IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

ROSEMARY PAEZ and REY PAEZ,

Plaintiffs-Appellants,

vs.

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

Defendants-Appellees.

No. 32,105
Socorro County
D-0725-CV-2009-00083

DEFENDANT-APPELLEE BURLINGTON NORTHERN SANTA FE RAILWAY'S RESPONSE TO PLAINTIFFS-APPELLANTS' BRIEF-IN-CHIEF

ORAL ARGUMENT REQUESTED

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STATEMENT OF COMPLIANCE

Pursuant to Rule 12-213(F) NMRA the body of Defendant-Appellee Burlington Northern Santa Fe Railway's Response to Plaintiffs-Appellants' Brief-in-Chief, inclusive of headings, footnotes, quotations and all other text, consists of 10,869 words, typed in proportionally-spaced, size 14, Times New Roman typeface.

TABLE OF AUTHORITIES

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I. INTRODUCTION.

Judge Sweazea concluded, after consideration of the summary judgment motions and days of hearings, that no reasonable juror could find anything other than this fundamental truth: on the afternoon of January 17, 2008, Mrs. Paez disregarded her legal obligation to comply with the highway-railroad warning signs as she approached a railroad crossing in her rural neighborhood outside of Socorro, and drove slowly into the path of a plainly visible oncoming BNSF train. The crossing was marked on both sides with crossbucks, the highway sign that requires motorists to yield to an oncoming train. Mrs. Paez never looked in the direction of the approaching northbound train, which was sounding its horn for more than 23 seconds prior to the accident. She suffered extensive injuries in the collision. Given these irrefutable facts, Judge Sweazea correctly entered judgment in favor of BNSF. Nothing in the Paez Brief-in-Chief to this Court serves to undermine in any way the correctness of Judge Sweazea's rulings and they should be affirmed.

Mrs. Paez and her husband, Rey Paez ("Paez"), filed this lawsuit asserting a wide variety of allegations including that BNSF caused the accident by failing to provide adequate warning signs, travelling at an excessive speed, failing to provide an "unobstructed view" of the approaching train, and failing to sound the horn. Given the scatter-gun approach taken in the Amended Complaint (R.P.1-5), BNSF

was required to file numerous partial summary judgment motions to address the allegations, and Judge Sweazea entered orders as to all of them. Paez now abandons most of those contentions and advances only three issues in the Brief-in-Chief: whether vegetation on BNSF's right-of-way obstructed Mrs. Paez' view of the approaching train; whether the warnings were inadequate; and, whether the surface of the crossing and the approach to it was properly maintained. Judge Sweazea's summary judgments for BNSF on these issues were correct and should be upheld, for three reasons.

First, as Judge Sweazea decided, no reasonable juror could conclude anything other than that Paez' vegetation claims are defeated by the compelling photographic evidence, including photos taken by Paez within days of the accident. The significance of vegetation on BNSF's right-of-way at the crossing was at the heart of two separate but related issues: did BNSF fail to control vegetation so that it obstructed Mrs. Paez' view of an approaching train? and, if so, did the vegetation obstruct Mrs. Paez' view so that she could not be found negligent *per se* for violating the New Mexico statute, NMSA 1978 §67-7-341,that required her to "stop not more than fifty feet and not less than fifteen feet from the nearest rail of a crossing if ... a train is plainly visible..."? These two aspects of vegetation were the subject of BNSF's First and Fifth Motions for Partial Summary Judgment. When the motions were initially filed and argued, Judge Sweazea found the Paez

evidence "weak," but nonetheless denied the motions based on photos submitted by Paez and an affidavit by him attesting to vegetation obstructing the view as apparently depicted by the photos. R.P.2599-2600, 2875, 716-717, 5311.

BNSF later learned that certain of the photos attached to the Paez Responses had been taken with a wide-angle lens that enlarged the view of nearby vegetation and diminished the view of the tracks, and that additional and critical photos had been taken by Paez but withheld from BNSF in discovery and from the Court at the time of the initial hearings. R.P.2601-2613, 5309-5327. When those revelations were presented to Judge Sweazea on BNSF's motion for reconsideration, he described the Paez Responses to the summary judgment motions as "really misleading." Tr. 82:20-24. Judge Sweazea addressed, in particular, the fact that photos taken by Paez and repeatedly requested by BNSF in requests for production, deposition, and correspondence, had been concealed. R.P.5309-5318.

Months after the First and Fifth Motions had been argued and denied, BNSF obtained from Paez' expert's file an additional 62 Paez photographs that accurately depicted the vegetation on BNSF's right-of-way at the crossing – revealing it to be what was characterized as a "moonscape." R.P.2703. The photos had been taken by Paez within three weeks of the accident, sent to his expert, but concealed from

BNSF and the trial court. R.P.4506-4529, 4980-5053.[1] With the benefit of the previously concealed photos, BNSF renewed its First and Fifth Motions.

At the second hearing, Judge Sweazea decried counsel's failure to produce the remaining photographs and to selectively advance (wide-angle) photographs: "showing the Court, for instance, that [wide-angle] picture, and the Court not having available to it the other pictures is really misleading to the Court, I think." Tr. 82:20-24. The newly discovered photos, coupled with photos taken by BNSF's expert reconstructionist of an approaching train at various distances from the crossing, led Judge Sweazea to conclude that there was, in fact, no material issue that vegetation obstructed Mrs. Paez' view of the approaching train – it did not.[2] Based on that conclusion, Judge Sweazea held that "no reasonable juror" could find that Mrs. Paez had *not* violated the statute requiring her to yield to the plainly visible train, and that the newly-revealed and unaltered photos were "impossible to refute." Tr.168:21-169:9, 287:16-17. Consequently, Judge Sweazea granted BNSF's First and Fifth Motions. R.P.5122-5124.

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[1] BNSF's first written discovery requests propounded August 9, 2009, requested all photographs relating to Plaintiffs' claims and all photographs taken during any inspection/investigation of the accident. BNSF continued to request additional photos during the deposition of Frances Paez and during the fall of 2011, in writing. R.P.2599-2875. Despite the repeated requests, Paez continued to conceal the additional 62 photos. BNSF finally obtained the full set of Paez photos only because BNSF demanded the complete file of Paez' expert Archie Burnham, and they were included in his digital file.

[2] Contrary to the implication in the Brief-in-Chief that Judge Sweazea's site visit was somehow improper, it was agreed to by the parties in advance.

As to the condition of the crossing, Paez presented no evidence that the condition or maintenance of the crossing, including that the crossing supposedly was "humped," had anything to do with the accident. His experts would not and could not provide any opinion that the myriad of alleged deficiencies with the crossing now described in Paez' Brief to this Court had any causal connection to Mrs. Paez' deliberate operation of her vehicle, at slow speed, over the crossing, or to the accident. R.P.2876-2883. Judge Sweazea emphasized that no evidence of proximate cause was ever presented. Tr.298:2-3.

As a further basis for affirmance, Paez' claims about the condition of the crossing are preempted by operation of the Federal Railroad Safety Act's preemption provision. 49 U.S.C. §20106. First, despite the Brief-in-Chief's protestation to the contrary, the evidence establishing federal funding of the warning signs at the crossing was extensive and undisputed. That evidence was that this crossing was part of the same state-wide railroad crossing warnings upgrade program that was considered and recognized as preemptive in the Tenth Circuit and in Supreme Court cases establishing the law of federal preemption under the Federal Railroad Safety Act, 49 U.S.C. §§20101 *et seq.* ("FRSA"). As decades of decisions make clear, claims about the adequacy of those warning signs were preempted by the promulgation of federal regulations covering that subject matter. Those regulations require that a diagnostic team evaluate the totality of

conditions at a crossing – which necessarily encompasses the conditions of the surface of the crossing – in determining the adequacy of warning signs. Thus, claims of alleged maintenance failures or the alleged ultrahazardous condition of the crossing are preempted on that basis. In addition, FRSA regulations expressly address a railroad's duty with respect to maintenance of the surface of the track, ballast, drainage and elevation, and thus complaints about those conditions are preempted as well.

Judge Sweazea had earlier granted BNSF's Second, Third and Fourth Motions for Partial Summary Judgment, that claims of excessive speed and inadequate warning devices were preempted by federal law; that the horn had been sounded properly and at the decibel level prescribed by federal regulation; and, that Paez' claim of the crew's purported failure to keep a proper lookout was unsupported by any evidence. The rulings were based on the undisputed record and were in accordance with the controlling authorities, and the Brief-in-Chief makes no argument that the summary judgments on Paez' speed, horn and train operations claims were incorrectly decided. Those orders are not challenged in the Brief-in-Chief and are final. For all of these reasons, Judge Sweazea's Final Judgment should be affirmed.

II. STATEMENT OF PROCEEDINGS.

After the lawsuit was filed, BNSF served discovery requests on Paez' counsel, including requests for all photographs of the accident scene taken by Paez or his counsel. A handful of photos were produced in response. R.P.4574-4585, 5307-5327. Thereafter, BNSF filed its First Motion for Partial Summary Judgment that Rosemary Paez was negligent and negligent *per se* for failure to yield to a plainly visible oncoming train – a failure prohibited by statute. *See* §66-7-341; R.P.202-277. Paez opposed the motion, asserting that vegetation obscured Mrs. Paez' view of the oncoming train and constituted a justification for her failure to comply with the statute. R.P.453-457, 471-472. In support of that opposition, Paez attached an affidavit from Rey Paez and three photographs that portrayed extensive vegetation at the site. R.P.480-484. The court questioned Paez' counsel whether there were additional photos (particularly from a distance of 50 feet from the rails), and he denied that there were. R.P.4552, 5313. Judge Sweazea then denied the First Motion, finding that while Paez' evidence was "weak," there were issues of material fact as to whether vegetation would have obscured the oncoming train, based on the Paez photos and his affidavit. R.P.716-717; 2875. Similar issues were presented in BNSF's Fifth Motion for Partial Summary Judgment on Paez' visual obstruction claims. Paez opposed the Fifth Motion with the same Rey Paez affidavit, which attached three additional photographs (different from those

attached to the response to BNSF's First Motion) that also apparently portrayed extensive vegetation at the crossing. Again, the trial court found there were issues of material fact as to visibility, based on the six produced Paez photos. R.P.2600.

In November 2011, **after** the hearings on the First and Fifth Motions, and after fact discovery had concluded, BNSF obtained, from the file of Paez' expert Archie Burnham – but not from counsel – an additional 62 photographs taken by members of the Paez family or Paez' counsel in December 2008 (within the month following the accident). R.P. 2601-2613. The electronic "EXIF" data established that these 62 Paez photographs were from the same batch of photos from which those attached to the original Paez Responses were taken. R.P.2613. The photographs taken that day are now described in Paez' Brief-in-Chief as "the best evidence" of the condition of the vegetation at the crossing on the day after the accident. As found by Judge Sweazea and as set out in detail in the Statement of Facts herein, these previously concealed photos were "irrefutable evidence" that confirmed that there was no genuine issue of material fact that Mrs. Paez' view of the oncoming train was unobstructed.

After receiving the entire set of Paez photos from Burnham, BNSF's expert Brian Charles analyzed them and determined that some of the photos attached to Rey Paez' affidavits in opposition to BNSF's First and Fifth Motions had been taken with a wide angle lens. R.P.2653-2658. This had the effect of focusing

primarily on the brush on the ditch bank (beyond BNSF's right-of-way) and minimizing the view of the track. The photos were misleading and they did not depict a normal driver's eye view. *Id.* Critically, however, certain of the 62 photos that had been withheld by Paez proved that Mrs. Paez' view was unobstructed on her approach to the crossing – "impossible to refute," as Judge Sweazea found. R.P.2604-2614.

Armed with this new evidence, BNSF then filed its Sixth Motion for Partial Summary Judgment, or in the alternative, BNSF's renewed Fifth Motion on the visual obstruction claims and renewed First Motion that Rosemary Paez was negligent and negligent *per se*. R.P.2599-2875. In considering this new evidence, Judge Sweazea expressed his displeasure with the fact that Paez' counsel had withheld the photos:

> THE COURT: Okay. So what about, you have these 68 pictures, and six of them are produced to opposing counsel in response to [the] Request for Production, but 62 of them are not.
> MR. CHAVEZ: Yes, we did eventually produce these.
> THE COURT: Obviously yes. Or Mr. Burnham did.
>
> . . .
>
> [O]bviously you, as counsel for the Plaintiffs, can pick and choose which pictures you use to support your position in your pleadings, but that doesn't mean you get to pick and choose which ones you turn over to counsel for opposing parties so that they can defend their case....[E]ven if you wouldn't have given those pictures to the Court to look at, that go precisely to the questions that I raised during the [earlier, September 28, 2010] hearing [on BNSF's First and Fifth Motions] and the things that I was concerned with, I'll bet you [BNSF's counsel] would have pointed them out to the Court, had he had them....Showing the Court, for instance, that picture, and the

> Court not having available to it the other pictures, is really misleading to the Court, I think.

Tr. 81:4-82:24. Despite repeated questioning by Judge Sweazea, Paez' counsel was unable to provide the Court with a cogent excuse for withholding the photographs.[3]

Following argument from the parties, Judge Sweazea found that "the photographs are impossible to refute," and based on the photographic evidence, "no reasonable jury" could find that Mrs. Paez had not violated the statute that required her to stop within 50 to 15 feet from the track, in the presence of a plainly visible oncoming train. Tr. 287:11-17, 168:21-169:19. The Court then granted BNSF's renewed First and Fifth Motions. R.P.5122-5124.

On October 18, 2010, Judge Sweazea granted BNSF's Second Motion for Partial Summary Judgment, dismissing claims that the train was travelling at excessive speed or that the BNSF train crew was negligent in failing to slow or brake and failing keep a lookout. R.P.711-713. On March 2, 2011, Judge Sweazea granted BNSF's Fourth Motion for Partial Summary Judgment, dismissing claims that the horn was not properly sounded. R.P.786. Although Paez states that these Orders are appealed (*see* Docketing Statement 3, Brief-in-Chief 2), there is no

[3] At the end of the two-day hearing, Judge Sweazea instructed BNSF to file its request for sanctions on the concealed photographs after final judgment was entered. "I want to know what you're asking for and see what Mr. Chavez' explanation is for failing to turn over all of those photographs." Tr. 299:16-300:1.

argument in his Brief-in-Chief that these partial summary judgments in BNSF's favor were wrongly decided, and as a matter of law, Paez has abandoned any appeal of those Orders. *See Cain v. Champion Window Co. of Albuquerque, LLC,* 2007-NMCA-085, ¶31, 142 N.M. 209 (holding that the plaintiffs abandoned their arguments when they failed to include them in their brief-in-chief)*; Bauer v. College of Santa Fe,* 2003-NMCA-121, ¶17, 134 N.M. 439, 78 P.3d 76 (because appellant did not argue on appeal that summary judgment was improperly granted, those claims were abandoned).

BNSF's Third Motion for Partial Summary Judgment, that Paez' inadequate warning device claims were preempted by federal law, was supported by affidavits and deposition testimony establishing that the warning devices (crossbucks) at Paizalas Road crossing had been installed with federal funds. Pursuant to *Norfolk Southern Railway Co. v. Shanklin*, 529 U.S. 344, 351 (2000) and *Largo v. Atchison, Topeka & Santa Fe Railway Co.*, 2002-NMCA-21, ¶9, 131 N.M. 621, 41 P.3d 347, once federal funding has been established, federal preemption bars any claim based on allegedly inadequate warning devices. The Court entered its Order granting the Third Motion on March 2, 2011. R.P.786. That Order had the further effect of barring any claims based on conditions at the allegedly ultrahazardous crossing as identified by Paez' experts Burnham and Alan Blackwell (*i.e.*, the

crossing was "humped" and "uneven;" ballast was fouled, drainage inadequate, etc.) R.P.1193-1197.

BNSF filed its Seventh Motion for Partial Summary Judgment, for dismissal of claims based on the condition and maintenance of the crossing, on the grounds of lack of causation and preemption by federal law. R.P.2876-2957. In addition, BNSF argued that it had no responsibility for maintaining the approach to the Paizalas Road crossing beyond two feet from the rails, as a matter of law. That responsibility belonged to the County. The Seventh Motion was argued (as were the First, Fifth and Sixth Motions) in the two-day hearing on February 16 and 17, 2011. Judge Sweazea ruled that "Plaintiffs haven't proven any proximate cause on any of their claims," and further ruled, citing *Petre v. Norfolk Southern Railway Co.*, 458 F.Supp.2d 518 (N.D.Ohio 2007) and other authorities, that the Seventh Motion should be granted. Tr.273:16-19, 298:2-3. At the conclusion of the hearing, the Court noted that there were no outstanding claims and directed the parties to prepare a Final Judgment. Tr. 301:12-17. The Court instructed BNSF to file its request for sanctions based on the withheld Paez photographs after entry of Final Judgment. Tr. 299:16-300:1. That Motion (R.P.5289-5447) remains pending in the trial court until this appeal is resolved.

III. FACTS MATERIALTO DECIDING THE ISSUES ON APPEAL.

None of the following facts were disputed. Paez presented no competent evidence that controverted these facts, although he argued to the trial court, as he does here, about their significance.

On November 17, 2008, at approximately 12:30 p.m., an automobile entered the path of an oncoming BNSF train at the Paizalas Road crossing in Socorro County, New Mexico. Mrs. Paez, the 78-year-old driver of the car, was injured. Mrs. Paez lived about 250 yards from the Paizalas crossing and had driven over the crossing on a daily basis for about 20 years. R.P.204-205.

At the time of the collision, railroad signs called "crossbucks" were located on both sides of the Paizalas Road crossing, warning approaching motorists of the railroad crossing and to yield to oncoming trains. The train tracks run in a north-south direction through rural Socorro County near Los Abeytas. Paizalas Road crosses the tracks east-west. R.P.204-205. The train involved in the accident consisted of two bright red and yellow locomotives, standing more than 18 feet tall, pulling 121 cars for a total train length of 7,212 feet and weight in excess of 3,754 tons. The lead locomotive's three headlights were lighted to attract the attention of and warn motorists and others of the train's approach. R.P.205.

For at least 23 seconds prior to the collision, Engineer Ortega repeatedly sounded the locomotive's horn and bell. The BNSF crew watched Mrs. Paez

slowly approach the crossing. The crew believed that she was going to yield to the oncoming train. R.P.205-206. Instead, she continued her course and drove forward into the path of the oncoming train and was struck. New Mexico State Police cited "driver inattention" as the cause of the accident. R.P.206. Mrs. Paez remembered nothing about the accident, including her actions as the driver of the car as it approached and entered the path of the oncoming train. R.P.206.[4]

As to the condition of the crossing, the record is devoid of any evidence that the factors alleged by Paez caused or contributed to the accident. Tr. 288:4-7. BNSF's train operations and railroad engineering expert Gary Wolf opined that the condition of crossing surface had nothing to do with the accident. R.P.2882-2883. Paez, through his experts, admitted the same. Specifically, Blackwell testified that he was not providing opinions that the condition of the Paizalas Road crossing distracted Mrs. Paez, or that the condition of the plank surface, the protruding spikes, the alleged lack of drainage, or the roadway approach had any connection to the accident. Burnham similarly declined to provide any causation opinion. R.P.2881.

With respect to preemption of claims of inadequate warning signs, it was uncontroverted that federal funds participated in the erection of warning signs at

[4] There is no admissible evidence in the record about the extent of Mrs. Paez' injuries and no evidence causally linking any of her injuries (or her death, which occurred after judgment in this case) to the accident. R.P.3217-3271.

the Paizalas crossing.[5] R.P.341-354. In 1982-1983, the New Mexico State Highway Commission ("NMDOT") undertook a program to install reflectorized crossbucks at every public crossing in New Mexico that lacked the requisite type or number of crossbucks. The program was state-wide and included most public crossings in New Mexico. R.P.350-354, Affidavit of George White, former NMDOT Railroad and Utilities Supervisor. As part of the federally-funded state-wide program, NMDOT and BNSF's predecessor, the Atchison, Topeka & Santa Fe, entered into a State Project Agreement for the installation of additional reflectorized crossbucks at certain public crossings in New Mexico. *Id.*

As a prerequisite for commencement of the work on the project, the Federal Highway Administration ("FHWA") approved the project and authorized the use of over $85,000 of federal funds for the construction and installation of crossbucks. *Id.*; R.P.399 (authenticating exhibits to the White Affidavit). Paizalas Road crossing (US DOT # 019504H) was listed on the State Project Agreement as one of the public crossings needing an additional reflectorized crossbuck. R.P.344, 363, Exhibit A to the State Project Agreement listing US DOT crossing # 019504H on page 5 of 18. J-H Supply Company ("J-H") was the successful bidder on the crossbuck project. R.P.350-354.

[5] Paez did not attempt to dispute any of these facts. Instead, he moved to strike the White Affidavit. R.P.503-516. On appeal, he argues that there was *no* evidence of federal funding of the warning signs at the crossing, which ignores the record.

Thereafter, in order to complete the federal project, J-H installed additional reflectorized crossbucks at those crossings listed, including the Paizalas Road crossing. *Id.* Once the work on the State Project Agreement was completed, J-H submitted its bill to the State of New Mexico and the State of New Mexico paid J-H. Shortly after the work was completed, the FHWA reimbursed the State Highway Commission under the terms of the previously approved Federal Aid Highway Construction Program and Project Agreements between the federal and New Mexico governments. That is, the FHWA paid for 90 percent of the total cost of the project and the NMDOT paid for 10 percent. R.P.350-354. At the time of the November 17, 2008 collision, the Paizalas Road crossing identified as US DOT # 019504H was protected with passive traffic warning devices that included reflectorized railroad crossbucks. R.P.345.

On the issue of vegetation control, BNSF presented extensive evidence of its vegetation clearing program. BNSF's Engineering Instruction and its contract with its vegetation control contractor, Right-A-Way, Inc. ("RAW") required that herbicide be applied at all crossings in a specified pattern: 50 feet on either side of the crossing, tapering evenly to 12 feet on either side of the centerline of the tracks at a distance of 500 feet. R.P.2605-2609. RAW representatives testified, and no evidence controverted, that application of herbicide within the area specified in the BNSF-RAW contract comported with the industry standard for vegetation control

at railroad crossings. R.P.2608. The evidence was undisputed that RAW correctly applied vegetation control herbicide by high rail and off-road truck applicators at the Paizalas Road crossing both in January 2008 (to control pre-emergent vegetation) and in August 2008 (to control post-emergent vegetation), in accordance with the BNSF-RAW contract. R.P.2608-2609. Judge Sweazea described that these programs undisputedly were effective: "The photos do not appear to me to show any vegetation in that sight triangle that's of any consequence at all." Tr. 108:8-10. The photographs in the record on which Judge Sweazea relied include:

- R.P.2647, 2651-2652, two of the withheld Paez photos, showing an unobstructed view to the south down the tracks, at positions 50 and 20 feet east of the crossing;
- R.P.2719 (RAW describing the right-of-way looking south from the crossing as "void of any vegetation whatsoever") and R.P.2799-1801 (photos of BNSF's right-of-way);
- R.P.2707-2709 (photo of crossing taken on the day of the accident, 50 feet from the crossing looking south);
- R.P.2702-2703 (BNSF's Director of Public Projects Lyn Hartley described the right-of-way as looking "like a moonscape").

As Judge Sweazea asked Paez' counsel during the two-day hearing, "What would you have mowed there, Mr. Chavez? It looks like dirt to me, in the pictures." Tr.104:17-18.

Consistent with the facts established by the evidence of the concealed Paez photos, Paez' expert Burnham admitted that the oncoming train would have been "open and obvious and apparent to" Mrs. Paez when she was 50 feet from the crossing; that the train would have been plainly visible, had she looked; and that she should have stopped her vehicle before she reached the crossing. R.P.2611-2612. Burnham also admitted that when Mrs. Paez was 35 feet from the crossing, she had an unobstructed sight line for **1700 feet** down the tracks looking towards the approaching BNSF train. R.P.2611. Judge Sweazea cited to these admissions as one of the grounds for his ruling, and disregarded Burnham's attempt to retreat from his admissions in his deposition. As Judge Sweazea concluded, "the train would have been clearly visible to her, had she looked. I don't believe 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, and Mr. Paez says that he can't see it." Tr.169:11-19.

BNSF's expert Brian Charles performed an extensive reconstruction of the accident, including performing a visibility study (a "Scene Test"), taking photographs, as he drove his vehicle west to the crossing, of a BNSF train approaching the crossing from the south, as on the date of the accident. R.P.2612-

2613, 2653-2658.[6] All of the photographs were taken with a 50 millimeter exposure, which is equivalent to a normal eye view, and were taken from the standard motorist viewpoint height of 3'9." R.P.2612, 2653-2658. Taken in sequence from #28 to #34, the Scene Test photos show a BNSF train approaching when the vehicle is approximately 79 feet east of the crossing (#28), becoming increasingly more obvious as the vehicle and train move toward the crossing, with the vehicle at 50 feet (#32); and becoming unavoidably obvious as the vehicle moves to 15 feet from the crossing (#34). R.P.2670-2677. As Judge Sweazea found, when the withheld Paez photos (R.P.2651-2652) are compared with the Charles photos of an approaching train, the photographic evidence is "impossible to refute," and establishes that the train would have been plainly apparent to Mrs. Paez, had she looked. Tr. 287:5-17.

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[6] As part of his expert reconstructionist services in this case, Mr. Charles analyzed the six photographs Plaintiffs attached to the Paez Affidavit attached to Plaintiffs' Response to BNSF's Fifth Motion on vegetation obstruction claims. Using simple digital camera computer software that is generally available, Mr. Charles reviewed the metadata (called "EXIF") that is generated with each photograph, and concluded that the six Paez photographs were taken with a wide angle setting (about 35 millimeter; normal eye view is 50-55 millimeter). The wide angle setting of those Paez photographs distorted the normal eye view, producing an image which emphasized grass and brush in the foreground (80-100 feet east of the crossing and well off of BNSF's right-of-way) and minimized items in the background, such as the rail bed. R.P.2658. Paez submitted no evidence or testimony to controvert that the photos were taken with a wide angle setting, and, remarkably, cites to those same misleading photos as "evidence" that vegetation obstructed Mrs. Paez' view. Brief-in-Chief 29.

IV. ARGUMENT: THE FINAL JUDGMENT SHOULD BE AFFIRMED.

A. THE PHOTOGRAPHIC EVIDENCE MANDATED SUMMARY JUDGMENT ON PAEZ' VISUAL OBSTRUCTION CLAIMS.

Under Rule 1-056(C) NMRA, summary judgment is proper when the motion papers, affidavits, and other evidence submitted by the parties show that no genuine issue exists as to any material fact, and that the moving party is entitled to judgment as a matter of law. In New Mexico, summary judgment is proper when the moving party has met its initial burden of establishing a *prima facie* case for summary judgment and the opposing party has not demonstrated the existence of specific evidentiary facts which would require trial on the merits. *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶10, 148 N.M. 713, 242 P.3d 280 (reversing Court of Appeals and reinstating summary judgment granted by trial court). Judge Sweazea properly granted summary judgment on Paez' vegetation claims, notwithstanding the purportedly conflicting testimony of Mr. Paez that the view of an approaching train was obstructed by vegetation, because the "irrefutable" photographic evidence conclusively proved the view was not obstructed. *See Perez v. City of Albuquerque*, 2012-NMCA-040, ¶9, 276 P.3d 973.

Judge Sweazea initially denied BNSF's First and Fifth Motions, that no vegetation obstructed Mrs. Paez' view of the plainly visible approaching train, based in part on the misleading photos attached to Paez' Responses. However,

once BNSF was able to present the previously concealed photos, Judge Sweazea granted the motions based on the "irrefutable evidence" that no vegetation obstructed Mrs. Paez' view. Paez now argues that the trial court erred in relying upon those photographs because Mr. Paez testified that a train could not be seen 50 feet from the crossing because of the vegetation. Brief-in-Chief 29.

Under New Mexico law, Judge Sweazea was not required to accord weight to that Mr. Paez' testimony when it was blatantly at odds with the extensive and irrefutable photographic evidence. The rule is that "when opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Perez*, 2012-NMCA-040, ¶9, citing *Scott v. Harris*, 550 U.S. 372, 375-76, 380 (2007) (reversing denial of summary judgment for defendant because videotape of the events "quite clearly contradict[ed] ... the story told by" the plaintiff).

Judge Sweazea was faced with the same situation as the Court in *Scott*, and rejected the same argument Paez makes to this Court:

> MR. CHAVEZ: Ray Paez, in his deposition, said that you can't see too far south down the tracks from where the crossbucks are. 50 feet behind the crossbucks, he said you could not see a train at all.
> THE COURT: So, let me ask you with respect to his testimony, that testimony right there. That doesn't square with the pictures, so do I have to take that testimony at face value, even though I don't think it's something that any jury would rely on? **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. Where he says you can't, really? I have to accept that testimony?

Tr. 125:2-15 (emphasis added). The answer to those questions, according to the controlling cases of *Perez* and *Scott*, is "no." Indeed, Judge Sweazea concluded that Mr. Paez' testimony on visibility at the crossing was speculative, utterly contradicted by the photographs, and probably inadmissible. Tr.285:15-286:17.

Case law from other jurisdictions arising out of crossing collisions confirms the propriety of Judge Sweazea's analysis. *See Brown v. Illinois Cent. R.Co.*, --- F.3d---, 2013 WL 322213 *4 (5th Cir.) ("[W]here photographs and undisputed measurements establish that a driver approaching the crossing would have had an unobstructed view of an oncoming train, the [Mississippi Supreme] Court has instructed trial courts to grant judgment as a matter of law"); *Maret v. CSX Transportation, Inc.*, 721 N.E.2d 452,456 (Ohio App.1998) (affirming summary judgment for railroad on basis of photographs showing unobstructed view; holding that contrary testimony, that brush obstructed the view of the approaching train was "so inherently incredible that it is entitled to no probative value"); *National Railroad Passenger Corp. v. H & P Inc.*, 949 F.Supp.1556, 1564 (M.D.Ala.1996) (granting summary judgment to railroad and holding that plaintiff's statement that he did not see the approaching train "is not sufficient, given the photographic evidence to the contrary, to create a conflict in the evidence").

Judge Sweazea's ruling accorded with the standards for granting summary judgment in New Mexico: Mr. Paez' testimony that at 50 feet from the crossing, a motorists could not see a train approaching on the tracks, "was [not] something that any reasonable jury would even consider as factually accurate, looking at those photographs." Tr.127:1-5. Summary judgment on the vegetation claims was proper.

B. THE TRIAL COURT CORRECTLY RULED THAT MRS. PAEZ WAS NEGLIGENT AND NEGLIGENT *PER SE*.

Summary judgment on BNSF's First Motion, that Mrs. Paez was negligent and negligent *per se*, was proper and should be affirmed. The Brief-in-Chief 33 argues the trial court erred because it found that Mrs. Paez was "the *sole* cause" of the accident, which is incorrect. BNSF's First Motion expressly did not request a ruling on causation, but instead was limited to seeking a ruling whether Mrs. Paez breached her statutory duties as a matter of law. R.P.202.

New Mexico law imposed upon Mrs. Paez the ongoing duties to look for an oncoming train, and to stop and yield to a plainly visible train in close proximity as she approached the crossing within 15 to 50 feet from the tracks. NMSA 1978, §66-7-341 provides:

> A. A person driving a vehicle approaching a railroad-highway grade crossing shall:
>
> * * *
>
> (2) Stop not more than fifty feet and not less than fifteen feet from the nearest rail of a crossing if:

* * *

(b) a train is plainly visible and approaching the crossing within hazardous proximity to the crossing;

* * *

(3) proceed through the railroad-highway grade crossing only it if is safe to completely pass through the entire railroad-highway grade crossing without stopping.

§66-7-341 (excerpted). It was undisputed below that Mrs. Paez' failure to stop and yield to the plainly oncoming train met all elements of negligence *per se* under New Mexico law: (1) a statute proscribes certain actions or defines a standard of conduct, either explicitly or implicitly; (2) Plaintiff violated the statute; (3) Plaintiff is in the class of persons sought to be protected by the statute; and (4) Plaintiff's injuries are generally of the type of injuries that the legislature, through the statute, sought to prevent. *Apodaca v. AAA Gas Co.*, 2003-NMCA-085, ¶¶43-50, 134 N.M. 77, 73 P.3d 215 (upholding defendant's requested instruction on plaintiff's negligence *per se*); UJI 13-1501 NMRA; *see Hamilton v. Allen*, 852 P.2d 697, 699-700 (Okla. 1993) (holding plaintiff negligent *per se* for violation of state statute requiring motorist to yield to oncoming train because Plaintiff was in the class intended to be protected, and his injuries sustained in the crossing collision were the type intended to be prevented by the statute).

The statute prohibits certain clearly proscribed conduct, thus meeting the first test. Mrs. Paez undisputedly violated the state statute in three separate ways, meeting the second test. She failed "to obey traffic control devices at the

crossing," namely the railroad crossbucks, which required her to yield to an oncoming train at the crossing [§66-7-341(A)(1)], and she failed to "stop not more than fifty feet and not less than fifteen feet from the nearest rail of the crossing" when the "train [was] plainly visible and approaching the crossing within hazardous proximity to the crossing." In addition, Mrs. Paez attempted to "proceed through the ... grade crossing" when it was not "safe to completely pass through the crossing...." §66-7-341(A)(3).

As to the third element, the statute was enacted for the benefit of motorists and Mrs. Paez was a motorist. *Kelly v. Montoya*, 81 N.M. 591, 594, 470 P.2d 563, 566 (Ct.App.1970) ("it seems obvious to us that a traffic statute such as [one requiring a vehicle to stop within 50 and less than 15 feet of the tracks prior to crossing the tracks] was enacted for the benefit of persons using our highways"); *see Hamilton*, 852 P.2d at 699-700 (plaintiff motorist who was found to be negligent *per se* was in the class of persons intended to be protected by the statute requiring a driver to yield to an oncoming train).

Finally, the fourth element of negligence *per se* is satisfied because it is foreseeable as a matter of law that violations of motor vehicle laws requiring a driver to yield to an oncoming train may cause accidents with injuries, and therefore Mrs. Paez' injuries caused by her violation of such laws are those that the state legislature sought to prevent. *Kelly*, 81 N.M. at 594, 470 P.2d at 566;

Apodaca, 2003-NMCA-085, ¶¶4, 46 (plaintiff's injuries in propane explosion, caused in part by plaintiff's violation of the fire code, were the type of injuries that the City sought to prevent). Because the undisputed record established all of the elements, BNSF was entitled to partial summary judgment establishing that Mrs. Paez was negligent *per se* for violating §66-7-341.

In addition, New Mexico common law imposes an ongoing duty upon Mrs. Paez, as she approached the crossing, to look for and react to the presence of an oncoming train. *See Henderson v. Nat'l R.R. Passenger Corp.*, 412 Fed.Appx. 74, 2011 WL 14458, *8 (10th Cir.) (quoting *Chicago, Rock Island & Pac. R.R. Co. v. McFarlin*, 336 F.2d 1, 2 (10th Cir. 1964) ("New Mexico law . . . requires a traveler approaching an open, unguarded railroad crossing . . . to stop, look and listen for trains using the tracks, and the act of looking and listening must be performed in such [a] manner as to make it reasonably effective.").

Paez' own expert Burnham readily admitted that Mrs. Paez had an ongoing duty to search for and detect the presence of the oncoming BNSF train, *whether or not* her view of the train was obstructed by vegetation. R.P.2611-2612. The undisputed photographic evidence is that the northbound BNSF train would have been plainly visible and in close proximity to Mrs. Paez as she approached the crossing from the east, at distances 79 up to 15 feet from the tracks. R.P.2671-2677. This evidence and the critical admissions of Burnham confirm the propriety

of summary judgment that Mrs. Paez was negligent in failing to yield to an oncoming train.

C. SUMMARY JUDGMENT ON CLAIMS RELATING TO THE CONDITION OF THE CROSSING SHOULD BE AFFIRMED. PAEZ PRESENTED NO EVIDENCE OF CAUSATION AND THE CLAIMS ARE PREEMPTED BY FEDERAL LAW.

Paez, through his experts Blackwell and Burnham, presented no evidence that any of the allegedly deficient conditions and maintenance at the crossing had any causal connection to the accident. As Judge Sweazea ruled at the conclusion of the February 16-17, 2011 hearing, "Plaintiffs haven't proven any proximate cause on any of their claims." Tr. 298:2-3.

Federal railroad safety regulations promulgated pursuant to FRSA specifically address the conditions (*i.e.*, improper ballast, drainage, elevation) about which Paez complains. Judge Sweazea properly ruled that such claims are expressly preempted. Judge Sweazea also ruled that claims about the condition of the crossing are necessarily preempted by his earlier ruling that warning devices claims were preempted. Tr. 272:23-274:25. The evidence was undisputed that federal funds participated in the installation of the crossbucks at the crossing, and therefore, federal regulations promulgated under FRSA preempted any claims that warning signals at the crossing were inadequate. *See Shanklin*, 529 U.S. at 353-354. That ruling necessarily encompasses claims about the surface of the crossing, because when the federally mandated diagnostic team determined the adequacy of

warning devices, that determination necessarily included an evaluation of conditions at the crossing, including conditions of the crossing surface. Thus, Paez' claims that the crossing was unsafe or extrahazardous are preempted.

Paez argues that preemption does not apply because "BNSF presented no evidence" that federal funds were spent on warning devices at the crossing, which simply ignores the undisputed and extensive record of federal funding. He then argues that no federal funds were spent on the *crossing* (as opposed to the crossbucks), which is irrelevant. Preemption attaches when regulations promulgated under FRSA address and cover the subject matter of Paez' claims, and as a matter of law, the pertinent regulations cover the subject matter of his claims. Paez then argues that the crossing is "a local hazard," which again misses the point. The existence of a "local hazard" constitutes an exception to *speed* preemption, and is utterly inapplicable here. Summary judgment on Paez' claims concerning the condition and maintenance of the crossing on preemption grounds was proper and should be affirmed.

1. Plaintiffs' Purported Claims that the Condition of the Paizalas Road Crossing Had Deteriorated and Was Unsafe Fail for Lack of Proof of Causation.

The record is devoid of proof that the alleged deteriorated and unsafe condition of the Paizalas Road crossing, whether the ballast, inadequate drainage, the immediate surface approach, the planks or the spikes, caused the accident.

Plaintiffs' expert Alan Blackwell readily admitted he could not offer an opinion that any of the allegedly deficient conditions at the crossing had anything to do with the accident. R.P.2881. BNSF's train operations and accident reconstructionist Gary Wolf agreed, testifying that the condition of the crossing surface, ballast, drainage, planks, spikes and dimension of the crossing, had nothing to do with accident. R.P.2882-2882. Judge Sweazea also agreed, stating to Paez' counsel, "You don't have any testimony that I can see to tie these conditions to anything." Tr. 256:13-14. Therefore, any purported claims of negligence against BNSF that are based on the condition of the crossing were properly dismissed for lack of proof of causation.

An act or omission is a cause of an injury if it contributes to bringing about the injury, and if the injury would not have occurred without it. UJI 13-305 NMRA. To be a "cause," the act or omission "must be reasonably connected as a significant link to the [injury]." *Id.* Causation is an issue of law when no facts are presented that would allow a reasonable jury to find causation. *Johnstone v. City of Albuquerque*, 2006-NMCA-119, ¶ 6, 140 N.M. 596, 145 P.3d 76; *Ettenson v. Burke*, 2001-NMCA-003, ¶55, 130 N.M. 67, 17 P.3d 440 (affirming summary judgment for failure to establish causation).

Courts routinely have dismissed, for lack of causation, a plaintiff's claim that the condition of a railroad crossing caused the plaintiff's collision with a train.

In *Illinois Central Gulf Railroad Co. v. Travis*, ---- So.3d ----, 2012 WL 5951413, **16, 17 (unpublished), the Mississippi Supreme Court reversed the trial court's denial of JNOV, holding that plaintiff's "allegations regarding the overall condition of the crossing are without merit," and that no evidence supported the jury verdict. In *Wilkerson v. Kansas City So. Ry.*, 772 So.2d 268 (La.Ct.ApP.2001), the court reversed a jury verdict and held that the driver's inattention, not the railroad, was the legal cause of the collision with the train at a crossing with passive warning devices. "[N]otwithstanding the complaints about the condition of the crossing itself...," the court rejected the plaintiffs' argument the crossing was a "dangerous trap" and held the plaintiffs failed to prove the railroad was a cause in fact of the harm. *Id.* at 279-80.

In *Chicago, Rock Island & Pac. Rd. Co. v. Hugh Breeding, Inc.*, 247 F.2d 217 (10th Cir. 1957), plaintiff's truck became stuck while going across the crossing, in blizzard conditions, and was struck by a train. Plaintiff claimed the crossing was negligently maintained and defective. The Tenth Circuit disagreed, finding "[t]he evidence wholly failed to establish that the condition of the planking on the crossing caused the truck to stall or otherwise contributed to the accident." *Id.* at 219-222; *see also Seaboard Air Line Rd. Co. v. Crowder*, 62 S.E.2d 227, 230 (Va.1950) (reversing judgment for plaintiff and finding elevated condition of crossing could not be cause of accident where there was no evidence decedent's

car stalled or stopped because of condition).

Paez had the burden of proving the condition of the Paizalas Road crossing caused the accident. There is no evidence of that in this case. To the contrary, Paez' expert witnesses conceded they cannot testify or give an opinion that the purported deteriorated condition of the ballast, inadequate drainage, and other crossing conditions had anything to do with the accident. R.P.2881-2882. Summary judgment for BNSF on that basis was warranted.

2. Paez' Claims Regarding the Condition of the Crossing are Preempted.

a. Federal regulations covering the subject matter of Paez' crossing claims preempt those claims. The purpose of the express preemption provision in FRSA is to promote safety in every area of railroad operations.

"The purpose of the preemption doctrine is to allow Congress to promulgate a uniform federal policy without states frustrating it through either legislation or judicial inteR.P.retation." *Largo,* 2002-NMCA-021, ¶6. FRSA contains an express preemption clause stating that "[l]aws, regulations, and orders related to railroad safety . . . shall be nationally uniform to the extent practicable." 49 U.S.C. §20106(a)(1). FRSA's purpose "is to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. §20101. State common law negligence claims, as well as statutory duties imposed on railroads, fall within the scope of the preemption provision of the FRSA. *Largo,*

2002-NMCA-021, ¶ 6; *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). A preemption analysis does not "call for an inquiry into the Secretary's purposes [Secretary of Transportation, acting through the Federal Railway Administration], but instead directs the courts to determine whether regulations have been adopted that in fact cover the subject matter of [plaintiff's claims]." *Easterwood*, 507 U.S. at 675.

Paez argues generally that there is a presumption against preemption. Brief-in-Chief 20. Any such presumption, however, "is not triggered . . . where there has been a history of significant federal presence," as there has been with federal regulation of railroads. *U.S. v. Locke*, 529 U.S. 89, 108 (2000). The task of determining Congress' pre-emptive intent focuses on the plain wording of the preemption provision. *Sprietsma v. Mercury Marine, a Div. of Brunswick CoR.P..*, 537 U.S. 51, 62-63 (2002). In FRSA, Congress expressly preempted state law, *see Easterwood*, 507 U.S. at 664, in a broadly worded preemption provision. In the case of an expressly worded provision such as FRSA, any "presumpation against preemption" is defeated as a matter of law.

Federal regulations set forth in 49 C.F.R. §§213, *et seq.*, prescribe "minimum safety requirements for railroad track that is part of the general railroad system of transportation." 49 C.F.R. §213.1(a). Certain of these regulations address the same issues raised by Paez' experts about the allegedly unsafe

condition of the Paizalas Road crossing.

Specifically, federal regulations prescribe requirements for roadbed and areas immediately adjacent to roadbeds, including drainage requirements. *See* 49 C.F.R. §213.31. 49 C.F.R. §213.33 expressly requires that "[e]ach drainage or other water carrying facility under or immediately adjacent to the roadbed shall be maintained and kept free of obstruction, to accommodate expected water flow for the area concerned." Regulations also prescribe requirements for the surface of track and the elevation of rails, including regulations requiring track owners to maintain the surface of the track within certain specific elevation limits. *See* 49 C.F.R. §§213.51, 213.63, 213.57, 213.59.

Federal regulations also address track structure and prescribe minimum requirements for ballast, crossties, track assembly fittings, and the physical condition of rails. *See* 49 C.F.R. §213.101. For example, 49 C.F.R. §213.103 mandates that all track shall be supported by ballast material that will, among other things, "[p]rovide adequate drainage for the track," and maintain proper track crosslevel, surface, and "alinement."[7] Finally, federal regulations mandate how tracks are inspected by railroads, how many tracks can be inspected at one time, how often tracks are inspected, and who is qualified to conduct the inspection. *See* 49 C.F.R. §§213.7, 213.231 and 213.233. Because Paez' claims about the

[7] The regulation uses the word "alinement."

condition are subsumed by federal regulations addressing the same matters, they are preempted.

b. Courts uniformly hold that claims relating to the condition of the surface of the track, ballast, drainage, elevation and similar conditions as well as inspection claims are preempted under the FRSA.

Claims relating to purportedly unsafe conditions at a crossing, such as those asserted here have been dismissed as preempted by both federal and state courts. In *Rooney v. City of Philadelphia*, 623 F. Supp.2d 644, 664-666 (E.D. Pa. 2009), plaintiffs alleged runoff from negligently constructed track and roadbed caused flooding and property damage. The Pennsylvania federal district court analyzed FRA regulations governing railroad track roadbed, track geometry and track structure (including 49 C.F.R. §§213.59, 213.63, 213.33, 213.103) and found that the regulations expressly preempted tort claims covering the same subject: "[u]nder 49 C.F.R. §213.2, regulations relating to 'Track Safety Standards' are given preemptive effect by essentially mirroring 49 U.S.C. §20106." 623 F.Supp.2d at 664.

In *Black v. Baltimore & Ohio Rd. Co.*, 398 N.E.2d 1361 (Ind.Ct.ApP.1980), the plaintiff union brought an action against the railroad to correct allegedly hazardous conditions almost identical to those asserted by Paez' experts, including lack of good crossties, ballast and poor drainage. *Id.* at 1362. The court held the action was preempted, recognizing that the FRA had "adopted numerous

regulations concerning track roadbed, geometry and structure." *Id.* at 1363 (citing to regulations concerning roadbeds and drainage, track structure and ballast, crossties, and rail joints, 49 C.F.R. §§213.33, 213.103, 213.105, 213.109 and 213.121). The court concluded that from these regulations, it was clear the federal government had entered the area of railroad safety to a sufficient extent to preempt state action even though there was no regulation specifically addressing muddy conditions: "The fact that regulations have been adopted on those conditions that are alleged to have contributed to the situation around the track is sufficient." *Id.*[8] *See also Rooney,* 623 F. Supp.2d at 665 (citing numerous cases that "uniformly found in favor of preemption" when considering "whether FRSA preempts state law in similar contexts"); *Cart v. Missouri Pac. Rd. Co.*, 752 So.2d 241, 243-44 (La. Ct. App.2000) (holding plaintiffs' claims of negligence regarding condition of track and speed were preempted because FRA's regulations covered track maintenance, condition, inspection and classification); *Plasser Am. Corp. v. Burlington Northern & Santa Fe Ry. Co.,* 2007 WL 4410682, ** 2-3 (E.D. Ark.

[8] Paez attempts to distinguish *Black* by pointing out that the action was brought by a public entity – actually, the trainmen's union United Transportation Union – rather than a private citizen. For purposes of the preemption analysis, this is a distinction without a difference. The doctrine of preemption applies equally to state common law actions and to regulatory actions, and the analysis of FRSA preemption employed by the court in *Black* applies equally to the issues in this case. "...[T[he congressional intent of the Act [FRSA] was to pre-empt most state regulation dealing with railroad safety and since the Act's goal was to establish uniform control of railroad safety, the statutory and regulation provisions evince a 'total pre-emptive intent.'" 398 N.E.2d at 1363.

2007) (plaintiff's claim against railroad was preempted under 49 C.F.R. §213.63 where plaintiff asserted derailment was caused by a drop in rail elevation). Paez' claims about the condition of the crossing are preempted.

c. The evidence that federal funds participated in installing crossbucks at Paizalas Road was undisputed, and the trial court properly held that claims of inadequate signalization were preempted.

Paez asserted claims in the trial court that the crossbucks at the Paizalas Road crossing were inadequate and BNSF should have installed lights and gates. R.P.1-5, ¶15. The trial court ruled that Paez' claims were barred by preemption (R.P.786), based on the controlling law and undisputed facts and relying upon the bright-line ruling of the United States Supreme Court in *Shanklin*, 529 U.S. at 358-359. That case holds that whenever federal funds participate in the installation of warning devices at a railroad crossing, state tort claims seeking to impose a duty on a railroad to provide other warning devices at railroad crossings are preempted under FRSA and FHWA regulations. Paez' claims in this case are thus preempted because the undisputed facts establish that federal funds participated in the NMDOT safety programs for the installation of traffic warning devices at the Paizalas Road crossing.

On appeal, Paez reverses field and now advances the opposite of his position before the trial court: "appellants do not claim that the warning devices at the crossing (*i.e.*, the lights and crossbucks) were inadequate...." Brief-in-Chief 22.

This is confusing, not only because Paez does in fact argue on appeal (*see* Brief-in-Chief III.B) that judgment on the signalization claims was improper, but because lights are not, and never have been, installed at Paizalas Road crossing – the crossing is protected by crossbucks. However, Paez' only argument before this Court that addresses the trial court's entry of summary judgment on warning devices claims is that BNSF "*failed to submit any evidence* that federal monies were spent on said warning devices." Brief-in-Chief 22. That statement is flatly incorrect, as the record establishes.

BNSF's Third Motion for Partial Summary Judgment attached extensive evidence – the Affidavit of former Railroad and Utilities Supervisor of the NMDOT, George White, and attached documentation of a state-wide project for installing warning devices at crossings – demonstrating that federal funds participated in installation of the crossbucks. R.P.341-433. BNSF's evidence of federal funding was exactly the same evidence relied upon by the federal district court in *Atchison Topeka & Santa Fe Ry. Co. v. Armijo,* CIV-89-293 JC/DJS, March 29, 1995 Order (R.P.418) in granting summary judgment, on preemption grounds, to the railroad based upon evidence of federal funding. The district court's decision was affirmed by the Tenth Circuit, *Armijo v. Atchison, Topeka and Santa Fe Railway Co.*, 87 F.3d 1188 (10th Cir. 1996). The United States Supreme Court in *Shanklin* approved the approach to preemption taken by the Tenth Circuit

in *Armijo*, 529 U.S. at 351-352, 358-359; *see also* summary judgments based on the White Affidavit in the First, Second, Third and Twelfth Judicial Districts of New Mexico. R.P.420-430.

In the trial court, Paez responded by moving to strike the White Affidavit, and simply denied BNSF's facts without citation to any evidence in the record. R.P.503-516. BNSF's Reply established that Mr. White's Affidavit was competent evidence for summary judgment purposes, and that evidence was unrefuted. R.P.536-543. Judge Sweazea properly considered the White Affidavit and BNSF's other evidence of federal funding, granted BNSF's partial summary judgment, and thereby denied Paez' motion to strike the White Affidavit. R.P.786. Before this Court, Paez makes no argument that Judge Sweazea's denial of the motion to strike constituted an abuse of discretion.

Paez has abandoned his objection to the White Affidavit in this appeal, and contends only that BNSF failed to submit *any* evidence to support federal funding – an argument which simply ignores the actual record. Not only did BNSF submit the White Affidavit and exhibits demonstrating that federal funds were used to install the crossbucks at Paizalas Road as part of the 1982-1983 state-wide program, BNSF's reply on the Third Motion attached the testimony of the current NMDOT Rail Section Manager Henry Gonzales, which confirmed that crossbucks, which were paid for with federal funds, were installed at the crossings identified by

DOT number, on what is Exhibit 6 to the White Affidavit. R.P.541-554. Documents certified as maintained in the ordinary course of business establish that the railroad (through its contractor, J-H Supply) was paid for the installation of crossbucks at all the crossings identified on Exhibit 6. R.P.399. There was no controverting evidence, and on the state of the record, installation of the crossbucks at Paizalas Road was established. *Shanklin* and *Armijo* hold that claims like Paez' signalization claims are preempted by FRSA. Summary Judgment on the Third Motion should be affirmed.

d. Paez' claim that the Paizalas Road crossing is extrahazardous is encompassed by FRSA preemption of his claim that the warning devices at the crossing were inadequate.

Paez' experts Burnham and Blackwell opined that the Paizalas Road crossing was "extra-hazardous" and "unreasonably dangerous" due in part to their characterization of the conditions of the crossing surface, ballast and drainage. R.P.1194-1197; R.P.2879-2881. These claims are barred by virtue of the trial court's ruling that FRSA preempted Paez' claim of inadequate warning devices. R.P.786. A determination that inadequate warning devices claims is preempted necessarily acknowledges that the condition of the Paizalas Road crossing was subject to analysis by a diagnostic team and that the team concluded that the condition of the crossing did not require active warning devices (gates and lights). Given this, any claims by Paez that the condition of the Paizalas Road crossing was

unsafe or extra-hazardous are preempted by the FRSA. *See* 49 U.S.C. §20106.

When federal funds are used to install warning devices at a public crossing, as they undisputedly were here, federal regulations require that a diagnostic team evaluate conditions at the crossing to determine what warning devices are adequate. *See* 23 C.F.R. §646.214(b)(3). These diagnostic teams consider numerous factors in deciding which warning devices should be installed. *See* 23 U.S.C. §148 (setting forth some of the criteria for identifying and correcting hazardous crossings as part of "State strategic highway safety plan"); 23 C.F.R. §646.214(b) (instructing diagnostic team to consider, *inter alia*, limitations on sight distances, volumes of roadway and railing traffic, continuing accident occurrences, number of tracks, and speed of train operations, in determining whether active warning devices are required at crossing). "[T]hese federal standards preempt common law claims that seek to impose additional duties upon a Railway." *Petre,* 458 F.Supp.2d at 528-529, citing *Easterwood*, 507 U.S. 658; *Shanklin*, 529 U.S. 344. "In other words, the federal standards preempt State 'extra-hazardous' crossing claims." *Petre, id.*

As Judge Sweazea concluded, the *Petre* case is directly on point. Tr.273:16-19. In that case, plaintiffs' expert[9] opined that conditions at the crossing – including greenery obstructions, angle of the track's intersection with the County

[9] Archie Burnham was plaintiffs' expert in *Petre*, as he is in this case, and he renders strikingly similar and equally unfounded opinions in both cases.

road, the "hump" in the crossing, etc. – prevented Mrs. Petre from "having a meaningful opportunity to perceive the oncoming train," which rendered the crossing extra-hazardous. 458 F.Supp.2d at 529, 531. The Ohio federal district court found that federal funds had been used to install warning devices at the crossing, and that therefore, the conditions cited by plaintiffs' experts had been evaluated by the diagnostic team in determining the adequacy of warnings at the crossing: "many of these same factors are considered in the design and engineering of the grade crossing, and were factors that were to be taken into consideration when the federally funded warning devices were installed . . . ." 458 F. Supp.2d at 532. Because these factors are regulated by 23 C.F.R. §646.214, claims as to the condition of the crossing, including that it was a "humped" crossing that made it difficult to traverse, were preempted.

The record in this case contains uncontroverted evidence that conditions at the crossing were taken into account by the diagnostic team that evaluated the sufficiency of warning devices at the crossing:

> [T]he New Mexico Department of Transportation ... would have had it within their purview to review the approach grades, sight line triangles, condition of the crossing, train speed, train count, vehicle speed, number of vehicles, and by going forward with their program, it's within the purview of the New Mexico Department of Transportation based on their 1973 Highway-Railway Safety Act that they would have deemed the crossing, the crossbuck and the crossing, as adequate.

R.P.2940-2942 (testimony by BNSF's Director of Public Projects and Field

Engineering). Furthermore, it is NMDOT's duty to review the ranking system of each of the public crossings in New Mexico and determine that the traffic control devices that they deemed adequate in 1982 are still adequate. R.P.2945.

The New Mexico cross-buck program and corresponding federal regulations promulgated under FRSA preempt Paez' tort claims that other or different warnings were required, or that the crossing was extra-hazardous. *See Cochran v. CSX Transp., Inc.*, 112 F.Supp.2d 733, 737-38 (N.D. Ind.2000) (holding that under *Shanklin*, 529 U.S. 344, "preemption includes any claims under state tort law that a grade crossing is extra-hazardous and that the warning devices provided at the crossing are inadequate"); *Petre*, 458 F. Supp.2d at 529-30 (recognizing that once a court finds federal funds were used to place crossbucks at crossing where accident occurred, claims based on extra-hazardous conditions at the crossing are preempted); *Hightower v. Kansas City So. Ry. Co.*, 70 P.3d 835, ¶¶ 3, 34-37 (Okla. 2003) (Oklahoma Supreme Court reversing verdict for plaintiff because trial court erroneously permitted evidence relating to ultra-hazardous crossing claim, which was preempted).

Paez argues that FRSA does not preempt his crossing claims because BNSF has not presented evidence that federal monies were used to repair or maintain the crossing *surface.* Brief-in-Chief 20. That argument misses the point, as his reliance on *Largo* demonstrates. That case stands for the proposition that when

federal monies are used to install warning devices, common law claims that those devices are inadequate are preempted. In *Largo,* however, completely unlike this case, "the record [did] not establish that any federal money was spent installing warning devices at the crossing." 2002-NMCA-021, ¶ 10. *Largo* makes clear that the pertinent inquiry is whether federal funds were used to install *warning devices*, not to improve the surface of the crossing.[10]

Paez utterly fails to distinguish *Petre* by misstating the record in this case, asserting that "neither BNSF nor the County submitted *any evidence to the District Court* that any federal monies were used to construct warning devices..." Brief-in-Chief 25. That is incorrect, and *Petre* is directly on point. In *Petre*, as in this case, the court found that federal funds were spent on the crossbucks at the crossing, and that preemption of inadequate warning devices claims necessarily encompassed plaintiff's claims that the crossing was unsafe, because the conditions at the crossing had been accounted for in the decision to erect crossbucks, rather than lights and gates. As did the court in *Petre*, Judge Sweazea's finding of preemption for inadequate warning devices necessarily acknowledged that the condition of the Paizalas Road crossing was subject to analysis by a diagnostic

[10] As Paez points out, NMSA 1978 §63-3-26 provides that railroads shall construct crossings with specified materials, and maintain them. To the extent this statute conflicts with federal regulations governing ballast, drainage, track structure and elevation – and it does not appear to conflict with federal law – the state statute is preempted under *Shanklin*, *Petre*, and other authorities cited.

team, and the condition of the crossing was adequate. Accordingly, any purported claims that the condition of the Paizalas Road crossing was unsafe were properly held to be preempted.

e. Paez' crossing claims do not fall under any exception to preemption.

Plaintiffs make an utterly confused and misdirected argument that their claim is not preempted under what is sometimes called the "essentially local safety hazard" exception to federal preemption arising under FRA train speed regulations. Brief-in-Chief 25-26. This exception, however, is narrowly applied and then only to excessive *train speed* claims; it has nothing to do with the claims Paez asserts about the crossing. *See Easterwood*, 507 U.S. at 673-675 (noting that federal regulations set maximum allowable operating speeds for trains and take into account alignment and hazards posed by track conditions); *Largo*, 2002-NMCA-021, ¶¶19-24, 32 (rejecting plaintiff's argument that crossing fell within local safety hazard exception to federal speed preemption).

Thus, the cases Paez cites in support of application of the local safety hazard exception addressed claims of excessive *train speed* and are wholly inapposite. *See In re Speed Limit for Union Pac. Rd. through the City of Shakopee*, 610 N.W.2d 677, 685 (Minn.Ct.App.2000) (considering state commissioner's decision to impose speed limit on track segment and whether track segment presented essentially local safety hazard); *Stone v. CSX Transp., Inc.*, 37 F.Supp.2d 789, 795-

96 (S.D.W.Va.1999) (plaintiff asserted railroad should have reduced speed of trains or issued slow order at crossing where signal sometimes falsely activated); *Missouri Pac. Rd. Co. v. Lemon*, 861 S.W.2d 501, 509-10 (Tex.Ct.App.1993) (plaintiff claimed train was operated at excessive speed at crossing where railroad had illegally parked tank cars and obstructed engineer's vision and crossing was unlit and did not have active warning devices). Because the "local safety hazard" exception only applies to federal preemption of regulations or claims relating to *train speed*, it has absolutely no application to federal preemption of Plaintiffs' purported crossing claim.

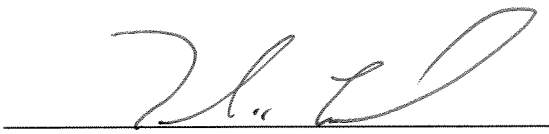
Paez argues that his crossing claims are not preempted because "the Paizalas crossing has several identified violations of federal and state regulations." Brief-in-Chief 26. However, Paez fails to identify even one "violation." This Court should disregard Paez' wholly unsupported argument. Paez failed to present evidence or argument that there existed any exception to preemption. The summary judgment on that basis should be affirmed.

V. CONCLUSION.

Paez' appeal is limited to arguing that summary judgment was improper on the issues of excessive vegetation at the crossing, sufficiency of warnings at the crossing, and the condition and maintenance of the crossing. The photographic evidence conclusively defeats the challenge to the vegetation claims. Lack of

evidence of causation defeats claims about the condition and maintenance of the crossing, and preemption bars those claims and claims regarding warnings. Final Judgment should be affirmed.

ATKINSON, THAL & BAKER, P.C.



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CERTIFICATE OF SERVICE

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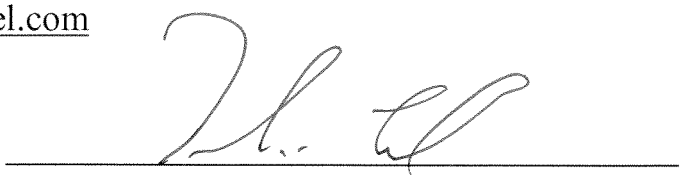

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