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No. 83385-1

SUPREME COURT OF THE STATE OF WASHINGTON

CLERK

ALIZON VEIT,
an individual, by and through David M. Nelson,
the guardian of her estate,

Appellant,

v.

BURLINGTON NORTHERN SANTA FE CORPORATION,

Respondent.

FILED
JUL 31 2009
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STATE OF WASHINGTON

BURLINGTON NORTHERN SANTA FE CORPORATION'S
ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

The issues in this case do not warrant review by the Washington Supreme Court.

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.¹ The weather was clear and the roadway was dry.² The approach to the crossing was marked with no fewer than seven warning signs and devices placed there by the City of Bellingham ("City") to direct motorists' attention to the tracks:

- a round "RxR" sign;
- an "X" with lines painted on the street;
- a crossbuck sign (black-and-white, X-shaped sign that read "RAILROAD CROSSING");
- a smaller sign that said "2 TRACKS";
- a sign that said "NO STOPPING ON TRACKS;"
- a "STOP" sign; and

¹ *Veit v. Burlington Northern Santa Fe Corp.*, 207 P.3d 1282, 1283 (Wn. Ct. App. 2009) (attached in Appendix below); CP 2075; RP 595-96.

² *Veit*, 207 P.3d at 1285; CP 2094.

- painted pavement markings including a crossbuck and a stop line.³

Ms. Veit was reportedly listening to classical music as she approached the crossing.⁴

A northbound BNSF train was also approaching.⁵ It was blasting its whistle loud and long and had begun blowing a quarter-mile before the crossing.⁶ As Veit arrived at the stop bar, she made a “California” stop.⁷ The oncoming train continued to blow its whistle.⁸

Veit, who was described by friends and former co-workers as an unskilled driver, rolled through the stop bar and stop sign and seemed to panic when she saw the train.⁹ An eyewitness testified that Veit “appeared confused by the actions of the car,” which looked

³ *Veit*, 207 P.3d at 1283–84; CP 2241–47; *see also* RP 244, 467, 512.

⁴ *Veit* at 1284; CP 2078.

⁵ *Veit* at 1284; RP 1213.

⁶ *Veit* at 1284; RP 528, 1196–97.

⁷ *Veit* at 1284; RP 595–96.

⁸ *Veit* at 1284; RP 1193.

⁹ *Veit* at 1286 (“Wilder said that Veit was ‘a terrible driver.’ Wilder testified that after Veit’s husband died, he had to help Veit back her car out of the driveway because otherwise ‘she would always go in the bushes.’”); RP 595–96.

like it was jerking.¹⁰ The car eventually stopped on the tracks, directly in the train's path.¹¹

Percipient witnesses confirmed that the train was traveling at 20 mph on Class 3 track, half the 40 mph federal speed limit.¹² Only the conjecture of Veit's hired expert suggested the train traveled faster than 20 mph (train allegedly traveled between 25.7 mph and 33.2 mph).¹³

Although the engineer threw the train into emergency stop before the crossing, he was unable to stop the train before reaching Veit's vehicle.¹⁴ 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.¹⁵

¹⁰ *Veit*, 207 P.3d at 1285; RP 596.

¹¹ *Veit* at 1285; RP 524–25.

¹² *Veit* at 1283–86, RP 529, 1202–03; CP 1898; *see* 49 C.F.R. § 213.9. Veit's contention to this Court that “[a]s of August 25, 2006, it was undisputed that the BNSF train was going faster than 29.5 mph at the time of the accident” is false. Veit acknowledged in her own appellate brief that “*BNSF told the Bellingham Police investigating the accident that . . . the train was traveling at 20 mph at the time of the accident.*” *Brief of Appellant* p. 8 (emphasis added).

¹³ *Veit* at 1286; RP 763.

¹⁴ *Veit* at 1284; RP 1204–05.

¹⁵ *Veit* at 1284; CP 2078.

Several years later, Veit filed suit against BNSF, its engineer Michael Burks, and the City of Bellingham.¹⁶ The City settled with Veit before trial, and Burks was dismissed on summary judgment.¹⁷ Thus, at trial, BNSF was the sole remaining defendant. After approximately three weeks of testimony and argument, the jury found that BNSF was not negligent.¹⁸ Veit appealed, arguing 34 separate assignments of error.¹⁹ The court of appeals affirmed the jury's verdict and entry of judgment in favor of BNSF on June 1, 2009.²⁰

Veit subsequently petitioned for review by this honorable court.²¹ The petition centers around two legal issues: the train speed limit and Veit's contributory negligence. Neither justifies further review by this Court.

¹⁶ CP 2351-2373.

¹⁷ *Veit* at 1285; CP 691-94.

¹⁸ *Veit* at 1285, 1287; CP 138-140.

¹⁹ *See Brief of Appellant.*

²⁰ *Veit* at 1286.

²¹ Technically, of course, the petition was filed by Mr. Nelson, Veit's guardian, but as Veit is the party in interest, this Answer treats Veit herself as the Petitioner.

REASONS WHY REVIEW SHOULD BE DENIED

RAP 13.4(b) states that discretionary review will be accepted by the Washington Supreme Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Washington Supreme Court;
- (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals;
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Veit's petition fails to meet any of these considerations.

1. The court of appeals decision is not in conflict with any decision of this Court or any other Washington court of appeals.
 - A. Courts addressing the issue uniformly agree with the court of appeals that the federal train speed limits found in 49 C.F.R. § 213.9 control.

The U.S. Supreme Court case *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 676, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993) ruled that the federal speed limits prescribed in 49 C.F.R. § 213.9 preempt state causes of action that seek to impose greater speed restrictions upon railroads.²² Since *Easterwood*, courts have uniformly ruled that negligent speed claims are preempted—even if a train is traveling faster than the maximum allowed in its railroad’s timetable—so long as the train was traveling at or below the Section 213.9 federal speed limit.²³ Here, it is undisputed that the train was

²² *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 676, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993).

²³ See, e.g., *Michael v. Norfolk S. Ry. Co.*, 74 F.3d 271, 274 (11th Cir. 1996) (holding that the FRA “sets out specific speed limits for different types of tracks and trains; those limits are not affected by internal railroad policies”); *St. Louis Southwestern Ry. Co. v. Pierce*, 68 F.3d 276, 278 (8th Cir. 1995) (affirming partial summary judgment based on federal preemption train exceeded self-imposed maximum speed of 45 m.p.h. where FSA speed limit was 60 m.p.h.); *Rennick v. Norfolk & W. R.R.*, 721 N.E.2d 1287, 1290 (Ind. Ct. App. 2000) (holding where “the train’s speed was in compliance with the federally prescribed speed limit at the time of the accident, [plaintiff’s] claim of NW’s negligence based upon excessive speed under a NW timetable must fail as a matter of

traveling well below 40 mph, the federal speed limit for Class 3 track.

- (1) *Goodner is not on point and does not compel discretionary review.*

In this case, not only does the court of appeals decision *not* conflict with any post-*Easterwood* Washington cases, but it closely adheres to other post-*Easterwood* decisions. Nevertheless, Veit incorrectly argues that *Goodner v. Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 61 Wn.2d 12, 377 P.2d 231 (1963) controls with respect to negligent train speed.

Goodner (the single Washington case cited by Veit regarding train speed) was decided thirty years before *Easterwood*, and fails to mention the Section 213.9 federal train speed limits—because they

law”); *Mott v. Missouri Pacific R.R. Co.*, 926 S.W.2d 81, 84 (Mo. Ct. App. 1996) (“Violation of a railroad’s own self-imposed speed limit would only be relevant as evidence of due care in a negligence action for excessive speed outlawed by *Easterwood*, so any violation of the Missouri Pacific timetable should not have been submitted to the jury.”); *Bowman v. Norfolk S. Ry. Co.*, 832 F. Supp. 1014, 1016 (D.S.C. 1993) (“because . . . state law regarding train speed is pre-empted,” it logically followed that evidence of the defendant’s internal train speed policies was irrelevant).

were not yet promulgated by the Secretary of Transportation.²⁴ The court of appeals opinion ably addresses Veit's *Goodner* contention:

Veit also contends that the trial court erred in excluding evidence of the internal speed limits set in the BNSF timetables. In *Goodner*, the court held that violation of a railroad's internal speed limit was evidence of negligence. *Goodner*, 61 Wash.2d at 19, 377 P.2d 231. While a violation of the railroad's internal speed limits may be evidence of negligence under state law, under *Easterwood*, the federal regulations which specify the speed limits for different types of track preempt state law negligence claims based on excessive speed. *Easterwood*, 507 U.S. at 673-74, 113 S.Ct. 1732; See also *St. Louis Southwestern Ry. Co. v. Pierce*, 68 F.3d 276, 278 (8th Cir.1995) (railroad's self-imposed speed limit of 45 m.p.h. was preempted by the Federal Safety Act speed limit of 60 m.p.h.); *Mott v. Missouri Pac. R. Co.*, 926 S.W.2d 81, 85 (Mo.App. W.D.1996) ("The railroad's alleged violation of a self-imposed speed limit should not have been submitted to the jury.").²⁵

No grounds for review exists under RAP 13.4(b)(1) or (2) based on *Goodner*.

²⁴ *Goodner v. Chicago, M., St. P. & P. R. Co.*, 61 Wn.2d 12, 377 P.2d 231 (1963); see *Santini v. Consolidated Rail Corp.*, 505 N.E.2d 832, 837 (Ind. App. Ct. 1987) ("The Federal Railroad Administration initially adopted on October 20, 1971, under the authority of 45 U.S.C. §§ 431 and 438 and 49 C.F.R. 1.49(N), a regulation governing the maximum speed of trains on six classes of railroad track.").

²⁵ *Veit*, 207 P.3d at 1289.

- (2) *Veit's claim that BNSF's timetable sets the federal speed limit, although not properly before this Court, is nonsensical.*

Veit also argues for the second time—the first was in her appellate reply brief—that “[t]he Timetable, as a matter of law, sets the federal speed limit.”²⁶ The appellate court responded properly to Veit’s claim:

For the first time in her reply brief, Veit cites *Anderson v. Wisconsin Cent. Transp. Co.*, 327 F.Supp.2d 969 (E.D.Wis.2004) and a provision in 49 C.F.R. § 213.9, to argue that railroads establish track classification and speed limits in the timetables. We do not consider arguments made for the first time in a reply brief. *Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 809, 828 P.2d 549 (1992). *See also Dickson v. U.S. Fid. & Guar. Co.*, 77 Wash.2d 785, 787-88, 466 P.2d 515 (1970) (“Contentions may not be presented for the first time in a reply brief.”).²⁷

And even if the issue was properly raised by Veit—which BNSF disputes—it makes no sense. Although she claims the

²⁶ See *Petition for Review* at pp. 8–9, 11. The “speed limit” issues that Veit allegedly raised prior to filing her appellate reply brief related to BNSF’s timetable/internal speed limits and restrictions, not the *federal* speed limit(s) of 49 C.F.R. § 213.9.

²⁷ *Veit*, 207 P.3d at 1290 n.6.

timetable set the federal speed at 20 mph or 30 mph, there *is no* 20 mph or 30 mph federal speed limit for freight trains.²⁸

Federal Railroad Administration, DOT		§ 213.17	
(In miles per hour)			
Over track that meets all of the requirements prescribed in this part for—	The maximum allowable operating speed for freight trains is—	The maximum allowable operating speed for passenger trains is—	
Excepted track	10	N/A	
Class 1 track	10	15	
Class 2 track	25	30	
Class 3 track	40	60	
Class 4 track	60	80	
Class 5 track	80	90	

49 C.F.R. § 213.9 (2000).

Veit’s speed limit arguments do not necessitate further review by this Court.

(3) *The Pine Street crossing was not an “essentially local safety hazard”—and neither was BNSF’s timetable.*

Veit claims that the state can enforce a lower speed limit if necessary “to eliminate or reduce an essentially local safety hazard.”²⁹ But her theory (at least against BNSF; it was clear at trial that BNSF had no control over vegetation on the adjacent

²⁸ 49 CFR § 213.9 (2000).

²⁹ *Petition for Review* at p. 16.

embankment³⁰) appears by process of elimination to be based entirely on the railroad's internal timetable speed regulations, which Veit says "were adopted 'for the safety of persons using the highway crossing.'"³¹ The case *Hightower v. Kansas City Southern Railway Co.*, 70 P.3d 835, 848–849 (Okla. 2003) illuminates the flaws in such an argument:

Internal speed limits set by the Railroad are not a person, vehicle, obstruction, object, or event which is not a fixed condition or feature of the crossing incapable of being taken into account by the Secretary of Transportation. Clearly, train speed limits are capable of being taken into account by the Secretary of Transportation in the promulgation of uniform, national speed regulations, since this is exactly what the Secretary has done in establishing classifications of tracks and corresponding maximum speed limits. Such internal speed limits are not a unique occurrence which could lead to a specific and imminent collision and have nothing to do with the avoidance of a specific collision such that would fall within the definition of "specific, individual hazard" as defined in *Myers*. . . . [Plaintiff's] "specific, individual hazard" or "local hazard claim" is merely a cloak for his

³⁰ *Veit*, 207 P.3d at 1289 ("[T]he evidence established that BNSF was not responsible for the vegetation on the embankment" and "the City had not designated the Pine Street crossing as a local safety hazard.").

³¹ *Petition for Review* at p. 17.

excessive train speed theory of negligence, which federal law clearly preempts.³²

Veit's improper use of the phrase "essentially local safety hazard" to describe BNSF's timetable does not justify review of the appellate court's decision by the Supreme Court.

B. BNSF's and Veit's duties are separable issues, and the extent of Veit's own negligence does not warrant further review by this Court.

Veit's duty (or lack thereof) to stop at the stop bar has no bearing on the jury's decision on whether BNSF was negligent, but only whether Veit was negligent.³³ Therefore, the RCW 46.61.345 instruction—and related facts—would only have come into the jury's consideration if it had decided that BNSF was negligent and therefore was moving on down the verdict form to consider whether

³² *Hightower v. Kansas City Southern Ry. Co.*, 70 P.3d 835, 848–849 (Okla. 2003) (internal citations omitted).

³³ The trial court did, however, instruct the jury on negligence, contributory negligence, and the requirements of the MUTCD concerning traffic controls, the location of the stop bar, and the duty of the railroad to maintain the right-of-way. *Veit*, 207 P.3d at 1286.

and to what degree Veit had been contributorily negligent.³⁴ The stop bar instruction and testimony as to whether Veit stopped before entering the crossing could therefore not have affected the outcome of the trial.

Despite Veit's argument to the contrary, *Bordynoski v. Bergner*, 97 Wn.2d 335, 644 P.2d 1173 (1982) does not compel a different result or review by this Court. In *Bordynoski*, the trial court incorrectly instructed the jury that the plaintiff was contributorily negligent as a matter of law, which the Court held prejudiced the jury's defense verdict based on factors not at issue in this case.³⁵ The facts of *Bordynoski* distinguish it from Veit's trial, in which no such contributory negligence instruction was given. And Veit essentially asks this Court to rule that all juries must answer whether and to what extent a plaintiff was contributorily negligent after answering that the defendant was not at fault. There is no basis in the law for

³⁴ See, e.g., *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995) (erroneous statement of the law in a jury instruction is reversible error only if it is also prejudicial); *James S. Black & Co. v. P & R Co.*, 12 Wn.App. 533, 537, 530 P.2d 722 (1975) (error not prejudicial unless it affects, or presumptively affects, the outcome of the trial).

³⁵ *Bordynoski v. Bergner*, 97 Wn.2d 335, 644 P.2d 1173 (1982).

such a blanket rule. Veit's argument asks this honorable court to consider reversing a jury verdict because of instructions regarding a question that the jury never addressed—the ultimate harmless error.

2. Ms. Veit cannot demonstrate any state or federal constitutional violation.

Veit claims that her due process rights were violated based on unpublished federal train speed limits, as well as the lack of “some kind of ‘ascertainable standard’ and process for review of the agency decision.”³⁶ The federal train speed limits are published at 49 C.F.R. § 213.9. Veit's irrelevant discussion about unpublished agency rules does not satisfy the RAP 13.4(b)(3) guidelines.

3. There is no issue of substantial public interest.

Veit bases her substantial public interest argument on “whether federal train speed limits must be published . . . or whether they can exist only in the mind of a railroad employee.”³⁷ The federal

³⁶ *Petition for Review* at p. 15.

³⁷ *Id.* at p. 13.

train speed limits are published at 49 C.F.R. § 213.9. Veit's public interest argument—which fails to cite even one case—does not compel review by this Court under RAP 13.4(b)(4).

REQUEST FOR ATTORNEY FEES AND EXPENSES

BNSF filed an unopposed cost bill with the Court of Appeals.³⁸ BNSF respectfully requests this Court award reasonable attorney fees and expenses for the preparation and filing of this answer to Veit's petition for review pursuant to RCW 4.84.080 and RAP 18.1.³⁹

CONCLUSION

Veit's petition does not trigger review under RAP 13.4(b). This Court should decline discretionary review.

³⁸ See Court of Appeals *Cost Bill*.

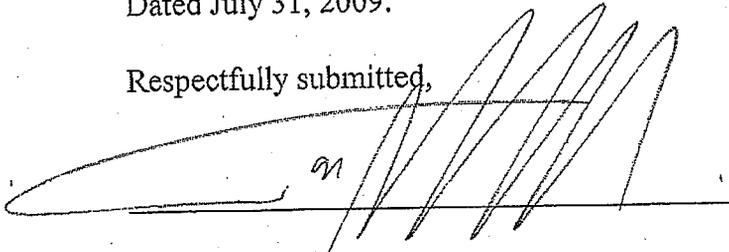
³⁹ See RAP 18.1(b) ("Requests made at the Court of Appeals will be considered as continuing requests at the Supreme Court"); RAP 18.1(j) ("If attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals, and if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing party's preparation and filing of the timely answer to the petition for review.").

APPENDIX

A copy of the court of appeals decision, *Veit v. Burlington Northern Santa Fe Corp.*, 207 P.3d 1282 (Wn. Ct. App. 2009), is attached.

Dated July 31, 2009.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Tom Montgomery', written over a horizontal line. The signature is stylized and somewhat cursive.

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CERTIFICATE OF SERVICE

I am over the age of 18; and not a party to this action. I am a paralegal with Montgomery Scarp MacDougall, PLLC, whose address is 1218 Third Avenue, Suite 2700, Seattle, Washington, 98101.

I hereby certify that the original of *Burlington Northern Santa Fe Corporation's Answer to Petition For Review* and this certificate of service have been filed with the Supreme Court of the State of Washington via legal messengers (ABC Legal Services) and a copy served upon the following via legal messengers (4th Corner Network, Inc.):

Douglas R. Shepherd
Edward S. Alexander
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1616 Cornwall Ave, Ste 100
Bellingham, WA 98225-
(360) 733-3773

I declare under penalty under the laws of the State of Washington that the foregoing information is true and correct.

DATED this 31st day of July, 2009, at Seattle, Washington.



Lisa Miller

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SUPREME COURT OF THE STATE OF WASHINGTON
ALIZON VIET, ET AL.,

Plaintiff/Petitioner

vs

No. 83385-1

BURLINGTON NORTHERN SANTA
FE CORPORATION

DECLARATION OF
EMAILED DOCUMENT
(DCLR)

Defendant/Respondent

I declare as follows:

1. I am the party who received the foregoing email transmission for filing.
2. My address is: 120 Pear St NE, Olympia, WA 98506.
3. My phone number is (360) 754-6595.
4. I have examined the foregoing document, determined that it consists of 24 pages, including this Declaration page, and that it is complete and legible.

I certify under the penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated: 7/31/09 at Olympia, Washington.

Signature: _____

Print Name: Ingrid Y. Elsinga