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Thomas P. Sprunt v. The Denver and Rio Grande Western Railroad Co. : Brief of Appellant

Utah Supreme Court

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Case No. 8957

IN THE SUPREME COURT

of the
STATE OF UTAH

FILED

JAN 9 - 1959

Clerk, Supreme Court, Utah

THOMAS P. SPRUNT,

Plaintiff and Appellant,

vs.

**THE DENVER AND RIO
GRANDE WESTERN RAIL-
ROAD COMPANY, a corpo-
ration,**

Defendant and Respondent.

Appellant's Brief

C. C. PATTERSON

*Attorney for Plaintiff and
Appellant*

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IN THE SUPREME COURT
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STATE OF UTAH

THOMAS P. SPRUNT,
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vs.

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ROAD COMPANY, a corpo-
ration,

Defendant and Respondent.

STATEMENT OF THE FACTS

RE: SPRUNT vs. D & R G

Plaintiff was injured in an accident which occurred during plaintiff's regular course of employment as a switchman for the defendant. The accident occurred on tracks leading into and on property allegedly owned by the Vitro Chemical Company in Salt Lake County, Utah. The evidence showed that for a substantial period of time the roadbed upon which plaintiff and the switch crews of the defendant were required to walk was full of holes averaging from a few inches to 8 and 10 inches and occasionally 12 inches deep. That these holes were caused by reason of the fact that the Vitro Chemical

Company used a clam shell and a bulldozer to maintain the levelness of the roadbed and also to remove chemical ore from the site of the roadbed. That the defendant railroad made no effort to maintain or inspect these premises upon which it sent its employees to perform work.

The evidence showed that the unsafe condition had existed for a substantial period of time, that the Union had protested in September 1956, some four months before the accident to plaintiff, and again in December 1956, approximately 3 weeks before the accident; that each time promises to correct these conditions were made by officials of the defendant railroad but that no effort was made by the railroad to maintain the roadbed in a level condition and no actions were taken by the railroad to make good its promises. The evidence further showed that the plaintiff had knowledge of this irregular condition and that he had known of its defective condition for many months prior to that day of his injury.

On the day that the plaintiff was injured the roadbed was covered with snow and the holes and depressions and irregularities in the roadbed were covered so that they were not visible, although plaintiff had walked along the roadbed and knew that holes were still there. While in the process of mounting a car which was a necessary act and which he performed in the usual customary fashion, one of plaintiff's feet slipped into a hole some 6 or 8 inches deep, he fell and suffered an injury resulting in a 50% loss of the use of his left arm at the shoulder, which damage and injury was the subject of the action.

The undisputed testimony of the plaintiff was that he did not know of the existence of the hole in which he stepped prior to his fall and that the same was not visible to him by reason of the fact that it was filled with snow. No evidence was introduced to show that plaintiff should have known of the hole unless it could be inferred from his prior knowledge of the generally defective condition of the area generally.

The jury found for the plaintiff but found that he was guilty of contributory negligence and that he was 66-2/3% responsible for his injuries.

POINT I

THE COURT ERRED IN SUBMITTING THE QUESTION OF CONTRIBUTORY NEGLIGENCE TO THE JURY.

POINT II

THE AMOUNT OF DAMAGES IS INADEQUATE IN LAW.

Do the facts involved herein constitute contributory negligence? It is necessary for some basic understanding of the facts upon which contributory negligence can be predicated.

The court by instruction 12 stated:

“You are instructed that you cannot infer or find liability on the part of the railroad company from the mere fact that an injury took place. Accidents do happen without negligence or liability on the part of either party to a suit. Therefore, if you believe from the evidence in this case that the occurrence, resulting in injuries to plaintiff, was caused without negligence or fault on the part of defendant, then your verdict must be in favor of defendant, and against the plaintiff ‘no cause of action’.”

As the instruction indicates, the fact that an accident took place does not in and of itself prove either negligence or contributory negligence. It is not a one-way street, although the defendant would have one take that position. In other words, the carrier contends that the mere fact that an injury occurred does not prove or tend to prove or create any inference that the Company was negligent. On the other hand, the carrier contends that it is permitted to argue the fact of contributory negligence from the mere fact that plaintiff sustained an injury.

This obviously is incorrect. The Court in *Williams v. Ogden Ry. & Depot Co.*, Utah 1951, 230 P2 316, quotes with approval an instruction of the trial court in part as follows at page 323:

“* * *To establish the defense of contributory negligence the burden is upon the defendant to prove, by a preponderance of evidence, that the plaintiff was negligent and that such negligence contributed in some degree as a proximate cause of the injury.”

By a preponderance of the evidence means a substantial evidence. A jury may not conjecture or speculate but must have substantial evidence upon which to base a verdict. (*Anderson v. Nixon*, Utah, 1943, 139 P2d 216)

The above view was reaffirmed in *Alvarado v. Tucker*, Utah, 1954, 268 P2d 986, wherein Justice Crockett speaking for the Court relative to the problem of burden of proof states at page 988:

“(3,6) The burden was upon plaintiff to

prove the charge of speeding; such a finding of fact could not be based on mere speculation or conjecture, but only on a preponderance of the evidence. This means the greater weight of the evidence, or as sometimes stated, such degree of proof that the greater probability of truth lies therein. A choice of probabilities does not meet this requirement. It creates only a basis for conjecture, on which a verdict of the jury cannot stand."

It has been established without any question that the mere fact that plaintiff fell does not establish contributory negligence on the part of the plaintiff. It was established without debate that plaintiff did not know of the existence of the hole in which he stepped and fell prior to stepping into it. This, of course, relates only to the problem of actual knowledge. Did he have constructive knowledge of the existence of this hole? This requires a review of the evidence. The evidence relating to this is proof and is as set forth below.

STATEMENT OF POINTS

POINT I

THE COURT ERRED IN SUBMITTING THE QUESTION OF CONTRIBUTORY NEGLIGENCE TO THE JURY.

The testimony for the plaintiff indicated that the area in which the plaintiff was compelled to work was in deplorable condition, exceptionally rough, full of holes, gouge marks and other rough areas and constituted a hazaradous condition. This condition had existed for some months prior to this injury (Tr. 105). On September 26, officials of the Switchman's Union took the de-

fendant's Safety Engineer to the property to show him and at that time the area was impassable by foot (Tr. 105, 106, 112, 114).

Conversations were had between Mr. Smith and Mr. Griffith, Assistant Superintendent, as late as the 27th day of December, relative to correcting this difficulty, however, nothing was done. Promises were made relative to correcting these difficulties which were never complied with. The only testimony as to the manner in which the plaintiff was injured and his knowledge of these conditions come from the witness, Mr. Patterson, and plaintiff himself, and is as follows:

MR. PATTERSON: (Page 15, 16, lines 28 to 30, line 1)

Q. Now, Mr. Patterson, what, if anything, did the Vitro Uranium maintain between this new spur switch and the hopper spur switch at this time?

A. Under the condition they didn't maintain any of them.

(Page 20, line 6-8)

Q. (By Mr. Patterson) Mr. Patterson, what was the weather that day?

A. Well, there was snow on the ground, as I recall, it was snowing just a little bit at the time.

(By Mr. Patterson, page 22, lines 1 to 22)

Q. Now, you had had occasion to walk in that area earlier also that day, hadn't you?

A. Yes sir, when I coupled the air hoses on the cars.

Q. Tell the jury if you will the condition of that road bed in that area?

A. Well, it was very rough—holes, mounds, there was enough snow on the ground that made it hard to detect the holes filled with snow and it was generally in a very poor condition.

Q. Now, how long had it been in that condition to your knowledge?

A. It had been in that condition for a long time, we had complained to the company.

MR. ASHTON: Just a minute, may we have stricken the last part, it is not responsive. We would like to have the foundation laid so we can meet that particular testimony.

THE COURT: It may be stricken.

Q. (By Mr. Patterson) You say for a long time, can you tell me in terms of months how long?

A. I know it was five or six months because we had the safety man on the Rio Grande system come to the Vitro and inspect it under our complaints.

MR. SPRUNT: (Page 42, lines 2 to 30; page 43, lines 1 to 7)

Q. (By Mr. Patterson) You say you were starting to mount the cars?

A. Yes.

Q. Why would you do that?

A. When you are shoving through that place where the hopper is, there is a shed there, when you get inside that shed the engineer can't see inside the shed, I was going to ride the cars up so when Mr. Patterson got on through I could stop the head car at the hopper.

Q. You could walk two miles an hours?

A. Yes, as a general rule we always climb it because the engineer couldn't see me where

I was at and I could pass signals to Mr. Patterson.

Q. In other words, it was necessary for you to climb on the car?

A. Yes sir.

MR. ASHTON: I object, the court please, it is calling for a conclusion.

THE COURT: The objection is overruled, the answer may stand.

Q. (By Mr. Patterson) Now, what happened when you—describe how you started to mount the car, what you did?

A. Well, as a general rule when you are switching on a lead, or anything, we most generally hit the stirrup with our right foot and most generally reach up with the one hand, get hold of the grab iron and follow up with the other, when I went to follow up I slipped in the meantime, and I couldn't get the grab iron.

Q. Why did you slip?

A. I stepped in a hole.

Q. Will you describe that hole to the jury, please?

A. Well, as far as I remember, it was a hole along side the cars where we walked, made by the clam shovel cleaning up the ore.

Q. Describe the hole itself as much as you can?

A. I would say the hole was around between eight and twelve inches deep.

(Page 49, lines 9 to 26)

Q. (By Mr. Patterson) Will you describe the condition of the roadbed in the area between this new spur switch and the hopper spur switch, particularly at the time that you sustained your injury?

A. Well, I will say it was awfully rough, it was full of holes from where the clam shell had picked up the ore they had dumped from the cars, they couldn't get all the ore out of there.

Q. How long had this condition existed prior to this to your knowledge?

A. I would say around six months at least.

Q. Now, what was the weather that day?

A. It had been snowing—it was snowing.

Q. And could you see these holes?

A. No sir.

Q. Why?

A. Because it had snowed all night and a lot of the holes was filled with snow.

(Cross Examination by Mr. Ashton, page 57, lines 24 to 30; page 58, lines 1 to 14)

Q. You have, of course, a large area you can choose to board this car?

A. That is right.

Q. You didn't have to get on, did you, at this particular point?

A. No, I didn't have to.

Q. These cars are moving two to three miles an hour and you could have, if you elected to, to walk along there?

A. I don't know I could have walked that fast there the way the roadbed was.

Q. You elected to get on the car at this particular point?

A. Yes sir.

Q. You chose at this particular point to get on the car?

A. That is right.

Q. This was broad daylight?

A. Yes sir.

Q. You were aware of the fact where cars were unloaded and the clam shell worked and would make gouges, and were aware of the fact snow had fallen and concealed rough spots under the snow, you were aware of that?

A. Yes.

(Page 59, lines 5 to 30; page 60, lines 1 to 3)

Q. Mr. Sprunt, I am not trying to get you, in detailing the matter to relate what each muscle did in this particular time. When you reached up, what was the usual way to do it, put the weight on one hand?

A. Most generally put the weight on both hands.

Q. You reached with the left hand, and hadn't got your weight up?

A. No sir.

Q. You were walking when this occurred?

A. No.

Q. You were standing still?

A. Yes.

Q. So you were standing still when the car came past going about two or three miles an hour, and you reached up with your left hand?

A. Yes sir, that is right.

Q. Were you standing in a hole?

A. No I wasn't.

Q. Did you move your feet before you got aboard?

A. That is something I can't say.

Q. As you reached with your left hand, as you started to board, your foot went in a hole?

A. No, generally when you are boarding a car you swing yourself on, when I went to swing

on I slipped.

Q. When you swung to go on to board you stepped, do you know which foot?

A. No sir.

Q. You slipped with your foot in a hole?

A. Yes sir.

(Page 92, lines 26-30; page 93, lines 1-3)

Q. (By Mr. Patterson) Was there any difference in the condition of the roadbed after the visit you have mentioned?

A. No sir.

Q. Did they cease to have these holes in the roadbed?

A. What is that?

Q. Did they cease to have holes in the roadbed after these officials had been there?

A. No.

Mr. Hayden and Mr. Smith testified as follows as to visits to the premises with officials of the defendant and conversations relative thereto:

MR. HAYDEN: (Page 104, lines 14-30, page 105, lines 1-24)

Q. (By Mr. Patterson) Did you have occasion during that period of time to contact an official of the Denver and Rio Grande Railroad relative to the premises?

A. Yes.

MR. ASHTON: Excuse me, Mr. Patterson, let me have that time.

MR. PATTERSON: In September.

MR. ASHTON: In September of—

MR. PATTERSON: 1956.

Q. (By Mr. Patterson) When was that?

- A. That was, I believe on the 27th.
- Q. Of what?
- A. Of September in '56.
- Q. Now, whom did you contact?
- A. Mr. Pete Ackermann.
- Q. Who is he?
- A. He was the assistant superintendent of safety.
- Q. For whom?
- A. By the Denver and Rio Grande.
- Q. And why did you contact him?
- A. Because I was a member of the safety committee and we knew that a hazardous condition existed at Vitro Chemical Company.
- Q. A hazardous condition relative to what?
- A. Relative to footing along the trackage.
- Q. And what did you and Mr. Ackermann do?
- A. Well, we were on a tour of the Roper yards and we proceeded to Vitro Chemical, that we found the conditions so bad there that we—

MR. ASHTON: May we have the witness testify what he saw rather than characterize it.

THE COURT: It is not proper to draw your own opinions, that is the duty of the jury. Tell what you saw.

- A. We saw holes along the trackage, which were water and mud, and we proceeded to a point which was impossible on foot.
- Q. And then what did you do?
- A. We turned around and came back off the property.
- Q. And what, if anything, did Mr. Ackermann say about this situation at that time, or subsequent to that time?
- A. Mr. Ackermann said that he would have the

condition taken care of.

MR. SMITH: (Page 113, lines 9 to 15)

Q. (By Mr. Patterson) Did you and Mr. Ackermann and Mr. Hayden go out to that property?

A Yes sir.

Q. What did you discover when you went out there?

A. Well, the conditions were such we went up as far as we could go in our oxfords and had to truck from that point and he told us the conditions would be corrected.

From the above, it will be seen that the only basis upon which actual or constructive knowledge of the existence of the hole could be imputed to the plaintiff would be on the basis he knew for a period of six months that the area upon which he was compelled to work was dangerous, defective and unsafe. Is this sufficient?

The question answers itself in that this does not constitute negligence but on the contrary is a form of assumption of risk which had been outlawed by the 1939 amendment to the Federal Employers' Liability Act, 45 U.S.C.A. Sec. 54.

This problem as to what constitutes assumption of risk, which is outlawed by statute, and what constitutes contributory negligence on the part of an employee is a difficult close question. However, an examination of the law prior to 1939 and the law subsequent to 1939 discloses a very interesting fact, namely, that the facts in issue have always been held to be facts constituting the

defense of assumption of risk.

Thus, in *Kansas City Railroad Co. v. Roe*, Okla. 1919, 180 P. 371, the Court held that a switchman having knowledge of the rough and uneven condition of a track assumed the risk of the derailment which was caused by the defective condition of the roadbed.

In *Edwards v. Southern Railroad Co.*, Ga., 184 S.E. 370, the Court held as a matter of law that an experienced switchman assumed the risk of injury from soft uneven dirt and gravel alongside the track, that he also assumed the risk of broken, rotten and uneven cross ties as well as the absence of ballast between the cross ties at a place where a switchman attempted to mount an engine.

It will be observed that the facts in this case are almost precisely the facts involved in the case at bar.

In *Lehi Valley Railroad Co. v. Hatmaker*, Pa., 69 F.2d 282, a railroad switchman who slipped and fell injuring his knee while closing a switch was held not to be entitled to recovery because he assumed the risk of injury from frost, grease and dirt on the ties by reason of the fact that he had knowledge thereof, and in addition had knowledge of the defective condition of the ground below the ties.

Finally, the Supreme Court of the United States upheld this conclusion in *Delaware L. & W. RR v. Koske*, 49 S. C. 202, 279 U. S. 7. There, a switchman who had worked for years in a yard stepped into an open ditch and fell while in the process of jumping from a locomotive.

tive. The Supreme Court held that he had assumed the risk of this condition and could not recover.

In all of these cases the question was not the question of the negligence of the employee which would only mitigate damages, but that of an absolute defense to any damages on the basis of assumption of risk, and uniformly under the facts at bar, as the preceding cases set forth, the defense was found to be good as a matter of law.

In the year 1939 the Congress of the United States enacted provision of the Court now known as Title 45 U.S.C.A. Section 54, which legislatively abolished the doctrine of assumption of risk. In this case we now have the carrier attempting to use the same facts which formerly constituted the defense of assumption of risk but which they now call contributory negligence. The question is, can that be done?

It is submitted that the Supreme Court of the United States in *Tiller v. Atlantic Coast Line Railroad Co.*, 318 U. S. 54, 87 L.Ed. 610, has answered this contention once and for all. In the Tiller case the plaintiff's husband was a policeman for the railroad who had the duty of inspecting seals on cars while they were in the yard. While so engaged in his employment the decedent was struck and killed by an unlighted switch engine. Tiller was using a flashlight to assist him in inspecting the seals on the train which was moving slowly along one track when he was suddenly hit and killed by the rear car of another train which was moving in the opposite direction. The railroad claimed that the plaintiff should not be

permitted to recover because of his knowledge of conditions.

~~over~~ The Supreme Court of the United States, speaking through Mr. Justice Black, stated:

“We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to ‘non-negligence.’ As this Court said in facing the hazy margin between negligence and assumption of risk as involved in the Safety Appliance Act of (March 2) 1893, 45 USCA §1, ‘Unless great care be taken, the servant’s right will be sacrificed by simply charging him with a assumption of the risk under another name’; and no such result can be permitted here.”

Mr. Justice Frankfurter in the concurring opinion pointed out the problem, which is precisely the problem which we have at bar, stating at page 620:

“The point is illustrated by two opinions of Mr. Justice Holmes. In *Schlemmer v. Buffalo, R. & P. R. Co.* 205 US 1, 12, 13, 51 L ed 681, 686, 27 S Ct 407, he called attention to the danger of relieving from liability for negligence by talking about ‘assumption of risk’—a danger resulting from the ambiguity of the phrase. ‘Assumption of risk’ by an employee may be a way of expressing the conclusion that he has been guilty of contributory negligence. But an employee cannot be charged with contributory negligence simply because he ‘assumed the risk’; the inquiry is, did his conduct depart from that of a reasonably prudent em-

ployee in his situation? As Mr. Justice Holmes admonished us in the Schlemmer Case, 'unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name.' "

That the amendment and the decision in the Tiller case has resulted in a complete about face on this problem is illustrated by the case of *Georgia S. & F. RR Co. v. Williamson*, 65 S.E. 2d 44, in which the Supreme Court of Georgia completely reversed *Edwards v. Southern Railroad Co.*, supra. By reason of the Tiller decision, the Supreme Court of Georgia now held that a switchman did not assume any risk of damage because he continued to work in a railroad yard knowing that loose coal and other debris was scattered about and that he did not assume the risk of an injury sustained when he stumbled on such debris and fell under a moving box car.

Since the Tiller case there have been six Federal Second decisions on this subject, the first of which is to be found in *Anderson v Elgin, Joliet and Eastern Railway Co.*, 7th Circuit, Ill., 227 F. 2d 91. In this case the switchman brought an action for injuries sustained by reason of a fall on ice in the railroad yards. The Court claimed that the evidence showed no negligence on the part of the carrier and upon the basis of the evidence that there was no proof of any negligence, the Court found:

"Obviously, in the instant case, plaintiff at the time he went to work had knowledge of the icy condition of the yards, as did the defendant, and being familiar with the situation could be

held under the reasoning of Aeby to have taken 'the risk of known conditions and dangers.' However, unfortunately for defendant, the reasoning of the Aeby case has been definitely repudiated by the Supreme Court in *Tiller v. Atlantic Coast Line Railroad Co.*, 318 U.S. 54, 63 S. Ct. 444, 87 L. Ed. 610. In that case the District Court allowed defendant's motion for a directed verdict, which was affirmed by the Court of Appeals, 4 Cir., 128 F. 2d 420.

"The Supreme Court in reversing stated, 318 U.S. at page 57, 63 S. Ct. at page 446: 'The Circuit Court distinguished between assumption of risk as a defense by employers against the consequence of their own negligence, and assumption of risk as negating any conclusion that negligence existed at all.'

"That, in our view, is precisely what the Supreme Court did in Aeby. The Supreme Court in *Tiller*, in response to the reasoning of the Circuit Court of Appeals, stated, 318 U.S. at page 58, 63 S. Ct. at page 446: 'We find it unnecessary to consider whether there is any merit in such a conceptual distinction between aspects of assumption of risk which seem functionally so identical, and hence we need not pause over the cases cited by the Court below, all decided before the 1939 amendment, which treat assumption of risk sometimes as a defense to negligence, sometimes as the equivalent to non-negligence.'

"Following this statement the court cites in a footnote the Aeby case as one which had treated assumption of risk 'as the equivalent of non-negligence.' The court on the same page continued: 'We hold that every vestige of the doctrine of assumption of risk was obliterated from the law

by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence.'”

Following this case is the one of *Texas and Pacific Railway Co. v. Buckles*, 232 F.2d 257. The plaintiffs were members of switch crew bound for the round house. Their switch engine temporarily stopped pursuant to a red light. At that time another switch engine attempted to couple under the rear thereof without warning and at an excessive speed. The defendant requested an instruction which reads as follows:

“Where an employee of a common carrier by railroad operating in interstate commerce anticipates the risk resulting from the possible negligence of a fellow-employee, or should under the circumstances anticipate such risk, and decides to chance that particular risk, he cannot recover for an injury resulting from such negligence. Therefore, if you find that complainant anticipated, or should have anticipated, the impact resulting from the coupling attempt and knew, or should have known, of the risk inherent in such an attempt and chanced that risk your verdict must be for the defendant.”

This instruction was refused by the trial court. The railroad then appealed from a verdict in favor of the plaintiffs and based its argument in part on the requested instructions given above. The Court of Appeal refused to buy the argument, stating:

“Specification 6 is that the trial court erred in refusing to give special charge 9 requested by

the defendant. Appellant relies particularly upon an expression in the concurring opinion of Mr. Justice Frankfurter in *Tiller v. Atlantic Coast Line R. Co.*, supra, 318, U.S. at page 71, 63 S. Ct. at page 453.

“ ‘By specific provisions in the Federal Employers’ Liability Act, it has swept away assumption of risk as a defense once negligence is established. But it has left undisturbed the other meaning of assumption of risk, namely, that an employee injured as a consequence of being exposed to a risk which the employer in the exercise of due care could not avoid is not entitled to recover, since the employer was not negligent.’

“If appellant’s counsel had read the succeeding page of the concurring opinion, he would have found the answer to his contention :

“ ‘Assumption of risk as a defense where there is negligence has been written out of the Act. But assumption of risk, in the sense that the employer is not liable for those risks which it could not avoid in the observance of its duty of care, has not been written out of the law. Because of its ambiguity the phrase assumption of risk is a hazardous legal tool. As a means of instructing a jury, it is bound to create confusion. It should therefore be discarded.’ 318 U.S. page 72, 63 S. Ct. at page 453.”

Again it will be seen that the facts upon which the defendant is now basing its defense of contributory negligence is not contributory negligence at all but on the contrary is the old doctrine of assumption of risk now being reviewed under a different name. This Mr. Sprunt cannot be held negligent because he might have anticipated an injury because of the defective condition of the road

and especially when the defects were obscured by snow.

In *Johnson v Erie Railroad Co.*, N. Y. 236 F. 2d 352. Plaintiff was injured while working in a railway car between two other cars standing on a spur track as a result of an impact caused by a coupling, which coupling the plaintiff alleged was without warning. From a judgment in favor of the defendant the plaintiff appealed and the case was reversed and sent back for new trial in part because of the court's confusing of the issues of negligence with that of assumption of risk, stating at page 356:

“In addition, we think the court stated the issue of contributory negligence to the jury in such terms that it might be thought that assumption of the risk was a good defense, contrary to 45U.S.C. A. § 54. *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 63 S. Ct. 444, 87 L. Ed. 610. The relevant portion of the charge was as follows:

“‘Now, as to the question of contributory negligence, which has been talked about in this case: Owen Johnson had been working part time it is true, but he had been doing this job before. Is there anything that he did at the time that contributed to it? He knew what his condition was. He testified that the slightest bang on this bone might be an aggravation of this condition. He claims he wasn't warned and that that violated their rule by not warning him. But Del Guidice, his own witness, testified that it was a normal coupling that happened every night, and presumably every night they didn't stop to warn him because it was so gentle that nobody was pushed around. At least, you will be entitled to infer that from the testimony of Del Guidice.’

“From this it might have been thought that it was permissible to infer that, because on other occasions when the plaintiff was at work the locomotive crew did not warn the mail car occupants, the plaintiff had assumed the risk of an unexpected coupling of normal force. The specific exception to this passage was well taken.”

If the injured employee here was entitled to a new trial by reason of the Court's error, is Thomas Sprunt not entitled to an equal consideration? Is not Mr. Sprunt's knowledge of the condition the sole basis for the claim of negligence?

In *Southern Railway Co. v. Welch*, Tenn. 6th Circuit, 247 F. 2d 340, the evidence was that on the days of the injury excessive grit, dirt and tar on the rails required extra force to pull the rails into proper position. Plaintiff alleges that he suffered a ruptured intervertebral disc by reason of the fact that he was not given extra men. The case was tried without a jury. The defendant appealed, alleging that there was no evidence of any negligence and in fact that the evidence showed that the plaintiff had not asked for any assistance and as a consequence his action was barred. The court disposed of this argument, stating at page 341:

“Defendant's second contention arises out of the fact found by the District Court, that plaintiff did not request additional help nor make use of the help available. It urges that these facts bar recovery and require reversal. These objections, however, are based essentially on the doctrines of assumption of risk and of contributory negligence. But, since the enactment of 1939, 45 U.S.C. A. Section 51 et seq., ‘every vestige of the doctrine of assumption of risk’ has been eliminated from

the Federal Employers' Liability Act. *Tiller v. Atlantic Coast Line Railroad Company*, 318 U.S. 54, 63 S. Ct. 444, 446, 87 L.Ed. 610. See also *Thompson v. Camp*, 6 Cir., 163 F. 2d 396, 402, which held that neither assumption of risk nor contributory negligence is a bar under the present Act."

On the basis of the evidence, the plaintiff was entitled to have the court give its requested instructions to the effect that he was not guilty of any contributory negligence.

It is true that the court instructed the jury that assumption of risk was not a defense and that it further instructed the jury that the burden of proving contributory negligence was on the defendant. However, it is submitted that there was no evidence introduced showing that the plaintiff's conduct in any way departed from that of a reasonably prudent employee in his situation. The defendant introduced no evidence to show that his conduct was in any way different from any other employee. It did not attempt to show that the plaintiff did anything in any fashion different from an ordinary prudent person. On the contrary, it argued that the fact he was hurt should not have happened because he had knowledge that there were holes in the roadbed and that had he exercised ordinary care he would not have been hurt, without attempting to show either that he knew or should have known of the existence of a hole under the snow in the area in which he was about to step. I should like to recall again the words of Mr. Justice Frankfurter in the *Tiller* case:

“ ‘Assumption of risk’ by an employee may be a way of expressing the conclusion that he has been guilty of contributory negligence. But an employee cannot be charged with contributory negligence simply because he ‘assumed the risk;’ the inquiry is, did his conduct depart from that of a reasonably prudent employee in his situation? ”

The defendant made no effort and introduced no evidence in conformity with that requirement of the Supreme Court of the United States. It is submitted that a result thereof the court erred in permitting the jury to consider whether the facts at bar constituted contributory negligence, facts which have never been held to constitute negligence but which have always been held to constitute the defense of assumption of risk.

Fortunately, the question has been categorically answered by the Federal Courts. In the case of *Williams v. Atlantic Coast Line R. Co.*, 190 F.2d 744, the railroad attempted to claim that the employee was guilty of contributory negligence because the employee continued to work in an area which he knew was defective by reason of the negligence of his employer in failing to provide a safe place to work. The Court ruled against the railroad saying at page 748:

“Indeed, even though the employee may know that the employer has been negligent in the furnishing of a safe place to work or necessary safety equipment, the employee does not under this Act assume the risks of such danger. Title 45 U.S.C.A. § 54; *Tiller, Exec. v. Atlantic Coast Line R. R. Co.*, 318 U.S. 54, 63 S. Ct. 444, 87 L.Ed. 610.”

Finally, in *Thomas v. Union Railway Company*, 6th Cir., 1954, 216 F.2d 18, the plaintiff slipped on grease allegedly left on the round house floor. It was not argued that the railroad was guilty of negligence in permitting the grease to remain on the concrete. However, the Defendant contended that it should be exonerated from liability by reason of the fact that the employee knew that this condition existed. The Court of Appeals reversed a decision, a jury verdict for the defendant, saying at pages 19 and 20:

“(1,2) The trial court charged the jury that the railroad was not liable for injuries sustained from dangers that were obvious or as well known to the injured party as to the railroad; and that if the jury found from the evidence a dangerous condition of the concrete floor near the foreman’s office, in the roundhouse or deficient lighting facilities in that place, ‘if such dangerous condition existed, was obvious, or as well known to the plaintiff Thomas as to the railroad, the defendant would not be liable for injury sustained from such dangerous condition.’ The foregoing charged the employee with assumption of risk. This was error, as ‘every vertige of the doctrine of assumption of risk was obliterated from the law (the Federal Employers’ Liability Act) by the 1939 amendment.’ *Tiller v. Atlantic Coast Line R. R. Co.*, 318 U.S. 54, 58, 63 S. Ct. 444, 446, 87 L. Ed. 610. Even though the employee may know that the employer has been negligent in the furnishing of a safe place to work, the employee does not, under the Federal Employers’ Liability Act, assume the risks of such danger. *Williams v. Atlantic Coast Line R. Co.*, 5 Cir., 190 F. 2d 744, 748.”

This view finds complete acceptance in the *Restate-*

ment of the Law of Torts which defines assumption of risk at Section 893, page 344 as follows :

“The defense of assumption of risk is not dependent upon the defendant’s knowledge or belief as to the plaintiff’s state of mind but depends upon the plaintiff’s risk to which he exposes himself.”

Indeed, the illustration, No. 14, on page 351 could almost use the language of Justice Frankfurter in the *Tiller case supra*. This illustration provides at page 351 as follows :

“14. A is employed by B in a State in which by statute it is provided that, ‘in an action for personal injuries caused by visible defects for which an employer would be liable but for the defense of assumption of risk, the fact that the employee continues in the employment after he has been informed of the danger shall not be an assumption of the risk of injury therefrom.’ He is employed in a building at work in which it is necessary to use a rope ladder which, as A knows, is dangerous because not fastened at the bottom. He is hurt by falling from the ladder. A is entitled to recover from B unless his fall is caused by his failure to be reasonably alert and watchful of his own safety in using the ladder.”

It is obvious that the fact that the plaintiff Thomas Sprunt knew and had known of the dangerous defective condition of the roadbed upon which he was compelled to work and knowing of the situation and recognizing the risks to which he was exposed, does not render him negligent but it does in fact constitute the defense of assumption of risk—a defense which is not available to the defendant in this action and which cannot be used by him

under the guise of contributory negligence to reduce in whole or in part the damages to which the plaintiff is entitled.

These facts are not sufficient to predicate a determination that Thomas Sprunt was two-thirds responsible for his accident and consequent injury.

Is there any other facts or theories which added to the above facts would give the defendant railroad any comfort? That the only suggestion is that is to be gained comes from the suggestion that it was not necessary for Mr. Sprunt to board the car at the precise place he did; that he could in fact have selected some other place. The statement that Mr. Sprunt could have selected another place from which to mount the car must be considered in light of the following circumstances. The switching operation was on the premises of the Vitro Uranium Company. It was necessary for him to mount the car in order that the engineer could see him when he was passing signals so that what the plaintiff was doing was essential and a necessary part of his job. The roadbed in the vicinity of where plaintiff and other members of his switching crew were working had been pitted and in a generally unsafe condition for several months. In September, before the accident to plaintiff, conditions were so bad that company safety officials could not walk along that roadbed in ox-fords. This was a general condition not a special condition. At the time plaintiff fell, it had been snowing and the holes had filled with snow so that neither plaintiff nor his fellow employees could tell precisely where the

holes were located. *No evidence was introduced to show that plaintiff knew of the existence of the hole in which he stepped nor was any evidence introduced to indicate that plaintiff knew or should have known that any other place in the area would have been safer for plaintiff to use as a boarding point except that provided by hindsight.*

No evidence was introduced to show that there was an area in the immediate vicinity or in the general vicinity that was free of holes and that would have provided safe footing for the plaintiff. *On the contrary, all of the evidence indicated that no safe area did in fact exist.*

Under these facts, does the fact that the plaintiff could have mounted the car from an area other than that from which he selected constitute negligence? The answer to this of necessity is an unequivocal negative.

However, before going into an examination of what the law is relative to choice, I should like to point out to this Court the following items:

1. The defendant in its answer did not allege any facts which raise this theory of contributory negligence.
2. Defendant at the pretrial did not mention this theory.
3. The Defendant did not suggest to the trial court any such theory.
4. The defendant did not submit any requested instructions embodying said theory.
5. The Court did not advise the jury as to the elements necessary to find contributory negligence on the theory of an election.

The rule as to choice is set down in the case of *Stricklin v. Rosemeyer*, Calif., 142 P2d 953 wherein it was alleged that a plaintiff was guilty of contributory negligence because the plaintiff alighted from a parked vehicle on the left side when in fact he could have opened the door from the right side.

The court made a succinct statement as to the law relative to choice as follows:

“The rule is accurately stated in 38 Am. Jr. p. 873, as follows: ‘One having a choice between methods of doing an act which are equally available, who chooses the more dangerous of the methods, is ordinarily deemed negligent, in the absence of a showing of the existence of an emergency, sudden peril, or other circumstances justifying such choice. The fact that the less dangerous method takes longer and is inconvenient and attended with difficulties furnishes no excuse for knowingly encountering peril.’ The exceptions to the application of the rule are also noted, but no one is pertinent here.”

One of the requirements set forth in the rule is knowledge and one is not necessarily contributorily negligent even though he or she chooses a way that was in fact less safe. In *Williams v. City of Hobbs*, N. Mex., 249 P. 2d 765, the defendant contended that the plaintiff was negligent because she admitted that she was familiar with a dangerous condition of the sidewalk. The court stated the question as follows:

“In treating the contention the plaintiff was contributorily negligent as a matter of law in entering a place of known danger and in choosing

to walk along the sidewalk rather than in the adjacent street or other nearby streets, our inquiry is not whether she actually chose the least safe of the ways available to her, but whether she failed to exercise that degree of care required of a reasonably prudent person under the circumstances.”

The court stated the question as follows:

“In the present case we cannot say as a matter of law that the plaintiff was guilty of contributory negligence in choosing to walk upon the sidewalk, even though she was well aware of its dangerous condition. It was the only sidewalk in the neighborhood; the street it paralleled was unlighted; neither that street nor the nearby streets were paved and a recent rain had left them muddy and wet; the plaintiff had used the walk in safety many times before, as had other persons. Under these circumstances minds might reasonably differ as to whether the plaintiff was contributorily negligent in the choice she made, and the question is, therefore, one for the jury.”

The State of Utah has long recognized the problem inherent in an election or choice as will be seen in *Tuckett v. American Steam & Hand Laundry*, 84 P. 500, and in *Stam v. Ogden Packing & Provision Co.*, 177 P. 218. As was stated in *Kaumans v White Star Gas & Oil Co.*, Utah, 63 P. 2d 231, “The mere fact that the servant was aware that he was exposing himself to danger does not make him guilty of contributory negligence.”

There are two recent cases in Utah bearing directly upon the problem of contributory negligence of a plaintiff involving an election. In *Baker v. Decker*, Utah, 212

P. 2d 679, the plaintiff, an elderly woman of 70 years of age, fell while walking along a second story hallway in the Roosevelt Apartments in Salt Lake City. The defendant showed that there were three means that the plaintiff could have used to depart from her apartment but that she chose one where it was obvious repair work was being done, that she saw on the floor of the hallway the folded uneven canvas that the repairman had laid on the floor, that notwithstanding previous knowledge on the part of the plaintiff, she elected to pursue that particular route, caught her heel on the fold or uneven part of the canvas and fell. The jury found for the plaintiff. The defendant appealed, alleging that the respondent was guilty of contributory negligence as a matter of law in pursuing the course she took because there was a safer course readily available. The court in disposing of this case quoted with approval from *Moore v. Miles*, Utah, 158 P. 2d 676, stating at page 682:

“In our decision in that case we quoted with approval the following excerpt from the case of *Tillotson v. City of Davenport*, 232 Iowa 44, 4 N.W. 2d 365, 366: ‘It is well settled that mere knowledge that a walk is dangerous, unsafe for travel, is not sufficient to establish contributory negligence though there is another way that is safe and convenient, and to defeat recovery it must appear that the traveler knew or as an ordinarily cautious person should have known that it was imprudent to use the walk.’”

The court then went on to deal with the problem raised by the fact that it was conceded that the plaintiff knew and saw the alleged hazard. The Court disposed of

that problem by stating:

“Conceding that respondent saw the equipment in the hall, unless it was imprudent for her to proceed along that course she was not bound to take a safer way. The danger portrayed by the manner in which the equipment was placed in the hall was not so serious that plaintiff can be charged with indiscretion or lack of due care in not deviating from her usual course of exit from the building.”

Where does the defendant claim the evidence shows the plaintiff knew or should have known that it was imprudent to attempt to board the car where he did?

The view set forth in *Baker v. Decker, supra* found approval again in *Wold v. Ogden City, Utah*, 258, P. 2d 453.

In the facts at bar, the evidence is clear that Sprunt did not know of the existence of the hole in which he stepped. There was no evidence to indicate that moving to any other place would have been any safer, nor was there any evidence to indicate that it was imprudent on the part of Mr. Sprunt to attempt to board the car at the place he did save as a matter of hindsight.

The Restatement of the Law of Torts again conclusively establishes that the plaintiff cannot be held to have been guilty of contributory negligence under these facts. And it states, at Section 893, page 346 as follows:

“* * * On the other hand where the defendant had no right to act dangerously or to maintain a dangerous condition after knowledge of it by the

plaintiff, the fact that the plaintiff choose to subject himself to a known risk does not necessarily bar him from recovery. * * * In all such cases the risk has not been thrust upon him. Either the defendant was negligent with respect to the plaintiff in view of a situation in which the plaintiff had properly placed himself, or the defendant was otherwise tortious in creating a situation in which it was necessary for the plaintiff to take such a risk in order to protect an interest of his own or that of a third person against the consequences of the defendant's conduct.

"If, however, the plaintiff in making his choice, adopts a course of conduct which would not have been adopted by a reasonably prudent man in the light of the alternative open to him, he may be barred from recovery. This is a form of contributory negligence which has been frequently called 'voluntary assumption of risk'. This is an application of the phrase made for convenience to indicate a defense based upon the fact that the plaintiff is aware of the risk and chooses to continue."

Illustration No. 5 is closest to the facts involved herein and provides as follows at page 348:

"5. The A railroad company negligently permits a slippery substance to remain on the floor in front of its ticket window. B, a traveler entering to purchase a ticket, which he has a right to do as a member of the public, realizes that he cannot avoid stepping on the substance if he is to purchase a ticket, but reasonably believes that with care he can avoid slipping. Although he advances with due care he nevertheless slips and is hurt. B is entitled to recover damages from A."

From the above, it will be seen that there is no way

on the basis of the evidence produced at this trial that the plaintiff can be found guilty of contributory negligence. In the first place, it would be essential to find that the plaintiff knew specifically of the danger he was running and that he further knew of a safer course which a reasonably prudent person would have selected to take. Again, let us state that there is no evidence either that there was a safer course or that if such a safer course existed that the plaintiff knew of or should have known of its existence. On the contrary, all of the evidence negates any presumption that either a safer place or safer method existed or that plaintiff knew of it. No evidence was introduced nor claimed to exist that discloses any safer place. On the contrary, all the evidence demonstrates that this place was duplicated throughout the area generally.

It is apparent that the evidence does not meet the test required to submit the question of choice as a basis for contributory negligence to a jury. Had the court been requested to instruct the jury on this issue that the Court would have been duty bound to refuse such an instruction.

It would appear, therefore, that the defendant is left with a principle of law as its justification for a finding of contributory negligence on the part of the plaintiff that is completely and totally unsupported by the facts.

POINT II

THE AMOUNT OF DAMAGES IS INADEQUATE IN LAW.

This suit originated by reason of a personal injury

sustained by the Plaintiff while in the employment of the Defendant on the 4th day of January, 1957. Mr. Sprunt received a tear of the rotorcuff of his left arm as a result of a fall which occurred during the course of his employment. Although he had some previous injury, the orthopedic surgeon who treated him stated there was no causal connection between any prior injury and the injury he sustained on the 4th day of January. (Tr. 72, 73). Nor did this injury in any way constitute an aggravation of any pre-existing condition (Tr. 79). As a result of the injury, the Plaintiff sustained a 50% loss of function of the left arm (Tr. 84) which disqualified him physically from working as a switchman (Tr. 84). His disqualification is permanent (Tr. 84).

The jury found in favor of the Plaintiff and against the Defendant and awarded damages in the sum of \$15,000.00. However, the jury further diminished the amount recovered in the amount of \$10,000.00 saying that in effect that the negligence of the plaintiff was at least two-thirds responsible for his injury.

At the time of Plaintiff's injury, he was employed as a switchman at the rate of \$20.30 per day. This amount was stipulated as a daily rate of pay by the counsel for the Defendant. Plaintiff had some thirty (30) years seniority and he had enough seniority that he could have worked five day per week (Tr. 48). After his release from the doctor he made an effort to obtain other employment but has been unable to find any other than the position of driving a cab (Tr. 48). He commenced working in this job on January 25, 1958 and makes approxi-

mately \$90.00 per month at said employment.

No evidence was introduced by the Defendant to indicate either that other employment was available to the Plaintiff or that he could have earned at other employment an amount in excess of \$90.00 per month.

As of the date of trial his loss of pay equalled \$6,432.00, which would have to be reduced by his earned income as a taxi driver, leaving a loss of pay as of the date of trial of \$5,802.30. There was no evidence to indicate that he had any other difficulty with his health. He had a life expectancy in excess of twenty years. Even assuming that he would only work until the age of 65, an annuity purchased at the date of the trial would cost approximately \$25,000.00, which together with his damages of the date of trial would mean that he would have received a monetary loss in excess of \$30,000.00. That would be only a dollar and cents loss and include no award for pain, suffering, embarrassment, humiliation, the permanent injury sustained, or otherwise. For a jury to find that he was only damaged in the amount of \$15,000.00 is absurd and can only mean a complete disregard of the elements of damages set forth by the Court. Counsel for the defendant argued that he could obtain employment that would earn him in excess of \$90.00 which he stated he was able to earn. However, the uncontradicted evidence was that he had made search for employment and was unable to obtain any other employment by reason of his age and that all he had been able to earn was \$90.00 per month. The defendant argued facts to the jury which were not in evidence and the only

explanation for the determination of the size of the award must be that the jury considered the argument of counsel as being facts rather than argument and that they disregarded the testimony or the lack of it.

The Supreme Court of the State of Utah in *Bodon v. Suhrmann* have adopted the position that it is within the discretion of the trial court to increase a judgment brought in by a jury, stating:

“We affirm the responsibility of this court to be indulgent toward the verdict of the jury, and not to disturb it so long as it is within the bounds of reason, in accordance with the principles set forth in the companion case of *Schneider v. Surhmann*; and also that it is primarily the prerogative and duty of the trial court to pass upon the adequacy of the verdict and to order any necessary modification thereof. Nevertheless, when the verdict is outside the limits of any reasonable appraisal of damages as shown by the evidence, it should not be permitted to stand, and if the trial court fails to rectify it, we are obliged to make the correction on appeal.”

CONCLUSION

It is respectfully submitted that the plaintiff is entitled to have a full judgment of \$15,000.00 restored to him by reason of the fact that there is no evidence in the record that in any way justifies the finding of contributory negligence on the part of Mr. Sprunt that in any way contributed to or proximately caused his in-

jury. It is further submitted that Mr. Sprunt is entitled to have the amount of \$15,000 increased by a minimum of \$10,000.00 or be granted a new trial by reason of the fact that the total amount of damages found by the jury were inadequate and unrealistic as a matter of law.

Respectfully submitted,

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Appellant*