

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

GABRIEL GIRAUD,	)	
	)	
Plaintiff,	)	<b>CASE NO. CV-08-08005</b>
	)	
vs.	)	MEMORANDUM OPINION AND
	)	ORDER IN RE: MOTION FOR
DeARTOLA CONSTRUCTION; UNION	)	SUMMARY JUDGMENT
PACIFIC RAILROAD; IDAHO	)	
TRANSPORTATION DEPARTMENT;	)	
POST FALLS HIGHWAY DISTRICT;	)	
and John/Jane Does I Through X, whose	)	
True identities are presently unknown,	)	
	)	
Defendants.	)	
	)	

Plaintiff was the conductor on a train involved in a collision with a truck at a railroad crossing. The truck driver was killed. Plaintiff suffered injuries. Defendant Idaho Department of Transportation filed a Motion for Summary Judgment. .

James Piotrowski and Marty Durand, HERZFELD & PIOTROWSKI, LLP, attorneys for Plaintiff.

Theodore O. Creason and Cynthia L. Mosher, CREASON, MOORE, DOKKEN & GEIDL, PLLC, attorneys for Defendant Idaho Department of Transportation.

Ausey Robnett, III, PAINE HAMBLLEN LLP, and Kent Hansen, Union Pacific Railroad Company, attorneys for Defendant Union Pacific Railroad.

Sonyalee R. Nutsch, CLEMENTS, BROWN & McNICHOLS, P.A.  
attorneys for Defendant Post Falls Highway District.

Clinton O. Casey, CANTRILL, SKINNER, SULLIVAN & KING,  
LLP, attorneys for Defendant DeArtola Construction.

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**I**  
**FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiff Gabriel Giraud (“Giraud”) was a conductor for the Union Pacific Railroad (“UPRR”). At approximately 3:00 P.M. on September 24, 2007, Giraud was the conductor on a freight train traveling southwest toward a highway/railroad crossing at Hayden Avenue in Kootenai County. A truck driven by Gary Gibson, who was a mechanic for Defendant DeArtola Construction (“DeArtola”), was carrying a load of trusses. The truck did not stop at the crossing and the truck and train collided. Giraud survived, but Gary Gibson was killed in the crash. Giraud alleges that, as a result of the collision, he suffered post traumatic stress syndrome.

When the collision occurred, the railroad crossing was marked with regular stop signs. It did not have crossing bars or flashing lights. The crossing was unobstructed.

At the time of the collision, plans were pending for automatic traffic control devices at that crossing. On March 27, 2006, an agreement for the modification of the controls at the intersection had been entered into between the Post Falls Highway District (“PFHD”), the Idaho Transportation Department (“ITD”), and UPRR. However, the construction had not yet begun.

Hayden Avenue is not a state highway. Instead, it is a highway under the jurisdiction of the PFHD, which is responsible for maintaining the approaches and traffic warning devices at the railroad crossing.

Prior to September 24, 2007, the Federal Railroad Administration (“FRA”) had documented five train-vehicle accidents at this crossing between October 2, 1988 and September 18, 2006. A subsequent accident occurred on October 16, 2007. Thus, there were seven reported train-vehicle accidents at the Hayden Avenue crossing and, in those seven accidents, five fatalities were reported in addition to injuries.<sup>1</sup>

ITD had access to the collision data for this crossing. The railroad companies report rail-highway collisions to the FRA and the Idaho Transportation Department. The Idaho Transportation Department Traffic Manual states that “Headquarters Traffic shall maintain a single database containing information from all of these reports.”<sup>2</sup>

In a “Concept Report” in which accident data from ITD was compiled and evaluated to determine the safety of the existing roadway and railroad intersection, ITD stated that there were “zero accidents” at the crossing between 2000 and 2004. The

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<sup>1</sup> The initial information provided by Giraud was from the FRA’s “Highway-Rail Grade Crossing Accident/Incident Reports” at its website ([www.fra.dot.gov](http://www.fra.dot.gov)) under “Safety Data.” The train-vehicle accidents documented by the FRA are:

(1)	10/02/88	Train-Auto	2 Fatalities, 1 injured
(2)	10/05/88	Train-Auto	Property damage, no injuries
(3)	03/02/89	Train-Unspecified Vehicle	Property damage, no injuries
(4)	08/06/03	Train-Auto	1 Injured
(5)	09/18/06	Train-Truck	2 Fatalities
(6)	09/24/07	Train-Truck	1 Fatality, others injured
(7)	10/16/07	Train-Truck	1 Injured

After an objection to this evidence from the IDT, an Affidavit of Marty Durand was filed on March 26, 2010, with the following exhibits attached:

- A copy of the Idaho Vehicle Collision Report of the accident on August 5, 2003, from Marytom Pickett;
- A copy of the Idaho Vehicle Collision Report of the accident on September 18, 2006, from the Idaho State Police;
- A copy of the Idaho Vehicle Collision Report of the accident on October 16, 2007, from the Kootenai County Sheriff;
- A copy of the Coeur d’Alene Press article of the October 3, 1988 accident obtained from the Coeur d’Alene Public Library;
- A copy of the Coeur d’Alene Press article of the October 6, 1988 accident obtained from the Coeur d’Alene Public Library.

<sup>2</sup> *ITDMT § 856.02/01.*

Concept Report was prepared by Ruen-Yeager & Associates, Inc., in 2005. However, according to the FRA, a crossing accident occurred on August 5, 2003.

On October 7, 2008, Gabriel Giraud filed a Complaint seeking special and general damages. Giraud alleged a cause of action against ITD and PFHD for negligence. The conduct complained of included, but was not limited to: “the negligent design, construction and maintenance of the rail crossing, which did not meet relevant safety standards at the time of such design, construction and maintenance.” Giraud further alleged that the “poor design, construction and maintenance of the road crossing were casually related to the collision which resulted in injury to Plaintiff.”

On January 10, 2010, ITD filed a Motion for Summary Judgment. Plaintiff Giraud opposes ITD’s Motion for Summary Judgment. ITD and Giraud submitted briefing in support of their positions.<sup>3</sup> At the conclusion of a hearing on the Motion, the parties were granted permission to submit additional information.<sup>4</sup>

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<sup>3</sup> In opposition to ITD’s Motion, Plaintiff filed the Affidavit of Marty Durand. ITD did not file an affidavit. Instead, ITD attached the following Appendices to its Memorandum:

- Appendix A Traffic Manual 2009
- Appendix B Idaho State Rail Plan
- Appendix C Railroad Guide 2009
- Appendix D Manual on Uniform Traffic Control Devices
- Appendix E Local Public Agency Projects
- Appendix F Railroad Manual July 2007

Exhibits A-E were also attached to the Memorandum. **Rule 56(c), Idaho Rules of Civil Procedure**, refers to evidence which is “on file” to support a motion for summary judgment. In order for documents and exhibits to be admitted into evidence for purposes of ruling on a motion for summary judgment, the documents and exhibits must be attached to an affidavit or verified complaint. **Puckett v. Oakfabco, Inc.**, 132 Idaho 816, 979 P.2d 1174 (1999); **Johnson v. City of Homedale**, 118 Idaho 285, 796 P.2d 162 (Ct.App. 1990). The documents attached to ITD’s Memorandum are not evidence. To the extent that information in the Appendices might be relevant to any determination regarding a standard or duty to act, both parties have agreed that such standards or duties existed.

<sup>4</sup> After the initial supplemental briefing had been submitted, Giraud filed a Motion for Leave to File Sur-Reply Brief and ITD filed a Motion for Leave to Respond to Plaintiff’s Sur Reply in Opposition to ITD’s Motion for Summary Judgment. In arriving at a decision on ITD’s Motion for Summary Judgment, these Motions will be granted and all of the briefing will be considered.

## II

### STANDARDS FOR SUMMARY JUDGMENT

Summary judgment is provided for where there is no genuine issue and the moving party is entitled to judgment as a matter of law. In order to make that determination, the court must look to “the pleadings, depositions, and admissions on file, together with the affidavits, if any . . . .” *Rule 56, Idaho Rules of Civil Procedure*.

On a motion for summary judgment, the facts in the record are to be liberally construed in favor of the party opposing the motion. Where a jury has been requested, the party opposing the motion is to be given the benefit of all favorable inferences which might be reasonably drawn from the evidence. If the record contains conflicting inferences or if reasonable minds might reach different conclusions, a summary judgment must be denied. *Roell v. City of Boise*, 130 Idaho 197, 938 P.2d 1237 (1997); *Bonz v. Sudweeks*, 119 Idaho 539, 808 P.2d 876 (1991).

Once the moving party has properly supported the motion for summary judgment, the non-moving party must come forward with evidence which contradicts the evidence submitted by the moving party and which establishes the existence of a material issue of disputed fact. *Zehm v. Associated Logging Contractors, Inc.*, 116 Idaho 349, 775 P.2d 1191 (1988).

If there are no genuine issues of material fact, the court will determine whether a party is entitled to judgment as a matter of law. *Venters v. Sorrento Delaware, Inc.*, 141 Idaho 245, 108 P.3d 392 (2005); *Zumwalt v. Stephan, Balleisen & Slavin*, 113 Idaho 822, 748 P.2d 405 (Ct.App. 1987), *rev. denied* (1988).

According to *Berg v. Fairman*, 107 Idaho 441, 444, 690 P.2d 896, 900 (1984), the “purpose of summary judgment proceedings is to eliminate the necessity of trial where facts are not in dispute and where existent and undisputed facts lead to a conclusion of law which is certain.” *See also Venters v. Sorrento Delaware, Inc., supra.*

### III

#### **PLAINTIFF’S CAUSE OF ACTION FOR NEGLIGENCE**

In his Complaint, Giraud alleges that ITD was negligent in the design, maintenance, or construction of the Hayden Avenue crossing. In order to succeed on a claim for negligence, Giraud must prove: (1) ITD had a duty recognized by law which required ITD to conform to a certain standard of conduct; (2) ITD breached that duty; (3) a causal connection existed between ITD’s conduct and the resulting injuries; and (4) actual loss or damage. *McKim v. Horner*, 143 Idaho 568, 149 P.3d 843 (2006). ITD contends that it is entitled to Summary Judgment because Giraud is unable to show that ITD breached any duty owed to Giraud on the claim asserted by Giraud in his Complaint. Alternatively, ITD argues that, even if Giraud was able to establish a breach, ITD is immune from liability under the Idaho Tort Claims Act.

#### **A. ITD’s Duties Under the Law**

ITD admits that it has a duty with respect to the Hayden Avenue crossing, but it contests Giraud’s contention that it breached its duty. ITD’s duties arise under the statutory law of the state and federal governments and under ITD’s operational and guidance manuals.<sup>5</sup>

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<sup>5</sup> ITD sets forth its duties in detail in its initial Memorandum, which was submitted on January 28, 2010, at pp. 5-11. Giraud also sets forth duties required of ITD in his initial Memorandum, which was submitted on March 4, 2010, at pp. 4-6. The duties, which are undisputed, will only be outlined here, but in enough specifics to provide a basis for a determination as to a breach of a duty by ITD.

Federal law establishes a funding program for states to ensure safety at rail-highway crossings.<sup>6</sup> Under the program, federal aid is available for projects to eliminate hazards at rail-highway crossings. As a condition to receiving aid, states have a duty to maintain a survey of all highways to identify those railroad crossings requiring separation, relocation of highways, or protective devices as well as a duty to establish and implement a schedule for such projects.

ITD complies with federal transportation funding statutes by maintaining Idaho's National Railroad-Highway Crossing Program Database. ITD gathers accident data for each rail-highway crossing in Idaho to determine the priority of crossings to be improved. Specifically, ITD collects and maintains data regarding collisions at crossings, identifies hazardous crossings, establishes priority projects, and conducts engineering studies.

Not all railroad crossings belong to ITD. When the crossings are under a local entity's jurisdiction, the entity is contacted to determine if it would be willing to improve the crossing with federal assistance. If the entity chooses to do so, it makes a formal request to ITD.

ITD bases its choice of crossing project improvements to fund on the consideration of several goals. Once a project is selected, improvements to the crossing are to be constructed within three years.

Pursuant to the federal law, grants are made to states for the purpose of providing for priority rail-highway grade crossing safety improvements, including the installation, repair, or improvement of railroad crossing signals and gates.<sup>7</sup> The grants are distributed

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<sup>6</sup> 23 U.S.C. § 130. Section 130 is also known as the Rail Highway Safety Program.

<sup>7</sup> 49 U.S.C. § 22501.

to the state agency responsible for rail-highway grade crossing safety. In Idaho, the ITD is the agency that receives and administers federal assistance under this provision.

State statutes also define ITD's responsibility for railway crossings. The Idaho Legislature has established the railroad grade crossing protection fund,<sup>8</sup> which is administered by ITD. In administering the account, ITD establishes a priority rating for railroad crossings by considering factors such as traffic volume by school buses and vehicles carrying "dangerous commodities" along with accident reports. Funding priority must be given "to the most hazardous railroad crossing locations."

Once a local crossing is considered for development, ITD establishes a diagnostic study team. The diagnostic study team, which is comprised of various professionals, conducts a field review. Then the local agency is informed whether the project qualifies for federal aid and, if so, the steps that must be taken to begin the project. The local entity must submit a formal application through ITD; after obtaining approval from staff, the Idaho Transportation Board reviews the project. If the Board approves the project, it will be included in the Highway Development Program. At that point, an agreement is made between ITD and the local entity and project development begins.

In addition to responsibilities established by federal and state law, ITD's operational and guidance manuals detail the duties with respect to rail-highway crossings.<sup>9</sup> Under the Railroad Guide, ITD is responsible for railroad crossing maintenance on state highways; rail companies are responsible for the installation and maintenance of traffic devices for rail-highway crossings located on their property and local jurisdictions have responsibility for devices on their road system. In this case, the

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<sup>8</sup> *Idaho Code § 62-304D.*

<sup>9</sup> *See* Manual on Uniform Traffic Control Devices, Traffic Manual, Railroad Manual, State Rail Plan, and Railroad Guide.

highway was owned by PFHD and, therefore, PFHD was responsible for maintaining the crossing.

In summary, both Plaintiff Giraud and Defendant ITD agree that ITD had a duty with respect to the Hayden Avenue crossing and that ITD's duty over locally owned intersections such as the Hayden Avenue crossing was to establish recommendations for the crossing, assist in the design of the crossing, and give final project approval for improvements. Under federal transportation funding statutes, ITD had a duty to conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require improvement and then to implement a schedule of projects. The purpose of the survey is to obtain federal funds for the construction of projects in order to eliminate hazards at rail-highway crossings. ITD maintains Idaho's National Railroad-Highway Crossing Program Database. ITD gathers accident data for each rail-highway crossing in Idaho to determine the priority of crossings to be improved.

**B. Breach of Duty**

ITD argues that it did not breach any of its duties with respect to the Hayden Avenue crossing. First, ITD claims that there is no evidence that the intersection was improperly maintained. It is undisputed that the intersection was unobstructed at the time of the accident. Even if the intersection was improperly maintained, however, PFHD was the entity responsible for maintaining the crossing and not ITD. Second, ITD contends that the intersection was controlled in a manner permitted under state law. According to Idaho law, rail-highway crossings may be controlled by stop signs. Therefore, ITD was not negligent in permitting the crossing in this case to be controlled by a stop sign. Third, ITD claims that it acted in compliance with federal and state law

by maintaining a survey of rail-highway crossings and implementing a schedule for priority projects. Thus, according to ITD, it fulfilled its duties under state and federal law.

On the other hand, Giraud contends that ITD negligently collected and maintained accident data; ITD then relied on such data to determine which crossings would get priority funding. Thus, according to Giraud, a jury question exists as to whether ITD's design or plan for the Hayden Avenue crossing was based upon negligently collected accident data, *i.e.*, whether ITD breached its duty of care to properly inspect, maintain and collect accident data.<sup>10</sup>

ITD admits that it had a duty to inspect and maintain the Hayden Avenue crossing and to collect and evaluate accident data on the crossing. Giraud argues that ITD failed to obtain critical accident history of the crossing. It is undisputed that ITD collected and maintained accident rate data for the Hayden Avenue crossing. In ITD's Safety Evaluation of Hayden Avenue at UPRR Crossing, ITD claims that its accident data revealed no accidents at the subject crossing between 2000 and 2004. In fact, the FRA documented at least one reported injury accident at the Hayden Avenue crossing in 2003 and other fatality collisions that occurred between 1988 and 2006.

Giraud contends that, if ITD had obtained correct and complete data regarding previous accidents at the Hayden Avenue crossing, it would have been on notice of dangerous conditions prior to September 24, 2007. It is undisputed that plans were pending for the installation of automatic traffic control devices under an agreement that

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<sup>10</sup> ITD objects to what it characterizes as a new theory of negligence not raised in Plaintiff's Complaint – the negligent inspection and collection of data. However, ITD acknowledges a duty under the law regarding collection of data. Furthermore, the parties have now been given ample opportunity to address this issue. Finally, although Plaintiff has not moved to do so at this time, the Complaint might be amended to reflect this claim. Therefore, the issue is being addressed here.

ITD entered into on March 27, 2006. Giraud claims that a genuine issue of material fact exists as to whether the plans were dilatory in light of the accident history. According to Giraud, the failure to have active control devices at the time of the accident caused or contributed to the train-truck collision.

ITD denies that it was negligent in the collection of data as represented in the Concept Report prepared by Ruen-Yeager & Associates, Inc., or the consideration of the data in arriving at a recommendation for the Hayden Avenue crossing. Additionally, a question exists as to the application of an evidentiary privilege, which would preclude the admission of accident reports from evidence. Therefore, in order to reach a determination as to whether or not the duties imposed upon ITD were breached, it is necessary to address the evidence that can be considered.

C. **Application of an Evidentiary Privilege**

An issue has been raised as to whether *Idaho Code § 62-304D* and *23 U.S.C.A. § 409* preclude from evidence accident reports regarding other rail-highway collisions at the Hayden Avenue crossing. Such accident reports would include those submitted by the railroads to the ITD and/or collected and compiled by a governmental agency like the FRA. The question is whether Giraud is prohibited from proving the occurrence of other accidents at the Hayden Avenue crossing because his evidence is derived from reports protected by those statutes.

*23 U.S.C.A. § 409* states as follows:

*[R]eports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings . . . for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall*

*not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, schedules, lists, or data. (Emphasis added.)*

This statute was addressed in *Pierce County, Washington v. Guillen*, 537 U.S. 129, 123 S.Ct. 720, 154 L.Ed.2d 610 (2003). The United States Supreme Court held that the evidentiary privilege under *23 U.S.C.A. § 409* must be strictly construed. Therefore, the privilege does not protect information which was originally compiled or collected for purposes unrelated to federal funding statutes and which is held by the agencies that compiled or collected it. The privilege does not apply even if the same information was at some point collected by an agency for statutory purposes. For example, a crossing accident report held by a county sheriff's department would not be protected under Section 409 even though the same report might be protected in the hands of a government agency like ITD or FRA.

*Idaho Code § 62-304D* provides as follows:

**Establishing priorities for hazardous railroad locations – Accident reports to be filed with Idaho transportation department.** – In its administration of the railroad grade crossing protection account, the Idaho transportation department shall establish a priority rating for railroad crossings, assigning priority first to the most hazardous railroad crossing locations, giving proper weight to traffic volume over such crossings by school buses and vehicles transporting dangerous commodities . . . . *Every railroad company shall file with the Idaho transportation department a copy of each report of accident* which is filed with the Idaho public utilities commission . . . for the Idaho transportation department to consider in making its determination. *No part of any report filed with the Idaho transportation department as required by this section . . . and no finding, conclusion or order made by the Idaho transportation department in the administration of this act shall be used as evidence in any trial, civil or criminal, arising out of an accident at or in the vicinity of any crossing prior to installation of signals or other warning devices* pursuant to an order of the Idaho transportation department as a result of any such investigation or proceeding. (Emphasis added.)

The Idaho statute has not been interpreted by the appellate courts of this state. However, the language of the statute would limit the privilege to information obtained by the ITD from a railroad company report.

Initially, Giraud provided information from the FRA to support his claim of negligence in ITD's collection and maintenance of data. However, the information from the FRA is subject to an evidentiary privilege because it was evidence obtained from reports that are protected under *23 U.S.C.A. § 409* and/or *Idaho Code § 62-304D*.

Since the information from the FRA was inadmissible evidence, Plaintiff's counsel obtained information and reports of the other accidents at the Hayden Avenue crossing from the Idaho State Police, the Kootenai County Sheriff's Department, a witness contact, and news articles on the Internet and at the Coeur d'Alene Public Library.<sup>11</sup> Because Giraud obtained his information through means independent of the reporting requirements in either *28 U.S.C.A. § 409* or *Idaho Code § 62-304D*, the privilege does not apply to this evidence regarding the number and dates of accidents at the Hayden Avenue crossing.

ITD asserts that the newly offered evidence from other sources is not admissible. ITD objects to the copies of state accident reports, including the copy of the report provided to Giraud by Marytom Pickett, on grounds that they are inadmissible hearsay. ITD also objects to the copies of newspaper articles on grounds that they are inadmissible hearsay and irrelevant.

Although Giraud claims that the reports and articles can be corroborated by witness testimony at the time of trial, the standards for summary judgment require that

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<sup>11</sup> *See* Affidavit of Marty Durand, which was filed on March 4, 2010, and its exhibits.

the evidence in opposition to a motion be admissible. *Rule 56(e), Idaho Rules of Civil Procedure*. Furthermore, motions for summary judgment must be decided upon facts shown, not upon facts that might have been shown. *Verbillis v. Dependable Appliance Co.*, 107 Idaho 335, 689 P.2d 227 (Ct.App. 1984). *See also Sammis v. MagneTek, Inc.*, 130 Idaho 342, 941 P.2d 314 (1997); *Cates v. Albertson's Inc.*, 126 Idaho 1030, 895 P.2d 1223 (1995). Therefore, ITD's objections must be sustained.

Giraud argues that the reports and articles are admissible because they are not offered for the truth of the matter asserted. Instead, Giraud contends that they are offered for the effect they had on ITD's decision making with regard to the timing of the installation of automated traffic control devices at the Hayden Avenue crossing. However, ITD is not required to have knowledge of those reports and articles. Under Idaho law, ITD is only expected to collect and maintain accident data submitted by the railroad company and law enforcement agencies.<sup>12</sup> When the information is not submitted by these entities, ITD is not obligated to collect accident data from other sources. The failure of the railroad company or law enforcement officers to report the incidents is not a breach of duty by ITD. Thus, the reports and articles submitted by Giraud cannot be used to demonstrate that ITD should have known of prior accidents.

Furthermore, Giraud is relying on the reports and articles to prove prior accidents occurred and that, since ITD did not have knowledge of them, ITD must have breached its duty to collect and maintain accident data. Giraud is asserting that, because there were

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<sup>12</sup> ITD has a duty to enter information into Idaho's National Railroad-Highway Crossing Program database. However, that duty is limited to information received from railroad companies. The duty of reporting crossing accidents rests with the railroad company. *See Idaho Code § 62-304D; 49 C.F.R. § 225.11*. With respect to ITD's own highway safety information, accident reports from law enforcement are entered into ITD's database when they are received. *Idaho Code § 49-1306(1)* ("Every law enforcement officer . . . shall within twenty-four (24) hours after completing the investigation forward a written report of the accident to the department.")

prior accidents, ITD collected and maintained its accident data negligently. Therefore, the reports and articles were offered for the truth of the matter asserted and, because they contain inadmissible hearsay, they cannot be considered in ruling upon ITD's Motion for Summary Judgment.

**D. Conclusion**

To the extent that Giraud is claiming that ITD was negligent in the design, construction, and maintenance of the Hayden Avenue rail crossing, ITD's Motion for Summary Judgment must be granted. Giraud has also argued that ITD was negligent in the collection and maintenance of accident rate data for the Hayden Avenue crossing. Giraud has not come forward with admissible evidence to create a genuine issue of material fact that ITD was negligent in that it breached a duty with regard to the collection and maintenance of such data. Therefore, ITD's Motion for Summary Judgment must be granted.

**IV**

**ITD'S IMMUNITY FROM LIABILITY UNDER THE ITCA**

ITD claims that it is immune from liability under the Idaho Tort Claims Act ("ITCA"). Although it is not necessary to address immunity under the ITCA since ITD's Motion for Summary Judgment was granted above, it will nonetheless be considered alternatively here.

The Idaho Tort Claims Act waives traditional governmental immunity.<sup>13</sup> Under the ITCA, a governmental entity is liable for damages caused by its employees' negligent or wrongful acts or omissions.<sup>14</sup> Thus, a governmental entity may be held liable for

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<sup>13</sup> The Idaho Tort Claims Act (ITLA) is found in Chapter 9 of Title 6 of the Idaho Code.

<sup>14</sup> *Idaho Code § 6-903.*

damages to the same extent as a private person or entity. Even though traditional governmental immunity has been waived, there are exceptions to governmental liability. A governmental entity is immune from liability when it acts without malice or criminal intent and the claim arises out of: (1) “any act or omission of an employee of the governmental entity exercising ordinary care, in reliance upon or the execution or performance of a statutory or regulatory function”<sup>15</sup> (the Statutory/Regulatory Function Exception); (2) the performance of a discretionary function<sup>16</sup> (the Discretionary Function Exception); or (3) “a plan or design for construction or improvement to the highways, roads, streets, bridges, or other public property” where such plan or design meets certain criteria<sup>17</sup> (Design Immunity Exception).

First, with regard to the Statutory/Regulatory Function Exception, ITD contends that it was acting in accord with the Idaho law. Stop signs are a permissible control measure and electronic signals are not required. There is no evidence that the stop signs were installed, designed, or maintained negligently. Therefore, ITD is immune under this exception on Giraud’s claims for negligent design, construction, or maintenance at the crossing. Furthermore, to the extent that a claim for negligent collection and maintenance of data is now being asserted, Giraud has not come forward with any admissible evidence to show that ITD failed to act in accord with Idaho law.<sup>18</sup> Therefore, ITD is immune under this exception on Giraud’s claim for negligent collection and maintenance of data. Based on the Statutory/Regulatory Function Exception, ITD is entitled to Summary Judgment.

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<sup>15</sup> *Idaho Code § 6-904(1)*.

<sup>16</sup> *Id.*

<sup>17</sup> *Idaho Code § 6-904(7)*.

<sup>18</sup> *See* discussion regarding admissible evidence in Section III(C) above.

Second, ITD claims that it is immune from liability under the Discretionary Function Exception. In order to qualify for immunity under this exception, a plaintiff's claim must be based on the government's exercise of a discretionary function. Thus, the exception applies to government planning or policy decisions and does not apply to negligent operational decision-making or negligent implementation of a statute or policy. Courts use the "planning/operational" test when applying this exception. A two-step process is used in determining whether a decision was discretionary: (1) courts look at the nature and quality of the challenged action; and (2) courts consider the policies underlying the discretionary function exception. The policies are: (a) permitting those who govern to do so without being unduly inhibited in the in the function by the threat of tortuous conduct; and (2) limiting judicial re-examination of basic policy decisions properly entrusted to other branches of government. *Ransom v. City of Garden City*, 113 Idaho 202, 743 P.2d 70 (1987); *Roberts v. Transportation Department*, 121 Idaho 727, 827 P.2d 1178 (Ct.App. 1991).

To the extent that Giraud is contending that the Hayden Avenue crossing should have been upgraded sooner, ITD argues that the decision about whether, when, and how to improve the crossing was discretionary. However, the issue at this time is whether or not ITD breached its duty to collect and maintain its database in accord with statutory requirements. The collection and maintenance of ITD's database was not discretionary. Therefore, the Discretionary Function Exception does not provide immunity for ITD.

Third, ITD argues that the Design Immunity Exception applies for any role ITD may have played in approving the installation of the stop signs. Once a governmental entity makes the decision to plan and design a project, the design must either be: (1)

“prepared in substantial conformance with engineering or design standards in effect at the time of preparation of the plan or design;” or (2) “approved in advance of the construction by the . . . administrative agency, exercising discretion by authority to give such approval.”<sup>19</sup> There is no evidence to indicate that the stop signs were not prepared in conformance with engineering and design standards in effect at the time of the preparation of the plan. Furthermore, plans for automatic traffic control devices at the Hayden Avenue crossing were pending when the train and truck collided. Since the automatic traffic control devices had not yet been installed, the Design Immunity Exception does not apply here.

In summary, ITD is entitled to Summary Judgment based upon the Statutory/Regulatory Function Exception to liability under the ITCA. ITD’s Motion for Summary Judgment is granted on this ground.

V

**CONCLUSION AND ORDER**

Based on the foregoing discussion, it is hereby ORDERED that the Motion for Summary Judgment by the Idaho Transportation Department be and hereby is granted in part and denied in part as set forth herein.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2010.

\_\_\_\_\_  
John Patrick Luster  
District Judge

<sup>19</sup> *Idaho Code § 6-904(7)*.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing MEMORANDUM  
OPINION AND ORDER IN RE: MOTION FOR SUMMARY JUDGMENT was sent by  
U.S. Mail, postage prepaid, by facsimile transmission, or by interoffice mail, on the \_\_\_\_  
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By: \_\_\_\_\_  
Deputy Clerk