NO. COA10-1497
NORTH CAROLINA COURT OF APPEALS

Filed: 4 October 2011

JOEY TEDDER,
Plaintiff,

v. Edgecombe County
No. 08 CVS 1522

CSX TRANSPORTATION, INC., AND
SIDNEY EARL WILLIAMS, III,
Defendants.

Appeal by plaintiff from order entered 11 May 2010 by Judge W. Russell Duke, Jr., in Edgecombe County Superior Court. Heard in the Court of Appeals 9 June 2011.

John J. Korzen and Rachel Scott Decker, attorneys for plaintiff.

John C. Millberg and Meredith Woods, attorneys for defendants.

ELMORE, Judge.

Joey Tedder (plaintiff) appeals from an order entered 11 May 2010 granting a directed verdict in favor of CSX Transportation, Inc. (defendant CSX). After careful consideration, we affirm the decision of the trial court.

On 16 August 2006, plaintiff, a signal inspector employed at defendant CSX, was performing a test at a railroad crossing near the ramp from U.S. 64 West to Western Boulevard, a four-lane highway in Tarboro. Plaintiff began his work on the crossing around 9:00 AM. It was raining that day. Plaintiff parked the van he was driving four to five feet off the road. After plaintiff finished his work at the crossing, he returned to the van and began writing in a log book. After a few minutes, another vehicle driven by Sidney Earl Williams, III (defendant Williams), struck the van from behind. The collision caused the rear doors of the van to cave in, to the extent that they could not be opened. The van's rear bumper was also bent inward. The collision totaled defendant Williams's vehicle. Almost immediately following the collision, plaintiff began noticing pain in his neck. Later that day, the pain in plaintiff's neck began to increase, and his back began to hurt. Plaintiff sought treatment from Dr. Hal Woodall for his injuries.

Following the accident, plaintiff completed a two-page accident report given to him by defendant CSX. One question asked, "Did employee have a safe place in which to work?" Plaintiff checked "no" and commented, "no adequate parking and

dangerous intersection." On 1 December 2008, plaintiff filed suit against defendant CSX for negligence under the Federal Employer's Liability Act (FELA) and against defendant Williams for negligence.

During discovery, plaintiff identified Kelly Adamson, a civil engineer who worked in the field of traffic accident reconstruction, highway design maintenance, and construction, as an expert witness. Plaintiff then produced a copy of a report written by Adamson regarding the accident. The report stated that in Adamson's opinion, "CSX failed to provide a safe location for Mr. Tedder to park his vehicle while performing his job duties." Adamson was then deposed by videotape on 26 January 2010 by defendant CSX pursuant to North Carolina Rules of Civil Procedure 30 and 32.

At the beginning of the trial, defendant CSX made a motion *in limine* to exclude the videotaped deposition testimony of Adamson. Plaintiff argued that Rule 32 allowed for expert testimony to be offered by videotape. Defendant CSX argued that Adamson should not be considered an expert witness, because Adamson was unfamiliar with railroad practices and procedures, and because he had never dealt with an accident involving cars parked on the side of a railroad crossing. The trial court

granted the motion to exclude Adamson's videotaped deposition testimony. However, the trial court declined to rule on whether Adamson qualified as an expert, reserving the right to make that determination after *voir dire* examination of Adamson. Plaintiff did not produce Adamson as a witness at trial.

During trial, plaintiff testified that he did not drive the van up to the signal box because he was afraid the van would get stuck. Plaintiff also stated that he did not park the van across the street because "there are big ditches over there." Furthermore, when addressing where he parked, plaintiff stated "I thought it was the best place to park at the time." When asked whether the place he parked was a reasonably safe place to park, he responded "I don't think so." Plaintiff also testified that defendant CSX equipped the van with 1) a small red reflector beside the taillight on the driver's side, 2) a small white reflector beside the taillight on the passenger side, 3) a small yellow strobe light on the front, and 4) hazard lights. Plaintiff also testified that defendant CSX supplied him with an orange cone to be used when parking the van. Plaintiff further testified that during the last full year before the accident, he was paid an hourly wage of $26.82, which correlated to an estimated yearly earning of $56,000.00.

Next, plaintiff submitted the deposition testimony of Dr. Woodall. Dr. Woodall testified that plaintiff had on-going problems with his neck and lower back. He stated that plaintiff had "not been able to do any heavy work" and that "I do not think he can do heavy physical labor anymore." He also testified that "the pain will bother him the rest of his life."

Plaintiff then asked the trial court to take judicial notice of the Federal Reserve five-year and ten-year treasury rates, in order to use this information for a present value argument to the jury. The trial court declined to take judicial notice of the rates stating, "[y]ou haven't introduced any kind of economist or anything else that would give you any kind of basis to argue that to the jury." The trial court also noted that "those Federal Reserve rates[,] or whatever they were[,] five or ten year rates[,] those had never [been] produced, never been identified as exhibits."

At the close of plaintiff's evidence, defendant CSX and defendant Williams both made motions for a directed verdict. The trial court denied defendant Williams' motion. Plaintiff later settled with defendant Williams. But, the trial court granted the motion for directed verdict in favor of defendant CSX on grounds that 1) plaintiff failed to introduce evidence

sufficient to establish that defendant CSX negligently caused the accident and 2) plaintiff failed to introduce evidence sufficient to prove future medical expenses or future loss of earning capacity. Plaintiff now appeals.

Plaintiff first argues that the trial court erred in excluding the videotaped deposition testimony of Kelly Adamson under Rule 32 of the North Carolina Rules of Civil Procedure. We disagree.

"The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds . . . the witness is an expert witness whose testimony has been procured by videotape as provided for under Rule 30(b)(4)." N.C. Gen. Stat. § 1A-1, Rule 32(a)(4) (2011). In order to be considered an expert:

> [T]he witness must be qualified by knowledge, skill, experience, training, or education. North Carolina case law requires only that the expert be better qualified than the jury as to the subject at hand, with the testimony being helpful to the jury. Whether the witness qualifies as an expert is exclusively within the trial judge's discretion, and is not to be reversed on appeal absent a complete lack of evidence to support his ruling.

State v. Davis, 106 N.C. App. 596, 601, 418 S.E.2d 263, 267 (1992) (quotations and citations omitted).

Here, plaintiff identified Adamson as an expert witness. Prior to trial, defendant argued that Adamson should not be considered an expert witness. The trial court declined to rule, at that time, on whether Adamson qualified as an expert. Instead, the trial court decided to make that determination after *voir dire* examination of Adamson. However, plaintiff 1) did not produce Adamson as a live witness at trial, 2) did not otherwise produce Adamson for *voir dire* examination, or 3) make any request of the trial court to rule on defendant CSX's objection to Adamson's qualifications as an expert witness. In short, plaintiff failed to properly submit Adamson for qualification as an expert. Therefore, we conclude that Rule 32 of the North Carolina Rules of Civil Procedure did not apply to the videotaped deposition testimony of Adamson.

Plaintiff next argues that the trial court erred in granting directed verdict in favor of defendant CSX for failure to submit sufficient evidence to prove that defendant CSX negligently caused the accident. We disagree.

"The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 720, 693

S.E.2d 640, 643 (2009) (quotation and citation omitted). "Under [FELA] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury[.]" *Wilkins v. CSX Transp., Inc.*, 194 N.C. App. 338, 340, 669 S.E.2d 784, 786 (2008) (quotation omitted) (alteration in original). However, the primary issue to determine under FELA is whether defendant exercised reasonable care, and not whether defendant could have employed safer methods. *See Stillman v. Norfolk & W. R. Co.*, 811 F.2d 834, 838 (4th Cir. 1987) (finding that the question the jury had to decide was whether the defendant had exercised reasonable care for the safety of the plaintiff, not whether the defendant could have employed a safer method). "Under FELA, an employer . . . owes [employees] a continuing duty to provide a reasonably safe work place. The duty to provide a safe work place . . . includes a duty to provide employees with the equipment and assistance necessary to complete the tasks assigned." *McKeithan v. CSX Transp.*, 113 N.C. App. 818, 820-21, 440 S.E.2d 312, 314 (1994) (quotations and citations omitted).

Plaintiff first asserts that the videotaped deposition testimony of Adamson would have been sufficient evidence to

prove that defendant CSX did not exercise reasonable care. As we have previously discussed, the trial court did not err in excluding the videotaped deposition testimony of Adamson.

Plaintiff next asserts that his own trial testimony was sufficient evidence to establish that defendant CSX violated its standard of care. Here, plaintiff testified that defendant CSX equipped the van with reflectors, a strobe light, and hazard lights. Plaintiff also testified that defendant CSX supplied him with an orange cone to place next to the van. When reviewing plaintiff's testimony, in the light most favorable to plaintiff, it is evident that his testimony is insufficient to establish that defendant CSX failed to exercise reasonable care. Plaintiff's testimony clearly indicates that defendant CSX supplied plaintiff with the equipment and assistance necessary to complete his tasks. Plaintiff's argument suggests that defendant CSX should have provided plaintiff with a safer place to park, farther away from the road and closer to the signal box. However, as we have noted, the issue to be determined under FELA is whether defendant exercised reasonable care, and not whether defendant could have employed safer methods.

Therefore, we conclude that plaintiff did not offer sufficient evidence to prove that defendant CSX failed to

provide a reasonably safe work place. The trial court did not err in granting directed verdict in favor of defendant CSX on this issue.

Finally, plaintiff argues that the trial court erred in granting directed verdict in favor of defendant CSX for failure to establish future lost earning capacity. Specifically, plaintiff argues that 1) plaintiffs who do not produce discount rate evidence may still recover future lost wages, or in the alternative, that 2) the trial court erred in failing to take judicial notice of the Federal Reserve treasury rates. We disagree.

The U.S. Supreme Court has held that "[s]tate courts are required to apply federal substantive law in adjudicating FELA claims." *Monessen S. R. Co. v. Morgan*, 486 U.S. 330, 335, 100 L. Ed. 2d 349, 357 (1988) (citation omitted). "Damages [awarded] in suits governed by federal law should be based on present value. The self-evident reason is that a given sum of money in hand is worth more than the like sum of money payable in the future." *Monessen*, 486 U.S. at 339, 100 L. Ed. 2d at 360-361. (quotations and citations omitted). The U.S. Supreme Court has also held "that no single method for determining present value is mandated by federal law and that the method of

calculating present value should take into account inflation and other sources of wage increases as well as the rate of interest[.]" *St. Louis S. R. Co. v. Dickerson*, 470 U.S. 409, 412, 84 L. Ed. 2d 303, 307 (1985).

Here, plaintiff submitted evidence that 1) he earned about $56,000.00 in his last full year of employment prior to the accident, 2) the pain from his injuries will bother him for life, and 3) he can no longer do heavy physical labor. However, plaintiff offered no evidence of the discount rate to be used to establish the value of his future lost earnings.

Plaintiff asserts that there is no settled rule regarding whether FELA plaintiffs are required to produce discount rate evidence. Plaintiff suggests that this Court should follow the rule established by the Supreme Court of Virginia in *CSX Transp., Inc. v. Casale*, 441 S.E.2d 212, 216 (Va. 1994). In that case, the Supreme Court of Virginia held that the defendant in a FELA action has the burden of producing evidence of the discount rate. *Id.* Plaintiff also directs this Court's attention to the holding of an unpublished case from a federal district court in Oklahoma, establishing that a plaintiff's failure to present evidence to assist the jury in reducing a

future lost wages award to its present value did not preclude recovery.

We disagree with plaintiff's argument and suggested sources of authority. This Court adheres to the well-established rule that damages awarded in a case governed by federal law should be based on present value. Present value may be determined by taking into account a variety of factors, including: 1) inflation; 2) other sources of wage increases; 3) the rate of interest. Regardless of which party has the burden of establishing the discount rate, it is clear that there must be some evidence in the record of the discount rate. Here, neither party submitted this evidence to the trial court. Therefore, there exists no evidence in the record of the discount rate, and the present value of future lost earnings cannot be established.

Plaintiff further argues that he attempted to submit evidence to establish the discount rate when he requested that the trial court take judicial notice of the Federal Reserve treasury rates. Plaintiff asserts that the trial court erred in not taking judicial notice of these rates.

Again, we disagree with plaintiff. "Rule 201 of the North Carolina Rules of Evidence clearly states that judicial notice is discretionary[.]" *Jones v. Ratley*, 168 N.C. App. 126, 130,

607 S.E.2d 38, 41 (2005). "Judicial notice is mandatory only where requested by a party and [when the court is] supplied with the necessary information. *Id.* (quotations and citations omitted). Here, plaintiff requested that the trial court take judicial notice of the Federal Reserve treasury rates. However, plaintiff failed to produce information of those rates to the trial court. Therefore, the trial court's decision whether or not to take judicial notice was discretionary. "The exclusion of evidence under the Rule 403 balancing test lies within the trial court's sound discretion and will only be disturbed where the court's ruling is manifestly unsupported by reason[.]" *State v. Jacobs*, 363 N.C. 815, 823, 689 S.E.2d 859, 864 (2010) (quotations and citations omitted). Here, the trial court clearly indicated its reason for declining to take judicial notice of the Federal Reserve treasury rates. The trial court stated that since plaintiff did not plan to introduce any witness to explain the rates to the jury, judicial notice of the rates was inappropriate. Therefore, the trial court's decision was supported by reason, and the trial court did not err in declining to take judicial notice.

In sum, we conclude that the trial court did not err in excluding the videotaped deposition of Adamson under Rule 32 of

the North Carolina Rules of Civil Procedure, because plaintiff failed to properly submit Adamson for qualification as an expert. Furthermore, the trial court did not err in granting a directed verdict in favor of defendant CSX, because plaintiff 1) failed to produce sufficient evidence to prove that defendant CSX negligently caused the accident and 2) failed to establish future lost earning capacity.

Affirmed.

Judges CALABRIA and STEELMAN concur.

Report per Rule 30(e).