

# MASSACHUSETTS LAWYERS WEEKLY

June 21, 2004

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## The 'Biggest' Defense Wins Of The Year

BY LISA K. BRUNO

### Railroad Not Liable For Child Trespasser's Injuries

The shortcut across the railroad tracks was well known and one 15-year-old Raymond Wright had taken several times before. But when the teenager crossed the tracks on Feb. 27, 1998, he sustained multiple fractures, internal injuries, a punctured lung, lacerations and a closed head injury after he was tossed approximately 60 feet by a locomotive pulling 96 freight cars.

But before the case could even reach trial, the plaintiffs' claims were dismissed by summary judgment.

The key to such a result in the face of devastating injuries, say defense attorneys Michael B. Flynn and Richard A. Davidson Jr., was nailing down the standard of care the rail company owed the young plaintiff.

On their way to an appointment, Wright and his older sister chose to use a shortcut across the rail tracks that ran a block or so from their home. As they approached the rail lines, a westbound train stood still, apparently "parked" on the tracks.

The plaintiffs reportedly crawled under one of the standing train's freight



**Richard A. Davidson Jr. (left) and Michael B. Flynn successfully defended a minor's tort claim against Consolidated Rail Corp.**

cars, with the sister leading the way. As she came out from under the car, she saw an eastbound train approaching and dove to the other side of the tracks.

When Wright emerged a few seconds later, he found himself five feet away from the illuminated locomotive

of the approaching train. He jumped out, in an attempt to cross the tracks, but was unable to avoid the train and was struck.

After being airlifted to Albany Medical Center, Wright fell into a coma and remained hospitalized for

four months, after which he underwent extensive physical therapy.

Although railroads generally owe foreseeable trespassers on its tracks only the limited duty to refrain from willful, wanton or reckless conduct, according to Flynn, the plaintiffs had argued that Wright was a "child trespasser" to whom the defendant, the owner of the tracks at the time, owed the duty of ordinary care.

"With that standard, we were reasonably assured that [the plaintiffs] would get to a jury under a garden-variety negligence standard," he remarks. "And of course, if it gets to a jury, that provokes fears in any client that anything can happen."

The defense attorneys were not helped by caselaw, which does not provide a bright-line age test. But at 15 years of age, Wright was "on the cusp" of being an adult, and so the lawyers devoted their time to pre-deposition discovery in an effort to uncover the boy's history and the types of activities he was involved in.

While much of what was discovered remains subject to a confidentiality order, Flynn reports the information gathered showed that although Wright was a teenager, he had also had a num-

ber of adult experiences and was able to appreciate the full dangerousness of his conduct.

"We had a lot of ammunition at the young man's deposition and were able to draw out of him admissions as to the types of activities he was involved with," he says.

As a result, when the defendants moved for summary judgment in a bid to dispose of the child trespasser issue, the plaintiffs abandoned their position altogether.

"We discovered the daylights out of this person," comments Davidson. "We had so much information that it became a good tactical decision on his part to leave [the claim] on the wayside."

However, the plaintiffs took a different tack and contended they were not trespassers — and thus were owed a duty of reasonable care — because the public's continuous and notorious use of the shortcut created a prescriptive easement across the tracks.

The defense attorneys countered by invoking G.L.c. 160, §218, which establishes as a crime any unauthorized entry onto property used or controlled by a railroad corporation.

No authority recognizes a prescriptive easement in the face of such a statute, they maintained. "Criminal conduct does not allow you to obtain an equitable interest in real estate," Davidson sums up.

Flynn adds the argument was bolstered by "clear-cut" precedent developed under the statute in wrongful death cases absolving the railroads from any

duty to individuals on their property "contrary to law."

The plaintiffs next alleged that if they were trespassers, the defendants owed Wright a duty of reasonable care pursuant to its own safety regulation, which required the train operators to sound a whistle four times when approaching a standing train. Because there was a dispute as to whether the whistle sounded prior to the accident, the plaintiffs maintained summary judgment was inappropriate.

But they pointed to no authority suggesting that internally adopted regulations necessarily imparted a duty of reasonable care, Flynn notes. On the facts of the case, moreover, no whistle was needed to warn Wright of the oncoming train; the teen was aware of its presence before making the "tragic misjudgment" to try to jump ahead of it, he argued.

"So that regulation, whether or not it was adhered to, was irrelevant, given the split decision involved in this case," Flynn says. "It really became a red herring in the court's eyes."

The defense's motion for summary judgment was granted by U.S. District Court Judge Michael A. Ponsor. The plaintiffs reportedly decided not to pursue an appeal. Michael J. Chieco of Springfield, counsel to the plaintiffs, declined to comment on the case.

Flynn believes the case has a larger meaning in showing the commitment of trial judges to upholding the law even while expressing great sympathy for plaintiffs and their families.

"[The plaintiffs' attorney] did a great job for his clients — he tried everything he could do," he comments. "But when it came right down to it, the law was the law."

*Wright, et al. v. Consolidated Rail Corporation, et al.*  
U.S. District Court, Springfield, No. 01-30076  
Date: Oct. 17, 2003  
Defense attorneys: Michael B. Flynn and Richard A. Davidson Jr., Quincy (formerly of Boston)  
Demand: \$7.4 million  
How disposed: Judge grants summary judgment