IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

ROSEMARY PAEZ AND RAY PAEZ,

Plaintiffs/Appellants,

v. Ct. App. No. 32,105

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

Defendants/Appellees.

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
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FEB 25 2013

APPELLEE'S ANSWER BRIEF

ORAL ARGUMENT REQUESTED

Civil Appeal from the Seventh Judicial District, County of Socorro
The Honorable Kevin R. Sweazea, District Court Judge
(District Court Cause No. D-0725-CV-2009-83)

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SUMMARY OF PROCEEDINGS

Pursuant to NMRA Rule 12-213(B), Appellee Socorro County accepts much of Appellants' Summary of Proceedings and will add nothing further to Appellants' description of the Nature of the Case and the Course of Proceedings. Appellee adds that the only issue before this Court, regarding Appellee Socorro County, is the District Court's March 1, 2012 Order Granting Socorro County's Motion to Reconsider Summary Judgment Based Upon Plaintiffs' Inability to Prove that Socorro County was Negligent, or that Negligence was the Proximate Cause of Plaintiffs' Damages (hereinafter "Motion to Reconsider"). See Appellants' Brief in Chief p. 2; see also Order Granting the Motion to Reconsider (March 1, 2012)[RP 5119-5121]. In regard to Appellants' Statement of Relevant Facts, Appellee Socorro County adds the following facts relevant to this Court's consideration of the District Court's granting of Socorro County's Motion to Reconsider:

Appellants' Statement of Relevant Facts does not include several very important facts that were relied upon by the District Court in granting the Motion to Reconsider. First, the testimony from the only two (2) witnesses that actually saw the November 17, 2008 incident stated that Mrs. Paez did not stop and did not look to see if a train was coming prior to driving onto the railroad tracks. That testimony is undisputed. For example, prior to her death, Mrs. Paez did not recall any of the facts

surrounding the November 17, 2008 incident, including the cause of the incident. [RP 3500-3514, p. 4 ¶ 2, and "Exhibit A" thereto RP 3515-3516]. When Mrs. Paez's husband, Ray Paez, was asked during his deposition if he was aware of what specifically caused the incident, he responded, "I don't know what caused it, probably a lot of different things." [RP 3500-3514, p. 4 ¶ 4, and "Exhibit A" thereto RP 3515-3516].

The two (2) witnesses to the accident are BNSF employees Hector Duran and Mike Ortega, who were riding aboard the BNSF locomotive that Mrs. Paez collided with. Mr. Duran testified during his deposition that as the BNSF train approached the crossing, Mr. Duran remembered the engineer, Mike Ortega, blowing the horn at the whistle board and at the crossing. [RP 3500-3514, p. 4 ¶ 3, and "Exhibit B" thereto RP 3517-3518]. As the train approached the crossing, Mr. Duran could see Rosemary Paez's face as she drove towards the crossing. Id. Mr. Duran testified that Mrs. Paez never turned to look in the direction of the train to see it coming. Id. Mr. Duran also testified that Mrs. Paez did not stop at the crossing and did not slow down at any time prior to the collision. Id.

Mr. Ortega testified that as the train approached the crossing, he blew the horn at the whistle board. [RP 2599-2623, p. 16 ¶ 38, and "Exhibits M" and "M-1" thereto RP 2832-2836]. Mr. Ortega testified that as the train approached the crossing he

could see Mrs. Paez's vehicle moving very slowly towards the crossing. Id. Mr. Ortega testified that as Mrs. Paez continued towards the crossing, Mr. Ortega continued to blow the horn. Id. Mr. Ortega testified that Mrs. Paez was traveling so slowly that her car was not even raising any dust. Id. Mr. Ortega testified that he then put the train into emergency, at which point Mrs. Paez's vehicle collided with the train. Id.

The witness testimony of Mr. Duran and Mr. Ortega establish that it was not a defect in the railroad crossing roadway that caused the November 17, 2008 incident, rather, Rosemary Paez simply did not look to see the oncoming BNSF train and did not stop for the train. Appellants' own experts do not provide any evidence to the contrary. For example, during the deposition of Appellants' expert, Archie Burnham, Mr. Burnham described multiple factors at the Paizalas crossing that *could* distract a motorist. However, Mr. Burnham also agreed that he could not say whether any one of those factors was actually a cause of the November 17, 2008 incident in this case. [RP 3500-3514, p. 4 ¶ 6, and "Exhibit D" thereto RP 3521-3523]. When Mr. Burnham was asked if he was able to determine if any factor under Socorro County's control caused the November 17, 2008 incident, he responded that he had not isolated any factor that would be directly attributable to Socorro County. Id. Mr. Burnham then went on to state that the lack of maintenance of the Paizalas crossing itself

caused the wood planks to deteriorate and railroad spikes to stick up, which caused an unusually rough crossing. Id. But Mr. Burnham also conceded that it is never the duty of a local road authority, such as Socorro County, to maintain those aspects within the crossing, such as the planks and spikes. Id.

Further, during the deposition of Appellants' other expert, Alan Blackwell, Mr. Blackwell testified that he was not providing any opinion about causation whatsoever. [RP 4932-4942, p. 3 and "Exhibit B" thereto (missing from RP but can alternatively be found at RP 2809)]. Mr. Blackwell also conceded that he had no opinions about Socorro County's responsibility to maintain the Paizalas railroad crossing. [RP 3500-3514, p. 4 ¶ 5, and "Exhibit C" thereto RP 3521-3523]. Just like Mr. Burnham, Mr. Blackwell's testimony provided no basis for a jury to connect the dots for proximate cause. Just like Mr. Burnham's testimony, Mr. Blackwell's testimony cited various conditions at the Paizalas railroad crossing for which he considered BNSF responsible, but Mr. Blackwell did not say any one of those conditions either caused the November 17, 2008 incident or was under the control of Socorro County.

Even more fatal to Appellants' case was Mr. Burnham's admission that Rosemary Paez would have had an unobstructed view of the approaching BNSF train, and that the train would have been open, obvious, and apparent when Mrs. Paez was

still fifty (50) feet from the railroad crossing, if Mrs. Paez had simply looked. Specifically, Mr. Burnham testified:

> Q. (By Mr. Atkinson) In fact, the conductor testified to what on that issue?
>
> A. He never saw her look toward his direction.
>
> Q. Yes, sir. And Mrs. Paez had the obligation to stop before she drove on the tracks, did she not?
>
> A. If she could detect the approach of the train.
>
> Q. And she had the obligation from 50 feet to look both ways to ensure that the crossing was clear. Correct?
>
> A. Yes, sir.
>
> Q. And she had an obligation to search as she approached the track from 50 feet. Correct?
>
> A. Yes, sir.
>
> Q. And there is a continuing duty of a motorist that Mrs. Paez had to continue looking for the train as she approached the crossing. Correct?
>
> A. I think that's the same thing we've been talking about. Yes, sir.
>
> Q. All right. Would it have been open and obvious and apparent to her from 50 feet if she had looked to the south that there was an oncoming train?
>
> A. It may have been.
>
> Q. In your opinion, was it?

A. Yes. If she had looked at that point. I don't know whether she was in a non-recovery position in which she could not stop at that point.

[RP 4932-4942, p. 9, and "Exhibit A" thereto (missing from RP)]; see also [RP 2645]. The evidence of the case, as stated by Mr. Burnham, is that Rosemary Paez could have seen the train if she had looked, from as far back as fifty (50) feet before she reached the crossing. Mr. Burnham's admission is supported by the very photographs that were taken by the Plaintiffs only several weeks after the November 17, 2008 incident. Those photographs, particularly photograph B-1, B-2, and B-3, show that Mrs. Paez would have had a completely unobstructed view of the railroad crossing from at least fifty (50) before she reached the crossing. [RP 2650-2652]. When the photographs are considered in conjunction with the photographs that were provided by BNSF, depicting a BNSF train from the same viewpoint as the original photographs, it simply becomes impossible to argue that Rosemary Paez could not have seen the approaching train, had she simply looked. [RP 2671-2677].

These are the same photographs that were relied upon by Judge Sweazea during the February 16-17, 2012 hearings, when he granted Appellee's dispositive motions. After viewing the photographs for the first time, the Court rendered the following findings:

> [b]ut it appears to me that 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. I don't believe that any reasonable jury could find otherwise based upon the photographic evidence, notwithstanding that the expert admitted that, and then tried to waffle on it, and then admitted it again...

Transcript of the February 16-17, 2012 hearing. 169:10-17. The Court went on to find:

> [l]ooking at the relevant point, once one rounds the corner and turns in a westerly direction from having traveled north on that roadway, the photographs and whatever else somebody may want to say, the photographs are just almost impossible to argue with. The closer you get to the crossing, the more visible a train would be. From 50 feet a train is absolutely visible on the road or on the railroad, maybe as far back as 500 or more feet from the crossing, it looks like. And, maybe even farther than that.

Transcript of the February 16-17, 2012 hearing. 286:6-17. If Mrs. Paez had looked, the approaching train would have been obvious and apparent. Appellants' own expert agrees with that. Further, both of Appellants' experts cannot establish any act or omission on the part of Socorro County that caused the November 17, 2008 incident. When the witness testimony of Mr. Duran and Mr. Ortega is considered in conjunction with the photographic evidence for the case, it creates an undisputable fact that it was simply Mrs. Paez's own failure to look and see the approaching BNSF train that actually caused the November 17, 2008 incident. Further, it is undisputed that there is no evidence in the case to support the theory that any act or omission on

the part of Appellee Socorro County proximately caused the November 17, 2008 incident.

STANDARD OF REVIEW

Whether the trial court has properly decided, as a matter of law, that a defendant is entitled to summary judgment is reviewed de novo. Gormley v. Coca-Cola Enterprises, 137 N.M. 192, 194, 109 P.3d 280, 282 (2005); see also Fikes v. Furst, 134 N.M. 602, 606, 81 P.3d 545, 549 (2003) (holding that summary judgment may be proper even though some disputed issues remain, if there are sufficient undisputed facts to support a judgment and the disputed facts relate to immaterial issues).

"Summary judgment is proper when the moving party is entitled to judgment as a matter of law and the opposing party fails to demonstrate the existence of a genuine issue of material fact. NMRA Rule 1-056; Tapia v. Springer Transfer Co., 106 N.M. 461, 462-63, 744 P.2d 1264, 1265-66 (N.M. Ct. App. 1987), cert. quashed, 106 N.M. 405, 744 P.2d 180 (1987); Gordon v. Sandoval County Assessor, 130 N.M. 573, 576, 28 P.3d 1114, 1117 (N.M. Ct. App. 2001). Once the movant has made a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to substantiate the existence of an issue of fact that is both genuine and material through more than bare allegations or a showing that there is "some metaphysical doubt as to the material facts[.]" Scott v. Harris, 550 U.S. 372, 380, 127 S. Ct. 1769, 1776 (2007); citing Matsushita Elec. Industrial Co. v. Zenith

Radio Corp., 475 U.S. 574, 586-587, 106 S. Ct. 1348 (1986); Koenig v. Perez, 104 N.M. 664, 666, 726 P.2d 341, 343 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 586-587; Goradia v. Hahn Co., 111 N.M. 779, 782, 810 P.2d 798, 801 (1991) ("[i]f from the facts, presented, 'but one reasonable conclusion' can be drawn, then summary judgment must be granted."); citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 2511 (1986). Finally, when the facts are unambiguous and only the legal effect of those facts must be determined, summary judgment is appropriate. Gardner-Zemke Co. v. State, 109 N.M. 729, 732, 790 P.2d 1010, 1013 (1990); Cuevas v. State Farm Mutual Automobile Insurance Co.,130 N.M. 539, 540, 28 P.3d 527, 528 (N.M. Ct. App. 2001).

ARGUMENT

I. THE DISTRICT COURT'S DECISION, GRANTING APPELLEE SOCORRO COUNTY'S MOTION FOR SUMMARY JUDGMENT SHOULD BE UPHELD AS IT IS SUPPORTED BY THE FACTS OF THE CASE AND THE LAW OF NEW MEXICO.

A. It is proper for a district court to decide proximate cause, as a matter of law, when the facts are not in dispute and the reasonable inferences from those facts are plain and consistent.

Then general rule in New Mexico is that, "Where reasonable minds may differ on the question of proximate cause, the matter is to be determined by the fact finder." Galvan v. City of Albuquerque, 85 N.M. 42, 45, 508 P.2d 1339, 1342 (Ct. App. 1973); citing Fitzgerald v. Valdez, 77 N.M. 769, 775, 427 P.2d 655, 659 (1967). However, "Where the facts are not in dispute and the reasonable inferences from those facts are plain and consistent, proximate cause becomes an issue of law." Id.; citing Adamson v. Highland Corporation, 80 N.M. 4, 8, 450 P.2d 442, 446 (Ct. App.1969).

B. When the facts of a case fail to establish that any negligence on the part of a defendant was the proximate cause of a plaintiff's injuries, it is proper for the district court to dismiss the case as a matter of law.

Consider the New Mexico Supreme Court's decision in New Mexico State Highway Dept. v. Van Dyke, 90 N.M. 357, 563 P.2d 1150 (1977) (granting Highway Department's motion for a directed verdict because the Plaintiffs failed to show that

the negligence of the Highway Department proximately caused their injuries). In Van Dyke, the Plaintiff was driving from Albuquerque toward Santa Fe on Highway 85. Id. at 358 and 1151. After passing the crest of La Bajada Hill, the Van Dyke vehicle struck the rear of a truck carrying concrete blocks. Id. The collision caused the death of Mrs. Van Dyke with injuries to Mr. Van Dyke and his son. Id. Mr. Van Dyke filed suit and alleged that the Highway Department was negligent in designing the highway with 'stopping-sight' distances and shoulders less than standard, and that it posted an excessive speed limit for the highway. Id. The jury rendered a judgment in favor of all three (3) plaintiffs and the New Mexico State Highway Department appealed. Id. The Court of Appeals granted a new trial for the Highway Department. Id. The Supreme Court of New Mexico reversed the Court of Appeals and granted the Highway Department's motion for a directed verdict. Id. at 360 and 1153.

As a basis for its reversal, on the issue of plaintiff's claim of inadequate sighting distance, the Supreme Court stated that although the sight stopping distances did not comply with either the 1954 or 1971 criterion for new-highway construction, the plaintiff had adequate distance to see and perceive the truck in front of him. The Court stated, "[i]t is the duty of a motorist to do more than merely look, 'it is his duty to see and be cognizant of what is in plain view or obviously apparent, and he is chargeable with seeing what he should have seen, but not with what he could not

have seen in the exercise of ordinary care.'" Id. at 359 and 1152; citing Ortega v. Koury, 55 N.M. 142, 145, 227 P.2d 941, 943 (1951); Horrocks v. Rounds, 70 N.M. 73, 89, 370 P.2d 799, 810 (1962); Martinez v. City of Albuquerque, 84 N.M. 189, 190, 500 P.2d 1312, 1313 (Ct. App.1972). "Plaintiff offered no evidence to justify his failure to perceive the truck and take adequate measures to avoid it." Id.; citing Selgado v. Commercial Warehouse Company, 86 N.M. 633, 638, 526 P.2d 430, 435 (Ct. App.1974).

The Court then addressed the plaintiff's claim that the shoulder of the road was inadequate. The Court held that although the shoulders at that point in the road did not conform to the 1971 standard, there was no evidence that the shoulders contributed to the accident. Id. The Court went on to state, "[h]owever, where improperly constructed or maintained shoulders contribute to, or are causally related to accidents, the state's negligence may result in liability." Id.; citing Russell v. State, 268 App.Div. 585, 588, 52 N.Y.S.2d 629, 631 (S. Ct. 1944) (remanded for a determination of causation); also citing generally 45 A.L.R.3d 875 (1972). The Court reasoned that since the shoulders did not contribute to or cause the accident, any defect therein was irrelevant, which only left the matter of the 70 mph speed limit. Id.

However, before addressing the excessive speed limit claim, the Court addressed the issue of proximate cause. The Court stated, "[d]espite the failure of the

highway to conform to the standard stopping-sight distance, it is still necessary for the plaintiff to show the failure to meet those standards proximately caused the accident." Id. at 360 and 1153; citing Pack v. Read, 77 N.M. 76, 78, 419 P.2d 453, 455 (1966); Hartford Fire Insurance Company v. Horne, 65 N.M. 440, 447, 338 P.2d 1067, 1072 (1959); Archuleta v. Johnston, 83 N.M. 380, 382, 492 P.2d 997, 999 (Ct. App.), cert. denied, 83 N.M. 379, 492 P.2d 996 (1971). The Court reasoned that, "[w]here several factors may have caused an accident, the plaintiff cannot recover unless he proves that his injuries were sustained by a cause for which the defendant is responsible." Id.; citing Stuart-Bullock v. State, 38 A.D.2d 626, 627, 326 N.Y.S.2d 909, 911 (S. Ct. 1971).

The Court held, "[w]hen the negligence of the driver produces the injury, the state is not responsible for unrelated road conditions. Id.; citing Ikene v. Maruo, 54 Haw. 548, 550, 511 P.2d 1087, 1089 (1973); Martin v. State Highway Commission, 213 Kan. 877, 880, 518 P.2d 437, 440 (1974); Litts v. Pierce County, 9 Wash.App. 843, 849, 515 P.2d 526, 529 (1973). "Negligence and causal connection are generally questions of fact for the jury, but it is equally well established that where the evidence is undisputed and reasonable minds cannot differ, the question is one of law to be resolved by the judge." Id.; citing Montoya v. Williamson, 79 N.M. 566, 568, 466 P.2d 214, 216 (1968) (citation omitted).

Given the facts of the Van Dyke case, the New Mexico Supreme Court concluded as follows:

> The truck was visible to plaintiff for an adequate time and distance before the collision. The plaintiff failed to perceive it until too late to avoid the collision. Since the plaintiff is required by law to perceive what is visible, the proximate cause of the accident was nothing other than plaintiff's failure to see, and not any negligence of the Highway Department. The sole proximate cause of the accident was the negligence of the driver Knox Van Dyke.

Id.

The Van Dyke case was determined by the New Mexico Supreme Court when New Mexico was still a contributory negligence jurisdiction. However, even after New Mexico changed to a comparative fault jurisdiction, the New Mexico Supreme Court's rationale in Van Dyke is still sound. The requirement that a plaintiff provide evidence that establishes proximate cause has nothing to do with comparative fault or contributory negligence. It is simply one of the requisite elements to proving a negligence claim. There must be a duty, a breach of that duty, causation, and damages. If a plaintiff cannot prove causation, it is fatal to the claim. Moreover, if the undisputed facts of the case establish that a plaintiff cannot prove that a condition that was under the control of a defendant proximately caused the plaintiff's injuries, then causation is appropriately decided by the trial judge, as a matter of law.

C. When a party asserts multiple theories of liability, without any way to prove that one of the theories actually caused an injury, the multiple theories cancel each other out and do not support a finding of negligence.

Appellants cannot operate under a logic that presents multiple theories of liability, and then ask a jury to just pick one theory, without proving that any single theory was a cause of injury. What Appellants are essentially doing is making a claim for *res ipsa loquitur*. Appellants are basically alleging that a railroad crossing accident does not occur in the absence of negligence. It is essentially the same argument that the plaintiff made in Tapia v. McKenzie, 85 N.M. 567, 514 P.2d 618 (Ct. App. 1973) (granting the defendant's motion for directed verdict based on insufficient evidence of negligence). In Tapia, the plaintiff contended that when he hit the cow that ultimately killed the deceased, the cow had come onto the highway through several possible cattle guards or open gates. Unlike the present case, in Tapia there was actual evidence as to what caused the incident, as cow tracks were found that substantiated plaintiff's theory.

However, the Court of Appeals, granting the defendant's motion for a directed verdict held that the cow track evidence supported two possible theories as to how the cow got onto the highway. Id. at 570 and 621. The Court of Appeals then stated, "[e]vidence equally consistent with two hypotheses tends to prove neither." Id.; citing

Stambaugh v. Hayes, 44 N.M. 443, 103 P.2d 640, 645 (1940). "The proof is insufficient to support a finding of negligence on the part of defendant on the theory the cow came through the south gate." Id.; citing Hughes v. Walker, 78 N.M. 63, 65, 428 P.2d 37, 39 (1967); Lovato v. Plateau, 79 N.M. 428, 430, 444 P.2d 613, 615 (Ct. App.1968); see also Buchanan v. Downing, 74 N.M. 423, 426, 394 P.2d 269, 273 (1964)(holding that it is not sufficient to show that the negligence charged might fairly and reasonably have caused the injury, if the circumstances shown indicate an equal probability that it was due to some other cause).

While Appellants did not plead *res ipsa loquitur* in this case, the Tapia decision is cited, along with the cases therein, to establish that Appellants cannot rely on several theories of liability, without any way to prove that any one of the theories actually caused the November 17, 2008 incident. This is especially true in light of the testimony and photographic evidence establish that Rosemary Paez had a clear and unobstructed view of the railroad tracks from at least fifty (50) feet away, if she had chosen to look. There is no evidence to support Appellants' contention that any number, or just one, of the their theories proximately caused the November 17, 2008 incident.

D. Appellants' own experts do not place any causal connection between any act or omission by Socorro County and the November 17, 2008 incident.

Both of Appellants' experts, Mr. Burnham and Mr. Blackwell, focus only on conditions that were under BNSF's control as factors in causing the November 17, 2008 incident. There is no expert testimony that causally relates an action or omission by Socorro County with the November 17, 2008 incident. For example, during the deposition of Appellants' expert, Archie Burnham, Mr. Burnham described multiple factors at the Paizalas crossing that *could* distract a motorist. However, Mr. Burnham also agreed that he could not say whether any one of those factors were actually a cause of the November 17, 2008 incident in this case. [RP 3500-3514, p. 4 ¶ 6, and "Exhibit D" thereto RP 3521-3523]. When Mr. Burnham was asked if he was able to determine if any factor under Socorro County's control caused the November 17, 2008 incident, he responded that he had not isolated any factor that would be directly attributable to Socorro County. Id. Mr. Burnham then went on to state that the lack of maintenance of the Paizalas crossing itself caused the wood planks to deteriorate and railroad spikes to stick up, which caused an unusually rough crossing. Id. But Mr. Burnham also conceded that it is never a local road authority's, i.e. Socorro County's, duty to maintain those aspects within the crossing, such as the planks and spikes. Id. Mr. Burnham makes it clear that he is not aware of any act or

omission that is attributable to Socorro County that caused the November 17, 2008 incident.

Further, during the deposition of Appellants' other expert, Alan Blackwell, Mr. Blackwell testified that he was not providing any opinion about causation whatsoever. [RP 4932-4942, p. 3 and "Exhibit B" thereto (missing from RP but can alternatively be found at RP 2809)]. Mr. Blackwell also conceded that he has no opinions about Socorro County's responsibility to maintain the Paizalas railroad crossing. [RP 3500-3514, p. 4 ¶ 5, and "Exhibit C" thereto RP 3521-3523]. Just like Mr. Burnham, Mr. Blackwell's testimony provides no basis for a jury to determine that Socorro County was a proximate cause of Plaintiffs' injuries.

The evidence of the case is such that the District Court properly ruled that Appellants' cannot prove that any negligence on the part of Socorro County proximately caused Appellants' injuries. In fact, the District Court's holding was as follows:

> I would prefer to go ahead and address the issue of causation also because I'll tell you very honestly it looks to me like that there is, as far as the County is concerned, you're absolutely, sorely, lacking on proof of causation.

February 17, 2012 hearing. 275:13-17. Based on the evidence of the case, it is undisputed that Appellants cannot prove any act or omission by Socorro County

proximately caused the November 17, 2008 incident. Not by expert testimony, and not by the testimony of lay witnesses, which will be discussed in the next section.

E. **There are no fact witnesses that can establish causation.**

Appellants cannot rely upon the testimony of their experts to establish causation against Appellee Socorro County, nor can they rely upon the testimony of lay fact witnesses. Specifically, on June 17, 2011, Socorro County filed its Motion in Limine to Exclude Plaintiffs' Fact Witnesses from Offering Speculation and Opinion Testimony at Trial Regarding Causation. [RP 1420-1439]. In the Motion and the Reply [RP 1536-1542], Appellee Socorro County argued that because the Appellants had admitted that none of their fact witnesses saw the November 17, 2008 incident (See Response p.4 [RP 1473-1487]), they could not ask questions of their fact witnesses at trial regarding the general conditions that they observed at the Paizalas crossing over the years preceding the November 17, 2008 incident, how those conditions were unsafe, and how those conditions contributed to the November 17, 2008 incident. Id.

The thrust of Socorro County's Motion was based on Pavlos v. Albuquerque Nat. Bank, 82 N.M. 759, 487 P.2d 187 (Ct. App. 1971). In Pavlos, Mr. And Mrs. Brint were killed in a motor vehicle accident when their vehicle swerved into the lane of the plaintiff, Pavlos. As part of the defendants' case, defendants attempted to

present the testimony of a witness named Teague, who would testify that in his opinion, it was the wind conditions that caused the Brint vehicle to enter the lane of the Pavlos vehicle. Mr. Teague was not qualified as a wind expert, nor as an expert on the effects of wind on the Brint vehicle. Mr. Teague was asked for his lay opinion. Further, although Mr. Teague did not see the accident, he was asked to testify regarding the windy conditions that generally existed that day, and how they could have caused the accident at issue.

The New Mexico Court of Appeals, upheld the trial court's refusal to admit Mr. Teague's opinion testimony as it related to causation. As a basis for its decision, the Court of Appeals held that in each of the New Mexico cases there were considered as precedent on the issue of permitting a non-expert to elicit opinion testimony, personal observation was a key factor in permitting the opinion. Pavlos, 82 N.M. at 761. The Court held that Mr. Teague's opinion testimony was inadmissible as it related to causation because a proper foundation had not been laid for Mr. Teague's testimony qualifying Mr. Teague as an expert either in wind or the effects of wind on cars. Further, because Mr. Teague had not witnessed the motor vehicle collision, nor had he witnessed any of the possible wind conditions or related factors that he had testified to as existing at the time of the accident, as actually causing the accident, the Court stated that Mr. Teague's opinion was speculative. Pavlos, 82 N.M. at 762.

That Court stated that "[s]uch a speculative opinion was properly excluded." Id.; see also Fitzgerald v. Fitzgerald, 70 N.M. 11, 369 P.2d 398 (1962); Adamson v. Highland Corporation, 80 N.M. 4, 450 P.2d 442 (Ct. App.1969).

The scenario is the same in the present case as that in Pavlos. Although none of Appellants' lay fact witnesses actually observed the November 17, 2008 collision, each witness still sought to offer opinions as to what caused the collision. Those opinions were based upon observations of general conditions, such as the general conditions described by Mr. Teague in the Pavlos case. Just like the Pavlos case, in this case, none of the witnesses actually saw if any one of the general conditions they opine caused the November 17, 2008 accident, actually cause the accident.

The District Court heard Appellee Socorro County's Motion on August 16, 2011 and granted the Motion. [RP 1731]. The Court held that pursuant to NMRA 11-701, Appellants' lay fact witnesses could not testify about what they thought caused the November 17, 2008 incident. Id. Unfortunately, it would appear that although an Order was presented to the Court, it was not entered (apparently through mistake).

However, the Court properly concluded that Appellants cannot have their lay fact witnesses, who are mostly the Paez family members, testify about what they think caused the November 17, 2008 incident. Therefore, in addition to there being no factual evidence of causation, and no expert testimony regarding causation, there is

also no lay witness testimony that establishes causation for the Appellants. The District Court properly concluded that there is no evidence in this case that establishes that any act or omission on the part of Socorro County proximately caused Appellants' injuries.

CONCLUSION

In their Brief in Chief, Appellants attempt to raise multiple issues of fact. However, Appellants have not raised any issues of fact that are material to the determination of proximate cause. Rather, Appellants have raised the same speculation and conjecture issues, that have nothing to do with the November 17, 2008 incident and that were raised in the District Court. The District Court properly found that there is no evidence, and Appellants cannot prove that any act or omission by Socorro County proximately caused Appellants' damages. The evidence of the case is that Rosemary Paez did not look to see the oncoming BNSF train. The evidence of the case, as stated by Appellants' own expert, is that Rosemary Paez had a clear and unobstructed view of the oncoming BNSF train for at least fifty (50) feet before she reached the railroad crossing. All of Appellants' arguments regarding BNSF's breaches of its own standards, or BNSF's breaches of standards within the railroad industry, are immaterial to the determination of proximate cause and they are certainly immaterial to Appellee Socorro County. Facts that are immaterial are appropriately disregarded. Therefore, the District Court appropriately disregarded Appellants' asserted factual issues. The District Court properly granted Appellee Socorro County's Motion for Summary Judgment, as there is no evidence of proximate cause. This Court should uphold that decision.

REQUEST FOR ORAL ARGUMENT

Pursuant to NMRA Rule 12-214, Appellees respectfully request that the Court permits oral argument for this appeal. Appellees respectfully submit that oral arguments would help this Court better understand the record, the proceedings below, as well as the appropriateness of the District Court's order granting summary judgment to Appellee Socorro County.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing Appellee's Answer Brief was served by mail on this 25 day of February 2013, on the following opposing counsel:

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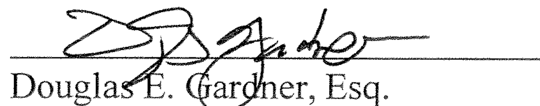

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