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SUPREME COURT OF KENTUCKY
No. 2012-SC-000750-D

JEFFREY T. CANIFF APPELLANT,

V.

CSX TRANSPORTATION, INC. APPELLEE.

APPEAL FROM COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 2011-CA-000178

REPLY BRIEF FOR APPELLANT JEFFREY T. CANIFF

Alva A. Hollon, Jr.
SAMS & HOLLON, P.A.
9424 Baymeadows Road, Suite 160
Jacksonville, Florida 32256
904-737-1995 (Telephone)
904-737-3838 (Facsimile)
Counsel for Appellant

Thomas I. Eckert
PO Box 7272
Hazard, Kentucky 41702
606-436-4445 (Telephone)
606-439-0748 (Facsimile)
Co-Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of February, 2014, copies of this Reply Brief for Appellant were served by U.S. Mail, postage prepaid, on: Linsey W. West, Esquire and Kara M. Stewart, Esquire, DINSMORE & SHOHL LLP, 250 West Main Street, Suite 1400, Lexington, Kentucky 40507; Dan Himmelfarb, Esquire and Michael B. Kimberly, Esquire, MAYER BROWN LLP, 1999 K Street NW, Washington, District of Columbia 20006; Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; and The Honorable William Engle, III, Circuit Judge, Perry County Hall of Justice, 545 Main Street, Hazard, Kentucky 41701.

One of the Counsel for Appellant

Comes now the Plaintiff/Appellant, Jeffrey T. Caniff, by counsel, and for his Reply Brief states as follows:

A. Mr. Caniff alleged sufficient facts concerning the issue of CSXT's negligence under FELA to defeat Summary Judgment.

Mr. Caniff disputes the thrust of CSXT's arguments in several areas in its Brief and will address these issues in the space allocated for this Reply Brief. Mr. Caniff reiterates his contention that he produced more than sufficient evidence of negligence in order to defeat Summary Judgment. CSXT devoted considerable time in its Brief in arguing about railroad industry custom for carrying a knuckle. On page 1 of its Brief, CSXT stated: "If anything, the record shows that the industry custom at the time of Caniff's accident was for employees to carry knuckles alone for *greater* distances." The record does not contain one shred of evidence regarding industry custom for this job practice. There is nothing concerning the job practices of railroads such as the Union Pacific, Norfolk Southern, Canadian National Illinois Central, Burlington Northern Santa Fe, or Amtrak. Instead, CSXT focused on an occasion in which Mr. Caniff's co-worker, John D. Quillen, testified about the time he had to carry a knuckle 3,000 feet without assistance. On page 23 of its Brief, CSXT states that, "...Caniff presented *no* evidence that transporting a knuckle was, in 2004, a task that "usually required [the] assistance" of a second employee." This is not correct as the deposition of Mr. Quillen demonstrates. To put this incident in proper context, this is what Mr. Quillen stated in his Discovery deposition concerning this incident.

> A: I have personally had to carry knuckles 50, 75 car lengths down in the yard to put a train back together with.
>
> Q: How long is that; how long is 50 to 75 car lengths?

A: Well, each car will average 60 feet, length.

Q: So - -

A: That's a long way. Let me tell you that. You'll set it down a many a time.

Q: Yeah. Fifty car lengths times 60 feet would be 3,000 feet, a hundred yards? [sic]

A: It's a long way down in there when you're packing approximately a 90-pound knuckle.

Q: That's carrying a knuckle the length of a football field. [sic]

A: Yeah. I would put a bar thought it and pull it tight to me, as tight as I could, and I'd carry it down through there; and then, you know, when my arms would get tired, I'd set it down. They would send one guy - - if they had two, they would put one on each side of the bar, and you would had to carry it down there. We didn't have any roads at that time. This was pre-Jeff.

Q: You would - - "pre-Jeff" - -

A: Before he come there.

Q: Jeff who?

A: Caniff.

(Quillen deposition, pages 39 and 40. Emphasis added.)

Mr. Caniff hired in with the Chessie System, a predecessor of CSXT, in July 1979. Mr. Quillen testified that two men used a rod, presumably metal, to carry a knuckle before 1979, which was "pre-Jeff." Thus, Mr. Caniff has offered evidence that carrying the knuckle was a two-man job prior to the time he began working for the railroad.

On pages 1 – 2 of its Brief, CSXT contends that there is no evidence in the record that the assistance of another employee would have prevented Mr. Caniff's injury. This assertion overlooks the testimony of both Mr. Caniff and Mr. Quillen. As Mr. Caniff testified in his second Discovery deposition, since he did not have anyone to help him carry the knuckle, he had to hold it tightly next to his body, thereby obscuring the view of his feet. (Caniff depo, 04/12/10, pp. 9-10, 23.) As Mr. Quillen explained in his deposition, with someone to assist Mr. Caniff to carry the knuckle, one man would have been on each side of the knuckle holding the presumably metal bar stuck through the opening in the knuckle. Mr. Caniff certainly would have been better able to have seen his feet by holding the metal bar on one side with the knuckle suspended in the center of the bar.

CSXT's reference on page 6 of its Brief to the "knuckle mate" is misplaced. The knuckle mate is an apparent refinement of the metal bar referred to by Mr. Quillen in his deposition. Irrespective of the date the knuckle mate was made available to CSXT employees in Russell Yard, Mr. Quillen has testified without contradiction a bar was used prior to December 2004 as part of a two-man job to carry a knuckle.

An additional ground to reject CSXT's argument that, "...the record shows that the industry custom at the time of Caniff's accident was for employees to carry knuckles for *greater* distances." (Appellee's Brief, page 1.) This argument completely ignores the CSXT safety rule issued in August 1995 regarding end-of-train devices. A copy of this rule is attached to the Appellant's Brief at tab 5. On page 26 of this Brief, CSXT seems to be questioning the authenticity of the 1995 safety rule. CSXT did not challenge the authenticity of this safety policy or rule at the trial court level. Had it done

so, it would have been a very simple matter for counsel to have authenticated the 1995 safety policy or rule. This Court should not entertain any doubts now expressed by CSXT concerning the validity of this policy or rule.

It is a sad commentary that CSXT relies upon John Quillen's Herculean effort to carry a knuckle by himself for 3,000 feet to then suggest that Mr. Caniff did not need assistance to carry the knuckle at the time of his accident. It should be noted that carrying a 90-pound knuckle 3,000 foot distance, is ten times the maximum allowable distance that a Mechanical Department employee is required to carry an object weighing a little more than half the weight of a knuckle.

Mr. Caniff presented to the trial court three allegations of negligence, any one of which was sufficient to defeat summary judgment. First, CSXT failed to provide adequate assistance to Mr. Caniff to perform his job. Caniff relies upon the cases listed on pages 18 – 23 in his Brief in support of this argument. It is fundamental that a railroad has a duty to provide sufficient manpower for employees to safely perform their work. Inadequate assistance has formed the basis of various claims of negligence in FELA cases. (See Appellant's Brief, pages 18 – 23.)

Second, CSXT failed to maintain its road within Russell Yard in serviceable condition. Indeed, Mr. Caniff could not even negotiate the road driving a work truck due to poor road maintenance. In its opinion, the Court of Appeals noted on page 8 of its slip opinion that Caniff had abandoned, "...his claim about improperly maintained ballast..." This is the case since Mr. Caniff fell on a main line with main line ballast. This is not a case in which there is a claim that yard ballast or walking ballast should have been used rather than mail line ballast. Nonetheless, Mr. Caniff brought to the attention

of the trial court, his complaint about the poor condition of the road he was driving on before his accident. (See Appellant's Brief, page 6. See also Plaintiff's Motion to Vacate Summary Judgment, at tab 3 of Appellant's Brief.)

Third, CSXT violated the aforementioned 1995 safety rule policy for carrying end-of-train devices. It is elementary that it is against CSXT's Mechanical Department rules for an employee to carry a distance of 3000 feet, by himself or herself, an object weighing 40 to 55 pounds; therefore, to require an employee to carry an object weighing 75 to 90 pounds, a similar distance, *has* to be a violation of this same policy. (See Appellant's Brief, pages 29 – 32, where these issues were raised.)

In its Brief, on pages 28 – 29, CSXT argues that neither Mr. Caniff's Affidavit nor any of its Exhibits are properly part of the record, because he submitted those documents with his Motion to Vacate Summary Judgment. This position is untenable. In Coomer v CSX Transportation, Inc., 319 S.W.3d 366 (Ky. 2010), Mr. Coomer filed a Motion in the Perry Circuit Court to Vacate Summary Judgment in favor of CSXT. The trial court accepted an Affidavit of a biomechanical engineer as a part of Coomer's Motion to Vacate Summary Judgment. This Court referred to the Affidavit of Dr. Tyler A. Kress in its opinion. Since the trial court accepted Mr. Caniff's Affidavit and Exhibits in this case, these issues were brought to the attention of the trial court before its final ruling. They obviously are properly before the Court as they were accepted by the trial judge.

B. The FELA does not require Mr. Caniff to produce a liability expert under the facts of this case.

Mr. Caniff submits that the trial court abused its discretion in requiring him to produce a liability expert in order to establish negligence in a FELA case. This Court has defined abuse of discretion. "The test of abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles." Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999). In CSX Transportation, Inc., v Begley, 313 S.W.3d 52 (Ky. 2010), this Court noted the underpinnings of what constitutes negligence in a FELA case. In this regard, this Court held:

> Federal decisional law governs what constitutes negligence in a FELA claim and requires a plaintiff to prove the traditional common-law elements of negligence, including duty, breach, foreseeability, causation, and injury in order to prevail. Federal law also governs the parties' burden of proof on the merits; the sufficiency of evidence...

Id at 58 – 59. (Footnotes omitted.)

Respectfully, Caniff contends that the trial court's requirement that a FELA plaintiff must support his or her allegation of negligence by use of a liability expert witness is "unsupported by sound, legal principles" and is unreasonable. Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999).

As the U.S. Supreme Court made clear in the landmark case of Rogers v. Missouri Pac. R. Co., 352 U.S. 500 (U.S. 1957):

> The decisions of this Court after the 1939 amendments teach that the Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury.

352 U.S. 510, 77 S.Ct. 450-451, 1 L.Ed. 2d 501-502. (footnotes omitted.)

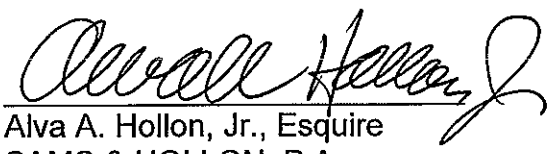
In September 2013, the Sixth Circuit was confronted with a FELA case in which CSXT argued that expert testimony was necessary to support allegations of negligence in a FELA case, an issue which goes to the heart of this case. In rejecting CSXT's argument, the Court held: "[c]ontrary to Defendant's argument and as this court has recognized, expert testimony is not necessary to support allegations of negligence." Szekeres v. CSX Transp., Inc., 731 F.3d 592, 603 (6th Cir. 2013) (A copy of the Sixth Circuit's slip opinion is attached at Tab 8 of Appellant's Brief. The case has now been published.) It is clear that as this Court observed in Begley, that a FELA plaintiff's sufficiency of evidence concerns substantive law rather than procedural. Thus, the requirement imposed by the Court of Appeals and the trial court that the only way Mr. Caniff could defeat Summary Judgment was to provide a liability expert witness to prove negligence, is not based upon sound legal principles in a FELA case.

The requirement that Mr. Caniff produce a liability expert witness under the facts of this case was unreasonable. The following matters are certainly within the comprehension of the average juror. First, the average juror understands it is easier to drive a vehicle on a road that has been maintained and does not have pot holes or mud holes. Second, the average juror can certainly comprehend that it is more difficult to carry an object weighing between 75 and 90 pounds than it is to carry an object weighing between 40 and 55 pounds. Third, the average juror understands the concept of having to do a task by yourself after assistance has been refused. Cases cited by Caniff in his Brief on pages 18 to 23, do not require an expert liability witness to opine that a railroad has a duty to provide adequate assistance. Furthermore, these basic

facts in this case do not require an expert liability witness. The factors outlined above do not involve complicated job practices on a railroad.

In conclusion, Caniff respectfully request that the Court reverse the Court of Appeals and remand this case for trial by jury.

Respectfully submitted,



Alva A. Hollon, Jr., Esquire
SAMS & HOLLON, P.A.
9424 Baymeadows Road, Suite 160
Jacksonville, Florida 32256
904-737-1995 (Telephone)
904-737-3838 (Facsimile)