

1953

Merlene Lodder v. Western Pacific Railroad Company and Richard White : Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

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In the Supreme Court of the State of Utah

MERLENE LODDER,
Plaintiff and Respondent,

v.

WESTERN PACIFIC RAILROAD
COMPANY and RICHARD WHITE,
Defendants and Appellants.

Case No.
7809

Petition For Rehearing And Brief In Support Thereof

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In the
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MERLENE LODDER,
Plaintiff and Respondent,

v.

WESTERN PACIFIC RAILROAD
COMPANY and RICHARD WHITE,
Defendants and Appellants.

Case No.
7809

**Petition For Rehearing
And Brief In Support Thereof**

PETITION FOR REHEARING

The Western Pacific Railroad Company and Richard White, appellants herein, respectively petition this Honorable Court for a rehearing and reargument in the above

entitled case. The petition is based upon the following grounds:

POINT I.

THE COURT ERRED IN FAILING TO CONSIDER POINT IV AS ARGUED IN APPELLANT'S BRIEF AND IN FAILING TO REVERSE THE JUDGMENT OF THE TRIAL COURT THEREON.

POINT II.

THE COURT ERRED IN HOLDING THE EVIDENCE AND SPECIAL VERDICT SUFFICIENT TO SUPPORT THE JUDGMENT.

POINT III.

THE COURT ERRED IN FAILING TO HOLD THAT THE SOLE PROXIMATE CAUSE OF PLAINTIFF'S ACCIDENT AND INJURIES WAS THE NEGLIGENCE OF THE DRIVER.

POINT IV.

THE COURT ERRED IN FAILING TO CONSIDER POINTS V AND VI AS ARGUED IN APPELLANTS' BRIEF AND IN FAILING TO REVERSE THE JUDGMENT THEREON.

WHEREFORE, the Appellants, petitioners herein, pray that the judgment and opinion of the court be reexamined and a reargument permitted of the entitled case.

A brief in support of this petition is filed herewith.

VAN COTT, BAGLEY, CORNWALL & MCCARTHY
 Grant H. Bagley,
 Leonard J. Lewis,
Attorneys for Petitioners.

GRANT H. BAGLEY, hereby certifies that he is one of the attorneys for Appellants, petitioners herein, and that in his opinion there is good cause to believe that the opinion is erroneous on the grounds set forth in the following brief, and that the case ought to be reexamined and reargued as prayed for in said petition.

DATED this _____ day of August, 1953.

Grant H. Bagley

BRIEF IN SUPPORT OF PETITION FOR REHEARING

ARGUMENT

INTRODUCTORY STATEMENT

Ordinarily appellants would not ask the court to reconsider a decision concurred in by all the members of the court. However, due to the importance of the questions involved and an abiding conviction that the judgment of the trial court should not be affirmed, appellants urge the

court to consider fully the questions and arguments which they make at this time.

The decision of the court would seem to depart from the law in this field as established by the court in the course of its consideration of railroad grade crossing accidents. Furthermore, the appellants are disturbed that the court has not seen fit to recognize and discuss in its opinion several of the important questions involved and that it has not condemned certain of the erroneous practices and rulings in the trial of the case.

The brief which follows is submitted, not to rehash previous arguments, but to insure that no material issue has escaped the consideration of the court. This is a purpose, we are sure, in which the court concurs.

POINT I.

THE COURT ERRED IN FAILING TO CONSIDER POINT IV AS ARGUED IN APPELLANT'S BRIEF AND IN FAILING TO REVERSE THE JUDGMENT OF THE TRIAL COURT THEREON.

The appellants vigorously contended in their brief and upon oral argument to the court that the trial court erred in refusing to submit the issue of plaintiff's contributory negligence, and in refusing to instruct the jury on that issue as requested by defendants. (Appellants' Brief, pages 6, 7, 52.) In its opinion this court makes no mention of that contention. At page 2 of the opinion, the court

expressly excludes that issue as one of appellants' contentions on this appeal. Appellants feel particularly justified therefor in asking the court at this time to give that issue the consideration which it merits.

Throughout the course of this action, it was one of defendants' contentions that plaintiff was herself guilty of negligence proximately causing her accident and injury. This defense was alleged in defendants' answers (R. 4, 6). In their answer to plaintiff's interrogatories, defendants set forth the several specific respects in which it was claimed that plaintiff was negligent (R. 21). In their Requested Instruction No. 9, the defendants set forth the law applicable to the facts on this defense (R. 339). A reading of that requested instruction will show that defendants' contention was not restricted to the claim that plaintiff's negligence consisted merely of failure to maintain a lookout for the locomotive in question. It is extremely significant that the trial judge gave his tacit approval to the substance of said instruction by subscribing his name thereto and the words "given in substance." It is also significant that plaintiff herself recognized that the law and the evidence required the submission of the issue of her negligence to the jury under her Requested Instruction No. 1 (R. 341). Plaintiff asked that the whole question of her negligence be determined by the jury, not just the question of "lookout." Despite the defendants' pleadings and the requested instructions and the approval of said instructions by the trial court and plaintiff's counsel, the said defense was not submitted to the jury and no determination thereof was made

by the jury. The only inquiry made to the jury upon that issue was contained in Special Interrogatory No. 16:

“Question No. 16: Do you find by a preponderance of the evidence that plaintiff herself negligently failed to keep a lookout for the approach of the locomotive with which the car in which she was riding collided?”

A critical consideration of the said interrogatory will readily reveal that it was insufficient. It utterly fails to inquire whether plaintiff was negligent in failing to listen for or hear the bell on the locomotive. The importance of this inquiry is manifest when one considers that the jury found that the bell was ringing continuously as the locomotive approached the intersection. Said interrogatory does not even fully inquire as to plaintiff's duty to maintain a lookout; it is restricted to whether plaintiff *maintained a lookout for the locomotive*. It fails to inquire whether plaintiff was negligent in failing to maintain a lookout for the crossing watchman or a signal from him, or for the presence of other conditions or movements constituting forewarning of danger. Finally, the interrogatory utterly fails to inquire whether plaintiff was negligent in failing to warn or caution the driver concerning his speed or the conditions of the road or crossing.

Under the law and the pleadings and the evidence, defendants were entitled to have the jury determine the *whole* issue of plaintiff's negligence, not just the question whether the plaintiff was negligent in failing to maintain a lookout for the locomotive. This court has frequently held that the duty of an automobile passenger is to exercise that degree

of care which is customarily expected of a reasonable and prudent passenger under the circumstances.

Hudson v. U. P. R. R. Co., ... Utah ..., 233 P. 2d 357;

Montague v. S. L. & U. R. R. Co., ... Utah ..., 174, Pac. 871;

Cowan v. S. L. & U. R. R. Co., ... Utah ..., 184 Pac. 599.

The duty of a passenger obviously includes more than simply maintaining a lookout for a specific approaching vehicle or object. It includes looking and listening and warning, and all other acts of a reasonable and prudent passenger under the circumstances. Surely neither the trial court nor this court could say that as a matter of law reasonable minds could not find that plaintiff was negligent in failing to listen for or hear the bell on the locomotive, or in failing to observe other warnings or signs of danger at the intersection, or in failing to caution or warn the driver of his speed or conditions of the road or the crossing. These were questions which reasonable minds could differ upon, and questions, therefore, which should have been submitted to and determined by the jury. By her Requested Instruction No. 1 the plaintiff herself conceded this.

Appellants are unable to understand the statement made by the court in paragraph 1, page 2, of its opinion that the jury exonerated plaintiff and the driver of the automobile from *any and all negligence*, when in fact the jury was given no opportunity to ever pass upon the ques-

tion of plaintiff's negligence except in answer to the inquiry contained in Interrogatory No. 16. It is clear, as argued in appellants' brief, page 45, that no findings in support of the judgment can be implied. Certainly no finding as to plaintiff's negligence could be inferred from the finding regarding the driver's negligence. Plaintiff could and might well have been found guilty of negligence independent from any acts or omissions on the part of the driver. Only by the loosest and most uncritical type of thinking could a determination of the issue of plaintiff's negligence be sustained by reference to findings on the negligence of the driver. Moreover, the interrogatories did not fully submit the issue of the driver's negligence. No inquiry was made in them whether the driver was negligent in failing to listen for and hear the locomotive bell.

POINT II.

THE COURT ERRED IN HOLDING THE EVIDENCE AND SPECIAL VERDICT SUFFICIENT TO SUPPORT THE JUDGMENT.

The judgment must be sustained, if at all, on the basis of the interrogatories and the jury's answers thereto and the evidence. A consideration of the interrogatories relating to the issue of defendants' negligence and the evidence will show that the judgment cannot be sustained. The said interrogatories will be discussed in the order in which they were submitted.

Interrogatory No. 1: The jury answered this interrogatory in favor of defendants, and, therefore, no judgment

could be predicated upon the claim of negligence claimed in it.

Interrogatory No. 3: The only inquiry made in this interrogatory and the only determination made by the jury thereon was whether the locomotive whistle was sounded *just prior* to the entrance of the locomotive into the intersection. Except for the negative testimony of plaintiff and her husband who said they did not hear the whistle, the uncontradicted evidence was that the whistle had been sounded at the second switch north of Second South, at the first switch north of Second South, and when the locomotive was about one-half way between First and Second South Streets (R. 289). The only independent significance which a failure to blow a whistle could have on this case would be by virtue of Section 77-0-14, Utah Code Annotated, 1943. That statute requires, among other things, the blowing of a whistle *before* each street crossing while passing through cities and towns. The statute does not even remotely suggest that the whistle be blown *just prior* to the entrance of the locomotive into an intersection. The reasonable meaning of the statute is that the whistle be blown back from the crossing at a place where it can accomplish some good. It is apparent that a railroad neither discharges or fails to discharge its duty under that statute by blowing or failing to blow a whistle *just prior* to entering an intersection. At the very least, the interrogatory should have been in the language of the statute. Preferably it should have inquired whether the whistle was sounded at a place where it would reasonably give notice of the approaching locomotive. It was not submitted in that language, and the

jury's answer is not a finding that any duty imposed by the statute was violated.

Moreover, there was no evidence to support a finding that the locomotive was passing through a city or town as provided in the statute. The uncontradicted evidence was that the locomotive was proceeding from the roundhouse to the Union Depot. As the statute is penal in character, making the violation thereof a misdemeanor, it must be strictly construed and cannot be extended by implication.

Guaranty Mtg. Co. v. Wilson, 62 Utah 184, 218 Pac. 133;

Millar v. Stuart, 69 Utah 250, 253 Pac. 900.

The evidence was uncontradicted that both plaintiff and her husband were well aware of the presence of danger when the locomotive was some distance back from the north edge of the intersection. It is simply inconceivable that the sounding of the whistle *just prior* to the entrance of the locomotive into the intersection would have prevented the accident. For that reason, it must be determined as a matter of law that the failure to blow the whistle *just prior* to the entrance of the locomotive into the intersection was not a proximate cause of plaintiff's accident and injury. In view of the foregoing, Interrogatories Nos. 3 and 4, the evidence pertaining to them, are insufficient to sustain a judgment based thereon.

Interrogatory No. 5: This interrogatory was answered in favor of defendants, and, therefore, no judgment could be based thereon.

Interrogatory No. 7: What is the evidence from which it could be inferred that the engine crew failed to maintain a proper lookout? The uncontradicted evidence was that the engine crew were keeping a lookout in the direction the locomotive was moving (R. 190, 233, 245). These crew members saw everything that could be seen under the circumstances. The hostler helper had maintained a position on the rear end of the locomotive (R. 244). Before the rear of the locomotive reached the switch nearest Second South, the hostler helper had no view of automobiles approaching from the east (R. 243-5). The moment his vision cleared the building on the northeast corner of the intersection, the hostler helper saw the automobile in which plaintiff was riding. He realized that the automobile could not stop before reaching the tracks, and he immediately jumped off and gave the engineer an emergency stop signal (R. 233). The engineer responded immediately to the emergency signal (R. 235). There is not a single fragment of evidence in the record from which the jury could find that these crew members failed to maintain a lookout. It is difficult to understand how plaintiff could properly contend, or how a jury could properly find that the view of the crew members to the east was not obstructed by the building on the northeast corner of the intersection, making said crew members negligent, but that the view of the driver of the automobile and the plaintiff was blocked by the presence of said building exonerating plaintiff and the driver from negligence in that respect. The physical facts themselves, apart from the testimony of the crew members, conclusively demonstrate that the crew maintained that lookout which

was possible under the circumstances. They saw the automobile in which plaintiff was riding as soon as it was possible to do so.

Interrogatory No. 11: This is the interrogatory which the court evidently believes best sustains the judgment. Apart from the conflicting evidence relating to this interrogatory, the following considerations are important. What is the law upon which plaintiff relies to impose a duty upon defendants to maintain a flagman who shall signal motorists? What are the limitations of that duty? There is no statute in this jurisdiction imposing a duty upon a railroad to maintain a flagman at a crossing. Furthermore, this court has held that it is not negligence for a railroad to fail to keep a flagman at a public crossing.

Christensen v. O. S. L. R. R. Co., 80 Pac. 746.

That decision is in accord with the great weight of authority. See the collection of cases cited for this proposition in the annotation in 60 A. L. R. at 1196. Not owing plaintiff any duty to maintain a flagman at said crossing, it would not be negligence for the flagman to fail to station himself in the intersection and wave plaintiff's husband down. The court seems influenced by the testimony that the watchman was talking on the telephone a short time prior to the accident. The transcript reveals, however, that the said telephone conversation was in the performance of the watchman's duties. It was a call to the yardmaster for the purpose of determining the movement of trains. The evidence demonstrates the watchman's duties consisted of more than simply flagging the crossing. It

was his duty to aid in the lining of switches and the signaling of trains and equipment entering the depot. Certainly, these duties could be performed without subjecting the railroad to liability for failure to have said watchman stationed in the intersection at all times. As argued by appellants in their brief, and as stated by this court in the *Christensen case* cited above, the question to be submitted to the jury, if any, was whether the defendants had given reasonable warning of the approach of the locomotive; negligence could not be predicated solely upon failure to have a flagman in the intersection or failure to give special warning of some other type. Failure to have a flagman at the crossing was only one possible factor to be considered in determining whether the railroad was negligent in failing to give reasonable warning of the approach of the locomotive. It could not be the basis of negligence in and of itself.

Interrogatory No. 11 is insufficient to sustain a judgment for other reasons. A reading of said interrogatory clearly demonstrates that it is duplicitous and ambiguous. The said interrogatory contains two distinct propositions stated in the disjunctive or alternative: "Do you find that the watchman or flagman negligently failed to be stationed in the intersection or that he negligently failed to signal the plaintiff or the driver?" The answer to this interrogator was "yes," but what meaning does that answer have? It means simply that eight jurors agreed that the watchman either failed to do one thing or do another. It is not a finding by six of the jurors or more that the watchman failed to station himself in the intersection and it is not

a finding by six of the jurors or more that the watchman failed to signal the plaintiff or the driver. Four jurors might have been of the opinion that the watchman failed to be stationed in the intersection; four might have been of the opinion that the watchman failed to signal; or three might have agreed to one proposition and five to the other proposition. No one can say, however, whether six of the jurors agreed upon any one of the alternative propositions. The judgment should not be permitted to stand on the basis of such an interrogatory.

The general rule is that each special interrogatory must call for a finding on a single question of fact; an interrogatory combining two or more issues in one question in the disjunctive or alternative is patently bad.

Gunther v. Ulbrich, 52 N. W. 88;

Martin v. Elbert, 13 N. W. 2d 907;

Butter v. Herring, 34 S. W. 2d 307;

McFadden v. Hebert, 15 S. W. 2d 213;

Friedman v. New York R. Co., 71 Atl. 901;

Illinois Steel Co. v. Mann, 64 N. E. 484;

Jones v. Shelby County, 100 N. W. 520;

Webb v. Boulanger, 229 Pac. 754.

The foregoing principle is so well settled and the reasons for it so apparent that it would seem to require no further explanation. Although argued by appellants at page 41 of their brief, the court makes no mention of the problem. It is appellants' belief that upon further reflection it will be apparent to the court that the interrogatory

was improper, and that the answer to it has no effect whatsoever. Certainly, the court should not permit or condone the practice of submitting this type of interrogatory to a jury.

The interrogatories which have been discussed above are the only ones relating to the issues of defendants' negligence. The judgment must be sustained, if at all, on the basis of said interrogatories. As argued above, there is not one of those interrogatories upon which a judgment in this case could be sustained.

POINT III.

THE COURT ERRED IN FAILING TO HOLD
THAT THE SOLE PROXIMATE CAUSE OF
PLAINTIFF'S ACCIDENT AND INJURIES
WAS THE NEGLIGENCE OF THE DRIVER.

In its disposition of the above stated contention, the court states that the driver's negligence was an issue for the jury; that the jury's conclusion cannot be overruled.

Appellants submit that the evidence and law requires a finding that the driver was negligent and his negligence the sole proximate cause. The transcript will show that the driver apparently assumed that because he saw and heard no warning of the approach of a locomotive or train that he could safely proceed into the intersection without stopping. That is exactly what the driver intended to and did do despite the fact that he admittedly could not see to the north of the intersection because of the building

on the northeast corner thereof. The driver could certainly not reasonably indulge in such an assumption. He was approaching what he knew to be an intersection; he knew that he could not see traffic, if any, approaching the intersection from the north. Fourth West Street was and is a street travelled by conveyances of all types—trains, automobiles and trucks, the driver was confronted with the likelihood of any one of such conveyances moving into the intersection from the north. The result of his conduct would likely have been no different had the south bound conveyance been an automobile instead of the locomotive. The exercise of reasonable care reasonably required that the driver maintain a speed which would permit him to stop in time to avoid colliding with traffic moving south through said intersection. This he did not do. For the driver to assume that because he saw no signal and heard no signal of the approach of a locomotive or train, that he could enter and pass through the intersection without stopping was without doubt the grossest form of negligence. The statute, Section 57-7-113 (a) U. C. A. 1943, (41-6-46 (a) U. C. A. 1953), provides:

“In every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway * * *.”

The driver did precisely what the statute forbids. His speed, whatever it was, prevented him from avoiding a collision with other conveyances entering the intersection. For these reasons it is apparent that the driver was negli-

gent as a matter of law. The court should not condone such conduct.

Moreover, the physical facts and common experience belie the testimony of the plaintiff and the driver as to the speed of the automobile. The only independent witness on this question was S. S. Taylor, a civil engineer and an expert on stopping distances (R. 297, 298). It was his opinion, based on the undisputed physical facts that the automobile was travelling at a speed of 25 to 30 miles an hour when it started to slide (R. 300). Any experienced driver will at once conclude that an automobile travelling at the speed of 15 m. p. h. can be stopped, even on a slippery road, in a distance of 60 feet. These considerations simply make the testimony of plaintiff and the driver unworthy of belief by this court.

The court while recognizing the principal stated therein distinguishes the several cases cited by appellants in support of this contention on the grounds that they are not cases involving failure to have a watchman. Appellants respectfully submit that the principal stated in those cases applies irrespective of whether the claimed negligence is failure to give notice by means of a whistle or failure to give notice by means of a watchman. Those cases assume negligence on the part of the railroad in failure to give notice of the approach of a train. Moreover, in at least one of those cases the plaintiff alleged and attempted to prove that the railroad was negligent in not maintaining a watchman at the crossing.

See:

Umlauft v. Chicago, M., St. P. & P. Ry Co., 233
Wis. 291, 289 N. W. 623.

The important consideration is that in the cases cited by appellants, as in this case, there was simply no proof that an earlier warning of some kind by the Railroad would have prevented the accident; in those cases as in this, that question was entirely speculative and conjectural. The court states at Page 4 of its opinion that there is no suggestion in the evidence that had the watchman signaled the traffic the driver would not have stopped sooner. This statement would seem to suggest that defendant, rather than plaintiff, has the burden of proof. It was incumbent upon plaintiff to prove by a preponderance of the evidence that an earlier warning would have prevented the accident, not for defendant to disprove that. A finding in favor of plaintiff on that question must be based on competent evidence, not on conjecture as to what a driver would or might do. The undisputed fact is that the driver knew from the time he entered Second South, a block away, that he would be approaching the intersection and the railroad crossing. He knew the exact location of the tracks and he knew that engines and trains passed over the crossing at all hours of the day and night. He had notice of the danger at that time and did not protect his safety or that of plaintiff; at that time and for several hundred feet, the driver could have acted to prevent the accident. Under those circumstances his negligence was the sole cause of the accident and plaintiff's injuries as a matter of law.

POINT IV.

THE COURT ERRED IN FAILING TO CONSIDER POINTS V AND VI AS ARGUED IN APPELLANTS' BRIEF AND IN FAILING TO REVERSE THE JUDGMENT THEREON.

Appellants points V and VI, argued in their brief, were not mentioned by the court in its summary of appellants' contentions and were not discussed in the opinion. Appellants still believe that those contentions are material and important as demonstrated by the cited cases and must be reckoned with in order to sustain the judgment.

Point V in appellants' brief related to the abstract definition of the term "proximate cause" given by the trial court to the jury. The issue of proximate cause was of vital importance to defendants in this case. It was important that the jury be given an instruction on proximate cause applied to the evidence which was clear and unambiguous. It is appellants' position that instruction No. 2 given by the trial court to the jury could only result in confusing the jury on this vital issue. It seems doubtful to appellants whether the said instruction could be understood by a person legally trained let alone a layman. The said instruction contains technical legal language which could not be fully understood by the average juror. By way of illustration, what does the word "efficient" mean to a layman? Is there anything in the instruction explaining the meaning of that word? What does the word intervening mean to a layman? Is there anything in the instruction or elsewhere defining that word? It seems highly significant

to appellants that even the modern legal treatises on this subject, written for the benefit of legally trained persons, define causation in terms more easily understood than the terms employed in instruction No. 2. In the American Law Institute, Restatement Of The Law of Torts, Volume 2, Section 431 legal cause is defined as: The actor's negligent conduct is a cause of harm to the other if (a) his conduct is a substantial factor in bringing about the harm and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm. The use of the term "substantial factor" has a definite and unambiguous meaning to both a lawyer and a layman. The language contained in instruction No. 2 has no meaning whatsoever; said language could only confuse a jury. Although the trial court apparently believed that the jury would readily understand the meaning of the term "intervening" the restatement of the law of torts written for the benefit of legally trained persons, goes to some length to define the meaning of that term. In section 441 of the said restatement intervening force is defined as "(1) an intervening force is one that actively operates in producing harm to another after the actor's negligent act or omission has been committed." The said section further discusses the distinction between dependent and independent intervening forces. It would seem apparent the jury could not reasonably be expected to understand the meaning of instruction No. 2 or the language contained therein. As argued by appellants in their brief, the situation was not aided by any instruction applying the principle to the facts of the case. The instruction simply stated an abstract

proposition of law in an ambiguous and misleading manner. Inasmuch as the question of proximate cause was a vital one to appellants' defense, the giving of said instruction clearly prejudiced appellants. Appellants submit therefore, that the judgment of the trial court should be reversed on that ground.

Appellants argued in Point VI of their brief that Special Interrogatories Nos. 13 and 14 should not have been submitted to the jury because said interrogatories pertained to issues which should have been determined as a matter of law. Those interrogatories related to the negligence of the driver of the automobile. The argument made in this brief under point 4 will demonstrate that the negligence of the driver should have been determined as a matter of law.

Appellants also contended in Point VI of their brief that special interrogatories Nos. 7 and 8 should not have been submitted to the jury. Said interrogatories related to whether the operators of the locomotive failed to keep a lookout for automobiles crossing the intersection. As we have already demonstrated in this brief, there is no evidence from which a jury could find that the said operators failed to keep a lookout for automobiles crossing the intersection. No jury question was presented upon that claim of negligence.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Court should grant appellants' petition for rehearing.

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