

Summary of SC91617, *Eddie Cluck v. Union Pacific Railroad Company*

Appeal from the Jackson County circuit court, Judge Ann Mesle

Argued and submitted Nov. 2, 2011; opinion issued May 1, 2012

Attorneys: Cluck was represented by Stephen H. Ringkamp of the Hulverson Law Firm in St. Louis, (314) 421-2313; Charles W. Armbruster III, Michael T. Blotevogel and Roy C. Dripps of Armbruster, Dripps, Winterscheidt & Blotevogel LLC in Alton, Ill., (800) 917-1529; and Jose Bautista of Bautista Allen in Kansas City, (816) 221-0382. Union Pacific was represented by Craig M. Leff, James M. Yeretsky, Gregory F. Maher, Christopher Confer and Spencer Throssell of Yeretsky & Maher LLC in Kansas City, (816) 842-5566. The Missouri Association of Trial Attorneys, which submitted a brief as a friend of the Court, was represented by Steven L. Groves of Holland, Groves, Schneller & Stolze LLC in St. Louis, (314) 241-8111; and Stephen H. Ringkamp of the Hulverson Law Firm in St. Louis, (314) 421-2313.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A man was injured by the accidental discharge of his co-employee's pistol while he was unloading the co-employee's luggage during a work-related trip. He appeals a verdict in favor of his employer, arguing the trial court erred in instructing the jury. In a 5-2 decision written by Judge Mary R. Russell, the Supreme Court of Missouri affirms the trial court's judgment. Under the federal employer's liability act, for an employer to be liable to an employee for a co-employee's conduct, the co-employee's actions must have occurred during work hours, within the scope of the employment and in furtherance of the employer's business. The injured man's proposed instructions failed to state the law correctly, and the trial court was under no duty to submit correct instructions on his behalf.

Chief Justice Richard B. Teitelman dissents. He would hold that two of the injured man's proposed instructions accurately state the law because he would find the conduct at issue was not the specific negligent act of carrying a loaded gun to work but rather was the co-employee's failure to warn his fellow employees of the danger posed by the gun while both were performing a work-related task. He would find the test for determining whether an employer can be held liable for its employee's act is whether, in context, the act occurred during the scope and course of employment, not whether the specific negligent act – here, carrying a loaded gun in luggage during a work-related trip – itself was in furtherance of the employer's business.

Facts: Union Pacific Railroad Company employees Eddie Cluck and Larry Clark were two members of a train crew whom the railroad transported in a crew van to Coffeyville, Kansas, where they were to spend the night in a hotel and crew a train the next day. Before the trip, Clark packed a loaded pistol with the safety disengaged in his luggage because he planned to sell it to a friend before the trip. He did not sell the pistol, and he still had it in his luggage when the crew arrived in Coffeyville. No one but Clark knew there was a pistol in his luggage. When the railroad employees arrived in Coffeyville, Cluck helped unload the crew's luggage, including Clark's luggage containing the pistol. The pistol accidentally discharged, and the bullet hit Cluck's right knee. Cluck subsequently sued Union Pacific, alleging the railroad was liable for

his injuries under the federal employer's liability act (FELA). At the close of evidence at trial, both parties sought directed verdict, and the trial court overruled both motions. During a conference to discuss jury instructions, Cluck sought to submit a verdict-directing instruction under the imputed liability theory of Missouri Approved Instruction (MAI) 24.01(A). The trial court believed each of Cluck's proposed verdict directors misstated the law by improperly addressing or wholly ignoring the element of *respondeat superior* (under which an employer can be held liable for the actions of its employee) and gave him numerous opportunities to propose a correct verdict director. After six attempts, his failure to propose an instruction that accurately instructed the jury as to the law resulted in the trial court refusing to submit his theory of imputed liability to the jury. The trial court did submit, however, Cluck's alternatively pleaded theory of United Pacific's direct liability to the jury under MAI 24.01(B), despite objections from both parties, though neither party appeals this ruling. The jury returned its verdict in Union Pacific's favor. Cluck appeals.

AFFIRMED.

Court en banc holds: (1) To submit an imputed negligence theory to the jury under FELA, Cluck was obligated to make a submissible case that he and Clark were acting within the scope and course of their employment by showing that Clark's negligent conduct was undertaken in furtherance of the interests of the employer. Under FELA, for an employer to be liable to an employee for a co-employee's conduct, it is not enough that the injury occur during the hours of both employees' employment; rather, the co-employee's actions must have been within the scope of the employment, in furtherance of the employer's business. *Lavender v. Illinois Central Railroad Co.*, 219 S.W.2d 353, 357 (Mo. 1949) (holding that a railroad was not liable after its employee negligently discharged a firearm, killing another employee, because the co-employee's acts causing the gun's negligent discharge were not in furtherance of the railroad's business and, therefore, were outside the course and scope of employment). It is not necessary that the employee at fault have the employer's authority to commit the particular act. *Id.* at 357-58. Under certain circumstances, the employer may be liable if the employee's act was contrary to the employer's express orders. *Id.* But for the employer to be held liable, the act always must have been done in furtherance of the employer's business. *Id.* This interpretation of FELA – requiring a co-employee's negligent act to be in furtherance of the employer's business to impose vicarious liability on the employer for injuries caused by the act – is the same followed by the vast majority of federal courts that have addressed the issue of co-employee liability under FELA.

(2) Cluck's proposed verdict-directing instructions were not supported by the law. Two of his proposed instructions would have required the jury to find only that Clark failed to warn Cluck either of the presence of the loaded gun in his luggage with the safety off or of the presence of an unsafe condition – not that Clark was acting in the course and scope of his employment. As such, these instructions did not accurately state the law for the reasons discussed in Paragraph 1 above. The other two of Cluck's proposed instructions contained the phrase “course and scope of employment” but nonetheless did not instruct the jury accurately as to the applicable *respondeat superior* principles. Cluck was not entitled to have the trial court submit a faulty instruction to the jury.

(3) The trial court did not commit reversible error in refusing to submit Cluck's faulty instructions, and it was under no duty to draft a correct instruction for Cluck. Although a party in a civil case is entitled to an instruction on any theory supported by the evidence, the trial court does not have a duty to modify a party's instruction or submit a correct instruction in the place of the party's erroneous instruction. As the court of appeals has noted, it is the duty of an attorney for a party to aid the court in giving proper instructions that support the party's claim, but if the attorney fails to render such aid, the trial court should refuse to submit the case to the jury. *Black v. Cowan Construction Co.*, 738 S.W.2d 617, 620 (Mo. App. 1987). Here, despite numerous opportunities afforded by the trial court to submit a correct instruction, Cluck failed to do so.

Dissenting opinion by Chief Justice Teitelman: The author would reverse the trial court's judgment and remand (send back) the case for a new trial. He would hold that two of Cluck's proposed instructions accurately state the law because he would find the conduct at issue was not Clark's specific negligent act of carrying a loaded gun to work but rather was Clark's failure to warn Cluck of the danger posed by the gun while both were performing a work-related task. The Court's conclusion that Cluck's proposed instructions improperly recast the "course and scope of employment" as a purely temporal test is based on an incorrect premise that the course and scope of employment analysis looks solely at whether the specific negligent act that caused the injury was an action that actually furthered the employer's interests. The analysis of *respondeat superior* liability explicitly recognizes that actions occur in context – whether the conduct causing injury was undertaken in the course and scope of employment. He would hold that *Lavender v. Illinois Central Railroad Co.*, 219 S.W.2d 353, 358 (Mo. 1949), is inapposite because, unlike here, in *Lavender* the accidental gunshot occurred while the employees were engaged in "horseplay" that was wholly unrelated to the performance of a work-related task and, therefore, was not in furtherance of the railroad's business. Here, there is no dispute that Clark stored the gun in his luggage on a work-related trip and that he failed to warn Cluck about the gun as they unloaded the luggage as part of a work-related task, resulting in the injury to Cluck. As such, two of Cluck's proposed instructions accurately stated the law and are supported by the evidence. The author, therefore, would hold that the circuit court erred in failing to submit these instructions to the jury, causing prejudice to Cluck because he was deprived of the opportunity to submit his case to the jury on a theory of vicarious liability that is supported by the evidence.