

1957

Yosif B. Abdulkadir et al v. The Western Pacific Railroad Company : Brief of Respondent

Utah Supreme Court

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In the
Clerk, Supreme Court, Utah

Supreme Court of the State of Utah

YOSIF B. ABDULKADIR, and PAM-
ELA SUSAN ABDULKADIR, an in-
fant, and PATRICIA FATIN AB-
DULKADIR, an infant, by Yosif B.
ABDULKADIR, their Guardian, Ad
Litem,

Plaintiffs and Appellants,

vs.

THE WESTERN PACIFIC RAIL-
ROAD COMPANY, a corporation,
Defendant and Respondent.

Case No.
8677

RESPONDENT'S BRIEF

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Case No.
8677

RESPONDENT'S BRIEF

STATEMENT OF THE CASE

This suit was commenced April 14, 1956, to recover damages for the death of LaMay R. Abdulkadir. Extensive pretrial discovery was employed by counsel for both parties including the taking of depositions of all known witnesses

and a series of written interrogatories. Approximately one year after the action was filed, the case was submitted to the trial court on the motion of defendant for summary judgment. The trial judge heard arguments of counsel, took the matter under advisement, and on the 20th day of April, 1957, entered an order granting defendant's motion for summary judgment. This appeal followed. "R" refers to pages of the depositions.

STATEMENT OF FACTS

The accident out of which this suit arose occurred on the defendant's main line track at approximately 11:40 p. m. on the 18th day of July, 1955. The atmosphere was clear. At the point of the accident, defendant's main line running east and west is paralleled on the north by a siding track. The main line from this point is paralleled by U. S. Highway 40 for several miles to the east and to the west. There is a narrow abandoned roadway approximately eight feet in width crossing defendant's tracks at the point where plaintiff's intestate was struck. The only structure in the vicinity of the crossing is a small wooden building located south of the track. Persons approaching the old road crossing, as plaintiff and his wife were doing on the fatal night, have an unobstructed view up and down the track for many miles. The diagram attached as Exhibit "A" which has been prepared from the testimony and admitted facts accurately reflects the physical surroundings of the accident site.

Shortly before the accident, plaintiff had been proceeding west on Highway 40 towards Wendover. In order to

get off of the traveled portion of the highway to change a tire, he pulled his automobile onto the side road to the south of the highway and stopped with the front of the automobile facing defendant's tracks and approximately 66 feet north of the siding track. After the tire had been changed, it became necessary for plaintiff's wife to relieve herself and in order to secure privacy and shelter the two decided to proceed south along the abandoned road across the tracks. Before starting out, plaintiff testified that he turned on the high beam of his headlights which cast a beam of light down the old roadway and across the tracks (R. 16). Upon leaving the car plaintiff could see the passing track and told his wife that they would have to cross a railroad track (R. 17). Upon crossing the siding track, plaintiff and his wife noticed the main line (R. 19). It was plaintiff's testimony that he and his wife before crossing the main line were "noticing both sides to see if the train was coming" (R. 19) but failed to see or hear the approaching train (R. 19, 23, 24). Plaintiff's intestate was following one step behind him and a little to the right (R. 23). When plaintiff was between the tracks on the main line, he looked up, saw the light of the train, yelled to his wife, and made a single jump to safety (R. 22, 23). His wife, however, was struck and killed before she could reach the south side of the track. Plaintiff referred to the light on the train as "a very strong light" (R. 24) about 6 feet off of the ground (R. 25) which he saw for the first time only a few feet from him (R. 24, 25).

Following the accident, plaintiff went to the head of the train and observed the light which he described as a

“very bright light,” (R. 50) and he thought that the engineer had forgotten to switch from the high to the low beam when the train was brought to a stop (R. 49-52).

The only known witnesses to the accident are plaintiff, Mr. Abdulkadir; the engineer, Mr. Harry Fuller, and the fireman, Mr. Sam Steele, Jr. The fireman and engineer were in the cab of the train at the time of the collision. Depositions of each of these three men were taken and filed with the court.

It appears from defendant's evidence that just prior to the accident the train was traveling 79 miles per hour (R. 63). The engineer and fireman based their statement as to speed on observance of the speed recorder in the cab of the engine and a speed tape permanently recording the speed of the train. Plaintiff estimated the speed of the train to be 90 miles per hour from the sound of the wheels as it passed him (R. 36). A whistle was sounded as the train approached, approximately a mile or $\frac{3}{4}$ of a mile distant (R. 66). The light of the train was on full beam and cast light down the track in front of the train about 800 feet (R. 68). Despite the unobstructed view up the track, plaintiff failed to see the light until the train was upon him (R. 34).

STATEMENT OF POINTS

POINT I

THERE WERE NO ISSUES OF FACT TO BE TRIED BY A JURY.

POINT II

DEFENDANT WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

POINT III

PLAINTIFFS WERE NOT DENIED ANY OF THEIR RIGHTS BY THE ENTRY OF THE JUDGMENT BELOW.

POINT IV

THE UNDISPUTED EVIDENCE, INCLUDING PLAINTIFF'S OWN TESTIMONY, COMPELS THE CONCLUSION THAT THE DECEASED WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW. THERE WAS, THEREFORE, NO GENUINE ISSUE OF MATERIAL FACT TO BE TRIED BY A JURY.

ARGUMENT

POINT I

THERE WERE NO ISSUES OF FACT TO BE TRIED BY A JURY.

Plaintiff asserts that he has been denied his constitutional right of trial by jury and that Rule 39, U. R. C. P. has not been complied with. There is no constitutional right to trial by jury in a civil case. Rule 39 provides for trial

of issues of fact by a jury upon proper demand. The trial court by its order granting the motion for summary judgment found that there were no material issues of fact to be tried. The only issue on this appeal is whether or not, in view of the admitted facts, there was a genuine issue of material fact to be tried by a jury. This is discussed under Point IV infra.

POINT II

DEFENDANT WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

Plaintiff urges that defendant was not entitled to judgment because the Complaint states a cause of action and plaintiff has not admitted contributory negligence. Defendant's position is, and the court found, that the depositions and other papers on file conclusively show, that the decedent was guilty of contributory negligence as a matter of law. If this is true, none of the other prospective issues in the lawsuit are material. This simply emphasizes the point heretofore made that the only genuine issue on this appeal is whether or not the trial court properly found that there was no genuine issue of material fact. We submit that the trial judge properly decided the motion under Rule 56 which provides that:

“The judgment sought shall be rendered forthwith if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”

POINT III

PLAINTIFFS WERE NOT DENIED ANY OF THEIR RIGHTS BY THE ENTRY OF THE JUDGMENT BELOW.

Unless there was some material issue of fact to be tried, plaintiffs had no right to require the time and expense of a trial. It is enough to say that the question of contributory negligence is conclusively resolved by the testimony of plaintiff himself.

Plaintiff asserts that considerable effort has been made to locate a certain witness who it is claimed was on the scene at the time of the accident. Although it has been over two years since the occurrence of the accident, plaintiff has had no success with his attempt to locate this witness. No offer has been made to show what the testimony of this witness would be. It is obvious, however, that no living person was in a better position to see and hear what happened than was plaintiff who was only a step away from deceased when she was killed.

The depositions of defendant's employees gave an account of the accident very similar to that given by plaintiff. There is no substantial dispute of fact so far as the issue of contributory negligence is concerned. Insofar as there may be a dispute, plaintiff's version will be accepted for purposes of considering the propriety of the court's ruling.

POINT IV

THE UNDISPUTED EVIDENCE, INCLUDING PLAINTIFF'S OWN TESTIMONY, COMPELS

THE CONCLUSION THAT THE DECEASED WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW. THERE WAS, THEREFORE, NO GENUINE ISSUE OF MATERIAL FACT TO BE TRIED BY A JURY.

If, as the court found, the deceased was guilty of contributory negligence as a matter of law, the motion for summary judgment was properly granted. Contributory negligence is a complete defense in this jurisdiction available against the heirs in a wrongful death suit. *Van Wagoner v. Union Pacific Railroad Company*, 112 Utah 189, 186 P. 2d 293, Reh. 112 Utah 218, 189 P. 2d 701. If the defense is established as a matter of law, as it was in the case at bar, the other issues (negligence and damages) are not material.

In the instant case the testimony of all known eye witnesses was taken by deposition and published at the hearing on defendant's motion. The important facts bearing on the issue of contributory negligence came from the mouth of plaintiff himself who was closest on the scene of any person now living. We think this evidence clearly shows that the deceased failed to exercise that degree of care required for her own safety in crossing defendant's tracks.

The following facts are established by the testimony of plaintiff himself: The accident occurred at the intersection of a narrow unused dirt road with defendant's main line track. The trackage at the point of the accident and for several miles in either direction traverses isolated and desolate desert-like country. It was approximately 11:30

p. m. in the summer evening of July 18, 1955. The atmosphere was clear and there was no obstruction to vision either up or down the track, the only limiting factor being the darkness of the night. Plaintiff and the deceased had decided to traverse the track by foot to find some privacy from the highway. Before setting out to cross the tracks, plaintiff had turned on his automobile lights. Both he and his wife knew that they would have to cross railroad tracks to reach a position of privacy. Plaintiff was constantly watching both up and down the tracks before crossing the passing track. After the passing track had been traversed, plaintiff and deceased noticed the main line track (R. 19) and before attempting to cross the main line, the two were "noticing both sides to see if the train was coming" (R. 19). Plaintiff made it across the main line track but deceased did not.

Plaintiff's own evidence establishes that the train had a very bright light on front (R. 24, 49, 52). Defendant's witness testified that the beam of the headlight illuminated the track ahead for about 800 feet (R. 68). Plaintiff estimated that he could see a lighted train a half-mile away (R. 33). Despite the unobstructed view up the track, plaintiff and deceased failed to see the lighted train until it was upon them; nor did they hear the huge locomotive with its many cars (R. 19, 23, 24). The train was traveling at the usual high speed at which trains are propelled in isolated territory. From the foregoing it seems to us manifest that deceased was guilty of contributory negligence as a matter of law and that the motion was properly granted by the trial judge.

The law pertaining to the duty of a traveler at railroad crossings is well defined in the decisions of our own Supreme Court. It is unnecessary to refer, as plaintiff has repeatedly done, to the summation of general law contained in American Jurisprudence. In *Wilkinson v. Oregon Short Line R. Co.*, 35 Utah 100, 116, 99 Pac. 466, 468, the duty of a traveler in crossing railroad tracks was defined as follows:

“The requirements of the law * * * proceed beyond the featureless generality that one must do his duty in this respect, or must exercise ordinary care under the circumstances. *The law defines precisely what the term ‘ordinary care under the circumstances’ shall mean in these cases.* In the progress of the law in this behalf the question of care at railway crossings, as affecting the traveler, is no longer, as a rule, a question for the jury. The quantum of care is exactly prescribed as a matter of law. In attempting to cross the traveler must listen for signals, notice signs put up as warnings, and look attentively up and down the track * * *.” (Emphasis added.)

One of the required precautions applicable to the instant case is defined by the court in the *Wilkinson* opinion as follows:

“*If a traveler, by looking, could have seen an approaching train in time to escape, it will be presumed in case he is injured by collision, either that he did not look or, if he did look, that he did not heed what he saw. Such conduct is held negligence per se.*” (Emphasis added.)

Numerous cases affirm the rule set forth in the *Wilkinson* case, *supra*, to the effect that a traveler who had an

opportunity to discover an approaching train in time to avoid an accident and who fails to do so, is guilty of contributory negligence as a matter of law: See e. g., *Butler v. Payne*, 59 Utah 383, 203 Pac. 869; *Drummond v. Union Pacific R. R. Co.*, 14 Utah 289, 117 P. 2d 903, *Haarstrich v. O. S. L. R. Co.*, 70 Utah 552, 262 Pac. 100; *Nuttall v. Denver and Rio Grande Western R. Co.*, 98 Utah 383, 99 P. 2d 15; *Benson v. The Denver and Rio Grande Western R. Co.*, . . . Utah . . . , 286 P. 2d 790. In each of the cases above cited it was held as a matter of law that the traveler in failing to see what was there to be seen was guilty of negligence as a matter of law.

It also seems apparent that the time when the traveler is required to look is when he is about to cross the tracks. Our high court noted in *Drummond v. Union Pacific R. R. Co.*, 14 Utah 289, 117 P. 2d 903, (1947) that:

“The time to look is when he is about to cross. That is the time when he is about to encounter the danger portended by a railroad crossing, and it is not enough that he look at a point some distance from the crossing, when looking on nearer approach would reveal danger.”

These propositions of law pose the following question: Could the deceased have seen defendant's locomotive had she looked attentively up the main track as she was about to cross it? The evidence compels a decisive affirmative answer. It would be simply incredible to suppose that a person in deceased's position would be unable, had she looked as she neared the crossing, to observe the approach of a huge lighted locomotive pulling a train of 13 cars, *and*

yet be struck by the train as she took her first step onto the track. Such a proposition would defy all known human experience. We submit that, as was said in the *Holmgren* case, *supra*,

“The conclusion is irresistible that [deceased] either failed to look or having looked, failed to heed what [s]he saw or should have seen [S]he must, therefore, be held to have been guilty of contributory negligence as a matter of law.”

The facts of this case are very similar to those in *Mingus v. Olsen*, 114 Utah 505, 201 P. 2d 495, where the deceased walked from the sidewalk into a street at nighttime and was struck and killed by an automobile. The court said in that case:

“More convincing than the direct testimony that deceased did not look, is the further evidence that deceased neither said nor did anything to indicate that he was at all aware of the danger presented by defendant’s approaching automobile. He seems to have been wholly unaware of its approach. Certainly he did nothing either to warn his wife, or to rescue either himself or her from their position of peril. On this evidence, it must be said as a matter of law that deceased either failed to look, or having looked, failed to see what he should have seen.”

It also seems to us manifest that deceased failed to listen for the approach of a train as she neared the crossing. The locomotive which struck her was pulling a train of twelve to thirteen cars (R. 72). As the train passed plaintiff it made a great deal of noise (R. 35). A pedestrian has a better opportunity to hear and to see approaching

trains and to prevent a collision than the ordinary motorist who sits in an automobile with the engine running and must look up and down the track from within his vehicle. If plaintiff had been listening for trains as she approached the crossing, it seems manifest to us that she could have heard the noise of defendant's locomotive before she was struck.

Plaintiff does not seriously argue that deceased could not have seen the train had she looked, for the train was there to be seen and deceased was in a position to see it. Mr. Abdulkadir's testimony conclusively shows that the lighted locomotive could have been seen had deceased looked (R. 33). Plaintiff's position is that deceased did not have a duty to look as she crossed the tracks because she was being led across by her husband who walked ahead of her. It is urged that she had the same duty of care for her own safety as would a guest in an automobile. No cases are cited in support of this unique proposition and, of course, none can be found. If such a proposition were accepted, it might also be suggested that the driver of one automobile could rely upon the driver of another to lead him safely across railroad tracks. It is axiomatic in our law that an adult pedestrian having the normal faculties has no right to rely upon another to safely lead him or her across streets or across railroad tracks. Each person has a duty to exercise care for his own safety and when, as in the instant case, the traveler has full control of the situation, he must exercise certain minimum precautions before stepping onto a railroad track. Plaintiff's urge that what is reasonable care under the circumstances is for the jury. As pointed out

in the foregoing cases, however, the law has defined in this area exactly what the traveler must do to comply with the standard. One of those requirements is that the traveler must look and listen for trains at a railroad crossing and see what is to be seen.

Further, as a demurrer to the negligence of deceased, a halfway attempt is made by plaintiff to urge the doctrine of last clear chance. Last clear chance was not pleaded and none of the elements of the doctrine are present in the instant case. Only a portion of the doctrine is quoted. The third element of § 480 of the Restatement which is very significant in this case has been omitted by plaintiff's counsel in the quote from the *Holmgren* case. This is simply a case of a woman stepping directly into the path of an oncoming train. It is clear from the language of § 480, and the cases interpreting it, that the doctrine has no application to such facts. *Cox v. Thompson*, . . . Utah . . ., 254 P. 2d 1047; *Van Wagoner v. Union Pacific R. Co.*, 112 Utah 189, 186 P. 2d 293.

The single Utah decision cited and relied upon by plaintiff is *Toomer's Estate v. Union Pacific R. Co.*, 121 Utah 37, 239 P. 2d 163. In that case the view of the traveler was obstructed by a freight train standing on parallel tracks pulling 65 cars, emitting steam and blowing a whistle. The defendant's streamliner was traveling twice the permitted speed in a busy station yard. It was snowing "quite hard" and independent eye witnesses definitely established that the streamliner could not be seen until it was on the crossing. The only similarity in the facts of the two cases is that there was more than one set of railroad tracks in each case.

CONCLUSION

Plaintiff's own testimony clearly shows that the deceased failed to look and to listen before stepping onto defendant's tracks or failed to heed what was there to be seen and heard. We submit that the trial court properly dismissed the Complaint and that the decision below should be affirmed by this Court.

Respectfully Submitted,

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Exhibit "A"

