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June Singleton v. George v. Alexander and William J. Green, A Copartnership dba Carefree Laundry : Brief of Appellant

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IN THE SUPREME COURT
of the
STATE OF UTAH

JUNE SINGLETON,

Plaintiff and Appellant,

vs

GEORGE V. ALEXANDER and
WILLIAM J. GREEN, a copartnership
d/b/a Carefree Laundry.

Case
No.
10780

FILED
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Supreme Court, Utah

BRIEF OF APPELLANT

Appeal from the Judgment of the 2nd District Court
for Weber County
HONORABLE CHARLES G. COWLEY, JUDGE

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In the Supreme Court of the State of Utah

JUNE SINGLETON,

Plaintiff and Appellant,

vs

GEORGE V. ALEXANDER and WILLIAM J. GREEN, a copartnership d/b/a Carefree Laundry.

STATEMENT OF KIND OF CASE

This is an action for personal injuries resulting from paintiff slipping and falling in defendants place of business known as Carefree Laundry.

DISPOSITION IN LOWER COURT

Defendants motion for summary judgment dismissing case granted and Court found as a matter of law plaintiff was "contributorily negligent" and defendants were not negligent.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of judgment dismissing plaintiff's case, and judgment in her favor as a matter of law, or that failing, remanding case to lower Court for trial.

STATEMENT OF FACTS

On or about November 14, 1963, plaintiff entered the Self-Service Laundromat owned by the defendants at the corner of 25th Street and Monroe Boulevard, Ogden, Utah. This was the first time she had been in the Laundromat (Deposition, Page 4, Lines 13 and 14.) She entered the premises with her clothes in a clothes basket, and in company with her daughter (Deposition, Page 5, Lines 16 and 17), and according to plaintiff between 11:00 o'clock A.M., and 1:00 o'clock P.M. on the 14th, (Deposition, Page 6, Line 30, and Page 7, Lines 1, 2, 5). Plaintiff indicated that at the time she entered the premises she noticed a small area with water on it to the South part of the building near the rest-room and office floors; that it looked like just a little spill, not even two feet round (Deposition, Page 12, Lines 9 through 30). This area was not near the pathway taken by plaintiff from the time she entered the premises until she left (Defendants Exhibit No. 1).

After plaintiff had dried her clothes she folded the same, put them in the basket, and left the premises by the same route that she had entered the same. As she made a turn to the right, turning toward the door, she suddenly felt water on her feet, and before she could do anything about it slipped and fell, causing the injuries complained of. (Deposition, Page 9, Lines 22-26; Page 16, Lines 1 to 30. See also defendants Exhibit No. 1).

The plaintiff further testified that the water covered so much of the store front that she could not walk out without going through this, as she determined later

(See Deposition, Page 20, Lines 21-25. She also testified (Deposition p. 20, Lines 18 through 24) that water was running out the door by the time the police arrived. The Plaintiff also stated that she was looking ahead as she was walking out of the Laundromat (See Deposition, Page 22, Lines 10 through 23). She also explained that the reason she was not paying strict attention to where her feet were being placed was that she had gone over this floor just a few minutes earlier an the floor was dry. She also explained that she had the basket in her arms, a circumstance reasonably foreseeable by any operator of a Laundromat. Plaintiff testified further that a drain existed very near the water. (Deposition, Page 11, Lines 8-11).

The affidavit of Wilma Alexander admits that the premises were left unattended for a period of time during which the accident occurred. (Defendant's Affidavit, Page 4). The Affidavit alleges that it is not customary in the self-service laundry business for the premises to be attended at all times. (Defendant's Affidavit, Page 4). Mrs. Alexander also stated in her Affidavit that leaving the premises unattended was justifiable in light of the fact that the premises had a telephone with her number listed on a card near it. (Defendant's Affidavit, Page 6). Yet, in the Answers to Interrogatories submitted by defendant, it was admitted that there was no telephone on the premises on November 14, 1963. (Answers to Interrogatories No. 14).

Nothing has been introduced by the defendant to dispute that the floor was covered with water, nor has defendant introduced any information that the water on the floor was being properly eliminated by the drain installed on defendant's premises. Defendant's Affidavit (Page 8) states that Mrs. Alexander discovered that the toilet had overflowed but defendant has introduced no evidence that the over-flow from this toilet had caused or even that it was capable of causing, the extensive inundation which existed on the premises.

ARGUMENT

POINT 1

THE COURT ERRED REJECTING PLAINTIFF'S CONTENTION THAT THE CASE FELL WITHIN THE DOCTRINE OF RES IPSA LOQUITUR.

With respect to plaintiff's contention that the Complaint is one involving Res Ipsa Loquitur, the Court should be advised that the wording used in the Complaint is the same wording basically as the case of *Welch vs. Sears Roebcck Company,* 96 CA. 2d 553, 215 Pac. 2d 796. In the Res Ipsa Loquitur doctrine, the facts or circumstances accompanying an injury may be such as to raise a presumption or at least permit an inference of negligence on the part of defendant.

The conclusion to be drawn from the cases as to what constitutes the rule of Res Ipsa Loquitur is that proof that the thing which caused the injury to the plaintiff was under the control and management of the defendant, and the occurence was such as in the ordinary course of things would not happen, if those who had its control or management used proper care, together, afford sufficient evidence, or as stated by some Courts reasonable evidence, in the absence of explanation by the defendant, that the injury arose from, or was caused by the defendants' want of care. See 38*Am. Jur. Negligence, Sec.* 295, *P.* 989. It has been held that the phrase "Res Ipsa Loquitur" as a symbol for the rule that the fact of the occurrence of an injury, taken with the surrounding circumstances may permit an inference of culpability on the part of the defendant, makes plaintiff's a prima facie case, and presents a question of fact for the defendant to meet with an explanation. The facts in the instant case are that plaintiff came into the premises owned by the defendants, and under the control of the defendants, and when leaving stepped in water from an unknown source, and under circumstances that ordinarily do not exist. She has no way of determining where the water came from and what care had been exercised in preventing this water from being on the floor. In her inert condition she is not to be expected to inspect the premises immediately and attempt to determine what caused the situation. In 38 Am. Jur., Negligence, Sec. 297, P. 993, the Rule is stated further as follows: "In a situation to which Res Ipsa Loquitur, as a distinctive rule applies, there is no evidence, circumstantial or otherwise, at least none of sufficient probative value to show negligence apart from the postulate, which rests on common experience and not on the specific circumstances of the instant case, that physical causes of the kind which produced the accident in question do not ordinarilyy exist in the absence of negligence, that is, in the absence of a breach of duty, such as defendant owed plaintiff."

In Section 299 under the same citation, the text further states "Res Ipsa Loquitur doctrine is based, in part, upon the theory that the defendant in charge of the instrumentality which causes the injury either knows the cause of the accident, or has best opportunity of ascertaining it, and that plaintiff has no such knowledge, and therefore is compelled to allege negligence in general terms, and to rely upon proof of the happening of the accident in order to establish negligence."

In the case at bar plaintiff was a business invitee to defendant's Laundromat. The Laundromat was suddenly inundated, and the water was not eliminated by the drainage system in the establishment. This set of circumstances does not ordinarily exist in the absence of negligence in the installation and manitenance of the plumbing and drainage system. These circumstances were a proximate cause of plaintiff's injury. The plumbing and drainage systems of defendants' establishment were entirely in the control of defendants, and therefore defendants are in the best position to ascertain the cause of the inundation and the failure of the drain properly to eliminate the problem. Plaintiff has no knowledge as to the plumbing in defendants' establishment and therefore is compelled to allege negligence in general terms. Upon this set of facts plaintiff submits that the dostrine of Res Ispa Loquitur applies.

If that doctrine applies, then the Court below erred in granting a summary judgment based upon a finding that defendants were not negligent. Once the doctrine of Res Ipsa Loquitur obtains, it then becomes the defendant's burden to refute a presumption of negligence. We submit that that burden could not be sustained merely by submission of an affidavit of defendant's belief that the negligence was caused by over-flow from a toilet stuffed with paper by an unknown person. But, in the case at bar no such affidavit has even been presented. Defendant's affidavit merely states that the toilet over-flowed through no fault of the management, and supplies no causal connection between that overflow and the extensive flooding of the premises. It does not even state the affiant's belief that there was such a causal connection. Supplying such a causal connection is a jury function, and as the suit now stands there is no evidence at all bearing upon this issue.

The Res Ispa Loquitur doctrine has been applied in a number of cases similar to the instant case. See *Knowles vs. Hillside Lounge, Inc.,* 137 NW 2d 361, a Nebraska case in 1965, where a collapsing stool or chair was held to be a Res Ipsa Loquitur situation.

See *Bell & Koch, Inc. vs. Stanley,* 375 SW. 2d 696, a Kentucky case in 1964; a stack of dry-wall materials fell upon plaintiff, and plaintiff testified he did nothing to cause the sheets to fall. Doctrine applied. *See Barca vs. Daitch Crystal Dairies, Inc.,* 256 NYS 2d. 14, a Supreme Court decision in New York in 1965, where the Court held that the doctrine of Res Ipsa Loquitur applied, in the case where a supermarket customer fell on loose sugar in the isle. The Court went on further to state that the use of Res Ipsa Loquitur is not foreclosed by plaintiff's having pleaded a specific act of negligence. See *Sanone vs. J. C. Penney Co.,* 404 Pac. 2d 248, a Utah case in 1965, where the Court affirmed a jury verdict for plaintiff, and stated that Res Ipsa Loquitur applied to plaintiff's injuries. Plaintiff, a two and one-half-year-old girl caught her foot in an escalator while descending with her mother. For similar cases see 66 ALR 2d. 496.

It is our contention that Res Loquitur does in fact apply in the instant case where plaintiff came upon the premises and encountered a situation not ordinarily anticipated in such a location. The premises were owned and operated by defendants, and under their control and as stated hereinabove, plaintiff had no method of determining the source of the water and had no reason to anticipate that water would suddenly flood over a large part of the floor of the Laundromat. An affidavit certainly could not be held to constitute legal evidence binding upon the Court and plaintiff, that the water came from any certain spot and that the defendants were not negligent in the maintenance of the premises; and in the case at bar the affidavit of defendant does not even go so far as to allege these items.

The Rule is that it is the duty of a store owner to use reasonable care, ordinary or due care, to make and keep the premises reasonably safe for business invitees to use; 162 ALR. 950 et seq. This is a question of fact to be determined by the jury.

POINT II.

THE COURT ERRED IN FINDING THAT AS A MATTER OF LAW DEFENDANTS WERE NOT NEGLIGENT.

Plaintiff contends that the depositions and affidavits before the Court establish two bases upon which a jury might find defendants negligent: First, defendants admit that their establishment was left unattended, but contend that this was the custom for those engaged in the business of running a Laundromat. Plaintiff submits that merely stating this in an affidavit does not establish it as so. It is an opinion of a defendant who is not established, by affidavit or otherwise, as having the appropriate expertise to render a competent opinion on this matter; nor has plaintiff had the opportunity, through voir dire, to test the affiant's expertise. But even if it were established that this was a standard procedure in the Laundromat business, a jury need not conclude that such a business custom met the standard of care which a business man owes a business invitee;

See *Ramsey v. Mellon National Bank & Trust Co.,* 251 F. Supp. 646 (W.D. Pa. 1966 and *Calligan v. City of Monongahela,* 115 Atl. 869 (Pa. 1922).

The second basis upon which a jury might find the defendants negligent lies in the construction and maintenance of the plumbing and drainage system of the premises.

Plaintiff has contended in her first argument that the doctrine of Res Ipsa Loquitur should work to allow the establishment of a prima facie case that defendants were negligent in this regard. But even if that doctrine does not so operate, plaintiff submits that enough probative evidence could be adduced to support such a contention. First, the bathroom had no drain. Second, the drain in the main room did not eliminate the hazard even though the water coursed by it. Third, the Deposition (Page 15, Line 5) indicates that evidence exists which would lead to the conclusion that the water came from the plumbing beneath the toilet instead of, or in addition to, the water which came from an over-flow. Each of these items, if proved, would be a proper basis for a jury to find the defendants negligent in the construction or maintenance of the premises. Against these items defendants have introduced evidence only that the toilet bowl was clogged and had overflowed. They have offered no evidence that this over-flow created the extensive hazard which caused plaintiff's injury.

Many recent cases have determined the more enlightened view concerning negligence. See *Newman vs. United States,* 248 F. Supp. 699 a DC case in 1965, where plaintiff fell in a hole in a walkway leading away from Washington Monument. Evidence indicated that a water line beneath the walkway had been negligently installed, and that water was leaking out around joint causing a sudden collapse of the ground under the walkway. Held: Award judgment to plaintiff. Negligent installation of pipe was proximate cause of accident. See *Robinson vs. Parkcent Apts.,* 248 Federal Supplement, 632. In this case the hotel had a crew of men clearing away the snow from the approach to the hotel. At 9:45 P.M., the work stopped. When plaintiff arrived shortly after midnight he slipped and fell on glare ice covering sidewalk and path. It was held in this matter that the award to plaintiff was proper, and the Court stated that it was negligent to stop work that had continued all day, and to take no precaution for late arrivals.

See *Control Hardware Company vs. Statler,* 180 So. 2d. 205, a Florida Appellate case, 1965' were the defendant store owner placed a mat on a sidewalk in front of store, and plaintiff tripped on it and fell. Held: Affirming jury verdict for plaintiff. Where abutting owner creates a servitude on sidewalk he has a duty to servitude from becoming a nuisance. This would be analogous to the present case, where either the improper installation or condition of the toilet, or the failure to place a drain in the bathroom would be enough to create a servitude for it to be negligent.

See *Moore vs. Winn-Dixie Stores, Inc.,* 173, So. 2d 603, a Mississippi case, 1965, where there was evidence of presence of dried banana peel on said Supermarket floor, despite floor inspection two hours earlier;Held: that the evidence raised submissible issues for the jury as to the defendant's negligence. See also *Guidani vs. Cumerlato,* 207 NE 2d 1, Illinois Appellate case, 1965. A foreign substance was on the floor case, where the bowler in a Bowling Alley went to the restroom and his shoes got wet as the floor was wet. When he returned to bowling his shoes stuck to the floor, and he fell. The Court here held it was error to grant defendants judgment n.o.v., after verdict for plaintiff.

The Court in this case said the defendant was under duty "to prevent their patrons from getting liquid substance on the soles of their shoes." A case almost exactly in point with the present case.

See *Harvey Building, Inc. vs. Haley,* 175 So. 2d. 780, a Florida case in 1965, where the plaintiff upon entering the lobby of defendant's office building during rain, slipped and fell on slick floor; held reversing

Summary Judgment for defendant, Affidavits of plaintiff's witnesses that floor was wet and slippery, and that plaintiff was observed on the floor sufficient to raise submissible issue as to occupier's negligence. See *also Murphy vs. El Dorado Bowling, Inc.,* 407 Pac. 2d. 57, Arizona Appellate case, 1965. The premises in this case was shown by the evidence to have a walkway adjacent to the last lane, which was lower than the lane, and the bowler watching his ball, started to take a step with his left foot, slipped over the drop-off causing him to fall and break his leg; held reversing directed verdict for defendant; jury could properly find that recesssed walkway constituted negligence on the part of the bowling alley operator. The mere fact that condition of premises is open and obvious, does not necessarily mean that condition is not unreasonably dangerous. Occupier may be liable to his invitees for harm from "open and obvious conditions, where he should anticipate harm despite his knowledge of obviousness." In this case before the Bar defendants claim that plaintiff should have seen the open and obvious danger from the water, even though she was carrying a basket customarily which in some way blocked her view. The case is further in point with our present case, i. e., the Court held the jury could find the condition of the premises was such that negligence could be found, and this, of course, is plaintiff's contention in the present case before the Court, that the maintenance of the bathroom was such that negligence could be found by the jury.

See also, *G. E. vs. Salcidio,* 408 P. 2d 42, an Arizona Appellate case in 1965: In this case the Court found the plaintiff does not have to prove actual or constructive notice of defective floor condition, where defect is created by defendant or his servants. Once again this is a analogous to the case before the Court, where plaintiff claims that defendants noted the dangerous conditions in the bathroom, where in fact, the water was coming up around the base of the toilet, or the fact that no drain was presented permitted the water to come through the remaining traversed part of the Laundromat.

See also, 61*ALR.* 2d 62, *Harper & James Torts,* 1073-75; 1487, 1488: See *Prossor Torts* 402, 3d Ed. 1964. *See Garrett vs. American Air Lines, Inc.* 332 Fed. 2d 939 (5th Cir. 1964). Plaintiff was injured when she stumbled over a small zipper bag put on the floor near a gate in the waiting room and sued the air carrier for negligance in not providing a safe place for passengers to wait. In reversing a directed verdict for defendant, the Court held it is a submissible issue for the jury to determine whether air carrier must anticipate liklihood that the manner in which passengers handle hand baggage would cause injury to fellow passengers. The Court stated that a carrier must reasonably take cognizance of the customs and habits and practices followed generally by its passengers insofar as these actions present hazards to its business invitees, and with awareness of these hazards it must take reasonably appropriate steps to avoid or minimize liklihood of harm. This would be applicable in the present case, where a jury must determine whether or not customers would be carrying baskets, which might hamper their vision, and whether the customers would be likely to use the bathroom in such a manner as to cause the toilet to over-flow, and with this in mind the defendants would then be under the care to take reasonable steps to avoid any dangerous condition.

Along the same line, with respect to the owner's liability to anticipate acts of third parties, see *Denisewich vs. Pappas* 198 A. 2d 144, a Rhode Island case in 1964; the plaintiffs' restaurant patrons, were injured when a car operated in defendant-restaurant's parking lot broke through the wall of the restaurant adjacent to the booth. There was no adequate barrier between the parking lot, and the building. The Court here held that it was a question of fact whether the defendant was under a duty to erect adequate barrier. The Court stated that where a third person's intervening act could have been first seen or anticipated as natural and probable result of the original negligence, the chain of causation was not broken, and applying this Rule to our present case, the jury could find that defendants have, or should have forseen or anticipated the public use of toilet facilities, and possibly flooding of the same, if this in fact did occur. See *Bozza vs. Varnado, Inc.,* 43 N.J. 355, 200 A. 2d 777, a New Jersey case in 1964, where plaintiff fell on a cafeteria floor, and proved that the defendant was very busy, supplied no lids on beverage containers, did not require the use of trays, and the floor was littered, which circumstances, according to the Court, were held to make that a prima facie case, and stated that when plaintiff's circumstances were such as to create reasonable probility that a dangerous condition would occur he need not prove occupier's actual or constructive notice thereof. The

Court further held: "Concept of actual or constructive notice has been given undue emphasis in our decision."

The case of *Mahoney vs. J. C. Penney Company*, 377 Pac. 2d., 663, a New Mexico case decided in 1962, found likewise, where plaintiff fell down on the stairway of the store, the Court held that plaintiff's recovery was warranted though proof of actual, or constructive knowledge was absent, and that actual or constructive knowledge of specific foreign substance or length of time it was present need not be proved where dangerous condition is not isolated, but is foreseeable because of pattern of conduct, recurring, general condition, or continuing condition. Once again this is analogous to the case before this Court, where the condition of the plumbing and drainage system was such that the injury or conditions causing the injury were reasonably foreseeable.

In 38 Am. Jur. Sec. 30, P. 677, the Rule is stated as follows:

> "The standard by which the conduct of a person in a particular situation is judged in determining whether he was negligent, is the care which an ordinary prudent person would exercise under like circumstances."

and this particular rule, ordinarily, is to be followed by a jury determining the presence or lack of negligence or contributory negligence, but is not a question of law.

POINT III.

THE COURT ERRED IN FINDING THAT AS A MATTER OF LAW PLAINTIFF WAS NEGLIGENT.

Plaintiff contends that defendants knew or should know in the ordinary course of business, customers are going to come into the store carrying containers and oftentimes large baskets of clothing, and that this factor is one that must be considered in using reasonable care to provide reasonably safe premises for such traffic. Indeed, the business of the defendants relies upon customers entering and leaving with large bundles in their arms. With this in mind, plaintiff submits there can be no question but what we have a jury question as to whether or not defendants had the premises in such a condition as it would reasonably require for the safety of its patrons, and the further question as to whether or not plaintiff was using reasonable care in her ingress and egress from the building. In this case, the Court cannot say, without the taking of evidence, that either one of the parties, plaintiff or defendants, were not negligent as a matter of law. See *Kreiss vs. Altuna Laundry, Inc.* 133 So. 2d 602, a Georgia case, 1963, where the Court held; "Whether it was reasonable for plaintiff to use the only method of egress from flat under the circumstances, and whether she was reasonably careful was for the jury to determine." This is where the plaintiff left the premises, testifying, "It was pitch-black" and where the plaintiff had previously traversed the area. See also *Safeway Stores, Inc. vs. Stephens.* 197 A. 2d 849, a 1964 case of Washington, D. C. Appellate Court, where the Court held; "Plaintiff was not necessarily negligent in stepping through debris. Whether she was exercising a degree of care commensurate with the known circumstances was a question upon which reasonable minds could disagree. Therefore, a jury question was presented." In this case, plaintiff admittedly was in a hurry because the store was about to close, and walked across the isle, knowing vetetable debris was on a dirty floor. See also *Dever vs. Theriot's, Inc.,* 159 So. 2d 602, a Louisiana case in 1964, where the plaintiff-customer fell on lettuce, the Court held that the plaintiff was not guilty of contributory negligence, and it not necessary to make a specific observation of floor conditions before taking each step. See also *Gargaro Foley vs. Salesianum School, Inc.,* 208 A. 2d. 308, Deleware Supreme Court Case, 1965, where the Court held that plaintiff could not be said to be guilty of contributory negligence, or assumption of risk, as a matter of law, where question existed as to her appreciation of degree of risk under poor lighting conditions. In this case, plaintiff slipped and fell in a school parking lot after leaving school, where she had been playing bingo. Plaintiff had been at school about once a week for a year and knew of mounds and poor lighting. See *Robinson vs. Parkcent Apts.,* 248 Federal Supplement 632, DDC., 1965. In this case defendant had a crew of men clearing away snow on the approach to the hotel. At 9:45 P.M. the work stopped. When plaintiff arrived shortly after Midnight he slipped and fell on glare ice covering a sidewalk and path. Held: Awarding judgment to plaintiff. It was negligent to stop work that had continued all day, and to take no precautions for late arrivals. Plaintiff was not under duty as a matter of law to look at street before leaving the taxi, and not guilty of contributory negligence in stepping onto icy walk. Since plaintiff required to use both public sidewalk and path to reach hotel, hotel would be liable whether fall occurred on sidewalk or hotel property.

See *Blackburn vs. Tombling,* 407 Pac. 2d. 337, a Colorado case, in 1965, where the hotel door swung outward immediately on to a four and one-half inch step, plaintiff who had just entered the hotel, went back out and fell down over step; held a verdict for plaintiff, evidence supported finding that a person in exercise of due care could fail to observe step down.

The case cited by defendants in support of their contributory negligence allegation, are, as is obvious, old cases, not in point, and at the present time not good law. The Courts have recently all indicated that a question of negligence, and contributory negligence are questions of ultimate fact, which should be determined by the jury, after all available evidence is sumbitted to it.

POINT IV.

THE COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR DEFENDANTS AND AGAINST PLAINTIFF AT TIME OF PRE-TRIAL.

With respect to Summary Judgments, our Supreme Court of Utah, in the case of *Brandt vs. Springville Banking Company,* 10 Utah 2d., 350, 353 Pac. 2d 460, held that a Summary Judgment prevents litigants from fully presenting their case to the Court; Courts are and should be reluctant to invoke this remedy.

In a further case, *Bullock vs. Deseret Dodge Truck Center, Inc.,* 11 Utah 2d 1, 354 Pac. 2d. 559, 561, the Court stated:

> "A Summary Judgment must be supported by evidence, admissions, and inferences which when

> viewed in the light most favorable to the loser show that, 'there is no genuine issue as to any material fact, and that the losing party is entitled to a judgment as a matter of law'."

The Court went on further to say;

> "Such showing must preclude all reasonable possibility that the loser could, if given a trial, produce evidence which would reasonably sustain a judgment in his favor."

Under these rulings plaintiff should be given the opportunity to present evidence to show that defendants were negligent since nothing has been adduced or offered by defendants to indicate that plaintiff could not sustain her burden of proof. Questions of fact remain unanswered. What caused the hazard? Why was it not eliminated by the drain? Should there have been a drain in the bathroom? Were the defendants justified in leaving their premises unattended? Nothing indicates that these questions, and others, could not be reasonably answered in plaintiff's favor at the trial, and the record indicates the availability of evidence which supports plaintiff's allegations.

In the case of *Lundberg vs. Bachman,* 9 Utah 2d. 58, 337 Pac. 2d. 433, the Court held that as against general allegations of negligence contained in the Complaint, the facts set out in affidavits cannot be construed as totally superseding the pleadings. This would seem to be good law; the defendant cannot disprove plaintiff's allegations, and all of the necessary allegations merely from affidavits where there is no opportunity for examination of the affiant, and where there are other possibilities not gone into, or brought forth. The mere fact that an affiant states that she did examine the premises within thirty minutes prior to the accident, and that they were perfectly normal, and that some unknown person came in and stuffed the toilet is not sufficient evidence to disprove any allegation of negligence or to prevent plaintiff from cross-examining as to whether or not the facts stated in the affidavit were in fact true.

Thus, even if the affidavit were consistent with all the other evidence, it should not totally supercede the pleadings. But in the case at bar the affidavit is not consistent either with the evidence of plaintiff or with the other evidence provided by the defendants themselves. Two inconsistencies are apparent: First, in their Answer to Interrogatories defendants admit that there was no telephone on their premises on the day of the accident. The affidavit contradicts this admission, and thereby creates doubt about its credibility. Second, the Deposition shows the existence of a very large amount of water on the floor. Defendant's affidavit suggests (but does not allege) that the only water on the floor of the premises was that which over-flowed from the flushing of a toilet. Other inconsistencies might develop where the affiant is cross-examined; and when conflicts and inconsistencies exist in evidence a jury should resolve them. As the Court stated in *Carter vs. Parker,* 183 So. 2d. 3, (Fla. App. 1966);

> "Extreme caution should be exercised in granting Summary Judgments in negligence cases, since the issue of negligence is ordinarily a jury question."

The law governing Summary Judgment cannot be that a party may, by affidavit, swear that he was not negligent, and by affidavit state that the opposing party was negligent, and have the Court accept this as competent, binding evidence. Nor should the law governing Summary Judgments force litigants to try their cases by affidavit before presenting them to a jury.

Plaintiff concludes that under the Statutes of Utah and under the laws pointed out in recent court decisions, Judgment should be granted to Plaintiff on the pleadings and the case remanded to the Lower Court for a determination of amount of damages, or this failing, reversing judgment of Lower Court and remanding this case to the Lower Court for trial.