

No. 83385-1

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SUPREME COURT OF THE STATE OF WASHINGTON

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Alizon Veit,  
an individual, by and through David M. Nelson, the guardian of her estate

Petitioner,

v.

Burlington Northern Santa Fe Corporation,

Respondent.

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SUPPLEMENTAL BRIEF OF RESPONDENT  
BURLINGTON NORTHERN SANTA FE CORPORATION

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## I. INTRODUCTION

The question before this Court is whether the Federal Railroad Safety Act of 1970 (“FRSA”), 49 U.S.C. § 20101 *et seq.*, preempts state tort claims based on excessive train speed when a train is going under the speed limit prescribed by federal law. The United States Supreme Court and the federal circuit courts of appeals have answered this question in the affirmative. This Court should as well.

Pursuant to the FRSA, Congress delegated to the Federal Railroad Administration (“FRA”) the power to establish national and uniform regulations on maximum train speeds. *See* 49 C.F.R. § 213.9. The FRA explicitly and unambiguously declares that the “issuance of these regulations preempts any State law, regulation, or order covering the same subject matter....” 49 C.F.R. § 213.2. Based on these regulations, multiple federal and state courts have held that the FRSA preempts state tort claims based on excessive train speed, and that evidence of internal railroad standards related to train speed are irrelevant. Holding otherwise would create a fractured state-by-state approach to train safety, contrary to Congress’s intent to establish uniform, national standards.

This Court should follow Congress’s directive and federal precedent and hold that the FRA’s regulations on train speed preempt Petitioner Veit’s state tort cause of action based on claimed excessive train speed. The train in this case was undisputedly traveling slower than the federal speed limit. No exception to federal preemption applies. Thus, the

trial court properly determined as a matter of law that BNSF was entitled to summary judgment on Veit's excessive speed claim.

Further, Veit's duty to stop prior to entering the Pine Street crossing is beside the point. Veit's actions only go to her potential contributory negligence. The jury found that BNSF was not negligent, so the question of whether Veit's damages should be reduced due to contributory negligence was moot. Finally, Veit's argument regarding an alleged violation of due process is without support.

## **II. SUPPLEMENTAL STATEMENT OF THE CASE**

On September 10, 2001, Alizon Veit drove her manual transmission Mercedes westbound downhill towards the Pine Street railroad crossing near the Bellingham waterfront. CP 2075; RP 595-96. The weather was clear and the roadway was dry. CP 2094. The approach to the crossing was marked with no fewer than seven warning signs, devices and markings placed there by the City of Bellingham to direct motorists' attention to the tracks. CP 2241-47; *see also* RP 244, 467, 513-14. At the same time, a northbound BNSF train was also approaching. RP 1213. It was blasting its whistle loud and long and had begun blowing a quarter-mile before the crossing. RP 528, 1196-97.

Veit was described by friends and former co-workers as an unskilled driver. *Veit v. Burlington N. Santa Fe Corp.*, 150 Wn. App. 369, 378, 207 P.3d 1282 (2009); RP 595-96. Veit went through the numerous warning devices, and her car eventually stopped on the tracks. RP 524-25.

An eyewitness testified that Veit “appeared confused by the actions of the car,” which looked like it was jerking. RP 596.

Although the engineer threw the train into an emergency stop before the crossing, he was unable to stop the train before reaching Veit’s vehicle. RP 1204-05. The locomotive pushed Veit’s car approximately 150 feet down the track and off to the side, where the police and emergency responders found the car – in third gear. CP 2078.

On the same day of the accident, BNSF’s track inspector verified that the track at the Pine Street crossing was properly classified as Class 3 track under FRA’s regulations. CP 1917. The federal speed limit for Class 3 tracks is 40 mph. 49 C.F.R. § 213.9.

The only evidence introduced before the trial court confirms that the train was going less than 40 mph at the time of the accident. Witnesses at the scene testified that the train was traveling around 20 mph. RP 529, 1202-03; CP 1898. Even Veit’s own expert speculated that the train was traveling somewhere between 25.7 and 33.2 mph. RP 763.

Several years later, Veit filed suit against BNSF, its engineer Michael Burks, and the City of Bellingham. CP 2351-73. The City settled with Veit before trial. Burks was dismissed on summary judgment. *Veit*, 150 Wn. App. at 376-77 and n. 3. Prior to trial, BNSF moved for, *inter alia*, summary judgment on Veit’s excessive speed claim, arguing that it was preempted by federal law because the FRA speed limit for the crossing was 40 mph and there was no evidence that the train was traveling anywhere close to that speed. CP 1893-98. The trial court

granted BNSF's motion for summary judgment on Veit's excessive speed claim, ruling that it was preempted by federal law. CP 691-94. After approximately three weeks of trial, the jury found that BNSF was not negligent on Veit's remaining claims. CP 138-40.

Veit appealed, arguing 34 separate assignments of error. *See Brief of Appellant*. The Court of Appeals affirmed the jury verdict and entry of summary judgment in favor of BNSF on June 1, 2009. *Veit*, 150 Wn. App. at 373. Veit petitioned for review, which this Court granted.

### III. ARGUMENT

#### A. Federal Law Preempts Veit's Negligence Claim Based on Excessive Train Speed.

##### 1. Congress Enacted the FRSA to Create Uniform, National Standards for Trains.

In 1970, Congress passed the FRSA to "promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. Congress authorized the Secretary of Transportation to "prescribe regulations and issue orders for every area of railroad safety" in order to carry out this purpose. 49 U.S.C. § 20103(a). Under the FRSA, "[o]nce the Secretary has prescribed a uniform national standard, the State...no longer ha[s] authority to establish Statewide standards with respect to rail safety." H.R. Rep. No. 91-1194, *as reprinted in* 1970 U.S.C.C.A.N. at 4116-17. Accordingly, the FRSA regulations contain an explicit preemption clause, providing that: "[I]ssuance of these

regulations preempts any State law, regulation, or order covering the same subject matter....” 49 C.F.R. § 213.2; *see also* 49 U.S.C. § 20106.

The FRA has issued regulations on train speed for almost four decades. In 1971, the FRA began promulgating regulations setting maximum train speeds for different classes of train tracks. 36 Fed. Reg. 20,336, 20,338 (Oct. 20, 1971). The FRA continues to regulate maximum train speeds to this day. *See* 49 C.F.R. § 213.9. For example, the federal speed limit for the Class 3 track at issue in this case is 40 mph. *Id.* Accordingly, by its express terms, the FRA “covers the subject” of train speed, and preempts state tort claims that would undermine the national standards.

2. *The U.S. Supreme Court's Opinion in Easterwood Controls.*

The U.S. Supreme Court confirmed that the FRA’s speed limits for trains preempt state causes of action based on excessive train speed. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993). In *Easterwood*, the Court held that the FRA regulations “cover[] the subject matter of train speed with respect to track conditions.” *Id.* at 675. The Court based its opinion on Congress’s desire to create a national, uniform system of train standards under the FRSA. *Id.* at 661-62, 674-75. Accordingly, when the FRA’s regulations are applicable, states cannot impose an independent duty on the railroad. *Id.* at 673-75.

The facts and claims in *Easterwood* are strikingly similar to Veit’s. In *Easterwood*, Mr. Easterwood’s vehicle was struck by a freight train at a

railroad crossing. *Id.* at 661. Mr. Easterwood's widow brought multiple claims against the railroad, including a negligence claim based on an allegation that the train was operating at an excessive speed. *Id.* The federal regulations prescribed a speed limit of 60 mph for the track at issue. *Id.* at 673. Ms. Easterwood conceded that the train was going under the federal speed limit, but contended that the railroad breached its common law duty to operate at a safe and moderate speed. *Id.* After analyzing the FRSA's preemption clause and Congress's intent, the Court held that the FRA's speed limits preempt any state claims based on excessive speed because "the speed limits must be read as not only establishing a ceiling, but also precluding additional state regulation of the sort that [Ms. Easterwood] seeks to impose on [the railroad]." *Id.* at 674. Allowing state law claims to go forward would undercut the national, uniform standards that the FRA establishes in its regulations. Indeed, without preemption, liability for excessive train speed would vary from state to state, resulting in 50 different legal standards to which railroads would be subject. This piecemeal approach contradicts Congress's express desire to eliminate state based claims in favor of national standards for train safety.

Moreover, the Court held that the FRA's regulations "cover[] the subject matter of train speed with respect to track conditions, including the conditions posed by grade crossings." *Id.* at 675 (emphasis added). The FRA speed limit applied to the train that collided with Mr. Easterwood's

truck in the crossing because the FRA took grade crossing conditions into consideration when creating the speed limit.<sup>1</sup> *Id.* at 674-75.

Veit's car was similarly struck by a freight train in a railroad crossing. She brought an allegation that the railroad operated the train at an excessive speed negligently. And, like in *Easterwood*, there is no dispute that the train was going slower than the federal speed limit. Both the FRSA and *Easterwood* prohibit Veit's excessive speed claim because the alleged speed of the train did not surpass the federal speed limit.

3. *BNSF's Internal Timetables Do Not Set the Federal Speed Limit, and Were Correctly Excluded.*

Veit argues, however, that BNSF's internal timetables that set a different speed limit than 40 mph evidence a safe speed for BNSF's trains. The trial court properly ruled that evidence of BNSF's internal speed limits should be excluded based on the FRSA's comprehensive regulation of speed limits. That BNSF sets internal speed limits lower than the federal speed limit does not change *Easterwood's* holding that all state law negligence claims for excessive speed are preempted for a train traveling within the prescribed FRA speed limits.

a. *Easterwood's progeny hold that evidence of a railroad's internal speed limits should be excluded.*

Following *Easterwood*, the federal circuit courts of appeals repeatedly have rejected the argument that a railroad should held be liable

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<sup>1</sup> The FRA does not change speed limits for trains based on the fact that there is a railroad crossing, or even for urban areas. Instead, the FRA "concentrate[s] on providing clear and accurate warnings of the approach of oncoming trains to drivers [and] providing appropriate warnings given variations in train speed." *Id.* at 674.

in negligence for violating an internal policy or rule on speed. *See Hesling v. CSX Transp., Inc.*, 396 F.3d 632, 641 (5th Cir. 2005) (“internal speed regulations cannot overcome preemption”); *Michael v. Norfolk S. Ry. Co.*, 74 F.3d 271, 273 (11th Cir. 1996) (holding same); *St. Louis Sw. Ry. Co. v. Pierce*, 68 F.3d 276, 278 (8th Cir. 1995) (same). The pertinent facts in *Hesling*, *Michael* and *Pierce* are the same as here: a negligence claim was brought based on excessive train speed, and the plaintiff sought to introduce evidence of an internal railroad speed limit lower than the speed limits prescribed in the FRA regulations. Each of these courts held that internal railroad speed limits are irrelevant, and should be excluded.

The Eleventh Circuit Court of Appeals explained the basis for the courts’ exclusion of internal speed limits: “Violation of the railroad’s own speed regulations may be evidence of negligence in a state tort claim for excessive speed; however, such a state tort claim is preempted by federal law, and the internal railroad regulations would be irrelevant under federal law.” *Michael*, 74 F.3d at 273; *see also Veit*, 150 Wn. App. at 386 (same). Because all claims based on excessive train speed are preempted, evidence of a standard of care other than the standard set by the FRA is irrelevant.

Allowing individual railroad policies to set the speed limit would create inconsistent standards. This is directly contrary to the FRSA’s goal of creating a uniform, national standard for rail safety, and would render the FRA’s speed limits meaningless. *Hesling*, 396 F.3d at 637.

Accordingly, multiple courts have “conclud[ed] that internal railroad policies on train speed that are inconsistent with federal speed regulations

are superseded by the [FRSA].” *Rice v. Cincinnati, New Orleans & Pacific Ry. Co.*, 955 F. Supp. 739, 740 (E.D. Ky. 1997).<sup>2</sup>

Moreover, if preemption does not apply to internal railroad safety standards, then railroads are, in effect, punished for setting more stringent safety goals and standards than what the law requires. Such a holding would create a perverse incentive for railroads. Railroads should be encouraged to set higher internal goals and standards that promote public safety, not penalized. This Court should follow the weight of authority, and reject Veit’s claims that BNSF’s timetable is relevant evidence of whether or not the train exceeded the federal speed limit.

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<sup>2</sup> See also *Murrell v. Union Pac. R.R. Co.*, 544 F. Supp. 2d 1138, 1149-50 (D. Or. 2008) (analyzing the 2007 amendment to the FRSA that clarifies preemption of state claims, and holding that an excessive speed claim alleging violation of a timetable limit is preempted); *Seyler v. Burlington N. Santa Fe Corp.*, 102 F. Supp. 2d 1226, 1235 (D. Kan. 2000) (“Claims based on a railroad’s failure to obey a self-imposed speed limit are preempted by FRSA.”); *Wright v. Illinois Cent. R.R. Co.*, 868 F. Supp. 183, 186-87 (S.D. Miss. 1994) (rejecting argument that preemption does not apply because railroad violated internal policies setting lower speed); *Bowman v. Norfolk S. Ry. Co.*, 832 F. Supp. 1014, 1017 (D. S.C. 1993) (where railroad complied with FRA speed limit, “state law regarding train speed is preempted, [and] evidence of the defendant’s internal policies [setting lower speed limit] is irrelevant”), *aff’d*, 66 F.3d 315 (4th Cir. 1995) (Table); *Rennick v. Norfolk & W. R.R.*, 721 N.E.2d 1287, 1290 (Ind. Ct. App. 2000) (“[B]ecause the train’s speed was in compliance with the federally prescribed speed limit at the time of the accident, Estate’s claim of NW’s negligence based upon excessive speed under a NW timetable must fail as a matter of law.”); *Mott v. Missouri Pac. R.R. Co.*, 926 S.W.2d 81, 84-85 (Mo. Ct. App. 1996) (“The railroad’s alleged violation of a self-imposed speed limit should not have been submitted to the jury.”); *Hightower v. Kansas City S. Ry. Co.*, 70 P.3d 835, 846-49 (Okla. 2003) (excessive speed claim preempted where train operated within FRA limits, even though the train may have operated above the railroad’s internal policy limit).

b. *Veit's argument that subjective opinions determine the applicable maximum train speed fails.*

Veit argues that the subjective opinions of BNSF, its employees and City of Bellingham police officers are evidence of a safe speed limit. While BNSF disputes Veit's characterization of certain facts in her Petition, even assuming they are true, the most they establish is that BNSF, its employees and local police thought the speed limit at the crossing was 20 mph. *See* Petition, at 4-5. These subjective beliefs are irrelevant. As demonstrated above, the FRA alone sets the speed limit for trains, and speed limits codified in the federal regulations preempt evidence of any other claimed safe speed limits.

Veit's argument makes no sense. It would lead to the conclusion that a driver of a car going 55 mph in a 60 mph zone could be given a speeding ticket if the driver believed that the speed limit was 50 mph. Speed limits are established as a matter of law, not subjective belief. For trains, the FRA establishes speed limits as a matter of law, and the speed limit is fixed regardless of subjective belief.

c. *The undisputed evidence is that the track at issue is Class 3 with a speed limit of 40 mph.*

The FRA sets maximum train speeds based on the classification of track. Once a railroad designs and maintains a track at a certain classification, then the FRA speed limits govern. "The different classes of track are in turn defined by, *inter alia*, their gage, alignment, curvature,

surface uniformity, and the number of crossties per length of track.”

*Easterwood*, 507 U.S. at 673 (citing 49 C.F.R. §§ 213.51-213.143).

Here, the undisputed evidence was that the characteristics of the track were Class 3; a classification that allows trains to travel at up to 40 mph. *Veit*, 150 Wn. App. at 384-85. Indeed, BNSF’s track inspector inspected the relevant portion of track on the day of the accident, and verified that it is a Class 3 track. CP 1917. The only statement otherwise was a mistake in an initial accident report, designating the track as Class 2, which the author of the report clarified as a mistake in a subsequent declaration. CP 576. This subsequently corrected misstatement does not raise an issue of fact that precludes summary judgment. And *Veit* does not provide any evidence that the essential characteristics of the track, such as the “gage, alignment, curvature, surface uniformity, and the number of crossties per length of track” are anything other than a Class 3 track. BNSF’s track inspector’s undisputed verification of the track as Class 3 determines the issue in light of the lack of any evidence to the contrary.<sup>3</sup> See *Myers v. Missouri Pac. R.R. Co.*, 52 P.3d 1014, 1023-24 (Okla. 2002) (holding that a track inspector’s affidavit that track is Class 3 is sufficient to shift burden to plaintiff to show that the inspector does not have personal knowledge or that the track did not meet the criteria for a Class 3 track).

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<sup>3</sup> Only a federal track inspector has the authority to determine that a track should be downgraded to a lower classification; the issue is not a question of fact for the jury. *Hightower*, 70 P.3d at 845.

There is no dispute that the train was going less than 40 mph when it struck Veit's car. Veit's own expert opines that the train was going, at most, 33.2 mph. RP 763. Accordingly, summary judgment was proper on Veit's negligence claim based on excessive train speed. This Court should affirm the trial court and Court of Appeals.

*d. Veit's argument regarding portions of the Federal Register is untimely and incorrect.*

Veit's belated attempt to cite sections of the Federal Register in support of her arguments related to BNSF's internal timetables is untimely and takes the FRA's language out of context. Veit cites to a passage of the Federal Register that was not codified to assert that "[t]he Timetable, as a matter of law, sets the federal speed limit." Petition, at 11. First, as the Court of Appeals correctly noted, Veit presented her arguments regarding the Federal Register for the first time in her reply brief, and they were therefore not properly before the court. *Veit*, 150 Wn. App. at 386 n. 6 (citing *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 828 P.2d 549 (1992) and *Dickson v. U.S. Fid. & Guar. Co.*, 77 Wn.2d 785, 787-88, 466 P.2d 515 (1970) ("Contentions may not be presented for the first time in a reply brief")).

Second, the cited portion of the Federal Register is part of the preamble to the final rule, and is not published in the Code of Federal Regulations.

Third, Veit focuses on partial quotes that leave out important context. Indeed, Veit's argument based on the portion of the Federal

Register that states: "Railroads set train speed in their timetables or train orders," Petition, at 11 (citing 63 Fed. Reg. 33,992 (June 22, 1998)), was considered and rejected in *Hesling*. There, the Fifth Circuit rejected the plaintiff's argument that the Federal Register language stands for the proposition that "train speed is left to the discretion of the railroads once a track classification is established." 396 F.3d at 637. The Fifth Circuit reasoned that such a reading would render the FRA's speed limits meaningless. *Id.* The court explained that:

Although on its face the statement from the Federal Register supports *Hesling's* position, the meaning of the statement changes drastically when put back into context. The next sentence is illustrious, it elucidates "[f]or example, if a railroad 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.* In other words, train speed is left to the discretion of railroads insofar as they can target what type of track designations they want to maintain. However, that is not to say that railroads can ignore federal regulations in setting their own train speeds. . . .

*Id.* at 637-38. Thus, while a railroad may select train speeds initially by choosing to construct and/or maintain its tracks according to the requirements of a classification, once it has done so the federal speed limits apply and preempt internal policies on speed limits. Allowing railroads to set speed limits that inform a legal standard would create varying standards for train speed, counter to Congress's intent to create national, uniform standards governing train safety. Moreover, the FRA goes on to clarify in the same section that state law negligence standards

are preempted, and the railroad will be held liable according to the federal standard established in 49 C.F.R. § 213.9. *See* 63 Fed. Reg. at 33,999.

Veit's Petition for Review omits this part through ellipses.

Fourth, the cases Veit cites in support of her interpretation of the Federal Register are not persuasive. In *Hargrove v. Missouri Pac. R.R. Co.*, 888 So.2d 1111, 1116 (La. App. 2004), the court actually upheld a summary judgment dismissal based on federal preemption. While the court discussed the Federal Register language, the court did not address whether or not the internal timetable actually trumped the federal regulations. Veit also cites *Anderson v. Wisconsin Cent. Transp. Co.*, 327 F. Supp. 2d 969 (E.D. Wis. 2004), to assert that internal timetables set the speed limit. But in *Anderson*, there was a material issue of fact as to the classification of the track, which is not the case here. And *Anderson* has not been followed. A recent federal case affirmatively declined to find an internal railroad speed limit as setting the federal speed limit. *Murrell v. Union Pac. R.R. Co.*, 544 F. Supp. 2d 1138 (D. Or. 2008).

Accepting Veit's argument would run counter to numerous federal opinions based on select introductory language in the Federal Register. This Court should hold that evidence of internal speed limits is irrelevant.

4. *To the Extent Goodner is to the Contrary, It Has Been Preempted by the FRSA and Easterwood.*

Eight years prior to Congress's enactment of the FRSA, and thirty years before the U.S. Supreme Court's decision in *Easterwood*, this Court decided *Goodner v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 61

Wn.2d 12, 377 P.2d 231 (1962). In *Goodner*, a car was struck by a train in a train crossing. This Court held, *inter alia*, that:

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....

61 Wn.2d at 19. *Goodner* was applying Washington State law at a time prior to the FRSA's preemption of state law claims. Congress decided subsequently to regulate train safety through the FRSA. By doing so, Congress established that federal law is "understood as covering the subject matter of train speed." *Easterwood*, 507 U.S. at 675.

The FRSA and *Easterwood* explicitly preempt *Goodner*'s holding on excessive train speed. "Federal law preempts state law when Congress intends to occupy a given field, when state law directly conflicts with federal law, or when state law would hinder accomplishment of the full purposes and objectives of the federal law. Preemption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. Federal regulations have the same preemptive effect as federal statutes." *Berger v. Personal Prods., Inc.*, 115 Wn.2d 267, 270, 797 P.2d 1148 (1990).

Here, *Easterwood* confirms that when Congress enacted the FRSA, it explicitly preempted any state law claims based on excessive train speed. *Goodner* is no longer good law to the extent it supports a state

cause of action based on excessive train speed. This Court should overturn *Goodner* to the extent it is contrary to the FRSA and *Easterwood*.

5. *Neither of the Exceptions to Preemption Applies.*

The two recognized exceptions to FRSA preemption do not apply here. The FRSA contains a savings clause that allows a state to impose more stringent laws when “necessary to eliminate or reduce an essentially local safety...hazard.” 49 U.S.C. § 20106(a)(2)(A) (emphasis added). The FRSA’s legislative history “makes it abundantly clear that this savings clause is to be narrowly construed.” *Hesling*, 396 F.3d at 640 (citation omitted). Further, *Easterwood* recognizes that preemption may not apply where there is a “duty to slow or stop a train to avoid a specific, individual hazard.” *Easterwood*, 507 U.S. at 675 n. 15 (emphasis added).

The Pine Street crossing was not an “essentially local safety hazard.” An essentially local safety hazard is a local safety concern which is not adequately encompassed within FRA’s national uniform standards. *Union Pac. R.R. v. Cal. Pub. Utils. Comm’n*, 346 F.3d 851, 860 (9th Cir. 2003). Veit relies on former WAC 480-62-155 to assert that the City adopted a lower speed limit to address an essentially local safety hazard at the crossing. But the WAC only allowed the City to designate areas as local safety hazards. The City, in fact, did not designate the Pine Street crossing as a local safety hazard. *Veit*, 150 Wn. App. at 386.

Moreover, there was no “specific, individual hazard” present on the day of the accident. A specific, individual hazard must be a hazard

“which is not a fixed condition or feature of the crossing and which is not capable of being taken into account by the [FRA] in the promulgation of uniform, national speed regulations.” *Myers*, 52 P.3d at 1027. This exception applies where there is a unique occurrence, rather than a generally dangerous condition. *Veit*, 150 Wn. App. at 385. For example, if visibility is limited due to a snowstorm. *Myers*, 52 P.3d at 1028 n. 44. Situations where there are not specific, individual hazards include general knowledge that a crossing is dangerous, traffic conditions, a crossing’s accident history, sight distances, sun glare, a railroad’s internal policies regarding speed, and inadequate signal maintenance. *Id.* at 1028. If a condition can be or is present at multiple sites then it cannot be a specific, individual hazard. *Hesling*, 396 F.3d at 640 & n.4 (“Most courts have rejected...claims of a specific, individual hazard, finding instead that the circumstances are preempted.”).<sup>4</sup>

Veit’s argument that vegetation on the embankment created a specific, individual hazard is unfounded. The vegetation was a feature of the crossing, present for every train that passed through the Pine Street crossing, and a condition that can be present at many crossings. The vegetation was not a condition present only for this specific collision, and thus not an individual, specific hazard.<sup>5</sup> The FRA’s speed limits preempt Veit’s claims based on excessive speed; no exceptions to the rule apply.

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<sup>4</sup> See also *id.* at 641 (noting that violation of agreement by railroad to operate below FRA speed limits does not create a specific, individual hazard); *Stevenson v. Union Pac. R.R. Co.*, 110 F. Supp. 2d 1086, 1088-91 (E.D. Ark. 2000) (rejecting argument that the alleged violation of state law vegetation standards constitutes a specific, individual hazard).

<sup>5</sup> Regardless, BNSF was not responsible for the vegetation on the embankment. This fact

**B. Veit's Duty to Stop is Irrelevant to the Jury's Determination that BNSF was not Negligent.**

Veit asserts that BNSF's negligence cannot be determined without examining her separate duty to stop. Veit argues that the court's initial rejection of a jury instruction regarding the Manual on Uniform Traffic Control Devices and RCW 46.61.345 (related to duty of vehicles to stop within 15-50 feet of nearest rail) was error. Petition, at 9-10. But Veit's duty goes to her own contributory negligence, not BNSF's negligence.

If a defendant is not negligent, then the affirmative defense of contributory negligence is irrelevant. *Bertsch v. Brewer*, 97 Wn.2d 83, 91-92, 640 P.2d 711 (1982). In *Bertsch*, the Court held that contributory negligence only affects the extent of a plaintiff's recovery. *Id.* This rule applies here, where the jury instruction as to Veit's duty to stop would only impact Veit's recovery if BNSF was found liable. But BNSF was not found liable by the jury so the question of Veit's duty is moot.

The cases Veit cites are inapposite. In *Bordynoski v. Bergner*, 97 Wn.2d 335, 644 P.2d 1173 (1982), the issue was whether the trial court erred by determining as a matter of law that the plaintiff bicycle rider was contributorily negligent, and that the plaintiff's negligence was a proximate cause of an accident with an automobile. This Court held that

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distinguishes the present case from *Missouri Pac. R.R. Co. v. Lemon*, 861 S.W.2d 501 (Tex. Ct. App. 1993), upon which Veit relies. In that case, the railroad was responsible for illegally parking a line of tank cars that obstructed the engineer's view. Here, the vegetation was not in BNSF's control. And to the extent that Veit claims these exemptions to preemption are based on BNSF's internal timetable, it is "merely a cloak for [her] excessive train speed theory of negligence, which federal law clearly preempts." *Hightower*, 70 P.3d at 848-49.

the trial court could not make this determination and remanded for a new trial. *Id.* at 343. The holding was based on statutory assumptions related to auto-bicycle accidents and the specific facts. *Id.* at 338-41.

Veit confuses the *Bordynoski* court's use of a quote from *Gaines v. N. Pac. Ry.*, 62 Wn.2d 45, 380 P.2d 863 (1963), which states that "[t]he questions of negligence and contributory negligence are usually so intimately related that the latter cannot be determined without reference to the former." *Id.* at 341 (emphasis added). This statement establishes the rule that a determination on contributory negligence as a matter of law is generally not proper before a determination of negligence. The Court did not state that the opposite is true, as Veit contends. The problem identified in *Bordynoski* and *Gaines* arises when there is a finding of contributory negligence first. Here, no such finding took place. The jury did not reach the issue of contributory negligence because it ruled that BNSF was not liable. A rule that contributory negligence instructions must always be given, even if a defendant is not negligent as determined by the jury, is not warranted, and is counter to judicial efficiency.

Regardless, while the trial court initially did not give the instruction related to RCW 46.61.345, it then reversed itself and gave the instruction. RP 1613-17. If there was any error, it was harmless.

**C. Veit's Due Process Claim is Not Supported.**

Veit claims a due process violation in her Petition. Petition, at 15. The claim should be denied because it is raised for first time in the

Petition. Moreover, Veit does not cite any authority for the proposition apparently underlying the due process claim that a court's decision not to publish part of an opinion violates due process.

#### IV. CONCLUSION

Congress has chosen to regulate train speed limits. The U.S. Supreme Court has recognized the preemptive effective of this action. This Court should recognize the developments in federal law since *Goodner*, and hold that the only applicable speed limit is that established by the federal regulations. Because there is no dispute that BNSF's train was going slower than the federal speed limit at the time of Veit's accident, Veit's negligence claim based on excessive speed is preempted, and evidence of BNSF's internal timetables are subsequently irrelevant. Veit's claims of error based on contributory negligence and due process are baseless. BNSF respectfully requests that this Court affirm.

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