K. C. So. Ry. Co. *v.* Story.

5-3578 390 S. W. 2d 124

Opinion delivered May 17, 1965.

[Rehearing denied June 7, 1965.]

1. Railroads—liability for damages caused by fire—negligence.—The effect of Act 320 of 1955 is to require plaintiffs seeking damages for fire caused by sparks from a train to allege and prove negligence on the part of the railroad company just as was required before passage of Act 141 of 1907.
2. Railroads—liability for damages caused by fire—weight and sufficiency of evidence.—The finding of the trial court (sitting as a jury) that the fire was caused by negligence on the part of the railroad company and judgment for damages in favor of appellee held supported by substantial evidence.

Appeal from Sevier Circuit Court; *Bobby Steel,* Judge; affirmed.

Hardin, Barton, Hardin & Jesson, for appellant.

Byron Goodson, for appellee.

Paul Ward, Associate Justice. A fire which originated along the right-of-way of the Kansas City Southern Railway Company (appellant herein) damaged real estate belonging to appellees (S. G. Story and Dukes Wilson, d/b/a Story and Wilson) which land lay adjacent to said right-of-way. The stipulated damages amounted to $1980.

Following a trial before the Circuit Judge (sitting as a jury) wherein appellees contended the fire was caused by negligence and carelessness on the part of appellant, a judgment was entered against appellant and in favor of appellees in the amount previously mentioned.

On appeal the only point urged is the lack of substantial evidence to support the judgment.

The material testimony which is not in dispute may be summarized as hereafter set forth. Appellant's freight train, consisting of 122 cars and five diesel locomotive units passed the land belonging to appellees and shortly thereafter a fire was observed on the right-of-way. No one saw the fire when it first started or knows exactly how it started. At the time of the fire the weather was dry and had been for several weeks.

First, it is deemed proper to set forth clearly the applicbale rule of law under which this case is being tried. In the recent case of *Kansas City So. Ry. Co.* v. *Beaty,* 239 Ark. 187, 388 S. W. 2d 79, to which reference is made for more details, it is pointed out that before the passage of Act 141 of 1907, it was necessary for the plaintiff, in a case of this nature, to allege and prove negligence on the part of the railroad company. After the passage of said Act 141 it was not necessary to allege or prove negligence, but it was, of course, necessary to prove (by direct or circumstantial evidence) that the railroad company was responsible for starting the fire. This was the law until the passage of Act 320 of 1955 when once more it was made the duty of the plaintiff to allege and prove negligence. This rule of law applies in this case.

We have concluded that in this case the finding of the trial court (sitting as a jury) is supported by substantial evidence. In the *Beaty* case we quoted with approval from *Missouri Pacific Railroad Company* v. *Johnson,* 198 Ark. 1134, 133 S. W. 2d 33, the following:

"Where fire is discovered shortly after a train has passed, and the proof does not establish some other origin of the fire, the jury is justified in finding that fire originated from sparks from the engine. . . . There is thus made a case of *prima facie* negligence, not rebutted by other evidence to the effect only that the spark arresters were in good condition. . . ."

In addition to the testimony set out above, the record also discloses: one witness said he observed the fire shortly after the train passed; another witness said the train was using its brakes when it went by; and, another witness testified the wheels and brakes on the train were made of cast-iron, which (when the brakes were applied) has a tendency to create sparks; and, appellant has some fiber brake shoes on its newer cars. We conclude, therefore, that the judgment of the trial court is supported by substantial evidence.

Affirmed.