IN THE UTAH COURT OF APPEALS

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Shayne Clayson, Plaintiff and Appellant, v. Union Pacific Railroad Company, a Delaware corporation; and Utah Railway Company, a Utah corporation, Defendants and Appellees.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20040783-CA F I L E D (October 27, 2005) 2005 UT App 453

Third District, Salt Lake Department, 020905849
The Honorable Joseph C. Fratto Jr.

Attorneys: Alan R. Stewart, Murray, Wesley W. Hoyt, Englewood, Colorado, and Robert Tramuto, Houston, Texas, for Appellant
E. Scott Savage and Casey K. McGarvey, Salt Lake City, for Appellees

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Before Judges Billings, McHugh, and Orme.

ORME, Judge:

We have determined that "[t]he facts and legal arguments are adequately presented in the briefs and record[,] and the decisional process would not be significantly aided by oral argument." Utah R. App. P. 29(a)(3). Moreover, the issues presented are readily resolved under applicable law.

Plaintiff Shane Clayson appeals the trial court's grant of summary judgment in favor of defendants Union Pacific Railroad Company and Utah Railway Company. Summary judgment is proper only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). "Because summary judgment is granted as a matter of law, we give the trial court's legal conclusions no particular deference." Hodgson v. Bunzl Utah, Inc., 844 P.2d 331, 333 (Utah 1992).

Clayson's claims against Union Pacific, his employer, are brought under the Federal Employers' Liability Act (FELA). See 45 U.S.C. §§ 51-60 (2000). Under FELA, a railroad carrier employer is liable to the employee "for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." Id. § 51 (emphasis added).

Clayson argues that there is a factual issue about whether Union Pacific was negligent in not providing him additional training. We disagree. Clayson has failed to establish that his employer had a duty to provide him additional training. Clayson points to no evidence that his employer could have reasonably foreseen, considering his previous training and extensive work experience, that, without further training, his current position would pose an unsafe environment for him or that he would encounter an increased risk of accidents of the sort that occurred here. See Handy v. Union Pac. R.R. Co., 841 P.2d 1210, 1219 (Utah Ct. App. 1992) ("[W]hile foreseeability is no longer a component of causation in FELA negligence cases, foreseeability, under the weight of authority, 'remains an element of duty.'") (citation omitted).

Clayson also contends that Union Pacific was negligent because Utah Railway's approaching train was not warned of the malfunctioning crossing gates on which he was working. There is evidence suggesting that Clayson's supervisor knew of the crossing gate failure, but that this information was not relayed so the dispatcher could notify the train crew, as required by federal regulation. See 49 C.F.R. § 234.107(a) (2004). There is also evidence suggesting that had such a warning been given, it would have caused the train to be traveling more slowly, which might have reduced the force of the impact and, thus, the severity of Clayson's injuries, even if the accident would not have been avoided altogether. Therefore, we cannot say, as a matter of law, that Union Pacific had no duty to get appropriate information about the malfunctioning crossing gates to the train crew. Nor can we say, as a matter of law, that breach of this duty did not "play[] any part at all" in Clayson's injuries. Rogers v. Missouri Pac. R.R., 352 U.S. 500, 507 (1957).

In his non-FELA negligence claim against Utah Railway, Clayson argues that Utah Railway was negligent in failing to reduce its train's speed to fifteen miles per hour, as required by federal regulation. See 49 C.F.R. § 234.107(c)(2). But, almost as a necessary consequence of his evidence that Union Pacific failed to advise Utah Railway of the malfunctioning crossing gates, Clayson can point to no evidence that Utah Railway knew, or should have known, of the malfunctioning crossing gates. Therefore, we agree that given its unrefuted

evidence, Utah Railway had no duty to reduce its train's speed under the cited regulation.

Clayson's remaining contention against Utah Railway is that there is a dispute of material fact about whether the train sounded its horn near the crossing as required by state law. See Utah Code Ann. § 56-1-14 (2000). As evidence that the horn did not sound, Clayson points to the testimony of four witnesses to the effect that they were in hearing range but did not hear the train sound its horn. The weight of such negative testimony in the face of contrary evidence "ordinarily is for the jury to determine," except when it is "highly improbable" that the witness would have heard the horn had it been sounded. Russell v. Watkins, 49 Utah 598, 164 P. 867, 869 (1917) (emphasis added). The situation here is not one of those exceptional cases. Rather, the testimony relied on by Clayson in this case is governed by the long-standing general rule:

> Though a witness was not specially listening for signals, or giving special attention to the occurrence, yet if his attention was not engrossed or diverted to other things, and it being made to appear that he was in position to hear, and in all likelihood would have heard them had they been given, his testimony that he heard none is still of probative value . . . .

Clark v. Union Pac. R.R. Co., 70 Utah 29, 38, 257 P. 1050 (1927).

Viewing the evidence in the light most favorable to Clayson, three witnesses were near the scene of the accident and a fourth was conversing with Clayson via cell phone immediately before the accident. While none of these witnesses was specifically listening for it, there is evidence from which a jury could conclude each was in a position to hear the train horn. And we cannot say on the record before us that, as a matter of law, each was so "engrossed or diverted to other things" as to make the testimony of no probative value.[1] Id.

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[1]In its argument that the negative testimony here is legally insufficient for Clayson's claim to survive summary judgment, Utah Railway points to a recent case, Price v. National Railroad Passenger Corp., 2000 UT App 333, 14 P.3d 702, cert. denied, 26 P.3d 235 (Utah 2001), where negative testimony regarding a train signal was not sufficient to withstand summary judgment in favor of the railroad. See id. at ¶31. The facts in the instant case, however, are markedly different from those in Price. First, the (continued...)

Accordingly, while we affirm the summary resolution of the training issue in favor of Union Pacific and the speed issue in favor of Utah Railway, we reverse the summary judgment in favor of both defendants on the remaining issues. We remand for trial or such other proceedings as may now be appropriate.

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Gregory K. Orme, Judge

WE CONCUR:

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Judith M. Billings,
Presiding Judge

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Carolyn B. McHugh, Judge

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[1](...continued)
witnesses in Price were in vehicles with the windows rolled up and music playing. See id. at ¶27. Here, two witnesses were in an automobile with the windows rolled up, but were only intermittently talking while waiting for the crossing gate to raise. Second, in Price there was objective evidence from the train's event recorder that the horn was blown continuously for about forty seconds before the accident. See id. at ¶¶28-29. Here, while maintaining that the event recorder did show the horn was being sounded before the accident, Utah Railway concedes that the recorder shows that it sounded for such an unreasonably long period of time that the recorder "is inconclusive and is not relied upon to prove the whistle sounded." Finally, the witnesses on whom plaintiffs relied in Price were all in cars with windows up and music playing. See id. at ¶27. Here, however, only two of the witnesses were even in an automobile, and another witness was outdoors. The factual differences between Price and the instant case buttress our holding that the negative testimony here does have probative value and is enough to "preserve a genuine issue of material fact." Id. at ¶31.