1986

Robert L. Gleave v. The Denver and Rio Grande Western Railroad Company, Utah Railway Company, the State of Utah Department of Transportation : Petition for Rehearing

Utah Court of Appeals

IN THE COURT OF APPEALS

OF THE STATE OF UTAH

DOCKET NO. 860057-CA 860058-CA

ROBERT L. GLEAVE, Plaintiff-Respondent and Cross-Appellant, vs. THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, a corporation, UTAH RAILWAY COMPANY, a corporation, Defendants-Appellants and Cross-Respondents and THE STATE OF UTAH, DEPARTMENT OF TRANSPORTATION, Defendant-Respondent.	Case No. 8600057-CA Case No. 8600058-CA

PETITION BY THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY FOR A REHEARING

Appeal from the Judgment of the Fourth Judicial District Court, Utah County, State of Utah
The Honorable Cullen Y. Christensen, Presiding

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Pursuant to Rule 35 of the Rules of the Utah Court of Appeals, The Denver and Rio Grande Western Railroad Company ("DRGW") respectfully petitions the Court of Appeals for rehearing on DRGW's contention on appeal that the verdict must be set aside because Mr. Gleave had to have been at least 1% negligent as a matter of law.

I. AS A MATTER OF LAW, MR. GLEAVE COULD NOT HAVE BEEN ENTIRELY WITHOUT FAULT

For purposes of this petition for rehearing, DRGW is not asking the Court of Appeals to completely rehear every contention raised on appeal by DRGW. DRGW may disagree with some of the ultimate legal conclusions reached by the Court of Appeals in this case, but DRGW nonetheless generally is satisfied that the Court of Appeals has addressed and reviewed the major facts and law on appeal, with one main exception. The main exception, which is the subject of this petition for rehearing, is that the opinion issued by the Court does not explain why a motorist in Utah is not at least 1% negligent as a matter of law if he admits to driving out in front of a train without first looking both ways.

A. MR GLEAVE WAS AT LEAST 1% NEGLIGENT BECAUSE HE VIOLATED HIS ABSOLUTE DUTY TO YIELD THE RIGHT OF WAY TO THE TRAIN

Both as a matter of Utah statutory and common law, DRGW absolutely and unquestionably enjoyed a superior right of way at the crossing where Mr. Gleave caused the accident. By violating DRGW's superior right of way, the jury was obligated

to find, but did not find, Mr. Gleave at least 1% negligent. To find Mr. Gleave entirely without fault, as the jury did, the jury had to have completely ignored the lower court's instructions concerning an autoist's absolute and non-waivable duty to yield the right of way to an oncoming train. A new trial is essential because the jury verdict finding Mr. Gleave 0% at fault is patently absurd and contrary to the law of right of way.

DRGW respectfully petitions the Court of Appeals to rehear and reconsider this fundamental question of right-of-way law. DRGW respectfully submits that the decision rendered by the Court of Appeals in this case is inconsistent with, cannot be squared with, and is not supported by the numerous Utah Supreme Court railroad crossing cases and statutes quoted at pages 15 through 23 of the Rio Grande's Opening Brief (blue cover). The cited cases and statutes establish the minimum legal standard for "reasonable" conduct of motorists approaching railroad crossings in Utah. Mr. Gleave fell below the minimum standard of care. The opinion issued by the Court of Appeals does not directly analyze the cited cases and statutes which compel a finding that Mr. Gleave was at least 1% negligent as a matter of law.

B. THE UNDISPUTED FACTS SHOW THAT MR. GLEAVE DIDN'T LOOK BOTH WAYS BEFORE CROSSING THE TRACKS

Besides violating an absolute legal duty to yield the right of way to an oncoming train, other key undisputed facts

in the record compel a finding that Mr. Gleave was at least 1% negligent as a matter of law. The opinion released by the Court of Appeals in this case does not explain how Mr. Gleave can be found entirely without any fault under circumstances where he admitted that he pulled out in front of the train while looking to his right, knowing all along that the real area of visual obstruction and danger was to his left. DRGW petitions for rehearing to have the Court directly address these facts. DRGW submits that it is plain error for this Court to sustain the jury verdict finding 0% fault under these facts.

It is undisputed that the mound of earth in the vicinity of the subject crossing causes a visual obstruction of the view that an eastbound motorist has of a train coming from the left or north, whereas an eastbound motorist's view to the right or south is substantially unobstructed for a much longer distance. (R. 1739). Mr. Gleave testified that he was driving eastbound across the subject crossing in Springville on the morning of the accident. He admitted that he knew that he was approaching a railroad crossing because he had been over those tracks at least three other times and because he had once worked on the crossing itself as part of an asphalt paving crew in 1979 (R. 1746-48 and 1757). Mr. Gleave also admitted that he saw all the warning signs on the road as he approached the crossing. (R. 1749 and 1757).

Even though Mr. Gleave had actual and present knowledge that he was about to drive across railroad tracks, he admitted that he proceeded across the tracks looking to his right (south) and that he continued looking to the right as he started up from the stop sign toward the tracks (R. 1750). He admitted that he knew his view to the left (north) was more restricted that his view to the right (south). He said that from the stop sign he could see about 900 feet down the tracks to his right (south) but only 50 to 100 feet up the tracks to his left (north) (R. 1758-59). Nevertheless, while still looking right, he testified that he traveled from the stop sign to a point where he could no longer stop and avoid the collision. (R. 1759-60). Mr. Gleave admitted that only after it was too late to prevent the accident that he finally "glanced back to the left" and saw the train (R. 1750).

Under all the circumstances, the uncontested evidence is that Mr. Gleave proceeded across the tracks with his eyes foolishly glued to his right for an inordinately and dangerously long period of time, even though he knew the area to his left was the most obstructed and thus the area of greatest potential danger.

DRGW thus petitions for rehearing because the opinion issued by the Court utterly fails to explain on these facts why the dubious 100% - 0% jury verdict can stand. The uncontroverted evidence shows that Mr. Gleave proceeded across

the tracks into the path of the train without first looking both ways, causing at least 1% of his accident A new trial is necessary to quantify the amount of Mr. Gleave's negligence.

II. IF REQUESTED, DRGW WILL FILE A RESPONSE TO MR. GLEAVE'S PETITION FOR REHEARING

Mr. Gleave recently filed and served a petition for rehearing in this matter. Mr. Gleave seeks rehearing of the ruling by the Court of Appeals sustaining the lower court's entry of directed verdict against Mr. Gleave on his request for punitive damages. As DRGW interprets Rule 35 of the Rules of the Utah Court of Appeals, DRGW is not entitled to answer Mr. Gleave's petition for rehearing unless requested by the Court. DRGW submits generally that Mr. Gleave has raised no new issues and that reconsideration on the punitive damages question is neither necessary nor warranted. If the Court of Appeals requests a response, DRGW will file one.

DATED this 12th day of February, 1988.

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CERTIFICATE OF COUNSEL

I, Patrick J. O'Hara, hereby certify that this Petition for Rehearing is presented in good faith, and not for purposes of delay.

Patrick J. O'Hara

PATRICK J. O'HARA

CERTIFICATE OF SERVICE

I hereby certify that four true and correct copies of the foregoing PETITION BY THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY FOR A REHEARING, were mailed, postage prepaid, this 12th day of February, 1988, to the following:

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