1955

Alfred Roger Moore v. The Denver & Rio Grande Western Railroad Co. : Brief in Answer to Petition for Rehearing

Utah Supreme Court

Van Cott, Bagley, Cornwall & McCarthy; Clifford L. Ashton; Grant MacFarlane, Jr.; Counsel for Appellant;

In the
Supreme Court of the State of Utah

ALFRED ROGER MOORE,
Respondent,

vs.

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

Case No. 8284

BRIEF IN ANSWER TO PETITION FOR REHEARING

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PRELIMINARY STATEMENT

The Petition for Rehearing poses the identical questions considered by this court on the appeal. It is not urged that the court has misconstrued the arguments or has overlooked any of the facts. The same authorities are cited and the same arguments rehashed. In short, nothing is raised

by the petition which was not considered on the appeal and in the opinion of this court.

We set forth herein a concise answer to the renewed arguments. A more complete answer may be found in the briefs heretofore filed and in the opinion of the court.

STATEMENT OF POINTS

POINT I.

THIS COURT DID NOT ERR 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 PROPERLY RULED THAT INSTRUCTION NO. 12 SHOULD NOT HAVE BEEN GIVEN TO THE JURY.

POINT III.

THE COURT PROPERLY RULED THAT INSTRUCTION NO. 13 SHOULD NOT HAVE BEEN GIVEN TO THE JURY.

POINT IV.

THE CONCURRING JUDGES DID NOT ERR IN HOLDING THAT THE VERDICT WAS EXCESSIVE INDICATING BIAS AND PREJUDICE ON THE PART OF THE JURORS.

ARGUMENT

POINT I.

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

In their brief petitioner's counsel point out that plaintiff's injury is "nerve root irritation." It is urged that the court has confused this proposition. From the opinion, however, it is clear that the court had a complete understanding of the facts. We quote Justice McDonough:

> "On the basis of this evidence, plus the history of pain as given him [the doctor] by respondent, he concluded that there was a nerve irritation, and that *it was possible* that the accident initiated the condition and, when queried about his opinion as to what was causing the nerve irritation, he testified:
>
> > " 'Again it is a possibility. It is my opinion that this is possibly due to pressure on the nerve in the lower spine due to irritation from a disc.'
>
> * * * *
>
> "It is, of course, possible that the jury in assessing the award considered merely the doctor's positive assertion of the existence of a 'nerve irritation,' but his testimony as to the permanency of disability was linked to the possibility of a disc injury and a discussion of disc injuries, including diagrams, occupied a considerable portion of evidence offered through him, thus impressing the jury with the

> seriousness of such a condition. Under these circumstances, if the proof of such an injury falls short of that required under our law, then an instruction to that effect should have been given the jury."

It is manifest from the record that the whole point of plaintiff's case was to prove a permanent spinal injury resulting from the accident. His difficulty was that the doctor he had employed for trial would not testify that such an injury was probable or likely (R. 65). Instead, he said "It is just a possible condition (R. 65)." Since there was no other evidence in the case indicating a spinal injury this court was required to decide whether the doctor's testimony was sufficient to support a finding of a disc injury.

The majority opinion holding that the doctor's testimony was not sufficient evidence follows the decisions of all other courts which have decided the question including this court in the case of *Chief Consolidated Mining Company* v. *Salisbury,* 6 Utah 66, 210 Pac. 929. Mr. Justice Crockett acknowledges that the rule laid down by the majority of this court is correct, but reaches a different conclusion on the issue because he feels the lay testimony indicated a disc injury. Petitioner, in his brief on rehearing, argues the case from a still different standpoint. He contends that under the *Utah Fuel* case the evidence was sufficient to show nerve irritation and since "No cause [of the nerve irritation] other than a ruptured disc was suggested by anyone (P. 5)" it must follow that there was sufficient proof of a disc injury. In other words, the failure

of the defendant to prove that there was no disc injury is, in itself, proof of the existence of such an injury.

This same specious argument was made on the appeal and is fully dealt with at page 7 of our reply brief. Suffice it to say here that if plaintiff claimed the nerve irritation was caused by a disc injury he had the burden of proving it and the only evidence on that point was Dr. Clegg's testimony that such a condition was medically "possible." Counsel fail to grasp that it is at this point of their case that the *Salisbury* decision comes into play. With this in mind, it is obvious that whether or not the jury could find the existence of "nerve irritation" under the *Utah Fuel* case does not have any bearing upon the real problem in the lawsuit, i. e. whether the doctor's testimony was sufficient under the *Salisbury* case to show a disc injury.

Petitioner's counsel cite *Story Parchment Co.* v. *Patterson Parchment Paper Co.*, 282 U. S. 55, for the proposition that the rule preventing recovery where damages are uncertain does not apply if the fact of damage is certain. This rule obviously has no application to the instant case because the question here was whether there was sufficient proof of a substantial element of damage which the jury was allowed to consider in assessing damages. The very fact of the alleged disc injury was in issue. The *Story* case may have had some application if it had appeared that the jury considered only those injuries which were proved and if the appeal questioned only the certainty of the monetary amount of damages allowed for such injuries.

The statement that "apparently the majority opinion holds that causal relation is not a jury question (P. 7)"

demonstrates a complete failure on counsel's part to understand the opinion for this court did not decide the case on the question of causal relation—it held that the evidence was not sufficient to show the *existence* of the alleged injury. If the evidence had been sufficient to show a disc injury *then* the court would have been required to decide whether the evidence warranted a finding that such injury was caused by the accident.

The Moore decision represents a recognition by the court that there must be some limit to the weight which may be given to the speculation and conjecture of doctors. The opinion affirms sound law in this age where given symptoms may indicate to a medical expert innumerable medically possible conditions some of which, as in the instant case, cannot even be said to be probable conditions.

POINT II.

THE COURT PROPERLY RULED THAT INSTRUCTION NO. 12 SHOULD NOT HAVE BEEN GIVEN TO THE JURY.

POINT III.

THE COURT PROPERLY RULED THAT INSTRUCTION NO. 13 SHOULD NOT HAVE BEEN GIVEN TO THE JURY.

The opinion of this court instructs the trial court not to give instructions 12 and 13 on a retrial. Petitioner's counsel suggest that this is a "peculiar thing * * *

[for] the opinion * * * nowhere holds the * * * instructions to be prejudicial or reversible error (P. 11)." There is nothing peculiar or even unusual about the opinion because there was no occasion to determine whether error in giving these instructions was prejudicial as the judgment was set aside on other grounds. However, the court was compelled by its rules to determine whether these instructions were proper. Rule 76(a) URCP provides:

> "If a new trial is granted, the court shall pass upon and determine *all questions of law involved in the case presented upon the appeal* and necessary to the final determination of the case."

See *Zoccolillo* v. *O. S. L. R. Co.*, 53 Utah 39, 177 Pac. 201.

The court correctly decided that the instructions were improper and should not have been given. The purpose of instructions is to enlighten the jurors as to the issues and to assist them in their determination of the facts—not to inject into the case extraneous matter which can only confuse and perhaps distort deliberations on the operative facts. The *Moore* decision simply affirms the rule stated in *Parker* v. *Bamberger*, 100 Utah 361, 116 P. 2d 425, 430 to the effect that:

> "* * * it is error for the trial court to give an instruction, though such an instruction correctly states the law, on a matter extraneous the issues and evidence of the case."

Petitioner's counsel are no doubt aware of the fact that similar instructions have been held not only improper

but prejudicial. In a recent case, for example, it was held that an instruction given by a trial court to the effect that a verdict for personal injuries is not subject to federal income tax constituted prejudicial error. *Wagner* v. *Illinois Central Railroad Company,* 129 N. E. 2d 771 (Ill. 1955). See also *Maus* v. *New York, Chicago & St. Louis Railroad Company,* 128 N. E. 2d 166 (Ohio 1955). Certainly no distinction can be made between this income tax instruction and those given in the instant case. We think the instructions were not only erroneous but prejudicial.

Counsel's main argument for the instructions is that the railroad secured other instructions which in their opinion were similar and consequently equally improper. The simple answer is that the propriety of the other instructions referred to was not before the court on this appeal. Even if such instructions had been questioned on this appeal they do not fall in the same category as instructions Nos. 12 and 13. The latter instructions not only are wholly unrelated to the evidence and the issues, but are calculated to divert the minds of the jurors therefrom to the prejudice of the defendant. On the other hand, the instruction that railroad companies are not insurers of the safety of their employees has a direct bearing on negligence which is always an issue in F. E. L. A. cases. The sentence containing the word "insurers" is only a part of the instruction defining the duty of the railroad (R. 292). Likewise the instruction on sympathy does not inject a foreign issue. This instruction was given by the court on its own motion as a part of the general instructions (R. 296) and applies to all parties to the suit.

POINT IV.

THE CONCURRING JUDGES DID NOT ERR IN HOLDING THAT THE VERDICT WAS EXCESSIVE INDICATING BIAS AND PREJUDICE ON THE PART OF THE JURORS.

The evidence relating to this point was painstakingly briefed on the appeal and the minority opinion demonstrates a thorough understanding of the facts.

Petitioner's counsel gloss over the facts relating to Moore's activities after the injury. The record discloses that counsel's statements are for the most part misleading, incomplete and incorrect. (See R. 115, 46 re elk hunting; R. 291-220 re dancing; R. 209, 210, 112 re leave of absence.)

A fair and impartial consideration of all of the evidence concerning Moore's alleged injury and of his activities following the accident compel the conclusion reached by the court.

CONCLUSION

We submit that the issues raised by this petition have already been carefully considered and have been correctly decided by this court. It follows that the petition should be denied.

Respectfully submitted,

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