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IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 18-2039
(Black Hawk County No. LACV126365)

RICHARD J. WERMERSIKIRCHEN and CAROL M. WERMERSKIRCHEN,

Plaintiffs-Appellants,

vs.

CHICAGO, CENTRAL & PACIFIC RAILROAD COMPANY; TIMOTHY DORSEY; and JOSHUA YOKEM,

Defendants-Appellees,

APPEAL FROM THE IOWA DISTRICT COURT
FOR BLACK HAWK COUNTY
HONORABLE LINDA FANGMAN, JUDGE

PROOF BRIEF AND REQUEST FOR ORAL ARGUMENT OF DEFENDANTS/APPELLEES

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CERTIFICATE OF FILING AND SERVICE

I hereby certify:

That I filed the Defendants/Appellees' Brief with the Clerk of the Supreme Court of Iowa by EDMS on the 3rd day of July, 2019 which constitutes service on all other parties to this appeal pursuant to Iowa Ct. R. §16.1215 (2016).

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1). This brief contains 12,393 words, excluding the parts exempted by Rule 6.903(1)(g)(1).

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I. DID THE DISTRICT COURT CORRECTLY GRANT SUMMARY JUDGMENT ON PLAINTIFFS' SPEED, LOOKOUT, AND BRAKING CLAIMS?

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III. DID THE DISTRICT COURT CORRECTLY INSTRUCT THE JURY?

Citations:

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Olson v. Prosoco, Inc., 522 N.W.2d 284, 289 (Iowa 1994)

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State v. Milam, 447 N.W.2d 415, 417 (Iowa Ct. App. 1989)

Thavenet v. Davis, 589 N.W.2d 233, 236 (Iowa 1999)

IV. WERE ANY ERRORS ON BEHALF OF THE DISTRICT COURT HARMLESS?

Citations:

APAC-Mississippi, Inc. v. Goodman, 803 So.2d 1177, 1185 (Miss. 2002)

Davis v. Williams, No. 278713, 2008 WL 5101634, at *3 (Mich. Ct. app. Dec. 4, 2008)

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ROUTING STATEMENT

Pursuant to Iowa Rule of Appellate Procedure 6.1101(3), the Iowa Supreme Court should transfer this case to the Iowa Court of Appeals because it involves the application of existing legal principles. The question of whether fog or other weather conditions avoid federal preemption of claims against railroads has been repeatedly answered in the negative, including by the United States Court of Appeals for the 8th Circuit.

The other claims Plaintiffs raise on appeal involve straightforward applications of existing legal principles regarding causation, admissibility of evidence, and jury instructions. There are no substantial issues of first impression or issues of broad public importance necessitating review by the Iowa Supreme Court.

STATEMENT OF THE CASE

This case arises out of a collision between a train operated by Defendants and a road grader Plaintiff Richard Wermerskirchen operated on January 28, 2013. (Pet.) (App. I, 8). Plaintiffs filed their original Petition at Law on December 18, 2014. (App. I, 8). Plaintiffs filed their First Amended Petition at Law on January 16, 2015. (App. I, 27). Defendants answered the First Amended Petition at Law on February 5, 2015, denying all adverse allegations and raising several affirmative defenses, including federal

preemption, causation, and comparative fault. (App. I, 36). Plaintiff filed a seconded amended petition on July 28, 2017. (App. I, 73). Defendants answered on September 11, 2017.

On July 20, 2017, Defendants filed its Motion for Summary Judgment, with supporting memorandum and statement of facts, on all claims, asserting both preemption and factual defenses as to negligence and causation. (App. I, 47). Plaintiffs resisted. On September 15, 2017, the district court granted the Defendants' Motion for Summary Judgment as to the speed, braking, and lookout claims, but denied the Defendants' Motion for Summary Judgment regarding the train horn. (App. I, 87). Plaintiffs filed their Application for Interlocutory Appeal on October 14, 2017. This Court denied Plaintiffs' Application for Interlocutory Appeal on December 1, 2017.

Following additional discovery, Defendants filed their Second Motion for Summary Judgment on the remaining train horn claims on August 28, 2018. (App. I, 107). On that same date, Defendants also filed a Motion to Exclude Testimony of Plaintiffs' Expert David Rangel. (App. I, 95). On October 12, 2018, Plaintiffs filed a Motion to Reconsider Court's September 15, 2017, [sic] Ruling in Favor of Defendants' Summary Judgments. The district court denied all of these motions on October 29, 2018 or October 30, 2018.

The case proceeded to a six-day jury trial on Ocotober 30, 2018. On November 7, 2018, the jury returned a verdict in favor of Defendants, finding that Defendants were not negligent. (App. I, 243). Plaintiffs timely filed a Notice of Appeal.

STATEMENT OF THE FACTS

On January 28, 2013, Plaintiff Richard Wermerskirchen (Plaintiff R.W.) was operating a road grader northbound on South Nesbit Road in rural Black Hawk County, Iowa. (First Amended Petition, ¶8-9) (App. I, 27); (Incident Reports, Trial Exs. C & D) (App. II, 44); (Sheriff Report, Trial Ex. 5) (App. II, 8). A Chicago, Central & Pacific Railroad Company (CCP) freight train was heading westbound, intersecting with South Nesbit Road at approximately the same time and collided with Plaintiff R.W.'s road grader. (Incident Reports, Trial Exs. C & D) (App. II, 44); (Sheriff Report, Trial Ex. 5) (App. II, 8). Defendant Timothy Dorsey (Defendant Dorsey) was operating the train on the day of the accident. (Incident Reports, Trial Exs. C & D) (App. II, 44). Defendant Joshua Yokem (Defendant Yokem) was the conductor of the train on the day of the accident. The federal crossing number for this crossing is 307095M. (Trial Ex. D) (App. II, 45); (Sheriff Report, Trial Ex. 5) (App. II, 8).

The tracks that the train was operating on are classified as a "Class 4" track by the Federal Railroad Administration (FRA). (Def. Statement. Mat. Facts, July 20, 2017, ¶13). The maximum speed for a freight train on a "Class 4" track is 60 m.p.h. *See* 49 C.F.R. § 213.9. CCP's internal timetable speed limit for the track in question was 50 m.p.h. (*Id.* at ¶15) (App. I, 52). The lead locomotive in question contained an "event recorder" which is an electronic device that records certain train functions such as braking, operation of the whistle and bell, as well as train speed. The event recorder data and testimony from the train crew indicates that the train's speed at the time of the incident was 47 miles per hour. (Nov. 5, 2018 Tr. p. 49) (App. II, 254); (Ex. Q) (App. I, 17).

The event recorder data also indicates that the train's horn and bell were activated prior to the train's approach to the crossing. (Trial Ex. Q) (App. I, 17). The train's headlight and ditch lights were activated. (Nov. 5, 2018 Tr. p. 49) (App. II, 254). The horn can be heard on the video recording of this incident well in advance of the accident. (Ex. AA) (App. II, 164).

The railroad crossing was protected by reflectorized crossbucks and a reflectorized yield sign that were both in good condition. (Def. Statement. Mat. Facts, July 20, 2017, ¶21) (App. I, 52). The signposts also had reflectorized strips that were also in good condition. *Id.* An advance yellow

warning sign was also present approximately 700 feet from the crossing. (*Id.* at ¶22) (App. I, 53).

The accident occurred at approximately 9:30 a.m. (Ex. C & D) (App. II, 44-45). The temperature was 31 degrees and it was foggy. (Ex. C & D); (App. II, 44-45). The lead locomotive for the train in question contained an onboard video camera which faced forward and recorded the incident in question. (Ex. AA) (App. II, 164). The locomotive video camera, the Sheriff's report, and the Engineer and Conductor reports indicate Plaintiff R.W. operated the road grader onto the crossing and into the path of the oncoming CCP freight train. (Ex. AA, C, D, and 5) (App. II, 164, 44-45, 8). Plaintiff R.W. did not stop or yield to the train prior to entering the crossing. (Ex. AA, C, D, and 5) (App. II, 164, 44-45, 8).

Experts for both parties agreed that by the time Plaintiff R.W.'s vehicle proceeded past the yield sign, initiating emergency braking would not have avoided the accident. (Report of David Rangel, p. 5) (App. II, 147); (Report of Foster Peterson p. 14) (App. II, 128). The lead locomotive of the train collided with the passenger side of the road grader. (Ex. AA) (App. II, 164). Plaintiff R.W. survived the accident.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT ON PLAINTIFFS' SPEED, LOOKOUT, AND BRAKING CLAIMS

A. Preservation of Error and Standard of Review

Defendants agree Plaintiffs preserved error regarding the district court's grant of partial summary judgment as to Plaintiffs' speed, proper lookout, and braking claims, as Plaintiffs resisted Defendants' Motion for Summary Judgment[1].

Appellate review of summary judgment motions is for corrections of errors at law. *Linn v. Montgomery*, 903 N.W.2d 337, 342 (Iowa 2017). Summary judgment is appropriate when no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *Whalen v. Connelly*, 593 N.W.2d 147, 152 (Iowa 1999). The court must examine the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits to determine if summary judgment is appropriate. *Id*.

However, a party resisting summary judgment "may not rest upon the mere allegations or denials of the pleadings." IOWA R. CIV. P. 1.981(5). Rather, "[t]he resistance must set forth specific facts constituting competent

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[1] Plaintiffs also filed an application for interlocutory appeal, which this Court denied.

evidence to support a *prima facie* claim." *Thompson v. City of Des Moines*, 564 N.W.2d 839, 841 (Iowa 1997); *Hoefer v. Wisconsin Educ. Ass'n Ins. Trust*, 470 N.W.2d 336, 339 (Iowa 1991).

An inference to create a triable issue in response to a motion for summary judgment cannot be based on conjecture or speculation. *Castro v. State*, 795 N.W.2d 789, 795 (Iowa 2011). "In considering a motion for summary judgment, ... [a]ll reasonable inferences arising from the undisputed facts should be made in favor of the nonmovant, but an inference based on speculation and conjecture is not reasonable." *Id.* (Citing *Blackston v. Shook & Fletcher Insulation Co.,* 764 F.2d 1480, 1482 (11th Cir. 1985)); *see also Henchey v. Dielschneider* 2011 WL 227642, 3-4 (Iowa Ct. App. 2011). Therefore, "[s]peculation is not sufficient to generate a genuine issue of fact." *Hlubek v. Pelecky,* 701 N.W.2d 93, 96 (Iowa 2005).

B. Brief Overview of Federal Preemption in the Railroad Industry

Under the supremacy clause of the United States Constitution, the federal government has the authority to preempt and supersede any state law. U.S. CONST. ART. VI, cl. 2. *See also, CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 663 (1993) ("Where a state statute conflicts with, or frustrates, federal law, the former must give way."); *California Federal Savings & Loan Assn. v. Guerra*, 479 U.S. 272, 280-81 (1987) (discussing various ways that

federal law may pre-empt state law). The extent of preemption is not limited to superseding the legislation set forth by a state, but includes all conflicting common law enunciated through the judiciary branch of the state. *Easterwood*, 507 U.S. at 658, 665; *San Diego Unions v. Garmon*, 359 U.S. 236, 247 (1958).

Congress enacted the Federal Railroad Safety Act (FRSA) of 1970 “to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.” 49 U.S.C. § 20101. The FRSA includes an integral express preemption provision and declares a federal policy that railroad safety should be “nationally uniform to the extent practicable.” 49 U.S.C. § 20106 (a) (2008); *Peters v. Union Pacific R.R.*, 80 F.3d 257, 261 & n.2 (8th Cir. 1996). *See also,* H.R. Rep. No. 91-1194, *reprinted in* 1970 U.S.C.C.A.N. 4104, 4110 (“The committee does not believe that safety in the Nation’s railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems.”).

Additionally, Plaintiffs’ argument that there is a presumption against federal preemption applicable to this case is inaccurate. (See Pl. Br. p. 42). The presumption against preemption Plaintiffs allege applies in this case simply “is not triggered when the state regulates in an area where there has

been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000). Railroad regulation certainly has such a history of a significant federal presence, and therefore, *Locke* defeats any presumption against preemption. Indeed, nearly 40 years ago, the United States Supreme Court recognized that "[r]ailroads have been subject to comprehensive federal regulation for nearly a century." *United Transp. Union v. Long Island R.R.*, 455 U.S. 678, 687 (1982). Regarding railway regulation, "a presumption against federal preemption of traditional areas of state authority cannot apply. Even if it did, any presumption would be easily overcome." *Norfolk Southern Ry. Co. v. City of Alexandria*, No. 1:08cv618(JCC), 2009 WL 1011653 at *4 n. 9, (E.D. Va., Apr. 15, 2009). Thus, there is no presumption against preemption that applies in this case because there is a history of comprehensive federal regulation in the area of railroad law. No presumption against preemption can apply as the *Easterwood* court held that, pursuant to 49 U.S.C. § 20106, when the Secretary of Transportation promulgates regulations "covering" the subject matter in an area of railroad safety, then state regulation of the same subject matter is preempted. *Easterwood*, 507 U.S. at 662-65.

C. Plaintiffs' Lookout and Braking Claims Failed as Preempted and for Lack of Causation

The district court properly granted summary judgment on the allegations that Defendants failed to keep a proper lookout and failed to timely apply the brakes. (Order Mot. Partial. Sum. J, p. 5-6) (App. I, 91-92). The district court concluded that the lookout and braking claims related to the excessive speed claim. (Order Mot. Partial. Sum. J, p. 6-7) (App. I, 92-93). Defendants submit this conclusion warrants a finding of preepmtion of those claims. *See Van Buren v. Burlington Northern Santa Fe Ry. Co.*, 544 F.Supp.2d 867, 880-81 (D. Neb. 2008) (holding that, where the train was traveling within the federally mandated speed limit, "[t]he Claim that Defendant's crew failed to keep a proper lookout and timely apply the brakes is preempted"); *Jasper v. Chicago Great Western Ry. Co.*, 84 N.W.2d 21, 29 (Iowa 1957) ("In fact . . . it is difficult to wholly separate his duty to maintain a lookout from the necessary acts to control the vehicle and the speed at which it is driven - there is some necessary relation between them").

However, even if the lookout and braking claims were not preempted, those claims fail as to causation, which appears to be the basis for the district court's decision to grant summary judgment on the proper lookout and braking claims. (Order Mot. Partial. Sum. J, p. 6-7) (App. I, 92-93). The district court correctly held it is undisputed that the experts for both Plaintiffs,

David Rangel, and Defendants, Foster Peterson, concluded that immediately applying the brakes upon seeing Plaintiff R.W.'s vehicle moving towards the crossing would not have changed the outcome in this case, as discussed in more detail below. (Order Mot. Partial. Sum. J, p. 6-7) (App. I, 92-93); (Rangel Report, p. 5) (App. II, 147); (Peterson Report, p. 13-14) (App. II, 127-128).

Despite the experts for both Plaintiffs and Defendants concluding that immediate braking upon the first ability to perceive the risk would not have avoided the collision, Plaintiffs rely upon *Dresser v. Union Pacific Railroad Company*, 809 N.W.2d 713, 722 (Neb. 2011) to argue that a fact issue existed at the summary judgment stage as to whether braking in the final seconds before collision could have slowed the train enough to allow Plaintiff to accelerate his vehicle and clear the crossing prior to impact. *Dresser* does not aid Plaintiffs in this case because *Dresser* turned on the determination that the summary judgment record was "silent on what effect activation of the emergency brake would have had on the speed of the train" had it been activated when the vehicle left the stop sign and proceeded towards the tracks, which was the earliest time the duty to brake could have arose. *Id.* at 721. In other words, *Dresser* concluded that there was insufficient evidence in the

record to determine whether earlier braking could have slowed the train sufficiently to avoid the accident. *Id.* at 721-22.

Here, Defendants introduced the exact evidence at the summary judgment stage that was missing in *Dresser.* Specifically, Defendants' expert, Foster Peterson, opined that "Even an **instantaneous reaction** by the crew when the grader failed to yield as required and went past the crossbuck onto and stopped on the crossing would have yielded **no measurable change in the train's arrival time** at the point of impact."[2] (Peterson Report, p. 14) (App. II, 128) (emphasis added). This conclusion is undisputed, as Plaintiffs' expert, David Rangel, agreed, stating in his report: "even maintaining a proper lookout would not provide the crew with sufficient time to perceive the risk,

[2] The delay chart on page 13 of Mr. Peterson's report is also illustrative. (App. II, 127). Pursuant to that chart, initiating braking at 400 feet from the crossing would not have delayed the train in any perceivable manner. Initiating emergency braking at 600 feet from the crossing would have resulted in a delay of less than one half second. The video of the collision demonstrates earliest visibility of the road grader approximately six seconds before impact, at which point the train would have been approximately 420 feet away based on an approximate speed of 70 feet per second. Acocunting for some reaction time (and time to perceive the vehicle moving past the yield sign present at the crossing), the train would have been less than 400 feet from the crossing before the crew could have even potentially had a duty to apply the brakes. Initiating emergency braking at that time would have had no impact on the outcome and would not have even been perceivable to Plaintiff. The only result that may have been different if Plaintiff had decided to attempt to accelerate the road grader across the crossing is that Plaintiff may not have survived the accident. (See Tr., Oct. 30, 2018, p. 104:15-18) (App. II, 195).

react, and initiate braking to avoid the collision." (Rangel Report, p. 5) (App. II, 147).

Thus, the evidence missing in *Dresser*, whether braking at the first possible moment the duty may have arisen would have slowed the train enough to avoid the collision by allowing the vehicle to move off the tracks, is present in this case. Experts for both parties have opined that keeping a proper lookout and braking immediatley upon perceiving the risk could not have avoided the collision—Mr. Peterson specifically opined that immediate braking upon perceiving the risk would have resulted in **no measurable change** in the train's arrival time at the crossing.

There is no contrary evidence in the summary judgment record. In other words, there is no evidence supporting a claim that reacting and initiating braking immediately upon the road grader coming to view would have had any material or perceivable impact on arrival time at the crossing. If Plaintiffs had such evidence, the summary judgment proceeding was the "put-up or shut-up moment" in the lawsuit at which time Plaintiffs were required to produce evidence from which a jury could find that braking would have slowed the train in a manner that would have avoided the accident. *See Slaughter v. Des Moines Univ. Coll. of Osteopathic Med.*, 925 N.W.2d 793, 808 (Iowa 2019) ("Summary judgment is not a dress rehearsal or practice run;

it is the put up or shut up moment in a lawsuit, when a nonmoving party must show what evidence it has that would convince a trier of fact to accept its version of the events.") (internal citations and quotations omitted).

Plaintiffs produced no such evidence and therefore did not generate fact issue on causation related to the claim the brakes should have been applied earlier. Plaintiffs have no evidence that the outcome would have been different had braking been initiated in the seconds prior to impact because Plaintiffs have no evidence that, had the crew immediately initiated braking upon seeing Plaintiff's vehicle proceed past the crossbucks, the braking would have resulted in a slowing of the train that would have materially changed the arrival time at the crossing or that would have been perceivable to Plaintiff[3]. Again, the only evidence in the record is the expert opinions to the contrary—

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[3] Plaintiffs speculation that had Plaintiff "observed a slowing of the CN Train or any indicaiton by the train crew that it had seen him, he could have accelerated across the railroad tracks" (Pl. Br. p. 39-40) in the seconds prior to the collisions. is directly contradicted by the expert reports in the summary judgment record. Regardless, Plaintiffs' speculation is insufficient to avoid summary judgment. *Petre v. Norfolk S. Ry. Co.*, 458 F. Supp. 2d 518, 537 (N.D. Ohio 2006) ("It is simply pure speculation as to whether a fraction of a second would have, or could have, spared the parties from this collision or lessened its tragic result."). This is particularly true where Plaintiff is not qualified to opine as to what impact immediate braking at the point when Plaintiff's vehicle appeared would have had on the train or the accident.

braking immediately upon seeing and reacting to Plaintiffs' vehicle, even immiedately upon coming into view, would not have altered the outcome.

Courts have repeatedly granted judgment as a matter of law under similar factual circumstances. *See, e.g. Illinois Cent. Gulf R. Co. v. Travis*, 106 So. 3d 320, 331 (Miss. 2012) (reversing trial court's denial of motion for judgment notwithstanding the verdict and instead rendering verdict in favor of railroad, finding in favor of the raiload on causation grounds where the evidence was that even applying the brakes 960 feet from the crossing [which there was no duty to do] would have resulted in the train arriving at the crossing only **0.5 seconds** later than without braking) (emphasis added); *Eubanks v. Norfolk S. Ry. Co.*, 875 F. Supp. 2d 893, 907 (N.D. Ind. 2012) (granting summary judgment where there was not any evidence addressing the effect of applyng the brakes on a train of that size and therefore there was no evidence that failing to brake in the final seconds before the accident [when the duty first arose] caused the accident); *Rasmusen v. White,* 970 F. Supp. 2d 807, 824-25 (N.D. Ill. 2013) (holding summary judgment is warranted whetere the evidence indicates that the train crew could not have prevented the accident after realizing that a vehicle is not going to yield and granting summary judgment on causation despite plaintiff's expert opining that the crew should have applied the brakes at an earlier time and that such action

would have given the plaintiff the few extra seconds she needed to clear the crosing because plaintiff's expert did not perform calculations involving speed and braking and how much time braking would have actually saved, and, therefore, his opinion was insufficient to create a geunuine issue of material fact because he failed to provided support for his analysis to conclude what the degree of slowing would have been or whether it would have prevented the accident); *Petre v. Norfolk S. Corp.*, 260 F. App'x 756, 762 (6th Cir. 2007) (upholding grant of summary judgment on proper lookout and braking on causation grounds because even immediately taking emergency precautions upon realizing car was not going to stop would not have avoided the accident); *Byrne v. CSX Transp.*, No. 3:09 CV 919, 2011 WL 1584324, at *5 (N.D. Ohio Apr. 26, 2011); *Janero v. Norfolk S. Ry. Co.*, No. 1:13-CV-155-TLS, 2017 WL 993055, at *11 (N.D. Ind. Mar. 15, 2017) (train crew would have been required to begin braking approximately 1,425 feet in advance of the crossing to delay the train's arrival by 1.04 seconds [the amount necessary to avoid the collision] but was only 528 feet from the crossing when the crew could first see the car so it would have been impossible to avoid the collision even if the train crew began emergency braking immediately); *Graham v. S. Pac. Transp. Co.,* 619 So. 2d 894, 898–99 (La. Ct. App. 1993) (holding that by the time the crew realized the plaintiff

was not going to stop, the train was upon him and could not possibly have been stopped with the emergency brakes in time to avoid the accident); *Norfolk & W. Ry. Co. v. Wright*, 229 S.E.2d 890, 893 (1976) (reversing jury verdict regarding delay in applying the emergency brakes on causation grounds because there was no evidence to show that the engineer "could have applied the brakes soon enough to develop brake cylinder pressure great enough to make the progress of the train slow enough to permit the station wagon to pass safely in front of it"); *Lindsey v. Seaboard Coastline R. Co.*, 248 So. 2d 518, 521 (Fla. Dist. Ct. App. 1971) ("It is extremely doubtful that even had the emergency brakes been applied, the collision could have been avoided").

In sum, the experts for both parties agree that earlier braking would not have altered the outcome in this case, and Plaintiffs introduced no relevant evidence in the summary judgment record to generate a disputed issue of material fact on causation regarding any alleged failure to keep a proper lookout and timely apply the brakes. The district court correctly granted summary judgment on the lookout and braking claims because these claims failed as to causation, regardless of whether they are preempted based on train speed.

D. Federal Law Preempted Plaintiffs' Excessive Speed Claim

Plaintiffs also appeal the district court's grant of summary judgment as to the speed of the train. On this issue, the district court held that the speed claim was preempted because "The United States Supreme Court has stated that negligence claims based on excessive speed are preempted by the Federal Railroad Safety Act of 1970." (Order Partial Sum. J., p. 5) (App. I, 91); *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 674-76 (1993) (holding that speed claims are preempted). The Supreme Court's opinion in *Easterwood* holds that Federal regulation of train speed, as set forth in 49 C.F.R. § 213.9, preempts claims based on "excessive" speed under the circumstances. *St. Louis Southwestern Ry. Co. v. Pierce*, 68 F.3d 276 (8th Cir. 1995).

Plaintiffs do not contest the general proposition that negligence claims based on excessive speed are preempted where the train was traveling within the federal speed limit, nor do Plaintiffs contest that the train in question was travelling within the federal speed limit. Indeed, Plaintiffs concede that for their excessive speed claims to survive preemption, the fog in this case must constiute a specific, individual hazard that brings their claim within an exception to preemption of speed claims so as to have a viable claim that the train should have been traveling at a lower speed. (Pl. Br. p. 40-41).

The specific, individual hazard exception to preemption arises from a footnote in the *Easterwood* decision and has been interpreted to include a truly discrete hazard such as a child standing on the railway, rather than general conditions, such as weather conditions. *See O'Bannon v. Union Pac. R. Co.*, 960 F. Supp. 1411, 1420 (W.D. Mo. 1997) (stating, “Generally, courts considering this issue have ruled that a ‘specific, individual hazard’ must be a discrete and truly local hazard, such as a child standing on the railway. They must be aberrations which the Secretary could not have practically considered when determining train speed limits under the FRSA”); *Hesling v. CSX Transp., Inc.*, 396 F.3d 632, 640 (5th Cir. 2005) (“The term specific, individual hazard means a discrete and truly local hazard. It relates to the avoidance of a specific collision.”) (internal citations omitted); *Anderson v. Wisconsin Cent. Transp. Co.,* 327 F. Supp. 2d 969, 978 (E.D. Wis. 2004) (“A specific, individual hazard is a unique occurrence which could cause an accident to be imminent rather than a generally dangerous condition. A commonly cited example is a child standing on a track. Factors such as general knowledge that a crossing is dangerous, traffic conditions, a crossing’s accident history, sight distances, multiple crossings in close proximity, sun glare, a railroad’s internal policies regarding speed, and inadequate signal maintenance are not specific, individual hazards”).

In arguing that weather conditions, such as fog, may defeat preemption of speed claims, Plaintiffs rely exclusively on *Bakhuyzen v. Nat'l Rail Passenger Corp.*, 20 F. Supp. 2d 1113 (W.D. Mich. 1996) which held that weather conditions are not capable of being encompassed within uniform national standards and therefore weather conditions can defeat preemption. Defendants could find no other decision supporting *Bakhuyzen's* holding regarding weather conditions. Defendants found no authority, including *Bakhuyzen,* specifically holding any weather condition constituted a specific, individual hazard.[4] The overwhelming authority, including that from the 8th Circuit, discussed below, rejects *Bakhuyzen*, either implicitly or explicitly. Indeed, in specifically holding that "weather conditions are not capable of being adequately encompassed within uniform national standards," *Bakhuyzen* **appears to stand alone**.

Most notably, in *Grade* v. *BNSF* Ry. Co., 676 F.3d 680, 687 (8th Cir. 2012), the 8th Circuit directly contradicted the *Bakhuyzen* court's conclusion stating:

> In implementing the national regulations, the Secretary of Transportation was surely aware that fog would exist along railroad tracks on many occasions and that ice storms would occur. **These conditions are not uniquely local in character**

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[4] Plaintiffs apparently also could not locate any cases holding weather conditions were a specific, individual hazard as they did not cite to any such cases.

> **and could be adequately addressed at the national level**. Thus, the local-condition savings clause does not apply…

Id. (emphasis added). Thus, in *Grade*, the 8th Circuit expressly held that **foggy conditions do not defeat preemption**, concluding that weather conditions are capable of being addressed by uniform national standards.

Plaintiffs argue that *Grade* does not mean what it says when it states that weather conditions, such as fog, do not defeat preemption, arguing that *Grade* analyzed weather conditions under the "essentially local safety or security hazard" statutory exception to preemption instead of the "specific, individual hazard" exception referenced in the *Easterwood* footnote. However, *Bakhuzyen* also did not specifically make the distinction between the two related exceptions to preemption and also appears to have decided the case based on the "essentially local safety or security hazard" because *Bakhuzyen* held, contrary to *Grade*, that weather conditions are not "capable of being adequately encompassed within uniform national standards." This is the exact language courts use to define whether a condition is an "essentially local safety or security hazard." *Id.* at 1115; *see also Union Pac. R. Co. v. California Pub. Utilities Comm'n,* 346 F.3d 851, 860 (9th Cir. 2003) ("Our sister circuits, which have plumbed the statutory history of the FRSA, have come to a similar conclusion and have created a workable definition of an

'essentially local safety hazard', defining it as one which is not 'adequately encompassed within national uniform standards.'").

Defendants submit that it is likely that the *Grade* court did not specifically address the "specific, individual hazard" exception because it concluded that weather conditions can be encompassed in national standards and therefore are general conditions that cannot possibly meet the definition of specific, individual hazard. *See Seyler v. Burlington N. Santa Fe Corp.*, 102 F. Supp. 2d 1226, 1237 (D. Kan. 2000) ("Generally, courts which have considered this issue have ruled that a 'specific, individual hazard' must be a discrete and truly local hazard such as a child standing on the railway…Several courts have rejected claims that adverse weather conditions generally may constitute specific, individual hazards."); *Williams v. Alabama Great S. R.R. Co.,* No. CIV. A. 93-2117, 1994 WL 419863, at *3 (E.D. La. Aug. 8, 1994) ("Nor do the plaintiffs' claims fall within the duty to slow exception referenced in footnote 15 of *Easterwood*. The plaintiffs argue that the presence of fog and the nearby brick facility qualify as 'specific, individual hazard[s]' which defendant's train should have slowed to avoid. Their expansive interpretation of the footnote is logically inconsistent with the *Easterwood* decision. The footnote means what it says—namely, if possible, a train should reduce its speed in order to avoid an imminent collision."); *Sec.*

First Bank v. Burlington N., 213 F. Supp. 2d 1087, 1091 (D. Neb. 2002) (stating, "other district courts have also rejected claims that adverse weather conditions generally may constitute specific, individual hazards."); *Carter v. Nat'l R.R. Passenger Corp.*, 63 F. Supp. 3d 1118, 1154 (N.D. Cal. 2014) (stating, "Courts have interpreted the exception narrowly to exclude claims that are based on conditions that arise on a regular basis or are found statewide because such hazards are 'capable of being adequately encompassed within uniform national standards'…Thus, for example, courts have found that in general, adverse weather conditions do not constitute a specific, individual hazard under *Easterwood*"). Regardless, it would be nonsensical for the *Grade* court to conclude that weather conditions such as fog are general conditions capable of being addressed by uniform national standards but also are specific, individual hazards sufficient to defeat preemption.

In fact, Plaintiffs assert that a "specific, individual hazard is a person, vehicle, obstruction, object, or event that…cannot be addressed by a uniform national standard." (Pl. Br. p. 30-31). When specifically addressing a plaintiff's claim that fog and ice were sufficient to avoid preemption, the 8th Circuit disagreed, stating: "These conditions are not uniquely local in character **and could be adequately addressed at the national level**." *Grade* 676 F.3d at 687 (emphasis added). If foggy conditions can be adequately

addressed at the national level as the 8th Circuit concluded, they cannot be a specific, individual hazard under Plaintiffs' own definition of specific, individual hazard.

Thus, the position of the 8th Circuit on this issue is clear; weather conditions do not defeat preemption. *Grade* holds, along with the overwhelming majority of other courts having addressed the issue, that weather conditions are not essentially local safety hazards or specific, individual hazards, that weather conditions are capable of being adequately encompassed within national standards, and weather conditions do not defeat preemption. In so holding, these courts reject *Bakhuyzen's* conclusion that weather conditions are not capable of being encompassed within national standards.

Plaintiffs also argue that courts declining to adopt *Bakhuzyen's* reasoning have been careful to distinguish that case rather than reject *Bakhuzyen* directly. (Pl. Br. p. 44-45). Plaintiffs' assertion is incorrect. *Bakhuzyen* has been expressly criticized by multiple courts and impliedly rejected by every other court to consider the issue.

In *Kankakee*, *Beaverville & S. R. Co. v. McLane Co.,* No. 4:08-CV-00048, 2010 WL 3672228 (N.D. Ind. Sept. 10, 2010), the court specifically addressed the holding from *Bakhuyzen. Kankakee* involved a claim that foggy

conditions created a specific, individual hazard. *Id.* at *3. The court noted that the *Bakhuyzen* court did hold that weather conditions could defeat preemption. *Id.* at *4. However, the *Kankakee* court rejected *Bakhuyzen* directly, stating:

> **This Court does not find this reasoning persuasive**. It agrees instead with the majority of courts that have considered the meaning of "specific, individual hazard" and concluded that it refers to a unique occurrence that could cause an imminent collision…This Court also declines to hold that a widely-occurring weather condition is a specific, individual hazard as contemplated by *Easterwood*. Defendants' claims that Plaintiff was negligent in failing to halt the train in the face of adverse weather conditions are therefore preempted.

Id. (emphasis added).

Similarly, while Plaintiffs in this case rely upon *Cox v. Norfolk & W. Ry. Co.*, 998 F. Supp. 679 (S.D.W. Va. 1998) as support for the reasoning in *Bakhuyzen*, the *Cox* court definitively held that weather conditions do not constitute a specific, individual hazard. *Cox* rejects *Bakhuyzen,* stating:

> If the court were to hold that state law claims based on a failure to slacken speed due to weather conditions were not preempted by the FRSA, the court would have to find that the Secretary did not take into account less than perfect weather conditions when the Secretary set the operating speed limits…To hold that these conditions are not preempted by the FRSA would mean that every time it was not a perfectly sunny day and a train accident occurred, a plaintiff could bring a state suit based on train speed. Such a result would swallow the federal regulations dealing with train speed, undermine the Secretary's ability to prescribe uniform operational speeds, and act contrary to Congress' intent that laws, regulations, and orders related to railroad safety be nationally uniform to the extent practicable.

Id. at 687. Additionally, when specifically addressing the *Bakhuyzen* opinion, the *Cox* court, like *Kankakee*, found "the *Bakhuyzen* opinion **unpersuasive for a number of reasons**." *Id.* (emphasis added).

Ultimately, Plaintiffs asked the district court to accept the reasoning of a single federal district court opinion from Michigan from over 20 years ago as more persuasive than the express holding of the 8th Circuit in 2012 directly holding that fog does not defeat preemption, and asked the district court to ignore the express holdings of every other court to address the issue, all of which have determined that weather conditions, including fog, do not defeat preemption. *See, e.g.*, *Hughs v. Union Pac. R.R. Co.*, No. 5:15-06079-CV-RK, 2017 WL 1380480, at *3 (W.D. Mo. Apr. 14, 2017) ("The Court agrees with Defendant that **the clear majority** of courts have come to the opposite conclusion [from *Bakhuyzen*] and rejected the argument that weather conditions are an exception to FRSA preemption of excessive speed claims.") (emphasis added); *Security First Bank v. Burlington Northern*, 213 F.Supp.2d 1087, 1091 (D. Neb. 2002) (weather conditions, including limited visibility, are not "atypical aberrations which the Secretary could not have practically considered when determining train speed limits under the FRSA"); *Furlough v. Union Pac. R.R. Co.*, 766 So. 2d 751, 754 (La. App. 2 Cir. Aug. 31, 2000) (rejecting plaintiff's speed claim as preempted where the train was within the

federally mandated speed limits **despite the presence of fog and low visibility**); *Williams v. Alabama Great S. R.R. Co*., No. CIV. A. 93-2117, 1994 WL 419863, at *2 (E.D. La. Aug. 8, 1994) (rejecting plaintiff's speed claim as preempted where the train was within the federally mandated speed limits **despite the presence of fog** and a brick facility that impaired visibility); *see also Seyler v. Burlington Northern Santa Fe Corp.,* 102 F.Supp.2d 1226, 1236 (D. Kan. 2000) ("**Nearly every court** which has addressed this issue has held that a state law claim based on failure to slow or stop a train under certain circumstances is preempted.") (emphasis added).

Preemption is a question of federal law, and the United States Court of Appeals for the 8th Circuit has already rejected Plaintiffs' argument that fog is a condition that can defeat preemption. Under federal law, as interpreted by every court but one, weather conditions, including fog, do not amount to an essentially local safety hazard or a specific, individual hazard and do not defeat preemption. Defendants were operating the train well below the federally established maximum speed of 60 m.p.h. The district court properly granted summary judgment on the speed claims.

II. THE DISTRICT COURT CORRECTLY REFUSED TO ADMIT EVIDENCE OF "NEAR MISSES" AND THE HORN MAINTENANCE MANUAL

A. Preservation of Error and Standard of Review

Plaintiffs made an offer of proof regarding the evidence of a "near miss" occurrence. (Nov. 5, 2018 Tr., p. 95-98) (App. II, 257-260). The offer of proof involved testimony from the train's engineer, Defendant Dorsey and the submission of an affidavit from Brian Davis. (Nov. 5, 2018 Tr., p. 96-97) (App. II, 258-259). Mr. Davis did not testify during the offer of proof; his hearsay affidavit was offered as an exhibit during the offer of proof. Following the offer of proof, Plaintiffs were permitted to inquire about "near misses" with Defendant Dorsey. Nov. 5, 2018 Tr., p. 113) (App. II, 261).

Plaintiffs offered the horn's maintenance manual as an exhibit. The district court held that the maintenance manual was not admissible as hearsay.

The trial court has wide discretion in ruling on the admissibility of evidence…The trial court's decisions will not be disturbed unless there is a clear and prejudicial abuse of discretion. *Gamerdinger v. Schaefer,* 603 N.W.2d 590, 594 (Iowa 1999). An abuse of discretion occurs when the trial court exercises its discretion 'on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Buenaventura*, 660 N.W.2d 38, 50 (Iowa 2003).

B. The District Court Did Not Abuse Its Discretion Regarding Evidence of a "Near Miss"

The district court granted the Defendants' Motion in Limine regarding evidence of a "near miss" prior to the accident on the morning of January 28, 2013 until such time as Plaintiffs laid a sufficient foundation to demonstrate the relevance and substantial similarity of any alleged "near miss" on the day of the accident. On this issue, Plaintiffs made an offer of proof attempting to lay the required foundation for admission of evidence of a "near miss" on the day of the accident. (Nov. 5, 2018 Tr., p. 95-98) (App. II, 257-260). During the offer of proof, Plaintiffs asked Defendant Dorsey, the train's engineer, if he recalled any near misses that day prior to the accident. Defendant Dorsey testified that he did not recall any near misses. (Nov. 5, 2018 Tr., p. 96) (App. II, 258). Defendant Dorsey also testified he did not recall any conversations with the conductor, Defendant Yokem, regarding the conductor's recollection of any "near misses." (Nov. 5, 2018 Tr., p. 96) (App. II, 258). Such testimony is not probabitive as to whether a "near miss" even occurred. Certainly, this tesitmony provides no information as to whether any "near miss" was under substantially similar circumstances or whether any "near miss" could potentially be probative of the condition of the horn. Regardless, Plaintiffs were permitted to ask Defendant Dorsey on cross-examination whether he recalled any "near misses," and he testified under

oath that he did not recall any "near misses." (Nov. 5, 2018 Tr., p. 113) (App. II, 261).

Plaintiffs also submitted the affidavit of Brian Davis as part of the offer of proof. (Nov. 5, 2018 Tr., p. 97) (App. II, 259). Regarding the alleged "near miss," the affidavit simply states that Mr. Davis spoke with Defendant Yokem (the conductor) following the accident and "Josh told me during that conversation that about 45 minutes prior to this collision they had a near miss at a crossing somewhere outside of Independence." (Affidavit of Brian Davis) (App. I, 185-187). No further details regarding the "near miss" appear in the affidavit, and neither Mr. Davis nor Defendant Yokem testified during the offer of proof. (Nov. 5, 2018 Tr., p. 95-98) (App. II, 257-260).

Plaintiffs assert that evidence of a "near miss" was probative on the question of an improperly functioning horn, as well as Defendants' alleged notice of the alleged improperly functioning horn, but the offer of proof described above fell far short of establishing substantial similarity to the accident. There was no information in the offer of proof that would permit the Court to conclude that the "near miss," assuming it even took place, occurred under substantially similar circumstances to the accident at issue in this case or was probative on the question of whether the horn was working properly. *Kuta v. Newberg*, 600 N.W.2d 280, 289 (Iowa 1999) (upholding district

court's denial of admission of prior accidents where the proffered testimony failed to meet the test of substantial similarity and stating "Evidence of prior accidents is not relevant to the issue of causation of the occurrence in question in the absence of proof of substantial similarity of all conditions that might enter into or affect causation."); *Mercer v. Pittway Corp.*, 616 N.W.2d 602, 612–13 (Iowa 2000) ("A preliminary requirement to the admission of evidence of prior incidents, however, is a foundational showing that the prior accidents or incidents occurred under substantially the same circumstances as the incident in the present case."). The determination as to whether the requirement of substantial similarity is met "involves relevancy and the inconvenience of trying collateral issues and is therefore vested in trial court discretion." *Oberreuter v. Orion Indus., Inc.*, 398 N.W.2d 206, 211 (Iowa Ct. App. 1986).

Here, the "near miss" would have occurred earlier in the day at a different location and at a crossing with different characteristics. There are a number of unanswered questions[5] that would be relevant to the issue of whether the "near miss" was substantially similar to the accident so as to be

[5] There are likely numerous other unanswered questions that would be relevant on the issue; Defendants are providing a sampling of some of the questions that would be relevant to substantial similarity of the "near miss" and its alleged probative value on horn function.

probative of the horn questions at issue in this case. For example, was the visibility the same or was the fog heavier, lighter, or absent at the area of the "near miss"[6]? Were the warning devices present at the crossing the same? Did it involve a construction vehicle, car, pickup truck, semi-truck, motorcycle, bicycle, or pedestrian? Was the road gravel or paved? Was there ice on the road such as the driver heard the horn but slid close to the crossing before stopping resulting in the "near miss"? Was vegetation obstructing visibility? Was the crossing at an angle or perpendicular? Was the driver of the vehicle listening to loud music? Was the driver of the vehicle hearing impaired? Was the vehicle stuck on the crossing but able to move prior to the train arriving? Did the driver hear the horn and decide to accelerate across the crossing and beat the train? Was it a private crossing where no horn was required to be sounded? What evidence was there that the driver in the "near miss" heard or did not hear the horn, if any? How close was the "near miss"? Was the driver speeding? Was the visibility even worse and an accident was prevented solely because the horn was functioning properly?

In sum, to the extent a "near miss" even took place, it occurred at different crossing with unknown characteristics, occurred under unknown

[6] Defendant Dorsey, the engineer, testified that there was fog the whole trip "on and off". (Nov. 5, 2018 Tr., p. 36:15-17) (App. II, 253).

weather conditions, and under numerous other unknown circumstances. Without any details as to the circumstances of the alleged "near miss" other than it occurred the same day as the accident, a substantial risk of prejudice to the Defendants existed if such evidence was admitted without the proper foundational showing to establish relevance because the jury may have speculated that the horn functioning was the cause of the "near miss" without any actual evidence as to the circumstances of the "near miss" and whether it was even related to horn volume. Plaintiffs had the burden to demonstrate the foundational showing of substantial similarity and failed to do so. The district court did not abuse its discretion in refusing to allow evidence of a "near miss" for which Plaintiffs failed to establish a proper foundation.

C. The District Court Did Not Abuse Its Discretion in Excluding the Horn's Maintenance Manual

Plaintiffs sought to introduce the train horn's maintenance manual into evidence in order to establish that the manual warns about icy conditions and provides solutions. (Nov. 1, 2018 Tr., p. 65-75) (App. II, 225-235). The district court denied Plaintiffs' request to admit the manual itself on hearsay grounds, but the district court informed Plaintiffs' counsel that he could question his expert about his familiarity with the horn and maintenance required, including permitting questioning about the manual, the conditions the horn would encounter, how those conditions could be fixed, and what can

happen to the horn under icy conditions. (Nov. 1, 2018 Tr., p. 65-75) (App. II, 225-235).

There was no abuse of the district court's discretion. The manual contained out of court statements offered for their truth. (Pl. Proposed Ex. 61) (App. I, 174). The manual was unquestionably hearsay, and Plaintiffs do not dispute that it was hearsay. See IOWA R. EVID. 5.801. Instead, Plaintiffs argue that the manual was admissible to impeach the testimony of Mr. Peterson, Defendants' expert. (Pl. Br. p. 52-53). Plaintiffs misunderstand the nature of admitting evidence that would otherwise be inadmissible hearsay for impeachment purposes. While a contradictory, out of court statement previously made by the testifying witness may be admitted for impeachment purposes, the reason this is so is because the statement is not being offered for its truth but rather to show the inconsistency of the statements. As this Court explained in *Brooks v. Holtz*, 661 N.W.2d 526, 530–31 (Iowa 2003):

> One noted treatise on evidence explains the use of impeachment evidence in this way:
>
> The attack by prior inconsistent statement is not based on the theory that the present testimony is false and the former statement true but rather upon the notion that talking one way on the stand and another way previously is blowing hot and cold, raising a doubt as to the truthfulness of both statements. McCormick on Evidence § 34, at 126.
>
> Because the out-of-court statement is offered to prove the witness's testimony is unreliable rather than to prove the truth of

> the matter asserted out of court, the prior inconsistent statement is not substantive evidence. *State v. Allen*, 348 N.W.2d 243, 246 (Iowa 1984). Thus, "[a] prior inconsistent out-of-court statement offered for impeachment purposes falls outside of the definition of hearsay." *State v. Nance*, 533 N.W.2d 557, 561 (Iowa 1995). As these principles make apparent, **the foundational basis for admissibility of an out-of-court statement as impeachment is a contradictory statement by the declarant at trial**.

(emphasis added).

Therefore, simply because hearsay evidence that is also substantive evidence would have a tendency to contradict or "impeach" a witness' testimony does not mean the hearsay is admissible where the value of the hearsay for "impeachment" depends on the hearsay being offered for its truth[7].

Here, Mr. Peterson testified he had not experienced horns icing up during his career as an engineer or consultant. (Nov. 5, 2018 Tr., p. 147) (App. II, 264). The fact that the manual contains warnings about the horn icing up does not even contradict this testimony. Regardless, to the extent the manual

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[7] For example, if Bill testifies the sun is blue, an out-of-court hearsay statement or affidavit from Susie that the sun is green would not come into evidence for impeachment as it is substantive evidence whose "impeachment" value only exists based upon its truth. Susie would need to come testify about the color of the sun and be subject to cross-examination. If Bill had previously stated the sun was pink, that statement may be admissible for impeachment purposes to show Bill made inconsistent statements, but not for its truth; it would not be admissible as substantive evidence to show that the sun is pink and Bill is wrong about it being blue. Here, Plaintiffs were offering the manual for its truth, as substantive evidence of the danger of the horn icing up. The district court correctly held it was inadmissible hearsay.

was contradictory or impeaching of his testimony, it would only be impeachment evidence if the statement was true. In other words, the manual could only have value as casting doubt on Peterson's testimony if the warnings about the horn's potential for icing up were true. Therefore, it was offered for its truth and was inadmissible hearsay.

Additionally, any error in failing to admit the manual itself was harmless. Plaintiffs were permitted to discuss the manual in detail with their expert, Mr. Rangel. Mr. Rangel testified that the manual warned about the danger of ice collecting on the diaphragm and not allowing it to vibrate and about the need to maintain the horn. (Nov. 1, 2018 Tr., p. 65-79) (App. II, 225-239). This testimony was undisputed. It was well within the district court's discretion to refuse to admit the hearsay manual, and the jury was nonetheless informed that the manual warned about the danger or possibility of ice collecting on the horn.

III. THE DISTRICT COURT CORRECTLY INSTRUCTED THE JURY

A. Preservation of Error and Standard of Review

Plaintiffs objected to all of the jury instructions for which they raised error in their brief.

Jury instructions are reviewed for corrections of errors at law. *Koenig v. Koenig*, 766 N.W.2d 635, 637 (Iowa 2009) ("We review challenges to jury

instructions for correction of errors at law.”). Jury instructions “must be considered as a whole, and if the jury has not been misled there is no reversible error.” *Thavenet v. Davis*, 589 N.W.2d 233, 236 (Iowa 1999); *Rivera v. Woodward Res. Ctr.*, 865 N.W.2d 887, 904 (Iowa 2015) (“any evaluation of an alleged flaw in a jury instruction must be considered based upon the instructions as a whole, not piecemeal”).

Additionally, harmless errors do not require reversal. *Rivera v. Woodward Res. Ctr.*, 865 N.W.2d 887, 903 (Iowa 2015) (declining to grant a new trial and stating, “Even when we find an instruction legally inadequate, error may be harmless. In applying the harmless-error doctrine we ‘first guess’ the jury. In other words, we try to divine what a jury would have done had it been properly instructed….”); *State v. Milam*, 447 N.W.2d 415, 417 (Iowa Ct. App. 1989) (stating, “An error in instructing a jury doesn’t require reversal unless it is prejudicial.”) (citing *State v. Bone*, 429 N.W.2d 123, 126 (Iowa 1988)); *Olson v. Prosoco, Inc.*, 522 N.W.2d 284, 289 (Iowa 1994) (finding error in submitting both negligence and strict liability theories but finding such error was harmless where jury found in favor of plaintiff on both theories).

B. There Was No Error in Instruction 16

Instruction 16 stated: "The mere fact an accident occurred or a party was injured does not mean a party was negligent." (App. I, 204). This is a stock intrusction, Iowa Civil Jury Instruction 700.8. It is a correct statement of the law and Plaintiffs concede that the instruction was justified based on the law as it currently stands. (Pl. Br. p. 54). The instruction merely clarifies that the jury is not to infer negligence by **either party** as a result of the fact that an accident occurred.

Plaintiffs argue that the instruction encourages the jury to take "an easy out" by determining neither party was negligent. (Pl. Br. p. 54-55). However, the instruction does not encourage the jury not to find either party negligent—it merely cautions the jury not to determine negligence on the basis of an accident alone. This was not a case where one party repeatedly argued along the lines that "stuff happens" or "accidents just happen and that's what happened here." No party mentioned Instruction 16 in closing argument and both parties argued specifically that the other party was negligent. Therefore, instead of unduly empahsizing one party's theory of the case, the instruction simply clarified for the jury that the occurrence of the accident itself does not mean either party was negligent, with the goal of focusing the jury on the

actual specifications of negligence in the marshalling instruction. There was no error in giving the instruction.

C. Any Error in Instruction 18(6) and Instruction 34 Was Harmless as the Jury Found Defendants Were Not Negligent, and Substantial Evidence Supported the Instructions

Plaintiffs next assert error in Instructions 18 (part 6) and 34. Instruction 18 stated, in relevant part:

> Defendants claim that Plaintiff R.W. was at fault in one or more of the following particulars:
> …
> 6. In voluntariliy assuming any risks or hazards attendant to traversigin the railroad crossing when same was open and obvious.

(App. I, 206).

Instruction 34 stated:

> A driver must have his or her vehicle under control. It is under control when the driver can guide and direct its movement, control its speed and stop it reasonably fast. A violation of this duty is negligence.

(App. I, 222).

As discussed below, both of these instructions were supported by substantial evidence in the record, and, regardless, any error in these instructions was harmless.

1. Any error in Instructions 18 or 34 was harmless because the jury found Defendants were not negligent

Instructions 18 and 34 both related to specifications of negligence regarding Plaintiff R.W.'s conduct. As discussed in the next section, there was no error in giving these two instructions as they were accurate statements of the law[8] and there was substantial evidence in the record supporting these instructions. However, this Court does not need to address the issue of whether there was error in the instructions because any error in jury instructions regarding Plaintiff's negligence was harmless because the jury found Defendants were not at fault in any respect.

Because the jury found that Defendants were not negligent (App. I, 243), it is irrelevant whether Instructions 18 and 34, which relate solely to Plaintiffs' negligence, were supported by substantial evidence in the record. In other words, any error in Instructions 18 or 34 (which there was none) was harmless. The jury found that Defendants were not negligent. Therefore, Instructions 18 and 34 were ultimately irrelevant to the jury's determination in this case because they related to Plaintiffs' negligence.

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[8] Plaintiffs do not argue that these instructions do not accurately state the law. Plaintiffs only assert that there was not substantial evidence in the record supporting the instructions.

2. Instructions 18 and 34 were supported by substantial evidence in the record

In addition to Instructions 18 and 34 being irrelevant to the outcome of the case as a result of the jury determining that Defendants were not negligent, substantial evidence supported these instructions. "In considering whether the instruction is supported by substantial evidence, [appellate courts] give the evidence the most favorable construction it will bear in favor of supporting the instruction." *Asher v. OB-Gyn Specialists, P.C.*, 846 N.W.2d 492, 496–97 (Iowa 2014).

Instruction 18, part 6, was supported by substantial evidence. Giving the evience the most favorable construction it will bear in favor of supporting the instruction, the jury could have found that Plaintiff R.W. was familiar with the crossing as he had crossed it well in excess of 100 times (Oct. 30, 2018 Tr. p. 83-84) (App. II, 178-179), knew trains came at different times with no set schedule (Oct. 31, 2018 Tr. p. 71) (App. II, 214), knew that trains came from both directions (Oct. 30, 2018 Tr. p. 87) (App. II, 182), knew it was foggy (Oct. 30, 2018 Tr. p. 79-80) (App. II, 175-176), and despite knowledge of these facts made the decision to assume the risk of traversing the crossing without stopping at the yield sign or stopping at all prior to the railroad tracks. The jury could have found this action negligent.

As for Instruction 34, it is undisputedly a correct statement of the law and Plaintiffs concede this point. (Pl Br. p. 58). It is a stock instruction, Iowa Civil Jury Instruction 600.7. Substantial evidence supports the instruction as based upon the video and evidence at trial, and giving the evidence the most favorable construction it will bear in favor of supporting the instruction, the jury could have concluded that Plaintiff R.W. failed to have his vehicle under control for the conditions based upon Plaintiff R.W.'s actions in driving past the yield sign and directly into the path of an oncoming train, while failing to bring the vehicle to a stop until a portion of the vehicle was on the railroad tracks. (Ex. AA) (App. II, 164).

Again, the evidence supporting these instructions is irrelevant because they address Plaintiff R.W.'s negligence and the jury found that Defendants were not negligent. Therefore, any error would be harmless. Nonetheless, substantial evidence supported both instructions and there was no error in giving these instructions.

D. There Was No Error in Instruction 25

Instruction 25 states:

> Each 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 locmotive in its direction of travel. A violation of this regulation is negligence.

(App. I, 213).

This is an accurate statement of the law. It is the exact language from the federal regulation regarding horn equipment and decibel level. 49 C.F.R 229.129. There was no dispute at trial that the horn test was conducted in 2010 and the decibel level met the requirements of the regulation. Nonetheless, the jury was offered a specification of negligence regarding whether the horn was defective or not operating properly. (See Jury. Inst. No. 17) (App. I, 205). There was no error or prejudice to Plaintiffs in giving the exact language from the federal regulation and a specification of negligence as to whether the horn was working properly.

In fact, Defendants objected to this instruction as unsupported by substantial evidence in the case because there was no evidence as to what decibel level the horn was sounding on the day of the accident. (Nov. 6, 2018 Tr. p. 13-18) (App. II, 282-287) The engineer testified that the horn was sounded as part of the daily inspection and it was working properly. (Nov. 5, 2018 Tr. p. 22-23, 26) (App. II, 249-251). The crew sounded the horn nearly 400 times that day prior to the accident in question and testified that the horn was working properly. (Nov. 5, 2018 Tr. p. 22-23, 26, 35, 49, 65, 91) (App. II, 249-252, 254-256) Plaintiffs had no competent evidence to the contrary, as the only testimony that the horn was defective came from Mr. Rangel, and, as

set forth in the last section of this brief, Defendants maintain Rangel's testimony was unreliable, lacked foundation, and should have been excluded.

E. There Was No Error in Instruction 29

Instruction 29 states:

> You are instructed that with reference to the question of whether the train's horn was sounded before the accident, it is the law in this state that the positive testimony of a witness that he or she heard the horn as evidence that the horn was, in fact, sounding because it must have been soudning or he or she would not have heard it. On the other hand, the negative testimony of a witness that he or she did not hear the horn is not necessarily evidence that thehorn was not soudned for it may have been sounded and yet not heard by that witness.

(App. I, 217).

This is an accurate statement of the law, and Plaintiffs do not dispute whether this statement accurately states the law. Instead, Plaintiffs argue that the instruction is misleading because they speculate that it was possible this instruction caused the jury to condluce that the disputed issue was whether or not the horn was sounded at all as opposed to whether it was sounded at the appropriate volume.

Review of the jury instructions as a whole, including the specifications of negligence submitted against Defendants (Jury Inst. No. 17) (App. I, 205), as well as the testimony and the parties' closing arguments make it clear that the primary argument from Plaintiffs was that the horn was not loud enough,

not that it was not sounded at all. (Pl. Closing Arg., Nov. 6, 2018 Tr. p. 47-52). This instruction was not likely to confuse the jury, and again, was an accurate statement of the law.

Regardless, this instruction was supported by the evidence and appropriate for this case. In addition to the volume claim, Plaintiffs were also making the claim that the horn was not sounded in the proper sequence and submitted two specifications of negligence against Defendants regarding horn sequence. (Jury Inst. No. 17) (App. I, 205). The instruction clarifies for the jury that the testimony that Plaintiff R.W. did not hear the horn does not necessarily mean that the horn was not sounded at a particular time, which is relevant to the sequence claim as well. There was no error[9] in Instruction 29.

F. There Was No Error in Instruction 30

Instruction 30[10] stated:

> You are instructed that the railroad engineer had the right to assume that Plaintiff Rick Wermerskirchen would observe the law until such time as the engineer knew, or in the exercise of

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[9] Any error would be harmless, as the instruction is at worst unnecessary; it did not materially misstate the law on any issue, and the jury was instructed regarding specific allegations of negligence as to Defendants, including the Plaintiffs' claim that the horn not operating properly or was defective. (Jury Inst. No. 17) (App. I, 205).

[10] This instruction is a modified form of Iowa Civil Jury Instruction 600.71, and it accurately states the law. *Hitchcock v. Iowa S. Utilities Co. of Delaware,* 6 N.W.2d 29, 35-36 (1942).

> ordinary care should have known, that Plaintiff Rick Wermerskirchen would not observe the law.

(App. ___).

Plaintiffs' primary objection to this instruction was the last sentence of the proposed instruction[11] which was removed by the court.

Plaintiffs also argue that the instruction should have been reciprocal, arguing that, without adding a sentence that Plaintiff R.W. had the right to assume Defendants would observe the law, the instruction leaves the impression that there were no duties owed by Defendants. (Pl. Br. p. 66-67). However, the Court instructed the jury on several duties owed by Defendants, and the jury was instructed that a violation of any of these duties constituted negligence. (Jury Inst. No. 17, 20, 23, 24, 25, 26, 27, 28) (App. I, 205, 208, 211-216). The jury found Defendants were not negligent. It is unclear how adding a sentence that Plaintiff R.W. had the right to assume that Defendants would observe the law could have changed the jury's analysis[12], particularly

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[11] The last sentence of Defendants' proposed instruction, removed by the Court, stated: "In other words, the engineer had the right to assume that Plaintiff would not drive onto the track immediately into the path of an approaching train."

[12] Again, at worst, the instruction was unnecessary, as by the time the engineer could have seen Plaintiff R.W.'s vehicle and reacted, nothing could have been done to avoid the accident—there was arguably nothing that either party could have had time to assume at that point.

as Plaintiff R.W. testified he did not see the train until he was already on the tracks.

IV. ANY ERRORS WERE HARMLESS

As discussed in detail above, there were no errors in any jury instruction or in granting partial summary judgment. At trial, the only claims of negligence remaining against Defendants revolved around the train horn. Plaintiffs do not argue or assert on appeal any error regarding horn sequence (either emergency or crossing). Therefore, Plaintiffs have waived any error regarding horn sequence. Plaintiffs' remaining assertions of error only relate to the horn's volume at the time of the accident. Any errors regarding jury instructions or evidence were harmless[13] for the additional reason that Defendants were entitled to a directed verdict on the horn claims.

Testing demonstrated the horn was in compliance with federal regulations from the horn test performed in May 2010. (Nov. 5, 2018 Tr. p. 128-129) (App. II, 262-263); (Ex. A) (App. I, 160). Mr. Rangel admitted that the horn test was current as of the date of the accident (Nov. 1, 2018 Tr. p. 60:4-16) (App. II, 224). The train engineer, Defendant Dorsey's, undisputed testimony was that he tested the horn on the day of the accident as it was

[13] The harmlessness of any alleged error in any specific instruction was addressed above in the sections pertaining to each instruction, as appropriate.

subject to daily tests and was working properly. (Nov. 5, 2018 Tr. p. 22-23, 26, 35, 49, 65, 91) (App. II, 249-252, 254-256).

Plaintiffs' only support for their speculation that the horn was not working properly came from their expert, Mr. Rangel. Mr. Rangel's testimony was unreliable and should have been exluded as a matter of law. (Mot. to Exclude[14]) (App. I, 95). Mr. Rangel's opinion that the horn was not sounding at an appropriate level was nothing more than unsupported speculation and lacked a reliable scientific foundation. Mr. Rangel failed to conduct any scientific investigation, testing, or measurements concerning the level at which the horn was sounding. (Mot. to Exclude, p. 3, 5-6) (App. I, 97, 99-100). He did not personally inspect the horn or interview the train crew about the functionality of the horn on the day of the accident. (Mot. to Exclude, p. 2, 5-6) (App. I, 96, 99-100). Mr. Rangel's sole source of knowledge concerning the level at which the horn was sounding on the day of the accident comes from his viewing of a video of the accident. (Mot. to Exclude, p. 3, 5-6) (App. I, 97, 99-100).

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[14] Defendants filed a motion to exclude Mr. Rangel's testimony based on lack of foundation and reliability and objected at trial to his opinions, incorporating the arguments made in the motion to exclude. (Nov. 1, 2018 Tr. p. 85-86) (App. II, 240-241).

In *Nunes v. BNSF Railway Co.*, 2012 WL 2874059, at *5 (C.D. Ill. 2012), the plaintiff's expert asserted the horn on a locomotive had not sounded properly. In support of that conclusion, the expert theorized that the horn failed mechanically. *Id.* at *6. However, the expert had not conducted any tests that demonstrated the horn was not functioning properly, and the court noted: "[The expert] cited no evidence at all to support this as a viable possibility-other than the lack of horn data on the download." *Id.* Ultimately, the court excluded the expert's testimony. *Id.* at *7.

In *Marsh v. Norfolk Southern, Inc.,* 243 F. Supp. 3d. 557, 571 (M.D. Penn. 2017), the plaintiff alleged that a locomotive's horn should have been louder. However, the plaintiff failed to offer any objective evidence the horn failed to comply with applicable federal regulations. *Id.* Lacking objective evidence regarding the level of sound the horn produced, the court determined the assertion that the horn should have been louder was untenable. *Id.*

However, in *National Railroad Passenger Corp. v. Transwood, Inc.*, 2001 WL 492392, at **1, 3 (E.D. La. 2001), the court allowed an expert to testify regarding the propriety of a train horn's sound following a truck-train accident. In that case, the court specifically noted that the expert had taken sound-level measurements and discussed "decibel levels, including the level

of normal train whistles and the rate at which sound diminishes over distance." *Id.* at *3.

Here, as in *Nunes* and *Marsh* and unlike in *National Railroad Passenger Corp.*, Mr. Rangel has not conducted any scientific tests to determine the sound level of the horn and can offer no objective evidence that the horn was defective on the day of the accident. Mr. Rangel set forth no scientific basis from which he could credibly claim that the horn was not functioning properly on the day of the accident simply from watching a video. Ultimately, Mr. Rangel's opinion is unsupported speculation based upon the viewing of a video of the accident, is not based on any scientific testing or examination, and is contradicted by the undisputed facts regarding the level at which the train horn was sounding on the day of the accident.

Because the factual foundation upon which Mr. Rangel's opinion depends is wholly unsupported, his testimony and opinions should have been excluded. *See, e.g.*, *Ranes v. Adams Labs., Inc.*, 778 N.W.2d 677, 693 (Iowa 2010) ("[I]f an expert's opinion is so fundamentally unsupported it can offer no assistance to the jury, it must be excluded." (citations omitted)); *Lessenhop v. Norton*, 153 N.W.2d 107, 114 (Iowa 1967) ("An expert opinion lacking a proper foundation is, of course, of no value and is not admissible."); *see also Perry v. Berkley*, 996 A.2d 1262, 1271 (Del. 2010) (dismissing case where

expert's opinion was based on a "completely incorrect case specific factual predicate" and stating "When the expert's opinion is not based upon an understanding of the fundamental facts of the case, however, it can provide no assistance to the jury and such testimony must be excluded."); *Davis v. Williams*, No. 278713, 2008 WL 5101634, at *3 (Mich. Ct. App. Dec. 4, 2008) (where experts assumed facts contradicted by the record, the trial court appropriately disregarded the experts' opinions); *APAC-Mississippi, Inc. v. Goodman*, 803 So. 2d 1177, 1185 (Miss. 2002) (reversing the trial court in part for failing to strike an expert's testimony that was based upon inaccurate facts because the facts relied upon by an expert "must afford a reasonably accurate basis for the expert's conclusion"); *Williams v. W.C.A.B. (Hahnemann Univ. Hosp.)*, 834 A.2d 679, 684 (Pa. Commw. Ct. 2003) ("It is well-settled that where an expert's opinion is based upon an assumption which is contrary to the established facts of record, that opinion is worthless."); *Houston Unlimited, Inc. Metal Processing v. Mel Acres Ranch*, 443 S.W.3d 820, 832–33 (Tex. 2014) ("If an expert's opinion is unreliable because it is based on assumed facts that vary from the actual facts, the opinion is not probative evidence"); *Vasquez v. Mabini*, 606 S.E.2d 809, 811 (Va. 2005) ("Expert testimony founded upon assumptions that have no basis in fact is not merely subject to refutation by cross-examination or by counter-experts; it is

inadmissible.”). Despite the availability of scientific tests to measure the sound level of the horn and determine whether the horn was operating at proper sound levels, Mr. Rangel did not conduct such testing. Nevertheless, he claims, based solely on his review of a video of the accident, the horn was not operating at proper sound levels.

Similarly, the fact that Plaintiff R.W. allegedly failed to hear the train horn does not create an issue of material fact as to whether the horn was producing sound between 96 and 110 decibels. Again, the test conducted of the horn established it was in compliance with federal regulations. The train crew tested the horn prior to departure that day. The train crew would have also sounded it prior to the accident at numerous crossings. Plaintiff R.W.’s testimony that he did not hear the whistle does not avoid preemption. *Estate of Strandberg v. Chicago, Cent. & Pac. R. Co.*, 284 F. Supp. 2d 1136, 1143–44 (N.D. Iowa 2003) (stating, “the plaintiff alleges that the whistle and headlights merely were not adequate. The evidence establishes that the whistle, bell, and headlights were all activated prior to the collision. The passenger in the vehicle simply states that he did not hear the whistle or see the headlights. This does not create a genuine issue of material fact as to whether these devices were activated…The plaintiff’s claim of inadequate whistle is preempted by federal law and summary judgment is appropriate.”).

Ultimately, Plaintiffs failed to offer evidence from any qualified witness that the train horn was not producing between 96 and 110 decibels on the day of the accident (if it had been tested under the conditions specified in the federal regulations). Defendants were entitled to directed verdict on the horn claims, which were the only remaining claims at trial. Therefore, any error in jury instructions or evidence was harmless.

CONCLUSION

The district court correctly granted Defendants' Motion for Summary Judgment on the speed, lookout, and braking claims. The jury was properly instructed and found that Defendants were not negligent. The specifications of error raised by Plaintiffs are without merit, any errors that do appear in the record were harmless, and Defendants were entitled to a directed verdict on Plaintiffs' claims.

Ultimately, Plaintiff R.W. operated his vehicle past a yield sign and crossbucks without stopping and moved directly into the path of an oncoming train that had its horn and bell activated, headlights and ditch lights activated, and was travelling 13 miles per hour below the federally mandated speed limit. As even Plaintiffs' expert conceded, nothing Defendants could have done could have avoided the accident once Plaintiff R.W. proceeded past the yield sign and onto the tracks. Following a 6-day trial, the jury correctly found

that Defendants were not negligent. There is no basis to reverse judgment in favor of Defendants. The verdict and judgment must be affirmed.

REQUEST FOR ORAL ARGUMENT

Defendants respectfully request oral argument on the issues contained herein.

Date: July 3, 2019

Respectfully submitted,

/s/ Kellen Bubach

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