In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00355-CV

BNSF RAILWAY COMPANY, APPELLANT

V.

GARY EPPLE, APPELLEE

On Appeal from the 249th District Court
Johnson County, Texas
Trial Court No. C-201200142, Honorable D. Wayne Bridewell, Presiding

November 30, 2016

MEMORANDUM OPINION

Before QUINN, C.J., and HANCOCK, and PIRTLE, JJ.

BNSF Railway Company (BNSF) appeals from a judgment awarding damages to Gary Epple. The latter was an employee of BNSF who sued under the Federal Employer's Liability Act (FELA) to recover damages for injuries suffered while on the job. The appeal was transferred to this court from the Tenth Court of Appeals.[1] Four issues are before us, but we address only one because its disposition requires a new

[1] Because the appeal was transferred to this court from the Tenth Court of Appeals, we apply the latter's precedent when available along with that from the pertinent court of last resort in Texas. TEX. R. APP. P. 41.3.

trial.[2] The issue of which we speak involves the trial court's refusal to include within its jury charge a question and instruction pertaining to pre-existing back and knee conditions of Epple and their relationship to the damages recoverable. We agree with the contention that the trial court erred in omitting the question.

Under question number seven sought by BNSF, the jury was asked: "What percentage, if any, of Plaintiff's injury, if any, for which you awarded damages in Question No. 6 above is the result of a pre-existing condition of the Plaintiff?" It was followed by the following instruction: "If you find that the Plaintiff's injury was due in part to a pre-existing condition, you must determine how much of Plaintiff's injury is due to his pre-existing condition . . . ." Each was tendered to and expressly rejected by the trial court.

The standard of review pertinent to alleged charge error is one of abused discretion. *Thota v. Young*, 366 S.W.3d 678, 687 (Tex. 2012); *In the Interest of E.M.*, No. 10-14-00313-CV, 2015 Tex. App. LEXIS 5490, at *32-33 (Tex. App.—Waco May 28, 2015, pet. denied) (mem. op.). Furthermore, a trial court abuses its discretion when it acts without regard to guiding rules or principles. *Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 855-56 (Tex. 2009); *Capps v. Foster*, No. 10-14-00061-CV, 2016 Tex. App. LEXIS 626, at *22 (Tex. App.—Waco January 21, 2016, pet. denied) (mem. op.). Next, one of those guiding rules obligates the trial court to submit questions and instructions on issues raised by the pleadings and evidence. TEX. R. CIV. P. 278; *Union Pac. R.R. Co. v. Williams*, 85 S.W.3d 162, 166 (Tex. 2002). If they are omitted, then we must determine if they were reasonably necessary to enable the jury to

[2] None of the other issues would result in the reversal and rendition of a judgment favorable to BNSF.

render a proper verdict. TEX. R. CIV. P. 277; *Shupe v. Lingafelter*, 192 S.W.3d 577, 579 (Tex. 2006). Should they be held reasonably necessary, then we decide whether their omission resulted in harm. That obligates us to assess whether the mistake probably caused the rendition of an improper verdict or probably prevented the petitioner from properly presenting the case to the appellate court. TEX. R. APP. P. 44.1(a)(1) & (2); *Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851 at 856. Finally, harm normally exists when the error related to a "'contested critical issue.'" *R.R. Comm v. Gulf Energy Expl. Corp.*, 482 S.W.3d 559, 571-72 (Tex. 2016), *quoting, Columbia Rio Grande Healthcare, L.P. v. Hawley, supra.* With that said, we turn to the issue at hand.

Neither party disputes the substantive law applicable to FELA claims wherein pre-existing conditions are involved. Where the record contains evidence indicating that an injury may have resulted from the aggravation of a pre-existing condition, the jury should be directed to award damages only for the aggravation of the pre-existing condition. *Schultz v. N.E. Ill. Reg'l Commuter R.R. Corp*., 201 Ill. 2d 260, 277, 775 N.E.2d 964, 974-75 (Ill. 2002); *accord*, *Richardson v. Missouri Pac. R.R.,* 186 F.3d 1273, 1278 (10th Cir. 1999) (stating that a "[p]laintiff is entitled to recover damages for any aggravation of the pre-existing condition, but those damages are limited to the additional increment caused by the aggravation."). That is, the award should exclude the proportion of losses that the employee's pre-existing condition would inevitably cause, irrespective of the railroad's negligence. *Nichols v. BNSF Ry.,* 148 P.3d 212, 216 (Colo. Ct. App. 2006); *accord*, *Stevens v. Bangor & Aroostook R.R*., 97 F.3d 594, 601 (1st Cir. 1996) (stating that " . . . as a general matter, when a defendant's negligence aggravates a plaintiff's pre-existing health condition, the defendant is liable only for the additional increment caused by the negligence and not for the pain and

impairment that the plaintiff would have suffered even if the accident had never occurred"). Yet, if the factfinder cannot separate injuries caused or exacerbated by the railroads negligence from those resulting from a pre-existing condition, then the railroad is liable of all the injuries. *Stevens v. Bangor & Aroostook R.R.*, 97 F.3d at 603; *Kelham v. CSX Transp., Inc*., No. 2:12-cv-316, 2015 U.S. Dist. LEXIS 97400, at *3-4 (N.D. Ind. July 27, 2015).

The record at bar contained evidence indicating that Epple suffered from pre-existing conditions related to both his back and knee. Indeed, his own and another physician testified about these conditions. So too did evidence of record indicate that he would have had to undergo knee and back surgery irrespective of the purported negligence underlying his suit against BNSF. The evidence consisted of such testimony as: 1) "[t]he slip-and-fall, there's nothing to show that it created any new problem, but there had been complaints over the years of the back and the knee"; 2) the spinal condition is "not something that resolves"; 3) "[w]ith the knee, it's a progressive problem with progressive complaints over the years"; 4) the back surgery " . . . wouldn't have been made necessary by the fall"; 5) the back surgery " . . . was something that was a result of a long history of degenerative changes in the back"; and 6) Epple was destined for a knee replacement due to the "degeneration" of the knee prior to the fall.

That BNSF also raised the issue of pre-existing injuries in its live answer is clear.[3] The pleading coupled with the aforementioned evidence and the law espoused in *Stevens*, *Nichols, Schultz* and the others, therefore, satisfied the requisites of Rule

[3] The following appears in BNSF's live answer: ". . . Petition, Defendant avers that Plaintiffs injuries were or may have been caused, in whole or in part, by . . . pre-existing conditions and/or to concurrent, contemporary causes. Therefore, Defendant is liable, if at all, in damages only for those injuries attributable to Defendant's negligence, if any . . . and Plaintiffs monetary recovery, if any, should be diminished by the proportion of damages assigned to causes other than Defendant's negligence, if any."

278. In other words, BNSF was entitled to have the trial court submit a question asking the jury "[w]hat percentage, if any, of Plaintiff's injury, if any, for which you awarded damages in Question No. 6 above is the result of a pre-existing condition of the Plaintiff?" The question and instruction was reasonably necessary to render a proper verdict.

Epple argued that BNSF waived the error because the railroad failed to comply with the requirements of Texas Rule of Civil Procedure 278. The purported omission involved the proffer of a substantially correct question and instruction to the trial court. That allegedly was not done because BNSF omitted from its proposals a comment informing the jury that if it were unable to separate the injuries caused or exacerbated by the accident from those resulting from a pre-existing condition, then the railroad was liable for all of them. We disagree.

Rule 278 provides that the "[f]ailure to submit a question shall not be deemed a ground for reversal . . . unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment . . . ." TEX. R. CIV. P. 278. "Substantially correct" does not mean that the instruction is perfect. *Placencio v. Allied Indus. Int'l, Inc.*, 724 S.W.2d 20, 21 (Tex. 1987). Rather, it satisfies the test when it is "in substance and in the main correct, and . . . not affirmatively incorrect." *Id.*, *quoting Modica v. Howard*, 161 S.W.2d 1093 (Tex. Civ. App.—Beaumont 1942, no writ); *Greenstein, Logan & Co. v. Burgess Marketing, Inc.*, 744 S.W.2d 170, 182 (Tex. App.—Waco 1987, writ denied). The question and instruction tendered to and rejected by the trial court here encompassed the applicable law. The jury's award should exclude the proportion of losses caused by the pre-existing condition, and it was

that body's obligation to determine the percentage. If it could not, then it was free to enter "0" or "zero" in the blank given that the question asked for a percentage “if any.”

More importantly, requiring BNSF to include in its question or instruction the caveat mentioned by Epple would tend to run afoul of another prohibition. Generally, a trial court may not advise the jury of the effect of its answers to particular questions. TEX. R. CIV. P. 277; *H.E. Butt Co. v. Bilotto*, 985 S.W.2d 22, 24 (Tex. 1998). Such occurs when the submission instructs the jury how to answer a question for the plaintiff or defendant to prevail. *H.E. Butt Co. v. Bilotto*, 985 S.W.2d at 24. Telling a jury that if it could not apportion damages caused by pre-existing conditions from those caused by the negligence of BNSF then the railroad would be liable for all the damages is nothing short of telling the jury how to answer the question to secure the greatest relief for Epple. It need only enter a "0" in the blank that followed the question. That is more than an incidental way of informing the jury of the effect of its answer. It is actually telling the jurors how to answer the question to hold BNSF responsible for all the damages despite evidence illustrating that Epple would have suffered them notwithstanding BNSF's alleged negligence.

BNSF's proposed question seven and its accompanying instruction were correct in substance and in the main. Thus, BNSF preserved its complaint.

Finally, Epple's pre-existing conditions and BNSF's liability for the damages they would have caused irrespective of the railroad's negligence was a contested issue of fact. Nevertheless, the trial court actually informed the jury that when calculating damages *"[d]o not reduce the amounts, if any, in your answers because of the Plaintiff's pre-existing condition*, as the Court will do that based on the percentages of [comparative] negligence that you have assigned above." (Emphasis added). These

circumstances coupled with the evidence of pre-existing injuries mentioned earlier lead us to conclude that the trial court's omission probably caused the rendition of an improper judgment.[4] *See*, *Union Pac. R.R. v. Williams*, 85 S.W.3d 162, 170-71 (Tex. 2002) (finding harm where the trial court omitted from the charge an "'essential ingredient' of the railroad's duty to use reasonable care" and informed the jury that the ingredient was not an element of a FELA claim). And, because BNSF's underlying liability was also contested, we must remand the dispute for a new trial. TEX. R. APP. P. 44.1(b) (barring an appellate court from ordering a separate trial solely on liquidated damages if liability is contested).

As previously mentioned, the issue we addressed is dispositive of the appeal. In so addressing the issue, we reverse the judgment of the trial court and remand the cause to it for a new trial.

Brian Quinn
Chief Justice

[4] We considered Epple's contention that other instructions included in the charge rendered the question and instruction sought by BNSF unnecessary. The other instructions did not deal with the relationship between pre-existing conditions and their causal responsibility for some or all of the damages sought by Epple. As the latter suggested, it may be that a defendant takes the plaintiff as he finds him, as instructed by the trial court, but under the FELA a defendant is not liable for damages that the plaintiff nonetheless would have suffered without the happenstance of the defendant's negligence.