

November 13, 2006

Trial Report

Railroad settles fatal crash case for \$37.5M Plaintiffs rejected \$25M offer during eight-week trial

By Anne C. Vitale

After an eight-week trial and nearly two days of jury deliberations, Kansas City Southern Railway Co. agreed to a \$37.5 million settlement in a Jackson County case over a train collision that killed a 5-year-old girl and left her mother and three sisters severely injured.

Two weeks before the collision, the railroad began installing lights and gates at the crossing where the accident occurred in Arcadia, La. But the railroad took the gates down, turned off the lights and "inexplicably" placed black plastic bags over the lights instead of turning them on, said Grant L. Davis of Kansas City, lead attorney for the family. Since the silhouettes of the lights were still visible, the plaintiffs argued that the bags created an illusion that the dark lights were not flashing - indicating it was safe to cross.

"The evidence of fault against KCS was overwhelming," Davis said. "KCS should have installed lights and gates years before the wreck and they absolutely should not have turned off the lights and gates after they had them up."

Before trial, KCS offered about \$5 million to settle the case, Davis said. The railroad made offers of \$18 million and \$25 million during trial, but the plaintiffs rejected the offers and moved on.

In closing arguments, Davis asked the jury for a range of damages for each plaintiff that totaled \$263 million on the high end. He also planned to seek punitive damages in a second phase of the bifurcated trial.

KCS steadfastly maintained that it was a safe crossing. The railroad argued there was ample ability for the driver to hear the train and its whistle, but she simply failed to look around before driving into the train's path.

"This was nothing more than an intersection collision case where the crew was operating well within the speed limit," said James Yeretsky of Overland Park, Kan., attorney for Kansas City Southern. "The fact that it was an eight-week trial did not complicate the issue," he said.

The plaintiffs' demand never dipped below \$105 million until the last day of jury deliberations, when the plaintiffs approached the railroad and dropped their demand to \$50 million, Yeretsky said, which jumpstarted negotiations.

"The resolution of the case was welcomed by the railroad, but certainly without any consideration of fault," Yeretsky said. "It was more of an attempt to determine what a Jackson County jury was going to do with the case, given the horrendous injuries and death."

Hollis H. Hanover, a Kansas City trial attorney and mediator in practice for nearly 40 years, called the events leading up to this settlement "stunning and unprecedented."

The plaintiffs' decision to turn down a \$25 million settlement offer and proceed with trial showed "an icy fearlessness" on the part of the attorneys and an unparalleled degree of confidence from their clients, Hanover said.

Collision

In 1995, Kansas City Southern acquired the MidSouth Railroad, which owned tracks running from Meridian, Miss., to Shreveport, La., and crossing through the tiny town of Arcadia in north-central Louisiana. The railroad used this route to transport freight from the east coast down to Mexico.

The Federal Railroad Administration regulates train speed based on the condition of tracks and the type of train. Since the tracks around Arcadia had fallen into a state of disrepair, Yeretsky said, the FRA had limited the speed in the area.

Shortly after the acquisition, KCS repaired the tracks and nearly doubled the train speed through Arcadia - from 25 mph to 49 mph, and the route became known as the "Meridian Speedway." Arcadia residents then complained about the increased speed, citing a municipal ordinance restricting train speed through town to 25 mph.

But KCS declined to reduce the speed, citing the federally regulated, post-repair speed limit of 55 mph. Thus, the residents requested gates and lights at the five railroad crossings covering a mile and a half stretch through Arcadia.

There had been no collisions at Arcadia's Maple Street crossing before KCS increased the speed in 1995. Between 1995 and 2000, there were four car-train collisions at the crossing. In early 2000, the State Department of Transportation & Development recommended that KCS install lights and gates at the crossing, but KCS did not heed the recommendation. The following January, there was a fifth collision at the crossing - this one fatal, killing a local lawyer.

KCS waited until July 2001 to begin installing flashing lights and gates. A KCS crew successfully tested the lights and gates, and they were operational by July 16.

But the railroad took the gate arms down, turned off the lights and placed tight fitting black plastic bags over the black lights instead of turning them on. According to Yeretsky, KCS was also installing lights and gates at an adjacent crossing about a half-mile away, and the railroad wanted to synchronize the crossings before turning the lights on. KCS placed bags over the lights to indicate that the construction was not yet complete, he said.

About two weeks later, Marian Kemp and her four young daughters were crossing the Maple Street intersection when a westbound KCS train traveling 34 mph hit their Ford Expedition.

Kemp, 32, suffered severe brain damage, confining her to a nursing home where she eats through a feeding tube. Five-year-old Kitty Kemp died in the collision, 3-year-old Lillian Kemp suffered permanent brain damage, 7-year-old LaShara James sustained serious injuries and 10-year-old Melanie Prud'homme was left with a broken ankle and post-traumatic stress disorder.

Dangerous Crossing

"Maple Street was a crossing that needed the protection of lights and gates to be safe," Davis said. "It was listed as one of the most dangerous crossings in Louisiana."

The plaintiffs argued that the crossing lacked adequate sight distance, according to the American Association of State Highway & Transportation Officials' engineering standards and other industry standards adopted in all 50 states.

The plaintiffs' evidence also showed that KCS violated its own internal rules and the federal code dealing with active lights and gates that are not functional. "The rules regarding activation failure are that the railroad must bring its train to a complete stop and have someone flag the crossing when lights and gates are up but not working," said plaintiffs' co-counsel Thomas C. Jones.

Furthermore, the plaintiffs presented evidence that KCS does not independently evaluate and determine which of its railroad crossings are dangerous for the motoring public, without receiving state or federal funding. Similarly, KCS does not voluntarily put up lights and gates with its own money for public safety. These policies, the plaintiffs argued, effect the timing of light and gate installations that are needed at dangerous crossings.

"KCS has a duty to maintain safe crossings on its own tracks," said plaintiffs' co-counsel Scott S. Bethune. "KCS' policies and practice ignore the fact that KCS is supposed to maintain safe crossings."

Davis, who spoke with jurors after the parties reached the settlement, said several jurors were "surprised and dismayed to learn that KCS, on its own, does not have one employee or spend any money trying to determine which of its railroad crossings were dangerous and needed lights and gates."

Finally, the plaintiffs argued that KCS raised speeds on other tracks, and the number of train collisions and deaths subsequently rose dramatically. They pointed to evidence indicating that an increase in train speed equated to an increase in revenue to the railroad. "KCS increased its revenues at the expense of public safety," Jones said.

Driver Error

The defense focused on driver error. At least six whistle witnesses testified that the train had been blowing its whistle for a quarter mile before the crossing. An eyewitness driving behind Kemp and another standing 50 to 75 feet from the track both testified that she never looked around before driving into the train's path.

Specifically, KCS argued that Kemp failed to adhere to Louisiana regulations governing a driver approaching a "cross buck" crossing - the white "X" signs mounted at the crossing indicating "railroad crossing" - preceded by a yellow advanced warning sign with an "X" through the "RR" posted 100 feet from the crossing. The state statutes require that drivers, within 50 and 15 feet of the tracks, look to ensure a clear, safe way to cross the tracks when a train is coming. "She clearly didn't do that, which was the sole cause of the accident," Yeretsky said.

But in arriving at the decision to settle the case, Yeretsky said the defense considered the severity of the injuries and compared them to historical jury verdicts in Jackson County.

"You have to evaluate the extent of those damages and compare that with the potential exposure from a jury and add the length of an appeal and the potential for a new trial after an eight-week trial," he said. "It became very clear that the plaintiffs were very interested in continuing to drop their demand to the point that the railroad believed it was in their best interest to enter into a settlement, even though there was never any thought of admitting any liability. To the contrary, we believed the facts and the law as submitted to the jury certainly was indicative of a potential defense verdict."

But most juries tend to err on the side of trying to help a family that has devastating injuries like these, Yeretsky said.

"So the analysis was to look at the facts, the damages and the deliberations that had gone on for two days," he said. "I think the plaintiffs got concerned with the length of time it was taking the jury to reach a verdict and it was obvious the jury was struggling. Both sides have to take a calculated risk in determining whether or not there is an opportunity to settle."

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Facts of the Case

Type of Action: Railroad crossing collision

Type of Injuries: One death and four injuries

Court/Case No./Date: Jackson County Circuit Court/03CV231382/Oct. 27, 2006

Caption: *Kemp v. Kansas City Southern Railway Company*

Judge, Jury, ADR: Jury

Name of Judge: Stephen Nixon

Verdict or Settlement: \$37.5 million settlement

Last Demand: \$50 million

Last Offer: \$25 million

Plaintiffs' Experts: Kenneth Heathington, Knoxville, Tenn. (traffic and crossing safety engineering); Jim Scott, Kingsport, Tenn. (railroad operations); Harvey Levine, Rockville, Md. (transportation policy); Ellie Francis, Boston, Mass. (human factors); David Lipscomb, Seattle, Wash. (audiology); Dr. Terry Winkler Springfield, Mo. (life care planning); Dr. Solomon Batnitzky, Kansas City, Mo. (neuroradiology); Dr. Sam Boellner, Little Rock, Ark. (child neurology and neuroimaging); Wilbur Swearingen, Springfield, Mo. (vocational rehabilitation); Peter Patrick, Charlottesville, Va. (pediatric neuropsychology); Bernard Pettingill, Palm Beach Gardens, Fla. (economist); Dr. Sam Mehr, Omaha, Neb. (positron emission tomography); Dr. Sydney Rice, Charlottesville, Va. (pediatric neurorehabilitation)

Defendant's Experts: Not disclosed

Insurance Carrier: Trans Fin Insurance Company

Attorneys for Plaintiffs: Grant L. Davis, Thomas C. Jones and Scott S. Bethune, Davis, Bethune & Jones, Kansas City

Attorneys for Defendant: James M. Yeretsky, Gregory F. Maher, Craig M. Leff and Michael A. Preston, Yeretsky & Maher, Overland Park, Kan.

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