

State of Minnesota
In Court of Appeals

Michael D. Frazier, as Trustee for the
Next-of-Kin of Brian L. Frazier,

Respondent (A09-2212),

Harry James Rhoades, Sr., as Trustee for the
Next-of-Kin of Harry James Rhoades, Jr., deceased,

Respondent (A09-2213),

Denise Renee Shannon, as Trustee for the
Next-of-Kin of Bridgette Marie Shannon, deceased,

Respondent (A09-2214),

Elizabeth Chase, as Trustee for the
Next-of-Kin of Corey Everett Chase, deceased,

Respondent (A09-2215),

vs.

Burlington Northern Santa Fe Corporation, et al.,

Appellants,

Richard P. Wright, as Special Administrator
of the Estate of Corey E. Chase,

Respondent (A09-2212),

Cristy Y. Frazier, as Special Administrator
for the Estate of Brian Frazier,

Respondent (A09-2213, A09-2214, A09-2215),

and

BNSF Railway Company, third party plaintiff,

Appellant (A09-2213, A09-2214, A09-2215),

vs.

Richard P. Wright, as Special Administrator
for the Estate of Corey Everett Chase, deceased, third party defendant,

Respondent (A09-2213, A09-2214, A09-2215).

RESPONDENTS' JOINT BRIEF, ADDENDUM AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF FACTS

Ferry Street Crossing.

BNSF had actual knowledge of several incidents of signal system malfunction at the Ferry Street Crossing before September 25, 2003. On March 9, 2002 the lights and gates failed to activate and a car was almost hit by an oncoming train.¹ A BNSF signal maintainer never came to the scene to investigate, to troubleshoot the problem, or to protect the public.²

On April 29, 2001 BNSF was notified that the gates were going up and down, without the presence of a train.³ Signal maintainer [REDACTED] [REDACTED] investigated the incident, and believed the cause of the problem was AC interference.⁴ The problem was never identified or corrected.⁵ After leaving the crossing, [REDACTED] was called back because the problem reoccurred.⁶

On February 7, 2003, the Anoka Police Department advised BNSF of a report that a train had gone through the crossing but the gates failed to lower.⁷

¹ Ex.4, 5, 6.

² T.3015-3017, 3037-3049.

³ Ex.9, 10.

⁴ T.2946-2947.

⁵ T.2946.

⁶ Ex.4.

The Accident.

Shortly after 10:00 p.m. on September 26, 2003, Brian Frazier with passengers Harry Rhodes, Jr., Corey Chase, and Bridgette Shannon drove south on Ferry Street.⁸ As Frazier drove through the crossing, the gates and lights did not activate⁹ and the vehicle was struck by a westbound BNSF freight train traveling at 60 miles per hour.¹⁰ The coupler on the leading locomotive entered the rear passenger compartment behind the driver's seat.¹¹ The only witness who claimed to have seen Frazier enter the crossing was [REDACTED] [REDACTED] the engineer.¹²

In a post-accident statement, [REDACTED] claimed he saw the Cavalier driving "not very fast," as it wove around the lowered gate.¹³ The Cavalier's black box, however, documented the car's speed at impact as 28 miles per hour.¹⁴ [REDACTED] described the car as white when it was black,¹⁵ did not apply the brakes until almost 500 feet

⁷ Ex.11, 12.

⁸ Ex.133, T.2586.

⁹ T.1147-1148.

¹⁰ T.3160.

¹¹ T.1113-1114.

¹² Ex.144.

¹³ Ex.144.

¹⁴ Ex.261, T.2838.

beyond the crossing and well after impact,¹⁶ claimed he could identify the driver of the vehicle as Corey Chase from a color picture in the newspaper¹⁷ when none was ever printed,¹⁸ and said Chase had white/blonde hair when his hair was brown.¹⁹

Physical Evidence

The physical evidence in this case indisputably supports the jury's conclusion that the gates malfunctioned at the time of the accident.²⁰ Hundreds of photographs were taken by law enforcement documenting scuff marks, fluid marks, scratches on the engine, and debris location at the accident scene. A total station laser survey of the scene was completed by the State Patrol and [REDACTED] Respondents' reconstruction expert.²¹ Other than a few pieces of broken taillight, all of the physical evidence was located in the southbound lane and farther west..²² The right rear tire left marks on the road close to the fog line in the southbound lane.²³ All experts

¹⁵ T.1009-1010.

¹⁶ T.3160.

¹⁷ T.1040-1042.

¹⁸ Ex.174, T.1046-1048.

¹⁹ T.1009-1010, 4142.

²⁰ T.1147-1148, 1033.

²¹ T.1073-1075.

²² T 1130-1134, 1147.

agreed it was physically impossible for the Cavalier to have driven to the position where the right rear tire was located if the gate was lowered.²⁴ Because there was no physical evidence of an impact in the northbound lane, BNSF's expert, ██████████ based his opinion primarily on the black box data from the Cavalier.²⁵ State Patrol officers ██████████ and ██████████ who unlike ██████████ are certified in the operation and interpretation of black box data, testified they had never heard of anyone using black box data to determine point of impact.²⁶

The front of the locomotive left distinct marks on the Cavalier.²⁷ The measurements from the snow plow, coupled with the distinct marks on the car, established that the car was in the southbound lane at the time of impact.²⁸

The active warning system at the Ferry Street Crossing was operated by "state of the art" electronic equipment, an HXP-3R2 and an HCA.²⁹ The HXP determines the speed of an approaching train and

²³ T 1079.

²⁴ T 1148.

²⁵ T 4100-4104, 4206-4207.

²⁶ T 4197-4198, 4225, 2838-2841.

²⁷ T 1108-1109, 1114-1120.

²⁸ T.1131-1136

²⁹ T.2420.

directs the warning devices to activate and notify a driver of an approaching train in adequate time to stop.³⁰ The HCA analyzes and records, activation of the lights and gates.³¹ Both devices contain event recorders. Data downloaded from the HCA immediately after an accident, if authenticated, provides objective proof of whether the active warning system functioned properly. BNSF's company rules require that a signal technician to enter the bungalow only with a reliable witness present, preferably a police officer.³² On September 26, 2003 Signal Manager [REDACTED] instructed Gary Reamer, the supervisor on call at the accident scene, to remind signal technician [REDACTED] to have a police officer observe his entry into the bungalow.³³ Despite the rule and the warning, [REDACTED] entered the bungalow without a witness and downloaded the HXP and HCA on his laptop computer³⁴

On September 29, 2003, [REDACTED] gave Signal Supervisor [REDACTED] a disk and two paper printouts of what he claimed contained the HXP and HCA data downloaded the night of the accident.³⁵ [REDACTED] gave them to in the claims department.³⁶ No one

³⁰ T.410.

³¹ T.411.

³² T.2147.

³³ T.3214-15.

³⁴ T.416-417.

³⁵ T.3165.

handling the data used a chain of custody form for the data. Claims representative ██████ testified that in 2003 it was claims department policy not to use a chain of custody form for signal downloads, although use of such a form was routine for downloads taken from locomotive event recorders.³⁷ Sgt. ██████ requested that ██████ provide download data from the locomotive and the crossing devices on several occasions.³⁸ It was not provided. The State Patrol's official Reconstruction Report was ultimately issued without the benefit of the data.³⁹

██████ discovery Respondents requested *all* download data from the event recorders in the bungalow and on the train, in both paper and electronic format. The only data provided were partial print copies of an HXP and an HCA download that was purported to have been completed the night of the accident and copied a few days later.⁴⁰ The printed HXP data produced contained four pages from October 22, 2003, nearly a month after the accident.⁴¹ At a February 13, 2006 hearing on Respondents' motion to compel production of the data in native electronic format, counsel for BNSF advised the court that

³⁶ T.3166.

³⁷ T.1304.

³⁸ Ex.111.

³⁹ T.1284-1285.

⁴⁰ Ex.137a

⁴¹ T.2209.

“BNSF’s procedure was not to maintain them on disk. We don’t have a disk.”⁴² In fact, BNSF policy required post-accident download data to be backed up on a write-protected disk and maintained for seven years.⁴³ BNSF’s claims department representatives denied possession of either the disk or the original electrical drawings from the signal bungalow.⁴⁴

On November 10, 2006, at a court-ordered meta-data comparison at BNSF’s facility, ██████████ opened Ferry Street data file dated September 29, 2003.⁴⁵ Respondents’ two representatives were promptly ushered out of the room, a data file dated September 26 was displayed.⁴⁶ Counsel for BNSF denied that the download dated September 29 was relevant. In his deposition of May 9, 2007, ██████████ ██████████ denied that he performed any post-accident downloads.⁴⁷

BNSF ultimately produced the September 29 data upon court order. The laptop used to download data on the night of the accident was recycled.⁴⁸ Hildebrant transferred the download data on the

⁴² T.2/13/06 hearing, T.38]

⁴³ T.2144-2145.

⁴⁴ T.1408.

⁴⁵ T.405-407

⁴⁶ T.408-409.

⁴⁷ T.453-454.

⁴⁸ T.2197-2199.

laptop to his H drive on the BNSF server.⁴⁹ Without the disk and the laptop, it was not possible to verify that the downloads were actually done on the night of the accident.⁵⁰

On April 3, 2008, at the court-ordered second deposition, [REDACTED] admitted he was aware during his first deposition that he had downloaded both recorders on September 29, 2003. He could not explain why he denied it under oath.⁵¹

On April 17, 2008 Respondents examined [REDACTED] H drive.⁵² It contained over fifty Ferry Street data files, including files transferred after [REDACTED] retirement from BNSF.⁵³

Thomas Day, a forensic computer analyst, testified that the easiest way to fabricate electronic evidence is to obtain several samples and then cut and paste.⁵⁴ [REDACTED] testimony, evidence showing cutting and pasting data from one download into another download was found in the data files located on the H drive.⁵⁵

⁴⁹ T.389-390.

⁵⁰ T.1724-1726.

⁵¹ April 3, 2008 Deposition of [REDACTED] p.190-197.

⁵² T.446.

⁵³ T.446-450; Ex. 21, April 29, 2008 Affidavit of Allan Shapiro regarding H Drive

⁵⁴ T.1716-1718.

⁵⁵ T.2284-2300.

ARGUMENT

I. BNSF CONCEDES THAT THE JURY'S VERIDCT IS SUPPORTED BY THE EVIDENCE.

BNSF's brief raises no challenge to the sufficiency of the evidence to support the jury's liability verdict.⁵⁶ BNSF does not discuss any of the physical evidence, which overwhelmingly supports that verdict. By not challenging the sufficiency of the evidence in its opening brief, BNSF has waived its right to do so.⁵⁷

With this concession, BNSF's burden on appeal is significant. All issues fall under the rubric of trial error except, to a limited extent, preemption. Yet even a *de novo* review standard does not save the preemption defense in light of the overwhelming evidence in the record that BNSF violated the federal standard of care. Trial error in the face of a fully supported jury verdict rarely warrants a new trial, and constantly does not do so here.

II. THE RESPONDENTS' CLAIMS AND RESULTING JUDGMENTS ARE NOT PREEMPTED BY FEDERAL LAW.

Whether federal law preempts state law is primarily an issue of statutory interpretation, and is subject to *de novo* review by an appellate court.⁵⁸ The preemption issue is the **only** issue in this appeal subject to A *de novo* standard. The Minnesota Supreme Court

⁵⁶ Appellant's Brief (hereinafter referred to as "AB") at 31, n29.

⁵⁷ *State v. Stockwell*, 770 N.W.2d 533, 541 (Minn. App. 2009); *McIntire v. State*, 458 N.W.2d 714, 717 n.2 (Minn. App. 1990); *See Balder v. Haley*, 399 N.W.2d 77, 80 (Minn. 1987).

⁵⁸ *In re Estate of Barg*, 752 N.W.2d 52, 63 (Minn. 2008).

has recently reiterated that congressional purpose is “the ultimate touchstone” of the preemption inquiry.⁵⁹ This court’s primary focus in the ensuing analysis is to ascertain the intent of Congress.⁶⁰ BNSF, as the party urging the application of preemption, carries the burden of demonstrating that preemption applies to eliminate each one of the Respondents’ claims.⁶¹

The trial court declined to find Respondents’ claims.⁶² Finding first that BNSF waived this affirmative defense by failing to raise it in a timely manner, Judge Maas went on to conclude that Respondents’ common law claims alleged violations of the federal standard of care, were not preempted given the evidence presented at trial.⁶³ She noted that BNSF’s allegation of regulatory compliance was completely undermined by the evidence.⁶⁴ This is a factual finding subject to an abuse of discretion standard of review. Judge Maas was correct in her determination with respect to all of the preemption issues.

⁵⁹ *Id.* (citing *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)).

⁶⁰ *Id.*

⁶¹ *Dahl v. R.J. Reynolds Tobacco Co.*, 742 N.W.2d 186, 191 (Minn. App. 2007) (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984)).

⁶² Add.003-005.

⁶³ *Id.*

⁶⁴ Add.005.

A. BNSF Forfeited the Preemption Defense.

Rule 12.02 requires “every defense, in law or fact, to a claim for relief in any pleading” to be asserted in the responsive pleading.⁶⁵ Preemption is an affirmative defense. Failure to properly raise it in the answer results in forfeiture. The crux of the Respondents’ wrongful death claims was that BNSF was negligent in its inspection, maintenance and operation of the active warning system located at the Ferry Street Crossing. They first raised those allegations in their Complaints.⁶⁶ Respondent Chase’s Complaint, for example, plainly raised the allegations that BNSF failed to properly maintain the warning devices at the Ferry Street Crossing, and that those warning devices malfunctioned.⁶⁷ The Chase Complaint specifically references the federal regulations governing active warning systems.⁶⁸ BNSF was fully aware of the availability of the preemption defense from the time these lawsuits began. It raised very specific instances of federal preemption in its answer: claims “with respect to traffic control devices,” claims “regarding the . . . locomotive, including . . . train speed, whistle system and braking system,” and claims “regarding the maintenance of the right-of-way.”⁶⁹ None apply to claims based on the negligent maintenance, operation, and inspection of a grade crossing warning system.

⁶⁵ Minn. R. Civ. P. 12.02.

⁶⁶ Add.005-0054

⁶⁷ App.0021-0024.

⁶⁸ App.0022-0024.

BNSF brought a comprehensive motion for summary judgment on March 3, 2008. That motion challenged the evidence supporting negligence and causation. The argument BNSF made in the motion was premised on common law negligence; federal preemption was not mentioned. In April 2008 BNSF challenged the foundation for the Respondents' expert witnesses in a two day *Frye-Mack* hearing. Again federal preemption was not mentioned. BNSF's requested jury instructions included the common law definition of negligence and failed to identify a *single* federal regulation as a standard.⁷⁰ The federal regulations read to the jury were initially requested by the Respondents.⁷¹ Federal preemption of the Respondents' active warning system claims was *first* raised at the end of a motion for directed verdict.

The express preemption clause in the Federal Railroad Safety Act (FRSA)⁷² neither creates a federal cause of action nor confers federal question jurisdiction on a state cause of action.⁷³ FRSA preemption is a choice-of-law defense, not a choice of forum or jurisdictional defense.⁷⁴ Because FRSA preemption is a choice-of-law

⁶⁹ App.0060.

⁷⁰ R.A.41-56.

⁷¹ R.A.25-26.

⁷² 49 U.S.C. § 20106 (2008) (formerly 45 U.S.C. § 434).

⁷³ 49 U.S.C. § 20106(c).

⁷⁴ Compare *International Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 391, 106 S.Ct. 1904, 1912 (1986) (NRLA *Garmon*

defense, a party who fails to timely raise it forfeits their right to do so.⁷⁵ The trial court thus correctly concluded that BNSF waived its federal preemption defense of the plaintiffs' warning device claims "by not raising the issue until the close of evidence."⁷⁶

B. The Respondents' Claims, Which are Based on the Failure of Active Warning Devices to Operate Properly due to the Negligent Maintenance, Operation and Inspection of Grade Crossing Warning Devices, are not Preempted by Federal Law.

The FRSA contains an express preemption clause sandwiched between two savings clauses.⁷⁷ Preemption under the FRSA is, therefore, not complete preemption. The express savings clauses permit States to adopt or continue in force their own laws regarding railroad safety until the Secretary of Transportation adopts regulations that "cover" the same subject matter as the state law in question.⁷⁸ For a state "law, regulation or order" to be federally preempted the party advocating in favor of the defense must show

preemption is a claim that the state court has no power to adjudicate the subject matter of the case, and thus is the equivalent of subject matter jurisdiction) *with Dueringer v. General American Life Ins. Co.*, 842 F.2d 127, 130 (5th Cir. 1988) (ERISA preemption involves a choice of law question rather than a choice of forum question and is therefore an affirmative defense that is waived if not timely raised).

⁷⁵ *Id.*

⁷⁶ Add.005.

⁷⁷ 49 U.S.C. § 20106.

⁷⁸ *CSX Trans., Inc. v. Easterwood*, 507 U.S. 658 (1993).

that “federal regulations substantially subsume the subject matter of the relevant state law.”⁷⁹

In *Wyeth v. Levine*⁸⁰ and *Altria Group, Inc. v. Good*,⁸¹ the United States Supreme Court removed all possible doubt that the long-standing presumption against preemption applies in **all** preemption cases, including this one. In *Wyeth* the Supreme Court identified

two cornerstones of our pre-emption jurisprudence. First, “the purpose of Congress is the ultimate touchstone in every pre-emption case” . . . **Second, “[i]n all pre-emption cases**, and particularly in those in which Congress has ‘legislated . . . in a field which the States have traditionally occupied,’ . . . **we ‘start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’**⁸²

The Minnesota appellate courts have long recognized and applied the presumption against preemption.⁸³ As noted by the Minnesota Supreme Court, the presumption is especially strong in matters historically governed by the police powers of the individual States.⁸⁴

⁷⁹ *Id.* at 664.

⁸⁰ 129 S.Ct. 1187 (2009).

⁸¹ 129 S.Ct. 538 (2008).

⁸² *Wyeth*, 129 S.Ct. at 1194-95 (emphasis added); *see also Altria*, 129 S.Ct. at 543.

⁸³ *In re Estate of Barg*, 752 N.W.2d at 63; *Harbor Broadcasting, Inc. v. Boundary Waters Broadcasters, Inc.*, 636 N.W.2d 560, 564 n. 1 (Minn. App. 2001); *Dahl v. R.J. Reynolds Tobacco Co.*, 742 N.W.2d at 191.

⁸⁴ *In re Barg*, 752 N.W.2d at 63.

Given the traditional “primacy of state regulation of matters of health and safety,”⁸⁵ courts assume “that state and local regulation related to [those] matters . . . can normally coexist with federal regulations.”⁸⁶ The FRSA establishes a regulatory scheme “to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.”⁸⁷ As the trial court noted, the presumption against preemption is strong.

BNSF’s footnote comment that the trial court’s reliance on the “presumption against preemption” was evidence of her “profound misunderstanding of preemption”⁸⁸ is totally unsupported in the law. BNSF’s description of what the United States Supreme Court calls a “cornerstone” of its preemption jurisprudence⁸⁹ as being “generic” and having “no bearing” on the preemption analysis is startling and insupportable.⁹⁰ *Engvall v. Soo Line Ry*⁹¹ the case on which BNSF relies, addressed preemption in the context of the Federal Employees Liability Act (FELA) and the Locomotive Inspection Act (LIA), two federal statutory schemes not at issue in this case. *Engvall* never

⁸⁵ *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

⁸⁶ See *Hillsborough County v. Automated Med. Cabs., Inc.*, 471 U.S. 707, 718, (1985).

⁸⁷ 49 U.S.C. § 20101.

⁸⁸ AB at 25, n.23.

⁸⁹ *Wyeth*, 129 S. Ct. at 194-95.

⁹⁰ AB at 25, n.23.

⁹¹ 632 N.W.2d 560 (Minn. 2001).

addressed the standard for determining whether preemption applied to the LIA because both parties to the action conceded that the defective locomotive hand brake at issue fell within “the field preempted by the LIA.”⁹² *Engvall* was decided in 2001, well before *Wyeth* or *Altria* reaffirmed the primacy of the presumption against preemption in **all** preemption cases. The Minnesota Supreme Court itself reaffirmed that fundamental standard in 2007⁹³ and 2008.⁹⁴

Preemption provisions such as the one in the FRSA tell courts that Congress intended to supersede state law to some extent, and delegated to executive agencies the task of defining the specific contours of what was intended to be preempted. The “presumption against displacing law enacted or authorized by a State applies both to the ‘question whether Congress intended any pre-emption at all’ and to ‘questions concerning the scope of [the section’s] intended invalidation of state law.’”⁹⁵ The United States Supreme Court has made it clear that in light of the strong presumption against preemption, a court must “look to each of [respondents’] common-law claims to determine whether it is in fact pre-empted.”⁹⁶ The common

⁹² *Id.* at 569.

⁹³ *Dahl*, 742 N.W.2d at 191.

⁹⁴ *In re Estate of Barg*, 742 N.W.2d at 63.

⁹⁵ *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 260-61 (2004) (Souter, J., dissenting).

⁹⁶ *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 523 (1992).

law “is not of a piece.”⁹⁷ Contrary to BNSF’s desire to paint common law negligence actions as *per se* undermining the FRA’s regulatory scheme, the United States Supreme Court has noted “it does not necessarily follow that [t]he hit-or-miss common law method runs counter to a statutory scheme of planned prioritization.”⁹⁸ An express preemption clause such as that present in the FRSA preempts some common law claims while saving others.⁹⁹

The preemptive language in the FRA’s signal system safety regulations does not change this analysis. BNSF cites to 49 CFR § 234.4 for the general proposition that any and all state common law claims having anything to do with signal systems are preempted because the regulations “blanket” or “cover” every aspect of the Respondents’ claims.¹⁰⁰ This regulation does little more than parrot the general preemption language of the pre-2007 version of the FRSA’s preemption clause. The inference BNSF wishes to convey is that any common law claim that addresses the failure of a signal system is preempted – basically because the FRA says it is preempted. That is not the law.

The United States Supreme Court recently addressed the effect of an agency’s proclamation of preemption in *Wyeth v. Levine*.¹⁰¹

⁹⁷ *Id.* at 523

⁹⁸ *Easterwood*, 507 U.S. at 668.

⁹⁹ *Cipollone*, 505 U.S. at 524 n.22.

¹⁰⁰ AB at 17, 18.

¹⁰¹ 129 S.Ct. 1187 (2009).

Wyeth dealt with the preemptive effect of labeling regulations issued by the Food and Drug Administration (FDA) under the pre-market approval process established by the Federal Food, Drug, and Cosmetic Act (FDCA). In 2006 the FDA promulgated a rule containing preemption language in the preamble. In analyzing what, if any, effect to give to the agency's preemption proclamation, the *Wyeth* court conducted an overall analysis of agency preemption. That analysis is instructive here.

The *Wyeth* Court began with the observation that an agency regulation can preempt conflicting state regulation.¹⁰² An agency preemption proclamation, however, does not establish that preemption exists. In the face of an agency proclamation of preemption, a court must perform its own analysis.¹⁰³ That analysis is premised on the substance of state and federal law, not on the agency proclamation.

First the court must ascertain whether Congress authorized the agency in question to preempt state law directly.¹⁰⁴ For example, the Federal Communications Commission is expressly authorized to preempt "any [state] statute, regulation or legal requirement" that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."¹⁰⁵

¹⁰² *Id.* at 1200.

¹⁰³ *Id.* at 1201.

¹⁰⁴ *Id.*

¹⁰⁵ 47 U.S.C. §§ 253(a), (d) (2000).

Other agencies have also been granted express permission by Congress to preempt state law, including the Department of Transportation with respect to the transportation of hazardous waste.¹⁰⁶ Tellingly, the FRA has not been granted such authority under the FRSA.

Absent such express congressional authority, the question facing the *Wyeth* court was what, if any, weight to give to the FDA's preemption assertion. This court must answer the same question with respect to 49 CFR § 234.4. Historically courts have given "some weight" to an agency's assessment of the impact of tort law on federal objectives, but they have done so primarily when "the subject matter is technical and the relevant history and background are complex and extensive."¹⁰⁷ That deference to the weight of an agency's regulation does not extend to an agency's *conclusions* about preemption of state law.¹⁰⁸ The *Wyeth* Court ultimately concluded that the FDA's 2006 preamble did not merit any deference.¹⁰⁹

¹⁰⁶ See, e.g., 30 U.S.C. § 1254(g) (2006) (preempting any statute that conflicts with "the purposes and the requirements of this chapter and permitting the Secretary of the Interior to "set forth any State law or regulation which is preempted and superseded"); 49 U.S.C. § 5125(d) (2000 ed. and Supp. V) (authorizing the Secretary of Transportation to decide whether a state or local statute that conflicts with the regulation of hazardous waste transportation is preempted.).

¹⁰⁷ *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000).

¹⁰⁸ *Wyeth*, 129 S.Ct. at 1201.

¹⁰⁹ *Id.* at 1203.

The FRA's preemption declaration as set forth in 49 CFR § 234.4 warrants no deference either. Congress did not authorize the FRA to make a pronouncement on preemption. The FRA did nothing more than cut and paste a portion of the statutory preemption clause into the regulation. Nothing in the regulation itself or its administrative history offers any technical or analytical discussion of how state common law claims conflict with the standards contained in Section 234. In fact the FRA added this "preemption regulation" on its own initiative during a comment period to a proposed rulemaking.¹¹⁰ Section 234.4 appeared in written form for the first time in the announcement of the final rule after the comment period for commentary on the overall rulemaking had passed. This makes its validity highly questionable given the requirements of the Administrative Procedures Act.¹¹¹ In the commentary accompanying the enactment of the final preemption regulation the FRA expressly acknowledges that "while the presence or absence of such a section does not in itself affect the preemptive effect of this part, it informs the public concerning the statutory provision which does govern the preemptive effect of these rules."¹¹² Given this history and FRA's own comments, this court's preemption analysis should give no deference to 49 CFR § 234.4.

¹¹⁰ 59 Fed. Reg. 50086 (Sept. 30, 1994); *compare with* 57 Fed. Reg. 28819 (June 29, 1992) (this Notice of Proposed Rulemaking does not contain any reference to Section 234.4 or to preemption).

¹¹¹ *See Wyeth*, 129 S.Ct. at 1201.

¹¹² 59 Fed. Reg. 50086 (Sept. 30, 1994).

On August 3, 2007 Congress amended the FRSA's preemption clause.¹¹³ The amendment indisputably applies to this action. It specifically provides that state common law tort actions such as this one are not preempted, even when a federal regulation "covers the subject matter" if the action "allege[s] that a party has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation," and if the action alleges that a party "has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries."¹¹⁴

The House Conference Report that accompanied the amendment clearly reflects that the amendment's purpose is to correct what Congress deemed to be an overly broad application of the FRSA's preemption clause.¹¹⁵ Even in areas in which a federal regulation "covers" the subject matter of a state law, a state law negligence claim is not preempted where the claim alleges a violation of the federal standard of care set forth in the regulation itself or in a plan, rule or standard the railroad created pursuant to a federal regulation or order.

The plaintiffs' negligence claims were both pled and tried in accordance with the standard of care envisioned by Congress. BNSF's bald statements that "the record demonstrates adherence to the

¹¹³ Pub. L. No. 110-53, § 1528.

¹¹⁴ *Id.*

¹¹⁵ H.R. Conf. Rep. 110-259, § 1528 (July 25, 2007).

applicable regulations,” and “Respondents never proved a regulatory violation,”¹¹⁶ are belied by the record. Its blanket assertion that there was evidence all “applicable federal regulations” and “all federal inspection and maintenance obligations”¹¹⁷ were satisfied is nothing but unsupported spin. In the string cite of exhibits listed in support of BNSF’s allegedly total compliance with inspection requirements, five are documents indicating that weekly, monthly, quarterly, and annual inspections of warning system components were completed. One is the post-accident test checklist.¹¹⁸ One is the track warrant for the morning of the accident that gave BNSF track maintenance employees permission to be on the track to repair a rail.¹¹⁹ The remaining seven identified by BNSF as proof of adherence to applicable federal regulations are nothing more than seven printouts of data, allegedly from the HXP and HCA at the Ferry Street Crossing, that as printed reflect the required warning time before a train arrived at the crossing.¹²⁰ Plaintiffs’ signal expert ██████████ testified, however, that these exhibits were not authentic.¹²¹ He testified that all printouts of crossing device data produced by BNSF during the course

¹¹⁶ AB at 19.

¹¹⁷ *Id.*

¹¹⁸ App.0106-0109 (Ex. 135).

¹¹⁹ App.0290-0291 (Ex. 212).

¹²⁰ App.0111-0125; App.0126-0140; App.0141-0204; App.0292-0306; App.0307-0332.

¹²¹ T.2495–2505 and 2512–2519.

of discovery and at trial, with the exception of those associated with the plaintiffs' inspection of those devices in July 2005, could not have come from the HXP and HCA at the Ferry Street Crossing.¹²² The device that generated those printouts was programmed differently than the device at the crossing in 2005.¹²³ The printed HCA data that BNSF relied on throughout trial reflected that the warning devices properly activated and provided 32 seconds of warning time.¹²⁴ Plaintiffs' counsel stipulated to that fact – “if you believe that document.”¹²⁵ As the trial court noted in denying BNSF's preemption motion below, “BNSF's claims of absolute compliance with federal regulations carry little persuasive weight because BNSF often relies on evidence that it mishandled, misplaced, destroyed, or fabricated to support its claims of compliance.”¹²⁶ Having found BNSF to be 90% at fault for the accident, the jury was also clearly persuaded that that the documents upon which BNSF relied were not authentic.

Not only is BNSF's allegation that it complied with all applicable federal regulations false, but the record is replete with evidence that BNSF violated many federal regulations governing the maintenance, operation, and even inspection of the signal system at the Ferry Street Crossing. Grade Crossing warning systems are subject to regulatory

¹²² T.2503, 2505.

¹²³ T.2503–2505.

¹²⁴ Ex.175; App.0292-0306; App.0307-0332. See T.2506–2508, 2513.

¹²⁵ T. 2683-2685.

¹²⁶ Add 005

standards found in 49 C.F.R. Part 234. BNSF's argument focuses solely on the last portion of Part 234, which specifies required tests and inspections of the warning equipment.¹²⁷ It completely ignores the entire first two thirds of this regulatory part, yet much of the evidence produced at trial supports violations of regulations found there.

The crux of the Respondents' case below was that the warning system at the Ferry Street Crossing failed on September 26, 2003, leading the decedents to believe it was safe to cross the tracks. The warning system failed because BNSF was negligent in its maintenance, operation and inspection of that signal warning system in the months and years leading up to the accident. Negligent track maintenance in violation of standards specified in Part 213, negligence in the settings used on the signal equipment, and turning a blind eye to significant evidence of earlier intermittent warning system malfunctions in violation of standards specified in Part 234 culminated in the deaths that brought this case to trial.

██████████ has 30 years experience designing and troubleshooting signal warning systems at railroad grade crossings. He designed the predictor unit at the Ferry Street Crossing, the HXP-3R2, and has extensive experience operating and reading the data gathered by the HCA, the crossing analyzer. He opined at trial that there was an activation failure the Ferry Street Crossing on September 26, 2003: that the warning system failed to give the occupants of the Cavalier, 20 seconds of warning that a BNSF train, was heading towards the

¹²⁷ 49 C.F.R. §§ 234.247-.273

crossing.¹²⁸ The failure of a signal warning system to give at least 20 seconds warning time of an oncoming train is a violation of the federal regulatory scheme.¹²⁹

██████████ testified that either of two situations caused the activation failure.¹³⁰ Both involved negligent maintenance of the warning system. One cause he could not rule out was that in the process of repairing a defective rail in the Ferry Street approach circuit on the morning of the day of the accident, maintenance workers neglected to remove the jumpers they used to bypass the warning system while they did the work.¹³¹ If jumpers used earlier in the day had not been removed, there would have been no warning whatsoever at the crossing when the train went through.¹³²

The most likely cause of the activation failure, however, was a combination of factors that resulted in a high level of AC interference. The high level of AC interference led the predictor unit to mistake the interfering hertz for the approaching train.¹³³ The factors were 1) an imbalance in the current running through the rails, 2) cross talk between the two tracks, 3) HXP being set at 86 hertz, its lowest, rather

¹²⁸ T. 2532, 2538, 2540, 2598, 2600, 2601.

¹²⁹ 49 C.F.R. § 234.225.

¹³⁰ T.2533 – 54.

¹³¹ T.2533, 2598.

¹³² T.2598.

¹³³ T.2453.

than a higher setting that would have offered more resistance to AC interference, 4) and setting the HXP approach size setting at the very short setting, an improper setting for this crossing per the manufacturer's specifications.¹³⁴

An imbalance in the current in the rails is frequently the result of pumping, a condition on the track in the approach circuit in which mud pumps up through the ground, fouls the ballast and undermines the support for the rail.¹³⁵ Evidence was produced at trial that pumping was occurring within the Ferry Street approach circuit near the island several months before the accident, on the night of the accident, and even two years later – in exactly the same spot.¹³⁶ Failure to maintain ballast so that the rail is adequately supported – which includes addressing pumping and the resulting fouled ballast – is a violation of both 49 C.F.R. § 213.103 and Section 8.2 of BNSF's Engineering Instructions, both of which address ballast requirements.¹³⁷ Rail imbalance is also caused by unbonded rail joints.¹³⁸ Photographs were introduced at trial showing rail joints with deteriorated insulation.¹³⁹ This condition is a violation of 49 C.F.R. §

¹³⁴ T.2538.

¹³⁵ T.2466. *See also* T.1563 – 65.

¹³⁶ T.1563 – 66, 1600, 2470. 2473, 2474. Ex.199.

¹³⁷ T.1542-44.

¹³⁸ T.2466.

¹³⁹ *See* Ex.179, 180, 181.

234.235. Photographs were introduced showing a rail anchor touching the metal portion of the joint.¹⁴⁰ Such contact reduces resistance and affects rail conductivity.¹⁴¹ This condition is a direct violation of BNSF's tack maintenance standards as set forth in its Engineering Instructions.¹⁴² Ballast piled on the shoulder or touching the rail steals some of the current that belongs in the rail, also contributing to rail imbalance.¹⁴³ Failure to properly maintain the condition of the ballast and to keep it away from the rail violates internal maintenance of way rules because it tends to decrease conductivity, allowing the current to run through the ballast into the ground rather than through the rails.¹⁴⁴ ██████████ trial the Respondents introduced evidence that at the time of the accident the HXP at the Ferry Street Crossing was set for a very short approach circuit, an improper setting according to the manufacturer's manual.¹⁴⁵ Setting the HXP at an improper setting is a violation of 49 C.F.R. §§ 234.205 and .227(a).

If the malfunction of the warning system on September 26, 2003 was a onetime event about which there was no warning or notice, then BNSF's protest that it cannot be held liable in strict liability might

¹⁴⁰ T.179, 180, 1558.

¹⁴¹ T.1556, 1558, 2468, 2470.

¹⁴² T.1558.

¹⁴³ T.2468.

¹⁴⁴ T.2468.

¹⁴⁵ T.2479.

have merit. That is not the case, however. BNSF had notice of all of these factors, and that they had combined in the past to cause warning system malfunctions.

The federal regulations are explicit about how a railroad must respond to a report of any “warning system malfunction,” a phrase the regulations define to include “an activation failure, a partial activation or a false activation of a highway-rail grade crossing warning system.”¹⁴⁶ The report of any warning system malfunction must be credible to trigger a railroad’s obligations under the federal scheme. The phrase “credible report” of a warning system malfunction is defined in the regulations to mean specific information regarding a malfunction at an identified crossing “supplied by a railroad employee, law enforcement officer, highway traffic official, or other employee of a public agency acting in an official capacity.”¹⁴⁷ Respondents introduced evidence at trial of three credible reports of warning system malfunction that occurred before the accident in this case. BNSF’s poor response to those three prior warning system malfunctions violated the federal regulatory scheme and set the stage for the resulting deaths.

The first warning system malfunction occurred on April 29, 2001. The Anoka County 911 call center reported to BNSF that the gate arms at the Ferry Street Crossing were going up and down.¹⁴⁸

¹⁴⁶ 49 C.F.R. § 234.5.

¹⁴⁷ 49 C.F.R. § 234.5.

¹⁴⁸ App.0411.

Signal maintainer [REDACTED] was notified of the problem at 2:09 pm and reported to the crossing.¹⁴⁹ Over an hour after [REDACTED] was notified, Anoka County called BNSF a second time to report that the problem was still occurring.¹⁵⁰ After spending several hours trying to diagnose the problem, [REDACTED] concluded that the AC interference was causing the gate arms to malfunction. Signal technician [REDACTED] [REDACTED] cleared the trouble ticket without checking for AC interference, without arranging to monitor the crossing for further evidence of AC interference, and without ever diagnosing the problem. BNSF's handling of this malfunction violates 49 CFR § 234.103 and .207.

The second warning system malfunction occurred on March 9, 2002. It involved a false activation followed by an activation failure. The term "activation failure" is defined in the federal regulations to mean "the failure of an active highway-rail grade crossing warning system to indicate the approach of a train at least 20 seconds prior to the train's arrival at the crossing."¹⁵¹ Section 234.9 requires BNSF to report to the FRA of any activation failure within 15 days. [REDACTED] [REDACTED] testified that she was nearly hit by a train on March 9, 2002 when none of the bells, lights or gates activated as she went over the Ferry Street Crossing.¹⁵² She first became aware of a train when she was in

¹⁴⁹ App.0412.

¹⁵⁰ *Id.*

¹⁵¹ 49 C.F.R. § 234.5.

¹⁵² T.183, 184-85, 187-88.

the middle of the tracks.¹⁵³ She heard the horn as the train bore down on her, and she had to gun the gas to get off the tracks before the train arrived.¹⁵⁴ Watching in her rear-view mirror, Ms. [REDACTED] testified that no lights ever came on, and the gates never came down as the train roared through the crossing behind her.¹⁵⁵ The failure of the gate arm to be fully deployed across the traffic lane at least five seconds before the arrival of a train is in and of itself a violation of 49 C.F.R. § 234.223.

[REDACTED] experienced an activation failure at the Ferry Street Crossing a year and a half before the accident in this case. BNSF denied that it was an activation failure and came forward with no evidence that this incident was reported to the FRA as required by 49 C.F.R. § 234.9.

[REDACTED] husband reported the March 9, 2002 activation failure to Anoka County law enforcement in a 911 call shortly after it occurred.¹⁵⁶ Anoka County law enforcement reported it directly to BNSF.¹⁵⁷ At the time BNSF got the call reporting the activation failure, it already had an open trouble ticket from a prior report of a false activation earlier in the afternoon.¹⁵⁸ Although BNSF called

¹⁵³ T. 184–85, 187.

¹⁵⁴ T. 184–188.

¹⁵⁵ T. 189–190.

¹⁵⁶ T. 192; App.0408 (Ex. 4).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

several signal maintainers to go out and check the crossing, none went.¹⁵⁹ The trouble ticket was closed after dispatch spoke with the crew of two later trains, who reported that they observed the lights and gates at Ferry Street to be activated as they traveled by.¹⁶⁰ No investigation or troubleshooting was ever done and no repairs were ever made.

When BNSF received an official call from the Anoka County 911 call center on March 9, 2002 reporting the failure of the warning system to activate as a motorist crossed the tracks, it received a credible report of a warning system malfunction. This triggered obligations under 49 C.F.R. § 234.103 to promptly investigate the reported malfunction and determine the nature of the malfunction. Until repair or correction of the problem could be completed, BNSF was obligated by federal regulation to provide an alternative means of warning highway users of the approach of a train.¹⁶¹ Because the reported malfunction on March 9, 2002 was an activation failure, 49 C.F.R. § 234.105 required BNSF to provide an alternative means of warning the public about approaching trains, and to trains to slow to a maximum speed of 15 miles per hour through the crossing.¹⁶²

¹⁵⁹ T. 3212-13.

¹⁶⁰ App.0408 (Ex. 4); T. 3212-13.

¹⁶¹ 49 C.F.R. § 234.103.

¹⁶² 49 C.F.R. § 234.105; *see also id.* at §§ 234.103 and .107.

The evidence in the record reflects that BNSF did none of these things. It failed to investigate the cause of the failure. It did no troubleshooting. BNSF simply closed the trouble ticket when two subsequent train crews reported that the lights and gates were functioning when they traveled through. The failure to investigate and troubleshoot what occurred on March 9, 2002 and the failure to slow trains until the cause of intermittent malfunction violated 49 C.F.R § 234.103, .105, and .107.

The third warning system malfunction occurred on February 7, 2003. The Anoka County 911 call center notified BNSF that the lights and bells activated at the Ferry Street Crossing but that the gates never lowered as a train came through the crossing.¹⁶³ BNSF noted the warning malfunction as a partial activation.¹⁶⁴ Pursuant to federal regulation, BNSF was required to investigate the malfunction and its cause.¹⁶⁵ Until the problem was identified and rectified, BNSF was obligated to provide an alternative means of warning highway travelers on Ferry Street of approaching trains, and to issue slow orders to trains passing over the crossing.¹⁶⁶ The evidence at trial clearly reflects that the cause of the problem was never found. The trouble ticket cleared and nothing further was done.

¹⁶³ App.0413 (Ex. 11), App.0414 (Ex. 12).

¹⁶⁴ App. 0414 (Tr. Ex. 12).

¹⁶⁵ 49 C.F.R. § 234.103.

¹⁶⁶ 49 C.F.R. §§ 234.103, 105, and 107.

The Federal regulations require that plans “required for proper maintenance and testing” be kept at the crossing to which they apply and that they be both legible and correct.¹⁶⁷ Evidence was undisputed at trial that the signal plans in the bungalow on the night of the accident were inaccurate and did not reflect the signal circuitry as it existed at the Ferry Street Crossing at the time.¹⁶⁸ This was a violation of 49 C.F.R. § 234.201. Federal regulations also required BNSF to inspect all insulated joints within the approach circuit at the Ferry Street Crossing at least once every three months.¹⁶⁹ There were 6 insulated joints within those approaches at the time of the accident.¹⁷⁰ BNSF introduced no evidence that any of them had been inspected in the year before the accident.¹⁷¹ In the post-accident inspection report, completed on the night of the accident, [REDACTED] marked the portion addressing the inspection of insulated joints as “not applicable.”¹⁷² The integrity of insulated joints is critical to a properly functioning active warning device.

Evidence of BNSF’s failure to comply with the federal regulatory scheme also came in the form of evidence that it violated its own

¹⁶⁷ 49 C.F.R. § 234.201.

¹⁶⁸ T.3218.

¹⁶⁹ 49 C.F.R. § 234.271; T. at 2520.

¹⁷⁰ Ex. 23B (circled in orange); T.2520, 2718.

¹⁷¹ T.2478, 2717.

¹⁷² App.0106-0109 (Ex. 135); T.2479, 2718.

maintenance rules. The FRSA expressly provides that common law claims are not preempted to the degree they allege a railroad failed to comply with its own plan, rule, or standard that it created pursuant to a regulation issued by the Secretary of Transportation.¹⁷³ Both the regulations governing track maintenance found in 49 C.F.R. Part 213 and those governing warning signal systems found in Part 234 provide in their initial sections: “This part does not restrict a railroad from adopting and enforcing additional or more stringent requirements not inconsistent with this part.”¹⁷⁴ BNSF adopted both track maintenance rules and signal system rules as authorized by these regulations. Per the 2007 amendment to the FRSA’s preemption clause, a wrongful death action premised on the violation of those rules is not preempted. There was considerable evidence offered at trial of such rules violations, all of which were causally related to the activation failure on September 26, 2003.

Respondents’ track maintenance expert, Alan Blackwell, in track maintenance testified that the condition of the ballast within the activation circuits at the Ferry Street Crossing not only violated federal regulations but also violated Rule 8.21 of the BNSF Engineering Instructions.¹⁷⁵ He testified that he found BNSF’s maintenance standard for insulated joints, Standard 2.4.5, was

¹⁷³ 49 U.S.C. § 20106(b)(1)(B) (2008).

¹⁷⁴ 49 C.F.R. §§ 213.1 and 234.1.

¹⁷⁵ T.1542-44.

violated.¹⁷⁶ He found Rules 18.1 and 18.2 of BNSF's Engineering Instructions describing precautions to use in bonded territory to have been violated, because dirt and mud was in contact with the rails, thereby reducing ballast resistance.¹⁷⁷ These rules were also violated by the presence of anchor nails on ties supporting insulated joints.¹⁷⁸ In short, Blackwell opined that the Ferry Street approach circuits were not maintained in accordance with BNSF's own standards in bonded territory, nor were they maintained "within any standard recognized by the railroad."¹⁷⁹ In his opinion, "the condition of the track has everything to do with this case."¹⁸⁰

The evidence of negligence presented at trial was all about BNSF's failure to comply with the federal standard of care. The trial court correctly concluded that the Plaintiffs' claims are not preempted as a matter of law.

C. The Negligence Instruction Conveyed a Substantially Correct Understanding of the Law.

A trial court has "considerable latitude in selection of language in the jury charge."¹⁸¹ That broad latitude extends to determining the

¹⁷⁶ T.1547, 1554 – 56; Ex. 179.

¹⁷⁷ T.1557 – 1558.

¹⁷⁸ T.1558; Ex. 179 and 180.

¹⁷⁹ T.1615, 1616.

¹⁸⁰ T.1536.

¹⁸¹ *Alholm v. Wilt*, 394 N.W.2d 488, 490 (Minn. 1986).

propriety of a specific instruction in a specific case.¹⁸² The charge as a whole must convey to the jury a clear and correct understanding of the law of the case.¹⁸³ An error instructing the jury warrants a new trial only if the error “destroy[s] the substantial correctness of the charge, cause[s] a miscarriage of justice, or result[s] in substantial prejudice.”¹⁸⁴ Only when the instructions are confusing or misleading on a material issue should a new trial should be granted.¹⁸⁵ Generally parties must make a timely objection to jury instructions or their right to object is forfeited.¹⁸⁶

BNSF argues that the combination of the standard reasonable care instruction, CIVJIG 25.10, and the standard instruction for the violation of a statute, CIVJIG 25.45, modified to refer to the federal regulations, was reversible error. The argument fails on its face. BNSF itself requested CIVJIG 25.10, the common law definition of negligence and reasonable care.¹⁸⁷ The instruction was necessary because this standard unquestionably applies to the driver of the car. BNSF requested no modification to clarify that this instruction does

¹⁸² *Id.*; See also *Sandhofer v. Abbott N.W. Hosp.*, 283 N.W.2d 362, 367 (Minn. 1979).

¹⁸³ *Aholm*, 394 N.W.2d at 490.

¹⁸⁴ *Lindstrom v. Yellow Taxi Co.*, 298 Minn. 224, 229, 214 N.W.2d 672, 676 (Minn. 1974).

¹⁸⁵ *Id.*, 298 Minn. at 229, 214 N.W.2d at 677.

¹⁸⁶ Minn. R. Civ. P. 51.04(a); *Ness v. Fischer*, 207 Minn. 558, 562, 292 N.W. 196, 198 (Minn. 1940).

¹⁸⁷ R.A.45

not apply to the railroad's conduct. Having requested the instruction in the first place, BNSF cannot cry foul now.

In order to address the federal regulatory scheme in the jury instructions, the *Respondents* requested a modification of CIVJIG 25.45, the instruction for dealing with statutory violations other than traffic statutes.¹⁸⁸ The Respondents' requested modification included a list of the federal regulations they contended were violated, and added the language to which BNSF now objects.¹⁸⁹ BNSF submitted no instruction that discussed the federal regulatory scheme it now argues is controlling. BNSF did not object to giving a version of CIVJIG 25.45; its only objection was to make sure the entire text of each regulation was included in the instruction.¹⁹⁰ Having failed to object to either instruction, either singularly or in combination, BNSF has forfeited its right to do so.

Because BNSF failed to object, it is compelled to argue fundamental error. The Rules provide a very limited exception to forfeiture where an error is plain or fundamental.¹⁹¹ A party seeking to establish plain error with respect to jury instructions must show that the instruction given (1) was error, (2) that the error was plain, and (3) that the error affected that party's substantial rights.¹⁹²

¹⁸⁸ R.A.25-27

¹⁸⁹ *Id.*

¹⁹⁰ R.A.146.

¹⁹¹ Minn. R. Civ. P. 51.04(b).

¹⁹² *State v. Ihle*, 640 N.W.2d 910, 916 (Minn. 2002).

A jury instruction is only erroneous if it provides the jury with an inaccurate or misleading understanding of the law to which it must apply the evidence in order to determine the facts. If successful at demonstrating error, the complaining party must next demonstrate that the error was “plain.” An error is “plain” if it was “clear or obvious” under current law.¹⁹³ The third requirement is that the plain error at issue must have affected the complaining party’s “substantial rights.” Per the Minnesota Supreme Court, “[a]n error affects substantial rights if the error is prejudicial – that is, if there is a reasonable likelihood that the error *substantially* affected the verdict.”¹⁹⁴ Even if the three prongs of the plain error test are satisfied, however, Rule 54.04(b) does not mandate the trial court to remedy the error.¹⁹⁵ The language of the rule is permissive. A court should remedy plain error only to ensure the fairness and integrity of the judicial proceedings themselves.¹⁹⁶

The plain error doctrine does not save BNSF here. The overall charge was correct. After including the full text of each federal regulation the jury was to consider, the “federal regulation” instruction was by far the longest of any instruction given. Violation of a federal regulation is evidence of negligence, just as the jury was

¹⁹³ *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002) (addressing admission of testimony) (citing *United States v. Olano*, 725 U.S. 725, 734 (1993)). See also *State v. Ihle*, 640 N.W.2d at 917.

¹⁹⁴ *Strommen*, 648 N.W.2d at 688 (emphasis added).

¹⁹⁵ *Ihle*, 640 N.W.2d at 916.

¹⁹⁶ *Id.*

instructed. It is not conclusive proof of negligence, the jury was instructed that a violation of one of the federal regulations is not proof of reasonable care. The only evidence of negligence produced at trial was evidence that BNSF's conduct violated a federal regulation or its own rules, which were in turn incorporated into the federal regulatory scheme by federal regulation. In this context the reference to reasonable care in the "federal regulation" instruction was perhaps inartful, but reflected language requested and approved by BNSF.

A party generally "cannot avail himself of invited error."¹⁹⁷ "A party is concluded by an instruction given at his own request" and in such circumstances, the district court's charge, "even though it be erroneous, becomes the law of the case."¹⁹⁸ A party may not challenge jury instructions where the instructions were discussed and approved by all counsel before the charge and the district court gave the instructions as discussed and approved without objection by counsel.¹⁹⁹ Had BNSF objected to the inclusion of the phrase "reasonable care" in the instruction, the phrase might have been removed. Having made no objection, however, and having itself requested the reasonable care instruction with no clarification that the phrase applies only to the driver, BNSF itself invited the error

¹⁹⁷ *McAlpine v. Fidelity & Cas. Co.*, 134 Minn. 192, 199, 158 N.W.967, 970 (Minn. 1916).

¹⁹⁸ *Heise v. J.R. Clark Co.*, 245 Minn. 179, 191, 71 N.W.2d 818, 826 (Minn. 1955); *See also Lee v. Wilson*, 167 Minn. 248, 250, 208 N.W.803, 804 (Minn. 1926).

¹⁹⁹ *LaValle v. Aqualand Pool Co.*, 257 N.W.2d 324, 327 (Minn. 1977).

about which it now complains. The law requires BNSF to live with the results of instructions it crafted and agreed to.

III. THE TRIAL COURT CORRECTLY DETERMINED THAT TRIAL ERRORS DO NOT WARRANT A NEW TRIAL.

Pointing to three trial rulings, BNSF asks for a new trial on the basis of their cumulative effect. In doing so BNSF admits that none of them is significant enough to warrant a new trial standing alone. The trial court, denying the motion for new trial, found none of these rulings to be error.²⁰⁰ That determination is subject to the abuse of discretion standard of review.²⁰¹ “In the absence of some indication that the trial court exercised its discretion arbitrarily, capriciously, or contrary to legal usage, the appellate court is bound by the result.”²⁰²

Even if each challenged ruling was error, their cumulative effect does not warrant a new trial. In a close factual case, cumulative errors can have the effect of depriving an individual of a fair trial, thereby warranting a new trial.²⁰³ Only where cumulative errors affect the fundamental fairness of a trial is a new trial warranted on that basis, however.²⁰⁴ When the evidence is very strong and “the errors did not affect the jurors’ deliberations or their assumptions about” the

²⁰⁰ Add006–008.

²⁰¹ *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45–46 (Minn. 1997).

²⁰² *Id.* at 46.

²⁰³ *State v. Erickson*, 610 N.W.2d 335, 340 (Minn. 2000).

²⁰⁴ *See State v. Underwood*, 281 N.W.2d 337, 344 (Minn. 1979).

complaining party, the cumulative effect of the errors is not prejudicial and does not warrant a new trial.²⁰⁵ The evidence in favor of the jury's liability verdict was very strong – so strong that BNSF does not challenge its sufficiency. The first trial having been fundamentally fair, a new trial is not warranted.

A. The Trial Court Correctly Concluded that the Adverse Instruction Given at Trial was Appropriate and was not Exploited by Respondents' Closing Argument.

Spoliation is the destruction of evidence or the failure to preserve evidence for another's use in pending or future litigation.²⁰⁶ Courts have the inherent power to sanction a party for spoliation, particularly where that party gains an evidentiary advantage due to its failure to preserve evidence.²⁰⁷ Under Minnesota law spoliation encompasses both the intentional and the negligent destruction of evidence.²⁰⁸ Regardless of intent, the disposal of evidence is spoliation when a party knows or should know that the evidence should be preserved for pending or future litigation.²⁰⁹ Using this clear cut standard the trial court found that BNSF spoliated the blueprints of the crossing

²⁰⁵ *Erickson*, 610 N.W.2d at 340–41.

²⁰⁶ *Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 436 (Minn. 1990).

²⁰⁷ *Patton v. Newmar Corp.*, 538 N.W.2d 116, 119 (Minn. 1995) (applying standard in *Dillon v. Nissan Motor Co., Ltd.*, 986 F.2d 263, 267 (8th Cir. 1993)); *Himes v. Woodings-Verona Tool Works, Inc.*, 565 N.W.2d 469, 471 (Minn. App. 1997).

²⁰⁸ *Patton*, 538 N.W.2d at 118.

²⁰⁹ *Id.*

circuitry that were in the signal cabinet on the night of the accident. BNSF does not and cannot argue that this finding was error. Its own employees admitted that the blueprints were found to be inaccurate several days after the accident, that they were removed from the cabinet, that the employee who removed them was instructed by his manager to preserve them, and that he failed to do so.

Once spoliation has been established, trial courts must utilize standards adopted by the Minnesota Supreme Court in *Patton v. Newmar Corporation*²¹⁰ to fashion the appropriate remedy, the purpose of which is to rectify the prejudice to the opposing party.²¹¹ Judge Maas did exactly that in her “Midnight Order.” She granted the Respondents’ motion requesting an adverse inference arising from the spoliated evidence, but limited the evidence she found to have been spoliated to the missing blueprints.²¹²

By the time the parties finalized the instructions, additional evidence of missing or fabricated evidence had been admitted. The Respondents requested that the trial court include a list of those items in the adverse inference instruction. Particular attention was focused on the evidence of the data downloaded from the crossing event recorders on the night of the accident. The trial court denied that request. She ultimately allowed the admission of the download data as offered by BNSF into evidence despite its extremely flimsy

²¹⁰ *Id.*

²¹¹ *Id. at* 119.

²¹² App.-355

foundation, denied the inclusion of that evidence in the adverse inference instruction, and instead permitted vigorous cross examination and argument about its authenticity.

The only evidence Judge Maas found to have been spoliated and thus entitled to the adverse inference instruction was the blueprints. Yet the jury had heard about additional evidence that had been lost, misplaced, destroyed or fabricated. To distinguish between the two categories of evidence, Judge Maas crafted a modification to the adverse inference instruction about which BNSF complains. The instruction, when read in context and in its entirety, accurately reflects the evidence presented at trial and was not error.

In arguing that the instruction was error, BNSF focuses on two words, “for example.” It ignores the entire last sentence. The jury was instructed:

In this case the Court has determined that Defendant BNSF has failed to preserve some of the original evidence, for example, the blueprints of the crossing circuitry, and that this evidence should have been preserved. **You are permitted to infer from this fact that the contents of the missing blueprints of the crossing circuitry, if produced, would have been favorable [to the respondents] and unfavorable to BNSF.**²¹³

The jury had already heard undisputed evidence that the blueprints in the cabinet on the night of the accident were inaccurate, that they had been removed a few days later and that they were missing. Read literally, the jury was instructed that the court had determined that BNSF should have preserved the blueprints, and that because the

²¹³ T. 4373 (emphasis added).

court had determined that the blueprints should have been preserved, they could infer that the contents of the blueprints would have been unfavorable to BNSF. The focus of the instruction is on the duty to preserve, not on whether the evidence is missing. The blueprints were the only piece of evidence the trial court expressly found should have been preserved. Nothing in the last sentence permits the jury to make an adverse inference about any of the other evidence in the case. This makes sense, since the instruction finds that only the blueprints were associated with a preservation duty. The jury had heard evidence about all kinds of evidence that was missing or lost or fabricated. The “for example” language about which BNSF complains was a means of distinguishing that evidence from the blueprints, the only evidence to which the duty to preserve had been established. This Court has stated that it “will assume that jurors are intelligent and practical people who take the district court at its word, and are guided by the plain language of the court’s instructions.”²¹⁴ The instruction accurately reflects the trial court’s conclusion that only the blueprints had been spoliated. It also reflects her concern that the adverse inference instruction should apply only to the blueprints, and not to the other documents and data that were alleged to be missing, lost, or fabricated. The jurors, as intelligent and practical people, are assumed to have followed the plain language of the instruction, rather than BNSF’s convoluted spin of its underlying meaning.

Even if the instruction were error, BNSF did not object. BNSF’s trial counsel objected to Respondents’ request that the instruction

²¹⁴ *In re Welfare of D.D.R.*, 713 N.W.2d 891, 903 (Minn. App. 2006).

include all of the evidence they believed had been spoliated, and the trial court did not grant Respondents' request. Noting the objection, Judge Maas fashioned the instruction to take those concerns into consideration. Once the final instruction was crafted, no objection was made until new counsel had been substituted at the post trial stage. BNSF cannot achieve a new trial based on an objection never made.

Attempting to create egregiousness where none exists, BNSF next complains that attorney Pottroff's closing argument was "intended to be argumentative," and that he "exploited" the adverse inference instruction in his closing argument with "the empty box stunt."²¹⁵ This argument misrepresents the record.

For a new trial to be appropriate on the basis of attorney misconduct during closing argument the losing party must have objected to the alleged infractions at the time they occurred, requested a curative instruction, and the trial court must have failed to take corrective action.²¹⁶ These actions are prerequisites to obtaining a new trial.²¹⁷ The only exception to this general rule is where the misconduct is so flagrant as to require the court to act on its own motion, or is so extreme that a corrective instruction would not alleviate the prejudice.²¹⁸

²¹⁵ AB at 33 and 34.

²¹⁶ *Hake v. Soo Line Ry. Co.*, 258 N.W.2d 576, 582 (Minn. 1977).

²¹⁷ *Id.*

²¹⁸ *Id.*

BNSF failed to object to Pottroff's closing argument until after it was concluded. As noted by the trial court, under these circumstances BNSF failed to preserve any objection it had.²¹⁹ Furthermore, rather than finding Pottroff's conduct to be an "extreme" or "flagrant" violation of the rules of final argument, the trial court specifically noted that Pottroff kept his argument squarely within the parameters the court had laid out for him to follow. In light of the "for example" language in the adverse inference instruction the trial court specifically instructed Respondents' counsel that he was not to use inflammatory language such as "hidden" or "concealed" or "spoliation" in his argument.²²⁰ Pottroff followed those guidelines.

BNSF is particularly offended by Pottroff's use of empty boxes to represent missing evidence. The use of the boxes was indeed argumentative. Argument is appropriate in closing so long as it is an accurate extension of evidence produced at trial. Each box in this case accurately reflected the evidence it was intended to represent. Further, BNSF's counsel was aware of both the boxes and how they were going to be used before the argument began. In a sidebar held out of the presence of the jury, BNSF's trial counsel informed the court that he was concerned about the "empty box" argument because he had read a transcript in which it had been used in another case. It was not a surprise. Yet when the first box went up, he did not object. At no point did he request a curative instruction. Further, the evidence represented by each box was, indeed, evidence that was

²²⁰ Add. 007.

missing. Contrary to BNSF's allegation in its brief, the evidence represented by each box was never described as "withheld or destroyed."²²¹ Pottroff described it as being "missing" – and it was.

BNSF offered an explanation for why many of the items were missing: corporate policy, or routine document management policies among others. It was precisely because BNSF had an explanation for why this evidence was missing that the trial court did not find that it had been spoliated. Instead the trial court allowed both sides to produce evidence: Respondents that the evidence was missing, and BNSF an explanation about why it was missing. The jury heard both sides. Pottroff's empty box argument was a statement of the truth. The evidence assigned to each box was indeed missing. His argument was proper.

BNSF also objects to what it describes as a "send a message" argument. This argument also fails. First, the quoted statement is only a "send a message" argument if misconstrued. To do so would violate the pertinent standard of review. More importantly, it was at best a passing comment. In short, Respondents' closing argument on liability fell well within the evidentiary rules and is fully supported by the evidence.

B. The Negligence Question on the Verdict Form was Appropriate.

The trial court has broad discretion in framing special verdict questions.²²² Examining the verdict form as a whole, the trial court

²²¹ Compare AB at 33 ("repository for withheld or destroyed evidence.") with T.4491 – 92.

found that the special verdict questions fairly stated the questions the jury was required to answer given the evidence before it and the parties' theories of the case. That conclusion was not error.

BNSF complains that the negligence question on the special verdict form, which simply asked "Was BNSF negligent?", somehow gave the jury license to hold BNSF liable for the failure "to use reasonable care at any time, in connection with any event."²²³ This argument is nonsensical when read together with the second question: "Was BNSF's negligence a direct cause of the accident on September 26, 2003?" The causation question linked any negligence found in response to the first question directly to the accident. BNSF could only be found liable for negligence that was a direct cause of the accident.

BNSF's reliance on *Peterson v. Burlington N. R.R. Co.*,²²⁴ for the proposition that there is a special rule for railroads with respect to verdict questions is misplaced. In *Peterson*, this Court found that the "trial court properly adhered to the rule that the focus of a jury's inquiry should be whether the railroad exercised due care under all the circumstances of the case before it."²²⁵ The alleged negligence in *Peterson* was the operation of the train at the time and place of the

²²² *Dang v. St. Paul Ramsey Medical Center, Inc.*, 490 N.W.2d 653, 658 (Minn. App. 1992).

²²³ AB at 35.

²²⁴ 399 N.W.2d 175 (Minn. App. 1987).

²²⁵ *Id.* at 178.

accident. Under the circumstances of that case, advising the jury that it was to consider whether the railroad exercised due care at the time and place of the accident was appropriate “to the circumstances of the case before it.” This is not a train operations case. Respondents produced evidence at trial of poor track maintenance and the failure to troubleshoot prior evidence of intermittent warning system malfunctions that put BNSF on notice that the signal system at the Ferry Street Crossing malfunctioned on an intermittent basis. It ultimately failed on the day of the accident. The negligence that led to the warning system failure occurred in the past, much like the negligent design or assembly of a helicopter engine can lead to a helicopter crash at a later date. The negligence question correctly focused the jury’s attention on the inquiry of whether BNSF was negligent under the circumstances presented in this case. It was tied to the accident with the causation question. It was not error.

BNSF uses the tortured logic of this special verdict issue as an opportunity to draft a string cite pointing to evidence of three prior signal malfunctions at the Ferry Street Crossing.”²²⁶ BNSF did not identify admission of the prior malfunctions as an issue on appeal, and did not brief it substantively. Having failed to raise and address the issue squarely and substantively in its brief, BNSF’s back door disparagement of a trial court ruling ought not be condoned.

²²⁶ AB at 36.

**C. The Trial Court Acted Well Within its Discretion
Permitting Sgt. [REDACTED] to Testify.**

The ultimate decision about whether and to what degree to admit late disclosed evidence is vested in the trial court's discretion.²²⁷ Where there is no showing that late disclosure of a witness is a willful case of sandbagging, or that it creates undue prejudice to the opposing party because of its untimeliness, a trial court is vested with the discretion to permit the witness to testify.²²⁸ "In situations where the failure to disclose is inadvertent but harmful, the court should be quick to grant a continuance and assess costs against the party who has been at fault."²²⁹ Where the opposing party does not seek a continuance and fails to show prejudice from having had only brief notice of the appearance of the witness, the trial court's discretion to admit the evidence will be upheld on appeal.²³⁰ In this case the trial court exercised her discretion to allow Sgt. [REDACTED] to testify in his capacity as a State Patrol trooper and accident reconstructionist just as she did the other two members of the State Patrol reconstruction team. Under the circumstances of this case, she did not abuse her discretion.

²²⁷ *Phelps v. Blomberg Roseville Clinic*, 253 N.W.2d 390, 394 (Minn. 1977); *See also Krech v. Erdman*, 305 Minn. 215, 218, 233 N.W.2d 555, 557 (1975).

²²⁸ *Krech*, 305 Minn. at 218, 233 N.W.2d at 557.

²²⁹ *Id.*

²³⁰ *Id.*

BNSF's characterization of [REDACTED] as a "stealth" witness, whose testimony turned the case into a "trial by ambush" is hyperbole. BNSF deliberately misconstrues the context in which [REDACTED] testimony arose and ignores the representations made by its own counsel about [REDACTED] both to the court a few weeks earlier and to the jury in opening statement.²³¹

BNSF subpoenaed [REDACTED] for a trial deposition on May 1, 2008, four days before trial was scheduled to begin. [REDACTED] that deposition [REDACTED] testified repeatedly that the State Patrol opinion reflected in his written report was a "consensus" opinion arrived at between himself, [REDACTED] and Sergeant [REDACTED].²³² He stated that he consulted with [REDACTED] and that [REDACTED] joined in his analysis and his opinion.²³³ His discussion of the analysis of the data collected was in terms of "we," and [REDACTED] confirmed that the "we" included [REDACTED].²³⁴

On May 2, 2008, three days before trial was to start, BNSF's trial counsel stated to the court while arguing motions in limine:

[REDACTED] and [REDACTED] -- [REDACTED] was the supervisor, the head of the entire Metro Crash Team, had been doing it since 1997 -- that it was a collaborative effort. So three different state troopers came to the

²³¹ T.143 – 145; 1199 – 1204; 1816 – 1831.

²³² Ex. 4, [REDACTED] depo at 66 – 67; 94; 103 – 105.

²³³ [REDACTED] depo at 94, 103 – 105.

²³⁴ [REDACTED] depo at 54; 58 – 59; 66 – 67; 94; 103 – 105.

opinions that were expressed in his report dated November 22, 2003.²³⁵

In opening statement, BNSF's counsel told the jury: "[REDACTED] [REDACTED] and three other members of the Minnesota State Patrol collaborated with respect to evaluating this crossing accident, with respect to evaluating what happened at the time of this accident."²³⁶ After discussing all of the things "they" did, counsel told the jury "their opinion, as the Minnesota State Patrol, was that the primary cause of this accident was the driver of the car driving around the fully-lowered gate, in violation of about four Minnesota Statutes. That's the Minnesota State Patrol."²³⁷ BNSF, in its opening statement, told the jury that all of the members of the Minnesota State Patrol team who participated in evaluating the accident agreed that the accident was caused because the driver drove around the lowered gate. [REDACTED] was one of the involved members of the Minnesota State Patrol.

In light of these statements, Respondents' counsel spoke with [REDACTED] after opening statements and notified BNSF that they intended to call [REDACTED] as a witness. [REDACTED] testified on May 13, 2008.²³⁸ On May 19, 2008 a discussion was held in chambers about

²³⁵ May 2, 2008 hearing at 59. This transcript is in the trial court record attached as Exhibit 5 to the Plaintiffs' Joint Memorandum in Opposition to BNSF's Motion for JMOL or New Trial.

²³⁶ T.144.

²³⁷ T.145.

²³⁸ T.509.

arranging for ██████ to see the car's remains.²³⁹ BNSF's trial counsel admitted that "under the rules they can meet with him and talk to him, and try to change his opinion. Whatever they want to do."²⁴⁰ With the court's guidance, arrangements were made for a representative from both sides to be present with ██████ when he viewed the car.²⁴¹ At no point in this interchange did BNSF object to ██████ testifying, even though the sole purpose for the trip was preparation to testify.

Respondents called ██████ ██████ to testify on May 21, 2008.²⁴² No objection was raised until he was well into his testimony.²⁴³ ██████ the course of discussing the objection, BNSF's counsel admitted that he had talked about consensus: "When I said consensus, I had no idea what this witness was involved with. I knew what ██████ was going to say, and ██████ and I thought ██████ was the photographer."²⁴⁴ At that point it was clear that the reason for the objection was not that BNSF did not know about the witness, or did not have access to the witness, but instead that BNSF had not bothered to learn in advance what he was likely to say.

²³⁹ T.1199 – 1204.

²⁴⁰ T.1202.

²⁴¹ T.1203-1204.

²⁴² T.1791.

²⁴³ T.1813, 1816.

²⁴⁴ T.1830.

BNSF listed [REDACTED] on its own witness list, and specifically reserved the right to call him as an expert witness.²⁴⁵ BNSF's counsel could have talked with him at any time before trial. BNSF's counsel not only talked with [REDACTED] before he testified, a BNSF representative also accompanied [REDACTED] on his visit to see the wreckage of the Cavalier. BNSF's counsel then affirmatively elicited from [REDACTED] the very "collaboration" testimony it currently would like to disclaim.²⁴⁶ At no point did BNSF request a continuance for the purpose of greater preparation.

The trial court properly permitted [REDACTED] to testify. It limited his testimony to the accident investigation, the State Patrol's conclusions, his consideration of factual evidence already admitted in the case that he had lacked at the time the State Patrol Report was completed, and the effect of that additional information on his current thinking about the cause of the accident.²⁴⁷ He was not permitted to comment on the testimony of BNSF's expert accident reconstruction expert or the Respondents' animation.²⁴⁸

[REDACTED] testified within the set limits. BNSF's real complaint about [REDACTED] is that he was an honest and compelling witness who, when provided with factual evidence he lacked in October and

²⁴⁵ R.A.107, 110.

²⁴⁶ T.1875.

²⁴⁷ T.1820-21; 1830-31.

²⁴⁸ T.1820-21.

November 2003, reevaluated his conclusion. That is neither “unfair prejudice” nor “trial by ambush.”

IV. THE TRIAL COURT ACTED WELL WITHIN ITS DISCRETION IN UPHOLDING THE JURY’S DAMAGES VERDICT.

A decision about whether to grant a new trial or to grant a remittitur is left to the sole discretion of the trial court, and will not be disturbed absent an abuse of that discretion.²⁴⁹ A damage award is excessive only where it “so greatly exceed[s] what is adequate as to be accountable on no other basis than passion or prejudice.”²⁵⁰ Stated another way, a verdict should be set aside as excessive only where the award “shocks the conscience.”²⁵¹ Upon careful consideration of the evidence, the bifurcated trial, and the jury’s demeanor, the trial court upheld the jury’s damages verdict. There is no basis for concluding that its broad discretion was abused.

The wrongful death statute provides that the amount of recovery “is the amount the jury deems fair and just in reference to the pecuniary loss resulting from the death.”²⁵² In the context of wrongful death actions the term “pecuniary loss” historically focused on the concrete economic contributions a decedent made to his or her next-

²⁴⁹ *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990); *Bigham v. J.C. Penney Co.*, 268 N.W.2d 892, 898 (Minn. 1978).

²⁵⁰ *Kinikin v. Heupel*, 305 N.W.2d 589, 596 (Minn. 1981).

²⁵¹ *Verhel v. Indep. Sch. Dist. No. 709*, 359 N.W.2d 579, 591 (Minn. 1984).

²⁵² Minn. Stat. § 573.02, subd. 1.

of-kin such as monetary support and household services. The term also encompasses the more difficult to quantify manifestations of family relationships that are severed by the death. In the case of the death of a child it is these latter, more difficult to quantify types of losses that make up the major portion of a jury's award.

The Wrongful Death Act was enacted in the earliest days of Minnesota's statehood. Since that time the social and economic life of the community has evolved from that of an agrarian society, in which a child was often considered to be an economic asset, to a more urban society in which "the majority [of today's children] render far less service to their parents than did children in the last century when the test was formulated."²⁵³ As the Minnesota Supreme Court recognized in 1961 in *Fussner v. Andert*,²⁵⁴

With the passage of time the significance of money loss has been diminished. Conversely, there is a growing appreciation of the true value to the parent of the rewards which flow from the family relationship and are manifested in acts of material aid, comfort, and assistance which were once considered to be only of sentimental character.²⁵⁵

Recognizing that the Wrongful Death Act is a remedial statute, the *Fussner* court noted that "it is the court's duty to construe it liberally in light of current social conditions."²⁵⁶

²⁵³ *Fussner v. Andert*, 261 Minn. 347, 352, 113 N.W.2d 355, 359 (1961).

²⁵⁴ *Id.*

²⁵⁵ *Id.*, 261 Minn. at 353, 113 N.W.2d at 359.

²⁵⁶ *Id.*, 261 Minn. at 354, 113 N.W.2d at 359.

The “growing appreciation of the true value . . . of the rewards which flow from the family relationship” is even more pronounced today than it was in 1961 when the *Fussner* court first described it. Recognizing that reality, these four families limited their damages request to the intangible but very real loss of “counsel, guidance, aid, advice, comfort, assistance, companionship and protection” each parent and sibling experienced due to the death of their respective family member.²⁵⁷ The loss of counsel, guidance, aid, advice, comfort, assistance, companionship and protection are nothing more than manifestations of the loss of relationship the *Fussner* court recognized in 1961.²⁵⁸ Juries have been putting a monetary value on family relationships on a case by case basis ever since – a total of nearly 50 years. The “average” dollar amount awarded for the death of a child has steadily increased as society and the economic milieu in which we live continues to evolve. It is within this context that BNSF’s allegation that the jury’s damages award is excessive must be weighed.

The four young people killed in the September 26, 2003 accident were at an age of transition. Bridgett Shannon was a 17-year-old high school student. Brian Frazier, Harry Rhoades and Corey Chase were slightly older still figuring out what they wanted to do with their adult lives and not quite sure of how to get there. Each of the four was young, vibrant, and full of the future. They were in the process of

²⁵⁷ T.4838.

²⁵⁸ *Fussner*, 261 Minn. at 353, 113 N.W.2d at 359.

learning to be independent and self supporting and, like most modern youth, they were not contributing much economically to their respective families at this point in their lives. It was for precisely this reason that the Respondents elected to limit their damages to compensation for the loss of counsel, guidance, aid, advice, comfort, assistance, companionship and protection. BNSF stipulated to this modification to the standard jury instruction. The relationships between these youths and their respective parents and siblings, however, were strong and of enormous importance to the families involved.

BNSF argues first that the verdicts are excessive because, historically, wrongful death verdicts for minors have been lower. It argues that such verdicts are “uniformly less than \$1 million.”²⁵⁹ As observed by the trial court, however, wrongful death damages are not to be determined by a court, or by a jury, for that matter utilizing statistical averages. In 1961 when *Fussner* was decided, wrongful death damages for the life of a child averaged a few thousand dollars. By 1994 the Minnesota Supreme Court upheld a trial court’s refusal to grant a new trial or remit a verdict of a little over \$1 million awarded to the family of a seven year-old child.²⁶⁰ In 2003 Hennepin County Judge Mary Steenson DuFresne upheld a \$3 million wrongful death award to the family of a twenty-two year old high school

²⁵⁹ AB at 41.

²⁶⁰ [REDACTED] *v. Washington County*, 518 N.W.2d 594, 601-02 (Minn. 1994).

dropout with no dependents.²⁶¹ After the verdict in this case, but before the post trial motion hearing, a jury in Hibbing, Minnesota returned two wrongful death verdicts awarding \$6 million for the loss of relationship damages.²⁶² This court's response to the "but-this-is-the-biggest-verdict-ever" argument in 1995 was right on point: "past cases represent history, not controlling law."²⁶³

BNSF next argues that the damages awards were punitive because the jury rendered the same verdict for each family, and because the jury "was also implored to send a message."²⁶⁴ There is no logical correlation between identical verdicts and those verdicts being punitive. There is no evidence in the record, when that record viewed in the light most favorable to the verdict, from which it can be fairly stated that the jury was "implored" to punish BNSF with a large damages award. And there is no logical connection between the jury's unanimous, identical verdicts and the statement made by Respondents' counsel BNSF chooses to characterize as a "send a message" argument.

²⁶¹ *Olson v. Christian*, Hennepin County File No. WD 01-8016, Order Denying Motions For Remittitur, JNOV, and/or New Trial, contained in the record as Exhibit 6 attached to the Authenticating Affidavit of Sharon L. Van Dyck Regarding Motions for JMOL, New Trial or Remittitur.

²⁶² *See* Add.012.

²⁶³ *Lundman v. McKown*, 530 N.W.2d 807, 832 (Minn. App. 1995).

²⁶⁴ AB at 42.

In closing argument, Pottroff suggested a range of ten to twelve million dollars as an appropriate award for each family.²⁶⁵ He also urged the jury to treat the families equally, with no one child being “better than” any other. There is nothing in either of these statements that suggests punishment. BNSF neglects to mention that its own trial counsel also suggested that the jury award identical verdict amounts to each family, only at a considerably lesser dollar amount.²⁶⁶

What BNSF calls a “send-a-message” argument consists of one sentence, taken out of context, in which Pottroff requested the jury to make sure it awarded “the correct amount of restitution” for “wrongful conduct.” BNSF’s argument ignores the sentences before and after the one it cherry picked. Taken in context, Pottroff stated:

This is what we are saying as a community is the value of the relationships in a community that’s built on family values. We need to know that this system that we’re in works, to make sure that when wrongful conduct occurs the correct amount of restitution applies. It’s not punishment. It’s not gain. It’s not win-fall. [sic] It’s where our values are.”²⁶⁷

Because the case was bifurcated at BNSF’s request, the jury had already determined that BNSF was 90% at fault for causing the deaths of these four young people before any evidence of damages was presented. The jury determined before the damages trial began that BNSF had engaged in “wrongful conduct” that caused the accident in

²⁶⁵ T.4859

²⁶⁷ T.4860.

which these four youths died. In the damages final argument, plaintiffs' counsel urged the jury to award the "correct amount" of damages for the losses it had already determined to have been caused by BNSF's negligence. This is not an improper "send a message" argument.

In an argument that is itself astonishing, BNSF cites to an unpublished opinion by this court, *Benning v. Moore*,²⁶⁸ and argues that like the plaintiff in that case, "these decedents provided little or no aid and comfort to their families."²⁶⁹ Incredibly, BNSF goes on to allege that the jury's damages award must be intended to compensate for "companionship and advice that these decedents had never provided."²⁷⁰ BNSF concludes that because of these "facts" the jury's large award shocks the conscience.²⁷¹ In doing so, BNSF not only ignores, but misrepresents the record.

The damages testimony introduced at trial consists entirely of evidence about the relationships between each of the decedents and their various parents and siblings. Pointing out with disdain what it considers to be an improper display of grief or regret on the part of some witnesses, BNSF fails to mention the rich testimony about four kids who were extremely close to and involved with their families. The jury heard about the close relationship Corey had with his mother,

²⁶⁸ 2005 WL 2129094 (Minn. App. Sept. 6, 2005), App. 1232.

²⁶⁹ AB at 46.

²⁷⁰ *Id.*

²⁷¹ *Id.*

and how he tried to be the man around the house when his father was not around.²⁷² They heard about Corey's close relationship with his younger brother Sam, which was characterized by the 20 year old regularly attending his 11 year old brother's sports events and practices as a sign of support.²⁷³ The jury heard about 17 year-old Bridgett Shannon, a gregarious, warm, friendly teen who insisted on decorating the house from top to bottom for the family holidays,²⁷⁴ and went with her brother to her grandmother's house to watch Stephen King movies just so she could scare her grandmother.²⁷⁵ They heard about quiet Harry Rhoades, who went out in the field behind the family's rural home and created a flower garden for his mother just because she had always wanted one.²⁷⁶ And they heard about Brian Frazier, who with his younger brother Tim enlivened multi-generational family outings with practical jokes.²⁷⁷

The jury heard evidence about lost relationships from four different families compressed into an afternoon and a morning. While everyone in the courtroom was aware that the family members suffered grief, grief was not the focus of the testimony. Three to four

²⁷² T.4531.

²⁷³ T.1491.

²⁷⁴ T.4446.

²⁷⁵ T.4464.

²⁷⁶ T.4768-69.

²⁷⁷ T.4814-15.

witnesses testified for each family. Some moments were sad. Others were funny. The damages testimony brought these four young people to life and made their relationships with their parents and siblings real. The jury heard the testimony, observed the demeanor of the witnesses and felt the impact of relationships lost. Its damages verdict is a reflection of those losses.

Because the jury's damages awards were substantial, BNSF argues that they were necessarily the product of passion and prejudice, and that they "shock the conscience." Because the jury's damages awards were the same for each family, BNSF argues that the awards were punitive. Because the pecuniary loss testified to at trial was limited to the loss of family relationships – companionship, advice and comfort - BNSF chastises plaintiffs' counsel for "soliciting next-of-kin grief, distress and wounded feelings." These same arguments were made below, and the trial court acknowledged in the post trial hearing that the challenge to the damages award was one she needed to carefully consider. Having done so, however, she concluded:

the jury carefully and respectfully reflected upon the damages evidence presented to it and, although the returned verdict is substantial, their decision was not made while inflamed by passion or prejudice. . . . it is the jury's duty to assign a value to those relationships and, barring evidence of passion or prejudice contaminating that decision, which there appears to be none, this Court may not supplant the jury's decision with opinions that may be held by others.²⁷⁸

²⁷⁸ Add.012.

The trial court observed the jury during six weeks of trial. It observed the dynamics in the courtroom and the jury's demeanor. It took note of the fact that the trial was bifurcated, and that the liability issues were not introduced into the damages trial. In the end, convinced that neither passion nor prejudice played a role in the size of the damages verdict, the trial court exercised its discretion and left intact the jury's determination of the value of the family relationships that ended on September 26, 2003. There being no evidence that the trial court abused its discretion, this Court should do the same.

V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED BNSF A NEW TRIAL BASED ON NEW WITNESSES.

BNSF argues that the district court abused its discretion in declining to order a new trial based on three allegedly "new" witnesses despite the fact that: (1) none of the alleged witnesses actually saw the accident; (2) each alleged witnesses offered testimony that contradicted the other; and (3) BNSF paid one of the witnesses \$5,000 for her clearly incorrect statement. This Court should affirm the district court's decision.

"A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court, and the court's discretion is to be exercised sparingly."²⁷⁹ The burden is on the moving party to show "affirmatively and unequivocally that the new evidence was not in fact discovered until after the trial and that it **could not** have been discovered before the trial by the exercise of

²⁷⁹ *Wurdemann v. Hjelm*, 257 Minn. 450, 465, 102 N.W.2d 811, 821 (1960).

reasonable diligence.”²⁸⁰ “A motion for a new trial upon the ground of newly discovered evidence is properly denied for lack of diligence of the moving party where the same diligence which led to the discovery of the new evidence after trial would have discovered it had such diligence been exercised prior thereto.”²⁸¹ The evidence at issue must have been relevant and admissible at the trial the proponent seeks to overturn.²⁸² The evidence must be such that “it **probably** will lead to a different result in a new trial.”²⁸³

The trial court, who spent five weeks observing the liability evidence and the demeanor of all of the liability witnesses, found that all of the late surfacing witnesses could have been found before trial, that none offered new or relevant testimony, that their testimony was not likely to change the outcome, and that their testimony was not likely to be admissible in the first instance.²⁸⁴ These conclusions are readily supported by the record.

A. BNSF Failed to Exercise Due Diligence.

BNSF failed to exercise due diligence in uncovering “new” witnesses after trial. BNSF originally relied on [REDACTED] and

²⁸⁰ *In re Hore’s Estate*, 222 Minn. 197, 203, 23 N.W.2d 590, 593 (1946) (emphasis added).

²⁸¹ *George v. Estate of Baker*, 724 N.W.2d 1, 12 n.8 (Minn. 2006).

²⁸² *Brown v. Bertrand*, 254 Minn. 175, 180, 94 N.W.2d 543, 548 (1959).

²⁸³ *Bruno v. Belmonte*, 252 Minn. 497, 503, 90 N.W.2d 899, 903 (1958) (emphasis added).

²⁸⁴ Add.013; *see also* Add.014.

██████████ – witnesses to whom BNSF paid rewards of \$10,000 and \$5,000, respectively, months after the trial had concluded.²⁸⁵ BNSF withdrew its reliance on ██████████ shortly before the hearing—six months after the motion was scheduled. BNSF later added Sergeant ██████████ and his wife when they came forward in response to publicity surrounding the pending sanctions motion. BNSF offers the testimony of ██████████ and the ██████████ to prove that the gates and lights were working at the time of the accident.

BNSF was on notice that Respondents were alleging that the gates and lights malfunctioned at the time of the accident from the time they received Respondent Chase’s Answers to Interrogatories in 2005. BNSF could have sought witnesses who had observed the gates and lights functioning that evening at any time from 2005 until trial started on May 8, 2008. It did not.

BNSF, of its own accord, narrowed its search to eyewitnesses to the accident, rather than eyewitnesses to whether the lights and gates functioned. BNSF claims adjuster ██████████ did locate one “lights and gates” witness—off-duty Officer ██████████ ██████████ even took Officer ██████████ statement. He had been stopped behind a line of vehicles and a fully lowered gate while coming home from the Anoka High School homecoming game. After sitting through the Respondents’ entire case in chief with its evidence about intermittent warning system failures, BNSF did not call ██████████ as a witness. It did not initiate a search for other “lights and gates” witnesses at any time before or during trial. Its claim that it did not know that it

²⁸⁵ Add.013.

needed to look for such witnesses is belied by the record and by common sense.

The search for new witnesses began the first week of November 2008, some five months after trial, because Megan Ricke, head of BNSF's trial counsel's law firm, was concerned about her firm's sanctions exposure. The search began with "cold leads" gleaned from the *original claims investigation file*. BNSF located and produced statements from [REDACTED] and [REDACTED] in one month's time. [REDACTED] and his wife came forward in May 2009 after reading a newspaper article that led them to believe that their experience on the night of the accident might be significant. Sergeant [REDACTED] was a member of the Coon Rapids police force at the time of the accident. He worked with the coroner's deputy, [REDACTED] the next morning and notified [REDACTED] Chase of her son's death. Sergeant [REDACTED] told [REDACTED] about his experience with the lights and gates the night of the accident. Both Sergeant [REDACTED] name and [REDACTED] name were among the law enforcement records available to all parties since this litigation began. Sergeant [REDACTED] and his wife would unquestionably have come forward long before trial if BNSF had made it known that it was looking for "lights and gates" witnesses.

Judge Maas, looking at these facts, correctly concluded that if BNSF had used the same diligence before trial it used months after trial, it could and would have located these "lights and gates" witnesses. The due diligence requirement was not met, and the denial of BNSF's motion should be affirmed on this basis alone.

B. The New Evidence is Not Admissible at Trial.

The new witnesses BNSF now relies upon are tied to the Anoka High School football game. [REDACTED] and the [REDACTED] picked up their respective children *before the game had ended* and headed home, traveling northbound over the Ferry Street Crossing. They traversed the crossing before Officer [REDACTED] who had stayed until the game was finished. BNSF did not call Officer [REDACTED] because he was unable to pin down the exact time he arrived at the crossing. [REDACTED] suggested to him that it was between 9:45 and 10:00, but he was not certain; he just knew it was tied to the end of the game.

Respondents presented probative evidence in the post-trial motions that the game ended between 9:15 and 9:30. Given that evidence it is virtually certain that [REDACTED] and the [REDACTED] traversed the crossing at about 9:30 pm. In fact, [REDACTED] testified that these events took place between 9:45 and 10:00, and admitted that it could have been 9:30. Officer [REDACTED] who was several minutes behind [REDACTED] and [REDACTED] arrived a bit after 9:30 pm and was stopped by the 9:30 train. The accident at issue occurred at 10:10 pm.

Even if timing were not an issue, none of the new witnesses saw a fully lowered gate, the train, the decedents' car, or the accident. Respondents' theory of the case was that the activation failure that caused the accident was a manifestation of a recurring but intermittent malfunction. Evidence that witnesses saw the lights start to flash or even saw the gate begin to descend, whether at 9:30 p.m. or even at 10:00 p.m., is not relevant to whether the signal warning system at Ferry Street fully activated in a timely manner before the

train arrived at 10:10 p.m.. The trial court correctly concluded that none of this evidence would have been admissible at trial.

C. The New Evidence is Cumulative.

Even if relevant, the evidence offered by [REDACTED] and the [REDACTED] is cumulative. BNSF offers their testimony as evidence that the active warning devices fully deployed in advance of the arrival of the train at 10:10 p.m. That same testimony was offered at trial by the Timothy Langeberg and [REDACTED] the train crew. The fact that [REDACTED] and [REDACTED] are not railroad employees is relevant only to credibility. Their testimony is cumulative and not a proper basis for a new trial.²⁸⁶ BNSF's reliance on *Keyes v. Amundson*, a North Dakota case,²⁸⁷ is misplaced. In *Keyes* the critical issue was the speed of the plaintiff's motorcycle.²⁸⁸ No eyewitnesses could testify to its speed, and evidence about how the accident occurred came solely from expert accident reconstructionists.²⁸⁹ The new witness located years later saw the accident. He was able to testify that the motorcycle was accelerating, a fact that went to the assumptions upon which the experts had based their opinions.²⁹⁰ For this reason, this witness offered probative evidence no other witness had been able to provide.

²⁸⁶ *Regents of Univ. of Minn. v. Med. Inc.*, 405 N.W.2d 474, 478 (Minn.App.1987).

²⁸⁷ 391 N.W.2d 602 (N.D. 1986).

²⁸⁸ *Id.* at 605.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

Here, neither [REDACTED] nor [REDACTED] saw the accident, saw the gates fully deployed, saw the train, or was able to identify the decedents' car. Their testimony duplicates the testimony of the train crew. *Keyes* is inapposite.

Further, it is surprising BNSF would rely on a North Dakota district court case, when this Court has addressed and rejected the very argument BNSF now asks this Court to endorse.²⁹¹

D. The New Evidence Would Not Have Affected the Outcome at Trial.

BNSF's argument that the evidence offered by these new witnesses would change the result of the trial relies entirely on a comparison between the admittedly poor credibility of the train crew and the assumption that [REDACTED] standing as a "veteran police officer" coming forward to do the "right thing" would sell well. The argument completely ignores the great weight of the trial evidence: the physical evidence that the collision occurred at such a point in the southbound lane that a lowered gate was impossible. The trial court, after observing all of the evidence, had no difficulty concluding that no matter how credible Officer [REDACTED] might be his testimony was not likely to overcome the great weight of the other evidence that supports the verdict.

²⁹¹ *Bruno v. Belmonte*, 252 Minn. 497, 502-03, 90 N.W.2d 899, 902-03 (1958).

VI. THE SANCTIONS IMPOSED ON BNSF ARE AUTHORIZED BY LAW AND WARRANTED BY CONDUCT.

The trial court imposed monetary sanctions on BNSF for significant, repeated, and almost inconceivable misconduct that, by any measure, “did indeed strain the limits of the civil justice system.”²⁹² BNSF saturated the proceedings below with misconduct that included, among other things, an untold number of intentional misrepresentations to the Court and to counsel, the deliberate falsification of documents, the intentional hiding of material from discovery, and attempts to suborn perjury—all in an effort to hide what really happened on the evening of September 26, 2003. The list is as shocking as it is long. Indeed, Judge Maas, who witnessed firsthand BNSF’s blatant misconduct over a period of nearly five years, found the breadth of that misconduct to be “staggering; beginning within minutes of the accident, up to and through trial.”²⁹³

The trial court’s sanctions memorandum contains a comprehensive review of the voluminous record, specific factual findings, none of which BNSF’s challenges, and a thorough legal analysis. The trial court specifically fashioned the sanction to be the “least restrictive” while at the same time designing it “to deter future misconduct.”²⁹⁴ The trial court properly exercised her broad discretion in light of BNSF’s pervasive, repeated, and inexplicable misconduct. The trial court should be affirmed.

²⁹² Add.046.

²⁹³ *Id.*

²⁹⁴ Add.075.

A. Standard of Review.

This Court reviews a trial court's decision to impose sanctions, as well as its determination of the proper extent of those sanctions, only for an abuse of discretion.²⁹⁵ This record unequivocally shows the trial court properly exercised her broad discretion to impose monetary sanctions on BNSF, and did so within the confines of well-established law.

B. Inherent Authority.

Minnesota courts recognize a trial court's inherent power to levy sanctions.²⁹⁶ The court's inherent power derives from, and is incidental to, the administration of justice and equity.²⁹⁷ Inherent

²⁹⁵ *Patton v. Newmar, Corp.*, 538 N.W.2d 116, 118-119 (Minn. 1995) (*Patton II*); *Dillon v. Nissan Motor Co.*, 986 F.2d 263, 267 (8th Cir. 1993); *See also Uselman v. Uselman*, 464 N.W.2d 130, 145 (Minn. 1990)

²⁹⁶ *Patton II*, 538 N.W.2d at 118-19 (exclusion of evidence as sanction which resulted in dismissal); *In re Burns*, 542 N.W.2d 389, 389 (Minn. 1996) (restriction on communication with court imposed as sanction); *Foust v. McFarland*, 698 N.W.2d 24, 31-33 (Minn. Ct. App. 2005) (adverse inference instruction as sanction for destroyed evidence); *Olson v. Babler*, No. A05-395, 2006 WL 851798, at *7 (Minn. Ct. App. Apr. 4, 2006) (concluding that district court properly awarded attorney fees as sanction under inherent authority where appellant "demonstrated total disregard for the sanctity of oath and of the authority and dignity of the [c]ourt as a function of its duty to dispense fairness and justice") R.A. 124; *Capellupo v. FMC Corp.*, 126 F.R.D. 545 (D. Minn. 1989) (attorney fees awarded as sanction for document destruction).

²⁹⁷ *Patton II*, 538 N.W.2d at 118-19; *In re Clerk of Lyon County Court's Compensation*, 241 N.W.2d 781, 784 (Minn. 1976).

power vests the court with authority to control the cases that come before it, and to manage the affairs of justice.²⁹⁸

While some litigation misconduct, such as the filing of a frivolous pleading, can adequately be addressed by existing rules or statutes, there are circumstances where existing rules and statutes are not “broad enough to reach ‘acts which degrade the judicial system.’”²⁹⁹ Under those circumstances, the court must rely on its inherent power to get the job done.³⁰⁰ Further, where misconduct sanctionable under a particular rule or statute is so intertwined with misconduct that only the inherent power can address, “requiring a court first to apply Rules and statutes containing sanctioning provisions to discrete occurrences before invoking inherent power to address remaining instances of sanctionable conduct would serve only to foster extensive and needless satellite litigation, which is contrary to the aim of the Rules themselves.”³⁰¹

Once a trial court invokes its inherent power it has broad discretion in assessing what type of sanction is appropriate.³⁰² Here,

²⁹⁸ *Patton II*, 538 N.W.2d at 118-19.

²⁹⁹ *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991).

³⁰⁰ *Chambers*, 501 U.S. at 50.

³⁰¹ *Id.* at 51.

³⁰² *Chambers*, 501 U.S. 32, 50-51 (attorney fees awarded as sanction); *Dillon v. Nissan Motor Co., Ltd.*, 986 F.2d 263 (8th Cir. 1993) (exclusion of evidence and expert testimony as sanction); *Patton II*, 538 N.W.2d 116 (exclusion of evidence as sanction which resulted in dismissal); *In re Burns*, 542 N.W.2d 389 (restriction on communication with court imposed as sanction); *Foust*, 698 N.W.2d at 31-33 (Minn.

observing firsthand that much of BNSF's misconduct was still being unearthed on the eve of trial and even after trial began, the trial court turned to its inherent authority to sanction BNSF because "the nature of the misconduct in this case, which included, *inter alia*, destruction, mishandling, and tampering with critical evidence, misrepresentations to [the trial court] and opposing counsel, and sundry other problems with witnesses, does not fit neatly into the existing sanctions framework provided by the rules of procedure and relevant statutes."³⁰³ Judge Maas stood on firm legal ground in utilizing the court's inherent power under those circumstances. Only the court's inherent power permitted her impose an appropriate sanction.

C. Sanctions Standard.

In *Patton v. Newmar (Patton II)*³⁰⁴ the Minnesota Supreme Court affirmed the inherent power of a trial court to fashion an appropriate sanction for misconduct during the course of litigation. The misconduct at issue in *Patton* was limited to traditional spoliation – the destruction of an allegedly defective motor home.³⁰⁵ The test articulated by *Patton II* is limited to spoliation.

Because the misconduct at issue here ranges far beyond spoliation, the trial court relied on factors this court culled from

Ct. App. 2005) (adverse inference instruction as sanction for destroyed evidence).

³⁰³ Add.047.

³⁰⁴ 538 N.W.2d 116.

³⁰⁵ *Patton II*, 538 N.W.2d at 118.

federal case law in *Patton I*.³⁰⁶ *Patton II* reversed this Court's penultimate determination that the trial court's sanction for spoliation of the motor home the dismissal of the entire lawsuit was too harsh, but it did not reverse this court's use of the six factors as an analytic tool. *Patton II* cited the same federal cases to fashion the spoliation standard.³⁰⁷

Here, the trial court applied the following *Patton I* factors to determine an appropriate sanction:

- (1) bad faith;
- (2) prejudice;
- (3) least restrictive sanction and deterrence;
- (4) notice.³⁰⁸

These factors incorporate all of the considerations used by the federal courts in inherent power cases. They incorporate all of the concerns expressed by the Minnesota appellate courts about the imposition of sanctions of any kind. The trial court was correct to apply them to BNSF's misconduct in this case.

D. The Sanctions are Appropriate to the Conduct.

BNSF's misconduct ranges far beyond spoliation and is of a category seldom seen in Minnesota. In addition to spoliation it includes hiding evidence, tampering with evidence, repeated misrepresentations to the trial court and counsel, suborning false

³⁰⁶ 520 N.W.2d 4, 8 (Minn. App. 1994).

³⁰⁷ *Patton II*, 538 N.W.2d at 119.

³⁰⁸ See Add.050-63.

testimony, and witness abuses. Notwithstanding, ignoring the vast scope of its misconduct, BNSF continues to advocate, as it did before the trial court, for the standard applicable only to spoliation. The trial court strongly rejected this position. Based on the record, this Court should do the same.

1. Bad Faith

Minnesota does not require a finding of bad faith to impose sanctions.³⁰⁹ It is, however, a factor that courts in the vast majority of jurisdictions consider when determining the type and severity of sanctions not only for spoliation, but also for a variety of other misconduct. The trial court made factual findings that BNSF engaged in a pattern of misconduct, and that the following misconduct was perpetrated in bad faith: (1) the loss, destruction and/or fabrication of electronic and physical records; (2) the failure to follow its own policies for accident investigation and coordination with law enforcement; (3) the obstruction of and interference with Respondents' investigation; (4) the interference with Respondents' access to witnesses and the accident site; (5) the destruction or production of erroneous circuitry drawings; and (6) knowingly and repeatedly advancing lies, misleading facts and/or misrepresentations.³¹⁰

The evidence of this misconduct and its deliberate nature is overwhelming. Within moments of arriving at the crossing, BNSF's corporate representative, [REDACTED] violated BNSF rules and

³⁰⁹ *Patton II*, 538 N.W.2d at 118-19.

³¹⁰ Add.053.

downloaded the data from the HXP and HCA outside the presence of law enforcement.³¹¹ The first generation write protected disk he made of that data mysteriously disappeared three days later – again in violation of BNSF rules. [REDACTED] laptop, used to download the data, was recycled. The data printout BNSF claimed was authentic contained changed headings and an additional four pages of data from a later date. [REDACTED] admitted at trial that he changed the mnemonics, the headings used on the data printouts, a few days before a court-ordered site inspection. [REDACTED] “H” drive contained multiple Ferry Street Crossing data files that were comprised of data from multiple dates in a single file, improper sequencing, and combinations of data from the HCA and the HXP in the same file – all of which is evidence of fabrication via cutting and pasting. All of the data files ostensibly downloaded from the HCA in 2003, including the one BNSF sponsored as having been downloaded the night of the accident, recorded the operation of the flashing lights in a completely different way than did the data downloaded at the Respondents’ site inspection on July 17, 2005. Only the 2005 data matched the wiring diagram on the HCA, thus only the 2005 data could be authenticated as having come from the Ferry Street Crossing. Respondents’ signal expert [REDACTED] testified that the difference in how the flashes are recorded is a function of the logic algorithm programmed into a specific module in any given HCA. Changing the mnemonics does not affect this programming; a signal technician like [REDACTED] would not have access to that coding. Based on this

³¹¹ Ex. 7

evidence, Mr. ██████ testified that the printed data BNSF relied upon to prove that the warning system was functioning properly could not have come from the HCA at the Ferry Street Crossing.

BNSF withheld significant evidence from the Minnesota State Patrol despite repeated requests. BNSF never provided the State Patrol with data from the HXP, HCA, or from the locomotive event recorders. BNSF never made the locomotive involved in the accident available for inspection and measurement despite specific requests. BNSF measured the locomotive snow plow for its own investigation, but never provided those measurements to the State Patrol or allowed the patrol to take its own.

The disabled crossing form that documented when and how the signal circuitry was bypassed while a work gang was repairing the track in the Ferry Street approach *circuit the day before and the day of the accident* was lost or destroyed.³¹² Track defect records from the rail detector car showing defects in and replacement of an eight foot piece of rail in the Ferry Street approach circuit were concealed for *years* until BNSF needed to use that information – well after discovery was closed and expert reports had been exchanged.³¹³ The PATS/PARS records, which record the time, identity and location of track work, were deliberately withheld until a month before trial.

Two years of readings were missing from the HXP history logs. Those two years included the time period encompassing the accident

³¹² T.2534.

³¹³ T.2915, 3498-3501; 1383-1384.

through the date of Respondents' inspection of the crossing.³¹⁴ Respondents requested permission to examine the history logs in 2005 during their site inspection. BNSF convinced the trial court at that time to restrict their access to the log. By the time of trial those records were gone. [REDACTED] the period of missing data there was a significant change in the "Rxpot" values. Evidence that the change was made after the accident would prove definitively that the setting for the length of the approach circuit was incorrect at the time of the crash.

Signal desk communications for the day of the accident were deliberately not preserved, although [REDACTED] [REDACTED] the claims representative whose job it was to make the preservation request, testified that her entire investigation was conducted in anticipation of litigation. The signal system blueprints in the cabinet on the night of the accident were found to be inaccurate in violation of a federal regulation. The day before the FRA conducted its accident-related inspection those blueprints were removed from the cabinet and destroyed, despite the fact that the signal manager had directed the local signal supervisor to preserve them.

The record is also replete with evidence of misrepresentation and false testimony. The trial court noted that it "lost count of the total number of misrepresentations BNSF made to counsel, the parties, and this Court throughout the proceedings." On February 13, 2006, in a hearing on Respondents' motion to compel discovery BNSF represented to the Court and counsel that it was not BNSF's policy to

³¹⁴ T.2534-3455

create or preserve disks of downloaded crossing data. It was later learned that BNSF had a *written policy* to download such data onto a write-protected disk and preserve it for *seven years*.

BNSF represented to Respondents' counsel and to the trial court that the PATS/PARS records – electronic records that record the time and location of track maintenance – were irrelevant to the case. BNSF's counsel characterized Respondents' request for the records as being "ridiculous." [REDACTED] Respondents' fifth motion to compel, when it became apparent that the trial court was going to allow some access to the records, BNSF convinced the trial to limit access to "track one" because only "track one" could possibly contain relevant data. In fact signal technicians working on the Ferry Street Crossing recorded their time as "track nine." Full access to the records ultimately revealed, *less than three weeks before trial*, that eight feet of defective rail had been removed the day before and the day of the accident.³¹⁵ BNSF repeatedly misrepresented that the condition of the track had nothing to do with the accident, that the PATS/PARS records were irrelevant, and that that only track one records contained data pertinent to the accident.

[REDACTED] false statements and misrepresentations are legion. He testified under oath that the only HXP and HCA data downloads he conducted were on September 26, 2003, shortly after the accident, and July 17, 2005, the day of Respondents' site inspection. By the time of trial he had admitted that he had downloaded data on September 29, 2003, October 3, 2003 and October 22, 2003. Mr.

³¹⁵ T.3500-3501.

██████████ testified under oath that the September 29, 2003 data downloads first exposed to Respondents' counsel inadvertently during the "misclick" incident had no connection to the accident. In his second, court-ordered deposition ██████████ admitted that he knew that statement was false when he made it, but he could not explain why. At trial, BNSF used the originally denied September 29, 2003 data to try to authenticate the September 26, 2003 data.

Judge Maas found all of this misconduct to have been conducted in bad faith. The record fully supports her finding.

2. Prejudice

The trial court treated prejudice as one of several factors to consider in fashioning an appropriate sanction. BNSF characterizes its misconduct as inadvertent "bungling," "sloppy evidentiary maintenance and preservation," or "negligence"³¹⁶ – all of which failed to prejudice Respondents because they ultimately prevailed at trial. The trial court correctly rejected this artificially narrow definition of prejudice.

BNSF's misconduct prejudiced Respondents in a multitude of ways. Respondents had to bring two motions to gain access to the accident site. The first motion required a two day hearing. The second motion was necessary because BNSF employees mismarked the end of the approach circuit. Respondents had to bring four additional discovery motions to get evidence that should have required no court intervention. Three BNSF employees had to be deposed twice. ██████████ was deposed twice because he testified falsely

³¹⁶ T. April 21, 2008 hearing at 25, 40.

in the first deposition and later discovery revealed his false statements. The 30.02(f) locomotive event recorder deposition had to be taken twice because BNSF instructed the designee to attend the first deposition without his computer, making it impossible to view the data needed to answer questions. The 30.02(f) PATS/PARS deposition had to be taken a second time because BNSF misrepresented the scope of the available data to both the court and counsel. Both corporate designee depositions required travel to Ft. Worth, Texas.

No detector car records or track maintenance records were produced until long after discovery was closed and expert reports exchanged. Access to the additional Ferry Street Crossing HXP and HCA download data stored on [REDACTED] "H" drive not occur until three weeks before trial, requiring Respondents' expert witnesses to analyze volumes of additional data and write supplemental reports on the eve of trial. Because of the myriad problems with the event recorder data Respondents had to hire a forensic computer analyst. That analyst, without whom Respondents would have been unable to identify and prove that the electronic evidence had been tampered with, cost over \$90,000.

BNSF insists that Respondents suffered no prejudice because the jury returned a multimillion dollar verdict finding BNSF 90% at fault. To make that argument BNSF insists that all of its misconduct falls under the rubric of spoliation. It simply ignores all misconduct it would prefer not to address. BNSF pretends that the enormous expenditure of time and money required to overcome its abuses did not occur. In the end the argument is disingenuous, since BNSF asks

this Court in the same breath to reverse the very verdict it claims eliminates prejudice.

The law does not require that a party lose its case in order to establish prejudice. The United States Supreme Court has rejected the very argument BNSF asks this Court to endorse, observing that the propriety of sanctions “depends not on which party wins the lawsuit, but on how the parties conduct themselves during the litigation.”

BNSF’s misconduct caused Respondents at least a full year’s delay getting to trial. It caused them enormous expense uncovering the deception itself and gaining access to evidence needed to prove their case. It caused their attorneys to spend thousands of hours of otherwise unnecessary time. This is prejudice, and a monetary sanction is the only way to address it.

3. Least Restrictive Sanction and Deterrence

The United States Supreme Court addressed pervasive litigation abuse in *Chambers*, the seminal case affirming a court’s inherent power to craft sanctions for such abuse. Local federal cases cite to it,³¹⁷ and this court has done so as well. *Chambers* not only addresses the nature of the inherent authority to sanction, but also outlines its proper scope. “Because of their very potency, inherent powers must be exercised with restraint and discretion.”³¹⁸ That care requires a

³¹⁷ See *Dillon*, 986 F.2d at 266.

³¹⁸ *Chambers*, 501 U.S. at 44-45.

court to impose the least restrictive sanction possible under the circumstances.³¹⁹

Courts routinely recognize that inherent power sanctions are imposed not only to compensate the aggrieved party or the court for costs flowing from the sanctioned party's misconduct, but also to deter future misconduct and, in doing so, vindicate the court's authority. In *Chambers*, for example, in upholding a district court's inherent authority to impose attorney's fees as a sanction the Supreme Court explained that “[t]he imposition of sanctions [for bad-faith litigation conduct] transcends a court's equitable power concerning relations between the parties and reaches a court's inherent power to police itself, thus serving the *dual purpose* of vindicating judicial authority . . . and making the prevailing party whole.”³²⁰ Monetary sanctions for bad faith serve two purposes: an equitable purpose—to compensate the aggrieved party for the wrongs caused by the bad-faith conduct, and a remedial purpose—to dissuade the party or attorney from inflicting the same harm in the future.³²¹

The trial court sanctioned BNSF for its misconduct by awarding the following monetary sanctions: (1) costs associated with the additional work needed for the Respondents to uncover evidence that had been hidden, delayed, fabricated or destroyed; (2) attorney fees for

³¹⁹ *Patton I*, 520 N.W.2d at 8.

³²⁰ *Chambers*, 501 U.S. at 46 (emphasis added); *see id.* at 53.

³²¹ *Id.* at 54; *Capellupo*, 126 F.R.D. at 552-53.

the extra time required to prepare the case that were directly attributable to BNSF's misconduct; and (3) disgorgement of both BNSF's return on investment and 4% post judgment interest on the \$21,600,000 judgment due to the one year delay caused by BNSF's misconduct. These monetary sanctions were carefully crafted to fit the circumstances, and fall well within the trial court's broad discretion.

The trial court sanctioned BNSF \$90,111.21 to reimburse the Respondents for added costs incurred as a result of BNSF's misconduct. BNSF has not challenged that award in its brief, thus it should be affirmed.

Citing to this Court's unpublished decision in *Mahoney & Emerson v. Private Bank of Minnesota*,³²² BNSF asserts that Minnesota law does not allow the imposition of attorney fees outside the confines of Rule 11.³²³ The very passage on which BNSF so heavily relies contradicts this assertion. *Mahoney* reversed a trial court's sanctions award not because attorney fees cannot be awarded under a court's inherent power, but because the misconduct at issue fell neatly within a "clearly applicable" statute and rules of civil procedure.³²⁴ Minnesota courts *have* imposed attorney fees as a sanction under the inherent powers.³²⁵ In *Olson v. Babler*,³²⁶ for example, this Court

³²² 2009 WL 1852789 (Minn. App. June 30, 2009).

³²³ AB at 49 – 50.

³²⁴ *Mahoney*, 2009 WL 1852789 at *7.

³²⁵ R.A.124; *Olson*, 2006 WL 851798 at *7; *Aboud v. Dyab*, 2008 WL 313624, at *9 (Minn. App. Feb. 5, 2008).

affirmed a district court's inherent powers sanction of attorney fees, costs, and litigation expenses in an action seeking an order for protection.³²⁷ This court held that the district court did not abuse its discretion, noting that "in addition to what the rules may provide, the district court has inherent power to award sanctions for bad faith, vexatious, wanton or oppressive reasons."³²⁸ The trial court was justified in using its inherent powers because the rules did not "fully address the scope of remedies reasonably required to cure the resulting harm and protect the dignity of the [c]ourt" as a result of the appellant's actions.³²⁹

BNSF's next challenge to the attorney fee award goes to foundation. BNSF suggests that Minnesota courts will award fees only using the lodestar method, when in fact they award fees based on actual hours spent. Respondents' attorneys, like most personal-injury attorneys, do not bill their clients on an hourly basis. To justify a fees award they provided the court with affidavits that contained time estimates directly linked to specific work that in turn was directly linked to BNSF's misconduct.³³⁰ Just days ago, this Court again examined the scope of a district court's inherent authority to sanction,

³²⁶ 2006 WL 851798 (Minn. App. April 4, 2006).

³²⁷ *Id.* at *7-8.

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ Register of Actions #211, 218, 385, 386, 387, 388, 399 and 514.

and held that “[s]uch sanctions *can* include attorney-fees awards when a party acts in bad faith, vexatiously, wantonly, or for oppressive reason.”³³¹ The trial court, who was an active participant in the various motions, hearings, and extra discovery required, was in an excellent position to review the affidavits and assess whether they accurately reflected a reasonable time assessment for each task identified, the necessary connection between the task and the misconduct, and whether the hourly rate requested was reasonable. One attorney attached 13 months of time sheets specific to this case that link time with specific work done and her non-contingent fee hourly rate, as well as an affidavit identifying specific tasks that were linked to specific misconduct.³³² All submitted affidavits that contained detailed summaries of the time spent for specific tasks and disclosed hourly rates used in non-contingent fee cases.³³³ The trial court examined each affidavit in determining the fee award. She awarded only those estimates she could link to specific misconduct and removed time that was not so linked. She examined hourly rates and decreased one she considered to be too high. The \$999,640 attorney fee award covers time spent by multiple attorneys over the course of several years that the trial court could link directly to BNSF’s misconduct. The trial court did not abuse its discretion in making the award.

³³¹ R.A. 178. *Murrin v. Mosher*, 2010 WL 1029306 (Minn. App. March 23, 2010).

³³² Register of Actions #514.

³³³ Register of Actions #211, 218, 385, 386, 387, 388, 399 and 514.

BNSF complains that the disgorgement sanction has no factual basis because Respondents stipulated to the one year delay. The trial court directly addressed and rejected that contention. Respondents admit that they stipulated to the delay. As noted by Judge Maas, however, Respondents' agreement was given with reluctance and "with much trepidation." It was necessitated by BNSF's misconduct. Absent the delay, they would have been forced to trial without critical evidence they managed to squeeze out of BNSF during the final year. The trial court acquiesced to the delay because it was only towards the end of 2007 that she "began to see the pattern of misconduct on the part of BNSF that raised serious questions about the intentions and veracity of BNSF regarding its handling of critical evidence in this case."³³⁴

BNSF also complains that to assume a verdict returned a year earlier would yield the same result is "the height of speculation" because the extra year "afforded the time to create 'late developing theories.'"³³⁵ The fact that there is a \$21,600,000 judgment against BNSF is not speculative. The fact that BNSF had the benefit of that money for an additional year is not speculative. The plaintiffs were not able to verify that AC interference played a vital part in causing the activation failure on the night of the accident until shortly before trial because of BNSF's misconduct. AC interference first surfaced relatively early in the case. [REDACTED] noted AC interference as

³³⁴ Add.074.

³³⁵ AB at 54-55.

the potential cause of a warning system malfunction at the Ferry Street Crossing on April 29, 2001.³³⁶ Gary Storbeck, BNSF's Director of Signals, testified about intermittent warning malfunctions at his deposition on April 20, 2007.³³⁷ Signal manager [REDACTED] testified about AC interference in his deposition on October 11, 2007. He confirmed that strong AC interference can cause an activation failure.³³⁸ Until the evidence of track defects and track work surfaced with the PATS/PARS records shortly before trial, however, there was insufficient evidence to prove that the factors necessary to raise AC interference to such a level that it would cause an activation failure were present on the night of the accident.

Finally, BNSF argues that fashioning sanctions on the basis of disgorgement is impermissible because it is traditionally used in the context of contractual claims or actions arising out of federal regulatory violations. BNSF cites no law that prohibits the use of the equitable remedy of disgorgement under these circumstances. Disgorgement is a remedy designed to prevent a wrong doer from profiting from its malfeasance.³³⁹ Its purpose is deterrence, not punishment.³⁴⁰ Sworn testimony from [REDACTED] BNSF's

³³⁶ Ex.10; T.2946-2947.

³³⁷ T.3124-3127.

³³⁸ T.3215.

³³⁹ *Zacharias v. SEC*, 569 F.3d 45, 471-72 (D.C. Cir. 2009); *U.S. v. Nacchio*, 573 F.3d 1062, 1079-80 (10th Cir. 2009).

³⁴⁰ *Id.*

Vice-President and General Counsel, confirmed BNSF's internal rate of return for the year in question.³⁴¹ The trial court was able to craft this remedy because she had adequate foundation to do so.

4. Notice

Respondents acknowledge that due process requires a litigant subject to a bad faith inherent power sanction to be afforded notice and an opportunity to be heard before sanctions can be imposed.³⁴² BNSF attacks the sanctions award in part by arguing it has not been afforded the 21 day safe harbor notice period required by Rule 11 and Minnesota Statutes § 549.211. This argument has no merit. First, the safe harbor provision is specific to sanctions governed by Rule 11 and Section 549.211. The sanctions in this case were imposed under the court's inherent power. This court recently concluded that under egregious circumstances a trial court did not abuse its discretion by invoking its inherent authority to levy sanctions without utilizing the procedural requirements embodied in the statute and rule.³⁴³

BNSF had ample notice of the Respondents' intention to seek sanctions, and was afforded more than ample time to brief the issue and to be heard. The motion was first noticed for hearing on March 3, 2008.³⁴⁴ It was continued several times as more evidence surfaced,

³⁴¹ Shewmake depo at 73 – 74, depo exhibit 9.

³⁴² *Plaintiffs' Baycol Steering Committee v. Bayer Corp.*, 419 F.3d 794 (8th Cir. 2005).

³⁴⁴R.A.178, 184-185; *Murrin at *__*.

³⁴⁴ Register of Actions at 7.

and was not heard until April 20 and 21, 2009, over a year after it was originally scheduled. The issue was briefed more than once, and the hearing lasted two days. The trial court noted that BNSF was on notice that the Respondents were seeking sanctions beginning in February 2008, “but due to BNSF’s continued abuses and [Respondents’] ongoing difficulties in unearthing those abuses, the parties agreed that the sanctions motion would be heard after the trial.³⁴⁵ Significantly, BNSF’s abuses continued after it was first notified of the Respondents’ intention to seek sanctions. The trial court correctly found that BNSF had adequate notice of the possibility that it would be sanctioned from both Respondents and the Court.

CONCLUSION

All but one of the issues raised in this appeal are subject to an abuse of discretion standard of review. The trial court took great care to evaluate all issues raised in light of the record, and the record more than supports its conclusions. The only issue in this appeal subject to *de novo* review is preemption. Not only did BNSF forfeit its right to raise the preemption issue, the evidence overwhelmingly supports the trial court’s conclusion that the Respondents’ claims as tried are not

³⁴⁵ Add.063.

preempted by federal law. Accordingly the Respondents respectfully request that the trial court be affirmed in all respects.

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Dated: March 25, 2010

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 18,743 words. This brief was prepared using Microsoft Word 2007.

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