The Burger Court Opinion Writing Database

Kelley v. Southern Pacific Co.

419 U.S. 318 (1974)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 20, 1974

Re: 73-1270 - Kelley v. Southern Pacific Co.

Dear Thurgood:

As revised, please join me.

Regards,

WEB

Mr. Justice Marshall

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1270

Eugene C. Kelley, Petitioner,
v.
Southern Pacific Company.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

11-16

[November —, 1974]

MR. JUSTICE DOUGLAS, dissenting.

Today's decision marks a return to the era when the FELA was interpreted in a hostile and restrictive manner by the federal judiciary. Accordingly I am constrained to register my dissent.

The first Employers' Liability Act was enacted in 1906, 34 Stat. 232, and this Court responded by holding the Act unconstitutional. *Employers' Liability Cases,* 207 U. S. 463. Congress tried again in 1908 and produced the Act which is now in effect. 45 U. S. C. § 51 *et seq.* This time the Court upheld the statute, *Second Employers' Liability Cases,* 223 U. S. 1, but judicial hostility did not end. The defense of assumption of risk was, for the most part, held to be still available to the employer. *Seaboard Air Line R. Co.* v. *Horton,* 233 U. S. 492. The Act sought expressly to control the use of a contributory negligence defense, but the Court circumvented this to a considerable degree by developing the doctrine of "primary duty." See *Great Northern R. Co.* v. *Wiles,* 240 U. S. 444. Finally, in 1939, the Congress decided that further legislation was needed. 53 Stat. 1404. The result was a more liberal view of the Act which did not provide the employer with so many defenses. See *Tiller* v. *Atlantic Coast Line,* 318 U. S. 54.

Since 1939 this Court has interpreted the Act in the spirit of those amendments. Gradual liberalization has

1, 6, 8

To : The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

From: Douglas, J.

Circulate: _____

Recirculate: 11-29

SUPREME COURT OF THE UNITED STATES

No. 73-1270

Eugene C. Kelley, Petitioner, v. Southern Pacific Company. } On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[November —, 1974]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN concurs, dissenting.

Today's decision marks a return to the era when the FELA was interpreted in a hostile and restrictive manner by the federal judiciary. Accordingly I am constrained to register my dissent.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 18, 1974

RE: No. 73-1270 Kelley v. Southern Pac. Co.

Dear Bill:

Please join me in your dissenting opinion in the above.

Sincerely,

Bill

Mr. Justice Douglas

cc: The Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1270

Eugene C. Kelley, Petitioner, v. Southern Pacific Company. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[November —, 1974]

MR. JUSTICE STEWART, dissenting.

I would vacate the judgment of the Court of Appeals and remand this case to the District Court for a determination of whether Kelley was "employed" by the Southern Pacific.

The District Court was in error in its apparent reliance on general agency principles, as opposed to the particular principles of "master-servant" law, in determining Kelley's status under the FELA. But once the proper legal standard is isolated, it is the original fact finder who, having heard the testimony and seen the evidence, is best placed to apply that standard to the facts of this case.

The Court of Appeals avoided a remand by reading the District Court's findings—mistakenly in my view—as having rejected a master-servant relationship between the railroad and Kelley. This Court avoids a remand by undertaking itself to measure the paper record against the proper legal standard. Both justice and the efficient allocation of judicial resources would be better served if trial process were carried out by the District Judge.

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73–1270

Eugene C. Kelley, Petitioner, v. Southern Pacific Company. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[November —, 1974]

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To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1270

From: Stewart, J.

Circulated: DEC 6 1974

Recirculated: _____

Eugene C. Kelley, Petitioner,
v.
Southern Pacific Company.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[December —, 1974]

MR. JUSTICE STEWART, concurring in the judgment.

In determining Kelley's status under the FELA, the District Judge apparently relied on general agency principles, rather than on the particular principles of master-servant law. This was error, and it is thus proper to remand this case to the District Judge so that he can take a fresh look at the record, in light of the correct legal standard.

The correct standard is not a novel one. The law of master and servant has been with us for a long time, and its adequate exposition elsewhere, *e. g.*, Restatement (Second) of Agency §§ 220, 226, 227, and 5 (2), renders much of the Court's extended discussion unnecessary. But my chief problem with the Court's opinion is its insistence upon dissecting the particularized evidence in this case. Whether or not the Southern Pacific Company controlled or had the right to control Kelley's work is for the original factfinder to determine.

The Court today substantially invades the trial court's function. If the Court wishes to decide the issue itself, a remand is unnecessary. If the Court wishes to leave the decision to the District Judge, who saw the evidence and heard the witnesses, much of the detailed discussion of the evidence in the Court's opinion is gratuitous.

I believe that both the efficient allocation of judicial resources and the ends of justice are best served by a

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 29, 1974

Re: No. 73-1270 - Kelley v. Southern Pacific Co.

Dear Thurgood:

Please join me in your November 26 circulation in this case.

Sincerely,

Mr. Justice Marshall

Copies to Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Marshall, J.

1st DRAFT

Circulated: NOV 15 1974

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 73–1270

Eugene C. Kelley, Petitioner, v. Southern Pacific Company. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[November —, 1974]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Petitioner Eugene Kelley was seriously injured when he fell from the top of a tri-level railroad car where he had been working. He sought recovery for his injuries from the respondent railroad under the Federal Employer's Liability Act (FELA), 35 Stat. 65, as amended, 45 U. S. C. §§ 51–60. Under the FELA, a covered railroad is liable for negligently causing the injury or death of any person "while he is employed" by the railroad. Although petitioner acknowledged that he was technically in the employ of a trucking company rather than the railroad, he contended that his work was sufficiently under the control of the railroad to bring him within the coverage of the FELA. The District Court agreed, but the Court of Appeals for the Ninth Circuit reversed, 486 F. 2d 1084 (CA9 1973), creating an apparent conflict with a previous decision of the Fourth Circuit, *Smith* v. *Norfolk & Western R. Co.*, 407 F. 2d 501 (CA4), cert. denied, 395 U. S. 979 (1969).[1] We granted certiorari to

[1] Very similar fact situations have arisen in a number of federal and state cases. *E. g.*, *Tarboro* v. *Reading Co.*, 397 F. 2d 941 (CA3 1968), cert. denied, 393 U. S. 1027; *Mazzucola* v. *Pennsylvania R. Co.*, 281 F. 2d 267 (CA3 1960); *Cimorelli* v. *New York Central R. Co.*, 148 F. 2d 575 (CA6 1945); *Thornton* v. *Norfolk & Western R.*

Wm. Douglas
Oct 1974

8, 12, 14

5

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Marshall, J.

2nd DRAFT

Circulated:

Recirculated: NOV 19 197

SUPREME COURT OF THE UNITED STATES

No. 73–1270

Eugene C. Kelley, Petitioner, v. Southern Pacific Company. } On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[November —, 1974]

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[1] Very similar fact situations have arisen in a number of federal and state cases. *E. g., Tarboro* v. *Reading Co.*, 397 F. 2d 941 (CA3 1968), cert. denied, 393 U. S. 1027; *Mazzucola* v. *Pennsylvania R.*

Wm. Doyle
Oct 74

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 26, 1974

MEMORANDUM TO THE CONFERENCE

Re: No. 73-1270 -- Kelley v. Southern Pacific Co.

Since it appears that there will not be majority support for the result reached in the first draft of this opinion, I have altered Part III somewhat and added a fourth section remanding the case to the District Court. I recognize that this departs from the course charted at Conference, but I can see no other way of finding a majority.

T.M.

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2, 4, 8, 9, 11-14

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

From: Marshall, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 73-1270

Recirculated: NOV 26 1974

Eugene C. Kelley, Petitioner, v. Southern Pacific Company. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[November —, 1974]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

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Wm. Douglas 26 74

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 7, 1975

file

MEMORANDUM TO THE CONFERENCE

Re: No. 74-83 -- Pelliccioni v. Schuyler Packing Co.

This case was held for Kelley v. Southern Pacific Co., No. 73-1270. Petitioner was employed at the time of his injury as a truck driver for the New York Central Transport Co., a wholly owned subsidiary of the Penn Central Railroad. His job was to drive a "Commando," a vehicle that moves trailers that have just been unloaded from trains to storage areas in the railroad yard. While petitioner was moving a trailer packed by respondent Schuyler Packing Co., his vehicle overturned and he was injured. He argued that he was an "employee" of the Penn Central because (1) the New York Central Transport Co. was a wholly owned subsidiary of the Penn Central; (2) petitioner was a servant of the New York Central Transport Co., over which respondent Penn Central had a "complete right of control;" and (3) petitioner was working on premises owned and controlled by Penn Central.

The trial court refused to permit the case to go to the jury, and the New Jersey Superior Court, Appellate Division, affirmed in a per curiam decision. The New Jersey Supreme Court denied certification. The trial court's reasons for refusing to give the case to the jury are not specified, and the appellate court's opinion is quite cryptic on the question of employment. Although from the papers petitioner's claim looks pretty thin, the best course would appear to be to vacate and remand in light of our decision in Kelley. Petitioner alleged that the evidence demonstrated that he was, in effect, a subservant of the railroad. Under Kelley, that would be sufficient to establish

the employment relationship necessary to bring him within the coverage of the FELA. The appellate division seems not to have dealt with this claim directly, and it may be best to give it an opportunity to reconsider petitioner's "employment" argument in light of the standards recited in Kelley.

Petitioner's second point -- that the trial court erred in refusing to submit his common law negligence claim against the Schuyler Packing Co. to the jury -- is obviously not certworthy.

T.M.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: Blackmun, J.

Circulated: 11/20/74

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 73-1270

Eugene C. Kelley, Petitioner, *v.* Southern Pacific Company. } On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[November —, 1974]

MR. JUSTICE BLACKMUN, dissenting.

The Court in its decided cases has traveled far in order to accord Federal Employers Liability Act coverage to a variety of employment situations. See, for example, *Shanker* v. *Baltimore & Ohio R. Co.*, 374 U. S. 1, 5 (1963); and *North Carolina R. Co.* v. *Zachary*, 232 U. S. 248, 260 (1914). Its many decisions are now a well-chalked slate that should not be significantly erased without good reasons. Neither should the Court change a mature and highly developed legal standard, long accepted by Congress, without explaining those reasons or even saying what the effect will be.

For me, the Court's *per curiam* opinion in *Baker* v. *Texas & Pacific R. Co.*, 359 U. S. 227 (1959), controls this case. There the injured workman had been hired by a corporation engaged in work along the railroad's main line right-of-way. The work consisted of pumping sand and cement into the roadbed in order to strengthen and stabilize it. The workman was struck by a train while engaged at this job. The petitioners contended that he was killed while he was "employed" by the railroad, within the meaning of the Act. Evidence on the question was introduced, but the trial judge declined to submit the issue to the jury, holding as a matter of law that the workman was not in such a relationship to the railroad at the time of his death as to entitle him to the

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1270

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[November —, 1974]

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SUPREME COURT OF THE UNITED STATES

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[November —, 1974]

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 18, 1974

No. 73-1270 Kelley v. Southern Pacific

Dear Thurgood:

Please join me.

Sincerely,

L. Lewis

Mr. Justice Marshall

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 27, 1974

No. 73-1270 Kelley v. Southern Pacific

Dear Thurgood:

I am willing to accept the revisions in the third draft of your opinion if, as I understand, they are necessary to obtain a Court opinion.

Sincerely,

Lewis

Mr. Justice Marshall
CC: The Conference
LFP/gg

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 18, 1974

Re: No. 73-1270 - Kelley v. Southern Pacific

Dear Thurgood:

Please join me.

Sincerely,

WHR

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 27, 1974

Re: No. 73-1270 - Kelley v. Southern Pacific

Dear Thurgood:

While I was glad to join your earlier draft of this opinion, I am perfectly willing to go along with the revisions contained in the third draft if they are necessary to produce a majority opinion.

Sincerely,

WHR

Mr. Justice Marshall

Copies to the Conference