

1953

Wilfred A. Rogalski v. Phillips Petroleum Company : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

McKay, Burton, McMillan & Richards; Paul E. Reimann; Attorneys for Defendant and Appellant;

Recommended Citation

Brief of Appellant, *Rogalski v. Phillips Petroleum Co.*, No. 7982 (Utah Supreme Court, 1953).
https://digitalcommons.law.byu.edu/uofu_sc1/1958

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

✓

In the Supreme Court
of the State of Utah

RECEIVED

SEP 28 1953

LAW LIBRARY
U. of U.

WILFRED A. ROGALSKI,

Plaintiff and Respondent,

vs.

PHILLIPS PETROLEUM COMPANY,
a corporation,

Defendant and Appellant.

No. 7982

BRIEF OF APPELLANT

McKAY, BURTON, McMILLAN & RICHARDS, and
PAUL E. REIMANN

FILED *Attorneys for Defendant and Appellant*

Utah Supreme Court, Utah

TABLE OF CONTENTS

PRELIMINARY STATEMENT	3
STATEMENT OF FACTS:	
(a) The place where the injury occurred was not a part of the premises where plaintiff and his employer were business invitees	5
(b) Defendant's employees did not participate in the acts which produced the injuries to plaintiff	8
(c) Failure to see the caustic soda tank was originally due to plaintiff's lack of observation of what was clearly visible, and consequently due to lack of visibility created by plaintiff	9
STATEMENT OF POINTS RELIED UPON FOR REVERSAL OF THE JUDGMENT	13
ARGUMENT:	
POINT NO. 1	
The Case Should Not Have Been Submitted to the Jury for Defendant Violated No Duty of Care to Plaintiff	14
POINT NO. 2	
Plaintiff Was Guilty of Negligence as a Matter of Law Which Would Preclude Recovery in Any Event	22
POINT NO. 3	
The Court Erred in Excluding Evidence	35
POINT NO. 4	
The Court Erred in its Charge to the Jury by Erroneous Instructions and by Refusal to Submit Instructions on Defendant's Theory	39
POINT NO. 5	
The State Insurance Fund Was A Necessary Party	44
CONCLUSION	49

TABLE OF CASES

Baumler v. Wilm, (1910) 136 App. Div. 857, 122 N.Y. Supp. 98	27
Benton v. Watson, (1919) 231 Mass. 582, 121 N.E. 399	27
Boyce v. Brewington (1945) 49 N. Mex. 107, 158 P. (2d) 124, 163 A.L.R. 583	26
Bruce v. Risley, (1936) 15 Cal. App. (2d) 659, 59 P. (2d) 847.	24
Brusseau v. Selmo, (1938) 286 Mich. 171, 281 N.W. 580	28
Campbell v. Abbott, (1900), 176 Mass. 246, 57 N.E. 462	26
Costello v. Farmers Bank, (1916) 34 N.D. 131; 157 N.W. 982.	29
Czesznek v. Ruffy Corporation (1940) 259 App. Div. 302, 19 N.Y. Supp. (2d) 248	29
Dacus v. Dickinson Trust Co. (1941) 65 Ga. App. 872, 16 S.E. (2d) 786	30
DeGraffenried v. Wallace, (1899), 2 Ind. Ter. 657, 53 S.W. 452.	29
Donaldson v. Kemper, 152 Kan. 533, 106 P. (2d) 1051	29
Dunn v. Bomberger (1938) 213 N.C. 172, 195 S.E. 364	20
DuRocher v. Teutonia Motor Car Co. (1925), 188 Wis. 208, 205 N.W. 921, 42 A.L.R. 1094	27
Elliott v. Dahl, (1941), 299 Mich. 380, 300 N.W. 132	30
Erickson v. McKay, (1932) 207 Wis. 497, 242 N.W. 133	28
Freirson v. Mutual Realty Co. (1934) 48 Ga. App. 839, 174 S.E. 144	27
Gasch v. Rounds (1916) 93 Wash. 317, 160 P. 962	29
Gillespie v. John W. Ferguson & Co. (1909) 78 N.J.L. 470, 74 Atl. 460	29

TABLE OF CONTENTS (Continued)

Hart v. Sullivan (1944), 323 Ill. App. 243, 58 N.E. (2d) 301..	26
Heidenrich v. Dumas, (1937) 88 N.H. 453, 190 Atl. 705	28
Hilsenbeck v. Guhring, (1892) 131 N.Y. 674, 30 N.E. 580	27
Hooker v. Route Realty Co., (1938) 102 Colo. 8, 76 P. (2d) 431.	26
Hudson v. Church of Holy Trinity (1929), 250 N.Y. 513, 199 N.E. 603	28
Huyink, v. Hart Publications (1942), 212 Minn. 87, 2 N.W. (2d) 552	29
Illinois Central Railroad Co. v. Sanderson (1917) 175 Ky. 11, 192 S.W. 869, L.R.A. 1917D 890	28
Johanson v. Cudahy Packing Co., 107 Utah 114; 152 P. (2d) 98 (1944)	45
Knox v. Snow, (1951) 229 P. (2d) 874	33
McVeagh v. Bass, (1933) 110 Pa. Sup. Ct. 379, 171 Atl. 486...	28
Moore v. Miles (1945) 108 Utah 167, 158 P. (2d) 676.....	30-31
Morrison v. Rutledge Co., (1922) 20 App. Div. 636, 193 N.Y. Supp. 428	18
Murphy v. Cohen, (1916) 223 Mass. 54, 111 N.E. 771	25
National Refining Co. v. Strichmaker, (1934) 49 Ohio App. 467, 197 N.E. 364	28
Paquet v. Barker (1937), 250 App. Div. 771, 293 N.Y. Supp. 983	19
Plahn v. Masonic Hall Bldg. Assn. (1939) 206 Minn. 232, 288 N.W. 575	28
Powers v. Raymond, (1925), 197 Cal. 126, 239 P. 1069.....	29
Pratt v. Utah Light & Traction Co., 57 Utah 7, 169 P. 868, 869.	43
Raymond v. Union Pacific R.R. Co. (1948) 113 Utah 26, 191 P. (2d) 137	43
Rosalo v. Perch Realty Corporation (1933), 239 App. Div. 373, 267 N.Y. Supp. 561	19
Ross v. Becklenberg, 1917, 209 Ill. App. 144	29
Rowell v. John Hutzler Lbr. Co. (1930), 228 App. Div. 158, 239 N.Y. Supp. 192, affirmed 1930, 255 N.Y. 581, 175 N.E. 322	25
Sartori v. Capitol City Lodge (1942), 212 Minn. 538, 4 N.W. (2d) 339	28
Sauter v. Hinde, (1913) 183 Ill. App. 413	27
Smith v. Cannady, (1915), 45 Utah 521, 529, 147 P. 210	42
Smith v. Lenzi, 74 Utah 362, 369, 279 P. 893	42
Smith v. Wiley-Hall Motors (1945) 184 Va. 50, 34 S.E. (2d) 233	30
Tutwiler v. Beverally Nalle, Inc. (1943) 152 Fla. 479, 12 So. (2d) 163	24
Van Ness v. Murphy, (1907) 56 Misc. 556, 107 N.Y. Supp. 99.	25
Webb v. Snow, 102 Utah 435, 132 P. (2d) 114	43
Weitzmann v. A. L. Barber Asphalt Co. (1908), 190 N.Y. 452, 123 Am. St. Rep. 560, 83 N.E. 477	18
Wesbrook v. Colby, Inc., (1942) 315 Ill. App. 494, 43 N.E. (2d) 405	28
Wentink v. Traphagen, (1940) 138 Neb. 41, 291 N.W. 884....	29
Wilkinson v. Frairrie (1862), 9 Jur. N.S. 280	29

TEXTS

49 A.L.R. 778, supplemented at 156 A.L.R. 1226	18
Restatement on Torts, Vol. II, Sec. 342	20
163 A.L.R. 593, 613.	
4 Wigmore on Evidence, Sec. 1048	
1945 Session Laws, re-enactment Sec. 42-1-58	45

In the Supreme Court of the State of Utah

WILFRED A. ROGALSKI,

Plaintiff and Respondent,

vs.

PHILLIPS PETROLEUM COMPANY,
a corporation,

Defendant and Appellant.

No. 7982

BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Defendant appeals from a judgment on a verdict for \$6,212.50 recovered by plaintiff for personal injuries. On January 18, 1952, plaintiff's employer, Parley Droubay, instructed plaintiff to drive one of Droubay's tanker trucks onto a cement platform on defendant's premises at Woods Cross, Utah, and to steamclean the undercarriage of said truck. Droubay had previously been refused permission by defendant's officials to use cement platform for washing his trucks. Plaintiff alleged in his complaint that he and his employer, Droubay, were

"business invitees," although the place where the injury to plaintiff occurred was entirely outside the area where plaintiff and his employer transacted any business with defendant.

Defendant by answer denied that plaintiff and his employer were business invitees, and alleged that the injuries were sustained solely by reason of plaintiff's negligence. The evidence showed that plaintiff operated the steam cleaner, and directed a charge of steam downward in such a manner that his vision was completely obscured, and while his vision was so obscured by the steam by reason of the manner in which plaintiff operated the equipment, and without turning the nozzle up or away and without waiting for the steam to clear away, the plaintiff walked around the front of the truck off the cement platform, stepped into a tank of caustic soda, the side of which tank was 14 inches above the level of the concrete washing platform. Plaintiff suffered chemical burns to his leg. A lid was and is hinged to the caustic soda tank, which, when down, covers the tank. The caustic soda is used by defendant for cleaning certain chemical pump equipment parts. Plaintiff admitted that at no time did he pay any attention to said tank, and he made no observations with respect to it as he drove the truck onto the platform. There is no evidence as to who raised the cover lid of the tank on the day in question, and as far as the evidence shows, the only persons who were around there were plaintiff and his employee, Parley Droubay.

The trial court refused defendant's request to make the State Insurance Fund a party to the action, although plaintiff was paid compensation for the injury. The court excluded

evidence of plaintiff's admissions made on deposition which showed that plaintiff could have seen the tank and avoided stepping off the platform over into the tank if he had turned the steam nozzle up instead of downward. The court denied defendant's motion for a directed verdict of no cause of action. Such motion was predicated upon the theory that plaintiff was guilty of negligence which as a matter of law precluded recovery, for the reason that (a) there was no evidence that either plaintiff or his employer was a business invitee at the place on defendant's property where the injury occurred, (b) there was no evidence that defendant's officers or employees had lifted the lid of the caustic soda tank, and (c) the evidence conclusively showed that the injury was caused solely by the reckless conduct of plaintiff in moving toward the tank when his vision was totally obscured from the steam by reason of the manner in which plaintiff operated the equipment. The court submitted the case to the jury on plaintiff's theory that plaintiff was a business guest, and refused to submit the case to the jury with appropriate instructions as to defendant's theory that plaintiff was not a business invitee on the premises of defendant where the injury occurred.

The trial court denied defendant's motion for judgment in accordance with the motion for directed verdict, and also the alternative motion for a new trial.

STATEMENT OF FACTS

(a) *The place where the injury occurred was not a part of the premises where plaintiff and his employer were business invitees.*

Phillips Petroleum Company, defendant and appellant, has a petroleum products loading plant located at the southeast corner of Firth North and Onion Streets in Woods Cross, Utah. At the west end of the property there is a loading rack consisting of pumps from which petroleum products of defendant are diverted into tankers. Plaintiff's employer, Parley Droubay, was and is an independent business operator engaging in the distribution of Phillips petroleum products, under an express written contract. Droubay owned tankers, into which he or his employees loaded Phillips products at the marketing facility.

Several hundred feet to the east of the loading rack is a garage building, part of which was used by defendant, and other portions were leased to Droubay under written lease, and another portion was leased as a custom garage to one Mitchell. The premises leased to Droubay are specifically described in the lease. Those leased premises did not include any portion of the premises where the accident occurred, nor the loading area where Droubay and his employees obtained petroleum products.

The premises where the accident occurred on January 18, 1952, were never included in the lease to Droubay, nor ever used for loading any petroleum products into Droubay's trucks or tankers (R. 150). There is no evidence that any business whatsoever was ever transacted between Droubay and the defendant in that particular area. Adjacent to the portion of the garage building used by defendant and not leased to others, there is a cement slab 13 feet 11 inches in width and 51 feet 4 inches in length (R. 101). There is a drain located approxi-

mately in the center of the slab (R. 101). The steam-cleaning equipment was located on the north wall. On the east of the concrete slab or platform, there is a large garage door leading to garage and warehouse facilities of defendant. There was and is no covering for this concrete washing platform.

On the south of the concrete platform, entirely off such slab, 2 inches south of the slab, 20 inches from the east wall of the garage, there was and is a metal tank containing caustic soda. The tank is 5 feet 11 inches in length, and extends $14\frac{3}{4}$ inches above the level of the concrete slab (R. 38). There was and is a lid fastened on hinges (R. 65). The cover has always been down when the vat or tank was not in use, as far as Droubay had observed (R. 77). The caustic soda is used for cleaning equipment parts (R. 76). Neither Droubay nor plaintiff saw any Phillips employees around or near the tank on January 18, 1952, the date of the accident (R. 77, 108, 114, 172-173).

Neither the washing platform nor the adjacent caustic soda tank has ever been leased to anyone. Droubay had attempted to obtain written permission for the use of the washing platform, but such use had never been granted (R. 92). He did not claim any right to go onto that concrete slab to wash trucks (R. 87). He had previously asked for permission, but he was "generally just put off" (R. 86). The written agreements he had did not include the right to use said facilities. None of the company officials had ever authorized him to utilize the washing facilities and had refused him such right. Droubay, a former employee of defendant, had washed his trucks there at times prior to the day in question. He had

"usually checked with the people in the maintenance to see if they were going to be using it, or if I was going to be in anybody's way." He had no arrangements for going onto the slab, and he regarded his use of it as a matter of "neighborly accommodation (R. 86-87). Permission had neither been granted nor denied (R. 87). On the day of the accident, he had no recollection of having made any inquiry of anyone as to whether defendant would be using the washing platform (R. 87).

(b) Defendant's employees did not participate in the acts which produced the injuries to plaintiff.

By answers to the written interrogatories, plaintiff claimed that defendant's alleged negligence consisted of the following:

"14. No warning signs, directions, or instructions provided; no cover over the vat; vat placed too close to steam cleaning equipment; no proper protection or barricades around vat for person working in vicinity; insufficient visibility provided when steam hose in use."

Plaintiff made no claim that defendant or any of defendant's employees were actively negligent in some manner which contributed to the injury of plaintiff. Plaintiff relied on the claim that he and his employer were business invitees at the place where the accident occurred. Plaintiff produced no evidence that the cover lid for the caustic soda tank was raised by any of defendant's employees on the day of the accident. There was no evidence that the tank was in use by defendant on the day of the plaintiff's injury. In fact, neither Droubay nor plaintiff noticed any of the defendant's employees in the immediate vicinity of the concrete platform on January 18,

1952 (R. 77, 108, 114, 172). Neither Droubay nor plaintiff paid any attention to the caustic soda tank, nor made any observation as to whether the cover lid was up or down at any time prior to the accident (R. 114, 160).

Defendant neither turned on the steam, nor operated the equipment, nor placed the trailer truck on the washing platform. Plaintiff himself drove the truck onto the platform. Plaintiff's employer, Parley Droubay, was the person who turned on the steam cleaner, placed the soap on it, and placed the equipment in operation (R. 68-69). Droubay cleaned a portion of the left side of the undercarriage of the truck, showing plaintiff how to use the equipment. Droubay then turned the steam hose over to the plaintiff, leaving plaintiff entirely alone until after the accident occurred (R. 70-71).

(c) Failure to see the caustic soda tank was originally due to plaintiff's lack of observation of what was clearly visible, and subsequently due to lack of visibility created by plaintiff.

Plaintiff had never been on the concrete platform prior to the day of the accident. At the direction of Parley Droubay, plaintiff drove Truck No. 18 onto the "concrete ramp," keeping it as far from the windows and wall as possible to avoid splashing the wall and windows with grease and water (R. 124-125). He drove the truck in a position so as to stay on the slab with the right wheels. At the trial he estimated that he drove the truck to a point within 3 feet from the garage door located at the east end of the concrete washing platform, whereas on deposition he testified the distance was about 6 feet (R. 125, 159). Droubay estimated that the front of the truck was parallel with the west edge of the caustic soda

tank (R. 102). Droubay estimated that the right wheels of the truck were about 20 inches north of the south edge of the concrete slab (R. 102).

Prior to the date of the accident, plaintiff had merely seen the concrete platform and surroundings from a distance of about 125 feet (R. 151). No one had ever told him that there was a caustic soda tank adjacent to the washing platform. When he drove onto the platform, he did not see the tank. He testified that "if I had of I wouldn't have paid much attention to it" because "there is always a lot of different tanks and metal containers they have in this vicinity here" (R. 127). In examining his own photograph, Exhibit "A," plaintiff admitted that he could see the caustic soda tank, and that the same was plainly visible in approaching the concrete slab (R. 154). As he drove onto the concrete platform he was paying more attention to the left wall and windows. He knew there were objects to his right, a collection of tanks and high-boys, but he did not pay too much attention to objects on his right. He stayed about 5 feet away from the north wall of the building (R. 155). He testified, "I tried to stay as far away from the building as I could and still clear the objects on the right hand side and not scrape the fender." He knew he had to stay away from the objects on the right side to get around with the steam cleaning equipment (R. 156). The steam-cleaner nozzle is about 3 or 4 feet from the end of the hose to the tip of the nozzle (R. 157). There were no objects on the concrete platform other than the steam-cleaning equipment. He had an unobstructed path when he drove onto the platform, and he did not have to move any objects (R. 159).

As plaintiff drove onto the platform, he did not observe whether the lid cover of the caustic soda tank was up or down (R. 160). He thought there were objects within a foot of the concrete platform (R. 161), but he admitted that he testified on deposition that there were no objects on the concrete platform except the steam cleaner, and that the objects such as barrels which he claimed obstructed his view were 4 or 5 feet away from the concrete platform (R. 162-163).

Plaintiff got out of the cab, and Parley Droubay showed him how to steam-clean the undercarriage (R. 164). Plaintiff then started to use the steam-cleaner. Plaintiff directed the steam where he wanted it, and moved the nozzle to examine the part to which he had previously applied the steam (R. 165-166):

"Q. When you started to clean around in the front of the truck, how could you tell whether or not the part you had been cleaning, or the undercarriage had been sufficiently cleaned?

"A. I knew if I waited a minute the steam would clear, and put steam on it again and more or less take it for granted the last dose I had given enough to have it cleaned.

"Q. As you handled this nozzle you directed this nozzle to the under-carriage, you turned it to one side, you turned the steam nozzle away and looked at the part you were working on?

"A. Some of the time turned it up in the air and waited for the steam to disappear."

Plaintiff tried "to walk around the side of the truck" as far as he could get "over by the cab door, to wash the outside

of the right front wheel" when his left foot hit the north wall of the tank of caustic soda, and he raised his foot up over the wall and stepped into the tank. The visibility was so poor "on account of the steam, I never saw, or noticed any vat being there." He held the steam nozzle "straight in front of me, to my left, a little," his hand being about 2 feet from the end of the nozzle. The steam was on the entire period of time (R. 166-168). The steam was so dense that it was "difficult to see where I was going, very difficult (R. 166). There was so much steam coming out in front of the truck that he could not see. It was so foggy he could not see his hand in front of his face (R. 133). Explaining how he stepped over the wall of the caustic soda tank, he testified (R. 168):

"A. I touched it with my foot, and as I sort of stumbled I tried to raise my foot up, to catch my balance, therefore, I accidentally stepped into the tank, trying to keep my balance, with my right elbow on the fender, trying to hold myself as I moved forward."

The trial court denied the defendant's offer to show that on deposition plaintiff admitted that he could easily see where he was going if he turned the steam nozzle to one side and up instead of turning it down (R. 170-172).

Plaintiff admitted that Exhibit 9 as a photograph of a steam-cleaner nozzle is similar to the one he used (R. 176). Plaintiff had control over the steam-nozzle the entire time he was using it (R. 177-178).

When plaintiff stepped into the tank of caustic soda, he yelled, ran into the wash room and was given assistance by his employer and taken to the hospital. The court excluded

the offered evidence that he was paid workmen's compensation, and recovered sufficiently to return to work when compensation settlement was made.

Defendant offered evidence showing that Parley Droubay prior to January 18, 1952, requested written permission to use the washing rack, and to share the use with defendant; and that he was advised that the only privileges he had were those set forth in the written contracts and lease, and that Lloyd Clyde McDonnell, to whom application was made, was unable to grant such permission (R. 199-200).

The trial judge declined to hear argument on the motion for dismissal or the motion for directed verdict of no cause of action, and submitted the case to the jury.

STATEMENT OF POINTS RELIED ON FOR REVERSAL OF THE JUDGMENT

1. The case should not have been submitted to the jury, for defendant violated no duty of care to plaintiff.
2. Plaintiff was guilty of negligence as a matter of law which would preclude recovery in any event.
3. The court erred in the exclusion of evidence.
4. The court erred in its charge to the jury, by erroneous instructions and by refusal to submit instructions on defendant's theory.
5. The State Insurance Fund was a necessary party.

ARGUMENT

POINT NO. I

THE CASE SHOULD NOT HAVE BEEN SUBMITTED TO THE JURY, FOR DEFENDANT VIOLATED NO DUTY OF CARE TO PLAINTIFF.

Plaintiff filed suit on the theory that he was a business invitee on defendant's premises, and that defendant was negligent by failing to keep the premises in a safe condition, particularly by keeping and maintaining a tank of caustic soda adjacent to a concrete washing platform (R. 1). The defendant denied that plaintiff was a business invitee on the particular premises where the accident occurred, and the evidence shows that the place where plaintiff's employer transacted business with the defendant by loading petroleum products into trucks and tankers is an area at least 100 feet from the concrete platform and 150 feet from the caustic tank south of that platform. As pointed out hereinafter in a discussion of the error in the submission of the case to the jury, the trial court assumed that if plaintiff was a business invitee on *some portion* of the real property of defendant, that business invitation extended to all of defendant's property.

The place where the injury occurred was at least 150 feet distant from the eastern portion of the marketing facility. No petroleum products were loaded by Droubay or his employees at or adjacent to the place where the injury occurred. Droubay had a right to use certain portions of the defendant's premises by express written agreements. He admitted that he claimed no right to use the washing platform, and that he had made no

arrangements for its use. He had requested written permission from defendant's officials to use the washing platform, but he was never given such permission—"generally just put off" (R. 86-87). Droubay washed his trucks once every sixty days, and it cost him money when he had his trucks washed at Wagstaff's (R. 108, 92). Droubay never offered to pay any money for the use of the defendant's washing facilities (R. 92). He had tried to make some arrangements for the use of said washing platform and a grease rack, but permission had never been granted (R. 92). Before using the washing platform, he generally asked someone in the maintenance department of defendant corporation whether defendant would be using it or if he would be in the way (R. 86). He regarded the matter of using those facilities as a matter of neighborly accommodation (R. 87). On the day of the accident he did not recall having asked anyone about it (R. 87).

There is not a scintilla of evidence that Droubay was invited to use the washing platform and the steam-cleaning equipment, either by implication or otherwise. Plaintiff was not a business invitee of defendant. He was an employee of Droubay. The injury occurred at a place entirely outside the place where any business was transacted, and more than 150 feet away.

The accident did not occur by reason of some acts of defendant's employees. The plaintiff's employer turned on the steam-cleaning equipment, and turned the use of it over to plaintiff after plaintiff had driven the truck onto the cement platform. Plaintiff paid no attention to his surroundings other than to observe that there were no employees of defendant

around. None of the defendant's employees did any of the acts which produced the injury. There was no active negligence on the part of defendant, and plaintiff claimed none. The only negligence claimed by plaintiff on the part of defendant was:

"14. No warning sign, directions, or instructions provided; no cover over the vat; vat placed too close to steam cleaning equipment; no proper protection or barricades around vat for person working in vicinity; insufficient visibility when steam hose in use."

Under plaintiff's theory, defendant had an obligation to place warning signs, directions or instructions but since plaintiff created so much steam-fog by the way he operated the steam-cleaner, the signs would not have been visible to him anyway. In view of the admission of plaintiff that even if he had seen the tank he "wouldn't have paid much attention to it" (R. 127), it is difficult to see what good such warnings would have been. Furthermore, there was a lid for the tank. Obviously it was a lid which could be raised so that the tank could be used by defendant. The claim that defendant failed to provide a cover is not supported by the evidence, for the proof shows there was always a cover lid attached to the tank. The proof is also that the cover-lid was down when not in use, as far as Droubay was able to observe (R. 77). There is no proof whatsoever, that any of defendant's employees raised the cover lid of the tank on the day of the accident. In fact, when Droubay and plaintiff came onto the washing platform, they did not pay any attention to the tank and did not observe whether the lid was up or down (R. 114, 127, 160). Neither Droubay nor plaintiff saw any employees of the

defendant working in that immediate vicinity on the day of the accident (R. 77, 108, 114, 172-173).

The claim that the caustic soda tank was "too close to the steam-cleaning equipment" is patently absurd, for it was entirely off the concrete platform in a position where defendant could use it. It was not located where it would obstruct movement on the concrete platform. In fact, there were no obstructions of any kind on the platform. Likewise, the contention that defendant was negligent by not having "proper protection or barricades around the vat for persons working in the vicinity," is also unsound; for if the tank had been barricaded sufficiently to keep plaintiff from stepping into the tank, the plaintiff would likely have suffered a worse injury by running into the barricade while moving around in a fog of steam which he had created by his own reckless indifference for his own safety. It would be utterly impossible to have insured the safety of plaintiff under the circumstances.

Furthermore, the claim that defendant was negligent because of "insufficient visibility when steam hose in use," disregards the fact that plaintiff's employer turned on the steam, and plaintiff created the condition of lack of sufficient visibility of which he complains. All of the conditions of alleged invisibility were due solely to the affirmative acts and omissions of the plaintiff. He had control of the situation, whether there would be a cloud of steam in front of him or not. There is nothing in the record which even hints that defendant knew that plaintiff was present at the place in question.

If plaintiff was not a trespasser, at best he was a mere licensee. He was on the portion of defendant's property to

do a job for his employer, Parley Droubay. He was in no sense a business invitee on either the washing platform of defendant, nor in the caustic soda tank.

The development of the distinction in liability of a possessor of land toward a business invitee and bare licensee and a trespasser is discussed in the Annotation 49 A.L.R. 778 and supplemented at 156 A.L.R. 1226. The terminology used in the A.L.R. Annotation is "active negligence" in the liability toward licensees and trespassers and "passive negligence" in the case of business invitees. An application of the distinction is *Morrison v. Rutledge Co.*, (1922) 20 App. Div. 636, 193 N.Y. Supp. 428, where the evidence showed that the defendant discharged the plaintiff but plaintiff was permitted to remain in the hotel for the night. On the following morning she fell and suffered injuries because of a cake of soap on a stairway. She fell on her way to get utensils belonging to her and used by her in her work. The court said:

"Assuming that she was a licensee, then this defendant owed to her the duty not to injure her by an active negligence. This court so held in the case of *Lande v. L. & S. Constr. Co.* (1920) 191 App. Div. 497, 181 N. Y. Supp. 493, and the same rule has been stated in the court of appeals in the case of *Walsh v. Fritchburg R. Co.* (1895) 145 N.Y. 306, 27 L.R.A. 724, 45 Am. St. Rep. 615, 39 N.E. 1068. As to a trespasser or licensee, the defendant owed no active vigilance, nor was the defendant liable for any passive negligence in failing to keep the premises in good repair; but for active negligence the defendant was liable under the authorities cited."

In *Weitzmann v. A. L. Barber Asphalt Co.* (1908), 190

N.Y. 452, 123 Am. St. Rep. 560, 83 N.E. 477, plaintiff was injured by a barrel attached to a cable. The trial court had charged the jury that the barrel was more in the nature of a projectile fired from a gun or instrument which suddenly shot across the premises, than where there was a stationary danger. The Appellate Court said in reversing a judgment for the plaintiff:

"The defendant had the undoubted right to maintain the apparatus in question on its property, and while it was probably much more dangerous than stationary machinery, we do not think that circumstance altered the rule with respect to its liability towards mere trespassers or bare licensees. As to such persons the well-settled rule is that the only duty of the owners or occupiers of the land is to abstain from inflicting intentional, wanton, or wilful injuries."

In *Rosado v. Perch Realty Corporation* (1933), 239 App. Div. 373, 267 N.Y. Supp. 561, the court stated:

"It is the established law in this state that the only duty owed to a mere licensee by the owner of the premises upon which he is injured is to refrain from inflicting intentional, wanton, or wilful injury. In short, in order to render the owner liable for injuries sustained by a bare licensee as the result of a defect in the premises where he was injured, there must be some act of active negligence on the part of the owner. The owner cannot be held liable in damages for failure to keep its premises in repair."

The same doctrine was applied in *Paquet v. Barker* (1937) 250 App. Div. 771, 293 N.Y. Supp. 983, where the court said:

"As a matter of law the deceased was either a trespasser or a bare licensee. If he was a trespasser, the

appellant owed to him no duty except that of refraining from intentionally or wantonly injuring him; if he was a bare licensee, the appellant owed him no duty to exercise care that the premises were safe for the licensee, who, in entering by permission, took the risk of their condition. To such licensee, however, the appellant owed the duty of refraining from affirmative acts of negligence that might injure the former."

And in *Dunn v. Bomberger* (1938) 213 N.C. 172, 195 S.E. 364, the court said:

"The only duty resting upon the defendant was to refrain from wilful or wanton negligence, and from the commission of any act which would increase the hazard. The owner of land is not required to keep his premises in a suitable or safe condition for those who come there solely as licensees and who are not either expressly invited to enter or induced to come upon them for the purpose for which the premises are appropriated and occupied. In authoritative decisions of this and other jurisdictions, the degree of care to be exercised by the owner of premises toward a person coming upon the premises as a bare or permissive licensee for his own convenience is to refrain from wilful or wanton negligence and from doing any act which increases the hazard to the licensee while he is upon the premises. *The owner is not liable for injuries resulting to a licensee from defects, obstacles, or pitfalls upon the premises, unless the owner is affirmatively and actively negligent in respect to such defect, obstacle, or pitfall while the licensee is upon his premises, resulting in increased hazard and danger to the licensee.*" (Emphasis ours).

The Restatement makes the same distinction. (Restatement on Torts, Volume II, § 342, is as follows:

"A possessor of land owes to a gratuitous licensee no duty to prepare a safe place for the licensee's reception or to inspect the land to discover possible or even probable dangers.

"If the license is gratuitous, the privilege to enter is a gift and the licensee, as the recipient thereof, is entitled to expect nothing more than a disclosure of the conditions which he will meet if he acts upon the license and enters, *in so far as those conditions are known to the giver of the privilege.*" (Emphasis ours.)

In the case at bar no invitation was issued to the plaintiff. The sole business of the plaintiff upon defendant's premises was his own and that of his employer. There was no evidence from which the jury could conclude that plaintiff was a business invitee within the meaning of the Authorities. Defendant owed no duty to plaintiff except to disclose to him any *known* defects or dangerous conditions. There was no evidence to the effect that any employe or official of the defendant corporation had any knowledge that the lid was not on the vat, nor was there any evidence to the effect that any employe or official knew or had reason to believe that plaintiff was going to enter the premises to use the wash rack upon the day of the accident.

It is respectfully submitted that the court erred in failing to grant defendant's motion to dismiss on the ground that no negligence or other breach of duty toward plaintiff was shown and that the court erred further in permitting the jury to conclude that the plaintiff was a business invitee upon defendant's premises.

POINT NO. 2

PLAINTIFF WAS GUILTY OF NEGLIGENCE AS A MATTER OF LAW WHICH WOULD PRECLUDE RECOVERY IN ANY EVENT.

Defendant did not turn on the steam which blinded plaintiff, nor did it do anything to obscure his view. Plaintiff's employer turned on the steam, and plaintiff had control of the steam nozzle, and he created the steam cloud of which he complains. He had a clear view of the entire cement platform as he drove the truck onto it. There were no obstructions. He could have seen the tank of caustic soda if he had looked. He said he would not have paid much attention to it even if he had seen it because of other metal tanks and barrels (R. 127). His failure to see was due to his own indisposition to look at what was plainly visible, as shown by Exhibit "A." Exhibits "B," "C," and "D" clearly show that the tank was in a position entirely off the concrete platform. It did not obstruct movement on the platform.

Plaintiff testified that he stepped over the side of the metal tank, which side is 14 inches above the concrete slab, and into the tank, because he could not see where he was going. The only reason he could not see was because he held the steam nozzle out in front of him, and downward. The steam fog was of his own creation. The steam was so dense that he could not see his hand in front of his face (R. 133). Yet, he tried to move around the front of the truck blindly. He was reckless in holding the steam hose in front and downward, which obscured his view of what was in front of him. He could

have turned the nozzle up or to one side and thus have permitted the steam to float away and to see where the steam cloud had been. He had sole control of the direction of the steam, and it was within his own power to wait until the steam cleared so that he could see (R. 132, 133, 165-166). He testified that as he came across the front axle and started to clean on the right side, he started over toward the door and to walk around the fender when his foot came in contact with the metal tank which was not visible to him because of the steam. In trying to get his balance he placed his arm on the fender, and stepped over into the tank with his left foot (R. 131-133, 164-168, 177-178).

There was nothing which could have prevented seeing the tank except the steam fog which he created. He wilfully went forward knowing he could not see, and knowing also that he could see if he would turn the nozzle up and to one side. He was wantonly reckless in failing to follow a few simple rules of care for his own safety.

As a matter of law plaintiff was negligent in failing to see the vat, or if he saw it he was negligent in stumbling into it. It is clear that he was negligent in using the steam hose in such a manner as prevented him from seeing what was plain to be seen. If he did not see the vat but stepped in a direction where he had no visibility, being unacquainted with the premises, his negligence consisted of failing to exercise ordinary precautions for his own safety in walking into an area without knowing that it was reasonably safe.

Taking a degree of care beyond any duty owed plaintiff by defendant a number of cases have held that a business

invitee walking into a portion of the premises with which he is not familiar, without endeavoring to ascertain the existence of defects in the premises, or other dangerous conditions which he may encounter beyond the door, is guilty of contributory negligence as a matter of law.

In *Tutwiler v. Beverally Nalle, Inc.*, (1943) 152 Fla. 479, 12 So. (2d) 163, plaintiff was a prospective tenant inspecting the premises in an apartment house owned by defendant. A stairway was constructed to the left of the hallway, which led from the living room of the apartment to the kitchen, with a door beneath the stairway. The door opened unwarningly upon a flight of stairs to the cellar. The floor level of the hall did not extend beyond the door, there being a stone drop from the level of the passageway or hall to the first step of the stairway. The stairway was dark, precipitous and unlighted. There was evidence that the door had the appearance of an entrance into a closet rather than an entrance into a cellar. Plaintiff had no knowledge of the condition of the apartment. She opened the door and fell down the stairway into the cellar. The court held that plaintiff was guilty of contributory negligence as a matter of law. When she opened the door to the cellar and was unable to see what was beyond she failed to exercise ordinary care for her own safety by taking a step forward into a dark and unlighted stairway.

In *Bruce v. Risley*, (1936) 15 Cal. App. (2d) 659, 59 P. (2d) 847, plaintiff was a prospective tenant. The accident occurred in substantially the same manner as in *Tutwiler v. T. Beverally Nalle, Inc.* Plaintiff and another man proceeded to the rear of the room, opened up a door which led to a base-

ment stairway platform and plaintiff proceeded along the platform, striking paper matches to light his way. Plaintiff fell down the steps into the basement. The court stated that the impenetrable darkness which surrounded the stair landing was of itself a sufficient warning to plaintiff that if he proceeded through the doorway without sufficient light to enable him to see what lay beyond he would do so at his own risk.

In *Murphy v. Cohen*, (1916) 223 Mass. 54, 111 N. E. 771, plaintiff, a real estate agent, was showing a prospective tenant through the house and fell on unfamiliar cellar steps so dimly lighted that the width of the treads was scarcely visible. The court held that he was negligent as a matter of law in proceeding into an unlighted area. The New York court held in *Van Ness v. Murphy*, (1907) 56 Misc. 556, 107 N.Y. Supp. 99, that plaintiff was guilty of contributory negligence as a matter of law, when she had recently rented an apartment and entered a dark hallway, deliberately opened and walked through the first door she saw without ascertaining that the doorway entered into a stairway to the cellar. The court said that there was no presumption that a person can walk through any door he comes to in a strange house without taking precautionary measures, and in *Rowell vs. John Hutzler Lumber Co.*, (1930) 228 App. Div. 158, 239 N. Y. Supp. 192, affirmed 1930, 255 N.Y. 581, 175 N.E. 322, plaintiff, a prospective purchaser, opened and passed through a door marked "Private." The door opened from the staircase and the stairs were in complete darkness. The court said "She was not precipitated down the stairs by anything giving way; She intentionally pushed the door open, knowing that it

swung away from her; she then voluntarily stepped into an unknown space in a strange building without taking any precaution for her safety." Substantially the same factual situation existed in *Boyce v. Brewington* (1945) 49 N. Mex. 107, 158 P. (2d) 124, 163 A.L.R. 583. The court stated the rule with respect to the duty owed a business invitee. It concluded that: "The failure of the plaintiff to exercise ordinary care for her own safety when opening a closed door and taking a step forward into an unlighted stairway, thereby contributing to her own injury as a matter of law, will preclude recovery on her part under the evidence in this case, and it was error for the trial court to refuse to direct a verdict in favor of the defendant."

The same rule frequently has been applied where the plaintiff was a guest, or prospective guest, of a hotel or a tenant of an apartment house, other than a dwelling place. In *Hooker v. Route Realty Co.*, (1938) 102 Colo. 8, 76 P. (2d) 431, plaintiff was attempting to make a social call on a friend who was a resident of a hotel. Instead of entering the front entrance plaintiff chose a dark, dingy area, unfamiliar to her, located in the rear of the hotel. In *Hart v. Sullivan*, (1944), 323 Ill. App. 243, 58 N.E. (2d) 301, plaintiff proceeded up an unlighted stairway to meet someone who occupied an apartment in the building. The only light was a match plaintiff was using and it was extinguished before he reached the stairway landing. Plaintiff opened the door leading off the landing and fell down another stairway leading to the basement. He was held to have been contributorily negligent as a matter of law. In *Campbell v. Abbott* (1900), 176 Mass. 246, 57 N.E. 462, plaintiff had never before been in the building. He entered without knocking or ringing a bell and found himself

in darkness. Instead of attempting to attract attention from the family he endeavored to find his own way. In so doing he fell down the cellar steps. The Massachusetts Supreme Court held he was negligent as a matter of law. The same rule was applied in *Freirson v. Mutual Realty Co.* (1934), 48 Ga. App. 839, 174 S.E. 144, and in *Baumler v. Wilm*, (1910) 136 App. Div. 857, 122 N.Y. Supp. 98. *Hilsenbeck v. Guhring*, (1892) 131 N.Y. 674, 30 N.E. 580, applied the same rule to substantially similar facts. Plaintiff had never before been in the apartment house. He opened a door believing he was entering a closet but in fact he entered a short dark hallway leading to the basement. Plaintiff had testified that "it was dark and after he got hold of the door in question it was so dark he could not see in the space in front of him. He had never been there before, and he had no information which might lead him or cause him to think there was but one and that the door led into the closet. He knew nothing about it and in that state of ignorance he opens the door which he thought was the one leading to the closet, but, it being dark, he could not be certain, and, notwithstanding the darkness, he walks ahead and, while supposing himself in the closet, steps into the heading of the stairway and falls down the cellar stairs." The court said that the plaintiff could not walk through a door in darkness into a hallway with which he was unfamiliar and then claim damages for the resulting injury.

To the same effect see *Sauter v. Hinde*, (1913) 183 Ill. App. 413; *Benton v. Watson*, (1919) 231 Mass. 582, 121 N.E. 399; *DuRocher v. Teutonia Motor Car Co.* (1925), 188 Wis. 208, 205 N.W. 921, 42 A.L.R. 1094; *National Refining*

Co. v. Strickmaker, (1934) 49 Ohio App. 467, 197 N.E. 364; *Heidenrich v. Dumas*, (1937) 88 N.H. 453, 190 Atl. 705; *Wesbrock v. Colby, Inc.*, (1942) 315 Ill. App. 494, 43 N.E. (2d) 405; *Sartori v. Capitol City Lodge* (1942), 212 Minn. 538, 4 N.W. (2d) 339; *Hudson v. Church of Holy Trinity* (1929), 250 N.Y. 513, 199 N.E. 603; *McVeagh v. Bass* (1933) 110 Pa. Sup. Ct. 379, 171 Atl. 486; *Brusseau v. Selmo* (1938) 286 Mich. 171, 281 N.W. 580.

In *Erickson v. McKay* (1932) 207 Wis. 497, 242 N.W. 133, plaintiff went around to the rear of the building in an area which he had never been before and fell into a ramp leading down into the basement. He was held to be contributorily negligent as a matter of law. In *Plahn v. Masonic Hall Bldg. Assn.* (1939) 206 Minn. 232, 288 N.W. 575, the court placed emphasis upon the fact that plaintiff knew, or should have realized, the risks which she took in walking into an unlighted area through a door which entered into a stairway which led to the cellar. Plaintiff here was in search of a toilet and the court held that she appreciated the risks involved and that her lack of knowledge of the area exposed plaintiff to danger.

In *Illinois Central Railroad Co. v. Sanderson* (1917) 175 Ky. 11, 192 S.W. 869, L.R.A. 1917D 890, the Court of Appeals of Kentucky applied the rule, although plaintiff had been in the area where the accident occurred before three times, plaintiff in this case hurriedly purchased a railroad ticket and proceeded through a partially opened and unmarked door in the waiting room. The court stated in its opinion that to bolt headlong into a dark and unknown place, without stopping

to determine whether it is safe to proceed, is an act of recklessness about which reasonable minds could not well differ. The trial court should have directed a verdict for defendant. The rule was applied in England in *Wilkinson v. Frairrie* (1862), 9 Jur. N.S. 280, where the opinion was written by Justice C. B. Pollock.

The same rule has been applied where the plaintiff fell into a furnace pit or other depression rather than down stairways. *Huyink v. Hart Publications* (1942), 212 Minn. 87, 2 N.W. (2d) 552; *Wentink v. Traphagen* (1940) 138 Neb. 41, 291 N.W. 884; *Czesznek v. Ruffy Corporation* (1940) 259 App. Div. 302, 19 N.Y. Supp. (2d) 248; *Gasch v. Rounds* (1916) 93 Wash. 317, 160 P. 962; *Donaldson v. Kemper*, 152 Kan. 533, 106 P. (2d) 1051.

In *Ross v. Becklenberg* (1917), 209 Ill. App. 144 and *DeGraffenried v. Wallace* (1899), 2 Ind. Ter. 657, 53 S.W. 452, plaintiffs had entered into unfinished buildings which were unlighted and in which they had never previously been. They were held contributorily negligent as a matter of law when they fell through unfinished floors. In both instances the courts considered plaintiffs to be business invitees. In the latter case plaintiff was an attorney who went on to the premises to interview his client.

The rule was applied in the following cases where the plaintiffs walked into dark areas and fell into a hole in the ground or passageway. *Powers v. Raymond*, (1925), 197 Cal. 126, 239 P. 1069; *Gillespie v. John W. Ferguson & Co.*, (1909) 78 N.J.L. 470, 74 Atl. 460; *Costello v. Farmers Bank*,

Co. v. Strickmaker, (1934) 49 Ohio App. 467, 197 N.E. 364; *Heidenrich v. Dumas*, (1937) 88 N.H. 453, 190 Atl. 705; *Wesbrock v. Colby, Inc.*, (1942) 315 Ill. App. 494, 43 N.E. (2d) 405; *Sartori v. Capitol City Lodge* (1942), 212 Minn. 538, 4 N.W. (2d) 339; *Hudson v. Church of Holy Trinity* (1929), 250 N.Y. 513, 199 N.E. 603; *McVeagh v. Bass* (1933) 110 Pa. Sup. Ct. 379, 171 Atl. 486; *Brusseau v. Selmo* (1938) 286 Mich. 171, 281 N.W. 580.

In *Erickson v. McKay* (1932) 207 Wis. 497, 242 N.W. 133, plaintiff went around to the rear of the building in an area which he had never been before and fell into a ramp leading down into the basement. He was held to be contributorily negligent as a matter of law. In *Plahn v. Masonic Hall Bldg. Assn.* (1939) 206 Minn. 232, 288 N.W. 575, the court placed emphasis upon the fact that plaintiff knew, or should have realized, the risks which she took in walking into an unlighted area through a door which entered into a stairway which led to the cellar. Plaintiff here was in search of a toilet and the court held that she appreciated the risks involved and that her lack of knowledge of the area exposed plaintiff to danger.

In *Illinois Central Railroad Co. v. Sanderson* (1917) 175 Ky. 11, 192 S.W. 869, L.R.A. 1917D 890, the Court of Appeals of Kentucky applied the rule, although plaintiff had been in the area where the accident occurred before three times, plaintiff in this case hurriedly purchased a railroad ticket and proceeded through a partially opened and unmarked door in the waiting room. The court stated in its opinion that to bolt headlong into a dark and unknown place, without stopping

to determine whether it is safe to proceed, is an act of recklessness about which reasonable minds could not well differ. The trial court should have directed a verdict for defendant. The rule was applied in England in *Wilkinson v. Frairrie* (1862), 9 Jur. N.S. 280, where the opinion was written by Justice C. B. Pollock.

The same rule has been applied where the plaintiff fell into a furnace pit or other depression rather than down stairways. *Huyink v. Hart Publications* (1942), 212 Minn. 87, 2 N.W. (2d) 552; *Wentink v. Traphagen* (1940) 138 Neb. 41, 291 N.W. 884; *Czesznek v. Ruffy Corporation* (1940) 259 App. Div. 302, 19 N.Y. Supp. (2d) 248; *Gasch v. Rounds* (1916) 93 Wash. 317, 160 P. 962; *Donaldson v. Kemper*, 152 Kan. 533, 106 P. (2d) 1051.

In *Ross v. Becklenberg* (1917), 209 Ill. App. 144 and *DeGraffenried v. Wallace* (1899), 2 Ind. Ter. 657, 53 S.W. 452, plaintiffs had entered into unfinished buildings which were unlighted and in which they had never previously been. They were held contributorily negligent as a matter of law when they fell through unfinished floors. In both instances the courts considered plaintiffs to be business invitees. In the latter case plaintiff was an attorney who went on to the premises to interview his client.

The rule was applied in the following cases where the plaintiffs walked into dark areas and fell into a hole in the ground or passageway. *Powers v. Raymond*, (1925), 197 Cal. 126, 239 P. 1069; *Gillespie v. John W. Ferguson & Co.*, (1909) 78 N.J.L. 470, 74 Atl. 460; *Costello v. Farmers Bank*,

(1916) 34 N.D. 131; 157 N.W. 982; *Dacus v. Dickinson Trust Co.* (1941), 65 Ga. App. 872, 16 S.E. (2d) 786.

In at least two cases plaintiffs were invitees in a garage or filling station and were held to be contributorily negligent in walking through darkness and falling into grease pits. *Elliott v. Dahl*, (1941), 299 Mich. 380, 300 N.W. 132; *Smith v. Wiley-Hall Motors* (1945) 184 Va. 50, 34 S.E. (2d) 233.

The Court's attention is invited to the Annotation appearing in 163 A.L.R., beginning at page 593, where these and many other cases are discussed. At page 613 of the Annotation the editor distinguishes the cases that hold that contributory negligence is a question for the jury in situations where plaintiff had some knowledge of the premises or the accident occurred in a place where the injured person possibly had some right to assume that area was safe or that the injured person relied upon the advice or direction of an employe on the premises, or that there was not sufficient opportunity to discover the danger prior to the accident.

The case of *Moore v. Miles* (1945) 108 Utah 167, 158 P. (2d) 676, is not contrary on its facts to the principle announced in the cases following the majority rule. In the Moore case the plaintiff testified that the west end of the hall was so dark that she could not see the stairs. She said she was walking slowly and feeling ahead with her feet that she lost her balance at the first step and fell down the short flight of steps to the doorway. The night clerk testified that the hallway was lighted and that when he stood at the east end of the hall he could see the entire length and could see the rooms all the way down the hall. The court said:

"This conflict in the evidence presented a question for the jury as to whether the hallway was lighted, an important element on the question of negligence. *Olson v. Hayden Holding Company*, 92 Utah 551, 70 P. (2d) 463."

The court held that where reasonable minds could draw different conclusions from the evidence the question of contributory negligence was for the jury.

In the case at bar there is no question of inadequate lighting. The statute referred to in *Moore v. Miles* is, of course, inapplicable here. Conceding that this Court is committed to the doctrine that questions of negligence and contributory negligence allegedly are to be decided by the jury under proper instructions, it is respectfully submitted that reasonable minds could not conclude that plaintiff Rogalski was free from contributory negligence.

It must be kept in mind that the accident occurred in the middle of the day. The vat into which plaintiff stumbled was not hidden. It was not placed in a position where its detection would be difficult. It was in plain view. It was placed in a position off the cement apron, in an area which would normally not be frequented by any persons except employees of the defendant and persons who had specific permission to enter the premises.

Would this Court say that if a man closed his eyes and walked into the side of the building that he was not guilty of contributory negligence as a matter of law? Where then will the Court draw the line? Is it less negligent to stumble into a vat in a refinery area than to walk into the side of a building? Certainly, the plaintiff had no excuse for not seeing

the vat. He simply failed to look and observe what was in plain view. If a man is contributorily negligent as a matter of law for proceeding into an area insufficiently lighted, then *a fortiori* plaintiff is negligent as a matter of law when he stumbles into a vat which is in plain view in the middle of the afternoon. This is not a case where plaintiff used a defective appliance or where he stepped on a covering which was not strong enough to hold his weight. It is to be noted that the plaintiff alleges that defendant was negligent because of "insufficient visibility provided when steam hose in use" (R. 14). Plaintiff himself held the steam hose in such a manner that according to his testimony his vision was obscured. The steam which he himself operated and over which he exercised dominion, prevented him from seeing the vat. Can this Court say that when plaintiff himself, by his own negligence, makes it impossible to see the vat, he is less guilty of contributory negligence than if he actually closed his eyes and walked into it?

Moreover, plaintiff was not in the kind of an area in which he could reasonably expect to be free from danger. He was near a gasoline refinery, an area in which there are bound to be some dangerous tools and substances. It does not matter, for the purpose of considering plaintiff's negligence, whether the content of the vat was water, gasoline, caustic soda or any other substance. Plaintiff is not entitled to presume, in the kind of an area in which he was working, that any substance in the vat was safe to step into. There is no evidence as to what his thoughts were on this subject in any event, because he did see the vat before he stepped into it. Certainly this Court cannot say that if he had seen the vat he

would have stepped into it on a cold day in January, on the assumption that its contents were not harmful to him.

It is respectfully submitted that the trial court erred in failing to grant defendant's motion for a directed verdict and in failing to enter a judgment of non-suit at the close of plaintiff's evidence.

The case at bar is substantially identical with the case of *Knox v. Snow, et al.*, recently decided by this court. *Knox v. Snow, et al.*, (1951) Utah, 229 P. (2d) 874. The plaintiff in that case was a customer in a service station. Upon his own initiative, and without any invitation or direction from the defendant, he walked through the repair shop looking for an innerliner for a tire. In the language of the Court:

"As he walked across the shop he stepped over a hydraulic hoist, which extended about eight inches above the floor, and which was a few feet from the grease pit, and continued on toward the tire rack. Upon approaching the rack he stopped, his left foot resting on or near the rim of the pit. After standing there a moment, he shifted his weight from one foot to another, and in doing so, his left foot slipped, he lost his balance, and fell into the well."

The Court assumed, for the purpose of argument, original negligence by the defendant and assumed further that plaintiff was a business invitee. The Court then held, squarely affirming the trial judge, that plaintiff was guilty of contributory negligence as a matter of law. The language of Mr. Justice Latimer is quoted for the convenience of the Court:

"Assuming that the service room was somewhat shaded as plaintiff claims, such a circumstance would

not relieve him from maintaining some reasonable lookout along the path he was to travel. Such a condition might require that he be more alert. He was entering a shop which was used for servicing motor vehicles. From his previous experiences and observations of similar shops where motor vehicles are serviced, he could reasonably be charged with knowledge that some of the equipment in the shop would present hazards to one paying no attention to the obstacles across the course to be taken. Furthermore, the evidence establishes that he knew the path he was taking was not free and clear as while proceeding across the room toward the rack he stepped over both beams of a hydraulic hoist which was in his pathway and he maneuvered his way around cans and other debris on the floor of the shop. In spite of knowing the probability of other obstacles blocking his course plaintiff continued forward without seeing the cement border around the pit, the grease pit, or the ladder which was protruding prominently from the pit. The hydraulic hoist was located about nine feet from the pit, and the grease and oil cans were between the hoist and the pit. These obstructions compelled plaintiff to pay some heed to the floor of the shop and the path he travelled as he crossed the service room in order to avoid tripping over them.

"When he approached the point where he claims he could more closely examine the tires on the rack, the ladder which extended up from the pit was almost within his reach; the cement border was large enough to be easily observed; and the merest glance towards the floor as he moved forward would have disclosed the presence of the danger. It seems unbelievable that plaintiff could have been so unobservant as to miss seeing the pit as he testified he stood right at its edge and upon shifting his weight from one foot to the other he lost his balance and fell into the excavation.

"Plaintiff seeks to justify his failure to observe the danger which was clearly visible because his sole interest was in the tire on the rack; that he didn't see the ladder or the pit because he wasn't looking at the floor or wasn't watching where he was stepping because his interest was centered solely on the tire rack; and that if he had looked he would probably have seen the protruding ladder and the pit. It thus becomes apparent that this is not a case where plaintiff used reasonable care for his own safety. *A reasonable person makes some observations along the path he chooses to follow.* In this instance plaintiff was so intent upon observing the articles on the rack that he neglected to use the care required of a prudent man traversing a shop having hazards readily discernable, even to one with impaired vision." (Emphasis applied.)

In the case at bar plaintiff did not even have the excuse that the area was shaded, nor did he have the excuse that there was a possible defect in his vision. Applying the tests of *Raymond v. Union Pacific Railroad Company* (1948), 113 Utah 26, 191 P. (2d) 137, it is clear that in any reasonable view of the evidence a jury could not find that plaintiff was free of contributory negligence. It is respectfully submitted that the trial court erred in failing to grant defendant's motion for a directed verdict and in failing to enter a judgment of non-suit at the close of plaintiff's evidence.

POINT NO. 3

THE COURT ERRED IN EXCLUDING EVIDENCE.

The plaintiff attempted to escape the consequences of his own negligence by claiming ignorance of his surroundings,

and unfamiliarity with those surroundings. The proof showed that any ignorance of what was within plain sight was due to his unwillingness to look, and his indisposition to take the ordinary care that common sense would require a person to exercise. Plaintiff's deposition was taken prior to trial, and he gave a different version of how some of the events had occurred.

When confronted with his deposition for the purpose of showing the admissions of plaintiff that he could have easily avoided the accident, counsel for the plaintiff objected to reading certain portions to him, and the court sustained the objections without knowing the content. Consequently, in the absence of the jury, defendant made a proffer of proof to show not only some inconsistency, but the admissions of plaintiff (R. 170-172):

"Q. But, as you turned the nozzle away from that particular part, you could see whether it was cleaned, or needed the application of further steam?

MR. McCARTHY: Your Honor, I object to the whole line of questioning, Your Honor, it is repetition, and not in any way contradictory to anything the witness testified to.

THE COURT: The objection is sustained.

MR. REIMANN: Then we would like to make a tender of this testimony on the deposition.

THE COURT: You may make the tender after the jury is gone.

MR. REIMANN: The tender we wish to make is page 35 of the deposition of Mr. Rogalski.

THE COURT: The court, ladies and gentlemen, will

be in recess until 2 P.M. (Thereupon the jury is admonished and excused until 2 o'clock P.M.)

These proceedings were had during the absence of the jury:

MR. REIMANN: May we make the tender in the record? The defendant makes the following tender of proof from the deposition of the plaintiff on page 35, lines 4 to 9 inclusive:

"Q. But, as you turned the nozzle away from that particular part, you could see whether it was cleaned, or needed the application of further steam?

"A. *After I took the nozzle away and raised it up in the air, I would wait a short while till the steam disappeared, then I could see if I was cleaning it fairly good.*"

The defendant further tenders proof on page 35 of the deposition, lines 15 to 26 inclusive:

"Q. *And you had the nozzle and the steam running slightly downward, did you not?*

"A. Yes, sir.

"Q. You did not put the hose up so you could see where you were going?

"A. I had it my my left, and *down*. I was following right along the fender. The fender was right by my hip, *I cold feel my fender right there.*

"Q. *You could have seen rather easily if you had turned the steam upwards, turned the nozzle upwards,* you could have seen the fender without difficulty, could you not?

"A. *Yes, I suppose I could have.*" (Italics added.)

The defendant also makes a tender of evidence from the deposition on page 35, lines 27 to 30:

"Q. You could have seen all of your surroundings, too, without difficulty, if you had turned the steam hose up instead of turning it down?

"A. I would probably have had to raise it away over my head."

Each of said tenders is made to show admissions on the part of plaintiff, which proximately contributed to his injury, each of said tenders so shows. Our proof is further made for the purpose of impeaching the plaintiff with respect to answers given both on direct examination and on cross-examination.

MR. McCARTHY: I object to it, it is incompetent, irrelevant and immaterial and not proper material for impeachment.

THE COURT: The objection is sustained.

As pointed out in 4 Wigmore on Evidence, § 1048, pages 2-6, the admissions made by a party out of court are admissible in evidence. A fortiori, the admissions made under oath are likewise admissible. The quoted portions of plaintiff's deposition show that plaintiff *knew* that in order to see where he was moving, all he had to do was to turn the steam nozzle to one side and upward instead of down, inasmuch as he had full control of the nozzle and the course and direction of the steam. The admissions show conclusively that the condition of lack of visibility was created solely by plaintiff, not by defendant. Rule 26 (d) permits the deposition of a party to be used by "an adverse party for any purpose."

Independent of the proffered evidence, the defendant was entitled to have the court grant the motion for a directed verdict of no cause of action. When the court committed the further error of submitting the case to the jury, under erroneous

instructions, the exclusion of such proffered evidence became all the more prejudicial; for the admissions clearly show that plaintiff knew how he could have assured himself sufficient visibility and that the lack of it depended solely on himself.

POINT NO. 4

THE COURT ERRED IN ITS CHARGE TO THE JURY, BY ERRONEOUS INSTRUCTIONS AND BY REFUSAL TO SUBMIT INSTRUCTIONS ON DEFENDANT'S THEORY.

It was defendant's theory at the trial of this cause that plaintiff had no permission, either express or implied, to use the steam cleaning equipment upon the day of the accident. Defendant expressly denied any negligence and denied expressly that plaintiff and his employer were business invitees on the premises (R. 16). The evidence supporting defendant's theory was to the effect that the agreements between Droubay, plaintiff's employer, and defendant was the lease dated March 1, 1949 and the consignment agreement dated February 25, 1949 (Exhibits 2 and 8). In neither of these agreements is Droubay given any permission to use any portion of Phillips' property except the area referred to on Exhibit 1 as "The Droubay office" and the area referred to as the "truck pumps." Droubay had requested permission to use the steam equipment and the wash rack but that he was never given such permission. He was "generally just put off." According to his own testimony (R. 86, 87) it was customary, before he ever used the rack on previous occasions to inquire of Phillips' maintenance foreman whether it would be in use or whether he would be in the way, but on the day of the accident he has no

recollection of making such inquiry (R. 87). He claimed no right to go on to the slab to wash his trucks. His use of the equipment was "purely a matter of neighborly accommodation." in the instances where the equipment was used. Droubay had never offered to pay anyone for the use of the steam cleaning equipment. When his trucks were washed elsewhere, or when he used other equipment to wash them he was, of course, required to pay for the service (R. 91, 92).

Defendant requested the Court to give a series of instructions, placing before the jury defendant's theory with respect to the question of whether plaintiff was a business invitee. Defendant's requested Instruction No. 1 was to the effect that the jury could find that the plaintiff was a business invitee with respect to the area adjacent to the gasoline pumps without being an invitee with respect to the area adjacent to the wash rack and the wash rack itself.

Defendant's requested Instruction No. 2 was substantially to the same effect. Defendant's requested Instructions Nos. 3, 4 and 5 were to the effect that if plaintiff and his employer were not business invitees the defendant owed them no duty to warn plaintiff of a danger of which defendant had no knowledge. Defendant's requested Instruction No. 5 incorporates the idea of an assumption of risk. Defendant's requested Instruction No. 6 is a further attempt to enlighten the jury concerning the liability toward the business invitee. It includes the idea that a "business invitee may extend to one part of the premises without extending to all of the premises."

Defendant's requested Instruction No. 7 was as follows: "If you find that the plaintiff was merely a licensee upon the

premises of the defendant you are instructed that the only duty owed to the plaintiff by the defendant was not to unlawfully and wantonly injure him. In the absence of such wilful and wanton misconduct on the part of the defendant you must not allow the plaintiff to recover." Defendant's requested Instruction No. 8 was to the effect that plaintiff could not have been a business invitee unless he went on the premises for a purpose mutually beneficial to plaintiff and defendant, and defendant's requested Instruction No. 9 stated: "A possessor of land owes to a gratuitous licensee no duty to inspect the land to discover possible or even probable dangers." Defendant's requested Instruction No. 10 is to the effect that a gratuitous licensee is not entitled to any special preparation of the premises for his safety.

Judge Baker uniformly refused to give in substance or effect, or at all, defendant's requested Instructions Nos. 1 through 10. Instead the Court's Instructions 10 and 11 were the only enlightenment received by the jury on the difficult and technical question of liability of a possessor of land toward a business invitee, a gratuitous licensee or a trespasser. Instructions 10 and 11 by the Court can be searched in vain for any distinction in the liability toward these various classes of persons. The entire Instructions only emphasized and reiterated the special and particular duty toward a business invitee. The Court did not tell the jury in any manner the distinction between the duty toward a business invitee and a gratuitous licensee.

Unquestionably, there was evidence from which the jury could have determined that plaintiff was a gratuitous licensee.

In fact, the evidence is conclusive to that effect. The jury might even have determined, under the evidence, that at least with respect to the day on which the accident occurred plaintiff was a trespasser on the wash rack and in the use of the steam cleaning equipment. Defendant was entitled to have its theory of the case presented to the jury. If the actual requested Instructions of the defendant were inadequate for any reason they at least attempted to present defendant's theory. The Court's ruling and the Instructions actually given took from the jury one of the primary issues in the lawsuit. This Court has clearly held that the duty of a trial court to instruct the jury on a pertinent theory cannot be avoided because a request fairly calling the attention of the court to the principle of law may also contain some language in addition to the statement of the legal principle which may be subject to criticism. *Smith v. Lenzi*, 74 Utah 362, 369, 279 P. 893. The duty of the court to adequately instruct the jury on the theory of each litigant is so well established in this jurisdiction that citation of authority is unnecessary. The duty is not discharged by giving mere abstract statements of law. The court itself is required to apply the law to the particular facts and to direct the jury as to the legal effects of particular facts found by it. *Smith v. Cannaday*, 45 Utah 521, 529, 147 P. 210.

In the case at bar the trial court refused to discharge this duty. It is a fair statement that aside from the question of contributory negligence as a matter of law, defendant's main theory was that plaintiff was not a business invitee. The special duty to discover and disclose defects or dangerous conditions was, therefore, inapplicable. The Court could well have ruled

that there was no evidence from which the jury could have found that plaintiff was a business invitee. Certainly, there was evidence to support a finding that plaintiff was a mere licensee or even a trespasser. The importance of ample instructions with respect to liability in each instance is apparent.

There was ample evidence that plaintiff was not a business invitee, and that he was a bare licensee if not a trespasser with respect to the portion of the premises where the accident occurred. The giving of plaintiff's requested instruction No. 4, whereby the jury might consider the plaintiff a "business visitor" when there was no such evidence, invited a verdict against the defendant. The defendant's theory of the evidence was not presented, for the court refused to give defendant's requested instructions numbered 1 to 12; and the court even failed to define the terms such as "business visitor" and "licensee," so that the jury was left without any guide (R. 228-240). The jury was not instructed on defendant's theory at all, with respect to plaintiff being a trespasser or bare licensee.

As pointed out in *Webb v. Snow*, 102 Utah 435, 132 P. 2d 114, a party is entitled to have his theory submitted to the jury, when there is evidence to sustain it. In *Pratt v. Utah Light & Traction Co.*, 57 Utah 7, 169 P. 868, 869, this Honorable Court declared:

"Each party to a suit is entitled to have his theory, when there is evidence to sustain it, submitted to the jury and the judgment of the jury on the facts tending to support such theory assuming always that there is testimony offered to support the same, and this court has so held in *Hartley v. Salt Lake City*, 41 Utah 121, 124 P. 522, where, speaking through Straup, J., it is said:

“ ‘There are two parties to a lawsuit. Each on a submission of the case to the jury is entitled to a submission of it on his theory and the law in respect thereof. The defendant’s theory as to the cause of the accident is embodied in the proposed requests. There is some evidence, as we have shown, to render them applicable to the case. That is not disputed. We think the court’s refusal to charge substantially as requested was error. That the ruling was prejudicial and works a reversal of the judgment is self-evident. * * * ’ ” See also *Morgan v. Bingham Stage Lines Co.*, 75 Utah 87, 283 P. 160.”

If there had been any issue to submit to the jury, the defendant was entitled to have its theory presented in accordance with proposed instructions 1 to 12 inclusive, or the substance thereof.

It is respectfully submitted that a trial court’s error in giving and failing to give the instructions with respect to defendant’s theory of the case is reversible error and requires defendant’s theory of the case is reversible error and would require a new trial in the event the cause were not dismissed with prejudice.

POINT NO. 5

THE STATE INSURANCE FUND WAS A NECESSARY PARTY.

The defendant filed a motion to the complaint of the plaintiff, moving the court to dismiss the action on the grounds that the State Insurance Fund was a necessary party plaintiff.

This motion was argued and denied by the court. By answer the defendant set up the further defense that the cause of action, if any, was in the State of Utah, or the State Insurance Fund.

In support of these defenses the defendant offered to introduce in evidence in the case from plaintiff as witness, the fact that he had received compensation, the amounts of compensation he had received, and the doctor and hospital bills that had been paid by the insurance carrier. All of this evidence the court refused to admit. The defendant made a proffer of proof in this connection which the court denied (R. 205-206).

The date of the accident was January, 1952. The statute covering the wrongful act of third persons was 42-1-58 Utah Code Ann. (1943). This section was a re-enactment of Title 42-1-58, Chapter 65 of the Session Laws of 1945.

The 1945 enactment was a complete revision of the section covering the death or injury by wrongful act of third persons which was in effect at the time the Utah Supreme Court issued its decision in the *Johanson v. Cudahy Packing Co.* case, 107 Utah 114; 152 P. (2d) 98. This decision was issued October 5, 1944. The 1945 Session Laws re-enacted Sec. 42-1-58, Rev. Stat. of Utah 1943.

In the *Johanson* case the court held the cause of action of the third party was not assignable under the statutes then in effect. The court construed the word "subrogation" in this section as not creating any new cause of action. At page 104 of the Pac. Rep. the court states as follows:

"The insured who, because of non-payment of the loss in full retains a portion of the right of action, and such insurance companies, not only are proper parties plaintiff but must be joined as such."

Again, at page 105, the court states:

"The only concern of the defendant, third party, is that he not be sued twice for the same wrong; that is, that the suit be brought in the name of the real party in interest and that all persons interested in the litigation be bound by any judgment entered therein. The failure on the part of plaintiffs to make the insurance carrier a party plaintiff, or if it refused to join, make it a party defendant, is at the most a defect in parties plaintiff. Such a defect is waived unless raised."

The court goes on to point out that the special demurrer on the grounds that the plaintiff did not have the capacity to sue, did not raise the point of a defect of parties plaintiff.

The action of the Utah State Legislature in completely rewriting the section covering the wrongful act of third persons at the next session of the legislature following the decision in the *Johanson* case must be construed as having had for its purpose the enacting of a law which would protect the insurance carrier. There must have been some significance in changing the word "subrogation" and making the insurance carrier who had paid compensation the trustee of the cause of action and then providing that the recovery was to be distributed in accordance with the three items set forth in the statute. The first two of the schedules for reimbursement provide for the payment of all costs of action, including attorney's fees, which is to be charged proportionately against the

parties as their interests shall appear; secondly, that the compensation carrier shall be reimbursed in full for all payments made, and lastly is the provision that any amount over and above shall go to the employee or his heirs.

This statute in its wording provides that the insurance carrier is to bring the action though the action may be in the name of the employee or the insurance carrier. This act also provides that the insurance carrier can settle and release the cause of action but can do so only with the consent of the Commission. Clearly, the objection raised by the motion to require the Insurance Fund to be joined as a necessary party, and the defense that the cause of action was in the insurance carrier, are both valid defenses and should have been sustained by the court.

It is no answer that the 1945 amendment (41-1-58) provides that " * * * the employer or insurance carrier shall become trustee of the cause of action against the third party and may bring and maintain the action either in its own name or in the name of the injured employee * * * ." The action in the case at bar was not brought by the insurance carrier in the name of the injured employee. It was instead brought by the employee himself and in his own right.

The record in this case is clear that the complaint was filed on March 18, 1952 (R. 1-3). Plaintiff sued in his own right without reference to the right of the State Insurance Fund. On April 2nd (R. 7) defendant filed its motion to dismiss and to make more certain in which defendant specifically grounded its motion to dismiss on the fact that plaintiff's injury apparently occurred during the course of his employment;

that the plaintiff has received compensation" and the insurance carrier, be it the State of Utah or otherwise, is therefore a necessary party to this action, or the cause of action, if there is one, would appear to be in the compensation carrier" (R. 6).

After this motion was filed a letter was sent by the State Insurance Fund to Dennis McCarthy, in which Mr. McCarthy was authorized to represent the interest of the State of Utah "in attempting to procure reimbursement to the fund for the amounts which the State Insurance Fund has been required to pay in this case. * * *" (R. 9). The letter is dated April 8, 1952, and was filed on the same date. At no time after this letter was filed was any appearance entered for the State Insurance Fund. There was never any order of Court to the effect, by implication or otherwise, that plaintiff was suing in behalf of the Insurance Fund. Certainly the Insurance Fund was not maintaining this action and did not maintain the action "in the name of the injured employee." The action had been filed and defendant's motions served and filed before it appeared to counsel that the State Insurance Fund had an interest of any kind. The letter of April 8, 1952, was an afterthought, and certainly could not add any right to plaintiff which he did not have at the time he filed the action.

It is respectfully submitted that, particularly in view of the fact that the Court overruled defendant's motions, there is nothing in the record in this case to prevent the State Insurance Fund from now maintaining its own separate action under the statute, either in its own name or in the name of the injured employee.

CONCLUSION

Knox v. Snow, (1951), Utah, 229, P. 874, establishes the principles applicable in this case with respect both to negligence and contributory negligence. If anything, the sole negligence of plaintiff and lack of any negligence on the part of defendant are more apparent in the case at bar than in that case. The Court should reverse the judgment and dismiss plaintiff's claims with prejudice. There is no question that inasmuch as defendant's theory of the case was never presented to the jury by appropriate instructions, and because the instructions given were erroneous and inadequate, defendant would be entitled to a new trial. If a new trial is required the Court should order that the State Insurance Fund be required to enter an appearance or assign its interest to the plaintiff.

Respectfully submitted,

McKAY, BURTON, McMILLAN & RICHARDS, and
PAUL E. REIMANN

Attorneys for Defendant and Appellant

Received.....copies of the foregoing Brief of Appellant
this.....day of June, 1953.

Attorneys for Respondent