

NO. A11-1329

State of Minnesota  
**In Court of Appeals**

Dmitriy Zimbovskiy,

*Appellant,*

v.

Union Pacific Railroad Company; Soo Line Railroad Company,  
a Minnesota corporation d/b/a Canadian Pacific Railway and a  
wholly owned subsidiary of Canadian Pacific Railway Limited,  
and Canadian Pacific Railway Limited, a Canadian Corporation;  
and James A. Stroik,

*Respondents.*

**APPELLANT'S BRIEF, ADDENDUM AND APPENDIX**

Sharon L. Van Dyck (#0183799)  
VAN DYCK LAW FIRM, PLLC  
5354 Parkdale Drive, Suite 103  
St. Louis Park, MN 55416  
(952) 746-1095

and

Robert C. Sullivan (MO #52408)  
George E. Chronic (#0388688)  
SULLIVAN, MORGAN  
& CHRONIC, LLC  
1600 Baltimore Avenue, Suite 200  
Kansas City, MO 64108  
(816) 221-9922

*Attorneys for Appellant  
Dmitriy Zimbovskiy*

David A. Donna (#0163624)  
Julius W. Gernes (#0189704)  
DONNA LAW FIRM, P.C.  
7601 France Avenue South  
Edina, MN 55435  
(952) 562-2460

*Attorneys for Respondent  
Union Pacific Railway Company*

Timothy R. Thornton (#0109630)  
Jonathan P. Schmidt (#0329022)  
BRIGGS AND MORGAN, P.A.  
2200 IDS Center  
80 South Eighth Street  
Minneapolis, MN 55402  
(612) 977-8400

*Attorneys for Respondents Soo Line Railroad  
Company, a Minnesota corporation d/b/a Canadian  
Pacific Railway and a wholly owned subsidiary of  
Canadian Pacific Railway Limited, a Canadian  
Corporation, and James Stroik*

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 LEGAL ISSUES**

1. Only admissible evidence may be considered on summary judgment. The trial court's holding that the plaintiff's inadequate warnings claim is preempted by both federal and state law was based entirely upon evidence declared to be inadmissible for any purpose by federal statute. Did the trial court err in its interpretation of the statute?

### **Issue Preservation and Resolution Below:**

The trial court interpreted a federal statute containing an evidentiary bar, 23 U.S.C. § 409, as having a "preemption" or "federal funding" exception. On the basis of that interpretation, the trial court considered and relied upon evidence undisputedly covered by this statute. The court then dismissed the plaintiff's claim on the basis of federal preemption under 49 U.S.C. § 20106, and state "preemption" under Minn. Stat. § 219.402. The plaintiff appealed the judgment.

### **Apposite authority:**

23 U.S.C. § 409;

*Pierce County v. Guillen*, 537 U.S. 129 (2003);

*Boyd v. Nat'l RR Passenger Corp.*, 821 N.E.2d 95 (Mass. App. 2005);

Minn. Stat. § 645.16;.

Minn. Stat. § 219.402.

2. Under Minnesota law, causation is almost always a question of fact for the jury. Did the trial court err when it found as a matter of law that there is insufficient evidence of causation to support the plaintiff's claims that the train crew was negligent in their failure to slow the train, and negligent in their failure to

timely apply the emergency brake for a specific individual hazard?

**Issue Preservation and Resolution Below:**

The trial court found that the failure to slow and failure to brake claims are not preempted, but dismissed them on the basis of what it considered to be a lack of evidence of causation. The plaintiff appealed the judgment.

**Apposite authority:**

*Anderson v. Wisconsin Cent. Trnsp. Co.*, 327 F. Supp. 2d 969 (E.D. Wisc. 2004);

*Bashir v. Nat'l RR Passenger Corp.*, 929 F.Supp. 404, 412 (S.D. Fla. 1996);

*Vanderweyst v. Langford*, 303 Minn. 575, 228 N.W.2d 271 (1975).

**STATEMENT OF THE CASE**

Dmitriy Zimbovskiy was seriously injured on November 29, 2003 when the commercial tractor-trailer he was operating was struck by an oncoming train as it passed over the Yosemite Avenue Crossing in Shakopee, Minnesota. He brought this negligence action against Union Pacific Railroad Co. (hereinafter UP), the owner of the tracks, Soo Line Railroad, d/b/a Canadian Pacific Railway, the owner of the train involved in the accident, and against James A. Stroik, the engineer operating that train (collectively referred to as CP).<sup>1</sup>

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<sup>1</sup> The original complaint alleged negligence against the City of Shakopee and an unidentified member of the train crew (John Doe); these claims were voluntarily dismissed.

The plaintiff's claims against UP included a claim for inadequate warning of an approaching train due to visual obstructions (vegetation claim), and one for failure to install adequate warning devices at the crossing. His claims against CP included a claim for inadequate auditory warning of the oncoming train (horn claim), and "operational negligence" claims, which are comprised of the failure to slow the train and failure to apply the emergency brake in a timely manner.

At the close of discovery each defendant brought a motion for summary judgment. UP argued that there is no evidence to support the vegetation claim, and that the inadequate warning device claim is preempted both by the express preemption clause in the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20106, and by state statute, Minn. Stat. § 219.402. CP argued that all of the plaintiff's claims against it are preempted by the FRSA. CP also argued that the plaintiff was negligent and the sole cause of the accident as a matter of law.

The trial court granted the Union Pacific's motion in its entirety, and entered a judgment of dismissal as to all of the plaintiff's claims against it on May 23, 2011<sup>2</sup>. The trial court granted CP's motion with respect to the operations claims only. The court found that the plaintiff's horn claim against CP is not preempted and that there is sufficient evidence for those claims to go to a jury. The trial court also found the issues of the plaintiff's causal negligence and degree of fault to be questions for the jury.

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<sup>2</sup> On appeal, Appellant Zimbovskiy does not challenge dismissal of the vegetation claim against U.P.

Following the entry of the partial judgment on May 23, 2011, the plaintiff and CP entered into a stipulation to dismiss the remaining horn claim without prejudice. The trial court ordered the dismissal of this final remaining claim pursuant to that stipulation. Final judgment on all claims was entered on May 27, 2011. This appeal followed.

### **STATEMENT OF THE FACTS**

#### **The Yosemite Avenue Crossing.**

In November 2003, the railroad grade crossing at Yosemite Avenue in Savage, Minnesota posed a high risk of injury or death to the operator of any truck or train traveling over it. The road over the tracks was the only way in and out of a busy industrial area north of the UP-owned tracks. The area is occupied by companies such as an asphalt and oil manufacturer, a waste management facility, a recycling plant and a grain supplier. [Exhibit E, Dahler Depo at pp. 25-27; Exhibit P., Menze Depo at pp. 18-20].<sup>3</sup> The crossing was traversed by heavy traffic consisting primarily of tractor-trailers and large trucks. [Exhibit D, Schmidt Depo at p. 21; Exhibit C, Stroik Depo at p. 43.]. As many as 2500 vehicles travel over the Crossing per day. [Burnham Affidavit, attached Exhibit B., Report of Findings at p. 1]. One trucking company estimated that 8 to 10 of its drivers crossed the tracks approximately 10 times a day making deliveries and pickups at those businesses. [Exhibit F, Crosby Depo at p. 10].

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<sup>3</sup> "Exhibit \_\_" refers to exhibits attached to the Authenticating Affidavit of Sharon L. Van Dyck. These documents were filed with the trial court and comprise part of the trial court record.

Many trucks were grain haulers measuring 70 feet in length. Others were roll-off garbage trucks with hydraulic arms. Some of the trucks were tankers carrying oil, gas, chemicals, and other hazardous materials. [Menze Depo at pp. 19-21]. A collision between these latter trucks and the trains operating through the area would have been “catastrophic” for all concerned. [Exhibit I, Onan Depo at p. 62; Burnham Affidavit, attached Exhibit B, Report of Findings at p. 1].

The sight distance to the east for southbound traffic approaching the Yosemite Avenue Crossing was limited. [Exhibit G, McColl Depo at pp. 20-21, G.1]. On the southbound approach a driver’s view was first blocked by buildings: “You might as well have been looking into a wall.” [Crosby Depo at p. 15]. As the driver got closer to the crossing, the view was blocked by a fence. [Exhibit N, Bebeau Depo at p. 17; Dahler Depo at pp. 46-47; Crosby Depo at p. 7; Stroik Depo at pp. 69-70]. It was then blocked by vegetation south of the fence, notably large evergreen trees. [Bebeau Depo at p. 17; Dahler Depo at pp. 46-47; Exhibit L, Heil Depo at p. 65]. A clump of trees on the railroad’s right of way between the crossing and the trestle to the east restricted sight distance to below nationally recognized traffic engineering standards. [Burnham Affidavit, attached Exhibit B, Report of Findings at p. 5 and attached video]. James Schmidt, the CP train’s conductor, was personally aware of the restricted sight distances at the Crossing: “Well, the only thing I recall is there was a lot of brush out there, and the fence was maybe there, too, so it was, yeah, it was kinda obstructed there.” [Schmidt Depo at p. 43]. He was unable to see the approaching southbound road at 1,000 or even 500 feet before the crossing. [Schmidt Depo at p. 44].

The track geometry at the Yosemite Avenue Crossing further increased the hazards it posed to motorists. Running north-south, Yosemite Avenue Crossing bisects the UP tracks running east-west next to the intersection of Yosemite Avenue Crossing and Minnesota Highway 13. [Burnham Affidavit, attached Exhibit B, Report of Findings at p. 4]. Highway 13, a major four-lane highway, runs parallel to the UP tracks. In November, 2003, a stop sign for southbound motorists was located between the tracks and Highway 13, only 50 feet from the near rail. [Id.]. Southbound truck drivers could not fit their tractor-trailers in the space. Crosby Depo at pp. 18-21; Drevnick Affidavit]. Truck drivers had to either disregard the law requiring a motorist to stop before a stop sign, or disregard the law prohibiting a motorist from stopping within 15 feet of the tracks. [Id.]. They were forced to choose between risking a collision with the high-speed vehicles on Highway 13, and risking a collision with the trains on the tracks. [Id.]. Further, there is an incline on Yosemite Avenue running from the crossing up to Highway 13. A motorist, particularly one driving a loaded tractor trailer, must “always be nosing it to get onto 13 so you don’t drift back onto the tracks.” [Crosby Depo at p. 25].

The track geometry required southbound tractor-trailer drivers to focus on multiple factors, especially the traffic on Highway 13. [Burnham Affidavit, attached exhibit B, Report of Findings at pp. 4, 7]. According to Archie Burnham, P.E., the former Chief Traffic Safety Engineer for the Georgia Department of Transportation and advisor to the National Safety Council and U.S. Department of Transportation on railroad grade crossing issues:

Proceeding to the crossing, a loaded tractor-trailer truck would be inside a non-recovery point at least 16 feet from the near rail. Simultaneously, the driver will be concerned with multiple operational problems including:

- gear shifting,
- train search left and right,
- Highway 13 search for vehicles left and right,
- road geometry change over the tracks, and
- short storage area.

[Id.].

By November, 2003, the Yosemite Avenue Crossing had, not surprisingly, been the location of multiple accidents. [Heil Depo at pp. 56-58; McColl Depo at pp. 13-14, 20-22]. Before this train crash, there were at least eight reported collisions at the crossing. [Exhibits R.1 – R.8, Prior Collision Reports]. A collision resulting in serious injuries to Jake Seth, another trucker who was hauling grain southbound and was hit by an eastbound train, makes nine. [Crosby Depo at pp. 23-24]. All of the prior collisions involved trains and trucks, the same problematic track geometry, the same limited sight distances, and the same passive warning devices. [Exhibits R.1 – R.8, Prior Collision Reports; Exhibit S, Crossing Inventory; McColl Depo at pp. 13-14, 20-22]. Near-misses or near-collisions occurred with frightening frequency. [Schmidt Depo at pp. 21-22]. James Schmidt, conductor, operated trains through the Yosemite Avenue Crossing nearly every day during 2003. [Id.] He experienced close calls with semi-trucks there at least several times a week. [Id.]

These characteristics posed a significant injury risk to motorists, and more than qualified the Yosemite Avenue Crossing for an upgrade of the warning devices to flashing light signals with automatic gates. [Burnham Affidavit, attached Exhibit B, Report of Findings at p. 7]. More specifically, the crossing met the federal standard for active warning devices under 23 C.F.R. §646.214(b)(3) given the presence of high speed trains and limited sight distance, high volume vehicular traffic, use by hazardous material vehicles and continuing accident occurrences. [Burnham Affidavit, attached Exhibit B, Report of Findings at p. 6].

Lights and gates should have been in place at the Crossing in 2003 when this collision occurred. [Stroik Depo at p. 52; Burnham Affidavit, attached Exhibit B, Report of Findings at p. 7]. Lights and gates always provide a motorist with a better warning than a stop sign. [Stroik Depo at pp. 51-52]. Gates, in particular, would have helped to avoid the collision. [Stroik Depo at p. 52]. Flashing light signals with automatic gates were finally installed at the Crossing after the crash. [Burnham Affidavit, attached Exhibit B, Report of Findings and Field Study Videos]. Unfortunately, it was too late to help the truckers involved in the nine prior collisions. It was also too late to help Mr. Zimbovskiy.

### **The Accident.**

Working during the holidays on Saturday morning, November 29, 2003, Mr. Zimbovskiy drove southbound over the Yosemite Avenue Crossing in an 80,000 lb. Freightliner tractor trailer fully loaded with dry bulk. [Exhibit O, Zimbovskiy Depo at p. 111]. He had

picked up the cargo from one of the businesses north of the Crossing and was exiting the industrial park onto Highway 13. He had crossed the tracks on many previous occasions, all but one of which took place at night. At night, he was able to rely on the headlight and horn to provide warning of an approaching train. [Zimbovskiy Depo at p. 42].

Neither provided any warning this time. He stopped 30-35 feet before the stop sign on the north side of the tracks. Zimbovskiy Depo at p. 55]. At that location his view to the east was completely blocked by an evergreen tree. [Zimbovskiy depo at p. 38]. He neither saw nor heard an approaching train. [Zimbovskiy Depo at p. 55].

After stopping and looking to best of his ability, Zimbovskiy proceeded forward, concentrating on the traffic on Highway 13. He was on the rail when he first saw the train. [Zimbovskiy Depo at p. 42]. Confused, he stopped, tried to reverse, then went into second gear, trying to move forward to get off the tracks. [Zimbovskiy Depo at pp. 40, 45, 47]. He was moving forward when a westbound Canadian Pacific train crashed into the middle of his trailer, dragging it more than 1056 feet west of the crossing before coming to rest. [Exhibit A, T. Wishard Depo at p. 13; Exhibit K, Langer Depo at pp. 10-11; Zimbovskiy depo at p. 41].

Mr. Zimbovskiy tried to avoid the collision. The CP train crew, however, did nothing. They knew of the crossing and its dangerous nature because it was a part of their daily route and they had frequently experienced near-collisions there with other trucks. [Schmidt Depo at pp. 21-22]. Conductor Schmidt claims to have spotted the Zimbovskiy truck when the train was 1000 feet east of the

Yosemite Avenue Crossing. [Schmidt Depo at p. 20]. Yet, according to two independent witnesses, Tom Wishard and Josh Wishard, the crew failed to sound the train horn or train bell at all on approach to the Crossing. [T. Wishard Depo at pp. 14-15, 52-53, 60; Exhibit B, J. Wishard Depo at pp. 10-11, 40]. The crew never sounded the emergency horn pattern of short blasts, even when they saw the Zimbovskiy truck stopped on the rails when the train was 500 feet away. [Schmidt Depo at pp. 34-35; Stroik Depo at pp. 53, 97]. Tom and Joshua Wishard, who were driving westbound in a pickup truck on Highway 13 paralleling the train and would later call 911, testified that the train crew sounded the horn at a previous crossing (Lynn Ave. Crossing), but did not sound it again between that point and the Yosemite Avenue Crossing. They also swore under oath that the train bell was not rung. [T. Wishard Depo at pp. 14-15, 52-53, 60; J. Wishard Depo at pp. 10-11, 40]. By their own admission, the train crew did not decrease the throttle or otherwise attempt to decelerate the train while they watched the Zimbovskiy truck. [Stroik Depo at p. 97].

The train crew also failed to be alert and attentive. At a speed of 35 mph, the train crew had close to 20 seconds to act when they first saw the slow-moving truck 1,000 feet away. They had close to ten seconds to act upon recognizing that the truck was stopped on the tracks at that point the train was 500 feet from the crossing. They never slowed, and, if the data in the event recorded is ultimately

deemed admissible and accurate, waited to engage the emergency brakes until two seconds before impact. [Scott Affidavit, p. 2].<sup>4</sup>

## **ARGUMENT**

### **I. STANDARD OF REVIEW.**

On appeal from summary judgment the reviewing court's task is to determine whether there are any genuine issues of material fact and whether the district court erred in applying the law. *Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 112 (Minn. 1992); *Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). This Court must review the evidence in the record *de novo*, and draw all reasonable factual inferences in favor of Appellant Zimbovskiy. *Ingram v. Syverson*, 674 N.W.2d 233, 235 (Minn. App. 2004).

Here, the trial court was called upon to interpret and apply three statutes: 49 U.S.C. § 20106 (express preemption clause in the Federal Railroad Safety Act (FRSA)), 23 U.S.C. § 409 (which bestows an evidentiary privilege on the State), and Minn. Stat. § 219.402

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<sup>4</sup> The locomotive event recorder data is unreliable. A precise measurement of a designated wheel taken from the lead locomotive immediately after the data is downloaded is essential to accurately process it. Changing the wheel measurement will make the train appear to cover greater or smaller distances, and affect the timing of recorded events such as speed, braking, throttle, etc. [Saladin Depo at pp. 19-20]. Here, three measurements of the same wheel, conducted 15 minutes apart, inexplicably resulted in three different widths. [Exhibit Q, Denzer Depo at pp. 30-32]. To this day, the railroad employee who measured the wheel cannot determine which, if any, of those widths is the correct measurement. [Onan Depo at pp. 44-45, 64-65]. At least two of the measurements are wrong. This fundamental inaccuracy taints all interpretations of the data.

(which deems certain railroad warning devices adequate). A trial court's statutory interpretation is subject to *de novo* review. *Brekke v. THM Biomedical, Inc.*, 683 N.W.2d 771, 774 (Minn. 2004). When the words of a law in their application to a specific situation are clear and free from ambiguity, the letter of the law will not be disregarded under the pretext of pursuing the spirit. Minn. Stat. § 645.16. When enacting a statute, it is presumed that the legislature acts with full knowledge of existing law. *Goodyear Tire & Rubber Co. v. Dynamic Air, Inc.*, 702 N.W.2d 237, 244 (Minn. 2005). Courts generally presume that a statute is consistent with the common law. *Shetsky v. Hennepin County*, 239 Minn. 463, 469, 60 N.W.2d 40, 45 (1953). "A statute is not to be construed in derogation of well-established principles of common law . . . unless so required by express words or by necessary implication, and then only to the extent clearly indicated." *Swogger v. Taylor*, 243 Minn. 458, 465, 68 N.W.2d 376, 382 (1955).

With respect to the plaintiff's operations claims against CP, the trial court concluded that there was insufficient evidence to establish causation as a matter of law. "The question of proximate cause is normally for the jury to decide." *Vanderweyst v. Langford*, 303 Minn. 575, 576, 228 N.W.2d 271, 272 (1975). "It is only where the evidence is so clear and conclusive as to leave no room for differences of opinion among reasonable people that the issue of causation becomes one to be decided by the court." *Id.* Summary judgment is inappropriate when the evidence can lead reasonable persons to different conclusions concerning material facts. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn.1997). Summary judgment is, therefore,

rarely appropriate on the issue of causation. See *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 373 (Minn. 2008).

## **II. RAILROAD LAW AND PREEMPTION OVERVIEW.**

### **A. Minnesota Railroad Law.**

Per Minnesota common law, “a railroad company is bound to take such precautions in the management and operation of the railroad as public safety requires, though such precautions may be in addition to the requirements prescribed by statute or the Railroad and Warehouse Commission (predecessor to MnDOT) or though there be no statute or order upon the subject.” *Licha v. Northern Pac. Ry. Co.*, 201 Minn. 427, 430, 276 N.W. 813, 814 (1937). A railroad “is bound to be on the lookout for men, women, and children at public crossings and to exercise due care to discover them; and ... it is not enough merely to exercise care to avoid injuring them after discovering them in places of danger.” *Bryant v. Northern Pac. Ry. Co.*, 221 Minn. 577, 592, 23 N.W.2d 174, 183 (1946). In short, a railroad has a duty to exercise due care under all of the circumstances present. *Perkins v. Nat’l R.R. Passenger Corp.*, 289 N.W.2d 462, 466 (Minn. 1979).

Minnesota law places the responsibility for giving the motoring public adequate warning of the dangers associated with a railroad crossing on the railroad. *Blaske v. Northern Pac. Ry.*, 228 Minn. 444, 449 - 50; 37 N.W.2d 758, 762 (1949); *Licha v. Northern Pac. Ry.*, 201 Minn. at 431 - 37, 276 N.W. at 814 - 18. Over the years the State has increasingly regulated railroads for the purpose of promoting public safety. It has done so through the enactment of statutes and delegated administrative regulation. See, e.g., Minn. Stat. §§ 219.17 -

219.26. These statutes and regulations have historically been treated as supplements to the existing common law, amending that law only by the addition of specific and minimum requirements. *Licha*, 201 Minn. at 431, 276 N.W. at 815. The common law duty to use “due care under all circumstances” remains the underlying standard of by which to measure a railroad’s conduct. Due care has, depending upon the circumstances, been found to require a railroad to actively warn of approaching trains, whether by the use of flagmen or active warning devices, to clear vegetation along railroad right-of-way where it obstructs a motorist’s view, to sound an emergency horn, to reduce speed in hazardous locations, and to apply the emergency brake at the first sign that a vehicle is not going to stop. See, e.g., *Licha*, 201 Minn. at 438 – 39, 276 N.W. at 818 - 19; *Perkins*, 289 N.W.2d at 466-67; *Munkel v. Chicago, M. St. P. & P. R Co.*, 202 Minn. 264, 267- 69, 278 N.W. 41, 44 – 45 (1938); See *Hondl v. Chicago Great Western Ry Co.*, 249 Minn. 306, 310 – 11, 82 N.W.2d 245, 248 – 49 (1957); *Bryant*, 221 Minn. at 588 – 89, 23 N.W.2d at 181.

**B. Federal Preemption of Minnesota Railroad Law.**

Federal preemption is an affirmative defense. UP and CP argue that the Federal Railroad Safety Act of 1970 (FRSA), 49 U.S.C. § 20101 *et seq*, preempts a number Appellant’s negligence claims. As the proponents of this affirmative defense, they bear a heavy burden of proof. *Butler v. MFA Life Ins. Co.*, 591 F.2d 448, 451 (8th Cir. 1979). They must affirmatively demonstrate that preemption applies to eliminate each specific claim to which they claim it applies. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984).

Rail transportation in the United States is has been regulated by the federal government for decades. The safety regulations currently governing much of this country's rail transportation were promulgated by the Federal Railroad Administration (FRA), an administrative agency created by the Department of Transportation Act of 1966. 49 U.S.C. § 20103 (3)(e)(1). The majority of those FRA regulations were authorized by the FRSA, which vested the Secretary of Transportation with the power to "prescribe regulations and issue orders for every area of railroad safety." 49 U.S.C. § 20103(a). The purpose of the FRSA is to "promote safety in every area of railroad operations and reduce railroad-related-accidents and incidents." 49 U.S.C. § 20101.

The FRSA contains an express preemption clause sandwiched between two savings clauses. The preemption clause governs the preemptive effect of the regulations promulgated by the FRA. 49 U.S.C. § 20106. Prior to August 1, 2007 this provision read in pertinent part:

Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable. A state may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement. A state may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order

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(1) is necessary to eliminate or reduce an essentially local safety hazard;

(2) is not incompatible with a law, regulation, or order of the United States Government; and

(3) does not unreasonably burden interstate commerce.

49 U.S.C. § 20106 (2006). 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. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 662 (1993). For a state “law, regulation or order” to be federally preempted the party advocating in favor of the defense must show that “federal regulations substantially subsume the subject matter of the relevant state law.” *Id.*

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.” *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 532 (1992). The common law “is not of a piece.” *Id.* at 523. 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.” *Easterwood*, 507 U.S. at 668 (citation omitted). An express preemption clause such as that present in the FRSA preempts some common law claims while saving others. *Cipollone*, 505 U.S. at 524; *See also Easterwood*, 507 U.S. at 665.

In 1993 and again in 2000 the United States Supreme Court construed the FRSA’s express preemption language in the context of negligence claims arising out of car/train collisions at grade crossings. In *Easterwood* the High Court construed for the first time the meaning

of the phrase “covering the subject matter.” The Court concluded that “covering the subject matter” means “to substantially subsume the subject matter of the relevant state law.” *Easterwood*, 507 U.S. at 662. Having defined the scope of the clause, the *Easterwood* court went on to analyze the specific negligence allegations in the Complaint. One involved the allegation that the use of passive warning devices (cross bucks) at the crossing was inadequate warning of the hazard. Another involved the allegation that the railroad breached its common law duty to operate its train at a moderate and safe rate of speed. *Id.* at 673. The *Easterwood* court held that 23 CFR §§ 646.214(b)(3) and (4), regulations promulgated by the Federal Highway Administration (FHWA) as part of its implementation of the Crossings Program, “establish requirements as to the installation of particular warning devices” and “when they are applicable, state tort law is preempted.” *Id.* at 670. Next, the *Easterwood* court looked to the federal regulations governing speed, 49 CFR § 213.9(a), noted that those regulations set a maximum speed for each class of track, and concluded that common law claims for excessive speed where that speed was less than the regulation maximum are preempted. *Id.* at 675. The Court re-affirmed this very specific, claim-by-claim preemption analysis in 2000 in *Norfolk Southern Ry Co. v. Shanklin*, 529 U.S. 344 (2000).

In the years following *Shanklin*, the Eighth Circuit began to wander down a path of an increasingly expansive interpretation of the FRSA’s “covering” language. The journey ultimately led federal district courts within its purview to conclude that FRSA preemption was the functional equivalent of field preemption, despite the absence of a

federal remedy to replace the state remedy that was lost. The matter came to a head with claims arising from a derailment in Minot, North Dakota on January 18, 2002. In parallel actions involving personal injury and wrongful death claims from the Minot derailment, the Federal District Courts in North Dakota, *Mehl v. Canadian Pacific Ry*, 417 F. Supp. 2d 1104 (D.N.D. 2006), and in Minnesota, *Lundeen v. Canadian Pacific Ry*, 507 F. Supp. 2d 1006 (D. Minn. 2007) concluded not only that the breadth of the FRSA's regulatory scheme conferred federal jurisdiction, but also that the Act preempts virtually all state common law claims, even where the regulation at issue provides no specific standards. Those courts found preemption even when the plaintiffs alleged that the railroad failed to comply with federal regulations, *Mehl*, 417 F. Supp. 2d at 116 - 17, and failed to comply with its own internal rules and policies. *Lundeen*, 507 F. Supp. 2d at 1011 - 12. These courts dismissed claims based on allegations of negligent inspection, negligent construction and maintenance, negligent training and negligent operation. *Mehl*, 417 F. Supp. 3d at 115 - 119; *Lundeen*, 507 F. Supp. 2d at 1013 - 1015.

On August 3, 2007, recognizing the overly expansive interpretation the Eighth Circuit in particular had given the FRSA's preemption clause, Congress passed the "Implementing Recommendations of the 9/11 Commission Act of 2007." Public Law No. 110-53. Described as a clarifying amendment, this new law added the following to the existing 49 U.S.C. § 20106:

(b) Clarification Regarding State Law Causes of Action –

(1) Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party –

(A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation . . . , covering the subject matter as provided in subsection (a) of this section;

(B) 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; or

(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

(2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.

(c) Jurisdiction – Nothing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.

Public Law No. 110-53, *codified at* 49 U.S.C. § 20106. A plain reading of the House Conference Report that accompanied the amendment clearly reflects that its purpose is to reign in the Eighth Circuit and correct what Congress deemed to be an overly broad application of the FRSA’s preemption clause. H.R. Rep. 110-259, § 1528 (2007). 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 (1) the claim alleges a violation of the federal standard of care set forth in the regulation itself, or (2) where a claim alleges the violation of a plan, rule or standard the railroad created pursuant to a federal regulation or order. Preemption under the FRSA is not field preemption.

Looking back to *Easterwood*, the preemption standard articulated in Section 20106 of the FRSA is “relatively stringent,” and the presumption against preemption does not permit an overly broad application of the “covering” standard. *Easterwood*, 507 U.S. at 668. As articulated in the 2007 amendment, even when a federal regulation “covers” subject matter addressed in a state common law tort action, the analysis does not stop. Claims alleging that nationally uniform federal standards themselves have been violated, whether contained in a regulation or in a railroad rule or standard, are not preempted. 49 U.S.C. § 20106 (b)(1)(A) and (B). Claims based on an “essentially local safety hazard” that “are not otherwise incompatible” with the federal standards and create no undue burden on interstate commerce are likewise not preempted. 49 U.S.C. § 20106 (a).

**III. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT RELIED ON INADMISSIBLE EVIDENCE TO DISMISS THE PLAINTIFF’S INADEQUATE WARNING DEVICE CLAIM AGAINST THE UNION PACIFIC.**

The plaintiff’s inadequate warning device claim against the UP was dismissed on the basis of preemption. The trial court’s conclusion that UP had met its burden of proof for the application of preemption, an affirmative defense, was based exclusively on documents that were created and collected in connection with the federal-aid highway grade crossing improvement program. UP obtained the documents from the Minnesota Department of Transportation (MnDOT). The affidavits of two MnDOT employees rely upon these same documents.

23 U.S.C. § 409 establishes an absolute evidentiary bar with respect to such documents. The trial court, under the rubric of

statutory interpretation, created a special exception to the statutory prohibition that is not warranted by its plain language. It then based the dismissal of the Appellant's inadequate warning device claim upon this inadmissible evidence. In so doing, the trial court committed reversible error.

**A. Federal Law.**

On the day of the accident the Yosemite Avenue Crossing was equipped with passive warning devices: cross bucks and a stop sign. These devices inform an oncoming driver of the presence of railroad tracks. They give no warning of the presence of an oncoming train. The plaintiff has alleged and had evidence to support the claim that the only adequate warning devices appropriate for this crossing were active warning devices like those installed after the accident, and that UP was negligent for failing to have them prior to the accident.

As *Easterwood* established and *Shanklin* affirmed, inadequate warning device claims are preempted by the FRSA when federal funds paid for and the FHWA approved the installation of the warning devices that are in place and operating on the day of an accident. *Shanklin*, 529 U.S. at 354. As the proponent of preemption, UP has the burden of submitting admissible evidence that the cross bucks and stop sign in place at the Yosemite Avenue Crossing on November 29, 2003 were installed through the use of federal funds, and were approved by the FHWA. *Brandt v. Marshall Animal Clinic*, 540 N.W.2d 870, 874 (Minn. App. 1995), *citing* *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984). Only evidence admissible at trial may be used to support a motion for summary judgment. *Murphy v. Country*

*House, Inc.*, 307 Minn. 344, 349, 240 N.W.2d 507, 511 (1976); *Hopkins v. Empire Fire and Marine Ins. Co.*, 474 N.W.2d 209, 212 (Minn. App. 1991); Minn. R. Civ. P. 56.05. Inadmissible evidence must be disregarded, and a trial court's exclusive reliance on inadmissible evidence to grant summary judgment is reversible error. See *Murphy*, 307 Minn. at 511; *Hopkins*, 474 N.W.2d at 212 - 13.

All of the evidence UP submitted to the trial court to prove that federal funds paid for and the FHWA approved the cross bucks and stop sign at the Yosemite Avenue Crossing on November 29, 2003 is inadmissible by literal application of 23 U.S.C. § 409. By relying on this inadmissible evidence to dismiss the plaintiff's inadequate warning claim, the trial court committed reversible error.

In its current form, the statute provides:

Notwithstanding any other provision of law, reports, surveys, schedules, lists or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to Sections 130, 144 and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists or data.

23 U.S.C. § 409 (emphasis added). The evidence submitted by UP and considered by the trial court falls squarely within its terms.

The evidence the trial court relied upon comes from files maintained by MnDOT. It is authenticated by the affidavits of

Timothy J. Spencer, Manager of the Rail Planning and Program Development Unit of MnDOT, and Mary Ann Frasczak, an employee in the MnDOT finance department. In their affidavits, both Mr. Spencer and Ms. Frasczak rely exclusively on documents and data maintained by MnDOT.

All of the documents appended to the Spencer affidavit are from the MnDOT crossing file. Only three identify the Yosemite Avenue Crossing. Spencer Exhibit A is a Statement of Need for the crossing corridor containing the Yosemite Avenue Crossing. It contains data collected about the hazards present at crossings along the rail corridor that contains the Yosemite Avenue Crossing.<sup>5</sup> The data was collected pursuant to 23 U.S.C. § 130 for the purpose of obtaining federal-aid funding for safety improvements at crossings along that corridor.<sup>6</sup> Spencer Exhibit B is an order issued by the Minnesota Transportation Regulation Board approving the foregoing petition. Like the Petition, it is comprised of data and other material collected for the evaluation and planning of safety enhancements to railroad crossings as required by Section 130. Exhibit D is the Contract between the railroad and the State governing this federal-aid project. It includes an attachment that contains data identifying the type of traffic control devices already in place at each crossing along the corridor, and the proposed updated traffic control devices to be placed at each crossing along the

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<sup>5</sup> At that time the rail corridor was owned by the Chicago & North Western Railroad, which merged with UP in 1998.

<sup>6</sup> 23 U.S.C. § 130 is the portion of the federal aid funding program dedicated to upgrading railroad crossings.

corridor. The Yosemite Avenue Crossing is identified in the data associated with each of these exhibits. These three documents are the only documents submitted by UP linking a federal-aid funding project to the warning signs in place at the Yosemite Avenue Crossing.

The documents attached to Ms. Frasczak's affidavit are computer printouts of financial data associated with payment for the corridor safety improvement project referenced in the documents attached to the Spencer Affidavit. As such they were generated pursuant to the requirements of Section 130. The Yosemite Avenue Crossing is not mentioned in any of them.

Neither Mr. Spencer nor Ms. Frasczak has any personal knowledge of what warning devices were in place at the Yosemite Avenue Crossing on November 29, 2003, or of whether federal funds paid for their installation. Their affidavits are based entirely upon the documents and data compiled and collected by the State of Minnesota pursuant to 23 U.S.C. § 130. UP admits as much, having made no argument to the contrary. The trial court agreed. See generally ADD. 34-36. Since UP submitted no other evidence to prove that the warning devices in place on the day of the accident were paid for with federal funds and approved by the FHWA, all of the evidence in support of UP's affirmative defense of preemption of the Appellant's inadequate warning device claim falls squarely within the literal terms of 23 U.S.C. § 409. The trial court did not disagree. So where did it go wrong?

When it considered the evidence UP provided despite the prohibition contained in 23 U.S.C. § 409, the trial court reasoned that by providing affidavits that rely upon these protected documents,

MnDot waived whatever privilege 23 U.S.C. § 409 bestowed upon it. ADD.37. It reasoned that the legislature could not have intended to deprive a railroad of the proof it needed to support a preemption defense. ADD.37-38. The trial court's reasoning is not supported by the plain language of 23 U.S.C. § 409. It cannot be permitted under Minnesota's rules of statutory construction.

The starting point for statutory construction is that “[w]hen the words of a law in their application to an existing situation are clear and free from ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.” Minn. Stat. § 645.16. There is nothing ambiguous about the exclusionary language in 23 U.S.C. § 409, and nothing ambiguous about its applicability here.

23 U.S.C. § 409 confers an evidentiary privilege on the State, acting through MnDOT. *Pierce County v. Guillen*, 537 U.S. 129, 144 (2003). Under the common law, as the holder of the privilege, MnDOT can waive it. The trial court relied upon the common law doctrine of waiver when it considered the MnDOT evidence. ADD.37. In doing so, however, the trial court ignored the plain language of 23 U.S.C. § 409. Not one of the cases the trial court relied on, two decisions by the third circuit of the Louisiana Court of Appeals, and two unpublished lower court decisions, addresses the plain language of the first phrase of 23 U.S.C. § 409. ADD.37.

The evidentiary prohibition contained in 23 U.S.C. § 409 is unequivocal. The first phrase, “[n]otwithstanding any other provision of law,” applies to the common law doctrine of waiver, which is undeniably an “other provision of law.” This statutory evidentiary bar is absolute. The Massachusetts Court of Appeals so found in *Boyd v.*

*National Railroad Passenger Corp.*, 821 N.E.2d 95, 106 n.11 (Mass. App. 2005). See also *Vega v. State*, 10 Misc. 3d 822, 825 - 26, 804 N.Y.S.2d 229, 232 - 33 (N.Y. Court of Claims 2005) (23 U.S.C. § 409's evidentiary bar cannot be waived). Per Minnesota's rules of statutory construction, since this phrase is clear and free from all ambiguity, the letter of 23 U.S.C. § 409 "shall not be disregarded."

The trial court was convinced to ignore the plain text of the statute to carve out a "proof of federal funding exception" by reasoning 1) that 23 U.S.C. § 409 was intended to shield railroads as well as the State, and 2) that it could not, therefore, have intended to prevent a railroad from having access the evidence it needs to prove the affirmative defense of preemption. ADD.38. This reasoning is flawed. First, there is nothing in the legislative history to suggest that the evidentiary privilege contained in 23 U.S.C. § 409 was intended to "shield railroads." As the United States Supreme Court chronicled in *Pierce County*, the shield was for the purpose of protecting the States from potential tort liability flowing from federally required recordkeeping. *Pierce County*, 537 U.S. at 133 - 36, 146 ("By amending the statute, Congress wished to make clear that § 152 was not intended to be an effort-free tool in litigation against state and local governments."). Second, as interpreted by the United States Supreme Court in *Pierce County*, 23 U.S.C. § 409 does not make it impossible for UP to prove that the warning devices at the Yosemite Avenue Crossing were installed pursuant to federal approval and funding. It just bans the use of the protected evidence to do so.

The trial court was persuaded to adopt a "federal funding exception" to 23 U.S.C. § 409 in part because it believed other courts

had made such a distinction. Neither of the two cases cited, however, supports this rationale. In *Hester v. CSX Transp., Inc.* 62 F.2d 382, 386 - 87 (5<sup>th</sup> Cir. 1995), protected documents were indeed admitted and considered to prove federal funding. There is no indication in the opinion, however, that the plaintiff ever objected to the admission of those documents at trial. In *Walden v. Department of Transp.*, 27 P.3d 304 - 05 (Alaska 2001), the Alaska Supreme Court upheld a trial court's exclusion of protected evidence at trial on the basis of 23 U.S.C. §409 – precisely what the plaintiff asked the trial court to do here. Again, none of the cases cited by the trial court address the plain language of the statute's first phrase.

In creating a “federal funding” exception to the plain language of 23 U.S.C. § 409, the trial court ignored a fundamental rule of statutory construction. It ignored plain, unambiguous language used by Congress in a statute it amended twice, in 1991 and 1995, both times for the purpose of strengthening the evidentiary bar. See *Pierce County*, 537 U.S. at 133 - 36 (history of the statute, its interpretation by the courts, and the subsequent amendments). And it ignores the fact that any railroad, including the UP, has the ability to retain its own records of the funding used at crossings on its rail lines. Internal railroad records that reflect the funding source of the warning devices in place at the Yosemite Avenue Crossing would not be subject to 23 U.S.C. § 409's evidentiary bar. See *Pierce County*, 537 U.S. at 146. The fact that UP cannot locate or no longer has the internal records of federal funding it needs to prove an affirmative defense does not justify ignoring clear statutory language. The Minnesota appellate courts have consistently upheld valid evidentiary exclusionary rules,

even when application of those rules preclude a party from being able to prove a claim or defense. *Hopkins*, 474 N.W.2d at 212 - 13; *Murphy*, 307 Minn. at 349, 240 N.W.2d at 511.

All of the evidence the trial court relied on to dismiss the plaintiff's inadequate warning device claim is inadmissible pursuant to 23 U.S.C. § 409. This evidentiary bar is not subject to waiver. There being no admissible evidence to support a finding of federal funding and approval of the warning devices in place at the Yosemite Avenue Crossing on the day of the accident, UP cannot meet its burden to prove that the plaintiff's inadequate warning device claim is preempted by federal law. The trial court's ruling to the contrary should be reversed.

**B. State Law.**

The trial court also found that the plaintiff's inadequate warning device claim is "preempted" by state statute, which provides "Crossing warning devices or improvements installed or maintained under this chapter as approved by the commissioner or any predecessor, whether by order or otherwise, are adequate and appropriate warning for the crossing." Minn. Stat. § 219.402; ADD.52. This, too, is reversible error.

The evidence UP offered to prove that Section 219.402 applies to Appellant's inadequate warning device claim is the same evidence it used in connection with its federal preemption argument: a 1993 order issued by the Minnesota Transportation Regulation Board approving a federally funded corridor project for track owned by the Chicago & North Western Railroad. [Spencer Affidavit, Exhibit B].

That order, with its attached exhibits, is comprised of data and other material collected for the evaluation and planning of safety enhancements to railroad crossings as required by 23 U.S.C. §130. It specifically references the federal funding program, and its attached Exhibit A contains the only reference to warning devices at the Yosemite Avenue Crossing. UP submitted no other evidence that the warning devices in place at the Yosemite Avenue Crossing on November 29, 2003 are the subject of the formal approval of the Commissioner of Transportation or a predecessor.

For the reasons set forth above, this evidence is inadmissible pursuant to 23 U.S.C. § 409. The evidentiary bar applies to this state court proceeding for any purpose, and cannot be waived. The trial court erred when it considered it, and without it, UP has not met its burden of proving that this statute applies to bar the plaintiff's claim.

Even if the order were admissible, however, it does not apply to bar the plaintiff's inadequate warning device claim against UP. As noted above, Minnesota law places the responsibility for giving the motoring public adequate warning of the dangers associated with a railroad crossing on the railroad. *Blaske*, 228 Minn. at 449 - 50; 37 N.W.2d at 762; *Licha v. Northern Pac. Ry.*, 201 Minn. at 430 - 31, 276 N.W. at 814 -15. Over the years the State passed legislation and authorized the promulgation of administrative rules that pose specific safety requirements of railroads. Those statutes and regulations have historically been held to be minimum standards with which a railroad must comply. *Licha v. Northern Pac. Ry.*, 201 Minn. at 431 - 37, 276 N.W. at 814 - 18 (1937). They do not replace or "preempt" the common law duty requiring a railroad to use due care. *Id.*

Turning to the rules of statutory construction, it is fundamental that when interpreting a statute, a court is to presume that a statute is consistent with the common law. *Shetsky v. Hennepin County*, 239 Minn. 463, 469, 60 N.W.2d 40, 45 (1953). “A statute is not to be construed in derogation of well-established principles of common law . . . unless so required by express words or by necessary implication, and then only to the extent clearly indicated.” *Swogger v. Taylor*, 243 Minn. 458, 465, 68 N.W.2d 376, 382 (1955). The trial court failed to even consider this rule, and instead read Section 219.402 to completely abrogate Minnesota common law. A narrower reading, with eye on the totality of Minnesota law before Section 219.402 was enacted in 1985, gives full effect to the statute’s meaning without abrogating the pre-existing common law.

Current Minnesota regulation requires railroads to mark all public crossings with cross bucks as a minimum safety measure. *See* Minn. R. part 8830.0500. Under Minnesota common law, an accident victim injured at a particularly hazardous crossing has the right to ask a jury to consider whether a railroad should have installed additional or different warning devices, such as lights and gates, over and above the state regulated minimum standards. The obligation to do so belongs to the railroad, not the State or other road authority.

Recognizing that many crossings are unsafe despite the minimum signage requirements, state law granted MnDOT (and its predecessors) the power to order a railroad to install active warning devices at individual crossings where that agency determines that the minimum regulated requirements are inadequate. *See*, Minn. R. part 8830.1000, subpart 1. To make certain that the State is protected

from liability when it exercises its discretion to order upgraded crossing protection, the legislature enacted Minnesota Statutes Section 219.402.

Minnesota's regulatory scheme retains the common law's placement of responsibility for the adequacy of warning devices on the railroad. The regulatory minimum requirement that cross bucks be used at all public crossings does not change the identity of the owner of the duty. Under the Minnesota regulatory scheme, railroads are mandated to install, pay for, and maintain cross bucks as a minimum safety standard at all public railroad crossings. When, however, the State began to exercise its authority to require the installation of additional or different protection at a given crossing, which became increasingly common when the State began to participate in the Federal Aid highway grade crossings program, the responsibility for making decisions about what type of protection at any given crossing is adequate shifted from the railroad to the State. See *Shanklin*, 529 U.S. at 353 – 354. For the first time the State had potential exposure to tort liability. Section 219.402 protects the State from this exposure by "deeming" the State's crossing protection selections to be adequate. Interpreted this way, the statute confers immunity on the State for acts or omissions in an area of responsibility it historically did not hold. It does not relieve the railroad of a common law duty, or an injured member of the public of a cause of action, where the law would otherwise uphold them. Since there is nothing in the language of Section 219.402 to suggest the legislature intended to abrogate preexisting common law, this interpretation is in keeping with the rules of statutory construction.

The only appellate decision to interpret and apply this statute is *McEwen v. Burlington Northern Railroad Co.*, 494 N.W.2d 313 (Minn. App. 1993). In *McEwen*, the plaintiff, whose decedent was killed in a car/train crash at a railroad crossing, brought a wrongful death claim against the State. He alleged that the State, which ordered the railroad to install flashing light signals at the involved crossing in 1957, was negligent because by 1986, when the accident occurred, the signals the State had ordered to be installed were inadequate. Treating Section 219.402 as a form of statutory immunity, this court held that the plaintiff's inadequate warning claim against the State was barred. *Id.* at 316. In 1957 the Railroad and Warehouse Commission (predecessor of the DOT) had exercised the discretion afforded it by the legislature in Chapter 219 and ordered the pertinent railroad to install circulating signal lights at the Dugdale crossing to warn motorists of oncoming trains. The devices were thus "installed under this chapter" (Chapter 219), and approved in the Order of the Railroad and Warehouse Commission. Section 219.402 thus applied to relieve the State of any legal responsibility associated with the exercise of its discretionary authority. In using Section 219.402 to immunize the state from liability for acting on a discretionary duty, *McEwen* is consistent with the interpretation of the statute urged by Appellant Zimbovskiy.

In this case the trial court, at UP's urging, interpreted Section 219.402 as if it had the same type of preemptive effect over the common law that a federal statute can have over state law by virtue of the Supremacy Clause. In so doing the court failed to abide by longstanding rules of statutory construction. Since the statute can

fairly be interpreted so that it does no violation to pre-existing Minnesota law, that is how it should be interpreted. Thus even if the supporting documentation were admissible, which it is not, in interpreting Section 219.402 as “preempting” the common law, the trial court committed reversible error.

**IV. THE TRIAL COURT ERRED WHEN IT CONCLUDED AS A MATTER OF LAW THAT THERE IS INSUFFICIENT EVIDENCE OF CAUSATION TO SUPPORT THE PLAINTIFF’S OPERATIONS CLAIMS AGAINST CP.**

The plaintiff has alleged both that the CP train crew failed to keep a reasonable lookout, [Plaintiff’s Complaint, ¶¶ 34-36], and that that they breached their duty to slow or stop the train in a timely manner in response to the presence of Dmitriy Zimbovskiy’s tractor trailer slowly approaching and stopping on the tracks. [Plaintiff’s Complaint, ¶¶ 38-39]. The trial court correctly found that neither claim was preempted by the FRSA to the degree that they fall within the “special individual hazard” exception first articulated by the United States Supreme Court in *Easterwood*, 507 U.S. at 675, n. 15.

Generally speaking, a specific individual hazard is a person, vehicle, obstruction, object or event that is not a fixed condition or feature of a crossing, thus it cannot be addressed by a uniform, national standard. *Anderson v. Wisconsin Cent. Transp. Co.*, 327 F. Supp. 2d 969 (E.D. Wisc. 2004). A commonly cited example is a child standing on the tracks. *See, e.g., Bashir v. Nat’l RR Passenger Corp.*, 929 F. Supp. 404, 412 (S.D. Fla. 1996). In addition, the following conditions have been found to constitute specific, individual hazards: *Bakhuyzen v. Nat’l R. Passenger Corp.*, 20 F. Supp. 2d 113, 118 (W.D. Mich. 1996) (a snowstorm creating poor visibility); *Stone v. CSX*

*Transp., Inc.*, 37 F. Supp. 2d 789, 795 (S.D. Wa 1999) (terrain, obstructed sight lines and limited access together with repeated signal system malfunctions at a crossing); *Griffin v. Kansas City Southern Ry.*, 695 S.W.2d 458, 461 (Mo. App. 1998) and *Alcorn v. Union Pacific RR Co.*, 50 S.W.3d 226, 242 (Mo. 2001) (an “unwavering approach” of a vehicle at a crossing that the train crew either knew or should have known about); *Missouri Pacific R.R. Co. v. Lemon*, 861 S.W.2d 501, 510 (Tex. App. 1003) (illegally parked tank cars that obstructed a motorist’s view down the tracks). The presence of Zimbovskiy’s truck slowly approaching the track was a specific individual hazard. When the CP train crew saw this tractor trailer pull slowly out towards and onto the tracks, they did not immediately slow down or apply the emergency brakes. They waited, despite having experienced near-misses with similar trucks on a weekly basis. They waited, though they knew that the Zimbovskiy truck was slow, long, and undoubtedly fully loaded. Neither member of the crew applied the emergency brakes or made any effort to slow the train until after the collision was inevitable – after the truck was already stopped on the tracks. In short, the crew saw what they should have known was a specific individual hazard and ignored it.

The trial court found that as a matter of law, the plaintiff has failed to provide evidence that the crew’s failure to slow the train or activate the emergency brake until two seconds before the collision would have made a difference to the outcome – which are the injuries Mr. Zimbovskiy suffered in the accident. In coming to this conclusion, the trial court misconstrues the point at which the Zimbovskiy truck became a “specific individual hazard.” This crew had actual

knowledge that slow-moving, fully loaded trucks barely make it across the Yosemite Avenue Crossing. They had actual knowledge that these fully loaded trucks had to go from a complete stop at the first stop sign, cross the tracks, and head to the second stop sign on an uphill grade. They had actual knowledge of “near-misses” on a weekly basis. When Mr. Zimbovskiy first became aware of the train, he stopped. He tried to reverse. Upon accidentally putting the tractor into second gear, he had moved forward sufficiently that the train struck mid-way back on the trailer. Had the crew attempted to slow or brake the train at 1,000 feet when they first saw the truck slowly approaching the crossing, the train had nearly 20 seconds before arriving at the impact point to slow – even when calculating at 35 miles per hour. [See Scott Affidavit at p.2]. Had they waited until the 500 foot mark, when they saw the truck actually stopped on the tracks, (which is the location the trial court chose to use), the train had nearly 10 seconds before arriving at the impact point to slow – even when calculating at 35 miles per hour. [Id.]. Even if the data from the event recorder is utilized, the crew did not brake until two seconds before impact. The trial court concluded that at the 500 foot mark, braking would not have prevented the a collision. While this may be true, the inquiry does not stop there. Mr. Zimbovskiy testified that at the moment of impact he had moved forward and was still moving forward, albeit very slowly. He had progressed from having his tractor on the tracks to having the mid portion of his trailer on the tracks. Taking all facts and inferences in favor of Mr. Zimbovskiy, had the train crew applied the emergency brakes earlier – even utilizing the 500 foot mark chosen by the trial court, Mr. Zimbovskiy would have had more time to move

forward. The impact would have occurred further back on the trailer, with a different result to him with respect to injuries, since he was in the tractor.

The difference in outcome is even more pronounced if the crew is held accountable for its knowledge of the many near-misses with similar vehicles at this crossing. While that knowledge may give rise to no duty to slow the train in the absence of a slow-moving, steadily approaching vehicle, under these circumstances as soon as that vehicle appears it becomes a “specific individual hazard,” triggering the obligation to brake or slow. See *Alcorn*, 50 S.W.3d at 242 (an “unwavering approach” of a vehicle at a crossing that the train crew either knew or should have known about is a specific individual hazard that triggers a train crew’s obligation to brake). In this case, that occurred at 1,000 feet. What was true at 500 feet and 10 seconds is even more pronounced at 1,000 feet and 20 seconds. Mr. Zimbovskiy was moving forward at impact. To conclude that giving him an additional 8 to 18 seconds to get more of his rig off the tracks would have changed the nature of the impact and the severity of his injuries is not speculation. The plaintiff’s operations claims should go to the jury.

### **CONCLUSION**

The trial court erred when it failed to properly apply the rules of statutory construction, resulting in the misinterpretation and misapplication of two statutes. As a result, the trial court erroneously dismissed the Appellant’s inadequate warning claim against UP. In addition, by reading the “specific individual hazard” exception to

preemption too narrowly, and failing to make all reasonable inferences of the factual evidence in favor of the non-movant, the trial court erroneously dismissed the Appellant's operations claims against CP, impermissibly deciding the causation question as a matter of law. Appellant Dmitriy Zimbovskiy therefore respectfully requests this court to reverse the trial court, reinstating the inadequate warning device claim against UP and the negligent operations claims against CO, and to remand the case to the district court for a trial on the merits.

Date: September 19, 2011

VAN DYCK LAW FIM, PLLC

By: Sharon L. Van Dyck  
Sharon L. Van Dyck (#188799)  
5354 Parkdale Drive, Suite 103  
St. Louis Park, MN 55416  
952-746-1095  
[sharon@vandycklaw.com](mailto:sharon@vandycklaw.com)

and

Robert C. Sullivan (MO Bar  
52408)  
George E. Chronic (# 0388688)  
Sullivan, Morgan & Chronic, LLC  
1600 Baltimore Ave., Suite 200  
Kansas City, MO 64108  
(816) 221-9922

ATTORNEYS FOR APPELLANT

**CERTIFICATION OF BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 10,077 words. This brief was prepared using Microsoft Word 2007.

Date: September 19, 2011

VAN DYCK LAW FIM, PLLC

By: *Sharon L. Van Dyck*  
Sharon L. Van Dyck (#183799)  
5354 Parkdale Drive, Suite 103  
St. Louis Park, MN 55416  
952-746-1095  
[sharon@vandycklaw.com](mailto:sharon@vandycklaw.com)

ATTORNEYS FOR APPELLANT