1971

Karen Lillian Layton and Kathy Layton By and Through Her Guardian Ad Litem Karen Lillian Layton v. Union Pacific Railroad Company, A Corporation, and Denver & Rio Grande Western Railroad Company : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

KAREN LILLIAN LAYTON and KATHY LAYTON by and through her guardian ad litem KAREN LILLIAN LAYTON,

Plaintiffs and Appellants,

vs.

UNION PACIFIC RAILROAD COMPANY, a corporation, and DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, a corporation,

Defendants and Respondents.

Case No. 12618

BRIEF OF RESPONDENT, Union Pacific Railroad Company

Appeal by Plaintiffs and Appellants from a Partial Summary Judgment Entered by the District Court of Salt Lake County, Utah, the Honorable Leonard W. Elton, Judge Presiding, and a Final Judgment Entered by the District Court of Salt Lake County, Utah, the Honorable D. Frank Wilkins, Judge Presiding, and Sitting Without a Jury, Each in Favor of Union Pacific Railroad Company, a Corporation, Defendant and Respondent.

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IN THE SUPREME COURT OF THE STATE OF UTAH

KAREN LILLIAN LAYTON and KATHY LAYTON by and through her guardian ad litem KAREN LILLIAN LAYTON,

Plaintiffs and Appellants,

vs.

UNION PACIFIC RAILROAD COMPANY, a corporation, and DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, a corporation,

Defendants and Respondents.

Case No. 12512

BRIEF OF RESPONDENT, Union Pacific Railroad Company

STATEMENT OF THE CASE

Respondent accepts as sufficient the STATEMENT OF THE KIND OF CASE, the DISPOSITION IN THE LOWER COURT and the RELIEF SOUGHT ON APPEAL as set forth in appellants' brief, but the STATEMENT OF FACTS con-

tained therein is not detailed enough to provide the court with a full and complete explanation of the facts of this lawsuit and respondent therefore supplements said STATEMENT OF FACTS.

STATEMENT OF FACTS

A. HISTORY OF THIS LITIGATION

Appellants' decedent, Kenneth Layton, was killed on January 15, 1965, at the public stockyards in North Salt Lake, Utah. At the time of his death decedent was working in course of his employment with the Salt Lake Stockyards Operating Company and was assisting in unloading hogs from railroad cars into feeding pens of the stockyards after said cars had been spotted at the stockyards docks (R. 195, 226-229; Exhibit 4-P). As a result of his death appellants were paid the compensation provided by the Workmen's Compensation Act of the State of Utah by decedent's employer's carrier, the State Insurance Fund (R. 133).

On November 17, 1966, appellant filed an original complaint and on January 16, 1967, an amended complaint against Union Pacific Railroad Company (hereinafter Union Pacific) alleging that it was negligent, causing the death of appellants' decedent in respect to enumerated items involving construction and maintenance of the track and roadbed upon which the railroad cars were being operated, including the construction of the track as it related to the construction of side struc-

tures consisting of the docks owned by the stockyards company (R. 4-6, 14-16).

Union Pacific answered appellants' amended complaint on January 23, 1967, and in that answer included an allegation that the Denver and Rio Grande Western Railroad Company (hereinafter Rio Grande) was entirely responsible for the maintenance of the trackage and roadbed involved though at the joint and equal expense of Union Pacific and Rio Grande (R. 17). Appellants thereupon sought leave to further amend and did further amend their complaint to include Rio Grande as a party. In that amended complaint, appellants alleged that both railroad defendants were negligent in the construction and maintenance of and operation over, the track and roadbed including its relation to side structures.

The lower court upon motion of the Rio Grande dismissed it from the lawsuit and appellants perfected an appeal from that dismissal which resulted in the decision of this Court dated October 15, 1968, *Layton v. UPRR*, 21 Utah 2d 374, 445 P. 2d 988, wherein this Court decided that Rio Grande was not negligent in the particulars alleged under the admitted facts of the case. The Court said:

> "The facts of this care are not in dispute. The decedent worked for the Salt Lake Union Stock Yards, and at the time he lost his life he was unloading a carload of hogs consigned to his employer. The two defendant railroad companies had a joint lease on the land upon which the tracks were placed, and the D. & R. G. W. pursuant to

agreement with the Union Pacific maintained the trackage but billed the Union Pacific for one-half of the costs thereof. The car in question and the engine moving it belonged to the Union Pacific, and the D. & R. G. W. is not charged with any negligence in the train movement.

"While unloading the hogs, the deceased worked on the dock, which was the property of and in the exclusive possession of his employer. During the unloading operation it is claimed that wet straw fell from the car being unloaded onto the ground underneath and created a slick and slippery condition over and about the tracks.

"The only claims of negligence against the D. & R. G. W. are in substance that (a) it negligently allowed slippery and icy straw to accumulate and be upon the roadbed and tracks; (b) it failed to remove the straw after it knew or in the exercise of reasonable care should have known of its presence; (c) it failed to warn the deceased of the slippery and icy straw; and (d) the roadbed was not properly constructed with reference to side structures.

"It is to be noted that the train was not derailed and that the track was sufficiently maintained so as to permit train traffic thereon without any difficulty. The deceased had no duties which required him to descend to the ground from the dock where his work required him to be. In fact, he slipped and fell from the dock onto the ground, where he was crushed by the trucks of the moving car. The plaintiffs say that he was prevented from escaping the movement of the train by reason of the excess quantity of slick straw upon the ground.

* * *

"The duty to maintain trackage in this case does not require a constant removal of straw which falls from a railroad car while livestock is being unloaded. In fact, it is difficult to see how the D. & R. G. W. could constantly keep the ground free from falling straw without interfering with the unloading operation by the deceased and his fellow employees. It is equally difficult to see how the D. & R. G. W. could foresee that the deceased would slip and fall from the dock and thus be upon the ground at all, since his work was confined to the dock area. The D. & R. G. W. thus owed him no duty to keep the tracks free from straw and ice and had no reasonable time or opportunity to do so.

"We therefore hold under the admitted facts of this case that the plaintiffs cannot state a valid claim against the D. & R. G. W." (R. 95)

Following the action taken by this Honorable Court and upon remand to the District Court, appellants sought and obtained leave to again amend their complaint to allege additional grounds of negligence against Union Pacific. In addition to making against Union Pacific the identical allegations of negligence theretofore made against both defendants in respect to the construction and maintenance of the track, roadbed, and side structures (which had been disposed of contrary to appellants' contentions in respect to Rio Grande) appellants added allegations of negligence in respect to the operation of the switch movement being performed by Union Pacific at the time and place of the accident (R. 118-121).

After receipt of appellants' third amended complaint, Union Pacific filed a motion for partial summary judgment in its favor on the allegations of negligence in respect to construction and maintenance of the track, roadbed, and side structures, basing said motion on the opinion of this Honorable Court wherein it determined that Rio Grande owed no duty toward appellants' decedent in respect to the track, roadbed, and side structures, which had been breached resulting in his death. Union Pacific argued that it had no greater duty, and even less duty to decedent in respect to construction and maintenance of the track, roadbed, and side structures than had Rio Grande. At the hearing on this motion, the court granted Union Pacific's motion for partial summary judgment and entered the same (R. 131, 135-141). Appellants then petitioned this Honorable Court for an interlocutory appeal from said entry of partial summary judgment and that petition was denied. (Case No. 11714 in this Court.)

Following further discovery, the issues in respect to appellants' claims of negligence relating to the operation of the switching movement by Union Pacific were fully tried to the court sitting without a jury and the court found following such trial that appellants had failed to sustain their burden of proving by a preponderance of the evidence that Union Pacific was negligent and granted final judgment to Union Pacific (R. 176-177, 180). Appellants thereupon prosecuted this appeal requesting a new trial as to all issues.

B. THE FACTS OF THE ACCIDENT

On the night of the accident, Union Pacific was switching 31 carloads of hogs into the plant of the Salt Lake Union Stockyards for unloading (Exhibit 37-D). The night was cold and slightly foggy, but clear enough to see well (R. 290, 298). There was adequate artificial light insofar as the unloading at the docks was concerned, although the light did not reach well underneath the railroad cars (R. 257, 419). There was some straw and manure on the dock which was somewhat frosty in view of the nature of the night (R. 290-291), but there was no snow on the dock in the working area since it had been shoveled off down onto the track and roadbed by the dock workers at the commencement of their shift (R. 290, 418). The carloads of hogs were being unloaded by stockyard employees at stockyard docks identified as 1, 2, and 3 on Exhibit 16-P (R. 228-229). Union Pacific's engine was on the south end of the switching movement and the cars were being moved northward by the engine for unloading beginning with the northernmost cars, three cars at a time (R. 262, 334, 341).

There was a full train crew consisting of engineer Kenneth Hier, fireman Harley Workman, engine foreman Joseph Terry, pin puller S. Jack Spratt, and field man C. Fred Hansen, all employees of Union Pacific (R. 261). This was an experienced crew. Hier had 29 years experience as an engineer (R. 260) with 11 years on this stockyards job (R. 271). Spratt had been on the stockyards job approximately a year (R. 282). Hansen

had 25 years of experience (R. 346). Terry had 31 years experience (R. 404) and six or seven on the stockyards job (R. 405). The fireman and the engineer were in the cab of the switch engine (R. 273) and the pin puller was stationed on top of a caboose (R. 264) next to the engine in order to relay signals to the engineer from the other men in the crew, particularly field man Hansen who was spotting the cars (R. 280).

In order to unload the hogs, one car would be spotted at each of the docks marked 1, 2, and 3 on Exhibit 16-P with the car door corresponding to one of the openings in the dock chutes of each of said docks (R. 227-229). The car door would then be opened and the wing gates on the dock would be placed inside the car door, a dock board inserted, the hogs would be chased out of the railroad car and into the dock chute by two stockyard employees working at each dock and the hogs would then be driven down the chutes by the dock workers and other stockyards employees to feeding pens (R. 253-254, 288, 467). As soon as all the hogs had been unloaded from the car, the wing gates on the dock would be placed back into position, the dock boards would be removed from the cars, and Hansen, the field man of the Union Pacific crew, would be told that the dock workers were ready for the cars to be moved to the next spot (R. 230-231, 253-254).

Hansen was directing the switching movement from the running boards in the center of the tops of the railroad cars and was stationed on top of the car spotted at

the dock numbered 2 in the picture identified as Exhibit 16-P which was also the dock at which the decedent was working along with co-workers and stockyard employees, Ray Payne and Clayton Dennis (R. 334, 466). Before beginning any movement of the cars, Hansen would step over to the side of the car from the running board and see that all of the dock workers were clear of the cars and that the movement to the next spot was ready to begin. He would also transmit a warning that the movement was about to begin and would receive an assurance from each dock that everyone was clear. He would then signal the movement to begin and as the movement began, he would step back up on the running board and walk south as the cars were moving north, walking at about the same speed the cars were moving, thereby remaining in the same relative position in respect to dock No. 2 in order that he could correctly spot the next set of three cars at the respective docks (R. 334-337, 341-342). After Hansen had stepped away from the edge of the car and back to the center running board, he was unable to see the stockyards employees in the dock area immediately adjacent to the cars, but could see other stockyards employees farther away from the cars (R. 335).

The track upon which the switching was done was fairly level in the vicinity of the docks, but further to the north and west the grade of the track was away from the docks and consequently during the entire movement, hand brakes were set on several of the lead cars in order that the cars could be kept bunched together and the spots made accurately (R. 270-271). The evening of the

accident 27 cars had been unloaded in the normal manner and 4 cars still remained to be spotted for unloading (R. 467; Exhibit 37-D). At that time, since field man Hansen was within sight distance of pin puller Spratt and could see his lantern clearly (R. 342), engine foreman Terry, who initially had been in position between Hansen and Spratt to relay signals (R. 341) had gone into the administration building at the stockyards to take care of the paper work involved in delivering the hogs to the stockyards (R. 338, 406, 407).

On the movement in which decedent lost his life, Hansen had ascertained that the docks were cleared, had received assurance from the docks that they were clear, had signaled for the movement to start and had stepped to the running board and was walking south on top of the cars as they were moving north when from over his left shoulder he heard Payne cry out to stop the train (R. 336-337, 345). Hansen immediately gave a washout signal to stop the movement and it did stop within a very few feet thereafter, in his opinion 8-10 feet (R. 345). This stop signal given by Hansen had to be and was relayed by Spratt (R. 280), and was acted on immediately thereafter by engineer Hier after he received Spratt's signal (R. 266).

At the time said movement started, decedent was standing by the dock at which he was working, well away from the moving cars, talking to Payne and Dennis, both co-workers at the stockyards (R. 304-305, 467-468). No evidence was introduced to explain why decedent left

that place of safety and placed himself in a position where he fell off the dock under the moving railroad cars, but the evidence is clear that decedent had no duties to perform near the railroad cars while they were moving (R. 254-255).

In any event, Payne, Dennis, and decedent were standing talking while the railroad cars were moving and then all took a couple of steps to the east away from the moving cars (R. 304). A short time thereafter Payne heard decedent say in a normal tone of voice, "Help me, Ray, I've slipped." Payne turned, went to the edge of the dock, looked down and saw decedent under the train and at that time decedent said, "Can you help me get out of here?" or something to that effect. Payne then heard decedent's bones breaking, decedent stopped talking, and Payne screamed for the train to stop (R. 298). When the movement stopped shortly thereafter, decedent was pinned beneath the truck side of a railroad car identified as Great Northern 58498 (R. 446; Exhibit 29-P) and his body was approximately in front of the main double chute of dock No. 2 (Exhibits 27-P through 31-P). One other witness, a car inspector for Union Pacific, Walter C. Griffin, claimed to have seen decedent fall. Griffin was on duty for Union Pacific at the stockyards but was not a member of the train crew and would not ordinarily give signals to the train crew nor be involved in the switch movement (R. 373—page 190 of transcript). Griffin was leaning against the north post of dock No. 2 (Exhibit 16-P) waiting to close doors on the unloaded cars after the hogs were unloaded (R. 372-369—pages 184-

186 of transcript). Griffin stated that decedent fell from a place about midway between dock No. 2 and the dock to the south thereof (R. 374; Exhibit 23-P). He immediately began to yell and wave his lantern, and he stated the train stopped within approximately 10 feet after decedent fell. He also stated the cars had moved approximately 1½ car lengths between the time they started moving and the time decedent fell (R. 381).

Decedent's death was apparently instantaneous as soon as the first bone snapped for he stopped talking and from the multiple fractures and crushing injuries found by the medical examiner, it appears probable that decedent's neck was snapped and that he was thereafter rolled under the truck side of the car, which apparently crushed the entire right side of his body (R. 298; Exhibit 3-P, 27-P through 31-P).

The foregoing facts in respondent's opinion will provide the court with sufficient facts to properly review the issues of this appeal, but respondent deems it necessary also to reply to certain factual statements made in the argument in appellants' brief.

Appellants argue facts by disclosing only an incomplete part of those facts to the court. For example, on pages 4 and 5 they argue that Union Pacific could foresee that stockyards employees might occasionally be on the ground near the tracks in order to catch a hog that had escaped during the unloading process, but appellants fail to point out to the court that when this occurred (once a week or once every two weeks) the train crew

was fully informed that stockyards employees were going down to the ground from the dock and that the train crew understood the railroad cars were not to be moved until the hog was caught and the stockyards employees had remounted the docks (R. 291-292). There was absolutely no evidence that Union Pacific could reasonably foresee that any stockyards employee would be on the ground between the track and the dock while railroad cars were being moved.

Appellants' brief also includes asserted facts which are not in accordance with the testimony. On page 9 they say that, "Hansen walked from 1½ to 2½ car lengths after the decedent fell." This is clearly not shown by the facts as testified to by all witnesses and set forth above, for it is apparent therefrom that the movement was stopped in less distance than 1½ car lengths after decedent fell since one and one-half car lengths had gone by before he fell (R. 381) and the cars were not yet to the unloading spot when the movement had stopped (R. 446-447, 467; Exhibits 27-P through 31-P).

Likewise on page 10 of appellants' brief they state that, "The function of the foreman was to pass signals when the switchman couldn't see" but neglect to add that this duty exists only when the field man and pin puller can't see each other's signals and that both of those men were within sight of each other's signals at the time and place of the accident (R. 342, 362).

The safety and operating rules numbered 4065, 106, 828, and 802 set forth and argued on pages 11 and 12 of

appellants' brief are clearly not applicable to Union Pacific's switch movement at the time and place of this accident and appellants introduced no testimony to show that they were. The only testimony in respect to rules is that no rule violations occurred (R. 362).

Appellants' statement on page 10 of their brief that "the train crew relaxed" is simply a figment of appellants' imagination since there was no evidence of any relaxation on the part of any of the crew members and there would be no reason to relax since it is just as hard to correctly spot the last four cars in a movement as it is the first twenty-seven. A fair reading of the testimony of each of the crew members discloses that each was engaged in the diligent performance of his duties at the time of the accident.

Respondent also feels compelled to comment generally upon appellants' argument wherein appellants consistently argue facts and inferences therefrom concerning the operation of Union Pacific's switch movement in the light most favorable to them as though the trial court had determined those facts in their favor when the exact opposite is true.

STATEMENT OF POINTS

POINT I

JUDGE ELTON CORRECTLY ENTERED PARTIAL SUMMARY JUDGMENT IN FAVOR OF UNION PACIFIC ON THE ALLEGA-

TIONS OF NEGLIGENCE MADE AGAINST BOTH DEFENDANTS.

POINT II

JUDGE WILKINS DID NOT ERR IN FINDING THAT APPELLANTS HAD FAILED TO PROVE UNION PACIFIC NEGLIGENT IN RESPECT TO THE OPERATION OF ITS SWITCHING MOVEMENT.

POINT III

THE DOCTRINE OF LAST CLEAR CHANCE IS NOT APPLICABLE TO THE FACTS OF THIS CASE.

ARGUMENT

POINT I

JUDGE ELTON CORRECTLY ENTERED PARTIAL SUMMARY JUDGMENT IN FAVOR OF UNION PACIFIC ON THE ALLEGATIONS OF NEGLIGENCE MADE AGAINST BOTH DEFENDANTS.

When this Honorable Court determined that Rio Grande had no duty in respect to decedent arising out of the construction and maintenance of the track and roadbed nor in respect to its construction and maintenance as

it related to side structures, it necessarily must follow that there is a similar lack of such duty on the part of Union Pacific toward decedent. The allegations of negligence made by appellants against Union Pacific in those respects were identical to those made by appellants against Rio Grande and arose from precisely the same factual situation. If this Court will substitute the words "Union Pacific" for the words "D. & R. G. W." wherever the same appear in this Court's earlier decision in this case, supra, beginning with the recitals of what elements are necessary for plaintiff to prove in order to recover, starting with the paragraph numbered 1 at the bottom of page 376 of 21 Utah 2d, this Court will readily observe that the allegations of appellants' complaint which were the subject matter of the summary judgment had already been determined in this action adversely to appellants' contentions prior to Judge Elton's entry of summary judgment thereon. Although it may not be precisely correct to say that the earlier decision of this Court has become the law of the case in respect to Union Pacific (since different railroads are involved), nevertheless, the reason for establishing the rule of the law of the case applies with equal force to the partial summary judgment entered in favor of Union Pacific. The rule is that where the questions of law and fact are the same, the decision of the first appeal, whether right or wrong, becomes the law of the case on the second appeal and is binding as well on the parties to the action, the trial court, and the appellate court, *Helper State Bank vs. Crus*, 95 Utah 320, 81 P. 2d 359. See also the cases cited therein

and *Gammon vs. Federated Milk Producers Association, Inc.*, 14 Utah 2d 291, 383 P. 2d 402.

The only factual difference between Rio Grande and Union Pacific in respect to the track and roadbed (aside from the fact that as between the two it was Rio Grande's duty to construct and maintain the same) was the fact that at the time of the accident Union Pacific was operating a switching movement on the track. Over Union Pacific's objection, Judge Wilkins at the trial allowed the introduction of evidence by which appellants attempted to prove that the condition of the track and roadbed was such that Union Pacific was negligent in operating over the same at the time and place of the accident and this contention of appellants was fully explored at the trial (R. 205, 209-210, 215-216, 243, 250-252, 255-256, 290-292, 364, 370-372, 417-418; Exhibits 17-P through 24-P, 27-P through 31-P). This contention therefore was one of the contentions decided adversely to appellants by Judge Wilkins (R. 472).

Judge Wilkins undoubtedly would also have allowed appellants' counsel to introduce evidence in respect to the construction of the dock inside the clearance limits imposed by order of the Public Service Commission of Utah if appellants' counsel had not stipulated to the truth of the fact that the track, roadbed, and side structures at the scene of the accident all had been constructed prior to the promulgation of said order of the Public Service Commission and were in existence at the time of the order, and that said order was applicable only

to new construction done after the promulgation of said order (R. 436-442).

Appellants also contend in connection with the grant of partial summary judgment that Judge Elton failed to comply with Rule 56(d) U.R.C.P., which rule requires the Court to specify the noncontroverted facts and those controverted when a partial summary judgment is granted. This contention is not justified for it is clear from the judgment itself (R. 138-139) that the judgment entered by Judge Elton was based on the admitted facts of the case as set forth in the decision of this Honorable Court as those facts applied to allegations of negligence made against Union Pacific identical to those allegations theretofore decided adversely to appellants in respect to Rio Grande. It is also clear from the record that appellants were not in any way restricted from fully adjudicating at the trial before Judge Wilkins all of the facts and contentions surrounding the operation of Union Pacific's switching movement at the time and place of the accident, including the condition of the track and roadbed at that time and place.

POINT II

JUDGE WILKINS DID NOT ERR IN FINDING THAT APPELLANTS HAD FAILED TO PROVE UNION PACIFIC NEGLIGENT IN RESPECT TO THE OPERATION OF ITS SWITCHING MOVEMENT.

Respondent finds it difficult to believe that appellants can seriously assert as they apparently do on page 7 of their brief that, "The evidence presented does not support a finding that the defendant, Union Pacific Railroad Company, was free from negligence." In order to make that assertion appellants must be considering every fact and every inference therefrom most favorably to them, although the case was decided by the lower court adversely to them. This is not the proper approach to those facts on this appeal as this Court has so succinctly stated in *Thompson vs. Van Wagenen*, 25 Utah 2d 383, 483 P. 2d 427, as follows:

> "There no doubt would be merit to the defendant's (appellants' in this case) argument if we could properly do as he has done in his brief: select those aspects of the evidence and the inferences to be drawn therefrom which are favorable to his contentions. However, as we are constantly reiterating, difficult as it seems to be for a losing party to see the other point of view, the law has long been established to the contrary: that we survey the evidence and whatever reasonable inferences may fairly be drawn therefrom in the light favorable to the findings and judgment."

Under the evidence of this case, the Court's finding that appellants had failed to prove Union Pacific negligent in the operation of its switching movement can clearly be sustained on the grounds that the movement was being performed in a normal and customary manner consistent with reasonable care, that adequate warning was given prior to beginning the movement and that

everything possible was done to avert the tragedy after decedent had fallen under the moving cars.

Appellants misconstrue the duty of Union Pacific in respect to decedent on page 11 of their brief when they state that Union Pacific owed a duty to decedent to maintain a safe place for him to work. Decedent was not in the employ of Union Pacific and the duty to maintain a safe place to work arises solely out of the employment relationship (53 Am. Jur. 2d, Master & Servant § 195). The duty of Union Pacific towards a nonemployee working near the tracks on the property of a consignee and employed by the consignee instead is covered by common law principles of negligence and contributory negligence, *Raymond vs. Union Pacific Railroad Company*, 113 Utah 26, 191 P. 2d 137.

Appellants also contend on page 11 of their brief that Union Pacific failed to warn decedent of hazards which might exist, and in respect to that allegation it seems sufficient to say that Judge Wilkins could reasonably find from the evidence that all hazards in moving railroad cars next to a dock on which decedent was working were as readily apparent to decedent as they were to Union Pacific and that Union Pacific had fulfilled any duty to warn that might exist by giving warning to decedent that the movement of the railroad cars was about to begin. In addition, from the evidence it is clear the railroad cars began moving when decedent was standing in a place of safety and that any failure to warn concerning the beginning of the movement could not have been a proximate cause of this unfortunate accident.

On page 7 of appellants' brief, they state, "The refusal of the court to accept the investigating officer's report in evidence was error." Respondent believes that this casual reference to claimed error in appellants' brief is not sufficient to preserve this point for consideration of this Honorable Court on appeal, but assuming that the point is here for consideration, it is clear that the trial court's ruling at pages 326 and 327 of the record is correct. The investigating officer's report (proposed Exhibit 26-P) contained hearsay statements of individuals who were available and who testified at the trial and it also contained conclusions and opinions of the officer in respect to his investigation when the officer was not qualified as an expert in the investigation of this type of accident (R. 202).

POINT III

THE DOCTRINE OF LAST CLEAR CHANCE IS NOT APPLICABLE TO THE FACTS OF THIS CASE.

In order for the doctrine of last clear chance to be applicable, the court must first find that both decedent and defendant were negligent in proximately causing the accident. In this case the court found that neither party had sustained their burden of proving by a preponderance of the evidence the other party to be negligent. Clearly, then, last clear chance has no application to this case. Assuming, however, that the court had found negligence on the part of the defendant and contributory neg-

ligence on the part of decedent, last clear chance would still not apply to the facts of this accident for Union Pacific reasonably performed every action consistent with its then existing ability to avoid decedent's injury once decedent fell from the dock. The cases cited on pages 12, 13, and 14 of appellants' brief are cases in which the factual situations are so clearly different from the factual situation in the instant case that although they may correctly state the law, such is not applicable to the facts of this accident. As this court has said many times, in order that last clear chance may be applied the opportunity to avoid the accident must be a clear chance and must not be only a possible chance. *Holmgren vs. Union Pacific Railroad Company*, 114 Utah 262, 198 P. 2d 459; *Compton vs. Ogden Union Railway & Depot Company*, 120 Utah 453, 235 P. 2d 515. And see *Anderson vs. Bingham & Garfield Ry. Company*, 117 Utah 197, 214 P. 2d 607, wherein this Court stated on page 212 of the Utah Reports and on page 614 of the Pacific Reporter that, "Equality in treatment to plaintiffs and defendants demands that the doctrine of last clear chance be not invoked unless there is evidence that with the *means at hand* the defendant clearly could have avoided injury to the plaintiff." There is in Utah law no anticipatory last clear chance and Judge Wilkins correctly held last clear chance inapplicable in this case.

CONCLUSION

The facts and circumstances surrounding the accident involving the death of appellants' husband and

father demonstrate that the trial court was clearly correct in finding that Union Pacific was not negligent in respect to this accident. Any hazard involved in this accident which may have contributed to decedent's death was not a hazard created by Union Pacific's negligence, but was rather a hazard of decedent's employment; and, fortunately, the Utah State Legislature has seen fit to enact a law which provides compensation when persons are killed or injured as a result of employment hazards. Appellants were paid the compensation provided by law for relief of the hazards of decedent's employment and there is simply no justification for appellants' apparent assumption that because Union Pacific was moving the car under which decedent was killed, Union Pacific must therefore have been negligent. The trial court has determined this case on the evidence in favor of Union Pacific and that judgment should stand. To paraphrase what this court has recently said in the case of *Thompson vs. Van Wagenen*, supra, appellants have had what they are entitled to: a resort to a court with a full and fair opportunity to present their evidence and their contentions relating to the issues in controversy and have had them resolved by the court making findings and rendering judgment thereon. Referring generally to appellants' several attacks on such judgment, the court should observe as it did in the *Thompson* case:

> "When the processes of justice have taken their course in the trial court, culminating in findings and a judgment, it is essential that they have some solidarity. Serving that objective are the well known rules of review which give them the pre-

> sumption of verity and correctness. The reasons usually assigned are the advantaged position and the prerogatives of the trial court. Further, and in harmony therewith, it is plain to be seen that to the extent judgments can easily be upset, the processes of justice are weakened, and confidence in the courts who render them is undermined. Conversely, the degree of respect given to judgments bears a direct relationship to the quality of the processes of justice and to the confidence reposed in the courts. This is not meant to gainsay nor to disparage the right nor the propriety of appeal and review to correct errors of substance. But it is in accord with what we think is the correct policy: that minor irregularities or errors should be disregarded, and that the action of the trial court should not be upset as to findings of fact so long as they have reasonable and substantial support in the evidence; nor as to the law, unless the trial court acted under some substantial mistake or misunderstanding of the law which may have materially affected the result."

After nearly six years of litigation this case should finally be closed with affirmance of the judgment of the trial court.

Respectfully submitted,

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