

1952

Harry Kirk Creamer v. The Ogden Union Railway and Depot Company : Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

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Recommended Citation

Petition for Rehearing, *Creamer v. Ogden Union Railway and Depot Co.*, No. 7664 (Utah Supreme Court, 1952).
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Case No. 7664

**IN THE SUPREME COURT
of the
STATE OF UTAH**

HARRY KIRK CREAMER,
Plaintiff and Respondent,

— vs. —

**THE OGDEN UNION RAILWAY
AND DEPOT COMPANY, a cor-
poration,**
Defendant and Appellant.

**PETITION FOR REHEARING AND BRIEF IN
SUPPORT THEREOF**

FILED **REWLINGS, WALLACE, BLACK,**
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JUN 13 1952
Clerk, Supreme Court, Utah

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Case No. 7664

PETITION FOR REHEARING AND BRIEF IN
SUPPORT THEREOF

PETITION FOR REHEARING

COMES now HARRY KIRK CREAMER, Plaintiff and Respondent herein, and respectfully petitions this Honorable Court for a rehearing in the above-entitled case, and to vacate the Order of this Court herein reversing the judgment for respondent with instructions to dismiss.

This Petition is based on the following grounds:

Point I.

This Court has, by its opinion herein, deprived the plaintiff of a jury trial and has decided this case contrary to the opinions and controlling cases decided by the Supreme Court of the United States.

Point II.

This Court has erred in deciding as a matter of law that defendant was not negligent in furnishing "insufficient" equipment for the work of icing diners, and only owes a duty to workmen having "no physical weakness."

Accompanying this Petition and filed herewith is a brief in support thereof.

RAWLINGS, WALLACE, BLACK
ROBERTS & BLACK

.....Wayne L. Black.....
Wayne L. Black
*Attorneys for Plaintiff and
Respondent*

I hereby certify that I am one of the attorneys for the Respondent, Petitioner herein, and that in my opinion there is good cause to believe the judgment objected to is erroneous and that the case ought to be re-examined as prayed for in said Petition.

Dated this 16 day of June, 1952.

.....Wayne L. Black.....
Wayne L. Black

RECEIVED 4 copy of the foregoing Petition and
Brief in Support Thereof this 16 day of June, 1952.

Bryan P. Leverich

M. J. Bronson

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BRIEF IN SUPPORT OF PETITION FOR REHEARING

Point I.

THIS COURT HAS, BY ITS OPINION HEREIN, DEPRIVED THE PLAINTIFF OF A JURY TRIAL AND HAS DECIDED THIS CASE CONTRARY TO THE OPINIONS AND CONTROLLING CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES.

Plaintiff, employed by defendant as a coach cleaner, after a number of months of assignment to lighter tasks, was ordered and directed to ice three diners. Over a period of 2½ hours he carried 1½ tons of ice, 100 pounds at a time, up a 15 foot ladder. The extreme overexertion occasioned by this task caused him to suffer heart failure and consequent permanent injury. Icing diners was the most strenuous task in The O. U. R. & D. yard. Some of

the coach cleaners didn't have sufficient strength and stamina to ice three diners. Coach cleaners coming from a vacation or whose muscles were not hardened to the task, experienced real difficulty icing diners until they became conditioned to its strenuous demands. Yet, of the many coach cleaners working in the yard, any or all were called upon from time to time to perform this task. The likelihood of injury from overexertion to one or more of this class of workmen could certainly be foreseen by a reasonably prudent employer, viewing the evidence in a light most favorable to plaintiff.

The evidence further revealed that practical lifting and hoisting devices were readily available and even in use on adjacent tracks by the Pacific Fruit Express Company.

The trial judge determined that the evidence was sufficient to require submission to the jury of the questions of defendant's negligence and proximate cause. The jury found that defendant was negligent and that said negligence was the proximate cause of plaintiff's injuries. The case was submitted to the jury on instructions unassailed here.

This Court has held that reasonable minds could not differ upon the proposition that the evidence was insufficient to support the jury's verdict in favor of plaintiff. By this holding, the Court has deprived plaintiff of a jury trial upon the issues of this case.

The Supreme Court of the United States in *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 87 L. Ed. 610, 63 S. Ct. 444, 451, has pointed out:

“It appears to be the clear Congressional intent that to the maximum extent proper, questions in actions arising under the Act should be left to the jury.”

That Court in a number of recent cases has carefully guarded the right of trial by jury in cases arising under the Federal Employers' Liability Act and has vigorously upheld and given effect to the intention of Congress as above set forth. We submit that the holding of this Court is in conflict with the holdings in these controlling cases and is contrary to the provisions of said Act.

This Court has resolved facts and legitimate inferences from facts against rather than in favor of the plaintiff. For example, the Court in its opinion stated:

“It must be conceded that without the rheumatic heart, injury would not have resulted.”

We call attention to the fact that plaintiff had not been performing this type of vigorous exercise for a long period of time. He was assigned this task on a hot summer day. It involved lifting a tremendous amount of weight up a near vertical ladder. Some coach cleaners, because of natural physical weakness, could not have iced three diners, one following the other, even had they tried. We deny that it must be conceded plaintiff would not have suffered injury without the rheumatic heart. We submit that from the legitimate inferences from known facts the jury could well have found and did find a likelihood of injury to *any* member of the class of work-

men to which plaintiff belonged in the general nature of the task assigned.

This Court has disregarded the admonitions of the United States Supreme Court in the case of *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 64 S. Ct. 409, 412, 88 L. Ed. 520, where the court stated:

“It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion, drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. * * * That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

“Upon an examination of the record we cannot say that the inference drawn by this jury that respondent’s negligence caused the fatal accident is without support in the evidence. Thus to enter a judgment for respondent notwithstanding the verdict is to deprive petitioner of the right to a jury trial. No reason is apparent why we should abdicate our duty to protect and guard that right in this case.”

In the *Tiller* case, *supra*, the court stated (63 S. Ct. 444, 451) :

“* * * Many years ago this Court said of the problems of negligence, ‘We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.’ *Jones v. East Tennessee, V. & G. R. Co.*, 128 U.S. 443, 445, 9 S. Ct. 118, 32 L. Ed. 478, 479. Or as we have put it on another occasion, ‘Where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences,’ the case should go to the jury.”

In *Bailey v. Central Vermont Ry. Inc.*, 319 U.S. 350, 63 S. Ct. 1062, 1064, 87 L. Ed. 1444, the court stated:

“The right to trial by jury is ‘a basic and fundamental feature of our system of federal jurisprudence.’ *Jacob v. New York City*, 315 U.S. 752, 62 S. Ct. 854, 86 L. Ed. 1166. It is part and parcel of the remedy afforded railroad workers under the Employers’ Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. That method of determining the liability of the carriers and of placing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern systems of workmen’s compensation. But however inefficient and backward it may be, it is the system which Congress has provided. *To deprive these workers of the*

benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

A recent case of the Eighth Circuit Court concisely states the gist of these Supreme Court decisions. *Terminal R. Ass'n. of St. Louis v. Schorb*, 151 F. 2d 361:

"* * * One of the main purposes of the Federal Employers' Liability Act was to modify the common law barriers against recovery by an employee in a suit against his employer predicated on an industrial accident. *Tiller, Executor, v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 63 S. Ct. 444, 87 L. Ed. 610, 143 A.L.R. 967. The right to jury trial constitutes a part of the remedy afforded by the act and employees must not be deprived of that right in close or doubtful cases. *Bailey, Administratrix, v. Central Vermont Ry. Inc.*, 319 U.S. 350 loc. cit. 354, 63 S. Ct. 1062, 87 L. Ed. 1444. It was for the jury, as the fact finding body, to weigh the evidence and judge credibility. *Tennant, Administratrix, v. Peoria & P. U. Ry. Co.*, 321 U.S. 29, 64 S. Ct. 409, 88 L. Ed. 520; *Crain v. Illinois Central R. Co.*, 335 Mo. 658, 73 S.W. (2d) 786, certiorari denied, 293 U.S. 607, 55 S. Ct. 123, 79 L. Ed. 698. On this appeal we must view the evidence and inferences reasonably to be drawn therefrom, in the light most favorable to plaintiff. *Chicago, St. P., M. & O. R. Co., v. Muldowney*, 8 Cir., 130 F. (2d) 971, certiorari denied, 317 U.S. 700, 63 S. Ct. 526, 87 L. Ed. 560."

In *Wilkerson v. McCarthy et al.*, 336 U.S. 53, 69 S. Ct. 413, 421, 93 L. Ed. 1098, reversing the Utah Supreme Court, 112 Utah 300, 187 P. 2d 188, Mr. Justice Douglas,

discussing the stewardship of F. E. L. A. cases by the United States Supreme Court, stated:

“The basis of liability under the Act is and remains negligence. Judges will not always agree as to what facts are necessary to establish negligence. We are not in agreement in all cases. But the review of the cases coming to the Court from the 1943 Term to date and set forth in the Appendix to this opinion shows, I think, a record more faithful to the design of the Act than previously prevailed.

“Of the 55 petitions for certiorari filed during this period, 20 have been granted. Of these one was granted at the instance of the employer, 19 at the instance of an employee. In 16 of these cases the lower court was reversed for setting aside a jury verdict for an employee or taking the case from the jury. In 3 the lower court was sustained in taking the case from the jury. In the one case granted at the instance of the employer we held that it had received the jury trial on contributory negligence to which it was entitled. In these 20 cases we were unanimous in 10 of the decisions which we rendered on the merits.

“Of the 35 petitions denied, 21 were by employers claiming that jury verdicts were erroneous or that new trials should not have been ordered. The remaining 14 were filed by employees. In 10 of these the lower court had withheld the case from the jury and rendered judgment for the employer, in 3 it had sustained jury verdicts for the employer and in 1 reversed a jury verdict for the employee and directed a new trial.

“From this group of cases three observations can be made:

“(1) The basis of liability has not been shifted from negligence to absolute liability.

“(2) *The criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below but whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected.*

“(3) *The historic role of the jury in performing that function, see Jones v. East Tennessee, V. & G. R. Co., 128 U.S. 443, 445, 9 S. Ct. 118, 32 L. Ed. 478; Washington & G. R. Co. v. McDade, 135 U.S. 554, 572, 10 S. Ct. 1044, 1049, 1050, 34 L. Ed. 235; Bailey v. Central Vermont Ry., supra, is being restored in this important class of cases.*”

We submit that in the case at bar this Court has abdicated its duty to guard and protect the right of plaintiff to a jury trial. The approach by the Court to this case is contrary to the spirit of the foregoing cases. The evidence has been viewed in a light more favorable to the defendant than is justified. Inferences, some not founded on evidence, have been drawn in favor of defendant's case and against the jury's verdict. We will attempt to point these out with particularity in the following point:

Point II.

THIS COURT HAS ERRED IN DECIDING AS A MATTER OF LAW THAT DEFENDANT WAS NOT NEGLIGENT IN FURNISHING “INSUFFICIENT” EQUIPMENT FOR THE WORK OF ICING DINERS, AND ONLY OWES A DUTY TO WORKMEN HAVING “NO PHYSICAL WEAKNESS.”

Applying the rules set forth in Point I herein, and

viewing the evidence and the inferences deducible therefrom in a light most favorable to plaintiff, let us consider this Court's opinion.

This Court has decided as matter of law that defendant has violated "no legal duty." It has neither admitted nor denied existence of a duty owed by defendant of furnishing coach cleaners with equipment and machinery sufficient for icing diners with safety, but the effect of its opinion is a holding that defendant owes no such duty. Consider for a moment the remarkable precariousness of this position. If no such duty exists, what is the meaning of the word "sufficient?" How can it be defined in such a manner as to eliminate defendant's duty to plaintiff and its other employees? Perhaps we should again consider the purpose of the Federal Employers' Liability Act as defined in the *Wilkerson* case, supra; at p. 420:

"* * * The purpose of the Act was to change that strict rule of liability, to lift from employees the 'prodigious burden' of personal injuries which that system had placed upon them, and to relieve men 'who by the exigencies and necessities of life are bound to labor' from the risks and hazards that could be avoided or lessened 'by the exercise of proper care on the part of the employer *in providing safe and proper machinery and equipment with which the employee does his work.*'

"That purpose was not given a friendly reception in the courts. In the first place, a great maze of restrictive interpretations were engrafted on the Act, constructions that deprived the beneficiaries of many of the intended benefits of the legislation. See *Seaboard Air Line Ry. v. Horton*,

233 U.S. 492, 34 S. Ct. 635, 58 L. Ed. 1062, L.R.A. 1915C, 1, Ann. Cas. 1915B, 475; Toledo, St. L. & W. R. Co. v. Allen, 276 U.S. 165, 48 S. Ct. 215, 72 L. Ed. 513; and the review of the cases in Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 62-67, 63 S. Ct. 444, 448-451, 87 L. Ed. 610, 143 A.L.R. 967. In the second place, doubtful questions of fact were taken from the jury and resolved by the courts in favor of the employer. This Court led the way in overturning jury verdicts rendered for employees. See Chicago, M. & St. P. R. Co. v. Coogan, 271 U.S. 472, 46 S. Ct. 564, 70 L. Ed. 1041; Missouri Pac. R. Co. v. Aeby, 275 U.S. 426, 48 S. Ct. 177, 72 L. Ed. 351; New York Central R. Co. v. Ambrose, 280 U.S. 486, 50 S. Ct. 198, 74 L. Ed. 562. And so it was that a goodly portion of the relief which Congress had provided employees was withheld from them.

“The first of these obstacles which the courts had created could be removed by Congress. In 1939 Congress did indeed move to release the employees from the burden of assumption of risk which the Court had reimposed on them. 53 Stat. 1404, 45 U.S.C. Sec. 54, 45 U.S.C.A. Sec. 54; Tiller v. Atlantic Coast Line R. Co., supra. The second evil was not so readily susceptible of Congressional correction under a system where liability is bottomed on negligence. Since the condition was one created by the Court and beyond effective control by Congress, it was appropriate and fitting that the Court correct it. In fact, a decision not to correct it was to let the administration of this law be governed not by the aim of the legislation to safeguard employees but by a hostile philosophy that permeated its interpretation.”

We submit that the duty owed by defendant was a broad duty in keeping with the purposes of the act as outlined in the *Wilkerson* case, *supra*, and was owed not only to workmen who had "no physical weakness," but was owed to each and every member of the class of workmen performing the task of icing diners. It was owed to the strong, the weak, the old and the young alike. This was a duty owed to a class of workmen as such. Its violation would depend on whether the class as a whole, and not just a part of the class, is protected, on whether there was a foreseeable likelihood of injury to *any* member of the class, not just to plaintiff, and not just to "normal" or "ordinary" members of the class.

If the foregoing propositions be not true, a large segment of workmen who fall below the normalcy class are precluded from the protection of the law.

Defendant has claimed there was no breach of duty because plaintiff had an undiscoverable physical eccentricity, but has failed to point out wherein plaintiff's physical condition has a bearing on defendant's duty and breach of duty. If defendant owed a duty to furnish sufficient equipment for safety in icing diners and did not furnish such equipment, how can we escape the conclusion that defendant was negligent? Under what stretch of the imagination does plaintiff's physical condition have a bearing on safety or unsafety to coach cleaners from insufficient equipment?

This Court has held as a matter of law that there was no likelihood of injury from overexertion to any substantial number of coach cleaners assigned the task

of icing diners by hand rather than by use of machinery, and has thereby again fallen into the error of judicially deciding a purely fact question.

This Court's resolving of a fact issue as a matter of law brings to mind similar decisions of this Court in previous cases brought under the Federal Employers' Liability Act and the Federal Safety Appliance Act. We invite a comparison with the first opinion in *Pauly v. McCarthy et al.*, 109 Utah 398, 166 P. 2d 501, 508, wherein the Court held that the passing track at Chacra was not a place to work. This Court will recall the evidence that trains with hotboxes proceeded onto the passing track at Chacra not only to allow other trains to pass along the main line track, but to make temporary repairs. The evidence was that plaintiff in dismounting from the rear car of his train at night, stepped off a trestle to the creek bed below and was injured. This Court held, and we quote:

“We conclude that under the evidence the passing tracks at Chacra were not contemplated as a place for work but must be considered as one with all the rest of the road in the matter of making emergency adjustments or repairs; that using the passing tracks for such repairs was for convenience only in not holding up traffic and not because by custom, designation or contemplation a place of work; that for reasons more fully set out hereunder, under the evidence this was not a jury question.”

Yet, the Supreme Court of the United States at 67 *S. Ct.* 962 reversed, holding that whether or not the passing track at Chacra was a place of work was at least a jury question.

Mr. Justice Wolfe, in his dissent in the case of *Coray v. Southern Pac. Co.*, 112 Utah 166, 185 P. 2d 963, 970, had this to say about the reversal of the *Pauly* case by the United States Supreme Court:

“We thought that to hold the entire shoulder of the railroad as a place to work regardless of any functions, frequent or otherwise, to be performed there, might require railroads to spend millions of dollars in widening the shoulders on every cut and fill so that an employee might safely drop off without first looking. For if there was a duty to build a flooring over a bridge at a passing track where an employee might by chance be required to make repairs in order to prevent an employee not exercising proper care from going down through the bridge, there would be a similar duty to widen every fill so as to prevent an employee, carelessly alighting, from sliding down the side of a fill where the sides were steep.

“While we have not had the benefit of an opinion of the United States Supreme Court as to the reasons for its decision, we may assume that it concluded from the evidence that in law the passing track was a place to work, or at least that, under the evidence, the passing track was a place to work was for the jury.”

In the case at bar reasons other than those relating to a determination of negligence have again been used

by this Court. It makes the astounding argument that if it were necessary for the defendant to use sufficient equipment it might eliminate manual labor on this job and deprive families of a livelihood. This should have nothing to do with a determination of plaintiff's right of recovery.

This reasoning of the Court is absolutely contrary to the established interpretation of the Federal Employers' Liability Act. In *Boston & M. R. R. v. Meech*, 156 F. 2d 109, 111, the Court held that where further precautions could be taken for the safety of employees an evidentiary basis of negligence was established. The Court stated:

"From the foregoing, it is clear that although some precautions were taken for the decedent's safety, further precautions were possible, and from this it follows, as we read the decisions cited above, that there was an 'evidentiary basis' for submitting the issue of the defendant's causal negligence to the jury, and hence that our 'function is exhausted.'"

Also see *Boston & M. R. R. v. Kyle*, 156 F. 2d 112. Where a safer method of procedure could have been followed in doing the work, the Court held there was an evidentiary basis for a finding of negligence.

This Court took a fact question from the jury in the case of *Wilkerson v. McCarthy et al.*, 112 Utah 300, 187 P. 2d 188, 194. In that case the question arose as to whether by custom and usage a plank across a wheel pit, surrounded on three sides by chains, was a walkway. In spite of evidence that for three months prior to the acci-

dent switchmen had used the plank as a walkway, swinging around the posts and inside the enclosure of the chains, this Court weighed disputed questions of fact and held, and we quote:

“An examination of this evidence shows the witness could identify two switchmen who crossed the plank during the three months period, but it is entirely lacking in those elements necessary to show acceptance of a custom or practice by acquiescence. The use by employees other than the two is confused between the times before and the times after the installation of the safety chains.”

And again, at p. 195:

“It must be conceded that if dependents knew or were charged with knowledge that switchmen and other workmen generally in the yard were habitually using the plank as a walkway in the manner claimed by plaintiff, then the safety enclosure might be entirely inadequate, and a jury question would have been presented on the condition of the board and the adequacy of the enclosure.”

The Supreme Court of the United States again was forced to remind this Court that disputed questions of fact and inferences therefrom are peculiarly questions for the jury, and after quoting the last aforementioned portion of this Court's opinion, stated (69 S. Ct. 413, 417):

“We agree with this last quoted statement of the Utah court, and since there was evidence to

support a jury finding that employees generally had habitually used the board as a walkway, it was error for the trial judge to direct a verdict in favor of respondent."

In the case at bar this Court has held that there is no disputed question of fact concerning the likelihood of injury from over straining in icing diners. This decision assumes the very fact which was in dispute in the case and about which there was controversial evidence. It assumes as an absolute proposition of fact that the railroad could not have reasonably anticipated or foreseen the likelihood of injury to *any* of its employees from the nature of the task of icing diners and the severity of the strain involved in performing that task, that the task was not difficult to perform and did not involve the likelihood of overexertion. This Court is again in the identical position it occupied in deciding disputed questions of fact as matter of law in the *Pauly* and *Wilkerson* cases.

This Court has set up as the sole standard of care to which the railroad company must comply safeguarding against foreseeable injury to "ordinary" employees. As we have heretofore pointed out, the "ordinary" individual thusly defined would be more accurately described as the perfect individual, that is, the strong, husky youth with no physical deficiency or inadequacies whatsoever. This Court is blinded to the realism of fact that all employees are not perfect or even "ordinary." Some may be 5 feet 7 inches in height and weighing 127 pounds, as was one of the witnesses. Some may have suffered from the ravages of age and hardening of the arteries. Some

may have congenital weaknesses which may ultimately produce hernias from overstrain. Yet these individuals, when subjected to the usual and ordinary type of stress and strain in the performance of their labor, would suffer no injury, but if confronted with the strenuous and burdensome task of icing three diners, carrying 1½ tons of ice up a 15 foot laddered over a period of 2½ hours, may suffer injury, and the jury could have found and did find that plaintiff was among the class of individuals wherein there was and would be a likelihood of some injury in the assigning of him to this task, especially in view of the fact that he was not hardened to the task but had been performing lighter work for some period of time prior to his injuries. Consider in this connection the statement made by Mr. Justice Wade in his concurring opinion in *Bennett v. Pilot Products Co., Inc.*, 235 P. 2d 525, 528:

“It seems clear, however, that if respondent had reason to believe that one out of every thousand of its owners would be harmed as plaintiff was by the use of its products, then it could foresee, and therefore must reasonably anticipate that such would be the result. Many negligently maintained dangerous instrumentalities actually harm less than one person in a thousand of those who come in contact with them. To hold that such result could not be reasonably anticipated is to give to such expression a meaning not ordinarily intended and will lead to confusion rather than clear thinking.”

Although we realize the court has held otherwise,

let us assume for the purpose of argument that a duty was owed by defendant to furnish sufficient equipment for the task of icing diners and that said duty was violated in not furnishing sufficient equipment. The only remaining question is that of proximate cause. This Court has likewise held as matter of law that strenuous overexertion was not a proximate cause of plaintiff's injuries. It has so held in spite of positive medical testimony that overstraining was the precipitating, contributing cause of his injuries. Let us consider this holding in the light of the Act which reads in part as follows (45 U.S.C.A., Sec. 51) :

“Every common carrier * * * shall be liable in damages * * * for * * * injuries * * * resulting *in whole or in part* from * * * insufficiency, due to its negligence, in its * * * machinery, * * * or other equipment.”

Common law principles of proximate cause are modified and altered by abolition of contributory negligence as a bar to recovery, and by substitution of the concept of multiplicity of causes.

This Court has suggested that plaintiff would not have been injured were it not for his rheumatic heart. It has held as a matter of law that the rheumatic heart was the sole proximate cause of plaintiff's injuries.

We wonder what characterization this Court would attach to the overexertion to which plaintiff was subjected. Is this merely “a non-negligent condition” as was suggested by this Court in its erroneous opinion in the

case of *Coray v. Southern Pacific Co.*, 112 Utah 166, 185 P. 2d 963, or is this distinguishable as a cause "in a philosophical sense" rather than "in a legal sense" as was suggested by this Court in the same case?

We call attention to the language of the United States Supreme Court in the case of *Coray v. Southern Pacific Co.*, 335 U.S. 520, 69 S. Ct. 275, 277, 93 L. Ed. 208, where the Court stated:

"The language selected by Congress to fix liability in cases of this kind is simple and direct. Consideration of its meaning by the introduction of dialectical subtleties can serve no useful interpretative purpose. The statute declares that railroads shall be responsible for their employees' deaths 'resulting in whole or in part' from defective appliances such as were here maintained. 45 U.S.C. Sec. 51, 45 U.S.C.A. Sec. 51. And to make its purpose crystal clear, Congress has also provided that 'no such employee * * * shall be held to have been guilty of contributory negligence in any case' where a violation of the Safety Appliance Act, such as the one here, 'contributed to the * * * death of such employee.' 45 U.S.C. Sec. 53, 45 U.S.C.A. Sec. 53. Congress has thus for its own reasons imposed extraordinary safety obligations upon railroads and has commanded that if a breach of these obligations contributes in part to an employee's death, the railroad must pay damages. These air-brakes were defective; for this reason alone the train suddenly and unexpectedly stopped; a motor track car following at about the same rate of speed and operated by an employee looking in another direction crashed into the train; all of these circumstances were insepar-

ably related to one another in time and space. The jury could have found that decedent's death resulted from any or all of the foregoing circumstances."

In a case where a multiplicity of causes and conditions contributed to cause plaintiff's injuries, this Court has singled out plaintiff's physical condition and labeled it sole proximate cause. It has thereby in effect judicially legislated the words "in whole or in part" out of the act.

If this Court's opinion is allowed to stand and become a precedent in this state it will mean that any railroad workman suffering from a straining injury will be defeated simply because he had an "undiscoverable physical eccentricity," without which he would not have suffered injury. The reasoning of this Court's opinion would clearly have defeated plaintiff in *Stewart v. Baltimore & O. R. Co.*, 137 F. 2d 527, 529, where decedent had an undiscoverable physical weakness, to wit: a coronary heart, injured from overstraining, but the Court rightly held "Over-exertion resulting in serious casualties is something which can as well be foreseen as many other occurrences and is something which an employer may be thought bound to take all reasonable steps to prevent." Such reasoning would have defeated plaintiff in *Louisville, etc. R. Co. v. Kerrick*, 178 Ky. 486, 199 S.W. 44, where plaintiff incurred a hernia from straining. Likewise it would have defeated plaintiff in the case of *Duffy v. Union Pacific R. Co.*, 218 P. 2d 1080.

Countless cases and countless courts have allowed

plaintiffs under the Federal Employers' Liability Act to recover for straining injuries. Ruptured intervertebral disks, spondylolisthesis, inguinal hernia, incisional hernia, ruptured blood vessel and coronary thrombosis cases are being tried daily in our courts. Almost without exception these are cases of latent undiscoverable weaknesses without which injuries would not have occurred, and where the injury is caused in whole or in part from overexertion either as a result of insufficient equipment or as a result of insufficient help, or both. Many of these cases are cited in plaintiff's original brief.

Analogous cases where recovery has not been allowed are distinguishable. Among others, this Court has cited *Owen v. Rochester-Penfield Bus Co.*, 103 N.Y.S. 2d 137, and *Louisville & N. R. Co. v. Willhite*, 300 Ky. 75, 187 S.W. 2d 1010.

As we pointed out in our original brief, these are cases decided pursuant to the doctrine of assumption of risk. Under this doctrine a man assumes the natural, ordinary anticipated risks of his employment. Risks of overexertion from insufficiency of equipment were the very kind of risks assumed. There was no recovery at common law for insufficiency of equipment. This is a duty imposed by statute, and safeguarded by statutory abolition of the doctrine of assumption of risk. We again cite 45 *U.S.C.A.*, Sec. 54:

“That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees,

such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; * * *."

Likewise, the *Tiller* case, *supra*, (63 S. Ct. 444, 451) where it was said:

"The doctrine of assumption of risk cannot be 'abolished in toto' and still remain in partial existence as the court below suggests. The theory that a servant is completely barred from recovery for injury resulting from his master's negligence, *which legislatures have sought to eliminate in all its various forms of contributory negligence*, the fellow servant rule, and assumption of risk, must not, contrary to the will of Congress, be allowed recrudescence under any other label in the common law lexicon * * *."

This Courts calls it by another name, non-negligence, but the doctrine of assumption of risk cannot thus easily be disguised. It has been resurrected from the scrap heap of the law to again defeat a plaintiff's cause.

In conclusion may we urge the following propositions:

1. This Court has erroneously concluded that there was no likelihood of injury to railroad coach cleaners from overexertion even though the evidence and inferences favorable to plaintiff lead to a contrary conclusion, and even though the jury and trial judge came to a contrary conclusion.

2. This Court has erroneously concluded that the

words "in whole or in part" have no meaning in the statute, are mere verbiage, and has judicially excluded workmen with so-called physical eccentricities, who break down under strain and overexertion, from the benefits of the act.

3. This Court has erroneously disregarded the statutory and United States Supreme Court decisional law in holding that plaintiff assumed the risks of overexertion incident to his employment and has labeled assumption of risk as non-negligence.

Never before has this Court, even in the *Pauly*, *Wilkerson* and *Coray* cases, supra, so clearly disregarded the meaning and philosophy of the Federal Employers' Liability Act.

CONCLUSION

For the reasons herein set forth, we submit that error was committed by the Court in reversing and dismissing the cause of plaintiff and in setting aside a jury verdict in his favor.

Respectfully submitted,

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