

83385-1

NO. 60126-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

(Whatcom County Court Case No. 03-2-02056-3)

ORIGINAL

Alizon Veit,

Plaintiff/Appellant,

VS.

Burlington Northern Santa Fe Corporation, et al,

Respondents/Defendants.

PLAINTIFF/APPELLANT'S REPLY BRIEF

Douglas R. Shepherd
SHEPHERD ABBOTT CARTER
1616 Cornwall Ave., Suite 100
Bellingham, WA 98225
(360) 733-3773 or 647-4567

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 SEP 30 AM 10:52

September 29, 2008

TABLE OF CONTENTS

I. ARGUMENT..... 1

 A. Parties’ Duties – De Novo Review..... 1

 1. Train Speed Limit..... 3

 2. RCW 46.61.345..... 8

 B. Evidence Errors – Abuse of Discretion..... 14

 1. Excluded Evidence Related to Speed
 Limit(s)..... 15

 2. Expert Opinion of Ayres..... 15

 a. Excluded Testimony of Rosenberg
 and Williams..... 17

 b. Ayers “Opinion” Testimony..... 18

 3. Robert Basey..... 21

 5. Absence of Previous Accidents at
 Crossing.....23

II. CONCLUSION.....25

TABLE OF AUTHORITIES

United States Supreme Court

<i>CSX Transp., Inc. v. Easterwood</i> , 507 U.S. 658, 113 S.Ct. 1732 (1993).....	6, 8
--	------

Washington Supreme Court

<i>Miller v. Stanton</i> , 64 Wn.2d 837, 841, 394 P.2d 799 (1964).....	1
<i>Portland-Seattle Auto Freight v. Jones</i> , 15 Wn.2d 603, 607, 131 P.2d 736 (1942).....	1
<i>Hertog v. City of Seattle</i> , 138 Wn.2d 265, 275, 979 P.2d 400 (1999).....	2
<i>Sherman v. State</i> , 128 Wn.2d 164, 183, 905 P.2d 355 (1995).....	2
<i>State v. Womac</i> , 160 Wn.2d 643, 649, 160 P.3d 40 (2007).....	2
<i>Goodner v. Chicago, M. St.P. & P. R. Co.</i> , 61 Wn.2d 12, 19, 377 P.2d 231 (1962).....	8
<i>Fenimore v. Donald M. Drake Const. Co.</i> , 87 Wn.2d 85, 91, 549 P.2d 483 (1976).....	9
<i>Erickson v. Robert F. Kerr, M.D., P.S., Inc.</i> , 125 Wn.2d 183, 191, 883 P.2d 313 (1994).....	14
<i>Ladley v. St. Paul F. & M. Ins. Co.</i> , 73 Wn.2d 928, 934, 442 P.2d 983 (1968).....	15

Washington State Physicians Insurance Exchange & Association v. Fisons Corporation, 122 Wn.2d 299, 344, 858 P.2d 1054 (1993).....19

State v. Kelly, 102 Wn.2d 188, 196, 685 P.2d 564(1984)..... 25

Washington State Court of Appeals

Kappelman v. Lutz, 141 Wn.App. 580, 590-91, 170 P.3d 1189 (2007) *rev. granted*, 164 Wn.2d 1010 (2008).....13

Zwink v. Burlington Northern, Inc., 13 Wn.App 560, 536 P.2d 13 (1975)..... 14

Salas v. Hi-Tech Erectors, 143 Wn.App. 373, 378, 177 P.3d 769 (2008)..... 14

Kubista v. Romaine, 14 Wn.App. 58, 65, 538 P.2d 812 (1975)..... 14

State v. Ecklund, 30 Wn.App. 313, 317-18, 633 P.2d 933 (1981)..... 20

State v. Nation, 110 Wn.App. 651, 41 P.3d 1204 (2002) *rev. denied* 148 Wn.2d 1001, 60 P.3d 1212 (2003)..... 20

Gabel v. Koba, 1 Wn.App. 684, 693, 463 P.2d 237 (1969)...24

Courts of Other Jurisdiction

Anderson v. Wisconsin Cent. Transp. Co., 327 F.Supp.2d 969, 976 – 977 (E.D.Wis.,2004)..... 4, 5, 6,7, 8

<i>Hargrove v. Missouri Pacific R.R. Co.</i> , 888, So.2d 1111, 1114 - 1115, La.App. (2004).....	7
<i>Myers v. Missouri Pacific R. Co.</i> , 2002 Ok 60, 52 P.3d 1014, 1024 (2002).....	7
<i>Union Pacific R. Co. v. California Public Utilities Com'n</i> , 346 F.3d 851, 858 (9 th Cir., 2003).....	8

Statutes

RCW 46.61.345.....	2, 8, 9, 12, 13
RCW 46.61.050.....	12

Rules

CR59(a)(1).....	14
ER 703	19, 20
ER 403	21

Other Authorities

49 C.F.R. § 213.9.....	3, 4, 7, 8
49 C.F.R. § 213.57	5
49 U.S.C.A. § 20106	5
FRA Track Safety Standards, 63 Fed. Reg. 33992 (1998).....	6
49 C.F.R. § 217.7	6

I – ARGUMENT

In determining whether a plaintiff was granted her right to a fair trial, Washington appellate courts consider the trial court's errors "in the light of their total effect on the jury." *Miller v. Staton*, 64 Wn.2d 837, 841, 394 P.2d 799 (1964).

A. PARTIES' DUTIES - DE NOVO REVIEW.

Prior to trial, the trial court, summarily, incorrectly decided that the train speed limit at the crossing was 40 MPH. In fact, the speed limit at the crossing was 20 MPH. CP 684, 690; CP 130. Trial Exhibits 37 and 52.¹ At the time of impact, the BNSF work train was going approximately 33 MPH. 03/13/07 RP 763-64; Ex 32. The exact speed is unknown because BNSF destroyed or "lost" the engine speed (event data recorder) tapes for the day and time of the accident.² The BNSF train had two engines and the engineer believed both engines had working recorders. 03/19/07 RP 1211.

Veit had a duty to obey the rules of the road. *Portland-Seattle Auto Freight v. Jones*, 15 Wn.2d 603, 607, 131 P.2d 736

¹ "Speed . . . Bellingham – over street crossing (HER) MP 96.2 – Pine Street crossing . . . 20 MPH." Ex. 37. "BNSF ON-TRACK EQUIPMENT ACCIDENT/INCIDENT REPORT . . . 22. FRA Track Class: 2" Ex. 52.

² The data recorder is an electronic device that records an engine's speed at all times. 03/19/07 RP 1210-1211.

(1942). Veit's principal duty was detailed by statute.³

The state department of transportation and local authorities within their respective jurisdictions are authorized to designate particularly dangerous highway grade crossings of railroads and to erect stop signs at those crossings. **When such stop signs are erected the driver of any vehicle shall stop within fifty feet but not less than fifteen feet from the nearest rail of the railroad and shall proceed only upon exercising due care.**" (Emphasis added).

RCW 46.61.345. Prior to the trial, the trial court incorrectly determined that RCW 46.61.345 did not apply to Veit as she crossed the Pine Street crossing. 03/06/07 RP 59-73.

The duty owed by Veit as she approached and crossed the track is a question of law. The duty owed by BNSF at the crossing, is a question of law. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). Both are reviewed de novo. *Id.*; *Sherman v. State*, 128 Wn.2d 164, 183, 905 P.2d 355 (1995). Questions of law are reviewed de novo. *State v. Womac*, 160 Wn.2d 643, 649, 160 P.3d 40 (2007).

³ In a procedure unknown to the undersigned counsel, BNSF first raised and argued the applicable rule of the road in its Motions in Limine: "25. **Reference to Inapplicable Statutes.** Plaintiff should be prohibited from presenting any argument, comment, or testimony relating to inapplicable statutes. . . . [I]ncluding RCW 46.61.345 and RCW 47.36.110. . . . Both of these statutes relate to stopping requirements that do not apply to the case at hand." CP 508, 522.

1. Train Speed Limit.

Before trial the trial court dismissed Veit's negligence claim against BNSF for speeding. CP 691. Veit moved the trial court to reconsider its findings that the 20 MPH speed limit was preempted by federal law and that the condition of the crossing was not extra-hazardous. CP 664. Veit's motion for reconsideration was erroneously denied. CP 46.⁴

The trial court erred in determining as a matter of law that the speed limit at the crossing was 40 miles per hour under 49 C.F.R. § 213.9. A railroad sets the track classification and speed limit under 49 C.F.R. § 213.9 in its "timetables, general orders and

⁴ "MR. MONTGOMERY: . . . Plaintiff cannot present evidence, ask questions or make argument suggesting or trying to show that BNSF was negligent because it violated any internal speed limits or restrictions. We've been over it many times in the past; that is a preempted matter under Easterwood and its extensive progeny. This Court has found that the federal limit is 40 miles an hour at the crossing. The most that anyone will opine at trial was that the train was traveling 30.5 miles an hour, and that as testimony should be and must be precluded. By the same token, Plaintiff should also be prohibited from introducing any evidence regarding BNSF's speed limit or the head-end restriction at the crossing." 03/06/07 RP 49-50.

THE COURT: All the competent evidence I have is that it was a Class 3 track and has a 40 mile an hour speed limit. . . . there will be no evidence as to what BNSF's head-end restriction was there, or BNSF's speed limit down the track, or BNSF's speed limit at that point, because I think Easterwood says as long as they're underneath, below the federal standard, that there's not evidence of negligence, and it can't be used as evidence of negligence. 03/06/07 RP 53-54.

speed restrictions." *Anderson v. Wisconsin Cent. Transp. Co.*, 327 F.Supp.2d 969, 976 – 977 (E.D.Wis.,2004).

During discovery, BNSF's produced two documents related to track class and speed. Both were offered at trial (and during summary judgment) and erroneously rejected by the trial court. At page 2 of its On-Track Equipment Accident/Incident Report, BNSF reported that the Track Class was 2. Ex. 52. BNSF, in its Timetable No. 3, described the speed limit south of the crossing as 30 MPH and at the crossing as 20 MPH. Ex. 48; CP 690.

At his deposition, Leeper testified that one would have to look at Timetable Number 3 to determine classification for the BNSF track in 2001. CP 681 – 683.⁵ Leeper further explained that the Timetable is BNSF's designation of speed limits prescribed by the Federal Railroad Administration that he referenced in his declaration. CP 1910, CP 681 – 682.⁶ At the crossing the track

⁵ "I think I was probably looking at that document [Exhibit 12 - the Pacific Division Timetable Number 3]." CP 682.

⁶ "Is that what Exhibit Number 12 is is BNSF's designation of maximum allowable speeds for its segments of its tracks?" "Yes." CP 683.

was Class 2 with appropriate reductions for curve and local condition. 49 C.F.R. § 213.57. 49 U.S.C.A. §20106.⁷

BNSF argues that it set two speeds limits for the crossing: one found in the timetable and the other found only in employee Carl Johnson's mind. Brief of Respondent, p. 7; CP 676.

In *Anderson*, the court held that a conclusory statement by one employee that the track classification at that particular crossing at the time of the accident, without more, was not sufficient to establish its class. The court reasoned that "the classification of the track at the County M Crossing at the time of the accident depended on the speed that defendant permitted its trains to operate at over such as set forth in its timetables, general orders and speed restrictions." *Anderson*, 327 F. Supp.2d 969, 976-77. The *Anderson* court held that it was implausible that affidavits, apparently based on memory, would be correct, where no

⁷ "Laws, regulations, and orders related to railroad safety . . . shall be nationally uniform **to the extent practicable**. . . . Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party - - (A) has failed to comply with the Federal standard of care established by an . . . order issued by the Secretary of Transportation; (B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or (C) has failed to comply with a State law, regulation, or order **that is not incompatible with subsection (a)(2)**. (Emphasis added.) 49 USC § 20106, in part.

timetable was produced, and the depositions of the employees showed that they did not necessarily have recollections consistent with their affidavits. *Id.*, at 977. The court disregarded affidavits that conflicted with depositions, refusing to explain inconsistencies based on a "lapse of memory." *Id.*

BNSF relies on *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 113 S.Ct. 1732 (1993), for the proposition that a stretch of track may have an internal and an external speed limit. Brief of Respondent, p. 7. Contrary to BNSF's argument, there is no separate "external" speed limit:

Under the current Track Safety Standards, FRA has only an indirect role in determining speed limits. **Railroads set train speed in their timetables or train orders.** Once a railroad sets a train speed, it must then maintain the track according to FRA standards for the class of track that corresponds to that train speed. . . . Notwithstanding some of the language in *Easterwood* that a cursory reading may otherwise indicate, FRA has never assumed the task of setting train speed. Rather, the agency holds railroads responsible for minimizing the risk of derailment by properly maintaining track for the speed they set themselves.

FRA Track Safety Standards, 63 Fed.Reg. 33992 (1998). Railroads are consequently required to file the speed limits in their timetables with the FRA. 49 C.F.R. § 217.7.

Subsequent to FRA's 1998 clarification that "railroads set speed limits in their timetables," courts have looked to the railroads' timetables to determine the federal speed limit under 49 CFR § 213.9. *Hargrove v. Missouri Pacific R.R. Co.*, 888 So.2d 1111, 1114 - 1115, La.App. (2004). Summary judgment on FRA speed preemption has been affirmed, for example, where the railroad produces a timetable showing that the railroad had set the speed limit at 40 miles per hour, and it is undisputed that the train was traveling slower than that speed. *Myers v. Missouri Pacific R. Co.*, 2002 Ok 60, 52 P.3d 1014, 1024 (2002). "Railroads set train speed in their timetables or train orders." *Id.*, 1023.

The speed limit in BNSF's timetable of 20 miles per hour corresponds to a class 2 track under 49 C.F.R. § 213.9. *Anderson*, *supra*, 976 - 977. The *Anderson* court explained:

The FRA does not classify particular segments of track.^{FN5} Rather, railroads identify desirable speeds for stretches of track and designate such speeds in their timetables and train orders. Once they do so, they must maintain the track so as to satisfy FRA standards for the class of track corresponding to that train speed or be subject to a penalty. Track Safety Standards, 63 Fed.Reg. at 33998.^{FN5} For example, if a freight train wants its freight trains to operate at 59 m.p.h. between two certain locations, it

must maintain the tracks between those locations to Class 4 standards.

Id., at 976.

Even assuming the track class was 3 and not 2, there is a strong presumption against federal preemption of state law or orders imposing duties on railroads, essential to “avoiding unintended encroachment on the authority of the States.” *CSX Transp. Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). “A violation by railroad employees of a regulation adopted by the railroad itself with respect to the speed of a train may be considered in determining the due care of the railroad company in an action for injury to persons or property at a highway crossing, but it must appear that such regulation was adopted to secure the safety of persons using the highway crossing.” *Goodner v. Chicago, M. St.P. & P. R. Co.*, 61 Wn.2d 12, 19, 377 P.2d 231 (1962).

The FSRA does not preempt state law requiring railroads to comply with their own internal rules. *Union Pacific R. Co. v. California Public Utilities Com’n*, 346 F.3d 851, 858 (9th Cir., 2003).

2. RCW 46.61.345

BNSF moved in limine to prohibit Veit from presenting any evidence, testimony, argument or comment on RCW 46.61.345

during the trial. CP 520. Such motions are intended to be addressed to "evidence" which is clearly inadmissible and so prejudicial as to preclude a fair trial. *Fenimore v. Donald M. Drake Const. Co.*, 87 Wn.2d 85, 91, 549 P.2d 483 (1976). BNSF's motion was made eight days before trial and argued the first day of trial. CP 508; 03/06/07 RP 60-73.⁸ Veit objected to BNSF's use of a motion in limine to obtain a summary decision on the legal duty of Veit and the applicability of RCW 46.61.345.⁹ The trial court incorrectly ruled that Veit's duty was to "stop at the (incorrectly placed stop) line." 03/06/08 RP 72.

BNSF argues incorrectly that the trial court's order in limine regarding evidence, testimony, argument or comment on RCW 46.61.345 was "harmless error, since the jury made no finding as to her negligence." Brief of Respondent, 31-32. Restrictions in sight distance were a key issue related to proximate cause.

03/12/07 RP 423. Where Veit was required by the rules of the

⁸ "MR. SHEPHERD: I would respectfully differ with the Court. If this Court thinks that this statute, RCW 46.61.190 applies to this crossing, and RCW 46.61.345 doesn't apply to this crossing, we are being led into error which is going to require a second trial in this case." 03/06/07 RP 69.

⁹ "MR. SHEPHERD: Your Honor, I'm troubled that these motions in limine are used for summary judgment motions You've determined what statute applies before you've heard any evidence. You've determined what statute applies before you've heard any evidence." 03/06/07 RP 73.

road to stop was crucial. Proximate causation of the collision could not be correctly decided by the jury without determining the sight distance available to a reasonably prudent driver approaching the crossing. The jury was instructed:

Plaintiff claims that defendant was negligent in one or more of the following respects:

1. Failure to exercise reasonable care in designing the railroad crossing;
2. Failure to exercise reasonable care in maintaining proper visibility at the crossing;
3. Failure to exercise reasonable care in operating the train given all the conditions at the crossing.

.....

CP 153.

At trial, BNSF was well aware that the railroad's duties, as instructed, changed depending on sight distance. 03/12/07 RP 380. RP 392. Sight distance changed when the required stop was at the stop bar, 15 feet from the nearest rail, or 50 feet from the nearest rail. BNSF cross-examined Veit's expert, Stevens, extensively on the issue of sight distance and the stop bar.

03/12/07 RP 430-471.

Q. Which is not a sight distance from the sight bar, but rather from the track, itself?

A. Exactly.

Q. I was in the way. Did everybody -- okay.
Now, what you don't have on Exhibit 13 with these foot markings, what you don't have are the sight distances from Exhibit 11 that are actually from the sight bar -- excuse me the stop bar. Those distances are not exhibited on the stop bar, those distances are not represented on Exhibit 13, are they?

A. Correct, because that's not the standard.

RP 430 – 432 (emphasis added).

Having received the benefit of the erroneous ruling in limine,

BNSF was allowed to present the following evidence to the jury:

(MR. ROBBINS:) And for a driver – as a traffic officer, if a driver coming down Wharf Street had not stopped at the stop bar, you would have cited that driver for failure to stop?

A. Hmm. . .

Q. At or near the stop bar, somewhere around there?

A. At or near. . . . 03/08/07 RP 317 (Officer Cristelli).

. . . .

(MR. ROBBINS:) And in your experience a driver can come to the bottom of Wharf Street, stop somewhere around the stop bar, and proceed cautiously and cross safely; isn't that correct?

A. Yes, sir. 03/09/07 RP 366 (Officer Wong).

. . . .

(MR. SCARP:) Okay. Now, you're going to come down, and where will you stop?

A. We'll stop at the stop bar just before the tracks.

Q. Okay, and why stop there?

A. Because it's my understanding of the law that's where you stop at a stop sign when there's a white bar on the road. 03/19/07 RP 1177 (Mullins).

Because of the trial court's ruling on BNSF's motion in limine, Veit was prohibited from proper redirect examination of the above witnesses and others, and from fully and fairly presenting her expert testimony. The trial court, at the end of trial, recognized its error and instructed the jury on RCW 46.61.345. Inst. 15; CP 158. BNSF recognized the jury confusion caused by the trial's court pre-trial prohibition regarding RCW 46.61.345 and then correctly instructing the jury on RCW 46.61.345. 03/20/07 RP 1340-1342.¹⁰

Veit did not stop at the stop bar. Veit was not required to stop at an improperly placed stop bar. RCW 46.61.050; CP 838. Veit stopped somewhere between the stop sign and the stop bar. 03/12/07 RP 529. After stopping, Veit proceeded forward slowly and was seen by another eye witness with the nose of her car on the first set of tracks, looking confused and not sure what to do. 03/13/07 RP 591-93; Ex. 19.

When Veit complied with the rules of the road, stopping no further than 50 feet and no closer than 15 feet from the nearest rail, she had no ability to see a train was coming because of the

¹⁰ "MR. ROBBINS: . . . [Y]ou've had multiple witnesses testify that the duty is to stop at the stop bar, and I think that makes that a confusing instruction, and we would object to it." 03/20/07 RP 1342.

curvature, embankment and vegetation. 03/08/07 RP 237.¹¹

Because of this unique problem the stop bar was moved perilously closer to the first track. On the day of the accident, placement of the stop bar, appropriate design criteria required a train to be going 14 MPH or less in order to safely make the decision to cross or remain where you are. 03/12/07 RP 378, 398.

The trial court's erroneous pretrial ruling on RCW 46.61.345 prevented Veit from having a fair trial.

[P]arties are entitled to a fair trial, including the ability to present their theory of the case. Moreover, the jury is entitled to decide the facts. By excluding relevant evidence of (a driver's statutory duty) . . . the trial court improperly encroached upon the jury's prerogative to determine proximate cause.

Dissent in *Kappelman v. Lutz*, 141 Wn.App. 580, 590-91, 170 P.3d 1189 (2007) *rev. granted*, 164 Wn.2d 1010 (2008). BNSF's motion in limine and the trial court's pretrial ruling on that motion was an

¹¹ Q. And your opinion is that this crossing is, I believe you said, "Extremely dangerous." Were those your words from this morning?

A. That would be a characterization, yes.

Q. Because of the design and maintenance of the crossing?

A. Correct.

Q. And that's based on an inadequate sight line and a wrong placement of that stop bar?

A. Exactly.

Q. The stop bar was too close to the tracks?

A. Correct. 03/12/07 RP 446-47.

irregularity in the proceedings of the court which prevented Veit from having a fair trial. CR 59(a)(1).

"[E]ach case involving a railroad crossing accident must be considered in light of its own peculiar facts. Hewitt v. Spokane, Portland & Seattle Ry., 66 Wash.2d 285, 291, 402 P.2d 334 (1965); O'Dell v. Chicago, Milwaukee, St. Paul & Pacific R.R., 6 Wash.App. 817, 821, 496 P.2d 519 (1972)." Zwink v. Burlington Northern, Inc., 13 Wn.App 560, 536 P.2d 13 (1975).

B. EVIDENCE ERRORS - ABUSE OF DISCRETION

The below evidentiary issues are reviewed for an abuse of discretion. Salas v. Hi-Tech Erectors, 143 Wn.App. 373, 378, 177 P.3d 769 (2008). "Abuse of discretion occurs if the decision is 'manifestly unreasonable or based upon untenable grounds or reasons.' (citations omitted.)" Erickson v. Robert F. Kerr, M.D., P.S., Inc., 125 Wn.2d 183, 191, 883 P.2d 313 (1994). The trial court abuses its discretion when irrelevant evidence is erroneously admitted. Id., 191-92. It is error to exclude relevant evidence. Kubista v. Romaine, 14 Wn.App. 58, 65, 538 P.2d 812 (1975).

All facts which support a reasonable inference on a contested matter and any circumstance whereby an alleged fact may be proved or disproved are relevant. Chase v.

Beard, 55 Wash.2d 58, 346 P.2d 315 (1959). Any circumstances is relevant which reasonably tends to establish the theory of a party or to qualify or disprove the testimony of his adversary. Bloomquist v. Buffelen Mfg. Co., 47 Wash.2d 828, 289 P.2d 1041 (1955).

Ladley v. St. Paul F. & M. Ins. Co., 73 Wn.2d 928, 934, 442 P.2d 983 (1968).

1. Excluded Evidence Related to Speed Limit(s)

The speed limit, as set by the BNSF Timetable, was 20 MPH. Ex. 36, Ex. 37. 03/14/07 RP 801-810. The Track class, at the time of the accident was Class 2. Ex. 52, page 2, section 2, paragraph 22. The trial court erred in not admitting BNSF documents related to train speed and track class produced during discovery.

The trial court erred in not allowing the testimony of Nies regarding his investigation of and report regarding the accident. Ex. 53. The trial court erred in not allowing the testimony of engineer Burks regarding his understanding of the speed limit. 03/14/07 RP 801-810; CP 130; 03/21/07 RP 1694.

2. Expert Opinion of Ayers

In discovery, Veit asked BNSF to produce copies of "any and all right-of way plans for the tracks where the accident occurred. BNSF responded: "Defendant has searched and cannot located

(sic) any right-of-way plans for the subject area." Ex. 48.

Assuming BNSF and Bellingham were not jointly responsible to control the vegetation, the issue was who had the legal duty to keep the right of way to the southeast of the crossing free of vegetation: Bellingham and/or BNSF.

In its motion for summary judgment Bellingham, provided the following evidence: "To the south of the crossing there is an embankment located in the Burlington Northern right-of-way." CP2122, 2124. BNSF joined in Bellingham's motion for summary judgment and in support of Bellingham's motion BNSF adopted Bellingham's evidence and arguments as its own. CP 2031. The pictures taken the day of the accident and the Stevens survey clearly demonstrate that BNSF claimed more than 25 feet of right-of-way at the crossing at the time of the accident. Ex. 1 (pictures 14, 15, 22, and 23); Ex. 13.

The vegetation seen in Exhibits 1 and 7 was removed after the accident. BNSF argued incorrectly that it had no control over the hillside. Subsequent measures are allowed into evidence when offered to prove ownership, control, or feasibility. ER 407.

a. Excluded Testimony of Rosenberg and Williams

The trial court erroneously excluded testimony offered from Rosenberg and Williams. Ex. 50; Ex. 51; 03/19/07 RP 1130-31.¹² The only filed document of record described the right of way as 25 feet from the centerline of the track. The recorded agreement gave the railroad the "right to make the full width of said right-of-way hereby granted available by permitting the slopes, both in cuts and fills to extend outside of said right-of-way as the nature of the ground may make necessary." Ex. 18. Further, the agreement granted the railway, upon demand, to receive such "further right-of-way deeds or contract should be found necessary in order to carry out the purpose of this contract and to give to the party of the second part the rights-of-way herein described, completely and fully . . ." Id.

Williams, Bellingham's agent in charge of managing Bellingham's real property, testified that the BNSF right of way through Bellingham was at least 25 feet from the centerline of the track. 03/21/07 RP 1698. Since 1999, BNSF occupied the 25 feet of right of way at all times. RP 1700.

¹² Both offered to testify that the vegetation at the crossing in the southeast corner was removed after the accident and it was not removed by Bellingham.

b. Ayers "opinion" testimony

BNSF called Ayers as an alleged expert to opine that the right of way was 7 feet from the centerline of the tracks. Ayers based his opinion on an inadmissible document obtained on the internet; dated 1818, 1908 or 1918. 03/20/07 RP 1434. When BSNF offered the document, Veit properly objected on lack of foundation. Veit's objection was sustained. RP 1427-28. Similarly, Veit objected to Exhibit 63-A. The trial court erroneously admitted 63-A for illustrative purposes. Veit objected to 63-B. RP 1430. Again, the trial court erroneously admitted 63-B in for illustrative purposes.

Veit properly moved to strike his 7 feet by occupation opinion as lacking any foundation. RP 1436. Thereafter, without a proper foundation, over Veit's repeated objections, BNSF offered and the trial court erroneously admitted Exhibits 64 through 67 and the testimony related thereto. RP 1442-1449. Veit objected to Ayers' alleged expert opinion(s). RP 1450.

Ayers did his work two weeks before trial. RP 1450. He was asked to make no assumptions. He made no assumptions regarding anything, including occupation of any right of way by

BNSF or Bellingham. RP 1451.

Ayers testified that "held by occupancy" means someone put a line on a map and "took the property" from someone else. RP 1458. Such an opinion would make Ayers opinion testimony a legal conclusion. It is error to allow an expert to express an opinion on ultimate legal issues such as ownership of rights-of-way.

Washington State Physicians Insurance Exchange & Association v. Fisons Corporation, 122 Wn.2d 299, 344, 858 P.2d 1054 (1993).

Ayers had no information regarding the occupancy of any right of way by BNSF from 1950 to the time of the accident. RP 1460. Ayers had never given similar testimony before. RP 1466.¹³

Expert opinion based upon the station map is not admissible unless the inadmissible map is "of a type reasonably relied upon by experts in the particular field in forming opinions." ER 703. Ayers had never relied on a similar document and had never previously testified regarding "owned by occupation."

¹³ Q. Do you remember me saying, "I'm not familiar with the term held by occupancy," and me asking you, "Where else have you seen it, in a deed or anything else, besides this document you were just looking at?"

A. Well, the term held by occupancy is somewhat unique. The term occupancy I use all the time, so that what I'm referring to there is the entire term of held by occupancy on a station map. That's not something that I've had a lot of experience -- I'm not sure that's, that's a common term. I think that's used at this point by Chicago, Milwaukee on their station map. I'm not sure there's a lot of -- but the term occupancy is what I testified to.

No Washington case has been cited by BNSF discussing the legal significance of the term "owned by occupation." Veit has found no Washington case discussing "owned by occupation." BNSF has not cited any authority for the proposition that a right of way can be acquired by occupation and if acquired by occupation, cannot be expanded, by occupation, over the next 80 years.

Ayers testimony lacked a sufficient basis for its admission to be allowed under ER 703. It was not based upon sufficient facts or data, it was not the product of reliable documents, principles, or methods, and the alleged map was neither customary nor reasonable. The trial court must first find that the underlying data is of a kind reasonably relied upon by experts in the field of surveying. *State v. Ecklund*, 30 Wn.App. 313, 317-18, 633 P.2d 933 (1981). A 1900 unreadable map describing the occupation of an unknown track right of way cannot be of a type "reasonably" relied upon by anyone to determine the right of way of a different track, held by a different company, more than 80 years later. *State v. Nation*, 110 Wn.App. 651, 41 P.3d 1204 (2002) *rev. denied* 148 Wn.2d 1001, 60 P.3d 1212 (2003).

3. Robert Basey

For a time, Pat Basey was the caretaker of Veit at Maple Falls, Washington. Apparently her husband, Robert Basey, had a felony conviction for a sex crime. Veit moved in limine to prohibit evidence of testimony regarding Robert Basey's criminal record. CP 547-48. His criminal record was not relevant to any issue. However, even if relevant, its probative value was substantially outweighed by the danger of unfair prejudice or confusion of the issues. ER 403.

The move to Pat Basey's house occurred when Wilders were in California. 03/14/07 RP 851. The move was not authorized by the Wilders who held Veit's health care power of attorney. Id. Veit made that decision on her own. On returning from California, Wilder asked the Whatcom County Superior Court to appoint a guardian for Veit.

On June 9, 2006, while Veit was living with the Baseys, the Whatcom County Superior Court appointed Cindy Maxwell as full guardian of Veit. Ex. 10 to CP 1387. The sealed report of Constance Gould advised the court that Veit liked living with the Baseys and "was happy there, but missed Bellingham." Ex. 9, page

3 to CP 1387. Further, the report advised the trial court that Veit was not at risk from Robert Basey but that Veit was "interested in the possibility of moving into a nice adult family home in Bellingham." Ex. 9, page 4 to CP 1387.

Concerned that BNSF was going to seek inadmissible and highly prejudicial testimony from Mary Wilder, related to Robert Basey's criminal past and Veit's move back into Bellingham, Veit asked for a sidebar. 03/14/07 RP 855. After the sidebar, the trial court erroneously allowed Mary Wilder to be examined on her opinion on why Veit's move from Maple Falls occurred.¹⁴ Veit moved for a mistrial. 03/14/07 RP 857.¹⁵ The motion was denied. RP 860. On redirect Wilder admitted she did not have any role in

¹⁴ Q. And do you know the reason why she was moved from Maple Falls?

A. That -- I believe that was happening at the time that she was getting the guardian, and we were transferring the power of attorney to the guardian.

Q. Right, and do you know why the decision was made by the guardians to move Ms. Veit?

A. I believe so.

Q. And what's that?

A. I believe they felt that Pat's home was not a safe place for her.

Q. Why is that?

A. Because Pat's husband was a registered sex offender.

Q. Is that your understanding of the reason why she had to move to Alabama Hills?

A. I believe so." 03/14/07 RP 855-56.

¹⁵ "MR. SHEPHERD: You just heard their closing argument. Because the Court removed her from the home of a sex offender, that's caused all the damages. That's the most remarkable distortion of the truth I have ever heard." 03/14/07 RP 859. Her testimony was not based on personal knowledge.

the decision to move Veit from the Basey home. RP 874. Wilder had no knowledge of any inappropriate conduct by Robert Basey toward Veit. RP 875.

Maxwell, the GAL, with personal knowledge of the reason for Veit's move from the Basey home, correctly testified as follows:

Q. So if I was to ask you who made the decision to remove her from the Basey home to the Alabama home, was it you--

A. First off, no one removed her. No one had the ability or authority to do that. Alizon requested that she move because she thought Maple Falls was too far away.

Q. So there's been -- I want you to assume there's been some testimony here about Pat Basey. I guess it says her husband, is a registered sex offender.

A. Yes.

Q. Were you aware of that?

A. Yes.

Q. Was the move related to that issue at all?

A. No.

Q. Was there any evidence or anything that you determined that Mr. Basey was acting inappropriately towards Alizon?

A. I didn't have any direct knowledge of that.

Q. So the move she requested to get closer to Bellingham; is that correct?

A. Yes.

03/21/07 RP 1647-48.

4. Absence of previous accidents at Crossing

Veit moved in limine for an order prohibiting BNSF and witnesses, directly or indirectly, from conveying to the jury evidence related to previous accidents or absence of previous

accidents at the crossing. CP 547-49. BNSF moved in limine for an order prohibiting evidence of lawsuits, injuries, and/or accidents at this intersection. CP 508, 514. BNSF's motion was granted.

03/06/07 RP 24-25. BNSF opposed Veit's motion, but it was granted by the trial court. 03/06/07 RP 139-143.

The train that hit Veit was going much faster than 20 MPH at the crossing, after having engaged its brakes. The speed limit had been 20 MPH or lower for years. After the accident, changes were made to the crossing, including lights and gates. BNSF examined no witness who crossed the tracks under similar conditions.

Therefore, the trial court's pretrial decisions were correct. *Gabel v. Koba*, 1 Wn.App. 684, 693, 463 P.2d 237 (1969).

When Nelson was cross-examined, BNSF violated the court's order in Limine regarding prior accidents. 03/17/07 RP 654-55.¹⁶

¹⁶ Q. Now, you personally have used that crossing as a driver frequently, haven't you?

A. Yes, I -- probably once a month.

Q. And you personally have been able to come down, stop at or near the stop bar and ascertain safely whether or not a train was coming?

MR. SHEPHERD: Objection, relevancy, Your Honor.

THE COURT: Overruled.

Q. (By Mr. Robbins) Isn't that true, Mr. Nelson?

A. I've never encountered a train going down the hill, so, you know, obviously I made it across safely.

Q. You've never had a problem with that crossing, have you?

A. No, I have not. 03/17/07 RP 654-55.

The purpose of the motion in limine was so that Veit did not have to object to the questions when asked. *State v. Kelly*, 102 Wn.2d 188, 193, 685 P.2d 564 (1984). Later, when BNSF repeated the violation, Veit moved for a mistrial. 03/14/07 RP 868-70. The trial court then abandoned its order in limine and erroneously ruled that BNSF could ask questions about other drivers going safely across the crossing without any showing of similar conditions. This was prejudicial error.

II - CONCLUSION

The trial court made numerous errors, which errors denied Veit a fair trial. This Court should reverse the trial's court Order on Veit's Motion for a New Trial and remand this case with instructions for a new trial.

Respectfully submitted this 29th day of September 2008.

SHEPHERD ABBOTT CARTER

By 
Douglas R. Shepherd, WSBA # 9514
Of Attorneys for Appellant Veit