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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 REPLY BRIEF AND ARGUMENT

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ARGUMENT

The Defendants make a number of arguments in their brief. While most of these arguments are dealt with adequately in the Plaintiffs' original brief and argument, some require further attention. First, it is necessary for Plaintiffs to respond to Defendants' arguments regarding the case of *Bakhuyzen v. National Rail Passenger Corporation*, 20 F.Supp.2d 1113 (WD. Mich.1996). Second, Plaintiffs must clarify their position with respect to the Natham Airchime Model K Series Locomotive Air Horns Installation and Maintenance instructions (the "Horn Maintenance Manual") (App. v. I p. 174). Finally, Plaintiffs must address Defendants' claim that any errors on the part of the district court were harmless because they were entitled to a directed verdict on Plaintiffs' horn claims. In support of this claim, Defendants rely on the same arguments set forth in their pretrial motion to exclude the testimony of Plaintiffs' expert, David Rangel. Because the district court properly rejected these arguments, Defendants' claim that it was entitled to a directed verdict on Plaintiffs' horn claims must fail.

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE SEVERELY LIMITED VISIBILITY AT THE TIME OF THE ACCIDENT DID NOT CONSTITUTE A "SPECIFIC, INDIVIDUAL HAZARD."

In their original brief and argument, Plaintiffs argued that the case of *Grade v. BNSF Railway Co.*, 676 F.3d 680 (8th Cir. 2012) did not defeat

their claim that the severe fog existing at the time of the accident in this case constituted a "specific, individual hazard," on the grounds that the *Grade* addressed a different exception to federal preemption, but rather, i.e. the exception for "essentially local safety or security hazard[s]." *49 U.S.C. §20106(a)(2)*. Plaintiffs urged the Court not to extend the holding in *Grade* to cover "specific, individual hazards", but rather, to adopt the reasoning in *Bakhuyzen*. (Plaintiffs' Proof Brief ("Pl. Br.") pp. 41-44). Defendants claim that the court in *Bakhuyzen* "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." (Defendants' Proof Brief ("Def. Br.") p. 36). But there is no dispute that the plaintiffs' expert in *Bakhuyzen* filed an affidavit which identified the limited visibility due to snow as a "specific, individual hazard." *Id.* at 1117.

Nor is there any dispute that numerous cases which have reached the opposite conclusion from *Bakhuyzen* are distinguishable on their facts and/or contain explicit statements distinguishing *Bakhuyzen*. These cases include three cases cited by the Defendants in their brief i.e. *Cox v. Norfolk and Western Railway Company*, 998 F.Supp. 679, 687 (S.D. WVa. 1998); *Hughs v. Union Pacific Railroad Company*, 2017 WL 1380480 *9 (W.D. Mo. 2017); and *Seyler v. Burlington*, 102 F.Supp.2d 1226, 1237 (D. Kansas

2000). (See Pl. Br. pp. 44-47; Def. Br. pp. 40-42). While Defendants acknowledge that the *Grade* court did not specifically mention the exception to federal preemption for "specific, individual hazards," they attempt to downplay this fact by speculating that it is "likely" the court did not do so "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." (Def. Br. p. 37). However, there is no way to determine this from the *Grade* case itself, and it is just as "likely" that, contrary to the plaintiffs in *Bakhuyzen*, the plaintiffs in *Grade* never made an argument regarding the exception for "specific, individual hazards." Hence, Plaintiffs maintain their position that the *Grade* case does not dictate that the Court reject the reasoning in *Bakhuyzen*.

II. THE DISTRICT COURT ERRED IN REFUSING TO ADMIT THE HORN MAINTENANCE MANUAL FOR IMPEACHMENT PURPOSES.

Plaintiffs also argued in their original brief that the district court should have admitted Horn Maintenance Manual for the purpose of impeaching the testimony of Defendants' expert, Foster Peterson. The Defendants claim that "Plaintiffs misunderstand the nature of admitting evidence that would otherwise be inadmissible hearsay for impeachment purposes," and offer arguments in rebuttal as if Plaintiffs were attempting to

introduce a "contradictory, out of court statement previously made by the testifying witness." (Def. Br. p. 49). But the Horn Maintenance Manual does not constitute a prior, inconsistent statement made by Mr. Peterson, and the rule that evidence which is not admissible as substantive evidence may be admitted for purposes of impeaching a witness is not confined evidence consisting of a prior, inconsistent statement by the testifying witness himself. See *ACTONet, Ltd. v. Allou Health & Beauty Care*, 219 F.3d 836, 846-847 (8th Cir. 2000)(Court upheld district court's decision to admit a magazine review of a website for purposes of impeaching an expert's claim that the website was unsatisfactory). The Defendants are correct that the statements in the Horn Maintenance Manual cannot be offered for their truth. However, the district court abused its discretion by not permitting Plaintiffs to offer the manual for purposes of impeaching the *credibility* of Mr. Peterson.

III. DEFENDANTS WERE NOT ENTITLED TO A DIRECTED VERDICT ON PLAINTIFFS' HORN CLAIMS.

The Defendants make the following statements on page 63 of their brief:

> 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 excluded as a matter of law. 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. He did not personally inspect the horn or interview the train crew about the functionality of the horn on the day of the accident. (Def. Br. p. 63).

First, the Defendants' claim that "Plaintiffs' only support for their speculation that the horn was not working properly came from their expert, Mr. Rangel" is incorrect. This case differs from the vast majority of cases involving railroad accidents, because the party involved in the accident, Richard Wermerskirchen, lived to provide testimony. Mr. Wermerskirchen testified at his deposition and at trial that he could not hear a horn despite listening intently for one. (Wermerskirchen Dep. p. 66; Wermerskirchen Aff. ¶¶6, 12; Tr. 1 p. 89, ln. 4-20; p. 103, ln. 11-22)(App. v. II pp. 58, 63, 103, 184, 194). He also testified that he had previously approached the crossing where the accident occurred many times and was generally able to hear the horns of 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. 178-179, 181).

The Defendants rely on the case of *Estate of Strandberg v. Chicago, Central & Pacific Railroad Company*, 284 F.Supp.2d 1136 (N.D. Iowa 2003), to support their claim that Mr. Wermerskirchen's testimony is not sufficient to generate a genuine issue of material fact as to whether or not the horn was operating at the required volume. The *Strandberg* case is

distinguishable. Although the plaintiff in *Strandberg* asserted that the whistle was not "adequate", the court determined the estate's claims were preempted because the plaintiff could not create a genuine issue of material fact as to whether or not the whistle was "activated." *Id.* at 1143-1144. In the present case, there is no question that the whistle on Canadian National Train No. CSX 7376 (the "CN Train") was "activated." Rather, the fighting issue is whether it met the federal standard of care set forth in 49 C.F.R. §229.129(a), i.e. whether it was operating at the required volume at the time of the accident. *49 C.F.R. §229.129(a)*. *Strandberg* was also decided prior to the 2007 amendments to the Federal Railroad Safety Act, which amendments added subsection (b) to 49 U.S.C. §20106. This amendment clarified that state law causes of action alleging that a party has failed to comply with a federal standard of care or failed to comply with its own plan, rule, or standard created pursuant to a federal regulation or order are not preempted. *49 U.S.C. 20106(b)(A), (B)*.

The Plaintiffs submit that Mr. Wermerskirchen's testimony, by itself, was sufficient to generate a genuine issue of material fact as to whether the horn on the CN Train was working properly. Therefore, even assuming the Defendants' claim that the testimony of Mr. Rangel should have been excluded were valid, they could not demonstrate that they were entitled to a

directed verdict on Plaintiffs' horn claims. The Court need not reach this issue, however, because the district court properly rejected Defendants' motion to exclude Mr. Rangel's testimony. The statements in Defendants' brief reveal that they either misunderstand or have chosen to distort the applicable law regarding expert testimony. That a witness is not required to have conducted any scientific investigation or testing in order to qualify as an expert is plain from I.C.A. Rule 5.702, which provides as follows:

> "A witness who is qualified as an expert by knowledge, skill, experience, training, *or* education may testify in the form of an opinion or otherwise if the expert's scientific, technical, *or* other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue. *I.C.A. Rule 5.702*. (Emphasis added).

In other words, an expert's testimony is properly admitted if his scientific, technical, *or other specialized* knowledge will help the trier of fact.

Notably, the Iowa Supreme Court is "committed to a liberal view on the admissibility of expert testimony." *Johnson v. Knoxville Community School District*, 570 N.W.2d 633, 636 (Iowa 1997)(citing *Mensink v. American Grain*, 564 N.W.2d 376, 380 (Iowa 1997)). Also see *Kirk v. Union Pacific Railroad*, 514 N.W.2d 734, 738 (Iowa Ct. App. 1994)("[T]he general rule is one of liberality of admission." (citing *Hunter v. Board of Trustees*, 481 N.W.2d 510, 519 (Iowa 1992) and *State v. Halstead*, 362 N.W.2d 504, 506 (Iowa 1985)). "Doubts regarding whether an expert's

testimony will be useful should generally be resolved in favor of admissibility." *Thomas v. FCA US LLC*, 242 F.Supp.3d 819, 823 (S.D. Iowa 2017)(citing *United States v. Finch,* 630 F.3d 1057, 1062 (8th Cir. 2007)). "[R]ejection of expert testimony is the exception rather than the rule." *Id.* (citing *Robinson v. Geico General Insurance Co.*, 447 F.3d 1096, 1100 (8th Cir. 2006)). "[N]o particular education is required" and "experience is sufficient to qualify a witness as an expert." *Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525, 535 (Iowa 1999)(citing *Hutchison v. American Family Mut. Ins. Co.*, 514 N.W.2d 882, 887-888 (Iowa 1994)). Mr. Rangel's opinion was based on specialized knowledge acquired through his significant experience with horn installation, and testing of the type of horn affixed to the engine on the CN Train, as well as significant experience reviewing footage from locomotive event recorders like the one on the CN Train. (Affidavit of David Rangel p. 1)(App. v. I p. 148).

While the absence of scientific testing would not render Mr. Rangel's opinion inadmissible or insufficient to create a genuine issue of material fact as to the functioning of the horn under any circumstances, the Defendants' reliance on the absence of such testing is particularly inappropriate given the circumstances of this case. This is because Plaintiffs never had a meaningful opportunity to perform any testing on the horn. Plaintiffs filed the Petition

in this case in December of 2014. Despite requesting the event recorder footage through discovery on January 16, 2015, the Defendants did not provide Plaintiffs with this footage until 17 months later in June of 2016. After the Defendants finally provided the footage, the undersigned was given information indicating that the engine on the CN Train had been destroyed, and accordingly, amended the Petition to include a claim for spoliation of evidence. (See Second Amended Petition at Law, pp. 4-5) (App. v. I pp. 76-77).

By the time counsel for the Defendants indicated that the engine was in fact available for testing, on July 31, 2017, the engine had been under the control of CN and/or CSX for over four and a half years. As a chain of custody was never established for purposes of preserving this evidence, testing at this late date would not have yielded any meaningful results. (Appendix in Support of Plaintiffs' Resistance to Motion to Exclude Expert Testimony and Resistance to Second Motion for Summary Judgement pp. 26-27)(App. v. I pp. 171-172). Lastly, it bears emphasizing that, as an expert retained by the Defendants, Mr. Peterson, unlike Mr. Rangel, had the opportunity to perform a site inspection in this case. (Peterson Report, p. 3) (App. v. II p. 117). Yet Mr. Peterson's report indicates that he, like Mr.

Rangel, performed no sound level testing on the horn. (Peterson Report, pp. 10-11)(App. v. II pp. 124-125).

Second, the Defendants' assertion that Mr. Rangel's opinion lacked a "reliable scientific foundation" makes little sense, as the foundation for Mr. Rangel's opinion was the footage from the Defendants' own event recorder. I.C.A. Rule 5.703 provides that "[a]n expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed." *I.C.A. Rule 5.703*. There is no question that Mr. Rangel has been made aware of and has viewed the CN event recorder footage leading up to the collision between the CN Train and Mr. Wermerskirchen's road grader. Rule 5.703 goes on to state, "[i]f experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted." *I.C.A. Rule 5.703*.

It is not even necessary to determine whether experts in the field would reasonably rely on the event recorder footage, as the parties stipulated to its admissibility. The following exchange occurred at the hearing on Defendants' first motion for summary judgment on August 20, 2017:

> THE COURT: Earlier you mentioned giving me some exhibits. And I think, Mr. Walker, you mentioned 911 calls. Do you have some exhibits that the parties want to admit?
> MR. GAFFNEY: Should we mark them?

> THE COURT: Please.
> MR. GAFFNEY: *For the record, I can just say the first one is the videotape from the locomotive,* and then the second one is 911. *And maybe we can call the first one 1* and the second one 2 for purposes of this hearing
> THE COURT: *Any objection to that, Mr. Walker?*
> MR. WALKER: *No. I think that's okay.*
> MR. GAFFNEY: Okay.
> THE COURT: *Okay. Exhibits 1 and 2 will be admitted.* Okay. Thank you, gentlemen. I'll take it under advisement, read your filings and look at those two exhibits. (Transcript of August 30, 2017 hearing on Motion for Summary Judgment p. 35, ln. 8-25)(See Appendix in Support of Plaintiffs' Resistance to Motion to Exclude Expert Testimony and Resistance to Second Motion for Summary Judgement p. 25))(Emphasis added)(App. v. I p. 170).

Even if the parties had not previously agreed to admit this evidence, the Defendants would be hard pressed to argue that the Plaintiffs' expert could not rely upon it in forming his opinion, as the footage relied upon by Mr. Rangel is the very same footage relied upon by the Defendants to support their arguments at the summary judgment stage and at trial.

Moreover, the Defendants cannot now argue that this footage does not constitute a reliable foundation from which to form an expert opinion, without calling in to question the opinion of their own expert, Mr. Peterson, as his report relies heavily on the event recorder footage. (Peterson Report) (App. v. II pp. 114-131). "When a litigant clearly believes a certain methodology is acceptable as shown by his or her own expert's reliance on that methodology, it is disingenuous to challenge an opponent's use of that

methodology." *Shuck v. CNH America, LLC*, 498 F.3d 868, 874 (8th Cir. 2007). For all of these reasons, there is no question about the reliability of the foundation for Mr. Rangel's opinion, and the cases cited by Defendants on pages 65 and 66 of their brief are inapposite. (Def. Br. pp. 65-66 (citing *Ranes v. Adams Labs, Inc.*, 778 N.W.2d 677, 693 (Iowa 2010); *Lesenhop v. Norton*, 153 N.W.2d 107, 114 (Iowa 1967), et al).

The Defendants' reliance on the case of *Nunez v. BNSF Railway Company*, 2012 WL 2874059 (C.D. Ill. 2012) to support their claim that Mr. Rangel's testimony should be excluded is misplaced. In *Nunez*, the Court excluded the opinion of the plaintiff's expert witnesses, Paul Bodnar, regarding horn functioning. The issue in *Nunez* was not whether the horn was operating at the required volume, but whether or not it was sounded at all before reaching the intersection where the accident occurred. Bodnar based his opinion that the horn was not sounded solely on the fact that the railroad failed to record the horn data as required by federal regulations. *Id.* at 6. First, the court noted that the regulation requiring the recording of horn data was inapplicable because the train in *Nunez* was placed in service prior to October 1, 2009. *Id.* at 6. Hence, the court concluded Bodnar's opinion that the horn data was deficient to be without legal support.

Second, Bodnar suggested four possibilities, other than the lack of any legal obligation to record it, which could explain the absence of any horn data. The court determined that none of the possibilities suggested by Bodnar was viable given the *undisputed* evidence in the record. The court made the following statements in *Nunez*:

> Bodnar insisted at his deposition that the lack of recorded data is evidence to support his second possibility—that the horn was never activated at all. This flies in the face of undisputed testimony from three witnesses—one of them completely independent of BNSF. Bodnar discounts witness testimony as unreliable, but this is not a situation of conflicting witness testimony; there is no contrary witness testimony. As BNSF points out, Bodnar's opinion on this point is like saying that if a tree falls in the forest but there is no video recording of it, the tree never fell even if witnesses observed it. An expert may not simply ignore evidence that does not support his opinion. *Nunez*, 2012 WL 2874059, at *6.

The only undisputed evidence in the record with respect to the horn on the CN Train is that it was tested in May of 2010, more than two and a half years prior to the accident that severely injured Mr. Wermerskirchen, and that the horn made some sound in the period leading up to the accident. This evidence, by itself, was insufficient for the district court to conclude, as a matter of law, that the horn was functioning properly. Unlike the situation in *Nunez*, the evidence regarding the functioning of the horn on the date of Mr. Wermerskirchen's accident is disputed. Mr. Rangel's opinion that the horn was not operating properly on the date of the accident is not speculation, but

rather, based on his observation of the CN event recorder footage. Moreover, Mr. Wermerskirchen's testimony provides additional support for Mr. Rangel's opinion.

The other case relied upon by the Defendants, *Marsh v. Norfolk Southern, Inc.*, 243 F.Supp.3d 557 (M.D. Pa. 2017), is also readily distinguishable. The Court does not even address the issue of expert testimony in *Marsh*. The defendant in this case produced evidence of a horn test conducted less than four months prior to the accident, which demonstrated that the horn met the decibel level requirements of 49 C.F.R. §229.129(a). Because the Plaintiff could come forward with no evidence to indicate that the horn was not operating in accordance with federal regulations on the date of the accident, the court concluded her claim was preempted and granted the defendant's motion for summary judgment. On the contrary, in the present case, the Plaintiffs offered both expert witness testimony from Mr. Rangel and lay witness testimony from Mr. Wermerskirchen that the horn on the CN Train did not meet the requirements of 49 C.F.R. §229.129(a) on the date of the accident. As such, Defendants' claim that they were entitled to a directed verdict on Plaintiffs' horn claims must fail.

CONCLUSION

For the reasons stated herein, and for the reasons stated in the Plaintiffs' original brief and argument, 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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I hereby certify that the cost of printing the foregoing Appellant's Final Reply Brief was the sum of $5.75.

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

/s/Jordan M. Talsma
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