1986

Robert L. Gleave v. The Denver and Rio Grande Western Railroad Company, a corporation, Utah Railway Company, a corporation : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

ROBERT L. GLEAVE, Plaintiff-Respondent and Cross-Appellant, vs. THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, a corporation, UTAH RAILWAY COMPANY, a corporation, Defendants-Appellants and Cross-Respondents and THE STATE OF UTAH, DEPARTMENT OF TRANSPORTATION, Defendant-Respondent.	(Case No. 20166) 860057-C (Case No. 20300) 860058-C Consolidated Case No. 20300

BRIEF OF APPELLANTS AND CROSS-RESPONDENTS THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY AND UTAH RAILWAY COMPANY

Appeal from the Judgment of the Fourth Judicial District Court, Utah County, State of Utah
The Honorable Cullen Y. Christensen, Presiding

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IDENTIFICATION OF PARTIES TO PROCEEDING BELOW

In addition to the parties named in the caption, there were two other defendants in the proceeding below. Defendant Gerald H. Burton was dismissed before trial pursuant to a stipulation between the parties. Defendant City of Springville, a municipal corporation, prevailed on a motion for a directed verdict at the close of all the evidence. Neither Mr. Burton nor the City of Springville is affected by this appeal.

Since there are multiple parties to this appeal and since separate appeals have been filed by these parties, the defendant-appellant, The Denver and Rio Grande Western Railroad Company, will be referred to herein as the "Rio Grande" or the "railroad." The plaintiff-respondent, Robert L. Gleave, will be referred to as "plaintiff" or "Mr. Gleave." The defendant-respondent, Utah State Department of Transportation, will be referred to as "UDOT" and the Utah State Public Service Commission as the "UPSC." The defendant-appellant, Utah Railway Company, is, for all purposes relevant to this appeal, in the same position as the Rio Grande and references herein to the Rio Grande shall be deemed to also refer to the Utah Railway Company.

The Rio Grande and the plaintiff filed separate appeals. The two separate appeals were consolidated by an order of this Court and, since the consolidated case bears the

same case number as the appeal filed by the Rio Grande, the appeal of the plaintiff has now been designated as a cross-appeal.

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BRIEF OF APPELLANTS AND CROSS-RESPONDENTS THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY AND UTAH RAILWAY COMPANY

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Whether a new trial should be ordered for the reason that there is insufficient evidence to justify the jury's verdict to the extent it found no negligence on the part of the plaintiff.

2. Whether a new trial should be ordered because the Rio Grande was denied its due process right to an impartial and unbiased jury.

3. Whether the lower court erred in denying the Rio Grande's motion for partial summary judgment that it owed no duty to plaintiff to: (1) change the physical configurations present at the 1600 South Crossing from those which the UDOT evaluated at the time it mandated the crossing protection which existed at the time of the accident, or (2) slow the speed of its trains to below that which UDOT recognized when it mandated the existing crossing protection, or (3) perform any duties exclusively preempted by UDOT and UPSC.

4. Whether a new trial should be ordered because of plaintiff's counsel's surprise and improper use in closing argument of testimony from a witness excused from the stand by order of the trial court without further direct examination and without any cross-examination.

5. Whether a new trial should be ordered because the lower court denied the Rio Grande's requested jury instruction which would have instructed the jury that it could consider

whether plaintiff failed to mitigate his damages by not wearing his seatbelt.

6. Whether it was error for the lower court to grant defendant Utah Department of Transportation's pre-trial motion to dismiss on the grounds of sovereign immunity.

STATEMENT OF THE CASE

A. Nature of the Case

This is a personal injury action arising from injuries sustained by plaintiff when he drove his automobile into the path of an oncoming train owned and operated by the Rio Grande. The accident occurred at a railroad crossing in Springville, Utah, which was protected by advance warning signs, railroad crossing signs and, in addition, a stop sign which required motorists to stop before proceeding across the railroad tracks. The plaintiff's vehicle was eastbound at the time of the accident and was struck by a southbound train. The Utah Department of Transportation ("UDOT") was joined as a defendant because it allegedly breached certain statutory duties to install adequate traffic warning devices at the crossing.

The Rio Grande has appealed from a judgment based upon a jury verdict in favor of plaintiff and it has appealed an order of the lower court dismissing co-defendant UDOT prior to trial. In what is now designated a cross-appeal, the plaintiff has appealed the lower court's order granting the Rio Grande's

motion for a directed verdict as to plaintiff's claim for punitive damages. (R. 806; also Addendum Exhibit E").

B. Disposition of the Case Below

This action was tried before a jury in the Fourth Judicial District Court in and for Utah County, the Honorable Cullen Y. Christensen presiding. Prior to trial, the lower court denied the Rio Grande's, the City of Springville's, and the plaintiff's respective motions for summary judgment. (R. 407 and 569; also Addendum Exhibit "D"). A pre-trial motion to dismiss filed by UDOT was granted on the grounds that UDOT was, in the lower court's opinion, immune from suit under the doctrine of sovereign immunity. (R. 569; also Addendum Exhibit "D").

A five day jury trial was held in June, 1984. After the close of all the evidence, the lower court denied the Rio Grande's motion for a directed verdict, but granted defendant City of Springville's motion for a directed verdict. (R. 1085). The case was submitted to the jury upon comparative negligence instructions, the court having denied the Rio Grande's motions for summary judgment (R. 460-61; 569-70) and for a directed verdict (R. 1349; 1355) requesting that the plaintiff be found negligent as a matter of law. The jury returned its verdict, finding the Rio Grande 100% at fault and the plaintiff 0% at fault. (R. 765-68; also Addendum Exhibit "A"). The lower Court entered judgment against the Rio Grande on August 15, 1984, in the amount of $439,937.87. (R. 808-09;

also Addendum Exhibit "B"). The lower court denied post-trial motions filed by the Rio Grande seeking, in the alternative, a new trial, judgment notwithstanding the verdict, or an alteration or amendment of the judgment. (R. 906; also Addendum Exhibit "C").

C. Statement of Facts

The Rio Grande's main line tracks are crossed by a narrow, infrequently travelled, country road at 1600 South in Springville, Utah (R. 1244). In this area of Utah County, the railroad's tracks run generally in a north-south direction and, as can be seen from the numerous photographic exhibits, the grade for these tracks was established by making a long cut through a hillside which extends several hundred yards to the north from 1600 South. (Plaintiff's Trial Exhibits 2A-2G, 2I-2M, 47, and 48; Defendant's Trial Exhibits 22-33, and 41). This hillside causes a substantial obstruction of the view that an eastbound motorist has of a train coming from the north, but, since the hill essentially ends at 1600 South, an eastbound motorist's view to his right, or south, is relatively unobstructed (R. 1739). The top of the hillside, including portions which were on the railroad right of way, had weeds growing on it. The train in this instance was southbound and, since plaintiff was eastbound at the time, it approached the crossing from plaintiff's left. The train was travelling at 50 mph and there was no claim that this speed exceeded any speed limits imposed by either governmental entities or the railroad

itself. The crossing had the usual round yellow sign with a cross on it to provide an advance warning to motorists of the upcoming railroad crossing, and the usual crossbucks at the point of the crossing to denote its location. In addition, this crossing had a stop sign (R. 1749).

Plaintiff Robert L. Gleave testified that he was driving eastbound on 1600 South Street in Springville on the morning of April 16, 1982 (R. 1746-48), and that he knew he was approaching a railroad crossing on 1600 South Street because he had been over these tracks about three other times and because he had worked on the crossing itself as part of an asphalt paving crew in 1979 (R. 1748 and 1757). There was enough daylight so that he was not using his vehicle's headlights (R. 1748), the window on the driver's side was almost all the way up (R. 1749), and the vehicle's heater was on (R. 1743).

Under direct examination, Mr. Gleave testified that his radio was "off" (R. 1749) but, during cross-examination, he conceded that he did not know for sure but believed it was off (R. 1755). The railroad claim agent who investigated the accident testified that when he examined plaintiff's vehicle on the morning of the accident, its radio switch was in the "on" position (R. 938).

The plaintiff testified that he saw "all the warning signs on the road" as he approached the railroad crossing (R. 1749 and 1757). Although he had told the investigating police officer that he had only "slowed down" for the stop sign (R.

1422), during trial he testified that he came to a complete stop at the stop sign. (R. 1749). He further testified that while stopped at the stop sign, he looked to the left (north) and saw no train approaching (R. 1749). A video tape prepared by plaintiff's expert, and offered into evidence by the plaintiff, demonstrated that the headlights and the top of a train approaching from the north at 50 mph could be seen even by a motorist stopped at the stop sign for approximately six seconds, but, from that point on the roadway, the view of the rest of the train was substantially obstructed by the hillside. (Plaintiff's Exhibit No. 47.) The weeds caused little additional obstruction, even though the video tape was made in June when the weeds would have had an additional two months of growth.

The plaintiff next testified that after stopping at the sign and looking left, he then looked to his right (south) and that he continued looking to the right as he started up from the stop sign towards the tracks (R. 1750). He acknowledged that his view to the left (north) was more restricted than his view to the right (south), claiming that from the stop sign he could see about 900 feet down the tracks to his right (south), but only 50-100 feet up the tracks to his left (north) (R. 1758-59). Nevertheless, he testified unequivocally that he travelled from the stop sign to a point where he could no longer stop and avoid the collision while looking only to his right (R. 1759-60). He claimed that he

heard the train whistle and saw the train as he glanced back to his left (north) while his car was moving (R. 1750) and that upon seeing and hearing the train, he immediately stopped his car (R. 1750).

The plaintiff further testified that his vehicle stopped with its front end about one foot from the west track (R. 1750, 1761-62 and 1765), and the train hit his vehicle while he was trying to put it into reverse and move it from that position (R. 1750). He was not wearing his seatbelt at the time of the collision (R. 1750). He testified that he saw the train about two or three seconds before the collision (R. 1750), and that he believes the train would not have hit his vehicle if he had stopped at the point where his vehicle was when he saw the train (R. 1775-76). He was certain that he only stopped at the stop sign and at the point where the front of his vehicle was when it was impacted by the train (R. 1761, 1765). He did not stop a second time at a point between the stop sign and the tracks, where his view to the left would have been unobstructed by the hillside.

Robert Mitchell, chief of the New Jersey Department of Transportation's Grade Crossing Section was called as an expert by plaintiff. Mr. Mitchell testified that an eastbound driver stopped with his front bumper at the stop sign could see about 250 feet up the tracks to to the left (north) (R. 1733-34), and that it would be "suicidal" for a driver not to pull up closer to the tracks to get a better view and stop a second time

before proceeding across the tracks (R. 1734). He further testified that an eastbound driver who pulls slightly forward from the stop sign can see about 430-450 feet up the tracks to the left (north); that a driver who pulled forward and stopped a second time would be able to see a train approaching the crossing from the left (north) for about six seconds, assuming the train was travelling at the uncontroverted speed in this instance of 50 mph (R. 1734-35); and that it would be "foolhardy" for a driver to try to beat the train if it was only 450 feet or 6 seconds from the crossing (R. 1735).

This testimony was in substantial agreement with the testimony of experts called by the railroad. The defense experts testified that a driver stopped at the stop sign could see only 285 feet of track north of the crossing (R. 974), but that if a motorist were to pull forward to a point five feet from the stop sign, he could see 474 feet of track to the north (R. 1361, 1369-70). That point was almost ten feet (116 inches) from the west rail of the track (R. 1385). The railroad's experts agreed with plaintiff's expert, Mr. Mitchell, that an eastbound motorist approaching this crossing should stop a second time and look to his left (north) before proceeding over the tracks (R. 963, 968) and that, since the view to the right was relatively unobstructed, a motorist proceeding east from the stop sign should be looking to his left (north) as he proceeds to the point where his view of the tracks in that direction becomes unobstructed (R. 969-71).

Plaintiff called Rio Grande train crew member Bruce Leek who testified that he was in the cab of the lead engine of the train that collided with plaintiff's vehicle (R. 1811). He further testified that the subject crossing is not visible from the train at a point one-quarter mile north of the crossing because of a curve in the track (R. 1812). He first saw plaintiff's vehicle creeping toward the crossing about nine seconds before the collision (R. 1813), and he saw plaintiff stop with the nose of his automobile on the west rail for about 4 or 5 seconds before the automobile disappeared from his view under the nose of the engine shortly before the impact (R. 1815). He testified that the train had a "very loud" whistle and that the train's engineer sounded the whistle continuously from the quarter mile whistle post north of the 1600 South crossing until he interrupted the normal signal with an emergency blowing of the whistle that continued until the train impacted the automobile (R. 1817-1818; and 1822). The train was travelling 50 mph at the time of the collision (R. 1818) and he thought the plaintiff could have made it across the subject crossing without being hit by the train (R. 1823 and 1826).

Plaintiff also called the train engineer, Gerald H. Burton. Mr. Burton testified that the train was travelling at 50 mph, which was the designated speed for this train (R. 1396 and 1397). He saw the plaintiff's vehicle move slowly onto the tracks and stop (R. 1401-02) and, at that point in time, he

interrupted the normal whistle signal to blow the whistle in rapid succession (R. 1402). He testified that the photograph marked as Defendant's Exhibit 27 (which depicts the lead engine of a train 474 feet from the crossing (R. 1374)) shows an engine in the approximate location where he was when he first saw the plaintiff's vehicle. (R. 1404-05). He believed that the plaintiff's vehicle was stopped on the rail for about three to four seconds before the accident (R. 1409), and he thought the plaintiff had adequate time to remove his vehicle from the tracks in order to prevent the accident (R. 1412).

The plaintiff also called Sergeant David Coron of the Springville Police Department. Sergeant Coron testified that he investigated this accident (R. 1416-17), that he spoke with the plaintiff at the scene of the accident (R. 1419), and that the plaintiff was lucid at that time (R. 1421-22). He asked the plaintiff what had happened and the plaintiff said he "slowed down" for the stop sign (R. 1422; also Addendum Exhibit "J"). Sergeant Coron believed that the automobile driver's failure to stop for the stop sign was the cause of the accident (R. 1436). He also testified that in his opinion it is reasonable to expect one to stop a second time at a point between the stop sign and the tracks to get a better view to the north (R. 1445-47).

Plaintiff's next witness was Robert H. Brey, a Brigham Young University associate professor in audiology. Dr. Brey testified that his recording equipment first detected railroad

whistle sounds when a train was 792 feet from this crossing (R. 1464). The whistle signal was measured to be audible to a human ear, even over the background noise of an automobile, when it was at a point that is 467 feet from the crossing (about 6.5 seconds at 50 mph) (R. 1465). While he was standing at the crossing taking his measurements, he was able to hear train whistles from all over the city of Springville, even whistles one to two miles from the crossing (R. 1477). He could actually hear train whistles at the 1600 South crossing before the sound would register on the meter he was using to make his measurements (R. 1487). Finally, he stated that in his opinion, it would be pretty stupid to stop on the track if you heard train whistles in the distance, even if you did not know the exact location or direction of the train (R. 1492).

Plaintiff's next witness was Wayne T. Van Wagoner. Mr. Van Wagoner testified as an expert that an eastbound driver with his bumper at the stop sign has a sight distance of approximately 285 feet to the north (R. 1609), that the whistle on the train would give a driver at the crossing an additional warning of the approaching train if the driver heard the whistle (R. 1610), and that, given the visual limitations at the subject crossing, he agreed that the stop sign should have been there (R. 1628-29). He believed the advance warning of the railroad crossing was adequate at the subject crossing (R. 1631), and he testified that the State of Utah ultimately determines whether the crossing protection at any given

railroad crossing should be upgraded and that this decision is based upon a State "hazard index" (R. 1333-34).

The Rio Grande called as a witness Mr. Arthur Geurts, Safety Studies Engineer for UDOT. Mr. Geurts testified that he was responsible for UDOT's hazard index rating for all railroad crossings in the State of Utah (R. 981). The 1600 South crossing was one of 1280 crossings studied by the state and the Federal Railroad Administration. The Federal Railroad Administration initially and incorrectly ranked it as the 68th most dangerous among the 1280 crossings. In computing this ranking, the Federal Railroad Administration believed that train speeds in the area were 70 mph (R. 989-91). Mr. Geurts testified that train speeds through this crossing are only 50 mph and, by assuming 50 mph for the speed of trains in the area instead of 70 mph, the ranking of this crossing under the UDOT hazard index was changed from the 68th most dangerous to the 353rd most dangerous of the 1280 crossings surveyed (R. 982, 989-91). Moreover, Mr. Geurts explained that this UDOT evaluation was done before the stop signs were installed, which, of course, provided a motorist with additional crossing protection and reduced the hazard (R. 983). In determining what crossing protection to require at a particular crossing, Mr. Geurts explained that UDOT considers factors such as a motorist's sight distance at the crossing, the speed and number of trains in the area, and the speed and volume of highway traffic at the crossing (R. 985-87).

The plaintiff called Mr. Joseph Bruce Yuhas, who was an employee of UDOT that participated in the survey of the 1600 South crossing in October of 1974. Mr. Yuhas testified that the survey team considered factors such as the sight distances and, after fully evaluating the crossing, it recommended federal funds be sought to install flashing light signals as additional crossing protection (R. 1247-49). The team further recommended that stop signs be installed until federal funds for flashing signals became available (R. 1241, 1258-59). Sometime after this survey, the stop signs were installed.

Obviously, much more evidence was adduced during trial, but space limitations do not permit the recitation of all of the evidence, and the facts essential to this appeal have been enumerated.

SUMMARY OF ARGUMENT

1. The Rio Grande is entitled to a new trial because the evidence to support the verdict of no negligence on plaintiff's part is completely lacking or is so slight and unconvincing as to make the verdict plainly unreasonable and unjust.

2. The Rio Grande is entitled to a new trial for the reason that the Rio Grande was deprived of its due process right to trial by an impartial jury by virtue of the undisclosed doctor-patient relationship between juror Edna Argyle and plaintiff's treating physician and witness Dr. John Mendenhall.

3. The Court should order a new trial because the lower court erred in the denial of the Rio Grande's pretrial motion for partial summary judgment. The Legislature has vested exclusive authority over the design and protection of railroad crossings in the hands of the Utah Department of Transportation, subject only to review by the Utah Public Service Commission.

4. The Rio Grande is entitled to a new trial because of plaintiff counsel's surprise and improper use during closing arguments of the testimony of witness Willis Woodard.

5. The Rio Grande is entitled to a new trial because it was error for the lower court to deny the Rio Grande's requested Jury Instruction No. 25, which would have instructed the jury that it could consider whether the plaintiff failed to mitigate his damages by not wearing his seatbelt.

6. The Rio Grande is entitled to a new trial because it was error for the lower court to dismiss co-defendant UDOT prior to trial on the grounds of sovereign immunity. Even if this Court determines that the designation of a traffic control device at a railroad crossing constitutes a "governmental function," UDOT still should not have been dismissed because said work does not constitute a "discretionary function" involving basic state policy.

ARGUMENT

POINT I

THE PLAINTIFF WAS NEGLIGENT AS A MATTER OF LAW AND THE JURY VERDICT FINDING THE PLAINTIFF TO HAVE NO DEGREE OF FAULT CANNOT BE SUPPORTED BY THE EVIDENCE AND A NEW TRIAL IS REQUIRED.

Although the railroad believes it was not negligent in this instance, such a conclusion is not necessary for a new trial to be required. Similarly, this Court need not conclude the negligence of the plaintiff to have been equal to or greater than any negligence of the railroad in order to resolve this appeal. In this instance, a jury found there to be no negligence on the part of the plaintiff. If this Court concludes the evidence insufficient to support such a finding, if the plaintiff was only 1% negligent, this case must be remanded for a new trial.

Facts disputed by the plaintiff support a finding that this accident resulted when the plaintiff ran a stop sign. However, even if one were to ignore the investigating officer's testimony concerning what the plaintiff told him immediately after the accident, even if one were to accept completely the testimony of the plaintiff, one is at most presented with facts which have been held consistently by this Court to constitute negligence as a matter of law.

According to the plaintiff, he knew on that clear April morning that he was approaching a railroad crossing. Indeed, he had been part of a paving crew that laid asphalt at this crossing. (R. 1748 and 1757). He saw all of the warning

signs and he saw the stop sign. Even if he did stop for the sign, his duty to yield the right of way to a train was only beginning.

The obvious purpose of the stop sign at this crossing is to force a motorist to stop before proceeding into the zone of danger that is incidental to this crossing. It is not there to enable a motorist to disregard the crossing itself and any trains in the area, so long as he stops for the sign. The testimony of all witnesses agreed that an eastbound motorist stopped at the stop sign had a severely obstructed view to the north, or the driver's left. The view to the motorist's right was relatively unobstructed. It was also beyond dispute that a motorist pulling forward from the stop sign would reach a point where the view to his left (north) would become unobstructed and, at that point, his vehicle would still be clear of any danger from a passing train. Even the plaintiff admitted that had his vehicle been stopped when he first saw the train, rather than moving forward, he would have avoided the collision (R. 1775-76).

Had the plaintiff pulled forward slowly enough to stop as soon as the view to his left became unobstructed, this accident would not have happened. Such conduct is what the law requires, and it is the crossing itself which requires such conduct, not the stop sign. The stop sign requires a motorist to stop at the sign; the crossing itself requires him to control his vehicle and, if necessary, stop it at the point

where he can see that no train is within dangerous proximity to the crossing.

> "The law requires that a traveler, approaching a railroad crossing, look and listen, and, if necessary, stop to avoid being injured by trains. This is his duty at all times and on all occasions, whether his view be obstructed or unobstructed, and the greater the hazard or danger surrounding him, the greater is the care required of him ." Lundquist v. Kennecott Copper Co., Inc. 30 Utah 2d 262, 266, 516 P.2d 1182, 1184 (1973) (emphasis added). See also, Steele v. D&RGW 16 Utah 2d 127, 396 P.2d 751, 754 (1964). Benson v. D&RGW, 4 Utah 2d 38, 41-42 286 P.2d 790, 792 (1955).

According to the plaintiff, he not only failed to stop for the train, he drove forward from the stop sign while looking to his right, the direction which had an unobstructed view for about 900 feet down the track (R. 1759). At the stop sign, the plaintiff knew there was no train to his right because his view in that direction was unobstructed. From his own testimony, he also knew that from there he could not see more than 100 feet up the track to his left (R. 1759). He then pulled forward looking to his right (R. 1750). It is only after he could no longer stop short of the tracks, that he "glanced back to the left" and saw the train (R. 1750).

This testimony only permits two possible conclusions: Either the plaintiff rolled through the stop sign glancing left, then right, then left again without stopping and at an unsafe rate of speed, or he stopped and proceeded slowly with his eyes glued to his right for an inordinately long period of

time when any danger had to come from his left. Such conduct has been held by this Court to be negligent as a matter of law.

Unlike the plaintiff in this case, the plaintiff in Lundquist v. Kennecott Copper Co., 30 Utah 2d 262, 516 P.2d 1182 (1973), was travelling toward an unfamiliar crossing. Just as in this case, the view to his left, which was also north, was "obstructed by an embankment." 30 Utah 2d at 263-64, 516 P.2d at 1183.

> "He testified that as he proceeded to the crossing he looked north and observed nothing since the embankment extended approximately 10 feet north of the crossing. He looked in a southerly direction, where his view was unobstructed, and he saw nothing. As he looked to the north again the train and vehicle collided." Id.

The embankment which obstructed the driver's view to his left extended to within 10 feet of the crossing, but, as here, the plaintiff in Lundquist conceded that there was sufficient space prior to crossing the tracks where a vehicle could stop, and where the driver would have a view up the tracks to see a train approaching from his left (north).

Even without the presence of a stop sign and even though the Lundquist plaintiff was unfamiliar with the crossing, the trial court found him negligent as a matter of law. The Utah Supreme Court noted that the railroad track itself was a sufficient warning to require the plaintiff to proceed to a point where his view was unobstructed and either stop or so control his vehicle that a collision with any

oncoming train could be avoided. The summary judgment was affirmed; the plaintiff was negligent as a matter of law.

In the case of Steele v. The Denver & Rio Grande Western Railroad Co., 16 Utah 2d 127, 396 P.2d 751 (1964), the plaintiff mistakenly proceeded onto a construction site where a viaduct was being built over railroad tracks. The point where the temporary dirt road through the construction site crossed the railroad tracks contained none of the usual railroad crossing signs, although there was a sign which proclaimed those entering the property to be trespassers.

A dirt "embankment" obscured vision at the construction site, but the Supreme Court noted that the motorist's "visibility was not obscured by the fill embankment or any other condition within 10 feet of the track [and the motorist] proceeded onto the track without stopping or observing the approaching train." 396 P.2d at 753 (emphasis added). Although the operator of the automobile in Steele claimed to be distracted by the hustle and bustle of the construction site, the lower court found him negligent as a matter of law and dismissed his action. The Utah Supreme Court affirmed.

Finally, in Drummond v. Union Pacific Railroad Co., 111 Utah 289, 177 P.2d 903 (1947), a plaintiff claimed weeds and trees limited her view of an oncoming train to 100 feet up the track. The crossing involved in the Drummond case was protected by what the Court described as an "automatic signal

bell" which the plaintiff said she stopped "alongside", even though she claimed it was not ringing. 111 Utah at 292, 177 P.2d at 904. It was from this point that she asserted her view to be obstructed.[1] She claimed the road bed from the point adjacent to the automatic signal bell to the crossing to have been unusually rough and that this condition occupied her attention until she was too close to the tracks to avoid the collision. For the purpose of the appeal, the Supreme Court assumed that the automatic crossing signal malfunctioned and that the railroad was negligent. Nevertheless, it affirmed the lower court's finding that the plaintiff was negligent as a matter of law.

> "Having been fully aware of the conditions confronting her in driving over this crossing, if the road was such that it interfered with the opportunity of looking while the car was in motion, plaintiff could have stopped her car closer to the track where visibility would have been better and road conditions much less important. . . The failure of the signal bell was an invitation to her to proceed with due care, but was not an invitation to proceed without regard to other dangerous conditions then existing that could have been ascertained by the use of ordinary care." 111 Utah at 299-300, 177 P.2d at 908 (emphasis added).

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[1] It is interesting that the Supreme Court in Drummond noted that one could see the top of the train over the top of the weeds. In the present case, the plaintiff's own video tape demonstrated that the top of the train could be seen for several hundred feet up the track to the driver's left (north) even at the point where a driver must stop for the stop sign. (Plaintiff's Exhibit 47).

Just as Mr. Gleave now claims, the plaintiff in Drummond claimed she stopped at the point of a stop signal and from that point her view was obstructed. Then because the electronic sign indicated a clear track and because the road condition occupied her attention, she argued she should be exonerated in proceeding over the crossing without again stopping and looking for an approaching train. The trial court and the Supreme Court disagreed, finding such conduct negligent as a matter of law.

> "The time to look is when he is about to cross. That is the time when he is about to encounter the danger portended by a railroad crossing, and it is not enough that he look at a point some distance from the crossing when looking on nearer approach would reveal danger." 111 P.2d at 298, 277 P.2d at 907 (quoting from Chicago, R.I.&P.R. Co. v. Wheeler, 80 Kan. 187, 101 P. 1001 (1909).

In the present case, there is no claim of an electronic signal failure, no claim of unfamiliarity with the area, and no claim of construction work or other activity to distract a motorist's attention. If the plaintiff in Drummond had to stop a second time, then so did Mr. Gleave. If the unmarked tracks in Steele required the plaintiff in that case to stop within 10 feet of them in order to see around an embankment, then the crossbucks at 1600 South in Springville required no less of Mr. Gleave. If the plaintiff in Lundquist was negligent in looking mostly to the right as he approached a crossing with an obstructed view to the left, then so was Mr. Gleave.

Very good reasons exist for granting railroad trains the "unquestioned right of way" over automobiles at railroad crossings. Pippy v. Oregon Short Line Railroad Co., 79 Utah 439, 451, 1 P.2d 305, 310 (1932). Trains confine their movements to the tracks, they are enormously heavy and difficult to stop, they cannot swerve to avoid a collision and they are certified as a public necessity and convenience. See e.g., Lundquist v. Kennecott Copper Co., 30 Utah 2d 262, 516 P.2d 1182, 1184 (1973).

"If a traveler, by looking, could have seen an approaching train in time to escape, it will be presumed, in case he is injured by collision, either that he did not look, or, if he did look, that he did not heed what he saw. Such conduct is held negligence per se." Wilkinson v. Oregon Short Line R. Co., 35 Utah 110, 116, 99 P. 466, 468 (1909) (citing Mann v. Belt Railroad & Stock-Yard Co., 128 Ind. 138, 142, 26 N.E. 819, 820 (1891)). Accord, Benson v. The Denver and Rio Grande Western Railroad Co., 4 Utah 2d 38, 286 P.2d 790, 792 (1955); Nabrotzky v. Salt Lake & Utah R. Co., 103 Utah 274, 282, 135 P.2d 115, 119 (1943).

Plaintiff's own expert testified that the train would have been plainly visible from a point of safety beyond the stop sign (R. 1609), and the photographic exhibits clearly demonstrate this fact (R. 1373, 1380, and defendant's Exhibits 27-33). The plaintiff testified that had he been stopped where he was when he first saw the train, the collision would not

have occurred (R. 1775-76). Plaintiff's video tape (Exhibit No. 47) undeniably shows that a motorist stopped with the front of his vehicle at the stop sign can see the headlight and the top of a train approaching from the north (left) at 50 mph for at least six seconds. Even disregarding the train whistle, the bell, and Mr. Gleave's confession to the police officer, he simply did not see what was there to be seen from a point of safety. He violated the train's right of way, he ignored the crossbucks and the tracks, and he drove to a point of danger without even looking in the direction from which the danger must come.

This Court has stated that a new trial must be ordered if "the evidence to support the verdict was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust." Nelson v. Trujillo, 657 P.2d 730, 732 (Utah 1982). See also, Anderson v. Bradley, 590 P. 2d 339, 342 (Utah 1979), and Holmes v. Nelson, 7 Utah 2d 435, 326 P.2d 722 (1958). In this instance, not only is the evidence to support a finding of no negligence on the part of the plaintiff "unconvincing," even the plaintiff's own version of the facts compels the conclusion that he was negligent as a matter of law.

POINT II

THE COURT SHOULD ORDER A NEW TRIAL BECAUSE THE RIO GRANDE WAS DEPRIVED OF ITS DUE PROCESS RIGHT TO AN IMPARTIAL JURY.

Perhaps the most fundamental precept of our system of trial by jury is the requirement that each and every member of

the jury be impartial. Despite voir dire, no one discovered until after the trial that Juror Edna Argyle was so well-acquainted with the plaintiff's witness, Dr. John Mendenhall, that the Rio Grande did not enjoy its due process right to an impartial jury.

This Court has stated that it is appropriate to order a new trial when the voir dire of the prospective jurors fails in its basic purpose of eradicating juror bias. In Anderton v. Montgomery, 607 P.2d 828 (Utah 1980), the Court stated:

> "Trial by jury in civil cases is guaranteed under the Utah Constitution. Moreover the requirements of due process dictate that the jury be impartial and unbiased. It is in furtherance of these rights that voir dire examination of prospective jurors before the beginning of trial is engaged in. For the same reason, a trial court may order a new trial should it appear that juror bias crept into the proceedings notwithstanding voir dire questioning." 607 P.2d at 835 (emphasis added).

As confirmed by the Affidavit of Edna Argyle (R. 779-800; also Addendum Exhibit "I"), Dr. Mendenhall surgically implanted artificial knees in Juror Argyle. Juror Argyle first became aware that her physician was going to be a witness when he took the stand to testify as part of the plaintiff's case. Affidavit of Edna Argyle at ¶ 4. Juror Argyle did not notify the Court or the parties of her relationship with this witness until after the trial was over. Affidavit of Edna Argyle at ¶ 5. The transcript of the voir dire (R. 1659-60) confirms paragraph 2 of Juror Argyle's Affidavit that plaintiff's counsel did not mention Dr. Mendenhall as a prospective witness

during the voir dire of the jury. Juror bias crept into the proceeding because plaintiff's counsel failed to identify all of his witnesses when asked to do so by the Court.

The relationship between Juror Argyle and Witness Mendenhall was not a casual or insignificant acquaintance. Rather, Dr. Mendenhall was Edna Argyle's personal physician and surgeon. Edna Argyle trusted and respected Dr. Mendenhall so much that she was willing to allow him to perform major surgery on her. Affidavit of Edna Argyle at ¶ 3. Although she presumably tried to ignore her special relationship with one of plaintiff's key witnesses, the appearance and possibility of bias is too great to ignore.

In Anderton, supra, this Court stated:

> "The evil to be avoided in any relationship between juror and counsel is that of improper bias or prejudice, which arises, not from the fact of the relationship itself, but only from an awareness thereof. Mr. Huber [i.e., the juror] can hardly be suspected of inclining toward the representations of Mr. Nebeker [i.e. the defense counsel] due to a relationship existing between the two of them of which neither was aware until after the trial had finished. For this reason, impartiality of the jury was undiminished by the relationship, and no prejudicial error occurred". 607 P.2d at 835 (emphasis added).

This Court in Anderton implied that a relationship between a lawyer for one of the parties and a juror would be prejudicial if the juror was aware of the relationship during the trial. A close relationship between a juror and the plaintiff's principal physician seems no less significant. Juror Argyle certainly was aware of her relationship with Dr.

Mendenhall while he was testifying on behalf of the plaintiff and she exhibited this awareness while she was deliberating, as indicated by her testimony that she mentioned the fact of her relationship with the doctor to her fellow jurors. See Affidavit of Edna Argyle at ¶¶ 4 and 6. This compounded the problem. The effect this had upon other jurors in their deliberation can only increase the appearance of bias in this case.

In State v. Brooks, 563 P.2d 799 (Utah 1977), the defendant was charged and convicted of aggravated robbery. The Brooks case explains why a juror cannot be "impartial" when the juror accords one of the parties' witnesses particular respect or esteem.

> "Impartiality" is not a technical conception but is a state of mind; it is a mental attitude of appropriate indifference. . . A juror, who through personal association with a witness or party has developed a relationship of affection, respect, or esteem cannot be deemed disinterested, indifferent, impartial.
>
> Where there have been personal associations, such as the one here, to remain uninfluenced, unbiased, and unprejudiced; runs counter to human nature. One cannot be deemed indifferent and impartial." 563 P.2d at 801-02 (footnotes omitted) (emphasis added).

Even if, arguendo, Juror Argyle consciously tried to be unbiased and impartial, it would be against her human nature for her to ignore the fact that a person very highly regarded by her had come forward as a witness in plaintiff's behalf. Under such circumstances, Juror Argyle cannot be deemed to have been "disinterested, indifferent, impartial."

The Rio Grande and Utah Railway were each given three peremptory challenges. However, they only exercised five of their possible six peremptories. Even if Juror Argyle had survived a challenge for cause, the Rio Grande and Utah Railway could have exercised their sixth peremptory challenge on her. Moreover, since there was an alternate juror who could have replaced Juror Argyle, plaintiff counsel's mistake during voir dire could have been corrected when Dr. Mendenhall came forward to testify, but Juror Argyle chose not to inform the court of her relationship with this witness.

Juror Argyle's vote was undeniably important to the jury's verdict. When polled, only six of the eight jurors joined in the finding that plaintiff was 0% negligent; Juror Argyle was one of the six. (R. 1181-82). Of course, the Rio Grande would be entitled to a new trial even if Juror Argyle had joined in a unanimous verdict. See, Crawford v. Manning, 542 P.2d 1091, 1093 (Utah 1975).

This Court can determine by logic, based upon common experience, that Mrs. Argyle's intimate association as a patient of one of plaintiff's key witnesses prevented her from standing in an "attitude of indifference" between plaintiff and defendants. Juror Argyle subconsciously or even consciously associated her feelings of esteem for Dr. Mendenhall with the merits of plaintiff's case. Under such circumstances, even a statement by a juror that she intends to be fair loses its meaning. See, Jenkins v. Parrish, 627 P.2d 533, 536 (Utah

1981). "The juror cannot be the judge of his qualifications; this function is the responsibility of the trial court." See also, State v. Brooks, 631 P.2d 878, 882-84 (Utah 1981).

Although a new trial will involve some additional expense and inconvenience to the parties, such must be borne to preserve and protect the constitutional right to a trial by an impartial jury. The Rio Grande still has not had its day in court.

POINT III

THE COURT SHOULD ORDER A NEW TRIAL BECAUSE IT WAS ERROR FOR THE LOWER COURT TO DENY THE RIO GRANDE'S MOTION FOR PARTIAL SUMMARY JUDGMENT THAT THE RIO GRANDE OWES NO DUTY TO PLAINTIFF TO PERFORM FUNCTIONS EXCLUSIVELY PREEMPTED BY UDOT AND UPSC.

Before trial, the Rio Grande moved for partial summary judgment, arguing that the plaintiff was not entitled to submit to the jury a theory that the Rio Grande owed him a duty to redesign the landscape at the 1600 South crossing, provide additional warning devices at the crossing, or slow its trains to a speed below that which UDOT understood was the speed of trains in this area (R. 460-63; 501-03; 2110-11; 2139-40). The lower court denied this motion (R. 569-70; 769-71; also Addendum Exhibit "D").[2]

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[2]The Rio Grande also moved unsuccessfully for a new trial based on the same grounds. (R. 825; 906).

It was undisputed that UDOT evaluated the subject crossing and took all of the factors extant at the crossing into account in discharging its statutory obligation to mandate the crossing protection at that location. These factors included the obstructed view caused by the hillside and the rate of travel of trains through the crossing. Arthur Geurts, the Safety Studies Engineer for UDOT, testified that UDOT considers many factors at each railroad crossing, including but not limited to the volume and speed of both train and automobile traffic, the number of tracks, the gradients in the area, and the various sight distances (R. 981-92). See also the testimony of Joseph Bruce Yuhas (R. 1236-37). After UDOT evaluated all of the circumstances relevant to highway safety at the 1600 South crossing, UDOT, pursuant to state law, determined what warning devices were reasonable and appropriate under those circumstances. The Rio Grande does not have any legal authority, and thus no duty, to second-guess UDOT. As such, it was error to allow the plaintiff to suggest to the jury that the Rio Grande breached a common law duty owed to plaintiff by not reshaping the contour of the earth in the vicinity of the crossing and/or by not slowing its trains (R. 1113-14; 1155-56).

A. The Statutory Framework

A series of related statutes in Chapter 4 of Title 54 of the Utah Code establish UDOT's authority to control traffic safety at railroad crossings in Utah, subject only to UPSC

review. Utah Code Ann. § 54-4-15(1) (1953, as amended) provides that a railroad-highway crossing cannot be built "without the permission of the department of transportation [UDOT] having first been secured" and that the department "shall have the right to refuse its permission or to grant it upon such terms and conditions as it may prescribe." Id. (emphasis added). Furthermore, Utah Code Ann. § 54-4-15(2) (1953, as amended) provides:

> "The department [UDOT] shall have the power to determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use and protection of each crossing . . . of a public road or highway by a railroad or street railroad, . . . and to alter or abolish any such crossing . . . and the proportions in which the expense of the alteration or abolition of such crossings . . . shall be divided between the railroad or between such corporations and the state, county, municipality or other public authority in interest." (Emphasis added).

Pursuant to Utah Code Ann. § 54-4-15(4), the Utah Public Service Commission ("UPSC") "shall retain exclusive jurisdiction for the resolution of any dispute by any person aggrieved by any action of the department [UDOT]" taken pursuant to Section 54-4-15. Id. (Emphasis added).

The statewide duty of UDOT to regulate safety signals or devices at railroad-highway crossings is expressly stated at Utah Code Ann. § 54-4-15.1:

> "The department of transportation so as to promote the public safety shall as prescribed in this act provide for the installing, maintaining, reconstructing, and improving of automatic and other safety appliances, signals or devices at

> grade crossings on public highways or roads over the tracks of any railroad or street railroad corporation in the state." (Emphasis added).

Moreover, Section 54-4-15.3 provides that UDOT "shall apportion the cost of the installation, maintenance, reconstruction or improvement of any signals or devices described in section 54-4-15.1 between the railroad or street railroad and the public agency involved." Section 54-4-15.4 separately requires that the "department of transportation shall provide in its annual budget for the costs incurred" to install signals or other safety devices at railroad crossings.

B. The Authority of UDOT to Regulate Railroad Crossings Is Exclusive.

Presumably, at the time when only horsedrawn vehicles and early "horseless carriages" crossed over railroad tracks, the railroads themselves installed whatever signs they chose to at these crossings. One can safely assume the crossing protection signs of that era offered little consistency to the highway traveller but, of course, the speed and range of highway travel was substantially different from what it is today. In Utah, as elsewhere, government became increasingly involved in the regulation of highway traffic as the speed and number of vehicles increased. In 1917, the Utah Legislature enacted the predecessor of Section 15-4-15, and at that time the predecessor of the Utah Public Service Commission [UPSC] was granted: ". . . the exclusive power to determine and prescribe the manner . . . and the terms of installation,

operation, maintenance, use and protection . . . of each crossing of a public road or a highway." Laws of Utah 1917, § 47-4-14. (Emphasis added).

This language was held by the Utah Supreme Court to mean just what it says in The Denver & Rio Grande Western Railroad Co. v. Public Utilities Commission of Utah, 51 Utah 623, 172 Pac. 479 (1918), and later in Provo City v. Department of Business Regulation, et al. 118 Utah 2d 1, 218 P.2d 675 (1950). On both occasions, the power of the designated state agency to "determine and prescribe" railroad crossings was held to be exclusive. One limited area of joint city and state jurisdiction remained. Prior to 1978, Utah Code Ann. § 41-6-96 (1953) authorized cities to erect stop signs at railroad crossings within city limits, if they determined such to be necessary. In 1978, this statute was repealed and even this limited authority by a local government was abolished. The legislative intent could not be more clear. Neither railroads nor even local governments have the power to prescribe what is to exist at public railroad crossings. This activity, including the determination and prescription of any signs or other devices installed to offer "protection" to a motorist approaching such crossings, is to be done exclusively by a state agency.

Section 54-4-15 was amended in 1975 in conjunction with the creation of UDOT, which assumed some of the UPSC's duties regarding railroad crossing safety. The only purpose

of the amendment was to substitute references to UDOT for the prior references in the statutes to the UPSC. See 6A Utah Code Ann. § 54-4-15, Compiler's Notes (Supp. 1983). A fourth subsection was added to retain ultimate jurisdiction in the UPSC to review the actions of UDOT. The word "exclusive" was transferred from the second subsection to the new fourth subsection so as to accommodate the new scheme under which UDOT has initial jurisdiction over railroad crossing protection, subject to review only by the UPSC. The joint jurisdiction of these state agencies over the signs and control devices at railroad crossings remains exclusive and a private party, such as a railroad, has no more right to change the traffic protection signs at a public railroad crossing, than it would to change any other signs on a public highway.[3]

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[3] The trial court ultimately recognized the exclusive nature of UDOT's authority to design the crossing and mandate the signs and devices which afford protection to motorists approaching the crossing, although, as discussed in the following text of Point III C, he incorrectly limited the scope of this ruling. See Instruction 13, attached hereto as Addendum Exhibit "O" and the text, infra. Although the Utah Supreme Court has not been asked to consider the exclusive nature of UDOT's authority over railroad crossings since the 1975 amendment of Utah Code Ann. § 54-4-15, much litigation has occurred in the United States District Court of Utah concerning this issue and the federal district judges of this state have uniformly interpreted Utah law to preclude railroads and local governments from any authority or duty to change the crossing protection at public crossings. See, e.g., the Order of Chief Judge Bruce S. Jenkins in D&RGW v. West Jordan Municipal Corp., Civil No. 82-0344(D. Utah May 28, 1982), attached hereto as Addendum Exhibit "R"; the Order of Chief Judge Aldon J. Anderson in Bellon v. D&RGW, Civil No. C83-0888A (D. Utah Sept. 8, 1984), attached hereto as Addendum Exhibit "Q"; and the Order of Judge David K. Winder in Harsin v. D&RGW, Civil No. C-83-0993W (D. Utah Jan. 10, 1985) attached hereto as Addendum Exhibit "K".

C. Any Change of Train Speeds or Sight Distances Requires Reconsideration of the Crossing Protection.

Since the mandated crossing protection is determined by UDOT from factors such as view obstructions and train speeds, any change of those factors presumably would require new UDOT evaluation and perhaps different crossing protection. The Rio Grande could not remove the hillside at 1600 South, even if that were feasible, without notifying UDOT so that it could come out and re-evaluate the crossing protection, since it was the obstructed view caused by the hillside, among other factors, which led UDOT to mandate the particular traffic signs which existed at this crossing. A similar situation exists with respect to changes in train speeds in the area.

In determining how highway traffic is to be regulated, UDOT operates with the twin goals of traffic flow efficiency and traffic safety. To some extent, these goals are inherently inconsistent. For example, if the speed limit on Utah's interstate highways were reduced from 55 mph to 25 mph, they no doubt would be safer, but the effect upon traffic flow efficiency would be disastrous. It is for this reason that traffic control, including the traffic control at any particular railroad crossing, is vested exclusively with a single state agency. Hopefully, this will result in some consistency so that a motorist will confront the same type of signs or other warning devices at crossings with essentially the same type of hazards, regardless of who owns the railroad tracks. Changing the hazard rating of a crossing, either by

erecting structures which obstruct the motorists' view of the tracks or by removing them, without changing the crossing protection, subverts the purpose of the Legislature every bit as much as changing the signs.

The same is true with respect to changes in the speed of trains passing through any particular crossing. A crossing which the State, in its exercise of exclusive authority, determines to be properly protected by a simple crossbuck sign, may require flashing lights and gates if the railroad decides to raise the speed of its trains in the area from 50 to 90 mph. Conversely, the goals of traffic flow efficiency and state-wide uniformity may have resulted in UDOT removing the rather extraordinary measure of a stop sign at the 1600 South crossing if the railroad had reduced the speed of its trains in that area to something below 50 mph.[4]

The point to be made is that the exclusive authority and duty to determine crossing protection is inextricably tied to the factors upon which those decisions are made. The railroad certainly had a duty not to change those factors so as to make the crossing more dangerous than UDOT thought it was when it determined the existing crossing protection. See e.g.

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[4] The UDOT Safety Engineer, Arthur Geurts, testified, for example, that nothing more than a 20 mph change in the speed of trains in the area (from 70 mph to 50 mph) would change the hazard rating of this particular crossing from one that would rank it as the 68th most dangerous crossing to one that would rank it 353rd most dangerous (R. 982,989-91).

Toomer's Estate v. Union Pacific R. Co., 121 Utah 37, 239 P.2d 163 (1951).[5] Had it done so, it undoubtedly would have been obligated to inform UDOT of the change. Similarly, if the railroad chose to do something to make the 1600 South crossing more safe, such as reduce its train speeds, it would have been obligated to so inform UDOT, so that changes in the crossing protection could be considered by the State agency. However, so long as the railroad was operating at the speeds which UDOT evaluated in determining the crossing protection for motorists such as Mr. Gleave, and so long as the motorists' view at 1600 South was not obstructed by the railroad any more than UDOT understood it to be when it evaluated the crossing, then the railroad violated no duty owed to motorists approaching that crossing. The agency with the exclusive authority and duty to establish the appropriate protection for motorists had evaluated those factors in determining what protection would be afforded to motorists approaching that crossing. The railroad had no duty to change those factors. Indeed, it had a duty not to change them.

The lower court recognized the exclusive authority of UDOT to determine the design of the crossing and the crossing

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[5] In Toomer, a temporary hazard, unknown to the State agency which determined crossing protection, was created by the railroad when it parked a large train on a siding and thereby blocked the view of the mainline tracks to oncoming motorists.

protection at 1600 South. See the first paragraph of Instruction No. 13, attached hereto as Addendum Exhibit "O". However, he incorrectly instructed the jury that it could consider whether or not the Rio Grande should have exercised greater caution in approaching the 1600 South crossing because a reasonable man may have thought the crossing protection to be inadequate. Instruction No. 6, paragraph (b), attached hereto as Addendum Exhibit "P", and the second paragraph of Instruction No. 13.

This suggested that the Rio Grande could second guess the State agency and it invited the jury to consider the train speed even though there was no claim that the speed of this train was in excess of what UDOT expected it to be when it determined the crossing protection for this crossing. In closing argument, the plaintiff's counsel was permitted to argue that the railroad was negligent in not removing the hillside to improve a motorist's view of the tracks, and in not reducing the speed of its trains (R. 1113-14; 1155-56). This was prejudicial error. Since the jury may have determined the railroad to be negligent for one of these improper reasons, a new trial is required.

POINT IV

THE COURT SHOULD ORDER A NEW TRIAL BECAUSE OF PLAINTIFF COUNSEL'S SURPRISE AND IMPROPER REFERENCE TO WOODARD'S TESTIMONY IN CLOSING ARGUMENT.

One of the witnesses called to the stand by plaintiff was a man named Willis J. Woodard. Mr. Woodard was a Rio

Grande employee who was working on the train which collided with plaintiff's vehicle. By the time of trial, Mr. Woodard had been fired from his job at the Rio Grande for engaging in, and concealing, criminal activities. In fact, Mr. Woodard was an inmate at the Utah State Prison at the time of trial. Plaintiff counsel's direct examination of Mr. Woodard drew a strenuous objection by counsel for the Rio Grande when plaintiff's counsel began to impeach Mr. Woodard, even though Mr. Woodard was plaintiff's own witness and had not said anything to surprise plaintiff's counsel. (R. 1788-90) Furthermore, based upon written communications received by the Rio Grande from Mr. Woodard, it was evident that Mr. Woodard had offered to give testimony favorable to the Rio Grande if it promised to reemploy him and unfavorable testimony if it refused to guarantee him a job at the end of his prison term. The Rio Grande had refused to give Mr. Woodard the employment he was seeking to extort. (R. 2083-84; also Addendum Exhibit "N") Because Mr. Woodard could not be trusted to tell the truth, the Rio Grande decided not to call him as a witness, even though his deposition testimony had been very favorable to the railroad. (R. 1789).

During a lengthy conference outside the presence of the jury (R. 1788-1808), it became clear that counsel for the plaintiff was aware of Mr. Woodard's attempt to extort a job from the Rio Grande even before he called him as a witness (R. 1791-1792, 1798-99, 2083-89, and Addendum Exhibit "N".)

Plaintiff's counsel intended to use Mr. Woodard's extortion communications with the Rio Grande to impeach Mr. Woodard, even though Mr. Woodard was a witness who was not to be called by the Rio Grande and who, in fact, was being called by the plaintiff.

Ruling on the Rio Grande's objection to plaintiff's proposed continued examination of Mr. Woodard, the Court ordered plaintiff's counsel to terminate the direct examination of Mr. Woodard and he ordered Mr. Woodard to be excused immediately from the witness stand. As a result of this order, counsel for the Rio Grande, of course, had no opportunity to cross-examine Mr. Woodard. The Rio Grande had no objection to dismissing Mr. Woodard from the stand during Mr. Woodard's direct testimony (i.e., without cross-examination) because the Rio Grande understood that Mr. Woodard's testimony was stricken and that counsel for all parties--including plaintiff--would not argue any of Mr. Woodard's testimony to the jury. (R. 1803).

To the great surprise and detriment of the Rio Grande, counsel for the plaintiff did argue to the jury, during the rebuttal portion of his closing argument, certain testimony given by Mr. Woodard concerning a critical question of the litigation (R. 1151-52). Specifically, Mr. Woodard had given testimony which could be construed by the jury to mean that the Rio Grande's engineer had not sounded the whistle a full

one-quarter mile prior the crossing. See Curtis v. Harmon Electronics, Inc., 575 P.2d 1044 (Utah 1975). For the reasons stated above, the Rio Grande never had an opportunity to cross-examine Mr. Woodard regarding the estimate of distance offered by him as to the point where the engineer first sounded the whistle.

Counsel for the plaintiff improperly called a witness, not for his testimony, but merely to impeach him and demonstrate to the jury that the railroad had employed a "bad man" who attempted extortion. Counsel then used the testimony which had not been subject to cross-examination as a rebuttal point in closing argument. The adequacy of the whistle signal was a critical issue for the jury to determine and offering and arguing this witness' testimony was prejudicial as well as questionable attorney conduct. Since ordinary prudence by the Rio Grande could not have guarded against plaintiff counsel's surprise use of Mr. Woodard's testimony in his rebuttal argument, and since the jury may have based its finding of negligence against the Rio Grande on Mr. Woodard's stricken testimony, the appropriate remedy is to order a new trial.

POINT V

THE COURT SHOULD ORDER A NEW TRIAL BECAUSE IT WAS AN ERROR FOR THE COURT NOT TO INSTRUCT THE JURY THAT IT COULD CONSIDER WHETHER PLAINTIFF FAILED TO MITIGATE HIS DAMAGES BY NOT WEARING HIS SEAT BELT.

During the trial, plaintiff testified that he was not wearing his seat belt at the time of the accident. (R. 1750) (Tr. 98). Sergeant Coron testified that the passenger compartment of the vehicle was structurally intact after the collision. (R. 1426-27). The Rio Grande further established through the testimony of plaintiff's treating physician that substantially all of plaintiff's injuries were consistent with injuries sustained by plaintiff upon coming into contact with the ground after being thrown from the vehicle. (R. 1209-10). At the close of the evidence, the Rio Grande asked for Jury Instruction No. 25 which would have instructed the jury that it could reduce any damages awarded to plaintiff if it found that plaintiff had failed to mitigate his damages by not wearing a seat belt (R. 702; and Addendum Exhibit "L"). The instruction was refused and the Rio Grande took exception to the Court's refusal (R. 1159).

It was error for the trial court to deny this instruction. Shortly before trial, the Utah Supreme Court had ruled that facts concerning the failure of a plaintiff to fasten his seat belt presents an issue of mitigation failure. See, Acculog v. Peterson, No. 18133 slip op. (Utah May 1, 1984). The Rio Grande had introduced sufficient evidence to

warrant such an instruction and to argue that theory to the jury. The Rio Grande was prejudiced by being prevented from arguing that plaintiff had failed to mitigate his damages, particularly in light of the jury's significant damage award of $425,140.00.

POINT VI

IT WAS ERROR FOR THE TRIAL COURT TO DISMISS DEFENDANT UTAH DEPARTMENT OF TRANSPORTATION ON GROUNDS OF SOVEREIGN IMMUNITY

Prior to trial, defendant Utah Department of Transportation ("UDOT") filed a Motion to Dismiss the Complaint as against UDOT on the grounds that UDOT was immune from suit under the doctrine of sovereign immunity. The lower court granted UDOT's motion. In so ruling, the lower court stated:

> "The motion of defendant Department of Transportation to dismiss is granted. The court is of the opinion that the decision of whether or not to install a safety signal at a particular crossing is a discretionary one protected by the Governmental Immunity Act. See also Section 63-30-22 with respect to punitive damages." Rulings of Judge Christensen dated May 29, 1984 (R. at 569-70; also Addendum Exhibit "D").

The Rio Grande objected to UDOT's Motion to Dismiss on the grounds that Utah's Governmental Immunity Act does not immunize UDOT from suit under the facts and circumstances of this case. (R. 508-513; 769-71; 2134-35) The full text of the Utah Governmental Immunity Act is attached hereto as Addendum Exhibit "H".

The tenth cause of action in plaintiff's Amended Complaint alleges that UDOT has the duty under Utah Code Ann.

§§ 54-4-14 et seq. to install, maintain, reconstruct and improve safety devices and signals at the crossing where plaintiff had this accident, and that UDOT breached its duty of care by failing "to provide for adequate safety signals or devices." See Amended Complaint at ¶¶ 82-83 (R. at 343-44; also Addendum Exhibit "G"). To the extent that plaintiff was entitled to submit his case against the Rio Grande to the jury, so too were the plaintiff and the Rio Grande entitled to submit their respective theories of negligence against UDOT to the jury. The lower court completely misunderstood and misapplied the sovereign immunity provisions of the Utah Governmental Immunity Act in dismissing UDOT.

A. Summary of the Two Tier Analytical Framework Applicable to Cases Involving the Utah Governmental Immunity Act

A claim of governmental immunity in any given case presents two questions under the Utah Governmental Immunity Act. See, e.g., Johnson v. Salt Lake City Corp., 629 P.2d 432, 433-34 (Utah 1981). The first question is whether the activity in question constitutes a so-called "governmental function." Utah Code Ann. § 63-30-3 provides in pertinent part:

> "Except as may otherwise be provided in this Act, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function. . . ." Id.

If the particular governmental activity does not constitute a "governmental function," then the doctrine of sovereign immunity has no application to the case and the plaintiff is entitled to go forward with his action against the

governmental entity. Cf., Dalton v. Salt Lake Suburban Sanitary District, 676 P.2d 399 (Utah 1984). If, however, the activity in question does constitute a "governmental function," then the second question is whether the Legislature has waived immunity from suit for conduct in connection with that specific governmental function.

B. UDOT'S Regulation of Traffic Warning Devices At Railroad Crossings Is Not a "Governmental Function" Within the Purview of the Utah Governmental Immunity Act and, Therefore, UDOT Is Not Immune From Suit

The lower court improperly dismissed UDOT from this proceeding. The installation or failure to install certain traffic control devices at a particular railroad crossing is not a "governmental function" as that term has been consistently defined by the Utah Supreme Court since 1980. In the watershed governmental immunity case of Standiford v. Salt Lake City Corp., 605 P.2d 1230 (Utah 1980), the Court declared:

> "We therefore hold that the test for determining governmental immunity is whether the activity under consideration is of such a unique nature that it can only be performed by a governmental agency or that it is essential to the core of governmental activity. Clearly this standard broadens governmental liability." Id. at 1236-37 (emphasis added).

The Supreme Court in Standiford held the operation of a public golf course not to be a "governmental function" within the purview of the Utah Governmental Immunity Act and

this Court has expressly adhered to the Standiford definition of "governmental function" in several other cases.[6]

The installation of highway warning devices at railroad crossings is not as "of such a unique nature that it can only be performed by a governmental agency," and the installation of traffic warning devices at railroad crossings, while desirable, is not "essential to the core of governmental activity." Standiford, 605 P.2d at 1236-37. Although the Rio Grande does contend in Point III, supra, that the State has elected to preempt the field of railroad crossing protection, it could have been otherwise, and it was prior to the time when the State preempted the field. Thus, although traffic protection at railroad crossings is something the State has elected to do exclusively, it is not something that the "government alone must do." Johnson, 629 P.2d at 434.

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[6] See, e.g., Thomas v. Clearfield City, 642 P.2d 737, 738-39 (Utah 1982) (holding that operation of a municipal sewer system is not a "governmental function" within the purview of the Utah Governmental Immunity Act); Johnson v. Salt Lake City Corp., 629 P.2d 432, 433-34 (Utah 1981) (holding that municipal maintenance of a winter recreational facility was not a "governmental function" within the purview of the Utah Governmental Immunity Act, and stating, with emphasis in the original, that, "The first part of the Standiford test--activity of such a unique nature that it can only be performed by a governmental agency--does not refer to what government may do, but to what government alone must do."); See also, Comment, Defining Governmental Function Under the Utah Governmental Immunity Act, 9 J. CONTEMP. LAW 193, 198-203 (1983).

C. The Lower Court Erroneously Relied On The "Discretionary Function" Exception

The mistake made by the lower court in evaluating the sovereign immunity question is that it assumed the installation of highway warning devices at a railroad crossings to constitute a "governmental function." Rather than focusing first on the "governmental function" question, the lower court mistakenly assumed the existence of a "governmental function," then proceeded to focus upon whether the activity was or was not "discretionary" within the meaning of Utah Code Ann. § 63-30-10(1)(a) (1953, as amended). That statute provides that a governmental entity may not be sued for negligence, in the exercise of a "governmental function", if the negligence "arises out of the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused." Id.

Since the governmental activity in question in this case is not a "governmental function," it is not necessary to determine whether the activity is or is not "discretionary." However, even if the design and installation of traffic warning devices at railroad crossings constitutes a "governmental function," that activity is not a "discretionary function" as that term has been interpreted by this Court.

In Bigelow & Ingersoll, 618 P.2d 50 (Utah 1980), the Utah Supreme Court expressly held that the Utah Governmental Immunity Act did not bar a suit filed against the State of Utah

by a plaintiff injured in an automobile accident allegedly caused by a negligently designed traffic control system. In so holding, the Court explained:

> According to the definition of discretion established in Frank v. State, Utah 613 P.2d 517 (1980), a discretionary function under § 63-30-10(1) is "confined to those decisions and acts occurring at the 'basic policy making level,' and not extended to those acts and decisions taking place at the operational level, or, in other words, . . . 'those which concern routine, everyday matters, not requiring evaluation of broad policy factors.'" Although the acts of the State involved in designing the traffic control system involve some degree of discretion, as do almost all acts, the design of the traffic control system does not involve the "basic policy making level". 618 P.2d at 53 (emphasis added). Accord, Little v. Utah State Division of Family Services, 667 P.2d 49, 51 (Utah 1983) (defining "discretionary function").

In this case, as in Bigelow, governmental immunity does not obtain because UDOT's regulation and design of the crossing where Mr. Gleave had his accident was an operational level decision, not a basic policy decision of the State of Utah.

In the lower court proceeding, UDOT relied heavily on the case of Velasquez v. Union Pacific Railroad Co., 24 Utah 2d 217, 469 P.2d 5 (1970), for the proposition that Mr. Gleave's suit was barred by Section 63-30-10(1)(a). In Velasquez, a passenger in a pickup truck which was involved in an accident with a train at a railroad crossing, sued the State of Utah Public Service Commission. The lower court entered summary judgment in favor of Commission and the passenger

appealed. On appeal, the Supreme Court held that under the applicable statutes, the Public Service Commission had discretionary power to require the railroad to construct and maintain appropriate safety devices at a grade crossing, and the commission was immune from suit by the passenger.

The Rio Grande submits that Velasquez has been overruled sub silentio by Standiford and its progeny and/or by Bigelow. To the extent that Velasquez represents a position contrary to the position asserted by the Rio Grande in this case, the Velasquez opinion should be expressly overruled. The Court in Velasquez made the same mistake as the lower court in this case. That is, the Velasquez Court failed to first determine whether the activity in question was or was not a "governmental function." Under the definition of "governmental function" articulated in Standiford and its progeny, the Velasquez holding must be overruled. The Velasquez holding must also be overruled in light of the "discretionary function" cases subsequently decided by this Court, such as Bigelow and Little.[7]

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[7] Cf., Hobbs v. The D.&R.G.W.R. Co. and the Utah Dept. of Transp., 677 P.2d 1128 (Utah 1984). Hobbs was decided subsequent to the Standiford decision and in Hobbs UDOT was named a party upon a claim it had negligently routed traffic over a certain railroad crossing during the upgrade construction of a different crossing. The case was tried and appealed and no issue of sovereign immunity was ever recognized.

D. The Rio Grande Was Prejudiced at Trial By UDOT'S Absence From the Courtroom

The Rio Grande is entitled to have a jury evaluate simultaneously the comparative negligence, if any, of both the Rio Grande and UDOT. By submitting the matter to the jury without even having UDOT present in the courtroom, and thereby preventing both plaintiff and the Rio Grande from trying the issue of UDOT's comparative negligence, if any, the Rio Grande was prejudiced. The Rio Grande was particularly prejudiced by UDOT's dismissal in light of the Court's holding in Jensen v. Intermountain Health Care, Inc., 679 P.2d 903 (Utah 1984) that, in a multi-defendant case, Utah's Comparative Negligence Act requires the total negligence of all the defendants to be compared to that of the plaintiff to determine whether a particular defendant is liable. Prejudice against the Rio Grande was further compounded by the lower court's refusal to even read to the jury, the Rio Grande's requested Jury Instruction No. 29 which would have instructed the jury that the Rio Grande could not be held liable for any perceived errors or omissions by UDOT (R. 706; 1159; also Addendum Exhibit "M").

CONCLUSION: RELIEF SOUGHT ON APPEAL

For the foregoing reasons, this Court should reverse the judgment entered by the lower court, reinstate the Amended Complaint as against co-defendant UDOT, and remand for a new trial. During the new trial, the jury should be instructed

that the plaintiff was negligent as a matter of law, with the jury to determine the degree to which plaintiff's negligence and the negligence, if any, of the Rio Grande and UDOT proximately caused this accident.

DATED this 12th day of March, 1985.

VAN COTT, BAGLEY, CORNWALL & McCARTHY
E. Scott Savage
Michael F. Richman
Patrick J. O'Hara

By _____

P. O. Box 45340
50 South Main Street, Suite 1600
Salt Lake City, UT 84145

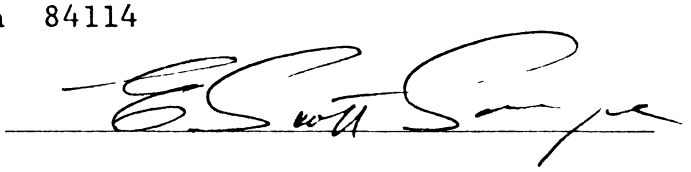
Attorneys for Defendants-Appellants and Cross-Respondents The Denver and Rio Grande Western Railroad Company and Utah Railway Company

CERTIFICATE OF SERVICE

I hereby certify that four true and correct copies of the foregoing Brief of Appellants and Cross-Respondents The Denver and Rio Grande Western Railroad Company and Utah Railway Company were mailed, postage prepaid, this 12th day of March, 1985 to:

Robert J. DeBry
Attorney for Plaintiff-Respondent and Cross-Appellant
965 East 4800 South, Suite 2
Salt Lake City, Utah 84117

Paul M. Warner, Esq.
Assistant Attorney General for the
State of Utah
Attorney for Defendant-Respondent
Utah Department of Transportation
236 State Capitol Building
Salt Lake City, Utah 84114



ADDENDUM

Attached hereto are the following exhibits:

EXHIBIT "A": Special Verdict Form dated June 18, 1984 (R. 765-68).

EXHIBIT "B": The Judgment entered on or about August 15, 1984 (R. 808-09).

EXHIBIT "C": Rulings dated October 16, 1984 (regarding denial of the Rio Grande's post-trial motions) (R. 906).

EXHIBIT "D": Rulings dated May 29, 1984 (denying the Rio Grande's summary judgment motion and partial summary judgment motion; also granting dismissal of Utah Department of Transportation (R. 569-70).

EXHIBIT "E": Order Granting Directed Verdict Regarding Punitive Damages dated August 15, 1984 (R. 806).

EXHIBIT "F": Notice of Appeal dated November 9, 1984 (R. 912-13).

EXHIBIT "G": Paragraphs 81-86 of the Amended Complaint--Tenth Cause of Action Against Utah Department of Transportation (R. 343-44).

EXHIBIT "H": Utah Governmental Immunity Act, Utah Code Ann. §§ 63-30-1 to -38 (1953, as amended).

EXHIBIT "I": Affidavit of Edna Argyle (R. 779-800).

EXHIBIT "J": Investigating Officer's Report of the Gleave Accident (Defendants' Trial Exhibit 34).

EXHIBIT "K": "Order Stating Uncontested and Contested Facts and Granting Partial Summary Judgment in Favor of Defendant" dated January 10, 1985 in Harsin v. Denver and Rio Grande Western Railroad Co., Civil No. C-83-0993W (D. Utah 1985) (Winder, J.).

EXHIBIT "L" The Rio Grande's Requested Jury Instruction No. 25 (R. 702) (regarding the seat belt issue) (refused by the lower court June 18, 1984).

EXHIBIT "M": The Rio Grande's Requested Jury Instruction No. 29 (R. 706) (regarding UDOT's comparative negligence) (refused by the lower court June 18, 1984).

EXHIBIT "N": Letter to Willis Woodard from E. Scott Savage at Van Cott, Bagley dated March 3, 1984 (R. 2083-84) and part of letter from Willis Woodard to the Rio Grande dated February 15, 1984 (R. 2086).

EXHIBIT "O": Jury Instruction No. 13 (R. 737).

EXHIBIT "P": Jury Instruction No. 6 (R. 729-30).

EXHIBIT "Q": Denver and Rio Grande Western Railroad Co. v. Bellon, Civil No. C83-0888A (D. Utah September 8, 1984) (Anderson, J.) ("Order Granting Partial Summary Judgment").

EXHIBIT "R": Denver and Rio Grande Western Railroad Co. v. West Jordan Municipal Corp., Civil No. 82-0344J (D. Utah May 28, 1982) (Jenkins, J.) ("Findings of Fact and Conclusions of Law").

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IN THE DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH

ROBERT L. GLEAVE,

Plaintiff,

vs.

DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, et al,

Defendants.

Civil No. 62912

SPECIAL VERDICT

LADIES AND GENTLEMEN OF THE JURY:

Please answer the following questions from a preponderance of the evidence. If you find that the evidence preponderates in favor of the issue presented, answer it "yes". If, on any issue, you find that the evidence is so equally balanced that you cannot determine the preponderance of the evidence, or if you find that the evidence preponderates against the issue presented, answer it "no."

QUESTION ONE:

(a) Was plaintiff Robert Gleave negligent?

ANSWER no.

(b) If 1(a) is "yes," was such negligence a proximate cause of the injuries sustained by plaintiff Robert Gleave?

ANSWER (no).

EXHIBIT "A"

QUESTION TWO:

(a) Were defendant Denver & Rio Grande Western Railroad and Utah Railway Company negligent?

ANSWER yes .

(b) If 2(a) is "yes," was such negligence a proximate cause of the injuries received by plaintiff Robert Gleave?

ANSWER yes .

QUESTION THREE:

If you have answered Questions 1 and 2 affirmatively and have found that plaintiff Robert Gleave and the defendants railroads were negligent in a way that caused plaintiff Robert Gleave's injuries, then, and only then, answer the following question:

Considering all of the negligence of defendants Denver & Rio Grande Western Railroad Company and Utah Railway Company that you found to be a cause of plaintiff Robert Gleave's injuries and all of the negligence of plaintiff Robert Gleave that you found to be a cause of plaintiff Robert Gleave's own injuries to total 100%, you will now allocate the 100% negligence between the negligent parties. You will weigh the negligence of each party against the negligence of the other party and determine the relative negligence

of each party in relation to the negligence of the other party or parties. Your answer in percentages will reflect your decision. What part of the 100% do you find to be attributable to:

(a) Defendant Denver & Rio Grande Western Railroad Company and Utah Railway Company _____%

(b) Plaintiff Robert Gleave _____%

Total must be 100%

QUESTION FOUR:

Considering only the instructions and evidence concerning damages, and without being concerned with the effect of fault of any party on damages in answering this question, what amount of money would fairly and adequately compensate plaintiff Robert Gleave for any and all injuries sustained by him as a result of the collision at issue?

If you have answered Question 3, and if Mr. Gleave is entitled to have the amount of damages reduced because of the percentage of negligence allocated by you to Mr. Gleave, that computation will be made by the Court. Therefore, do no make any reduction in your answer to this question.

A. Past medical expenses $ 56,000 ;

B. Future medical expenses $ 22,540 ;

C. Past lost wages $ 20,000 ;

D. Loss of future earnings and earning capacity $ 275,000 ;

E. General damages to include pain and suffering and loss of enjoyment of life $ 50,000 ;

F. Reasonable market value of Robert Gleave's automobile on the date of the collision $ 1600 ;

TOTAL..... $ 425,140 .

Dated this 18 day of June, 1984.

Charles D. Coleman
JURY FOREMAN

ROBERT J. DEBRY
ROBERT J. DEBRY & ASSOCIATES
Attorney for Plaintiff
965 East 4800 South, Suite 2
Salt Lake City, Utah, 84117
Telephone: (801) 262-8915

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

IN AND FOR UTAH COUNTY, STATE OF UTAH

ROBERT L. GLEAVE, Plaintiff, vs. DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, a Utah corporation, UTAH RAILWAY COMPANY, a Utah corporation, GERALD H. BURTON, an individual, CITY OF SPRINGVILLE, a Municipal corporation, and STATE OF UTAH, DEPARTMENT OF TRANSPORTATION, Defendants.	JUDGMENT Civil No. 62912 (Judge Cullen Y. Christensen)

This action came on for jury trial on June 11, 1984 through June 18, 1984, Honorable Cullen Y. Christensen, District Judge, presiding. The issues having been duly tried, and the jury having duly rendered its verdict.

It is ordered and adjudged that the plaintiff Robert Gleave, recover from the defendants Denver & Rio Grande Western Company and Utah Railway Company jointly and severally, the sum of $425,140.00, with interest as provided by law and the costs of action.

EXHIBIT "B"

Judgment pursuant to further order of the Court:

A. Jury Verdict $ 425,140.00

B. Pre-Judgment interest on special damages (§78-27-44 U.C.A.) $ 14,179.81

C. Costs (Rule 54(e)) $ 618.00

D. Interest at 12% on $425,140.00 from ~~June 18, 1984~~ Aug 15 1984 to date of satisfaction of judgment (§15-1-4 U.C.A.) ~~$~~ ———

TOTAL $ 439,937.81

DATED this 15th day of August, 1984.

BY THE COURT:

Cullen Y. Christensen

Honorable Cullen Y. Christensen

IN THE DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH

ROBERT L. GLEAVE,

Plaintiff,

Civil No. 62,912

vs.

RULINGS

THE DENVER & RIO GRANDE
WESTERN RAILROAD CO., et al

Defendants.

This matter comes before the Court under Rule 2.8 of the Rules of Practice on various motions as hereinafter set forth. The Court has reviewed the file, the affidavits and memorandum filed on behalf of the respective parties, and upon being fully advised in the premises now makes the following

RULINGS

1. The Motion of Defendants D&RGW and Utah Railway for a new trial is denied.

2. The Motion of said defendants to alter or amend the Judgment is denied.

3. The Motion of said defendants for a Judgment not withstanding the Verdict is denied.

4. The plaintiff's Motion for award of attorney fees under Sec 78-27-56 UCA is denied.

Dated this 16th day of October, 1984.

BY THE COURT

Cullen Y Christensen

CULLEN Y CHRISTENSEN, JUDGE

cc: to counsel

EXHIBIT "C"

IN THE DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH

ROBERT L. GLEAVE,

Plaintiff, Civil No. 62912

vs. RULINGS

D & RGW RAILROAD COMPANY,
et al, Defendants.

This matter comes before the Court under Rule 2.8 on plaintiff's motion for summary judgment, the motion of defendant Utah Department of Transportation to dismiss, the motion of defendants D&RGW Railroad Company, Utah Railway and Burton for summary judgment, defendant D&RGW Railroad Company's motion for independent physical, plaintiff's motion for leave to file an amended complaint, defendant D&RGW Railroad Company's motion to strike affidavits, plaintiff's motion to determine sufficiency of response to request for admissions, and plaintiff's motion to compel discovery. The Court has reviewed the file, the affidavits and memoranda of authority filed by the various parties, and upon being advised in the premises now makes the following

RULING

1. Plaintiff's motion for summary judgment is denied.

2. The motion of defendant Department of Transportation

EXHIBIT "D"

to dismiss is granted. The Court is of the opinion that the decision of whether or not to install a safety signal at a particular crossing is a discretionary one protected by the Governmental Immunity Act. See also Section 63-30-22 with respect to punitive damages.

3. The motion of defendant D&RGW Railroad Company, Utah Railway and Burton for summary judgment or partial summary judgment is denied.

4. The motion of defendant D&RGW Railroad Company for an independent physical is granted. The Court has been informed that the plaintiff has no objection.

5. Plaintiff's motion for leave to file a second amneded complaint is denied.

6. The motion of defendant D&RGW Railroad Company to strike affidavits is denied.

7. Plaintiff's motion to determine the sufficiency of the response to plaintiff's first set of requests for admissions is denied. (See Scheduling Order filed December 14, 1984.)

8. Plaintiff's motion to compel discovery is denied. (See Scheduling Order filed December 14, 1983.)

--ooOoo--

Dated this 29th day of May 1984.

BY THE COURT

Cullen Y. Christensen

Cullen Y. Christensen, Judge

cc: to counsel

ROBERT J. DEBRY
ROBERT J. DEBRY & ASSOCIATES
Attorney for Plaintiff
965 East 4800 South, Suite 2
Salt Lake City, Utah, 84117
Telephone: (801) 262-8915

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
IN AND FOR UTAH COUNTY, STATE OF UTAH

ROBERT L. GLEAVE, Plaintiff, vs. DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, a Utah corporation, UTAH RAILWAY COMPANY, a Utah corporation, GERALD H. BURTON, an individual, CITY OF SPRINGVILLE, a Municipal corporation, and STATE OF UTAH, DEPARTMENT OF TRANSPORTATION, Defendants.	ORDER GRANTING DIRECTED VERDICT REGARDING PUNITIVE DAMAGES Civil No. 62912 (Judge Cullen Y. Christensen)

At the close of plaintiff's case (June 18, 1984), defendant moved for an order granting a directed verdict with respect to the issue of punitive damages.

For reasons set forth in the record, the directed verdict is granted with respect to punitive damages only.

The issue of compensatory damages is specifically reserved for the jury.

DATED this 15th day of August, 1984.

BY THE COURT:

Cullen Y. Christensen
District Judge

EXHIBIT "E"

VAN COTT, BAGLEY, CORNWALL & McCARTHY
E. Scott Savage
Michael F. Richman
Patrick J. O'Hara
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Salt Lake City, Utah 84110-3400
Telephone: (801) 532-3333

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

IN AND FOR UTAH COUNTY, STATE OF UTAH

ROBERT L. GLEAVE, Plaintiff, vs. THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, a corporation, UTAH RAILWAY COMPANY, a corporation, GERALD H. BURTON, an individual, CITY OF SPRINGVILLE, a municipal corporation, and STATE OF UTAH, DEPARTMENT OF TRANSPORTATION, Defendants.	NOTICE OF APPEAL Civil No. 62912

Please take notice that defendants The Denver and Rio Grande Western Railroad Company and Utah Railway Company hereby appeal to the Supreme Court of the State of Utah from the judgment entered against them in the above entitled matter on

EXHIBIT "F"

August 15, 1984 and from the District Court's denial of said defendants' post-judgment motions.

DATED this 9th day of November, 1984.

VAN COTT, BAGLEY, CORNWALL & McCARTHY
E. Scott Savage
Michael F. Richman
Patrick J. O'Hara

By Patrick J. O'Hara
Attorneys for Defendants
The Denver and Rio Grande Western Railroad Company, Utah Railway Company, and Gerald H. Burton
P. O. Box 3400
50 South Main Street, Suite 1600
Salt Lake City, UT 84110-3400
Telephone: (801) 532-3333

79. As a direct and proximate result of defendant City of Springville's aforesaid breach of duty, plaintiff has suffered substantial injuries as alleged herein.

80. On or about the date of September 23, 1982, plaintiff served a Notice of Claim upon defendant City of Springville as required by §63-30-11 Utah Code Annotated (1953, as amended); a copy of such Notice of Claim is attached hereto as Exhibit "A". Defendant has refused to honor plaintiff's claim.

TENTH CAUSE OF ACTION

81. Plaintiff realleges every allegation contained in paragraphs 1 through 80 above, and incorporates the same herein by reference.

82. The defendant Department of Transportation, State of Utah (hereinafter "State of Utah"), pursuant to §54-4-14, et seq., Utah Code Annotated (1953, as amended), has the duty to provide for the installation, maintenance, reconstruction and improvement of safety signals or devices at the railroad crossing that is the subject of this action, at 1600 South in Springville.

83. The defendant State of Utah, knew of or should have known of the unreasonably dangerous condition at the 1600 South railroad crossing and failed to provide for the installation of adequate safety signals or devices, thereby breaching its duty as provided by statute.

84. The acts of defendant, State of Utah, complained of herein constitute negligence.

85. As a direct and proximate result of defendant State of Utah's aforesaid breach of duty, plaintiff has suffered substantial injuries as alleged herein.

86. On or about the date of September 23, 1982, plaintiff served a Notice of Claim upon defendant State of Utah, as required by §63-30-11, Utah Code Annotated, (1953, as amended); a copy of such Notice of Claim is attached hereto as Exhibit "B". Defendant has failed to honor plaintiff's claim.

ELEVENTH CAUSE OF ACTION

87. At all times alleged herein, defendant City of Springville had a stop sign situated 16' West of the 1600 South Railroad Crossing.

88. From the point of that stop sign, a driver is unable to see any southbound train until that train is 137' from the intersection.

89. Defendant Denver & Rio Grande has established a speed limit of fifty (50) m.p.h. at the 1600 South railroad crossing. At the time of the collision alleged herein, the Denver & Rio Grande train was traveling at forty nine (49) m.p.h.

90. A train traveling at 49-50 m.p.h. will cover said 137' in about 1.87 seconds. (See paragraph 88 above.)

91. It takes an average driver a minimum of 7.2 seconds to travel from a full stop at the stop sign across the tracks to a point of safety.

92. According to the foregoing speeds and distances, it is mathematically impossible for any driver to safely

Chapter 30. Governmental Immunity Act

63-30-1. Short title.

This act shall be known and may be cited as "Utah Governmental Immunity Act."

63-30-2. Definitions.

As used in this chapter:

(1) "State" means the state of Utah, and includes any office, department, agency, author commission, board, institution, hospital, coll university or other instrumentality of the state;

(2) "Political subdivision" means any cou city, town, school district, public transit dist redevelopment agency, special improvement taxing district, or other governmental subdivi or public corporation;

(3) "Governmental entity" means the state its political subdivisions as defined herein;

(4) "Employee" means any officer, employe servant of a governmental entity, whether or compensated, including student teac certificated in accordance with section 53-2 educational aides, students engaged in provi services to members of the public in the cours an approved medical, nursing, or ot professional health care clinical training prog volunteers and tutors;

(5) "Claim" means any claim or cause of ac for money or damages against a governme entity or against an employee;

(6) "Injury" means death, injury to a per damage to or loss of property, or any other in that a person may suffer to his person, or est that would be actionable if inflicted by a pri person or his agent.

(7) "Personal injury" means an injury of kind other than property damage;

(8) "Property damage" means injury to, or of, any right, title, estate, or interest in real personal property.

63-30-3. Immunity of governmental entities from suit.

Except as may be otherwise provided in chapter, all governmental entities are imm from suit for any injury which results from exercise of a governmental functio governmentally-owned hospital, nursing home, other governmental health care facility, and fr an approved medical, nursing, or oth professional health care clinical training prog conducted in either public or private facilities.

The management of flood waters and construction, repair, and operation of flood storm systems by governmental entities considered to be governmental functions, governmental entities and their officers an employees are immune from suit for any injury damage resulting from those activities.

63-30-4. Act provisions not construed as admission or denial of liability - Effect of waiver of immunity - Exclusive remedy - Joinder of employee - Limitations on personal liability.

(1) Nothing contained in this chapter, unless specifically provided, shall be construed as an admission or denial of liability or responsibility so far as governmental entities or their employee are concerned. If immunity from suit is waived by this chapter, consent to be sued is granted and liability of the entity shall be determined as if the entity were a private person.

EXHIBIT "H"

(2) Nothing in this chapter shall be construed as adversely affecting any immunity from suit which a governmental entity or employee may otherwise assert under state or federal law.

(3) The remedy against a governmental entity or its employee for an injury caused by an act or omission which occurs during the performance of such employee's duties, within the scope of employment, or under color of authority is, after the effective date of this act, exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or the estate of the employee whose act or omission gave rise to the claim, unless the employee acted or failed to act through fraud or malice.

(4) An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee may be held personally liable for acts or omissions occurring during the performance of the employee's duties, within the scope of employment or under color of authority, unless it is established that the employee acted or failed to act due to fraud or malice. 1983

63-30-5. Waiver of immunity as to contractual obligations.

Immunity from suit of all governmental entities is waived as to any contractual obligation and actions arising out of contractual rights or obligations shall not be subject to the requirements of sections 63-30-11, 63-30-12, 63-30-13 or 63-30-19. 1983

63-30-6. Waiver of immunity as to actions involving property.

Immunity from suit of all governmental entities is waived for the recovery of any property real or personal or for the possession thereof or to quiet title thereto, or to foreclose mortgages or other liens thereon or to determine any adverse claim thereon, or secure any adjudication touching any mortgage or other lien said entity may have or claim on the property involved. 1965

63-30-7. Waiver of immunity for injury from negligent operation of motor vehicles - Exception.

Immunity from suit of all governmental entities is waived for injury resulting from the negligent operation by any employee of a motor vehicle or other equipment during the performance of his duties, within the scope of employment, or under color of authority; provided, however, that this section shall not apply to the operation of emergency vehicles as defined by law and while being driven in accordance with the requirements of section 41-6-14. 1983

63-30-8. Waiver of immunity for injury caused by defective, unsafe, or dangerous condition of highways, bridges, or other structures.

Immunity from suit of all governmental entities is waived for injury caused by a defective, unsafe, or dangerous condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct or other structure located thereon. 1965

63-30-9. Waiver of immunity for injury from dangerous or defective public building, structure, or other public improvement - Exception.

Immunity from suit of all governmental entities is waived for any injury caused from a dangerous or defective condition of any public building, structure, dam, reservoir or other public improvement. Immunity is not waived for latent defective conditions. 1965

63-30-10. Waiver of immunity for injury caused by negligent act or omission of employee - Exceptions - Wavier for injury caused by violation of fourth amendment rights.

(1)Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of his employment except if the injury:

(a) arises out of the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused, or

(b) arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, or civil rights, or

(c) arises out of the issuance, denial, suspension, or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization, or

(d) arises out of a failure to make an inspection, or by reason of making an inadequate or negligent inspection of any property, or

(e) arises out of the institution or prosecution of any judicial or administrative proceeding, even if malicious or without probable cause, or

(f) arises out of a misrepresentation by said employee whether or not such is negligent or intentional, or

(g) arises out of or results from riot, unlawful assemblies, public demonstrations, mob violence and civil disturbances, or

(h) arises out of or in connection with the collection of and assessment of taxes, or

(i) arises out of the activities of the Utah National Guard, or

(j) arises out of the incarceration of any person in any state prison, county or city jail or other place of legal confinement, or

(k) arises from any natural condition on state lands or the result of any activity authorized by the state land board.

(2) Immunity from suit of all governmental entities is waived for injury proximately caused or arising out of a violation of protected fourth amendment rights as provided in Chapter 16 of Title 78 which shall be the exclusive remedy for injuries to those protected rights. If section 78-16-5 or subsection 77-35-12(g) or any parts thereof are held invalid or unconstitutional, this subsection (2) shall be void and governmental entities shall remain immune from suit for violations of fourth amendment rights. 1992

63-30-11. Claim for injury - Notice - Contents - Service - Legal disability.

(1) A claim is deemed to arise when the statute of limitations that would apply if the claim were against a private person commences to run.

(2) Any person having a claim for injury against a governmental entity or against an employee for an act of omission occurring during the performance of his duties, within the scope of employment, or under color of authority shall, before maintaining an action, file a written notice of claim with such entity.

(3) The notice of claim shall set forth a brief statement of facts, the nature of the claim asserted, and the damages incurred by the claimant so far as they are known, shall be signed by the person making the claim or such person's agent, attorney, parent or legal guardian, and shall be directed and delivered to the responsible governmental entity in the manner and within the time prescribed in section 63-30-12 or 63-30-13, as applicable.

(4) If, at the time the claim arises, the claimant is under the age of majority, or mentally incompetent and without a legal guardian, or imprisoned, upon application by the claimant and after hearing and notice to the governmental entity the court, in its discretion, may extend the time for service of notice of claim; but in no event shall it grant an extension which exceeds the applicable statute of limitations. In determining whether to grant an extension, the court shall consider whether the delay in serving the notice of claim will substantially prejudice the governmental entity in maintaining its defense on the merits. 1983

63-30-12. Claim against state or its employee - Time for filing notice.

A claim against the state or its employee for an act or omission occurring during the performance of his duties, within the scope of employment, or under color of authority, is barred unless notice of claim is filed with the attorney general and the agency concerned within one year after the claim arises, or before the expiration of any extension of time granted under subsection 63-30-11(4). 1983

63-30-13. Claim against political subdivision or its employee - Time for filing notice.

A claim against a political subdivision or against its employee for an act or omission occurring during the performance of his duties, within the scope of employment, or under color of authority, is barred unless notice of claim is filed with the governing body of the political subdivision within one year after the claim arises, or before the expiration of any extension of time granted under subsection 63-30-11(4). 1983

63-30-14. Claim for injury - Approval or denial by governmental entity or insurance carrier within ninety days.

Within ninety days of the filing of a claim the governmental entity or its insurance carrier shall act thereon and notify the claimant in writing of its approval or denial. A claim shall be deemed to have been denied if at the end of the ninety-day period the governmental entity or its insurance carrier has failed to approve or deny the claim. 1965

63-30-15. Denial of claim for injury - Authority and time for filing action against governmental entity.

If the claim is denied, a claimant may institute an action in the district court against the governmental entity in those circumstances in which immunity from suit has been waived in this chapter. The action must be commenced within one year after denial or the denial period as specified in this chapter. 1983

63-30-16. Jurisdiction of district courts over actions - Application of Rules of Civil Procedure.

The district courts shall have exclusive original jurisdiction over any action brought under this chapter and such actions shall be governed by the Utah Rules of Civil Procedure in so far as they are consistent with this chapter. 1983

63-30-17. Venue of actions.

Actions against the state may be brought in the county in which the claim arose or in Salt Lake County. Actions against a county may be brought in the county in which the claim arose, or in the defendant county, or, upon leave granted by a district court judge of the defendant county, in any county contiguous to the defendant county. Leave may be granted ex parte. Actions against all other political subdivisions including cities and towns, shall be brought in the county in which the political subdivision is located or in the county in which the claim arose. 1983

63-30-18. Compromise and settlement of actions.

A political subdivision, after conferring with its legal officer or other legal counsel if it has no such officer, may compromise and settle any action as to the damages or other relief sought.

The risk manager in the department of administrative services may compromise and settle any claim for damages filed against the state up to and including $10,000 for which the risk management fund may be liable, and may, with the concurrence of the attorney general or his representative and the executive director of the department of administrative services, compromise and settle a claim for damages in excess of $10,000 for which the risk management fund may be liable. 1983

63-30-19. Undertaking required of plaintiff in action.

At the time of filing the action the plaintiff shall file an undertaking in a sum fixed by the court, but in no case less than the sum of $300, conditioned upon payment by the plaintiff of taxable costs incurred by the governmental entity in the action if the plaintiff fails to prosecute the action or fails to recover judgment. 1965

63-30-20. Judgment against governmental entity bars action against employee.

Judgment against a governmental entity in an action brought under this act shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee whose act or omission gave rise to the claim. 1965

63-30-21. Repealed. 1978

63-30-22. Exemplary or punitive damages prohibited - Governmental entity exempt from execution, attachment or garnishment.

No judgment shall be rendered against the governmental entity for exemplary or punitive damages; nor shall execution, attachment or garnishment issue against the governmental entity. 1965

63-30-23. Payment of claim or judgment against state - Presentment for payment.

Any claim approved by the state as defined by subsection 63-30-2(5) or any final judgment obtained against the state shall be presented to the state risk manager, or to the office, agency, institution or other instrumentality involved for payment, if payment by said instrumentality is otherwise permitted by law. If such payment is not authorized by law then said judgment or claim shall be presented to the board of examiners and the board shall proceed as provided in section 63-6-10. 1983

63-30-24. Payment of claim or judgment against political subdivision - Procedure by governing body.

Any claim approved by a political subdivision or any final judgment obtained against a political subdivision shall be submitted to the governing body thereof to be paid forthwith from the general funds of said political subdivision unless said funds are appropriated to some other use or restricted by law or contract for other purposes. 1965

63-30-25. Payment of claim or judgment against political subdivision - Installment payments.

If the subdivision is unable to pay the claim or award during the current fiscal year it may pay the claim or award in not more than ten ensuing annual installments of equal size or in such other installments as are agreeable to the claimant. 1965

63-30-26. Reserve funds for payment of claims or purchase of insurance created by political subdivisions.

Any political subdivision may create and maintain a reserve fund or may jointly with one or more other political subdivisions make contributions to a joint reserve fund, for the purpose of making payment of claims against the co-operating subdivisions when they become payable pursuant to this chapter, or for the purpose of purchasing liability insurance to protect the co-operating subdivisions from any or all risks created by this chapter. 1983

63-30-27. Tax levy by political subdivisions for payment of claims, judgments or insurance premiums.

Notwithstanding any provision of law to the contrary, all political subdivisions shall have authority to levy an annual property tax sufficient to pay any claims, settlements or judgements, or to pay the costs to defend against same, or for the purpose of establishing and maintaining a reserve fund for the payment of such claims, settlements or judgments as may be reasonably anticipated; and there is hereby specifically included any judgment against an elected official or employee of any political subdivision, including peace officers based upon a claim for punitive damages, provided, that the authority of a political subdivision for the payment of such judgments for punitive damages is limited in any individual case to $10,000. It is hereby declared to be the legislative intent that the payments authorized for punitive judgments is money spent for a public purpose within the meaning of this section and Article XIII, section 5 of the Constitution of Utah; or to pay the premium for such insurance as authorized, even though as a result of such levy the maximum levy as otherwise restricted by law is exceeded; provided, that in no event shall such levy exceed one-half mill nor shall the revenues derived therefrom be used for any other purpose than those stipulated herein. 1978

63-30-28. Liability insurance - Purchase or self-insurance by governmental entity authorized - Establishment of trust accounts for self-insurance.

Any governmental entity within the state may purchase commercial insurance, self-insure, or self-insure and purchase excess commercial insurance in excess of the statutory limits of this chapter against any risk created or recognized by this chapter or any action for which a governmental entity or its employee may be held liable.

In addition to any other reasonable means of self-insurance, a governmental entity may self-insure with respect to specified classes of claims by establishing a trust account under the management of an independent private trustee having authority with respect to claims of that character to expend both principal and earnings of the trust account solely to pay the costs of investigation, discovery, and other pretrial and litigation expenses including attorneys' fees, and to pay all sums for which the governmental entity may be adjudged liable or for which a compromise settlement may be agreed upon. The monies and interest earned on said trust fund shall be subject to investment pursuant to the State Money Management Act 51-7-1 to 51-7-2 and shall be subject to audit by the state auditor. Notwithstanding any law to the contrary, the trust agreement between the governmental entity and the trustee may authorize the trustee to employ counsel to defend actions against the entity and its employees and to protect and safeguard the assets of the trust, to provide for claims investigation and adjustment services, to employ expert witnesses and consultants, and to provide such other services and functions necessary and proper to carry out the purposes of the trust. 1983

63-30-29. Repealed. 1983

63-30-29.5. Liability insurance - Government vehicles operated by employees outside scope of employment.

A governmental entity that owns vehicles driven by employees of the governmental entity with the express or implied consent of the entity, but which, at the time liability is incurred as a result of an automobile accident, is not being driven and used within the course and scope of the driver's employment is deemed to provide the driver with the insurance coverage required by Chapter 41, Title 31, and is deemed to provide liability coverage by the governmental entity in accordance with the requirements of the Safety Responsibility Act (section 41-12-1 et. seq.). In no event, however, shall the limits of the liability coverage provided under this subsection be deemed to exceed the minimum bodily injury and property limits specified in section 41-12-5. 1983

63-30-30. Repealed. 1978

63-30-31. Liability insurance - Construction of policy not in compliance with act.

Any insurance policy, rider or endorsement hereafter issued and purchased to insure against any risk which may arise as a result of the application of this chapter, which contains any condition or provision not in compliance with the requirements of the chapter, shall not be rendered invalid thereby, but shall be construed and applied in accordance with such conditions and provisions as would have applied had such policy, rider or endorsement been in full compliance with this chapter, provided the policy is otherwise valid. 1983

63-30-32. Liability insurance - Methods for purchase or renewal.

No contract or policy of insurance may be purchased or renewed under this chapter except upon public bid to be let to the lowest and best bidders; except that the purchase or renewal of insurance by the state shall be conducted in accordance with the provisions of sections 63-56-1 through 63-56-73. 1983

63-30-33. Liability insurance - Insurance for employees authorized - No right to indemnification or contribution from governmental agency.

A governmental entity may insure any or all of its employees against liability, in whole or in part, for injury or damages resulting from an act or omission occurring during the performance of an employee's duties, within the scope of employment, or under color of authority, regardless of whether or not said entity is immune from suit for said act or omission, and any expenditure for such insurance is for a public purpose. The insurer under any contract or policy of insurance pursuant to this section shall have no right to indemnification or contribution from the governmental entity or its employee with respect to any loss or liability covered by the contract or policy. 1983

63-30-34. Limitation of judgments against governmental entity or employee - Insurance coverage exception.

(1) Subject to the provisions of subsection (3), if a judgment for personal injury against a governmental entity, or an employee whom a governmental entity has a duty to indemnify, exceeds $250,000 for one person in any one occurrence, or $500,000 for two or more persons in any one occurrence, the court shall reduce the judgment to that amount.

(2) Subject to the provisions of subsection (3), if a judgment for property damage against a governmental entity, or an employee whom a governmental entity has a duty to indemnify, exceeds $100,000 in any one occurrence, the court shall reduce the judgment to that amount.

(3) If a governmental entity has secured insurance coverage in excess of the amounts set forth in subsections (1) and (2), the court shall reduce the amount of the judgment or award to a sum equal to the applicable limits of the insurance coverage. 1983

63-30-35. Comprehensive liability plan - Providing coverage - Expenses of attorney general in representing state or employees.

(1) After consultation with appropriate state agencies, the risk manager in the department of administrative services shall provide a comprehensive liability plan, with limits not lower than those set forth in section 63-30-34, which will protect the state and its indemnified employees from claims and liability. Deductibles and maximum limits of coverage shall be determined by the risk manager in consultation with the director of administrative services.

(2) The risk manager may expend funds from the risk management fund established in section 63-1-47, to procure and provide coverage to all state agencies and their indemnified employees, except those specifically exempted by law, and shall apportion the cost of such coverage in accordance with section 63-1-47. Unless specifically authorized by statute to do so, including subsection 63-1-47(9), no agency other than the risk manager may procure or provide liability insurance for the state.

(3) Notwithstanding the provisions of section 67-5-3 or any other provision of this code, the state attorney general may bill the department of administrative services for all costs and legal fees expended by the attorney general, including attorneys' and secretarial salaries, in representing the state or any indemnified employee against any claim for which the risk management fund may be liable and in advising state agencies and employees regarding such claims. The risk manager shall draw funds from the risk management fund for this purpose. 1983

63-30-36. Defending government employee - Request - Cooperation - Payment of judgment.

(1) Before a governmental entity may defend its employee against a claim, the employee must make a written request to the governmental entity to defend him and must make it within ten days after service of process upon him or within such longer period as would not prejudice the governmental entity in maintaining a defense on his behalf, or conflict with notice requirements imposed on the entity in connection with insurance carried by the entity relating to the risk involved. If the employee fails to make a request or fails to reasonably cooperate in the defense, the governmental entity is not required to defend or continue to defend the employee, nor pay any judgment, compromise, or settlement against the employee in respect to the claim.

(2) If a governmental entity conducts the defense of an employee, the governmental entity shall pay any judgment based upon or any compromise or settlement of the claim except as provided in subsection (3).

(3) A governmental entity may conduct the defense of an employee under an agreement with the employee that the government entity reserves the right not to pay the judgment, compromise, or settlement unless it is established that the claim arose out of an act or omission occurring during the performance of his duties, within the scope of his employment, or under color of authority. 1983

63-30-37. Recovery of judgment paid and defense costs by government employee.

(1) Subject to subsection (2), if an employee pays a judgment entered against him, or any portion of it, which the governmental entity is required to pay under section 63-30-36, the employee is entitled to recover the amount of such payment and the reasonable costs incurred in his defense from the governmental entity.

(2) If a governmental entity does not conduct the defense of an employee against a claim, or does conduct the defense under an agreement as provided in subsection 63-30-36(3), the employee may recover from the governmental entity under subsection (1) if:

(a) The employee establishes that the act or omission upon which the judgment is based occurred during the performance of his duties, within the scope of his employment, or under color of authority, and that he conducted the defense in good faith; and

(b) The governmental entity does not establish that the injury or damage resulted from the fraud or malice of the employee. 1983

63-30-38. Indemnification of governmental entity by employee not required.

If a governmental entity pays all or part of a judgment based on or a compromise or settlement of a claim against the governmental entity or an employee, the employee may not be required to indemnify the governmental entity for the payment. 1983

1984 JUL 26 PM 4:55

WILLIAM F. HUISH, CLERK
BY _____ DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

IN AND FOR UTAH COUNTY, STATE OF UTAH

ROBERT L. GLEAVE, Plaintiff, vs. THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, a corporation, UTAH RAILWAY COMPANY, a corporation, GERALD H. BURTON, an individual, CITY OF SPRINGVILLE, a municipal corporation, and STATE OF UTAH, DEPARTMENT OF TRANSPORTATION, Defendants.	AFFIDAVIT OF EDNA ARGYLE Civil No. 62912

STATE OF UTAH)
) ss:
COUNTY OF UTAH)

I, Edna Argyle, being first duly sworn, do say:

1. I was a member of the jury in the above-entitled case.

2. To the best of my recollection, during the questioning of prospective jurors, when counsel mentioned the witnesses to be called. Dr. John Mendenhall was not named as a prospective witness.

EXHIBIT "I"

3. I have had medical services provided to me by Dr. Mendenhall, including the implantation of artificial knees.

4. The first time that I knew that Dr. Mendenhall was to be a witness for Plaintiff was when Dr. Mendenhall was called to the stand.

5. I recognized the Doctor, but I did not inform the Court or the attorneys that I knew the Doctor and had been treated by him.

6. I did inform members of the jury of my medical experience with Dr. Mendenhall prior to the verdict being returned.

edna Argyle
Edna Argyle

Subscribed and sworn to before me this 23rd day of June, 1984.

Notary Public
Residing at: Salt Lake City, Utah

My Commission Expires:

September 23, 1987

800

STATE OF UTAH

-80 # INVESTIGATING OFFICER'S REPORT OF TRAFFIC ACCIDENT

DO NOT WRITE IN THIS SPACE

TIME

DATE OF ACCIDENT: 04 / 16 / 82 (Month / Day / Year) — DAY OF WEEK: 1 2 3 4 5 6 7 / M T W Th F S S — MILITARY TIME: 0613C

LOCATION

PLACE WHERE ACCIDENT OCCURRED: County UTAH 49 City or town SPRINGVILLE

If accident was outside city limits, indicate distance from city limits or nearest town ____ miles ☐N ☐E ☐S ☐W of ____ City or town

ROAD ON WHICH ACCIDENT OCCURRED: 1600 SOUTH

Give name of street or highway number

1 - AT ITS INTERSECTION WITH ____ Name of intersecting street or highway number

2 - IF NOT AT INTERSECTION 500 feet ☐N ☐S ☐E ☒W of 500 EAST MAIN STREET — Nearest intersection street, house no., landmark

☐N ☐S ☐E ☐W of milepost ____ hundredth of a mile — BE SURE TO COMPLETE IF ROAD HAS MILEPOSTS

STATE/LOCAL

☐ Traffic Accident ☐ Non-Traffic Accident

ACCIDENT SEVERITY: 4 (1 - Damage only; 2 - Possible Injury; 3 - Non-incapacitation; 4 - Incapacitating; 5 - Fatal)

FIRST HARMFUL EVENT: 3 — SUBSEQUENT EVENT: ☐ ☐ ☐ (1 - Pedestrian; 2 - Other motor vehicle; 3 - Train; 4 - Bicycle; 5 - Animal; 6 - Fixed object; 7 - Other object; 8 - Overturned on road; 9 - Ran off road; 10 - Other non-collision)

If accident involved more than 2 motor vehicles, pedestrian, bicycle, animal, fixed object attach supplement [Form SR-9A]

2 TOTAL NUMBER VEHICLES INVOLVED

VEHICLE 1

Year	Make	Model	Body Style/Type	Code	Commercial Vehicle (Reg. 12,000 lbs. or more)	Description of cargo	Reg. weight of vehicle
1975	CHEV	MONZA	2DR	02	Interstate ☐ Intrastate ☐		

Accident Release Sticker #	License Plate Info: Year	Month	State	Number	Parts damaged	Removal Authority
50[illegible]	82	04	UT	Y96407 (Temp)	01	3

Removal Authority: 1 - Owner; 2 - Driver; 3 - Officer; 4 - Occupant; 5 - Other; 6 - N/A

Vehicle Identification Number	Valid Safety Inspection	Disposition of Vehicle	Cost of Repair
3785Z123353	1 (1 - Yes; 2 - No)	MERCY'S GARAGE SPRINGVILLE UT	$ TOTAL

	Full name	Street, City, State	Years Drive Exp.	Driver Education
OWNER	ROBERT L. GLEANE	Box 712 SALEM UT 84653		
DRIVER	ROBERT L GLEANE	Box 712 SALEM UT 84653	1	

Driver Education: 1 - Public; 2 - Comm'l; 3 - None; 4 - Unkn

Driver's License	State	Number	Type (1 - Regular; 2 - Chauffeur; 3 - Motorcycle; 4 - Restricted)	Specify Restrictions	Date of Birth (Month Day Year)	Age	Sex	Safe Equip.	Injury: Type	Injury: Cause	Injury: Area	Ejection	Through what area ejected?
	UT	4089640	1		02 05 43	39	M	3	4	9	8	3	DRIVER SIDE

OCCUPANTS:

	Name	Address	Age	Sex	Safe Equip.	Injury: Type	Injury: Cause	Injury: Area	Ejection	Through what area ejected?
1 Center										
1 Right										
Left										
Center 1										
Center 2										
Right										

VEHICLE 2

Year	Make	Model	Body Style/Type	Code	Commercial Vehicle (Reg. 12,000 lbs. or more)	Description of cargo	Reg. weight of veh.
	DIESEL	ENGINE		21	Interstate ☐ Intrastate ☐		

Accident Release Sticker #	License Plate Info: Year	Month	State	Number	Parts damaged	Removal Authority
						3

Removal Authority: 1 - Owner; 2 - Driver; 3 - Officer; 4 - Occupant; 5 - Other; 6 - N/A

Vehicle Identification Number	Valid Safety Inspection	Disposition of Vehicle	Cost of Repair
30785	1 (1 - Yes; 2 - No)		$ 200.00

	Full name	Street, City, State	Years Drive Exp.	Driver Education
OWNER	DENVER & RIO GRANDE WESTERN RAILRD.			
DRIVER	GERALD H. BURTON (TRAIN ENGINEER)	7253 So. 580 EAST MIDVALE UT	1	

Driver Education: 1 - Public; 2 - Comm'l; 3 - None; 4 - Unkn.

Driver's License	State	Number	Type (1 - Regular; 2 - Chauffeur; 3 - Motorcycle; 4 - Restricted)	Specify Restrictions	Date of Birth (Month Day Year)	Age	Sex	Safe Equip.	Injury: Type	Injury: Cause	Injury: Area	Ejection	Through what area ejected?

OCCUPANTS (CONDUCTOR)

	Name	Address	Age	Sex	Safe Equip.	Injury: Type	Injury: Cause	Injury: Area	Ejection	Through what area ejected?
Center	C.E. CONNORS	527 JEREMY ST. S.L.C. 84-1355								
Right										
Left										
Center 1										
Center 2										
Right										

EHXIBIT "J"

DEFENDANT'S EXHIBIT NO. 34

1 - Manufacturing or industrial
2 - Shopping or business
3 - Residential
4 - School
5 - Farms and Fields
6 - Open Country

1 - Officer or watchman
2 - Flagman
3 - Traffic signal
4 - Traffic signal-flashing
5 - Stop sign
6 - Yield sign
7 - RR gates or signal
8 - Specify other

9 - No control present

DRIVER 1: 05 DRIVER 2: 00

Driver 1 2

00 ☐ ☐ Did not contribute
01 ☐ ☐ Speed too fast
02 ☐ ☐ Failed to yield right of way
03 ☐ ☐ Drove left of center
04 ☐ ☐ Improper overtaking
05 ☐ ☐ Passed stop sign
06 ☐ ☐ Disregarded traffic signal
07 ☐ ☐ Followed too closely
08 ☐ ☐ Made improper turn
28 ☐ ☐ DUI (alcohol)

Driver 1 2

09 ☐ ☐ Had been drinking
10 ☐ ☐ Under the influence of drugs
11 ☐ ☐ Eyesight defective-uncorrected
12 ☐ ☐ Asleep
13 ☐ ☐ Fatigued
14 ☐ ☐ Ill
15 ☐ ☐ Improper parking
16 ☐ ☐ Improper lookout
17 ☐ ☐ Failed to signal
18 ☐ ☐ Other improper driving

Driver 1 2

19 ☐ ☐ Brakes defective
20 ☐ ☐ Headlights insufficient or out
21 ☐ ☐ Headlights glaring
22 ☐ ☐ Other lights or reflectors defective
23 ☐ ☐ Steering mechanism defective
24 ☐ ☐ Tires defective
25 ☐ ☐ Windshield not clear
26 ☐ ☐ Other defective condition of vehicle
27 ☐ ☐ Hit and Run
30 ☐ ☐ Non-collision (Fire)
31 ☐ ☐ Collision (Fire)
40 ☐ ☐ Stolen

ROAD SURFACE: 1

1 - Dry
2 - Wet
3 - Muddy slippery
4 - Snowy slippery
5 - Icy

ROAD CHARACTER: 2

1 - Straight-level
2 - Straight-grade
3 - Straight-Hillcrest
4 - Curve-level
5 - Curve-grade
6 - Curve-hillcrest

LIGHT CONDITION: [ ]

1 - Daylight
2 - Dawn or dusk
3 - Dark-no street lights
4 - Dark-Street lights

WEATHER: [ ]

1 - Clear or cloudy
2 - Raining
3 - Snowing
4 - Fog
5 - Dust

ALCOHOL TEST: Veh.1: 1 Veh.2: 1 Ped:

1 - No Test
2 - Blood
3 - Breath
4 - Other
5 - Unknown
6 - Refused
7 - Post Mortem

DIRECTIONAL ANALYSIS

Veh. 1: 5
Veh. 2: 5

DIRECTION PRIOR TO TURNING
1 - N
2 - S
3 - E
4 - W
5 - N/A

ALCOHOL TEST RESULTS

Veh. 1 - Veh. 2 - Ped.

COLLISION TYPE: 11

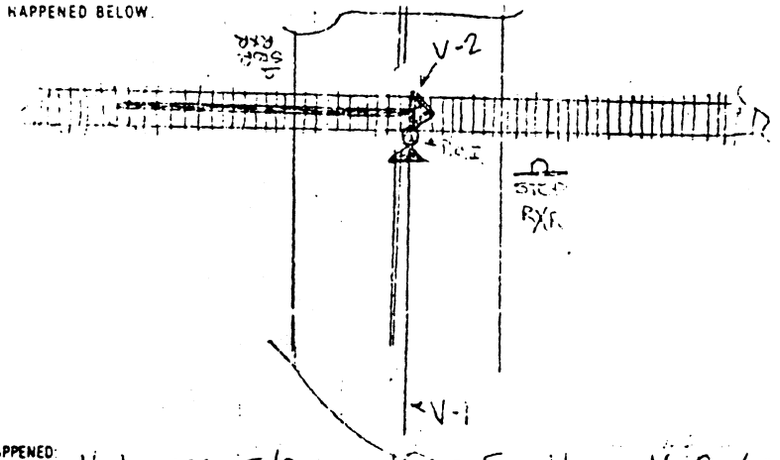
01 02 03 04 05 06 07 08 09 10 11 12 13 14 15 16 - OTHER 17 - SINGLE VEH. 18 - BACKING

Driver intent prior to accident

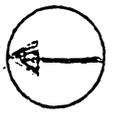
Driver: 01 1 01

01 Go straight ahead
02 Overtake
03 Make right turn
04 Make left turn
05 Make U turn
06 Slow or stop
07 Start in traffic lane
08 Start from parked position
09 Back
10 Remain stopped in traffic lane
11 Remain parked

RAM WHAT HAPPENED BELOW.



INDICATE DIRECTION OF NORTH



	Vehicle 1	2
Travel Speeds	05	01
Impact Speeds	02	01
Posted Speeds	00	51

BE WHAT HAPPENED: (Vehicles by Number) V-1 WAS E/B ON 1600 South, V-2 (A DIESEL FREIGHT TRAIN) WAS E/B ON TRACKS APPROX 500 FT EAST OF SOUTH MAIN ST. V-1 STOPPED FOR STOP SIGN FAILED TO SEE V-2 (V-2 APPEAR STEADY SPEED) UNTIL COLLISION UNAVOIDABLE. V-1 STOPPED ATTEMPTED TO BACK OUT OF V-2's PATH, UNSUCCESSFULLY. D-1 CAUSED COLLISION BY FAILURE TO STOP FOR POSTED SIGN & IMPROPER LOOKOUT.

SES

Address

Address

FIRST AID ADMINISTERED BY

6 - Private Individual
7 - Hospital
8 - Helicopter Personnel
9 - None Administered
0 - Unknown

EMS REPORT NO. 249724

EMS REPORT NO

INJURED TAKEN BY: 2

1 - Ambulance, Private
2 - Ambulance, Police
3 - Paramedics
4 - Private Vehicle
5 - Other

INJURED TAKEN TO: MTN. VIEW HOSPITAL, PAYSON

ACTIVITY: 04 16 82 Date Notified of Accident (Month Day Year)

(USE MILITARY TIME) 0631 Time Notified of Accident

0639 Arrived at Scene

Investigation of accident completed at 0755 of [X] the same day [ ] the ____ day following

SOURCE OF INFORMATION (Officer at scene, No. 1 Driver contacted station, etc.): OFFICER AT SCENE

PHOTO(S) TAKEN: 1 (1 - Yes 2 - No)

Charge

Charge

ion taken:

IERE: D (Unit #9) LEO #1 SPRINGVILLE PD 04 16 [illegible]

Officer's rank and name | Supervisor Approval | Badge # | Department | Date of report

that report be forwarded to Dept. of Public Safety within 5 days following completion of the investigation. Mail ORIGINAL OF REPORT TO

SPRINGVILLE CITY POLICE DEPARTMENT

NARRATIVE REPORT PAGE # 1

DATE AND TIME THIS REPORT	TYPE OF REPORT
16APR82 0630hrs.	T/C

82-379

16APR82 0630hrs. I was dipatched to a "possible train vehicle" collision, location unk. at the "south end of town" and "around 700 South." I checked the area of 700 South and 800 South Main St. and was then directed to the railroad yard on 400 West. As I checked that location, the actual location was relayed to me as 1600 South Main st.. Upon arrival I confirmed need for an ambulance with dispatch and attended to the driver (injured party). Driver was conscious and seemed rational inspite of his injuries. I obtained information as to identity of driver and then asked him what had happened. Driver, Robert Gleave, gave me the following information: Driver was E/B on 1600 South. He stated that he "slowed down" at the stop sign and looked to the south. He did not see any train. He then turned to look north. When he did he saw the train "right on top of" him. He said that he tried evasive action (stopping and backing) but was unable to avoid collision. Driver did not know how he was ejected from the vehicle. Ambulance personnel then arrived and attended to Driver.

I then contacted the conductor, C.E. Connors, who gave the following information to me: The train (owned and operated by Denver and Rio Grande Western Railroad) was on an eastbound route (south bound at the point of impact) at approx. 50 (fifty) miles per hour. As they approached the intersection of 1600 South, they observed the vehicle (V-1) pull out too far into the intersection before stopping, and into the path of their train. The train was a 33 (thirty three) car diesel which was running emptv at the time.

The following measurements were taken at the scene: Width of total roadway at intersection with RR tracks--21'5" . Distance from south edge of roadway to approx. POI--7'9". Distance POI to POR--29'0". Distance veh to tracks approx.3'. Driver was located between the veh. and the tracks.

OFFICER'S	BADGE(S)	APPROVED BY

SPRINGVILLE CITY POLICE DEPARTMENT

NARRATIVE REPORT PAGE # 2

DATE AND TIME THIS REPORT	TYPE OF REPORT
16APR82 0630hrs.	T/C

82-379

Driver was transported by ambulance to Mountain View Hospital, with multiple injuries to torso, head, leg (area of left knee) and left foot.

Vehicle, a 1975 Chev Monza appeared to be totaled. all windshields and side windows appeared in tact with the exception of the drivers side window which was down (probable point of ejection.)

Unknown at time of report whether the train engineer had activated his horn as audible signal as he was approaching the intersection.

OFFICER(S)	BADGE(S)	APPROVED BY

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

CHARLES HARSIN, Plaintiff, vs. THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Defendant.	ORDER STATING UNCONTESTED AND CONTESTED FACTS AND GRANTING PARTIAL SUMMARY JUDGMENT IN FAVOR OF DEFENDANT Civil No. C-83-0993W

I.

INTRODUCTION

This is an action by plaintiff against defendant for injuries sustained by plaintiff when he collided with defenant's stationary train at a railroad crossing at Ogden, Utah. Defendant The Denver and Rio Grande Western Railroad Company's Motion for Summary Judgment and Partial Summary Judgment came on regularly for hearing before the Honorable David K. Winder, Monday, January 7, 1985 at 10:00 a.m. Plaintiff Charles A. Harsin was represented by Richard W. Campbell. Defendant was represented by Alan L. Sullivan and Patrick J. O'Hara. Since the Court is not going to grant judgment on the whole case, this Order is entered pursuant to Rule 56(d), F.R.C.P.

II.

UNCONTESTED FACTS

Having reviewed the pleadings, depositions, answers to interrogatories, together with the uncontested facts stated in the Pretrial Order and Affidavits and Memorandum filed by defendant in support of its Motion for Summary Judgment and Partial Summary Judgment, the Court finds that there is no genuine issue as to the following material facts:

1. At or about 3:55 a.m. on June 28, 1979, plaintiff Charles Harsin was driving east along 21st Street at Ogden, Utah on a 1973 Harley-Davidson Motorcycle, Sprint Model.

2. At the time of the accident, it was dark, the weather was clear, and the surface of the road was level.

3. The Rio Grande's track crosses 21st Street at a point approximately one block west of Wall Street at Ogden.

4. On the morning of the accident a standard black and white railroad "crossbuck" sign was located about 36 feet west of the west rail of the track; a white line was painted across all three lanes of 21st Street at a distance of about 36 feet west of the west rail; one standard round yellow and black railroad crossing advance warning sign was located about 200 feet west of the crossing and another standard round yellow and black railroad crossing advance warning sign was located about 611 feet west of the crossing. Three large white "railroad

crossing" pavement markings were located about 181 feet west of the crossing and two more large white "railroad crossing" pavement markings were located about 611 feet west of the crossing.

5. Plaintiff definitely knew that he was approaching the railroad crossing on the morning of the accident because he had gone across the crossing at least once a day for approximately three years before June 1979.

6. Plaintiff collided with the side of the Rio Grande's stationary engine at the 21st Street crossing.

7. Plaintiff filed his Complaint against the Rio Grande on or about June 24, 1983.

III.

CONTESTED ISSUES OF FACT

The following material facts are in good faith controverted by the parties and shall be reserved for trial:

1. At the time of the accident, what Rio Grande lights were operating?

2. At the time of the accident, was the train bell ringing?

3. At the time of the accident, was plaintiff travelling too fast under the circumstances to stop in time to prevent the collision?

IV.

PARTIAL SUMMARY JUDGMENT

Having fully considered the foregoing uncontested facts and the applicable law, IT IS HEREBY ORDERED:

1. Partial Summary Judgment is entered in favor of defendant and against plaintiff that, to the extent that plaintiff's complaint alleges that defendant was negligent in not installing additional or different signs, lights, or other traffic control devices at the 21st Street railroad crossing, said allegations are dismissed with prejudice as a matter of law because the authority for installing signs, lights, or other traffic control devices at railroad crossings within Utah is exclusively vested in agencies of the State of Utah. Utah Code Ann. § 54-4-15, 54-4-15.1, 54-4-15.3 (1953, as amended). As a matter of law, therefore, defendant had no duty to install additional or different traffic warning devices at the 21st Street railroad crossing.

2. Partial Summary Judgment is entered in favor of defendant and against plaintiff that the 21st Street railroad crossing is not an extrahazardous crossing.

3. Partial Summary Judgment is entered in favor of defendant and against plaintiff with respect to any allegations in plaintiff's Complaint that defendant is liable to plaintiff for negligently causing damage to plaintiff's personal

property. As a matter of law, Utah Code Ann. § 78-12-26(2) (1953, as amended) requires that an action for negligent damage to personal property be brought within three years after the cause of action arises. Since plaintiff's Complaint was filed more than three years after the accident described in plaintiff's Complaint, plaintiff is barred from making any claim at trial for damage to his personal property.

The Court is of the opinion that it is not appropriate to enter complete summary judgment on the whole case because there are contested issues of fact regarding the extent of plaintiff's negligence and as to what Rio Grande lights were burning and whether the train bell was ringing.

ENTERED this 11th day of January, 1985.

BY THE COURT:

District Judge
David K. Winder

INSTRUCTION NO. 25

The evidence in this case has shown that Mr. Gleave was not wearing his seat belt at the time of the collision, although his vehicle was equipped with seat belts. If you find from a preponderance of the evidence that Mr. Gleave's damages would have been less severe if he had been wearing a seat belt at the time of the accident, then you are instructed to reduce the amount of damages, if any, that you award to Mr. Gleave in an amount equal to the extent that Mr. Gleave's damages would have been avoided had Mr. Gleave worn his seat belt.

EXHIBIT "L"

INSTRUCTION NO. 29

One of the interrogatories that the jury will have to answer in the Special Verdict is whether the Utah Department of Transportation was negligent, and if so, whether that negligence was the proximate cause of Mr. Gleave's injuries. If the jury does attribute negligence to the Department of Transportation, a related interrogatory that the jury will have to answer is to what extent (expressed as a percentage) did the Department of Transportation's negligence contribute to Mr. Gleave's injuries. It is necessary for the jury to answer the interrogatories about the percentage of negligence, if any, attributable to the Utah Department of Transportation because the jury may not hold the Rio Grande, Utah Railway or the City of Springville responsible for the Department of Transporation's errors and omissions, if any, regarding the geometic design of the 1600 South crossing and/or the adequacy of the traffic safety devices at the 1600 South crossing.

EHXIBIT "M"

LAW OFFICES OF
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POST OFFICE BOX 3400
84110-3400

March 3, 1984

Mr. Willis J. Woodard, #16623
P.O. Box 250
Draper, Utah 84020

Re: Your deposition in Gleave v. The Denver and Rio Grande Western Railroad Company, et al. Civil No. 62912.

Dear Willis:

With regard to the above-referenced matter, I have received from Cameron Hansen two similar but different handwritten notes which contain proposed "changes" to your sworn deposition testimony.

Your notes are troublesome because they appear to suggest that your testimony may depend upon whether the Railroad will rehire you after you are released from prison. Neither you nor the Railroad can permit such an inference. Your testimony must be the truth -- nothing more, nothing less.

The possibility of your return to the Railroad will in no way be affected by your testimony in this case -- so long as you tell the truth. The Railroad cannot promise you employment if you testify in a manner favorable to the Railroad and it will not refuse you employment just because your testimony might be unfavorable.

At your deposition you were sworn to tell the truth the whole truth and nothing but the truth. Because of this, the testimony you gave at that time was given under penalty of

EHXIBIT "N"

perjury. The "changes" which you indicate that you will send to opposing counsel only if you do not hear from Mr. Hansen, both differ from what you testified to earlier, and, in some instances, do not even relate to the same material addressed by the question and your original answer. Moreover, the "changes" you suggest in your second note differ from the same "changes" in your first note. I simply cannot accept these as legitimate changes to your deposition when they are transmitted under conditions that suggest they are only to be made if the Railroad doesn't guarantee you employment when you get out of prison.

If your original testimony was true and complete as given, you change it only by committing perjury. On the other hand, if your original testimony was not true or complete, you must change it to make it so, regardless of the consequences.

Please let either me or Cameron Hansen know what you desire to do with respect to this testimony. It is my understanding that you already have a copy of your deposition. If not, let me know and I can get you another copy. Also, I am providing proper forms for changing your deposition, should you decide to make any changes.

Very truly yours,

E. Scott Savage

ESS/mje

Enclosures

Name: W. J. McCLURE
#16623
P.O.BOX 250
DRAPER, UTAH 84020
DATE: Feb 15, 1984

Included are changes To be made in Depostion # 62912 after careful consideration. After 10 yrs of faithful service To the DRGW RR my interest are to take care of my personal problems and get back to work. I hope to hear from you within a week. If I don't within this 30 day period I will have my people send a copy of changes To the Robert De Bay Ass

Instruction No. 13

Under Utah law the ultimate determination regarding right of way and crossing design and crossing warning and safety devices is placed under the control of the Utah Department of Transportation. You may not therefore find either defendant railroad negligent based upon any defects which might exist with respect to the design of the 1600 South crossing or based upon any problems you may perceive in the lack of traffic warning devices at the 1600 South crossing.

However, irrespective of the foregoing, the defendant Denver & Rio Grande Western Railroad is not relieved of any responsibility to exercise due care when its trains approach such crossing. Consequently, if you find that the configuration of the land and other physical features in the area make such crossing more than ordinarily hazardous and that the warning devices employed at the crossing were inadequate to warn the public of the danger, you shall determine whether the defendant Denver & Rio Grande Western Railroad knew of or should have known of such condition and whether it exercised due care in view of all the circumstances. The failure to exercise due care under such conditions would constitute negligence.

EXHIBIT "O"

Instruction No. 4

The claims of the parties are as follows:

PLAINTIFF'S CLAIMS

(a) That the defendant Denver & Rio Grande Western Railroad failed to give a sufficient and reasonable audible warning that the train was approaching the 1600 South Crossing.

(b) That the defendant Denver & Rio Grande Western Railroad failed to use reasonable caution in approaching the 1600 South crossing taking into consideration the physical features affecting visability at such crossing.

(c) That defendant Denver & Rio Grande Western Railroad and defendant Utah Railway failed to remove plants and shrubs from the railroad right-of-way which obstructed the plaintiff's view of any train approaching the 1600 South crossing.

DEFENDANTS DENVER & RIO GRANDE WESTERN RAILROAD AND UTAH RAILWAY CLAIM

The defendants Denver & Rio Grande Western Railroad and Utah Railway deny the claims of plaintiff and allege that plaintiff was himself negligent in failing to maintain a proper lookout and in failing to yield the right-of-way to the train.

EXHIBIT "P"

Instruction No. 4 (cont'd)

The foregoing is merely a general statement of what the indicated parties claim against each other and is not intended to indicate what facts may or may not have been established by the evidence.

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Jeffrey E. Nelson
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IN THE UNITED STATES DISTRICT COURT IN AND FOR THE

DISTRICT OF UTAH, CENTRAL DIVISION

LeANN D. BELLON, LAIRD BELLON, ANGELEE BELLON, by her Guardian Ad Litem Laird Bellon, and JESS LAIRD BELLON, Deceased, by the Personal Representative of his estate, Laird Bellon, Plaintiffs, - vs - THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Defendant.	ORDER GRANTING PARTIAL SUMMARY JUDGMENT Civil No. C83-0888A

The defendant's Motion for Partial Summary Judgment came on for hearing before the Court at 9:30 A.M. on August 30, 1984. The defendant was represented by E. Scott Savage and Jeffrey E. Nelson, and the plaintiffs were represented by Ray M. Harding and Greg W. Stephens. The Court considered the memoranda and evidence proffered by the parties and heard oral argument.

The Court, being fully advised, finds that the Utah State Legislature has vested state agencies with the exclusive authority

EXHIBIT "Q"

to determine and prescribe the type of warning signs, lights, and other traffic control devices for public railroad crossings within the State of Utah. For this reason, the Court is of the opinion that the Railroad cannot be found negligent for failing to install control devices different from those which existed at the subject crossing on the day of the accident. The Court, however, cannot determine at this time that the plaintiff, LeAnn D. Bellon, was contributorily negligent as a matter of law.

THEREFORE, IT IS HEREBY ORDERED that defendant's Motion for Partial Summary Judgment is granted with respect to the plaintiffs' claim of negligence in regard to the implementation of crossing protection; and the defendant's Motion for Partial Summary Judgment on the issue of plaintiff LeAnn D. Bellon's contributory negligence is denied at this time.

DATED this 8 day of Sept, 1984.

BY THE COURT:

ALDON J. ANDERSON
Federal District Court Judge

APPROVED AS TO FORM:

HARDING & HARDING

By
RAY M. HARDING
Attorneys for Plaintiffs

Copies mailed 9/10/84:dp
Ray M. Harding, Esq.
Jeffrey E. Nelson, Esq.

VAN COTT, BAGLEY, CORNWALL & McCARTHY
E. Scott Savage
Paul M. Durham
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Suite 1600, 50 South Main Street
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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, a Delaware corporation, Plaintiff, vs. WEST JORDAN MUNICIPAL CORPORATION, et al., Defendants.	FINDINGS OF FACT AND CONCLUSIONS OF LAW Civil No. C-82-0344J

Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, the Court enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff, The Denver & Rio Grande Western Railroad Company, is a corporation organized pursuant to the laws of the State of Delaware and having its principal place of business in the State of Colorado.

2. Defendant, West Jordan Municipal Corporation, is a municipal corporation organized under the laws of the State of Utah with its principal place of business in the State of Utah.

3. Defendant, Dennis M. Randall, is a citizen of the State of Utah and mayor of the City of West Jordan.

4. Defendant, Allan G Tolman, is a citizen of the State of Utah and manager of the City of West Jordan.

5. Defendants, Sherr Monson, Chris Buttars, Betty Naylor, and Howard Barben, are citizens of the State of Utah and members

EXHIBIT "R"

of the West Jordan City Council.

6. The matter in controversy herein exceeds, exclusive of interest and costs, the sum of $10,000.

7. Plaintiff is engaged in business as a common carrier by rail in interstate commerce.

8. During the month of February or March, 1982, defendants caused to be enacted an ordinance designated as sections 6-7-101 and 6-7-102 of the West Jordan Municipal Code (hereinafter the "ordinance") which provided as follows

> 6-7-101 WARNING AND SIGNAL DEVICES REQUIRED AT RAILROAD GRADE CROSSINGS
>
> At every location where the railroad track crosses a street, highway or other roadway utilized by vehicular traffic, the company or corporation operating such railroad shall install the appropriate signal or warning devices and lights, of a type specified by the Utah Department of Transportation.
>
> 6-7-102 FLAG OR GATES REQUIRED
>
> (a) At every location where a railroad track crosses a street, highway or other roadway and where there are not signal or warning devices as required by Section 6-7-101, above, the railroad company or corporation operating the said train shall provide two flagmen, one on each side of the grade crossing, to warn oncoming vehicular traffic of the approaching train. Said flagmen shall position themselves on each side of the grade crossing at the approach of the train where such train is so close as to constitute an immediate hazard to vehicular traffic and shall remain so positioned until the train has cleared the grade crossing. Each flagman shall be equipped with a flag at least 16" square. In times of darkness, the flagman shall be equipped with a red lantern capable of being visible under normal atmospheric condition for a distance of 500'. In the alternative, the railroad company or corporation may elect to install gates which will be lowered upon approach of the train and which will remain lowered while the train is within the grade crossing. Said gates shall extend completely across the traffic lanes of that portion of the roadway and shall be constructed to also impede the passage of pedestrians and other nonvehicular traffic across the grade crossing. The gates shall be of a type and size to be readily visible in the lowered position at a distance of 500' under normal atmospheric conditions. At night, the gates shall contain on each side at least two red warning lights visible at a distance of 500'.

(b) The requirements of subsection (a), above, shall be in addition to any other legal requirements concerning the sounding of a whistle or bell upon approach to such grade crossing.

(c) The engineer operating such train and the company or corporation operating such railroad shall both be guilty of a class B misdemeanor if the train crosses said grade crossing and such flagmen or gates are not so positioned, unless there are the warning devices required under Section 6-7-101, above

9. All of the crossings affected by the above ordinance are crossings of a right-of-way which plaintiff acquired from the Bingham Canyon and Camp Floyd Railroad in approximately 1881. The railroad tracks have existed continually on this right-of-way since 1883, and the existence of the line of track pre-dates most of the city streets which now cross it within the boundary of the City of West Jordan

10. The population of the City of West Jordan and its surrounding communities has increased substantially in recent years, and the volume of authomobile and other highway traffic upon the streets which cross the railroad right-of-way within the City of West Jordan has also increased.

11. Railroad traffic on the tracks which traverse West Jordan has not increased in recent years.

12. Neither the Utah State Department of Transportation nor the Utah State Public Service Commission has authorized the placement of flagmen, lights or any of the other protections referred to in the ordinance at any of the crossings which are subject to the ordinance since it was enacted

13. Plaintiff's right-of-way through the City of West Jordan contains a single track which branches at approximately 4000 West as shown below. Public roads cross the tracks at 17 locations with such protective devices as indicated below

Mile Post	Crossing Number	Address	Description	
		BINGHAM BRANCH		
1.28	254-871K	1300 West 7960 South	RxB-AW	
1.81	254-870D	1700 West 8100 South	CFLS-B	(Redwood Road)
2.34	254-869J	2200 West 8250 South (8180 South)	RxB-AW	
2.88	254-868C	2700 West 8400 South	RxB-AW	
3.60	254-865G	3385 West 8600 South	RxB-AW	
3 95	254-863T	3500 West 8650 South	RxB	(Dirt Crossing)
4.50	255-377G	4000 West 8980 South	RxB-AW	(Old Bingham Highway)
4.77	254-965L	4200 West 9000 South	RxB-AW	(Old Bingham Highway)
5.69	254-968G	4800 West 9400 South	RxB-AW	(Old Bingham Highway)
6.30	255-373E	5200 West 9550 South	RxB-AW	(Old Bingham Highway)
		GARFIELD BRANCH		
4.80	254-966T	4190 West 8970 South West Leg Wye	RxB-AW	(Old Bingham Highway)
4.95	254-967A	4300 West 9000 South East Leg Wye	RxB-AW	(Old Bingham Highway)
6.43	254-963X	4620 West 7800 South	RxB	
7.45	254-962R	4700 West 7000 South	RxB	(Dirt Crossing)
8.48	254-961J	4780 West 6200 South	RxB-AW	
		SPUR TRACK PUBLIC CROSSING		
3.59	254-866N	8600 South 3350 West	RxB	(Hatfield Copper)
3.59	254-864A	8600 South 3400 West	RxB	(Plastroics Corp.)

Key RxB-AW = Reflectorized Crossbuck with Advanced Warning Sign

CFLS-B = Cantilevered Signal with Flashing Lights and Bell

RxB = Reflectorized Crossbuck

14. The plaintiff presently runs two trains each way on the subject tracks on a regular, but not on a timetable, basis each Monday through Thursday. The plaintiff runs one train each way on a regular, but not on a timetable, basis on Fridays and Saturdays. Irregular, and unscheduled trains also use the subject tracks from time to time.

15. The plaintiff did not receive actual notice that the ordinance set forth in paragraph 6 above was under consideration and, upon receiving notice of its enactment, the plaintiff immediately requested an opportunity to discuss this matter with officials of the City of West Jordan.

16. A meeting was held on April 6, 1982, between representatives of the plaintiff and the city attorney and city manager of the City of West Jordan. At that meeting, the city manager stated that the city would not consider repeal nor any amendment of the ordinance and that the city fully intended to enforce the ordinance.

17. In passing and enforcing the ordinance, defendants are acting under color of state law.

18. The Court expressly makes no finding regarding whether the ordinance constitutes an unreasonable burden on interstate commerce.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 by virtue of the fact that it arises under the Commerce Clause, Article I, § 8, of the Constitution of the United States.

2. The Court also has jurisdiction over this matter pursuant to 28 U.S.C. § 1332 by virtue of the fact that plaintiff is a corporation organized pursuant to the laws of the State of Delaware and having its principal place of business in the State of Colorado, defendant West Jordan Municipal Corporation is a municipal corporation organized and existing under the laws of the State of Utah and having its principal place of business in the State of Utah, defendants Dennis M. Randall, Allan G. Tolman, Sherm Monson, Chris Buttars, Betty Naylor, and Howard Barben are citizens of the State of Utah, and the matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000

3. Venue is proper in the Central Division of this Court pursuant to 28 U.S.C. § 1391(b) and (c) in that all defendants reside within this division, the claims herein arise within this division, and defendant West Jordan Municipal Corporation functions as a municipal corporation within this division.

4. This is an action for declaratory judgment pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, and for injunctive relief.

5. Sections 10-8-36 and 10-8-83 of the Utah Code Annotated (Repl. Vol 1973) have been repealed to the extent they are inconsistent with the Public Utilities Act of 1917 The City of West Jordan had no power or authority to enact the ordinance known as Sections 6-7-101 and 6-7-102 of the West Jordan Municipal Code, and for this reason the said ordinance is null and void ab initio.

6. The laws of the State of Utah have given the Utah Department of Transportation the exclusive power and authority to determine, prescribe, and allocate the costs of protecting railroad grade crossings within the State of Utah. The actions of the

Department of Transportation are subject to review by the Utah Public Service Commission.

7. The protection of railroad grade crossings in the State of Utah is a matter of state-wide concern. The legislative grant of authority to the Public Service Commission and the Department of Transportation in the State of Utah concerning the protection of railroad grade crossings is pervasive and has appropriated the entire field of activity in that regard. The ordinance enacted by the defendants, Sections 6-7-101 and 6-7-102 of the West Jordan Municipal Code, is therefore preempted by State law and is void.

8. The ordinance aforesaid is also preempted and is therefore void for the further reason that it is inconsistent with the following State laws and regulations of the State of Utah. Utah Code Ann. §§ 54-4-15, 54-4-15.1, 54-4-15.3 (Supp. 1981), Utah Public Service Commission Regulation A 67-05-61.

9. The Court expressly makes no finding regarding whether the ordinance constitutes an unreasonable burden on interstate commerce.

10. Because Sections 6-7-101 and 6-7-102 of the West Jordan Municipal Code are void, the plaintiff is entitled to have the Court issue a permanent injunction enjoining the defendants, and each of them, their deputies, agents, servants and employees from enforcing the said ordinance in any respect.

DATED this 28th day of May, 1982.

/s/ Bruce S. Jenkins
BRUCE S. JENKINS
United States District Judge