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E. Scott Savage; Casey K. McGarvey; Berman, Gaufin, Tomsic & Savage; Attorneys for Appellee.
Alan R. Stewart; Robert M. Tramuto; Jones & Granger; Attorneys for Appellant.

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CASE NO. 20040783

IN THE UNITED STATES COURT OF APPEALS
STATE OF UTAH

SHAYNE CLAYSON,	)
	)
Plaintiff/Appellant,	)
vs.	)
	)
UNION PACIFIC RAILROAD	)
COMPANY, a Delaware Corporation,	)
and UTAH RAILWAY COMPANY,	)
a Utah Corporation	)
	)
Defendants/Appellees.	)

On Appeal from the Third Judicial District
Court of Salt Lake County, State of Utah

APPELLANT SHAYNE CLAYSON'S BRIEF

E. Scott Savage
Casey K. McGarvey
BERMAN, GAUFIN, TOMSIC &
SAVAGE
50 South Main Street, Suite 1250
Salt Lake City, Utah 84144
Telephone: 801/328-2200
Facsimile: 801/531-9926

ATTORNEYS FOR APPELLEE

Alan R. Stewart
ALAN R. STEWART
1366 E. Murray-Holladay Road
Salt Lake City, Utah 84117
Telephone: 801/278-1063
Facsimile: 801/278-8603

Robert M. Tramuto, pro hoc
JONES & GRANGER
10,000 Memorial Drive, Suite 888
Houston, Texas 77024
Telephone: 713/668-0230
Facsimile: 713/956-7139

ATTORNEYS FOR APPELLANT

FILED
UTAH APPELLATE COURTS
JAN 2 8 2005

LIST OF ALL PARTIES

1. **Parties to trial court's final judgment:**

Shayne Clayson, Individually
Plaintiff and Appellant

Union Pacific Railroad Company and Utah Railway Company,
Defendant and Appellee

2. **Trial counsel:**

Appellant Shayne Clayson's counsel:

Alan R. Stewart (4920)
ALAN R. STEWART
1366 E. Murray-Holladay Road
Salt Lake City, Utah 84117
Telephone: 801/278-1063

Wesley W. Hoyt, pro hoc (4606)
Bank One Building
333 West Hampden #500
Englewood, Colorado 80110
Telephone: 303/806-8887 x 39

Robert M. Tramuto, pro hoc (6863)
JONES & GRANGER
10,000 Memorial Drive, Suite 888
Houston, Texas 77024
Telephone: 713/668-0230

Appellee Union Pacific Railroad Company and Utah Railway Company's counsel:

E. Scott Savage (2865)
Casey K. McGarvey (4882)
BERMAN, GAUFIN, TOMSIC & SAVAGE
50 South Main Street, Suite 1250
Salt Lake City, Utah 84144
801/328-2200

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TO THE HONORABLE COURT OF APPEALS:

Appellant Shayne Clayson petitions this court to reverse the erroneous judgment that resulted from a erroneous ruling by the trial court in granting a Motion for Summary Judgment in favor of the Union Pacific Railroad Company and Utah Railway Company against Shayne Clayson.

JURISDICTIONAL STATEMENT

The Utah Court of Appeals has jurisdiction pursuant to Utah Code Annotated § 78-2a-3 (2)(h). The order appealed from is a final order disposing of all claims of all parties.

ISSUES PRESENTED ON APPEAL

Did the trial court commit an error of law in deciding that there is no issue of fact in an FELA case where there is disputed testimony and issues of fact raised by the testimony and documentary evidence in this case?

Did the trial court commit an error of law in deciding that there is no issue of fact against Utah Railway Company and Union Pacific Railroad Company when the railroads failed to use ordinary care for the safety of its employee?

STANDARD OF APPELLATE REVIEW

Since a summary judgment is granted as a matter of law rather than fact, the appellate court reviews the trial court's conclusions for correctness and to determine weather there has been an error of law, without according deference to the trial court's legal conclusions. *Barber v. Farmers Ins. Exch.* 751 P.2d 248

(Utah Ct App. 1988); *Bonham v. Morgan*, 788 P.2d 497 (Utah 1989).

STATUTORY PROVISIONS

The determinative statutory provision for this appeal is 45 U.S.C. § 51 et seq. Federal Employers Liability Act (FELA)

STATEMENT OF THE CASE

This is an appeal for the reversible error of the trial court granting a Motion for Summary Judgment in favor of The Union Pacific Railroad Company ("UPRR") and Utah Railway Company ("Utah") against Shayne Clayson ("Clayson").

This is a Federal Employer's Liability Act (FELA) case against Union Pacific Railroad. Mr. Clayson was employed as an employee of the Union Pacific Railroad Company ("Union Pacific") working in the course and scope of employment as a signal maintainer when he sustained serious bodily injuries while he was repairing a Union Pacific crossing and was struck by a Utah Railway Company ("Utah") train. Utah was a permissive user of the track under a written Track Agreement with the Union Pacific which gave track rights to operate locomotives on Union Pacific track in the area that Plaintiff was injured.

Mr. Clayson sued his employer, The Union Pacific under the FELA in Salt Lake City, Utah for the damages he sustained as a result of these serious debilitating injuries. Mr. Clayson further sued Utah as a result of common law negligence against Utah for the negligent operation of the locomotive which struck

Plaintiff. Mr. Clayson's case was originally assigned to the Honorable J. Dennis Frederick, but the Honorable Judge Frederick recused himself and the case was assigned to the Honorable Joseph C. Fratto.

Mr. Clayson appeals from the trial courts granting of Defendant's Motion for Summary Judgment. Mr. Clayson contends that the court committed reversible error as a matter of law when it granted Union Pacific's Motion for Summary Judgment on an FELA case when there were issues of fact raised by the testimony of numerous witnesses in the records of this case.

Mr. Clayson further appeals from the trial court granting Defendant's Motion for Summary Judgment against Utah Railway Company when there were issues of fact raised by the testimony of numerous witnesses in the records of this case.

STATEMENT OF FACTS

1. **The Parties**. The appellant lived in Salt Lake City, Utah with his wife and three children at the time of his injuries on December 4, 2000. Appellant currently resides in Utah by himself, and has worked for Appellee Union Pacific Railroad as a signal maintainer in Salt Lake City, Utah and Omaha, Nebraska. Union Pacific Railroad has a railroad yard in Salt Lake City, Utah and conducts business in Utah. Appellee Utah Railway Company is a permissive user of the Union Pacific track and conducts business in Utah.

2. Clayson's Employment at Union Pacific Railroad. After graduating from high school in 1987 at Granger High in Salt Lake City, Utah, Mr. Clayson had a variety of jobs until he commenced his employment with the Union Pacific Railroad on January 9, 1989 in the Signal Department. He has worked for the Union Pacific Railroad from January 1981 until the date of his injury on December 4, 2000. Mr. Clayson commenced his employment as a signal maintainer in the Salt Lake City area and worked that position until he transferred to Omaha, Nebraska in 1994 drafting maps. Mr. Clayson remained in Omaha until May 2000 when he exercised his senority and returned as a signal maintainer in the Salt Lake City area. It was during this time that he was seriously injured on December 4, 2000.

3. Clayson's Injury of December 4, 2000. Clayson received significant physical injuries when he was struck by a Utah locomotive being operated by Utah Railway employees while he was attempting to make a repair of a signal malfunction at the 17th Street North Crossing in Salt Lake City, Utah. At the time of Clayson's injury, he was performing the duties of a signal maintainer by himself for the Union Pacific Railroad. Mr. Clayson was ordered to the crossing by his supervisor Mr. Ron Nash where it was reported that the signal gates were malfunctioning in the activated position with no trains approaching. When Clayson arrived at the 17th Street North Crossing, he complied with a UP safety requirement of completing a Lone Worker Permit prior to commencing work on

the crossing. The readings that Mr. Clayson obtained were not consistent with the physical findings, so he contacted his supervisor, Mr. Ron Nash by cell phone. It was while he was troubleshooting the crossing that he was struck by a Utah Railway train which did not issue any warnings by blowing its horn or whistle prior to striking Clayson. The failure of the train crew to blow its horn, is in violation of General Code of Operating Rules 5.8.2 Sounding Whistle.

4. Utah Railway's Use of Union Pacific Track. Utah Railway Company was a permissible user of the Union Pacific track by virtue of a Trackage Right Agreement which allows Utah to operate its trains on Union Pacific property. The first question of fact was whether the crew of Utah train RUT311 should have been informed of the malfunctioning signals at the 17th Street North Crossing prior to reaching the location of the malfunction. As per the testimony of the conductor Steve Clifton, the crew had not been informed of the signal malfunction at this crossing (5:17), and he had not received notice from the dispatcher that a signal maintainer was working in this area (5:43). Signal Operations and Manager of Signal Maintenance Ron Nash, had notified Mr. Clayson of the malfunction of the signals at grade crossing 17th Street North at approximately 10:30 to 11:00 a.m. on the day of the accident. However, according to the taped conversation between the dispatcher and the crew of Utah RUT311, the train crew was notified of malfunctioning block red light signals at control points 786 and 787 on either side of the location of the accident. The crew was not notified of the crossing signal

malfunction between the signals at approximately MP 786.5, (where the accident occurred) even though maintainer Clayson had informed the dispatcher of problems with the crossing as well as problems with signals at both ends of the crossing (18.11). Mr. Clayson had also informed his supervisor Ron Nash of the malfunction of the crossing signals (18.10). Because both Signal Operations and Manager of Signal Maintenance Ron Nash were aware of a problem with the crossing signals at grade crossing at 17th North (17:12), they were required to inform the dispatcher of this situation so that affected trains could be notified. Had the train crew been informed that the crossing signals were malfunctioning, they would have had a duty to stop and flag the crossing (send a flagman to walk the train through the crossing) in violation with General Code of Operating Rules 632.2 A. and Federal Regulation, 49 CFR 234.107 whereby the accident would have been avoided.

5. **Utah Railway's Failure to Warn.** The Utah Railway locomotive's audible warning device was not used as required to warn Mr. Clayson of the approaching train. Several witnesses testified that they did not hear any audible warning sounds from either the train or the crossing arms at the time the train impacted with Plaintiff, nor at any time prior thereto. Further the engineer's event recorder or black box did not indicate that the horn was blown prior to arriving at the crossing. This by itself confirmed the absence of the horn being used as required by federal regulations. These facts alone establish a basis of negligence against the crew

operating the train at the time of the accident, and clearly warrant a finding that a question of fact exists for which a jury should decide.

Rebecca Cook was a passenger in an automobile being driven by her husband. At the time of the incident they were the first car stopped at the crossing on the east side as the train in question approached, just prior to striking Mr. Clayson. She observed the Plaintiff straddling the track with his back to the train in a bent over position. (See p. 23, l. 19-25 Plaintiff's Exhibit "3", Deposition of Rebecca Cook.) She testified that she **did not hear a bell nor any warning given by the train of its approach.** She believed that had the train given some kind of audible warning, she would have heard it. (See p. 25, l. 6-14. Plaintiff's Exhibit "3", Deposition of Rebecca Cook) Mrs. Cook was stopped at the crossing because of the malfunctioning gates and was waiting for a train to clear before proceeding over the crossing. She was actively waiting and listening for the train since she could not proceed until the train passed. Not only was her vision unimpaired, but she was consciously listening for an approaching train since the crossing signals were in a down position. This was likewise true for her husband Rhett Cook who was also in the same vehicle.

Rhett Cook, Rebecca Cook's husband, testified that he was sitting in the driver's seat of their car and he did not hear a train horn, nor did he hear any bells from the crossing signal. (See p. 16, l. 14-23. Plaintiff's Exhibit "4", Deposition of Rhett Cook)

Ron Nash, Plaintiff's supervisor was talking with the Plaintiff by phone at the time he was struck by the train. Mr. Nash testified that he had no problems hearing the Plaintiff. They were talking when suddenly the phone went dead as a result of the accident. Prior to the accident, Mr. Nash testified that he had no problem hearing the Plaintiff. Had the train whistle been blowing at such close range, it would have interfered with his ability to hear Mr. Clayson. (See p. 59, l. 4-13, Plaintiff's Exhibit "5" Deposition of Ron Nash)

Einor Paulson, electrician for the Union Pacific Railroad Company, testified that he was working approximately 50 feet from Plaintiff at the time of the accident. He observed the train in question moving at a very slow speed and come to a stop after hitting the Plaintiff. He did not hear the train coming, and emphatically testified that the train was not blowing its horn. (See p. 43, l. 1-17, Plaintiff's Exhibit "6", Deposition of Einor Paulson.) He further testified that he should have been able to hear the train if the horn were blowing.

6. The Requirement to Operate at Restricted Speed. The train was not operated at the required speed for the conditions. Had the train crew been given an XH Order (protective order) from the UP Dispatcher as required by 49 C.F.R. 234.107, the train crew was required to operate at Restricted Speed, and should be prepared to stop within half the range of vision of any impediment or person. However the engineer did not stop as required, resulting in the impact with Mr. Clayson.

Engineer Chad Booth testified that the train in question was being operated at a speed of 17-20 mph., a speed that exceeds the restricted speed of 15 mph. (See p. 43, l. 16-17, Plaintiff's Exhibit "7" Deposition of Chad Booth.)

7. The Requirement of Union Pacific Railroad Dispatcher to Issue Protective Orders. Train Dispatcher Carl Steiger did not properly perform his duties to inform Utah train RUT311 of conditions ahead, issuing an XH Protective Order (Order regarding special caution when there is an adverse condition ahead.) In fact, no notice was given to the train crew of the existence of the Plaintiff as required. Steve Clifton, Conductor for Utah Railway testified that the dispatcher should have notified the crew of the existence of a defective signal and crossing. (See p. 21, l. 1-8, Plaintiff's Exhibit "8", Deposition of Steve Clifton.) The failure to inform the crew of that fact was a violation of the railroad's own safety rules. (See p. 27, l. 1-4, Plaintiff's Exhibit "8", Deposition of Steve Clifton.) Terry Miller, Senior Manager of Signal Operations for the Union Pacific Railroad, testified that it is the requirement of the railroad to comply with FRA (Federal Railroad Administration) rules and regulations and to issue either XG or XH (protective) Order in situations involving malfunctioning crossing warning systems. Such an order mandates that the train crew reduce their speed to no greater than 15 mph. No such order was given on the occasion in question. (See p. 45-48, Plaintiff's Exhibit "9", Deposition of Terry Miller.)

8. **<u>Union Pacific's Failure to Train Shayne Clayson.</u>** Shayne Clayson was not provided with the training that he had requested in order to perform his duties in the safest manner. These unreasonably dangerous conditions, failures, and associated negligent acts of commission or omission on the part of Defendant created an unsafe work place for Plaintiff. *Id.*

Ralph Smith, Maintenance Foreman for the Union Pacific Railroad at the time of Plaintiff's injury, testified that the Grant Tower area where Plaintiff was working at the time of his injury was a very complex area for maintainers. Given the complexity, Mr. Smith opined that the one week of training given Plaintiff was an inadequate training period from a safety standpoint. (See p. 35, l. 24-24 to p. 36, l. 1-16, Plaintiff's Exhibit "10", Deposition of Ralph Smith.)

Plaintiff's injury was caused due to the unreasonably dangerous conditions of Plaintiff's work place and the failures and associated negligent acts of commission or omission on the part of the Defendants. The combination of Defendant's crew not being informed of malfunctioning signals; failure to use the audible warning device to warn Mr. Clayson of the approaching train; not operating the train at a restricted speed for the conditions; the train dispatcher's failure to inform Utah train RUT311 of the conditions ahead and the lack of training Plaintiff had requested to perform his duties in the safest manner, all created the unsafe condition that existed at the time and place of Plaintiff's injury.

Plaintiff's expert Charles Culver, expressed an opinion that Plaintiff's injury was caused due to unreasonably dangerous conditions of Plaintiff's work place and the failures and associated negligent acts of commission or omission on the part of the Defendant. (Plaintiff's Exhibit "1", Affidavit of Charles Culver). Plaintiff's expert found that 1) Defendant's crew had not being informed of malfunctioning signals 2) failed to use the audible warning device to warn Mr. Clayson of the approaching train 3) did not operating the train at the restricted speed for the conditions which existed 4) the train dispatcher's failed to inform Utah train RUT311 of the conditions ahead and 5) Mr. Clayson was not provided the training he had requested to perform his duties in the safest manner which created an unsafe condition at the time and place of Plaintiff's injury. (Plaintiff's Exhibit "1", Affidavit of Charles Culver).

SUMMARY OF ARGUMENT

Summary Judgment should be granted only when the evidence, considered in a light most favorable to the non-moving party, demonstrates that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. The lower court granted Petitioner's motion for summary judgment on the basis that, as a matter of law, that a question of fact has not been raised by the pleadings, deposition testimony, and affidavits on file herein. In the case before this court numerous questions of fact have been raised by the deposition testimony and affidavit of appellant's expert witness Charles Culver,

attached hereto, marked as Plaintiff's Exhibit "1". Statutory violations have been raised pertaining to the train crews violation of 49 CFR 241.107 when the train crew failed to operate the Utah train at restricted speed and further failed to warn Mr. Clayson by sounding its horn which is confirmed by the event recorder (black box) and testimony of five witnesses. Further question of fact has been raised by the failure of the Union Pacific Railroad Company's dispatcher's failure to place protective orders (XH) to protect the crossing when there is a known malfunction. See 49 CFR 234.107.

The standard of review in an FELA case is that the railroad employee is to be given every doubt before the court, and that a right to a jury trial on the questions of whether the defendant's negligence which caused plaintiff's injury is viewed as an integral part of the remedy congress fashioned for railroad employees. *Bailey vs. Central Virginia Railroad Co.*, 319 U.S. 350 (1943). The U. S. Supreme Court in *Rogers v. Missouri Pacific Railroad Company*, 352 U.S. 500, 77 S.Ct. 443 (1957) has further reaffirmed that the clear congressional intent was that railroad related cases should be submitted to juries for resolution.

The Utah Supreme Court has further held that four elements are necessary in order to establish a prima facie case under the FELA. The four elements are 1) the injured employee was injured while in the scope of his employment 2) the employee's employment was in the furtherance of the railroad's interstate transportation business; 3) the employer was negligent; and 4) the employer's

negligence played some part in causing the injury for which compensation is sought under FELA. See *Green v. River Terminal Ry. Co.*, 763 F. 2d 805, 808 (6th Cir. 1985). The facts in this case established through the pleadings, the deposition testimony and affidavit on file, clearly shows that appellant has met this burden, and that summary judgment should be reversed.

ARGUMENT

POINT I.

The trial court committed reversible error as a matter of law when it granted Union Pacific Railroad Company and Utah Railway Company's Motion for Summary Judgment.

A Summary Judgment is an extreme and drastic remedy which should only be allowed if there are no genuine issues of fact requiring a trial, a question of fact exists when fair-minded people could reach different conclusions on issues in controversy.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). When evaluating a motion for summary judgment, "a court must consider all of the facts and evidence presented, and every reasonable inference arising therefrom, in a light most favorable to the party opposing the motion." *Katzenberger v. State*, 735 P.2d 405, 408 (Utah App. 1987). Because entitlement to summary judgment is a

question of law, we review the trial court's ruling with no deference. *Higgins v. Salt Lake County,* 855 P.2d 231, 235 (Utah 1993). In the case before this court, numerous fact questions have been raised by the depositions taken (12) and affidavit on file in this case. Questions of fact were raised pertaining to the train crew's violation of 49 C.F.R. 234.107 when the crew failed to operate the train at restricted speed and failed to warn Mr. Clayson by sounding its horn which was documented on the event recorder (black box) and testimony of five witnesses. Further question of fact was raised by the failure of the UP dispatcher to issue protective orders (XH Order) to protect the crossing when there is a known malfunction. (49 C.F.R. 234.107)

POINT II.

The trial court committed reversible error, when after viewing the testimony of the parties, granted Defendant's Motion for Summary Judgment against Plaintiff Shayne Clayson on the issue of liability in an Federal Employer's Liability Act (FELA) case.

The FELA represents a legislative departure from the principles of the common law motivated by "the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety." *Sinkler v. Missouri Pacific R.R.*, 356 U.S. 326, 329, 78 S.Ct. 758, 762 (1958). The statute reflects a legislative recognition that the cost of human injury is an unavoidable expense of railroading, which must be borne by someone, and it has to be adjusted equitably between the worker and the

carrier. Id. Because the Act is remedial in nature, it should be liberally construed to effectuate its purposes. *Kulavic v. Chicago & Illinois Midland Railway Co.*, 1 F.3d 507 (7th Cir. 1993). See, also, *Rogers v. Missouri Pacific Railroad Company*, 352 U.S. 500, 77 S.Ct. 443 (1957).

In a FELA case, the railroad employee is to be given every doubt before the court. *Ratigan v. New York Central Railroad Company*, 291 F.2d 548 (2nd Cir. 1961), citing, inter alia, *Harris v. Pennsylvania Railroad*, 361 U.S. 15 (1959), *Moore v. Terminal Railroad Association*, 358 U.S. 31 (1958). And, importantly, the right to a jury trial on the questions of whether the Defendant's negligence caused Plaintiff's injury is viewed as an integral part of the remedy Congress fashioned for railroad workers. *Bailey v. Central Virginia Railroad Co.*, 319 U.S. 350 (1943). In *Rogers v. Missouri Pacific Railroad Company*, 352 U.S. 500 (1957), the Supreme Court found that underpinning the FELA was a clear congressional intent that railroad related injury cases should be submitted to juries for resolution. As the Court there observed:

> "The Congress when adopting the law was particularly concerned that the issues whether there was employer fault and whether that fault played any part in the injury of death of the employee should be reached by the jury whenever fair minded men could reach these conclusions on the evidence . . . The inclusion in the 1908 statute of another provision, 'all questions of fact relating to negligence shall be brought before the jury to determine,' was proposed but not adopted. The view prevailed that this would be surplusage light of the seventh amendment embodying the common law tradition that fact questions were for the jury."

Id. At 508-509, citing Hearings before Senate Committee on Education and Labor

on S. 5307, 60th Cong., 1st Sess. 8-9, 45-46.

Hence, the inescapable and unassailable conclusion that, except in the rarest of instances, causes of action under the FELA must be submitted to a jury and "only when there is a complete absence of probative facts to support the conclusion" that the plaintiff's injury was caused by the railroad's negligence can the case be taken from the jury. *Lavender v. Kurn*, 327 U.S. 645, 653 (1946).

POINT III.

The trial court committed reversible error since the evidence required to establish liability in an FELA case is much less than an ordinary negligence action.

The FELA provides that the railroad employer is liable whenever an employee's injury results "in whole or in part from negligence of any of the officers, agents or employees" of the railroad. 45 U.S.C. §51. Interpreting this provision in *Rogers v. Missouri Pacific R.R.*, *supra*, the United States Supreme Court held that under the FELA, "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, *even the slightest*, in producing the injury or death for which damages are sought." Accordingly, it has long been accepted doctrine that "the question of evidence required to establish liability in an FELA case is much less than an ordinary negligence action." *Harbin v. Burlington Northern Railroad Company*, 921 F.2d 129 (7th Cir. 1990). Indeed, the Harbin court's analysis of the case law prompted it to observe that numerous FELA actions have been submitted to a jury based on

"evidence scarcely more substantial than pigeon bone broth." *Id.* At 132. Certainly, the quantum of proof necessary to create a question of fact in FELA cases is very small; so small that, if as it has been said, it is "more than a scintilla of evidence", it is "not much more". *Aparicio v. Norfolk and Western Railway*, 84 F.3d 803, 810 (6th Cir. 1996).

The railroad has a non-delegable duty to provide a safe place to work, and to provide safe tools and equipment. *Rogers v. Missouri Railroad Co., supra* and *Moore v. Terminal R.R. of St. Louis*, 358 U.S. 31 (1958).

Although a FELA employer is not the insurer of the safety of its employees, it does owe them a continuing duty to provide a reasonably safe workplace, *Kimbler v. Pittsburgh and Lake Erie R.*R., 331 F.2d 383 (3rd Cir. 1964); a duty which is non-delegable. *Shenker v. Baltimore and Ohio Railroad*, 374 U.S. 1(1963). This duty includes the obligation to provide employees with the equipment, training and assistance necessary to complete the task assigned, *Blair v. Baltimore and Ohio Railroad*, 323 U.S. 600 (1945), to inspect the place where the railroad's employees work and the responsibility to take reasonable precautions to protect its employees from possible dangers. *Kozad v. Chesapeake and Ohio Railway*, 622 F.2d 72, 75 (4th Cir. 1980).

The defendant also has a non-delegable duty to warn its workers of any hazards in the work, even if the danger cannot be avoided. *Hose v. Chicago Northwestern Trans. Co.,* 70 F.2d 968 (8th Cir. 1995). In addition, the employer is

charged with a duty to reasonably foresee potential harm and take appropriate prophylactic measures. *Gallick v. Baltimore and Ohio Railroad Company*, 372 U.S. 108 (1963). The plaintiff, in *Gallick*, was the beneficiary of the relaxed standard for the submission of FELA cases in juries. Mr. Gallick worked around a stagnant pool of water, which contained dead and decayed rats and insects. While working near the pool, plaintiff was bitten by an insect, which through bizarre complications led to both legs being amputated. The plaintiff had no evidence that the insect, which bit him, had any connection with the stagnant pool, or that the railroad should have foreseen such an injury would have resulted form the stagnant pool. As a result of these perceived deficiencies, the Ohio Court of Appeals reversed a verdict in favor of the plaintiff. The Supreme Court reinstated the verdict, holding that the questions of whether the railroad should have foreseen an injury such as the plaintiff's and taken steps to protect against it were necessarily ones for the jury. *Gallick*, 83 S.Ct. at 667. Merely because there had never been a similar incident in the past did not mean that the injury was not "foreseeable" under the FELA. *Id.* at 121.

It has been suggested that actual or constructive notice is not required where the defendant had control of the premises so that its conduct could be considered a sole cause of the dangerous condition which caused injury to plaintiff. *Webb v. Illinois Central R. Co.*, 352 U. S. 512 (1957).

Examples of where liability has been imposed for maintaining an unsafe condition include **1)** Where the railroad allowed poor footing conditions because of ice and snow, dirt and debris, slippery substances, or holes; *Barrett v. Toledo, P. & W. R.R.*, 334 F.2d 803 (7th Cir. 1964); **2)** Where the railroad allowed insufficient room to work in *Ellis v. Union Pac. R.R.*, 329 U.S. 649 (1947); or inadequate lighting; *Murray v. Denver & R.G. W. R.R.*, 229 F.2d 644 (10th Cir. 1956); or **3)** switching operations performed at night without adequate lighting. *Tiller v. Atlantic Coast Line R.R.*, 310 U.S. 54 (1943); Also, a railroad will be held liable for train movement without sufficient warning *Elliot v. St. Louis S.W. Ry.*, 487 S.W.2d 7 (Mo. 1972); or obstruction of the work areas. *Brewer v. Norfolk & W. RY.*, 128 Ill. Ap.2d 200, 261 N.E.2d 541 (1970).

Clearly, case law reflects an unwavering judicial philosophy that virtually all FELA cases should be submitted to the jury. Where there is any part in causing or aggravating Plaintiff's condition, then the case must be given to the jury to resolve. A right to trial by jury on the question of whether a railroad company's negligence caused Plaintiff's injury is an integral part of the remedy Congress afforded railroad workers under the FELA, and as such may not easily be denied. *Bailey v. Central Virginia Railroad Co.*, 319 U.S. 350 (1943); *Rogers v. Missouri Pacific. Supra*.

Plaintiff's expert Charles Culver, a railroad operations consultant has indicated through Affidavit (Plaintiff's Exhibit "1", Affidavit of Charles Culver)

that the crew of Utah train RUT311 should have been, but was not informed of the malfunctioning signals at the grade crossing at 17th North Street, prior to reaching the location of the malfunction. These facts are established through the deposition testimony of Conductor Steve Clifton and gives rise to the violation of 49 C.F.R. Section 234.107 (a). Further, the failure of the dispatcher to notify the train crew violates Train Dispatcher Bulletin No. 80 issued December 1, 1999 which further requires the train dispatcher to notify the train crew of the malfunction of a crossing device. This violates Rule 6.32.2 of the General Code of Operating Rules for the Union Pacific Railroad Company. (See Plaintiff's Exhibit "2", Train Dispatcher's Bulletin No. 80) These two violations of both Federal law and the Railroad's Operating Rules clearly establish a fact question which must be decided by the trier of fact. In addition to these rules, the facts serve to establish, at the very least, a question of fact which should be determined by the trier of fact, under both Utah law and The Federal Employer's Liability Act.

POINT IV.

The trial court committed reversible error since the Defendant had a duty to instruct it's employee's in safe working practice and warn of unsafe conditions.

A railroad has a duty to instruct its employees on safe working practices. If the employee is inexperienced, the railroad has a duty to instruct him and to provide him with the knowledge and experience he needs to do the work safely. Whether the employee is experienced or not, the railroad has a duty to warn him of

dangers about which it knew or should have know. Liability will exist **1)** where the plaintiff is not warned of dangers known or observed by his co-workers; *Pittman v. Gulf, C & S. F. Ry.*, 338 S.W.2d 774 (Tex. Civ. App. 1980); **2)** where plaintiff's co-workers fail to warn him of a change in their work activity; *Johnson v. Missouri K. T. Ry.*, 334 S.W.2d 41 (Mo. 1960); **3)** where the plaintiff is not warned of the movement of cars or trains; *Dunn v. Terminal R.R. Assn.*, 285 S.W.2d 701 (Mo. 1956); **4)** where the railroad fails to warn third persons of plaintiff's dangerous position; *Ft. Worth & Denver Ry., v. Threadgill*, 228 F.2d 307 (5th Cir. 1956); or **5)** where plaintiff is not warned of dangers at or near the area where he is working. *Kansas, O. & G. Ry. v. Woodward*, 198 F.2d 322 (10th Cir. 1952).

In *Chambers v. Lofton*, 67 So.2d 220 (Fla. 1953); the railroad was liable where it failed to instruct the plaintiff on the proper use and location of a guard on a power saw, when it knew that the plaintiff was inexperienced in the use of that tool.

In *Kiger v. Terminal R.R.*, 311 S.W.2d 5 (Mo. 1958); the railroad was liable for injuries suffered by plaintiff when the car door he was trying to close fell on him. The railroad knew that the top hanger of the door was loose and failed to warn plaintiff. In *Trowbridge v. Chicago and I.M.R. Co.*, 263 N.E.2d 619 (Ill. Ct. App. 1970); recovery was allowed to a brush cutter who was a seasonal employee of twenty years when he was injured by a chain saw which tended to jump and did

not have a safety guard and was operated by a fellow employee while the plaintiff was holding branches. He was not instructed in the use of the saw, no safety meetings had been held for several years and the use of the saw was not included in safety rules, thereby justifying a finding of negligence against the railroad. In *Marmo v. Chicago, R.I. & P.R.R.*, 350 F.2d 236 (7th Cir. 1965); the railroad was held liable where the plaintiff caught his hand between a wheel unit and the diesel unit on to which he was lowering it, where the railroad assigned plaintiff operate a machine to accomplish that task, and knowing of his lack of experience, did not instruct him on the dangers involved.

CONCLUSION

WHERFORE, PREMISES CONSIDERED Appellant Clayson, respectfully prays that this Court of Appeals will reverse the final judgment that the Third Judicial District Court of Salt Lake County, State of Utah granted, and remand this case to the Third Judicial District Court of Salt Lake County, State of Utah for further proceedings consistent with this Court's opinion. Appellant Clayson also requests such other and further relief, at law or in equity, to which he may show himself entitled.

Respectfully submitted,

Alan R. Stewart (4920)
ALAN R. STEWART
1366 E. Murray-Holladay Road
Salt Lake City, Utah 84117
Telephone: 801/278-1063
Facsimile: 801/278-8603

Wesley W. Hoyt, pro hoc (4606)
Bank One Building
333 West Hampden #500
Englewood, Colorado 80110
Telephone: 303/806-8887 x 39
Facsimile: 303/806-8881

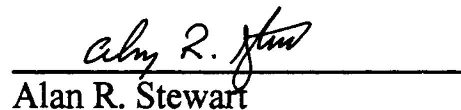
Robert M. Tramuto, pro hoc (6863)
JONES & GRANGER
10,000 Memorial Drive, Suite 888
Houston, Texas 77024
Telephone: 713/668-0230
Facsimile: 713/956-7139

ATTORNEYS FOR APPELLANT
SHAYNE CLAYSON

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing has been forwarded to opposing counsel on the 28th day of January, 2005.

E. Scott Savage
Casey K. McGarvey
BERMAN, GAUFIN, TOMSIC & SAVAGE
50 South Main Street, Suite 1250
Salt Lake City, Utah 84144



Alan R. Stewart

APPENDICIES

Order Granting Motion for Summary Judgment 1

Utah Rules of Civil Procedure, Rule 56 (c) 2

45 U.S.C. § 51 et seq. (Federal Employer's Liability Act) 3

49 CFR 234.107 4

Plaintiff's Exhibit "1", Affidavit of Charles Culver 5

Plaintiff's Exhibit "2", Train Dispatcher's Bulletin No. 80 6

Plaintiff's Exhibit "3", Deposition of Rebecca Cook, p. 23, l. 19-25 and p. 25, l. 6-14 7

Plaintiff's Exhibit "4", Deposition of Rhett Cook, p. 16, l. 14-23 8

Plaintiff's Exhibit "5" Deposition of Ron Nash, p. 59, l. 4-13 9

Plaintiff's Exhibit "6", Deposition of Einor Paulson, p. 43, l. 1-17 10

Plaintiff's Exhibit "7" Deposition of Chad Booth, p. 43, l. 16-17 11

Plaintiff's Exhibit "8", Deposition of Steve Clifton, p. 21, l. 1-8 and p. 27, l. 1-4 12

Plaintiff's Exhibit "9", Deposition of Terry Miller, p. 45-48 13

Plaintiff's Exhibit "10", Deposition of Ralph Smith, p. 35, l. 24-24 to p. 36, l. 1-16 14

Tab 1

726

SHAYNE M. CLAYSON

V.

UNION PACIFIC RAILROAD COMPANY, UTAH RAILWAY COMPANY

MINUTE ENTRY
Case No. 020905849
Judge Fratto

The matter is before the court to consider defendants' Motion for Summary Judgment.

Plaintiff makes common law and Federal Employers' Liability Act negligence claims against defendants, arising from a train striking him while working on a malfunctioning railroad crossing signal. Defendants assert plaintiff backed into the oncoming train, and that none of the facts cited by plaintiff, even if true, are material to the issue of negligence.

The court grants summary judgment where there are no material facts reasonably in dispute, and therefrom the moving party is entitled to judgment as a matter of law.

Defendants are obligated to provide a reasonably safe work environment and operate the train in a reasonably safe manner. Having considered the pleadings and arguments, the court is persuaded that the facts relied upon by plaintiff to show negligence are not material to a breach of these duties, with the exception of the fact regarding the sounding of a horn from the train prior to the accident.

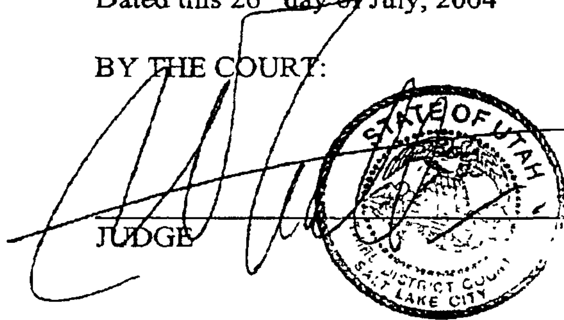
As to this fact, the court is persuaded that it is material but not reasonably in dispute. Defendants present evidence that a horn was sounded. Plaintiff counters with testimony from witnesses that do not recall hearing a horn. Testimony about not hearing a horn, when the witness

is not focused on trying to hear a horn, is insufficient to characterize this fact as reasonably in dispute.

Accordingly, the motion is granted. Counsel for defendants should submit a proposed order consistent with this minute entry.

Dated this 26th day of July, 2004

BY THE COURT:



JUDGE

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 020905849 by the method and on the date specified.

METHOD	NAME
Mail	CASEY K MCGARVEY ATTORNEY DEF 50 SOUTH MAIN ST SUITE 1250 SALT LAKE CITY, UT 84144-0000
Mail	ALAN R STEWART ATTORNEY PLA 1366 EAST MURRAY-HOLLADAY ROAD SALT LAKE CITY UT 84117

Dated this 29 day of July, 2004.

Deputy Court Clerk

Tab 2

liability against defaulting defendant, 8 A.L.R.3d 1070.

Appealability of order setting aside, or refusing to set aside, default judgment, 8 A.L.R.3d 1272.

Defaulting defendant's right to notice and hearing as to determination of amount of damages, 15 A.L.R.3d 586.

Opening default or default judgment claimed to have been obtained because of attorney's mistake as to time or place of appearance, trial, or filing of necessary papers, 21 A.L.R.3d 1255.

Failure to give notice of application for default judgment where notice is required only by custom, 28 A.L.R.3d 1383.

Failure of party or his attorney to appear at pretrial conference, 55 A.L.R.3d 303.

Default judgments against the United States under Rule 55(e) of the Federal Rules of Civil Procedure, 55 A.L.R. Fed. 190.

Rule 56. Summary judgment.

(a) *For claimant.* A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) *For defending party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and proceedings thereon.* The motion, memoranda and affidavits shall be filed and served in accordance with CJA 4-501. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) *Case not fully adjudicated on motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of affidavits; further testimony; defense required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) *When affidavits are unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits made in bad faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.
(Amended effective November 1, 1997.)

Compiler's Notes. — This rule is similar to Rule 56, F.R.C.P.

Cross-References. — Contempt generally, §§ 78-7-18, 78-32-1 et seq.

NOTES TO DECISIONS

Affidavit.
—Contents.
—Corporation.
—Experts.
—Extension of time to submit.
—Failure to submit.
—Inconsistency with deposition.
—Necessity of opposing affidavits.
——Resting on pleadings.
—Objection.
—Sufficiency.
——Hearsay and opinion testimony.
—Superseding pleadings.
—Unpleaded defenses.
—Verified pleading.
—Waiver of right to contest.
—When unavailable.
——Exclusive control of facts.
—Who may make.
Affirmative defense.
Answers to interrogatories.
Appeal.
—Adversely affected party.
—Standard of review.
Applicability.
Attorney's fees.
Availability of motion.
Compliance with rule.
Cross-motions.
Damages.
Discovery.
Disputed facts.
Evidence.
—Admissions of plaintiff.
—Facts considered.
—Improper evidence.
—Proof.
—Unsupported motion.
—Weight of testimony.
Implicit rulings.
Improper party plaintiff.
Issue of fact.
—Contract interpretation.
—Corporate existence.
—Deeds.
—Lease as security.
—Notice.
—Wills.
Judicial attitude.
Motion for new trial.
Motion to dismiss.
Motion to reconsider.
Notice.
—Provision not jurisdictional.
—Waiver of defect.
Procedural due process.
Purpose.
Scope.
Summary judgment improper.
—Damage to insured vehicle.
—Dispersal of interest.
—Findings by court.
—Foreclosure of trust deeds.
—Fraud or duress.
—Guardianship.
—Mortgage note.
—Negligence.
—Nonspecific denial of requests for admission.
—Note.
—Product liability action.
—Recovery for goods and services.
—Stock ownership.
—Wrongful possession.
Summary judgment proper.
—Breach of fiduciary duty.
—Contract action.
——Waiver of claims.
—Contract terms.
—Deceit.
—Defamation.
—Duty of care.
—Employee status.
—Federal law.
—Fraud.
—Judicial immunity.
—Jurisdiction.
—Lease action.
—Misrepresentation.
—Negligence.
—Proximate cause.
—Res ipsa loquitur.
Time for motion.
Written statement of grounds.
Cited.

Affidavit.

—Contents.

Specific facts are required to show whether there is genuine issue for trial. Reagan Outdoor Adv., Inc. v. Lundgren, 692 P.2d 776 (Utah 1984).

When a motion for summary judgment is made under this rule, the affidavit of an adverse party must contain specific evidentiary facts showing that there is a genuine issue for trial. Treloggan v. Treloggan, 699 P.2d 747 (Utah 1985).

Affidavits submitted by plaintiff that contained opinion, legal conclusions, and facts not supported by adequate foundation but portions of which complied with Subdivision (e), because the objectionable statements did nothing more than supplement the arguments made in plaintiff's memorandum, did not prejudice defendants. Broadwater v. Old Republic Sur., 854 P.2d 527 (Utah 1993).

In case arising under county development code, affidavits from building inspector and from Deputy Attorney General stated conclusions and opinions regarding county's accessory use argument, not specific facts supporting it, leaving no genuine issue for trial. Harper v. Summit County, 963 P.2d 768 (Utah Ct. App. 1998), cert. granted, 982 P.2d 87 (Utah 1999).

A trial court did not abuse its discretion in striking affidavits in which many of the facts asserted were not based on personal knowledge, lacked foundation, were conclusory, and contained hearsay. Murdock v. Springville Mun. Corp., 1999 UT 39, 982 P.2d 65.

—Corporation.

Where an affidavit is made by an officer of a corporation, it is generally considered to be the affidavit of the corporation itself. However, the personal knowledge of an agent of the corporation who is not a corporate officer regarding the facts to which he has sworn will generally not be presumed, and therefore, the specific "means and sources" of his information should be shown. Utah Farm Prod. Credit Ass'n v. Watts, 737 P.2d 154 (Utah 1987).

—Experts.

Utah Rule of Evidence 704 allows the expert to state his opinion concerning the ultimate issue in the case, and an expert affidavit must also contain a sufficient factual basis for the opinion proffered. Thus, the affidavit is sufficient if it articulates the facts upon which the opinion was based and if the facts were of the "type usually relied upon by experts in the field." Gaw v. State, 798 P.2d 1130 (Utah Ct. App. 1990).

Because the sole purpose underlying Utah R. Evid. 705 is to obviate the need to use hypothetical questions to elicit expert opinion, the rule's drafters did not intend to exempt expert affidavits in opposition to summary judgment from the requirement in Subdivision (e) of this rule that affidavits set forth specific facts showing there is a genuine issue for trial; affidavits must include not only the expert's opinion, but also the specific facts that logically support the expert's conclusion. Butterfield v. Okubo, 831 P.2d 97 (Utah 1992).

—Extension of time to submit.

Motion for an extension of time under Subdivision (f) was without merit because the movant failed to explain why it was unable to submit evidentiary affidavits, or how a continuance would have aided it to respond to a summary judgment motion. Campbell, Maack & Sessions v. Debry, 2001 UT App 397, 38 P.3d 984.

—Failure to submit.

On its motion for summary judgment, the moving party failed to meet its burden of proving that there was no genuine issue as to any material fact in averring that the area where plaintiff was injured was not a limited area or was not constantly intruded upon by trespassers, as the defendant did not support the argument with an affidavit or any other evidence. Connor v. Union Pac. R.R., 972 P.2d 414 (Utah 1998).

—Inconsistency with deposition.

Party may not rely on a subsequent affidavit that contradicts his deposition to create an issue of fact on a motion for summary judgment unless there is some substantial likelihood that the deposition testimony was in error or the party-deponent is able to state in his affidavit an adequate explanation for the contradictory answer in his deposition. Webster v. Sill, 675 P.2d 1170 (Utah 1983); Gaw v. State, 798 P.2d 1130 (Utah Ct. App. 1990).

—Necessity of opposing affidavits.

Where a defendant's motion for summary judgment is based solely on his pleadings and is not made and supported by affidavits, as provided in Subdivision (c), plaintiff, pursuant to Subdivision (e), may rest on the allegations in his pleadings. Parrish v. Layton City Corp., 542 P.2d 1086 (Utah 1975).

Fact that party opposed to the motion for summary judgment fails to submit documents in opposition does not preclude the denial of the motion; where the party opposed submits no documents in opposition, the moving party may be granted summary judgment only if appropriate, that is, he is entitled to judgment as a matter of law. Olwell v. Clark, 658 P.2d 585 (Utah 1982).

When a party opposes a properly supported motion for summary judgment and fails to file any responsive affidavits or other evidentiary materials allowed by Subdivision (e), the trial court may properly conclude that there are no genuine issues of fact unless the face of the movant's affidavit affirmatively discloses the existence of such an issue. Franklin Fin. v. New Empire Dev. Co., 659 P.2d 1040 (Utah 1983); Cowen & Co. v. Atlas Stock Transf. Co., 695 P.2d 109 (Utah 1984); Busch Corp. v. State Farm Fire & Cas. Co., 743 P.2d 1217 (Utah 1987).

Summary judgment need not be affirmed merely because party opposing summary judgment did not file affidavits in order to avoid judgment against him. Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, Chartered, 681 P.2d 1258 (Utah 1984).

When read in light of Subdivision (b), it is clear that the Subdivision (e) requirement that a party opposing the summary judgment motion file counter-affidavits applies only when the moving party has elected to and has filed affidavits in support of the motion. If the moving party chooses not to or simply fails to file affidavits, Subdivision (e) is inapplicable. Gade v. Olson, 685 P.2d 1041 (Utah 1984).

When a motion for summary judgment is filed and supported by an affidavit, the party opposing the motion has an affirmative duty to respond with affidavits or other materials allowed by Subdivision (e). D & L Supply v.

Saurini 775 P2d 420 (Utah 1989) Thayne v Beneficial Utah Inc 874 P2d 120 (Utah 1994)

——Resting on pleadings

When adequate proof is submitted in support of a motion for summary judgment the pleadings are not sufficient to raise an issue of fact Dupler v Yates 10 Utah 2d 251 351 P2d 624 (1960)

An unverified amendment of a pleading should not be allowed to defeat a motion for summary judgment if the amendment does not effect any substantial change in the issues as they were originally formulated in the pleadings Dupler v Yates 10 Utah 2d 251 351 P2d 624 (1960)

In view of 1965 amendment to this rule it was proper to grant summary judgment for plaintiff upon facts given by defendant in his deposition defendant could not rely upon allegations in pleading to create issue of fact United Am Life Ins Co v Willey 21 Utah 2d 279 444 P2d 755 (1968)

A party may not rely upon allegations in the pleadings to counter affidavits made upon personal knowledge stating facts contrary to those alleged in the pleadings Freed Fin Co v Stoker Motor Co 537 P2d 1039 (Utah 1975)

A defendant cannot rely upon the mere allegations or denials of her pleadings to avoid a summary judgment but must set forth specific facts showing that there is a genuine issue for trial Thornock v Cook 604 P2d 934 (Utah 1979)

Allegations or denials in the pleadings are not a sufficient basis for opposing summary judgment Hall v Fitzgerald 671 P2d 224 (Utah 1983)

—Objection

Because the defendants objection to the plaintiff s first affidavit was framed as a separate written motion to strike the plaintiff should have been given ten days to respond as prescribed by Utah Code Jud Admin 4 501(1)(b) Gillmor v Cummings 806 P2d 1205 (Utah Ct App 1991)

—Sufficiency

In order for an affidavit to be of effective use in the determination of a motion for summary judgment it must set forth such facts as would be admissible in evidence Preston v Lamb 20 Utah 2d 260 436 P2d 1021 (1968) Norton v Blackham 669 P2d 857 (Utah 1983)

An affidavit in opposition to motion for summary judgment to be effective must set forth such facts as are admissible in evidence thus affidavit consisting of inadmissible parol evidence used for purpose of varying terms of written agreement was ineffective Rainford v Rytting 22 Utah 2d 252 451 P2d 769 1969)

An affidavit that does not meet the requirements of this rule is subject to motion to strike Howick v Bank of Salt Lake 28 Utah 2d 64 498 P2d 352 (1972)

In consideration of a motion for summary judgment answers to interrogatories incorporated by reference into an affidavit in support of the motion are subject to the rules of evidence Humphries v Remco Inc 30 Utah 2d 348 517 P2d 1309 (1974)

Affidavits in support of or opposition to a motion for summary judgment are admissible unless they are not made on personal knowledge their contents would not be admissible in evidence or the affiant was not competent to testify Strange v Ostlund 594 P2d 877 (Utah 1979) Treloggan v Treloggan 699 P2d 747 (Utah 1985)

Employee claiming he was fired in retaliation for whistle blowing failed to raise a genuine issue of material fact as to his wrongful termination because he did not produce evidence of actual safety violations but relied only on his own unsupported conclusions Winter v Northwest Pipeline Corp 820 P2d 916 (Utah 1991)

——Hearsay and opinion testimony

Hearsay testimony and opinion testimony that would not be admissible if testified to at the trial may not properly be set forth in an affidavit supporting a summary judgment Western States Thrift & Loan Co v Blomquist 29 Utah 2d 58 504 P2d 1019 (1972) Walker v Rocky Mt Recreation Corp 29 Utah 2d 274 508 P2d 538 (1973)

An affidavit that merely reflects the affiant s unsubstantiated conclusions and that fails to state evidentiary facts is insufficient to create an issue of fact Walker v Rocky Mt Recreation Corp 29 Utah 2d 274 508 P2d 538 (1973) Williams v Melby 699 P2d 723 (Utah 1985)

Statements in an affidavit that are largely conclusory in form and would not be admissible in evidence may not be considered on motion for summary judgment under Subdivision (e) Norton v Blackham 669 P2d 857 (Utah 1983)

A supporting affidavit must be based on the affiant s personal knowledge and an affidavit based merely on his unsubstantiated opinions and beliefs is insufficient Treloggan v Treloggan 699 P2d 747 (Utah 1985)

—Superseding pleadings

As against general allegations of negligence contained in the complaint facts set out in affidavits cannot be construed as totally superseding the pleadings Lundberg v Backman 9 Utah 2d 58 337 P2d 433 (1959)

—Unpleaded defenses

Defenses not raised by the answer or by proper motion may not be raised in an affidavit in opposition to a motion for summary judgment Valley Bank & Trust Co v Wilken 668 P2d 493 (Utah 1983)

—Verified pleading

A plaintiff s verified pleading that meets the requirements for affidavits can be considered the equivalent of an affidavit for the purpose of defeating a motion for summary judgment Pentecost v Harward 699 P2d 696 (Utah 1985)

—Waiver of right to contest

Formal or evidentiary defects in an affidavit in support of or opposition to a motion for summary judgment are waived in the absence of a motion to strike or other objection Fox v Allstate Ins Co 22 Utah 2d 383 453 P2d 701

(1969); Howick v. Bank of Salt Lake, 28 Utah 2d 64, 498 P.2d 352 (1972); Strange v. Ostlund, 594 P.2d 877 (Utah 1979); Franklin Fin. v. New Empire Dev. Co., 659 P.2d 1040 (Utah 1983); Hobelman Motors, Inc. v. Allred, 685 P.2d 544 (Utah 1984); Salt Lake City Corp. v. James Constructors, Inc., 761 P.2d 42 (Utah Ct. App. 1988).

Where verified pleadings did not satisfy the criteria of Subdivision (e), but neither party objected to the form or the content of the other's verified pleading and/or affidavit and the trial court apparently raised no objections sua sponte, any evidentiary objections were deemed to be waived and the verified complaint was held sufficient to controvert the affidavit for purposes of avoiding summary judgment. Pentecost v. Harward, 699 P.2d 696 (Utah 1985).

Defendant waived evidentiary errors in plaintiff's affidavit and in the recitation of supposedly uncontested facts in plaintiff's memorandum of points when he failed to object at the trial court. D & L Supply v. Saurini, 775 P.2d 420 (Utah 1989).

—When unavailable.

In libel action against student newspaper published at state university, where defense counsel presented affidavit asserting that newspaper was a university-controlled entity protected by doctrine of sovereign immunity, and plaintiff's counsel in reply four days later stated that he was unable to respond to defendant's contention due to lack of discovery, such a reply was sufficient under this rule to invoke the trial court's discretion, and it was an abuse of that discretion to enter summary judgment for defendant without granting plaintiff additional time for discovery. Strand v. Associated Students of Univ. of Utah, 561 P.2d 191 (Utah 1977).

Where investors sued attorney and his client with regard to funds lost in investment venture, the trial court erred in granting motion for summary judgment against them without allowing them additional time to gather facts necessary to refute allegations in defendant's affidavit. Cox v. Winters, 678 P.2d 311 (Utah 1984).

Where the party opposing summary judgment had initiated discovery prior to the filing of the summary judgment motion and received no response, the trial court should, under Subdivision (f) of this rule, postpone its decision pending the completion of such discovery. Cox v. Winters, 678 P.2d 311 (Utah 1984).

Plaintiffs' Rule 56(f) motion for continuance was properly denied because they did not file accompanying affidavits specifying the facts they believed further discovery would produce to defeat defendant's motion. Callioux v. Progressive Ins. Co., 745 P.2d 838 (Utah Ct. App. 1987).

Trial court did not abuse its discretion in denying plaintiff's request for a continuance under Subdivision (f), where counsel's affidavit asserted merely that she had not had adequate time to conduct sufficient discovery and secure expert affidavits opposing those of respondents, and did not describe the type of additional discovery needed or the time necessary to complete it. Reeves v. Geigy Pharmaceutical, Inc., 764 P.2d 636 (Utah Ct. App. 1988).

To determine whether an affidavit is sufficient to merit a Subdivision (f) continuance, several factors should be considered: (1) the reasons articulated in the Rule 56(f) affidavit must be "adequate" and the party against whom summary judgment is sought should not be merely on a "fishing expedition" for purely speculative facts; (2) there must have been sufficient time since the inception of the lawsuit for the party against whom the summary judgment is sought to use discovery procedures, and thereby cross-examine the moving party; and (3) if discovery procedures were timely initiated, the nonmoving party must have been afforded an appropriate response. Sandy City v. Salt Lake County, 794 P.2d 482 (Utah Ct. App. 1990), rev'd on other grounds, 827 P.2d 212 (Utah 1992); Jones v. Bountiful City Corp., 834 P.2d 556 (Utah Ct. App. 1992).

Subdivision (f) motions should be granted liberally to provide adequate opportunity for discovery, because information gained during discovery may create genuine issues of fact sufficient to defeat a motion for summary judgment. However, courts should not grant such motions when the party is dilatory or the arguments are lacking in merit. Sandy City v. Salt Lake County, 794 P.2d 482 (Utah Ct. App. 1990), rev'd on other grounds, 827 P.2d 212 (Utah 1992).

When a party timely presents an affidavit under Subdivision (f) stating reasons why it is unable to proffer an evidentiary affidavit in opposition to its opponent's motion for summary judgment, the trial court's discretion is invoked. Unless the court finds the affidavit dilatory or lacking in merit, the motion should be treated liberally. United Park City Mines Co. v. Greater Park City Co., 870 P.2d 880 (Utah 1993); Crossland Sav. v. Hatch, 877 P.2d 1241 (Utah 1994).

A motion for additional time for discovery is properly denied as to claims barred by statutes of limitations. United Park City Mines Co. v. Greater Park City Co., 870 P.2d 880 (Utah 1993).

——Exclusive control of facts.

In a Subdivision (f) motion, the mere averment of exclusive knowledge or control of the facts by the moving party is not adequate; the opposing party must show to the best of his ability what facts are within the movant's exclusive knowledge or control; what steps have been taken to obtain the desired information pursuant to discovery procedures under the rules; and that he is desirous of taking advantage of these discovery procedures. Sandy City v. Salt Lake County, 794 P.2d 482 (Utah Ct. App. 1990), rev'd on other grounds, 827 P.2d 212 (Utah 1992).

—Who may make.

Any witness, not just a party, who has knowledge of the facts can make an affidavit as to material facts. Western Pac. Transp. Co. v. Beehive State Agric. Coop., 597 P.2d 854 (Utah 1979).

Affirmative defense.

Summary judgment may be based on an affirmative defense, such as a valid release, that would defeat the cause of action. Ulibarri v. Christenson, 2 Utah 2d 367, 275 P.2d 170 (1954).

Answers to interrogatories.

This rule must be considered together with Rule 56(e); thus, answers to interrogatories based on self-serving hearsay and conclusions are not sufficient to show genuine issue of material fact necessary to prevent summary judgment. A & M Enters., Inc. v. Hunziker, 25 Utah 2d 363, 482 P.2d 700 (1971).

While Subdivision (c) allows consideration of answers to interrogatories on a motion for summary judgment, evidence considered must be observations made on personal knowledge or it will be declared incompetent and of no weight. A & M Enters., Inc. v. Hunziker, 25 Utah 2d 363, 482 P.2d 700 (1971).

Appeal.

Where the only controversy brought by the parties was the interpretation of a writing and both parties placed the question in the hands of the court by making mutual motions for summary judgment, the losing party was not entitled to a trial on the facts after the court made its decision. Mastic Tile Div. of Ruberoid Co. v. Acme Distrib. Co., 15 Utah 2d 136, 389 P.2d 56 (1964).

On review of a grant of summary judgment to a plaintiff, the inquiry is whether there is any genuine issue as to any material fact, and if there is not, whether the plaintiffs are entitled to judgment as a matter of law. Thornock v. Cook, 604 P.2d 934 (Utah 1979).

Where a party pursues a motion for summary judgment on one claim, he may not, on appeal, either justify the grant of such motion or challenge its denial on the basis of a separate and distinct claim. L & A Drywall, Inc. v. Whitmore Constr. Co., 608 P.2d 626 (Utah 1980).

A challenge to a summary judgment presents for review only conclusions of law because, by definition, cases decided on summary judgment do not resolve factual disputes. Schurtz v. BMW of N. Am., Inc., 814 P.2d 1108 (Utah 1991).

In appeal from summary judgment, court refused to consider arguments that were not raised before the trial court. Olson v. Park-Craig-Olson, Inc., 815 P.2d 1356 (Utah Ct. App. 1991).

Although an appellate court reviews the entry of summary judgment for correctness, according no deference to the trial court's legal conclusions, review of a municipality's land use decision is limited to determining whether the decision was arbitrary, capricious, or illegal. Ralph L. Wadsworth Constr., Inc. v. West Jordan City, 2000 UT App 49, 999 P.2d 1240.

—Adversely affected party.

Recognizing that the party adversely affected by the summary judgment has not had an opportunity for trial, the court views the facts in the light most favorable to that party. When summary judgment is granted, the party adversely affected is the party who did not move for summary judgment. If summary judgment is denied on the merits and a claim or defense of the movant thereby eliminated, then the facts are viewed in the light most favorable to the moving party. Estate Landscape & Snow Removal Specialists, Inc. v. Mountain States Tel. & Tel. Co., 793 P.2d 415 (Utah Ct. App. 1990).

—Standard of review.

On review of a summary judgment or a motion on the pleadings treated as a motion for summary judgment under Rule 12(c), the party against whom the judgment has been granted is entitled to have all the facts presented, and all the inferences fairly arising therefrom, considered in a light most favorable to him. Morris v. Farnsworth Motel, 123 Utah 289, 259 P.2d 297 (1953); Young v. Texas Co., 8 Utah 2d 206, 331 P.2d 1099 (1958); Brandt v. Springville Banking Co., 10 Utah 2d 350, 353 P.2d 460 (1960); Bridge v. Backman, 10 Utah 2d 366, 353 P.2d 909 (1960); Allen's Prods. Co. v. Glover, 18 Utah 2d 9, 414 P.2d 93 (1966); Pioneer Sav. & Loan Ass'n v. Pioneer Fin. & Thrift Co., 18 Utah 2d 106, 417 P.2d 121 (1966); Geneva Pipe Co. v. S & H Ins. Co., 714 P.2d 648 (Utah 1986); Thompson v. Ford Motor Co., 16 Utah 2d 30, 395 P.2d 62 (1964); Whitman v. W.T. Grant Co., 16 Utah 2d 81, 395 P.2d 918 (1964); English v. Kienke, 774 P.2d 1154 (Utah Ct. App. 1989), aff'd, 848 P.2d 153 (Utah 1993); Mountain States Tel. & Tel. Co. v. Garfield County, 811 P.2d 184 (Utah 1991); Winegar v. Froerer Corp., 813 P.2d 104 (Utah 1991).

Upon review of a grant of a motion for summary judgment, the Supreme Court applies the same standard as that applied by the trial court. Durham v. Margetts, 571 P.2d 1332 (Utah 1977); Briggs v. Holcomb, 740 P.2d 281 (Utah Ct. App. 1987).

Because disposition of a case on summary judgment denies the benefit of a trial on the merits, the appellate court must review the evidence in the light most favorable to the losing party, and affirms only where it appears there is no genuine dispute as to any material issues of fact, or where, even according to the facts as contended by the losing party, the moving party is entitled to judgment as a matter of law. Themy v. Seagull Enters., Inc., 595 P.2d 526 (Utah 1979); Briggs v. Holcomb, 740 P.2d 281 (Utah Ct. App. 1987); Copper State Leasing Co. v. Blacker Appliance & Furn. Co., 770 P.2d 88 (Utah 1988); Reeves v. Geigy Pharmaceutical, Inc., 764 P.2d 636 (Utah Ct. App. 1988); Hunt v. ESI Eng'g, Inc., 808 P.2d 1137 (Utah Ct. App.), cert. denied, 826 P.2d 651 (Utah 1991).

Since a summary judgment is granted as a matter of law rather than fact, the appellate court is free to reappraise the trial court's legal conclusions. Barber v. Farmers Ins. Exch., 751 P.2d 248 (Utah Ct. App. 1988); Winegar v. Froerer Corp., 813 P.2d 104 (Utah 1991).

Inasmuch as a challenge to summary judgment presents for review conclusions of law only, because, by definition, summary judgments do not resolve factual issues, the appellate court reviews those conclusions for correctness, without according deference to the trial court's legal conclusions. Bonham v. Morgan, 788 P.2d 497 (Utah 1989); Daniels v. Deseret

Fed. Sav. & Loan Ass'n, 771 P.2d 1100 (Utah Ct. App.), cert. denied, 783 P.2d 53 (Utah 1989); Transamerica Cash Reserve, Inc. v. Dixie Power & Water, Inc., 789 P.2d 24 (1990); Mountain States Tel. & Tel. Co. v. Garfield County, 811 P.2d 184 (Utah 1991).

If a contract is ambiguous and the trial court makes findings of fact from extrinsic evidence, the appellate court's review is strictly limited. However, if the contract is ambiguous but the case is decided on summary judgment, the appellate court can affirm only if the undisputed material facts concerning the parties' intent demonstrate that the successful litigant's position is correct as a matter of law. Fashion Place Inv., Ltd. v. Salt Lake County/Salt Lake County Mental Health, 776 P.2d 941 (Utah Ct. App.), cert. denied, 783 P.2d 53 (Utah 1989).

In considering an appeal from a grant of summary judgment, the appellate court views the facts in a light most favorable to the losing party below. And in determining whether those facts require, as a matter of law, the entry of judgment for the prevailing party below, the appellate court gives no deference to the trial court's conclusions of law, which are reviewed for correctness. Blue Cross & Blue Shield v. State, 779 P.2d 634 (Utah 1989).

An appellate court accords no deference to a trial court's legal conclusions given to support the grant of summary judgment, but reviews them for correctness. Schurtz v. BMW of N. Am., Inc., 814 P.2d 1108 (Utah 1991); Springville Citizens for a Better Community v. City of Springville, 1999 UT 25, 979 P.2d 332.

In determining whether the trial court correctly found that there were no genuine issues of material fact, the appellate court views the facts and all reasonable inferences in a light most favorable to the party opposing the motion. It reviews the trial court's conclusions of law for correctness, including its conclusion that there are no material fact issues. Neiderhauser Bldrs. & Dev. Corp. v. Campbell, 824 P.2d 1193 (Utah Ct. App. 1992).

Reviewing court may affirm a grant of summary judgment on any ground available to the trial court, even if it is one not relied on below. Higgins v. Salt Lake County, 855 P.2d 231 (Utah 1993).

Applicability.

When affidavits or other evidence is presented in conjunction with a motion to dismiss under U.R.C.P. 12(b)(6) and the court does not exclude them, the motion is generally treated as a motion for summary judgment pursuant to this rule. DOIT, Inc. v. Touche, Ross & Co., 926 P.2d 835 (Utah 1996).

Evidentiary hearing to adduce facts for the purpose of ruling on a summary judgment motion is not a trial and does not require an order specifying facts under Subdivision (d). Salt Lake County Comm'n v. Salt Lake County Att'y, 1999 UT 73, 985 P.2d 899.

Attorney's fees.

Where attorney's fees are awarded to a prevailing party on summary judgment, the undisputed, material facts must establish, as a matter of law, that (1) the party is entitled to the award and (2) the amount awarded is reasonable. Taylor v. Estate of Taylor, 770 P.2d 163 (Utah Ct. App. 1989).

Availability of motion.

The remedy of summary judgment is available to both the plaintiff and the defendant, on the original action or counterclaims. National Am. Life Ins. Co. v. Bayou Country Club, Inc., 16 Utah 2d 417, 403 P.2d 26 (1965).

Summary judgment on a complaint is not precluded by the existence of a counterclaim. Bennion v. Amoss, 28 Utah 2d 216, 500 P.2d 512 (1972); Timm v. Dewsnup, 851 P.2d 1178 (Utah 1993).

Compliance with rule.

Summary judgment procedure is a drastic remedy, requiring strict compliance with the rule authorizing it. Summary judgments may be granted without strict compliance with the rules only when both parties are present and no prejudice is shown. Timm v. Dewsnup, 851 P.2d 1178 (Utah 1993).

Cross-motions.

When both parties move for summary judgment, the court is not bound to grant it to one side or another. Diamond T. Utah, Inc. v. Travelers Indem. Co., 21 Utah 2d 124, 441 P.2d 705 (1968).

Cross-motions for summary judgment do not warrant the court's granting of summary judgment unless one of the moving parties is entitled to judgment as a matter of law upon facts that are not genuinely disputed. Amjacs Interwest, Inc. v. Design Assocs., 635 P.2d 53 (Utah 1981).

Cross-motions may be viewed as involving a contention by each movant that no genuine issue of fact exists under the theory it advances, but not as a concession that no dispute remains under the theory advanced by its adversary. In effect, each cross-movant implicitly contends that it is entitled to judgment as a matter of law, but that if the court determines otherwise, factual disputes exist that preclude judgment as a matter of law in favor of the other side. Wycalis v. Guardian Title, 780 P.2d 821 (Utah Ct. App. 1989), cert. denied, 789 P.2d 33 (Utah 1990).

Damages.

Defendant's failure to oppose plaintiff's motion for partial summary judgment in an action for legal malpractice was a capitulation only on the question of whether there was a genuine issue of material fact with respect to his breach of duty, and granting judgment did not relieve plaintiff of the obligation to prove any damages he sustained that were proximately caused by defendant's negligence. Williams v. Barber, 765 P.2d 887 (Utah 1988).

Discovery.

Generally, summary judgment should not be granted if discovery is incomplete, since information sought in discovery may create genuine issues of material fact sufficient to defeat the motion. Downtown Athletic Club v. Horman.

740 P.2d 275 (Utah Ct. App.), cert. denied, 765 P.2d 1277 (1987).

District court properly denied plaintiff's motions to compel further deposing of defendant and to continue the summary judgment hearing, where plaintiff's counsel was simply on a "fishing expedition" for purely speculative facts after substantial discovery had been conducted without producing any significant evidence. Downtown Athletic Club v. Horman, 740 P.2d 275 (Utah Ct. App.), cert. denied, 765 P.2d 1277 (1987).

Because the facts the plaintiff sought to discover would not be legally relevant to the resolution of the issues, the denial of the plaintiff's motion to continue discovery was proper. American Towers Owners Ass'n v. CCI Mech. Inc., 930 P.2d 1182 (Utah 1996).

Trial court did not abuse its discretion in denying plaintiff's motion for further discovery, since the trial court had ruled that the defendant was entitled to summary judgment as a matter of law on the plaintiff's claim of defamation, and therefore further discovery was unnecessary. Mast v. Overson, 971 P.2d 928 (Utah Ct. App. 1998), cert. denied, 982 P.2d 88 (Utah 1999).

Where plaintiff's claims failed as a matter of law, the trial court did not abuse its discretion in denying a motion under this rule after determining that additional discovery would *not* have addressed the legal issues presented in the summary judgment proceeding. Holmes v. American States Ins. Co., 2000 UT App 85, 1 P.3d 552.

Plaintiff's Rule 56(f) motion was properly denied where, after the initial requests for discovery and one letter of reminder, plaintiff's counsel waited until the very last day of discovery to act. Plaintiff's counsel had a duty to act with reasonable diligence. Brown v. Glover, 2000 UT 89, 16 P.3d 540.

Disputed facts.

Where disputed facts would not establish a basis upon which plaintiff could recover, no matter how they were resolved, it would have been useless to try them and a dismissal on a summary judgment was proper. Abdulkadir v. Western Pac. R.R., 7 Utah 2d 53, 318 P.2d 339 (1957).

On a motion for summary judgment against a defendant, where some of the facts are in dispute, a judgment can properly be rendered against him only if, on the undisputed facts, the defendant has no valid defense. Disabled Am. Veterans v. Hendrixson, 9 Utah 2d 152, 340 P.2d 416 (1959).

Summary judgment cannot properly be granted if the allegations of the plaintiff's complaint stand in opposition to the averments of the affidavits so that there are controverted issues of fact, the determination of which is necessary to settle the rights of the parties. Christensen ex rel. Christensen v. Financial Serv. Co., 14 Utah 2d 101, 377 P.2d 1010 (1963).

It only takes one sworn statement to dispute averments on other side of controversy and create issue of fact, precluding summary judgment. Holbrook Co. v. Adams, 542 P.2d 191 (Utah 1975).

The presence of a dispute as to material facts disallows the granting of a summary judgment. Bill Brown Realty, Inc. v. Abbott, 562 P.2d 238 (Utah 1977).

Where the parties were not in complete conflict as to certain facts, but the understanding, intention, and consequences of those facts were vigorously disputed, the matter was not proper for summary judgment and could only be resolved by a trial. Sandberg v. Klein, 576 P.2d 1291 (Utah 1978).

Summary judgment is not precluded simply whenever some fact remains in dispute, but only when a material fact is genuinely controverted. Heglar Ranch, Inc. v. Stillman, 619 P.2d 1390 (Utah 1980).

Evidence.

In case of motion for summary judgment the adverse party is entitled to have the court survey the evidence and all reasonable inferences fairly to be drawn therefrom in the light most favorable to him. Morris v. Farnsworth Motel, 123 Utah 289, 259 P.2d 297 (1953); Thompson v. Ford Motor Co., 16 Utah 2d 30, 395 P.2d 62 (1964); Bowen v. Riverton City, 656 P.2d 434 (Utah 1982).

Where trial court granted defendant's motion for summary judgment on the ground that the plaintiff's own statement in his deposition showed that plaintiff was contributorily negligent in causing his injuries, on appeal by plaintiff, contesting that ruling, Supreme Court was obliged to consider the evidence in the light most favorable to plaintiff. Whitman v. W.T. Grant Co., 16 Utah 2d 81, 395 P.2d 918 (1964).

Submissions in support of or opposition to a motion for summary judgment should be looked at in the light favorable to the nonmoving party's position. Durham v. Margetts, 571 P.2d 1332 (Utah 1977); Salt Lake City Corp. v. James Constructors, Inc., 761 P.2d 42 (Utah Ct. App. 1988).

Because disposition of a case by summary judgment denies the benefit of a trial on the merits, any doubt concerning questions of fact, including evidence and reasonable inferences drawn from the evidence, should be resolved in favor of the party opposing the motion. Beehive Brick Co. v. Robinson Brick Co., 780 P.2d 827 (Utah Ct. App. 1989).

—Admissions of plaintiff.

Defendant's admission that she had failed to cure numerous violations of her lease agreement with the plaintiffs negated her contention that plaintiffs would not have taken the same action against her if not for her "multi-generational" family, and thus any dispute as to the plaintiffs' purported discriminatory intent in issuing a seven-day notice was immaterial and did not preclude summary judgment. Malibu Inv. Co. v. Sparks, 2000 UT 30, 996 P.2d 1043.

—Facts considered.

In ruling on a motion for a summary judgment, the court may consider only facts that are not in dispute. Sorenson v. Beers, 585 P.2d 458 (Utah 1978).

—Improper evidence.

Where summary judgment is granted, there

has been no hearing and no evidence has been viewed by the court and, therefore, no appeal may be made on the basis of improper evidence. Burningham v. Ott, 525 P.2d 620 (Utah 1974).

—Proof.
The quantum of proof to show nonexistence of a material fact is of necessity less than that required to prove a matter of affirmative defense. Dupler v. Yates, 10 Utah 2d 251, 351 P.2d 624 (1960).

—Unsupported motion.
Trial court erred in granting the defendant's unsupported motion for summary judgment on a wrongful death claim brought by the plaintiff under the Federal Employers' Liability Act, as the plaintiff, absent any evidence submitted in affidavits by the defendant to support its motion for summary judgment, needed only to make out a prima facie case in her pleadings, and the trial court based its ruling on a point that was in factual dispute given the lack of evidence presented by the defendant. Wilkinson v. Union Pac. R.R., 975 P.2d 464 (Utah 1998).

—Weight of testimony.
Court cannot consider weight of testimony or credibility of witnesses on motion for summary judgment; court simply determines that there is no disputed issue of material fact and that as matter of law one party should prevail. Singleton v. Alexander, 19 Utah 2d 292, 431 P.2d 126 (1967); Sandberg v. Klein, 576 P.2d 1291 (Utah 1978).

Summary judgment is never used to determine what the facts are, but only to ascertain whether there are any material issues of fact in dispute. Hill ex rel. Fogel v. Grand Cent., Inc., 25 Utah 2d 121, 477 P.2d 150 (1970).

On a motion for summary judgment, it is not appropriate for a court to weigh disputed evidence concerning such factors; the sole inquiry to be determined is whether there is a material issue of fact to be decided. W.M. Barnes Co. v. Sohio Natural Resources Co., 627 P.2d 56 (Utah 1981); Spor v. Crested Butte Silver Mining, Inc., 740 P.2d 1304 (Utah 1987).

Implicit rulings.
If a motion for summary judgment on a claim, the notice of hearing on the motion, and the summary judgment itself make no reference to an existing counterclaim, the summary judgment is an implicit ruling on the counterclaim only to the extent that the ruling on the claim necessarily rejects conflicting contentions in the counterclaim. Timm v. Dewsnup, 851 P.2d 1178 (Utah 1993).

Improper party plaintiff.
Summary judgment against husband suing for damages occasioned by alleged negligent injury to wife was sustained since wife rather than husband was proper party to sue for damages claimed. Corbridge v. M. Morrin & Son, 19 Utah 2d 409, 432 P.2d 41 (1967).

Issue of fact.
A genuine issue of fact exists where, on the basis of the facts in the record, reasonable minds could differ on whether defendant's conduct measures up to the required standard. Jackson v. Dabney, 645 P.2d 613 (Utah 1982).

In order for nonmoving party to oppose successfully a motion for summary judgment and send the issue to a fact-finder, it is not necessary for the party to prove its legal theory; it is only necessary for nonmoving party to show "facts" controverting the "facts" stated in moving party's affidavit. Salt Lake City Corp. v. James Constructors, Inc., 761 P.2d 42 (Utah Ct. App. 1988).

—Contract interpretation.
When contract interpretation must be determined by extrinsic evidence of intent, it becomes a question of fact, and if this extrinsic evidence is disputed, then a material fact is also disputed and summary judgment cannot be granted. Records v. Briggs, 887 P.2d 864 (Utah Ct. App. 1994).

—Corporate existence.
Where an issue of fact was raised as to whether plaintiff veterans' organization was a corporation having a right to institute suit in its own name under Rule 17(d), or was in fact a voluntary unincorporated association, a summary judgment against the defendant nonprofit corporation was precluded on this point. Disabled Am. Veterans v. Hendrixson, 9 Utah 2d 152, 340 P.2d 416 (1959).

—Deeds.
Presumptive validity of deeds created issues of fact which precluded summary judgment for plaintiffs attacking deeds. Judkins v. Toone, 27 Utah 2d 17, 492 P.2d 980 (1972).

—Lease as security.
Whether a lease was intended as security for a sale is a question to be determined on the facts of each case, as is the issue of whether the nature of the document raises questions of fact that preclude summary judgment. Colonial Leasing Co. v. Larsen Bros. Constr. Co., 731 P.2d 483 (Utah 1986).

—Notice.
The trial court properly granted summary judgment on the issue of notice, because the nonmoving party failed to allege specific facts to show that his insurer had failed to mail him the cancellation notice on his policy. Baumgart v. Utah Farm Bureau Ins. Co., 851 P.2d 647 (Utah Ct. App.), cert. denied, 862 P.2d 1356 (Utah 1993).

—Wills.
Material issues of fact were in dispute when reasonable minds could differ as to whether decedent intended to remove appellant as beneficiary where decedent was in the process of changing the beneficiary at the time of death. Estate of Anello v. McQueen, 921 P.2d 1030 (Utah Ct. App. 1996).

Judicial attitude.
Because a summary judgment prevents litigants from fully presenting their case to the court, courts are, and should be, reluctant to invoke this remedy. Brandt v. Springville Banking Co., 10 Utah 2d 350, 353 P.2d 460 (1960).

Motion for new trial.

A motion for a "new" trial following summary judgment is procedurally correct and available to litigants. Moon Lake Elec. Ass'n v. Ultrasystems W. Constructors, Inc., 767 P.2d 125 (Utah Ct. App. 1988).

Filing of an "exception to order and motion for reconsideration" of summary judgment tolled the thirty-day time period within which to file a notice of appeal, notwithstanding the incorrect title placed upon the pleading, where the judge ruled on the motion as if it were a motion for a new trial. Watkiss & Campbell v. Foa & Son, 808 P.2d 1061 (Utah 1991).

Motion to dismiss.

Where, in an action based on an alleged contract, the parties have stipulated all of the evidence, and the defendant moves for dismissal of the action on the ground that, as a matter of law, the evidence shows no meeting of the minds, the motion is really a motion for a summary judgment, and can be granted only if there is no evidence from which it would be reasonable to find that there was a meeting of the minds. R.J. Daum Constr. Co. v. Child, 122 Utah 194, 247 P.2d 817 (1952).

In denying defendant's motion to dismiss libel complaint for failure to state a claim, trial court acted improperly in demanding that plaintiff produce evidence to support her allegation of malice and in entering a summary judgment for defendant on her failure to do so, since the court on its own initiative should not try to convert a motion for dismissal into one for summary judgment. Hill v. Grand Cent., Inc., 25 Utah 2d 121, 477 P.2d 150 (1970).

Motion to reconsider.

Court properly refused to reconsider when the party seeking reconsideration did not present any legal theories that had not already been considered and, although it elaborated on some facts, it presented no material facts that had not been before the court at the time of the original decision to grant summary judgment. Salt Lake City Corp. v. James Constructors, Inc., 761 P.2d 42 (Utah Ct. App. 1988).

Notice.

A summary judgment is proper even in the absence of any formal notice by the moving party when it appears there are no true factual issues and the court can resolve the remaining determination of questions of law. Security Title Co. v. Payless Bldrs. Supply, 17 Utah 2d 179, 407 P.2d 141 (1965).

Where a party cannot prove that his rights were adversely affected, an appellate court will uphold a summary judgment granted at a hearing held less than 10 days after service of the notice of, and motion for, a summary judgment. Western States Thrift & Loan Co. v. Blomquist, 29 Utah 2d 58, 504 P.2d 1019 (1972).

—Provision not jurisdictional.

Trial court did not lack jurisdiction to render summary judgment where notice of the motion was mailed only nine days prior to the hearing but defendants were present at the hearing; notice provision of this rule is not jurisdictional. Walker v. Rocky Mt. Recreation Corp., 29 Utah 2d 274, 508 P.2d 538 (1973).

Because a violation of the notice requirement of Subdivision (c) does not divest the court of jurisdiction over the motion, it has the power to grant summary judgment despite such a violation. However, such a violation will void the grant unless the violation amounts to harmless error. Crookston v. Fire Ins. Exch., 817 P.2d 789 (Utah 1991).

—Waiver of defect.

Where defendant failed to object in the trial court to the fact that a notice of a motion for summary judgment was mailed only nine days prior to the hearing, any defect was deemed to have been waived. Walker v. Rocky Mt. Recreation Corp., 29 Utah 2d 274, 508 P.2d 538 (1973).

Procedural due process.

Defendant was not denied procedural due process on ground that it did not have reasonable opportunity to prepare for trial and engage in discovery procedures despite fact that only 13 days lapsed between the mailing of defendant's answer and the filing of plaintiff's motion for summary judgment. Walker v. Rocky Mt. Recreation Corp., 29 Utah 2d 274, 508 P.2d 538 (1973).

Purpose.

The primary purpose of the summary judgment procedure is to pierce the allegations of the pleadings, to show that there is no genuine issue of material fact, although an issue may be raised by the pleadings, and to establish that the moving party is entitled to judgment as a matter of law. Dupler v. Yates, 10 Utah 2d 251, 351 P.2d 624 (1960).

The sole purpose of summary judgment is to bar from the courts unnecessary and unjustified litigation. Reliable Furn. Co. v. Fidelity & Guar. Ins. Underwriters, 16 Utah 2d 211, 398 P.2d 685 (1965).

A motion for summary judgment provides a means for searching out the undisputed facts as shown by the pleadings, depositions, admissions, answers to interrogatories and documents before the court; its aim is to discover whether a controversy can be settled as a matter of law, thereby saving both court and litigants the time, trouble and expense of a trial; but because the party against whom a summary judgment is entered is deprived of the privilege of a trial, the record must be carefully scrutinized to see if that party presents allegations which, if true, would entitle him to judgment; if so, then summary judgment is improper. Rich v. McGovern, 551 P.2d 1266 (Utah 1976).

In circumstances where the granting of a motion for summary dismissal is justified, it serves the salutary purpose of eliminating the time, trouble and expense of a trial that would be to no avail anyway. McBride v. Jones, 615 P.2d 431 (Utah 1980).

A major purpose of summary judgment is to avoid unnecessary trial by allowing the parties to pierce the pleadings to determine whether there is a genuine issue to present to the fact finder. Reagan Outdoor Adv., Inc. v. Lundgren, 692 P.2d 776 (Utah 1984).

Scope.

The moving party decides what issues to present to the court for adjudication. The party may move for summary judgment on all or less than all of the issues raised by the complaint and answer and may also move for determination of issues raised by any counterclaim or cross-claim if he or she deems it appropriate. Timm v. Dewsnup, 851 P.2d 1178 (Utah 1993).

Summary judgment improper.

If there is any genuine issue as to any material fact, the motion should be denied. Young v. Felornia, 121 Utah 646, 244 P.2d 862, cert. denied, 344 U.S. 886, 73 S. Ct. 186, 97 L. Ed. 685 (1952); Ruffinengo v. Miller, 579 P.2d 342 (Utah 1978).

Unless there is a showing that the disfavored parties cannot produce evidence that would reasonably support a finding in their favor on a material or determinative issue of fact, a summary judgment is erroneous. Bridge v. Backman, 10 Utah 2d 366, 353 P.2d 909 (1960); Krantz v. Holt, 819 P.2d 352 (Utah 1991); Billings v. Union Bankers Ins. Co., 819 P.2d 803 (Utah 1991).

Summary judgment was erroneously entered for plaintiff where issue of fact was raised by pleadings and counteraffidavit of defendant. Hatch v. Sugarhouse Fin. Co., 20 Utah 2d 156, 434 P.2d 758 (1967).

Bare contentions, unsupported by any specification of facts in support thereof, raise no material questions of fact to preclude the entry of summary judgment. Massey v. Utah Power & Light, 609 P.2d 937 (Utah 1980).

A motion for summary judgment should be denied where the evidence presents a genuine issue of material fact which, if resolved in favor of the nonmoving party, would entitle him to judgment as a matter of law. Jackson v. Dabney, 645 P.2d 613 (Utah 1982).

Summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Ehlers & Ehlers Architects v. Carbon County, 805 P.2d 789 (Utah Ct. App. 1991).

Because there were genuine and material fact issues concerning the adverse consequences of forfeiture suffered by the plaintiff in relation to damages sustained by the defendant through plaintiff's repeated failure to pay rent, which facts were not explicitly explored by either party, summary judgment in favor of plaintiff was reversed and remand for a trial on the issue of substantial compliance ordered. Cache County v. Beus, 1999 UT App 134, 978 P.2d 1043.

Where the trial court erred in striking expert testimony which would have raised a material issue of fact, and also erred in denying the plaintiff's motion to substitute a new expert, the grant of summary judgment on the basis of failure to present expert testimony was erroneous. Boice v. Marble, 1999 UT 71, 982 P.2d 565.

The trial court abused its discretion when it found that the only issues to be decided were "matters of law" to be based upon the legislative record, in a case arising out of a multi-year, multiparty transaction with many contingencies, since the fairness of each year's exchange values was a disputed question of material fact not resolvable on summary judgment. Price Dev. Co. v. Orem City, 2000 UT 26, 995 P.2d 1237.

—Damage to insured vehicle.

Insurer was improperly granted summary judgment in suit for damage to insured's vehicle where fact question existed whether vehicle was stolen car when wrecked or buyer on conditional sales contract had taken possession of vehicle repossessed by finance company. Diamond T. Utah, Inc. v. Travelers Indem. Co., 21 Utah 2d 124, 441 P.2d 705 (1968).

—Dispersal of interest.

Summary judgment was improperly granted in dispute over dispersal of savings account interest where settlement agreement made no mention of the interest while affidavit of plaintiff's attorney claimed that the interest was included as part of the settlement agreement. L & A Drywall, Inc. v. Whitmore Constr. Co., 608 P.2d 626 (Utah 1980).

—Findings by court.

While findings of fact are unnecessary to support granting of summary judgment, the grant of summary judgment is precluded where trial judge saw fit to make and enter findings and conclusions, the content of which evidence material issues of fact. Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, 681 P.2d 1258 (Utah 1984).

—Foreclosure of trust deeds.

In action by vendors of real estate to foreclose two trust deeds executed by purchasers, summary judgment was improper where affidavit in support of motion for summary judgment and supporting documents showed unsupported conclusions and unresolved issues of fact, even though vendors did not present affidavits in opposition to motion for summary judgment. Frisbee v. K & K Constr. Co., 676 P.2d 387 (Utah 1984).

Summary judgment upholding a trustee's right to foreclosure under a deed of trust was improper where the debtor and trustee contested the issue of whether an entity to which the debtor made an alleged reinstatement payment was acting as the trustee's agent, which if true may have cured the debtor's default, and thus a genuine issue of material fact existed. Nyman v. McDonald, 966 P.2d 1210 (Utah Ct App. 1998).

—Fraud or duress.

Where plaintiff alleged that he was forced to settle an insurance claim on a business-interruption policy for a reduced amount by claim adjuster's representation that an amount due the plaintiff on a fire insurance policy could not be paid until plaintiff agreed to the lower payment on the business-interruption policy, trial court was not justified in concluding at a pretrial hearing that, as a matter of law, there was no fraud or duress alleged, and so was not justified in granting summary judgment for the insurer. Reliable Furn. Co. v. Fidelity & Guar

Ins. Underwriters, 16 Utah 2d 211, 398 P.2d 685 (1965).

Because plaintiff's motion did not address defendant's allegations in a counterclaim of fraud in the inducement, claiming that defendant had entered a lease because of specific promises made by the plaintiff before the lease was signed, it was error for the trial court to grant summary judgment on plaintiff's contract claim on the lease. TS 1 Partnership v. Allred, 877 P.2d 156 (Utah Ct. App. 1994).

—Guardianship.

A summary judgment dismissing an action to collect a promissory note because of the incompetency of the maker was improper where evidence that guardian had been appointed for defendant under the Uniform Veterans' Guardianship Act raised substantial fact issue. Home Town Fin. Corp. v. Frank, 13 Utah 2d 26, 368 P.2d 72 (1962).

—Mortgage note.

Summary judgment was not proper where answer to complaint on note, although admitting execution of note, further alleged that plaintiff was without authority to sign mortgage and that the matter was being litigated in another action between plaintiff and defendant. Freed Fin. Co. v. Stoker Motor Co., 537 P.2d 1039 (Utah 1975).

—Negligence.

In action to recover for injuries suffered when struck by rocks from dynamite blast exploded by neighboring farmers in constructing irrigation ditch, issues of assumption of risk and contributory negligence should have been submitted to jury where plaintiff helped in activities of blasting to same extent and retreated same distance defendants did in their trucks but failed to dismount from his horse; summary judgment for defendants was vacated. Robison v. Robison, 16 Utah 2d 2, 394 P.2d 876 (1964).

Ordinarily the question of negligence and contributory negligence may not be settled on a motion for summary judgment. Preston v. Lamb, 20 Utah 2d 260, 436 P.2d 1021 (1968).

Whether defendant's nominal charge for ambulance service constituted gratuitous accommodation or a payment removing passenger from guest status was fact question precluding summary judgment in action for alleged negligent transportation to hospital. Willden v. Kennecott Copper Corp., 25 Utah 2d 96, 476 P.2d 687 (1970).

Naked assertions of negligence, unsupported by any facts, fall far short of raising a material issue of fact on the issue of negligence. Massey v. Utah Power & Light, 609 P.2d 937 (Utah 1980).

Summary judgment should be granted with great caution in negligence cases. Williams v. Melby, 699 P.2d 723 (Utah 1985).

While courts should be extremely cautious in granting summary judgment for defendant on the basis that plaintiff has failed to secure expert testimony to support a medical negligence action, summary judgment may be allowed where the record indicates that plaintiff has had every opportunity to establish his case and has failed to demonstrate that he could show negligent acts or omissions on the part of defendant by expert medical testimony and the issue is clearly one which cannot be determined by laymen alone. Robinson v. Intermountain Health Care, Inc., 740 P.2d 262 (Utah Ct. App. 1987).

Summary judgment, granted on the ground that plaintiff failed to file the notice required in a medical malpractice action within the statutory limitation period, was reversed where the facts were unclear and did not give rise to the conclusion that, as a matter of law, plaintiff should have known of her legal injuries at the time she suffered them. Brower v. Brown, 744 P.2d 1337 (Utah 1987).

Trial court properly granted summary judgment against a customer who sued a storeowner for injuries sustained in a "slip and fall" accident just inside the store entrance, because the customer failed to raise any material issues of fact beyond a bare contention that the storeowner was somehow negligent. Dybowski v. Ernest W. Hahn, Inc., 775 P.2d 445 (Utah Ct. App. 1989).

A trial court may not grant summary judgment and thereby deny the plaintiff a trial on a negligence issue, including resolving the applicable standard of care, unless it correctly concludes that the jury could not reasonably find the defendant's conduct to be negligent. Wycalis v. Guardian Title, 780 P.2d 821 (Utah Ct. App. 1989), cert. denied, 789 P.2d 33 (Utah 1990).

—Nonspecific denial of requests for admission.

Defendant's nonspecific denials to requests for admission contrary to Rule 36(a) did not entitle plaintiff to a summary judgment. Pace v. Pace, 559 P.2d 964 (Utah 1977).

—Note.

Trial judge's action in granting plaintiffs' motion for summary judgment on a note, while reserving for trial defendants' affirmative defense of lack of consideration for the same instrument, was inappropriate where it was not clear how plaintiffs could be entitled to judgment on the note as a matter of law if factual issues sufficient to warrant trial existed as to whether there was consideration. Agathangelides v. Shaw, 740 P.2d 259 (Utah 1987).

—Product liability action.

In a products liability action against an automobile manufacturer, summary judgment for defendant was improper where, even though the particular car which was the subject of the action was missing, plaintiff should have been given the opportunity to present evidence to support his claims of a design defect. Drysdale v. Ford Motor Co., 947 P.2d 678 (Utah 1997).

—Recovery for goods and services.

In action to recover for goods and services provided on an open account to a partnership, the record revealed disputed issues of material fact regarding treatment of the owner of one of the partners. Amjacs Interwest, Inc. v. Design Assocs., 635 P.2d 53 (Utah 1981).

—Stock ownership.

Summary judgment was not proper where

conflicting affidavits, although not raising issue of ownership of stock shares, did raise issue as to whether subsequent purchaser for value and without notice was a bona fide purchaser. Strand v. Prince-Covey & Co., 534 P.2d 892 (Utah 1975).

—Wrongful possession.
Summary judgment was improperly granted for transport company in action against defendant for wrongful possession of a trailer, where complaint alleged value of use and possession of $10 per day but defendant denied this and asserted a much lower value and also requested a setoff for storage and care against any charge for possession. Western Pac. Transp. Co. v. Beehive State Agric. Coop., 597 P.2d 854 (Utah 1979).

Summary judgment proper.
It must appear to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of its claim before a judgment on the pleading may be granted. Securities Credit Corp. v. Willey, 1 Utah 2d 254, 265 P.2d 422 (1953).

A summary judgment is proper only if the pleadings, depositions, affidavits and admissions show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. In re Williams' Estates, 10 Utah 2d 83, 348 P.2d 683 (1960); Ruffinengo v. Miller, 579 P.2d 342 (Utah 1978); Bowen v. Riverton City, 656 P.2d 434 (Utah 1982); Snyder v. Merkley, 693 P.2d 64 (Utah 1984); Geneva Pipe Co. v. S & H Ins. Co., 714 P.2d 648 (Utah 1986); Billings ex rel. Billings v. Union Bankers Ins. Co., 819 P.2d 803 (Utah 1991).

Even though the facts developed under a discovery process were not consistent with the allegations in a counterclaim, such facts did not impel a finding that there was a fact issue to be presented to an arbiter. Continental Bank & Trust Co. v. Cunningham, 10 Utah 2d 329, 353 P.2d 168 (1960).

This rule permits an excursion beyond the pleading and if the facts discovered irrefutably disprove facts pleaded, summary judgment is appropriate on motion therefor. Continental Bank & Trust Co. v. Cunningham, 10 Utah 2d 329, 353 P.2d 168 (1960); Aird Ins. Agency v. Zions First Nat'l Bank, 612 P.2d 341 (Utah 1980); Gadd v. Olson, 685 P.2d 1041 (Utah 1984).

A summary judgment must be supported by evidence, admission and inferences which, when viewed in the light most favorable to the loser, show that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law"; such showing must preclude all reasonable possibility that the loser could, if given a trial, produce evidence which would reasonably sustain a judgment in his favor. Bullock v. Desert Dodge Truck Ctr., Inc., 11 Utah 2d 1, 354 P.2d 559 (1960).

A summary judgment is appropriate only where the favored party makes a showing which precludes, as a matter of law, the awarding of any relief to the losing party. Tanner v. Utah Poultry & Farmers Coop., 11 Utah 2d 353, 359 P.2d 18 (1961).

To sustain a summary judgment, the pleadings, evidence, admissions and inferences therefrom, viewed most favorably to the losing party, must show that there is no genuine issue of material fact, and that the winning party is entitled to a judgment as a matter of law. Such showing must preclude, as a matter of law, all reasonable possibility that the losing party could win if given a trial. Frederick May & Co. v. Dunn, 13 Utah 2d 40, 368 P.2d 266 (1962); Judkins v. Toone, 27 Utah 2d 17, 492 P.2d 980 (1972).

Only where it clearly appears that the party against whom the judgment would be granted cannot possibly establish a right to recover should summary judgment be granted, and any doubts should be resolved in favor of such party when summary judgment against him is being considered. Reliable Furn. Co. v. Fidelity & Guar. Ins. Underwriters, 16 Utah 2d 211, 398 P.2d 685 (1965).

A summary judgment can be granted only when it is shown that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law under those facts. Singleton v. Alexander, 19 Utah 2d 292, 431 P.2d 126 (1967); Sandberg v. Klein, 576 P.2d 1291 (Utah 1978).

Summary judgment should be granted only when it clearly appears that there are no issues of material fact in dispute, which if resolved in favor of the adverse party would entitle him to prevail. University Club v. Invesco Holding Corp., 29 Utah 2d 1, 504 P.2d 29 (1972).

A summary judgment motion should be granted only when all the facts entitling the moving party to a judgment are clearly established or admitted. Sorenson v. Beers, 585 P.2d 458 (Utah 1978).

A summary judgment is appropriate only where the favored party makes a showing which precludes, as a matter of law, the awarding of any relief to the losing party. FMA Acceptance Co. v. Leatherby Ins. Co., 594 P.2d 1332 (Utah 1979).

A summary judgment must be supported by evidence, admissions and inferences which, when viewed in the light most favorable to the losing side, establishes that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Bihlmaier v. Carson, 603 P.2d 790 (Utah 1979).

The grant of a motion for summary judgment (or the affirmance thereof on appeal) is appropriate only where there exists no genuine issues of fact relevant to the disposition of the claim underlying the motion. L & A Drywall, Inc. v. Whitmore Constr. Co., 608 P.2d 626 (Utah 1980).

Where pleadings, answers to interrogatories and depositions disclosed undisputed facts which permitted resolution of controversy as a matter of law, it was appropriate to enter summary judgment. Aird Ins. Agency v. Zions First Nat'l Bank, 612 P.2d 341 (Utah 1980).

Even if there is no genuine issue as to any material fact, a summary judgment is proper only if the pleadings and other documents dem-

onstrate that the moving party is entitled to a judgment as matter of law. Lockhart Co. v. Anderson, 646 P.2d 678 (Utah 1982).

Summary judgment should be granted only when it clearly appears that there is no reasonable probability that the party moved against could prevail. Snyder v. Merkley, 693 P.2d 64 (Utah 1984).

Summary judgment should be granted only when it is clear from the undisputed facts that the opposing party cannot prevail. Conder v. A.L. Williams & Assocs., 739 P.2d 634 (Utah Ct. App. 1987); Bray Lines v. Utah Carriers, Inc., 739 P.2d 1115 (Utah Ct. App. 1987).

When the moving party has presented evidence sufficient to support a judgment in its favor, and the opposing party fails to submit contrary evidence, a trial court is justified in concluding that no genuine issue of fact is present or would be at trial. Amica Mut. Ins. Co. v. Schettler, 768 P.2d 950 (Utah Ct. App. 1989).

—Breach of fiduciary duty.

Summary judgment was appropriately granted to the defendants on a claim for breach of fiduciary duty where no fiduciary relationship was created by a homeowner's payment to a title insurance company for a title search in connection with the preparation of a commitment for title insurance and where the plaintiff presented no evidence of any breach of any duty that may have existed. Gildea v. Guardian Title Co., 970 P.2d 1265 (Utah 1998).

—Contract action.

Summary judgment was properly awarded car dealer suing bank for portion of reserve account being held by bank to secure conditional sales contract sold to bank since acts and statements of dealer did not in fact terminate contract and consequently there was no genuine issue of fact requiring trial. Spencer Auto Sales, Inc. v. First Sec. Bank, 20 Utah 2d 145, 434 P.2d 455 (1967).

Summary judgment on a contract claim was proper where a fully integrated contract specifically stated that certain payroll reports where to be prepared only "as needed," while the plaintiff claimed the contract contained an implied provision that the defendant was strictly required to prepare the payroll reports. ELM, Inc. v. M.T. Enters., Inc., 968 P.2d 861 (Utah Ct. App. 1998), cert. denied, 982 P.2d 89 (Utah 1999).

Summary judgment for the defendant, the Department of Financial Institutions (DFI), was affirmed on a claim that DFI had breached the implied covenant of good faith and fair dealing by taking possession of a savings and loan purchased by the plaintiffs after DFI had issued net worth certificates to keep the savings and loan solvent. DFI had no express contractual obligation to continue to recognize the net worth certificates and the course of dealings between the plaintiffs and DFI did not reveal any obligation of or representations by DFI which would support the claim. Brown v. Moore, 973 P.2d 950 (Utah 1998).

Summary judgment was properly entered for the defendant, a hospital, on claims by a staff physician that the hospital had violated its own bylaws during peer review and disciplinary proceedings against the plaintiff, as the hospital substantially complied with its contractual obligations under the bylaws, gave the plaintiff notice and an opportunity to be heard on all charges against the plaintiff, held hearings which the plaintiff attended and fully participated in, negotiated settlements with the plaintiff, and all decisions made during the proceedings were made on record by the duly appointed disciplinary body. Brinton v. IHC Hosps., 973 P.2d 956 (Utah 1998).

——Waiver of claims.

Summary judgment was properly entered for the defendant on the plaintiff's claims that the defendant, a hospital, violated its own bylaws in peer review and disciplinary proceedings against the plaintiff by making certain procedural errors, as the plaintiff waived the right to object by failing to make timely objections during the review proceedings as the plaintiff was required to do. Brinton v. IHC Hosps., 973 P.2d 956 (Utah 1998).

—Contract terms.

Only when contract terms are complete, clear, and unambiguous can they be interpreted by the judge on a motion for summary judgment. If the evidence as to the terms of an agreement is in conflict, the intent of the parties as to the terms of the agreement is to be determined by the jury. Colonial Leasing Co. v. Larsen Bros. Constr. Co., 731 P.2d 483 (Utah 1986).

—Deceit.

Where defendants in an action in deceit based upon misrepresentation produced evidence that pierced the allegations of the complaint and the plaintiff did not controvert, explain or destroy that evidence by counteraffidavit or otherwise, the court would be justified in concluding that no genuine issue of fact was present and that summary judgment should be rendered for the moving party. Dupler v. Yates, 10 Utah 2d 251, 351 P.2d 624 (1960).

—Defamation.

Public comments made by a county commissioner about a real estate developer were not defamatory as a matter of law, as the statements were made as part of a continuing and spirited political debate, the statements were made in response to the plaintiff's assertions of wrongdoing by the commissioner, there was no likelihood of damage to the plaintiff's reputation and the statements therefore could not sustain a defamatory meaning. Mast v. Overson, 971 P.2d 928 (Utah Ct. App. 1998), cert. denied, 982 P.2d 88 (Utah 1999).

Summary judgment was appropriate in defamation action where all the defendants denied plaintiff's allegation in affidavits contained in the record, because the burden then shifted to plaintiff "to provide some evidence, by affidavit or otherwise," to support the allegations of his complaint, which he failed to do. Brown v. Wanlass, 2001 UT App 30, 18 P.3d 1137.

—Duty of care.

Where the plaintiff did not know who constructed or installed the steps on the trailer where she suffered a fall, and plaintiff's counsel had no admissible evidence showing that the defendant had notice of the defective condition of the steps, there was no evidence to support her claim of defendant's responsibility, no genuine issue of material fact, and the trial court correctly granted summary judgment to the defendant. Gerbich v. Numed Inc., 1999 UT 37, 977 P.2d 1205.

—Employee status.

In the absence of some evidence showing that the Boy Scouts of America and the Great Salt Lake Council have the right to control the manner and method of conducting regular troop meetiongs, plaintiff failed to create a factual dispute as to whether the troop master/defendant was an "employee" of these entities and summary judgment was properly granted. Glover ex rel. Dyson v. Boy Scouts of Am., 923 P.2d 1383 (Utah 1996).

—Federal law.

Summary judgment was proper on a claim that federal law required a defendant to provide certified payroll records where the plaintiff/movant failed to specifically cite any authority for such a requirement and the court concluded that, as a matter of law, it was the plaintiff's responsibility to produce the certified reports. ELM, Inc. v. M.T. Enters., Inc., 968 P.2d 861 (Utah Ct. App. 1998), cert. denied, 982 P.2d 89 (Utah 1999).

—Fraud.

Summary judgment in favor of defendants was appropriate on a claim for conspiracy to defraud based on the defendants' bringing a frivolous claim against the plaintiffs in a previous case, since frivolous actions are not fraudulent and the plaintiffs offered no proof of any conspiracy by any of the defendants. Gildea v. Guardian Title Co., 970 P.2d 1265 (Utah 1998).

—Judicial immunity.

A psychologist, appointed by the court to assist it in making a custody determination, performs a function integral to the judicial process and is therefore entitled to quasi-judicial immunity. Claims against a court-appointed psychologist for negligently conducted court-appointed duties were therefore barred by immunity and were properly dismissed on a motion for summary judgment. Parker v. Dodgion, 971 P.2d 496 (Utah 1998).

—Jurisdiction.

Bare contention that Arizona court did not have jurisdiction, unsupported by any specification of facts in support thereof, raised no question of fact so that entry of summary judgment according full faith and credit to the Arizona judgment was not error. Transamerica Title Ins. Co. v. United Resources, Inc., 24 Utah 2d 346, 471 P.2d 165 (1970).

—Lease action.

Trial court properly granted summary judgment in favor of the lessor in a claim to recover the cost of replacing the roof on the leased property where the lease expressly provided that the lessee was responsible for maintaining and repairing the roof, and the court interpreted this language as requiring the lessee to replace the roof if that was necessary. SLW/Utah, L.C. v. Griffiths, 967 P.2d 534 (Utah Ct. App. 1998).

—Misrepresentation.

Summary judgment in favor of defendants was appropriate on a claim that a title insurance company misrepresented to purchasers of a title search that a judgment lien was valid by the title company's excluding the lien from coverage under a proposed commitment for title insurance, as the judgment lien was on record at the time of the title search and the plaintiffs were not purchasing the title commitment so they had no basis to rely on its contents. Gildea v. Guardian Title Co., 970 P.2d 1265 (Utah 1998).

—Negligence.

Summary judgment for defendant was proper where pleadings and depositions showed no negligence or omission of duty of reasonable care. Long v. Smith Food King Store, 531 P.2d 360 (Utah 1973).

Issues of negligence ordinarily present questions of fact to be resolved by the fact-finder and it is only when the facts are undisputed and where but one reasonable conclusion can be drawn therefrom that such issues become questions of law appropriate for summary judgment. FMA Acceptance Co. v. Leatherby Ins. Co., 594 P.2d 1332 (Utah 1979).

Although summary judgment may on occasion be appropriate in negligence cases, it is appropriate only in the most clear-cut case. Ingram v. Salt Lake City, 733 P.2d 126 (Utah 1987).

Plaintiff's own evidence that he instructed his attorneys not to amend his statement and schedules precluded a finding that attorneys' negligence proximately caused the denial of plaintiff's discharge in bankruptcy, and thus grant of summary judgment to defendant was proper. Harline v. Barker, 912 P.2d 433 (Utah 1996).

—Proximate cause.

Proximate cause issues can be decided as a matter of law when a determination of the facts falls on either of two opposite ends of a factual continuum: summary judgment is appropriate (i) when the facts are so clear that reasonable persons could not disagree about the underlying facts or about the application of a legal standard to the facts, and (ii) when the proximate cause of an injury is left to speculation so that the claim fails as a matter of law. Harline v. Barker, 912 P.2d 433 (Utah 1996).

—Res ipsa loquitur.

Summary judgment was properly awarded defendant in an action where the plaintiff, a powder man, was injured when a cap and stick of dynamite of defendant's manufacture exploded as he placed them in a drilled hole, and there was no evidence as to how or why they exploded, none as to when or how either of them were manufactured, and none as to how

or by whom they had been handled or treated prior to their use, except as plaintiff himself handled them. The doctrine of res ipsa loquitur was not applicable under the circumstances recited. To apply it would be to impose absolute liability and insurability upon manufacturers of explosives and perhaps most any other commodity and would extend the fact or fiction of control necessary to invoke the doctrine to an unreasonable, impractical and unrealistic degree. Matievitch v. Hercules Powder Co., 3 Utah 2d 283, 282 P.2d 1044 (1955).

Time for motion.
Defendant violated this rule by moving for summary judgment only when the case was called for trial. Hein's Turkey Hatcheries Inc. v. Nephi Processing Plant, Inc., 24 Utah 2d 271, 470 P.2d 257 (1970).

Written statement of grounds.
Because a summary judgment motion can be denied for at least two reasons, either because judgment is not merited or because factual issues preclude a grant of summary judgment, a trial court decision denying summary judgment should be expressed in a brief, written statement, identifying the grounds for denying summary judgment. Estate Landscape & Snow Removal Specialists, Inc. v. Mountain States Tel. & Tel. Co., 793 P.2d 415 (Utah Ct. App. 1990).

Inasmuch as summary judgment is only appropriate when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law, the inclusion of the requirement in Rule 52(a) that the court shall issue a statement of the ground for its decision cannot bear upon the undisputed factual basis for the decision. Hence, it can only bear upon alternative theories of law that may apply to the facts. Neerings v. Utah State Bar, 817 P.2d 320 (1991).

An important reason for inclusion of the requirement that the trial court state the ground for its decision in summary judgment cases is administrative in nature: to provide a ready basis for review on appeal. However, also from the administrative point of view, failure to state the grounds for its decision would not constitute reversible error. Rather, in an appropriate case, failure to do so may only justify remand to the trial court. Neerings v. Utah State Bar, 817 P.2d 320 (1991).

Cited in Holbrook v. Webster's Inc., 7 Utah 2d 148, 320 P.2d 661 (1958); Aetna Loan Co. v. Fidelity & Deposit Co., 9 Utah 2d 412, 346 P.2d 1078 (1959); Leininger v. Stearns-Roger Mfg. Co., 17 Utah 2d 37, 404 P.2d 33 (1965); Asphalt Prods., Inc. v. Paulos Auto Co., 17 Utah 2d 402, 413 P.2d 596 (1966); Foster v. Steed, 19 Utah 2d 435, 432 P.2d 60 (1967); Summerhays v. Holm, 24 Utah 2d 190, 468 P.2d 366 (1970); Bradshaw v. Beaver City, 27 Utah 2d 135, 493 P.2d 643 (1972); State Farm Mut. Auto. Ins. Co. v. Strang, 27 Utah 2d 362, 496 P.2d 707 (1972); Kjar v. Brimley, 27 Utah 2d 411, 497 P.2d 23 (1972); Whitmore v. Calavo Growers, 28 Utah 2d 165, 499 P.2d 849 (1972); Whitmore v. Industrial Comm'n, 28 Utah 2d 185, 499 P.2d 1290 (1972); Cram v. Cram, 29 Utah 2d 62, 504 P.2d 1022 (1972); Clegg v. Lee, 30 Utah 2d 242, 516 P.2d 348 (1973); Hays v. Fidelity Indus. Credit Co., 549 P.2d 701 (Utah 1976); Butler v. Sports Haven Int'l, 563 P.2d 1245 (Utah 1977); Kesler v. Kesler, 583 P.2d 87 (Utah 1978); Rees v. Albertson's, Inc., 587 P.2d 130 (Utah 1978); Caldwell v. Armengol, 587 P.2d 135 (Utah 1978); Bekins Bar V Ranch v. Utah Farm Prod. Credit Ass'n, 587 P.2d 151 (Utah 1978); Mountain States Tel. & Tel. Co. v. Salt Lake City, 596 P.2d 649 (Utah 1979); Larson v. Wycoff Co., 624 P.2d 1151 (Utah 1981); Clarkson v. Western Heritage, Inc., 627 P.2d 72 (Utah 1981); Lockhart Co. v. Equitable Realty, Inc., 657 P.2d 1333 (Utah 1983); Westley v. Farmer's Ins. Exch., 663 P.2d 93 (Utah 1983); Lind v. Lynch, 665 P.2d 1276 (Utah 1983); Crafts v. Hansen, 667 P.2d 1068 (Utah 1983); Carnes v. Carnes, 668 P.2d 555 (Utah 1983); Bushnell Real Estate, Inc. v. Nielson, 672 P.2d 746 (Utah 1983); Rose v. Allied Dev. Co., 719 P.2d 83 (Utah 1986); Barlow Soc'y v. Commercial Sec. Bank, 723 P.2d 398 (Utah 1986); Williams v. Singleton, 723 P.2d 421 (Utah 1986); Chapman v. Chapman, 728 P.2d 121 (Utah 1986); Lane v. Messer, 731 P.2d 488 (Utah 1986); White Pine Ranches v. Osguthorpe, 731 P.2d 1076 (Utah 1986); Gump & Ayers Real Estates, Inc. v. Domcoy Investors V, 733 P.2d 128 (Utah 1987); Utah Farm Prod. Credit Assoc. v. Wasatch Bank, 734 P.2d 904 (Utah 1987); Katzenberger v. State, 735 P.2d 405 (Utah Ct. App. 1987); Atlas Corp. v. Clovis Nat'l Bank, 737 P.2d 225 (Utah 1987); Toomb v. Hepworth, 737 P.2d 657 (Utah 1987); Maddocks v. Salt Lake City Corp., 740 P.2d 1337 (Utah 1987); McKee v. Williams, 741 P.2d 978 (Utah Ct. App. 1987); Christiansen v. Holiday Rent-A-Car, 742 P.2d 77 (Utah 1987); First Am. Commerce Co. v. Washington Mut. Sav. Bank, 743 P.2d 1193 (Utah 1987); Jackson v. Layton City, 743 P.2d 1196 (Utah 1987); Hendricks v. Interstate Homes, Inc., 745 P.2d 475 (Utah Ct. App. 1987); Callioux v. Progressive Ins. Co., 745 P.2d 838 (Utah Ct. App. 1987); Lach v. Deseret Bank, 746 P.2d 802 (Utah Ct. App. 1987); First Sec. Fin. v. Okland, Ltd., 750 P.2d 195 (Utah Ct. App. 1988); Oberhansly v. Sprouse, 751 P.2d 1155 (Utah Ct. App. 1988); Hope v. Berrett, 756 P.2d 102 (Utah Ct. App. 1988); Wheeler ex rel. Wheeler v. Mann, 763 P.2d 758 (Utah 1988); C.J. Realty, Inc. v. Willey, 758 P.2d 923 (Utah Ct. App. 1988); DeStefano v. Oregon Mut. Ins. Co., 762 P.2d 1123 (Utah Ct. App. 1988); Creekview Apts. ex rel. Hedman Invs., Inc. v. State Farm Ins. Co., 771 P.2d 693 (Utah Ct. App. 1989); Gilmore v. Salt Lake Area Community Action Program, 775 P.2d 940 (Utah Ct. App. 1989); Utah State Coalition of Senior Citizens v. Utah Power and Light Co., 776 P.2d 632 (Utah 1989); Bergen v. Travelers Ins. Co., 776 P.2d 659 (Utah Ct. App. 1989); Caldwell v. Ford, Bacon & Davis Utah, Inc., 777 P.2d 483 (Utah 1989); Bailey v. Parker, 778 P.2d 1005 (Utah Ct. App. 1989); Utah State Retirement Office v. Salt Lake County, 780 P.2d 813 (Utah 1989); Donahue v. Durfee, 780 P.2d 1275 (Utah Ct. App. 1989); Territorial Sav. & Loan Ass'n v. Baird, 781 P.2d 452 (Utah Ct. App. 1989); G. Adams Ltd. Partnership v. Durbano, 782 P.2d 962 (Utah Ct. App. 1989); Chapman ex rel. Chapman v. Primary Children's Hosp., 784 P.2d

1181 (1989); Yoho Automotive, Inc. v. Shillington, 784 P.2d 1253 (Utah Ct. App. 1989); Hunt v. Hurst, 785 P.2d 414 (Utah 1990); Whatcott v. Whatcott, 790 P.2d 578 (Utah Ct. App. 1990); Village Inn Apts. v. State Farm Fire & Cas. Co., 790 P.2d 581 (Utah Ct. App. 1990); Madsen v. United Television, Inc., 797 P.2d 1083 (Utah 1990); Alford v. Utah League of Cities & Towns, 791 P.2d 201 (Utah Ct. App. 1990); Govert Copier Painting v. Van Leeuwen, 801 P.2d 163 (Utah Ct. App. 1990); Gate City Fed. Sav. & Loan Ass'n v. Dalton, 808 P.2d 1117 (Utah 1991); City Consumer Serv., Inc. v. Peters, 815 P.2d 234 (Utah 1991); Rollins v. Petersen, 813 P.2d 1156 (Utah 1991); Silcox v. Skaggs Alpha Beta, Inc., 814 P.2d 623 (Utah Ct. App. 1991); Kirk v. Division of Occupational & Professional Licensing, 815 P.2d 242 (Utah Ct. App. 1991); Johnson v. Morton Thiokol, Inc., 818 P.2d 997 (Utah 1991); Hill v. Seattle First Nat'l Bank, 827 P.2d 241 (Utah 1992); Campbell v. State Farm Mut. Auto. Ins. Co., 840 P.2d 130 (Utah Ct. App 1992); K & T, Inc. v. Koroulis, 888 P.2d 623 (Utah 1994); Wilcox v. Geneva Rock Corp., 911 P.2d 367 (Utah 1996); Perrine ex rel. Perrine v. Kennecott Mining Corp., 911 P.2d 1290 (Utah 1996); Crossroads Plaza Ass'n v. Pratt, 912 P.2d 961 (Utah 1996); State Farm Mut. Auto. Ins. Co. v. Northwestern Nat'l Ins. Co., 912 P.2d 983 (Utah 1996), De Baritault ex rel. De Baritault v. Salt Lake City Corp., 913 P.2d 743 (Utah 1996); Kunz & Co. v. State DOT, 913 P.2d 765 (Utah Ct. App. 1996); Cook v. Zions First Nat'l Bank, 919 P.2d 56 (Utah Ct. App. 1996); Hebertson v. Willowcreek Plaza, 923 P.2d 1389 (Utah 1996); State v. Sucec, 924 P.2d 882 (Utah 1996); American Nat'l Fire Ins. Co. v. Farmers Ins. Exch., 927 P.2d 186 (Utah 1996); R & R Energies v. Mother Earth Indus., Inc., 936 P.2d 1068 (Utah 1997); Jensen v. IHC Hosps., 944 P.2d 327 (Utah 1997); Pappas v. Richfield City, 962 P.2d 63 (Utah 1998); Harnicher v. University of Utah Medical Ctr., 962 P.2d 67 (Utah 1998); Cherry v. Utah State Univ., 966 P.2d 866 (Utah Ct. App. 1998); Julian v. Petersen, 966 P.2d 878 (Utah Ct. App. 1998); Pennington v. Allstate Ins. Co., 973 P.2d 932 (Utah 1998); Munford v. Lee Servicing Co., 2000 UT App 108, 999 P.2d 23; Regal Ins. Co. v. Bott, 2001 UT 71, 31 P.3d 524; Brockbank v. Brockbank, 2001 UT App 251, 32 P.2d 990.

COLLATERAL REFERENCES

Utah Law Review. — Attorneys' Fees in Utah, 1984 Utah L. Rev. 553.

Note, The Movant's Burden in a Motion for Summary Judgment, 1987 Utah L. Rev. 731.

Am. Jur. 2d. — 73 Am. Jur. 2d Summary Judgment §§ 16 to 19, 26 to 36, 41 to 44.

C.J.S. — 49 C.J.S. Judgments §§ 219 to 227.

A.L.R. — Proceeding for summary judgment as affected by presentation of counterclaim, 8 A.L.R.3d 1361.

Reviewability of order denying motion for summary judgment, 15 A.L.R.3d 899.

Right to voluntary dismissal of civil action as affected by opponent's motion for summary judgment, judgment on the pleadings, or directed verdict, 36 A.L.R.3d 1113.

Dead man's statute, use of evidence excludable under, to defeat or support summary judgment, 67 A.L.R.3d 970.

Liability in tort for interference with physician's contract or relationship with hospital, 7 A.L.R.4th 572.

Admissibility of oral testimony at state summary judgment hearing, 53 A.L.R.4th 527.

Sufficiency of evidence to support grant of summary judgment in will probate or contest proceedings, 53 A.L.R.4th 561.

Necessity of oral argument on motion for summary judgment or judgment on pleadings in federal court, 105 A.L.R. Fed. 755.

Rule 57. Declaratory judgments.

The procedure for obtaining a declaratory judgment pursuant to Chapter 33 of Title 78, U.C.A. 1953, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

Compiler's Notes. — This rule is substantially similar to Rule 57, F.R.C.P.

NOTES TO DECISIONS

Cited in Oil Shale Corp. v Larson, 20 Utah 2d 369, 438 P.2d 540 (1968).

Tab 3

CHAPTER 2—LIABILITY FOR INJURIES TO EMPLOYEES

Sec.
51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined.
52. Carriers in Territories or other possessions of United States.
53. Contributory negligence; diminution of damages.
54. Assumption of risks of employment.
55. Contract, rule, regulation, or device exempting from liability; set-off.
56. Actions; limitation; concurrent jurisdiction of courts.
57. Who included in term "common carrier".
58. Duty or liability of common carriers and rights of employees under other acts not impaired.
59. Survival of right of action of person injured.
60. Penalty for suppression of voluntary information incident to accidents; separability of provisions.

Cross References

Actions arising under this chapter as nonremovable, see section 1445 of Title 28, Judiciary and Judicial Procedure.

Application of this chapter to operation of Alaska Railroad by State of Alaska, see section 1207 of this title.

United States Railway Association loans for payment of obligations arising from claims subject to this chapter, see section 721 of this title.

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

(Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.)

Historical Note

1939 Amendment. Act Aug. 11, 1939, added last par. defining employee.

Short Title. The Act of Apr. 22, 1908, as amended, which comprises this chapter, is popularly known as the "Employers' Liability Act".

The following are also popularly known as Employers' Liability Acts:

June 11, 1906, c. 3073, 34 Stat. 232 [Unconstitutional].

Apr. 5, 1910, c. 143, 36 Stat. 291. See sections 56 and 59 of this title.

Aug. 11, 1939, c. 685, 53 Stat. 1404. See sections 51, 54, 56, and 60 of this title.

§ 52. Carriers in Territories or other possessions of United States

Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

(Apr. 22, 1908, c. 149, § 2, 35 Stat. 65.)

§ 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

(Apr. 22, 1908, c. 149, § 3, 35 Stat. 66.)

§ 54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

(Apr. 22, 1908, c. 149, § 4, 35 Stat. 66; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.)

Historical Note

1939 Amendment. Act Aug. 11, 1939, inserted "where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case" following "of his employment in any case".

§ 55. Contract, rule, regulation, or device exempting from liability; set-off

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

(Apr. 22, 1908, c. 149, § 5, 35 Stat. 66.)

§ 56. Actions; limitations; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

§ [illegible]. Duty or liability of common carriers and rights of employees under other acts not impaired

Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress.

(Apr. 22, 1908, c. 149, § 8, 35 Stat. 66.)

§ 59. Survival of right of action of person injured

Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

(Apr. 22, 1908, c. 149, § 9, as added Apr. 5, 1910, c. 143, § 2, 36 Stat 291)

§ 60. Penalty for suppression of voluntary information incident to accidents; separability of provisions

Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: *Provided,* That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

If any provision of this chapter is declared unconstitutional or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of the chapter and the applicability of such provision to other persons and circumstances shall not be affected thereby.

(Apr. 22, 1908, c. 149, § 10, as added Aug 11, 1939, c. 685, § 3, 53 Stat. 1404.)

Tab 4

Code of Federal Regulations

Transportation

49

PARTS 200 TO 399

Revised as of October 1, 1996

eed with caution through the sing at a speed not exceeding 15 ıs per hour. Normal speed may be med after the locomotive has ed through the crossing.

) If there is not an appropriately pped flagger or uniformed law enement officer providing warning to ıway traffic at the crossing, each n must stop before entering the ssing and permit a crewmember to nount to flag highway traffic to a ɔ. The locomotive may then proceed ɔugh the crossing, and the flagging wmember may reboard the locomotive before the remainder of the in proceeds through the crossing.

l) A locomotive's audible warning ice shall be activated in accordance h railroad rules regarding the apach to a grade crossing.

34.106 Partial activation.

Jpon receipt of a credible report of a tial activation, a railroad having intenance responsibility for the rning system shall promptly initiate orts to warn highway users and railıd employees at the subject crossing the same manner as required for se activations (§ 234.107).

34.107 False activation.

Upon receipt of a credible report of a lse activation, a railroad having aintenance responsibility for the ghway-rail grade crossing warning stem shall promptly initiate efforts warn highway users and railroad nployees at the crossing by taking e following actions:

(a) Prior to a train's arrival at the ossing, notify the train crew of the port of false activation and notify ıy other railroads operating over the ossing;

(b) Notify the law enforcement ageny having jurisdiction over the crossıg, or railroad police capable of reponding and controlling vehicular affic; and

(c) Provide for alternative means of ctively warning highway users of aproaching trains, consistent with the ollowing requirements (see Appendix } for a summary chart of alternative neans of warning).

(1)(i) If an appropriately equipped lagger is providing warning for each direction of highway traffic, trains may proceed through the crossing at normal speed.

(ii) If at least one uniformed law enforcement officer (including a railroad police officer) provides warning to highway traffic at the crossing, trains may proceed through the crossing at normal speed.

(2) If there is not an appropriately equipped flagger providing warning for each direction of highway traffic, or if there is not at least one uniformed law enforcement officer providing warning, trains with the locomotive or cab car leading, may proceed with caution through the crossing at a speed not exceeding 15 miles per hour. Normal speed may be resumed after the locomotive has passed through the crossing. In the case of a shoving move, a crewmember shall be on the ground to flag the train through the crossing.

(3) In lieu of complying with paragraphs (c) (1) or (2) of this section, a railroad may temporarily take the warning system out of service if the railroad complies with all requirements of § 234.105, "Activation failure."

(d) A locomotive's audible warning device shall be activated in accordance with railroad rules regarding the approach to a grade crossing.

§ 234.109 Recordkeeping.

(a) Each railroad shall keep records pertaining to compliance with this subpart. Records may be kept on forms provided by the railroad or by electronic means. Each railroad shall keep the following information for each credible report of warning system malfunction:

(1) Location of crossing (by highway name and DOT/AAR Crossing Inventory Number);

(2) Time and date of receipt by railroad of report of malfunction;

(3) Actions taken by railroad prior to repair and reactivation of repaired system; and

(4) Time and date of repair.

(b) Each railroad shall retain for at least one year (from the latest date of railroad activity in response to a credible report of malfunction) all records referred to in paragraph (a) of this section. Records required to be kept shall be made available to FRA as provided

167-198 O—96——12

Tab 5

Brent O. Hatch (5715)
HATCH, JAMES & DODGE
10 West Broadway, Suite 400
Salt Lake City, Utah 84101
Telephone: 801/363-6363
Facsimile: 801/363-6666

Wesley W. Hoyt, pro hac
Bank One Building
333 West Hampden #500
Englewood, Colorado 80110
Telephone: 303/806-8887 x 39
Facsimile: 303/806-8881

Robert M. Tramuto, pro hac
JONES & GRANGER
TBN: 20186300
Fed. ID No. 6863
10,000 Memorial Drive, Suite 888
Houston, Texas 77024
713/668-0230
713/956-7139

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

SHAYNE CLAYSON, **Plaintiff,** **vs.** **UNION PACIFIC RAILROAD COMPANY, a Delaware Corporation, and UTAH RAILWAY COMPANY, a Utah Corporation** **Defendants.**	)	**AFFIDAVIT OF CHARLES CULVER** **Case No. 020905849** **Judge Frederick**

STATE OF TEXAS §

COUNTY OF HARRIS §

CHARLES CULVER, being first duly sworn under oath, deposes and states as follows:

1. I am a railroad operations consultant. I am over 18 years of age, and I have personal knowledge of and am competent to testify about the following facts stated below.

2. Attached hereto is a true and correct copy of a report I prepared with respect to the above-captioned case. As stated therein, I reviewed photographs and other related materials that are listed in my report..

DATED this 3rd day of March, 2004.

[signature]

CHARLES CULVER

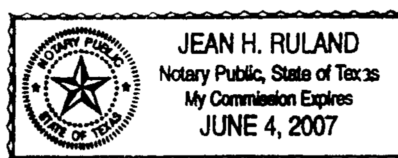
SUBSCRIBED AND SWORN to before me this 3rd day of March, 2004.

Jean H. Ruland

Notary Public in and for the State of Texas

6-4-07

My Commission Expires



Charles L. Culver & Associates
Railroad Operations Consultation

413 Bay Ridge Drive, League City, Texas 77573
Tel. (281) 334-3226 Fax (281) 538-3400 e-mail < clca@houston rr com >

July 16, 2003

CLAYSON VS. UTAH RAILWAY

NOTE: Numbers in parenthesis inserted throughout report indicate item number:page number of reference.

A. Assignment

In December 2002 I was contacted by attorney Robert Tramuto of the law firm Jones & Granger, regarding a railroad accident involving a Utah Railway freight train and a railroad employee.

My opinions, provided in section F of this report are based on my training and experience in the railroad industry, as well as a review of the various materials that I have listed under Section D of this report.

B. Qualifications

I am qualified as a designated supervisor of locomotive engineers, as well as a certified locomotive engineer. I am qualified as an instructor of trainmen and engineers through Union Pacific Railroad. I have testified in court regarding duties of engineers and conductors, air brake operation, event recorder data interpretation and railroad operations in general. My current Curriculum Vitae is attached.

C. Scope of Assignment

1. To provide consultation, reviewing certain documents and reference materials as listed under Section D.
2. To focus on railroad operations as applicable to the circumstances of this incident.
3. To provide opinions directed solely to the actions and duties of railroad operations personnel, railroad managers and dispatchers.

D. Documents Reviewed

1. Accident Reports
2. Deposition of Rebecca Cook
3. Deposition of Signal Maintainer Einor Paulson
4. Deposition of Manager of Signal Maintenance Ron Nash
5. Deposition of Conductor Steve Clifton
6. Deposition of Director of Safety Steve G. Zamantakis

7. Deposition of Engineer Chad Booth
8. Deposition of Rhett Cook
9. Deposition of Ralph E. Smith
10. Deposition of Dispatcher Carl Steiger
11. Deposition of Engolf Deros
12. Deposition of Lewis Leatham
13. UP Timetable
14. UP Track Bulletins
15. Dispatcher's Tape
16. Lone Worker Permit
17. Recorded Interview of Shane Clayson
18. Locomotive Inspection Report
19. Event Recorder Data from Locomotives 2006 & 2007
20. Maps
21. Photographs
22. Deposition of Senior Manager of Signal Operations Terry Miller
23. Deposition of Signal Tech Paul Reinhard
24. 49 Code of Federal Regulations
25. General Code of Operating Rules

E. Summary of Events

On December 4, 2000 signal maintainer Shane Clayson was working on the 18th North grade crossing warning devices at the intersection of track 3 at about Milepost 785.4 on the Union Pacific Salt Lake Subdivision. As Mr. Clayson stood near a signal cabinet, then turned facing north, he was struck by Utah Railway train RUT311, approaching from the south. According to witness Rebecca Cook, Mr. Clayson was bent over, straddling the track with his back to the approaching train (2:23). Mr. Clayson was injured as a result of the incident.

F. Opinions

(Opinion 1.)

The crew of train RUT311 should have been, but was not informed of the malfunctioning signals at the grade crossing at 17th North prior to reaching the location of the malfunction.

As per the testimony of conductor Steve Clifton, the crew had not been informed of the signal malfunction at this crossing (5:17), and he had not received notice from the dispatcher that a signal maintainer was working in this area (5:43).

Signal Operations and Manager of Signal Maintenance Ron Nash had notified Mr. Clayson of the malfunction of the signals at grade crossing 17th North at approximately 10:30 to 11:00 AM on the day of the accident. However, according to the taped conversation between the dispatcher and the crew of RUT311, the train crew was notified of malfunctioning block signals at control points 786 and 787, but was not notified of the

crossing signal malfunction between the signals at approximately MP 786.5, even though maintainer Clayson had informed the dispatcher of problems with the crossing as well as problems with signals at both ends of the crossing (18:11). Mr. Clayson had also informed his supervisor Ron Nash of the malfunction of the crossing signals (18:10).

Because both Signal Operations and Manager of Signal Maintenance Ron Nash were aware of a problem with the crossing signals at grade crossing at 17th North (17:12), they were required to inform the dispatcher of this situation so that affected trains could be notified. Had the train crew been informed that the crossing signals were malfunctioning, they would have had a duty to stop and flag the crossing as per the following railroad rule and federal regulation, whereby the accident would likely have been avoided:

GENERAL CODE OF OPERATING RULES

6.32. Road Crossings

6.32.2 Automatic Crossing Devices

A. Automatic Warning Devices Malfunctioning

Use the following table to properly complete movement over the crossing:

Movement When Automatic Warning Devices Are Malfunctioning	
If	**Then**
Someone is not at the crossing to provide warning	**Stop before occupying the crossing. After a crew member is on the ground at the crossing to warn highway traffic, proceed over the crossing on hand signals from that crew member...**

****

TITLE 49--TRANSPORTATION

CHAPTER II--FEDERAL RAILROAD ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

PART 234--GRADE CROSSING SIGNAL SYSTEM SAFETY

Subpart A--General

Sec. 234.105 Activation failure. ***(XG Order required by UP)***

Upon receipt of a credible report of warning system malfunction involving an activation failure, a railroad having maintenance responsibility for the warning

system shall promptly initiate efforts to warn highway users and railroad employees at the subject crossing by taking the following actions:

(a) Prior to any train's arrival at the crossing, notify the train crew of the report of activation failure and notify any other railroads operating over the crossing;

(b) Notify the law enforcement agency having jurisdiction over the crossing, or railroad police capable of responding and controlling vehicular traffic; and

(c) Provide for alternative means of actively warning highway users of approaching trains, consistent with the following requirements (see appendix B for a summary chart of alternative means of warning):

(1)(i) If an appropriately equipped flagger provides warning for each direction of highway traffic, trains may proceed through the crossing at normal speed.

(ii) If at least one uniformed law enforcement officer (including a railroad police officer) provides warning to highway traffic at the crossing, trains may proceed through the crossing at normal speed.

(2) If an appropriately equipped flagger provides warning for highway traffic, but there is not at least one flagger providing warning for each direction of highway traffic, trains may proceed with caution through the crossing at a speed not exceeding 15 miles per hour. Normal speed may be resumed after the locomotive has passed through the crossing.

(3) If there is not an appropriately equipped flagger or uniformed law enforcement officer providing warning to highway traffic at the crossing, each train must stop before entering the crossing and permit a crewmember to dismount to flag highway traffic to a stop. The locomotive may then proceed through the crossing, and the flagging crewmember may reboard the locomotive before the remainder of the train proceeds through the crossing.

(d) A locomotive's audible warning device shall be activated in accordance with railroad rules regarding the approach to a grade crossing.

Sec. 234.107 False activation. *(XH Order required by UP)*

Upon receipt of a credible report of a false activation, a railroad having maintenance responsibility for the highway-rail grade crossing warning system shall promptly initiate efforts to warn highway users and railroad employees at the crossing by taking the following actions:

(a) Prior to a train's arrival at the crossing, notify the train crew of the report of false activation and notify any other railroads operating over the crossing;

(b) Notify the law enforcement agency having jurisdiction over the crossing, or railroad police capable of responding and controlling vehicular traffic; and

(c) Provide for alternative means of actively warning highway users of approaching trains, consistent with the following requirements (see Appendix B for a summary chart of alternative means of warning).

(1)(i) If an appropriately equipped flagger is providing warning for each direction of highway traffic, trains may proceed through the crossing at normal speed.

(ii) If at least one uniformed law enforcement officer (including a railroad police officer) provides warning to highway traffic at the crossing, trains may proceed through the crossing at normal speed.

(2) If there is not an appropriately equipped flagger providing warning for each direction of highway traffic, or if there is not at least one uniformed law enforcement officer providing warning, trains with the locomotive or cab car leading, may proceed with caution through the crossing at a speed not exceeding 15 miles per hour. Normal speed may be resumed after the locomotive has passed through the crossing. In the case of a shoving move, a crewmember shall be on the ground to flag the train through the crossing.

(3) In lieu of complying with paragraphs (c) (1) or (2) of this section, a railroad may temporarily take the warning system out of service if the railroad complies with all requirements of Sec. 234.105, ``Activation failure."

(d) A locomotive's audible warning device shall be activated in accordance with railroad rules regarding the approach to a grade crossing.

(Opinion 2.)

Based on the information that I have been provided, the locomotive's audible warning device was not used as required to warn Mr. Clayson of the approaching train.

There are different accounts regarding the sounding of the train horn at the time of the accident. The engineer and conductor testified that the horn was blown from the whistle board through the point of the accident, but witnesses near the accident site have indicated that the horn was either not blown at all, or not blown until the train had entered the crossing (2:1, 3, 5, 6, 11, 13, 14, 15).

Although crewmembers stated that the train's horn was blown, according to witness, no horn was heard as the train approached the crossing near where Mr. Clayson was working (2:25), (3:43, 44), (4:62). Because the event recorder of the train's lead unit did not record horn activation, there is no documentation to back up claims that the horn was blown. Having considered both accounts as to the sounding of the horn, I find the lack of an audible warning a more likely scenario, based on the accounts of witnesses near the

scene of the accident. Moreover, Mr. Clayson was talking with signal supervisor Ron Nash Mr. via cell phone at the time of the incident, continuing this communication until the phone went dead, yet Mr. Nash, through his cell phone, heard no audible warning from the approaching train (4:62).

When a train is approaching a public crossing, the audible warning is to be sounded as follows:

GENERAL CODE OF OPERATING RULES

5.8.2 Sounding Whistle

The required whistle signals are illustrated by "o" for short sounds and

"–"for longer sounds:

Sound	Indication
(11) – – o ––	**Approaching public crossings at grade with engine in front, start not less than 1/4 mile before reaching crossing, if distance permits. If distance does not permit, start signal soon enough before the crossing to provide warning. Prolong or repeat signal until engine occupies crossing.**

The following federal regulation addresses the requirement of train RUT311 to operate its audible warning as the train approached Mr. Clayson. This regulation was violated.

TITLE 49--TRANSPORTATION
CHAPTER II--FEDERAL RAILROAD ADMINISTRATION,
DEPARTMENT OF TRANSPORTATION
[Revised as of October 1, 2000]

PART 214--RAILROAD WORKPLACE SAFETY

Sec. 214.339 Audible warning from trains.

Each railroad shall require that the locomotive whistle be sounded, and the locomotive bell be rung, by trains approaching roadway workers on or about the track. Such audible warning shall not substitute for on-track safety procedures prescribed in this part.

Sec. 214.7 Definitions.

Lone worker means an individual roadway worker who is not being afforded on-track safety by another roadway worker, who is not a member of a roadway work group, and who is not engaged in a common task with another roadway worker.

Roadway worker means any employee of a railroad, or of a contractor to a railroad, whose duties include inspection, construction, maintenance or repair of railroad track, bridges, roadway, signal and communication systems, electric traction systems, roadway facilities or roadway maintenance machinery on or near track or with the potential of fouling a track, and flagmen and watchmen/lookouts as defined in this section.

When a pedestrian or railroad worker is in danger of being struck by an oncoming train, an emergency situation exists. When such an emergency exists, railroad rules require the following:

GENERAL CODE OF OPERATING RULES

5.8.2 Sounding Whistle

Sound	**Indication**
(1) Succession of short sounds	**Use when an emergency exists, or persons or livestock are on the track.**

(Opinion 3.)

The train was not operated at the required speed for the conditions.

The train crew was required to operate at Restricted Speed, prepared to stop within half the range of vision. However, the engineer did not stop as required, resulting in the impact with Mr. Clayson.

According to the deposition testimony of dispatcher Carl Steiger (Pg. 65), the area where the incident took place was "...considered actually yard movements..." Mr. Steigler further states, "...Yard movements are governed by their own rules, and that's 20 MPH."

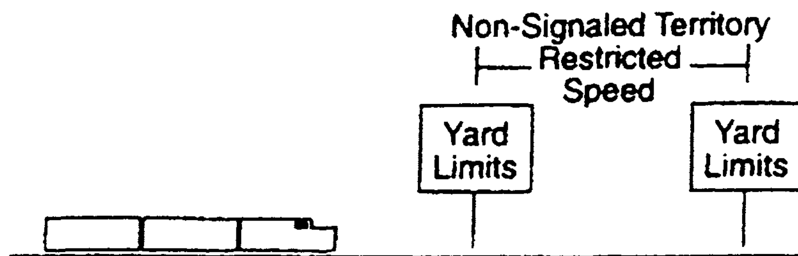
I find no reference to "Yard Movements" in Railroad Operating Rules or Special Instructions. However, assuming that the dispatcher was referring to this area as being under the provisions of "Yard Limits," because there were two trains operating in the same area within close proximity to one another, the following would apply, requiring trains to operate at his referenced maximum speed of 20 MPH (7:40-41).

GENERAL CODE OF OPERATING RULES

6.13 Yard Limits

Within yard limits, trains or engines are authorized to use the main track not protecting against other trains or engines. Engines must give way as soon as possible to trains as they approach.

All movements entering or moving within yard limits must be made at restricted speed unless operating under a block signal indication that is more favorable than Approach.



Assuming that train RUT311 was operating under the provisions of Yard Limit Rule 6.13, they were in violation of this rule by exceeding "Restricted Speed."

Additionally, according to memorandum generated by Dale W. Hughes, dated 12/11/2000, "...RUT311 was approaching (Mr. Clayson's) location from the south at restricted speed due to a signal problem north of the crossing (1:1)." Senior Manager of Signal Operations Terry Miller testified in his deposition that he had "...no reason to disagree with (the memorandum) (22:68)."

6.27 Movement at Restricted Speed

When a train or engine is required to move at restricted speed, movement must be made at a speed that allows stopping within half the range of vision short of:

- **Train**
- **Engine**
- **Railroad Car**
- **Men or equipment fouling the track**
- **Stop signal**

or

- **Derail or switch lined improperly**

The crew must keep a lookout for broken rail and not exceed 20 MPH.

Comply with these requirements until the leading wheels reach a point where movement at restricted speed is no longer required.

Had the train crew complied with Rule 6.27, prepared to stop within half the range of vision, short of "Men or equipment fouling the track," the accident most likely would not have occurred.

(Opinion 4.)

Train dispatcher Carl Steiger did not properly perform his duties to inform train RUT311 of conditions ahead, issuing an XG Order*.

In his deposition, Mr. Steiger testified that he has "...never done an XG Order." However, per the deposition testimony of Senior Manager of Signal Operations Terry Miller, an XG order is to be generated upon receipt of a report of a crossing malfunction in which the devices are not warning the public as intended (23:48). Because an XG Order requires a crewmember or a flagman to flag a crossing from the ground, had this precaution been taken, the accident most likely would not have occurred.

**An XG Order requires a crewmember or a flagman to flag a crossing from the ground.*

(Opinion 5.)

Shayne Clayson was not provided the training that he had requested in order to perform his duties in the safest manner.

In the railroad industry, proper training is essential for safe work performance. Mr. Clayson had asked for additional training, but had not been provided that training, and was not assigned a co-worker to assist him with his duties in his new territory. Quoting from his interview of December 4, 2000:

NO: At the end of that time, was there any concerns that you had taking over the territory or needing any additional help or anything that way?

SC: I didn't know at that time, I, uh, I hadn't been in the Signal Department for the past 7 years so it was going to be a new experience for me. And I had never maintained before so I need, I was going to need a lot of help with me.

Had Mr. Clayson been assigned a co-worker to assist him with this "new experience," this person could have helped in keeping a lookout for approaching train traffic. Keeping such a lookout is done routinely in the railroad industry where two or more persons are working together. Refer to the following:

TITLE 49--TRANSPORTATION
CHAPTER II--FEDERAL RAILROAD ADMINISTRATION,
DEPARTMENT OF TRANSPORTATION
[Revised as of October 1, 2000]

PART 214--RAILROAD WORKPLACE SAFETY

Sec. 214.329 Train approach warning provided by watchmen/lookouts.

Roadway workers in a roadway work group who foul any track outside of working limits shall be given warning of approaching trains by one or more watchmen/lookouts in accordance with the following provisions:

(a) Train approach warning shall be given in sufficient time to enable each roadway worker to move to and occupy a previously arranged place of safety not less than 15 seconds before a train moving at the maximum speed authorized on that track can pass the location of the roadway worker.

(b) Watchmen/lookouts assigned to provide train approach warning shall devote full attention to detecting the approach of trains and communicating a warning thereof, and shall not be assigned any other duties while functioning as watchmen/lookouts.

(c) The means used by a watchman/lookout to communicate a train approach warning shall be distinctive and shall clearly signify to all recipients of the warning that a train or other on-track equipment is approaching.

(d) Every roadway worker who depends upon train approach warning for on-track safety shall maintain a position that will enable him or her to receive a train approach warning communicated by a watchman/lookout at any time while on-track safety is provided by train approach warning.

(e) Watchmen/lookouts shall communicate train approach warnings by a means that does not require a warned employee to be looking in any particular direction at the time of the warning, and that can be detected by the warned employee regardless of noise or distraction of work.

(f) Every roadway worker who is assigned the duties of a watchman/lookout shall first be trained, qualified and designated in writing by the employer to do so in accordance with the provisions of Sec. 214.349.

(g) Every watchman/lookout shall be provided by the employer with the equipment necessary for compliance with the on-track safety duties which the watchman/lookout will perform.

G. Conclusions

These opinions, to a reasonable degree of professional certainty, are based on the review of the materials listed, and the research completed at this time. They may be supplemented or revised upon receipt and review of additional data.

I would also request an inspection of the lead unit involved in this accident, including a test of the horn, activated in a series of specific patterns, to be recorded by the event recorder that was installed at the time of the accident. Printouts of the results of these tests will be requested for review prior to the time of the trial in this matter.

Charles L. Culver

CURRICULUM VITAE (12/02)

CHARLES L. CULVER
RAILROAD OPERATIONS CONSULTANT
Tel. (281) 334-3226 Fax (281) 538-3400
E-Mail clca@houston.rr.com
Web site www.culverassociates.com

Charles L. Culver is a railroad operations consultant with expertise in train handling, rules interpretation, event recorder data interpretation, and railroad industry practice. Clients include both plaintiff and defense firms who seek assistance for incidents involving freight trains, passenger trains, and railroad employees, and, who represent major railroads, short lines, trucking firms, insurance companies and federal/state/local government.

;ONSULTATION/EXPERT WITNESS TESTIMONY

- Deposition and Trial Testimony in Federal and District Courts in Litigation of Railroad Crossing Accidents, FELA, Derailments, Personal Injuries and Property Damage for Both Plaintiff and Defense Counsel
- Expert Testimony in Areas of Railroad Operations, Railroad Rules and Federal Regulations, Train Handling, Air Brake Operation, Event Recorder Data Interpretation and Industry Practice
- Special Focus on Train Handling and Crossing Evaluation from Operations Standpoint
- Special Focus on Inspections of Locomotives and Equipment, Railroad Yards and Other Accident Sites
- Accident Reconstruction Support through Interpretation of Event Recorder Data, Railroad Records and Documents and Execution of Software Based Train Event Simulators

.ICENSES, CERTIFICATIONS and QUALIFICATIONS

- Federally licensed locomotive engineer

  Maintain Compliance with Code of Operations Rules, Scheduled Testing as Required for Operation of Trains in ABS, CTC, TWC and Dark Territories (1970 – Present)
- Designated Supervisor of Locomotive Engineers

Qualified via BNSF Academy of Railroad Sciences per requirements of 49CFR Part 240 As Follows:

1. *Knows and understands the requirements of this part;*
2. *Can appropriately test and evaluate the knowledge and skills of locomotive engineers;*
3. *Has the necessary supervisory experience to prescribe appropriate remedial action for any noted deficiencies in the training, knowledge, or skills of a person seeking to obtain or retain certification; and*
4. *Is a certified engineer*

Qualified Instructor of General Code of Operating Rules
Qualified Instructor of Air Brake and Signal Appliance Equipment
Qualified Instructor of Safety and Radio Rules Pertaining to Operating Department
Qualified in Hostler Certification (Brakemen/Conductors Certified to Operate Locomotives)
Certified by Texas Safety Association as Operation Lifesaver Presenter

AILROAD OPERATIONS EXPERIENCE

25 Year Career with Union Pacific (Formerly Missouri Pacific) Railroad as Locomotive Fireman/Engineer, Handling All types of Freight, Yard, Passenger and simulator Equipment Under Various Terrain and Weather Conditions
Technical Training Instructor for Union Pacific Railroad

- *Locomotive Operation*
- *Hostler Certification Instruction*
- *Conductor Work Order Implementation*
- *ATCS On-Board Computer Operation*
- *Rules and Safety Training for Newly Hired Train Service Employees*

Instructed Supervisory Personnel in Rules, Safety, Train Handling, Field Efficiency Testing and Derailment Investigation (1997)
Delegated by Missouri Pacific/Union Pacific for Special Assignments:

- *Engineer Special Passenger Train for Railroad Tour for Upper Management Personnel of Dow and Monsanto Chemical Companies*
- *Liaison for Railroad to Consult with City, County and State Law Enforcement Agencies and City Government Officials Regarding Grade Crossing Safety*
- *Critical Incident Peer Support Program Representative*

Railroad Certified Operation Lifesaver Presenter with Focus in the Following Areas:

- *Crossing Safety Programs for Trucking Companies*
- *Public Relations, Radio and Television PSA Production, Public Speaking*
- *Defensive Driving Classes*
- *Industrial and Corporate Safety Programs*
- *Presentations to Community Civic Groups*
- *Classroom Seminars in Schools throughout the State of Texas in Areas of Driver Education, Bus Driver Safety, Pre-Driving Age Students, and Pedestrian Safety*

ᴾECIAL TRAINING

Interpretation of event recorder (Black Box) data
Certificate of Training-Burlington Northern/Santa Fe National Academy of Railroad Sciences-Locomotive Engineer Re-certification

Certificate of Achievement for Advanced Engineer Training through Union Pacific (Simulator)
Technical training in Code of Federal Regulations 49-Transportation (Railway Educational Bureau)
Certificate of Training for Traffic Signalization, 3d Computer Visualization, and Injury Mechanism Analysis through Texas Association of Accident Reconstruction Specialists
Certificate of Training from National Highway Institute- Highway-Rail Safety Improvement (FRA)
Specialized Training-Managing Fatigue in Transportation (NTSB/NASA)
Certificate of Training-Railroad Trespass Prevention and Border Issues (FRA/Operation Lifesaver)
Technical Training in Basic Instruction for Brakemen/Switchmen (Railway Educational Bureau)
Technical Training in Derailment Investigation Procedures (Railway Educational Bureau)
Engineer Certification Seminar (American Short Line and Regional Railroad Association)

DVANCED TRAINING/QUALIFICATIONS IN AIR BRAKE OPERATION AND TECHNOLOGY

Certificate of Advanced Training in Freight Car Air Brake Equipment (Westinghouse Air Brake Company)
Certificate of Advanced Training in Locomotive Air Brake and Electro-Pneumatic Equipment (Westinghouse Air Brake Company)
Technical Training in Train Braking Distance Calculation (Railway Educational Bureau)
Qualified as Instructor of Air Brake Rules and Operation through Union Pacific Technical Training Department

AILROAD SAFETY AWARDS AND APPOINTMENTS

Union Pacific Grade Crossing Safety Award (1994)
Twenty Year Injury Free Service Award from Union Pacific (1990)
Operation Lifesaver Special Achievement Award (1986)
Safety Committee Chairman-Union Pacific Railroad (1983-1984)

PECIAL PROJECTS

Consultant/Advisor to U.S. Government Justice Dept/EPA in Matters of Railroad Safety
Translated General Code of Operating Rules to Spanish for Use by Mexican Railroads
Consolidated Timetables of Former Mexican National Railroad into Single Unit for Use in Privatized Operation
Development, Coordination and Presentation of Training Programs for Railroad Management and Operating Personnel, Including Rules, Safety, Train Operation and Derailment Investigation (NARSCI)

Hands-on Testing of Locomotive Handling, Signaling and Stopping Capabilities in Accident Reconstruction
Train Crew Operations Auditing for Major Railroads and Short lines
Participant- FRA Remote Control Locomotives Technical Conference
Developed Operations/Training Manual for Industrial Railroad Operations

ᴾECIAL SKILLS
Strong Ability to Express Railroad Terminology and Operations Scenarios in Laymen's Terms for Benefit of Jury
Fluent in Spanish

JBLICATIONS AND PRESENTATIONS
Certified Speaker for Texas Operation Lifesaver from 1985 Through Present
Published: Event Recorder Evolution, Operation, and its Role in Railroad Accident Reconstruction (University of Tennessee, 1996)
Presented: Post Accident Trauma and its Effect of Train Crews Involved in Railroad Accidents
Presented: Operating Rules and Their Function in Railroad Operations-NARSCI
Published: Certification of Railroad Operating Employees - What Has Been Accomplished and What Lies Ahead? (University of Tennessee, 2000)

EMBERSHIPS
Advisory Committee, National Association of Railroad Safety Consultants and Investigators
The Air Brake Association
International Association of Railway Operating Officers, Inc.

Charles L. Culver and Associates
Railroad Operations Consultation

413 Bayridge Drive, League City, Texas 77573
Tel. (281)334-3226 Fax (281) 538-3400 E-Mail clca@houston.rr.com

In compliance with RULE 26, FEDERAL RULES OF CIVIL PROCEDURE, the following will summarize my trial/deposition testimony during the past four years:

February 5, 1999 – Deposition-Tugwell vs. NS

February 19, 1999 – Deposition-Olguin vs. Mitchell Energy & Development Corp., et al. and UPRR

March 10, 1999 – Trial testimony, Brumfield vs. Illinois Central/Amtrak

May 4, 1999 – Deposition-Moore vs. KCS

May 5, 1999 – Deposition-Shaw vs. UP

June 22, 1999 – Deposition-Monohon vs. UP

June 24, 1999 – Deposition-Archer vs. UP

July 20, 1999 – Deposition-Dikes vs. Contrail

September 14, 1999 – Deposition-CSX vs. Plymouth

September 20, 1999 – Deposition-Mann vs. ATSF

November 3, 1999 – Deposition- Graumann vs. UP

November 4, 1999 - Deposition -Spence vs. UP

November 22, 1999 - Deposition -Kirby vs. Norfolk Southern

January 10, 2000 - Deposition -Redding vs. BNSF

March 2-3, 2000 – Trial Testimony – Mann vs. ATSF

March 24, 2000 –Deposition – Gintner vs. KCS

April 7, 2000 – Trial Testimony – Denning vs. UP

April 11, 2000 - Deposition -Nelson vs. Union Pacific

April 26, 2000 - Deposition -Humphrey vs. Union pacific

July 14, 2000 – Deposition -Fluitt vs. Union Pacific

July 26, 2000 - Deposition -Dugo vs. ATSF

August 29, 2000 - Deposition -Dugo vs.

September 25, 2000 - Deposition -Lee vs. Keokuk. Railway

October 27, 2000 – Deposition – Fabe vs. Kansas City Southern

November 16, 2000 – Deposition – Forsythe vs. Chance Rides, Inc.

December 22, 2000 – Deposition – Urquidi vs. Union Pacific.

January 2, 2001 – Deposition Escajeda vs. BNSF

January 25, 26, 2001 – Trial Testimony – Mann vs. ATSF

January 29, 2001 – Deposition Khemo vs. Amtrak

March 15, 2001 – Deposition – Foutch vs. UP

March 27, 2001 – Deposition – Simon vs. BNSF

March 31, 2001 – Deposition- Powell vs. UP

May 22, 2001 – Trial Testimony – Powell vs. UP

May 29, 2001 – Deposition – Summers vs. UP

June 19, 2001 – Deposition – VanHolt vs. Amtrak

August 22, 2001 – Deposition – CSX vs. Tyson Foods

August 24, 2001 – Deposition – Carson vs. UP

September 5, 2001 – Deposition – Martinez vs. UP

October 1, 2001 – Deposition – Lozenski vs. NS

October 2, 2001 – Deposition - Robishaw vs. New England Central

October 4, 2001 – Deposition - Dunn vs. BNSF

November 20, 2001 – Deposition – Gabehart vs. Soo Line ; CP

December 11, 2001 – Deposition - Giles vs. Kansas City Southern

December 18, 2001 – Deposition – Barber vs. Union Pacific

January 17, 2002 – Deposition - Staben vs. Amtrak/UP

February 15, 2002 – Deposition – James Smith vs. Union Pacific

March 1, 2002 – Deposition - Michael Smith vs. Union Pacific

March 18, 2002 – Deposition- Doerrbecker vs. Roberson Logging

March 19, 2002 – Trial Testimony – Michael Smith vs. Union Pacific

April 10, 2002 – Deposition – Johnston vs. Union Pacific

April 17, 2002 – Deposition – Lambert vs. Union Pacific

April 19, 2002 – Deposition – Hammock Bros. vs. CSX

April 25, 2002 – Deposition – Fite vs. KCS

May 10, 2002 – Trial Testimony – Barber vs. Union Pacific

May 14, 2002 – Deposition – Flores vs. Union Pacific

May 17, 2002 – Deposition – Skelton vs. BNSF

June 6, 2002 – Deposition – BNSF vs. Bellefontaine Quarry

June 14, 2002 – Deposition – Millard vs. BNSF

July 1, 2002 – Deposition – Glaviano vs. Union Pacific

July 3, 2002 – Deposition – Trexel vs. Union Pacific

July 24, 2002 – Deposition – Lee vs. New Jersey Transit

August 13, 2002 – Deposition – Jesus Martinez vs. BNSF

August 20, 2002 – Deposition – Martinez vs. Sacramento Rapid Transit

August 23, 2002 – Deposition – Gonzales vs. BNSF

August 26, 2002 – Deposition – Alexander vs. BNSF/UP

September 12, 2002 – Trial Testimony – Lee vs. New Jersey Transit

September 13, 2002 – Deposition – Paz vs. KCS

September 26, 2002 – Deposition – BNSF vs. Bellefontaine Quarry

November 18, 2002 – Deposition – Moore vs. BNSF

November 25, 2002 – Deposition – Royer vs. UP

November 27, 2002 – Deposition – Sandoval vs. BNSF

December 4, 2002 – Deposition – Jiron vs. BNSF/Amtrak

December 9, 2002 – Deposition – Wiggins vs. UP

December 12, 2002 – Deposition – Phillips vs. UP

CURRICULUM VITAE (10/00)
CHARLES L. CULVER
RAILROAD OPERATIONS CONSULTANT

Tel. (281) 334-3226 Fax (281) 538-3400 E-Mail sculver@iwl.net Web Site www.culverassociates.com

LICENSES/CERTIFICATIONS/SPECIALIZED TRAINING

- Qualified as Designated Supervisor of Locomotive Engineers through BNSF Academy of Railroad Sciences per Requirements of 49CFR Part 240 As Follows:
  1. Knows and understands the requirements of this part;
  2. Can appropriately test and evaluate the knowledge and skills of locomotive engineers;
  3. Has the necessary supervisory experience to prescribe appropriate remedial action for any noted deficiencies in the training, knowledge, or skills of a person seeking to obtain or retain certification; and
  4. Is a certified engineer.
- Licensed Locomotive Engineer (49CFR Part 240)
- Certificate of Training-Burlington Northern/Santa Fe National Academy of Railroad Sciences-Locomotive Engineer Recertification
- Certificate of Achievement for Advanced Engineer Training Through Union Pacific (Simulator)
- Technical Training in Code of Federal Regulations 49-Transportation (Railway Educational Bureau)
- Certificate of Training for Traffic Signalization, 3d Computer Visualization, and Injury Mechanism Analysis Through Texas Association of Accident Reconstruction Specialists
- Certificate of Training from National Highway Institute- Highway-Rail Safety Improvement (FRA)
- Specialized Training-Managing Fatigue in Transportation (NTSB/NASA)
- Specialized Training- Interpretation of Event Recorder (Black Box) Data
- Certified by Texas Safety Association as Operation Lifesaver Presenter
- Certificate of Training-Railroad Trespass Prevention and Border Issues (FRA/Operation Lifesaver)
- Technical Training in Basic Instruction for Brakemen/Switchmen (Railway Educational Bureau)
- Derailment Investigation Procedures Workshop (Railway Educational Bureau)
- Engineer Certification Seminar (American Short Line and Regional Railroad Association)

RAILROAD OPERATIONS EXPERIENCE

- 25 Year Career with Union Pacific (Formerly Missouri Pacific) Railroad as Locomotive Fireman/Engineer, Handling All Types of Freight, Yard, Passenger and Simulator Equipment Under Various Terrain and Weather Conditions
- Delegated by Missouri Pacific/Union Pacific for the Following Special Assignments:
  - Engineer Special Passenger Train for Railroad Tour for Upper Management Personnel of Dow and Monsanto Chemical Companies
  - Certified as Operation Lifesaver Presenter to Represent Railroad in the Following Areas:
    - Public Relations, Radio and Television PSA Production, Public Speaking
    - Crossing Safety Programs for Trucking Companies
    - Defensive Driving Classes
    - Industrial and Corporate Safety Programs
    - Presentations to Community Civic Groups
    - Classroom Seminars in Schools throughout the State of Texas in Areas of Driver Education, Bus Driver Safety, Pre-Driving Age Students, and Pedestrian Safety
  - Liaison for Railroad to Consult with City, County and State Law Enforcement Agencies and City Government Officials Regarding Grade Crossing Safety
  - Critical Incident Peer Support Program Representative
  - Technical Training Instructor for Union Pacific Railroad:
    - Locomotive Operation
    - Hostler Certification Instruction
    - Conductor Work Order Implementation
    - ATCS On-Board Computer Operation

- Rules and Safety Training for Newly Hired Train Service Employees
- 1997-Instructed Supervisory Personnel in Rules, Safety, Train Handling, Field Efficiency Testing and Derailment Investigation

CONSULTATION/EXPERT WITNESS TESTIMONY

- Have Given Expert Testimony in Court in Areas of Railroad Operations, Railroad Rules and Federal Regulations, Train Handling, Air Brake Operation and Event Recorder Data Interpretation
- Research and Trial Testimony in Federal and District Courts in Litigation of Railroad Crossing Accidents, FELA, Derailments and Personal Injuries for Both Plaintiff and Defense Counsel
- Special Focus on Train Handling and Crossing Evaluation from Operations Standpoint
- Inspections of Locomotives and Equipment, Railroad Yards, and Other Accident Sites
- Assistance in Accident Reconstruction through Interpretation of Event Recorder Data, Railroad Records and Documents
- Computerized Train Braking Simulation

ADVANCED TRAINING/QUALIFICATIONS IN AIR BRAKE OPERATION AND TECHNOLOGY

- Certificate of Advanced Training in Freight Car Air Brake Equipment (Westinghouse Air Brake Company)
- Certificate of Advanced Training in Locomotive Air Brake and Electro-Pneumatic Equipment (Westinghouse Air Brake Company)
- Technical Training in Modern Freight Car Air Brakes-FRA/AAR Rules (Railway Educational Bureau)
- Technical Training in Train Braking Distance Calculation (Railway Educational Bureau)
- Qualified as Instructor of Air Brake Rules and Operation through Union Pacific Technical Training Dept.

RAILROAD SAFETY

- Union Pacific Grade Crossing Safety Award [1994]
- Twenty Year Injury Free Service Award from Union Pacific [1990]
- Operation Lifesaver Special Achievement Award [1986]
- Safety Committee Chairman-Union Pacific Railroad [1983-1984]

RULES AND REGULATIONS INTERPRETATION

- Qualified Instructor of General Code of Operating Rules
- Qualified Instructor of Air Brake and Signal Appliance Equipment
- Qualified Instructor of Safety and Radio Rules Pertaining to Operating Department
- Qualified in Hostler Certification (Brakemen/Conductors Certified to Operate Locomotives)
- Have Developed Extensive Reference Library and Regularly Monitor FRA Code of Federal Regulations as Changes Occur
- 1970-Present, Compliance with Code of Operating Rules, Scheduled Testing as Required
- Operation of Trains in ABS, CTC, TWC and Dark Territories

SPECIAL PROJECTS

- Consultant/Advisor to U.S. Government Justice Dept/EPA in Matters of Railroad Safety
- Translated General Code of Operating Rules to Spanish for Use by Mexican Railroads
- Consolidated Timetables of Former Mexican National Railroad into Single Unit for Use in Privatized Operation
- Development, Coordination and Presentation of Training Programs for Railroad Management and Operating Personnel, Including Rules, Safety, Train Operation and Derailment Investigation

- Member of Train Handling Committee for Development of Accident Reconstruction Manual (NARSCI)
- Hands-on Testing of Locomotive Handling, Signaling and Stopping Capabilities in Accident Reconstruction
- Train Crew Operations Auditing for Major Railroads
- Participant- FRA Remote Control Locomotives Technical Conference

SPECIAL SKILLS

- Ability to Express Railroad Terminology and Explain Scenarios in Laymen's Terms for Benefit of Jury
- Second Language: Spanish

PUBLICATIONS AND PRESENTATIONS

- Certified Speaker for Texas Operation Lifesaver from 1985 Through Present
- Published: Event Recorder Evolution, Operation, and its Role in Railroad Accident Reconstruction (University of Tennessee, 1996)
- Presented: Post Accident Trauma and its Effect on Train Crews Involved in Railroad Accidents
- Operating Rules and Their Function in Railroad Operations-NARSCI
- Published: Certification Of Railroad Operating Employees-What Has Been Accomplished, and What Lies Ahead? (University of Tennessee, 2000)

MEMBERSHIPS

- Texas Association of Accident Reconstruction Specialists
- Advisory Committee, National Association of Railroad Safety Consultants and Investigators
- The Air Brake Association
- International Association of Railway Operating Officers, Inc.

Charles L. Culver and Associates
Railroad Operations Consultation

413 Bayridge Drive, League City, Texas 77573
Tel. (281) 334-3226 Fax (281) 538-3400 E-Mail sculver@nvl.net>

In compliance with RULE 26, FEDERAL RULES OF CIVIL PROCEDURE, the following will summarize my trial/deposition testimony during the past four years

August 05, 1994-Deposition-Santana vs. Missouri Pacific Railroad

June 23, 1995-Deposition- Mrs. Patsy G. Owen vs. CSX Transportation: United States District Court for the Northern District of Georgia, Atlanta Division: No. 193-CV-2138-HTWr

October 30, 1995-Deposition-Gary C. Herman vs. Burlington Northern Railroad

November 21, 1995-Deposition-Wilburn and Betty Ansley vs. Southern Pacific

December 5-6, 1995 – Testimony in federal court, Northern District of Georgia-Mrs Patsy G. Owen vs. CSX Transportation- United States District Court for the Northern District of Georgia, Atlanta Division: No 193-CV-2138-HTW

January 10, 1996 – Deposition-Raymond Espinoza, Jr vs Elgin Joliet & Eastern Railroad- Circuit Court of the 19th Judicial Circuit, Lake County, Illinois: No. 90 L 317

January 31, 1996 – Deposition-Szafranski vs. Burlington Northern Railroad- United States District Court for the District of Colorado: No. 94-Z-2088

March 6, 1996 – Deposition-Dynasty Trucking/Amtrak collision- Fifteenth Judicial District Court, Parish of Acadia, State of Louisiana. No. 66.668-1

April 1, 1996 – Deposition-Lollar vs. Union Pacific Railroad- 118th Judicial District Court for the State of Texas, County of Howard· No 95-06-37,726-CV

May 22, 1996 – Deposition-Queen vs. Norfolk Southern- State Court of Fulton County, State of Georgia: No. 95VS100348G

July 23, 1996 – Deposition-Durr vs. Conrail- Superior Court of New Jersey Law Division-Gloucester County: No. L-000543-91

August 22, 1996 – Deposition-Nelson vs. MoPac- United States District Court Eastern District of Louisiana: No. 95-1575

August 27, 1996 – Deposition-Curtis vs. ATSF- District Court of Tarrant County, Texas: No. 141-155208-94

October 11, 1996 – Deposition-Watson vs. Southern Pacific Transportation Company- District Court of Jefferson County: No. B-149,759

October 14, 1996 – Deposition-Darling vs. Conrail- United States District Court, Southern District of New York: No. 95 CV 9841

October 18, 1996 – Deposition-DeBerge vs. Burlington Northern- Superior Court of the State of Washington, County of Snohomish: No. 95-2-04886-1

October 31, 1996 – Deposition-Kelly vs. Southern Pacific- District Court of El Paso County, Texas: No. 95-8900

November 26, 1996 – Deposition-Hamilton vs. Union Pacific- United States District Court for the District of Colorado: No. 96-K-592

January 9, 1997 – Testimony in district court Tarrant County, Texas, 141st Judicial District-Sondra Curtis vs. ATSF- District Court of Tarrant County, Texas: No. 141-155208-94

January 10, 1997 – Deposition-Butler vs. Union Pacific- Circuit Court for the City of St. Louis, State of Missouri: No. 942-01421

January 17, 1997 – Deposition-Qualls vs. Burlington Northern- United States District Court, Eastern District of Arkansas, Jonesboro Division: No. J-C-95-67

January 23, 1997 – Deposition-Miguez vs. Southern Pacific- State of Louisiana, Parish of Lafayette, Fifteenth Judicial District Court: No. 89-5361-D

January 30, 1997 – Testimony in circuit court for the city of St. Louis, state of Missouri-Butler vs. Union Pacific- Circuit Court for the City of St. Louis, State of Missouri: No. 942-01421

May 7, 1997 – Testimony in Superior Court of New Jersey Law Division, Cloucester County-Peter Durr vs. Consoidated Rail Corporation- Superior Court of New Jersey Law Division-Gloucester County: No. L-000543-91

July 15, 1997 – Deposition-Peterson vs.. Burlington Northern- District Court Northwest Judicial District Civil: No. 94-000947

September 8, 1997 – Deposition-Watkins vs. Amtrak/Illinois Central- Twenty-First Judicial District Court, Parish of Tangipahoa, State of Lousiana: No. 92-02894

September 11, 1997 – Deposition-Houghton vs. Port Terminal Railway

October 28, 1997 – Deposition-Harding vs. Union Pacific- Los Angeles County Superior Court

November 5, 1997 – Testimony in District Court of Harris County, Texas-Houghton vs. Port Terminal Railway

November 25, 1997 – Deposition-Landry vs. Southern Pacific- 16th Judicial District Court Parish of Iberia, State of Louisiana: No. 80,518 A

February 24, 1998 – Deposition-Foster vs. Union Pacific- District Court of Jefferson County, Texas, 60th Judicial District: No. B150434

February 27, 1998 – Deposition-Long vs. Norfolk Southern- Circuit Court, City of St. Louis, State of Missouri: No. 952-09567

March 5, 1998 – Deposition-Lambert vs. CSX- Court of Common Pleas, Huron County, Ohio: No. CVC-97-059

May 5-6, 1998 – Deposition-Smith vs. CSX- Circuit Court for the County of Livingston, State of Michigan: No. 96-15482-NO

June 23, 1998 – Deposition-Landry vs. SP- 16th Judicial District Court, St. Martin Parish, Louisiana: No. 56002

June 24, 1998 – Deposition-Meissner vs. BN/SF- District Court for the State of Idaho: No. 96-0490-N-EJL

June 26, 1998 – Deposition-Lovett vs UP- United States District Court for the Western District of Arkansas, Fort Smith Division: No. 97-2036

July 15, 1998 – Deposition-Ryan vs. UP- District Court for the Southern District of Texas, Galveston Division: No.G-97-419

August 18, 1998 – Deposition-Campbell vs. UP- United States District Court for the District of Idaho: No. 97-0463-E-BLW

August 25, 1998 – Deposition-Dennis vs. UP- Superior Coourt of the State of Wasington, Spokane County: No. 96-2-00855-3

September 25, 1998 – Deposition-Griffin vs. KCS-

October 1, 1998 – Deposition-Stelly vs. SP- District Court of Jefferson County, Texas, 58th Judicial District: No. A-154,032

October 7, 1998 – Deposition-Kocian vs. UP- District Court of Harris County, Texas:

No. 96-50768

November 9, 1998 – Deposition-Crouse vs Chapparal Steel- District Court, Ellis County, Texas, 40th Judicial District. No. 55636

November 11, 1998 – Deposition-Larabee vs. ATSF- United States District Court for the Southern District of Texas, Galveston Division: No G-97-723

February 5, 1999 – Deposition-Tugwell vs NS- State Court of Bibb County, Georgia. No. 44607

February 19, 1999 – Deposition- Olguin vs. Mitchell Energy & Development Corp., et al. and UPRR– District Court of Harris County, Texas, 129th Judicial District, No. 97-46921

March 10, 1999 – Testimony in 21ST Judicial District Court, Parish of Tangipahoa, State of Louisiana – Brumfield vs. Illinois Central/Amtrak

May 4, 1999 – Deposition-Moore vs KCS- District Court of Hunt County, Texas, 196th Judicial District No 59,454

May 5, 1999 – Deposition-Shaw vs. UP- District Court of Harris County, Texas, 189th Judicial District No 98-10769

June 22, 1999 – Deposition-Monohon vs UP- District Court of Labette County, Kansas: No 98 C 27 OS

June 24, 1999 – Deposition-Archer vs UP- United States District Court, District of Idaho: No. 498CV00222

July 20, 1999 – Deposition-Dikes vs. Conrail- Circuit Court of Cook County, County, Law Division: No. 97 L 01614

September 14, 1999 – Deposition-CSX vs. Plymouth: Civil Action No. 98-76315 (E.D. Mich.)

September 20, 1999 – Deposition-Mann vs. ATSF: District Court of Tarrant County, Texas 342nd Judicial District

November 3. 1999 – Deposition-Graumann vs. BN: District Court, State of North Dakota, Northeast Judicial District, Civil No. 98-C-2020

November 4, 1999 – Deposition-Spence vs. UP: District Court of Canadian County, State of Oklahoma, Case No CF-97-01

November 22, 1999 – Deposition- Kirby vs. Norfolk Southern, United States District

Court, Northern District of Georgia, Case Number 1 98-CV 2939

January 10, 2000 – Deposition- Redding vs BNSF, Circuit Court of the City of St Louis State of Missouri, Cause No 972-10046, Division 1

March 2-3, 2000 – Trial Testimony - Mann vs. ATSF District Court of Tarrant County, Texas 342nd Judicial District

March 24, 2000 – Deposition - Gintner vs KCS

April 7, 2000 – Trial Testimony - Denning vs. UP: Circuit Court of the State of Oregon for the County of Baker, Case No 98663

April 11, 2000 – Deposition - Nelson vs Union Pacific

April 26, 2000 – Deposition - Humphrey vs. Union Pacific

July 14, 2000 – Deposition - Fluitt vs Union Pacific

July 26, 2000 – Deposition - Dugo vs ATSF - Circuit Court of Cook County, Illinois County 95 L 10615

August 29, 2000 – Deposition - Dugo vs ATSF - Circuit Court of Cook County, Illinois County 95 L 10615

September 25, 2000 – Deposition - Lee vs Keokuk Jct Railway -

October 27, 2000 – Deposition - Fabe vs Kansas City Southern

November 16, 2000 – Deposition - Forsythe vs Chance Rides, Inc

Charles Culver and Associates
Rate Schedule

Retainer: 1850.00	Retainer is fully refundable, less charges for any amount of hourly work performed prior to refund.
Consultation: 185.00/hour	Includes phone consultation, meetings, document review, report preparation Billing in 15-minute increments
Site inspection: 185.00/hour	Includes time spent on site 4-hour minimum
Away from Home	Minimum 1500 per day flat rate when held away from home
Trial: 350.00/hour	Includes time spent giving (and waiting to give) deposition or trial testimony 4 hour minimum
Travel Time: 90.00/hour	Includes time spent traveling to/from site inspections, meetings, trial events No minimum
Travel Expenses	All costs associated with travel are billed to client Refundable airfare tickets purchased unless otherwise requested by client
Other Expenses	With prior approval, costs associated with outside agency services are billed to client

Tab 6

UNION PACIFIC RAILROAD
HARRIMAN DISPATCHING CENTER
TRAIN DISPATCHER'S BULLETIN NO. 80

December 1, 1999

ALL TRAIN DISPATCHERS:

Subject: General cleanup of old Train Dispatcher's Bulletins and change of verbal format when Requesting Automatic Crossing Device Protection.

Item 1. Cancel the following Train Dispatcher's Bulletins TDB #'s 11, 18, 33, 35, 39, 43, 45, 47, 48, 53, and 57

Item 2. Cancel Train Dispatcher's Bulletin No. 3 and change Rule 6.32.2 AUTOMATIC CROSSING DEVICES, in Instructions Governing Train Dispatchers and Control Operators to read:

When advised of a defective or malfunctioning automatic crossing warning device, the location must be immediately protected and reported to the signal technician.

When notified that an automatic crossing device is malfunctioning, the train dispatcher must:

1. Obtain as much detailed information as possible about malfunction.

2. **Notify closely approaching trains of the malfunctioning crossing device, and instruct crew to be governed by Rule 6.32.2.**

3. Contact the Harriman Dispatching Center (HDC) crossing signal technician and be governed by the technician's instructions.

   (a) If signal technician requests a stop label per Rule 6.32.2:

   Issue the following track bulletin ~~(High-Use format XG) or~~, where software allows, use protective track label to prevent clearing signals into affected area.

   "AUTOMATIC CROSSING DEVICE NOT WORKING PROPERLY AT (location) PROTECT CROSSING UNLESS OTHERWISE INSTRUCTED BY SIGNAL EMPLOYEE."

   If using protective track label, advise trains of location before allowing to enter affected area using same format as used for track bulletin.

   (b) If signal technician requests a 15 mph label per Rule 6.32.2:

   Issue the following track bulletin (High-Use format XH) or use protective track label to prevent clearing signals into affected area when software allows.

   "AUTOMATIC CROSSING DEVICE NOT WORKING PROPERLY AT (location). PROCEED NOT EXCEEDING 15 MPH UNTIL CROSSING OCCUPIED. STOP NOT REQUIRED."

If using protective track label, advise trains of location before allowing to enter affected area using same format as used for track bulletin

4. Where track bulletin is used this information may be transmitted verbally to commuter trains with engineer only in the cab, using the same wording as track bulletin.

5. Protection must remain in place until notified by signal technician that crossing protection is restored to normal operation

NOTE: Signal technician will notify local law enforcement.

William B. Hall
Manager of Rules - HDC

Tab 7

COPY OF TRANSCRIPT

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

SHAYNE CLAYSON,

Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, a Delaware corporation, and UTAH RAILWAY COMPANY, a Utah corporation,

Defendants.

Civil No. 020905849

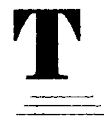
Hon. J. Dennis Frederick

~~~~~~

DEPOSITION OF REBECCA GRACE COOK

~~~~~~

TAKEN AT:	Hatch, James & Dodge 10 West Broadway, Suite 400 Salt Lake City, Utah
DATE:	February 6, 2003
TIME:	12:45 p.m.
REPORTED BY:	Scott M. Knight, RPR



1 A. At Point No. 4. And as the train came,
2 he--he still was standing there. My husband I
3 remember saying to me, Oh, my God, that guy just
4 got hit. And as I looked, at that moment Shayne
5 was in the air about halfway up the train cart.
6 So if you're looking at the top of the train car,
7 he was flying about halfway. His body was
8 turning and hitting a cart, and then it turned
9 again, and it just fell. Looked like somebody
10 threw a rag on the ground, just flew.
11 Q. Would you like to take a minute? Maybe
12 have a drink of water. If you want to get up and
13 walk around, it would be okay.
14 A. I'm okay. Thanks.
15 Q. So to the best of your recollection, do
16 you believe that Mr.--that Shayne was actually in
17 between the rails of the railroad track at the
18 time he was hit?
19 A. I believe he was standing over--like
20 straddling one--one track. There was a track, and
21 he was standing with his back faced toward the
22 train. And he was straddled, so he had one leg
23 on one side of the track. So he had his left leg
24 in the middle of the tracks and his right leg to
25 the right side of the track.

1 your husband and from the time that you arrived
2 up until the time that Shayne was hit by the
3 train at Point No. 5, did you hear the train
4 horn?
5 A. No.
6 Q. Did you hear the train's bell?
7 A. No.
8 Q. Did you hear any warning given by the
9 train of its approach to the intersection?
10 A. No.
11 Q. Do you believe that if the train had
12 given a warning, audible signal of its approach to
13 the intersection, that you would have heard it?
14 A. Yes.
15 MR. McGARVEY: Objection.
16 You can answer.
17 BY MR. HOYT:
18 Q. Sometimes attorneys make objections,
19 but it's okay to answer.
20 A. Okay.
21 Q. And your answer to that question was?
22 A. Yes. I believe if the train would have
23 sounded a horn, we would have heard it.
24 Q. Okay. Did you notice, before he was
25 struck, if Shayne had any equipment in his hands

Tab 8

COPY OF TRANSCRIPT

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

SHAYNE CLAYSON,

Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, a Delaware corporation, and UTAH RAILWAY COMPANY, a Utah corporation,

Defendants.

Civil No. 020905849

Hon. J. Dennis Frederick

~~~~~~

DEPOSITION OF RHETT COOK

~~~~~~

TAKEN AT: Hatch, James & Dodge
10 West Broadway, Suite 400
Salt Lake City, Utah

DATE: February 6, 2003

TIME: 1:36 p.m.

REPORTED BY: Scott M. Knight, RPR

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Corporate Offices. 50 West Broadway, Suite 900, Salt Lake City, Utah 84101

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1 what would be the east rail?
2 A. Yeah.
3 Q. Okay. And you indicated that the train
4 actually picked his body up and--
5 A. Yeah.
6 Q. --moved it forward?
7 A. Yeah.
8 Q. And where did he land?
9 A. He landed right here on the other side
10 of the track (indicating).
11 Q. Would you draw a circle around that X
12 and put a Number 7 next to it?
13 A. (The witness complied.)
14 Q. From the time that you got to the
15 intersection and stopped up until the time that
16 Mr. Shayne Clayson was hit at the intersection by
17 the train, did you hear a train horn?
18 A. I don't remember hearing a train horn.
19 Q. Did you hear--did you hear the train
20 bell, the ding, ding, ding, ding, ding bell?
21 A. I could hear the bells from the
22 (indicating)--
23 Q. The cross guard?
24 A. --the cross guard. They were
25 constantly on going ding, ding, ding, you know.

Tab 9

COPY OF TRANSCRIPT

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

SHAYNE CLAYSON,

Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, a Delaware corporation, and UTAH RAILWAY COMPANY, a Utah corporation,

Defendants.

Civil No. 020905849

Hon. J. Dennis Frederick

~~~~~~

DEPOSITION OF RONALD JOE NASH

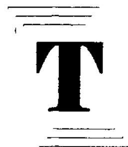
~~~~~~

TAKEN AT: Hatch, James & Dodge
10 West Broadway, Suite 400
Salt Lake City, Utah

DATE: February 4, 2003

TIME: 2:01 p.m.

REPORTED BY: Scott M. Knight, RPR



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1 or--up to the point that it went dead, were you
2 able to hear Shane?
3 A. Yes.
4 Q. All right. Did you have any problems
5 hearing Shane?
6 A. No.
7 Q. And then did it all of a sudden just go
8 blank or go dead?
9 A. Yeah, it just made kind of a crackling
10 noise and that was it.
11 Q. Did you, were you and Shane talking up
12 to the point that it went dead?
13 A. From what I can remember, yes.
14 Q. And what did you later learn was the
15 cause for the phone to go dead?
16 A. Well, I learned that a train had hit
17 him. The electrician that was working in that
18 area called me shortly after I hung up from, or,
19 yeah, hung up after the call from Shane, and the
20 phone rang and I thought it was Shane calling me
21 back so I answered it. And it was the
22 electrician saying that I'd had a maintainer get
23 hit by a train.
24 Q. Was that, was it Einor Paulson who gave
25 you a call?

Tab 10

COPY OF TRANSCRIPT

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

SHAYNE CLAYSON,

Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, a Delaware corporation, and UTAH RAILWAY COMPANY, a Utah corporation,

Defendants.

Civil No. 020905849

Hon. J. Dennis Frederick

~~~~~~

DEPOSITION OF EINOR CARL PAULSON

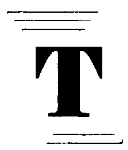
~~~~~~

TAKEN AT: Hatch, James & Dodge
10 West Broadway, Suite 400
Salt Lake City, Utah

DATE: February 6, 2003

TIME: 10:00 a.m.

REPORTED BY: Scott M. Knight, RPR



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1 Q. And did you hear that train coming?
2 A. No, I did not.
3 Q. At any point prior to that, did you see
4 that train coming?
5 A. No, I did not.
6 Q. Was the train blowing its horn?
7 A. No, it was not.
8 Q. Was--
9 MR. McGARVEY: Well, objection. Lack
10 of foundation as to whether he knows whether it
11 was blowing its horn or not. And you can ask him
12 whether he heard a horn.
13 BY MR. HOYT:
14 Q. Well--
15 A. Did I hear a horn?
16 Q. Did you hear a horn?
17 A. No, I did not.
18 Q. Approximately what is the distance
19 between Point No. 1 and Point No. 3 on the
20 diagram?
21 A. Point No. 1 and Point No. 3?
22 Q. Yes.
23 MR. McGARVEY: Objection. Lack of
24 foundation. It calls for speculation. But you
25 can go ahead and answer if you can.

Tab 11

COPY OF TRANSCRIPT

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

SHAYNE CLAYSON,

Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, a Delaware corporation, and UTAH RAILWAY COMPANY, a Utah corporation,

Defendants.

Civil No. 020905849

Hon. J. Dennis Frederick

~~~~~~

DEPOSITION OF ROBBIE CHAD BOOTH

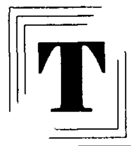
~~~~~~

TAKEN AT: Hatch, James & Dodge
10 West Broadway, Suite 400
Salt Lake City, Utah

DATE: February 4, 2003

TIME: 11:28 a.m.

REPORTED BY: Scott M. Knight, RPR



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1 A. No.
2 Q. Did you, based on the tapes that we
3 have in front of us that were pulled, it shows
4 that your speed obtained 20 miles an hour. Would
5 you have any reason to disagree with that?
6 A. No.
7 Q. Okay. And would that basically be your
8 recollection of what you recall how fast you were
9 going at the time?
10 A. At the time of being talked by or . . .
11 Q. No, because at the time that you were
12 talked by, you were stopped, correct?
13 A. Well, shortly after being talked by is
14 that the speed you're talking?
15 Q. Yes, sir that's what I'm talking about.
16 A. Seventeen to twenty, somewhere in that
17 area.
18 Q. And then once you're past the yellow
19 block, did you deviate your speed any?
20 A. Not that I'm aware of.
21 Q. And then what happens when you get to
22 787? What are you supposed to do at that point?
23 A. Stop.
24 Q. And because it's a red block?
25 A. Yes.

Tab 12

COPY OF TRANSCRIPT

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

SHAYNE CLAYSON,

Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, a Delaware corporation, and UTAH RAILWAY COMPANY, a Utah corporation,

Defendants.

Civil No. 020905849

Hon. J. Dennis Frederick

~~~~~~

DEPOSITION OF STEVE CLIFTON

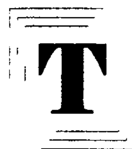
~~~~~~

TAKEN AT: Hatch, James & Dodge
10 West Broadway, Suite 400
Salt Lake City, Utah

DATE: February 5, 2003

TIME: 9:09 a.m.

REPORTED BY: Scott M. Knight, RPR



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1 Q. Now, if the dispatcher, then, knew that
2 the signal was defective and knew that the signal
3 at the 17th Street crossing was, in fact,
4 defective and not working properly, didn't the
5 dispatcher have a responsibility to notify the
6 crew--your train crew that there was a defective
7 signal and crossing?
8 A. I believe so, yes.
9 Q. Okay. I mean, that's taking the safe
10 course.
11 A. Right.
12 I have a question.
13 Q. Sure.
14 A. You keep calling it a signal. Are you
15 talking about the crossing gates?
16 Q. I'm talking about the crossing gates.
17 A. Not the signal signal?
18 Q. That's correct. And I probably
19 should--that's a good issue, because you have the
20 signals at both ends, the block signals, and then
21 you have the intermediate signal, and then you
22 have your crossing arms and--
23 A. What we call flashers.
24 Q. --flashers. Okay. Let's use the word
25 flashers and cross arms. That way we're on the

1 safety rules for failing to tell you that the
2 warning devices at 17th North was--were
3 malfunctioning?
4 A. If he knew, yes.
5 Q. And of course, the Utah Railway
6 operates under the general code of operating
7 rules, do they not?
8 A. Yes, sir.
9 Q. And Rule 1.1.1 is maintaining a safe
10 course; isn't that correct?
11 A. I don't know the numbers. I'm not--
12 there's about a thousand rules in there.
13 Q. But if--if the Rule 1.1.1 is the
14 maintaining a safe course, it means that the
15 safest course must be taken in any situation,
16 correct?
17 A. I suppose so.
18 Q. Now, when is the first time, then,
19 that--let me start over. Let me move you back a
20 little bit now and you've left the yard, you
21 know, with your six loads and three empties. And
22 you're proceeding toward Chevron. Do you come up
23 to the block signal at 786?
24 A. What do you mean do I come up to it?
25 Q. In other words, you have to go through

Tab 13

1 IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY STATE OF UTAH

2

3 SHAYNE CLAYSON,) CASE NO. 020905849
)
4 PLAINTIFF,)
)
5 VS.)
)
6 UNION PACIFIC RAILROAD)
COMPANY, A DELAWARE)
7 CORPORATION, AND)
UTAH RAILWAY COMPANY,)
8 A UTAH CORPORATION,)
)
9 DEFENDANTS.)

COPY

10

11 DEPOSITION OF
TERRY A. MILLER

12 TAKEN ON BEHALF OF
PLAINTIFF

13

14 DEPOSITION OF TERRY A. MILLER, taken

15 before Cynthia Craig, General Notary Public within

16 and for the State of Nebraska, beginning at

17 9:40 a.m., on May 22, 2003, at the Offices of Thomas

18 & Thomas Court Reporters & Certified Legal Video,

19 3861 Farnam Street, Omaha, Nebraska.

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22

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25

1 Q. Okay. All right. I want to visit with
2 you now about when there is a problem with a
3 particular crossing or there is a -- where it may
4 involve the safety of the general motoring public.
5 What may be generated out of your office
6 from a warning standpoint?
7 A. Well, it depends on the report that we
8 receive.
9 Q. Explain.
10 A. That would determine the action that we
11 take.
12 Q. All right. For instance, give me some
13 examples.
14 A. For instance, where you have a crossing
15 that is reported that lights are flashing and the
16 gates are down and there's no train movement in that
17 area, then what we'll do is put an XH order on it,
18 which is a 15-mile-an-hour, we'll notify the local
19 law enforcement agency, we generate a ticket, of
20 course, through all this, and we get a maintainer
21 dispatched.
22 Q. Okay. And what is your understanding of
23 an XH order? What's the function of that?
24 A. It's actually to reduce the speed to
25 15 miles an hour if the speed exceeds beyond that on

1 maximum authorized speed.
2 Q. And it's -- is it also part of an XH order
3 that the train crew run a restricted speed?
4 A. No, restricted speed is different from a
5 15-mile-an-hour order.
6 Q. All right. And so it's your understanding
7 that an XH order does not direct a crew to run at
8 restricted speed; is that correct?
9 A. 15 miles an hour at a crossing is
10 completely different from actually the terminology
11 of restricted speed.
12 15-mile-an-hour order is basically telling
13 the train crew that at this particular crossing they
14 need to proceed at 15 miles per hour, not exceeding,
15 and if conditions warrant, they may be travelling at
16 less -- a lesser speed than 15 miles per hour.
17 Q. Okay. And that's what an XH order is?
18 A. That is correct.
19 Q. Is that generated out of your office?
20 A. If we are made aware of it.
21 Q. Okay. And take me through the protocol.
22 Let's say you're notified of the crossing arm as
23 you -- let's use that example, crossing arms are
24 down, lights are on but there's no train in the
25 area. Would you necessarily on a regular basis

1 issue an XH order in that regard?
2 A. Yes, we would.
3 Q. All right. Take me through who you notify
4 or how you place that XH order in effect.
5 A. Well, we notify the dispatcher and of
6 course give him the pertinent information as far as
7 location and tell him that we need an XH,
8 15-mile-an-hour, at this particular crossing.
9 Q. Okay.
10 A. Then we notify the local law enforcement
11 agency of the condition that we have at this
12 crossing.
13 Q. And then how long is that XH order in
14 force?
15 A. The XH order is in force until the
16 conditions are repaired.
17 Q. And how is that XH order disseminated for
18 the people in the field at that location?
19 A. Well, actually that comes from the train
20 dispatcher, and that's really out of my true field
21 of expertise.
22 Q. All right. But your office does generate
23 the orders to begin with?
24 A. Our office notifies the dispatcher of an
25 XH if we are the first individual to be notified,

1 and we're doing this all hypothetically --
2 Q. Sure.
3 A. -- so we're saying that a public citizen
4 calls in and reports that to us, then we notify the
5 dispatcher to put an XH order, 15-mile-an-hour, at
6 this particular crossing.
7 Q. Okay. Now, is there also an XG order?
8 A. There is.
9 Q. Have you in the past generated XG orders?
10 A. Yes, I have.
11 Q. On one or many occasions?
12 A. On many occasions.
13 Q. Okay. And what are some of the conditions
14 just generically speaking that you would generate an
15 XG order?
16 A. An XG order would be generated if we
17 received a report of a crossing malfunction to the
18 degree of where the crossing may have been
19 vandalized, the lights were shot out, so the
20 crossing is not actually warning the public as it is
21 intended.
22 Q. Would the location of a crossing, let's
23 say if it's a heavily traveled crossing from the
24 general public where you know there's a lot of
25 activity there'd also be a factor in generating an

Tab 14

COPY OF TRANSCRIPT

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

SHAYNE CLAYSON, Plaintiff, vs. UNION PACIFIC RAILROAD COMPANY, a Delaware corporation, and UTAH RAILWAY COMPANY, a Utah corporation, Defendants.	Civil No. 020905849 Hon. J. Dennis Frederick

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DEPOSITION OF RALPH E. SMITH

~~~~~~

TAKEN AT: Hatch, James & Dodge
10 West Broadway, Suite 400
Salt Lake City, Utah

DATE: February 5, 2003

TIME: 1:06 p.m.

REPORTED BY: Scott M. Knight, RPR

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1 any interrelationship between 786, the
2 intermediate, the switch--I mean the signals at
3 the 17th North crossing and 787?
4 MR. McGARVEY: Objection. Asked and
5 answered. You can go ahead.
6 THE WITNESS: Is it--now give me that
7 again.
8 MR. TRAMUTO: Do you want to read that
9 back? Can you read that back, please?
10 (The last question was read.)
11 THE WITNESS: No.
12 BY MR. TRAMUTO:
13 Q. Okay. When Shayne Clayson bidded a
14 maintainer's job there at Grant Tower, did you
15 have any kind of a training session or training
16 program for him to introduce him to the tower?
17 A. Well--oh, gee, I forget his name. The
18 maintainer that had the job and he was still
19 there, he was--I think Shayne went out with him
20 for a week, I believe. I'm not sure if it was
21 longer than that, but I think it was a week. It
22 could have been longer. And then he--that guy
23 left to go to his job that he'd bid on.
24 Q. Because of the complexity that's there
25 at Grant Tower, is a week, in your opinion, long

1 enough to introduce a new maintainer to that
2 system?
3 A. Well, not really. I mean, you learn
4 new things every day about that stuff over there.
5 That's--that's--there's a lot of little quirks
6 over there you could run into. So I--I'd say the
7 guys are always learning over there, even the ones
8 that's been around there for years.
9 Q. Would it be fair to say, then, that a
10 training period of more than a week would be
11 advisable?
12 A. Oh, I think so, yeah.
13 Q. Do you think, from a safety standpoint,
14 that training with an individual more than a week
15 is indicated for safety purposes?
16 A. Probably.
17 Q. Did you ever work with Shayne from the
18 time that he first bid on the position at Grant
19 Tower to the time he was injured there at Grant
20 Tower?
21 A. At Grant Tower, I--I'm sure I was
22 around when we were working on switch machines and
23 we were both there, I'm sure. I can't remember
24 specifically. I'm pretty sure that I also worked
25 with him at 17th North on the switches over on