1955

Alfred Roger Moore v. The Denver & Rio Grande Western Railroad Co. : Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

Rawlings, Wallace, Roberts & Black; Counsel for Respondent;

Case No. 8284

IN THE SUPREME COURT
of the
STATE OF UTAH

ALFRED ROGER MOORE,
Plaintiff and Respondent,

— vs. —

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, a corporation,
Defendant and Appellant.

PETITION FOR REHEARING
and
BRIEF IN SUPPORT THEREOF

RAWLINGS, WALLACE,
ROBERTS & BLACK
Counsel for Respondent
530 Judge Building
Salt Lake City, Utah

TABLE OF CONTENTS

AUTHORITIES CITED

Page

IN THE SUPREME COURT
of the
STATE OF UTAH

ALFRED ROGER MOORE,
Plaintiff and Respondent,

— vs. —

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, a corporation,
Defendant and Appellant.

Case No. 8284

PETITION FOR REHEARING
and
BRIEF IN SUPPORT THEREOF

PETITION FOR REHEARING

COMES NOW Alfred Roger Moore, respondent herein, and respectfully petitions this Honorable Court for a rehearing in the above-entitled case and to vacate the Order of the Court herein reversing the judgment for respondent.

This petition is based on the following grounds:

Point I.

This Court erred in holding that the jury should have been instructed that they were not to take into consideration any evidence regarding a ruptured disc.

Point II.

The Court erred in ruling that the trial court was in error when it gave its Instruction No. 12 to the effect that the statutes of the State of Utah and Colorado covering Employers' Liability and Workman's Compensation are not applicable and that plaintiff's right to recover is based solely upon the statutes of the United States.

Point III.

The Court erred in ruling that the trial court was in error in giving its Instruction No. 13 to the effect that under the Federal Employers' Liability Act an employee should not be held to have assumed the risks of his employment in any case where his injury resulted in whole or in part from defendant's negligence.

Point IV.

The concurring judges erred in holding that the verdict was excessive indicating bias and prejudice on the part of the jurors.

RAWLINGS, WALLACE
ROBERTS & BLACK
Counsel for Respondent
530 Judge Building
Salt Lake City, Utah

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 March 31st, 1956.

BRIGHAM E. ROBERTS

BRIEF IN SUPPORT OF RESPONDENT'S PETITION FOR REHEARING

POINT I.

THIS COURT ERRED IN HOLDING THAT THE JURY SHOULD HAVE BEEN INSTRUCTED THAT THEY WERE NOT TO TAKE INTO CONSIDERATION ANY EVIDENCE REGARDING A RUPTURED DISC.

The opinion herein confuses a number of propositions. In the first place, the injury from which plaintiff suffers was definitely established by the opinion of the doctor. He testified that in his opinion plaintiff was suffering from nerve root irritation as follows (R. 61):

> "* * * it was my opinion that Mr. Moore had irritation of the nerves of the lower spine, which radiate into both legs, especially on the left side."

He was asked about the causal relation between the dropping of the tire and the nerve root injury. He testified that it was possible that the dropping of the tire caused the nerve root injury. This established that medically there could be a causal relation between the two. At this point the claimant in *Chief Consolidated Mining Co. v. Salisbury,* 61 Utah 66, 210 Pac. 929, stopped. However, in the case at bar, as in *Utah Fuel Co. v. Industrial Commission,* 102 Utah 26, 126 P. 2d 1070, plaintiff proceeded with further evidence. In both cases plaintiff and claimant proved there was no symptom before the trauma. From the trauma to the time of trial in the case at bar, and to the time of death in the *Utah Fuel* case, the plaintiff and deceased had suffered pain and disability. According to the *Utah Fuel* case, this was sufficient to make a jury case on causal relation.

It was on this very basis that the court in the *Utah Fuel* case distinguished the *Salisbury* case. In discussing this latter case, the court stated (p. 30):

> "* * * The case of Chief Consolidated Mining Co. v. Salisbury, 61 Utah 66, 210 P. 929, 930, is not necessarily in conflict with this view. While the decision does not state what the nature of the accident was which it was claimed accelerated a chronic disease of the heart, the record reveals that it was a definite event, to wit, a slipping and wrenching of the muscles of his right side and a bruising and straining of the muscles of his right chest wall in trying to stop the fall. The opinion states that there was 'no positive statement that in the judgment of the experts testifying it did or could have (accelerated the heart disease).'"
>
> * * * *

> "* * * This court in that case went on to say 'nor is there any fact proven from which it might legally or reasonably be deducted that the accident did accelerate the disease.'
>
> "In this case there are such facts. The specific member was injured and from that time on grew progressively worse until death."

It is the *Utah Fuel* case which is similar to the case at bar and not the *Salisbury* case as stated in the opinion. The case at bar is stronger than the *Utah Fuel* case because the doctor there said that he would not even speculate whether the injury accelerated the pre-existing cancerous condition and this court paraphrased his testimony as follows (p. 29):

> "* * * The medical profession has been unable definitely to determine the cause and cure of cancer. The profession is hesitant to make any positive statements concerning it."

This is very similar to Dr. Clegg's testimony (R. 64):

> "A. In medicine, we cannot come out definitely on things, very often and say absolutely definitely that such-and-such a condition is so-and-so, but we usually qualify our diagnosis, because sometimes we get fooled, and we use the word 'possible' and that is all I can state. I cannot say definitely that this is probably or definitely that it is. It is just a possible condition; that was my opinion."

What was the specific internal condition which caused plaintiff's nerve root irritation? No cause or condition other than a ruptured disc was suggested by

anyone. No one could see inside the body of plaintiff and so anything suggested would not be a certainty. Just as Dr. Clegg said, if he could not be definite he could only say it was a possibility. Everything here was consistent with the existence of a disc. This is not a case where there are two possible causes and which is the cause cannot be determined. Here there was a possibility of one cause and so far as the record is concerned, no other.

The situation here is analygous to that encountered in *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 51 S. Ct. 248, 75 L. Ed. 544 (1930) where it is held a judgment should be affirmed when the fact of damage is certain but there is uncertainty as to the extent. The court stated the rule as follows:

> "Nor can we accept the view of that court that the verdict of the jury, in so far as it included damages for the first item, cannot stand because it was based upon mere speculation and conjecture. This characterization of the basis for the verdict is unwarranted. It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount. * * *"

* * * *

> "As was said by Judge Anderson in his dissenting opinion below, there are many cases in which damages are allowed where the element of uncertainty is at least equal to that in the present case — as, for example, copyright and trade-mark cases, cases of unfair competition and *many cases of personal injury.* * * *"

In the case at bar there can be no question that plaintiff suffered injury as a result of the falling of the tire and wheel. Hence, damage is certain and only its extent uncertain when we construe the evidence as does the majority of this court.

Apparently the majority opinion holds that causal relation is not a jury question. They cite the *Utah Fuel* case to support a statement that evidence of possibility of cause is admissible. They fail to consider this case on the question of sufficiency. The case is not one of admissibility but is one of sufficiency of evidence. The majority relies upon the Salisbury case. However, a careful reading of the Utah Fuel case shows that the court distinguished the *Salisbury* case and refused to follow it because of the existence of evidence, which is present in the case at bar. The evidence here is that plaintiff was in good health before the injury and had never had any trouble with his back. From the time of injury he has constantly been troubled with his back.

We also submit that this Court has "slavishly" followed the witness' choice of words. It has seized upon the word "possible", taken it out of context and applied a strict construction to its meaning. The doctor could not be absolutely sure of the exact condition existing in-

side of plaintiff's body. He could not see inside. He therefore used the word possible. In so many words, he stated that he used the word not in its ordinary connotation but as creating a concept that if a thing was not absolutely certain then the only term to be used is possible. That is not the usual meaning of the word but the witness chose "possible" and explained the meaning he attached to it. See Dr. Clegg's testimony quoted supra.

The opinion on this point flies in the face and is contrary to the language of the United States Supreme Court in *Lavender v. Kurn,* 327 U.S. 645, 66 S. Ct. 740, 90 L. Ed. 916, quoted on page 30 of Respondent's Brief herein. Of necessity there must be some speculation in arriving at a conclusion regarding the inner workings of the human body.

POINT II.

THE COURT ERRED IN RULING THAT THE TRIAL COURT WAS IN ERROR WHEN IT GAVE ITS INSTRUCTION NO. 12 TO THE EFFECT THAT THE STATUTES OF THE STATE OF UTAH AND COLORADO COVERING EMPLOYERS' LIABILITY AND WORKMAN'S COMPENSATION ARE NOT APPLICABLE AND THAT PLAINTIFF'S RIGHT TO RECOVER IS BASED SOLELY UPON THE STATUTES OF THE UNITED STATES.

POINT III.

THE COURT ERRED IN RULING THAT THE TRIAL COURT WAS IN ERROR IN GIVING ITS INSTRUCTION NO. 13 TO THE EFFECT THAT UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT AN EMPLOYEE SHOULD NOT BE HELD TO HAVE ASSUMED THE RISKS OF HIS EMPLOYMENT IN ANY CASE WHERE HIS INJURY RESULTED IN WHOLE OR IN PART FROM DEFENDANT'S NEGLIGENCE.

Points II and III can be considered together since they involve the same principle.

For at least a dozen years and by many trial judges instructions similar or exactly like Instruction Nos. 12 and 13 have been given in F.E.L.A. cases. These trial judges have been of the opinion that they serve a useful purpose in keeping the minds of the jury in the proper channel in deciding the case and to keep jurors from considering things which should not influence their verdict.

Why should not the jury know what the law is on propositions which might cause it to go astray? These are not instructions on extraneous issues but rather are they cautionary instructions to guard against erroneous impressions jurors probably have.

This Court gives one reason for not giving these instructions as follows:

> "* * * It is obvious that an attempt to exclude all possible considerations from the individual thinking of the jurors which may influence the verdict would be an impossible task and result in instructions so numerous that the only result could be complete confusion. * * *"

The simple and obvious answer to this is that the Court can wait until the instructions are so numerous as to result in complete confusion and then reverse or hold them improper. In the case at bar, this situation does not exist. Two instructions can hardly be said to be numerous or to result in confusion of any kind.

Two instructions were requested by plaintiff whereby

the jury would be informed correctly of the law, an erroneous impression of which might cause an erroneous result in the verdict. The trial judge, in his discretion, believed it proper to inform the jury. The Court now says it was improper. Upon what grounds? Extraneous issues and confusion!

We do hope that this striking down of long given cautionary or extraneous instructions will not be one sided and only relate to those instructions which aid plaintiffs in preventing juries from falling into error.

Similar instructions have been given at the behest of defendants in F.E.L.A. cases for many years by many trial judges and even in the case at bar. The jury is usually told that sympathy should play no part in the trial of a lawsuit and a railroad corporation should be treated the same as an individual. No one ever contends differently. Such instruction covers no issue in the lawsuit, but judges have believed this instruction helpful in keeping the "eye" of the jury "on the ball." But certainly it falls within the principle of the *Moore* case and hence should not be given.

Another defendant's instruction uniformly given is one that informs the jury that defendant railroad companies are not insurers of the safety of their employees and that there is no liability for accidents. No one ever contends to the contrary and such are never issues in the case. As the instructions herein struck down, these instructions are helpful to keep juries in the right channels. These instructions may no longer be given, at least

if this Court applies with even handed justice the doctrine now espoused. What is taken from plaintiffs should also be taken from defendants. Other examples could be given but this should be sufficient to show the error of this opinion.

A peculiar thing about this opinion is that the trial court is told not to give these instructions in a retrial but so far as we read the opinion, it nowhere holds the giving of these instructions to be prejudicial or reversible error. This is a new role for an appellate court.

The federal law is controlling. *Dice v. Akron, Canton & Youngstown R. Co.,* 342 U.S. 359, 72 S. Ct. 312.

Only one federal case was cited in the briefs herein. It held an instruction that an employee did not assume the risk of the negligence of his employer was proper in an F.E.L.A. case. This authority was ignored and not even referred to. See *Atlantic Coast Line R. Co. v. Burkett,* 192 F. 2d 941 (5 C.C.A. 1951). Other cases were cited upholding this instruction. This Court, when the matter was squarely raised, refused to hold the giving of this instruction improper. *Bruner v. McCarthy,* 105 Utah 399, 142 P. 2d 649 (1943). This latter case held similarly on the instruction advising that workmen's compensation laws were inapplicable.

The only authorities cited by the Court are the *Bruner* case (which is contrary to the present holding), *Parker v. Bamberger,* 100 Utah 361, 116 P. 2d 425, and *Ellis v. Union Pacific R. Co.,* 148 Neb. 515, 27 N.W. 2d

921. The *Parker* case does not consider an instruction like either of the two here and in fact held the instruction advising under what circumstances the driver would be negligent was properly given. In the *Ellis* case, the court shows a complete misunderstanding of the statutory elimination of assumption of risk. It states that the statutory elimination only applied to it as a defense and not as an element in determining nonnegligence of defendant. In *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 63 S. Ct. 444, 87 L. Ed. 610, the court expressly refused to follow any such concept and ruled every vestige of that doctrine to have been abolished. It stated:

> "* * * We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence.' * * *"

We submit that this Court has held contrary to all credible authorities, contrary to its own position heretofore announced in the *Bruner* case and contrary to the almost uniform practice of many trial judges for many years in this jurisdiction. We submit such a holding is absolutely erroneous and improper and before such a right about face is perpetrated a rehearing should be granted. The holding in this case has caused confusion in the minds of the trial judges faced with the problem of properly instructing juries and keeping their deliberations within proper bounds.

POINT IV.

THE CONCURRING JUDGES ERRED IN HOLDING THAT THE VERDICT WAS EXCESSIVE INDICATING BIAS AND PREJUDICE ON THE PART OF THE JURORS.

Two justices held that a new trial should be granted upon the grounds that the verdict appears to have been rendered as a result of passion and prejudice. The other three justices say nothing on this proposition. It therefore seems necessary to address ourselves to this.

We submit this holding is erroneous. It seems a bit difficult to believe the jury was influenced by passion and prejudice when it cut the verdict fifty percent. This is a strange thing for an inflamed group of citizens to do. They are inflamed against defendant when they cut the verdict in half in favor of defendant?

This opinion also hypothesizes that the passion and prejudice was engendered by taking pictures of plaintiff. This act was performed by defendant and introduced by defendant. How many more times must we try this already twice tried case confronted each time by this same testimony. It seems neither right nor just to infer prejudice and passion from an act of a defendant which itself introduces. As well grant a new trial where a defense counsel states an insurance company is involved.

This minority opinion does not view the evidence favorable to plaintiff's case. Plaintiff did not take a leave of absence to put up his hay, he testified. He went to kill an elk to feed his family once. He taught, once, kids to box; he danced once; he entered a calf roping contest

once. He tried not again because of his back.

The jury was instructed that the amount prayed for was not material and correctly so. It is of no help here that the jury found the damages asked were right. The figures set forth at page 62 of Respondent's Brief are reasonable, were reasonably arrived at and are justified by the evidence.

We submit the verdict was not attributable to passion or prejudice. The trial judge with his facilities of experience, seeing and hearing plaintiff and other witnesses did not abuse his discretion in denying defendant's motion for a new trial.

In Respondent's Brief is found a complete statement of the evidence most favorable to plaintiff. We will not again review this evidence. The foregoing considerations should eliminate the existence of any passion. If there is any excessiveness in the verdict this Court can require a remittitur and prevent the requirement of another and third trial.

CONCLUSION

We respectfully pray that the Court grant a rehearing or affirm or consider the matter of remittitur.

Respectfully submitted,

RAWLINGS, WALLACE,
ROBERTS & BLACK
BRIGHAM E. ROBERTS
Counsel for Respondent
530 Judge Building
Salt Lake City, Utah