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SUPREME COURT OF VIRGINIA
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IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD No. 730918

WILLIAM LAWRENCE REAGAN, AN INFANT WHO SUES BY HIS FATHER AND NEXT FRIEND, V. J. REAGAN AND VINCENT J. REAGAN,

Plaintiffs in error,

v.

FRANCES PEREZ,

Defendant in error.

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MOTION FOR JUDGMENT

(Filed March 3, 1972)

[1] * * *

The undersigned, William Lawrence Reagan, an infant, who sues by and through his father V. J. Reagan, as next friend, will, twenty-one days after service of this Motion for Judgment on you, move the Hustings Court of and for the City of Newport News, Virginia, for judgment against you in the amount of FIFTY THOUSAND DOLLARS ($50,000), plus the cost of this proceedings and award of execution, for personal injuries sustained by him in the following manner, to-wit:

1. On the 4th day of July, 1971, you, Frances Perez, owned and occupied a dwelling house and yard surrounding the same located at 348 - 52nd Street in the City of Newport News, Virginia, and while so occupying said house gave a birthday party for a small child, and the undersigned, William Lawrence Reagan, fourteen years of age, was invited to and attended said party, and at the time of the occurrence of the mishap hereinafter mentioned occupied the position of a social guest.

2. Thereupon, it became your duty as owner and user of said premises to correct any condition known to you or which you had reason to know would involve an unreasonable risk of harm to the undersigned and to warn the undersigned of such condition if you should have expected that he would not discover or realize the danger and did not know or have reason to know [2] of the condition and the risks involved.

3. Notwithstanding the aforementioned duties, you negligently omitted and failed in your duty as above alleged and as a proximate result and in consequence thereof, the undersigned, while on said premises as a social guest, was injured when he and another child were occupying a hammock, one end of which was tied to a tree and the other end of which was tied to a chimney of an old building that had been previously demolished, and while so occupying the aforementioned hammock, the chimney collapsed and the brick and debris therefrom fell upon and over the body of the undersigned, by which means he was caused to suffer painful, disabling, permanent and disfiguring injuries.

4. The injuries sustained by the undersigned as aforesaid are disabling, permanent, painful and progressive in nature, have caused the undersigned to suffer nervousness, headaches, mental anguish, emotional disturbance, physical pain and limitation of activities, and will in the future cause the undersigned to so suffer.

5. The undersigned has in addition to all of the foregoing been prevented by such injuries from following his usual and customary activities without hindrance.

6. All of the foregoing injuries and resultant consequences were due to the sole negligence and omissions of you, Frances Perez, which negligence and omissions were the sole proximate cause of the injuries and consequences aforesaid.

WHEREFORE, the undersigned will, twenty-one days after service of this Motion for Judgment on you, move the Hustings Court of and for the City of Newport News, Virginia, for judgment against you in the amount of FIFTY THOUSAND DOLLARS ($50,000) [3] plus the cost of this proceedings.

* * *

ANSWER AND GROUNDS OF DEFENSE

(Filed March 21, 1972)

[5] * * *

For answer and grounds of defense to the Motion for Judgment Defendant, Frances Perez, comes and says:

1. Defendant denies each and every allegation in the Motion for Judgment, particularly all allegations of negligence.

2. Defendant denies that Plaintiff was injured in the manner and to the extent alleged in the Motion for Judgment.

3. Defendant says that she was not guilty of any negligence which proximately caused or efficiently contributed to the injuries and damages alleged to have been sustained by Plaintiff.

4. Defendant says that the injuries and damages, if any, sustained by Plaintiff were caused solely by his own negligence or the negligence of persons other than Defendant.

5. Defendant says that if she were guilty of any negligence, which is expressly denied, such negligence was remote and was not a proximate cause of the injuries and damage, if any, sustained by Plaintiff.

6. Defendant says that Plaintiff was guilty of contributory negligence and assumption of risk, which bars any recovery by him.

[6] 7. Such other defenses that may be available at or before trial, or which may be justified by the evidence at trial.

* * *

MOTION FOR JUDGMENT

(Filed March 3, 1973)

[7] * * *

The undersigned, Vincent J. Reagan, will, twenty-one days after service of this Motion for Judgment on you, move the Hustings Court of and for the City of Newport News, Virginia, for judgment against you in the amount of TEN THOUSAND DOLLARS ($10,000), plus the cost of this proceedings and award of execution, for the following reasons, to-wit:

1. That on the 4th day of July, 1972, you, Frances Perez, owned and occupied a dwelling house and yard surrounding the same located at 348 - 52nd Street in the City of Newport News, and while so occupying said house gave a birthday party for a child and William Lawrence Reagan, the fourteen year old son of the undersigned, was invited to attend said party, and at the time of the occurrence of the mishap hereinafter mentioned occupied the position of a social guest.

2. Thereupon, it became and was your duty as owner and user of said premises to correct any condition known to you or which you had reason to know would involve an unreasonable risk of harm to William Lawrence Reagan and to warn him of such condition if you should have expected that he would not discover or realize the danger, and did not know or have reason to know of the condition and the risks involved.

3. Notwithstanding the aforesaid duties, you negligently omitted and failed in your duties as above alleged and as a [8] proximate result and in consequence thereof William Lawrence Reagan was severely in-

jured while on said premises as a social guest when he and another child were occupying a hammock, one end of which was tied to a tree and the other end of which was tied to a chimney of an old building that had been previously demolished, and while the children were so occupying the aforementioned hammock, the chimney collapsed and the brick and debris therefrom fell upon and over the body of William Lawrence Reagan, by which means he was severely injured and the undersigned was obliged to spend and become obligated for large sums of money in an effort to cure, relieve and minimize his injury, and it will be necessary for the undersigned to continue to expend money in an effort to cure and minimize said injuries. Furthermore, the undersigned has been deprived of the services of his son, William Lawrence Reagan, age fourteen, and will continue to be deprived of such services by reason of the injuries hereinbefore mentioned.

WHEREFORE, the undersigned will, twenty-one days after service of this Motion for Judgment on you, move the Hustings Court of and for the City of Newport News, Virginia, for judgment against you in the amount of TEN THOUSAND DOLLARS ($10,000), plus the cost of this proceedings.

* * *

ANSWER AND GROUNDS OF DEFENSE

(Filed March 21, 1973)

[10] * * *

For answer and grounds of defense to the Motion for Judgment Defendant, Frances Perez, comes and says:

1. Defendant denies each and every allegation in the Motion for Judgment, particularly all allegations of negligence.

2. Defendant denies that Plaintiff was damaged in the manner and to the extent alleged in the Motion for Judgment.

3. Defendant says that she was not guilty of any negligence which proximately caused or efficiently contributed to the damages alleged to have been sustained by Plaintiff.

4. Defendant says that the damages, if any, sustained by Plaintiff

were caused solely by the negligence of Plaintiff's son, William Lawrence Reagan, or the negligence of persons other than Defendant.

5. Defendant says that if she were guilty of any negligence, which is expressly denied, such negligence was remote and was not a proximate cause of the damage, if any, sustained by Plaintiff.

6. Defendant says that Plaintiff's son, William Lawrence Reagan, was guilty of contributory negligence and assumption of risk, which bars any recovery by Plaintiff.

[11] 7. Such other defenses that may be available at or before trial, or which may be justified by the evidence at trial.

* * *

ORDER

(Entered May 3, 1973)

[12] * * *

On motion of Attorney for the Plaintiffs in the above-captioned cases, it is ADJUDGED and ORDERED that these two cases be, and the same hereby are consolidated for trial.

* * *

JUDGMENT ORDER

(Entered June 27, 1973)

[13] * * *

This action came on this day for trial on the issues joined in the pleadings and a jury was impaneled, namely: Sherman Harris, Leonard W. Fairfield, William H. Gaw, Daniel C. Stinson, William M. Robertson, Mrs. Gaynelle Newton, and Alvin S. Butterworth, Jr.

At the conclusion of the Plaintiff's evidence, the Defendant, by counsel, moved the Court to strike the evidence of the Plaintiff and to enter Summary Judgment in favor of the Defendant on the grounds that the Plaintiff had failed to establish a prima facie case of negligence on the part of the Defendant and for other reasons assigned during argument.

UPON CONSIDERATION WHEREOF, and for the reasons stated into the records from the bench—the Court does sustain the Motion and it is accordingly ORDERED that the evidence of the Plaintiff be, and the same hereby is, stricken, that the jury is discharged from further consideration of this case; and that Summary Judgment is awarded in favor of the Defendant, to which action of the Court Plaintiff, by counsel, duly objected and accepted.

* * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

(Filed July 6, 1973)

[14] * * *

TAKE NOTICE that the respective plaintiffs in the above styled and numbered actions hereby appeal to the Supreme Court of Virginia from the judgments rendered in each such case on the 27th day of June, 1973, and assign error as follows:

Assignments of Error

1. The Court erred in sustaining the motion of the defendant to strike the evidence of the plaintiff, William Lawrence Reagan, infant, in the first numbered action.

2. The Court erred in sustaining the motion of the defendant to strike the evidence of the plaintiff, Vincent J. Reagan, in the second numbered action.

3. The Court erred in refusing to permit the jury to pass [15] upon the issues between the parties in each such action, under proper instructions, and render a verdict in accordance therewith.

4. The Court erred in entering summary judgment in favor of the defendant in each of the said actions.

Appellants give notice that a transcript of the testimony and other incidents of trial will be filed in due course.

* * *

ORDER

(Entered July 27, 1973)

[18] * * *

It appearing to the Court that the Defendant has appealed her convictions in this Court and the records, transcripts and exhibits are now ready to be sent to the Clerk of the Supreme Court of Virginia.

It is ordered that the Clerk of this Court retain custody of the Plaintiff's Exhibits No. 1 and No. 2 and if requested, to immediately transport the same to the Clerk of the Supreme Court of Virginia.

* * *

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

[3] * * *

Testimony of William Lawrence Reagan

Direct Examination

By Mr. Pitchford:

Q What is your name?

A William Reagan.

Q How old are you?

A 15.

Q How old were you on July 4, 1971?

A 13.

Q When is your birthday?

A August 6.

Q On the day I have mentioned, did you go to the home of Mrs. Perez located at 348 52nd Street?

A Yes, ma'am—sir.

[4] Q And while there—why did you go there?

A Supposed to have been a party there.

Q What sort of a party?

A Birthday party.

Q Were you invited to go to the home?

A Yes, sir.

Q By whom?

A Larry Perez.

Q By whom?

A Larry Perez.

Q How old is Larry?

A I don't know.

Q Was it his birthday?

A I don't know. I don't know. He invited me.

Q About what time did you go to the Perez home to attend a birthday party?

A I don't know. It was getting dark.

Q Getting dark?

A Yes, sir.

Q What did you all do at the birthday party?

A We went in and we stood out in the living room and talked for awhile, and then, went down in the basement; stayed down there for about an hour or so. And then Wesley Massey and Alan and Teresa Williams and Anna Williams went out in the back yard, and a bunch of people followed us; and [5] somebody got in the hammock before us. And then me and Teresa got in the hammock; somebody was pushing us. I don't know who it was. And so, I don't know—I remember waking up in the hospital.

Q What were you doing just before you said somebody was pushing you? Pushing you in what?

A The hammock.

Q And where was the hammock?

A Tied to a tree and to the chimney.

Q Tied to a chimney and what?

A To the chimney and to the tree. That is what it was tied to.

Q And long were you in the hammock before the mishap, if you know?

A I can't remember.

Q Was it a long time, or short time, or do you have any memory at all?

A I don't know. I can't remember. Really, it's been a long time.

Q Had you ever been in a hammock before?

A No, sir.

[7] * * *

Cross-Examination

By Mr. Dowding:

Q Billy, I believe you said your birthday was August the 6th; is that right?

A Yes, sir.

Q I didn't catch the year. I don't think you gave us that.

A 1957.

Q So you were 14 then, on—

A Thirteen. I had my fourteenth birthday in the hospital.

Q That's what I was getting ready to say. You were thirteen at the time of the accident, and you had your fourteenth birthday a little more than a month later while you were in the hospital; is that correct?

A Yes, sir.

[8] Q And where did you attend school at this time?

A In the Newport—no, Jackson Elementary.

Q All right. And what grade had you completed, the June before this occurred?

A I think it was seventh. It was seventh grade.

Q I am sorry. I can't hear you.

A Seventh grade, I think.

Q Seventh grade. And was that the grade that you were suppose to be in?

A No. I was going into the eighth.

Q Pardon me?

A I was going into the eighth.

Q The following September you are talking about?

A That summer, and then in September, I was—

Q Were you going to school during the summer?

A No, sir.

Q Well, my question is, you just finished the seventh grade?

A Yes, sir.

Q And that was the correct grade for you to have been in; wasn't it?

A Yes, sir.

Q And had you been getting along pretty well in school up through the seventh grade?

A I failed the sixth grade.

[9] Q You repeated that?

A Yes, sir.

Q And did you get along in the seventh grade?

A Yes, sir.

Q You passed that all right, and you went into the eighth grade the following year is that right?

A Yes, sir.

Q Now, Billy, as I understand it, when you first went to the Perez home, you went down into the basement; that's where the party was?

A No. We stayed up on the first floor for a little while, then went down into the basement.

Q Had you even been to the Perez home before this particular day?

A No, sir.

Q You had not ever been there?

A No.

Q And after you stayed upstairs for awhile, you went down into the basement, and then you and three others went out into the back yard; is that correct?

A Yes. And everybody followed us into the yard.

Q So everybody went out there, and about how long did you think you stayed in the back yard before the accident happened?

A I can't remember.

[10] Q Now, you saw the hammock, as I understand it, and you saw that one end of it was attached to a tree; is that right?

A Yes, sir.

Q How was it attached to the tree?

A It was tied.

Q Just tied around the tree, or tied to something that was attached to the tree?

A It was tied to the tree.

Q And you saw that the other end was attached to this chimney that you have described; is that right?

A Yes, sir.

Q And how was it attached to the chimney?

A It was tied.

Q With a rope?

A I don't know. I can't remember. I don't know. But it was attached to that chimney.

Q And you saw that as soon as you went out in the back yard; is that right?

A I didn't see the hammock. I went to sit on the steps with Wesley for a little while, and everybody was playing in the hammock. And then, me and Teresa went and got in the hammock.

Q All right. So how many kids were there altogether? Would you estimate?

[11] A I don't know. I don't remember the exact number.

Q About how many?

A I really don't know.

Q Well, let's see, were there as many as 10, do you think?

A Yes, I think so.

Q Were there as many as 20?

A I don't think there were that many.

Q Would it be fair to say probably somewhere between 10 or 20 children?

A About 15, I guess.

Q And what was the general age group of the children who were there?

A Around my age.

Q Were there some older?

A Yes, sir.

Q Were there any younger?

A Yes, sir.

Q And you say that all the others had been playing in the hammock before you and Teresa got in; is that correct?

A Not all of them.

Q About how many would you think?

A Some were playing. I don't really know. I was sitting on the steps, and some were playing in the hammock.

[12] Q But you did remember that some of the other children played in the hammock before you and Teresa got in it; is that right,

A Yes, sir.

Q And did the ones that played in the hammock swing in the hammock, too? Was someone pushing them?

A Yes, sir.

Q How many children were in the hammock at one time while this was going on?

A About two, one or two.

Q One or two at different times; is that right?

A Yes, sir.

Q And were there times when there were two boys together in the hammock?

A I can't remember.

Q But you do remember that sometimes there were two children in the hammock, and sometimes one; is that right?

A Yes, sir.

Q And during this time, somebody was pushing them in it and swinging back and forth; is that right?

A Yes, sir.

Q And nothing happened to the chimney then; did it?

A No.

Q Now, then you and Tracy went over and you got [13] into the hammock; is that right?

A Yes, sir.

Q Tell the members of the jury generally what position you were in when you got into the hammock. Were you laying down or straddling it, or just how were you in it?

A She was laying across, and I was straddled; and they were pushing.

Q She was laying across the hammock and you were straddling? By that, you mean, you had a leg on each side of the hammock?

A Yes, sir.

Q And did your feet touch the ground?

A I can't remember.

Q And was somebody pushing from each side, or just one side?

A From one side.

Q Were you swinging back in an arc like I am describing to you with this pad of paper?

A Yes, sir.

Q And before you and Tracy got into the hammock, did you go over and examine the tree?

A No, sir.

Q How did the tree look to you?

A I can't remember.

Q Do you recall that you saw anything unusual [14] about the tree, or anything dangerous, as far as you were concerned?

A No, sir.

Q Because if there had been anything that appeared dangerous about the tree, you wouldn't have gotten in the hammock in the first place?

A If I knew it was dangerous, I wouldn't have.

Q That's right. And did you go over and look at the chimney?

A No, sir. Everybody else was swinging in it, too, so I guessed it would be safe.

Q So you assumed that it was all right because everybody else had been swinging in it, and nothing happened; is that right?

A Yes, sir.

Q And you didn't go over and inspect the chimney, or try to push on it, shake it, or anything like that; did you?

A No.

Q It was a brick chimney; wasn't it?

A Yes, sir.

Q And you could see that the bottom of it was set down in concrete; couldn't you?

A I didn't look.

Q You didn't look. But there wasn't anything [15] about the appearance of this chimney that you saw that lead you to believe it was dangerous in any way; was it?

A No, sir.

Q Because if it appeared to be dangerous, you wouldn't have gotten in it in the first place; would you?

A I don't know if it was. I saw everybody else swinging.

Q I understand that. But if you had known there was anything dangerous about that chimney, you wouldn't have gotten into the swing in the first place?

A Yes, sir.

Q You mean you would not?

A No, I wouldn't have.

Q Because you were 13 years old at that time, and you were aware that it would be dangerous to get into a hammock that was attached to something that appeared to be dangerous. You could appreciate that at this time; couldn't you?

A Everybody else was swinging in it, so I guess I could, too.

Q I understand that. But back at this time that this happened, Billy, what I'm asking you is that you were intelligent enough to realize that you shouldn't have been getting into a hammock if it was attached to something that appeared to be weak or dangerous, or likely to fall; isn't [16] that true?

A Yes, if I would be aware of it.

Q That's right. Because you were intelligent enough on the day that that accident occurred to realize that; weren't you?

A Yes, sir.

Q There isn't any question about that; is there?

A No, sir.

Q You didn't see Mrs. Perez on this night; did you?

A I can't remember.

Q Just one moment please.
How old was Tracy at the time this happened?

A I guess about 16—15, something like that.
Her name is Teresa.

Q I am sorry. I thought you were referring to her as Tracy, but that name is Teresa?

A Yes, sir.

* * *

Testimony of Wesley Massey

[24] * * *

Direct Examination

By Mr. Pitchford:

Q What is your name?

A Wesley Massey.

Mr. Dowding: I am sorry. I didn't get the first name.

The Witness: Wesley Massey.

By Mr. Pitchford:

Q How old are you, Wesley?

A 17.

Q Where do you live?

A 5200 Huntington Avenue.

Q Were you at the Perez home on the night of July 4, 1971?

A Yes, sir.

Q And when Billy was injured?

A Yes, sir.

Q Why were you there?

A I was invited by Larry Perez.

Q All right. Tell us what you children did at the birthday party before the happening of the accident.

[25] A Yes, sir.

Q What did you-all do before the accident happened?

A Well, we went to the house and went down in the basement and listened to some records and went up and went out in the back yard. And we started—they started swinging on the hammock and just fell. And that was it.

Q How long were you-all in the back yard before the hammock fell?

A I'm not sure. I couldn't say.

Q Had you been in the hammock?

A No, sir.

Q Had you seen other children in the hammock?

A Yes, sir.

Q And to what was the hammock fastened?

A Sir?

Q What was the hammock fastened to?

A One end was on a tree, and the other one was tied to the chimney.

Q Was the chimney attached to anything?

A No, sir.

Q Did you see the chimney? Did the chimney fall?

A Yes. I seen it when it fell.

Q What was happening just before the chimney did fall?

A Everybody was just running around in the back [26] yard having a party.

Q And where was Billy?

A He was in the hammock.

Q Did you see him in the hammock?

A Yes, sir.

Q When the chimney fell, what happened to Billy?

A It knocked him out.

Q And then what happened?

A Well, I guess it was about 10 or 15 minutes before the anbulance came. Somebody called the ambulance. I don't remember who it was.

* * *

Testimony of Katherine Young

* * *

Direct Examination

By Mr. Pitchford:

Q State your name, please, ma'am.

[27] A Mrs. Katherine Young.

Q Where do you live?

A 347 51st Street.

Q Where is that in reference to the home of Mrs. Perez?

A Mrs. Perez lives back on the corner, and I live at the third door from the Warwick Boulevard.

Q Do you know how long Mrs. Perez lived in the neighborhood?

A I do not.

Q Ma'am?

A I do not.

Q Do you recollect a building being torn down in the back of the Perez's?

A Yes, sir.

Q And after that building was torn down, was some part of it left up?

A Yes, sir.

Q What was left up?

A The chimney.

Q Was anything tied to or attached to that chimney?

A The hammock.

Q Did you know that Billy Reagan was hurt in that hammock on July 4?

A I knew children were hurt over there.

[28] Q Where were you when this happened?

A I was in my kitchen. I had gotten out of bed, I think, it was around 9:30, somewhere around 10:00. And I put on my robe. I heard them screaming, and I went out on the back porch. But I did not know he was hurt.

Q Had you ever gone over into the Perez's yard and looked at the chimney?

A No, sir.

* * *

Testimony of Frances Perez

* * *

Direct Examination

By Mr. Pitchford:

Q State your name, please, ma'am.

A Frances Perez.

Q Mrs. Perez, did you on July 4, 1971 live at [29] 348 52nd Street?

A Yes, sir.

The Court: Will you speak up a little.

The Witness: Yes, sir.

By Mr. Pitchford:

Q How long have you lived there?

A I would say about a year.

Q During that year's time, did you or your family tear down an old building in the back?

A Yes, sir.

Q What kind of a building was it?

A It was a double garage.

Q And why was it torn down?

A It was getting ready to fall.

Q Getting ready to fall down?

A Yes, sir.

Q And that was the reason it was torn down?

A Yes, sir.

Q Why didn't you tear the chimney down when you tore the garage down?

A We were planning to build back.

Q You were planning what?

A To build back.

Q Did you ever inspect the chimney, or have the chimney inspected?

[30] A No, sir.

Q When was the hammock tied to the chimney?

A About two days.

Q About what?

A About two days.

Q Before this accident?

A Yes, sir.

[31] * * *

Testimony of Vincent J. Reagan

* * *

Direct Examination

By Mr. Pitchford:

Q State your name, please.

A Vincent Joseph Reagan.

Q Where do you live, Mr. Reagan?

A 483 Huntington Avenue.

Q This Billy, the boy that was sitting beside you, is that your son?

A Yes, sir, it is.

Q Was Billy involved in an accident on about July 4, 1971?

A Yes, sir, he was.

[31A] * * *

Q Now, were you familiar with the premises at 348 52nd Street occupied by Mrs. Perez?

A I had passed it, but I didn't know who lived there.

Q What, if anything, do you know about an old dilapidated building being torn down in her back yard?

A Well, I knew there was a two-car, white garage facing Warwick Boulevard, and on occasion, I passed it. And I seen that it was being demolished, and my son-in-law and I passed it two or three days later and it had been pretty well pulled down; and it looked like some debris had been down beside it. But most of it had been hauled away, and there was a brick flue chimney which evidently would have been at the rear of the garage.

Q Describe that to me, if you will.

A Oh, I would say it was a 20-inch square brick flue, square, approximately 16 feet high.

Q Was there anything at all supporting the chimney?

[32] A No, sir. It was just a brick flue standing alone.

Q And when did that have reference to the happening of the accident?

A Pardon?

Q How long before the accident did you make that observation?

A Well, it was just a matter of days. We were going to New Market, and something else was being torn down in the north end, and being a resident there, I just happened to notice it. That was all.

[35] * * *

PROCEEDINGS ON MOTIONS

Mr. Dowding: Yes, sir. If Your Honor please, at this time, the defendant would move the Court to strike the evidence of the plaintiff and enter summary judgment [36] for the defendant on several grounds.

We start with the proposition in the case that at the time of this unfortunate accident, Billy Reagan occupied the position of a social guest on the premises of Mrs. Perez; that, in fact, is alleged in his motion for judgment. So there is no question in this case as to his status.

Now, the evidence has been developed, or perhaps I should say, the lack of it is very simple. The garage which existed on Mrs. Perez' property was demolished. There was a chimney left standing, which Mr. Reagan has described being about 10 inches square and 16 feet high constructed of brick with a flue.

There was a birthday party to which the young man was invited by one of Mrs. Perez' children. They ended up in the back yard where this hammock was located; one end attached to the chimney; one end attached to the tree.

After a number of other children had been playing in the hammock, Billy and Teresa were in the hammock for an unknown period

of time being swung by some other children, and this chimney collapsed causing the injury to him. That is the sum and substance of the evidence before the Court at this time.

There is not one iota of evidence before the Court as to really what caused the chimney to fall; what its condition was, or for that matter, even or—I do think the [37] one young man—no, I don't think so—the two bricks from the bottom, I think that may have been in opening statement. But in any event, the chimney broke and that is that.

Now, we start with the proposition that the law in Virginia is crystal clear that in the case of a social guest who is injured by reason of a defect, or defective condition in the premises, that person, in order to recover against the owner of the property, is required by Virginia law to establish that the owner of the property was guilty of willful or wanton negligence; something akin, if not a twin brother of gross negligence.

Well, I don't think anybody in this case would even suggest to the Court that there is an iota of willful or wanton negligence on the part of Mrs. Perez. So with that proposition in mind, the only question then is whether the injury in this case was caused by a condition on the premises, or by active negligence on the part of Mrs. Perez. That is the clear distinction that is made by the cases.

The case which laid down that rule was *Bradshaw* v. *Minter* decided in 1965, where a guest was injured when she fell off a horse owned by the property owner which was a wild, uncontrolled horse. And this was shown, and that was known to the owner, but still in spite of that knowledge, the owner allowed this particular plaintiff to ride this horse. The court in that case said this is active negligence [38] on the part of the owner, allowing someone to ride a horse which is known to be unruly, uncontrollable and dangerous. But it said—it drew a clear distinction between cases of that nature and cases where the injury is caused by a condition on the premises. Now, certainly it can't be seriously argued that the injury in this case was caused by something other than a condition of the premises. There is not an iota of evidence before the Court of any activity at all on the part of Mrs. Perez in connection with this matter. The rule of—before I get to that, *Bradshaw* v. *Minter* established that rule.

The next case which came along and which the recovery was affirmed, was a situation where a social guest was in the home of the defendant and was injured by a metal chip which flew off of a screw-

driver when the owner of the property hit the screwdriver with a hammer. It was decided, really, at the same term of court that *Bradshaw* v. *Minter* was decided. The court again said this injury didn't result from a condition of the premises. It resulted from active negligence on the part of this defendant; and, therefore, there is a duty of ordinary care.

And then we come to the case of *Busch* v. *Gaglio,* decided in 1966. Now, this is a case, if Your Honor please, where the facts are as follows: The plaintiff, a social guest, was injured when her leg became impaled on a sharp edge of a pipe which the defendant had driven into his lawn.

[39] "The metal pipe which caused the plaintiff's injuries was driven into the ground with a sledge hammer by the defendant, about six months before the plaintiff's accident, to prevent persons from parking automobiles on the lawn. The defendant's mother and sisters protested the installation of the pipe. Their protests went unheeded, however, because, in the words of the defendant, 'they could not object.'

"The pipe was approximately one inch in diameter and protruded above the ground from 12 to 20 inches. It was located in an unlighted area, 18 inches from a graveled sidewalk in front of the home and 12 inches from the edge of a graveled driveway leading into the property.

"The condition of the pipe at the time of the accident was described as '* * * rusty. The lip of the pipe was battered as if some heavy object had been used to pound it into the ground, and a section of the lip or the end of the pipe was projecting upward in a curved, hook-like fashion.' "

The Court in the Busch case said this is an exception to the rule of *Bradshaw* v. *Minter*.

He held that a social guest, "is not in law an invitee, but is nothing more than a licensee," and stated that the general rule followed in Virginia, was "no duty is imposed [40] upon the owner of occupant to keep his premises in a safe and suitable condition for the use of a licensee, and that so far as the condition of the premises is concerned the owner or occupant is only liable for any willful or wanton injury that may be done to him."

And then they go on to note the exceptions involving injuries resulting from active conduct, active negligence on the part of the host. They quote the Restatement of the Law of Torts in this case, and they said that—they went to make an exception of *Bradshaw* v. *Minter* where these tests could be met. And the first test is:

"A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,

(a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and

(b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and

(c) the licensees do not know or have reason to know of the condition and the risk involved.

Well, clearly this case is beyond the scope of [41] those tests, because in the first place, there is no evidence before the Court of what the "condition" is that the plaintiff must be complaining of. The only evidence is that this chimney was there, and it broke. Not an iota of evidence of what caused it to break, which must be shown, of course, to even come within a million miles of bringing the case within the rules of the Busch case.

All that has been testified to is that the chimney was there. The hammock had been used before, and that it broke; and that is that. Certainly, it's not akin to a case where we are dealing with a pipe actually driven into the ground by the defendant and left a short distance above the ground in an unlighted area with a sharp hook on the end. That, if Your Honor please, is an inherently dangerous condition which any person could see and realize and should expect; that if someone—a guest comes walking through, he is likely to impale himself upon it. But that's not the case with this chimney. There is nothing inherently dangerous about the chimney.

Suppose the evidence in this case was that the tree had broken. We would be in exactly the same situation. It's simply something there that this hammock was tied to. There is no evidence that anybody had any prior difficulty, that there was any weakness in this chimney, that it was anything other than a solid and stable 10 inches of square brick.

[42] Apparently, the plaintiff is going to ask the Court to take judicial knowledge of the fact, or perhaps, allow this jury to speculate that a 10-inch square brick chimney is inherently dangerous to tie a hammock to. Well, the same is true of the tree, or anything else that might fall under unknown conditions. But the fact of the matter is,

if Your Honor please, you can't get away from this. Something caused this chimney to fall. I don't know what it was. The jury doesn't know what it was, and the Court doesn't know what it was. It simply fell while these children were swinging two of them in this hammock at the same time.

Not one iota of evidence that this lady had any knowledge of anything other than: Number one, the chimney was there, and number two, the hammock was tied to it. And that is the evidence and all of the evidence.

There is not a suggestion that she knew that this was not a solid support for this hammock, or that there was any reason to believe that it would fall; since the plaintiff's own evidence is that it had been used before on this particular night by a number of children. And that, of course, is an essential test even under this Busch case involving the hook pipe driven into the ground, knowledge and active conduct on the part of the owner.

So I don't think that the plaintiff's attorney is in a position to ask the Court to submit the issue of [43] knowledge to this jury. Knowledge of what? Knowledge that the chimney was there, or knowledge that the hammock was there? That's not what the law is about. A law of this kind is about a defective, dangerous condition; and there is not any evidence of that before the Court; nor can this jury speculate that, plain and simply, the chimney is in an inherently dangerous condition any more than the tree would be. I say if the tree had broken in this case, do we submit to the jury and allow them to speculate that Mrs. Perez shouldn't have had the hammock there? So I say the plaintiff in this case falls clearly within the rule of Bradshaw v. Minter. It was—if there was any defect, it was there to start with. It was a latent defect unknown to this defendant. And the only duty she had is to refrain from willful or wanton negligence, and certainly, that can't even be suggested. Because if you look at it this way, Your Honor, if we look at the other side of the case, if the plaintiff is contending that Mrs. Perez should have known that a chimney of this type was an inherently dangerous thing to attach a hammock to, and that it would be inherently dangerous to swing in a hammock attached to this chimney, then where does that leave young Billy? He would have been 14 years old a month after this accident. Your Honor is familiar with the rule that he is presumed to be incapable of contributory negligence until he is 14. But that presumption can be rebutted by showing that he had [44]

sufficient development and intelligence to appreciate the danger, if any, involved and the particular circumstances in that particular case.

Well, by his own testimony, I asked him, and he certainly would not have gotten into the hammock if it had appeared to him that there was anything dangerous about it. So how can we say that it must have appeared inherently dangerous to Mrs. Perez? Obviously, any presumption in his favor is rebutted by his own testimony that he would not have gotten into it if it appeared in any way dangerous to him. So how can we tax such knowledge on to her.

So if he wants to argue that it was inherently dangerous and it was inherently dangerous to attach a hammock to it, and she knew it was there, then we are right back in the teeth of the young man's own testimony. If it wasn't inherently dangerous, she has no duty to warn him in the first place. It's not wanton at all in view of Bradshaw v. Minter.

It's just like the case when you are walking through somebody's living room, and the floor appears to be perfectly all right. There is no give, or softness, or anything to indicate that it's been weakened underneath, and the guest falls through the floor caused by a latent defect unknown to the home owner. It is the same rule that has been applied in many, many cases ever since this type litigation started in Virginia. If there was a defect—and, of course, there is [45] no evidence of any, really, any defect; just the chimney fell. Suppose there was evidence that the mortar was old and that it had worn away, and that it was in an obviously weak condition in between certain bricks. If that condition is not known to her, or not visible upon reasonable inspection, then she has no duty to warn a guest of something she doesn't know about in the first place.

So no matter how you look at it, I submit that the plaintiff's case must fail; and submission of this case to the jury would have to be on pure utter absolute speculation. For these reasons, we would move the Court to strike the plaintiff's evidence.

Mr. Pitchford: If Your Honor please, Mr. Dowding has made reference to two cases, and relying on the first one is that of *Limberg* v. *Lent,* which involved a screwdriver case. That case for the first time established in Virginia an exception to the rule of gross inculpable negligence. It established, also, that there has to be active negligence on the part of the defendant.

Before ruling, I would like for the Court to read the cases because it's very difficult to get up here and make it clear, the law, as it actually exists.

The next case that he talked about is that of *Bradshaw* v. *Minter,* 206 Va. 450. And the court discusses the duties a little bit commencing at page 453 where he said:

[47] "In Virginia we have adhered to the general rule that no duty is imposed upon the owner or occupant to keep his premises in a safe and suitable condition for the use of a licensee, and that so far as the condition of the premises is concerned the owner or occupant is only liable for any willful or wanton injury that may be done to him.

"However, the textwriters and the later cases hold that a different rule applies where a guest is injured by reason of the activities of the host which may constitute active or affirmative negligence as distinguished from passive negligence, that is, the condition of the premises. Where the activities of the host are involved, the test should be one of reasonable care under the circumstances. As is said in Restatement of the Law of Torts:

" 'A possessor of land is subject to liability to licensees, whether business visitors or gratuitous licensees, for bodily harm caused to them by his failure to carry on his activities with reasonable care for their safety, unless the licensees know or from facts known to them, should know of the possessor's activities and of the risk involved therein.' "

"The principle is thus stated in 2 Harper & James, The Law of Torts:

" 'There are a good many dicta—mostly in older cases—and some holdings to the effect that the occupier of [48] land owes the bare licensee no greater duty than to refrain from intentional or willful or wanton, misconduct towards him. The prevailing view is to the contrary, however, and it is now generally held that in cases involving injury resulting from active conduct, as distinguished from conditions of the premises, the landowner or possessor may be liable for failure to exercise ordinary care towards a licensee whose presence on the land is known or should reasonably be known to the owner or possessor.' "

Now, these two cases both recorded in 206 Va., deal readily with active negligence. So I will address myself to that.

I have called Mrs. Perez, the defendant, and she has testified that this two-car garage was in her back yard. It was in such condition it

was falling down. They elected to, and did, tear it down. They did not tear the chimney down, nor did they inspect the chimney. She assigned as her reason that they expected to rebuild.

Now, the only real case in Virginia that I have been able to find, and believe you me, I have done some research, is that of *Busch* v. *Gaglio,* which reviews the two cases I have just discussed and many other cases. And again, the Restatement of Torts in Virginia has now laid down the rules on page 348.

"We hold, then, adverting to the Restatement of [49] the Law of Torts, Second Edition, that the defendant was liable to the plaintiff for injuries caused her by the condition on his land if he knew or had reason to know of the condition, should have realized that it involved an unreasonable risk of harm to her, should have expected that she would not discover or realize the danger, and failed to exercise reasonable care to make the condition safe or to warn her of the condition; provided, however, that she did not know or have reason to know of the condition and the risk involved."

That comes from the case where the stake was driven into the ground to keep people from parking there.

I submit to the Court—point out to the Court in the Busch case, the court permitted the case to go to the jury and then set it aside relying on the two cases earlier discussed; and then set the verdict aside taking the position that there was no theory in law by which the plaintiff could recover.

The Supreme Court of Appeals reviewed the cases, and this Restatement of the Law of Torts, Second Edition, covered other exceptions to the Rule that fits here; and they held, and very properly so, that it was a matter for the jury to determine from all of the facts and circumstances. No cases are ever exactly alike. We have principles of law that we have to apply. We have the principles here, and submit, sir, [50] that we are entitled to go to the jury. The jury is entitled to determine whether or not under all these facts and circumstances this condition was unreasonably safe or exposed this boy to a danger that he could not reasonably apprehend or expect.

So I submit that the evidence should not be stricken. If you would like to read the cases, I have the books here.

Mr. Dowding: I would like to reply just briefly, sir.

I think Mr. Pitchford's argument has defeated his own position. What, for example, would Your Honor instruct the jury? If you find that Mrs. Perez knew or should have known of a defect in the chimney, or what evidence are they going to find that? The evidence is that the chimney was standing there in plain obvious view to everyone. The hammock was there and had been used successfully. And listen, very briefly, if Your Honor please, to what this case says, this Busch v. Gaglio case.

Mr. Pitchford: Page 348. Do you want to read mine?

Mr. Dowding: I have a different book.

It is talking about the dangerous condition and should have realized that it involved an unreasonable risk or harm to her. What evidence is there of that? What evidence [51] is there that Mrs. Perez knew or should have known that the mere fact this hammock was there and attached to the chimney involved any unreasonable risk of harm?

The burden is on the plaintiff to come up with this evidence. The jury can't speculate. They can't sit back there and decide themselves that we think a 10-foot square chimney about 16 feet feet high is an inherently dangerous instrumentality. This is something that the plaintiff has to come up with, or that must appear obvious from the facts in the case, like the hooked pipe set down in the unlighted area. There isn't an unlit area, or secret area, or anything else. It was in plain view to this young man just as it was to her, and he no more reason to believe it was dangerous than she had. If she was supposed to have known of it, and that it was inherently dangerous, where does it leave him? Can the Court say, yes, you can speculate that that was knowledge on the part of Mrs. Perez; but this man, young man, by his own testimony said he was intelligent to realize such danger. You can't speculate as to that.

So I don't see whether it makes any difference how the case is viewed. It's an entirely different situation in this Busch case. All throughout this opinion they hammer on the question of knowledge.

And the case which I didn't mention, which was decided later, is *Cannon* v. *Clark* where a woman who had [52] received a phone call that her next door neighbor had a heart attack and apparently slipped on some ice or something. They were trying to show that, in that case, she wasn't a social guest because if she was, that's the end of the case. And the court said it doesn't make any difference, and we are not even

going to decide whether under the circumstances of responding, or going over there to advise them of an emergency, she occupied the position of an invitee. It doesn't make any difference because it said here, again, in order to show the property owner liable for injuries sustained by an invitee, which this young man, by his own pleadings, is not, it must be shown that the owner had knowledge of the alleged unsafe condition or that it existed for such a length of time to make the owner duly exercise ordinary care so to have discovered it. And the record is entirely devoid of any such evidence.

We again submit that there is no way that the Court can submit this case to the jury. There is no evidence on which they can reach any finding other than pure speculation.

The Court: All right. Let me have the citations of the cases. 206 Va. what?

Mr. Pitchford: 206 Va. 425, that is, *Limberg* v. *Lent.*

Mr. Dowding: And Bradshaw.

Mr. Pitchford: The other case is *Bradshaw* v. *Minter,* 206 Va. 450. And the last case I have cited is that [53] of *Busch* v. *Gaglio,* 207 Va. 343.

Now, I have read the last case cited by Mr. Dowding, but I did not figure that was applicable here because the woman was not a social guest.

The Court: All right: I knew that you both said the Busch case, 207 Va.—

Mr. Pitchford: Yes. We both cited the same case.

Mr. Dowding: That is right.

Mr. Pitchford: I cited the other case simply because there isn't any invitee liability.

The Court: Both of you are relying on the same case, as I understand it?

Mr. Pitchford: Yes, we are.

Mr. Dowding: I suppose.

The Court: What I am going to do now is to take a recess for

lunch and come back at a quarter of two. We'll take a recess now and look at these cases and decide.

Call the jury back in.

(The jury was returned to the courtroom.)

The Court: We are going to take a recess for lunch now, and I will ask you not to talk to anyone about the case while you are at lunch; and also, it would be improper for you to go to this property. I don't know whether the chimney is still there or what the condition of the property is, but you should not go and take a view of this property [54] where this accident took place. You may go to your lunch now. I will get you to come back at 1:45 and meet in the jury room at that time. We will stand in recess until that time.

(Recess.)

Afternoon Session

(Met pursuant to luncheon recess at 1:45 p.m.)

The Court: All right, gentlemen. In reference to the defendant's motion to strike, in looking at these authorities again, the Court feels that the plaintiff infant was a social guest on the property of the defendant, and it's my understanding of the law that the owner of the premises is under no duty to keep his premises safe; and the owner is liable only for willful and wanton injuries caused to him.

However, if the host engages in some activities which constitute active or affirmative negligence as distinguished from passive negligence, there may be an exception to this rule. And of these cases that counsel has mentioned to the Court, one is an instance of a plaintiff's pipe having been driven into the ground and the other involves a horse of the owner. The host knew it was a spirited and uncontrolled animal, insofar as the case has disclosed.

According to my notations of the evidence, Mr. Reagan had testified that he, the father, said he had seen, in passing by, this garage being torn down, and that he saw a [55] chimney. And my notation is that it was 20 inches square, brick flue, approximately 16 feet high. Counsel made mention of a 10 foot—10 inch instead of 20 inches. Here, the host did have this chimney, but there isn't any evidence as far as the Court sees of any defect in the chimney that was known to the defendant, or any act on her part to create willful or wanton acts

amounting to negligence, except that they left the chimney there; and they didn't know of any defects in it, from the evidence that has been produced. And the evidence is that the child, or the infant, was intelligent enough not to have gotten in it if it had been defective. And based on that and the evidence before me, I will sustain the defendant's motion to strike the plaintiff's evidence, which I will do; and I will dismiss the jury.

[56] * * *

EXCEPTION

Mr. Pitchford: The plaintiff excepts to the ruling of the Court for the reason it is contrary to the law and the evidence. The evidence is supported; and we already assigned reasons, and we adopt those reasons. And I ask that my exception be noted in the record.

* * *

CERTIFICATE

I certify that on or before the date of the filing of this appendix in the Clerk's Office of the Supreme Court of Virginia, the required copies thereof were deposited in the United States mail at Richmond, Virginia, addressed to Counsel of Record for defendant in error at his address of record, postage fully prepaid.

EDWARD A. MARKS, JR.
Counsel for Plaintiffs in Error