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Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 6795

In the Supreme Court of Appeals of Virginia at Richmond

DANDRIDGE COCKRELL CRABBE, Plaintiff in error,

v.

COUNTY SCHOOL BOARD OF NORTHUMBERLAND COUNTY, ET AL. Defendants in error.

FROM THE CIRCUIT COURT OF NORTHUMBERLAND COUNTY

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a.m.; Adjourns at 1:00 p.m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 6795

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 10th day of October, 1967.

DANDRIDGE COCKRELL CRABBE, Plaintiff in error,

against

COUNTY SCHOOL BOARD OF NORTHUMBERLAND COUNTY AND BOBBY LEE ALBRITE,
Defendants in error.

From the Circuit Court of Northumberland County
Daniel Weymouth, Judge

Upon the petition of Dandridge Cockrell Crabbe a writ of error is awarded him from a final order entered by the Circuit Court of Northumberland County on the 27th day of March, 1967, in a certain motion for judgment then therein depending, wherein the said petitioner was plaintiff and County School Board of Northumberland County and another were defendants; upon the petitioner, or some one for him, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of $300, with condition as the law directs.

RECORD

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The plaintiff, Dandridge Cockrell Crabbe, by his attorney, respectfully moves this Honorable Court for judgment aginst the County School Board of Northumberland County and Bobby Lee Albright, jointly and severally, in the amount of One Hundred Thousand Dollars ($100,000.00), with interest and costs, upon the following grounds, to-wit:

1. Heretofore, to-wit, on the 3rd day of February, 1965, the said plaintiff, who was then a minor but who has subsequently attained the age of twenty-one years, having been born July 26, 1945, was a student regularly enrolled in Northumberland High School at Heathsville, Virginia, which said school was then operated and controlled by the defendant County School Board of Northumberland County (hereinafter called the School Board). The defendant, Bobby Lee Albrite was then and there employed by said School Board and acting as a teacher in said High School.

page 3 } 2. On the date aforesaid, the plaintiff, in the due course of his duties as a student or pupil of said High School was receiving instruction from the defendant, Bobby Lee Albrite, who was then and there engaged in the performance of his duties pursuant to his aforesaid employment as a teacher. The instruction then and there involved was in the use of a powered woodworking tool in the nature of a table saw, supposedly equipped to produce moldings and other wooden artifacts, and to saw and cut small pieces of wood, and the method of instruction then and there being employed involved the operation and use of said tool by the plaintiff under the supervision, control, and step by step instruction of the said defendant teacher.

3. The particular use of the aforesaid tool involved in the instruction then and there being given was new to, and thitherto unknown to, the plaintiff.

4. The aforesaid power tool, for reasons unknown to the plaintiff, was not in proper and safe working condition for the purposes for which it was then and there being used, and was defective and improperly equipped therefor, all of which was then and there unknown to the plaintiff, but was, or reasonably should have been, known to said defendant teacher, in the following and other respects:

(a) Said tool should have been, but was not, equipped with a safety block designed to prevent such occurrences as are hereinafter set forth.

(b) The rip fence on said tool would not properly strike a board being cut by said tool, as that it was necessary to run two boards at once through said tool, thus creating a dangerous and hazardous condition for the operator and for others in the vicinity of said tool.

(c) The said tool had previously malfunctioned in a manner similar to that hereinafter set forth, to the knowledge of said defendant teacher and of other agents and employees of the said School Board, whose knowledge of all of such defects is imputed to said School Board.

page 4 } 5. It then and there was the duty of said defendant teacher and of said School Board not to permit the use of said tool, so defective, in instruction or otherwise, such use being dangerous as aforesaid.

6. Notwithstanding their said duty, the said School Board, and the said teacher, caused the plaintiff to use said powered tool as aforesaid at the time and place aforesaid, such action on the part of the defendants being reckless, negligent, unlawful, and in willful disregard of the safety of the plaintiff.

7. While the plaintiff was so using the said tool under the supervision, control and instruction of the said teacher, said tool "grabbed" the board being fed into it and hurled the board with great force through and out of said tool, causing the board to strike violently against the second, third and fourth fingers of the plaintiff's right hand, amputating and knocking off the first or distal phalanx of each of said fingers. Such action of the said tool in grabbing and hurling a board being fed into it was a result of the defectiveness aforesaid of said tool, and, in this instance, was the direct and proximate result of the negligence, recklessness, and willful disregard of the safety of the plaintiff, on the part of the defendants in causing the plaintiff to use such defective tool, and in failure properly to instruct the plaintiff in its use.

8. As a direct and proximate result of such negligence on the part of the said defendants, plaintiff was injured, crippled and mutilated as aforesaid, thereby sustaining permanent injury and disability, suffering great and excruciating pain and suffering, incurring great expense in and about the medical treatments of said injuries and mutilation, suffering life-long permanent diminution in earning ability, incurring the permanent and continuing anguish of the disfigurement and crippling of his right hand, all to the damage of the plaintiff in the amount of One Hundred Thousand Dollars ($100,000.00).

page 5 } WHEREFORE the plaintiff moves the Court for judgment as aforesaid.

* * * * *

Filed in the Clerk's Office the 28 day of Jan., 1967.

Teste:

EMELINE A. HALL, Clerk
....., D. C.

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The defendant, The County School Board of Northumberland County, for its special plea to the action against it brought by the said plaintiff, say;

1. That the County School Board of Northumberland County has the responsibility under the law for the operation of the Public School system in Northumberland County, Virginia.

2. That the operation of such school system and the providing of schools for the children of Northumberland County, Virginia, is a governmental function of said county and of the state and that the said County School Board of Northumberland County was, at all times material to this action, engaged in and participating in the performance of said governmental function.

3. That in each and every act, neglect or failure of duty alleged against this defendant, the charge lies in
page 9 } an alleged failure on the part of this defendant to perform properly and adequately its duty in its official capacity in and about the performance of the governmental function hereinabove mentioned and described.

WHEREFORE, this said defendant says that it is immune from liability to the said plaintiff for or on account of the matters and things alleged against it by the said plaintiff, and that as a matter of law the plaintiff cannot recover from this said defendant in this action.

REQUEST FOR REPLY

Pursuant to Rule 3:11 of the rules of the Supreme Court

of Appeals of Virginia, this defendant requests that the plaintiff reply to the factual and legal allegations of this special plea.

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page 10 }

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Filed in Clerk's Office Circuit Court of Northumberland County, Virginia Feb. 15, 1967.

EMELINE A. HALL, Clerk

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page 11 }

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DEMURRER OF THE COUNTY SCHOOL BOARD OF NORTHUMBERLAND COUNTY

This defendant demurs to the Motion for Judgment filed herein against it on the ground that the Motion for Judgment fails to state a cause of action against this defendant on which a recovery can be based.

* * * * *

Filed in Clerk's Office Circuit Court of Northumberland County, Virginia Feb. 15, 1967.

EMELINE A. HALL, Clerk

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page 13 }

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SPECIAL PLEA OF BOBBY LEE ALBRITE

The defendant, Bobby Lee Albrite, for his special plea for the action against him brought by the said plaintiff, says;

1. That the County School Board of Northumberland

County has the responsibility under the law for the operation of the Public School System in Northumberland County, Virginia.

2. That the operation of such school system and the providing of schools for the children of Northumberland County, Virginia, is a governmental function of said county and of the State of Virginia and that the said County School Board of Northumberland County was, at all times material to this action, engaged in and participating in the performance of said governmental function.

3. That this defendant was a servant and employee of the County School Board of Northumberland County at and during the times all of the alleged acts, neglects, or failures of duty occurred. That during the performance of

page 14 } each and all of such alleged acts, neglects or failures of duty this defendant was acting legally and within the scope of his employment. That he was acting solely for the County School Board of Northumberland County in his representative capacity, was not acting in his own individual right and his acts were the acts of the said Board.

WHEREFORE, this defendant says that he is immune from actions for tort and from liability to the said plaintiff for or on account of the matters and things alleged against him by the said plaintiff for the reason that the said County School Board of Northumberland County is immune from action for tort and from liability, which immunity extends to him as its employee, and that as a matter of law the plaintiff cannot recover from this said defendant in this action.

REQUEST FOR REPLY

Pursuant to Rule 3:11 of the rules of the Supreme Court of Appeals of Virginia, this defendant requests that the plaintiff reply to the factual and legal allegations of this special plea.

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Filed in Clerk's Office Circuit Court of Northumberland County, Virginia Feb. 18, 1967.

EMELINE A. HALL, Clerk.

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page 16 }

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DEMURRER OF BOBBY LEE ALBRITE

This defendant demurs to the Motion for Judgment filed herein against him on the ground that the Motion for Judgment fails to state a cause of action against this defendant on which a recovery can be based.

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The plaintiff, Dandridge Cockrell Crabbe, by his attorney, for answer to the special plea filed in this cause by the County School Board of Northumberland County and to the special plea filed in this cause by Bobby Lee Albrite, the defendants, answers and says.

1. The plaintiff admits the truth of the allegations contained in Paragraph 1 of each of the aforesaid special pleas.

2. The plaintiff denies that the operation of the School system mentioned in said special pleas is a purely governmental function insofar as the defendant, County School Board is concerned, but that said County School Board was, at all times material to this action, acting as a form of corporation, sometimes referred to a quasi-corporation, and the said County School Board is made answerable to actions at law by the law for such cases made and provided.

page 19 } 3. As to the allegations in Paragraph 3 of the special plea of the County School Board of Northumberland County, the plaintiff denies as aforesaid the allegations or inferences that the actions, neglects and failures of duty alleged against the said defendant and the charge lie entirely in an alleged failure on the part of the said defendant to perform a purely governmental function, but in fact charge the defendants for breach of duty, for negligence, and improper actions, performed by it as a quasi-corporation, subject to suit under the law, and as to risks against which the said County School Board has procured insurance. As to the defendant, Bobby Lee Albrite, and his special plea in Paragraph 3 thereof, the plaintiff repeats his position as herein-

above set forth and adds that, in addition thereto, the said defendant, Bobby Lee Albrite, being of age and *sui juris* is personally liable for the acts of negligence charged against him in the motion for judgment.

WHEREFORE, the plaintiff denies that the two aforesaid defendants are in any wise immune from liability to the plaintiff on account of the matters and things alleged against them by the plaintiff.

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Filed in Clerk's Office Circuit Court of Northumberland County, Virginia March 6, 1967.

FRANCES B. SWANN, Deputy Clerk

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page 20 }

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This day came the parties, by counsel, pursuant to agreement and presented argument to the court on the defendants demurrers and the court, having heard argument of the parties, having considered the authorities cited by the parties is of the opinion to and does sustain the demurrers of both defendant and it is therefore ordered that this action be dismissed as to both defendants. To all of which the plaintiff excepted. Send copies to all counsel.

Enter this order March 27, 1967.

DANIEL WEYMOUTH, Judge

We ask for this:
J. CALVERTT CLARKE, JR.
Counsel for the County School Board
of Northumberland County

WALTER B. FIDLER
Counsel for Bobby Lee Albrite

Seen and objected to & exception noted
WM. B. McLEOD, p.q.
Dandridge Cockrell Crabbe

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page 23 }

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Now comes the plaintiff by his attorney and notes an appeal from the order of the Circuit Court of Northumberland County, entered in the above captioned cause on the 27th day of March, 1967, and assigns as errors the following:

1. Court erred in sustaining the demurrer of the defendant, the County School Board of Northumberland County, and
2. The Court erred in sustaining the demurrer of the defendant Bobby Lee Albrite, and
3. The Court erred in dismissing the action brought by the plaintiff as to both defendants.

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Filed in Clerk's Office Circuit Court of Northumberland County, Virginia May 18, 1967.

EMELINE A. HALL, Clerk.

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page 3 }

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Mr. Clarke: * * *

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And then they quote the recent decision of—in Virginia, that was School Board—*County School Board* v. *Thomas,* 201 Va. 608. But in that case, that was a motor vehicle accident on a school bus, and there is a specific statute which says that the school board shall have school buses and shall insure them and that you can't invoke the state's immunity because of that.

The Court: That is the way we get those cases.

Mr. Clarke: Yes, sir. And there is no such statute in respect to any other function of the school board. Just as to the operation of the school buses.

The Court: In other words, they give the public the right

to sue; the legislature does?

Mr. Clarke: That is right.

page 19 } Mr. Fidler: Limited to the insurance coverage.

Mr. Clark: Limited to the insurance coverage. And the legislature goes on to say they shan't be guests, and sets that up. But this has to do with automobiles.

The Court: And that is the kind of policy you have in this?

Mr. Clarke: In this case?

The Court: Yes.

Mr. Clarke: Well, Judge, we say that there is no materiality to whatever the school board happened to do to protect itself against cost of litigation, and I can also say to the Court, sir, again it is immaterial and irrelevant in this matter, but in any event, there isn't enough there to cover this suit. But there is. But the fact that there may be insurance on the school board in his instance, for this action, it is certainly immaterial.

The Court: Let me put it this way. Maybe my question wasn't fair.

There is no statute, similar statute, that gives the right to sue in this kind of case?

Mr. Clarke: No, sir. We can find none. And I think I have looked as thoroughly as can be looked.

The Court in the *Kellam* case, the Virginia case, goes on to state that:

page 20 } "The fact that section 22-94, 1950 Code provides that school boards 'may sue and be sued' does not affect their governmental immunity for tortious personal injury."

And it just allows such things as taxpayers' suits, and things like that, to keep the school board from over-spending its budget and things.

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Mr. McLeod: Now, as to the School Board itself, Virginia has only had one case on this issue. And again, I am in agreement with the gentlemen on the other side.

The Court: Well, if you are in agreement with them, we will stop.

Mr. McLeod: That there has only been one case.

The Court: Oh, I thought you said you were in agreement with them.

Mr. McLeod: To that effect, that there has only been one case. And this case, as it states itself, that the question involved is whether or not a person, a member of the general public, who is injured by the condition of the school building, which was then in use by a lessee, under the authority of the School Board, has the right to sue the School Board.

Note, we don't go into the question of whether they have the right to sue the lessee, or any of these points. The question is whether the School Board, as lessor of the
page 64 } building are liable to the public who are lawfully in the building as invitees of the lessee.

Our case, of course, is quite different. Our case is that of a pupil who is in the school under the function as a school. And the cases are not in complete accord through the country. The case of *Kellam* v. The *School Board of the City of Norfolk,* cited by Mr. Clarke, cites the doctrines primarily set forth in a series of cases in West Virginia, and West Virginia is a state which holds that the pupil has no protection from the School Board.

Frankly, West Virginia does hold that the School Board is immune, from practically everyone, for practically everything. Now, by Virginia citing that case in this case, I will admit that there is some persuasive force that Virginia might, when faced squarely with the situation adopt this. But in recent years, this view—

The Court: Has been from West Virginia. I told him, talking about another one this morning, boy, they litigate people out there.

Mr. McLeod: Yes, sir. And they have a number of these cases out there. And I don't raise any point but what that is the ruling in West Virginia. I will have to admit that. I have read a number of their cases.

The Court: Well, I will tell you something else,
page 65 } too. After long checking through the years, they are copycats. They do everything just like we do.

Mr. McLeod: Yes, but sometimes they do it first.

The Court: Practically everything. They wouldn't go around the bend without seeing how we do it. They are still walking around the hole.

Mr. McLeod: That is certainly true if we have taken a stand. If we have decided something, they will sure follow us. But in this case, they decided something first. And I am not attempting to make any serious argument on this. I admit that the *Kellam* case sounds like Virginia is getting ready to follow them. It followed them in the limited sense that it

washed the school board with immunity as to the public using a leased school building.

Now, that, certainly, they did. They may have said more than they meant to say. But what the Court has not done yet is cite this case. We have not had a case in the Supreme Court of Appeals of Virginia involving this type of injury to the student, or a pupil.

I might point out that there is a doctrine recognized generally by quite a number of states, and by implication, a statute in Virginia, that if the School Board insures itself, it is not immune as to the amount of insurance, because that certainly is not going to call on the state to pay

page 66 } anything. There is no money coming from the state on that. This School Board was insured.

Now, furthermore, while probably a majority of the states have held that school boards are immune, they have not all done so; and at least one state has not long ago reversed that position by its court, with a very sound and well-reasoned argument, in the case of *Monitor* v. *Canton Community District.*

The Court: Has that been settled in Virginia?

Mr. McLeod: No, sir. It has not. See, it has never been before this court.

The Court: Pardon?

Mr. McLeod: This kind of case has never been before the Court.

The Court: Why, you just read one.

Mr. McLeod: No, sir. I was speaking about a case where they had a case involving a member of the public who was injured as the invitee of a lessee of the school building.

Now, they didn't go into the question of liability, or anything like that. They simply held, under that situation, where the school board had leased the building to someone else, someone else had held a function in it, and a member of the public who had paid admission to it was injured.

The Court: What he is doing is a governmental

page 67 } function. If the other thing is a governmental function, what he is doing is a super-duper governmental function.

Mr. McLeod: And what we have got now is the case of whether or not Virginia is going to go on and follow the West Virginia rule, which it may have indicated it might be going to do by this decision; or whether it is going to follow the rule that is coming more and more into effect. Actually, by the case decided in Illinois, which just after carefully going over the whole picture—

The Court: Well, they follow the rule in Virginia, as far

as I know. Every lawyer in every place else has been following it since I have come to the bar.

Mr. McLeod: They didn't in Illinois.

The Court: They didn't sue them, except in these school bus cases.

Mr. McLeod: There are a few states that have statutory modifications of this situation. The State of Washington is one. The State of California is one. And cases from Washington and California are not strictly in point, because they are in the specific statutes. New York has its own rule, which Virginia might elect to follow, or has not—it has not precluded itself from it—which imposes liability if the authority was vested in the board to have done what was necessary to have avoided. For instance, New York has a
page 68 } system where a different board runs the school from that which maintains it, and they absolve the school board of responsibility for situations arising out of poor maintenance, naturally.

Now, in a number of the other states that have historically followed the theory of immunity, we are finding a turning away from it, simply because it has been found to be a virtually untenable theory in that the people cannot be expected to entrust their children to absolutely irresponsible forces unleashed upon them, and not actually governed by the state, but by local boards who should be amendable to the people.

The Illinois case that I have referred to analyzes this very carefully. Maryland has shown a tendency to follow this, in that while it has not yet actually held the school board liable, it has been avoiding it on the facts of the case, not on the theory the school board couldn't be held liable. There has been other movements in that direction; and frankly, in Virginia, the case is not fully closed yet. The only decision is that one dealing with a lessee, and I admit there is indications of the Supreme Court of Appeals at the time it wrote that decision might have gone on and adopted the West Virginia rulings in full. But it hasn't been done, and I suggest to the Court that not having done so, this Court is not precluded from considering the propriety and justice of such cases, as the one in Illinois which I have
page 69 } here, and the others, in deciding whether or not the School Board itself may not be properly liable; and we maintain that it is.

The Court: Well, this thing you are talking about, of course, it isn't the school. It is the jail down here. It is the judge of the court, in the courtroom. It is all functions, and everything else. Maybe we have got somebody here not

washing the floor right. I have seen some of them. I had a case one time where a woman broke her leg, and broke her wooden leg in the bank; both at the same time. The stump was in a wooden leg. She went in there, and they had been scrubbing, and she started to slip, spreading her legs there with that wooden leg. She tore the wooden leg up, and she broke the wooden leg, and broke her leg again between the stub and the hip. It was a mess. It was a mess. It really was. Pour soul! And all of these things could very well happen in the courtroom. They could happen in all other governmental buildings. Jails and court houses. All that sort of thing. Now, I know down to Eastville they have some kind of a policy that if you fall around there, whether it is your fault or not, if you fall down steps—we have had too many of them fall down the steps. One in Richmond County fell down the steps there, and had $7500. The insurance company paid the bill. They have got some kind of policy. I don't think it makes any difference whose fault it is. But if they didn't have that, why they would be sued right

page 70 } and left. Maybe what you say is so. It looks like to me you are blazing a new trail here. That is the way it looks to me. It looks like to me there is nothing in the world here but a suit against the School Board. That is what you are shooting for. A suit against the School Board. I don't see anything in the world that you have charged him with that you are not charging the School Board with. That seems to be the test. He is doing the same things that the School Board has been doing, and he is employed by them.

I see no reason why in the world you couldn't sue the janitor if he didn't do things exactly right. If he made a slip-up, or made a mistake in the school house and a child was injured.

Well, what is the difference? His job is to clean up. His job is not to leave things around where people will trip over them. That is his job, but he does that every now and then. He leaves something. Somebody falls over it. A child comes along with thick glasses and falls over it.

Maybe he has been told not to leave it there before. "Don't put that out here. Put that in the closet. Put that in the closet when you get through with it." I tell these people around the court house. I see the things around here. "Don't leave that. Somebody is liable to trip over that." "That is right. You told me before. I will try to watch that thing."

page 71 } But they do it. That is the way people do.

And some act of negligence, after a person has been warned of something, that is sufficient. They held in this case it wasn't sufficient. This man went out there. He had a

spring. He was on his land. He knew about the rock country. "Don't do that. Please don't do that. You are going to ruin my spring. I know they told you to do it, but don't do that. You will mess me up. You will mess me up."

But they didn't pay a bit of attention to him. They didn't go back and see the employers or anything. They just went right ahead and did it. All kinds of warning.

Yours is just a difference of degree there. Just a difference of degree. It looks like to me it is just a case where you can't sue.

Now, I can think of cases where you could get around it; where you just depart from it then and you no longer are acting within the scope of your employment.

You remember all of those cases where the fellow departs from his place in the truck or the car, and all that thing. He moves from Richmond to Washington. You find him over in Baltimore with the car. He is outside the scope of his employment. But as far as these papers are alleged, this man is—he is doing things the same way.

We all do that, you know. We do bad things
page 72 } over and over and over. Every now and then I
will find something that I have done, been doing it wrong all my life and just found out. Practicing law, you look in the Code. It isn't even like I thought it was at all. It is entirely different. We just do that. We keep on plugging along, and if you are just going to have a simple act of negligence on the part of an employee, just a simple act of negligence—because we do know that nobody wants the employer to be negligent, even a little teensy weensy bit. But if you are going to open it up so you can sue all of these people, thousands and thousands of them who work for the government, boy, it is going to be a new field of litigation here. It is going to have a tremendous effect on jobs. If I could be sued for all these things we do up here, boy, I wouldn't want this job. I'd be afraid they'd take my house, home, little land I have got. It would worry me to death. I wouldn't want the job. And I dare say if Mr. Albrite can be sued for every little thing he does wrong down there, boy, I think he'd do something. He'd go get a policy of his own, of course, if it cost him $100; or go get another job.

So that is the big thing we are faced with. I really believe they are talking about something radical, something outside the scope of their employment. Like the fellow coming down there drunk is an exaggeration a little bit. No question about
it then. No question about it then. But just these
page 73 } ordinary run of the mind mistakes and things

that might amount to negligence, I don't think so. So I am going to sustain both demurrers.

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A Copy—Teste:

Howard G. Turner, Clerk.

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