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Mona C. Hudson v. Union Pacific Railroad Company : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

MONA C. HUDSON,
Plaintiff and Appellant,

vs.

UNION PACIFIC RAILROAD
COMPANY, a corporation,
Defendant and Respondent.

Case No.
7449

Brief of Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

MONA C. HUDSON,
Plaintiff and Appellant,

vs.

UNION PACIFIC RAILROAD
COMPANY, a corporation,
Defendant and Respondent.

Case No.
7449

Brief of Appellant

NATURE OF CASE

This suit was brought by the appellant, Mona C. Hudson, against the respondent, Union Pacific Railroad Company, to recover damages for personal injuries sustained in a crossing accident. The appellant was a passenger in an automobile driven by one Era Jones. The automobile and a freight train of the respondent had a crossing collision. At the close of the trial the court directed a verdict of no cause of action, and this appeal was taken.

STATEMENT OF FACTS

It will aid the court in a study of the facts to know that the motion for a directed verdict was made on the following grounds: (1) a denial of any negligence on the part of the railroad; (2) a denial that the negligence, if any, was a proximate cause of appellant's injuries; (3) a claim that appellant was guilty of contributory negligence as a matter of law; and (4) a claim that the evidence showed that the negligence of Era Jones, the driver of the car, was the sole proximate cause of the accident. (R. 269) The record does not disclose the basis for the trial court's ruling—it may have been on any one or on all of the four points specified. It also will be helpful to the court to know at the outset that appellant claims negligence in the failure of the train to give warning of the approaching train; denies that she was guilty of contributory negligence as a matter of law, and in addition claims that the respondent had the last clear chance to avoid the accident. (R. 4)

There is a conflict in the testimony on some of the matters of fact. Where there is a direct conflict, we state only that portion which favors the position of the appellant. This is done because the court directed a verdict against appellant and thus ruled that as a matter of law there was no view of the evidence which would have permitted the appellant to recover.

This accident happened on May 1st, 1948, near Logandale, Nevada. (R. 52) The day was clear. (R. 249) The collision occurred at about 3:15 p.m. (R.

249) The appellant was a passenger in the car. She was riding in the front seat on the right hand side. She and Mrs. Jones were just out for a ride. Mrs. Jones had wanted to take a gift to some people who lived near Logandale and Mrs. Hudson, the appellant, went with her. They had delivered the gift and then had decided to go for a ride. (R. 74, 75, 87) Mrs. Hudson had ridden with Mrs. Jones many times before. (R. 77) Mrs. Jones was a good driver and she was paying close attention to the road. (R. 77, 102) The appellant and Mrs. Jones were talking casually. (R. 93) The windows on both sides of the car were open. (R. 93) Neither appellant nor Mrs. Jones were hard of hearing. (R. 105) Appellant thought that Mrs. Jones was "paying every attention" to her driving. (R. 77) By frequently riding with her, the appellant had determined that Mrs. Jones was a competent driver. There had never been any reason for appellant to be nervous while riding with her. (R. 77) The car was going slow. One witness placed the speed at about 18 miles per hour. (R. 225) It is also clear that the driver, Mrs. Jones, knew of the location of the railroad track. The car had crossed over the tracks just a few minutes before. They had found the road they were traveling to be partially blocked and had turned around within a short distance after crossing the track, and were returning to the same crossing. (R. 75, 191, 220)

The railroad track was a single track. (Ex. 3 and 4) It ran in a general north-south direction. (R. 54) It was essentially straight for some distance before reaching the highway. (R. 261) The train was going

toward the south. (R. 61) At mile post number 854, near Logandale, Nevada, this track crossed a country road. (R. 52) The road was winding, but its general course was also north-south. The car in which plaintiff was riding was going toward the south along this road, but as the road turned to go up over the tracks the car would be facing toward the west. (R. 61) Thus the road crossed the track at approximately right angles.

We believe that the course of the road, its location and elevation, are of importance insofar as the issue of contributory negligence is concerned. We, therefore, start to the north and east where car turned and trace the course of that road to the crossing. Appellant testified that the car had come from Logandale, crossed the tracks at the crossing here involved and had gone north for some short distance. She said that "when we got down in the ravine, we couldn't get through and we turned around and came back." (R. 75) Since the jury could have believed this, it is perhaps not necessary to describe the area beyond the ravine. There is considerable evidence on this, however, and we refer to it briefly. Keate, the deputy sheriff, testified that beyond the ravine, to the north, the road would be about one mile from the tracks. (R. 58) There is a ridge that runs east and west and the tracks run north and south. One could see the tracks coming into view but because of this ridge, one could not see north along them. (R. 64) Then the road dips down into a ravine. The sheriff said that a train crew might be able to look down on the top of the car, but that

passengers in the car could not have seen the train while the car was in the ravine. (R. 64, 67) The road is down in this ravine for about one-eighth of a mile. (R. 67) As the road comes up out of the ravine, it is more or less facing the track. The track can be seen head on, but there is a hill or ridge which prevents anyone in a car from seeing north along the track at this point. (R. 64, 67) Exhibit 1, which is a rough sketch made by Sheriff Keate, shows the road facing the track but to the right of the road (north) there is a hill shown which blocks the view to the north. (R. 70) The hill can also be seen in the photographs introduced by the railroad.

The fact that the road is so low that the passengers in the car could not see the train while in the ravine, together with the fact that even as the car came up out of the ravine (facing the tracks) the tracks to the north were hidden from view is important because, as will be hereinafter noted in detail, there is evidence from which the jury could have found that the train was behind (north of) the car as the car came out of the ravine. (R. 224) In any event the road dips into the ravine where the train crew might have been able to see the top of the car, but the passengers in the car could not have seen the train. (R. 64, 67) Thereafter the road turns to the west to come up from the ravine. As it comes out of the ravine the tracks could have been seen head on, but a small hill blocks vision to the north along the tracks. (Ex. 1, R. 57, 64-67) The road then turns abruptly and goes parallel to the tracks. Exhibit 3 is a good picture of the turn just

after the road leaves the ravine. The road then is parallel to the track for some 300 feet. (R. 55) It is approximately 75 feet from the track along this 300-foot strip. (R. 55, 150) The road then turns abruptly to the right and goes up a sharp incline to cross the tracks. (R. 55) This also is shown by Exhibit 3 and by Exhibit 1 (the sheriff's sketch).

Insofar as elevation is concerned, the sheriff testified that the road was considerably lower than the track. He was asked: "And they would see it [the train] for this 300 feet that it parallels the track?" And he answered: "Yes, they would if they looked straight up." (R. 68) At page 67, the sheriff said they could have seen the train had it been on the track opposite them if they had looked "up at an angle."

Jenkins, an engineer, testified also that the train could not have been seen from the ravine, (R. 152) and that the road went up a sharp incline as it went up onto the tracks. (R. 154) This incline onto the track is also mentioned by Mace, a brakeman. (R. 206-7) Mace also testified that he could see the top of the car in the ravine (R. 202) but he did not know whether or not he could see the occupants. (R. 203)

MOVEMENT OF THE CAR AND TRAIN

As to the movements of the car and the train, there is some conflict. It is clear that the car first crossed the tracks while it was going toward the north. The appellant testified that the car turned around in the ravine. (R. 75, 90) Other witnesses (the

railroad crew) testified that they saw the car turn around and start back south along the road toward the crossing. (R. 191) The car was not traveling fast. One of the railroad employees estimated the speed to be about 18 miles per hour. (R. 225) The engineer who had control of the train was on the right hand side of the cab. (R. 165) He perhaps could have seen to the left, but he was not looking. (R. 166) The left side of the train was being watched by the fireman, and it was his duty to watch to the left. (R. 167) He testified that he saw the car turn around near the dam, (R. 201) and kept his eyes on the car and saw it proceeding along this road and saw it go down into the ravine. (R. 202) He said he could see the top of the car at all points, (R. 197) and that he did not know whether he could see the driver when the car was down in the ravine. (R. 202) He also said that he saw the car proceeding along the strip parallel to the train but that he did not say anything to the engineer; (R. 204) that it looked as though the driver of the car was not paying any attention to the car at all. (R. 205) He was asked: "By the way the car was being operated, it appeared they had never seen the train? Answer: "That is right." He never, at any time, warned the engineer that the car was approaching the tracks. (R. 205) Sheriff Keate corroborated this by his testimony that when he interviewed the train crew he was advised by them that they had observed the car for a quarter of a mile approaching the crossing. (R. 60) It thus appears clear that the car went over the crossing, went some distance north along the road, that it turned

around and proceeded back toward the crossing at a speed of 18 miles per hour. At least while it was down in the ravine the occupants of the car could not see the train but the train crew could see the top of the car. (R. 198) As the train came out of the ravine, the sheriff's drawing, Exhibit 1, shows the road approaching the track at right angles, but because there was a hill to the right of the road the occupants of the car, according to the sheriff, could not have seen north along the tracks, but they could have seen the tracks head-on. (R. 64-68) There is evidence from which the jury could have found that the train was not on the tracks at that point, (R. 104) but that it was north, and behind this hill as the car came out of the ravine. (R. 224) The car then turned to the left and paralleled the tracks for some 300 feet, (R. 55) and without changing speed or doing anything to indicate that its occupants had seen the train, (R. 205) proceeded at the same speed onto the crossing. The train coming from behind the car (R. 224) could only have been seen on this 300-foot strip had appellant looked back and up at a sharp angle. (R. 68)

The appellant's testimony is that she did not see the train at all until it was right on them, and all she had time to say was, "Oh, my God." (R. 76) She did give a statement to the railroad claims agent in which she indicated that she had seen the train for some fifty feet before the impact. However, both the appellant and the claims agent who took the statement testified that he had pressed her to make an estimate of the distance, that before any distance was mentioned

she had advised him that the train was right on them before she saw it, and that she only had time to exclaim, "Oh, my God" before the impact. (R. 96-98, 129) This remark was not placed by the claims agent in the statement which he had had the appellant sign. There is nothing in the statement inconsistent with her testimony at the trial, except the estimate that the train was fifty feet away. The circumstances under which this statement was given, as testified to by the appellant and admitted by the claims agent (R. 129) are such that the jury could have found that her testimony at the trial was true and that the train was right upon them before she noticed it. (R. 76)

Insofar as the movement of the train is concerned, the testimony is that it was moving at a speed of from 15 miles per hour (R. 225) to 20 miles per hour. (R. 158) At 20 miles per hour the train could have stopped in 120 feet. (R. 169) There is no evidence as to how quickly it could have stopped at 15 miles per hour. It was proceeding down the straight track with some members of the crew keeping the car in sight at all times, but without warning the engineer that the car was approaching. (R. 192) As the car came out of the ravine it was ahead of the train. Mrs. Hudson so testified and one of the train crew corroborated her as follows: (R. 224-5)

Mr. Oliver:

Q. You saw the car again as it came up out of the ravine?

A. Yes.

Q. Just before it started on that parallel strip to go to the track?

A. Yes.

Q. And to that point was the car a little behind you, or a little ahead of you? [Note: Oliver was riding in the cab on the engine at front of train. (R. 218)]

A. It was a little ahead of me.

Q. The car was a little ahead of you as it came up out of the ravine?

A. Yes.

Q. Assuming this—this is the bottom of the ravine, here is the car as it proceeds back before making this turn to the parallel—before it came to this point to go parallel with the track, you understand this map, I take it

A. Yes.

Q. It was right along in here (indicates)?

A. Yes.

Q. At that time the train was to the rear a short distance?

A. Yes.

Q. Back of the car?

A. Yes.

Q. You are sure of that?

A. Yes.

Mrs. Hudson testified: (R. 104)

Q. Did you ever at any time prior to the time when you looked up and saw the train, did you ever look toward the right to the railroad track when you were traveling on that 300-foot strip?

A. After we came out of the cut, naturally I looked out of the cut, I didn't see a train there at that time. The train was coming back of us. She might have seen it out of the rear vision mirror. I didn't have a rear vision mirror.

Q. You say you looked as you came out of the ravine?

A. Yes.

Q. As you traveled that 300-foot strip did you look?

A. I do not know whether I looked or not. When we made that turn the train was right on us—unless she was looking in the rear vision mirror I do not know how she could have seen it because the train was back of us all the time.

The appellant testified that she did not hear a bell or a whistle. (R. 79, 85, 107) Her hearing was all right. (R. 79) The car windows were down. (R. 78) They were talking only casually. (R. 93) The radio was not on, (R. 85) and the speed of the car was so slow that there would have been no wind noise. (R. 225) The car was on a road which under the uncontradicted evidence was within 75 feet of the track. (R. 55) The engine was equipped with a bell, (R. 159) and had an air whistle which would give a very shrill sound. (R. 158) With the car as close behind the car as it obviously was, the physical factors are such as to suggest that the whistle was not blown. With a powerful air whistle, under the circumstances indicated above, the train crew who observed the car's approach to the tracks should have been able to literally shake it with sound vibration, and certainly should have been able to bring home

to the driver of the car that the train was approaching. Unless one is to attribute an intention on the part of the driver and of the appellant to commit suicide by driving in front of the train, one must conclude that they did not hear any warning signal. We think that the fact that they did drive up on the track is itself evidence that they did not hear any signal and that under the circumstances they could not have helped hearing it had it been sounded.

We desire to emphasize in this statement of facts that the train crew observed the car at all times. This is not contradicted. It is admitted by the engineer and by the fireman that it was the fireman's duty to watch for traffic approaching the train from the left side, (R. 167) that he did see the car approaching; that the car did nothing to indicate that the driver had seen the train, (R. 205) and that the fireman gave no warning whatever to the engineer until after the car had arrived directly in front of the train and a collision was unavoidable. (R. 192) At that time he shouted to the engineer to apply the brakes. The extent and nature of Mrs. Hudson's injuries are not material here.

ARGUMENT

POINT I. THERE WAS EVIDENCE FROM WHICH A JURY COULD HAVE DETERMINED THAT THE RAILROAD WAS NEGLIGENT.

We argue the question of the railroad's negligence because it is one of the bases assigned by the respondent for its motion for a directed verdict.

The negligence relied upon by the defendant is that the train crew failed to give adequate warning of its approach. It is our contention that respondent had both a statutory duty and a common law duty to warn the occupants of the car of the train's approach. We contend that the jury could have found (1) that no warning whatever was given and (2) that even had the jury believed the train crew to the effect that a signal was given, it could nevertheless have found that the warning given was not adequate under the circumstances of this case.

THE COMMON LAW DUTY

We contend that even were there no statute requiring the respondent to give a warning of the approach of its train to a crossing, it nevertheless would have had, and did have, a common law duty to warn the car of the train's approach. The circumstances which required the train crew to give a warning of its approach are as follows: The jury would have been compelled to find under the uncontradicted testimony that the train crew saw the car turn around; (R. 191) that the fireman, whose duty it was to watch for cars

approaching the train from the left hand side, saw the car at all times after it turned around; that he could see it go down into the ravine, (R. 197) see the top of it while it was in the ravine, (R. 198) watch it come out of the ravine and pull on to the tracks. (R. 198-204) The car had done nothing whatever to suggest that the driver had seen the train. (R. 205) Still the fireman did not advise the engineer that the car was approaching. (R. 192) The distance that the fireman thus observed the car was considerable. It was in the ravine for nearly one quarter of a mile and paralleled the tracks for 300 feet after coming out of the ravine. The jury could have found that the train was coming from directly behind the car. (R. 224) It was above it so the occupants of the car could only have seen the train by looking backwards and up at a sharp angle. (R. 224, 67-68) With the crew knowing that the train and the car were thus approaching a crossing, the crew had a common law duty either to adjust the speed of the train to avoid an accident or to warn the car of its approach.

The train was only going 15 miles an hour according to one witness, and at 20 miles per hour could have come to a complete stop in 120 feet. (R. 165, 169) It had a bell and a shrill whistle. The car was only 75 feet away and while it was slightly ahead of the train, (R. 224) they traveled parallel to each other for 300 feet.

Under the view of the evidence most favorable to the appellant, the jury could have concluded that no

signal of any kind was given. It must be remembered that under the evidence, the car was traveling only about 18 miles per hour. (R. 225) The train was going between 15 and 20 miles per hour. (R. 158, 225) While the jury could have placed the car slightly ahead of the train as it turned down the 300-foot strip of road parallel to the tracks, the car still would have been within 75 feet of the engine of the train. (R. 55) The car windows were all down. (R. 78) The radio was not on. (R. 85) The occupants of the car were talking only casually. (R. 93) It was a clear day, out in the country. (R. 249) It is almost a certainty that the occupants of the car did not hear any signal, for the car did go onto the track directly in front of the train. All of these facts the jury had before it. It also had the positive testimony of Mrs. Hudson that the bell was not sounded and the whistle was not blown. (R. 79, 85, 107) On page 107 she was asked: "Didn't you hear a whistle at all?" Answer: "Absolutely there was no whistle of any kind." On page 85 she was asked: "Was anything going on in the car itself, or outside the car that distracted your attention so you couldn't have heard a whistle had one been blown?" Answer: "No, there wasn't anything, there wasn't any whistle blown." On page 79 she testified that she did not hear the bell or any other sound until just before the impact. The jury thus could have believed that no signal of any kind was given. Mrs. Hudson so testified.

Taking the view of the evidence most favorable to the respondent, (which is exactly opposite from

what should be done) the best that can be said for the train crew is that at some distance back from the crossing they sounded a standard whistle warning. The whistle which the crew said was sounded was a standard "two longs, a short, and a long" and that is known as the crossing whistle. (R. 159) The engineer did not know exactly how far from the crossing the train was when he sounded the whistle, but finally said that he guessed he was about one quarter of a mile from the crossing when he started to sound the whistle. (R. 174) Even though the car was slightly ahead of the train some 75 feet away, (R. 224) and going parallel to it for 300 feet, no other or further whistle signal was given. The crew did testify that a bell was sounded continuously. In this regard, however, the engineer said the bell was not a very loud bell, (R. 172) and another member of the crew said that you could not ordinarily hear the bell in the caboose with the train running. (R. 252)

Thus under the most unfavorable view of the evidence, the most the train crew did was to give a standard whistle signal some distance back from the crossing and ring a bell which was not a "very loud bell," and which could not be heard as far back as the caboose. With a car ahead of the train and approaching the crossing, with nothing to suggest that the occupants had yet seen the train, and with the train crew watching the car at all times, the jury could certainly have found that the respondent, in the exercise of reasonable care, should have sounded the shrill whistle again while the car and the train were within 75 feet of each other and

traveling parallel for 300 feet. This was not done. With a train going 20 miles per hour, it could have stopped in less than 120 feet had the engineer been aware of the approaching danger. (R. 169) There is evidence that it was going only 15 miles per hour, (R. 225) and thus could have stopped in considerably less than 120 feet. At this slow speed the train could have been slowed slightly to await the further action of the car, or the engineer, who had control of the signals, could have made certain that the occupants of the car had seen the train. Instead the fireman remained silent. The engineer relied on the fireman to watch that side of the train, and did not even glance in that direction. (R. 162) And they gambled that the car driver would hear or see the train. We believe that this failure of the fireman to warn the engineer of the approaching car, and the failure of the train crew to give a whistle signal as the train and car proceeded parallel for 300 feet, could have been classed as negligence by a jury.

STATUTORY DUTY

In addition to the common law duty, we also rely upon the statutory duty of a railroad to give a warning as it approaches a crossing. At the close of the trial, counsel for respondent attempted to introduce statutes of the State of Nevada. Since the Nevada law was not pleaded, it could not be introduced and the Utah Court would be compelled to presume that the Nevada law was the same as the law of the State of Utah. In other words, where there is no evidence to show that the law where an accident happens is different from the law of

the forum, then the presumption is that the law of the forum and the law of the place where the accident happened are the same. See *Dickson v. Mullings*, 66 Utah 282, 241 P. 2d 840, 43 A.L.R., 136.

In this regard there is not very much difference anyway because the Nevada statutes which were read into the record in the absence of the jury, (R. 263) and our Utah Statute, Section 77-0-14, Utah Code Annotated, 1943, are not materially different. The Nevada statute, Volume 3, Section 6276, Compiled Laws of Nevada, 1949, required a train to ring a bell of at least 20 pounds weight at a distance of at least 80 rods from the place where the railroad shall cross any street, road or highway. In this regard it should be noted that there was no evidence introduced by the railroad to show that the bell which was rung weighed 20 pounds or more. Counsel for respondent attempted to get the railroad employees to so testify, but the testimony was to the effect that they did not know its weight. (R. 159)

The Utah statute provides:

“Every locomotive shall be provided with a bell and it shall be rung continuously from a point not less than eighty rods from any city or town or public highway grade crossing, until such city or town, street or such grade crossing shall be crossed. But except in towns and at terminal points the sounding of locomotive whistle or signal one-fourth of a mile before reaching such grade crossing, shall be deemed equivalent to the ring of the bell as aforesaid.”

Thus under either the Nevada law or under the Utah law, the respondent was compelled to ring a bell

at least eighty rods before reaching the crossing. Under Nevada law that bell must have weighed at least 20 pounds, and there was no alternative which permitted the sounding of a whistle. In Utah the bell did not have to be of any particular weight, and the sounding of the whistle could take the place of ringing the bell. We think that the Utah law applies because the Nevada law was not pleaded. In the case of *Buhler v. Maddison*, 105, Utah 39, 140 P. 2d 933, the Utah court refused to consider Nevada statutes which were introduced but not pleaded, and we think that such is the rule which must be followed here. It is a well established rule of law that in the absence of proof it will be presumed that the law of another state is the same as the law of the forum, and the court will administer and apply the law of the jurisdiction until the law of the situs is shown. *Dickson v. Mullings*, 66 Utah 282, 241 P. 2d 840, 43 A.L.R. 136. In any event, regardless of which law is applied, there was a statutory duty on the part of the railroad to give a warning as it approached the crossing. The jury could have found from the testimony of Mrs. Hudson that no warning signal was given. (R. 79, 85, 107) There are numerous cases to the effect that a jury question is presented on the issue of negligence where a person, in a position to hear, testifies that he did not hear a whistle or bell. In this regard the case of *Earle v. Salt Lake & Utah Railroad*, 109 Utah 111, 165 P. 2d 877 is in point. There the jury had only the testimony of witnesses that they did not hear a signal even though they were situated so that they could have heard it had one been given. The Supreme Court said (R. 114) that this presented a jury question.

POINT NO. 11: THE NEGLIGENCE OF THE RAILROAD COMPANY WAS A PROXIMATE CAUSE OF THE ACCIDENT

The motion for a directed verdict specified that it was made on the grounds that the evidence showed as a matter of law that any negligence on the part of the railroad was not a proximate cause of the injury. It was also argued as a part of the motion that the sole cause of the injury was the negligence of Mrs. Jones. These matters can best be argued together.

We readily admit that the jury could have found that Mrs. Jones was guilty of negligence in not looking for the train before pulling onto the crossing. This, however, is not sufficient to demonstrate that the railroad's negligence was not also a contributing cause. It is not necessary for us to show that the railroad's negligence was the *sole* cause of the injury. It is sufficient in law if we can establish that its negligence was a contributing cause.

If the jury had been permitted to find that the railroad was negligent in (a) not giving proper warning of the train's approach to the crossing, and (b) in the fireman's failure to warn the engineer of the car's approach, then it would seem to go without argument that such negligence was one of the contributing causes of the accident. The evidence shows that the car was proceeding at a slow enough speed, (18 miles per hour), that it could have been stopped had the driver known of the approach of the train. If the jury had concluded

that no warning had been given, then there certainly was a jury question as to whether or not the failure to give that signal was a contributing cause of the accident. Likewise, if the fireman who saw the car approaching the crossing without any indication that the driver knew of the approach of the train, had advised the engineer of the train's approach, then the train could have been slowed or the engineer could have been more diligent in warning the approaching car. Certainly had the fireman warned the engineer of the approach of the car, and had the engineer then adjusted to the approaching danger, the accident could have been avoided. We need not here contend or demonstrate that the jury would have been compelled to find that the railroad's negligence was a proximate cause of the collision. The Court directed a verdict. In regard to the issue of proximate causation, it is sufficient if appellant shows that the jury could have found, reasonably, that the railroad's negligence was a proximate cause. We submit that a jury could have so found.

We cite the case of *Earle v. Salt Lake & Utah Railroad Company*, 109 Utah 111, 165 P. 2d 877, which is in point on the question of proximate cause. The railroad there argued that as a matter of law the failure to sound a whistle was not a proximate cause of the accident. The Court said,

“Certainly under the state of the record, with a conflict in the evidence as to whether any crossing warnings were given by the engineer, the question of whether they were negligent was properly for the jury. Defendants further urge

that the evidence is conclusive, that from a point on the highway approximately 123 feet south of the track, there was a clear and unobstructed view of the track for approximately 84 feet east from the east edge of the highway, that since the train was traveling much slower than the automobile, the automobile must have traveled the last 123 feet before the collision while the train was moving on the track toward the crossing in full and unobstructed view of the driver of the car; that this in itself was ample warning to the driver of the automobile that the train was approaching, and therefore his failure to heed this warning was the sole proximate cause of the accident. . . . It is not the province of the Court to say that had the train whistled or rang a bell to signal its approach, the driver of the car would not have stopped or slowed down and thereby avoided the collision. This is properly a question for the trier of the fact."

The Court also quoted from *Pippsy v. Oregon Short-line Railroad Company*, 79 Utah 439, 11 P. 2d 305, 310, to the effect that the failure to sound a signal to warn an approaching car is a proximate cause of a resulting collision between the train and the car under circumstances such as are here present.

POINT NO. III: THE APPELLANT WAS NOT
GUILTY OF CONTRIBUTORY NEGLIGENCE
AS A MATTER OF LAW

It is this third point upon which we believe the trial court granted the directed verdict. The record does not show this but the indication from the bench so suggested. In this regard we believe that the recent

case of *Earle v. Salt Lake & Utah Railroad Corporation*, 109 Utah 111, 165 P. 2d 877, is directly in point. The facts of that case and this are almost a direct parallel. Both cases involved a guest riding in an automobile which had a collision with a train at a railroad crossing. In the Earle case the plaintiff was a stranger to the driver of the car and did not know whether or not he was a careful driver. He, therefore, would have had a greater duty to be attentive. In the instant case the appellant had ridden with Mrs. Jones on many previous occasions and had concluded from previous observation that Mrs. Jones was an attentive and careful driver. (R. 76-77) Her duty to be watchful would thus not have been as strict as in the Earle case. In the Earle case there were cross arms which warned approaching drivers of the existence of a railroad track. It was undisputed that the plaintiff in the Earle case saw the cross arms but did not warn the driver that they were approaching a railroad track. The court there had a case where the plaintiff passenger knew they were approaching a railroad crossing, yet he failed to warn the driver. There was no evidence to suggest that the driver saw the cross arms. In the instant case the evidence is much stronger on behalf of the appellant because there is affirmative and uncontradicted evidence that the driver knew of the existence of the tracks and that they were approaching the same. Several witnesses testified that the car had crossed over the tracks, gone north along the road a short distance (less than a mile) and had turned around and was going back toward the tracks. (R. 75, 191) Therefore, Mrs. Jones had crossed over

these very tracks not more than five minutes before and the appellant could have safely relied upon the fact that she knew the tracks existed.

In both cases the plaintiff was a guest. In the Earle case the "vegetation growing along the east side of the highway would somewhat obstruct the view of the track for some distance to the east," but for at least 123 feet there was no obstruction whatsoever and the car was approaching at a right angle. In the instant case there was evidence to the effect that the tracks were considerably higher than the road so that the occupants of the car would have had to look up at an angle to see the train. (R. 68, 91) There is also evidence to the effect that the car was ahead of the train so that the train was approaching the car from the rear. (R. 224, 104) We realize that the evidence is in conflict on this point, but Mrs. Hudson testified that as they came out of the ravine she looked at the tracks and there was no train there. (R. 104) Her vision, under the evidence, was blocked so that she could not see north along the track, (R. 64, 68) but on the portion of the track which she could see she looked and there was no train. (R. 104) Then one of the employees of the railroad was asked concerning this matter and he testified that he was certain that when the car came out of the ravine it was ahead of the train. (R. 224) We have read the transcript of the evidence in the Earle case upon which the Supreme Court based its decision. Both that transcript and the opinion of the court show that the vegetation growing along the right of way would not completely hide the train at any point. It partially obscured the

vision of the car occupants, but it did not block it, and for the last 123 feet the view was not obstructed at all, and the car was approaching at a right angle. In the instant case the jury could have found that vision was blocked entirely to the north; that as the car came out of the ravine the train was to the north; that thereafter the train approached the car from the rear and that it was at a higher elevation so that to see it Mrs. Hudson would have been compelled to look directly back of her and up at a sharp angle. Under her testimony she did look at the tracks as the car came out of the ravine, and there was no train on the tracks. (R. 104) Of course she could not see north along the tracks, but could see them "head on" as the car came out of the ravine. (R. 64-68) She looked and the train was not there. (R. 104) From that point on to the curve up to the track crossing, the train was behind her and above her. Certainly her opportunity to see the train was not as good as that of the plaintiff in the Earle case.

In both this and the Earle case the plaintiff was in the front seat. In both cases the train struck the side of the car on which the plaintiff was riding. The only points of difference in the two cases are in favor of the appellant's position here. (1) There the plaintiff was a stranger to the driver and did not know whether or not he was careful. Here the plaintiff had ridden many times with Mrs. Jones and had concluded that she was an attentive driver generally and that she was watching the road at this time. (R. 77, 102). (2) In both cases the plaintiffs knew that the car was approaching a crossing but in the Earle case the plaintiff did not know whether

or not the driver had observed that he was approaching a train track. Here the plaintiff knew that the driver knew of the presence of the tracks and that she was about to cross them. (3) There was no evidence in the Earle case that the train crew had seen the car. Here the crew watched the car for nearly half a mile as it approached the tracks. (4) There the speed of both vehicles was faster so that both needed more time to adjust to the situation which rapidly developed. Here the train could have been stopped in a few feet and the crew was observing the car. The car, had an effort been made to warn the driver, could have stopped almost up to the point of impact. (5) There the view was unobstructed entirely for 123 feet immediately before the crossing. Here the train was to the rear of the car and above it so that it could only be seen by looking back and up at an angle. We simply cannot see how the trial court could be sustained here unless the Earle case is to be now overruled. The cases to follow will demonstrate that the Earle case is in complete harmony with earlier cases from this state and with the cases from other jurisdiction.

The court in the Earle case cited and quoted from two cases arising out of a single accident. In the first case, *Shortino v. Salt Lake & Utah Railroad Company*, 52 Utah 476, 174 P. 860, 866, the court noted the duty of the driver of the car. In *Montague v. Salt Lake & Utah Railroad Company*, 52 Utah 368, 174 P. 871, 872, the court noted the duty of a guest. The guest rule there set forth was reapproved by the Earle case and is apparently the rule in Utah today. It is as follows:

“ . . . the plaintiff was not charged with the same strict legal duty of keeping a lookout and being watchful as the owner and driver of the automobile, Mr. Shortino.

“The rule applicable here, which is adopted by the Supreme Court of Minnesota in the case of *Cotton v. Willmar & San Francisco Railroad Company*, 99 Minn. 366, 109 N.W. 835, 8 L.R.A. N.S. 643, 116 Am. St. Rep. 422, 9 Ann. Cas. 935, which case is cited and followed in the *Atwood* case, supra, is stated thus: ‘The rule which has met with general approval in the more recent cases made the passenger responsible only for his personal negligence, and leaves it to the jury to determine whether, under the circumstances, he was justified in trusting his safety to the care of the driver and not looking or listening for himself. The negligence of the driver is thus not imputed to the guests or passenger, but the circumstances may be such as to make it the duty of the passenger to look and listen and attempt to control the driver for his own protection.’ ”

In a third case arising out of this same (Shortino) accident, *Cowan v. Salt Lake & Utah Railroad Company*, 56 Utah 94, 189 P. 599, 605, the court reviews most of the Utah cases in great detail and concludes by affirming the rule of *Atwood v. Utah Light & R. Company*, 44 Utah 366, 140 P. 137, 139, and the Minnesota case quoted above. In commenting on these earlier cases, the Utah Supreme Court said in *Earle* case that the rule announced is “that contributory negligence should be left to the jury ‘unless that question is free from substantial doubt.’ ”

In the Atwood case the court quoted with approval from another Minnesota case as follows:

“ ‘We think that it would hardly occur to a man of ordinary prudence, when riding as a passenger with a competent driver, who he had no reason to suppose was neglecting his duty, that he be required, when approaching a railway crossing, to exercise the same degree of vigilance in looking and listening for approaching trains that he would if he himself had the control and management of the team.’ ”

The Utah court then commented: “This seems to us good sense as well as good law.” It is this rule which was expressly affirmed again in the Earle case. The cases from other states are to like effect. In this regard we confine ourselves to cases of unobstructed vision and passengers in the front seat.

In *Cate v. Fresno Traction Company*, (Cal.) 2 P. (2d) 364, the defendant operated an electric trolley line on regular schedule between Fresno and the town of Pine Dale. The line crossed Shaw Avenue at a point about five miles from the city of Fresno in a level and sparsely settled country. The deceased, a woman thirty five years of age, was a passenger in an automobile which was driven in a westerly direction toward the intersection, while the trolley car involved in the collision was approaching from the south. For 637 feet along Shaw Avenue before reaching the tracks there was nothing to obstruct either the driver's or the passenger's vision of the electrical car. The ground was level, no foliage, house or other obstruction of any kind existed. It was in

the open country and there was a standard railroad crossing sign. The driver testified that as they approached the crossing and at a distance of about sixty or eighty feet therefrom they both looked to the right and he looked to the left. He further testified that he saw nothing, that the deceased said nothing until just before the collision when she said, "Lord, there's a car." There was a conflict as to whether the motorman gave a warning signal. When the motorman first observed the automobile the electric car was going 18 or 19 miles per hour and when it approached the crossing it had been slowed down to 17 miles per hour. The speed of the automobile was from 18-22 miles per hour. The court refused to hold that the passenger was guilty of contributory negligence.

In *Hopkins v. Pacific Electric Ry. Co.*, 118 P. (2d) 872, (California), the guest was riding in the front seat beside the driver. The intersection was unobstructed. The guest did not look for a train, though familiar with the crossing. Having no warning of approaching danger he could do nothing to warn the driver of it. The court said:

"Defendants also urge that Hopkins was guilty of contributory negligence as a matter of law. This argument finds little evidentiary support. Hopkins was the guest of Johnson, and the negligence of Johnson, if any, was not imputable to him. Johnson was in no way subject to the control of Hopkins, nor under his supervision or direction as to the manner in which he operated the automobile. . . . The deceased had the right to assume that the driver

was competent, that he knew the capacity of his machine, and that he would not put it in a perilous position. It follows that we can not conclude that Hopkins was guilty of contributory negligence as a matter of law."

In *Atlanta and W. P. R. Co. v. McCord*, (Ga.) 189 S.E. 403, the court held that a person riding in an automobile as the guest of another who is operating the automobile is not as a matter of law guilty of negligence barring recovery against the railroad company for an injury received by him in failing to observe the approaching train, although the view down the track for over a half mile was unobstructed.

See also *Gorman v. Franklin*, (Mo.), 117 S.W. (2d) 289; *Carson v. Thompson*, (Mo.), 161 S.W. (2d) 995; *Gifford v. Pa. R. Co.*, (New Jersey), 196 Atl. 679; *Scheer v. Long Island R. Co.*, 34 N.Y.S. (2d) 25; *Anstine v. Pa. R. Co.* (Pa.), 20 Atl. (2d) 774; *Valera v. Reading Co.*, (Pa.), 36 Atl. (2d) 644; *Wichita Valley Ry. Co. v. Durrett*, (Tex.), 17 S.W. (2d) 329; *Gulf M. & O. R. Co. v. Underwood*, (Tenn.), 187 S.W. (2d) 777; *Cox v. Polson Logging Co.*, (Wash.), 138 P. (2d) 169; *Parsons v. N. Y. Central R. Co.*, (West Va.), 34 S.E. 334; *Kosciuk v. Sherf*, (Wisc.), 272 N.W. 8; *Chicago and E. I. Railway Co. v. Felling*, (Ind.), 200 N.E. 441; *Finley v. Lowden*, (Iowa), 277 N.W. 487; *Frideres v. Lowden*, (Iowa), 17 N.W. (2d) 396; and *Lang v. Chicago & N. W. Ry. Co.*, (Minn.), 295 N.W. 57.

It seems clear that the plaintiff here had no control over the car and no right to exercise control. She did

not observe the train before the collision was unavoidable and she had no duty to observe it. She knew the driver, had observed that the driver was careful and attentive. They were not speeding, the driver was looking straight ahead and watching the road, her attention was not detracted. She knew that the driver knew of the presence of the railroad track. She had observed the railroad tracks as the car came out of the ravine and did not see any train there. She then relied upon the driver to watch the road and the tracks from that point to the crossing, but just as the car went up on to the crossing she looked and observed the train and warned Mrs. Jones immediately. It is obvious that she could have seen the train had she looked backward and up at an angle, but under the Utah cases she had no absolute duty to do so. She had a right to rely upon Mrs. Jones watching the road and the railroad tracks.

LAST CLEAR CHANCE

If the court were to conclude, notwithstanding the above, that Mrs. Hudson was guilty of contributory negligence as a matter of law, we believe that the railroad had the last clear chance to avoid the accident. It is not contradicted that it observed the car approaching the track at a speed of approximately 18 miles per hour. The car had done nothing to indicate that the driver had seen the train. Its speed was so slow that it could have stopped almost instantly. As it continued to approach the tracks without slackening its speed, all that the defendant would have had to do to avoid the collision was to give a blast of the whistle. At that point

the train and the car were so close together that even a driver who was completely inattentive could have heard the whistle. We do not here have a situation of a car and a train each approaching the crossing at a rapid speed. Under the evidence the jury could have found the train to be going as slow as 15 miles per hour and the car at 18 miles per hour. The jury would have been compelled to find that the train crew was watching the car approaching the tracks. It would have been compelled to find that the car had not slackened speed or done anything to indicate that the driver had seen the train. There certainly was a point at which the train crew knew full well that the car was going up on to the tracks. As the car went up to the tracks it was going uphill at a very slow speed. A sounding of the whistle most certainly would have stopped the car. We submit that the train crew was guilty of negligence in not sounding the whistle at that point, and that it did have the last clear chance to stop the car and avoid the accident.

We respectfully submit that the trial court erred in directing a verdict against the plaintiff.

Respectfully submitted,

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