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Paul Ernest Jopes v. Salt Lake County et al : Brief of Appellant

Utah Supreme Court

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Grant MacFarlane Jr.; Van Cott, Bagley, Cornwall & McCarthy; Attorneys for Plaintiff and Appellant;

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MAY 3 1958

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In the
Supreme Court of the State of Utah

PAUL ERNEST JOPES,
Plaintiff and Appellant,

vs.

SALT LAKE COUNTY, SALT LAKE
COUNTY RECREATION BOARD,
JUNIOR CHAMBER OF COM-
MERCE OF SALT LAKE CITY,
MEADOW BROOK GOLF CLUB and
JOSEPH MICHAEL RILEY,
Defendants and Respondents.

FILED
MAY 3 1958
Clerk, Supreme Court, Utah

Case No.
8702

BRIEF OF APPELLANT

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MEADOW BROOK GOLF CLUB and
JOSEPH MICHAEL RILEY,
Defendants and Respondents.

Case No.
8702

BRIEF OF APPELLANT

STATEMENT OF THE CASE

Plaintiff Paul E. Jopes commenced this suit to recover damages for personal injuries sustained in an accident which occurred at the Meadow Brook Golf Course in Salt Lake County, Utah. The case was tried before the Hon-

orable Martin M. Larson sitting with a jury. At the close of the evidence each of the defendants moved the court for a directed verdict. The court granted each of said motions causing the action to be dismissed, and later denied plaintiff's motion for a new trial. This appeal is taken from the orders of the court granting defendants' motions and denying plaintiff's motion for a new trial.

Because on an appeal of this type the evidence must be viewed by the appellate court in light most favorable to the plaintiff, we will state as fact those matters supported by competent credible evidence without regard to any dispute which may exist as to some of said facts. "R" refers to pages of the Record on Appeal.

STATEMENT OF FACTS

The plaintiff is a professional golfer. On the 27th day of August, 1955, he was injured when he fell over a concrete obstruction in a narrow dimly lit hallway in the clubhouse on Meadow Brook Golf Course.

Meadow Brook Golf Course is owned and operated by Salt Lake County through its Recreation Board. The course is operated precisely the same as any private course in the city. Golfers are charged admission fees for the privilege of playing the course (R. 80, 255). Lockers are rented for a fee (R. 80, 259). Golf clubs, balls, tees, carts and accessories are sold at competitive prices (R. 259). Golf lessons are given for a consideration at "rates comparable with rates charged at other public golf courses in this area" (Ex. 24-P-Pg. 2, R. 255, 256). On the course is located a clubhouse

building. In a portion of the clubhouse is located the rental lockers. In another portion is located the golf shop concession where golf supplies are sold. Still another portion of the clubhouse is leased out as a restaurant. The restaurant is operated by the lessee as a commercial enterprise for profit (R. 246, Exhibit 25-P).

The golf course is managed by the defendant Joseph Michael Riley under a contract with the Salt Lake County Recreation Board (Ex. 24-P). Under said contract Riley is employed as a "Golf Professional, Instructor and Manager" for the course. He is paid a salary of \$3,600.00, receives a home and all utilities free of charge, and has the exclusive right and franchise to the following concessions at the course: "(a) sale or rent at reasonable charges all balls, clubs, golf carts, bags and/or golf accessories of any type, nature or description whatsoever; (b) the storage and/or repair, cleaning or club making of any and all golf clubs or accessories; (c) the exclusive group, class or individual instruction in golf at rates comparable with rates charged at other public golf courses in this area * * *" (Ex. 24-P). The contract of employment further provides, inter alia, for the promotion and holding on the course of "one men's open or amateur golf tournaments each year." Riley is charged with "promotion of instruction and to supervise, operate, improve and maintain the golf course." The contract also enjoins upon Riley the duty to "maintain and operate at reasonable prices a first-class golf shop" and to "have on hand during all playing seasons an adequate supply and variety of golf balls, clubs, tees, golf carts and other commonly used accessories for sale or rent."

The dining room of the clubhouse is leased to Mrs. Jessie Smith (Exhibit 25-P) under an instrument which provides for the rental of the following premises and equipment:

“The dining room, fountain and kitchen in the Clubhouse at the Meadow Brook Golf Course, in Salt Lake County, Utah, together with all furniture, fixtures, equipment, cooking utensils, hardware, glassware, and other personal property now located in said premises, all of which items are listed on the inventory hereto attached and marked Exhibit ‘A’.”

Said lease provides for a rental of “five per cent of the gross receipts [of the lessee] derived each month * * * from the operation of the said premises.” The lessor retains the right to modify the percentage of the gross receipts to be charged as rental. Rental is payable monthly with a ten day grace period. The use of the premises under said lease is defined as follows:

“* * * [S]aid premises shall be occupied and used exclusively for the operation of a restaurant and for the sale of food, ice cream, soda, soft drinks, beer, candies, tobaccos and other confections.”

The lessee has the right under said lease to serve any place on the golf course.

The county derives income from the operation of the course in substantial amounts. In 1954 it received \$29,066.75. In 1955 \$30,579.75 was collected and in 1956 the course brought in \$38,696.62 (R. 80). The expenses of operation are discussed infra.

Based on the rentals paid to the county it appears that the restaurant leased to Mrs. Smith brought in \$30,260.00, \$44,102.00 and \$47,642.40 for the years 1954, 1955 and 1956 respectively, netting the county five per cent of said amounts (R. 80).

At the time of plaintiff's injury the Utah Open Golf Championship was being held at the Meadow Brook Golf Course. This tournament was co-sponsored by the defendants Meadow Brook Golf Club and Salt Lake Junior Chamber of Commerce. The Utah Golf Association had "awarded" the tournament to Meadow Brook which undertook the holding of the tournament (R. 263). The use of the course for the holding of the tournament at Meadow Brook was actually considered to be an obligation on the Recreation Board as the owner of a course (R. 257, 261). Speaking of the attitude of the Recreation Board and himself towards the tournament at Meadow Brook, Riley said:

"* * * because of our obligation to golf as a whole * * * the picture of golf * * * and they feel the same as I do that, each club should take a turn at putting this tournament over to stimulate and boost playing of golf; * * *" (R. 257).

The tournament at first was to be sponsored by the defendant Meadow Brook Golf Club (R. 233). The Salt Lake Jaycees, however, offered to co-sponsor the tournament for one-half of the profits (R. 233, 235). Income in the amount of \$10,655.10 was derived from the holding of the tournament (R. 76). The income was received and expenses paid by the co-sponsors. The profits were divided

equally between Meadow Brook Golf Club and the Salt Lake Jaycees (R. 80, 235). Each netted about \$900.00 profit (R. 74, 296, 311).

The general planning and management of the tournament was under the charge of the general committee composed of Carman Kipp of the Jaycees; Jack Gilbert of Meadow Brook and Riley (R. 234, 286). About Riley's place on the committee and the attitude of the two co-sponsors toward him, he said:

“They were using me of my knowledge and experience in running open tournaments” (R. 236).

The general committee in turn selected subcommittees such as publicity, finance and social (R. 236, 237).

A number of so-called “sponsors” (not to be confused with the co-sponsors of the tournament) were contacted each of whom paid \$25.00 in exchange for having his or its name printed in the program (R. 287). Policies of the tournament were formed by Kipp, Gilbert and Riley on the general committee and the subcommittees worked under their supervision to accomplish the work of the tournament (R. 234, 236, 237). Programs were prepared, scoreboards erected, signs constructed and the greens put in readiness for the play of the tournament. Invitations were sent out to professional and amateur golfers. The plaintiff received a written invitation and also a personal invitation from Riley to enter and participate in the tournament (R. 114, 245). All participants (including plaintiff) were required to pay an admission fee of \$10.00 to play in the open tournament (R. 115, 245). The public was invited to view the

tournament but was admitted only upon the purchase of spectators tickets (R. 245). Participants and spectators alike were allowed full use of the golf clubhouse facilities (R. 242). The golf shop, rest rooms, and locker rooms were, of course, an essential element of the facilities for the holding of the tournament. The dining room was used for certain activities of the tournament (including a "Calcutta" and dinner) and the restaurant was patronized by both golfer and spectator (R. 246).

Mr. Jopes was injured in a narrow hallway of the clubhouse which connects the restaurant with the golf shop and locker rooms (See Exhibit 1-P). This passageway is approximately 18 feet in length, four feet in width and runs in a north-south direction. At the time of the accident there was no artificial light fixture in the passage to furnish artificial light (R. 120). The east wall of the passage was one of the exterior walls of the building and was constructed of glass block so as to permit the passage of natural light into the hallway. Said glass block was laid on a concrete foundation approximately 18 inches high. At the north end of the hallway a concrete obstruction about 18 inches in height protrudes into the traveled portion of the hallway one foot or more. The width of the hallway from the outer edge of this obstruction to the west edge of the hallway is about two feet ten inches (Ex. 1-P). There is a considerable amount of traffic in the hallway and people frequently pass each other therein. Before the commencement of the tournament Riley, one of the members of the general committee, caused a large scoreboard to be constructed and placed on the outside of the east wall of the passage com-

pletely covering the glass block on said wall (Ex. 1-P). This scoreboard which was attached directly to the glass block prevented the passage of natural light through said glass block and into the hallway.

The accident occurred about 3:00 p. m. on the 27th day of August, 1955 (R. 116). At the time of the accident plaintiff had completed a round of golf and had gone into the golf shop to secure change in order to pay his caddy. There was no change in the golf shop so he went into the restaurant where he purchased a paper cup of beer and secured change for a \$20.00 bill. The accident occurred on his return from the restaurant to the golf shop. After Jopes left the restaurant, he started down the hallway walking north. When he had reached about the middle of the hall two men came out of the locker room at the north end of the passage and walked south toward him. In order to pass them in the hallway Jopes walked to the east side of the passage. As he came to the north end of the passage his foot struck the concrete obstruction throwing him violently forward and causing his shoulder to strike a 4x4 post at the north end of the hall. This blow resulted in the severe injuries suffered by plaintiff. These injuries necessitated surgery and pinning of the shoulder and resulted in a permanent partial disability at the shoulder joint.

Plaintiff's witnesses testified that it was difficult to see in the hallway and that below the concrete foundation where the obstruction was located it was "very dark" (R. 123, 277, 278). These witnesses though looking down the hallway were unable to see the obstruction with the light conditions as they were (R. 123, 278). There was evidence

that at least two persons had tripped over the obstruction before plaintiff's accident (R. 277, 278). Plaintiff had passed through the hallway before but had not noticed the obstruction—probably because of the light conditions and because he had not been forced to walk on the east side of the passage by other traffic. There were no signs or other warnings whatever giving the traveler notice of the obstruction in the hallway.

Although the absence of any artificial light in the hallway and the presence of the concrete obstruction contributed considerably to the hazard, perhaps the greatest single affirmative act contributing thereto was the construction and erection of a scoreboard covering all of the glass portion of the east wall of said passage. It is clear that the scoreboard was constructed and erected for the sole purpose of the Utah Open Golf Tournament. On this point Riley said:

(R. 260)

“Q. Now, who made the scoreboard?

“A. I had it made for the express purpose of using in the Utah Open Tournament, and it was made for me by the County Recreation Maintenance Department.”

The board was erected about two weeks before the tournament (R. 242, 243). Although actual erection of the board was made by county employees, it is clear that its placement was taken up by Riley with the other two members of the general committee as one of the items of business of the tournament (R. 243, 244, 309). Kipp did not remember this, but Gilbert did (R. 309). Gilbert remembers

a discussion as to the placement of the sign in some place out of the wind. (Ibid.) As a matter of fact Riley testified that the matter was even taken up with the general committee after it had been placed (R. 244). Riley's suggestion for placement of the board and his act in having it placed where it was brings to mind his statement that:

(R. 236)

"They [The Golf Club and the Jaycees] were using me of my knowledge and experience in running open tournaments."

It is clear that both Gilbert and Kipp of the general committee knew where the board was placed and made no objections to its placement (R. 269, 310). It is also clear that these men as well as numerous other Jaycees and members of the Golf Club knew of the light conditions in the hallway following the erection of the scoreboard.

At the close of the evidence the trial court refused to allow the case to go to the jury. The question now before this court is whether under any view of the facts the plaintiff could recover against any one or more of the defendants. If so, he is entitled to a new trial. "Plaintiff is entitled to have the trial court, and this court on review, consider all of the evidence which plaintiff is able to present and every inference and intendment therefrom in the light most favorable to him." *Abdulkadir v. The Western Pacific Railroad Company*, (Utah, 1957), 318 P. 2d 339; *Morris v. Farnsworth Motel*, (Utah, 1953), 259 P. 2d 297. We think that the plaintiff was entitled to go to the jury on the issue of liability as to each of the defendants. The following pages will demonstrate this.

STATEMENT OF POINTS RELIED ON

POINT I.

THE COURT ERRED IN DISMISSING THE COMPLAINT AS TO THE DEFENDANT SALT LAKE COUNTY.

- (1) *The Maintenance and Operation of Meadow Brook Golf Course is a Proprietary Function To Which the Doctrine of Governmental Immunity Does Not Extend.*
- (2) *Salt Lake County in Leasing Premises For a Restaurant Was Acting in a Proprietary Capacity and is Charged with the Same Liability in Said Operation as Any Private Landlord Would Be.*
- (3) *There is Ample Evidence From Which the Jury Could Have Found That Salt Lake County Was Guilty of Negligence Which Proximately Contributed to Plaintiff's Injuries.*
- (4) *The Evidence Does Not Compel a Conclusion That Plaintiff Was Guilty of Contributory Negligence as a Matter of Law.*

POINT II.

THE COURT ERRED IN DISMISSING THE COMPLAINT AS TO THE DEFENDANT JOSEPH MICHAEL RILEY.

POINT III.

THE COURT ERRED IN DISMISSING THE COMPLAINT AS TO THE DEFENDANT MEADOW BROOK GOLF CLUB.

POINT IV.

THE COURT ERRED IN DISMISSING THE COMPLAINT AS TO THE DEFENDANT JUNIOR CHAMBER OF COMMERCE.

ARGUMENT

POINT I.

THE COURT ERRED IN DISMISSING THE COMPLAINT AS TO THE DEFENDANT SALT LAKE COUNTY.

- (1) *The Maintenance and Operation of Meadow Brook Golf Course is a Proprietary Function To Which the Doctrine of Governmental Immunity Does Not Extend.*

We have already stated that Meadow Brook Golf Course is owned and operated by Salt Lake County through its Recreation Board. The course is operated precisely the same as any private course in the city. Golfers are charged "green fees" for the privilege of playing the course. Lockers are rented for a fee. Golf clubs, balls, tees, carts and accessories are sold in the golf shop. The clubhouse located on the premises is devoted almost exclusively to commercial

concessions and enterprises. A portion of said clubhouse contains lockers which are rented to golfers. In another portion is located the golf shop concession where golf supplies are sold as a profit making or business undertaking. Still another part of the clubhouse is leased by the county as a restaurant. The restaurant, as the golf shop, is operated by the lessee as any other commercial restaurant. In 1954 the county deposited in its treasury as revenue derived from the operation of the course the sum of \$29,066.75. In 1955 this revenue was increased to the sum of \$30,579.75, and in 1956 the sum of \$38,696.62 was taken in by the county (R. 80). The expenses incurred in operating the course amounted to \$50,309.11 in 1956, and were about the same in 1954 and 1955 (R. 80, 81).

We think the conclusion of the trial court that the county in operating Meadow Brook Golf Course is acting in a proprietary capacity is wholly unsupported in fact and law. Statutes pertinent to the suit against the county are §17-15-10, U. C. A., 1953, (providing that a county may sue or be sued), §11-2-3 (authorizing county to act through recreation board), §11-2-1, U. C. A., 1953, (authorizing maintenance of facilities such as golf courses). The expenses of the operation are paid by the county (R. 80, See §11-2-7, U. C. A., 1953) and the revenue derived is deposited in the county treasury (R. 80, 255).

The principal of sovereign immunity is a common law doctrine which insulates municipalities and agencies of the government from liability in tort while engaged in the performance of governmental functions. From the very inception of the doctrine it has been recognized that immunity

does not extend to activities performed by the sovereign which are private or proprietary in nature.

The distinction between proprietary and governmental functions is most commonly discussed in connection with suits against a city or municipality. However, the proposition that a county as well as a city may act in a private or proprietary capacity and is liable for its torts when so acting is firmly established in this country. The case law on this subject is collected in annotations at 101 A. L. R. 1166 and 16 A. L. R. 2d 1079 (See also A. L. R. 2d Supplement Service). It appears from these cases that the question has been before the appellate courts in at least twenty different jurisdictions. With the exception of some Texas decisions and Georgia (where a statute controls), all of the other decisions referred to in the above annotations (or later decisions of the same court) have rejected the contention that the powers of a county are purely governmental and recognized that counties, as cities, may act in a private as well as a public capacity and that when so acting the county has no immunity from suit. The western states of California, Idaho, Nevada and Montana have all recognized this principal of law. A lengthy analysis of the cases is set forth in *Granite Oil Securities v. Douglas County*, 67 Nev. 388, 219 P. 2d 191, where it was concluded as follows:

“While it is said that the doctrine holding counties, liable for torts committed in the exercise of proprietary functions has been of much later development than a similar doctrine for municipalities, we find that doctrine clearly expressed in the early case of *Hannon v. County of St. Louis*, 62 Mo. 313,

decided in 1876 * * * We cite these as among the early cases. *Later cases are overwhelmingly in support of the liability of counties for tort when acting in their proprietary capacity. (Citing cases.)*”

See also the following cases :

Coburn v. San Mateo County, 75 Fed. 520; *Jones v. Jefferson County*, 206 Ala. 13, 89 So. 174; *Peterson v. Bannock County*, 61 Idaho 419, 102 P. 2d 647; *Johnson v. Billings*, 101 Mont. 462, 54 P. 2d 579; *Calkins v. Newton*, 36 Cal. App. 2d 262, 97 P. 2d 523.

Although this Court has not directly passed upon the question it is evident from the case of *Lund v. Salt Lake County*, 58 Utah 546, 200 Pac. 510, that the Court recognizes the almost universal rule of county tort liability. In that case, though holding that the county was not liable because its act in maintaining a private water system and furnishing water for hire was without statutory authority and hence “ultra vires,” the court said :

“* * * If they were authorized to engage in such business, as was Salt Lake City in the *Brown* case, cited by plaintiff, we see no objection to applying the common law doctrine of respondeat superior and holding the municipality liable. * * *”

It should be noted at this point that the instant case is not a situation involving an “ultra vires” act as was the case in *Lund v. Salt Lake County*, supra. The legislature has authorized the county to operate and maintain facilities such as golf courses (§ 11-2-1, 3 U. C. A., 1953) just as the city was authorized to maintain and operate swimming

pools (§ 10-8-9, U. C. A., 1953) in the cases of *Griffin v. Salt Lake City* and *Burton v. Salt Lake City*, *infra*. In the *Griffin* and *Burton* cases it was held that the maintenance and operation of a swimming pool by the city pursuant to statutory authority is proprietary in nature and that the city is liable for its negligence in said operation. The courts have uniformly recognized that the conduct of certain authorized enterprises by cities and counties are proprietary in nature and in such instances the city or county in question is held liable for torts committed in the operation of such enterprises. Having demonstrated that the overwhelming weight of authority supports the proposition that a county (as a city) may act in a proprietary as well as a governmental capacity, we pass to a consideration of the character of the operation in the instant case.

Traditionally a governmental undertaking is one which is operated for the protection of persons and property within the limits of the governmental unit. The most typical examples are perhaps police and fire protection. Although many of the old decisions assign as the reason for the doctrine the theory that "the king can do no wrong" probably the real motive for affording immunity to the sovereign while engaged in a governmental undertaking is that the function is not only enjoined by law upon the city without its choice but it is also a necessary function, the performance of which should not be hindered by vexatious lawsuits. A private or proprietary undertaking on the other hand is a function the performance of which is not enjoined by law upon the governmental unit and one which a private corporation, association or other form of business might also

conduct. The hardship and injuries of the immunity doctrine have been discussed and deplored by many a judge and textwriter and at least one former justice of this court has cried out against the extension of the doctrine beyond its present limits. See concurring opinion of Justice Wolfe in *Niblock v. Salt Lake City*, 100 Utah 573, 111 P. 2d 800. As we will point out there is no decision in this state or any other state of the union which extends the cloak of governmental immunity to a city or county engaged in the operation of a public golf course for admission to which a fee is charged. Neither the facts nor rational of any decision of this court would extend the doctrine so far. A golf course as the court judicially knows is a type of operation traditionally and commonly undertaken by private organizations or associations of persons.

Although the financial success is not as significant a factor as the character of the undertaking in determining whether a given activity is proprietary or governmental the financial picture is not insignificant. In this connection we point out that the revenue derived by Salt Lake County in the operation of Meadow Brook Golf Course is very substantial and cannot be said to be merely incidental and nominal. The course is a relatively new course (R. 226, 227) and after only a few years of operation is already bringing in over \$38,500 per year. The admitted facts indicate that the costs of operation remain about the same but the income continues to increase. Given the same growth had over the last year for which we have figures *the County should profit approximately \$4,500.00 this year from the operation of the course* and these profits will continue to

increase as the course grows in popularity. But even more significant than the great amount of income derived from the operation of the course is its character as an enterprise that is not open to the public generally except upon the payment of an admission fee. Just as significant is the fact that ordinary commercial enterprises are operated on the premises.

The precise question now before the court was decided in *Burton v. Salt Lake City*, 69 Utah 186, 253 Pac. 443. In that case Justice Frick holding that a municipally owned and operated swimming pool was operated in a private capacity said:

“* * * Is it not pertinent to ask, What governmental function does Salt Lake City exercise in conducting the bathhouses and swimming pools in question? In what way does it discharge any governmental function? What is it that it governs or regulates or controls of a public or governmental character? In view of the allegations of the complaint, does the city not own, operate, and conduct the bathhouses and swimming pools in question precisely the same as they would be conducted under private ownership? We confess our utter inability to perceive any act of a governmental nature which the city exercises in owning, operating, and conducting the bathhouses and swimming pools referred to in the complaint.”

In the later case of *Griffin v. Salt Lake City*, 111 Utah 94, 176 P. 2d 156, the court again ruled that a municipally owned swimming pool which charged an admission fee is

a private or proprietary undertaking. In that case the court said :

“This is not a case of a swimming pool operated without charge in connection with some park; but an enterprise *apparently* in competition with private business, and one which could *likely* be operated as successfully in private ownership as in municipal ownership. * * *” (Emphasis added.)

How this can be said to be a governmental enterprise is beyond our ability to comprehend. Is it not pertinent to ask here, the same questions asked by the court in the *Burton* case, i. e.: In what way does the city discharge any governmental function? Is there any reason why this enterprise could not be operated as well in private ownership as in municipal ownership? The maintenance and operation of a golf course is not a duty which devolves upon the city. It is not part of the city's business which is the protection of persons and property, the preservation of peace and other legitimate exercises of the police power. The doctrine of governmental immunity has been extended (to the dismay of some members of the court) to include the furnishing of *free* recreational activities such as *free* public parks or *free* public sleigh riding hills. *Husband v. Salt Lake City*, 92 Utah 449, 69 P. 2d 491; *Alder v. Salt Lake City*, 64 Utah 568, 231 Pac. 1102; *Davis v. Provo City Corporation*, 1 Utah 2d 244, 265 P. 2d 415. This is decidedly an extension of the doctrine, however, which has been carefully limited to situations where the facility is provided free of charge to the public generally. The distinction between a public park and a golf course is pointed out in the California case of *Plaza v. City of San Mateo*, *infra*. We

have found no decision in this jurisdiction or in any other state of the union which allows the conduct of a golf course under the cloak of governmental immunity.

The character of such an operation as governmental or proprietary has been considered by the appellate courts of Ohio and California. In each of these cases it was held that municipal operation of a golf course is a proprietary function.

In *Gorsuch v. City of Springfield*, (Ohio) 61 N. E. 2d 898, the facts were strikingly similar to those of the instant case. The City of Springfield, Ohio, operated a golf course and clubhouse. Income from the operation was a little over \$11,500.00 for the years in question. Said income was raised as it was in the instant case through green fees, clubhouse fees and the sale of golf supplies.

The Ohio trial court, notwithstanding the fact that the land on which the course was operated had been deeded to Springfield in trust for the free use of the public as a park and playground, ruled as a matter of law that the operation was proprietary in nature. The appellate court affirmed saying:

“It is sufficient for the present case to say that if the city in the maintenance and operation of its municipal golf course was directly compensated or benefited by growth and prosperity of the city and its inhabitants and the city had an election to do or omit to do the acts set forth herein as shown by the evidence, the function is private and proprietary.

“It cannot be said that the city was enjoined by any law to maintain and operate the golf course and club house in Snyder Park. It had an election

to do or to omit to do so. * * * The city was benefited by revenue received in the operation of a business which is customarily carried on by private persons and corporations in their proprietary capacity. * * *”

In the instant case income was over \$38,500.00 from the same sources except that in the instant case Salt Lake County derives income not only from the sources derived by the Springfield course but also from the commercial operation of a restaurant.

California has adopted the same holding in the case of *Plaza v. City of San Mateo*, (Cal. 1954), 266 P. 2d 523. In the *Plaza* case plaintiff was struck and injured by a golf ball while near her car in a parking lot adjacent to the golf course operated by the defendant city. She had just completed a round of golf at the time of her injury for which she had paid the required admission fee to the course. A demurrer to the complaint was sustained below. The appellate court held as a matter of law that the operation of a golf course is a private or proprietary undertaking. In so doing it distinguished those cases wherein it had been held that the operation of public parks and playgrounds is governmental in character. The reasoning of the court was as follows:

“The underlying purpose behind the playing of a game of golf, however, is undoubtedly pleasure or amusement. True, it provides some exercise and gets the player out into the fresh air and sunshine, but a walk in the park would serve the same purpose. Golf is a game of skill and rivalry, with a decided social aspect, and it is doubtful that most people who

play consider health benefits to be the primary objective. Some even ride between shots in small vehicles designed for this purpose, and have caddies to carry their clubs and equipment, which indicates that exercise is for them not the foremost consideration. A golf course does not serve the public generally but only those who play the game. *It is designed for a single purpose, while a public park is devoted to no specific use and serves many purposes for the public in general. Many private golf courses are maintained, some for profit, and others as an adjunct to private clubs or associations. It is true that a public golf course undoubtedly makes the sport available to a segment of our population to which private courses would not be accessible, but this alone does not constitute it a governmental function. It is actually in competition with other courses, and in its clubhouse commercial enterprises usually are carried on where commercial rates are charged for commodities and services.*" (Emphasis added.)

We submit that the operation of the Meadow Brook Golf Course is a proprietary function which differs in no sense from the private operation of other golf courses. It follows, we submit, that the trial court erred in dismissing the complaint as to Salt Lake County on the theory of governmental immunity.

(2) *Salt Lake County in Leasing Premises For a Restaurant Was Acting in a Proprietary Capacity and is Charged with the Same Liability in Said Operation as Any Private Landlord Would Be.*

Even assuming, arguendo, that the maintenance of a golf course is a governmental function there is another

reason why the county cannot escape liability on the theory of sovereign immunity. At the time of the plaintiff's accident a restaurant was being operated on the golf course premises by a lessee of Salt Lake County. This was a business independent of the golf course which, as will be shown, actually brought in more revenue to the operator than did the course to the County. Salt Lake County (through its Recreation Board) was in every sense of the word a landlord.

Mrs. Smith leased "the dining room, fountain and kitchen in the clubhouse at the Meadow Brook Golf Course * * *" (Exhibit 25-P). The rental reserved to the county was five per cent of the gross receipts of the lessee payable monthly.

The premises were leased for a specific purpose defined as follows:

"[S]aid premises shall be occupied and used exclusively for the operation of a restaurant and for the sale of food, ice cream, soda, soft drinks, beer, candies, tobaccos and other confections."

The other provisions of the lease are such as would be expected to be found in any commercial lease.

The county derived income from the lease as follows:

1954	\$1,513.00
1955	\$2,205.00
1956	\$2,382.12
(R. 80)	

It appears from these rentals that the restaurant grossed \$30,260.00, \$44,102.00 and \$47,642.40 for the years 1954,

1955 and 1956, respectively. This operation is not merely incidental to the operation of the course. The restaurant actually produced more revenue than the golf course.

Leasing of premises to a private individual for a profit making enterprise is not a governmental function. The county, as a landlord, acts in a private or proprietary capacity in every sense of the word. From the early development of the common law doctrine of immunity, it has been recognized that the letting of premises for hire is a private and not a public undertaking.

In the early case of *Worden v. New Bedford*, 131 Mass. 23, 41 Am. Rep. 185, the City of New Bedford let a room in the City Hall to a poultry association together with the services of a janitor, who by appointment of the city had charge of the building. The plaintiff was injured by the negligence of the janitor in lighting and heating the rooms. The court holding that these facts were sufficient to establish the liability of the city said:

“A city or town is not liable to a private citizen for an injury caused by any defect or want of repair in a city or town hall or other public building erected and used solely for municipal purposes, or for negligence of its agents in the management of such buildings. This is because it is not liable to private actions for omission or neglect to perform a corporate duty imposed by general laws upon all cities and towns alike, from the performance of which it derives no compensation.

“But when a city or town does not devote such building exclusively to municipal uses, but lets it, or

a part of it, for its own advantage and emolument, by receiving rents, or otherwise, it is liable while it is so let in the same manner as a private owner would be. *Oliver v. Worcester*, 102 Mass. 489; S. C., Am. Rep. 485; *Hill v. Boston*, 122 Mass. 344; S. C., 23 Am. Rep. 332."

A similar situation was involved in the early Utah case of *Lowe v. Salt Lake City*, 13 Utah 91, 44 Pac. 1050. In that case Salt Lake City had rented a portion of the City Hall to the legislature. Plaintiff, a legislator, was attending a night session. There was an outhouse in the rear of the building behind the City Jail. There was a light in the hallway of the building but none in the jail yard where the outhouse was located. Heeding a call of nature, plaintiff went out into the darkened yard, got off of the path and fell into an open hatchway. Our Supreme Court affirmed a verdict for plaintiff. It should be noted that in this case the rooms let to the legislature were in the City Hall, a building used for governmental purposes. Furthermore, plaintiff's injury did not occur on the demised part of the premises. The court assumed that the city was liable as any other landlord would be. At the outset of the opinion the court pointed out:

"It is admitted in the record that *the defendant rented a portion of the City Hall* to the legislature, as a legislative chamber, for the purpose of holding its session in 1889 therein, *and received rent for the same*, and that the legislature was rightfully there." (Emphasis added.)

Referring to the place where the accident occurred the court said :

“The yard was appurtenant to the hall, and, in the absence of any restrictions, the members of the legislature had a right to make a proper use thereof;”

The discussion of the duty of the city to make the yard reasonably safe and to have the same properly lighted is pertinent to the facts of the instant case. The *Lowe* case stands for the proposition that a public body in acting as a landlord is liable as any other landlord would be.

A good general discussion of the theory and development of the doctrine of governmental immunity is contained in the case of *Chafor v. City of Long Beach*, 174 Cal. 478, 163 Pac. 670. In that case the City of Long Beach had let a public auditorium built and maintained by it to an organization known as the Sons of St. George for the purpose of celebrating the birthday of Queen Victoria. The auditorium was open to the general public after the members of this organization, their paraders and friends had been admitted. Plaintiff's intestate was killed when a pier adjacent to the auditorium collapsed. In an opinion holding the municipality liable, the court said :

“Again it is important to note that the true test does not rest upon the determination as to whether or not the municipality is reaping a monetary gain. *A very large class of cases arises where this fact is established, as where parts of public buildings, such as a city hall, are leased or rented to private individuals, when it is uniformly held that the city in doing this thing is acting in a private*

capacity. But while it is true that the exaction of a rent or the making of a private profit is a very potent factor in determining the character of the act, the converse is not true. In other words, the act does not become governmental merely by virtue of the fact that the city from the performance of it reaps no direct pecuniary return. It may be and is equally a private, proprietary act if no financial return at all be exacted, or if the financial return which is exacted does not amount to a profit on the enterprise. * * *

See also *Sanders v. City of Long Beach*, 54 Cal. App. 2d 651, 129 P. 2d 511.

There is one Utah decision which should be distinguished from the instant case. In *Ramirez v. Ogden City*, 3 Utah 2d 102, 279 P. 2d 463, part of a public recreation hall was used by a Mexican group for a dance. The hall was usually open to the public free of charge, but on this occasion the city received \$15.00. The court regarded this payment as "merely nominal" or de minimus. Justice Crockett took care to point out those facts showing "large expenditures made by the city for its maintenance, coupled with lack of income therefrom, except the incidental fees referred to which may be regarded as merely nominal * * *". It was concluded that the general character of the auditorium was governmental and that the \$15.00 fee did not deprive the operation of this character. This is not the situation with which the court is confronted in the instant case. Here the premises were let under a written lease for an appreciable amount over a period of years to an enterprise not interested in furnishing education or recreation

but only in making a profit in the commercial restaurant business.

Even if we make the assumption (which, we submit, is an erroneous assumption) that the maintenance of a golf course by a public body is a governmental function, still there is no reason why a proprietary activity cannot be conducted at the same time on the same premises or even under the same roof. The authorities fully support this proposition.

In *Engles v. City of New York*, 6 N. Y. S. 2d 436, plaintiff was injured on alighting from an elevator to visit a pay patient in a municipal hospital. A verdict for her was affirmed on appeal. The court noted that the general operation of the hospital was a governmental function. As to paying patients, however, the court said the city was acting in a private capacity in the performance of which it owed a duty of due care both to the patient and her visitor. The court said:

“No one will contend that if a city conducts an activity for profit, that it is performing a governmental function. That the city enjoys both powers—proprietary or governmental or public. *It may exercise those two powers under the same roof—at one institution.*”

The principal is also well illustrated by the *New Bedford* and *Salt Lake City* cases cited *supra*, where the accidents occurred in or about the city hall.

In *Rhodes v. City of Palo Alto*, 100 Cal. App. 2d 336, 223 P. 2d 639, plaintiff was injured in a parking lot on city

property while en route to a community theatre situated in a public park. Defendant urged that the theatre was situated in a public park where public recreational facilities were located and that the theatre performed the same general function as the park and was hence maintained in a governmental capacity. In ruling that the theatre was operated in a private capacity the court quoted from the *Chafor* case as follows:

“True, it was maintained for the benefit of the municipality in the sense that it afforded the populace a meeting place for many forms of amusement and instruction. *But in all these respects it differed no whit from any other auditorium or assembly hall built and maintained by private capital for the same purposes.*” (Emphasis added.)

The Defendant city had urged that the accident did not actually occur on the theatre premises and that the parking lot was strictly a governmental operation. In answer to this the court said:

“The fact that the parking lot may also be used by persons using governmental facilities operated by appellant in the very park in which the community theatre is located, would not seem to alter its proprietary character when used by patrons of the theatre.

“As stated by this court in *Dineen v. City and County of San Francisco*, 38 Cal. App. 2d 486, 101 P. 2d 736, judicial authorities in other jurisdictions * * * establish the rule that if a governmental agency permits part or whole of a building to be used for other than governmental purposes, then the agency is generally liable in tort to any person who is injured by reason of the negligent maintenance

or operation of the building, *if such injury occurs in the common hallways, passages or yard of such building* or in the portion used for nongovernmental purposes.”

The court reasoned that the parking lot fell within the spirit of the rule. In determining whether the theatre was governmental or proprietary, the argument that the building was used in connection with a public park did not impress the court. That argument was dismissed with the following language.

“It is the nature of the activity, not its location, nor by what department carried on, nor the fact that the facility may also be used for governmental purposes, that determines its proprietary character.”

From the explanation of the law in the foregoing cases including the *Salt Lake City* case, it seems to us apparent that the leasing of the premises in the instant case was an act performed by Salt Lake County in its proprietary capacity. The fact that the restaurant is located on a golf course does not alter the fact that it is a private undertaking. This lease does not differ from any other lease entered into for profit, nor does the restaurant differ from any other commercial restaurant.

We submit that the conclusion is inescapable that the county in leasing its premises for a fee is liable as any other landlord would be. As a landlord, one of the duties of the county was to maintain the hallways furnishing ingress and egress to the demised premises in a reasonably safe condition. This is pertinent to the instant case because plaintiff was injured as he was leaving the restaurant by

a hallway commonly used as a means of ingress and egress to and from said restaurant.

(3) *There is Ample Evidence From Which the Jury Could Have Found That Salt Lake County Was Guilty of Negligence Which Proximately Contributed to Plaintiff's Injuries.*

There is ample evidence from which a jury might have found that a dangerous condition existed in the hallway where plaintiff was injured and that said condition was caused or was allowed to exist as a result of the negligence of Salt Lake County all of which contributed as a proximate cause to plaintiff's injury.

The hallway where plaintiff was injured was approximately four feet in width (three and one-half feet at the north end) and 18 feet in length. It runs in a north-south direction (See Exhibit 1-P). The east wall of said hallway is constructed of glass brick which ordinarily would allow some light to come into the passage. At the time of the accident this wall was covered by a scoreboard which obstructed the passage of light into the hallway. There were no artificial lights in the hallway itself. Approximately ten feet north of the south end of the hallway a large piece of concrete approximately 18 inches in height protrudes out into the passageway for over one foot. As the passageway furnished a means of ingress and egress to and from the golf shop and coffee shop, persons were often required to pass each other therein. There is scarcely room at the north end of the hallway for two persons to pass side by side

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without coming into contact with the concrete abutment. With regard to the light conditions in the hallway plaintiff testified as follows:

(R. 122)

“Q. Now, what was the condition with respect to light in that hallway on the occasion of this accident?

“A. Well, on the occasion of this accident, it was about three o'clock in the afternoon; so, the sun would be shining from the west over this way, not letting too much light in from the—from any place there—because it was shining over the clubhouse, and was especially very dark along the foot of that. Up a little higher, you could see very well, but not down lower; not along the passageway, you couldn't see very well.

“Q. What was the condition of the light with respect to the area below this concrete wall that supports the glass brick?

“A. It was very difficult to see.

“Q. Were you watching where you were going when—

“A. Yes, I was watching where I was going. As I explained, I had spikes on, so you have to be especially cautious when walking with pair of golf spikes on.

“Q. Did you see that abutment before you tripped on it?

“A. I certainly did not, because I don't believe I tried to trip over it on purpose.

“Q. What was on the floor there, if anything, Mr. Jopes, that you can recall; what type of material was the floor?

"A. I am not exactly sure what was on the floor. There seemed to be that—there might be some rubber matting; sometimes there are in golf shops, and so forth, where people will not slip."

Mr. Paul Gore, a professional golfer who played in the Utah Open testified as follows:

(R. 277, 278)

"Q. Now, Mr. Gore, you participated in the play of '55, Utah Open at Meadow Brook Golf Course?

"A. Yes, I did.

"Q. Were you on the premises there on all of the days that, on which that tournament was held?

"A. Yes, I came here to play practice round, as a witness, and played through the entire tournament.

"Q. Did you have occasion to pass through that hallway that we have been speaking about where the plaintiff was injured?

"A. Yes, I did.

"Q. Did you observe the condition with respect to the light in that hallway, on the various days of the tournament?

"A. It seemed very dark to me.

"Q. Well, was the condition the same throughout those various days?

"A. There were never any changes made that I saw.

"Q. Did you pass through the hall on each day of the tournament?

"A. I don't think I did the first two days, no.

“Q. Now, calling your attention, Mr. Gore, to the afternoon of Thursday, August 25, you have occasion to pass through the hallway on that afternoon?

“A. Yes; I went from the lunch room to the locker room.

“Q. And will you relate what occurred?

“A. Well, I tripped over that abutment and almost fell to the floor.

“Q. Then, what did you do after that?

“A. I went on into the locker room and was there about ten minutes; then—

“Q. Then, what did you do?

“A. I came back out to go back to the lunch room.

“Q. What, if anything, happened then?

“A. Well, there was another fellow came down the hallway and started to pass me; I held to him, but he tripped over the abutment, too, and I helped hold him up, so we didn't fall to the floor.

“Q. Was it sufficiently light in that hallway to see those abutments—

“MR. CHRISTENSEN: Well, just a minute—

“Q. —in your opinion?

“MR. CHRISTENSEN: Well, I will object to it as calling for a conclusion.

“MR. MACFARLANE: I will submit it, your Honor; he has testified he was there.

“THE COURT: Well, he may testify as to what the condition of the light was, but you are—his opinion as to whether or not there was sufficient light or not is just calling for a conclusion, and is not proper.

"Q. All right, did you see the abutment before you tripped over it?

"A. No.

"Q. Were you watching where you were going?

"Yes; looking straight ahead."

On cross examination Mr. Gore testified as follows:

(R. 229)

"Q. What did you trip over as you went through that hall, Mr. Gore?

"A. I tripped over an abutment.

"Q. How do you know it was an 'abutment'?

"A. Because I got out and felt up over it.

"Q. Got down and felt what?

"A. I wanted to know what it was; couldn't see it clearly enough to know what it was."

Plaintiff was a patron of the lessee having made a purchase just before the injury. He was also a patron of the golf course for admission to which he had paid a fee of \$10.00. Under these circumstances he was a business visitor as a matter of law. *Hayward v. Downing*, 112 Utah 508, 189 P. 2d 442; *In re Wimmers Estate*, 111 Utah 444, 182 P. 2d 119; Restatement of Torts, §332. The duty owed by an owner of property to a business visitor is defined in *Rogalski v. Phillips Petroleum Company*, 3 Utah 2d 203, 282 P. 2d 304, as follows:

"The duty owed by an owner of land to a business visitor is to inspect and maintain his premises in a reasonably safe condition or to warn the visitor of any dangerous condition thereon."

The duty of a governmental agency which lets a portion of premises, otherwise governmental for a private undertaking to maintain the common hallways and passage-way in a reasonably safe condition is set out in the cases of *Lowe v. Salt Lake City*, supra, *Chafor v. City of Long Beach*, supra, and *Rhodes v. City of Palo Alto*, supra.

In the *Lowe* case the court held that the failure to provide adequate light to illuminate an open hatchway or to warn plaintiff of the danger was negligence which would support a cause of action against Salt Lake City. In that case the court said:

“* * * We think that the leaving of the hatchway in an unguarded and unprotected condition by the defendant, as shown by the evidence, and the failure to have any light in the yard by which its condition could be seen, was such negligence as rendered it liable for any injury which was caused thereby. While the owner or occupant of premises is not an insurer of them against accidents from their condition, still, so far as he is able to do so by the exercise of ordinary care and vigilance, he is bound to keep them in such a condition that persons who are rightfully using them will not be injured by any insecurity or insufficiency for the purpose to which they are put. If such owner or occupant fails in his duty in these regards, he becomes a wrongdoer, and as such will be liable for any injury which results as a natural consequence from his misconduct, and which might reasonably have been anticipated as likely to occur as a natural and probable result thereof. * * * In the case at bar the defendant, by invitation, and leasing of the premises, induced the respondent to come upon them for a legitimate purpose, knowing their dangerous

condition, without giving him notice thereof. It was therefore liable to him for the injury, in the absence of contributory negligence on his part."

In *Dineen v. City and County of San Francisco*, 38 Cal. App. 2d 486, 101 P. 2d 736, the court answered the very question now before this court in the following language:

"[I]f a governmental agency permits part or whole of a building to be used for other than governmental purposes, then the agency is generally liable in tort to any person who is injured by reason of the negligent maintenance or operation of the building, *if such injury occurs in the common hallways, passages or yard of such building* or in the portion used for nongovernmental purposes."

There can be no question in this case but what the county knew of the obstruction caused by the concrete abutment. Indeed this condition was allowed to remain on the premises for a period of six or seven years before the accident (R. 228). It is also clear that the county did not undertake to furnish any artificial light in the hallway up to the time of the accident. The county also knew that virtually all of the natural light furnished to said hallway from outside sources had been blocked off by the erection of the scoreboard against the glass block. The county's own employee (Riley) was the person who erected the scoreboard and the dangerous condition was allowed to remain for at least three weeks before the accident occurred (R. 242, 243). During all of this time the county not only had knowledge of the condition of the hallway through its employee Riley but it actively caused the same by the erection of the scoreboard, the maintenance of the concrete obstruc-

tion and the failure to provide any artificial light or to post warning signs or give other notice of the hazard.

It was urged by the county at the time of trial that it was not responsible for the safety of patrons of the Open Tournament as it was not deriving any income from the tournament and had in effect turned the premises over to the Salt Lake Jaycees and the Meadow Brook Golf Club who co-sponsored the tournament. *This argument does not answer the plain fact that the county was at all times in possession through its lessee, Jessie Smith, and was responsible at the very least, to see that the common hallways were maintained in a reasonably safe condition.* Nor can the county escape the fact that its employee, Riley, the person who actually erected the scoreboard was acting within the scope of his contract of employment in erecting the scoreboard and failing to provide artificial light. This seems inescapable for the contract of employment actually contemplated the promotion of "men's open or amateur golf tournament each year" (Ex. 24-P) and the Utah Open was conducted at Meadow Brook just as it would be conducted at any privately owned club. Riley's contract gave him express authority to conduct such a tournament. How can it be said that he was not acting within the scope of his authority in the planning and conduct of the tournament? The county in holding this tournament was not only fulfilling its duty as a golf course to the game of golf in taking its turn to hold the Utah Open (R. 257) but there were likely decided benefits in doing so in the form of increased patronage of the lessee during the tournament (the county got a share of the gross proceeds) and the focusing of public

interest on the course during the actual play of the tournament which would result in an increase of future green fees.

Even had the county (contrary to the facts in this case) relinquished complete control of the premises and had there been no lessee in possession or employee acting for it, it would be liable for injury caused by the dangerous condition thereon at the time the tournament opened. See § 359, Restatement of Torts and Comments (a) and (c) to said sections. Jopes was on the premises as a participant in the tournament. Salt Lake County could certainly not have expected that the sponsors of the tournament would install artificial lights and remove the concrete obstruction. Nor could they reasonably expect the scoreboard to be removed before the completion of the tournament.

In summary we submit that there was ample evidence from which a jury might reasonably have found that a dangerous condition existed in the hallway where plaintiff was injured and that the county failed to exercise reasonable care to make said hallway safe or to warn plaintiff of the danger therein. The evidence in the instant case not only shows the existence of a dangerous condition and a failure to warn of the hazard but also compels the conclusion that the hazard was created by the county's employee acting within the scope of his employment.

(4) *The Evidence Does Not Compel a Conclusion
That Plaintiff Was Guilty of Contributory
Negligence as a Matter of Law.*

The testimony of Jopes was that he had been in the hallway before the time of the accident; that he did not

see the concrete obstruction on said occasions and did not know it was there until he tripped over it (R. 166). He said that the hallway was dimly lighted; that he was watching where he was going but could not see the abutment before he fell (R. 122). His testimony was corroborated by Paul Gore who also testified as to the light conditions and who though watching where he was going also tripped over the abutment and caught another golfer as he fell over the same (R. 277, 278). From this testimony it appears that the hallway was neither extremely dark nor was it light, but was dimly lighted particularly below the concrete foundation to which the abutment was attached. It further appears that a traveler's view of any obstruction along the wall was so obscured by the light conditions as to prevent his seeing it. It is also significant that Jopes was passing another golfer in the hallway at the time of the accident and was probably devoting that degree of care in doing so that any other person would have done in passing someone in a narrow hallway. Is it for the court to say that no reasonable minds could find that Jopes was exercising the care of a reasonably prudent person in traversing the hallway? How can it be said from these facts that Jopes was guilty of contributory negligence as a matter of law.

This court in *Rogalski v. Phillips Petroleum Company*, 3 Utah 2d 203, 282 P. 2d 304, under circumstances much less favorable to the plaintiff than those in the instant case refused to hold that plaintiff was guilty of contributory negligence as a matter of law. In that case Rogalski was engaged in steam cleaning a truck on a ramp owned by defendant. There was a tank of caustic acid on the ramp

with no lid on it, but Rogalski's view of the tank was obscured by a mist caused by the steam he was using to clean the truck. He testified that if he had stepped back "and waited a minute the steam would clear." Instead of waiting for the mist to clear, however, he felt his way around the truck and stumbled into the vat of acid. Of these facts the court said:

"It has been frequently announced by this court that contributory negligence is a question for the jury unless all reasonable men must draw the same conclusion from the facts as they are shown. *Shafer v. Keeley Ice Cream Co.*, 65 Utah 46, 234 P. 300, 38 A. L. R. 1523; *Lowe v. Salt Lake City*, 13 Utah 91, 44 P. 1050, 57 Am. St. Rep. 708; *Baker v. Decker*, 117 Utah 15, 212 P. 2d 679. As was said in *Linden v. Anchor Min. Co.*, 20 Utah 134, 58 P. 355, 358:

" 'Where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them.' "

"In the present case, although there is no conflict in the evidence on this question, the triers of the facts might justifiably conclude that a person, acting with due regard for his own safety and with no awareness of the presence of a dangerous liquid, could not be required to inspect the premises for possible hazards. * * *"

Lowe v. Salt Lake City, supra, involved a similar question. In that case plaintiff, because of insufficient light stepped into an open hatchway and was injured. The court

concluded that he was not guilty of contributory negligence as a matter of law in walking into the dark yard beside the path to the outhouse. See also *Baker v. Decker*, 117 Utah 15, 212 P. 2d 679, where the court held that contributory negligence is a question of fact for the jury unless all reasonable minds are compelled by undisputed evidence to find that plaintiff did not exercise reasonable care for his own safety. Commenting on this the court said:

“* * * 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.” (Emphasis added.)

One of the defendants suggested to the trial judge below that plaintiff was guilty of contributory negligence as a matter of law in traversing the hallway instead of taking an alternate route. The hallway was maintained for the use of patrons such as plaintiff. He had no reason to expect, in the absence of any warning, that there was a dangerous condition in said hallway nor that he would be taking an unusual risk in using the same. This defendant's contention in this respect seems to us too ridiculous to require rebuttal. In any event it is fully answered by the cases of *Baker v. Decker*, supra, and *Moore v. Miles*, 108 Utah 167, 158 P. 2d 676.

We submit that the issue of contributory negligence was under the circumstances of this case a question for the fact finders and should have been submitted to the jury.

POINT II.

THE COURT ERRED IN DISMISSING THE COMPLAINT AS TO THE DEFENDANT JOSEPH MICHAEL RILEY.

Riley was employed by the county as a manager of the course. It was his duty among other things to maintain the facilities. He had both the right and the duty to see that changes were made in the facilities if in his judgment they were necessary. He knew of the obstruction in the hallway; he knew of the traffic in the hallway and particularly that people often passed each other and needed all possible clearance in the narrow passage; he knew that there were no artificial lights to illuminate the obstruction; it was his duty to install lights if the same were reasonably necessary; *he caused the scoreboards to be erected* which blocked out the natural light from said passageway, and when the hazard was complete, he sat back with full knowledge of the hazardous condition until the accident occurred. Certainly it was a jury question as to whether or not Riley was guilty of negligence which proximately contributed to plaintiff's injuries. In our opinion the evidence compelled a finding that Riley was negligent. In any event it certainly must be concluded that reasonable minds might have found that all or any of the acts and omissions above outlined constituted actionable negligence. The case, therefore should have been allowed to go to the jury on the issue of Riley's liability.

POINT III.

THE COURT ERRED IN DISMISSING THE COMPLAINT AS TO THE DEFENDANT MEADOW BROOK GOLF CLUB.

POINT IV.

THE COURT ERRED IN DISMISSING THE COMPLAINT AS TO THE DEFENDANT JUNIOR CHAMBER OF COMMERCE.

The Salt Lake Jaycees and the Meadow Brook Golf Club were co-sponsors of the Utah Open Golf Tournament. The tournament was planned and managed by a general committee of three, including Kipp of the Jaycees, Gilbert of Meadow Brook and Riley the golf pro. Meadow Brook Golf Club and the Jaycees furnished supervision, management and labor and in return for their joint contribution each of the said co-sponsors, according to agreement, divided the net profits of the tournament. These profits amounted to several hundreds of dollars. This is the clearest case of the legal relationship of "joint venture."

See e. g. *Kaumans v. White Star Gas & Oil Co.*, 92 Utah 24, 63 P. 2d 231.

30 Am. Jur. 680.

This being true each of said defendants are jointly and severally liable as joint tortfeasors for personal injuries sustained by others as a result of negligence in the conduct of the joint enterprise or from negligence of their agents or employees acting within the scope of their employment.

Kaumans v. White Star Gas & Oil Co., supra.

Since the liability of Meadow Brook Golf Club and the Salt Lake Jaycees is the same, Points III and IV will be discussed together.

We have already pointed out under Point I (3) *supra*, that plaintiff's injuries were caused by a hazardous condition existing in the hallway where he was injured. There are two compelling reasons why Meadow Brook Golf Club and the Jaycees as well as the other named defendants were responsible to plaintiff for this hazard: (1) The Golf Club and the Jaycees as possessors of the Meadow Brook Golf Club during the duration of the tournament and as proprietors of the tournament owed a duty to plaintiff to exercise reasonable care to see that the premises were in a reasonably safe condition, and (2) Riley in placing the scoreboard over the east wall of the passageway was acting as the agent of the Golf Club and of the Jaycees.

As to the first of said theories, the Golf Club and Jaycees took possession of the course for the conduct of the tournament and invited participants and spectators from whom they exacted an admission fee. The greens and fairways were, of course, essential to their operation. No less essential, however, were the locker rooms, rest rooms, and golf shop, all located within the clubhouse. The plaintiff, Jopes, was on the course by invitation and for the purpose of the tournament. He had paid the required admission fee which became part of the income collected by the co-adventurers. Spectators of the tournament paid a "gallery fee" which came into the same hands. The duty of the

Jaycees and the Golf Club toward Jopes is defined in the Restatement of Torts as follows:

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

“Title A. Definitions.

* * * *

“§ 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.

“§ 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

“(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.’ ”

As pointed out *supra*, page 35, the undisputed evidence compels the conclusion that plaintiff was a business visitor under the facts of the instant case. (Even had he been a mere gratuitous licensee, however, the standard of care was not met, See § 342, Restatement of Torts.)

It is undisputed that the Golf Club and the Jaycees knew of the condition existing there and invited plaintiff upon the premises without doing anything to alter the condition or to warn plaintiff. Certainly it was for the jury to say whether or not the condition involved an “unreasonable risk” and whether or not the co-adventurers had reason to believe that plaintiff would not discover the condition or realize the danger.

It is no answer to urge that the Golf Club and Jaycees had no right to alter the physical conditions which existed at the course. They cannot absolve themselves from liability for injuries caused to persons whom they invited on the premises by any such simple device. No exception is made in the above stated rule of law which would permit proprietors to invite and admit patrons to premises they possess and then contend they had no duty for the safety of said patrons because they had no *right* to alter the premises. Another reason why this contention must fail

is that one of the most significant contributing factors to the hazard was the placement of the scoreboard. This board was constructed for the express purpose of the joint enterprise in putting on the Utah Open. A jury might well have found, and we think would be compelled to find, that the placement and maintenance of this scoreboard was a decision to be made by the general tournament committee and a matter over which said committee had the right of supervision, direction and control.

It cannot be reasonably concluded, as a matter of law, that the co-adventurers had no responsibility for conditions existing in the building. Their operation required the use of the building—particularly the locker rooms, rest rooms and golf shop. The securing of change to pay a caddy as plaintiff was doing was a necessary activity for any tournament. When golfers were invited to the tournament the invitation necessarily extended to the clubhouse as well as the greens and hallways.

As a second reason for the liability of the Golf Club and the Jaycees, we submit that there was ample evidence from which the jury could have found that Riley was acting for said defendants as an agent in the placement of the scoreboard. We have already shown why the placement of the scoreboard over the glass wall of the hallway constituted negligence. Riley testified that the board was made for the “express purpose of using in the Utah Open Tournament” (R. 260). The placement of the board was taken up by Riley with Kipp and Gilbert, the other members of the general committee, as one of the items of business of the tournament (R. 243, 244, 309). Although Kipp did not

recall the discussion Gilbert did remember a discussion as to the placement of the sign (R. 309).

It would appear that the actual location of the sign was made more as a result of Riley's judgment than that of the other two general chairmen. The court should note that Riley was making a number of decisions after having consulted the co-sponsors. The reason for this is explained by Riley himself as follows:

(R. 236)

"They were using me of my knowledge and experience in running open tournaments."

The very fact that Riley was one of the three members of the general committee seems to us conclusive evidence that he was acting for said committee and said co-sponsors in performing work in furtherance of the tournament. It is undisputed that what he did was with the full knowledge and consent of the other two committee members. The very placement of the sign was a task done in furtherance of the enterprise conducted by the co-adventurers. We think that this court will agree with us that there is sufficient evidence from which a jury might find that Riley was acting as agent for the enterprise and for the co-adventurers in placing the scoreboard where it was placed.

It follows that the liability of the defendants Meadow Brook Golf Club and Salt Lake Jaycees was an issue which should have been submitted to the jury.

CONCLUSION

From the foregoing we submit that the trial court erred in dismissing the complaint and that the case should be remanded to the district court for a new trial to determine the liability of each of the defendants.

Respectfully submitted,

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