IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

ROSEMARY PAEZ and REY PAEZ,

Plaintiffs/Appellants,

v.

Ct. App. No. 32,105

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' REPLY TO ANSWER BRIEF OF DEFENDANT/APPELLEE BURLINGTON NORTHERN SANTA FE RAILWAY

Civil Appeal from the Seventh Judicial District, County of Socorro
The Honorable Kevin R. Sweazea, District Court Judge
No. D-0725-CV-2009-00083

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STATEMENT OF COMPLIANCE

Pursuant to Rule 12-213(F), *NMRA,* the body of Appellants' Reply to the Answer Brief of Defendant/Appellee Burlington Northern Santa Fe Railway, inclusive of headings, footnotes, quotations, and all other text, consists of 4,376 words, typed in proportionally-spaced, size 14, Times New Roman typeface.

I. INTRODUCTION

Appellee Burlington Northern Santa Fe Railway's Answer Brief overwhelmingly ignores the myriad of disputed issues of material fact that Appellants submitted in opposition to its summary judgment motions and relies on photographs that the District Court Judge first complained were inaccurate depictions of the scene but nevertheless later based his ruling on. Neither the photographs nor Ms. Paez's alleged negligence when crossing the train tracks are sufficient to prevent a jury from concluding that BNSF's failure to provide a safe and non-hazardous crossing was a foreseeable and proximate cause of the collision resulting in Appellants' injuries. BNSF's assertion that Appellants "presented no evidence of causation" is simply contradicted by the record, and its argument that Appellants' claims regarding the condition of the crossing are preempted by federal law is erroneous in that such argument has already been considered, and dismissed, by this Court in *Largo v. Atchison, Topeka & Santa Fe Ry. Co.*, 2002-NMCA-21, 131 N.M. 621, 41 P.3d 347.

Additionally, throughout its Answer Brief, BNSF discusses *at length* an apparent discovery dispute concerning certain photographs taken by Appellants. Appellants maintain that such discussion is wholly irrelevant and not subject to this appeal because no discovery motion was pending prior to the summary judgment hearing in the court below and unsuccessfully moved to strike the brief on the

grounds that BNSF's frequent and unnecessary accusations that Appellants' "withheld" certain photographs and somehow violated the discovery rules are designed to confuse the true issues on appeal and prejudice this Court against Appellants. The same tactic used here was similarly employed at the summary judgment hearing: BNSF managed to turn the Court's attention away from the merits of the case and argued incessantly about discovery issues. This Court should disregard BNSF's arguments regarding discovery or, alternatively, view the discussion on the record below as BNSF's successful attempt to prejudice the Court against Appellants.

Accordingly, the District Court erred in finding in favor of BNSF on Appellants' claims as a matter of law. Consequently, the Judgment below should be reversed.

II. ARGUMENT

A. The Photographic Evidence Does Not Conclusively Disprove Appellants' Claim That BNSF Maintained a Hazardous Crossing As a Matter of Law

BNSF's argument that the District Court correctly dismissed Appellants' evidence concerning the visual obstructions and hazardous condition of the crossing because they were purportedly contradicted by the photographs is inherently false. The Court found that Ms. Paez should have seen the train approaching when she was 50 feet out *based on the photographs:* "I mean, you

can look at a picture from 50 feet out and see a train that's sitting aways back from the crossing, and you dang sure can see it pretty clearly." [Tr. Vol. I, 125:11-13] The Court relies on the same photographs that it earlier disclaimed as "surprisingly" failing to accurately depict the extent of the hump based on its site visit. [Tr. Vol. I, 113:2-4] The Court's finding is erroneous and similar to that overturned by the Court in *Lingsch v. Norfolk & Western Railway,* 1995 Ohio App. LEXIS 3321.

Lingsch arises from facts similar to those present here. In that case, the plaintiff was killed when his vehicle was struck by an oncoming train when he was attempting to drive across a grade crossing. The Ohio Court of Appeals reversed the lower court's granting of summary judgment in favor of the railroad on the issue of causation. As in this case, the evidence presented to the trial court in *Lingsch* included expert opinions that the crossing grade and surrounding vegetation obstructed the motorist's view of approaching trains and created visibility problems at the crossing as well as photographs of the crossing that showed obscured visibility. The appellate court criticized the lower court for "downplaying" the plaintiff's evidence and finding instead that the "locomotive and trailing cars are a massive piece of equipment which simply cannot hide behind the bridge (which has open sides) and the tree line (*sans* foliage)." *Id.* at *9. The Court of Appeals also held that lower court erred in firmly relying on

photographic evidence. "In reviewing the photographs of the crossing, it is not difficult to discern whether or not a train is present. However, the photographs *do not take into account the relative speeds of the train and the car.* Nor do they reflect the weather conditions at the time of the collision." *Id.* at n.2. Thus, "[d]espite the trial court's skepticism," the *Lingsch* Court held that the lower court should have construed the evidence in the light most favorable to the appellant and that a genuine issues of material fact exists that the trestle and the tree line obstructed the plaintiff's view. *Id.*

Here, the photographs submitted in conjunction with the summary judgment motions confirm the existence of a genuine issue of fact regarding visibility obstructions. They show that the elevation of the roadway is much lower than the elevation of the tracks so that drivers approaching the crossing are not able to see over the vegetation and observe trains coming down the tracks. In his report, Appellants' expert witness, Archie Burnham, stated that the level of the roadway in relation to the height of the crossing creates a hazardous condition due to Appellees' lack of proper maintenance. Mr. Burnham 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 clearly show tall weeds,

trees, shrubs, and other vegetation in the sight-line of oncoming trains from the top of the crossing hump. [*Id.*]

Similar to the lower court in *Lingsch,* the Court below assumed that Ms. Paez was negligent *per se* and focused almost exclusively on her role in the collision and ignored BNSF's negligence even though reasonable minds could differ on the weight and sufficiency of the evidence submitted in support of, and in opposition to, BNSF's motion. The jury should be afforded the opportunity to determine whether the visual obstructions present at the scene were a proximate cause of the collision.

B. The Evidence Submitted In Opposition to BNSF's Summary Judgment Motion Demonstrates That the Paizalas Road Crossing Was Hazardous and, Coupled With Visual Obstructions, a Foreseeable and Proximate Cause of the Collision

BNSF's argument in its brief that Appellants submitted no evidence of causation to the District Court is simply false. Ample evidence was submitted demonstrating that BNSF permitted a hazardous crossing to exist at Paizalas Road for which it was foreseeable that a collision between a motorist and an approaching train would occur.

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] They 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, stated that the crossing is worn down and has an uneven wooden platform with protruding nails and spikes; is deteriorated; and that BNSF failed to maintain the crossing surface and improve the sight distance in compliance with industry practices and standards. He also stated that BNSF's failure to adequately maintain the crossing violated safety standards and rendered the crossing unsafe to the public. [*Id.* at 3, ¶¶ 12-13] Mr. Blackwell and Mr. Burnham also provided the following opinions:

1. 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];

2. 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.*]

3. Photographs of the scene clearly depict 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. [RP 1174-1235, at 3-10];

4. The greenery surrounding the crossing partially obscures approaching trains. [*Id.*];

5. There is insufficient distance for a westbound motorist, like Ms. Paez, to observe a train as the vehicle approaches that tracks at 10 mph or more. [*Id.*];

6. Assuming Ms. Paez was travelling between 10 and 15 mph, when she turned to approach the crossing at the irrigation canal, the northbound train would be up to 540 feet away, which is well beyond the line of sight of 480 feet required for a plainly visible train. [*Id.*]

7. The elevated hump crossing fails to meet the standards of AREMA. [*Id.*]

Mr. Paez also testified that from the position of 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] Mr. Paez also testified that immediately after the collision, he saw rocks, debris, trees, and weeds that would have prevented his wife from seeing the northbound train. [*Id.*] In fact, 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 also testified at deposition that 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]

Therefore, based on this evidence, the District Court should have determined that there was evidence for which a jury could conclude that the hazardous condition of the crossing was a proximate cause of the collision. As the Court stated in *Galvan v. City of Albuquerque,* 85 N.M. 42, 508 P.2d 1139 (Ct. App. 1973), "[p]roximate cause is that which, in a natural or continuous sequence, produces the injury and without which the injury would not have occurred." "Proximate cause of an injury need not be the last act or the nearest act to the injury but may be one which actually aided in producing the result as a direct and existing cause . . . ." *Ortega v. Texas-New Mexico Rwy. Co.,* 70 N.M. 58, 370 P.2d 201 (1972). Importantly, the act of negligence need not be the *sole cause,* but it must be a concurring cause. *Rix v. Town of Alamogordo,* 42 N.M. 325, 77 P.2d 765 (1938); *Kelly v. Montoya,* 81 N.M. 591, 470 P.2d 563 (Ct. App. 1970). Where reasonable minds may differ on the question of proximate cause, the matter is to be determined by the fact finder. *Fitzgerald v. Valdez*, 77 N.M. 769, 427 P.2d 655 (1967).

As shown above, BNSF failed to maintain the crossing so that the travelling public could safely cross the tracks free of visual obstructions of oncoming trains. As a result of the ultra-hazardous condition of the crossing that BNSF caused to exist, it was certainly foreseeable that a collision between a motorist and a train would occur there. As the Court held in *Calkins v. Cox Estates,* 110 N.M. 59, 61,

792 P.3d 36, 38 (1990), foreseeability is not a question of law under the rubric of duty, but a *question of fact* under the rubric of proximate cause.

In *Calkins*, the New Mexico Supreme Court reversed summary judgment in favor of an apartment complex owner in a case involving an eight year old boy who was killed when he was struck by a car on a frontage road in the vicinity of the apartment complex where he lived. The Court rejected the defendant's argument that its alleged negligence (in not maintaining an enclosed fence adjacent to the property and the frontage road) could not have been the proximate cause of the plaintiff's injuries because it was not a substantial factor in producing the result. *Id.* at 65 n. 6, 792 P.3d at 42 n. 6. It held that "New Mexico does not apply the substantial factor test as a test of proximate case; *the question is one of foreseeability. . . . This is not a situation where a judge can determine that reasonable minds cannot differ; the discussion below indicates that the evidence was controverted.*" *Id.* (emphasis added). The Court stated that in cases in which a party offers evidence that the manner of harm was reasonably foreseeable, "[w]hether the injury was too remote, or whether intervening, superseding acts will be determined to have caused the injury, is thus a question of fact for the jury." *Id.* (emphasis added).

In *Andrews v. Saylor,* 2003-NMCA-132, 134 N.M. 545, 80 P.3d 482, the Court of Appeals similarly reversed a district court's ruling on the issue of

proximate cause in favor of the defendant. Although the *Andrews* case arose out of legal malpractice, the Court's discussion of causation is instructive here. The Court held that "*[w]ith few exceptions, proximate cause is a question of fact to be determined by the factfinder,*" and found that the district court committed "substantive error" in treating the alleged malpractice as "'the'" proximate cause." 2003-NMCA-132, ¶ 14, 19-20, 134 N.M. at 549, 551, 80 P.3d at 486, 488 (citing *Lerma v. State Highway Dep't,* 117 N.M. 782, 784-85, 877 P.2d 1085, 1087-88 (1994) (emphasis added). The *Andrews* Court stated:

> Proximate cause superimposes considerations of foreseeability on causation in fact. *See Torres v. El Paso Elec. Co.,* 1999-NMSC-29, ¶ 14, 127 N.M. 729, 987 P.2d 386 (noting the necessity of limiting "potentially limitless liability arising from mere cause in fact"). New Mexico follows the rule that "*'any harm which is in itself foreseeable, as to which the actor has created or increased the recognizable risk, is always "proximate," no matter how it is brought about.'*" *Id.,* ¶ 23 (quoting *Restatement (Second) of Torts § 442B cmt. b* (1965)).

Id., ¶ 22, 134 N.M. at 552, 80 P.3d at 489 (emphasis added). Importantly, the Court went on to confirm that "[u]nder New Mexico law, *there may be more than one proximate cause of an injury,*" citing both the Uniform Jury Instructions, 13-305, *NMRA*, and the Supreme Court's opinion in *Torres, supra. Id.,* ¶ 23, 134 N.M. at 552, 80 P.3d at 489.

Here, the District Court's finding that Ms. Paez's purported negligence was the *sole cause* of the collision between her car and the oncoming train is expressly contradicted by the overwhelming evidence of Appellees' negligence in not

maintaining a safe crossing at Paizalas Road, one that was free of hazards and visual obstructions.

Two out-of-state cases are highly instructive in determining the trial court's substitution of its own opinion for that of the factfinder. First, *Hales v. Illinois Central Ry. Co.*, 718 F.2d 138 (5th Cir. 1983), involved facts similar to those present here. In *Hales*, a motorist was struck by an approaching train as he attempted to cross the tracks. The Fifth Circuit reversed the nonsuit in favor of the railroad after a non-jury trial and remanded the case to the District Court on the grounds that the court "failed to make findings of fact respecting the dangerousness, if any, of the crossing as a result of the limited view afforded approaching drivers such as [the plaintiff], the adequacy of the warnings given, and the effect thereof as concerns causation of the collision . . . ." *Id.* After reviewing the record, the Court determined that it is "unclear whether [the plaintiff's] negligence was *the sole proximate cause* of the collision" if the crossing "was unusually dangerous." *Id.* at 141 (emphasis added). The Court further held that whether the crossing was unusually dangerous and whether the plaintiff's negligence was the sole proximate cause of the collision "are questions for the trier of fact." *Id.*

Second, the *Lingsch* opinion, 1995 Ohio App. LEXIS 3321, discussed above, also supports Appellants' argument that the District Court erred in granting

summary judgment in favor of BNSF. In that case, the Court of Appeals of Ohio reversed the lower court's granting of summary judgment in favor of the railroad on the issue of causation, holding that the trial court should have afforded equal weight to expert and lay witness testimony regarding the vegetation that created visibility problems at the crossing and construed the evidence in the light most favorable to the non-moving party; *i.e.,* the plaintiff.

Further, the authorities submitted in BNSF's brief as to causation are not instructive. For example, *Wilkinson v. Kansas City So. Ry.*, 772 So.2d 278 (La. Ct. App. 2001), in inapposite in that the judgment appealed from was the result *of a jury verdict. See* Answer Brief, at 30. Here, the Court prevented a jury from considering the merits of Appellants' claims when it granted summary judgment in favor of BNSF. The unpublished opinion of *Illinois Central Gulf Railroad Co. v. Travis,* 2012 WL 5951413, also cited by BNSF on page 30, similarly arose from a jury verdict, as does *Chicago, Rock Island & Pac. Rd. Co. v. Hugh Breeding, Inc.,* 247 F.2d 217 (10th Cir. 1957). In addition, both *Chicago, Rock Island* and *Seaboard Air Line Rd. Co. v. Crowder*, 62 S.E.2d 227 (Va. 1950) (yet another trial case), were decided based on contributory negligence standards, *not* comparative negligence of the parties, which is the law of New Mexico.

Thus, material facts exist as to whether BNSF failed to provide a safe and clear crossing at Paizalas Road, and the Court should have allowed the jury to decide whether such inaction was a proximate cause of the collision.

C. BNSF's Preemption Argument Fails

BNSF erroneously contends that Appellants' negligence claims are preempted by the Federal Railroad Safety Act ("FRSA"), *49 U.S.C. § 20101 (1994)*, and fails to distinguish this Court's holding in *Largo v. Atchison, Topeka & Santa Fe Ry. Co.*, 2002-NMCA-21, 131 N.M. 621, 41 P.3d 347, a case presenting facts similar to those here. As discussed in the Brief in Chief, the Court of Appeals reversed the lower court's order that the plaintiff's claims that the warning devices were inadequate and the train's excessive speed were preempted by FRSA. 2002-NMCA-21, ¶ 2, 131 N.M. at 623, 41 P.3d at 349. 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). Thus, the party seeking to establish preemption, like BNSF here, 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.

Interestingly, BNFS all but ignores the *Largo* decision, citing it just once in its Answer Brief even though it is the most recent and indispensable authority on FRSA preemption in New Mexico. BNSF does not challenge Appellants' contention that federal preemption is not triggered in this case for two reasons: first, that 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," BSNF *failed to submit any evidence* that federal monies were spent on said warning devices. Thus, BNSF's failure to show the expenditure of federal funds to construct, maintain, or improve the Paizalas crossing is fatal to its preemption argument under *Largo*.

Therefore, because federal funds were not used at the Paizalas crossing, BNSF's argument that Appellants' claims are preempted by the FRSA fails as a matter of law.

D. BNSF's Numerous References to Appellants' Purported Failure to Comply With Its Discovery Obligations Are Irrelevant to the Issues on Appeal and Are Prejudicial

When the District Court heard and then subsequently granted Appellees' respective summary judgment motions on March 1, 2012, there was no pending discovery motion regarding the photographs BNSF complains about in its Answer Brief. *See* Record Proper. Regardless, BNSF makes certain accusations about Appellants' alleged "withholding" of photos at the hearing over Appellants' objections that (1) the hearing was on the summary judgment motions, not on a discovery issue; and (2) Appellants did not obtain adequate notice that BNSF was going to address such arguments at the hearing. Specifically, Appellants' counsel stated the following at the February 16, 2012 hearing:

> MR. CHAVEZ: Your Honor, I'd like to object at this point. This sounds more like a Motion to Compel than something that has to do with a Motion for Summary Judgment and facts that are in evidence.
>
> I have a lot of things that I could have brought today that we argued before that I have in my office. I could have somebody potentially bring them up here, if necessary. But, basically, a lot of this is, from my perspective, your Honor, something that is distorting what was done in discovery.
>
> I will address it in a minute, I mean, when I have a chance to respond, but at this point it seems very off-track of the Motion for Summary Judgment No. 6 by BNSF.

[Tr. Vol. I, 28:3-18]

Further, the March 1, 2013 Orders granting Appellees summary judgment--which are appealed from here--make no mention of the discovery dispute, and Appellants' Docketing Statement raises six issues on appeal--*none* of which arise from an alleged discovery dispute *that was not properly before the District Court when it granted summary judgment in favor of Appellees.* That BNSF subsequently filed a motion for discovery sanctions *after* Appellants filed their Notice of Appeal is irrelevant to the Court's findings.[1] In fact, the District Court has delayed hearing that motion on the merits (and ruling on it) when and until the Judgment below is reversed and a mandate is issued. Thus, BNSF's repeated references to the dispute in its brief in which it accuses Appellants of "concealing" or "withholding" evidence and "misleading" the Court (*see, e.g.,* pages 2 through 7 and footnotes thereto to the Introduction; pages 7 through 10 and footnotes thereto to the Statement of Proceedings; pages 17 through 19 and footnote thereto of the Facts Material to Deciding the Issues on Appeal; and pages 20 through 21 of the Argument), which comprise nearly *30 percent of its Answer Brief* should be completely disregarded on the grounds that a discovery dispute is not subject to this appeal and that such accusations are nothing more than BNSF's attempt to prejudice this Court against Appellants.

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[1] After the judgment was entered and Appellants' Notice of Appeal was filed on March 30, 2013, BNSF filed a motion for discovery sanctions on April 26, 2012 (presumably because it was too late for it to file a motion to compel) in which it complained about Appellants' purported failure to produce certain photographs.

The transcript of the January 16 and 17, 2012 hearing on Appellees' respective summary judgment motions confirms that the District Court erroneously entertained BNSF's arguments about the photos. Beginning on page 24 of the transcript, Vol. I at line 24, BNSF's counsel provides an oral chronology of the case by discussing various document requests propounded on Appellees. The transcript reflects his discussion on several pages until he is eventually interrupted by Appellants' counsel, who objects to the discussion on the grounds that it is irrelevant to the pending summary judgment motions. [Tr. Vol. I, 28:3-16] The Court overrules the objection for reasons that are not entirely clear:

> THE COURT: Overruled, and I'll tell you why. Because during the course of the case in connection with motions, there's been motions made that I've addressed based upon what the lawyers had at the time, and it seems like as the case develops, more things come out and more things come out, because I see in connection with some of the motions that there are even allegations that there's pictures that are being withheld yet, or appear to have been withheld.

[Tr. Vol. I, 28:17-25] BNSF's counsel then proceeds--over the next *28 pages* of the transcript and with minimal interruptions--to make various assertions regarding Appellants' alleged failure to produce certain photographs. He relies mostly on deposition testimony but repeatedly fails to provide citations to transcripts or, in certain instances, to even identify whose deposition he is discussing. [Tr. Vol. I, 29:5-56:9] After a break, BNSF's counsel continues argument on the merits but intersperses assertions regarding Appellants' purported failure to turn over

photographs of the scene. [*See, e.g.*, Tr. Vol. I, 61:24-65:9, 66:13-19] In fact, BNSF's argument regarding the photographs continues until the Court finally instructs its counsel "to deal with the motions." [Tr. Vol. I, 73:24-25]

The District Court should not have considered BNSF's unsupported rendition of the parties' discovery obligations without a proper motion pending. References in BNSF's Answer Brief to Appellants' alleged failure to produce certain documents to BNSF and argument that Appellants somehow engaged in discovery misconduct should be disregarded as irrelevant and prejudicial.

III. CONCLUSION

WHEREFORE, for the reasons set forth above, Plaintiffs/Appellants Rosemary Paez and Rey Paez respectfully request that this Court reverse the Orders granting summary judgment in favor of Defendants/Appellees the County of Socorro, Burlington Northern Santa Fe Railway, Mike A. Ortega, and Hector L. Duran, and the Judgment below, and remand this case to the District Court for trial.

Respectfully submitted,

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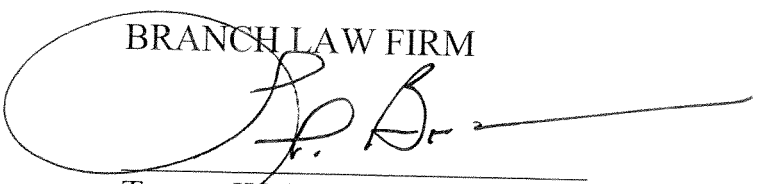

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing Appellants' Reply to Answer Brief of Appellee Burlington Northern Santa Fe Railway was served by mail on this 22nd day of April, 2013, on the following counsel of record:

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