1970

Stephen Simpson v. General Motors Corporation : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

STEPHEN SIMPSON,
Plaintiff and Appellant,
vs.
GENERAL MOTORS CORPORATION,
a corporation,
Defendant and Respondent.

Case No. 11630

APPELLANT'S BRIEF

Appeal from the Judgment of the Third D
In and for Salt Lake County, U
The Honorable D. Frank Willi

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STATEMENT OF KIND OF CASE

This is an action for serious personal injuries sustained by the appellant while performing paint repairs on the tailgate assembly of a new Chevrolet station wagon. The incident occurred in the paint shop of the Capitol Chevrolet Company in Salt Lake City, Utah.

DISPOSITION IN LOWER COURT

This case was tried to a jury which returned a general verdict in favor of the defendant and against the plaintiff, no cause of action. Judgment on the verdict was entered, and plaintiff made a motion for a new trial, which was thereafter denied.

RELIEF SOUGHT ON APPEAL

Plaintiff-appellant seeks reversal of the judgment in the court below and a new trial.

STATEMENT OF FACTS

Appellant Stephen Simpson was 26 years of age, who had worked as an automobile painter since he was 15 years old (R. 292, 295). He started working for Capitol Chevrolet Company in June of 1961. He was required to obtain his own tools, consisting of a small ratchet set, a couple of screwdrivers, a pair of pliers, etc. (R. 298). It was a frequent, usual and customary part of his work to use these tools in order to remove things in the area he was required to paint. On December 9 he was assigned the painting of a damaged tailgate on a 1966 Chevrolet station wagon. He noticed that the tailgate had been burned quite badly where it had been spot welded, and the removal of the safety straps (elsewhere in the record called support arms) was essential to his doing a good job. In order to remove the support arms he just had to take out three screws with a screwdriver (R. 302-304). He removed all but one screw and called for a coworker, Ray Ure, to hold onto the other side of the tailgate so that they could gently lower it. He then removed the third screw and proceeded to let the tailgate down (R. 304, 305). As the tailgate was being lowered, Ray Ure suddenly said, "Watch out for that torque bar," and when appellant looked to see what he was talking about, he got hit in the head. He was taken to the hospital where he was unconscious for about three days (R. 307, 308).

The witness Ure testified that he had no idea what would happen if the torque rod came out of the sleeve which was holding it, he simply thought there might be some problem in getting it back into position. He had no understanding as to what problem it might create (R. 212-214).

The appellant likewise did not know what the function of the torque rod was, although he knew it had something to do with the movement of the tailgate. The function of the torque rod had never been explained to him by anyone (R. 306). On previous occasions he had taken off the support arms and dropped the tailgate on older models, and he did not know the rod would come out, or what would happen if it did. He was intending to lower the tailgate down, paint the inside, put the straps back on, then shut the tailgate and do the outside (R. 327). He didn't know there was any spring tension there. He had lowered tailgates before where the bumper would prevent the rod from coming out of its bracket (R. 332). Even if the rod dropped through the guide did not mean that it would flip out. Even if it came out, it might fall the other way or it could just stand there stationary, for all the witness then knew (R. 334, 335). The appellant further testified that he did not know that the rod would come out of the sleeve at the time of the accident, no matter how the tailgate was lowered (R. 336). Appellant was not trying to remove the tailgate altogether, nor to disconnect it from the hinges. He planned on letting it down just a little bit so that he could do his painting (R. 346). Appellant did not know what the name of the

torque bar was until after the accident. He considered the springs or the hinges themselves would operate as the spring like on a storm door (R. 348).

Dr. Wayne S. Brown, professor of engineering at the University of Utah, testified that he had performed experiments on the same model station wagon and photographs were taken during these experiments which were received in evidence as exhibits P-1 - 8 inclusive. He testified that when the tailgate was lowered a little bit below the horizontal position, the rod came out (R. 132, 133). The witness testified that the torque rod travelled at a speed equivalent to 47 miles per hour, which would be similar to the velocity achieved by dropping a piece of metal from a height of a six story building (R. 136). Dr. Brown described simple inexpensive procedures by which the operation of the tailgate could be obviated without impairing function (R. 141, 143). Even to him as a highly trained engineer, the torque rod's operation was not completely obvious. He had carefully watched the torque rod operating during the experiments, and it was not until he analyzed the photographs later that he got a clear picture of what was really happening—and this was because the hinge itself moves while the tailgate is moving, and so the relative motion has to be determined with some reference to the fixed part of the automobile (R. 166).

Charles J. Griswold, the engineer in charge of the Fisher Body Division of General Motors Corporation testified that a similar torque rod design had been in use since 1962 on over two million vehicles (R. 221, 232).

He stated that if the support straps were moved with the bumper in place, the torque rod would already be out before the tailgate touched the bumper (R. 243). He testified that when the torque rod in question was designed, one concern that they had was that someone would open the gate completely and go after those two screws supporting the torque rod with the gate open (R. 259). He admitted that at no time did they conduct any experiment to see what would happen if the torque rod came all the way through the retainer. He stated, "We didn't run experiments of that nature. Something like that is hazardous, to deliberately put that thing down. You are running all kinds of risks. . . . " He testified that the tailgate does not have to drop all the way down in order for the torque rod to escape with the side supports down, "And that's a highly dangerous thing, if that happens. If it comes out, there is no question about it" (R. 260, 261). The witness admitted that he would not expect a person without special experience as an engineer or as a service mechanic for General Motors to know that the rod was a torque rod just by looking at it, and he further testified that a person without special experience as an engineer or service mechanic would not be aware that if the rod came through its retainer with the tailgate at 35° that the rod would fly toward him at a dangerous rate of speed, and he did not think the average owner of a General Motors station wagon since 1962 would be aware of these things (R. 266). The witness admitted that on several occasions while the Court would recess he would lock up the tailgate on Exhibit 19 so that someone could not operate or play with it (R. 275).

The respondent offered into evidence a service manual and a page from the manual as exhibits 17 and 18. These exhibits were admitted over the objection of the appellant until it was first shown that the manual and its contents had been brought to attention of the appellant in connection with his work (R. 159). The appellant excepted to the question that if the procedure prescribed by the manual had been followed no danger would have been involved (R. 162). Over appellant's objection, counsel for the respondent was permitted to read the instructions in the manual with respect to the removal of the tailgate assembly (R. 174, 175, 176). Again, over the objection of the appellant, counsel for respondent was permitted to read from the manual, exhibit D-18, the instructions for the removal of the tailgate, even though appellant's counsel specifically pointed out there was never any attempt or intention to remove the tailgate, he was simply endeavoring to lower it (R. 177, 178, 179). When the body shop foreman was asked if he expected a painter to come from the paint shop and consult the manual in the performance of his work as a painter, he answered that a painter wouldn't particularly need the manual (R. 190), and he could not even remember how many years ago it was that a painter came out of the shop to look at a manual (R. 191). During the several years that he had worked at Capitol Chevrolet, at no time was the appellant given any instruction with respect to the use of a General Motors Fisher Body Manual. No Fisher Body Manual was ever kept in the paint shop (R. 298). He acknowledged that painters frequently removed molding from a

car, sometimes a main part, sometimes an ornament, or maybe even a safety strap (R. 186, 187).

ARGUMENT

POINT I

THE RESPONDENT WAS STRICTLY LIABLE FOR PLACING UPON THE MARKET A STATION WAGON EQUIPPED WITH A TAILGATE ASSEMBLY THAT WAS DANGEROUSLY DEFECTIVE IN DESIGN AND CONTRIBUTORY NEGLIGENCE IS NOT A DEFENSE IN STRICT LIABILITY SITUATIONS.

This case involves a tailgate assembly which was inherently defective and dangerous in its design. The danger was hidden and not perceptible, even to a highly trained engineer, much less to the appellant who was a painter. Every time the tailgate on any of the General Motors station wagons is lowered a short distance below the horizontal position, the torque rod will escape from its retainer and fly forward at a highly dangerous rate of speed. It is a serious threat of injury or death to the unsuspecting, and it was acknowledged as highly dangerous by the engineer in charge of the Fisher Body Division of General Motors Corporation, who testified that a similar torque rod design had been in use since 1962 on over two million station wagons (R. 260, 261, 262, 266).

We respectfully refer the Court to *Section 402A Restatement of Torts 2d. Special liability of seller of product for physical harm to user or consumer.*

"(1) One who sells any product in a defective condition, unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate consumer or to his property, if (a) the seller is engaged in the business of selling such a product, (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

"(2) The rule state in subsection (1) applies although (a) the seller has exercised all possible care in preparation and sale of his product, and (b) the user or consumer has not bought the product or entered into any contractual relation with the seller. . . .

"Comment

"(N) Contributory Negligence. Since the liability with which this section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases (see Section 524) applies. Contributory negligence of the plaintiff is not a defense when such negligence consists of a mere failure to discover the defect in the product or to guard against the possibility of its existence. On the other hand, the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger and nevertheless proceeds unreasonable to make use of the product and is injured by it, he is barred from recovery."

See also *Prosser on Torts* 2d Ed P 341:

> "It frequently is said that the contributory negligence of the plaintiff is not a defense in cases of strict liability. . . . At the same time the defense which in negligence cases is called assumption of risk, will, in general, relieve the defendant of strict liability. Here as elsewhere, the plaintiff will not be heard to complain of a risk which he has encountered voluntarily or brought upon himself with full knowledge and appreciation of danger."

See also *Dillard & Hart, Product Liability and Duty to Warn*, 41 Va. Law Review 145, 163 (1955):

> "To hold these defenses is to divulge in circular reasoning, since the plaintiff cannot be said to have assumed a risk of which he was ignorant and to have contributed to his own injury when he had no way of reasonably ascertaining that the danger of injury existed."

See also *Vandermark v. Ford Motor Co.*, 37 Cal. Reports 896, 391 P2d 168. In that case the hydraulic brake system of a new Ford failed after 1,500 miles and the plaintiff was seriously injured.

At page 898 in the *Cal. Reports* the Court said:

> "In Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 62, 27 Cal. Rptr 697, 700, 377 P2d 897, 900, we held that 'A manufacturer is strictly liable in tort when an article he places on the market knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to human beings . . . ' since Ford as the manufacturer of the complained product cannot delegate its duty to have its cars delivered to the ultimate purchaser free from dangerous defects, it cannot escape liability on the ground that the de-

fect in Vandermark's car may have been caused by something one of its authorized dealers did or failed to do."

In the case, *Curry v. Fred Olsen Line*, 367 F2d 921 (1966), 928, the Court said:

> "The general rule is that contributory negligence is a defense only to actions grounded on negligence and the California courts apply this principle, thus they have held that contributory negligence is not a defense to an intentional tort. . . . Similarly the California courts have held contributory negligence is not a defense in certain types of actions bottomed upon strict liability."

See also *Greeno v. Clark Equipment Co. (Ind)*, 327 F.Supp. 427 (1965) which involved a defective forklift truck. The Court cited with approval *Section 402A of the Restatement of Torts* and stated at page 429:

> "Neither did contributory negligence constitute a defense although use different from or more strenuous than that contemplated to be safe by ordinary users/consumers, that is 'a misuse' would either refute a defective condition or causation."

Hansen v. Firestone Tire & Rubber Co., C.C.A. 6 278 F2d 254, 258:

> "Negligence on the part of the buyer would not operate as a defense to the breach of warranty. If the manufacturer chooses to extend the scope of his liability by certifying certain qualities as existent, the negligent acts of the buyer, bringing about the revelation that the qualities do not exist, would not defeat recovery. As Justice Butzel said in the Bahlman case, there is neither 'reason nor authority' for introducing the defense of con-

tributory negligence into an action for breach of warranty."

The case of *Jarnot v. Ford Motor Co.,* Pa. 156 A.2d 568, involved a defective king pin in the steering mechanism of a tractor which broke while the driver was negotiating a curve. The Court held:

> "The question of plaintiff's contributory negligence does not arise here in an action of assumpsit on a contract as it does on trespass for personal injuries. . . . Under the facts in this case the plaintiff cannot be barred in the application of that principle."

The case of *Schneider v. Shurman,* 8 Utah 2d 35, 327 P2d 822 recognizes the following principle:

> "Plaintiff based his claim of negligence against the supplier upon the doctrine, of which we do not doubt the correctness, that the supplier of his commodity directly or through a third person is subject to liability to those who he ordinarily expects to use it, if the supplier (a) knows of its potential danger, (b) knows or reasonably should know that the user will not realize the danger, and (c) the supplier fails to use reasonable care to safeguard against the danger or to inform the user of the facts which makes it dangerous."

In the case at bar it cannot be seriously disputed that the arrangement of the tailgate assembly was highly dangerous and that the danger would not be discernible to a person not technically familiar with the function and behavior of the torque rod when the tailgate is lowered beyond the horizontal position. It was easily forseeable by the designers and assemblers of the General Motors

station wagons that persons not especially trained or skilled in the operation or function of the tailgate assembly would have occasion to lower the tailgate beyond the horizontal position for purposes of painting or repair, or even in the normal use of the vehicle, and yet they altogether failed to take the simple and inexpensive alternatives that were available to them which, if used, would have eliminated the threat of bodily harm and injury inherent in the design.

Reason, common sense, and the principles of justice all combine in holding the manufacturer strictly liable in situations of this kind. As the eminent Justice Cardozo remarked in the case of *Palsgraf v. Long Island Railroad*, 248 NY 349, 162 NE 99:

> "The risk reasonably to be perceived defines the duty to be obeyed."

The same rule applies to the behavior of the appellant in this case. It would be foolish to hold him responsible for the consequences of an inherent danger unknown to him. This would require an extension of the duty to be obeyed far beyond the risk reasonably to be perceived. The appellant should not have been required to take measures to protect himself against a danger which was not reasonably apparent to him. The record is completely devoid of any evidence that would show that the appellant knew or should have known of the risk involved in removing the third screw from the support arm and lowering the tailgate.

POINT II

EVEN IF THE DEFENSE OF CONTRIBUTORY NEGLIGENCE WERE AVAILABLE IN THIS CASE THERE WAS NO EVIDENCE UPON WHICH THE JURY COULD BASE A FINDING OF CONTRIBUTORY NEGLIGENCE AND THAT ISSUE SHOULD NOT HAVE BEEN SUBMITTED TO THE JURY.

Realizing at the conclusion of the case that the defendant had altogether failed to prove that the appellant was guilty of any conduct which would constitute contributory negligence, the appellant asked the Court in its requested instruction No. 8 to remove this issue from the case (R. 51). Appellant duly accepted to the Court's refusal to grant this request.

A review of the Statement of Facts set forth above will conclusively show that appellant was carefully pursuing his assigned duty to paint the damaged tailgate; that he had no awareness of the function of the torque rod or of what would happen if it escaped from its sleeve. He did not know there was any tension there. He had lowered tailgates before without experiencing any danger. The professor of engineering testified that even though he had carefully watched the torque rod operating during the several experiments performed by him that it was not until he later analyzed the photographs that he got a clear picture of what was really happening. The respondent's engineer, Charles J. Griswold, who was chiefly responsible for the adoption of the dangerous tailgate design, acknowledged that it was highly dangerous (R. 260, 261), and admitted that he would not expect a per-

son without special experience as an engineer or as a service mechanic for General Motors to know the significance of the torque rod operation or to be aware that if the tailgate were lowered beyond 35 degrees that the rod would escape from its retainer and fly at a dangerous rate of speed (R. 266). There was no warning of any kind upon the vehicle itself and no instructions concerning the mechanical operation of the tailgate were ever given to the appellant. There is nothing in the record to show either that he was aware of any danger or that he had a duty to inform himself so that he could avoid it. The record fails to disclose any unreasonable conduct on his part, unless thoroughness in the performance of his work could be so construed. The appellant felt that the removal of the support arm was essential to his performance of a first class job in the painting restoration of the tailgate on a new station wagon.

Although appellant's counsel realizes that contributory negligence is ordinarily a jury question. It becomes a matter for the Court when no evidence is adduced upon which a finding of contributory negligence could be based. To submit this unsupported issue to the jury was highly prejudicial. Indeed, it is difficult to otherwise explain the jury's verdict.

In *Northwestern Airlines, Inc. v. Glenn L. Martin Co.,* C.C.A. (6), 224 F2d 120, the lawsuit involved a defective design in an airplane wing. We quote from that case at page 120:

> "In short we believe that there is a complete absence of any evidence that Northwestern at any

time prior to August 29, 1948 had knowledge or appreciation of any risk or danger associated with the design, the material, the workmanship or the tests of the faulty wing joints in the 202 airplanes. There is no evidence that the danger lurking in the wing joint was obvious to those Northwestern representatives who actually did observe it that they must be taken to have appreciated the danger. We conclude that it was error to submit to the jury the questions of Martin's assumption of risk in this case."

Again from the same case at page 127:

"It is conceded by Martin that 'if Northwestern had simply relied on Martin to produce a safe and sound airplane and had taken no further interest in the material, there would be no issue here of contributory negligence'. That, in any event, seems to be the law. One need not anticipate the negligence of another until he becomes aware of such negligence. . . . It is not contributory negligence to fail to look out for danger when there is no reason to apprehend any (citing cases). . . . One to whom a duty is owed has a right to assume that it will be performed. He is not required to anticipate negligent acts or omissions on the part of others (citing cases)."

Again in *Styers v. Winston Coca-Cola Bottling Co.*, (N. C.) 80 SE 2d 253, 239 N.C. 504 it was held as a matter of law that there was no contributory negligence involved when the plaintiff was injured in the explosion of a Coca-Cola bottle.

See also *Brown v. Chapman*, 304 F2d 149, 153 (C.C.A. 9) where the following language appears:

"One may well rely upon a warranty as protection against the aggravation of the consequences of

ones own carelessness anticipating that one may negligently drop tobacco ash upon one's clothing. One may well rely upon a warranty that such clothing is made from suitable fabric which does not possess extraordinary characteristics of flammability and accordingly will not burst into flame as the result of such act of carelessness."

Similarly in *Bahlman v. Hudson Motor Car Co.*, 290 Mich. 683, 288 NW 309, involved the purchase of an automobile and reliance upon the manufacturer's representation that it had a unisteel top. The purchaser was in an accident and his head was gashed on a seam where two pieces of steel had been welded together. He recovered for breach of warranty even though it was his negligence that caused the automobile to overturn.

POINT III

THE COURT ERRED IN RECEIVING IN EVIDENCE THE FISHER BODY SERVICE MANUAL (EXHIBITS 17 AND 18) AND IN ALLOWING TESTIMONY WITH RESPECT TO ITS CONTENTS TO BE GIVEN TO THE JURY.

The appellant was not required to use or follow the service manual in the performance of his work as a painter, and it was error for the Court to receive the manual in evidence and testimony concerning it.

It was not negligence for appellant to fail to use or follow the manual in performing his work in this case, for the following reasons: The service manual itself did not contain any word of warning or caution referring to

the hidden danger involved in the tailgate assembly, or the risk to be incurred in the removal of the support arm. The service manual was kept in the office of the body shop manager (R. 51), and the appellant was never at any time instructed to use the manual nor was there a body manual in the paint shop where he worked (R. 297, 298). No instructions were ever given to employees in the paint shop regarding the use of the manual (R. 190). The body shop foreman said, "As a painter, he wouldn't particularly need the manual" (R. 190, 191). The body shop foreman didn't even know within years when a painter last came in the body shop to ask for the manual (R. 191). The body shop foreman testified that the screwdriver was standard equipment for painters (R. 182) and that painters frequently removed moldings from a car, sometimes a main part, sometimes an ornament, or maybe even a safety strap (R. 186, 187). Finally, it would not be reasonable to expect a painter working on a commission basis, to go around the body shop looking for a manual to tell him how to remove three screws so that he could sand and paint underneath the support arm, when nothing in his training or experience gave any hint as to any possible risk or danger in the operation in so proceeding.

The Trial Court, over the objection of the appellant, allowed counsel for the respondent to read instructions in the manual with respect to the removal of the tailgate assembly (R. 174, 175, 176) even though appellant's counsel specifically pointed out that there was never any attempt or intention on the part of the appellant to re-

move the tailgate—he was simply endeavoring to lower it (R. 177, 178, 179).

These errors with respect to the introduction into evidence of the service manual were highly prejudicial. The jury might very well have attached to the manual and the procedures outlined therein significance beyond that to which they were entitled, and they may have considered this a breach of duty when the duty itself did not exist, the manual and its contents not having ever been brought to the appellant's attention or his compliance with it required, or even recommended or expected by his superiors.

POINT IV

THE COURT ERRED IN GIVING INSTRUCTION NO. 16.

In instruction No. 16 the jury was told that an automobile manufacturer is not liable for injuries resulting when an automobile is used in a manner it was not entitled to be used, that merely because a product can be used dangerously or because a user can be subjected to a danger does not make the product itself dangerous, if it would not be so while being used as intended, and that a manufacturer is not required to foresee all possible ways in which a person may injure himself nor to protect against all such possibilities or against misuse by careless persons (R. 70).

Appellant excepted to the giving of this instruction for the reason that it was misleading in failing to include

in the use of the automobile the reasonably to be anticipated repairs of the automobile. The jury may very well have concluded under the instruction of the Court that there was no duty to protect the appellant in the performance of his work as a painter on the vehicle as distinguished from its general use. The instruction is even more objectionable in view of the fact that it refers to "misuse by careless persons" which would carry with it the implication that the appellant was careless. If, as Justice Cardozo observed, the risk reasonably to be perceived defines the duty to be obeyed," the manufacturer would not even be excused by an unintended or abnormal use, although it would require a considerable stretch of the normal meaning of words to consider the painting or repair of a vehicle as an unintended or abnormal use. The test is not the intended use, but the forseeable risk. The enlightened trend of recent case law is to permit the jury to determine whether certain unintended uses should be anticipated as within the scope of foreseeable risk. See *Haberly v. Reardon Co.*, 319 S. W. 2d 859 (Mo. 1958) where a boy lost his eye which came in contact with dripping paint brush in father's hand. The Court held that if the jury found the chemicals were strong enough to cause blindness, manufacturer owed duty to warn. In *Spruill v. Boyle-Midway, Inc.*, 308 F2d 79, a 14 month old child died from ingestion of defendant's furniture polish. There was a duty to warn of foreseeable abnormal use. See also *Victory Sparkler Co. v. Latimer*, 53 F2d 3, where it was held foreseeable that children would eat the type of fireworks called "spit devils" because of color and appearance, and there are numerous other cases.

POINT V

THE COURT ERRED IN GIVING ITS INSTRUCTION 18.

In instruction No. 18 the Court told the jury that if the plaintiff was negligent then his recovery would be barred. Of course, as pointed out under Point I, it was error for the Court to instruct the jury on contributory negligence, but this instruction was especially objectionable because the Court provided no guide whatsoever for the jury with respect to what would or would not constitute contributory negligence in this particular case on the part of the appellant.

Kassouf v. Lee Bros. Inc., 26 Cal Rptr 276. In that case the Court refused an instruction to the effect that it was incumbent upon the plaintiff to take reasonable precautions for her own safety in the handling, inspection and consumption of the candy bar at isssue and that a failure on her part to meet such duty proximately contributing to her injury, if any, would defeat her right of recovery even though the jury might find there was a breach of warranty on the part of the defendants. The Court said:

> "Instruction No. 20 may be dealt with rather summarily. It contains no definition of the degree of care which the profferor claims to be required of plaintiff. Is it ordinary care? Slight care? What is meant by 'reasonable precautions'? Besides, we deem it to be in outright error in its postulate that precautions must be used in the 'handling' and 'inspection' of the candy bar. This would include presumably a duty to look before biting into the

bar and perhaps to feel the bar before eating. We believe there is no such duty. One can fancy the consternation among packaged candy makers and sellers if a statute were proposed which would require labels on candy bars warning the buyers to look before eating because worms or vermicular eggs might be present. . . .

"This brings us to the question whether fault of the plaintiff is a defense in a food warranty case. Fault of the plaintiff in the form of assumption of risk was not pleaded by the defendants and it is the law that it must be pleaded specifically unless it appears from the facts alleged in the complaint or unless the case has been tried as if the case had been pleaded. . . .

"It is our decision that contributory negligence would not be a defense. This issue, unlike that of assumption of risk, actually was raised by pleading and by manner in which the case was tried."

See also *Adams v. Parish,* 189 Ky 628, 225 SW 467.

CONCLUSION

In view of the facts and authorities set forth in this brief, the appellant respectfully urges this Court to reverse the judgment of the Trial Court and grant to the appellant a new trial in the furtherance of justice and right.

Respectfully submitted, this 15th day of January, 1970.

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Attorney for Plaintiff and
Appellant