: And the other one I've asked leave to file.
14. COURT: Well, how can the Court base its ruling on
15. something it hasn't read? Isn't it incum-
16. bent upon you to produce that?
17. MR. WHARTON: I understand that. But it just occurred, I
18. just learned of it, this morning.
19. COURT: He (indicating Clerk) has a copy of the
20. paper that you could have had prior to this.
21. MR. WHARTON: Well, all I'm asking is to make it part of
22. the record, if I may, sir.
23. COURT: I'll admit it.
24. MR. WHARTON: I think Your Honor has indicated you have

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1. read it. In view of this article - well,
2. I guess we can take that up in instructions.
3. COURT: All right.
4. (End of Hearing on Motion in Chambers)
5. ******
6. (In Open Court)
7. COURT: Are counsel ready?
8. MR. GRECO: Yes, Your Honor.
9. MR. WHARTON: Yes.
10. COURT: Call the venire, please.
11. (Jurors Called and Sworn)
12. COURT: Ladies and gentlemen, the case which we
13. have to try today is a civil case. I think
14. this is the first case you all have tried
15. at this term, but it's civil rather than
16. criminal. The criminal cases involve a
17. charge by the Commonwealth that a person
18. has committed a certain crime. This is a
19. civil case in which one party is suing an-
20. other for damages. Now, in this case, it
21. involves an accident on Route 661 in Warren
22. County in which Charles Wilbur Greenfield
23. was killed in an accident between an auto-
24. mobile and the railroad train owned by Nor-

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folk and Western Railway. Are any of you related by blood or by marriage to the deceased, Charles Wilbur Greenfield? Are any of you officers of, employees of, agents of, stockholders of, Norfolk and Western Railway Company? Have any of you any interest in the case or the outcome thereof? Are any of you conscious of any prejudice or bias, either for or against the heirs of Charles Wilbur Greenfield or the Norfolk and Western Railway Company? Have any of you expressed or formed any opinion as to the outcome of this case? Do any of you know of any other reason why you couldn't render a fair and impartial trial to both sides based solely on the law and the evidence which you will hear from the witness stand today? (No affirmative responses given to any of the above questions by the Court.) The Court is satisfied. Any questions?

MR. GRECO: The plaintiff is satisfied with the jurors.

MR. WHARTON: The defendant is, Your Honor, except to the fact that there's been quite a bit of publi-

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1. city, or some publicity in the newspapers
2. in regard to this.
3. COURT: All right. Ladies and gentlemen, have any
4. of you acquired any information about this
5. from the news media or from any other source,
6. and if so, would it affect your impartiali-
7. ty in the trial of this case? Those of
8. you who may have heard something about it
9. over the radio or read something about it
10. in the newspaper, would that prohibit you
11. from rendering a fair and impartial verdict
12. to both sides based solely on what you hear
13. on the witness stand today, not what you
14. have heard over the radio or read in the
15. newspaper? Would it keep you all from ren-
16. dering a fair and impartial decision? (No
17. affirmative responses to the above questions)
18. Submit the list please.
19. (Jurors Selected and Sworn)
20.
21. OPENING STATEMENT - MR. LARGENT
22. OPENING STATEMENT - MR. WHARTON
23.
24.

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1. WITNESS - RONKEITH KIRTLEY

2. Direct Examination by Mr. Largent:

3. Q. Would you state your name, please, sir.

4. A. Ronkeith Kirtley.

5. Q. And you are a Trooper with the Virginia State Police?

6. A. Yes sir.

7. Q. Did you investigate the accident involving the station
8. wagon and Mr. Greenfield and the train operated by Nor-
9. folk and Western Railway on July 3, 1974?

10. A. July 30, yes sir.

11. Q. July 30, I meant to say. Officer, would you relate the
12. results of your investigation and what you found?

13. A. It occurred in Warren County at approximately 5.8 miles
14. north of Front Royal on State Route 661, which is the
15. road that goes into the fair grounds, at its intersec-
16. tion with the railroad crossing. When I arrived at the
17. scene I found that a station wagon was some seventeen
18. hundred feet north of the railroad crossing and had been
19. struck by a train. It was learned through my investiga-
20. tion that this vehicle had been operated by Charles Wil-
21. bur Greenfield of Front Royal. The investigation reveal-
22. ed that the vehicle had been traveling east on 661, the
23. train was northbound on the railroad tracks. It struck
24. the right side of the vehicle at approximately where the

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1. door and the right front fender meet. And then it con-
2. tinued on down the railroad for approximately seventeen
3. hundred feet.
4. Q. Did I interrupt you?
5. A. No.
6. Q. What time did you arrive at the scene of the accident?
7. A. I arrived at the scene at approximately 7:20 a.m.
8. Q. 7:20?
9. A. Yes sir.
10. Q. Were you able to ascertain when the accident occurred?
11. A. 6:35 a.m.
12. Q. At the time you arrived, what were the weather condi-
13. tions at that time?
14. A. It was foggy.
15. Q. Had it changed prior to the time you arrived at 7:20?
16. A. The fog had lifted somewhat.
17. Q. It had lifted at 7:20?
18. A. Yes.
19. Q. In other words, the conditions were a little bit better
20. then?
21. A. Yes sir.
22. MR. LARGENT: Your Honor, there are a number of pho-
23. tographs and in order to save time I
24. think we might just introduce all of

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1. them. I think you've seen them all.
2. (Off the Record Discussion at the Bench)
3. MR. LARGENT: Your Honor, these photographs have pre-
4. viously been agreed to to offer into
5. evidence. At this time I'd like to
6. offer these in evidence and have these
7. marked as Plaintiff's Exhibits #1 and
8. subsequently numbered.
9. COURT: All right.
10. (Reporter Marks Photographs as Plaintiff's Exhibits #1 through #11.)
11. MR. LARGENT: Your Honor, I also have the photographs
12. of the defendant and would ask that they
13. be numbered as Defendant's Exhibits.
14. (Reporter Marks Photographs as Defendant's Exhibits #1 through #9.)
15.
16. Q. Trooper Kirtley, I hand you Plaintiff's Exhibit #1 and
17. ask you when you took that photograph and to describe
18. what it shows.
19. A. This was taken just after the accident occurred. It
20. shows the station wagon and the diesel engine of the Nor-
21. folk and Western. This was taken looking west. I was
22. on the east side of the railroad looking west.
23. Q. Is where this is taken seventeen hundred feet north of
24. the railroad crossing?

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1. A. Yes sir.
2. Q. And that was taken for the purpose of showing the point
3. where the train hit the station wagon?
4. A. This part, the front of the station wagon, was hit at
5. this location too on the locomotive. The coupling hit
6. at approximately the door and the right front fender.
7. The front of the vehicle hit this part of the locomotive.
8. Q. All right, would you identify Plaintiff's Exhibit #2.
9. A. This is looking south at the same scene, and this was
10. taken just after my arrival at the scene.
11. Q. And that was taken at the same location, seventeen hun-
12. dred feet north of the crossing?
13. A. Yes, it was.
14. Q. I hand you Plaintiff's Exhibit #3. Would you identify
15. that.
16. A. This shows the inside of the vehicle, the ignition, this
17. is the light switch, which is on, and the inside of the
18. vehicle on the driver's side.
19. Q. I hand you Plaintiff's Exhibit #4, and ask you to identi-
20. fy that.
21. A. This is looking north. A hundred feet south of where the
22. vehicle is resting now the body was found.
23. Q. A hundred feet south?
24. A. A hundred feet south, the body was located.

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1. MR. LARGENT: Now, Your Honor, in these pictures when
2. they were presented at the conference
3. and were initialed, these were - the
4. pictures I'm about to show were taken
5. August 16 and 20 by Mr. Greco, and I
6. think they've been approved.
7. Q. Trooper Kirtley, you are acquainted with this crossing
8. and this area?
9. A. Yes sir.
10. Q. I hand you Plaintiff's Exhibit #5 and ask you to identify
11. the view from which that's taken and point out the rail-
12. road tracks.
13. MR. WHARTON: If he didn't take it, I doubt if he
14. can . .
15. COURT: He can inquire as to . .
16. MR. WHARTON: As to where it was taken from, I mean . .
17. Q. Well, can you identify this view in this picture?
18. A. This is the crossing looking east.
19. Q. Looking east?
20. A. Yes sir.
21. Q. And the crossing is here?
22. A. Yes.
23. Q. Now, Trooper Kirtley, the railroad right of way has
24. been admitted to be bound on the east and west by a

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1. fence on each side and it's sixty-six feet wide. Now,
2. did you examine the right of way south of the crossing
3. when you were there?
4. A. I observed it, yes sir.
5. Q. And what did you observe?
6. A. There was some foliage on the right of way and two trees
7. setting up next to the fence on the outside, between the
8. fence and the railroad tracks. It was setting up on a
9. hill.
10. Q. The trees were on the railroad right of way?
11. MR. WHARTON: They were setting up on the hill.
12. Q. I'm sorry, the trees were on the east side of the fence?
13. On the west boundary the trees were on the east side?
14. A. Yes.
15. Q. They were within the fence row?
16. A. Yes.
17. Q. All right, now, how high - what was the height of this
18. tree? Did I have you measure that tree?
19. A. I estimated.
20. Q. And what did you estimate?
21. A. The trunk of the tree was approximately six feet from
22. the railroad track, standing on the railroad track.
23. The foliage started anywhere from twelve to fifteen feet
24. up.

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1. Q. In other words, the foliage would have been then how
2. many feet - seven or eight?
3. MR. WHARTON: I object, I thought he said twelve.
4. Q. I'm sorry, what . .
5. A. Approximately twelve.
6. Q. Is that the total height of the tree?
7. A. No, the tree was taller than that.
8. Q. The tree was taller than that?
9. A. Yes.
10. Q. And the foliage then was about twelve feet?
11. A. Yes.
12. Q. All right, now, I hand you Plaintiff's Exhibit #6 and
13. I'll ask you to identify that.
14. A. This is looking west of the railroad crossing.
15. Q. And I hand you Plaintiff's Exhibit #7 and I'll ask you
16. to identify that view and the building in the picture,
17. if you can.
18. A. This is looking easterly - northeasterly at an angle
19. at the crossing. This is a house that sets on the north-
20. east side of the roadway.
21. Q. All right, sir, I hand you Plaintiff's Exhibit #9 and
22. ask you to identify the view in that picture.
23. A. This is looking sort of southwest at an angle at the
24. crossing.

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1. Q. Now, does that view include the trees that you referred
2. to in your testimony?
3. A. One of them, yes sir.
4. Q. Where is the other one?
5. A. The other one is south of that location.
6. Q. Is this the one that you referred to as being . .
7. A. No sir.
8. Q. Oh, the other one.
9. A. Yes sir.
10. Q. What height was that one?
11. A. This one?
12. Q. Yes.
13. A. I don't know.
14. Q. All right. This view, that is the trees, and what is
15. this right here?
16. A. The foliage and the growth.
17. Q. The growth?
18. A. Yes.
19. Q. Is that within the fence line?
20. A. Yes sir.
21. Q. I hand you Plaintiff's Exhibit #10 and ask you to iden-
22. tify that view.
23. A. This is looking south at the railroad crossing.
24. Q. And I'll direct your attention to the west side of

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1. the railroad right of way. Are these trees and this
2. brush, are they within the fence line?
3. A. Yes sir.
4. Q. All right. I hand you Plaintiff's Exhibit #11 and ask
5. you to identify that view.
6. A. This is looking in an easterly - southeasterly direction
7. at the crossing.
8. Q. Now, is this the same - are these the trees?
9. A. This is the one tree that was on the corner.
10. Q. And all this is within the fence line?
11. A. Yes sir.
12. Q. Do you happen to know whether that is still there or
13. not?
14. A. I think it was.
15. Q. You don't know?
16. A. No.
17. Q. All right, I hand you Plaintiff's Exhibit #8 and ask
18. you to identify that view.
19. A. This is looking south.
20. Q. And it's a view of the . .
21. A. Foliage.
22. Q. The foliage and the trees.
23. A. Yes.
24. Q. Now, Trooper Kirtley, you ascertained some other things

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1. as a result of your investigation, I believe. Would you
2. describe the train for us, the number of locomotives and
3. the cars and so forth.
4. A. Three diesel units, it consisted of thirty-one loaded
5. cars and thirteen empty ones.
6. Q. And what was the approximate weight that you ascertained?
7. A. Approximately 2,842 tons.
8. Q. Now, did you find out, was there any statement about the
9. speed that the train was traveling?
10. A. I was informed that the train was traveling approximate-
11. ly forty miles an hour.
12. Q. All right, this area this train proceeded over, was that
13. downgrade or upgrade?
14. A. Downgrade.
15. Q. Did you ascertain whether or not there was a speed re-
16. corder on the train?
17. A. I recall discussing the speedometer or something on the
18. train, but as far as a recorder, I cannot recall direct-
19. ly if there was one on the train at that time or not.
20. Q. Who did you talk to, the engineer?
21. A. I was talking to the engineer.
22. Q. And what was his name?
23. A. Bobby Lee Dovel, from Stanley.
24. Q. Now, did you ask him if he had any sort of device on the

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1. train that recorded speed.
2. A. I spoke with him about it, but I can't recall exactly
3. what he said, whether they did or didn't, I mean, as
4. far as recording the speed.
5. Q. But there was no speed recorder or anything to indicate
6. speed that was made available to you?
7. A. I didn't see it.
8. Q. You didn't see it or they didn't give you anything.
9. A. They didn't give me anything, no sir.
10. Q. Now, Trooper Kirtley, at this intersection, what houses
11. are located there?
12. A. There is a house on the right just prior to getting,
13. traveling east, just getting to the intersection. And
14. there's another house on the east, northeast side of the
15. tracks.
16. Q. Do you know who lives in those houses?
17. A. Just by sight and talking to them.
18. Q. And you testified as to a description of the right of
19. way a hundred feet south of the railroad crossing. I
20. believe I had you measure - let me hand you Defendant's
21. Exhibit #8 and ask you to point out on that picture, if
22. you can, where a hundred feet would be south of the
23. crossing.
24. A. A hundred feet is approximately halfway between this

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1. telephone pole and - from the edge of the crossing it's
2. about halfway or two-thirds of the way between these
3. two telephone poles.
4. Q. All right.
5. A. And from this telephone pole to this telephone pole it's
6. 133 feet.
7. Q. From the first telephone pole . .
8. A. From the first telephone pole to the second telephone
9. pole.
10. Q. Now, I believe I had you measure the distance of a
11. hundred feet from the crossing.
12. A. Yes sir.
13. Q. So, that's what you base your opinion on?
14. A. Yes sir.
15. Q. Now, did you also measure the next telephone pole, from
16. this point back to this point?
17. A. Yes sir.
18. Q. How far was that?
19. A. A hundred and twenty-seven feet.
20. Q. So, they were not all exactly the same?
21. A. No sir.
22. Q. All right, would you estimate approximately how far this
23. first pole is from the crossing?
24. A. Thirty feet.

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1. Q. Thirty feet?
2. A. Approximately, I did not measure that.
3. Q. All right. Now, on this photograph you just referred to,
4. Defendant's Exhibit #8, was this growth and these trees
5. within the hundred feet?
6. A. Yes sir.
7. Q. Trooper Kirtley, would you do one other estimate of dis-
8. tance for us. What would be your estimate of the length
9. of this Courtroom from window to window?
10. A. I would say fifty or fifty-five feet.
11. MR. LARGENT: All right, thank you. I believe that
12. is all.
13.
14. Cross Examination by Mr. Wharton:
15. Q. Trooper, as you were traveling in the direction in which
16. the decedent was traveling on the morning of this acci-
17. dent and you stopped within eighteen to twenty feet -
18. I'm not talking about on the morning of this accident
19. in the fog, but if you stopped within eighteen to twenty
20. feet of the rail, how far south could you see?
21. MR. LARGENT: Objection, Your Honor, this is a matter
22. of conjecture. The question was "If".
23. COURT: I think you'd have to be more specific
24. and find whether he knows.

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1. MR. WHARTON: I want to see what the view would be.
2. COURT: I know, but I mean, there's no evidence
3. that he has viewed it from that loca-
4. tion.
5. MR. WHARTON: No sir, but there was a duty, and I
6. think the Court will instruct later, for
7. him to stop and view it at a place . .
8. COURT: Well, you'd have to inquire whether he
9. did or not.
10. MR. WHARTON: You mean the Trooper?
11. COURT: Yes.
12. MR. WHARTON: Well, I knew he couldn't answer unless
13. he did.
14. COURT: Well, you didn't ask him whether he did.
15. MR. WHARTON: Well, excuse me, Your Honor. We were
16. both thinking the same thing, except I
17. was thinking different. I apologize.
18. Q. Trooper, in the course of your investigation, did you
19. look or place yourself in a position with reference to
20. the railroad track itself to determine how far south one
21. could see when he was in a position close to the rails?
22. MR. LARGENT: Well, I . .
23. MR. WHARTON: I'm going to ask him how far it was
24. later.

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1. Q. Did you do that?
2. A. Yes sir, I did.
3. Q. And what distance back from the rails were you when you
4. made those examinations?
5. A. I didn't measure the distance from the front of my vehic-
6. le or where I was setting, but by stopping at a distance
7. from the track, so as not to be struck by a train, enough
8. clearance, I could see approximately half a mile.
9. Q. This is a photograph marked Defendant's Exhibit #2 for
10. identification. Does that picture show the same trees
11. as were shown in the small photographs?
12. A. Yes.
13. Q. And I hand you Defendant's Exhibit #3 for identification
14. and . .
15. COURT: Well, Mr. Wharton, if you're going to
16. show it to the jury, don't you have to
17. introduce it in evidence?
18. MR. LARGENT: These have been introduced.
19. COURT: Mr. Wharton didn't indicate that he . .
20. MR. LARGENT: I introduced them.
21. MR. WHARTON: Oh, I'm sorry.
22. COURT: Well, they're exhibits then, not just
23. identified as such.
24. Q. Does this also show the shrubbery here?

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1. A. Yes sir, it does.
2. Q. I hand you one marked Exhibit #6, does that also show
3. the shrubbery?
4. A. Yes sir.
5. Q. This is Defendant's Exhibit #8, Trooper, and is a view,
6. I believe, looking south.
7. A. Yes sir.
8. Q. And that was the direction in which the train was coming?
9. A. Yes sir, it was going north, yes sir.
10. Q. And does that show the condition of the right of way
11. as to the shrubbery and so forth at the time?
12. A. Yes sir.
13. MR. WHARTON: That's all.
14.
15. Re-Direct Examination by Mr. Largent:
16. Q. Trooper Kirtley, you were asked by defense counsel about
17. the view at that crossing. You didn't mean to indicate
18. in your answer that you could see a half a mile that
19. morning, could you?
20. A. No sir.
21. Q. As a matter of fact, the visibility was very poor that
22. morning.
23. MR. WHARTON: I object to the leading questions.
24. MR. LARGENT: I'll withdraw that.

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1. Q. Are you saying that you went out there at some later time
2. to determine what the visibility would be if the weather
3. was clear?
4. A. Yes sir.
5. Q. And you made that estimate under conditions that were
6. unlike these or not?
7. A. Yes sir.
8. Q. Now, these photographs that you've just been handed,
9. would you take Defendant's Photograph #2 and would you
10. state, based upon the information in the photograph,
11. from which direction that picture was taken.
12. A. This was taken south, looking south.
13. Q. Looking south?
14. A. Yes sir.
15. Q. Now, what about Photograph #6?
16. A. That was also looking south.
17. Q. Looking south?
18. A. Yes sir.
19. Q. And Photograph #3?
20. A. South.
21. Q. And Photograph #8.
22. A. South.
23. Q. All right, now, in which direction was the decedent
24. headed driving his car?

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1. A. East.
2. Q. Now, when you attempted to determine the visibility,
3. did you look south, or did you look east?
4. A. I looked both ways, east and south. At the time of the
5. accident.
6. Q. At the time of the accident, in which direction though -
7. the direction of the decedent was east?
8. A. Yes sir.
9. MR. LARGENT: All right, I think that's all.
10.
11. Re-Cross Examination by Mr. Wharton:
12. Q. I'm confused, you mean the direction he was traveling?
13. A. Yes sir.
14. Q. Was east?
15. A. Yes sir.
16. Q. How long after the accident was it approximately, Troop-
17. er, that you - I believe you answered, but I - approxi-
18. mately how long after the accident did you arrive?
19. A. The accident occurred at 6:35 a.m. and I arrived at
20. 7:20 a.m.
21. MR. WHARTON: That's all.
22.
23. Re-Direct Examination by Mr. Largent:
24. Q. Trooper, I believe I asked you this, but just to be cer-

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1. tain, the decedent was driving what kind of car?
2. A. He was operating a 1963 Ford station wagon.
3. MR. LARGENT: That's all.
4. MR. WHARTON: That's all.
5.
6. WITNESS - LUCY MARIE GREENFIELD
7. Direct Examination by Mr. Largent:
8. Q. Mrs. Greenfield, would you state your name, please.
9. A. Lucy Marie Greenfield.
10. Q. And where do you live?
11. A. Route 2, Cedarville.
12. Q. Is this the same place you were living at the time your
13. husband was killed?
14. A. No.
15. Q. Where were you living at that time?
16. A. I was living right up the road from where I'm living
17. now, maybe a block from where I'm living now.
18. Q. From where you're living now?
19. A. Yes.
20. Q. Do you live alone now?
21. A. No.
22. Q. Who do you live with?
23. A. I live with my parents.
24. Q. Now, were you married to Charles Wilbur Greenfield?

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1. A. Yes sir.
2. Q. When were you married?
3. A. November 3, 1972.
4. Q. And where were you married?
5. A. Martinsburg.
6. Q. Martinsburg, West Virginia?
7. A. West Virginia.
8. Q. Now, how many - had your husband been married before?
9. A. Yes.
10. Q. And he had been divorced?
11. A. Yes.
12. Q. And how many children did he have of his first marriage?
13. A. Two.
14. Q. And how old are those children?
15. A. Six and seven.
16. Q. What are their names?
17. A. Walter Lee Greenfield and Robin Greenfield.
18. Q. Walter is seven and Robin is six?
19. A. Yes.
20. Q. And where do they live?
21. A. Morehead, Kentucky.
22. Q. In Kentucky?
23. A. Yes.
24. Q. Do they live with their mother?

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1. A. Yes.
2. Q. Now, how many children were born of your marriage?
3. A. Three.
4. Q. And what are the names and ages of your children?
5. A. Ages right now?
6. Q. Yes.
7. A. Bertha Ann Greenfield, 5; Judy, 4; and Nancy, 2.
8. Q. Now, are they living at home with you?
9. A. Yes.
10. Q. Do you work?
11. A. No, I don't.
12. Q. Did you work before your husband was killed?
13. A. No.
14. Q. Now, Mrs. Greenfield, I just want to ask you a few ques-
15. tions about your husband. How far did he go in school?
16. A. Seventh grade.
17. Q. And what was his employment, his work?
18. A. He worked as a Sheet Metal Worker.
19. Q. A Sheet Metal Worker?
20. A. Yes.
21. Q. And where did he learn that trade?
22. A. Here in Front Royal.
23. Q. And during the time that you were married to him, he
24. worked as a Sheet Metal Worker?

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1. A. Yes.
2. Q. Who was he employed by in Front Royal?
3. A. He was employed by Miracle's Heating and he was employed
4. by Archie Fox Heating Service. They install furnaces
5. and sheet metal work.
6. Q. Now, during the time that he worked for these people,
7. what were his weekly earnings, what did he bring home?
8. A. Approximately $130.00.
9. Q. $130.00 a week?
10. A. Yes.
11. Q. Now, who took care of the finances in your home?
12. A. I did.
13. Q. What would he do with the check when he brought it home?
14. A. He usually gave it to me.
15. Q. He'd turn it over to you?
16. A. Yes.
17. Q. And what would you do with it?
18. A. Paid the bills out of it and things like that.
19. Q. Did you have . .
20. A. You know, just keep it until we needed it for something.
21. Q. Did you have an account at one of the banks?
22. A. Yes.
23. Q. Now, at the time of your husband's death, who was he
24. employed by?

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1. A. James J. Lihos.
2. Q. How long had he been on that job?
3. A. Approximately a week and a half.
4. Q. Where did he work?
5. A. He worked around Fairfax, around through there.
6. Q. Why did he leave his job in Front Royal?
7. A. He got a little more money from this man.
8. Q. More money?
9. A. Yes.
10. Q. What about the employment of your husband, was he laid
11. off anytime during the year?
12. A. No, I don't think so. He worked all the time.
13. Q. He worked all the time?
14. A. Yes. He wasn't laid off at any time.
15. Q. Did he work at any other job other than his regular job
16. that you know of.
17. A. He had to work where we lived at to pay the rent where
18. we lived at. He had to work for the man we rented from.
19. Q. And when would he do that?
20. A. Evenings when he got off from work and weekends.
21. Q. Oh, I see, and then the work he did for him was in pay-
22. ment for the rent?
23. A. Yes.
24. Q. All right. When was your husband born?

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1. A. March 24, 1944.
2. Q. And I hand you this document and ask you to identify
3. that.
4. A. That's a copy of his birth certificate.
5. MR. LARGENT: I'd like to offer this in evidence as
6. Plaintiff's Exhibit #12. (Birth certi-
7. ficiate received in evidence as Plain-
8. tiff's Exhibit #12.)
9. Q. Did you file the tax returns for your husband or make
10. arrangements to have them prepared?
11. A. Yes.
12. Q. Is this a copy of the one you filed in 1973?
13. A. (Witness examines tax return) Yes.
14. Q. And what does that show your husband earned at that
15. time?
16. A. It shows $7,641.79.
17. MR. LARGENT: I'd like to offer this as Plaintiff's
18. Exhibit #13.
19. COURT: Without objection it's so received.
20. (Tax return for 1973 received in evi-
21. dence as Plaintiff's Exhibit #13.)
22. Q. Mrs. Greenfield, did you and your husband belong to any
23. church, did you have any church affiliation?
24. A. We didn't belong to any church, no.

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1. Q. When you went to church, where would you go?
2. A. Freewill Baptist Church, Stephens City.
3. Q. Now, you stated that at the present you live with your
4. mother and father. Were you and your husband and child-
5. ren living in a house alone at the time?
6. A. Yes.
7. Q. And on the day that your husband left to go to work,
8. would you state what time he got up that morning?
9. A. 5:00.
10. Q. And what time did he leave the house?
11. A. About 6:20.
12. Q. Is this the usual time he would leave to go to work?
13. A. Usually, yes.
14. Q. Did he appear to be in any hurry that morning?
15. A. No.
16. Q. You stated your husband worked regularly, who was his
17. doctor who treated him?
18. A. Doctor?
19. Q. Yes.
20. A. When he went to the doctor, Dr. Eastham.
21. Q. Had he had any physical problems that you know of in
22. the past year?
23. A. No.
24. Q. Let me clarify his work. The work he did for the rent,

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1. tell me again when he would do this.
2. A. He would do it in the evenings after getting off from
3. work. If there was work to be done he would do it then
4. in the evenings. He worked all day Saturday and some-
5. times on Sundays.
6. Q. What were his hobbies, did he have any hobbies?
7. A. He liked fishing, hunting and stuff like that. Especial-
8. ly fishing.
9. Q. Who would he do that with?
10. A. Well, sometimes he'd do it with all of us, the whole
11. family.
12. Q. And where would he go to do that?
13. A. It's a creek that runs back of the house down through
14. there and we'd fish down through there.
15. MR. LARGENT: All right, I think that's all.
16.
17. Cross Examination by Mr. Wharton:
18. Q. How long had you lived at the home you were living in
19. at the time your husband met his death?
20. A. Almost two years.
21. Q. Almost three years?
22. A. Two years.
23. Q. And during that time he worked here in Front Royal?
24. A. Yes.

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1. Q. And he traveled backward and forward in his automobile?
2. A. Yes.
3. Q. And took, I suppose, the same route he took this day?
4. A. He'd usually take the same route, yes.
5. Q. He usually took that same route?
6. A. Yes.
7. Q. And had been traveling it some two years, is that right?
8. A. Yes.
9. Q. What was the weather like at your home when he left that
10. morning?
11. A. It was a little foggy.
12. Q. A little bit foggy?
13. A. Yes.
14. Q. So it wasn't bad?
15. A. It was foggy that morning.
16. Q. Just foggy?
17. A. Yes.
18. Q. Was it bad?
19. A. No, I'm not going to say it was bad, it was foggy, it
20. was pretty foggy that morning.
21. Q. About like we had this morning?
22. A. No, it was a heavy fog that morning.
23. Q. Foggy enough that one would have to be careful how they
24. drive, right?

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1. MR. GRECO: Objection, it calls for a conclusion
2. or the statement of an opinion.
3. COURT: I think it calls for a conclusion. I
4. don't know whether she's capable of
5. answering it.
6. MR. WHARTON: I'll withdraw it. That's all.
7.
8. Re-Direct Examination by Mr. Largent:
9. Q. Mrs. Greenfield, one question I didn't ask you. I hand
10. you this statement from Brown Funeral Home and ask you
11. to identify it, please.
12. A. This is a statement from Brown Funeral Home.
13. Q. How much is that?
14. A. $783.65.
15. Q. All right.
16. MR. LARGENT: I'd like to offer this as Plaintiff's
17. Exhibit #14.
18. COURT: Without objection it's so admitted.
19. (Statement from Brown Funeral Home
20. admitted in evidence as Plaintiff's
21. Exhibit #14.)
22. MR. LARGENT: I think that's all.
23. MR. WHARTON: That's all.
24. (Off the Record Discussion at the Bench and Recess)

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1. MR. LARGENT: Your Honor, I'd like to offer in evi-
2. dence Exhibit #15, a Life Expectancy
3. Table.
4. MR. HODGE: No objection, Your Honor.
5. COURT: Without objection it's so admitted.
6. (Life Expectancy Table entered in evi-
7. dence as Plaintiff's Exhibit #15.)
8. MR. LARGENT: Now, Your Honor, at this time I'd like
9. to read for the record the admissions
10. made by the defendant in this case.
11. COURT: You may proceed.
12. MR. LARGENT: With the Court's permission, I might
13. also explain or the Court might explain
14. to the Jury . .
15. COURT: All right, ladies and gentlemen, in
16. order to save time and the inconvenience
17. to some witnesses, either party may re-
18. quest of another answers to certain
19. questions or it may request that a
20. party admit or deny a certain matter.
21. And the attorneys in this case have done
22. that and Mr. Largent will now read cer-
23. tain admissions. These are matters
24. which the parties have agreed to, and

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1. rather than to have to summons a wit-
2. ness to prove a doctor's bill or some-
3. thing such as that, they have agreed
4. that this is the correct amount. And
5. it just saves times for everybody. That
6. is what Mr. Largent is going to do now.
7. Both sides have agreed to these things.
8. MR. LARGENT: All right, ladies and gentlemen, the
9. first admission is: "That the Plaintiff,
10. Lucy M. Greenfield, is the Administra-
11. trix of the Estate of Charles Wilbur
12. Greenfield, Deceased, who, at the time
13. of his death, was a resident of the
14. County of Warren, Virginia. That on
15. July 30, 1974, the Norfolk and Western
16. Railway Company owned and maintained
17. a railroad track in Warren County, Vir-
18. ginia, that extended in a northerly-
19. southerly direction along the Company's
20. right of way which crossed State Road
21. 661 at Success, Warren County, Virginia,
22. which crossing is used by motorists to
23. drive over the said tracks. That the
24. roadway crossing on State Road 661

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1. which passes over the railroad tracks
2. of the Defendant, is maintained by the
3. Defendant for many years prior to July
4. 30, 1974. That the Defendant is and
5. was, on July 30, 1974, a corporation
6. duly organized under and pursuant to the
7. laws of the Commonwealth of Virginia,
8. and was, in fact, doing business in the
9. Commonwealth at the said times. That
10. on July 30, 1974, a railroad train
11. operated by the Defendant collided with
12. a vehicle operated by Charles Wilbur
13. Greenfield at the railroad crossing at
14. State Road 661 in Warren County, Vir-
15. ginia. That Charles Wilbur Greenfield
16. died of injuries received as a result of
17. the collision of the said train and his
18. vehicle. That the right of way of the
19. said railway company extending from the
20. southern boundary of State Road 661,
21. Warren County, Virginia, in a southern-
22. ly direction along the said railroad
23. track is bounded on the east by a line
24. fence and on the west by a line fence.

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1. The crew of Bobby L. Dovel, John W.
2. Burner, Ernest Jones, Jr. and W. E.
3. Lawhorne, were operating the said train
4. as agents of and at the direction of
5. the Defendant. The speed recorder for
6. determining the speed of the train was
7. destroyed by the Defendant subsequent
8. to the accident on July 30, 1974."
9.
10.
11. WITNESS - JOHN W. BURNER
12. Direct Examination by Mr. Largent:
13. Q. Will you state your name, please.
14. A. John W. Burner.
15. Q. And you were employed by the Norfolk and Western in
16. what position?
17. A. Road Brakeman.
18. Q. And you were aboard the train that collided with Mr.
19. Greenfield's car?
20. A. Yes.
21. Q. On July 30, 1974?
22. A. Yes.
23. Q. I wanted to ask you a question about the weather, what
24. the weather conditions were and what the visibility was

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1. on that morning?
2. A. It was foggy and you couldn't see very good.
3. Q. Couldn't see very good?
4. A. No.
5. Q. Could you estimate about how far you could see?
6. A. Oh, about - what do you mean, when I seen the car or
7. what?
8. Q. The number of feet.
9. A. Oh, feet. Oh, about seventy-five feet.
10. Q. Well, now, I direct your attention to answers to a
11. question you answered in Interrogatories that says . .
12. MR. HODGE: Your Honor, I don't believe Mr. Burner
13. answered any questions on Interrogator-
14. ies. They were submitted and were not
15. signed by Mr. Burner.
16. MR. LARGENT: Your Honor, these were submitted by the
17. defendant and I submit that they're
18. bound by these answers.
19. MR. HODGE: Well, we're not objecting. We answer-
20. ed Interrogatories, but we just wanted
21. to clarify that Mr. Burner did not per-
22. sonally answer this question or signed
23. this Interrogatory.
24. COURT: Were the Interrogatories submitted to

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1. Mr. Burner?
2. MR. HODGE: No sir, they were not. They were sub-
3. mitted to the railroad, to the N & W,
4. and an agent of the railroad responded
5. to them.
6. COURT: But not Mr. Burner.
7. MR. HODGE: No.
8. Q. Were you asked about this before the Interrogatories
9. were answered?
10. MR. WHARTON: He wouldn't know when they were answer-
11. ed, Your Honor please.
12. MR. LARGENT: Your Honor, I'm going to ask the Court
13. then that the defendant be permitted to
14. read the question and answer of this
15. Interrogatory.
16. MR. HODGE: Your Honor, I think to cut through
17. this, is that Mr. Burner had made a
18. statement to railroad officials. We
19. don't want it confused that he signed
20. these Interrogatories. He made a state-
21. ment and the answer was based on that
22. and we certainly have no objection to
23. him inquiring what his statements have
24. been prior to this.

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1. MR. WHARTON: As a matter of fact, we gave you a copy
2. of his statement. That's what these
3. were made from, Your Honor.
4. COURT: So, it's based on this, so then he may
5. use it to refresh his memory.
6. Q. You had previously stated that it was foggy and you esti-
7. mated you could not see much over fifty to seventy-five
8. feet ahead of the engine. Is that an accurate statement
9. of what the visibility was in your opinion?
10. A. Yes sir.
11. MR. LARGENT: Thank you very much. That's all.
12.
13. Cross Examination by Mr. Wharton:
14. Q. You were asked about the fog, was this a continuous
15. fog or was it foggy in patches or how?
16. A. It was foggy in patches.
17. Q. When did you first run into this heavy fog at the time?
18. A. Coming out of Front Royal.
19. Q. And did you stay in it or run out of it or how?
20. A. Well, we'd run in it awhile and then we'd run out of it.
21. Q. And this last fog that you ran into just before you got
22. to the scene of this accident, about where did you run
23. into that fog?
24. A. Before you got to the road crossing.

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1. Q. With reference to the whistle post, do you know?
2. MR. LARGENT: I object to that, Your Honor. There's
3. been no groundwork laid for any whistle
4. post.
5. COURT: Some statement was made about the whis-
6. tle post.
7. Q. Well, is there any reference point you can make as to
8. where you ran into the fog?
9. A. Oh, about a mile back down the tracks.
10. Q. And when you based this statement of yours on visibility
11. being somewhere between fifty and seventy-five feet,
12. what object did you see or what were you talking about?
13. A. What do you mean, the car?
14. Q. Yes.
15. A. When the car started coming across the crossing, moving
16. across the crossing.
17. Q. When you saw the car, how far away from you was it?
18. A. About seventy-five feet.
19. Q. And where was it?
20. A. The car?
21. Q. Yes.
22. A. About eighteen feet west of the crossing.
23. Q. Was it moving?
24. A. Yes sir, it was moving.

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1. Q. Did it move on to the crossing?
2. A. Sir?
3. Q. Did it move on to the crossing?
4. A. Yes sir, it moved on to the crossing.
5. Q. And what did you do?
6. A. Throwed the train in emergency.
7. Q. Did you pick up this car in your lights?
8. A. Yes sir.
9. Q. Was the headlight on on your train?
10. A. Yes sir.
11. Q. Were you giving the signals?
12. MR. GRECO: I object, Your Honor. It's not respon-
13. sive to the direct examination.
14. COURT: Yes, unless you wish to make him your
15. witness.
16. MR. WHARTON: I'll withdraw it. We can go into it
17. later.
18. COURT: All right.
19. MR. WHARTON: That's all.
20.
21. Re-Direct Examination by Mr. Largent:
22. Q. Mr. Burner, according to the statement you previously
23. made you stated that you first observed the automobile
24. moving on to the crossing. Are you now changing your

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1. testimony to say that you saw the automobile eighteen
2. feet west of the crossing?
3. A. Yes sir, it was moving on to the crossing.
4. Q. It was moving on to the crossing?
5. A. Yes sir.
6. Q. So, he wasn't eighteen feet west of the crossing.
7. MR. HODGE: Objection, Your Honor. He's already
8. testified to the fact of where it was
9. and he testified what it was doing. I
10. think the statement stands for itself.
11. COURT: Well, I think it needs clarification.
12. Q. When you first saw the automobile, were the front wheels
13. moving up on the tracks?
14. A. When I first saw the automobile?
15. Q. Yes.
16. A. No sir, he was moving.
17. Q. Now, in your statement, and I quote, you state, "I saw
18. an automobile moving on to the crossing." What does
19. that mean?
20. A. That when I picked him up he was back about eighteen
21. feet from the crossing. When I seen him I throwed the
22. train in emergency. When the train got to the crossing
23. he come on the crossing. He was still moving.
24. MR. LARGENT: I think that's all.

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1. WITNESS - HILTON GRUBBS

2. Direct Examination by Mr. Largent:

3. Q. Would you state your name, please.

4. A. Hilton Grubbs.

5. Q. And where do you live with relation to the crossing at

6. 661?

7. A. At Success.

8. Q. Beg your pardon?

9. A. Success.

10. Q. Do you live on the southwest corner of that intersection

11. of the crossing at 661?

12. A. That's right.

13. Q. Did you see this train the morning that this accident

14. happened?

15. A. No, I was in bed.

16. Q. You were in bed?

17. A. Yes.

18. Q. Did you hear anything?

19. A. I heard the whistle blow and I heard it move across the

20. crossing, that's all I heard.

21. Q. You heard the whistle blow and then the train pull across

22. the tracks.

23. A. That's right.

24. Q. And that's all you heard?

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1. A. That's right.
2. Q. Mr. Grubbs, I hand you Plaintiff's Exhibit #10 and ask
3. you if you can identify the area on the west side of the
4. railroad tracks there.
5. A. Yeah, that's on my side. This is my yard.
6. Q. And what are those things there?
7. A. Bushes and honeysuckle.
8. Q. And the trees, are they all within the fence line?
9. A. Yes.
10. Q. Now, is that same condition in existence today? Are
11. these trees . .
12. A. Yes.
13. Q. They are?
14. A. Yes.
15. Q. There's been no change in these? There have been - has
16. anything been cut?
17. A. A couple of them little ones were cut that evening after
18. the accident.
19. Q. I beg your pardon.
20. A. None of them has been cut at all that I know of until
21. after the last accident.
22. Q. Has anything been cut out there?
23. A. No.
24. MR. LARGENT: Your Honor, I've been taken by surprise

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1. by this answer and I would like to make
2. or consider Mr. Grubbs to be a friendly
3. hostile witness so that I may cross ex-
4. amine him.
5. MR. WHARTON: What is the surprise? We maintain it
6. and cut it once or twice a year probab-
7. ly, and other than that . .
8. MR. LARGENT: Well, my question will clarify what
9. I'm trying to . .
10. MR. WHARTON: Well, excuse me, I'm sorry . .
11. Q. Mr. Grubbs, I came out and talked to you about this
12. matter and at the corner of the fence and this crossing
13. haven't there been some bushes or redbuds cut within the
14. last few weeks?
15. A. Yes.
16. MR. WHARTON: Your Honor, that makes no difference
17. whatsoever, we have to maintain the
18. right of way.
19. MR. LARGENT: I beg your pardon, may I finish?
20. COURT: Do you object to his question?
21. MR. WHARTON: I object to it on the ground it has
22. no bearing, what's been done in the
23. last few weeks.
24. COURT: The objection is overruled.

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1. Q. Now, how long have those bushes and the redbuds - were
2. they redbuds?
3. A. One of them was.
4. Q. What was the other one?
5. A. I couldn't tell you, just scrub, I mean, not scrub, but
6. just growed up.
7. Q. Well, now, how long have those two bushes and the redbud
8. been there before they were cut? When were they cut, as
9. a matter of fact?
10. A. They were cut the evening of this last accident.
11. MR. WHARTON: That's objected to and asked to be
12. stricken.
13. COURT: Objection overruled.
14. Q. Now, just give me - about two or three weeks ago?
15. A. No, it hasn't been that long.
16. Q. It hasn't been that long?
17. A. No.
18. Q. Well, how long prior to that time . .
19. (Off the Record Discussion at the Bench)
20. COURT: Ladies and gentlemen, we're not concern-
21. ed with what might have been done by the
22. railroad company in their cleaning of
23. the railroad since then, what trees
24. were removed or what has been done such

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1. as that. What we're concerned about
2. is the condition of the crossing and
3. that intersection on the morning of the
4. accident. So, just disregard his an-
5. swering the question in regard to bush-
6. es that were cut and so forth.
7. MR. LARGENT: Well, that's all the questions I have.
8. MR. WHARTON: No questions at this time, but I would
9. not want this witness to leave. We
10. would use him, if we have to, as our
11. first witness.
12.
13. WITNESS - JOHN TENNETT
14. Direct Examination by Mr. Largent:
15. Q. Would you state your name, please.
16. A. John Tennett.
17. Q. Where do you live?
18. A. Across the railroad tracks at Success.
19. Q. Is that on the northeast corner of the crossing at 661?
20. A. Yes.
21. Q. Now, where are you in school?
22. A. Warren County High.
23. Q. And what are you, a sophomore?
24. A. Yes sir.

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1. Q. What time did you get up on the morning of July 30, 1974,
2. the morning of this accident?
3. A. Well, I was awake about 5:30 or 6:00.
4. Q. You were awake about 5:30 or 6:00?
5. A. Yes.
6. Q. And where were you sleeping?
7. A. In the living room on the couch.
8. Q. I beg your pardon.
9. A. I was in the living room on the couch.
10. Q. I hand you Plaintiff's Exhibit #7, would you identify
11. on that photograph - was this on the first floor of the
12. house?
13. A. Yes.
14. Q. Identify on there approximately where that would be.
15. A. Right there. (Witness Indicates on Plaintiff's Exhibit
16. #7.)
17. Q. And is the couch right at a window?
18. A. Yes sir.
19. Q. Was the window up or down?
20. A. I don't know.
21. Q. You don't remember?
22. A. No.
23. Q. You were awake but lying on the couch, is that right?
24. A. Yes.

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1. Q. Now, what did you see or hear?
2. A. I heard the whistle.
3. Q. You heard the whistle of the train?
4. A. Yes.
5. Q. And what did you do when you heard the whistle?
6. A. Sat up on the couch and looked out the window.
7. Q. Looked out the window?
8. A. Yes.
9. Q. And what did you see when you looked out the window?
10. A. I seen the light.
11. Q. What were the weather conditions that morning?
12. A. Foggy.
13. Q. And what was the condition of the light that you saw
14. as far as . .
15. A. It was dim.
16. Q. Dim?
17. A. Yes.
18. Q. And what estimate did you make as to how far away the
19. train was when you saw it, when you looked at it?
20. A. About two football fields, about two hundred yards.
21. Q. About what?
22. A. Two hundred yards.
23. Q. About two hundred yards?
24. A. Yes.

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1. Q. Now, what did you do after you heard the whistle, you
2. looked out the window, and - first of all, let me ask
3. you, how do you arrive at two hundred yards as being the
4. place where you saw the train?
5. A. It was from the house.
6. Q. From what?
7. A. From the house.
8. Q. You estimated that distance from the house?
9. A. Yes.
10. Q. How long have you lived out in that area?
11. A. Six years in August.
12. Q. Now, was there anything that you could relate the dis-
13. tance that morning to to give you an idea to better es-
14. timate - could you see, I believe you said you only could
15. see the light of the train?
16. A. Yes.
17. Q. Well, let me repeat my question. How do you base your
18. estimate of two hundred yards?
19. A. It looked about like two football fields.
20. Q. It what?
21. A. It looked like about two football fields.
22. Q. About two football fields?
23. A. Yes.
24. Q. You couldn't see the telephone poles where you were?

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1. A. No sir.
2. Q. But you base your estimate on the fact that that's what
3. it looked like when you saw it.
4. A. Yes sir.
5. Q. Now, when you heard the whistle of the train, how soon
6. after you heard the whistle did you look out the window?
7. A. When the whistle blew.
8. Q. When the whistle blew you looked out the window?
9. A. Yes.
10. MR. LARGENT: I think that's all.
11.
12. Cross Examination by Mr. Wharton:
13. Q. When you looked out there and got just a glimpse of the
14. train's headlight, did you continue to watch the train?
15. A. No sir.
16. Q. You just made one glance at it?
17. A. Yes.
18. Q. Did you know about the accident?
19. A. Yes.
20. Q. Well, I know you know about the accident. There was
21. an accident at the crossing, is that right?
22. A. Yes.
23. Q. But you didn't continue looking?
24. A. No.

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1. Q. Did you hear the accident or what?
2. A. I just heard it - the noise.
3. Q. Could these lights have been up as far as the trees?
4. At the top of the hill?
5. A. Yes.
6. Q. It could have been?
7. A. Yes.
8. Q. I hand you Exhibit #8. These are the trees at the top
9. of the hill. You say it could have been back as far
10. as that?
11. A. Yes.
12. MR. LARGENT: I didn't hear what you asked him.
13. Q. I said, these are the trees at the top of the hill where
14. he said it could have been back to. I'm asking him if
15. it could have been back there.
16. A. Yes.
17. Q. That's a distance of considerably more than two hundred
18. yards, isn't it?
19. A. Yes.
20. Q. So you were just more or less guessing at the distance,
21. is that right?
22. A. Yes sir.
23. MR. WHARTON: That's all.
24.

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1. Re-Direct Examination by Mr. Largent:
2. Q. Mr. Tennett, from where you were at your house, could
3. you see the crossing of the car of the decedent?
4. A. I didn't look.
5. Q. You didn't look?
6. A. No.
7. Q. So, at no time did you see the crossing and your only
8. view was to look south down the tracks?
9. A. Yes.
10. MR. LARGENT: All right, that's all.
11. MR. WHARTON: That's all.
12. MR. LARGENT: I think that's all, Your Honor.
13. COURT: Does the plaintiff rest?
14. MR. LARGENT: The plaintiff rests.
15. MR. WHARTON: We have a motion.
16. COURT: All right, you can make it right here.
17. (Off the Record Discussion at the Bench)
18. COURT: We'll take a recess at this time.
19. (Recess)
20.
21.
22.
23.
24.

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1. (In Chambers)

2. MR. WHARTON: Your Honor please, we move to strike the
3. plaintiff's evidence and enter summary judg-
4. ment on the grounds, first of all, there has
5. absolutely no negligence been shown. This
6. thing about the shrubs in the right of way,
7. there's no evidence that that interfered
8. with the view of the train. The only evi-
9. dence about a view there at all--and that's
10. what it has to be, clearing the right of
11. way that they are relying on, it says you
12. don't have to clear it, you have to clear
13. anything that would interfere with the view
14. of the train--the Trooper says that by put-
15. ting a car where he did there at the time,
16. you could see a quarter of a mile either
17. way. The pictures themselves show that
18. there's nothing wrong with it. The one tree
19. that the Trooper spoke about, other than the
20. shrubs, is twelve feet high before you see
21. any foliage at all. So, there's no negli-
22. gence there and there's no negligence shown
23. as to - the burden is on the Plaintiff to
24. show that the statutory signals weren't

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1. given. We have a case on that. And that
2. is so far as the negligence, as the alleged
3. negligence, of the plaintiff is concerned.
4. Now, we say this, that the uncontradicted
5. evidence in this case as it now stands, is
6. that the deceased when this train was coming
7. down this track with visible headlights,
8. that were visible anywhere from two hundred
9. yards on back to almost a quarter of a mile--
10. according to the Trooper saying what the
11. view would be, this boy was uncertain about
12. that--but anyway, the lights were visible
13. for at least two hundred yards. And it
14. goes without saying that this case is
15. directly in line with cases that start back
16. with a case at 118 Virginia, which is the
17. Zell case, and states that without any
18. question, "A traveler approaching such
19. crossing for the purpose of crossing must
20. always exercise care proportioned to the
21. known danger . ." This man knew, it was
22. shown he had traveled this road for two
23. years straight, ". . and this case must be
24. such as one who knows the danger and of the

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1. prior right of passage would be expected
2. to exercise. The duty of looking and
3. listening for approaching trains must be
4. discharged in such manner as will make the
5. looking and listening effective." That line
6. of cases, it's probably some back of this,
7. this was decided in 1950, and just goes
8. right on through, that when someone who
9. approaches the railroad track, who knows
10. it was there--and there's no question this
11. man traveled the road, his wife testified,
12. she didn't say he went there always, but
13. for two years most of the time he came to
14. town that way. He was familiar with the
15. track being there and he crossed the track
16. every day and it was a duty on him to stop
17. and look where he could see and not proceed
18. directly in front of the train. He is with-
19. out question guilty of - that's the sole
20. proximate cause of this accident. And we
21. submit, Your Honor please, that in this
22. case it's directly in line with numerous
23. cases, just as strong as can be, on this
24. point here, that "This was a dangerous

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1. crossing for travelers coming as these two
2. men were, from the south, because on that
3. side of the track and west of the highway
4. there was a natural embankment or hill
5. which obstructed the view from the highway
6. of the track." And that was the facts in
7. this Zell case. And this case was reversed
8. and it was held that the driver was guilty
9. of contributory negligence as a matter of
10. law and the passenger couldn't recover.
11. That's back when joint enterprise was dif-
12. ferent than now, it has no bearing on this.
13. MR. LARGENT: You're not saying our case had a dangerous
14. crossing, are you?
15. MR. WHARTON: I'm not saying it is, but if it is a danger-
16. ous crossing - you all said he couldn't see
17. very well. "But conceding that there was
18. evidence tending to show negligence on the
19. part of the defendant there can be no re-
20. covery by the plaintiff for the reasons
21. hereinafter stated. The negligence of the
22. driver of the car is perfectly manifest.
23. He had no right to proceed across the track
24. without looking and listening for a train.

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1. The greater the danger the greater was the
2. measure of his duty . . . The very conten-
3. tion made here that he had to be close to
4. the track before he could see any distance
5. to the west emphasizes the importance of
6. caution on his part."
7. COURT: Aren't you getting a little past yourself,
8. I mean, right now we have only the plain-
9. tiff's evidence, and as I see it, it's
10. whether or not he has proven that there's
11. been any negligence on your part. And if
12. so, was that the proximate cause of the
13. injury.
14. MR. WHARTON: The only evidence we have in this case,
15. Your Honor please, is that the plaintiff
16. was eighteen feet from this track when we
17. were coming and pulled in front of us,
18. that's by their own witness. I mean, that's
19. undisputed. That wasn't by an adverse
20. witness, that was by a witness they put on
21. the stand. It's absolutely undisputed that
22. he pulled in front of an oncoming train.
23. They've shown by people that the headlights
24. could be seen for a minimum distance, so

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they put it, of two hundred yards. They have shown here that their man was the sole cause of this accident.

COURT: All right, Mr. Largent.

MR. LARGENT: Judge, first of all, the decedent goes into this case with a presumption that he did exercise ordinary care, that he stopped, looked and listened, and that's Hagan v. Hicks, 209 Va. 499. Mr. Wharton very quickly moves over the facts a little bit too quickly because first of all, the witness again, Mr. Burner, says that the visibility was fifty to seventy-five feet in front of the engine, so there is no way that - well, there is no testimony actually that the State Trooper says that there are two hundred yards or four hundred yards visibility down the railroad to the south. As a matter of fact, I asked him if he did this on this morning, and it has no bearing on this. It's what you could see on the morning that it was so foggy. It was limited at that time. Now, the next question which I think we're all concerned here with questions for

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1. the jury, because Mr. Wharton has the tree
2. trunk twelve feet tall. Well, that's not
3. the testimony of the Trooper at all. He
4. didn't say that the foliage didn't begin
5. until it got twelve feet up. So, there
6. is . .
7. MR. WHARTON: We can check the record.
8. MR. LARGENT: Well, what I'm saying is . .
9. COURT: Well, what negligence do you contend you
10. have proven on the part of the railroad?
11. MR. LARGENT: Well, now, as far as the railroad is con-
12. cerned, what we're saying is that they owe
13. ordinary care, and we go first of all to
14. speed. We say that they operated that
15. train at an excessive speed under the cir-
16. cumstances, and that's based on the fact
17. that it was foggy, the brakeman could only
18. see fifty to seventy-five feet ahead of the
19. engine. And then in his own testimony, they
20. knew that it was foggy, very thick fog, as
21. they left Front Royal and for one mile out
22. they knew that they were in heavy fog. And,
23. as a matter of fact, they were operating
24. the train at this speed which they, which

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1. I'm saying was minimum, they said that they
2. thought it was approximately 40 m.p.h.
3. COURT: Was there any testimony that they could only
4. see fifty to seventy-five yards, or feet,
5. or was the testimony that they saw, that
6. Burner saw this car, at fifty to seventy-
7. five feet away.
8. MR. LARGENT: His statement was that the visibility was
9. fifty to seventy-five feet ahead of the
10. engine.
11. COURT: At the point of impact, at the time of im-
12. pact.
13. MR. LARGENT: He said fifty to seventy-five feet ahead of
14. the engine, and so I assume that that would
15. be what he meant. Well, anyway, it was feet
16. and not yards. Now, the other thing is the
17. testimony of this young man, John Tennett,
18. of where he heard the whistle blow and saw
19. the light of the train, which was two hun-
20. dred yards. Now, if the jury believes that
21. story and he says it's two football fields,
22. then I think the statute says what?
23. COURT: Three to six hundred yards.
24. MR. LARGENT: So there is actually a jury question there

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1. as far as his testimony is concerned. Then,
2. in addition, we say that the brush and the
3. trees, which are clearly, from the photo-
4. graphs, I think it's a jury question whether
5. they feel that this actually obstructed the
6. view of the driver. Now, it's a matter of
7. them, and as a matter of fact, that's the
8. other thing, in so many of these cases
9. there's a lack of evidence as far as other
10. facts as to negligence. Usually it's con-
11. fined to whether, did they blow the whistle
12. or didn't they. But, here, I think we have
13. a question of the brush and the trees cer-
14. tainly being a matter for the jury. Mr.
15. Wharton can't decide that, I can't decide
16. that, but I think the evidence is there.
17. The height of the tree is shown, and whether
18. we disagree on twelve feet or not, it's
19. there in the evidence to show what it is.
20. MR. WHARTON: Your Honor please, you had asked what neg-
21. ligence was shown by us. He talked about
22. the speed, there is no evidence in here that
23. the speed was negligent or that it was the
24. proximate cause of the accident in any way

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1. that the speed would have played any part.
2. I'm talking about now our own negligence,
3. if any. The pictures in this thing, the
4. large pictures shown, without any question
5. at all, if you stop where the trooper said
6. he stopped, you have a - he didn't say it,
7. he didn't have to say it, he said he had a
8. view, but I'm pretty sure you'd have an un-
9. obstructed view, for half a mile. I'm talk-
10. ing about in the daytime, not at night. The
11. uncontradicted evidence is that this boy
12. saw this light at two hundred yards. Well,
13. of course, he later in my questioning indi-
14. cated and said it could have been as far
15. back as those trees, which is the reason I
16. mention the quarter of a mile or half a mile
17. that the Trooper said, that's the distance
18. you can see. This boy indicated it could
19. have been back that far. And, the only
20. other thing, I mean, I say there's no evi-
21. dence of negligence at all on the part of
22. the defendant. The plaintiff hasn't shown
23. by the greater weight of the evidence that
24. we're guilty of any negligence. They

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1. haven't made a prima facie case. But I say
2. the strongest part of it, if they have, if
3. they've made out a case, we have the undis-
4. puted facts in this case that a train was
5. coming down that track and that it had head-
6. lights that were visible for two hundred
7. yards, according to their own witness--I'll
8. shorten that a little, he said two hundred
9. yards from his house, which would make it
10. seventy-five feet less than two hundred
11. yards, 525 feet--that you could see that
12. headlight. We had the uncontradicted evi-
13. dence by the witness they put on that this
14. man was about eighteen feet away and pulled
15. directly in front of that train. Now, that
16. is directly in line with all the cases that
17. I can find from right here on through. And
18. this thing, Your Honor please, about a pre-
19. sumption, that goes out the window when you
20. have evidence. I mean, he said something
21. about a presumption that he was taking care
22. of himself. So we submit that for two rea-
23. sons in this case that there should be at
24. this time, strike the evidence and entry of

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1. summary judgment for the defendant in this
2. case.
3. COURT: I'll deny your motion, I think there's
4. sufficient evidence to go to the jury.
5. MR. WHARTON: We respectfully except to the Court's ruling.
6. I think we might save some time if you all
7. will agree and if the Court rules we gave
8. the statutory signals, I mean, we don't need
9. proof because the burden is on you all and
10. we won't take up that time.
11. MR. LARGENT: Well, there's evidence in the case to be
12. considered. What do you mean? If he didn't
13. give them within three hundred yards.
14. MR. WHARTON: I think there's no evidence, that's what I'm
15. talking about.
16. COURT: Whose burden is it to prove . .
17. MR. HODGE: Your Honor, it's the plaintiff's burden of
18. proof that the statutory signals were not
19. given. Norfolk and Western Railway v. Eley,
20. 157 Va. 568, at page 579, note [11] in the
21. next to the last paragraph , "Before any re-
22. covery could be had in this case negligence
23. of the defendant must be shown, which is but
24. to say in another way that the burden is on

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1. Eley to show that the defendant railway
2. company failed to give statutory crossing
3. signals. This he had not done." So, the
4. burden is upon the plaintiff in this case
5. to make out that we did not give them, and
6. obviously that burden has not been met.
7. MR. LARGENT: Well, the Eley case certainly doesn't hold
8. that the burden of proof is on the plain-
9. tiff. In that case, if I recall correctly,
10. it was confined to a narrow issue, there
11. wasn't any other evidence. You see, what
12. the defendant is saying here is that there
13. is only one issue of negligence. They still
14. owe ordinary care and whether we have borne
15. the burden as far as the signals are con-
16. cerned, it really wouldn't make any differ-
17. ence, but I am saying in addition to that
18. that there is evidence . .
19. COURT: Well, the signals only go to whether there
20. is comparative negligence or not.
21. MR. LARGENT: Well, if it is comparative, but what I'm
22. saying is that this case is being used to
23. say that the burden is on the plaintiff.
24. That is not the holding in that case, that

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1. case pointed out the fact that absent any
2. other evidence of negligence, in other words
3. they didn't have anything else in that case,
4. and as I recall speed was involved in that
5. case . .
6. MR. HODGE: It was in a foggy situation too.
7. MR. LARGENT: But there was no - I know, but they didn't
8. make any issue over it. The main thing was
9. that the speed was fifteen miles an hour in
10. that case and it was a case in town, it
11. wasn't a case under these circumstances,
12. and the Court made - as a matter of fact,
13. the Supreme Court has just handed down a
14. decision in the last week or two talking
15. about this very thing, about if there is
16. evidence of other negligence, then they are
17. matters for the jury to consider. This was
18. the Bunn v. Norfolk, Franklin and Danville
19. case, and here again, there was no other
20. evidence that the jury could consider. Now,
21. I submit in this case, let's say we had not
22. done anything about - we hadn't even heard
23. any testimony about the whistle, that doesn't
24. mean that that's the only duty that the rail-

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1. road has, they still have ordinary care,
2. they still must operate that train at a
3. speed that is not excessive under the cir-
4. cumstances. And that's certainly a question
5. for the jury, whether or not you're going
6. to permit that train of that size to travel
7. at the speed they did with the visibility
8. they had. The second thing is, we have
9. proved the condition of the right of way.
10. Now, the question of whether it obstructed
11. or not, all these cases . .
12. COURT: I think the only question that we're arguing
13. right now is whether or not there has to be
14. further testimony as to whether the signals
15. were given.
16. MR. HODGE: Yes sir, we can speed this up, I believe,
17. if we don't have to.
18. COURT: That's the only thing we're discussing right
19. now, whether you are going to require that
20. they produce evidence that they were given,
21. or whether you are willing to admit that
22. they were given? Or, whether it is your
23. duty to prove that they weren't given.
24. MR. LARGENT: I thought the proposition was made that the

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1. burden was on us to prove that they'd been
2. given. Well, as far as the signals are con-
3. cerned, I think that's a matter that they'd
4. have to prove.
5. MR. WHARTON: We're talking about the statutory signals.
6. MR. LARGENT: Well, the sounding of the whistle is also
7. tied into distance and you've got some tes-
8. timony in this case right now that . .
9. MR. WHARTON: Well, there's a lot of difference if we go
10. in there and take time to prove distances
11. and statutory . .
12. COURT: I think you're going to have to prove it.
13. MR. LARGENT: We certainly are not going to agree that the
14. whistle was blown properly.
15. MR. HODGE: Well, what I'm saying though, Your Honor,
16. is that the burden is upon, before we have
17. to go forward, the burden is upon the plain-
18. tiff for evidence that the whistle was not
19. given. That's the burden that we feel that
20. they haven't met.
21. COURT: The only evidence that they have here now
22. is that each one heard the whistle once.
23. MR. WHARTON: No.
24. COURT: Now, according to the statute, you have to

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1. blow it continuously or alternately for
2. three hundred yards, and there was no evi-
3. dence of that.
4. MR. HODGE: Well, that is exactly right, that is nega-
5. tive evidence . .
6. COURT: They heard it once.
7. MR. HODGE: Well, they testified that they heard the
8. whistle in the distance, but . .
9. MR. WHARTON: Well, the judge has already ruled.
10. MR. HODGE: Well, we would object to your ruling on the
11. point, of course.
12. COURT: I don't think that there's enough here to
13. prove that it was given.
14.
15. (End of Hearing on Motion in Chambers)
16.
17.
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1. WITNESS - HILTON GRUBBS

2. Direct Examination by Mr. Wharton:

3. Q. Mr. Grubbs, on the night of this accident, or the early
4. morning rather of the accident, right after daylight,
5. what was the weather conditions?
6. A. I really don't know, I was still in bed. I never even
7. got up and looked out the window.
8. Q. What, if anything, did you hear?
9. A. I heard it blow and I heard it pull across the crossing
10. and stop.
11. Q. How many times did you hear the signal? The whistle?
12. A. Well, I couldn't say, that morning. But, since I've
13. noticed it blows about three longs and a short in between.
14. Q. As you recall, it blowed about three longs and a short?
15. A. Yes.
16. Q. Could you tell where the whistle started?
17. MR. GRECO: I object, Your Honor.
18. A. No, because I'm in bed. It would have to be up around
19. the whistle post or whatever it might be.
20. Q. You couldn't tell?
21. MR. GRECO: I'd move to strike.
22. A. No.
23. MR. WHARTON: His answer was it had to be up at the
24. whistle post.

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1. MR. GRECO: Yes, I know, and I objected to it.
2. COURT: He said he didn't know.
3. MR. WHARTON: And then I was going to ask him why he
4. thought it was up . .
5. COURT: He said he didn't know, he was in bed.
6. A. We'd had a . .
7. COURT: Don't volunteer anything, Mr. Grubbs.
8. You're supposed to just answer the ques-
9. tions.
10. Q. Did I understand you correctly to say you did not know
11. where it started?
12. A. No, I don't.
13. Q. Aside from the whistle, was the train making any other
14. noise?
15. A. It always makes a noise when it goes by there, picking
16. up slack and so forth. If it hit something you couldn't
17. tell the difference, it all sounds alike.
18. Q. By taking up the slack, do you mean - what do you mean
19. by that?
20. A. Down below my place is all going downgrade. When they
21. get along about my place, well then naturally they're
22. taking up slack and the train is jerking and snapping
23. and you can't tell when it hits anything. It all sounds
24. alike.

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1. MR. WHARTON: That's all.
2. COURT: May this witness be excused?
3. MR. GRECO: The plaintiff has no objection.
4. MR. HODGE: No objection.
5. COURT: You may go home or stay as you wish,
6. Mr. Grubbs.
7. MR. HODGE: Mrs. Grubbs has been summoned, I believe,
8. by both parties and we do not feel we
9. want to call her. If they do not, she
10. can be excused at the same time.
11. COURT: You may leave too, Mrs. Grubbs.
12.
13. WITNESS - JOHN W. BURNER
14. Direct Examination by Mr. Hodge:
15. Q. Mr. Burner, I remind you that you're still under oath
16. from the previous time you testified. What position were
17. you riding on the train on the morning of this accident?
18. A. I was riding on the fireman's side, the west side.
19. Q. And was this in the lead locomotive?
20. A. Yes.
21. Q. After you left Front Royal, what is the nature of the
22. track coming up to this position?
23. A. Uphill.
24. Q. Uphill to where?

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1. A. Up there to that signal.
2. Q. What signal was this?
3. A. When you leave Front Royal you go down a hill and go
4. over a crossing, a Southern crossing, and then you start
5. up the hill and then when you get to the top of the hill
6. up there at Success, at that signal, then you start go-
7. ing downhill.
8. Q. What signal are you talking about at Success?
9. A. South of that road crossing, that signal.
10. Q. What kind of signal is it?
11. A. Our signal, clear signals that we go by.
12. Q. Is there any other railroad signal device or marker at
13. that point?
14. A. Just north of that is a whistle board.
15. Q. What occurred at the point of the whistle board?
16. A. Then we started blowing the whistle.
17. Q. You started blowing at that time?
18. A. At the whistle board.
19. Q. What is the distance of the whistle board from the cross-
20. ing?
21. A. Fourteen hundred feet.
22. Q. Fourteen hundred feet?
23. A. Yes.
24. Q. Could you describe how the whistle was blown, what signal

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1. was given?
2. A. The signal of the whistle?
3. Q. Yes.
4. A. Two longs, a short and a long.
5. Q. Two longs, a short and a long?
6. A. Yes.
7. Q. And is this the normal whistle that is given?
8. A. Yes.
9. Q. Was any other signal device used at this time other than
10. the whistle?
11. A. Ringing the bell.
12. Q. Was this activated at the same time as the whistle?
13. A. Yes.
14. Q. And how did that occur, how did you activate the whistle?
15. A. Well, that rings all the time.
16. Q. And how do you do this, is it automatic then you're say-
17. ing?
18. A. Yes, you pull a lever over and it stays on until you pull
19. the lever back.
20. Q. Was this bell you were talking about, you indicated it
21. was turned on the same time as the whistle at the whis-
22. tle post?
23. A. Yes.
24. Q. And was it on the whole time until you reached the cross-

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1. ing?
2. A. Yes sir.
3. MR. HODGE: We have no further questions, Your
4. Honor.
5.
6. Cross Examination by Mr. Greco:
7. Q. Mr. Burner, you didn't see the whistle post yourself,
8. did you?
9. A. Yes.
10. Q. Was it on your side of the train?
11. A. No sir, on the engineer's side.
12. Q. You weren't watching the road, you were watching for
13. the whistle post?
14. A. Yes sir, we was watching for the signal because it was
15. foggy and we didn't want to miss the signal and watch-
16. ing the whistle post.
17. Q. Would you repeat that, I didn't catch all of it.
18. A. We was watching for the signal because it was foggy and
19. we didn't want to miss the signal and the whistle board
20. is just right . .
21. Q. Well, who was watching for the signal?
22. A. The engineer.
23. Q. And who was looking for the whistle board?
24. A. The engineer too, both of us was.

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1. Q. And the whistle board is on the other side of the train
2. from you, is it not?
3. A. Yes.
4. Q. So really you didn't hit the whistle until the engineer
5. told you, is that correct?
6. A. No, the engineer blowed the whistle.
7. Q. Oh, you didn't blow the whistle?
8. A. No sir.
9. Q. So you don't know whether he blew it as soon as he saw
10. it or sometime thereafter, but you do know he blew it.
11. A. Yes sir, I'm most sure he blowed it at the whistle
12. board, because I could see . .
13. Q. Well, as a normal procedure, but . .
14. MR. WHARTON: Well, let him finish the question. He
15. started to say, I could what?
16. A. I could see . .
17. MR. GRECO: I thought I was conducting the cross
18. examination.
19. COURT: Yes, Mr. Wharton, if you wish to make an
20. objection, do it to the Court and not to
21. counsel.
22. MR. HODGE: Your Honor, we would object and ask that
23. he be allowed to continue his answer.
24. COURT: Yes, the objection was, let him complete

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his answer.

A. I could see just right over the side, sitting right here I could see right over there.

Q. Okay, and you say you heard - you didn't actuate the switch then, the engineer did that?

A. Yes.

Q. And you heard two longs, a short and a long, is that correct?

A. Yes.

Q. Do you know what distance from the crossing that these occurred?

A. Distance?

Q. Yes. You don't obviously.

A. No.

Q. You couldn't see the crossing, right?

A. No.

Q. Have you ever measured that distance from that whistle board to the intersection?

A. We counted the rails.

Q. How long are the rails?

A. I believe they're thirty-nine feet.

Q. You're not sure?

A. I'm most sure they're over thirty-nine feet.

Q. How fast were you all going?

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1. A. Forty miles an hour.
2. Q. All right. And when you came into Front Royal, how fast
3. were you going?
4. A. Coming into Front Royal?
5. Q. Yes.
6. A. We had to stop there and set a unit off.
7. Q. How about a couple miles before you got to Front Royal,
8. how fast were you going?
9. A. Oh, about thirty-five to forty.
10. Q. In other words, your usual speed is about forty miles
11. an hour, is that correct.
12. A. Yes, right through there.
13. Q. In other words, you went through Success at forty miles
14. an hour and that's what you usually go through Success
15. at, is that correct?
16. A. Well, it depends on what size train we have. We've
17. got a speed limit through there of fifty miles an hour.
18. Q. If it's a smaller train you run fifty miles an hour?
19. A. Yes.
20. Q. But your usual procedure is to run through there between
21. forty and fifty then?
22. A. Yes.
23. Q. Depending on the size of the train?
24. A. Yes.

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1. MR. GRECO: That's all.
2. MR. HODGE: We have no further questions, Your
3. Honor.
4.
5. WITNESS - BOBBY LEE DOVEL
6. Direct Examination by Mr. Wharton:
7. Q. What is your name, sir.
8. A. Bobby Lee Dovel.
9. Q. How old are you?
10. A. Thirty-eight.
11. Q. Where do you live?
12. A. Stanley, Virginia.
13. Q. How long have you been employed at the Norfolk and
14. Western?
15. A. December 6, 1961.
16. Q. And what is your present - you're an engineer, I believe
17. now?
18. A. Yes sir, well, I'm an extra engineer.
19. Q. How long have you been an extra engineer?
20. A. I was promoted March, 1971.
21. Q. And I don't know what you mean by an extra engineer,
22. what does that mean?
23. A. Well, if a man lays off, the extra engineer fills the
24. vacancy for the regular engineer.

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1. Q. Do you work regularly then to fill in places for other
2. people, is that right?
3. A. That's right.
4. Q. How long have you been on the Shenandoah Division making
5. the runs that were made back in July two years ago when
6. this accident occurred?
7. A. I came down here on the Shenandoah - Hagerstown District
8. in January of 1966 as a Road Brakeman.
9. Q. On this particular occasion this accident occurred, were
10. you the engineer?
11. A. Yes sir, I was the engineer.
12. Q. The engineer sits on which side of the train?
13. A. The right side.
14. Q. And, while I'm thinking of it, let's describe this train
15. a little. It's not like back on the steam trains, you
16. sit further forward, do you not?
17. A. Yes sir, you have a long hood or short hood.
18. Q. Well, how close is your seat from the front of the train?
19. A. Approximately twelve feet.
20. Q. You're about twelve feet from the front of the train?
21. A. Yes.
22. Q. How about the fireman?
23. A. The same distance.
24. Q. He's just on the other side about the same distance?

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1. A. Yes sir.
2. Q. What is the height of the train, or approximate height?
3. A. I believe it's twelve feet at the top of the rail, on
4. the top of the rail, the engine is.
5. Q. And what would be the height of the search light?
6. A. Oh, about eleven.
7. Q. About eleven feet?
8. A. Yes.
9. Q. And, on this occasion, did you have your headlight on?
10. A. Yes sir.
11. Q. And why did you have it on?
12. A. Well, it's a rule that we run day and night with our
13. headlight burning.
14. Q. That's your railroad rule?
15. A. Right.
16. Q. And, as you approached the scene of this accident and
17. before you got to what has been referred to as the whistle
18. board, what - are you going upgrade or downgrade?
19. A. Well, you're coming upgrade to the traffic control sig-
20. nal and then you start a decline at that signal onto
21. the road crossing.
22. Q. What sign are you speaking of?
23. A. The traffic control signal that's operated in Roanoke.
24. Q. With reference to the whistle board, where is that?

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1. A. That's approximately five to six hundred feet south
2. of the whistle board.
3. Q. How far is the whistle board sign from the crossing
4. where this accident occurred?
5. MR. GRECO: I object, Your Honor. The proper foun-
6. dation has not been laid. I'd appre-
7. ciate it if you'd ask him how he measur-
8. ed it.
9. COURT: Yes, ask him whether he knows.
10. MR. WHARTON: I will, but I'm sure he couldn't answer
11. if he didn't.
12. Q. At my specific request, did you measure from the crossing
13. to the whistle board?
14. A. We counted the rail lengths and the rule calls for four-
15. teen hundred feet.
16. Q. What's a rail length? How much is a rail length?
17. A. Thirty-nine feet.
18. Q. This is Exhibit #8. Tell us if you can see the whistle
19. board, where it is, on there.
20. A. I can't see the whistle board, but I can see the signal.
21. Q. How far is that signal from the whistle board?
22. A. Well, the signal is about five to six hundred feet from
23. the whistle board and the whistle board is seventeen
24. hundred feet, so that would be two thousand feet.

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CORRECTION TO TRANSCRIPT

The following is a correction to a transcript of the trial in the above styled case held on July 23, 1976:

Page 93, Line 23, should read as follows:

"the whistle board and the whistle board is fourteen"

(the word "seventeen" should be "fourteen")

With the above correction, the transcript is true and correct to the best of my knowledge and belief.

Given under my hand this 23rd day of August, 1976.

COURT REPORTING SERVICE

By: /s/ Christine Fulk

1. Q. Will you show them where that signal is there?
2. A. It's right here. (Indicating on Exhibit #8) This right
3. here, that's the signal, it's controlled in Roanoke.
4. Q. And the whistle board is . .
5. A. The whistle board is approximately five to six hundred
6. feet north of that.
7. Q. Did you give signals for this crossing that morning?
8. A. Yes sir, I rung the bell and blowed the rule signals.
9. Q. Where did you start?
10. A. At the whistle board.
11. Q. How is that bell started or activated?
12. A. It's a lever that you push over and it stays over until
13. you manually push it back off.
14. Q. You mean you push the bell over the bell continues to
15. ring?
16. A. Right.
17. Q. And I've been speaking of a whistle, is that really a
18. whistle or is it an air horn or what?
19. A. Well, it's an air horn. The bell is an air bell too.
20. Q. And, when did you put that on?
21. A. At the whistle board.
22. Q. And what sort of signal did you give from there to the
23. crossing?
24. A. You mean with the whistle or . .

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1. Q. Yes, with the whistle.
2. A. I gave two longs, a short, and a long.
3. Q. Your last whistle, you speak about a long, were you
4. blowing as you approached the crossing?
5. A. Yes sir.
6. Q. Right as you got up there?
7. A. I blow until the lead unit goes across the crossing.
8. Q. What speed were you making?
9. A. Approximately forty miles an hour.
10. Q. Do you have a speedometer on your train?
11. A. Yes.
12. Q. Do you also have a, I don't know whether you call it a
13. speedometer or what, but you have a piece of equipment
14. that registers speed?
15. A. Yes sir.
16. Q. That tapes it or records it?
17. A. Yes sir.
18. Q. Do you have access to that?
19. A. No sir, that is sealed and only a company supervisor
20. is allowed to break the seal and take it out.
21. Q. You were speaking of the speed you were making, were you
22. judging your speed by anything other than your exper-
23. ience as to how fast you were going?
24. A. No, I had looked at the speedometer when I come by the

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1. signal, because I knowed that I was topping the grade
2. and it would pick up speed down through there and I'm
3. not to exceed fifty miles an hour, so I didn't want to
4. get over that.
5. Q. And you were judging your speed at forty by your speed-
6. ometer, is that right?
7. A. Yes sir.
8. Q. Did you see this vehicle you struck?
9. A. No sir.
10. Q. What's the first indication that you had that there was
11. trouble?
12. A. When the brakeman put the train in emergency.
13. Q. When he did what?
14. A. When he put the train in emergency.
15. Q. How do you do that?
16. A. It's a lever that puts the air on, you pull the lever
17. on.
18. Q. Does that make any difference how you put it on, or does
19. it work automatically?
20. A. When you pull the lever it's all the brakeage to be put
21. on the train.
22. Q. And how long after that is pulled before there is any
23. slowing of the train or does it take effect?
24. A. I'd say eight or nine seconds.

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1. Q. In other words, why . .
2. A. Well, you have to give the air time to set up the pistons
3. and push the pistons out against the wheels.
4. Q. And when you stopped - do you recall the number of cars
5. you had on that train?
6. A. I believe it was thirty-one loaded and thirteen empties.
7. Q. What was the length of the train?
8. A. Well, it was forty-four cars and fifty feet to a car.
9. It would be what - twenty-five hundred feet?
10. Q. When you stopped, the Trooper testified, I believe, that
11. the front of your engine was about seventeen hundred
12. feet or so from the crossing, is that correct?
13. A. Yes sir.
14. Q. And that left part of your train back of the crossing?
15. A. Yes sir.
16. Q. It was foggy on this morning, was it not?
17. A. Yes sir, patchy foggy, it wasn't continuous fog, it was
18. patchy fog.
19. Q. Where had you run into the fog - well, was there fog
20. there at the crossing?
21. A. Yes sir, it was foggy at the crossing.
22. Q. Where did you run into that patch of fog?
23. A. Along about the signal out there.
24. MR. WHARTON: That's all.

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1. Cross Examination by Mr. Greco:
2. Q. Mr. Dovel, I take it then that the longer the train, the
3. more cars that you all are hauling, the longer it takes
4. for you all to stop, is that correct?
5. A. Yes, to a certain extent.
6. Q. Well, if it was just a locomotive used, you could stop
7. in a shorter distance than you can with some cars on?
8. A. Yes.
9. Q. And, as I understand your testimony, at the top of the
10. hill as you're starting to come down to this intersec-
11. tion, what is the distance? You say about twenty-two
12. or twenty-three hundred feet?
13. A. Approximately.
14. Q. And it's downhill, from the top of the hill then you
15. start going on a downgrade towards the intersection, is
16. that correct?
17. A. Right.
18. Q. Now, at the top of the hill you said you looked at the
19. speedometer and you said your speed was 40 m.p.h. at
20. that time.
21. A. Yes sir.
22. Q. And you watched it to make sure you didn't go over fifty,
23. is that correct?
24. A. Yes.

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1. Q. Where did you report in - Hagerstown?
2. A. No, Shenandoah.
3. Q. Did you take the train back to Shenandoah?
4. A. You mean after the accident?
5. Q. After the accident, yes.
6. A. We went on to Hagerstown.
7. Q. And you reported to your supervisor in Hagerstown? Or,
8. did you bring the train back to Shenandoah and report
9. to the supervisor there?
10. A. I talked to the supervisor in Shenandoah, I believe.
11. Q. Did you talk to him and report the accident to him?
12. A. Well, there was a supervisor at the scene of the acci-
13. dent.
14. Q. Oh, there was a supervisor at the scene of the accident?
15. A. Yes.
16. Q. When did he destroy the tape recorder, do you know?
17. A. No, I don't know.
18. Q. But he didn't destroy it at the scene of the accident?
19. A. No sir.
20. Q. I think you've already testified to this, but I believe
21. you testified what the maximum speed is you all operate
22. at.
23. A. It's fifty miles an hour.
24. Q. How fast can a locomotive go?

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1. A. Well, I've never had one open, I don't know how fast it
2. would run. Fifty miles an hour is our speed limit and
3. we don't get over that.
4. Q. Have you ever seen a locomotive of that type go over
5. fifty miles an hour?
6. A. Over fifty miles an hour?
7. Q. Yes.
8. A. Oh, I've seen them run fifty to fifty-two or three down
9. a hill.
10. Q. Now, the operation of the train, you all have certain
11. rules and regulations. For example, the speed limit.
12. A. Right.
13. Q. And what are the rules and regulations as to keeping
14. lookout?
15. A. What's that, sir, I don't understand you.
16. Q. What are the regulations as to keeping lookout? Who is
17. to keep the lookout for obstacles in front of you . .
18. A. The engineer and the head brakeman.
19. Q. The engineer and the head brakeman?
20. A. Yes.
21. Q. Mr. Burner was the brakeman?
22. A. Yes sir.
23. Q. Okay, is there anyone else on the train who assists you
24. all in your lookout?

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1. A. Well, every crew on the train is supposed to be on look-
2. out at all times for what is going on in the train and
3. ahead of it.
4. Q. What is the rule regarding lookout, Mr. Dovel?
5. A. I don't understand what you mean, lookout.
6. Q. Well, to look out for obstacles. There's an elephant
7. laying up there in front of you. Is there a written
8. rule regarding anything sitting on the tracks or ob-
9. structing your way?
10. A. Well, sure, you go along looking out for stuff on the
11. tracks.
12. Q. Okay, what does the rule say? Do you recall? Do you
13. know what it says?
14. A. I don't get what you're asking - looking ahead . .
15. Q. What does the rule say with respect to keeping a proper
16. lookout?
17. MR. WHARTON: Your Honor please . .
18. A. I mean, a man looks out, that's all he can do.
19. COURT: Wait a minute.
20. MR. WHARTON: We object to what the rules of the
21. railroad may be. The rules of the rail-
22. road could be far more strict than the
23. law of ordinary care.
24. COURT: Well, we're getting into questions of

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1. law now, aren't we? He's asking him a
2. question, what was the rule of the rail-
3. road in regard to looking ahead.
4. MR. WHARTON: That's right.
5. COURT: All right, I think he has the right to
6. ask that.
7. MR. WHARTON: Well, we'd object to that.
8. A. You mean - well, we have signals. We call them and relay
9. them through the brakeman and the brakeman relays them
10. back to us when we pass them. Anything that's unneces-
11. sary seen on the tracks the engineer and the brakeman
12. relays it to each other.
13. Q. Relays it to each other. How do you do this?
14. A. By word of mouth.
15. Q. So that's the way you all operate?
16. A. That's right.
17. Q. You're not sure that that's what the rules require, but
18. that's the way you operate.
19. A. That's the way we operate.
20. MR. GRECO: That's all.
21. MR. WHARTON: That's all. We have two other of the
22. train crew here, Jones and Lawhorne,
23. one of them was the conductor and the
24. other was the rear end brakeman. They

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1. were in the caboose. They heard no-
2. thing and know nothing. I just had
3. them here. They would testify that
4. they know nothing and heard nothing.
5. MR. GRECO: No objection.
6. COURT: All right.
7.
8. WITNESS - RALPH THOMPSON
9. Direct Examination by Mr. Wharton:
10. Q. Tell me your age, your address and what you do for the
11. Norfolk and Western and how long you've been there.
12. A. I'm fifty-five years old, I've been with the railway
13. company going on thirty-one years. I'm the Division
14. Road Foreman of Engines and I live in Roanoke, Virginia.
15. Q. And, what do you have to do with the Shenandoah Division
16. where this accident occurred?
17. A. I'm a supervisor for the railroad between Winston-Salem,
18. North Carolina and Hagerstown, Maryland.
19. Q. And you've been present in the courtroom here?
20. A. Yes.
21. Q. You heard the questions about the destruction of the
22. tape?
23. A. Yes.
24. Q. Briefly tell us what all your trains are equipped with

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1. in the way of tapes.
2. A. Well, each unit is equipped with a speedometer and a
3. speed recorder. The speed recorder contains the tape.
4. Q. Is that locked up? Who takes that off the train?
5. A. Well, the supervisor does if he has the necessary means
6. to do so.
7. Q. Do you know, what are those tapes for?
8. A. They are to record the speed of our trains and if there
9. is any rule violations involved we make a check, I have
10. to make a check every three months on every engineer I
11. have.
12. Q. How long do you keep these tapes?
13. A. Approximately about a week or ten days, unless I'm so
14. instructed to keep them.
15. Q. You keep them longer if there's any rule violation?
16. A. If there's any rule violation or if we're going to have
17. a rule investigation, yes sir.
18. Q. On this particular train here, did you in your usual
19. course of business take that off?
20. A. Yes sir, we had the tapes pulled.
21. Q. And was it destroyed?
22. A. Sir?
23. Q. Was the tape destroyed?
24. A. Probably in about a week or ten days, something like that,

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1. because there was no rule violation involved in it.
2. MR. WHARTON: That's all.
3.
4. Cross Examination by Mr. Largent:
5. Q. I don't quite understand this. You say you hold onto the
6. tapes until you find out where there is a rule violation
7. involved?
8. A. Yes sir, I review them when they are taken off the unit.
9. Q. This has to be rules affecting your employees.
10. A. Well, anything, an accident or anything like that. A
11. derailment or what have you.
12. Q. Well, wasn't this an accident?
13. A. Yes sir.
14. Q. And after knowing that this accident had occurred on
15. July 30th, you're telling this jury that you destroyed
16. that tape?
17. A. Well, I don't remember what date the tapes were destroy-
18. ed.
19. Q. Are you saying you destroyed the tape knowing that this
20. accident had occurred and after July 30th you destroyed
21. the tapes.
22. A. Yes sir, I did, because there was no rule violation in-
23. volved.
24. Q. You didn't consider this a serious enough violation to

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1. maintain that tape.
2. A. No sir, not when a man is running forty miles an hour
3. in fifty mile an hour territory.
4. MR. LARGENT: That's all.
5. MR. WHARTON: That's all. Mr. Scott here, who's with
6. the railroad, took the pictures, the
7. large pictures that were introduced, the
8. day after the accident. We'll stipulate
9. that.
10. MR. LARGENT: We'll stipulate that.
11. COURT: Very well.
12. MR. WHARTON: Will you stipulate that the crossbuck
13. sign was present at the crossing and
14. also in addition to that there was a
15. sign put up by the highway department.
16. Is it so stipulated that the sign in
17. this picture here is a proper sign in
18. compliance with the code and that this
19. other sign back here is a highway sign
20. indicating the crossing. We further
21. stipulate that that highway sign in
22. that picture was back two hundred feet
23. from the railroad.
24. COURT: Does the defendant rest?

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1. MR. WHARTON: Yes sir.
2. COURT: Ladies and gentlemen, suppose we recess
3. for lunch. I'll ask you to return di-
4. rectly into your jury room. And, again,
5. let me caution you not to discuss the
6. case with anyone or permit anyone to
7. discuss the case in your presence.
8. Don't listen to the radio or read the
9. newspapers or anything such as that.
10. And don't go out and look at the scene
11. of the accident. Don't discuss the
12. case among yourselves unless all of you
13. are present at the same time. We'll now
14. recess until 2:00.
15.
16. (Luncheon Recess)
17.
18.
19.
20.
21.
22.
23.
24.

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1. (In Chambers)
2. MR. WHARTON: First of all, I would like to renew my mo-
3. tion to strike the plaintiff's evidence and
4. enter summary judgment. I further make a
5. motion that . .
6. COURT: Well, first of all, do you rest?
7. MR. LARGENT: Yes sir.
8. COURT: Okay, I just wanted to clear that up.
9. MR. WHARTON: Any verdict in this case would be - there's
10. no evidence to support a verdict. First of
11. all, there's no negligence been shown and,
12. secondly, the plaintiff is guilty of contri-
13. butory negligence as a matter of law. And
14. we sincerely submit that this is not a case
15. that there's any evidence that would sub-
16. stantiate a verdict.
17. COURT: All right, Mr. Largent.
18. MR. LARGENT: First of all, I go back to the - well, I
19. won't discuss the presumption. As far as
20. the evidence is concerned, we do have an
21. evidence of speed, that they operated the
22. train at the usual speed that they would
23. have done under any other ordinary circum-
24. stances. And here we have unusual circum-

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1. stances and they still operated it at approx-
2. imately forty miles an hour. In addition to
3. that, the most amazing thing that's in evi-
4. dence, I think, as far as speed is concern-
5. ed, is that they destroyed the speed record-
6. er, the very thing that could establish
7. exactly what it was. They destroyed it and
8. disregarded the fact that this is a serious
9. enough matter to retain the recorder. Now,
10. that's number one, and that I think is a
11. jury - remains a jury question. The second
12. thing is, you cannot escape the fact that
13. the brush and the trees is a jury question
14. and not for Mr. Wharton or for me to decide
15. as to what the visibility was. He continues
16. to dwell on the fact of what the Trooper
17. could see on a clear day. That has nothing
18. to do with this situation, it's a question
19. of where that light was with reference to
20. the height of the locomotive, which they
21. say was, I think, eleven or twelve feet,
22. and the height of that tree. The photo-
23. graphs are available for them to take a
24. look at that. And in addition to that,

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1. despite the fact that they object to the
2. rules of the railroad, the engineer said,
3. "We have a duty and they require us to look-
4. out," which is a reasonable sort of thing.
5. And despite the fact that they looked out,
6. they came out of Front Royal, the fog was
7. heavy, they could only see fifty to seventy-
8. five feet, and still - they rendered inef-
9. fective a lookout, as a matter of fact, be-
10. cause if you're only going to see that far
11. ahead you wouldn't be able to pick up any-
12. thing on the tracks at any rate. And then
13. finally, to go back to that whistle, they
14. have not refuted and except for that last
15. little remark which is always thrown in by
16. a good defense attorney, "you don't really
17. know anyhow," the young man testified that
18. in his opinion it was two football fields,
19. two hundred yards, from his house, where
20. he heard the whistle blow and where he saw
21. the light, the dim light, as a matter of
22. fact. That's another consideration for
23. the jury, as to whether he should have seen
24. the light or not, he said it was very dim

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1. and with the foliage on the trees maybe he
2. couldn't see it. And then finally I'll go
3. back to the presumption. The law says that
4. the man is presumed to have exercised ordi-
5. nary care. He's not going out there to
6. drive up on the tracks to kill himself. It
7. all adds up to the fact that we have ques-
8. tions here that are for the jury to decide
9. and not for either of counsel, although we
10. can argue those facts. And particularly
11. contributory negligence, the law is plain
12. that if you have any facts that you are
13. trying to say that the plaintiff is contri-
14. butorily negligent, that's a matter for the
15. jury.
16. COURT: All right, Mr. Wharton.
17. MR. WHARTON: I want to address myself primarily to this
18. contributory negligence. The undisputed
19. facts in this case are that this train was
20. coming down that track - this is the plain-
21. tiff's evidence, the most favorable evidence
22. to the plaintiff. The train was coming
23. down that track at a speed of forty miles
24. an hour. The lights were on, they were

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1. visible for 525 feet. That the whistle
2. was blowing. That's if you disregard every-
3. thing now that we've put on. That the
4. plaintiff, when he was eighteen feet away
5. from the train, proceeded onto the track
6. in front of the train. That the plaintiff
7. was familiar with and had traveled this.
8. And this is directly, the facts are direct-
9. ly and just right in line with case after
10. case that the Supreme Court has held not
11. only that that was the law, but has revers-
12. ed and entered final judgment in. I mean,
13. the plaintiff cannot escape negligence in
14. this case. There is no way that reason-
15. able men could infer, there is no evidence
16. that - the law requires him to stop at a
17. place where looking would be effective.
18. There is case after case that says that.
19. There is not one iota of evidence in this
20. case that if he stopped at that point that
21. he could not see this train approaching,
22. those headlights approaching. Not one
23. iota. The headlights, uncontradicted, were
24. eleven feet above anything else. There is

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1. no brush that high along there, there is
2. a tree way over on the side, but that does
3. not affect his view if he'd have been up
4. there eighteen feet or anything. It's so
5. positive from those pictures. And he was
6. guilty of contributory negligence as a mat-
7. ter of law in putting himself in front of
8. that train and he was the sole proximate
9. cause of that accident. Your Honor please,
10. I don't think that any other conclusion
11. could be reached.
12. COURT: I think the evidence is conflicting, but I
13. think it's a matter for the jury to decide,
14. so I'll deny your motion. Your exception
15. is noted.
16.
17. ARGUMENT ON INSTRUCTIONS
18. COURT: All right, we'll take up the instructions.
19. MR. WHARTON: This is the life expectancy instruction?
20. MR. LARGENT: That's right out of the book.
21. COURT: I'll grant this one. Then we'll go to
22. the next one of these. The greater weight
23. instruction.
24. MR. LARGENT: That's a stock instruction.

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1. COURT: All right. This is the negligence instruc-
2. tion. Is that all right.
3. MR. WHARTON: Yes.
4. COURT: All right, then the next one is reasonable
5. care or ordinary care. Any objection to
6. this one?
7. MR. WHARTON: I don't think it's necessary.
8. COURT: Okay, the next one is the sole judges.
9. MR. WHARTON: The credibility of the witnesses.
10. COURT: Yes.
11. MR. WHARTON: That's all right. Now, I want the record
12. to show that I'm objecting to the giving of
13. any instruction, because there's no basis
14. to give any instruction on which a recovery
15. could be made.
16. COURT: Now, then, we've got contributory negli-
17. gence.
18. MR. WHARTON: I'd like to add in there "one" of his
19. defenses. We're not relying on that entire-
20. ly.
21. COURT: Well, it says as "a" defense, not "the"
22. defense.
23. MR. WHARTON: All right.
24. COURT: No objection to that one then. All right.

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This is the one about the whistle and bell. Any objection to that one?

MR. WHARTON: Which one is that?

COURT: The duty to have a whistle and bell.

MR. HODGE: We'd object to that, Your Honor. I don't think there's any evidence it wasn't given, the signals weren't given and the bell was not on the train. So, they're not entitled to an instruction, there was no evidence to the contrary.

COURT: I don't think the first paragraph is the law, "It shall be rung continuously."

MR. LARGENT: No, sounded at least twice first and then continuously.

COURT: Between . .

MR. LARGENT: Between three hundred and six hundred yards. And then go continuously.

MR. HODGE: The evidence was the signal, they both testified, that the signal was given at the signal board and the bell was rung continuously from the signal board.

COURT: Yes, what evidence was there it wasn't?

MR. LARGENT: John Tennet said that . .

COURT: He heard one.

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1. MR. LARGENT: He said he first heard the whistle two
2. hundred yards from his house.
3. COURT: No, he didn't, because he said he got up
4. and looked out the window and saw it two
5. hundred yards, so it had to be past two
6. hundred yards . .
7. MR. WHARTON: And he also said it could have been way up
8. there.
9. MR. LARGENT: Well, Judge, I went back and asked him the
10. question, I said, "When you heard the whis-
11. tle, did you look out the window?" In other
12. words, he said he got up right then and look-
13. ed out the window.
14. MR. WHARTON: Your Honor please, he testified there une-
15. quivocably that it could have been clear
16. up to where those trees are shown in that
17. picture #8. He said it could have been up
18. that far. And we submit that that's an im-
19. proper instruction. There's no evidence to
20. base it on.
21. COURT: Is this a true statement - proximately caus-
22. ed or contributed in any degree or in any
23. way? Is that the law?
24. MR. WHARTON: I'm talking about giving it at all. There

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1. is no evidence to base it on, Your Honor.
2. It would allow them to speculate in face
3. of absolute proof.
4. COURT: Well, the evidence here from their witness-
5. es was it was blown once.
6. MR. WHARTON: No, he said he heard it once. He didn't
7. say it was blown once.
8. MR. HODGE: But the evidence also from the witness they
9. called, Mr. Grubbs, he said it blew three
10. or four times.
11. COURT: Well, he didn't say that. He said that -
12. he said since then he's noticed that it's
13. been blown three or four times.
14. MR. WHARTON: I didn't understand that.
15. COURT: That's what he said. Now, how about the
16. second paragraph?
17. MR. WHARTON: That's not a proper paragraph.
18. MR. HODGE: The law is it has to be the proximate cause
19. before they can be held. Now, the law
20. though is that if they didn't give it and
21. it is the proximate cause, then the compara-
22. tive negligence doctrine applies, but it is
23. not a contributing factor. That has to be
24. the proximate cause.

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1. COURT: I think that is what the statute says. If
2. they don't give the signals, then contribu-
3. tory negligence comes into mitigation of
4. damages.
5. MR. GRECO: Then the defendant railroad is guilty of
6. negligence. And if you further believe
7. from such evidence that any such negligence
8. proximately caused . .
9. COURT: Now, is that statement right there the law,
10. that he contributed to it.
11. MR. HODGE: It still has to be the proximate cause.
12. In other words, if the railroad didn't give
13. the signal and the plaintiff, or the victim,
14. would admit that he saw the crossing and
15. drove on anyway, that wouldn't be the proxi-
16. mate cause of the accident. It may have
17. contributed to it.
18. COURT: Well, can we strike out "or contributed in
19. any degree or in any way to the death."
20. MR. WHARTON: Well, if Your Honor is going to give it, we
21. can strike it out. I mean, I've objected
22. to it in its entirety, but I understand I
23. was overruled on that.
24. COURT: I've overruled you on that. But, I mean,

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1. do you agree that we can strike that out -
2. assuming that the instruction is any good
3. at all, it would be better this way.
4. MR. WHARTON: Yes.
5. COURT: So then the rest of the instruction is all
6. right.
7. MR. WHARTON: Let me ask you this, if I may. I could be
8. wrong, but I feel this instruction should
9. advise the jury that "if you believe that
10. the plaintiff has proved by a preponderance
11. of the evidence." The burden is on them to
12. prove this.
13. MR. LARGENT: Well, I don't agree with that, I mean, I
14. don't think that the case - first of all,
15. the case that you cite certainly doesn't
16. say that.
17. MR. WHARTON: In other words, it's not up to us to estab-
18. lish - in other words, "If you believe that
19. the plaintiff has proved by a preponderance
20. of the evidence," - it was not up to us to
21. show that we gave the signals. It's up to
22. the defendant, the burden is on the defen-
23. dant - I mean on the plaintiff.
24. MR. GRECO: This instructions says, "If you believe from

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1. a prepondernace of the evidence that the
2. defendant railroad failed to give the fore-
3. going signals." So, they have to believe by
4. a preponderance of the evidence.
5. MR. WHARTON: They are not told though that the burden is
6. on you to establish that.
7. MR. LARGENT: Let's get that back in perspective. Let's
8. say that we went through this case and only
9. relied on speed and brush and trees and we
10. didn't say anything about those bells. We
11. would still be able to recover if we proved
12. lack of ordinary care. The Supreme Court
13. is saying, in the absence of any other evi-
14. dence, then you can't come in and by nega-
15. tive evidence prove . .
16. COURT: All right, I'll grant it as is then.
17. MR. WHARTON: We except to the giving of this instruc-
18. tion on the grounds . .
19. COURT: I'll make a check here and then you can
20. dictate your objections at a later time
21. while the jury is out.
22. MR. WHARTON: Can I say right now, for the reasons here-
23. tofore assigned.
24. COURT: And hereafter to be. All right, how about

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1. this one, presumption of ordinary care.
2. MR. WHARTON: We object to that, Your Honor please. This
3. presumption is not there because there is
4. no basis for it. We have direct evidence
5. and circumstances which show what happened.
6. COURT: What is your authority for that one, Mr.
7. Largent.
8. MR. LARGENT: Hagan v. Hicks, 209 Va. 499.
9. MR. WHARTON: I agree with him 100% if there is no negli-
10. gence, Judge, and the circumstances or the
11. evidence doesn't show something.
12. MR. LARGENT: Well, Judge, this is where we're getting
13. back to the jury question. It's presumed,
14. he goes in with that presumption, and then
15. if the evidence of the defendant, that he
16. overcame that presumption, then the jury can
17. consider it.
18. MR. WHARTON: You can't put a witness on and show how it
19. happened and then - like you did, and then
20. come in and ask for this instruction.
21. COURT: All right, is there any evidence to the
22. contrary?
23. MR. LARGENT: What? That he . .
24. COURT: That he didn't use ordinary care.

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1. MR. LARGENT: Well, now, we go back to what I consider a
2. jury question. The evidence to the contrary
3. is Mr. Wharton said he should have seen the
4. light.
5. COURT: Well, what I'm saying is that this is an
6. instruction that says "in the absence" of
7. it, but if there is evidence then how can
8. we give them an instruction saying that
9. there isn't.
10. MR. LARGENT: Well, we would object to not allowing this
11. instruction on the grounds that the plain-
12. tiff and the decedent is entitled to this
13. presumption. 209 Va. 499, Hagan v. Hicks.
14. COURT: Okay, then, this is the finding instruc-
15. tion.
16. MR. WHARTON: We object to that instruction on the grounds
17. that there is absolutely no evidence in this
18. case that there was any brush of any kind
19. that would obstruct the view of this ap-
20. proaching train.
21. MR. GRECO: It's a jury question.
22. MR. LARGENT: Well, it's clearly - the height of the train
23. and the light was twelve feet, the height
24. of the tree, he testified, that the foliage

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1. was twelve feet. Whether or not he could
2. have seen or should have seen that light,
3. here again, as Mr. Greco says, is a jury
4. question.
5. COURT: I'll overrule your objection to paragraph
6. one.
7. MR. WHARTON: I want to except on the grounds that there
8. is no evidence to support number one.
9. COURT: In order to save time, we'll note your
10. exception and then you can dictate it later.
11. Now, how about paragraph 2?
12. MR. WHARTON: There's no evidence at all that the speed
13. was excessive.
14. COURT: Do you object to that paragraph 2?
15. MR. WHARTON: Yes.
16. COURT: I'll overrule you on paragraph 2. Para-
17. graph 3.
18. MR. WHARTON: I'll also say, I don't want to belabor it,
19. but to give number two would tell the jury,
20. "you can say what you think the speed
21. should be." There's been no evidence here
22. by any experts or no one else about what it
23. should be. "You all can guess, it ought
24. to be two miles an hour or three miles an

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1. hour." You can give a verdict in this case,
2. it don't make any difference, that's exact-
3. ly what this is saying.
4. COURT: If they think it's unreasonable aren't they
5. the sole judges of whether it's unreason-
6. able?
7. MR. WHARTON: No sir, not unless they have something to
8. base it on.
9. MR. LARGENT: Your maximum speed is fifty miles an hour,
10. now they do have that standard to go by -
11. you never go over that. And your own engi-
12. neer testified as to speed.
13. MR. WHARTON: Further, Your Honor, and I don't want to
14. belabor it, but there is no evidence that
15. this had a thing to do with it, there is
16. just nothing that would show that speed
17. had anything to do with it.
18. MR. GRECO: In other words, if it was going a thousand
19. miles an hour, it would have had nothing
20. to do with it.
21. MR. WHARTON: That's right. And there isn't - I mean,
22. the Virginia cases have held that.
23. COURT: All right, how about number 3?
24. MR. HODGE: We would object to that. There is no evi-

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1. dence that there was not a lookout kept.
2. COURT: Well, that is the duty.
3. MR. WHARTON: Yes, but you don't give an instruction un-
4. less there was something to base it on and
5. this is a finding instruction down below
6. here. There's no evidence we didn't keep
7. a reasonable lookout.
8. MR. LARGENT: There is under the circumstances.
9. COURT: All right. How about paragraph 4?
10. MR. WHARTON: We say there's no evidence to base this on.
11. In other words, you're allowing them to spe-
12. culate on everything that has been proven
13. conclusively to the contrary, particularly
14. this thing about signals.
15. COURT: Well, they've got two people to say they
16. only heard it once. They were the only
17. two people in the whole area, they are the
18. only two people who could have heard it,
19. except for the decedent. All right, how
20. about the last paragraph?
21. MR. WHARTON: I object to the whole thing, but there's
22. nothing wrong with the last paragraph.
23. COURT: Okay. The next one is, "In the absence
24. of a preponderance of the evidence to the

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1. contrary it's presumed . ."
2. MR. LARGENT: That's another presumption. That was put
3. a little bit differently. You might take
4. a look at that one, because you might find
5. it a little more tolerable. I said there,
6. "prevails unless it appears that he was neg-
7. ligent or contributorily negligent, and if
8. the jury is uncertain . ."
9. MR. HODGE: We object on the same grounds. Here all
10. the evidence is to the contrary.
11. MR. WHARTON: And we have some way of telling how this
12. accident happened.
13. COURT: Yes, I think I have to turn that one down
14. too.
15. MR. LARGENT: Well, the final one is the damage instruc-
16. tion.
17. MR. WHARTON: Frankly, I've never seen a damage instruc-
18. tion under this new death thing. Have you
19. had a case?
20. COURT: This is the first one I've had.
21. MR. LARGENT: Your Honor, what I did, it's stock and then
22. I used those same items that the code pro-
23. vided for as far as the basis of damage.
24. It's 8-636.

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1. MR. WHARTON: Three has to be changed, Judge.
2. COURT: Yes, there wasn't any of that. You didn't
3. have any evidence as to hospitalization.
4. MR. GRECO: Yes, right.
5. COURT: So we have to eliminate that one. Do you
6. have any objection to the rest of it?
7. MR. WHARTON: There are too many dependents in there. He
8. didn't have but three.
9. MR. LARGENT: Five.
10. MR. WHARTON: Well, you all filed a tax return showing
11. that he didn't claim them.
12. MR. LARGENT: No, but under the Code we have to put in all
13. of his children.
14. COURT: They can apportion it.
15. MR. LARGENT: It doesn't mean they get more, but you've
16. got to put them in. We can't ignore them.
17. MR. HODGE: They've got to suffer some damages though
18. before . .
19. MR. LARGENT: You see, if the jury gives them nothing,
20. then they distribute nothing, but - in other
21. words, it isn't so much for each daughter,
22. they take what ever they award.
23. COURT: And may direct in what proportion they
24. shall be distributed to the surviving spouse

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1. or children or grandchildren.
2. MR. WHARTON: I'm frank to say, Your Honor please, I
3. think that's true, except I thought there
4. was a change made, and I've got to see the
5. Code, that there has to be some support be-
6. fore that applies.
7. COURT: It doesn't say so either in the old Code or
8. this Code.
9. MR. WHARTON: I thought there was a change.
10. COURT: Here's a case here that says, "The dependen-
11. cy required by former Section 8-636 meant
12. an actual dependency, however it did not
13. have to be total, it might be partial."
14. That must have been changed, because I don't
15. see anything in here about it.
16. MR. GRECO: You have to include your illegitimate child-
17. ren too.
18. MR. WHARTON: There's no evidence in here that he gave any
19. care or assistance at all to these people.
20. COURT: That goes into the proportions. We'll
21. strike out the third paragraph. How about
22. the rest of the instruction, Mr. Wharton?
23. MR. HODGE: Your Honor, I think there should be a nota-
24. tion as to the dependency, a proper alloca-

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1. tion based on dependency.
2. COURT: In what way?
3. MR. HODGE: Of the two children that are not - there
4. was no evidence of the two children in Ken-
5. tucky being dependent in any way upon the
6. decedent.
7. COURT: I don't understand what these cases say.
8. I'll grant that. Okay, Mr. Wharton.
9. MR. HODGE: This is the instruction, "mere happening
10. of an accident".
11. MR. WHARTON: In offering these instructions we do not,
12. on matters which we have objected to, we
13. do not waive our objections to none being
14. given because of lack of evidence.
15. COURT: All right, what about this one.
16. MR. GRECO: I assume they have something that covers
17. comparative negligence.
18. MR. LARGENT: We have an instruction on comparative neg-
19. ligence.
20. MR. WHARTON: Well, I tell you, we don't have one because
21. we didn't think it would ever get there.
22. MR. GRECO: No, the tree is a circumstance. The tree
23. does not have to be the sole proximate
24. cause, the tree is a circumstance to be

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1. considered . .
2. COURT: Where are you - oh, let's look at this one
3. first.
4. MR. LARGENT: Oh, didn't you finish the first one?
5. COURT: No objection to that one?
6. MR. LARGENT: That one is all right.
7. COURT: All right.
8. MR. LARGENT: You ought to just use the language of the
9. statute instead of trying to designate the
10. tree because, as a matter of fact, that
11. should be trees and brush - they all are to
12. be taken into consideration.
13. COURT: What is your objection?
14. MR. LARGENT: Well, if it's going to be granted you ought
15. to just use the language of the statute.
16. MR. WHARTON: I thought you were just talking about the
17. tree.
18. MR. LARGENT: We're talking about trees - the evidence
19. was trees and brush, it all was involved.
20. COURT: And honeysuckle.
21. MR. LARGENT: It all hangs out over the side of the road.
22. MR. GRECO: And also, our objection is - the trees need
23. not necessarily be the sole proximate cause
24. of the collision, it's a circumstance . .

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1. MR. WHARTON: You cannot find for the plaintiff . .
2. MR. GRECO: But, it's a circumstance.
3. MR. HODGE: Well, any act of negligence would have to
4. be the proximate cause.
5. MR. GRECO: That's true, but you could say the trees
6. weren't the proximate cause, the shrubs
7. wasn't the proximate cause, and the speed
8. wasn't the proximate cause, but when you com-
9. bine them altogether, they might be the prox-
10. imate cause.
11. COURT: If you add "and brush". It would read, "Un-
12. less you further believe that such trees
13. and brush obstructed the view of the ap-
14. proaching train to such an extent that it
15. was the sole proximate cause of the colli-
16. sion. You cannot find for the plaintiff
17. on the plaintiff's alleged negligence of
18. the defendant to clear the right of way."
19. Okay, Mr. Largent?
20. MR. LARGENT: I think that's all right.
21. MR. GRECO: I can argue around it.
22. COURT: Do you have proclamation?
23. MR. LARGENT: Yes. I had said now we go back to the pre-
24. sumption that the decedent exercised ordi-

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1. nary care. With that presumption then, I
2. think it's all right to follow with this.
3. He's presumed to have it, and then if he
4. doesn't do certain things, then he's guilty
5. of contributory negligence.
6. MR. WHARTON: Your Honor, this is based on the evidence.
7. In other words, the undisputed evidence
8. from the only man they put on is what this
9. man did, that they saw him approaching the
10. track and he drove on the track. This
11. shows what his duties were.
12. COURT: My objection to that one was that it says,
13. "in the absence of evidence." But, there
14. was evidence, so how can you - you can't
15. give an instruction contrary to what the
16. evidence was.
17. MR. LARGENT: Well, where it's a presumption . .
18. COURT: But, it says it's a presumption in the ab-
19. sence of evidence. Other than that, have
20. you got any objection to this one?
21. MR. LARGENT: No.
22. MR. WHARTON: This is taken from the Code Section.
23. COURT: 46.1-244.
24. MR. WHARTON: Now, Judge, we've got to explain something

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1. further to you. If you'll notice the anno-
2. tation you'll think our instruction was
3. wrong. But that case, the second annotated
4. case down there, was decided when that Code
5. Section was in a different form. We looked
6. back in the old Code and found it, but that
7. is a distinct and unquestionable . .
8. MR. HODGE: Your Honor, the forerunner of this 244 is
9. 254, and the last paragraph, if you'll read
10. the qualification on the last paragraph of
11. that, that's what that original case sus-
12. pends. And that language in that paragraph
13. has been in the Code until 1956, and I can-
14. not find where it's in the Code right now.
15. This was the Code in 1956, and this is
16. the language which that case was based on,
17. that language is in the Code all the way
18. back to about 1900.
19. COURT: And this section hasn't been amended?
20. MR. LARGENT: Judge, we're back - there's no evidence
21. that he failed to stop.
22. MR. WHARTON: But, he proceeded.
23. MR. LARGENT: This says it was his duty to stop and there
24. is no evidence he didn't stop. You don't

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1. have any evidence of that. The evidence
2. was he was coming up on the crossing at
3. eighteen feet.
4. MR. WHARTON: "And not to proceed until he could do so in
5. safety."
6. MR. LARGENT: But, that goes back to stop.
7. MR. WHARTON: I mean, this is one thing - he proceeded.
8. MR. LARGENT: He's not under any obligation to stop and
9. sit there forever.
10. MR. WHARTON: Well . .
11. MR. LARGENT: Not forever.
12. MR. HODGE: Well, not to proceed until he can do it in
13. a safe manner.
14. MR. GRECO: As long as he thinks it's in a safe manner.
15. He has a duty to exercise reasonable care,
16. not to . .
17. COURT: Are you entitled to that even though there
18. is no evidence to the contrary.
19. MR. HODGE: Well, the evidence is that he was proceed-
20. ing when the train was there.
21. MR. WHARTON: In other words, if he had stopped he was
22. violating the law when he proceeded. That's
23. what we're saying. The crux of the negli-
24. gence was, whether he stopped or whether he

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1. didn't is immaterial. He was not supposed
2. to proceed.
3. MR. LARGENT: Well, Judge, they're relying on this statute
4. and the statute specifically says he has to
5. stop. Now, they don't have any evidence of
6. that. Now, if I stop and then I exercise
7. ordinary care in proceeding, that doesn't
8. mean I have violated the statute. I mean,
9. if I've got things in front of me that keep
10. me from exercising the care necessary for my
11. safety, then I don't think they're entitled
12. to it. It doesn't mean he sits there for-
13. ever. I mean, otherwise he'd never be able
14. to . .
15. COURT: "And shall not proceed until he can do so
16. safely."
17. MR. LARGENT: Well, now, that has to be . .
18. COURT: In other words you're saying - well, here,
19. for instance, you're saying - the guy ran
20. into the train or the train ran into him,
21. there he didn't proceed when he could do so
22. with safety, because he got killed.
23. MR. LARGENT: Well, he could still have exercised ordinary
24. care. The train hit him, the train hit his

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car when it was on the track. Now, if he had stopped and he had looked and he had listened and he wasn't able to see, for instance, he wasn't able to see the light for the brush and the trees, I think that's a consideration. Just to put it the other way, everytime somebody would be in an accident, no matter how careful he was, he would be guilty of - he'd be precluded from a recovery.

MR. GRECO: Every stop sign, if you ever stopped at a stop sign and pulled out, under this instruction you'd be precluded from recovery, even if the guy came over the hill two hundred miles an hour.

MR. LARGENT: Oh, that's the other point I was going to make. And if the train is proceeding at a speed that's excessive under the circumstances, we have that factor.

COURT: All right, before you proceed to make a left turn, you have to stop and look. And if the man is exceeding the speed limit approaching you, can you go ahead? Are you guilty of negligence?

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1. MR. LARGENT: You can assume that he is complying with
2. the law, with the speed limit, you can
3. assume that he is obeying the law.
4. MR. HODGE: You have a railroad here, where there's no
5. way the railroad can do anything other than
6. go down the track. The question really is,
7. if this is a jury issue, is whether or not
8. he--and bear in mind he was proceeding with
9. due care, and that's what he's instructed--
10. if they decide he was proceeding and you
11. argue that he was proceeding with due care,
12. then he has not been guilty of negligence.
13. But, if they would decide with the train
14. coming to pull on out, that is not due care
15. and then by this instruction he should be
16. held guilty of negligence.
17. MR. GRECO: Well, I think with this instruction, Your
18. Honor, we would be entitled to the presump-
19. tion that he was not negligent, because
20. there's no evidence to the contrary that
21. he did not stop.
22. MR. LARGENT: It seems to me that would be reasonable.
23. It was presumed that he stopped, looked,
24. and listened - he's entitled to that pre-

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1. sumption under the law. This instruction
2. then would say that if the jury believed . .
3. MR. WHARTON: There's no presumption he stopped at the
4. place where he should have, because he was
5. seen moving there. And he moved on right in
6. front of the train. He violated this stat-
7. ute.
8. MR. LARGENT: Not necessarily. This statute is stopping
9. fifty feet . .
10. MR. WHARTON: Yeah, but he moved out though.
11. MR. LARGENT: Well, that's a question . .
12. MR. HODGE: Stopping fifty feet or fifteen feet where
13. it can do some good. Now, I think the pic-
14. tures and so on would indicate to the jury
15. whether stopping back at fifty feet, and I
16. will grant there's no evidence that he did
17. not stop back at fifty feet, but the evi-
18. dence would be that if he stopped back at
19. fifty feet, then he stopped at a place he
20. couldn't see and he didn't obey the statute.
21. MR. GRECO: I think the evidence will further show that
22. if he stopped back at fifteen feet he could
23. not see.
24. MR. HODGE: I don't believe the evidence is that, be-

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1. cause the evidence was that he was seen
2. at eighteen feet.
3. MR. GRECO: That's where we're going to run into the
4. problem. I think the evidence will show
5. that he couldn't see at that point.
6. MR. HODGE: Well, I don't think there's any question
7. that he could look down the track at that
8. point. You may argue that there's a ques-
9. tion as to whether he could see . .
10. MR. GRECO: Or how far he could see.
11. MR. HODGE: Well, I think the evidence of the pictures
12. is clear.
13. MR. LARGENT: Well, no, it isn't conclusive. You see,
14. all your pictures are slanted southeast.
15. Not one single picture is taken headed east.
16. You so labeled them, but there isn't a sin-
17. gle one, everyone of them gave a distorted
18. view of how far down the track you can see.
19. MR. HODGE: A man's neck turns. When I go to a crossing
20. I don't continue looking straight or direct-
21. ly ahead, I look in the direction in which
22. the train is coming.
23. MR. LARGENT: No, but if I'm driving this way, I'm not
24. going to get the view you all got in the

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1. pictures.
2. COURT: How do you get around the words, "not pro-
3. ceed until he can do so safely."
4. MR. LARGENT: Well, is that part of the statute?
5. COURT: Yes.
6. MR. LARGENT: If that's part of the statute, I don't know
7. how you get around it. That's never been
8. the law as I knew it. I always was under
9. the impression that there was no responsi-
10. bility to wait forever and that is what I
11. was objecting to.
12. COURT: Now, it's less if you're driving a bus.
13. "The driver of any motor vehicle carrying
14. passengers for hire or a school bus carrying
15. any school children or any vehicle carrying
16. explosives, before crossing any railroad
17. shall stop within fifty feet, but not less
18. than fifteen, from the nearest rail and while
19. so stopped shall listen and look in both
20. directions of all such track for approaching
21. vehicle and for signals indicating the ap-
22. proach of the train and shall not proceed
23. until he can do so safely. After stopping
24. as required herein and upon proceeding when

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1. it is safe to do so, the driver shall cross
2. only . ." - that tells you what to do, but
3. here you have to do everything.
4. MR. WHARTON: Well, you have to. That was just for a sit-
5. uation like this.
6. MR. LARGENT: That's what troubles me. The safety still
7. has to go back to the basic proposition that,
8. "proceed until he can do so in safety," well,
9. the test of that is what a reasonable man
10. would do under the circumstances. It does
11. not mean absolute safety, or at least it
12. never has. All traffic would have to come
13. to a standstill or be in violation of that
14. statute.
15. COURT: All right, when you're coming off a private
16. road onto the highway. You will not proceed
17. until you can do so in safety. The fact
18. that you have an accident is liable to lead
19. the jury to conclude that you couldn't do
20. so safely.
21. MR. LARGENT: Well, that's it, that's right.
22. MR. GRECO: And therefore the plaintiff would never
23. recover at an automobile crossing. But,
24. let's suppose that a man comes out of a

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1. crossing and he perceives that he can do
2. so in safety. It's what he, a reasonable
3. man, could do. That's the standard. Now,
4. if a man comes over a hill one hundred yards
5. away when that guy comes out of that road,
6. out of his driveway onto that road, and this
7. man is going 125 m.p.h., then that has . .
8. COURT: Did you have this case, Chesapeake and Ohio
9. Railroad, 140 Va.
10. MR. WHARTON: Well, that's when the law was different.
11. See how they changed that, I mean, the sta-
12. tute.
13. MR. LARGENT: Well, all that says is he's not guilty as
14. a matter of law to contributory negligence
15. for failure to stop. Well, that's still
16. the law.
17. MR. WHARTON: No, it isn't.
18. MR. LARGENT: Yes, it's still the law.
19. COURT: Well, if that's the case, it's not proper.
20. MR. WHARTON: No, the reason we've shown that back one,
21. that case was decided, the statute was dif-
22. ferent, Judge. The language of the statute
23. itself said that.
24. MR. GRECO: But I think there's another statute that

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1. says you do not have to stop for a railroad
2. crossing.
3. COURT: Why don't we take a break for lunch and you
4. all can see if you can find that statute.
5. MR. HODGE: Quite frankly, I didn't think they would
6. take that provision out without putting it
7. back someplace else. And I looked and I
8. couldn't find it.
9. MR. GRECO: I thought I saw it.
10. MR. HODGE: Maybe you can. I thought it would be under
11. the railroad section, but I couldn't find
12. it there.
13. MR. GRECO: It seems to me it was about six or seven
14. sections in front of this one.
15. (Luncheon Recess)
16. COURT: What have you all come up with?
17. MR. LARGENT: Nothing further. It's still our opinion
18. that proceeding in safety is qualified by
19. ordinary care, but I don't get it out of
20. the statute.
21. COURT: Well, it almost says he's guilty as a mat-
22. ter of law of contributory negligence.
23. MR. HODGE: Well, Your Honor, I believe a situation
24. that I would foresee where you could argue

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1. I think very effectively that he proceeded
2. using ordinary care is a situation at some
3. crossing where the view down the track is
4. obstructed, either because another train
5. is on the adjoining siding or where there
6. is a curve such that you have a very limited
7. view down the track. It's not a . .
8. COURT: Then you're saying what is reasonable care.
9. He proceeds in what appears to a reasonably
10. prudent man to be in safety.
11. MR. HODGE: Well, I believe that is the intent of the
12. legislature.
13. COURT: That isn't what it says though. Not to
14. proceed until he can do so in safety.
15. MR. WHARTON: That is exactly what it means, isn't it?
16. I mean, in other words . .
17. COURT: Well, now, you and Mr. Hodge had better get
18. your heads together, because he says one
19. thing and you're saying another thing.
20. MR. WHARTON: This instruction requires, when a signal
21. is given, that the man stop and not proceed.
22. COURT: Well, actually, it doesn't even require the
23. signals.
24. MR. WHARTON: Yes, it does.

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1. MR. HODGE: That's what we certainly cite as the require-
2. ment for stopping. There are certain condi-
3. tions for stopping.
4. COURT: All right.
5. MR. LARGENT: This is going to refer to our instruction,
6. isn't it?
7. MR. WHARTON: Yes.
8. MR. GRECO: Well, maybe we should have an instruction
9. on safety. Safety is that which a reason-
10. ably prudent man would do under the same
11. circumstances, or the same or similar cir-
12. cumstances.
13. COURT: It's funny there hasn't been a case decided
14. under this since the statute was adopted.
15. MR. LARGENT: What does it do to that instruction to say,
16. "not to proceed . ." - it's not very well
17. put, but I'm just trying to think of a way
18. to put it in, "Not to proceed until he can
19. do so in safety and exercising ordinary care."
20. MR. HODGE: Well, I guess getting back to the fact that
21. the signal was given of an approaching train
22. and there's really no way you're going to
23. be able to go over that crossing in safety.
24. MR. WHARTON: That's exactly what they're saying.

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1. MR. LARGENT: Well, we've got two things. We've got a
2. question . .
3. COURT: I hadn't even read the conditions.
4. MR. HODGE: And taking that hypothetically, even if
5. the track is blind on down on a curve, if
6. you hear that signal you shouldn't be going
7. across the track.
8. MR. GRECO: Yes, but if you hear that signal and you
9. can - if you think you can proceed across
10. that track safely, you may do so at your
11. own peril.
12. MR. WHARTON: That's what this is for. That's what this
13. statute is for.
14. COURT: I've changed my mind now, because it says
15. that you've got to stop and you can't pro-
16. ceed if there is a mechanical signal or a
17. crossing gate or the signals have been giv-
18. en or the train is visible and is in a
19. hazardous proximity or you can't wander
20. around the gate or barrier. If he does,
21. then he's had it.
22. MR. GRECO: They're talking about a closed - well, a
23. signal . .
24. COURT: That's one of the things. "If the railroad

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1. train approaching such crossing gives the
2. signals as required by 56-414," then he's
3. guilty of contributory negligence.
4. MR. LARGENT: Where are you reading from now?
5. MR. HODGE: You've got the one that's been revised.
6. COURT: Oh, I see. It says, "Under these circum-
7. stances, if any one of those conditions ex-
8. ist," . .
9. MR. LARGENT: Let's see, that's the three hundred and
10. six hundred statute.
11. COURT: That's right. All right, but now, that
12. thing has got to be modified - no, no. If
13. you've got the signal requirements, then
14. that's it.
15. MR. WHARTON: Yes, as long as the signals are given, see.
16. COURT: You don't have comparative negligence.
17. MR. WHARTON: That's right.
18. MR. GRECO: As long as the instructions were given in
19. accordance with law.
20. MR. WHARTON: Well, in accordance with instruction number
21. so and so.
22. MR. LARGENT: In other words, this will go back to our
23. instruction.
24. COURT: Okay.

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1. MR. WHARTON: This one is on the crossbuck.
2. COURT: Is this going to confuse them? They've
3. got to give signals from the engine, but
4. you say they're not required to place any
5. warning signals or devices at the crossing.
6. MR. WHARTON: That's right. The reason, Judge, I'm parti-
7. cularly anxious to have this one is on
8. account of this publicity that's been around
9. here, you know, about making us put up a
10. blinker light, or something like that.
11. COURT: Is this the law?
12. MR. WHARTON: Yes sir.
13. MR. GRECO; What about the sign? Aren't they also re-
14. quired to have that sign 230 feet . .
15. MR. WHARTON: Well, we've shown we had that. That's the
16. highway department's responsibility.
17. COURT: Okay.
18. MR. WHARTON: This one is taken from the Southern Railway
19. Company v. Lacey, back in 94 Va.
20. MR. LARGENT: We object to that. The case must have had
21. a lot more to say on this than just this.
22. MR. WHARTON: That's true, isn't it?
23. MR. LARGENT: It's not any truer than my right of presump-
24. tion of ordinary care.

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1. MR. HODGE: I think you've got a different standard for
2. a train because it's on the tracks and so
3. on and it didn't have any duty . .
4. COURT: I'm going to refuse this one. If there
5. wasn't anything else in the case at all you
6. might be able to put that in there. Okay.
7. Don't we have that one in there once?
8. MR. WHARTON: No sir, that gave the statutory, but that
9. didn't say that's all we were supposed to
10. do.
11. MR. LARGENT: Well, this is what I've been harping on all
12. along. You still cannot escape ordinary
13. care. That statute is not minimal, there
14. are other duties you have to perform. You
15. don't even have it correct in the first
16. place. It isn't sufficient to blow the
17. whistle at the whistle post, that's not
18. what the statute says.
19. COURT: Yes, I'll refuse this one.
20. MR. HODGE: Are you saying that your instruction says
21. that the only warning they were required to
22. give was the statutory warning under 414?
23. MR. LARGENT: No, I'm just saying that our section covers,
24. this covers the situation as far as the

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1. whistle is concerned. My objection to this
2. is that I don't think it's the law. You
3. can't just blow at the crossing or at the
4. whistle post.
5. MR. HODGE: Well, I think we can modify it and say,
6. "giving the signals required by your in-
7. struction."
8. MR. LARGENT: No, that's not all I'm saying. "And no fur-
9. ther warning need be given of the train's
10. approach to the crossing."
11. MR. WHARTON: We want to modify that.
12. COURT: All right, take a look at this one. "The
13. duty of the driver where there is obstruct-
14. ed vision . ."
15. MR. LARGENT: Are they admitting that it was obstructed?
16. MR. GRECO: That flies in conflict with that statute,
17. within fifty feet - you must stop within
18. that time.
19. MR. WHARTON: This is so whether the signal was given or
20. not.
21. MR. HODGE: If they believe that we didn't give our
22. signals.
23. COURT: Do you object to this one?
24. MR. LARGENT: I have no objection.

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1. COURT: Don't you think there ought to be an in-
2. struction on the comparative negligence?
3. MR. WHARTON: Well, I thought he had that there.
4. COURT: I mean, just setting that forth as a gen-
5. eral thing. This thing here precludes com-
6. parative negligence.
7. MR. WHARTON: Well, you've got a comparative negligence
8. instruction though to take care of it.
9. COURT: Well, that's what I'm asking, I don't be-
10. lieve we've got on.
11. MR. WHARTON: Wouldn't it be a short one something like
12. this - I'm just thinking outloud.
13. COURT: In the language of the statute.
14. MR. WHARTON: "If you believe the defendant was guilty
15. of some negligence as described in other
16. instructions, if he didn't blow the whistle
17. or . ."
18. MR. LARGENT: Is that the one "contributory, if any, is
19. not a bar to recovery, but must be consider-
20. ed in mitigation."
21. COURT: Yes.
22. MR. WHARTON: Well, can't that one be worked on and fix-
23. ed?
24. COURT: The one he gave?

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1. MR. WHARTON: The one they gave. Could you add this in,
2. "Unless you believe the statutory signals
3. were not given and in that event the con-
4. tributory negligence goes . ."
5. COURT: ". . in mitigation. It does not bar recov-
6. ery." But you wouldn't have this last par-
7. agraph then.
8. MR. WHARTON: Yes, you would.
9. MR. LARGENT: That destroys what you're saying in the
10. first place.
11. COURT: Yes, you'd have to take that one out. You
12. can do that or just use the language of the
13. statute. "If you believe that the required
14. signals were not given . ."
15. MR. LARGENT: It seems to me like we've said it, because
16. this . .
17. MR. WHARTON: I think he's already said it.
18. COURT: Where?
19. MR. LARGENT: In this instruction. That's all the statute
20. says, "it shall be considered in mitigation
21. of damages." I think that's the only lan-
22. guage.
23. COURT: Well, okay.
24. MR. HODGE: We'd like to offer this revised one here.

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1. MR. LARGENT: We object to that. There are other things,
2. that ignores the necessity of the light, and
3. that's a warning.
4. COURT: I'll refuse that one.
5. MR. HODGE: We object to the refusal.
6. MR. WHARTON: I did overlook this one. I don't believe
7. it's covered. It's a stock instruction.
8. MR. HODGE: It's the stock instruction on the preponder-
9. ance of the evidence.
10. MR. LARGENT: The same thing would apply to us on contri-
11. butory negligence. Do we have anything?
12. MR. WHARTON: You all have got one.
13. MR. LARGENT: Here it is. Okay, all right, no problem.
14. COURT: That's all then.
15.
16. (Further Objections to Instructions
Dictated While Jury Deliberated.)
17.
18. MR. WHARTON: The defendant objects to the refusal of
19. Instruction B on the ground that it's a
20. correct statement of the law. And without
21. the giving of this in this particular case,
22. the jury would be allowed to speculate.
23. And counsel argue that further signals and
24. warnings should be given, even though there

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1. is absolutely no evidence as a basis for
2. the necessity, or any showing of a necessity,
3. for the giving of any additional signals.
4. Again, I state that the jury would be allow-
5. ed to speculate on this and could say we
6. were negligent in not giving signals. The
7. same objection is to the failure to give
8. Instruction A. The failure of the Court to
9. give Instruction C is objected to on the
10. ground that it's a correct statement of the
11. law. It calls to their attention that while
12. the rights of both the automobile and the
13. train are reciprocal, that the railroad can-
14. not cut to the right or left as an automo-
15. bile can, nor can it stop, and for that
16. reason, if no other, it's necessary for a
17. person operating an automobile on the high-
18. way to yield to a train or suffer the con-
19. sequences. Without this instruction the
20. jury could, particularly in light of a speed
21. instruction and a lookout instruction, em-
22. bodied in Instruction 6, say that we were
23. the ones who had to keep a lookout so we
24. could in the event of an approaching auto-

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1. mobile. The giving of Instruction #6 is
2. objected to on the ground that there's no
3. evidence to support paragraph 1 of the in-
4. struction, concerning the brush, as there's
5. no evidence showing that the brush and trees
6. in any way affected or obstructed the view
7. of the approaching train. And the pictures
8. that were introduced in evidence by the
9. plaintiff show that the brush and trees re-
10. ferred to, but not seen or scantly seen
11. therein, could in no way have obstructed
12. the view of the approaching train. Para-
13. graph 2, when it speaks of not foreseeing
14. any excessive or unreasonable speed under
15. the circumstances, leaves it entirely to
16. the jury to speculate what would be exces-
17. sive and what would be unreasonable when
18. they themselves have shown from their evi-
19. dence that the speed limit at that point as
20. established by the railroad was fifty miles
21. an hour. They have not even shown or inti-
22. mated that speed had anything whatsoever to
23. do with the accident and certainly could not
24. be considered as a proximate cause. The

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1. law in Virginia is that speed is not appli-
2. cable in a crossing case, and I believe the
3. authority for that is 117 Va., the Zell case.
4. Paragraph 3 stands by itself when it says
5. to keep a reasonable lookout for vehicles
6. approaching the crossing. It would indicate
7. that if you saw a vehicle approaching the
8. crossing that it would be necessary to stop.
9. Irrespective of the movement of the vehicle
10. or what would be the result of a reasonable
11. lookout, it would allow the jury to find
12. for the plaintiff. And there is absolutely
13. no evidence in this case to show, first,
14. that a reasonable lookout was not kept to
15. base such an instruction on, that the rea-
16. sonable lookout was not kept, or if one was
17. kept what could have been done. To the con-
18. trary, the undisputed evidence is that a
19. lookout was kept, that the vehicle was seen
20. approaching and the brakes were applied.
21. Paragraph 4, there is no evidence to give
22. this instruction as the undisputed evidence
23. in this case is the statutory signals were
24. given. Instruction #14 is objected to on

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1. the grounds that there is absolutely no evi-
2. dence to support the fact that statutory sig-
3. nals were not given. There is not even any
4. negative evidence that would allow the jury
5. to consider that the signals were not given.
6. To the contrary, the evidence shows without
7. question they were. The defendant excepts to
8. the instruction on damages on the grounds that
9. the evidence shows that two of the children
10. were not residing with and dependent upon the
11. decedent, and for the other reasons voiced in
12. prior objections. In addition to the excep-
13. tions herein enumerated, the defendant renews
14. all objections previously made.
15. (Instructions Read to Jury, Closing Arguments of Counsel,
16. Jury Retires to Deliberate and Returns With Verdict as
17. follows: "We, the jury, find for the plaintiff in the sum
18. of $350,000.00 and apportion this amount as follows:
19. $100,000.00 to wife, Lucy M. Greenfield; $50,000.00 to
20. daughter, Bertha A. Greenfield; $50,000.00 to Judy M. Green-
21. field; $50,000.00 Nancy L. Greenfield; $50,000.00 Robin B.
22. Greenfield; $50,000.00 Walter L. Greenfield."
23. COURT: Is that your verdict? (Affirmative reponse)
24. All right, your verdict will be recorded

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1. and I certainly want to thank you all.
2. MR. LARGENT: Your Honor, we move for judgment on the
3. verdict.
4. MR. WHARTON: Your Honor please, we move the Court to set
5. aside this verdict as being contrary to the
6. law and the evidence. We point out the
7. error in not sustaining the defendant's mo-
8. tion to strike the evidence and enter sum-
9. mary judgment at the conclusion of the plain-
10. tiff's case and at the conclusion of the
11. entire case. For misinstruction of the
12. jury in the refusal of certain instructions
13. which we noted our exception to and for the
14. giving of instructions, particularly the
15. instruction on the failure, allowing the
16. jury to speculate on the failure to give
17. the statutory signals. And also, of course,
18. being excessive. I would like leave of
19. Court, if I may, to put these grounds in
20. writing and possibly add additional grounds
21. that might occur to me before that is done.
22. And if the Court would like to hear argu-
23. ment, to assign a date for arguments after
24. I've had an opportunity to - if the Court

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1. wanted to hear arguments, I'd prefer to
2. have the record taken off.
3. COURT: All right, Mr. Largent.
4. MR. LARGENT: We would oppose the motion, but would only
5. ask for sufficient time - I don't know what
6. the Court has as far as a schedule, but
7. give us sufficient time to answer after
8. they file their motion.
9.
10. (Court Set August 20 for Filing of Memorandum
September 6 for Plaintiff's Reply
September 9 for Defendant's Reply,
11. and Set for Argument on Motion on
September 9)
12.
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