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Howard F. Seybold v. Union Pacific Railroad Company : Brief of Appellant

Utah Supreme Court

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**IN THE SUPREME COURT
of the
STATE OF UTAH**

HOWARD F. SEYBOLD,

Plaintiff and Appellant,

vs.

UNION PACIFIC RAILROAD COM-
PANY, a corporation,

Defendant and Respondent.

BRIEF OF APPELLANT

Appeal from the District Court of the Third Judicial
District, in and for Salt Lake County, State of Utah
Honorable Clarence E. Baker, presiding.

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ROBERTS & BLACK

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT of the STATE OF UTAH

HOWARD F. SEYBOLD,

Plaintiff and Appellant,

vs.

UNION PACIFIC RAILROAD COM-
PANY, a corporation,

Defendant and Respondent.

Case No.
7641

BRIEF OF APPELLANT

PRELIMINARY STATEMENT

(All figures in parentheses are the page number of the record. The parties will be referred to as they appeared in the lower court.)

This is an appeal by plaintiff (210) from a judgment and decree (208) entered by the court after granting defendant's motion to set aside verdict and judgment entered thereon and to enter judgment for the defendant notwithstanding said verdict (207).

This was an action to recover damages for personal injuries suffered by the plaintiff in a railroad crossing accident occurring at Roberts, Idaho, November 14, 1949. The case was tried before a jury and a verdict rendered in plaintiff's favor in the sum of \$1,500.00 (10).

During the trial of the case the defendant made a motion for a directed verdict and the court in denying said motion stated that he believed the case resolved itself into a jury question (150). After the jury returned the foregoing verdict the defendant filed a motion for a new trial (205) and a motion for judgment notwithstanding the verdict (207). The trial court by its judgment and decree kept under advisement the motion for a new trial but granted the motion for a judgment notwithstanding the verdict of the jury and entered judgment in favor of defendant (208).

STATEMENT OF FACTS

This is a usual crossing case in the sense that the testimony of plaintiff and the railroad is in direct conflict. Plaintiff testified that it was not very easy to see and that it was quite dark (22) at the time of the collision and that the caboose came onto the crossing without lights and without warning or signals of any kind. The railroad introduced evidence that the crossing was light, that bells and gongs were ringing and lights were on the caboose and men were standing on the caboose and in the crossing signaling with lights and voice to plain-

tiff to stop. Since the motion for judgment notwithstanding the verdict was granted the evidence must be viewed in its light most favorable to plaintiff. We, therefore, in making this statement, will follow this well-established rule and state the evidence as presented by plaintiff.

The accident occurred at the Rigby Crossing at Roberts, Idaho, at approximately 7:00 o'clock P.M. on the 14th day of November, 1949 (17). The plaintiff was driving a truck from Leadore, Idaho, to the auction yards at Idaho Falls. The truck was loaded with eighteen head of beef cattle. It was a 1½-ton heavy-use truck with a 26-foot semi-trailer. The trailer was attached to the cab of the truck (16). The tracks of the defendant railroad company run in a north-south direction and the highway crosses these tracks at right angles and runs east and west. The plaintiff, at the time of the collision, was driving in an easterly direction and the caboose of the defendant was proceeding south over the crossing and was on the so-called passing track. A detailed description of the crossing should here be given.

THE CROSSING

In the file is found a pencil diagram, not drawn to scale, of the crossing and its immediate surroundings. While this was not introduced as an exhibit, it is an accurate portrayal of the diagram which was placed on the blackboard and referred to by the witnesses during the course of the trial.

There are three tracks on this crossing, each of which runs north and south. The tracks are parallel with Highway No. 91. Between 150 and 175 feet south (59) of the depot Highway No. 48, running in an east and west direction, crosses the three tracks and connects with Highway No. 91. Plaintiff was proceeding south on Highway 91 and turned east onto Highway No. 48 and across the tracks. The three tracks, starting from the west, are known as the Team Track, the Passing Track and the Main Line Track. The distance from the middle of Highway No. 91 to the middle of the Team Track is 79 feet, from the Team Track to the Passing Track 43 feet, and from the Passing Track to the Main Line Track 17 feet. There are red flasher signal lights on each side of the crossing. These signals are 15 feet west of the Team Track and 15 feet east of the Main Line Track. The depot building itself is north of the crossing and east of the tracks. The surroundings are portrayed by pictures introduced in evidence as Defendant's Exhibits "1" to "6" inclusive. At the time of the collision the crossing was shrouded in darkness (22, 38).

This crossing was extensively used. It appeared that trucks had been using it all day long on the day of the accident (136, 139).

THE ACCIDENT

Plaintiff was driving his truck in a southerly direction on Highway No. 91. He made a left hand turn from this highway onto Highway No. 48. He slowed at the

intersection, made the turn and stopped at the flasher light, which was in operation (18). He described the turn as a "rather hard one to make" and estimated his speed at about five or six miles per hour and stated that the cattle being as top heavy as they were he could not negotiate that turn going more than seven or eight miles on hour at the most (18). He caused his truck to come to a complete stop at this flasher and noted that the locomotive was standing on the main line track (18, 38) between the depot and the crossing (19). It was headed south. He saw the big headlight of the engine shining across the crossing in a southerly direction. He estimated that the engine was about 75 feet from the crossing. It was not in motion. He knew that the engine on the main line track activated the flasher signal at the crossing. Believing that the standing engine was activating the flasher he shifted into first gear and started across the crossing (19). Because of his knowledge that the engine was making the flasher work he considered that it was safe to go across the crossing. As he proceeded to traverse the crossing, he kept his eyes on the engine and the road (20). He did not see anything until the light of the engine seemed to black out and then he looked up and noticed the caboose. At the time the caboose was just a few feet from plaintiff's truck and was on the passing track. He merely got a fleeting glimpse of the caboose—not more than a second. He did not notice any lights on the caboose and saw no people there. No one was on the road as he attempted to traverse the crossing (21).

Plaintiff detailed the observations he made as he proceeded over the crossing on cross-examination as follows (39, 40) :

“Q. Did you look along the passing track to your left?

“A. It was quite dark there, and that locomotive headlight was flashing across the crossing. I looked, I couldn't see anything at that time.

“Q. Did you look up this track to your left?

“A. Yes, I did.

“Q. You said you didn't see anything?

“A. That is right.

“Q. After you proceeded across, you said you saw the caboose just before the collision?

“A. Yes, I did.

“Q. How far away was it?

“A. Oh, it was six or seven feet.

* * * * *

“Q. Did you see the man at the end of the caboose, on the platform?

“A. I didn't see a man on the caboose.

“Q. Did you look at the platform?

“A. You don't have much time to look that close.

“Q. Did you look to see if a man was on there?

“A. Not to look to see if there was a man on there.

“Q. You would say there was no man there?

“A. I would say there was no man there.

“Q. You would testify there was not a man there?

“A. Yes.

“Q. Did you see the lights?

“A. No, sir.

“Q. You had to look awfully fast?

“A. Yes.

“Q. You would testify there were no lights?

“A. Yes, there were no lights.

“Q. You would say there were no lights on the caboose?

“A. I would say there were no lights on the caboose.

“Q. There were no lights inside the caboose?

“A. No lights.

“Q. No lights at all?

“A. That is right.

“Q. It was completely dark?

“A. That is right.”

Plaintiff testified that there were no lights at this crossing and a person cannot see anything; that by the time he had gotten as far as he had the arc lights were behind him and also the street lights of Roberts and there were no bright lights he could see (21).

Plaintiff was dazed for a period of time after which he made observations as to the relative positions of the truck and caboose (22). The impact occurred just at the rear of the door of the cab on the truck. The caboose, after it hit the truck, glanced off and ran up on the cattle rack and was hooked there. The rack and cab of the truck had turned partly over on its side and the caboose was keeping the cab of the truck from going on over (22).

In the collision plaintiff received gashes on his head and his left knee and the cartilage of his knee was torn (24, 26).

We will not go into the details of the damages resulting to plaintiff from the injuries sustained because the only matter of interest on this appeal is whether there was sufficient evidence to support the jury's finding of liability against the defendant company.

The defendant introduced in this case what may be termed *the usual railroad evidence*. If the plaintiff crossed the crossing under the conditions described by defendant's testimony, the only conclusion that reasonable persons could reach is that plaintiff was attempting to commit suicide.

The conductor of the crew that had charge of this caboose testified he was standing in the middle of the crossing between the main line and the passing tracks; that he was yelling and waiving his electric lamp to attract the attention of the plaintiff (61, 63). He testi-

fied that the engine was halfway between the north switch and the depot, which would mean that the engine was some 400 feet from the crossing at the time the accident occurred. Of course, this employee of defendant had to admit that it was his duty to stand at the crossing to conform to the rules of the defendant company under the conditions there existing and his failure to be there would have been grounds for discipline (75). This would be a good reason to discredit his testimony, because he obviously had a motive for testifying as he did (75).

Howard Kunze, the rear brakeman, testified that he was on the south end of the caboose as it approached the crossing (112). Before reaching the crossing he took up the slack on the chain to the brake preparatory to stopping on the other side of the crossing. When he was 105 feet from the crossing he noticed plaintiff's truck (113). The truck at that time was going south on Highway No. 91. After plaintiff made the turn onto Highway No. 48 he heard the engine of the truck accelerate and it came over the crossing (114). He testified he was in plain sight, hollering and waving the lantern at the plaintiff and then the collision occurred (115).

There were other witnesses for defendant but the above is the substance of defendant's case. The jury did not believe this testimony but chose to accept the plaintiff's testimony and returned a verdict for him. The railroad testimony here was just a little too good to be believed unless it could be established that plaintiff was bent on suicide.

STATEMENT OF POINTS RELIED UPON

POINT I

THE TRIAL COURT ERRED IN ENTERING JUDGMENT FOR DEFENDANT, NOTWITHSTANDING THE VERDICT IN FAVOR OF PLAINTIFF.

POINT II

THE EVIDENCE PRESENTED A JURY QUESTION OF WHETHER OR NOT THE DEFENDANT WAS GUILTY OF NEGLIGENCE PROXIMATELY CAUSING PLAINTIFF'S INJURIES.

POINT III

THE EVIDENCE PRESENTED A JURY QUESTION OF WHETHER OR NOT THE PLAINTIFF WAS GUILTY OF NEGLIGENCE WHICH CONTRIBUTED TO PROXIMATELY CAUSE HIS OWN INJURIES.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN ENTERING JUDGMENT FOR DEFENDANT, NOTWITHSTANDING THE VERDICT IN FAVOR OF PLAINTIFF.

The only grounds upon which the trial court could have entered judgment in favor of defendant notwithstanding the jury verdict in favor of plaintiff was either (1) that as matter of law the evidence did not support a finding of negligence on the part of defendant proximately causing plaintiff's injuries, or (2) that as matter

of law plaintiff was guilty of contributory negligence. In order to justify this ruling of the trial court it is necessary that reasonable minds could not differ upon the propositions presented. We submit that the evidence in this case presented jury questions on both of these propositions and that the trial court erred in its ruling granting defendant's motion and in entering judgment in favor of defendant.

We will discuss the evidence in detail under the following points of the brief. There is nothing in the record indicating the ground upon which the trial court entered the judgment in favor of defendant. It will, therefore, be necessary to discuss each of the propositions mentioned.

POINT II

THE EVIDENCE PRESENTED A JURY QUESTION OF WHETHER OR NOT THE DEFENDANT WAS GUILTY OF NEGLIGENCE PROXIMATELY CAUSING PLAINTIFF'S INJURIES.

The trial court by its Instruction No. 3 (186, 187) set forth the six grounds of negligence alleged in plaintiff's complaint. By its Instruction No. 8 (192) the court instructed the jury that in order to find a verdict for plaintiff the jury must find by a preponderance of the evidence that defendant was negligent in one or more of the particulars set forth in Instruction No. 3.

We submit that the evidence in this case supported a finding of negligence upon the grounds mentioned in said instructions. However, in order to support plaintiff's position that error was committed in entering judgment for defendant it is only necessary that the court conclude there was sufficient evidence to support a finding that defendant was negligent in one of said particulars and that such negligence proximately caused injuries to plaintiff.

The situation which existed at the crossing at the time plaintiff attempted to traverse it constituted a hazardous condition. The crossing was dark. As plaintiff proceeded in an easterly direction, the arc lights and the neon signs and lights in the stores west of the highway were behind him. The engine formed a dark background as it stood on the main line track. The caboose as it approached the crossing was moving on the westerly side of the engine. The engine would create a condition making it extremely difficult, if not impossible, to see the caboose. The headlight of the engine shone south onto the crossing, adding further to the difficulty of seeing the caboose. The caboose was drifting along the passing track and would make no noise as it approached the crossing. This condition required that precautions be taken by the defendant in affording a warning to motorists traversing the crossing in an easterly direction. It would be necessary for some type of signal to be given other than merely the flasher signals on either side of the tracks. A person approaching this crossing could well

believe that the signals were being activated by the engine on the main line track. This being so, further signals were necessary. These signals should have been in the form of lights on the caboose, thereby making its movement and presence known to persons on the crossing or by some person standing on the crossing for the purpose of giving further signals to motorists. As shown in the statement of facts, plaintiff testified that there were no lights on the caboose (40) and there was no person standing at or near the crossing giving signals for the purpose of having him stop (21). The position of the engine approximately 75 feet north of the crossing was in violation of the rule of the railroad which was introduced in evidence as Exhibit "B."

We submit that this evidence establishes that the defendant was guilty of negligence in the manner in which it conducted these switching operations over and across this crossing. This negligence consisted of a failure to give any warning whatsoever of the approach of this caboose either by reasonably adequate signals or warning at the crossing or by warning with adequate lights or audible signal on the caboose itself. The railroad was also negligent in placing its engine, in violation of its own safety rules, a scant 75 feet from the crossing, thereby creating an obstruction to a view of the caboose as it approached the crossing.

SIGNALS AT THE CROSSING

We submit a jury could properly find that defendant company, to exercise reasonable care, should have stationed a flagman on the crossing under the circumstances existing at the time plaintiff attempted to drive across. A person could reasonably believe that the flasher signal was being activated by the stationary engine on the main line track and, hence, the jury could have found that this signal was not adequate. The caboose with no lights approached on the passing track against the dark background of the engine. There was a conflict in the evidence as to the presence of a flagman on the crossing. Plaintiff testified that there was no flagman there and no signal given. We submit that under the authorities a jury question was thereby made out.

The conductor, Ray, admitted on the witness stand that the rules of the defendant company required that under the circumstances existing at Roberts he, as conductor, should flag the crossing (75). In direct conflict with the testimony of plaintiff this conductor testified that he in fact flagged the crossing and was attempting to stop plaintiff from traversing the crossing. From these circumstances alone the jury could infer that reasonable care required that the crossing be flagged under the conditions then and there existing. The very purpose of this rule was to protect the railroad company not only so far as its own equipment was concerned but also to protect travelers on the highway who might come

into collision with the caboose as it silently drifted southward hidden by the dark background of the engine and the glare of the headlight.

The great weight of authority holds that safety rules of a railroad company are admissible in evidence for the consideration of the jury in determining whether or not by violating such rules the railroad company was negligent. See *Pollard v. Roberson*, (Ga.) 6 S.E. 2d 203; *Callaway v. Pickard*, (Ga.) 23 S.E. 2d 564; *Southern Pacific Co. v. Haight*, 126 F. 2d 900; *Peizer v. City of Seattle*, 24 P. 2d 444; *Stevens v. Boston Elevated Ry. Co.*, 184 Mass. 476, 69 N.E. 338; *Canham v. Rhode Island Co.*, 35 Rhode Island 177, 85 Atl. 1050; *Hurley v. Connecticut Co.*, 118 Conn. 276, 172 Atl. 86; *Warner v. Baltimore & Ohio Railroad Company*, 168 U. S. 339, 18 S. Ct. 68, 42 L. Ed. 491; *Deister v. Atchison T. & S. F. Ry. Co.*, 99 Kan. 525, 162 P. 282, L.R.A. 1917 C 784. See 2 *Wigmore on Evidence*, 3rd Ed., Sec. 282, at page 132.

Numerous cases have held that it is negligence under certain circumstances to fail to flag a crossing. We submit that under the authorities the case at bar presents such a situation and plaintiff's testimony that no person flagged the crossing presents an evidentiary basis for a finding of negligence on the part of defendant. The Tenth Circuit has had occasion to consider this matter of flagging crossings. In *Chicago & N.W. Ry. Co. v. Golay*, 155 F. 2d 842, 844, a collision occurred at a railroad crossing in Wyoming. At a crossing where there

was an obstruction on the northwest corner, the tracks running in an east-west direction and the road in a north-south direction. The plaintiff's automobile was proceeding southerly and the train easterly. In speaking of the relative duties of railroads and travelers on the highways the court stated:

“* * * But the rights of the general public and the rights of the railway company at street crossings are mutual and reciprocal; and, although common convenience gives to trains precedence over automobiles in the use of crossings, it is upon the condition that the company will give due warning of the approach of its train in order that those in automobiles may stop safely and wait for the trains to pass. What constitutes reasonable and timely warning depends upon the circumstances and surroundings. For instance, the vigilance and care must be greater at crossings in a populous city or town where the travel is great than at ordinary crossings in the country. And, as a general rule, whether reasonable care and prudence require under all the circumstances that special warning facilities be maintained at a crossing in a city or town is a question of fact for the jury.”

In the case at bar there was testimony that considerable traffic had passed over this crossing during the day of the collision (136, 139).

The presence of an undue amount of traffic is not essential in order to make a jury question of negligence in failing to have a flagman at a crossing. This is ex-

emplified by another case of the Tenth Circuit: *Interstate Motor Lines, Inc., v. Great Western Ry. Co.*, 161 F. 2d 968, 972, wherein the court stated:

“* * * But the mere fact that a crossing is in the country does not necessarily in all circumstances relieve the railway company of any duty to maintain a special warning signal. If a crossing in the country is peculiarly dangerous to travelers on account of its location, or mode of construction, or because the track is curved, *or the view is obstructed*, the railroad company is required in the exercise of ordinary care to meet the peril with a special warning signal such as a bell, an electric wigwag, a flash signal, or other like caution.”

In speaking of the duty of a railroad to furnish a flagman at a crossing the court in *Green v. Southern Pac. Co.*, 53 Cal. App. 194, 199 P. 1059, 1062, stated:

“* * * But the law does impose upon a railroad company the duty to use reasonable care, corresponding to the circumstances constituting the probable danger, to avoid injury to persons lawfully traveling upon the public highway crossed by the company's tracks and trains. It then becomes a question for a jury to decide whether or not it was negligence for the company to run its cars across the highway without providing a flagman or some means of warning to travelers at the place of crossing.”

The court in *Hinkle v. Southern Pac. Co.*, 12 Cal. 2d 691, 87 P. 2d 349, 354, pointed out that it was unnecessary that the traffic at a crossing be extraordinarily heavy. In that case it stated:

“* * * It is true the crossing is not in a populous city, but it is over a public highway where there is much travel to and from a popular summer resort. Moreover, it is apparent from the photographs introduced as exhibits that an unobstructed view of the tracks cannot be had until one is almost upon them. The fact that a crossing is frequently crossed over by travelers is not an indispensable factor to a determination that a crossing is a particularly dangerous one, but the hazardous nature of the crossing may depend upon the physical nature of the crossing itself.”

Parenthetically the plaintiff particularly calls the Court's attention to this *Hinkle* case in that the conflict in that case was as great as the conflict presented in the case at bar. The plaintiff in that case stated that he was traversing the crossing when an unlighted backing train loomed out of the trees about 20 feet from his automobile. He testified that he observed no lights and nobody at the crossing. The railroad company introduced evidence that the backing engine was lighted; that a member of the crew was on the crossing waving a lantern and that plaintiff was drunk. The jury, which was the trier of the fact, disbelieved this “pat” evidence introduced by the railroad company just as the jury in the case at bar disregarded the “pat” evidence of the Union Pacific.

The court in *St. Louis-San Francisco Ry. Co. v. Prince*, 145 Okla. 194, 291 P. 973, 977, held that the absence of a flagman presented a jury question of negligence even in the absence of statute. The court stated:

“It is now well recognized that the duty may exist outside of the statute to provide flagman, gates, automatic bells, or other adequate warning appliances, if the situation of the crossing reasonably requires it. And whether or not the situation of any particular crossing requires such additional warning, signs, appliances, etc., is a question for a jury, where the evidence is such that reasonable men might reach different conclusions therefrom. *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 12 S. Ct. 679, 684, 36 L. Ed. 485.”

It will be noted that the court relied upon *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 12 S. Ct. 679, 36 L. Ed. 485. This latter case is one of the leading cases on signals at crossings and supports the original ruling of the trial court herein that a jury question of negligence for lack of sufficient signal or warning was presented.

See also *Engstrom v. Canadian N. R. Co.*, 153 Minn. 51, 190 N.W. 68, and *Moody v. Canadian N. R. Co.*, 156 Minn. 211, 194 N.W. 639.

LIGHTS ON CABOOSE

Another method of warning travelers upon the highway that a caboose was in the process of being shunted along the passing track would be to place lights thereon which would be visible to travelers on the highway. Another method would be to station a brakeman on the front end of the caboose in order that he might give signals both vocal and by light to such travelers. The

plaintiff very definitely testified that there were no lights and no man upon the caboose (40). The defendant offered testimony that such lights and such crew member were present but the jury could refuse to believe this testimony and believe the testimony of plaintiff.

The failure to light the caboose would be a part of the whole situation presented at the crossing. It may be that if adequate lights had been on the caboose it would not have been necessary to place a flagman on the crossing. However, as part of the negligence of the railroad company plaintiff relies upon its failure to have the caboose sufficiently lighted so that a traveler on the highway would become aware of its presence. The headlight of the engine glaring upon the crossing in the eyes of the traveler as he looked to the north would prevent the traveler seeing a caboose shrouded in darkness drifting into the crossing.

The duty of the railroad in the case of shoving a car over a crossing is stated in *Colorado & S. Ry. Co. v. Chiles*, 50 Colo. 191, 114 P. 661, 664, as follows:

“* * * It is the duty of a railway company in backing a train over such a crossing to employ some reasonable means to warn travelers that the train is about to be backed over the crossing. Some authorities say that it is the duty of the company to have a brakeman on the rear end who can signal the engineer as well as the endangered traveler. Certain it is that some reasonable means looking to the protection of the traveler should be employed.”

We submit that cases where the shoving of a railroad car is involved are analogous to the situation in the case at bar.

In speaking of a similar situation the court in *Hines v. Chicago, M. & St. P. Ry. Co.*, 105 Wash. 178, 177 P. 795, 797, stated:

“* * * Indeed, we see no room for any such contention, (that defendant was not negligent) in view of the fact that the locomotive was running backwards at such a rate of speed over this country crossing, with no headlight on the rear of the tender, indicating that it was running in that direction, and no other lights upon it other than, possibly, the red and white lanterns which were on the rear of the tender, and which would not suggest to an observer of reasonable caution, even if he saw either of them, that the engine was running in that direction at such a place as on a main line track, out in the country, over a road crossing.”

See also *Chung Sing v. Southern Pac. Co.*, 182 Cal. 609, 189 P. 281.

POSITION OF ENGINE

The evidence would support a finding that the engine was standing on the main line track 75 feet from the crossing at the time plaintiff stopped his truck preparatory to traversing the crossing. This was in violation of defendant's Rule 803(A) pleaded (4) and introduced in evidence as Exhibit "B" (204).

While this engine was not between plaintiff and the caboose it was just as effective in obliterating an adequate view of the caboose as if it were. Its position together with its headlight created a condition which prevented plaintiff from seeing the unlighted caboose until it was too late. Its presence there tended to attract plaintiff's attention to the engine. He would naturally watch this engine as he slowly traversed the crossing.

Authorities above cited establish that this rule and its violation could be considered in determining defendant's negligence. Other factors at the crossing heretofore discussed under this point necessitate a conclusion that the placing of the engine in this position under the circumstances could support a finding of negligence in so doing.

We submit that defendant's negligence was properly left to the jury and error was later committed by entering judgment for defendant.

POINT III.

THE EVIDENCE PRESENTED A JURY QUESTION OF WHETHER OR NOT THE PLAINTIFF WAS GUILTY OF NEGLIGENCE WHICH CONTRIBUTED TO PROXIMATELY CAUSE HIS OWN INJURIES.

The situation presented at this crossing as plaintiff attempted to cross it constituted a trap with the engine forming a dark background for the drifting caboose and with its headlight glaring onto the crossing. Plaintiff

was unable to adequately see the passing track or the caboose. The fact that the flashing signals were being activated would not necessarily require an ordinary prudent person to wait until they had stopped. As plaintiff approached the crossing from the east he stopped and at that time observed the stationary engine on the main line track, which he could reasonably conclude was activating the signals. The placing of the engine in this position with its headlight shining on the crossing and the movement of the unlighted caboose in the southerly direction without warning of its approach constituted a chain of circumstances based upon defendant's negligence which prevented plaintiff from realizing the dangerous condition which this crossing presented.

That the negligence of the defendant may be taken into consideration in determining whether or not plaintiff was contributorily negligent is well established by the cases. An interesting discussion of this problem is contained in the case of *Hines v. Chicago, M. & St. P. Ry. Co.*, 105 Wash. 178, 177 P. 795, 797, wherein the court stated:

“Counsel for respondent seek to have us shut our eyes to the question of its negligence, and proceed upon the theory that such negligence is not a subject for proper inquiry at this time, since they are relying upon the contributory negligence of appellant to defeat his recovery. This view of the case we cannot assent to. This is one of those cases where the question of appellant's contributory negligence is intimately related to

the question of respondent's negligence, since it was the negligent acts of respondent which largely induced appellant to act as he did. When respondent's servants failed to give such signals by sound or lights as would attract the attention of one about to pass over this country crossing, indicating that the locomotive was running in that direction, it clearly was guilty of negligence; and such negligence becomes little short of a controlling factor in determining whether or not appellant was guilty of contributory negligence in acting as he did. As was well said by Judge Fullerton in *Hull v. Seattle, Renton & Southern R. Co.*, 60 Wash. 162, 167, 110 Pac. 804, 806:

“A victim of an accident is entitled to have his conduct judged by the circumstances surrounding him at the time of the accident—by the conditions as they appeared to one in his then situation—and if his conduct, when so judged, appears to be that of a reasonably prudent person, he cannot be said to be guilty of negligence.’

“This is not only the rule applicable generally to contributory negligence, but it has peculiar force and application to conditions which are the creations of a defendant relying upon the contributory negligence of the injured person to escape responsibility, when such conditions would naturally influence the action of the person charged with contributory negligence. This is the principle upon which our decision in *Richmond v. Tacoma R. & Power Co.*, 67 Wash. 444, 122 Pac. 351, was largely rested; which dealt with a situation, we think, even less favorable to the injured person than that with which we are here dealing.

“We are also to remember that this is not a case where we are asked to decide negatively that there is not sufficient evidence of negligence on the part of respondent to warrant recovery; but we are asked to decide affirmatively that it has been conclusively proven that appellant was guilty of contributory negligence—a question as to which the burden of proof rested upon respondent. As pointed out in the Richmond Case, greater caution is to be exercised in deciding as a matter of law that a fact which the law requires to be affirmatively proven has been conclusively proven than in merely deciding as a matter of law, negatively, that a fact has not been proven. It seems to us that there is greater danger of invading the province of the jury in the former than in the latter case. That contributory negligence is an affirmative defense, casting the burden of proof upon the defendant to establish it, is the well-settled law of this state. *Benson v. English Lumber Co.*, 71 Wash. 616, 622, 129 Pac. 403.”

That a dark background may eliminate contributory negligence in failing to see an approaching train is declared in *Green v. Southern Pac. Co.*, 53 Cal. App. 194, 199 P. 1059, 1061. In describing the situation existing there the court stated:

“* * * It must be remembered, however, that these incidents occurred in the dusk of evening, when the clearness and certainty of daytime light were absent; that the icehouse was in the background of the car as it approached; and therefore that there is some room for doubt as to the degree in which it may be said that the view was clear and unobstructed. This court cannot know to what extent the daylight had faded.”

See also *Los Angeles & Salt Lake R. Co. v. Lytle*, 56 Nev. 192, 47 P. 2d 934, in which case the court held the negligence of the driver of the automobile was for the jury where the railroad left a black gondola coal car on a dark crossing. Also *Burroughs v. Southern Pacific Co.*, 153 Or. 431, 56 P. 2d 1145.

The case at bar is more favorable to plaintiff than *Clark v. Union Pacific R. Co.*, 70 Utah 29, 47, 257 P. 1050. In that case there was no evidence that plaintiff looked or listened before he attempted to cross a crossing in a heavy fog. The lack of signals of the approaching train and the inability to see the train through the fog constituted a situation making the automobile driver's negligence a question of fact for the jury. A quotation in that case from 2 *Thompson, Commentaries on Negligence*, Section 1650, is particularly applicable here, to wit:

“But whether it is negligent in him (the traveler) to fail to look and listen where the view is obstructed or where there are complicated circumstances calculated to deceive and throw him off his guard, presents a question for the jury.”

Evans v. Denver & R. G. W. R. R. Co., 74 Utah 201, 206, 278 P. 809 also supports plaintiff's contention here. In that case the train was backed over a crossing at night without lights or warning. It was held that it could not, as a matter of law, be said that plaintiff saw the cars standing or in motion prior to the collision. The question

of plaintiff's contributory negligence was there properly left to the jury. In comparing that case with the *Clark* case, *supra*, the court stated:

“* * * The two cases are alike, in that the view of the driver of the approaching automobile was obstructed, in one case by a fog, in the other by darkness.”

See also *Pippy v. Oregon Short Line R. Co.*, 79 Utah 439, 11 P. 2d 305.

In *Chicago & N. W. Ry. Co. v. Golay*, 155 F. 2d 842, 847, the defendant contended that the driver of the automobile involved in the crossing accident was guilty of contributory negligence as matter of law. The appellate court held that such was not the case and in discussing the evidence stated as follows:

“* * * In a case of this kind, contributory negligence seldom depends upon a single fact or circumstance. Ordinarily, it depends upon many relevant facts and surrounding circumstances, and upon inferences fairly to be drawn from the testimony produced. Viewed in that light, we find no warrant for holding that reasonable minded persons would necessarily reach the conclusion that plaintiffs were at fault in failing to see the train in time for the automobile to be stopped before reaching the crossing, that Fred Golay was at fault in failing to stop the car, and that Ruth Golay was likewise at fault in failing to warn her husband of the approach of the train. In short, we think the question of contributory negligence was for the jury.”

Contention that contributory negligence was established as matter of law was made in *Chung Sing v. Southern Pac. Co.*, 182 Cal. 609, 189 P. 281, 282. The court held it was a jury question and stated:

“As to the second point, that of contributory negligence, it appears that the accident occurred on an evening in November when it was beginning to get dusk. The train crew already had their lanterns lit. The plaintiff was coming along Santa Fe street, driving a two-horse wagon. The contention of the defendants is that the plaintiff could and should have seen the car coming as he approached the crossing in ample time to stop, and that one of the switchmen was protecting the crossing and signaling to traffic to stop. The testimony of the plaintiff is, however, direct that he approached the crossing slowly, and saw the car standing still, at least as he supposed, and then suddenly it came at him from across the street. If this be true, and the jury was entitled to believe it, there was no negligence on his part in attempting to cross, unless he disregarded the warning of the switchman. But as to such warning there is a decided conflict, and the jury were entitled to find against the defendants on this point as well. It follows that it cannot be said that the verdict is not sustained by the evidence. Judgment affirmed.”

Another case closely paralleling the case at bar on the question of the contributory negligence is the case of *Moses v. Missouri Pac. R. Co.*, 138 Kan. 347, 26 P. 2d 259, 261. The defendant in that case backed a string of cars across a highway in the nighttime without light on

the advancing cars and without sounding a warning of any kind. The court in considering the evidence and reaching its conclusion that a question of fact was presented stated:

“* * * The testimony of plaintiff was that when he approached the track he both looked and listened for trains and cars and that he neither saw nor heard any until he came within about ten feet of the track. One taking these precautions might reasonably assume that he could cross the track without danger. He had no right to anticipate that a train would be pushed or pulled over the crossing in the nighttime without lights or warning of some kind. If the brakeman had been posted on the end of the advancing string of cars with a swinging lantern, it would have constituted some warning to the plaintiff, and if such a precaution had been taken, probably the casualty would have been averted. It is urged that plaintiff might have stopped his automobile after discovering the approaching cars when he was within ten or twelve feet of the track. According to the testimony he attempted to do so and whether his failure to do so on that limited space and time was contributory negligence was a fair question for the determination of the jury. This court is not warranted in declaring as a matter of law that his failure to do so in the brief time and space available constituted contributory negligence.”

The fact that flasher signals were in operation does not require a finding that plaintiff failed to exercise ordinary care for his own safety. As heretofore ex-

plained, the plaintiff thought, and could in the exercise of reasonable care think, that the flasher was being activated by the stationary engine standing upon the main line track 75 feet to the north of the crossing. In fact the engine was causing the flasher light to operate (19). Plaintiff then proceeded to cross and was hit by a caboose which came out from the darkness created by the engine and the headlight. In point on this question is the case of *Missouri Pacific R. Co. v. Shell*, (Ark.) 185 S.W. 2d 81, wherein an automobile with four occupants was involved in a crossing accident with a passenger train. All four occupants of the automobile were killed. As the automobile approached the crossing it could be observed that there were locomotives standing on each side of the highway and the blinker lights were in operation. Evidence established that the presence of at least one of these locomotives was sufficient to cause these lights to flash. The headlights of both engines were burning. The court held that the driver of the automobile and the passengers were not guilty of contributory negligence as matter of law. In reaching this conclusion the court stated:

“Numerous cases in which it was held that one injured in a collision at a railroad crossing was precluded from recovering are cited by appellants, but none of them presents exactly the same fact situation as the case at bar. ‘No inflexible rule can be laid down as to when or under what circumstances a traveler at a public railroad crossing will be free from contributory negligence

in going over the crossing; but each case must necessarily depend upon its own particular facts.' *Smith v. Missouri Pacific Railroad Company*, 138 Ark. 589, 211 S.W. 657, 658.

"Under the testimony presented in this case the question of contributory negligence on the part of the occupants of the automobile was one for the jury to decide. * * *

"While the warning lights were flashing when these men drove on the crossing, it appears that there were two locomotives, one standing on each side of the crossing and facing the crossing, and there was testimony that one of these would have set the 'blinker' signal to operating. The jury might have concluded that this led the occupants of the automobile to assume that the signal was being operated as a result of the proximity of one of the locomotives standing near the crossing and that, for that reason, failure to heed this warning was not necessarily negligent.

"It is, of course, the duty of anyone driving a vehicle, in approaching a railroad crossing, to look and listen for an approaching train before crossing the track, and to stop the vehicle, if it becomes necessary to do so, in order to look and listen. It is undisputed that Shell, in approaching the crossing, was driving very slowly, but there was no testimony as to whether or not he or any of the other occupants of the automobile looked or listened for a train. The switch engine was standing on a spur track, near the main line, about 400 feet down the track in the direction of the approaching passenger. Several witnesses—one introduced by appellants—testified that the headlight of this standing switch engine was burning. The jury may have considered that the presence

of the two locomotives, which were standing still, coupled with the failure of the operators of the passenger train to give the required signals, created a situation which did not establish negligence on the part of the driver of the automobile in proceeding to cross the track slowly."

In *Hough v. Atchison, T. & S. F. Ry. Co.*, 133 Kan. 757, 3 P. 2d 499, 501, a judgment for plaintiff in a crossing case was affirmed. At the time the plaintiff's automobile attempted to traverse the crossing a wigwag appliance was in operation. A train was in the vicinity of the crossing which could have activated the signal. Another train came along and collided with the plaintiff's automobile. In holding that the question of plaintiff's contributory negligence was one for the jury the court stated:

"The principal question presented by the defendant is that the injury and loss sustained by plaintiff was due to his own negligence. The negligence attributed to plaintiff is based mainly on the fact that the wigwag was in operation and the gong thereon ringing when plaintiff undertook to drive across the tracks laid over the street. It is argued that the wigwag and gong in operation was a notice to plaintiff that there was a train in the vicinity, and that he should have waited until the bell stopped ringing. The wigwag with a bell ringing is not always a certain signal that a train is approaching a crossing or that there is a present danger in passing the crossing. A moving or standing train in any part of the block would start the operation of the bell and continue as long as the car was within the zone. The at-

tachments were such that a train standing or moving in the zone as much as 1,200 feet away from the crossing would cause the ringing of the bell, and the appliance might be in operation a considerable time without a train approaching the crossing or even an intention to propel it over the crossing. The ringing of that bell was of course notice to the traveler that a train was moving or standing somewhere within the block, and warned him to look out for trains approaching the crossing, but did not require him to wait there indefinitely while the bell was ringing.”

The court quoted from *Frank v. Reading Company*, 297 Pa. 233, 146 A. 598, 599, as follows :

“* * * Evidence as to ringing of crossing bells may be shown as proof of contributory negligence, but is ordinarily for the jury. Such evidence cannot be accepted as showing that defendant has discharged its duty, nor is it conclusive that a pedestrian or a driver must know a train is coming and should be governed accordingly. Here there is no evidence to show the ringing of this particular bell came from the approach of the train that caused the accident.”

To the same effect on principle see *Newton v. Oregon Short Line R. Co.*, 43 Utah 219, 134 P. 567, and *Baltimore & O. R. Co. v. Deneen*, 167 F. 2d 799.

In the case at bar the flasher signals were not being activated by the caboose which hit plaintiff's truck (74). The uncontradicted evidence is that the standing engine on the main line track activated them (19, 74).

True it is that plaintiff did not wait a half hour but how was he to know that a car was moving on the passing track? Would he be required to wait when from all appearances the standing engine, which did not hit him, was activating the signals?

The language of this Court in *Newton v. Oregon Short Line R. Co.*, 43 Utah 219, 226 134 P. 567, is applicable here:

“Where, therefore, the circumstances are such that it may reasonably be said that different minds, in viewing and considering the evidence, might arrive at different conclusions with respect to whether or not the injured person exercised ordinary care, the question of negligence must of necessity be determined as one of fact and not of law. While the substance of the foregoing statement is often found in the books and may be said to be a correct statement of the doctrine, yet such statements often leave the reader in doubt whether a given case falls within or without the doctrine. But, notwithstanding this, it is impossible to formulate a rule by which all cases can be determined.

“All that can be said is that, unless the question of negligence is free from doubt, the court cannot pass upon it as a question of law; that is, if after considering all the evidence and the inferences that may be deduced therefrom the court is in doubt whether reasonable men, in viewing and considering all the evidence, might arrive at different conclusions, then this very doubt determines the question to be one of fact for the jury and not one of law for the court. The court can

pass upon the question of negligence only in clear cases. All others should be submitted to the jury. The reason of this is apparent from the fact that in this state all questions of fact are for the jury; and therefore, unless it is clear that in viewing and considering the evidence reasonable minds might not arrive at different conclusions, the case should go to the jury."

To the same effect see *Malizia v. Oregon Short Line R. Co.*, 53 Utah 122, 178 P. 756; *Steed v. Rio Grande Western Ry. Co.*, 29 Utah 448, 82 P. 476.

We submit that the question of plaintiff's contributory negligence was one for the jury to determine and under the circumstances it in fact found that plaintiff was not guilty of contributory negligence.

CONCLUSION

The trial court by entering its judgment for defendant contrary to the jury's verdict denied to plaintiff his right of trial by jury. Its ruling is, in effect, a directed verdict for defendant. Only if reasonable minds cannot differ upon the two propositions of defendant's negligence and plaintiff's contributory negligence can this ruling be correct. That eight jurors reached a result contrary to the trial court is certainly some evidence that reasonable minds can differ upon these propositions.

It is a serious undertaking to set aside a jury verdict on the basis that all reasonable minds must conclude that the eight jurors were entirely wrong.

We submit that the judgment of the trial court should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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Received copies of the within Brief of
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