IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 12-16507

ANTHONY PEARSON, SR., and OLIVIA PEARSON,
Plaintiffs-Appellants,

v.

CSX TRANSPORTATION CO.,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia
District Court Case No. CV 5:11-cv-100

BRIEF ON BEHALF OF DEFENDANT-APPELLEE CSX TRANSPORTATION, INC, INCORRECTLY DESIGNATED CSX TRANSPORTATION CO.

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned, counsel of record for the Defendant-Appellee CSX Transportation, Inc., incorrectly designated CSX Transportation Co., certifies the following is a full and complete list of the parties and entities that have an interest in the outcome of this action:

Alvarado, Donna M. – CSX Board of Directors

Boor, David A. – CSX Vice President – Tax and Treasurer

Senator John B. Breaux – CSX Board of Directors

Brown, David A. – CSX Executive Vice President Chief Operating Officer

Carter, Pamela L. – CSX Board of Directors

Crosby, Stephen A. – President – CSX Real Property, Inc.

CSX Corporation – parent corporation of CSX Transportation, Inc.; CSX Corporation is a publicly traded corporation (CSX); no entity owns 10% or more of CSX Corporation's stock

CSX Transportation, Inc. – Defendant-Appellee; CSX Transportation, Inc. is a wholly-owned subsidiary of CSX Corporation

Fitzsimmons, Ellen M. – CSX Senior Vice President – Law and Public Affairs General Counsel & Corporate Secretary

Fulcher Hagler LLP – Counsel for Appellee

Gooden, Clarence W. – CSX Executive Vice President & Chief Commercial Officer

Graham, James E. – United States Magistrate Judge, Southern District of Georgia

Halverson, Steven T. – CSX Board of Directors

Hayes, Jr., Dewey N. – Attorney for Appellants

Kelly III, Edward J.– CSX Board of Directors

Lamphere, Gilbert H. – CSX Board of Directors

Lonegro, Frank A. – President – CSX Technology, Inc.

Mancini, Lisa A. – CSX Senior Vice President – Human Resources and Labor Relations

Mayer Brown LLP – Counsel for Appellee

McPherson, John D. – CSX Board of Directors

Munoz, Oscar – CSX Executive Vice President & Chief Financial Officer

O'Toole, Timothy T. – CSX Board of Directors

Passa, Lester M. – CSX Vice President – Strategic Planning

Pearson, Sr., Anthony – Appellant

Pearson, Olivia – Appellant

Price, John E. – Attorney for Appellee

Purcell, James W. – Attorney for Appellee

Ratcliffe, David M. – CSX Board of Directors

Ruehling, Michael J. – CSX Vice President – Federal Legislation

Shepard, Donald J. – CSX Board of Directors

Shudtz, Peter J. – CSX Vice President – Federal Regulation and General Counsel

Sizemore, Carolyn T. – CSX Vice President and Controller

Tager, Evan M. – Attorney for Appellee

Ward, Michael J. – CSX Chairman, President and CEO, Board of Directors

Congressman J. C. Watts, Jr. – CSX Board of Directors

Whisler, J. Steven – CSX Board of Directors

Whitt, Wilby – President – CSX Intermodal Terminals, Inc.

Chief Judge Lisa Godbey Wood – U.S. District Court, Southern District of Georgia

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STATEMENT REGARDING ORAL ARGUMENT

This is a straightforward case. Plaintiffs-appellants Anthony Pearson, Sr. and Olivia Pearson (collectively, "the Pearsons") appeal the district court's entry of summary judgment in favor of defendant-appellee CSX Transportation, Inc., incorrectly designated CSX Transportation Co., (hereinafter "CSXT"), on their wrongful-death action arising from a collision at a railroad grade crossing. Video footage from the lead locomotive's camera shows that the gate arms at the crossing were lowered and illuminated and that the signal lights were blinking at the time of the accident. The decedent, who had alcohol and cannabinoids present in his system, drove around the lowered crossing gate and into the path of the train. Because the relevant facts and legal arguments are adequately presented on the papers, and because the district court's order granting summary judgment to CSXT applied settled law to the undisputed facts in the record, oral argument is unnecessary. See Fed. R. App. P. 35(a)(2)(C).

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STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. § 1332 because the parties are completely diverse—the Pearsons are citizens of Georgia, whereas CSXT is a citizen of Florida and Virginia—and the amount in controversy exceeds $75,000. (R-1 at pp. 2, 8.) CSXT timely removed the action pursuant to 28 U.S.C. §§ 1441(a) and 1446(b). (Id. at pp. 3, 6.) The district court entered final judgment in favor of CSXT on November 29, 2012 (R-75), and the Pearsons timely filed a notice of appeal on December 21, 2012 (R-77). Therefore, this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED

(1) Whether the district court properly granted summary judgment to CSXT on the ground that there was no evidence of negligence on the part of CSXT.

(2) Whether the district court properly granted summary judgment to CSXT on the ground that the decedent's negligent conduct was the sole proximate cause of the accident.

(3) Whether the district court abused its discretion in denying the Pearsons' untimely attempt—after the deadline for filing an amended complaint and after the close of discovery—to assert new claims in response to CSXT's motion for summary judgment.

STATEMENT OF THE CASE

This case arises out of the death of the Pearsons' 20-year-old son Anthony, Jr. following a collision between his vehicle and a CSXT freight train at the McDonald Avenue railroad grade crossing in Douglas, Georgia, shortly before midnight on September 7, 2009. (See R-1 at pp. 7-8 (Compl. ¶¶ 2, 6, 9).) As the district court explained, the "uncontested evidence shows that Pearson [*i.e.*, the decedent] had alcohol and cannabinoids in his system when he drove his car around the lowered gate of a railroad crossing and into the path of an oncoming train." (R-74 at p.1.) Nevertheless, the Pearsons sued CSXT. Unsurprisingly, given the incontrovertible evidence of the decedent's negligence *and* the incontrovertible evidence that the active warning systems at the crossing were working exactly as they should, the district court granted CSXT summary judgment.

A. The Pearsons' claims

The Pearsons brought this wrongful-death action against CSXT on September 7, 2011 in Georgia state court. (R-1 at p. 8.) CSXT timely removed the action. (R-1 at pp. 1-4.)

Although much of the Pearsons' brief on appeal is aimed at accusing the train crew of negligent conduct in the moments before the collision (Appellants' Br. at 3, 7, 11-12, 16-17), the Pearsons did not raise any claims related to train handling in their complaint. (See generally R-1 at pp. 7-9.) Instead, the Pearsons

attacked alleged deficiencies in CSXT's installation and maintenance of warning devices at the crossing. Their complaint asserted that CSXT negligently failed to (1) maintain the crossing, (2) place advance warning signs, (3) remove sight-obstructing vegetation, (4) "illuminate" the crossing, and (5) place and maintain other "traffic control devices" around the crossing. (R-1 at pp. 7-8 (Compl. ¶¶ 3-6).) Although the Pearsons acknowledged that the McDonald Avenue crossing was equipped with "active traffic control systems"—specifically, flashing signal lights, automatically lowering crossing gates, and a warning bell—they alleged that these systems were malfunctioning at the time of the accident. (R-1 at p. 8 (Compl. ¶ 6).)

B. <u>The McDonald Avenue crossing</u>

At the McDonald Avenue crossing, a two-lane road (which runs in the north-south direction) intersects a pair of railroad tracks (which run in the east-west direction). (R-35-2 at pp. 5-6 (plan).) On the day of the accident, the decedent approached the crossing from the north, while the CSXT train approached the crossing from the west. (R-35-7 at p. 1 (Cornelius Aff. ¶ 3); R-35-8 at p. 1 (Henderson Aff. ¶ 3); R-35-15 at p. 11 (McCulloch Dep. 36:3-4); R-35-16 at p. 5 (McCulloch Dep. Exh. 2 at 2) (police report).)

Motorists (like the decedent) who approached the crossing from the north encountered "passive" warning devices—specifically, advance warning signs and pavement markings—indicating that a railroad grade crossing was ahead. (R-35-10

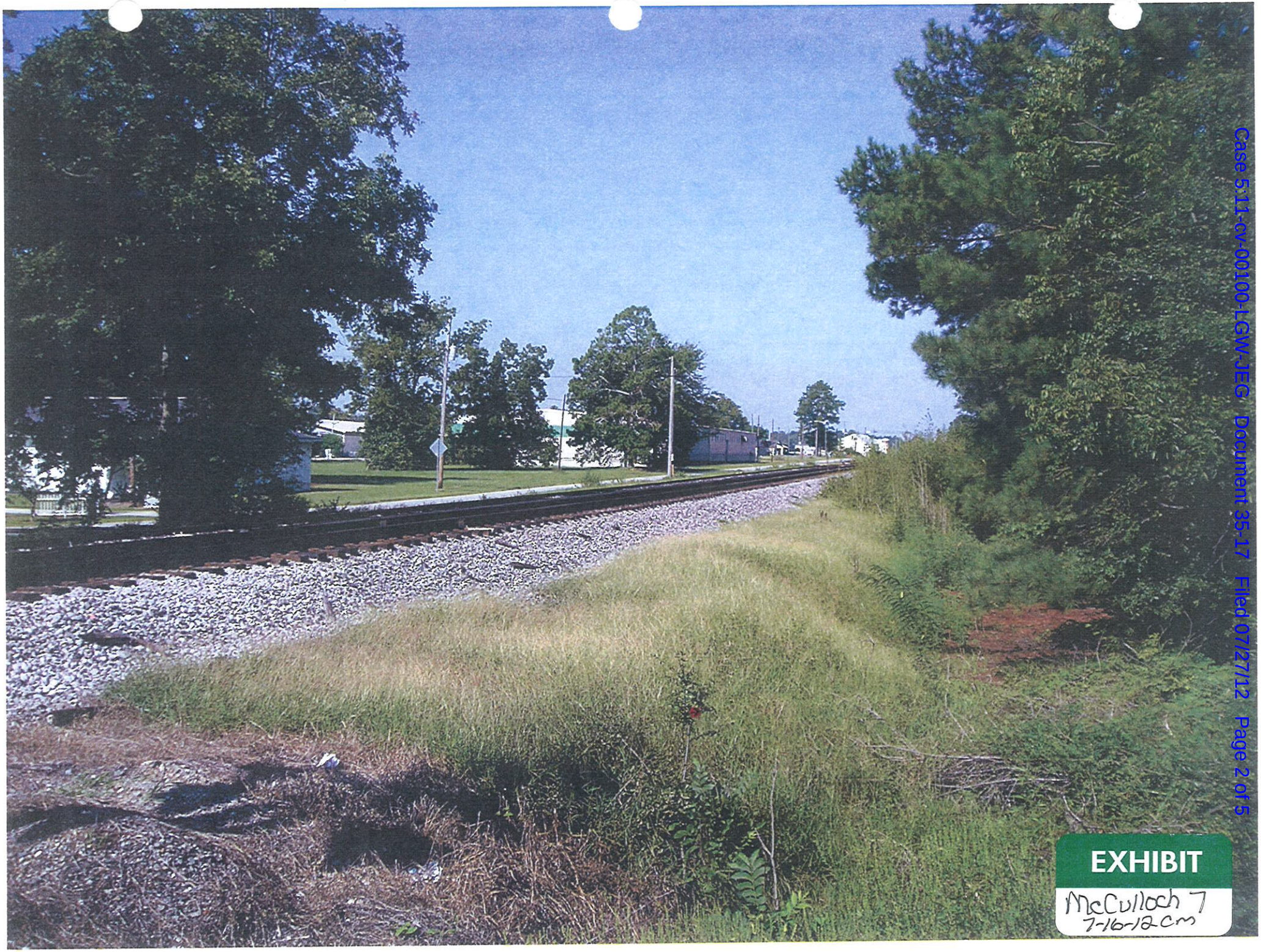
at p. 14 (A. Pearson, Sr. Dep. 49:22-50:3); R-35-11 at p. 1 (A. Pearson, Sr. Dep. Exh. 2); R-35-15 at pp. 11, 13 (McCulloch Dep. 37:11-23, 44:18-45:11); R-35-17 at p. 1 (McCulloch Dep. Exh. 6); R-35-18 at p. 2 (McCulloch Dep. Exh. 12).) At the crossing itself, reflectorized railroad crossbuck warning signs were mounted on the signal masts on both sides of the roadway. (R-35-6 at p. 3 (Anderson Aff. ¶ 9); R-35-10 at p. 19 (A. Pearson, Sr. Dep. 70:8-10); R-35-15 at p. 13 (McCulloch Dep. 45:6-11); R-35-18 at p. 2 (McCulloch Dep. Exh. 12).)

The McDonald Avenue crossing was also equipped with an "active" warning system consisting of red flashing lights, automatic gates, and a loud warning bell. (R-35-6 at p. 1 (Anderson Aff. ¶ 2); R-35-7 at p. 2 (Cornelius Aff. ¶ 7); R-35-8 at p. 2 (Henderson Aff. ¶ 6); R-35-15 at pp. 11-14 (McCulloch Dep. 37:24-38:2, 38:12-20, 44:24-45:5, 49:7-23).) CSXT installed the McDonald Avenue crossing's active warning system using federal funds. (R-35-2 at p. 2 (work authorization showing $69,480 in federal funds).)

Federal regulations require CSXT to perform inspections and tests of the signal system and its various components on a monthly, quarterly, and annual basis. See 49 C.F.R. §§ 234.253, 234.257, 234.259. In accord with these regulations, Kade Anderson, a signal maintainer for CSXT, inspected the signal system each month from June 2009 through September 2009. (R-35-6 at pp. 1-2 (Anderson Aff. ¶¶ 2, 4-7); id. at pp. 4-15 (Anderson Aff. Exh. A) (inspection

reports).) On each occasion, including at an inspection just four days before the accident, Anderson determined that the signal system—including its flashing lights, automatic gate arms, and bell—was in proper working order. (Id. at p. 2 (Anderson Aff. ¶ 4-7).) In the hours following the decedent's accident, Anderson went to the crossing to inspect and retest the signal system; he again found everything to be in working order. (Id. (Anderson Aff. ¶ 8).)

There was no vegetation at the crossing that would obstruct a motorist's view of the signals or the approaching train. (R-35-6 at p. 3 (Anderson Aff. ¶ 9); R-35-15 at pp. 11-12, 14-15 (McCulloch Dep. 35:14-36:9, 39:9-13, 46:4-7, 47:19-48:2, 49:21-50:13).) Indeed, Olivia Pearson, the decedent's mother, admitted during her deposition that the signal lights were visible to approaching motorists like the decedent. (R-35-20 pp. 24-25 (O. Pearson Dep. 92:25-93:3, 95:12-24).) Photographs of the crossing—several of which are reproduced in the following pages—confirm that an approaching motorist would have an unobstructed view of the signals and that a motorist stopped at the crossing would have an unobstructed view of an approaching train. (E.g., R-35-11 at pp. 1-2 (A. Pearson, Sr. Dep. Exh. 2A, 2B); R-35-17 at pp. 1-2 (McCulloch Dep. Exhs. 6, 7); R-35-18 at pp. 2, 4 (McCulloch Dep. Exhs. 12, 14); R-35-22 at pp. 1-2, 4 (O. Pearson Dep. Exhs. 6A, 6B, 6D).)



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C. The accident

The collision occurred at approximately 11:58 p.m. on September 7, 2009. (R-1 at pp. 7-8 (Compl. ¶¶ 2, 6); R-35-7 at p. 1 (Cornelius Aff. ¶ 3); R-35-8 at p. 1 (Henderson Aff. ¶ 3).) At the time of the accident, conditions were clear and dry, and the decedent had an unobstructed view of the crossing's passive and active warning devices. (R-35-6 at pp. 2-3 (Anderson Aff. ¶ 9-10); R-35-7 at p. 2 (Cornelius Aff. ¶ 10); R-35-8 at p. 2 (Henderson Aff. ¶ 9); R-35-15 at pp. 14-15 (McCulloch Dep. 49:11-50:3); R-35-16 at p. 5 (McCulloch Dep. Exh. 2)); see supra p. 5.

There was overwhelming, uncontradicted evidence that the signal lights were flashing and the gate arms were down as the decedent approached the crossing. To begin with, the lead locomotive was equipped with a video camera and digital recording system. (R-35-9 at pp. 1-2 (Harrison Decl. ¶¶ 2-5.) The footage from the locomotive digital video recording ("LDVR") system showed that the McDonald Avenue crossing's automatic gate arms were lowered and its red signal lights were flashing prior to the collision.[1] In the LDVR footage, the

[1] A DVD containing a portion of the video captured by the LDVR system was filed below as Exhibit 2 to the Declaration of Dillon Harrison in support of CSXT's motion for summary judgment. (R-35-9 Exh. 2.) The video footage can be accessed only using LocoCam Viewer, which is a proprietary software package developed and owned by the General Electric Company. Under the terms of the

(Footnote continued . . .)

flashing signal lights are visible through a "bull's eye"—a lateral peephole that allows approaching train crews to verify that the lights are operating properly—for at least 30 seconds before the collision. (Id. at p. 3 (Harrison Decl. ¶ 9); see also id. Exh. 2.) The lowered gate arms are also visible in the video footage. (Id. at p. 3 (Harrison Decl. ¶ 10); see also id. Exh. 2.)

Additionally, the CSXT train crew—conductor C.G. Cornelius and engineer David Grover Henderson—witnessed the active warning system operating, and they recalled seeing lowered gates and flashing lights. (R-35-7 at p. 2 (Cornelius Aff. ¶ 7); R-35-8 at p. 2 (Henderson Aff. ¶ 6).) The train crew's testimony was corroborated by that of Lieutenant Bart McCulloch of the Douglas Police Department, who investigated the accident and arrived at the scene within minutes of the collision. (R-35-15 at pp. 9-10 (McCulloch Dep. 28:9-29:22).) When Lt. McCulloch arrived, the signal lights were flashing and the gate arms were down. (Id. at p. 14 (McCulloch Dep. 49:8-23).)

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relevant licensing agreement, CSXT is unable to redistribute copies of the software. Rather, any entity seeking to use the software must enter into a licensing agreement with GE. CSXT sought and obtained leave below to file *in camera* the LocoCam Viewer with the district court, which also approved entering into the licensing agreement. (R-37; R-40.) Although Plaintiffs' counsel has been shown the video footage multiple times at CSXT's facilities, Plaintiffs' counsel never obtained the requisite software license. (R-37.) If the Court deems it helpful to view the video, CSXT can facilitate its acquisition of the viewer software.

As the CSXT train approached the crossing, the lead locomotive's headlight and ditch lights were on, and the train crew repeatedly blew the locomotive's horn throughout the train's approach to the crossing. (R-35-7 at p. 2 (Cornelius Aff. ¶ 6); R-35-8 at pp. 1-2 (Henderson Aff. ¶ 5); R-35-15 at pp. 9, 19 (McCulloch Dep. 28:4-5, 28:15-18, 69:12-23).) On the LDVR footage, the lights are visible and the horn and bell are audible. (R-35-9 at pp. 2-3 (Harrison Decl. ¶¶ 8-9) & Exh. 2.) The train was traveling at approximately 40 miles per hour, well below the 60 mph timetable speed set by CSXT for freight trains approaching the crossing. (R-35-7 at p. 1 (Cornelius Aff. ¶¶ 4-5); R-35-8 at p. 1 (Henderson Aff. ¶ 4); R-35-9 at pp. 2-3 (Harrison Decl. ¶ 8) & Exh. 1.) Despite keeping a vigilant lookout, the conductor "did not see the car until the moment of impact." (R-35-7 at p. 2 (Cornelius Aff. ¶ 9).) The engineer spotted the decedent's headlights only "1-2 seconds before the collision." (R-35-8 at p. 2 (Henderson Aff. ¶ 8).) The decedent's car "did not stop as it approached the crossing," and the engineer witnessed it go "around the lowered gate arm" and "directly into the path of the train." (Id. ¶ 7.) Upon impact, the engineer activated the train's emergency brake. (Id. ¶ 8.) There was no way that the engineer could have avoided the collision. (R-35-15 at p. 16 (McCulloch Dep. 21-57:25).)

The collision itself was not recorded on the LDVR video footage because of the location of the camera. The camera recorded the area beginning about 50 feet

in front of the train, and not the area immediately in front of the locomotive. (R-35-9 at pp. 1-2 (Harrison Decl. ¶¶ 2-5.) As a result of the camera's placement, the decedent's vehicle was never actually visible in the footage. But "[p]rior to impact, beams from the decedent's headlights are visible" in the video, confirming "that the decedent entered the opposing lane of traffic in order to go around the lowered gate arm prior to the collision." (R-35-9 at p. 3 (Harrison Decl. ¶ 12); id. at Exh. 2.)

D. The investigation

As noted above, Lt. McCulloch investigated the accident. He was less than one-quarter mile from the McDonald Avenue crossing when the accident occurred. (R-35-15 at p. 9 (McCulloch Dep. 27:21-28:12).) Lt. McCulloch immediately drove to the scene, where he saw the signal lights flashing and the crossing gates still in the lowered position. (Id. at p. 14 (McCulloch Dep. 49:7-23).) He noticed that the view of the signal lights was unobstructed from the vantage point of an approaching motorist. (Id. at pp. 14-15 (McCulloch Dep.49:24-50:10).) He also noticed that there were no obstructions, from vegetation or otherwise, "until [someone] [got] a fair piece down the track." (Id. at pp. 12, 15 (McCulloch Dep. 39:9-13, 50:11-13).)

Lt. McCulloch concluded that the decedent "went around the railroad barrier into the path of the train." (R-35-15 at p. 7 (McCulloch Dep. 21:21-23).) He based

this conclusion on the "angles of the impact" and the "gouge marks" left in the pavement from the decedent's car. (Id. at p. 8 (McCulloch Dep. 22:2-6); see also id. at p. 12-13 (McCulloch Dep. 39:20-43:21); R-35-16 at pp. 4-5 (McCulloch Dep. Exhs. 9-10); R-35-17 at pp. 1-2 (McCulloch Dep. Exhs. 11-12).) Because the decedent had approached the crossing from the north and was travelling *south*, yet the gouge marks were found in the *northbound* lane, Lt. McCulloch concluded that the decedent must have gone into the opposing lane of traffic in order to drive around the lowered gate arm. (R-35-15 at p. 7 (McCulloch Dep. 22:2-23:6); see also id. at pp. 12-13 (McCulloch Dep. 41:3-13, 43:4-21).)

Lt. McCulloch smelled an odor of alcohol emanating from the decedent's car and person. (R-35-15 at pp. 9-10 (McCulloch Dep. 29:23-30:8); R-35-16 at p. 5 (McCulloch Dep. Exh. 2) ("there was an odor of alcoholic beverage about his person and the car").) An "air of alcohol to his breath" was also noted in the decedent's emergency room records. (R-43-2 at p. 44.) Blood samples were taken and analyzed by the Georgia Bureau of Investigation ("GBI"), which found that the decedent had a whole blood-alcohol concentration of 0.069 grams per 100 milliliters. (R-35-5 at p. 7 (lab report); see also R-35-15 at pp. 6-7, 16 (McCulloch Dep. 16:21-20:23, 54:4-24); R-35-16 at p. 10.) As part of routine trauma care, the decedent's blood and urine were also analyzed by Coffee Regional Medical Center ("CRMC") staff. (R-43-2.) CRMC's testing revealed a serum/plasma blood-

alcohol concentration of 117.3 milligrams per deciliter, equivalent to a whole blood-alcohol concentration of approximately 0.098 grams per 100 milliliters. (R-35-4 at p. 1 (lab report); R-43-2 at p. 29 (same); R-43-5 at p. 25 (same).)[2]

The decedent's urine tested positive for cannabinoids. (R-35-4 at p. 2 (lab report); R-43-2 at p. 30 (same); R-43-5 at p. 26 (same).)

E. The decedent's duties under Georgia law

Georgia law imposes various duties on motorists generally, and motorists approaching a railroad crossing in particular.

O.C.G.A. § 40-6-391(k)(1) makes it illegal for "[a] person under the age of 21"—such as the decedent—to drive "while the person's alcohol concentration is 0.02 grams or more."

[2] "[T]he use of a conversion ratio to convert a serum alcohol reading into a whole blood alcohol concentration level has been widely accepted." Potter v. State, 301 Ga. App. 411, 417 (2009). In Potter, the Georgia Court of Appeals approved the use of "a conversion ratio of 20 percent." Id. at 418. Similarly, this Court has explained that "[b]lood serum can be converted to whole blood alcohol content by an average ratio of 1/1.18 (with a dominator [sic] range of 1.10 to 1.35)." Capone v. Aetna Life Ins. Co., 592 F.3d 1189, 1193 (11th Cir. 2010) (citing Dominick J. Di Maio & Vincent J.M. Di Maio, Forensic Pathology, 466 (1989)). Regardless of which of these conversion ratios is applied, the CRMC's blood-serum test confirms that the decedent's blood-alcohol concentration exceeded the legal limit: The precise figure ranges from 0.087 grams per 100 milliliters (using Capone's low-end conversion ratio of 1/1.35) to 0.099 grams per 100 milliliters (using Capone's high-end conversion ratio of 1/1.10).

O.C.G.A. § 40-6-391(a)(5) makes it illegal for any person to drive if his or her "alcohol concentration is 0.08 grams or more."

O.C.G.A. § 40-6-391(a)(6) makes it illegal for any person to drive if "there is *any amount* of marijuana . . . .present in the person's blood or urine, or both, including the metabolites and derivatives of each or both." (Emphasis added.)

In relevant part, O.C.G.A. § 40-6-140(a) provides:

> Whenever any person driving a vehicle approaches a railroad grade crossing, such driver shall stop within 50 feet but not less than 15 feet from the nearest rail of such railroad and *shall not proceed* until he can do so safely, when:
>
> > (1) A clearly visible electric or mechanical signal device gives warning of the immediate approach of a train;
> >
> > (2) A crossing gate is lowered or a human flagman gives or continues to give a signal of the approach of the passage of a train; or
> >
> > (3) An approaching train is plainly visible and is in hazardous proximity to such crossing.

(Emphasis added.)

Finally, O.C.G.A. § 40-6-140(b) provides that "[n]o person shall drive any vehicle through, around, or under any crossing gate or barrier at a railroad crossing while such gate or barrier is closed or is being opened or closed."

F. Proceedings below

CSXT moved for summary judgment. (R-35.) The district court granted CSXT's motion on two independent grounds: (1) the absence of any evidence that CSXT was negligent and (2) the overwhelming evidence that the decedent's negligence was the sole proximate cause of the accident.

1. *The district court's conclusion that there was no evidence that CSXT was negligent*

The district court concluded that the Pearsons had "presented no evidence—only allegations—of [CSXT's] negligence" and determined that the Pearsons' assertions of negligence were "not supported by the law or evidence." (R-74 at pp. 9, 21.) The court addressed the Pearsons' pleaded claims (relating to the design and maintenance of the McDonald Avenue crossing), as well as their unpleaded claims (relating to alleged negligence on the part of the train crew).[3]

a. As to the Pearsons' pleaded claims, the district court began by noting that the Pearsons had "put forward no evidence to support" their "general claim of negligent Crossing maintenance," and so the court construed that claim as simply

[3] As discussed below (at pp. 16-17), the Pearsons attempted repeatedly to inject new and unpleaded theories of liability into the case in response to CSXT's motion for summary judgment. The district court rejected these claims—which challenged the allegedly negligent conduct of the train crew—as both untimely and unsupported by the evidence. (R-74 at p.5 n.4.)

"encompass[ing] all of the specific negligence claims" in the remainder of the complaint. (R-74 at p. 9.)

The district court determined that the Pearsons' claim that CSXT failed to trim vegetation around the crossing was unsupported by the evidence, which "shows that Pearson had an unobstructed view of both the signal masts and the approaching train." (R-74 at p. 10.) Photographs and eyewitness testimony established that none of the vegetation blocked an approaching motorist's view of the road markings, signs, signal lights, or train. (Id.) In short, the "undisputed evidence shows that, for a vehicle stopped north of the gate at McDonald Avenue, the sight distance for a train approaching from the west was at least one hundred—and likely many hundred—feet." (Id. at 11.)

The district court also determined that the Pearsons' claim that CSXT had failed to properly erect a railroad crossbuck sign, as required by O.C.G.A. § 32-6-60, was unsupported by the evidence. (R-74 at p. 14.) CSXT's signal maintainer observed the requisite reflectorized crossbuck signs on both sides of the crossing, and even the decedent's father believed that there were crossbuck signs at the crossing. (Id. at 13-14.)

Next, the district court rejected the Pearsons' claims that CSXT had failed to properly illuminate the crossing and install traffic-control devices—*e.g.*, an advance warning sign—in its vicinity. (R-74 at pp. 12-19.) The district court

concluded that these claims were both preempted by Georgia law (id. at 13 n.8, 15-18) and unsupported by the evidence (id. at 12-19.) Georgia has abrogated the "common law duty to initiate the installation of protective devices at grade crossings" and replaced that with a comprehensive statutory scheme. (Id. at 15-16.) Under the statutory framework, a railroad's *sole* duty is to erect a railroad crossbuck sign. (Id. at 15); see also O.G.C.A. § 32-6-50(b). Otherwise, the "duty to install adequate warning devices and signals at railroad crossings" is placed on the "governmental body responsible for the road that crosses the railroad tracks." (Id. at 16.) Accordingly, the district court held that CSXT had no duty to install additional illumination or warning signs at the crossing. (Id. at 13 n.8, 16, 18.) The district court also held in the alternative that the undisputed evidence showed that the crossing *was* illuminated—*i.e.*, that the flashing signal lights and the lights on the lowered gate arm were all operational—and that an advance warning sign was present at the time of the accident. (Id. at 13-14, 17.)

Finally, the district court rejected the Pearsons' claim that the crossing's active warning system was inoperative at the time of the accident. (R-74 at pp. 19-20.) The district court explained that "uncontradicted evidence"—including "video footage from the train's locomotive camera" and testimony from the train crew and Lt. McCulloch—showed that the "signal mast lights were illuminated and blinking," that the "gates were lowered, and that the lights on the gates were

illuminated." (Id. at 19.) The undisputed evidence, including CSXT's contemporaneously maintained records, also showed that the signals had been inspected and maintained consistently with federal regulations. (Id. at 20.) In short, the "overwhelming and uncontradicted evidence" was that the "signaling system functioned properly before, during, and after the accident." (Id.)

b. The district court also rejected the Pearsons' *unpleaded* train-handling claims, explaining that those claims had been made "too late" and lacked evidentiary support in any event. (R-74 at p.5 n.4.) The Pearsons' complaint took issue only with CSXT's alleged failure to provide "warning devices and systems at the crossing"; it did *not* challenge the crew's handling of the train before the collision. (Id. at 8.) In response to CSXT's motion for summary judgment, though, the Pearsons "attempted to change their theory" of the case to include new claims that the train's speed was excessive and that the crew negligently failed to slow or stop the train so as to avoid the collision. (Id. at 5 n.4; see R-41 at p. 4.)

Although the Pearsons do not acknowledge this in their brief to this Court, the magistrate judge entered an order on October 15, 2012, denying them leave to amend their complaint to include the negligent-train-handling claims. (R-55.) In denying the Pearsons' motion to amend (R-50), the magistrate judge observed that the Pearsons had failed to seek leave to amend until nine months *after* the deadline for amended pleadings had passed. The magistrate judge found that the Pearsons

had failed to establish "good cause" for modifying that deadline. (R-55 at p. 3.) The Pearsons did not file objections to the magistrate judge's order.

The Pearsons also filed a proposed pretrial order asserting the same, unpleaded negligent-train-handling claims, to which CSXT objected. (R-47 at pp. 1-2.)

In its order granting summary judgment to CSXT, the district court found that the Pearsons' negligent-train-handling claims had been made "too late." (R-74 at p.5 n.4.) The district court also rejected the claims on the merits, concluding that the Pearsons "presented no evidence of negligence on the part of the train crew." (Id.) Further, "even assuming that the engineer could have pulled the train's emergency brake when he saw Pearson's car one to two seconds prior to impact, Plaintiff presented no evidence that the train's speed would have sufficiently dropped" so as to avoid the accident. (Id.)

2. *The district court's conclusion that the decedent's negligence was the sole proximate cause of the accident*

The district court granted summary judgment to CSXT on the independent ground that the "uncontradicted evidence rebut[ted] the presumption that [the decedent] exercised ordinary care" and "show[ed] that [the decedent]'s negligence was the sole proximate cause of his injuries." (R-74 at p. 23.)

Specifically, the blood and urine testing showed that the decedent had "alcohol and cannabinoids in his system at the time of the accident." (R-74 at p. 22.) The decedent thereby violated Georgia law. See O.C.G.A. § 40-6-391(k)(1) (prohibiting individuals under the age of 21 from driving with a blood-alcohol concentration above 0.02); id. § 40-6-391(a)(6) (prohibiting driving with "any amount of marijuana" in the person's body).

Moreover, the "evidence conclusively show[ed]" that the decedent "drove around the lowered gate and into the train's path." (R-74 at p. 22.) This evidence included the train engineer's testimony that he saw the decedent drive around the gate and into the train; the video footage recorded by the LDVR, which showed the lowered gate at the crossing and the headlights from the decedent's car illuminating the northbound lane of the road just prior to the collision; and Lt. McCulloch's discovery of gouge marks left by the decedent's car in the opposing lane of traffic as he was driving around the lowered gate. (Id.)

STANDARD OF REVIEW

The Court reviews *de novo* the district court's grant of summary judgment. Fennell v. Gilstrap, 559 F.3d 1212, 1216 (11th Cir. 2009). Although the Court is "required to view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the [summary judgment] motion,'" a party cannot resist summary judgment merely by establishing "'some metaphysical doubt as to

the material facts.'" Scott v. Harris, 550 U.S. 372, 379-80 (2007) (internal quotation marks omitted). Rather, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts." Id. at 380; Kesinger v. Herrington, 381 F.3d 1243, 1249 (11th Cir. 2004) (rejecting as "not substantial evidence" eyewitness testimony which was contradicted by other testimony and photographic evidence). When, as here, there is objective video evidence of the events, the Court cannot accept a party's "visible fiction" to generate a dispute of material fact, but must "view[] the facts in the light depicted by the videotape." Scott, 550 U.S. at 380-81.

This Court ordinarily reviews for an abuse of discretion the decision to deny a motion for leave to file an amended complaint, and will reverse such a decision only "in instances in which the district court has *clearly* abused its discretion." Reese v. Herbert, 527 F.3d 1253, 1262 n.13 (11th Cir. 2008) (quotation marks omitted; emphasis in original). When, however, a party "fails to timely challenge a magistrate's nondispositive order before the district court, the party [has] waived his right to appeal those orders in this Court." Smith v. Sch. Bd. of Orange County, 487 F.3d 1361, 1365 (11th Cir.2007); see also Fed. R. Civ. P. 72(a) ("A party may not assign as error a defect in the order not timely objected to.").

SUMMARY OF THE ARGUMENT

Incontrovertible evidence shows that while under the influence of alcohol and marijuana, the decedent drove past an advance warning sign and pavement markings indicating that a grade crossing was ahead, ignored flashing signal lights, circumvented a lowered crossing gate, and collided with CSXT's train. Video footage from the lead locomotive's camera shows that the crossing's signal lights were flashing; that the crossing gate arms were down prior to the accident; and that, throughout the train's approach, its lights were burning brightly and its horn was being sounded. Photographic evidence shows that the decedent had a clear view of warning signs, flashing signal lights, and the approaching train itself. Despite all of these warnings, the decedent did not stop as he approached the crossing and instead drove around the lowered gate arm into the path of the oncoming train.

The district court properly granted summary judgment on the Pearsons' claims on the basis of this overwhelming evidence. It correctly determined that the Pearsons' allegations of negligence on CSXT's part are without merit and devoid of evidentiary support. Their claims relating to the selection and installation of warning devices at the crossing are preempted under federal law (which preempts any state-law claim alleging the inadequacy of warning devices at a crossing that, like this one, has been upgraded with federal funds); precluded by Georgia law

(which displaces any common-law claim based upon a railroad's alleged failure to install additional warning devices at a grade crossing); and unsupported by the evidence (since the warning devices were in fact present at the crossing). See Section I.A, infra. Their claims relating to the maintenance of the crossing likewise are unsupported by the evidence. Eyewitness testimony, along with video and photographs, indisputably show that the crossing's active warning system was functioning properly and that an approaching motorist's view of the flashing lights, lowered gate arm, and train was unobstructed by vegetation. See Section I.B, infra. And finally, the Pearsons' unpleaded claims relating to alleged negligence on the part of the train's crew are both waived and without merit. The Pearsons made no attempt to raise those claims until after the pleadings and discovery had closed and after CSXT had moved for summary judgment. See Section I.C.1, infra. And there is no evidence that the train crew acted negligently or could have avoided the collision in any event. See Section I.C.2, infra.

The district court also correctly determined that the sole proximate cause of the decedent's death was his own reckless conduct. The presumption that the decedent has exercised ordinary care for his own safety has no bearing here, where the undisputed evidence shows that the decedent had alcohol and cannabinoids in his system; failed to stop at a crossing equipped with flashing red lights and other

active warning systems; and drove around a lowered crossing gate directly into a freight train in plain sight. See Section II, infra.

ARGUMENT

I. The District Court Correctly Granted Summary Judgment On The Ground That The Pearsons' Claims Of Negligence Were Without Merit.

The district court properly granted summary judgment in favor of CSXT because there was no genuine dispute of material fact as to the Pearsons' claims that CSXT had acted negligently. On appeal, the Pearsons, citing cases decided by Georgia state courts, repeatedly assert that summary judgment is as a rule inappropriate in negligence cases. See Appellants' Br. at 5-7, 9, 12-13. Suffice it to say, it is the *federal* summary-judgment standard that governs whether there is a genuine fact dispute entitling the Pearsons to a jury hearing on their claims, and that standard applies to negligence cases like any other. Fed. R. Civ. P. 81(c)(1) ("These rules apply to a civil action after it is removed from a state court."); see, e.g., Palmisano v. Allina Health Sys., Inc., 190 F.3d 881, 885 (8th Cir. 1999) (applying "federal summary judgment standards" on the ground that "[a]fter removal . . . federal rather than state law governs the future course of proceedings") (quotation marks omitted); Schultz v. Newsweek, Inc., 668 F.2d 911, 917 (6th Cir. 1982) ("Summary judgment practice in federal district courts is controlled by Rule 56, unaffected by state procedural rules.").

As the district court determined, the Pearsons "presented no evidence—only allegations—of [CSXT's] negligence," making summary judgment appropriate under the governing federal standard.[4] (R-74 at p. 21); see, e.g., Walker v. CSX Transp. Inc., 650 F.3d 1392, 1397-98 (11th Cir. 2011) (affirming grant of summary judgment in favor of defendants because the "evidence was insufficient to raise a triable issue of fact on various elements necessary for [the plaintiff] to prevail on his negligence claims"). In this regard, the Pearsons ignore the district court's reasoning and analysis and fail to identify contrary evidence that would substantiate their claims. The incontrovertible evidence in the record shows that CSXT did nothing wrong and that the Pearsons' claims are without merit.

A. The Pearsons' claims relating to the installation of additional traffic control devices and street lights at the crossing are preempted and unsupported by the evidence.

The Pearsons assert that the warning devices at the crossing were inadequate in various respects. They claim, for example, that the crossing lacked advance "pavement marking[s]" and that "more illumination was needed." See Appellants' Br. at 3, 8, 13. The district court concluded that these claims were preempted and

[4] Notably, though, even the Georgia cases cited by the Pearsons hold that no jury question is presented as to the adequacy of a crossing when, as here, there are "starkly obvious" and "plainly visible" indicators of approaching trains. E.g., Seaboard Coast Line R. Co. v. Sheffield, 194 S.E.2d 484, 485 (Ga. Ct. App. 1972) (cited at Appellants' Br. 3, 6, 16).

unsupported by the evidence, determinations that were manifestly correct. (R-74 at pp. 12-19.)

1. *The claims are preempted by State and federal law.*

a. The district court correctly determined that the Pearsons' claims that additional warning devices or illumination should have been provided at the crossing are precluded by the Georgia Code of Public Transportation ("GCPT"). (R-74 at p. 13 n.8, 15-18) As the district court determined, the GCPT abrogates any common-law claim based upon a railroad's alleged failure to initiate the installation of additional warning devices or street lights at a crossing. See, e.g., Bentley v. CSX Transp., Inc., 437 F. Supp. 2d 1327, 1331 (N.D. Ga. 2006); see also Wright v. CSX Transp., Inc., 375 F.3d 1252, 1259-60 (11th Cir. 2004); CSX Transp. Inc. v. Trism Specialized Carriers, Inc., 182 F.2d 788, 792 (11th Cir. 1999) (per curiam). As this Court explained in Wright, under Georgia law, "the duty to install and retain . . . a certain type of warning device belongs to the local government." 375 F.3d at 1260. Thus, a negligence claim *cannot* as a matter of law be premised on the "the adequacy of the signal light[s] or the need for any additional warning device[s]" at the crossing. Id.[5]

[5] Under the GCPT, the railroad has a single responsibility: "[E]rect[ing] and maintain[ing] a railroad crossbuck sign." O.C.G.A. § 32-6-50(b). It is undisputed

(Footnote continued . . .)

Indeed, the GCPT statutorily barred CSXT from erecting additional warnings, signage, or other traffic-control devices at the crossing without first being directed to do so by the government. See Bentley, 437 F. Supp. 2d at 1331; CSX Transp., Inc. v. Trism Specialized Carriers, Inc., 9 F. Supp. 2d 1374, 1379 (N.D. Ga. 1998), aff'd, 182 F.3d 788. The GCPT has assigned exclusive responsibility for determining what devices are "necessary to regulate, warn, or guide traffic" at railroad crossings to the Georgia Department of Transportation. O.C.G.A. § 32-6-50(b). As another court has explained in discussing the preemptive effect of an analogous state statutory regime, "[i]t would be ludicrous to hold [CSXT] liable based on the government's decision[s]." Bryan v. Norfolk & W. Ry. Co., 21 F. Supp. 2d 1030, 1038 (E.D. Mo. 1997).

In their opening brief, the Pearsons do not present any arguments for reversal of the district court's conclusion that their failure-to-install-warning-devices claims are preempted by the GCPT. They thus have waived any challenge to that conclusion. Egidi v. Mukamai, 571 F.3d 1156, 1163 (11th Cir. 2009) ("Arguments not properly presented in a party's initial brief . . . are deemed waived."); N. Am. Med. Corp. v. Axiom Worldwide, Inc., 522 F.3d 1211, 1217 n.4 (11th Cir. 2008) ("[I]ssues not raised on appeal are abandoned.").

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that crossbuck signs (among numerous other warnings) were in place at the McDonald Avenue crossing.

b. Although the district court did not reach the issue, the claims relating to the installation of additional warning devices at the crossing are preempted by federal law, which provides an independent basis for affirmance. See Krutzig v. Pulte Home Corp., 602 F.3d 1231, 1234 (11th Cir. 2010) ("This court may affirm a decision of the district court on any ground supported by the record.").

It is undisputed that the McDonald Avenue crossing's warning system was installed using federal funds. See supra p. 4; (R-74 at p. 3 n.1). Federal regulations promulgated pursuant to the Federal Railroad Safety Act ("FRSA") govern the design of crossing-signal systems installed with federal funding. See 23 C.F.R. § 646.214. Here, by installing lights and automatic gates, CSXT provided the highest level of protection contemplated by § 646.214. See id. § 646.214(b)(3)(i). The Supreme Court has squarely held that when a crossing's warning devices have been installed using federal funds, any state-law claim alleging the inadequacy of those devices is preempted, without the need for any further factual inquiry. Norfolk S. Ry. Co. v. Shanklin, 529 U.S. 344, 357-59 (2000). As the Court explained, "[w]hether the State should have originally installed different or additional devices"—or, for that matter, whether the devices that were installed actually adhered to any applicable standards and requirements—is irrelevant for purposes of preemption. Id. at 358; see also id. at 357 (rejecting argument that the

State's failure to "install pavement markings as required by the MUTCD," or the Manual on Uniform Traffic Control Devices, made preemption inapplicable).[6]

Because federal funds participated in the installation of the gates and lights at the McDonald Avenue, any claim based upon the supposed inadequacy of those warning devices is preempted by federal law.

2. *The claims lack evidentiary support.*

In any event, the Pearsons' claims fail because, as the district court correctly determined, the undisputed evidence shows that the crossing *was* illuminated—by, among other things, the crossing-signal lights and the lights on the lowered gate arm—and that an advance warning sign and pavement markings were present. (R-74 at pp. 12-15.) The Pearsons do not—and cannot dispute—that the signal lights at the crossing were blinking and that the lowered gate arm was lit. See supra at pp. 6-7 (video footage from the LVDR); id. at p. 7 (testimony).

The Pearsons assert that the decedent "encountered no reflective paint nor [sic] reflectors in or on pavement marking [sic] which would have indicated a railroad crossing ahead." See Appellants' Br. 3, 13. This assertion is contradicted

[6] Congress modified the FRSA's preemption provisions in 2007; however, these amendments do not undermine Shanklin's conclusions regarding the preemptive effect of § 646.214. Grade v. BNSF Ry. Co., 676 F.3d 680, 686 (8th Cir. 2012); Henning v. Union Pac. R.R. Co., 530 F.3d 1206, 1215 (10th Cir. 2008); Van Buren v. Burlington N. Santa Fe Ry. Co., 544 F. Supp. 2d 867, 876 (D. Neb. 2008); Murrell v. Union Pac. R.R. Co., 544 F. Supp. 2d 1138, 1148 (D. Or. 2008).

by undisputed evidence. In his deposition, Lt. McCulloch agreed that there were "advanced pavement markings on the approach to the crossing that night."[7] (R-35-15 at p. 11 (McCulloch Dep. 37:14-16); see also id. at p. 13 (McCulloch Dep. 44:18-20).) The decedent's father testified similarly: "Q. . . . [D]o you see the markings on the pavement, the advanced markings warning that a railroad crossing is coming up? A. Yes, sir, I do." (R-35-10 at p. 14 (A. Pearson, Sr. Dep. 49:22-25).) The markings are also visible in photographs of the crossing. (R-35-11 at p. 1 (A. Pearson, Sr. Dep. Exh. 2); R-35-17 at p. 1 (McCulloch Dep. Exh. 6); R-35-18 at p. 2 (McCulloch Dep. Exh. 12).)

At any rate, there is no basis for the suggestion that the (hypothetical) absence of pavement markings contributed to the accident: The decedent plainly had available to him a multiplicity of *other* indicators—*e.g.*, the advance warning signs, the crossbuck, the flashing signal lights, the lowered gate, the crossing bell, and, of course, the approaching train itself, see supra pp. 3-5—that a railroad grade crossing was ahead. Any alleged deficiencies as to the pavement markings were

[7] Lt. McCulloch stated that the pavement markings may not have been separately reflectorized. (R-35-15 at p. 19 (McCulloch Dep. 68:4-7).) But the Pearsons have identified no requirement that those markings be reflectorized. And in any event, it was the sole responsibility of the governmental authorities to install and maintain the pavement markings. O.G.C.A. § 32-6-50(b)-(c); (R-35-2 at p.4; R-35-3 at p. 8).

immaterial in light of the decedent's defiance of all these other warning signs and his decision to drive around a lowered crossing gate.

B. The Pearsons' claims relating to maintenance of the crossing are unsupported by the evidence.

The district court correctly determined that there was no evidence that CSXT failed to maintain the crossing's active warning system or failed to trim vegetation around the crossing. (R-74 at pp. 10-11, 19-20.) In their arguments to this Court, the Pearsons ignore, among other things, the incontrovertible video and photographic evidence that the system was functioning properly at the time of the accident and that the decedent's view of the signals was not obstructed by any vegetation. Instead, they offer unsupported conjecture and speculation that is insufficient to defeat summary judgment.

1. *The crossing's flashing signal lights and automatic gate functioned properly before, during, and after the accident.*

As the district court explained, the "uncontradicted evidence"—including "video footage" and the consistent testimony of the train crew and Lt. McCulloch—was that the "signal mast lights were illuminated and blinking" and that the "gates were lowered and that the lights on the gates were illuminated" at the time of the accident. (R-74 at 19.); see supra pp. 6-7. The undisputed evidence—including records documenting that an inspection performed just four days before the accident and that another inspection was performed within hours of

the accident—also showed that the signals were operating in full compliance with the applicable federal regulations.[8] See supra pp. 4-5. In short, the signal system was found to be in proper working order before and after the accident, and the video conclusively demonstrates that the signal system was working at the time of the accident as well. Scott, 550 U.S. at 380-81 (holding that, at the summary judgment stage, a court should "view[] the facts in the light depicted by the videotape" and not accept a party's "visible fiction" that is "blatantly contradicted by the record"); see also Kesinger, 381 F.3d at 1249.

The Pearsons' only rejoinder to this overwhelming evidence is to speculate—without citing anything in the record—that the gate "could" have "malfunctioned" and "popped up" during the brief "period of time on [the] video before the collision that the crossbar [was] not visible." See Appellants' Br. 8, 14. There is not a shred of evidence to support this assertion. And it is well-settled that a "bare and self-serving allegation" ungrounded in "personal knowledge is inadequate to carry [the non-moving party's] burden" in defeating summary judgment. Stewart v. Booker T. Washington Ins., 232 F.3d 844, 851 (11th Cir.

[8] Federal regulations prescribe the railroad's duties with respect to the testing, inspection, and maintenance of active warning systems at railroad crossings. See 49 C.F.R. §§ 234.1, 234.201-234.273. Plaintiffs have no evidence that CSXT failed to comply with these federal regulations, and to the extent that they seek to impose any additional duties upon CSXT, any such claim would be preempted. Olberding v. Union Pac. R.R. Co., 454 F. Supp. 2d 884, 887 (W.D. Mo. 2006).

2000); see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) ("the mere existence of some alleged factual dispute . . . will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of material fact") (emphasis added). The Pearsons' speculation about what "could" have happened with the gate arms in the few moments that they were not visible on the video "does not create a genuine issue of fact; instead, it creates a false issue, the demolition of which is a primary goal of summary judgment." Cordoba v. Dillard's, Inc., 419 F.3d 1169, 1181 (11th Cir. 2005).[9]

[9] The Pearsons also assert that the gate arm "*could* have been *down* blocking travel *without* [an] approaching train" and that "*[o]ther* crossbars have malfunctioned around town in this way." Appellants' Br. 8 (emphasis added). Besides being unsupported speculation, this is transparently irrelevant. Even if the Pearsons had evidence that *other* crossing gates had on *other* occasions lowered *without* a train traversing the crossing, that would have no bearing on the dispositive issue in *this* case—the fact that *these* gate arms were lowered when the decedent approached the crossing at the time of the accident. See Wright, 375 F.3d at 1260 (affirming exclusion of evidence of other incidents because "[e]vidence of a similar past occurrence may be introduced" *only* if the "conditions of the past incident are similar enough to those of the current incident" *and* if the "past incident was not too remote in time"); see also id. at 1258 (approving jury instruction that "the mere fact that no train travels through the crossing when the warning signal lights activate, by itself, is not sufficient evidence to demonstrate any negligence"). Further, regardless of what other gates may have done on other occasions, the decedent was not entitled to assume that *this* gate was stuck in the down position, that no train was approaching, and, accordingly, that it was proper to drive around the gate. To the contrary, O.C.G.A. § 40-6-140(b) unequivocally prohibits any person from "driv[ing] any vehicle . . . around . . . any crossing gate or barrier at a railroad crossing while such gate or barrier is closed."

2. *The view at the crossing was unobstructed by vegetation.*

The district court found that the evidence demonstrated "that Pearson had an unobstructed view of both the signal masts and the approaching train." (R-74 at p. 10.) It explained that the vegetation the Pearsons "found objectionable . . . [was] far from the crossing and removed from the railroad tracks." (Id.) In their brief, the Pearsons assert that "bamboo and tress" and "shrubbery" around the crossing would have blocked a motorist's "observation of [an] approaching train." Appellants' Br. 3; see also id. at 8-9 (asserting that the decedent's view of the "train or its light" was obstructed by "bamboo"), 13 (asserting that the decedent's view of an "approaching train" was "obscured by shrubbery").

Tellingly, the Pearsons' arguments are focused entirely on the view from the crossing of an approaching *train*. They do *not* claim that the view of the flashing signal lights—let alone the lowered automatic gate—was obstructed. And any such claim would be frivolous. The photographic evidence shows that the lights and lowered gate were plainly visible to approaching motorists, as does the testimony of Lt. McCulloch and the decedent's parents. See supra pp. 5-6. Therefore, as the district court concluded, Pearson was required by Georgia law to stop at the lowered gate. (R-74 at p. 11); see O.C.G.A. § 40-6-140(a)(1) (requiring motorists to stop when a "clearly visible electric . . . signal device gives warning of the immediate approach of a train"); O.C.G.A. § 40-6-140(a)(2) (requiring motorists to

stop when a "crossing gate is lowered"); O.C.G.A. § 40-6-140(b) (forbidding motorists from driving around a lowered crossing gate). Indeed, the possibility that the view of an on-coming train may be obstructed is all the more reason why driving around crossing gates is strictly prohibited. This alone defeats the Pearsons' sight-view claim, since regardless of whether the decedent could see the approaching *train*, he undisputedly could see the activated *signals* and was required by law to proceed no further.

At any rate, as the district court found, "had [the decedent] stopped as required by law, he would have seen an approaching train." (R-74 at p. 11). The photographs speak for themselves and demonstrate that the decedent had a clear view of the approaching train from the crossing. See supra p. 5; accord Scott, 550 U.S. at 380 (holding that summary judgment is warranted "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it"); Kesinger, 381 F.3d at 1249. Moreover, as the district court further pointed out (R-74 at p. 11 n.6), the decedent's father admitted during his deposition that the nearest vegetation that could obscure a motorist's view consisted of low-lying vegetation approximately 50 feet from the crossing (and therefore at least 100 feet from a driver in a lawfully stopped vehicle). (R-35-10 at p. 14 (A. Pearson, Sr. Dep. 50:19-52:5); see also supra pp. 5, 9. The Pearsons' contrary assertions on appeal, unsupported by citations to the

record, do not come close to showing that the district court erred in determining that no genuine disputes of material fact existed.

C. The Pearsons' claims relating to the handling and operation of the train are waived and unsupported by the evidence.

The district court also properly rejected the Pearsons' train-handling claims as too little, too late. (R-74 at p. 5 n.4.) In their brief, the Pearsons complain that the train crew did not activate the brake or otherwise "attempt to stop the train" before the collision. Appellants' Br. at 7; see also id. at 11-12 (asserting that the engineer "could have pressed emergency brake [sic]"), 16-18 (similar). The district court correctly determined that these claims, which were raised for the first time after discovery had closed and CSXT had moved for summary judgment, were not properly before the court and, in any event, without merit.[10]

[10] In their brief, the Pearsons also try to raise claims that were never presented to the district court *at all*. They assert that CSXT violated *former* O.C.G.A. §§ 46-8-190 and 46-8-191, which previously required railroads to erect "blowposts" 400 yards away from a crossing and required train crews to blow the train's horn at that point. (Appellants' Br. at 7, 11, 19.) Yet O.C.G.A. §§ 46-8-190 through 46-8-193 were repealed in 2006—several years before the decedent's accident—and therefore have no bearing on this case. See 2006 Ga. Laws 733 § 5. Furthermore, the Pearsons do not—and cannot—identify any evidence that the crew failed to properly blow the horn, let alone that any (hypothetical) deficiencies in horn operation contributed to the accident. To the contrary, the train's event recorder showed that the "train crew repeatedly blew the locomotive horn prior to reaching the crossing." (R-35-9 at pp. 3-4 (Harrison Decl. ¶ 8) & Exh. 1.) This is confirmed by audio from the LDVR footage and the testimony of the train crew and Lt. McCulloch. See supra p. 8. For this reason as well, the claims should be rejected.

(Footnote continued . . .)

1. ***The district court correctly found that these claims, which were not asserted in the complaint and instead were advanced for the first time in response to CSXT's motion for summary judgment, had been made "too late."***

The Pearsons' complaint did not assert any claims related to the train crew's operation of the horn or brake. (See generally R-1 at pp. 7-9.) Instead, as discussed above, it focused on alleged deficiencies pertaining to the installation and maintenance of warning devices at the crossing. Only in response to CSXT's motion for summary judgment did the Pearsons for the first time advance claims relating to the alleged negligence of the train crew. The district court correctly found that the Pearsons' attempt to change their theory of the case came "too late" and that those claims were not properly before the court. (R-74 at p. 5 n.4.)

It is well settled that only claims that are in the complaint are before the court on summary judgment: "A plaintiff may not amend her complaint through argument in a brief opposing summary judgment." Gilmour v. Gates, McDonald & Co., 382 F.3d 1312, 1315 (11th Cir. 2004) (per curiam); see also Coon v. Georgia Pac. Corp., 829 F.2d 1563, 1571 (11th Cir. 1987) (noting that the defendant and the Court properly take "the complaint at face value," concluding that "unpleaded claims" are not at issue). Likewise, it is improper to attempt to sneak in unpleaded

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Finally, the claims are waived because the Pearsons did not press them below, and a claim that "was never raised in the district court" cannot be "consider[ed] . . . for the first time on appeal." Miller v. King, 449 F.3d 1149, 1150 n.1 (11th Cir. 2006).

allegations or legal theories in a proposed pretrial order. See Drexel Burnham Lambert, Inc. v. Edwards, 100 F.R.D. 422, 424 (N.D. Ga. 1983) ("Allegations which are not relevant to matters contained in the pleadings are normally not allowed in the pretrial order.").

There is no dispute that the Pearsons' negligent-train-handling claims were not in the only operative complaint in this case. And the Pearsons' untimely motion for leave to file an amended complaint—filed on September 28, 2012, over ten months *after* the deadline for filing amended pleadings had expired on December 6, 2011; over two months *after* CSXT has filed its motion for summary judgment on July 27, 2012; and a month after the close of discovery (R-12; R-35; R-50)—was properly denied. (R-55 at pp. 1-4.) As this Court has made clear, "[i]t is *not* an abuse of discretion for a district court to deny a motion for leave to amend a complaint when such motion is designed to avoid an impending adverse summary judgment. Furthermore, it is *not* an abuse of discretion for a district court to deny a motion for leave to amend following the close of discovery, past the deadline for amendments and past the deadline for filing dispositive motions." Lowe's Home Ctrs., Inc. v. Olin Corp., 313 F.3d 1307, 1315 (11th Cir. 2002) (emphasis added; citing Local 472 v. Georgia Power Co., 684 F.2d 721, 724 (11th Cir. 1982), and Hinson v. Clinch County, Georgia Bd. of Educ., 231 F.3d 821, 826 (11th Cir. 2000)); accord Reese, 527 F.3d at 1263-64 (holding that the district

court acted "well within its discretion in denying" a motion for leave to file an amended complaint that was filed "after the defendant had moved for summary judgment" and after "the period for discovery had expired").

Further, because the Pearsons failed to file objections to the magistrate judge's order denying their motion for leave to file an amended complaint in the district court, they have "waived [their] right to appeal those orders in this Court." Smith, 487 F.3d at 1365; see also Fed. R. Civ. P. 72(a) ("A party may not assign as error a defect in the order not timely objected to.").

Finally, an additional and independent ground for sustaining the district court's finding of waiver is that the Pearsons' opening brief to this Court does not even acknowledge—let alone present arguments for reversal of—the rejection below of their belated attempt to raise the negligent-train handling claims after discovery had closed and CSXT had moved for summary judgment. Thus, any argument that this Court should overlook these waivers is itself waived. E.g., United States v. Keys, 359 F. App'x 585, 587 (6th Cir. 2009) ("[The plaintiff] asks us to overlook that waiver, but he forfeited that request by not raising it until his reply brief."); Linn v. Andover Newton Theological Sch., Inc., 874 F.2d 1, 6 (1st Cir. 1989) (concluding that issue was waived on appeal because the appellant's "initial brief [did] not even mention this obvious waiver problem, much less demonstrate why [the Court] should overlook it").

2. *The negligent-train-handling claims fail on the merits.*

In any event, the Pearsons' accusations of train crew negligence are, as the district court found, unsupported by the evidence. (R-74 at p. 5 n.4.) As noted above, the horn was blown throughout the train's approach. See supra p. 8 and note 10. Moreover, any alleged deficiencies in how the horn was activated could not have been a proximate cause of the accident given that the decedent circumvented a lowered crossing gate. Nor is there any evidence to support an inference that the train crew could have braked sooner and avoided the collision. The Pearsons assert, without citation to any evidence or authority, that the engineer had the "last clear chance" to avoid the accident and should have made an "attempt to stop the train." Appellants' Br. 4, 7, 16-17. But the engineer had no reason to activate the brake any sooner because he had no way to know that the decedent would drive around the gate until just a second or two before the collision. (R-35-7 at p. 2 (Cornelius Aff. ¶ 9); R-35-8 at p. 2 (Henderson Aff. ¶ 8).)

In particular, the unrebutted evidence in the record shows that the crew members, who were keeping a diligent watch down the tracks ahead and operating the train at 40 mph, below the speed limit for this area of track, first saw the decedent's headlights only instants before the collision. See supra pp. 8-9. "[T]he immutable laws of physics prove the inability to stop a train in a short distance." Petre v. Norfolk S. Ry., 458 F. Supp. 2d 518, 538-39 (N.D. Ohio 2006), *aff'd*, 260

F. App'x 756 (6th Cir. 2007). "In order to impose this duty on a train crew, the motorist's perilous condition must be 'discovered in time to prevent injury.'" Dugle v. Norfolk S. Ry., 683 F.3d 263, 269 (6th Cir. 2012) (quoting Louisville & N. R. Co. v. Wallace, 302 S.W.2d 561, 564 (Ky. 1957)); see also Lovett v. Union Pac. R.R., 201 F.3d 1074, 1083-84 (8th Cir. 2000) ("A train crew does not owe a duty to keep a lookout and take precautions to avoid injury until it becomes apparent that the traveler or pedestrian approaching a railroad track will not stop before placing himself in peril.") (citing Northland Ins. Co. v. Union Pac. R.R. Co., 830 S.W.2d 850, 853 (Ark. 1992)).[11]

Here, the decedent was not in peril until he drove around the lowered gate arm just moments before the collision. Cf. Petre, 458 F. Supp. 2d at 538 ("[T]he crew's duty is not activated until the approaching car enters the crossing."). Prior to that, the train crew was entitled to assume that the decedent would exercise care for his safety, yield to the train, and stop at the crossing. Cf. Lawson v. Southern

[11] See also Anderson v. Union Pac. R.R. Co., 342 F. App'x 990, 991 (5th Cir. 2009) ("Only when 'the vehicle's approach is so unusual as to place an ordinarily prudent man on notice the vehicle cannot be brought to a stop in time to avoid a collision' does the train crew have a duty to do 'everything in its power to avert the collision.'") (citation omitted; applying Louisiana law); Puckett v. Soo Line R. Co., 897 F.2d 1423, 1427 n.5 (7th Cir. 1990) (explaining that train crew had right to assume that motorist would exercise due care) (applying Illinois law); Power v. Union Pac. R. Co., 655 F.2d 1380, 1384 (9th Cir. 1981) (similar; applying Washington state law); Burdis v. Texas & P. Ry. Co., 569 F.2d 320, 324 n.5 (5th Cir. 1978) (similar; applying Louisiana law);

Ry. Co., 186 Ga. App. 159, 160, 366 S.E.2d 801, 803 (1988) (noting that train crew has a right to assume that a pedestrian "will attempt to leave the tracks or otherwise exercise ordinary care for his own safety"). By the time that the decedent circumvented the lowered gate, any attempt to stop or slow the train would have been futile, as Lt. McCulloch agreed. (R-35-15 at p. 16 (McCulloch Dep. 21-57:25).) Therefore, under these circumstances, the crew had no duty to attempt to slow or stop the train, and any alleged failure to slow or stop the train could not have been a proximate cause of the accident. See, e.g., Lovett, 201 F.3d at 1084 ("[U]nless at the moment the crew's duty arose the train could have been sufficiently slowed or stopped in time to avoid the collision, the failure to keep a lookout is not the proximate cause of the injury.").

In sum, because the Pearsons were unable to produce any evidence that the train crew could have appreciated the decedent's peril with sufficient time to avoid the collision, the district court correctly concluded that any claims based upon an alleged failure to maintain a proper lookout or to slow or stop the train were without merit. See Petre, 458 F. Supp. 2d at 539 (granting summary judgment where train crew did not have "clear opportunity" to view motorist until four seconds before impact); Brinks v. Chesapeake & Ohio Ry. Co., 398 F.2d 889, 891-92 (6th Cir. 1968) (affirming judgment in favor of railroad where there was no

evidence that the railroad could have realized the decedent's peril in sufficient time to avoid the accident by applying the emergency brake).

II. The District Court Correctly Granted Summary Judgment On The Independent Ground That The Decedent's Decision To Drive Around A Lowered Crossing Gate Was The Sole Proximate Cause Of The Accident

Quite apart from the *absence* of any evidence that CSXT was negligent, the district court also correctly granted summary judgment in favor of CSXT on the independent ground that there was overwhelming objective evidence—*e.g.*, footage from the train's video camera, gouge marks on the road, and the results of blood and urine testing—that the decedent's own negligence in ignoring flashing signal lights and driving around a lowered and illuminated crossing gate while under the influence of alcohol and marijuana was the sole proximate cause of the accident. (R-74 at pp. 21-23.) The Pearsons take a scattershot approach to challenging this conclusion, but their varied arguments share a common feature: They are insubstantial and unsupported by either the facts or the law.

To begin with, the Pearsons argue that issues such as "lack of ordinary care for one's own safety" and proximate causation are as a class unsuitable for "summary adjudication" because they are "peculiarly" questions for the jury under Georgia law. E.g., Appellants' Br. 4-6, 9. Under the Pearsons' view, railroad defendants would never be entitled to summary judgment in a grade-crossing

accident case. That, of course, is not the law. As discussed above (see supra at pp. 22-23), federal procedural standards govern whether there is a triable issue of fact. And although it may be true that questions of negligence and proximate cause are *normally* for the jury, the court is entitled to determine in "'plain and indisputable cases'"—that is, when the evidence "shows that a plaintiff 'was injured solely because of his failure to exercise ordinary care for his own safety'"—that judgment as a matter of law must be entered in favor of the defendant. Crockett v. Norfolk S. Ry., 95 F. Supp. 2d 1353, 1360 (N.D. Ga. 2000); accord Good v. Atlantic Coast Line R. Co., 142 F.2d 46, 47 (5th Cir. 1944) (affirming directed verdict in favor of railroad when the "negligence of [the defendant] was the sole and proximate cause of the accident") (applying Florida law); Brown v. S. Ry. Co., 61 F.2d 399, 400 (5th Cir. 1932) (finding it unnecessary to address the issue of comparative fault because there was "no doubt that the negligence of the driver was the proximate cause of the accident") (applying Georgia law).[12]

Such was the case here. "Where a plaintiff's 'failure to exercise reasonable care for [his] own safety is the direct and immediate cause of [his] [injury], which danger could have been avoided by [his] exercise of due care, the sole proximate

[12] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to close of business on September 30, 1981.

cause of [his] injury was [his] contributory negligence.'" Crockett, 95 F. Supp. 2d at 1360 (quoting Garrett v. NationsBank, 228 Ga. App. 114, 119, 491 S.E.2d 158 (1997)). The decedent in this case ignored the flashing signal lights—as well as the train's blaring horn and bright headlight—and then drove around the lowered crossing gate and directly into the path of the oncoming train. This evidence permits but a single conclusion: that the decedent's negligence was the sole proximate cause of the accident.

As described in more detail elsewhere, there was overwhelming evidence that the accident arose solely as a result of the decedent's negligence. In particular:

1. The decedent failed to stop at the crossing in violation of O.C.G.A. § 40-6-140(a), which provides that motorists "shall not proceed" when they encounter flashing signal lights or a lowered gate at a crossing. The video from the camera mounted on the train shows that the signal lights were flashing and the crossing gates were down prior to the collision. See supra pp. 6-7. The train's crew and Lt. McCulloh testified to the same effect. See supra pp. 7, 9.
2. The decedent drove around the lowered crossing gate arm in violation of O.C.G.A. § 40-6-140(b). The engineer personally witnessed this happening, and Lt. McCulloch testified without

contradiction that the gouge marks in the northbound lane were the result of the decedent's vehicle driving around the gate. See supra pp. 8-10.

3. The decedent was driving under the influence of alcohol. Blood tests conducted by the Georgia Bureau of Investigation and by the emergency room at the Coffee County Regional Medical Center showed that the decedent's blood-alcohol concentration was at least 0.069 grams per 100 milliliters and likely as high as 0.098 grams per 100 milliliters. See supra at pp. 10-11 and note 2. Whatever the precise figure, the decedent violated O.C.G.A. § 40-6-391(k)(1), which makes it illegal for a driver under the age of 21 to drive with a blood-alcohol level above 0.02.[13]

4. The decedent had cannabinoids present in his urine in violation of O.C.G.A. § 40-6-391(a)(6); see supra at p. 11.

[13] The decedent also likely violated O.C.G.A. § 40-6-391(a)(5), which prohibits driving with a blood-alcohol concentration above 0.08 grams per 100 millimeters. The differing results between the CRMC and GBI tests simply reflect the passage of time between the two blood draws. The CRMC test was performed on blood drawn from the decedent at approximately 12:20 a.m., less than an hour after the accident. (R-43-2 at p. 21; R-43-5 at p. 25.) The GBI test was performed on blood drawn from the decedent at approximately 1:40 a.m., more than an hour later. (R-44-1 at p. 1.) "[T]he average person metabolizes alcohol at approximately '0.015 grams percent per hour.'" Keef v. State, 220 Ga. App. 134, 136 (1996).

The Pearsons fail even to acknowledge the first and fourth of these points, which thus stand as established fact on appeal. See Egidi, 571 F.3d at 1163; N. Am. Med. Corp., 522 F.3d at 1217 n.4.

The Pearsons assert that because the decedent's circumvention of the gate and the actual collision were not captured on video, the gate "could" have malfunctioned and "popped up" in the second or two that it was not visible. Appellants' Br. at 8, 15. But as explained above, unsupported speculation cannot create a triable fact issue. See supra at pp. 30-31. No reasonable jury could accept the Pearsons' conjecture in the face of the overwhelming evidence that the decedent drove around a lowered crossing gate. Although the decedent's car is never visible in the video footage, "[p]rior to impact, beams from the decedent's headlights are visible, demonstrating that the decedent entered the opposing lane of traffic in order to go around the lowered gate arm." (R-35-9 at p. 3 (Harrison Decl. ¶ 12).) Further, the engineer testified that he saw the decedent go around the lowered crossing gate, and the investigating officer testified that the decedent's car left gouge marks in the opposite lane of the crossing. See supra at pp. 8-10.

The Pearsons also assert in conclusory fashion that the blood and urine tests showing that the decedent had been consuming alcohol and marijuana are "not admissible." Appellants' Br. at 15. They claim that there was no "proof of chain of custody" of the blood and urine samples. Id. This is simply false. The decedent's

medical records, including the Coffee Regional Medical Center test results, were authenticated and properly considered by the district court pursuant to Fed. R. Evid. 803(6). (See generally R-43-2; R-43-4.) The certified GBI blood test results were likewise authenticated, and CSXT submitted voluminous chain-of-custody evidence as to the blood and urine samples in this case, including testimony from Douglas Police Department officers and CRMC employees. (See generally R-35-5; R-35-15 at pp. 16-21; R-43-1; R-43-2; R-43-4; R-44-1.) The Pearsons can point to no evidence that the decedent's blood and urine samples or the resultant test results were misidentified or tampered with in any way. Nor is there any doubt as to the authenticity of the test results.

Regardless, a "[c]hallenge to the chain of custody goes to the weight rather than the admissibility of the evidence." United States v. Lopez, 758 F.2d 1517, 1521 (11th Cir. 1985). All that is required "is evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a). The Pearsons' assertion that the drug and alcohol tests were inadmissible at the summary-judgment stage is without foundation.

Finally, ignoring all of the above evidence, the Pearsons argue that they are entitled under Georgia law to presumptions that the railroad was negligent and that the decedent exercised due care. Appellants' Br. 14, 19. The district court correctly concluded that these presumptions fall away in the face of uncontroverted and

overwhelming evidence that CSXT was not negligent and that decedent was negligent. (R-74 at pp. 21-23.) These presumptions have no application "[i]n view of [CSXT's] showing of ordinary care," Houston v. Georgia Ne. R. Co., 388 S.E.2d 762, 763 (Ga. Ct. App. 1989), and the "evidence that the decedent had negligently ignored [warning signals] and thereby caused the accident," Harris v. White, 243 S.E.2d 276, 278 (Ga. Ct. App. 1978). "[U]nder Georgia law, when *any* evidence is produced showing that the railroad company was not negligent, the presumption vanishes." Brown v. Seaboard Coastline R.R., 405 F.2d 601, 603 (11th Cir. 1968) (emphasis added; discussing predecessor to O.C.G.A. § 46-8-292). Here, the decedent's consumption of alcohol and marijuana was negligent *per se* and the evidence allows but a single conclusion—namely that the decedent's circumvention of the lowered crossing gate and defiance of the activated warning signals was the sole proximate cause of the accident.

//

CONCLUSION

The judgment below should be affirmed.

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,765 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by the word processing program stated below.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportional typeface using Microsoft Office Word 2010 with Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2013, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will automatically send e-mail notification of such filing to all attorneys of record. I further certify that on May 2, 2013, the foregoing was served upon Appellants' counsel by depositing same in the United States Mail with sufficient postage attached thereto to ensure delivery, addressed as follows:

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