

1960

James R. Henry v. Washiki Club, Inc. : Brief of Appellant

Utah Supreme Court

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Case No. 9249

IN THE SUPREME COURT

**of the
STATE OF UTAH**

FILED
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Clerk, Supreme Court, Utah

JAMES R. HENRY,

Appellant,

VS.

WASHIKI CLUB, INCORPORATED,

UNIVERSITY OF UTAH *Respondent.*

JUL 10 1967

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Appellant's Brief

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TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	1
STATEMENT OF POINTS	5
ARGUMENT	6
POINT 1 THE ISSUE OF DEFENDANT'S NEGLIGENCE WAS ONE OF FACT THAT SHOULD HAVE BEEN SUBMITTED TO THE JURY, AND THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MO- TION FOR SUMMARY JUDGMENT	6
POINT II THE TRIAL COURT ERRED IN FAILING TO SUBMIT THE ISSUE OF CON- TRIBUTORY NEGLIGENCE ON THE PART OF THE PLAINTIFF TO A JURY, AND IN ITS GRANTING OF DEFENDANT'S MO- TION FOR SUMMARY JUDGMENT	11
POINT III PLAINTIFF'S STATUS AS TO WHETHER HE WAS AN INVITEE OR LI- CENSEE WAS A QUESTION OF FACT FOR THE JURY, AND THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDG- MENT TO THE DEFENDANT	18
POINT IV THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THAT THE FACTS BEFORE THE COURT PRESEN- TED TRIABLE ISSUES	24
CONCLUSION	26

TABLE OF CASES CITED

Bass vs. Hunt, 100 P 2d 696	7, 8
-----------------------------------	------

	Page
Campbell vs. Weathers, 11 P 2d 72 77, 78.....	7, 8
Flanigan vs. Madison Plaza Grill, Inc., 20 Atlantic 2d 38	14, 15, 16
Hall et. ux. vs. Boise Payette Lumber, 125 P 2d 311, 313	16, 17
Hectus vs. Chicago Transit Co., 122 N. E. 2d 587, 589, 590	19, 20
Martin vs. Fox West Coast Theatres Corporation, 108 P 2d 29, 32	12
Martin vs. Jones, 253 P 2d 359, 362.....	9, 10, 11
Mc Lain vs. Haley, 207 P 2d 1013, 1014.....	25
Montgomery vs. Allis-Chalmers Mfg. Co., 164 S. W. 2d 556, 557, 558	22, 23, 24
Moore vs. Miles, 158 P 2d 676, 677, 678	13, 14
Palmer vs. Boston Penny Savings Bank, 17 N. E. 2d 889, 902	21, 22
Peckham vs. Ronrico Corporation, 7 F.R.D. 328.....	25
Petersen vs. Alkema et. ux. 261 P 2d 175, 177.....	25
Stickle vs. Union Pacific Railroad Co., 251 P. 2d 867, 870	17, 18

TEXTS CITED

Harper and James, Law of Torts, Vol. 2 P 1486.....	21
Restatement of Torts, Section 343-b	8
Restatement of Torts, Section 343-d	8

IN THE SUPREME COURT of the STATE OF UTAH

JAMES R. HENRY,

Appellant,

vs.

WASHIKI CLUB, INCORPORATED,

Respondent.

APPELLANT'S BRIEF

STATEMENT OF FACTS

This is an appeal from an Order of the District Court of Weber County granting Defendant's Motion for Summary Judgment. In the Memorandum filed by Defendant at the time the Motion was heard, Defendant contended:

1. That under the facts and circumstances of the case there was no duty on the part of the Defendant to Plaintiff, and therefore Defendant was not guilty of any negligence.

2. That Plaintiff was guilty of contributory negligence and assumption of risk as a matter of law.

The facts of the case are as follows:

The Plaintiff is an industrial tool designer (Jim Henry Deposition Page 11), who at the time of sustaining his injuries was employed in Ogden, Utah, for Tool Research Company in this capacity (Jim Henry Dep. 2 and 11). On April 24, 1959, the Plaintiff worked his regular shift which ended at about 5:00 p. m. (Jim Henry Dep. P 18); he left work and arrived home at about 6:00 P.M. (Jim Henry Dep. P 18). He and his wife had previously made arrangements to go to dinner with two other men who were employed in a similar capacity by his employer (Jim Henry Dep. P 18). Plaintiff, upon arriving home, changed clothes; thereafter he went to the State Liquor Store where he purchased a pint of whiskey and then returned home (Jim Henry Dep. P 18). About 7:30 P.M., Mr. Phipps, (Jack Phipps Dep. P 3), a fellow employee, arrived at Plaintiff's residence; and Plaintiff, his wife, and Mr. Phipps went to the Combo (Kitty Henry Dep. P 4), where they met a Mr. Redman (Jack Phipps Dep. P 4), also a fellow employee (Kitty Henry Dep P 4). While at the Combo, Plaintiff had one mixed drink which he estimated contained about one ounce of whiskey (Kitty Henry Dep. P 5, Jim Henry Dep. P 20-21, Jack Phipps Dep. P 4). The four people then went to Mr. Phipps' apartment while Mr. Phipps changed clothes (Kitty Henry Dep. P 21); the group then went to Graycliff Lodge in Ogden Canyon, Utah, for dinner, arriving at about 9:30 P.M. (Kitty Henry Dep. P 7, Jim Henry Dep. P 22). While they were waiting to be served, Plaintiff had one mixed drink (Jack Phipps Dep. P 7, Kitty Henry Dep. P 7, Jim Henry Dep. P 23). At Grey-cliff Lodge, Plaintiff had a large steak dinner (Jack

Phipps Deposition P 6-8), after which the group proceeded to the Combo, arriving there shortly before 12 midnight (Kitty Henry Dep. P 10 and 12, Jim Henry Dep. P 24). Plaintiff and his friends were at the Combo until 12:45 A.M. (Jim Henry Dep. P 27), and during that time he had two mixed drinks (Jim Henry Dep. P 22).. The group then walked from the Combo to the Washiki Club located in the basement of the Ogden Hotel (Kitty Henry Dep. P 14, Jim Henry Dep. P 27). On arriving at the Washiki Club, each person paid \$1.00 for a so-called membership card, valid for that particular evening only (Jim Henry Dep. P 28). While at the Washiki Club, Plaintiff had one or possibly two mixed drinks (Kitty Henry Dep. P 15 and 16, Jim Henry Dep. P 22). Between 1:30 to 1:45 A.M., Plaintiff and his wife made the suggestion that they go home, and Plaintiff stated that he wanted to go to the restroom before leaving (Kitty Henry Dep. P 16 and 17, Jim Henry Dep. P 32 and 33). The description of the physical layout of the Washiki is necessary for an understanding of the events that followed. The bar in the club is located in the Northeast corner of a large room containing tables and a small dance floor. Over the bar the ceiling is lowered to give a canopy like effect. Directly to the North of the bar are located the Men's and Ladies' rest rooms. There is a small neon sign designating these rest rooms, but this sign is obscured by the canopy over the bar from the view of persons sitting at most of the tables in the larger room. It is impossible to see the rest room signs from the tables near the rear of the room (McKinley Dep. P 6 and 12). Plaintiff and his wife were seated at tables near the

rear, or the south side of the room (Jim Henry Dep. P 29 and 30). On the south wall of the room is a neon sign which says "DINING ROOM OPEN". On the night in question, this sign was not lighted (McKinley Dep. P 6). The lighting in the main room was very dim (Jim Henry Dep. P 33, Affidavit McKinley P 7 and 8). Underneath the "DINING ROOM" sign were two swinging doors (McKinley Dep. P 12) leading into a room, now used as a store room, which room had previously been used as a kitchen (McKinley Dep. P 6). This room was lighted by a single globe of about 25 watts intensity, (McKinley Dep. P 7 and 8) located in the most easterly end of the room. In this store room was a stack of beer and soda water cases, a large galvanized sink that ran part way across the room which served as sort of a partition dividing the room into two parts, a service entrance opening to the alley, and a door leading to a sump pump located down a flight of concrete steps (McKinley Dep. P 9).

Plaintiff had been to the Washiki Club on one previous occasion about six months previous to the night in question (Kitty Henry Dep. P 14, Jim Henry Dep. P 28). He testified that he had no recollection of using the rest room at that time (Jim Henry Dep. P 32).

Plaintiff got up from his table and walked toward the double doors at the back of the room, assuming that these doors led to the restroom (Jim Henry Dep. P 33). Plaintiff passed through the doors; he then walked through a passageway in the store room and made a turn, and this was the last he remembered until

he recalled crawling up a stairway (Jim Henry Dep. P 34). In the fall down the stairs, the Plaintiff received a severely cominuted fracture of the right wrist (Kitty Henry Dep. P 22, Doctor's statement,) together with bruises and contusions. The fracture of the right wrist has resulted in a permanent disability for Plaintiff. His work consisted of doing highly technical detailed engineering drawings related to specialized machine tool design. As a result of the injuries he sustained in this fall, it is now impossible for him to draw at all (Jim Henry Dep. P 48).

STATEMENT OF POINTS

POINT I

THE ISSUE OF DEFENDANT'S NEGLIGENCE WAS ONE OF FACT THAT SHOULD HAVE BEEN SUBMITTED TO THE JURY, AND THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

POINT II

THE TRIAL COURT ERRED IN FAILING TO SUBMIT THE ISSUE OF CONTRIBUTORY NEGLIGENCE ON THE PART OF THE PLAINTIFF TO A JURY, AND IN ITS GRANTING OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

POINT III

PLAINTIFF'S STATUS AS TO WHETHER HE WAS AN INVITEE OR LICENSEE WAS A QUESTION OF FACT FOR THE JURY, AND THE TRIAL

COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANT.

POINT IV

THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THAT THE FACTS BEFORE THE COURT PRESENTED TRIABLE ISSUES.

ARGUMENT

POINT I

THE ISSUE OF DEFENDANT'S NEGLIGENCE WAS ONE OF FACT THAT SHOULD HAVE BEEN SUBMITTED TO THE JURY, AND THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

Upon a motion by the defendant for Summary Judgment, the evidence of the plaintiff should be taken as true, and all reasonable inferences and presumptions indulged which tend to support the position of the plaintiff. The question must be submitted to the jury if the facts are such that reasonable minds might reach different conclusions thereon.

Plaintiff bases his claim of negligence on the part of the defendant on the following: Defendant knew that prior to plaintiff's injury that other persons had mistakenly assumed that the doors leading to the kitchen and to the stairway, where plaintiff was injured,

were doors leading to restrooms (McKinley Dep. P 7, 8). Despite the fact that defendant had actual knowledge of the likelihood that a patron would assume that the doors through which plaintiff passed led to restrooms, defendant took no action to lock the doors; to bar the particular door leading to the cellar; or to post a notice of warning of any kind on the doors until after plaintiff's injury (McKinley Dep. P 7).

Is it not reasonable to assume that the exercise of due care on the part of the defendant would require the defendant, who had actual knowledge of the fact that customers were prone to assume that the door in question led to restrooms, to at least post a sign stating "EMPLOYEES ONLY", "KEEP OUT", "NO ADMITTANCE", "DO NOT ENTER", or "PRIVATE", or any words that would give a patron an indication that the doors did not lead to a portion of the premises which a patron might normally be expected to have access to?

The law is well settled that when an owner or occupier of business premises has reason to apprehend danger to a patron from a particular situation on the premises, and that there is a possibility of injury to the patron from such situation, then in such event, the question as to whether or not the occupier had violated his duty toward the patron becomes a question of fact for a jury to be determined upon the evidence.

In the case of *Campbell vs. Weathers*, 111 P 2d 72, 77, 78, the Supreme Court of Kansas quoted the following language from *Bass vs. Hunt*, 100 P 2d 696, with approval:

"It is the duty of a restaurant keeper to

keep in a reasonably safe condition the portions of his establishment where his guests may be expected to come and go, including a necessary water closet and a passage thereto, and it cannot be said that as a matter of law that there was no actionable negligence in his failure to sufficiently light the passageway or to warn a guest of an unlighted stairway covered by a trap door which was not closed. * * * Appellant had the right to assume if the hallway was not in a reasonably safe condition warnings signs would be erected to appraise him of lurking danger, or that he would have been otherwise notified concerning it."

Section 343-d, The *Restatement of Torts* sets forth the duty owed a business visitor:

"WHAT BUSINESS VISITOR ENTITLED TO EXPECT: A business visitor is entitled to expect that the possessor will take reasonable care to ascertain the actual condition of the premises and, having discovered it, either to make it reasonably safe by repair or to give warning of the actual condition and the risk involved therein."

Section 343-b of the *Restatement of Torts* deals with the law in regard to a business visitor's use of the wrong door while on the business premises.

"If the possessor has intentionally or negligently misled the visitor into reasonable belief that a particular passageway or door is an appropriate means of reaching the business area the visitor is entitled to the protection of a business visitor while using this passageway or door."

It is certainly reasonable to assume that rest rooms

for patrons are part of the business area of a night club. Plaintiff contends that an examination of all of the facts and circumstances of his injury clearly indicates that he was misled in his search for a restroom by the negligence of the defendant.

The question of how far the business area extends, and the question of reasonable action on the part of a business visitor were before the Utah Supreme Court in the case of *Martin vs. Jones*, 253 P 2d, 359 (Utah 1953). In this case, the plaintiff entered Defendant's drugstore to make some purchases. Except for the bottled liquor counter, prescription counter, and soda fountain, customers were allowed to pick up and handle merchandise in the store without the assistance of the clerks. Plaintiff's evidence showed that he purchased razor blades and tablets for which he had paid; he asked for an automatic pencil and was told by the clerk that they were displayed on a shelf by the liquor counter. Plaintiff then proceeded to the rear of the store. He stated that he observed no signs barring his admittance, and that he saw nothing unusual about the floor by the counter, although the floor was shadowy. As he reached up on tip-toe to remove a display card from the shelf about seven feet above the floor, he took a step sideways on what appeared to him to be the floor and suddenly fell down a dumb-waiter shaft into the basement eight or ten feet below. Defendant's employees testified that when the clerks waited on plaintiff, he said nothing about wanting a pencil, and the clerks went on serving other customers. One clerk testified that when she next observed appellant, he was standing behind the liquor counter with a display card of pencils

in his hand. She went over to him and asked if she could serve him. He removed a pencil from the card and turned to place the card on the shelf; and in doing so fell down the shaft. The clerk said she did not tell him that he was not allowed behind the liquor counter. She also said that the lighting in the store made the open shaft visible, and she thus assumed plaintiff could see it, so she did not warn him of the danger. Defendant was able to prove that at the entrance to the rear of the counter was posted the sign "No Admittance - Employees Only". The case went to a jury, and the jury returned a verdict No cause of Action. Plaintiff appealed and the Court reversed on the ground of error in the instructions. The Supreme Court in reversing the judgment and ordering a new trial held at page 362:

"A jury could find that Mrs. Cannon (defendant's clerk) had reason to believe that the Appellant did not have notice of and would not discover a hazard on the floor behind the counter. Assuming that she thought that he read the 'No Admittance' sign as he made his way behind the counter, she could be charged with the realization that he had no reason to believe that his admittance was barred because of hazards lurking, but because the management did not want liquor bottles tampered with, being under bond to the State for their strict account. That there should be an open hole behind a counter in a modern store where clerks walk seems certainly extraordinary, raising a jury question as to whether the respondent's employees had reason to believe that a customer who was unfamiliar with that part of the store and who had his at-

tention focused on a display card seven feet above the floor would not see an open hole in the floor.”

It is respectfully submitted that there was ample evidence on the question of negligence on the part of the defendant to require the court to submit that issue to a jury for determination, and that the trial court erred in granting defendant’s Motion for Summary Judgment.

POINT II

THE TRIAL COURT ERRED IN FAILING TO SUBMIT THE ISSUE OF CONTRIBUTORY NEGLIGENCE ON THE PART OF THE PLAINTIFF TO A JURY, AND IN ITS GRANTING OF DEFENDANT’S MOTION FOR SUMMARY JUDGMENT.

Defendant has contended that Plaintiff was guilty of contributory negligence as a matter of law. This contention is apparently based upon the claim that there was nothing which particularly indicated to Plaintiff that the doors through which he passed led to restrooms. This contention of the Defendant ignores the testimony of McKinley, the operator of Defendant’s premises (McKinley Dep. P. 8), as well as the testimony of two of Defendant’s employees, Nixon, the head awiter, and Lemmon, a waiter (Nixon Dep. P. 10, 11; Lemmon Dep. P. 4, 5), all to the effect that other persons have made the same assumption that plaintiff made regarding where the doors in question led. The cited portions of the depositions indicate clearly that despite defendant’s knowledge of the erroneous assumptions frequently made by its patrons concerning the location of the restrooms, that Defendant still did nothing to provide any form

of warning to its patrons. The additional fact that Defendant's manager knew that from the place where Plaintiff was sitting it would be impossible for him to see the sign which indicated the location of the restrooms must also be considered (McKinley Dep. P 6). The reasonableness of plaintiff's action in seeking a restroom should also be regarded in the light of the actions of Carl Gillis as shown by his Affidavit. Gillis sought a restroom in the identical manner in which Plaintiff sought one, at a time shortly after Plaintiff passed through the doors in question.

Plaintiff's position in regard to contributory negligence is well stated in the case of *Martin vs. Fox West Coast Theater Corportion*, 108 P 2d 29, which states as follows at page 32:

“Where different conclusions may be reasonably drawn by different minds from the same evidence the decision must be left to the triers of the fact, and in the instant case it is clear to us that whether the situation in which he (plaintiff) found himself was such as to impress upon the mind of the (plaintiff) the danger incident to going around the front end of a parked automobile was for the jury to decide as an issue of fact. The question of contributory negligence is always one of fact for the jury to decide under proper instructions, except in those cases in which, judged in the light of common knowledge and experience, there is a standard of prudence to which all persons similarly situated must conform. It is only in these last named cases that failure to adhere to that common standard is as matter of law of contributory negligence.”

The Utah case of *Moore vs. Miles*, 158 P 2d 676 (Utah), deals with a fact situation not dissimilar to the one now before the Court. In the Miles case the Plaintiff was a guest at Defendant's hotel, and she left her room to go to her car in the parking lot maintained by the hotel to the west of the building. Extending east and west across the building on the same floor as Plaintiff's room was a hallway, the east end of which turned down into the lobby by an "L" stairway. At the end of the hallway was a short flight of steps leading directly to the door leading to the parking lot. Plaintiff fell down these steps and sustained a fractured arm. The Plaintiff recovered judgment. Defendant appealed on the contention:

a. That there was not sufficient evidence to take the case to the jury.

b. Plaintiff was guilty of contributory negligence as a matter of law.

As to the matter of evidence sufficient to take the case to the jury, the Court held that under the laws of the State of Utah, the defendant had a duty of keeping the hallways of the hotel properly lighted, and that since there was evidence of failure to keep them properly lighted, the question of the Defendant's negligence was one for the jury to determine.

On point b., the defendant contended that the testimony showed that the west end of the hall was so dark that plaintiff could not see the stairs; that plaintiff was walking slowly feeling ahead with her foot; that she lost her balance and fell down the short flight of steps to the doorway; and that this action on her part

made her guilty of of contributory negligence as a matter of law. Defendant further argued that since Plaintiff had a choice of going down the stairway to the lobby which was a well lighted passageway, or going down the west stairway which was dark, that she was negligent as a matter of law because she chose the route which proved to be unsafe. In answering the question of contributory negligence the court said at page 677:

“The next question for consideration is whether Plaintiff was guilty of contributory negligence as a matter of law in proceeding down the darkened hallway knowing that the stairway was at the end thereof. *In this jurisdiction we are committed to the doctrine that the question of contributory negligence is one for the jury, different conclusions may be reasonably drawn by different minds from the same evidence.*” (emphasis ours)

The court further said at page 678:

“In view of the foregoing authorities and the long established rule in this jurisdiction, that contributory negligence is a question for a jury, we hold that the issue of contributory negligence was properly submitted to the jury by the trial court.”

The case of *Flanigan vs. Madison Plaza Grill, Inc.* 30 Atlantic 2d 38, dealt with a mistake of the Plaintiff in regard to the door which led to the restroom. The facts in this case are as follows: The Plaintiff who was previously unfamiliar with defendant's restaurant entered between 9 and 10 P.M.; she left her companions in a booth and proceeded down a dimly lighted corridor

which a sign indicated as the way to the restroom and telephones. She noted a sign over a door indicating that it was the men's room; adjacent thereto was another door which was slightly ajar through which a light showed, and which was marked "Private"; but plaintiff testified she did not notice the sign marked "Private". Plaintiff stepped through this door and fell down the cellar steps, and in the fall she was injured.

The Court held that the question as to whether she used reasonable care was one of fact. The court stated at page 39:

"The location and construction of these rooms off the corridor, which were such that it was not an unreasonable assumption on the part of the plaintiff, entering the premises for the first time that the door which she opened was intended for ladies in view of the circumstances that she did not observe the sign 'Private' on this door when she opened it".

The Court further held that if she mistakenly thought she was entering the ladies' room, it could not be assumed that she expected to find a staircase there.

"She had no duty to make constant observation or to proceed with more than reasonable care, and that whether or not she proceeded with reasonable care was a question of fact for the Jury."

A Motion for a directed verdict was properly refused because the court held the evidence showed that Plaintiff had not exceeded her invitation, and that she was not guilty of contributory negligence as a matter of law. The court further held that contributory negli-

gence does not automatically follow because the accident might have been avoided. The reasonableness of her action under the circumstances was held to be a question of fact for the jury.

In the case of *Hall et ux. vs. Boise Payette Lumber*, 125 P 2d 311, the Supreme Court of the State of Idaho stated as follows on a matter closely allied to the matters before the court in the instant case, quoting at page 313:

“Whether maintaining an unlocked door swinging in and over a precipitous stairway down into a dark basement; whether maintaining such a door without warning sign thereon, or any hint that the door led into a basement and not into another room; whether maintaining such a door opening into a dark basement abruptly descending from the threshold to the first step; whether the absence of a railing on the east side of the stairway, leaving that side without anything to catch hold of, with a cement well on the west side; and, whether the failure of the manager to warn Mrs. Hall constituted negligence on the part of appellant, and whether the acts and conduct of Mrs. Hall constituted contributory negligence, *were questions for the jury.* *Stearns v. Graves*, 62 Idaho, 111 P 2d 822, 884; *Byington v. Horton*, 61 Idaho 389, 401, 102 P 2d 652, 657; *Asumendi v. Ferguson*, 57 Idaho 450, 465, 65 P 2d 713.” (Emphasis ours)

“Furthermore, conceding, but not deciding, that one person might reasonably draw the conclusion that the maintenance of the door in question in the circumstances hereinabove stated did not constitute actionable negligence, another might, with equal reason to say the least, conclude it constituted actionable negligence. This

court held in *Fleenor v. Oregon Short Line R. Co.*, 16 Idaho 781, 102 P 897;

“Where the evidence on material facts is conflicting, or where on undisputed facts reasonable and fair-minded men may differ as to the inferences and conclusions to be drawn, or where different conclusions might reasonably be reached by different minds, the question of negligence is one of fact to be submitted to the jury”.

Denton v. City of Twin Falls, 54 Idaho 35, 28 P 2d 202; *Call vs. City of Burley*, 57 Idaho 69, 62 P 2d 101; *Bennett v. Deaton*, 57 Idaho 752, 767, 68 P 2d 895.”

The Utah Supreme Court in the case of *Stickle vs. Union Pacific Railroad Co.*, 251 P 2d 867 at Page 870, 122 U. 477, discussed the question of a finding of contributory negligence as a matter of law as follows at Pages 870, 871:

“Contributory negligence is an affirmative defense and the burden rests upon the defendant to prove it by preponderance of the evidence. * * * If evidence were such that reasonable men may fairly say that they are not convinced from a preponderance of the evidence that he was guilty of negligence, the court could not rule that he was negligent as a matter of law and take the case from the jury. * * *

“In our democratic system, the people are the repository of power whence the law is derived; from its initiation and creation to its final application and enforcement, the law is the expression of their will. The functioning of a cross-section of the citizenry as a jury is the method by which the people express this will in the ap-

plication of law to controversies which arise under it. Both our constitution and statutory provisions assure trial by jury to citizens of this state * * *

“A very fine statement of the proper attitude toward this right was expressed for this court by the late Mr. Justice Frick in *Newton vs. Oregon Short Line Railroad Co.* where, in referring to the question of submitting plaintiff’s contributory negligence to a jury, he made these statements: ‘The Court can pass upon the question of negligence only in clear cases. * * * unless the question of negligence is free from doubt, the court cannot pass upon it as a question of law * * * if * * * the court is in doubt whether reasonable men, * * * might arrive at different conclusions, then this very doubt determines the question to be one of fact for the jury and not one for law for the Court.’”

Plaintiff submits that it is certainly reasonable to assume that fair minded men may arrive at different conclusions from the evidence of plaintiff’s actions on the night of his injury, and that, therefore, the matter should have been submitted to the jury, and the trial court erred in granting the motion for Summary Judgment.

POINT III

THE QUESTION AS TO WHETHER PLAINTIFF WAS AN INVITEE OR LICENSEE UNDER THESE FACTS PRESENTED A QUESTION OF FACT FOR THE JURY, AND THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANT.

Defendant does not dispute that Plaintiff came upon its premises as a business visitor, and that he was thereby entitled to be regarded as an invitee. Defendant contended to the trial court that Plaintiff, in leaving the area of the premises where the tables and chairs were located and in passing through the unmarked doors in search of a restroom, lost his status as an invitee, and he thereby became a licensee. Plaintiff would lose his status as an invitee only if his action in seeking a restroom in the manner he did was unreasonable under all of the circumstances. In considering what was reasonable under the circumstances, one must give regard to the fact that the sign indicating the location of the restrooms was not visible from the area where Plaintiff was sitting. (McKinley dep P. 6); that Plaintiff had been in Defendant's establishment only once before, and that he did not recall using the restroom at that time; and that there was no sign indicating that the doors through which Plaintiff passed led to an area that was restricted in any way (McKinley Dep P 6 & 7). In fact, the unlighted neon sign above the door stated "Dining Room OPEN".

In the case of *Hectus vs. Chicago Transit Company*, Illinois, (1954) 122 NE 2d 587, the Court in discussing the facts that bore on Plaintiff's status as an invitee or a trespasser said at pages 589, and 590:

"With respect to Defendant's contention that Plaintiff was a trespasser, it argues that Plaintiff was roaming about on a part of Defendant's premises where he had no right to be.. This argument is based on the theory that the men's washroom in the Loop was intended for the ex-

clusive use of defendant's employees. The evidence on this point is conflicting. There was evidence, however, tending to prove that the washroom was used by the public. A police officer testified that he used the men's washroom on many occasions at night for a period of two years prior to the accident; and that he saw persons not employed by the Defendant use it, and that he never found the door locked. Motorman Corcoran admitted that he 'gave lot of guys' other than employees of the defendant 'favors by opening the door for them'. Another Motorman stated that 'the washroom was used by streetcar passengers and other people.

Whether plaintiff was an invitee presented a question of fact for the jury to determine. We think the evidence is ample to warrant the finding that the Plaintiff was an invitee. See Eliguth vs. Blackstone Hotel, Inc. 408 Ill. 343, 97 NE 2d 290; Larson vs. Illinois Central Railway Co., 2 Ill. App 2d, 102, 118 NE 2d 886." (emphasis ours).

Whether or not an invitee exceeds the limits of his invitation is dependant upon the facts of each case. If the use of the premises by the injured person is within the bounds of the use with which the owner may reasonably contemplate, then in such a case the invitee is within the limits of his invitation despite the owner's contention that the invitation did not extend to the particular area where the injury occurred. In the case now before the Court the knowledge of the operator and manager of the Defendant's premises of the frequency with which the doors concerned had been mistaken for doors leading to restrooms, coupled with the

failure of the Defendant to warn of the nature of the area to which the doors led, strongly support Plaintiff's contention that he was still within the area of his invitation when he sustained his injuries. Harper and James in their work on *The Law of Torts*, Vol. 2, at page 1486, discuss the law question now before the court and state as follows:

“If, on the other hand, a defendant arranges part of his premises, leading a visitor reasonably to think they are included in the area of invitation, he will be held as an invitor as to that part even though he did not mean to invite plaintiff to it.”

The question of a Plaintiff's making an erroneous choice of doors, and receiving injuries resulting from such error was discussed by the Massachusetts Supreme Judicial Court in the case of *Palmer vs. Boston Penny Savings Bank*, Mass. 17 NE 2d 899. In this case the facts were as follows: Plaintiff parked his car at a public garage intending to call for it later that night; he received a claim check from the attendant and left by the same door he had entered. Plaintiff had never been to the garage before. This garage had three entrances, a large center door for motor vehicles, and on each side of the center door and a few feet away an ordinary sized door. The westerly of these ordinary sized doors led directly into the garage; the easterly door led to a stairway which went down to a boiler room. Plaintiff returned to the garage late at night, found the large center door locked, and he erroneously assumed that the easterly door was the door he had used previously; he opened the door, and fell down a dark

stairway. The Court held at page 902:

“The main question is whether or not Plaintiff could have been found to have been an invitee in using the easterly door as an entrance to the place where his automobile was stored. It is clear there was no express invitation for him to do so. But the jury could consider the location of the three doors and the apparent purpose for which they were intended. They could find that the center door was locked at a time when the Defendant’s premises were not closed to business, and that it was reasonable to expect, in the absence of any smaller door in the center door which would permit a person to enter the garage, that another means of ingress was available for the use of persons who came to get their automobiles. * * * We cannot say under that such circumstances, with others appearing in the evidence, when considered in conjunction with each other, were not sufficient fairly to constitute a representation that the Easterly door was intended as an entrance to the garage. The plaintiff was entitled to rely to a reasonable extent upon appearances even though he misjudged the actual situation. The fact that this door was left unlocked did not of itself constitute an invitation to enter, but the Plaintiff was entitled to have this fact viewed in the light of all the attending circumstances. If the jury could find, as we think they could, that the Plaintiff was an invitee at the time he was injured, then it is clear that the determination of Defendant’s negligence was properly left to the jury.”

In the Texas case of *Montgomery vs. Allis-Chalmers Mfg. Co.*, 164 S. W. 2d 556, the plaintiff and her husband entered the defendant’s place of business to discuss the

purchase of farm implements. While plaintiff's husband was conducting his business with defendant, plaintiff desired to use the ladies rest room. There was no one present in the display room from whom she could inquire as to the location of the rest room. Plaintiff mistakenly entered an unlocked, unmarked door which led to the basement, believing this door to be the entrance to the ladies rest room she was seeking. She fell down the stairs to the basement and was injured. The trial court granted judgment for defendant; plaintiff appealed and was granted a new trial. In discussing the questions of negligence on the part of the defendant and contributory negligence on the part of the plaintiff the Court stated at 557, 558:

“However, under the liberal indulgence of inferences, implications and intendments in such cases, we are of opinion that, whether or not, in the exercise of reasonable care, the defendant corporation should have anticipated that a person situated as was plaintiff's wife, minus the named precautionary measures, would likely mistake and enter the unlocked and unnamed door under the belief that it opened in to the ladies' restroom, was a question of fact and not one of law; nor do we think it can correctly be said, as a matter of law, that she was guilty of contributory negligence.

“The doctrine we think applicable to the situation presented, is announced in 38 *Amer. Jur.* (subject Negligence), p 796, 135, as follows: ‘It is well settled that where a store, office building, or similar business establishment to which the public is impliedly invited has a door leading to a cellar, elevator shaft, or other dangerous

place, which is left unfastened, and which, from its location and appearance, may be mistaken for a door which a member of the public on the premises is entitled to use, the proprietor is liable to a person who by mistake passes through that door and is injured.' ”

Under the fact situation presented to the court in the instant case, any question as to whether the plaintiff was an invitee or a licensee at the time of sustaining his injuries was a proper question of fact for the jury to determine, and the Trial Court was in error in granting Defendant's motion for summary judgment.

POINT IV

THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THAT THE FACTS BEFORE THE COURT PRESENTED TRIABLE ISSUES.

Summary Judgment is a drastic remedy and one that should not be granted except upon a clear showing that there were no issues as to any material facts. Plaintiff earnestly contends that where the defendant failed to warn its patron of the danger of its open stairway, where the evidence was clear that Defendant had knowledge of the propensity of patrons to seek a restroom in the area back of the dining room that negligence on the part of the defendant became an issue that was entitled to be submitted to the jury. Likewise the plaintiff was entitled to have the question of the reasonableness of his action in seeking a rest room in the rear of the premises submitted to the jury.

It is well settled that to authorize the granting of

a Summary Judgment, the complete absence of any genuine issue of facts must be apparent, and all doubts thereon must be resolved against the party moving for a Summary Judgment.

The following language from *Peckham vs. Ronrico Corporation*, 7 F.R.D. 328 was cited with approval by the New Mexico Supreme Court in *McLain vs. Haley*, 207 P 2d 1013 at page 1014:

“(1) That Rule 56 should be cautiously invoked to the end that the parties may always be afforded a trial where there is a bona fide dispute of facts between them.

“(2) That a litigant has a right to a trial where there is the slightest doubt as to the facts.”

The Court at the hearing on a Motion for Summary Judgment should not attempt to try the issues between the parties but should merely ascertain whether in fact there is an issue.

In the case of *Petersen vs. Alkema et ux*, 261 P 2d 175, the Utah Supreme Court said at Page 177:

“While in a given case a tool may be so simple and the employee so familiar with it that the Court would be correct in holding as a matter of law that he cannot recover, the case at bar is not such a case, but one which *the court should* have heard all the evidence before determining whether there was a breach of duty by the plaintiff so as to nullify a possible breach of duty by the Defendant.” (Emphasis ours).

Based on the foregoing grounds the Supreme Court

vacated the action of the trial court in granting summary Judgment to the Defendant and remanded the cause for trial.

It is submitted that depositions and affidavits are a dangerous and unsatisfactory substitute for oral testimony before a court and jury. The right of examination and cross examination *in the presence of the triers of the fact* has often been acclaimed as one of the most valuable attributes of the common law system.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Summary Judgment in favor of the defendant should be reversed, and the case remanded to the trial court for trial.

Respectfully submitted,

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