MISSOURI COURT OF APPEALS
WESTERN DISTRICT

JUDITH ANN CAMPBELL, As Guardian and Conservator of KRISTA MOLLY BARNHART,

Appellant,

v.

UNION PACIFIC RAILROAD COMPANY; RICHARD LOUIS ALSBURY and WILLIAM LAMAR WOODWARD,

Respondents.

DOCKET NUMBER WD83328

Date: November 24, 2020

Appeal from:

Adair County Circuit Court
The Honorable Russell E. Steele, Judge

Appellate Judges:

Division Two: Lisa White Hardwick, Presiding Judge, Alok Ahuja and Karen King Mitchell, Judges

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Attorneys:
Louis C. Accurso, Burton Haigh, Clayton E. Gillette, KCMO; Terry M. Evans, William S. Lewis, Miles B. Figg, Smithville; John J. Benson, Kirksville, for appellant.
Thomas E. Jones, Harlan A. Harla, Bellville, IL; Craig M. Leff, KCMO, C. David Rouner, Kirksville, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

MISSOURI COURT OF APPEALS
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JUDITH ANN CAMPBELL, As Guardian and Conservator of KRISTA MOLLY BARNHART, Appellant,

v.

UNION PACIFIC RAILROAD COMPANY; RICHARD LOUIS ALSBURY and WILLIAM LAMAR WOODWARD, Respondents.

WD83328 Adair County

Before Division Two Judges: Lisa White Hardwick, Presiding Judge, Alok Ahuja and Karen King Mitchell, Judges

Judith Campbell, guardian and conservator of Krista Molly Barnhart, appeals the circuit court's entry of two summary judgments in favor of Union Pacific Railroad Company, Richard Alsbury, and William Woodward on her negligence and punitive damages claims against them. Campbell contends that genuine issues of material fact remain precluding summary judgment and that the court's exclusion of the opinions of five of her experts was erroneous.

AFFIRMED, IN PART, AND REVERSED AND REMANDED, IN PART.

Division Two holds:

(1) The circuit court did not err in granting summary judgment in favor of Union Pacific on its affirmative defense that Campbell's inadequate warning device claims are preempted by the Federal Railway Safety Act ("FRSA"). The uncontroverted facts establish that the Federal Highway Administration approved the Missouri Highway and Transportation Commission's installation of the yield signs at the crossing where Barnhart's collision occurred and that federal funds were used to pay for their installation. Therefore, under 49 U.S.C. § 20106(a)(2), Campbell's claims are preempted.

(2) The circuit court did not err in granting summary judgment in favor of Union Pacific on its affirmative defense that the FRSA and the Locomotive Inspection Act ("LIA") preempt Campbell's claims regarding the timing and pattern of the horn blasts and the horn's construction or design. The uncontroverted facts establish that the train crew sounded the horn within 49

C.F.R. §222.21(b)(2)'s prescribed time frame and in the pattern prescribed by 49 C.F.R. § 222.21(a), so the FRSA preempts any claims that the horn was not sounded in a timely manner or in the correct pattern. Furthermore, because the uncontroverted facts establish that the horn was installed pursuant to the manufacturer's design, the LIA preempts Campbell's claim that the horn was installed backwards.

(3) The circuit court erred in granting summary judgment on Campbell's claims that Union Pacific, Alsbury, and Woodward failed to provide an adequate audible warning to Barnhart. Genuine issues of material fact remain on the issue of Union Pacific's compliance with 49 C.F.R. § 229.129(a)'s decibel-level requirements at the time of the collision, and Union Pacific's pleadings were insufficient to assert lack of causation as a basis for granting summary judgment on the horn audibility claims.

(4) The circuit court did not err in granting summary judgment on Union Pacific's affirmative defense that the FRSA preempts her claims based on excessive speed. The uncontroverted facts show that the train was traveling well below the speed limit. Campbell failed to demonstrate that a genuine issue of material fact remains as to whether Barnhart was making an unwavering approach to the crossing that the train crew should have observed, which was necessary for Campbell to establish to avoid preemption.

(5) The circuit court did not err in granting summary judgment in favor of Alsbury and Woodward on Campbell's failure to keep a careful lookout and slacken speed claims. Even if we were to accept that Barnhart did, in fact, make an unwavering approach to the crossing, Campbell failed to demonstrate that the train crew should have known about Barnhart's unwavering approach in time to slow the train and avoid the collision.

(6) The circuit court erred in granting summary judgment in favor of Union Pacific on Campbell's punitive damages claim associated with her horn audibility claims, as genuine issues of fact remain on the horn audibility claims. The court did not err in granting summary judgment in favor of Union Pacific on Campbell's punitive damages claim associated with all of her other claims. To recover punitive damages, a plaintiff must prevail on an underlying claim entitling her to actual damages. Because summary judgment was properly granted on Campbell's other underlying claims, she cannot recover punitive damages on those claims.

(7) The circuit court did not err in excluding the opinions of Campbell's experts Dr. Ellie Francis, Dr. Harvey Levine, Dr. Stephen Richards, and Jimmy Scott. All four experts offered opinions that were irrelevant due to preemption.

Moreover, Scott's opinion that was not irrelevant was based on an excluded video that was not part of the summary judgment record, and Campbell failed to properly challenge the exclusion of the video on appeal.

(8) The circuit court did not err in excluding the opinions of Campbell's expert Michael Seidemann concerning the timing and pattern of the horn blasts and the installation of the horn because those opinions were irrelevant due to preemption. The court did err, however, in excluding Seidemann's opinions on the horn's audibility, as Campbell's horn audibility claims are not preempted.

Opinion by: Lisa White Hardwick, Judge November 24, 2020

THIS SUMMARY IS UNOFFICIAL AND SHOULD NOT BE QUOTED OR CITED.