

TRANSPORTATION

May 2013

IN THIS ISSUE

This month's Transportation Committee Newsletter article written by Vice Chair of Rail Tim Daniels details a very interesting case involving a railway crossing accident and how new technology played a dramatic role in resolving the case. The piece of technology involved is a locomotive video recorder which provided accurate and reliable video and audio information showing the decedent driver's actions and resulting in summary judgment being awarded to the railroad.

The Locomotive Video Stars in Successful Motion for Summary Judgment*



ABOUT THE AUTHOR

Tim Daniels concentrates his practice on railroad litigation, premises liability, pharmaceutical and medical device liability, complex litigation, products liability, and environmental and toxic tort. His railroad practice has for many years included the defense of employee lawsuits arising under the Federal Employers' Liability Act (FELA), involving both traumatic injuries and a variety of occupational injuries such as repetitive stress, asbestos exposure, and chemical exposure. Tim is the current president of the New Orleans Bar Association and he is the Vice Chair of Rail and Diversity for the Transportation Committee. He can be reached at tdaniels@irwinllc.com.

ABOUT THE COMMITTEE

This is a brand new IADC Committee that was formed to combine practices of aviation, rail, maritime with trucking together to serve all members who are involved in the defense of transportation including aviation companies (including air carriers and aviation manufacturers), maritime companies (including offshore energy exploration and production), railroad litigation (including accidents and employee claims) and motor carriers and trucking insurance companies for personal injury claims, property damage claims and cargo claims. The Committee is dedicated to taking advantage of networking and referral opportunities as well as providing substantive knowledge to our members.

Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



Donna L. Burden
Vice Chair of Trucking and Publications
Burden, Gulisano & Hickey, LLC
(716) 849-6800
dlb@bghattorneys.com

The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

The accident that is the subject of this case occurred on June 18, 2010 at approximately 1:25 p.m., at a railroad crossing near Independence, Louisiana. At the time of the accident, the decedent driver, an 18-year-old, unlicensed driver who was seven months pregnant, was operating a 2002 Ford Windstar with her three younger brothers as passengers. The decedent driver was traveling south on a road that ran parallel to adjacent railroad tracks located to her right. As the vehicle approached the intersection, there was a yield sign, and the driver could only go straight or turn right toward the crossing; there was no left turn. Between the yield sign and the railroad tracks, there was a railroad advance warning sign, a stop sign, and a cross buck sign. After the decedent driver turned right, she traveled past each of the traffic signs, without stopping or slowing, and drove directly into the path of the southbound Amtrak train. Unfortunately, the Amtrak train collided with the minivan and all four occupants were killed in the accident.

A critical fact in this case, which distinguished it from most other cases, was that the Amtrak locomotive involved in this incident was equipped with a camera that recorded the events prior to, during, and after the accident. Therefore, unlike many other crossing cases, in which the court is required to evaluate conflicting expert reports, or indeed, conflicting eyewitness accounts, this Court had the benefit of a video, which showed exactly how the accident occurred. The locomotive video made the Court a virtual eyewitness to the unfortunate truth of this tragic accident. Despite the significant efforts and expense used by the plaintiffs' attorney, no amount of expert manipulation, animation, or editing could change what was revealed in the locomotive video of the June 18, 2010 accident. The unfortunate – but

undisputed – truth told by the locomotive video shows the young, decedent driver traveling past an advanced warning sign, a stop sign, and a cross buck sign without stopping or slowing, and driving directly into the path of the southbound Amtrak train, giving the train engineer no opportunity to avoid the accident. Additionally, the locomotive video presented the Court with clear evidence of the train's operation: speed, braking and horn; and the conditions at the crossing: a well-kept railroad right of way and no trees or vegetation obstructing the view of a motorist at the crossing.

The Commencement of Litigation

Approximately two weeks after the accident, with no attempt to do any meaningful investigation, the mother and her only surviving child filed a lawsuit against Amtrak, Illinois Central, the State of Louisiana, and the Parish of Tangipahoa. With the intent of capitalizing on the emotions of the local community, and its clear affection for the young, now deceased residents, the plaintiffs filed suit in the nearby state court. However, being very much aware of the overwhelming sympathy of the local community, Amtrak removed the case to federal court. Of course, in their lawsuit, the plaintiffs made virtually every allegation of negligence against the defendants that could be made. The primary allegations against Amtrak were speeding and the failure to sound its horn loudly and timely. The primary allegations against Illinois Central were the improper maintenance of its tracks, the failure to have adequate warning devices at the crossing, and the failure to control the speed of the Amtrak train.

In an effort to confront plaintiffs with the unfortunate reality of their case before

significant money had been spent on court costs, discovery and experts, Amtrak invited the plaintiffs' attorney and his clients to review the locomotive video of the accident. The plaintiffs' attorney chose to review the video without his clients. After reviewing the video, the dramatically clear visual evidence of the decedent driver disregarding all traffic signs at the crossing and never stopping or slowing to look for a train, the plaintiffs' attorney clearly recognized the significant liability problems in the case. However, apparently confident that the sympathetic appeal of the case would prevail, the attorney embarked upon an immediate and protracted litigation strategy. So, the plaintiffs' quest to refute the indisputable truth of the case commenced.

Despite the existence of the event recorder, the striking locomotive video, and photographs taken at the crossing, the plaintiffs' attorney embarked upon an incredible course of denial and distortion. Plaintiffs proceeded to obtain affidavits from several local residents affirmatively stating that there were hanging trees obstructing the view of an approaching train, that the design of the roadway and the position of the signs made it difficult to see an approaching train, and that the trains often did not sound their horns until just before reaching the crossing. Plaintiffs also presented evidence of several prior accidents at the crossing. Plaintiffs then hired two experts in the case, an accident reconstructionist and an audiologist. The accident reconstruction expert took several videos of various vehicles using the crossing and essentially opined that due to sight line issues, the habitual failure of other drivers (including police) to stop at the stop sign, and the history of prior accidents, there should have been gates and lights at the crossing. It is important to note that there was undisputed evidence of another available crossing with gates and lights just one-half mile and a few

short minutes from the crossing where the accident occurred. Additionally, the plaintiffs' audiology expert opined that due to the routine noise inside the car and the sound proof construction of the minivan, the train's horn (even if being sounded within the legal limit) could not be heard inside the vehicle. Consequently, the experts were advancing a scenario, completely refuted by the physical evidence, in which the decedent driver could not have seen or heard the approaching train in time to avoid the accident.

The Railroad Defendants' First Motion for Summary Judgment

After the plaintiffs rejected early attempts to resolve the case, and demonstrated a clear path toward litigation, based on sympathy, discovery began. The first deposition to be taken was the deposition of the decedent driver's mother, who was also the lead plaintiff in the case. Aside from the locomotive video, the mother's deposition testimony would provide one of the most valuable forms of evidence supporting the railroad defendants' motion for summary judgment. Remarkably, during her deposition, it became clear that the plaintiff/mother had not seen the locomotive video and, in fact, she was not even aware of the existence of the locomotive video. The plaintiff/mother proceeded to give sworn deposition testimony that on more than fifty (50) prior occasions, when she had ridden as a passenger in the minivan with her daughter driving, on each occasion, sometimes with a train approaching, the decedent driver had been able to use the same crossing safely and without incident. She also testified that on each prior occasion, her daughter had always stopped at the stop sign and looked both ways for approaching trains. Still further, the mother testified that when stopped at the stop sign at the crossing, one could both see and hear an approaching train much farther away

than the train was when the decedent driver approached the same stop sign on the day of the accident.

Using the locomotive video and the plaintiff/mother's deposition testimony, Amtrak and Illinois Central moved for summary judgment, contending that the sole cause of the accident was the decedent driver's failure to stop at the stop sign, look and listen for an approaching train, and yield the right of way to the train, all as required by Louisiana law. The railroad defendants relied upon clear Louisiana law regarding the duty of a motorist at a railroad crossing. LSA R.S. 171 (A) provides as follows:

A. Whenever any person driving a motor vehicle approaches a railroad grade crossing **under any of the circumstances stated** in this Section, the driver of such vehicle **shall stop** within fifty feet but not less than fifteen feet from the nearest rail of such railroad, and **shall not proceed until he can do so safely**. The foregoing requirements shall apply when:

(1) A clearly visible electric or mechanical signal device gives warning of the immediate approach of a railroad train.

(2) A crossing gate is lowered or when a human flagman gives or continues to give a signal of the approach or passage of a railroad train.

(3) **A railroad train approaching within approximately nine hundred feet of the highway crossing emits a signal in accordance with R.S. 32:168, and such railroad train, by reason of its speed or nearness to such crossing, is an immediate hazard.**

(4) **An approaching railroad train is plainly visible and is in hazardous proximity to such crossing.**

(5) A stop sign is erected at the approach to a railroad grade crossing.

Consequently, if any one of the five (5) described circumstances existed at the time of the accident, the decedent driver was required to stop at the crossing until she could cross safely. As the evidence in this case clearly indicated, not one, but three (3) of the five (5) enumerated circumstances (as highlighted above) existed at the time of the accident, and each required the decedent driver to stop at the railroad crossing. Nevertheless, to avoid the introduction of fact issues to defeat their motion for summary judgment, the railroad defendants focused the Court's attention on item No. 5, the indisputable presence of a stop sign at the crossing.

Further, to counter plaintiffs' anticipated contention that the engineer should have stopped or slowed down as the vehicle approached the crossing, the railroad defendants presented the clear provision of Louisiana law that a train engineer is not required to stop or slow for an approaching motorist. In fact, it is "well established in [Louisiana] jurisprudence that a train crew can presume that vehicles approaching railroad crossings will obey the law and stop in time to avoid an accident. [Citations omitted] Additionally, the train need not slow down at all or attempt to stop upon seeing a vehicle approaching an upcoming crossing." *LeJeune v. Union Pacific R.R.*, 712 So.2d 491 (La. 4/14/98).

After a hearing on the motion for summary judgment, the Court took the matter under advisement. However, it is important to note that during the briefing before the Court in plaintiffs' opposition memorandum, and in an attempt to argue liability against another defendant, it became clear that despite their protestations to the contrary, plaintiffs were very much aware that the only person

responsible for this accident was the decedent driver. In making a liability argument against the motion for summary judgment filed by the State of Louisiana, the plaintiffs made the following argument:

Given that [the Mother] testified that she witnessed her daughter stop, look, and listen at the crossing, and that she was always a careful driver, it would reason that on this occasion [the decedent driver] was momentarily inattentive.

Consequently, it was clear that plaintiffs understood that since the decedent driver had used the crossing safely on more than fifty (50) prior occasions, by stopping at the stop sign each time, the only reason for the accident on this occasion, and the sole cause of the accident, was the decedent driver's failure to stop and look for an approaching train.

The Railroad Defendants' Second Motion for Summary Judgment

While the motion for summary judgment was being considered by the Court, discovery in the case continued. Plaintiffs had already been provided with the event recorder download to show the speed of the train, the emergency braking, and the sounding of the horn prior to the accident. The evidence was clear that the train was operating within the federal speed limit at the time of the accident. In that respect, the applicable federal jurisprudence provides that “when a train is operating within the maximum speed limits set by regulations promulgated pursuant to the FRSA, state law claims for excessive train speed and failure to maintain control of the train are preempted and fail as a matter of law.” *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993). Therefore, since the

Amtrak train was traveling within the federal speed limit at the time of the accident, the plaintiffs could not argue that the train was speeding

Furthermore, during subsequent discovery, the railroad defendants obtained documents and deposition testimony to establish that the advance warning sign and cross buck sign at the crossing had been installed and paid for with federal funds many years before the accident. Under the applicable federal jurisprudence, the United States Supreme Court has held that where the evidence establishes that federal funds are expended for the installation of warning signs or devices at a railroad crossing, state law claims based on the adequacy of those warning devices are preempted by the FRSA. See *Norfolk Southern Railway Co. v. Shanklin*, 529 U.S. 344, 347, 353-354, 120 S.Ct. 1467, 146 L.Ed.2d 374 (2000). While the state can “revisit[] the adequacy of devices installed using federal funds . . . [and] install more protective devices at such crossings with their own funds or with additional funding from the FHWA[, w]hat States cannot do—once they have installed federally funded devices at a particular crossing—is hold the railroad responsible for the adequacy of those devices.” *Id.* at 358. Thus, absent additional action by the state, the warning devices are deemed adequate as a matter of law. Consequently, since federal funds had been used to pay for the installation of the signs at the crossing in the instant case, plaintiffs could not argue, as plaintiffs' reconstruction expert had attempted to argue, that the warning devices at the crossing were inadequate.

Also, in further discovery, it was clearly established that the locomotive horn was tested on the day after the accident, and found to be performing at 109 decibels, well within the decibel range required by federal law.

Federal law provides that “[e]ach lead locomotive shall be equipped with a locomotive horn that produces a minimum sound level of 96 dB(A) and a maximum sound level of 110 dB(A) at 100 feet forward of the locomotive in its direction of travel.” 49 C.F.R. § 229.129. Therefore, since the Amtrak locomotive horn was being sounded at a level within the range required by federal law, the plaintiffs could not argue, as their audiology expert had attempted to argue, that the Amtrak horn needed to be sounded at a higher decibel level.

Consequently, based upon the applicable federal law, the railroad defendants filed a second motion for summary judgment contending that the plaintiffs’ arguments regarding the speed of the train, the adequacy of the warning devices, and the sounding of the horn were preempted. The State and Parish filed separate motions for summary judgment, which focused on their unique status and also adopted the arguments of the railroad defendants.

The Trial Court's Decision and the Appeal

In October of 2012, the Court granted the pending motions for summary judgment, dismissing all of plaintiffs’ claims against all defendants. In the reasons for judgment, the Court stressed the testimony of the mother, the locomotive video, and the evidence presented in support of federal preemption.

Plaintiffs filed a motion for reconsideration, which the Court properly treated as a motion to alter or amend under Rule 59(e) of the Federal Rules of Civil Procedure. In support of their motion, the plaintiffs submitted the

Rule 30(b)(6) deposition testimony of both Amtrak and Illinois Central in which plaintiffs’ counsel simply restated his legal arguments, but obtained no new or relevant testimony from the witnesses. Plaintiffs also submitted the deposition testimony of two residents and plaintiffs’ investigator, who simply restated the statements from their affidavits previously submitted to the Court. Plaintiffs then attacked the test results of the locomotive horn, and the use of the mother's deposition testimony in support of the railroad defendants’ motions for summary judgment, arguing for the first time that the witness did not understand English very well. The Court denied plaintiffs’ motion to alter or amend the judgment, finding no new evidence, and nothing contrary to the previous ruling on defendants’ motions for summary judgment. In the reasons for judgment, the Court reiterated the finding that the locomotive horn was tested in accordance with the applicable federal law on the day after the accident. With respect to the mother's deposition testimony, the Court also noted the mother had been provided with an interpreter at her deposition. Plaintiffs have now filed a Notice of Appeal to the United States Court of Appeals for the Fifth Circuit, so the case is currently on appeal.

**Cecilia E. Alfaro, et al. v. National Railroad Passenger Corporation, et al., U.S. District Court, Eastern District of Louisiana, Case No. 10-1912*

PAST COMMITTEE NEWSLETTERS

Visit the Committee's newsletter archive online at www.iadclaw.org to read other articles published by the Committee. Prior articles include:

MARCH 2013

Driving Logs: Can Deficiencies Expose Motor Carriers and Their Drivers to Criminal and Civil Liability?

Mary Anne Mellow and Natalie J. Kussart

FEBRUARY 2013- DOUBLE ISSUE

The MCS-90 Endorsement: Protecting the Public from Motor Carrier Negligence in the Absence of Insurance Coverage

David M. Wilson and Drew Feeley

Keep on Trucking- Deceit, Speculation and Discovery Abuse Result in Exclusion, Sanctions and Dismissal

Michael H. Gladstone and J. Matthew Haynes, Jr.

NOVEMBER 2012

So You Think You'll Be Sued – A Practical Checklist To Help Navigate The E-Discovery Labyrinth

Richard M. Dunn and Mary Teresa Soltis