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

Utah Supreme Court

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Case No. 7641

IN THE SUPREME COURT
of the
STATE OF UTAH

HOWARD F. SEYBOLD,
Plaintiff and Appellant,

— vs. —

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

REPLY BRIEF OF APPELLANT

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Clerk, Supreme Court, Utah

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COMPANY, a corporation,
Defendant and Respondent.

Case No. 7641

REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

At the oral argument counsel for the defendant railroad company conceded that the testimony introduced in this case would support a finding that the railroad company was negligent. This placed the emphasis upon the existence of contributory negligence of plaintiff. Because this matter of contributory negligence becomes of so much importance in the case we feel that certain matters were not brought out as clearly as they could have been at the argument. The above concession had not been made at the time counsel for plaintiff had made his argument and therefore he did not sufficiently stress the three propositions which we desire to present in this reply brief.

We desire particularly to call to the Court's attention that contributory negligence is an affirmative defense and the burden rests upon the defendant to establish this defense by a preponderance of the evidence. The presumption is that the plaintiff was in the exercise of ordinary care for his own safety. The presence or absence of lights on the caboose is only material so far as it relates to the question of plaintiff's contributory negligence.

Much stress was placed upon the proposition that plaintiff's testimony of the lack of lights and warnings was negative testimony and did not present a jury question. We submit that this evidence made a question for the jury. We will call cases to the court's attention on this subject.

The third and last proposition we desire to present is that plaintiff is entitled to a jury trial. A jury has been made the tribunal charged with the responsibility of determining disputed questions of fact. In this case the testimony given by plaintiff and by defendant is in conflict and the resolving of this dispute is peculiarly within the province of the jury. This Court should not permit a trial judge to usurp the functions of the jury and this Court should not usurp the function of the jury by upholding the trial court in his ruling in this case that defendant should prevail as a matter of law.

STATEMENT OF POINTS

POINT I.

THE BURDEN OF PROOF IS UPON THE DEFENDANT

TO ESTABLISH CONTRIBUTORY NEGLIGENCE AND ALL DEFENDANT DID WAS MAKE A JURY QUESTION ON THIS MATTER.

POINT II.

THE TESTIMONY GIVEN BY PLAINTIFF OF LACK OF LIGHTS OR WARNINGS ON THE CABOOSE IS SUBSTANTIAL EVIDENCE WHICH SUPPORTS A FINDING OF NO LIGHTS OR WARNINGS.

POINT III.

PLAINTIFF IS ENTITLED TO A JURY TRIAL AND THE COURTS SHOULD NOT USURP THE FUNCTIONS OF A JURY.

ARGUMENT

POINT I.

THE BURDEN OF PROOF IS UPON THE DEFENDANT TO ESTABLISH CONTRIBUTORY NEGLIGENCE AND ALL DEFENDANT DID WAS MAKE A JURY QUESTION ON THIS MATTER.

It is well established in this jurisdiction that the defense of contributory negligence is an affirmative defense and that the burden of proof rests upon the defendant to prove plaintiff's contributory negligence by a preponderance of the evidence. *Rogers v. Rio Grande Western Ry. Co.*, 32 Utah 367, 90 P. 1075, 125 Am. St. Rep. 876; *Clark v. Union Pac. R. Co.*, 70 Utah 29, 257 P. 1050.

As pointed out in the *Clark* case, the burden of proof being upon the defendant the presumption or inference in the absence of evidence to the contrary is that the plaintiff was in the exercise of reasonable care. See also

Lewis v. Rio Grande Western Ry. Co., 40 Utah 483, 123 P. 97; *Evans v. Oregon Short Line R. Co.*, 37 Utah 431, 108 P. 638. In the *Evans* case the trial court instructed the jury as follows:

“* * * ‘It is the presumption of law that every man exercises due care for his own safety when in a place of danger, and the presumption is that the deceased did so when he approached the crossing. * * * The court instructs the jury that the plaintiffs need not affirmatively prove that the deceased looked and listened for the train before coming upon the crossing. The presumption is that he did so, and the burden of proof that he did not is on the defendant railway company, and it must be proved by a preponderance of the evidence.’”

The court in discussing this instruction stated:

“* * * It is conceded by counsel for appellant that those excerpts, in the absence of all evidence, do correctly state an abstract rule or proposition of law, but it is urged that it was error to give them in this case, because there were eye-witnesses to what occurred just before and at the time of the collision, and hence, it is contended, there was nothing left upon which a legal presumption could operate. It is further strenuously insisted that in view that appellant in its answer set up and relied on the plea of contributory negligence, and since the evidence upon that plea was before the jury, therefore the respondents could not be permitted to throw the presumption referred to in the instruction into the balance to be weighed by the jury against the evidence

in support of appellant's plea of contributory negligence. Had the court done this by giving the instruction complained of, the contention of counsel would be sound. This is well illustrated by the authorities cited by counsel in support of their contention. But we are of the opinion that such was neither the intended nor the actual effect of the language used by the court in the two instructions quoted from above. What was said by the court was, in effect, no more than to call the jurors' attention to the fact that the burden of proof upon the plea of contributory negligence was upon appellant; and, unless such negligence was established by a preponderance of the evidence upon that subject, then the respondents must prevail as to that issue."

The testimony introduced by plaintiff shows that he stopped, looked and listened. The jurors saw and heard the plaintiff testify and they saw and heard the other witnesses who gave testimony in conflict with his. The burden of proof was on the defendant to show that plaintiff failed to exercise reasonable care for his own safety. To hold that the defendant has sustained this burden and has established as matter of law that plaintiff was guilty of contributory negligence certainly is not justified by the testimony in this case.

Counsel for the defendant contended at the oral argument that the plaintiff looked to the left only at the time he stopped for the flasher light west of the team track, and that he did not thereafter look to the left or north. Counsel further contended that the plaintiff kept his eyes glued upon the engine standing upon the main

line track and the road ahead. We challenge these statements as being incorrect. Plaintiff, on his direct testimony, testified (R. 20):

“Q. Mr. Seybold, after you signaled for this turn and stopped at the crossing, tell us what you did after that?

“A. Well, I noticed the engine setting there, the lights flashing, and I knew it was safe to go due to the fact that the engine was the vehicle that was making the lights work, so then I shifted gears into first, and proceeded across the crossing.

“Q. As you went across the crossing, Mr. Seybold, what did you do concerning these other tracks?

“A. I don’t see just what you mean there.

“Q. Did you continue to watch the engine?

“A. Yes, I more or less kept my eyes on the engine, and road, too, straight ahead.”

The meaning to be ascribed to this testimony is clear. The plaintiff in proceeding over the crossing looked at the road and looked at the engine. The fact that he looked at the road and the engine did not preclude his looking to the left along the passing track upon which came the caboose. His language is that he “more or less” kept his eyes on the engine and road. Plaintiff on cross-examination testified that after he came to the “absolutely dead stop” west of the crossing he at that time saw the engine and he was then asked (R. 39):

“Q. You then proceeded across?

“A. That is right.”

He was then asked :

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

“A. No sir.

“Q. Did you see anything?

“A. I didn’t see anything.”

And after being asked about looking along this team track he was asked concerning the passing track and answered as follows :

“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.”

A reasonable interpretation of this evidence is that plaintiff looked to the left after he proceeded from his stopped position and he looked as he traversed the crossing. It appears that plaintiff testified on a number of occasions that he did not see anything. Counsel for defendant at the oral argument and in their brief assert that this means he did not look. This merely reflects the extent to which defendant must go to prevail on this appeal. The only reasonable interpretation that could be made is that plaintiff looked but did not see the caboose. The plaintiff’s mind in so testifying was focused upon whether or not he was able to see a car proceeding

southerly on the passing track. He says he did not see anything. He said he looked. This testimony should be sufficient to make a jury question on whether or not he was guilty of contributory negligence.

There is nothing in this testimony which is improbable. The physical facts do not in any way detract from the weight of plaintiff's testimony. The other witnesses testified contrary to plaintiff but certainly this case is no different from the ordinary case where witnesses testify contrary to one another. The simple question is whom do you believe? The jury was in a position to determine which of the witnesses it would believe and in making a determination that plaintiff was the one upon whom it would place credence it was merely carrying out its function. In order for a court to entirely disregard his testimony it would have to come within the rule announced in 20 *Am. Jur.* 1033, Evidence, Section 1183, as follows:

“Testimony Manifestly Untrue, Incredible, or Impossible.—The mere fact that testimony given by a witness in support of an issue is not plausible does not destroy all probative value. Where, however, the testimony of a witness is incredible, inherently or physically impossible and unbelievable, inherently improbable and irreconcilable with, or contrary to, physical facts and common observation, and experience, where it is so opposed to all reasonable probabilities as to be manifestly false or is contrary to the laws of nature or to well-known scientific principles, or where it cannot be said to amount to substantial evidence of the facts testified to or accepted as a basis

for liability, it is to be disregarded as being without evidentiary value, even though uncontradicted. Thus, the testimony of one who says he looked but did not see an object, which, if he had looked, he in the nature of things must have seen, cannot be credited, although such a conclusion is not adopted or applied where by reason of the surrounding conditions, it was possible for him to look and still not see. It is often said, however, that an extraordinary case is required to authorize the court to regard sworn testimony as manifestly impossible and untrue."

Certainly this is not one of those extraordinary cases which call for the application of this rule. If twenty witnesses testified contrary to plaintiff's testimony, still it would be a question for the jury to determine whom they would believe.

There is no contradictory evidence on the proposition of whether plaintiff stopped, looked and listened. This is understandable because in the ordinary case witnesses cannot be found who could testify that the driver of an automobile either did or did not look or listen. Plaintiff testified that he looked as he proceeded across the crossing and he testified that he did not see anything. His failure to see the approach of the car could be attributable to the darkness, the background created by the locomotive, the difference in the lighted area in front of the locomotive and the darkness to the rear and to the lack of lights on the caboose as it stealthily crept along the passing track and into the crossing. The burden was upon defendant to establish that plaintiff did

not look. There is a failure upon the defendant's part to introduce testimony which would require a finding that plaintiff did not look.

The proper view to take of a case such as this one is found in *Doty v. Southern Pac. Co.*, 186 Or. 308, 207 P. 2d 131. In that case plaintiff drove an automobile over a crossing consisting of six tracks. A train collided with the automobile. Plaintiff contended that there were boxcars and a switch engine which obstructed her view and required part of her attention on tracks other than the one along which came the engine which collided with her. Defendant in that case contended that the plaintiff was guilty of contributory negligence as matter of law. The court clearly pointed out the effect of the rule that the burden of proof is upon the defendant. The court stated:

“* * * Because of such alleged failure on the part of plaintiff to look and listen, defendant argues that she was guilty of contributory negligence as a matter of law. The burden of proving that plaintiff did not listen was on the defendant; it was a part of its defense. It was not incumbent on plaintiff to prove that she did listen. Moreover, the jury might at least have inferred that she was listening, from her testimony that as she passed the scale track she glanced to her right ‘and there was nothing coming that I could see, and I didn’t hear anything.’ There is also the presumption that she did her duty.”

After discussing and considering *Baltimore & O. R. Co. v. Goodman*, 275 U.S. 66, 48 S. Ct. 24, 72 L. Ed. 167,

56 A.L.R. 645 and *Pokora v. Wabash Railway Co.*, 292 U.S. 98, 54 S. Ct. 580, 78 L. Ed. 1149, the court stated at page 141:

“The question for determination in the instant case is whether plaintiff exercised the care which a reasonably cautious person would have used under the circumstances. Obviously, the care which a traveler upon a highway is required to exercise in approaching and crossing railroad tracks is not such care as would, under all the circumstances, prevent injury.

“Many questions present themselves for consideration in determining whether Mrs. Doty was guilty of contributory negligence. Some of them are: Was the speed at which Mrs. Doty was driving too fast? If so, at what speed should she have driven her car? Should she have stopped the car before proceeding across the main line track? If so, where should she have stopped? Was there a zone of safety where she could have stopped after the point of clearance had been reached? Should she have stopped on the passing track, on the scale track, or partly on each? Should she, before reaching the scale track, have stopped her car, got out and reconnoitred? As Mrs. Doty proceeded across the tracks, at what point could she have first seen the approaching train? Should she have seen it at that point? If she did not see it at that point, was she negligent as a matter of law? Should she have looked continuously to her right as she approached the main line track? If so, from what point should she have begun to so look? Would the presence of the switch engine to her left affect her duty to look to her right? Had she seen the approaching train, could she have stopped her car in time to avoid a collision?

“Unless we can say, as a matter of law, that Mrs. Doty’s failure to have seen or heard the train in time to have avoided a collision ‘was negligence so obvious and certain that one conclusion and one only is permissible for rational and candid minds’, the question whether she was guilty of contributory negligence was for the judgment of the jury.”

See also good discussions on contributory negligence, the burden of the defendant and the province of the jury in *Clark v. Union Pac. R. Co.*, supra; *Fish v. Southern Pac. Co.*, 173 Or. 294, 143 P. 2d 917; *Hoffman v. Southern Pac. Co.*, 101 Cal. App. 218, 281 P. 681; *Cooper v. Southern Pac. Co.*, 43 Cal. App. 2d 693, 111 P. 2d 689; *Hough v. Atchison, T. & S. F. Ry. Co.*, 133 Kan. 757, 3 P. 2d 499; *Baltimore & O. R. Co. v. Deneen*, 167 F. 2d 799.

We respectfully submit that there was substantial evidence given by the only witness who could actually testify to his own conduct, that he did in fact stop, look and listen along the tracks in such a method that whether or not he properly performed these duties became a question to be determined by the jury. Hence, the trial court was in error in holding as matter of law only a verdict against plaintiff could be returned.

POINT II.

THE TESTIMONY GIVEN BY PLAINTIFF OF LACK OF LIGHTS OR WARNINGS ON THE CABOOSE IS SUBSTANTIAL EVIDENCE WHICH SUPPORTS A FINDING OF NO LIGHTS OR WARNINGS.

Many cases discuss the difference between so-called

affirmative and negative testimony. Some assert that negative testimony will not be considered to conflict with positive testimony and that therefore where both exist a finding must be made in accordance with the positive testimony.

However, it should be noted that in the determination of the existence or nonexistence of the light the defendant in these railroad cases usually asserts that there was a light and the plaintiff that there was not. Of necessity plaintiff's testimony must be negative in character because that which he seeks to prove is negative. If it were true that negative testimony was never to be believed, then plaintiffs in these cases would fail every time and it would be impossible for a person to prove a negative. However, where a witness is in a position where he could see a light or hear a signal and he testifies that he did not hear or see, a jury question is presented and such testimony is not considered negative.

While we are considering this proposition we should also keep in mind the fact that the controversy here over the existence of a light is not the usual one where plaintiff is claiming its nonexistence to establish negligence upon the part of the defendant. The defendant here does not now assert the evidence was insufficient to sustain a finding of negligence on the part of the defendant. We have here a situation where the defendant has the burden of proving the existence of the light in order to establish that if plaintiff had looked he would have seen. All of the cases which we have read have

considered this positive and negative testimony in determining whether or not the defendant was negligent.

The most recent case on this subject in Utah is the case of *Hudson v. Union Pac. R. Co.*, 233 P. 2d 357, 360. That was an action by a passenger in an automobile to recover for injuries suffered by her in a crossing accident. The usual conflict existed in testimony by the railroad that the whistle and bell were rung and testimony by plaintiff that neither was heard. The court held that if the plaintiff was in a position where she would likely have heard the ringing bell her testimony was such that it would create a conflict with the positive testimony of the railroad. It no longer is necessary in Utah to show that the individual was consciously listening or looking for the warning signal. While this may have been a requirement in the cases of *Clark v. Union Pac. R. Co.*, 70 Utah 29, 257 P. 1050, and *Anderson v. Union Pac. R. Co.*, 76 Utah 324, 289 P. 146, this Court stated in the *Hudson* case:

“* * * Defendant now maintains that no jury issue of negligence in failing to sound a warning was made out, because it does not appear that Mrs. Hudson was affirmatively listening or paying attention to determine whether the train was going to whistle or not. Admittedly this was necessary under the *Clark* and *Anderson* cases, *supra*, in order to change the characterization of negative testimony that no warnings were heard to positive testimony to the effect that, ‘I was listening for the whistle and bell but they were not given.’ Such a distinction governing the relative

probative value of testimony and concluding plaintiff's right to a jury trial is not sound. *All that need appear is that the witness was so situated in relation to the train at the time it is claimed the warnings were given that said warnings would have awakened her attention to them.* The circumstances bearing on her opportunity and capacity to hear, such as possible deafness, pronounced wind direction affecting sounds, the speed and noise of the train and of the car, topography of the surrounding country, absorption in conversation or with her own thoughts or devices and any other factors which would enable the fact finder to evaluate the probative force of her testimony should be considered. The convincing power of testimony that a sound was not heard varies according to the opportunity of the witness giving it to hear and observe, but a passenger in an automobile need not persistently keep his ear cocked for the sound of a train. In this case the plaintiff is necessarily confined to negative evidence in proving the fact that the whistle or bell was not sounded. If such evidence is unworthy of belief simply because it is negative, then a plaintiff in like circumstances must nearly always fail. The issue is fundamentally a question of the credibility of witnesses and considering the close proximity of the car to the train while they travelled parallel to each other, Mrs. Hudson was in a position where it is likely that she would have heard the whistle, or at least the bell, and as there is no evidence that her attention was so absorbed in other matters that she would not have heard, a jury question is presented."

The *Hudson* case was a hearing case, the case at

bar a seeing case. We submit that as a practical matter a person's attention would be more readily attracted to moving lights in a dark background than to a sound. Plaintiff here was in a position to see and he looked and saw no lights.

In the case at bar it comes to simply a matter of which witness to believe. The testimony of plaintiff quoted under the first point was that he did look but did not see anything. He also testified that when the caboose came into the rays of the locomotive headlight he saw no light on the caboose. That there was only a short period of time in which he could make his observation does not eliminate the probative value of this testimony. He saw the caboose and he saw no light on it. It would not assist in making this determination for him to stand and gaze at the car. How long must a person look to see a light on a caboose? Certainly if there were a light a glance would suffice to see it.

Plaintiff under this testimony looked, saw the caboose but saw no light (R. 40) :

"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."

We submit that under all of the authorities this testimony given by the plaintiff created a conflict in the evidence and the testimony of the plaintiff who was in a position to see and looked and did not see would support a finding that there were no lights upon the caboose.

Conflicts of fact in these railroad cases are of common occurrence. In many cases a watchman or a trainman has testified to flagging a crossing and other persons have testified to the contrary. These matters are ordinarily left to the determination of the jury. Cases in which such conflict exist are legion, but as examples we cite the following: *Shreveport v. Vicksburg, S. & P. R. Co.*, 167 La. 157, 118 So. 872; *Missouri P. R. Co. v. Powell*, 196 Ark. 834, 120 S.W. 2d 349; *Ray v. Hines*, 118 Wash. 530, 203 P. 929; *Missouri P. R. Co. v. Byrd*, 206 Ark. 369, 175 S.W. 2d 564; *Mazanek v. Pennsylvania-Reading Seashore Lines*, 125 N.J.L. 394, 15 A. 2d 885; *Cartwright v. Grand Trunk Western R. Co.*, 288 Mich. 316, 284 N.W. 727.

POINT III.

PLAINTIFF IS ENTITLED TO A JURY TRIAL AND THE COURTS SHOULD NOT USURP THE FUNCTIONS OF A JURY.

Under our system of government and laws a

tribunal has been selected to determine conflicting questions of fact. Where a conflict exists one witness has testified to one thing and another witness has testified to the contrary. The jury must determine which one should be given credence. Under our laws eight citizens perform this task. In the case at bar eight citizens of this community sat on the jury. They saw and heard the plaintiff. They had an opportunity to face him, watch his expression, hear the certainty or uncertainty of his voice and were able to see and hear and become cognizant of all those things which go to make up a person's mind on whether or not another is telling the truth. Those things cannot be placed in the printed pages of a transcript. It is impossible for a court to make a reasonable determination of the credibility of a witness from the pages of a transcript. The witnesses who testified to lights and flagmen and signals were also before the jury. The jury could make a reasonable determination as to whether it would believe them and particularly whether it would believe them as against the plaintiff.

The tendency of some courts is to believe that juries are not competent to perform the function of fact finding. These courts seem to feel that only the courts should make the determination. The only difficulty with this is that a court which does not recognize the function of a jury and invades its province is acting contrary to law. A jury is just as competent to make these factual determinations as any court. Juries are composed of citizens of the community who usually have some business acumen. They are, in fact, in a better position than

an appellate court and they have an opportunity of discussing the matter in the jury room during their deliberations and arriving at a result after an exchange of ideas. True, they are laymen but then truth or falsity is not a legal question.

In the case at bar the defendant had the burden of showing that plaintiff did not look or that if he looked he did it ineffectively in that he did not see what was there to be seen. The burden of proof to show failure to exercise ordinary care was upon defendant. In order to believe that plaintiff was negligent it was necessary for the defendant to prove to the satisfaction of the jury by a preponderance of the evidence that a flagman flagged the crossing or that there were lights sufficiently strong on the caboose to have made it necessary that plaintiff see the caboose if he had looked. The jury concluded that defendant had failed in its burden.

Why should this Court or the trial court usurp the function of the jury and say that the testimony of plaintiff cannot be believed or that defendant maintained its burden of proof?

We submit that plaintiff was entitled to his right of trial by jury, guaranteed to him by the Constitution and by the common law system under which we operate. We respectfully submit that the jury has made a determination of these matters in plaintiff's favor. That finding should be respected.

We close this point of the brief by a pertinent quotation from *Reid v. Maryland Casualty Co.*, 63 F. 2d 10, 11:

“* * * District Judges are pronouncing no mere rigmarole when, in law cases, they charge jurors that they are the sole and exclusive judges of the credibility of the witnesses, and the weight to be given to their testimony. They are setting forth the very substance of a jury trial as guaranteed by the Seventh Amendment to the Constitution. Its purpose and aim ‘is not to preserve mere matters of form and procedure, but substance of right. This requires that questions of fact in common-law actions shall be settled by a jury, and that the court shall not assume, directly or indirectly, to take from the jury or to itself such prerogative.’ *Walker v. New Mexico & S. P. R. Co.*, 165 U.S. 593, 17 S. Ct. 421, 422, 41 L. Ed. 837. It requires that except in cases where the evidence is such that reasonable minds can draw only one conclusion from it upon the issues, cases tried to a jury must go to a jury for their verdict. Especially is this so where, as here, the case turns upon the credibility of the witnesses.”

CONCLUSION

Defendant now contends that the court should have directed a verdict in favor of defendant on the grounds of plaintiff's contributory negligence. We submit that the Court cannot say as a matter of law that the defendant has sustained this burden and it certainly should only be in extraordinary and exceptional cases where a court should direct a verdict in favor of the party who has the burden of proof.

We submit that the judgment entered in favor of the defendant should be reversed.

Respectfully submitted,

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Received copies of the within Reply

Brief of Appellant this day of October, A.D., 1951.

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