UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60195

DORIS HUGHES (By Ruby Sullivan, Her Conservatrix),

Plaintiff-Appellant,

VERSUS

ILLINOIS CENTRAL RAILROAD COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
(CA J91-0684-W-S cons/w
CA J92-0229-W-C)

(June 7, 1995)

Before GARWOOD and BARKSDALE, Circuit Judges, and BRAMLETTE, District Judge.[1]

PER CURIAM:[2]

Claiming clear error in the district court's finding of fact that Doris Hughes' negligence was the sole, proximate cause of an automobile-train collision, Hughes appeals the adverse judgment on her action against the Illinois Central Railroad Company, contending that Illinois Central was also negligent because it

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[1] District Judge of the Southern District of Mississippi, sitting by designation.

[2] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

failed to take additional precautions at a railroad crossing that she claims was unusually dangerous due to visual obstructions. We **AFFIRM**.

I.

On the afternoon of September 5, 1990, Hughes was injured when the automobile she was driving collided with a train operated by Illinois Central; the accident occurred in Simpson County, Mississippi, at the grade crossing at Saratoga-Sharon Road. Following a bench trial, the district court held that Hughes' negligence was the sole, proximate cause of the accident.

II.

Hughes concedes that her negligence was a contributing cause of the accident; she maintains, however, that it was not the sole, proximate cause. She asserts that, under Mississippi law, the crossing is unusually dangerous due to visual obstructions, and that Illinois Central failed to take added precautions in order to reduce the risk to travelers on the road. Accordingly, Hughes contends that negligence on the part of Illinois Central was a contributing cause of the accident.

In Mississippi, the duties and obligations of drivers of automobiles approaching railway crossings, as well as operators of railroads, are predominantly a matter of statutory law. ***Mitcham v. Illinois Cent. Gulf R.R.***, 515 So. 2d 852, 854 (Miss. 1987). With respect to the driver of an automobile, the Mississippi Code provides the following:

> (1) Whenever any person driving a vehicle approaches a railroad grade crossing under any of

> the circumstances stated in this section, the driver of such vehicle shall stop within fifty feet but not less than fifteen feet from the nearest rail of such railroad, and shall not proceed until he can do so safely. The foregoing requirements shall apply when:
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> ....
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> (c) A railroad train approaching within approximately nine hundred feet of the highway crossing emits a signal in accordance with section 77-9-225, and such railroad train, by reason of its speed or nearness to such crossing,is an immediate hazard;
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> (d) An approaching railroad train is plainly visible and is in hazardous proximity to such crossing.

MISS. CODE ANN. § 77-9-249 (1972). "A plain reading of this statute imposes a duty upon the driver to stop when one of the enumerated conditions is met." ***Mitcham***, 515 So. 2d at 854. As for the operator of a railroad, the Code requires that

> [e]very railroad company shall cause each locomotive engine run by it to be provided with a bell ... and with a whistle or horn ... and shall cause the bell to be rung or the whistle or horn to be blown at the distance of at least three hundred (300) yards from the place where the railroad crosses over any public highway .... The bell shall be kept ringing continuously or the whistle or horn shall be kept blowing at repeated intervals until said crossing is passed.

MISS. CODE ANN. § 77-9-225 (Supp. 1994). Moreover, every railroad company operating or controlling any railroad track intersecting a public road at grade crossings "shall erect and maintain at each such crossing the standard sign known as `railroad crossbuck' ...." ***Id.*** § 77-9-247 (Supp. 1994). There is no dispute that Illinois Central complied with these requirements. In fact, as discussed below, there were additional warnings.

In addition to these statutory requirements, Mississippi courts require railroads to take added precautions when visual obstructions create a dangerous condition to those using the crossing. *E.g.*, ***Gulf, M. & O.R.R. v. Scott***, 62 So. 2d 878, 881 (Miss. 1953) (when confronted with visual obstructions, the railroad company should meet the peril thus created with precautions commensurate with the situation). This is the linchpin of Hughes' appeal.

The crossing at issue consists of a single railroad track that runs generally northeast and southwest; Saratoga-Sharon Road crosses the track at an angle of approximately 40 degrees and runs generally north and south. The road is a paved, two-lane, county highway with a speed limit of 55 miles per hour. Prior to the accident, the train involved was coming out of a railroad yard located to the southwest of the crossing. While in the railroad yard, trains are restricted to 20 miles per hour. Approximately 160 feet before the crossing, a yard limit post delineates the end of the railroad yard; the speed limit for trains then becomes 25 miles per hour. As Hughes approached the crossing from the north, she passed a standard railroad crossing sign (an advanced warning disc) 420 feet before the intersection. At 260 to 315 feet from the crossing, she sped over railroad markings on the pavement. Finally, a crossbuck sign stood in its customary spot on the right-hand side of the road, just before the track.

As noted, Hughes concedes that her negligence was a contributing proximate cause of the accident; what she challenges

is the district court's conclusion that her negligence was the sole, proximate cause.[3] Hughes contends that Illinois Central was

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[3] The district court's findings with respect to Hughes' negligence are as follows:

> ... motorists in the southbound lane of Saratoga Road have more than an adequate view of the approaching railroad tracks in order to avert a collision with a passing train.
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> ....
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> ... [Hughes] was driving 50 plus miles per hour, possibly as much as 60 miles per hour, and that she was inattentive to her safety. [A passenger in her car] testified that [Hughes] was distracted by her baby and was not maintaining a proper lookout. In fact, [this passenger] testified it was she who alerted [Hughes] to the forthcoming danger by shouting to [Hughes] to watch out for the train.
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> ... [A motorist who was driving northbound on Saratoga Road] ... testified that when he observed [Hughes] just before the accident, [she] was on the wrong side of the road.
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> ... [Hughes] was not maintaining a proper lookout, but instead was distracted by other matters. After [Hughes] applied her brakes, her car skidded at least 117 feet, which again indicates that she was traveling at a high rate of speed.... [I]t is clear that [Hughes] did not slow her speed until [the passenger] shouted. Yet [Hughes] had [a] clear view of the approaching train tracks. Yet [Hughes] had bypassed readily identifiable signs both on the side of the road and on the pavement advising motorists of an approaching train track.
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> ... [Hughes] failed to slow her speed even after the train engine in question had sounded its bell and blown its whistle.
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> The overwhelming evidence points unerringly to [Hughes'] negligence.... Even [her] expert ... testified that had [she] merely reduced her speed to less than 46 miles per hour, the accident here would not have occurred.

also negligent because visual obstructions at the crossing created an unusually dangerous hazard, and that, as a result, Illinois Central was required to take precautions necessary to reduce this hazard.[4] Thus, Hughes' appeal centers on the district court's conclusion that Illinois Central did not fail to exercise an appropriate amount of care in light of the claimed visual obstructions. For this finding of fact, we review only for clear error. FED. R. CIV. P. 52(a); *see* ***Badger v. Louisville & N.R.R.***, 414 F.2d 880, 882-83 (5th Cir. 1969) ("[t]he density of the obstruction and whether one must come dangerously close to the track before being able to see the train were factual resolutions to be made by the [factfinder]"); ***Gulf, M. & O.R.R. v. Golden***, 72 So. 2d 446, 449 (Miss. 1954) (issue of whether visual obstructions required the exercise of additional precautions by the railroad company is to be determined by the factfinder).

> ....
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> In sum, this Court holds that the accident could have been averted had [Hughes] maintained the proper lookout. This Court finds then that [Hughes'] negligence was the sole cause of the accident.

[4] In addressing this contention, the district court made the following finding:

> This Court ... rejects [Hughes'] contention that the crossing in question is unusually dangerous. No witness testified to such, and each credible witness asked the question denied the assertion. And there is no proof of any prior accidents or near misses at the crossing.

As is firmly established, a finding of fact is clearly erroneous only "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed". ***Anderson v. City of Bessemer City, N.C.***, 470 U.S 564, 573 (1985) (quoting ***United States v. United States Gypsum Co.***, 333 U.S. 364, 395 (1948)).

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Id. at 573-74. Obviously, on appeal, the burden of showing that the findings of fact are clearly erroneous is on the party attacking them. *E.g.*, ***Griffin v. Missouri Pac. R.R.***, 413 F.2d 9, 13 (5th Cir. 1969).

This case presents an issue comparable to one presented in ***Badger*** -- the role of the factfinder. That case involved a wrongful death action arising from an automobile-train collision at a crossing. There were obstructions to the view of an automobile's driver when a train was approaching the crossing. ***Badger***, 414 F.2d at 882. Despite a jury verdict for the plaintiffs, the district court granted the railroad judgment as a matter of law. In reversing, our court recognized that the issue of the railroad's negligence was presented properly to the jury. It acknowledged that there was "evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might

reach different conclusions .... [I]t is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses." ***Id.*** at 883 (quoting ***Boeing Co. v. Shipman***, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc)).

In addressing whether a railroad crossing is unusually dangerous, our ruling in ***Hales ex rel. Williams v. Illinois Cent. Gulf R.R.***, 718 F.2d 138 (5th Cir. 1983), demonstrates the proper respect that appellate courts must accord the factfinder in resolving the issue. The crossing in ***Hales*** involved a single railroad track intersecting a two-lane, rural road. For 1000 feet along the fence line of the railroad's right-of-way, and approximately 80 feet from the track, a thick line of trees ran parallel to the track. Between the tree line and track, there was a line of brush and weeds ranging in height from two to eight feet. As in the instant case, the district court in ***Hales***, sitting as the factfinder, held that the motorist's negligence was the sole, proximate cause of the automobile-train accident. In reversing and remanding, our court stated that it was unclear whether Hales' negligence was the sole, proximate cause of the accident, ***id.*** at 141, and that it could not say, as a matter of law, that it was. ***Id.*** at 142. In ***Hales***, however, the district court failed to make any findings on whether the crossing was unusually dangerous. ***Id.*** at 143. Through it all, our court kept the proper perspective of the factfinder's role, declaring that, "though there is weighty evidence of the dangerousness of the crossing, we ... refrain from

holding, as a matter of law, that the crossing was unusually dangerous. These are questions for the trier of fact." ***Id.*** at 142.

Hughes contends that the presence of a metal barn, trees, brush, and the roadway embankment in the area to the west of the crossing created a visual obstruction of such a character as to create an ultrahazardous railroad crossing. In support of her contention that the findings were clearly erroneous, Hughes relies upon photographs of the area, and the testimony of her expert, Dr. Frank Griffith.

With regard to the photographs and whether a motorist's view of an oncoming train was obstructed, the district court stated that the

> photographs are tunnel vision and fail to show what a motorist could observe with peripheral vision or by the simple rotation of one's head. Many of [Hughes'] other photographs were taken in 1993 and are not truly reflective of the conditions at the accident scene as they were at the time of the accident.

Such a finding indicates clearly that the district court, as the trier of fact, determined the photographs were to be given little, if any, weight on the issue of visual obstruction. This was the prerogative of the factfinder.

As for the testimony of Dr. Griffith, the district court stated that it was "unimpressed with [his] testimony ... on his line of vision theory and his reconstruction of the accident". Dr. Griffith, a physicist and expert in accident reconstruction, utilized minimum sight triangles to arrive at an appropriate sight

distance for the conditions at the crossing.[5] Based upon his calculations and his assumption of the place where both parties could see each other, Dr. Griffith opined that a highway speed limit of 20 to 30 miles per hour would have made the crossing safe. In rejecting this testimony, the district court stated that it was persuaded that Dr. Griffith's "theories are unsound and not based on the credible evidence nor on the conditions which actually pertained to this mishap."

Again, Hughes challenges this credibility determination. On cross-examination, Dr. Griffith acknowledged that the table upon which he based his minimum sight triangles has the underlying assumption of a 65-foot truck approaching the crossing at a right angle; two conditions not present in this accident. Also, the assumed reaction time utilized by Dr. Griffith in formulating his calculation was quicker than other accepted reaction times. Furthermore, Dr. Griffith's testimony was countered by Illinois Central's expert, who provided a different sight line analysis. Simply put, all of this goes to the underlying soundness or credibility of Dr. Griffith's testimony. Resolution of such issues rests with the district court.

In short, Hughes seeks to have this court make credibility determinations and to weigh the evidence; but, that is the function of the factfinder. Hughes has failed to demonstrate clear error in

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[5] Using a table and the estimated speeds of the vehicles involved, minimum sight triangles provide a calculated distance which, in theory, should provide the operator of a vehicle a sight line that will allow him to respond to the presence of a crossing vehicle or train.

the district court's finding that the railroad crossing was not unusually dangerous.[6]

III.

For the foregoing reasons, the judgment is

AFFIRMED.

[6] Obviously, because the crossing was not unusually dangerous, we do not address the issues that Hughes premises on an opposite holding.