

1956

Macario Arellano v. The Western Pacific Railroad Co. : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Van Cott, Bagley, Cornwall & McCarthy; Clifford L. Ashton; Attorneys for Respondent;

Recommended Citation

Brief of Respondent, *Arellano v. Western Pacific Railroad Co.*, No. 8486 (Utah Supreme Court, 1956).
https://digitalcommons.law.byu.edu/uofu_sc1/2555

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

RECEIVED

MAY 12 1956

LAW LIBRARY

U. OF U.

In the
Supreme Court of the State of Utah

MACARIO ARELLANO,
Plaintiff and Appellant,

vs.

THE WESTERN PACIFIC RAIL-
ROAD COMPANY, a corporation,
Defendant and Respondent.

Case No.
8486

FILED
MAY 12 1956

Clerk, Supreme Court, Utah

BRIEF OF RESPONDENT

VAN COTT, BAGLEY,
CORNWALL & McCARTHY,
CLIFFORD L. ASHTON,
Attorneys for Respondent.

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
STATEMENT OF POINTS RELIED ON	5
ARGUMENT	6
I. THE COURT DID NOT ERR IN ITS INSTRUCTION NO. 12	5, 6
II. THE COURT DID NOT ERR IN REFUSING TO GIVE APPELLANT'S REQUESTED INSTRUCTION NO. 3	5, 8
III. THE COURT DID NOT ERR IN REFUSING TO GIVE APPELLANT'S REQUESTED INSTRUCTION NO. 2	5, 12
IV. THE COURT DID NOT ERR IN FAILING TO SPECIFICALLY INSTRUCT, AS REQUESTED BY APPELLANT, THAT AN EMPLOYER IS GUILTY OF NEGLIGENCE IF IT EXPOSES ITS EMPLOYEE TO AN UNNECESSARY RISK, AND THAT SUCH DUTY CANNOT BE DELEGATED	5, 16
V. THE COURT DID NOT ERR IN FAILING TO SPECIFICALLY INSTRUCT, AS REQUESTED BY APPELLANT, THAT THE PLAINTIFF DID NOT ASSUME THE RISK OF HIS EMPLOYMENT AND THAT HE WAS NOT NEGLIGENT IN CONTINUING TO WORK KNOWING THAT HE WAS REQUIRED TO WORK IN A DANGEROUS OR UNSAFE PLACE	5, 6, 19
VI. THE COURT DID NOT ERR IN REFUSING TO GIVE APPELLANT'S REQUESTED INSTRUCTIONS NOS. 13 AND 14	6, 21

TABLE OF CONTENTS—Continued

	Page
VII. THE COURT DID NOT ERR IN REFUSING TO GRANT APPELLANT A NEW TRIAL BY REASON OF THE MISCONDUCT OF A JUROR	6, 26
CONCLUSION	27

AUTHORITIES CITED

A. T. & S. F. Railroad Company v. Struder, 213 F. 2d 250	9
August v. Texas and N. O. R. Co., 265 S. W. 2d 148, (Texas Appellate)	11
Boston & M. R. R. v. Meech, 1 Cir., 156 F. 2d 109	13
Bowden v. D. & R. G. Western Railroad Company, 3 Utah 2d 444, 286 P. 2d 240	8, 17
Brown v. Coley, 152 So. 61, 168 Miss. 778	13, 14, 18
Cahn v. S. P. Company, 282 P. 2d 78, 132 Cal. App. 410	10
Chicago, Rock Island & Pacific Railroad Co. v. Wright, 278 P. 2d 830 (Oklahoma)	13
E. J. O'Brien & Co. v. Shelton's Adm'r., 55 S. W. 2d 352, 246 Ky. 537	13
Enid Transfer and Storage Company v. Mollenhauer, 251 P. 2d 1068, 207 Okla. 654	10, 11
Fidelity Trust Co. v. Wisconsin Iron & Wire Works, 129 N. W. 615, 145 Wis. 385 (1911)	25
Fisher v. Minn. and S. L. Railroad Company, 199 F. 2d 308	9
Grant Storage Battery Co. v. De Lay, 87 F. 2d 726 ...	25
Huskey v. Heine Safety Boiler Co., 181 S. W. 1041, 192 Mo. App. 370	13, 14

TABLE OF CONTENTS—Continued

	Page
Jefferson v. City of Raleigh, North Carolina, 140 S. E. 76, 194 N. C. 479 (1927)	9
Joy v. Pope, 53 P. 2d 683, 175 Okla. 540	10
Leonidas v. Great Northern Ry. Co., 72 P. 2d 1007, 105 Mont. 302	24
Millett v. Maine Cent. R. Co., 146 Atl. 903, 128 Me. 316	11
Alfred Roger Moore v. The Denver and Rio Grande Western Railroad Company, . . . P. 2d . . . , . . . Utah . . . ,	19, 20
In Re Panasuk, 105 N. E. 368 (Mass.)	26
Pullman Co. v. Ranshaw, 203 S. W. 122 (Texas App.)	25
Richard v. Amoskeag Mfg. Co., 109 Atl. 88, 79 N. H. 380	26
Sadler v. Lynch, 64 S. E. 2d 669, 192 Va. 257	26
Stone v. New York, C. & St. L. R. Co., 344 U. S. 407, 97 L. Ed. 441, 73 Sup. Ct. 358	13, 15
Upton v. Conway Lumber Co., 128 Atl. 802, 81 N. H. 489	26

In the
Supreme Court of the State of Utah

MACARIO ARELLANO,
Plaintiff and Appellant,

vs.

THE WESTERN PACIFIC RAIL-
ROAD COMPANY, a corporation,
Defendant and Respondent.

} Case No.
8486

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

The facts as related in Appellant's brief are so selected that we believe a complete restatement is necessary in order to fairly present Respondent's position.

Appellant alleged in his complaint that he was injured on the 31st day of March, 1954, at Dumphy, Nevada, and that his injury was caused by the negligence of the Railroad in the following particulars:

1. The defendant ordered him to perform dangerous and unsafe acts when it knew or should have known that there were safer methods of performing the work.

2. The Railroad failed to provide plaintiff with proper tools.

3. The Railroad failed to provide plaintiff with a safe place to work.

Following a pretrial, the trial judge made a pretrial order in which he stated the following:

“1. The grounds on which the plaintiff contends that the defendant was negligent are limited to the following:

“a. That the defendant did not furnish the plaintiff with the proper tools and equipment for the work he was ordered to do.

“b. That the defendant did not furnish the plaintiff a safe place in which to work.”

The evidence can be simplified by stating those things which are undisputed. It is clear that plaintiff fell while the section crew on which he was working was unloading riprap from the railroad track into the adjoining culvert. The dispute which arises concerns whether he slipped and fell into the culvert, as testified by Mr. Charlevois, or whether he was knocked into the culvert by rolling stones after he had dislodged one or more of the stones on direct order from Charlevois.

The testimony of Charlevois is simple and in substance is as follows: While the rocks were being removed, he observed the plaintiff to be unsteady on his feet and “told him to get out of the way before he got hurt.” He intended that the plaintiff would step off of the rocks so that the others could move them out of the way. “Instead of getting

out of the way the man walked out on the edge of the fill * * * on the edge of the pile of the rock there, and he stumbled * * * and turned almost completely around, and fell down into the ditch * * *” (R. 140).

At the time plaintiff slipped he was not engaged in the process of attempting to move a rock or rocks (R. 140). At no time did Charlevois observe him attempting to move any rocks (R. 141). Charlevois further stated that he at no time instructed “Mr. Arellano to get down and move or dislodge a rock” (R. 141).

Arellano’s version of what occurred is not so simple. In fairness to him it should be pointed out that the testimony which he gave came through an interpreter. His testimony, as so elicited, was in substance as follows: After the riprap was dumped from the flat car the roadmaster told “the rest of us * * * to roll the stones” (R. 19). He, with the others, thereupon “began to roll the stones.” He was rolling the stones with a bar which the roadmaster told him to use (R. 22). While he was rolling the stones he dislodged one and another one rolled and hit him in the back and knocked him into the culvert. The spot where he was located when the stone struck him is near the edge of the culvert toward the east, as shown on Exhibit 3.

Later at page 24 of the record, he said: “The roadmaster made the sign, the motion to me, with his hand, to keep on rolling the stones. I laid my bar down, because one of the stones would not be rolled, so I seized it with my hands to pull it; when I pulled it with my hand, the other one became dislodged and hit me.” Again at page 25, he

said that he moved to the outer edge of the riprap when the roadmaster told him to roll the stones and that he moved to this position when the roadmaster said "roll them."

Following this testimony, counsel for the plaintiff withdrew the plaintiff from the stand and called another witness. When the plaintiff returned to the stand, he was again asked about moving the stones and stated that he rolled rocks at the top of the pile for about twenty minutes and that then the roadmaster motioned to him to keep pushing the stones (R. 44). He again reiterated that the reason he moved from the top of the pile to the bottom of the pile in a place which he thought was in the clear was "because the roadmaster said to roll the stones."

After the evening recess the plaintiff was again recalled to the stand and in answer to his counsel's questions, "rehashed" the whole incident and made significant changes in his testimony. Instead of the roadmaster telling him to "roll the stones," as he had testified on the previous day, the plaintiff said that he left the top of the pile because the roadmaster "told me to *remove a stone* that was blocking it" (R. 99).

The only other person present who was called as a witness was an Indian by the name of Jerry Jackson. He was one of the section crew moving the rocks at the time the plaintiff was injured. He did not see the plaintiff fall but heard somebody say "somebody going to fall." At that time the plaintiff was near the east end of the culvert (R. 125-126).

At the conclusion of the testimony the jury returned a verdict in favor of the railroad "No cause of action."

Thereafter, the Appellant made a motion for new trial, which was denied, and it is from this judgment and order that Appellant appeals.

STATEMENT OF POINTS RELIED ON

I.

THE COURT DID NOT ERR IN ITS INSTRUCTION NO. 12.

II.

THE COURT DID NOT ERR IN REFUSING TO GIVE APPELLANT'S REQUESTED INSTRUCTION NO. 3.

III.

THE COURT DID NOT ERR IN REFUSING TO GIVE APPELLANT'S REQUESTED INSTRUCTION NO. 2.

IV.

THE COURT DID NOT ERR IN FAILING TO SPECIFICALLY INSTRUCT, AS REQUESTED BY APPELLANT, THAT AN EMPLOYER IS GUILTY OF NEGLIGENCE IF IT EXPOSES ITS EMPLOYEE TO AN UNNECESSARY RISK, AND THAT SUCH DUTY CANNOT BE DELEGATED.

V.

THE COURT DID NOT ERR IN FAILING TO SPECIFICALLY INSTRUCT, AS REQUESTED

BY APPELLANT, THAT THE PLAINTIFF DID NOT ASSUME THE RISK OF HIS EMPLOYMENT AND THAT HE WAS NOT NEGLIGENT IN CONTINUING TO WORK KNOWING THAT HE WAS REQUIRED TO WORK IN A DANGEROUS OR UNSAFE PLACE.

VI.

THE COURT DID NOT ERR IN REFUSING TO GIVE APPELLANT'S REQUESTED INSTRUCTIONS NOS. 13 AND 14.

VII.

THE COURT DID NOT ERR IN REFUSING TO GRANT APPELLANT A NEW TRIAL BY REASON OF THE MISCONDUCT OF A JUROR.

ARGUMENT

I.

THE COURT DID NOT ERR IN ITS INSTRUCTION NO. 12.

We do not quarrel with Appellant's general proposition that a party is entitled to have the court instruct on its theory of the case. This, however, does not establish that Instruction No. 12 is erroneous.

Plaintiff's theory of the case, as stated in the pretrial order, was failure of the defendant to provide a safe place

to work and failure to provide plaintiff with proper tools. During the trial, plaintiff and only plaintiff, testified that immediately prior to the time he was injured he was in the act of loosening a stone which he had been directed to move by defendant's roadmaster. If this was so and if the defendant was negligent in requiring plaintiff to perform this task, then defendant failed to furnish plaintiff a safe place to work. Instruction No. 12 is directed to this point and instructs the jury that before the defendant can be held responsible for plaintiff's injuries by reason of the plaintiff's act of loosening the stone, the jury must find that the defendant knew or should have known that the removal would expose plaintiff to unreasonable risk of harm.

Failure to give such an instruction would have left the jury free to find that defendant was liable if the plaintiff was removing a stone immediately prior to the time he fell, without regard to whether or not defendant was negligent. Inasmuch as there was a sharp dispute and some emphasis placed on this issue, the jury could have believed that all they need have found was this fact. The instruction was therefore necessary to properly present to the jury the law applicable to the evidence in the case.

Appellant does not claim that Instruction No. 12 is not a correct statement of the law nor does Appellant cite any law which would sustain him in such a contention. It is difficult to understand what Appellant does claim. As near as we can determine, the instruction is objected to because it does not contain all other theories which Appellant now claims are applicable to the issues in this case.

In *Bowden v. D. & R. G. Western Railroad Company*, 3 Utah 2d 444, 286 P. 2d 240, the Utah Supreme Court sustained an instruction given by the lower court which in substance and effect was similar to Instruction No. 12, particularly with reference to the necessity of finding that the defendant railroad knew or should have known that a condition was unsafe before it could be held negligent. The instruction was as follows:

“In order to find that the railroad was negligent in failing to provide a safe place to work in this case, you must find by a preponderance of the evidence that

“(1) The railroad knew, or by the exercise of reasonable care, should have known that there was snow or other substance near the tracks at the point of the accident, which snow or substance created a situation which was not a reasonably safe place for railroad workers to work; * * *.”

II.

THE COURT DID NOT ERR IN REFUSING TO GIVE APPELLANT'S REQUESTED INSTRUCTION NO. 3.

Appellant's proposed Instruction No. 3 is as follows:

“You are instructed that the defendant had a statutory duty to provide its employees, including the plaintiff, with a safe place in which to work. This duty on the part of the defendant includes within its meaning the duty to provide its employees a reasonably safe manner and place for doing the work, and it is required to exercise reasonable care to provide such a plan. If the defendant failed to

exercise reasonable care to provide a reasonably safe manner and place to do the work required by it, then defendant is guilty of negligence.”

In support of its contention, Appellant cites the following cases:

In *Fisher v. Minn and S. L. Railroad Company*, 199 F. 2d 308, the court held that plaintiff’s husband, who was killed when he cut poles loose from a loaded railroad car, could not recover because his own negligence in performing the work was, as a matter of law, the sole proximate cause of his death. The safe method referred to in the quotes at page 17 of Appellant’s brief applies to the deceased’s conduct which the court held as a matter of law was negligent.

In *Jefferson v. City of Raleigh, North Carolina*, 140 S. E. 76, 194 N. C. 479 (1927), there is very little reference to the facts in the case. Apparently it involved the question of whether or not the defendant was negligent in failing to provide the plaintiff with goggles and the failure to provide a shield or hood on a machine involved. The court submitted the issue to the jury, saying:

“It was the duty of the defendant in the exercise of ordinary care to provide its servants and employees with reasonably safe places and safe tools and appliances to work with, and to provide them with reasonably safe methods and means to do the work for which they are employed and in which they are engaged.”

We fail to see how these facts in any way relate to the facts in the instant case, or to Instruction No. 3.

In *A. T. & S. F. Railroad Company v. Struder*, 213 F. 2d 250, the court simply held that it was a jury question as

to whether or not it was negligent to provide a refrigerator car for hauling long lengths of galvanized pipe instead of a car from which the pipe could be more easily unloaded. There were no instructions involved. The case is of no help in this situation.

In *Cahn v. S. P. Company*, 282 P. 2d 78, 132 Cal. App. 410, plaintiff allegedly sustained an eye injury when a heavy coupler fell from a pile of couplers onto the cement where he was working causing a particle of cement to strike his eye, dislodging the retina. The court did not discuss instructions but merely held that from such evidence the jury could find the railroad negligent in failing to provide plaintiff with a safe place to work.

In *Joy v. Pope*, 53 P. 2d 683, 175 Okla. 540, and in *Enid Transfer and Storage Company v. Mollenhauer*, 251 P. 2d 1068, 207 Okla. 654, neither the facts nor the law are analogous or helpful in the instant case. In the *Pope* case, the allegation of the complaint was as follows:

“ ‘Plaintiff alleges that the machinery and appliances hereinabove described and the construction and operation thereof, in the manner herein alleged, was highly dangerous, and which danger was not known to plaintiff’s decedent, and could not by the exercise of ordinary care have been ascertained by him * * * and said defendant was guilty and negligent in the maintenance and operation of the machinery and appliances as herein alleged; that the construction and operation of such machinery and appliances, in the method and manner herein alleged, constituted the same highly dangerous, and said defendant wholly failed in its duty to plaintiff’s decedent as hereinabove set out.’ ”

In the *Enid* case *supra* the plaintiffs plead failure to furnish: (1) A safe place to work. (2) A safe method to do the work. (3) Safe tools. (4) Competent and safe co-workers.

The court in sustaining a verdict returned for the plaintiff in the lower court did not consider instructions but only considered the question of whether there was sufficient evidence to take the case to the jury. The most the two foregoing cases contribute are generalities with which we do not disagree, such as stated in the *Enid* case as follows:

“The duty of furnishing a reasonably safe place in which to work, reasonably safe appliances with which to perform the work, and reasonably careful, prudent, and competent fellow servants, is a non-delegable duty of the employer.”

In *August v. Texas and N. O. R. Co.*, 265 S. W. 2d 148, (Texas Appellate), the trial court directed a verdict for the defendant. The Texas Appellate Court sustained. There was no discussion in the case regarding instructions. The court simply held, as quoted in plaintiff's brief, that the Railroad had a duty to provide a reasonably safe place and method of doing work. We find nothing in this case with which we can disagree.

In *Millett v. Maine Cent. R. Co.*, 146 Atl. 903, 128 Me. 316, the plaintiff was injured by a flying spark while working near a field fire. His job was to keep the fire from spreading. At the time of injury he was walking near the fire with a bucket of water and broom. The plaintiff claimed this was a negligent method of doing the work. The lower court, however, could find no evidence of negli-

gence and refused to permit the case to go to the jury. The Maine Court in sustaining the action of the lower court said at page 904:

“Plaintiff had the burden to adduce reasonable evidence which would tend to show, primarily, a breach of duty owed to him in respect to the method of doing the work. Negligence may not be found from the mere happening of an accident.

* * * *

“There is no evidence that the method employed was not common and usual in the occupation.”

There was no evidence in the instant case that defendant failed to supply plaintiff with a reasonable safe place to work or method of working except as testified by plaintiff. The action which he outlined related to place of work. This situation was completely covered by the court's instructions, particularly Instruction No. 12. Any further instruction on method of work would not have assisted the jury. Particularly is this so considering Appellant's failure to introduce any evidence relative to an alternative method of doing the work.

III.

THE COURT DID NOT ERR IN REFUSING TO GIVE APPELLANT'S REQUESTED IN- STRUCTION NO. 2.

Appellant's requested Instruction No. 2 is very similar to the requested Instruction No. 3. The argument under point II is equally applicable to the instruction here considered.

The Appellant has cited the following cases in support of his contention under Point III. These cases are as follows: *Boston & M. R. R. v. Meech*, 1 Cir. 156 F. 2d 109; *Stone v. New York, C. & St. L. R. Co.*, 344 U. S. 407, 97 L. Ed. 441, 73 Sup. Ct. 358; *Chicago, Rock Island & Pacific Railroad Co. v. Wright*, 278 P. 2d 830, (Oklahoma) ; *Huskey v. Heine Safety Boiler Co.*, 181 S. W. 1041, 192 Mo. App. 370; *Brown v. Coley*, 152 So. 61, 168 Miss. 778; *E. J O'Brien & Co. v. Shelton's Adm'r.*, 55 S. W. 2d 352, 246 Ky. 537.

In the *Meech* case *supra* the court did not consider anything more than the sufficiency of the evidence to take the case to the jury. The court made general statements relative to the duty to provide a safe place to work, which are of very little assistance in the instant case. In the *Rock Island* case *supra* the plaintiff in his pleadings alleged negligence in the following particulars:

1. Failure to provide plaintiff with a safe place to work.
2. Failure to provide a reasonable safe manner or plan for doing the work.
3. Failure to provide adequate tools.
4. Failure to provide sufficient help.

Evidence was introduced in support of all the above and particularly in support of the allegation that defendant did not provide plaintiff with a reasonable safe manner or plan for doing the work. In this respect plaintiff produced evidence showing that the method employed in moving the rail was improper, and introduced evidence showing a proper method of doing the work. The court found suffi-

cient evidence to support the allegations and submitted the case to the jury. The court did not discuss instructions.

In the *Huskey* case *supra* plaintiff introduced evidence showing two ways of doing the work, one of which was clearly unnecessary and unreasonable. The court, as cited at page 27 of Appellant's brief, said:

“If two ways are open to a person to use, one safe and the other dangerous, the choice of the dangerous way with knowledge of the danger constitutes negligence.”

In the *Huskey* case *supra* there was no discussion of instructions. It was again simply a question of whether or not there was sufficient evidence to take the case to the jury. We believe that the finding of the court was proper, but in no way helpful in determining the issues before this court.

In the *Brown* case *supra* the plaintiff was a laborer who received burns when he poured gasoline from a bucket into a small opening in a tank without using a funnel, and while the motor was running. The lower court permitted the case to go to the jury and the Supreme Court of Mississippi reversed holding that there was not sufficient evidence. The court said:

“‘If the work is simple in character and free from complexities, the master is under no obligation to adopt rules. In other words, where the danger is apparent to all, and the duty of the servants to avoid such danger is manifest, no rules are required.’ See also, *Reed v. Ridout's Ambulance*, 212 Ala. 428, 433, 102 So. 906.

“The attempt of the servant without the use of a funnel to pour gasoline out of a bucket into a small hole in the tank, near the electrical equipment of the engine while the engine was running was an act which, to any sensible, adult person acquainted with the volatile and highly inflammatory character of gasoline, would be known to be a dangerous method, it would be obvious. *The servant admits that he knew this; and it seems to us that it is such a fact as would not involve any complexity or uncertainty or obscurity to a person who had ever worked around gasoline motors as the servant admits he had done, not only in this service but in previous experience.* Moreover, the handling and use of gasoline have become so general, so much a part of the daily observation and experience of all adult persons, so much a matter of conscious knowledge to all of mature age who will open their eyes, that there could be no well grounded basis of justice now to hold that its use, in the manner shown in this case, involves that which is either complex or uncertain or obscure.”

This case in no way supports Appellant's position. If anything, it argues against it.

In the *Stone* case *supra* the United States Supreme Court by a split court reversed the decision of the Missouri Supreme Court which held that there was not sufficient evidence of negligence or causation to take the case to the jury. The facts were that plaintiff, a section laborer, claimed he injured his back while pulling a tie from under a rail. Evidence was introduced *showing other methods of removing* the tie and also evidence that at the time plaintiff was injured the section foreman urged him to pull harder and it was while he was pulling harder that he injured his

back. Evidence was also introduced showing that it required additional men to finally move the tie. The case did not involve an instruction, but again simply involved a question of whether or not there was sufficient evidence to go to the jury. The Missouri Supreme Court felt that there was not sufficient evidence and three of the United States Supreme Court Justices agreed. However, the majority of the United States Supreme Court Justices agreed with Justice Douglas and held that the evidence was sufficient. How this case can possibly assist the court in determining the question involving failure to give certain instructions is beyond our comprehension.

IV.

THE COURT DID NOT ERR IN FAILING TO SPECIFICALLY INSTRUCT, AS REQUESTED BY APPELLANT, THAT AN EMPLOYER IS GUILTY OF NEGLIGENCE IF IT EXPOSES ITS EMPLOYEE TO AN UNNECESSARY RISK, AND THAT SUCH DUTY CANNOT BE DELEGATED.

We clearly understand that an employer has a duty to provide employees with a safe place to work, which of course, means that the employer should not expose the plaintiff to unnecessary risks. Appellant has cited some case law wherein courts have held that the evidence introduced was sufficient to permit a jury finding on this issue. Such cases do not help in determining whether the court erred in failing to give Appellant's requested Instructions Nos. 1 to 5.

Appellant's requested Instruction No. 1 is in effect the same as the court's Instruction No. 12 which is patterned after the instruction given in the *Bowden* case *supra*, wherein the court approved an instruction to the effect that the employer is not negligent unless he knew or should have known that the situation or place where the employee was working exposed the employee to unreasonable risk of harm. Unreasonable risk of harm is simply another way of saying unnecessary risk.

As herein stated the requested Instruction No. 2 relates to a safe method of doing the work. Appellant claims that he was ordered to remove a rock. Defendant denied this and produced evidence that Appellant was standing at the edge of the rock pile, and was directed to move out of the way. The court in its Instruction No. 12 told the jury that if they believed the Appellant's story then the Railroad was liable, *if the Railroad knew or should have known that requiring Appellant to remove a stone, as claimed*, exposed him to an unreasonable risk of harm. An instruction which would permit the jury to speculate about alternative methods of doing the work would have been improper.

Appellant's requested Instruction No. 3 relates to "a safe plan of work." The Appellant introduced no evidence showing that the plan of work employed by the respondent was unreasonable or that some other plan should have been adopted. The only evidence in the case, as herein stated, was whether the Appellant was moving a rock on direction of the roadmaster or was standing on the outside edge of the rocks and when directed to move slipped and fell. Permit-

ting the jury to speculate about "a plan of work," would concern the jury with an irrelevant issue without evidence upon which it could make a finding.

It is true that the respondent introduced some evidence to the effect that the crew were advised when they were at the tool house prior to the time they commenced the work that they should keep behind the rocks and work from the rail outward. The Appellant denied that such a conversation took place.

In *Brown v. Coley*, *supra*, cited by Appellant, the Mississippi Supreme Court held that "if the work is simple in character, the master is under no obligation to adopt rules." Certainly moving rocks is simple. Must the railroad devise rules and plans for such work, or is it permissible to assume that employees are able to do such tasks on their own?

Appellant's requested Instruction No. 4 relates to safe and efficient tools. No evidence was introduced which in any way indicated that the Appellant was not supplied with such tools. The only evidence on this question relates to a bar which was supplied to the Appellant and which Appellant testified he laid on the ground prior to the time he reached for a stone as directed by the roadmaster. The Appellant introduced no evidence showing that a bar was not a proper tool, and introduced no evidence showing that other tools would have been proper under the circumstances. To permit the jury to speculate without evidence on this issue would have been error.

We have considered Appellant's requested Instruction No. 4 because Appellant has discussed it in his brief. Actually it is not properly before the court. The Appellant

took no exception to the court's failure to give it at the time he took his exception to the court's instructions.

Appellant's requested Instruction No. 5 states that the Respondent had a "duty not to expose them [Appellant] to any unnecessary or unreasonable risks." The only unnecessary or unreasonable risk claimed by the Appellant in this case was the risk imposed upon him when he was allegedly ordered to move a stone which had become lodged. While doing so he allegedly caused the other stones to become loose. The court instructed on this evidence and stated in effect that if the roadmaster so ordered the Appellant to move a stone and if at said time the roadmaster knew or should have known that this would expose the Appellant to an unreasonable risk of harm, then the Railroad would be negligent and liable to the Appellant. We submit that the court's instruction was proper and that an instruction relating generally to unnecessary risk which was not applicable to evidence introduced in the case, would permit the jury to speculate and would have been improper.

V.

THE COURT DID NOT ERR IN FAILING TO SPECIFICALLY INSTRUCT, AS REQUESTED BY APPELLANT, THAT THE PLAINTIFF DID NOT ASSUME THE RISK OF HIS EMPLOYMENT AND THAT HE WAS NOT NEGLIGENT IN CONTINUING TO WORK KNOWING THAT HE WAS REQUIRED TO WORK IN A DANGEROUS OR UNSAFE PLACE.

We believe the Utah Supreme Court in the recent case of *Alfred Roger Moore v. The Denver and Rio Grande*

Western Railroad Company, No. 8284, (not yet reported) clearly answered Appellant's objection wherein the court said:

"Two instructions, requested by respondent, were given the jury, although they are outside the issues of the trial. There is no question but that the statements of law contained in each were correct, but this court has held that where the instruction is extraneous to the issues and evidence of the case, it is error for the trial court to give it. *Parker v. Bamberger*, 100 Utah 361, 116 P. 2d 425.

* * * *

"The *Bruner* case also discussed an instruction of the same import as Instruction No. 13 in the present case:

"The Federal Employers' Liability Act provides as follows:

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

"In the present case, as in the *Bruner* case, no issue of assumption of risk was raised by the pleadings or the evidence and no good purpose could have been served by the giving of such an instruction."

As in the *Moore* case *supra*, no issue of assumption of risk was pled or was evidence relating thereto introduced. Furthermore, the court clearly advised the jury that if plain-

tiff was injured as he claimed the defendant was liable if the defendant knew or should have known that defendant's conduct placed plaintiff in a position where he would be exposed to unreasonable risk of harm.

VI.

THE COURT DID NOT ERR IN REFUSING TO GIVE APPELLANT'S REQUESTED INSTRUCTIONS NOS. 13 AND 14.

We note before making argument hereunder that Appellant did not except to the court's failure to give Instruction No. 14. We, however, desire to make no point of this as both Instruction Nos. 13 and 14 relate to the same subject matter.

The theory of the two requested instructions is that (1) the jury could find that the defendant through its roadmaster gave an order in English which the plaintiff misunderstood and that because of this misunderstanding plaintiff was injured, and (2) that failure to give the order in Mexican or in some other manner constituted negligence.

We submit that so far as (1) above is concerned there is no evidence from which the jury could find that plaintiff misunderstood an order resulting in his injuries. This is apparent from the testimony of plaintiff himself. The following statements from the record are pertinent:

“Q. Now how did the roadmaster tell you to roll the stones?

“A. Told us to take the bars.

"Q. How did he say to take the bars, in Spanish?

"A. No, in English.

"Q. *And did you understand, 'take the bars'?*

"A. Yes, 'bar' is similar to Spanish 'bara'.

"Q. And what did they do then?

"A. We began to roll the stones (R. 19).

* * * *

"A. When I was told to roll stones, that is where I was, in this position, rolling with the bar.

"Q. Who told you to roll the stones?

"A. The roadmaster.

"Q. *How did he tell you to roll the stones?*

"A. *With the bar* (R. 22).

* * * *

"A. When the roadmaster told us to roll the stones in there, dislodging one, another one rolled and hit me in the back and knocked me to the spot (R. 23).

* * * *

"A. *The roadmaster made the sign, the motion to me, with his hand, to keep on rolling the stones.* I laid my bar down, because one of the stones would not be rolled, so I seized it with my hands to pull it; when I pulled it with my hand, the other one became dislodged and hit me.

"After the roadmaster made this motion to me to roll the stones, I rolled it; the other one became dislodged and hit me, and that is when I fell to this spot I have indicated (R. 24).

* * * *

"Q. (Mr. Patterson) How long did you continue to roll the rocks at the top of the pile?

"A. About 20 minutes.

“Q. Then what happened?

“A. Then the roadmaster *motioned for me to keep pushing the stones* (R. 44).

* * * *

“Q. Why had you gone from the top of the pile down to this place on the bottom of the pile?

“A. *Because the roadmaster said to roll the stones.*

“Q. Then when you got to the bottom of the pile, what did you do?

“A. Then I turned the stone over.

“Q. And then what did you do?

“A. When I rolled that stone away, another one hit me in the back” (R. 45).

Mr. Charlevois' testimony was as follows:

“A. I noticed that Mr. Arellano, as he started to move these rocks, to remove these rocks—he was very unsteady on his feet, and I told him to get out of the way before he got hurt. What I meant for him to do was to step off to the side there, and let these other fellows get the rocks out of the way.

“I was quite certain that the man would fall down if he tried to maintain his footing on these rocks.

“Q. What did you observe after you told him to get out of the way, as to what he did and where he went?

“A. Instead of getting out of the way, the man walked out on the edge of the fill—walked out this way—and walked east on the edge of the pile of rock there, and he stumbled here, and turned almost completely around, and fell down into the ditch here.

* * * *

“Q. (Mr. Lewis) At the time that you say Mr. Arellano lost his footing and fell in the ditch, was he engaged in the process of attempting to move a rock or rocks?

“A. No” (R. 140).

If the jury believed Mr. Arellano's testimony they could not believe Charlevois. The two stories are incompatible. The jury could not have found from the evidence that when Mr. Arellano was removing a rock he thought he was doing so because of an order from the roadmaster. So far as the evidence is concerned Mr. Charlevois gave an order to move the rocks or he did not. Furthermore he told Appellant to move out of the way or he did not. For the jury to find that he did what he did because of misunderstanding would be to invite speculation. The evidence offers no basis for such a finding.

Even if it be assumed that Arellano misunderstood because the roadmaster did not give the order in Mexican, such fact would not show negligence. Surely a master who sees someone in a position of peril is not negligent because he is unable to speak a foreign tongue and shouts a warning or gives an order in English. Surely, he need not stand in silence in such a situation until an interpreter appears. In any event the Appellant has cited no cases so holding. The cases which are cited seem to us to have no bearing on the problem here considered.

In *Leonidas v. Great Northern Ry. Co.*, 72 P. 2d 1007, 105 Mont. 302, the facts are in no way analagous. There was no evidence of misunderstanding. The court, in dealing with another point, stated a general rule relative to obedience to a master's order.

In *Grant Storage Battery Co. v. De Lay*, 87 F. 2d 726, the question related to the duty of a master to caution an employee about a hidden danger. (In this case a condition which would cause lead poisoning.) The court announced a general rule, quoted by Appellant, with which we do not disagree. It, however, has no application to the problem here.

In *Pullman Co. v. Ranshaw*, 203 S. W. 122, (Texas App.), the question was whether pleadings were sufficient. Plaintiff alleged he was ordered by the defendant company to remain on a pullman car, and that without his knowledge the defendant company employed two immature Mexicans, who could not speak English, and that these watchmen shot him while in the process of removing him from the car. The court, understandably, held that a cause of action was stated.

In *Fidelity Trust Co. v. Wisconsin Iron & Wire Works*, 129 N. W. 615, 145 Wis. 385 (1911), one of defendant's tanks contained a solution of cyanide of potassium. Also near the tank was a hose containing water from which employees were in the habit of obtaining a drink. The defendant's superintendent placed the hose in the tank for the purpose of syphoning off the solution. The court held that an instruction allegedly given by the master could have been misleading to plaintiff's decedent who went into the basement and drank the water. The court said:

"This is not the case of a master instructing his employees concerning the dangers attendant upon work to be done by the latter. What would be a sufficient warning in that case might not be a sufficient warning in a case like this."

In *Richard v. Amoskeag Mfg. Co.*, 109 Atl. 88, 79 N. H. 380, and *Upton v. Conway Lumber Co.*, 128 Atl. 802, 81 N. H. 489, the facts are in no way analagous, nor is there any point in disagreeing with the general principles of law announced therein. The same is true of *Sadler v. Lynch*, 64 S. E. 2d 669, 192 Va. 257, and *In Re Panasuk*, 105 N. E. 368, (Mass.).

The other authorities taken from texts and particularly from "Naval Leadership" (a text of the U. S. Naval Academy), are interesting but of very little help in determining the question raised in Appellant's brief.

VII.

THE COURT DID NOT ERR IN REFUSING TO GRANT APPELLANT A NEW TRIAL BY REASON OF THE MISCONDUCT OF A JUROR.

The trial court had before it the affidavits filed by Appellant and observed the conduct of the witness Garcia who testified at the special hearing relative to the alleged misconduct and summarily held that no evidence was produced which indicated misconduct.

We submit that a reading of the affidavits filed by Appellant and the examination of the testimony given by Garcia will quickly convince the court that the suspicions apparently existing in Appellant's mind about the supposed misconduct of a juror are entirely unfounded, and unjustified.

CONCLUSION

We respectfully submit that the Appellant in this case has had a fair trial by a jury selected to try his case, and that the verdict returned is in all respects a fair and proper one and that the instructions given by the court fairly and properly advised the jury relative to the law applicable to the case.

Respectfully submitted,

VAN COTT, BAGLEY,
CORNWALL & McCARTHY,
CLIFFORD L. ASHTON,

Attorneys for Respondent.