

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT

(Placer)

----

CHRISTOPHER HAUT,

Plaintiff and Appellant,

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant and Respondent.

C070419

(Super. Ct. No. SCV23592)

Plaintiff Christopher Haut was injured in his job with defendant Union Pacific Railroad Company when he repeatedly pushed a crane button to try to lift a stuck radiator from a locomotive, and a bolt flew off the crane's lifting device and hit him in the face. He sued under the Federal Employers' Liability Act (FELA), which requires the employee to prove the railroad's negligence played a part, no matter how small, in bringing about the injury, and denies recovery where the employee is the sole cause of his injury. (45 U.S.C. § 51 et seq; *CSX Transp., Inc. v. McBride* (2011) \_ U.S. \_ [180 L.Ed.2d 637] (*CSX*)). The jury returned a special verdict finding (1) defendant was negligent but (2) its negligence was not a cause of plaintiff's injury.

Plaintiff appeals, arguing no substantial evidence supports a finding that he was the sole cause of his injury. We disagree. Plaintiff forfeits substantial evidence by failing to acknowledge evidence favorable to the judgment. Moreover, plaintiff admittedly knew the safety rule that “if something is stuck, you better stop.” The jury was not required to believe plaintiff’s testimony that he had no idea the crane was straining when he kept pushing the crane button. The jury could reasonably find negligence on defendant’s part yet find plaintiff was the sole cause of his injury. We affirm the judgment.

#### FACTS AND PROCEEDINGS

At trial and on appeal, plaintiff has presented an avalanche of material claiming defendant was negligent in a multitude of ways, e.g., inadequate training and supervision of the employee who failed to know about and remove hidden radiator bolts; failure to have written diagrams and instructions easily available; failure to remove from service a defective lifting device; and inadequate training on the use of the crane and lifting equipment. Defendant responds on each point. We need not address most of this evidence, because the judgment may be affirmed on the simple ground that plaintiff kept pushing the crane button even though the radiator was stuck.

Defendant hired plaintiff as a “journeyman machinist” in August 2004, three years before the accident. The position required at least four years of documented experience working on engines or heavy equipment. Plaintiff had 24 years’ prior experience as a machinist, including 22 years working on military tanks and vehicles for the National Guard. At Union Pacific, plaintiff had one week of classroom training and three months of peer training where he shadowed and learned from senior workers. It was not possible to train each new employee to do every job on every type of locomotive, because defendant has 30 classes of locomotives made by this manufacturer. But the mechanical aspect of locomotives is “pretty basic stuff.”

Plaintiff worked in defendant's locomotive maintenance and repair facility. Before the accident, plaintiff had never participated in lifting a radiator out of a locomotive engine and had not worked with the particular lifting device used that day, but he had previously operated cranes and lifting devices and felt confident he knew what he was doing on the day of the accident.

On the day of the accident, June 3, 2007, a supervisor told plaintiff he would be working with Terry Stuart to pull a radiator of a locomotive to repair a leak in the radiator. Stuart told plaintiff the radiator was ready to be pulled out, which plaintiff understood to mean that all bolts had been removed from the radiator. Stuart said he had tried to lift the radiator with a cable sling hooked to a lifting device on a crane, without success, and they had to find the chains for the lifting device. They looked but could not find the chains that belonged with the particular lifting device. They reported to supervisor Robert McKenzie, who indicated they should use other chains.

Plaintiff found a chain but it was not big enough for the "shackles" to go through it. A shackle or "clevis" is a U-shaped device that unscrews to accommodate a chain or cable and then screws back together. A clevis is specifically designed to take the force of lifting, whereas bolts are used for lateral forces.

Plaintiff had the idea to use bolts instead of shackles to attach the chain to the lifting device. He testified he told McKenzie, who said, "Just get it done." It was the end of a shift, so Stuart and McKenzie left. Plaintiff used bolts to secure the chain to the lifting device.

Plaintiff was joined by Shane Franks and Greg Hughes. The latter two got on top of the locomotive. Plaintiff operated the overhead crane, picked up the lifting device, and moved it over the engine, where the others hooked the lifting device to the radiator. Hughes then left to check on the new radiator.

Plaintiff was the crane operator, and Franks on top of the locomotive was the signal person. They double-checked and believed all bolts had been removed. They

were unaware there were additional bolts hidden behind the shutter assembly that had not been removed.

Franks signaled plaintiff to go up, and plaintiff pushed the crane button to go up. The lifting device inched up but “wouldn’t go.” Franks said go down, so plaintiff went down. Franks said he needed a pry bar, which plaintiff handed to him. Sometimes sealant around the gaskets will stick. Franks checked from the top, then handed the pry bar to plaintiff, who stepped inside the compartment and checked from underneath. Everything seemed free and clear.

According to Franks -- who testified before plaintiff at trial -- the radiator did not move with the first attempt; they stopped and checked; and the bolt failed on the *second* attempt. This conflicted with plaintiff’s testimony at trial *and in his deposition* that he pushed the crane button *four times* before the bolt flew off. Before plaintiff testified, the trial court allowed the defense to use the deposition testimony in cross-examining a witness, over a curious objection by plaintiff’s attorney that this was a “new issue” that was “never disclosed in discovery.”

Plaintiff testified Franks gave him a second signal to go up. Plaintiff pushed the button in a “short burst” as he was supposed to do. Franks said to go up again. Plaintiff pushed the button a third time. Franks said to go up again. Plaintiff pushed the button a fourth time and got hit in the chin by the flying bolt. He went to the hospital and received three stitches. He returned to work but later complained of head and neck pain, took a leave of absence, then quit to work for the State.

Since plaintiff did not testify he went down after the second and third short bursts of the button, it is not clear whether he lowered the hook each time or whether the strain caused the crane to stall, as other witnesses described crane operations generally. For purposes of this appeal, it does not matter.

Defendant conducted an internal investigation and disciplined plaintiff and supervisors for violating the rule against modifying equipment. It could not be

determined who attached the lifting device with bolts, because plaintiff falsely denied having done so -- both during the internal investigation and in his testimony at the disciplinary hearing. Instead, plaintiff claimed he went to the rest room and then took his break, and when he returned, the chain was already bolted to the lifting device. At trial, plaintiff claimed he gave this false information due to memory loss from the accident, but he did not express any memory difficulties during the disciplinary hearing on July 11, 2007, more than a month after the accident. Plaintiff acknowledges there was conflicting medical evidence as to whether he suffered a brain injury resulting in temporary memory loss.

Defendant suspended plaintiff from work for five days. He quit and took a job with the state Department of Water Resources.

According to plaintiff's testimony, all he did the day of the accident was follow coworker Franks's signals -- "I just did what he told me to do." The jury learned the parties stipulated that "no action or inaction by Shane Franks is a basis for fault against Union Pacific Railroad Company."

Plaintiff testified he listened to the crane's motor but did not hear or sense any motor strain. It never occurred to plaintiff to stop; he did not look at the lifting device as he pushed the button multiple times; and he gave no thought to the fact he had used bolts instead of shackles.

However, other witnesses who described how cranes operate testified the operator should sense the crane straining, though they were not present at plaintiff's accident. Though some had not operated this particular type of crane, the basic mechanics are the same.

Defendant's director of the locomotive facility, Dennis Magures, testified he expects a journeyman machinist to stop and find out what's wrong if he tries to remove a radiator and it is stuck. If you keep trying, "[y]ou're looking to have a failure" because "[s]omething is going to break." Magures has operated five-ton cranes, though not this

particular one, and has been around cranes lifting things out of locomotives for 38 years. He testified a crane operator does not focus just on the person giving the hand signals, as plaintiff indicated he did. “His task would be multi-functional. Not only should he be paying attention to Mr. Franks, but he should also be paying attention to the crane and the load that he’s trying to lift, and recognizing that if there are any issues, you know, the danger exists that he can knock Mr. Franks off the top of the locomotive.” A five-ton crane operating under the stress of a load makes a sound if something is struck and cannot move. “If you look at an electric motor running freely, and you started to put a load on it, an electric motor makes a whirring noise. And then as the load continues, it just bogs it down until it would finally stall.” The crane makes a sound when it is being stressed against a heavy load. Magures could not say what plaintiff or Franks heard. Magures based his testimony on his 38 years of experience around a mechanical facility and being around cranes for 38 years.

Additionally, Paul Bertolozzi, locomotive manager of the shop where the accident happened, testified there *would be* an indication the crane was straining. He is a former Air Force ground mechanical equipment mechanic and started working for defendant in 1996.

Bertolozzi did not witness the accident but heard the unusually loud noise when the lifting device failed. Bertolozzi had no prior experience with that particular lifting device but understood the mechanics. “The truth of the matter is you know when you’re lifting a crane, when it’s under a load bearing that it just can’t handle, and it’s going to overwork itself. And if you don’t burn up the crane, you should notice that you’re trying to lift the locomotive with a tiny little bolt.” If you’re lifting a radiator and it gets stuck, you should stop. Bertolozzi agreed, “you never ever force something out with a five-ton crane unless you’re sure that it’s free.” Defendant now calls this rule “stop the line.” All Union Pacific employees were “empowered to do what we [now] call stop the line.”

Bertolozzi said there was nothing unusual about attempting to lift the radiator a second time, after the first attempt failed and the pry bar was used to check, because sometimes a heavy item may be just stuck in place. It was Bertolozzi's understanding that the bolt blew off on the first attempt after use of the pry bar. Defense counsel asked Bertolozzi to assume plaintiff did not push the crane button twice but rather he pushed it a total of four times. Plaintiff objected it assumed facts not in evidence. The trial court allowed the defense to read from plaintiff's deposition that, after the first attempt, they stopped and used the pry bar, and then Franks "told me to go up; I tapped the button. He said go up; I tapped the button. He said go up; I tapped the button. And on the third one [after the pry bar] it -- there was a big bang and a big crash, and I got smacked by something." Plaintiff said in deposition that about 15 to 20 seconds passed between the first hit of the button (presumably after using the pry bar) and the last hit of the button (the third push after using the pry bar). When asked if he would expect a journeyman machinist to do that, Bertolozzi said no. "One tap is one thing. And now you pulled out a pry bar, and it still isn't moving. Something is wrong. You've got to stop. You got to stop and get somebody else to take a look for you." "You have to exhaust all resources." We note the defense at trial thought plaintiff said he held the button down for 15 to 20 seconds.

Bertolozzi testified if one is using a crane "and something is stuck, each time you push the button that strains the crane." "That's something that the person operating the crane would be able to visually see." "Something you could hear, for the most part." A "basic tenet of being a mechanic" is, "if you're operating the crane or on top, you don't force something that's stuck."

Bertolozzi acknowledged he did not know what *plaintiff* heard or knew or whether *plaintiff* sensed any straining of the crane or movement of the radiator. But the fact a bolt sheared off would be an indication the crane was strained.

Plaintiff's expert, Dennis Fitzpatrick, testified there was no evidence that the way plaintiff pushed the crane's button was in any way a cause of the incident.

Plaintiff argued to the jury multiple negligent acts for which defendant was liable, including that Stuart failed to remove all the radiator's bolts, supervision was inadequate, and defendant failed to remove from service the defective lifting device and failed to provide adequate training. Defendant argued to the jury that plaintiff's injury was caused solely by his failure to adhere to "one of the primary rules in the world of mechanics" -- "if something is stuck, you better stop."

The jury returned a special verdict, finding defendant was negligent, but defendant's negligence was not a cause of injury to plaintiff. Judgment was entered on November 7, 2011.

On November 18, 2011, plaintiff moved for judgment notwithstanding the verdict or, in the alternative, new trial on multiple grounds, including insufficiency of the evidence -- the only issue on appeal. On January 19, 2012, the trial court denied the motion.

Plaintiff's appellate brief indicates he appeals from both the judgment and the post-judgment order, but his notice of appeal states only that he appeals from the judgment. Accordingly, we need address only the judgment.

## DISCUSSION

### I

#### *Standard of Review*

In reviewing evidence on appeal, all conflicts must be resolved in favor of the prevailing party, and all legitimate and reasonable inferences indulged in to uphold the finding if possible. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571.) When a finding is attacked as being unsupported by the evidence, "the power of the appellate court begins and ends with a determination as to whether there is

any substantial evidence, contradicted or uncontradicted, which will support the [finding].’ ” (*Ibid.*) When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. (*Ibid.*) The same standard applies to our review of the trial court’s denial of plaintiff’s motion for judgment notwithstanding the verdict. (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 770.)

## II

### *The Federal Employers’ Liability Act*

When FELA cases are brought in state court, federal law governs the substantive rights of the parties, and state rules govern procedure. (*St. Louis Southwestern Ry. Co. v. Dickerson* (1985) 470 U.S. 409, 411 [84 L.Ed.2d 303].)

The railroad business was “exceptionally hazardous at the dawn of the twentieth century.” (*CSX, supra*, \_ U.S. at p. \_ [180 L.Ed.2d 644-645].) The physical dangers of railroading resulted in the death or maiming of thousands of workers every year. (*Ibid.*) FELA was enacted in 1908 to “ ‘shif[t] part of the human overhead of doing business from employees to their employers.’ ” (*Ibid.*)

FELA provides: “Every common carrier by railroad while engaging in commerce between any of the several States or Territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . 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, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.” (45 U.S.C. § 51.) “[T]he fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.” (45 U.S.C. § 53.) However, no employee shall be held to

have been contributorily negligent in any case where the railroad's violation of a *statute* enacted for employee safety contributed to the injury. (45 U.S.C. § 53.) Assumption of the risk is not a defense in a FELA case (45 U.S.C. § 54), but assumption of the risk under federal law is “ ‘the knowledgeable acceptance by an employee of a dangerous condition *when and if such acceptance was necessary* for the performance of his duties.’ ” (*Ammar v. United States* (2d Cir. 2003) 342 F.3d 133, 139 (*Ammar*), italics added.)

FELA “does not incorporate ‘proximate cause’ standards developed in nonstatutory common-law tort actions.” (*CSX, supra*, \_ U.S. at p. \_ [180 L.Ed.2d at pp. 643, 645].) “Given the breadth of the [FELA] phrase ‘resulting in whole or in part from the [railroad’s] negligence,’ and Congress’ ‘humanitarian’ and ‘remedial goal[s],’ [the United States Supreme Court has] recognized that, in comparison to tort litigation at common law, ‘a relaxed standard of causation applies under FELA.’ ” (*Id.* at p. 645.) “Juries in such cases are properly instructed that a defendant railroad ‘caused or contributed to’ a railroad worker’s injury ‘if [the railroad’s] negligence played a part -- no matter how small -- in bringing about the injury.’ That . . . is the test Congress prescribed for proximate causation in FELA cases.” (*Id.* at p. 653.) The test of a jury case is whether the evidence supports a conclusion that employer negligence played any part at all, “even the slightest, in producing the injury . . . . It does not matter that, from the evidence, the jury may also with reason on the grounds of probability, attribute the result to other causes . . . [¶] . . . [¶] The employer is stripped of his common-law defenses and for practical purposes the inquiry in these cases . . . rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit.” (*Rogers v. Mo. Pac. R. R. Co.* (1957) 352 U.S. 500, 506-508 [1 L.Ed.2d 493] (*Rogers*); accord, *Fontaine v. National R.R. Passenger Corp.* (1997) 54 Cal.App.4th 1519, 1525.) When the facts reasonably support

a conclusion for either party, the decision is exclusively for the jury to make. (*Rogers, supra*, 352 U.S. at p. 504.)

A railroad is not liable at all if the employee was the “sole cause” of his injury. “[P]roof that the employee’s own negligence was the SOLE cause of his or her injury is a valid defense because it eliminates the possibility that the employer contributed in whole or in part to the injury. [Citation.]” (*Duron v. Western R.R. Builders Corp.* (D. New Mexico 1994) 856 F.Supp. 1538, 1540-1541 (*Duron*), citing *Walden v. Illinois C.G. Railroad* (7th Cir. 1992) 975 F.2d 361, 364 (*Walden*).) Defendant bears the burden of proving that plaintiff was the sole cause of his injury. (*Toth v. Grand Trunk R.R.* (6th Cir. 2002) 306 F.3d 335, 351.)

### III

#### *Analysis*

As noted by defendant, a plaintiff seeking substantial evidence review on appeal must set forth *all* material evidence, not merely evidence favorable to his position. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) Here, plaintiff’s appellate brief presents a distorted picture of the trial, citing his own testimony that he did not know the radiator was stuck, and claiming there was no substantial evidence of any noise or other indication that anything was wrong, and no evidence that he knew the crane was straining or the radiator was stuck.

Plaintiff virtually ignores the testimony of Magures and Bertolozzi that, if the radiator is stuck, each attempt to lift it strains the crane, and the crane operator can see, hear and sense that the crane is being strained -- from which the jury could infer plaintiff knew the crane was straining and knew he should stop but kept pushing the crane button anyway. When plaintiff pushed the crane button the third and fourth times, it did not matter why the radiator was stuck. By failing to stop, plaintiff was the direct and immediate cause of his own injury. Because of plaintiff’s failure to acknowledge

evidence that supports the jury's finding, plaintiff has arguably forfeited his claim of insufficiency of the evidence.

Even assuming plaintiff has not forfeited review, substantial evidence supports the judgment.

Though opinions of federal district and circuit courts are not binding on us, we may consider them. (*Irwin v. City of Hemet* (1994) 22 Cal.App.4th 507, 520-521, fn. 8.)

In *Walden, supra*, 975 F.2d 361, the railroad violated Federal Railroad Administration (FRA) standards which required the railroad to cease operations when radio communications were interrupted. (*Id.* at p. 363, citing 49 C.F.R. § 220.49.) The plaintiff, a brakeman, was injured when other employees proceeded to couple two cars without operational radio communications. He asserted he was unaware of the impending impact and could not brace for it. (*Ibid.*) The plaintiff had initiated the coupling by throwing a track switch and instructing the engineer by radio to begin backing the engines toward the boxcars. As the engines began moving, the plaintiff climbed aboard the rear of one of the moving engines, though he was not required to do so. Another employee took over the radio communications, but the communication was garbled, so the employee stepped out to where the engineer could see him and gave hand signals to proceed. (*Walden, supra*, 975 F.2d at p. 363.)

In a pretrial motion in *Walden*, the trial court found negligence per se on the part of the railroad. Causation was submitted to the jury, which found the railroad's negligence did not cause or contribute to the plaintiff's injury. (*Id.* 975 F.2d at pp. 363-364.) The appellate court affirmed. The jury could have found the plaintiff had no reason to board the engine, which he was not required to do during the coupling process, and he knew he should be braced during a coupling, and he knew there would be nothing with which to brace himself. (*Id.* at pp. 364-365.) The jury could have found that, because of the plaintiff's unbraced position, not only was his injury caused by his unbraced position, but the same injury would have occurred had the coupling stopped

when radio communications were interrupted, because the stop would have been unexpected, and the plaintiff still would have been injured because of his unbraced position. (*Id.* at pp. 364-365.)

*Walden* said the plaintiff made no argument that the railroad was negligent in failing to prevent the plaintiff's failure to care for his own safety and, had the plaintiff made such an argument, it would not have been resolved in his favor but rather would strengthen the argument that his own negligence was the sole cause of his injuries. (*Id.* 975 F.2d at p. 365.)

In *Duron, supra*, 856 F.Supp. 1538, a railroad engineer crushed his hand when, in order to uncouple two railroad cars, he stepped between the cars before the train came to a complete stop and placed his hand near the coupling device ("knuckle"). The slack from the cars was taken up, which compressed upon the knuckle and crushed his hand. (*Id.* at p. 1542.) His FELA suit alleged the railroad failed to train and warn him adequately and failed to provide a safe place to work. (*Id.* at p. 1540.) The railroad moved for summary judgment on the ground that, even assuming it was negligent (which it denied), the plaintiff was the sole cause of his injury. The railroad presented evidence, including the plaintiff's deposition testimony, that he had experience uncoupling cars and knew before the accident that safety rules said he should not place any part of his body on or near the knuckle while the train was moving. (*Id.* at p. 1543.) The district court granted summary judgment to the railroad. "Even if Defendants were negligent in failing to adequately train and warn Plaintiff not to place his hand near the knuckle, such negligence did not cause Plaintiff's injury because Plaintiff *already* knew, and has admitted that he knew, that the safety rules prohibited him from placing any part of his body on or near the knuckle or drawbar." (*Id.* at p. 1543, italics added.)

Plaintiff argues *Walden* is distinguishable, because here there were multiple actors and multiple acts of negligence, each of which was individually and collectively a "but for" cause of plaintiff's injuries. Plaintiff lists the acts: (1) Stuart failed to remove all the

radiator's bolts; (2) defendant failed to remove from service the defective lifting device; (3) defendant had no conveniently available diagrams; (4) defendant failed to provide employees and supervisors adequate training on how to remove the radiator and gave plaintiff only peer training, not "formal training" on use of a crane and rigging equipment; (5) the specifications for rigging the lifting device were not available; (6) no one at that shop was trained on rigging the lifting device; (7) the supervisors failed to conduct an adequate job briefing; and (8) supervision was inadequate because the supervisors were not adequately trained.

Plaintiff argues no reasonable juror could have determined defendant's negligence was not at least a slight cause of plaintiff's injury. As noted, we disagree.

Plaintiff does not try to differentiate *Duron* from this case. Instead, plaintiff cites much older case law, cited by defendant in the trial court, for the proposition that " 'a failure to stop a man from doing what he knows that he ought not to do, hardly can be called a cause of his act.' " (*Southern R. Co. v. Youngblood* (1932) 286 U.S. 313, 317; *Unadilla V.R. Co. v. Caldine* (1928) 278 U.S. 139, 142.) Plaintiff says these old cases were "swept into discard" with the 1939 amendment of FELA eliminating the defense of assumption of the risk. (45 U.S.C., § 54; *Boat Dagny, Inc. v. Todd* (1st Cir. 1955) 224 F.2d 208, 211 (*Boat Dagny*).

However, the 1994 *Duron* case was not an assumption of the risk case. Where an act of alleged contributory negligence is but the practical counterpart of assumption of risk, it does not constitute a defense, but can only reduce damages. (*Jenkins v. Union Pac. R.R.* (9th Cir. 1994) 22 F.3d 206, 210-211.)

Moreover, assumption of the risk under FELA, as noted earlier, is " 'the knowledgeable acceptance by an employee of a dangerous condition *when and if such acceptance was necessary* for the performance of his duties.' " (*Ammar v. United States, supra*, 342 F.3d at p. 139, italics added.) Here, it was not necessary for plaintiff to push the crane button the third and fourth times. All the evidence showed plaintiff could have

and should have stopped, and plaintiff admitted he could have stopped. Assumption of the risk does not apply.

*Waldon* and *Duron* support affirmance of the judgment in this appeal.

Based on the evidence, the jury could reasonably find (1) defendant was negligent in failing to provide adequate training on removing radiator bolts, for example, but (2) that negligence was not a cause of plaintiff's injury because plaintiff already knew, and admitted he knew, he was not supposed to force a heavy object but was supposed to stop, yet he failed to stop after the second time he pushed the crane button -- after he and Franks had tried using the pry bar -- and pushed a third time and a fourth time. It did not matter why the radiator did not move. The jury heard evidence that defendant's policy, reiterated to employees at daily safety meetings, was that "employees have the power to stop doing whatever it is they're doing at any given time, for any reason, whether they feel unsafe, whether they don't know what they're doing, whether there's a condition that needs to be looked at." Although plaintiff claims he *thought* he knew what he was doing, he admittedly knew of defendant's policy that if something is stuck, do not force it, stop.

Plaintiff appears to assume the jury was required to believe his testimony that he did not know and had no reason to know the radiator was stuck or the crane was straining, when he pushed the button the third and fourth times. However, the jury could have disbelieved plaintiff. Plaintiff's credibility was already tarnished by evidence that he falsely denied at his disciplinary hearing that he was the one who used the bolts to attach the lifting device. The jury was not required to accept his explanation of temporary memory loss.

The jury may have believed, not just that plaintiff was negligent in not paying attention as he operated the crane, but that plaintiff *was* paying attention, heard and felt the crane straining, and kept going anyway. To the extent this might sound like assumption of the risk, which does not relieve a FELA employer from liability, it does not constitute assumption of the risk under FELA, which required the employer to do the

act that caused the injury. (*Ammar, supra*, 342 F.3d at p. 139.) Though plaintiff cites some cases involving assumption of the risk, he presents no analysis that the doctrine applies here. That plaintiff's supervisor assertedly told him to get the job done is insufficient, because that was assertedly said when the replacement chains were being attached to the lifting device. After attaching the replacement chains, plaintiff never stopped and told the supervisor that two crane attempts were unsuccessful before plaintiff tried a third and fourth time. Moreover, a direction to get the job done would not overcome plaintiff's knowledge of defendant's policy -- don't force it, stop.

Plaintiff argues he cannot be the sole cause of his injury because his coworkers "violated every one of whatever safety rules he is claimed to have violated . . . ." (*Martinez v. Burlington N. & Santa Fe Ry. Co.* (N.D. Ill. 2003) 276 F.Supp.2d 920 (*Martinez*); *Boat Dagny, supra*, 224 F.2d at pp. 210-211.) Not so. Only plaintiff and Franks violated the "stop the line" rule, which required them to stop rather than forcing the crane. But the parties stipulated that Franks's violation cannot be a basis for finding defendant liable. This leaves plaintiff as the sole cause, making inapposite plaintiff's cited cases where the railroad's liability was predicated on negligence of plaintiff's coworker who participated with plaintiff in the very activity that caused the plaintiff's injury. (*Illinois C. R. Co. v. Skaggs* (1916) 240 U.S. 66 [60 L.Ed. 528] [coworker who was helping plaintiff back up engine signaled plaintiff to proceed despite lack of adequate clearance]; *Martinez, supra*, 276 F.Supp.2d at p. 922 [coworker serving as plaintiff's lookout failed to look out].)

Plaintiff cites various cases where employees were found *not* to be the sole cause of their injury, but those cases do not support the same result in this case. In *Chicago G. W. R. Co. v. Schendel* (1925) 267 U.S. 287, the employee violated a safety rule by failing to notify the engineer or conductor that he was going between two freight cars to check some defective equipment. He was killed when the engineer uncoupled the engine from the train, which initiated movement of the cars. (*Id.* at pp. 290-292.) The court held the

railroad liable because the employee went into a dangerous place because of the defective equipment. (*Ibid.*) There was no evidence that the crane plaintiff operated at the time of the accident was defective before plaintiff overstressed it and caused it to fail.

Plaintiff cites *Ackley v. Chicago & North Western Transp. Co.* (8th Cir. 1987) 820 F.2d 263. There, the railroad knew that its employees were using an unsafe ladder unequipped with rubberized safety shoes, which was the only available ladder long enough to reach the scaffold. (*Id.* at pp. 265, 268.) The railroad did not tell the employees to stop using the ladder. The appellate court held the trial court erred in instructing the jury that the railroad had the right to assume its employees would exercise reasonable care for their own safety and would not disobey safety rules. (*Id.* at pp. 266-268.) The reviewing court held the trial court erred in instructing the jury that the railroad had the right to assume the plaintiff would not violate safety rules. (*Id.* at p. 268.) The railroad had a nondelegable duty reasonably to foresee that the employee would perform the task under unsafe conditions. (*Ibid.*) Here, the trial court did not instruct the railroad had a right to assume plaintiff would not violate safety rules, and plaintiff makes no assignment of error concerning the jury instructions. The jury could find it was not reasonably foreseeable to defendant that plaintiff would keep forcing the crane after it was clear something was wrong, particularly given the evidence that the railroad hammered it into employees on a daily basis that they had the power to stop at any time for any reason, and if it is stuck, stop. Plaintiff argues it was reasonably foreseeable he would use bolts. Perhaps. But it was not reasonably foreseeable he would keep forcing the crane.

Plaintiff argues his use of the lifting device cannot be divorced “in time and space” from defendant’s failure to remove the item from service due to the missing chains. He cites *Strobel v. Chicago, R.I. & P.R. Co.* (1959) 96 N.W.2d 195, 255 Minn. 201, which said that, for a plaintiff to be the sole cause of his injury, his conduct must constitute an intervening act that breaks the chain of causation set in force by the railroad, and that

intervening act must be one that was not reasonably foreseeable to the railroad. There, the employee failed to protect himself by setting out available red flags or other warning signals to warn passing motorists of his precarious position on a ladder leaning against a draw bridge. (*Id.* at p. 198.) He was hit by a car and sued his employer as well as the motorist. The Minnesota court reversed for instructional error, holding it was error to permit the jury to consider whether the employee's negligence was an intervening cause. Since the railroad's negligence consisted of failure to take precautionary measures, it could not have been unforeseeable that its employee too would fail to take precautionary measures. (*Id.* at pp. 201-202.) Here, it was a jury question, and the evidence supports the verdict.

Plaintiff cites various cases inapplicable here because the railroads' liability was predicated on violation of statutes other than FELA, and FELA strips railroads of the defense of a plaintiff's comparative negligence in such cases. (45 U.S.C. § 53.) For example, *Coray v. Southern Pacific Co.* (1949) 335 U.S. 520 [93 L.Ed. 208] (*Coray*), a train stopped unexpectedly due to defective brakes that violated the Federal Safety Appliance Act (45 U.S.C. §§ 1, 8-9, 23), and the plaintiff, operating a motor car following the train, crashed into the train. (*Coray* at pp. 521-522.) The plaintiff had apparently been looking backward and did not see the train stop. (*Ibid.*) *Coray* has no bearing here for two main reasons. First, the procedural posture was not to hold the railroad liable but merely to reverse a state trial court's direction for the jury to return a verdict in the railroad's favor. (*Id.* at p. 522.) Second, the high court concluded the trial court erred because FELA made the employee's comparative negligence irrelevant where the railroad's negligence constituted a violation of other statutes, the Safety Appliance Act. (*Id.* at p. 524.)

*Grand T. W. R. Co. v. Lindsay* (1914) 233 U.S. 42, affirmed a judgment in favor of an employee where an automatic coupling device failed to function, a coworker moved the train at the plaintiff's signal to do so, and the plaintiff then stepped between the cars

to couple them and was injured. The failure of the railroad's automatic coupling device constituted a violation of the federal safety appliance act, making the plaintiff's negligence irrelevant under 45 U.S.C. section 53. (*Id.* at pp. 44, 47-50.)

Plaintiff cites *McCarthy v. Pennsylvania R. Co.* (7th Cir. 1946) 156 F.2d 877, which involved an engineer who became aware of a "hot box" problem with his engine. A conductor gave the engineer authority to transfer engines, but he did not do so. The engine eventually derailed, killing the engineer. His heirs sued not only under FELA, but also under the Boiler Inspection Act, 45 U.S.C. section 23, which imposed strict liability on the railroad. (*Id.* at p. 880.) Therefore, the decedent could not be deemed to have assumed the risk. (*Ibid.*) The reviewing court reversed a defense verdict, holding the trial court erred in (1) failing to instruct the jury on the railroad's strict liability, and (2) instructing that the railroad's liability depended on its being "the cause," not a cause, of the death. (*Id.* at pp. 881-882.) While the latter instruction was correct as an abstract proposition of law, there was no evidence of any independent acts of negligence by the decedent that were the sole cause of his death. (*Ibid.*) Here, there is no issue of strict liability or assumption of the risk, and there was evidence of independent acts of negligence by plaintiff in pushing the crane button the third and fourth times.

We conclude the jury could reasonably find, based on substantial evidence, that defendant was negligent but its negligence was not a cause of plaintiff's injury.

#### DISPOSITION

The judgment is affirmed. Defendant shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

\_\_\_\_\_ HULL \_\_\_\_\_, J.

RAYE, P. J., Concurring.

I am not persuaded by the logic of the lead opinion. As defendant's counsel conceded at oral argument, if indeed defendant was negligent in failing to remove the bolts securing the radiator, then plaintiff's negligence in operating the crane would not constitute the sole cause of his injuries. Nonetheless, I concur in the result and would affirm the jury's verdict based on our obligation to resolve all evidentiary conflicts in favor of the prevailing party and to indulge in all reasonable inferences to uphold the jury's finding if possible.

It is fundamental that when a finding is attacked as being unsupported by the evidence, “ ‘the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding . . . .’ [Citations.]” (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) We begin with a presumption that the record contains evidence to sustain every finding of fact (*ibid.*), and we view the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in the evidence in support of the judgment (*As You Sow v. Conbraco Industries* (2005) 135 Cal.App.4th 431, 454). We do not weigh the evidence, consider the credibility of the witnesses, or resolve conflicts in the evidence or in the reasonable inferences that may be drawn from them. (*Leff v. Gunter* (1983) 33 Cal.3d 508, 518.) If more than one inference reasonably can be deduced from the facts, the trial court's decision will not be disturbed on appeal. (*Ibid.*)

An additional facet is added to the substantial evidence rule where multiple theories are advanced to support a single cause of action but the jury's verdict does not, by response to special interrogatories or otherwise, disclose the theory on which the verdict is based. It has been held that where a jury enters a general verdict in a case with multiple counts, the verdict will be sustained if any one count is supported by substantial evidence despite possible insufficiency of the evidence as to the remaining counts,

provided the record does not affirmatively demonstrate the jury relied upon an unsupported count. (See *McCloud v. Roy Riegels Chemicals* (1971) 20 Cal.App.3d 928, 935-936.) The same principle applies here.

Plaintiff proposed multiple theories of negligence:

1. The failure to remove all the bolts connecting the radiator to the locomotive.
2. The lifting device was defective and should not have been in service.
3. The railroad's failure to have conveniently available information on its computers as to the location of the radiator bolts.
4. The railroad's failure to provide training on the removal of a radiator from locomotives of the design in question.
5. The failure to have specifications for rigging the lifting device available at the Roseville location.
6. The failure of the railroad to provide training to its employees on the proper rigging of the lifting device.
7. The failure to abide by the railroad's work rules, which required a job briefing to be held before the radiator removal job was undertaken.
8. The failure to train supervisors McKenzie and Fleming on the removal of the radiator.

Plaintiff's counsel pressed his multiple theories of negligence in a meandering closing argument that emphasized safety in the workplace. He spoke about the supervisors' lack of training and experience in industrial safety, and the failure to provide information about the equipment. He spoke about "the duty to provide safe methods and procedures" and "[t]he duty to publish and enforce . . . safety rules," and argued "there was no training, no notice . . . [n]o locomotive maintenance instruction, no step-by-step instruction." He decried the failure to comply with the railroad's job briefing policies and that only one of the Roseville supervisors knew where the specifications for the

lifting device were but was unable to “get them out of the [railroad’s] computer.” He minimized the problems with the lifting device as modified by plaintiff and insisted the device failed because the radiator was still bolted to the engine.

While articulating a multiplicity of negligence theories, plaintiff’s counsel did not seek an instruction that would have required the jury to explain the basis for any negligence finding it might make. Instead, the parties agreed to a special verdict form that separated the question of negligence from the question of causation and presented the jury with two interrogatories:

“Question number one: Was the defendant Union Pacific Railroad negligent on June 3rd, 2007. Answer yes or no. . . .

“If [your] answer to question number one is yes, then answer question Number two. . . . Question Number two: Was such negligence a cause of injury to plaintiff?” The jury answered “yes” to question number one and “no” to question number two.

Plaintiff is faced with this conundrum: The jury found defendant was negligent but its verdict does not disclose in what respect defendant was negligent. It found the negligence was not the cause of the injury without explaining why. Plaintiff does not dispute the jury’s negligence finding, nor does he try to limit the scope of the finding to a particular theory of negligence. His challenge is to explain why the evidence does not support the jury’s additional finding that the railroad’s negligence was not a cause of his injuries. Proving a negative is always difficult; it is especially so when the premise to be proved (or disproved) cannot be clearly identified. But on appeal it is plaintiff’s burden to demonstrate that the jury’s negligence finding compels a conclusion that his injuries were caused by the negligence.

Plaintiff acknowledges that “it is unknown which act(s) of Union Pacific was/were relied upon by the jury as the basis for its verdict of negligence . . . .” Plaintiff also acknowledges, if only implicitly, his obligation on appeal to demonstrate that under none of the theories of negligence presented at trial could the jury have found negligence

without also finding causation. If any single theory would permit the jury to find negligence in response to the first interrogatory while rejecting a claim of causation in response to the second, then we are obligated to affirm the jury's verdict.

We acknowledge that a finding of causation might naturally follow from some of the theories and supporting evidence offered by plaintiff to prove negligence. The evidence indicates that plaintiff was injured when the lifting device being used to lift the radiator from the locomotive failed because of the excessive load imposed on the device as a result of the railroad's failure to remove all the bolts attaching the radiator to the locomotive. Plaintiff's injuries resulted when a bolt flew from the lifting device and hit him in the face. If the jury found defendant was negligent in using a defective lifting device or in failing to remove the bolts securing the radiator, then the jury's finding of no causation would be suspect. But again, the record does not reveal the basis for the jury's verdict. Having urged that the evidence supported multiple theories, plaintiff cannot now insist the jury found negligence based on a theory that is incompatible with a finding of no causation. Defendant did not concede that it was negligent in failing to discover a remaining bolt but insisted that its experienced employees did all that was reasonable to avoid an undue risk of injury.

The jury could have instead accepted plaintiff's theory that the railroad was negligent in failing to hold a job briefing before the radiator removal job was begun and that the failure to take such a preliminary step before undertaking a hazardous job created an unreasonable risk of injury. However, the jury could have also reasonably concluded that while a job briefing was a needed prophylactic against many of the risks associated with the operation of heavy equipment and the failure to hold one constituted a lack of due care, a briefing would not have eliminated this particular risk, created by the failure to detect and remove all of the bolts attaching the radiator to the locomotive. Everyone was well aware of the need to remove the bolts, and indeed an earnest search was undertaken for all the bolts. The jury could reasonably find that a job briefing would not

have affected the course of events and thus the failure to hold a briefing was not a cause of plaintiff's injuries.

Or the jury could have been persuaded by plaintiff's argument and evidence that the railroad's failure to have specifications for the lifting device available at the Roseville location constituted negligence. Nonetheless, the jury could also reasonably find that while equipment specifications are necessary to assure that workers have all the information they need regarding the operation of potentially dangerous equipment and the availability of specifications might have averted injury under certain circumstance, it would not have done so under the circumstances presented.

Given the multiple grounds for negligence considered by the jury, not all of which compelled a finding of causation, we cannot conclude the jury's verdict on causation is unsupported by the evidence. For that reason I would affirm the jury's verdict.

\_\_\_\_\_  
RAYE, P. J.

Blease, J., Concurring:

The obvious problem with the plaintiff's trial tactics was the failure to advance a theory and an allied instruction that informed the jury there were two concurrent causes of the accident based upon two grounds of negligence, one by the employee, who failed to sever the bolts securing the radiator to the engine, and the second by the plaintiff, who failed to follow the employer's instruction regarding the safe operation of the lifting device. The employer was liable under the doctrine of respondeat superior for the first employee's negligence in failing to sever all of the bolts and the plaintiff was negligent in failing to follow the employer's safety instructions.

But for the fact that each ground of negligence was a concurrent cause of the accident, it would not have occurred. If all of the bolts had been severed the accident would not have occurred. If the plaintiff had followed the employer's safety instructions, the accident would not have occurred. Both were concurrent causes of the accident and if the jury had been so instructed it would have had to apportion the liability according to each party's negligence.

But the plaintiff did not so instruct the jury leaving the record in the form assayed by Presiding Justice Raye. On that basis I concur in the result.

BLEASE, J.