ELECTRONICALLY FILED JUL 03, 2019 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA

RICHARD J. WERMERSKIRCHEN and CAROL M. WERMERSKIRCHEN, Plaintiffs-Appellants, And Concerning CANADIAN NATIONAL RAILROAD, a/k/a CN, a/k/a CN RAILWAY; CHIGAGO, CENTRAL & PACIFIC RAILROAD, a/k/a CCP ILLINOIS CENTRAL RAILROAD COMPANY; TIM DORSEY, and JOSH YOKEM Defendants-Appellees.	Supreme Court No. 18-2039 Black Hawk County Case No. LACV126365

APPEAL FROM THE DISTRICT COURT FOR BLACK HAWK COUNTY
THE HONORABLE LINDA M. FANGMAN

APPELLANTS' FINAL BRIEF AND ARGUMENT

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. THE DISTRICT COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFFS' CLAIM THAT THE CN TRAIN WAS TRAVELLING AT A SPEED IN EXCESS OF WHAT WAS SAFE UNDER THE CIRCUMSTANCES.

Kent Feeds, Inc., v. Manthei, 646 N.W.2d 87, 89 (Iowa 2002)
CSX Transportation, Inc. v. Easterwood, 507 U.S. 658 (1993)

A. The district court erred in granting summary judgment to Defendants as to Plaintiffs' claims regarding lookout and failure to brake to avoid the accident.

1. The claims that the train crew failed to maintain a proper lookout and failed to stop or slow the CN Train to avoid a "specific, individual hazard" are not preempted by FRSA.

Alcorn v. Union Pacific Railroad Company, 50 S.W.3d 226, 232 (Mo. 2001)
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Coulthard v. Keenan, 129 N.W.2d 597 (Iowa 1964
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2. The Defendants failed to demonstrate, as a matter of law, that the train crew's failure to maintain a proper lookout or slow the train did not cause any damages in this case.

Dresser v. Union Pacific Railroad Company, 809 N.W.2d 713, 722 (Neb. 2011)
Smith v. *Shagnasty's Inc.*, 688 N.W.2d 67, 71 (Iowa 2004)

B. The district court erred in concluding that the severely limited visibility at the time of the accident did not constitute a "specific, individual hazard."

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A. The district court erred in failing to sustain Plaintiffs' objection to Jury Instruction No. 16.

Dickman v. Truck Transp., Inc., 224 N.W.2d 459, 464 (Iowa 1974)
Olson v. Prosoco, Inc., 522 N.W.2d 284, 287 (Iowa 1994)
I.C.J.I. 700.8

B. The record does not contain substantial evidence to support Jury Instruction No. 18 in its entirety or Jury Instruction 34.

Struve v. Payvandi, 740 N.W.2d 436, 439 (Iowa 2007)
Wolbers v. Finley Hospital, 673 N.W.2d 728, 732 (Iowa 2003)

1. The record does not contain substantial evidence that Mr. Wermerskirchen was at fault "in voluntarily assuming any risks or hazards attendant to traversing the railroad crossing when same was open and obvious."

Wolbers v. Finley Hospital, 673 N.W.2d 728, 732 (Iowa 2003)

2. The record does not contain substantial evidence that Mr. Wermerskirchen did not have his vehicle under control.

Wolbers v. Finley Hospital, 673 N.W.2d 728, 732 (Iowa 2003)

C. Jury Instruction No. 25 was incomplete and misleading, as it failed to instruct the jury that the federal horn audibility requirements impose an ongoing obligation.

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BNSF Railway Company v. Seats, Inc., 235 F.Supp.3d 1089 (D. Neb. 2017)

BNSF Railway Company v. Seats, Inc., 900 F.3d 545 (8th Cir. 2018
Estes v. Moore, 993 F.2d 161, 163 (8th Cir. 1993)
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49 C.F.R. §229.129
49 C.F.R. Appendix B to Part 229—Schedule of Civil Penalties

D. Jury Instruction No. 29 has no application to this case, as the parties did not dispute whether or not the horn on the CN Train was sounded, but rather, whether it was sounded at the appropriate level.

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Payne v. C & N.W.R. Co., 78 N.W. 813, 815 (Iowa 1899)
Rivera v. Woodward Resource Center, 865 N.W.2d 887, 903 (Iowa 2015)

E. The district court erred by instructing the jury that the railroad engineer had the right to assume Mr. Wermerskirchen would observe the law without also instructing the jury that Mr. Wermerskirchen had the right to assume the railroad engineer would observe the law.

Rivera v. Woodward Resource Center, 865 N.W.2d 887, 903 (Iowa 2015)
I.C.J.I. 600.71

IV. THE DEFENDANT CANNOT DEMONSTRATE THAT THE ERRORS CLAIMED BY THE PLAINTIFFS WERE HARMLESS.

In re Estate of Connor, 36 N.W.2d 833, 841 (Iowa 1949)
Johnson v. State Farm Auto Insurance Co., 504 N.W.2d 135, 138 (Iowa Ct. App. 1993
In re Estate of Kelly, 558 N.W.2d 719 (Iowa Ct. App. 1996)
Madison v. Colby, 348 N.W.2d 202, 204 (Iowa 1984
Rivera v. Woodward Resource Center, 865 N.W.2d 887, 903 (Iowa 2015)
Steensland v. Iowa-Illinois Gas & Electric Co., 47 N.W.2d 162, 165 (Iowa 1951)

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court pursuant to Rule 6.1101(2)(c) of the Iowa Rules of Appellate Procedure. It presents a substantial issue of first impression, which must ultimately be decided by the Iowa Supreme Court. The Court has never ruled on the scope of federal preemption with respect to the particular negligence claims asserted by the Plaintiffs in this case.

STATEMENT OF THE CASE

Nature of the Case: Plaintiffs Richard J. and Carol M. Wermerskirchen appeal from the jury verdict entered in favor of Defendants Chicago Central & Pacific Railroad, Tim Dorsey and Josh Yokem, after trial in the District Court for Black Hawk County, the Honorable Linda M. Fangman presiding.

Course of Proceedings: On December 18, 2014, Plaintiffs filed a Petition at Law (the "Petition") in this matter. (App. v. I p. 8). Defendants filed an Answer to the Petition on January 15, 2015. (App. v. I p. 16). Plaintiffs subsequently amended the Petition on January 16, 2015 (the First Amended Petition), and Defendants filed an Answer to the First Amended Petition on February 5, 2015. (App. v. I p. 36). Plaintiffs claimed Defendants were negligent in numerous particulars relating to speed,

lookout, braking, and the quality and use of the horn on the train that collided with the road grader driven by Richard J. Wermerskirchen Plaintiffs filed a motion to amend the First Amended Petition on July 28, 2017, and attached the Second Amended Petition at Law (the "Second Amended Petition"). (App. v. I p. 73). The court granted Plaintiffs' Motion to Amend the First Amended Petition on August 8, 2017, and Defendants filed an Answer to the Second Amended Petition on September 11, 2017.

On July 20, 2017, Defendants filed a Motion for Summary Judgment in which they requested that the district court rule that all of Plaintiffs' negligence claims were preempted by the Federal Railroad Safety Act ("FRSA"). On September 15, 2017, the district court entered an Order for Partial Summary Judgment. (App. v. I p. 87). The district court concluded that Plaintiffs' claims that Defendants failed to maintain a proper lookout and failed to slow or stop Canadian National Train number CSX 7376 (the "CN Train")[1] to avoid the collision were directly related to Plaintiffs' claim for "excessive speed," which claim was preempted by federal law. The district court denied Defendants' Motion for Summary Judgment as to Plaintiffs' claims relating to the locomotive horn. Plaintiffs filed an Application for Interlocutory Appeal of the district court's Order for Partial

[1] "CN" is a trade name for all of the Defendant entities.

Summary Judgment on October 14, 2017, which was denied by the Court on December 1, 2017.

Trial was held in this matter from October 30, 2018 through November 6, 2018. On November 7, 2018, the jury returned a verdict in favor of the Defendants. (App. v. I p. 243). On November 27, 2018, Plaintiffs filed a timely Notice of Appeal in this case. (Supp. App. p. 3)

STATEMENT OF THE FACTS

Richard J. Wermerskirchen ("Rick" or "Mr. Wermerskirchen") began working in construction while he was still attending Don Bosco High School, as part of the school's co-op program. While attending high school, Rick worked half days at Bertch Cabinet Manufacturing in Washburn, Iowa, during the early days of the company. (Transcript Day 1 ("Tr. 1.") p. 61, ln. 1-21; p. 62, ln. 11-15)(App. v. II pp. 169-170). After high school, he continued working at Bertch Cabinet, before ultimately leaving because he was not getting enough hours. Mr. Wermerskirchen continued working in the construction industry for many years, during which time he relocated to Texas and then Colorado, before returning to Iowa in 2002. (Tr. 1 p. 62, ln. 20 to p. 64, ln. 13)(App. v. II p. 170). In May of 2002, Rick began working for Black Hawk County as a member of the bridge crew. (Tr. 1 p.65, ln. 12-18)(App. v. II p. 173). He subsequently worked as a truck driver,

distributing rock to County road graders for use on gravel road surfaces, before becoming a road grader himself in 2010. (Tr. 1 p. 65, ln. 22 to p. 66, ln. 21) (App. v. II pp. 173-174).

On the morning of January 28, 2013, Rick was ordered by his supervisor to come into work to scarify, i.e. "rough up", the gravel roads in his territory, because they had iced over due to freezing rain. The roads were slippery, and visibility was limited due to severe fog. (Tr. 1 p. 79, ln. 24 to p. 80, ln. 13) (App. v. II p. 175); Transcript Day 2 ("Tr. 2") p. 127, ln. 8-19; p. 128, ln. 7-15; p. 136, ln. 5-25; p. 140, ln. 15-24) (App. v. II pp. 218-220). While operating the road grader north on Nesbit Road, Rick approached railroad crossing 307095M, which was controlled by crossbucks and a yield sign (the "Crossing"). During his previous three years as a road grader for Black Hawk County, Rick had crossed the tracks at the Crossing well over 100 times and was able to hear the horns from oncoming trains up to a mile away. (Tr. 1 p. 83, ln. 24 to p. 84, ln. 4; p. 86, ln. 16-24) (App. v. II pp. 178-181).

Mr. Wermerskirchen elevated the plow and scarifier on his road grader when he came within 50 feet of the Crossing. (Tr. 1 p. 88, ln. 18-24) (App. v. II p. 183). He has never scarified the gravel and ice in the immediate vicinity of the Crossing, because CN has a right of way and

maintains control over this area. (Tr. 1 p. 79, ln. 6-18; p. 95, ln. 14-16)(App. v. II pp. 175, 187). Rick approached the Crossing two different times on the morning of January 28, 2013, and he was able to clear the Crossing the first time. (Tr. 1 p. 85, ln. 5-9) (App. v. II p. 180). Each time he approached the Crossing, he looked for trains continually, from both the east and the west, as trains can approach from both directions. (Tr. 1 p. 87, ln. 6 to p. 88, ln. 3; Tr. 2 p. 125, ln. 23 to p. 126, ln. 8)(App. v. II pp. 182-183, 216-217). Rick was very concerned about the poor visibility and was focused on crossing the railroad tracks safely. (Tr. 1 p. 88, ln. 15-17; p. 103, ln. 24 to p. 104, ln. 1)(App. v. II pp. 183, 194-195).

In order to cross the railroad tracks at the Crossing, it is necessary to drive up an icy incline. Knowing that his road grader takes significantly more time to accelerate from a stopped position than an average size vehicle, Rick determined to keep the road grader in motion when he approached the Crossing, so as to minimize the time it would take to cross the tracks. (Tr. 1 p. 81, ln. 6-19; p. 104, ln. 2-17) (App. v. II pp. 177, 195). As Rick could not see a train, despite looking in both directions, or hear the sound of an engine or horn, he determined it would be safe to proceed and attempted to clear Crossing for a second time. (Tr. 1 p. 89, ln. 4-20; p. 103, ln. 11-22) (App. v. II pp. 184, 194). Just after his front tires crossed the northernmost rail of the

tracks, the CN Train appeared out of the fog from the east, traveling at approximately 47 miles per hour. Rick observed that the train was moving at a substantial rate of speed, but did not observe any attempt by the train crew to slow the train, or any other conduct or movement indicating that they had seen him. As such, he made the decision not to accelerate his road grader forward so as to avoid placing his body directly in the path of the CN Train. (Tr. 1 p. 90, ln. 1 to p. 91, ln. 11) (App. v. II p. 185-186). Instead, Rick stopped the road grader before the cab he occupied entered the railroad tracks, a decision which likely saved his life. (Tr. 1 p. 104, ln. 15-18) (App. v. II p. 195).

The CN Train collided with the front portion of Mr. Wermerskirchen's road grader. The railroad engineer, Timothy Dorsey, and the conductor, Josh Yokem, threw themselves on the floor of the cab of the train before impact. They did not apply the brake until approximately ten seconds after the collision. As such, the CN Train continued travelling at full speed for some time. (ESI Investigative Report p. 7; CN Train Event Recorder Data Table) (App. v. II p. 17-20).[2] Rick was thrown

[2] Defendants' expert places the time of collision between 09:37:25 and 09:37:26. (ESI Investigative Report, p. 7). The data table indicates the CN Train maintained full speed until 09:37:33). (CN Event Recorder Data Table).

approximately 30 yards from the road grader into a ditch. (Tr. 1 p. 96, ln. 16-18)(App. v. II p. 188). He lay on the ground in excruciating pain, soaked in diesel fuel, and unable to move because he was trapped under a heavy metal bar. (Tr. 1 p. 97, ln. 3-5; p. 101, ln. 9-15)(App. v. II pp. 189, 192). The train crew eventually stopped the train and returned to the scene of the accident. Rick was approached by Mr. Yokem, who did not know what intersection he was at and was unable to lift the metal bar off of Rick by himself. (Tr. 1 p. 99, ln. 15 to p. 100, ln. 8)(App. v. II p. 190). At some point EMT workers arrived at the scene of the accident in an ambulance, and it took four individuals to lift the metal bar off Mr. Wermerskirchen. (Tr. 2 p. 142, ln 13-15)(App. v. II p. 222). After they did so, Rick initially shifted out of position in an effort to relieve his pain, before one of the EMT workers told him not to move because he could paralyze himself. (Tr. 1 p. 101, ln. 20-23; p. 102, ln. 6-11)(App. v. II pp. 192-193).

Rick suffered a broken pelvis, ankle, and knee, as well as five or six broken ribs as a result of the accident. (Tr. 2 p. 32, ln. 18-19; p. 36, ln. 7-14) (App. v. II pp. 198-199, 202). He also sustained three fractures to his spine, which required the insertion of metal rods into his back. (Tr. 2 p. 33, ln. 11-24; p. 36, ln. 15-18; p. 37, ln. 12-20)(App. v. II pp. 199, 202-203). Rick was initially taken to Covenant Hospital in Waterloo. (Tr. 2 p. 31, ln. 20-25)

(App. v. II p. 197). He had internal bleeding around his heart, and the doctors at Covenant were unable to keep his blood pressure up. (Tr. 2 p. 32, ln. 19-21)(App. v. II p. 198). The decision was made to transfer Mr. Wermerskirchen to University of Iowa Hospitals and Clinics ("UIHC"). (Tr. 2 p. 31, ln. 23-25)(App. v. II p. 197). He was transported to Iowa City by ambulance, rather than by helicopter, because it was not possible to travel by helicopter due to the fog. (Transcript Day 4 ("Tr. 4"), p. 28, ln. 11-21) (App. v. II p. 243). Rick was treated in the emergency trauma unit at UIHC by several different doctors, including a cardiologist and a neurosurgeon, Dr. Patrick Hitchon, M.D. (Tr. 2 p. 35, ln. 14-24)(App. v. II p. 201). Rick was not given any pain medications initially, because doing so would have carried the risk of lowering his blood pressure to a dangerous level. (Tr. 2 p. 34, ln. 21 to p. 35, ln. 9)(App. v. II pp. 200-201). He was catheterized more than once, because he was unable to urinate, causing him great pain. (Tr. 2 p. 33, ln. 25 to p. 34, ln. 20)(App. v. II pp. 199-200).

After twelve days as an inpatient at UIHC, during which time he had multiple surgeries, Rick was referred to the rehabilitation center at Covenant Hospital. When he was discharged from UIHC, he was confined to a wheelchair, which he would continue to use into the fall of 2013. (Tr. 2 p. 38, ln. 7-18; Tr. 4 p. 35, ln. 15-23) (App. v. II p. 244). Rick spent two weeks

at Covenant, before being discharged with a walker because he could not support his weight on his own, and he had to have grab bars and hand rails installed in his home. (Tr. 2 p. 39, ln. 1-18)(App. v. II p. 204). His wife, Carol, played a great role during his period of convalescence. She took time off from work to drive him to medical appointments, and essentially functioned as his personal nurse, administering his medications, and helping him perform the basic functions, including getting in and out of his wheelchair, getting to and from the bathroom, bathing, cooking, etc. (Tr. 2 p. 41, ln. 24 to p. 42, ln. 7; Tr. 4 p. 37, ln. 9-23)(App. v. II pp. 205-206, 245). As a result of the stress she endured caring for her husband, Carol was forced to seek medical care herself because she believed she was having a heart attack (Tr. 4 p. 37, ln. 24 to p. 38, ln. 10)(App. v. II pp. 245-246).

Rick never returned to his previous condition after the accident, and there is no expectation that he ever will. In the period following the accident, he took pain killers which produced negative side effects, including constipation, depression and anxiety. (Tr. 2 p. 51, ln. 15 to p. 52, ln. 11)(App. v. II pp. 210-211). Eventually, Rick reached a plateau in the recovery process, where he achieved maximum medical improvement and then started to deteriorate again. He continues to have moderate to severe pain in his back, ankle, and leg on a daily basis, and this pain has affected

his mood and temperament. (Tr. 2 p. 49, ln. 5 to p. 50, ln. 3; p. 66, ln. 9-14; Tr. 4 p. 43, ln. 6-19)(App. v. II pp. 208-209, 212, 247). Rick is no longer able to play golf, ride horses, or go camping and boating. (Tr. 2 p. 66, ln. 18 to p. 67, ln. 1)(App. v. II pp. 212-213). There have been periods where he remains flat on his back for up to a week, and there are times when he has to roll out of bed and crawl to his closet. (Tr. 2 p. 50, ln. 4-19)(App. v. II p. 209).

Mr. Wermerskirchen attempted to return to his previous job as a road grader, which he very much enjoyed. (Tr. 1 p. 78, ln. 8-14)(App. v. II p. 174). However, he was unable to continue in this position due to severe pain in his back and his joints. (Tr. 2 p. 44, ln. 1 to p. 45, ln. 23)(App. v. II p. 207). After the accident, Rick remained under the care of Dr. Hitchon at UIHC for an extended period of time. Dr. Hitchon performed surgery to remove the rods and screws from Rick's back and ankle, in the hope that doing so would reduce his pain, but this surgery did not make any noticeable difference. (Tr. 2 p. 47, ln. 15-23; p. 48, ln. 2-16)(Supp. App. pp. 8-9). At one point, Dr. Hitchon told Rick that his condition would deteriorate and advised him to "live life the best you can." (Tr. 2 p. 47, ln. 47)(Supp. App. p. 8). Other physicians have expressed the same sentiment. (Tr. 2 p. 48, ln. 20-23)(Supp. App. p. 9). On July 28, 2014, Dr. Joseph G. Chen, M.D., a

physician at the UIHC Spine Center, Department of Orthopaedics and Rehabilitation, opined that Rick had reached maximum medical improvement and that his various impairments totaled a twenty-three percent impairment of the whole person. (Plaintiffs' Exh. 14 p. 230-31)(App. v. II pp. 165-166).

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFFS' CLAIM THAT THE CN TRAIN WAS TRAVELLING AT A SPEED IN EXCESS OF WHAT WAS SAFE UNDER THE CIRCUMSTANCES.

Preservation of Error: In the Order for Partial Summary Judgment, the district court held that all of plaintiffs' claims relating to speed were preempted by the Federal Railroad Safety Act ("FRSA"). Plaintiffs filed an Application for Interlocutory Appeal of this ruling, which was denied. During the trial, Plaintiffs incorporated their objections to the district court's prior ruling onto the record. (Transcript Day 6 ("Tr. 6") p. 43, ln. 13-24) (App. v. II p. 295).

Standard of Review: The Supreme Court "review[s] the District Court's summary judgment for the correction of legal error." *Kent Feeds, Inc., v. Manthei,* 646 N.W.2d 87, 89 (Iowa 2002).

The Plaintiffs acknowledge that States do not have the general right to establish lower speed limits based on track conditions or signage near the crossing per the Supreme Court's decision in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), and they have not made a claim that Defendants violated the speed limit in the present case. However, the United States Supreme Court in *Easterwood* declined to address the issue of whether or not state law claims for breach of related tort law duties, such as the "duty to slow or stop a train to avoid a specific, individual hazard" were preempted by federal law. See *Easterwood,* 507 U.S. 658 at fn. 15.

A. The district court erred in granting summary judgment to Defendants as to Plaintiffs' claims regarding lookout and failure to brake to avoid the accident.

The district court determined, incorrectly, that Plaintiffs' claims that the train crew failed to maintain a proper lookout and failed to slow or stop the train to avoid hitting Rick were "directly related to the claim of excessive speed for the present circumstances." Specifically, the district court stated:

> The Court finds Defendants' argument convincing that the claims regarding failure to keep a proper lookout, to warn or to stop the train more quickly all relate to the excessive speed claim. By the time that Defendants could have taken any of those actions, the train and the road grader were already in too close proximity to each other for those attempts to make any difference in the result. (Order for Partial Summary Judgment p. 6)(App. v. I p. 92).

The district court's analysis seemingly blends the issues of preemption and causation. Be that as it may, the Defendants were not entitled to summary judgment on either basis.

1. The claims that the train crew failed to maintain a proper lookout and failed to stop or slow the CN Train to avoid a "specific, individual hazard" are not preempted by FRSA.

Since *Easterwood*, courts have explicitly rejected the argument that a claim for failure to keep and maintain a proper lookout is synonymous with a claim for excessive speed. See *Murrell v. Union Pacific Railroad Company*, 544 F.Supp.2d 1138, 1155-1156 (D. Or. 2008). The court in *Murrell* made a point of distinguishing the plaintiff's excessive speed claim from his claim that the train crew failed to observe a proper lookout, specifically noting that train operators could be held negligent for not maintaining a proper lookout even if they are following specified speed limits. *Murrell*, 544 F.Supp.2d at 1155-1156. Adopting the position of the Defendants and the district court would mean that so long as the CN Train was traveling within the applicable federal speed limit for a "Class 4" track, Mr. Dorsey and Mr. Yokem could have been wearing blindfolds or had their backs completely turned while operating the CN Train and Plaintiffs' claims for negligence would still be preempted. *Easterwood* certainly does not mandate this absurd result.

Moreover, the Iowa court of appeals addressed the issue of lookout in *Garcia v. Iowa Interstate Railroad, Ltd.*, 829 N.W.2d 589, *1, 5 (Iowa Ct. App. 2013)(unpublished), and it indicated that the duty to keep a proper lookout applied to both the motorist and the train crew. *Id.* at *1. Significantly, the duty to maintain a proper lookout includes the duty to stop if a driver has lost visibility entirely. *Coulthard v. Keenan*, 129 N.W.2d 597 (Iowa 1964). Iowa Civil Jury Instruction 700.11 ("Proper Lookout") is as follows:

> "Proper lookout" is the lookout a reasonable person would keep in the same or similar situation. It means more than looking and seeing. It includes being aware of one's movements in relation to things seen or that could have been seen in the exercise of ordinary care. *I.C.J.I. 700.11.*

Notably, the Defendants have incorporated these same principles into their internal operating rules. For instance, CN Air Brake & Train Handling Rule ("CNATBHR") 306 states, "[d]uring winter operating conditions you must consider the need for increased stopping distances because of potential ice buildup." (App. v. II p. 68)(Supp. App. p. 11). CN ATBHR 323 provides that the train crew must consider potential risk to life or property, location, terrain, *visibility*, and train make-up when reacting to an unplanned or unexpected situation requiring an immediate stop. (App. v. II p. 68)(Supp. App. p. 12).

Furthermore, since the Supreme Court decided *Easterwood*, numerous courts have addressed the issue raised in footnote 15 of the decision, i.e. whether or not state law claims for related tort duties such as the "duty to slow or stop a train to avoid a specific, individual hazard," were preempted. These courts have consistently held that such state law claims were not preempted. See, et. al., *Alcorn v. Union Pacific Railroad Company*, 50 S.W.3d 226, 232 (Mo. 2001); *Armstrong v. Atchison, Topeka & Santa Fe Ry. Co.,* 844 F.Supp. 1152 (W.D. Tex. 1994)*; Peters v. Union Pacific Railroad Company*, 455 F.Supp.2d 998, 1003 (W.D. Mo 2006)("Plaintiffs' claim that Defendants operated the train at an *excessive speed given the known specific individual hazards* is not preempted by FRSA.")(Emphasis added). This exception from preemption has effectively preserved numerous state law tort claims against railroads, and it is compatible with the overall purpose of FRSA, i.e. "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." *49 U.S.C. §20101.*

A specific, individual hazard is a "person, vehicle, obstruction, object, or event that (1) is not a fixed condition or feature of a crossing; (2) cannot be addressed by a uniform national standard; (3) is a unique occurrence that could cause an accident to be imminent; and (4) is not a generally dangerous condition. This exception is an express recognition of the common law duty

to slow or stop a train in the face of known hazards. The key to the specific, individual hazard exception to FRSA preemption is the "unfixed nature of the event that creates the danger." *Cause of Action for Accident at Railroad Tracks at Crossing*, 60 Causes of Action 2d. §14 (citing, et al. *Partenfelder v. Rohde*, 830 N.W.2d 115 (Wis. Ct. App. 2013)). Also see *Beausoleil v. Massachusetts Bay Transportation Authority*, 138 F.Supp.2d 189, 208 (D. Mass. 2001)(The Court defines a "specific, individual hazard" as "a transient condition that could lead to a particular accident.")(citing *Price v. National Railroad Passenger Corporation*, 14 P.3d 702, 707 (Ct. App. Utah 2000)).

The summary judgment record in this case contained ample evidence that the presence of Mr. Wermerskirchen's road grader near the Crossing constituted a "specific, individual hazard." The video footage from the CN Train's event recorder is sufficient to generate a genuine issue of material fact as to whether or not Mr. Wermerskirchen's road grader had entered the "zone of danger" when it came into the view of the train crew. *Bryan v. Norfolk and Western Railway Company*, 154 F.3d 899, 902 (8th Cir. 1998). Hence, Plaintiffs' claims that the train crew had the duty to apply the brakes to avoid the collision in this case are not preempted, and the district court erred in ruling otherwise. *Peters,* 455 F.Supp.2d at 1003.

The Nebraska Supreme Court addressed this issue in detail in *Dresser v. Union Pacific Railroad Company*, 809 N.W.2d 713, 722 (Neb. 2011). In this case, the district court determined plaintiff's claim that the train crew failed to exercise ordinary care to avoid the accident by failing to slow or stop the train was essentially an excessive speed claim and was, therefore, preempted by FRSA. The Nebraska Supreme Court disagreed, stating:

> We do not agree with the district court that [plaintiff's] state law negligence claim based on Union Pacific's alleged failure to exercise ordinary care once it appeared that a collision would probably occur is speed based and thus preempted. State tort law is not preempted "until" a federal regulation "covers" the same subject matter, and we are not presented with any federal regulations that cover a railroad's duty to exercise ordinary care in situations where collisions are imminent. The mere fact the speed the train is traveling is tangentially related to how quickly it can be stopped does not transform the claim into an excessive speed claim. Nebraska tort law duties to exercise reasonable care could be violated even if the federal train speed limits are being followed. *Id.* at 723.

Instead, the Nebraska Supreme Court found that the state law claim against the railroad was "akin to a duty to avoid a 'specific, individual hazard' at a grade crossing," and agreed with the other federal and state courts that have concluded such claims are saved from preemption. *Id.* Also see *Bryan* 154 F.3d at 902 (Court held that the train crew was required to brake when Mr. Bryan "entered the 'zone of danger,' that point where an accident would certainly occur."); *Alcorn*, 50 S.W.3d at 232 (Plaintiff's claim was not

preempted, and train crew had the duty to slow or stop the train because "[t]he facts support the jury's conclusion that the train crew knew or should have known, by reason of [the plaintiff's] "unwavering approach", that a collision was imminent.").

The case of *Bashir v. National Railroad Passenger Corporation (Amtrack)*, 929 F.Supp. 404 (S.D. FL 1996) highlights the flaw in the district court's decision to grant summary judgment on this issue. In *Bashir*, a child who attempted to clear a railroad crossing was struck and killed by an oncoming train. The Court held that plaintiff's claim for negligence based on defendant's failure to stop the train before striking the decedent was not preempted, reasoning as follows:

> Indeed, if Defendant's position were correct, railroads would be insulated from state tort liability regardless of whether a train attempted to stop to avoid even the most obvious obstructions, simply because federal law prescribes the speed at which they may travel absent obstructions. *Easterwood* does not support this result. *Bashir*, 929 F.Supp. at 412.

The Defendants have previously relied upon the case of *Van Buren v. Burlington Northern Santa Fe Railway Company*, 544 F.Supp.2d 867 (D. Neb. 2008) to support their claim that Rick's presence at the Crossing did not constitute a "specific, individual hazard." The Court in *Van Buren* interprets the "specific, individual hazard" exception narrowly, and the Nebraska Supreme Court subsequently disagreed with the decision in

Dresser. *Dresser*, 809 NW.2d at 723. However, even assuming *Van Buren* is still good law, it is distinguishable from the present case. In *Van Buren*, the plaintiff, Timothy Van Buren, was driving his truck at a speed of 3 or 4 miles per hour on a "clear and dry summer afternoon," and he was in the process of slowing down as he approached the railroad crossing. *Van Buren*, 564 F.Supp.2d at 870, 880. Mr. Van Buren himself admitted that from the perspective of the train crew, he appeared to be a "cautious driver approaching the crossing to come to a stop and wait for the train" and that "the train crew had no reason to believe a collision was imminent until [his] front tires reached the outermost rail," at which point the train's engineer applied the emergency brake. *Van Buren*, 564 F.Supp.2d at 80. Hence, the Court held that the approach of Mr. Van Buren's vehicle to the railroad crossing was not a "specific, individual hazard" and that his claims that the train crew failed to keep a proper lookout and timely apply the brakes were preempted. *Id.*

The facts of the present case stand in stark contrast to those in *Van Buren*. For one, Mr. Wermerskirchen testified that due to the severe fog he could not see the CN Train despite looking for trains continuously as he approached the Crossing. It is plain that the impaired visibility on the morning of January 28, 2013 made the need for an audible horn signal all the

more important, yet Rick was not able to hear the horn on the CN Train despite listening intently. Moreover, the event recorder video footage indicates that Mr. Wermerskirchen's road grader was dangerously close to the tracks when it became visible to the train crew, yet the train crew did not apply the brake until ten seconds *after* impact.[3] (ESI Investigative Report p. 7)(App. v. II p. 121). The facts of the present case more closely resemble the facts of *Alcorn*, which is distinguished by the court in *Van Buren*.

It also bears emphasizing that, rather than excusing the train crew's failure to act, the poor visibility due to severe fog actually increased the level of care required by Defendants. Iowa case law is clear that once Mr. Dorsey and Mr. Yokem were able to see Mr. Wermerskirchen's road grader at the Crossing, they were required to react to it in light of the particular circumstances of the case, including the poor visibility, the fact that Mr. Wermerskirchen was driving a 37 foot long vehicle through a fog bank, and the fact that Mr. Wermerskirchen would have a more difficult time seeing the CN Train than the train crew would have seeing him because he was required to look for trains in both directions. See *Vasconez v. Mills*, 651 N.W.2d 48, 55 (Iowa 2002)(Court held that driver had the duty to respond to

[3] Defendants' expert places the collision between 09:37:25 and 09:37:26, and the application of the emergency brake between 09:37:35 and 09:37:36.

a particular condition, i.e. the setting sun, in a reasonable manner, because the condition was known and foreseeable). Also see *Foster v. Ankrum*, 636 N.W.2d 104, 107 (Iowa 2001)(Court rejected the sudden emergency defense when the driver had sufficient time to assess the situation and take prudent action short of running over the plaintiff).

Plaintiffs presented both deposition testimony and a detailed affidavit from Mr. Wermerskirchen in which he described how he slowed down his road grader and looked and listened intently for oncoming trains. (Wermerskirchen Dep. p. 66; Wermerskirchen Aff. ¶¶6, 12)(App. v. II p. 58, 63). Notably absent from the summary judgment record was an affidavit from either train crew member setting forth facts indicating they fulfilled their obligation to maintain a proper lookout. In fact, the record contained affirmative evidence to the contrary, as Defendants' own expert, Foster Peterson, confirmed that the train crew made no effort to apply the brake until ten seconds after the collision, and Defendants admitted Mr. Dorsey and Mr. Yokem threw themselves onto the floor of the train cab, thereby losing control of the train before impact. (ESI Report pp. 7; Def. Ans. Int. 8)(App. v. II p. 67, 121). This evidence, along with the footage from the CN Train event recorder, which indicates the point at which the train crew could have seen Mr. Wermerskirchen's road grader, was certainly sufficient

to generate a genuine issue of material fact as to whether or not the train crew failed to maintain a proper lookout.

For all of these reasons, Plaintiffs were entitled to have their claim that the train crew failed to maintain a proper lookout submitted to the jury at trial. Instead, Plaintiffs were prohibited from presenting any evidence and making any argument on this issue, while Defendants were permitted to offer video footage from the CN Event Recorder on a frame by frame basis, for purposes of demonstrating what Mr. Wermerskirchen should have been able to see, despite the fact that Mr. Wermerskirchen was viewing the scene from a completely different vantage point. (Tr. 2 p. 12, ln. 12 to p. 13, ln. 8) (Supp. App. pp. 6-7).

2. The Defendants failed to demonstrate, as a matter of law, that the train crew's failure to maintain a proper lookout or slow the train did not cause any damages in this case.

The district court also erred in determining that Plaintiffs failed to generate a genuine issue of material fact on the issue of causation. The district court claims that both Plaintiffs' and the Defendants' experts concluded that by the time the train crew could have seen Mr. Wermerskirchen and taken action to avoid the collision, "the train and the road grader were already in too close proximity to each other for those attempts to make any difference in the result." (Order on Partial Summary

Judgment p. 6)(App. v. I p. 92). Given that the district court has the obligation to "indulge in every legitimate inference that the evidence will bear in an effort to ascertain the existence of a fact question," its analysis did not go nearly far enough. *Smith* v. *Shagnasty's Inc.*, 688 N.W.2d 67, 71 (Iowa 2004).

First, the methods used by Defendants' expert in his analysis of braking distance are questionable. Mr. Peterson used neither a correct scientific nor mathematical application of the complex calculations required with respect to stopping distance. Rather, he attempted to calculate the stopping distance which would have been required *prior* to the accident using the stopping time and distance of the CN Train *after* the accident, omitting critical calculations and conditions that are part of the pre-accident mathematical formula. (ESI Investigative Report pp. 7-8)(App. v. II p. 121-122). For example, the grade of the tracks was different before and after the point of collision. The CN Train was travelling up a slight incline prior to the collision, during which period its rate of speed was between 46 and 48 m.p.h. with the throttle engaged. The event recorder footage indicates that following the collision, the CN Train maintained a speed of between 46 and 48 m.p.h. even with the throttle idle. (CN Event Recorder Data Table)(App. v. II p. 18-20). Hence, it cannot be assumed that the distance required to

stop the CN Train prior to the collision would have been the same as the distance calculated by Mr. Peterson after the collision. Plaintiffs should have been permitted to cross examine Mr. Peterson about these matters at trial.

Even assuming away this problem, however, the district court was still wrong to grant Defendants' motion for summary judgment on grounds of causation. This is because neither Mr. Peterson nor Plaintiffs' expert, Dave Rangel, made calculations based on the speed of two intersecting vehicles, each of which is able to alter its speed and braking decisions based on its perceptions of the other. This principle is important in the present case, for Rick indicated that he considered accelerating his road grader to attempt to clear the Crossing, but determined not to do so based on his observations of the other vehicle, i.e. the CN Train. (Wermerskirchen Aff. ¶¶7-8)(App. v. II p. 58).

Had Rick observed a slowing of the CN Train or any indication by the train crew that it had seen him, he could have accelerated across the railroad tracks. If the CN Train had slowed down, its reduced speed would have provided Rick with additional time to clear the Crossing. Whether or not the combination of these actions would have resulted in the collision being avoided entirely or in lessening the force of the impact so as to reduce

damages are fact questions the jury should have been permitted to decide. As both experts gave their opinions before Plaintiffs obtained Rick's affidavit, it cannot be said that they took these issues into consideration.

The Nebraska Supreme Court addressed this very issue in *Dresser*. The court determined, as a matter of law, that the train crew could not have stopped the train before it reached the crossing even if it had activated the emergency brake the instant the plaintiff's vehicle left the stop sign. *Dresser*, 809 N.W.2d at 721. However, the court found a genuine issue of material fact existed as to whether or not the crew's failure to *slow* the train was a proximate cause of the accident, because the record contained evidence that the driver was attempting to back off the tracks when the collision occurred. *Id.* The court determined that, had the train slowed down, the driver might have been able to move off the tracks in time to avoid the accident. The same principle applies in the present case. Hence, Defendants' motion for summary judgment on the issue of causation should have been denied.

B. The district court erred in concluding that the severely limited visibility at the time of the accident did not constitute a "specific, individual hazard".

For the foregoing reasons, Plaintiffs were able to demonstrate that Rick's presence at the Crossing constituted a "specific, individual, hazard."

They were also able to demonstrate a genuine issue of material fact as to whether or not the train crew's failure to slow the CN Train was a cause of any damages. Hence, the Plaintiffs were not required to demonstrate that the severe fog existing at the time of the accident qualified as a "specific, individual hazard," in order to survive summary judgment on their claims of negligence for failure to maintain a proper lookout or failure to slow the train to avoid the accident. Rather, the Plaintiffs only needed to demonstrate that the fog, which was so thick the train crew could not even determine its location for a significant period of time after the accident, constituted a "specific, individual hazard" in order to survive summary judgment with respect to their claim that the CN Train should have been traveling more slowly due to the severely impaired visibility.

As a preliminary matter, the train crew's duty to slow or stop a train to avoid a "specific, individual hazard" is separate and distinct from the statutory exception from preemption for laws related to an "essentially local safety or security hazard," set forth in 49 U.S.C. §20106(a)(2). *49 U.S.C. §20106(a)(2)*. The district court lumps these two concepts together in its Order for Partial Summary Judgment, and it relies heavily on the Eighth Circuit's decision in *Grade v. BNSF Railway Company*, 676 F.3d 680 (8th Cir. 2012). (Order for Partial Summary Judgment pp. 4-5) (App. v. I p. 90-

91). But the Eighth Circuit did not address the applicability of the common law exception for a "specific, individual hazard" in *Grade*, and there is no indication that the plaintiff even argued this exception to the court. Rather, the court focused solely on the claim that the weather conditions came within the statutory exception for an "essentially local safety or security hazard" set forth in 49 U.S.C. §20106(a)(2). *Id.* at 686-687. The court determined the plaintiff's weather related claim did not come within this particular exception, and, therefore, was not saved from preemption.

Because preemption is an affirmative defense, Defendants bear the burden of proof on this issue. *Anderson v. Wisconsin*, 327 F.Supp.2d 969, 973 (E.D. Wis. 2004)(citing *Chicago Board of Education v. Substance, Inc.*, 354 F.3d 624, 629 (7th Cir. 2003)). Significantly, there is a presumption against preemption. *Easterwood*, 507 U.S. at 664 (citing *Malone v. White Motor Corp*, 435 U.S. 497, 504 (1978)). The presumption against preemption is even stronger when traditional state interests such as tort recovery are at issue. John W. Rogers, *Federal Pre-emption of State Railroad Tort Law: The Misuse of the Federal Railroad Safety Act to Insulate Railroads from Liability*, 58 Mo. L. Rev. 359, 363 (1993)(citing *English v. General Electric Co.*, 496 U.S. 72, 79 (1990)). Given the presumption against preemption, the district court erred in extending the

holding in *Grade*. This is particularly true in light of the existence of contrary authority. In *Bakhuyzen v. National Rail Passenger Co.*, 20 F.Supp.2d 1113 (W.D. Mich. 1996), the court concluded plaintiff's claim that the engineer had the duty to slow the train because of the weather conditions at the time was not preempted by FRSA. *Bakhuyzen* is squarely on point, as it involved a train approaching a crossing at a time when there was limited visibility due to a snow storm.

The court in *Bakhuyzen* held that the plaintiff's claim that the engineer had a duty to slow down as he approached the intersection due to limited visibility resulting from snowy weather conditions was not preempted, reasoning as follows:

> "In contrast to the lighting at the crossing, weather conditions are not static. They arise and abate, requiring independent responses from individual engineers. In this sense they differ materially from the crossing conditions addressed in the cases cited above. Moreover, Amtrak and Chiles have not shown that weather conditions are the subject of federal regulations adopted under the FRSA. Indeed, weather conditions are not capable of being adequately encompassed within uniform national standards. Maximum train speeds, like automobile speed limits, do not remove from the driver the obligation to exercise due care when and if the circumstances such as poor visibility due to snow make operation at the maximum speed careless." *Bakhuyzen*, 20 F.Supp.2d at 1118.

The reasoning in *Bakhuyzen* is persuasive. Weather conditions affecting visibility are not statewide in character, and while the federal

government could consider impaired visibility due to weather conditions generally, it could not possibly enact regulations taking into account the particulars of each and every snow storm or instance of fog. Put another way, the *degree* of impaired visibility is necessarily dependent on the conditions in a particular location at a particular time. Hence, the Court should determine that the impaired visibility due to fog at the time of Rick's accident constitutes a "specific, individual hazard" in accordance with the decision in *Bakhuyzen*.

Plaintiffs are mindful of the cases in which courts have held that weather conditions at the time of a railroad accident did not constitute "specific, individual hazards." But just as the district court erred by extending the holding in *Grade*, it erred in derogating firmly embedded common law principles applicable to vehicle accident cases based on case law from other jurisdictions. If Iowa common law is to be changed in this manner, it is imperative that it be upon a directive from the Iowa Supreme Court. Second, to the extent that the cases from other jurisdictions relied upon by Defendants address adverse weather conditions generally, rather than limited visibility specifically, they are inapposite.

Third, numerous cases in which courts have concluded that weather conditions did not save a plaintiff's claims from preemption have been

careful to distinguish *Bakhuyzen*, rather than simply ignoring or declining to follow the decision. In *Seyler v. Burlington Northern Santa Fe Corporation*, 102 F.Supp.2d 1226 (D. Kansas 2000), the court held that plaintiff's claim that the railroad was negligent in failing to slow or stop the train because of flash flood warnings was preempted. However, the court specifically distinguished *Bakhuyzen* on the grounds that the plaintiff did not present evidence of impaired visibility. *Seyler*, 102 F.Supp.2d at 1237; Also see *Hughs v. Union Pacific Railroad Company*, 2017 WL 1380480 *9 (W.D. Mo. 2017)(Court found that, contrary to the situation in *Bakhuyzen*, the evidence showed that snow was not impairing visibility at the time of the accident).

The case which examines the *Bakhuyzen* decision most closely is *Cox v. Norfolk and Western Railway Company*, 998 F.Supp. 679 (S.D. WVa. 1998). The court determined in *Cox* that the particular weather condition existing at the time of the accident, i.e. snow covering the surface of the crossing, did not qualify as a "specific, individual hazard." It made the point of emphasizing, however, that "it was not snowing at the time of the accident, was not foggy, and that there was good visibility," the implication being that the outcome in *Cox* might well have been different had the

conditions been comparable to those in *Bakhuyzen* and those which existed at the time of the accident in the present case. *Cox*, 998 F.Supp. at 5.

The Court should reverse the decision of the district court holding that the weather conditions at the time of the accident did not constitute a "specific individual hazard." It is essential to keep in mind that one of the purposes behind preemption is to make laws and regulations related to railroad safety and security "nationally uniform to the extent practicable." *49 U.S.C.A. §20106(a)*. Courts that have found plaintiffs' claims based on the conditions at a particular crossing to be preempted have reasoned that a contrary finding would defeat this purpose. For example, in *Herriman v. Conrail Inc.*, 883 F.Supp. 303 (N.D. Ind. 1995), the court determined that the particular lighting condition at the crossing did not save plaintiff's claims from preemption because the condition was not one that would require a particular engineer to slow down, but rather, would require a substantial reduction in speed by every train entering the crossing at night. *Id.* at 307.

Similarly, in *Cox*, the court held that the presence of snow covering the crossing did not save the plaintiff's claim from preemption because this same condition "often exists during winter months across West Virginia and most of the country." *Cox*, 998 F.Supp. at 686. The same cannot be said about the particular weather condition existing at the time of the accident in

the present case, as fog so thick that a train crew cannot determine its location is clearly the exception, not the rule, regardless of the season, location, or time of day. For this reason, a finding that the particular weather conditions facing Rick on January 28, 2013 constituted a "specific, individual hazard" would require very few trains entering the Crossing or, for that matter, any other railroad crossing, to reduce their speed. In other words, such a finding would not undermine the purpose behind federal preemption.

Finally, severe fog has long been a concern in the railroad industry, and its presence at the time of railroad accidents has sparked investigations by the National Transportation Safety Board ("NTSB"). The NTSB is an independent agency of the federal government charged by Congress with investigating transportation accidents, determining their probable cause, and making recommendations to prevent similar accidents from occurring in the future. On June 12, 2001, the NTSB made several safety recommendations following its investigation of a 1999 railroad accident in Bryan, Ohio, which occurred in dense fog. The railroad accident report states, "[a]s a risk management measure, all railroad operating crews should be reminded about the dangers and potential consequences of operating at speeds that are not appropriate for weather conditions, *particularly dense fog*." (NTSB

Railroad Accident Report p. 36)(App. v. II p. 160)(Emphasis added). The NTSB made a safety recommendation to all Class I railroads directing them to take action to ensure that their train crews "consistently follow uniform operating procedures when they encounter reduced visibility conditions en route." (NTSB R-01-08)(App. v. II p. 162). It also made the following safety recommendation to the Association of American Railroads ("AAR"):

> Advise your member railroads of the findings of the National Transportation Safety Board's investigation of the January 17, 1999, railroad accident in Bryan, Ohio, and alert them to the hazards of operating at or near maximum authorized speed during periods of reduced visibility. (NTSB R-01-10)(App. v. II p. 149).

Canadian National Railroad (a/k/a CN Railway) is a member of the AAR. (App. v. II p. 73).

It is telling that the very agency charged with investigating railroad accidents and making safety recommendations thought it necessary to alert all Class I railroads and members of the AAR to the danger of operating at or near maximum speed in cases of reduced visibility. This strongly suggests that the federal government does not believe the FRSA, by itself, adequately addresses the issue. Moreover, the fact that the CN Operating Rules state, "[s]peeds indicated are maximum speeds between locations named, but do not modify any rule or instruction that may require a lower speed. . ." indicates it too recognized this reality. (CNOR 501)(App. v. II p.

163). This is yet another reason the Court should apply the reasoning in *Bakhuyzen* and determine that the severe fog existing in the vicinity of the Crossing on the morning of January 28, 2013 constituted a "specific, individual, hazard," and reverse the district court's Order granting summary judgment to Defendant on this issue.

II. THE DISTRICT COURT ERRED BY REFUSING TO ADMIT EVIDENCE OF A "NEAR MISS" BY THE TRAIN CREW ON THE MORNING OF THE ACCIDENT AND BY REFUSING TO ADMIT THE HORN MAINTENANCE MANUAL FOR IMPEACHMENT PURPOSES.

Preservation of Error. After the district court granted Defendants' motion in limine on these issues, Plaintiffs made an offer of proof regarding the "near misses" at trial. (Tr. 5 Vol I, p. 95, ln. 9 to p. 98, ln. 1)(App. v. II p. 257-260). Plaintiffs also argued at trial that the horn maintenance manual should be admitted for purposes of impeaching the testimony of Defendants' expert witness, and the district court denied this request. (Tr. 5 Vol I, p. 170, ln. 12 to p. 180, ln. 14)(App. v. II p. 265-275).

Standard of Review. The Supreme Court reviews a district court's determination of relevancy and admission of relevant evidence for an abuse of discretion. *Mohammed v. Otoadese*, 738 N.W.2d 628, 631 (Iowa 2007).

A. The district court erred in refusing to admit evidence of a "near miss" by the train crew on the date of the accident.

I.C.A. Rule 5.401 provides that evidence is relevant if (a) it has a tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action. *I.C.A. Rule 5.401*. Relevant evidence is generally admissible unless the United States Constitution, Iowa Constitution, a statute, the Iowa Rules of Evidence or other Iowa Supreme Court rule provides otherwise. *I.C.A. Rule 5.402*. At trial, Plaintiffs attempted to introduce evidence that the conductor of the CN Train, Josh Yokem, told Brian Davis, a bridge lead worker for Black Hawk County, that the train crew had a near miss on the morning of January 28, 2013, approximately forty-five minutes prior to the accident that injured Mr. Wermerskirchen. (Affidavit of Brian Davis, filed on October 19, 2018)(App. v. I p. 186).

The district court abused its discretion in refusing to admit this evidence. Defendants made much of the fact the engineer blew the horn "384 times" on the morning of January 28, 2013, prior to the time the CN Train collided with Mr. Wermerskirchen's road grader, and that the horn was working correctly. (Tr. 6 p. 82, ln. 1-13)(App. v. II p. 303). The occurrence of a "near miss" certainly undercuts this claim and makes the claim of the Plaintiffs, i.e. that the horn was not working properly, more probable than it would be without this evidence. *I.C.A. Rule 5.401(a)*.

Moreover, it cannot be denied that this fact is of consequence in determining the action, as the horn was central to Plaintiffs' case. As a result of the district court's order granting Defendants summary judgment on all of the other claims, the functioning of the horn was the only issue Plaintiffs were permitted to present to the jury at trial.

In determining whether to admit evidence of "near misses" or "near accidents," courts follow the same standard used in determining whether to admit evidence of *actual* prior accidents. *Robinson v. Missouri Pacific Railroad Company*, 16 F.3d 1083, 1089-1090 (10th Cir. 1994). Also see *Lindquist v. Des Moines Union Ry. Co.*, 30 N.W.2d 120 (Iowa 1948)(Court discusses evidence of "accidents" and "near accidents" together). The train crew's "near miss" on January 28, 2013 should have been admitted to show the train crew's knowledge of a dangerous condition, i.e. an improperly functioning horn, as well as notice of this condition, because the near accident occurred under "substantially similar circumstances." *Kuper v. Chicago and Northwestern Transportation Company*, 290 N.W.2d 903, 909 (Iowa 1980), *superseded by statute on other grounds* (citing *Lindquist*, 30 N.W.2d at 26)). The "near miss" Plaintiffs attempted to introduce into evidence at trial occurred on the very same day, when the same train crew was operating the same train, under the same weather conditions. Hence, it

cannot be said that the probative value of this evidence was substantially outweighed by the danger of unfair prejudice, and the district court abused its discretion in refusing to admit it. *I.C.A. Rule 5.403.*

B. The district court erred in refusing to admit the horn maintenance manual for purposes of impeaching the testimony of Defendants' expert, Foster Peterson.

Prior to trial, the district court granted Defendants' motion in limine regarding the Natham Airchime Model K Series Locomotive Air Horns Installation and Maintenance instructions (the "Horn Maintenance Manual"). (Plaintiffs' Proposed Exhibit No. 61)(App. v. I p. 175). The court denied Plaintiffs' request to admit the horn maintenance manual as substantive evidence, ruling that the manual constituted hearsay. The law is clear, however, that evidence which is not admissible as substantive evidence may be admitted for purpose of impeaching a witness. *Actonet, Ltd. v. Allou Health & Beauty Care*, 219 F.3d 836, 846 (8th Cir. 2000); *Fireman's Fund Insurance Company v. Thien*, 8 F.3d 1307, 1311 (8th Cir. 1993); *Brown v. LaCreek Electric Association, Inc.*, 939 F.2d 623, 625 (8th Cir. 1991). The district court failed to take into account this important distinction when, during the course of the trial, it again refused Plaintiffs' request to admit the Horn Maintenance Manual for the purpose of impeaching Defendants' expert witness, Foster Peterson.

After testifying to his extensive experience as a railroad consultant, Mr. Peterson testified that he has never had a train horn ice up in his personal experience or in his consulting experience. (Tr. 5 Vol I p. 147, ln. 2-6)(App. v. II p. 264). This testimony likely left the jury with the impression that it was extremely rare for horns to ice up, thereby casting doubt on Plaintiffs' claim that the horn on the CN Train had iced up prior to the accident in this case. The fact that the manufacturer of the horn on the CN Train thought it necessary to create a system to prevent snow and ice build-up so as to minimize horn failure during sever winter conditions, casts doubt on Mr. Peterson's testimony. The district court abused its discretion in refusing to admit the Horn Maintenance Manual for purposes of impeachment, as the jury should have been permitted to weigh this evidence in evaluating Mr. Peterson's credibility. (Plaintiffs' Proposed Exhibit No. 61 p. 7)(App. v. I p. 180).

III. THE DISTRICT COURT ERRED IN FAILING TO SUSTAIN PLAINTIFFS' OBJECTIONS TO JURY INSTRUCTION NOS. 18, 25, 29, 30 AND 34, AND IN FAILING TO GIVE IOWA CIVIL JURY INSTRUCTION 600.71 IN ITS ENTIRETY.

Preservation of Error. Plaintiffs objected to jury instructions 16, 18, 25, 29, 30, and 34 at trial, and the district court overruled their objections. (Transcript Day 6 ("Tr. 6") p. 6, ln. 12 to p. 8 p. ln. 18)(App. v. II pp. 277-

279); p. 9, ln. 15 to p. 10, ln. 21 (App. v. II pp. 280-281); p. 15, ln. 5 to p. 17, ln. 19 (App. v. II pp. 284-286); p. 21, ln. 6 to p. 22, ln. 5 (App. v. II pp. 288-289); p. 22, ln. 12 to p. 24, ln. 2 (App. v. II pp. 289-291); p. 31, ln. 15 to p. 32, ln. 4 (App. v. II pp. 292-293). Plaintiffs also requested that the jury instructions include Iowa Civil Jury Instruction 600.71, and the district court denied their request. (Tr. 6 p. 42, ln. 3 to p. 43, ln. 5)(App. v. II pp. 294-295).

Standard of Review. "Trial court determinations regarding jury instructions are reviewed on appeal for errors of law." *Struve v. Payvandi*, 740 N.W.2d 436, 439 (Iowa 2007).

A. The district court erred in failing to sustain Plaintiffs' objection to Jury Instruction No. 16.

The district court overruled Plaintiffs' objection to Jury Instruction No. 16, i.e. "[t]he mere fact an accident occurred or a party was injured does not mean a party was negligent." (App. v. I p. 204). Plaintiffs acknowledge that this instruction was based on Iowa Civil Jury Instruction No. 700.8 and, therefore, that it was justified based on the law as it currently stands. *I.C.J.I. 700.8*. However, Plaintiffs request that the Court reconsider this instruction. The Iowa Civil Jury Instructions are clear that in order to demonstrate negligence, a party must prove one or more *particulars*. *I.C.J.I. 400.6*. Hence, the substance of I.C.J.I. No. 700.8, i.e. the fact that the happening of

an accident or an injury, by itself, does not mean a party was negligent, is already included elsewhere in the Iowa Civil Jury Instructions.

Plaintiffs submit that incorporating this concept into a separate jury instruction is unfair to plaintiffs, as it unduly emphasizes an option which favors defendants. See *Olson v. Prosoco, Inc.*, 522 N.W.2d 284, 287 (Iowa 1994)("[E]ven instructions correctly stating the law should not give undue emphasis to any particular theory, defense, stipulation, burden of proof, or piece of evidence." (citing *Dickman v. Truck Transp., Inc.*, 224 N.W.2d 459, 464 (Iowa 1974)). Individuals who have been forced to take significant time away from their personal and professional lives to serve as jurors, sometimes at great inconvenience, have an incentive to shorten the deliberation process. If jurors determine neither party was negligent, they can quickly enter a verdict for the defendant without having to take the time to consider the other items on the verdict form, including apportionment of fault and damages, which have the potential to be time consuming. The instruction in I.C.J.I. 700.8 only serves to increase the likelihood that this incentive will come into play by giving jurors an easy out, to the advantage of defendants and the detriment of plaintiffs.

B. The record does not contain substantial evidence to support Jury Instruction No. 18 in its entirety or Jury Instruction 34.

The Iowa Supreme Court has held that a trial court must give a requested instruction if it "correctly states the law, has application to the case, and is not stated elsewhere in the instructions." *Struve*, 740 N.W.2d 436, 439 (Iowa 2007). Additionally, "[p]roposed instructions must be supported by the pleadings and substantial evidence in the record. Evidence is substantial if a reasonable person would accept it as adequate to reach a conclusion." *Wolbers v. Finley Hospital*, 673 N.W.2d 728, 732 (Iowa 2003).

1. The record does not contain substantial evidence that Mr. Wermerskirchen was at fault "in voluntarily assuming any risks or hazards attendant to traversing the railroad crossing when same was open and obvious."

One of the particulars included in Jury Instruction No. 18 was that Mr. Wermerskirchen was negligent "in voluntarily assuming any risks or hazards attendant to traversing the railroad crossing when same was open and obvious." (App. v. I p. 206). It bears emphasizing that the burden was on Defendants to demonstrate the comparative fault of Mr. Wermerskirchen. (App. v. I p. 206). Yet there was no evidence that Mr. Wermerskirchen made the decision to cross the tracks at the Crossing when the risk of an oncoming train was "open and obvious." While Defendants played a video of the footage from the CN Train Event Recorder, this video indicated only what the train crew was able to see at various times. Defendants did not

offer any evidence demonstrating what Rick, who was immersed in a fog bank, and who was viewing the train from a completely different vantage point, could see at each precise moment, and they certainly did not offer any evidence that he voluntarily assumed the risk of crossing the tracks knowing that the CN Train was approaching.

The only testimony regarding what Mr. Wermerskirchen could see and how he evaluated the risks came from Rick himself who stated that he could not see the CN Train until the front of his road grader was already on the tracks, and that he deliberately determined not to cross the tracks so as to prevent the train from coming into direct contact with his body. Unfortunately for Rick, County road graders are not equipped with event recorders, and there were no other witnesses to the accident to substantiate his claims. Be that as it may, the record lacked substantial evidence from which a jury could conclude that Rick voluntarily assumed an "open and obvious" risk or hazard. As such, the district court should not have included this particular in Instruction No. 18. *Wolbers*, 673 N.W.2d at 732.

The district court explained its' decision to include this instruction as follows:

> "Okay. The Court was assuming that No. 6 meant the fact that there was testimony that the plaintiff was well-familiar with this crossing, that he crossed it numerous times, that he knew trains came at all times of the day, that there was no set schedule, and that trains came

> from both directions. That's what the Court was assuming No. 6 meant. And obviously Mr. Wermerskirchen did testify that knowing about all of those risks during his – I think both his direct and his cross examination." (Tr. 6 p. 10, ln. 4-12)(App. v. II p. 281).

While the district court correctly states the facts, these facts do not constitute evidence that Mr. Wermerskirchen voluntarily assumed an "open and obvious" risk or hazard. If they did, it would mean that anyone who was familiar with a particular railroad crossing and knew that trains came through such crossing at unpredictable times could be found to be contributorily negligent if he made the decision to cross the tracks, regardless of the circumstances.

2. The record does not contain substantial evidence that Mr. Wermerskirchen did not have his vehicle under control.

Plaintiffs' objection to Jury Instruction No. 34 should not have been sustained for the same reason. While this instruction correctly states the law, it is not supported by substantial evidence in the record in this case. At trial, Defendants attempted to portray Mr. Wermerskirchen as distracted in the period leading up to the collision. They suggested that he did not see or hear the CN Train because he was focused on doing good work for the people of Black Hawk County, and that he may have "zoned out," and/or been listening to sports radio. (Tr. 2 p. 94, ln. 18- 21; Tr. 6 p. 77, ln. 6-11; p. 84, ln. 10-13)(App. v. II pp. 215, 302, 304). Defendants also faulted Rick

for not stopping the road grader completely and opening the windows to look for trains, a decision for which he offered a clear explanation at trial. (Tr. 1 p. 81, ln. 6-19; p. 104, ln. 2-17)(App. v. II pp. 177, 195). But Defendants did not even make the claim, let alone offer any supporting evidence, that Mr. Wermerskirchen was not able to guide and direct the movement of his road grader, control its speed, or "stop it reasonably fast." (Jury Ins. No. 34)(App. v. I p. 222). Hence, the district court erred in giving this instruction to the jury. *Wolbers*, 673 N.W.2d at 732.

C. Jury Instruction No. 25 was incomplete and misleading, as it failed to instruct the jury that the federal horn audibility requirements impose an ongoing obligation.

Jury Instruction No. 25 provided as follows:

> "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 110dB(A) at 100 feet forward of the locomotive in its direction of travel."

Plaintiffs requested that the district court add the phrase "at the time of the accident" to the end of the instruction, so as to make it clear to the federal standard of care regarding horn audibility confers an *ongoing* obligation on Defendants. The Iowa Supreme Court has held that reversal is warranted when jury instructions are "misleading and confusing." *Rivera v. Woodward Resource Center*, 865 N.W.2d 887, 902 (Iowa 2015)(citing *McElroy v. State*, 637 N.W.2d 488, 500 (Iowa 2001)). "[A]n instruction is misleading or

confusing if it is 'very possible' the jury could reasonably have interpreted the instruction incorrectly." *Id.* Because the instruction did not make it clear that the sound level requirements were ongoing, the jury could very well have determined that Defendants satisfied this standard of care by virtue of the fact that a horn test performed more than two and a half years prior to Mr. Wermerskirchen's accident, in May of 2010, indicated that the horn on the CN Train met sound level requirements at that time, a point the Defendants made repeatedly. For this reason, reversal is warranted under the standard in *Rivera* and *McElroy*.

Moreover, the instruction requested by Plaintiffs "correctly states the law." *Struve*, 740 N.W.2d at 439. The relevant case law leaves no doubt that 49 C.F.R. §229.129 imposes an ongoing obligation to maintain the horn decibel requirements therein. After determining that the plaintiff's claim that a horn was inadequate was preempted by the Locomotive Inspection Act ("LIA"), the court made the following statements in *Hughs v. Union Pacific Railroad Co.*, 2017 WL 1609646 (W.D. Mo. 2017):

> This finding does not affect the Court's holding as to Plaintiffs' claim that Defendant violated the decibel requirement of 49 C.F.R. §229.129 *at the time of the collision*. That claim survives summary judgment as set forth in this Order. Therefore, the scope of Plaintiffs' horn claim is now limited to the claim that Defendant was negligent by breaching its duty with respect to the horn sounding between 96 dB(A) and 110 dB(A) in compliance with section 229.129 *at the time of the*

> *accident* . . . However, the Court realizes that certain evidence which may not be a breach in and of itself may be relevant as to the issue of whether the horn sounded between 96 dB(A) and 110 dB(A) in compliance with section 229.129 *at the time of the accident*. *Hughs*, 2017 WL 1609646 at *fn 3 (Emphasis added).[4]

An examination of the subparts and the penalties applicable to violations of 49 C.F.R. §229.129 provides additional support for Plaintiffs'

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[4] Notably, since the decision in *Hughs*, the Eighth Circuit has clarified the law on preemption under the LIA. The Court in *Hughs* addressed the issue of whether or not state common-law claims based on federal standards of care are preempted by the LIA and stated the following:

> Even more recently, a district court in this circuit, examined whether state common-law claims based on federal standards of care are preempted by the LIA. *[BNSF Ry. Co. v.] Seats, Inc.*, 2017 U.S. Dist. LEXIS 8921, at *4, 2017 WL 318636 [D. Neb. Jan. 23, 2017]. There, the court analyzed a split of authority on the issue but "[i]n the absence of clear authority from the Eighth Circuit Court of Appeals or the Supreme Court. . . , and in light of the broad scope of LIA preemption set forth [by the Supreme Court]," the court declined "to draw a distinction between tort claims based on a state standard of care, as opposed to the LIA's federal standard of care, for purposes of LIA preemption." *Id.* at *11-12. *Hughs*, 2017 WL 1609646 * at 3.

The Eighth Circuit has since reversed the decision of the District Court of Nebraska in *Seats*, providing the clear authority that was absent at the time the District Court for the Western District of Missouri decided *Hughs*. See *BNSF Railway Company v. Seats, Incorporated*, 900 F.3d 545 (8th Cir. 2018)("Seats II"). The Eighth Circuit's decision in *Seats II* makes it clear that state law claims based on federally imposed standard of care are <u>not</u> preempted by the LIA. See *Seats II*, 2018 WL 3827428 at *2-3. This means that the limitations on horn claims, which were discussed in *Hughs*, are no longer present.

argument. Subsection (a) and subsection (b)(2) of the regulation provide as follows:

> (a) 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 locomotive in its direction of travel. *49 C.F.R. §229.129(a).*
>
> (b)(2) Each locomotive built before September 18, 2006 shall be tested in accordance with this section before June 24, 2010 to ensure that the horn installed on such locomotive is in compliance with paragraph (a) of this section. *49 C.F.R. §229.129(b)(2).*

That subsection (a) of 49 C.F.R. §229.129 imposes an ongoing, affirmative duty is evidenced by the fact that the regulations impose separate penalties for violation of these two subsections. The penalty for violation of the sound levels prescribed in subsection (a) is $2,500, and the penalty for a willful violation of this subsection is $5,000. These penalties are separate and distinct from the penalties for failure to perform the sound level test required by subsection (b) of Section 229.129. See *49 C.F.R. Appendix B to Part 229—Schedule of Civil Penalties.* If performance of the sound level test required by 49 C.F.R. §229.129(b)(2) were the only action necessary to satisfy the federal standard of care with respect to horn audibility, a separate penalty for violation of subsection (a) would be superfluous. The Court "avoid[s] statutory construction which renders a part of a statute superfluous or redundant, and instead "presume[s] that each part of the statute has a

purpose. *State v. Graves*, 491 N.W.2d 780, 782 (Iowa 1992)(citing *George H. Wentz, Inc. v. Sabasta*, 337 N.W.2d 495, 500 (Iowa 1983)).

Second, while the regulations regarding periodic inspection and testing do not require horn sound pressure level testing at specific intervals, Section 229.129 clearly contemplates that additional horn tests will be performed after the test required by 49 C.F.R. §229.129(b). Subsection (c)(10) of 49 C.F.R §229.129 provides as follows:

> "Written reports of locomotive horn testing required by this part shall be made and shall reflect horn type; the date, place, and manner of testing; and sound level measurements. These reports, which shall be signed by the person who performs the test, shall be retained by the railroad, at a location of its choice, *until a subsequent locomotive horn test is completed* and shall be made available, upon request, to FRA as provided by 49 U.S.C. 20107." *49 C.F.R. §229.129(c)(10)* (Emphasis added).

If the test required by 49 C.F.R. 229.129(b)(2) were the only test the FRSA believed to be necessary, there would have been no need to make mention of a "subsequent locomotive horn test."

Finally, it bears emphasizing that the "one and done" approach to horn testing, which has been advanced by Defendants from the beginning of this case, defies common sense. Per the Defendants' interpretation of the federal regulations, it would not matter what sound level a horn was operating at on any given occasion so long as the railroad had a horn test on record demonstrating that, at one point in time, the horn on the train met the

requirements of 49 C.F.R. §229.129. This position is untenable, as it is directly contrary to the purpose of the FRSA. Rather than promoting *safety* in railroad operations and *reducing* railroad-related accidents, the position advanced by Defendants would create substantial risk which would serve to increase the number of accidents. *49 U.S.C. §20101.*

Plaintiffs acknowledge that Defendant's expert, Foster Peterson, testified at trial that the test required by 49 C.F.R. §229.129(b)(2) was the only test necessary and stated about the horn on a locomotive, "to put it quite bluntly, you can tell if its working or not when you blow it." (Tr. 5 Vol I p. 172, ln. 18-19)(App. v. II p. 267). The interpretation of an administrative regulation is question of law, not a question of fact. Hence, Mr. Peterson is not qualified to give an opinion on the matter, and he is certainly not qualified to overrule the relevant precedent. *Peterson v. City of Plymouth*, 60 F.3d 469, 475 (8th Cir. 1995) (citing *Arnott v. Mataya*, 995 F.2d 121, 123-124 (8th Cir. 1993) and *Estes v. Moore*, 993 F.2d 161, 163 (8th Cir. 1993)). Also see *Terrell v. Reinecker*, 482 N.W.2d 428, 430 (Iowa 1992)("[W]hen however the legal conclusion is a rule of decision to be applied by the judge or jury in deciding the case, it is not a proper subject for expert testimony."). For this reason, Mr. Peterson's testimony cannot provide a legitimate basis

for denying Plaintiffs' request for an instruction that the federal horn audibility requirements applied "at the time of the accident."

D. Jury Instruction No. 29 has no application to this case, as the parties did not dispute whether or not the horn on the CN Train was sounded, but rather, whether it was sounded at the appropriate level.

Jury Instruction No. 29 was also misleading and confusing. The instruction reads as follows:

> "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 [sic?] evidence that the horn was, in fact, sounding because it must have been sounding 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 the horn was not sounded for it may have been sounded and yet not heard by that witness. (Jury Ins. No. 29)(App. v. I p. 217)

This instruction was proposed by Defendants, based on case law from 1899 and 1929. (See Defendant's Proposed Jury Instructions, p. 26; citing *Lenning v. Des Moines & C.I.R.R.*, 227 N.W. 828, 830 (Iowa 1929) and *Payne v. C & N.W.R. Co.,* 78 N.W. 813, 815 (Iowa 1899))(App. v. I p. 184). The district court erred by accepting this proposed instruction over Plaintiffs' objection.

Jury Instruction No. 29 is misleading because it is very possible that this instruction caused the jury to conclude that the disputed issue was whether or not the horn on the CN Train was, in fact, sounded, when

Plaintiffs never made the argument that the horn was not sounded *at all*. *Rivera*, 865 N.W.2d at 902. The principle that failure to hear a train whistle sounded does not "create a conflict with positive evidence that the signals were given at the whistle posts," which is set forth in *Payne* and reiterated in *Lenning*, cannot logically be extended to cases like the present, in which the issue is whether or not a signal was given *at the appropriate volume*. The fact that the train crew sounded the horn does not constitute positive evidence that it was sounded at the appropriate volume, prior to the collision in this case.

E. The district court erred by instructing the jury that the railroad engineer had the right to assume Mr. Wermerskirchen would observe the law without also instructing the jury that Mr. Wermerskirchen had the right to assume the railroad engineer would observe the law.

The following is the text of Iowa Civil Jury Instruction 600.71:

> **600.71 Right of Assumption**. Both drivers had a right to use the road, but each had to respect the rights of the other. Each driver could assume the other would obey the law until they knew, or in the exercise of ordinary care, should have known the other driver was not going to obey the law.

Defendants proposed the following jury instruction, citing I.C.J.I. 600.71:

> 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 ordinary care, should have known, that [Plaintiff Rick Wermerskirchen] would not observe the law. *In other words, the engineer had the right to assume that Plaintiff [Rick Wermerskirchen] would not drive onto the track*

> *immediately into the path of an approaching train.* (Defendants' Proposed Jury Instructions p. 24)(App. v. I p. 183).

While the district court removed the last sentence from Jury Instruction No. 30 at Plaintiffs' request, it denied Plaintiffs' request to add a statement that Rick Wermerskirchen had the same right to assume the railroad engineer would obey the law. The district court justified its decision on the grounds that "it's different when you have two motorists on a highway who are both following the same rules versus the train who has different rules than the vehicle." (Tr. 6 p. 42, ln. 20-23)(App. v. II p. 294).

The district court is correct that motorists and railroad engineers are required to follow different rules. But this fact does not justify its decision to deny Plaintiffs' request. Plaintiffs did not request a jury instruction which provided that motorists and railroad engineers are subject to the exact same rules. Rather, the instruction Plaintiffs requested would have conveyed to the jury that each party had the right to assume the other would obey the laws applicable to them, until they knew, or in the exercise of reasonable care, should have known, the other party would not obey the law. That the railroad engineer was not required to follow the exact same laws as Mr. Wermerskirchen does not mean he was not required to follow *any* laws. Had the district court given the instruction requested by Plaintiffs, Defendants could have argued to the jury that the legal obligations of the

railroad engineer were different than those of Mr. Wermerskirchen. Jury Instruction No. 30 modifies I.C.J.I. 600.71, so as to make it misleading. The instruction, as given by the district court, suggests that Mr. Wermerskirchen was the only party faced with any legal obligation in the period leading up to the collision. *Rivera*, 865 N.W.2d at 902. Therefore, reversal is warranted.

IV. THE DEFENDANT CANNOT DEMONSTRATE THAT THE ERRORS CLAIMED BY THE PLAINTIFFS WERE HARMLESS.

"The erroneous admission of evidence is presumed to be prejudicial." *Johnson v. State Farm Auto Insurance Co.*, 504 N.W.2d 135, 138 (Iowa Ct. App. 1993) (citing *Madison v. Colby*, 348 N.W.2d 202, 204 (Iowa 1984)). Also see *Steensland v. Iowa-Illinois Gas & Electric Co.*, 47 N.W.2d 162, 165 (Iowa 1951) ("[W]here error appears in the admission of testimony prejudice will be presumed unless the contrary affirmatively appears."). The same is true in the case of an erroneous jury instruction. In *Rivera*, the Court held that the burden to demonstrate that an erroneous jury instruction constitutes harmless error is on the party claiming harmlessness, and it stated that the Court "assume[s] prejudice unless the record affirmatively establishes that there was no prejudice." *Rivera*, 865 N.W.2d at 903.

The record does not contain any affirmative evidence which establishes that the jury was not prejudiced by the district court's errors in this case. It bears emphasizing that any errors bearing on the issue of comparative fault cannot be rendered harmless by virtue of the fact that the jury found that Defendants to be without fault. While the jury determined that Chicago Central & Pacific Railroad Company, Tim Dorsey and Josh Yokem were not negligent, it did not stop there, but rather, continued on to make findings regarding causation and comparative fault. (Jury Verdict Form)(App. v. I p. 243-245).

Finally, it is significant that, "[e]rror on trial is not rendered nonprejudicial by the fact that verdict finds support in the evidence." *Steensland*, 47 N.W.2d at 165. In *Steensland*, the Court rejected the defendant's argument that the admission of certain evidence was without prejudice because there was competent evidence to support the verdict, reasoning as follows:

> We have held the fact there is 'other strong and persuasive evidence ample to support' the trial court's finding in a law case tried to the court does not render non-prejudicial the improper reception of evidence where the evidence as a whole is conflicting. *Steensland*, 47 N.W.2d at 166 (citing *In re Estate of Connor*, 36 N.W.2d 833, 841 (Iowa 1949)).

Also see *In re Estate of Kelly*, 558 N.W.2d 719 (Iowa Ct. App. 1996)(Court granted a new trial based on prejudice caused by inadmissible evidence

despite finding there was substantial evidence in the record to support the jury verdict). Hence, Defendants cannot demonstrate that the district court's errors were harmless simply by demonstrating that the record contains substantial evidence to support the jury's findings. Rather, the Defendant carries the greater burden of demonstrating that, notwithstanding these errors, the competent evidence was such that it was entitled to judgment as a matter of law. See *Kurth v. Iowa Department of Transportation*, 628 N.W.2d 1, 8 (Iowa 2001)(citing *Steensland*, 47 N.W.2d at 165-166). Defendants cannot meet this burden, as the district court recognized that there were issues of fact for the jury and twice denied Defendants' motion for a directed verdict at trial.

CONCLUSION

For the reasons stated herein, the Plaintiffs respectfully request that the Court reverse the decision of the district court entering judgment on the jury verdict for Defendants, and remand this case to the district court for a new trial.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Counsel for Appellants respectfully requests to be heard in oral argument upon submission of this case.

ATTORNEY'S COST CERTIFICATE

I hereby certify that the cost of printing the foregoing Appellant's Final Brief was the sum of $18.25

/s/ John R. Walker, Jr.
John R. Walker, Jr.

CERTIFICATE OF SERVICE

I certify that on the 3rd day of July, 2019, I served the following individuals with the attached document electronically through EDMS:

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CERTIFICATE OF FILING

I further certify that on the 3rd day of July, 2019, I filed this document in the Iowa Supreme Court by EDMS.

/s/John R. Walker, Jr.
John R. Walker, Jr.

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