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 COUNTY OF SOCORRO

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

TIBO J. CHAVEZ, JR.
Tibo J. Chavez, Jr.
P.O. Box 569
Belen, New Mexico 87042
(505) 864-4428 - Telephone
(505) 864-4476 - Telefax

BRANCH LAW FIRM
Turner W. Branch
2025 Rio Grande Blvd. NW
Albuquerque, New Mexico 87104
(505) 243-3500 - Telephone
(505) 243-3534 - Telefax

Attorneys for Plaintiffs/Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Out of State Cases

New Mexico Statutes

Other Authorities

I. INTRODUCTION

Defendant/Appellee County of Socorro (the "County") erroneously argues in its Answer Brief that Plaintiffs/Appellants failed to submit any evidence showing that the County's negligence was a contributing cause of the collision between Ms. Paez and a train owned and operated by Defendant/Appellee Burlington Northern Santa Fe Railway ("BNSF"). Sufficient evidence in the record below reflects, however, that a reasonable jury could find that the County was negligent in failing to properly maintain the Paizalas roadway approaches, and that such negligence--which created a dangerous and ultra hazardous condition--was a cause of the collision.

As discussed more fully in Appellants' Brief in Chief, the District Court found that Ms. Paez acted negligently when she attempted to cross the tracks; thus, it entered summary judgment in favor of both the County and BNSF. The District Court failed to determine that the County's negligence *was also* a contributing cause of the collision, assuming, of course, that Ms. Paez's alleged negligence was a proximate cause of the collision as well. Under New Mexico law, whether a parties' negligence was a proximate cause--not *the sole cause*--of the plaintiff's injuries is a question of fact for the jury. Based on the evidence submitted in the record, reasonable minds could find that, based on the rough approach and humped track crossing, it was foreseeable that a motorist attempting to cross the railroad

tracks would suffer serious injury from an oncoming train. Accordingly, the District Court's granting of summary judgment in favor of the County was in error. The Judgment below should be reversed and the case remanded for trial.

II. ARGUMENT

A. The County Does Not Dispute Its Negligence, and Appellants Presented Sufficient Evidence to the District Court Regarding the County's Comparative Fault

In its Answer Brief, the County does not refute Appellants' contention that the County negligently maintained the Paizalas Road crossing. The primary focus of its Brief is that there was sufficient evidence in the record to determine Ms. Paez's negligence when attempting to cross the train tracks on the day of the collision. Even assuming, for the sake of argument, that Ms. Paez failed to look for an oncoming train (see Answer Brief, at 6), the District Court failed to recognize that there was ample evidence for which a jury could determine that it was foreseeable that the County's hazardous crossing *was a contributing cause* of the collision. The Court's substitution of its opinion for that of a jury is reason for reversal of the Judgment in favor of the County.

The evidence confirms that the County breached its duty to the general public to provide a hazardous-free crossing. Plaintiffs' lay and expert witnesses--as well as the photographic evidence and measurements taken by Plaintiffs' experts--establish that the low level of the approaches to the crossing, coupled

with the crossing's hump in relation to the height of the vegetation and the tracks, obstructed the visibility of approaching motorists like Ms. Paez. Due to these obstructions, motorists were unable to see trains traveling northbound on the track as well as vehicles approaching from the opposite side of the crossing. Such evidence could lead a jury to conclude that the lack of proper maintenance of the roadway approaches by the County was a foreseeable cause of the collision between the train and Ms. Paez. Therefore, the Court committed reversible error when it wholly disregarded witness testimony and the experts' findings and ruled that, based on its review of photographs of the scene[1] as well as its own visit to the site, Ms. Paez should have seen the train coming and stopped her vehicle.

First, the County falsely states that Appellants failed to dispute the testimony of two "eye witnesses" present at the time of the collision who testified that (1) Ms. Paez never looked to see whether a train was approaching the crossing; and (2) Ms. Paez continued a slow ascent toward and on the approach even though the train engineer, Mike Ortega, blew the whistle. Answer Brief, at 2. However, Appellants' traffic engineering and railroad safety expert, Archie Burnham, expressly disputes these facts and raises questions regarding Mr. Duran's credibility as a witness. Specifically, Mr. Burnham testified at deposition that Mr.

---

[1] The Court expressed reservations about what the photographs accurately depicted. *See* Transcript of the January 16-17, 2012 hearing, at 112:24-113:9.

Duran *could not have seen Ms. Paez's face* or determined what she *looked at* shortly before the collision. Mr. Burnham calculates that the distance from Mr. Duran's place on the train to the curve straightening when Mr. Duran claims he saw Ms. Paez's face was approximately 1,800 feet--or six football fields away. [RP 4369, 4387, 4393 (at 194:11-196:1)] Certainly a reasonable jury could not consider Mr. Duran's testimony credible, given he claims he was able to determine what Ms. Paez was looking at from a third of a mile away. In addition, even though Appellants do not dispute that the train sounded its horn, Mr. Ortega's testimony that Ms. Paez was going so slowly toward the crossing that her car was not raising any dust (*see* Answer Brief, at 3) is irrelevant as to Ms. Paez's purported negligence but germane to Mr. Burnham's opinion that her safe speed on approach (between 10 and 15 mph, as suggested by Mr. Ortega) means that the approaching train was 480 feet away, which was well beyond the line of sight for it to have been plainly visible to Ms. Paez. [RP 1174-1235, at 3-10; RP 4366-4407, Exhibit 4 thereto]

Second, Appellants submitted additional evidence that create a disputed issue of fact as to whether it was foreseeable that the County's negligence in failing to provide a safe and hazard-free approach was a proximate cause of the collision. For example, the evidence reflected the following:

1. Former County Commissioner Leo Lovato stated that Mr. Paez contacted him prior to the collision about the dangerous roadway conditions at the crossing regarding the fill dirt pushed by county employees onto the Paizalas crossing [RP 4369, 4389, 4390 and Exhibit 4 thereto (at 80:20-81:8); RP 4401-02 (at ¶¶ 3-9)] ;
2. Socorro County Road Department employee Climaco Armijo revealing at deposition that BNSF and the County had previously partnered together to elevate and maintain roadways at railroad crossings [RP 4366-4407, at 4, ¶¶ 5-6]];
3. In his affidavit and preliminary expert report, Mr. Burnham stated that the crossing, including the level of the roadway in relation to the height of the crossing, created a hazardous condition due to the lack of proper maintenance and that the elevated hump 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]
4. Ms. Paez stated in discovery responses that, contrary to the County's assertion in its Answer Brief, she has "knowledge of the events leading up to the day of the crossing and regarding the dangerous condition of the crossing," and that "[w]eeds, brush and trees were

allowed to grow alongside the tracts *and obstruct the view of oncoming trains. The steep incline and condition of the road also caused the view to be blocked.*" [RP 4368, 4380-83 (responses to nos. 2, 11, 28 and 29)]

5. Ms. Paez she stated that "[i]f not for the reckless creation of the dangerous crossing and willful disregard and failure [of the train] to slow or keep a proper lookout, I would not have been struck by the train." [*Id.*]; and
6. Mr. Paez testified at deposition that he believes Ms. Paez could not have seen the train because of the overgrown weeds and the need for the crossing to be properly maintained by the County by filling and raising the road to the height of the crossing, and that he contacted both the County Commissioner Mr. Lovato as well as county about the overgrowth of vegetation lining the tracks at the crossing which obstructed visibility for motorists crossing at Paizalas Road. [RP 4368, 4379, 4388 (at 43:9-25)]

Moreover, the County's summary of the testimony of Alan Blackwell, Appellants' other expert witness, is similarly incorrect. The evidence in the record, as set forth in Appellants' response to the County's motion for reconsideration of the District Court's denial of its initial summary judgment motion [RP 4366-4407],

flatly contradicts the County's assertion that Mr. Blackwell did not assign any fault for the collision on the County. Mr. Blackwell testified at deposition that the County took responsibility of the crossing because (a) a county employee performed road work at the crossing; (b) Mr. Lovato acknowledged that county employees filled the road in after receiving a complaint from Mr. Paez; and (c) the hump nature of the crossing made it impossible for a motorist approaching the hump to see whether any vehicles were approaching from the opposition directly until he or she is directly on top of the crossing. [RP 4369-70, 4397 (at 172:6-24), 4399 (at 255:15-256:11), 4400 (at 257:14-258:3)] Mr. Blackwell explained that industry standard requires that roadway surface to extend 30 feet on either side of the crossing and should not be more than three inches above or below the surface of the rail plane so that the capabilities of motorists are not affected by the hump crossing in factors such as sight distance, braking, acceleration, and not getting stuck on top of the crossing. [*Id.*] According to Mr. Blackwell, the Engineering Instructions require BNSF to notify the local roadway authorities, such as the County, in this instance, of deficiencies in the roadway approaches and cooperate with them to correct the deficiencies. [RP 4399 (at 256:12-257:19)]

Further, the County's obligation to correct problems with the roadway approaches in conjunction with BNSF is also in dispute. Mr. Burnham submitted expert testimony that the County's attempt to improve the approaches by bringing

in fill dirt was somewhat helpful but *still* fell far below AREMA standards of a safe crossing due to the elevation of the crossing's hump. [RP 4366-4407, Exhibit 4 thereto] Specifically, Mr. Burnham stated that the County acknowledged its obligation to maintain the roadway up to 50 feet from the crossing but stopped two feet short of the rail. [*Id.* at 162:22-163:22] Thus, opined Mr. Burnham, because the County failed to improve the humped crossing, the crossing is extra-hazardous because it fails to meet the standards of care in the industry as to (a) the width of the platform; (b) the sight distance; (c) motorists' inability to be warned by the sight or sound of a train; (d) the elevated hump; and (e) roughness and deterioration of the platform. All these factors are obstacles to a safe crossing and are confirmed by the photographs Mr. Burnham took of the site on June 3, 2010. [*Id.* at 118:23-119:15, 192:23-193:22]

The evidence cited above clearly demonstrates that not only was the County negligent in failing to provide safe roadway approaches to the Paizalas Road crossing, a reasonable jury could find that its malfeasance was a foreseeable and proximate cause of the collision between Ms. Paez and BNSF's train, and that fault does not lie solely with Ms. Paez. The District Court's failure to consider the County's negligence as a proximate cause of the collision constitutes reversible error.

B. Even Assuming, for the Sake of Argument, That Ms. Paez Negligently Crossed Paizalas Road on the Day of the Collision, the County's Failure to Adequately Maintain the Roadway Approaches Was Also a Foreseeable and Proximate Cause of Appellants' Injuries

In *Galvan v. City of Albuquerque,* 85 N.M. 42, 508 P.2d 1139 (Ct. App. 1973), the Court stated that "[p]roximate cause is that which, in a natural or continuous sequence, produces the injury and without which the injury would not have occurred." *See also Chavira v. Carnahan,* 77 N.M. 467, 423 P.2d 988 (1967); *Bouldin v. Sategna,* 71 N.M. 329, 278 P.2d 370 (1973); *Thompson v. Anderman*, 59 N.M. 400, 285 P.2d 507 (1955). "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). The act 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). Importantly, under New Mexico law, 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).

It is clear and undisputed that the County assumed the duty for maintenance of the crossing. As cited above, the County acknowledges that road department employees pushed fill dirt up and over the Paizalas crossing as a result of Rey Paez's requests and complaints to improve the condition of the crossing. Mr.

Lovato stated that a road crew did work on both sides of the crossing in order to raise the elevation of the approach to the Paizalas Road crossing. Therefore, once the County had notice of the dangerous condition at the crossing and had taken some remedial measures, it had a continuing obligation to identify hazards at the crossing and to continue to monitor and maintain the crossing. The County breached its duty to provide a safe crossing when it failed to adequately improve the crossing. As a result of the ultra-hazardous condition of the crossing that the County 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.

Specifically, 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. In that case, 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. The Court 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:

> A court may decide questions of negligence and proximate cause, if no facts are presented that could allow a reasonable jury to find proximate cause, i.e. if a reasonable jury could not find that respondent reasonably could foresee that [the plaintiff] may climb through the fence and be injured as a result. *See, e.g., Bouldin v. Sategna,* 71 N.M. 329, 378 P.2d 370 (1963) (deciding that, as a matter of law, an automobile owner cannot reasonably foresee car theft, and therefore his negligence in leaving his keys in the car is not the proximate cause of subsequent negligent driving by the thief). In this case, petitioner offered evidence that the manner of harm was reasonably foreseeable. *Whether the injury was too remote, or whether intervening, superseding acts will be determined to have caused the injury, is thus a question 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.

In the case at bar, 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 also 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 that case, 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 of Appeals determined that the district court's findings that the railroad was *not* negligent in operating its train and that the plaintiff's failure to keep a proper lookout was a proximate cause of the collision were *not* clearly erroneous, 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.* (citing *Badger v. Louisville & Nashville Railroad Co.,* 414 F.2d 880, 883 (5th Cir.1969) (holding that the plaintiff was guilty of negligence, as a matter of law, did not defeat recovery where crossing was unusually dangerous because of obstructions).

Second, the opinion in *Lingsch v. Norfolk & Western Railway,* 1995 Ohio App. LEXIS 3321, arising out of a grade crossing collision, is also helpful. In that case, the Ohio appellate court 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 trail 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. Similar to Judge Sweazea's comments at the hearing that, in his opinion, the photographs showed that Ms. Paez should have been able to see the oncoming train when she was on the approach and then stop in time, the lower court in *Lingsch* "downplayed this evidence, asserting 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. Although the appellate court agreed with the trial court that "the trestle and the tree line do not completely obscure the tracks north of the crossing," it ruled that "reasonable minds could conclude that the tree line and trestle acted together to significantly reduce visibility" and that "[d]espite the trial court's skepticism," construing the evidence "in the light most favorable to appellant, [a] genuine issue of material fact exists that the trestle and tree line obstructed [the plaintiff's] view" of the train. *Id.* The *Lingsch* Court also dismissed the trial court's firm reliance, as in this case, on the photographs of the crossing. "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. n. 2.*

Thus, the District Court erred in finding as a matter of law that the County's failure to properly identify and remediate the roadway hazards at the Paizalas crossing was not a proximate cause of the collision between Ms. Paez and the BNSF train. Whether there was more than one proximate cause of the collision falls within the province of the jury's determination, not the Court's. As the Supreme Court stated in *Calkins*, "proximate cause is a question of fact to be determined by the factfinder," for which there are "few exceptions." The County fails to identify any exception in its Answer Brief.

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,

BRANCH LAW FIRM

Turner W. Branch
2025 Rio Grande Blvd. NW
Albuquerque, New Mexico 87014
(505) 243-3500 - Telephone
(505) 243-3534 - Telefax

LAW OFFICE OF TIBO J. CHAVEZ, JR.
Tibo J. Chavez, Jr.
P.O. Box 569
Belen, New Mexico 87042
(505) 864-4428 - Telephone
(505) 864-4476 - Telefax

Attorneys for Plaintiffs/Appellants

Certificate of Service

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

Douglas E. Gardner
Marcus E. Rael, Jr.
500 Marquette Ave. NW, Suite 700
Albuquerque, New Mexico 87102

Attorneys for Defendant/Appellee
County of Socorro

Clifford K. Atkinson
Juan M. Marquez
Atkinson, Thal & Baker, P.C.
201 Third Street NW, Suite 1850
Albuquerque, New Mexico 87102

Attorneys for Defendant/Appellee
Burlington Northern Santa Fe Railway

Turner W. Branch