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defense to that charge. Although the evidence was sufficient to support the guilty verdict, the erroneous evidentiary ruling was not harmless. We reverse this conviction and remand for a new trial only on that charge.

We reverse the judgments of conviction for DUI, refusing to submit to a chemical test, and possessing an open container. We remand the cause with directions to vacate these convictions and sentences and to dismiss the charges.

REVERSED AND REMANDED WITH DIRECTIONS.

REBECCA L. DRESSER AND KRISTA A. ROSENCRANS, APPELLANTS, V. UNION PACIFIC RAILROAD COMPANY, A CORPORATION, APPELLEE.

809 N.W.2d 713

Filed October 14, 2011. No. S-10-645.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Railroads: Motor Vehicles: Negligence.** A traveler on a highway, when approaching a railroad crossing, has a duty to look and listen for the approach of trains, and failure to do so without a reasonable excuse constitutes negligence.
3. **Railroads: Motor Vehicles: Right-of-Way.** Although railroad trains do not have an absolute right-of-way at grade crossings under all conditions, an engineer operating a train has no duty to yield the right-of-way until it appears to a reasonably prudent person that to proceed would probably result in a collision. At that time, it becomes the duty of the engineer to exercise ordinary care to avoid an accident, even to the extent of yielding the right-of-way.
4. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
5. **Summary Judgment: Evidence: Proof.** After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.
6. **Summary Judgment.** Conclusions based upon guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for purposes of summary judgment.

7. **Railroads: Claims.** A state law claim based upon a railroad's duty to avoid a specific, individual hazard at a grade crossing is not preempted by 49 U.S.C. § 20106 (2006).
8. **Summary Judgment: Affidavits.** The purpose of Neb. Rev. Stat. § 25-1335 (Reissue 2008) is to provide an additional safeguard against an improvident or premature grant of summary judgment.
9. ____: ____. A Neb. Rev. Stat. § 25-1335 (Reissue 2008) affidavit that a party submits in support of a continuance need not contain evidence going to the merits of the case; rather, a § 25-1335 affidavit must contain a reasonable excuse or good cause, explaining why a party is presently unable to offer evidence essential to justify opposition to the motion for summary judgment.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Derek A. Aldridge and Corey L. Stull, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellants.

William M. Lamson, Jr., Anne Marie O'Brien, and Angela J. Miller, of Lamson, Dugan & Murray, L.L.P., for appellee.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

Krista A. Rosencrans was severely injured when a train collided with a motor vehicle in which she was a passenger. She and her mother, Rebecca L. Dresser (collectively appellants), brought this negligence action against Union Pacific Railroad Company (Union Pacific) and the operator of the motor vehicle and her mother. Appellants appeal from an order of the district court for Lancaster County granting summary judgment in favor of Union Pacific.

I. FACTS

On March 19, 2005, 18-year-old Rosencrans was a passenger in a motor vehicle driven by 17-year-old Chanda McDonald. The vehicle was traveling north on Thayer County Road 26 near Belvidere, Nebraska, and the teenagers were talking and listening to music. About 11:40 a.m., the vehicle approached a two-track railroad grade crossing that had no automatic gate or flashing lights, but was protected by a stop sign and crossbucks

on each side of the tracks. The stop sign and crossbucks were respectively located approximately 30 feet and 15 feet south of the tracks.

McDonald came to a complete stop at the stop sign. It was a clear day, and when Rosencrans looked in both directions at the stop sign, she saw a train coming down the tracks from her left. During her deposition, Rosencrans indicated on a photographic exhibit that the train was quite close to the crossing when she first saw it, but in a subsequent affidavit, she stated she could not quantify how far away the train was. Rosencrans testified she listened for but did not hear a train horn or bell. Rosencrans did not know whether McDonald looked in both directions at the stop sign. After stopping at the stop sign, McDonald drove the vehicle into the railroad crossing and onto the tracks. When Rosencrans began screaming, McDonald tried to back the vehicle off the tracks, but was unable to get off the tracks in time, and the vehicle was struck by the train. Rosencrans suffered severe injuries in the accident.

The locomotive engineer testified that he sounded the locomotive horn as the train approached the crossing. He observed the McDonald vehicle slowing as it approached the stop sign south of the crossing. The engineer testified he could see the occupants of the vehicle and noted they were not paying attention to him. The engineer testified that when he saw the vehicle pulling onto the tracks, he immediately applied the emergency brake and took cover on the floor of the locomotive. Before taking cover, the engineer noticed the nose of the vehicle was roughly in the center of the railroad tracks.

The conductor testified that he saw the McDonald vehicle approaching the railroad crossing and thought it was slowing down to stop at the stop sign. He then looked away to check for traffic from the other direction. When he looked back, the vehicle was coming into the crossing and the engineer was yelling "No, no, no." The conductor testified that at this time, he could see the occupants of the vehicle. He heard the engineer apply the emergency brake and then took cover on the floor prior to impact.

In compliance with Federal Railroad Administration requirements, each of the three locomotives powering the train was

equipped with an event recorder, similar to an airplane's "black box," which captures information as to the speed of the train, braking applications, throttle position, and other locomotive and train functions. Data from these devices showed the train was traveling at 45 m.p.h. at the time of the accident, well within the 80-m.p.h. federally mandated speed limit for this type of train and track. Event recorder data also established the train was 189 feet past the center of the railroad crossing before the emergency brake was activated. After the brake was applied, the train traveled between 2,732 feet (.517 miles) and 2,798 feet (.530 miles) before coming to a stop.

The event recorder data also disclosed when the locomotive horn was activated. Union Pacific's expert averred that the horn was activated 4,902 feet (.928 miles) before the train came to a stop, for a period of 35 seconds. An expert retained by appellants opined that the locomotive horn was activated as one uninterrupted blast 577 feet from the center of the crossing, for a period of 10 seconds before impact. This expert also explained that the event recorder shows only that an electrical impulse was sent to the horn, and does not record whether the horn in fact sounded when the impulse was sent.

Appellants brought this negligence action against Union Pacific, McDonald, and McDonald's mother, seeking to recover medical expenses incurred by Dresser on Rosencrans' behalf and general damages sustained by Rosencrans. The operative second amended complaint alleges Union Pacific was negligent in part because the train crew failed to maintain a proper lookout, failed to slow or stop the train to avoid the collision, and failed to properly sound the locomotive horn. In its answer, Union Pacific denied that it was negligent and alleged that any injuries or damages sustained by Rosencrans were proximately caused by the negligence of McDonald. It also alleged the negligence claims were preempted by local, state, and federal laws.

Approximately 17 months after the action was commenced, Union Pacific filed a motion for summary judgment and a motion to stay discovery while that motion was pending. After conducting a hearing on the motion to stay, the district court ordered that "[a]ll discovery not related to issues raised by the

pending motion for summary judgment of the defendant Union Pacific is stayed until resolution of that motion or further order of the court." The district court later entered summary judgment in favor of Union Pacific. It determined that the claims that the train crew failed to maintain a proper lookout and failed to slow or stop the train to avoid a specific, individual hazard were preempted by the Federal Railroad Safety Act of 1970 (FRSA).[1] It also determined there was no genuine issue of material fact on whether the train crew properly sounded the locomotive horn prior to the collision. After the court sustained a motion to dismiss the claims against McDonald and her mother without prejudice, appellants perfected this timely appeal.

II. ASSIGNMENTS OF ERROR

Appellants assign, restated and renumbered, that the district court erred in (1) finding no genuine issue of material fact existed as to whether the Union Pacific locomotive horn was sounded at the crossing; (2) dismissing the claims of negligence identified in paragraphs 8(c), (j), (l), (q), (r), and (t) of the second amended complaint; (3) finding no genuine issue of material fact existed as to whether the locomotive horn signalization was a proximate cause of the accident; (4) finding federal law preempted their claim that Union Pacific was negligent in failing to maintain a proper lookout and to slow or stop its train; and (5) limiting the scope of their discovery.

III. STANDARD OF REVIEW

[1] In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[2]

IV. ANALYSIS

1. Summary Judgment

[2,3] Union Pacific's general defense is that McDonald's negligent operation of the vehicle in which Rosencrans was a

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[1] See 49 U.S.C. § 20101 et seq. (2006 & Supp. III 2009).

[2] *Radiology Servs. v. Hall*, 279 Neb. 553, 780 N.W.2d 17 (2010).

passenger was the sole proximate cause of the accident. The respective duties of motorists and train engineers approaching a grade crossing are well settled. A traveler on a highway, when approaching a railroad crossing, has a duty to look and listen for the approach of trains, and failure to do so without a reasonable excuse constitutes negligence.[3] Although railroad trains do not have an absolute right-of-way at grade crossings under all conditions, an engineer operating a train has no duty to yield the right-of-way until it appears to a reasonably prudent person that to proceed would probably result in a collision.[4] At that time, it becomes the duty of the engineer to exercise ordinary care to avoid an accident, even to the extent of yielding the right-of-way.[5]

[4,5] The respective duties of parties in a summary judgment proceeding are also well settled. The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.[6] After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.[7]

For Union Pacific to be successful on its motion for summary judgment, the record must show as a matter of law either

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[3] *Whitaker v. Burlington Northern, Inc.*, 218 Neb. 90, 352 N.W.2d 589 (1984); *Wyatt v. Burlington Northern, Inc.*, 209 Neb. 212, 306 N.W.2d 902 (1981); *Thomas v. Burlington Northern R.R., Inc.*, 203 Neb. 507, 279 N.W.2d 369 (1979). See, also, Neb. Rev. Stat. § 60-6,170 (Reissue 2010).

[4] *Whitaker v. Burlington Northern, Inc., supra* note 3; *Wyatt v. Burlington Northern, Inc., supra* note 3.

[5] *Id.*

[6] *Tolbert v. Jamison*, 281 Neb. 206, 794 N.W.2d 877 (2011); *Kline v. Farmers Ins. Exch.*, 277 Neb. 874, 766 N.W.2d 118 (2009).

[7] *Village of Hallam v. L.G. Barcus & Sons*, 281 Neb. 516, 798 N.W.2d 109 (2011); *Tolbert v. Jamison, supra* note 6.

that it owed appellants no duty, that any duty owed was not breached, or that any breach was not the proximate cause of the accident.[8] Appellants argue there are genuine issues of material fact related to their claim that Union Pacific was negligent in failing to sound the locomotive horn and their claim that Union Pacific was negligent for failing to slow or stop the train once it became apparent to the engineer that to proceed would probably result in a collision. We turn to these arguments.

(a) Claims Pertaining to Sounding Horn

(i) Activation

The operative complaint alleged Union Pacific was negligent because it "fail[ed] to properly sound the locomotive's horn and bells." Evidence presented to the district court on this issue primarily focused on when and how the horn was sounded and whether such sounding complied with federal regulations and Union Pacific's internal protocol. Relying on this evidence, the district court initially found that "any causal connection between when the locomotive horn began sounding and whether the horn was sounding in one uninterrupted blast or in a succession of short blasts and the occurrence of the accident" was a jury question. On Union Pacific's motion for reconsideration, the court concluded that because the horn actually sounded, "reasonable minds could only conclude that the accident . . . was not proximately caused by any negligence on the part of Union Pacific relating to the sounding of the locomotive's horn and bells."

In this appeal, appellants no longer focus on when and how the horn sounded. Instead, they argue there is a genuine issue of material fact as to whether the horn was sounded at all. Although Union Pacific contends that this is a new theory of the case, we consider a claim that the horn was not sounded at all to be encompassed within the allegation in the complaint that Union Pacific failed to "properly" sound the horn. We further note that appellants argued to the district court that the horn was not sounded at all.

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[8] See, *Riggs v. Nickel*, 281 Neb. 249, 796 N.W.2d 181 (2011); *Tolbert v. Jamison*, *supra* note 6.

The evidence on whether the horn was sounded consists of data from the train's event recorder, which shows the horn was activated, and testimony from both the train engineer and the train conductor that the horn was activated. Appellants contend this evidence is not sufficient to entitle Union Pacific to summary judgment, because their expert testified that activating the horn does not necessarily make the horn sound. They also contend the evidence supports an inference that the horn did not sound, because Rosencrans testified she did not hear the horn and McDonald indicated the same in an interrogatory answer.

[6] We, of course, view the evidence in the light most favorable to the party against whom the summary judgment was granted and give such party the benefit of all reasonable inferences deducible from the evidence.[9] But we are mindful that conclusions based upon guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for purposes of summary judgment.[10] On this specification of negligence, the focus of the inquiry is whether the engineer activated a working horn and not whether the occupants of the vehicle heard the horn. Here, the testimony from the engineer and the conductor and the event record data show that the horn was activated. And no evidence supports a reasonable inference that there was some defect which prevented the horn from sounding when activated. To the contrary, the record shows the horn was working properly when it was tested 2 days after the accident. Thus, despite Rosencrans' and McDonald's statements that they did not hear the horn, there are no facts upon which a finder of fact could reasonably conclude that the horn did not sound when it was activated. Because we conclude there is no genuine issue of material fact on this issue, we do not reach appellants' argument that the alleged failure to sound the horn was a proximate cause of the accident.

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[9] *Radiology Servs. v. Hall*, *supra* note 2.

[10] *Mefferd v. Sieler & Co.*, 267 Neb. 532, 676 N.W.2d 22 (2004); *Darrah v. Bryan Memorial Hosp.*, 253 Neb. 710, 571 N.W.2d 783 (1998); *Stones v. Sears, Roebuck & Co.*, 251 Neb. 560, 558 N.W.2d 540 (1997).

(ii) Other Claims Pertaining to Horn

The operative complaint alleged Union Pacific failed to operate the train in a safe and prudent manner, failed to properly train the crew, failed to adequately supervise the crew, failed to follow its internal rules, failed to follow the General Code of Operating Rules, and failed to follow proper train-handling methods. In its initial summary judgment order, the district court denied Union Pacific's motion for summary judgment with respect to any of these alleged acts of negligence that "relat[ed] to" the horn signalization issue. It specifically noted, however, that the motion for summary judgment was "granted in all other respects, regardless of whether specifically discussed in this order." In ruling on Union Pacific's motion for reconsideration, the district court determined that summary judgment was also appropriate as to "any alleged acts of negligence encompassed" in the above-stated allegations that related to the horn signalization issue.

Appellants argue this was error because (1) there remains a genuine issue of material fact as to whether the horn was sounded at all and (2) the district court "made no specific findings with respect to these claims."[11] As noted, we agree with the district court that no genuine issue of material fact exists as to whether the horn was sounded. And if there is no request for specificity, a district court may enter summary judgment without articulating its reasons.[12] We affirm the district court's grant of summary judgment on these allegations.

(b) Claim Pertaining to Avoiding Accident

Appellants contend genuine issues of material fact exist as to whether Union Pacific negligently failed to avoid the accident once it became apparent that to proceed would probably result in a collision.[13] Specifically, they claim that issues of fact exist as to whether Union Pacific breached its duty to

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[11] Brief for appellants at 18.

[12] See *Wells Fargo Ag Credit Corp. v. Batterman*, 229 Neb. 15, 424 N.W.2d 870 (1988).

[13] See, *Whitaker v. Burlington Northern, Inc., supra* note 3; *Wyatt v. Burlington Northern, Inc., supra* note 3.

exercise ordinary care to avoid the accident by failing to take timely action to slow or stop the train. The district court did not address this claim because it concluded it was "speed-related" and preempted by federal law.[14] Before engaging in a preemption analysis, we address whether genuine issues of material fact exist on this claim.

(i) Duty

Pursuant to long-established Nebraska law, Union Pacific's engineer had the right-of-way at the grade crossing.[15] He had a duty to exercise ordinary care to avoid an accident, including yielding the right-of-way, when it appeared to a reasonably prudent person that to proceed "'would probably result in a collision.'"[16]

It is undisputed that McDonald stopped the vehicle at the stop sign south of the railroad crossing and then proceeded into the crossing. Precisely when the engineer's duty to exercise ordinary care to avoid the accident arose in this case may be subject to dispute, but it is clear that it arose. For purposes of this summary judgment motion and giving appellants all reasonable inferences, we assume that the duty arose at the time McDonald's vehicle left the stop sign.

(ii) Breach

Union Pacific is entitled to summary judgment if the record shows as a matter of law that the engineer's duty to exercise ordinary care to avoid the accident was not breached. In arguing that it does, Union Pacific relies on the engineer's testimony that he activated the emergency brake after he saw the vehicle begin to pull onto the train tracks, which he stated was sometime before the train entered the crossing. If this evidence were uncontroverted, we would agree with Union Pacific. But

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[14] See *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993).

[15] See, *Whitaker v. Burlington Northern, Inc., supra* note 3*; Wyatt v. Burlington Northern, supra* note 3.

[16] *Whitaker v. Burlington Northern, Inc., supra* note 3, 218 Neb. at 95, 352 N.W.2d at 593.

it is not. Contrary to the engineer's testimony, the train event recorder shows the emergency brake was not activated until the train had traveled 189 feet past the center of the railroad crossing. There is thus a genuine issue of material fact as to when the engineer activated the emergency brake, an issue that relates to whether he breached his duty to exercise ordinary care to avoid the accident.

(iii) Proximate Cause

Any factual dispute about whether a duty was breached is immaterial if the record shows as a matter of law that any breach by Union Pacific was not the proximate cause of the accident. Without specific citation to the record, Union Pacific continually asserts that even if the engineer had reacted by activating the emergency brake immediately after McDonald's vehicle left the stop sign, the accident could not have been avoided.

We agree that on this record, no reasonable fact finder could conclude that even immediate action by the engineer could have stopped the train before it reached the crossing. After the engineer applied the emergency brake, the train traveled between 2,732 and 2,798 feet before it came to a stop, a distance of approximately one-half mile. There is no evidence in this record that could support a reasonable inference that the train was at least 2,731 feet away from the crossing at the time the McDonald vehicle left the stop sign. Both the engineer and the conductor testified that at the time the vehicle pulled onto the tracks, they were so close they could see the faces of the vehicle's occupants. And during her deposition, Rosencrans marked an exhibit with her approximation of where the train was when she first saw it; her mark is quite close to the crossing. Based on this evidence, no reasonable fact finder could conclude that the engineer could have stopped the train before it reached the crossing if he had activated the emergency break the instant the vehicle left the stop sign, which is the first possible moment that his duty to take evasive action could have arisen. The record therefore shows as a matter of law that the train's failure to *stop* was not a proximate cause of the accident.

But the record does not show as a matter of law that the train's failure to *slow* was not a proximate cause of the accident. As noted, in reviewing a summary judgment, we give all inferences to the nonmoving party, and we thus assume that the duty to exercise ordinary care arose the instant McDonald's vehicle left the stop sign and that slowing or stopping the train was encompassed in the duty to exercise ordinary care. Although the record shows as a matter of law that the train could not have been stopped before it reached the crossing, it is silent on what effect activation of the emergency brake would have had on the speed of the train. It is thus impossible to conclude on this record that the train's speed could not have been reduced had the engineer pulled the emergency brake immediately after the vehicle left the stop sign. Union Pacific did not meet its burden to show it is entitled to summary judgment on this issue.[17]

While this deficiency may not be relevant in every case, it is here. The engineer testified that the nose of McDonald's vehicle was in approximately the center of the track just prior to impact. Rosencrans testified that McDonald was attempting to back off the tracks when the collision occurred, and an exhibit shows the train's impact with the McDonald vehicle was quite near the front of the driver's side of the vehicle. On this record, the amount of time McDonald would have had to get off the tracks and avoid the accident is a critical factor which is dependent in part upon the engineer's reaction when it became evident that a collision could occur. The record does not permit us to conclude as a matter of law that earlier application of the emergency brake would not have prevented the collision. Therefore, unless preemption principles apply, Union Pacific was not entitled to summary judgment on the claim that the engineer failed to exercise ordinary care to avoid the accident, because there are genuine issues of material fact as to whether he breached his duty and whether that breach was a proximate cause of the accident. We therefore address whether the claim is preempted by federal law.

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[17] See *Stone v. CSX Transp., Inc.*, 37 F. Supp. 2d 789 (S.D. W. Va. 1999).

(c) Claim Is Not Preempted

The district court found the claim that the engineer failed to exercise ordinary care to avoid the accident by failing to slow or stop the train was an excessive speed claim and was preempted by 49 U.S.C. § 20106, a provision of the FRSA. Congress enacted the FRSA in 1970 with the purpose of promoting "safety in every area of railroad operations and reduc[ing] railroad-related accidents and incidents."[18] The FRSA grants the Secretary of Transportation broad authority to prescribe regulations and issue orders for every area of railroad safety.[19] Section 20106 is entitled "Preemption" and displaces a state's authority to regulate railroad safety when the Secretary of Transportation "prescribes a regulation or issues an order covering the subject matter of the State requirement." Section 20106(a)(2) further provides that a state may adopt or continue in force an additional or more stringent law as long as it "(A) is necessary to eliminate or reduce an essentially local safety or security hazard; (B) is not incompatible with a law, regulation, or order of the United States Government; and (C) does not unreasonably burden interstate commerce."

The U.S. Supreme Court addressed federal preemption under the previous version of § 20106 in *CSX Transp., Inc. v. Easterwood*.[20] In *Easterwood*, the Court reasoned the issue before a court in a FRSA preemption analysis is "whether the Secretary of Transportation has issued regulations covering the same subject matter as [state] negligence law pertaining to the maintenance of, and the operation of trains at, grade crossings."[21] It stated that to prevail on the claim that the regulations have preemptive effect, the proponent must establish more than that they "'touch upon'" or "'relate to'" the subject matter, "for 'covering' is a more restrictive term which indicates that pre-emption will lie only if the federal regulations substantially

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[18] 49 U.S.C. § 20101.

[19] 49 U.S.C. § 20103(a).

[20] *CSX Transp., Inc. v. Easterwood, supra* note 14.

[21] *Id.*, 507 U.S. at 664.

subsume the subject matter of the relevant state law."[22] The *Easterwood* Court held that legal duties imposed on railroads by state common law fall within the scope of state laws that are subject to federal preemption.

The precise issue addressed in *Easterwood* was whether a state law wrongful death claim based on excessive train speed was preempted by federal regulations that set maximum allowable operating speeds for all freight and passenger trains for each class of track. The Court reasoned that these limits were adopted only after the hazards posed by track conditions were taken into account and that thus, all state law claims for excessive speed were subsumed by the regulations. A footnote in *Easterwood* noted that although the railroad in that case was "prepared to concede" that the "pre-emption of [the] excessive speed claim [did] not bar suit for [its] breach of related tort law duties, such as the duty to slow or stop a train to avoid a specific, individual hazard," that issue was not presented and thus would not be decided by the Court.[23]

We do not agree with the district court that appellants' state law negligence claim based on Union Pacific's alleged failure to exercise ordinary care once it appeared that a collision would probably occur is speed based and thus preempted. State tort law is not preempted "until" a federal regulation "cover[s]" the same subject matter,[24] and we are not presented with any federal regulations that cover a railroad's duty to exercise ordinary care in situations where collisions are imminent. The mere fact that the speed the train is traveling is tangentially related to how quickly it can be stopped does not transform the claim into an excessive speed claim. Nebraska tort law duties to exercise reasonable care could be violated even if the federal train speed limits are being followed.[25]

[7] Instead, we find that the state law claim against a railroad at issue here is akin to a duty to avoid a "specific, individual

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[22] *Id.*

[23] *Id.*, 507 U.S. at 675-76 n.15.

[24] 49 U.S.C. § 20106(a)(2).

[25] See *Murrell v. Union Pacific R. Co.*, 544 F. Supp. 2d 1138 (D. Or. 2008).

hazard" at a grade crossing, and we agree with the various federal and state courts that have concluded that such claims are not preempted by § 20106.[26] Appellants' claim relates to an event which is not a fixed condition or feature of the railroad crossing and was not capable of being taken into account by the Secretary of Transportation in the promulgation of uniform, national speed regulations.[27] Appellants' claim is based on a unique occurrence which was likely to result in a collision, specifically the vehicle's forward advance from the stop sign into the path of the oncoming train.[28] We note that a "specific, individual hazard" in this context is not to be confused with the preemption exception in § 20106(a)(2)(A) for an "essentially local safety or security hazard,"[29] and to that extent, we disagree with the analysis employed in *Van Buren v. Burlington Northern Santa Fe Ry. Co.*[30]

2. Discovery Order

Union Pacific filed its motion for summary judgment on December 11, 2006. The motion was generic in nature and stated only that it sought summary judgment because there were no genuine issues of material fact and it was entitled to judgment as a matter of law. On January 5, 2007, Union Pacific moved to stay discovery while the summary judgment was pending. A hearing was held on January 12, and on June 4, the court ordered that "[a]ll discovery not related to issues raised by the pending motion for summary judgment of the defendant

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[26] See, e.g., *Peters v. Union Pacific R. Co.*, 455 F. Supp. 2d 998 (W.D. Mo. 2006); *Liboy ex rel. Liboy v. Rogero ex rel. Rogero*, 363 F. Supp. 2d 1332 (M.D. Fla. 2005); *Stevenson v. Union Pacific R. Co.*, 110 F. Supp. 2d 1086 (E.D. Ark. 2000); *Bashir v. National R.R. Passenger Corp. (Amtrack)*, 929 F. Supp. 404 (S.D. Fla. 1996); *Myers v. Missouri Pacific R. Co.*, 52 P.3d 1014 (Okla. 2002); *Alcorn v. Union Pacific R.R. Co.*, 50 S.W.3d 226 (Mo. 2001).

[27] *Myers v. Missouri Pacific R. Co., supra* note 26.

[28] See *id.*

[29] See *Stevenson v. Union Pacific R. Co., supra* note 26. See, also, *Myers v. Missouri Pacific R. Co., supra* note 26.

[30] *Van Buren v. Burlington Northern Santa Fe Ry. Co.*, 544 F. Supp. 2d 867 (D. Neb. 2008).

Union Pacific is stayed until resolution of that motion or further order of the court."

The parties agree that in its initial brief in support of its summary judgment motion, Union Pacific asserted that several of appellants' claims were preempted, but did not specifically refer to the claim regarding lookout and failure to stop or slow the train. Union Pacific first specifically asserted this claim was preempted in its reply brief on the motion for summary judgment. Appellants argue that because they did not know Union Pacific was seeking summary judgment on this claim until the reply brief was filed, they were unaware this claim was included in the summary judgment proceeding and therefore had not engaged in discovery on the claim.

At the final hearing on the summary judgment motion, appellants' counsel argued to the district court that the effect of its stay was to deny them the opportunity to conduct discovery on this claim. But they did not request a continuance, and instead argued to the court that the evidence before it was insufficient to prove as a matter of law that Union Pacific did not proximately cause the accident.

[8,9] According to Neb. Rev. Stat. § 25-1335 (Reissue 2008):

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

The language of this statute is a counterpart to Fed. R. Civ. P. 56(f), and we have interpreted it in accordance with the federal rule.[31] The purpose of § 25-1335 is to provide an additional safeguard against an improvident or premature grant of summary judgment.[32] The affidavit that a party submits in support of a continuance need not contain evidence going to the merits of the case; rather, a § 25-1335 affidavit must contain

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[31] See *Wachtel v. Beer*, 229 Neb. 392, 427 N.W.2d 56 (1988).

[32] *Id.*

a reasonable excuse or good cause, explaining why a party is presently unable to offer evidence essential to justify opposition to the motion for summary judgment.[33]

If appellants believed they could not present evidence on the failure to keep a lookout and/or failure to slow or stop the train claim because they had not conducted discovery in that area, they could have requested a continuance under § 25-1335 at the time of the summary judgment final hearing. They did not. Under these circumstances, the issuance of the discovery order was not an abuse of discretion and did not result in reversible error.

V. CONCLUSION

The district court erred in finding that appellants' claim based on failure to slow the train was preempted and in finding that no genuine issue of material fact existed on that claim. We therefore reverse, and remand for further proceedings on that claim, but affirm the judgment of the district court in all other respects.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating.

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[33] *Id.*

MARLENE BEDORE, PERSONAL REPRESENTATIVE OF THE ESTATE OF GEORGE JOHN VLASIN, DECEASED, ET AL., APPELLEES AND CROSS-APPELLANTS, V. RANCH OIL COMPANY, A COLORADO CORPORATION, AND BELLAIRE OIL COMPANY, A COLORADO CORPORATION, APPELLANTS AND CROSS-APPELLEES.

805 N.W.2d 68

Filed October 14, 2011. No. S-10-912.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.