

**IN THE SUPREME COURT OF THE STATE OF MICHIGAN
APPEAL FROM THE COURT OF APPEALS**

KIMBERLY CORL,
Personal Representative of the ESTATE Supreme Court Case No. _____
OF BRADLEY SCOTT CORL,
DECEASED, Court of Appeals Case No. 319004

Plaintiff-Appellee, Tuscola County Case No. 11-26733-NI
Hon. Amy Grace Gierhart

-vs-

RAILAMERICA, INC.,
AND HURON AND EASTERN
RAILWAY COMPANY, INC.,

Defendants-Appellants.

_____ /

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**APPLICATION FOR LEAVE TO APPEAL
OF DEFENDANTS-APPELLANTS RAILAMERICA, INC., AND
HURON & EASTERN RAILWAY COMPANY, INC.**

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STATEMENT OF JUDGMENT APPEALED FROM

Defendants seek leave to appeal a December 23, 2014, judgment of the Michigan Court of Appeals. The Court of Appeals held that a railroad has duty to create a clear vision area at a railroad crossing, which directly conflicts with the Court of Appeals' decision in *Paddock v. Tuscola & Saginaw Bay Ry. Co., Inc.*, 225 Mich App 526, 571 NW2d 564 (1997), and calls into substantial question the validity of MCL § 462.317 of the Railroad Code of 1993.

The Court of Appeals also held that a fact issue is created by witness testimony contradicted by incontrovertible physical facts, which directly conflicts with existing Michigan Supreme Court precedent, involves legal principles of major significance to the state's jurisprudence, was clearly erroneous, and will result in manifest injustice to the Defendants.

Defendants respectfully request that this Court grant leave to appeal and ultimately reverse the judgment of the Court of Appeals.

STATEMENT OF QUESTIONS INVOLVED

I. Whether the Court of Appeals' holding that a railroad has duty to create a clear vision area at a railroad crossing directly conflicts with the Court of Appeals' holding in *Paddock v. Tuscola & Saginaw Bay Ry. Co., Inc.*, 225 Mich App 526, 571 NW2d 564 (1997), and calls into substantial question the validity of MCL § 462.317 of the Railroad Code of 1993.?

Plaintiff-Appellee Answers: No

Defendants-Appellants Answer: Yes

The Court of Appeals Answer: No

II. Whether the Court of Appeals' holding that unsupported witness testimony creates a genuine issue of material fact by contradicted by incontrovertible physical facts directly conflicts with existing Michigan Supreme Court precedent, involves legal principles of major significance to the state's jurisprudence, was clearly erroneous, and will result in manifest injustice to the Defendants?

Plaintiff-Appellee Answers: No

Defendants-Appellants Answer: Yes

The Court of Appeals Answer: No

STATEMENT OF MATERIAL PROCEEDINGS

This case involves a September 29, 2009, motor vehicle accident between a truck driven by Plaintiff's decedent and a locomotive owned and operated by the Defendants at the Lobdell Road grade crossing in Mayville, Michigan. Plaintiff's decedent, Bradley Scott Corl, was a driver for Hoppes Lumber. While stopped in his truck at a railroad crossing and in full view of three eyewitnesses, Mr. Corl leaned over as if to pick something up off the floor of the truck. In doing so, he apparently took pressure off of the brake pedal and caused his vehicle to roll forward in front of an oncoming locomotive. He was fatally injured as a result of the collision.

Plaintiff brought suit against the Huron & Eastern Railway Company and its parent company, RailAmerica, Inc., alleging, among other things, that the Defendants were negligent for: (1) using only crossbucks at the crossing and failing to use a flagger or crossing watchperson to warn drivers of approaching locomotives; and (2) failing to create a clear vision area by removing vegetation that allegedly would have obstructed the view of the driver. Defendants moved for summary disposition on both claims and on the basis that there were no genuine issue of material fact with respect to causation. The Circuit Court denied the motion

Defendants then filed an Application for Leave to Appeal, which was granted. On appeal, the Court of Appeals reversed in part and affirmed and remanded in part for further proceedings consistent with its opinion. Specifically, the Court of Appeals reversed the Circuit Court by holding that a railroad has no duty to provide a flagger or crossing watchperson at a crossing absent an order by the appropriate road authority, and that such a duty is preempted by federal law in any event. But

the Court of Appeals affirmed the Circuit Court by holding that a railroad has a duty to create a clear vision at a crossing and that an expert witness's testimony that vegetation obstructions at a crossing caused the accident despite the only evidence being that the driver was not looking for the locomotive and despite photographs establishing that the vegetation did not obstruct the view of the locomotive or railroad tracks.¹ Defendants seek leave to appeal.

Review is necessary here because the Court of Appeals' holding that a railroad has duty to create a clear vision area at a railroad crossing directly conflicts with the Court of Appeals' decision in *Paddock v. Tuscola & Saginaw Bay Ry. Co., Inc.*, 225 Mich App 526, 571 NW2d 564 (1997), and calls into substantial question the validity of MCL § 462.317 of the Railroad Code of 1993. In addition, the Court of Appeals' holding that a genuine issue of material fact is created by witness testimony contradicted by incontrovertible physical facts directly conflicts with existing Michigan Supreme Court precedent, involves legal principles of major significance to the state's jurisprudence, was clearly erroneous, and will result in manifest injustice to the Defendants.

Accordingly, Defendants respectfully request that this Court grant their Application for Leave to Appeal and ultimately reverse the Court of Appeals' decision denying summary disposition.

¹ The opinions of the Circuit Court and Court of Appeals are attached in the Addendum to this brief.

STATEMENT OF FACTS

The accident occurred on September 29, 2009, at the Lobdell Road railroad crossing in Mayville, Michigan. A driver heading southbound on Lobdell Road, Mr. Corl's position at the time of the accident, would have encountered numerous warning devices and markings alerting him of the impending crossing. There was an advance railroad warning sign located approximately 550 feet north of the crossing as well as painted railroad pavement markings located approximately 540 feet north of the crossing. (Ex. A, Venturino Aff., p. HESR/Corl000441.)² Next, there was a "Yield Ahead" sign located approximately 368 feet north of the crossing. (Ex. A, Venturino Aff., p. HESR/Corl000442.) Even closer to the crossing, there were reflectorized crossbucks with yield signs located in the northwest and southeast quadrants of the Lobdell Road crossing, both of which were in good repair, as well as a stop bar painted on the roadway approximately 18 feet north of the nearest rail. (Ex. A, Venturino Aff., pp. HESR/Corl000442–0000446.) In short, there were ample warning signs and devices and there is no question Mr. Corl knew there was a live railroad crossing at Lobdell Road.

Mr. Corl was working for Hoppes Lumber driving a flat-bed truck at the time of the accident. Mr. Corl was familiar with the crossing as it was very near to his workplace and his job would have required him to drive over the crossing regularly. On the date of the accident, as Mr. Corl was driving south on Lobdell Road toward the crossing, Willis Johnson and his wife Loretta Johnson were traveling north on

² All exhibits were attached to Appellants' Brief in the Court of Appeals and to Defendants' Motion for Summary Disposition.

Lobdell Road toward the crossing. As a result of their position, the Johnsons witnessed the entire event.

As the Johnsons approached the crossing, they observed an eastbound locomotive on the tracks and heard its horn blowing. (Ex. B, W. Johnson Aff. ¶ 1; Ex. C, L. Johnson Aff. ¶ 1.) It is undisputed that the locomotive was traveling approximately 24–25 mph as it approached Lobdell Road, complying with the federally regulated speed restriction for that portion of railroad track. It is further undisputed that the locomotive horn began sounding approximately 15 seconds prior to reaching the crossing, complying with the federal regulation governing locomotive horn use at crossings. (See Ex. D, Peterson Aff. ¶ 1.)

The Johnsons also observed Mr. Corl's flatbed truck approaching the crossing from the opposite side. (Ex. B, W. Johnson Aff. ¶ 2; Ex. C, L. Johnson Aff. ¶ 2.) Mr. Johnson stopped his vehicle on the south side of the crossing and flashed his headlights at Mr. Corl to help alert him to the approaching locomotive. (Ex. B, W. Johnson Aff. ¶ 3; Ex. C, L. Johnson Aff. ¶ 3.) Mr. Corl then came to a complete stop short of the tracks on the north side of the crossing. (Ex. B, W. Johnson Aff. ¶ 4; Ex. C, L. Johnson Aff. ¶ 4.)

After watching Mr. Corl bring his vehicle to a complete stop at the crossing, the Johnsons watched Mr. Corl bend down toward the floor to his right as if to pick something up from the floor of the truck. (Ex. B, W. Johnson Aff. ¶ 4; Ex. C, L. Johnson Aff. ¶ 4.) Mr. Corl's head was below the dashboard and not visible to the Johnsons. (Ex. B, W. Johnson Aff. ¶ 4; Ex. C, L. Johnson Aff. ¶ 4.) The Johnsons

then watched Mr. Corl's truck—with Mr. Corl still bending down in the seat with his head below the dashboard—roll onto the tracks in front of the locomotive just as the locomotive reached the crossing. (Ex. B, W. Johnson Aff. ¶ 5; Ex. C, L. Johnson Aff. ¶ 5.) The locomotive struck the truck on the passenger side. (Ex. B, W. Johnson Aff. ¶ 5; Ex. C, L. Johnson Aff. ¶ 5.)

The incident was also witnessed by Russell Page, who was the engineer operating the locomotive. Page was seated on the left side of the locomotive sounding the horn. (Ex. E, Page Dep. 11:11–12:17.) From his vantage point, he could see Mr. Corl's truck stopped at the crossing as he approached. (Ex. E, Page Dep. 12:18–13:9.) Consistent with the testimony of the Johnsons, Page saw Mr. Corl bending down inside the cab of the truck “like he was getting something off the floor,” causing the truck to roll forward. (Ex. E, Page Dep. 13:23–14:8.) The truck rolled all the way onto the tracks just as the locomotive was reaching the crossing, causing the collision. (Ex. E, Page Dep. 13:23–14:8.)

In short, three eyewitnesses confirm Mr. Corl made a complete stop for the approaching locomotive and, after doing so, was bending down inside the cab of his truck, not looking for the locomotive, and apparently not intending to roll forward onto the railroad tracks. There is no evidence that contradicts the accounts of these eyewitnesses.

Irrespective of that fact, there was no vegetation that would have prevented Mr. Corl from seeing the approaching slow-moving locomotive. In fact, just a few weeks prior to the accident, on September 2 and 3, 2009, railroad employees Larry

Maurer and Dan Hodges cut and removed brush and vegetation from all four quadrants of the Lobdell Road crossing to maintain the view for drivers stopped at the crossing. (Ex. F, Maurer Dep. 11:5–11:18; Ex. G, Hodges Dep. 6:13–12:9.)

Indeed, photographs of the crossing conclusively prove that a southbound driver such as Mr. Corl would have had a clear view of an approaching train from at least 20 to 25 feet from the crossing. Additionally, several photographs were taken from a Hoppes Lumber truck, similar to the one Mr. Corl was driving on the date of the accident, and show a clear view of the tracks. (Ex. A, Venturino Aff., pp. HESR/Corl000460-000463.) Other photographs show the actual locomotive involved in the collision, running long-nose forward just as it was at the time of the collision. (Ex. H, Greiger Aff., Exs. A-1 through A-13, attached.) When Mr. Corl stopped at the crossing, the locomotive was less than 555 feet from the crossing. As shown in the photographs, the locomotive is clearly visible for at least 1300 feet, and even more so when it is within 555 feet of the crossing.³ (Ex. H, Greiger Aff., Exs. A-10 through A-13.) Consequently, Mr. Corl would not have had to look far to see the locomotive; it was close and moving closer when he first arrived at the crossing. The photographs conclusively show that the view of the locomotive was not obstructed.

³ At the time of, and just prior to, the accident, the locomotive was traveling 24–25 mph on approach to the crossing, or approximately 36–37 feet per second. The horn was sounded approximately 15 seconds prior to the collision. The Johnsons stopped in response to the horn, and before Mr. Corl stopped. Thus, the locomotive had to have been less than 15 seconds away from the crossing when Mr. Corl stopped at the crossing. In other words, the locomotive was closer (probably much closer) than 555 feet (15 seconds x 37 feet per second) from Mr. Corl when he first stopped at the crossing and the locomotive was moving toward him at a constant rate.

ARGUMENT

This Court should grant Defendants' Application for Leave to Appeal pursuant to MCR 7.302(B)(1), (2), (3), and (5). The Court of Appeals decision directly conflicts with an existing Court of Appeals decision, directly conflicts with existing Michigan Supreme Court precedent, involves legal principles of major significance to the state's jurisprudence, was clearly erroneous, and will result in manifest injustice to the Defendants. Accordingly, Defendants respectfully request that this Court grant leave to appeal and ultimately reverse the judgment of the Court of Appeals.

- I. **The Court of Appeals' decision in this matter directly conflicts with the Court of Appeals' decision in *Paddock v. Tuscola & Saginaw Bay Ry. Co., Inc.*, 225 Mich App 526, 571 NW2d 564 (1997), and calls into substantial question the validity of MCL § 462.317 of the Railroad Code of 1993.**

Under MCR 7.215(C)(2), "a published opinion of the Court of Appeals has precedential effect under the rule of stare decisis." Nevertheless, here, the Court of Appeals failed to follow its prior holding in *Paddock*. Consequently, the decisions in this case and *Paddock* cannot be squared.

With the enactment of the Railroad Code of 1993, Michigan law placed responsibility with the relevant road authority to determine whether a "clear vision area" is needed at a railroad crossing. *Paddock v. Tuscola & Saginaw Bay Ry. Co., Inc.*, 225 Mich App 526, 534, 571 N.2d 564 (1997). If so, "the acquisition of right-of-way, purchase and removal of obstructions within a clear vision area, including buildings and other artificial construction, trees, brush, and other growths, and

grading or earthwork, and including the maintenance of such conditions, shall be at the equal cost and expense of the railroad and the road authority.” MCL § 462.317.

In *Paddock*, the plaintiff sued the railroad claiming “vegetation at the accident site obstructed the view” of motorists such that the railroad was negligent for failing to clear the obstructing vegetation. *Id.* at 529-30. The Circuit Court granted summary disposition and the plaintiff appealed, arguing that even if the railroad had no duty to remove vegetation or create a clear vision area, it had a duty to petition the road authority to create a clear vision area. *Id.* at 531.

The *Paddock* court held that, “Under the plain language of this statute, it is the responsibility of the road authority—not the railroad—to determine the need for a clear vision area.” *Paddock*, 225 Mich App at 534. Citing *Turner*’s holding that “where a railroad has no duty to do a certain act, it also has no duty to petition for someone else to do the act,” the *Paddock* court held that the railroad had no duty to request that a clear vision area be created. *Id.* Thus, the *Paddock* court clearly held determined that pursuant to MCL § 462.317 the railroad has no duty to remove vegetation and create a clear vision area; that duty is the road authority’s. It is undisputed that the road authority never ordered a clear vision area at this crossing and had found no obstructions during its most recent inspection of the crossing.

Inexplicably, the Court of Appeals characterized this case as “defendants essentially ask[ing] this Court to extend the holding in *Paddock* to state that a railroad has no duty to create a clear vision area” and distinguished *Paddock* by artificially limiting it to the duty to petition the road authority to create a clear

vision area. But as shown above, this is clearly wrong. A holding that it is the road authority's responsibility to determine a need for a clear vision area and not the railroad's would not have been an extension of the holding in *Paddock*, rather it was precisely the holding in *Paddock*.

Such an interpretation renders *Paddock* meaningless. If the railroad had a duty to create a clear vision area in the first instance, then there would have been no need for the plaintiff to argue, or for the *Paddock* court to consider, the duty to petition the road authority to act. Moreover, the decision ignores the *Paddock* court's stated basis for the holding, i.e., that there is no duty to petition because there is no duty to act.

There is now a plain conflict between one Court of Appeals decision holding it is not the railroad's duty to create clear vision area at a crossing, and another holding the railroad has such a duty. Both cannot be correct. If left to stand, the Court of Appeals has rendered the statute a nullity and created a direct conflict with *Paddock*. This conflict must be resolved.⁴

Further, the Court of Appeals has called into question the validity of MCL § 462.317, which, until now, has never been understood to mean anything other than it is the duty of the road authority, not the railroad, to determine the need for a clear vision area. Plaintiff's common law claims with respect to vegetation were clearly displaced by statute. The "paramount rule of statutory interpretation is that

⁴The decision here also conflicts with federal case law. See *Smith v. Norfolk S. Co.*, No. 14-CV-10426, 2014 WL 2615278, at *2 (E.D. Mich. June 12, 2014) ("it is the City, as the applicable 'road authority,' that Michigan law tasks with determining if a 'clear vision area' needs to be established at a 'particular crossing' so that motorists can safely observe the tracks and surrounding areas.")

we are to effect the intent of the Legislature,” and that if “the statute’s language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written.” *Wickens v. Oakwood Healthcare System*, 465 Mich 53, 60, 631 NW2d 686 (2001).

“It is axiomatic that the Legislature has the authority to abrogate the common law” and “if a statutory provision and the common law conflict, the common law must yield.” *Trentadue v. Gorton*, 738 NW2d 664 (2007), citing *Hoerstman Gen. Contracting, Inc. v. Hahn*, 474 Mich 66, 74, 711 NW2d 340 (2006) and *Pulver v. Dundee Cement Co.*, 445 Mich 68, 75 n. 8, 515 NW2d 728 (1994). “In general, where comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with the subject matter.” *Id.* (citations omitted.)

There is simply no question what the Legislature intended with respect to § 462.317 and the Railroad Code of 1993. It was comprehensive legislation “to revise, consolidate, and codify the laws relating to railroads” and “to prescribe powers and duties of certain state and local agencies and officials.” Railroad Code of 1993, 1993 Mich. Legis. Serv. P.A. 354 (S.B. 646). Consistent with the purpose and intent of the Railroad Code of 1993, “[u]nder the plain language of the statute,” the Legislature clearly prescribed that “the duty to consider corrective actions at a railroad crossing

lies with the governmental entity with jurisdiction over the roadway, and not with the railroad.” *Paddock* at 534.

It bears noting that neither Plaintiff nor the Court of Appeals could find a single case decided after the 1994 enactment of MCL § 462.317 suggesting that a railroad has some surviving common law duty to determine the need for clear vision areas at railroad crossings.

Because the Court of Appeals’ decision in this matter directly conflicts with its decision in *Paddock*, and calls into substantial question the validity of MCL § 462.317 of the Railroad Code of 1993, Defendants respectfully request that its Application for Leave be granted.

II. The Court of Appeals’ decision in this case directly conflict with Michigan Supreme Court precedent and whether Michigan continues to follow the “physical facts rule” has major significance to Michigan tort law and criminal law.

This Court has long recognized that testimony of a witness positively contradicted by physical facts cannot be given probative value:

When, however, the case is not one in which the sole source of information for the jury is disputed and conflicting testimony, but added thereto are undisputed physical facts permitting of but one conclusion, utterly inconsistent with and flatly contradictory to plaintiff’s theory of the case, these may not be disregarded and credence be given only to the inconsistent, disputed testimony which is most favorable to plaintiff in determining the rights of the parties as a matter of law. Plaintiff has no constitutional right to have a determination of facts by a jury inconsistent with the undisputed physical facts of the case. On the contrary, such facts overcome testimony inconsistent therewith and are controlling of decision, leaving a jury determination

with respect to facts established by the undisputed physical facts unnecessary.

Van Gilder v. C. & E. Trucking Corp., 352 Mich 672, 675-76, 90 NW2d 828, 831 (1958); *Kok v. Lattin*, 261 Mich 362, 246 NW 149 (1933) (“[Driver’s] testimony in this respect is contrary to the physical facts. As his view was unobstructed and the defendant’s car was there in plain sight, it must be held that he did not look. If he had looked, he would have seen what was there to be seen”); *People v. Lemmon*, 456 Mich 625, 643-44, 576 NW2d 129, 137 (1998) (new trial appropriate “if the ‘testimony contradicts indisputable physical facts or laws,’ id., ‘[w]here testimony is patently incredible or defies physical realities.’”) This rule is commonly referred to as the “physical facts rule.” C. Wright & A. Miller, 9B Fed. Prac. & Proc. Civ. § 2527 (3d ed.); 29A Am. Jur. 2d Evidence § 1376.

This has been particularly true in cases such as this, where the physical characteristics of a railroad crossing prove the absence of obstructions to the driver’s view. *Champaign v. Detroit United Railway*, 181 Mich 672, 148 NW 201 (1914) (no issue for jury where physical facts show driver could have seen street car); *Molby v. Detroit United Ry.*, 221 Mich 419, 191 NW 29 (1922) (“undisputed physical facts established by plaintiff’s testimony demonstrate that, had plaintiff looked with the slightest degree of care, he could not have failed to see the approaching car or train”); *Downey v. Pere Marquette Ry. Co.*, 230 Mich 243, 202 NW 927 (1925); (“testimony that [driver] did look and did not see the locomotive is so opposed to the undisputed physical facts that it cannot be said to raise a question for a jury”); *Thomas v. New York Central R. Co.*, 267 Mich 396, 255 NW 214 (1934)

(“The presumption [of due care attending an accident to which no eyewitnesses survive] obtains unless the physical facts demonstrate that decedent failed to look for trains when she should have looked, failed to see what she should have seen, or, having seen what a reasonably prudent person would have seen, failed to act upon it with due care.”)

Here, in contradiction of the physical facts rule, the Court of Appeals held that an expert’s opinion testimony that is not only unsupported by any evidence, but positively contradicted by physical facts, can nonetheless create an issue of fact sufficient to defeat a summary disposition motion. It is undisputed that Plaintiff had already stopped at the crossing and was bending down inside the truck when the collision occurred. There is no evidence as that Mr. Corl was looking for the locomotive as surmised by plaintiff’s expert.

To the contrary, as set forth above, there were three—and only three—eyewitnesses to the driver’s action before and through the collision. All three testified that the driver stopped his vehicle, then bent over inside the cab of his truck as if he was picking something up off of the floor. Regardless of what he was doing, all three testified that the driver was not looking for the locomotive or in the direction of the locomotive after the driver stopped or at any time leading up to the collision. Instead, according to all three witnesses, the driver’s head was facing down and below the dashboard of the truck. In short, everybody who saw him agrees he was not looking for, or in the direction of, the oncoming locomotive.

The Court of Appeals expressly acknowledged these facts:

Review of the evidence shows that plaintiff's decedent came to a complete stop at the stop bar before the railroad tracks. A motorist stopped on the other side of the tracks flashed his lights at decedent to alert him to the approaching train. The motorist, the motorist's passenger, and the engineer conductor on the train all stated that decedent leaned toward the passenger side of the vehicle, and was still leaning when his vehicle moved onto the tracks. They stated that it appeared as if decedent was trying to pick something up from the floor. The engineer conductor expressly said that it did not appear as if plaintiff's decedent was trying to look down the track. He also clarified that he was about a hundred feet away when he saw decedent leaning toward the passenger side of the vehicle as if to pick something up from the floor. He said he did not see decedent's face.

Estate of Corl ex rel. Corl v. Huron & E. Ry., No. 319004, 2014 WL 7338915, at *4 (Mich. Ct. App. Dec. 23, 2014).

In addition, even had he looked, there was no vegetation that would have prevented the driver from seeing the slow-moving locomotive. Defendants presented photographs of the crossing that conclusively proved there was nothing obstructing the view of the tracks or the locomotive. As indicated above, just a few weeks prior to the accident, on September 2 and 3, 2009, railroad employees Larry Maurer and Dan Hodges cut and removed brush and vegetation from all four quadrants of the Lobdell Road crossing to maintain the view for drivers stopped at the crossing. (Ex. F, Maurer Dep. 11:5–11:18; Ex. G, Hodges Dep. 6:13–12:9.)

Moreover, the locomotive was quite close to the crossing when Mr. Corl stopped his truck. At the time of, and just prior to, the accident, the locomotive was traveling 24–25 mph on approach to the crossing, or approximately 36–37 feet per second. As set forth above, the horn was sounded approximately 15 seconds prior to

the collision. The Johnsons stopped in response to the horn, and before Mr. Corl stopped. Thus, the locomotive had to have been less than 15 seconds away from the crossing when Mr. Corl stopped at the crossing. In other words, the locomotive was closer (probably much closer) than 555 feet (15 seconds x 37 feet per second) from Mr. Corl when he first stopped at the crossing and the locomotive was moving toward him at a constant rate. The photographs show an unobstructed view from at least 555 feet away and for much farther. Again, the Court of Appeals expressly acknowledged these facts:

Photographs submitted by defendants show that a train was visible through the vegetation when 1300 feet from the crossing, and that at a distance of 100 feet — which is the distance the engineer conductor asserted he was from decedent when decedent leaned over — the train is undeniably visible through the vegetation. Further, additional photographs submitted by defendants show that the tracks are visible for some distance, in spite of the vegetation on the side of the road. The photographs also show the view from a truck similar to plaintiff's decedent's; the view shows that the tracks are visible for some distance.

Estate of Corl, 2014 WL 7338915, at *4.

Thus, as found by the Court of Appeals, the only evidence is that the driver had already stopped, was not looking for, or in the direction of, the locomotive and, even if he had, the locomotive would have been visible. With those being the only facts, Defendants should have been granted summary disposition. After all, if the driver was not looking for a train, and his view would not have been obstructed had he looked, then there is no basis for Plaintiff's claim that the accident was caused by vegetation obstructing the driver's view of the locomotive. The witnesses prove Mr.

Corl was not looking for the locomotive; the photographs necessarily and conclusively prove there was no vegetation obstructing his view had he been looking.

Despite that being the only evidence, the Court of Appeal nonetheless concluded that “there was a factual dispute as to whether the vegetation was a proximate cause of the accident” based solely upon plaintiff’s expert’s affidavit in which he “opined that the ‘grade crossing was unduly hazardous due to sight obstructions created by both foliage and the severe angle of the intersection of the railroad track and Lobdell Road,’ and that the ‘collision . . . was caused by the aforementioned sight obstructions.’” *Estate of Corl*, 2014 WL 7338915, at *4.

Contra the Court’s final conclusion, there is no “factual dispute as to whether the vegetation was a proximate cause of the accident.” As the Court conceded, the photographs showed no obstructions. If there were no obstructions, then the accident could not have been caused by obstructions (this also disregards the fact that the only evidence was that the driver had already stopped and was not looking for the locomotive at the time of the accident.)

By reaching that conclusion, the Court of Appeals has held that unsupported opinion testimony can create an issue of material fact even where positively contradicted by undeniable physical facts. This is contrary to Michigan case law both civil and criminal. This Court should grant leave to clarify and confirm the longstanding rule that witness testimony contradicted by physical facts cannot be given probative value. That is especially true in this case where courts

have repeatedly upheld that rule when faced with testimony from plaintiff's expert, Dr. Berg. *Van Buren v. Burlington N. Santa Fe Ry. Co.*, 544 F Supp 2d 867, 879 (D. Neb. 2008) (Opinion of Dr. Berg "does not create a question of fact in light of the . . . photographs clearly indicating an unobstructed view at the time in question"); *Wooten v. CSX RR.*, 2005-Ohio-6252, 164 Ohio App 3d 428, 441-42; 842 NE2d 603, 614 (Dr. Berg's affidavit regarding obstructions at the crossing not sufficient to create issue of fact in light of photographs); *Bickley v. Norfolk & W. Ry. Co.*, 60 F Supp 2d 732, 736 (N.D. Ohio 1998) *aff'd*, 187 F3d 634 (6th Cir. 1999) (Dr. Berg's opinions regarding obstructions at crossing insufficient to create issue of fact "especially in light of the photographs and affidavits submitted by defendant.")

The photographs conclusively show that the view of the locomotive was not obstructed for a driver who stopped and actually looked. Those physical facts establish that Mr. Corl failed to look. There is no evidence that Mr. Corl leaned down toward the floor of his truck and rolled his vehicle into the path of the locomotive because vegetation obstructed his view and prevented him from determining whether a locomotive was approaching. The uncontested eyewitness testimony and photographs establish that Mr. Corl stopped at the crossing and was not looking for a locomotive. Obviously, if he was not looking for a locomotive, then it cannot be said that vegetation prevented him from seeing the locomotive. In any event, had he been looking, there was no vegetation obstructing his view of the locomotive. Therefore, there is no basis for any claim that vegetation somehow caused Mr. Corl to enter the crossing.

The Court of Appeals decision directly conflicts with longstanding Michigan Supreme Court precedent. As such, the decision was clearly erroneous, will result in manifest injustice, and, unless reversed, could have major significance in Michigan jurisprudence.

RELIEF REQUESTED

For the reasons set forth above, Defendants respectfully request that this Court grant their Application for Leave to Appeal.

Respectfully Submitted,

s/James R. Carnes

James R. Carnes (P60312)

Shumaker, Loop & Kendrick, LLP

Attorneys for Defendants-Appellants

ADDENDUM

Michigan Compiled Laws Annotated
Chapter 257. Motor Vehicles
Michigan Vehicle Code (Refs & Annos)
Chapter VI. Obedience to and Effect of Traffic Laws (Refs & Annos)
Special Stops Required

M.C.L.A. 257.668

257.668. Railroad grade crossings; stop and yield signs; erection; obedience by drivers; failure to replace or maintain; action of negligence

Sec. 668. (1) The state transportation department with respect to highways under its jurisdiction, the county road commissions, and local authorities with reference to highways under their jurisdiction, may designate certain grade crossings of railways by highways as "stop" crossings, and erect signs at the crossings notifying drivers of vehicles upon the highway to come to a complete stop before crossing the railway tracks. When a crossing is so designated and signposted, the driver of a vehicle shall stop not more than 50 feet but not less than 15 feet from the railway tracks. The driver shall then traverse the crossing when it may be done in safety.

(2) The state transportation department with respect to highways under its jurisdiction, the county road commissions, and local authorities with reference to highways under their jurisdiction, may designate certain grade crossings of railways by highways as yield crossings, and erect signs at the crossings notifying drivers of vehicles upon the highway to yield. Yield signs may be mounted on the same post as is the crossbuck sign. Drivers of vehicles approaching a yield sign at the grade crossing of a railway shall maintain a reasonable speed based upon existing conditions and shall yield the right-of-way. The cost of yield sign installations shall be borne equally by the railroad and the governmental authority under whose jurisdiction the highway rests. The erection of or failure to erect, replace, or maintain a stop or yield sign or other railroad warning device, unless such devices or signs were ordered by public authority, shall not be a basis for an action of negligence against the state transportation department, county road commissions, the railroads, or local authorities.

(3) A person who fails to stop or yield as required by this section is responsible for a civil infraction.

Michigan Compiled Laws Annotated
Chapter 462. Railroads
Railroad Code of 1993 (Refs & Annos)

M.C.L.A. 462.105

462.105. Definitions; terms commencing "a" to "g"

Sec. 105. (1) "Active traffic control devices" means those traffic control devices located at or in advance of grade crossings, activated by the approach or presence of a train, such as flashing light signals, automatic gates and similar devices, manually operated devices, and a crossing watchperson, all of which display to operators of approaching vehicles positive warning of the approach or presence of a train.

(2) "Alcoholic liquor" means that term as defined in section 105 of the Michigan liquor control code, 1998 PA 58, MCL 436.1105.

(3) "Bridge" means a structure including supports erected over a depression or an obstruction, such as water, a highway, or a railway, having a track or passageway for carrying traffic or other moving loads, and having an opening measured along the center of the roadway of more than 20 feet between undercopings of abutments or spring lines of arches, or extreme ends of openings for multiple boxes where the clear distance between openings is less than half of the smaller contiguous opening.

(4) "Bridge carrying railroad traffic" means any bridge carrying a railroad track on which locomotives, railroad cars, or railroad maintenance machinery may be operated or moved. Bridge carrying railroad traffic includes unloading pits, turntables, and ferry aprons which meet the physical criteria for the definition of a bridge.

(5) "Department" means the Michigan department of transportation.

(6) "Diagnostic study team" means a group of knowledgeable individuals from the department, road authorities, railroads, and others who meet and, using crossing safety management principles, evaluate conditions at proposed or existing crossings and assist the department in making determinations concerning safety needs.

(7) "Flagger" means a person, other than a railroad employee, clearly visible to approaching traffic at all times, who controls highway traffic through work areas using a hand-held paddle sign during daylight hours and approved lights and reflectorized paddle signs at night.

(8) "Grade crossing" means the point at which any railroad intersects with any public street or highway, or a nonmotorized trail.

(9) "Grade separation" means an intersection of a railroad and a highway at different levels with either the railroad above or below the highway.

Michigan Compiled Laws Annotated
Chapter 462. Railroads
Railroad Code of 1993 (Refs & Annos)

M.C.L.A. 462.109

462.109. Definitions; terms commencing "r" to "w"

Effective: January 12, 2009

Sec. 109. (1) "Railroad" means a person, partnership, association, or corporation, their respective lessees, trustees, or receivers, appointed by a court, or other legal entity operating in this state either as a common carrier for hire or for private use as a carrier of persons or property upon cars operated upon stationary rails and includes any person, partnership, association, corporation, trustee, or receiver appointed by a court or any other legal entity owning railroad tracks.

(2) "Road authority" means a governmental agency having jurisdiction over public streets and highways. Road authority includes the department, any other state agency, and county, city, and village governmental agencies responsible for the construction, repair, and maintenance of streets and highways.

(3) "Serious impairment of a body function" means that term as defined in section 58c of the Michigan vehicle code, 1949 PA 300, MCL 257.58c.

(4) "Street railway" means an organization formed under the laws of this state for the purpose of operating a street railway system other than a railroad train for transporting persons or property. A street railway system is operated upon rails principally within a municipality utilizing streetcars, trolleys, and trams for the transportation of persons or property. Such organizations may accumulate, store, manufacture, conduct, use, sell, furnish, and supply electricity and electric power. Street railway does not include a street railway organized under the nonprofit street railway act, 1867 PA 35, MCL 472.1 to 472.31.

(5) "Street railway system" means the facilities, equipment, and personnel required to provide and maintain a public transportation service. Street railway system does not include a street railway system under the nonprofit street railway act, 1867 PA 35, MCL 472.1 to 472.31.

(6) "Traffic control device" means a sign, signal, marking, or other device placed on or adjacent to a street or highway by the road authority having jurisdiction over that street or highway to regulate, warn, or guide traffic.

(7) "Watchperson" means a railroad employee who is stationed at an at-grade crossing to signal to operators of vehicles approaching the crossing of the impending movement of a train or other railroad on-track equipment over the crossing.

Michigan Compiled Laws Annotated
Chapter 462. Railroads
Railroad Code of 1993 (Refs & Annos)

M.C.L.A. 462.315

462.315. Active traffic control devices

Effective: December 21, 2012

Sec. 315. (1) The department, by order, in accordance with section 301,¹ may prescribe active traffic control devices to warn of the approach of trains about to cross a street or highway at public railroad grade crossings consisting of signals with signs, circuitry, or crossing gates and other appurtenances as depicted in the Michigan manual of uniform traffic control devices. A determination shall detail the number, type, and location of signals with signs, circuitry, or gates and appurtenances, which, however, shall conform as closely as possible with generally recognized national standards.

(2) Except as otherwise provided for in this act, the cost of any installation, alteration, or modernization of active traffic control devices shall be at equal expense of the railroad and road authority.

(3) After initial installation, all active traffic control devices, circuitry, and appurtenances at crossings shall be maintained, enhanced, renewed, and replaced by the railroad at its own expense, except that the road authority shall pay \$1,271.00 for flashing signals on a single track, \$1,978.00 for flashing signals and gates on a single track, \$1,481.00 for flashing signals with cantilever arm on a single track, \$2,389.00 for flashing signals with cantilever arm with gates on a single track, \$2,257.00 for flashing signals and gates on multiple tracks, \$2,398.00 for flashing signals with cantilever arms and gates on a multiple track, \$1,269.00 for flashing signals on a multiple track, and \$1,375.00 for flashing signals with cantilever arms on a multiple track annually for maintenance to the railroad for each crossing with active traffic control devices not covered by existing or future railroad-road authority agreements. The railroad shall furnish standard equipment uniform for all railroads at a cost and installation basis consistent for all railroads. By January 1, 2010 and every 10 years after 2010, the department shall complete a study to determine the cost of maintenance of active traffic control devices and shall forward a copy of the study to the members of the house and senate committees that consider railroad legislation. The department shall consult with the railroad and the local road authority representatives when completing the study to determine the cost of maintenance of active traffic control devices.

(4) Standard active railroad-highway traffic control devices consisting of side of street flashing light signals with or without half-roadway gates and cantilevers shall include the railroad crossing (crossbuck) sign, "stop on red signal" sign, and number of tracks sign located, designed, and maintained on the signal support as prescribed by the Michigan manual of uniform traffic control devices. The railroad shall perform actual installation and maintenance of these signs. The railroad shall also install, renew, and maintain any signs placed on cantilevered signal supports. Whenever active traffic control devices are installed at any crossing, they shall be so arranged that for every train or switching movement over the grade crossing, the active traffic control device shall be in operation for a period of not less than 20 seconds or more than 60 seconds in advance of the train movement reaching the nearest established curb line or highway shoulder and the devices shall continue to operate until the train movement has passed the established curb line or shoulder on the far side of the highway.

(5) The department may order a railroad, at the railroad's expense, to stop and flag a crossing for normal train service or when active traffic control devices may become inoperable.

Michigan Compiled Laws Annotated
Chapter 462. Railroads
Railroad Code of 1993 (Refs & Annos)

M.C.L.A. 462.317

462.317. Establishment of clear vision areas at grade crossings

Sec. 317. (1) If a road authority determines to establish a clear vision area as described in this section, the railroad and a road authority may agree in writing for clear vision areas with respect to a particular crossing. The portions of the right-of-way and property owned and controlled by the respective parties within an area to be provided for clear vision shall be considered as dedicated to the joint usage of both railroad and road authority.

(2) The acquisition of right-of-way, purchase and removal of obstructions within a clear vision area, including buildings and other artificial constructions, trees, brush, and other growths, and grading or earthwork, and including the maintenance of such conditions, shall be at the equal cost and expense of the railroad and road authority.

(3) For public, farm, bicycle, pedestrian, or other private crossings of the railroad tracks of a high speed rail corridor, state, federal, and other funds may be expended in accordance with section 301(4)¹ for construction of access roads, purchase of real estate, purchase of private crossing easements, compensation for crossing closure, utility relocation, costs associated with improvements to traffic control devices, grade crossing closures, relocations, consolidations, and separations.

STATE OF MICHIGAN
COURT OF APPEALS

ESTATE OF BRADLEY CORL, by Kimberly
Corl, Personal Representative,

UNPUBLISHED
December 23, 2014

Plaintiff-Appellee,

v

No. 319004
Tuscola Circuit Court
LC No. 11-026733-NI

HURON & EASTERN RAILWAY and
RAILAMERICA, INC.,

Defendants-Appellants.

Before: O'CONNELL, P.J., and BORRELLO and GLEICHER, JJ.

PER CURIAM.

Defendants, Huron & Eastern Railway and RailAmerica, Inc., appeal by leave granted the trial court's order denying defendants' motion to dismiss plaintiff's claims pursuant to MCR 2.116(C)(10). We affirm in part and reverse and remand in part.

I. SUMMARY OF FACTS AND PROCEDURAL BACKGROUND

Plaintiff's decedent was killed when his truck was stuck by a train at a grade crossing on Lobdell Road in Mayville, Michigan. The crossing was marked by railroad warning signs, yield signs, and painted railroad pavement markings, as well as reflectorized crossbucks near the crossing. Moreover, it was undisputed that the train properly sounded its whistle as it approached the crossing and was traveling 25 miles per hour, in accord with federal train speed regulations. According to three eyewitnesses, decedent, who was driving southbound on Lobdell Road, came to a complete stop before the railroad tracks. He then leaned toward the passenger side of the vehicle as if he were going to pick something up from the floor. While he was bent over, the vehicle rolled onto the railroad tracks and was struck by the train. Decedent died as a result of his injuries.

In a five-count complaint, plaintiff alleged that defendants provided an inadequate warning device for the crossing, failed to provide a reasonably safe grade crossing, failed to clear obstructing vegetation, failed to warn, and that the train traveled at excessive speed. The parties stipulated to the dismissal of the last two counts, and defendants moved for summary disposition under MCR 2.116(C)(10) as to the remaining claims. At issue on appeal is the trial court's decision to deny defendants' motion for summary disposition as to plaintiff's claims that defendants breached their common law duty to maintain a safe grade crossing, when defendants

failed to deploy a flagman at the crossing, and failed to create a clear vision area by removing obstructive vegetation. The trial court also denied defendants' motion for summary disposition on the issue of proximate cause.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). In reviewing a motion for summary disposition under MCR 2.116(C)(10), a court considers "affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Greene v A P Prods, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006) (internal quotations and citations omitted). The motion for summary disposition "tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011). "There is a genuine issue regarding any material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). The court may not make factual findings on disputed factual issues during a motion for summary disposition and may not make credibility determinations. *Burkhardt v Bailey*, 260 Mich App 636, 647; 680 NW2d 453 (2004). The interpretation of a statute is a question of law that this Court reviews de novo. *Id.*

III. DUTY TO DEPLOY A FLAGMAN

The first question is whether defendants had a duty to deploy a flagman at Lobdell crossing. Defendants contend that they had no duty to deploy a flagman because MCL 257.668(2) precludes negligence claims based on a railroad's failure to deploy a flagman unless ordered to deploy one by public authority and because plaintiff's claim is preempted by federal law. We agree.

MCL 257.668(2) provides in pertinent part:

The erection of or failure to erect, replace, or maintain a stop or yield sign or other railroad warning device, unless such devices or signs were ordered by public authority, shall not be a basis for an action of negligence against the state transportation department, county road commission, the railroads, or local authorities.

This Court has previously held that "in enacting [MCL 257.668(2)], the Legislature intended that no liability was to be premised upon the absence of warning devices at a railroad crossing absent an order by the proper authority to install devices and a failure to follow that order." *Turner v CSC Transp, Inc.*, 198 Mich App 254, 257; 497 NW2d 571 (1993). Accordingly, under MCL 257.668(2), "the duty to determine the appropriate warning devices to be installed at railroad crossings lies with the appropriate governmental entity with jurisdiction over the roadway, not with the railroad." *Turner*, 198 Mich App at 257. Consequently, if a flagman is included in the definition of "railroad warning device" and was not ordered by the public authority, defendants cannot be held liable for failing to deploy a flagman.

The phrase “railroad warning device” is not defined in MCL 257.668. However, the similar phrase “active traffic control device” is defined in the Michigan Railroad Code of 1993, MCL 462.101 *et seq.* MCL 462.105(1) provides:

“Active traffic control devices” means those traffic control devices located at or in advance of grade crossings, activated by the approach or presence of a train, such as flashing light signals, automatic gates and similar devices, *manually operated devices, and a crossing watchperson*, all of which display to operators of approaching vehicles positive warning of the approach or presence of a train [(emphasis added).]

The definition in MCL 462.105(1) is instructive because it shows that the Legislature intended the term “device” to include people, in addition to signs and other inanimate warning devices. Further, it is appropriate to read MCL 257.668 and MCL 462.105 *in pari materia* because, even though they contain no reference to one another, they relate to the same subject. *Titan Ins Co v State Farm Mut Auto Ins*, 296 Mich App 75, 84; 817 NW2d 621 (2012). Accordingly, we conclude that a flagman is a “railroad warning device” within the meaning of MCL 257.668(2), and defendants are not subject to liability based upon the absence of a flagman because the proper authority did not give an order requiring deployment of a flagman. See *Turner*, 198 Mich App at 257.

In addition, pursuant to *Paddock v Tuscola & Saginaw Bay R Co, Inc*, 225 Mich App 526, 530; 571 NW2d 564 (1997), plaintiff’s claim that defendants should have deployed a flagman is preempted by federal law. In *Paddock*, the plaintiff’s decedent was killed at a grade crossing that plaintiff alleged was extra hazardous. *Id.* at 529. Among other claims, the plaintiff alleged that because of the hazardous nature of the crossing, the defendant railroad had a duty to stop its train and deploy a flagman to warn motorists of the train’s presence. *Id.* at 530. This Court disagreed, reasoning that the plaintiff’s claim was preempted by federal law because “the United States Supreme Court held that state-law tort claims based on train speed are preempted by federal law.” *Id.* (citing *CSX Transp, Inc v Easterwood*, 507 US 658; 113 S Ct 1732; 123 L Ed 2d 387 (1993)). Specifically, this Court stated that “if a train cannot be compelled to slow down as it approaches a crossing, it also cannot be compelled to stop altogether in order to deploy a flagman.” *Id.* at 531. Thus, following *Paddock*, plaintiff’s state law claim that the railroad should have deployed a flagman is preempted by federal law, and the trial court erred in denying summary disposition on this ground.¹

IV. FAILURE TO CREATE A CLEAR VISION AREA

¹ Plaintiff argues that *Paddock* was effectively overruled by the Sixth Circuit in *Shanklin v Norfolk Southern*, 369 F3d 978 (CA 6 2004). However, decisions of the Sixth Circuit are not binding on this Court. *Mettler Walloon, LLC, v Melrose Twp*, 281 Mich App 184, 221 n 6; 761 NW2d 293 (2008). Moreover, *Paddock* is binding on this Court because it was published after November 1, 1990, and has not been overruled or modified by our Supreme Court or a special panel of this Court. MCR 7.215(J)(1).

The next question is whether a railroad has a common law duty to maintain the vegetation on its right-of-way so as to provide a clear vision area for motorists. Defendants argue that the duty to act with respect to vegetation belongs solely to the appropriate road authority and that, in the absence of an order to create a clear vision area at a crossing, a railroad cannot be held liable. We disagree.

At the common law, railroads had a duty to maintain crossings in a reasonably safe condition. *Masters v Grand Trunk Western R*, 13 Mich App 80, 83; 163 NW2d 661 (1968); *Emery v Chesapeake & O R Co*, 372 Mich 663, 673; 127 NW2d 826 (1964). That duty included a duty to prevent visual obstruction of the track. See *Martin v Ann Arbor Railroad*, 76 Mich App 41, 46; 255 NW2d 763 (1977) (holding that there was sufficient evidence of proximate cause after the parties introduced evidence “as to the placement of the speed limit and warning signs, the absence of flashing light warning devices, and visual obstruction of the track.”). Defendants suggest that this Court held in *Paddock* that a railroad has no duty to remove visual obstructions absent an order from the appropriate road authority. However, in *Paddock*, this Court held that “[u]nder the plain language of [MCL 462.317(1)²], it is the responsibility of the road authority—not the railroad—to determine the need for a clear vision area.” *Paddock*, 225 Mich App at 534. The Court went on to explain:

As this Court held in *Turner, supra*, pp 256-257, where the duty to consider corrective actions at a railroad crossing lies with the governmental entity with jurisdiction over the roadway, and not with the railroad, the railroad has *no duty to petition* the governmental entity to act. Consistent with *Turner*, therefore, we conclude that a railroad has *no duty to petition* a road authority for the creation of a clear vision area at a railroad crossing [*Id.* (emphasis added).]

Based on the above language, defendants assert that this Court held that a railroad has no duty to act with respect to vegetation in the absence of an order from the appropriate road authority to create a clear vision area. However, a careful reading of this Court’s language shows that this Court has *not* held that a railroad has no duty to remove vegetation. Instead, this Court held railroads do not have a duty to *petition* the governmental authority to take corrective action. Thus, although defendants essentially ask this Court to extend the holding in *Paddock* to state that a railroad has no duty to create a clear vision area, nothing in the plain language of MCL 462.317 supports such an extension. See *Mich Ed Ass’n v Secretary of State (On Rehearing)*, 489 Mich 194, 217; 801 NW2d 35 (2011) (“[N]othing may be read into a statute that is not

² MCL 462.317(1) provides:

If a road authority determines to establish a clear vision area as described in this section, the railroad and a road authority may agree in writing for clear vision areas with respect to a particular crossing. The portions of the right-of-way and property owned and controlled by the respective parties within an area to be provided for clear vision shall be considered as dedicated to the joint usage of both railroad and road authority.

within the manifest intent of the Legislature as derived from the act itself.”). Moreover, unlike the plain language of MCL 257.668(2), which precludes negligence claims against a railroad based on inadequate warnings in the absence of the failure to follow an order from the road authority, the plain language of MCL 462.317 does not expressly or implicitly carve out an exception from the railroad’s common law duty to provide a safe grade crossing. Furthermore, well-settled common law principles are not to be abolished by implication, and when an ambiguous statute contravenes common law, it must be interpreted so that it makes the least change in the common law. *Walters v Leech*, 279 Mich App 707, 710-711; 761 NW2d 143 (2008). Consequently, even though there is no duty to petition the road authority to create a clear vision area, the railroad’s common law duty to provide a safe grade crossing has not been abrogated by statute. Accordingly, the trial court did not err in denying defendants’ motion for summary disposition based on plaintiff’s claim that defendants had a duty to create a clear vision area.

V. PROXIMATE CAUSE

The final question is whether the trial court erred in denying summary disposition as to the issue of proximate causation. Defendants argue that the uncontested facts show that plaintiff’s injuries were not proximately caused by defendants. We disagree.

“The requisite elements of a negligence cause of action are that the defendant owed a legal duty to the plaintiff, that the defendant breached or violated the legal duty, that the plaintiff suffered damages, and that the breach was a proximate cause of the damages suffered.” *Shultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993). The assessment of proximate cause is generally a jury matter “unless reasonable minds could not differ regarding the issue.” *Lockridge v Oakwood Hosp*, 285 Mich App 678, 684; 777 NW2d 511 (2009).

Here, the trial court concluded that both parties submitted conflicting factual evidence. Review of the evidence shows that plaintiff’s decedent came to a complete stop at the stop bar before the railroad tracks. A motorist stopped on the other side of the tracks flashed his lights at decedent to alert him to the approaching train. The motorist, the motorist’s passenger, and the engineer conductor on the train all stated that decedent leaned toward the passenger side of the vehicle, and was still leaning when his vehicle moved onto the tracks. They stated that it appeared as if decedent was trying to pick something up from the floor. The engineer conductor expressly said that it did not appear as if plaintiff’s decedent was trying to look down the track. He also clarified that he was about a hundred feet away when he saw decedent leaning toward the passenger side of the vehicle as if to pick something up from the floor. He said he did not see decedent’s face. Photographs submitted by defendants show that a train was visible through the vegetation when 1300 feet from the crossing, and that at a distance of 100 feet—which is the distance the engineer conductor asserted he was from decedent when decedent leaned over—the train is undeniably visible through the vegetation. Further, additional photographs submitted by defendants show that the tracks are visible for some distance, in spite of the vegetation on the side of the road. The photographs also show the view from a truck similar to plaintiff’s decedent’s; the view shows that the tracks are visible for some distance. However, plaintiff’s expert reviewed various materials, including the photographs, his own calculations, the information from the train’s event recorder, and the witnesses’ statements. He then opined that the “grade crossing was unduly hazardous due to sight obstructions created by both foliage and

the severe angle of the intersection of the railroad track and Lobdell Road,” and that the “collision . . . was caused by the aforementioned sight obstructions.” Accordingly, it is clear that there was a factual dispute as to whether the vegetation was a proximate cause of the accident. As such, the trial court did not err in denying defendants’ motion for summary disposition on this issue.

Affirmed in part and reversed and remanded in part for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O’Connell

/s/ Stephen L. Borrello

STATE OF MICHIGAN
COURT OF APPEALS

ESTATE OF BRADLEY CORL, by Kimberly
Corl, Personal Representative,

UNPUBLISHED
December 23, 2014

Plaintiff-Appellee,

v

No. 319004
Tuscola Circuit Court
LC No. 11-026733-NI

HURON & EASTERN RAILWAY and
RAILAMERICA, INC.,

Defendants-Appellants.

Before: O'CONNELL, P.J., and BORRELLO and GLEICHER, JJ.

GLEICHER, J. (*concurring*).

I concur with the majority opinion. I write separately to more fully respond to defendants' argument that MCL 462.317(1) abrogated the railroad's common-law duty to remove visually obstructing vegetation.

"The common law remains in force until modified." *Dawe v Dr Reuven Bar-Levav & Assoc, PC*, 485 Mich 20, 28; 780 NW2d 272 (2010). Whether a statute has abrogated the common law depends on legislative intent, but "amendment of the common law is not lightly presumed." *Id.* The Legislature is assumed to know the common law when it enacts a related statutory provision, and is expected to "speak in no uncertain terms" if it intends its enactment to alter the common law. *Id.* (quotation marks and citation omitted).

Here, as in *Dawe*, the question presented revolves around whether a statute trumps a common-law duty. In *Dawe*, a unanimous Supreme Court considered whether a subsection of the Mental Health Code, MCL 330.1946, abrogated a mental health professional's duty to warn third persons to protect them from harm caused by patients. *Id.* at 25-26. This Court held that "MCL 330.1946 preempts the field on the issue of a mental-health professional's duty to warn or protect others[.]" *Dawe v Dr Reuven Bar-Levav & Assoc, PC*, 279 Mich App 552, 568; 761 NW2d 318 (2008). The Supreme Court disagreed, holding that a common-law duty of care remained even after the statute's enactment. *Dawe*, 485 Mich at 27. Despite that the statute specifically eliminates a mental health professional's duty to warn third persons of threats of violence, the Supreme Court held that "the language of the statute expressly limits its own scope." *Id.* The statute retained a duty to warn of "threats of physical violence against a reasonably identifiable third person" emanating from a patient with "the apparent intent and

ability to carry out that threat in the foreseeable future.” *Id.* at 29. The plaintiff’s decedent in *Dawe* was not a third person, but another patient. The Supreme Court summarized:

MCL 330.1946(1) is not comprehensive and does not cover all the details of a mental health professional’s duty to provide reasonable care. In fact, the statutory language is expressly limited to warning or protecting third persons under very limited circumstances, i.e., when (1) a patient makes a threat of physical violence, (2) the threat is against a reasonably identifiable third person, and (3) the patient has the apparent intent and ability to carry out the threat. The statutory language never addresses a mental health professional’s other common-law duties to his or her patients. Therefore, on its face, the statute only defines a mental health professional’s duty to warn or protect a third person from a “threat as described in [MCL 330.1946(1)].” Nothing in the statute indicates that the Legislature intended to completely abrogate a mental health professional’s common-law special relationship duty to his or her patients. [*Id.* at 32.]

The statute at issue here provides:

If a road authority determines to establish a clear vision area as described in this section, the railroad and a road authority may agree in writing for clear vision areas with respect to a particular crossing. The portions of the right-of-way and property owned and controlled by the respective parties within an area to be provided for clear vision shall be considered as dedicated to the joint usage of both railroad and road authority. [MCL 462.317(1).]

Notably, the statute begins with the word “if.” This Court recently noted when construing a different statute that “[t]he Legislature’s use of the word ‘if’ at the start of the subsection and the relevant clause is crucial.” *In re Casey Estate*, 306 Mich App 252, ___ ; ___ NW2d ___ (2014), slip op at 5. So too, here. As explained in *Casey*, according to the “more pertinent” definition, the term “if” means “in case that; granting or supposing that; on condition that[.]” *Id.* (quotation marks and citation omitted). The Legislature’s use of the word “if” at the outset of MCL 462.317(1) sets forth a condition upon which the remainder of the subsection is premised. Absent satisfaction of the stated condition, the remainder of the subsection simply does not come into play.

The “clear vision area” statute commences as follows: “If a road authority determines to establish a clear vision area as described in this section, the railroad and a road authority may agree in writing for clear vision areas with respect to a particular crossing.” MCL 462.317(1). No evidence exists that a road authority determined to establish a clear vision area at the Lobdell Road crossing. Accordingly, this statute has no effect whatsoever in this case.

Moreover, *Dawe* teaches that if the Legislature intended to abrogate a railroad’s common-law duty to remove obstructing vegetation, it would have done so in a clear and straightforward fashion. MCL 462.317(1) does not speak to the common-law duty of a railroad to maintain a crossing area. The duty described arises only if and when a road authority has established a clear vision area. That did not occur in this case. As the Supreme Court elucidated

in *Dawe*, the statute's self-limiting language cannot be reasonably construed as completely abrogating a related but unaddressed common-law duty.

As the majority opinion correctly points out, *Paddock v Tuscola & Saginaw Bay R Co, Inc*, 225 Mich App 526; 571 NW2d 654 (1997), is not to the contrary. In that case, the plaintiff's claim was that "because the railroad knew that the obstructing vegetation at the crossing made it extra hazardous, the trial court should have found that the railroad had a duty to request that a clear vision area be created to protect the public." *Id.* at 533. Here, plaintiff has framed her claim as one arising only under the common law, rather than under the "clear vision area" duty described in the statute. Accordingly, as the majority concludes, *Paddock* is fully distinguishable.

/s/ Elizabeth L. Gleicher

**STATE OF MICHIGAN
IN THE 54TH CIRCUIT COURT FOR THE COUNTY OF TUSCOLA**

KIMBERLY CORL,
Personal Representative of the ESTATE OF
BRADLEY SCOTT CORL, DECEASED,

Plaintiff,

**File No: 11-26733-NI
HON. AMY GRACE GIERHART**

Vs.

**RAILAMERICA, INC.,
AND HURON AND EASTERN
RAILWAY COMPANY, INC.,**

Defendants.

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PHILLIP B. MAXWELL (P24872)
Co- Counsel for Plaintiff
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OPINION & ORDER

At a session of said Court held in the 54th Circuit Court
Courtroom, City of Caro, on the 23rd day of October, 2013.

PRESENT: HONORABLE AMY GRACE GIERHART
Circuit Court Judge

This matter is before the Court pursuant to the defendant's motion for summary disposition pursuant to MCR 2.116 (C)(10). The parties have stipulated that the defendant is entitled to summary disposition as to Count IV-Failure to Warn and Count V-Excessive Speed. The Court took the motion under advisement as to Counts I-Inadequate Warning Device Claim, II-Failure to Provide Reasonably Safe Grade Crossing/Sight Lines, & III-Obstructive Vegetation.

This case arises out of an automobile-train collision which occurred on September 29, 2009, at the railroad crossing on Lobdell Road in Mayville, Michigan. Bradley Corl was fatally injured as a result of the collision.

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. If the motion is properly made and supported, an adverse party must, by affidavit or otherwise, "set forth specific facts showing there is a genuine issue for trial." MCR 2.116(G)(4). In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. This evidence should be considered in the light most favorable to the nonmoving party. *Brown v. Brown*, 478 Mich 545, 551-552 (2007). Where, except for the amount of damages, the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment or partial judgment as a matter of law. *Brown, supra* at 552; MCR 2.116(C)(10).

INADEQUATE WARNING DEVICE CLAIM

The defendant asserts that summary disposition pursuant to MCR 2.116(C)(10) is appropriate as to the Inadequate Warning Device Claim because absent an order from the proper road authority, the railroad cannot be held liable for failure to install or maintain warning devices at a railroad crossing. Plaintiff asserts that summary disposition is not appropriate because a flagman is not a warning device, and falls outside of the warning devices referred to in MCL 257.668. Further, plaintiff asserts that regardless of the statute, the railroad still owes a duty to maintain the crossing in a safe manner under the common law.

Defendant relies on MCL 257.668(2) which provides: "The erection of or failure to erect, replace, or maintain a stop or yield sign or other railroad warning device, unless such devices or signs were ordered by public authority, shall not be a basis for an action of negligence against the state transportation department, county road commissions, the railroads, or local authorities." *Turner v. CSX Transportation, Inc.*, 198 Mich App 254, 257 (1993), held: "In our view, in enacting the statute, the Legislature intended that no liability was to be premised upon the absence of warning devices at a railroad crossing absent an order by the proper authority to install devices and a failure to follow that order." There is no evidence that the signage at the crossing was inconsistent with the orders in place at the time.

Plaintiff concedes that to the extent that their claim regarding inadequate warning devices alleges a failure to provide additional active traffic control devices, e.g. gates and flashers, it must be dismissed, because at the time of the collision no such active warning devices had been ordered by MDOT. However, plaintiff relies on *Decker v. Norfolk & Western Railway*, 81 Mich App 647,652; 265 NW2d 785 (1978), for the proposition that a flagman is outside the scope of the traffic control devices contemplated in MCL 257.668, "In the instant case, the defendant asked that the jury be instructed: "There has been testimony concerning advance or automatic crossing protection. You are instructed that there is no duty upon the Railroad to install such protection in this case and such testimony shall play no part in your deliberations." Defendant in its requested instructions has gone beyond *Masters, supra*, which held that defendant cannot be required to post additional warning signs. In the instant case, defendant includes "advance or automatic crossing protection". This is too broad and could have had the effect of directing a verdict to defendant and abrogating the defendant's duty to maintain the crossing in a reasonably safe condition. The other means available to maintain a safe crossing as mentioned in *Master, supra*, and *Bauman v. Grand Trunk W.R. Co.*, 376 675, 138 NW2d 285 (1965), i.e., a flagman, whistles, etc., would be considered "advance" crossing protection and the jury would be prohibited by such an instruction from considering such means of warning in determining if defendant breached its common law duty to maintain a safe crossing."

The Michigan Supreme Court addressed a similar issue in *Ebel v. Board of County Road Commissioners of the County of Saginaw*, 386 Mich 598, 605, "In *Emery v. Chesapeake & Ohio Railroad Company*, 372 Mich 663 (1964) and in *Baldinger's Estate v. Ann Arbor R.R. Co.*, 372 Mich 685(1964), this court treated extensively of the "unusual conditions" or "special circumstances" and "local warnings" rule, and

reaffirmed the long standing rule that the railroad's duty of due care may require it to provide warnings over and above those required by statutory law or safety regulations. The test is not whether the conditions were unusually dangerous, but whether what was done under the circumstances met the test of an ordinarily prudent man under the same or similar circumstances."

Therefore, the Court grants partial summary disposition pursuant to MCR 2.116(C)(10), only to the extent that the plaintiff complains of a failure to provide additional active traffic control devices, because at the time of the collision no such active warning devices had been ordered by MDOT. The court denies the motion for summary disposition as to the remainder of the claim.

FAILURE TO PROVIDE REASONABLY SAFE GRADE CROSSING/SIGHT LINES & OBSTRUCTIVE VEGETATION CLAIM

The defendant asserts that summary disposition pursuant to MCR 2.116 (C)(10) is appropriate as to the Failure to Provide Reasonably Safe Grade Crossing/Sight Lines because MCL 257.668 precludes any negligence of the railroad. Plaintiff is opposed stating that the railroad's common law duty to provide a safe crossing remains regardless of MCL 257.668.

The defendant asserts that summary disposition pursuant to MCR 2.116 (C)(10) is appropriate as to the Obstructive Vegetation Claim because absent an order to create a clear vision area, there is no duty on the railroad to clear vegetation. Plaintiff asserts that summary disposition is not appropriate because regardless of MCL 462.317, the defendants owed a common law duty to maintain a safe crossing which included clearing view obstructing vegetation.

Further, *Emery, supra* at 680-681 indicates that the issue of the railroad's duty to maintain a safe crossing under the common law is a question for the jury. "...there can be no doubt that the trial judge properly submitted for jury determination the question whether the physical circumstances existing at the grade crossing involved in this case required defendant railroad in the exercise of ordinary care and prudence commensurate with such circumstances to provide warning devices in addition to the ordinary wooden crossbuck sign."

As it relates to sight lines, *Emery, supra* at 681 states: "The evidence of limited visibility at this grade crossing on the very night of Emery's collision with defendant's train from witnesses who preceded and followed him across that grade and their own graphic description of the artificially created lighting conditions there prevailing were the circumstances for jury consideration in determining whether the black and white crossbuck satisfied the common law's requirement of ordinary care and prudence."

Again, the test set forth in *Ebel, supra* at 605, "Whether what was done under the circumstances met the test of an ordinarily prudent man under the same or similar circumstance", applies to the counts of failure to provide reasonably safe grade crossing/sight lines and obstructive vegetation. Both parties have submitted conflicting factual evidence creating a factual issue for a jury determination.

Therefore, the court considers and denies summary disposition as to both of these counts.

IT IS SO ORDERED.

Dated: October 23, 2013



AMY GRACE GIERHART (P51305)
54TH CIRCUIT COURT JUDGE

EXHIBIT H

OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF TUSCOLA

KIMBERLY CORL,
Personal Representative of the ESTATE OF
BRADLEY SCOTT CORL, DECEASED,

Case No. 11-26733-NI

Plaintiff,

-vs-

RAILAMERICA, INC.,
AND HURON AND EASTERN
RAILWAY COMPANY, INC.,

Defendants.

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Attorneys for Defendants

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Attorney for Plaintiff

AFFIDAVIT OF WELDON D. GREIGER

I, Weldon D. Greiger, after being duly sworn, hereby state:

1. On October 9, 2009, I photographed the Lobdell Road crossing in Mayville, Michigan, and the surrounding area.

2. The photographs attached as Exhibits A-1–A13 are true and accurate copies of photographs I took on October 9, 2009, and fairly and accurately depict the Lobdell Road crossing and surrounding area as it existed on that date.

3. Photograph A-1 was taken from a point behind the railroad crossbucks sign, within 15 to 19 feet of the nearest rail of the crossing, while the locomotive was located 1300 feet down the tracks from the west edge of the crossing.

4. Photograph A-2 was taken from a point behind the railroad crossbucks sign, within 15 to 19 feet of the nearest rail of the crossing, while the locomotive was located 1200 feet down the tracks from the west edge of the crossing.

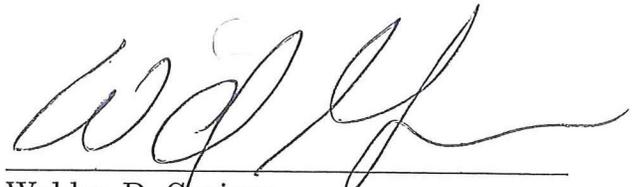
5. Photograph A-3 was taken from a point behind the railroad crossbucks sign, within 15 to 19 feet of the nearest rail of the crossing, while the locomotive was located 1100 feet down the tracks from the west edge of the crossing.

6. Photograph A-4 was taken from a point behind the railroad crossbucks sign, within 15 to 19 feet of the nearest rail of the crossing, while the locomotive was located 1000 feet down the tracks from the west edge of the crossing.

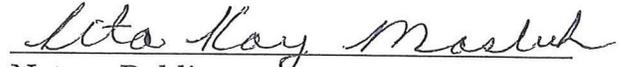
7. Photograph A-5 was taken from a point behind the railroad crossbucks sign, within 15 to 19 feet of the nearest rail of the crossing, while the locomotive was located 900 feet down the tracks from the west edge of the crossing.

8. Photograph A-6 was taken from a point behind the railroad crossbucks sign, within 15 to 19 feet of the nearest rail of the crossing, while the locomotive was located 800 feet down the tracks from the west edge of the crossing.

9. Photograph A-7 was taken from a point behind the railroad crossbucks sign, within 15 to 19 feet of the nearest rail of the


Weldon D. Greiger

Sworn to before me and subscribed in my presence this 8th day of
July, 2013.


Notary Public

RITA KAY MASLUK
Notary Public, Livingston County, MI
Acang in _____ County
My Commission Expires September 28, 2014



Exhibit A-1

OCT 9 2009



Exhibit A-2

OCT 9 2009

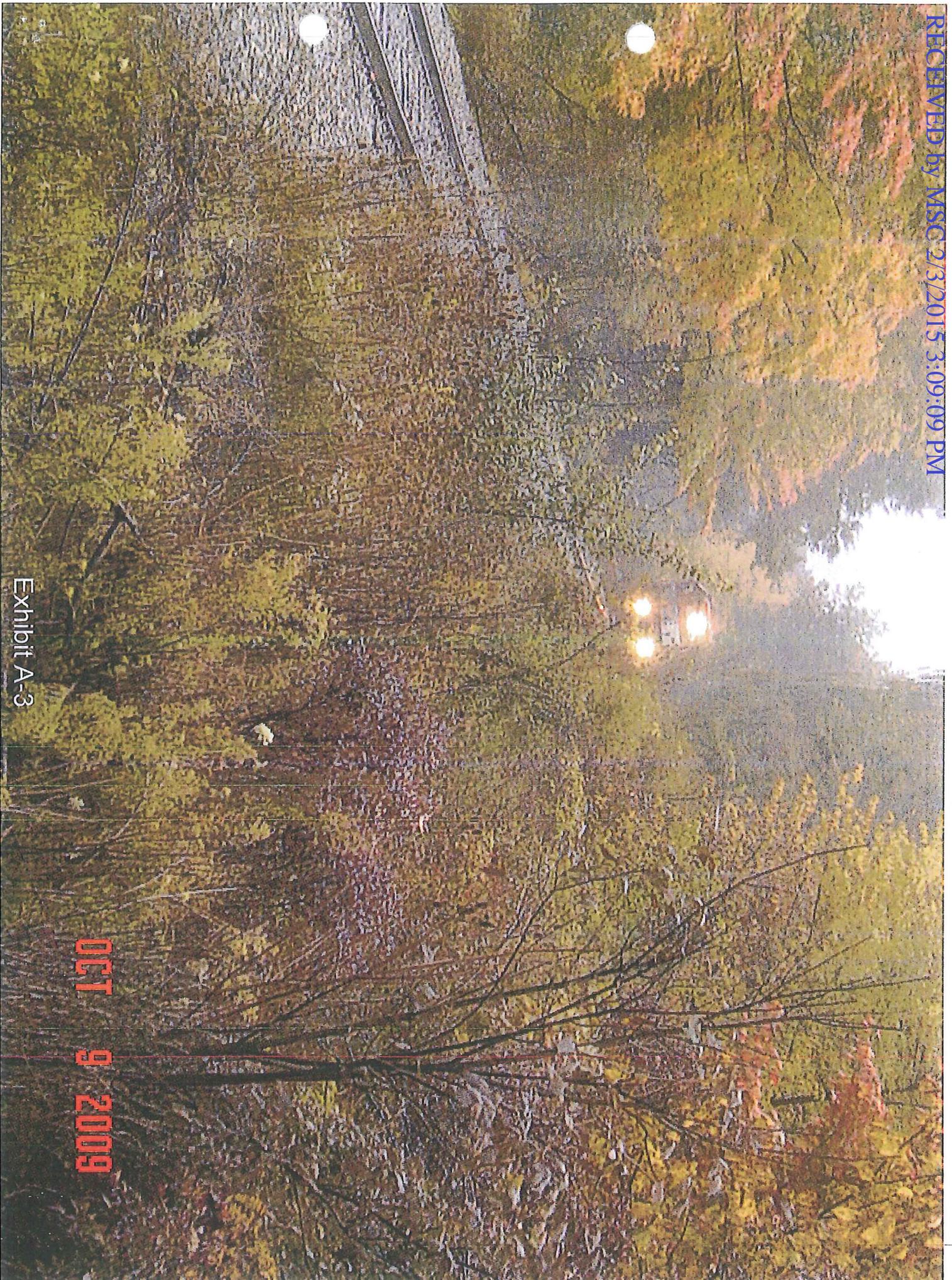


Exhibit A-3

OCT 9 2009

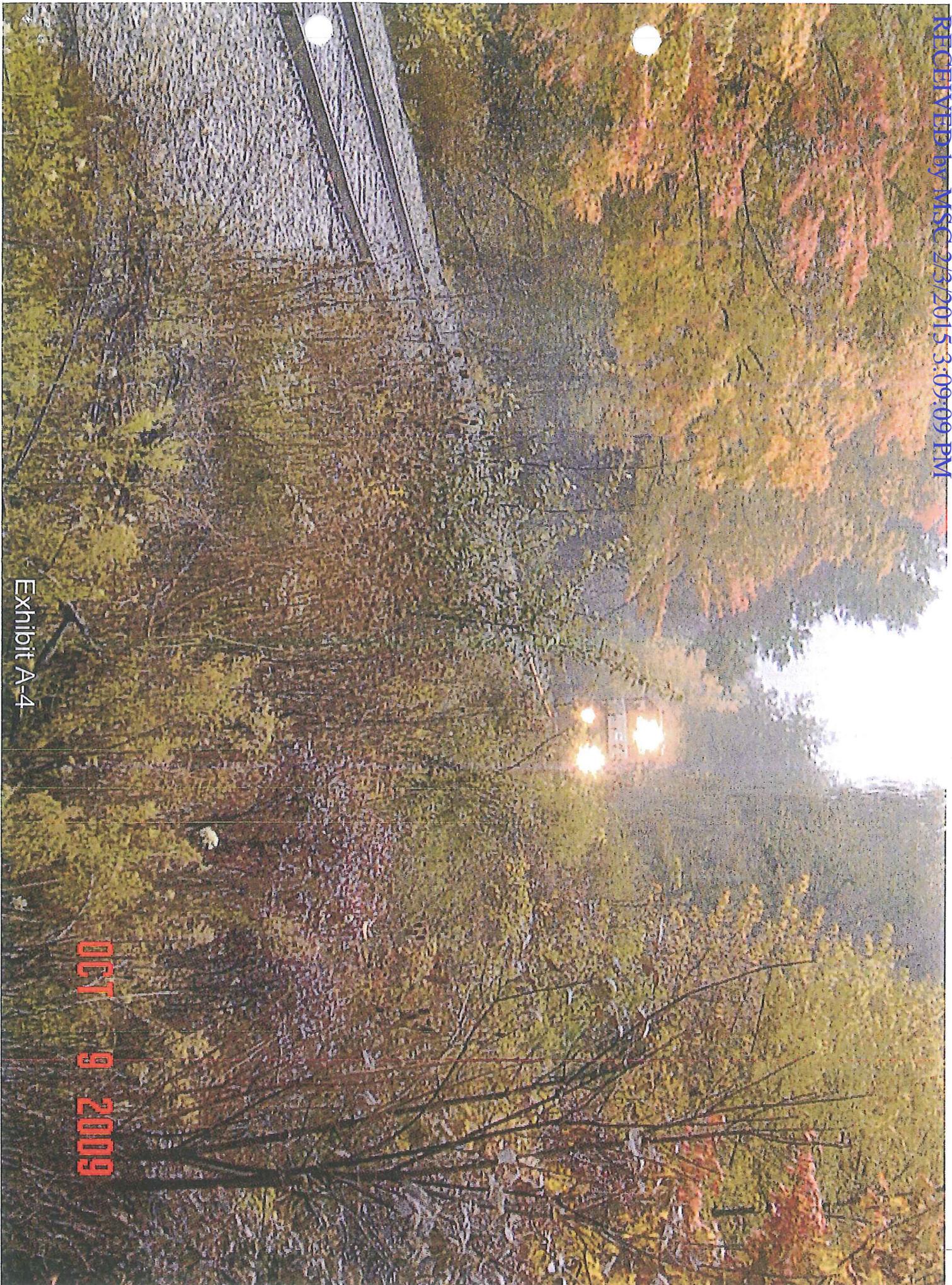


Exhibit A-4

OCT 9 2009

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Exhibit A-5

OCT 9 2009



Exhibit A-6

OCT 9 2009

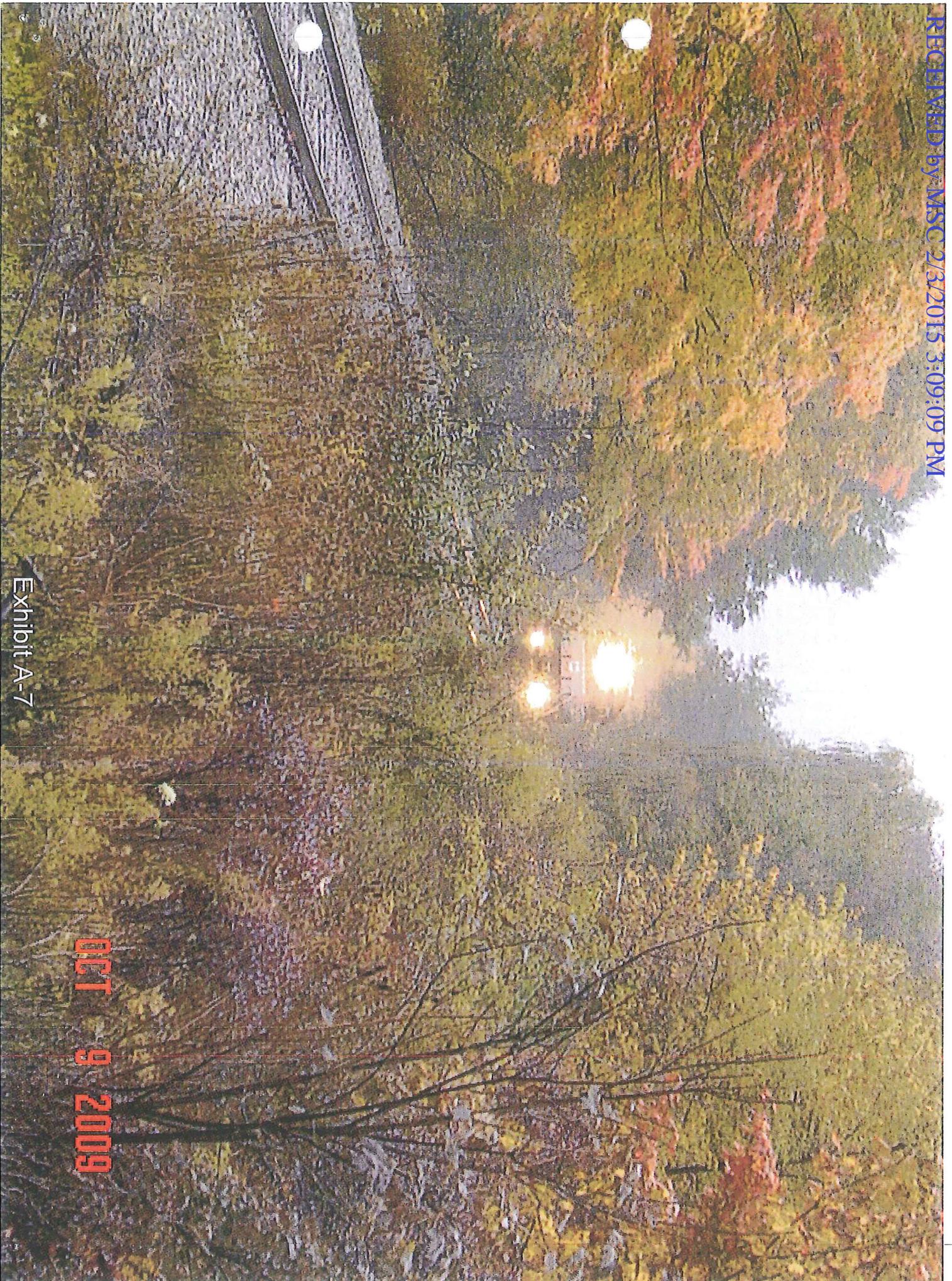


Exhibit A-7

OCT 9 2009

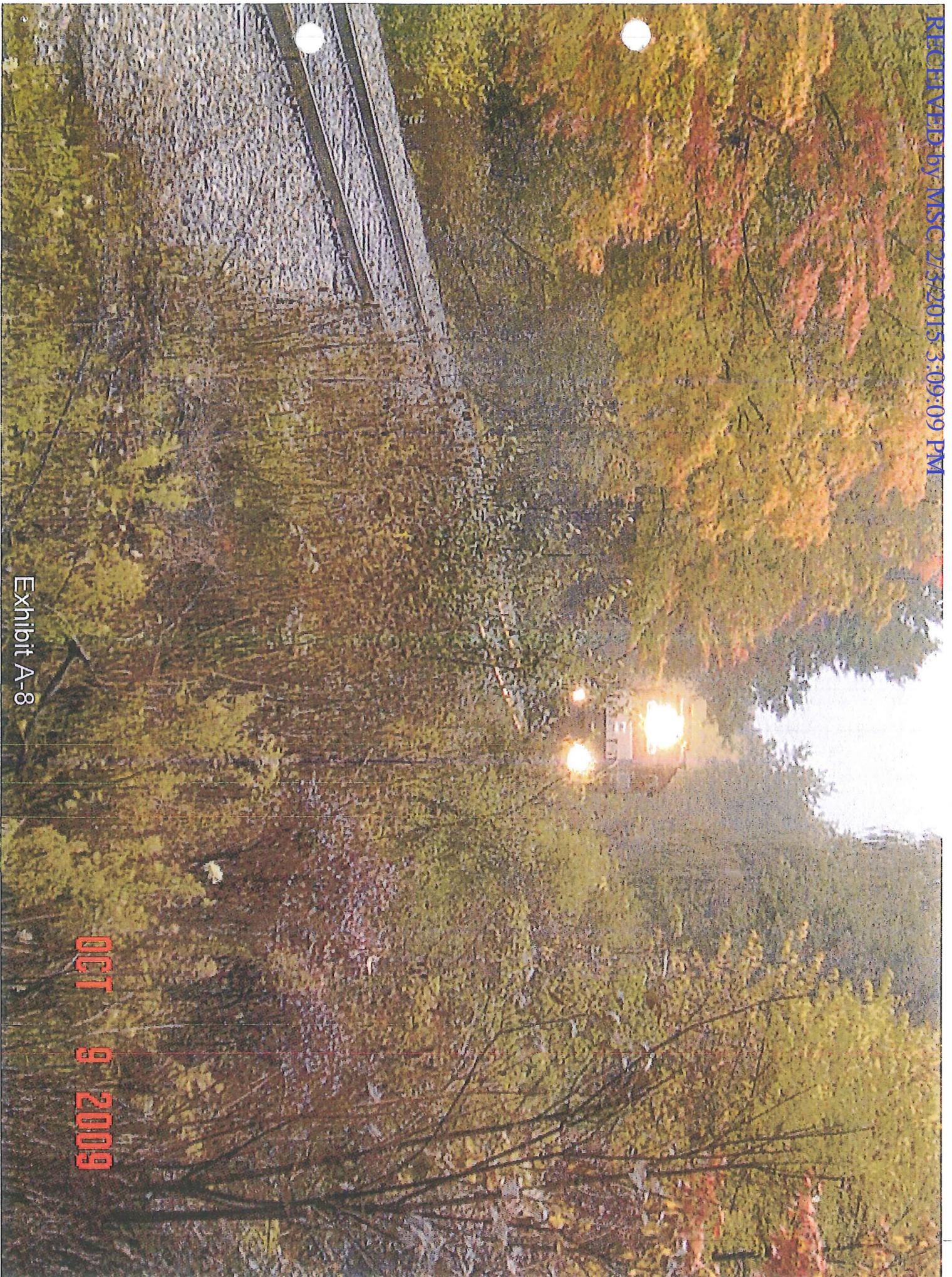


Exhibit A-8

OCT 9 2009



Exhibit A-9

OCT 9 2008



Exhibit A-10

OCT 9 2009

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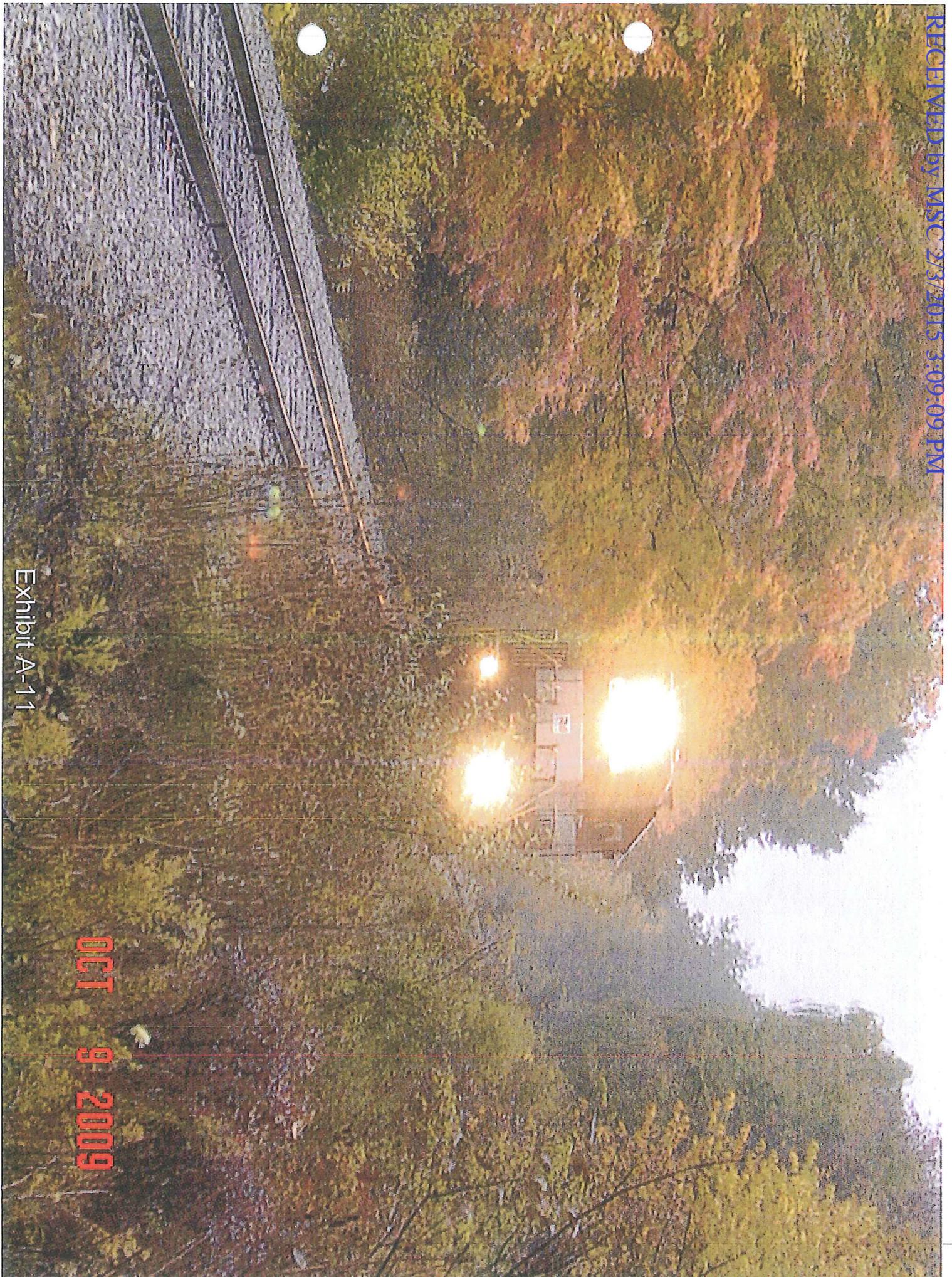


Exhibit A-11

OCT 9 2009

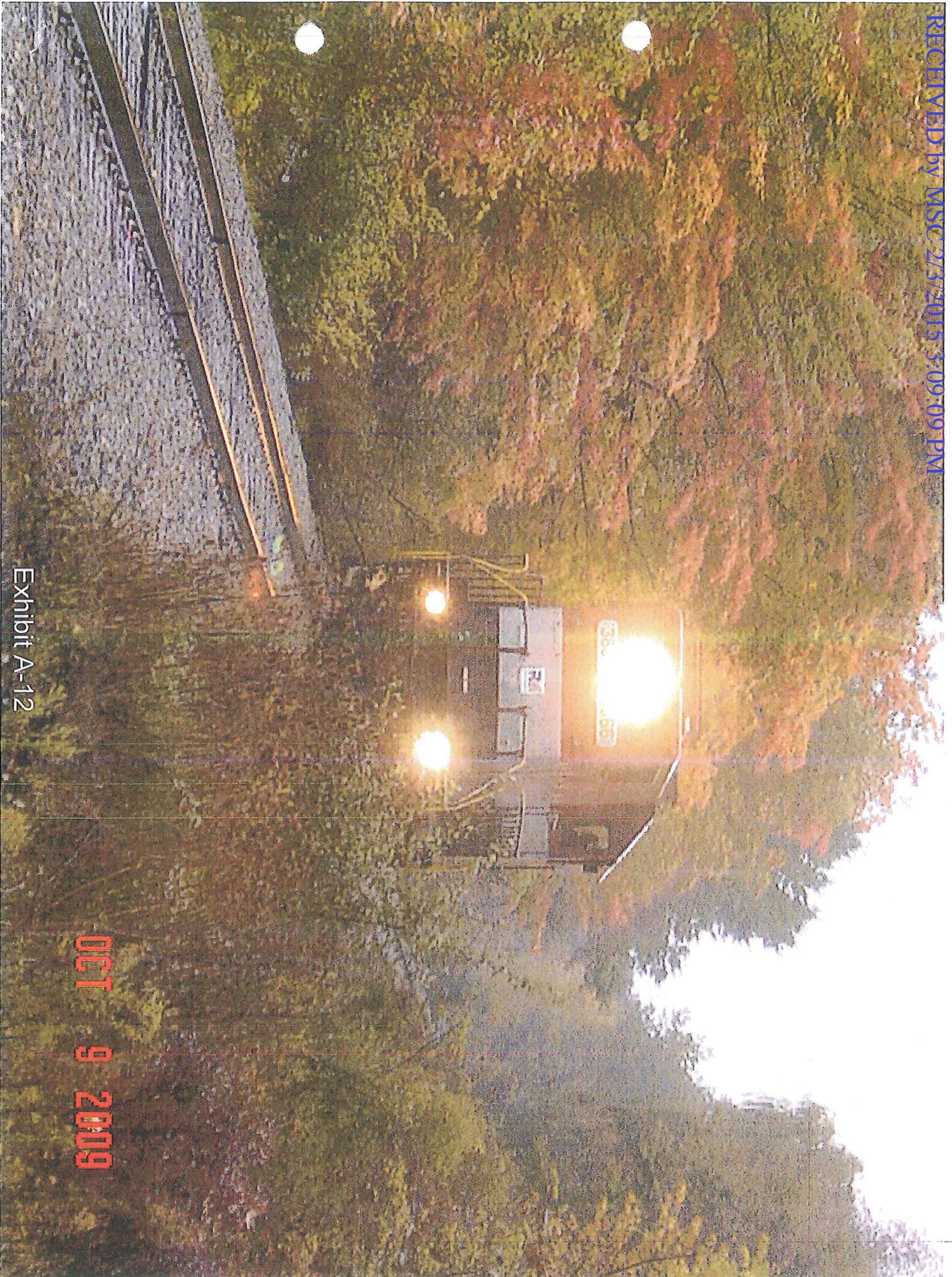


Exhibit A-12

OCT 9 2009

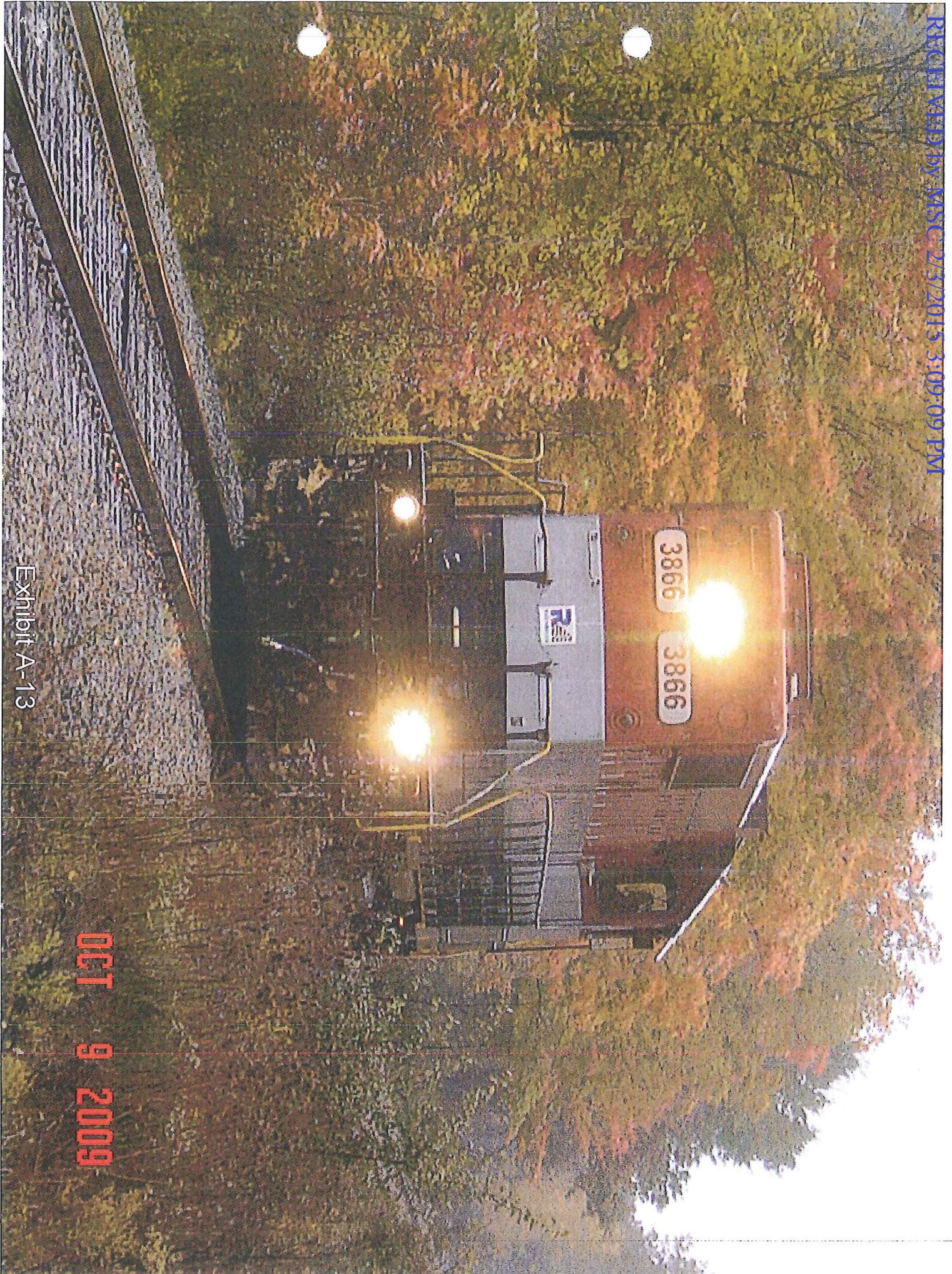


Exhibit A-13

OCT 9 2009

IN THE SUPREME COURT OF THE STATE OF MICHIGAN
APPEAL FROM THE COURT OF APPEALS

KIMBERLY CORL,
Personal Representative of the ESTATE OF BRADLEY SCOTT CORL,
DECEASED, Supreme Court Case No. _____
Court of Appeals Case No. 319004

Plaintiff-Appellee, Tuscola County Case No. 11-26733-NI
Hon. Amy Grace Gierhart

-vs-

RAILAMERICA, INC.,
AND HURON AND EASTERN
RAILWAY COMPANY, INC.,

Defendants-Appellants.

_____ /

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Attorney for Plaintiff-Appellee

_____ /

NOTICE OF HEARING

PLEASE TAKE NOTICE that the Application for Leave to Appeal of Defendants-Appellants will be heard on Tuesday, February 24, 2015, or as soon thereafter as it may be heard.

Respectfully Submitted,

s/James R. Carnes

James R. Carnes (P60312)

Shumaker, Loop & Kendrick, LLP

Attorneys for Defendants-Appellants

R. Schrope, Law Office Of Brian R. Schrope, P.C., 367 North State Street, Caro, MI 48723, Phillip B. Maxwell, Phillip B. Maxwell & Associates, 20 Hudson Street, Oxford, MI 48371, Attorneys for Plaintiff, this 3rd day of February, 2015.

Respectfully Submitted,

s/James R. Carnes

James R. Carnes (P60312)

Shumaker, Loop & Kendrick, LLP

Attorneys for Defendants-Appellants