1969

Robert L. Velasquez, By and Through His Guardian Ad Litem, Corinne F. Muniz v. Union Pacific Railroad Company, A Utah Corporation; Heinz Reinhold and State of Utah, Public Commission : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

ROBERT L. VELASQUEZ, By and Through His Guardian Ad Litem, CORINNE F. MUNIZ,
Plaintiff-Appellant,

vs.

UNION PACIFIC RAILROAD COMPANY, A Utah Corporation; HEINZ REINHOLD, *Defendants,*

and

STATE OF UTAH, PUBLIC SERVICE COMMISSION,
Defendant-Respondent.

Case No. 11883

BRIEF OF APPELLANT

Appeal from the Third District Court in and for Salt Lake County, State of Utah
Honorable Merrill C. Faux, Judge

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PRELIMINARY STATEMENT

Plaintiff will be referred to as such and Public Service Commission, State of Utah will be referred to as Defendant. All italics are added.

NATURE OF THE CASE

Plaintiff was severely injured when the vehicle in which he was asleep and riding as a passenger was struck by a Union Pacific Railroad Company train at a grade crossing in a residential area in Sandy, Utah on March 9, 1968.

DISPOSITION IN LOWER COURT

Plaintiff filed his Complaint for recovery of damages on May 21, 1969 naming Defendant in his ~~Third~~ Second Cause of Action. Plaintiff's Complaint against Defendant was amended by filing an Amendment to Second Cause of Action pursuant to Order of the Court on July 2, 1969.

Plaintiff's Complaint against Defendant is grounded in negligence and is brought pursuant to and in accordance with the provisions of the Utah Governmental Immunity Act (63-30-1 et seq. U.C.A., 1953). Plaintiff's Complaint alleges violation of statutory duty imposed upon Defendant by the provisions of 54-4-14, U.C.A., 1953 and 54-4-15(2), U.C.A., 1953.

Defendant filed Motion for Summary Judgment on August 4, 1969 and the lower Court granted Summary Judgment in favor of Defendant on September 19, 1969.

RELIEF SOUGHT ON APPEAL

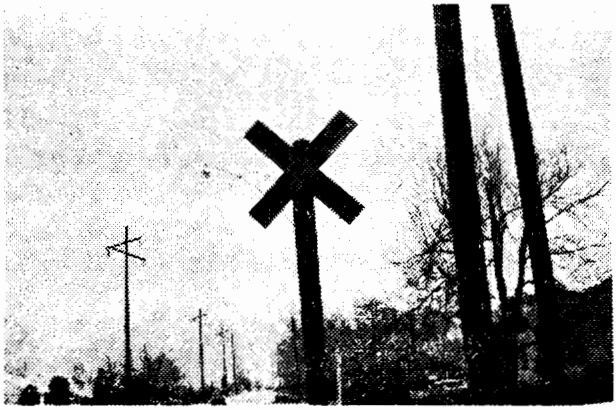
Plaintiff seeks to have the Summary Judgment entered by the lower Court vacated and to have the case remanded to the lower Courft for trial.

STATEMENT OF FACTS

On March 9, 1968 Plaintiff and two other boys were returning home after having been to a drive-in movie. On the way home they were to pick up the older brother of one of the boys who had been visiting with his girlfriend in Sandy. The vehicle was being driven by Manuel Ortega. Plaintiff fell asleep during the movie and was asleep from the time they left the drive-in until the time of the accident, which occurred at 400 North and 100 East in Sandy, Utah. The driver was not acquainted with this area and had never traveled up 400 North either as a driver or a passenger and had no knowledge that there were any railroad crossings in the vicinity and there were no advanced railroad warning signs as they approached the crossing (Deposition of Manuel Ortega, July 3, 1969 pp. 7-10).

The driver did not even know there was a railroad crossing in the area until just before his wheels went onto the tracks (Ortega Deposition p. 13).

The only safety device at the grade crossing in this residential area was a faded out "crossbuck" which was hard to see (Ortega Deposition, p. 14), a view of which is reproduced below in black and white (Ortega Deposition, Exhibit No. 6).



An average of Thirty-six (36) trains per week passed over this crossing during the year preceding March 9, 1968 (Union Pacific Railroad Company's Answers to Interrogatories, dated September 5, 1969, Answer 97).

After Defendant filed its Motion for Summary Judgment, Plaintiff filed an Affidavit in Opposition to the Motion for Summary Judgment. In Paragraph 2 of that Affidavit, Plaintiff stated that he would "introduce evidence intending to show and prove that Defendant State of Utah Public Service Commission was negligent in the following particulars" which are paraphrased as follows:

(a) That Defendant had no requirements for the periodic painting or maintenance of crossbucks.

(b) That there were no advanced warning signs approaching the crossing.

(c) That Defendant negligently failed to prescribe regulations to keep crossings free and clear of weeds, bushes, trees and other obstructions.

(d) That Defendant was, in fact, aware of the deteriorated condition of the single sign at the grade crossing in question and had negligently failed to take appropriate steps to insure its replacement or repair.

(e) That the volume of trains passing over the crossing weekly and the large volume of motor vehicle traffic through the crossing required the installation of automatic safety devices in order to protect the traveling public and it was negligent for the Public Service Commission to fail to require the installation of automatic signaling devices and that these acts of negligence were the proximate cause of the accident resulting in Plaintiff's injuries and that the Defendant had breached its duty toward Plaintiff.

That this Affidavit was available to the Court at the time the Court considered Defendant's Motion for Summary Judgment.

At the time of hearing on the Motion, Defendant introduced, without objection from Plaintiff, a copy of Association of American Railroads, Bulletin No. 6, "Railroad-Highway Grade Crossing Protection, Recommended Practices" and a copy of a resolution indicating that this pamphlet had been adopted by Defendant. This pamphlet merely describes the dimensions, colors and placement of signal devices with respect to distances from the road and tracks and in no way, prescribes recommendations or regulations for evaluation as to what

type of warning device, if any, should be placed at certain types of crossings after due diliberation with respect to volume of railroad traffic, volume of highway traffic, population of surrounding area, character of crossing and other factors which must be considered to make such an evaluation.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN GRANTING MOTION FOR SUMMARY JUDGMENT IN FAVOR OF THE PUBLIC SERVICE COMMISSION.

The Defendant Public Service Commission has a duty to protect the public by requiring proper and adequate safety devices at railroad grade crossings. This duty is created by statute. 54-4-14, U.C.A., 1953 provides as follows:

> Safety Appliances-Regulation. - The Commission shall have power, by general or special orders, rules or regulations, or otherwise, to require every public utility to construct, maintain and operate its line, plant, system, equipment, apparatus, *tracks* and premises in such manner as to promote and *safeguard* the health and safety of its employees, pasengers, customers and the *public* and to this end to prescribe, among other things, the *installation,* use, maintenance and operation of appropriate *safety* or other devices or appliances, including interlocking and other protective devices at *grade crossings* or

junctions ,and block or other system of signaling, and to establish uniform or other standards of construction and equipment, and to require the performance of any other acts which the health or safety of its employees, passengers, customers or the public demand.

The provisions of 54-4-15 (2), U.C.A., 1953 go even further to provide that the Commission shall have the *exclusive power* to provide for safety measures at grade crossings. That Section reads as follows:

> (2) "The Commission shall have the *exclusive power* to determine and prescribe ahe manner, including the particular point of crossing and the terms of installation, operation, maintenance, use and *protection* of each crossing of a public road or highway by a railroad . . . and of a street by a railroad or vice versa, and to alter or abolish any such crossing, to restrict the use of such crossing to certain types of traffic in the interest of public safety . . . ".

Plaintiff alleged that Defendant had breached its duty and was negligent in the following particulars:

(a) Negligently failing to provide for installation of adequate protective devices.

(b) Negligently failing to establish a program to discover dilapidated signs which did not meet Defendant's own standards and to provide for the repair or replacement of such signs.

(c) That Defendant had previously been informed by the Utah Safety Council by letter of May 15, 1967 that the Utah Insurance Agents Association had

made a survey of railroad crossing signs in the Salt Lake metropolitan area and had found many of them to be unsafe with inadequate protective devices and that said letter of May 15, 1967 called particular attention to the problem of dilapidated crossbacks such as the one in existence at the grade crossing involved in this accident and that notwithstanding this notice, Defednant negligently failed to formulate or implement adequate procedures to require the replacement or repair of such dilapidated "crossbucks" and particularly the one in question.

(d) That Defendant negligently failed to formulate, prescribe and issue orders and standards relating to the maintenance of railroad grade crossings with respect to keeping the same clear of weeds, brush, bushes, trees and other obstructions.

(e) That Defendant negligently failed to require installation or provide for the installation of advanced railroad warning signs to give warning of the presence of a railroad grade crossing.

Plaintiff's Affidavit in Opposition to Motion for Summary Judgment stated that Plaintiff would prove that Defendant was negligent as alleged.

All Defendant has shown is that it adopted Bulletin No. 6 of the Association of American Railroads which does nothing more than describe the physical characteristics of certain types of safety devices.

Defendant has not even filed an Answer in this case. Neither party has had an opportunity to engage in discovery. A Motion for Summary Judgment was

most certainly premature and at this stage of the proceedings *there is not one single shred of evidence in the record to refute Plaintiff's allegations of Defendant's* negligence, not even an Answer from Defendant. 6 *Moore's Federal Practice* 2152, §56.11[2] provides:

> If the Motion is made by the Defendants solely on the basis of the Complaint, the Motion is functionally equivalent to a Motion to Dismiss for failure to state a claim under Rule 12(b)(6); the Complaint should be liberally construed in favor of the Complainant; the facts alleged in the Complaint must be taken as true; and the Motion for Summary Judgment must be denied if a claim has been pleaded. Citing *Smoot v. State Farm Mutual Automobile Ins. Co.* (CA. 5th, 1962) 299 Fed. 2d 525, 5 FR Serv 2d 56c. 31, Case 1 and *Gunn v. Association of Casualty & Surety Executives* (ED, Tenn. 1951) 16 FR Serv 56c.41, Case 1.

In *Brandt vs. Springville Banking Company,* 10 Utah 2d 350, 353 Pac. 2d 460, this Court said:

> We are cognizant of the desirability of permitting litigants to fully present their case to the Court and that a Summary Judgment prevents this. For that reason Courts are, and should be, reluctant to invoke this remedy. Citing *Holland vs. Columbia Iron Mining Co.,* 4 Utah 2d 303, 293 Pac. 2d 700.

The reasons for the Court's reluctance to grant Summary Judgments are clearly set forth in *Reliable Furniture Co. vs. Fidelity & Guaranty Insurance Underwriters Inc.,* 16 Utah 2d 211, 398 Pac 2d 685, where this Court said:

> It is appropriate to reiterate that the dismissal of an action at pretrial, which peremptorily turns a party out of Court, is a drastic action which should be used sparingly and with great caution * * * the summary disposal of a case serves a salutory purpose in avoiding the time, trouble and expense of a trial when it is justified. But unless it is *clearly* so, there are other evils to be guarded against. A party with a legitimate cause, but who is unable to afford an appeal, may be turned away without his day in Court; or, when an appeal is taken, if a reversal results and a trial is ordered, the time, trouble and expense is increased rather than diminished. It is to avoid these evils and to *safeguard the right of access to the Courts* for the enforcement of rights and a remedy of wrongs by a trial, and by a jury if desired, that it is of such importance that the Court should take care to see that the party adversely affected has a fair opportunity to present his contentions against precipitate action which will deprive him of that privilege. His contentions as to the facts should be considered in the light most favorable to him, and only if it *clearly* appears that he could not establish a right to recovery under the law should such action be taken; and *any doubts* which exist should be resolved in favor of affording him the privilege of a trial.

The action in this case was even more "drastic" when we consider that the Motion was granted before any responsive pleadings were filed and before the parties could engage in discovery.

A Summary Judgment must be supported by evidence, admission and inference which, when viewed in the light most favorable to the loser, show that there is

no genuine issue as to any material fact and such showing must preclude all reasonable possibility that the loser could have given a trial to produce evidence which would sustain a judgment in his favor, *Thompson vs. Ford Motor Co.,* 16 Utah 2d 30, 395 Pac. 2d 62; *Bullock vs. Desert Dodge Truck Center Inc.,* 11 Utah 2d 1, 354 Pac. 2d 559; *Frederick May & Company, Inc. vs. Dunn,* 13 Utah 2d 40, 368 Pac. 2d 266. With respect to Summary Judgments in this particular type of action *6 Moore's Federal Practice* 2285, §56.15[1.-0] provides that Summary Judgment will normally *not* be warranted in an action based on negligence.

For the purpose of considering the Motion for Summary Judgment the averments of Plaintiff's Complaint must be taken as true and there is simply nothing whatsoever in the record to controvert such allegations let alone challenge such averments to the point of being able to conclude, when viewing the situation in the light most favorable to the Plaintiff, that there is no genuine issue as to any material fact. This follows *a fortiori* when the averments of the Complaint have not even been *challenged.*

CONCLUSION

The Summary Judgment should be vacated and the cause remanded to the lower Court for discovery proceedings and trial.

Respectfully submitted,

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