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New Jersey Court of Errors and Appeals

Frank S. Cornell,
Plaintiff-Respondent,
vs.
West Jersey & Seashore Railroad Company,
Defendant-Appellant.

On Appeal.

BRIEF FOR RESPONDENT (CORNELL)

The case below was tried before the Common Pleas Court of Camden County. At the conclusion of the plaintiff's case a motion to non-suit was made. The trial Court announced that it would reserve decision on the motion (33). The defendant introduced no testimony except medical testimony. The trial Court then ordered a non-suit (35). The purport of the ruling of the trial Court is that no negligence on the part of the defendant had been shown, and that the danger which confronted the plaintiff was an obvious one (35).

Suit was begun under the Federal Employers' Liability Act and the Safety Appliances Act. The pleadings show that suit was properly begun under the federal acts in that the answer admits the plaintiff to have been engaged in an interstate transaction.

From the judgment of non-suit an appeal was taken to the Supreme Court and that Honorable Court (Justices Swayze, Minturn and Kalisch sitting) reversed the judgment of the Camden Common Pleas and ordered a new trial. The opinion of the Supreme Court was handed down at the June Term, 1917.

It should be borne in mind that the federal acts have abolished the fellow-servant defense and made contributory negligence a means to reduce damages only. These acts also provided that, if an injury occurs because of any "insufficiency in the equipment" furnished by the employer to the employee, liability attaches.

The plaintiff was employed by the defendant as a lineman. The duty had to do with constructing telegraph and telephone lines. On the day when the injury occurred the plaintiff with a number of other workmen, was sent by train from Camden, Camden County, to Egg Harbor, in Atlantic County. The train was composed of an engine, a passenger car and a flat car loaded with telegraph poles (26). *The plaintiff had nothing to do with loading the poles on the flat car* (27). He rode to Egg Harbor in the passenger coach (26), and first got on the car carrying the poles at Egg Harbor (26). The process of unloading the poles was commenced at once (26). The train was late in reaching the point of unloading (13), and the plaintiff was *ordered by his foreman to hurry with the work* (14). The first pole was gotten off the flat car easily. It required only a push to get it off (15). The second pole was lifted to the edge of the car by the plaintiff and other workmen (15, 16). About ten men were engaged in the work (25). The plaintiff had his hands on top of the pole to help roll it over the edge of the car

(15). As the pole revolved over the edge of the car a spike or bolt fastened in the pole caught in the plaintiff's leather glove (16). The plaintiff was whirled into the air and struck on the adjoining track (17). The proof discloses no information given the plaintiff of the presence of the bolt or spike and the plaintiff says, and no effort was made to contradict him, "I did not see the bolt" (15). "If it had been plain I could have seen it" (15). "It was concealed" (15). "The bolt must have been turned down" (15). "It was hid" (15), and says there was no appearance of a bolt at all before his eyes (15). It is quite evident that the spike or bolt was in the bottom of the pole and could not be seen by the plaintiff unless he had in some way been able to see underneath it. It is well to note that the plaintiff did not get on the car until the point of unloading was reached; that he was ordered to hurry; that the unloading began at once and that in climbing about on a load of telegraph poles a person's attention is naturally concentrated on his footing. Is it to be expected that an ordinarily prudent man, under such circumstances, will make any effort to see what the condition of the bottom side of the poles is? We do not think so. Then, too, how was the plaintiff to examine the bottom of the poles? Moreover, although the plaintiff had been employed by the defendant for five years in the same kind of work (12), the pole in question was the first one that had ever had a spike or bolt in it (29). The situation, therefore, was not an ordinary one but was unusual.

The employer loaded the pole in question upon the flat car with the spike or bolt in it and placed the pole in such a position that the employee could not see it or discover it by the use of ordinary observa-

tion. The danger being one that was not obvious and one that could not be seen by the employee, it was the employer's duty to warn its employee of the presence of such a danger. In this respect the employer was negligent. This is especially true when it is considered that the plaintiff was ordered to hurry and that he had never seen or handled a pole with a spike or bolt in it before, although he had been doing the same work for the defendant for five years. The ruling of the trial Court is tantamount to holding that it was the duty of the plaintiff to, in some way, get underneath the telegraph pole and discover the spike or bolt which the employer had placed there and had failed to tell the plaintiff about. If the plaintiff, because the floor of the car had been rotten, had fallen through it and been injured would it be correct to hold that the plaintiff was at fault because he had not gotten underneath the car and examined the floor before venturing to step upon it? Our conception of the law is that an employer must furnish a reasonably safe place for his employee to work in and reasonably safe tools to work with and if the employer creates a situation which is dangerous to his employee he must inform his employee of the existence of the danger unless it is one that can be discovered by ordinarily prudent observation. What fact is there in the case at bar which even tends to show that the plaintiff could, by any means at all, discover the presence of the spike or bolt? It was hidden from his view and there was no way open to him for getting underneath the pole and to see what was there. Besides the pole was one of many. The poles were massed upon a car and were thick, heavy and long. They were a solid mass, so that it was a physical impossibility for the plaintiff to investigate and learn of the hidden danger,

which the employer had created and legally knew about. If it was usual for such spikes or bolts to be in such poles the situation would be different and the defendant company could have easily proved such things to be usual. However, the plaintiff's testimony that, in five years of the same work, this pole was the only one to have a spike or bolt in it, is uncontradicted. The first intimation that the plaintiff had of the presence of the spike or bolt was when it suddenly appeared from beneath the pole, as it rolled with great rapidity over the edge of the car, and hurled him to the ground beneath.

The following facts appear and are uncontradicted. Ten men were engaged in getting the pole in question from the car to the ground (25); the pole was large and heavy (13); two cant hooks *only* were furnished by the employer (25); cant hooks are usually furnished for such work (24); *cant hooks would have made the work safe* (25). The Safety Appliance Act provides that, if an employee is injured through any insufficiency in the equipment furnished by the employer, the employer shall be liable. Since it is uncontroverted that a sufficient number of cant hooks were not furnished in this case and since it is undisputed that cant hooks would have made the work safe it necessarily follows that the employer is liable.

It is incorrect to say that the Federal Safety Appliances Act does not apply. That act says recovery may be had for negligence by reason of "any defect or *insufficiency,*" etc., in "appliances, machinery, etc.," or "*other equipment.*" Cant hooks were part of the necessary appliances and equipment for the work plaintiff was required to perform. Cant hooks are used to lift as well as to roll logs. Had the plaintiff been furnished with a cant hook he would have

been in no danger at all; instead of using his hands to lift and roll the logs, and that is what plaintiff was doing (15), he would have used the cant hooks.

The plaintiff knew that the poles were old. Whether the poles had been cut for cross-bars was immaterial. That had nothing to do with spike hidden from view under the pole in question. The plaintiff was not obliged to examine the logs to see whether a spike was in the underside of the log. That would have required the plaintiff to use *extraordinary care*. The plaintiff was ordered by his boss to hurry. But, even if he had not hurried, he could not have seen or discovered the hidden spike. Appellant says that the plaintiff could have felt underneath for the hidden spike, the obvious answers are: First, it would, as said above, have required of him extraordinary care; second, the logs were large, very heavy and packed close together so that the plaintiff could not have felt under the log for a hidden spike; third, how could he have told where to feel for a spike, even had he suspected, for any reason, that one might have been there; and fourth, he had a legal right to assume that there was nothing unusual about the log in question and it *was* both an unusual and dangerous thing to have a spike in the log hidden from view. Besides the log looked like other logs and looked perfectly safe and harmless. It was deceptive in appearance and thus put the plaintiff off his guard and made defendant's negligence all the more pronounced.

The cases cited by the respondent are so totally out of point, as far as the facts are concerned, that they have no application to the case at bar.

~~It is respectfully insisted that the judgment below should be reversed~~.

It is clear that the plaintiff had no knowledge of the presence of the spike or bolt. It is clear that no reasonable inspection by him would have revealed the spike or bolt. It is clear that no opportunity was given for an inspection. It is clear that the presence of the spike or bolt was unusual. It is clear that the employer failed to warn the plaintiff of the presence of the spike or bolt and it is clear that the employer failed to furnish a sufficient number of cant hooks to make the work safe. It was a latent, hidden danger.

In the light of the undisputed testimony we most earnestly insist that a jury question was presented, that it was error on the part of the trial Court to order a non-suit, and that the judgment of the Supreme Court, reversing the Common Pleas, should be affirmed.

Respectfully submitted,

WESCOTT & WEAVER,
Attorneys for Appellant.