

1960

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

Utah Supreme Court

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Case No. 9249

IN THE SUPREME COURT
of the
STATE OF UTAH

FILED
AUG 3 1960

JAMES R. HENRY,

Appellant,

Clerk, Supreme Court, Utah

—VS.—

UNIVERSITY OF UTAH

WASHIKI CLUB, INCORPORATED,

Respondent.

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RESPONDENT'S BRIEF

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IN THE SUPREME COURT
of the
STATE OF UTAH

JAMES R. HENRY,

Appellant,

—vs.—

Case No.
9249

WASHIKI CLUB, INCORPORATED,

Respondent.

RESPONDENT'S BRIEF

THE FACTS

In this brief we refer to the parties as they appeared in the court below.

The Statement of Facts set forth in appellant's brief is not complete and omits certain salient facts which were relied upon by the court in arriving at its decision in defendant's favor. We, therefore, deem it necessary to supplement the Statement of Facts in appellant's brief with the following:

Defendant operates a night club or tavern in the basement of the Ogden Hotel in Ogden. (McKinley deposition, p. 4.) The club consists essentially of a bar, an orchestra stand, and a dance floor and table and chairs for patrons. The main room is approximately 40 feet by 90 feet in dimensions. (McKinley deposition, p. 5.) Rest rooms for both male and female patrons are situated at one end, being the same end as that where the bar is located. (McKinley deposition, pp. 5-6) The tables and chairs provided for the accommodation of patrons are generally in the opposite end of the room. (Plaintiff's deposition, pp. 28-30.) Because of a low ceiling over the bar, the neon light identifying the men's rest room is not visible from most of the area occupied by the tables and chairs. (McKinley deposition, pp. 6-9.)

At the opposite end of the room from the rest rooms are two swinging doors. Over the swinging doors is a neon sign which says "Dining Room." This sign, however, was not illuminated on the evening of the accident and was not observed by plaintiff. (Plaintiff's deposition, p. 33.) At that time there was no other sign of any kind on or over the doors. (McKinley deposition, p. 7.) Through the swinging doors was an old kitchen room, which at the time of the accident was used by defendant for storage of beer, ice, and other supplies. (McKinley deposition, p. 6.) According to plaintiff's testimony there was no light whatsoever in this room. (Plaintiff's deposition, p. 63.) However, according to the testimony of McKinley it was lighted by a 25 watt globe for the

convenience of defendant's employees. (McKinley deposition, pp. 7-8.) In a corner of the storage room, diagonally opposite to the swinging doors, were two doors, one leading to a sump pump in the basement. (McKinley deposition, p. 9.)

As indicated in plaintiff's brief, on the evening of the accident plaintiff had gone on a party with a group of friends during which they had been drinking, eating and dancing. Although plaintiff attempted to minimize the drinking on his deposition, he admitted, when pressed, that he had had at least five and possibly as many as seven whiskey high balls during the course of the evening prior to the occurrence of the accident. (Plaintiff's deposition, p. 58.) According to the testimony of Phipps, about one-half of the contents of plaintiff's pint of Jim Beam had been consumed when he found the bottle the next day. (Phipps' deposition, p. 36.) This would indicate that plaintiff drank a half pint of whisky before the party returned the Combo, plus whatever he drank thereafter at the Combo and the Washiki Club. (From three to five more drinks.)

Although plaintiff had been in defendant's place of business on only one prior occasion and did not know of the location of the men's rest room, he did not make any inquiry of defendant's employees as to its location, but instead, undertook to locate it by his own search. (Plaintiff's deposition, p. 33.) Although there was nothing on or over the swinging doors to indicate or suggest

that they led to a rest room, plaintiff passed through them and into the kitchen or storage room. (Plaintiff's deposition, p. 33.) He testified that it was very dark, and there was no light, that he could barely see at all, and that he more or less felt or groped his way through the room or passageway until he made a turn. (Plaintiff's deposition, pp. 33-35.) He then, in some unexplained fashion, fell down a stairway. Although plaintiff had a cigarette lighter with him he did not avail himself of any light which it might afford. (Plaintiff's deposition, p. 34.)

In plaintiff's argument he states that defendant should have been aware of the danger of patrons passing into the kitchen or storage room and falling down the stairway because there had been previous similar episodes. However, the record does not so indicate. Although McKinley and defendant's employees, Nixon and Lemmon, admitted that on prior occasions a few patrons had gone as far as the swinging doors, they all testified that none had ever passed more than a step or two beyond them. Other patrons had promptly and properly recognized that the doors did not lead to rest rooms or any other facilities which defendant's patrons were invited to use. (Nixon deposition, pp. 10, 11, 12; Lemmon deposition, p. 5; McKinley deposition, pp. 8-9, 15.) They, therefore, returned immediately to the main portion of the premises and made inquiry of defendant's employees, rather than seeking the rest room at a place where it quite obviously could not be expected to be. (Nixon

deposition, pp. 10, 11, 12; Lemmon deposition, p. 5; McKinley deposition, p. 15.) The only person other than plaintiff ever shown to have gone beyond the swinging doors was one Carl L. Gillies. However, his experience occurred on the same night as plaintiff's. (R. 16, McKinley deposition, p. 15.) And he had the prudence to light a match, thus discovering the presence of the stairway and avoiding it. (R. 16, Nixon deposition, p. 12.) McKinley had been manager of the Washiki Club six years when his deposition was taken, (McKinley deposition, p. 3) and Nixon had been employed there four years, (Nixon deposition, p. 2).

Since there were no signs indicating or suggesting the presence of a rest room in or near the place where plaintiff's accident occurred, plaintiff was not as to that portion of the premises an invitee, and defendant had no duty of care toward him. In the absence of any evidence that any other patron had, on any previous occasion, passed beyond the swinging doors or into any hazards which may have lurked in the dimly lighted kitchen, defendant was under no duty to anticipate that a patron such as the plaintiff here, would pass so far into the room, without benefit of any light, as to fall down a sump pump located in the far corner of the room. Moreover, in undertaking to pass through a darkened room with which he was wholly unfamiliar and without undertaking to use such means of light as he had available, plaintiff was guilty of contributory negligence and voluntary assumption of risk barring any recovery on his part.

POINTS TO BE ARGUED

POINT I

PLAINTIFF WAS AT BEST A LICENSEE AT THE PLACE WHERE THE ACCIDENT OCCURRED AND THEREFORE THE DEFENDANT OWED HIM NO DUTY TO MAKE THE PREMISES SAFE, AND WAS NOT GUILTY OF ANY NEGLIGENCE OR BREACH OF DUTY TOWARD HIM.

POINT II

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

POINT III

PLAINTIFF ASSUMED THE RISK AS A MATTER OF LAW.

POINT IV

THERE IS NO DISPUTE IN THE ULTIMATE FACTS, AND THERE ARE NO CONTESTED ISSUES OF FACT TO BE DETERMINED BY A JURY. THEREFORE THIS IS A PROPER CASE FOR SUMMARY JUDGMENT.

ARGUMENT

POINT I

PLAINTIFF WAS AT BEST A LICENSEE AT THE PLACE WHERE THE ACCIDENT OCCURRED AND THEREFORE THE DEFENDANT OWED HIM NO DUTY TO MAKE THE PREMISES SAFE, AND WAS NOT GUILTY OF ANY NEGLIGENCE OR BREACH OF DUTY TOWARD HIM.

We here answer plaintiff's Points I and III. It is conceded that plaintiff entered upon defendant's premises as an invitee. However, it is well settled that a business invitee as to one portion of a land-owner's premises may be but a mere licensee or even a trespasser as to another portion of the premises. It is equally well settled that the duty to exercise care for the safety of an invitee extends only to that portion of the premises to which the invitation extends. The general rule is well stated in 38 Am. Jur. 761, Negligence, Sec. 100, which reads as follows:

“An owner or occupant is liable for an injury sustained by a person, who entered the premises by invitation as a result of a defective condition of the premises only where the part of the premises upon which the injury was sustained was covered by the invitation. If a person, although on the premises by invitation, goes to a place not covered by the invitation, the owner's duty of care owed to such a person as an invitee ceases forthwith. Thus, where one enters a part of the premises reserved for the use of the occupant and his employees, and to which there was no express or implied invitation to go, there can be no recovery for resulting injury, even though he is an invitee to other parts of the premises. This does not mean that the duty of an owner to have his premises in such condition that an invitation to visit him may be accepted without danger of personal injury from a defective condition is limited necessarily to any specific portion of the premises; but it is limited to parts that reasonably appear to have been designed, adapted and prepared for the accommodation of such a person and to those

parts to which the invitee reasonably may be expected to go, in view of the invitation given him.”

See also A.L.I., Restatement of Torts, Sec. 343, Comment *b*:

“Under the rule stated in this Section, a possessor of land is subject to liability to another as a business visitor only for such bodily harm as he sustains while upon a part of the land upon which the possessor gives the other reason to believe that his presence is permitted or desired because of its connection with the business or affairs of the possessor and which as such is held open to the other as a business visitor.”

See also Sec. 341, Comment *b*.

In Prosser on Torts, 2d Edition, page 458, the author says:

“The special obligation toward invitees exists only while the visitor is upon the part of the premises which the occupier has thrown open to him for the purpose which makes him an invitee. This ‘area of invitation’ will of course vary with the circumstances of the case. * * * If the customer is invited or encouraged to go to an unusual part of the premises, such as behind a counter or into a storeroom, for the purpose which has brought him, he remains an invitee; *but if he goes without such encouragement and solely on his own initiative*, he is only a licensee if there is consent, or a trespasser if there is not.” (Emphasis ours.)

The rule has been recognized by this court and the passage above quoted from Am. Jur. was cited with approval in the case of *Hayward vs. Downing*, (Utah), 189 Pac. 2d 442. This court also quoted with approval from 38 Am. Jur. 794, Negligence, Sec. 133 as follows:

“The duty of the proprietor of a place of business which is open to public patronage to use ordinary care to make the premises safe for customers is generally limited to that part of the premises designed, adapted and prepared for the accommodation of customers, *or to which customers may reasonably be expected to go.*”

See also *Thompson vs. Beard and Gabelman, Inc.*, (Kan.), 216 Pac. 2d 798, where the court said at p. 800:

“The duty of the proprietor of a place of business which is open to public patronage to use ordinary care to make the premises reasonably safe for customers is *generally limited to that part of the premises designed, adapted, and prepared for the accommodation of customers, or to which customers may reasonably be expected to go.* The duty of the proprietor of a place of business to his customers does not require him to render safe for their use parts of the building reserved for use only by him and his employees, such as private offices, shipping rooms, and warehouses, unless he expressly or impliedly invites or induces a customer to enter such a reserved part. (38 Am. Jur. 794, and cases cited.) A person who has received an injury in consequence of passing through a wrong doorway in a part of the building not designed for the use of unattended

customers cannot recover unless he was induced to enter therein by the invitation or allurement of the proprietor. (38 Am. Jur. 796 and cases cited in note 15).” (Sic.)

See also *Trautloff v. Danver Mills*, (Mo. App.), 316 SW2d 866.

Plaintiff has cited and relied upon the Kansas cases of *Campbell v. Weathers*, 111 P 2d 72, and *Bass vs. Hunt*, 100 P 2d 696. However, both of those cases are readily distinguishable from the case at bar. In each case a state law required the operator of a restaurant to provide toilet facilities for the patrons. In each case the pathway provided for the patrons to the toilet was rendered hazardous by the presence of an open trap door. In both cases the path was dark and the hazard could not be readily observed. There was no question in either case as to the plaintiff following the proper and only course leading to the toilet facilities, whereas in the case at bar, there is no evidence of any danger whatsoever in the route actually leading to the toilet facilities actually provided by defendant. Here the plaintiff was not following a path indicated to him by the proprietor, but on the contrary was going in an entirely opposite direction in the fruitless search for the facilities he sought. Attention is also invited to the more recent Kansas case of *Thompson v. Beard and Gabelman, Inc.*, (Kan.), 216 P. 2d 798, where under facts analogous to those here, the Kansas Court followed the theory for which we here contend.

We have heretofore cited portions of the comment to Sec. 343 of the Restatement of Torts. Those portions of the comment quoted in appellant's brief are wholly inapplicable here. Comment *d* pertains to what a business visitor is entitled to expect *on that portion of the premises to which the invitation extends*. The portion of comment *b* quoted by plaintiff pertains to a situation where the possessor has "intentionally or negligently mis-led" the visitor into a reasonable belief that a particular passageway or door is an appropriate means of reaching the area which the visitor is invited to enter. There is no evidence in this case that defendant, either intentionally or negligently, did anything which would mislead a patron into believing that the swinging doors to the store-room led to the men's rest room.

The case of *Martin v. Jones*, (Ut.), 253 P 2d 359, cited and quoted by plaintiff, is not applicable to the instant case. In that case the plaintiff was admittedly trespassing. However, his presence in a position of potential danger was observed by one of defendant's employees. Although she, (the employee), was aware of the danger confronting plaintiff, she did not warn him of it. The case was decided under the principle set forth under Sec. 337 of the Restatement of Torts dealing with the duty of a possessor of land to a trespasser *where the possessor knows or should know of the trespasser's presence in dangerous proximity to an artificial dangerous condition and where the condition is of such a nature that the possessor would have reason to believe that the*

trespasser would not discover it or realize the risk involved therein. There is no evidence in this case that any employee of the defendant was aware that plaintiff had passed through the swinging doors or that he had attempted or would attempt to pass through the darkness of defendant's storeroom to the head of the stairs to the sump pump.

As previously noted in our Statement of Facts, there is no evidence that any patron of defendant had passed beyond the swinging doors leading to defendant's store-room prior to the accident here involved. The testimonies of McKinley, Nixon and Lemmon were all to the effect that whenever they observed anyone go through the swinging doors, such persons immediately recognized that such did not lead to the rest room and immediately turned around and came back. The only other person ever shown to have made the same mistake as plaintiff is Carl Gillies, whose affidavit appears at Page 16 of the record. By the terms of his own affidavit, his mistake occurred on the same night as plaintiff's. In the absence of any showing that other patrons had on prior occasions passed through the swinging doors and through the storage room to the area of the stairway leading to the sump room, there is no basis upon which a jury could find that defendant should have known of, or anticipated the presence of its patrons in that area.

The cases cited and relied upon by plaintiff under Point III of his brief are so different from the facts of

the case at bar as to be readily distinguishable. The case of *Hectus v. Chicago Transit Company*, (Ill. App.), 122 NE2d 587, arose out of a collision between one of defendant's buses with one of its patrons, who had dismounted from the bus. After dismounting, the plaintiff used a rest room situated inside a loop in defendant's track. The accident occurred as plaintiff was crossing the track to the outside of the loop after leaving the rest room. One of the issues was whether plaintiff was an invitee. Because there was substantial evidence that the rest room had been used by the defendant's patrons and others, the court held that it was jury question whether plaintiff was an invitee.

The case of *Palmer v. Boston Penny Savings Bank*, (Mass.), 17 NE2d 899, involved an erroneous choice of two similar doors. In that case plaintiff attempted to return to defendant's premises through the same door he entered. Upon finding it locked, he made a fairly careful attempt to find the correct door, before he finally mistakenly passed through the wrong one. The facts, as stated in the opinion of the Court, are as follows:

"The jury could find that the plaintiff with two companions, returned to the garage about 2 o'clock in the morning, February 11, 1933, and that, as they came along the middle of Waldo Street, there were no lights upon this private way or upon the outside of the garage. They tried to open the center door but were unable to do so. They then inspected this door to determine if it contained a smaller door through which a person

might pass. They did not find any such door. They looked through the glass in the center door and saw a dim light inside the garage. They rapped upon the door but none of the defendant's employees heard them, although one was busy in the stock room, a short distance away, checking figures. They then looked to see if there was another entrance to the garage. One of the plaintiff's friends walked to the right and opened the easterly door, and the plaintiff believing that he was then using the westerly door, stepped inside and almost immediately fell down the iron stairway."

The court in that case recognized the principle upon which defendant relies here:

"If the plaintiff was injured while upon a portion of the premises to which he was not induced to go by the defendant in the transaction of the business between them, then, while there, he could not demand the exercise of reasonable care toward him by the one in control and management of the locus."

The facts in the case at bar do not involve such a situation since there is no evidence that the door which plaintiff was seeking was in any way similar to the door through which he passed. Moreover, the door which plaintiff was seeking was in the opposite end of defendant's premises at a place where it could not be readily mistaken for the door through which plaintiff entered. Nor did plaintiff make any reasonable effort to locate the right door before passing through the wrong one.

In the case of *Montgomery v. Allis-Chalmers Manufacturing Co.*, (Tex.), 164 SW2d 556, the door through which plaintiff passed opened immediately from the display room onto a stairway. Thus, there was no opportunity for plaintiff to change her mind and correct her mistake after discovering her error. The basis for the Court's decision is found in the following language:

“The doctrine we think applicable to the situation presented, is announced in 38 Am. Jur. (subject, Negl.), p. 796, Sec. 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.’”

However, in the case at bar, the stairway down which plaintiff fell was not immediately adjacent to the swinging door. On the contrary, he had to grope his way through the darkness for a considerable distance before he came to the stairway. When he opened the swinging door and entered the dark room, that should have been sufficient notice to him that he was on the wrong track. However, he persisted, even after he should have discovered his error in following a pathway along which there was not the slightest indication of an invitation

to travel. The latter portion of the Am. Jur. statement quoted in the Montgomery case applies here:

“* * * However, a recovery is denied the injured person if the situation was such as to afford no reasonable ground for such a mistake. Moreover, a person who has received an injury in consequence of passing through a wrong doorway in a part of the building not designed for the use of unattended customers cannot recover unless he was induced to enter therein by the invitation or allurement of the keeper of the premises.”

POINT II

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

POINT III

PLAINTIFF ASSUMED THE RISK AS A MATTER OF LAW.

We here answer plaintiff's Point II.

A case quite similar on its facts to the case at bar is *Heidenreich v. Dumas*, (N.H.), 190 A. 705. In that case the plaintiff, a customer in defendant's restaurant where food and drink were dispensed, passed through a swinging door in the rear which gave access to a kitchen. From the kitchen the only other door opened upon a flight of stairs descending to the cellar. Plaintiff, desiring to go to the toilet and assuming that it was reached through the kitchen, passed through the kitchen in search of it. Al-

though there was at least one employee working in the kitchen, plaintiff made no inquiry for directions. He went to a door which was unmarked, but which he assumed led to the toilet. Upon opening the door he found darkness on the other side. Still without making inquiries as to a light or anything else, he stepped over the threshold and fell down the stairs into the cellar. On these facts the court held the plaintiff's motion for nonsuit should be granted and ordered judgment for the defendant.

In the case of *Thompson v. Beard and Gableman, Inc.*, (Kan.), 216 Pac. 2d, 798, the court said:

“Suffice it to say that plaintiff was traveling in a course she did not know; the door leading from the private office was partially closed and the light dim; on pushing the door inward she was standing at the entrance of a basement stairway, no bar or barrier about the steps, and was confronted with darkness which is always a signal of danger. The darkness or dimness of light called upon her to exercise greater caution for her own safety than is ordinarily required and *it was her duty under such circumstances to refrain from proceeding further without finding out where she might safely go*, and by this failure to exercise ordinary care for her safety, *she was guilty of negligence as a matter of law.*” (Emphasis ours.)

Another similar case is *Illinois Central Railway Company v. Sanderson*, (Ky.), 192 S.W. 869. The court there said:

“Passing the question whether the company which had provided a suitable toilet for men and

indicated its location by a proper sign, was bound to anticipate that the entrance to the basement might be mistaken by passengers as the entrance to the toilet . . . and whether the entrance in question was reasonably safe, it remains to determine whether plaintiff exercised ordinary care for his own safety. *The mere fact that the door was there and partly opened was not sufficient to justify plaintiff in assuming that the door led to the toilet.* In view of the necessity for doors for other purposes, plaintiff should have anticipated that the door in question might lead to a place other than the toilet room. Plaintiff admits that he did not look where he was going. He further says that after he got through the door it was so dark he could not see. Notwithstanding the fact, he hurried through the door . . . and fell down the stairs. *To bolt headlong into a place that is unknown and so dark that one cannot see without stopping to determine whether it is safe to proceed is an act of recklessness about which reasonable minds could not well differ. . . . The trial court should have held as a matter of law, that plaintiff was guilty of contributory negligence, and have directed a verdict in favor of defendant.*" (Emphasis ours.)

In *Sartori v. Capitol City Lodge*, (Minn.) 4 N.W. 2d 339, the court held that a complaint which alleged that plaintiff, while seeking a toilet in defendant's building, entered a dark, unfamiliar passageway and from it stepped into an open, totally dark basement doorway thinking it to be the toilet entrance and was injured, showed affirmatively that the plaintiff was guilty of contributory negligence.

In a recent California case, *Wolfe v. Green Mears Construction Company*, 286 Pac. 2d 433, in holding plaintiff guilty of contributory negligence as a matter of law, the court gave weight to the fact that plaintiff failed to light matches which he had with him, while he was in such darkness that he could not see his way. The court quoted with approval from *Robinson v. King*, 113 Cal. App. 2d 455, 457, 248 P. 2d 477, as follows:

“Where an invitee on premises, being unfamiliar therewith, proceeds into a place of impenetrable darkness and falls into an aperture and is injured, as a matter of law he does not exercise ordinary care for his own safety and hence any injury he receives is the result of his own contributory negligence for which he may not recover.”

The court also quoted with approval from *Mitchell v. A. J. Bayer, Co.*, 126 Cal. App. 2d 501, 504, 272 P. 2d 870, 872, as follows:

“We are also of the opinion that plaintiff was shown to have been guilty of negligence as a matter of law. He stepped into an area with which he was unfamiliar; it was ‘pitch dark’ and he took no precautions for his safety.”

Another similar case where plaintiff was held guilty of contributory negligence as a matter of law, is *Williams v. Treadway*, (N.J.), 55 A. 2d 48.

We have found no Utah cases as closely similar on their facts as those above cited and discussed. However,

three recent decisions of this court are in full accord with the principles upon which the foregoing decisions were reached. In *Morris v. Farnsworth Motel*, (Utah), 259 P.2d 297, this court held that the guest of a motel was guilty of contributory negligence when he collided with a chair while attempting to walk across his darkened room. Said the Court:

“Dr. Morris appears to be confronted with two horns of a dilemma, either (a) the room was sufficiently lighted so that he could and should by the exercise of ordinary, reasonable care and observation for his own safety see the chair and avoid walking into it, or (b) the room, or the portion thereof in question, was so dark that he could not see an object such as a chair, in which event due care would have required him to turn on a light.”

In *Tempest v. Richardson*, (Utah), 299 P.2d 124, plaintiff was a guest in defendant's home. While seeking the bathroom, she opened a door and stepped inside and fell down a stairway. In holding her guilty of contributory negligence as a matter of law, this court said:

“Had appellant exercised ordinary and reasonable care for her own safety she would not have opened a door and stepped into a dark and unlighted area with which she was unacquainted, without first ascertaining what was beyond the door even though she had not been told that the room to which she was going was lighted.”

The doctrine of that case was followed in the later case of *Wood v. Wood*, (Utah), 333 P.2d 630, where this court said:

“In that regard she (plaintiff) is confronted with a dilemma; she either had in mind the existence of the stairwell, or she did not. If she did, she was obligated to guard against the known hazard; if she did not, she is met with the principle recently affirmed by this court in the case of *Tempest v. Richardson*: that such a *guest could not enter heedlessly into the darkness in an unknown area and then complain of dangers there encountered.*” (Emphasis ours.)

Cases following the same line of reasoning are legion. The following are illustrative, but by no means exhaustive, of the authorities:

Hudson v. Church of the Holy Trinity, (N.Y.),

166 NE 306;

Smith v. Simon's Supply Co., (Mass.) 76 NE 2d

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Plahn v. Masonic Hall Building Assn., (Minn.),

288 NW 575

Pease v. Nichols, (Ky.), 316 SW 2d 849;

Hart v. Sullivan, (Ill.), 58 NE 2d 301;

Solomon v. Finer, (N.J.), 180 Atl. 567;

Wesbrock v. Colby, Inc., 315 Ill. App. 494, 43 NE 2d 405;

Washburn v. Brunswick Hotel, 366 Pa. 463, 77 Atl. 2d 357;

Rhodes v. J. R. Watkins & Co., 16 Tenn. App. 163, 65 S.W. 2d 1098.

Knapp v. Conn. Theatrical Corp., 122 Conn. 413, 190 Atl. 291.

The Utah case of *Moore v. Miles*, 158 P. 2d 676, is cited and relied upon by plaintiff. We believe that that case is distinguishable from the case at bar, and from the other Utah cases cited by us. In that case, plaintiff was proceeding by a stairway which had been specifically provided by the defendant for the use of guests. There were no bars or obstructions to indicate that passage was forbidden, nor were there any warning signs. Plaintiff was following a path which she was invited to follow at the time of the accident. We believe that the basis of the court's decision is neatly summed up in the concurring opinion of Justice Wolfe, which reads as follows:

“I concur. The stairway leading directly to the parking lot was not barred. *It was apparently for the use of the guests* to make exit and entry to and from the parking lot. *It constituted an invitation to use it as* such because it was built for that purpose and left open for use. Whether under its improper state of lighting a prudent person should have accepted the implied invitation is a question for the jury whose duty it is to judge whether the plaintiff trying to go to the parking lot in the most direct way acted with reasonable prudence under the circumstances of the case.” (Emphasis ours.)

To the extent that *More v. Miles* is not distinguishable from *Morris v. Farnsworth Motel*, (Utah), 259 P. 2d 297; *Tempest v. Richardson*, (Utah), 299 P.2d 124, and *Wood v. Wood*, (Utah), 333 P.2d 630, it has, by necessary implication, been overruled by those later decisions.

The case of *Martin v. Fox West Coast Theatres Corp.*, (Cal. App.), 108 P.2d 29, is also distinguishable. As in *Moore v. Miles*, the plaintiff was on a parking lot where he had a right to be and had been invited to come. He was entitled to expect that his host would have made the way safe or provided warning of any danger to be apprehended. Likewise, in the case of *Flanigan v. Madison Plaza Grill, Inc.*, (N. J.), 30 A.2d 38, the plaintiff was following a corridor which a sign indicated was the way to the restroom. She entered a doorway adjacent to a door indentified as leading to the men's restroom. Certainly this was a place where a ladies' rest room might be expected to be located. As observed by the Court:

“The plaintiff's mistake was quite understandable considering the physical lay-out of the premises.”

So also, in *Hall v. Boise Payette Lumber*, (Ida.), 125 P. 2d 311, the plaintiff was following a course which she had been directed to follow by the store manager. Again she was entitled to expect that the place would be made safe for her. There also the designated stairway was immediately adjacent to the hallway which she had been directed to enter. She did not proceed blindly through a considerable area before she encountered trouble.

The case of *Stickle v. Union Pacific Railroad Co.*, (Utah), 251 P.2d 867, is wholly different on its facts. We have no quarrel with the language of the court used

in that case, and quoted by plaintiff, but it is wholly inapplicable here. This is a case which is clear, and where the question of contributory negligence is free from doubt under principles repeatedly enunciated by this court, and which, therefore, meets the test laid down in the Stickle case, as one where the question of contributory negligence can be determined as a matter of law.

POINT IV

THERE IS NO DISPUTE IN THE ULTIMATE FACTS, AND THERE ARE NO CONTESTED ISSUES OF FACT TO BE DETERMINED BY A JURY. THEREFORE THIS IS A PROPER CASE FOR SUMMARY JUDGMENT.

We recognize that summary judgment is a drastic remedy and one that should be granted only upon clear showing that there are no contested issues as to any material facts. However, such a showing has been made here. Plaintiff's own testimony establishes his own want of care for his own safety. Under such circumstances, there would be no benefit to the plaintiff to have a jury trial which could only result in a directed verdict against him, upon the basis of his own admissions as to his own want of care for his own safety. While a summary judgment is a drastic remedy, it is one which the court should not hesitate to employ where warranted by the facts. Certainly it was provided in our rules of procedure for a definite purpose, namely to conserve the time and energies of both the courts and the litigants in cases where there is no genuine issue of fact, and which can be re-

solved as a matter of law. The basis and reasons for the rule are well stated in 6 Moore's Fed. Prac. Sec. 56.04, p. 2028, as follows:

“The summary judgment procedure prescribed in Rule 56 is a procedural device for promptly disposing of actions in which there is no genuine issue as to any material fact. In many cases there is no genuine issue of fact, although such an issue is raised by the formal pleadings. The purpose of Rule 56 is to eliminate a trial in such cases, since a trial is unnecessary and results in delay and expense which may operate to defeat in whole or in part the recovery of a just claim or the expeditious termination of an action because of a meritorious defense that is factually indisputable. ‘The very object of a motion for summary judgment is to separate what is formal or pretended in denial or averment from what is genuine and substantial, so that only the latter may subject a suitor to the burden of a trial.’

“To attain this end, the rule permits a party to pierce the allegations of fact in the pleadings and to obtain relief by summary judgment where facts set forth in detail in affidavits, deposition, and admissions on file show there are no genuine issues of material fact to be tried.

“* * * The court is authorized to examine proffered materials extraneous to the pleadings, not for the purpose of trying an issue, but to determine whether there is a genuine issue of material fact to be tried. If there is no such genuine issue, the parties are not entitled to a trial, and the court, applying the law to the undisputed material facts, may render a summary judgment.”

CONCLUSION

The testimonies on depositions of the parties and witnesses to the accident, show without dispute that plaintiff entered upon a portion of defendant's premises where he was not invited either expressly or by implication. Defendant therefore had no duty to anticipate his presence or to make the way safe for him, and therefore was not guilty of any negligence if plaintiff encountered a dangerous condition in passing through portions of the premises to which he was not invited. There is no showing that defendant had any reason to anticipate the presence of patrons at the place where plaintiff was injured. Plaintiff's own testimony shows that he groped through a darkened room where there was no illumination, and without availing himself of the means of light which he had at his disposal. In so doing, he encountered and failed to avoid a hazard which he could have readily discovered if he had simply lighted his cigarette lighter. Under the well established law as laid down by the decisions of this court, he is guilty of contributory negligence, and he voluntarily assumed the risk. He has no cause of action against the defendant and the judgment below should be affirmed.

Respectfully submitted,

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