

1958

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

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

EARL GREGORY,
Plaintiff and Appellant,
—vs.—
DENVER & RIO GRANDE WESTERN
RAILROAD COMPANY, a corporation,
Defendant and Respondent.

Case No.
8695

BRIEF OF APPELLANT

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EXHIBITS REFERRED TO

- Exhibit P-1: Map by William Y. Tipton.
- Exhibit P-2: Picture No. 1 taken by Tipton from a point on the map, Exhibit P-1, designated as No. 1 picture, about half way across crossing and looking in northwesterly direction.
- Exhibit P-3: Picture No. 2 taken by Tipton, No. 2 picture on map, east of crossing and looking west.
- Exhibit P-8: Picture of right side of Gregory car.
- Exhibit P-9: Front view of Gregory car.
- Exhibit P-10: Another view of right side of Gregory car.
- Exhibit P-11: Another view of right side of Gregory car.
- Exhibit P-12: View to the north of track on which accident occurred.

IN THE SUPREME COURT
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STATE OF UTAH

PEARL GREGORY,

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—vs.—

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RAILROAD COMPANY, a corporation,

Defendant and Respondent.

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BRIEF OF APPELLANT

STATEMENT OF THE CASE

The parties will be referred to as in the court below.

The plaintiff in her complaint claimed damages against the defendant on account of serious injuries she suffered in a crossing accident which occurred on the 26th day of December, 1955, when she was a passenger in the front seat of an automobile driven by her husband. She claimed the automobile came to a stop on the east side of the crossing at Fourth North Street and about Fourth West Street in Salt Lake City, Utah, and after having made such stop, proceeded west across the intersection and the railroad tracks at a slow rate of speed.

She claimed the defendant negligently drove the railroad train against the automobile in which she was riding, and the negligence complained of was:

a. It had been the custom for flagmen to be stationed at the crossing, and that on this day, at the time of the accident, there was no flagman on duty.

b. The defendant failed to give a signal by bell or whistle or otherwise.

c. The defendant violated Section 5005 of the Revised Ordinances of Salt Lake City, Utah, 1944, by operating its locomotive at a greater speed than 12 miles per hour.

d. The crew of the train failed to keep a proper lookout and failed to use reasonable care in the operation of the train.

The plaintiff then set out serious injuries she suffered by reason of the accident (R. 1).

The defendant's pleading admitted the operation of the train and that it had tracks which it used at the crossing wherein the plaintiff was injured. Defendant denied all the other allegations of the complaint, and affirmatively claimed plaintiff's injuries were sustained solely through her own negligence or the negligence of her husband (R. 2).

There had been no pre-trials in this case, and the case came on for jury trial before the Honorable Ray Van Cott, Jr. The plaintiff introduced all her evidence and rested. The defendant put on no testimony, and made its two motions for a directed verdict (R. 3 and 4). The court granted the motions and entered its order that the case be dismissed with prejudice (R. 5).

Thereafter, within the time provided by law, the plaintiff filed her notice of appeal.

STATEMENT OF FACTS

William Y. Tipton, a licensed land engineering surveyor, identified the map, Exhibit P-1. This map was drawn to scale, and depicts the railroad tracks crossing Fourth North, and also the buildings in the vicinity, a gravelled road, line of telephone poles, curbs and sidewalks, stop signs, etc. (R. 13-17). Mr. Tipton also testified he took two pictures, Exhibits P-2 and P-3. Exhibit P-2 was taken from a point on the map, Exhibit P-1, designated as No. 1 picture, and it is about half way across the crossing and looking in a northwesterly direction. Exhibit P-3 was a picture taken by Mr. Tipton east of the crossing and looking west. The point where the picture was taken was designated on the map, Exhibit P-1, as No. 2 picture (R. 17-22).

Mr. Tipton said he could observe the track for approximately a quarter of a mile or a half mile, depending on what the obstruction would be from point No. 1, which is illustrated by the picture, Exhibit P-2. Picture No. 1 was taken about in line with the watchman's house. If the watchman were looking to the northwest he could see about what would be shown in picture No. 1, Exhibit P-2.

Mr. Tipton stated that at a point about 20 feet to the west, where picture No. 2, Exhibit P-3, was taken, there would be no impairment of vision from any permanent, fixed object, and that point would be 190 feet east of the east rail of the track where the accident occurred.

Glen S. Cahoon and Curtis Coombs, police officers, investigated the accident involved in this case. They arrived there about 11:54 a.m. There was a train on the west track at the intersection with a diesel and 27 cars. There was a damaged automobile south of the intersection 97 feet 7 inches from what the officers determined to be the point of impact of the engine and the automobile (R. 32-33-50-52). Witness Cahoon marked Exhibit P-1 with an "X" where they determined the point of impact. He also marked on the map a point which he figured was 97 feet 7 inches south of point of impact. This mark represented where the Gregory automobile came to rest after the accident. Exhibit P-8, a picture, is a view of the right side of the Gregory car. P-9 is a front view of the Gregory car. P-10 is another view of the right side of the Gregory car. P-11 is another view of the right side of the Gregory car. P-12 (R. 35-36) is a view to the north of the track on which the accident occurred. Officers Curtis and Cahoon both testified there were box cars to the north of the intersection (R. 44 and R. 65).

The plaintiff, Pearl Gregory, could not offer much information as to the accident. She was 61 years of age at that time and the wife of Marion Gregory, the driver of the automobile. On account of the grievous injuries she sustained, she remembers nothing immediately before or after the accident, except she stated she did remember some box cars. Her hospital bills, not including the doctor bills, amounted to \$686.70. Mrs. Gregory was unconscious for several days after the accident (R. 73).

The plaintiff's only eye witness to the accident was

her husband, Marion Wilson Gregory, who died prior to the trial. The first 27 pages of his deposition were read into the record at the trial. On appeal, to save costs of transcribing the deposition, it was included in the record. Reference to pages will be referred to by "D-....."

At the deposition, Mr. Gregory was questioned by the same attorney who handled the case at the trial court.

Marion W. Gregory was 71 years of age at the time of the accident (R. 51). His eyesight and hearing were good. He was a laborer. He came from Oklahoma and Texas to Salt Lake City in 1944. He had seven living children. The car involved in the accident belonged to him and was a 1940 Dodge 4-door sedan, properly inspected.

On December 26, 1955, at about 11:20 a.m., he drove to a filling station. The plaintiff was in the car on his right side, and they intended visiting a son at Garfield. It was a nice, clear, dry day — no snow (D-17). He drove south to 4th North and turned right to the railroad crossing (D-8). He was acquainted with the crossing, had been over it lots and lots of times, and had seen a watchman there lots and lots of times (D-8 and 12). He knew where the watchman's shanty was (D-11).

He approached the crossing and stopped. He heard noises, a motor running, no bells. There was no watchman there to stop him (D-10, 11, 12 and 13). After Mr. Gregory stopped and saw the road was clear, and assumed he had the right of way on account of no watchman, he started with the car in low gear (D-10). He figured because there was no flagman there to stop him, he had the

right of way; that if there was a train coming, there would have been a flagman there (D-13 and 14). He noticed there were box cars setting on the tracks to the north. He could not definitely tell just where the cars were from the locomotive, but his judgment was two or three tracks to the east and fifty yards to the north (D-19 and 20). As they proceeded west across the tracks, Mr. Gregory did not see the approaching train until he was possibly on the track or within six or eight feet of the track. His car was in second gear when he was struck. The train sounded like a cyclone. There was no radio going in his car — no conversation prior to the accident. He figured his speed as very slow, but, as he said, it was merely an estimation, or, as he said again, “guess work,” for both him and the attorney (D-20 to 26).

ASSIGNMENT OF ERROR

The plaintiff makes the following assignment of error:

I.

The court erred in granting defendant's motions for directed verdict (R. 3 to 5 inclusive).

ARGUMENT

THERE WAS SUFFICIENT EVIDENCE OF DEFENDANT'S NEGLIGENCE TO BE SUBMITTED TO THE JURY, AND THE COURT WAS NOT JUSTIFIED IN GRANTING DEFENDANT'S MOTIONS FOR DIRECTED VERDICT.

There is only one assignment of error set forth, and it is upon that one point the plaintiff relies.

The first motion offered by defendant (R. 3) had two grounds:

1. That there was no evidence that the defendant was guilty of any negligent act or omission.

2. That the uncontradicted evidence showed the sole proximate cause of plaintiff's injuries was her own negligence or the negligence of her husband, the driver of the car.

In the second motion (R. 4), the defendant sets forth four grounds for the motion for directed verdict:

1. That there was no evidence to prove that the railroad was negligent.

2. There was no evidence that any negligence on the part of the defendant was the proximate cause of plaintiff's injuries.

3. The uncontradicted evidence was that the sole proximate cause of plaintiff's injury was the negligence of the driver of the automobile.

4. The uncontradicted evidence was that plaintiff was guilty of contributory negligence.

The order (R. 5) granted the motions of defendant. The motions were practically the same, and the court in its order said they had been argued and fully considered (R. 5). The argument appears on about five lines (R. 72). The court's full consideration of the matter falls in one line wherein he says: "I believe the motion is well taken" (R. 74).

The evidence clearly shows that this intersection is on 4th North, one of the busy streets of Salt Lake City, and that it crosses either six or seven tracks (Exhibit 1). The track upon which the train was running curved to the northwest north of the intersection, as can be seen from the picture, Exhibit 12, and the map, Exhibit 1. The uncontradicted testimony of Marion Gregory, the driver of the automobile, who is now deceased, shows that it was customary to have a flagman there when trains were about to cross the intersection. Mr. Gregory had gone over that crossing, as he said, "lots and lots of times," and on that date his positive testimony was there was no flagman. His testimony as to how he depended on the watchman will be found in his deposition:

"Q. You told me you heard the sound of the Diesel Engine as you came from the east before you got on the tracks?

"A. That is right.

"Q. Did that sound stop?

"A. Well I wouldn't say it stopped, and I wouldn't say it kept on because, for this reason, just like me, you or anybody else, if you was to drive down here to a crossing that you knew that you was supposed to be stopped by a flagman, or some sign like that to keep you from driving onto a track or anything; after there was none there, I felt safe and I felt that the right-of-way was mine, which I have crossed that track before then, when there was trains coming and stopped in 20 feet of that crossing there. And when there was no flagman there to stop you and you had the right-of-way and you knew you had the right-of-

way, you would feel safe in driving on too and that is just what I did.

“Q. Well, Mr. Gregory, as I understand it then you looked for the watchman, and when you saw no watchman, and you saw the way ahead of you clear, you figured you had the right-of-way?

“A. I figured I was safe.

“Q. You figured you were safe, you had the right-of-way, so you then proceeded on because of there not being a watchman, you figured it was clear.

“A. That is right.

“Q. And you had no recollection of hearing that Diesel Engine again after that?

“A. Well, not particularly. Just like any other man. If you thought you was safe, and the watchman was supposed to be there to take care of a thing like that, you wouldn't expect it to run across on you.

“Q. When you didn't see a watchman there, you just relied on the fact the way was clear and went ahead, is that right?

“A. That is right.” (D-13 and 14).

While the absence of a flagman will not absolve a person approaching a railroad crossing from the duty of exercising ordinary care for his own safety, however, if a traveller knows that the crossing is protected by a flagman and upon his approach observes that a flagman is not there to give warning, the traveller may regard that fact as some insurance to him that he can safely proceed.

Pippy v. Oregon Short Line R. Co., 79 U. 439, 11 P (2) 305, at page 309, says:

“and that when a traveler approaching a crossing has an unobstructed view of the track for a sufficient distance to see and discover a train in time to avoid colliding with it and advances upon the intersection and is struck by the train, a presumption arises that he did not look or if he did look he did not heed what he saw and thus is guilty of negligence, *unless under circumstances of exceptional cases where he is misled without his fault by some act of the company.* (Italics ours) *Clark v. Union Pac. R. Co.*, 70 Utah 29, 257 P. 1050.”

Tanzi v. New York Central Railroad Co. (Ohio Supreme Court, 1951) 98 N.E. 2d 39, 24 ALR 2d 1151:

“Where a railroad does undertake to provide a watchman to warn of the approach of all trains at a crossing, it should reasonably anticipate the effect of its having undertaken such an obligation. If it does, it may readily anticipate injuries to innocent parties due to a failure to give a customary warning which is reasonably expected by a motorist. In effect, the railroad has so acted as to induce others to act in reliance upon its action. Even if such others are negligent as a matter of law in so acting, the result of the action of the railroad may be to put innocent third parties in peril. . . .”

“The rule generally recognized is that, notwithstanding that a railroad is under no duty to maintain a flagman at a particular crossing, if it has customarily provided one to warn of the approach of all trains to that crossing, then, at least so far as persons who know of that customary

practice are concerned, the failure of a watchman to warn of an approaching train may constitute negligence, even in an instance where the approach of such train would not ordinarily involve an unusual hazard to an approaching automobile. . . .”

The annotation following the above case at 24ALR2d 1161 discusses the absence of a customary flagman at a railroad crossing.

Mr. Gregory, as he put it, had traveled over this 4th North crossing lots and lots of times. He grew to depend upon the watchman giving him a signal when a train was approaching, and the absence of the watchman in this case was definitely negligence on the part of the railroad. The railroad was also negligent in failing to keep a proper lookout for the Gregory automobile crossing the intersection. The railroad failed to sound a whistle or ring a bell to warn the Gregorys of their approach, and this omission constituted negligence. Even if the testimony as to the lack of warning by bell or whistle is negative it is a question for the jury.

Hudson v. Union Pacific Railroad Co., (Supreme Court of Utah 1951), 120 Utah 245, 233 Pacific 2d 357.

The Gregory car was going at a slow rate of speed. The railroad had an opportunity of observing it, and should have blown a whistle, rung a bell or stopped the train. The train did not come to a stop until 612 feet beyond the point of impact. The snapshots, plaintiff's Exhibits 8, 9, 10 and 11, show the terrific force with which the diesel struck the Gregory car. These pictures also show without question that this was not one of those cases

where the front of the automobile struck the side of the diesel, but this was a case where this car was struck by the diesel and knocked and dragged 97 feet south on the track.

Plaintiff's Exhibit 12 is a very good picture looking north along the track from the crossing where the accident occurred. This exhibit demonstrates clearly that the train would have to come around a bend at a point north of the intersection, and it would be very difficult for a traveller to see the approaching train until it was quite close to the intersection. It also shows the difficulty that a driver of a car would have in seeing the approaching train should there be box cars to the north of the track, which there were in this case.

The court's ruling, perhaps, would have been correct if Marion Gregory, the driver, were the plaintiff in the action. He is *not* the plaintiff; Pearl Gregory, his wife, is the plaintiff.

Benson v. Denver & Rio Grande R.R. Co., 4 U. (2) 38, 286 P.(2) 790.

In this case it is unfortunate that she only had the cold testimony of her husband in a deposition. It is unfortunate that on account of the severe injuries she sustained that she had no memory as to what occurred before or after the wreck, and it must be presumed, in the absence of contrary evidence, that she did everything necessary to protect herself.

Utah is committed to the doctrine that a guest may recover against a third person despite the contributory negligence of a host driver. In other words, the negli-

gence of Marion Gregory was not imputable to the plaintiff.

Hudson v. Union Pacific Railroad, supra;
Zenakis v. Garrett Freightlines, 1 U(2) 299, 265
 P(2) 1007.

Assuming for the sake of argument but not conceding as a fact, that Marion Gregory was negligent, if the negligence of the railroad company was a contributing factor, and contributed to the proximate cause of plaintiff's injuries, then the court was definitely wrong in its rulings. Can this court say, or anyone say, from the evidence in this case that plaintiff's injuries were caused solely by the negligence of Marion Gregory? The uncontradicted evidence shows there was no watchman, shows that Marion Gregory had grown dependent upon the watchman at that particular crossing, and that on this morning when he saw there was no watchman there, and he looked up and down and proceeded to cross, and as he got on the railroad track, it sounded like a "cyclone," and that is all he remembers.

A great deal was made by counsel for the railroad company in examining the 71-year-old, uneducated laborer from Oklahoma on pinning him to a definite speed. The old man said he was going slow, and there is no question but that he was going slow, but whether that slowness was 4, 6, 10 or 15 miles per hour, or even more, is open to conjecture as Mr. Gregory said it was his estimation and his guess.

Defendant cannot point out in any way, shape or form any contributory negligence by Mrs. Gregory. She

was grievously injured and had no memory of what occurred either before or after the accident. There is evidence of her severe head injuries, in this record for only one purpose, to show that her statement that she had no memory was not exaggerated. As the judge in the lower court said, this directed verdict amounts to nothing more than a non-suit (R. 75), and in granting this directed verdict or non-suit, every presumption is in favor of the plaintiff and against the defendant who makes the motion.

Plaintiffs contend that in granting defendant's motion for a directed verdict the trial court failed to give due weight to the well-settled rule that a directed verdict is not proper unless, after taking all the evidence in the light most favorable to the plaintiff, and all inferences reasonably drawn therefrom, there is nothing upon which a finding in favor of the plaintiff could be supported.

The jury could reasonably have found that the negligence of defendant's watchman in failing to warn the driver caused Mr. Gregory to proceed. The jury could have reasonably inferred that if the watchman had warned the driver, Mr. Gregory, he would have heeded and stopped. The jury could have found and could have reasonably inferred that the negligence of the railroad to warn Mr. Gregory by sounding a whistle or bell caused the accident.

"It is well to keep in mind . . . that rights and duties of a traveler and of a railroad company at crossings are mutual and reciprocal. The whole duty is not cast upon either one or the other to prevent collisions and injuries. The traveler may

not carelessly and heedlessly attempt to pass on a crossing on the assumption that the railroad will look out for him. Neither may a railroad company, merely because it is the favored traffic, carelessly and heedlessly operate its trains over crossings at an unusual and excessive speed and without giving adequate warnings, or create a misleading set of circumstances and rely upon the assumption that the traveling public may look out for their safety and keep out of the way of the trains." *Toomer's Estate v. Union Pac. R. Co.*, 121 Utah

37, 239 P(2) 163.

The railroad failed in its duty to the plaintiff and even though the driver, Mr. Gregory, was negligent, the plaintiff's case should have been submitted to the jury. We need not bolster with authority that rule of law that determination of what is the proximate cause of an accident is essentially a jury question.

Valles v. Union Pac. R. Co., (Idaho) 238 P. (2) 1154.

CONCLUSION

Plaintiff contends that the trial court acted arbitrarily in not allowing this case to go to the jury. There was clearly a jury question presented to the court and the negligence of the defendant could be predicated upon the following:

- (a) Excessive speed.
- (b) Failure to keep lookout.

(c) Failure to give proper warning by whistle or bell.

(d) Absence of customary flagman at railroad crossing.

One or all of the negligent acts of the defendant were the proximate cause of the injuries sustained by the plaintiff.

All of these points, except the speed, were supported by uncontradicted evidence and the speed could be deduced from the exhibits.

The plaintiff respectfully asks that the trial court grant the plaintiff a new trial.

Respectfully submitted,

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