

1953

Wilfred A. Rogalski v. Phillips Petroleum Company : Reply Brief of Appellant

Utah Supreme Court

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Recommended Citation

Reply Brief, *Rogalski v. Phillips Petroleum Co.*, No. 7982 (Utah Supreme Court, 1953).
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In the Supreme Court of the State of Utah

WILFRED A. ROGALSKI,

Plaintiff and Respondent,

vs.

PHILLIPS PETROLEUM COMPANY,
a corporation,

Defendant and Appellant.

Case No. 7982

REPLY BRIEF OF APPELLANT

McKAY, BURTON, McMILLAN & RICHARDS,
and PAUL E. REIMANN

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SEP 1 1953

Clerk, Supreme Court, U.

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PRELIMINARY STATEMENT

The respondent fails to state whether he disagrees with the Statement of Facts set forth in the Brief of Appellant. Instead, he proceeds to make a number of inaccurate statements, and also argumentative assertions unwarranted by the record. The appellant will discuss some of the inaccuracies in statements of respondent in reply to the points listed in the Brief of Respondent. The respondent avoids all reference to the admis-

sions of the respondent and the undisputed facts which show that plaintiff established no cause of action against defendant.

On page 2, in his Preliminary Statement, respondent states that the case was "submitted to a jury with appropriate instructions as to the definition of a business visitor or invitee and the duty of care owed to such a person." The instructions will be searched in vain for any appropriate definition of a business visitor or for any information as to the distinction between a business visitor and a mere licensee and a trespasser.

REPLY TO ARGUMENT OF RESPONDENT

Point I

RESPONDENT'S CLAIM THAT "THIS CASE WAS PROPERLY SUBMITTED TO THE JURY — THE EVIDENCE CLEARLY ESTABLISHED THAT PLAINTIFF WAS A BUSINESS VISITOR AND THAT DEFENDANT HAD VIOLATED THE DUTY OF CARE OWED TO SUCH A PERSON."

Respondent states on page 9: "The question before this Court, of course, is not whether the facts disclose negligent conduct on the part of defendant, but only whether there was sufficient evidence from which the jury could make a finding." In other words, the respondent insists that the *objective* test of negligence based upon the standard of the conduct of a reasonable and prudent person, is inapplicable, and that the *subjective* test of what jurors might conclude from conjectures should be adopted. The cited case of *Stickle v. Union Pacific*

Railroad Co., 251 P. 2d 867, 870, does not depart from the rule of an objective standard that the evidence must be sufficient to warrant reasonable and prudent men to find the defendant guilty of negligence.

In arguing that there was evidence from which the jury could find that Rogalski was a business visitor, respondent studiously avoids the undisputed fact that the property of defendant covers a large area, and that the portion of real estate where plaintiff's employer was a business visitor was not the part of the land where Drouby was a lessee nor a part of the land of defendant where the injury occurred. The evidence shows that plaintiff knew that the concrete slab and the appurtenances were adjacent to and connected with the maintenance shops. In an attempt to evade the basic facts, plaintiff argues:

"The defendant urges upon this Court a very artificial and untenable conception of what constitutes a business visitor. It is defendant's contention that the plaintiff's status must be determined with a tape measure, based upon the number of feet the place he was injured was from the point at which business was actually transacted, or whether or not money was actually paid by the plaintiff (or his employer) to be where he was, or whether or not he had been expressly invited to enter the particular area in question . . . "

Inferentially, respondent argues that being a business visitor on some property owned by defendant, the jury could guess that Rogalski had an implied invitation to enter upon any other property owned by defendant if there was no fence nor other formidable barricade. The argument of respondent

might sound a little plausible if there were a case involving an attractive nuisance and the injured party were a child of tender years; but clearly in this case, defendant's customers did not go to the place where the injury occurred, and the plaintiff himself had seen the place from a distance almost daily without having ventured onto the platform prior to the day when his employer instructed him to steam-clean the undercarriage of his employer's truck (R. 125).

The "implied invitation" theory is without evidentiary foundation in this case. The appellant does not disagree with the rule that an invitation might be implied, but an examination of the cited cases indicates that the implied invitation arises from the nature of the premises to which visitors *generally* are induced to come. There was no implied invitation for the public or any customers to come onto the concrete platform to wash or steam-clean the undercarriage of trucks at the expense of the defendant. There was nothing about the existence of the maintenance shop and the adjacent washing platform and adjacent caustic soda tank which would constitute an implied invitation to a reasonable and prudent member of the general public or of truck owners generally, to come onto that concrete platform to steam-clean their trucks just because they happened to be purchasing petroleum products on some other portion of the land owned by defendant.

Furthermore, the "implied invitation" theory is predicated upon the concept that the owner of the premises has given a standing invitation for the public or some class to come at any time during business hours, by the very nature of the premises. Although respondent implies by argument that Parley Drouby,

the employer of respondent, claimed a right to go upon the concrete platform and use the washing facilities, the admissions of Drouby negative such a claim. Drouby expressly admitted that he had no right to be there (R. 87). Nor is there any evidence that the defendant acquiesced in the use of that platform by Drouby, for he did not claim that he sought permission of any company official when he did use it, and he admitted that when he had asked any company official he had been refused permission (R. 86, 87, 92). He testified that when he wanted to use the washing facilities he "usually checked with the people in the maintenance to see if they were going to be using it, or if I was going to be in anybody's way." He acknowledged the fact that he had no arrangements for going onto the concrete slab or for using any of the facilities (R. 86-87).

The testimony of Parley Drouby negatives the implied invitation theory. He took the liberty of using the facilities, not by invitation, but because he found it advantageous to himself financially to do so, by washing his trucks at the expense of the defendant. He did not get any express permission, but he merely ascertained from some employee in the maintenance department whether the platform was going to be in use or if he would be in the way. At most, he could claim to be a bare licensee, not a business visitor on that concrete platform, and then only at the particular occasions when he made the inquiry.

Respondent cites *Martin v. Jones*, 253 P. 2d 359, for the contention that even if Drouby was a trespasser on the day in question, plaintiff could recover if defendant's employees

knew of his presence and failed to warn him of danger. The case is not applicable since the defendant did not know that Drouby was using the premises on the day in question. Nor did Drouby claim that he took the trouble to find out if defendant's maintenance men would be using the washing facilities (R. 87). Inasmuch as Droubay claimed that the practice had been for him to make inquiry of someone in defendant's maintenance department to find out if the platform would be in use or if he would be in anybody's way, it is obvious that Droubay recognized the fact that he had no invitation to use the premises; and that even if he claimed permission on the particular occasions when he made inquiry, he knew he had to make inquiry on each occasion when he sought to use the platform. He never had the status of an invitee, and on the particular occasions when he had previously used the facilities, the most that he could have claimed, would have been permission; and that on the day in question, he produced no proof that he attempted to obtain permission from anyone, so that his status was not even that of a bare licensee, but that of a trespasser.

Respondent's argument that the "jury could reasonably have inferred from this 'customary practice' that this same practice was followed on the day in question and that permission was expressly obtained," is patently absurd; for Droubay did not claim he had obtained permission from anyone on the day in question, and the jury could not properly infer that he had permission which he did not claim he had obtained. All he had previously done was to ascertain whether the maintenance employees of defendant were going to use the

platform or whether he would be in anybody's way. Ascertaining that defendant would not be using the facilities on December 30, 1951, for example, could not be construed as permission to use the platform on January 18, 1952. Then too, it is significant that plaintiff did not see any of defendant's employees around, and Droubay likewise did not see them, so there could be no basis for the claimed inference of express permission or any permission at all.

The contention that Droubay had an implied invitation to use the washing platform, because he was once an employee, is specious. When he ceased to be an employee, his duties to use the washing platform ceased. Those duties could not automatically be transferred into rights, as a former employee has no implied rights to use the property of his former employer.

The statement that Droubay had been "specifically instructed by defendant's sales department that these trucks should be kept clean," (R. 117) is a misstatement of the record. The sales department merely told Droubay that the trucks would look better if they were kept clean (R. 117). No one connected with defendant told Droubay that he could use the facilities of defendant to keep his trucks clean. All of the written instruments refute the contention that defendant imposed on Droubay the obligation to keep his trucks clean. The representative of the sales department made a recommendation which was for the benefit of Droubay to assist him in getting business. Droubay did not claim he had any rights on the washing platform, as lessee or otherwise. The arguments that it was to the benefit of defendant for Droubay to use the washing platform are fat-fetched, since it was not

necessary for Droubay to use defendant's facilities in order to clean the trucks. There were other facilities available to him. All Droubay was interested in doing by using defendant's platform was to save money. The argument about washing the trucks to keep the Phillips 66 insignia clean, could have no bearing on this accident anyway, because the accident resulted not from any washing operation of the insignia, but from stepping off the concrete platform as a result of lack of visibility created by plaintiff himself while in the course of *steam-cleaning the under-carriage of the truck.*

Likewise, the contention that Droubay was a lessee of defendant's property (R. 84), is also irrelevant, for he did not lease any of the property involved in the accident. The concrete platform was not an inducement for the lease, nor was said property an appurtenance to the leasehold.

The argument of respondent proceeds upon the naked theory that the plaintiff was a business visitor at the place where the accident occurred, when plaintiff himself showed by his testimony that he was merely carrying out the instructions of his employer Droubay in a negligent manner.

The alleged negligence of the defendant.

The whole argument of respondent is predicated upon the notion that plaintiff was a business visitor at the place where the accident occurred, because he was a business visitor earlier that day on some other portion of the land owned by defendant. The plaintiff had completed the loading of the petroleum products. He went from the leasehold directly to

the concrete platform. Now just what duties does respondent claim appellant violated?

It is clear that the following answer to written interrogatories constitute the only claim of negligence:

"14. No warning signs, directions, or instructions provided; no cover over the vat; vat placed too close to steam cleaning equipment; no proper protection or barricades around vat for person working in vicinity; insufficient visibility provided when steam hose in use."

1. *The claim that there were no warning signs.* By quoting from the *Restatement of the Law of Torts*, Section 343, the plaintiff must concede that even to a business visitor there could be no liability if the owner of land does not know, or by the exercise of reasonable care could not discover, the condition involving an unreasonable risk. There could be no risk to any person who looked and acted as a reasonable and prudent person. The testimony of the plaintiff shows that he could have seen the tank adjacent to the concrete platform except for two things: (1) He did not look before he started to use the steam equipment, and in fact paid no attention whatsoever, to any objects to his right. (2) After he began to use the steam, he created a cloud which completely obscured his vision by the manner in which he operated the steam. The lack of warning signs could not have contributed to the accident since the plaintiff never looked in the direction of the tank before he started to use the steam, and after he started to steam-clean, he obscured his own view to such an extent that he could not see such a sign had one been there. Likewise,

it would have been futile for the defendant to have given any instructions as to the use of the tank, inasmuch as use of the tank was not the cause of the accident, but blindly stepping into it. If respondent refers to instructions as to the existence of such tank, he could not possibly claim more than mere warning signs, and as pointed out above, such signs would have been useless in view of the reckless disposition of the plaintiff on that occasion.

2. *The claim there was no cover over the vat:* The evidence is conclusive that said caustic soda tank had a lid which was fastened by hinges. Plaintiff did not observe when he drove onto the concrete ramp whether the lid was up or down (R. 160). Droubay testified that the cover-lid of the tank was down when not in use, as far as he was able to observe (R. 77). *There is no evidence whatsoever that when the Droubay truck was parked on the platform the cover-lid was up instead of down.* There is no proof that the tank was in use on the day of the accident, and there is no evidence that any of the defendant's employees raised that cover lid. Droubay did not observe whether the lid was up or down when they came onto the platform (R. 114, 127, 160). Neither Droubay nor plaintiff saw any employees of the defendant working in that immediate vicinity on the day of the accident (R. 77, 108, 114, 172-173), so there is no evidence from which a valid inference could be raised that any of the defendant's employees lifted the cover-lid on January 18th. For anyone to conclude that the cover lid was up at the time plaintiff came onto the platform, would be mere conjecture. Furthermore, to conclude that one of defendant's employees must have

neglected to close down the lid on some previous day or to have raised it on the day of the accident when it was not being used by defendant, would be predicated on speculation which likewise would not be characteristic of the thinking of a reasonable and prudent man.

3. *The claim that the vat was too close to the steam-cleaning equipment:* On page 21 of his brief, respondent states that the ramp is "barely wide enough for a truck of the type involved to be parked thereon and still room for a man using the steam cleaning equipment to walk around it (R. 102, 125, 155)." The statement is a distortion of the record. The truck was only 7 feet 1 inch in width. The platform is 1 inch less than 14 feet in width, so there was a total of nearly 7 feet for working space. Since the plaintiff claimed he parked the truck about 3 feet from the east end of the platform, and that he had no difficulty working around to that point, the argument of the plaintiff amounts to a further indication of negligence on the part of the plaintiff, by parking the truck too close to the edge of the concrete platform. Parley Droubay had previously washed trucks and he had also steam-cleaned the undercarriage of trucks without difficulty. The fact is, that plaintiff realized he had parked too close to the edge, and that he had no room to work on the right side of the truck without getting off the concrete platform at a place where he knew there were "obstructions." The argument of respondent merely indicates greater negligence on the part of plaintiff in failure to move the truck farther to the north so that he could work on the concrete platform. The argument also emphasizes the negligence of the plaintiff in his indisposition to

make any observations as to objects near or adjacent to the platform.

As admitted by the plaintiff, the caustic soda tank was entirely off the platform, 2 inches away, and extended 13 to 14 inches above the platform. Obviously, the platform and the tank had to be in a position where defendant could use the same. The same were clearly visible to all persons who looked, and the only excuse for plaintiff not being able to see the tank was his indisposition to look to see what could clearly be seen.

4. *The claim there was no barricade around the vat:* Inasmuch as plaintiff for all practical purposes blind-folded himself so that he could not see where he was going, if there had been a barricade around the tank, plaintiff might have suffered a worse injury by running into such barricade or falling over it head-first. A barricade of any substantial height would have made it impossible to use the tank, and appellant submits that no reasonable and prudent landowner can possibly foresee what will happen to a person who either shuts his eyes when moving around, or blindfolds himself so he cannot see what he is doing or where he is going.

5. *The claim that there was insufficient visibility when the steam hose was in use:* Respondent states that "One operating the steam cleaning equipment, which is located on the opposite side of the ramp than the vat, would normally be unable, from that location, to see the vat because of the truck" (Page 21). But the truck was not placed there by defendant, but by the plaintiff. Defendant did nothing to obscure any

one's view. Although respondent contends that Droubay himself did not see the tank on the day of the accident, Droubay merely testified that he paid no attention to it (R. 74). Respondent further says: "The steam cleaning equipment, when in operation, greatly affected the vision of one using it (R. 131)." Such statement is not correct, for it depends on *how* a person directs the steam. All a person needs to do in order to see where he is going, while the steam is on, is to turn the nozzle to one side, particularly up in the air (R. 165-170).

There was nothing defective about the concrete platform. It was not slippery. The stumbling of plaintiff was due to lack of visibility which he created himself. There was nothing wrong with the steam-cleaning equipment, either. It was not shown to be defective. The steam cloud of which plaintiff complains, and the attendant lack of visibility, was not created by the defendant, but by plaintiff himself. He created that steam cloud in his own path, and he recklessly proceeded into that cloud. It would have been impossible for defendant to have created visibility, when plaintiff willfully did everything conceivable to blind himself and incapacitated himself from seeing where he was going by the manner in which he operated the steam.

The defendant did not cause the plaintiff to step off the concrete platform into the caustic soda tank. Defendant had nothing to do with the movements or activities of plaintiff. In fact, there is no proof that defendant knew plaintiff was even in the vicinity of the place where the injury occurred. Nor is there any proof that defendant knew that someone had raised the cover-lid to the caustic soda tank. Admittedly, Droubay failed to inform plaintiff of the caustic soda tank;

but no one representing defendant directed plaintiff to either go onto the platform or to step off the platform. By no possible stretch of the imagination could defendant be expected to warn plaintiff when defendant did not know he was going to be there, nor of a condition which it did not know existed, inasmuch as the practice was to keep the cover lid down when the tank was not in use.

Plaintiff utterly failed to prove violation of any duty of care by defendant. Defendant could not anticipate that anyone going onto the concrete platform, whether by permission or without permission, would deliberately obscure his own vision in disregard of his own safety; nor could defendant anticipate that the cover-lid to the tank (which was then not in use that day by defendant's employees), had been raised by someone.

Point II.

RESPONDENT'S CLAIM THAT "PLAINTIFF WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW."

It is interesting to note that respondent claims that proof of contributory negligence must be established beyond a reasonable doubt, in order to take a case from the jury.

In this case, the respondent himself furnished the proof of his own neglect, and of his utter disregard for his own safety, and he now claims that his own admissions should be disregarded, to enable the jury to disbelieve his admissions

and to permit him to recover because of his own negligence. What respondent seems to contend is that the plaintiff having been negligent, such negligence imposed upon the defendant as owner of the premises a duty to rescue plaintiff from the effects of his own negligence. It would appear that the "last clear chance" doctrine is invoked by implication in a situation to which it could have no possible application.

On page 27, respondent argues that the question is "what a reasonable man steam cleaning his employe's truck on a January day, with clouds of white steam being emitted from the nozzle in his hands, would have done." The statement begs the question, for a reasonable and prudent man would not turn the nozzle to emit steam in the same direction as he was moving, nor deliberately walk into a cloud of steam where he could not see what he was doing nor where he was going. Respondent argues that because Droubay paid no attention to the caustic soda tank on the day in question, plaintiff could not be expected to pay any attention either, which is another way of saying that if one person does not act as a reasonable and prudent man, no other person can be expected to do so, and such indifference to safety cannot amount to contributory negligence. Likewise, the contention that there were obstructions to the view of plaintiff, is also a misstatement of the record, for the exhibits introduced by plaintiff clearly show that plaintiff's views were not obstructed except by the obstructions which he created himself.

Respondent argues on page 28 that the "jury in this case found, and justly so, that it was not unreasonable for the defendant to have proceeded around the truck as he did,

operating the equipment and keeping his hip against the fender of the truck. The fact that he could have moved the nozzle does not mean that it was unreasonable for him not to have done so. This was a question for the jury." Appellant submits that no reasonable and prudent person would blindfold himself and move forward near the edge of a platform near which were unknown objects. The evidence shows that plaintiff knew how to make his path visible by merely turning the nozzle to one side and waiting a moment for the steam to disappear. The jury could not act as reasonable and prudent men if they concluded that by blinding himself and moving forward blindly in an area of unknown objects, the plaintiff was acting with due care for his own safety.

The respondent seems to urge a rule of law that the more negligent a person becomes, the greater the duty of care imposed upon the landowner by virtue of such negligence, notwithstanding such negligent conduct is unknown to the landowner.

The premises where plaintiff was working were not inherently dangerous. The only actual danger claimed was the alleged lack of cover on the tank at the moment plaintiff stepped over into it. If some unknown person had not raised that cover lid, it is not certain whether or not plaintiff would have sustained some injuries, since he was moving blindly into an area which he had not observed. With the cover-lid down, if he stumbled, he might well have fallen against the stop bar against which the cover-lid rests when the tank is open. It was the conduct of plaintiff which was fraught with danger, except for which no injury would have been sustained.

Respondent cites a number of cases which hold that where there is a conflict in the evidence from which reasonable minds might differ as to whether the plaintiff was negligent, the trial court may not take the case from the jury on motion for directed verdict on the ground of contributory negligence. Those cases are inapplicable, for in this case there is no dispute in the evidence as to the conduct of plaintiff, and there is no basis for reasonable minds to conclude that he was not negligent. The answer to all of those cases is the rule laid down in *Nabrotsky v. Salt Lake & Utah Railroad Co.*, 103 Utah 274, 135 P. 2d 115, there the court held that the plaintiff was guilty of contributory negligence as a matter of law when he was temporarily blinded by the glaring lights of another car approaching from the opposite direction, but proceeded onto the tracks and was injured by collision of his car with an approaching train. This case presents a far worse case of contributory negligence than the Nabrotsky case, for in this case plaintiff was blinded by his own acts, not the acts of a third party.

Point III.

THE CLAIM THAT "THE TRIAL COURT DID NOT ERR IN THE EXCLUSION OF EVIDENCE."

The respondent does not state correctly the purpose of the proffered evidence. The offer was not merely to "show some inconsistency," but to introduce the *admissions of the plaintiff*. The plaintiff was called upon not to repeat testimony previously given at the trial, as contended by him in his brief,

but to acknowledge the admissions made by him on deposition which show that he knew exactly how to avoid obscuring his view, by turning the steam nozzle away, and waiting momentarily for the steam cloud to clear away.

True, the plaintiff had already testified to facts which showed that it was his own negligent conduct which prevented him from seeing where he was going; but he had predicated his right of recovery, in part, at least upon *ignorance*, and the proffered testimony demonstrated that he *knew* how to avoid the condition, and that he could have avoided injury by looking where he was going and that he blinded himself well-knowing that he could have held the nozzle in a position where he could have seen his surroundings.

Point IV.

THE CLAIM THAT "THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY OR IN REFUSING TO SUBMIT DEFENDANT'S REQUESTED INSTRUCTIONS."

There is absolutely no substance to the contention that defendant's requested instructions were substantially covered in the charge to the jury. In the first place, the trial court did *not* define or distinguish the term "business visitor" and left the matter of definition to the conjecture of the jury. The argument that defendant did not make a special plea that plaintiff was either a bare licensee or a trespasser, and that defendant merely denied that plaintiff was a business visitor, assumes that defendant could not prove that plaintiff was

only a trespasser or at best a licensee under a denial that plaintiff was a business visitor. Respondent states on page 43:

" . . . As noted eariler in this brief, there may have been sufficient evidence offered to support a finding that plaintiff was a licensee or trespasser, . . . Even assuming this, it is difficult to conceive how the defendant in this case could have been prejudiced by the failure of the Court to so instruct."

There can be no doubt about the fact that plaintiff pleaded that he was a business visitor and that he failed to prove any such relationship as far as the premises where the accident occurred. The court not only erred in denying the motion for directed verdict, but the court refused to instruct the jury on defendant's theory of the case. The court did not define "business visitor," and by refusing to give the requested instructions, the court in effect ruled that if plaintiff was a business visitor on January 18th with respect to some portion of defendant's property, then he was a business visitor with respect to all of the property owned by defendant, irrespective of how remote the place might have been from any place where business could possibly be transacted.

In order for the court to have correctly charged the jury as to the meaning of the term "business visitor" to guide the jury in determining whether or not he was a business invitee at the place where the accident occurred, it was proper to distinguish that term from "bare licensee" and "trespasser." The cases cited by respondent where the defendant failed to request the court to instruct as to the difference, have no

application here, for the defendant specifically requested such definitions and the court refused to give any such definitions.

The assertion that the instructions requested by defendant did "not correctly state or apply the law," is contrary to the record. In fact, plaintiff does not take the trouble to point out wherein any of the requests of defendant which the court rejected, incorrectly states the law.

Respondent completely ignores the fact that the court refused to instruct the jury as to defendant's theory of the case.

Point V.

THE CLAIM THAT "THERE WAS NO DEFECT IN PARTIES—THIS ACTION WAS AUTHORIZED BY AND BROUGHT IN BEHALF OF THE PLAINTIFF AND THE STATE INSURANCE FUND."

The claim is extravagant, for the letter from the State Insurance Fund cannot be construed as an assignment of any claims asserted by the State Insurance Fund, nor to constitute the plaintiff a trustee. The defendant did not waive its objection that the State Insurance Fund was a necessary party in view of its claim, notwithstanding said claim was unfounded. None of the cases cited by respondent establish any law to the contrary.

CONCLUSION

Respondent cites a number of cases, none of which are applicable to the facts of this case. Respondent predicated his case upon the false premise that he was a business visitor where the accident occurred, when his employer made no such claim. Respondent made extravagant and untenable claims of negligence; but the fact is that the premises were safe where Droubay told plaintiff to work. Neither the concrete platform nor the steam cleaning equipment was defective. The only reason the accident occurred is that plaintiff for all practical purposes figuratively blindfolded himself by the manner in which he operated the steam, and while blinded by his own negligent conduct, he stepped off the platform over into a tank of caustic soda which was plainly visible to any person who would look. Notwithstanding the evidence of plaintiff's negligence came from his own lips since none of defendant's employees or officials knew he was in the vicinity or witnessed the accident, respondent contends that his own undisputed evidence of reckless disregard for his own safety could be viewed as acts of due care by reasonable and prudent persons.

Appellant contends that the record compels a finding that there was no negligence on the part of defendant, and further that the record requires a finding upon the undisputed testimony and admissions of plaintiff that his own negligence was a proximate cause of the accident. Appellant further submits that not only did the trial court err in allowing the jury to find defendant guilty of negligence, but that the court refused to furnish the jury any standards or guides, and the

court refused to instruct the jury on defendant's theory of the case, all of which warrants reversal of the judgment.

Respectfully submitted,

McKAY, BURTON, McMILLAN & RICHARDS,
and PAUL E. REIMANN

Attorneys for Defendant and Appellant.

Received a copy of the foregoing Reply Brief of Appellant,
this.....day of September, 1953.