

2001

Lulu Black v. V. Pershing Nelson, Ralph L. Smith, Gladys Smith, Gladys' Beauty Salon : Brief of Appellant

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

05 DEC 1975

Clark Law School

LULU BLACK,

Plaintiff-Appellant,

vs.

V. PERSHING NELSON, RALPH L.
SMITH and GLADYS SMITH, d/b/a
GLADYS' BEAUTY SALON,
Defendants-Respondents.

Case No.
13470

BRIEF OF APPELLANT

An Appeal from the Judgment of the Fourth Judicial
District Court in and for Utah County, State of Utah,
before the Honorable George E. Ballif, Judge.

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Clerk, Supreme Court, Utah

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LULU BLACK,

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GLADYS' BEAUTY SALON,

Defendants-Respondents.

Case No.

13470

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an action to recover for personal injuries sustained in a fall down a flight of stairs allegedly caused by defendants' negligent maintenance of the rear entrance to a beauty salon.

DISPOSITION IN LOWER COURT

At the conclusion of the evidence, the trial court granted defendants' motion for a directed verdict based on the finding that the actions of plaintiff constituted contributory negligence as a matter of law.

RELIEF SOUGHT ON APPEAL

The plaintiff seeks reversal of the trial court's ruling that acts of the plaintiff constituted contributory negligence as a matter of law and an order remanding the case for a new trial.

STATEMENT OF FACTS

On June 25, 1971, plaintiff, Lulu Black, had an appointment at 2:00 o'clock p.m. at Gladys' Beauty Salon on University Avenue in Provo, Utah. The plaintiff had been a regular patron of Gladys' for approximately one and one-half years. Plaintiff and her husband had intended to travel to Idaho the following day and had one of their two automobiles being serviced for the purpose of making that trip (Tr. p. 223). Mr. Eugene E. Black, plaintiff's husband, had instructed Mrs. Black to pick him up at the Courthouse at approximately 3:00 p.m. that afternoon so that he could use her car (Tr. p. 223). This necessitated Mrs. Black making arrangements with her hair dresser, Mrs. Suzan Hanks, to leave the beauty salon for a few minutes while her hair was up in curlers and go pick her husband up so that he could use the vehicle while Mrs. Black finished her hair appointment (Tr. p. 246). At approximately 3:00 o'clock p.m. Mrs. Black left Gladys' Beauty Salon to pick her husband up at the Courthouse and made arrangements to return a few minutes later to have Mrs. Hanks finish drying her hair and combing it out. Mrs. Black went to the Courthouse with her hair

in curlers and was unable to find her husband. Thereafter, she returned to Gladys' Beauty Salon to finish having her hair dried and combed out. Plaintiff testified that upon her return there was no parking at the front of Gladys' Beauty Salon and, consequently, she was forced to park on 1st East and 2nd North (Tr. p. 247). Mrs. Black testified that because there was no parking place, her hair was in curlers, and that the hair dryer was located in the rear of Gladys' Beauty Salon, when she returned to the beauty salon she chose to enter the establishment through the rear entrance in the back of the building (Tr. p. 247). She opened the rear door into a small landing area. From this landing area she could walk through an interior doorway into the rear of Gladys' Beauty Salon. Mrs. Black testified, and the testimony of other witnesses indicates, that both patrons and employees occasionally used the rear door for the purpose of entering and leaving the beauty salon (Tr. pp. 58, 156, 216, 248, 321, 385 and 386). Mrs. Black testified that on one prior occasion she had left the beauty salon through the rear entrance (Tr. pp. 247-248). The weather outside was clear, it was a bright sunshiny June afternoon. As she opened the outer doorway into the landing area, light from the outside lighted the room and Mrs. Black stepped inside (Tr. p. 249). The door closed behind her and she found herself in the middle of the landing area in almost complete darkness (Tr. p. 249). Mrs. Black testified that she did not realize that the electric overhead light inside the landing area was out until the door closed behind her (Tr. p. 251). She testified that she did not see nor did she have

any independent knowledge that the unguarded stairway at the west end of the landing was there (Tr. p. 250).

When plaintiff opened the outside door and walked into the landing area she was able to observe the door to the inside of Gladys' Beauty Salon on the south wall of the landing area, but was not looking at the stairway on the west wall, nor did she have any reason to believe that there was a stairway at the west end of the landing area. When the outside door closed it was dark. The immediate area was unlighted because the electric overhead light was off or burned out. Consequently, she could see neither the outside door through which she had just walked nor the stairway, and there is conflicting evidence as to whether she was able to see light from under the doorway of the beauty salon so that she could walk towards that direction. After the outside door closed, Mrs. Black attempted to walk towards the inside door of the Gladys' Beauty Salon. She knew generally where the interior door was because she had seen the interior door when the other one was open (Tr. p. 249). She knew there was only three or four steps, at the most, from her position in the middle of the landing to the inside door of the beauty salon (Tr. p. 250). She did not anticipate nor did she know of the stairway. She was cautious and reasonably prudent trying to avoid bumping into some other obstacle or into some other person. Plaintiff took two or three short steps and fell down the stairs into the basement. As a result of this fall, plaintiff was severely

injured, which injuries are of no consequence in so far as this appeal is concerned.

This dispute concerns the nature of the plaintiff's fall. At the conclusion of the evidence, defendants were granted a directed verdict, claiming the plaintiff was contributorily negligent as a matter of law. Plaintiff maintains that she acted in a careful and reasonably prudent manner at all times. The plaintiff entered the business establishment from the rear entrance, which she had observed other people do. Her hair was in curlers, she was conscious of her appearance, it was a more convenient access to the rear of the establishment where the dryers were, and the plaintiff had no reason to believe that the entrance and landing area contained an unguarded stairwell.

Plaintiff further contends that her status is that of a business invitee, since patrons continually used this rear entranceway. Defendants countered by asserting that this entrance was seldom used by patrons, that Lulu Black had the status of a licensee, to whom they owed no duty to warn of the dangerous or defective condition in the landing area.

ARGUMENT

POINT I.

A DIRECTED VERDICT BASED ON
CONTRIBUTORY NEGLIGENCE AS
A MATTER OF LAW IS A DRASTIC
STEP THAT IS JUSTIFIED ONLY

WHEN THE PLAINTIFF'S NEGLIGENCE IS SO CLEARLY ESTABLISHED THAT REASONABLE MINDS CAN REACH NO OTHER CONCLUSION. THE FACTS IN THE INSTANT CASE CLEARLY DEMONSTRATE THAT REASONABLE MEN COULD DIFFER AND THAT THE CONTRIBUTORY NEGLIGENCE, IF ANY, OF MRS. BLACK, IS A QUESTION FOR THE TRIER OF FACT.

As recently as August 16, 1973, the Utah Supreme Court stated:

"Upon a motion for a directed verdict, the trial court is obliged to view the evidence in a light most favorable to the party against whom it is directed. The court will sustain the granting of a such a motion only if the evidence were such that reasonable men could not arrive at a different conclusion." *Anderson v. Gribble*, 513 P.2d 432 (Utah (1973)).

As a general rule, courts are very reluctant to impose their judgment as to what reasonable men may differ over. This is rightly so since the existence of negligence on the part of the plaintiff must be clearly and overwhelmingly conclusive for it to be a question of law. The defendants must clearly establish that reasonable minds could not differ. See *State for the Benefit of Workman's*

Compensation Fund v. Columbia Hall Association, 75 N. D. 275, 27 N. W. 2d 664 (1947), and *Keech v. Clements*, 303 Mich. 69, 5 N. W. 2d 570 (1942).

In this case, however, the trial court has ruled that the plaintiff's actions constituted contributory negligence as a matter of law.

Prior to the trial, the Fourth District Court, the Honorable Maurice Harding, Judge was asked to rule on defendants' motion for summary judgment. This motion was made upon the grounds and for the reasons that the undisputed facts allegedly showed that plaintiff was contributorily negligent as a matter of law (R. p. 47). Defendants' motion was based precisely on the same fact situation that was indicated by the evidence presented at trial. Judge Harding, presumably a reasonable man, ruled:

"Unless the question of the plaintiff's contributory negligence is free from doubt, the Court cannot pass on it as a question of law. If the Court is in doubt whether reasonable men might arrive at different conclusions, then this very doubt determines the question to be one of fact for the jury and not one of law for the Court.

A reading of the Utah cases cited by counsel, Sections 308 to 318 in 62 Am.Jur.2d, and the annotations in 22 A.L.R.3d 281, 24 A.L.R.3d 388, 25 A.L.R.3d 466, and 28 A.L.R.3d 605, leaves one very much in doubt as to what the mythical reasonable man would hold.

The Court, therefore, denies the motion for summary judgment.” (R. p. 58)

The plaintiff contends that a reading of the A. L. R. 3d citations, the Am. Jur. 2d citations and the Utah cases cited in plaintiff’s memorandums, would confirm the correctness of Judge Harding’s decision and urges that the same rationale be applied by this Court.

The trial court’s precise rationale in granting defendants’ motion for a directed verdict, on the same basis as the earlier motion for summary judgment was denied, is stated thus:

“... But the Court, in searching and thinking on the matter, and the law, feels that I must dispose of the matter at this time, and it will be my ruling on the motion that because of the fact based on plaintiff’s own testimony, that as she opened the door and light went into the corridor into which she was going sufficient to enable her to see all that was there, but *the fact that she did not look directly ahead of her*, but only to the left or to the South, as she put it, looking only to and identifying the door into Gladys’ shop, and the further fact that without having made full observations that would have disclosed to her what was in front of her and the direction into which she was going, and *after the door closed behind her she proceeded in such a dark area constituted contributory negligence as a matter of law.*” (Emphasis added) (Tr., p. 406)

It should be noted that the Court does not appear to base its contributory negligence ruling on the step-in-the-dark rule. Plaintiff contends that the step-in-the-dark rule is customarily invoked when one steps into an area which is completely unknown. It is usually invoked when one is helplessly groping into the unknown, but in this instance the plaintiff had opened the door and had seen where she intended to walk prior to having the darkness envelop her. She was not looking to the west where the unguarded stairway was, and she did not anticipate that a stairwell existed.

It appears that the Court's finding of contributory negligence as a matter of law is based on the fact that Lulu Black failed to look and to observe that the area directly west of the outside doorway, which was a place that the plaintiff did not intend to go. Instead of walking in a westerly direction in the room, plaintiff testified on cross examination that she intended to walk to the South or the Southwest to get to the interior door of the beauty salon (Tr. p. 302, lines 5-7). Plaintiff thus argues that if one reads the precise words the court used in explaining why it felt compelled to grant the motion for directed verdict that the court is not invoking the step-in-the-dark rule but merely stating *that the plaintiff should have seen what was in a direction that she did not intend to go.*

It is further argued that light travels in a straight line, that when Mrs. Black opened the door the light illuminated the landing area and that this light may not have illuminated the stairwell, which was below the sur-

face of the floor, enabling her to see the steps in any event, and that this again should have been a question for the trier of fact. It should be remembered that there was no overhead illumination in the room.

Another fact that precludes invoking the step-in-the-dark rule is that the landing area was not enveloped in complete darkness. After all, darkness is a relative term (See Point III) and the record clearly shows that there was a light shining under the door that was the inside entrance into Gladys' Beauty Salon. (Quoting from the Transcript, page 249, lines 13 through 23):

Question (Mr. Howard) "What did you do when you found yourself in the dark?"

Answer (Mrs. Lulu Black) "Well, by this time I was quite positive that I was just as close to one door as I was to the other, because when I opened the door I could see the passageway to the Beauty Shop door, and I thought I was going in that direction in the dark.

And rather than turn around I just didn't think to turn around and go back to the door that had closed on me. I didn't know where it was as much as I knew where the lighted door was. And I was going in that direction."

One of the defendants, Mr. Ralph L. Smith, supports Mrs. Black's testimony as follows: (Quoting from the Transcript, page 352, lines 23 to 28.)

Question (Mr. Ivie) "Now, what about the

doorway, itself. When the door is shut and the light is on in your salon, does the light from your Salon show under the door?"

Answer (Mr. Ralph L. Smith) "There is a small opening underneath that door I have never measured it.. It could be half an inch, but the light shows underneath the door."

Again on page 365, lines 3 to 8, Mr. Smith states:

Question (Mr. H. Wayne Wadsworth) "And is it a fact that three of us went over there and closed those doors to see if the light went underneath the door?"

Answer (Mr. Ralph L. Smith) "That's correct."

Question (Mr. Wadsworth) "And did it show underneath the door?"

Answer (Mr. Smith) "It absolutely did."

Thus plaintiff argues that from the record itself there is revealed that: (1) The plaintiff saw where she intended to go, in a South or Southwesterly direction, not in a Westerly direction from the open doorway, and (2) There was testimony at the trial which indicated that there was light under the door which revealed where plaintiff wanted to go. Plaintiff argues that the transcript itself precludes the application of the step-in-the-dark rule and that the Court itself didn't even invoke this rule in its decision.

If the record and the court's rationale precludes the

applicability of the step-in-the-dark rule, then plaintiff submits that the question becomes whether the failure of Mrs. Black to look in a direction in which she did not intend to walk is contributory negligence as a matter of law. Plaintiff argues that it is clearly not, but rather it is a question upon which reasonable minds can differ. It is certainly not conclusive proof of negligence as the trial court held.

The basic thrust of plaintiff's argument is that a ruling of contributory negligence as a matter of law is simply a specialized example of certain circumstances in which reasonable minds cannot differ on the standard of care to be exercised by the plaintiff. Plaintiff submits that reasonable minds in the instant case can easily differ as to the existence of any negligence on her part and that, therefore, the issue of contributory negligence should have been submitted to the jury as a fact question.

An example of the stringent standards that courts exact in granting non-suits or directed verdicts by holding contributory negligence present as a matter of law is the case of *Waters v. Harris*, 110 S. E. 2d 283 (N. C. 1959). In this case a 45 year old groceryman fell on a puddle of grease in a dark warehouse. The plaintiff had desired to buy a refrigerated meat display case and had contacted a dealer who took him to a warehouse where he kept second-hand equipment. The dealer opened the door, but did not turn on any lights and it was dark inside the warehouse. As the plaintiff was examining a case near the open door, the dealer said, "Come on, follow me and

let me show you some more equipment". The groceryman followed about a step or two behind the dealer, but slipped and fell on a puddle of grease about 30 feet from the door. In reversing the trial court's judgment of a non-suit, the North Carolina Supreme Court said:

"A non-suit on the grounds of contributory negligence will be granted only when the plaintiff's evidence establishes the facts necessary to show contributory negligence so clearly that no other conclusion may be reasonably drawn therefrom." (*Supra*, 287)

The stringent standard referred to above even in the so called step-in-the-dark cases is discussed at 28 A. L. R. 3d, page 616:

"The step-in-the-dark rule is not an absolute rule of law. It is merely a specialized example of certain circumstances in which reasonable minds cannot differ on the standard of care to be exercised by a plaintiff. Even when the facts of the case fit squarely within the terms of the rule, other facts may render it inapplicable, as where the plaintiff could reasonably expect no danger in a given situation, an ordinarily prudent person might be lulled into a false sense of security, or plaintiff exercised caution commensurate with the circumstances. Moreover the rule is inapplicable where any of its elements is absent, as where the plaintiff was not unfamiliar with the place where he walked . . ." ((Emphasis added)

Plaintiff submits that the usual cliché that each case must be decided on the particular facts is even more compelling when the question of the presence of contributory negligence as a matter of law is posed. Each case must turn on its own facts. This is true even when one gropes his way in the dark.

The Court in *Palmer v. Boston Penny Savings Bank*, 301 Mass. 540, 17 N. E. 2d 899, 28 A. L. R. 3d 605 at 692, upheld the jury's verdict in finding that a parking garage patron was not contributorily negligent in entering the garage through a darkened door at 2:00 a.m. to get his car. The patron left his car in the garage at about 6:00 o'clock p.m. and had walked out by the large center door which served as the entryway for the vehicles. The patron saw, a few feet West of the vehicle entrance, another door which was level with the garage. Upon returning the next day at about 2:00 o'clock a.m., the patron found the vehicle door closed and was unable to open it or to attract the attention of garage employees stationed within. He then saw a door a few feet East of the vehicle entrance and believing that it was the West door he opened it and stepped into complete darkness inside and fell down an iron stairway leading to the boiler room. The court stated in overruling exceptions to the judgment based on the jury's verdict in the patron's favor that ordinarily one who gropes his way along in the darkness of a strange place and falls down a stairway or into an elevator well is lacking in due care, but the issue must

be determined on the particular facts in each case and was thus a jury question.

Plaintiff's remaining analysis will concentrate on enumerating the facts which in the instant case would cause reasonable men to differ as to whether the plaintiff was contributorily negligent. Plaintiff contends that if reasonable men can differ as to the presence or absence of negligence or in other words if it is not conclusive but questionable, then there exists a question of fact for the jury. The following points will discuss the reasons plaintiff believes that reasonable men can differ and that, therefore, the directed verdict was improperly granted and that contributory negligence was a question for the jury.

POINT II

THE REAR ENTRANCE TO GLADYS' BEAUTY SALON HAD BEEN USED BY GLADYS' PATRONS AS A MEANS OF ENTERING AND LEAVING THE PREMISES. PLAINTIFF, LULU BLACK, HAD ON ONE PRIOR OCCASION LEFT THE BEAUTY SALON BY MEANS OF THE REAR DOOR AND, THEREFORE, LULU BLACK COULD REASONABLY ASSUME THAT THIS ENTRANCE WAS IN A REASONABLY SAFE CONDITION FOR HER TO USE

ON THE DATE OF THE ACCIDENT.

Plaintiff submits that the record establishes that the rear door to Gladys' Beauty Salon was used by many patrons because of its convenience and that this use was acquiesced in and in some cases even permitted by the owners of Gladys' Beauty Salon, Mr. and Mrs. Smith. This is fully substantiated by the evidence introduced at trial. Mrs. Suzan Hanks testified (Tr., p. 53):

Question (Mr. Howard) "All right. During the time you were there and prior to June 25, 1971, did you have occasion to see patrons come and go to Gladys' establishment through the back door?"

Answer (Mrs. Suzan Hanks) "Yes."

On page 58 of the Transcript Mrs. Hanks testified to the names of a few of the patrons of Gladys' Beauty Salon who were accustomed to using the back door. On page 156 of the Transcript, Mrs. Gail Timms, another beauty operator, testified that the back door was used by patrons. On page 216 Mrs. Gloria Howard testified that she frequently used the back door. On page 258 Mrs. Lulu Black testified that she had left the beauty salon via the rear door on one prior occasion. On page 321 Mrs. Irene Wooton testified that she had occasionally left the establishment via the back door if it was convenient. On page 385 and 386 of the record Mrs. Gladys Smith testified that she did allow certain patrons by specific permission to use the back door.

Mrs. Lulu Black had noted, while a patron at Gladys', that other patrons did come and go through the back entrance. Plaintiff argues that from these facts that there was an implied invitation extended to her to use this entrance as other patrons were continually doing. There was no sign on the outside door of the building prohibiting patrons from using or entering through this rear door. Plaintiff submits that this factual pattern gives Lulu Black the status of a business invitee.

The testimony clearly shows that the rear door to Gladys' Beauty Salon was used by both patrons and employees alike, that it was not always kept locked, and that the patrons were not denied access nor were they requested not to use this back door. The defendants, by their actions, acquiesced in their patrons using this rear door to gain access to the beauty salon.

The defendants have maintained that Mrs. Black is a licensee. However, this is contrary to the recent cases which hold that the status or classification of a person who is upon the property of another is not to be determined by the occupants' responsibility or the degree of care which goes to that person. Rather, the occupant in the management of his property should act as a reasonable man in view of the probability or foreseeability of injury to others. A person's status as a trespasser, licensee or invitee may, of course, in light of the facts giving rise to such status, have some bearing on the question of liability, but it is only a factor and certainly not conclusive. See *Rowland v. Christian*, 60 Cal. 2d 108, 70 Cal.

Reporter 97, 443 P. 2d 561, 32 A. L. R. 3d 496 (1968); *Pickard v. Honolulu*, 452 P. 2d 445 (Hawaii, 1969); *Levine v. Katz*, 132 App. D. C. 173, 407 Fed. 2d 303, Annotation: Premises Liability — Claimant Status, 32 A. L. R. 3d 508; *Mile High Fence Company v. Radovich*, 489 P. 2d 308 (Colorado, 1971).

Plaintiff refers the court to its memorandum regarding the duty of due care which was submitted to the trial court for a synopsis of modern case law on the subject. The overwhelming weight of modern authority compels a finding that Mrs. Black was owed a duty of ordinary care as established by a reasonable man standard in view of the probability and foreseeability of injury to others resulting from the unguarded stairway; or, alternatively, that she was a business invitee upon the premises of Gladys' Beauty Salon and, therefore, that she was owed that same duty of care under the circumstances.

Mrs. Black's status as a business invitee, who was using this entrance in the same manner that other patrons had used it, has a significant impact upon the question of contributory negligence.

"A pedestrian's status with respect to the premises in question bears directly on the question of his contributory negligence because it determines what he has a right to expect if he proceeds in darkness. A licensee takes the premises as he finds them, but under many circumstances *an invitee has a right to assume that*

... *they are safe for his use . . .*" (Emphasis added) 22 A.L.R.3d 294.

Plaintiff argues that Lulu Black was in a place where the public was invited. She had a right to expect safe passageway and she had, in fact, left Gladys' Beauty Salon through the rear entrance on a prior occasion. It was simply not reasonable to expect a business invitee to encounter darkness and a potentially hazardous unguarded stairway in this rear entrance which was used by numerous other patrons. As a business invitee she has the right to expect a safe entrance and not one that is inherently dangerous. Plaintiff submits that on this basis she is not contributorily negligent as a matter of law.

In *Markley v. Wiseman*, 491 P. 2d 79 (Col. App. 1971), the court stated that the distinction between a licensee and an invitee is not controlling, but is only one element among many to be considered in determining the land owner's liability for personal injury to an entrant upon his land. In this particular case the plaintiff was an insurance salesman who obtained defendants' names as prospective customers and made an appointment to meet with them at their home to discuss insurance coverage. He had never been to the defendants' home prior to the evening of the appointment. Plaintiff arrived at the defendants' residence while it was still daylight and spent approximately two hours in their home. As he left the home plaintiff walked down the sidewalk toward a gate located approximately 30 feet from the front door. By this time it was dark. Plaintiff was able to see the

gate, but could see no further. The only illumination in the immediate vicinity was a 75 watt lamp over the front door of the residence. He proceeded past the front gate but failed to observe eight steep concrete steps descending from the gate to the street level. He had walked up these same steps some two hours earlier. Plaintiff fell and thereby suffered serious injuries. Upon a trial to the court judgment was rendered in favor of the plaintiff. Defendants' appealed to the Colorado Appellate Court stating that plaintiff should have been ruled contributorily negligent as a matter of law. The Appellate Court affirmed the judgment of the trial court.

It is submitted that the plaintiff, Lulu Black, stands in a better position than the plaintiff in *Markley*. Mrs. Black was totally unaware of the existence of the stairway while the plaintiff in *Markley* had traversed the same steps only two hours earlier. Mrs. Black had seen people enter and leave through the rear entrance of Gladys' and had left through the rear entrance on a prior occasion herself. She had no reason to suspect that there was an unguarded stairway dangerously near the rear entrance to the beauty salon.

POINT III

DARKNESS IS A RELATIVE TERM
AND THE EXACT NATURE OF THE
DARKNESS IS AN IMPORTANT
CONSIDERATION IN DETERMIN-
ING IF ONE IS CONTRIBUTORILY

NEGLIGENT AS A MATTER OF
LAW.

The factor of the degree of darkness in determining contributory negligence of the plaintiff is discussed at 28 *A. L. R.* 3d 625:

"The degree of darkness has a direct bearing on the question of the plaintiff's contributory negligence. The contributory negligence defense is stronger if the plaintiff walked in total darkness than it is where the darkness was not absolute."

Darkness is a relative term. Even the use by Lulu Black of the term "pitch black" (Tr. p. 308) may leave room for an interpretation that includes the presence of some light appearing under the door. Plaintiff respectfully requests the court to refer to the earlier cited testimony on pages 249, 352, and 365 of the Transcript. The record clearly discloses that even with the electric light off in the landing area and the rear entrance door closed, that light was visible from under the rear door leading to the interior of Gladys' Beauty Salon.

It is also submitted that the degree of darkness is important. When Mrs. Black opened the door to the room, light shined into the landing area. She was able to see the landing area between the outside door and the interior door leading into the beauty shop. The annotation in 22 *A. L. R.* 3d 305 summarizes the court's handling of the question of contributory negligence when one is

suddenly plunged into a degree of darkness as happened to Lulu Black.

“The courts have also noted, in holding *not* contributorily negligent one who proceeded in a dark hall, that the hall was lighted *until plunged into darkness* by the breaking of a circuit, or *appeared lighted until a door closed shutting off the light* from a room.

The degree of darkness is also important, especially in Pennsylvania. In some cases the area in which the pedestrian walked has been held to have been not so dark as to require him to wait for light or assistance. In other cases the courts have noted, in holding a pedestrian not to have been contributorily negligent, that he did not proceed in total darkness: . . .” (Emphasis added)

Plaintiff submits that the record clearly discloses that there was light under the rear door leading to the interior of the beauty salon towards which Lulu Black was attempting to walk. The plaintiff, in attempting to walk towards the source of light, is not conclusively negligent, but rather it is a question of fact upon which reasonable minds can well differ.

In *Mozert v. Noeding*, 76 N. M. 396, 415 P. 2d 364 (1966), the plaintiff sustained personal injuries when she fell down an unguarded stairway in a dimly lit storeroom of an artist's gallery when she came to the gallery to pick up a peg board promised to her by the artist. The trial

court rendered judgment in favor of the artist upon a directed verdict on the question of contributory negligence at the close of plaintiff's case in chief and plaintiff appealed. The Supreme Court held that the question of the visitor's contributory negligence was for the jury. The New Mexico Supreme Court stated:

"... In considering the motion for a directed verdict at the close of her case, plaintiff was entitled to have the evidence, together with all reasonable inferences deducible therefrom, viewed in the light most favorable to her."
(*Supra*, 365.)

The court also held that in this case there was evidence from which it could be found or reasonably inferred that the plaintiff's actions were reasonable under the circumstances and that the question of contributory negligence was one for the jury.

The *Mozert* case bears some striking resemblances to the case at bar. In both cases the plaintiff entered the premises of the defendant either at the express or implied invitation of the defendant. Both landing areas were small and dimly lit. There was evidence that both plaintiffs were moving cautiously as their senses of sight and feeling directed them. Neither plaintiff had any warning of the danger of the unguarded stairway. In Mrs. Black's case the stairway was dangerously close to the interior doorway into the beauty salon. Plaintiff submits that the well reasoned opinion of the New Mexico Supreme Court

in *Mozert v. Noeding* should be applied to the facts in the instant case.

POINT IV

PLAINTIFF IS NOT CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW BECAUSE SHE EXERCISED ORDINARY CARE IN ENTERING THE REAR DOOR OF THE BEAUTY SALON.

Plaintiff submits that the question of whether Lulu Black exercised reasonable care under the circumstances is one for the trier of fact. As a business invitee or even as a licensee under the well reasoned recent cases cited previously, plaintiff is required to exercise the ordinary care of the mythical reasonable man. Her conduct is required to be that of a prudent business invitee considering all of the surrounding circumstances.

Let us consider for a moment the manner in which the plaintiff proceeded. She did not proceed heedlessly and recklessly into an unknown and darkened area, but on the contrary, entered the landing area at the rear of Gladys' Beauty Salon prudently, carefully and circumspectfully as she had observed many other patrons doing. Hers was certainly not an act of recklessness. Here is how Lulu Black, herself, describes the manner in which she proceeded:

"Well, by this time I was quite positive that I was just as close to one door as I was to the other, because when I opened the door I could see the passageway to the beauty shop door, and I thought I was going in that direction in the dark.

And rather than turn around I just didn't think to turn around and go back to the door that had closed on me. I didn't know where it was as much as I knew where the lighted door was and I was going in that direction." (Tr. p. 249)

This is not the description of one who is jumping headlong into the dark unknown, but rather it is the description of a cautious prudent person proceeding to a known destination that was lighted. Lulu Black testified that she could see the lighted door. She proceeded toward it cautiously. It was probably only three or four steps away from her at the most (Tr. p. 250). Plaintiff would argue that this cannot be contributory negligence as a matter of law. It is the type of action that reasonable men such as Judges Harding and Ballif can well differ upon as to whether it constitutes contributory negligence.

Plaintiff submits that the following facts should also be considered. The distance walked by Lulu Black after she opened the door was very short, possibly less than three or four steps (Tr. p. 254, line 7). The time interval was a very short duration. Mrs. Black was thrust into semi-darkness in not totally unfamiliar surroundings, but she proceeded cautiously as a reasonable business invitee

would. Plaintiff had no knowledge nor did she suspect that there was an unguarded stairway only a few short inches from the rear interior door into Gladys' Beauty Salon. Plaintiff contends that under the circumstances, when one considers all of the factors in the light most favorable to the plaintiff, that whether Lulu Black was negligent is certainly a question upon which reasonable minds could well differ. In *Newman v. Pace*, 196 Kansas 689, 413 P. 2d 1013 (1966), the Kansas Supreme Court stated:

"In ascertaining whether, as a matter of law, a plaintiff is guilty of contributory negligence precluding recovery, the court must accept as true all evidence favorable to the plaintiff along with the reasonable inferences to be drawn therefrom, disregarding testimony which is unfavorable to the plaintiff. The court may not weigh any part of the evidence which is contradictory nor any contradiction between plaintiff's direct and cross-examination. The plaintiff's evidence must be considered liberally in his favor and doubts resolved against defendant, and if the facts be such that reasonable minds might arrive at contrary conclusions, the matter of contributory negligence must go to the jury." (Emphasis added)

CONCLUSION

Lulu Black did exercise reasonable care. She looked towards the door to which she was walking. She did not

notice nor had she any reason to suspect the presence of an unguarded stairway. After the open door had closed she thought she had only one or two more steps to take. When the door closed Lulu Black was already in the center of the landing area. She thought she was much closer to the inside entrance into the beauty salon than she was to the outside door which had just closed behind her. She could see the light underneath this interior doorway. Plaintiff argues that however one characterizes this manner of proceeding, it certainly doesn't resemble that of one groping helplessly in the dark. It is the action of one to which reasonable men could well differ as to whether these actions were so reckless as to be negligent as a matter of law. A mere recital of the manner of her proceeding clearly demonstrates that whether her acts constituted negligence is a question upon which all reasonable minds can well differ and this is all that plaintiff must demonstrate. In this case the question of contributory negligence should be remanded for consideration by the jury.

Respectfully submitted,

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