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Pearl Gregory v. Denver & Rio Grande Western Railroad Co. : Brief of Respondent

Utah Supreme Court

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In the
Supreme Court of the State of Utah

FILED

MAY 2 - 1958

PEARL GREGORY,

Plaintiff and Appellant,

v.

THE DENVER AND RIO GRANDE
WESTERN RAILROAD COMPANY,
a corporation,

Defendant and Respondent.

Clerk, Supreme Court, Utah

Case No.
8695

BRIEF OF RESPONDENT

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In the
Supreme Court of the State of Utah

PEARL GREGORY,
Plaintiff and Appellant,

v.

THE DENVER AND RIO GRANDE
WESTERN RAILROAD COMPANY,
a corporation,
Defendant and Respondent.

Case No.
8695

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Plaintiff brought suit for injuries sustained by her in a train-car collision which occurred at a railroad crossing in Salt Lake City, Utah, on December 26, 1955. The case was tried before the Honorable Ray Van Cott, Jr., sitting with a jury. At the conclusion of the plaintiff's case the defendant moved the court for a directed verdict and

for a nonsuit. The motion was granted and the case was dismissed. This appeal followed.

STATEMENT OF FACTS

Defendant is in substantial agreement with the statement of facts set forth by plaintiff in her brief so far as it goes. The statement does not afford a complete understanding of the accident as reconstructed by the plaintiff's evidence, however.

The accident occurred at a railroad crossing near 4th West and 4th North Streets in Salt Lake City. Fourth North Street is a divided two-lane highway about 40 feet wide. At said intersection several of defendant's tracks cross in a north-south direction. Just prior to the accident plaintiff's automobile was proceeding west on Fourth North Street and defendant's locomotive was traveling south on the westernmost of several tracks crossing said street. Plaintiff's witnesses demonstrated that from a point in Fourth North Street approximately 90 feet east of the point of impact there was a clear view of the track on which the locomotive was traveling for "probably" $\frac{1}{2}$ a mile to the north of the street (R. 23, 24). At a point in the road about 190 feet east of the point of impact a traveler could see up the westernmost track for about $\frac{1}{4}$ to $\frac{1}{2}$ of a mile if there were no obstructions on the other rails (R. 26, 27). Plaintiff sought to show that there were certain standing box cars on the rails to the north of the street which would partially obstruct the traveler's view of the west track. The evidence completely failed to establish a material ob-

struction, however. A police officer called by plaintiff as a witness testified that there were standing cars "several hundred feet" to the north of the north line of 4th North Street (R. 44, 45). In response to questioning by the court this witness said:

"A. As I recall I walked back up the roadway and looked at the point of vision and, as I recall, the box cars didn't offer an obstacle as far as the vision was concerned."

His testimony was that immediately after the accident he had walked back a little east of the watchman's shanty to determine a motorist's view of the track on which the locomotive was approaching and found no obstruction to vision (R. 47). This shanty is located more than 150 feet east of the rail where the accident occurred. It thus appears from the plaintiff's own witness that 150 feet east of the point of accident a motorist had an unobstructed view to the north of the track on which the locomotive was traveling. Plaintiff's husband, Marion Gregory, who was driving the automobile testified that there were standing box cars on the rails two or three tracks east of the rail where the accident occurred and about 50 feet north of Fourth North (R. 20). With regard to Gregory's view of the westernmost track, he said: (D. 19)

"Yes sir; there was some box cars setting down there. I wouldn't say it prevented me from seeing a train coming on a certain track, but there were some box cars there."

It is thus clear that for many car lengths to the east of the point of impact Gregory had an unobstructed view of the track on which the locomotive was traveling.

The accident occurred on December 26, 1955, at approximately 11:50 a. m. It was a clear day. The road was dry. The train involved was a diesel pulling 27 cars (R. 52).

The only eye-witness account of the accident was given by Marion Gregory, the driver of the automobile. Gregory testified that as he approached the railroad tracks he stopped his car (D. 10, 13). He then started up and drove a distance of over 100 feet, at a constant speed of three to four miles per hour to the point where the train and car collided (D. 14, 23, 24). The speed was characterized as being comparable to a fast walk. The officer whom plaintiff called said that the car at this speed could be stopped in about four feet (R. 58). Gregory testified that as he approached the easternmost track he heard a diesel engine but that, he didn't see a watchman and therefore didn't pay any attention to it (D. 9, 10, 13, 14). The physical evidence compels the conclusion that the train was in full view as Gregory approached the westernmost track. Notwithstanding this he failed to see the train until it was six to ten feet from the car (D. 21). At that time it was too late to prevent the accident as the car was either on, or right to the edge of the track (D. 21). In answer to counsel's questioning Gregory testified as follows: (D. 15, 16)

"Q. Now I think you said, not seeing the watchman, you assumed it was clear to go, and you went on, is that right?

"A. That is right.

"Q. All right, as you proceeded on west, Mr. Gregory, then I think you indicated, in answer to my

question about whether you could still hear the sound of this Diesel, that that was out of your mind, because you didn't see a watchman there, and you assumed you could go on.

"A. I assumed the right-of-way was mine, and I was safe.

"Q. You heard the sound of the Diesel before that?

"A. Before that.

"Q. And you paid no attention, after you started, because there wasn't a watchman there, and you figured it was safe to go?

"A. I figured that was my protection.

"Q. Well then, as you proceeded to the west, did you ever see this particular engine that struck your car, prior to the time that it hit it?

"A. I never seen it before, it seemed to me—now I want to get as close to it as I can—it was between six and eight feet of me, or ten, something like that.

Now listen, a thing like that could be done so quick—

"Q. Mr. Gregory, I appreciate and understand that very well, and all you can do is give your best judgment.

"A. That is right.

"Q. And your best judgment is that you saw this Diesel Engine about six to ten feet, prior to the time that it hit you?

"A. That is right.

"Q. And that is the first time that you saw it?

"A. And that is the only time I saw it.

“Q. The first and only time you saw it?

“A. That is right.”

When Gregory saw the engine he threw his head to the right directly into the diesel's burning headlight and the impact occurred (D. 17).

Although plaintiff alleged that the train was exceeding the lawful speed limit there was absolutely no evidence that it was. Plaintiff also sought to show that no bell or whistle was sounded as the train approached the crossing but the only evidence even remotely tending to prove these allegations was the testimony of Marion Gregory to the effect that he could not state whether or not a bell or whistle was sounded (D. 17-18). Plaintiff did testify that he expected to see a watchman if any train was approaching the crossing and that he saw no watchman.

Defendant's motion for directed verdict was grounded upon its contention that there was no evidence of actionable negligence on the part of the defendant and that plaintiff's evidence demonstrated as a matter of law that the negligence of Marion Gregory and of the plaintiff was the sole cause of the accident.

STATEMENT OF POINTS RELIED ON

POINT I

THE TRIAL COURT DID NOT ERR IN GRANTING DEFENDANT'S MOTION FOR DIRECTED VERDICT.

- (1) *There Was No Evidence That Defendant Was Guilty of Actionable Negligence.*

- (2) *The Negligence of Marion Gregory and of The Plaintiff Was The Sole Cause of The Accident.*

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN GRANTING DEFENDANT'S MOTION FOR DIRECTED VERDICT.

- (1) *There Was No Evidence That Defendant Was Guilty of Actionable Negligence.*

The plaintiff's evidence completely failed to establish any negligence on the part of the defendant which could have proximately contributed to the accident.

There was no evidence whatsoever that the train was traveling at an excessive speed. Only two witnesses were interrogated as to the speed of the locomotive. Marion Gregory replied in response to counsel's question as to how fast the locomotive was traveling:

"I wouldn't begin to try to tell you how fast. It might have been running ten mile an hour and it might have been running sixty, I don't know (D. 26)."

The police officer who investigated the accident was unable to state from the physical evidence how fast the train had been traveling before the impact. There was no showing whatever that the train was traveling at an excessive rate of speed. As a matter of fact there was no evidence from which the jury could have made a finding as to speed.

In the absence of any evidence to the contrary it is to be presumed that the train was traveling at a safe and reasonable speed and was not exceeding the lawful speed limit.

Counsel for plaintiff urges in their brief that there was evidence from which the jury could have found that the defendant negligently failed to sound a whistle or a bell as it approached the crossing. The only testimony bearing on this issue was offered by Marion Gregory, the driver of the car. His testimony was as follows: (D. 17, 18)

"A. I wouldn't say I could hear the bell ringing or anything.

"Q. Would you say, Mr. Gregory, the bell wasn't ringing?

"A. No, I wouldn't say it was, nor I wouldn't say it wasn't.

"Q. Did you hear any sound of a whistle?

"A. No sir, there wasn't any whistle blown I didn't think.

* * * * *

"I am not going to be positive; I am not going to say something I didn't know.

* * * * *

"Q. Would you say Mr. Gregory that such a whistle was not blown?

"A. No sir, I wouldn't. I wouldn't say it wasn't; I wouldn't say it was."

The plaintiff who was actually closer to the locomotive than Mr. Gregory offered no testimony whatsoever with regard to the bell or whistle. It is submitted that the testimony of Gregory is not substantial enough to support a finding by the jury that the defendant failed to sound a

bell or whistle. We think this is particularly true in view of the fact that Gregory admitted that as he approached the point of impact he was not particularly paying attention to the noises about him (D. 9). As a matter of fact after Gregory had stopped his automobile just east of the easternmost track, he heard the sound of a diesel motor but paid no attention to this sound as he started up and proceeded west on Fourth North (D. 9). He further testified that because the road looked clear the sound of the diesel which he had heard left his mind (D. 10). This case is similar to that of *Jensen v. Oregon Short Line Railroad Company*, 59 Utah 366, 204 Pac. 101, where a judgment for the plaintiff was reversed, the court holding that negative testimony as to the failure of the defendant railroad to ring a bell was insufficient to support a finding of no warning. The court there said:

“This is not a case in which the witness claims to have been listening for signals and failed to hear them.”

From the earlier decisions of this court it appears clear that negative testimony of the character involved in the instant case has no probative value whatsoever unless it appears from the testimony of the witness that he was actually listening for warning sounds and that he was actually paying attention to what occurred. *Jensen v. Oregon Short Line Railroad Company*, *supra*; *Clark v. Union Pacific Railroad Company*, 70 Utah 29, 257 Pac. 1050; *Anderson v. Union Pacific Railroad Company*, 76 Utah 324, 289 Pac. 146. In the later case of *Hudson v. Union Pacific Railroad Company*, 120 Utah 245, 233 P. 2d 357,

this court stated that the test is whether under all of the circumstances the "warnings would have awakened [the witness'] attention to them." It is manifest from the plaintiff's own testimony that he was oblivious to the noises about him and that he was blindly relying upon the absence of a watchman as assurance that there were no approaching trains. He was very frank to state that a whistle might have been sounded and that a bell might have been rung and that he was in no position to state that no whistle was sounded or that no bell was rung. We submit that such a feeble showing is not substantial evidence which would support a finding by the jury.

It is next contended by counsel that plaintiff's evidence would have supported a finding by the jury that the railroad failed to maintain a proper lookout for the approach of motor vehicles. There is no evidence whatsoever that the engineer of the locomotive was not looking for approaching traffic or that he did not see the plaintiff's automobile. It is settled in this jurisdiction that the operator of the defendant's locomotive had a legal right to assume that the plaintiff's automobile, which was traveling at a rate of three to four miles per hour would stop short of the track on which the locomotive was traveling and yield the lawful right of way. The automobile could have been stopped in four feet. The train with its 27 cars required 612 feet to come to a stop after the impact.

This court was confronted with an identical problem in the case of *Van Wagoner, et al. v. Union Pacific Railroad Company*, 112 Utah 189, 186 P. 2d 293, where the plaintiff claimed that the defendant's train operators failed to keep

a proper lookout. Plaintiff's counsel excepted to the trial court's refusal to submit the issue to the jury. In dealing with this contention, the court said:

“* * * While both objects were approaching the crossing the crew was entitled to assume the truck would stop until such time as a reasonably prudent person would know otherwise. Under the facts and circumstances of this case, a failure to act in time to avoid a collision does not establish a failure to look.

“Even were we to assume the train crew failed to keep a proper lookout, appellants must still fail in their assignment, as assuming the truck was stalled for a couple of seconds; if it is intended to submit this question to the jury, there must be a basis for concluding that the failure to keep a lookout proximately contributed to the accident.

* * * Assuming that when the truck stalled, as testified to by Miss Bowers, and this would be the first opportunity the train crew would have of knowing it was stalled, and assuming further that the engineer saw the truck, could the jury reasonably have found that the collision would have been avoided? Not unless there was sufficient time for the train crew to have stopped the train or, assuming the warning signals not to have been given, to permit these signals to have been given and the deceased to have been warned in time to have jumped clear of the train. A fair reading of the evidence warrants a finding by the trial court that regardless of whether or not the train crew was keeping a lookout, this could not have been a proximate cause of the collision. Because of the weight of the train, the impossibility of turning to avoid objects in its path, the same right of way rule does not apply as in the case of two automobiles. Trains

cannot be stopped in time to avoid collisions if the time interval is shortened to a matter of two seconds, and warnings are of no avail if they cannot be given in time to permit a person to escape from his position of peril."

Even assuming a failure to keep a proper lookout, this could not, as demonstrated, have been a proximate cause of the accident. The final alleged act of negligence on the part of the railroad was the failure to provide a watchman to flag down approaching traffic. There is no common law duty imposed upon railroads to maintain watchmen at all crossings. Under certain exceptional circumstances where conditions of extreme danger exist, it has been held that railroad companies must maintain either a watchman or provide other suitable warning devices. There is no showing, however, from the facts of the instant case that there was any unusual or extreme danger involved in the crossing which is the subject of this action. It was broad daylight at the time of the accident. There were no substantial obstructions to the vision of motorists either to the south or to the north of the crossing. There was nothing about the physical arrangement which might be confusing to a motorist. In fact the only other equipment of which the witnesses were aware was a few standing box cars located north of the intersection and two or three tracks east of the rail on which the locomotive was approaching. It is firmly established in this jurisdiction that railroad tracks are in themselves a warning of danger. In addition to this, plaintiff's evidence clearly establishes that there were appropriate signs posted at the approach to the crossing, and plaintiff himself testified that he was "very familiar"

with the crossing and knew that he had to cross several tracks. He did testify that he had seen watchmen at the crossing on prior occasions but this would certainly not justify or explain the conduct of Gregory as he traveled obliviously into the path of the heavy locomotive. If by some stretch of the imagination it be held that under the circumstances of this case the failure of the defendant to maintain a watchman was negligence, still it is clear that such negligence did not proximately contribute to the accident. It is undisputed that Gregory stopped his car at the east rail where the watchman would have been. He then started his car and traveled approximately 150 feet from the point where the watchman would have been to the point where the accident occurred. His negligence in failing to maintain a proper lookout as he approached the accident site was an independent and efficient cause of the accident. We certainly do not concede that the railroad had a duty to maintain a watchman at this crossing, but in any event, even if there was such a duty, any antecedent negligence on the part of the railroad in failing to maintain a watchman at a point 150 feet east of the accident site was not a direct and proximate cause of the accident. Under the circumstances of this case the absence of a watchman bears only on the issue of the negligence of the motorist. It is no justification whatsoever for the failure of Gregory to look and to see the approaching locomotive.

We submit that there was no evidence offered by the plaintiff from which the jury could have found that defendant was guilty of actionable negligence.

(2) *The Negligence of Marion Gregory and of The Plaintiff Was The Sole Cause of The Accident.*

That Marion Gregory was guilty of negligence as a matter of law is too clear for labored argument. Plaintiff's evidence conclusively shows that as Gregory approached the west rail of the crossing he had an unobstructed view in the direction in which the defendant's locomotive was traveling for a distance of $\frac{1}{4}$ to $\frac{1}{2}$ mile. Yet he failed to see the approaching train until it was too late to prevent the accident. He admits that he heard a diesel engine when he was over 100 feet from the accident site and yet he paid no particular attention to it. When the locomotive was six to ten feet away he said it made a "loud noise" and sounded like a "cyclone" (D. 16, 17). His awareness of the sound of the locomotive came too late, however, to prevent the accident. Since counsel for plaintiff concedes the negligence of Marion Gregory in their brief, we will not lengthen this argument with an analysis of the cases pertinent to the issue of his negligence. Suffice it to say that he clearly failed to look and listen as he approached the crossing or failed to heed what he heard and saw and was in this regard negligent as a matter of law. *Benson v. Denver and Rio Grande Western Railroad Company*, 4 Utah 2d 38, 286 P. 2d 790; *Nuttall v. Denver and Rio Grande Western Railroad Company*, 98 Utah 383, 99 P. 2d 15; *Wilkinson v. O. S. L. Ry. Co.*, 35 Utah 110, 99 Pac. 466; *Abdulkadir v. The Western Pacific Railroad Company*, 7 Utah 2d 53, 318 P. 2d 339.

Even if it be assumed, contrary to the evidence and to the facts, that the defendant failed to warn of the approach of the locomotive by watchmen, whistle or bell, still the

conduct of Gregory in driving obliviously into the path of the locomotive is not any less the cause of the accident. In this regard the court's statement in *Holmgren v. Union Pacific Railroad Company*, 114 Utah 262, 198 P. 2d 459, is pertinent:

“The failure of the blinker signal to warn Holmgren of the approaching train was not an invitation for him to proceed blindly across the tracks
* * *”

See also *Drummond v. Union Pacific Railroad Company*, 111 Utah 289, 177 P. 2d 903, where a signal bell was not operating. To the same effect is *Nuttall v. Denver and Rio Grande Western Railroad Company*, 98 Utah 383, 99 P. 2d 15, where it was said:

“Before a motorist can be justified in making any assumption that signals will be given or that the train will be operated at a lawful speed he must first slow up, listen for signals, and look attentively up and down the track. ‘If * * * by looking, [he] could have seen an approaching train in time to escape, it will be presumed, * * * either that he did not look, or, if he did look, that he did not heed what he saw.’”

We think that the negligence of Gregory in driving his automobile in clear view of the locomotive directly into the path of danger was the sole cause of the accident. The defendant was not required by law nor could it reasonably have been expected to foresee such conduct on the part of the defendant. The rationale of the decision of this court in *Haarstrich v. O. S. L. R. Co.*, 70 Utah 552, 262 Pac. 100, seems to us to be controlling in the instant case. In the *Haarstrich* case plaintiff was a guest in an automobile

which collided at nighttime with a train at a railroad crossing on Beck Street. Plaintiff's evidence was that the defendant failed to sound appropriate warnings by blowing a whistle, ringing a bell, providing a switchman or even having a light on the car of the train. The driver of the car did not see the train until it was 13 to 15 feet away. In ruling that the negligence of the driver of the automobile was the sole proximate cause of the accident, this court said:

"The street lights were functioning, and there appears to have been no reason whatever why he could not have stopped his car and avoided the collision if he had looked ahead and applied his brakes at the proper time. In view of the indubitable facts disclosed by the evidence, it is wholly immaterial whether the defendant strictly complied with the law as to warnings and signals. Its failure in that regard, * * * had nothing whatever to do with the accident and was in no sense the proximate cause of plaintiff's injury."

Under the facts of the instant case, it was broad daylight. The train was actually 15 feet onto the crossing at the time of the impact. As in the *Haarstrich* case, there is no reason why Gregory could not have seen the locomotive had he only looked. As a matter of fact the evidence is that he did hear the diesel locomotive several yards back from the point of accident and yet paid no attention to it.

We submit that the evidence compels the conclusion that Gregory's negligence was the sole proximate cause of the accident.

In further support of the trial court's ruling, we submit that even if it be held that there was evidence from which

a jury would have found negligence on the part of the railroad which was a proximate cause of the accident, the plaintiff is still not entitled to recover as she was guilty of contributory negligence as a matter of law.

The evidence is clear that Gregory did not see the defendant's locomotive until it was eight to ten feet from his automobile and even at that time his awareness of the train was not brought to his attention by any warning given by the plaintiff. Plaintiff was sitting in the front seat of the automobile. It is undisputed, as heretofore pointed out, that the plaintiff had an unobstructed view of the approaching train when the driver still had ample opportunity to prevent the accident had he been aware of the locomotive's approach. As a matter of fact the plaintiff probably had a better view to the north as she was sitting on the north side of the automobile. It also appears manifest from the testimony of Marion Gregory that the train was making a "loud noise" and that it sounded like a "cyclone" as it moved into the automobile, yet no warning was offered by the plaintiff that an approaching train had been seen or heard.

Although a passenger in an automobile does not have the same duty as the driver in listening and maintaining a lookout, it has been established in this jurisdiction that the passenger owes at least some duty to exercise care in warning of manifest dangers which are or should be apparent at railroad crossings. In this regard we cite the case of *Lawrence v. Denver and Rio Grande Railway Company*, 52 Utah 414, 174 Pac. 817. Although later decisions have made inroads on the rationale of the *Lawrence* case,

we think the holding of that case is particularly appropriate to the facts of the case at bar. In ruling that the plaintiff passenger was guilty of contributory negligence as a matter of law in failing to warn the driver of an approaching train the presence of which the court said the guest should have been aware, Justice McCarty stated:

“Assuming for the sake of argument, but not conceding, that plaintiff was merely the guest of Bird, and was in no sense responsible for the manner in which Bird operated and managed the automobile while making the trip in question, it nevertheless was incumbent upon him to exercise ordinary care and prudence by making diligent use of his senses of sight and hearing, by looking and listening for trains as the automobile approached the crossing, and to heed the warnings and signals of the approach of the train, and to suggest to Bird that they stop until the danger was over, and to protest if that was not done. (Citing Cases.)”

This principle should have application, where, as in the instant case, the proximity of a train is so manifestly apparent and yet constitutes such an immediate hazard.

CONCLUSION

We submit that plaintiff introduced no evidence proving or tending to prove that the railroad was guilty of actionable negligence and that the undisputed evidence shows as a matter of law that the negligence of Marion Gregory and of the plaintiff was the sole proximate cause of the accident, or in any event that plaintiff was guilty of contributory negligence. The judgment of dismissal should therefore be affirmed.

Respectfully submitted,

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