

**IN THE COURT OF APPEALS 08/20/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-CA-00729 COA**

**CLEASTER MASSEY, CANDIES COTTON, JOHN D. GILLESPIE AND MARY THOMAS  
GILLESPIE**

**APPELLANTS**

**v.**

**ILLINIOS CENTRAL RAILROAD COMPANY**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND  
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. EUGENE M. BOGEN

COURT FROM WHICH APPEALED: LEFLORE COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

PAT M. BARRETT; LEMAN D. GANDY

ATTORNEYS FOR APPELLEE:

GLENN F. BECKHAM; JAMES E. UPSHAW

NATURE OF THE CASE: CIVIL: NEGLIGENCE

TRIAL COURT DISPOSITION: JNOV FOR THE APPELLEE

BEFORE BRIDGES, P.J., KING, AND McMILLIN, JJ.

BRIDGES, P.J., FOR THE COURT:

Samuel Sims was killed when he walked in front of an oncoming freight train in Greenwood, Mississippi. His mother, Mary Thomas Gillespie, and other members of his family brought a wrongful death action against the Illinois Central Railroad alleging negligence in failure to give adequate warning. The jury returned a verdict in favor of the Plaintiffs, and the lower court granted Illinois Central Railroad a JNOV judgment notwithstanding the verdict. Aggrieved, Sims' family appeals that decision to our Court. Finding their claim to be without merit, we affirm the lower court.

### STATEMENT OF THE FACTS

On September 17, 1991, Samuel Sims was walking slowly in a generally western direction on McLaurin Street in Greenwood, Mississippi. At the same time, Tyrone Davis and Douglas Moody were also walking in a western direction on McLaurin Street, toward a railroad crossing, when they passed Sims, who was walking very slowly toward the crossing. Davis and Moody could hear a train approaching the crossing, but could not yet see the train.

The McLaurin Street crossing was guarded by a railroad gate warning system consisting of blinking lights and gate arms which activated automatically upon the approaching of a train. The system had a history of failure known to local residents. As the train was approaching, the gate to the crossing had not yet closed. Davis and Moody continued to walk toward the tracks, saw the train approaching, and crossed safely in front of the train to the other side. After they crossed the tracks, the gate crossing signal activated and closed, albeit not until the train was at the crossing. The men continued walking a short distance and noticed that the train had applied its brakes, and that an ambulance had arrived at the crossing. Both men concluded that Sims was hit by the train, although neither saw the accident.

At trial several witnesses testified that they could hear the train very loudly before it approached the crossing, and that they heard a train whistle blowing. Witnesses also testified that they saw Sims attempt to cross the tracks, and that he could have looked to the left and the right before crossing the tracks, although no one saw him look in either direction. The train engineer testified that he saw Sims look at the train before he attempted to cross the tracks, but then continued to walk in front of the train. The engineer also testified that he blew the whistle several times before Sims attempted to cross the tracks. All witnesses testified that Sims was walking very slowly. There was also testimony that nothing was wrong with his hearing or eyesight. Further, medical records showed that no alcohol was found in Sims' bloodstream after the accident.

The jury returned an 11-1 verdict for the Plaintiffs/Appellants in the amount of \$125,000.00. The lower court then granted the Defendants/Appellees a JNOV stating:

[T]here is no evidence whatsoever from which a reasonable person can conclude that anything the railroad did or failed to do proximately caused Mr. Sims to be run over. There is just no evidence to support it.

Aggrieved, Sims' family appeals this decision and argues that the trial court erred in granting the JNOV, by refusing to allow testimony into evidence concerning the failure of the crossing gate warning, in precluding proof to support an award of hedonic damages, and in refusing a jury instruction as to the issue of damages.

## ARGUMENT AND DISCUSSION OF THE LAW

### I. WHETHER THE TRIAL COURT ERRED IN GRANTING ILLINOIS CENTRAL RAILROAD COMPANY A JNOV.

A motion for a directed verdict or a JNOV "tests the legal sufficiency of the evidence supporting the verdict." *Goodwin v. Derryberry Co.*, 553 So. 2d 40, 42 (Miss. 1989) (quoting *Stubblefield v. Jesco*, 464 So. 2d 47, 54 (Miss. 1984)).

It is a well-established rule that when a trial court, or the [Court of Appeals] in this case, considers such a motion, it must do so 'in the light most favorable to the party opposed to the motion.' The non-movant must also be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. *If the facts and inferences so considered point so overwhelmingly in favor of the defendant (movant) that reasonable men and women could not have arrived at a verdict for the plaintiff (non-movant), granting the motion is required.* The burden on the movant in such cases is great, for if there is 'substantial' evidence opposed to the motion, which would allow reasonable and fair-minded men and women to reach differing conclusions, the motion must be denied.

*Green Acres Farms, Inc. v. Brantley*, 651 So. 2d 525, 528 (Miss. 1995) (citations omitted) (emphasis added).

When granting a JNOV or a new trial, "the trial judge should set aside a jury's verdict when, in the exercise of his sound discretion, he is convinced that the verdict is contrary to the substantial weight of the evidence." *McKinzie v. Coon*, 656 So. 2d 134, 138 (Miss. 1995); *see also Harvey v. Wall*, 649 So. 2d 184, 186 (Miss. 1995).

The instant case was submitted to the jury on the theory of negligence. The jury returned a general verdict for the Plaintiffs which was reversed by the lower court. In the history of Mississippi jurisprudence, a railroad company has never been assessed with liability solely for a failure to warn when an adult pedestrian having normal sensory capabilities, walked in a direction perpendicular to the railroad tracks at a street crossing and onto the tracks in front of an oncoming freight train. Each and every witness in this case who claimed to have been in the area before the accident clearly heard the train coming long before the train reached the crossing. None of the witnesses could testify that they saw Sims look to the right or left of his path for a train. The uncontradicted testimony from one witness, the railroad engineer, was that as Sims approached the crossing, but while he was still "in the clear," Sims looked at the train, but kept walking toward the tracks, at which time the engineer placed that train into an emergency braking mode. There was nothing else the train engineer could

have done under these circumstances. The record is void of evidence contradicting this witness' account of Sims' approach to the crossing. Other evidence showed that the train's whistle was blown as it reached the telephone pole south of the southern edge of the crossing. Furthermore, the record reflects that Sims had good eyesight, unimpaired hearing, and was not taking any kind of drugs, alcohol, or medication that would have impaired his senses. We therefore find that the trial court in the instant case acted properly in finding that "there is no evidence whatsoever from which a reasonable person can conclude that anything the railroad did or failed to do proximately caused Mr. Sims to be run over."

Upon examining the record, we are convinced that the evidence was not legally sufficient to sustain the jury verdict, and that the weight of the evidence supports the decision in favor of Illinois Central Railroad. Accordingly, we affirm the JNOV granted to Illinois Central Railroad by the lower court. This finding precludes consideration of other issues raised in this appeal. However, for further clarification, we will address the exclusion of the expert testimony.

## II. WHETHER THE LOWER COURT ERRED IN EXCLUDING PAUL GOUTY, SIGNAL EXPERT, FROM TESTIFYING AS TO POSSIBLE CAUSES OF SIGNAL SYSTEM FAILURE.

The trial court refused to allow the Sims family to call Paul Gouty, a railroad signal expert, to explain why the railroad warning system could have failed to activate upon the train's approach at the McLaurin crossing. They further argue that this evidence would have corroborated the testimony of witnesses that the signals failed, giving Sims "virtually a zero warning time." However, *no negligence was charged by the Plaintiff/Appellants on the part of Illinois Central for the failure of the signal system.*

As to whether the trial court correctly excluded the testimony of Gouty, "the initial inquiry is whether the offered expert testimony will be of assistance to the trier of fact." *Hammond v. Grissom*, 470 So. 2d 1049, 1052 (Miss. 1985). Additionally, Mississippi Rule of Evidence 702 states that an expert's testimony may be used if it will "assist the trier of fact to understand the evidence or to determine a fact in issue." M.R.E. 702. We quote from the Appellants' brief to state the proffered testimony that was excluded by the trial court:

The trial court refused to allow plaintiffs/appellants to call their railroad signal expert Paul Gouty to explain possible reasons this particular signal system could have failed to activate upon the subject train's approach, such as because of an "interfering shung." The trial court also refused to allow plaintiffs/appellants to introduce documents produced by the railroad probative of the fact that railroad signals frequently fail to activate . . . The significance of the signal failure (denied by the engineer) was simply that it occurred contemporaneously with the engineer's negligent failure to blow the horn.

Appellants do not claim any negligence on the part of the railroad for the system failure. As a result, this Court has difficulty understanding how the above testimony would be of any assistance to the

jury. Furthermore, Mississippi Rule of Evidence 401 states that relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." M.R.E. 401. Mississippi Rule of Evidence 402 provides that "Evidence which is not relevant is not admissible." M.R.E. 402. In the case *sub judice*, the excluded expert testimony bears no relationship to the determination of whether or not the system actually failed on the date in question and is therefore not relevant. Assuming *arguendo* the excluded testimony is relevant, it is well within the trial court's discretion to exclude any hypothetical speculation of system failure in a negligence case because "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." M.R.E. 403. Finally, Mississippi Rule of Evidence 103 provides in pertinent part, "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." M.R.E. 103. The exclusion of this evidence in no way affects a substantial right of the Appellants because it neither aids the jury in determining negligence nor is relevant to the merits of this case. Accordingly, we affirm the decision of the lower court on all issues.

**THE JUDGMENT OF THE LEFLORE COUNTY CIRCUIT COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANTS.**

**THOMAS, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR. FRAISER, C.J., NOT PARTICIPATING.**