

1990

Lewis Duncan, Patrick Duncan v. Union Pacific Railroad Company, The State of Utah, Paul Kleinman : Brief of Appellant

Utah Supreme Court

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BRIEF

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DOCKET NO:

900233

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 BRIEF

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

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JUL 16 1990

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

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JURISDICTION OF THIS COURT

Jurisdiction to hear this appeal is conferred upon the Supreme Court under Article VIII, § 3, of the Utah Constitution; Utah Code Ann. § 78-2-2(3)(i); and Rule 45, Utah Rules of Appellate Procedure, this being a review of the decision of the Utah Court of Appeals by a grant of Plaintiff's Petition for a Writ of Certiorari.

ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err in affirming the Summary Judgment entered by the District Court in favor of the State of Utah on the issue of "governmental immunity"?

2. Did the Court of Appeals err in affirming the Summary Judgment entered in favor of the Union Pacific Railroad in assessing its duties to improve warning devices at railway crossings?

DETERMINATIVE STATUTES AND RULES

The following statutes and rules are believed to be determinative of the issues presented above:

Utah Code Ann. §§ 54-4-15, et seq. (1990);

Utah Code Ann. § 56-1-11 (1990);

Utah Code Ann. § 63-30-8 (1990);

Utah Code Ann. § 63-30-10 (1990);

Rule 56, Utah Rules of Appellate Procedure.

The contents of the cited authority are fully set forth in the Addendum to this Brief in accord with Rule 24(f), Utah Rules of Appellate Procedure.

STATEMENT OF THE CASE

Nature of the Case, Course of the Proceeding and Disposition in the Lower Court.

These proceedings originated as a wrongful death action filed by the heirs and/or estates of four individuals who were killed in an automobile/train collision which occurred in rural Tooele County, Utah. Named as Defendants were Tooele County (subsequently dismissed by stipulation), the State of Utah, Union Pacific Railroad and its train operator, Paul Kleinman. (R. 9, 82 and 86).

The Complaint stated four Causes of Action; negligent operation of the train on the part of Union Pacific and its employee Kleinman; negligent maintenance and a failure to install proper warning devices at the railway crossing by the State (through the Utah Department of Transportation, "UDOT") and railroad, and; Union Pacific's negligent entrustment of the train to an unfit operator, Defendant Kleinman. (R. 1-9). For purposes of the present review, the focus is on allegations of Defendants' failure to maintain adequate safeguards at the crossing.

In addition to denying specific allegations of the Complaint, the State and Union Pacific affirmatively alleged contributory negligence on the part of Patrick Duncan, the automobile's driver. The State also defended on the grounds of sovereign immunity. Lastly, the Defendants pleaded a Counterclaim against the Estate of Patrick Duncan for indemnity

and contribution as to any recovery awarded other Plaintiffs.
(R. 23-27 and 36-45).

Following a period of discovery, Defendants filed Motions for Summary Judgment in the Fall of 1987. (R. 121-122 and 127-128). Among supporting Affidavits submitted by Defendants were those of Paul Kleinman, as to operation of the train; numerous members of UDOT surveillance teams, as to the decision on whether or not to upgrade warning devices at the crossing by installation of automatic gates, and; Affidavits by persons who had examined the crossing and testified to its general condition and that of the surrounding terrain. In response, Plaintiffs offered the Affidavit of Robert Crommelin as an expert witness who had visited and examined the subject crossing and opined as to whether it was "extra-hazardous". (R. 192).

Important to the issues presently pending before the Court, the Affidavits submitted by UDOT's surveillance team members described the process by which crossings received priority for funding to upgrade warning devices. This process can best be described as incorporating information and projections as to automobile and train traffic, speed, crossing angle and predicted and actual accident rates into a mathematical formula (the "Hazard Rating Index") which, if a certain level was reached, would result in funding. The Affidavits indicated a recommendation to install automatic crossing gates at Droubay Road prior to the Duncan accident but installation was postponed

until Federal funding became available. (R. 357-359 and 403-405).

After oral argument on the Motions, and in the face of UDOT's recommendation to upgrade warning devices and the Crommelin Affidavit on the question of the crossing being "extra-hazardous", District Judge Timothy R. Hanson entered Summary Judgment in favor of Defendants on November 17, 1987. (R. 477-488 and appended hereto). The Memorandum Decision found that Plaintiffs had produced no evidence on negligent operation of the train and that, as a matter of law, the railroad had no duty as to placement of warning devices at the crossing. (R. 484). The Court went on to grant the State sovereign immunity, the determination as to enhancement of warning devices being the exercise of a "discretionary function". (R. 482).

Judge Hanson's ruling was affirmed by the Utah Court of Appeals in its Opinion dated April 12, 1990.¹ As described below, Judge Bullock assumed Plaintiffs had stated a prima facie case of negligence, but proceeded to find that Union Pacific had no duty to erect warning devices at the crossing (790 P.2d 599) and UDOT was shielded from liability by governmental immunity (790 P.2d 602). Plaintiffs assert that these decisions as to the relative duties of Defendants with respect to warning devices at the crossing and the availability of sovereign immunity for the State are contrary to prior decisions of the Utah Supreme Court

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

and Court of Appeals warranting a reversal and remand for purposes of trial.

STATEMENT OF FACTS

The Accident

At approximately 8:50 p.m. on the night of April 9, 1983, a northbound automobile driven by Patrick Duncan and containing passengers Jeffrey Bowers, his nine month old daughter, Nicole Bowers and Ramon Henwood was struck by a westbound Union Pacific freight train in Tooele County, Utah. All four occupants of Duncan's 1978 Chevrolet Caprice died in the collision at the intersection of Droubay Road with Union Pacific's main line trackage. The 67 car train, operated by engineer Paul Kleinman sustained relatively minor damage to its lead locomotive. (R. 215 and 215). Weather was cloudy with a light rain falling. (R. 431).

Duncan, a California resident was unfamiliar with the crossing. He had been visiting relatives in Tooele and, on this particular occasion, was headed to the home of Steven Bowers (deceased Jeffrey Bowers' uncle) for a family gathering and dinner. (R. 215 and 427-428).

Plaintiffs are the decedents heirs. To the extent not set forth above, deceased Patrick Duncan left, as his heirs, Louis and Noreen Duncan, father and mother respectively; Jason Duncan, son; and Michael, Tim, Kevin and Brian Duncan, brothers. Jeffrey Bowers and his daughter, Nicole Bowers, left as their heirs at law, Michelle Bowers, wife and mother, respectively;

Judson Bowers, father and grandfather; Florence Hanson, mother and grandmother; and Shelly and Sherrie Bowers, sister and aunt. Deceased Ramon Henwood left as his next of kin, Monica Henwood, wife; and Phillis and Owen Henwood, mother and father. (R. at 8).

THE DROUBAY ROAD CROSSING

Droubay Road is an essentially straight, two-lane road running north and south through rural Tooele County, Utah positioned approximately one-half the distance between State Highway 36 and the western foothills of the Oquirrh Mountains. The road is an important arterial in the County, serving the communities of Erda and Bates Canyon. At this crossing, Union Pacific's rails traverse Droubay at an angle of slightly over 43° north and over 136° south of the track. (R. at 412).

At the time of the accident, the only warning signs present from the northbound lane were a railroad advance warning sign (a circular yellow sign with a large black "X" and a "R" on either side of the intersecting lanes) located 300 feet from the crossing and two railroad crossing signs (white cross-bars with "railroad crossing" printed in black letters), 19 feet from the intersection.² (R. at 410).

The possible need to upgrade warning devices at the crossing was raised as early as September of 1979 when Union

² Federal standards mandate that in a rural area a railroad advance warning sign be located 750 feet in advance of a crossing. (R. at 188).

Pacific was approached by Tooele County in connection with a project to widen Droubay Road. W.A. Ridge, Union Pacific's superintendent stated "if the widening of the roadway will increase the vehicular traffic using the roadway, it would be well to indicate to the State if any additional crossing protection is required other than the standard cross-buck at the present location."

In November of 1981, UDOT re-evaluated the crossing at Droubay Road pursuant to a second request of the Tooele County Engineer. The surveillance team recommended a removal of automatic crossing signals from Bauer Road, another north-south arterial in the County which had recently been closed for installation at the Droubay Road crossing. (R. at 360 and 361). The closure had resulted in a projected increase of up to 1,500 (from 100) vehicles on a daily basis, including a minimum of 4 school buses. High speed automobile and train travel over the tracks was also noted by the surveillance team. (R. at 302). Despite the substantial diversion of high speed traffic to Droubay Road and over this particular crossing, installation of mechanical crossing gates was postponed until federal funding became available. (R. 403-405 and 357-359). This was because the "Hazard Index Rating" arrived at by the surveillance team allegedly fell just under that required to receive priority for upgrade funding.

In May and June of 1983, immediately after notification of the fatal Duncan accident, the UDOT team conducted additional

inspections at the urging of Tooele County officials. (R. 303). At this time, flashing light signals with gates were proposed. The recommendation was warranted by "high traffic speed, including passenger train; high vehicular speed; moderately high train volume; high predicted accident rate." (emphasis added). (R. 298). The high incidence of accidents at the Droubay Road crossing which supported the recommendation to install additional safeguards is evidenced by accident reports made part of the record at 212-221. These reports indicate that, as of May 18, 1983, there had been three similar (for a total of four) accidents at the intersection. (R. 188).

Another key factor in compiling the "hazard index" which ultimately prompted an upgrade was the "angle of crossing factor" at Droubay Road, 43°. This angle made it difficult to gauge the speed and distance of oncoming trains. (R. 189). Crommelin's Affidavit testimony on this point is substantiated by a test to estimate train speeds conducted by Highway Patrol Trooper Terry Smith and made part of the record at R. 433. Smith found:

. . . at that angle to the train, it was very difficult to judge the speed of the train. I estimated the speed of the train at 45 m.p.h. and felt sure I had time to cross the intersection. On radar stationary, the train was traveling at 70 m.p.h. I would not have made it through the intersection if I had tried. The problem of estimating train speed is exacerbated at night, when the Duncan accident occurred."

(R. 433).

Through use of the mechanical formula developed by the United States Department of Transportation, UDOT indexed the subject crossing at .21, well over the .15 index where additional precautions, such as automatic crossing gates are warranted. As a result, mechanical gates with flashers were installed at the Droubay Road intersection in 1985. Responsibility for construction work was shared by Union Pacific and Tooele County. (R. 303 and 298-299). In addition, Tooele County widened Droubay Road running north from the crossing by 10 feet to match the width on the southern approach. These remedial measures were too late to save the lives of Patrick Duncan, Jeffrey Bowers, Nicole Bowers, his daughter, and Ramon Henwood.

It is submitted that the above facts, most of which are garnered from a canvas of Defendants' own Affidavits and evidence support a finding that the Droubay Road crossing was "extra-hazardous." Nonetheless, and despite assuming Plaintiffs had stated a prima facie case of negligence, the Court of Appeals found no liability on the part of either the State or Union Pacific for dangerous conditions at the crossing. From this anomalous result springs the present review.

SUMMARY OF ARGUMENTS

AT POINT I

As a matter of law, the District Court and Court of Appeals relieved the railroad from any responsibility as to dangerous conditions created by inadequate warnings at railroad crossings. This was premised upon Utah statutes which vest

authority over highway signage with the Utah Department of Transportation.

These rulings were erroneous. There is absolutely no indication that the legislature by enacting the statutory scheme (codified at Utah Code Ann. 54-4-15 et seq.) intended to abrogate the common law duties imposed upon railroads to make and maintain safe crossings. Nor is there any evidence that the legislature intended to repeal the statutory liability of railroads for damages assessed by other code provisions, specifically, § 56-1-11. Finally, the lower court decisions are flawed as contrary to sound public policy considerations.

AT POINT II

Although the District Court conceded the State might be liable, under some circumstances, for injuries occurring at "extra-hazardous" crossings, the Court of Appeals foreclosed such liability, concluding "that UDOT is immune for its failure to do more than minimal warning and control . . ." Duncan v. Union Pacific Railroad, 790 P.2d 598 (emphasis added).

The Court of Appeals finding of governmental immunity is unsound. It is contradicted by recent precedent from the Utah Supreme Court and other sections of the Governmental Immunity Act. It is also poor reasoning to permit a governmental entity to get by with only "minimal" precautions at a dangerous railroad crossing when it is statutorily mandated to "promote the public safety". Utah Code Ann. § 54-4-15.1 (1990).

AT POINT III

Should this Court reject immunity for the State and hold the railroad liable for injuries at dangerous crossings, it must then find there are disputed issues of material fact as to whether or not the Droubay Road intersection is "extra-hazardous" requiring Defendants to take additional precautions. Disputed facts raised by the Affidavit of Robert Crommelin and Defendants' own Affidavits and evidence were more than sufficient to defeat the Rule 56 Motions for Summary Judgment.

ARGUMENT

INTRODUCTION

Undisputed evidence in our case reveals Union Pacific and the State had knowledge of a dangerous condition at the Droubay Road rail crossing. Tooele County officials had requested numerous inspections of the crossing with an eye toward enhancing inadequate warning devices. Although UDOT could have ordered the railroad to cover installation costs, placement of automatic crossing gates was deferred until federal funding was available. This delay was in spite of the recommendations from Union Pacific representatives and members of the surveillance teams.

Yet, as a result of the Court of Appeals opinion in Duncan, the families of four people who died in a train collision at the crossing have been unjustly denied compensation. The opinion obligates Union Pacific to simply clear vegetation from areas around its tracks and the State must only provide minimally effective warning signs on the public road. Thus, free from fear

of being joined in suits for inadequate warning devices, the State and railroad can sit by and do nothing while on notice of dangerous conditions imperiling the public. The Supreme Court must redefine the duties of the respective Defendants with regard to improving railroad crossing safety and grant these injured Plaintiffs the remedy they so aptly deserve.

POINT I

THE LEGISLATURE HAS NOT PRE-EMPTED THE RAILROAD'S DUTIES TO
MAINTAIN SAFE RAILROAD CROSSINGS.

Without any support from prior precedent, whether from Utah or other jurisdictions, the Court of Appeals in Duncan made all railroads within the State free from any concerns of negligence for unsafe conditions at crossings regardless of notice and requests to cure. Though this ruling is no doubt widely heralded by railroads, it is contrary to reason, long-standing statutory and case law precedent and violative of good public policy. The Supreme Court is compelled to reverse the Court of Appeals in this instance and restore the law to former sound principles.

A. DESPITE UDOT'S AUTHORITY, UNION PACIFIC CONTINUES TO BE
LIABLE FOR DANGEROUS CONDITIONS AT RAILWAY CROSSINGS.

In a long line of cases commencing with English v. Southern Pacific Company, 45 P.2d 47 (Utah 1896) this Court embraced the common law duty imposed upon a railroad to adopt such reasonable measures for the public safety as common prudence may dictate in considering dangers at crossings. See also, Bridges v. Union Pacific Railroad Co., 488 P.2d 738 (Utah 1971). Despite the absence of any Utah Supreme Court opinion absolving the railroad of this longstanding duty, the Court of Appeals in Duncan rejected liability on the grounds that Utah Code Ann. § 54-4-15.1 had somehow pre-empted the field. There is no support for this proposition in either the cited statute or existing case law.

Although UDOT is given authority to "provide for the installing, maintaining, reconstructing and improving of automatic and other safety appliances, signals or devices at grade crossings" pursuant to the foregoing statute, there is no indication that the legislature intended for that authority to be "exclusive" and in derogation of the railroad's traditional obligations. In fact, when Utah Code Ann. § 54-4-15 was amended in 1975, the term "exclusive" was deleted when empowering UDOT to determine what safety precautions were required at crossings, while subsection (4) was added to retain the Public Service Commission's "exclusive" jurisdiction to resolve disputes arising from UDOT's actions in determining appropriate safeguards.

Other provisions of the Public Utilities Act maintain the notion that the railroad has continuing duties to improve railroad crossings. The Act still obligates Union Pacific to share costs of warning precautions at crossings. Utah Code Ann. § 54-4-15.3 (1990). See also, Duncan, 790 P.2d 597, n. 11. Furthermore, § 54-4-16 requires the railroad to investigate and file a report on any accident which occurs at a crossing.

The result reached by the Court of Appeals in this case is also contradicted by statutory duties and liabilities imposed upon Union Pacific under Utah Code Ann. § 56-1-11 (1990) which states:

Every railroad company shall be liable for damages caused by its neglect to make and maintain good and sufficient crossings at points where any line traveled crosses its road.

There was neither an explicit or implicit repeal of this provision (in effect since 1898) when the legislature enacted the Public Utilities Act under which Union Pacific seeks protection. Though Plaintiffs relied upon this Code provision, the Appeals Court didn't address the issues raised by 56-1-11 nor did it attempt to harmonize the potentially inconsistent statutes. See, VanWagoner v. Union Pacific, 186 P.2d 293 (Utah 1947) (Identically worded predecessor to § 56-1-11 imposed civil liability on railroad for injuries which occur from negligent breach of duty to maintain safe crossing).

In view of the express language of § 54-4-15.1, other statutory authority and the clear and unequivocal holdings of numerous Supreme Court opinions, the Court of Appeals and District Court committed error in finding that Union Pacific had no legal responsibility for adequate warning devices at railroad crossings.

It seems curious that, if the legislature really intended the crucial and sweeping changes the railroad suggests, it would do so in the manner and at the place suggested. The rules governing negligence claims arising from railroad crossing accidents were long and painstaking in development. The cases, and the rules derived from them date from early statehood. The change perceived by the railroad would shift responsibility, and presumably tort liability, from railroads to the public. . . . [W]e are persuaded that the statute does not serve the railroad as a defense to plaintiff's assertion in this suit.
. . .

Sullivan v. Chicago & Northwestern Transportation Co., 326 N.W.2d 320, 323 (Iowa 1982) (a railroad cannot hide behind authority of

Department of Transportation to determine the use of warning devices and signs at hazardous crossings in derogation of common law duties).

B. EVEN IF UDOT HAD SOLE AUTHORITY TO PRESCRIBE WARNING DEVICES, UNION PACIFIC IS STILL NOT FREE FROM LIABILITY.

Although this is a case of first impression before the Utah Supreme Court, appellate courts from numerous other jurisdictions have found a railroad has ongoing civil liability for injuries sustained in crossing accidents attributable to inadequate warning devices regardless of state authority and regulation over grade crossings.

It is undisputed that most, if not all, states have enacted pervasive statutory schemes granting their respective transportation departments authority to determine the appropriate method to safeguard the public at railroad crossings as Utah did at Utah Code Ann. §§ 54-4-1, et seq. They serve the salutary purposes of uniformity within the state's transportation system and avoids duplication by placing all of the responsibility within one governmental agency.

It is the desire and intent of the Division of Safety to meet its legal obligations under "Utah's Transportation Act" in protecting the safety of all those who travel in or through the state, while ensuring reasonable and fair implementation of safety regulations that will economically protect the industries and the public.

LeGRAND O. JONES, REGULATORY TRANSPORTATION SAFETY, a White Paper, for the Utah Department of Transportation. These objectives are also consistent with policies fostered under the

Federal Railroad Safety Authorization Act, codified at 45 U.S.C. § 421, et seq. Yet, in spite of state authority over railroad crossings, state and federal appellate courts have uniformly, until Duncan, refused to discharge railroads from their traditional duties.

Illustrative is the case of Stevens v. Norfolk & Western Railway Co., 357 N.E.2d 1 (Ind. App. 1976). There, the applicable statute provided:

Automatic Train Activated Warning Signals. . . .
The authority of the [Public Service Commission] to require the installation of such signals shall be exclusive and shall supercede such power of any other state or local governmental agency.

IC 1971, 8-6-7.7-2 (Burns Supp. 1976). Nonetheless, the court found:

[T]hat a railroad can be found negligent not only in the manner in which it operates its trains, but also, once it is determined under all the circumstances that a grade crossing is extra-hazardous, it can then be found negligent in its failure to adequately protect the public from danger by providing warnings and taking safety precautions in addition to those required by statute, and despite the absence of a public service commission determination that the crossing is extra-hazardous.

Id. at 4.

Similarly, in Harrison v. Grand Trunk Western Railroad Co., 413 N.W.2d 429 (Mich. App. 1987) the statute permitted only authorized officials of the State Road Commission could place highway traffic signs, including railroad warning signs at any given crossing. M.C.L. § 257.615; M.S.A. § 9.2315.

In other words, defendants cannot erect additional crossing signs without proper permission. . . however, apart from the above provisions, defendants still have the common law duty of due care. [citation omitted] That duty includes 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. Among other states where a railroad has been found negligent for inadequate warning devices at a crossing irrespective of state regulation are Illinois, Stromquist v. Burlington Northern, Inc., 444 N.E.2d 1113 (Ill. App. 1983); Iowa, Karl v. Burlington Northern Railroad Co., 880 F.2d 68 (8th Cir. 1989); Florida, Seaboard Coastline Railroad Co. v. Louallen, 479 S.2d 781 (Fla. App. 1985), and; Montana, Runkle v. Burlington Northern, 613 P.2d 982 (Mont. 1982) (also rejecting a pre-emption of the railroad's duties premised upon the Federal-Aid Highway Act of 1973).

Requiring a railroad to seek governmental approval to erect appropriate warning devices at a crossing is reasonable in view of the scant public resources available to correct dangerous conditions. As our facts illustrate, installation of upgrades must often wait two or three years before state or federal funds become available. During the waiting period a hazardous condition persists and grave or fatal accidents can result. Hence, when a railroad is on notice of a hazardous crossing, it

must take action and not merely depend on governmental intervention.³

The precise argument posed by Plaintiffs here was adopted by the federal district court in McMinn v. Consolidated Rail Corp., 716 F. Supp. 125 (S.D.N.Y. 1989). There, similar to the above, the state statute prevented the railroad from effecting a change in warning devices at the crossing without approval of state authorities. Still the court found the railroad was under a duty to petition the appropriate agency to change conditions and if an upgrade was refused, that refusal must be challenged in an appropriate manner, including resolution through litigation or discontinuing service along the line.

In this case it is especially inappropriate for the railroad to seek to absolve itself of liability on this ground because it was hardly vigorous in its effort to persuade the appropriate regulatory authorities that changes should be made at the crossing.

Id. at 127.

In totally discharging Union Pacific from liability for accidents which occur as a result of inadequate warnings at crossings, the Court of Appeals in Duncan not only ruled contrary to clear statutory and case law authority within the State of

³ Union Pacific's and the State's heavy reliance on this purported lack of federal funding should carry little weight with the court. Utah Code Ann. 54-4-15.3 directs UDOT to apportion the cost of installation or improvement of signals between the railroad, public agencies and even the county. Here, Union Pacific did, in fact, pay for the crossing improvements by performing construction work. (R. 298-299).

Utah but also that of other jurisdictions construing similar statutory schemes for crossing regulation.

C. RELIEVING THE RAILROAD FROM LIABILITY FOR CROSSING SAFETY IS CONTRARY TO SOUND POLICY CONSIDERATIONS.

1. Defendant Union Pacific must sometimes Act to Cure Dangerous Conditions without regard to purely Monetary Considerations.

One of the principles expressed in the above cases is the court's refusal to permit a railroad to sit idly by and await governmental action when it is on notice of dangerous conditions at a railroad crossing. With all due respect, government action is frequently slow or even non-existent. In light of its duties to protect the traveling public, railroads must sometimes prod the government into action or face liability for the tragic consequences which result from dangerous conditions. This was precisely the ruling of the 8th Circuit in the case of Brown v. Missouri Pacific Railroad, 703 F.2d 1050 (8th Cir. 1983).

In Brown, local government officials had on two occasions requested the railroad to install or upgrade safety devices at the Laurel Street railroad crossing. These requests were refused. Finally, in 1976, an Arkansas Highway Department surveillance team recommended that warning bells and flashing lights be installed by applying a "hazardous rating index". However, because state and federal funds were unavailable and the railroad would not, at its expense, install safety devices, the crossing went unprotected until, in 1979, the subject fatal accident occurred.

On the basis of those almost identical facts, the 8th Circuit upheld the trial court's award of punitive damages against the railroad.

Punitive damages may be imposed upon a defendant who knew or had reason to know that its course of conduct was about to inflict injury but who nonetheless continued on this course with a conscious indifference to the consequences.

Brown, 703 F.2d 1052. The Circuit Court refused to condone Missouri Pacific's policy determination "that it is cheaper to be sued than to protect railroad crossings." Id., 1053. Finally, although the Court considered the presence of federal and state funding of crossing improvement relevant in determining the railroad's liability, it found that this did not excuse Missouri Pacific's duties.

As the Brown opinion states, a railroad's determination not to upgrade warning devices, and in turn this Court's decision on imposing liability therefor, cannot be guided entirely by the funding considerations relied on by Union Pacific and the Court of Appeals. Rather, this Court should impose liability on Union Pacific when a failure to maintain adequate warning devices results in injury to the public. When, as here, the railroad is on notice of dangerous conditions, action must be taken regardless of federal or state funding issues.

2. The Court of Appeals has Adopted an Unworkable Standard as to the Respective Responsibilities of the Parties to Cure Dangerous Crossing Conditions.

In assessing Union Pacific's duties with respect to crossing warning devices, this Court must avoid the confusing territorial notions espoused by the Court of Appeals in Duncan and Gleave and promote the primary policy concern of public protection.

In Gleave,⁴ the first appellate decision construing the railroad's responsibilities since enactment of § 54-4-15.1, the Court of Appeals reaffirmed the common law principles originally stated in English, to wit:

[The railroad] cannot ignore the public peril at a more than ordinarily hazardous crossing and excuse itself until UDOT takes action to upgrade the safety devices at the . . . crossing. Rio Grande remains subject to a standard of reasonable care which, under the circumstances at this crossing, could require actions to reduce the risks imposed on the public.

Gleave, 749 P.2d 664. Yet, in Duncan the Court of Appeals appears to retreat from the foregoing principles by simply requiring the railroad to reduce vegetation which might obstruct a motorist's view.⁵ In so doing, Judge Bullock defines the railroad's duties in terms of territorial limits, an unworkable standard.

⁴ Gleave v. Denver & Rio Grande Western Railroad Company, 749 P.2d 660 (Utah App. 1988).

⁵ Although Gleave was cited for this proposition, its facts suggest broader responsibilities of the railroad. One of the facts there relied on by Plaintiffs was D&RGW's failure to supplement a stop sign it placed at the crossing.

Simply put, the railroad must purge its right-of-way of hazardous conditions while UDOT is responsible for public roads including signage thereon. What is absent is the traditional interaction between State authorities and the railroad to correct crossing deficiencies. The State can await Federal funds and the railroad, while on notice of the dangers, shrug its shoulders and place blame on an immune governmental authority. In the meantime, the traveling public is exposed to the hazard. This is an unfortunate result which cannot be condoned by this Court. Through this review, the Supreme Court is respectfully urged to return to the laudable policy concerns addressed in English and other Utah precedent which hold railroads, such as Union Pacific, liable for maintenance at crossings, including installation of adequate warning devices.

POINT II

THE STATE OF UTAH SHOULD NOT BE IMMUNE FROM SUIT FOR INJURIES CAUSED BY INADEQUATE WARNINGS AT RAILROAD CROSSINGS.

Relying largely on this Court's decision in Velasquez v. Union Pacific Railroad Company, 469 P.2d 5 (Utah 1970), the Court of Appeals in Gleave and Duncan found UDOT's decision not to upgrade warning devices at railroad crossings immune from liability as the exercise of a "discretionary function" under Utah Code Ann. § 63-30-10(1)(a) (1990). Although the Court of Appeals was bound by Velasquez, the Supreme Court has the opportunity to re-evaluate and overrule that authority in view of twenty years of subsequent sovereign immunity decisions.

A. RECENT CASES EXPRESS THE POLICY OF EXPANDING THE STATE'S LIABILITY.

A constant theme of this Court's recent interpretations of the Governmental Immunity Act is an expansion of liability on the part of the State of Utah.

The policy and legislative intent behind the act is to . . . allow more innocent victims injured by tortious conduct on the part of the public entities access to the courts for redress. Fewer such people will be mercilessly and senselessly barred from recovery for their injuries sustained at the hands of the entities designed to serve them.

Standiford v. Salt Lake City Corp., 605 P.2d 1230, 1237 (Utah . 1980). This rule should apply with particular force where the State has expressly assumed duties formerly those of a private entity (the Union Pacific Railroad) as occurred by the legislature's enactment of Utah Code Ann. § 54-4-14 (1990). On our facts, the State has blurred the distinction between governmental functions and those traditionally performed by the private sector. See, Standiford, 604 P.2d at 1232 and 1233. In assuming these responsibilities, the State must assume associated liabilities as well.

As discussed above, the Court of Appeals decision in Duncan effectively precludes an injured party from recovering for any injuries incurred as a result of inadequate warning devices at railroad crossings. In so doing, it ignored the "important substantive right" of a plaintiff to be compensated for his losses. "It is thus essential that the defendant be made to pay damages and they be equal to plaintiff's loss." Condemarin v.

University Hospital, 775 P.2d 348, 364 (Utah 1989) quoting, R. POSNER, ECONOMIC ANALYSIS OF THE LAW, § 6.12 at 143 (1972).

The expansive freedom from suit granted the State of Utah under Duncan is also contrary to another tort principle espoused in Condemarin, that of deterrence. Although traditionally the courts have been slow to recognize the importance of deterring negligent conduct on the part of the government, it is now widely accepted that even the sovereign must be admonished against committing further negligent acts by holding the State liable for dangerous conditions it helps create. This weighs heavily in favor of liability and against allowing the State a governmental immunity defense in our case.

B. THE STATE OF UTAH HAS EXPRESSLY WAIVED IMMUNITY FOR ACCIDENTS WHICH OCCUR AT RAILROAD CROSSINGS.

In Velasquez, the Utah Supreme Court held that decisions made by the State as to railroad crossing warning devices were the exercise of a "discretionary function" immune from suit pursuant to Utah Code Ann. § 63-30-10(1)(a). By so holding, Justice Ellett implicitly ruled that discretionary function immunity took priority over the express immunity waiver set forth in 63-30-8 under which the plaintiff sought recovery. That section of the Immunity Act (which seems directly applicable to hazardous rail crossings) states, in pertinent part:

Immunity from suit of all governmental entities is waived for any injury caused by a defective, unsafe or dangerous condition of any highway, . . . or other structure located thereon.

As this ruling is contrary to subsequent opinions of the Court, it is submitted that Velasquez has been overruled, sub silentio, as the foundation for the sovereign immunity decision in the present case. As a result, a reversal of the District and Appeals Court decisions in Duncan is warranted and a remand for trial on the State's negligence justified.

In Richards v. Leavitt, 716 P.2d 276 (Utah 1985) and Bigelow v. Ingersol, 618 P.2d 50 (Utah 1980), the Supreme Court found that the express immunity waiver of § 63-30-8 was not modified by discretionary function immunity pursuant to § 63-30-10(1)(a). This is consistent with general rules of statutory construction which state that in the event of an inconsistency, specific provisions govern over more general terms.⁶ It also undercuts the rationale behind Velasquez. Hence, regardless of whether the State is exercising a "discretionary function," when its decision pertains to highway improvement, immunity is expressly abrogated.

The Duncan opinion has only added to the confusion which results from an attempt to interpret all of these immunity cases on highway and railroad crossing issues. This Court should use this opportunity to clarify the law on this question and find the State of Utah liable on our facts.

⁶ The principle that express waivers of immunity as set forth in § 63-30-8, for instance, govern over immunity grants, such as "discretionary function" immunity under 63-30-10(1)(a), was recently reiterated in Hanson v. Salt Lake County, 136 Utah Adv. Rep. 26 (Utah June 15, 1990).

C. EVEN IF DISCRETIONARY FUNCTION IMMUNITY STILL APPLIES, THE DECISION TO IMPROVE WARNING DEVICES IS "OPERATIONAL", NOT "POLICY-MAKING."

Assuming, for purposes of argument, that immunity under 63-30-10(1)(a) is not modified by the express waiver in 63-30-8, the decision to upgrade warning devices at the Droubay Road crossing is still not an act or omission on the part of the State immune from suit as it is not the exercise of a "discretionary function." Little v. Utah State Division of Family Services, 667 P.2d 49 (Utah 1983).

As discussed above, it is difficult if not impossible, to reconcile Velasquez with the more recent immunity decisions in Bigelow, Bowen⁷ and Richards. In Duncan, the Court of Appeals added to that confusion by stating "the government is not liable in tort for its failure to better maintain or to enhance the signage" or "for its failure to do more than minimal warning and control". Duncan, 790 P.2d 601 and 602, respectively. These bewildering attempts to contrast Bowen and Richards with Gleave and Velasquez is highlighted by Judge Jackson in his concurring opinion. At least part of this confusion results from a flawed attempt to categorize UDOT's decision as to warning devices at crossings as "policy-making" as distinguished from "operational."

Aside from their rulings on application of 63-30-8, Richards and Bigelow clearly held that decisions as to the design of traffic control systems (presumably including warning devices

⁷ Bowen v. Riverton City, 656 P.2d 434 (Utah 1982).

at railroad crossings) take place at the operational level as distinguished from the policy-making level and hence do not constitute the exercise of a "discretionary function." Bigelow v. Ingersol, 618 P.2d 53. That the decision to upgrade warning devices is operational, not policy making, is consistent with the UDOT prioritization procedures.

On our facts, the UDOT surveillance team will inspect a given railroad crossing and through application of a purely mathematical formula, arrive at a "hazard rating index". Those crossings which fall at a certain level receive priority and funding and those which fall below that level must await later funding or some other change in conditions. Here, UDOT recommended installation of automatic crossing gates at Droubay Road in 1981, prior to the Duncan accident, but the request for funding from the federal government was deferred. This deferral was "implementive" under the standards in Bigelow and consequently not immune.

UDOT's decision not to install automatic crossing gates at Droubay Road prior to the Duncan accident is not a discretionary act under the criteria set forth in Little, 667 P.2d 49. The court there held that to be purely discretionary, an act by the state must be affirmed under four preliminary questions:

- (1) Does a challenged act, omission or decision necessarily involve a basic governmental policy, program or objective?

- (2) Is the questioned act, omission or decision essential to the realization or accomplishment of the policy program or objective as opposed to one which would not change the course or direction of the policy, program or objective?
- (3) Does the act, omission or decision require the exercise of basic policy evaluation, judgment and expertise on the part of the governmental agency involved?
- (4) Does the governmental agency involved possess the requisite, constitutional, statutory or lawful authority and duty to make the challenged act, omission, or decision?

Id. at 51. It is submitted that the determination here at issue fails at least two of these standards.

First, the alleged negligent conduct in this case - the manner of warning the public - was not "essential to the realization or accomplishment of a governmental policy." Irvine v. Salt Lake County, 785 P.2d 411 (Utah 1989). Secondly, the recommendation to upgrade warning devices was in the nature of a professional judgment, not policy making. Abbett v. County of St. Louis, 424 N.W.2d 82 (Minn. App. 1988) (decision on where to install guardrail pursuant to standard enunciated in highway manual does not involve policy making protected under discretionary function immunity). See also, Ostendorf v. Kenyon, 347 N.W.2d 434 (Minn. App. 1984) (Placement of warning signs on

highway not a discretionary act where state had notice of dangerous condition which could be improved by additional or better signs).

This analysis is consistent with the decision reached in Johnson v. State, 636 P.2d 47 (Ala. 1981). There, the plaintiff brought a negligent action against the state alleging, among other claims, a failure to provide adequate warnings at the subject railroad crossing. The state argued that the decision on the type of warning sign to be utilized was the exercise of a "discretionary function." The court rejected the state's position finding that the decision to sign was "operational" and hence not immune. See also, Williams v. State, 438 S.2d 781 (Fla. 1983) (failure to place warning signs at a railroad crossing which is known to be dangerous is an operational-level function immunity which is waived).

The continued viability of Velasquez is gravely questioned by the Court's subsequent opinions in Bigelow, Bowen and Richards all of which reject a discretionary function immunity for the government's decisions as to the design and signage at or on public thoroughfares. Without Velasquez, the Court of Appeals decision on sovereign immunity in Duncan must fall and this case returned to the District Court.

POINT III

IF THE COURT FINDS, AS A MATTER OF LAW, THAT THE RAILROAD HAD A DUTY WITH RESPECT TO WARNING DEVICES AND THE STATE IS NOT IMMUNE THIS CASE MUST BE REMANDED FOR TRIAL.

It is conceivable that the court could reject sovereign immunity for the State and hold Union Pacific liable for inadequate warnings at crossings yet affirm the summary judgment by finding that the Droubay Road crossing was not "extra-hazardous" as a matter of undisputed fact. This is not, however, a finding which is supported by the facts in our case.

The question of whether there is something in the nature of the railroad crossing to require additional safety precautions is traditionally and properly one to be reached by a competent jury. Whether a party is negligent in failing to provide automatic gates is a material question of fact which is almost always disputed by the parties. DeElena v. Southern Pacific Co., 592 P.2d 759 (Ariz. 1979); English v. Southern Pacific Co., 45 P.2d 47. ("As a general rule it may be said that whether ordinary care or reasonable prudence requires a railroad company [to take additional precautions] at a crossing that is especially dangerous is a question of fact for a jury to determine . . ." 45 P.2d 50). As with most negligence actions, summary judgment should be granted with great caution in an action arising out of a crossing accident. Williams v. Melby, 699 P.2d 723 (Utah 1985).

In our case there was more than ample evidence to premise a finding that the Droubay Road crossing was extra-hazardous. Plaintiffs offered the affidavit of Robert Crommelin who, after performing an on-site inspection of the crossing

opined that it was indeed "extra-hazardous." In rendering this opinion he relied upon:

- (a) actual and projected traffic volume on the roadway, including school buses.
- (b) train volume and speed.
- (c) angle of the crossing, 43°. ⁸
- (d) placement of existing warning signs at 300' and 5' away from the crossing. ⁹
- (e) evidence of other accidents at the crossing. ¹⁰

By application of the above factors in a hazard rating index, Crommelin arrived at the conclusion that the crossing did warrant additional safeguards, specifically automatic crossing gates.

In order to grant Defendants' Motions for Summary Judgment, Judge Hanson struck or refused to consider the Crommelin Affidavit mistakenly finding that his testimony lacked an adequate foundation. (R. 484). This was because Crommelin had relied, in part, on information contained in surveillance team inspection reports, which Defendants offered through the Affidavits of Ross Wilson, Lillian Witkowsky, Woodrow Burnham and Duncan Silver.

⁸ "This angle makes it extremely difficult for motorists to judge the speed, distance and approach of trains nearing the crossing." (R. at 189)

⁹ "Federal standards clearly mandate that such sign are to be 750' in advance of a crossing in a rural area." (R. at 188).

¹⁰ As of the date of the Duncan accident, there had been three similar accidents at the crossing.

Rule 56(e), Utah Rules of Civil Procedure, does require an affiant to base his opinion upon specific facts. However, when the affiant is an expert witness, those specific facts need not be independently admissible so long as they are of the sort reasonably relied upon by experts in the field and are trustworthy and reliable. Rule 703, Utah Rules of Evidence. See also, In re: Agent Orange Product Liability Litigation, 611 F. Supp. 1223 (S.D.N.Y. 1985) construing the similarly worded Federal Rules of Procedure and Evidence. As Crommelin was relying upon an on-site inspection and the identical facts utilized by Defendants' affiants, his testimony should have been admitted and considered. As it raised disputed issues of material fact concerning the hazardous condition of the crossing, summary judgment should have been denied.

Even without the Crommelin Affidavit, there is ample evidence from which to find a disputed issue of material fact on the question of the crossing being "extra-hazardous." Defendants' own UDOT surveillance team reports recommending automatic crossing gates reveal the State and railroad had notice of dangerous conditions but nonetheless failed to take curative actions simply because "federal funds were unavailable." And, though evidence of prior accidents is inadmissible for purposes of proving negligence, it is admissible to show the existence of a danger or defect. Runkle v. Burlington Northern, 613 P.2d 982. And, the fact that automatic gates were ultimately installed by

the State and railroad impeachs Defendants' testimony that the crossing was not "extra-hazardous."

In this case, experts testified for the railroad that the crossing was not extra-hazardous. The fact that automatic signals were installed on the crossing after the accident would have been relevant for the purpose of impeachment as well as feasibility.

Id. at 987. See also, Rule 407, Utah Rules of Evidence.

In granting the Motions for Summary Judgment, the District Court improperly struck Plaintiffs' Affidavit and ignored evidence of an "extra-hazardous" crossing contained within Defendants' own submissions. Should the court find that one or both of the Defendants are liable for inadequate signage at railroad crossings, it must remand for a trial on the disputed issue of whether the Droubay Road crossing was "extra-hazardous."


CONCLUSION

Based upon the foregoing, the District Court and the Court of Appeals erred in absolving the Union Pacific Railroad from liability as to inadequate warning devices at railroad crossings in granting the State of Utah governmental immunity for its decisions on upgrading such warning devices. And as there is more than sufficient evidence to find the Droubay Road crossing "extra-hazardous" as would necessitate additional safeguards, the District Court's Summary Judgment must be reversed and this matter remanded for purposes of a trial on the merits of the negligence claims.

The Supreme Court cannot let stand rulings which deny worthy Plaintiffs compensation for injuries sustained as a result of dangerous conditions created by the Defendants.

Respectfully submitted this 16th day of October, 1990.

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Brief was mailed, postage prepaid, this 16th day of October, 1990, to the following:

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Addenda

STATUTES

54-4-15. Grade crossings — Transportation department — Commission — Regulation.

(1) No track of any railroad shall be constructed across a public road, highway or street at grade, nor shall the track of any railroad corporation be constructed across the track of any other railroad or street railroad corporation at grade, nor shall the track of a street railroad corporation be constructed across the track of a railroad corporation at grade, without the permission of the Department of Transportation having first been secured: provided, that this subsection shall not apply to the replacement of lawfully existing tracks. The department shall have the right to refuse its permission or to grant it upon such terms and conditions as it may prescribe.

(2) The department shall have the power to determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use and protection of each crossing of one railroad by another railroad or street railroad, and of a street railroad by a railroad and of each crossing of a public road or highway by a railroad or street railroad, and of a street by a railroad or vice versa, and to alter or abolish any such crossing, to restrict the use of such crossings to certain types of traffic in the interest of public safety and is vested with power and it shall be its duty to designate the railroad crossings to be traversed by school buses and motor vehicles carrying passengers for hire, and to require, where in its judgment it would be practicable, a separation of grades at any such crossing heretofore or hereafter established, and to prescribe the terms upon which such separation shall be made and the proportions in which the expense of the alteration or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected, or between such corporations and the state, county, municipality or other public authority in interest.

(3) Whenever the department shall find that public convenience and necessity demand the establishment, creation or construction of a crossing of a street or highway over, under or upon the tracks or lines of any public utility, the department may by order, decision, rule or decree require the establishment, construction or creation of such crossing, and such crossing shall thereupon become a public highway and crossing.

(4) The commission shall retain exclusive jurisdiction for the resolution of any dispute upon petition by any person aggrieved by any action of the department pursuant to this section.

History: L. 1917, ch. 47, art. 4, § 14; C.L. 1917, § 4811; R.S. 1933, 76-4-15; L. 1939, ch. 84, § 1; C. 1943, 76-4-15; L. 1975 (1st S.S.), ch. 9, § 17.

Cross-References. — Change of grades and crossings. § 10-8-34.

Cities, power to regulate tracks. § 10-3-33.
Fences, cattle guards and street crossings. § 10-3-35.
Flagmen, grade crossings and drains. § 10-3-36.

54-4-15.1. Signals or devices at grade crossings — Duty of transportation department to provide.

The Department of Transportation so as to promote the public safety shall as prescribed in this act provide for the installing, maintaining, reconstructing, and improving of automatic and other safety appliances, signals or devices at grade crossings on public highways or roads over the tracks of any railroad or street railroad corporation in the state.

History: L. 1973, ch. 118, § 1; 1975 (1st S.S.), ch. 9, § 18.

Meaning of "this act". — The term "this

act," referred to in this section, means L. 1973, ch. 118, §§ 1 through 4, which appear at §§ 54-4-15.1 through 54-4-15.4.

54-4-15.2. Signals or devices at grade crossings — Funds for payment of costs.

The funds provided by the state for purposes of this act shall be used in conjunction with other available moneys, including those received from federal sources, to pay all or part of the cost of the installation, maintenance, reconstruction or improvement of any signals or devices described in § 54-4-15 1 at any grade crossing of a public highway or any road over the tracks of any railroad or street railroad corporation in this state

History L 1973, ch. 118, § 2
Meaning of "this act" — See note under
this catchline following § 54-4 15 1

54-4-15.3. Signals or devices at grade crossings — Apportionment of costs by transportation department — Liability of cities, towns and counties — Claims for payment of costs.

The Department of Transportation, in accordance with the provisions of § 54-4-15, shall apportion the cost of the installation, maintenance, reconstruction or improvement of any signals or devices described in § 54-4-15 1 between the railroad or street railroad and the public agency involved Unless otherwise ordered by the department, the liability of cities, towns and counties to pay the share of maintenance cost assigned to the local agencies by the department shall be limited to the funds provided under this act Payment of any moneys from the funds provided shall be made on the basis of verified claims filed with the Department of Transportation by the railroad or street railroad corporation responsible for the physical installation, maintenance, reconstruction or improvement of the signal or device

History L 1973, ch 118 § J, 1975 (1st S S), ch 9, § 19 Meaning of "this act" — See note under
this catchline following § 54-4-15 1

56-1-11. Maintenance of crossings.

Every railroad company shall be liable for damages caused by its neglect to make and maintain good and sufficient crossings at points where any line of travel crosses its road

History R.S 1898 & C L 1907, § 445; C L 1917, § 1237; R S 1933 & C 1943, 77-0-11 Regulation of crossings, § 10 8 34 et seq
Stopping at crossings, duties of buses and
Cross-References — Gates at crossings, certain trucks, § 41 6 97
§ 10 8 83

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

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

History: L. 1965, ch. 139, § 8.

63-30-10. Waiver of immunity for injury caused by negligent act or omission of employee — Exceptions — Waiver for injury caused by violation of fourth amendment rights [Effective until July 1, 1990].

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

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

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

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

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

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

(f) arises out of a misrepresentation by the employee whether or not it is negligent or intentional; or

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

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

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

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

(k) arises from any natural condition on state lands or the result of any activity authorized by the Board of State Lands and Forestry;

(l) arises out of the activities of:

(i) providing emergency medical assistance;

(ii) fighting fire;

(iii) regulating, mitigating, or handling hazardous materials or hazardous waste; or

(iv) emergency evacuations; or

(m) arises out of research or implementation of cloud management or seeding for the clearing of fog.

(2) (a) Immunity from suit of all governmental entities is waived for injury proximately caused or arising out of a violation of protected fourth amendment rights as provided in Chapter 16, Title 78 which shall be the exclusive remedy for injuries to those protected rights.

(b) If Section 78-16-5 or Subsection 77-35-12(g) or any parts thereof are held invalid or unconstitutional, this Subsection (2) shall be void and governmental entities shall remain immune from suit for violations of fourth amendment rights.

Rule 56. Summary judgment.

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

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

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

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

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

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

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

(1955), the appellant had failed to comply with a trial court order in a divorce proceeding and had been found in contempt. The Nevada Supreme Court did not dismiss his appeal for failure to comply with the judgment below, but held that the appeal would be dismissed unless the appellant within 30 days submitted himself to the process of the trial court or posted a supersedeas bond. *Id.* 280 P.2d at 291. The court stated:

[A]ppellant husband is now a fugitive from process of the trial court. We shall not permit him to avail himself of judicial review while at the same time he places himself beyond reach of the process of the trial court in defiance of its attempts to enforce its judgment . . .

We do but insist that one seeking the aid of the courts of this state should remain throughout the course of such proceeding, amenable to all judicial process of the state which may issue in connection with such proceeding.

Id. at 291 (emphasis added).

The United States Supreme Court considered an appellate court's dismissal of a civil appeal on the basis that the appellant was in contempt of the trial court's order in *National Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37, 75 S.Ct. 92, 99 L.Ed. 46 (1954). The Court was asked to decide whether the Washington Supreme Court violated either the equal protection clause or the due process clause of the fourteenth amendment when it dismissed an appeal from a money judgment as a reasonable measure for safeguarding the collectibility of that judgment. The appellant had filed a notice of appeal, but had offered no supersedeas bond and had obtained no stay of the proceedings. *Id.* at 39, 75 S.Ct. at 93-94. The trial court ordered the appellant to deliver certain bonds in its possession to the court's receiver for safekeeping pending disposition of the appeal. *Id.* The appellant refused and was held in contempt. *Id.* As a result, the Washington Supreme Court struck the ap-

peal on the merits, giving the appellant 15 days to purge its contempt by delivering the bonds. *Id.* at 40, 75 S.Ct. at 94. The United States Supreme Court found no constitutional violation, stating that "[w]here statutory review is important and must be exercised without discrimination, such a review is not a requirement of due process." *Id.* at 43, 75 S.Ct. at 95. The Court stressed that "[p]etitioner's appeal was not dismissed because of petitioner's failure to satisfy a judgment pending an appeal from it. It was dismissed because of petitioner's failure to comply with the court's order to safeguard petitioner's assets from dissipation pending such appeal." *Id.* at 44, 75 S.Ct. at 96.

We are persuaded that the *Closest* approach is most consistent with the Utah Supreme Court's *Tuttle* decision and the United States Supreme Court's *Arnold* decision. By adopting this approach, we do not deny appellant her right to an appeal under Utah Const. art. VIII, § 5,² but rather insist she must submit herself to the jurisdiction of the trial court and satisfy that court's concerns before she may exercise that right. She merely has the obligation to come forward and offer a reasonable alternative to the trial court to safeguard her assets from dissipation pending her appeal.

Appellant was given the opportunity to post a supersedeas bond, but has refused. She has ignored the orders of the trial court and, apart from obtaining a temporary stay which she allowed to lapse, she has provided no reasonable alternative to allow the court to insure that her assets are available to satisfy the judgment pending appeal. By her actions, appellant is frustrating the administration of justice.

Appellant has not claimed that she did not have the ability to comply with the trial court's order. See *Stewart v. Stewart*, 18 Ariz. 356, 372 P.2d 697, 700 (1962). The situation is similar to one faced by a

appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause."

trial court, where it found it was "dealing with a fugitive who not only has previously failed to appear as ordered, but who up to the very time remains a fugitive from justice. Apparently, he is unwilling to respond to a court order with which he disagrees, but seeks to obtain on appeal" a more favorable result. *Tobin v. Casaus*, 188 Cal.App.2d 588, 275 P.2d 792, 795 (1954).

We therefore hold that appellant has 30 days from the date of the issuance of this opinion to bring herself within the process of the trial court. If appellant submits herself to the trial court, she should be afforded an opportunity to offer alternatives to the trial court to protect the judgment. Appellant may persuade the court it should hold the disputed judgment amount in trust until a resolution of this appeal on the merits. However, if appellant persists in ignoring herself in violation of the trial court's orders, her appeal will be dismissed at the expiration of the 30-day period.

GARFF and ORME, JJ., concur.



leave DUNCAN, individually and as personal representative of the Estate of Patrick Duncan, deceased; Jason E. Duncan, a minor by and through his Guardian ad Litem; Alice Duncan; Norman Duncan; Michael Duncan; Tim Duncan; Kevin Duncan; Brian Duncan; Michelle Bowers, individually and as personal representative of the Estate of Jeffrey and Nicole Bowers, deceased; Joshua Bowers; Florence Hanson;

Shelly Bowers; Sherry Bowers; Monica Henwood, individually and as personal representative of the Estate of Ramon Henwood, deceased; Phyllis Henwood; and Owen Henwood, Plaintiffs and Appellants,

v.

UNION PACIFIC RAILROAD COMPANY, a corporation; The State of Utah; Paul Kleinman; and Does 1 through 100, inclusive, Defendants and Respondents.

No. 890291-CA.

Court of Appeals of Utah.

April 12, 1990.

Heirs of victims of train-automobile accident brought action against railroad, Department of Transportation and railroad engineer. The Third District Court, Tooele County, Timothy R. Hanson, J., entered summary judgment dismissing wrongful death action. Heirs appealed. The Court of Appeals, J. Robert Bullock, Senior District Judge, held that: (1) heirs failed to establish that either engineer or railroad were negligent, and (2) Department, having given at least some warning or control at railroad crossing, was governmentally immune in deciding whether to improve means of warning or control at crossing because of fiscal effects of decision.

Affirmed.

Jackson, J., filed a concurring opinion.

1. Railroads ⚡348(1)

Evidence failed to support claim of heirs of accident victims that there was negligence in operation of train or entrusting its operation to engineer who was in charge at time of automobile-train collision.

2. Railroads ⚡348(2)

Evidence did not support claim of heirs of accident victims that railroad negligently maintained railroad right-of-way at crossing with street where train-automobile collision occurred; there was nothing to indicate what could have made railroad's right-

2. Utah Const. art. VIII, § 5 provides, in pertinent part "Except for matters filed originally with the supreme court, there shall be in all cases an

of-way safer to motorist crossing since path of train was clearly visible to oncoming motorists.

3. Railroads ⇨303(1)

Railroad has tort duty to maintain its rights-of-way in condition safe to motorists who traverse them at established crossings.

4. Railroads ⇨303(1)

Railroad is required to take precautions to prevent injury to motorists crossing railroad right-of-way if reasonable person in railroad's position would take such precautions.

5. Railroads ⇨303(1)

In determining what is reasonable under the circumstances for railroad crossing, every railroad crossing is hazardous but, since it is not practicable to eliminate all railroad crossings, simple existence of railroad crossing is not in itself a breach of duty of care.

6. Railroads ⇨303(1)

For railroad to be liable for crossing mishap, there must be something about railroad's right-of-way that creates hazard to motorist greater than hazard presented by simple fact that railroad and street intersect.

7. Railroads ⇨303(1)

Railroad is required to take every reasonable action to assure safety of motorist who can reasonably be expected to cross right-of-way and in determining what is reasonable under circumstances of specific case, trier of fact must ultimately weigh burden on railroad, and indirectly on public, of requiring added precautions, against benefits that would be derived by public at large from precautions.

8. Railroads ⇨307(2, 3)

It was not responsibility of railroad to place signs and devices on public road warning motorists of railroad crossing.

9. States ⇨112(1)

Governmental immunity shields sovereign policy making and discretion from state law damage claims by generally precluding damage liability for performance of

governmental function subject to certain statutorily enumerated waivers.

10. Automobiles ⇨277

Department of Transportation enjoyed governmental immunity from liability in action brought by heirs of train-automobile accident victims alleging that safety improvements at railroad crossing were inadequate U.C.A.1953, 63-30-10.

11. Municipal Corporations ⇨724

Test for determining governmental immunity is whether activity under consideration is of such unique nature that it can only be performed by governmental agency or that it is essential to core of governmental activity, and under that test, court examines nature of activity itself, not identity of person performing activity.

12. Automobiles ⇨279

Government may be held liable in tort for failure to provide some effective warning or control for traffic at city intersection; however, duty to provide some effective warning or control must be distinguished from more than minimal maintenance and from enhancement of means of providing warning and control.

13. Automobiles ⇨279

Highways ⇨194

As long as warning or control signage of clear hazard is in existence and maintained enough to give it minimal effectiveness, government is not liable in tort for failure to better maintain or to enhance signage.

Michael A. Katz (argued), Burbidge & Mitchell, Salt Lake City, for appellants.

J. Clare Williams (argued), Larry A. Gothenbein, Salt Lake City, for respondents Union Pacific R. Co. and Paul Kleinman.

Allan L. Larson (argued), Craig Barbra, Anne Swenson, Snow, Christensen & Martineau, Salt Lake City, R. Paul Van Pelt, State Atty. Gen., Stephen J. Screws, Asst. Atty. Gen., Salt Lake City, for respondent State of Utah.

Before BENCH and JACKSON, JJ., and BULLOCK,¹ Senior District Judge.

OPINION

J. ROBERT BULLOCK, Senior District Judge.

Plaintiffs appeal from a summary judgment dismissing their wrongful death action arising out of a train-automobile collision. We affirm.

Droubay Road is a two-lane thoroughfare running north and south in rural Tooele County. At one point, it intersects the Union Pacific Railroad tracks at approximately a 43-degree angle on the north and a 136-degree angle on the south. Three roadside signs warn oncoming motorists of the crossing, one sign located about 300 feet from the crossing, and two on either side of the road 19 feet from the crossing. There are no flashing lights or mechanical devices at the crossing to warn of an approaching train, but nothing obstructs a motorist's view of the tracks for several thousand feet.

On the evening of April 9, 1983, at about 6:50 p.m., a Union Pacific train operated by Paul Kleinman struck an automobile and killed all four occupants of the vehicle at the Droubay Road crossing. There is no evidence to indicate that the train was negligently or improperly operated, and its headlight, warning bells, and whistles were activated well in advance of the crossing. The engineer, Kleinman, averred that he saw the car approach the crossing but believed that it would stop. When it became apparent that the car was not going to stop, it was too late for him to stop the train.

The Utah Department of Transportation (UDOT) periodically evaluated the Droubay Road crossing in planning the allocation of its resources, including federal funding, for state-wide highway improvements. Under the methods used at the time, the Droubay Road crossing did not rank high enough in

UDOT's prioritization of the State's railroad crossings to receive additional safety improvements, such as electrified lights and crossbars.

The heirs of the accident victims sued Union Pacific and engineer Kleinman for negligent operation of the train, negligent maintenance of the railroad right of way at the Droubay Road crossing, and for entrusting operation of the train to an allegedly unfit employee. The heirs also sued the State, claiming that the safety improvements at the crossing were inadequate. All of the defendants moved for summary judgment, and the district court granted their motions and dismissed the complaint. Plaintiffs appealed.

CLAIMS AGAINST UNION PACIFIC

In defense against the motions for summary judgment, the plaintiffs filed an affidavit of one Robert Crommelin, a traffic safety engineer. In Crommelin's opinion, "the warning signs present at the crossing were clearly inadequate" and "the intersection [was] clearly 'extra hazardous.'" The district court, however, struck Crommelin's affidavit on the grounds that 23 U.S.C. § 409 (Supp.1989) forbade admission into evidence of the factual basis for Crommelin's conclusions, and Utah Rule of Civil Procedure 56(e) permits only affidavits which state "such facts as would be admissible in evidence[.]" Crommelin's opinion was based partly on information gained from UDOT's records of the Droubay Road crossing. To facilitate candor in administrative evaluations of highway safety hazards, 23 U.S.C. § 409 prevents a court from receiving records of such evaluations into evidence.² Therefore, under this federal statute, the documents from which Crommelin obtained a large part of the data used in reaching his conclusions were inadmissible.

On that basis, the district court struck Crommelin's affidavit. However, the dis-

¹ J. Robert Bullock, Senior District Judge, sitting by special appointment pursuant to Utah Code Ann. § 78-3-24(10) (Supp. 1989).

² The legislative purpose of section 409 can be gleaned from H.Conf. Rep. No. 100-27, 104th Cong. 1st Sess. 172-173, reprinted in 1987 U.S. Code Cong. & Admin. News 66, 156-57.

trict court also ruled that, even if the affidavit were considered, the case should be dismissed on its merits. Faced with these alternative grounds for the same result, we choose on appeal in this case to rest our decision on the merits. We will thus take Crommelin's opinion at face value.

[1] Even if Crommelin's affidavit is considered, plaintiffs did not show that Union Pacific breached any duty of care in the collision at the Droubay Road crossing. Plaintiffs alleged negligence in the operation of the train by Kleinman and, through *respondent superior*, by Union Pacific, as well as negligence by Union Pacific in employing an unfit train operator and in maintaining its right of way. Plaintiffs also sought punitive damages from Union Pacific for willful and reckless conduct. Plaintiffs introduced no evidence to show that the train was negligently operated, much less that the collision was willfully and recklessly caused, and no evidence to show that Kleinman was unfit to operate the train. Kleinman avers that he operated the train properly. Of course, Kleinman's testimony is biased, and there are no known witnesses surviving the crash other than Union Pacific employees. Nevertheless, lacking any evidence to the contrary, we conclude that plaintiffs failed to show negligence in operating the train or in entrusting its operation to Kleinman.³

[2] The only claim against Union Pacific on which evidence was introduced was the claim for negligent maintenance of the railroad right of way, which is supported, from plaintiffs' point of view, by Crommelin's affidavit. We therefore proceed to consider this claim.

[3] It is settled that a railroad has a tort duty to maintain its rights of way in a

condition safe to motorists who traverse them at established crossings.⁴ However, there seems to be a lack of clarity about the standard of care required of the railroad in the observance of this duty, and this apparent lack of clarity has led to some criticism of the Utah standard of care as it was understood.⁵ Since we must apply a standard of care in determining whether Union Pacific breached its duty, we attempt to state clearly the extent to which a railroad must make its right of way safe for motorists to cross.

[4] The confusion concerning the standard of care centers in the meaning of the words "more than ordinarily hazardous," which were used in applying the standard of care in two Utah cases, *Bridges v. Union Pacific R.R. Co.*, 26 Utah 2d 281, 488 P.2d 738 (1971), and *English v. Southern Pacific Co.*, 13 Utah 407, 45 P. 47 (1896). These words were never intended to impose a standard of care higher than ordinary care, the degree of care exercised by a reasonable person under the circumstances.⁶ Thus, the railroad is required to take precautions to prevent injury to crossing motorists if a reasonable person in the railroad's position would take such precautions.⁷

[5, 6] In determining what is reasonable under the circumstances of a railroad crossing, it is obvious that every railroad crossing is hazardous, but, since it is not practicable to eliminate all railroad crossings, the simple existence of a railroad crossing is not in itself a breach of a duty of care. Much of everyday life presents hazards; driving or walking along a street are hazardous, and so are stairs, electricity, and many other things, but we tolerate those hazards because of the impracticability of eliminating them. In determining

whether a mishap involving one of those hazards is tortious, the question is not whether a hazard existed, but rather whether, under prevailing community standards, the defendant should bear the responsibility to discover and ameliorate a hazard, in light of the practicability of doing so and the costs and benefits to society of requiring the defendant to do so.⁸ In the case of railroad crossings, the cost of eliminating the hazard, such as by installing overpasses at all railroad crossings, including rural ones, does not warrant a duty of care so rigorous that simply having a railroad cross a street is tortious. Rather, for a railroad to be liable for a crossing mishap, there must be something about the railroad's right of way that creates a hazard to motorists greater than the hazard presented by the simple fact that the railroad and the street intersect.

[7] In determining what is reasonable to require of a railroad in its tort liability for crossings, it would thus be error to hold that the railroad right of way cannot cross a street. However, for such a crossing, the railroad is required to take every reasonable action to assure the safety of motorists who can reasonably be expected to cross the right of way. In determining what is reasonable under the circumstances of a specific case, the trier of fact must ultimately weigh the burden on the railroad, and indirectly on the public, of requiring added precautions, against the benefits that would be derived by the public at large from such precautions. For example, in the *Gleave* case,⁹ wild vegetation on the right of way obscured oncoming trains from motorists at the crossing. The cost of removing or maintaining the vegetation was minimal compared to the enormous benefit to the public of being able to see an approaching train at a frequent crossing.

The imposition of a tort duty on the railroad to remove or maintain the vegetation was therefore clearly correct.

[8] In this case, there is nothing to indicate what could have made Union Pacific's right of way safer to motorists crossing on Droubay Road. The path of the train is clearly visible to oncoming motorists. Plaintiffs suggest that Union Pacific should have placed warning signs and devices on Droubay Road, including automatic gates blocking traffic on the Road from crossing the tracks when a train was approaching. It is not, however, the responsibility of the railroad to place signs and devices on the public road. The railroad must maintain its own right of way, but it is not under any duty to place signs or devices on the public road.

The design and maintenance of state roads and the control of traffic on state roads are UDOT's responsibilities and prerogatives.¹⁰ At common law, this responsibility at railroad crossings was shared with the railroad.¹¹ Thus, in *English*, the railroad was found liable for failing to flag motorists on an intersecting city street. Since *English*, however, UDOT has been established, and the Legislature invested UDOT with "power to determine and prescribe the manner of . . . protection of each crossing."¹² Although that responsibility in no way reduces the railroad's responsibility to maintain its right of way,¹³ it would nevertheless, under ordinary circumstances, place the railroad in the role of meddler, trespasser, or usurper if the railroad were to put signs on the public road or forbid traffic on the public road from crossing its right of way. Union Pacific therefore had no duty to place signs or roadblocking devices on Droubay Road,

3. See *Ron Case Roofing & Asphalt Paving Co. v. Blomquist*, 773 P.2d 1382, 1385 (Utah 1989); *Creekview Apartments v. State Farm Ins. Co.*, 771 P.2d 693, 695 (Utah Ct.App.1989).

4. *Gleave v. Denver & Rio Grande W. R.R. Co.*, 749 P.2d 660, 662-64 (Utah Ct.App.1988).

5. *Wilde v. Denver & Rio Grande W. R.R. Co.*, No. C-83-1493, slip op. at 16, 1985 WL17370 (D.Ut. April 3, 1985).

6. *English*, 45 P. at 50.

7. See *Meese v. Brigham Young Univ.*, 630 P.2d 720 (Utah 1981); *Whitman v. W.T. Grant Co.*, 16 Utah 2d 81, 395 P.2d 918 (1964); Restatement (Second) of Torts § 283 (1965).

8. See *Enckson v. Walgreen Drug Co.*, 120 Utah 31, 232 P.2d 210, 31 A.L.R.2d 177 (1951); *Wagener v. Waterslide, Inc.*, 744 P.2d 1012, 1013 (Utah App.1987).

9. *Gleave v. Denver & Rio Grande W. R.R. Co.*, 749 P.2d 660, 662-64 (Utah 1988).

10. Utah Code Ann. § 54-4-15.1 (1990).

11. Although we hold that the railroad does not have authority or responsibility to place signs or roadblocks on the public road, we note that the cost of protecting users of the public road continues to be shared with the railroad pursuant to Utah Code Ann. § 54-4-15.3 (1990).

12. Utah Code Ann. § 54-4-15(2) (1990).

13. *Gleave*, 749 P.2d at 664.

and it is not liable in tort for its failure to do so.

CLAIMS AGAINST UDOT

[9,10] Governmental immunity is UDOT's principal defense¹⁴ against plaintiffs. Governmental immunity shields sovereign policy-making and discretion from state-law damage claims by generally precluding damage liability for performance of a governmental function, subject to certain statutorily enumerated waivers.¹⁵

Resolution of the governmental immunity question in this case is controlled by *Gleave*, which held that UDOT was governmentally immune in determining the precise method to be used in warning persons on a public road approaching a railroad crossing. We follow *Gleave*, and hold that UDOT is immune in this case. We add, however, a few comments to address the particular arguments of counsel in this case.

[11] Plaintiffs cite *Bowen v. Riverton City*, 656 P.2d 434 (Utah 1982) in an attempt to avoid governmental immunity. In *Bowen*, the Utah Supreme Court reversed a summary judgment in favor of Riverton in a tort action. *Bowen* asserted that a stop sign at a busy Riverton intersection was lying on the ground as *Bowen* and another vehicle collided in the intersection.

14. We logically do not reach the affirmative defense of governmental immunity without first determining or presuming that a plaintiff has established a prima facie case. See *Ferree v. State of Utah*, 784 P.2d 149 (Utah 1989). However, while UDOT's prima facie liability was perhaps implicitly presumed in the district court's reasoning, the district court did not expressly review plaintiffs' prima facie claim against UDOT. We are reluctant to delve into an issue on which the trial court has not expressly ruled, for the reasons explained in *Zions First Nat'l Bank v. National Am. Title Ins. Co.*, 749 P.2d 651, 654 (Utah 1988). Therefore, we choose to rest our decision on governmental immunity and presume for purposes of argument (but do not hold) that the plaintiffs have stated a prima facie case of negligence by UDOT. See *Kirk v. State of Utah*, 784 P.2d 1255 (Utah App. 1989).

15. See *Utah Code Ann.* § 63-30-10 (1989). The scope of the governmental immunity issue in this case is limited. Plaintiffs have not sued any governmental personnel, and therefore, the

Bowen came after the pathbreaking *Standiford v. Salt Lake City Corp.*, 605 P.2d 1230 (Utah 1980), but did not cite *Standiford* or refer to its test for "governmental function," the threshold of governmental immunity analysis. *Standiford* held that the test for determining governmental immunity is "whether the activity under consideration is of such a unique nature that it can only be performed by a governmental agency or that it is essential to the core of governmental activity." *Standiford*, 605 P.2d at 1236-37. Under this test, we examine the nature of the activity itself, not the identity of the person performing the activity. In this case, for example, the activity in question consists of designing and maintaining a road. It would make the analysis tautological to define the activity as designing and maintaining a public or governmental road.¹⁶

As Judge Jackson points out in his separate concurring opinion, the absence in *Bowen* of a reference to *Standiford* could simply be a result of the procedural posture of the *Bowen* case. Possibly the only issues before the court in *Bowen* were the elements of *Bowen*'s prima facie case, and the court did not reach the issue of governmental immunity because it is a defense, rather than an element of the prima facie case. However, *Bowen*'s emphasis on Riv-

erton's duty to maintain streets becomes rather disingenuous lip service if Riverton had a viable defense of governmental immunity against all liability based on that duty. While procedurally it is important to observe the distinction between plaintiff's prima facie case and defendant's defenses, in a more basic sense, what is ultimately important is the scope of governmental responsibility, which, in a well-pleaded case, is a function both of prima facie liability and available defenses. It would also seem to be a waste of resources to reverse and remand *Bowen* for a trial on the negligence question if there was no way for *Bowen* to recover due to governmental immunity.

16. In adopting its test for governmental function, *Standiford* renounced the earlier governmental/proprietary distinction because of inconsistencies that had developed over the course of its application.

Like the *Standiford* test, the governmental/proprietary distinction was originally meant to restrict the application of governmental immunity. However, in time, the governmental/proprietary analysis degenerated from real thought of its meaning to simple categorization of the activity in question as involving a good course, a park, a hospital, etc. To some extent, the same consequences can result from a facile categorization approach under the *Standiford* test. We therefore decline to make an entry on a laundry list of governmental functions per se, eliminating all thought in future cases of the basic test established in *Standiford*.

erton's duty to maintain streets becomes rather disingenuous lip service if Riverton had a viable defense of governmental immunity against all liability based on that duty. While procedurally it is important to observe the distinction between plaintiff's prima facie case and defendant's defenses, in a more basic sense, what is ultimately important is the scope of governmental responsibility, which, in a well-pleaded case, is a function both of prima facie liability and available defenses. It would also seem to be a waste of resources to reverse and remand *Bowen* for a trial on the negligence question if there was no way for *Bowen* to recover due to governmental immunity.

[12,13] *Bowen*'s emphasis on the government's duty in tort to assure safe streets is entirely consistent with *Standiford*, if we accept the premise that the decision whether to exert any control at all over intersecting traffic is not a governmental function giving rise to immunity from tort liability. In other words, the government may be held liable in tort to provide some effective warning or control for traffic at a city intersection. However, the duty to provide some effective warning or control must be distinguished from more than minimal maintenance and from enhancement of the means of providing warning and control. The case of *Richards v. Learitt*, 716 P.2d 276 (Utah 1985) (per curiam) required compliance with the notice requirements of governmental immunity for a claim based on allegedly inadequate maintenance of a stop sign. From a comparison of *Bowen* and *Richards* and in light of *Gleave*, we conclude that as long as warning or control signage of a clear hazard is in existence and maintained enough to give it minimal effectiveness, the

17. Not every governmental activity that affects the public fisc is a governmental function. Clearly nongovernmental functions, such as providing utility services or recreation, or serving process, may be financed in part by funds obtained through governmental revenue exactions, and liability incurred in performing those functions will be satisfied out of the public treasury. See *Schultz v. Conger*, 755 P.2d 165 (Utah 1988); *Dalton v. Salt Lake Suburban Sanitary Dist.*, 676 P.2d 399 (Utah 1984); *Thomas v. Clearfield City*, 642 P.2d 737 (Utah 1982); *Johnson v. Salt Lake City Corp.*, 629 P.2d 432 (Utah

1981). However, the sources of funds to conduct the activity or to pay an eventual judgment do not determine whether the activity in question is a governmental function. In this case, disregarding the fact that the funds for railroad crossings may derive in part from public sources, we are nevertheless left with an overriding fiscal question: How much to spend on each railroad crossing that could be improved. We believe that the governmental budgeting and spending involved in deciding how to improve the safety of railroad crossings suffice to make that decision a governmental function.

Highway maintenance and improvement are predominately¹⁷ fiscal matters. Every highway could probably be made safer by further expenditures, but we will not hold UDOT (and implicitly, the legislature) negligent for having to strike a difficult balance between the need for greater safety and the burden of funding improvements. As we pointed out in *Gleave*, and as UDOT emphasizes here, there are hundreds of unelectrified railroad crossings in Utah, and it is not fiscally feasible to equip them all with the best possible means of assuring traffic safety. Rather, UDOT prioritizes the crossings in allocating the limited funds available for crossing improvements. The role of the judiciary in that prioritization and allocation process is strictly limited. In a case seeking judicial review of that administrative process, we would exercise our reviewing function with deference to the administrative agency under the "arbitrary and capricious" standard. However, in a tort action such as this, the deference to a governmental function is absolute unless waived, and we do not review it at all under tort principles.

In this case, we are not presented with a lack of any effective control of traffic, since there are three signs on Droubay Road where it approaches the railroad. The basis asserted here for recovery against UDOT is its failure to better warn

1981). However, the sources of funds to conduct the activity or to pay an eventual judgment do not determine whether the activity in question is a governmental function. In this case, disregarding the fact that the funds for railroad crossings may derive in part from public sources, we are nevertheless left with an overriding fiscal question: How much to spend on each railroad crossing that could be improved. We believe that the governmental budgeting and spending involved in deciding how to improve the safety of railroad crossings suffice to make that decision a governmental function.

and control traffic at the crossing. Since we have concluded that UDOT is immune for its failure to do more than minimal warning and control, we hold that plaintiffs cannot recover against UDOT or the State.

CONCLUSION

We therefore hold in this case that, even considering the Crommelin affidavit and considering the evidence in the light most favorable to the plaintiffs, they failed to show any negligence by Union Pacific in the design and maintenance of its right of way. Union Pacific is not responsible for controlling traffic on state roads, and the state, having given at least some warning or control at this railroad crossing, is governmentally immune in deciding whether to improve the means of warning or control at the crossing because of the fiscal effects of such a decision.

Thus, these plaintiffs have not shown negligence by the railroad in the accident at this crossing, where the oncoming train was clearly visible from a lengthy distance on the road toward the crossing, and the train was not shown to have been negligently operated. Signs notified approaching drivers of the crossing, but UDOT is not liable for not having expended more funds in making more extensive safety improvements that might have prevented the accident. The net effect of this holding is that if the railroad's right of way does not negligently obscure an oncoming train, the train is properly operated, and if some visible warning sign age is present on the public road, then the plaintiff is not entitled to relief in tort for an injury at the crossing. We do not consider this outcome to be harsh or unjust, although any tragedy in which life is lost or impaired is regrettable, whatever the cause.

The dismissal of the plaintiffs' case is affirmed.

BENCH, J., concurs.

JACKSON, Judge (concurring):

Although I concur in the result reached by the majority and in most of its analysis, I write separately to disassociate myself

from the faulty analysis of the governmental immunity issue. Contrary to the majority's characterization, *supra* at 6, UDOT's general activity in this case does not consist of "designing and maintaining a road." It consists of the installation and improvement of traffic safety devices and signs at railroad crossings. As for the specific, purportedly negligent act by UDOT, plaintiffs in this case alleged that UDOT negligently failed to install a different, presumably safer, kind of traffic warning device at a railroad crossing. The same claims were raised by the plaintiff in *Gleave v. Denver & Rio Grande W.R.*, 749 P.2d 660 (Utah Ct App.), *cert. denied*, 765 P.2d 1278 (1988). As the majority recognizes, the outcome in this case is controlled by *Gleave*, in which we held that (1) UDOT's general activity in evaluating, installing, maintaining, and improving safety signals or devices at railroad crossings is a governmental function within Utah Code Ann. § 63-30-3 (1986) under the test set forth in *Standiford v. Salt Lake City Corp.*, 605 P.2d 1230 (Utah 1980); and (2) the specific act of UDOT which the plaintiff claimed was negligent, i.e., the failure to upgrade safety devices at a particular railroad crossing, arose out of the exercise of a discretionary function, under the test in *Little v. Utah State Dept. of Family Servs.*, 667 P.2d 49, 51 (Utah 1983), for which immunity had not been waived by Utah Code Ann. § 63-30-10(1) (1986).

The majority appears unaware of the two-step analysis—used, for example, in *Gleave* and *Rocky Mt. Thrift Stores v. Salt Lake City Corp.*, 784 P.2d 459 (Utah 1990)—that is necessary to resolve a governmental immunity claim in which the parties contest whether, even if the general activity is a governmental function, the allegedly negligent act arose out of the exercise of a "discretionary function" under section 63-30-10(1). If the general activity under consideration is not a governmental function within the meaning of section 63-30-3, then there is no immunity. If the general activity is a governmental function, then the *Little* test must be applied to determine if the specific, allegedly negligent act or omission is purely discretionary under sec-

tion 63-30-10(1)(a). If it is purely discretionary, then immunity has not been waived by section 63-30-10(1)(a). If it is not purely discretionary, then immunity has been waived by section 63-30-10(1).

The failure to appreciate the difference between these two distinct inquiries apparently underlies the majority's confusing attempt to harmonize the results in *Bowen v. Everett City*, 656 P.2d 434 (Utah 1982) and *Richards v. Leavitt*, 716 P.2d 276 (Utah 1985) (per curiam) with *Standiford v. Gleave*. Governmental immunity was not even an issue in *Bowen*, a case involving the allegedly negligent failure of the city to maintain a stop sign that had been knocked down, so it is not really surprising that no mention was made of *Standiford*. It is the substance of the issues actually raised and of the tacit assumptions made in *Bowen*, not the case's procedural posture, that is important. The summary judgment in favor of the city, which the supreme court reversed in *Bowen*, had been granted on the basis that the city was not negligent as a matter of law on the undisputed facts; the summary judgment was not granted on the basis of any immunity. The first unspoken assumption in *Bowen*, which was subsequently the express holding in *Leavitt*, 716 P.2d at 279, is that the maintenance and repair of traffic signs is a governmental function. *Leavitt*, which also involved a municipality's failure to maintain a traffic control device at a highway intersection, addressed another issue not raised in *Bowen*, i.e., whether immunity for the exercise of that governmental function had been discretionarily waived. The court in *Bowen* tacitly assumed that it had, or the summary judgment in favor of the municipality could have been affirmed on the alternate ground of immunity. The *Leavitt* court concluded that the immunity provided to the city by section 63-30-3 for its activities in maintaining traffic control devices had been expressly waived by section 63-30-8 "for any injury caused by a defective, unsafe, or dangerous condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located thereon." Relying

on its prior decision in *Bigelow v. Ingersoll*, 618 P.2d 50 (Utah 1980), decided two years before *Bowen*, the *Leavitt* court reaffirmed that the express waiver of immunity in section 63-30-8 is not subject to the section 63-30-10(1)(a) discretionary function exception to the waiver of immunity. The court thus read section 63-30-8 as expressing the legislature's view that an act or omission in the exercise of a governmental function that created a "defective, unsafe, or dangerous condition" on a public way could never involve activity at the basic policy-making level for which immunity is preserved by section 63-30-10(1)(a).

Unlike the plaintiffs in *Leavitt* and *Bigelow*, however, but exactly like the injured plaintiff and appellant railroad in *Gleave*, 749 P.2d at 667 & n. 6, the plaintiffs in this case have never pleaded or contended that the discretionary function analysis under section 63-30-10(1)(a) is unnecessary and irrelevant because the decedents' injuries resulted from an unsafe or dangerous condition on a road within the purview of section 63-30-8. Instead, they asked the trial court and us to overrule one of the two aforementioned holdings in *Gleave* and conclude either that (1) UDOT's evaluation, installation, maintenance, and improvement of safety signals or devices at railroad crossings is not a governmental function within section 63-30-3; or (2) UDOT's failure to install upgraded safety devices at the subject railroad crossing did not arise out of a section 63-30-10(1)(a) discretionary function.

Since my colleagues and I have unanimously declined the invitation to abandon *Gleave*, it is unfortunate that the majority adds confusion to an already difficult area of law in its flawed analysis of *Leavitt* and *Bowen*, which should be disregarded as dicta.



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

LEWIS DUNCAN, individually and	:	MEMORANDUM DECISION
as personal representative of	:	
the Estate of PATRICK DUNCAN,	:	CIVIL NO. 84-146
deceased, et al.,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
UNION PACIFIC RAILROAD COMPANY,	:	
a corporation, et al.,	:	
	:	
Defendants.	:	

The above-referenced matter came before the Court for oral argument on November 12, 1987. Counsel for the various parties appeared and argued their respective positions. Prior to the oral argument, the parties had submitted Memoranda of Points and Authorities, as well as Affidavits and other documentary evidence addressing the issues raised in the various Motions. Following oral argument, the Court ruled from the bench on portions of the defendant Union Pacific Railroad's (hereinafter "Railroad") Motion for Summary Judgment. The remainder of the Motions were taken under advisement for further consideration of the issues raised. The Court has since argument, again reviewed the Memoranda of Points and Authorities, and other materials submitted, and being fully advised, enters the following Memorandum Decision.

MOTIONS PREVIOUSLY GRANTED

As indicated above, the Court granted a portion of the Railroad's Motion for Summary Judgment. From the bench, at the conclusion of oral argument, the Court determined that there was no evidence to support the plaintiffs' claim that the Railroad operated the train in a negligent manner. To the contrary, the only evidence presented went to the proposition that the train was operated in a reasonable, safe and prudent manner. In addition, there was no evidence offered by the plaintiffs that suggested that their claim that the engineer, co-defendant Kleinman, was incompetent. The only evidence before the Court is again to the contrary, and establishes that the defendant Kleinman was a competent and qualified engineer. Therefore, the Railroad and Kleinman's Motions for Summary Judgment on those issues were granted. There was also a Motion to Strike a portion of the plaintiffs' Brief that contained inappropriate comments. The plaintiff did not object, and the Motion was granted, and the word "murdered" in plaintiffs' Brief was stricken pursuant to Rule 12(f) of the Utah Rules of Civil Procedure.

PRELIMINARY STATEMENT OF FACTS

This case arises out of an automobile/train collision that occurred on April 9, 1983, at approximately 8:50 p.m. The collision took place at the crossing of the defendant's railroad tracks, and Droubay Road in a rural portion of Tocele County.

The train was operated by defendant Kleinman; a deceased, Patrick Duncan, operated the automobile and, in addition to the operator, the automobile contained three passengers. All four occupants of the automobile were killed as a result of the collision. It was dark at the time of the collision, and the weather was not a factor. The automobile's and the train's lights were lit. The train had in operation a dual headlight, and a stroke light, both exceeding federally mandated standards. Droubay Road crosses the railroad tracks at an oblique angle of approximately 136° in the direction that the automobile was planning on crossing the tracks. Considering the direction of the automobile and the train, the train was therefore approaching the crossing to the right front of the automobile. The defendant engineer, Kleinman, observed the automobile approaching the crossing for some substantial distance before the crossing, and assumed that the automobile would stop prior to reaching the crossing. By the time the defendant Kleinman was able to observe that the automobile was not going to stop, it was not possible to stop the train, or take other evasive action before the impact occurred. The required whistle and bells on the train were operating for the prescribed distance prior to the crossing. Other than railroad personnel on the train, there were no eyewitnesses to the collision that survived. Based upon the material submitted, there is no obstruction to the observation of an approaching

train for an automobile driver approaching, as was the Duncan automobile in this case for some substantial distance before the crossing (investigating officer's tests).

Plaintiffs' counsel orally argued that the terrain approaching the crossing was not flat as suggested by the defendants, but offered no support for that conclusion. The photos, submitted to show the terrain, suggests the contrary, and there is no genuine issue of material fact that is disputed on that point. The signing on the road preceding the crossing consisted of a traditional railroad crossing sign at approximately 305 feet in advance of the crossing. Unrefuted tests offered by the defendants show that the sign was visible at night, using automobile low beams for a distance of three-quarters of a mile. The white crossing sign at the crossing itself was also visible at that distance. An automobile traveling with high beams would be able to observe the signs in question a mile distant from the crossing. The automobile and the train collided front-to-front at the crossing. There is a disputed issue of fact regarding the effect of marijuana use by the deceased driver Duncan. For the purposes of this Motion, the Court accepts the proposition that the plaintiffs assert, to wit: that marijuana ingestion by the plaintiff driver had no effect on his ability to operate the vehicle in any fashion, and that his judgment was not impaired. At the time of the accident there

were no flashing signals at the crossing, nor crossing arms prohibiting the passage of vehicle traffic onto the crossing.

RAILROAD'S MOTION FOR SUMMARY JUDGMENT

Plaintiffs claim that the Railroad was negligent in not installing additional warning lights or other devices at the crossing. Plaintiffs claim that the Railroad has a duty to install such devices concurrently with the State of Utah, and more particularly the Utah Department of Transportation (hereinafter referred to as "State" or "UDOT"). The Railroad denies this duty, and claims that the determination of need and the decision to install signing and other warnings is the sole and exclusive responsibility of the State. With that proposition the Court agrees. Utah statutes place the responsibility clearly upon the State for making the determination of what type of signing and when it should be installed on railroad crossings. This conclusion is true, even in the face of the 1975 amendment to Section 54-4-15, Utah Code Ann., 1953 as amended. The courts that have interpreted Section 54-4-15, as amended, have held and this Court finds those holdings persuasive, that no duty exists in law for the Railroad to independently, or concurrently with the State, install or maintain crossing signs, lights, and other traffic control devices at railroad crossings. There being no duty to sign or place signals at railroad crossings on the part

of the Railroad, the remainder of the Railroad's Motion for Summary Judgment should be and is hereby granted.

STATE OF UTAH'S MOTION FOR SUMMARY JUDGMENT

In considering the State's Motion for Summary Judgment, it must be considered in two phases. First, it must be determined if the State is entitled to immunity in this case, because of the State's claim that crossing, signing and signals are discretionary, and therefore governmental immunity is not waived and applies, and secondly, even if such activity is a discretionary function, is the State still liable because of the plaintiffs' claim that the crossing is extra hazardous.

The process used by UDOT personnel in making their inspection of railroad crossings in this state to determine what type of signs and signals should be used is a process requiring both the use of objective and subjective factors and considerations. It must first be determined whether or not a particular crossing requires more than just advance signing. If it is so determined, then it must be determined to apply for whatever federal funding is available. The crossing must also be rated by UDOT personnel and given a position on a priority listing for crossings for which federal funding has been requested throughout the state. In reaching a priority evaluation, the inspection team evaluates the potential hazards of the crossing compared to all others in the state. This

procedure is fully described in the State's Brief and supporting documents. The process is far beyond the perfunctory decisions that government officials may make on a day-in and day-out basis, which are not entitled to protection as discretionary decisions. The process of evaluation involved here embodies the classic elements of a discretionary function, to wit: balancing various needs of differing railroad crossings throughout the state, weighing competing interests for available funding, balancing potential risk versus dollar and manpower available. The Court finds that the decision to add additional signs or signals to this crossing, and when to do it was a discretionary function for which the State has not waived immunity under Section 63-30-10(1)(a), Utah Code Ann., 1953 as amended. Having determined that the State is entitled to immunity under the exception of a discretionary function, the Court declines to address the other two grounds for immunity asserted by the State.

The plaintiff also claims that even if a decision to install signs and signals is discretionary, the exemption does not apply, because the crossing is extra hazardous. While the Court is not necessarily convinced that the plaintiffs' proposition is a correct statement of the law, the Court is satisfied as a matter of law that the crossing in question does not fall into the category of extra hazardous. This conclusion is reached for two reasons. First, the plaintiffs' expert Affidavit upon which the

plaintiffs rely to establish their claim of an extra hazardous crossing is based upon inadmissible evidence and a flawed foundation. Secondly, and more important, the evidence presented clearly shows that this crossing does not fall into the type of crossing contemplated by the Supreme Court in defining extra hazardous crossings.

Plaintiffs have filed the Affidavit of Robert Crommelin in which Mr. Crommelin opines that based, at least in substantial part, on the inspection and surveillance reports of the State officials at UDOT, that the crossing is extra hazardous. That opinion is without foundation or basis when the report relied upon is removed from consideration, as it must be in this case. 23 U.S.C. 409 prohibits any court, state or federal, from receiving into evidence reports and other information such as UDOT surveillance reports. The policy reasons behind Congress's action is clear. It is to encourage the full and free exchange of information, and to encourage candid reports, conclusions and evaluations by governmental officials conducting inspections at railroad crossings and the like. Were the reports and other information admissible, inspection teams would be chilled in making accurate reports so as to insure that they were not hindsighted at a later time in liability actions by statements and evaluations contained in those reports. Plaintiffs' expert's conclusions are also based upon misinformation. Mr. Crommelin relies upon a "projected" traffic density of 1,500 vehicles per

day, when in actuality the density was at most 580 vehicles per day. The statement that the placement of the advance warning sign violated federal standards for distance is also misplaced. The federal statute does not mandate a specific distance, it provides a suggested distance. In any event, the placement of the sign could have no proximate effect upon the accident in any event. The driver either failed to see the sign, or ignored the sign, and it makes little difference if an operator does not see, or ignores a sign 305 feet from a railroad crossing, as opposed to not seeing or ignoring a sign that is 750 feet from a railroad crossing. A careful review of the Crommelin claim of "similar accidents" at the crossing further shows that his use of that basis for determining that this crossing is ultra hazardous is in error. The three prior accidents upon which he relies are not similar to the action in question at all. One involved a collision with a train where visibility was poor in a snowstorm. The others involved automobiles coming from the opposite direction, which substantially changes the angle at which the train approaches the intersection, as compared to the oncoming approaching car, and are otherwise substantially dissimilar. These differences were pointed out in defendant Railroad's Memoranda, dated May 26, 1987, and the Court has received no addition to Mr. Crommelin's Affidavit to suggest that his conclusions are or can be based upon proper foundations.

Considered as a whole, the opinion of Mr. Crommelin, because of the loss of its underpinnings, cannot be considered as raising a substantial or genuine material issue of fact on the issue of the crossing being extra hazardous or not.

More important than the lack of plaintiff raising a genuine issue of fact on the nature of the crossing by way of Mr. Crommelin's Affidavit, is the Court's evaluation through the photos and other documents submitted of the crossing itself. This crossing as a matter of law does not meet the Supreme Court test as outlined in Bridges v. Union Pacific Railroad Co., 433 P.2d 373 (Utah 1971). As noted by the Supreme Court in the Bridges case, there must be something unusual about the crossing. The photos and investigating officer's tests and observations all show that the surrounding land in the area of the automobile's approach is reasonably flat. It is flat, at least to the extent that the approaching train can be readily seen and observed by the driver of an approaching automobile. There are no buildings or other structures in the area to divert a driver's attention, or to otherwise confuse. There are no other lights or unusual noises to confuse or deceive an otherwise unsuspecting driver. In sum, there is nothing about this crossing that could provide notice to UDOT personnel that the warnings which were there at the time of the accident were not adequate to warn the public. While any railroad crossing can be hazardous, it is hard to

imagine a crossing that presents a smaller hazard than the one in question before the Court. The Court therefore determines that reasonably minds could not differ on whether or not this crossing is extra hazardous, and concludes as a matter of law that the crossing is not extra hazardous.

Based upon the foregoing, the State's Motion for Summary Judgment is equally well-taken as that of the Railroad, and should therefore be, and the same is hereby granted.

Counsel for the Railroad and Kleinman are requested to prepare an appropriate Order in accordance with this Memorandum Decision granting their Motion for Summary Judgment, and counsel for the State is likewise requested to prepare an Order granting the State's Motion for Summary Judgment in accordance with this Memorandum Decision, and submit the same to the Court for review and signature in accordance with the Local Rules of Practice.

Dated this 17 day of November, 1987.

15/ JLL
TIMOTHY R. HANSON
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, postage prepaid, to the following, this 18 day of November, 1987:

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