

1972

Ewell & Son, Inc. v. Salt Lake City Corporation, The Denver And Rio Grande Western Railroad Company, And Union Pacific Railroad Company : Petition For Rehearing By Appellant Union Pacific Railroad Company And Brief In Support Thereof

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Recommended Citation

Petition for Rehearing, *Ewell & Son v. Salt Lake City Corp.*, No. 12166 (1972).
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IN THE SUPREME COURT OF THE STATE OF UTAH

EWELL & SON, INC, a corporation,
Plaintiff-Respondent,

vs.

SALT LAKE CITY CORPORA-
TION, a corporation,
Defendant-Respondent

THE DENVER AND RIO GRANDE
WESTERN RAILROAD COM-
PANY, a corporation,

Defendant-Appellant,

UNION PACIFIC RAILROAD
COMPANY, a corporation,

Defendant-Appellant

Case No.
12166

PETITION FOR REHEARING BY APPEL- LANT, UNION PACIFIC RAILROAD COM- PANY, AND BRIEF IN SUPPORT THEREOF

Appeal by Union Pacific Railroad Company, Defendant-Appellant,
from a Judgment on Jury Verdict and Amended Judgment
entered by the District Court of Salt Lake County, Utah, the
Honorable Marcellus K. Snow, Judge Presiding, in Favor of
Ewell & Son, Inc., a corporation, Plaintiff-Respondent.

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FILED
FEB 29 1972

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

EWELL & SON, INC, a corporation,
Plaintiff-Respondent.

vs.

SALT LAKE CITY CORPORA-
TION, a corporation,

Defendant-Respondent

THE DENVER AND RIO GRANDE
WESTERN RAILROAD COM-
PANY, a corporation,

Defendant-Appellant,

UNION PACIFIC RAILROAD
COMPANY, a corporation,

Defendant-Appellant

Case No.
12166

PETITION FOR REHEARING

Comes now Union Pacific Railroad Company, defendant and appellant herein (hereinafter called Union Pacific), and petitions this Court for a rehearing of the above-entitled case heretofore decided by opinion of this Court made and entered February 10, 1972. This petition is based upon the following grounds:

1. This Court's opinion affirming the judgment below in its entirety imposes upon Union Pacific the burden of a contract between plaintiff and Union Pacific, but denies Union Pacific the benefit of that same contract and this result arises (a) from the Court's failure to consider or decide Union Pacific's primary contentions in respect to the portion of the judgment against Union Pacific attributable to delay; (b) from the Court's failure to distinguish between the respective positions of Union Pacific and the other defendant railroad, The Denver and Rio Grande Western Railroad Company (hereinafter called Rio Grande), in respect to the delay portion of the judgment and from its erroneous decision of that issue solely upon Rio Grande's position; and (c) from the Court's failure to consider that its decision stating what the jury was entitled to find in respect to the agreement between plaintiff and Union Pacific effectively precludes a judgment against Union Pacific for the type of delay charged Union Pacific by plaintiff herein.

2. The Court's opinion when applied to the instructions given by the lower court in this case erroneously, but effectively, abolishes the historic function of the judge in instructing the jury in this state, and allows the jury to determine what the law is or will be in respect to a particular matter.

Respectfully submitted,

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BRIEF OF APPELLANT, UNION PACIFIC
RAILROAD COMPANY, IN SUPPORT OF
ITS PETITION FOR REHEARING

PRELIMINARY STATEMENT

Throughout the lengthy history of this case Union Pacific has been plagued with the problem that the jury and the trial court have failed and/or refused to distinguish its position from that of the Rio Grande. The opinion of this Court shows that it also has failed to distinguish between the respective positions of the defendant railroads in relation to the delay portions of the judgment entered against each railroad. In Union Pacific's Point I argued hereinafter, Union Pacific will demonstrate that its position in respect to that portion of the judgment against it attributable to delay is correct and that such position was not considered by the Court in rendering its opinion. In Union Pacific's Point II it will demonstrate that the Court's opinion in this case in relation to instructions given herein abolishes the historic duty of the trial judge to instruct the jury concerning the law.

ARGUMENT POINT I

In its opinion filed herein, this Court affirmed the jury finding of a contract between Union Pacific and plaintiff and stated:

“Upon the evidence, viewed in the light favorable to the plaintiff, the jury could have looked at the facts in this manner: after the Railroads had been advised by the City that they would be responsible for additional expense because of the presence of their tracks; and their representatives had asked for and were given figures by the plaintiff concerning the additional expense, if they had any objection to the plaintiff’s figures, they should have so stated; and that by remaining silent in full awareness that the plaintiff was proceeding with the project they should be deemed to have the obligation to compensate him in accordance with the figures he had given them.”

Assuming the truth of the above quote (and the Court and jury has now so found) then part of the additional expense that was the responsibility of the railroads arising from the presence of their tracks was that involved in exposing and protecting the railroad and highway signal cables located at those tracks. Plaintiff’s entire claim and judgment for delay against Union Pacific arose from the need to locate, expose and protect those cables *by hand digging*. Plaintiff had no problem with Union Pacific’s cooperation in removing its tracks and in attempting to locate and expose its cables. (R. 599-603) Plaintiff failed to segregate any delay caused by the time needed to locate the cables and the time required to hand-dig around them, but lumped its entire claim for delay against Union Pacific on the fact that the cables had to be protected. (R. 595-606). In its opinion this Court overlooked the basic rule of contract law to the effect that,

as one of the implied terms of every contract, each party thereto is required to do everything necessary and reasonable to carry out the provisions of such contract. *Cummings vs. Nielson*, 42 Utah 157, 129 P. 619; *Burt vs. Stringfellow*, 45 Utah 207, 143 P. 234. Therefore, when this Court affirmed the jury's finding that plaintiff made an agreement with Union Pacific based upon figures quoted by plaintiff and silence by Union Pacific, the Court and jury necessarily had to find that *all* of the expense involved arising from the presence of Union Pacific's tracks was covered by that agreement and that any time spent by plaintiff in protecting Union Pacific's cables because of the need to locate, expose and hand-dig around them was an integral part of that agreement and plaintiff cannot recover for such time in addition to its contract price with Union Pacific. That the Court failed to consider Union Pacific's position in respect to this contention is demonstrated by the paragraph of the Court's opinion relating to delay. In that paragraph the Court begins by saying: "Defendant Railroads each made an attack upon the portion of damages assessed against them for plaintiff's claim of 'unreasonable delay' arising from their conduct including indecision as to methods of procedure." (emphasis added) Union Pacific respectfully submits that none of the delay charged to Union Pacific was caused by Union Pacific's "conduct including indecision." The only "conduct including indecision" causing delay to plaintiff was attributable solely to the Rio Grande, and this Court has failed to differentiate between the

type of delay plaintiff charged to Union Pacific and the type of delay that plaintiff charged to Rio Grande. The Court in that paragraph of its opinion relating to delay continues by saying "the Railroads' reasons seeking to justify their conduct are a *good jury argument*." In respect to this statement Union Pacific respectfully submits that it has never sought in any way to justify its conduct in respect to delay for there is no evidence in this case of any such conduct of Union Pacific which necessitated justifying. This statement of this Court also can only be explained on the ground that this Court failed to distinguish between Union Pacific and Rio Grande in respect to the position of each on the delay portion of the judgment. The delay portion of the judgment against Union Pacific amounts to ~~\$1,022.70~~ (R. 122, 123 and 204) and Union Pacific is entitled because of its contract with plaintiff as found by the jury and now affirmed by this Court to have that portion of the judgment attributable to delay stricken from the judgment together with interest applicable thereto. Additionally, plaintiff's contract with Salt Lake City provided that plaintiff would be responsible for any damage to cables and would pay the appropriate utility for damages done to any such cables. The Court did not even mention in its opinion the contention of Union Pacific that those provisions of the City's contract insulated Union Pacific from a delay claim arising from the protection of cables even though it was Union Pacific's number *one* point on appeal, but rather the Court ignored that contention

and those provisions of plaintiff's contract with Salt Lake City. For the reasons set forth in Union Pacific's original brief (pages 10, 11, 12 and 13 except for the last paragraph), Union Pacific on that ground also is entitled to have the delay portion of the judgment stricken.

ARGUMENT POINT II

The historic function and province of the court in a jury trial has always been to decide what the law is and to instruct the jury concerning the law applicable to the case. *Hall vs. Blackham*, 18 Utah 2d 164, 417 P. 2d 664. In failing to reverse this case for a new trial because of the manner in which the instructions were given, this Court in effect places its stamp of approval upon the abdication by a trial judge of his duty to instruct the jury concerning the law. This Court's opinion states that the court correctly instructed the jury that "no particular instruction or part thereof should be picked out and considered separately. They should all be considered together." This Court thereby implies that the giving of the quoted instruction cured whatever conflict there might be in the instructions given by the trial court. Does this Court really mean to say that a trial judge can give any number of conflicting instructions upon request of the parties and thereupon by giving the quoted curative instruction either require the jury to attempt a synthesis of the law or require the jury to make a choice between conflicting

instructions? If so, then the historic function of the judge to instruct the jury concerning the law is completely abolished. In Union Pacific's Reply Brief, pages 9 and 10, filed earlier with this Court herein, it called to this Court's attention the fact that the trial court did not attempt to formulate any comprehensive statement of the law applicable to this case and instruct the jury thereon, but instead gave nearly all of the instructions requested by each party in separate sets without regard as to whether there were conflicts between them and without regard as to whether or not certain instructions requested by one party were applicable to other parties. Even if the Court were to conclude that the entire effect of the instructions given in this case was not prejudicial to Union Pacific, it should at least clarify the duty of the trial court to properly instruct the jury as to the law and in doing so clarify that court's duty to resolve conflicting instructions so that the jury will receive a clear unconfused statement of the law rather than one that allows them to select what they believe the law ought to be from various conflicting instructions given. If this Court is going to condone the practice of giving instructions without change no matter how conflicting they may be and intends to say that conflicting instructions are cured by giving an instruction that they all have to be considered together, then the Bar of this State should be so advised so that an attorney handling a jury trial will know that he should be prepared to assume the duty of synthesizing the various requests for instructions into

a nonconfusing statement of the law. Appellants were entitled to have this case reversed for a new trial because the instructions as given were confusing and contradictory and necessarily prejudicial to whichever party lost, for the jury was simply allowed to choose those portions of the instructions they wanted to choose and allowed to ignore the rest, but even assuming that instructions as given, although erroneous, were not prejudicial, this Court should exercise its appellate function to put an end to the failure of the lower courts to synthesize into a comprehensive statement of the law the various instructions requested by the parties involved.

CONCLUSION

Without question, this Court failed to consider and rule upon Union Pacific's contentions in respect to the delay portion of the judgment against it, and Union Pacific is entitled to have this Court consider those contentions and to have the portion of the judgment against it attributable to delay amounting to \$1,992.70, plus interest, stricken from the judgment. When this Court affirmed the jury's finding of a contract, it also of necessity found that one of the terms of that contract required plaintiff to perform the work necessary to give rise to Union Pacific's obligation to pay for additional expense because of the presence of its tracks. In failing to strike the portion of the judgment attributable to performance of that type of work by plaintiff after it

found a contract to exist, this Court committed error of the type which compels rehearing herein. In respect to Union Pacific's second point, Union Pacific would ordinarily not raise this issue in a petition for rehearing after a decision thereon but it feels compelled to reargue this point in order to give this Court an opportunity to correct its error and thereby substantially improve the orderly administration of justice in this state.

Respectfully submitted,

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