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would have on future stability for the children, and partly in reference to Danelle's deceits and the impacts those had on her credibility. The court, however, also considered all of the relevant factors for a custody determination, and Colby presented sufficient evidence, as set forth above, to support the court's ultimate conclusion that the best interests of the children would be served by awarding him custody. The court's custody award was not based on Danelle's military service, on its own.

V. CONCLUSION

We find no merit to Danelle's assertions on appeal. The court's custody award was supported by sufficient evidence, including credibility concerns related to Danelle, and was not an abuse of discretion. The court also did not base its decision on Danelle's military service, on its own. We affirm.

AFFIRMED.

MARY BECERRA, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MARIO E. BECERRA III, APPELLANT, V. MICHAEL SULHOFF, PERSONAL REPRESENTATIVE OF THE ESTATE OF MARIO E. BECERRA, SR., AND UNION PACIFIC RAILROAD COMPANY, A DELAWARE CORPORATION, APPELLEES.

837 N.W.2d 104

Filed August 20, 2013. No. A-12-823.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **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.

4. **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.
5. **Motor Vehicles: Negligence.** Regardless of whether a road is icy, a motorist is expected to retain control of his or her vehicle and abide by his or her duties.
6. **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.
7. **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.
8. **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.
9. **Negligence: Proximate Cause.** Under Nebraska negligence law, proximate cause consists of three elements: that (1) but for the negligence, the injury would not have occurred, (2) the injury is the natural and probable result of the negligence, and (3) there is no efficient intervening cause.
10. ____: ____. The foreseeability of an injury that results from a negligent act determines whether that injury is the natural and probable result of the act.
11. ____: ____. To constitute proximate cause, an injury must be the natural and probable result of the negligence, and be of such a character as an ordinarily prudent person could have known, or would or ought to have foreseen, might probably occur as the result.
12. ____: ____. Regarding proximate cause, the law does not require precision in foreseeing the exact hazard or consequence which happens; it is sufficient if what occurs is one of the kind of consequences which might reasonably be foreseen.
13. **Proximate Cause: Words and Phrases.** A proximate cause is a cause that produces a result in a natural and continuous sequence, unaccompanied by an efficient intervening cause, and without which the result would not have occurred.
14. ____: ____. An efficient intervening cause is a new and independent act, itself a proximate cause of a result, which breaks the causal connection between the original wrong and the result.
15. **Negligence.** A person is not legally responsible for a result if it would not have resulted but for the interposition of an efficient intervening cause, which he or she should not have reasonably anticipated or reasonably foreseen.
16. **Negligence: Proximate Cause.** The question of whether an act is a proximate cause, or simply a nonactionable condition, is determined by whether it was

foreseeable that the initial act could join with the intervening act to cause the alleged injuries.

17. **Summary Judgment: Affidavits.** Neb. Rev. Stat. § 25-1335 (Reissue 2008) prescribes a prerequisite for a continuance, or additional time or other relief under the statute, namely, an affidavit stating a reasonable excuse or good cause for a party's inability to oppose a summary judgment motion.
18. ____: ____. Without the appropriate affidavit required by Neb. Rev. Stat. § 25-1335 (Reissue 2008), a party is not entitled to a continuance or additional time to obtain affidavits or discovery to counteract an opposing party's motion for summary judgment.
19. **Motor Vehicles: Negligence.** The Nebraska guest statute, Neb. Rev. Stat. § 25-21,237 (Reissue 2008), states that the owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person related to such owner or operator as spouse or within the second degree of consanguinity or affinity who is riding in such motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by (1) the driver of such motor vehicle being under the influence of intoxicating liquor or (2) the gross negligence of the owner or operator in the operation of such vehicle.
20. **Motor Vehicles: Negligence: Parent and Child.** Under the Nebraska guest statute, relationship by consanguinity or affinity within the second degree includes children.
21. **Motor Vehicles: Negligence: Words and Phrases.** Gross negligence, within the meaning of the Nebraska guest statute, means gross and excessive negligence or negligence in a very high degree, the absence of slight care in the performance of duty, an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others.
22. **Negligence.** Negligence that is purely momentary in nature generally does not constitute gross negligence.
23. **Motor Vehicles: Negligence: Proof.** Gross negligence on the part of a driver must be proved by the plaintiff.

Appeal from the District Court for Douglas County: TIMOTHY P. BURNS, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

E. Terry Sibbernsen and Andrew D. Sibbernsen, of Sibbernsen, Strigenz & Sibbernsen, P.C., for appellant.

Karen Weinhold and Angela D. Jensen-Blackford, of Engles, Ketcham, Olson & Keith, P.C., for appellee Michael Sulhoff.

William M. Lamson, Jr., Anne Marie O'Brien, and JoAnna S. Thomas, of Lamson, Dugan & Murray, L.L.P., for appellee Union Pacific Railroad Company.

PIRTLE and RIEDMANN, Judges, and MULLEN, District Judge, Retired.

MULLEN, District Judge, Retired.

I. INTRODUCTION

Mario E. Becerra III (Mario III) was a passenger in a motor vehicle operated by his father, Mario E. Becerra, Sr. (Mario Sr.). Mario III and Mario Sr. were killed when their vehicle collided with a train owned and operated by Union Pacific Railroad Company (Union Pacific). Mario III's mother, Mary Becerra (Becerra), individually and as the personal representative of the estate of Mario III, brought this negligence action against Michael Sulhoff, personal representative of the estate of Mario Sr., and Union Pacific. Becerra appeals from an order of the district court for Douglas County granting summary judgment in favor of Sulhoff and Union Pacific.

II. BACKGROUND

On December 23, 2007, at approximately 1:30 p.m., Mario Sr. drove a motor vehicle with his minor son, Mario III, riding as a passenger. The vehicle was traveling eastbound on County Road B in Otoe County when it crossed railroad tracks owned and operated by Union Pacific. As the vehicle crossed the tracks, it was struck on the right rear by a northbound train owned and operated by Union Pacific. The vehicle was propelled by the collision into a concrete signal set base owned by Union Pacific. Both Mario Sr. and Mario III were killed as a result of the collision. The road preceding the tracks was ice covered and slick. A crossing advanced warning sign and crossbucks are located near the railroad tracks.

On December 22, 2009, Becerra filed this negligence action against Sulhoff and Union Pacific, seeking to recover general and special damages related to the death of Mario III. Becerra alleged that Mario Sr. was grossly negligent in (1) driving at an excessive speed under the conditions existing at the time and place of the collision, (2) failing to yield to the northbound Union Pacific train at a designated railroad crossing, and (3) failing to keep a proper lookout for the northbound Union Pacific train. Becerra alleged that Union Pacific was

negligent in (1) failing to keep a proper lookout for motor vehicular traffic under the conditions existing at the time and place of the collision, (2) failing to exercise due care under the last-clear-chance doctrine, and (3) failing to remove a concrete signal set base that presented a dangerous condition as a secondary impact object within close proximity to the crossing.

Union Pacific filed an answer on January 21, 2010, affirmatively alleging that the sole cause of the accident was the negligence of Mario Sr. On November 18, Union Pacific filed a motion for summary judgment alleging that there were no genuine issues of material fact and that it was therefore entitled to judgment as a matter of law. A hearing on Union Pacific's motion for summary judgment was held on February 3, 2011. In its order filed on April 14, the district court granted summary judgment in Union Pacific's favor. The district court found that (1) Mario Sr. was the sole proximate cause of the collision, (2) the last-clear-chance doctrine did not apply to support Becerra's claims, and (3) the concrete barrier was a condition, not a cause of the collision, which could not create an independent basis for recovery. Becerra subsequently filed a motion to alter or amend the judgment. The district court amended its order to provide "the necessary final judgment language" as well as clarify that the order makes "no actual factual determinations regarding the driver of the car at the time of the collision." Becerra then appealed the district court's order granting summary judgment in favor of Union Pacific. We dismissed Becerra's appeal, finding that the district court's order was not final and appealable, because the court had not disposed of Becerra's claim as to Mario Sr.

Sulhoff filed an amended answer on November 16, 2011, affirmatively alleging that Becerra's claims against him were barred by Nebraska's Motor Vehicle Guest Statute, Neb. Rev. Stat. § 25-21,237 (Reissue 2008). On July 13, 2012, Sulhoff filed a motion for summary judgment alleging that the pleadings, affidavits, and depositions demonstrate there were no genuine issues of material fact and that he was therefore

entitled to judgment as a matter of law. A hearing on Sulhoff's motion for summary judgment was held on August 1. In its order filed on August 23, the district court granted summary judgment in Sulhoff's favor. The district court found that pursuant to the Nebraska guest statute in effect at the time of this accident, § 25-21,237, Mario Sr. can be held liable for damages only if he was grossly negligent in the operation of his vehicle at the time of the collision. The district court found that there was clearly an inference Mario Sr. was guilty of ordinary negligence, but that there was no evidence Mario Sr. was guilty of gross negligence. The district court, having previously sustained a motion for summary judgment in favor of Union Pacific, dismissed Becerra's complaint. Becerra filed this timely appeal.

III. ASSIGNMENTS OF ERROR

Becerra assigns that the district court erred in (1) finding that the actions of Mario Sr. constituted the sole proximate cause of the accident, (2) finding that the concrete barrier did not constitute active negligence on the part of Union Pacific, (3) finding that there was no evidence that Mario Sr. was grossly negligent, (4) finding that there was no evidence that the weather conditions had any effect on the accident, (5) entering summary judgment in favor of Sulhoff, and (6) entering summary judgment in favor of Union Pacific.

IV. STANDARD OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *U.S. Bank Nat. Assn. v. Peterson*, 284 Neb. 820, 823 N.W.2d 460 (2012). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence. *Id.*

V. ANALYSIS

1. Summary Judgment in Favor of Union Pacific

Becerra assigns two errors relating to the district court's grant of summary judgment in Union Pacific's favor. Becerra asserts that the district court erred in finding that (1) the actions of Mario Sr. constituted the sole proximate cause of the accident and (2) the concrete barrier did not constitute active negligence on the part of Union Pacific.

[3-5] Union Pacific's general defense is that Mario Sr.'s negligent operation of the vehicle in which Mario III was a 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. 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.

Dresser v. Union Pacific RR. Co., 282 Neb. 537, 542, 809 N.W.2d 713, 718 (2011). Regardless of whether a road is icy, a motorist is expected to retain control of his or her vehicle and abide by his or her duties. See *Burkey v. Royle*, 233 Neb. 549, 446 N.W.2d 720 (1989).

[6,7] 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. *Dresser v. Union Pacific RR. Co., supra*. 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. *Id.*

For Union Pacific to be successful on its motion for summary judgment, the record must show as a matter of law either that it owed Mario III no duty, that any duty owed was not breached, or that any breach was not the proximate cause of the accident.

(a) Failure to Keep a Proper Lookout

Becerra argues there are genuine issues of material fact related to her claim that Union Pacific was negligent in failing to keep a proper lookout and failing to control the train upon seeing Mario Sr.'s vehicle, knowing that the roads were icy and that the vehicle would likely be unable to stop in time to avoid the collision. 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. *Dresser v. Union Pacific RR. Co., supra*. 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." *Id.* at 542, 809 N.W.2d at 718.

It is undisputed that Mario Sr. did not stop his vehicle at the railroad crossing. Furthermore, testimony from the train engineer and conductor, as well as video evidence, shows that Mario Sr. did not attempt to slow his vehicle as he approached the railroad crossing. Precisely when the train 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 had arisen.

(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. Union Pacific presented evidence at the summary judgment hearing establishing that at the time of the collision, the weather was clear and the sun was shining. The evidence submitted at the summary judgment hearing established that the Union Pacific train was in a federally regulated speed limit zone of 60 m.p.h., that Union Pacific had self-imposed a modified speed limit of 50 m.p.h., and that the train was traveling at 42 m.p.h. at the time of the collision. The record clearly established that the train's whistle was activated 28 seconds before the collision, and continued to sound until after the collision. In the conductor's affidavit, he stated that he observed Mario Sr.'s vehicle, but had "every reasonable belief that the vehicle would stop" because the train's horn was blowing loudly and the train was clearly visible and quickly coming onto the crossing. The conductor then stated that "[i]n a split second, I then observed the vehicle proceed past the crossbucks and onto the crossing." The conductor stated that "[b]ecause of the locomotive's proximity to the crossing at the time the vehicle proceeded onto the crossing, it would have been impossible to stop the locomotive and avoid impact with the vehicle." Both the engineer and conductor testified in their depositions that the engineer activated the emergency brake as soon as they realized that Mario Sr.'s vehicle was not going to stop, which was before the train entered the crossing.

Union Pacific also offered the affidavit of a certified designated supervisor of locomotive engineers who has been specially trained in the interpretation of event recorder data. According to him, an event recorder is similar to a "black box" on an airplane. Event recorders are required and regulated by the Federal Railroad Administration. Event recorders provide a recording of the locomotive's functions (including speed, distance, time, horn activation, direction of travel, and braking) as they occur. The supervisor stated that the train's event recorder showed the emergency brake on the lead locomotive was activated between 2,488 and 2,550 feet prior to the stop. In Union Pacific's answers to interrogatories, which were received into evidence, it stated that the train traveled approximately 2,429 feet after the collision, before coming to a stop.

Thus, there is evidence that the train's emergency brakes were activated prior to the collision.

Union Pacific made a prima facie case by producing enough evidence to demonstrate that it was entitled to judgment on the issue of "failing to keep a proper lookout and failing to control the train" if the evidence was uncontroverted at trial. See *Dresser v. Union Pacific RR. Co.*, 282 Neb. 537, 809 N.W.2d 713 (2011). The burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to Becerra. See *id.*

Becerra presented no evidence at the summary judgment hearing. Becerra argues, however, that the following matters create issues of material fact that warrant reversal of the district court's grant of summary judgment in Union Pacific's favor: (1) The engineer and conductor knew or should have known that the weather conditions were such that an approaching vehicle may not have been able to stop to avoid the collision, therefore requiring extra vigilance in keeping a proper lookout and in stopping as soon as they were made aware of the vehicle, (2) the train needed only to slow down to permit the vehicle to clear the tracks and did not need to come to a complete stop to avoid the collision, (3) had the crew maintained a proper lookout and seen the vehicle only seconds earlier, or deployed the engine's brakes seconds sooner, the train could have prevented the collision.

[8] We 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. *U.S. Bank Nat. Assn. v. Peterson*, 284 Neb. 820, 823 N.W.2d 460 (2012). 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. *Dresser v. Union Pacific RR. Co., supra*. As stated previously, Becerra presented no evidence at the summary judgment hearing. Becerra's foregoing assertions of "facts" regarding Union Pacific's failure to keep a proper lookout and failure to slow the train down sooner are nothing more than mere possibility based entirely on speculation and conjecture. Accordingly, Becerra did not produce

evidence showing the existence of an issue of material fact that prevents judgment as a matter of law in favor of Union Pacific on its alleged failure to keep a proper lookout.

(b) Concrete Barrier

Becerra asserts that the district court erred in finding that the concrete barrier did not constitute active negligence on the part of Union Pacific. The district court found that the concrete barrier did not create an independent basis for recovery. The district court, citing *Loudy v. Union P. R. R. Co.*, 146 Neb. 676, 21 N.W.2d 431 (1946), found that any negligence in maintaining the concrete barrier at the intersection was "passive and potential thereby only creating a condition" and that it was Mario Sr.'s actions that were "active and the effective cause of the accident."

In *Loudy*, the plaintiff sued to recover damages to his car incurred in a crossing accident. The plaintiff alleged that the collision and damages proximately resulted from the railroad's negligence, because it, among other things, negligently failed to keep in repair good and sufficient crossings over its tracks, including the grading, ditches, and culverts over its right-of-way. Plaintiff alleged that a mudhole in the railroad's right-of-way, 50 to 60 feet before the tracks, caused the car, driven by the plaintiff's wife, to slow down. Once the driver left the mudhole and approached the tracks, she saw the train three to four blocks away. The driver tried to hurry the car, but it had slowed down so much that she could not go on across, so she shifted from second gear directly into reverse, which killed the motor, and the car stopped on the tracks. The driver was able to exit the car and escape injury, but the train struck the car. The Nebraska Supreme Court stated:

> If we assume, without deciding, that defendant was obligated by statute to maintain the highway within its right-of-way, we must nevertheless conclude that the mud hole was only a condition and not the proximate cause of the collision. It is the rule that ordinarily where the negligence of one party is merely passive and potential causing only a condition while that of the other is the moving and effective cause of the accident, the latter is the proximate

> cause. Steenbock v. Omaha Country Club, 110 Neb. 794, 195 N.W. 117 [1923]; Anderson v. Byrd, 133 Neb. 483, 275 N.W. 825 [1937].
>
> In Baltimore & O. R. Co. v. Reeves, 10 F. 2d 329 [1926] (an Ohio case), the court assumed, without deciding, that the railroad company was required under a statute similar in many respects with our own to maintain the highway. Nevertheless, it was said in the opinion: "We are satisfied that this highway defect, even if due to defendant's default, cannot constitute an independent, affirmative basis of recovery. . . . It has no direct tendency to lead to a crossing collision; it only surrounds the traveler with a condition, save for which he might not have been injured."

Loudy v. Union P. R. R. Co., 146 Neb. at 683-84, 21 N.W.2d at 435.

However, the U.S. Court of Appeals for the Eighth Circuit has more recently addressed the issue of "condition" versus "cause." In *Heatherly v. Alexander*, 421 F.3d 638, 645 (8th Cir. 2005), the court stated that "the cause-condition analysis . . . reveals that a finding of a condition *derives from*, and does not *determine*, proximate cause," and that "[a] finding of proximate cause emerges from an analysis of the foreseeablility that the injury could arise from the negligent act." (Emphasis in original.)

In *Heatherly*, a professional truckdriver working for Midwest Specialized Transportation (MST) of Rochester, Minnesota, was hauling a load from Minnesota to California in his tractor-trailer unit. Around 1:15 a.m., he became tired and decided to pull off Interstate 80 to sleep at a rest area located at mile marker 317, near Phillips, Nebraska. The driver parked his truck on the shoulder (or emergency lane) of the deceleration portion of the exit ramp leading into the rest area. Around 2:30 a.m., Carroll and Margaret Heatherly's motor home approached mile marker 317 from the east. They were towing a Ford Escort. Another tractor-trailer rig, stolen and being driven by Steven Alexander, was coming up behind the motor home at a speed of nearly 90 m.p.h. A series of four collisions ensued. First, Alexander's truck struck the back of

the towed Escort. This propelled the Escort forward, striking the back of the motor home. The Escort rotated and was briefly sandwiched between the motor home and Alexander's truck before Alexander's truck ran over the top of the Escort. The third impact involved Alexander's truck striking the back of the motor home. This forced the motor home, still traveling at some 67 m.p.h., headlong into the back of the parked MST truck, the fourth and final impact. Alexander's truck proceeded, unimpeded, across the deceleration lane, and across the shoulder of the lane. It came to rest in the grassy ditch next to the shoulder of the lane. The motor home and the MST truck were soon engulfed in flames. All four of the Heatherly children and Carroll were rescued, although Carroll was badly injured. Margaret was killed in the collision.

Carroll commenced a personal injury and wrongful death action in the U.S. District Court for the District of Nebraska. Before trial, Alexander was dismissed as a defendant, leaving as defendants the truckdriver and MST. At the close of the evidence, the defendants moved for judgment as a matter of law. Taking the motion under advisement, the district court submitted the case to the jury. After the jury deadlocked, the district court declared a mistrial, granted the defendants' motion for judgment as a matter of law, and then dismissed the case. The district court concluded, as a matter of law, that the truckdriver's conduct in parking the MST truck where he did on the exit ramp was not a proximate cause of the Heatherlys' injuries, but merely created a condition by which those injuries were made possible through the negligence of Alexander. Carroll appealed to the Eighth Circuit.

[9-16] On appeal, the Eighth Circuit reversed the district court's judgment granting the defendants' motion for judgment as a matter of law and remanded the cause for a new trial. In doing so, the Eighth Circuit reviewed the law of proximate cause in Nebraska. We quote from their analysis at length:

> Under Nebraska negligence law, proximate cause consists of three elements: that (1) but for the negligence, the injury would not have occurred, (2) the injury is the natural and probable result of the negligence, and (3) there

is no efficient intervening cause. . . . The *foreseeability* of an injury that results from a negligent act determines whether that injury is the "natural and probable result" of the act. "To constitute proximate cause . . . the injury must be the natural and probable result of the negligence, and be of such a character as an ordinarily prudent person *could have known*, or would or ought to have *foreseen* might probably occur as the result." . . . "The law does not require precision in foreseeing the exact hazard or consequence which happens. It is sufficient if what occurs is one of the kind of consequences which might reasonably be foreseen." . . . Further, "[a] proximate cause is a cause that produces a result in a natural and continuous sequence, unaccompanied by an efficient intervening cause, and without which the result would not have occurred." . . . An efficient intervening cause "is a new and independent act, itself a proximate cause of a result, which breaks the causal connection between the original wrong and the result. A person is not legally responsible for a result if it would not have resulted but for the interposition of an efficient intervening cause, which he should not have *reasonably anticipated* or *reasonably foreseen*." . . .

. . . .

In the instant case, it is difficult to tell the extent to which the role of foreseeability was considered in the analysis of proximate cause. This leaves us with two concerns. First, the question of causation was decided as a matter of law, when it is generally a matter of fact under Nebraska law. Second, though the district court relied on relevant precedent, our analysis of Nebraska proximate cause law dictates a different outcome. As an initial matter, proximate cause appears to have been analyzed from the standpoint that "'X' is a condition, therefore 'X' is not a cause." Instead, we think the question should have been "Is 'X' a proximate cause?" and if it is not, then "X" may be merely a condition. This latter approach follows the weight of Nebraska law which makes foreseeability the axis around which the cause-condition analysis rotates. It

> also makes more sense of the difficult inquiry involved in distinguishing cause from condition. This is so because it makes the finding of a condition the product of the proximate cause analysis.
>
> Finally, though Alexander's negligence was determined to have been an intervening cause of the collision, which it was, we believe an analysis of the foreseeability of that negligence acting in concert with the parked MST truck should have been a more prominent factor in the overall analysis. The question of whether an act is a proximate cause, or simply a non-actionable condition, is determined by whether it was foreseeable that the initial act could join with the intervening act to cause the alleged injuries.

Heatherly v. Alexander, 421 F.3d 638, 641-43 (8th Cir. 2005) (citations omitted) (emphasis in original).

The court held there was sufficient evidence, via expert testimony, to create a jury question regarding causation and foreseeability. The court held that a jury should decide (1) whether the Heatherlys' injuries reasonably flowed, at least in part, from the truckdriver's negligent parking of the MST truck on the shoulder of the exit ramp and (2) whether it was foreseeable that the parking of the MST truck on the shoulder of the exit ramp could result in a collision and injuries of the type suffered by the Heatherlys.

In this case, the concrete barrier was located on the opposite side of the crossing as Mario Sr.'s vehicle approached. The vehicle hit the concrete barrier after the collision with the train. Becerra argues that there are material questions of fact regarding (1) whether Union Pacific should have foreseen the type of accident that occurred in this case and (2) whether the collision with the concrete barrier enhanced the injuries to Mario III. We agree that these are questions of fact regarding causation and foreseeability that cannot be resolved as a matter of law. Further evidence is needed to show (1) whether Mario III survived the initial collision with the train; (2) if he did survive the initial collision, whether his injuries and death reasonably flowed, at least in part, from the collision with the concrete barrier; and (3) whether it was foreseeable

that the concrete barrier near the railroad crossing could result in a collision and the injuries/death suffered by Mario III. Accordingly, we reverse the district court's grant of summary judgment in favor of Union Pacific for further proceedings regarding Union Pacific's negligence and liability in maintaining the concrete barrier.

(c) Was Summary Judgment Premature?

Becerra argues that summary judgment was premature because she should have been allowed additional time to develop the record in support of her position. Given our remand of the summary judgment order on the issue of the concrete barrier, we consider Becerra's argument that the order of summary judgment was premature only with regard to her claim that Union Pacific failed to keep a proper lookout.

[17,18] In its order, the district court noted that Becerra did not comply with the demands of Neb. Rev. Stat. § 25-1335 (Reissue 2008) to obtain additional time. Section 25-1335 states:

> Should it appear from the affidavits of a party opposing the motion 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 purpose of § 25-1335 is to provide an additional safeguard against an improvident or premature grant of summary judgment. *Wachtel v. Beer*, 229 Neb. 392, 427 N.W.2d 56 (1988). A § 25-1335 affidavit 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. *Wachtel v. Beer, supra*. Section 25-1335 prescribes a prerequisite for a continuance, or additional time or other relief under the statute, namely, an affidavit stating a reasonable excuse or good cause for a party's inability to oppose a summary judgment motion.

See *Wachtel v. Beer, supra*. Without the appropriate affidavit required by § 25-1335, a party is not entitled to a continuance or additional time to obtain affidavits or discovery to counteract an opposing party's motion for summary judgment. See *Wachtel v. Beer, supra*.

Becerra did not submit an affidavit supporting her position that summary judgment was premature. Accordingly, she was not entitled to additional time to develop the record on her claim that Union Pacific failed to keep a proper lookout.

(d) Conclusion With Regard to Union Pacific

For the foregoing reasons, we find that the order of the district court granting summary judgment in favor of Union Pacific is correct and is affirmed as to Becerra's claims that Union Pacific failed to keep a proper lookout and failed to control the train.

However, we find that there are genuine issues of material fact regarding Union Pacific's maintenance of the concrete barrier. Therefore, we reverse, and remand the district court's grant of summary judgment in favor of Union Pacific on this issue for further proceedings consistent with this opinion.

2. Summary Judgment in Favor of Sulhoff

Becerra assigns that the district court erred in finding there was no evidence Mario Sr. was grossly negligent and that the court therefore erred in granting summary judgment in Sulhoff's favor.

[19,20] The Nebraska guest statute in effect at the time of this accident, § 25-21,237, states:

> The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person related to such owner or operator as spouse or within the second degree of consanguinity or affinity who is riding in such motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by (1) the driver of such motor vehicle being under the influence of intoxicating liquor or (2) the gross negligence of the owner or operator in the operation of such vehicle.

> . . . Relationship by consanguinity or affinity within the second degree shall include . . . children . . . .

Because Mario III is the child of Mario Sr., Mario Sr. can be held liable for damages only if he was grossly negligent in the operation of his vehicle at the time of the collision—there was no evidence or allegation that Mario Sr. was intoxicated.

[21-23] Gross negligence, within the meaning of the Nebraska guest statute, means

> gross and excessive negligence or negligence in a very high degree, the absence of slight care in the performance of duty, an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others.

Klundt v. Karr, 261 Neb. 577, 581, 624 N.W.2d 30, 33 (2001). Negligence that is purely momentary in nature generally does not constitute gross negligence. *Luther v. Pawling*, 195 Neb. 679, 240 N.W.2d 42 (1976). Gross negligence on the part of the driver must be proved by the plaintiff. *Id.*

Becerra alleged that Mario Sr. was grossly negligent in (1) driving at an excessive speed under the conditions then and there existing on County Road B, (2) failing to yield to the Union Pacific train at a designated railroad crossing, and (3) failing to keep a proper lookout for the Union Pacific train. The evidence presented at the summary judgment hearing included the train's track image recorder video, as well as the depositions of the investigating deputies, the train's conductor and engineer, and Becerra.

The Otoe County Sheriff's Department investigated the accident. The chief deputy of the Otoe County Sheriff's Department testified in his deposition that the speed limit was 50 m.p.h. where the accident took place; it did not appear Mario Sr. was exceeding the speed limit; there was no evidence the vehicle was swerving prior to the collision; and there were no skid marks, which meant the brakes were not "locked up" prior to the collision, but that the brakes still could have been applied. One sheriff's deputy testified in his deposition that there were no tire tracks that would indicate any evasive action or any marks in the roadway that would indicate that the tires were "locked up," it did not appear the vehicle was traveling faster

than the posted speed limit, there was no evidence the vehicle was swerving or fishtailing while approaching the train, and it is unknown whether the driver saw the train. Another deputy testified in his deposition that there was no evidence the vehicle was exceeding the speed limit and that there was no evidence the vehicle had lost control on the ice.

The Union Pacific conductor testified in his deposition that he saw the vehicle before the collision and that the vehicle was not speeding, swerving, or fishtailing. He did not know why the vehicle did not stop. The Union Pacific engineer testified that he did not see the vehicle until "[r]ight at the last second." The engineer testified that the vehicle was not swerving or fishtailing.

Becerra testified in her deposition that Mario Sr. was an excellent driver, was a safe driver, and would not do anything to put Mario III in danger while driving. She testified that on the day of the accident, Mario Sr. told her to "[b]e careful out there" because "[t]he roads are bad" and "ice-packed." Becerra testified that Mario Sr. had driven on County Road B "[a]bout a thousand times."

The train's track image recorder video was received into evidence at the summary judgment hearing. The video shows that there were no obstructions at the railroad crossing. The video shows that the vehicle did not stop or swerve prior to crossing the railroad tracks.

The Nebraska Supreme court has decided a number of cases in which the court found insufficient evidence of gross negligence. See, *Liston v. Bradshaw*, 202 Neb. 272, 275 N.W.2d 59 (1979); *Luther v. Pawling*, 195 Neb. 679, 240 N.W.2d 42 (1976); *Warmbier v. Zeurlein*, 182 Neb. 425, 155 N.W.2d 364 (1967); *Pester v. Nelson*, 168 Neb. 243, 95 N.W.2d 491 (1959); *Bishop v. Schofield*, 156 Neb. 830, 58 N.W.2d 207 (1953).

Although we acknowledge the foregoing decisions, we cannot say, as a matter of law, that Mario Sr. was not grossly negligent. As stated previously, included in the meaning of "gross negligence" is "the absence of slight care in the performance of duty." *Klundt v. Karr*, 261 Neb. 577, 581, 624 N.W.2d 30, 33 (2001). The evidence shows that Mario Sr. did not slow down or swerve prior to the collision, and neither the train's

conductor nor the engineer saw brakelights illuminated on the vehicle. Thus, there is a question of material fact as to whether Mario Sr. was grossly negligent in the operation of his vehicle. We therefore reverse the district court's grant of summary judgment in favor of Sulhoff for further proceedings consistent with this opinion.

VI. CONCLUSION

For the foregoing reasons, we find that the order of the district court granting summary judgment in favor of Union Pacific is correct and is affirmed as to Becerra's claims that Union Pacific failed to keep a proper lookout and failed to control the train.

However, we find that there are genuine issues of material fact regarding Union Pacific's maintenance of the concrete barrier. Therefore, we reverse, and remand the district court's grant of summary judgment in favor of Union Pacific on this issue for further proceedings consistent with this opinion.

We therefore reverse the order of the district court granting summary judgment in favor of Sulhoff and remand the cause for further proceedings consistent with this opinion.

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

STATE OF NEBRASKA, APPELLEE, V.
MICHAEL MESADIEU, APPELLANT.
837 N.W.2d 585

Filed August 27, 2013. No. A-12-357.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
3. **Postconviction: Appeal and Error.** On appeal from a proceeding for postconviction relief, the trial court's findings of fact will be upheld unless such findings are clearly erroneous.
4. **Effectiveness of Counsel: Appeal and Error.** Determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law that we review independently of the lower court's decision.