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No. 60126-1

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

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

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**Alizon Veit,**

**Plaintiff/Appellant,**

vs.

**Burlington Northern Santa Fe Corporation, et al,**

**Respondents/Defendants.**

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2008 AUG 11 PM 4:18

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**BRIEF OF RESPONDENT**

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August 11, 2008

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**ORIGINAL**

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## I. INTRODUCTION<sup>1</sup>

On September 10, 2001, Alizon Veit (“Ms. Veit”) drove her manual transmission Mercedes westbound downhill towards the Pine Street railroad crossing, in a little-used industrial area 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 and devices placed there by the City of Bellingham (“City”) to direct motorists’ attention to the tracks. CP 2241-47; *see also* RP 244, 467, 512. Ms. Veit was apparently listening to classical music as she approached the tracks. CP 2078.

A northbound train was approaching the crossing. RP 1213. It was blasting its whistle loud and long and had begun blowing a quarter-mile before the crossing. RP 528, 1196-97. As Ms. Veit approached the crossing, she made a “California” stop. RP 595-96. The oncoming train continued to blow its whistle. RP 1193.

Ms. Veit, who was described by friends and former co-workers as a relatively unskilled driver, then rolled through the stop bar and stop sign and seemed to panic when she saw the train approaching. RP 595-96. An

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<sup>1</sup> BNSF notes that Ms. Veit’s Introduction is conspicuously devoid of citations and should be disregarded.

eyewitness testified that Ms. Veit “appeared confused by the actions of the car,” which looked like it was jerking. RP 596. The car eventually came to a complete stop on the tracks, directly in the train’s path. RP 524-25.

The train was traveling at 20 miles per hour, much slower than the 40 mile per hour speed limit. RP 1202-03; CP 1898. Although the engineer attempted an emergency stop before the crossing, he was unable to stop the train before reaching Ms. Veit’s vehicle. RP 1204-05. The locomotive pushed Ms. Veit’s car approximately 150 feet down the track and off to the side, where the police and emergency responders found it – in third gear. CP 2078.

Several years later, Ms. Veit filed suit against BNSF, its conductor Mr. Burks, and the City of Bellingham. CP 2351-2373. The City settled with Ms. Veit before trial, and Mr. Burks was dismissed on summary judgment. CP 691-94. Thus, at trial, BNSF was the sole remaining defendant. After approximately three weeks of testimony and argument, the jury found that BNSF had done absolutely nothing wrong. CP 138-140.

## **II. ASSIGNMENTS OF ERROR**

BNSF did not cross-appeal the jury verdict or judgment and therefore has no assignments of error.

### III. STATEMENT OF THE CASE

#### A. Procedural Summary.<sup>2</sup>

Ms. Veit claimed that the defendants caused her accident by negligent operation of the train (i.e., “unreasonable and excessive speed”), negligent crossing design, and inadequate sight distance due to excessive vegetation on an embankment southeast of the crossing. CP 2351-2374. She also claimed that the City and BNSF were “strictly liable because the crossing was “extra hazardous.” CP 2356-57.

The City filed a motion for summary judgment on July 31, 2006. CP 2033. Shortly thereafter, but before the motion was decided by the trial court, the City and Ms. Veit settled. CP 1363. BNSF and Mr. Burks filed their own motion for summary judgment on August 11, 2006. CP 1884-1908. BNSF argued that the crossing was not negligently designed or maintained, and that the “extra hazardous/strict liability” claim should be dismissed. CP 1884 *et seq.* BNSF and Mr. Burks also explained that Ms. Veit’s excessive speed claim was preempted by federal law, as the Federal Railroad Administration (FRA) speed limit for the crossing was 40 m.p.h. and there was no evidence that the train was traveling anywhere close to that speed. CP 1893-98.

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<sup>2</sup> This section relates to Ms. Veit’s assignments of error Nos. 32-34. *See Brief of Appellant.*

The trial court denied BNSF's motion with regard to the design and maintenance of the crossing. CP 691-94. It granted BNSF's motion with regard to the "extra hazardous/strict liability" claim, and granted BNSF's and Mr. Burks' motion with regard to excessive speed, holding that those claims were preempted.<sup>3</sup> CP 691-94. Ms. Veit's motion to reconsider the rulings in favor of BNSF and Mr. Burks was denied.<sup>4</sup> CP 23-27.

**B. Ms. Veit's Actions At the Crossing Provide Some Context.<sup>5</sup>**

There is nothing at all in the record to support appellant's conjecture that Ms. Veit was confused by the *crossing design* when she rolled past the stop sign, saw the approaching train and stopped on the tracks. Ms. Veit's attorney acknowledged that his client never told him anything about the accident. RP 1759. She never testified at trial.

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<sup>3</sup> Nowhere in her 34 assignments error, issues related thereto, or brief did Ms. Veit expressly appeal the Court's ruling dismissing the "extra hazardous/strict liability" claim. It is therefore waived. RAP 10.3(c); *State v. Pleasant*, 38 Wn. App. 78, 81, 684 P.2d 761 (1984) ("An issue cannot be raised for the first time in a reply brief."). To the extent that the Court of Appeals deems it not waived, BNSF adopts herein its arguments made to the trial court. CP 1900-02, 822, 2049-55. Clearly, the testimony at trial as well as the jury's verdict, sustain the conclusion that the crossing was not extra hazardous.

<sup>4</sup> Nowhere in her appellate brief did Ms. Veit expressly appeal the trial court's ruling dismissing her claim of juror misconduct. It is therefore waived. *See* RAP 10.3(c); *see also Pleasant*, 38 Wn. App. at 81. To the extent that the Court of Appeals deems it not waived, BNSF refers the Court to its arguments set forth in CP 64-75 (*Defendant BNSF Railway Company's Response to Plaintiff's Motion for New Trial Based on Juror Misconduct*).

<sup>5</sup> This section addresses Ms. Veit's assignments of error Nos. 32-34, insofar as she asserts the jury verdict was unjustified.

According to the undisputed testimony, the train sounded its normal whistle prior to and approaching the crossing before the accident, and it was very loud. RP 527-28. The whistle, as usual, was so loud that it interrupted phone conversations in a nearby building. RP 527-28. One witness testified the train whistles were very resonant at the Pine Street crossing, and that a person waiting to cross could actually feel the train approaching. RP 319.

There is ample support in the record that Ms. Veit was not a skilled driver, especially with a stick shift. On appellant's direct examination neighbor and close friend Grant Wilder testified he often had to back Ms. Veit's car out of her driveway for her. RP 270, 281. The day after the accident Mr. Wilder, who held Ms. Veit's power of attorney, told investigating officers that she was not a competent driver, or that she was a terrible driver, and that because the Mercedes was a clutch operated vehicle she may have stalled it on the railroad tracks. RP 274, 282. Another friend and former co-worker, Jacqueline Hollingsworth, who used to carpool with Ms. Veit testified that Ms. Veit was not a smooth driver and was jerky or rough when shifting the gears. RP 1409-10.

Just before the collision, Ms. Veit was traveling "very slowly," according to an eyewitness, less than five m.p.h. RP 529-30. The car was in

third gear when it came to a stop after the collision. CP 2078. Ms. Veit's own expert testified that Ms. Veit's use of third gear at low speed on the tracks was "certainly mistaken" and inappropriate if not "irrational." RP 516-518.

**C. No Spoliation Occurred.<sup>6</sup>**

The event recorders on the train were not high technology, but were eight-track tapes with the new data taping over the old. RP 1396. In this case, when the event recorder was downloaded onto a computer after the accident it produced no readable data regarding train speed or anything else relating to the train involved in the accident. RP 1396-97. Nonetheless, BNSF employee Mr. Kime preserved the useless data by downloading it onto a laptop computer which is the manner by which such data normally is handled. *Id.* The laptop computer was stolen a couple months later during a vehicle break-in at a Seattle Center parking garage. RP 1397, 1400. The crime was immediately reported to the Seattle Police Department when it occurred, and a police report was issued. RP 1397-98. The laptop theft took place almost two years before Ms. Veit filed her lawsuit. Accordingly, the trial judge did not issue an instruction regarding spoliation.

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<sup>6</sup> This section pertains to Ms. Veit's assignment of error No. 11.

**D. The Federal Train Speed Limit Was 40 m.p.h.<sup>7</sup>**

Two “speed limits” may potentially apply to a stretch of track: the federal speed limit and the railroad company’s internal operating timetable speed limit. *See* CP 1917, 1910-11, 364; *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 673-76, 113 S.Ct. 1732 (1993). For purposes of a claim of negligent train speed, the federal speed limit controls. *Id.* at 674-75.

Here, although BNSF’s internal timetable speed limit was 30 m.p.h. with a head end restriction at the crossing of 20 m.p.h., the federal speed limit at the crossing was 40 m.p.h.<sup>8</sup> *See* CP 1917, 1923; 49 C.F.R. § 213.9. There was no evidence in the record that the BNSF train on September 10, 2001, was going anywhere near 40 m.p.h.

**E. The Trial Court Gave Ms. Veit’s Requested Jury Instruction Regarding The MUTCD and Washington’s Rules of the Road.<sup>9</sup>**

Ms. Veit attacks the trial court for giving her requested jury instruction regarding the applicability of the Manual on Uniform Traffic Control Devices (“MUTCD” or “Manual”) and RCW 46.61.345 after

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<sup>7</sup> This section pertains to Ms. Veit’s assignments of error Nos. 1-4, 10-16, 27, 30-34.

<sup>8</sup> A head end restriction is not a speed limit *per se*. *See* CP 364. It is simply the speed that the railroad company states the head end of the train must go *as it enters* a crossing. CP 1923, 364. As soon as the train enters the crossing, it can speed back up to the speed limit. CP 364.

<sup>9</sup> This section responds to Ms. Veit’s assignments of error Nos. 5, 33 and 34.

previously denying the request for that instruction.<sup>10</sup> RP 1613-17. The court ruled that the instruction would be appropriate given the manner in which the evidence had come in at trial.

**F. Expert Surveyor Mr. Ayers Properly Testified About the Boundaries of the Railroad and City's Rights of Way.<sup>11</sup>**

At trial, both City witnesses and a professional surveyor testified that the portion of the embankment adjacent to the crossing (allegedly preventing a clear view down the tracks) belonged to the City. RP 1674-75, 1705-06. Ms. Veit takes issue with the expert testimony of Mr. Ayers, a local professional surveyor with extensive experience and expertise. *Brief of Appellant* pp. 37-40.

To identify the boundaries of the railroad right-of-way, Mr. Ayers was required to locate and research old property documents, including a 1918 station map, which is what surveyors routinely do in order to determine boundary lines. The trial judge excluded the station map itself from evidence and from going to the jury – because Mr. Ayers could not personally authenticate the document – but he was nonetheless allowed to rely on it in

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<sup>10</sup> Although BNSF maintains that the instruction was improper, it did not affect the jury's verdict; thus, BNSF did not appeal the issue.

<sup>11</sup> This section addresses Ms. Veit's assignments of error Nos. 9, 17-26, 28, 29, 31-34.

forming his opinions and conclusions. It was hardly novel. Mr. Ayers' analysis was no different from what he commonly undertakes in his everyday profession as a surveyor.

**G. BNSF Properly Cross-Examined Ms. Veit's Witnesses On Their First-Hand Knowledge And Personal Experience At Crossing.<sup>12</sup>**

Ms. Veit called no fewer than 29 witnesses to testify at trial who did not see the accident. Yet some were asked on direct examination about their knowledge of the location and opinions as to the "dangerous" nature of the crossing. Ms. Veit opened the door to such testimony and now criticizes the cross-examination of those same witnesses (which was restricted to how they themselves had stopped, looked and listened before crossing the tracks at that location). There was no testimony about prior accidents or absence thereof.

**H. BNSF Properly Cross-Examined Damages Witnesses On Living Arrangements, Cost, and Reason For Moving.<sup>13</sup>**

Ms. Veit presented cumulative testimony intended to support a very large claim for the cost of future life care, which relied on the assumption that she (ostensibly due to her injuries and behavior) was incapable of ordinary assisted care at an adult family home. She had moved through a succession

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<sup>12</sup> This section pertains to Ms. Veit's assignment of error No. 8.

<sup>13</sup> This section addresses Ms. Veit's assignments of error Nos. 6-7.

of care givers in the five and one-half years since the accident, and the most recent of which was charging almost double the monthly rate of most local adult family home providers. RP 1053. On cross-examination, it was acknowledged by Ms. Veit's guardian that she was moved from a place where she otherwise got along well, and her behavior was less of an issue, because the provider's husband was found to be a registered sex offender. It is unclear why that issue makes any difference, especially because it addresses Ms. Veit's claim for damages, which the jury did not reach because it found that BNSF was not liable for the accident.

#### **IV. ARGUMENT**

##### **A. Legal Standard For Appellate Review.**

The Court of Appeals reviews the following trial court decisions for abuse of discretion: (1) the decision to admit or exclude evidence and testimony; (2) refusal to give a jury instruction based on a factual dispute; (3) determination regarding spoliation; (4) denial of a motion for a mistrial; (5) an order denying a motion for JNOV; (6) denial of a motion for a new trial; and (7) denial of a motion for reconsideration. *See, e.g., State v. Allen*, 159 Wn.2d 1, 10, 147 P.3d 581 (2006); *Weems v. N. Franklin Sch. Dist.*, 109 Wn.

App. 767, 777, 37 P.3d 354 (2002); *Aluminum Co. of America v. Aetna Casualty & Surety Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000); *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998); *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997); *State v. Bourgeois*, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997); *Henderson v. Tyrrell*, 80 Wn. App. 592, 602, 910 P.2d 522 (1996). A trial court abuses its discretion only when its decision is manifestly unreasonable, or is based on untenable grounds or reasons. *Will v. Frontier Contractors, Inc.*, 121 Wn. App. 119, 128, 89 P.3d 242 (2004).

The Court reviews the trial judge's conclusions of law *de novo*. See, e.g., *Walker*, 136 Wn.2d at 771-72; *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994).

**B. Ms. Veit's Actions At Crossing Supported the Jury's Verdict For BNSF.**

If the accident is the sole fault of the plaintiff, she is not entitled to a verdict in her favor. See, e.g., *Pisano v. S/S Benny Skou*, 346 F.2d 993, 995 (2<sup>nd</sup> Cir. 1956), *cert. denied*, 382 U.S. 938 (1965).

Ms. Veit never testified at trial and there is nothing in the record to support her attorney's conjecture that she was confused by the crossing design as she rolled through the stop, panicked at the approaching train and

came to a stop on the tracks. RP 595-96. The record was clear that Ms. Veit was not a skilled driver. RP 281-82. She had difficulty shifting the gears in her manual transmission Mercedes, and was traveling less than five miles an hour. RP 529-30, 1409-10. Her own expert testified that Ms. Veit's use of third gear at low speed on the tracks was "certainly mistaken," if not "irrational." RP 516-518. The train was properly sounding its whistle as it approached which was so loud it interrupted phone conversations in a nearby building. RP 527-28. There is abundant evidence to support the jury's verdict in favor of BNSF.

**C. The Court Properly Denied Ms. Veit's Request For a Spoliation Instruction.**

**1. In Washington, a Finding of Spoliation of Evidence Requires That The Party Act In *Bad Faith*.**

To evaluate potential culpability for unavailable evidence, Washington courts examine whether the party destroyed evidence in bad faith, or whether an innocent reason for its loss exists. *See Henderson v. Tyrrell*, 80 Wn. App. 592, 609, 910 P.2d 522 (1996) (citing *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4<sup>th</sup> Cir. 1995) (holding "the inference requires a showing that the party[']s . . . *willful* conduct resulted in its loss or destruction.") (emphasis added); *see also Marshall v. Bally's*

*Pacwest, Inc.*, 94 Wn. App. 372, 382, 972 P.2d 475 (1999) (“Culpability turns on whether the party acted in bad faith or whether there is an innocent explanation for the destruction.”); 5 WAPRAC § 402.6. In *Henderson*, the court emphasized that although the defendant destroyed an automobile involved in an accident, the car itself was not crucial to the issues presented because other evidence existed to show how plaintiff’s injuries occurred. *Henderson*, 80 Wn. App. at 608. The court also noted that the plaintiff had not acted in bad faith in disposing of the automobile. *Id.*

Justification for a bad faith requirement “derives from the evidentiary inference that spoliation creates; unless there was bad faith, there is no basis for ‘the inference of consciousness of a weak cause.’” *Id.* at 609 (quoting 2 John W. Strong, *McCormick on Evidence* § 265, at 192 (4<sup>th</sup> ed. 1992)). The rule is the same in other jurisdictions. *See Shepherd v. American Broadcasting Co.*, 62 F.3d 1469, 1481 (D.C. Cir. 1995) (“A sanction for failure to preserve evidence is appropriate only when a party has *consciously* disregarded its obligation to do so.”) (emphasis added); *DeLaughter v. Lawrence County Hosp.*, 601 So.2d 818, 821 (Miss. 1992) (explaining “where the evidence is positive that the hospital had been destroyed by fire, such circumstance would adequately account for the loss of the original

medical record without fault attributable to the hospital”); *Williams v. Dunagan*, C.A. No. 15870, 1993 Ohio App. LEXIS 2430, at \*4 (Ohio Ct. App., May 5, 1993) (holding where ladder involved in plaintiff’s injury was stolen from defendant’s yard, defendant did not willfully destroy or conceal evidence to justify finding spoliation).

**2. In Cases Involving Missing Event Recorder Data, Courts Consistently Hold That Spoliation Requires Proof That the Railroad Acted in Bad Faith.**

Judicial response to allegations of spoliating train records also reflects an understanding that finding spoliation is inappropriate without showing a defendant’s motive or degree of fault. *See, e.g., Nye v. CSX Transportation, Inc.*, 437 F.3d 556, 569 (6<sup>th</sup> Cir. 2006) (holding the element of “willful destruction of evidence by defendant designed to disrupt the plaintiff’s case” must be established to sustain a prima facie claim of spoliation of radio communication audiotapes); *Stevenson v. Union Pacific Railroad Company*, 354 F.3d 739, 746 (8<sup>th</sup> Cir. 2004) (explaining “there must be a finding of intentional destruction [of voice tape evidence and track maintenance records] indicating a desire to suppress the truth”); *Williams v. CSX Transportation, Inc.*, 925 F. Supp. 447, 452 (S.D. Miss. 1996), *aff’d* 139 F.3d 89 (5<sup>th</sup> Cir. 1998) (“[T]he destruction [of the train’s on-board computer] must

be such as to indicate ‘bad conduct of the defendant.’”) (quoting *Vick v. Texas Employment Comm’n*, 514 F.2d 734, 737 (5<sup>th</sup> Cir. 1975)); *Bashir v. Amtrak*, 119 F.3d 929, 931(11<sup>th</sup> Cir. 1997) (stating that an adverse inference from a lost speed tape results “from a party’s failure to preserve evidence only when the absence of that evidence is predicated on bad faith”); *Wright v. Illinois Central Railroad Co.*, 868 F. Supp. 183, 188 (S.D. Miss. 1994) (declining to find spoliation of track inspections without evidence that “documents have been destroyed in bad faith”).

The *Nye* analysis provides insight into when train record destruction does not amount to spoliation. In *Nye*, CSX Railroad destroyed audiotapes of radio communications 30 days after the train accident at issue, “in accordance with [its own] internal retention policy and ‘normal railroad practice.’” *Nye*, 437 F.3d at 568. In finding no spoliation occurred, the court considered it controlling that “the tapes were destroyed before [plaintiff] made his discovery request and [one and a half] years before the case was filed.” *Id.* at 569.

In *Williams*, plaintiffs unsuccessfully sought a spoliation ruling. *Williams*, 119 F. Supp. at 452. They claimed that the loss of information from the CSX train’s on-board computer hindered their ability to contradict the

defendant train engineer's testimony that the train traveled at 42 m.p.h. in a 45 m.p.h. speed zone. The court, however, found that without evidence of "bad conduct of the defendant," the missing data was not spoliation. *Id.* The court further elaborated that even "mere negligence [would not have been] enough" to sustain spoliation. *Id.*

The *Wright* court reiterated that actions short of bad faith do not constitute spoliation. *Wright*, 868 F. Supp. at 188. Although Illinois Central Railroad (ICR) expunged its records ten months after plaintiffs filed their complaint, "[d]efendants . . . produced undisputed testimony that said records routinely were maintained for a period of twelve months, in accordance with FRSA regulations." *Id.* Plaintiffs' First Request for Production of Documents in *Wright* occurred almost seven months after defendants destroyed relevant reports of track inspections, and one and one half years after filing their lawsuit. *Id.* Because ICR destroyed its train records without bad faith, under routine procedures, in advance of plaintiff's Request for Production of Documents, the court denied plaintiff's request for adverse inferences for alleged spoliation. *Id.*

In *Bashir*, a missing speed tape was not spoliation where the circumstances surrounding the tape's absence did not indicate that defendants

had tampered with the evidence. *Bashir*, 119 F.3d at 931. The court noted that other evidence existed pertaining to the train's speed:

Plaintiff contends that an issue of fact exists because Amtrak did not preserve the speed recorder tape, which continuously records the speed of a train during its operation. Plaintiff is incorrect. *The statements of [the train's crew] are perfectly valid evidence of speed.* It is immaterial whether other evidence may have been available if there is no reason to doubt the evidence Defendants have offered. Plaintiff's burden is to rebut the evidence Defendant has offered, not simply to suggest that better evidence may be available.

*Bashir*, 119 F.3d at 411 (emphasis added). The court also reasoned that defendants knew, when they reported the train's speed to police for an accident report, that the speed tape had recorded the train's velocity at the time of the accident. *Id.* at 931. Without reason or motivation for defendants to lie, the court refused the Ms. Veit's request for a spoliation inference.

**3. Because BNSF Did Not Destroy Speed Tape Data From September 10, 2001 Accident in Bad Faith, This Court Should Affirm the Trial Court's Decision That a Spoliation Instruction Was Inappropriate.**

Because BNSF employee Mr. Kime clearly did not act in bad faith, a finding of no spoliation is warranted. Mr. Kime followed a rational and normal procedure in handling speed tapes. RP 1396. Once he successfully downloaded data on a tape to his computer, he did not retain the actual eight-

track tape cartridge itself because it was corrupted. RP 1396-97. If the tape was good, he erased and reused it. If the tape was bad, he destroyed it to prevent it from being put back into circulation and because he had transferred the data to his laptop computer. RP 1405-06. Mr. Kime plainly did not expect the laptop to be stolen and was not responsible for the theft of the unusable data.

It is impossible to read the spoliation cases and find Mr. Kime and BNSF guilty of spoliation here. There is no evidence that Mr. Kime was “conscious[] of a weak cause.” There is no evidence that the theft of the laptop was “designed to disrupt the plaintiff’s case.” There is no evidence of “a desire to suppress the truth.” Indeed, BNSF would like to have a good event recorder data from this accident, as it would corroborate the testimony of the engineer and of the eyewitness, Jennifer Hendricks, and put Ms. Veit’s unsubstantiated allegations of wrongdoing to bed. CP 2022; RP 529. This case is foursquare with *Wright*, where “[b]ecause [the railroad] destroyed its train records without bad faith, under routine procedures, in advance of plaintiff’s Request for Production of Documents,” the court denied Ms. Veit’s request for adverse inferences for alleged spoliation.

Moreover, there is other reliable evidence of the train's speed. Like the defendants in *Bashir*, Engineer Burks and Brakeman Davis had no reason to lie to the police about the train's speed because they believed that it had been recorded. Ms. Hendricks testified there was nothing unusual about the train speed that day, and she watched them go by every day looking out her window. And the crew had no reason to speed; this was a work train hauling some concrete ties to a nearby job. RP 1212. Finally, Mr. Kime's uncontested testimony that the eight-track tape failed to record useful train speed information confirms that the neither the speed tape nor the data in the computer had evidentiary value to either party.<sup>14</sup>

Under the laws of Washington and other jurisdictions addressing the issue, spoliation's "bad faith" test was not even remotely met by any conduct of Mr. Kime or BNSF here. The court properly declined to grant an adverse

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<sup>14</sup> BNSF's production of a print out of event recorder data from approximately one year after the accident does not suggest bad faith. As Mr. Kime explains:

It is my understanding that the Court had questions about printouts of downloaded data from the locomotive that collided with Ms. Veit that was produced by BNSF to plaintiff in this case. The printouts show dates in August and November 2002, many months after the events at issue in this case. The printouts suggest that someone at that time pulled the tape from that locomotive's event recorder, got good data, and printed it. It may well have been a test to confirm that the event recorder in the lead locomotive was in fact functioning, and that the problem on September 10, 2001, had been the tape, not the event recorder.

CP 653 (Kime Decl. ¶ 27).

inference or jury instruction, because Mr. Kime and BNSF did not act in bad faith to hide or destroy evidence. That ruling should be affirmed.

**D. Preemption: The Trial Court Properly Granted Partial Summary Judgment And Excluded Evidence Relating to BNSF's Internal Speed Limit.**

**1. Ms. Veit's Claims Based on the Allegedly Excessive Speed of the Train Were Preempted As a Matter of Law.**

Federal regulations issued by the Secretary of Transportation ("Secretary") pursuant to the Federal Railroad Safety Act ("FRSA") and codified at 49 C.F.R. § 213.9 set out specific speed limits for different Classes of tracks. The different track Classes are defined by, *inter alia*, their gage, curvature, alignment, surface uniformity, and the number of crossties per length of track. *See* 49 C.F.R. §§ 213.51-213.143. When adopted by the Secretary, the maximum allowable speeds took into account the hazards posed by track conditions, "including the conditions posed by grade crossings." *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 674, 113 S.Ct. 1732, 123 L. Ed. 2d 387 (1993).

The FRSA provides that laws, regulations, and orders pertaining to railroad safety shall be nationally uniform to the extent practicable. 49 U.S.C. § 20106; *see City of Seattle v. Burlington N. R.R. Co.*, 145 Wn.2d 661, 670, 41 P.3d 1169 (2002). This means that the federal speed limits under 49

C.F.R. § 213.9 preempt state causes of action that seek to impose greater speed restrictions upon railroads than those imposed by the Secretary. *See Easterwood*, 507 U.S. at 676.<sup>15</sup>

Based on *Easterwood*, courts have consistently dismissed plaintiffs' claims seeking to inflict greater requirements upon railroads than those set pursuant to the FRSA, even when a train's speed violated the company's own self-imposed limit. *See, e.g., Michael v. Norfolk S. Ry. Co.*, 74 F.3d 271, 274 (11<sup>th</sup> 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 (8<sup>th</sup> 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

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<sup>15</sup> In *Easterwood*, the widow of driver killed in a collision with a locomotive filed a wrongful death action under Georgia law, alleging that the train crew was negligent because the locomotive was traveling at an excessive rate of speed. *Easterwood*, 507 U.S. at 673. Although the plaintiff conceded that the train was traveling below the maximum speed limit set by the federal regulations promulgated under the FRSA, she maintained that the railroad had "breached its common-law duty to operate its train at a moderate and safe rate of speed." *Id.* The Court disagreed, and concluded that the FRSA preempted all claims tending to undermine Congress' goal of national uniformity expressed in the FRSA. *Id.* at 674.

accident, [plaintiff's] claim of NW's negligence based upon excessive speed under a NW timetable must fail as a matter of 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).

Applying these principles, the trial court here properly ruled that because there was no genuine issue of material fact that the train was traveling in excess of the FRA 40 m.p.h. speed limit, Ms. Veit's excessive speed claims were preempted.

**2. Ms. Veit's Unsupported Arguments About Speed, Track Class, and Alleged Safety Hazards Do Not Save Her Claim From Preemption.**

Ms. Veit appears to accept that *Easterwood* holds that FRA speed limits preempt state negligence claims for excessive speed. *See Easterwood*, 507 U.S. at 676. She also concedes that there was no evidence that the train

was traveling remotely close 40 m.p.h. *Brief of Appellant* p. 9. Beyond those concessions, Ms. Veit's arguments are extraordinarily difficult to follow.

One of her arguments appears to be that the crossing here somehow constituted an "essentially local safety hazard" ("ELSH"). Doing so, she "bears a heavy burden in seeking to establish an essentially local safety hazard." *Largo v. Atchison, Topeka & Santa Fe Ry. Co.*, 131 N.M. 621, 629 (N.M. Ct. App. 2001).

This ensures that the policies advanced by preemption remain in force. Otherwise, the exception will swallow the rule. Railroads will be forced to cobble together a patchwork of train speeds, reacting to every crossing that involves some peculiarity or has some accident history. See *Easterwood*, 507 U.S. at 675 (emphasizing the need for uniformity and for the Secretary to be able to set speed limits without having to make countless adjustments for local conditions).

*Largo*, 131 N.M. at 629.

Ms. Veit writes that "the 1994 restrictions to speed at the crossing were continued 'in force' because of the restrictions to visibility at the crossing." Brief at 27. First, what "1994 restrictions to speed" she is talking about that were allegedly "continued 'in force'" is unknown. Second, the only "restrictions to visibility at the crossing" alleged by Ms. Veit were due to vegetation on the City's embankment.

Ms. Veit does not point to a single post-*Easterwood* case where a hillside or vegetation was held to satisfy the ELSH exception to federal regulation.<sup>16</sup> In *Missouri Pacific R.R. Co. v. Lemon*, from which Ms. Veit quotes liberally, a line of illegally parked tank cars blocked the vision of the engineer in approaching a railroad crossing but he did not slow his speed. The court upheld liability on the railroad, explaining “the improper parking of tank cars which obstructed the view of a crossing is not a hazard which the Secretary took into consideration when determining train speed limits under the FRSA.” *Lemon*, 861 S.W.2d 501, 510 (Ct. App. Tex. 1993). The improper parking of tank cars is not at issue here.

Although Washington courts have yet to address the issue, other jurisdictions uniformly hold that vegetation at a railroad crossing does not fall within the “specific, individual hazard” exception to federal preemption, and is a hazard which the Secretary considered. The Eighth Circuit and Ohio, Mississippi, Texas and Missouri district courts have all held that *Easterwood’s* footnote exception is a narrow one. *See generally Petre v. Norfolk Southern Ry.*, 458 F. Supp. 2d 518, 531 (D. Ohio 2006) (After reviewing “specific, individual hazard” cases from other jurisdictions, the

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<sup>16</sup> The 1963 *Goodner* case was clearly overruled by *Easterwood*.

Court noted that “such a claim ‘relates uniquely to the avoidance of a single specific collision.’ A ‘specific, individual hazard’ is not a general hazard common to all crossings -- it cannot be one that is statewide in character, and cannot be capable of being addressed within uniform, national standards.”) (internal citations omitted); *Johnson v. Union Pac. R.R.*, 2003 U.S. Dist. LEXIS 26881, \*24 (D. Tex. 2003) (“The Court finds that vegetation and limited sight distances, combined with an 83 percent angle and poor road conditions leading up to the crossing, is not a ‘specific, individual hazard’ within the meaning of footnote 15 of *Easterwood*.”); *O'Bannon v. Union Pac. R. R. Co.*, 960 F. Supp. 1411, 1420-21 (W.D. Mo. 1997) (specific, individual hazards do not encompass grade/angle of crossing, claims of inadequate warning devices, or proximity to highway), *aff'd* 169 F.3d 1088 (8th Cir. 1999).

Ms. Veit’s argument that there was some “essentially local safety hazard” is unsupported by the case law. Repealed WAC 480-62-155 adds nothing to the discussion. It simply recognized essentially local safety hazard exception where it existed.

Ms. Veit’s other argument appears to be that there were issues of fact as to whether the track in question was Class 3 with a federal speed limit of 40 m.p.h. There were none. The track inspector inspected the track *the day before* the accident and found that the track in question was Class 3 track and

was in compliance with FRA standards. CP 1916-21. John Leeper, Director Engineering Planning for BNSF, stated that “[o]n the date of the accident in this case, the track segment was Class 3.”<sup>17</sup> Ms. Veit’s protestations that the declarations were sworn in 2006 is of no moment, as each witness made clear.

Ms. Veit is correct that Trainmaster Terry Nies in preparing a multi-page report relating to the accident filled in the Class of track as 2. (Rejected) Plaintiff’s Ex. 52; CP 688. However, when that was called to his attention, Mr. Nies stated unequivocally that he had made a mistake, and that the Class of track on the date of the accident was 3. CP 576. As the trial court judge said, “It doesn’t matter whether BNSF makes an error in the report or not.” RP 56 (Motions in Limine).

Ms. Veit makes much of the fact that the head end restriction was not called an “internal BNSF” limit. *Brief of Appellant* pp. 24, 28. The import of this argument is unclear.

Ms. Veit’s assertion that engineer Burks would have testified that “he believed that the federal speed limit at the crossing was 20 miles per hour” is pure fiction. Mr. Burks never uttered a word about the FRA speed limit. He did, however, testify quite clearly that the Timetable speed limit was 30

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<sup>17</sup> Mr. Leeper was relying on the BNSF Timetable speed of 30 m.p.h. for the relevant stretch of track. CP 1909-1911. Given that the U.S. Department of Transportation has never objected to BNSF’s designation of that section as Class 3, it was deemed approved. *Id.* To the extent that Ms. Veit’s argument can be read to challenge the Timetable as hearsay, the Timetable is clearly a business record. *See* CP 362-65.

m.p.h. with a head end restriction of 20. CP 228, 240-41. At the end of the day, with regard to the applicable speed limits, as Judge Snyder commented, “the only competent evidence I have is that it is, in fact, a Class 3 track. I have no evidence from anybody else that says it’s not.” RP 56 (Motions in Limine). And that competent evidence was, as the judge said, from “people who are railroad employees who know this, and whose job it is to know that.” RP 55 (Motions in Limine).

Ms. Veit’s statement of the case and argument sections misstate the record, and mix up testimony about track class, the federal speed limit, the BNSF Timetable speed limit for the stretch of track, and the head end restriction at the crossing. Despite these efforts to confuse matters, the record is abundantly clear that the track was Class 3; the FRA speed limit was therefore 40 m.p.h.; and there was no evidence that the train was exceeding the FRA speed limit.

**E. Ms. Veit’s Arguments About the Stop Line Do Not Warrant a New Trial.**

The location of the stop line did not violate the Manual on Uniform Traffic Control Devices. The MUTCD clearly emphasizes that its provisions are “*not a substitute for engineering judgment*” to account for crossing nonuniformity. MUTCD 1A-4 (1988) (emphasis added). It specifically disclaims imposing any legal requirement for traffic control device installation, stating that the “decision to use a particular device at a particular

location should be made on the basis of an engineering study of the location.”  
MUTCD 1A-4 (1988).<sup>18</sup>

**1. The 1988 MUTCD Did *Not* Require Stop Bars to Be Placed 15 Feet From the Nearest Rail.**

The MUTCD’s *STOP Signs at Grade Crossings* section does not require any predetermined stopping distance between a stop line and the tracks. It simply states that “there must be sufficient sight distance down the track to afford ample time for a vehicle to cross the track before the arrival of the train.” MUTCD 8B-9 (1988).

Ms. Veit states that Section 8 requires BNSF to place a stop line 15 feet from the nearest rail. *See Brief of Appellant* p. 34. Section 8B-4, however, is not a section about stop bars or stop lines. It expressly and solely addresses the familiar markings of an “X” with the letters “RR” that appear on the pavement. The Section then says that the design of “railroad crossing pavement markings shall be essentially as illustrated in figure 8-2.” It goes on to elaborate that “The symbols and letters are elongated to allow for the low angle at which they are viewed” – clearly a reference, again, to the “X” and “RR” symbols, again showing that the section is devoted solely to those particular markings. The stop line is nowhere mentioned.

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<sup>18</sup> Additionally, BNSF does not have authority to install or change a crossing’s warning devices. The “determination of need and selection of devices at a grade crossing is made by the public agency with jurisdictional authority.” MUTCD 8A-1. Chapter 81.53 of the Revised Code of Washington grants that authority to the Washington Utilities and Transportation Commission.

Figure 8-2 does depict a stop bar. However, markings *other* than the “X” and “RR” symbols shown in Figure 8-2 are expressly titled “*Typical* placement of warning signs and pavement markings . . . .” There is nothing mandatory in the language, and no Section referring to the Figure that makes it a *requirement* for stop bars. Moreover, the stop bar appears to be “approximately” 15 feet from the track. Indeed, as Ms. Veit admits, if the stop bar were 15' from the east Pine Street track, a driver would have limited visibility. *Brief of Appellant* pp. 10-11. That makes no sense.

**2. Ms. Veit Cannot Show That the Location of The Stop Line Proximately Caused the Accident.**

Ms. Veit’s stop line causation argument is diffused by her own expert Mr. Mullins’ video reenactment depicting the viewpoint of a driver stopped at the stop line. *See* Ex. 56; RP 1175-84. The video shows that the driver can *hear* an approaching train roughly **43 seconds** before he or she sees the train round the bend. *Id.* The reenactment shows an additional **13 seconds of visual warning** before the train enters the crossing. *Id.*

The Manual’s *General Provisions* state that the placement of a device “should assure that . . . its location . . . is such that a driver traveling at normal speed has adequate time to make the proper response.” MUTCD 1A-2 (emphasis in original). Mr. Mullins’ reenactment indicates that drivers approaching or waiting at the stop line had almost one full minute of warning before a train entered the intersection, including 13 seconds of visual warning to safely traverse both sets of tracks. Ms. Veit’s liability expert, Mr. Stevens,

testified that it takes a car approximately 12.3 seconds to drive across the crossing. RP 487. Leaving aside that another video taken by Ms. Veit's investigator, Mr. Mullins, contradicts this and clearly shows car after car safely crossing the tracks in 4-6 seconds, *see* Ex. 56, there is no evidence that the location of the stop line caused Ms. Veit's accident.

**3. BNSF Did Not Have Authority to Relocate the Stop Line Even If It Was Improperly Placed.**

Even If The 1988 MUTCD did require stop lines to be placed 15 feet from the nearest rail, Mr. Rosenberg testified that the City exerted complete and exclusive control over its location:

- Q. Now, you were asked a question about joint responsibility at crossings. That's in reference to the actual place where the rails and the road intersect, correct? That's what the MUTCD talks about with regard to joint responsibility?
- A. Yes.
- Q. When we start talking about the street off the road, who paints the stop bar? That's the city's job, right?
- A. Correct.
- Q. If the railroad came out there and said I don't like your stop bar and scraped it up and moved it five feet one way or the other, the railroad can't do that, can it?
- A. No.
- Q. And if they did that, you'd erase it and put it where you thought it ought to go?
- A. Correct.

RP 242-43. Even if BNSF had scraped up the stop line and moved it further away from the tracks, the City would have repositioned the line in its original placement.

**4. The Trial Court Gave Ms. Veit's Requested Jury Instruction on (What She Incorrectly Argued to Be) Motorists' Duty to Stop at the Crossing.**

Ms. Veit discusses several RCWs, which she argues require a new trial. She begins with 46.61.340(1)(c), stating that “assuming no stop sign, Ms. Veit was required to stop no further than 50 feet and no closer than 15 feet from the first rail.” *Brief of Appellant* p. 31. This section of the RCW does not apply; the crossing at issue *did* have a stop sign. It is unclear what Ms. Veit expects to gain from citing 46.61.340.

Ms. Veit next quotes RCW 46.61.345. This RCW is also inapplicable. It applies by its terms to crossings that have been designated “particularly dangerous” by their respective jurisdictions. *See* first sentence of RCW 46.61.345. Ms. Veit’s reference to this section as one that applied is disingenuous, as she knows that Bellingham never designated the Pine Street Crossing as “particularly dangerous.” *See* RP 245; CP 2127 (*Declaration of Tom Rosenberg P.E.*, ¶9).

Regardless, it is unclear why Ms. Veit claims the Court incorrectly determined that RCW 46.61.345 did not apply to this crossing. She acknowledges that the Court instructed the jury that RCW 46.61.345 imposes a duty to stop when approaching railroad tracks. And even if the Court erred by preventing Ms. Veit from establishing that she did not have a legal duty to stop at the stop line (which BNSF denies since the stop sign was not improperly placed), it would be harmless error, since the jury made no

finding as to her negligence. Ms. Veit was not denied a fair trial based on whether or where she had to stop.

**5. Ms. Veit's Proposed Inst. No. 36 Did Not Apply To Crossings Without Active Warning Devices.**

Ms. Veit takes Section 8C-5 from the 1988 MUTCD out of context. *See Brief of Appellant* p. 35. Section 8C-5 involves train detection by automatic flashing light signals. *See generally* MUTCD at 8C (1988). It only applies when *active* devices are installed at a crossing.<sup>19</sup> *Id.* At the time of Ms. Veit's accident, the Pine Street crossing was controlled by seven *passive* devices: one Highway-Rail Grade Crossing Advance Warning Sign; one Highway-Rail Grade Crossbuck; two additional signs indicating "Two Tracks" and "No Stopping on Tracks;" pavement markings including a Crossbuck; a Stop sign and a corresponding stop line.<sup>20</sup> CP 2241-47; *see also* RP 244; 467; 512.<sup>21</sup> Thus, the Court did not err in denying Ms. Veit's Proposed Instruction No. 36.

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<sup>19</sup> Active traffic control signals "inform motorists and pedestrians of the approach or presence of trains, locomotives, or railroad cars on grade crossings." MUTCD at 8C-1.

<sup>20</sup> Passive traffic control systems consist of "signs, pavement markings, and grade crossing illumination" that "identify and direct attention to the location of a grade crossing." MUTCD at 8B-1.

<sup>21</sup> The design and placement of the signage, pavement markings and warnings were all in compliance with the MUTCD. *See* Part E(1) above.

**F. Testimony About the Boundaries of the Railroad and City Rights of Way Was Proper.**

**1. The Court Reviews the Admission of Expert Surveyor Testimony for Abuse of Discretion.**

Ms. Veit's brief incorrectly suggests that the *Frye* test compels *de novo* review in this case.<sup>22</sup> Where proposed testimony is not scientific in nature, *Frye* and *de novo* review are inapplicable. *See, e.g., State v. Sanders*, 66 Wn. App. 380, 385-86, 832 P.2d 1326 (1992) ("where expert testimony does not concern sophisticated or technical matters, it need not meet the rigors of a scientific theory."); *Dickerson v. Chadwell*, 62 Wn. App. 426, 434, 814 P.2d 687 (1991) (expert testimony was not subject to the *Frye* rule because it was not scientific in nature).

A professional survey is by no means a novel scientific technique.<sup>23</sup> Indeed, it is difficult to imagine what scientific theory or test could be applied to expert testimony of this kind, which is based on the surveyor's training, experience and observations on the job. Courts have considered countless

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<sup>22</sup>The *Frye* rule states if an expert's opinion is based upon a scientific theory or method, the theory or method must be generally accepted in the scientific community, allowing the court to exclude "junk" science. *See Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

<sup>23</sup> For example, the surveyor term "occupancy," or "held in occupancy" has been recognized by courts since at least 1899. *See, e.g., Williams v. Bernstein*, 51 La. Ann. 115, 124, 25 So. 411 (La. 1899) ("Neighbors constantly run up fences within or beyond the boundary lines, or join fences; doing so with the knowledge and understanding that such acts are merely temporary, and done subsidiarily to, and with reference to, the right of both to ultimately ascertain and fix rights by an action of boundary, or through a formal, legal survey. Until this happens, such land is *held in 'occupancy,'* and not in 'adverse possession,'-certainly, in the absence of a clear and direct claim advanced of adverse ownership and possession.") (emphasis added).

property dispute cases and extensive document research has been a crucial element of surveying land boundaries for decades.

**2. The Trial Court Did Not Abuse Its Discretion to Permit Ayers to Rely on And Discuss the Station Map at Trial.**

The admission of nonscientific testimony is largely within the discretion of the trial court, and should not be disturbed on appeal absent a showing of abuse of that discretion. *State v. Cauthron*, 120 Wn.2d 879, 885, 846 P.2d 502 (1993) (“once the *Frye* question is resolved, the admission of expert testimony is within the trial court’s discretion.”). And even if “the reasons for admitting or excluding the opinion evidence are both fairly debatable, the trial court’s exercise of discretion will not be reversed on appeal.” *Levea v. G.A. Gray Corp.*, 17 Wn. App. 214, 220-21, 562 P.2d 1276 (1977).

An expert may rely on inadmissible evidence to explain the reasons for his expert opinion, so long as it is of the type reasonably relied upon by experts in the field. ER 703; ER 705; see *In re Det. of Marshall*, 156 Wn.2d 150, 163, 125 P.3d 111 (2005). Reasonable evidence need not be established by independent evidence – the proponent may establish the necessary foundation by the expert’s own testimony. See *State v. Eaton*, 30 Wn. App. 288, 294, 633 P.2d 921 (1981). The *Eaton* court explained:

Although the determination of what data could reasonably be relied upon is ultimately for the court, the expert ordinarily is better qualified to make this decision in his field of expertise than is the judge, and if the judge is satisfied with the expert’s

general qualifications to express an opinion he usually should defer to the expert's advice on that point.

*Eaton* at 294 (internal citations omitted). An expert's opinion is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. ER 704.<sup>24</sup>

The trial court properly admitted Ayers' expert testimony on the boundaries involved in this case. Mr. Ayers has directly certified, supervised, or otherwise been involved in at least 2,700 surveys over his 27-year career. RP 1415. Roughly 150 of those surveys involved a railroad right-of-way. *Id.* Mr. Ayers has also testified at court approximately eight or nine times. RP 1419.

Mr. Ayers properly discussed the station map as one basis for his expert surveyor opinion.<sup>25</sup> Station maps are commonly and reasonably relied upon by other licensed surveyors when other deeds do not exist. RP 1427;

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<sup>24</sup> *Ray v. King County*, which Ms. Veit cites for the proposition that "the existence and extent of a railroad right of way is a legal question," is inapposite. *See Brief of Appellant* at p. 40. *Ray* involved a dispute about whether an existing deed conveyed fee simple or an easement. *Ray*, 120 Wn. App. 564, 571, 86 P.3d 183 (2004). The instant case does not involve deed interpretation, as no deed exists for BNSF's right-of-way at Pine Street.

<sup>25</sup> A station map is "a document that the railroads use to index the various agreements that were filed and entered into by various grantors and grantees." RP 1454. Ms. Veit misconstrues the inadmissibility of the 1918 Station map (Ex. 63) at trial. *See* RP 1427 ("The court found the 1918 Station Map . . . was inadmissible. The map was not helpful for the determination of any fact in issue. It was not admissible."). An enlarged version of the map was admitted for illustration purposes. as Ex. 63(a).

1432-33. Ayers did not interpret any laws, or directly comment on whether or not BNSF was negligent. Ms. Veit had an opportunity to cross-examine his findings and assumptions. The Court determined that his reliance on the station map was reasonable under ER 703. Railroad land dispute issues would never be resolved if expert surveyors were enjoined from testifying about property boundaries, i.e., the “existence and extent of a railroad right-of-way” as Ms. Veit argues.

### **3. Judicial Estoppel Is Unwarranted.**

Ms. Veit’s second attempt to preclude Ayers’ testimony is equally faulty. Bellingham produced and filed the declaration of traffic engineer Tom Rosenberg in support of its motion for summary judgment. BNSF adopted several of Bellingham’s arguments and facts in its own summary judgment motion, incidentally linking Rosenberg’s declaration to its brief. CP 1884-1908 (*Motion of Defendants BNSF and Michael Burks for Summary Judgment*). One sentence of Mr. Rosenberg’s declaration – which mainly pertained to the Manual on Uniform Traffic Control Devices – stated: “[t]o the south of the grade crossing there is an embankment located in the Burlington Northern right-of-way.”<sup>26</sup> Ms. Veit incorrectly asserts that this

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<sup>26</sup> CP 2124 (*Declaration of Tom Rosenberg P.E.* ¶ 4); *see generally* CP2122-2235.

sentence alone triggers judicial estoppel and prohibits Mr. Ayers' expert testimony.

The Washington Supreme Court has stated that judicial estoppel is inappropriate "when a party's prior position was based on inadvertence or mistake." *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 539, 160 P.3d 13, 15 (2007) (citing *New Hampshire v. Maine*, 532 U.S. 742, 753, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)). Judicial estoppel is also inapplicable where a party does not take clearly inconsistent positions, mislead the court, or derive an unfair advantage. *See id.* at 538-39.

Setting aside the fact that both briefs' broader crossing design arguments eclipsed non-expert Rosenberg's inconspicuous comment, the statement was simply an inadvertent assumption, and Rosenberg emphasized as much at trial:

- Q. Now, in your declaration, you said given the embankment and the railroad right-of-way, in fact you and I talked about that, you thought you might not exactly know where the railroad right-of-way was; is that correct?
- A. That's correct, and in my own defense this declaration was written by somebody else, and I made the assumption that that person had researched their work, and indeed they knew what they were talking about, and so I took them for their word that this was railroad right-of-way. *I have no idea whether it's railroad*

*right-of-way or not. I don't understand or . . . claim to understand who owns the property out there.*

Q. And in fact, the person you were trusting as regards right-of-way was the city people that represented the city, correct?

A. That's correct.

RP 238-39 (emphasis added).

Although an inadvertent assumption, Mr. Rosenberg's statement was not inherently wrong. And technically, Ayers' expert testimony was not "evidence or argument . . . contrary" to Rosenberg's declaration, as Ms. Veit claims. There *is* an embankment extending into the railroad right-of-way farther to the south of the crossing. Ayers simply clarified the precise location and extent to which the embankment and right-of-way overlapped. RP 1449-50; *see* Ex. 65A (depicting portion of embankment extending into 18.5-foot right-of-way to the farther south of the Pine Street crossing).

Ayers also explained the extent to which the embankment overlapped with the City's Pine Street right-of-way. The area of vegetation adjacent to the intersection that Ms. Veit claims obstructed the visibility to the south was on *City* property. *See* Ex. Nos. 1 and 65; RP 1462-63 (Ayers testified that the Pine Street right-of-way measured "80 feet, 40 feet on each side of the center

line.”); RP 1672-75.<sup>27</sup> Approximately 31.5 feet (40 feet, minus half the width of the 19-foot roadway) of the embankment abutting the south side of Pine Street was part of Bellingham’s right of way.

Ayers put the rights-of-way puzzle together, as all surveyor experts are trained and qualified to do. Rosenberg was not a surveyor and explained his statement to the jury. BNSF did not derive unfair advantage by presenting Ayers’ testimony nor did it ever argue or rely on Mr. Rosenberg’s single general sentence regarding property lines. Mr. Ayers was subject to voir dire and cross-examination, and his testimony was a topic of Ms. Veit’s closing argument. *See* RP 1450-67; RP1733. Judicial estoppel is inappropriate.

**4. BNSF Had No Duty to Maintain the Embankment in the City’s Pine Street Right-of-Way.**

Because BNSF did not own the embankment abutting the Pine Street right-of-way, it had no duty to remove, control or maintain the vegetation on the City’s property. *See Brief of Appellant* p. 36 (incorrectly citing RCW 35.21.310, and Bellingham Municipal Codes 13.40.080 and 13.40.140). Ms. Veit’s brief also quotes RCW 36.86.100, which refers to a “county road” and

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<sup>27</sup> Bellingham’s public works department witness Mr. Routhe also testified that the City’s Pine Street right-of-way measured 40 feet from the centerline and, after Ms. Veit’s accident, the City contracted to install a silver building in the right-of-way southeast of the Pine Street crossing. RP 1299-1308.

thus does not apply in this case. *Id.* Similarly, RCW 47.32.140 is inapplicable; it applies to grade crossings with a “state highway,” not a city road. *Id.*

**G. BNSF Cross-Examined Ms. Veit’s Witnesses on Their First-Hand Knowledge and Personal Experience at the Crossing.**

Ms. Veit brought a motion in limine to exclude the absence of prior accidents at the crossing which BNSF argued would be admissible to show that the railroad or City would not have been on notice of an excessively dangerous condition. RP 139-43 (Motions in Limine). The court granted the motion to exclude evidence of the absence of prior accidents. *Id.*

**1. There Was No Evidence to Show the Existence Or Absence of Prior Accidents at Trial.**

Evidence of other vehicle accidents at the same location may be excluded to avoid trial on collateral issues such as the conditions into which other accidents occurred. *Tyler v. Pierce County*, 188 Wash. 229, 62 P.2d 32 (1936). Where the danger of prejudice outweighs the probative value of evidence of prior accidents, the trial court may properly exclude such evidence. *Hoskins v. Reich*, 142 Wn. App. 557, 174 P.3d 1250 (2008). However, the fact of, or absence of, prior accidents may be weighed in determining whether the situation was inherently dangerous but it is only one

element in the total equation. *Tanguma v. Yakima County*, 18 Wn. App. 555, 563, 569 P.2d 1225 (1977).

At trial in this case, there was no evidence presented of prior accidents, or, more accurately, the absence of prior accidents at the Pine Street crossing. RP 867-870.

**2. Ms. Veit Opened the Door to Witnesses' First Hand Experiences at the Pine Street Crossing.**

“When a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of examination in which the subject matter was first introduced.” *Ang v. Martin*, 118 Wn. App. 553, 562, 76 P.3d 787 (2003) (citing *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969)). The trial court has considerable discretion in administering this open-door rule. *Ang*, 118 Wn. App. at 562.

On the first day of testimony, Ms. Veit’s attorney asked one damages witness, Mr. Froderberg, who had no personal knowledge about the accident about his own experience at that crossing which he had traveled regularly. The purpose was to elicit testimony that the condition of the crossing “was pretty bad,” and “overgrown with blackberry bushes.” Moreover, and in direct violation of an order granting BNSF’s motion in limine, that “at that

time, there was no signal there.” RP 38-39 (Motions in Limine); RP 252-53, 263-64.

BNSF then properly cross-examined the witness to confirm that in fact he previously experienced adequate visibility down the tracks, had never encountered any difficulty, and had stopped, looked and listened so he felt he could safely cross the tracks at that location. He also testified that he had never complained to anyone about the conditions. RP 261-62.

Again, still on the first morning of trial, Ms. Veit questioned a Bellingham police officer at length about the location of the stop bar at the crossing and the effect of vegetation south of the Pine Street intersection. RP 300-03. Officer Christelli was then asked on cross-examination and testified that in his 16 years of experience at that location drivers who stopped at or near the stop bar and proceeded with caution could see well down the tracks and cross safely. RP 317-18.

Because the court granted plaintiff’s motion in limine, BNSF was not allowed to present testimony from a witness of Ms. Veit’s who worked at the crossing, staring down at it for almost ten years, that this kind of accident had never happened there before. RP 142 (Motions in Limine); RP 523-26. That witness did testify, however, that she drove the same route as Ms. Veit almost

every day since she was old enough to drive and had always been able to determine whether or not the train was coming in order to safely cross at that location. RP 528. Similarly, Mary Wilder, who lived next to Ms. Veit and whose husband often had to get Ms. Veit's car out of the driveway for her, testified that she crossed the tracks at Pine Street countless times since 1985 and always stopped, looked, and listened, and would not cross the tracks until she was satisfied there was not a train approaching. RP 856. Where a party opens the door to a particular subject, the trial court does "not abuse its considerable discretion in permitting further questioning on that topic. . . ." *Ang*, 118 Wn. App. at 563. BNSF's examination of the witnesses' first-hand experience at the crossing, which testimony Ms. Veit had initiated, was proper.

There is nothing in the record about prior accidents or the lack thereof – which BNSF still contends would have been relevant to rebut Ms. Veit's argument and her expert's opinions about the inherently dangerous condition of the crossing – and there was no violation of the court's ruling on the motion in limine. Ms. Veit's counsel acknowledged that:

I really don't know what the motions in limine are and aren't, and I understand that I'm probably to blame for that, but I'm moving again for a mistrial and putting it on the record that there's been about five witnesses. . . .

RP 869. The trial court cogently explained its ruling in denying Ms. Veit's request for a mistrial. RP 870-71.

**H. Cross-Examination Of Damages Witnesses on Ms. Veit's Living Arrangements Was Necessary to Rebut the Allegations That Her Behavioral Problems Were Injury-Caused.**

Ms. Veit opposed BNSF's request to bifurcate the trial which would have precluded the need for numerous witnesses whose testimony was solely to support her claim for damages. One such issue was Ms. Veit's claim for exorbitant monthly costs for assisted living, ostensibly due to Ms. Veit's behavior, ostensibly caused by injuries related to the accident. BNSF was required to cross-examine each of those witnesses. Part of BNSF's case involved establishing that Ms. Veit's depression and anxiety – alleged to have prevented her from staying in the care of certain care givers – was in fact a long term pre-accident condition for which she had previously been receiving treatment and many types of medications.<sup>28</sup> RP 603.

However, long time friend Herbert Baird testified that Ms. Veit was alert, well behaved, and happy to see him when he went out to visit her at the

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<sup>28</sup> The issue of pre-accident anxiety and depression medications was also relevant to defend the claim for the cost and future cost of such medications as allegedly being related to this accident.

Basey's home in Maple Falls. He did not notice any emotional or behavioral problems when he was with her. RP 831-32.

The next witness, neighbor and close friend Mary Wilder, testified that despite the fact Ms. Veit was doing the best she had done in a couple of years there, she was nonetheless removed from the Basey's house:

- Q. [By BNSF's counsel] I'm sorry, Ms. Wilder. That was not a decision that you or your husband made to move her from Maple Falls?
- A. No, it was not.
- 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 a 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.

RP 853-56.

The appeal of the issue of Ms. Wilder's testimony is a red-herring. The court ruled that Ms. Wilder had intimate knowledge of what transpired and it is obvious she did. RP 861. Moreover, an underlying reason for moving

Ms. Veit from the Basey's home was confirmed by the newly appointed guardian.<sup>29</sup>

There was no violation of the court's ruling on the motion in limine. The testimony of Ms. Wilder and Ms. Maxwell was accurate and necessary to rebut the allegations of Ms. Veit's injury-caused behavioral problems as the reason she was moved to a new caregiver at almost twice the monthly cost. More importantly, the issue is of no significance at all because the jury did not even consider the question of damages since it found that BNSF was not negligent. Even if BNSF did violate the court's ruling, which it did not, the alleged violation would have been harmless error.

## V. CONCLUSION

Ms. Veit was not a skilled driver. Her car was jerking as she rolled at less than five m.p.h. to a stop in front of the train while apparently listening

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<sup>29</sup> The testimony of Cindy Maxwell, Ms. Veit's guardian, was that: "I didn't think it was a good idea to have a vulnerable adult in a home with a sex offender, but it was not against the law, and Alizon didn't even actually realize until I met with her that he was a sex offender. I was worried about it, yes." RP 1653. But more specifically:

Q. But it was a factor in why she was moved?

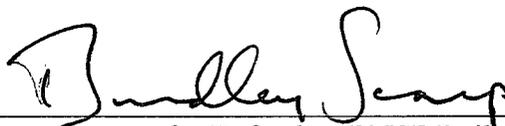
A. I thought it was a good idea that she move, uh-huh.

RP 1653.

to classical music. Her own expert said that being in third gear at that speed was a mistake, if not irrational. The jury did not take long to deliberate its verdict because Ms. Veit clearly was at fault. The numerous assignments of error her attorney now offers will not change that. Ms. Veit received a fair trial and the verdict should be affirmed.

Dated August 11, 2008.

Respectfully submitted,

A handwritten signature in black ink, reading "Bradley Scarp". The signature is written in a cursive style with a horizontal line underneath it.

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CERTIFICATE OF SERVICE

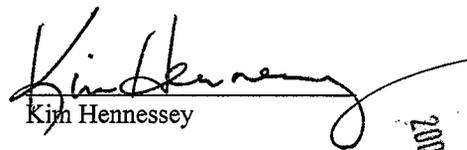
I am over the age of 18; and not a party to this action. I am the assistant to an attorney with Montgomery Scarp MacDougall, PLLC, whose address is 1218 Third Avenue, Suite 2700, Seattle, Washington, 98101.

I hereby certify that the original and one true and correct copy of the has been filed with the Court of Appeals of the State of Washington Division One via legal messengers (Washington Legal) and a copy served upon the following via Legal Messenger (4<sup>th</sup> Corner Network, Inc.):

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

DATED this 11<sup>th</sup> day of August 2008, at Seattle, Washington.

  
Kim Hennessey

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