

1958

Paul Ernest Jopes v. Salt Lake County et al : Brief of Respondents Junior Chamber of Commerce of Salt Lake City and Meadowbrook Golf Club

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

PAUL ERNEST JOPES,
Plaintiff and Appellant,

MAR 17 1958

vs.

Clerk, Supreme Court, Utah

SALT LAKE COUNTY, SALT
LAKE COUNTY RECREA-
TION BOARD, JUNIOR
CHAMBER OF COMMERCE
OF SALT LAKE CITY,
MEADOWBROOK GOLF
CLUB and JOSEPH MICHAEL
RILEY,
Defendants and Respondents.

Case No. 8702

BRIEF OF RESPONDENTS JUNIOR CHAMBER
OF COMMERCE OF SALT LAKE CITY AND
MEADOWBROOK GOLF CLUB

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Plaintiff and Appellant,

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BRIEF OF RESPONDENTS JUNIOR CHAMBER
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STATEMENT OF FACTS

These respondents cannot agree upon the state-
ment of facts in appellant's brief and submit the
following to supplement and clarify plaintiff's state-
ment of facts.

Appellant has not clearly set forth the fact that
there is absolutely no connection between the Mead-
owbrook Golf Course, as distinguished from the
defendant, and respondent Meadowbrook Golf Club.
The defendant Meadowbrook Golf Club, for clarity,
will be referred to as the Meadowbrook Golfer's

Association in this brief. Meadowbrook Golf Club is an association of some of the players who play golf at the Meadowbrook Golf Course, organized for social relationships between the players. It is a non-profit organization, organized in 1951 and consists of both men and women. Meadowbrook Golf Club has no right of management of the Golf Course or of the facilities, including the Clubhouse, and did not maintain any facilities, do any maintenance, had no control or right to control over James Michael Riley, the manager and professional of the course. (R. 304-306, 295)

The Salt Lake Junior Chamber of Commerce, a civic organization of young business men in Salt Lake City, had no connection with the Meadowbrook Golf Course, which course, it is undisputed, is owned by Salt Lake County.

The clubhouse was, and is, owned by Salt Lake County, and is the result of a conversion of a building that was on the property acquired by Salt Lake County. The abutment in the passageway where plaintiff fell was a part of the original building and was left in place when the building was converted to a clubhouse for the public. Neither the Junior Chamber of Commerce or the Meadowbrook Golfers Association had anything to do with the erection, maintenance, use or control of the clubhouse building and facilities.

The clubhouse included a golf shop, card room, locker room, restaurant, dining room and passageways. (Exhibit P-1) It was a public building owned, operated and under the control of Salt Lake County, with the exception of a portion of the interior leased to Mrs. Jesse Smith for cafe operation, (Exhibit P-25) and a portion used by James Michael Riley as a golf shop, and as authorized by his agreement with Salt Lake County. (Exhibit P-24). The lease between Salt Lake County and Mrs. Jesse Smith sets forth that the premises shall be kept open to the public during hours in the golf playing season, and authorized Mrs. Smith to allow reservation of the facilities of the dining room to golfers, the lessor and to the general public. The passageways, locker room, shower room and other facilities were not under lease to anyone, but were a public facility owned and operated for general public use by Salt Lake County.

The Utah Open Golf Tournament had been promoted by the Utah Golf Association each year since 1926. The Utah Golf Association had trouble obtaining a place for the 1955 Utah Open Golf Tournament and James Michael Riley agreed that the tournament could be held at the Meadowbrook Golf Course by letter directed to Steven Dunford, President of the Utah State Golf Association. The Utah Golf Association then voted to hold the tourna-

ment at Meadowbrook and Mr. Riley undertook to arrange the tournament. (R. 231, 232, 233)

After the tournament was set for August 25, through 28, 1955, Mr. Jack Gilbert, as President of the Meadowbrook Golfer's Association, agreed to sponsor the tournament and later Mr. Carmen Kipp, as President of the Junior Chamber of Commerce, offered to co-sponsor the tournament with the Meadowbrook Golfer's Association. (R. 233) Kipp offered to undertake co-sponsorship of the tournament because of the civic responsibility involved and offered his organization to enlist the necessary support among the merchants, and to devote the necessary man hours, time, and labor to put on the tournament. (R. 234) The management and planning of the tournament were under the direction of three general chairmen, Jack Gilbert, Carmen Kipp and James Michael Riley, and many committees were organized with the members for the most part being members of the Junior Chamber of Commerce and the Meadowbrook Golfer's Association. (R. 235) Exhibit 6-P lists the committee chairmen, assistant chairmen and advisors. The advisors, Steven Dunford and George Schneiter were not members of either sponsoring organization and the Calcutta committee chairman and vice-chairman, Steve Dunford and Carl Davidson, were not members of the sponsoring organizations. (R. 290)

One of the committees putting on the tournament was the Rocky Mountain Section of the P.G.A., and the plaintiff, Paul Jopes was chairman of that committee, with two assistants who were not members of the Junior Chamber of Commerce or the Meadowbrook Golfer's Association. The P.G.A. members held a dinner and election meeting during the course of the tournament at the clubhouse. (R. 242) The golf professionals, members of the P.G.A., sponsored their own tournament which was held in conjunction with the Utah Open Tournament, the scores of the last three days of the Open being counted as the P.G.A. tournament scores. (R. 264)

The Rocky Mountain Section of the P.G.A. sponsored their own tournament, exercised certain authority over the contestants in that tournament, determined their own rules and allocated their prizes. (R. 296) It is nowhere claimed that the Junior Chamber of Commerce of Meadowbrook Golfer's Association had any connection, duty or right concerning the Rocky Mountain Section of the Professional Golfers Association Tournament.

Among other activities during the tournament was the annual Calcutta held prior to the tournament, and a social hour on the Wednesday preceding the tournament. (R. 290)

There were many sponsors named in the tournament program who donated \$25.00 to have their

names listed for their support of the tournament. The Meadowbrook Golfer's Association members and Junior Chamber of Commerce members donated work, time and effort. (Exhibit 6-P, R. 287)

All proceeds from the tournament went into a common fund from which all the expenses and prizes were paid. The agreement for distribution of any profit was that the first \$300.00 was to go to the Utah Golf Association and the co-sponsors were to divide the balance. (R. 296-239)

The Junior Chamber of Commerce furnished many committee members and there were 60 to 70 members of the organization working at the course during the tournament for the full four days. Many wives of the Junior Chamber of Commerce members worked to successfully conduct the tournament. The Meadowbrook Golfer's Association members worked on committees and various other jobs during the tournament. None of the Junior Chamber of Commerce or Meadowbrook Golfer's Association members, or wives, received any pay for their time, effort and labor. (R. 287-288)

A scoreboard was necessary to keep the public and players informed as to standings in the tournament, and J. M. Riley arranged to have this scoreboard built by employees of the Salt Lake County Recreation Department. Riley decided upon the construction and placement of the board. (R. 261) The

board was fastened upon the east wall of the clubhouse where the passageway extended from the locker room and golf shop to the cafe. (Exhibit P-1)

The plaintiff Paul Jopes, a member of the Rocky Mountain Section of the P.G.A., had participated in three days of the tournament play. He finished his third round of the tournament during the afternoon of August 27, about 3:00 P.M. As he finished his round, he went to the golf shop but could not get change to pay his caddy, so he walked from the golf shop to the cafe, bought a beer and got change. As he was walking back to the golf shop, two men approached from the north and Jopes stepped aside to let them pass, and stumbled over the north abutment and fell. (R. 119)

Admittedly, Jopes and his golfing companion, testified it was dark in the passageway, but Jopes, upon cross examination, was asked by the attorney for the Meadowbrook Golfer's Association:

(R. 178)

"Q. And why, if you can tell us, didn't you see these large cement abutments?"

"A. That is what I would like to know."

Jopes had been in the passageway five or six times and never noticed or saw the abutment. (R. 177)

Mr. Kipp and Mr. Gilbert knew where the scoreboard was located and made no objection. They,

however, had nothing to do with its erection, placement or maintenance, and it was erected several weeks before the tournament commenced and was used for the Utah Women's Golf Tournament that was held prior to the Utah Open Tournament. (R. 260) At the time of his deposition, and which deposition was published at trial, Riley testified:

(R. 266)

"Q. Who was it decided that the scoreboard should be erected at that location?"

Mr. Riley's answer: "I was."

"Q. It was you who made the decision that the scoreboard should be erected there?"

The answer is: "Yes."

Mr. Kipp and Gilbert testified that they never had any voice in the matter of the scoreboard erection and placement, and did not attempt to have any say about its placement.

STATEMENT OF POINTS RELIED UPON

POINT I

THE COURT DID NOT ERR IN DISMISSING THE COMPLAINT AS TO THE DEFENDANTS JUNIOR CHAMBER OF COMMERCE OF SALT LAKE CITY AND THE MEADOWBROOK GOLF CLUB (GOLFER'S ASSOCIATION)

- (1) Defendants Junior Chamber of Commerce and Meadowbrook Golfer's Association were not possessors of the clubhouse or any part thereof, and had no obligation, duty or right of maintenance of the clubhouse.

- (2) Defendants Junior Chamber of Commerce and Meadowbrook Golfer's Association were not principals of James Michael Riley and had no right to direct or control James Michael Riley in anything done by him in connection with the signboard or the clubhouse.

POINT II.

THE PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW.

POINT III.

THE ERECTION OF THE SIGNBOARD ON THE EAST WALL OF THE PASSAGEWAY WAS NOT A PROXIMATE CAUSE OF PLAINTIFF'S INJURY.

POINT IV.

THERE IS NO EVIDENCE THAT THE ACCIDENT WAS CAUSED BY ANY NEGLIGENCE ON THE PART OF ANY DEFENDANTS.

ARGUMENT

POINT I

THE COURT DID NOT ERR IN DISMISSING THE COMPLAINT AS TO THE DEFENDANTS JUNIOR CHAMBER OF COMMERCE OF SALT LAKE CITY AND THE MEADOWBROOK GOLF CLUB (GOLFER'S ASSOCIATION)

- (1) DEFENDANTS JUNIOR CHAMBER OF COMMERCE AND MEADOWBROOK GOLFER'S ASSOCIATION WERE NOT POSSESSORS OF THE CLUBHOUSE OR ANY PART THEREOF, AND HAD NO OBLIGATION, DUTY OR RIGHT OF MAINTENANCE OF THE CLUBHOUSE.

Plaintiff in Points III and IV of his brief, briefly sets forth two reasons why it is claimed that these defendants and respondents are liable to the plaintiff for the conditions in the passageway, and which conditions it is claimed caused plaintiff's injury. We meet the argument in the order it is presented by plaintiff.

In support of his position, plaintiff quotes the *Restatement of Torts*, Section 329, comment (a) as his only authority upon the point that these defendants were possessors of the land and therefore the liability of the defendants is claimed to be that of a possessor of land.

The Restatement of Torts quoted by plaintiff is as follows:

“Topic 1. Liability of Possessors of Land to Persons Thereon.

“Title A. Definitions.

* * * * *

“Section 329. * * *

“Comment:

“a. Meaning of ‘possessor of land.’ The words ‘possessor of land,’ as used in the Restatement of this subject, mean:

“ ‘1. A person who is in occupation of land with intent to control it, or

“ ‘2. * * *

“Title E. Special Liability of Possessors of Land to Business Visitors.

“Section 343. Dangerous Conditions Known to or Discoverable by Possessor.

“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.’ ”

The *Restatement of Torts*, Section 157, sets forth a definition of Possession as follows:

“157. Definition of Possession.

In the Restatement of this subject, a person who is in possession of land includes and includes only one who:

(a). is in occupancy of land with intent to control it.”

The definition of possession of land, or possessor of land, as given in the comment to Section 329, comment (a) of the *Restatement of Torts* and that given in Section 157 of the *Restatement of Torts* are almost identical. The sections clearly provided that a possessor of land must not only be in occupancy but be in occupancy with intent to control.

The clubhouse was a public building, owned and operated by Salt Lake County, with portions leased to J. M. Riley and Mrs. Jesse Smith. The passageway, where the accident happened, was not leased to anyone, and was public property. Spectators, participants and other people were in the clubhouse during the tournament patronizing the cafe and golf shop. The clubhouse is a public building open to the public and any one who may come there. People come during the day to eat, visit, and the public used the clubhouse for parties, etc. (R. 258, 259, 260) There is no evidence that there was an admission fee charged for the public to enter the clubhouse during the tournament. There was an admission fee to watch the actual play on the course. The clubhouse had nothing to do with the play of

the tournament; it was a convenience for the public as a whole, a place where they could eat, visit, buy golf equipment and clubs, or use for any other purpose. The use of the clubhouse by Jopes had nothing to do with the tournament. He went through the passageway to get change so he could pay his caddy, and to get a beer. The only business Jopes had in going through the passageway was personal. He may have been a business visitor as to Mrs. Jesse Smith, but it is clear from any common sense understanding of the situation that his being in the clubhouse was in no way necessary or in any way connected with his participating in the golf tournament.

Plaintiff states that these defendants invited the people to come to the tournament. The mechanical work of inviting may have been done, but the rules, regulations of tournament players, etc. was not the part of these defendants. The Golf Associations, Utah Golf Association and Rocky Mountain P.G.A. set up the rules, regulations and conditions of play.

Plaintiff in his brief makes the bald assumption that the clubhouse was a necessary part of the conduct of the golf tournament. By plaintiff's own testimony, the first day he played at Meadowbrook, he never entered the clubhouse. He didn't need equipment, didn't want to eat, didn't want to shower there; therefore, he could play golf, be in the tourna-

ment, compete his rounds and do all things necessary without entering the clubhouse. Granted the facilities afforded by the county were for extra comfort and ease of people, but they were there for all the public, with no exceptions.

In putting on this tournament, the Utah Golf Association decided where it would be played, when J. M. Riley advised them it could be held at Meadowbrook, and that he would promote the tournament. Meadowbrook Golfer's Association and the Junior Chamber of Commerce entered the picture only after it was decided where and when the tournament would be held, and the rules of conduct of the tournament, entry fee, conditions and prizes were not decided by these defendants, and they had nothing to do with that part of the tournament. All these defendants did was volunteer to take over some of the details and the work and labor and to collect money from sponsors. There is no evidence that they had anything to do with the Rocky Mountain Section of the Professional Golfers Association tournament which was conducted with the Utah Open Tournament. Paul Jopes was chairman of the committee putting on the P.G.A. tournament, and it is just as logical to say that Jopes and the P.G.A. took over the clubhouse and possessed it as it would be to say that the Meadowbrook Golfer's Association and Junior Chamber of Commerce took possession of the clubhouse.

At no time did the Junior Chamber of Commerce or the Meadowbrook Golfer's Association intend to control or attempt to control the clubhouse or golf course. The record is void of any evidence that there was any intent of these defendants to exercise any control over the premises. J. M. Riley had charge of the clubhouse maintenance, as an employee of Salt Lake County, (R. 272) and these defendants never attempted to control or direct Riley in any way in the operation or maintenance of the premises. (R. 273, 274, 293)

The record contains not a scintilla of evidence that these defendants were possessors of the clubhouse or the golf course.

The defendants Junior Chamber of Commerce and Meadowbrook Golfer's Association were not in possession of the clubhouse or the course with intent to control the premises, and therefore the *Restatement of Torts*, Section 343, quoted by the plaintiff as authority for his claim of liability on the part of these defendants is not applicable. The basis of liability set forth in Section 343 is based only upon the fact that there be possession of land, with intent to control. Those factors being not proved by fact or inference, the section is completely irrelevant.

(2) DEFENDANTS JUNIOR CHAMBER OF
COMMERCE AND MEADOWBROOK GOLF-
ER'S ASSOCIATION WERE NOT PRINCI-

PALS OF JAMES MICHAEL RILEY AND
HAD NO RIGHT TO DIRECT OR CONTROL
JAMES MICHAEL RILEY IN ANYTHING
DONE BY HIM IN CONNECTION WITH
THE SIGNBOARD OR THE CLUBHOUSE.

Plaintiff and appellant contends that J. M. Riley was the agent of the defendants Junior Chamber of Commerce and Meadowbrook Golfer's Association in the placement of the scoreboard on the outside wall of the passageway where plaintiff fell. Plaintiff makes no contention or claim that J. M. Riley was engaged in a joint venture with Junior Chamber of Commerce and Meadowbrook Golfer's Association, although it is contended that Junior Chamber of Commerce and Meadowbrook Golfer's Association were joint adventurers, and that Riley was their agent in the placement of the scoreboard.

In determining the status of Riley, it should be remembered that the golf tournament was held at Meadowbrook Golf Course only after Riley advised the Utah Golf Association that it could be held there. The Utah Golf Association had held an Open Golf Tournament since 1926, without missing a year. The Utah Golf Association was having trouble finding a place to conduct the 1955 Open Tournament and James Michael Riley offered to have the tournament at Meadowbrook, as authorized by his employment contract with Salt Lake County. After Riley agreed that the tournament could be held at Meadow-

brook, the Utah Golf Association voted to have the tournament, and Mr. Dunford, President of the Utah Golf Association, notified Riley of the action of the association and the tournament was set for the Meadowbrook course. (R. 231, 232, 233)

Meadowbrook Golfer's Association and the Junior Chamber of Commerce had no say in the plans for the tournament, that is the plans for the time, place and conditions of the tournament, but entered into the picture only after the tournament had been set. Riley could not put on the tournament without help from some outside source and so the Meadowbrook Golfer's Association and Junior Chamber of Commerce volunteered to do the leg work, planning, social events, and many other of the multitude of details necessary to put on the tournament. As part of the tournament, the Rocky Mountain Section of the Professional Golfers Association was conducting its own tournament, by counting the last three round scores of the Utah Open Tournament as the scores by the members of the Rocky Mountain Professional Golfers Association for their tournament. The plaintiff Paul Jopes was chairman of the portion of the tournament conducted by the Rocky Mountain Professional Golfers Association. (R. 242, 264) The Rocky Mountain Section of the P.G.A. exercised authority over their contestants in the tournament and determined their own rules and allocated their own prizes. (R. 296)

The scoreboard that was fastened on the outside wall of the passageway was made by employees of the Salt Lake County Recreation Department about 30 days before the tournament, and was used for the Utah Woman's Amateur Tournament that took place at Meadowbrook prior to the State Open Tournament. (R. 260) J. M. Riley decided upon the construction and hung it up on the wall. There had been some discussion about the use of scoreboards and the use of easel type boards, but Riley decided upon the construction and placement of this board. (R. 261) Two or three weeks before the open tournament, Riley discussed with the other members of the general committee and he brought up the idea of the board and placing it where it was because it would be out of the wind if attached to the wall. (R. 243, 244) The sign was put where Riley wanted it placed, and where it would least interfere with the operation of the clubhouse or golf course. Gilbert and Kipp, the other members of the general committee, never said where the board should be located or anything about its construction and placement. (R. 310) Riley decided where the scoreboard would be located, and it was his decision. (R. 266) Carmen Kipp recalled no discussion about placement of the scoreboard on the wall and never made any suggestion or direction concerning placement of the board on the wall. (R. 291)

The clubhouse maintenance was under the charge of J. M. Riley. (R. 272) The members of the Meadowbrook Golfer's Association had no control of any kind over Riley nor could they give any orders or direction to Mr. Riley. (R. 273, 274) The Junior Chamber of Commerce has no right and did not control or direct Mr. Riley in any way in the operation of the clubhouse. (R. 273) Riley was never told anything to do with regard to the clubhouse at the time of the tournament. (R. 293)

Meadowbrook Association and Junior Chamber of Commerce did not have the right to tell Riley where to put the scoreboard, did not have anything to do with its construction, placement, design and erection, and after it was put up, they obviously had no right to take down the sign, remove it from the wall or do anything else in connection with it.

Considering first whether the relationship between Riley and Junior Chamber of Commerce and Meadowbrook Golfer's Association was master and servant, the *Restatement of the Law of Agency*, Volume 1, Section 220, defines a servant as follows:

“(1) A servant is a person employed to perform service for another in his affairs and who, with respect to his physical conduct in the performance of the service is subject to the other's control or right to control.”

There was certainly no evidence that Riley was

employed by the defendants Junior Chamber of Commerce and/or Meadowbrook Golfer's Association. He was not paid for anything he did in regards to the golf tournament, and received no part of any of the proceeds; in fact, he devoted time and effort to put on the tournament and to his financial disadvantage, considering the lessons he could not give and the decrease in golf shop sales.

In the recent case of *Oberhansley vs. Travelers Insurance Co.*, 295 P. 2d 1093, 5 Utah 2d 15, one of the questions involved was whether Oberhansley was the employee of one Pearce, for whom he was driving a car to Evanston, Wyoming from Ogden. Pearce had given him \$10.00 for traveling expense. The former testified at the trial that if he had seen Oberhansley driving the car in the manner which might result in damage to it, he felt that he could tell him not to do so inasmuch as the car was his responsibility. In holding that the relationship was not master and servant this court quoted from the decision of *Bingham City, et al. vs. Industrial Commission*, 66 Utah 390, 243 P. 113, on page 393, as follows:

“The usual test by which to determine whether one person is another's employee is whether the alleged employer possesses the power to control the other person in respect to services performed by the latter and the power to discharge him for disobedience or misconduct. Under the Workmen's Compen-

sation Act it is also essential that some consideration be in fact paid or payable to the employe. The purpose of the act is to provide compensation for earning power lost in industry, and the only basis for computing compensation is the earning ability of the employe in the particular employment of which the loss arises. In short, the term 'employe' indicates a person hired to work for wages as the employer may direct . . ."

The evidence is even more clear in this case that Riley was not the employee or servant of these defendants.

Was the relationship between these defendants and Riley that of principal and agent? Agency is defined in the *Restatement of the Law of Agency*, Vol. 1, Section 1, as follows:

"(1) Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.

"(2) The one for whom action is to be taken is the principal.

"(3) The one who is to act is the agent."

In the case of *Fox vs. Lavender*, 89 Utah 115, 56 P. 2d 1049, Justice Wolfe said:

"The test of whether one is the agent of the other depends upon the right of control of one over the other."

* * * *

"Many cases have loosely used such ex-

pressions such as 'for and on behalf,' or 'in the business of,' or 'for the benefit of.' As stated before, the inquiry must be directed to the question of agency in the operation of the car rather than to the question of agency for the accomplishment of some of some ultimate purpose."

Following Judge Wolfe's reasoning, the inquiry must be directed to the question of agency in the erection and placement of the scoreboard, **RATHER THAN THE AGENCY FOR THE ACCOMPLISHMENT OF ITS ULTIMATE PURPOSE.** The ultimate purpose was to keep the players and people informed of the players' standings. These defendants were not principals of Riley in the operations necessary to erect and place the scoreboard and he was not subject to their control in the erection and placement of the board.

In the case of *Dowsett vs. Dowsett*, 116 Utah 12, 207 P. 2d 809, a boy in the Army requested his father and mother to bring his car to him, and the other was injured in an accident while the father was driving the car to the army camp where the boy was stationed. The mother subsequently brought an action against the boy upon the theory that the father was the agent or servant of the defendant.

"* * * 'An agent who is not subject to control as to the manner in which he performs the acts that constitute the execution of his agency is in a similar relation to the principal as to such conduct as one who agrees only to accomplish mere physical results. For

the purpose of determining liability, they are both independent contractors and do not cause the person for whom the enterprise is undertaken to be responsible * * *.'

"If respondent had no right of control over the driver of his car, the court did not err in directing a verdict of no cause of action. *As shown above, a principle cannot be held responsible for the torts of his agent where he has no right of control over that agent.*" (Italics ours)

The evidence in this case is undisputed that Junior Chamber of Commerce and/or Meadowbrook Golfer's Association did not consent that J. M. Riley should act on their behalf, subject to their control, and there was no consent by J. M. Riley to act for these defendants, and subject to their control. Riley was not subject to control as to the manner in which he performed any act relating to the conduct of the golf tournament and the record is void of any evidence or inference that Riley was subject to any control by the Junior Chamber of Commerce and Meadowbrook Golfer's Association.

The fact that Riley may have advised these defendants that he was going to have the scoreboard erected and attached to the outside of the passageway would not in any way give rise to any inference that he was their agent in the preparation and placement of the sign. Riley testified that the Junior Chamber of Commerce was advised about the plans of putting the sign on the wall, but there is no evi-

dence he asked for or got direction from anyone about the scoreboard. (R. 269) The co-chairman, Mr. Kipp, testified that he never heard any discussion about the particular sign that was attached to the wall and never made any recommendation or direction about that sign. (R. 291) Kipp also testified that at no time during the tournament did he direct or in any way attempt to control or tell Riley what to do about the clubhouse, with the exception of making arrangements for a party to be held in the clubhouse prior to the tournament. (R. 293) Jack Gilbert, one of the co-chairmen, and the Meadowbrook Golfer's Association representative testified that he had no discussion about the type and nature of the signboard being attached to the wall of the clubhouse, only that there was a discussion of having the signboards in the patio where they would be protected from the wind. (R. 309)

There is no evidence that Riley was the agent, servant or employee of Junior Chamber of Commerce and/or Meadowbrook Golfer's Association in any particular as regards the Utah Open Golf Tournament.

POINT II.

THE PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW.

Plaintiff Jopes had traversed the passageway several times during the four days he had been at

Meadowbrook, during the daytime and at nighttime, but never noticed the abutment. (R. 177) He did not see the abutments and upon cross examination he was unable to state why he did not see them.

The Utah case of *Scofield vs. Sprouse Reitz Company*, 1 Utah 2d 218, 265 P. 2d 396, involved a salesman who visited the premises of the defendant company and ascended a stairway to a balcony or platform. There was no railing on the open side of the stairway and as the plaintiff left the balcony or platform he turned to descend the stairs and fell over the side. The court sustained the District Court direction of a verdict in favor of the defendant, and the opinion quotes with approval the general rule found at page 861 of Volume 38, *American Jurisprudence*, which reads:

“* * * As it generally is expressed, a plaintiff will not be held to have been guilty of contributory negligence if it appears that he had no knowledge or means of knowledge of the danger, and *conversely he will be deemed to have been guilty if it is shown that he knew, or reasonably should have known of the peril and might have avoided it by the exercise of ordinary care.*”

Jopes reasonably should have known of the existence of the abutment in the passageway. He had been through the passageway many times, both night and day. If he had observed and seen the abutments, he, in the exercise of ordinary care,

would have avoided his accident and injury. If there was any peril in the passageway, he knew, or in the exercise of ordinary care, should have known of it and then by any ordinary care could have avoided injury.

POINT III.

THE ERECTION OF THE SIGNBOARD ON THE EAST WALL OF THE PASSAGEWAY WAS NOT A PROXIMATE CAUSE OF PLAINTIFF'S INJURY.

At the time of the fall by Jopes he had been to the cafe, purchased a beer, got some change to pay his caddy and was returning through the passageway, which is approximately $15\frac{1}{4}$ feet in length, to the golf shop at the north end of the passage. (Exhibit P. 1) He walked carefully so as not to spill his beer and because he was wearing golf spikes, which he admitted made walking difficult (R. 165, 119). As he walked along the passage, two fellows came from the north and Jopes moved over to his right, nearer the wall, and walked into the abutment. (R. 119) There is no evidence that he ever looked at the floor or looked ahead. On cross examination he was asked:

(R. 178)

“Q. And why, if you can tell us, didn't you see those large cement abutments?”

“A. That is what I would like to know.”

It is obvious that Jopes never looked to see where he was going and whether it was dark or

light made no difference. He didn't look and didn't see what was there to be seen in front of him. The fact that the scoreboard may or may have not made it dark in the passageway was not a proximate cause of the accident, because Jopes did not look and the absence of light was therefore not a proximate cause of the fall. He had ample opportunity to look but failed to do so.

POINT IV.

THERE IS NO EVIDENCE THAT THE ACCIDENT WAS CAUSED BY ANY NEGLIGENCE ON THE PART OF ANY DEFENDANTS.

There is no dispute that the clubhouse was erected several years prior to the accident and that an existing building was utilized, and the concrete abutments in the passageway were part of the construction of the original building. The golf shop and locker rooms were at the north end of the passageway, a card room just west of the passageway, and the cafe just to the south entrance of the passageway. The evidence and exhibits indicate that there was ample light from the golf shop, the locker room, the card room, the cafe and from the windows on the east and west of the main restaurant section. The length of the passageway was approximately $15\frac{1}{4}$ feet from the south to the north and was open at both ends. The south end opened into the cafe

area which had large windows and glass doors on both the east and west side. The north end opened into the golf shop which was lighted. It was 3:00 P.M. on a bright summer afternoon. It is incapable of reasonable belief that the passageway was dark. Its short length and the fact that there were two open doors on each end, and it being a bright day outside makes any testimony that the hall was dark in the case not worthy of belief. Whatever danger there may have been in the passageway because of the presence of the concrete abutments cannot be charged to the defendants Junior Chamber of Commerce and Meadowbrook Golfer's Association.

The only possible ground upon which the plaintiff can claim negligence on the part of defendants is that the scoreboard caused a reduction of light in the passageway during daylight hours. The evidence is undisputed that at nighttime artificial lights in the golf shop and cafe were sufficient to light the passageway. There were no lights in the passageway. Plaintiff had traversed the passageway at nighttime and had no difficulty at that time. He had traversed the passageway on several other occasions with no difficulty.

The plaintiff testified he did not know why he did not see the abutments, therefore he failed to meet his burden of proof. He couldn't tell why he failed to see the abutments, and he cannot expect

the jury to find as a fact something he could not even guess at himself, that the erection of the scoreboard caused or contributed to cause the injury to plaintiff.

CONCLUSION

The defendants, Junior Chamber of Commerce of Salt Lake City and the Meadowbrook Golf Club (Golfers Association) were not in anyway responsible for any defective condition of the interior of the clubhouse. The clubhouse was a public building, and these defendants could not be held liable in any way for the construction, operation or maintenance of the building. The defendant, James Michael Riley, was not the agent of these defendants and they were in no way responsible for the placement of the signboard on the wall east of the passageway which went from the golf shop to the cafe. The accident and injury to the plaintiff did not proximately result from any negligence on the part of the defendants. The plaintiff, as it appears affirmatively from his own testimony, assumed all risk of walking down the hallway and his own negligence proximately contributed to cause his injury.

These defendants respectfully represent to the court that the judgment of the trial court dismissing the action as to the Junior Chamber of Commerce

of Salt Lake City and the Meadowbrook Golf Club
should be affirmed.

Respectfully submitted,

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