

293 S.W.3d 800
(Cite as: 293 S.W.3d 800)

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Court of Appeals of Texas,
Beaumont.
UNION PACIFIC RAILROAD COMPANY, Ap-
pellant,
v.
Derrick CEZAR, Individually and as Next Friend of
Jasmine Cezar, Jarvis Ardoin, Lashasa Ardoin, and
Lorenzo Ardoin, Appellee.

No. 09–08–00092–CV.
Submitted April 2, 2009.
Decided July 16, 2009.

Background: Father, on behalf of injured child, estate of child's deceased mother, and deceased mother's three other children, brought action against train company, railroad company and several of their employees to recover following collision between train and mother's pickup truck at railroad crossing in Louisiana. The 60th District Court, Jefferson County, Gary Sanderson, J., entered judgment on jury verdict finding railroad and mother negligent. Father appealed.

Holdings: The Court of Appeals, [Hollis Horton, J.](#), held that:

- [1] Louisiana's substantive law applied to the issue of railroad's duties to the traveling public;
- [2] railroad had a duty to exercise the control it possessed over installing additional warning devices at railroad crossing in a reasonable and prudent manner;
- [3] railroad had a legal duty to reasonably exercise its right to request permission from the necessary governmental entities in control of the crossing in order to improve the warnings at the crossing;
- [4] railroad failed to establish that federal funds participated in the reopening of railroad crossing, and thus failed to establish that state law governing adequacy of warning devices was pre-empted;
- [5] railroad claims investigator did not owe duty to the traveling public; and

[6] judgment against railroad would be reversed due to improper venue.

Affirmed in part, and reversed and remanded in part.

West Headnotes

[1] Negligence 272 204

272 Negligence

272I In General

272k204 k. What law governs. [Most Cited Cases](#)

With respect to accidents occurring in other states, Texas applies the “most significant relationship” test to the issue involved to determine what law applies.

[2] Negligence 272 204

272 Negligence

272I In General

272k204 k. What law governs. [Most Cited Cases](#)

The factors considered when deciding choice of law matters in personal-injury cases consist of the following: (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties; and (4) the place where the relationship, if any, between the parties is centered.

[3] Railroads 320 341.1

320 Railroads

320X Operation

320X(F) Accidents at Crossings

320k341 Actions for Injuries

320k341.1 k. In general. [Most Cited Cases](#)

Louisiana's substantive law applied to the issue of railroad's duties to the traveling public in action to recover following collision between train and

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driver's pickup truck at railroad crossing in Louisiana; injury and conduct giving rise to injury occurred in Louisiana, claimants were domiciled in Louisiana, train company conducted business in Louisiana, and parties' relationship was centered in Louisiana.

[4] Appeal and Error 30 ⚙️1001(1)

30 Appeal and Error

30XVI Review

30XVI(I) Questions of Fact, Verdicts, and Findings

30XVI(I)2 Verdicts

30k1001 Sufficiency of Evidence in Support

30k1001(1) k. In general. **Most**

Cited Cases

When legal sufficiency challenge is to an adverse finding on an issue for which the appellant had the burden of proof at trial, the appellant must show on appeal that, as a matter of law, the evidence establishes all vital facts in support of the issue.

[5] Appeal and Error 30 ⚙️930(1)

30 Appeal and Error

30XVI Review

30XVI(G) Presumptions

30k930 Verdict

30k930(1) k. In general. **Most Cited Cases**

In determining whether the evidence is legally sufficient to support a factfinder's determination of a disputed fact, appellate courts must view the evidence in the light favorable to the verdict, crediting favorable evidence if a reasonable fact finder could and disregarding contrary evidence unless a reasonable fact finder could not.

[6] Appeal and Error 30 ⚙️994(2)

30 Appeal and Error

30XVI Review

30XVI(I) Questions of Fact, Verdicts, and

Findings

30XVI(I)1 In General

30k994 Credibility of Witnesses

30k994(2) k. Province of jury. **Most**

Cited Cases

Jurors are the sole judges of the credibility of the witnesses and the weight to give their testimony.

[7] Appeal and Error 30 ⚙️930(1)

30 Appeal and Error

30XVI Review

30XVI(G) Presumptions

30k930 Verdict

30k930(1) k. In general. **Most Cited Cases**

Because most of a jury's credibility decisions are implicit, appellate court is required to assume that jurors credited testimony favorable to the verdict and disbelieved testimony contrary to it.

[8] Appeal and Error 30 ⚙️1001(1)

30 Appeal and Error

30XVI Review

30XVI(I) Questions of Fact, Verdicts, and Findings

30XVI(I)2 Verdicts

30k1001 Sufficiency of Evidence in Support

30k1001(1) k. In general. **Most**

Cited Cases

Upon challenge to the legal sufficiency of the evidence to support a finding, the evidence is conclusive on an issue if reasonable people, based on the evidence in the record, could reasonably reach the conclusion, even if reviewing court's opinion differs.

[9] Railroads 320 ⚙️307

320 Railroads

320X Operation

320X(F) Accidents at Crossings

320k306 Signboards, Signals, Flagmen,

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and Gates at Crossings

[320k307](#) k. In general. [Most Cited](#)

Cases

Whether a railroad owes a duty to install more than crossbucks at a crossing under Louisiana law is analyzed by applying a duty-risk analysis.

[10] Railroads 320 307.5

320 Railroads

[320X](#) Operation

[320X\(F\)](#) Accidents at Crossings

[320k306](#) Signboards, Signals, Flagmen, and Gates at Crossings

[320k307.5](#) k. Duty irrespective of statute, ordinance, or official regulation. [Most Cited Cases](#)

Louisiana statute that creates the railroad's duty to erect crossbucks is not intended to relieve a railroad company of its responsibility to maintain safe crossings. [LSA-R.S. 32:169](#).

[11] Railroads 320 307.3

320 Railroads

[320X](#) Operation

[320X\(F\)](#) Accidents at Crossings

[320k306](#) Signboards, Signals, Flagmen, and Gates at Crossings

[320k307.3](#) k. Signals and warnings.

Most Cited Cases

Under Louisiana law, railroad, which had installed crossbuck sign at railroad crossing, had a legal duty to motorists to exercise the control it possessed over installing additional warning devices at railroad crossing in a reasonable and prudent manner, even if crossing did not present a “dangerous trap” to the motoring public; motorists generally did not have sufficient sight distances of approaching trains, active crossing devices at crossing had been removed, several prior collisions had occurred at crossing, nearby crossings were protected by gates and lights, angle between the tracks and the street was sixty degrees, trains traveled at relatively high speeds, and railroad was aware of crossing's condition and history.

[12] Railroads 320 307.3

320 Railroads

[320X](#) Operation

[320X\(F\)](#) Accidents at Crossings

[320k306](#) Signboards, Signals, Flagmen, and Gates at Crossings

[320k307.3](#) k. Signals and warnings.

Most Cited Cases

Under Louisiana law, railroad had a legal duty to reasonably exercise its right to request permission from the necessary governmental entities in control of the crossing in order to improve the warnings at the crossing, where active crossing devices at crossing had been removed, several prior collisions had occurred at crossing, nearby crossings were protected by gates and lights, angle between the tracks and the street was sixty degrees, trains traveled at relatively high speeds, and railroad was aware of crossing's condition and history. [LSA-R.S. 32:169\(E\)](#).

[13] Statutes 361 223.4

361 Statutes

[361VI](#) Construction and Operation

[361VI\(A\)](#) General Rules of Construction

[361k223](#) Construction with Reference to Other Statutes

[361k223.4](#) k. General and special statutes. [Most Cited Cases](#)

Under Louisiana law, if after attempting to harmonize statutes, there remains a conflict, the statute specifically directed to the matter at issue must prevail as an exception to the statute more general in character.

[14] States 360 18.3

360 States

[360I](#) Political Status and Relations

[360I\(B\)](#) Federal Supremacy; Preemption

[360k18.3](#) k. Preemption in general. [Most Cited Cases](#)

A party asserting federal preemption of state law generally bears the burden of proving that is-

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sue.

[15] Railroads 320 ⚓307.2

320 Railroads

320X Operation

320X(F) Accidents at Crossings

320k306 Signboards, Signals, Flagmen, and Gates at Crossings

320k307.2 k. Signboards. **Most Cited Cases**

Railroads 320 ⚓307.3

320 Railroads

320X Operation

320X(F) Accidents at Crossings

320k306 Signboards, Signals, Flagmen, and Gates at Crossings

320k307.3 k. Signals and warnings. **Most Cited Cases**

States 360 ⚓18.21

360 States

360I Political Status and Relations

360I(B) Federal Supremacy; Preemption

360k18.21 k. Carriers; railroads. **Most Cited Cases**

Concerns arising under a state's law about the adequacy of signs at a railroad crossing can be preempted by federal law when federal funds have been used to participate in the installation of the crossing's warnings.

[16] Railroads 320 ⚓307.3

320 Railroads

320X Operation

320X(F) Accidents at Crossings

320k306 Signboards, Signals, Flagmen, and Gates at Crossings

320k307.3 k. Signals and warnings. **Most Cited Cases**

States 360 ⚓18.21

360 States

360I Political Status and Relations

360I(B) Federal Supremacy; Preemption

360k18.21 k. Carriers; railroads. **Most Cited Cases**

Railroad, whose right-of-way was site of train-automobile collision, failed to conclusively establish that federal funds participated in the reopening of railroad crossing, and thus failed to establish that Louisiana law was pre-empted by federal law governing adequacy of warning devices; grade crossing file did not reflect that federal officials inspected, approved or paid for signalization, there was no showing that federal officials approved reopening crossing without active warning devices, and evidence discredited contention that railroad's witness had personal knowledge about whether federal funds were used to reopen the crossing. **23 U.S.C.A. § 130.**

[17] Evidence 157 ⚓590

157 Evidence

157XIV Weight and Sufficiency

157k590 k. Testimony of interested persons. **Most Cited Cases**

Testimony of an interested witness is generally not sufficient to conclusively establish a disputed fact.

[18] Evidence 157 ⚓590

157 Evidence

157XIV Weight and Sufficiency

157k590 k. Testimony of interested persons. **Most Cited Cases**

The general rule is that evidence given by an interested witness, even though uncontradicted, presents an issue to be determined by the jury; an exception to this general rule exists only if the testimony could be readily contradicted if untrue, and is clear, direct and positive, and there are no circumstances tending to discredit or impeach it.

[19] Appeal and Error 30 ⚓1178(1)

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30 Appeal and Error

30XVII Determination and Disposition of Cause

30XVII(D) Reversal

30k1178 Ordering New Trial, and Directing Further Proceedings in Lower Court

30k1178(1) k. In general. [Most Cited Cases](#)

If venue was improper and there is probative evidence that venue is proper in the county to which transfer had been sought, the appellate court should instruct the trial court to transfer the case to that county. [V.T.C.A., Civil Practice & Remedies Code § 15.064\(b\)](#).

[20] Railroads 320 ⚡340(1)

320 Railroads

320X Operation

320X(F) Accidents at Crossings

320k340 Acts or Omissions of Employees or Others

320k340(1) k. Employees. [Most Cited Cases](#)

Under Louisiana law, a railroad claims investigator, who is subject to an employment policy encouraging the reporting of unsafe conditions, does not have a duty to the traveling public, as would permit a member of the public to sue the employee individually upon an accident at a railroad crossing.

[21] Negligence 272 ⚡1692

272 Negligence

272XVIII Actions

272XVIII(D) Questions for Jury and Directed Verdicts

272k1692 k. Duty as question of fact or law generally. [Most Cited Cases](#)

Whether a duty exists is a question of law for the court.

[22] Appeal and Error 30 ⚡1177(2)

30 Appeal and Error

30XVII Determination and Disposition of Cause

30XVII(D) Reversal

30k1177 Necessity of New Trial

30k1177(2) k. Defects in proceedings in lower court in general. [Most Cited Cases](#)

Where the sole defendant residing in the county in which Louisiana plaintiffs brought action to recover for damages sustained in train-automobile collision at Louisiana railroad crossing was found not to be a proper venue defendant, appellate court would reverse judgment against defendant railroad and remand with instructions to transfer venue to county where railroad had its principal place of business in Texas, in which venue was uncontested. [V.T.C.A., Civil Practice & Remedies Code § 15.002\(a\)\(3\)](#).

*803 [Douglas W. Poole](#), [William R. Floyd](#), [Michael Hughes](#), [McLeod, Alexander, Powel & Appfel](#), [Galveston](#), [Charles G. Cole](#), [Alice E. Loughran](#), [Jill C. Maguire](#), [Steptoe & Johnson LLP](#), [Washington, D.C.](#), [Jon B. Burmeister](#), [Moore Landry, Beaumont](#), for appellant.

[Jason A. Itkin](#), [Kurt B. Arnold](#), [Jeff Seely](#), [Arnold & Itkin, LLC](#), [Russell S. Post](#), [S. Douglas Pritchett, Jr.](#), [Beck, Redden & Secrest, L.L.P.](#), [Houston](#), for appellee.

Before [McKEITHEN](#), C.J., [KREGER](#) and [HORTON](#), JJ.

OPINION

[HOLLIS HORTON](#), Justice.

This appeal arises from a collision between a pickup and a train in Vinton, Louisiana. We reverse and remand with instructions to transfer the case to the District Clerk in Harris County, Texas.

Background Facts

On the afternoon of July 22, 2005, a Burlington Northern Santa Fe (BNSF) freight train traveling on Union Pacific Railroad's (UP's) right-of-way struck a pickup driven by Patsy Ardoin. Ardoin died at the scene. Ardoin's daughter, Jasmine, was a passenger in the pickup; she received [spinal cord injuries](#) resulting in [paraplegia](#).

The collision occurred at the Eddy Street crossing (hereinafter “the crossing”) in Vinton, Louisiana. The railroad tracks run in a generally east-west direction through Vinton. Ardoin was traveling in a northerly direction on Eddy Street just before the collision. When the accident occurred, the crossing did not have warning*804 devices that automatically activated when a train approached. Instead, the crossing's protection consisted of signs. A cross-buck sign, which is the familiar, white, X-shaped sign with black letters spelling out “RAILROAD CROSSING,” located approximately nineteen feet from the crossing, notified drivers of the presence of the railroad tracks. A stop sign, on the south side of the tracks approximately forty-three feet from the crossing, required northbound drivers to stop before crossing the tracks. Ardoin stopped at the stop sign just before she tried to cross the tracks. The BNSF train was eastbound, so it approached the crossing from Ardoin's left, or from the west. The angle between the tracks and the west side of Eddy Street is sixty degrees.

There are a total of four railroad crossings in Vinton; the other three crossings had gates and lights at the time of Ardoin's collision. Of the four crossings, the Eddy Street crossing is the farthest east. Train speeds through Vinton vary, with passenger trains authorized to travel at a speed of seventy miles per hour and freight trains authorized to travel at a speed of forty-five miles per hour.

The testimony reflects that five prior collisions had occurred at the crossing: one in 1977, two in 1998, and two in 2001. During a 1996 upgrade to the crossing on Horridge Street, which is the street immediately west of the crossing, the crossing was temporarily closed. When the State directed the closure of the crossing during this upgrade, the existing warnings at the crossing were removed. In the summer of 1997, despite its desire to see the crossing remain closed, the State instructed UP to reopen the crossing after the City of Vinton complained that the crossing had been closed without its authorization. After authorizing UP to reopen

the crossing, the State continued to pursue the City's authorization to again close the crossing; the City's officials never did so.

In February 2006, Derrick Cezar, on behalf of his daughter, Jasmine, Ardoin's estate, and on behalf of Ardoin's three other children, commenced a suit in Jefferson County, Texas, against BNSF and several BNSF employees, and against UP and one of its employees. Prior to trial, the claimants added two additional UP employees to the suit. In their Sixth Amended Petition, the pleading on which they proceeded to trial, the claimants alleged that the accident had been caused by BNSF's negligent operation of the train, UP's failure to maintain adequate unobstructed sight distances, and UP's failure to install adequate warning devices at the crossing.

At the conclusion of the jury trial, the trial court did not submit any issues against BNSF or any of the individually named defendants. Based on the issues submitted, the jury found UP and Ardoin negligent. The jury placed fault as follows: (1) sixty-five percent on UP, (2) fifteen percent on Ardoin, and (3) twenty percent on the Louisiana Department of Transportation (“LDOT”), a non-party. Based on the jury's findings, the trial court entered a judgment against UP from which UP appeals.

Issues on Appeal

In six issues, UP raises numerous complaints about the trial. In issue one, UP argues: (1) it had no duty to install any active warning devices at the crossing, (2) it had no authority from public officials to install active warning devices at the crossing, and (3) federal law preempts any state tort claim asserting that UP should have installed lights and automatic gates. In issue two, UP complains that the trial court made various errors in admitting and excluding evidence. In issue three, UP *805 asserts that the evidence is factually insufficient to support the jury's apportionment of fault. Issues four and five argue the trial court erred in various respects by giving erroneous instructions and by submitting issues not recognized under Louisiana

law. In issue six, UP contends that venue for the trial was not proper in Jefferson County, Texas.

Because we are required to address all rendition issues, we will first address UP's issues that would result in a rendition of judgment in its favor before we address its other issues that would result in a new trial.

Summary of the Evidence Related to the Crossing's History

Sergeant Michael Wright, a City of Vinton Police Department patrol officer, witnessed the collision. According to Sergeant Wright, he stopped behind a pickup located in the northbound lane just south of the crossing. Sergeant Wright heard the train's horn and noticed an eastbound train as it approached the crossing from the west. As the train approached, Sergeant Wright noticed that after having been stopped for several seconds at the stop sign, the pickup began to slowly move forward until it had pulled onto the train's tracks. Immediately after the collision, Sergeant Wright went to the pickup and found Ardoin dead inside. Jasmine, a four-year-old child, had been ejected but Sergeant Wright found her nearby. Hospital records reflect that Jasmine suffered a [cervical spine fracture](#), [spinal cord injury](#), and a [fractured femur](#).

Much of the evidence during the trial related to the history of the crossing and the apparent differences of opinion between state and city officials concerning whether the crossing should be opened or remain closed. The evidence reflects that some trains passed through Vinton at high speeds, as "timetable" speeds for trains through Vinton allowed certain trains to travel up to seventy miles per hour. A 2002 letter from LDOT to Vinton's mayor recommended that the City close the crossing. Earlier, in 1997, under a federal crossing improvement program, the warnings at the adjacent railroad crossing on Horridge Street had been upgraded to include flashing lights and gates. Also, in 1997, and based on instructions from LDOT, UP closed the crossing.

Prior to the crossing's closure, the crossing's protection included a "wigwag." ^{FN1} Generally, the jury heard testimony that showed Vinton city officials did not want the crossing permanently closed. David Riggins, who had been elected as a councilman shortly after the crossing's closure, went to Washington, D.C. and discussed with Louisiana's United States Senators and a Louisiana Congressman the City's complaints regarding the closure of the crossing. Because the crossing had been closed on LDOT's instruction but without the required authorization by the City of Vinton, in June 1997, LDOT directed that UP arrange to "install a new crossing at Eddy Street and remove the road closure *806 barriers." According to the information in LDOT's June 1997 letter, the reinstallation of the wigwag was not feasible because it would not be compatible with the new gates and the circuitry recently installed at the adjacent Horridge Street crossing. LDOT'S letter further instructed: "The crossing will be reopened as a passive crossing with crossbucks (installed and maintained by your railroad) and stop signs (installed and maintained by the town[.])." When the crossing was subsequently reopened in 1997, it was not protected by any warnings that activated to warn of an approaching train. Further, the evidence indicates that the City never objected that the crossing had been reopened without wigwags, flashing lights, or gates.

^{FN1}. According to the testimony in this case, a wigwag is a "flashing roundel that moves back and forth when activated by the approach of the train." According to Wikipedia, a "[w]igwag is the nickname given to a type of early, North American, 20th century, railroad grade crossing signal, so named due to the pendulum-like motion it used to signal the approach of a train. It is generally credited to Albert Hunt, a mechanical engineer at Southern California's Pacific Electric (PE) interurban streetcar railroad, who invented it in 1909 out of the necessity for a safer railroad grade crossing." Wikipedia, the Free

Encyclopedia, Wigwag (railroad), at [http://en.wikipedia.org/Fwiki/Wigwag_\(railroad\)](http://en.wikipedia.org/Fwiki/Wigwag_(railroad)) (last visited June 19, 2009).

Following a fatal collision at the crossing in November 2001, the City and LDOT renewed discussions about the crossing. Riggins, formerly a councilman but elected Vinton's mayor in July 2001, sought input on the City's desire to improve the crossing's safety from someone with UP, whom Riggins understood to be the person with jurisdiction over the railroad in the area. Mayor Riggins indicated to UP's area representative that the City would be a willing participant in the crossing's upgrade. According to Mayor Riggins, UP's representative advised him that while UP would be responsible for maintenance on any lights and gates, UP "can't go in and do anything without orders from the State." Consequently, the Mayor began to seek what he believed to be the necessary authorization from the State. The City never offered to pay UP to install additional safety devices at the crossing.

Subsequently, Mayor Riggins approached LDOT to express his interest in upgrading the crossing and to make known the City's interest in participating in such a project. In 2002, Mayor Riggins received LDOT's written response, in which LDOT advised that it was "compelled to reiterate [LDOT's] strong recommendation of the reclosure of the Eddy Street crossing to vehicular traffic."

Nevertheless, Mayor Riggins desired that the crossing remain open, and he advised LDOT that the City had existing funds or would obtain additional funds to keep the crossing open and that it would also "match the technology at Horridge Street" as long as "after the installation there was no liability that would tie the town to any, you know, upkeep or, God forbid, fatalities or accidents or [things] of that nature." LDOT never responded to the Mayor's offer. At the end of Mayor Riggins's term in 2006, no additional warnings had been installed at the crossing.

UP's Rendition Arguments

Although the parties dispute that proper venue for the suit existed in Jefferson County, Texas, for reasons of judicial economy, we must first consider UP's issues that might dispose of the need for further jury proceedings. See *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 727–30 (Tex.2003) (addressing proximate cause issue without reaching venue issue); *CMH Homes, Inc. v. Daenen*, 15 S.W.3d 97, 99 (Tex.2000) (addressing whether there was legally sufficient evidence to support the judgment without considering whether venue was proper). In this appeal, UP's first issue asserts three different arguments for the proposition that it had no legal duty to Ardoin to install additional warning devices at the crossing. First, UP asserts that a judgment should be rendered in its favor because the evidence about this particular crossing demonstrated that UP satisfied its only duty under Louisiana law by providing crossbucks. Second, UP argues that it had no authority under Louisiana law to install gates and lights on a public ~~*807~~ roadway without the permission of public officials. Third, UP argues that it proved that federal law preempted Louisiana's state law with respect to the warnings required under the law to be present at this crossing; consequently, UP concludes that because it received federal funds to erect crossbucks, it had no additional state law duties to motorists.

Choice of Law

[1][2][3] Before discussing the duty issues, we first address whether we are required to apply Texas or Louisiana law to the duty issue. With respect to accidents occurring in other states, Texas applies the "most significant relationship" test to the issue involved to determine what law applies. See *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex.1984) (adopting the "most significant relationship" method for resolving conflicts of law in all cases "except those contract cases in which the parties have agreed to a valid choice of law clause"). The factors considered when deciding choice of law matters in personal-injury cases consist of the following: (1) the place where the injury occurred (in this case, Louisiana); (2) the place

where the conduct causing the injury occurred (Louisiana); (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties (the claimants are domiciled in Louisiana and UP is a Delaware corporation with its principal place of business in Omaha, Nebraska; UP also conducts business in Louisiana); and (4) the place where the relationship, if any, between the parties is centered (Louisiana). *Hughes Wood Prods., Inc. v. Wagner*, 18 S.W.3d 202, 205 & n. 1 (Tex.2000) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2) (1971)); see also *Alumbaugh v. Union Pac. R.R. Co.*, 322 F.3d 520, 523 (8th Cir.2003) (“Union Pacific is a Delaware corporation with its principal place of business in Omaha, Nebraska[.]”).

Moreover, in this case, all of the parties rely on Louisiana law in their arguments concerning UP's duty, and no party proposes that the law of some other state should be applied. Applying the *Restatement* factors, and considering that all parties rely on Louisiana law, we conclude that Louisiana's substantive law applies to the issue of UP's duties to the traveling public at a Louisiana railroad crossing.

Standard of Review—Disputed Facts Relevant to UP's Duty at the Crossing

To some extent, as fully discussed below, Louisiana's duty analysis involves an evaluation of testimony and facts about the crossing at issue that are presented during a trial. At a trial's conclusion, a jury either expressly or implicitly resolves the disputes, including any disputes over each of the witness's credibility, and further decides the weight to be given to particular evidence. Here, the judgment resolved the dispute in the claimants' favor; therefore, we review UP's challenge to the legal sufficiency of the evidence under established standards.

[4][5][6][7][8] When the challenge is to an adverse finding on an issue for which the appellant had the burden of proof at trial, the appellant must show on appeal that, as a matter of law, the evidence establishes all vital facts in support of the is-

sue. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex.2001). In determining whether the evidence is legally sufficient to support a factfinder's determination of a disputed fact, appellate courts must view the evidence in the light favorable to the verdict, crediting favorable evidence if a reasonable fact finder could and disregarding contrary evidence unless a reasonable fact finder could not. *808 *City of Keller v. Wilson*, 168 S.W.3d 802, 807, 827 (Tex.2005). In doing so, appellate courts recognize that “[j]urors are the sole judges of the credibility of the witnesses and the weight to give their testimony.” *Wilson*, 168 S.W.3d at 819. Because most of a jury's credibility decisions are implicit, we are required to “assume that jurors credited testimony favorable to the verdict and disbelieved testimony contrary to it.” *Id.* The evidence is conclusive on an issue if reasonable people, based on the evidence in the record, could reasonably reach the conclusion, even if our opinion, had we been jurors, differs. See *id.* at 822. Since the judgment favored the claimants, who bore the burden to prove that the crossing remained unreasonably dangerous despite the presence of crossbucks and that UP had authority to install additional warnings, we construe the conclusions the jury reached in the light most favorable to upholding those findings.

Louisiana's Duty Analysis

U.P. argues that “[e]ven if added warning devices may improve safety, the railroad owes no legal duty to install them.” We do not agree that Louisiana law never requires added warning devices to improve a crossing's safety, and our review of Louisiana's crossing cases reflects that Louisiana courts have imposed an additional duty depending on the known circumstances existing at a crossing involved in a collision.

[9] Generally, Louisiana's duty rule is stated in Louisiana's Civil Code, which provides that “[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.” LA. CIV.CODE ANN. art. 2315 (2009). With respect to crossing accidents, whether a rail-

road owes a duty to install more than crossbucks at a crossing under Louisiana's law is analyzed by applying a duty-risk analysis. *Duncan v. Kansas City S. Ry. Co.*, 773 So.2d 670, 676 (La.2000) (applying duty analysis under Louisiana law to railroad crossing accident). "Under this analysis, [the] plaintiff must prove that the conduct in question was a cause-in-fact of the resulting harm, the defendant owed a duty of care to the plaintiff, the requisite duty was breached by the defendant[,] and the risk of harm was within the scope of protection afforded by the duty breached." *Id.* at 675.

In analyzing the railroad's duty, the *Duncan* court began by noting that under Louisiana law, railroads are required to provide signage at all crossings within their control. *Id.* at 676; see also LA.REV.STAT. ANN. § 32:169 (1994), amended by 2006 La. Acts, No. 11, § 2; 2002 La. Acts, 1st Ex. Sess., No. 156, § 1; 1998 La. Acts, No. 122, § 1. Based on the evidence of the surrounding conditions that existed at that crossing, and even though the railroad had complied with its statutory duty to install crossbucks at the crossing, the *Duncan* court stated: "[T]he jury could have reasonably concluded that [Kansas City Southern] had a duty to [the] plaintiffs to protect against the unique hazard presented by the East Iowa Road crossing." *Id.* at 677. The *Duncan* Court, in its discussion of the duty issue, cited to its opinion in *Syrie v. Schilhab*, 693 So.2d 1173, 1176–77 (La.1997). *Duncan*, 773 So.2d at 675–76.

Syrie provides further insight into a proper Louisiana duty analysis and merits discussion. In *Syrie*, the Louisiana Supreme Court decided whether a state trooper, who stopped to flag traffic following a one-car collision, owed a duty to various plaintiffs who were injured when a truck rear-ended a car that then hit the wrecker positioned to retrieve the car involved in the initial accident. *Syrie*, 693 So.2d at 1176–77. In deciding that the *809 trooper had a duty to protect the motorists from the truck, the *Syrie* court noted that a law enforcement officer has the power to regulate traffic and a duty to exer-

cise that power to reasonably refrain others from causing harm. *Id.* at 1177. The Louisiana Supreme Court explained: "When a law enforcement officer becomes aware of a dangerous traffic situation, he has the affirmative duty to see that motorists are not subjected to unreasonable risks of harm." *Id.* (citation omitted).

Duncan's holding reflects the Court's reasoning that when the record contains evidence that raises a reasonable inference that the railroad possessed knowledge of risks posed by unique circumstances at a crossing, and also possessed knowledge that adequate steps had not been taken to make the condition safe, that the railroad's duty to motorists is not discharged by erecting crossbucks at the crossing. See *Duncan*, 773 So.2d at 677–78. This view is consistent with the view more recently expressed in *Long v. State of Louisiana, Through the Department of Transportation and Development*, 916 So.2d 87, 92 (La.2005), which discusses the historical development of the duty owed by railroads at crossings. In *Long*, the Louisiana Supreme Court relied on the United States Supreme Court's discussion of the duties of the railroad at crossings in *Continental Improvement Company v. Stead*, 95 U.S. 161, 24 L.Ed. 403 (1877). See *Long*, 916 So.2d at 92. In *Stead*, the United States Supreme Court, describing the duty as "well-settled law," stated:

If a railroad crosses a common road on the same level, those travelling on either have a legal right to pass over the point of crossing, and to require due care on the part of those travelling on the other, to avoid a collision. Of course, these mutual rights have respect to other relative rights subsisting between the parties. From the character and momentum of a railroad train, and the requirements of public travel by means thereof, it cannot be expected that it shall stop and give precedence to an approaching wagon to make the crossing first: it is the duty of the wagon to wait for the train. The train has the preference and right of way. But it is bound to give due warning

of its approach, so that the wagon may stop and allow it to pass, and to use every exertion to stop if the wagon is inevitably in the way. Such warning must be reasonable and timely. But what is reasonable and timely warning may depend on many circumstances.

Stead, 95 U.S. at 164. The Louisiana Court's citation to *Stead* is consistent with its jurisprudence that examines the many circumstances of a crossing to determine the extent of a railroad's duty there.

[10] Like *Duncan*, at the time of Ardoin's accident, section 32:169 of the Louisiana Civil Code required railroads to erect crossbucks at crossings. LA.REV.STAT. ANN. § 32:169 (2005), amended by 2006 La. Acts, No. 11, § 2. However, because the accident in *Duncan* occurred in 1994, the Louisiana Supreme Court did not address the 1998 amendments to section 32:169 that are relevant to our analysis of UP's duty regarding Ardoin's 2005 crossing collision. These additional subsections of 32:169, which were not included in Louisiana's Revised Statutes at the time the Louisiana Supreme Court decided *Duncan*, provide:

E. (1) A railroad company shall install a traffic control device or devices at a public railroad grade crossing pursuant to an agreement with the Department of Transportation and Development. Whenever the department determines that a particular traffic control device *810 needs to be installed at a public highway railroad grade crossing, the railroad company shall cooperate with the department in the installation of such device or devices. In the case of a federally funded grade crossing project, the railroad company shall enter into an agreement with the department for the installation or upgrade of such traffic control device. A railroad company shall not be required to provide the non-federal share of costs involved in federally funded grade crossing improvement projects.

....

(3) A railroad company may install a traffic control device or make other improvements or modifications at a railroad grade crossing at its own expense under the following conditions:

(a) When such crossing upgrade, improvement, or modification will improve the safety of the traveling public, train crew members, or train passengers.

(b) When such crossing upgrade, improvement, or modification is needed due to the presence of hazardous conditions or certain operation factors or a combination of both.

(c) When such crossing upgrade, improvement, or modification is incidental to a railroad improvement project relating to track structures or train control systems.

(4) Any upgrade, improvement, or modification performed by a railroad company under the provisions of this Subsection shall comply with all conditions and requirements in the Manual on Uniform Traffic Control Devices.

F. Nothing in this Section shall relieve a railroad company of its responsibility to maintain safe crossings.

LA.REV.STAT. ANN. § 32:169 (2008) (as amended by 1998 La. Acts, No. 122, § 1). Thus, the Louisiana statute that creates the railroad's duty to erect crossbucks also gives it the right to install other devices and is not intended to “relieve a railroad company of its responsibility to maintain safe crossings.” *Id.*

[11] Generally, UP argues that even if warning devices might improve safety, UP had no legal duty to install them. Further, UP contends that the only exception to this rule under Louisiana law is when the crossing presents a “dangerous trap” to the motoring public. UP argues that since the jury answered “No” to the issue about whether the crossing was a dangerous trap, the trial court wrongly found “a further duty to install active

warning devices at the Eddy Street crossing.”

However, we are not persuaded that UP had no duty under Louisiana law to make the crossing reasonably safe under the circumstances presented in this record. Based on the evidence admitted by the trial court in this case, the following circumstances are relevant to our analysis of UP's duty to motorists at the crossing: (1) evidence from which a jury could reasonably conclude that motorists, based on expected train speeds at the crossing, did not generally have sufficient sight distances of approaching trains; (2) the opinion offered by Archie Burnham, the claimants' expert witness, that the crossing posed an unreasonable risk of danger to motorists; (3) evidence showing that before Ardoin's collision, an active protection device, a wig-wag, had been removed and the crossing had been reopened in 1997 without active warning devices to signal a train's approach; (4) a crossing collision history showing several prior collisions before Ardoin's that had occurred after the crossing was reopened without active protection, two of which involved fatalities; *811 (5) testimony proving that the three other crossings in Vinton were protected with gates and lights; (6) evidence that established the presence of a sixty-degree angle for a north-bound driver stopping at the crossing; (7) testimony that established relatively high expected train speeds at a crossing located inside a town, the number of trains traveling through the crossing on a daily basis, the volume of street traffic at the crossing, and the resulting impact of these variables on the potential and severity of any resulting collision; and (8) evidence showing that before Ardoin's accident, UP knew that LDOT had recommended that the crossing remain closed. Additionally, evidence established that before Ardoin's collision, UP knew about the presence of the wigwag at the crossing and its removal, knew of the existing physical conditions at the crossing, was aware of the crossing's accident history following its removal of the wigwag, and was on notice of the City's interest in improving the existing warnings at the crossing. Under the many circumstances presented here, we con-

clude that UP had a legal duty to motorists to exercise the control it did possess over installing additional warning devices at the crossing in a reasonable and prudent manner and a fact question exists to resolve if it had done so.

Authority To Install Additional Signs

[12] In its second argument, UP argues we should render judgment in its favor because it had no authority to install gates and lights on a public roadway without permission from public officials. However, claimants disagree and argue that [section 32:169\(E\)\(3\)-\(4\)](#) of Louisiana's Revised Statutes expressly allow a railroad to install traffic control devices or make other improvements or modifications at its own expense to improve the safety of the traveling public as long as the modification complies with the Manual on Uniform Traffic Control Devices (“MUTCD”). [LA.REV.STAT. ANN. § 32:169\(E\)](#) (2009).

[13] UP's argument relies on language in section 32:236 of Louisiana's Revised Statutes, which provides, in part:

A. No person, contractor, or public service corporation shall erect or maintain any sign of any nature or a traffic control device or any thing resembling a traffic control device within the right-of-way of any highway or street, without having official permission to install or maintain same in the public right-of-way under the provisions of R.S. 48:344 and R.S. 48:381, except the governing authority maintaining the highway or street.

....

[LA.REV.STAT. ANN. § 32:236](#) (2009). This language appears to conflict with language in [32:169\(E\)\(3\)-\(4\)](#), which grants a railroad authority to erect signs. Thus, UP's argument requires that we engage in statutory interpretation of Louisiana's law. In undertaking an issue of statutory construction, Louisiana's Supreme Court recently stated:

“[W]hen the words of a law are ambiguous, their meaning must be sought by examining the con-

text in which they occur and the text of the law as a whole.” LA. CIV.CODE [ANN.] art. 12. It is also well established that the Legislature is presumed to enact each statute with deliberation and with full knowledge of all existing laws on the same subject. [State v.] *Johnson*, 884 So.2d 568, 576 [La.2004]; *State v. Campbell*, 877 So.2d 112, 117 [(La.2004)]. Thus, legislative language will be interpreted on the assumption the Legislature ... was aware of existing statutes, well established principles of statutory construction and with knowledge of the effect of their acts and a purpose in view. *812*Johnson*, 884 So.2d at 576–77; *Campbell*, 877 So.2d at 117. It is equally well settled under our rules of statutory construction, where it is possible, courts have a duty in the interpretation of a statute to adopt a construction which harmonizes and reconciles it with other provisions dealing with the same subject matter. LA. CIV.CODE [ANN.] art. 13; *City of New Orleans v. Louisiana Assessors' Retirement and Relief Fund*, 986 So.2d 1 [(La.2007)].

M.J. Farms, Ltd. v. Exxon Mobil Corp., 998 So.2d 16, 27 (La.2008). Additionally, if after attempting to harmonize statutes, there remains a conflict, “the statute specifically directed to the matter at issue must prevail as an exception to the statute more general in character.” *LeBreton v. Rabito*, 714 So.2d 1226, 1229 (La.1998).

Section 32:169(E)(3)-(4) of Louisiana's Revised Civil Statutes serves as both the more recent and more specific statute concerning a railroad's right to erect traffic control devices in a shared right-of-way. Moreover, when the Louisiana Legislature added the provisions concerning a railroad's rights to erect signs in section 32:169(E) in 1998, it must have been aware of its general prohibition contained in section 32:236.

We find no instance in Louisiana's case law that addresses whether a railroad, acting pursuant to section 32:169(E)(3)-(4) may erect signs that comply with the MUTCD without LDOT's approval. While we might utilize Louisiana's principles of

statutory construction in analyzing whether section 32:169(E)(3)-(4) constitutes an exception to the general prohibition on erecting signs found in section 32:236, we need not do so on this record. In this case, the evidence reflects that UP did not initiate a request to improve the crossing's warnings with any governmental officials having jurisdiction over the crossing. In applying Louisiana's duty analysis, and based on this crossing's location, and prior history, we hold that Louisiana would place a duty on UP to reasonably exercise its right to request permission from the necessary governmental entities in control of the crossing in order to improve the warnings at the crossing. Consequently, we do not accept UP's argument that it had no duty because it had no right to affect the crossing's warnings.

Standard of Review—UP's Preemption Argument

[14] UP also argues that any state law duties it had to warn at the crossing were preempted by federal law. A party asserting federal preemption generally bears the burden of proving that issue. See *Mo. Pac. R.R. Co. v. Limmer*, 180 S.W.3d 803, 809 (Tex.App.-Houston [14th Dist.] 2005, pet. granted); see also *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984); *Gorman v. Life Ins. Co. of N. Am.*, 811 S.W.2d 542, 546 n. 7 (Tex.1991); *Boon Ins. Agency, Inc. v. Am. Airlines, Inc.*, 17 S.W.3d 52, 55 (Tex.App.-Austin 2000, pet. denied). Therefore, to receive a rendition on appeal, UP must show that the evidence conclusively established all of the vital facts in support of its preemption issue. See *Francis*, 46 S.W.3d at 241.

Preemption

[15][16] UP contends that it conclusively proved that federal funds participated in the installation of the crossing's crossbucks prior to Ardoin's collision.^{FN2} Concerns arising*813 under a state's law about the adequacy of signs at a crossing can be preempted by federal law when federal funds have been used to participate in the installation of the crossing's warnings. See *Norfolk S. Ry. Co. v.*

Shanklin, 529 U.S. 344, 347–58, 120 S.Ct. 1467, 146 L.Ed.2d 374 (2000); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 670–71, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993). In *Easterwood*, the United States Supreme Court explained:

FN2. The parties have not addressed whether state law duties are preempted by federal law at a railroad crossing that is not part of a state highway system. For purposes of our resolution of the preemption issues, we have assumed without deciding that federal preemption would apply to this crossing had UP conclusively proven that federal funds actually participated in the warnings present at the time of Ardoin's collision.

In short, for projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection. The Secretary's regulations therefore cover the subject matter of state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings.

Easterwood, 507 U.S. at 671, 113 S.Ct. 1732.

Subject to the provisions contained in 23 U.S.C.A. § 130, Congress authorized the expenditure of federal funds for projects to eliminate hazards at railway-highway crossings. 23 U.S.C.A. § 130 (West 2002 & Supp. 2009). To participate in the program, States are required to “conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose.” *Id.* § 130(d) (West 2002). The schedule “shall provide signs for all railway-highway crossings.” *Id.* The Secretary of Transportation has promulgated a regulation designed to implement projects under the program, including section 646.214(b) of title 23 of the Code of Federal Regu-

lations, which addresses the design of grade crossing improvements.^{FN3} Ultimately,*814 in *Easterwood*, the Court concluded that the personal injury claim that arose under state tort law had not been preempted by 23 C.F.R. § 646.214 because the facts did “not establish that federal funds ‘participated in the installation of the [warning] devices [.]’ ” *Easterwood*, 507 U.S. at 672, 113 S.Ct. 1732. In *Shanklin*, decided in 2000, the United States Supreme Court noted that in *Easterwood*, it had held that “§ 646.214(b)(3) and (4) pre-empt state tort claims concerning the adequacy of all warning devices installed with the participation of federal funds.” 529 U.S. at 357, 120 S.Ct. 1467. As explained by the Supreme Court, “Whether the State should have originally installed different or additional devices, or whether conditions at the crossing have since changed such that automatic gates and flashing lights would be appropriate, is immaterial to the pre-emption question.” *Id.* at 358, 120 S.Ct. 1467.

FN3. Section 646.214(b) of title 23 of the Code of Federal Regulations provides:

§ 646.214 Design.

(a) General. (1) Facilities that are the responsibility of the railroad for maintenance and operation shall conform to the specifications and design standards used by the railroad in its normal practice, subject to approval by the State highway agency and FHWA.

(2) Facilities that are the responsibility of the highway agency for maintenance and operation shall conform to the specifications and design standards and guides used by the highway agency in its normal practice for Federal-aid projects.

(b) Grade crossing improvements. (1) All traffic control devices proposed shall comply with the latest edition of the Manual on Uniform Traffic Control Devices for Streets and Highways sup-

plemented to the extent applicable by State standards.

(2) Pursuant to [23 U.S.C. 109\(e\)](#), where a railroad-highway grade crossing is located within the limits of or near the terminus of a Federal-aid highway project for construction of a new highway or improvement of the existing roadway, the crossing shall not be opened for unrestricted use by traffic or the project accepted by FHWA until adequate warning devices for the crossing are installed and functioning properly.

(3)(i) Adequate warning devices, under [§ 646.214\(b\)\(2\)](#) or on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:

(A) Multiple main line railroad tracks.

(B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

(C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.

(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of schoolbuses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.

(F) A diagnostic team recommends them.

(ii) In individual cases where a diagnostic team justifies that gates are not appropriate, FHWA may find that the above requirements are not applicable.

(4) For crossings where the requirements of [§ 646.214\(b\)\(3\)](#) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of FHWA.

(c) Grade crossing elimination. All crossings of railroads and highways at grade shall be eliminated where there is full control of access on the highway (a freeway) regardless of the volume of railroad or highway traffic.

[23 C.F.R. § 646.214](#), LEXIS [23 CFR 646.214](#).

Thus, in the case before us, the threshold question is whether UP conclusively established that federal funds participated in the installation of the crossbucks at the crossing. UP argues that the trial court record demonstrates:

(1) the Horridge Street project was a federally funded project, and it included the closure of the Eddy Street crossing; (2) the LDOT later authorized UP to use \$10,000 from the Horridge Street project to install a new crossing at Eddy Street with crossbucks; (3) the FHWA ^{FN4} was involved in the planning process with the LDOT to reopen the Eddy Street crossing, and was copied on the LDOT's letter authorizing the use of \$10,000 in federal funds; (4) the LDOT and UP executed a Change Order Authorization for submission to the FHWA; and (4) UP installed the crossbucks a few weeks later.

FN4. Federal Highway Administration.

In its brief, UP references the Eddy Street grade crossing file introduced during trial as evidence showing that federal funds participated at the crossing. The grade crossing file includes notes apparently taken by LDOT's representative of a meeting between LDOT and the FHWA at the end of April 1997. The notes reflect a discussion about the closure of the crossing. At that time, the note shows that the planned course was to keep the crossing closed. By the end of June 1997, however, an e-mail by UP's employee acknowledges UP's receipt of a letter from the City of Vinton and LDOT ordering the reinstallation of the crossing at Eddy Street. The e-mail directs other UP employees to reopen the crossing. Specifically, the e-mail expressly states: "The State authorized work up to \$10,000." With respect to warnings, the e-mail mentions that UP was required to install crossbucks. Finally, the crossing file further reflects that on *815 December 2, 1997, UP submitted a Change Order Authorization to LDOT to cover "the reinstallation of an unauthorized closed crossing at the above mentioned location."

Our review of the grade crossing file does not lead us to the conclusion that UP conclusively proved that federal funds participated in the reopening of the crossing. For instance, the grade crossing file does not reflect that federal officials inspected and approved the signalization for the project to reopen the crossing, or that federal officials approved or agreed to pay for the erection of crossbucks required as a result of the State's failed attempt to permanently close the crossing. Importantly, the crossing file also does not reflect that the State succeeded in utilizing federal funds previously approved for a project that encompassed closing the crossing to instead pay for the expenses incurred by UP to reopen it. Finally, while officials of the federal government were apparently notified of the plan to reopen the crossing as a passive crossing with crossbucks and stop signs, UP's grade crossing file does not reflect that federal officials approved

its reopening without active warning devices.

UP also relied on the affidavit of David Peterson ^{FN5} to establish that federal funds were "expended in the installation of the reflectorized crossbucks at the Eddy Street crossing." Peterson, whose affidavit states that in 1997 he was employed by UP as the Regional Manager of Industry and Public Projects, briefly describes the closing and subsequent reopening of the crossing. With respect to payment on the project to reopen the crossing, Peterson's affidavit states:

FN5. In its preemption argument, UP complains that after it rested, the trial court granted the claimants' request to strike Peterson's affidavit from evidence. Although the trial court admitted the exhibit, it later changed course and decided to exclude it. In light of our conclusion that the affidavit does not conclusively establish that federal funds were used at the crossing, we need not further address whether the trial court abused its discretion in excluding it from evidence after having previously admitted it into evidence.

This work was completed and Union Pacific charged the cost associated with reopening the Eddy Street crossing including the cost for the placement of the crossbucks to State Project No. 714-10-0100/FAP No. STP-000S (370). Union Pacific was reimbursed for the work. The reimbursement was funded with Federal funds.

However, Robert Kenneth Rouse, another UP witness who testified at trial and who apparently became UP's Senior Manager for Industrial and Public Projects in 1997, also testified about the \$10,000 that the State authorized under the Change Order Authorization. Although Rouse testified that he assumed from the authorization that the money included the payments to reinstall the crossbucks, on cross-examination, Rouse also testified that he had no knowledge about whether federal funds were used to reinstall them. The record also contains Rouse's e-mail that he sent in

reply to an e-mail by another UP employee notifying Rouse of Ardoin's accident. In his reply e-mail, Rouse stated: "There were no Federal Funds used in the recent UP cross buck renewal program in Louisiana. However, federal funds may have been used on the cross bucks that were replaced." Finally, the UP employee that notified Rouse by e-mail of the accident stated in his e-mail, "The crossing has cross bucks which were replaced in the program about 18–24 months ago. I understand NO Federal Funds were involved. Please confirm." Thus, Peterson's affidavit is not free from contradictory evidence that is in the complete trial record.

*816 [17][18] Testimony of an interested witness is generally not sufficient to conclusively establish a disputed fact. "The general rule is that evidence given by an interested witness, even though uncontradicted, presents an issue to be determined by the jury." *McGuire v. City of Dallas*, 141 Tex. 170, 170 S.W.2d 722, 728 (1943). An exception to this general rule exists "only if the testimony could be readily contradicted if untrue, and is clear, direct and positive, and there are no circumstances tending to discredit or impeach it." *Lofton v. Tex. Brine Corp.*, 777 S.W.2d 384, 386 (Tex.1989).

From Peterson's affidavit, it appears that his knowledge concerning the source of the funds used at the crossing came from his review of UP's operating file on the crossing, which is included in the record and is attached to Peterson's affidavit. Based on the work authorization requests contained in UP's Eddy Street crossing file, it further appears that UP submitted its requests for payment to the State; thus, UP's witnesses may not have had personal knowledge of whether the State actually obtained federal funds on the project to reinstall the crossbucks. For example, while the operating file refers to the State's authorizing funds to reopen the crossing, the file does not reflect that federal officials approved the use of federal funds or that federal funds participated in the reopening of the

crossing.

Thus, the circumstances tend to discredit or impeach the contention that Peterson possessed personal knowledge about whether federal funds had been used to reopen the crossing. Rouse, who appeared at trial and apparently held the same position with UP as Peterson did on the date Peterson signed his affidavit, also reviewed the UP crossing file, but later testified he had no personal knowledge about whether federal funds were used at the crossing.

Based on the entire trial record, with respect to UP's preemption argument, we conclude that whether federal funds participated in the reopening of the crossing was not conclusively proven. Although UP requested a submission of a preemption issue to the jury, the court did not submit UP's proposed charge. ^{FN6} Having considered UP's argument and all of the evidence, we hold that UP did not establish its preemption defense as a matter of law.

^{FN6}. In light of our resolution of the venue issue, we do not reach several issues raised by UP concerning the jury charge; however, we note that while UP's preemption issue was among issues it asked to be submitted to the jury, UP's appeal does not include any complaint concerning the trial court's refusal of its preemption issue that would have resolved any factual dispute about whether federal funds were used to reinstall the crossbucks at the crossing.

In summary, and with respect to UP's arguments that we should render judgment on its behalf, we hold there was legally sufficient evidence that UP owed the traveling public a duty to make the crossing reasonably safe and that UP had a duty to request any permission it believed it needed to erect additional warnings at the crossing. We further hold that UP failed to meet its burden on appeal to establish federal preemption as a matter of law. Therefore, we overrule all of UP's arguments that request

a rendition in its favor.

Venue

[19] UP asserts that this case should be transferred to Harris County, the location of its principal office in Texas, and that Jefferson County was not a county of proper venue for this lawsuit. In considering whether venue was or was not *817 proper, the Texas Legislature has directed appellate courts to “consider the entire record, including the trial on the merits.” [TEX. CIV. PRAC. & REM.CODE ANN. § 15.064\(b\)](#) (Vernon 2002). “[I]f venue was improper, it shall in no event be harmless error and shall be reversible error.” *Id.* Additionally, if venue was improper and there is probative evidence that venue is proper in the county to which transfer had been sought, “the appellate court should instruct the trial court to transfer the case to that county.” [Ruiz v. Conoco, Inc.](#), 868 S.W.2d 752, 758 (Tex.1993).

Texas statutes generally govern the plaintiff's initial choice of the proper county in which to file a claim, and in cases involving multiple defendants, Texas law provides: “In a suit in which the plaintiff has established proper venue against a defendant, the court also has venue of all the defendants in all claims or actions arising out of the same transaction, occurrence, or series of transactions or occurrences.” [TEX. CIV. PRAC. & REM.CODE ANN. § 15.005](#) (Vernon 2002). In this case, which involves multiple defendants, the claimants asserted that venue was proper in Jefferson County against UP because venue was proper against a co-defendant, Mann.

After UP had been served with Plaintiffs's Original Petition, it filed a motion requesting the trial court transfer the case to the county in which its principal offices were located, Harris County. The trial court denied UP's motion to transfer venue on July 21, 2006. When the trial court ruled on UP's motion to transfer venue, Mann had not yet been named as a defendant. Moreover, claimants do not argue that they had named another Jefferson County resident that, at the time of the venue hearing, established proper venue in Jefferson County.

Mann appeared as a party when he filed his answer to Plaintiff's Fifth Amended Petition on June 14, 2007. The claims against Mann at the time of trial alleged negligence, and essentially consisted of the following:

Mr. Mann investigated four accidents at the Eddy Street Crossing. Although he knew that this was a crossing that needed to be examined for upgrades or closure, Mr. Mann remained silent about the problems at the Eddy Street crossing until after the tragedy made the basis of this lawsuit took place.

UP's and Mann's Amended Original Answer, filed September 14, 2007, were their live pleadings at the time of trial and consist of a general denial and several affirmative defenses. After the claimants rested their case, Mann's attorney moved for an instructed verdict, arguing that Mann had no duty to Ardoin under either Texas or Louisiana law. *See* [TEX.R. CIV. P. 268](#). On the following morning, the trial court granted Mann's motion. The claimants have not appealed from the trial court's instructed verdict.

[20] In response to Mann's motion for directed verdict, the claimants argued to the trial court that by investigating prior accidents, Mann undertook a duty to do so reasonably. In support of that argument, the claimants relied on a UP policy from UP's “Grade Crossing Resource Manual,” which contains a statement that UP employees at all levels are to “take responsibility for making observations, reporting unsafe conditions, and maintaining safe grade crossings.” In response to UP's venue arguments, the claimants also rely on the trial testimony of Archie Burnham, their crossing-safety expert, who testified that Mann had investigated the prior accidents and if there were obvious deficiencies at the crossing, Mann could have *818 made recommendations about them to UP. Mann was not called as a witness at trial.

The claimants cite no Texas or Louisiana cases in support of their argument that an employee's fail-

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ure to comply with a company policy allows a member of the public to sue the employee individually. Mann was not alleged to own or control activities that occurred at the crossing, and there was no evidence that he did so. Thus, *Duncan's* duty analysis does not logically extend to Mann. See *Duncan*, 773 So.2d at 675. *Syrie*, in our opinion, contains the framework to analyze whether an individual owes a duty to the traveling public under Louisiana law. See *Syrie*, 693 So.2d at 1177 (relying upon a State trooper's power to regulate traffic at the time of the incident in reaching the conclusion that the trooper owed a duty to motorists on the highway). There is no evidence in the record that Mann had the power to cause UP to erect warnings at crossings.

UP's policy manual does not contain a general delegation of power to UP employees that provide its employees with control of activities at railroad crossings, such as the power to erect gates and lights. In its most favorable light, the claimants' evidence established, at most, that the policy required railroad employees to report unsafe conditions, which is different than the power to control traffic that formed the basis of the trooper's duty in *Syrie*. See *id.* Generally, Louisiana has imposed the duty to control safety warnings erected at crossings only upon the crossing's owner. See generally *Long*, 916 So.2d at 103. We have found no Louisiana case holding that a railroad claims investigator, who is subject to an employment policy encouraging the reporting of unsafe conditions, to have a duty to the traveling public, and we find no legal basis to do so here.

[21] Texas law would also not impose a duty on a claims investigator for a railroad under circumstances similar to those present here. Under Texas law, whether a duty exists is a question of law for the court. *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 181 (Tex.2004); *Tex. Home Mgmt., Inc. v. Peavy*, 89 S.W.3d 30, 33 (Tex.2002); *SmithKline Beecham Corp. v. Doe*, 903 S.W.2d 347, 351 (Tex.1995). In *Leitch v. Hornsby*,

the Texas Supreme Court explained when individual liability will be imposed on a corporate officer and when it will not. 935 S.W.2d 114, 117 (Tex.1996). The Court stated the rule as follows: "[I]ndividual liability arises only when the officer or agent owes an independent duty of reasonable care to the injured party apart from the employer's duty." *Id.* In *Leitch*, the Texas Supreme Court concluded that the company's officers were not individually liable for the failure to supply a lifting belt or dolly to the plaintiff, a company employee, who was injured when he lifted a sixty-five-pound reel of cable. *Id.* at 116–18. The Court explained that the officers were not individually liable because they "had no individual duty as corporate officers to provide [the plaintiff] with a safe workplace." *Id.* at 118. The Court reached this conclusion despite finding that the company did owe the employee a duty to provide a safe place to work, but explained that the company's officers, as individuals, did "not owe a corporate employee an individual duty to provide that employee with a safe work place[.]" *Id.*

[22] After reviewing the entire record before us, we conclude that based upon Mann's employment as a claims investigator, Mann did not individually owe a duty to members of the traveling public to provide warnings at UP's crossings. Consequently, Mann, the sole defendant alleged to reside in Jefferson County, is not a proper venue defendant.

***819** In their brief, the claimants do not contradict UP's allegation that proper venue of this case existed in Harris County, the location of UP's principal place of business in Texas. See *TEX. CIV. PRAC. & REM.CODE ANN. § 15.002(a)(3)* (Vernon 2002). In addition, in their original pleading, stating where UP could be served, the claimants alleged that UP's general solicitor could be served in Harris County.

Because trial in a county of improper venue is never harmless error, we conclude that UP is entitled to have the trial court's judgment awarding

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damages against it reversed, and venue of the claims brought against it transferred to Harris County, Texas. *See id.* § 15.064(b); *Ruiz*, 868 S.W.2d at 758. We therefore reverse the trial court's judgment against UP, but we affirm the trial court's judgment denying relief against all other defendants. We remand the cause to the trial court with instructions that the trial court instruct the district clerk to transfer this file to the District Clerk of Harris County, Texas.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART WITH INSTRUCTIONS TO TRANSFER VENUE TO HARRIS COUNTY.

Tex.App.–Beaumont,2009.
Union Pacific R. Co. v. Cezar
293 S.W.3d 800

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KEYCITE

H **Union Pacific R. Co. v. Cezar**, 293 S.W.3d 800 (Tex.App.-Beaumont, Jul 16, 2009) (NO. 09-08-00092-CV)

History**Direct History**

 **1** Cezar v. Burlington Northern and Santa Fe Ry. Corp., 2007 WL 4357187 (Trial Order) (Tex.Dist. Nov 09, 2007) (NO. B-0176429)

Reversed by

=> **2** **Union Pacific R. Co. v. Cezar**, 293 S.W.3d 800 (Tex.App.-Beaumont Jul 16, 2009) (NO. 09-08-00092-CV)

Related References

H **3** Cezar v. Burlington Northern and Santa Fe Ry. Corp., 2006 WL 5218560 (Trial Order) (Tex.Dist. Nov 03, 2006) (NO. B176-429)

H **4** Cezar v. Burlington Northern and Santa Fe Ry. Corp., 2006 WL 5218559 (Trial Order) (Tex.Dist. Nov 09, 2006) (NO. B-0176429)

H **5** Cezar v. Burlington Northern and Santa Fe Ry. Corp., 2007 WL 4357188 (Trial Order) (Tex.Dist. Jul 23, 2007) (NO. B176-429)

H **6** Cezar v. Burlington Northern and Santa Fe Ry. Corp., 2007 WL 4693352 (Trial Order) (Tex.Dist. Oct 18, 2007) (NO. B176-429)

Court Documents**Verdict and Settlement Summaries (U.S.A.)****Tex.Dist.**

7 Derrik Cezar, as next of friend of Jasmine Cezar and Lorenzo Ardoin, Lashasa Ardoin, and Rodney Woods, as next friend of Jarvis Ardoin v. Union Pacific Railroad and Jack Mann, 2007 WL 5347517 (Verdict and Settlement Summary) (Tex.Dist. Nov. 9, 2007) (NO. B-0176429)

Trial Court Documents (U.S.A.)**Tex.Dist. Trial Pleadings**

8 Derrick CEZAR, Individually and as Next Friend of Jasmine Cezar, Jarvis Ardoin, Lashasa Ardoin, and Lorenzo Ardoin Plaintiff, v. Burlington NORTHERN and Santa FE Railway Corporation, Union Pacific Railroad Company, William Thibodeaux, Anthony Baker, Chris Johnson, and

Andrew P. Granger Defendants., 2006 WL 6165144 (Trial Pleading) (Tex.Dist. Oct. 9, 2006) **Plaintiffs' Second Amended Petition** (NO. B-0176429)

- 9 Derrick CEZAR, as Next Friend of Jasmine Cezar and Lorenzo Ardoin, Lashas a Ardoin, and Rodney Woods, as Next Friend of Jarvis Ardoin, Plaintiff, v. BURLINGTON NORTHERN AND SANTA FE RAILWAY CORPORATION, Union Pacific Railroad Company, William Thibodeaux, Anthony Baker, Chris Johnson, Andrew F. Gran, 2007 WL 4879399 (Trial Pleading) (Tex.Dist. Apr. 9, 2007) **Plaintiffs' Fifth Amended Petition** (NO. B-0176429)
- 10 Derrick CEZAR, Individually Ofand as Next Friend of Jasmine Cezar, Jarvis Ardoin, Lashasa Ardoin, and Lorenzo Ardoin, Plaintiffs, v. BURLINGTON NORTHERN AND SANTA FE RAILWAY CORPORATION, Union Pacific Railroad Company, William Thibodeaux, Anthony Baker, Chris Johnson, and Andrew F. Granger, Defendant, 2007 WL 4879398 (Trial Pleading) (Tex.Dist. Jun. 14, 2007) **Jack Mann's Original Answer** (NO. B176-429)
- 11 Derrick CEZAR, Individually of and as Next Friend of Jasmine Cezar, Jarvis Ardoin, Lashasa Ardoin, and Lorenzo Ardoin, Plaintiffs, v. BURLINGTON NORTHERN AND SANTA FE RAILWAY CORPORATION, Union Pacific Railroad Company, William Thibodeaux, Anthony Baker, Chris Johnson, Andrew F. Granger, and Jack Man, 2007 WL 4655845 (Trial Pleading) (Tex.Dist. Sep. 14, 2007) **Defendants' Amended Original Answer** (NO. B176-429)
- 12 Derrick CEZAR, As Next Friend of Jasmine Cezar and Lorenzo Ardoin, Lashasa Ardoin, and Rodney Woods, as Next Friend of Jarvis Ardoin, Plaintiff, v. BURLINGTON NORTHERN AND SANTA FE RAILWAY CORPORATION, Union Pacific Railroad Company, William Thibodeaux, Anthony Baker, Chris Johnson, Andrew F. Grange, 2007 WL 4655844 (Trial Pleading) (Tex.Dist. Oct. 15, 2007) **Plaintiffs' Sixth Amended Petition** (NO. B-0176429)

Tex.Dist. Trial Motions, Memoranda And Affidavits

- 13 Derrick CEZAR, Individually and as Next Friend of Jasmine Cezar, Jarvis Ardoin, Lashasa Ardoin, and Lorenzo Ardoin, Plaintiffs, v. BURLINGTON NORTHERN AND SANTA FE RAILWAY CORPORATION, Union Pacific Railroad Company, William Thibodeaux, Anthony Baker, Chris Johnson, and Andrew F. Granger, Defendants., 2006 WL 5204997 (Trial Motion, Memorandum and Affidavit) (Tex.Dist. Sep. 14, 2006) **Defendants' Motion for Leave to Designate a Responsible Third Party** (NO. B176-429)
- 14 Derrick CEZAR, Individually and as Next Friend of Jasmine Cezar, Jarvis Ardoin, Lashasa Ardoin, and Lorenzo Ardoin, Plaintiff, v. BURLINGTON NORTHERN AND SANTA FE RAILWAY CORPORATION, Union Pacific Railroad Company, William Thibodeaux, Anthony Baker, and Chris Johnson, Defendants., 2006 WL 5204998 (Trial Motion, Memorandum and Affidavit) (Tex.Dist. Oct. 5, 2006) **Defendants' Motion for Partial Summary Judgment and No Evidence Motion for Summary Judgment** (NO. B176-429)
- 15 Derrick CEZAR, Individually and as Next Friend of Jasmine Cezar, Jarvis Ardoin, Lashasa Ardoin, and Lorenzo Ardoin, Plaintiffs, v. BURLINGTON NORTHERN AND SANTA FE RAILWAY CORPORATION, Union Pacific Railroad Company, William Thibodeaux, Anthony Baker, Chris Johnson, and John Roby, Defendants., 2006 WL 5204999 (Trial Motion, Memorandum and Affidavit) (Tex.Dist. Oct. 6, 2006) **Defendants' Motion for Continuance** (NO. B176-429)
- 16 Derrick CEZAR, Individually and as Next Friend of Jasmine Cezar, Jarvis Ardoin, Lashasa Ardoin, and Lorenzo Ardoin, Plaintiffs, v. BURLINGTON NORTHERN AND SANTA FE RAIL-

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- 17 Derrick CEZAR, Individually and as Next Friend of Jasmine Cezar, Jarvis Ardoin, Lashasa Ardoin, and Lorenzo Ardoin, Plaintiffs, v. BURLINGTON NORTHERN AND SANTA FE RAILWAY CORPORATION, Union Pacific Railroad Company, William Thibodeaux, Anthony Baker, and Chris Johnson, Defendants., 2007 WL 4879395 (Trial Motion, Memorandum and Affidavit) (Tex.Dist. Feb. 26, 2007) **Plaintiffs' Motion to Compel and Motion to Quash** (NO. B-0176429)
- 18 Derrick CEZAR, as Next Friend of Jasmine Cezar and Lorenzo Ardoin, Lashasa Ardoin, and Rodney Woods, as Next Friend of Jarvis Ardoin, Plaintiff, v. BURLINGTON NORTHERN AND SANTA FE RAILWAY CORPORATION, Union Pacific Railroad Company, William Thibodeaux, Anthony Baker, Chris Johnson, Andrew F. Grange, 2007 WL 4655843 (Trial Motion, Memorandum and Affidavit) (Tex.Dist. Aug. 14, 2007) **Plaintiffs' Motion for Partial Summary Judgment on Preemption** (NO. B-0176429)
- 19 Derrick CEZAR, As Next Friend of Jasmine Cezar and Lorenzo Ardoin, Lashasa Ardoin, and Rodney Woods, as Next Friend of Jarvis Ardoin, Plaintiffs, v. BURLINGTON NORTHERN AND SANTA FE RAILWAY CORPORATION, Union Pacific Railroad Company, William Thibodeaux, Anthony Baker, Chris Johnson, Andrew F. Grang, 2007 WL 4879397 (Trial Motion, Memorandum and Affidavit) (Tex.Dist. Oct. 18, 2007) **Defendants' Motion in Limine** (NO. B176-429)
- 20 Derrick CEZAR, Individually of and as Next Friend of Jasmine Cezar, Jarvis Ardoin, Lashasa Ardoin, and Lorenzo Ardoin, Plaintiffs, v. BURLINGTON NORTHERN AND SANTA FE RAILWAY CORPORATION, Union Pacific Railroad Company William Thibodeaux, Anthony Baker, Chris Johnson, and Andrew F. Granger, Defendant, 2007 WL 4879400 (Trial Motion, Memorandum and Affidavit) (Tex.Dist. Oct. 18, 2007) **Defendant's Supplemental Motion in Limine** (NO. B176-429)

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- 21 UNION PACIFIC RAILROAD COMPANY v. DERRICK CEZAR, INDIVIDUALLY AND A/N/F OF JASMINE CEZAR, JARVIS ARDOIN, LASHASA ARDOIN AND LORENZO ARDOIN, NO. 09-08-00092-CV (Docket) (Tex.App.-Beaumont Mar. 3, 2008)

Expert Court Documents (U.S.A.)

Tex.Dist.

- 22 Derrick Cezar, as next of friend of Jasmine Cezar and Lorenzo Ardoin, Lashasa Ardoin, and Rodney Woods, as next friend of Jarvis Ardoin v. Union Pacific Railroad and Jack Mann, 2007 WL 5347517 (Verdict and Settlement Summary) (Tex.Dist. Nov. 9, 2007) (NO. B-0176429)

Tex.Dist. Trial Motions, Memoranda And Affidavits

- [23](#) Derrick CEZAR, Individually and as Next Friend of Jasmine Cezar, Jarvis Ardoin, Lashasa Ardoin, and Lorenzo Ardoin, Plaintiffs, v. BURLINGTON NORTHERN AND SANTA FE RAILWAY CORPORATION, Union Pacific Railroad Company, William Thibodeaux, Anthony Baker, Chris Johnson, and John Roby, Defendants., 2006 WL 5204999 (Trial Motion, Memorandum and Affidavit) (Tex.Dist. Oct. 6, 2006) **Defendants' Motion for Continuance** (NO. B176-429)

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H Union Pacific R. Co. v. Cezar, 293 S.W.3d 800 (Tex.App.-Beaumont Jul 16, 2009) (NO. 09-08-00092-CV)

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- C 3 Responsibility for accident at railroad crossing as affected by absence, improper location, or insufficiency of signs warning approaching travelers of presence of crossing, 93 A.L.R. 218 (1934)
- 4 Litigation Management Handbook s 1:12, Early decisions on venue and forum (2010)
- 5 TX Practice Guide, Civil Pretrial s 6:64, Impact of joinder of claims and parties-Plaintiff's tag-along venue (2011)
- 6 TX Practice Guide, Civil Pretrial s 6:69, Multiple defendants (2011)
- 7 37 Am. Jur. Proof of Facts 2d 439, Inadequacy of Warning Device at Railroad Crossing (2011)
- C 8 Am. Jur. 2d Railroads s 280, Safeguards, generally (2011) **HN: 10 (S.W.3d)**
- 9 TX Jur. 3d Appellate Review s 545, Generally; legal sufficiency of evidence (2011)
- 10 TX Jur. 3d Appellate Review s 554, Sufficiency of evidence-Legal sufficiency (2011)
- 11 TX Jur. 3d Appellate Review s 597, Rulings on applications for change of venue (2011)
- 12 TX Jur. 3d Appellate Review s 625, Trial court findings-As affected by placement of burden of proof (2011)
- 13 TX Jur. 3d Appellate Review s 804, Appeals from venue rulings (2011)
- 14 TX Jur. 3d Conflict of Laws s 20, Contacts to be considered (2011)
- 15 TX Jur. 3d Constitutional Law s 71, Tests for determining preemption (2011)
- 16 TX Jur. 3d Evidence s 923, Basis, scope, and general effect of interested witness rule (2011) **HN: 18 (S.W.3d)**
- 17 TX Jur. 3d Evidence s 926, Operation of interested witness rule (2011) **HN: 17 (S.W.3d)**
- 18 TX Jur. 3d Tort Liability s 8, Existence and violation of legal right and duty; damage-Legal duty as question of law or fact (2011)
- 19 TX Jur. 3d Trial s 61, Province of jury (2011) **HN: 6 (S.W.3d)**



20 CONFLICT OF LAWS, 63 SMU L. Rev. 455, 491+ (2010) **HN: 22 (S.W.3d)**

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- 21 PRO M&E, INC. D/B/A JC Stonewall Constructors, LP, Petitioner, v. DB STERLING INVESTMENTS, LP, Respondent., 2009 WL 3422354, *3422354 (Appellate Petition, Motion and Filing) (Tex. Oct 07, 2009) **Petition for Review** (NO. 09-0840) ★ ★

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- 22 Martha ARANGO and Americare Nursing Services, Inc., Appellants, v. Andrea DAVILA, Appellee., 2010 WL 3514404, *3514404+ (Appellate Brief) (Tex.App.-Corpus Christi Jul 26, 2010) **Reply Brief of Appellants (Consolidated) Corrected** (NO. 13-09-00470-CV, 13-09-00627-CV) ★ ★
- 23 MARTHA ARANGO AND AMERICARE NURSING SERVICES, INC., Appellants, v. Andrea DAVILA, Appellee., 2010 WL 3011204, *3011204+ (Appellate Brief) (Tex.App.-Corpus Christi Jun 23, 2010) **Reply Brief of Appellants (Consolidated)** (NO. 13-09-00470-CV, 13-09-00627-CV) ★ ★
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- 25 Marjorie F. HUNTER and Ordell Hunter, v. WAL-MART STORES, INC. and Chris Seaman., 2010 WL 4950349, *4950349 (Trial Pleading) (S.D.Tex. Nov 29, 2010) **Notice of Removal** (NO. 410-CV-04774) ★ ★ **HN: 22 (S.W.3d)**

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- 26 Denise FARNSWORTH, Plaintiff, v. COVIDIEN, INC., Defendant., 2009 WL 4900210, *4900210 (Trial Motion, Memorandum and Affidavit) (E.D.Mo. Oct 28, 2009) **Reply in Response to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment** (NO. 408-CV-01689-ERW) ★ ★
- 27 REYNOLDS, v. CHESAPEAKE ENERGY CORPORATION., 2010 WL 2939209, *2939209+ (Trial Motion, Memorandum and Affidavit) (E.D.Tex. Jun 29, 2010) **Motion to Transfer Venue** (NO. 210CV00152) ★ ★ **HN: 3,22 (S.W.3d)**
- 28 DENNIS et al, v. CHESAPEAKE ENERGY CORP., 2010 WL 2939113, *2939113+ (Trial Motion, Memorandum and Affidavit) (E.D.Tex. Jun 01, 2010) **Motion to Transfer Venue** (NO.

210CV00095) ★ ★ ★ HN: 3,9,22 (S.W.3d)

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- 30 Tina TURNER, v. Brian OVEREEM, Wal-Mart Supercenter Store #462, Wal-Mart Stores Texas, L.P. and Wal-Mart Stores, Inc., 2010 WL 3423288, *3423288+ (Trial Motion, Memorandum and Affidavit) (S.D.Tex. Jun 08, 2010) **Plaintiff, Tina Turner's Opposed Motion for Remand and Memorandum in Support of Motion** (NO. 310-CV-00190) ★ ★ HN: 3,20 (S.W.3d)
- 31 THOMAS et al, v. UNION PACIFIC RAILROAD COMPANY., 2010 WL 2691890, *2691890+ (Trial Motion, Memorandum and Affidavit) (S.D.Tex. May 10, 2010) **Plaintiffs' Reply to Motion to Remand** (NO. 410CV00845) ★ ★
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- 35 Rosa E. GUAJARDO, v. WAL-MART STORES TEXAS, L.P. d/b/a Wal-Mart Store #3425 a/k/a Wal-Mart Associates, Inc. a/k/a Wal-Mart Stores East, Inc. a/k/a Wal-Mart Stores East, L.P., and Greg Garza, Individually., 2009 WL 5015843, *5015843 (Trial Motion, Memorandum and Affidavit) (S.D.Tex. Sep 23, 2009) **Response to Motion to Remand** (NO. 409-CV-02498) ★ ★ HN: 22 (S.W.3d)