

NO. A11-1329

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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.*

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**BRIEF OF RESPONDENTS  
SOO LINE RAILROAD COMPANY AND JAMES A. STROIK**

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## STATEMENT OF THE ISSUES

1. The Federal Railroad Safety Act (“FRSA”) preempts train handling complaints when railroads comply with the applicable federal regulations. The evidence showed that Canadian Pacific Railway Company and the engineer (collectively “CP”) complied in all respects with the governing operational regulations. Further by the time Dmitriy Zimbovskiy’s careless and illegal driving made the collision imminent, the train crew was unable to prevent impact. Were the claims against Canadian Pacific and Stroik, the engineer, properly dismissed?

The district court dismissed the case against Union Pacific Railroad Company as preempted by federal law and precluded by state law. The lookout and braking claims against CP were found to fall within the “specific, individual hazard” exception to preemption. Nevertheless, because CP did not, as a matter of law, proximately cause the collision the trial court dismissed the train handling claims.<sup>1</sup> CP preserved preemption for appellate review. (A.Add.1<sup>2</sup>).

### APPOSITE AUTHORITIES:

- *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993);
- *Engvall v. Soo Line R.R. Co.*, 632 N.W.2d 560 (Minn. 2001);
- *Van Buren v. Burlington N. Santa Fe Ry. Co.*, 544 F. Supp. 2d 867 (D. Neb. 2008); and
- *Veit v. Burlington N. Santa Fe Corp.*, 249 P.3d 607 (Wash. 2011).

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<sup>1</sup> The district court ruled that a horn claim could proceed to trial. Zimbovskiy and CP thereafter stipulated to dismiss that claim without prejudice. If the district court is affirmed, the dismissal will become “with prejudice.” If this Court reverses, Zimbovskiy can choose to revive the horn claim.

<sup>2</sup> “A.Add.” refers to Appellant’s Addendum; “A.A.” to Appellant’s Appendix; “App.Br.” to Appellant’s opening brief; “CP.A.” to CP’s Appendix. Summary judgment exhibits not included in CP’s Appendix that were filed in support of CP’s summary judgment motion will be referred to as “SJ.Ex.”

2. Commercial drivers must satisfy a heightened standard of care. The evidence established that Zimbovskiy drove too fast, stopped where he could not see the oncoming train, ignored a stop sign, did not look for trains, stopped on the crossing, and shifted gears on the tracks—all in violation of traffic laws and common-law duties. Could reasonable minds differ about Zimbovskiy’s extreme carelessness being the “but for” cause of the collision?

Despite Zimbovskiy’s illegal and reckless driving, the district court determined that reasonable minds could differ about Zimbovskiy being exclusively at fault for the crash (preserved in summary judgment motions (A.Add.44-45)).

**APPOSITE AUTHORITIES:**

- *Winge v. Minn. Transfer Ry. Co.*, 294 Minn. 399, 201 N.W.2d 259 (1972);
- *Lubbers v. Anderson*, 539 N.W.2d 398 (Minn. 1995);
- *Hicks v. N. Pac. Ry. Co.*, 239 Minn. 273, 58 N.W.2d 750 (1953); and
- *Fischer v. Chicago & N.W. Ry. Co.*, 193 Minn. 73, 258 N.W. 4 (1934).

## INTRODUCTION

This appeal challenges the dismissal of claims stemming from a train / commercial vehicle collision. A Canadian Pacific locomotive crashed into Zimbovskiy's truck on November 29, 2003 at the Yosemite Avenue crossing in Savage, Minnesota. Before being hit Zimbovskiy sped toward the crossing paying no heed to three signs that warned about the railroad tracks and the stop sign ahead. He supposedly stopped—over 59 feet from the tracks—where a fence blocked his view to the east. As the west-bound train bore down on the crossing, Zimbovskiy pulled out from behind the fence and never bothered to look to his left. He thereafter blew through the stop sign guarding the tracks.

The tractor-trailer filled with chemicals finally came to a halt on the tracks. The tanker straddled the rails. In contravention of training, commercial driver directives, and the law, Zimbovskiy attempted to back up, but mistakenly shifted into second gear. As the truck sat almost motionless, the train arrived; the force of the impact pushed the rig over 1,000 feet to the west. Zimbovskiy, who was not wearing his seatbelt, left the scene in an ambulance.

By this action, Zimbovskiy seeks to blame the collision on Canadian Pacific and James Stroik (collectively “CP”)—as the operator of the train—and Union Pacific Railroad Company (“UP”)—as the owner of the tracks. Both railroads asserted preemption and moved for summary judgment.

The district court dismissed all but one claim against CP. Zimbovskiy's claims against UP were completely cashiered. This appeal followed.

The district court's comprehensive order should be affirmed for three reasons. First, Zimbovskiy's claims are foreclosed by Federal Railroad Safety Act ("FRSA") preemption: CP complied with the governing federal regulations.

Second, the undisputed evidence and Zimbovskiy's admissions establish that train handling did not, as a matter of law, proximately cause the collision. Zimbovskiy stopped "more than 59 feet from the railroad tracks" where a "fence and large evergreen tree blocked his view" of the tracks. A.Add.9. North of the fence "there were no obstructions in the form of vegetation which prohibited [Zimbovskiy] from seeing an oncoming westbound train[.]" but after emerging from behind the fence "[t]here is no evidence that [he] ever looked to his left[.]" *Id.* at 43.

After disregarding all advance warnings, Zimbovskiy belatedly realized his peril and foolishly stopped in front of the train and shifted gears. *Id.* at 10. The engineer engaged the emergency brakes as soon as a collision became imminent. But, as the district court determined, "the time period between when [Zimbovskiy] stopped on the tracks and the collision itself was so brief that application of the emergency brakes more than two seconds prior to impact would not have changed the outcome in any substantial, non-speculative manner." *Id.* at 31. In these undisputed circumstances, CP cannot be found to have proximately caused Zimbovskiy's injuries.

Third, Zimbovskiy's fault was the "but for" cause of the wreck or, at a minimum, was equal to or greater than either railroad so as to provide alternative grounds to affirm the result below.

## STATEMENT OF THE CASE AND FACTS

### A. Dmitriy Zimbovskiy

#### 1. Experience with the Yosemite crossing

Bay & Bay hired Zimbovskiy in July of 2002. *See* 6/23/04 Zimbovskiy Depo. T.10:24-25, T.11:1-9.<sup>3</sup> On his regularly assigned route, Zimbovskiy repeatedly drove over the tracks at Yosemite Avenue—just north of Highway 13—to be loaded and back over again to deliver the lading. Zimbovskiy Depo. T.4:17-24; T.42:20-27. Bay & Bay incentivized drivers to work—and drive—faster by paying by the load: the more trips, the more money a driver would make. *Id.* at T.11:8-25, T.12:1-2, T.20:12-28, T.53:26-28.

Zimbovskiy had traversed the Yosemite crossing more than 3,000 times before the fateful day. *Id.* at T.5:6-9. But before November 28, 2003, Zimbovskiy had always worked at night. *Id.* at T.42:20-27, T.115:2-5. After dark headlights on the locomotive signaled the approach of a train from afar; a driver could detect an oncoming a train by glancing toward the highway and seeing a beam of light. *Id.* at T.42:18-26, T.44:4-8. On November 29, 2003, Zimbovskiy pulled his second day shift.

#### 2. Professional driver obligations

The law charges professional drivers with a heightened duties of care. *See, e.g., Ohrmann v. Chicago & Nw. Ry. Co.*, 223 Minn. 580, 589, 27 N.W.2d 806, 811 (1947); 49 C.F.R. § 392.11. Those who make their living behind the wheel must abide by the

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<sup>3</sup> Relevant deposition transcripts are included in CP's Appendix and will be referred to by the deposition transcript cite. Zimbovskiy's deposition transcript can be found at CP.A.15, James Stroik (the engineer) at CP.A.177, James Schmidt (the conductor) at CP.A.204, Captain Matthew Langer (the lead State Patrol investigator) at CP.A.219.

Commercial Driver's Manual. Zimbovskiy Depo. T.21:10-13, T.22:6-9; *see also* 2003

Commercial Driver's Manual (CP.A.153).

The Manual mandates the following precautions:

- “stop at least 10 feet and no more than 50 feet from” a railroad crossing when “[a]n approaching railroad train is plainly visible and is in hazardous proximity” (p.vii<sup>4</sup>); Zimbovskiy Depo. T.22:29-30, T.23:1-4;
- expect that “railroad crossings are always dangerous” and approach every crossing “with the expectation that a train is coming” (p.2-38); Zimbovskiy Depo. T.27:30, T.28:1-11, T.29:4-7;
- “Speed must be reduced in accordance with your ability to see approaching trains in any direction and speed must be held at a point which will permit you to stop short of the tracks in case a stop is necessary” (p.2-38); Zimbovskiy Depo. T.34:5-19;
- “Because of noise in the cab, you cannot expect to hear the train horn until the train is dangerously close to the crossing” (p.2-38); Zimbovskiy Depo. T.35:29-30, T.36:1-8;
- do “not rely solely upon the presence of warning signals, gates, or flagmen to warn of the approach of trains” (p.2-38); Zimbovskiy Depo. T.36:3-6;
- “Never attempt to race a train to a crossing [because] [i]t is extremely difficult to judge the speed of an approaching train” (p.2-38); Zimbovskiy Depo. T.32:13-20;
- stop at a grade crossing when required by law (p.2-39); Zimbovskiy Depo. T.38:25-30;
- “Never permit traffic conditions to trap you in a position where you have to stop on the tracks. Be sure you can get all the way across the tracks before you start across” (p.2-39); and
- do “not shift gears while crossing railroad tracks” (p.2-39); Zimbovskiy Depo. T.39:11-13.

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<sup>4</sup> The page numbers reference the Commercial Driver's Manual (CP.A.153) in effect at the time of the collision.

Zimbovskiy acknowledged that he was obligated to obey these directives. *See* Zimbovskiy Depo. T.9:11-14, T.21:10-13, T.22:6-9, T.27:30, T.28:1-11, T.38:25-30.

In addition to the Manual, professional drivers must abide by the traffic laws. *See* Minn. Stat. §§ 219.22;<sup>5</sup> 169.26, subd. 1(a);<sup>6</sup> 169.26, subd. 1(b);<sup>7</sup> 219.20, subd. 2.<sup>8</sup> Federal regulations further prescribe driver performance. Jon Cook Affidavit ¶ 3 (CP.A.297); *see also* 49 C.F.R. §§ 392.11;<sup>9</sup> 383.11. Failure to comply with traffic laws, federal regulations, or the Manual warrants commercial driver's license revocation. *See* Minn. Stat. § 171.165; Zimbovskiy Depo. T.27:3-7.

Reinforcing driver duties, Bay & Bay trained Zimbovskiy to “stop at all railroad crossings, period, you know, nothing open for discussion, it was just railroad crossing

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<sup>5</sup> “Before proceeding across the railroad track marked with a stop sign, drivers shall bring their vehicles to a full stop and ascertain whether or not trains are approaching the crossing.”

<sup>6</sup> “[W]hen any person driving a vehicle approaches a railroad grade crossing under any of the circumstances stated in this paragraph, the driver shall stop the vehicle not less than ten feet from the nearest railroad track and shall not proceed until safe to do so and until the roadway is clear of traffic so that the vehicle can proceed without stopping until the rear of the vehicle is at least ten feet past the farthest railroad track. These requirements apply when...an approaching railroad train is plainly visible and is in hazardous proximity.”

<sup>7</sup> “The fact that a moving train approaching a railroad grade crossing is visible from the crossing is prima facie evidence that it is not safe to proceed.”

<sup>8</sup> “When a stop sign has been erected at a railroad crossing, the driver of a vehicle approaching a railroad crossing shall stop within 50 feet, but not less than ten feet, from the nearest track of the crossing and shall proceed only upon exercising due care.”

<sup>9</sup> “Every commercial motor vehicle...shall, upon approaching a railroad grade crossing, be driven at a rate of speed which will permit said commercial motor vehicle to be stopped before reaching the nearest rail of such crossing and shall not be driven upon or over such crossing until due caution has been taken to ascertain that the course is clear.”

you stop, observed if it was safe, cross.” James Crosby Depo. T.6:2-4; *see also* Dean Wedul Depo. T.5:15-24.

## **B. The Yosemite crossing**

In November 2003, cross bucks, stop signs, and road markings guarded the Yosemite crossing and required the drivers to stop and look for trains. Zimbovskiy Depo. T.20:10-11; *see also* CP.A.122-CP.A.126, CP.A.134 (Pictures). Besides that, signs along Yosemite Avenue warned southbound motorists that they would soon encounter a railroad crossing. *Id.*

The stop sign mounted on the cross bucks was located 10 feet north of the north rail. Greg Heil Depo. T.12:22-25, T.13:1-13, T.22:3-9; CP.A.159. A fence, owned by a nearby business, on the east side of Yosemite was 59 feet north of the north rail. *Id.* The stop sign for Highway 13 on the south side of the tracks was 57 feet, 9 inches from the center of the crossing. *See* First John Krcmar Affidavit ¶ 4 (CP.A.295). An additional 46 feet, 4 inches of roadway stretched between that sign and Highway 13. *Id.* The total distance from the track centerline to the northern edge of Highway 13 spanned over 104 feet. *Id.*

UP owns the tracks. A.Add.3. The fence and tree north of the tracks and east of Yosemite Avenue were outside of the right-of-way, which extends 50 feet on either side of track centerline. *See* First Gary Wolf Affidavit ¶ 4 (CP.A.277); *see also* Heil Depo. T.13:9-13, T.16:13-17; CP.A.159; A.Add.43.

Visibility at the crossing was unobstructed for drivers who heeded the advance warning signs, stopped as required by law, and looked for trains. A.Add.5-7, 43; *see also*

Depositions of: Captain Langer T.71:9-11 (“[Zimbovskiy] had the opportunity to stop in a spot where he had a very clear sight distance east.”), T.98:9-14; Officer Eugene Miller T.10:27-30, T.11:1-2, T.14:4-19, T.15:15-21 (“The only way he [Zimbovskiy] couldn’t have seen [the train] is if he wasn’t looking, in my opinion.”); Chief Joel McColl T.18:8-16 (at the stop sign a driver can see a “Quarter mile” with no obstructions); Officer Alan Visek T.6:15-23; Officer Terry Bebeau T.12:5-23, T.13:30, T.14:1-3, T.16:8-13; Greg Heil T.20:20-23, T.32:6-23; Larry Dahler T.35:26-30, T.36:1, T.43:28-30, T.44:1, T.44:18-23, T.50:7-21; James Crosby T.7:1-22; Ricky Menze T.28:7-18, T.29:22-29 (“When you stop where you’re required to stop, you can clearly see down the tracks”), T.31:28-30, T.32:2; *see also* CP.A.120, CP.A.130-CP.A.132 (Pictures).

Anywhere along the roadway within 50 feet of the tracks affords a driver a clear view beyond the trestle that passed over the tracks—a distance of at least 650 feet to the east. *Zimbovskiy Depo.* T.7:13-17; *see also* *First Krcmar Aff.* ¶ 3; Officer Bebeau *Depo.* T.12:12-17. An approaching west-bound train becomes visible to a legally stopped driver well before arriving at the Juneau Blvd. crossing. *Id.*; *see also* *First Wolf Aff.* ¶ 4 (and *First Wolf Aff. Exs.* 2, 3); Officer Miller *Depo.* T.27:30, T.28:1-3; Officer Visek *Depo.* T.6:15-23; Officer Bebeau *Depo.* T.12:5-23; CP.A.120, CP.A.130-CP.A.132 (Pictures).

The driver’s seat in Zimbovskiy’s truck was higher off the ground than a typical passenger vehicle. That vantage point enabled Zimbovskiy to see vehicle and train traffic better than he could from an automobile. *See* *Cook Aff.* ¶ 4; Captain Langer *Depo.* T.92:3-4. If the vistas available at the crossing had been utilized, Zimbovskiy would not have been oblivious to the exigency that his indifference to mandatory crossing

precautions was about to create. Zimbovskiy Depo. T.7:13-19; *see also* CP.A.120, CP.A.130-CP.A.132 (Pictures).<sup>10</sup>

**C. November 29, 2003**

**1. Zimbovskiy crosses the tracks earlier that day**

On November 29, Zimbovskiy drove over the tracks three times before his last trip: once to pick up his first load; a second time to deliver that load, and a third to be loaded again. Zimbovskiy Depo. T.110:5-30, T.111:1-11. As soon as the tank that he was pulling was full, Zimbovskiy turned his rig towards the Yosemite crossing bound for Minneapolis. He would not get far.

**2. The train approaches blasting the horn and ringing the bell**

The Federal Railroad Administration (“FRA”) set the speed for the tracks over Juneau Blvd. at 49 miles per hour. *See* James Stroik Depo. T.54:10-19; Mike McDonald Affidavit ¶ 3 (CP.A.290); First Wolf Aff. ¶ 5. The CP train was traveling well under that limit at 34 to 35 miles-per-hour. *Id.*; *see also* CP.A.138.<sup>11</sup>

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<sup>10</sup> Zimbovskiy touts prior incidents at the Yosemite crossing (App.Br.7), which are inadmissible as substantially dissimilar and remote in time. *See Kelsay v. Consol. Rail Corp.*, 749 F.2d 437, 443 (7th Cir. 1984); *Haukom v. Chicago Great W. Ry. Co.*, 269 Minn. 542, 555, 132 N.W.2d 271, 279 (1964). In any event, the evidence would be inadmissible as to CP because CP has no responsibility for UP’s crossing. *Haukom*, 269 Minn. at 555, 132 N.W.2d at 279. The admissibility of prior incident evidence was presented to the district court, but never ruled upon because the claims against UP were dismissed on summary judgment.

<sup>11</sup> Zimbovskiy discounts the event recorder data as “unreliable.” App.Br.11 n.4. At the oral argument, however, Zimbovskiy’s attorney conceded train speed claim preemption because the event recorder showed the federal limit. A.Add.12 n.7. If the event recorder reliability enabled counsel to acknowledge that the train was not speeding, the data are certainly sufficient to confirm the sounding of the horn and the propriety of

Anticipating the Yosemite crossing, the engineer began ringing the locomotive's bell and blowing the horn. Stroik Depo. T.53:12-14, T.64:2-25, T.65:1-14; James Schmidt Depo. T.32:17-25, T.33:1-22, T.34:23-24; Norb Denzer Depo. T.63:12-25; CP.A.138. The locomotive event data recorder logged that the horn screeching over a distance of nearly 1,600 feet<sup>12</sup>—almost 300 feet more than the required 1/4 mile (1,320 feet) before the crossing. *See* SJ.Ex.60 (General Code of Operating Rules (“GCOR”) 5.8.1); McDonald Aff. ¶ 4.

Zimbovskiy denied hearing the train horn. Zimbovskiy Depo. T.44:20.<sup>13</sup> A driver and his passenger on Highway 13—who were several train car lengths behind the lead locomotive—also say they did not hear an audible warning. *See* Tom Wishard Depo. T.14:11-17, T.48:11-25; Josh Wishard Depo. T.10:21-25, T.11:1, T.31:3-5, T.38:3-14. The train's event recorder, however, shows that the horn being blown for well over 1/4 mile. *See* CP.A.138; *see also* McDonald Aff. ¶ 4; First Wolf Aff. ¶ 3. The credibility of an electronic recording device far exceeds that of the statements of a compensation-

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other operations. And contrary to Zimbovskiy's assertion, the different wheel measurements were fully explained: one measurement was a default automatically entered by the software; the second was taken at the accident scene; and the third was recorded in CP's maintenance shop a few days before the accident. Norb Denzer Depo. T.16:6-21, T.31-32; Tom Onan Depo. T.24:12-25, T.25:1-25. The different wheel sizes produce *de minimus* speed variations, but the integrity of the underlying data has never been compromised. Denzer Depo. T.17:1-22; Onan Depo T.25:11-14; Second Gary Wolf Affidavit ¶ 4. The data are accurate to within .06 miles per hour when either the shortest or the longest measurement is plugged into the software. Second Wolf Aff. ¶ 4. Not even Zimbovskiy suggests otherwise

<sup>12</sup> McDonald Aff. ¶ 4; First Wolf Aff. ¶ 3; CP.A.138.

<sup>13</sup> At the hospital shortly after the collision, Zimbovskiy reported hearing the horn as he proceeded toward the crossing and when he stopped on the tracks. A.Add.10.

seeking plaintiff or the seven year old recollections of witnesses who were in a car (with the radio on) that was well behind the locomotive-mounted source of the sound.

Regardless, Zimbovskiy knew that noise in the cab could prevent a driver from hearing the horn. Zimbovskiy Depo. T.35:29-30, T.36:1-8; *see also* CP.A.153 (p.2-38). And a train should have been expected whenever Zimbovskiy approached a crossing. *Id.*; *see also* Zimbovskiy Depo. T.27:30, T.28:1-11, T.29:4-7.

### **3. Zimbovskiy stops (if at all) where he could not see the train**

Zimbovskiy pretends that the truck stopped 30-35 feet north of the stop sign. App.Br.9. Zimbovskiy, however, disavowed that location and instead recalls stopping where the fence and a tree obstructed his view of the tracks. Zimbovskiy Depo. T.9:8-10, T.38:15-18 (“Q: Then why didn’t you see the train? A: There was a tree and fence in my way.”). At his deposition, Zimbovskiy marked an “S” on an aerial photograph to show where the front bumper was at the truck’s stopping place. CP.A.275 (Depo. Ex.33 (Zimbovskiy Depo. T.50:1-13)). The “S” is behind the fence north of the crossing. *Id.* If the fence—59 feet north of the tracks<sup>14</sup>—blocked east-ward sightlines, the truck had to have been more than 50 feet from the tracks. Zimbovskiy Depo. T.38:15-18; Captain Langer Depo. T.72:23-24; CP.A.128 (Picture). In fact, Zimbovskiy admits that from where he allegedly stopped he could not see the tracks on his left. Zimbovskiy Depo. T.9:8-10.

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<sup>14</sup> First Kremer Aff. ¶ 2; Heil Depo. T.13:9-13.

Looking for train traffic from behind the fence is inexplicable: Zimbovskiy knew that south of the fence he could see beyond the trestle to the east. Zimbovskiy Depo. T.7:13-19; *see also* CP.A.120, CP.A.130-CP.A.132 (Pictures). If Zimbovskiy had stopped where he says he did (30-35 feet from the tracks), the train could not have been missed. *Id.* Zimbovskiy's only explanation for his devil-may-care driving was: "It's what I do every day." Zimbovskiy Depo. T.10:1-8, T.18:1-4, T.60:23-27.

As Zimbovskiy proceeded to where the tracks could be seen, he only watched for vehicular traffic on the highway. Zimbovskiy Depo. T.42:1-7. As the district court noted, "[t]here is no evidence that [Zimbovskiy] ever looked to his left after his stop at the stop sign until approximately two seconds before the collision." A.Add.43. Thus while in the 50 to 10 foot from the tracks zone—where stopping, looking, and listening are required—Zimbovskiy forged ahead without regard to the danger that every crossing is known to pose. Zimbovskiy Depo. T.42:1-7; A.Add.8-14, 43.

#### **4. Zimbovskiy runs the stop sign**

The crew saw Zimbovskiy charge out from behind the fence after the train had passed under the overpass, some 630 feet to the east. Schmidt Depo. T.18:19-25, T.19:1-7, T.23:25, T.24:1-19; Stroik Depo. T.67:10-17, T.69:6-9, T.70:15-16, T.71:14-16, T.72:4-5. The truck traveled "pretty fast and stopped suddenly." Schmidt Depo. T.18:19-25, T.19:1-7, T.23:25, T.24:1-19; Stroik Depo. T.75:25, T.76:1-2; *see also* CP.A.136 (Picture). The conductor's observation of rapid movement and abrupt braking is consistent with the skid marks that law enforcement attributed to Zimbovskiy's truck. *See* Captain Langer Depo. T.37:13-14 ("These skid marks that are shown in [Deposition

Exhibit 124] are from the trailer that was hit in this collision.”), T.50:12-24, T.80:7-20; Officer Miller Depo. T.22:19-30, T.23:1-6; CP.A.114-CP.A.118.

The train crew was legally entitled to expect that Zimbovskiy would stop before fouling the tracks.<sup>15</sup> Stroik Depo. T.67:10-14. But Zimbovskiy disregarded the stop sign and brought the truck to a halt straddling the tracks. Schmidt Depo. T.18:19-25, T.19:1-7, T.23:25, T.24:1-8; Stroik Depo. T.72:4-5; *see also* CP.A.60 (Police Report). While on the tracks Zimbovskiy searched in vain for reverse—contrary to the Commercial Driver’s Manual—but instead found second. Zimbovskiy Depo. T.39:18-19, T.40:19, T.40:30, T.41:1-6. The insufficient torque available in that gear, stranded the trailer directly in the path of the oncoming train. CP.A.136.

Upon realizing that Zimbovskiy was not going to clear the crossing, the engineer applied the train’s emergency brakes; by that time, however, a crash could not be avoided. Schmidt Depo. T.18:19-25, T.19:1-7, T.26:1-3; Stroik Depo. T.77:25, T.97:9-21. The train crew had no idea whether the tanker that they were about to hit contained hazardous materials, whether the locomotive’s windshield would withstand the impact, or whether shards of glass and metal would penetrate the cab of the locomotive. Schmidt Depo. T.19:12-19; Stroik Depo. T.43:19-24, T.44:10-12; *see also* McDonald Aff. ¶ 6.

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<sup>15</sup> A train crew has the right to assume that a vehicle on or approaching a railroad crossing will stop, move out of the way, or otherwise yield. *See Baldwin v. Chicago & Nw. Ry. Co.*, 285 Minn. 15, 22, 171 N.W.2d 89, 93 (1969); *Nye v. CSX Transp., Inc.*, 437 F.3d 556, 567 (6th Cir. 2006); *Woods v. Amtrak*, 982 F. Supp. 409, 412-14 (N.D. Miss. 1997); *Bryan v. Norfolk & W. Ry. Co.*, 21 F. Supp. 2d 1030, 1035 (E.D. Mo. 1997); *Price v. Nat’l R.R. Passenger Corp.*, 14 P.3d 702, 708 (Utah App. 2000).

With a collision inevitable, the train crew took cover on the floor. Schmidt Depo. T.19:1-19; Stroik Depo. T.77:20-25, T.79:6-8; McDonald Aff. ¶ 6.<sup>16</sup>

The train smashed into the stationary tanker. The force of the collision pushed Zimbovskiy's truck down the tracks over 1,000 feet. See CP.A.60; Captain Langer Depo. T.10:11-12; SJ.Ex.41; Second Wolf Aff. ¶ 4 (CP.A.287); A.Add.12. The impact released a plume of white powder from the trailer and punctured the locomotive's fuel tank. CP.A.60. Not wearing a seatbelt, Zimbovskiy was injured. A.Add.10, 14.

### **5. Zimbovskiy ticketed and pleads guilty**

The police investigated the incident for more than a month. Officer Miller Depo. T.9:21-25. After thoroughly reviewing the facts, the State Patrol concluded "that one of two things happened, either [Zimbovskiy] didn't stop and he slid into the tracks and got hit by the train, or he did stop and pulled into the tracks and got hit by the train. Either way, by statute, that driver is at fault for being hit by the train." Captain Langer Depo. T.93:10-20. Law enforcement "saw nothing to question the complete liability on the part of the truck driver for what occurred there." *Id.* at T.86:4-6.

Consistent with that conclusion, the police cited Zimbovskiy for failing to yield to the train, careless driving, not wearing a seat belt, and driver record keeping infractions. SJ.Ex.23; Officer Miller Depo. T.9:1-25, T.10:1-18. Zimbovskiy ultimately pled guilty to careless driving, paid a fine, and lost his license. SJ.Ex.23; Zimbovskiy Depo. T.25:21-24, T.70:11-13.

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<sup>16</sup> Because the train crew dropped to the floor, the locomotive horn stopped blowing two seconds before impact. McDonald Aff. ¶¶ 4, 6; CP.A.138.

Bay & Bay independently assessed causation and found Zimbovskiy at fault. Heil Depo. T.4:21-25-T.5:1-20. In recognition of that finding, Bay & Bay reimbursed CP for the cost of repairing the locomotive and cleaning up the spilled fuel. SJ.Ex.57.

**D. Zimbovskiy returns to work only to be fired for dishonesty**

After recovering from his injuries, Zimbovskiy resumed driving. Zimbovskiy Depo. T.107:16-17. Before long, however, Bay & Bay caught Zimbovskiy falsifying log book entries. Wedul Depo. T.7:30, T.8:1-15. The misrepresentations of driving and rest time in contravention of federal law ended Zimbovskiy's Bay & Bay career. *Id.*

Log book lies were not the only instances of documented prevarication. Less than nine months following the collision, Zimbovskiy submitted Department-of-Transportation-required medical information and certified to: no injuries in the last five years; no head or brain impairment; and no back pain. Zimbovskiy Depo. T.62:30, T.64:3-11, T.66:30, T.67:1-19; SJ.Exs.43-47. In subsequent years Zimbovskiy repeatedly certified to no physical impairments. *Id.*

Zimbovskiy was also required to report regarding his driving record. Despite the collision for which he now seeks compensation, Zimbovskiy repeatedly represented never being involved in an accident. Zimbovskiy Depo. T.69:18-21, T.70:4-8; SJ.Ex.48. Besides defrauding governmental authorities, Zimbovskiy told prospective employers that he had no traffic convictions or citations and never had his license suspended. SJ.Ex.48; Zimbovskiy Depo. T.72:1-30. In fact, following the November 29, 2003 crash, Zimbovskiy received tickets, pled guilty, and suffered a license suspension. Zimbovskiy Depo. T.70:11-26, T.72:1-30.

## **E. Litigation**

Zimbovskiy sued UP, CP, and Stroik to recover damages supposedly caused by the crash. *See* Complaint. Zimbovskiy complains about no longer being able to work due to permanent brain, hip, and back injuries. *Id.* Zimbovskiy attempted to explain the discrepancies between his DOT certifications and his injury allegations by saying it “looks like” he lied in order to work because “if I don’t have a license, I can’t feed my family. And for economical, I didn’t do anything wrong.” Zimbovskiy Depo. T.68:4-6, T.75:14-15. To get money, Zimbovskiy apparently condones fabrication.

Zimbovskiy faults CP for operating the train too fast, failing to properly sound the horn, and waiting too long to brake, as well as common law negligence. Complaint at ¶¶ 31-33, 37, 40. Zimbovskiy charged that UP failed to clear vegetation, installed inadequate crossing warning devices, and bore responsibility for a problematic track / roadway / highway configuration. *Id.* at ¶¶ 43-54.

## **F. Summary judgment**

Both railroads moved for summary judgment. In a well reasoned opinion, the district court determined from Zimbovskiy’s deposition testimony that the truck stopped “more than 59 feet from the railroad tracks” where a “fence and large evergreen tree blocked his view.” A.Add.9, 43. North of the fence trains could be seen: “there were no obstructions in the form of vegetation which prohibited [Zimbovskiy] from seeing an oncoming westbound train.” *Id.* at 43. But “[t]here is no evidence that [Zimbovskiy] ever looked to his left after his stop at the stop sign until approximately two seconds before the collision.” *Id.*

The district court determined that a “specific, individual hazard” confronted the train crew when Zimbovskiy was unable to get off the tracks. *Id.* at 30-31. Nevertheless because the engineer engaged the emergency brakes as soon as a collision became imminent, “the time period between when Plaintiff stopped on the tracks and the collision itself was so brief that application of the emergency brakes more than two seconds prior to impact would not have changed the outcome in any substantial, non-speculative manner.” *Id.* at 31.

The claims against CP failed because train handling was not, as a matter of law, the proximate cause of the collision even though Zimbovskiy’s recklessness created a “specific, individual hazard” exception to FRSA preemption. *Id.* at 32. The district court also dismissed the crossing warning device and vegetation control claims against UP. *Id.* at 33-44. Because the horn claim against CP was not summarily dismissed<sup>17</sup> the trial court concluded that reasonable minds could differ about Zimbovskiy’s fault being greater than CP’s. *Id.* at 45.

This appeal followed.

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<sup>17</sup> The horn claim is not an issue on appeal. App.Br.4.

## ARGUMENT

### I. The dismissal should be affirmed

“The preemptive effect of a statute involves a question of law, which this court reviews *de novo*.” *In re Speed Limit for the Union Pac. R.R.*, 610 N.W.2d 677, 682 (Minn. App. 2000); *see also Frazier v. Burlington N. Santa Fe Corp.*, 788 N.W.2d 770, 775 (Minn. App. 2010). To decide this appeal, this Court asks: whether any genuine issues of material fact exist, and whether the lower court properly applied the law. *Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 581 (Minn. 2010).

#### A. State law tort claims are preempted when federal regulations cover the subject matter and the railroad complies

Congress enacted the FRSA to “promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.” 49 U.S.C. § 20101. To that end, the FRSA “creates a comprehensive scheme for the regulation of rail safety[.]” *Burlington N. R.R. Co. v. State of Minn.*, 882 F.2d 1349, 1352 (8th Cir. 1989). The FRSA vests the Federal Railroad Administration (“FRA”) with plenary authority to prescribe and enforce railroad “regulations and issue orders for every area of railroad safety.” *In re Derailment Cases*, 416 F.3d 787, 793 (8th Cir. 2005)(quotes omitted).

To ensure “[n]ational uniformity of regulation,” Congress precludes state law interference with federal oversight. 49 U.S.C. § 20106. The preemption effected by the FRSA extends to state common law causes of action that would impose standards of care different from the governing federal regulations. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 671-75 (1993); *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 358

(2000)(“FRSA pre-empts respondent’s state tort claim”); *Frazier*, 788 N.W.2d at 775. Accordingly, state law claims fail when (1) FRA regulations cover the subject matter, and (2) the railroad complies with the covering regulations. *Shanklin*, 529 U.S. at 358-59; *see also* 49 U.S.C. § 20106(b)(1)(2007).

Zimbovskiy trumpets common-law duties (App.Br.13-14), but CP can only be held accountable for violating a federal regulation. *Easterwood*, 507 U.S. at 671-73; *Shanklin*, 529 U.S. at 358; *Frazier*, 788 N.W.2d at 776; 75 Fed. Reg. 1180, 1208-10 (Jan. 8, 2010)(CP.A.161). “The applicable standard [for railroads], as always, is the standard imposed by the [federal regulations].” *Engvall v. Soo Line R.R. Co.*, 632 N.W.2d 560, 567 (Minn. 2001). The federal regulations are the *exclusive* measure of railroad due care because when “no state standard is imposed, there is no danger of undermining the goal of nationwide uniformity of railroad operating standards[.]” *Id.* at 570-71.

This regulatory standard of railroad care was recently reaffirmed: “[t]he common-law negligence standard is not the standard by which railroad safety is judged.” *Frazier*, 788 N.W.2d at 780. Hence, a finding that the railroad “violated federal law” is “an essential prerequisite to a finding of liability.” *Id.* at 781.

For that reason, “claims seeking to impose a state law standard of care on a manufacturer (or a railroad) are preempted.” *Engvall*, 632 N.W.2d at 571; *see also Mahutga v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.*, 182 Minn. 362, 366, 234 N.W. 474, 476 (1931)(“[a] jury cannot be permitted to substitute its judgment” for that of federal regulators); *Frazier*, 788 N.W.2d at 777 (an action against a railroad can proceed “provid[ed] that the federal standard of care [is] used”). But proof of non-compliance is

not enough: the violation must be shown to have proximately caused the alleged injury.

*Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995); *Frazier*, 788 N.W.2d at 777.

The FRA recently explained the FRSA's preemptive effect as follows:

[A] private plaintiff may bring a tort action for damages alleging injury as a result of violation of [the federal regulations]. ... [But] [o]nce the Secretary of Transportation has covered a subject matter through a regulation or order, and thus established a Federal standard of care, Section 20106 preempts State standards of care regarding this subject matter.

75 Fed. Reg. at 1208-10.<sup>18</sup>

Zimbovskiy embraces inapplicable preemption regimes to promote a "heavy burden of proof" and a "strong presumption against preemption." App.Br.14, 16, 20. But the preemption presumption Zimbovskiy asks this Court to indulge only bears on implied preemption. When a federal statute expressly preempts, nothing needs to be presumed. *Missouri Bd. of Exam'rs for Hearing Instrument Specialists v. Hearing Help Express, Inc.*, 447 F.3d 1033, 1035 (8th Cir. 2006)(presumption applicable to implied preemption, *i.e.*, when congressional intent is not express); *People of State of Ill. v. Outbound Marine Corp., Inc.*, 680 F.2d 473, 479-80 (7th Cir. 1982)(when congressional preemptive intent is express, there is a "presumption in favor of preemption").

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<sup>18</sup> The 2007 clarification of the FRSA did not, however, change the statute's preemptive implications for crossing claims. *See, e.g., Henning v. Union Pacific R.R. Co.*, 530 F.3d 1206, 1215-16 (10th Cir. 2008)(analyzing 2007 clarification and concluding that "Henning's inadequate signalization and negligent delay claims are preempted by § 646.214(b)(3) and (4)"); *Smith v. Burlington N. & Santa Fe Ry. Co.*, 187 P.3d 639, 646 (Mont. 2008)("Section 1528 of the 9/11 Act did not overrule the FRSA preemption analysis as announced in *Shanklin*"); 75 Fed. Reg. at 1208-10; H.R. Conf. Rep. No. 110-259 at 351 (the statute retains the "exact [pre-clarification] text" of 49 U.S.C. § 20106 and "the restructuring is not intended to indicate any substantive change in the meaning of the provision").

The language of the FRSA leaves no doubt about the displacement of state laws,<sup>19</sup> the U.S. Supreme Court has twice recognized the FRSA's preemptive effect,<sup>20</sup> and the operative language remains unchanged. *Henning*, 530 F.3d at 1214-16. When regulatory coverage and compliance are not at issue, state law that would disturb national uniformity must be presumed to be superseded. *CSX Transp., Inc. v. Williams*, 406 F.3d 667, 673 (D.C. Cir. 2005); *Shanklin*, 529 U.S. at 357-58. Without proof of a regulatory violation Zimbovskiy cannot establish that CP breached the applicable standard of care.

### **B. Zimbovskiy's claims are preempted**

The only claims against CP presented by this appeal are Zimbovskiy's attacks on the train crew's supposed failure to maintain an adequate lookout and to slow or stop sooner. App.Br.33-36.<sup>21</sup> Nothing supports these accusations. In fact, the undisputed facts establish that the train crew complied with controlling federal law by being vigilant and timely braking, and that Zimbovskiy was exclusively at fault for the collision.

The engineer first observed Zimbovskiy just after going under the overpass east of the Yosemite crossing. Stroik Depo. T.71:14-73:1. The conductor saw the truck emerge from behind the fence when the train was 900 to 1,000 feet away. Schmidt Depo. T.20:11-12. Upon seeing the rig loaded with an unknown chemical, both crew members continued to watch, to sound audible warnings, and to believe that Zimbovskiy would fulfill his legal obligation to stop before the tracks or to move off the tracks before the

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<sup>19</sup> 49 U.S.C. § 20106(a).

<sup>20</sup> *Easterwood*, 507 U.S. at 671-73; *Shanklin*, 529 U.S. at 358.

<sup>21</sup> Zimbovskiy conceded speed claim preemption (A.Add.16 n.14) and the horn claim is not at issue in this appeal. App.Br.4.

train arrived. Schmidt Depo. T.18:24-19:7; Stroik Depo. T.67:10-17, T.75:20-24; *see also Baldwin*, 285 Minn. at 22, 171 N.W.2d at 93; *Nye*, 437 F.3d at 567; *Woods*, 982 F. Supp. at 412-14; *Price*, 14 P.3d at 708; Minn. Stat. §§ 169.26, .30. Zimbovskiy failed to meet those expectations and instead rolled through the stop sign *Id.*

Once the train crew realized that Zimbovskiy was not going to move off the tracks and “that a collision was imminent,” the engineer immediately put the train into emergency. Schmidt Depo. T.19:5-7; Stroik Depo. T.75:22-24. But, Zimbovskiy’s recklessness deprived the crew of sufficient time and distance to avoid impact.

Vague averments, expert surmise, unsupported assumptions, rank speculation and general assertions cannot overcome summary judgment affirmance. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997); *Rochester Wood Specialties, Inc. v. Rions*, 286 Minn. 503, 509, 176 N.W.2d 548, 552 (1970); *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993); *Erickson v. Gen. United Life Ins. Co.*, 256 N.W.2d 255, 259 (Minn. 1977). Yet Zimbovskiy’s rendition of his driving and the train crew’s deficient lookout and braking is just that.

The undisputed evidence demonstrates that the train crew complied with all the federal regulations. The district court should be affirmed because Zimbovskiy’s claims against CP are preempted. *See Myers v. Price*, 463 N.W.2d 773, 775 (Minn. App. 1990)(“We will affirm the judgment if it can be sustained on any grounds.”); *Winkler v. Magnuson*, 539 N.W.2d 821, 827 (Minn. App. 1995)(affirming summary judgment on an alternative theory presented to the district court).

### C. No preemption exception saves Zimbovskiy's claims

Zimbovskiy argues that his claims are saved by the “specific, individual hazard exception to FRSA preemption” called for a different outcome below. App.Br.33-36.<sup>22</sup> Zimbovskiy insists that the train crew should have slowed the train upon first seeing the truck. *Id.* But that is not the applicable standard of care, and neither Zimbovskiy nor his expert can impose duties not recognized by the law. *See Safeco Ins. Co. of Am. v. Dain Bosworth Inc.*, 531 N.W.2d 867, 873 (Minn. 1995)(“An affidavit from an expert cannot create a duty where none exists. Where a party has no duty, there can be no breach.”).<sup>23</sup>

The “specific, individual hazard” exception “is a narrow one.” *Stevenson v. Union Pac. R. Co.*, 110 F. Supp. 2d 1086, 1090 (E.D. Ark. 2000). Contrary to Zimbovskiy’s pronouncement that the train crew must stop or slow the train upon seeing an approaching vehicle, “[t]he approach of a vehicle is not a ‘specific, individual hazard’ unless and until there is *imminent* danger of the train colliding with the vehicle.” *Van Buren*, 544 F. Supp. 2d at 880 (emphasis added); *see also Alcorn v. Union Pac. R.R. Co.*, 50 S.W.3d 226, 242 (Mo. 2001). When a collision becomes imminent, a train crew must then attempt to avoid the “specific, individual hazard.” *Id.*; *Eastwood*, 507 U.S. at 675

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<sup>22</sup> In opposing Rule 56 disposition Zimbovskiy attempted below to qualify his claims for both the “specific individual hazard” and the “local safety hazard” exceptions to FRSA preemption. A.Add.26-28. On appeal, Zimbovskiy only embraces the “specific, individual hazard” exception. *See* App.Br.33-36. Having failed to raise the “local safety hazard” in the opening brief, Zimbovskiy waives any argument about that exception. *See* Minn. R. Civ. App. P. 128.02, subd. 4; *McIntire v. State*, 458 N.W.2d 714, 717 n.2 (Minn. App. 1990)(declining to address issues first brought up in reply brief).

<sup>23</sup> Notably, Zimbovskiy’s treatment of the “specific, individual hazard” exception exclusively relies upon citations to an expert affidavit; the record is never cited. App.Br.34-36.

n.15. Before that, however, the crew has no duty to slow down or to stop the train.<sup>24</sup> *Id.*; *see also Baldwin*, 285 Minn. at 22, 171 N.W.2d at 93; *Nye*, 437 F.3d at 567.

The mere presence of traffic or a vehicle's approach does not create a specific, individual hazard. If such routine occurrences did, every passing car would implicate the exception. The Washington Supreme Court rejected that take on the exception:

A car approaching a railroad crossing generally does not result in an imminent collision, so the BNSF engineer was not required to stop or slow when he saw Veit's car approaching the tracks. Moments later, when it became clear that a collision was indeed imminent, the engineer exercised due care by activating the emergency brake. Thus, Veit's excessive speed claim does not fall within the narrow exception for specific individual hazards.

*Veit v. Burlington N. Santa Fe Corp.*, 249 P.3d 607, 619 (Wash. 2011).

A "specific, individual hazard" argument almost always constitutes no more than a futile attempt to steel an excessive speed claim against preemption. *See, e.g., Bashir v. Nat'l R.R. Passenger Corp.*, 929 F. Supp. 404, 412 n.5 (S.D. Fla. 1996)("claim of failure to maintain a slow speed to avoid [specific, individual] potential hazards is simply another way of claiming that the train was travelling at an excessive speed...which *Easterwood* precludes as preempted."); *O'Bannon v. Union Pac. R.R. Co.*, 960 F. Supp. 1411, 1420-21 (W.D. Mo. 1997)(specific, individual hazard allegations for failure to slow train, when "stripped of its cloak," amount to no more than a preempted excessive speed

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<sup>24</sup> Trains offer far fewer opportunities for regulatory control, and automobile driver conduct is the major variable in grade crossing accidents. *Easterwood*, 507 U.S. at 674. In fact, "[n]early all grade crossing accidents can be said to be attributable to some degree of 'driver error.'" *Id.* at 675 n. 14 (*quoting* U.S. Dept. of Transportation, Railroad-Highway Safety, Part I).

claim). Zimbovskiy concedes train-speed claim preemption (A.Add.12 n.7), the specific, individual hazard exception cannot revive an admittedly foreclosed claim.

Besides that, the undisputed facts preclude allegations about the train crew inadequately responding to a specific, individual hazard. Zimbovskiy failed to stop the truck where he could see oncoming trains. Zimbovskiy Depo. T.37:30-T.38:24; CP.A.128; A.Add.9, 43. The fence that supposedly prevented him from seeing the train was 59 feet north of the north rail. Stopping where the fence obstructed sightlines was neither legal nor prudent. Heil Depo. T.13:9-13, T.16:13-17, T.20:8-15, T.22:3-9; CP.A.159; First Krcmar Aff., ¶ 2; Captain Langer Depo T.72:19-24; CP.A.110-CP.A.112; Minn. Stat. § 219.20, subd. 2.

The truck's emergence from behind the fence did not create a hazard. Zimbovskiy had not yet fouled the tracks, and the train crew was entitled to expect that he would not stop on the tracks. Schmidt Depo. T.19:1-7, T.20:9-12, T.23:T.19-T.24:1; Stroik Depo. T.71:11-16, T.74:10-T.75:24; *see also Baldwin*, 285 Minn. at 22, 171 N.W.2d at 93; *Nye*, 437 F.3d at 567; *Woods*, 982 F. Supp. at 412-14; Minn. Stat. §§ 169.26, .30. But when he could see, Zimbovskiy never bothered to look for a train. Zimbovskiy Depo. T.42:1-7, T.47:24-26; A.Add.43 (as district court found “[t]here is no evidence that Plaintiff ever looked to his left after his stop”). Instead he was preoccupied with turning onto Highway 13. *Id.*

After Zimbovskiy's failure to obey the traffic laws and disregard of train traffic caused a track incursion, neither the engineer nor the conductor had any reason to foresee that Zimbovskiy would remain in harm's way. Schmidt Depo. T.19:1-7, T.20:9-12,

T.23:19-T.24:1; Stroik Depo. T.71:11-16, T.74:10-T.75:24; A.Add.30 (the train crew “anticipated that [Zimbovskiy’s truck] would move across the railroad tracks”); *see also Baldwin*, 285 Minn. at 22, 171 N.W.2d at 93; *Nye*, 437 F.3d at 567.

The crew could neither read Zimbovskiy’s mind nor predict that he would shift into a gear that would prevent movement off the tracks. Zimbovskiy says his truck slowly approached the crossing. App.Br.35. In fact, the truck was going “pretty fast and stopped suddenly.” Schmidt Depo. T.18:19-25, T.19:1-7; T.23:25, T.24:1-8; Stroik Depo. T.72:4-5.

Any potential specific, individual hazard did not arise until Zimbovskiy’s truck floundered on the tracks. The train was a mere eight or nine car lengths (400-450 feet) away when that happened. Stroik Depo. T.74:10-13; Second Wolf Aff., ¶ 4 (CP.A.287). To avoid impact, the emergency brakes would have to have been engaged at least 1,070 feet before Yosemite Avenue. *Id.*; A.Add.32 (“there is no dispute that even with a tractor-trailer with an 80,000 pound load on the front of its engine, the train was not able to stop for another 1,067 feet west of the intersection.”). Unfortunately, the train was much closer when Zimbovskiy’s lawlessness necessitated braking. With so little distance between the lead locomotive and the trailer, the collision would not have been avoided even if the brakes had been applied the instant the truck came to rest on the tracks. A.Add.31-32.

Putting the train into emergency is a last resort that can have catastrophic consequences. Stroik Depo. T.97:18-21; *Goins v. CSX Transp., Inc.*, No.1:08-CV-135, 2009 WL 803103, at \*4 (E.D. Tenn. Mar. 25, 2009)(“To have done so [placing the train

in emergency] earlier would be to put the train at risk of derailment every time the crew sees something on the track ahead. A derailment risks death or injury to the crew and considering the freight that trains often carry could place others at risk too.”). The train crew cannot expose themselves and the public to the consequences of a derailment without being confronted with an imminent emergency.

Even if Zimbovskiy had entered the crossing when the train was 1,070 feet away, the crew would not have been obligated to take emergency action because Zimbovskiy would have had plenty of time to clear the tracks, as he would be expected to do. Second Wolf Aff. ¶ 5; *Baldwin*, 285 Minn. at 22, 171 N.W.2d at 93; *Nye*, 437 F.3d at 567. As the district court concluded, Zimbovskiy “has simply failed to show that there is any issue of material fact relative to the issue whether delay of a few seconds in the train crew’s activation of the emergency brake was a proximate cause of the collision or [Zimbovskiy’s] injuries.” A.Add.32.

The specific, individual hazard exception does not apply, and preemption cannot be avoided. “[W]hen it became clear that a collision was indeed imminent, the engineer exercised due care by activating the emergency brake. Thus, [the] *excessive speed claim does not fall within the narrow exception for specific individual hazard.*” See *Veit*, 249 P.3d at 619 (emphasis added).

## II. Zimbovskiy caused the accident

CP alternatively sought dismissal because reasonable minds could not differ about Zimbovskiy being at fault for the crash or, at a minimum, about Zimbovskiy's negligence being equal to or greater than CP's so as to preclude recovery. *See* CP's summary judgment briefs; A.Add.44-45. The district court declined to dismiss the horn claim, demurring that the question of whether Zimbovskiy's negligence was greater than CP's was not amenable to an as a matter of law answer. A.Add.45.

Although the horn allegations survived summary judgment, Zimbovskiy's proximate causation and greater fault provide alternative grounds for affirmance. *See Myers*, 463 N.W.2d at 775 ("We will affirm the judgment if it can be sustained on any grounds."); *Winkler*, 539 N.W.2d at 827 (affirming summary judgment on an alternative theory presented to the district court); *Northway v. Whiting*, 436 N.W.2d 796, 798 (Minn. App. 1989)("[W]e may affirm a summary judgment if there are no genuine issues of material fact and if the decision is correct on other grounds.").

The facts establish that Zimbovskiy alone must take the blame for the collision. The essential elements of motor vehicle operator negligence are: (1) a duty of care; (2) a breach of that duty; (3) an injury; and (4) proximate causation. *Lubbers*, 539 N.W.2d at 401. "[I]f there are no facts in the record before [the court] giving rise to a genuine issue for trial as to any one of these essential elements, [CP] is entitled to summary judgment as a matter of law." *Id.*

Proximate cause is defined as "[a] cause that directly produces an event and without which the event would not have occurred." Black's Law Dictionary at 87 (1996).

Proximate cause is usually fact question, but the issue becomes a question of law “where reasonable minds can arrive at only one conclusion.” *Lubbers*, 539 N.W.2d at 402.

And “[w]here the evidence compels a finding that the plaintiff’s negligence is equal to, or greater than, that of defendant, [there is] no reason why” judgment should not be entered. *Winge v. Minn. Transfer Ry. Co.*, 294 Minn. 399, 404, 201 N.W.2d 259, 263 (1972).

## **A. The duties of a professional trucker**

### **1. Statutory duties applicable to all drivers**

Zimbovskiy, like everyone else on Minnesota roads, must stop, look, and listen for trains at all railroad crossings. Minn. Stat. §§ 219.22; .20, subd. 2. “[W]hen a person approaches a railroad crossing he is duty bound to make full use of his senses in order to avoid the danger incident to railroad traffic. The railroad track is in itself a warning of danger.” *Fischer v. Chicago & N.W. Ry. Co.*, 193 Minn. 73, 76, 258 N.W. 4, 5 (1934); *see also Seekins v. Duluth, M. & I.R. Ry. Co.*, 258 Minn. 180, 183-84, 103 N.W.2d 239, 242 (1960). The failure to look out for trains precludes driver crossing-accident recovery. *Olson v. N. Pac. Ry. Co.*, 84 Minn. 258, 87 N.W. 843 (1901); *Arine v. Minneapolis & St. L. R. Co.*, 76 Minn. 201, 78 N.W. 1108 (1899).

To comply with Minnesota law, Zimbovskiy had to stop within 50 feet, but no less than 10 feet, from the nearest rail, and the stopping place must enable the driver to see and hear approaching trains. Minn. Stat. §§ 219.20, subd. 2; 219.22. And regardless of the railroad crossing, a stop sign obligates all motorists to stop and yield the right-of-way.

*Id.*

After coming to a halt, drivers should not proceed until having ascertained that the tracks can be safely crossed. *Id.* When a train is visible or in hazardous proximity, a vehicle must refrain from moving forward “until safe to do so and until the roadway is clear of traffic so that the vehicle can proceed without stopping until the rear of the vehicle is at least ten feet past the farthest railroad track.” *Id.* at § 169.26, subd. 1(a).

## 2. The heightened duties of commercial drivers

As a commercial driver, Zimbovskiy must do more than just obey the traffic laws.<sup>25</sup> *Ohrmann*, 223 Minn. at 589, 27 N.W.2d at 811; 49 C.F.R. § 392.11; *Zimbovskiy Depo.* T.21:10-13, T.22:6-9. He had to adhere to the standards imposed by the Federal Motor Carrier Safety Regulations. 49 C.F.R. § 392.2. The federal driver regulations mandate that professional drivers:

shall not cross a railroad track or tracks at grade unless he/she first: Stops the commercial motor vehicle within 50 feet of, and not closer than 15 feet to, the tracks; thereafter listens and looks in each direction along the tracks for an approaching train; and ascertains that no train is approaching. When it is safe to do so, the driver may drive the commercial motor vehicle across the tracks in a gear that permits the commercial motor vehicle to complete the crossing without a change of gears. The driver must not shift gears while crossing the tracks.

49 C.F.R. § 392.10(a).

The Commercial Driver’s Manual also governs. *Zimbovskiy Depo.* T.21:10-13. The Manual specifies the protocol for commercial vehicle operations around railroad crossings. *See, e.g.*, CP.A.153 (p.2-38-p.2-39). The vehicle must come to a complete

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<sup>25</sup> Intrastate motor carriers are required to comply with the federal regulations incorporated into Minn. Stat. § 221.0314, as well as the state regulations. *See* Minn. Stat. §§ 221.026, subd. 3; 221.0314, subd. 1. Minn. Stat. § 221.0314, subd. 6 incorporates 49 C.F.R. § 392 by reference.

stop as required by law. *Id.* Truck drivers must “[l]ook both ways before crossing” and “[n]ever permit traffic conditions to trap you in a position where you have to stop on the tracks. Be sure you can get all the way across the tracks before you start across.” *Id.* Professional motor vehicle operators should “not shift gears while crossing railroad tracks,” and “[b]ecause of noise in the cab, [they] cannot expect to hear the train horn until the train is dangerously close to the crossing.” *Id.*

Zimbovskiy was aware of the statutes, regulations, and Manual that prescribe the obligations of commercial drivers.<sup>26</sup>

#### **B. Zimbovskiy’s Fault**

Zimbovskiy failed to abide by the applicable duty of care when he charged through the stop sign without looking for trains. His utter failure to take the requisite precautions makes Zimbovskiy’s negligence the sole proximate cause of the wreck. *See Lubbers*, 539 N.W.2d at 401-02; *Hicks v. N. Pac. Ry. Co.*, 239 Minn. 373, 376, 58 N.W.2d 750, 752 (1953)(“If the driver of an automobile involved in a collision with a train at a railroad crossing has an adequate opportunity under the surrounding circumstances to know of and see the approaching train in time to avoid the collision he is guilty of contributory negligence as a matter of law.”).

Zimbovskiy breached his duty of care by: (a) driving too fast; (b) failing to stop, look and listen for trains; (c) stopping on the crossing; and (d) shifting gears on the tracks.

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<sup>26</sup> Zimbovskiy Depo. T.22:29-30, T.23:1-4, T.27:30, T.28:1-11, T.29:4-7, T.32:13-20, T.34:5-19, T.35:29-30, T.36:1-8, T.38:25-30, T.39:11-13.

## **1. Speed**

Spurred on by a compensation scheme that encouraged haste, Zimbovskiy favored a heavy foot over railroad crossing safety. He came out from behind the fence “pretty fast and stopped suddenly.” Schmidt Depo. T.24:7-8. The truck skidded until the trailer straddled the tracks. *Id.* at T.18:19-25, T.19:1-7, T.23:25-T.24:1-8; CP.A.60.

The sudden stop left skid marks directly north of the crossing. *See* CP.A.114-CP.A.118; CP.A.60; Captain Langer Depo. T.37:13-14, T.50:12-24, T.80:7-20; Officer Miller Depo. T.22:19-20, T.23:1-6. Zimbovskiy contends—based upon no more than his expert’s review photographs—that another truck left the marks. A.Add.13-14. But the law enforcement officers who investigated the scene all agreed that Zimbovskiy’s tractor-trailer laid down the rubber. *Id.*; *see also* Captain Langer Depo. T.37:13-14 (“These skid marks that are shown in [Deposition Exhibit] 124 are from the trailer that was hit in this collision.”); Officer Miller Depo. T.22:19-30, T.23:1-6; CP.A.114-CP.A.118; Ricky Menze Depo. T.8:2-30 (Zimbovskiy’s fully loaded tractor-trailer could “quite easily” leave skid marks like those found on Yosemite Avenue).

Zimbovskiy’s financially incited rush caused him to drive too fast, slam on the brakes, and slide onto the tracks—leaving tell-tale skid marks behind.

## **2. Zimbovskiy did not stop, look, or listen for trains**

Zimbovskiy’s opening brief ignores the undisputed fact that he drove or slid through a stop sign into the path of an impossible to miss train. Zimbovskiy was (1) driving too fast to stop in time, (2) stopped where he could not see the tracks, or (3) proceeded without looking. Zimbovskiy Depo. T.42:1-5, T.47:24-26, T.45:15-16;

Schmidt Depo. T.24:7-25; CP.A.136. Whatever the scenario, Zimbovskiy flouted a multitude of statutes and common law duties. *See* Minn. Stat. §§ 219.22; 219.20, subd. 2; 169.26, subd. 1(a); 49 C.F.R. § 392; Captain Langer Depo. T.93:10-20, T.101:15-20.

**a. Failure to stop in a proper location**

Photographs of the Yosemite crossing and other evidence reveal that stopping in the federal regulatory zone of between 50 and 15 feet from the tracks or the Minnesota statutory zone of between 50 and 10 feet from the tracks would have afforded Zimbovskiy's unobstructed sight-lines to the left. First Wolf Aff. ¶ 4; McDonald Aff. ¶ 5; CP.A.120, CP.A.130-CP.A.132 (Pictures); A.Add.43 (within the 50 foot right-of-way "there were no obstructions in the form of vegetation which prohibited Plaintiff from seeing an oncoming westbound train"). When photographic evidence shows that a driver had a clear view of oncoming trains or advanced warning of the crossing, courts dismiss. *See, e.g., Sec. First. Bank v. Burlington N. Ry. Co.*, 213 F. Supp. 2d 1087, 1092-93 (D. Neb. 2002); *Petre v. Norfolk S. Ry. Co.*, 458 F. Supp. 2d 518, 532 (N.D. Ohio 2006); *Howard v. Ill. Cent. R.R. Co.*, 349 F. Supp. 141, 143-44 (M.D. La. 1972); *Terrell v. Soo Line R.R. Co.*, No. 2:04-cv-095, 2005 WL 4882750, at \*8 (S.D. Ind. Sept. 1, 2005).

Zimbovskiy says that he stopped 30 to 35 feet north of the tracks. App.Br.9. But from where he supposedly stopped he could not see the oncoming train:

Q So it's important that you position the truck in a position that enables you to see up and down the tracks before you stop your truck on the tracks?

A Yes.

Q And you didn't do that, did you?

A I did.

Q Then why didn't you see the train?

A There was a tree and fence in my way.

Q And were those tree and fences within 50 feet from the tracks?

A I don't know.

Q Well, if they were more than 50 feet away from the tracks then you were violating the law, weren't you?

A Yes.

Q And if you stopped in a position that allowed those items to obstruct your view to the east, then you weren't [putting] yourself in a position where you can look, were you?

A No.

Zimbovskiy Depo. T.37:30-T.38:24; *see also* CP.A.275 (picture marked with an "S" to show the position of front bumper when the truck supposedly stopped; the "S" is behind the fence on Yosemite (Zimbovskiy Depo. T.50:1-13)); A.Add.9. The fence that supposedly prevented Zimbovskiy from seeing the train was 59 feet north of the north rail. Heil Depo. T.13:9-13, T.16:13-17, T.20:9-15; CP.A.159; First Krcmar Aff. ¶ 2.

Looking for trains where sightlines were obstructed "wouldn't have been a legal spot to stop for that stop sign." Captain Langer Depo. T.72:19-24; CP.A.110-CP.A.112; *see also* Minn. Stat. § 219.20, subd. 2. Thus besides failing to be in a position from which he could see down the tracks, Zimbovskiy violated Minnesota and federal laws by stopping more than 50 feet away from the crossing—if he stopped at all.

#### **b. Failure to look and listen**

After supposedly stopping where the tracks could not be seen, Zimbovskiy proceeded without looking east (to his left). Zimbovskiy Depo. T.42:1-7, T.47:24-26;

A.Add.43 (“There is no evidence that [Zimbovskiy] ever looked to his left after his stop at the stop sign until approximately two seconds before the collision.”). Ignoring the crossing, Zimbovskiy focused on motor vehicle traffic beyond the tracks. *Id.*

To make matters worse, Zimbovskiy relied on night-driving shortcuts to detect the approach of trains. Zimbovskiy Depo. T.42:18-26, T.43:2-78, T.44:4-8. At night when the locomotive headlights shine through the darkness, such a look-out—although illegal—may have been sufficient. When the sun is up, headlights have a different visual effect. *Id.* Zimbovskiy could not expect to see a beam of light but instead needed to approach with caution because “[a]ll crossings are built for both day and night use.” *Seekins*, 258 Minn. at 184, 103 N.W.2d at 242.

### **3. The truck came to rest on the tracks**

Zimbovskiy finally stopped in front of the oncoming train. Zimbovskiy Depo. T.45:15-16; Schmidt Depo. T.24:7-25:4; *see also* CP.A.136. This blunder contravened commercial driver responsibilities. *See* Minn. Stat. §§ 169.26, subd. 1(a); 169.28, subd. 1; 49 C.F.R. § 392.10(a); CP.A.153 (p.2-39, p.12-6). Zimbovskiy has no excuse for this stunning breach of his legally prescribed due care.

### **4. Shifting gears**

After failing to stop in an appropriate place, never looking for trains, and ending up on the tracks, Zimbovskiy’s negligence continued: he shifted gears on the crossing. Zimbovskiy Depo. T.39:18-40:2, T.40:19-41:5, T.45:4-18. This careless maneuver further breached his duty of care and violated more traffic laws and driver responsibilities. Minn. Stat. § 169.28; 49 C.F.R. § 392.10(a); CP.A.153 (p.2-39, p.12-6).

Zimbovskiy speculates that if the train would have been put into emergency sooner, the truck might have rolled forward resulting in an impact toward the rear of the trailer and different injuries. App.Br.35-36. Nothing in the record supports this surmise.

Additional time may have allowed Zimbovskiy to discover that he selected second gear instead of reverse—as he was attempting to do.<sup>27</sup> If Zimbovskiy found reverse and backed up, the cab of the truck may have been t-boned by the train, thereby worsening his injuries. For that reason speculation cannot stand in the way of Rule 56 disposition. *Bob Useldinger & Sons*, 505 N.W.2d at 328. Zimbovskiy should not have been on the tracks in the first place. And by illegally shifting gears he made a bad situation worse.

**5. The roadway configuration does not excuse driver recklessness**

Zimbovskiy alleged below that “distracting circumstances” should exculpate his failure to obey the traffic laws and to observe professional driver standards of care. But Zimbovskiy has yet to explain how distractions prevented him from seeing the train. “[M]etaphysical doubt” cannot create fact issues for trial to avoid summary judgment. *DLH, Inc.*, 566 N.W.2d at 71.

Normal traffic conditions do not absolve excuse driver negligence. *See, e.g., Haleen v. St. Paul City Ry. Co.*, 141 Minn. 289, 290-91, 170 N.W. 207, 208 (1918)(“Plaintiff contends that the roughness of the road and the darkness of the night distracted him, but these can hardly be called distracting circumstances that will excuse.”). Having traversed the tracks more than 3,000 times, Zimbovskiy knew

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<sup>27</sup> Zimbovskiy Depo. T.39:18-19, T.40:19, T.40:30, T.41:1-6.

Yosemite crossing well. From experience, Zimbovskiy was aware that traffic on Highway 13 and trains on the tracks could be encountered. Zimbovskiy Depo. T.5:6-9, T.14:15-17. The situation on November 29 presented nothing out of the ordinary.

Zimbovskiy wants to hold the railroads responsible for a crossing and roadway configuration that he deems to be dangerous. App.Br.6-8. But the roads are designed by the State, County and City—railroads have no input. If Zimbovskiy thought the street / highway design caused the accident, he should have sued the road authorities. Because immunity precludes pursuit of those entities, Zimbovskiy hopes to skirt governmental defenses by blaming the railroads for how the Yosemite Avenue, Highway 13, and railroad crossing were laid out. Such finger-pointing goes nowhere.

Even if the conditions were difficult, Zimbovskiy's theory fails. Zimbovskiy says that obeying the stop sign at Highway 13 would leave the rear end of his truck hanging over the tracks. The math does not add up. Zimbovskiy's rig was 59 feet, 2 inches long. Cook Aff. ¶ 4; Zimbovskiy Depo. T.50:16-17 (the truck was "about 50 feet" long). There is more than 104 feet of asphalt between the centerline of the tracks and where traffic on Highway 13 would first be encountered. First Krcmar Aff. ¶ 4.

Law enforcement all agreed that Zimbovskiy could have easily crossed the tracks and stopped before Highway 13 without the risk of being hit by either a train or a vehicle. See Captain Langer Depo. T.64:18-22, T.65:1-15, T.66:25, T.67:1-7; Officer Visek Depo. T.3:25-28; Officer Bebeau Depo. T.21:9-16. Trucks routinely stop clear of the tracks and short of Highway 13. Captain Langer Depo. T.67:12-19. The distances between the tracks and the stop sign at Highway 13 may cause "an engineering aspect of this

intersection that should be looked at” by the Department of Transportation, but “there’s ample room to pull in front of that stop sign and still stop before getting to Highway 13.” *Id.* at T.65:2-3, T.65:11-15, T.67:13-19.

**C. Zimbovskiy’s negligence caused the collision**

Zimbovskiy admits being obligated to stop at the stop sign, to look and listen for trains, to come to a halt not less than 15 (federal) or 10 (state) but not more than 50 feet from the tracks, to stop where the tracks could be seen, to not stop on the tracks, to refrain from shifting gears on the tracks, and to approach the Yosemite crossing with the expectation that a train is coming. *See Zimbovskiy Depo.* T.22:30-23:4, T.28:29-29:7, T.38:28-30, T.39:11-13. Yet, Zimbovskiy disregarded those duties. There is “nothing to question the complete liability on the part of the truck driver for what occurred there.” *Captain Langer Depo.* T.86:4-6. The reason why the truck fouled the tracks and left the train crew no time to avoid the collision is obvious: Zimbovskiy failed to satisfy the standards of care to which professional truck drivers, in fact all drivers, are held.

Zimbovskiy either “didn’t stop and he slid into the tracks and got hit by the train, or he did stop and pulled into the tracks and got hit by the train. Either way, by statute, [Zimbovskiy] is at fault for being hit by the train.” *Id.* at T.93:16-20. Zimbovskiy directly caused the accident: the train crew neither placed Zimbovskiy in harm’s way nor precluded the opportunity for the consequences of Zimbovskiy’s recklessness to be avoided. No reasonable mind could conclude otherwise. At a minimum, Zimbovskiy’s negligence “is equal to, or greater than” that of CP. *Winge*, 294 Minn. at 404, 201 N.W.2d at 263.

## CONCLUSION

Zimbovskiy's accusations about inadequate train crew lookout or delayed braking are preempted by federal law. The "specific, individual hazard" exception does not provide a sanctuary from preemption.

Any claim that eludes preemption fails because the undisputed facts demonstrate that Zimbovskiy alone was at fault for the crash. Knowledgeable law enforcement officials unanimously confirm that Zimbovskiy, and no one else, caused the collision. If Zimbovskiy had discharged the duties of a professional driver, the truck would not have been on the tracks as the train entered the crossing. The Court need look no further than Zimbovskiy's testimony to arrive at that conclusion. The result below should be affirmed.

Dated: November 4, 2011

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## CERTIFICATE OF COMPLIANCE

This brief complies with the word limitations of Minn. R. Civ. App. P. 132.01, subd. 3(a). The brief was prepared using Microsoft Word 2003, which reports that the brief contains 10,820 words.

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke, positioned above a horizontal line.

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