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Douglas Lee Curtis v. Harmon Electronics, Inc. and The Denver & Rio Grande Western Railroad : Brief of Appellant

Utah Supreme Court

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E. Craig Smay; Attorney for Respondents;

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

DOUGLAS LEE CURTIS, :

Plaintiff-Appellant, : DISTRICT COURT
CASE NO. 226

-vs- :

HARMON ELECTRONICS, INC., : SUPREME COURT
and THE DENVER & RIO GRANDE CASE NO. 150
WESTERN RAILROAD, :

Defendants-Respondents. :

APPELLANT'S BRIEF

Appeal from the Judgment of
the District Court for the
Third Judicial District,
Hon. Jay E. Banks, Judge

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

DOUGLAS LEE CURTIS,	:	
Plaintiff-Appellant,	:	DISTRICT COURT CASE NO. 226426
-vs-	:	
HARMON ELECTRONICS, INC., and THE DENVER & RIO GRANDE WESTERN RAILROAD,	:	SUPREME COURT CASE NO. 15018
Defendants-Respondents.	:	

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Appeal from the Judgment of
the District Court for the
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CASES CITED

AUTHORITIES

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

DOUGLAS LEE CURTIS, :

Plaintiff-Appellant, :

-vs- : CASE NO. 15018

HARMON ELECTRONICS, INC., and THE DENVER & RIO GRANDE WESTERN RAILROAD, :

Defendant-Respondents. :

APPELLANT'S BRIEF

NATURE OF THE CASE

This is an action in tort brought for injuries sustained as a result of a collision between a pickup truck in which Appellant was a passenger and an engine of The Denver & Rio Grande Western Railroad.

Appellant appeals from a nonsuit granted by Third Judicial District Court Judge Jay E. Banks, upon conclusion of the evidence.

DISPOSITION IN THE LOWER COURT

A judgment of nonsuit was entered in favor of Respondents and against Appellant.

NATURE OF RELIEF SOUGHT ON APPEAL

Plaintiff-Appellant Curtis seeks a reversal and remand to

the Third Judicial District Court, and submission of the factual issues in dispute to a jury.

In this brief the abbreviation "Tr" refers to the page number of the Reporter's transcript of trial proceedings. "R" refers to the page number of the material in the file from the District Court. "Dp" refers to the page number in a deposition.

APPELLANT'S STATEMENT OF FACTS

On August 21, 1973 Plaintiff was riding as a passenger in a vehicle being driven in an easterly direction on 9000 South Str which collided with a southbound train owned and operated by defendant, Denver & Rio Grande Western Railroad (R. 2 & 3).

The testimony of Michael Peterson whose house is the clos to the railroad tracks (Tr. 3, L. 26; Exhibits 9 and 10), and wh at the time of the accident was in his back yard washing his aut (Tr. 5, L. 27), indicates that he heard the train approach but di not recall hearing a whistle (Tr. 7, L.4).

Mrs. Nelson, who was a passenger in an automobile that passed over the tracks from east to west just prior to the collis (Tr. 23, L. 5), testified that she did not hear any audible signa from the train while her vehicle was approaching the tracks (tr. L. 4). She testified that she heard the whistle sound for the first time when her vehicle was upon the tracks, stating, "I can recall he [the train] looked like he was right in the window; I mean, you know, it [the whistle] startled us." (Tr. 25, Ls. 7-9) She testified that when the train did sound its whistle, the trai was only three telephone poles (less than 300 feet) away from the

intersection (Tr. 25, L. 27).

Mrs. Wagstaff, who was driving the vehicle in which Mrs. Nelson was riding, testified to essentially the same facts as Mrs. Nelson. When asked the question, "Do you recall hearing any whistle from the train or horn from the train. . .before your car entered the crossing?" she replied unequivocally, "No," (Tr. 33, Ls 6-15). When asked regarding the first time she heard any whistle from the train, she replied, "We were on the tracks when he blew the whistle," (Tr. 33, L. 18). Also, when queried about the distance of the train when the whistle was blown for the first time, she responded, "It was like the back yard past the Peterson house. He was close," (Tr. 33, Ls. 25-26).

Allen John Karras, whose deposition was admitted into evidence and stipulated to constitute a part of the record on appeal, was working on a pickup truck in front of his gas station at the time the accident occurred. His gas station is next to the railroad tracks, situated on the southeast corner (Dp. 4, Ls. 7, 11, 16). His attention was drawn to the train by its whistle, causing him to look up (Dp. 20, Ls. 1-3), the sound of the engine (Dp. 6, L. 19), and the dinging of the bells (Dp. 7, L. 6). His best estimate of the time lapse between his first hearing of the train whistle and the collision is only 5 seconds (Dp. 19, L. 20). The train's whistle was therefore only being sounded a period of four (4) seconds before the front of the train's first power unit entered the intersection, since the train was traveling at 50 miles per

hour or 74 feet per second (Tr. 45, Ls. 22-28 and Tr. 51, L. 2
for the reason that the collision occurred 72 feet back from th
front of the first power unit (Tr. 46, Ls. 10-11). The whistle
therefore sounded for a distance of only 296 feet (4 seconds x
feet per second) prior to the train's entering upon the crossin

The testimony of David Lord, accident reconstruction ex-
pert, was that the train whistle would have to be blowing conti-
uously for eighteen (18) seconds in order for the sounding of th
whistle to meet the statutory requirement of one-quarter mile a
the admitted speed of 50 miles per hour.

From the above testimony of Mrs. Nelson, Mrs. Wagstaff
Mr. Karras, it must be concluded that all heard the train's whi
for the first time when it was substantially in the same positi
less than 300 feet from the crossing. All were in excellent
positions to have heard the whistle sooner had it been sounded
sooner.

Mr. Pope, the train's engineer at the time of the collis
testified that he had been through the intersection in questio
hundreds of times (Tr. 57, L. 30). When asked if he had sounde
the whistle on each of those occasions, he said, "Every time,"
(Tr. 52, L. 19). When asked if he had sounded the whistle for
statutory distance prior to the subject collision, he replied,
"Yes, sir," (Tr. 52, L.22). When asked the question, "What rea
would there be for you to remember specifically sounding the wh
on the approach to this crossing as opposed to any of the dozen
or hundreds of others," which he crosses every day, he respond

"Because I blow the whistle for every crossing," (Tr. 61, Ls. 16-19). Mr. Pope had no particular recollection of sounding the whistle for the full quarter mile on this occasion, but either thought he had because he always did, or tried to, (Tr. 61, Ls. 20-29; Tr. 63, Ls. 1-8).

The strongest testimony produced by defendant on the question of sounding of the whistle for the statutory distance was that of Trooper Richard Mattingly. He was outside his patrol car, just having finished issuing a citation to a motorist on I-15 four-tenths of a mile (2112 feet) north of the accident crossing (Tr. 4-A, L. 15). His attention was drawn to defendant's south-bound train by its whistle as it passed his location (Tr. 4-A, L. 27). He then got into his patrol car and traveled south to 90th South, where he exited. He made no observation concerning sounding of a whistle within the statutory one-quarter mile (1310 feet) ~~at~~ of the crossing.

There is no direct evidence that the whistle was sounded for the statutory distance except the equivocal and self-serving testimony of the engineer, Mr. Pope. His recollection was of habit, and conflicts with the testimony of at least four disinterested witnesses, all of whom place the first sounding of the whistle at less than 300 feet from the crossing.

POINT I

REASONABLE MINDS COULD DIFFER ON THE ISSUE WHETHER DEFENDANT'S ENGINEER SOUNDED THE WHISTLE CONTINUOUSLY FOR ONE-QUARTER MILE BEFORE ENTERING THE CROSSING AS REQUIRED BY STATUTE. A NON-SUIT SHOULD NOT HAVE BEEN ENTERED IN FAVOR OF DEFENDANT.

The subject statute provides:

> "Every locomotive shall be provided with a bell which shall be rung continuously from a point not less than eighty rods from any city or town street or public highway grade crossing until such city or town street or public highway grade crossing shall be crossed, but, except in towns and at terminal points, the sounding of the locomotive whistle or siren at least one-fourth of a mile before reaching any such grade crossing shall be deemed equivalent to ringing the bell as aforesaid; during the prevalence of fogs, snow and dust storms, the locomotive whistle shall be sounded before each street crossing while passing through cities and towns."

U.C.A. Section 56-1-14.

In Smith vs Rio Grande Western Ry. Co., 33 P. 626, 9 Utah 141 (1893), the Supreme Court of Utah was confronted with a situation similar to that in the instant case. The only question presented was whether the evidence was sufficient to justify the verdict of the jury. The Court's opinion includes the following:

> "The plaintiff testifies that he looked and listened for the train; that no whistle was sounded, and no bell was rung, in approaching the crossing. Watters, who accompanied the plaintiff, swears to substantially the same thing. A brother of the plaintiff, who was riding on horseback some 150 yards in the rear of the wagon, also testifies that no signal of the approach of the train was given. Against this testimony the defendant offered the testimony of the railway conductor, of the locomotive engineer, and of the locomotive fireman on the train in question, to the effect that the whistle was sounded before reaching the crossing. All of them swear positively that this was done. The locomotive engineer and fireman testified that it was sounded about 200 yards distant from the crossing. Neither of them claimed that the bell was rung. The failure to sound the whistle or ring the bell, or give any warning of approach, is the negligence relied upon by the plaintiff."

The Court noted that the evidence was in direct conflict with three witnesses on each side, and held that under those circumstances the case became peculiarly one for determination by jury.

The similarity of the two cases is clear. In Smith the plaintiff was contending: but for the railroad's failure to sound the whistle, there would have been no accident. In the case now before the Court, plaintiff contends that if the whistle had been sounded continuously, beginning at the statutory threshold of one-quarter mile, plaintiff's driver would have been made aware of the train and able to stop. A form of strict liability is imposed by statute in case of a railroad's failure to comply. The subject statute is as follows:

> "Every person in charge of a locomotive violating the provisions of this section is guilty of a misdemeanor and the railroad company shall be liable for all damages which any person may sustain by reason of such violation."

U.C.A. Section 56-1-14.

In Haun vs Rio Grande Western Ry. Co., 62 P. 908, 909, 22 Utah 346, 347 (1900) the engineer and fireman on the train testified, on behalf of the defendant, that the whistle was blown and the bell rung. At least 10 other witnesses, several of whom were passengers on the train, testified, on behalf of defendant, that they heard the whistle, but were not asked, and did not testify, whether or not the bell was rung. On behalf of the plaintiff, several witnesses who were in view of the place of the accident, and in a position where they could easily see and hear what transpired, testified that they neither saw nor heard the whistle or the bell, that their hearing was good, and that their attention was directed to the approaching train, and to whether the whistle was blown and the bell rung.

In Haun the Court concluded that in an action against a

railroad company for damages for personal injuries, the question of defendant's negligence in failing to sound the whistle and ring the bell as required by statute was solely within the province of the jury, as well as questions concerning the credibility of the witnesses and the weight to be given their testimony.

Evidence is "positive" in character where witness states that a certain thing did, or did not, happen or exist, and "negative" in character where witness states that he did not see or know of happening or existence of a circumstance or fact. 33 Words and Phrases, Page 72.

The Haun case states that affirmative testimony, unless of greater weight than negative testimony cannot be of higher character. The Court in Haun states two exceptions to the rule that positive testimony is of a higher character and to be given greater weight than negative testimony, both of which are satisfied in the instant case. The exceptions arise:

> "(1) When negative witnesses who are credible, and who were in a position where they could readily hear and see what transpired, and directed their attention thereto, testify that they did not see or hear the occurrence testified to by the affirmative witnesses; and (2) when negative witnesses, who are credible, and were in a position where they could readily see and hear what transpired, and directed their attention thereto, testify positively that the occurrences testified to by the affirmative witnesses did not happen." (P 347)

The testimony presented at trial disclosed that both Mrs. Nelson and Mrs. Wagstaff were in a position from which they could readily hear and see what transpired. They were in the process of passing over the railroad tracks in some haste since they were aware of the close approach of the train. Their attention was

directed to the train from the moment they first observed it visually since it presented an obvious risk of harm to them. Their testimony is in direct conflict with that of the engineer since they both testified the whistle was not sounded until the train was "very close" to the crossing, whereas the engineer said he sounded the whistle beginning at the statutory one-quarter mile. Both are credible witnesses since they have no interest in the outcome of the case.

The reason for the exceptions created in Haun is that if there were no exceptions to the rule in question, affirmative testimony in no instance could be overcome by negative testimony, however strong and convincing the negative testimony might be. It may be true in fact that under some circumstances greater weight should be given to the positive statement of one witness than to the negative statement of another; but it depends upon the circumstances, and is not true, as an abstract proposition of law.

The Court in Haun draws a distinction between two types of negative testimony. The weaker is where a witness merely does not remember the whistle. Such testimony is not sufficient to controvert a positive statement that the whistle did sound as required, other things being equal.

The stronger variety occurs where the witness testifies that an event did not occur.

> "Evidence of a negative nature may under particular circumstances, not only be equal, but superior, to positive evidence. This must always depend upon the question whether the negative testimony can be attributed to inattention, error, or defect of memory, and whether the witnesses had equal means and opportunities for ascertaining the facts to which they testify, and exercised the same. * * * It

has been often held that it is not true, as a matter of law, that negative evidence may not be sufficient to overbalance positive testimony. In such cases the jury or judge have to weigh, consider, and decide for themselves somewhat regardless of general rules."

State vs. Kansas City Ft. S. & M. Ry. Co., 70 Mo. App. 641, 642, Haun vs Rio Grande W. Ry. Co., 62 P. 908, 913, 22 Utah 346, 348 (1900).

Obviously the testimony of the two women in the car and the auto mechanic was of the type which should be accorded probative value. Those witnesses were all paying attention and the women remember explicitly seeing or hearing the train without hearing the whistle, until the train was three telephone poles five seconds prior to the collision, or less than 300 feet.

All three of those witnesses are saying the whistle was not sounded between the beginning of the quarter mile statutory distance and the last 300 feet. The testimony of each of the witnesses for plaintiff corroborates that of the other on that question. Such corroboration by the witnesses adds strength and credibility to their general testimony. Forbes vs Forbes 29 S.E.2d 829, 831, 18 E Va 636, 639 (1944).

Defendant supported its motion for nonsuit by citing Anderson vs Union Pacific Railroad Company 289 P. 146, 76 Utah 324 (1930). In that case the engineer testified he sounded the whistle and rang the bell. Unlike the instant case, the engineer's testimony was controverted only by witnesses who were engaged in other endeavors and not attentive to the circumstances or existence of a train. Their testimony constituted only nega-

evidence with no probative value, since they merely could not remember hearing a bell or whistle. That case can obviously be distinguished from the instant case where concerned and attentive witnesses failed to hear.

The Anderson case is further distinguishable from the case at hand. In this case Michael Peterson was out washing his auto when he heard the noise of the train, but does not recall having his attention drawn to any whistle while the train was still approaching his house, which is closest to the railroad tracks. This testimony is consistent with that of Mrs. Nelson and Mrs. Wagstaff, since the train was at a greater distance at the time of Mr. Peterson's observation than when the two ladies testified they first heard the whistle. His testimony is also consistent with that of the mechanic, Mr. Karras. This consistency in itself differentiates the instant case from Anderson. In Anderson one of the plaintiff's witnesses testified that he could remember no bell or whistle being sounded at all, while the other alleges that the whistle was blown but the bell not sounded.

Defendant also relies upon Jensen vs Ogden Short Line R. Co., 204 P. 101, 59 Utah 367 (1922). In Jensen numerous witnesses testified on behalf of defendant that the whistle was blown and the bell rung when the train approached the crossing. This was refuted by only one witness for the plaintiff, who was with the deceased and admitted his attention was centered on a train on another track going the other direction. His testimony that he did not hear a bell or whistle from the train which struck the

vehicle of the deceased was determined to be not sufficient to support a verdict that the whistle and bell were not sounded.

The present case also is distinguishable on the basis of the number of witnesses testifying and their lack of interest in the outcome. These factors should be taken into consideration since they are circumstances which the Haun Court states should considered in weighing the testimony.

In Jensen there were numerous witnesses asserting positively that the bell and whistle were activated, whereas here the engineer in a self-serving manner makes such an assertion. Four disinterested parties agree that there was no whistle sou until the train was within less than 300 feet of the crossing, at which point the whistle was heard by three of them for the first time. The engineer's interest in the outcome and in his own actions should be considered in weighing his testimony.

It is appellant's contention that the trial court failed to consider the credibility of the witnesses in the present cas "Credibility of testimony, which is its capacity for being beli must be settled before weighing it, since there is no occasion weighing if it has not this quality." Weliska's Case, 131 A. 125 Me. 147 (1926). Any question as to the exercise of due car must be determined by the jury by considering the personalities of the witnesses, their apparent interest in the controversy an their qualifications to give evidence, all of which matters are properly cognizable under the term credibility. If ~~no~~ an appropri credibility factor were allocated to the respective testimony o

the four consistent witnesses, it is evident that reasonable minds would at the very least, differ, and could have given as much if not more credence to the testimony of plaintiff's witnesses than that of the engineer.

In Clark vs Union Pacific Ry. Co., 257 P. 1050, 1053, 70 Utah 29 (1927), at the time of the crossing accident it was very foggy and two school girls particularly listened for the whistle of the train in order to learn just how late they were for school. Two men were driving a team towards the crossing and were continuously alert for the sound of the train because they were not able to see in the fog. The Court concluded that testimony concerning not hearing the whistle, though "negative" in character, was of probative value and created a jury question as to the failure to give warning. The Court stated:

> "It is clear that where one witness testifies that the bell was rung and the whistle blown, and another witness of equal opportunity to know the fact testifies that he was listening to see whether the whistle did or did not sound and the bell ring, and that the whistle did not sound nor the bell ring, positive testimony is met by positive testimony, and if the witnesses are of equal credibility, the testimony of the one is entitled as much weight as the other." (P 1053)

The Utah Court in Hudson vs Union Pacific R.R. Co., 233 P. 26 357, 120 Utah 245 (1951) agreed with the Clark decision. The Hudson opinion notes that the rule required before a jury question is created where there is conflicting testimony concerning whether warning signals were given is that,

> "It must be made to appear that they were (1) paying some attention to what actually occurred and (2) that they were in a position where they could and did observe what was done or what was not done."

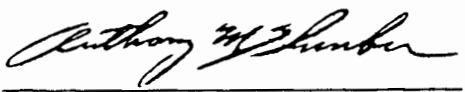
Mrs. Nelson and Mrs. Wagstaff both knew they were appro-
ing a railroad crossing, saw the train, and discussed crossing
the tracks in view of the fact that the train was "very close."
Only when their car began to go up on the tracks and cross the
did they hear any whistle sounded. Their proximity to the inte-
section and their discussion of the matter indicate they were
attentive to what was actually occurring, and the fact that they
saw the train prior to crossing the tracks and only heard the
whistle while upon them indicates that they were in a position t
observe what was being done. Further, the fact that the mechani
and Michael Peterson both heard the train before the whistle,
and then subsequently heard the whistle only a few seconds prior
to the collision, demonstrates their attentiveness to what was
happening. The sound of the train without a whistle most likely
was the thing that drew their attention. Both were in a positio
to observe what was being done with respect to sounding of a
whistle, since both could hear the train but not the whistle.
Observation, as the term is used by the Court in Hudson, refers
to hearing and not necessarily seeing, since the test was derive
from Clark, where the witnesses could not see any train because
the fog but could hear the sound of a whistle had one been sound
It is obvious that if one could hear the train approaching as th
mechanic and Michael Peterson testify they did, then one or both
would necessarily have heard the whistle, had it been sounded.

CONCLUSION

Plaintiff-Appellant respectfully submits that the trial court erred in granting defendant's motion for nonsuit, and that

the trial court's judgment should accordingly be reversed.

Respectfully submitted,



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