IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

JOHN T. GRIFFIN TRUCK CORPORATION,
Plaintiff in Error,

v.

WESLEY M. SMITH,
Defendant in Error.

PETITION FOR REHEARING.

A. B. CARNEY,
WM. G. MAUPIN,
Counsel for Petitioner.

W. T. POWELL CO., INC., PRINTERS, NORFOLK

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Plaintiff-in-error, under the Statutes and the Rule of Court for such cases made and provided, respectfully begs leave to file herein its Petition for a Rehearing, this Honorable Court having, by its opinion rendered on the 22nd day of March, 1928, affirmed the judgment of the trial court in this case.

The opinion approves the principle of law contended for by us, holding it sound law and applicable in proper circumstances, but declares that it has no application to this case: because, it says that "there is nothing in the plaintiff's evidence, supporting its theory, which is palpably untrue or inherently impossible".

The opinion says further:

> "Defendant indulges in theories based upon estimates of distance at which the occupants first saw the mule and cart, and of the speed at which

the automobile was running and the mule walking, and by mathematical calculation undertakes to show that it was physically impossible for the accident to have occurred where it was shown to have occurred.

"There is no denial, however, of the fact that the accident happened, and however inaccurate the plaintiff was in his estimate of distance and speed, this does not affect the fact that the collision occurred, nor does it have any important bearing on the manner of its occurrence."

We have no disposition to place ourselves in the position of even seeming to argue with this Court. Its pronouncements are the law by which we must be guided and to which we cheerfully submit. We venture, with all deference, to point out, however, that the opinion seems to leave entirely out of account a factor in the evidence which to us appears to be of the most vital significance: namely: *the point where the accident occurred, because this is conclusive of the question of whether the mule was running away or walking.*

All witnesses who testified on this agreed that the point of collision was abreast of the elm tree. Since *plaintiff himself* states this was the place, it must be taken as an established fact that *it was abreast of the elm tree that mule and automobile met.*

We are in full accord with the opinion in thinking that this fact would have no significance if the distance traversed in the same space of time by the automobile and the mule were based on *mere estimates.* But we earnestly remind the court that this record presents a situation which shows *not estimates of distance but distance exactly measured and determined.*

This Court has often held that no plaintiff is entitled to a more favorable version of the facts than that presented by his own words on the witness stand. This plaintiff said: "after I got by the track, I saw a mule just before I got up to the fork of the road where there is a gas station and a store. The mule turned the corner, and there is a bend in the road just in front of the school building."

The plaintiff himself has therefore given with exactness the point in the road where he was and the point in the road where the mule was: viz: the plaintiff was almost at "the fork of the road where there is a gas station and a store", and the mule, simultaneously, "turned the corner" at "a bend in the road just in front of the school building". It is submitted there is nothing vague or indefinite about this—there is no room for inaccuracy. The plaintiff had crossed the railroad tracks and was coming to the fork of the road when he saw the mule come around the bend in the road in front of the school house.

It is a mathematical certainty that, given two objects moving towards each other along a straight line, the point of meeting in that line will be determined by the respective speed of those objects.

We stated in the petition that the plaintiff's own testimony placed the mule and the automobile 581 feet apart. We submit, with all deference, that this was not indulgence in "theories based upon estimates of distance", but a *measured distance between two accurately determined points.*

Plaintiff's evidence puts his speed at 10 miles per hour. This, if an estimate, is plaintiff's own—he is bound by it, and he has no right to ask either jury or court to

disregard testimony offered by him and find that he was actually travelling at a lower speed. He surely cannot be heard to complain if his own and only evidence as to his speed is accepted as true. He has no right to ask for a finding more favorable to him. We submit, therefore, that the only evidence presented by this record is that plaintiff's automobile was travelling at ten miles per hour.

Plaintiff and his only other witness insisted and reiterated that the mule was *walking—walking as gently as a mule could walk—walking along unconcerned—walking along very quietly.* We asked in the petition that this Court take judicial notice of the fact that a mule, so walking, moves at about three miles per hour. We renew that request now. It is a matter of universal human knowledge.

The opinion inadvertently does us injustice in assuming that we asked this Court to take judicial notice of what a mule's *conduct* would be in any combination of circumstances. As high as our regard for this Court is, and as deeply as we revere its wisdom, we do not credit it with omniscience—and we did not make of it such a wholly unreasonable request. What we did ask it to judicially note was the *speed* of a gently walking mule, translated into miles per hour—not its conduct or its probable course of action if irritated or alarmed.

We have the speed of this mule established, as we maintain, and we earnestly hope that the Court, upon further reflection, and after being made more clearly aware of what we ask of it, will agree with us—at three miles per hour.

Here then is our problem: Point A and point B are 581 feet apart; an automobile leaves point A, proceeding on a straight line toward point B; and simultaneously a

mule leaves point B proceeding along the same line toward point A; the automobile moves at the rate of 10 miles per hour, the mule at the rate of 3 miles per hour. *Quaere:* at what point in this line will the two objects meet?

Answer: The speed of the automobile at 10 miles per hour equals 14.7 feet per second; the speed of the mule at 3 miles per hour equals 4.4 feet per second; the rate of approach, therefore, is 19.1 feet per second, and they will meet in 30.4 seconds. During this time the automobile will travel 447 feet and the mule 134 feet; and the point of contact, therefore, is 447 feet from Point A and 134 feet from Point B.

But if this is scaled on the plat it falls *175 feet west of the elm tree—175 feet from the point where automobile and mule actually, physically met.*

Make the problem more favorable to the plaintiff: let the distance between Point A and Point B be 700 feet instead of 581—that is to say let Point A be fixed in *the other road shown on the plat before the fork at the store is reached.* Given the same respective speeds, where will the point of contact be?

Answer: They will meet in 36.6 seconds. During this time the automobile will travel 538 feet and the mule 162 feet; and the point of contact, therefore, is 538 feet from Point A and 162 feet from Point B.

But if this is scaled on the plat it falls *150 feet west of the elm tree—150 feet from the point where automobile and mule actually, physically met.*

We submit, therefore, that it was a physical impossibility that the mule could have been walking. If there is one thing in this case that is certain, it is that *the accident occurred abreast of the elm tree.* Granting this—

and we must grant it, for plaintiff himself said so—the mule could not possibly have been walking. The testimony of Smith and Winbrough, that the mule was walking, *is* inherently impossible. And if that evidence is impossible and untrue, the whole theory of negligence set up by plaintiff collapses like a house of cards.

Let us state our case in syllogistic form. If the mule was walking the accident must have occurred at a point 162 feet east of the bend of the road.

The accident did occur at a point 312 feet east of the bend of the road.

Therefore, the mule was not walking.

This defendant submits that a consideration of the points hereinabove urged does vitally affect and have a most important bearing on the manner of this collision. If the mule was not walking—and we submit that it is physically and mathematically impossible that it could have been—then plaintiff's evidence is untrue and the accident did not happen—could not have happened, as he said it did, and his verdict ought not to stand.

We directed the attention of the Court, in the petition and in argument, to the utter improbability of plaintiff's evidence, aside from its impossibility. No labored argument is required to show the improbability of this: A mule is snowballed, just before it reaches a bend in the road, becomes frightened and runs away. A disinterested witness watches it disappear around the bend, running. No attempt is made to contradict or impeach the testimony of this witness. As the mule disappears, running, from the line of vision of this witness, going around the bend, it simultaneously comes into the line of vision of two highly interested witnesses who say it was walking.

Possibly all these witnesses *could* be telling the truth, but it is a strain on credulity to believe it. The disinterested witness, who says the mule was snowballed and running when it rounded the bend, is corroborated and uncontradicted; the two interested witnesses, who say it was walking, are not corroborated and are contradicted. Add to this situation the manifest physical impossibility that, if the mule was walking, the accident could have happened within 150 feet of where it did happen, it seems to us that the impartial mind is forced to the conclusion that the interested witnesses were not telling the truth—that the mule could not possibly have been walking.

We have only two postulates possible: 1st—That the mule was walking. Assume this as true, it must have met the automobile at least *150 feet west of the elm tree.* It actually did meet the automobile *just opposite* the elm tree. Therefore, the mule was not walking.

2nd—That the mule was running. Assume this as true, it would have met the automobile just about opposite the elm tree. It did meet the automobile opposite the elm tree. Therefore, the mule was running.

Postulate No. 1 is inconsistent with a known physical fact; it should, therefore, be discarded under the rule repudiating such testimony, whereas the known physical fact cannot be discarded.

Postulate No. 2 is consistent with every known physical fact, but inconsistent with testimony which may be true or untrue; it should, therefore, be accepted and the testimony rejected; for the known physical fact must of necessity be true, and the testimony in conflict therewith must of necessity be untrue.

If Postulate No. 2 is accepted, the mule was running away, out of control, and whatever damage it may have done was *damnum absque injuria,* an unfortunate accident for which no one is legally responsible.

The impossibility of accepting as true the evidence of the plaintiff that the mule was walking is further emphasized by considering what the speed of the automobile must have been in that case in order for the accident to have occurred at the elm tree.

This tree is almost exactly midway between the positions of the automobile and mule at the time the plaintiff first observed the mule. If, therefore, the mule was walking, that is, was moving at three miles per hour from that time until the accident occurred, it follows that the automobile was moving no faster than the mule; that is to say, we must accept as a fact that for a distance of approximately 300 feet this automobile moved along a concrete highway at a speed no greater than three miles an hour. Few automobiles can move at such a low speed, and to assume that this plaintiff drove his automobile a distance of approximately 300 feet at a speed no greater than three miles per hour, if not impossible, is so fantastically improbable as to be outside the realm of rational consideration.

For the reasons hereinabove set forth your petitioner prays that a rehearing may be granted in this case, and that the judgment of the trial court herein may be reversed.

Respectfully submitted,

JOHN T. GRIFFIN TRUCK CORPORATION,

By A. B. CARNEY,
WM. G. MAUPIN,
Its Counsel.