

MISSOURI PACIFIC RAILROAD COMPANY v. CREW.

4-3069

Opinion delivered July 10, 1933.

1. RAILROADS—KILLING BY TRAIN.—Evidence that the body of deceased was found on defendant's right-of-way, and that deceased's skull was crushed, his neck and several ribs broken, *held* to support a finding that he was killed by defendant's train.
2. RAILROADS—KEEPING LOOKOUT—JURY QUESTION.—In an action for a killing by defendant's train, the questions whether the trainmen kept a constant lookout and whether it was possible for them to do so with a defective headlight and a badly smoking engine *held* for the jury.
3. RAILROADS—KEEPING LOOKOUT—BURDEN OF PROOF.—Where the proofs show that deceased was killed by a train under circumstances that raise a reasonable inference that the injury might have been avoided if a constant lookout had been kept, the burden shifted to the railroad to show that such lookout was kept.

Appeal from Chicot Circuit Court; *Patrick Henry*, Judge; affirmed.

STATEMENT BY THE COURT.

This suit was instituted by Mrs. Raymond Crew in her own right, as administratrix of the estate of Raymond Crew, deceased, and as guardian of certain minors, children and dependents of Raymond Crew, to compensate an injury which resulted in the death of Raymond Crew on or about November 14, 1931, at Macon Lake, a flag station on appellant's line of railroad in Chicot County. The pertinent facts and circumstances with reference to the injury and death of Raymond Crew, deceased, were to the following effect:

Sometime prior to the injury Raymond Crew had been in the employ of the Missouri Pacific Railroad Com-

pany, and at the time of his death he had on his person a pass which had been issued by the railroad company; due to the depression, he had been let out of employment with the railroad company, and at the time of the injury was employed in the State of Mississippi; on the date of the fatal injury he left Mississippi, returning ostensibly to McGehee, Arkansas, where his family resided; he was traveling in an automobile which had broken down on the road some distance from Macon Lake, and he walked into the small village of Macon Lake, where he was observed by witnesses about 8 o'clock p. m. on November 14, 1931, waiting around the depot. Appellant's line of railroad at this point extends in a north and south direction and is straight for several miles north and south of the depot. On the morning of November 15, about 7 o'clock, the dead body of Raymond Crew was discovered lying some 20 feet north of the depot building; his head was lying within about 6 feet of the railroad track and ties, his feet extending in a southeasterly direction from the railroad track. Upon examination of the body it was found that deceased's skull had been crushed in the left temple; a number of ribs were broken on the right side, and his neck was broken; the blood vessels of his body had been so ruptured as to prohibit a first class application of embalming. Other evidences were found on the body indicating that he had received a terrific blow; his hat was found in the middle of the railroad track; the surface of the ground for several feet immediately south of the body indicated some disturbance; the grass and weeds which were growing immediately adjacent to the railroad company's track, and between the track and the body of the deceased, were shown to have been pressed down away from the track and towards the body of the deceased, thus indicating that deceased had been struck by a moving engine going from south to north and the body pushed away from the track.

The case was defended by appellant upon the theories of no liability and of contributory negligence. The engineer and fireman on the train which passed Macon Lake about 9 o'clock p. m. testified that the train was run-

ning about 35 or 40 miles an hour when it approached and passed Macon Lake; that they were each keeping constant lookout, and that neither saw any one endeavoring to flag the train. This train reached McGehee about 11 o'clock P. M. November 14, 1931, where it was determined that the right pilot step on the engine was bent.

Certain work sheets were introduced in evidence by appellee which tended to show that the headlight on the engine operated on the night of the injury was in bad condition, and that the engine did not properly steam, and as a result thereof smoked very badly. These work sheets were signed by Mr. Jansen, the engineer, on November 14, 1931.

It was further shown on behalf of appellant that about 10 o'clock P. M. on the date of the injury a freight train passed Macon Lake, and, because of a hot box in one of the journals, it was necessary to stop the train, and that they did stop to repair this condition, and all the employees on this train testified that they had opportunity to have seen Crew's body if it had been on the point where it was found at 7 o'clock the next morning, but that it was not discovered at that time.

The court submitted the case to the jury under instructions, which we deem unnecessary to here set out, and it returned a verdict in favor of appellee for \$1,500, from which judgment this appeal is prosecuted. Other facts will be stated or referred to in the opinion.

R. E. Wiley and *E. W. Moorhead*, for appellant.

E. P. Toney, *A. Z. Golden* and *J. M. Golden*, for appellee.

JOHNSON, C. J., (after stating the facts). Appellant earnestly contends that the trial court committed reversible error in refusing to direct the jury to return a verdict in its favor. This argument is based upon the theory that there is no evidence to show that Raymond Crew was struck or injured by a moving train on appellant's line of road.

It is true, of course, that there is no positive testimony that Raymond Crew was struck or killed by a moving train, but the circumstances are such as to warrant

this inference. The testimony introduced shows that the body of deceased was found upon the right-of-way and within a few feet of appellant's track. The skull was crushed, the neck broken, and several ribs on the right side were injured, and the jury was fully warranted in finding that the death of Raymond Crew resulted from a terrific blow from a moving train.

This court held in *St. Louis-San Francisco Railway Company v. Crick*, 182 Ark. 312, 32 S. W. (2d) 815, quoting from the second headnote:

“Where the body of deceased was found upon defendant's right-of-way within a few feet of the track with his skull crushed and his shoulder crushed, with black oil smeared upon his hair and clothing, the jury were warranted in finding that he was killed by the defendant's train.”

On the facts, the Crick case is full authority for the submission of this case to the jury. The fact is, the instant case is much stronger than the Crick case, because Thomas Crick, the injured party there, was determined to be a trespasser on the railroad company's tracks, whereas in the instant case Raymond Crew was an invitee and had a perfect right to be at the flag station at the time he was killed. The facts and circumstances were such as to warrant the jury in believing that Raymond Crew was awaiting the arrival of a train to transport him to McGehee; that he had his railroad pass in his hand in preparation of boarding the train; that, because of the defective condition of the headlight on the engine and the excessive amount of steam flowing from the engine, the employees on the train did not and could not discover his presence, and, as a result thereof, operated said train against him, which resulted in his death.

It is next insisted that the court erred in giving and refusing to give to the jury certain instructions.

Instructions 1, 6, 8, 9 and 12, given on behalf of appellee, are conceded to be correct declarations of law, but it is said that there is no evidence to support them. As we have heretofore pointed out, the evidence was amply sufficient to submit to the jury the questions as to whether

or not a lookout was kept by the engineer and fireman, and whether or not it was possible for the engineer and fireman to keep such lookout with a defective headlight and a badly smoking engine. It is said that the evidence of the fireman and engineer to the effect that a constant lookout was maintained is undisputed, and therefore plaintiff's instructions should not have been given. This contention is fully and completely answered by the engineer's work sheet report made on the night of the injury. This report shows that the headlight on the engine was dim and in bad condition, and, in addition, that the engine was smoking badly. Appellant's requested instructions which were refused by the trial court were fully covered by instructions given.

The facts of this case bring it well within the rule announced by this court in *St. Louis, Iron Mountain & Southern Ry. Co. v. Gibson*, 113 Ark. 417, 168 S. W. 1129, wherein we held: "The effect of our holding in the former opinion is that, where proof has been introduced by the plaintiff of an injury to a person by the operation of a train under such circumstances as to raise a reasonable inference that the danger might have been discovered and the injury avoided if a lookout had been kept, then the burden is shifted to the railway company to show that such lookout was kept."

No error appearing, the judgment is affirmed.
