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James Siciliano v. The Denver and Rio Grande Western Railroad Co. : Brief of Appellee

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

JAMES SICILIANO,

Plaintiff and Respondent,

vs.

THE DENVER AND RIO GRANDE
WESTERN RAILROAD COMPANY,
a corporation,

Defendant and Appellant.

FILED

MAY 12 1901

Clark, Supreme Court, Utah

Case No.
9378

BRIEF OF APPELLEE

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WESTERN RAILROAD COMPANY,
a corporation,

Defendant and Appellant.

Case No.
9378

BRIEF OF APPELLEE

STATEMENT OF FACTS

Appellant's statement of facts is incomplete in that it substantially disregards the plaintiff's theory, particularly with respect to defendant's negligence. It is, therefore, necessary to briefly state the facts as they relate to the plaintiff's theory and as they were found by the jury.

On September 8, 1952, at approximately 9:00 a.m., plaintiff, an immigrant from Italy (R. 116) was told to obtain a piece of wire hanging on a nail on a post in the defendant's shop (98, 111, 112). Plaintiff then was 53 years of age, a machinist for the railroad, and at that time had had 33 years experience (96). It is stipulated that both the plaintiff and defendant were engaged in interstate commerce (98). Prior to the accident when the plaintiff had used wire, he had obtained it from the tool room but the tool room had been abolished two weeks before the accident (104). When the plaintiff reached for the coil of wire he had no difficulty seeing it (113). It was a coil approximately 8 or 10 inches in diameter (113, 114) hanging over the top of a nail (115). Plaintiff did not observe the position of the ends of the wire (115). There was no way for the plaintiff to know that the wire was dangerous or that it would spring from the appearance of it on the nail (119, 120). As the plaintiff's right hand lifted the wire from the post, an end of the coil sprung loose and flipped into the plaintiff's eye (98, 99). Plaintiff then dropped the coil to the ground and the coil sprang further into a wider diameter (98, 99). In sum, the evidence was that the position of this particular piece of wire on the nail was that of a spring or coil and in the particular circumstances it was unsafe for use, the ends not having been wrapped around the coil to secure them.

As a result of the accident the plaintiff eventually lost the entire use of his left eye.

The facts are detailed further in the argument. References are to the page of the Record on Appeal unless otherwise indicated.

POINT I.

THE JURY'S VERDICT IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Throughout its brief, both in the Statement of Facts and Argument, the defendant recites its own theory of the facts and arbitrarily ignores the plaintiff's theory as it was adopted by the jury. The defendant extensively treats the proposition that a roll of wire hanging on a post is not dangerous and that liability could not be predicated on negligence consisting solely of requiring the use of a roll of wire hanging on a post. Whether requiring the use of such wire as it is ordinarily hung would constitute negligence in and of itself is not before the court in this case. A closer look at the facts is required.

The plaintiff's theory was that a piece of wire 12 to 15 feet long was rolled into the position of a coil or spring. The diameter of the coil was 8 to 10 inches. When the coil was hung on the post the ends were locked either under the coil or among some of the strands. There was, in other words, not simply "a roll of wire hanging on a nail" but a spring-like coil 12 to 15 feet long, 8 to 10 inches in diameter, precariously balancing in a position so that the ends were locked under or within the coil itself. In this position the coil was a trap. It was, as defendant admits throughout its brief, innocent enough in appearance, but in fact it was treacherous.

Plaintiff was instructed to get the wire from the post and bring it to the pit where he and Bob Wells were going to use it to tie back a brake beam (98, 109, 189). Unaware of any dangerous condition in the coil (113, 114), plaintiff raised his right hand to a position approximately level with the top of

his head toward the post (113) and lifted the coil from the nail. The instant that the weight of the coil was released from the ends of the wire, the trap was sprung. One of the ends of the coil flipped "like lightning" and struck the plaintiff in his left eye. Plaintiff dropped the coil to the ground. As the coil hit the ground it sprung further so that the diameter of the coil was larger on the ground than it was on the post (98, 99).

The question before the jury and the question here is not as defendants continuously recite, whether an ordinary roll of wire hanging on a nail is a safe tool or safe equipment. In fact, the jury was specifically instructed that a piece of wire with loose ends hanging on a post at the defendant's shop could not, *in and of itself*, constitute negligence (Instruction No. 20). At the same time, "Whether or not the manner in which this wire hung on the post is negligence is for you to determine based on all the evidence and such reasonable inferences as may be drawn therefrom" (*ibid*).

The evidence and such reasonable inferences as the jury drew from it support two propositions:

(a) A hanging coil of wire in a position of spring or tension where the ends are prevented from springing only by the weight of the coil or the position of the strands is an unsafe piece of equipment. That injury is likely from the use of such a coil by one unaware of its cocked position is foreseeable.

(b) The piece of wire involved in this lawsuit was hanging on the post in such a position of tension as to constitute a trap.

The first proposition is demonstrated from the very piece of wire (Ex. D-1) introduced by the railroad company in this lawsuit. While the piece introduced into evidence is probably only 20 or 22 inches in length, it is apparent from handling and coiling it that unless the ends are secure, they have a tendency to flip as soon as pressure on them is released. It is to be observed that time after time during the trial, counsel for the defendant wrapped the ends of the wire around the coil in demonstrating the physical properties of wire to the jury. It is, of course, a matter of common knowledge that wire is springy by its nature. As the defendant stipulated during the cross-examination of one of its witnesses, if the ends of a roll of wire are fastened around the coil, the ends cannot flip (187). Yet the plaintiff's foreman, Paul Schenk, admitted that he had never issued instructions that the ends should be wrapped around the coil (187).

The second of the two propositions is established, without contradiction, by the plaintiff's own testimony. He stated over and over again on direct and cross examination that when he lifted the coil from its position on the nail, an end flipped out and hit him in the eye. There is certainly nothing dubious or suspicious about this testimony. He told the same thing to everyone who inquired about the manner in which the accident happened, starting with his foreman and going right on through the railroad's claim agent. Further, he testified that when he dropped the coil onto the ground, it sprung into a wider diameter. The physical properties of wire are such that the Court knows this springing action is possible only when the wire is coiled in a position of tension.

The jury necessarily believed the plaintiff's theory in this case. Unless it believed that the wire was coiled in a position of a spring, it would have been required to find for the defendant on the issue of liability under the Court's instructions. Upon no other basis can the jury's decision be explained; moreover, the adoption of that theory is compelled by the undisputed evidence in the case.

Plaintiff does not quarrel with the general doctrine of the cases cited by the defendant to the effect that proof of an accident is not proof of negligence, and that there must be a showing of an unsafe condition upon which to predicate liability under FELA cases (Def. brief, 10-18). The jury in the case at bar necessarily determined, however, that the particular piece of wire in question was hung on the post in such a manner as to constitute an unsafe tool or piece of equipment.

It is to be observed that the defendant itself proved that the plaintiff could not have been solely responsible for the accident. On cross-examination the defendant's attorney artfully drew from the plaintiff the fact that he could not tell by looking at the coil, although it was right in front of his face, that there was anything unsafe about it.

"Q. You didn't have any reason to believe that if you picked that wire up it would spring and flip you in the eye?

"A. I didn't think it would spring." (120)

And again:

"Q. Mr. Siciliano, when you saw that particular wire hanging on the post you didn't see anything about

it to cause you to think there was anything wrong, did you?

"A. I didn't know it was going to flip on me." (119)

Apparently the jury found that, even so, defendant might somehow have avoided the accident, and that an offset for contributory negligence was appropriate. Defendant cannot get any more comfort from adoption of its theory in part than from the rejection of it in part. In substance, defendant simply asks this Court to adopt a theory of the facts which the jury rejected. The point is that Mr. Siciliano happened to be the victim caught in the trap. He had nothing to do with hanging the wire on the post. No other wire was provided to him. He was told to use this particular coil.

The defendants are totally in error to argue "There is no evidence that the wire was not safe for ordinary handling." In a given hypothetical case an argument might be made that a roll of wire as it is customarily hung upon a post with loose ends may be not unsafe for ordinary handling. But that is not our case. The jury in the case at bar expressly rejected the argument that this particular coil of wire was an ordinary one or that it was hung in an ordinary way. The jury instead approved and adopted the plaintiff's theory that the coil was hanging as a spring in a position of tension and that when the weight was released from the ends, one of them sprang out "like lightning" and injured the plaintiff. In this kind of a case the authorities require the acceptance of the jury's verdict.

Common law concepts with respect to liability for negligence were drastically revised by the Federal Employer's Liability Act. It is not necessary under that act that employer negli-

gence be shown to be the sole proximate cause of injury. The employer is liable if its negligence played "any part at all."

The rule itself bears repetition. In *Rogers v. Missouri Pac. R.R. Co.* (1957) 352 U.S. 500, 1 L.Ed. (2d) 493, 77 S. Ct. 443, Reh. d., 353 U.S. 943, 1 L.Ed. (2d) 764, 77 S. Ct. 808, the U.S. Supreme Court said:

"The jury was instructed to return a verdict for the respondent if it was found that negligence of the petitioner was the sole cause of his mishap. We must take it that the verdict was obedient to the trial judge's charge and that the jury found that such was not the case but that petitioner's injury resulted at least in part from the respondent's negligence.

* * * *

"Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find out that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or *in part*' to its negligence. (Emphasis added.) [By the Court]."

* * * *

“The statute supplants that [common law] duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer’s negligence. The employer is stripped of his common-law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit. The burden of the employee is met and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference.”

The Supreme Court expressly ruled in Note 13 of the foregoing opinion:

“Moreover, ‘what constitutes negligence for the statute’s purposes is a federal question, not varying in accordance with the differing conceptions of negligence under state and local laws for other purposes. Federal decisional law formulating and applying the concept governs.’ *Urie v. Thompson*, 337 US 163, 174, 93 L ed 1282, 1295, 69 S.Ct. 1018, 11 ALR 2d 252.”

The majority of the Court pointedly observed that its review of cases was because it was “Cognizant of the duty to effectuate the intention of Congress to secure the right of jury determination . . .” in this class of cases and that “In a relatively large percentage of cases reviewed, the Court has found that lower courts have not given proper scope to this integral part of the congressional scheme. . . . The decisions of this Court after the 1939 amendment teach that Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot hon-

estly differ whether *fault of the employer played any part* in the employee's injury." (Emphasis by Appellee.) In note No. 26 to the majority opinion the Court took the pains to cite 17 cases where lower courts were reversed for failure to allow the jury's verdict to stand.

The Rogers decision has been applied and followed consistently by a majority of the court. *Webb v. Illinois Cent. R. Co.* (1957) 352 U.S. 512, 1 L.Ed. (2d) 503, 77 S. Ct. 451; *Shaw v. Atlantic Coast Line R. Co.* (1957) 353 U.S. 920, 1 L.Ed (2d) 718, 77 S. Ct. 680; *Futrelle v. Atlantic Coast Line R. Co.* (1957) 353 U.S. 920, 1 L.Ed (2d) 718, 77 S. Ct. 682; *Deen v. Gulf, C. & S. F. R. Co.* (1957) 353 U.S. 925, 1 L.Ed (2d) 721, 77 S. Ct. 715; *Thomson v. Texas & Pac R. Co.* (1957) 353 U.S. 926, 1 L.Ed (2d) 722, 77 S. Ct. 698; *Arnold v. Panhandle & S. F. R. Co.* (1957) 353 U.S. 360, 1 L.Ed (2d) 889, 77 S. Ct. 840; *Ringhiser v. Chesapeake & O. R. Co.* (1957) 354 U.S. 901, 1 L.Ed (2d) 1268, 77 S. Ct. 1093; *McBride v. Toledo Terminal R. Co.* (1957) 354 U.S. 517, 1 L.Ed (2d) 1534, 77 S. Ct. 1398; *Gibson v. Thompson* (1957) 355 U.S. 18, 2 L.Ed (2d) 1, 78 S. Ct. 2; *Honeycutt v. Wabash R. Co.* (1958) 355 U.S. 424, 2 L.Ed (2d) 380, 78 S. Ct. 393; *Ferguson v. St. Louis-San Francisco R. Co.* (1958) 356 U.S. 41, 2 L.Ed (2d) 571, 78 S. Ct. 671; *Butler v. Whitman* (1958) 356 U.S. 271, 2 L.Ed (2d) 754, 78 S. Ct. 734; *Moore v. Terminal R.R. Assn.* (1958) 358 U.S. 31, 3 L.Ed (2d) 24, 79 S. Ct. 2; *Harris v. Penn. R.R. Co.* (1959) 361 U.S. 15, 4 L.Ed (2d) 1, 80 S. Ct. 22; *Conner v. Butler* (1959) 361 U.S. 29, 4 L.Ed (2d) 10, 80 S. Ct. 21; *Sentilles v. Inter-Caribbean Shipping Corp.* (1959) 361 U.S. 107, 4 L.Ed (2d) 142, 80 S. Ct. 173; *Davis v. Virginian Railway Co.* (1960) 361 U.S. 354, 4 L.Ed (2d) 366, 80 S. Ct. 387.

While some of these cases are under the *Jones* Act, they expressly adopt the rules of the *Rogers* case for FELA actions. In all of the later cases is tacit and explicit recognition of the philosophy of FELA cases as stated by Mr. Justice Brennan for the majority in *Sinkler v. Missouri R.R. Co.*, 356 U.S. 326, 2 L.Ed (2d) 799, 78 S. Ct. 758 at 802, 803 L.Ed:

“This statute, an avowed departure from the rules of the common law, cf. *Rogers v. Missouri Pac. R. Co.*, 352 US 500, 507-509, 1 L Ed (2d) 493, 499-501, 77 S. Ct. 443, was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety. *Tiller v. Atlantic Coast Line R. Co.*, 318 US 54, 87 L Ed 610, 53 S. Ct. 44, 143 ALR 967. The cost of human injury, an inescapable expense of railroading, must be borne by someone, and the FELA seeks to adjust that expense equitable between the worker and the carrier. *Kernan v. American Dredging Co.*, 355 US 426, 431, 438, 2 L Ed (2d) 382, 388, 392, 87 S. Ct. 394. The Senate Committee which reported the Act stated that it was designed to achieve the broad purpose of promoting ‘the welfare of both employer and employee, by adjusting the losses and injuries inseparable from industry and commerce to the strength of those who in the nature of the case ought to share the burden’. S. Rep. No. 460, 60th Cong. 1st Sess. 3.”

Detailed analysis of all these cases obviously is impracticable in this brief. Most of them are treated in an annotation at 4 ALR (2d) 1787 et seq. entitled “Supreme Court Reviews of Sufficiency of Evidence in Cases under Federal Employers’ Liability Act,” where the annotator summarizes (p. 1793, note 8) that “In view of the breadth of the rule stated in the Supreme

Court (Rogers) case . . . earlier cases decided in favor of the defendant, although the plaintiff had obtained a jury verdict, should be re-examined in the light of the Rogers and Webb cases.” It is significant that both of the U. S. Supreme Court cases relied upon by defendant in Point I of its brief, namely *Wilkerson v. McCarthy*, (1949) 336 U.S. 53, 93 L. Ed. 497, 69 S. Ct. 413 (Def. Brief 8, the court holding, incidentally, that the jury should have been permitted to rule on the case); *Brady v. Southern Ry. Co.*, (1943) 320 U. S. 476, 88 L.Ed. 239, 64 S. Ct. 232 (Def. brief 8, 11, 12-14, 16-17) were decided prior to the *Rogers* decision. To the extent that these cases represent a different point of view in FELA cases, they require appraisal “in the light of the Rogers and Webb cases” (Anno. 4 ALR (2d) 1787 at note 8) and, it is submitted, the many cases which have expressly adopted the point of view inherent in these decisions.

The factual situation involved in some of these cases is of interest by the way of comparison with the case at bar.

In *Ferguson v. Moore-McCormack Lines, Inc.* (1957) 352 U.S. 521, 1 L.Ed (2d) 511, 77 S. Ct. 459, a ship’s baker was injured when he undertook to remove ice cream from a container with a sharp butcher knife. His hand slipped into the knife blade. The Second Circuit held that the use of the knife as an ice cream scoop could not have been foreseen by the employer. The Supreme Court reversed, holding that the jury could conclude that the baker had been furnished no safe tool and that since he was required to fill ice cream orders placed with him by ship’s waiters, the use of the butcher knife for that purpose could be found to be foreseeable. The court said that “ . . . the standard of liability under the Jones

Act is that established by Congress under the FELA . . . ” and quoted the *Rogers* case in support of the decision.

In *Honeycutt v. Wabash R.R. Co.* (1958) 355 U.S. 424, 2 L.Ed. (2d) 380, 78 S. Ct. 393, the employee sought recovery for injuries sustained when a rivet gun with which he was working under a railroad car discharged a metal clip and struck him in the forehead. The trial court had entered a judgment on a verdict for plaintiff but had been reversed by the St. Louis Court of Appeals, 303 SW (2d) 153. The Supreme Court reversed the Court of Appeals and ordered that judgment be entered on the verdict holding that the proofs justified the jury’s conclusion that employer negligence played a part in producing the injury.

In *Conner v. Butler* (1959) 361 U.S. 29, 4 L.Ed (2d) 10, 80 S. Ct. 21, a railroad hose cutter was alighting from a passenger car. A movable portion of the platform car secured in a raised position by a latching device fell on his hand. A judgment entered on a motion for directed verdict was reversed by the Supreme Court stating that under the *Rogers* case “the proofs were sufficient to submit to the jury the question whether employer negligence played a part in producing the petitioner’s injury.” It is submitted that this case is extremely close on the facts to the case at bar.

In *Davis v. Virginian R.R. Co.* (1960) 361 US 354, 4 L. Ed. (2d) 366, 80 S. Ct. 387, the plaintiff was injured while shifting various railroad cars on its tracks near Norfolk, Virginia. The negligence charged was that plaintiff was required to do his work too quickly and was furnished inexperienced help so that he had to work faster than usual. The court said:

“The record indicates that petitioner would have taken his position on the ground rather than on the railroad cars but for the inexperience of the brakemen. This required petitioner to take his position on top of the cars in order to assist the brakemen—a function not ordinarily performed by a yard conductor. We think it should have been left to the jury to decide whether the respondent’s direction to complete the spotting operation within 30 minutes, plus the importance of the brakemen assigned to perform this ‘hot job,’ might have precipitated petitioner’s injury. ‘The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue (Tiller v. Atlantic Coast Line R. Co., 318 US 54, 87 L.Ed. 610, 63 S. Ct. 444, 143 ALR 967) as well as issues involving controverted evidence. Jones v. East Tennessee, V. & G. R. Co., 128 US 443, 445; Washington & Georgetown R. Co. v. McDade, 135 US 554, 572. To withdraw such a question from the jury is to usurp its functions.’ Bailey v. Central Vermont R. Co., 319 US 350, 353, 354, 97 L.Ed. 1144, 1147, 63 S. Ct. 1062 (1943).”

Michalic v. Cleveland Tankers, Inc. (1960) US 5 L.Ed. 2(d) 20, 81 S. Ct., was under the Jones Act, but the court has expressly held that the standard under the Jones Act is the same as under the Federal Employers Liability Act. See *Ferguson v. Moore-McCormack*, supra. Plaintiff was injured when a wrench dropped on his left foot. The Captain’s report filled out immediately after the plaintiff related the facts to him stated: “While working with pump man in pump room, man said he dropped the wrench on his foot and his toe has been sore ever since.” Plaintiff claimed that the wrench was not reasonably fit for its intended use. The court said

that the question was whether the evidence was sufficient "to raise a jury question whether the respondent failed to exercise due care in furnishing the wrench which was not a reasonable suitable appliance." At the trial, plaintiff claimed that the wrench slipped off a nut when it was struck with a mallet. The court said that even though there was no direct evidence of play in the jaw of the wrench, the jury "could reasonably have found that the wrench repeatedly slipped from the nut because the jaw of the wrench did not properly grip them." A jury question was thus made and the *Rogers* case was quoted for the proposition that "it does not matter, from the evidence, the jury may also with reason on grounds of probability attribute the result to other causes."

The facts of the case at bar bring it well within the lines drawn by the Supreme Court not only on the principles stated in *Rogers v. Missouri RR* but on the kind of factual situations which the Supreme Court repeatedly has ruled were jury questions. The accident here did not "just happen." It was the result of a chain of events. All of the events were put into motion by the railroad itself or its employees and agents. Defendant, in effect, hung the trap on the post. Defendant required plaintiff to use the trap without advising him of its hazardous condition. Defendant failed to furnish a piece of wire not unsafe for ordinary use.

The jury by its verdict, and the trial judge in ruling on the motions presented, determined after hearing the facts and weighing the probabilities and taking into account the physical facts with respect to the accident and no doubt considering the undisputed evidence that when the plaintiff dropped the

coil to the ground it spread out, determined that employer negligence played *at least some part* in the injury. The conclusion of the jury is not only a fair inference, it is compelled by the evidence in this case. The jury could and did find, with reason, that defendant's negligence played a part in causing the accident. It is submitted that the Supreme Court has ruled that "judges are to fix their sites primarily to make that appraisal, and, if that test is made, are bound to find that a case for the jury is made out of whether or not the evidence allows the jury a choice of other probabilities." *Rogers v. Missouri RR*, *supra*.

POINT II.

DEFENDANT CANNOT COMPLAIN THAT TWO JURORS WERE EXCUSED.

In its Point No. II, the defendant argues that the case should be retried because two prospective jurors, Stanton Peck and Ray A. Norton, were excused by the Court on its own initiative. The defendant argues to the court that the selection of jurors is particularly important to the railroad company in FELA cases (Def. Brief 18, 19). The defendant in this case requested a special panel and during the interrogation of the panel the court excused Messrs. Peck and Norton because the former was related to one of the attorneys for the plaintiff and the latter was a business associate. Notwithstanding the special care with which defendant on appeal says it selects the jurors, its counsel made no objection to the court's actions and did not bring the matter to the attention of the court in any manner whatever until after the trial of the case and

the jury had retired to consider its verdict. The matter was not formally brought to the attention of the court and counsel for the plaintiff until after the verdict was returned. Defendant now argues that it should have a second chance with a new jury which presumably it would select with the same painstaking care employed in the selection of the first.

It is submitted that the raising of this particular point on appeal demonstrates as much as any other single argument made, the inherent weakness of the defendant's position in this case.

The first juror excused was Mr. Peck. In 1957 George M. McMillan, one of the attorneys for plaintiff, was associated in the practice of law with McKay, Burton, McMillan & Richards in the Newhouse Building. He acted as the attorney for the Allsteel Office Supply Company and in connection with that employment was requested to review the stockholders' agreement between the stockholders of that company and Stanton Peck. Part of his duties involved certain estate planning problems with Mr. Peck. An attorney-client relationship existed between Mr. Peck and Mr. McMillan at that time (R. 65-A, 65-B).

Mr. Norton and George M. McMillan are second cousins, but more than that, they have had close family and social relationships for more than 30 years. They went to school together, participated together in band, orchestra, opera, choral work and similar activities. They traveled together to various cities in the states giving concerts and participating in various kinds of music contests (54-B, 65-C). Mr. Norton's wife is the secretary of the manager of one of the regular

clients of McMillan and they are together frequently at social gatherings related to such employment (65-C). The record in this case is to the effect that " . . . the Court's action in excusing prospective jurors Norton and Peck was intended by the Court to insure the defendant corporation's having a fair and impartial trial," and it appeared from " . . . the atmosphere, chain of events and occurrences at the time of the selection of said jury that the general feeling in the courtroom appeared to be that such action by the Court was for the purpose of insuring a fair trial to the defendant corporation and was not intended or generally felt to be adverse to its interests." (65-e).

What the defendant is arguing here is that it takes great pains to select its jury in such a manner as to enable it to have another chance when it loses the lawsuit. There is no possible justification for allowing the defendant to hand-pick two juries.

The law is well settled both before and after the adoption of Rule 46 that a litigant must call to the attention of the trial judge diligently any irregularity in the selection of a jury he expects to claim error on appeal. Almost squarely in point is *Adler v. Adler* (1950), 61 SE (2d) 824, 207 Ga. 394. There the trial judge disqualified four jurors on voir dire. The proponents of a will which was the subject of the litigation made no objection and the Supreme Court of Georgia held that failure to object constituted a waiver of any irregularities. The court followed *Gunther v. State* (1917) 92 SE 314, 19 Ga. App. 772 (2), which applied the same rule in a criminal case.

Courts have held uniformly that a party having knowledge of any matter which might affect the integrity or impartiality of a juror cannot remain silent and take his chance that the verdict may be favorable and then complain if an adverse judgment is rendered. The rule has been applied in a variety of factual situations. In *Arena v. John P. Squire Company* (1947) 73 NE(2d) 836, 321 Mass. 424, the defendant had been denied a new trial after an adverse judgment. Defendant appealed urging that the trial judge did not ascertain whether the jurors had talked to anyone about the case during an interval between deliberating sessions. The Massachusetts Supreme Court indicated that such irregularities were within the discretion of the trial judge on a motion for new trial. It stated: "A party having knowledge of a matter that might affect the integrity or impartiality of a jury cannot remain silent and take his chance that the verdict may be favorable and then complain if an adverse verdict is returned. *Hallock v. Franklin*, 2 Met. 558; *Rowe v. Canney*, 139 Mass. 41, 29 NE 219; *Randolph v. O'Riorden*, 155 Mass. 331, 29 NE 583; *Hill v. Greenwood*, 160 Mass. 256, 35 NE 558. See also *Young v. City of New York*, 5 NYS (2d) 74, 265 App. Div. 881."

Utah abolished the necessity of formal exceptions long before the adoption of Rule 46 (1933 Code, Sec. 104-24-18, 104-39-2). The committee on the adoption of the Code reported that Rule 46 of the Utah Rules of Civil Procedure was the same as the federal rule "with some unnecessary language deleted." Utah Rules of Civil Procedure, page 63, Committee Note. Rule 46 in the Federal Rules became effective in federal courts September 16, 1938. (Federal Rules of Civil Procedure, Rule 86; Barron and Holtzoff, *Federal Practice and*

Procedure, Rules Edition, Vol. 1, pg. 18). Rule 46 stands as promulgated at that time. Moore *Federal Practice 2nd Ed.*, par. 46.01. Prof. Moore discusses the effect of Rule 46 at par. 46.02. He points out that *formal* exceptions were made unnecessary but he states:

“The rule retains, however, the fundamental basis of the former practice by requiring a party to make known to the court the action desired, and his grounds therefor, at the time the ruling or order is made or sought, if he has an opportunity to do so. The purpose of the former practice was two-fold: (1) to appraise the court of the litigant’s position so that the court in the furthering of justice might correct its ruling was shown to be error; and (b) to permit an opponent to obviate the defect where possible. Rule 46 retains this purpose. It is still necessary for the party to make it clear to the court that he objects to the court’s action, and to state the grounds on which he basis his objection, in order that the defect may be obviated, is possible . . . ”

Federal courts have consistently ruled since the adoption of Rule 46 that irregularities in the selection of a jury must be called to the attention of the trial judge at the time if a party expects to predicate error upon them. In *U. S. v. Meyer* (CCA 7, 1940) 113 F(2d) 387 at 396, the court said:

“A complete answer to the defendants’ position with regard to the venire exists in the well known rule that errors in the manner of drawing a jury must be presented by challenge to the array before, or at the latest, at the time of the examination of the jury . . . The record discloses no prejudice or injury to defendants. And the charges of defendants are vague and uncertain in this respect. Courts do not reverse in such a situation,

unless the record discloses that the party complaining was substantially prejudiced.”

The observation of Judge Clark for the Second Circuit in *Reck v. Pacific and Atlantic SS Co.* (CCA 2, 1950) 180 F(2d) 866, 870, although on a different point, is particularly appropriate here:

“This is peculiarly the type of objection which under rule 46, Federal Rules of Civil Procedure, should have been made clear at the time, since it could and undoubtedly would have led to an immediate correction of whatever error of form may have been disclosed. Defendant cannot entrap a successful plaintiff by thus reserving its fire, particularly on a matter as inconsequential as this. We think defendant received a fair trial, and there is no reason to disturb the judgment on the verdict against it.”

The defendant admits “the right to challenge a juror is a right which may be waived” (Def. Brief 21). Conversely, the right to object to the improper excusing of a witness may also be waived. These waivers occur every day in the courtrooms of the state. Jurors request to be excused for business or personal reasons, and judges, without even disclosing to the litigants or their counsel the nature of the reason, excuse the jurors from the panel. One of the jurors in this case was thus excused (Juror No. 1, R. 9). Certainly a party cannot stand by and permit a juror to be relieved from duty, then after it has lost the case, ask the appellant court to reverse on the theory that if that particular juror instead of another had heard the facts, appellant may not have lost. Rule 46 makes unnecessary *formal exceptions* to rulings of the court, but it states “It is sufficient that a party, at the time the ruling

or order of the court is made or sought makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor . . . ” It is to be observed that the defendant’s counsel in this case requested a recess to discuss the selection of jurors with his client before the jurors were selected (94) and after the selection the court stated:

“Are these the individuals selected, Mr. McMillan?”

“Mr. McMillan: Yes, your Honor.

“The Court: Mr. Ashton?

“Mr. Ashton: Yes, your Honor.”

Thus, despite being present and having ample opportunity to object to the excusing of the jurors Peck and Norton, and knowing that the court had actually exercised two challenges for the defendant which obviously were intended for the defendant’s benefit, the defendant went to trial without breathing a word to anyone that it was prejudiced.

In this posture it is submitted that the appellant cannot be heard to argue as it does in pages 22 and 23 of its brief that if only jurors Peck and Norton could have been retained, it could have excused two of the women. This is a particularly facitious argument in view of the fact that the record shows that the defendant exercised its challenges with respect to Edward J. Callahan, a tile setter (R. 9, 85), Fred Naisbitt, a boiler operator (R. 9, 85), and Max A. Finlayson, a powder lineman for Hercules Powder (R. 9, 84).

In sum on this point, appellant does not even suggest

that it can show prejudice. Instead, it tacitly admits that the Court's action in excusing two prospective jurors was thought to be in its interest at the time. It failed to object or otherwise indicate disapproval of the court's action. Having taken its chances with the jury selected, defendant is now in no position to urge error.

POINT III.

THE COURT'S INSTRUCTIONS WERE NOT PREJUDICIAL TO THE DEFENDANT.

(a) *Instruction No. 7 was adequate and not misleading to the jury.*

In its Point No. III the defendant takes exception to the italicized portion of the following sentence in Instruction No. 7:

" . . . This duty does not require the absolute elimination of all danger, or hazard, but it does require the elimination of all danger or hazard which the exercise of reasonable care could remove or guard against, and *this applies to the condition with which we are concerned.*"

The word "this" was obviously intended to relate not only to the latter portion of the said sentence which described the danger which had to be eliminated, but the portion of the sentence which refers to the danger which does not have to be eliminated. The defendant asks the court to disregard the meaning of the whole instruction and to totally disregard the portion of Instruction No. 7 prior to the phrase to which objection is taken. In other words, the sentence might be construed to mean "This duty does not require the absolute

elimination of all danger of hazard . . . and this applies to the condition with which we are concerned” with the same certainty that defendant asks the court to construe it, namely, “. . . it does require the elimination of all danger of hazard which the exercise of reasonable care could remove or guard against, and this applies to the condition with which we are concerned.” It is apparent that the Court was simply telling the jury that foreseeability of harm is an element of negligence. This is clear from the balance of the instruction:

“The amount of caution required by that duty varies in direct proportion to the dangers known to be involved in this work. To put the matter in another way, the amount of care required of a railroad company in the exercise of ordinary care, to furnish its employees with a reasonably safe place within which to work, or safe tools and equipment increases or decreases as do the dangers that reasonably should be apprehended. Failure of the defendant to discharge this duty of using reasonable care to provide its employees with a safe place in which to work or with safe appliances, equipment or tools for his work would constitute negligence.”

Such is the obvious meaning of the instruction when considered with Instructions 8, 10 and 16.

(b) *Instruction No. 16 was not prejudicial.*

In its Instruction No. 16, the Court specifically instructed the jury that if “the injuries were caused solely by the negligence of the plaintiff or that the defendant was not negligent, you must return a verdict in favor of the defendant and against the plaintiff no cause of action.” Defendant’s attempting to take the word “or” in subparagraph 3 of the Instruction out

of context totally perverts the substance and effect of the instruction.

It is simply not true, moreover, that there was no instruction on proximate cause. In Instruction No. 10, requested by the defendant, the Court advised the jury, "Negligence, if any, and whether such negligence, if any, was a proximate cause of the accident resulting in injury to Siciliano must be proved by plaintiff Siciliano to the extent of a preponderance of the evidence" (48), and proximate cause was defined as "that cause which in a natural continuous sequence, unbroken by any new cause, produced the injury and without which the injury would not have occurred" (41), and again in Instruction No. 6 the Court said: "If the injury is caused solely by the negligence of the employee, or if the defendant is not negligent, then, of course, no recovery may be had by said employee." The defendant's argument to the effect that the instructions as a whole eliminated the necessity of finding proximate cause is wholly fallacious.

(c) *The instruction on assumption of risk was not prejudicial.*

In its Point No. 5, defendant argues that the portion of the Court's Instruction No. 6 on assumption of risk should not have been given. The argument is based on the idea that assumption of risk is not an issue in the case. In Instruction No. 6 the Court was explaining in a general way the provisions of the Federal Employers Liability Act. That act expressly provides that assumption of risk does not constitute a defense. *Bruner v. McCarthy*, 105 Ut. 399, 142 P(2d) 649, involved a situation where apparently the Court was reaching for a

basis upon which to predicate reversal. In the course of the discussion, the author of the majority opinion asserted as pure dicta that an instruction on assumed risk should not have been given. The Court expressly found, however, that giving of the instruction was not prejudicial. Similarly in *Moore v. U. P. R.R.*, 4 Ut. 2, 255, 292 P(2d) 849, the Court expressly refused to rule that the giving of an instruction on assumed risk was reversible error.

In the case at bar, it is gratuitous to suppose that defendant's counsel had not argued a point in connection with defendant's motion to dismiss whereby the Court felt it necessary to point out that employees did not assume the risk of employment as far as FELA cases are concerned. It is to be observed that the instruction on assumed risk was only a statement of the statutory provision. The law was correctly stated in the instruction and the defendant does not argue to the contrary. The jury was clearly instructed on the elements of liability and could not possibly have been misled. The jury was plainly told that the only basis for recovery by plaintiff was a finding that the defendant was negligent and that such negligence played a part in producing plaintiff's injury. It must be realized that the rule is that plaintiff can recover if defendant's negligence played *any part at all*. *Roger v. Missouri R.R.* and other cases cited in Point I of this brief. Particularly inasmuch as the sentence complained of was contained in an explanation of the principles provided by the Federal Employers Liability Act, it cannot be stretched out of context to justify reversal in this action.

(d) *Failure to instruct that the railroad company has the*

right to assume that employees would exercise reasonable care for their own safety is not prejudicial error.

The court instructed the jury over and over again that the plaintiff could not recover if any negligence by him was the sole proximate cause of the accident (Instruction No. 6, R. 44; of Instruction No. 8, R. 46; Instruction No. 10, R. 48).

To say that the defendant had the right to assume that the employees would exercise reasonable care for their own safety could be argued to mean that even though the defendant was negligent, if the plaintiff was also negligent, i.e., if he did not exercise reasonable care for his own safety, he could not recover at all. The FELA expressly provides that contributory negligence does not constitute a defense unless such negligence is the sole proximate cause of the accident. Adopting the defendant's theory as argued in its Point No. 6 would be to tell the jury in substance and effect that if the defendant did not exercise care for his own safety, that is to say, if he was contributorily negligent, that such negligence would constitute a defense; thus the purpose and meaning of the act would be thwarted. While such a device may be a credit to the ingenuity of counsel for the railroad, it simply does not constitute the law in cases of this kind. The defendant's requested instructions with respect to contributory negligence were substantially given by the court. The form of the instruction as required by the defendant that the defendant "was not required to foresee negligence on the part of the plaintiff" was not a correct statement of the law. Failure to give the instruction cannot constitute error.

POINT IV

THE AMOUNT OF THE AWARD WAS NOT EXCESSIVE.

The jury found that the damages sustained by plaintiff were in the sum of \$30,000 and reduced them \$7500 for contributory negligence. The jury was carefully instructed on the question of damages (Instruction No. 17, R. 55, 56). It was told that "sympathetic feelings have no place whatever in the trial of a case in a court of justice" (Instruction No. 18, R. 57). The Court's Instruction No. 14 is not objected to by defendant here. It may be assumed, therefore, that the defendant is in agreement that the jury could properly take into account the factors enumerated in that instruction. Plaintiff's age, earning capacity are not the only relevant factors. Also to be considered are the character and extent and severity of his injuries, the pain and suffering, if any, which he may expect reasonably to endure in the future. While at the trial level defendant apparently concedes that permanent disability is only one of the elements of damage, its brief on appeal chooses to ignore completely any consideration of the extent to which plaintiff has been totally deprived of vision in his left eye, his physical and mental suffering, the shock to his nervous system and impairment of his general health (R. 52).

Courts of review have been loathe to upset jury findings with respect to the money damage involved in the loss of an eye. In *National Brands v. Morton Tire Co.*, S. Ct. Fla. (1942) 150 Fla. 349, 7 SE (2d) 456, the Court said: "It is impossible to fix the value of the human eye. There can be

no doubt that such a loss is tremendous.” That concept permeates all the decisions where the question is considered. A discussion as to the amounts of verdicts both by juries and awards by judges on the loss of one eye or for blindness in one eye is treated at Belli, Vol 5, *Modern Trials, Damages*, Section 212, beginning at page 253. Cases are tabulated from state and federal courts beginning at page 255. Annotations on the subject as far as reported cases are concerned are at 16 ALR (2d) 130, 420, 102 ALR 1258, 1259, and 46 ALR 1282, 1283. In *Lopez v. Price* (1958) 145 Conn. 560, 145 Atl. (2d) 127, the court considered the question as to whether an award of \$75,000 for reduction of vision in one eye and related injuries was excessive. It said:

“The test is whether the amount of each award complained of falls somewhere within the necessarily uncertain limits of just damages or whether the size of the award so shocks the sense of justice as to compel the conclusion that the jury were influenced by partiality, prejudice, mistake or corruption. The refusal of the trial court to disturb a verdict is strong support for its propriety. *Sheiman v. Sheiman*, 143 Conn. 222, 224, 121 A.2d 285. The question is one peculiarly within the province of the jury. Juries may differ widely in the conclusions which they reach in apparently similar cases, and, in fact, in any given case one jury might arrive at a result substantially different from that of another jury. This flexibility, though it may lead to uncertainty, is a necessary concomitant of the jury system as it operates.

* * * *

“The vision in her right eye was reduced to 20/200, which is considered the ophthalmological equivalent of total loss of vision in that eye. She cannot read fine

print or do very fine work such as sewing. If she ever works in a factory, she will not be able to put small parts together. She will not be able to do clerical work. As far as earning capacity is concerned, her right eye is for all practical purposes blind. This impairment is permanent. In addition to 100 per cent loss of vision in the right eye, her ability to use both eyes for depth perception has disappeared. She will not be able to take part in sports like tennis, baseball or handball, where there is a fast moving object. She will have difficulty in judging the position of any fast moving object, such as a moving automobile. She will be handicapped in driving. She will have a relatively blind side on her right and will tend to bump into things on that side. . . . However, the most important residual, regardless of the 100 per cent loss of vision, the lack of depth perception and the walleye, is the fact she is now left with no reserve eye.

“The question of damages in personal injury cases, especially in these times of changing values, is always a difficult one. *Prosser v. Richman*, 133 Conn. 253, 256, 50 A. 2d 85. Assessment of damages is peculiarly within the province of the jury and their determination should be set aside only when the verdict is plainly excessive and exorbitant. *Szivos v. Leonard*, 113 Conn. 522, 525, 155 A. 637; *Rutkowski v. Conn. Light & Power Co.*, 100 Conn. 49, 54, 123 A. 25. Proper compensation for personal injuries cannot be computed by mathematical formula, and the law furnishes no precise rule for their assessment. *Russakoff v. Stamford*, 134 Conn. 450, 455, 58 A. 2d 517; *Samaha v. Mauro*, 104 Conn. 300, 302, 132 A. 455; *Knight v. Continental Automobile Mfg. Co.*, 82 Conn. 291, 293, 73 A. 751. The only practical test to apply to a verdict is whether the award of damages falls somewhere within the necessarily uncertain limits of fair and reasonable compensation in the particular case, or whether the verdict so shocks the sense

of justice as to compel the conclusion that the jury were influenced by partiality, prejudice, mistake or corruption.' *Slabinski v. Dix*, 138 Conn. 625, 629, 88 A. 2d 115, 117. In the light of this test, the jury could reasonably have returned the verdict awarding the plaintiff Pamela Lopez \$75,000. Consequently, we cannot say that the amount of the award to her was excessive."

The case of *Chan v. Southern Pacific Railroad Co.* (1955) 132 Cal. App. (2d) 420, 287 P(2d) 78, is also helpful on the facts. In that case a 48-year-old plaintiff suffered the loss of his right eye when he was struck by a concrete chip which was the result of a piece of steel falling on a cement block. The cement chipped off and flew into plaintiff's eye and his action was under the FELA. The court sustained the recovery on the question of negligence and affirmed the trial judge's decision that \$25,000 was a reasonable net recovery.

The experts in this case testified that the plaintiff had lost 100% of his vision in the left eye for all practical purposes, and that at the time of the maximum recovery from the accident before cataract had formed on the left eye, his visual loss was 87.3% (R. 160). A cataract can be removed only by surgery and the surgery could not be performed at the present time without producing double vision (161, 162). Plaintiff has lost depth perception and has a severe restriction upon peripheral vision (163, 164). Neither doctor called by the plaintiff recommended that the cataract on the left eye be removed but testified "It is to his interest not to have it removed at this time" (164).

The plaintiff's wife testified that in addition to the fact that he was in the hospital for approximately four weeks and lost seven weeks of work, she had observed marked changes

in the plaintiff's habits and attitudes since the accident (132). He cannot drive the car. He bumps his head getting in and out of the car. He stumbles and is slowed down. He is nervous, irritable and has had a heart attack (132, 133).

It is noteworthy that the defendant itself while conceding the propriety of including these factors in arriving at damages did not undertake to reduce damages by using mortality tables and interest rates in its presentation to the jury.

Defendant asked the trial judge for a new trial on the grounds contended for in Point 7 of its brief to this Court (Ground No. 5 of the Motion for New Trial, R. 65). This question is generally addressed to the discretion of the trial court. The trial judge in this case heard the testimony of the witnesses, listened to the argument of counsel and denied the plaintiff's motion. There is nothing to suggest and defendant does not argue that he abused his discretion.

The plaintiff in the case at bar was only 53 years of age at the time of the accident. Impairment of the total visual system was fixed without contradiction at 25%. All the limitations of body functions inherent in the loss will remain with plaintiff for the rest of his life. It is submitted that recovery in the net amount of \$22,500 is easily within the range of discretion which necessarily is given to juries in cases of this kind. Certainly it does not tend to indicate passion or prejudice.

CONCLUSION

Points II through VIII as treated by appellant in its brief are manifestly of the fly specking variety. The case was tried

to a jury which was virtually hand-picked by the defendant. If any irregularity occurred in its selection, it was thought at the time to be for the defendant's benefit. The defendant acquiesced and ratified any technical deficiencies. Not having brought them to the attention of the trial court at the time, it cannot urge error here. Individually and collectively the instructions were fair and adequate. Considered as a whole, the instructions were most favorable to the defendant, and the verdict was well within the latitude necessarily given to juries in cases of this kind.

At first blush it may appear that a question is presented as to whether there was evidence of negligence. It may be conceded for the purpose of argument that an ordinary roll of wire hanging on a nail may not be unsafe, but analysis of the facts of this case compel the conclusion that the particular coil of wire involved here was a dangerous trap. The jury necessarily found that the trap was sprung when the weight of the coil released the ends and one of them flipped like lightning and struck plaintiff's eye. This is the crux of the case. Under *Rogers v. Missouri Railroad* and subsequent cases, the jury's verdict is conclusive on the defendant in this court. The judgment must be affirmed.

Respectfully submitted,

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