1977

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

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

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

REPLY OF APPELLANT TO RESPONDENT'S BRIEF ON APPEAL

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CLARIFICATION OF FACTS

There are several statements of fact related in respondent's brief which examination of the record on appeal will disclose to be inaccurate.

The most significant is a very artful statement appearing on page 2 of respondent's brief, "The approaching train rang its bell and blew its whistle from a distance in excess of a quarter mile from the crossing, and all the way through the crossing." There was no testimony at the trial that the train either had or rang a bell. The train whistle was heard by Trooper Mattingly

when the train was 4/10 of a mile from the crossing, but not between that point and the crossing. (Tr. p. 4-A.) The other witnesses observed the whistle when the train was within 300 feet of the crossing. There was no testimony at trial that anyone heard the whistle sounded, continuously or otherwise, between a point 4/10 of a mile from the crossing and 300 feet from the crossing.

Appellant does not dispute respondent's statement tha the flashing devices at the crossing were operating or that the bell installed on the east side of the crossing was ringing as the train and pickup involved in the collision approached the crossing. The problem is that those devices were not clearly visible or audible to approaching eastbound traffic. (Tr. 11-1 36.)

At the time of the accident in which appellant was injured, the warning which should have been provided by the whi was virtually the only type of warning which could have prevent the accident, because of the relative speeds involved and the l of sight problems presented on the northeast quadrant of the cr sing. (Tr. 41-42, 49.) The driver of the vehicle in which app lant was riding as a passenger in fact reacted promptly upon hi first possible visual perception of the approaching train. (Tr 46, 13-A.)

The gas station owner, Mr. Karras, did not testify as respondent has indicated that he heard the train whistle sounde

"substantially in excess of five seconds." His testimony was that he heard the whistle sound for "around five seconds" as the train approached the crossing, swung under the truck on which he was working, and was under the truck for "one or two seconds at the most" before the accident occurred. (Dp. of Allen Karras, p. 19.) Finally and most importantly, it should be noted that no witnesses have testified that they heard the train whistle sounded for the entire one-quarter mile before the train entered the crossing.

ARGUMENT

POINT I.

THE STATUTORY CONSTRUCTION URGED BY RESPONDENT WOULD PRODUCE AN ABSURDITY.

Respondent argues that the subject statute, §56-1-14, U.C.A. (1953), in requiring "...the sounding of the locomotive whistle or siren at least one-fourth of a mile before reaching any such grade crossing..." requires only that the whistle be sounded at some point more than one-quarter mile from the crossing. The absurdity of this argument and the result, if that were the meaning of the statutory language quoted, is obvious: A brief sounding of the whistle one mile, three miles, or five miles from the crossing would technically satisfy the statute. It is conceivable that a sounding of the whistle once at the

commencement of the trip and never again would likewise satisfy the statute, since the whistle would have been sounded "at least one-quarter mile" from every crossing to be encountered during the course of the trip.

The statute provides that the prescribed sounding of a whistle or siren shall be "deemed equivalent to ringing the bell as aforesaid." Ringing of the bell must be continuous for eighty rods (one-quarter mile) before entry upon the crossing. The term "as aforesaid" must be considered to incorporate both the distance requirement and the term "continuously" or its meaning is lost and the statutory purpose defeated.

The object of the statute is obviously to provide some protection in the form of an audible warning of the train's approach to motorists and pedestrians utilizing grade crossings. The statute must be construed in such a manner as to promote its obvious purpose. The construction urged by respondent would produce a contrary result.

It is a basic principle of statutory construction that statutory language must be construed in such a manner as to make sense and avoid absurd consequences.

> A statute subject to interpretation is presumed not to be intended to produce absurd consequences, but to have the most reasonable application its language permits. If possible, doubtful provisions should be given a reasonable, rational, sensible and intelligent construction. 73 Am. Jur. 2d (STATUTES) 265.

An illustration of the absurdity that can result from literal application of statutory language is cited in 66 A.L.R. 1228 at 1231:

> An ancient and oft-quoted instance of absurdity avoided by construction is the judgment mentioned by Puffendorf that the Bolognian law which exacted the penalty that "whoever drew blood in the streets should be punished with the utmost severity" did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. Another is a ruling cited by Plowden that the statute of 1 Edward II which enacted that a prisoner who broke out of prison should be guilty of felony did not extend to a prisoner who broke out when the prison was on fire, "for he is not to be hanged because he would not stay to be burnt." United States v. Kirby, 7 Wall (U.S.) 482, 19 L Ed 278; State v Anderson, 40 NM 173, 56P2d 1134.

The two alternative warnings for which provision is made in §56-1-14, U.C.A. (1953) both involve the giving of a warning for one-quarter mile prior to the train's entry upon a crossing. Eighty rods happens to be one-quarter of a mile. The first alternative requires continuous warning by the ringing of a bell for that distance before the train's passing upon such a crossing, and the second provides for an alternative warning through the sounding of a whistle or siren. It is obvious that the warning contemplated by the statute in either case is for the one-quarter mile distance traveled before the train enters upon the crossing, as a warning given elsewhere during the train's progress would have no effect upon approaching motorists. To say that the brief sounding of a whistle at some great distance from

the crossing, at a time the train is not in sight and beyond the hearing of motorists approaching the crossing satisfied the statute's warning requirement would produce an obvious absurdity contrary to the intent and purpose of the statute. Respondent cannot seriously urge that this Court adopt such a construction.

CONCLUSION

Appellant respectfully submits that a jury issue was and is presented by the evidence herein, that the statutory construction urged by respondent should be rejected, and the District Court's judgment reversed in order that the issues may be submitted to a jury for determination.

RESPECTFULLY submitted this 19th day of August, 1977.

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MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Reply of Appellant to Respondent's Brief on Appeal was mailed, postage prepaid, to E. Craig Smay, at Van Cott, Bagley, Cornwall & McCarthy, 141 East First South, Salt Lake City, Utah 84111, this 19th day of August, 1977.