1965

Union Pacific Railroad Company v. El Paso Natural Gas Company : Appellant's Petition For Rehearing and Brief In Support thereof

In the

Supreme Court of the

UNION PACIFIC RAILROAD COMPANY,

Plaintiff-Appellant,

—vs.—

EL PASO NATURAL GAS COMPANY,

Defendant-Respondent.

APPELLANT'S PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

Appeal by Union Pacific Railroad Company, Plaintiff-Appellant, from a Summary Judgment entered by the District Court of Salt Lake County, Utah, the Honorable [illegible], Presiding, in favor of the Defendant-Respondent.

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In the
Supreme Court of the State of Utah

UNION PACIFIC RAILROAD COMPANY,
Plaintiff-Appellant,

—vs.—

EL PASO NATURAL GAS COMPANY,
Defendant-Respondent.

Case No. 10361

APPELLANT'S PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

PETITION FOR REHEARING

COMES NOW Union Pacific Railroad Company, plaintiff and appellant herein, and petitions the above entitled court for a rehearing of the above entitled case heretofore decided by opinion of this court made and entered December 15, 1965. This petition is based upon the following grounds:

1. This court erroneously held that the connection or relationship between the existence and maintenance of the pipeline, on the one hand, and Stacey's accident, on the other hand, was merely a "remote" or "coincidental" one; and erroneously held that there was no substantial causational relationship between the pipeline and the accident.

2. This court erred in that it apparently overlooked the most significant factual matters established in this lawsuit bearing upon the nature of the relationship between the existence and maintenance of the pipeline, on the one hand, and Stacey's accident, on the other hand.

3. This court erroneously held that the language of indemnity involved in this case did not sufficiently express a clear and unequivocal intent of the parties to provide indemnity in favor of the appellant from respondent for losses due in part to appellant's negligence.

4. This court erred in that it overlooked the applicable law of the State of Wyoming governing proper disposition of the issue mentioned in Point 3 above.

5. This court erred in that it placed reliance on older decisions from courts of other jurisdictions which are not currently acceptable even to the courts which originally wrote or made such decisions.

Respectfully submitted,

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APPELLANT'S BRIEF IN SUPPORT OF ITS PETITION FOR REHEARING

PRELIMINARY STATEMENT

The facts of this case having been stated in appellant's original brief, restated in respondent's brief, and in most respects again stated in the court's opinion entered December 15, 1965, there is no need to set them forth here. However, mention should now be made of two particularly significant facts relied upon by appellant in support of its petition for rehearing for the reason that the majority opinion of this court makes no reference to them whatever; and this strongly suggests the same were overlooked by this court. Those facts are that the private crossing on which Stacey was injured provided the only reasonably practical route by which Stacey or other employes of respondent could reach those certain portions of the easement areas conveyed by the deed to which Stacey was enroute when injured; and the ingress and egress language of the deed shows conclusively the parties thereto did have that general subject in mind when the deed was delivered and accepted.

ARGUMENT POINT I

Appellant's Points 1 and 2 of its petition for rehearing are so closely related that appellant's argument in support thereof may be most briefly made by treating them as a single unit. This court held that the relationship which existed between the existence and maintenance of the pipeline and Stacey's accident was "remote" and "coincidental"; and that there was no substantial causa-

tional relationship between these matters. This holding overlooks: (a) that the crossing on which Stacey was injured afforded the only possible route which he could use to reach the easement areas conveyed by the deed on which a portion of the pipeline was located; (b) that the parties had ingress and egress to and from the easement areas in mind as shown by a provision to that effect in the deed; so that (c) the parties to this deed must necessarily have intended, and the actual conduct of those parties shows conclusively they intended, that use of the crossing by respondent's employes in maintaining the pipeline was neither "remote" from nor simply "coincidental" with the existence and maintenance of the pipeline.

In its opinion this court agreed with appellant's previously espoused contention that the indemnity language of the deed encompassed indemnity for losses due to some type of causal relationship between the pipline and Stacey's accident other than one of "proximate" or "legal" cause; and also agreed that "but for" the pipeline, Stacey's accident with its consequent loss to Union Pacific would never have occurred. However, this court has refused to agree with appellant's further contention that the language of the indemnity provision encompassed losses, among others, with the very type of causal relationship which existed here. The court based its refusal on its characterization of the relationship (some relationship being conceded) as "remote" and as "coincidental."

We acknowledge that it is difficult for this court, or any other, to describe the nature of a relationship be-

tween the two factors (the pipeline and the accident) in a word or two and still express adequately the whole process of the court's reasoning. And we do not quarrel with the two words selected by the court in its effort to describe its conclusion simply because the words chosen are possibly a shorthand way of expressing the court's total thought concept. But we do respectfully assert that words such as "remote" and "coincidental" are mere adjectives; that their use obscures rather than clarifies the real problem in this lawsuit; and that their use seems to indicate this court, albeit unintentionally, judged the nature of the relationship between the existence of the pipeline and Stacey's accident in terms commonly used in considering, and significant only with respect to, cases involving the doctrine of "proximate cause." For what is there about such words from the indemnity language in the deed as: "in any other way whatsoever is due to or arises because of the existence of the pipeline," which suggests that some "remote" relationship does not satisfy their meaning? Even if event "B" is only "remotely" due to phenomenon "A", can it be said "B" is not due to "A" at all? And if "B" is due to "A" at all, is it not due to "A": "in any way whatsoever"? If the "remote" test is to be used despite the lack of any aid therefrom in decision of this lawsuit, then by what measure was or is it to be decided the relationship between the pipeline and Stacey's accident was "remote" or "coincidental"? Is it to be decided solely by a measure of geographical distance? Surely not, for if so this case is one for decision by a surveyor, not a court. If not by measure of distance, then by application of what legal theory is that conclusion reached or reachable? Is it by some sort of

judicial instinct? Certainly that conclusion is not supportable by resort to the analogies used for illustrative purposes by this court in its opinion, as will hereinafter be pointed out.

Parenthetically we ask the court to note here this appellant has never contended that *absolutely every* cause in fact or "but for" relationship between the pipeline and an accident was sufficient to invoke the indemnity language of the deed. Please see the paragraph of appellant's original brief beginning at the bottom of page 18 and ending on page 19. Instead, appellant suggested at page 21 of that brief what we still think is the only rational measure or yardstick by which valid conclusions can be reached concerning the nature of that connection or relationships, as distinguished from reaching those conclusions through use of mere semantics. That suggested test, one of determining which *hazards* were contemplated by the parties when the deed was given, also illustrates the precise reasons why the analogies suggested by the court are, in our opinion, inappropriate.

We could easily agree with the majority opinion of this court that those who negotiated the terms of the deed involved here were not thinking of, nor are they to be held to have been considering, risks or hazards of loss arising in circumstances where El Paso's employes were hurt or injured hundreds or thousands of miles from the easement areas while engaged coincidentally (if that is to be the magic word) in some activity related to the pipeline. But that situation is not analogous to the case this court was and is called upon to consider. Here Stacey was, at the very moment of his accident, on appellant's railroad property; using a private, not a public,

crossing; and, most importantly, using the only practical route which existed to reach some of the easement areas conveyed by the deed. Surely there is some very real difference between that situation and the examples conceived and mentioned by this court. The difference lies in the fact that ordinary business men would not normally be considered to have contracted with hazards of accidents occurring hundreds or thousands of miles away in their minds; but the same ordinary business men should very well normally be considered to have contracted with those hazards immediately at hand on this crossing very much in mind. Especially so since there was no other practical route to the pipeline in that area. The question therefore becomes: Is that difference sufficient to warrant a different answer than this court has given? Solution of that question should depend, with all due and genuine deference to this court's views and opinion, not upon use of adjectives germane only to a "proximate cause" case; but instead upon consideration of the intent of these parties; that is whether or not the parties' words and conduct were such as to justify the court in deciding hazards at this particular crossing should be held to be within the contemplation of the parties.

We believe the "hazards which should be held to have been contemplated by the parties" test, heretofore suggested at page 21 of our original brief and repeated here, is the only measure of the relationship between the pipeline and the accident which is meaningful in this case. But whether it is or not, and we ask the court to note the total absence of any suggestion whatever made by respondent either in its brief or at oral argument as to

what is a better test, we respectfully urge that decision of this case simply by use of an indeterminate adjective such as "remote" leaves entirely unknowable and unascertainable by what standard the court's decision was reached.

We also respectfully urge it appears this court did not give adequate consideration and effect to the fact that the crossing involved furnished the only route to the pipeline easement areas. At least that fact, established by the record at pages 47 and 164, is neither mentioned in the majority opinion of the court nor described in that opinion as immaterial. Granting that this court can never satisfy the desires of counsel as to the content (let alone the result) of its opinions, does not a case of this magnitude justify full analysis of a factor such as this one which obviously has at least some bearing on proper disposition of the lawsuit?

This petition and brief is not filed merely to criticize or belittle the literary qualities of the court's opinion. It is, instead, intended to present appellant's vital contention that the fact this crossing was the only way for Stacey to get to the pipeline, and the effect of that fact upon (a) the analogies relied upon by the court, and (b) upon the court's final conclusions, does merit further consideration by this court in this lawsuit. For reasons pointed out in our original brief, this fact in and of itself shows the parties to this suit should be held by this court to have contemplated that the hazard of loss arising from use of the crossing was closely, not "remotely", connected with and related to the existence of the pipeline and its

maintenance. Moreover, the basis for our assertion lies not alone in the difference between one and one-half miles and the several hundred miles examples of the court. It lies in the very realistic difference between contracting for indemnity as to the hazard of an easily foreseeable crossing accident at this crossing which was, for practical purposes, inseparably related to the pipeline — as distinguished from contracting for indemnity as to the hazards of some accident whose relationship to the pipeline was so tenuous, and whose forseeability was so difficult, that ordinary people would not consider it as an added hazard created by the pipeline at all. In short, there is no logical legal reason (nor for that matter even a geographical basis) for a conclusion that because an accident in Chicago or Salt Lake is "remote", so also is one occurring on the crossing where Stacey was hurt in the circumstances here.

ARGUMENT POINT II

Appellant's Points 3 and 4 set forth in its Petition for Rehearing also lend themselves to discussion simultaneously. Both these points concern the court's holding that the indemnity language of the deed here involved did not sufficiently express a clear and unequivocal intention to provide indemnity to the appellant at the hands of respondent for losses due to appellant's negligence. At the outset of the discussion of this point, we are impelled to say this court has apparently misconceived the nature of appellant's position on an important phase of this problem. That phase is the matter of whether or not there were discussions or negotiations between appellant

and respondent prior to execution and delivery of the deed with regard to indemnity in favor of appellant for losses occasioned by "negligence" of the appellant. This court said in the third full paragraph on page 3 of its opinion as follows:

> "This is pointed up by the plaintiff's own argument. It asserts that the parties in fact *discussed the possibility of loss arising from its negligence,* and that the agreement was intended to cover such an eventuality. Assuming it to be true that they discussed the matter, this does not strengthen the plaintiff's position, nor does it impair the validity of the trial court's conclusion. If the matter was discussed and was thus in the minds of the parties, this would affirm with greater emphasis that the Union Pacific should have expressly so stated in the contract. . . ." (italics added)

The court's statement quoted above seems to us to be premised on the assumption that appellant's position throughout the course of this litigation has been to the effect both appellant and respondent talked about indemnity for losses arising from Union Pacific's negligence *entirely separately and as a different and distinct subject for discussion* than indemnity to Union Pacific in any and all circumstances where the loss to Union Pacific resulted in any way whatsoever from the existence or maintenance of the pipeline. Such has never been Union Pacific's position in this case. To the contrary of the court's assumption, appellant has contended that the negotiations or discussions between the parties hereto prior to the execution and delivery of the deed occurred in only two ways: (a) By means of the general oral dis-

cussions evidenced by plaintiffs response to defendant's request for admission No. 9; and (b) By means of the submission to respondent of the precise form of indemnity language to be used in the deed, with the correspondence pertaining thereto. (R. 49, 50, 51, 56, 57, 58 and 164). And the important and significant fact with regard to these negotiations or discussions is this: It was the purpose of both Union Pacific and El Paso to provide for indemnity to Union Pacific from El Paso as to losses arising from the existence or maintenance of the pipeline, or other activities of El Paso in connection therewith specified in the deed, without distinction whatsoever as to other contributing factors to such losses, including negligence of the Railroad Company, so long as those losses were in any way whatsoever due to the existence of the pipeline. What else does the phrase "howsoever caused" used in the deed really mean? Never has appellant contended that there were discussions between the parties in which the specific words "negligence of Union Pacific" were used. Appellant's position is and always has been that the negotiations and discussions consisted, in substance, of appellant's advice to respondent to the effect that Union Pacific expected to be as thoroughly free from risk of loss after the pipeline was constructed as it was before the same existed; and the submission to respondent by appellant of the precise language of indemnity eventually to be used in the deed, which language was literally sufficient to accomplish that purpose absolutely. The very absence of negotiation or discussion in which the specific term "negligence" was used seems to us the most persuasive possible reason supporting appellant's argument that the language used in the deed was intend-

ed to cover all losses—not merely those losses occasioned Union Pacific independently of its own negligence. Both these parties knew how to say there would be no indemnity for losses due to Union Pacific negligence had they desired to so agree. The negotiations, as outlined above, reveal absolutely no purpose whatever on the part of those who conducted them to draw some distinction based on any determination (subsequently perhaps to be made by some unknown court or unknown jury) that any given loss was due to negligence of the Railroad Company. Nor does the language used in the deed evidence any such purpose. The purpose was and remains to provide for indemnity in favor of Union Pacific whenever a given loss was in "any way whatsoever due to" the existence or maintenance of the pipeline. The fact that such losses might also be due in part to negligence of the appellant was so wholly irrelevant to the arrangement these parties were consumating that it neither merited nor received special mention containing the word "negligence." Accordingly, this court's seeming reliance on the notion that there were specific discussions of some sort of distinction drawn by the parties as between those losses occasioned, in part, by railroad negligence and other types of losses, yet without expression of that distinction in the deed, is unfounded in fact and unsupported by the record before this court. This was never a case in which appellant and respondent divided the losses which might occur due to the existence of the pipeline into two separate parts: (a) those due to railroad negligence and (b) those occurring without railroad negligence; and then (c) described those two factors separately in the deed. It was instead a case in which the parties dealt with

the sum of (a) and (b) above in one fell swoop rather than in pieces. And treatment of all such losses as a whole, rather than breaking the whole in pieces, evidences no intent to leave out one of the pieces. Nor does the decision of this court in *Barrus v. Wilkinson,* 16 U. (2d) 204, 398 P.(2d) 207, relied upon by the court in its footnote No. 4, decide otherwise. One who reads that case carefully will search in vain for even a hint that parties may not contract for indemnity as to losses occasioned by the indemnitee's own negligence without stating that proposition *separately* from indemnity for other losses.

We do not intend to repeat all the argument made in our original brief. But it should be added here the only case from Wyoming discovered by either party to this lawsuit dealing with the question of whether or not indemnity language is sufficient to cover losses occasioned by the indemnitee's own negligence without specific mention of that word or its equivalent in the indemnity provision is the case of C. & N.W. Railway Company vs. Rissler, 184 F.Supp. 98. The deed involved in this lawsuit conveyed an interest in real estate *in Wyoming.* Its acceptance by respondent was evidenced and completed solely by recordation by respondent of that deed in a County Recorder's office *in Wyoming* and use of the easement areas *in Wyoming.* That acceptance, *in Wyoming,* first bound respondent to any contractual indemnity liability. Stacey's accident occurred *in Wyoming.* Can there be any dispute that the law *of Wyoming* governs interpretation of the meaning and effect of the indemnity provision under these circumstances despite that fact Stacey's suit was brought

in Utah and the current suit was brought in Utah state courts? Restatement of Conflict of Laws, Sec. 214, Sec. 311, Sec. 312, Sec. 323, Sec. 325, Sec. 332 (f), and Sec. 346; Mutual Benefit Health & Accident Assn. vs. Baldridge (10th Circ.) 70 F.(2d) 236; Heflebower vs. Sand, 71 F. Supp. 607, syllabus points #1, 2, and 3, at pages 609 and 610; Juden vs. Southeast Missouri Tel. Co. (Mo.), 235 S.W. (2d) 360, syllabus point 1, at page 363. The court's assertion in its majority opinion that no clearly and unequivocally expressed intention to indemnify Union Pacific against the consequences of its own negligence is to be found in the language of indemnity here presented because

> "it would have been easy enough to use that very language and to thus make that intent clear and unmistakable, which was not done here,"

is wholly inconsistent with the law of Wyoming, shown by the Rissler decision, to the effect that no such specific use of the word "negligence" or its equivalent is necessary in order to make such intent clear and unmistakable. In the absence of some explanation or even mention by this court as to why it has refused to follow the law of Wyoming in this regard, we cannot but conclude the court overlooked this important matter.

Lastly in this connection appellant desires to ask the court to reconsider the real validity of some of the remarks made near the top of page 3 of its opinion. The court said:

> ". . . each party is entitled to assume that the other intends to conduct himself as a reason-

> able and prudent person . . ., which presupposes that he will commit no wrongful act nor be guilty of negligence."

Whatever the merits of such a doctrine in situations such as were involved in the cases cited by the court in its footnote #2, it is not a principle which has absolutely universal application even in tort cases. Please see Lillie vs. Thompson, Trustee, 332 U.S. 459, 92 L.Ed. 73, 68 Sup. Ct. 140; Restatement of Torts (2d), Sec. 302 A, Comment (c); Sec. 302 B, Comment (e). And the view that two parties contracting for indemnity do so "presupposing" the indemnitee will "commit no wrongful act nor be guilty of negligence" is scarcely realistic. How can such an assumed "presupposition" be squared with the actual fact that in the case at bar the parties specifically provided for indemnity to Union Pacific for amounts paid for liability to third persons, not parties to the agreement, as to whom Union Pacific would not even be legally liable unless found to be negligent or at fault in some way? How can such a "presupposition" be squared with the hundreds of cases in which courts have found the parties did by contract provide for indemnity for losses due to an indemnitee's own negligence? How can such a "presupposition" be reconciled with the realities of liability insurance purchased by almost everyone? Do insurance companies really sell, and automobile owners and others really buy, liability insurance "presupposing" the buyer will never be guilty of negligence? Is the frame of mind of those entering indemnity agreements so wholly different than those involved in the insurance analogy mentioned above

as to justify this court's reliance in a contract case on a very general tort principle which has limited application even in its own tort field?

The court also said:

> "A closely related proposition pertinent here is that the law does not look with favor upon one exacting a covenant to relieve himself of the basic duty which the law imposes on everyone: that of using due care for the safety of himself and others. This would tend to encourage carelessness and would not be salutary either for the person seeking to protect himself or for those whose safety may be hazarded by his conduct."

As to these statements by the court we suggest the following: (1) An indemnity agreement such as here involved did not even purport to *relieve* appellant of the responsibility of exercising due care. More, it did not even purport to *relieve* appellant of a legal duty to respond in damages to Stacey. Its real effect, as is pointed out in Cozzi vs. Owens Corning Fiber Glass Corp. (N.J.) 164 A.(2d) 69, was to allocate as between Union Pacific and El Paso the responsibility for providing the resources, whether by contractual liability insurance or by other means, for paying losses both knew would inevitably someday occur. (2) The notion that indemnity contracts tend to encourage carelessness is also unrealistic. Is the fact that some justices of this court undoubtedly carry liability insurance as automobile owners one which "tends to encourage carelessness" on their part? At least, is any such tendency of real legal moment for any purpose? And even if it is, of

what real importance is that tendency in a case such as this? The negligence relied upon by Stacey in his suit against Union Pacific was claimed and alleged to exist in the conduct of appellant's train service employes. Is it really to be supposed in common sense that those employes tended to be less careful than they otherwise would have been simply because an indemnity agreement, which none of them had ever even heard existed, may have afforded their employer indemnity relief against loss? Please see the remarks of Messrs. Harper and James, Vol. 2, The Law of Torts, page 771 et seq., on the subject of the effect of liability insurance on the traditional "objective of tort law" to deter unreasonably dangerous conduct and to promote the taking of reasonable precautions. On this particular subject matter is there any real difference between liability insurance and an indemnity agreement? (3) Is it appropriate today for courts to "look with disfavor" upon indemnity agreements covering the indemnitee's negligence? If so, why? Is there anything antisocial or immoral in our courts allowing two corporations such as are parties here to decide between themselves at whose risk certain losses shall be borne irrespective of whose "negligence proximately caused" those losses? If there is something inherently antisocial about such an agreement, what makes it so in the present climate of tort liability? In all good faith, we say to the court its remark that "the law does not look with favor" is unsound in principle and inconsistent with modern indemnity cases cited in our previous briefs. Please see the Cozzi case cited supra at page 16 hereof.

ARGUMENT POINT III

In support of Point 5 of this Petition for Rehearing we point out this court relies upon Vinnell Company, Inc. vs. Pac. Elec. Ry. Co. (Calif.), 340 P.(2d) 604, in its footnote 4; and upon Southern Pacific Co. vs. Layman (Ore.), 145 P.(2d) 295, in its footnote 5, to support its decision. The Vinnell case is no longer followed slavishly even in California. Please see Harvey Machine Co., Inc. vs. Hatzel & Buehler, Inc. (1960) (Calif.), 353 P.(2d) 924, cited in appellant's "Reply Brief." The Layman case seems to us to afford an even more precarious foundation for decision in view of what the Oregon Supreme Court, who wrote it, later said about it and about indemnity agreements between large corporations in Southern Pacific Co. vs. Morrison-Knudsen Co., Inc. (Ore.), 338 P.(2d) 665, at 672 et seq. Whatever disposition is finally made of the case at bar, we ask this court to reconsider whether or not it really wishes the law of this state pertaining to contracts for indemnity to be left, as the court's footnotes now indicate, in reliance upon decisions of other jurisdictions whose absolutism is rejected at least in part even by the courts of the authoring states; and also in a general condition wholly inconsistent with the current judicial thought on indemnity law.

CONCLUSION

Counsel for appellant are fully aware this court does not favor unwarranted use of the court's rehearing procedure. We intend no disregard of the court's understandable desire to avoid needless decisions on petitions for rehearing; nor do we intend any offense or disrespect to this court by what is said in this brief. However, for the reasons pointed out herein, we strongly urge that this important case deserves reconsideration and reversal of the judgment below. We have neither the right nor the desire simply to quarrel with this court's opinion. But appellant's legal privilege to invite further thought by this court on the issues presented in this lawsuit is hereby invoked.

Respectfully submitted,

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