

1953

# Wilfred A. Rogalski v. Phillips Petroleum Company : Brief of Respondent

Utah Supreme Court

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Van Cott, Bagley, Cornwall & McCarthy; David E. Salisbury; Milton A. Oman; Attorneys for Plaintiff and Respondent;

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## Recommended Citation

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In the  
**Supreme Court of the State of Utah**

**FILED**

AUG 20 1953

Clerk, Supreme Court, Utah

**WILFRED A. ROGALSKI,**  
*Plaintiff and Respondent,*

VS.

**PHILLIPS PETROLEUM COMPANY,**  
*a corporation,*  
*Defendant and Appellant.*

Case No.  
7982

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**BRIEF OF RESPONDENT**

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In the  
Supreme Court of the State of Utah

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WILFRED A. ROGALSKI,  
*Plaintiff and Respondent,*

vs.

PHILLIPS PETROLEUM COMPANY,  
a corporation,  
*Defendant and Appellant.*

Case No.  
7982

---

BRIEF OF RESPONDENT

---

PRELIMINARY STATEMENT

This is an appeal from a judgment on a verdict recovered by plaintiff, Wilford A. Rogalski, for personal injuries sustained on January 18, 1952. Plaintiff was injured while working on and about property owned and maintained by defendant, Phillips Petroleum Company, at

Woods Cross, Utah. At the time he was injured, plaintiff was engaged in steam cleaning a truck owned and operated by his employer, Parley Droubay, a distributor of defendant's products. While so engaged, plaintiff stumbled into an open vat containing hot caustic soda, kept on its premises by the defendant.

The case was submitted to a jury with appropriate instructions as to the definition of a business visitor or invitee and the duty of care owed to such a person. The jury was specifically instructed that it could find for the plaintiff only if it first determined that he was a business visitor upon the defendant's property. The jury returned a verdict in plaintiff's favor.

This action was brought with specific authorization of the State Insurance Fund and upon the understanding that the State Insurance Fund would be reimbursed, in the event of recovery, for the compensation payments made by it to the plaintiff.

### STATEMENT OF FACTS

On January 18, 1952, plaintiff was an employee of one Parley Droubay (R. 55). His job was to drive the trucks in which defendant's products were distributed and to help repair and clean said trucks (R. 55, 56, 121). Prior to the acquisition of the Wasatch Oil Company facilities at Woods Cross, Utah, by defendant, Phillips Petroleum Company, Parley Droubay worked as a supervisory employee of Wasatch Oil Company, in charge of that company's trucks (R. 58). At that time, Droubay used the concrete washing



ramp, where the plaintiff was injured, to wash Wasatch Oil Company trucks (R. 59). In so doing he used the same steam cleaning equipment as was being used by the plaintiff at the time he was injured (R. 59). When defendant took over these facilities, Droubay purchased some of its trucks and since that time has acted as a consignee and distributor of defendant's products (R. 33).

Droubay has been referred to as a "distributing agent" (R. 90). There is and was, at the time of plaintiff's injury, a close business relationship between Droubay and defendant (R. 33). Products are consigned by defendant to Droubay who distributes and sells them under defendant's trade name.

Droubay leases from defendant an office and parking area which are located on the east side of the defendant's maintenance building (R. 84). The washing ramp in question is located on the south side of the same building (R. 37). The office and parking area leased by defendant to Droubay, the pumps and docks where Droubay's trucks are loaded with defendant's products, and the washing ramp in question are all located in the same enclosed yard (R. 36). He also had a right of way 50 feet wide leading in from the street (R. 89). Droubay had never felt that he was confined in his operations to any particular area of defendant's yard (R. 112-113).

Droubay, as noted above, used the washing ramp for cleaning trucks while an employee of Wasatch Oil Company and continued to so use the ramp and cleaning equipment after the defendant took over the property (R. 58,

59). Defendant acquiesced in and permitted the use of this ramp by Droubay for a period of almost three years prior to the time plaintiff was injured (R. 60). Defendant had at no time excluded Droubay from the use of this ramp or objected to his use of the same, although it was practically the only place used by him for washing his trucks (R. 60, 91). While on one occasion, Droubay was said to have been refused a specific permit or agreement by one of defendant's employees to use this ramp, he was not told that he could not use it and in fact continued to so use it with the acquiescence and knowledge of the defendant until the date plaintiff was injured (R. 201). Droubay did not even recall whether the request for permission included the washing ramp (R. 116).

Droubay's trucks are painted with defendant's black and orange colors. The trade name of defendant, "Phillips 66," appears on the sides of said trucks (R. 60, 117). This provides a source of advertising for defendant's products and the appearance of these trucks is naturally important to the defendant. Defendant's Sales Department had told Droubay that he should keep these trucks clean (R. 117). It was while cleaning one of these trucks that plaintiff sustained the injuries complained of in this case.

On the day of the injury, plaintiff was requested by Droubay to drive one of his trucks onto the washing ramp or platform so that it could be cleaned (R. 124). Prior to that day plaintiff had never been on the washing platform or in its vicinity (R. 127). This washing ramp is bordered on the left side by defendant's maintenance shop and to the front by a sliding door leading into defendant's

maintenance warehouse (R. 37, 68, Def's. Ex. 1). The steam cleaning equipment was on the left side of the ramp and the vat containing the caustic soda solution was on the right side of the ramp near the front (R. 38). Pumps and other objects cluttered the rest of the area to the right of the ramp (R. 126, 127, 142). Plaintiff was told by his employer that in driving onto the ramp, he should watch carefully to the left in order to avoid splashing on the windows of defendant's building (R. 124). After parking the truck on the ramp, he got out of the left-hand side and departed from the area to do some other work elsewhere (R. 125). He did not see the caustic soda vat at that time (R. 127).

The concrete slab or washing ramp on which the truck was parked is 13 feet 11 inches in width and 61 feet 4 inches in length (R. 101). The truck is 7 feet 1 inch in width from the outside fenders and 38 feet 11 inches in length (R. 101). While the exact location of the truck was not definitely established, there was approximately 3 to 6 feet in front of the truck and from 1 foot to 18 inches on the right side between the truck and the edge of the cement (R. 125, 102, 155). The vat was located just 2 inches from the right-hand edge of the ramp and near the front (R. 139), and it would therefore have been no more than 20 inches, at the most, from the right-hand side of the truck. It stood from 13 to 14 inches in height above the level of the ramp or about the same height as a man's shins (R. 38, 143). The vat was never used by Droubay or his employees in the cleaning of the trucks or otherwise (R. 61). It was customary for Droubay to ask permission of

some of defendant's employees to use the washing ramp, but he did not recall for certain whether this customary practice had been followed on the day in question (R. 86).

After lunch, plaintiff and Droubay returned to the washing ramp and Droubay started the steam cleaning equipment and showed the plaintiff how to operate the same (R. 69, 70). Plaintiff had never operated this type of equipment prior to this date (R. 127). It was a fairly cool day in January and the steam cleaning equipment produced a great deal of steam and vapor, obscuring one's vision for some distance (R. 131). Steam also continued to rise from parts of the truck previously cleaned, due to the heat having been applied to the cold metal (R. 165).

Plaintiff had cleaned the undercarriage on the front end of the truck and was proceeding around the front right-hand fender to clean the right side of the truck. His right hip was touching the side of the truck (R. 132). His vision was impaired by the steam from the cleaning apparatus (R. 132, 169). In walking around the fender, plaintiff's foot came in contact with the side of the vat causing him to lose his balance and stumble forward, and in regaining his balance he put his left foot into the caustic soda solution (R. 132, 133). Plaintiff, at that time, was not aware of the existence of this vat or of its contents (R. 133). There was no cover on the vat at the time and it contained no barricade, warning or markings which would indicate to one using the premises the presence of this condition (R. 75). Plaintiff was not warned by any of defendant's agents or employees of this hazard (R. 128). Even had he noticed the vat when he parked the truck on

the ramp, there was nothing to have warned him of its dangerous propensities or that it was different from the other empty tanks or objects placed in that area (R. 127).

This suit was instituted with the oral consent and authorization of the State Insurance Fund. Prior to the filing of an answer in this action, a formal letter from David C. Thomas, Manager of the State Insurance Fund, was filed (R. 9). This letter stated in part:

“You are authorized to represent the interest of the State Insurance Fund in attempting to procure the reimbursement to the Fund for the amounts which the State Insurance Fund has been required to pay in this case, it being our understanding that Mr. Rogalski’s accident was caused by the fault of a third party.”

## SUMMARY OF ARGUMENT

### POINT I.

THIS CASE WAS PROPERLY SUBMITTED TO THE JURY — THE EVIDENCE CLEARLY ESTABLISHED THAT PLAINTIFF WAS A BUSINESS VISITOR AND THAT DEFENDANT HAD VIOLATED THE DUTY OF CARE OWED TO SUCH A PERSON.

### POINT II.

PLAINTIFF WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW.

## POINT III.

THE TRIAL COURT DID NOT ERR IN THE EXCLUSION OF EVIDENCE.

## POINT IV.

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY OR IN REFUSING TO SUBMIT DEFENDANT'S REQUESTED INSTRUCTIONS.

## POINT V.

THERE WAS NO DEFECT IN PARTIES — THIS ACTION WAS AUTHORIZED BY AND BROUGHT IN BEHALF OF THE PLAINTIFF AND THE STATE INSURANCE FUND.

## ARGUMENT

## POINT I.

THIS CASE WAS PROPERLY SUBMITTED TO THE JURY — THE EVIDENCE CLEARLY ESTABLISHED THAT PLAINTIFF WAS A BUSINESS VISITOR AND THAT DEFENDANT HAD VIOLATED THE DUTY OF CARE OWED TO SUCH A PERSON.

It is difficult to differentiate in appellant's argument (Point I) as to whether it is concerning itself with the ques-

tion of whether the case was properly submitted to the jury as to defendant's negligence, in violating the duty of care owed plaintiff, or to the question of whether the plaintiff was himself negligent. As the latter question is discussed subsequently, we will concern ourselves first with the issue of defendant's negligence.

The question before this Court, of course, is not whether the facts disclose negligent conduct on the part of the defendant, but only whether there was sufficient evidence from which the jury could make such a finding. If there was any evidence from which a jury could reasonably find that plaintiff was a business visitor and that defendant had violated the duty of care owed to such a person, then the judgment of the trial court must be affirmed. *Stickle v. Union Pacific Railroad Co.*, ... Utah ..., 251 P. 2d 867, 870 (1952).

The questions to be determined are, first, whether or not there was any evidence from which a jury could infer that plaintiff was a business visitor upon defendant's premises at the time he was injured and second, if he was a business visitor, whether or not defendant violated the duty of care owed to such a person.

- (a) *Plaintiff was a business visitor on defendant's premises at the time and place he was injured.*

Various terms are used in classifying those who are injured while upon the property of another. The terms "invitee," "business invitee" and "business visitor," as used by the plaintiff in the record all refer to the same

classification. Since this Court has adopted the classification used in the *Restatement of the Law of Torts*—trespasser, licensee and business visitor—these terms will be employed in this brief. *In re Wimmer's Estate*, 111 Utah 444, 449, 182 P. 2d 119, 121 (1947).

Plaintiff alleged, in his complaint, that he was a business visitor. This was specifically denied in defendant's answer (R. 1, 16). There was no other issue raised by the pleadings as to plaintiff's status. Based upon the evidence submitted at the trial, the Court instructed the jury on this theory. The jury was specifically instructed that in order for plaintiff to recover, it must first be determined that he was a business visitor (R. 247). This instruction was very favorable to the defendant since, under the evidence disclosed at the trial and in light of the recent pronouncements of this Court, the plaintiff probably was entitled to recover even though he was not a business visitor. See *Martin v. Jones*, ... Utah ..., 253 P. 2d 359 (1953) in which a judgment denying recovery to a trespasser was reversed by this Court where defendant's employees knew of his presence and failed to warn him of a known dangerous condition. Under the Court's instructions in the present case, the definition of and duty of care owed to a licensee or trespasser was immaterial since the plaintiff's case depended upon a finding that he was a business visitor.

The defendant urges upon this Court a very artificial and untenable conception of what constitutes a business visitor. It is defendant's contention that the plaintiff's status must be determined with a tape measure, based upon the number of feet the place he was injured was from the



point at which business was actually transacted, or whether or not money was actually paid by the plaintiff (or his employer) to be where he was, or whether or not he had been expressly invited to enter the particular area in question. Not a single legal authority is cited for the proposition that the above factors are determinative. The very enlightening pronouncements of this Court on the subject are astutely ignored in appellant's brief.

*The Restatement of the Law of Torts* defines a business visitor as follows:

"A business visitor is a person who is invited or permitted to enter or remain on land in the possession of another for a purpose directly or indirectly connected with business dealings between them." *Restatement, Torts*, § 332 (1934).

The following comments accompany this definition:

"Business visitors fall into two classes. The first class includes persons who are invited or permitted to come upon the land for a purpose directly or indirectly connected with the business which the possessor conducts thereon \* \* \* the second class includes those who come upon the land for a purpose which is connected with their own business which itself is directly or indirectly connected with any purpose, business or otherwise, for which the possessor uses the land. *Restatement, Torts*, Vol. 2, p. 897.

"It is immaterial that the person is one whom the possessor is not willing to receive as a business visitor if the possessor's words or other conduct are understood, and would be understood by a reasonable man, as indicating the possessor's willingness. The nature of the use to which the possessor puts his

land is often sufficient to express to the reasonable understanding of the public or classes or members thereof a willingness or unwillingness to receive them. *Restatement, Torts*, Vol. 2, p. 898.

“It is not necessary that the visitor’s purpose be to enter into immediate business dealings with the possessor. The benefit to the possessor may be indirect and in the future.” *Restatement, Torts*, Vol. 2, p. 899.

The Restatement definition has been adopted and approved by this Court. *In re Wimmer’s Estate*, 111 Utah 444, 449, 182 P. 2d 119, 121 (1947) ; for a similar definition see *Prosser on Torts*, Section 79.

Under the above definition, two elements are necessary for one to obtain the status of a business visitor. First, he must be invited or permitted to enter or remain upon the premises of another and secondly, he must be there for a purpose directly or indirectly connected with the business dealings between them. The two elements are necessarily related and the greater the mutual benefit, the easier it is to infer the invitation or permission. *Nevada Transfer & Warehouse Co. v. Peterson*, 60 Nev. 87, 99 P. 2d 633, 636 (1940).

It is clear from this definition and the decisions of this Court that the invitation to enter upon the premises may be implied as well as express. See *Hayward v. Downing*, 112 Utah 508, 513, 189 P. 2d 442, 444 (1948) in which this Court in referring to a business visitor or invitee stated “he may be expressly invited to come upon the premises, but more commonly his invitation is implied.” It is also

sufficient if the person is only *permitted*, as contrasted with invited, to be upon the property. The California Supreme Court in *Oettinger v. Stewart*, 24 Cal. 2d 122, 148 P.2d 19, 21 (1944) has said:

“An invitation or permission to enter upon land need not be express but may be implied from such circumstances as the conduct of the possessor, the arrangement of the premises, or local custom.”

Turning then to the facts of this case, there was abundant evidence to support a finding of such an invitation. There is no question but that the status of plaintiff and Droubay, his employer, were the same, since at the time of his injury, plaintiff was acting under the direction of and in behalf of Droubay. See *Perl v. Cohodas, Peterson, Paoli, Nast Co.*, 295 Mich. 325, 294 N. W. 697, 700 (1940). As to the area where Droubay, plaintiff's employer, parked and loaded his trucks with defendant's products and other places on defendant's premises where business was actually transacted, there is no question but that plaintiff was a business visitor. As to those areas, the invitation was express and the mutual benefit obvious beyond doubt. Does this status change when the plaintiff, or his employer, is using the washing ramp or platform which is located in the same enclosed yard although admittedly some 100 to 150 feet from the pumps and loading docks? This Court has, on several occasions, indicated that where there is an invitation to enter part of one's premises or to enter one's premises generally, the question as to the extent or scope of this invitation and as to what portions of the property the in-

visitation affects is one of foreseeability as to where the business visitor might reasonably be expected to go.

*Hayward v. Downing, supra*, at page 445;

*Skerl v. Willow Creek Coal Company*, 92 Utah 474, 483, 69 P. 2d 502 (1937).

And in *In re Wimmer's Estate, supra*, at page 451, it is stated:

"A business visitor does not become a trespasser merely because his injury occurs while he is not at the very place he is working. He is entitled to use such other parts of the premises as necessary or reasonably incidental to the work he is required to perform. The deceased was not only entitled to use the area where he was actually carrying on his work, he was also entitled, without losing his status as a business visitor, to use such other places on the premises as would have some reasonable connection with his work \* \* \*."

In the comment to *Restatement of the Law of Torts*, Sec. 343 dealing with the liability owed to a business visitor it is provided:

"Where it is customary that customers or patrons shall be free to go to certain parts of the premises, the customer or patron is a business visitor thereon unless the possessor exercises reasonable care to apprise the customer or patron that the area of invitation is more narrowly restricted." Comment (b).

Whether or not plaintiff was invited or permitted to use the area where he was injured was a question of fact, properly submitted to the jury.

*Skerl v. Willow Creek Coal Co., supra*, at pages 482, 483.

The following facts in this case conclusively support the finding of the jury of an invitation or implied permission on the part of the defendant to let Droubay and his employees use this washing ramp and equipment:

1. The customary practice of obtaining permission. Droubay, a witness, obviously friendly to defendant (R. 111) testified that it was his customary practice to ask and receive permission from some of defendant's employees in the building adjacent to the ramp, to use the same (R. 86). Droubay could not recall whether or not on this particular date such permission had been obtained (R. 86). Defendant offered no evidence to the effect that such permission had not been requested and granted on the day plaintiff was injured. The jury could reasonably have inferred from this "customary practice" that this same practice was followed on the day in question and that permission was expressly obtained. Where express permission is given, the question of benefit to the owner, discussed subsequently, becomes less important.

2. The continued use by Droubay and his employees of this ramp for washing their trucks. As indicated in the comment to *Restatement, Torts, Sec. 332*, an invitation may be implied from "local custom or persistent course of conduct." See also comment to *Restatement, Torts, Sec. 343*, quoted *supra*. No evidence was introduced at the trial to show lack of knowledge, on the part of defendant, of Droubay's continued use of this ramp after defendant took over the Woods Cross facility. On the contrary, one of defendant's officials admitted to have had knowledge of such use (R. 201). Droubay used the ramp on an average of

every six weeks for each of its five trucks or a total use of approximately three times per month. Never during this entire time had defendant objected to this use (R. 60). What clearer evidence could be produced to show that defendant permitted and acquiesced in the use of this area by Droubay? At any time had it so desired, defendant could have prohibited this conduct. Defendant attempted to rebutt this argument by showing that Droubay had paid to have his trucks cleaned elsewhere, but the only instance testified to occurred subsequent to the commencement of this action (R. 91). That an invitation may be implied from continued use and failure of the defendant to post signs or otherwise prohibit said use, see *Eklund v. Kapitos*, 216 Minn. 79, 11 N. W. 2d 805 (1943).

3. The location of the ramp and its prior use. The jury could reasonably have inferred from the location of this ramp that Droubay was impliedly invited to use it. It was located in the same enclosed yard as Droubay used to load his trucks and it was in the same area as the office building and parking area, leased by defendant to Droubay (R. 36). The exact location of the parking area was not fixed by the lease or established at trial, although its dimensions were given. Droubay had never been lead to believe that he was confined in his operations to any particular area of defendant's premises (R. 112-113). Its convenient location, coupled with the fact that Droubay had used the ramp while an employee of Wasatch Oil Company prior to defendant's purchase of the property, could reasonably have lead him to believe that he was permitted and invited to continue using the same. At the time de-

defendant purchased this property and sold its trucks to Droubay, it could easily have given notice that he should henceforth cease using it. So far as this record is concerned, defendant did not do so. This implied invitation is further strengthened by the close business relationship existing between Droubay and defendant together with the mutual benefit derived from Droubay's continued use of the ramp.

Some authorities have taken the view that if the defendant benefits from the plaintiff's presence upon its property, this is alone sufficient to support a finding of an implied invitation. 65 C. J. S., *Negligence*, Sec. 43 (3)b. See *Hayward v. Downing, Supra*, at page 445, in which benefit to the defendant was used to support the contention that there was an invitation to the particular area where the plaintiff was injured. See also, *Nevada Transfer & Warehouse Co. v. Peterson, Supra*.

As to the question of mutual benefit, it is clear under the above definition that in order for a person to be classified as a business visitor, his presence upon the property need only indirectly benefit the owner. See *In re Wimmer's Estate, Supra*, in which a workman was held to be a business visitor even though at the time of his injury he was engaged in retrieving his hat from an area outside of the place he had been working. The court in that case found sufficient benefit to the property owner. In the present case, there were many facts from which a jury could have found that defendant benefited from Droubay and his em-

ployees using the washing facilities. Among those facts are the following:

1. Droubay's trucks were painted with defendant's colors and trade name and he had been specifically instructed by defendant's sales department that these trucks should be kept clean (R. 117). The use of Droubay's trucks on the highways undoubtedly provided defendant with a source of advertising. To the uninformed, these trucks, for all purposes, appear to be those of the defendant. If they were maintained in a dirty and unkempt condition, it would reflect upon defendant's reputation. Defendant was thus clearly benefited by Droubay's having a convenient place to wash and care for his trucks. Having facilities in defendant's yard made it possible for Droubay to clean his trucks in the same area as he maintained his office and where the trucks were parked and loaded.

2. Droubay was a consignee and distributor of defendant's products (R. 90). There was a close business relationship between them (R. 33). He was defendant's distributing agent, and the maintenance of a friendly and amicable relation between them was important to both. Defendant was able to favor Droubay by making this area available for his use. Had it not felt that some benefit would be derived by allowing this use by him, it had ample opportunity to object to its being so used. The use of the wash ramp admittedly saved Droubay money, and the efficiency of his operations were no doubt improved since he would otherwise have had to pay to have his trucks cleaned some distance away. A manufacturer is obviously benefited by the continued successful operation of its distribu-



tor's business since the marketing of its products are dependent upon such distributors.

3. Droubay was a lessee of the defendant's property (R. 84). Rent was paid directly, or as a credit against the purchase of the building Droubay rented, to defendant. A lessor is naturally benefited by the satisfied use of his property by its lessee. The providing of this ramp made the leased premises that much more attractive and useful to Droubay.

All of the above factors lead to only one conclusion—defendant was clearly and unmistakably benefited by the use of the washing ramp or platform by Droubay or his employees. This, coupled with the implied invitation, tacit permission and long acquiescence, furnishes abundant evidence to support a finding that plaintiff was a business visitor upon defendant's property at the time he was injured. The jury in this case so found upon instructions clearly and correctly stating the law of this State. The evidence not only sufficiently, but conclusively, supported this finding.

(b) *Defendant violated the duty of care owed to one in plaintiff's status.*

The duty of care owed to a business visitor or invitee is the highest standard of care imposed upon a land owner. Not only has an owner the duty to warn the business visitor of known hazards or to avoid from actively harming him, but he is required by law to inspect and maintain his premises in a reasonably safe condition or to warn the visitor of any dangerous conditions so that he might conduct himself safely thereon.

The *Restatement of the Law of Torts*, after setting forth the general liability of the land possessor to all licensees whether business visitors or gratuitous licensees, states in Section 343 the special liability to a business visitor:

“A possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereon, if but only if, he

“(a) knows, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them, and

“(b) has no reason to believe that they will discover the condition or realize the risk involved therein, and

“(c) invites or permits them to enter or remain upon the land without exercising reasonable care

“(i) to make the condition reasonably safe, or

“(ii) to give a warning adequate to enable them to avoid the harm without relinquishing any of the services which they are entitled to receive, if the possessor is a public utility.”

In discussing what a business visitor is entitled to expect, Comment (d) to the above section provides at page 942:

“A business visitor is entitled to expect that the possessor will take reasonable care to ascertain the actual condition of the premises and, having discovered it, either to make it reasonably safe by repair or to give warning of the actual condition and the risk involved therein.”

As noted *supra*, the provisions of the *Restatement* on this subject have been adopted by this Court. See *In re Wimmer's Estate, Supra*, at page 452 in which the above section is quoted and approved.

The defendant, Phillips Petroleum Company, maintained on its property, next to the ramp used for washing trucks, a vat containing a hot caustic soda solution (R. 60). This ramp is barely wide enough for a truck of the type involved to be parked thereon and still leave room for a man using the steam cleaning equipment to walk around it (R. 102, 125, 155). The caustic soda vat is located just 2 inches from the edge of this ramp and stood from 13 to 14 inches above the surface of the ramp (R. 139). There would be less than 2 feet between a truck parked on the ramp, in the usual position, and the edge of this vat. There were other tanks and objects usually littering this area (R. 127). Defendant knew, when it purchased these premises, that this ramp was used for steam cleaning trucks and continued to so use it for the same purpose (R. 58, 59). Despite this knowledge, after acquiring this property, defendant constructed or placed this vat in this hazardous location (R. 60). One operating the steam cleaning equipment, which is located on the opposite side of the ramp than the vat, would normally be unable, from that location, to see the vat because of the truck. Droubay himself did not see the vat on the day in question (R. 74). The steam cleaning equipment, when in operation, greatly affected the vision of one using it (R. 131). The defendant was required by law to make its premises safe for those making a customary and reasonable use of such equipment.

The vat did have a cover attached to it when visited several months after the accident. No one testified that this cover was attached to the vat at the time plaintiff was injured (R. 74). Even if the cover was attached, someone had left it open on the day in question. Plaintiff or his employer never used or had occasion to use this vat (R. 61). It was used exclusively by defendant's employees in cleaning pump parts. If the cover was attached, the jury clearly was warranted in finding that one of defendant's employees had carelessly left it open on the morning of January 18, 1952, or prior thereto.

The argument that this vat was plainly visible to one using the area ignores the use to which this concrete ramp or platform was put and the nature of the vat and its contents. The ramp, as previously noted, was used for steam cleaning trucks and the vision of those so using it was normally impaired to some extent by the steam. Secondly, even had one observed the vat, he would not have been aware of its highly dangerous contents. Defendant's conduct must be considered in the light of its knowledge as to the use made of the ramp.

The question of whether or not defendant violated the above described duty of care was clearly one for the jury. The jury, in finding for the plaintiff, necessarily concluded that defendant had failed to live up to this standard in maintaining an open vat of caustic soda in an area where men were known to be working with steam cleaning equipment. The basic factor in determining whether or not a given act or course of conduct constitutes negligence is whether the risk of harm outweighs the utility of such

conduct. *Prosser on Torts*, Sec. 35. The alternatives available to the defendant are important in this respect. Here the defendant's conduct created a very great risk of the most serious and painful type of harm to those working in the area. While this vat was no doubt useful and possibly necessary to the conduct of defendant's business, its utility would not have been materially affected by altering its location so as to place it outside of the area where persons using the wash ramp would be likely to step or stumble into it. Even assuming there was no other convenient place to locate such a vat, there was nothing to prevent the defendant from erecting some type of barrier or fence around the vat or at least posting conspicuous signs or warnings so those using the area would be appraised of the vat's presence and its contents. The defendant's position that to post signs or to erect a barrier would have been a useless act is completely untenable. Had there been a conspicuous sign posted, the plaintiff could easily have been warned of this hazard when he drove onto the ramp. The argument that plaintiff would have been more seriously injured had he stumbled into a barrier ignores the fact that plaintiff's injuries were not caused by a fall or stumble, but by the acid in the vat. Defendant had never given Droubay or his employees any instructions or warnings regarding the vat, or when it might be in use and the lid open (R. 75-76).

The case was submitted to the jury on the theory that if and only if plaintiff was a business visitor could recovery be allowed. This was the issue framed by the pleadings and the issue on which the trial proceeded. The appellant lays great stress on the contention that if plaintiff were a li-

censee, the defendant would have violated no duty of care. The tenor of this argument seems to concede that if plaintiff were a business visitor, defendant did violate the standard of care owed to him. One pages 20 and 21 of appellant's brief reference is made to the *Restatement of the Law of Torts*' provisions as to the duty owed to the licensee. The portion cited, however, is not the section of the *Restatement*, but only two paragraphs from the comment thereunder. So that this Court might be fully advised on the subject, Section 342 of the *Restatement of the Law of Torts* reads as follows:

"A possessor of land is subject to liability for bodily harm caused to gratuitous licensees by a natural or artificial condition thereon if, but only if, he

"(a) knows of the condition and realizes that it involves an unreasonable risk to them and has reason to believe that they will not discover the condition or realize the risk, and

"(b) invites or permits them to enter or remain upon the land, without exercising reasonable care

"“(i) to make the condition reasonably safe, or

"“(ii) to warn them of the condition and the risk involved therein’.”

There was no doubt under the evidence in this case that defendant knew of the caustic soda vat and of its location next to the washing ramp. The jury might reasonably have inferred that defendant also knew that it created an unreasonable risk to one using the steam cleaning equip-

ment on said ramp and that such a person might not discover the condition or realize the risk involved. It is also clear that defendant did nothing to either make this condition reasonably safe (on the contrary the lid was left open) or to warn the plaintiff of the condition and the risk involved therein. While the land owner owes the licensee no duty to inspect the premises to discover defects, there is a duty to protect or warn against known dangerous conditions. The comment to the above section in the *Restatement* contains many similar illustrations of conditions under which the land owner may be liable to a licensee. Thus, had plaintiff been deemed a licensee, recovery might still have been justified. Even if plaintiff had been deemed a trespasser, which no construction of the facts in this case would justify, liability might still have been predicated on the rationale of this Court in *Martin v. Jones*, ... Utah ..., 253 P. 2d 359 (1953). The fact remains however, that the only issue raised by the pleadings and at the trial was whether the plaintiff was a business visitor.

The question raised by appellant in Point I of its brief is whether or not this case was properly submitted to the jury. If under any fair construction of the evidence in the record, the jury was warranted in finding that defendant was a business visitor and that defendant had violated the standard of care owed to such a person, then the judgment of the trial court must stand. In determining a question of this kind, the Supreme Court must view the evidence in the light most favorable to the plaintiff. In *Els-*

*wood v. Oregon Short Line Railroad Company*, 82 Utah 235, 23 P. 2d 925, 927 (1933), this Court stated:

“In deciding the questions of whether or not a nonsuit should have been granted or a verdict directed for the defendant we must view the evidence in the light most favorable to the plaintiff. In testing the sufficiency of the evidence with respect to those questions the defendant stands in the position of admitting the truth of the plaintiff's evidence, and all reasonable inferences which the jury might fairly draw therefrom favorable to the plaintiff.”

## POINT II.

### PLAINTIFF WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW.

Before the issue of contributory negligence may be taken from the jury and the plaintiff be deemed guilty of contributory negligence as a matter of law, the defendant's burden of proving both that plaintiff was negligent and that such negligence proximately contributed to cause his injury must be met and established with such certainty that reasonable minds could not find to the contrary. If there is any reasonable basis, either because of lack of evidence, or from the evidence and the fair inferences arising therefrom, taken in the light most favorable to plaintiff, upon which reasonable minds may conclude that they are not convinced by a preponderance of the evidence either that plaintiff was guilty of contributory negligence or that such negligence was a proximate cause of the injury, the question must be submitted to the jury. *Martin v. Stevens*, . . . Utah . . . , 243 P. 2d 747, 749 (1952). Under the evidence presented in this case, it would clearly have been



error for the trial court to have concluded that plaintiff was guilty of contributory negligence as a matter of law.

It is academic that in determining whether or not plaintiff was negligent at the time he was injured the standard used is that of a reasonable man under *all* of the circumstances. *Prosser on Torts*, Section 36. It isn't a question of how a reasonable man would have conducted himself on this washing ramp on an average day with no obstruction to his vision. The question is rather what a reasonable man steam cleaning his employer's truck on a January day, with clouds of white steam being emitted from the nozzle in his hands, would have done. His experience in using the equipment and his knowledge of the area must also be considered.

The plaintiff testified that he did not observe the vat when he drove the truck onto the washing ramp (R. 127). For that matter, neither did Droubay observe the vat on that particular day (R. 74). There was evidence as to why plaintiff did not see it. It was the first time he had been in the vicinity of the ramp (R. 127). He was required by his employer to watch closely to his left to protect defendant's property; there were objects and trash in the area that tended to obstruct his view (R. 126, 127, 142). Even had he seen it, which he did not, he would not have known the hazardous nature of its contents (R. 127). After returning from lunch and beginning to work on the truck, his employer started the equipment and cleaned part of the truck (R. 69, 70). Plaintiff had never used this type of equipment before (R. 127). The nozzle sent forth a large spray and cloud of steam (R. 131). Indeed, that was the

purpose of the equipment, the reason it was there and the use normally made of the ramp. As the plaintiff cleaned around the truck and while the steam from the equipment and from the vat obscured his vision, but while he could still feel the side of the truck against his right hip, he struck his left leg against the side of the vat, causing him to fall forward, and in order to regain his balance, lifted his left leg over the edge and stepped into the vat.

Defendant lays great stress on the fact that had plaintiff turned the nozzle into the air and to one side and waited for the steam to clear, he could have observed the tank. The fact that there was an alternative available does not answer the question. The jury in this case found, and justly so, that it was not unreasonable for the defendant to have proceeded around the truck as he did, operating the equipment and keeping his hip against the fender of the truck. The fact that he could have moved the nozzle does not mean that it was unreasonable for him not to have done so. This was a question for the jury. The jury could have well concluded that plaintiff was entitled to assume that the ramp and the area immediately surrounding it was reasonably suited and maintained for doing the work the defendant knew was performed thereon. In this respect, Comment (d) to Section 343 of the *Restatement of Torts* is enlightening:

“A business visitor is entitled to expect that the possessor will take reasonable care to ascertain the actual condition of the premises and, having discovered it, either to make it reasonably safe by repair or to give warning of the actual condition and the risk involved therein. Therefore, a business

visitor is not required to be on the alert to discover defects which, if he were a bare licensee, entitled to expect nothing but notice of known defects, he might be negligent in not discovering. This is of importance in determining whether the visitor is or is not guilty of contributory negligence in failing to discover a defect, as well as in determining whether the defect is one of which the possessor should believe that his visitor would not discover and as to which, therefore, he must use reasonable care to warn the visitor."

If it is found, as the jury did in this case, that plaintiff was a business visitor upon the defendant's premises, then plaintiff is entitled to assume that the defendant has made the premises safe for the purpose for which the plaintiff is to use them. 38 Am. Jur., *Negligence*, § 199, p. 879, See *Larkin v. Saltair Beach Co.*, 30 Utah 86, 101, 83 Pac. 686 (1905).

Defendant relies upon the decision of this Court in *Knox v. Snow*, ... Utah ..., 229 P. 2d 874 (1951), which is clearly distinguishable from the case at hand. Plaintiff in the *Knox* case fell into the grease pit at a service station. In that case while the area was somewhat shaded — and this was doubted — the plaintiff's vision was not impaired as a result of his reasonably using the premises for the very purpose for which he was invited upon the property and for the purpose for which the area was designed and used, as in the present case. Further, in the *Knox* case, the plaintiff was clearly aware of obstructions in the area and had in fact stepped over some. The plaintiff in that case was observing other objects in the room rather than watching where he was proceeding; he was

familiar with the type of premises across which he was walking and knew that such pits were commonly located in such places. None of those factors were present in this case. The plaintiff in the present case was not familiar with the area where he was injured and his vision was impaired by the steam cleaning equipment he was using. See *Martin v. Jones, Supra*, at page 361 in which the *Knox* case is distinguished on the same grounds set forth above.

The pronouncement of this Court in *Baker v. Decker*, ... Utah ..., 212 P. 2d 679 (1949), answers defendant's argument on this point. The plaintiff in that case was a woman who resided in an apartment house. While leaving her apartment one morning, she noticed that a painter and house cleaner was working in the hall and that certain equipment and a ruffled, uneven canvas, was on the floor. She saw the canvas and yet as she stepped onto it caught her right heel in a fold or wrinkle and tripped and fell. The jury returned a verdict for plaintiff and defendant appealed contending that plaintiff was guilty of contributory negligence as a matter of law, since she was aware of the danger and could have taken an alternate route. In rejecting this contention, this Court quoted *Tillotson v. City of Davenport*, 232 Iowa, 44, 4 N. W. 2d 365, 366:

"It is well settled that mere knowledge that a walk is dangerous, unsafe for travel, is not sufficient to establish contributory negligence though there is another way that is safe and convenient, and to defeat recovery it must appear that the traveler knew or as an ordinarily cautious person should have known that it was imprudent to use the walk."

Justice Latimer, speaking for the Court, further stated:

"The last contention to be disposed of deals with the claim that plaintiff was guilty of contributory negligence in stepping onto the canvas and catching her heel. We must keep in mind that the burden is upon the defendant to establish this claim and that unless all reasonable minds must conclude that Mrs. Baker was negligent in the manner in which she attempted to get over the canvas the question of her due care must be submitted to the jury for determination. We must also keep in mind that this case falls within the category of cases dealing with pedestrians who are subjected to unnecessary hazards by the thoughtless conduct of others. Ordinary reasonable persons will trip over objects, stumble over obstructions, slip on slick surfaces and fall into holes or excavations. Even though they may see the object they sometimes fail to comprehend and anticipate the incident which precipitates the injury. Usually whether a reasonable person would have properly appraised the situation and escaped injury is for a jury to determine. \* \* \*

"The many variable factors to be considered in this type of case are such that standard of due care should be determined by the triers of the facts and not by the court. The jury having found the issues of negligence and contributory negligence in favor of plaintiff and against defendant, the verdict and judgment are affirmed."

It should be noted that the above decision requires that plaintiff comprehend and anticipate the incident which precipitates the injury. It isn't enough that he sees and recognizes some danger in the situation. Clearly the plaintiff in this case did not comprehend and anticipate a hazard such as caused his injury.

In a recent decision of the United States Court of Appeals, Tenth Circuit, in a case arising in Utah, the question of contributory negligence was considered in the business visitor situation. *Swift and Company v. Schuster*, 192 F. 2d 615 (10th Cir. 1951). A government meat inspector at appellant's plant was injured when he stepped down from a platform 22 inches high on which he was standing and slipped and fell on the wet, greasy floor. Defendant appealed from a judgment for plaintiff contending that plaintiff was guilty of contributory negligence and had assumed the risk. There were alternative means the plaintiff could have used to accomplish his purpose. In affirming the trial court and after distinguishing the case of *Knox v. Snow*, *Supra*, the Court stated at page 618:

"We think the test to be applied in this case is laid down by the Supreme Court in *Moshevel v. District of Columbia*, 191 U. S. 247, 24 S. Ct. 57, 63, 48 L. Ed. 170. In that case the plaintiff, in descending to the street, attempted to step over an uncovered water-box in the sidewalk and was injured. There were ways available for her to walk around the water-box on either side. She was fully cognizant of the situation and had used the sidewalk on many occasions, sometimes walking around the box and sometimes stepping over it. In reversing the lower court barring recovery, on the ground that she had knowingly and wilfully assumed the risk, the Supreme Court said: 'Coming to apply such principle, the question is this, was the situation of the water-box and the hazard to result from an attempt to step over it so great that the plaintiff, with the knowledge of the situation, could not, as a reasonably prudent person, have elected to step across the box, instead of stepping to the sidewalk

from either side of the tread of the last step? And this, we think, was, under the undisputed proof, a question for the jury, and not for the court.' See also *McCready v. Southern Pac. Co.*, 9 Cir. 26 F. 2d 569 and 9 Cir., 47 F. 2d 673.

"Applying these principles to the case in hand, we conclude that the question of plaintiff's contributory negligence was properly submitted to the jury and that its verdict and the judgment entered thereon must be affirmed."

The facts in the above case were much more favorable to the defendant than in the present case since the plaintiff there had used the area many times previously and was familiar with the condition causing his injury and had knowledge of its presence. In this case there was uncontradicted evidence to the effect that plaintiff did not see the caustic soda vat and that his failure to see it and recognize the danger was not due to negligent conduct on his part.

On the question of when a trial judge should take the question of contributory negligence from the jury, the law in this state is settled. In the recently decided case of *Stickle v. Union Pacific Railroad Co.*, ... Utah ..., 251 P. 2d 867, 870 (1952) this Court, in reversing the decision of the trial court in granting a Motion to Dismiss on the ground that plaintiff was guilty of contributory negligence, reviewed and summarized the authorities as follows:

"The authorities frequently state that the question of contributory negligence is usually for the jury. And that this is so wherever the evidence is such that reasonable minds may differ as to its existence has been stated innumerable times, which is undoubtedly correct. However, in view of the fact

that before the issue may be taken from the jury, the defendant has the burden of establishing plaintiff's negligence by a preponderance of the evidence it may be a bit more precise to state that the question of contributory negligence is for the jury whenever the evidence is such that jurors, acting fairly and reasonably, may say that they are not convinced by a preponderance of the evidence that the plaintiff was guilty of negligence which proximately contributed to cause his own injury.

\* \* \*

"These principles apply in identical fashion to the question of plaintiff's contributory negligence except that the defendant has the burden of proof. That the evidence is such that the jury *may* find from a preponderance of the evidence that the plaintiff failed to use due care for his own safety is not sufficient. The proof must establish his failure to do so with such certainty that all reasonable minds must conclude before the court may rule as a matter of law that he is precluded from recovery on that ground. The court should exercise caution and forbearance in considering taking questions of fact from the jury."

See also:

*Newton v. Oregon Short Line Railroad Co.*,  
43 Utah 219, 134 Pac. 567 (1913);

*Martin v. Stevens*, . . . Utah . . . , 243 P. 2d  
747, 749 (1952).

### POINT III.

#### THE TRIAL COURT DID NOT ERR IN THE EXCLUSION OF EVIDENCE.

The only question raised as to admissibility of evidence relates to certain portions of the testimony in the



deposition of plaintiff taken prior to trial. Defendant sought to tender this evidence at the trial for the purpose of showing "some inconsistency" in his testimony or admissions on the part of the plaintiff. Objection was made to the admission of said evidence on the ground that it was repetitious and that it was not contradictory of anything to which plaintiff had testified. The substance of the testimony offered was to the effect that plaintiff could see the parts of the truck being cleaned by moving the nozzle away, raising it up in the air and waiting a short while; that the steam was directed towards the under-carriage of the truck at the time of the accident and that by turning the steam into the air he could have seen the fender next to his hip and that if he had raised the nozzle above his head he probably could have seen his surroundings.

Appellant relies upon Rule 26(d) U. R. C. P. stating that the same permits the deposition of a party to be used by an adverse party for any purpose. It must first be noted however, that what is said in Rule 26(d)(2) is necessarily qualified by the general introductory statement in Rule 26(d) that makes a deposition admissible at trial only "so far as admissible under the rules of evidence." See Barron and Holtzoff, *Federal Practice and Procedure*, § 655, Vol. 2, p. 346. Thus if the evidence sought to be introduced was inadmissible under the rules of evidence, then it gains no hallowed stature merely because it was embodied in the deposition of a party. It should also be noted that Rule 26(e) allows objection to be made at the trial to receiving in evidence any deposition or part thereof for any

reason which would require its exclusion if the witness were testifying.

The appellant implies in its brief that the trial court sustained the objection to certain portions of the plaintiff's deposition without knowing the content thereof. The line of testimony thus far however, had already revealed its substance. While the objection was sustained in the presence of the jury, the Court, during the recess, listened to the proffered evidence and again reaffirmed its position (R. 170-172).

The evidence sought to be admitted by tendering the deposition was evidence the Court previously had excluded on cross-examination as repetitious (R. 170). If the trial court was correct in excluding the evidence offered from the witness on cross-examination, then clearly under the provisions of the Rules of Civil Procedure, above noted, the deposition was likewise properly refused. The evidence was objected to on cross-examination as being repetitious and in no way contradictory. An examination of the record shows this to be true. As noted above, the substance of the testimony, the exclusion of which appellant complains of on pages 36 to 38 of its brief, is that by moving the nozzle in another direction a person could, at least to some extent, see the area in which he was working. On direct examination plaintiff had testified as follows:

"A. Then I tried to clean this truck, the back dual wheel, on the outside of the wheel it was very sticky, I would keep the nozzle very close to it to make the steam efficient; it didn't clean it when you hold it far away.

"Then I went over to the left front wheel, cleaned the outside of that wheel, cleaned the inside of that front wheel, across the front axle, I cleaned the inside of the front wheel the best I could, *taking the nozzle away and putting it back down again.*

"Q. Standing in front of the truck at that time?

"A. Yes, sir, bending over, looking at the wheel, and pouring the steam, and then *I took the nozzle away from the inside of the front wheel several times and put it back to give it a little bit more cleaning*" (R. 132).

On cross-examination defendant's counsel had questioned the witness and read portions of plaintiff's deposition to the following effect:

"Q. This steam, that obscured your vision, is steam that came from this nozzle you were using, was it not?

"A. Part of it was, yes.

"Q. Was there any part came from any other source?

"A. Yes, sir.

"Q. Where was that?

"A. It came from underneath the truck from the northeast around the side of the front wheel where I had been cleaning, the steam was coming off of cold metal.

"Q. Before the steam cleared away, you moved around the area where you had no visibility?

"A. Poor visibility all around me there.

"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 under-carriage 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 handed 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.*

*"Q. That is right. How often did you turn it up in the air?*

*"A. After you had gone over quite an area.*

*"Q. You turned it up in the air so the steam would clear out of your vision?*

*"A. I don't know; I didn't know too much about handling this; I don't know how often I turned it up in the air.*

*"Q. Mr. Droubay had demonstrated to you how to work, had he not?*

*"A. I watched him, I imagine you could call it demonstration.*

*"Q. As you walked, or as you moved toward the south, were you as you moved toward the south, able to see anything as you hit the tank with your foot?*

*"A. I was trying to move toward the west.*

*"Q. As you moved toward the front, you had to move toward the front to get to the west, didn't you?*

*"A. About one step to the south.*

"Q. Could you see to the west?

"A. No, I can't remember as I could.

"Q. Well, wasn't the steam so thick at that time you couldn't see where you were going?

"A. Well, it was very dense, hard to see, I imagine you could see, it was difficult to see where I was going, very difficult.

"Q. Wasn't it because Mr. Rogalsky [sic], you turned this steam nozzle down to your left just before you moved over to the tank?

\* \* \*

"A. No, sir. Immediately after I pulled the nozzle, I had looked and seen the wheel through a fog and seen some sticky grease being removed, some was loose and going to be removed, a hose would take it off; I took it off and gave it another little shot and took the nose off the front wheel and I don't know whether I put it up in the air and started to walk around; I knew it was the fender. I could feel it with my elbow and hip, and I wanted to get done before the day was over.

"Q. Is it your testimony you did not turn the steam hose down to your left in the direction of that tank?

"A. I don't remember, sir.

\* \* \*

"MR. REIMAN: I want to show what he testified on the desposition, Your Honor, how he held the steam nozzle, how it pulled it away from the part he was working on. He said he assumed it was clean, and I want to go on. May I?

"THE COURT: You may.

"Q. (by Mr. Reiman) Line 22:

"Q. You mentioned that the steam obscured your view a little. How were you able to tell what parts had been satisfactorily cleaned?

"A. *I would move the steam cleaning nozzle away from that area, and look at it. If it was not clean I would put it back.*

"Q. You so testified, did you not on deposition?

"A. I guess I did.

"Q. *So that your vision was obstructed or obscured only in the direction in which you were shooting the steam; is that it?*

"A. Yes, in that direction, and in and about that direction or area, it was rather tall and it took in quite an area \* \* \*" (R. 165-167-169, 170). (Emphasis added.)

The portion of the record quoted above was already before the jury for its consideration. Counsel for defendant were seeking to argue the possible inferences to be drawn from this testimony by having it continually repeated. The evidence was sufficiently before the jury to form a basis for any argument defendant may have wished to make from it without the necessity of such repetition.

An examination of the above quotations from the record clearly shows that the information sought to be shown by the excluded evidence set forth on pages 36 to 38 of appellant's brief had at least twice previously been given by the witness. The portions which defendant sought to introduce from the deposition added nothing to what was already before the jury. It was entirely within the trial court's discretion to refuse the presentation of this

evidence for the third or fourth time. That the trial judge has discretion to exclude cumulative or repetitious evidence is well settled.

“The Court may properly prevent a witness from repeating testimony which he has already given.” 53 Am. Jur., *Trial*, Section 106.

In accord see:

*Parry v. Harris*, 93 Utah 317, 320, 72 P. 2d 1044 (1937);

*Litt v. Litt*, 75 Cal. App. 2d 242, 170 P. 2d 684 (1946);

*Minder v. Rowley*, 35 Wash. 2d 92, 211 P. 2d 170 (1949);

*Klinginsmith v. Allen*, 155 Neb. 674, 53 N. W. 2d 77 (1953).

Apart from the discretionary authority of the trial judge to exclude such repetitious evidence, it is clear that since the substance of the evidence was already before the jury the defendant could not possibly have been prejudiced by its exclusion.

#### POINT IV.

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY OR IN REFUSING TO SUBMIT DEFENDANT'S REQUESTED INSTRUCTIONS.

The main contention made by the defendant as to the instructions of the trial court to the jury relate to its re-

fusal to give defendant's requested Instructions No. 1-10 as submitted. Defendant's requested Instruction No. 1 is largely a statement of what defendant's theory as to the case was, and in substance was covered by Instructions No. 2 and No. 10 given by the trial court. Defendant's requested Instruction No. 2 merely repeats certain evidentiary matter defendant had offered in evidence. This evidence was before the jury and did not warrant a specific instruction.

Substantial portions of defendant's requested instructions relating to the definition of and duty of care owed to a business visitor or invitee were embodied within the court's Instructions No. 10 and 11, which correctly instructed the jury in accordance with the law of this state. *In re Wimmer's Estate*, 111 Utah 444, 182 P. 2d 119 (1947); *Skerl v. Willow Creek Coal Company*, 92 Utah 474, 69 P. 2d 502 (1937). The instructions given by the trial court in this case are in complete accord with the instructions approved by this Court in the above cases and the principles stated therein. Appellant fails to point out any error in the instructions given by the Court, or is it seriously contended that said instructions do not correctly state the law.

The balance of defendant's requested instructions all relate to the standard of care owed to one who is not a business visitor. The principal contention made by appellant is that the trial court erred in failing to instruct the jury, as requested by defendant, on the definition of a licensee and trespasser and the duty of care owed to such



persons. Appellant contends that the instructions took from the jury one of the primary issues in the lawsuit since there was evidence from which the jury could have found that plaintiff was a gratuitous licensee or even a trespasser. As noted earlier in this brief, there may have been sufficient evidence offered to support a finding that plaintiff was a licensee or trespasser, and also that defendant had violated the duty of care owed to such a person. Even assuming this, it is difficult to conceive how the defendant in this case could have been prejudiced by the failure of the Court to so instruct. The issue which defendant refers to as being "primary" was not even raised by the pleadings in the case or at the trial. The trial court isn't required to instruct the jury on every possible alternative in a case.

The jury was instructed as to the duty of care owed to a business visitor which is concededly the highest standard of care imposed on a landowner, but the burden placed upon the plaintiff to bring himself within the category of a business visitor is likewise the most difficult to meet. The jury was clearly and specifically instructed by the Court in its Instruction No. 5 (R. 247) that:

"If you find from the evidence that the defendant was not negligent, *or that plaintiff was not a business visitor of defendant*, or that the plaintiff was guilty of contributory negligence, as the term is elsewhere defined for you, *then your verdict shall be for the defendant, no cause of action*" (Emphasis added).

Under this instruction it was mandatory that the jury first find that plaintiff was a business visitor before recovery could be allowed.

Precisely the same contention made by the defendant in this case as to the trial court's failure to instruct on its theory that plaintiff was a licensee or trespasser has been previously considered and answered by this Court. *Skerl v. Willow Creek Coal Company*, 92 Utah 474, 69 P. 2d 502 (1937). In that case, while there was no specific request made by the defendant at trial for instructions as to the other categories, the same argument was made on appeal as appellant makes in its brief. On pages 484 this Court stated:

"Under the instructions a verdict for plaintiff indicates that the jury could not have found other than the plaintiff was a invitee or permittee, which of necessity negatives the position of her being a trespasser. The main point for the jury to determine was whether the plaintiff was an invitee. The jury were instructed that, if plaintiff was not an invited person, she was not entitled to recover. It would have tended to confuse the issues and the jury to have added instructions as to licensees and trespassers."

In any event, the instructions requested by the defendant did not correctly state or apply the law. A detailed examination of said instructions reveal that in neither substance or effect do they state the law of this state, or that set forth in the *Restatement of the Law of Torts*, as to the liability of a landowner to a licensee. The appellant's contention that there was no evidence to support the instruc-

tions as to business visitors is answered earlier in this brief under Point I where the various factors are enumerated from which a jury could have and did find that plaintiff was a business visitor.

The instructions given by the trial court in this case clearly presented to the jury the issues raised by the evidence. It is respectfully submitted that the defendant, under no view of the case, could have been prejudiced by the trial court's failure to give instructions as to the liability owed to a licensee or trespasser. Instructions to that effect were not warranted under the issues raised by the pleadings and would have only tended to confuse the jury. The instructions as given gave the defendant every advantage possible under the evidence introduced.

## POINT V.

THERE WAS NO DEFECT IN PARTIES —  
THIS ACTION WAS AUTHORIZED BY AND  
BROUGHT IN BEHALF OF THE PLAINTIFF  
AND THE STATE INSURANCE FUND.

Plaintiff filed this action, with the express approval and consent of the State Insurance Fund. Subsequent to defendant's filing its Motion to Dismiss and Make More Certain, plaintiff filed with the Court a letter addressed to plaintiff's counsel which states that a total of \$416.52 had been paid by the State Insurance Fund, part directly to the plaintiff and the balance to the hospital, and that:

“You are authorized to represent the interest of the State Insurance Fund in attempting to pro-

cure reimbursement to the fund for the amounts which the State Insurance Fund has been required to pay in this case, it being our understanding that Mr. Rogalski's accident was caused by the fault of a third party" (R. 9).

This letter merely confirmed a prior understanding of the parties. It was filed in this action prior to the defendant's answer and was before the Court when it heard and denied defendant's Motion. The parties argued the question fully and after considering the matter, particularly the above letter, the trial court concluded that the State Insurance Fund would be bound by the judgment in this case.

It is defendant's contention that Section 35-1-65, U. C. A. (1953) required the State Insurance Fund to be named as a party plaintiff in the present action and that any cause of action was in said agency. The concluding paragraph to Point V of appellant's brief states that there is nothing to prevent the State Insurance Fund from maintaining a separate action against the defendant. This, of course, is the only way defendant could be prejudiced by the alleged defect.

Prior to 1945 this section provided that the employer or insurance carrier, having paid compensation, "shall be subrogated to the rights of such employee." Section 42-1-58, U. C. A. (1943). It further provided that before being required to pay compensation, the employee could be required to make a written assignment of the cause of action of the insurance carrier. Section 35-1-65, U. C. A. (1953), as now written, provides that if compensation is claimed and the employer or insurance carrier becomes ob-

ligated to pay compensation, then said employer or carrier shall become trustee of the cause of action against the third party and may maintain the action either in its own name or the name of the injured employee. The present section has not been construed so as to indicate just what must exist between the employee and the insurance carrier prior to the commencement of the action and what must be shown in the proceedings as to said relationship. The legislature, however, certainly did not intend to alter the conclusion reached by the cases decided under the former section to the effect that the employee has a definite interest in the cause of action and that if the insurance carrier waives any right under the cause of action or refuses to prosecute said action, the employee may himself bring suit against the third party. It is likewise clear that there is but one cause of action against the third party.

*Johanson v. Cudahy Packing Co.*, 107 Utah 114, 152 P. 2d 98 (1944) ;

*Jay v. Chicago Bridge & Iron Co.*, 150 F. 2d 247 (10th Cir. 1945) ;

*Cederloff v. Whited*, 110 Utah 45, 169 P. 2d 777 (1946).

While in the *Johanson* case this Court stated that the failure to join the insurance carrier was at the most only a defect in parties that had been waived, the Court nevertheless made it clear that the injured employee (or as in that case the dependents of a deceased employee) was a real party in interest and where the carrier had waived its right to subrogation said party could properly bring suit to enforce the cause of action. In the *Jay* case, the United

States Court of Appeals for the Tenth Circuit held that a defective and invalid assignment of its cause of action by the insurance carrier to the injured employee nevertheless constituted a waiver of the insurance carrier's right to sue and the employee could maintain the action in his own name. There is no possible reason why the letter on file in the present case should not have the same effect. In the *Cederloff* case this Court relied on the *Johanson* opinion in reaching the conclusion in an analogous case that there was but one cause of action and that there was no danger of a second suit by the insurance carrier.

While the 1945 amendment to this section no doubt was fostered by the insurance interests, one purpose of the amendment was to make it clear that there is but one cause of action against the third party. Certainly the legislature did not intend to bar recovery by the employee and shield the third party where the insurance carrier or the employer refused to bring an action or waived its right to do so. There is nothing to indicate that the legislature intended the insurance carrier to be named as a party plaintiff in every action brought under this section. The contrary is expressly provided. Section 35-1-65, U. C. A. (1953); see also Section 31-7-11, U. C. A. (1953). The parties will generally prefer to have the action brought in the name of the employee rather than be prejudiced by having the insurance company the named plaintiff. While it is no doubt true that there must be some authorization by the insurance carrier for the bringing of the action, the very language of the section contemplates that this authorization need not be manifested by the joinder of the carrier and em-

ployee as plaintiff. Even though the section allows the carrier as trustee to bring suit in the name of the employee, the general law applicable to trusts would allow the beneficiary to sue in his own name when the trustee refused to prosecute the cause of action, or if the trustee conveyed or released his interest in the trust res to the beneficiary. Certainly, the letter by the State Insurance Fund should be given this effect.

It is clear under the letter from the State Insurance Fund that they authorized the bringing of this action in the name of the employee. Both plaintiff and the State Insurance Fund consider themselves bound by the ultimate decision in this case. The interest of the State Insurance Fund in any judgment recovered is set forth in said letter. It is clear under the authorities previously discussed that where the employee brings an action as here and recovers for the entire loss that he will hold in trust for the insurance carrier, such portion of the recovery as belong to said carrier. See *Annotation*, 157 A. L. R. 1242 at p. 1252. It would be impossible, in light of the foregoing, for the State Insurance Fund to maintain another action against this defendant.

## CONCLUSION

Plaintiff was entitled to recover for the injuries which he sustained on defendant's premises. The issues of defendant's and plaintiff's respective negligence were properly submitted to the jury and the jury was correctly instructed on the law applicable to the facts presented. A careful examination and consideration of the exceptions raised by

appellant's brief reveal no error in the trial of this case and certainly there were no prejudicial errors committed by the trial court. Under the authorities and arguments presented herein, the judgment in this case should be affirmed.

Respectfully submitted,

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Received \_\_\_\_\_ copies of the foregoing brief of respondent this \_\_\_\_\_ day of August, 1953.

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*Attorneys for Defendant and Appellant*