1960

Parley D. Bills v. Denver & Rio Grande Western Railroad Co. : Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

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

Case No. 9028

IN THE SUPREME COURT
of the
STATE OF UTAH

PARLEY D. BILLS,
Plaintiff and Appellant,

—vs.—

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

PETITION FOR REHEARING
and
BRIEF IN SUPPORT THEREOF

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PETITION FOR REHEARING

COMES NOW Parley D. Bills, appellant herein, and respectfully petitions this Honorable Court for a rehearing in the above entitled case and to vacate the Order of the Court herein affirming the judgment for respondent. This petition is based on the following grounds:

POINT I

This Court has erroneously concluded that the trial court properly submitted to the jury the issue of whether defendant was negligent in not avoiding the second stop.

POINT II

This Court has erroneously misconceived the meaning of Instruction No. 25, and laboring under such misconception has incorrectly held that said instruction was proper.

POINT III

This Court has erroneously misconceived the meaning of Instruction No. 19, and laboring under such misconception has incorrectly held that said instruction was proper.

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I hereby certify that I am one of the attorneys for the appellant, 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 July 16, 1960.

WAYNE L. BLACK

BRIEF IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING

POINT I.

THIS COURT HAS ERRONEOUSLY CONCLUDED THAT THE TRIAL COURT PROPERLY SUBMITTED TO THE JURY THE ISSUE OF WHETHER DEFENDANT WAS NEGLIGENT IN NOT AVOIDING THE SECOND STOP.

This Court has recognized the proposition that plaintiff was entitled to go to the jury on the issue of whether the railroad was negligent in not avoiding the second stop which resulted in plaintiff's injury. We quote the following language from the Opinion:

> "At the trial appellant claimed that respondent was negligent because the engineer stopped the train in a manner which subjected the caboose to an unusually violent jerk, which could have been avoided had a proper stop been made, *and that it was also negligent in not using the method of switching which would have avoided the second stop altogether.*"

At a later point in the opinion this Court, referring to Instruction No. 12, stated:

> "This instruction covered appellant's theories of what respondent's negligence consisted. Since the jury brought in a verdict of 'no cause of action' it must have found that respondent had not acted negligently in either of these particulars, and that *in the stopping* and manner of stopping, ordinary, reasonable care had been exercised."

We make no contention that Instruction No. 12 requested by plaintiff was improper. Instruction No. 12

in fact submitted the issues above enumerated to the jury. However, it has been long and well established law in the State of Utah that where two instructions are in conflict one with the other, and one instruction is erroneous, reversible error exists.

See *Sorenson et al. v. Bell,* 51 Utah 262, 170 Pac. 72, where the court stated:

> "At most it would merely present a case where two instructions were given upon the same subject, one proper and the other improper. Where such is the case, and the evidence is conflicting upon the subject covered by the instructions, or is such that more than one conclusion is permissible, and the record leaves it in doubt whether the jury followed the instruction that is proper or the one that is improper, then but one result is legally permissible in this court, and that is to reverse the judgment and grant a new trial to the aggrieved party. The district court no doubt had in mind correct principles of law when it framed the instruction, but in stating those principles it used language which cast a burden on plaintiffs which the law does not require of them. The instruction is therefore clearly erroneous."

See also, *Morrison v. Perry,* 140 P. 2d 772, where the court stated:

> "In other instructions the court stated in substance that a person who drove an automobile in the manner described in the propounded questions was negligent, and in Instruction No. 13, instructed with respect to an emergency allegedly created by the deceased. The jury was told that if a person drove his car in a certain manner he

> *was* negligent, and also that if he drove his car in that manner they were then to determine whether or not he was negligent. Thus the jury was permitted to decide that acts of negligence as a matter of law were not negligent. These instructions were conflicting and the giving of such instructions constitutes error. Sorenson v. Bell, 51 Utah 262, 170 P. 72."

In its Instruction No. 20 the trial court stated:

> "Before you can find the Railroad negligent, you must find by a preponderance of the evidence that the engineer failed to make an ordinary, normal and reasonable stop *when he acted on the signal of the brakeman Serassio.*"

It is obvious that Instruction No. 12 and Instruction No. 20 are incompatible and inconsistent. Instruction No. 12 authorizes the jury to find the defendant negligent "in stopping the train." Instruction No. 20 requires that before the railroad can be found negligent the *manner of stopping* the train must have been negligent. Absent Instruction No. 20 and Instruction No. 23, which contains the same erroneous proposition that the *manner* in which the engineer operated the train must have been negligent before the plaintiff could recover, we would have no complaint. Instruction No. 12 properly stated the law. But Instruction No. 12 and Instruction No. 20 are incompatible in that the one allows the jury to find the railroad negligent *for making the stop at all* and the other requires that before the railroad can be found negligent *the manner in which the stop was made must have been negligent.* The erroneous instruction may very well have

been the one followed by the jury and the correct instruction ignored. Under such circumstances it is our position that this Court is clearly in error where it states "since the jury brought in a verdict of no cause of action it must have found that respondent had not acted negligently *in either of these particulars* * * *".

POINT II.

THIS COURT HAS ERRONEOUSLY MISCONCEIVED THE MEANING OF INSTRUCTION NO. 25, AND LABORING UNDER SUCH MISCONCEPTION HAS INCORRECTLY HELD THAT SAID INSTRUCTION WAS PROPER.

The misconception by this Court of the true meaning of Instruction No. 25 is contained in the following statement:

> "Appellant contends that the court committed prejudicial error by giving an instruction such as the requirements of a safety rule of respondent that employees *should exercise reasonable care against injury from jerks or slack action or any other unexpected motion* by keeping a secure grip and foothold when riding on moving equipment, * * *".

Instruction No. 25 actually reads as follows:

> *"Plaintiff in the exercise of reasonable care is required by the safety rules of the Denver & Rio Grande Western Railroad Company to protect himself against injury as far as possible from jerks, slack action, or any other unexpected motion* * * *."

There is a vast difference between the requirement that a plaintiff *exercise reasonable care to guard against*

unexpected jerks and the requirement as a matter of law that *in the exercise of reasonable care he must guard against unexpected jerks.* In the former he is required to exercise reasonable care. In the latter he is required as a matter of law to guard against unexpected jerks. The latter is an improper instruction. The misquote by this Court clearly indicates a misconception of the meaning of Instruction No. 25. Correctly analyzed, the instruction requires *as a matter of law* that the plaintiff guard himself against unexpected jerks. We reaffirm the position we took in our brief under Point No. 1 and the authorities cited thereunder, that no case has ever been brought to our attention where a court has sustained a requirement that a party as a matter of law guard and protect himself against unexpected, negligently caused jerks. This requirement revives contributory negligence and assumption of risk as defenses under the Federal Employers' Liability Act.

POINT III

THIS COURT HAS ERRONEOUSLY MISCONCEIVED THE MEANING OF INSTRUCTION NO. 19, AND LABORING UNDER SUCH MISCONCEPTION HAS INCORRECTLY HELD THAT SAID INSTRUCTION WAS PROPER.

This Court, discussing Instruction No. 19, states:

> "Rather, that instruction told them that the jarring must have been unexpectedly *or* unnecessarily severe. Had the jarring been of the type or severity usually expected in a stop, and if such stop was not unexpected, then, of course, under the circumstances of this case, respondent could not have been negligent in any particular."

Instruction No. 19 actually states in part:

> "The plaintiff cannot *** recover *** unless he proves *** an unexpected jarring or jerking *of* unusual and unnecessary severity ***."

The difference between unexpected *or* unusually severe, and an unexpected jerking *of* unusual severity is the difference between a lion and a fish. The former, in the disjunctive, allows recovery for an unexpected jerk and also for an unnecessarily severe jerk. The latter allows recovery only for a jerk that is both unexpected and unusually severe. This Court has begged the very question raised on our appeal and has misanalyzed the case of Ayres v. Union Pacific in the process. It is obvious under the authorities cited in our brief that the plaintiff should have been allowed to recover if the jerk was not reasonably to be expected, and that plaintiff should have been allowed to recover if the jerk was unnecessarily severe. These are two separate and distinct propositions, yet they were combined and the requirement of both imposed by Instruction No. 19. This Court's opinion would make it appear that said instruction allowed recovery for either eventuality. Instruction No. 19 by use of the words "unexpected jarring or jerking of unusual or unnecessary severity" places an added burden of proof on plaintiff's shoulders. There is no way of determining that the jury, in a general verdict, found against plaintiff on *both* the issue of unexpectedness and unnecessary violence. They could have been for plaintiff on one or the other of these issues and plaintiff would still have lost under Instruction No. 19.

CONCLUSION

The basic thing about which we complain is that this Court has not met the issues raised by plaintiff's appeal.

With regard to Point I, we concede that Instruction No. 12 was proper. We requested the instruction. But it lost its meaning in the light of inconsistent and erroneous instructions No. 20 and 23. How anyone could read these instructions and not realize that plaintiff had been deprived of the issue of whether the stop should have been made *at all* we cannot understand. We sincerely and respectfully hope that this Court will reappraise this issue.

With regard to Point II we suggest that the opinion stems from a misconception of Instruction No. 25. A duty to exercise reasonable care and an absolute duty are widely different things. An absolute duty to expect the unexpected and a duty to exercise reasonable care in expecting the unexpected are two different things. Imagine a railroad rule requiring a man to expect the unexpected being approved by this Court as a rule of law! We can only hope with all due humility that this Court will review and correct this obvious error.

With regard to Point III we can only reiterate that to require plaintiff to prove *both* an unexpected *and* an unusually violent jerk flies in the very teeth of the liberal philosophy of the United States Supreme Court decisions interpreting the Federal Employers' Liability Act, see *Rogers v. Missouri Pac. Ry. Co.*, 77 S. Ct. 443, 352 U.S.

500, and also this Court's heretofore unassailable opinion in the case of *Ayres v. The Union Pacific Railroad Company*, 111 Utah 104, 176 P. 2d 161.

We respectfully petition this Honorable Court for a rehearing on the vital issues herein presented.

Respectfully submitted,

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