

1990

Lewis Duncan, individually and as personal
representative of the Estate of PATRICK
DUNCAN, deceased, et al, v. Union Pacific
Railroad Company, the State of Utah, Paul
Kleinman : Reply Brief

Utah Supreme Court

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UTAH SUPP.

BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

LEWIS DUNCAN, individually)
and as personal)
representative of the Estate)
of PATRICK DUNCAN, deceased,)
et al,)

Plaintiffs/Appellants,)

vs.)

UNION PACIFIC RAILROAD)
COMPANY, a corporation; THE)
STATE OF UTAH; PAUL KLEINMAN;)
and DOES 1 through 100,)
inclusive,)

Defendants/Respondents.)

Case No. 900233

APPELLANT'S REPLY BRIEF

Petition for a Review of the Decision of the
Utah Court of Appeals

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Clerk, Supreme Court, Utah

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LISTING OF ALL PARTIES TO THE
PROCEEDINGS IN THE DISTRICT COURT

PLAINTIFFS/APPELLANTS

LEWIS DUNCAN, individually and as personal representative of the
Estate of Patrick Duncan, deceased
JASON P. DUNCAN, a minor by and through his Guardian ad Litem
ALICE DUNCAN
NOREEN DUNCAN
MICHAEL DUNCAN
TIM DUNCAN
KEVIN DUNCAN
BRIEN DUNCAN
MICHELLE BOWERS, individually and as personal representative of
the Estate of Jeffrey Bowers, deceased
JUDSON BOWERS
FLORENCE HANSON
SHELLY BOWERS
SHERRY BOWERS
MONICA HENWOOD, individually and as personal representative of
the estate of Ramon Henwood, deceased
PHYLLIS HENWOOD
OWEN HENWOOD

DEFENDANTS/RESPONDENTS

UNION PACIFIC RAILROAD COMPANY, a corporation
THE STATE OF UTAH
PAUL KLEINMAN
DOES 1 through 100, inclusive

Plaintiffs/Appellants respectfully submit their Reply Brief in these proceedings.

REPLY TO RESPONDENTS' STATEMENTS OF FACT

Appellants take exception to the following "corrections and additions" to Plaintiffs' Statement of Facts by either Union Pacific or the State of Utah as the same are irrelevant, inaccurate and/or unsupported by the record on appeal.

1. At paragraphs 5 and 6 of its Brief, Union Pacific discusses the alleged high volume level of Patrick Duncan's car stereo and the purported absence of evidence that he made any effort to brake the automobile. At best, the statements relate to Defendants' contributory negligence claims or rebut a showing of proximate cause as part of Plaintiffs' prima facie case. They are not, however, the least bit relevant to this Court's consideration of the issues pending, to wit: whether the Railroad has duties with respect to warning devices at crossings; whether the State has sovereign immunity for decisions on such devices, and; was there sufficient evidence to show a disputed issue of material fact on whether the Droubay Road crossing was "extra-hazardous" precluding summary judgment in Defendants' favor.

2. At paragraph 2 of its description of the course of proceedings below, Union Pacific again attempts to inject into this appeal the highly irrelevant, prejudicial and disputed issue of Patrick Duncan's alleged substance abuse. Judge Hansen correctly ignored it in granting the Motions for Summary Judgment yet Respondents continue to raise this inflammatory evidence.

Respondents' statements on the substance abuse issue are objectionable and irrelevant to the substantive issues pending before the Court and should be stricken. See, Rule 24(k), Rules of Utah Appellate Procedure.

3. Paragraph 2 of Union Pacific's Brief discussing the Droubay Road crossing and Plaintiff's alleged ability to "view the train's approach in their peripheral vision with little or no need to turn their heads" is not only speculative but wholly without support in the record. This much seems obvious by the absence of any citation to the record.

4. Respondents' statements that the railroad crossing advance warnings signs, located 305 feet South of the crossing, where in accordance with the Manual on Uniform Traffic Control Devices ("MUTCD") is inaccurate and disputed by the parties. As revealed by the Manual portion excerpted at Union Pacific's Appendix, and as noted in the Crommelin Affidavit, the recommended distance for a 55 m.p.h. highway is 700 feet. 300 feet is the absolute minimum distance for this road thus substantiating Plaintiffs' claims that warning sign placement is evidence that the Droubay Road crossing was extra-hazardous and Defendants breached duties owed to warn of those hazards.

5. Respondents wrongly dispute the similarity of other accidents which occurred at the Droubay Road crossing. As discussed in greater detail below, the standards of similarity applied by the courts are extremely broad, easily encompassing the accidents relied on by Plaintiffs.

ARGUMENT

POINT I

DEFENDANT RAILROAD HAS ONGOING OBLIGATIONS TO PROTECT THE TRAVELING PUBLIC AT DANGEROUS CROSSINGS.

- A. UNION PACIFIC HAS WAIVED ANY DEFENSE PREMISED UPON STATE OR FEDERAL STATUTORY PREEMPTION.

Both the District Court and Court of Appeals rulings¹ in favor of the Union Pacific focused on the absence of any duty to improve warning devices at rail crossings. Duties imposed by long-standing Utah precedent requiring a railroad to take additional precautions at extra-hazardous crossings were "preempted" by the statutory scheme set forth at Utah Code Ann. § 54-4-14 et seq. which grants the Utah Department of Transportation authority to prescribe the manner of warning devices to be utilized at railroad crossings. In its Brief, Union Pacific has supplemented earlier preemption arguments by asserting federal preemption under the Federal Rail Safety Act of 1970 ("FRSA"), 45 U.S.C. § 421, et seq. As the Railroad did not plead state or federal preemption as an affirmative defense in its original answer, this Court should find it barred under Rule 8(c), U.R.C.P.

Only two affirmative defenses were stated by Union Pacific; a contributory negligence defense and a defense attempting to shift the accident's blame to Patrick Duncan. Nowhere is there a mention of the railroad's traditional duties

¹ Duncan v. Union Pacific Railroad Co., 790 P.2d 595 (Utah App. 1990).

to warn the public of hazardous crossings being preempted by either state or federal statutes which delegate authority over warning devices to state governmental agencies such as UDOT.

Although Appellants could not find a Utah case addressing the question of whether "preemption" is an affirmative defense which must be pled by Defendant or else waived, cases under the identically worded Federal Rule of Civil Procedure are consistent in finding that preemption of common law duties comes within the preclusion of Rule 8(c). 5 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE, § 1271 (1990). See also, In re Air Crash Disaster at Stapleton International Airport, Denver, Colorado, on November 15, 1987, 721 F. Supp. 1185 (D. Colo. 1988) wherein, under similar circumstances, the court held that preemption of common law claims based on federal regulatory statutes (there the Federal Aviation Act and regulations promulgated thereunder) must be set forth as an affirmative defense or else is waived.

The argument that Union Pacific has waived a preemption defense is particularly forceful with respect to its sudden and unexpected reliance on federal law, in particular the FRSA. Despite the existence of the Act prior to the fatal Duncan accident, at this final stage of these proceedings Union Pacific asks the Court to indulge its oversight and consider a complex new defense. This tardy attempt to inject new issues into the case is not only prejudicial to Appellants but contrary to elementary rules of appellate practice.

B. NEITHER STATE NOR FEDERAL LAWS REGARDING WARNING DEVICES AT CROSSINGS ABROGATE THE RAILROAD'S TRADITIONAL DUTIES TO TAKE ACTION IF ON NOTICE OF DANGEROUS CONDITIONS.

1. State Statutes.

There is little question that Union Pacific could not entirely of its own accord place automatic crossing gates or otherwise enhance warning devices at the Droubay Road crossing. This would be violative of Utah Code Ann. § 54-4-14. But while acknowledging that the primary authority to designate crossing warning devices resides with UDOT, the question posed by this appeal is whether the absence of authority absolves Defendant from taking other actions designed to better protect the public at railroad crossings. As found in the well-reasoned cases discussed at pp. 17 through 21 of Appellants' opening Brief, it does not.

Contrary to Union Pacific's arguments, railroads are frequently in a unique position to assess whether any given crossing is hazardous. As our facts indicate, it may have been contacted by local government officials requesting enhanced signage. Railroad representatives may also be members of surveillance teams assigned to investigate crossings. Union Pacific's self-deprecating statements that it lacks the expertise to determine appropriate traffic control devices at crossings is without support in the record and flies in the face of historical experience.

As such, courts have imposed on railroads the obligation to petition or urge appropriate state authorities to

upgrade crossing warning devices when on notice of hazardous conditions. See, McMinn v. Consolidated Rail Corp., 716 F. Supp. 125 (S.D.N.Y. 1989) and Petrove v. Grand Trunk Western Railroad Co., 436 N.W.2d 733 (Mich. App. 1989). Authority cited by Union Pacific stops short of relieving a railroad of its duty to petition the governing state agency to allow additional warning devices or take other actions designed to eliminate hazards.

Even those cases cited by Union Pacific in support of the proposition that state law has abrogated a railroads' duties with respect to crossing safety offer little support for this contention. For instance, in Eddington v. Grand Trunk Western Railroad Co., 418 N.W.2d 415 (Mich. App. 1987), the railroad's duties were not even addressed. Instead, the court was concerned with a county's obligations as to hazardous crossings. Nor was the adequacy of crossing devices challenged as an issue on appeal in South v. National Railroad Passenger Corp., 290 N.W.2d 819 (N.D. 1980) as Respondent alleges. Harrison v. Grand Trunk Western Railroad Co., 413 N.W.2d 429 (Mich. App. 1987), another Michigan case relied on by Respondent actually supports Appellants' argument.

In other words, Defendants cannot erect additional crossing signs without proper permission. . . however, apart from the above provisions, Defendants still have common law duty of due care. [citation omitted] That duty include petitioning the proper authorities when the railroad or the county considers warning devices at a dangerous crossing to be insufficient, so that the situation can be remedied.

Id. at 431.

Union Pacific's attempts to explain away the inconsistency in its state preemption argument raised by the statutory liability imposed on railroads by Utah Code Ann. § 56-1-11 are equally unpersuasive. Defendant continually asserts that duties under this provision extend only to maintenance of crossings while the statute itself imposes liability for damages caused by neglect to "make and maintain good and sufficient crossings". (emphasis added). Furthermore, courts construing the term "maintenance" in the context of similarly worded statutes have found that it exceeds mere physical care and upkeep to include questions of traffic control devices. See, Miller v. New Mexico Department of Transportation, 741 P.2d 1374 (N.M. 1987). Indeed, the only means of giving effect to the clearly worded mandate of § 56-1-11 here is to hold Union Pacific accountable for Plaintiffs' damages regardless of UDOT's ultimate authority to approve crossing warning devices.

2. Federal Statutes.

Relying on various provisions of the FRSA, Union Pacific next argues its common law duty to maintain a safe crossing is preempted by federal law. Assuming, for purposes of argument, that Union Pacific has not waived a preemption defense by failing to plead or previously assert the same, it should still be rejected by this court.

A proper analysis of any federal preemption defense begins with the presumption that state law is only superceded by

statutes or regulations where Congress specifically intended. This presumption is applied with particular consequence where issues of state tort liability are involved. See, Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984). See also, Rosdail v. Western Aviation, Inc., 297 F. Supp. 681 (D. Colo. 1969) (state remedies for personal injury claims not preempted by pervasive federal regulation of air carriers). Absent a direct conflict or clear expression of Congressional intent to do away with tort liability, neither of which are present here, a finding of preemption is unwarranted.

FRSA's stated purpose of establishing uniformity among railroad regulations, including those relevant to crossing warning devices is not contrary to Union Pacific's duty to take some action if on notice of hazardous conditions. The railroad can still notify state authorities that an upgrade in warning devices may be required or ask permission to install upgrades. And the railroad's involvement in the process of observing and determining which crossings are in need of additional protection suggests an ongoing responsibility and duty to the traveling public consistent with imposing liability on circumstances such as ours. It is thus no surprise that while acknowledging FRSA to be an effort by the federal government to improve grade crossing safety, courts have held "it does not lessen the statutory or common law duty of a railroad to maintain a good and safe crossing". Karl v. Burlington Northern Railroad Co., 880 F.2d 68, 76 (8th Cir. 1989), citing Runkle v. Burlington Northern

Railroad Co., 613 P.2d 982, (Mont. 1980). There is simply no conflict between the duties urged by Appellants and federal regulation which would trigger preemption.

With minor exceptions, cases cited by Union Pacific in support of their federal preemption defense are distinguishable and in apposite. In Sisk v. The National Railroad Passenger Corp., 647 F. Supp. 861 (D. Kan. 1986) the court was concerned with preemption of local ordinances on train speed not warning devices at crossings or common law tort liability. Nor is precedent on federal preemption as consistent and uniform in support of its position as Respondent would lead the court to believe. See, Missouri Pacific Railroad Co. v. Mackey, 760 S.W.2d 59 (Ark. 1988) (FRSA does not preempt state regulations on clearing vegetation from railroad crossings); Phillips Petroleum v. Illinois Environmental Protection Agency, 390 N.E.2d 620, 622 (Ill. App 1979) (although state environmental regulations dealing with railroads were preempted by FRSA, this did not extend to areas of common law redress and tort liability); and Henry v. District Court, 645 P.2d 1350 (Mont. 1982).

In spite of Union Pacific's comments, Karl v. Burlington Northern Railroad Co., supra., is not only "on point" but also the most recent federal circuit court expression on whether the FRSA preempts a common law negligence claim arising out of inadequate warning devices at a rail crossing. The opinion is well reasoned and consistent with the authority discussed above finding that even pervasive federal regulation

does not displace state tort law and duties thereunder. In view of the noted presumption, it is submitted that Marshall² and other cases cited by Union Pacific and its analysis of Karl are an overly broad interpretation of the express terms of 45 U.S.C. § 434.³ If the Ninth Circuit in Marshall had the opportunity to review the Supreme Court decision in Silkwood it would likely have reached a different conclusion.

Although a federal statute or regulation will unquestionably preempt a conflicting state rule on the identical subject, it is a far different thing to find that laws concerning railroad safety somehow deprive these Plaintiffs of a claim against Union Pacific for its failure to take some action to warn the public of a hazardous rail crossing. Even if the Union Pacific has not waived a preemption defense, there is no basis to depart from longstanding precedent and statutory authority which stand for the unequivocal proposition that railroads owe Plaintiffs' decedents a standard of due care to take actions at hazardous crossings.

² Marshall v. Burlington Northern, Inc., 720 F.2d 1149 (9th Cir. 1983).

³ Marshall is of dubious authority for Union Pacific's preemption claims. The 9th Circuit specifically held the railroad did have a duty install adequate warning devices at the subject crossing. Comments as to a railroad's duties under other circumstances (to wit: when local agencies had made a determination on the adequacy of existing devices) are dictum. 720 F.2d 1154.

POINT II

THE STATE IS NOT IMMUNE FROM LIABILITY FOR NEGLIGENTLY
CAUSED INJURIES AT RAILROAD CROSSINGS.

A. DECISIONS AS TO CROSSING UPGRADES DO NOT CONSTITUTE THE
EXERCISE OF A "DISCRETIONARY FUNCTION".

As the State apparently admits, the facts of our case fall within the specific governmental immunity waiver established by Utah Code Ann. § 63-30-8 which permits suits to recover for any injury caused by an unsafe or dangerous condition of any highway or structure located thereon. In an attempt to avoid the statute's explicit terms Respondent argues that the decisions here at issue represent the exercise of a discretionary function for which immunity is granted under § 63-30-10(1)(a).

In stating "there is no case which expressly holds that § 63-30-8 stands on its own and is not qualified by § 63-30-10(1)(a)" the State makes a grave and misleading representation as to the state of Utah law. In Bigelow v. Ingersol, 618 P.2d 50, 54 (Utah 1980), the Supreme Court found "since the waiver of immunity in §§ 8 and 9 encompasses a much broader field of tort liability than merely negligent conduct of employees within the scope of their employment, the legislature could not have intended that § 10, including its exceptions, should modify §§ 8 and 9 . . ." (emphasis added). (Quoting Sanford v. University of Utah, 488 P.2d 741, 745 (Utah 1971)). Any conceivable doubts flowing from the rulings in Bigelow or Richards⁴ are certainly

⁴ Richards v. Leavitt, 716 P.2d 276 (Utah 1985).

clarified by the foregoing pronouncement. Although the Court need not proceed to analyze if the immunity waiver under § 63-30-8 is subject to a "discretionary function" limitation, such an assessment would still not affect an outcome in Plaintiff's favor. This court has held on numerous prior occasions that decisions concerning the design of a traffic control system (which must be deemed to include warning devices at rail crossings) are not at the basic policy-making level and hence are not the exercise of a discretionary function. See, Andrus v. State, 541 P.2d 1117 (Utah 1975); Carroll v. State Road Commission, 496 P.2d 888 (Utah 1972), and; Bigelow, supra. Instead, under the criteria established in Frank v. State, they represent decisions at an operational level.⁵ Furthermore, if there were any doubts whether this decision is "policy-making" as distinguished from "operational", summary judgment should have been denied and a trial ordered to resolve this critical fact. Rocky Mountain Thrift Store, Inc. v. Salt Lake City Corp., 784 P.2d 459 (Utah 1989).

The State's attempts to distinguish safety devices at railroad crossings and those at issue in Bigelow, Richards and Bowen⁶ are unavailing and simply point out the contradictions and confusion between the Court of Appeals decisions in Duncan and

⁵ Frank v. State, 613 P.2d 517 (Utah 1980).

⁶ Bowen v. Riverton City, 656 P.2d 434 (Utah 1982).

Gleave⁷ and this Court's most recent opinions. Funding considerations which the Court of Appeals heavily relied upon in rendering the opinion in Duncan v. Union Pacific are present to the same degree in Bigelow, Richards and Bowen as in the railroad crossing cases. More important, since adoption of the MUTCD, all of these decisions are guided by uniform, set standards. As Defendants' own Affidavits show, prioritization of crossings for enhancement of signal devices is made through application of a set mathematical formula. For this reason, the theoretical foundation of Velasquez⁸, which was the basis for the Gleave and Duncan rulings, is undermined. See, Ostendorf v. Kenyon, 347 N.W.2d 834 (Minn. App. 1984) (where placement of warning signs is governed by MUTCD, state's duty to warn does not represent the exercise of a discretionary function).

B. DECISIONS UNDER THE FEDERAL TORT CLAIMS ACT ARE NOT SUPPORTIVE OF THE STATE OF UTAH'S IMMUNITY DEFENSE.

Attempting to overcome the clear import of Richards, Bigelow and Bowen, the State directs this Court's attention to a number of cases construing the discretionary function immunity provisions of the Federal Tort Claims Act ("FTCA"), specifically at 28 U.S.C. § 2680(a). Not only is the FTCA distinct from Utah's sovereign immunity scheme, but the cited cases involve decisions far different than placement of warning devices at a

⁷ Gleave v. Denver & Rio Grande Western Railroad Co., 749 P.2d 660 (Utah App. 1988).

⁸ Velasquez v. Union Pacific Railroad Co., 469 P.2d 5 (Utah 1970).

railroad crossing. The analogy offers scant support for Respondent's governmental immunity defense.

First, whereas the United States has generally waived immunity under § 2674 of the Act, Utah has retained immunity subject to certain enumerated exceptions, two of which apply to our facts: § 63-30-8 for injuries resulting from a negligently designed traffic control system, and; § 63-30-10, a broader waiver encompassing injuries caused by the negligent act or omission of a State employee committed within the scope of his employment. The importance of § 8 of Utah Act is its clear expression of legislative intent to severely limit immunity for highway accidents. No such expression of congressional intent exists under the FTCA to guide the court's decision on what constitutes the exercise of a "discretionary function" when assessing the adequacy of warning devices.

Nor is federal case law as clear-cut as Respondent suggests. Each case cited had to do with more generalized design decisions (e.g. Wright v. United States, 568 F.2d 153 (10th Cir. 1977)) while in the specific area of warning devices, courts are less inclined to find their placement as being a protected discretionary level decision. This is particularly so where compliance with the MUTCD is at issue.

In Morris v. United States, 585 F. Supp. 1543 (W.D. Mo. 1984), the District Court found the government's decision regarding a closed road warning device to involve a routine operational level decision falling outside the discretionary

function exception to the FTCA, in part, relying upon application of the MUTCD. To the same effect is Driscoll v. United States, 525 F.2d 136 (9th Cir. 1975) where the court rejected immunity for an alleged failure to install appropriate warning devices at an Air Force base, and; Smith v. United States, 546 F.2d 872 (10th Cir. 1976) as to placement of warning signs in Yellowstone Park. As the decision in our case pertains to the type of device best suited to warn motorists at the Droubay Road crossing, it is far closer to the facts of Morris, Driscoll and Smith than the more generalized design evaluations present in the cases cited by Respondent. See also, Seyler v. United States, 832 F.2d 120 (9th Cir. 1987) (rejecting discretionary function immunity on claim that United States was negligent in failing to erect proper speed limit signs).

Finally, to the extent FTCA cases support a discretionary function immunity argument, they are contrary to Utah authority and must, therefore, be little accorded little weight.

There is no doubt that the design of traffic warning devices involves some degree of discretion. "It would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the matter of its performance . . ." W. PROSSER, A HANDBOOK ON THE LAW OF TORTS, § 132 at 990 (4th ed. 1971). In assessing which end of the discretionary spectrum decisions as to traffic warning devices fall, the Utah Supreme Court has found they do not

represent basic plan-making level decisions immunized from suit. Richards v. Leavitt, supra. To the extent Respondent's cases under the FTCA are contrary to this finding, the only means of adopting their rationale is to drastically overrule well-considered Utah precedent. Appellants urge the Supreme Court to continue its tradition of finding decisions on traffic warning devices to be at the operational level and not immune as the exercise of a discretionary function.

POINT III

THERE IS AMPLE EVIDENCE TO SUPPORT A FINDING THAT THE DROUBAY ROAD CROSSING WAS "EXTRA-HAZARDOUS".

The many factors which support a finding that the Droubay Road crossing was "extra-hazardous" requiring Defendants/Respondents to take additional precautions are discussed in Appellants' opening Brief.⁹ Appellants also noted how the issue of whether a crossing is "extra-hazardous" is not properly the subject of summary proceedings, it typically being reserved for jury consideration. Nonetheless, a reply to Respondents' contentions that the Droubay Road crossing was not "extra-hazardous" as a matter of law is necessary.

In particular, Respondents challenge the Affidavit of Robert Crommelin which Appellants contend raised a genuine issue

⁹ Among them are: high speed and high volume traffic on the roadway, including school buses; train volume and speed; a dangerous crossing angle; inadequate placement of existing warning signs, and; evidence of similar accidents at the crossing. See Appellants' Brief at p. 32 and citations to the record thereat.

of material fact precluding entry of summary judgment in Defendants' favor. Contrary to Respondents' Briefs, there was ample foundation for Mr. Crommelin's opinion that the Droubay Road crossing was "extra-hazardous" necessitating a remand of this proceeding for a trial on the merits.

1. Placement of the Advanced Warning Sign.

Relying on the MUTCD, the State and Railroad argue the advance warning sign was placed at a adequate distance away from the crossing and hence is not evidence of its extra-hazardous nature. In fact, the Manual shows the minimum acceptable distance for placement on a comparable highway to be 450 feet which is still 50% more than the 305 feet present at Droubay Road and greatly less than the 700 feet advised under § 2C-3.

Furthermore, even if Defendants had complied with the Manual, it establishes only a minimum standard for safety which the jury could still find inadequate under the circumstances of the particular crossing. Schaeffer v. Kansas Department of Transportation, 608 P.2d 1309 (Kan. 1980).

2. Other Accidents at the Crossing.

Defendants also contest Crommelin's reliance on other accidents at the crossing to support his conclusion. That other accidents can support a finding of "extra-hazardous" seems admitted by Respondents and the UDOT evaluation process as well. The number of accidents, both actual and anticipated, is a factor in the hazard rating index applied by surveillance teams in recommending enhancement of existing warning devices. In the

case of Droubay Road, accidents at the crossing are precisely what prompted a change and resulted in prioritization for automatic crossing gates. (R. 298).

Admittedly, before evidence of prior accidents is admissible, the plaintiff must show they occurred under reasonably similar, although not identical, circumstances. The standard is, however, very flexible and the better rule is to allow the jury to evaluate whether the minor variations in accidents effect an ultimate finding of extra-hazardous. Pyle v. Southern Pacific Transportation Co., 774 S.W.2d 693 (Tex. App. 1989). Here, Crommelin found the accidents to be reasonably similar and Judge Hanson should not have removed this issue from jury consideration by granting the summary judgment.

3. Reliance on UDOT Surveillance Reports.

Aside from conducting a personal inspection of the Droubay Road crossing, Robert Crommelin utilized allegedly inadmissible UDOT surveillance team reports in rendering his opinion. As previously asserted by Plaintiffs, even if the reports themselves are inadmissible, in accord with 23 U.S.C. § 409, they may, nonetheless, be relied upon by an expert witness. See, Rule 703, Utah Rules of Evidence.

More important, Respondents should be deemed to have waived any objection to this evidence as a consequence of their own submittal of surveillance reports through various Affidavits offered in support of their summary judgment motions. It is settled law that a party will waive any objection to the

admissibility of evidence if he later introduces the same in support of his claims. 21 WRIGHT & GRAHAM, FEDERAL PRACTICE & PROCEDURE, § 5039 (1977). See also, Bishop v. St. John Hospital, 364 N.W.2d 290 (Mich. App. 1984) (incident report (cf. surveillance team report) which was inadmissible under state statute was nonetheless properly admitted where party challenging same relied on it). It would be highly prejudicial to permit the State and Union Pacific to submit Affidavits incorporating the surveillance team reports while denying Plaintiffs the opportunity of doing so through the Crommelin Affidavit.

POINT IV

PUBLIC POLICY SUPPORTS HOLDING AT LEAST ONE OF THESE DEFENDANTS ACCOUNTABLE FOR HAZARDOUS CONDITIONS AT THE DROUBAY ROAD CROSSING.

For different reasons, both the State and Railroad argue that sound public policy favors an absence of liability for damages proximately resulting from inadequate warning devices at hazardous railroad crossings. This is clearly the net effect of the Court of Appeals ruling in Duncan. But as it denies an injured party redress for negligently caused injuries and fosters the creation or continuance of dangerous conditions by removing the deterrent effect of tort liability, the Duncan opinion is unsound and must be overturned.

A. UNION PACIFIC RAILROAD.

As a matter of policy, Union Pacific argues they cannot have a duty to warn the public of dangerous rail crossings without a corresponding right to install appropriate warning

devices. The fallacy here is an assumption that the only means of discharging the duty is to place automatic crossing gates at Droubay Road. It ignores the option of notifying those parties with authority to improve warning devices, petition a public agency for the right to improve crossing safety or, perhaps, going so far as to discontinue train service along the subject line or bring litigation to prompt change, all options which courts have found to be part of a railroad's common law duty of due care towards the traveling public. McMinn v. Consolidated Rail Corp., supra.; Petrove v. Grand Trunk Western Railroad Co., supra., and Wells v. Baltimore & Ohio Railroad Co., 363 N.E.2d 1001 (Ind. App. 1977).

Further, the Railroad is in a unique position to implement the important public policy of travelers' safety. It may have been notified of dangerous conditions by local authorities (as occurred here). Train crew members are also experienced in assessing crossing hazards despite Union Pacific's claimed lack of expertise. Finally, Defendants' own evidence indicates how railroads participate in the actual decision-making process on prioritization of crossings for enhanced signage. All of these facts are indicative of Union Pacific's continued duties to take some action if on notice of a dangerous rail crossing.

B. THE STATE OF UTAH.

By its enactment of Utah Code Ann. § 54-4-15, the Legislature implicitly assumed the duty to provide parties such as these Plaintiffs with safe railroad crossings, an obligation

previously imposed upon Union Pacific. In view of the substantial body of case law assessing tort liability on railroads for negligently caused injuries at hazardous crossings, the Legislature must also have considered judicial and fiscal consequences associated with this duty of due care. To find otherwise would grant the State immunity for negligently caused injuries and allow parties entrusted with the public well-being to act with impunity in determining what constitutes adequate crossing safeguards. Both factors weigh heavily in favor of rejecting a sovereign immunity defense on our facts.

In order to avoid this anomalous result, the Court of Appeals in Duncan narrowed its ruling in favor of the State by granting immunity only to those decisions on "whether to improve the means of warning or control at the crossing" 790 P.2d 598. Because this neither compensates otherwise worthy injured parties nor deters negligent conduct or foster public safety, it should not withstand scrutiny by this court.

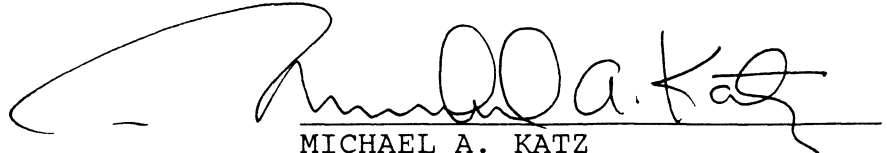
Implications of the challenged Court of Appeals decision could be far reaching. Its scope easily encompasses not only the numerous railroad crossings in Utah but all highway or intersection warning devices as well. So long as UDOT provides minimal warning and control, the State escapes liability. This is certainly not what the Supreme Court had in mind with its decisions in Bowen, Bigelow and Richards cited above. As a matter of public policy, the standard of "minimal effectiveness" as espoused in Duncan v. Union Pacific is bad law.

CONCLUSION

Based on the foregoing, Plaintiffs/Appellants respectfully urge the Supreme Court to overturn the Court of Appeals opinion in Duncan v. Union Pacific Railroad, reverse Judge Hanson's grant of summary judgment in Defendants' favor and remand this case for a trial on the merits.

Respectfully submitted this 5th day of February, 1991.

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CERTIFICATE OF MAILING

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