1974

Stanley R. Bryan v. Utah International : Brief of Appellant

In the Supreme Court of the State of Utah

STANLEY R. BRYAN,
Plaintiff and Appellant

vs.

Case No. 13773

UTAH INTERNATIONAL, a Corporation, and HOWARD SAVAGE,
Defendant and Respondent

BRIEF OF APPELLANT

Appealed from the Judgment of the Fifth Judicial Court of Iron County, Utah

The Honorable J. Harlan Burns, Judge

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NATURE OF CASE

The nature of this case is based upon a question as to whether or not injuries caused by the intentional misconduct of the employee, outside the line of his employment, to another employee, is covered by the workmans compensation act and is subject to recovery, where the person [illegible] the employer's supervisory personnel, and [illegible] and endorsed by other

DISPOSITION IN LOWER COURT

This item was based upon the complaint of the plaintiff filed on or about the 29th of March, 1974, alleging in effect, that on or about the 30th day of April, 1971, the plaintiff was an employee of the defendant, Utah International, in Iron County, state of Utah, and was employed as a shovel operator. During the day, it became necessary to move the shovel and equipment in connection therewith. That the power was furnished to the shovel by a large cable commonly called, "The Boloney Cable." That this cable furnished electric power. That the normal course of moving was to hook a pickup to the cable and to pull it out of the way; that the pickup was the one normally used by the supervisor, and in this instance, the shift foreman, Howard Savage, the other defendant; that intentionally with malice aforethought, the shift supervisor started the pickup intending to jerk the cable against the body of the plaintiff; that the cable was wrapped around the arm of the plaintiff, and the resulting damage from said misconduct, broke the wrist of the plaintiff, caused the shoulder separation, and various other items of damage as pled in said complaint; that thereafter the defendants filed a motion to dismiss plaintiffs complaint by and for the reason that said complaint failed to state a claim against either defendant upon which relief could be granted. That a few days after filing of said motion, the defendants filed a affidavit to the effect that the defendants, Utah International was covered under the Workmans Compensation Act of the state of Utah and that said coverage extended to the defendant Howard Savage by and for the basis that Howard Savage, and the Plaintiff at the time of injury were fellow workmen. Shortly thereafter, the defendant filed a brief with the trial court alleging to the effect that under the provisions of Title 35-1-46, Utah Code Annotated, 1953, and amendments thereto, coupled with the provisions of Title 35-1-60 Utah Code Annotated, 1953, and amendments thereto; that the Workmans Compensation Acts were the sole remedy open to the plaintiff, this al-

though at the time it was filed, the statute of limitations had already run, as against either defendant, as a matter of law, the plaintiff was barred from filing a claim at that time against or under the Workmans Compensation Act. That the matter was there after argued by counsel and submitted to court.

That thereafter on or about the 19th day of July, 1974, the Honorable J. Harlan Burns, district Judge, made an order granting motion to dismiss on the basis of said 35-1-60 being the exclusive remedy open to the plaintiff.

RELIEF SOUGHT ON APPEAL

Plaintiff and Appellant desires that the order granting motion to dismiss be reversed and that the defendants be required to file an answer and that it be allowed to go to trial either before a jury or without a jury, as the future developments and attitudes of the parties may dictate.

STATEMENT OF FACTS

The plaintiff and defendant, Howard Savage, were each longtime employees of the defendant, Utah International, a Corporation. That at the time of said injury, to-wit; on or about the 30th day of April, 1971, the defendant Howard Savage was the immediate supervisor of the plaintiff. That the plaintiff was shovel operator, and was responsible for operating a large power shovel that was used for loading ore, overburden, and other items into huge trucks for disposition according to the dictates of the defendant Utah International, a Corporation. That said shovel moved on tracks, was powered by electricity, and bearing in mind that said shovel was mobile, the cable that brought the electric power to said shovel for the last several hundred feet was a moveable cable of the type that laid on the ground, approximately as large as a mans wrist, covered by a ruberoid type covering. That when it was necessary to move said shovel in such a manner that the cable had to be moved, it was necessary to hook some powered vehicle to said cable and

drag it out of the way. The normal procedure was to use a small steel cable with a attaching devise, hook it to a pick-up normally operated by the supervisor, the defendant Howard Savage, and drag it out of the way. That a practice had arisen and was known to other supervisory personnel of the defendant Utah International, a Corporation, of jerking this huge power cable, called "a Boloney ," and knocking men down with it.

That on the incident in question, the plaintiff was told by the defendant, Howard Savage, to hook up and the defendant Howard Savage backed his vehicle toward the powered cable. That to get enough play into the power cable to hook onto the smaller steel cable for moving purposes, the plaintiff wrapped the large power cable, "a boloney", around his arm, and was in the process of hooking up the devise to the pickup truck operated by the defendant, Howard Savage, when without warning and knowing that the plaintiff was not free from said power cable, the defendant Howard Savage rapidly accelerated the pickup from a standing position, broke the wrist of the plaintiff, dislocated his shoulder, threw his body to the ground, and did considerable other damage as alleged in plaintiffs Complaint. That although condoned by other supervisory personnel of the defendant, Utah International, a Corporation, and known to them, this action was outside the scope of employment and not part of the scope of employment of the plaintiff and the defendant, Howard Savage, and was not an industrial accident, but was the result of intentional misconduct, and had death resulted, it would have been a form of manslaughter.

That thereafter remarks were made by the defendant Howard Savage to the effect that, that time he got the plaintiff, that the plaintiff did not move out of line fast enough and other supervisory personnel of the plaintiff attempted to cover up this misconduct and the resulting injury, and it was several days later before any investigation was made by other supervisory personnel, that as a matter of standing procedure this type of conduct was not

supposed to be condoned, and the defendant Howard Savage, in attempting to hide same, failed to make an accident report until 4 days after the occurance, although it was his duty as a supervisor to make an immediate accident report, and to see that medical attention was available immediately. That the plaintiff suffered considerable damage as a result of this misconduct and the attempt to hide same in true Watergate fashion, and had personal injuries resulting therefrom, and although permanently injured, the plaintiff returned to work at the insistance of the defendant Utah International, a Corporation, and as a result of the injuries could not perform his work. That thereafter, the defendant Utah International, by and through its supervisory personnel insisted that the plaintiff take early retirement. That considerable additional damage resulted therefrom.

That as the result of said misconduct, the plaintiff is still unable to perform the same work that he was doing at the time of the injury and is still damaged, and damage is still increasing.

ARGUMENT

POINT 1

THIS ACTION IS NOT UNDER JURISDICTION OF WORKMANS COMPENSATION ACT.

The trial court ruled that this cause of action was barred by the Workmans Compensation Act and the exclusive provisions thereof. The trial court erred as a result of interpretation of language. In as much as thic was not an accident, but was the result of intentional misconduct.

The trial courts ruling raises the question, is there any type of an injury between employees, on a job that is not covered by the Workmens Compensation Act. Can one say but had this resulted in the death of the plaintiff, that the only redress open to his widow was Workmans Compensation that she could not sue the person that caused the death.

If this is the case, all one has to do to people that one is tired of, is to become a fellow employee, put them in front of a vehicle and run over them while working on a job.

While Title 35-1-60, and 35-1-44, attempt to go into accidents, that sub-paragraph 5, Title 35-1-44, describes items as being included, reads,"Personal injury by accident arising out of and in course of employment shall include any injury caused by the willful act of the third person directed against the employee, because of his employment. It shall not include a disease except as it shall result from the injury." The item that throws one off, in this particular phase, is that we do not give effect to the words, an injury caused by willful act directed against an employee, because of his employment. The particular act in this question, while directed against an employee by a supervisor, was not because of his employment, but was in violation of his employment. Any error in interpretation of the acts in this matter legalizes mayhem and possible murder. Although there is no question that the courts have gone a long way to include items in the course of employment, the question that is now before this court, is whether or not an injury resulting from willful misconduct, outside of the course of employment, although committed on the job, bars a recovery against the responsible parties under the Workmans Compensation Act.

The Supreme Court of the state of Utah, has ruled many times, simply because an injury results on the job, this and this alone is not sufficient cause to put it within the Workmans Compensation Act.

Also contrary to what one might expect, pertaining to the language of Sub-section 5 of Title 35-1-44, which implies that anything on the job is covered, the Supreme Court of Utah long ago, in the case of Spring Canyon Coal Company v. Industrial Commission of Utah 58 Utah 608, 201 Pacific, 173, in which instance a fellow employee was killed on the job by an insane workman, who also was an employee, made a finding to the effect that simply because they

were on the same job, and a death resulted, that it did not come under the Workmans Compensation Act. That there had to be a showing it was in the course of his employment. In the case at bar, the cable had to be moved. However the practice that had arisen of jerking it against employees to make them jump, was out-side the course of employment. Under these conditions, the Spring Canyon Case is ruling in this particular instance, also there are many other instances in which the Supreme Court has upheld the ruling of the Industrial Commission that items were not covered simply because they were first noticed or occurred on the job. It can be found in a case of Bacholor v. Industrial Commission of Utah and others, 6, Utah 2nd, 261, 46 Pacific 996, also this was found in the case of Thompson v. Industrial Commission, 82 Utah, 247, 23 Pacific 2nd, 930. This line of thinking has been affirmed as late as 1971, in Crittenden v. Industrial Commission of Utah, 25 Utah, 2nd, 193, 479 Pacific 2nd 347

Under these conditions there is no question that the issue made by which was before the court at the time of ordering the dismissal of the plaintiffs complaint, was such that the court was required for purposes of this motion, to accept everything in the plaintiffs complaint as true. There is no reason to controvert the allegations that the injury occurred as the result of the intentional misconduct of supervisory personnel, outside the scope of employment. The court in granting the Order to dismiss, relied entirely upon the exclusive nature of Title 35-1-60, and did not give effect to the fact that the injury was pled as outside the course of employment

While without any question sub-section 5(Title 35-1-44, can be interpreted to include any willful act, and if it is so interpreted, the Title 35-1-60, Utah Code Annotated, 1953, can be interpreted to exclude the results thereof. This has been the finding of the Utah State Supreme Court. The [illegible] that the trial court failed to give effect to, was the requirement that these items had to be in the course of

employment, (these injuries), or these injuries for which compensation was granted, had to be in the course of employment. The Utah Supreme Court has specifically held that, in the event of injuries not arising in the course of employment, they are not covered by Workmans Compensation and the Industrial Commission has been upheld in all instances by the Utah Supreme Court which the undersigned has reviewed, where there was evidence upon which the Industrial Commission could make a finding that the injuries were not received in the course of employment, even though they were received on the job. Under these conditions, there seems to be no choice but that this matter be tried, and the court or the jury, required to make a finding; either that the injury was received in the course of employment, or that the injury was not received in the course of employment, and that until there is a finding based upon evidence, the Order of Dismissal is premature.

CONCLUSION

Under the conditions of the foregoing, the only conclusion that can be arrived at, is that the matter should be remanded back to the District Court of Iron County, Utah for a specific finding to the effect that the injuries were not received in the course of employment, or that injuries were received in the course of employment, and only when there is a finding to this effect based on the evidence, can there be a further finding either to the effect that Workmans Compensation is applicable and is exclusive, or that it is not.

Respectfully submitted

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