1967

# Robert Kingsley Wells v. The Denver & Rio Grande Western Railroad Company : Respondent's Brief

In the

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...RT KINGSLEY WE...,

*Plaintiff and ...*

vs.

...ENVER & RIO G...
...RN RAILROAD ...
...poration,

*Defendant and ...*

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TABLE OF CONTENTS


| | Page |
|---|---|
| STATEMENT OF THE KIND OF CASE | 1 |
| DISPOSITION IN LOWER COURT | 1 |
| RELIEF SOUGHT ON APPEAL | 1 |
| STATEMENT OF FACTS | 2 |
| ARGUMENT | 6 |
| POINT I. | |
| THE TRIAL COURT DID NOT ERR IN DIRECTING A VERDICT OF "NO CAUSE OF ACTION" | 6 |
| CONCLUSION | 18 |


CASES CITED


| | |
|---|---|
| Benson vs. Denver and Rio Grande Western Railroad Company, 4 Utah 2d 38, 286 P. 2d 790 | 6 |
| Bordenave vs. Texas and New Orleans Railroad Company, 46 So. 2d 525 (La. 1950) | 11, 12 |
| Brown vs. Louisville and Nashville Railroad Company, 234 F. 2d 204 (5th Cir. 1956) | 16 |
| Buchthal vs. New York Central Railroad Company, 334 Mich. 556, 55 NW 2d 92 | 12 |
| Gosnell vs. Baltimore and Ohio Railroad Company, 189 Md. 677, 57 A. 2d 322 | 15 |
| Gregory vs. Denver and Rio Grande Western Railroad Company, 8 Utah 2d 114, 329 P. 2d 407 | 8, 9, 10, 13, 14 |
| Hymel vs. Texas and New Orleans Railroad Company, 145 So. 2d 138 (La. 1962) | 15 |

TABLE OF CONTENTS — (Continued)


Page

Hynek vs. Kewaunee G. R. & W. Railway Company, 251 Wis. 319, 29 NW 2d 45 ..... 15

Illinois Central Railroad Company vs. Smith, 243 Miss. 766, 140 So. 2d 856 ..... 15, 16

Keegan vs. Chicago M. S. and P. P. Company, 251 Wis. 7, 27 NW 2d 739 ..... 13

Lawrence vs. Bamberger Railroad Company, 3 Utah 2d, 247, 282 P. 2d 335 ..... 11

Levendosky vs. Chicago, Milwaukee, St. Paul and P. Railway, 223 F. 2d 395 (8th Cir. 1955) .. 14, 15

Martin vs. Rivers, 72 So. 2d 789 (Fla. 1954) ..... 15

Matthews vs. New Orleans Terminal Company, 45 So. 2d 547 (La. 1950) ..... 15

Missouri-Kansas-Texas Railroad Company of Texas vs. Lane, 213 F. 2d 851 (5th Cir. 1954) .. 15

New York Central Railroad Company vs. Monroe, 188 F. Supp. 826 (S.D.N.Y. 1960) ..... 16

Nuttall vs. Denver and Rio Grande Western Railroad, 98 Utah 383, 99 P. 2d 15 ..... 6

Reedy vs. Missouri, Kansas, Texas Railroad Company, 347 SW 2d 111 (Mo. 1961) ..... 16

Schroht vs. Voll, 245 Minn. 114, 71 NW. 2d 843 ..... 12, 13

Van Wagoner, et al vs. Union Pacific Railroad Company, 112 Utah 189, 186 P. 2d 293 ..... 10, 11

Wilkinson vs. Oregon Short Line Railroad Company, 35 Utah 100, 99 P. 466 ..... 6

# In the
# Supreme Court of the State of Utah

ROBERT KINGSLEY WELLS,
*Plaintiff and Appellant,*

vs.

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

Case No. 10605

# RESPONDENT'S BRIEF

## STATEMENT OF THE KIND OF CASE

This is an action to recover damages for personal injuries arising out of a railroad crossing accident.

## DISPOSITION IN LOWER COURT

The trial court granted defendant's motion for directed verdict at the conclusion of plaintiff's case and subsequently entered judgment on the verdict dismissing the action.

## RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the judgment below and an order granting a new trial.

## STATEMENT OF FACTS

The defendant offered no evidence in view of the trial court's ruling on the motion for directed verdict. Accordingly, the only evidence before the court is that presented during the course of plaintiff's case. The Statement of Facts prepared by counsel for plaintiff is correct but incomplete. We shall attempt to supplement the Statement of Facts set forth in Appellant's Brief in those particulars deemed material to the appeal.

At the crossing where the accident occurred there are eight tracks which cross Fourth North Street. The collision occurred on the western-most track which is the main line of the Denver & Rio Grande Western Railroad Company. Thus, the automobile in which plaintiff was riding had crossed seven sets of tracks before the collision on the Rio Grande track. There is a distance of approximately 25 feet between the seventh track and the track where the collision occurred, which provided ample space for the motorist to stop his vehicle and wait for traffic on the Rio Grande track.

There was no obstruction to a motorist's view of the approaching train. The train had an engine headlight burning, the engine bell was ringing and the crossing whistle was sounded intermittently as the train approached the crossing. Plaintiff's evidence also established that the driver of the automobile, Mr. Lawrence, did not see the approaching locomotive and did not hear its bell or whistle. In fact, Mr. Lawrence was unaware that there was a train on the track until after the impact. An independent eye witness called by plaintiff estab-

lished that the train was in plain view; that the train's engine headlight could be seen for a considerable distance from the direction in which the train was approaching and that the signals sounded by the train were clearly audible.

Lawrence was intimately familiar with the crossing where the accident occurred. He had invariably gone over this crossing as he went to and from work and in addition drove his wife to and from her employment each day, five days a week. Thus, he had traversed the crossing an average of four to six times a day, five days a week for ten years prior to the accident (R. 79, 91). Since he had worked night shift for five years immediately prior to the accident, he was familiar with traffic to be expected during the late evening hours (R. 82). Both Lawrence and Wells had oftentimes waited for Rio Grande trains on the main line track of the Rio Grande while returning from their work at the close of the night shift (R. 98,112). Lawrence testified that he "knew there wasn't any crossing watchman after 11 o'clock at night"; that he wasn't "relying on any crossing watchman being there on this particular occasion" because he knew the watchman had left at 11 o'clock; that he "knew there wasn't any flashing warning signals or gates" and further:

> "Q. So as you entered and crossed those tracks, you knew you would have to rely on your own faculties of sight and hearing?
>
> A. Yes, sir."

( See R. 92-93)

The weather was clear and cold and visibility was good (R. 83, 96, 105). The crossing was lighted with at least three area lights at or near the point of the accident (R. 95). During the entire course of the automobile's travel over the crossing there was nothing which obstructed the driver's view in the direction of the approaching locomotive (R. 72-74, 94, 101). Further, there were no other trains on any of the other tracks to distract the attention of the motorist (R. 93).

As the automobile approached the crossing, Wells had his eyes shut. Lawrence's account of the accident was simply that he had stopped prior to crossing the first track; that he had looked both ways and proceeded west across the tracks at a speed of 10 miles per hour, and that the next thing he remembers is that he was placed in an ambulance (R. 84, 96, 98). The automobile was new, in excellent condition and equipped with power brakes. Lawrence testified "I could have stopped on a dime" and "I believe I could have stopped instantly" (R. 97). The windows on the automobile were rolled up and clear. The radio was turned off and the two occupants were not conversing (R. 86, 97, 109, 110). The evidence discloses that Lawrence drove his automobile a distance of approximately 150 feet from the point where he crossed the first Union Pacific track to the point of impact (Exhibit 1-P).

As the train approached from the north, its headlight illuminated the way ahead for a distance of approximately one city block (R. 143, 147). The engine bell was ringing (R. 143, 144) and the whistle was sounded

in alternate sequence commencing at a point approximately one block north of Fourth North Street, the final blast still being sounded as the train entered the crossing (R. 144, 150). The engineer's position in the locomotive made it impossible for him to see the approaching vehicle (R. 136, 137). The fireman had a view to the front and also in the direction of the approaching automobile and he yelled for the engineer to "big hole it" when the engine was "pretty near to the crossing" whereupon the engineer engaged the emergency brake, but it was too late to stop the train (R. 69, 70, 136-137, 142, 145). The impact occurred about 20 to 30 feet onto the crossing (See Exhibit 1-P). The engineer testified that the brakes made a good application and that the train made a good stop. The train traveled a distance of 204 feet from the point of impact (R. 69).

An independent eye witness called by the plaintiff saw the accident from a point approximately one-half block north of the crossing (R. 153, 54). He testified:

> "I distinctly remember the light [on the train] . . . I was right close to the train and I could see kind of a glow from the light; the train was quite a ways away at that time, but I knew it was coming, and I was hurrying to get to work because I was late; consequently, knowing the train was coming, I ran for a while there so I could get across the tracks — wouldn't get blocked; quite frequently large freights go through and delay me even more." (R. 158).

This witness further testified that as the train approached its headlight beam was so intense that he turned his back to the train so that the light would

not hurt his eyes (R. 155). Upon turning his back to the train this witness first observed the Lawrence automobile entering the crossing (R. 155). When he first saw the automobile, it had not yet crossed the eastern-most track. He did not see the automobile stop, although he testified that it appeared to have slowed for the crossing (R. 161).

On the basis of plaintiff's evidence the defendant at the close of plaintiff's case moved the court for a directed verdict upon the grounds that there was no evidence of negligence on the part of the railroad company which could have been a proximate cause of the accident and that the negligence of the driver of the automobile was the sole proximate cause of the accident. The motion was granted and this appeal followed.

## ARGUMENT

### POINT I

### THE TRIAL COURT DID NOT ERR IN DIRECTING A VERDICT OF "NO CAUSE OF ACTION"

That Lawrence was guilty of negligence which was a proximate cause of the accident is certain and undisputed. *Wilkinson vs. Short Line Railroad Company.* 35 Utah 100, 99 P. 466; *Nuttall vs. Denver and Rio Grande Western Railroad* 98 Utah 383, 99 P. 2d 15; *Benson vs. Denver and Rio Grande Western Railroad Company,* 4 Utah 2d 38, 286 P. 2d 790. Defendant contends that the negligence of Lawrence was the sole proximate cause of the accident and that the plaintiff offered no

evidence from which a jury could reasonably find that the defendant was guilty of negligence in any particular which proximately contributed to the accident.

Plaintiff's theory of the case as set forth on pages 9 and 10 of the Brief of Appellant is that the fireman either knew or should have known that Lawrence was unaware of the approaching engine at a time when the fireman and engineer could still take evasive action which would prevent the collision. It is apparently plaintiff's contention that the fireman, having an opportunity to see the approaching automobile, should have directed the engineer to make an emergency application of the brakes at a time when the train was still far enough from the crossing to avoid the collision. This argument is founded solely upon the factual circumstance that the Lawrence automobile approached the Rio Grande track for a distance of approximately 150 feet at a speed of 10 miles per hour. From this evidence, counsel for plaintiff somehow concludes that the engineer should have known what was in the mind of Lawrence, to wit, to proceed directly onto the Rio Grande track immediately in the path of the approaching locomotive without stopping or slowing.

Actually there is no possible way the fireman could have known or anticipated such action on the part of the motorist and under the circumstances he certainly had no duty to anticipate the gross neglect of Lawrence as the auto slowly approached the Rio Grande track. There was no other rail traffic to concern or distract Lawrence. He had a 25-foot safety zone between the seventh U.P. track and the Rio Grande track. This was the logical

place for an approaching vehicle to stop in yielding the right-of-way to the train. At the speed he was traveling Lawrence could have stopped almost instantly. The train crew gave every conceivable warning of the approach of the locomotive and there was no unusual circumstance which in any way served as a warning that the motorist was oblivious to the approach of the train. The engineer testified that "lots of times" approaching automobiles stop almost at the track (R. 149).

Counsel for plaintiff rely upon general principles to the effect that a railroad company has a duty to exercise reasonable care and diligence to prevent injury and to act reasonably to utilize the means at hand to avoid an accident. These general rules are conceded to be correct. They are neither controlling nor persuasive for plaintiff's cause, however, when applied to the facts of this case. There is not a single case or authority cited in the Brief of Appellant which deals with facts and circumstances similar to those before the court in this case. The fallacy of plaintiffs theory in this case is that it fails to take into account that there was no possible means available to the fireman to avoid the accident at the time when there first arose a duty on his part to be aware of the peril of plaintiff. There is considerable case law pertinent to this point.

The decision of the Utah Supreme Court in *Gregory vs. Denver and Rio Grande Western Railroad Company*, 8 Utah 2d 114, 329 P. 2d 407, determines the very issue presented in this case. Coincidentally, the accident in the *Gregory* case occurred at the very same crossing

and on the same track where the collision occurred in the case at bar. The plaintiff in the *Gregory* case was a passenger in a vehicle approaching the crossing from the same direction as the Lawrence vehicle and the train was approaching from the north on the same track. The case was tried before the late Ray VanCott, Jr., Judge, sitting with a jury and a motion for directed verdict was made at the conclusion of plaintiff's case. The court granted defendant's motion, dismissed the action and the cause was appealed to the Supreme Court and affirmed. Plaintiff seeks to distinguish the *Gregory* case upon the contention that the accident in that case occurred during daylight hours and the train was traveling at a greater speed. Neither contention has merit because plaintiff's own evidence shows that the train in the case at bar was clearly visible to the approaching motorist and that at the speed defendant's train was traveling (20 miles per hour) it took in excess of 200 feet to make a good stop.

In deciding the *Gregory* case in favor of the railroad company, this court held that there was no evidence from which a jury could reasonably find that the railroad company was negligent. In a separate concurring opinion Mr. Justice Crockett disposes of the very contention now made by counsel for plaintiff in the case at bar. (8 Utah 2d 114, 117).

> "I concur in affirming the judgment but upon a different ground: that viewing the evidence even in the light most favorable to plaintiff, the negligence of Mr. Gregory was the sole proximate cause of the collision. I don't see how reasonable minds could find to the contrary. *He approached*

*this expanse of at least eight railroad tracks at a very slow rate of speed, so that at any instant he could have stopped his car within a very few feet. There was no reason why he could not have seen the train which was coming from the north. Under the old and well-established rule, this impales him upon the horns of a dilemma: he either failed to look; or he looked and failed to heed.*

*The train crew had the right to assume that Mr. Gregory would stop and would not proceed in front of the train, until the time something occurred to warn them to the contrary. Particularly in view of his very slow speed, this would not be until he got quite close to their track, at which time the train was practically upon him. It is contrary to the generally known laws of physics and common sense to expect the train, with its great weight and momentum, to stop within the short distance available after the instant it should have become apparent that Gregory was not going to stop. After that point was reached, there is nothing the crew could have done to avoid the collision. And this is true whether the train was travelling fast or slow and whether the crew saw him or not."* (Emphasis added)

It is difficult to conceive of a precedent more closely in point than the *Gregory* case.

The rationale of Mr. Justice Crockett in the *Gregory* case is supported by other decisions of our Supreme Court. One of these decisions is *Van Wagoner, et al vs. Union Pacific Railroad Company,* 112 Utah 189, 186 P. 2d 293. In *Van Wagoner* the engineer was on the side away from the approaching motor vehicle and the brakeman

first saw the vehicle when it was approximately 160 feet from the track but did not realize that the vehicle was not going to stop until it was approximately 25 feet from the track. In holding for the railroad company the majority opinion said: (112 Utah 189, 204)

> "On the other hand, if appellants contend that by keeping a proper lookout, the crew could have stopped the train, the evidence establishes otherwise. Failure to maintain a proper lookout was not a jury question."

In a separate concurring opinion Justice Wolfe dealt with the issue as follows:

> "I think the evidence together with all legitimate inferences therefrom is all one way, that the train, even with the best of lookouts, could not be stopped after it became apparent to the crew that the driver of the truck was not going to stop. There simply was not time then for the train to be stopped in order to avoid the collision. . . .

See also *Lawrence vs. Bamberger Railroad Company,* 3 Utah 2d, 247, 282 P. 2d 335, where the court under similar circumstances affirmed defendant's motion for directed verdict made at the close of plaintiff's case.

The Reporters are replete with railroad crossing cases involving similar circumstances. These decisions fully support the rationale and holding in the *Gregory* and *Van Wagoner* cases *supra.* In *Bordenave vs. Texas and New Orleans Railroad Company,* 46 So. 2d 525 (La. 1950) plaintiff was passenger in an automobile which proceeded over a series of six tracks and was struck on the seventh track. In an opinion reversing judgment for the plaintiff

tiff, the Louisiana Supreme Court said: (46 So. 2d 525, 530)

> "It would be thoroughly unreasonable to require a train crew to bring the train to a stop to avoid an accident which could only be contemplated as possible and not imminent."

*Buchthal vs. New York Central Railroad Company*, 334 Mich. 556, 55 NW 2d 92, is another suit by a passenger in an automobile involved in a crossing accident. In dealing with the plaintiff's contention that the railroad company had failed to maintain a proper lookout, the Michigan Supreme Court said:

> "Plaintiff contends that under the admitted conditions of good visibility the train crew, particularly the fireman and the engineer, charged with the duty of observing persons lawfully crossing the tracks and of maintaining a reasonable lookout, should have stopped the train when the car became visible. There was no duty upon the train crew to slow down the train or stop, even if they had seen the car. . . .

A case from the Minnesota Supreme Court, *Schroht vs. Voll,* 245 Minn. 114, 71 NW 2d 843, fortifies Mr. Justice Crockett's opinion in *Gregory* under facts very similar to the case at bar. In that case the court said: (71 N W2d 843, 847)

> "The issue as to whether the train was kept under proper management and control was improperly submitted to the jury. Trainmen may reasonably assume that the vehicle approaching a crossing will stop before getting into a position of danger. 'They are not required to assume otherwise until, in the exercise of reasonable care, they should apprehend danger.' Thus, the fireman

> was under no duty to notify the engineer of the truck's approach until it became apparent that the driver was not going to stop and that a collision was imminent. The fireman testified that he expected the truck to stop, and there is no reason why he should have expected otherwise until the contrary became apparent. The truck was proceeding at a relatively slow speed of from 15 to 20 miles per hour. It was not driven in a manner indicative of an intention not to stop. The uncontradicted testimony is that, when it became apparent that the truck was not going to stop for the crossing, the fireman immediately commanded the engineer to stop. The engine was then only 25 to 30 feet from the crossing. *The train was then so close that all efforts of the engineer would not have avoided the collision.*" (emphasis theirs)

In *Keegan vs. Chicago M.S. and P.P. Railway Company*, 251 Wis. 7, 27 NW 2d 739, the fireman observed a truck approaching the crossing for a considerable distance at a speed of 10 to 15 miles per hour but gave no warning to the engineer to make an emergency application of the brakes until the truck was 10 or 15 feet from the track. A judgment for the plaintiff was reversed upon rationale identical to the quoted portion of the opinion in the *Gregory* case. In this case the court reasoned as follows: (27 NW 2d 739, 742)

> "Nothing there said deprives the engine crew of the right to assume that a traveler on a highway will look and listen and not go onto the track into danger when it is apparent that a train is approaching, and to continue this assumption until the contrary becomes apparent or he does something to indicate a contrary intention on his part. (cases cited) The truck in which deceased was riding was traveling at a slow rate of speed,

which is evidenced by the fact that the driver said he could have stopped it within ten feet. There was nothing unusual in the manner in which the truck approached the train, nor is there any proof of facts which would cause a reasonable person to believe the driver of the truck was not aware of the approaching train."

Another case in point is *Levendosky vs. Chicago, Milwaukee, St. Paul and P. Railway,* 223 F. 2d 395 (8th Cir. 1955) where a directed verdict in favor of the railroad company was affirmed upon reasoning as follows: (223 F. 2d 395, 401)

> " '*Travelers in motor vehicles frequently and customarily drive toward an oncoming train and stop just before going upon the tracks in order to permit the train to proceed on its way. There is in such conduct, however, no 'peril' until such wayfarer fails to stop in a zone of safety. Those in charge of the train have a right to assume that he will not drive into danger.*' "
>
> " 'Under the record, after the perilous position of the automobile was in fact discovered by the trainmen, the injury could not have been avoided by the exercise of ordinary care on the part of the men in charge of the train. The employees in charge of the train had the right to assume that the automobile would not be driven heedlessly on the track ahead of the approaching train. It is a matter of common knowledge that automobile drivers frequently drive right up to the track before coming to a stop. Under the record in this case, it is manifest that the employees of the defendant, after they ascertained that the automobile was not going to stop for the crossing, had no time to do more than they did

in the preventing of the collision.'" (emphasis added)

To the same effect is the reasoning of the Florida Supreme Court in a case involving similar circumstances where the court in *Martin vs. Rivers,* 72 So. 2d 789, (Fla. 1954) observed: (72 So. 2d 789, 791)

> *"The fireman had the right, from the facts in the record here, to believe that the deceased was in possession of his faculties and his normal senses, and that with all of the signals of danger, the extent of which were almost overwhelming, he would not walk directly into the path of a moving train. When the fireman finally realized that the deceased was not going to stop and was not going to heed every danger signal possible to give, it was too late for any human agency to extricate the deceased from the situation that he placed himself in or prevent the death which so unfortunately occurred.*
>
> "We conclude that the undisputed facts in this case entitled the railroad company to a directed verdict. Accordingly, the judgment is reversed with directions to enter one in favor of the railroad company." (Emphasis added)

See also *Hynek vs. Kewaunee G. R. & W. Railway Company,* 521 Wisconsin 319, 29 NW 2d 45; *Gosnell vs. Baltimore and Ohio Railroad Company,* 189 Md. 677, 57 A 2d 322; *Missouri-Kansas-Texas Railroad Company of Texas vs. Lane,* 213 F. 2d 851 (5th Cir. 1954); and *Matthews vs. New Orleans Terminal Company,* 45 So. 2d 547, (La. 1950); *Hymel vs. Texas and New Orleans Railroad Company,* 145 So. 2d 138 (La. 1962); *Illinois Central*

*Railroad Company vs. Smith,* 243 Miss. 766, 140 So. 2d 856; *Reedy vs. Missouri, Kansas, Texas Railroad Company,* 347 SW 2d 111, (Mo. 1961); *Brown vs. Louisville and Nashville Railroad Company,* 234 F. 2d 204 (5th Cir. 1956); *New York Central Railroad Company vs. Monroe,* 188 F. Supp., 826 (S.D.N.Y. 1960).

It is submitted that defendant's engineer had no duty to anticipate that Lawrence would fail to stop and yield to the train. Further, under principles of law long established in this and other jurisdictions, the engineer under the circumstances of this case had a right to assume that the slow-moving vehicle would stop and yield to the train and the right to this assumption continued up until the time that the automobile was virtually upon the track, at which time no possible evasive action on the part of the train crew could have avoided the accident.

Counsel for plaintiff has asserted some loose argument in the Appellant's Brief to the effect that plaintiff may have been entitled to the benefit of the doctrine of last clear chance, and that there is some evidence from which a jury could have reasonably found that additional warnings should have been given by the train crew. The first of these two contentions is entirely without merit because plaintiff did not allege last clear chance in his complaint; the pretrial order did not reserve the issue; the contention was not made before the court below by argument, evidence or request for instruction and finally because the contention is squarely at odds with the established case law. The plaintiff in the *Van*

*Wagoner* case *supra* sought the benefit of the doctrine of last clear chance but this court held that the doctrine was inapplicable because the train crew had the right to assume that the motorist would stop until it became apparent that it was not going to do so and that at the time plaintiff's situation of peril became apparent there was then no "clear opportunity" for the train crew to avoid the accident.

Also, there is no basis for the argument that the train crew should have given additional warnings. Counsel for plaintiff embodies this contention in a single paragraph on page 4 of the Brief of Appellant, concluding "obviously this is a jury question." The contention is founded upon the testimony of the eye witness Jaensch that "the whistle stopped blowing somewhere between his position and the crossing." (Page 14 Appellant's Brief.) On cross examination Jaensch testified that he could not remember where the train was when the last signal was sounded and that all he could say was that the whistle ended when the train was somewhere between him and the crossing (R. 160, 161). Under this testimony, the last signal could have been made when the train was 10 or 20 feet from the crossing. The engineer, on the other hand, positively testified that the last signal was still sounding as the train entered the crossing (R. 150). In any event, the undisputed evidence is that both bell and whistle were sounded and that the train was both visible and audible to persons in the area for a considerable distance as it approached the crossing.

## CONCLUSION

It is submitted that the evidence offered by plaintiff fails to provide any reasonable basis for a finding of railroad negligence which was a proximate cause of the accident and that such evidence shows as a matter of law that the driver Lawrence was guilty of negligence which was the sole proximate cause of the accident and of plaintiff's injuries. The judgment below should be affirmed.

Respectfully submitted,

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