IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

ROSEMARY PAEZ and REY PAEZ,

Plaintiffs/Appellants,

v.

Ct. App. No. 32,105
No. D-0725-CV-2009-00083

BURLINGTON NORTHERN SANTA FE RAILWAY, MIKE A. ORTEGA, HECTOR L. DURAN, COUNTY OF SOCORRO, by and through its COMMISSIONERS, ROSALIND TRIPP, JAY SANTILLANES, LAUREL ARMIJO, CHARLES GALLEGOS and STANLEY HERREA,

Defendants/Appellees.

APPELLANTS' BRIEF IN CHIEF

Civil Appeal from the Seventh Judicial District, County of Socorro
The Honorable Kevin R. Sweazea, District Court Judge

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

Appellants Rosemary Paez ("Ms. Paez") deceased, and Rey Paez[1], by and through their counsel of record, the Law Office of Tibo J. Chavez, Jr. (Tibo Chavez, Jr.) and The Branch Law Firm (Turner W. Branch), appeal from the Orders of the District Court, the Hon. Kevin R. Sweazea, granting summary judgment in favor of Appellees Burlington Northern Santa Fe Railway, Mike A. Ortega, and Hector L. Duran (collectively, "BNSF"), and the County of Socorro (the "County"), and the Final Judgment in favor of BNSF and the County dated March 1, 2012.

As discussed more thoroughly below, the District Court erred in finding that Appellants' negligence claims are preempted by federal law and there are no genuine issues of material facts for which a jury could find that Appellees' respective conduct was a proximate cause of the collision resulting in Ms. Paez' severe injuries and death. The record also reflects that the Court improperly substituted its own opinion as to the cause of the collision and the relative liability of the parties for that of the jury. Thus, because triable issues of fact exist as to Appellants' claims, the Judgment below should be reversed and the case remanded for trial.

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[1] Appellants are the Estate of Rosemary Paez, who passed away in April 2012 after the Final Judgment was entered and the Notice of Appeal was filed, and her surviving spouse, Rey Paez.

II. SUMMARY OF THE PROCEEDINGS

A. Nature of the Case

This case arises out of collision between a vehicle driven by Ms. Paez and a train owned and operated by BNSF on the Paizalas Road crossing in Socorro County, New Mexico, on November 17, 2008, which severely injured Ms. Paez and, ultimately, caused her death. Appellants asserted several common law negligence claims against both BNSF and the County, seeking damages for her injuries and loss of consortium on behalf of Mr. Paez.

Appellees filed numerous motions for partial summary judgment on Appellants' claims prior to a two-day hearing on February 17 and 18, 2012. Following the hearing, on March 1, 2012, the District Court granted, among other motions, BNSF's "renewed" motions and the County's motion for reconsideration of the Court's prior ruling denying summary judgment. [RP 5119-5121, 5122-5124] The Court's Orders disposed of Appellants' claims, and Final Judgment in favor of Appellees and against Appellants was entered on March 1, 2012. [RP 5125-5126] Appellants appeal from these Orders as well as the Court's October 18, 2010 Order granting BNSF's Second Motion for Partial Summary Judgment on Plaintiffs' Claims of Excessive Speed, Failure to Slow/Brake, and Failure to Keep a Proper Lookout [RP 711-713].

B. Course of the Proceedings

On June 17, 2009, Appellants filed a Complaint for Personal Injury and Damages against BNSF, Mike A. Ortega, Hector L. Duran, Middle Rio Grande Conservancy District, and the County, by and through its Commissioners Rosaline Tripp, Jay Santillanes, Laurel Armijo, Charles Gallegos and Stanley Herrera. [RP 1-5] Appellants filed an Amended Complaint on June 22, 2009. [RP 24-28] The Amended Complaint sets forth causes of action against Appellees for negligence and sought an award of punitive damages. [*Id.*]

As to BNSF, the Amended Complaint alleges that BNSF breached its duty of care owing Appellants and the traveling public by, among other things, (a) failing to maintain a safe crossing at Paizalas Road [RP 24-28, ¶¶ 13 & 15]; (b) failing to provide adequate warning signs and warnings of approaching trains at the crossing [*id.*]; and (c) failing "to provide for a clear and unobstructed view of the crossing and approaching trains." [*Id.*, ¶¶ 13 & 16]. The complaint asserts that BNSF's breaches of these duties resulted in injuries to Appellants. Appellants allege similar claims against the County; specifically, that it owes a duty of care to Appellants and the traveling public to maintain Paizalas Road in a safe manner, including the "placement of stop and warning signs at the crossing, as well [as]

clearing weeks that caused a visual obstruction," and that the breach of its duties caused injuries to Appellants. [*Id.*, ¶¶ 24-27]

BNSF and the County filed their answers to the Amended Complaint on August 7 and 10, 2009, respectively. [RP 40-45; RP 54-60] Defendant Middle Rio Grande Conservancy District moved to dismiss the claims against it for improper venue. [RP 63-67] The Court granted its motion on March 2, 2010. [RP 108-109]

There was extensive motion practice in the District Court during, and following, written and deposition discovery. For example, BNSF filed nine separate motions for partial summary judgment, including two renewed motions that the District Court previously denied. The County also filed four separate summary judgment motions, one of which was a motion for reconsideration of the Court's previous denial of its motion on Appellants' negligence claim. A summary of each of the motions is set forth below.

1. BNSF's Motions for Partial Summary Judgment

BNSF's First Motion for Partial Summary Judgment: On May 28, 2010, BNSF filed its First Motion for Partial Summary Judgment that Plaintiff Rosemary Paez was Negligent *Per Se*. [RP 202-277] In that motion, BNSF argued that Ms. Paez was negligent as a matter of law by failing to yield to a northbound BNSF train that was plainly visible at the Paizalas Road crossing in violation of *NMSA*

1978, § 66-7-341. [*Id.*] Appellants filed a response on July 7, 2010 and requested a continuance in order to conduct additional discovery pursuant to *Rule 1-057(F), NMRA*, and disputed the facts on which BNSF's motion was based. [RP 453-496] BNSF filed a reply in support of its motion on July 26, 2010. [RP 520-533] The Court denied BNSF's First Motion for Partial Summary Judgment on October 28, 2010. [RP 716-717] On January 11, 2012, BNSF "renewed" its First Motion (in conjunction with its Sixth Motion for Partial Summary Judgment to Dismiss the Complaint and its "renewed" Fifth Motion on Appellants' visual obstruction claims) [RP 2599-2875], which was granted on March 1, 2012. [RP 5122-5124]

BNSF's Second Motion for Partial Summary Judgment: BNSF filed its Second Motion for Partial Summary Judgment on June 9, 2010. [RP 286-337] In that motion, BNSF sought adjudication on Appellants' claims of excessive speed, failure to slow/brake, and failure to keep a proper lookout. [*Id.*] Appellants filed a response to that motion on September 7, 2010 [RP 597-599], and BNSF filed a reply in support of its motion on September 22, 2010. [RP 628-630] The Court granted BNSF's Second Motion for Partial Summary Judgment on October 18, 2010. [RP 711-713]

BNSF's Third Motion for Partial Summary Judgment: On June 10, 2010, BNSF filed its Third Motion for Partial Summary Judgment that Plaintiffs' Inadequate Warning Device Claims are Preempted by Federal Law. [RP 341-433]

Appellants responded to BNFS' Third Partial Summary Judgment Motion on July 12, 2010 [RP 503-516], and BNSF filed a reply in support of its motion on July 27, 2010. [RP 536-594] On October 8, 2010, BNSF filed a supplement affidavit in support of its motion [RP 698-699, 700-709], and Appellants filed a response to BNSF's supplemental affidavit on November 16, 2010. [RP 718-721] The Court granted BNSF's Third Motion for Partial Summary Judgment on March 2, 2011. [RP 786]

BNSF's Fourth Motion for Partial Summary Judgment: On April 8, 2011, BNSF filed its Fourth Motion for Partial Summary Judgment on Appellants' claims that it did not properly sound the train's horn. [RP 903-938] Appellants responded to the motion on May 9, 2011 [RP 1240-1256], and BNSF filed a reply in support of the motion on May 31, 2011. [RP 1323-1337] A hearing on BNSF's fourth motion was held on June 7, 2011, but the record proper does not reflect a ruling following the hearing. BNSF subsequently filed supplemental affidavits in support of its Fourth Motion for Partial Summary Judgment on July 18, 2011 [RP 1510-1532], and "renewed" its request for entry of partial judgment on Appellants' claims that BNSF did not properly sound the train's horn. [RP 1764-1804]. The Court then entered an Order granting BNSF Fourth Motion for Partial Summary Judgment on November 8, 2011. [RP 2164]

BNSF's Fifth Motion for Partial Summary Judgment: BNSF filed a Motion for Partial Summary Judgment Dismissing Plaintiffs' Visual Obstruction Claim on April 11, 2011. [RP 969-1046] Appellants filed a response to the motion on May 3, 2011 [RP 1174-1235], and BNSF filed a reply in support of its motion on June 1, 2011. [RP 1338-1358] The Court heard BNSF's fifth motion on June 7, 2011, but the record does not reflect a ruling on the motion. On January 11, 2012, BNSF filed an alternative motion "renewing" this motion in conjunction with its Sixth Motion for Partial Summary Judgment to Dismiss the Complaint. [RP 2599-2875]. The Court granted BNSF's renewed motion on March 1, 2012. [RP 5122-5124]

BNSF's Sixth Motion for Partial Summary Judgment: On January 11, 2012, BNSF filed its Sixth Motion for Partial Summary Judgment Dismissing Appellants' Complaint or, in the alternative, its "renewed" Fifth Motion for Partial Summary Judgment to dismiss the visual obstruction claims and a "renewed" First Motion for Partial Summary Judgment on the grounds that Ms. Paez was negligent *per se*. [RP 2599-2875] The County joined in BNSF's motion on January 25, 2012. [RP 3599-3600] Appellants responded to BNSF's Sixth Motion for Partial Summary Judgment on January 26, 2012 [RP 3681-3754], and BNSF filed a reply in support of its motion on February 9, 2012. [RP 4502-4600] BNSF also filed a supplement to its sixth motion on February 16, 2012. [RP 5054-5080] Following a two-day hearing on February 17, and 18, 2012, the Court granted BNSF's

renewed first and fifth motions for partial summary judgment, which were alternative motions to its sixth motion, on March 1, 2012. [RP 5122-5124]

BNSF's Seventh Motion for Partial Summary Judgment. On January 11, 2012, BNSF filed a Seventh Motion for Partial Summary Judgment on the Condition of the Crossing. [RP 2876-2957] On January 26, 2012, the County filed an objection to BNSF's Seventh Motion for Partial Summary Judgment [RP 3899-3914] and Appellants filed a response to BNSF's motion. [RP 4252-4281] BNSF filed a reply to the County's objections and a reply in support of its motion on February 9, 2012. [RP 4610-4649, 4650-4658] In its March 1, 2012 Order, the Court granted BNSF's motion. [RP 5122-5124]

BNSF's Eighth Motion for Partial Summary Judgment. On January 11, 2012, BNSF filed its Eighth Motion for Partial Summary Judgment on Appellants' punitive damages claim. [RP 2958-3002] On January 26, 2012, the County joined in this motion [RP 3601-3602], and Appellants filed a response to the motion on January 26, 2012. [RP 4185-4251] BNSF filed a reply in support of the motion on February 9, 2012. [RP 4659-4681] The Court's March 1, 2012 Order as to BNSF rendered BNSF's Eighth Motion for Partial Summary Judgment moot. [RP 5122-5124]

BNSF's Ninth Motion for Partial Summary Judgment. BNSF's Ninth Motion for Partial Summary Judgment filed on January 11, 2012 sought to dismiss

Defendants Ortega and Duran, employees of BNSF, with prejudice. [RP 3003-3006] Appellants filed their response to the motion on January 26, 2012 [RP 3671-3680], and BNSF filed its reply in support of the motion on February 9, 2012. [RP 46824684] The Court's March 1, 2012 Order as to BNSF also rendered BNSF's Ninth Motion for Partial Summary Judgment moot. [RP 5122-5124]

The Court's March 1, 2012 Order Regarding BNSF: The Court's March 1, 2012 Order granting BNSF's (1) First Motion for Partial Summary Judgment that Ms. Paez was negligent *per se*; (2) Fifth Motion for Partial Summary Judgment on Appellants' visual obstruction claim, and (3) Seventh Motion for Partial Summary Judgment on the condition of the crossing on the grounds that Appellants' claims are preempted by federal law disposed of Appellants' remaining claims against BNSF. [RP 5122-5124]

2. The County's Motions for Partial Summary Judgment

The County filed three motions for summary judgment. Its first motion filed on September 21, 2010 was based on lack of statutory duty and federal preemption. [RP 604-624] On November 22, 2010, the County filed a supplemental affidavit in support of its motion. [RP 722-734] Appellants filed a response to the County's supplemental affidavit on December 6, 2010 [RP 743-746], and filed their response to the motion on March 4, 2011. [RP 802-820] The County filed a reply to Appellants' response on March 9, 2011. [RP 830-846] On April 5, 2011, the

Court entered a Memorandum Decision granting the motion so far as the inadequate warning device claim was preempted by federal law but denying it as to facts regarding duties to maintain the crossing and approach. [RP 901-902]

On April 11, 2011, the County filed its Motion for Summary Judgment No. II For Lack of Actual or Constructive Notice of an Alleged Defect or Dangerous Condition and for Lack of Any Evidence of Proximate Cause. [RP 942-968] Appellants filed a response to the County's motion on April 29, 2011 [RP 1089-1168], and the County filed a reply on May 10, 2011. [RP 1257-1279] On August 19, 2011, the Court denied the County's motion in part. [RP 1743-1744]

On May 20, 2011, the County filed its Motion for Summary Judgment No. III based on lack of statutory duty and federal preemption. [RP 1286-1307] Appellants filed a response to this motion on June 10, 2011. [RP 1399-1408] On December 15, 2011, the Court entered an Order denying the County's Motion for Summary Judgment No. III based upon statutory duties to maintain the roadway and inapplicability of federal preemption. [RP 2321-2323]

On January 13, 2012, the County filed a Motion to Reconsider the Court's ruling denying its Motion for Summary Judgment No. II on the issue of negligence and proximate cause. [RP 3500-3523] Appellants filed a response to the County's motion on January 30, 2012 [RP 4366-4407], and the County filed a reply to Appellants' response on February 10, 2012. [RP 4932-4942] Following a two-

day hearing on the County's motion and BNSF's partial summary judgment motions, the Court granted the County's motion to reconsider on the issues of negligence and proximate cause on March 1, 2012. [RP 5119-5121]

C. Statement of Relevant Facts

The Collision: On November 17, 2008, Ms. Paez was struck by a BNSF northbound train at the elevated road grade crossing on Paizalas Road in the County of Socorro. The train smashed the driver's side of Ms. Paez's vehicle, breaking it into pieces and throwing it north and west. Ms. Paez suffered significant injuries as a result of the collision and died on April 18, 2012. In the Complaint, Appellants claim that the negligence of both BNSF and the County was a contributing cause of the collision and Ms. Paez' resulting injuries. [RP 24-24]

Central to Appellants' action is their claim that BNSF and the County failed to properly construct and maintain the Paizalas crossing, keeping it free and clear of visual obstructions so that vehicles approaching, and on top of, the crossing can see an approaching train. Even though Ms. Paez was not able to testify at deposition on account of her physical impairment following the collision, about whether she saw or heard the approaching train before it struck her vehicle, Appellants submitted testimonial and physical evidence for which a jury could reasonably have concluded that Appellees' failure to provide a safe crossing with adequate warnings of oncoming trains and free from visual obstructions

proximately caused the accident. [RP 3681-3754] Further, at least one witness testified that Ms. Paez was an excellent, safe, and skillful driver. [RP 1174-1235, Ex. 8 thereto]

The Condition of the Crossing: Appellants submitted ample evidence to the District Court supporting their claims. For example, Appellants' expert witnesses rendered opinions that the Paizalas crossing is a rough, uneven, wooden "hump" crossing with inadequate drainage and a surface not flush with the top of the rails. [RP 4252-4281, at 4-5, ¶¶ 1-11] The experts also opined that the ballast section of the crossing is not maintained and is fouled with foreign materials, which makes the tracks pump up and down the crossing when trains go over it. [*Id.*] Alan Blackwell, one of Appellants' expert witnesses, also rendered the opinion that, based on photographs he took as well as those taken by the parties, the crossing is worn down and has an uneven wooden platform with protruding nails and spikes; is deteriorated; and that Appellees failed to maintain the crossing surface, the roadway approaches, and the sight distance in compliance with industry practices and standards. Mr. Blackwell also stated that Appellees' failure to adequately maintain the crossing violated safety standards and rendered the crossing unsafe to the public. [*Id.* at 3, ¶¶ 12-13]

The Crossing Is Visually Obscured: With respect to the visual obstructions near the crossing, Mr. Blackwell stated that "BNSF failed to maintain vegetation

control on its entire right-of-way for a minimum of 500 feet on each side of the roadway," which also resulted in an unsafe public crossing. [RP 4252-4281, Exhibit 121 attached thereto, at 4] He also opined that BNSF failed "to ensure adequate visibility for trains and vehicles" by "maintaining vegetation control to [American Association of State Highway and Transportation Officials ("AASHTO")] sight distance requirements based on vehicular and train speeds at grade crossings, which it eliminated its previous internal engineering instruction that contained AASHTO guidelines and the state of New Mexico AASHTO sight distance requirements." [*Id.*]

Additionally, Appellants' traffic engineering and railroad safety expert, Archie Burnham, took photographs and measurements of the scene that echoed Mr. Blackwell's opinions. Mr. Burnham's photographs clearly depicted visual obstructions, such as weeds and other vegetation, which block the driver's view of northbound trains, such as the one that smashed into Ms. Paez's vehicle. [RP 1174-1235, at 3-10] Mr. Burnham's photographs and measurements also confirm that such visual obstructions impeded Ms. Paez's view as she approached the crossing and looked for northbound trains. [*Id.* at 3-4; RP 4366-4407, Exhibit 4 thereto] He testified that the greenery surrounding the crossing is very significant to partially obscure approaching trains, and that there was insufficient distance for a westbound motorist to observe a plainly visible train as the vehicle approached

the tracks at 10 mph or more. [*Id.*] Specially, when Ms. Paez turned to approach the crossing at the irrigation canal, she would first glance down the tracks to look for an oncoming train. If she was traveling between 10 and 15 mph, however, the train would be up to 540 feet away, well beyond the line of sight of 480 feet for a plainly visible train. [*Id.*]

Mr. Burnham stated that the physical impediments to sight distance were mostly correctable by cutting the tall weeks on top of the elevated ground nearest the tracks, and that the level of the roadway in relation to the height of the crossing created an unsafe condition due to the lack of proper maintenance by Appellees. [RP 1174-1235, at 3-4, ¶1; RP 4366-4407, Exhibit 4 thereto] Thus, he said, the elevated hump crossing fails to meet standards of the American Railway Engineering and Maintenance-of-Way Association ("AREMA"). [*Id.*]

The record is also replete with additional testimony regarding the dangerousness of the crossing because of visual obstructions. For example, Mr. Paez testified that from the crossbucks, a motorist cannot see too far south down the tracks, and from 50 feet behind the crossbucks, one cannot see a train at all. [RP 1174-1235, at 4, ¶¶ A, B & C, and Exhibits 2 & 3 thereto] Following the collision, when Mr. Paez ran to see whether Ms. Paez had been struck by the train, he saw rocks, debris, trees, and weeds that would have prevented his wife from seeing the northbound train. [*Id.*] Photographs Mr. Paez took the day of the

collision reflect overgrown, unkempt vegetation and lack of visibility by motorists approaching the crossing. [*Id.*] The Paez's sons' deposition testimony reflected that the trees and shrubs always obstructed visibility, and that a motorist has "to practically get on top of the tracks to see both ways [because with] all the trees and all that, you can't see too good going - coming from the south." [*Id.* at 5-6, ¶¶ E, F & G and Exhibits 5, 6 & 7 thereto]

No Evidence Was Submitted Establishing That Federal Funds Were Used to Maintain the Crossing and Keep It Free From Visual Obstructions: As discussed further below, a disputed issue in this case is whether Appellants' claims that the unsafe condition of the crossing was a proximate cause of the collision are preempted by federal law. To the extent Appellants' negligence claims question the "warning devices" at the Paizalas crossing, the New Mexico Court of Appeals has held that preemption is triggered *only when* federal monies are used to construct such devices at railroad crossings. *See Largo v. Atchison, Topeka & Santa Fe Ry. Co.,* 2002-NMCA-21, ¶ 12, 131 N.M. 621, 625, 41 P.3d 347, 351. Here, however, even though federal law regulates warning devices at railroad crossings, such as lights and crossbucks, which are not at issue here, Appellees failed to produce *any evidence* that federal funds were used to repair the surface of the crossing or to keep it free from visual obstructions.

In fact, Appellants submitted evidence that both BNSF and the County took steps to attempt to maintain the crossing. BNSF submitted an affidavit by its Vegetation Manager stating that vegetation around the Paizalas crossing was sprayed with chemicals in August 2011 but not cut. [RP 3681-3754, at 7, ¶ 8] In addition, County employees attempted to elevate the Paizalas crossing by pushing fill dirt on the crossing (even though the attempt was made without reference to any guidelines and fell short of the standards of a safe crossing), and County *and* BNSF personnel worked together to attempt to elevate and maintain roadways at other railroad crossings. [RP 4366-4407, at 4, ¶¶ 5-6] Thus, evidence was submitted that establish a joint relationship between BNSF and the County to maintain the road leading to the crossing and the crossing itself.

The Court's Site Visit and Statements Regarding His Opinions: Prior to the February 2012 hearing on Appellees' motions for summary judgment and other matters, the presiding District Court Judge, the Honorable Kevin R. Sweazea, made a visit to the Paizalas crossing, without the parties' objection. At the hearing, Judge Sweazea mentioned that he had visited the site the morning of the hearing and made at least two observations:

> And here [are] my observations. Perhaps that is a good place where it's important. Two observations: *One, I was surprised that the pictures don't show the extent of the hump. I was surprised that it was as humped as it was because I couldn't tell that from the pictures.* But the hump was not built right -- very close to the tracts so the -- do you understand what I mean? *So you're not on an incline back where*

that rise in the ground would obscure anything but maybe a view back to her house.

[SOCD CR 1, 2-16-2012, 12:24 (emphasis added)] Although Judge Sweazea noticed that the photographs do not accurately reflect the crossing, he nevertheless found the following:

> The photographs are just almost impossible to argue with. The closer you get to the crossing, the more visible a train would be. . . . when she was at 100 feet, which is basically over the top of the ditch--over the water [unintelligible] the train would've been about 500 feet down the track. Looking at the photographs that are in evidence, the train would have been visible--the front of it would've been visible then. When you move up to 79 feet where the photographs were taken, the train would have been 392 feet about down the tracks if Ms. Paez was travelling at 10 miles per hour as alleged by Plaintiffs. The train would've been absolutely visible then. So, and that's looking at the photographs of the vegetation that was in existence and comparing it down to the photographs that were recently taken that have a train in then. . . . At 50 feet the train would have been 250 feet, about, down south of the crossing. The train would have been visible. When you contrast that against Mr. Paez's testimony that the vegetation somehow kept one from seeing it, it's just not--the photographs are impossible to refute.

[SOCD CR 1, 2-17-2012, 11:37, 11:42] Judge Sweazea also said that "all of the photographs that have been referenced during our hearing today convince me that no reasonable jury would find that Ms. Paez had not violated the statute . . . at least any time when she was 50 feet or closer from the east rail the train would have been clearly visible to her had she looked." [SOCD CR 1, 2-16-2012, 15:19]

III. ARGUMENT

A. This Court Should Review *De Novo* the District Court's Order Granting Summary Judgment in Favor of Appellees

Summary judgment is appropriate when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Rule 1-056(C) NMRA (2001)*; *Self v. United Parcel Serv., Inc.*, 1998-NMSC-46, ¶ 6, 126 N.M. 396, 399, 970 P.2d 582, 585. This Court is to review the Orders granting summary judgment *de novo*. *DiMatteo v. County of Dona Ana,* 109 N.M. 374, 378, 785 P.2d 285, 289 (Ct. App. 1998).

As the Court held in *Martinez v. Metzgar,* 97 N.M. 173, 639 P.2d 1228, 1229 (1981) (*citing Pharmaseal Laboratories, Inc. v. Goffe,* 90 N.M. 753, 568 P.2d 589 (1977)), summary judgment is a "harsh remedy" and is infrequently granted. The party opposing summary judgment is to be given the benefit all reasonable doubts. *See Goodman v. Brock,* 83 N.M. 789, 792, 498 P.2d 676, 679 (1972). When reasonable minds can differ, summary judgment is inappropriate. *See Kelly v. Montoya,* 81 N.M. 591, 593, 470 P.2d 563, 565 (Ct. App. 1970). The conflict in the testimony of a single witness is to be resolved by the trier of fact. *Id.* Moreover, a party moving for summary judgment has the burden of establishing that there are no genuine issues of material fact to be determined by the fact finder. The party opposing summary judgment is not required to prove a

prima facie case. *Id.* at 596, 470 P.2d at 568 (*citing Barber's Super Markets, Inc. v. Stryker,* 81 N.M. 227, 465 P.2d 284 (1970)).

In this case, Appellees failed to demonstrate the absence of genuine issues of material facts as they relate to Appellants' claims against them. Therefore, because genuine issues of material fact exist, the District Court erred in granting summary judgment in their favor. Accordingly, the Judgment below should be reversed as a matter of law.

B. The District Court Erred in Concluding That Appellants' Claims Regarding Inadequate Warning Devices at the Paizalas Road Crossing Are Preempted by Federal Law

1. Appellants' Claims Are Not Preempted Because There Is No Evidence That Federal Funds Were Used at the Crossing

The District Court erred in granting BNSF's Third and Seventh Motions for Partial Summary Judgment and the County's Motion for Summary Judgment No. I on the basis that Appellants' claims against are preempted by the Federal Railroad Safety Act ("FRSA"), *49 U.S.C. § 20101 (1994).* The Court's error is two-fold. First, when granting BNSF's third motion for partial summary judgment [RP 789], the Court incorrectly found an absence of material fact as to whether federal funds were used to install the warning devices, which is a prerequisite to determining preemption. Second, the Court similarly erred when granting BNSF's Seventh Motion For Partial Summary Judgment Based on the Condition of the Paizalas

Road Crossing [RP 5122-514], because, again, there was no evidence that federal funds were used to construct, maintain, or improve the crossing.

Despite a strong presumption against preemption, and a "reluctance to preempt state laws relating to health and safety matters because those matters have been the exclusive concern of the states," *see Montoya v. Mentor Corp.,* 1996-NMCA-67, ¶ 7, 122 N.M. 2, 4, 919 P.2d 410, 412, the District Court granted BNSF's motions that Appellants' common law negligence claims arising out of the inadequate warning devices and unsafe condition of the crossing are preempted by the FRSA. Under the FRSA, the Secretary of Transportation is directed to "maintain a coordinated effort to develop and carry out solutions to the railroad grade crossing problem." *49 U.S.C. § 20134(a).* The FRSA also contains a preemption provision stating that "laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable." *49 U.S.C. § 20106* (the effect of preemption is limited in actions under state law seeking damages for personal injury, death, or property damages if the defendant failed to comply with certain federal or state standards, laws or regulations).

Largo v. Atchison, Topeka & Santa Fe Ry. Co., 2002-NMCA-21, 131 N.M. 621, 41 P.3d 347, is essentially on point and represents the most valuable authority available to the trial court on New Mexico law. It arises out of virtually similar arguments proposed by the railroad in this case.

Largo concerned a collision between a train and a motorist at a railroad crossing near Coolidge, New Mexico, in which the driver was killed and his passenger was injured. The district court granted the defendant railroad's summary judgment motion that the plaintiffs' negligence claims regarding the inadequacy of the warning devices and the train's excessive speed were preempted by the FRSA. 2002-NMCA-21, ¶ 2, 131 N.M. at 623, 41 P.3d at 349. The Court of Appeals *reversed* the court's order that the claims arising out of the inadequacy of the warning devices were preempted by federal law but affirmed the order regarding the train's speed. *Id.* The *Largo* court found that claims arising out of the inadequacy of warning devices are preempted "only when federal funds *are actually spent* on warning devices." *Id.*, ¶ 9, 131 N.M. at 624, 41 P.3d at 350 (emphasis added). *See also Armijo v. Atchison, Topeka & Santa Fe Ry. Co.*, 19 F.3d 547, 550 (10th Cir. 1994) (holding that the determination of preemption is "whether federal funds have participated in the installation of warning devices");

In reaching its holding, the New Mexico Court of Appeals in *Largo* held that the "party seeking to establish preemption must establish that federal regulations cover 'the *same subject matter* as [state] negligence law pertaining to the maintenance of, and the operation of trains at, grade crossings.'" *Id.*, ¶ 8, 131 N.M. at 624, 41 P.3d at 350 (*citing CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 664, 113 S. Ct. 1732, 1738 (1993)). It is not enough that the federal regulations "touch

upon" or "relate to" that subject matter. *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 352, 120 S. Ct. 1467, 1473 (2000). As the Supreme Court held in *Easterwood,* federal regulations "cover" the same subject matter "only if the federal regulations substantially subsume the subject matter of the relevant state law." 507 U.S. at 664, 120 S. Ct. at 1738

In this case, federal preemption is not triggered for two reasons: first, Appellants do not claim that the warning devices at the crossing (*i.e.,* the lights and crossbucks) were inadequate; and second, even if it could be reasonably argued that Appellants' claims regarding the dangerousness of the condition of the crossing constitutes a claim regarding "warnings," Appellees *failed to submit any evidence* that federal monies were spent on said warning devices. In fact, Appellants submitted evidence that *the County* presumably paid funds to its employees to add dirt fill to the roadway leading up to the crossing in order to elevate the hump more gradually, and that both the County and BNSF worked together to elevate and maintain the roadways at other New Mexico crossings. [RP RP 4366-4407, at 4, ¶¶ 5-6] Such failure to Appellees to show the expenditure of federal funds to construct, maintain, or improve the Paizalas crossing is fatal to its preemption argument under *Largo*.

Apparently the District Court was persuaded by Appellees' reliance on a 30-year old Indiana appellate court case, *Black v. Baltimore & Ohio Rd. Co.,* 398

N.E.2d 1361 (Ind. Ct. App. 1980), which presented facts largely different than those present here. In *Black*, the Indiana Public Service Commission ("IPSC") on behalf of the Indiana State Transportation Board--not a private citizen like Appellants herein--sought an order to make the defendant railroad correct alleged hazardous conditions at a railway yard. 398 N.E.2d at 1362. The court found that the FRSA preempts the IPSC from taking such action because Congress determined to regular the "entire railroad area." *Id.* In the case below, however, Ms. Paez does not seek an order requiring BNSF to improve the Paizalas Road crossing; this is an action for damages arising from Appellees' gross negligence. In fact, the New Mexico Legislature has enacted regulations subjecting every railroad company operating in New Mexico to maintain highway crossings *at its own expense*.

For example, section 63-3-36(A), NMRA 1978, regarding railroad construction and maintenance of highway crossings provides as follows:

> Subject to the provisions of Subsection B hereof, every railroad company in this state shall construct and maintain in good condition, *at its own expense*, good and sufficient crossings at all places in this state where its railroad crosses public highways, city, town or village streets at grade, now or hereafter to be opened for public use. Such crossings shall be constructed of planks, macadam, concrete or other suitable material in such manner as to be level with the top of the rails for a reasonable distance on each side of each rail.

Subsection B of the statute also provides:

> Any highway-railroad crossing at grade that may hereafter be constructed or reconstructed by the state highway department will be a full plank crossing of a material approved by the state highway department and railroad, to be installed by the railroad company. If a joint investigation of railroad and highway engineers shows that a highway-railroad crossing at grade should be reconstructed, then the highway department shall pay the railroad for the initial full plank crossing. Said constructed or reconstructed crossing will be maintained in good condition *at the railroad company's own expense.*

Therefore, as set forth in the New Mexico statutes cited above, either the railroads or the state highway department is reasonable to maintain the crossings and make improvements to them--*at their own expense and not at the expense of the federal government*--whenever it becomes apparent that the crossings are unsafe. In this case, Appellants claim that the Paizalas crossing was unsafe and that the railroad failed to properly maintain it and construct the grade so as obscure the approach of oncoming trains.

Appellees' reliance on a federal Ohio case, *Petre v. Norfolk Southern Ry. Co.*, 458 F. Supp. 2d 518 (E.D. Ohio 2007), is similarly misplaced. In *Petre*, which arises out of a similar fact-pattern as in this case (*i.e.,* motorists killed when struck by an oncoming train at a rural crossing), the Ohio court recognized that "*when federal funds are spent to equip the crossing with particular warning devices*, the federal standards determine the 'adequacy' of the warning devices employed; these federal standards preempt State common law claims that seek to impose additional duties upon a Railway." *Id.* at 528-29 (emphasis added). The

court went on to say that it "*has already determined that federal funds were used to place standard crossbuck signs at the County Road I - Norfolk Southern Railway crossing . . . .*" *Id.* at 529. Thus, whereas the court's determination of preemption in *Petre* was based on the fact that federal funds were used to erect crossbucks at the crossing at issue, here in this case neither BNSF nor the County submitted *any evidence to the District Court* that any federal monies were used to construct warning devices or make any improvements to the crossing itself, including the uneven surface complete with protruding nails and tracks that pump up and down as a vehicle crosses the tracks. Therefore, because federal funds were not used at the Paizalas crossing, Appellees' preemption claim fails as a matter of law.

2. The Evidence Also Shows That the Paizalas Crossing Is a Local Hazard

As an alternative argument, even if federal funds were used at the crossing, Appellants' claims would not nevertheless be preempted because the Paizalas crossing is a local hazard. In New Mexico, railroad companies have a common law duty to keep and maintain crossings for roads already established at the time of the building of the railroad line in a safe and suitable state of repair, including not only the crossing of the tracks but also the approaches thereto. *See* 1937-38 Op. Att'y Gen. 157. The duty of maintaining and keeping in repair highway crossings is a continuing duty, requiring the railroads to put such highway crossings in such condition as changes in circumstances require; therefore, when a highway is

improved by widening it to accommodate increasing traffic, the railroad then has the duty to improve its crossing so that it will be reasonably comparable to the roadway approaching the crossing. *Id.*

Thus, even if preemption applied to this crossing, which it does not, there is an applicable exception to preemption because the Paizalas crossing has several identified violations of federal and state regulations that combine to make it a dangerously neglected crossing that is unsafe for motorists to cross. Based on both expert and lay witness testimony, the Paizalas crossing is a local safety hazard, especially because of visibility obstructions that combine with the dilapidated condition of crossing. Negligence claims arising out of local safety hazards, such as the Paizalas crossing, are not preempted. *See In re Speed Limit for Union Pac. R.R. Through City of Shakopee,* 610 N.W.2d 677, 684 (Minn. Ct. App. 2000); *Stone v. CSX Transp., Inc.,* 37 F. Supp. 2d 789, 794-97 (S.D. W. Va. 1999); *Missouri Pac. R.R. Co. v. Lemon,* 861 S.W. 2d 501, 509-10 (Tex. App. 1993); *Largo,* 2002-NMCA-021, ¶ 25.

C. Disputed Issues Of Fact Exists As to Whether the Visual Obstructions and the Dangerous Condition of the Crossing Was a Proximate Cause of the Collision; Thus, the Court's Order Granting Summary Judgment on Appellants' Claims Should Be Reversed

In *Largo,* 2002-NMCA-021, ¶ 15, 131 N.M. at 626, 41 P.3d at 352, the Court of Appeals addressed the duty of a railroad to ensure safe crossings as follows: "Had the legislature intended to abrogate the railroad's common law duty

to provide safe crossings, we would expect to see the legislature's intent clearly expressed." The Court held that the legislature had not abrogated the defendant railroad's common law duty to place warnings at dangerous railroad crossings, despite a state statute giving authority to government entities to install warning devices. *Id.*

Courts in other jurisdictions have similarly found that a railroad may be found negligent for obscuring a crossing and that both issues of negligence and contributory negligence are questions of fact for the jury. *See, e.g., Longhini v. Gulf, Mobile & Ohio Ry. Co.,* 348 F.2d 228 (7th Cir. 1965); *Johnson v. Baltimore & O. Ry. Co.*, 528 F.2d 1313 (7th Cir. 1976). In *Martin v. Norfolk Southern Ry. Co.*, 271 S.W.3d 76 (Tenn. 2008), the court held than an injured party may recover for a claim based solely on a railroad's breach of its duty to ensure that vegetation on its right-of-way does not unreasonably obstruct motorists' view of approaching trains. *Martin* involved a wrongful death case in which the deceased plaintiff was killed when her vehicle was hit by a train at a railroad crossing. The defendants argued on appeal that "they [were] entitled to summary judgment because Tennessee courts do not allow recovery for a claim asserting than an obstruction on a railroad's right-of-way prevented a motorist from seeing a train." *Id.* at 82. The Court of Appeals reversed, finding it was error for the trial court to grant summary judgment in favor of the railroad on that claim.

In the case below, the District Court erred in finding that there was no disputed issue of fact showing that Appellees' actions were a proximate cause of Appellants' damages. In New Mexico, proximate cause is a question of fact to be determined by the fact finder unless facts regarding causation are undisputed and all reasonable inferences from those facts are plain, consistent, and uncontradictory. *Pollock v. State Highway and Transp. Dep't,* 1999-NMCA-083, 127 N.M. 521, 984 P.2d 768; *Lerma v. State Highway Dep't of New Mexico,* 117 N.M. 782, 784-85, 877 P.2d 1085, 1087-88 (1994) (citation omitted).

In response to BNSF's motion, opinions by Appellants' railway expert witness, Alan Blackwell, firmly established triable issues of fact. Mr. Blackwell detailed BNSF's failure to maintain its own and industry safety standards at the crossing, and stated that the Paizalas crossing is not being maintained by either BNSF or the County so that the motoring public can proceed over the crossing in a safe manner. Mr. Burnham, Appellants' railroad, traffic engineering and safety specialist expert, also submitted evidence in opposition to Appellees' motions that establishes BNSF breached its duty to keep its right of way clear of visual obstructions. For example, Mr. Burnham, rendered the opinion that there was insufficient distance for a westbound motorist to observe a plainly visible train as the vehicle approached the tracks at 10 mph or more. The physical impediments to sight distance were mostly correctable by cutting the tall weeds on top of the

elevated ground nearest the tracks, not just by spraying chemicals on the vegetation twice a year. [RP 1174-1235, at 3-4, ¶ 1; RP 4366-4407, Exhibit 4 thereto]. Further, testimony by individuals who regularly use the Paizalas crossing also establish that the crossing is widely regarded as dangerous because of the vegetation located on the right of way between the railroad tracks and the ditch that obscures the tracks. [RP 1174-125, at 4-6, ¶¶ A, B & C, and E, F and G, and Exhibits 2, 3, 5, 6 & & thereto] Photographic evidence relied on by Mr. Burnham and attached to Appellants' response to BNSF's motion confirm such visual obstructions for which a jury could find were detrimental to Ms. Paez's safety as she attempted to cross the tracks on the day of the collision. [RP 1174-1235, at 3-10; RP 4366-4407, Exhibit 4 thereto]

The photographs taken the day of the collision is the best evidence of the condition of the crossing. They confirm that the elevation of the roadway is much lower than the elevation of the tracks, so that vehicles approaching the crossing are not able to see over the vegetation and observe trains coming down the tracks. In his report, Mr. Burnham stated that the level of the roadway in relation to the height of the crossing created a hazardous condition due to the lack of proper maintenance on behalf of both BNSF and the County. He determined that the elevated hump crossing fails to meet the standards of the American Railway Engineering and Maintenance-of-Way Association ("AREMA"). [RP 1174-1235,

at 3-4, ¶1; RP 4366-4407, Exhibit 4 thereto] The photographs also show tall weeds, trees, shrubs, and other vegetation in the sight-line of oncoming trains from the top of the crossing hump.

Deposition testimony also establishes that both County and BNSF employees worked together on another railroad crossing to fill and raise the road to properly maintain the height of the roadway at the crossing, but they failed to do so on the Paizalas crossing. [RP 1174-1235, at 3-4, ¶ 1; 4252-4281, at 3, ¶¶ 12-13; 4366-4407, at 4, ¶¶ 4-5 and Exhibit 4 thereto]. Other witness testimony establishes that, because of the overgrown vegetation at the Paizalas crossing, motorists are not able to see approaching trains until they are practically on top of the hump. [RP 1174-1235, at 4-6, ¶¶ A, B & C, and E, F & G, and Exhibits 2, 3, 5, 6 & 7 thereto]. Lastly, even though Appellants submitted evidence that Ms. Paez was an excellent, safe driver, Appellees did not submit a single piece of evidence disputing that fact.

Therefore, the evidence in the record shows that BNSF breached its common law and statutory duties to clear vegetation on its right-of-way at the Paizalas crossing. Such failure to clear vegetation--as well as Appellees' failure to properly elevate the hump so that motorists can see approaching trains on the tracks prior to practically being on top of the tracks--caused visual obstructions to motorists

approaching the crossing, such as Ms. Paez, and was a proximate cause of the collision.

The bases for the Court's rulings on BNSF's motions addressing Appellants' visual obstruction and dangerous condition claims are unclear. It appears as if the Court may have found that, based on its own observation of the scene a few days prior to the February 2012 hearing, Ms. Paez is the only and sole cause of the collision, although the Court made no determination as how her alleged negligence compares to that of Appellees and completely ignores the evidence of experts and law witnesses. It also appears as if the Court, relying on the Ohio court's interpretation of Ohio common law in *Petre*, found that the crossing was not "ultrahazardous," even though such a finding is not required under New Mexico law, nor did Appellees cite to any authority for this proposition. Lastly, the Court appears to have rejected Appellants' argument that the dangerous, visually-obstructed Paizalas Road crossing is a "local hazard" for which Appellees would be held accountable under negligence theories if they fail to repair or remediate such hazard. Regardless of the theory the Court relied on, its ruling that there are no disputed issues of fact as to the cause of collision is erroneous and should be reversed as a matter of law.

D. The District Court's Ruling That Ms. Paez Was Negligent Is Contrary to the Evidence in the Record and Is Based on an Improper Determination of Fault

The audio recording of the February 16 and 17, 2012 hearing on Appellees' summary judgment motions reflects that the District Court judge inappropriately acted as the fact-finder when he found that Ms. Paez should have seen the train approaching based on his personal observation of the crossing more than three years after the collision. A factual determination is clearly within the province of the jury, not the district court judge. Not only did the Court substitute its own non-expert opinion for that of Appellants' expert, the Court rendered a conclusion of fact that is expressly reserved for the jury.

The Court also relied on the photographs of the crossing submitted by Appellees, which he admits did not accurately reflect the site. As stated above, Judge Sweazea visited the crossing the morning of the hearing on Appellees' motion. He stated, on the record that he "was surprised that the pictures don't show the extent of the hump" and he was also surprised that the crossing "was a humped as it was because I couldn't tell that from the pictures." [SOCD CR 1, 2-16-2012, 12:24] Nevertheless, the Court found that the train would have been visible to Ms. Paez had she looked because the "photographs are just almost impossible to argue with." [SOCD CR 1, 2-16-2012, 15:19; SOCD CR 1, 2-17-2012, 11:37, 11:42]

Accordingly, the Court ignored (1) witness testimony regarding the presence of vegetation at the crossing; (2) expert witness testimony that the overgrown vegetation obscured the sight line of approaching trains at the crossing; and (3) expert witness testimony that, because of the visual obstructions and sharp incline of the humped crossing, approaching trains were not visible to motorists, such as Ms. Paez, nearing the crossing at approximately 10 mph. Specifically, Mr. Burnham opined that if Ms. Paez was traveling toward the crossing at 10 to 15 mph, the train would have been up to 540 feet away when she neared the crossing, which was well beyond the line of sign of 480 feet for a plainly visible train. [RP 4366-4407, Exhibit 4 thereto] Thus, Appellees' photographs are *not,* as the Court found, "impossible to argue with." Mr. Burnham's expert opinion is that they do not tell the whole story, for they fail to depict the fact that the train was not visible to Ms. Paez as she approached the crossing.

At most, the Court could have found that Ms. Paez was a contributing cause of the collision, not the *sole* cause. It failed to take into account the doctrine of comparative negligence, in which the culpability of the parties is weighed against each other. In *Scott v. Rizzo,* 96 N.M. 682, 683, 634 P.2d 1234, 1245 (1981), New Mexico eliminated the harsh common law rule barring recovery by plaintiffs for their contributory negligence and substituted comparative negligence in its place. Under the old, contributory negligence rule, if Ms. Paez was found to be even one

percent at fault for the collision, she is precluded from pursuing her claims against the defendants. Here, however, there was ample evidence that Ms. Paez was not at all negligent when she attempted to cross the railroad tracks in November 2008. For example, there was evidence that Ms. Paez was a safe driver, which was not at all contradicted by Appellees. In addition, Appellants submitted evidence showing that her view of northbound traffic was obscured from within the distance allowed a driver based on AASHTO requirements. [*See, e.g.,* RP 4366-4407, Exhibit 4 thereto *Burnham report 14 & 15.*

Therefore, whether a party was a proximate cause of an injury is an issue for the jury. *New Mexico State Highway Ass'n v. Van Dyke,* 90 N.M. 357, 360, 563 P.2d 1150, 1153 (1977); *Trujillo v. Treat,* 107 N.M. 58, 752 P.2d 250 (Ct. App. 1988). In 1981, the New Mexico Supreme Court discarded contributory negligence and adopted comparative fault so that a plaintiff's own negligence no longer precludes her recovery entirely against the tortfeasor. As the Supreme Court held in *Torres v. El Paso Elec. Co.,* 1999-NMSC-29, ¶ 13, 127 N.M. 729, 735, 987 P.2d 386, 735, under comparative fault, "'the jury apportions fault regardless of degrees of fault, between the plaintiff and the defendant.'" *See also Scott v. Rizzo,* 96 N.M. 682, 634 P.2d 1234, 1241-42 (1981) (holding that "a pure comparative negligence standard shall supersede prior law in New Mexico, and that a plaintiff suing in negligence shall no longer be totally barred from recovery

because of his contributory negligence."), *overruled on other grounds by Herrera v. Quality Pontiac,* 2003-NMCA-18, 134 N.M. 43, 73 P.3d 181.

The jury is to decide, not the Court, whether Appellees breached their duty to protect motorists from foreseeable dangers caused by their failure to maintain vegetation, keep the crossing free from visual obstructions, and construct a roadway leading to the crossing that does not prevent motorists from seeing oncoming trains. A reasonable jury could find that the collision between Ms. Paez and the train may not have occurred but for Appellees' negligence. Certainly the physical impediments to sight distance were mostly correctable by cutting the tall weeds on top of the elevated ground, and that the level of the roadway in relation to the height of the crossing created a hazardous condition due to the lack of proper maintenance. The Court should have given consideration to Mr. Burnham's opinion that the elevated hump crossing fails to meet the standards of AREMA. Therefore, the Court's finding that Ms. Paez was negligent *per se* for failing to stop at the crossing constitutes reversible error.

IV. CONCLUSION

WHEREFORE, for the reasons set forth above, Appellants respectfully submit that this Court reverse the Orders granting summary judgment in favor of Appellees and the Judgment below, and remand this case to the District Court for trial.

Respectfully submitted,

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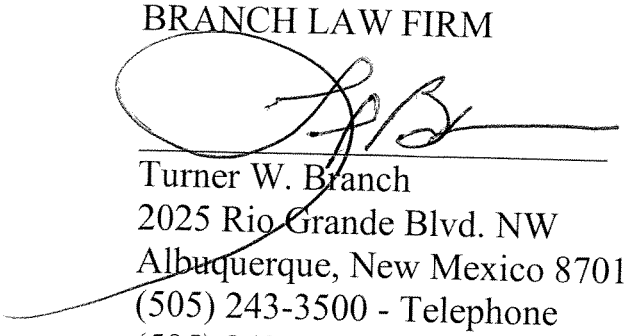

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STATEMENT REGARDING REQUEST FOR ORAL ARGUMENT

Pursuant to *Rule 12-214, NMRA*, Appellants respectfully request that the Court permits oral argument on their Appeal. As shown above in Appellants' Brief in Chief, the underlying case presents substantial issues of fact and a complicated record in the District Court. Accordingly, Appellants believe that oral argument will materially assist the Court in understanding the record and proceedings below, comprehending and evaluating the positions and arguments of the parties, and resolving the issues presented by this appeal.

Respectfully submitted,

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Certificate of Service

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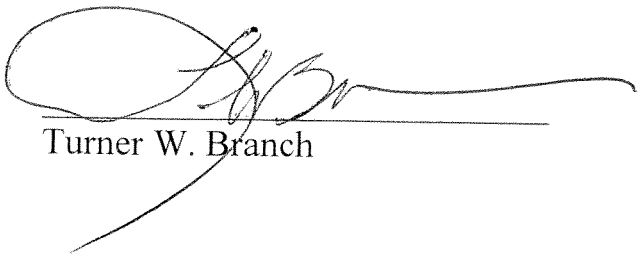

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