LOUISIANA & ARKANSAS RAILWAY COMPANY *v.* MULDROW.

Opinion delivered April 28, 1930.

1. MASTER AND SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—ASSUMED RISK.—The defense of assumed risk was not abolished by the Federal Employers' Liability Act (45 USCA, § § 51-59).
2. MASTER AND SERVANT—ASSUMED RISK.—A section hand *held* not, as matter of law, to have assumed the risk of negligence of fellow servants assisting him in lifting steel rails.
3. EVIDENCE—PREPONDERANCE.—The "preponderance of evidence" and the "greater weight of evidence" does not mean the greater number of witnesses, but evidence entitled to greater weight in respect to credibility.
4. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—A verdict supported by substantial testimony will not be set aside on appeal as contrary to the weight of testimony.
5. WITNESSES—CONTRADICTORY STATEMENT.—In a personal injury action, refusal to admit testimony showing what plaintiff's attorney said after consultation with plaintiff about the probability of recovery *held* not error, as not showing that plaintiff had made an inconsistent statement.

Appeal from Hempstead Circuit Court; *W. H. Arnold,* Special Judge; affirmed.

STATEMENT BY THE COURT.

This is a suit for damages for alleged personal injuries suffered by appellee while engaged in helping to load steel rails on the cars of appellant at the place in Arkansas for transportation and use on its line in Louisiana, resulting in a verdict for $1,000 against appellant, from which judgment it prosecutes this appeal.

The pleadings and proceedings show the action was upon the Liability created by the Federal Employers' Liability Act.

It appears from the testimony that appellee, a negro section hand, was injured while in the employ of appellant on February 2, 1929, while engaged with seven other negro section hands, working under the direction of two section foremen, in loading rails 32 feet long and weighing 825 pounds each. In the operation the eight men would pick up a rail, four at each end, walk up the embankment carrying it about knee high, raise it to the

height of their shoulders and throw it on a flat car. Muldrow, appellee, was the fourth man from one end of the rail. The rails were being loaded under the direction of a "caller," who would say, "Turn it down," "put your hands on it," "all pick up," "all walk with it, head high, throw away." The men following the directions as given had loaded one or two rails, and after the particular rail causing the injury had been raised to the height of the carriers' shoulders the "caller" directed "throw away," meaning to throw the rail on to the flat car. The men on the opposite end of the rail from Muldrow threw their end of the rail on the flat car, and the men with him at his end of the rail turned loose of the rail without throwing it, leaving Muldrow to hold the weight of the rail not on the flat car by himself—virtually one-half of it. Some one placed a stanchion in the car to prevent the end of the rail upon the car from slipping off, and in a few seconds the men who had turned loose the rail came back to the assistance of Muldrow and shoved the rail on the car.

Appellee testified that he felt something slip or pop in his back at the time the entire weight of the rail or one-half of it was thrown upon him, and that because of his position he was forced to hold the rail in order to avoid the danger of its falling upon him if he turned it loose. That he attempted to follow the order of the "caller" to "throw away," but because the other three men at his end of the rail did not "throw away" and turned the rail loose, he was unable to do anything but hold the weight of it. He was unable to continue work after the injury, sat down by the section house and later went to a doctor by direction of his foreman. Stated that he had been unable to work since that day, and suffered great pain until the present time. He had attempted to do a little work upon one occasion, but after an hour or two fainted and remained unconscious for several hours. That his physical condition had not improved since the injury. After he was injured the

manner of loading the rails was changed, and instead of their being carried by the men and thrown upon the car, they were "skidded" by means of two short rails from the ground up to and upon the car.

Appellee's statement of the cause of the injury was contradicted in many particulars, virtually by the other seven men engaged in the work and the two foremen. One of the foremen however, testified that appellee had claimed to be injured after loading the rails, "said he had hurt himself by lifting too much," and the method of loading was changed by the foreman after one or two rails had been loaded. Some of the witnesses testified that it was changed after one rail had been loaded and others after two had been loaded.

The court refused to allow the introduction of testimony showing what the attorney had said after consultation with his client, appellee, about the probability of recovery as in effect a contradictory statement of his testimony on the trial. Exceptions were saved to the giving of certain instructions at the request of appellee, and the refusal of others, thereby depriving appellant of the benefit of the defense of assumption of risk by the injured employee.

Steve Carrigan and *B. E. Carter,* for appellant.

John P. Vesey, for appellee.

KIRBY, J., (after stating the facts). Appellant first contends that the evidence disclosed that appellee had assumed the risk, and that the court erred in not directing a verdict in its favor. It is conceded that the action was brought under the Federal Employers' Liability Act, which it is correctly claimed did not abolish the defense of assumed risk. The evidence shows that, while the men were engaged in loading the rails, four at each end thereof, the three men carrying the end of the rail with appellee turned loose without direction of the "caller" allowing all the weight of it to fall on appellee, resulting in or causing his injury. Certainly he had no means of knowing or any intimation that they were going to turn

the rail loose, leaving the weight of it on him, in time to have protected himself against the negligence, this notwithstanding they were laughing and talking while doing the work, and might not have heard or heeded the direction of the "caller." This could have constituted no notice to him nor caused him to realize that they might negligently turn the rail loose before time or without throwing it on the car, leaving the whole weight to fall upon and be supported by him, and he could not, as a matter of law, be held to have assumed the risk of such negligence.

The court told the jury that one of the defenses was assumption of risk, and that, if it should be found that appellee was injured because of the negligence of some agent or employee of appellant which contributed to or caused the injury, such negligence was one of the ordinary and usual risks of plaintiff's employment, and was assumed by him. In the latter part of instruction No. 2, the court told the jury that appellee assumed the ordinary risks incident to his employment, but not the negligence, if any, of appellant or its employees, "unless he knew of such negligence before he was injured, if he was." He also told the jury that, if they found he was injured in the manner alleged or claimed in the complaint, etc., they could find for him damages, "provided you do not find that his injuries, if any, arose from his having assumed the risks incident to his employment." The court did not take from the jury, as contended, consideration of the defense of assumption of risk, and the authorities relied upon have no application here.

Neither was error committed in giving appellee's requested instruction No. 1, complained of, which told the jury that where the term "preponderance of evidence" and "greater weight of evidence" was used in the instruction, it did not mean a greater number of witnesses on one side or the other. These terms were defined properly in instruction No. 2, complained of, by

saying "Does not mean necessarily the greater number of witnesses, but means evidence which in your judgment is entitled to greater weight in respect to its credibility."

It is next insisted that the verdict is contrary to the weight of the testimony, and, conceding this to be true, it was a matter to be addressed to the trial court and furnishes no grounds for reversal here, there being substantial testimony in support of it. *Newhouse Mill & Lumber Co.* v. *Keller,* 103 Ark. 538, 146 S. W. 855; *St. L. Sw. Ry. Co.* v. *Ellenwood,* 123 Ark. 428, 185 S. W. 768.

No error was committed in refusing to allow the witness Greene to state the full conversation that occurred in appellee's attorney's office in his presence relative to the cause of the accident. Appellant attempted to show indirectly that appellee had made a different statement as to the cause of his injury in stating the case to his attorney by showing that his attorney stated that if such was the case there was no liability. This was not a contradictory statement of the witness, nor a statement of his at all. Neither was it competent, since there was no relation of the entire statement of the facts by appellee to his attorney, nor an attempt to show any contradictory statement made by him there. His attorney might have been mistaken as to the law and liability in making any such statement, if he did make it, and it cannot be presumed that, because witness made a statement of the facts of the jury to his attorney, who expressed the opinion that there was no liability, that the witness had made a different statement to the one related on the stand.

It may be that appellee did not suffer the particular technically alleged injury as a result of the negligence of his fellow workmen in releasing the end of the steel rail and letting the entire weight fall or rest on him, but there was substantial testimony from which the jury could have found that he had suffered an injury to his back therefrom that caused the pain and physical dis-

ability complained of, and it was sufficient to show the injury and support the verdict. We find no error in the record, and the judgment is affirmed.