IN THE SUPREME COURT OF MISSOURI

No. SC 84527

FLOYD J. SILL AND BILLYE SILL,

Appellants

vs.

BURLINGTON NORTHERN RAILROAD AND SANTA FE RAILWAY COMPANY,

Respondents

Appeal from the Circuit Court of Greene County, Missouri

Case No. 100CC0236

Honorable Don E. Burrell, Judge

APPELLANTS' REPLY BRIEF

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ORAL ARGUMENT REQUESTED

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PLAINTIFF'S SUBSTITUTE REPLY BRIEF

PROXIMAL CAUSE

Plaintiffs assert a number of points in their appellant brief filed before the Court of Appeals, but the Plaintiffs believe the controlling issue is whether the railroads alleged failure to maintain the fence is the proximate cause of Plaintiff's injury. The law related to proximate cause is well established in Missouri case law and is discussed in this first Point Relied On of Plaintiffs' Appellants' Brief.

The Defendant argues in its Substitute Brief that the relationship between the defective fence and Plaintiff's injury is too remote and does not meet the standards of proximate cause under Missouri case law. In order to meet this argument, Plaintiffs believe it is necessary to briefly discuss the issues of proximate cause, discussed in more detail in Plaintiffs' First Point Relied on. In *Callahan v. Cardinal Glennon Hospital*, 863 S.W.2 852 (Mo. banc 1994), the Supreme Court established the test for causation. The Supreme Court stated that the inquiry for proximate cause is whether the injury is the "reasonable and probable consequence of the act or omission of the defendant." Id. at 865.

Numerous cases amplify and illustrate this general rule. In the case of *Simonian v. Guvers Heating and Air Conditioning Company*, 957 S.W.2d 472 (Mo. App. 1997), the defendant was employed to repair a heating and air conditioning unit. The defendant's repairman accidentally activated the building

fire alarm and as a result exposed plaintiff to the intense noise of the alarm, causing tinnitus and hearing loss. The Trial Court dismissed the claim, finding that defendant's actions were not the proximate cause of plaintiff's injury. The Court of Appeals disagreed stating:

> "The test is not whether defendant could have foreseen plaintiff's particular injury but whether after the conclusion of all occurrences, plaintiff's injury appears to be the reasonable and probably consequence of defendant's actions. We believe that plaintiff has sufficiently alleged that defendant's actions set in motion the entire sequence of events culminating in plaintiff's hearing loss." Id. at 476.

If we apply the principles of *Callahan v. Cardinal Glennon Hospital* and other cases that define the principles of *Callahan*, it is clear that the railroads failure to maintain the fence is the proximate cause of Plaintiff's injury. The escape of livestock through a defective fence is a "reasonable probable consequence…" of the defective fence. See *Hobbs v. St. Louis, M & S.E.R. Co.*, 87 S.W. 525 (Mo. App. 1905). After livestock has escaped, it is a reasonable and probable consequence that the livestock may enter the highway and collide with a vehicle thereon. See *Lins v. Boeckler Lumber Company*, 299 S.W. 150 (Mo. App. 1927). It is self-evident that this chain of events is more direct than the attenuated chain of events that resulted in the hearing loss in the *Simonian* case.

In Defendant's Substitute Brief, it makes the unwarranted argument that the well established principles of proximate cause should not apply. To support this argument, Defendant cites a number of cases interpreting §389.650 RSMo.,

however, none of these cases involve injury to a motorist as a result of livestock escaping through a defective railroad fence. Defendant instead relies upon cases holding that under §389.650 RSMo., the railroad is not liable for damage to livestock unless livestock are injured on the railroad right-of-way. The Court's have interpreted this limitation into the statute as it relates to livestock, however, it is erroneous to argue that this limitation is required by the concept of proximate cause. If the principles of *Callahan* and other cases cited above are applied, it easily follows that the failure to maintain a fence is the probable cause of the injury to an animal escaping through the fence, even if the injury occurred beyond the railroad's right-of-way. Plaintiffs believe that the limitations that the Court has placed on §389.650 RSMo. are matters of statutory interpretation and public policy. The public policy considerations, as discussed at the end of this Brief, are of course much different when the interest to be protected is human life rather than the value of livestock.

The Defendants have cited a large number of cases, however, all of the cases under §389.650 RSMo. have a common theme. As an illustration, Defendant cites *Theener v. Kurn*, 146 S.W.2d 647 (Mo. App. 1940). In that case, the plaintiff was the <u>owner of livestock</u> that escaped through a defect in the railroad's fencing, got onto the highway and was hit by an automobile. In holding that the railroad was not liable for the property loss of the animal the Court stated:

> "We conclude there is no liability on a railroad company for injury to <u>animals</u> (emphasis added) that have departed from the right-of-way and

> while outside the right-of-way and are injured by other agencies other than those involved in the operation of the railroad." Id. at 650

The Plaintiffs could find no Missouri case, and the Defendant has cited no case, in which an injured motorist brought suit against the railroad for death or personal injury. Defendant cites a number of cases in his Substitute Brief, similar to the *Theener* case above and then argues that this Court would have to overrule an unbroken string of cases to find in favor of Plaintiff. This assertion is incorrect. The cases cited by Defendant all deal with the liability of the railroad for property damage under the statute. None of the cases deal with the issue of common law liability for death or personal injury to a motorist.

Plaintiffs believe that by analogy, the case law in Missouri supports their position. For example, in the case of *Isabel v. Hannibal and St. Joseph Railway Company*, 60 Mo. 475 (1875), a child came onto a railroad track where there was no fence and the child was killed. The railroad argued that the statute "was intended to prevent cattle from straying on the track, but not to guard against children coming thereon." In rejecting this argument, the Court noted a broader purpose of the statute:

> "Unquestionably, when the law enjoins a duty, and commands a company to build a fence along the line of its road, where it runs through a man's farm, the omission to build is a breach of that duty which it owes to those for whose protection the fence was designed. Whilst is may be intended to secure one object, it may incidentally have an effect of others. All must go together in determining the measure of the obligation." Id. at 7.

In the absence of Missouri law, the Defendant Railroad argues that the Courts "in numerous other states" find that there is no duty to prevent injuries to motorists. None of the cases cited by Defendant in other states deal with injuries to motorists.

The only case that Plaintiffs could find from any jurisdiction dealing with injury to motorists is from the neighboring Supreme Court of Iowa, *State Farm Mutual Automobile Insurance Company v. Nelson, et al.*, 166 N.W.2d 803 (Iowa 1969). In this case, Carl Johnson was driving his vehicle on US Highway 71 when he collided with a cow in the traveling portion of the highway. The car was damaged and Mr. Johnson sustained injury. Johnson was insured for property damage and medical payments by State Farm. State Farm paid the amount due to Johnson and became subrogated to his rights. State Farm brought the action against the owner of the cow and against the railroad. The Trial Court held that under the fencing statute, similar to the statute in Missouri, there was no duty to the motorist, leaving Nelson, the owner of the cow, solely responsible for liability. Nelson, the owner of the cow, appealed. The issue was whether the owner of the cow had a right to indemnity against the railroad for damages the owner of the cow owed to the injured motorist. The Appellate Court reversed the Trial Court findings that the railroad had the indemnity obligation. In so holding, the Court stated: "We conclude that Nelson has pleaded a cause of action against Rock Island for such loss, including liability to plaintiff, as he has suffered or suffers

proximately caused by Rock Island's failure to satisfy statutory requirements." Id. at 806.

PUBLIC POLICY CONSIDERATIONS

The central theme of Defendant's Brief is that there is a long, unbroken, chain of case law establishing a public policy that protects the railroad from obligations to motorists caused by its defective fences. This argument is simply incorrect. There is no Missouri case establishing this principle. At most, the cases cited by the Defendant establish that the Courts of this State have interpreted §389.650 RSMo. to protect owners of livestock only if their livestock are killed on the railroad right-of-way.

Defendant argues that the narrow statutory interpretation of §389.650 RSMo. regarding property damage to livestock should become the public policy of this state, protecting the railroads from financial responsibility for its negligence in causing death or personal injury. Clearly the public policy considerations when the issue is protection of motorist from death and personal injury are entirely different.

The most recent case under §389.650 RSMo. that limits the responsibility to the railroad to property damage occurring on its right-of-way was decided in 1940. See *Theener v. Kurn*, 146 S.W.2d 647 (Mo. App. 1940). This case was decided before the establishment of our interstate highway system. At that time, divided highways were unusual and high speed motor travel was limited.

In considering the public policy issue, it is important to note that the fence was the property of the railroad. The fence is built on real estate owned by the railroad and §389.650 RSMo. requires the railroad to "erect and maintain lawful fences…sufficient to prevent horses, cattle, mules and other animals from getting on the railroad…". The Defendant suggests that it is unfair to require the railroad to maintain a fence to contain livestock belonging to the adjoining landowner. Plaintiff believes this argument is without merit. First, the fence is on property belonging to the railroad. The Defendant's argument suggests that the adjacent landowner or the owner of the livestock should be responsible for maintaining the railroad's fence and financially responsibility if animals escape through the fence. The idea that an adjacent landowner should maintain the fence on another's property is unique. Defendant has not cited any case law to support this proposition and the argument is directly in conflict with §389.650 which places this obligation on the railroad.

Plaintiffs believe that the case of *St. Farm Mutual Automobile Insurance Company v. Nelson, et al.*, 166 N.W.2d 803 (Iowa 1969) discussed above clarifies the public policy issue. In that case, a motorist was injured by livestock that escaped through the railroad fence and sued the owner of the livestock and the railroad. The Iowa Supreme Court recognized that leaving the owner of the animal as the sole responsible party, when the railroad was the negligent party causing the injury, was not a just or logical result. The Iowa Supreme Court avoided this injustice by making the railroad responsible, in indemnity, for the

damages caused to the motorist. This Court should follow the well-reasoned logic of the Iowa Supreme Court. If this Court holds that the railroad has no duty to maintain its fence to prevent animals from escaping onto the highway, we are left with the illogical result that there is a presumption of fault on the part of the owner of the escaping animal[1], but the party responsible for owning and maintaining the fence through which the animal escaped is protected from liability.

This unjust result is not required by Missouri statute or past case law. Defendant's arguments to support this result are based on a narrow statutory interpretations of §389.650 RSMo. with situations that deal with property damage only. These cases do not prevent this Court from considering the full range of public policy issues and finding that the Defendant has a duty to the traveling public to adequately maintain its right-of-way fences.

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[1] In Missouri, there is a presumption of fault on the owner of livestock under §270.010 RSMo., which provides that the owner of an animal that escapes through a fence onto a public highway is liable for the damage caused by the animal unless the owner can establish that the animal was outside of the enclosure through no fault of the owner.

Respectfully submitted,

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I hereby certify that a true and correct copy of the foregoing was deposited in the U.S. Mail, postage prepaid, to Joseph L. Johnson, LATHROP & GAGE, L.C., 1845 S. National Ave., Springfield, Missouri 65808-4288 and R. B. Miller, III and Alok Ahuja, LATHROP & GAGE, L.C., 2345 Grand Blvd, Kansas City, MO 64108-2684 on this 19th day of September 2002.

_____

Charles Buchanan

CERTIFICATE OF COMPLIANCE
REQUIRED BY SUPREME COURT RULE 86.069(c)

The undersigned hereby certified the following:

1. I am an attorney practicing law with the law firm of BUCHANAN & WILLIAMS, P.C., 1105 E. 32nd Street, Suite 5, P. O. Box 1582, Joplin, Missouri 64802-1582. My telephone number is 417-623-8220. My Missouri Bar Number is 23185.

2. I am the attorney submitting the foregoing Substitute Reply Brief.

3. I hereby certify that the foregoing Reply Brief complies with the limitations contained in Supreme Court Rule 84.06(b). Based on the word-counting feature of the Microsoft Word software used to prepare this Brief, the Brief contains 2,091 words.

4. I have filed a copy of the foregoing Reply Brief with the Court on diskette, and have served a copy of that diskette on each adverse party. I hereby certify that the diskettes have been scanned for virus and that the diskettes are virus-free.

BUCHANAN & WILLIAMS, P.C.

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