South v. Amtrak

290 N.W.2d 819
Supreme Court of North Dakota
March 20, 1980

Civil No. 9664. Case officially styled as "South v. National Railroad Passenger Corporation." Billy Lee South and Delores South, husband and wife, Plaintiffs and Appellees v. National Railroad Passenger Corporation (AMTRAK), Burlington Northern Railroad, Inc., Leslie Roy Strom and S. M. Burdick as Public Special Administrator of the Estate of Howard W. Decker, Deceased, Defendants and Appellants. Appeal from the Grand Forks County District Court, the Honorable Kirk Smith, Judge. Opinion of the Court by Paulson, Justice. Davies, Pearson, Anderson, Seinfeld, Gadbow, Hayes and Johnson, Box 1657, Tacoma, Washington 98401 and Ralph S. Oliver, Box R, Larimore, North Dakota 58251, for plaintiffs and appellees; appearances by Ralph S. Oliver, Alvin A. Anderson, and Edward S. Winskill; argued by Alvin A. Anderson and Edward S. Winskill. Nilles, Hansen, Selbo, Magill, and Davies, Box 2626, Fargo, North Dakota 58108, for defendants and appellants; argued by Frank J. Magill.

PAULSON, J.

This is an appeal by the defendants, National Railroad Passenger Corporation (AMTRAK), Burlington Northern Railroad, Inc., Leslie Roy Strom, and S. M. Burdick as Public Special Administrator of the estate of Howard W. Decker, deceased [herein collectively referred to as the "Railroad"], from the judgment of the Grand Forks District Court, entered March 21, 1978, and amended May 12, 1978, in which the court, upon jury verdicts, awarded the plaintiff Billy Lee South [herein referred to as "South"] $948,552, including costs, and awarded the plaintiff Delores South $126,000, including costs. The Railroad also appeals from the order of the district court, entered May 16, 1979, in which the court denied its motion for judgment notwithstanding the verdict or in the alternative for a new trial. We affirm.

An action was commenced by South for damages sustained as a result of a collision between a pickup truck, owned and driven by South, and the Railroad's train at the Barrett Avenue crossing in Larimore, North Dakota, on January 17, 1976, at approximately 6:20 a.m. South sustained serious injuries in the collision. He sued the Railroad for damages on a theory of negligence, and his wife, Delores, also sued the Railroad for damages allegedly incurred by the loss of her husband's consortium.

Although pertinent facts will be detailed as each issue is discussed, a brief recitation of the facts at this point should be helpful in acquiring an understanding of the issues.

Prior to the collision South was employed as a missile site superintendent. South lived in Larimore, and on the morning of the collision he, for the first time, was driving to work at a new missile site location to which he had been assigned. To drive to the old work site South crossed the railroad tracks in Larimore at the Towner Avenue crossing, but in order to drive to the new work site South took a route which crossed the tracks at the Barrett Avenue crossing.

As South approached the Barrett Avenue crossing traveling south at approximately 20 miles per hour, a westbound AMTRAK passenger train was also approaching the Barrett Avenue crossing traveling at approximately 68 miles per hour. Both the train and South's pickup reached the crossing at approximately the same instant and the front of the train engine collided with the left front portion of South's vehicle.

The parties do not dispute that as one approaches the Barrett Avenue crossing traveling south his view of the tracks to the east is obstructed. The parties do dispute, however, the extent of the obstruction and the part such obstructed view played in the collision between South's pickup and the train. South's expert witnesses testified that

under the conditions existing at the time of the collision it was impossible for South to see the train in time to stop before reaching the railroad tracks. South asserts that the train whistle did not blow a warning of the train's approach to the Barrett Avenue crossing, and several witnesses testified on South's behalf that although they were in a position to hear the train whistle at the Barrett Avenue crossing that morning they did not hear the whistle blow. South also introduced evidence to support his assertion that the railroad negligently maintained the crossbuck sign at the Barrett Avenue crossing.

The Railroad asserts that it was not negligent in the operation of its train and that the maintenance of the crossbuck sign was not a material issue because South was aware of the location of the railroad tracks running through Larimore. Several witnesses testified, on behalf of the Railroad, that the train whistle did blow a warning on the morning of the collision. The Railroad also attempted to prove that South was negligent in failing to ascertain the presence of the train and in failing to safely stop his vehicle prior to reaching the railroad tracks.

At the conclusion of the trial the jury returned a verdict in favor of South and his wife, Delores, against the Railroad. The jury, upon finding that the Railroad was 100 percent negligent and that South was not negligent, awarded general and special damages of $935,000 to South and $125,000 to Delores South.[1]

The Railroad has raised numerous. issues on appeal, each of which we shall discuss in this opinion.~

Prior to opening argument the Railroad made a motion *in limine* to exclude all evidence referring to the train engineer's failure to cover South with his parka or to otherwise assist South at the scene of the accident, on the ground that such evidence was prejudicial. The engineer who was operating the train at the time of the accident died prior to the commencement of the trial in this case. Prior to his death, the Souths' counsel had taken the engineer's deposition, and it was part of this deposition testimony that the Railroad sought to exclude in its motion *in limine*. The motion was denied, and during opening argument the Souths' counsel made the following statement:

> The evidence will show that as he was lying there, and I'm taking the deposition of Mr. Decker, the engineer, I says to Mr. Decker, 'Did you have anything to cover him up with?' 'No, I told the police,' he says. 'Was it cold out? What did you do?' 'I went to the ,cab.' I said, 'Did you have anything to cover him up with?' He said, 'My new jacket.' I says, 'Why didn't you go and cover him up?' He says, 'That was a brand-new jacket. It cost $55. I wasn't going to get it bloody. The hood cost me $7 alone and I was going to be in Devils Lake the next day and I didn't want to get cold. I wasn't going to get a jacket bloody for anybody.' I said, 'If you'd have known he was alive, would you have covered him up?' He said, 'No, I wouldn't ruin that jacket.'

Subsequent to opening arguments, the trial court ruled in chambers that he would not allow certain parts of the engineer's deposition testimony regarding the parka incident to be read to the jury because its prejudicial effect outweighed its probative

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[1] In addition to the damages awarded by the jury the judgment of the court included an award of costs and disbursements in the amount of $13,552 to South and of $1,000 to Delores South.

value. The trial court allowed the following portion of the engineer's deposition on this matter to be read to the jury:

> Q. [Plaintiff's counsel],: And did you know where Billy South was laying during this time?
>
> A. [Decker]: Yes. I saw a hump on the right-of-way there. But I didn't go over there.
>
> Q. Did you have anything in the cab to cover him up with, blanket or anything like that?
>
> A. No, no.
>
> A. ... I tried to do my best to get the Highway Patrolman and police to get some covering for him.
>
> Q. Sure. They are the ones who are supposed to do things like that. What kind of--what day of the week was this?
>
> A. I think it was on a Saturday morning.
>
> Q. Okay. And if you had--
>
> A. In the first place, when he was layin' there I honest to God thought he was dead. Wouldn't do any good to cover him up.
>
> A. No, I just went out there with my coveralls.
>
> Q. I see.
>
> A. All the time my coat was hanging in the cab.
>
> Q. And before the police came how close did you walk over to Billy South to see whether or not--
>
> A. I couldn't do anything anyway. They tell you not to move an injured person, the ambulance crew.
>
> Q. You have heard about shock, haven't you?
>
> A. Yes. I never go over.
>
> Q. Did you ever take any courses in first aid?
>
> A. No.
>
> Q. Never?
>
> A. (Indicating no.)

During closing argument, the Souths' counsel commented on the foregoing testimony.

In its instructions to the jury the trial court stated that if the jury found by a fair preponderance of the evidence that the Railroad failed to provide any necessary care for South after the accident he could recover for damages proximately resulting from such failure.

The Railroad asserts that counsel's opening statement was highly prejudicial and constitutes grounds for a new trial. The Railroad also asserts that it was improper for the Souths' counsel to comment on the parka incident during closing argument after the

court had ruled to exclude such matters. The Railroad's latter assertion is based on an inaccurate premise of the trial court's ruling. The foregoing quoted portions of the deposition which were read to the jury demonstrate that the trial court did not exclude all testimony regarding the parka incident. Only certain statements made by the engineer which the court concluded were highly prejudicial and of little or no probative value were deleted from the deposition testimony. Provided the trial court did err in admitting this evidence of the engineer's failure to assist South, then plaintiff counsel's comments during closing argument were not improper.

In order to determine whether it was error for the trial court to admit evidence of the engineer's failure to render assistance after the accident this Court must resolve, as a matter of first impression, whether there is an affirmative duty to render assistance to an injured person, and, if so, under what circumstance Unless the engineer in this case had such an affirmative duty to assist South, all testimony regarding his failure to cover South with his parka or to otherwise assist was improperly admitted evidence--irrelevant and immaterial to any issue in the case.

During trial the Souths contended that the engineer had an affirmative duty to assist South by virtue of § 39-08-06, N.D.C.C., which imposes upon "the driver of any vehicle involved in an accident" a duty to render reasonable assistance to any person injured in such accident. We disagree that the engineer incurred a duty to assist under § 39-08-06, N.D.C.C. Trains are excluded from the definition of "vehicle" under Title 39, N.D.C.C, as follows:

> 39-01-01.Definitions. In this title, unless the context or subject matter otherwise requires: ...
>
> 72. 'Vehicle' shall include every device in, upon, or by which any person or property may be transported or drawn upon a public highway, except devices moved by human power or used exclusively upon stationary rails or tracks.

We conclude that the requirements of § 39-08-06, N.D.C.C., do not pertain to trains, and no duty was imposed upon the engineer of the train in the instant case by virtue of that section.

On the subject of whether there is a common law duty to assist one in peril Prosser comments as follows in his treatise, Prosser, Law of Torts, Section 56 (4th Ed. 1971):

> Because of this reluctance to countenance 'nonfeasance' as a basis of liability, the law has persistently refused to recognize the moral obligation of common decency and common humanity, to come to the aid of another human being who is in danger, even though the outcome is to cost him his life....
>
> Thus far the difficulties of setting any standards of unselfish service to. fellow men, and of making any workable rule to cover possible situations where fifty people might fail to rescue one, has limited any tendency to depart from the rule to cases where some special relation between the parties has afforded a justification for the creation of a duty, without any question of setting up a rule of universal application." [Footnotes omitted.]
>
> It also is recognized that if the defendant's own negligence has been responsible for the plaintiff's situation, a relation has arisen which imposes a duty to make a reasonable effort to give assistance, and avoid any further harm. Where the original danger is created by innocent conduct, involving no fault on the part of

> the defendant, it was formerly the rule that no such duty arose; but this appears to have given way, in recent. decisions, to a recognition of the duty to take action, both where the prior innocent conduct has created an unreasonable risk of harm to the plaintiff, and where it has already injured him. [Footnotes omitted.]

The Restatement (Second) of Torts S 322 (1965) takes the following position:

> § 322. Duty to Aid Another Harmed by Actor's Conduct
>
> If the actor knows or has reason to know that by his conduct, whether tortious or innocent, he has caused such bodily harm to another as to make him helpless and in danger of further harm, the actor is under a duty to exercise reasonable care to prevent such further harm.

Thus, the Restatement view is that one who harms another has an affirmative duty to exercise reasonable care to prevent further harm.

Although there is a paucity of case decisions involving this matter a few jurisdictions have discussed the issue. See, Annot., 33 A.L.R.3d 301 (1970). The Supreme Court of North Carolina held in *Parrish v. Atlantic Coast Line R.R. Co.*, 221 N.C. 292, 20 S.E.2d 299 (1942), that one who negligently harms another must take all steps necessary to mitigate the harm. See, also, *Whitesides v. Southern Railway Co.*, 128 N.C. 229, 38 S.E. 878 (1901).The Appellate Court of Indiana in *Tubbs v. Argus*, 140 Ind. App. 695, 225 N.E.2d 841 (1967), after quoting approvingly from § 322 of the Restatement (Second) of Torts, held that "... an affirmative duty arises to render reasonable aid and assistance to one who is helpless and in a situation of peril, when the injury resulted from the use of an instrumentality under the control of the defendant." See also, *L.S. Ayres & Co. v. Hicks*, 220 Ind. 86, 40 N.E.2d 3314 (1942).

We believe that the position expressed by § 322, Restatement (Second) of Torts (1965), reflects the type of basic decency and human thoughtfulness which is generally characteristic of our people, and we therefore, adopt the standard imposed by that section. Accordingly, we hold that a person who knows or has reason to know that his conduct, whether tortious or innocent, has caused harm to another has an affirmative duty to render assistance to prevent further harm. One who breaches such duty is subject to liability for damages incurred as a result of the additional harm proximately caused by such breach. We further hold that, in the instant case, the trial court did not err in the admission of the engineer's testimony regarding the assistance, or lack thereof, to South at the scene of the accident, nor did the court abuse its discretion in refusing to admit those portions of the testimony which the court determined were highly prejudicial and irrelevant.

During opening argument to the jury, the Souths' counsel referred to statements made by the engineer as to why he did not cover South with his jacket. As noted previously, some of those statements were never admitted into evidence because of the court's ruling that they were highly prejudicial. As part of its instruction to the jury the trial court gave a standard instruction that the arguments or other remarks of the attorneys were not to be considered as evidence in the case and that any comments by counsel concerning .the evidence which were not warranted by the evidence actually admitted were to be wholly disregarded. We recognize the reality of a situation such as this wherein inflammatory comments made by counsel during opening argument, once impressed upon the minds of the jurors, can perhaps never be totally erased or their effect completely negated by an instruction that such comments are not evidence and

should be wholly disregarded. Nevertheless, in view of the instruction as given and in view of the proper limited admission into evidence of the engineer's testimony regarding his failure to assist South after the accident we hold that the disputed comments of the Souths' counsel in opening argument did not constitute prejudicial error entitling the Railroad to a new trial.