

1961

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

Utah Supreme Court

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

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In the
Supreme Court of the State of Utah

FILED

APR 10 1961

JAMES SICILIANO,
Plaintiff and Respondent,

vs.

THE DENVER AND RIO GRANDE
WESTERN RAILROAD COM-
PANY, a corporation,
Defendant and Appellant.

Utah, Supreme Court, Utah

Case No.
9378

BRIEF OF APPELLANT

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In the Supreme Court of the State of Utah

JAMES SICILIANO,
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vs.

THE DENVER AND RIO GRANDE
WESTERN RAILROAD COM-
PANY, a corporation,
Defendant and Appellant.

Case No.
9378

BRIEF OF APPELLANT

STATEMENT OF THE CASE

Plaintiff instituted this suit under the provisions of the Federal Employers Liability Act to recover damages for an eye injury alleged to have been sustained on September 8, 1952. The case was tried before a jury in October, 1960. Prior to commencement of the trial, defendant demanded and the court called a special venire. During the course of the selection of the jury from the special panel, the court on its own motion and without legal cause excused two of the proposed jurors. The parties put on their evidence and the defendant moved

the court for a directed verdict. The court denied defendant's motion and the jury returned a verdict in favor of the plaintiff. Damages were assessed at \$30,000 and diminished by \$7,500 by reason of plaintiff's own negligence. Judgment was entered on the verdict. Defendant's motions for judgment notwithstanding the verdict and for new trial were denied. This appeal challenges the judgment below on the grounds that the court erred in denying the defendant's motions for directed verdict, for judgment n.o.v. and for new trial and committed prejudicial error in arbitrarily excusing qualified jurors from the special panel and in instructing the jury.

STATEMENT OF FACTS

On September 8, 1952, the plaintiff, James Siciliano, was working as a machinist in the defendant's shops in Salt Lake City. Siciliano and a fellow employee, Bob Wells, had been working in a drop pit, taking down a spring rigging on a railroad locomotive. In the course of their work, Wells required a piece of wire so that he could tie back a brake beam. Wells asked Siciliano to go and get a roll of wire that he had seen hanging on a post about 20 to 30 feet from where they were working. The accident occurred when Siciliano took the wire from the post.

Siciliano was the only witness to the accident. The wire (Exhibit D-1) consisted of a roll about 8 to 10 inches in diameter. It was hanging over a nail on a post just above the level of Siciliano's head. The shop was well

lit and Siciliano could clearly see what he was doing. Siciliano claimed that as he took the wire from the nail with his right hand it flipped and that a loose end penetrated his eye causing the eye injury (R. 99). The major dispute in the evidence arises as to the manner in which the wire was removed from the post. On direct examination, Siciliano said (R. 99):

“I *lifted* it up and all at once it sprung on my eye. I *lifted* it up with my right hand and I dropped the wire when it hit my eye . . .”

On cross examination he said (R. 114):

“I just grabbed it.”

In furnishing a report of the accident to the Railroad Company, he said (Ex. D-2):

“As I *pulled* wire off post it flipped in my eye.”

“I did not know the wire would flip when I *jerked it from the post.*”

In the same report Siciliano indicated that he blamed no one for the accident.

Siciliano related the circumstances of the accident to his foreman, Paul Schenk, on the day following the accident. As to this Schenk testified (R. 183):

“Well, he said he needed a piece of wire and went to this post, *gave it a jerk*, and a piece of it hit him in the eye.”

During cross examination of Siciliano, he was asked by counsel if he had told Schenk that he “jerked” the wire from the post. He replied (R. 121):

“I don’t remember whether I told him I jerked it or not.”

Plaintiff took the position, of course, that the wire had been “lifted” and not “jerked” from the post.

In defendant’s shop employees were instructed to pick up wire or other materials from the floor, and in the case of usable wire, to hang the same on posts within the shop so that it might be used in the work of the shop (R. 185). The men were not instructed to wind the end of the roll in such a way as to bind it to the rest of the roll thereby preventing use of the wire before unraveling and straightening of the ends (R. 185).

Defendant offered testimony concerning the custom and practice of hanging usable wire on posts in the working area of local shops where it was readily available for use by employees in the course of their work. The plant superintendent of a local shop doing heavy industrial work testified that at the time of the accident it was the custom and practice to hang usable wire over hooks on posts located in the working areas. In the shop where this witness was employed, Structural Steel and Forge Company, there were 50 to 100 hooks used for just that purpose (R. 196-198). It was not the practice to tie the ends of loops of wire placed on these posts. The witness stated:

“We never tie them” (R. 198).

Defendant also called a master mechanic employed with the Southern Pacific Railroad. The witness was familiar with the defendant’s shop where the accident

occurred and was employed in the Southern Pacific shops in Ogden at the time of the accident. It was the custom and practice in the Southern Pacific shops to hang usable wire on posts where employees could obtain it. This was done on posts located throughout the shop and the ends of the wires were not tied down (R. 199, 200).

There was no evidence as to any practice of tying the ends of rolls of wire.

Although the jury returned a verdict for the plaintiff, they found, as disclosed by their verdict, that the plaintiff himself was guilty of negligence which was a proximate cause of the accident (R. 62).

The defendant moved the court for a directed verdict at the close of plaintiff's case and again when defendant's evidence was in (R. 174, 175, 201, see also R. 10, 11). The basis of the motions was that there was no competent evidence of negligence on the part of defendant and that if there was any negligence which resulted in plaintiff's alleged injury it was solely the negligence of the plaintiff himself. The court denied these motions.

STATEMENT OF POINTS RELIED ON

POINT I.

THE COURT ERRED IN DENYING DEFENDANT'S MOTIONS FOR DIRECTED VERDICT AND FOR JUDGMENT N.O.V.

(a) *There is no evidence of negligence on the part of the defendant.*

- (b) *The negligence of the plaintiff in jerking the wire from the post was the sole proximate cause of the accident.*

POINT II.

THE COURT COMMITTED PREJUDICIAL ERROR IN ARBITRARILY EXCUSING QUALIFIED JURORS FROM THE SPECIAL PANEL.

POINT III.

THE COURT COMMITTED PREJUDICIAL ERROR IN GIVING INSTRUCTION NO. 7 WHICH IN SUBSTANCE AND EFFECT INSTRUCTED THE JURY THAT THE DEFENDANT HAD A DUTY TO ELIMINATE THE CONDITION WITH WHICH THE JURY WAS CONCERNED.

POINT IV.

THE COURT COMMITTED PREJUDICIAL ERROR IN GIVING INSTRUCTION NO. 16 WHICH IN SUBSTANCE AND EFFECT AUTHORIZED RECOVERY BY THE PLAINTIFF EVEN THOUGH HIS NEGLIGENCE WAS THE SOLE CAUSE OF THE ACCIDENT AND EVEN THOUGH DEFENDANT'S NEGLIGENCE WAS NOT A PROXIMATE CAUSE OF THE ACCIDENT.

POINT V.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN GIVING INSTRUCTION NO. 6 INVOLVING AN ISSUE NOT PRESENTED BY THE PLEADINGS OR THE EVIDENCE AND NOT BEFORE THE COURT OR THE JURY.

POINT VI.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTIONS NOS. 6 AND 11 WHICH WOULD HAVE DIRECTED THE JURY THAT IN DETERMINING WHETHER OR NOT THE DEFENDANT WAS NEGLIGENT THEY SHOULD TAKE INTO CONSIDERATION THAT DEFENDANT HAD THE RIGHT TO ASSUME THAT ITS EMPLOYEES WOULD EXERCISE REASONABLE CARE FOR THEIR OWN SAFETY.

POINT VII.

A GROSS AWARD OF \$30,000 FOR PLAINTIFF'S ALLEGED INJURY IS SO EXCESSIVE UNDER THE CIRCUMSTANCES OF THIS CASE AS TO COMPEL THE CONCLUSION THAT THE JURY WAS INFLUENCED BY PASSION AND PREJUDICE IN ASSESSING DAMAGES AND THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL BY REASON OF EXCESSIVE DAMAGES.

ARGUMENT

POINT I.

THE COURT ERRED IN DENYING DEFENDANT'S MOTIONS FOR DIRECTED VERDICT AND FOR JUDGMENT N.O.V.

Liability under the Federal Employers Liability Act arises from negligence and not from a mere showing of injury. Further, it must be shown that the negligence was the cause of the injury. It is still the function of

the state trial and appellate judges to determine when the evidence is sufficient to justify submission to a jury on the issues of negligence and proximate cause. The United States Supreme Court, though very solicitous of the role of the jury in F.E.L.A. cases, has not stripped the court of its right and duty to determine whether or not a jury question exists. Mr. Justice Frankfurter in his concurring opinion in *Wilkerson v. McCarthy*, 336 U. S. 53, 69 Sup. Ct. 413, said:

“The easy but timid way out for a trial judge is to leave all cases tried to a jury for jury determination, but in so doing he fails in his duty to take a case from the jury when the evidence would not warrant a verdict by it. A timid judge, like a biased judge, is intrinsically a lawless judge.

“These observations are especially pertinent to suits under the Federal Employers Liability Act.”

The observation, of course, is equally pertinent at the appellate level.

Brady v. Southern Ry. Co., 320 U.S. 476, 64 Sup. Ct. 232, states the prevailing rule in F.E.L.A. cases with respect to proof of negligence and proximate cause. In that case the plaintiff obtained a judgment for the death of her husband. The Supreme Court of North Carolina reversed the judgment and the United States Supreme Court affirmed. Mr. Justice Reed for the majority of the court said:

“The weight of the evidence under the Employers Liability Act must be more than a scintilla before the case may be properly left to the dis-

cretion of the trier of fact — in this case, the jury. (Citing cases) When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims. (Citing cases) . . . The rule as to when a directed verdict is proper, heretofore referred to, is applicable to questions of proximate cause (Citing cases). . . . *Liability arises from negligence not from injury under this Act.* And that negligence must be the cause of the injury (Citing cases).”

It is therefore still the law and the federal rule that juries do not determine liability in F.E.L.A. cases in the absence of substantial evidence of negligence on the part of the defendant and proof that the negligence complained of was a proximate cause of the injuries.

(a) *There is no evidence of negligence on the part of the defendant.*

Plaintiff’s claim is that he was injured when he handled a piece of wire. The evidence discloses that there was a roll of wire with free ends hanging on a post in defendant’s shops. This was customary and usual in defendant’s shops and in other shops in the area. We submit that there is no permissible inference to be drawn from these facts which in any way indicates negligence on the part of the Railroad Company.

In order to prove negligence on the part of the defendant, plaintiff must produce evidence from which a jury could reasonably find that the defendant should have foreseen the probability that a person handling the wire with ordinary prudence and care might sustain injury. (Defendant was entitled to assume that the wire would be handled by its employees in a careful and prudent manner. *Ferguson v. Reynolds*, 52 Utah 583, 176 Pac. 267.)

Plaintiff contended before the trial court that the roll of wire constituted a “trap” or a latent danger. There is nothing intrinsically or inherently dangerous in a roll of wire. It is one of the most simple items used in the industry. This is not to say that a piece of wire, if improperly handled, may not strike objects. This may happen by mishandling at any time. It could occur when the wire is picked up from the floor; when it is placed upon or removed from a table or a wall or a post; when it is unrolled for use or when it is actually being placed in use. Similarly, pinchers will pinch, hammers will crush, nails will puncture and glass will cut if mishandled. But the mere presence of a roll of wire hanging on a post did not present to James Siciliano an “unreasonable risk of harm” and the practice or method of placing wire with free ends upon posts throughout the shop was not “negligence.”

Proof of an accident is not proof of negligence nor is proof of “danger” proof of negligence. *Williams v. Ogden Union Railway and Depot Company*, 119 Utah 529, 230 P. 2d 315; *Horsley v. Robnison*, 112 Utah 227, 186 P. 2d 592.

Assuming, contrary to human experience, that the wire hanging on the post in defendant's shop was a potential source of danger to the plaintiff even had he handled it in a careful and prudent manner, plaintiff's contention of negligence overlooks the fundamental proposition that liability to a servant is not predicated upon "danger" but negligence and that negligence is never imputed from the employment of methods in general use in the business or industry involved. *Ellis v. L. & N. R. Co.*, 251 S.W. 2d 577; *Cheffey v. Pennsylvania Railroad Company*, 79 F. Supp. 252; *Prattico v. Hudson Coal Company*, 341 Pa. 490, 32 Atl. 2d 733.

The court in *Brady v. Southern Ry. Co.*, 222 N.C. 367, 235 S.E. 2d 334, was confronted with the identical question posed in this case. There the plaintiff contended that the railroad company was negligent in failing to provide a light indicating the dangerous position of a derailler. There was no custom or practice of placing warning lights on derailleurs. The Supreme Court of North Carolina said:

"The fact that there was no light on the small target indicating the position of the derailler in question under the circumstances of this case, would not alone be evidence of negligence, *in the absence of showing that placing lights on such target was in accord with the general and approved usage.*"

The United States Supreme Court affirmed the State court decision. As to the absence of a light on the derailler, the court said (320 U.S. 476, 480, 64 Sup. Ct. 232, 235):

“As to the light, it is nowhere shown that it was customary or even desirable in the operation of this or any other railroad to equip derailers with such a signal.”

Thus, the plaintiff's contention that the defendant was negligent in maintaining a derailer without a warning light was rejected and the judgment on the jury's verdict was set aside. In the case at bar plaintiff has wholly failed to show that the method and practice employed by the industry or in similar industries was to bind the free ends of a roll of wire. The undisputed evidence indicates the contrary. That is, that the prevailing custom and usage in the industry is to hang rolls of wire in the working areas of industrial shops without binding the free ends. There is nothing in this practice which is contrary to due regard for the safety of defendant's employees, and we submit that the defendant was as a matter of law not guilty of negligence in following the prevailing custom and practice in this regard.

Under the doctrine of the *Brady* case foreseeability is still a necessary element of negligence on the part of a railroad company. The state court decision in the *Brady* case discussed this element at length and the following quotation from this opinion represents a general summary of the law as it now stands:

“Where the duty to guard against injury to others grows out of certain relationships and circumstances, breach of such duty imposes responsibility for consequences which are probable, and which could reasonably have been foreseen, according to ordinary and usual experience, but not for consequences which are merely possible

according to occasional experience. Stone v. Boston & A. R. Co., 171 Mass. 536, 51 N.E. 1, 41 L.R.A. 794. *'The rule is that one is bound to anticipate those consequences of his negligent act or omission which in the ordinary course of human experience, might reasonably be expected to result therefrom.'* 38 Am. Jur., 710. Foreseeability is a necessary element in actionable negligence, and must be made to appear before liability can be imposed for the consequences of a wrongful act or omission. This principle was stated in Osborne v. Atlantic Ice & Coal Co., 207 N.C. 545, 177 S.E. 796, as follows: *'The law only requires reasonable foresight, and when the injury complained of is not reasonably foreseeable, in the exercise of due care, the party whose conduct is under investigation is not answerable therefor.'* This statement of the law has been frequently cited with approval, and the principle applied in numerous cases. Butner v. Spease, 217 N.C. 82, 6 S.E. 2d 808; Guthrie v. Gocking, 214 N.C. 513, 199 S.E. 707; Newell v. Darnell, 209 N.C. 254, 183 S.E. 374; Beach v. Patton, 208 N.C. 134, 179 S.E. 446. Justice Cardozo, in Bird v. St. Paul Fire & Marine Ins. Co., 224 N.Y. 47, 120 N.E. 86, 88, 13 A.L.R. 875, expressed the same idea in these words: *'The wrongdoer may be charged with those consequences and those only within the range of prudent foresight.'* In Milwaukee & St. Paul Ry. Co. v. Kellogg, 94 U. S. 469, 475, 24 L.Ed. 256, it was that *'it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.'* From Stone v. Boston & A. R. Co. [171 Mass. 536, 51 N.E. 3, 41 L.R.A. 794], supra, we quote, *'One is bound to anticipate and provide against what usually happens and what is likely to happen; but it would impose too heavy a responsibility to hold him*

bound in like manner to guard against what is unusual and unlikely to happen, or what, as it is sometimes said, is only remotely and slightly probable.' Snyder v. Colorado Springs & C. C. D. R. Co., 36 Colo. 288, 85 P. 686, 8 L.R.A., N.S., 781, 118 Am. St. Rep. 110.

“ ‘The substance of it all, stated and restated in various ways is that negligence carries with it liability for consequences which, in the light of attendant circumstances, could reasonably have been anticipated by a prudent man, but not for casualties which, though possible, were wholly improbable. One is not charged with foreseeing that which could not be expected to happen.’ Wyatt v. Chesapeake & Potomac Tel. Co., 158 Va. 470, 163 S.E. 370, 373, 82 A.L.R. 386.”

The accident which occurred in this case was a freak accident. Plaintiff recognizes this as evidenced by his requested instructions (R. 19). It was not one which might be expected in the ordinary course of human experience. Although the plaintiff could foresee no injury from the handling of the wire (R. 119, 120), he expects the Railroad Company to be clairvoyant in this regard. We know of no other court case or experience of railroad companies indicating a similar occurrence. To require the defendant to foresee this accident or to foresee harm to the plaintiff is to impose liability without fault.

The practical side of the judgment below is to make the Railroad Company an insurer of the safety of its employees while they are handling wire. Wire is necessary in the operation of a railroad shop and if men are to perform their work they must handle it. If wire is to be used, it must be handled with the ends free. It can-

not be employed in use until the ends are free. It makes absolutely no difference whether the wire is placed on a flat surface or hung on a vertical surface. There is just no "reason" in a finding that the defendant was negligent because a piece of wire with free ends was hanging on a post in its shops. If the key word in the area of negligence law is "reasonable" as we understand it to be, we respectfully submit that the judgment below must be set aside, for a finding that the defendant was guilty of actionable negligence under the circumstances of this case simply does not comport with reason or with justice and fairness under the law.

(b) *The negligence of the plaintiff in jerking the wire from the post was the sole proximate cause of the accident.*

The defendant contends that the plaintiff was negligent in jerking or pulling the wire from the post. This was the contention in the court below; this was the theory of the defendant's cross examination of the plaintiff, and of its argument to the jury. This is the only respect in which the evidence was in conflict. The jury found that the plaintiff was guilty of negligence and diminished the award accordingly (R. 62). This necessarily amounts to a finding that the plaintiff jerked or pulled the wire from the post. This mishandling of the wire was the sole cause of the accident.

The defendant had no duty to anticipate that the plaintiff would jerk the wire from the post. The *Brady* case, *supra*, is closely analogous in this respect. Plaintiff's decedent had been killed in a derailment and plain-

tiff urged, inter alia, that a defective rail was the cause of the accident. Evidence of experts disclosed that the rail on which defendant's car was riding was "so worn on top and sides that . . . it permitted the thrust of the east wheels of the car, as they rose over the 'wrong end' of the derailler, to force the flange on the west wheels over the defective rail and so to derail the cars." The evidence also disclosed that in the absence of such defective condition no derailment would have occurred "nine times out of ten." There was, however, no evidence of the unsuitability of the rail for ordinary use. The United States Supreme Court, in holding that the defendant railroad company had no duty to anticipate that the cars would be run over the wrong end of the derailler and that the defective rail would thus constitute a dangerous condition, said (320 U.S. 483, 484, 64 Sup. Ct. 236, 237):

"The Supreme Court of North Carolina [222 N.C. at page 370, 23 S.E. 2d at page 338] was of the view that striking a derailler from the unexpected direction 'was so unusual, so contrary to the purpose' of the derailler that provision to guard against such a happening was beyond the requirement of due care. With this we agree. Bare possibility is not sufficient. *Milwaukee, etc., R. Co. v. Kellogg*, 94 U.S. 469, at page 475, 24 L. Ed. 256: 'But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.' *Events too remote to require reasonable prevision need not be anticipated.* . . .

Here the rail was sufficient for ordinary use, and the carrier was not obliged to foresee and guard against misuse of the derailer, even though the misuse occurred as often as the evidence indicated. It was the wrongful use of the derailer that immediately occasioned the harm. Decedent had first closed and then opened the derailer on the first movement. He signalled the train to back into the storage track just before the fatal accident. Although this misuse of the derailer was an act of negligence, it is mere speculation as to whether that negligence is chargeable to the decedent or another. Without this unexpected occurrence, the adequacy of the rail vis-a-vis a properly used derailer is unquestioned. It was entirely disconnected from the earlier act of the carrier in placing the weak rail in the track. The mere fact that with a sound rail the accident might not have happened is not enough. The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events."

It was the wrongful use or mishandling of the wire which resulted in plaintiff's injury in this case, and the mere fact that this accident might not have occurred had the free ends of the wire been bound is not enough to charge the defendant with liability. There is no evidence that the wire was not safe for ordinary handling. We respectfully urge that the only reasonable inference that can be drawn from the evidence is that the practice of hanging wire on a post with free ends was safe at least for ordinary handling. Here, as in the *Brady* case, it was the "wrongful use . . . that immediately occasioned the harm" and "the carrier is not obliged to foresee and guard against misuse."

We submit that in this case the record before the court demonstrates that the jury found the plaintiff negligent in jerking the wire from the post; that the defendant had no legal duty to foresee or anticipate the misuse or mishandling of said wire; that the defendant in allowing said wire to be placed on the post was not guilty of negligence, and that if this accident was caused by the negligence of any person, it was the negligence of the plaintiff in jerking the wire from the post. For the reasons above stated, the case should be remanded to the district court with instructions to dismiss the action.

POINT II.

THE COURT COMMITTED PREJUDICIAL ERROR IN ARBITRARILY EXCUSING QUALIFIED JURORS FROM THE SPECIAL PANEL.

In every F.E.L.A. case defendant is faced with the proposition of defending what the public considers to be a wealthy corporation against the claim of an employee injured in the course of his work. The tendency of many jurors is to award damages without regard to fault. The background, experience and integrity of the jurors who decide these cases are vital. Whether counsel like it or not, they are faced in every case with the proposition of judging the probable viewpoint and attitude of each prospective juror. While there may be doubt as to the success achieved in this endeavor, the fact is that it is a vital part of success in the lawsuit. The trial court in

this case explained the process of peremptory challenges to the jury as follows (R. 82) :

“They use their own discretion based on what they learned about the jurors, what your knowledge and experience has been, they weigh your background and place of residence, and anything they can learn about you, and your other fellow jurors, and determine which one can best serve and solve the issue in this case. They also determine your ability to be fair and impartial. That is why we carry on this little examination.”

In this case the court on its own motion and without cause excused two prospective jurors, Stanton Peck and Ray A. Norton.

Peck was the fourth juror drawn from the name box. His address was given as 1440 Laird Avenue in Salt Lake City, Utah. He was associated with Allsteel Office Supply Company.

Norton gave his occupation as a job development specialist with the Department of Employment Security. His address was listed as 1722 Harvard Avenue, Salt Lake City, Utah.

The court excused these two jurors after the following inquiry (R. 89, 90) :

“THE COURT: (speaking to the jurors) . . . I would like to have you become acquainted with the parties. James Siciliano is the gentleman sitting at the center of the table with the white hair. Sitting on his left is Mr. McMillan and Mr. Beck, his attorneys. On Mr. Siciliano's right is Mr. Clif-

ford Ashton who is raising his hand. He is the attorney for The Denver and Rio Grande Western Railroad Company. Are you acquainted with any of these gentlemen?

Mr. Peck —

MR. PECK: I know Mr. McMillan and Mr. Beck.

THE COURT: Is that a business acquaintance?

MR. PECK: Yes.

THE COURT: Do they deal with your business?

MR. PECK: Just that we have Mr. McMillan on the books.

THE COURT: He is a customer of yours?

MR. PECK: That is right.

Peck was thereupon excused by the court. The court then continued (R. 90):

Mr. Norton —

MR. NORTON: I am acquainted with Mr. McMillan, in fact we are related.

THE COURT: How close are you related?

MR. NORTON: Second cousins, his father and I are cousins.

THE COURT: That excuses you, the law says those related second cousins or closer have a problem, . . ."

Thus Peck and Norton were eliminated as jurors by the court. We point out that there was no challenge made

by either counsel and that the basis for the court's action in each instance was a relationship between the juror and *counsel*.

In excusing the two jurors, the trial court no doubt had in mind Rule 47 (f) which gives a *litigant* the right to *challenge* a juror for cause because of the relationship of debtor and creditor or consanguinity existing between the juror and a *party*. There is no rule of law or statute in force in this state which disqualifies a juror because he is a creditor of or related to counsel. The common law rule is stated in *Petcosky v. Bowman*, 197 Va. 240, 89 S.E. 2d 4:

“It is well settled that at common law a juror is not disqualified by the fact that he is related to one of the counsel in the case. (Citing authorities)”

But even had there been a right to challenge jurors Norton and Peck that right existed in favor of the litigants, and the court had no right whatever to arbitrarily excuse the jurors. The right to challenge a juror is a right which may be waived and in this case had there been a right to challenge the jurors for cause said right would have existed in favor of the defendant. In the case of *Browning v. Bank of Vernal*, 60 Utah 197, 207 Pac. 462, the court stated the rule as follows:

“The fact that a juror sustains the relationship of debtor or creditor to a party to an action does not disqualify the juror to act, but it gives the litigant the right to challenge for cause such juror.”

This rule was affirmed in the case of *State Bank of*

Beaver County v. Hollingshead, 82 Utah 416, 25 P. 2d 612.

In the case at bar the jurors were excused at the direction of the court without motion of either party to the suit. Since dismissal of the jurors was made without motion, counsel for the defendant had no opportunity to object before the jurors were excused. Rule 46 of the Utah Rules of Civil Procedure provides that formal exceptions to the orders of the court are unnecessary. Rule 46 further provides that

“If a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.”

In this case there was no indication at all before the jurors were excused that the court was going to excuse the jurors from the panel. Under Rule 46 counsel had no duty to tell the court that it had erred or to object to that which had already been directed by the judge. Counsel was placed in the position of remaining silent as he had a right to do under Rule 46 or challenging in the presence of the jury an order already made by the court. It is common thing to take issue with opposing counsel. This is expected by court and jury alike. To take issue with the court at the outset of a lawsuit is a different proposition. Under Rule 46 it was not necessary for counsel to question an order already made. The error is therefore preserved.

It is difficult to say what actual effect the two jurors might have had on the outcome of the case had

they been allowed to serve. Notwithstanding any relationship between the jurors and counsel for the plaintiff, the two men who were excused by the court were considered by the defendant to be desirable jurors and the defendant would not have exercised one of its peremptory challenges against either of them. These men were both white-collar office workers who each resided in a middle or high income residential area of the city. Counsel for defendant are of the impression that the experience ordinarily encountered by jurors such as Norton and Peck and their position as office workers qualify them to decide the issues more impartially than the laborer or low income man whose sympathies often lie with a fellow laborer who has been injured in the course of his work.

It has also been counsel's experience that women jurors are often influenced by sympathy and compassion for an injured plaintiff to the point of disregarding the issue of liability. In this case the defendant would like to have excused the women jurors and particularly the juror, Maxine Beck, who bore the same name as one of plaintiff's counsel. With its three peremptory challenges, defendant excused other jurors who were felt to be more dangerous. However, had the court not excused jurors Norton and Peck, the woman juror, Maxine Beck, would not have been on the jury. (See Jury List — R. 9)

Counsel for plaintiff makes some interesting suggestions in his affidavit (R. 65-A) with respect to what we assume he is urging he would have revealed to the court had Norton and Peck not been excused by the

trial judge. Nothing in this "belated testimony" of counsel is pertinent in considering the propriety of the dismissal of the jurors or the effect thereof.

The point, of course, is that the defendant, and the defendant alone, had the right to challenge (if there had been basis for a challenge) and to decide who it would excuse peremptorily. The only legitimate inquiry of the trial court was the legal qualifications of the prospective jurors. These qualifications were met in the instant case. Beyond this, the court had no right to tell either or both parties to the lawsuit that a qualified juror would be excused and would not serve as a member of the jury any more than he could instruct counsel that a specific juror must serve on the jury panel.

The right of counsel to exercise their limited right of choice by making their own decisions as to who they will excuse seems to us to be a basic right in a jury trial. If that right is to be preserved, our appellate court cannot overlook or disregard interference with the right at the trial level. Certainly this court cannot say that the error was not prejudicial. A holding that the aggrieved party must show prejudice with certainty in cases of this kind simply leaves the litigants with a hollow right which when denied or interfered with cannot be enforced.

We respectfully submit that the defendant is entitled to try this lawsuit before a jury empaneled according to the statutes and rules of the state courts.

POINT III.

THE COURT COMMITTED PREJUDICIAL ERROR IN GIVING INSTRUCTION NO. 7 WHICH IN SUBSTANCE AND EFFECT INSTRUCTED THE JURY THAT THE DEFENDANT HAD A DUTY TO ELIMINATE THE CONDITION WITH WHICH THE JURY WAS CONCERNED.

By Instruction No. 7 the court instructed the jury as follows:

“You are instructed that a continuous duty exists on the part of a carrier, such as the defendant in this case, to use ordinary care in furnishing its employees with a reasonably safe place in which to work. 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 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.”

Exception was duly taken to this instruction upon the ground that the use of the words “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” amounts to a comment by the court that the defendant failed to exercise reasonable care (R. 208).

While the general language of this charge properly instructs the jury, the application of a specific portion of the charge to the condition in question amounted to a directed verdict against defendant on the issue of its negligence. The court probably intended to instruct the jury that the condition in question was to be considered in light of the entire charge. However, this is not the effect of the language used. The charge instructs the jury that the defendant is not required to absolutely eliminate all danger or hazard *but* must 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 use of the co-ordinate conjunction “but” followed by the use of the pronoun “this” brings home to the jury that the condition involved in the case is one which the Railroad Company was required to eliminate.

The language of this instruction furnished the answer for the jury on the issue of the defendant’s negligence. It could not have been more prejudicial had the court specifically instructed the jury that the defendant was guilty of negligence as a matter of law. The specific portion of this charge is not cured by the general language. This court has held that the specific portion of the charge controls and that where the jury can only

be confused by an application of the specific to the general, the court must reverse for a new trial. *State v. Hendricks*, 123 Utah 267, 258 P. 2d 452; *Jensen v. Utah Railway Company*, 73 Utah 356, 270 Pac. 349; *Heywood v. The Denver and Rio Grande Western Railroad Company*, 6 Utah 2d 155, 307 P. 2d 1045; *State v. Waid*, 92 Utah 297, 67 P. 2d 647. We submit that this error is so glaring that no extended argument is necessary to demonstrate either the fact of error or its prejudicial nature.

POINT IV.

THE COURT COMMITTED PREJUDICIAL ERROR IN GIVING INSTRUCTION NO. 16 WHICH IN SUBSTANCE AND EFFECT AUTHORIZED RECOVERY BY THE PLAINTIFF EVEN THOUGH HIS NEGLIGENCE WAS THE SOLE CAUSE OF THE ACCIDENT AND EVEN THOUGH DEFENDANT'S NEGLIGENCE WAS NOT A PROXIMATE CAUSE OF THE ACCIDENT.

By Instruction No. 16 the court charged the jury as follows:

“You are instructed that before you can return a verdict in favor of the plaintiff and against the defendant in this case you must find from a preponderance of the evidence the following propositions to be true:

1. That the defendant knew, or in the exercise of reasonable care should have known that there was an unsecured coil of wire located on a post in its shop at the time and place alleged.

2. That the defendant knew, or in the exercise of reasonable care should have known that

the presence of said coil of wire on said post at said time and place constituted an unreasonable hazard to employees working in said shop, assuming that the said employees would handle said wire with ordinary and reasonable care.

3. That the plaintiff in attempting to remove said coil of wire from said post sustained the injuries for which he makes claim, or that said injuries were not solely caused by the negligence of the plaintiff.

In the event you find the foregoing proposition to be true, then you will return a verdict in favor of plaintiff and against the defendant and assess damages in the manner set out in Instruction Nos. 14 and 17.

In the event you find that the injuries were solely caused 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."

Due exception to said instruction was taken by defendant's counsel (R. 208, 209).

Instruction No. 16 is similar to defendant's requested instruction No. 6 except that defendant's requested instruction required that the jury find *both* that the plaintiff sustained injury in removing the coil of wire on the post *and* that the injuries were not solely caused by the negligence of the plaintiff. The instruction given by the court authorized the jury to return a verdict in favor of the plaintiff if the jury found *either* that the plaintiff was injured in removing the coil of wire *or* that the negligence of the plaintiff was not the sole cause of the accident. The court also added a paragraph not con-

tained in defendant's request to the effect that the jury was authorized to return a verdict in favor of the plaintiff and against the defendant if they found the indicated propositions to be true.

The instruction authorized recovery in the absence of a finding of proximate cause. For example, if the jury found that plaintiff was not guilty of negligence which was the sole cause of the accident, they were authorized to return a verdict for plaintiff even though they should also find that the plaintiff was not injured in removing the wire from the post as he claimed. On the other hand, if the jury found that the plaintiff was injured in removing the wire from the post, they were authorized to return a verdict for the plaintiff even though plaintiff's injuries were the sole cause of the accident.

We submit that the instruction is manifestly erroneous and prejudicial and requires the reversal of this case.

POINT V.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN GIVING INSTRUCTION NO. 6 INVOLVING AN ISSUE NOT PRESENTED BY THE PLEADINGS OR THE EVIDENCE AND NOT BEFORE THE COURT OR THE JURY.

By Instruction No. 6 given at plaintiff's request the court charged the jury, inter alia (R. 44):

“Any such employee shall not be held to have assumed the risks of his employment occasioned by such negligence.”

Exceptions were duly taken upon the ground that the instruction was immaterial to any issue before the court and jury and prejudicial to the defendant (R. 208).

The defendant did not assert the doctrine of assumption of risk as a defense. Defendant offered no instructions and no argument for the proposition that plaintiff was barred from recovery because he must be held to have assumed certain risks. There was absolutely nothing in the pleadings or the evidence or in the other instructions of the court that would in any way intimate that assumption of risk was in issue.

In the case of *Bruner v. McCarthy*, 105 Utah 399, 142 P. 2d 649, this court held that an instruction on assumed risk should not have been given where it was not raised as an issue. There the court held that the defendant had not been prejudiced by the instruction since it was negligent in other respects as a matter of law. However, it was clearly pointed out that it is in no case proper to instruct a jury on abstract issues of law. *Riding v. Roylance*, 63 Utah 221, 224 Pac. 285. Later in the case of *Moore v. D. & R. G.*, 4 Utah 2d 255, 292 P. 2d 849, the Supreme Court considered a similar instruction. In that case the court reversed and remanded for a new trial. The decision, though holding it unnecessary to determine whether the instruction on assumed risk was reversible error, decided that said instruction was "improper and should not be given in the new trial."

The effect of the instruction is to convey to the mind of a juror that the law favors the injured workman over his employer. Where, as here, the doctrine of assumed

risk is not explained to the jury, the instruction can only confuse and mislead. A juror might well wonder why the court is instructing on this proposition. More likely the juror might try to apply it to the issues which are actually raised. If a jury attempted to apply it either to the issue of plaintiff's negligence or defendant's contributory negligence, the possibility of misapplication of the law is apparent.

We think that under the facts of this case the decision of the Nebraska Supreme Court in *Ellis v. Union Pacific R. Co.*, 148 Neb. 515, 27 N.W. 2d 921, is controlling. In that case, where a similar instruction on assumption of risk was given, the court said:

“Assumption of risk is an affirmative defense. In the case at bar it was not made an issue either by the pleadings or the evidence. Therefore it had no relation to the issues in the case and should not have been given.”

Under the facts of the *Ellis* case the improper instruction was held prejudicial error.

The court should settle the proposition in this case so that this strawman may not continually rise in F.E.L.A. cases to confuse and mislead juries in favor of the employee. We submit that the error here was prejudicial.

POINT VI.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTIONS NOS. 6 AND 11 WHICH WOULD HAVE DIRECTED THE JURY THAT IN DETERMINING WHETHER OR NOT THE DEFENDANT WAS NEGLIGENT THEY SHOULD TAKE IN-

TO CONSIDERATION THAT DEFENDANT HAD THE RIGHT TO ASSUME THAT ITS EMPLOYEES WOULD EXERCISE REASONABLE CARE FOR THEIR OWN SAFETY.

Defendant's requested instructions Nos. 6 and 11 proposed charges to the jury to the effect that the defendant was entitled to assume that its employees would exercise reasonable care for their own safety (R. 28, 33). Defendant took exception to the failure of the court to give these proposed instructions (R. 207).

As already pointed out under Point I, the defendant had no duty to anticipate that the plaintiff would jerk or pull the wire from the post. If there had been such a duty to foresee negligence on the part of its employees plaintiff could argue that the jury was authorized to conclude that the roll of wire should have been bound so that when employees negligently and carelessly jerked it about it could not inflict injury. It was of vital importance to the defendant to get a clear picture before the jury as to defendant's duty to plaintiff.

The point of the defendant's case was that defendant could not reasonably be expected to foresee the injury which occurred here; that the plaintiff was negligent and that the defendant had no duty to foresee the plaintiff's neglect. Although there are instructions in this case defining negligence and instructions defining the duty to furnish a reasonably safe place to work (R. 45), there is nowhere found in these instructions the important proposition that the defendant was not required to foresee negligence on the part of the plaintiff. We submit that the failure of the court to instruct on this proposition constituted prejudicial error.

POINT VII.

A GROSS AWARD OF \$30,000 FOR PLAINTIFF'S ALLEGED INJURY IS SO EXCESSIVE UNDER THE CIRCUMSTANCES OF THIS CASE AS TO COMPEL THE CONCLUSION THAT THE JURY WAS INFLUENCED BY PASSION AND PREJUDICE IN ASSESSING DAMAGES AND THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL BY REASON OF EXCESSIVE DAMAGES.

The jury assessed plaintiff's damages at \$30,000 and cut the award by \$7,500 by reason of the contributory negligence of the plaintiff.

Siciliano was 61 years of age at the time of the trial. He lost about seven weeks of work as a result of the accident (R. 107). Other than this loss of time his eye injury did not prevent him from working steadily and he was still working full time when the case was tried (R. 108). The full use of his eye is not lost.

From a monetary standpoint, the financial loss to Siciliano does not exceed \$560. (R. 106, 107).

We submit that the evidence cannot justify a verdict which assesses plaintiff's damages at \$30,000. That amount is over five (5) times the average annual income of Siciliano. At present insurance rates, \$30,000 would provide Siciliano at 61 years of age with more than \$2,200 per year annual income or \$180 monthly income for the rest of his life (Insurance Co. of North America, Rate Book.) Invested at 6 percent, \$30,000 would yield ap-

proximately \$150 income per month and still preserve the entire principal.

Whether the damages in any instance are excessive, must, of course, be determined in accordance with the peculiar facts and circumstances of each use. Under the facts of the case at bar we think that it is manifest that the verdict of the jury was influenced by sympathy, passion and prejudice and that the verdict below should not be allowed to stand.

CONCLUSION

It is most respectfully submitted that the defendant was not guilty of any actionable negligence which contributed to plaintiff's injuries; and that the plaintiff's negligence was the sole cause of the accident. The case should be remanded to the district court with instructions to vacate the judgment below and enter judgment in favor of the defendant. Further, we respectfully submit that the trial court erred in excusing jurors from the panel; in its instructions to the jury and in denying defendant's motion for a new trial and that the damages awarded were so excessive that the judgment below should be set aside. In the event the cause is not remanded with instructions to dismiss, we submit that defendant should be granted a new trial.

Respectfully submitted,

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