1996

ALECIA JENSEN, Plaintiff and Appellant, vs. UNION PACIFIC RAILROAD COMPANY, Defendant and Appellee and Petitioner.: Petition for Writ of Certiorari

Utah Court of Appeals

Allen K. Young; Young and Kester; Attorney for Appellant.
J. Clare Williams, Morris O Haggerty; Attorneys for Appellee.

IN THE UTAH SUPREME COURT

ALECIA JENSEN, Plaintiff/Appellant, vs. UNION PACIFIC RAILROAD COMPANY, Defendant/Appellee/Petitioner.	)	APPELLATE COURT NO. 950754-CA 960275 PRIORITY NO. 13

PETITION FOR WRIT OF CERTIORARI
OF APPELLEE UNION PACIFIC RAILROAD COMPANY

ALLEN K. YOUNG, No. A 3583
YOUNG & KESTER
Attorneys for Plaintiff/Appellant
101 East 200 South
Springville, Utah 84663
Telephone: (801) 621-3317

J. CLARE WILLIAMS, No. 3490
MORRIS O HAGGERTY, No. 5283
Attorneys for Defendant/Appellee
406 West 100 South
Salt Lake City, Utah 84101-1151
Telephone: (801) 595-3270

IN THE UTAH SUPREME COURT

ALECIA JENSEN, Plaintiff/Appellant, vs. UNION PACIFIC RAILROAD COMPANY, Defendant/Appellee/Petitioner.	)	APPELLATE COURT NO. 950754-CA PRIORITY NO. 13

PETITION FOR WRIT OF CERTIORARI OF APPELLEE UNION PACIFIC RAILROAD COMPANY

ALLEN K. YOUNG, No. A 3583
YOUNG & KESTER
Attorneys for Plaintiff/Appellant
101 East 200 South
Springville, Utah 84663
Telephone: (801) 621-3317

J. CLARE WILLIAMS, No. 3490
MORRIS O HAGGERTY, No. 5283
Attorneys for Defendant/Appellee
406 West 100 South
Salt Lake City, Utah 84101-1151
Telephone: (801) 595-3270

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Statutes

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals wrongly decide, in conflict with prior decisions of the Utah Supreme Court, that a witness who presents negative whistle testimony (i.e., a witness who testifies that a train whistle was not sounded) need only be in a physical position to hear the whistle and not in a mental position to hear the whistle? By "mental position" Union Pacific refers to the Utah Supreme Court's requirement that a negative whistle witness must not be so engrossed in or diverted to other things that the witness would have heard a train whistle had it been sounded.

2. Did the Court of Appeals wrongly decide, on an important question of law which has not yet but should be settled by the Utah Supreme Court, that a negative whistle witness does not need to lay a foundation showing that the witness was in a physical and mental position to have heard the train whistle had it been sounded? Encompassed within this question is the subsidiary question of whether Union Pacific presented evidence that Alecia Jensen was not in a mental position to hear a whistle as she was engrossed in other matters, and whether Jensen presented contrary evidence making this an issue of fact for the jury?

3. Did the Court of Appeals wrongly decide, on an important question of law which has not yet but should be settled by the Utah Supreme Court, that an affidavit filed in opposition to a motion for summary judgment that is inconsistent with previously served interrogatory answers creates an issue of fact sufficient to preclude entry of summary judgment? Encompassed within this question is the subsidiary question of whether the Court of Appeals wrongly decided that Jensen's affidavit submitted in opposition to summary

judgment was not inconsistent with her interrogatory answers?

OPINION OF THE UTAH COURT OF APPEALS

The Utah Court of Appeals affirmed summary judgment on two grounds and reversed on a third ground in Jensen v. Union Pacific Railroad, Case No. 950754-CA, Memorandum Decision, dated April 25, 1996. A copy of the decision is included as part of the Appendix.

JURISDICTION

The Utah Court of Appeals' Memorandum Decision which is sought to be reviewed is dated April 25, 1996. A motion for rehearing was denied by order dated May 17, 1996. A copy of the order denying rehearing is included as part of the Appendix.

Jurisdiction is conferred upon the Utah Supreme Court by Utah Code Ann. § 78-2-2(3)(a) (1953 as amended).

CONTROLLING PROVISIONS OF CONSTITUTIONS, STATUTES, ORDINANCES AND REGULATIONS

Because of the length of Utah Code Ann. § 56-1-14 (1994 as amended), it has been reproduced and included as part of the Appendix.

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings, and Disposition:

Alecia Jensen originally sued Union Pacific for a claim arising from a train/auto accident which occurred in Springville, Utah where Jensen was thrown from her automobile upon impact with a Union Pacific locomotive. Union Pacific brought a Motion For Summary Judgment in the Fourth Judicial District Court, Utah County (hereinafter "trial court").

Summary Judgment was granted on May 15, 1995 in a Memorandum Decision with an Order Granting Summary Judgment dated June 9, 1995. A copy of the trial court's Memorandum Decision and Order are included as part of the Appendix. An appeal was made by Jensen. The Utah Supreme Court assigned the case to the Utah Court of Appeals. That court affirmed the summary judgment on two grounds and reversed on a third ground in a Memorandum Decision dated April 25, 1996 (hereinafter "Court of Appeals Memorandum Decision"). On May 9, 1996 defendant filed a Petition For Rehearing. The Court of Appeals entered its Order denying the Petition on May 17, 1996.

Statement of Facts

Jensen, age 17, was seriously injured when the automobile in which she was riding as a passenger drove in front of and was struck by a Union Pacific coal train. The accident occurred at approximately 12:10 p.m. on February 5, 1994, at a public railroad crossing of Union Pacific's Provo Subdivision mainline trackage located near 650 West and 5950 South in Spanish Fork. (Utah County Sheriff's Investigation File ("Sheriff's File"), R. 143-123).

According to Jensen's Interrogatory Answers (No. 14), Jensen's car, a 1982 Honda Civic, had been purchased and was owned by Danny Jensen, Jensen's father, for Jensen's personal use. The car was being driven at the time of the accident by Jensen's boyfriend, Bruce Brinkmeier, also age 17. Brinkmeier was not licensed to drive an automobile, and received a citation for not being licensed following the accident. (Sheriff's File, R. 143-123).

Union Pacific engineer Puffer was sounding the locomotive whistle and bell as the train approached the crossing. He began sounding the whistle and bell approximately 1/4 mile away

from the 5950 South crossing and continued to sound the whistle and bell from the 5950 South crossing on up to the point of the accident at 650 West. The distance between the 5950 South and 650 West crossings is approximately 1100 feet. (Puffer Affidavit, R. 102-98; Sheriff's File, R. 143-123; Curley Affidavit, R. 121-106).

The whistle and bell were operating properly and the whistle was a particularly loud whistle. The locomotive bell was also ringing. Engineer Puffer turned the bell on when he started sounding the whistle for the 5950 South crossing. He never turned the bell off until after the accident. Puffer operated the whistle and bell continuously from more than one quarter mile away up to the point of the accident. (Puffer Affidavit, R. 102-98).

Shortly after seeing a truck/horse trailer clear the crossing, Puffer noticed the Jensen car rolling towards the crossing. The car was following a few seconds behind the truck/horse trailer and moving past the stop sign. Puffer had the impression that the car never stopped for the stop sign. The car rolled onto the track directly in front of the train. (Puffer Affidavit, R. 102-98; Sheriff's File, R. 143-123).

According to Jensen's Interrogatory Answers (Nos. 15 and 35), Brinkmeier and Jensen had come from Brinkmeier's home in Salt Lake City, with Brinkmeier driving, to the place of the accident. The purpose of the drive was to visit Brinkmeier's foster parents who lived in the area and to see where Brinkmeier had worked just north of the crossing.

Brinkmeier's deposition was never taken nor did he give an affidavit. However according to a recorded statement of Brinkmeier, a transcription of which was attached as an exhibit to Jensen's Memorandum in Opposition to Union Pacific's Motion (R. 178-158),

Brinkmeier and Jensen were playing a "wish" game upon arrival at the crossing. They did so by lifting their feet up off the floor of the car and touching something metallic with their fingers while at the same time making a wish and crossing the tracks. Jensen agrees that they may have been doing that. (Brinkmeier Statement, R. 168-166; Affidavit of Alecia Jensen ("Jensen Affidavit"), R. 181-180).

Brinkmeier and Jensen never saw nor heard the train at any time before impact. They were playing the game and looking in a forward and/or upward direction to try and find a metal screw to touch as the car was at or near the stop sign. They did not look or listen for train traffic because of being preoccupied with playing the game. (Jensen Affidavit, R. 181-180; Sheriff's File, R. 143-123).

In Jensen's Answer to Interrogatory No. 25, which specifically requested that she identify "any and all obstructions to your vision of the train's approach and railroad crossing," Jensen answered: "I do not recall if the view was obstructed. " (R. 265). In her subsequent affidavit in response to Union Pacific's Motion for Summary Judgment, Jensen recalled "that there were a lot of trucks and trailers which obstructed our view of the tracks in all directions." (Jensen Affidavit, R. 181).

In Jensen's Answer to Interrogatory No. 26, responding to the question of how the accident happened, she stated: "I remember nothing of the accident and very little, if anything, of what happened prior to the accident." (R. 218). In her affidavit later submitted in opposition to Union Pacific's Motion for Summary Judgment, Jensen stated that she did not recall playing the wish game, although she may have been, but did remember traffic congestion

at the crossing which obstructed the view of the tracks in all directions; and did recall never hearing or seeing the train. (Jensen Affidavit, R. 181-180); Court of Appeals Memorandum Decision at 4. This contradictory statement was Jensen's only evidence of noise and traffic congestion at the crossing and that the whistle was not sounded.

Brinkmeier, in his recorded statement attached to Jensen's Memorandum in Opposition, stated that he was "not paying attention" at the crossing and "never heard anything." (R. 164).

Independent witnesses Gerald and Whitney Hill and Johnny Starks were interviewed by the Utah County Sheriff's Office. They provided written statements to the Sheriff's Office but no depositions or affidavits were obtained in the lawsuit. The Hills made no reference to whether the whistle was or was not sounded--the subject was not addressed at all. However, Starks advised that, "I heard the train honking." (Sheriff's File, R. 139, 135, 134, 131).

ARGUMENT

Question No. 1. Did the Court of Appeals wrongly decide, in conflict with prior decisions of the Utah Supreme Court, that a witness who presents negative whistle testimony (i.e., a witness who testifies that a train whistle was not sounded) need only be in a physical position to hear the whistle and not in a mental position to hear the whistle? By "mental position" Union Pacific refers to the Utah Supreme Court's requirement that a negative whistle witness must not be so engrossed in or diverted to other things that the witness would have heard a train whistle had it been sounded.

In reversing the trial court's grant of summary judgment on the issue of whether Union

Pacific complied with Utah Code Ann. § 56-1-14 (1994), requiring the blowing of a whistle or ringing of a bell when approaching a railroad crossing, the Court of Appeals held that an issue of fact existed based on Jensen's negative whistle testimony; i.e., that she did not hear the whistle blow. The Court of Appeals held:

> It is not necessary for plaintiffs to establish that witnesses were affirmatively listening for the warnings or "paying particular attention to the thing observed [or not observed]." Seybold v. Union Pacific R.R., 121 Utah 61, 66, 239 P.2d 174, 177 (1951). "'All that need appear is that the witness was so situated in relation to the train at the time it is claimed the warnings were given that said warnings would have awakened her attention to them.'" Curtis v. Harmon Elecs., Inc., 575 P.2d 1044, 1047 (Utah 1978) (quoting Hudson v. Union Pacific R.R., 120 Utah 245, 251, 233 P.2d 357, 360 (1951)).

Court of Appeals Memorandum Decision at 3.

In so holding, the Court of Appeals misinterpreted this Court's test clearly enunciated in Curtis v. Harmon Elecs., Inc., that although a negative whistle witness need not be specifically listening for a train whistle, as would someone approaching the track in a dense fog, the person must have a physical position sufficient to allow the person to hear a whistle if it was sounded and a mental position sufficient to allow the person to hear a whistle if it was sounded; i.e., the person must not be so engrossed in or diverted to other things that she would have heard a train whistle had it been sounded. See Curtis, 575 P.2d at 1047 wherein this Court explained the mental position requirement repeatedly:

> On the other hand, where it appears the person whose negative testimony is offered was paying attention to another matter, such as another noisy passing train, his testimony is not of value. Id. citing Jensen v. Oregon Short Line, 59 Utah 367, 204

P. 101 (1922) (emphasis added).

. . .

In Clark v. Union Pacific Railroad Co., supra, this Court stated:

> Though a witness was not specially listening for signals, or giving special attention to the occurrence, yet, if his attention was not engrossed or diverted to other things, and it being made to appear that he was in [a] position to hear, and in all likelihood would have heard them had they been given, his testimony that he heard none is still of probative value, and is not to be disregarded, ...

This Court affirmed that view in Hudson v. Union Pacific Railroad Co., in which we noted it was not necessary for the plaintiff to show the person was affirmatively listening for the whistle. We stated:

> All that need appear is that the witness was so situated in relation to the train at the time it is claimed the warnings were given that said warnings would have awakened her attention to them... [The witness] was in a position where it is likely that she would have heard the whistle, or at least the bell, and as there is no evidence that her attention was so absorbed in other matters that she would not have heard, a jury question is presented.

Curtis, 575 P.2d at 1047. (Footnotes omitted, emphasis added.)[1]

---

[1]See also, Hudson v. Union Pacific R.R. Co., 120 Utah 245, 233 P.2d 357, 360-61 (1951). Although a plaintiff need not show that she was affirmatively listening or paying attention to determine whether the train was going to whistle or not, her mental position is important:

> All that need appear is that the witness was so situated in relation to the train at the time it is claimed the warnings were given that said warnings would have awakened her attention to them. The circumstances bearing on her opportunity and capacity to hear, such as possible deafness, pronounced wind direction affecting sounds, the speed and noise of the train and of the car, topography of the surrounding country, absorption in conversation or with her own thoughts or devices and any other factors which would enable the fact

Significantly, this is the position taken by Judge Greenwood of the panel of the Court of Appeals that decided this case. Judge Greenwood, concurring in part and dissenting in part, would hold that plaintiff need show that she was paying sufficient attention to have heard the warnings if they were sounded. Court of Appeals Memorandum Decision at 5 citing the same cases cited by the majority for the opposing view.

In restating the proposition that a person need not be specifically listening for a warning or paying particular attention to the thing observed, the Court of Appeals goes too far when it eliminates the requirement that a person still needs to be in a non-distracted mental position that would enable them to hear a whistle. There is a significant difference between the requirement that a person be affirmatively listening and the requirement that a person not be distracted or diverted so that she cannot hear. By failing to make this distinction, the Court of Appeals ruling significantly changes the test for negative whistle testimony which should

---

> finder to evaluate the probative force of her testimony should be considered. The convincing power of testimony that a sound was not heard varies according to the opportunity of the witness giving it to hear and observe, but a passenger in an automobile need not persistently keep his ear cocked for the sound of a train. In this case the plaintiff is necessarily confined to negative evidence in proving the fact that the whistle or bell was not sounded. If such evidence is unworthy of belief simply because it is negative, then a plaintiff in like circumstances must nearly always fail. The issue is fundamentally a question of the credibility of witnesses and considering the close proximity of the car to the train while they travelled parallel to each other, Mrs. Hudson was in a position where it is likely that she would have heard the whistle, or at least the bell, and as there is no evidence that her attention was so absorbed in other matters that she would not have heard, a jury question is presented.

(Emphasis added.)

be corrected by this Court. It is important for this Court to revisit the issue to prevent future misunderstandings of the test to be applied. Cf., Bebout v. Norfolk & Western Ry. Co., 982 F.2d 1178, 1179-80 (7th Cir. 1993) (explicitly setting forth a two part test of physical position and mental position).

Question No. 2. Did the Court of Appeals wrongly decide, on an important question of law which has not yet but should be settled by the Utah Supreme Court, that a negative whistle witness does not need to lay a foundation showing that the witness was in a physical and mental position to have heard the train whistle had it been sounded? Encompassed within this question is the subsidiary question of whether Union Pacific presented evidence that Alecia Jensen was not in a mental position to hear a whistle as she was engrossed in other matters, and whether Jensen presented contrary evidence making this an issue of fact for the jury?

If this Court should correct the Court of Appeals' departure from its negative whistle testimony standard, the issue arises as to whether the negative whistle witness has the burden to lay a foundation showing that she was in a physical and mental position to have heard the train whistle had it been sounded.

The Court of Appeals held:

> Union Pacific also claims Jensen's affidavit did not include statements that she was paying sufficient attention to have heard the whistle had it been sounded. Despite the dissent's acceptance of this argument, we can find no Utah law requiring nonmoving parties to lay such an evidentiary foundation in an affidavit opposing summary judgment. Nonmoving parties need only

> controvert the moving party's assertions, thus creating a genuine issue of fact.

Court of Appeals Memorandum Decision at 4.

Contrary to the Court of Appeals assertion, nonmoving parties are required to lay an evidentiary foundation in affidavits opposing summary judgment. Rule 56(e), Utah Rules of Civil Procedure, requires that 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." (Emphasis added.) For Jensen to meet this requirement she must show, through laying of a proper foundation for her conclusion that she heard no whistle and therefore no whistle was blown, and that she is competent to testify to that matter because she was in a physical and a mental position to hear. Otherwise, a plaintiff could oppose a summary judgment with numerous affidavits saying no whistle was blown even though at trial it turns out that the witnesses were miles away, involved in a noisy environment, or engaged in something which completely occupied their attention like talking on a cellular phone. Each person could truthfully say, "I heard no whistle," but this would be meaningless without a foundation showing they could have heard a whistle had it been blown.

This Court has stated that affiants must assert specific facts not mere assertions or conclusions. See, e.g., Butterfield v. Okubo, 831 P.2d 97, 102-103 (Utah 1992) ("Utah has long required nonexpert rule 56 affiants to enumerate the specific evidentiary facts in support of their conclusions. . . . In recent years, we have made clear that this standard also applies to

a situation in which the affiant testifies as an expert."); Webster v. Sill, 675 P.2d 1170, 1172 (Utah 1983) (in response to a motion for summary judgment the mere assertion that an issue of fact exists without a proper evidentiary foundation to support that assertion is insufficient to preclude the granting of a summary judgment motion). Requiring Jensen to set forth an evidentiary foundation for her negative whistle testimony is a logical extension of this rule.[2]

It is important for the Supreme Court to make this extension. The Court of Appeals sanctions the opposing of a proper summary judgment motion with a mere conclusion. Such a lessening of the requirement in opposing summary judgments will have an effect far beyond this case. If a proper foundation for a conclusion does not exist there is no sense in prolonging the litigation, forcing the parties and the trial court to spend more time and money when the case could be resolved summarily.

Encompassed within this question is the subsidiary questions of whether Union Pacific presented evidence that Jensen was not in a mental position to hear a whistle as she was engrossed in other matters, and whether Jensen presented contrary evidence making this an issue of fact for the jury.

Given the fact that the Court of Appeals rejected the proposition that a foundation must

---

[2]This topic has been discussed but not explicitly ruled on. See Broadwater v. Old Republic Surety, 854 P.2d 527, 533-34 (Utah 1993), discussing objections to affidavits submitted in support of a motion for summary judgment because, in part, the affidavits contained facts not supported by an adequate foundation. The court apparently gave credence to the argument although no holding was made regarding the necessity of a foundation or affidavit in support. See also, State v. Shama Resources Ltd. Partnership, 899 P.2d 977, 980-81 (Idaho 1995), allowing affidavits containing a proper foundation and rejecting affidavits that were in part, unsupported by any factual basis or foundation.

be laid without determining if a proper foundation was laid, should this Court decide that an evidentiary foundation must be laid it should reexamine the question of whether a proper foundation was laid by Jensen. This reexamination would promote judicial economy as the question can be answered based on the record before this Court.

Union Pacific presented evidence before the trial court and referred to that evidence before the Court of Appeals that Jensen was distracted and involved in playing a "wish" game which diverted her attention from the oncoming train. See statement of facts, supra. Jensen confirmed in her affidavit that she may have been playing this game although she did not specifically remember. Id. On the other hand, Jensen said nothing in her affidavit showing that she was sufficiently alert so that she would have heard the train whistle had it been blown. Even under the Court of Appeals' relaxed standard, Jensen's affidavit is not sufficient as she said nothing to contradict the fact that she was so engrossed in the "wish" game that had a whistle been blown it would have awakened her attention to it. She merely said that she heard no whistle.

Judge Greenwood of the Court of Appeals found that no proper foundation existed. In dissent, Judge Greenwood stated: "In my view, plaintiff did not adequately rebut defendant's evidence that such warnings were sounded. . . . Plaintiff's affidavit that she did not hear any warnings, and may have been playing a "wish" game at the time of the collision, is bereft of assertions she was paying sufficient attention to have heard the warnings if they were sounded. Consequently, I would affirm the trial court's decision in its entirety." Court of Appeals Memorandum Decision at 5-6 (emphasis in original). Given the record and the dissent's

findings on the issue not examined by the majority, it would be proper to reinstate the trial court's grant of summary judgment.

Question No. 3. Did the Court of Appeals wrongly decide, on an important question of law which has not yet but should be settled by the Utah Supreme Court, that an affidavit filed in opposition to a motion for summary judgment that is inconsistent with previously served interrogatory answers creates an issue of fact sufficient to preclude entry of summary judgment? Encompassed within this question is the subsidiary question of whether the Court of Appeals wrongly decided that Jensen's affidavit submitted in opposition to summary judgment was not inconsistent with her interrogatory answers?

The Court of Appeals held that Jensen's affidavit, submitted in opposition to Union Pacific's Motion For Summary Judgment, did not contradict her prior sworn interrogatory answers because Union Pacific did not specifically ask whether Jensen heard the whistle. Court of Appeals Memorandum Decision at 4. In a footnote, the court made a questionable ruling regarding whether a party opposing summary judgment can contradict prior testimony. The court ruled that answers to interrogatories, like affidavits, are sworn statements made without cross examination and that one sworn statement is not more probative than another merely because it was made first. Court of Appeals Memorandum Decision at 4 n.2. This implies that interrogatory answers can be contradicted with impunity any time a motion for summary judgment is brought.

The Court of Appeals' ruling is in conflict with established Supreme Court precedent

insofar as it allows prior testimony to be contradicted. To the extent that this Court has not ruled specifically on the issue of prior interrogatory answers being contradicted by a subsequent affidavit, this Court should lay the matter to rest consistent with its rulings that prior deposition answers may not be contradicted by a subsequent affidavit.

It is well established in Utah that when a party takes a clear position in a deposition he may not thereafter raise an issue of fact defeating a motion for summary judgment by filing an affidavit which contradicts his deposition unless he can provide an explanation of the discrepancy. See, e.g., Webster v. Sill, 675 P.2d 1170, 1172-73 (Utah 1983); Gaw v. State of Utah, 798 P.2d 1130, 1140 (Utah Ct. App. 1990). The reason for such a rule is not that depositions are more reliable due to the opportunity to cross examine. In a motion for summary judgment, deposition testimony receives no more weight than an affidavit. See Webster, 675 P.2d at 1172. The proper reason is that a contrary rule would undermine the utility of summary judgment as a means for screening out sham issues of fact. Id. at 1173. Otherwise, a party who goes through discovery, establishes the facts of a case and then moves for summary judgment will find that the opponent can change the facts by submitting an affidavit contradicting any admissions previously made. In effect, the opponent creates a sham issue of fact--which version of his testimony should be believed. See generally, Mays v. Ciba-Geigy Corp., 661 P.2d 348, 351-355 (Kan. 1983).

Although this rule has not been specifically applied to affidavits contradicting interrogatory answers in Utah, the reasoning still applies and should be extended as it has been by other courts. See, e.g., Dilberti v. U.S., 817 F.2d 1259, 1263 (7th Cir. 1987) (affidavit

contradicting sworn statement in a military document rejected. "It is well established that a party cannot create a genuine issue of fact by submitting an affidavit containing conclusory allegations which contradict plain admissions in prior deposition or otherwise sworn testimony.") It does not matter that interrogatory answers are not subject to cross examination or that they are a sworn statement similar to an affidavit. What matters is that interrogatory answers are a discovery device used to pin down facts. Once an answer is made and relied upon in a summary judgment motion the opposing party should not be allowed to create a sham issue of fact by simply contradicting the prior answer. The reasoning preventing contradiction without explanation applies whether the original testimony is a deposition, interrogatory answer, a sworn statement in a police report or any other sworn method of setting forth a statement of fact.

Encompassed within this question is the subsidiary question of whether the Court of Appeals wrongly decided that Jensen's affidavit submitted in opposition to summary judgment was not inconsistent with her interrogatory answers. Union Pacific submits that Jensen's subsequent affidavit which states she recalls not hearing the whistle is clearly contradictory of her earlier interrogatory answer that she remembered little or nothing of the accident.

This is an important question for this Court to review because the Court of Appeals has established the principle that a party may not ask a general question in discovery, such as the question asked here as to how the accident happened to which Jensen responded "I remember nothing of the accident and very little, if anything, of what happened prior to the accident" (R. 218), but instead must ask numerous and exhaustive questions regarding every conceivable fact

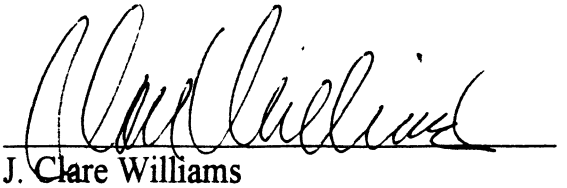
of the case. For example, Union Pacific would have been required to ask: did the accident happen because you were preoccupied, did the accident happen because you didn't see the train, did the accident happen because you didn't hear the train, did the accident happen because you could not stop in time, did the accident happen because the street was wet, etc. Such specific questions would be never ending and might never get to the truth that a general, broad question would elicit.

Such a process as the Court of Appeals implicitly requires, that of not being able to rely on answers to general questions, would be so unwieldy as to be unusable. In addition, summary judgments would be more difficult to bring because a party could escape prior answers by asserting that general answers in response to discovery do not preclude different answers in later filed affidavits as the general question was not specific enough. This Court should act to correct this situation.

CONCLUSION

The Court of Appeals has changed established precedent with regard to negative whistle testimony. The Court of Appeals has also ruled incorrectly on several legal questions which should be decided by this Court in accordance with related rulings. Union Pacific respectfully requests that this Court grant the petition for certiorari.

DATED this 14th day of June, 1996.



J. Clare Williams
Morris O Haggerty

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of June, 1996, two copies of the foregoing was served in the manner indicated below upon the following:

Allen K. Young, Esq.
Young & Kester
101 East 200 South
Springville, Utah 84663

_X_ U.S. Mail
____ Hand Delivered
____ Overnight
____ Facsimile
____ No Service

J. Clare Williams
Morris O Haggerty

Tab A

IN THE UTAH COURT OF APPEALS

----ooOoo----

Alicia Jensen, Plaintiff and Appellant,	)	MEMORANDUM DECISION (Not For Official Publication)
v.	)	Case No. 950754-CA
Union Pacific Railroad, Inc., Defendant and Appellee.	)	F I L E D (April 25, 1996)

Fourth District, Utah County
The Honorable Boyd L. Park

Attorneys: Allen K. Young, Springville, for Appellant
J. Clare Williams, Salt Lake City, for Appellee

Before Judges Greenwood, Jackson, and Wilkins.

JACKSON, Judge:

Alicia Jensen appeals the trial court's grant of summary judgment in favor of Union Pacific Railroad, Inc. (Union Pacific). We affirm in part, reverse in part, and remand.

We review grants of summary judgment for correctness. See Higgins v. Salt Lake County, 855 P.2d 231, 235 (Utah 1993). "We do not defer to the trial court's conclusion that facts are undisputed nor its legal conclusions supported by those facts." Oquirrh Assocs. v. First Nat'l Leasing Co., 888 P.2d 659, 662 (Utah App. 1994). Jensen raises three issues on appeal. We address each in turn.

First, Jensen claims Union Pacific was negligent because event recorders show the train was traveling up to 1.3 miles per hour in excess of its maximum timetable speed of 50 miles per hour just minutes before the accident. Excessive speed of a train or other vehicle is the cause of an accident only when it prevents the driver from slowing down, stopping, or controlling the vehicle to avoid the collision, or when it misleads the driver of another vehicle. See Horsley v. Robinson, 112 Utah 227, 239-41, 186 P.2d 592, 597-99 (1947); see also Dombeck v. Chicago, M., St. P. & Pac. Ry., 129 N.W.2d 185, 193 (Wis. 1964) (holding refusal to submit question of train's speed to jury

correct because evidence could not support finding that excessive speed was causal).

Jensen assumes that had the train been traveling one or two miles per hour slower, it could have stopped or slowed sufficiently to avoid the accident. "Trains cannot be stopped in time to avoid collisions if the time interval is shortened to a matter of . . . seconds." Van Wagoner v. Union Pac. R.R., 112 Utah 189, 203-04, 186 P.2d 293, 301 (1947). Former Justice Crockett declared:

> It is contrary to the generally known laws of physics and common sense to expect the train, with its great weight and momentum, to stop within the short distance available after the instant it should have become apparent that [the plaintiff] was not going to stop. After that point was reached, there is nothing the crew could have done to avoid the collision. And this true whether the train was travelling fast or slow and whether the crew saw [the plaintiff] or not.

Gregory v. Denver & Rio Grande W. R.R., 8 Utah 2d 114, 118, 329 P.2d 407, 409 (1958) (Crockett, J., concurring). Thus, a train's speed generally cannot be the cause of crossing collisions as a matter of law.

Further, in the present case, the train's speed was well within the federally mandated 60-miles-per-hour limit for the track in question. See 49 C.F.R. § 213.9(a) (1994). The train's speed was also within Union Pacific's timetable speed limit. Speed indicators on trains must be accurate within plus-or-minus 5 miles per hour at speeds over 30 miles per hour. See 49 C.F.R. § 229.117 (1994). Thus, the speed indicator's reading of 51.3 miles per hour places the train within Union Pacific's timetable speed limit of 50 miles per hour. Jensen cannot prove negligence per se based simply on a reading of 1.3 miles per hour over the 50-miles-per-hour maximum. Such a claim would have to be based on a reading in excess of 55 miles per hour. The trial court correctly determined Jensen's claim of negligent train speed must fail as a matter of law, and we affirm the trial court's ruling on that issue.[1]

---

1. We do not address Union Pacific's contention that federal law preempts Jensen's claim of negligent train speed under CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 113 S. Ct. 1732 (1993). Like the trial court, we conclude the train's speed could not have been a cause of the accident as a matter of law.

Second, Jensen asserts the crossing was more than ordinarily hazardous because a Utah Livestock Auction is held nearby on a weekly basis, creating traffic congestion and noise sufficient to obstruct the view of and muffle warning signals of on-coming trains. Liability of railroads for more-than-ordinarily-hazardous crossings is limited to obstructions either created by the railroad or located on the railroad's right of way. See Duncan v. Union Pac. R.R., 842 P.2d 832, 834 (Utah 1992); Gleave v. Denver & Rio Grande W. R.R., 749 P.2d 660, 663-64 (Utah App. 1988). Any obstructions making the instant crossing more than ordinarily hazardous were beyond the control of Union Pacific. Union Pacific did not create any obstruction at the crossing, and its right of way was free of obstructions. The trial court correctly determined Jensen could not establish liability for a more than ordinarily hazardous crossing as a matter of law, and we affirm the trial court's ruling on that issue.

Third, Jensen contends Union Pacific is negligent because it failed to comply with the requirements of Utah Code Ann. § 56-1-14 (1994). Utah law requires trains to sound warnings beginning one-quarter mile before every grade crossing. It is not necessary for plaintiffs to establish that witnesses were affirmatively listening for the warnings or "paying particular attention to the thing observed [or not observed]." Seybold v. Union Pac. R.R., 121 Utah 61, 66, 239 P.2d 174, 177 (1951). "'All that need appear is that the witness was so situated in relation to the train at the time it is claimed the warnings were given that said warnings would have awakened her attention to them.'" Curtis v. Harmon Elecs., Inc., 575 P.2d 1044, 1047 (Utah 1978) (quoting Hudson v. Union Pac. R.R., 120 Utah 245, 251, 233 P.2d 357, 360 (1951)). Additionally, whether a train sounded required warnings has been a factual question for juries to decide since before statehood. See, e.g., Smith v. Rio Grande W. Ry., 9 Utah 141, 143, 33 P. 626, 627 (1893).

In response to Union Pacific's motion for summary judgment, Jensen submitted an affidavit in which she stated she did not hear the train whistle. "'[I]t only takes one sworn statement under oath to dispute the averments on the other side of the controversy and create an issue fact.'" Draper City v. Estate of Bernardo, 888 P.2d 1097, 1101 (Utah 1995) (quoting Holbrook Co. v. Adams, 542 P.2d 191, 193 (Utah 1975)). Nonmoving parties need not rebut affidavit evidence at the summary judgment stage of litigation, they need only controvert such statements and thus create a genuine issue of material fact. See Utah R. Civ. P. 56(c). We also observe

> [w]hile generally positive testimony (such as I heard the whistle) is better than negative testimony (such as I did not hear the

> whistle) the district court may not accept positive testimony to the exclusion of negative testimony on a motion for summary judgment. It is a credibility question whether one witness' memory is more reliable than another witness' memory, and such credibility determinations are not to be made on a motion for summary judgment.

Easterwood v. CSX Transp., Inc., 933 F.2d 1548, 1560 n.14 (11th Cir. 1991), aff'd, 507 U.S. 658, 676, 113 S. Ct. 1732, 1744 (1993) (emphasis added).

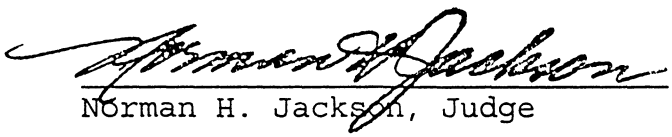
Union Pacific claims Jensen cannot rely on her affidavit to create an issue of fact because it contradicts her previous answers to interrogatories.[2] However, Union Pacific's interrogatories did not specifically ask whether Jensen heard the whistle; thus, her affidavit does not contradict her prior sworn statements. Union Pacific also claims Jensen's affidavit did not include statements that she was paying sufficient attention to have heard the whistle had it been sounded. Despite the dissent's acceptance of this argument, we can find no Utah law requiring nonmoving parties to lay such an evidentiary foundation in an affidavit opposing summary judgment. Nonmoving parties need only controvert the moving party's assertions, thus creating a genuine issue of fact. Accordingly, the trial court incorrectly determined that no genuine issues of material fact existed on the question of whether the train sounded warnings as required by Utah Code Ann. § 56-1-14 (1994), and we reverse the trial court's ruling on that issue.

In sum, we affirm the trial court's rulings on the issues of the train's excessive speed and Union Pacific's liability for a more-than-ordinarily-hazardous crossing. We reverse the trial court's ruling on the question of whether Union Pacific complied

---

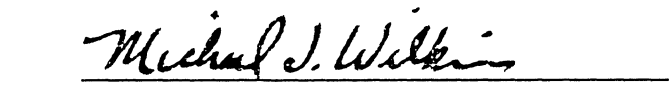
2. The rule relating to affidavits that contradict prior sworn testimony grows from cases in which an affidavit contradicts an earlier deposition. Courts have reasoned that deposition testimony is more reliable than an affidavit because it is subject to cross examination. See, e.g., Webster v. Sill, 675 P.2d 1170, 1172-73 (Utah 1983). Such is not the case here. Answers to interrogatories, like affidavits, are sworn statements made without cross examination; one sworn statement is not more probative than another merely because it was made first.

with Utah Code Ann. § 56-1-14 (1994) and remand the matter for further proceedings consistent with this opinion.



Norman H. Jackson, Judge

I CONCUR:



Michael J. Wilkins, Judge

GREENWOOD, Judge (concurring in part and dissenting in part):

I concur in the majority opinion's analysis regarding the speed of the train and whether the crossing was more than ordinarily hazardous. I respectfully dissent, however, from the majority's determination that there is a material issue of fact on the question of whether the defendant complied with Utah Code Ann. § 56-1-14 (1994) by sounding the required warnings. In my view, plaintiff did not adequately rebut defendant's evidence that such warnings were sounded. Caselaw in Utah and elsewhere regarding the probative value of negative testimony in similar cases holds that the witness must have been positioned so "it is reasonable to suppose he would have observed had it occurred or the fact existed." Seybold v. Union Pac. R.R. Co., 121 Utah 61, 66, 239 P.2d 174, 177 (1951). See also, Curtis v. Harmon Elecs., Inc., 575 P.2d 1044, 1047 (Utah 1978) (noting that witness's testimony valueless when attention elsewhere); Hudson v. Union Pac. R.R. Co., 120 Utah 245, 251, 233 P.2d 357, 360 (1951) (noting that witness must be situated so that warnings would have "awakened her attention to them"); Bebout v. Norfolk & Western Ry. Co., 982 F.2d 1178, 1179-80 (7th Cir. 1993) (discussing Illinois rule that negative evidence is probative only if witness close enough to hear and is paying sufficient attention to have heard).

Plaintiff's affidavit that she did not hear any warnings, and may have been playing a "wish" game at the time of the collision, is bereft of assertions she was paying sufficient attention to have heard the warnings if they were sounded.

Consequently, I would affirm the trial court's decision in its entirety.

Pamela T. Greenwood, Judge

Tab B

IN THE UTAH COURT OF APPEALS

---oo0oo---

Alicia Jensen,

Plaintiff and Appellant,

v.

Union Pacific Railroad, Inc.,

Defendant and Appellee.

ORDER

Case No. 950754-CA

This matter is before the court upon appellee's petition for rehearing, filed May 9, 1996.

IT IS HEREBY ORDERED that the petition for rehearing is denied.

Dated this 17th day of May, 1996.

FOR THE COURT:

Marilyn M. Branch
Clerk of the Court

Tab C

56-1-14. Procedures at grade crossings.

Every locomotive shall be provided with a bell which shall be rung continuously from a point not less than eighty rods from any city or town street or public highway grade crossing until such city or town street or public highway grade crossing shall be crossed, but, except in towns and at terminal points, the sounding of the locomotive whistle or siren at least one-fourth of a mile before reaching any such grade crossing shall be deemed equivalent to ringing the bell as aforesaid; during the prevalence of fogs, snow and dust storms, the locomotive whistle shall be sounded before each street crossing while passing through cities and towns. All locomotives with or without trains before crossing the main track at grade of any other railroad must come to a full stop at a distance not exceeding 400 feet from the crossing, and must not proceed until the way is known to be clear; two blasts of the whistle or two sounds of the siren shall be sounded at the moment of starting; provided, that whenever interlocking signal apparatus and derailing switches or any other crossing protective device approved by the Department of Transportation is adopted such stop shall not be required.

Provided, that local authorities in their respective jurisdiction may by ordinance approved by the Department of Transportation provide more restricted sounding of bells or whistles or sirens than is provided herein and may prescribe points different from those herein set forth at which such signals shall be given and may further restrict such ringing of bells or sounding of whistles or sirens so as to provide for either the ringing of a bell or the sounding of a whistle or of a siren or the elimination of the sounding of such bells or whistles or sirens or either of them, except in case of emergency.

The term locomotive as used herein shall mean every self-propelled steam engine, electrically propelled interurban car and so-called diesel operated locomotive.

Every person in charge of a locomotive violating the provisions of this section is guilty of a misdemeanor, and the railroad company shall be liable for all damages which any person may sustain by reason of such violation.

Tab D

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

ALECIA JENSEN, Plaintiff, vs. UNION PACIFIC RAILROAD, INC., Defendant.	MEMORANDUM DECISION CASE NO. 940400280 DATE May 15, 1995 JUDGE BOYD L. PARK

This matter came before the Court on April 17, 1995 for oral argument on defendant's Motion For Summary Judgment. The Court, having received and reviewed the motion, memorandum in support, memorandum in opposition, reply memorandum, and supplemental reply memorandum; having heard oral arguments; and having reviewed the applicable law, now makes the following findings and conclusions:

1. This Court has jurisdiction to decide this case. Although plaintiff is a resident of Salt Lake County, State of Utah, defendant Union Pacific Railroad is a Utah corporation authorized to do business in the State of Utah and in Utah County, State of Utah. The accident which gave rise to this cause of action occurred in Utah County, State of Utah, and therefore jurisdiction and venue are properly vested in this Court.

2. On February 5, 1994, the parties were involved in a collision between defendant's train and plaintiff's automobile. Plaintiff was a passenger in her automobile, which was crossing the railroad tracks at approximately 5950 South 650 West in Utah County when the automobile was struck by a train owned and operated by defendant. Plaintiff alleges she suffered severe and permanent injuries as a direct and proximate result of this collision.

3. On February 7, 1995 defendant filed with this Court a Motion For Summary Judgment and an accompanying Memorandum of Points and Authorities in Support of Motion For Summary Judgment. On March 2, 1995 plaintiff filed a Memorandum in Opposition to

Defendant's Motion For Summary Judgment and a Request for Hearing on Plaintiff's Memorandum in Opposition to Defendant's Motion For Summary Judgment. On March 15, 1995 Defendant's Reply Memorandum in Support of Motion For Summary Judgment was filed. On April 12, 1995 Defendant's Supplemental Reply Memorandum in Support of Motion For Summary Judgment was filed with the Court. Oral arguments on this motion were heard on April 17, 1995.

4. The accident giving rise to this cause of action occurred at approximately 12:10 p.m. on February 5, 1994 at a public railroad crossing of defendant's Provo Subdivision mainline trackage located near 650 West and 5950 South in Spanish Fork, Utah County. At the time of the accident, plaintiff's automobile was being driven by plaintiff's boyfriend, Bruce Brinkmeier, also a minor at the time of the accident. Brinkmeier was cited for driving without a license. The train in question was an empty coal train with three locomotives and 46 trailing empty coal cars. The train weighed 1424 tons and was 2622 feet in length.

5. According to the train's engineer, the train was traveling from Milford to Provo in a southwest to northeast direction. *See* Affidavit of Ryan Puffer, defendant's Memorandum in Support, Exhibit D. The trackage at that location is relatively straight and flat. *See* Affidavit of Lawrence Curley, defendant's Memorandum in Support, Exhibit B, at ¶ 5(e). Plaintiff's automobile was traveling southbound on 650 West. The road (650 West) is straight and flat for hundreds of feet before reaching the crossing. *Id.* The trackage and road intersect at an angle greater than 90 degrees with reference to the directions of approach of the train and car. *Id.* at ¶ 5(a).

6. The crossing is located in a rural farming area and is surrounded by open fields on the approach side. A Utah Livestock Auction building and animal pens are located in the southwest quadrant of the crossing intersection, which is on the opposite side of the tracks from which plaintiff's automobile approached. The northwest quadrant, which is the view quadrant for the approaching train and car, is an open field. *See* Affidavit of Lawrence Curley, defendant's Memorandum in Support, Exhibit B. At the time of the accident, a

livestock auction was taking place. There was a considerable amount of traffic, and trucks and trailers were parked near the crossing.

7. An advance stop sign warning sign was posted alongside 650 West approximately 572 feet north of the crossing. Also posted were an advance railroad crossing warning sign, an advance railroad crossing sign painted on the road, railroad crossing "crossbuck" signs, and a stop sign. *See* Affidavit of Lawrence Curley, defendant's Memorandum in Support, Exhibit B.

8. Defendant alleges that its engineer began sounding the locomotive whistle and bell approximately 1/4 mile away from the 5950 South crossing and continued to sound them up to the point of the accident at the 650 West crossing. *See* Affidavit of Ryan Puffer, ¶¶ 7-8, defendant's Memorandum in Support, Exhibit D. The distance between the 5950 South and 650 West crossings is approximately 1,100 feet. *See* Affidavit of Lawrence Curley, defendant's Memorandum in Support, Exhibit B, at ¶ 5(b).

9. At about the time the train passed over the 5950 South crossing, the engineer noticed a truck pulling a horse trailer begin to drive over the tracks in a southbound direction. Shortly after seeing the truck/horse trailer clear the crossing, the engineer noticed plaintiff's automobile rolling towards the crossing. The car was following a few seconds behind the truck/horse trailer and moving past the stop sign. The engineer placed the train in emergency braking immediately upon seeing the car. *See* Affidavit of Ryan Puffer, ¶¶ 9-11, defendant's Memorandum in Support, Exhibit D.

10. The train was a few hundred feet from the crossing when the engineer first saw plaintiff's car approaching the intersection. *See* Affidavit of Ryan Puffer, ¶ 10, defendant's Memorandum in Support, Exhibit D. It took the train approximately 1,400 feet to stop after emergency braking was initiated. *See* Affidavit of Lawrence Curley, defendant's Memorandum in Support, Exhibit B, at ¶ 5(g). The left side of the snowplow of the leading locomotive struck the right front portion of the car. *See* Affidavit of Ryan Puffer, ¶ 10, defendant's Memorandum in Support, Exhibit D; Affidavit of Lawrence Curley, defendant's

Memorandum in Support, Exhibit B, at ¶ 4(g)-(h). Both occupants were ejected from the car and thrown in the same northeasterly direction. Neither occupant was wearing a seatbelt.

11. Defendant alleges that plaintiff and Brinkmeier played a "wish" game upon arrival at the crossing, lifting their feet from the floor of the car and looking for something metallic within the car to touch with their fingers while simultaneously making a wish and crossing the tracks. Plaintiff admits this, but asserts that she has no recollection of doing so just prior to the collision. The parties agree, for the purpose of the summary judgment motion, that plaintiff and Brinkmeier never saw or heard the train prior to impact.

12. The parties agree that the "authorized speed limit" for the trackage in question was set by the Federal Railroad Administration (FRA) at 60 m.p.h. for freight trains and 80 m.p.h. for passenger trains. However, defendant Union Pacific voluntarily filed with the FRA a lower "timetable" speed of only 50 m.p.h. for its freight trains. Plaintiff argues that it is this timetable speed that applies rather than the FRA's authorized speed limit of 60 m.p.h.

13. Defendant claims that the train was traveling between 49 and 51 m.p.h. for at least the last three miles before the engineer initiated emergency braking. *See* Affidavit of Ryan Puffer, ¶ 5, defendant's Memorandum in Support, Exhibit D; Affidavit of George E. Ohlsson, ¶ 7, defendant's Memorandum in Support, Exhibit F. Plaintiff argues that the train was traveling an average speed of 51.5 m.p.h. for the three minutes prior to the collision. *See* Affidavit of Dennis Andrews, ¶ 8, Plaintiff's Memorandum in Opposition, Exhibit 2.

14. 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. *See* U.R.C.P. 56; *Ehlers & Ehlers Architects v. Carbon County*, 805 P.2d 789 (Utah Ct. App. 1991). Furthermore, "[a]lthough 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, 126 (1987) (citing *Bowen v. Riverton City*, 656 P.2d 434 (Utah 1982)).

15. Defendant's Motion For Summary Judgment addresses three areas of analysis: 1) Union Pacific was not negligent in traveling in excess of the timetable speed limit; 2) Union Pacific did not fail to reduce the speed of its train through what plaintiff alleged to be a "more than ordinarily hazardous crossing"; and 3) Union Pacific complied with requirements of U.C.A. § 56-1-14, which governs the use of whistles and bells when approaching railroad crossings. The Court will analyze these issues individually.

Authorized Speed Limit

16. Although the FRA has set the speed limit for freight trains at 60 m.p.h., Union Pacific has voluntarily chosen to set a lower "timetable" speed limit of 50 m.p.h. for its freight trains, 10 m.p.h. below the speed limit mandated by the FRA. According to plaintiff's accident reconstructionist, the train was averaging a speed of 51.5 m.p.h. for the three minutes prior to the collision. *See* Affidavit of Dennis Andrews (Plaintiff's Memorandum in Opposition to Defendant's Motion For Summary Judgment, Exhibit 2). At oral arguments, plaintiff presented a speed graph obtained from the train's recorder. That graph indicated variations in the train's speed prior to the accident, and recorded the train's speed as varying from 50 m.p.h. to as much as 52.5 m.p.h.

17. Based on data retrieved from the train's Pulse Electronics "speed recorder" device which electronically recorded the train's speed on tape prior to the accident, defendant claims that the train was traveling between 49 and 51 m.p.h. for at least the last three miles before emergency braking was initiated. *See* Affidavit of George Ohlsson (defendant's Memorandum of Points and Authorities in Support of Motion For Summary Judgment, Exhibit F); *see also* Pulse Electronic printout (defendant's Memorandum of Points and Authorities in Support of Motion For Summary Judgment, Exhibit A). In the Affidavit of George E. Ohlsson, Manager of Operating Practices for Union Pacific Railroad (*see* defendant's Memorandum in Support, Exhibit F), Mr. Ohlsson stated the following:

> It is difficult for even the most competent engineer to maintain a long and heavy train at a certain and undeviating speed. The curvature and undulation of the trackage will retard and increase the speed of a long and heavy train even though an engineer is holding a steady throttle on the locomotive. A train which travels for a number of miles at a speed which does not deviate more than one or two miles an hour is, in my professional opinion, going at a steady speed. It is simply not possible to control a train's speed any better than that.

Id. at ¶ 8.

18. Defendant argues that the FRA's "authorized speed limit" of 60 m.p.h. for freight trains preempts plaintiff's claim of excessive speed. Defendant cites *CSX Transportation, Inc. v. Easterwood*, 113 S.Ct. 1732 (1993) in support of its argument that plaintiff's claims of common law negligence are unfounded. In *Easterwood*, the plaintiff sued for the death of her husband resulting from a railroad crossing accident, alleging that CSX was negligent under Georgia law for failing to maintain adequate warning devices at the crossing and for operating the train at an excessive speed. The authorized speed limit for the track in *Easterwood* was set at 60 m.p.h. and, while conceding that the train was traveling at a speed under 60 m.p.h., Easterwood nevertheless claimed that CSX breached its common-law duty to operate its train at a moderate and safe rate of speed.

19. The federal regulations involved in *Easterwood* had been issued by the Secretary of Transportation pursuant to the Federal Railroad Safety Act of 1970 (FRSA), which established an authorized speed limit of 60 m.p.h. for freight trains. A clause of the FRSA permits states to adopt or continue in force any state law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary adopted a regulation covering the subject matter of such state requirement. The preemption clause of the FRSA (45 U.S.C.S. § 434) confers on the Secretary of Transportation the power to preempt state common law. Given the Secretary's adoption of train-speed regulations pursuant to the FRSA (49 C.F.R. § 213.9(a)), a state's common-law restrictions on train speed are *not* preserved by a saving clause in 45 U.S.C.S. § 434, under which a state may continue in force an additional or

more stringent law relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard and when not incompatible with any federal law. *Easterwood*, 113 S.Ct. at 1743 (1993).

20. The Court in *Easterwood* found for CSX, who had argued that Easterwood's claim was preempted because the federal speed limits are regulations covering the subject matter of the common law of train speeds. The Court further stated that to hold otherwise would be to deprive the Secretary of the power to preempt state common law, a power clearly conferred by § 434. Therefore, the Court found that Easterwood's reliance on the common law was incompatible with both the FRSA and the Secretary's regulations. *Id.* at 1743.

21. In the case now before this Court, defendant argues that its train was traveling well below the federally imposed speed limit of 60 m.p.h. for freight trains. "The fact that the Union Pacific had set a lower 'timetable' speed limit than that specified by the FRA is irrelevant since any claim based upon a violation of the railroad set limit would be but a variation of plaintiff's common law negligence claim of excessive or unreasonable speed." *See* Defendant's Memorandum in Support at 8, ¶ 1.

22. Plaintiff argues that, because defendant filed its timetable with the FRA pursuant to 49 C.F.R. 217, the Court should consider that action as evidence that the maximum authorized speed at the intersection of the collision is 50 m.p.h. and that timetables filed with the FRA are therefore enforceable against the defendant, and train speeds in excess of those timetables violate federal law. *See* Affidavit of Bruce Reading (plaintiff's Memorandum in Opposition, Exhibit 1). Furthermore, plaintiff claims that this case is distinguishable from *Easterwood* because there is no attempt to impose on Union Pacific a state-enforced speed regulation which is more stringent than its federal counterpart. Instead, plaintiff claims that defendant's train was exceeding its own maximum authorized timetable speed, thus violating federal law, and that defendant was therefore negligent.

23. Given the ruling in *Easterwood* and the parties' arguments, the issue now before the Court is (a) whether Union Pacific's timetable speed of 50 m.p.h. for freight trains is a

variation of plaintiff's common law negligence claim of excessive speed and thus preempted by federal law governing the"subject area," or (b) whether the FRSA covers speed limits self-imposed by Union Pacific and, if not, whether defendant was negligent in exceeding its speed limit for freight trains.

24. The FRSA specifically permits states to adopt or continue in force any state law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary adopts a regulation covering the subject matter of such state requirement. This legislation was designed to prevent states from interfering with regulations established by the FRA. In this case, it is clear that the FRA had designated an "authorized speed limit" of 60 m.p.h. for freight trains traveling along this stretch of track. However, the State of Utah has not attempted to impose a more stringent law, rule, or regulation regarding authorized train speed. Instead, Union Pacific has created its own timetable speed of 50 m.p.h. The Court finds the present case to be distinguishable from *Easterwood*, where the State of Georgia tried to impose law, rules, or regulations governing train speed. The Court in *Easterwood* did not explain how the FRSA addresses the question of timetable speeds which are a) self-imposed by railroad companies and not by States; and b) lower than the federally authorized train speeds.

25. In his affidavit, plaintiff's witness Bruce Reading alleges that, under federal law, each railroad company is required to file a copy of its Operating Rules and Timetables with the FRA, and concludes that the speed limits mandated in the Union Pacific Railroad Company Operating Rules and Timetables thus become the federally mandated guidelines and maximum speed limits for the railroad company and are enforceable by the FRA. *See* Affidavit of Bruce Reading, ¶¶ 4-9, Plaintiff's Memorandum in Opposition, Exhibit 1. Accordingly, Union Pacific's self-imposed timetable speed of 50 m.p.h. would become its federally authorized speed and could not be preempted by the FRA.

26. Defendant argues that 49 C.F.R. § 217 does not authorize timetables to change the federal speed limits set in 49 C.F.R. § 213.9 and that timetable filings therefore have no

effect on the maximum speeds at which a railroad may operate its trains. According to defendant, section 217 requires only the filing of operating rules and timetables, which may or may not contain speed limits, and does not require that speed limit changes be filed with the FRA. Defendant again turns to the *Easterwood* decision and argues that it is § 213.9 which sets the "ceiling" or "maximum" speed, not timetables, and asserts that "[i]mplicit in such holding is the understanding that while a railroad may not exceed such limit, it may by internal fiat voluntarily operate its trains at any slower speed deemed appropriate." *See* Defendant's Reply Memorandum in Support at 4.

27. The *Easterwood* case does not provide any clear rule as to how one should address the issue of timetable speeds within 49 C.F.R. §§ 217 and 213.9. However, plaintiff has equally failed to provide any case law which would substantiate her claim that Union Pacific's timetable filing under § 217 has an effect on the maximum speed at which a railroad may operate its train under § 213.9. Defendant has provided the Court with the recent case of *Southern Pacific Transp. Co. v. Public Util. Comm'n of Oregon,* 9 F.3d 807 (9th Cir. 1993), which supports defendant's argument that the FRA, by requiring Union Pacific to file its timetable speed limits, does not thereby adopt that timetable limit as a federal law enforceable against the railroad and preemptive of the speed limits set forth in 49 C.F.R. § 213.9. In *Southern Pacific*, an Oregon law permitted local authorities to ban the sounding of locomotive whistles under certain conditions. Southern Pacific Transportation Company argued that the state law was preempted by three federal statutes and moved for summary judgment. The state of Oregon made a cross-motion for summary judgment, claiming that its regulations were not preempted as a matter of law. Following the Supreme Court's decision in *Easterwood*, the circuit court held that the state law and regulations were not preempted by any of the three federal statutes cited by Southern Pacific and affirmed the district court's grant of partial summary judgment in favor of the State of Oregon.

28. In addressing Southern Pacific's claim that the Oregon statute was also preempted by 45 C.F.R. § 217, which requires railroads to keep their operating rules on file with the

FRA, the circuit court stated that "[b]ecause the FRA neither approves nor adopts the railroad's rules in any manner, the rules do not have the force of law and therefore cannot preempt the Oregon statute." *Southern Pacific*, 9.F3d at 812 n.5. This statement is equally applicable in the case now before this Court, in that it supports defendant's argument that 49 C.F.R. § 217 does not authorize timetables to change the federal speed limits set in 49 C.F.R. § 213.9. The railroad's rules and timetable filings submitted to the FRA in accordance with section 217 are not approved or adopted by the FRA and therefore do not have the force of law.

29. Even if defendant were bound by its timetable speed of 50 m.p.h., there still remain the questions of (a) whether Union Pacific was negligent in exceeding that speed, and (b) if the train's speed was a proximate cause of the collision.

30. The train's speed in this matter was not a causal factor unless the train could have stopped, prior to collision, from the point at which plaintiff first saw the danger. The Court agrees with the holding in *Dombeck v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 129 N.W.2d 185 (Wisc. 1964). In that case, the Wisconsin Supreme Court determined that, even under an assumption that the train's speed was negligent, such speed as a matter of law could not be causal:

> In order to be causal the train's speed must either have misled . . . the driver of the car or it must have interfered with the control and management of the train to the extent of rendering it probable that such control and management would have otherwise been effective to have avoided the collision.

Id. at 192. As to the first prong of this test, whether Brinkmeier, as driver, or plaintiff, as passenger, were misled as to the speed of the train, plaintiff stated in her affidavit that she did not see the train prior to the collision, nor did she hear the train blow its whistle or sound its horn prior to the collision. *See* Affidavit of Alicia Jensen, ¶¶ 7-8, Plaintiff's Memorandum in Opposition, Exhibit 3. In his recorded statement, Mr. Brinkmeier also stated that he did not hear the train or its horn. *See* the recorded statement of Bruce

Brinkmeier at 15, Plaintiff's Memorandum in Opposition, Exhibit 4. The Court finds that, because both plaintiff and Brinkmeier admit that they were not looking or listening for a train, and because both stated that they never saw or heard the train prior to impact, neither could have been misled as to the speed of the train in estimating its time of arrival at the crossing. As to the second prong of this test, whether the train's speed interfered with the control and management of the train to the extent of rendering it probable that such control and management would have otherwise been effective to have avoided the collision, the Court finds that plaintiff has made no argument or produced any evidence that the train could have been stopped or sufficiently slowed to have allowed plaintiff's automobile to safely cross the tracks if the train had indeed been traveling 50 m.p.h. at the time the engineer activated the emergency brakes. Defendant, however, provided the Court with the Affidavit of Ryan Puffer, the engineer. *See* defendant's Memorandum in Support, Exhibit D. In his affidavit, Engineer Puffer stated that he placed the train into emergency braking as soon as he saw plaintiff's automobile, because it was his impression that the car was not going to stop and was going to come onto the track directly in front of the train. He further stated that "[a] long heavy train takes a number of seconds, after placing it into emergency braking, before it even begins to slow down. On this occasion the train did not even begin to slow down before the accident happened." *Id.* at ¶ 11. In addition, defendant provided the Court with the affidavit of George E. Ohlsson, Manager of Operating Practices for Union Pacific Railroad Company. *See* defendant's Memorandum in Support, Exhibit F. In his affidavit, Mr. Ohlsson stated that the small difference between the 50 m.p.h. timetable speed and an actual speed of approximately 51 m.p.h. "would not have made any significant difference in terms of how far the train would have gone before slowing down or stopping after the brakes were applied. A matter of 1 m.p.h. is, in my opinion, insignificant in terms of stopping time and distance." *Id.* at ¶ 10.

31. For these reasons, the Court finds that, even if the train had been traveling one or two miles above the timetable speed limit of 50 m.p.h., the train's speed was not a proximate cause of the accident.

Dangerous Crossing

32. According to the Utah Supreme court in *English v. Southern Pacific Co.*, 45 P.47 (1896), a crossing that is "more than ordinarily hazardous" places an additional duty of care on the railroad. Plaintiff argues that several conditions existed at the time of the accident which created a "more than ordinarily hazardous" crossing. These conditions include (a) an auction barn near the tracks accompanied by the busy nature of a livestock auction; and (b) trucks and trailers parked near the crossing which may have impeded vision or caused plaintiff to not hear the train as it approached. According to plaintiff, the accident occurred during a time when the commotion and noise of a livestock auction rendered the nearby crossing "more than ordinarily hazardous."

33. More recently, the Utah Court of Appeals applied the *English* standard of "more than ordinarily hazardous" in *Gleave v. Denver & Rio Grande Western R.R. Co.*, 749 P.2d 660 (Utah App. 1988). In *Gleave*, the plaintiff was hit by an empty coal train at a crossing in Springville, Utah. The court instructed the jury that "UDOT was statutorily given ultimate responsibility for crossing design and warning and safety devices and that, accordingly, [the jury] could not find Rio Grande negligent 'based upon any defects which might exist with respect to the design of the 1600 South crossing or based upon any problems you may perceive in the lack of traffic warning devices' there." *Id.* at 663. The jury found the crossing to be more than ordinarily hazardous and then further found that Rio Grande failed to exercise reasonable care in driving the train across the roadway "given the crossing's design, its physical characteristics, and the existing warning signs." *Id.* at 664. The conditions that contributed to this "hazardous" crossing in *Gleave* included a dangerous crossing angle, a mound of earth, and a curving track.

34. In *Duncan v. Union Pacific R.R.*, 842 P.2d 832 (Utah 1992), a car containing a driver and three passengers was struck by a freight train in Tooele County on Droubay Road. While the road intersected the track at 43 degrees on the north and 136 degrees on the south, nothing obstructed the motorist's view of the tracks for several thousand feet. The Utah Supreme court in *Duncan* affirmed the trial court's finding that the "crossing was not 'more than ordinarily hazardous' because plaintiffs could not demonstrate, or even suggest, what more Union Pacific could have done to make this crossing safer, short of installing automatic warning lights and signs and gates, which admittedly was not its responsibility." *Id.* at 833. However, the *Duncan* court did reiterate the criteria used in the *English* case to determine whether a crossing would be found to be more than ordinarily hazardous:

> [A] crossing might be found to be more than ordinarily hazardous if it was in a thickly populated portion of a city; if the view of the tracks was obstructed because of the railroad itself or natural objects; if the crossing was frequented by heavy traffic so that approaching trains could not be heard; or if, for any reason, devices employed at the crossing were rendered inadequate to warn the public of the danger of an approaching train.

Id. at 834 (quoting *English*, 13 Utah at 419-20, 45 P. at 50 (1896)).

35. In light of the criteria set forth in *English* and reiterated in *Duncan*, the plaintiff in this case now argues that conditions present at the time of the accident, namely the auction barn and the traffic and commotion which accompany a livestock auction, meet the criteria of a "more than ordinarily hazardous" crossing. Plaintiff further argues that a factfinder should therefore be allowed to determine if the crossing was hazardous and, if so, whether defendant exercised reasonable care when driving the train across this particular railroad crossing.

36. While not agreeing that the crossing was more than ordinarily hazardous, defendant argues that, assuming *arguendo*, "such a scenario does not impose a duty upon Union Pacific to reduce the train's speed below the federally mandated limit." *See* defendant's Memorandum in Support at 9, ¶ 1. Defendant argues that the plaintiff in *Easterwood* also

alleged unsafe crossing conditions requiring additional warning devices. However, despite the *Easterwood* court's finding that plaintiff may have had a viable claim for an unsafe crossing, the Court found that the railroad had no duty to reduce the train's speed below the federal limit. Defendant argues that its train was traveling 10 m.p.h. below the federal limit and that because the FRA sets train speeds with crossing safety concerns already in mind, plaintiff's allegation of defendant's failure to reduce the speed of its train through the "more than ordinarily hazardous" crossing is unfounded.

37. Defendant further argues that, when a crossing is deemed to be extrahazardous, a railroad's duty of care is limited to those unsafe conditions which it created or over which it has responsibility. *See* defendant's Reply Memorandum at 13. Defendant cites *Gleave v. Denver & Rio Grande Western R.R.*, 749 P.2d 660 (Utah Ct. App. 1988), and *Duncan v. Union Pacific R. Co.*, 842 P.2d 832 (Utah 1990), in alleging that a railroad's duty of care extends only to obstructions to view or sound caused by the railroad or located on railroad right of way or property. Defendant then cites Utah Code Ann. § 41-6-19, which places a duty of care on property owners to remove vegetation or other obstructions on their property which constitute a traffic hazard by obstructing the view of any motor vehicle operator, and Utah Code Ann. § 54-4-14 *et seq.*, which delegates to the Utah Department of Transportation (UDOT) the responsibility for regulating the safe travel of motorists on roads and highways, including those which pass over and across railroad tracks.

38. This Court finds that, even if a jury could determine the existence of conditions that would make the accident site a "more than ordinarily hazardous" crossing, those conditions were not the responsibility of defendant. The noise around the auction was not something within defendant's control. The fact that there were "No Parking" signs posted around the area following the accident to prevent parked cars from obstructing drivers' views of the railroad track does not imply any lack of care on defendant's part prior to the accident, since such precautions are not the defendant's responsibility.

39. For these reasons, the Court finds that, even if the railroad crossing was a "more than ordinarily hazardous" crossing when a livestock auction was in progress, any unusually hazardous conditions resulting from the auction were not defendant's responsibility.

U.C.A § 56-1-14 (Locomotive Bells & Whistles)

40. Utah Code Ann. § 56-1-14 governs the operation of locomotive whistle and bell devices at public railroad crossings. It provides as follows:

> Every locomotive shall be provided with a bell which shall be rung continuously from a point not less than than 80 rods from any city or town street or public highway grade crossing until such city or town street or public highway grade shall be crossed, but, except in towns and at terminal points, the sounding of the locomotive whistle or siren at least 1/4 of a mile before reaching any such grade crossing shall be deemed equivalent to ringing the bell as aforesaid. . .

Id. According to defendant, where the grade crossing is in a rural area such as the one in question, the requirement is that either the bell or the whistle must be operated beginning "at least" 1320 feet from the crossing. Defendant argues that Engineer Puffer sounded both the bell and the whistle approximately 1/4 of a mile from the crossing, well in excess of the statutorily required distance of 1320 feet.

41. Plaintiff argues that neither the driver nor the passenger of the car ever heard the train's whistle or bells prior to the accident. *See* Affidavit of Alicia Jensen, Plaintiff's Memorandum in Opposition, Exhibit 3, and the recorded statement of Bruce Brinkmeier, Plaintiff's Memorandum in Opposition, Exhibit 4. Plaintiff alleges that the Pulse Electronics graph, attached to the Affidavit of Bruce Reading, indicates that no whistles or bells were sounded by the train as it approached the crossing. Plaintiff points to the statements of several witnesses who were near the crossing at the time of the accident. In their voluntary statements to police, Gerald and Whitney Hill made no mention of the train's whistle or bells at the time of the accident. Other witnesses also made voluntary statements to police and said nothing about hearing the train's whistle or bells at the time of the accident. However,

plaintiff has not provided the Court with any such statements in affidavit form, as required by Rule 4-501 of the Utah Code of Judicial Administration.

42. The failure of the Pulse Electronics graph to record the whistle or bells of the train prior to the accident is explained by George E. Ohlsson in his Supplemental Affidavit. Mr. Ohlsson stated that the event recorder device installed on the locomotive used only 8-track cassettes, which do not have sufficient channels to record everything relative to the operation of the train; specifically, the 8-track cassette does not have a channel for showing whether the horn or whistle was being sounded. *See* Supplemental Affidavit of George E. Ohlsson, ¶ 2. Mr. Ohlsson further stated that Union Pacific is beginning to replace the 8-track cassette event recorders with solid state event recorders which are capable of recording the sounding of a train's whistle. *Id.* at ¶ 4. Furthermore, there is testimony in the police record to support defendant's claim that the train did sound its whistle and bells at some point before reaching the crossing, and that there were witnesses to the accident who did hear the train's whistle and bells. *See* defendant's Memorandum in Support, Exhibit A (Voluntary Statements of Johnny Starks and Robert Craw). Ryan Puffer, engineer of the train, stated that he began sounding the whistle and the bells approximately 1/4 mile away from the crossing at 5950 South, and then continued operating the bells and whistle from 5950 South for another 1100 feet until the train reached the crossing at 650 West where the accident occurred. *See* defendant's Memorandum in Support, Exhibit C.

43. The Court finds that, despite plaintiff's reference to the voluntary statements of witnesses who said nothing about having heard the train's bells or whistle, plaintiff did not submit any affidavits to that effect in accordance with the requirements of Rule 4-501 of the Utah Code of Judicial Administration. Furthermore, there is no evidence to indicate that those witnesses were in a position to hear the bells and whistles if they had in fact been sounded. Conversely, defendant submitted the affidavit of the train's engineer, Ryan Puffer, who stated that he checked the train prior to leaving Milford to verify that the brakes, whistle, and headlights worked properly. Mr. Puffer also stated that he sounded the train's

bells and whistles for over 1/4 of a mile prior to reaching the crossing at 5950 South, and continued to sound the whistle beyond that crossing because he knew there was another crossing (the 650 West crossing) shortly beyond the 5950 South crossing. Finally, Mr. Puffer stated that he was sounding the whistle continuously as he watched the truck and horse trailer cross the tracks just ahead of plaintiff's automobile.

44. The Court finds the affidavit evidence presented is uncontradicted and that defendant did appropriately sound the train's bells and whistle as warning.

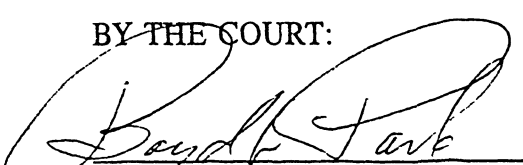
Conclusion

45. The Court concludes (a) that the speed of defendant's train was not a proximate cause of the accident; (b) that defendant was not responsible for any conditions which may have been present at the time of the accident and creating a "more than ordinarily hazardous" crossing; and (c) that defendant did sound the train's bells and whistle as it approached the crossing. Therefore, the Court finds no genuine issues of material fact remain as to defendant's liability to plaintiff. Accordingly, the Court grants defendant's Motion For Summary Judgment.

Counsel for defendant is to prepare, within 15 days of the date hereof, an order consistent with the terms of this decision and submit it to opposing counsel for approval as to form prior to submission to the Court for signature.

Dated at Provo, Utah this 15th day of May, 1995.

BY THE COURT:



JUDGE BOYD L. PARK

cc: J. Clare Williams
Allen Young

J. CLARE WILLIAMS, #3490
MORRIS O HAGGERTY, #5283
Attorneys for Defendant
UNION PACIFIC RAILROAD COMPANY
406 West 100 South
Salt Lake City, UT 84101-1151

IN THE FOURTH JUDICIAL DISTRICT IN AND FOR UTAH COUNTY

STATE OF UTAH

ALECIA JENSEN, Plaintiffs, vs. UNION PACIFIC RAILROAD COMPANY Defendant.	)	**ORDER GRANTING SUMMARY JUDGMENT** Civil No. 940400280 Judge Boyd L. Park

Defendant, Union Pacific Railroad Company's Motion for Summary Judgment came on for hearing by the Court on April 17, 1995; with defendant being represented by J. Clare Williams and plaintiff, who was present in the courtroom, being represented by Allen K. Young; and with the parties having filed written briefs and exhibits and having argued their respective positions to the Court, and the Court being fully advised in the premises, now rules as follows:

The Court finds and concludes:

(1) That the speed of defendant's train was not a proximate cause of the accident;

(2) That defendant was not responsible for any conditions which may have been present at the time of the accident and created a "more than ordinarily hazardous"

crossing; and

(3) That defendant did sound the train's bell and whistle as it approached the crossing.

Therefore, the Court finds that there is no genuine issue as to any material fact to prevent it from acting on defendant's motion as a matter of law.

Accordingly, the Court hereby grants defendant's Motion for Summary Judgment and orders plaintiff's Complaint dismissed with prejudice, with each party to pay its own costs and expenses.

DATED this 9 day of June, 1995.

BY THE COURT:

JUDGE BOYD L. PARK

Approved as to form this _____ day of _____, 1995.

_____
Allen K. Young
Attorney for Plaintiff