

DOCKET NO. 175

NUMBER	TERM	YEAR
250	November	1961

JAMES L. SMITH

VERSUS

M.P.W. REALTY CO., INC.

INSTRUCTIONS TO DELIVERING EMPLOYEE	
<input type="checkbox"/> Show to whom and when delivered	<input checked="" type="checkbox"/> Show to whom, when, and address where delivered <input type="checkbox"/> Deliver ONLY to addressee
(Additional charges required for these services)	

RECEIPT

Received the numbered article described below:

REGISTERED NO. 7650	SIGNATURE OR NAME OF ADDRESSEE (Must always be filled in)
CERTIFIED NO.	<i>Supreme Court - T. Di</i>
INSURED NO.	SIGNATURE OF ADDRESSEE'S AGENT, IF ANY
DATE DELIVERED 8-19-66	<i>257 Jan. 66 Record</i>
SHOW WHERE DELIVERED (only if requested)	

POST OFFICE DEPARTMENT
OFFICIAL BUSINESS

PENALTY FOR PRIVATE USE TO AVOID
PAYMENT OF POSTAGE, \$300

POSTMARK OF A B C FOR BETTER BUSINESS SERVICE	
#250 November 1961	



INSTRUCTIONS: Show name and address below and complete instructions on other side, where applicable. Moisten gummed ends, attach and hold firmly to back of article. Print on front of article **RETURN RECEIPT REQUESTED**.

RETURN
TO

NAME OF SENDER

Archie Hill, Prothonotary

STREET AND NO. OR P.O. BOX

P.O. Box 549

CITY, STATE, AND ZIP CODE

Clearfield, Pennsylvania 16830

55-16-71648-7

Jan. 1965

3811

POD Form

NO. *No 250 Nov.* TERM, 19 *61*
Filed in Drawer
17

NO. _____ TERM, 19 _____

James L. Smith

vs.

M. P. H. Realty Co. Inc.

NO. _____ TERM, 19 _____

NO. _____ TERM, 19 _____

NO. TERM, 19.....

NO. TERM, 19.....

NO. TERM, 19.....

NO. TERM, 19.....

Among the Records and Proceedings enrolled in the Court of Common Pleas in and for the County of Clearfield, in the Commonwealth of Pennsylvania, to No. 250 NOVEMBER Term, 19 61, is contained the following,

COPY OF CONTINUANCE DOCKET ENTRY

<u>James L. Smith</u>	<u>✓</u> <u>DECEMBER 14, 1961, SUMMONS IN TRESPASS</u> <u>Issued to the Sheriff.</u>
<u>Versus</u>	<u>✓</u> <u>JANUARY 30, 1962, AFFIDAVIT OF SERVICE</u> <u>filed:</u>
<u>Joseph J. Lee M.P.W.</u>	<u>Now, January 11, 1962 at 4:00</u>
<u>Realty Co., Inc.</u>	<u>o'clock P.M. served the within Summons</u>
<u>(Joseph J. Lee, Atty for Deft)</u>	<u>on M.P.W. Realty Co., Inc. at Place of</u>
<u>Robert V. Maine</u>	<u>Business, 61 Long Ave., DuBois, Penn-</u>
<u>Atty. for Plaintiff</u>	<u>sylvania, by handing to Philip Singer</u>

Store Manager, a true and attested copy of the original Summons and
made known to him the contents thereof. So answers, James B. Reese,
Sheriff.

✓February 7, 1962, On praecipe filed, Joseph J. Lee, Attorney
enters his appearance for the Defendants.

✓August 13, 1962, Praecipe for Rule to File Complaint, filed,
by Joseph J. Lee, Attorney for Defendant:

To Prothonotary: Issue a rule upon James Smith to file a Complaint
or pleading in the nature thereof in the above captioned matter, with
notice that if a Complaint or pleading in the nature thereof is not
filed within 15 days after service of the rule, judgment of non pros.
will be entered by the Prothonotary on Praecipe filed. s/ Joseph J. Lee,
Attorney for Defendant.

✓AUGUST 14, 1962, Rule, filed. And now, August 13, 1962, A.D., 1962,
petition read and considered and a rule is granted on James Smith to
file a Complaint or pleading in the nature thereof in the above
captioned matter, with notice that if a Complaint or pleading in the
nature thereof is not filed within fifteen (15) days after service of
rule, Judgment of non pros. will be entered by the Prothonotary on
Praecipe filed. By the Court, John J. Pentz, P.J.

✓August 22, 1962 - Service accepted on August 22, 1962 by Smith,
Smith & Work, William U. Smith, Attorney for James L. Smith.

✓SEPTEMBER 21, 1962, COMPLAINT, filed: Two copies certified
service accepted, September 22, 1962. s/ Joseph J. Lee, Attorney

for Defendant.

✓ OCTOBER 16, 1962 ANSWERS filed by Joseph J. Lee, Attorney for Defendant. Service accepted this 22nd. day of October, 1962 by Robert V. Maine, Attorney for the Plaintiff.

✓ MARCH 26, 1963, Praecipe filed; Please place the above case on the trial list for the coming term of Court. By Joseph J. Lee, Attorney for the Defendant.

substituted copy
→ JANUARY 30, 1964, JOINT MOTION FOR CONTINUANCE, filed by Robert V. Maine & Joseph J. Lee.

Come Now, Robert V. Maine, counsel for the plaintiff and Joseph J. Lee, counsel for the defendant in the entitled action and move the Court to continue the case to the May Term for trial.

Counsel further agree that the case shall be heard before your Honorable Court when the same is tried. s/ Robert V. Maine and Joseph J. Lee.

ORDER

Now, to sit, this 28th day of January, 1964, the foregoing Motion having been read and considered, the case is continued to the May Term of Court, By the Court, John A. Cherry, President Judge.

✓ May 6, 1964, ORDER: NOW, May 6, 1964, the above stated case having been continued upon application of counsel for Plaintiff, order is hereby made and entered thereon continuing the same to the September Term of Court, 1964. By the Court, John A. Cherry.

✓ AUGUST 20, 1964, DEPOSITION of Olive Crum taken before Jean M. Weaver, Notary Public on January 25, 1964, filed. Appearances Robert V. Maine and Ervin S. Fennell, Jr. Attorneys for Plaintiff and Joseph J. Lee, Atty. for Defendant.

✓ AUGUST 20, 1964, DEPOSITION OF DR. WILLIAM L. WHITE, taken before Dora W. Williamson, Notary, August 7, 1964, filed. Appearances Kountz, Fry & Meyer. Ervin Fenneill & Robert V. Maine, for Plaintiff & Joseph J. Lee, Atty. for Defendant.

AUGUST 20, 1964, DEPOSITIONS OF Dr. Alexander Richard

McCormick taken before Dore E. Williamson, Notary on August 7, 1964, filed, Appearances - Kountz, Fry & Meyer, Ervin Fennell and Robert V. Maine, for Plaintiff and Joseph J. Lee for Defendant.

SEPTEMBER 2, 1964, CAUSED REACHED, Trial Ordered, Jury called and Sworn as follows, to wit: John K. Miles, Sr., Oscar Lindberg, Arelene L. Heritt, Ambrose Rougeux, Robert Rishel and Lawrence W. Reiter.

On Motion of Defendant's Attorney request for Compulsory Non-Suit Granted by the Court.

SEPTEMBER 4, 1964, MOTION, filed by Robert V. Maine, Counsel for Plaintiff.

NOW, the 3rd. day of September, 1964, the Plaintiff, James L. Smith by his counsel, moves the Court to take off the Non-Suit in the above case and to grant him a new trial, and in support of the said motion files the following reasons: 1. The learned trial Judge erred in entering the said Non-Suit. 2. In accordance with the statement of the trial Judge made at the time of granting the said Non-Suit, the Plaintiff reserves the right to file additional and more specific reason in support of his motion until after the testimony has been transcribed and filed.

APRIL 6, 1965, TRANSCRIPT OF TESTIMONY taken before Hon. John A. Cherry, P.J. on August 17, 1964, Lodged this date by Carl E. Walker, Prothonotary.

MAY 24, 1965, MOTION TO TAKE OFF NON-SUIT AND TO GRANT NEW TRIAL, filed: Service Accepted 5-25-65, Joseph J. Lee, Attorney for Defendant.

SEPTEMBER 16, 1965, PRAECIPE, filed by Maine & Fennell.

Place the above captioned case on the Argument List.

DECEMBER 29, 1965, ORDERED, filed.

NOW, December 29, 1965, argument having been had in the above matter, on the motion of Plaintiff to remove the non-suit entered by this Court, and to grant a new trial, it is the finding of the Court that there is no legal basis for grant of the prayer of the

No. 250 NOVEMBER TERM , 1961

James L. Smith vs.
M.P.W. Realty Co., Inc.

same and it is, therefore, ORDERED that said motion be denied.
Opinion to be filed in the event of appeal. By the Court,
John A. Cherry, President Judge.

FEBRUARY 1, 1966, RECORD COSTS IN THE SUM OF \$58.60 Paid by
James L. Smith, Plaintiff.

Check No. #29, Smith, Smith & Work - Advanced Costs - \$14.60

Check No. #30, Maine & Fennell - Advanced Costs - ----- 8.00

Prothonotary ----- 36.00 \$58.00

✓ FEBRUARY 23, 1966 CERTIORARI from the Supreme Court, Returnable
the third Monday of April next 1966. Witness the Hon. John C. Bell,
Jr., Chief Justice of our said Supreme Court at Philadelphia
the 15th day of February in the year of our Lord one thousand
nine hundred sixty-six. s/ Patrick N. Bolsinger, Prothonotary.

✓ FEBRUARY 23, 1966 NOTICE OF APPEAL & ACCEPTANCE OF SERVICE
BY APPELLEE OR HIS COUNSEL, filed, Feb. 25, 1966 Service of the
foregoing notice is hereby accepted. s/ Joseph J. Lee, Attorney
for Appellee.

✓ FEBRUARY 23, 1966, NOTICE OF APPEAL & ACCEPTANCE OF SERVICE
BY JUDGE OF THE COURT BELOW, filed.

February 23, 1966 Service of the foregoing notice is hereby
accepted. John A. Cherry, P.J.

February 23, 1966, Service of the foregoing notice is hereby
accepted. s/ Vera G. Kester, Stenographer.

✓ MARCH 7, 1966, OPINION OF JOHN A. CHERRY, President Judge, filed

CONTINUED ON PAGE 5

Certified from the Records this
7th day of March A.D., 1966

MARCH 7, 1966, OPINION,

On the trial of the above cause, and upon conclusion of plaintiff's testimony as to negligence, the Court entered a compulsory nonsuit upon motion of the defendant. Thereafter, upon argument had, the Court denied plaintiff's motion to remove nonsuit and grant new trial. Plaintiff has now appealed from this Order of the Court entered December 29, 1965.

Recognizing that nonsuit can be entered only in clear cases, and that a plaintiff must be given the benefit of all evidence in his favor, and all reasonable inferences therefrom (STINAC VS. BARKEY, 405 Pa. 253, 174 A. 2d 868; CASTELLI VS. PITTSBURGH RAILWAYS CO., 402 Pa. 135, 165 A 2d 632); and also that no nonsuit should be entered except in clear cases (CASTELLI VS. PITTSBURGH RAILWAYS CO., 402 Pa. 135, 165 A. 2d 632); a full examination of the record in this case sustains the Court's determination, first, to enter the nonsuit, and second, to deny motion for its removal and grant the new trial.

The plaintiff having had the burden of proof, failed to establish by a clear preponderance of evidence, negligence in the defendant and that negligence of the defendant was proximate cause of his injuries. The Court is of the opinion that to have submitted the case to the jury would have required findings as to negligence and non-contributory negligence solely on speculation or guess. A full analyses and examination of the testimony, in the light of the foregoing rules, establishes the following facts:

The plaintiff, forty-four years of age, had rented several rooms from the defendant since 1955; and in October of 1959, had entered into a new lease which included the rooms under earlier rental and also an additional room adjoining. Under the prior and later lease, it was the defendant's obligation to supply all heat, light and water for the plaintiff's premises. The building being occupied by others, there was a central heating plant wholly controlled by the defendant, and situate in the basement of the building. The heating system was a one line steam system with steam-radiators in the rooms. Several weeks after the plaintiff had occupied the additional space so rented to him, he entered the room at the request of his secretary who complained about the lack of heat. Upon touching the radiator and the vent which controlled the release of air, he found it to be cold to the touch; and that the air vent was in a horizontal rather than a vertical and proper position. In order to release

the air and allow the steam to permeate through the radiator, he attempted to turn the air vent; first with one hand, and finding that he could not so turn it, then with both hands. The air vent or valve came off, steam was released, and the plaintiff suffered third degree burns to his hands as a result.

Plaintiff's testimony established that at any time that they had ever had to complain about heat or any other utility matters, the landlord-defendant had always taken care of the matters. In fact, his testimony was to the effect that that was the arrangement at all times. In this instance, however, he testified that he did not call the landlord because he thought it to be a simple matter to take care of; even though he knew that live steam was very dangerous; and even though he also stated that he had replaced air vents of the same nature in many other radiators (not connected with this building). Plaintiff declared further that he did not turn off the valve controlling the entry of steam into a particular radiator in question, before proceeding to attempt to turn the air vent.

Although the threads of the air vent appeared to have been stripped, it was not known how long this condition existed. In substance, the foregoing is the full effect of the plaintiff's testimony on negligence and contributory negligence.

First, although there is a suspicion that the radiator was not in good condition; there was no testimony to even indicate that the landlord knew or should have known of this condition; and thus, it was determined that there was no definite proof of negligence on the part of the landlord. Furthermore, the plaintiff's own acts were the proximate cause of the injuries which he sustained. Knowing the full effects of steam; and recognizing that he was unable to turn the air vent with one hand, he proceeded to apply extra pressure with both hands to turn the vent. There can be no doubt of the contributory negligence under these circumstances; and that that negligence of the plaintiff was the proximate cause of the injuries suffered by this plaintiff. Even though the sympathy of a Court and jury is for an individual who suffers such burns as were received by this plaintiff, they can not be a substitute for the proof necessary to establish his cause of action. This case was clearly a case in which the mere happening of the accident was not sufficient to sustain liability; since it does not establish negligence, raise a presumption of negligence, nor even make out a prima facie case of negligence. Further, as already indicated, the plaintiff did not do what an ordinary prudent man would have done under the

same or similar circumstances - seek the aid of the landlord, or at least of one fully acquainted with and competent to correct the condition then existing in the radiator. Dated: March 7, 1966. BY THE COURT, John A. Cherry, President Judge.

✓ June 21, 1966, CERTIFICATE OF AMOUNT IN CONTROVERSY, filed.
In compliance with Rule 61 of the Rules of the Supreme Court of Pennsylvania it is hereby certified for the purposes of appeal that the amount in controversy in the above entitled case exceeds the sum of \$10,000.00 exclusive of Costs. By the Court, John A. Cherry, President Judge.

Certified from the Records this

21st day of June A. D., 1966

June 21, 1966. CERTIFICATE OF AMOUNT IN CONTROVERSY, filed.
In compliance with Rule 61 of the Rules of the Supreme Court
of Pennsylvania it is hereby certified for the purposes of appeal
that the amount in controversy in the above entitled case exceeds
the sum of \$10,000.00 exclusive of costs. By the Court, John A.
Cherry, President Judge.

Certified from the records this

21st day of June A. D., 1966

Commonwealth of Pennsylvania, }
County of Clearfield } SS.

I, _____, Prothonotary
of the Court of Common Pleas in and for said County, do
hereby certify that the foregoing is a full, true and correct
copy of the whole record of the case therein stated, wherein
James L. Smith

Plaintiff, and M.P.W. Realty Co., Inc.

Defendant, so full and entire as the same remains of record before the said Court, at No. _____
250 November Term, A.D. 19 61,

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, this
3rd day of March 19 66.

PROTHONOTARY

I, John A. Cherry, President Judge of the Forty-sixth Judicial District, composed of
the Courts of Oyer and Terminer, Quarter Sessions and General Jail Delivery, Orphans' Court
and Court of Common Pleas, do certify that Archie Hill
by whom the annexed record, certificate and attestation were made and given, and who, in his
own proper handwriting, thereunto subscribed his name and affixed the seal of the Court of
Common Pleas of said county, was at the time of so doing and now is Prothonotary in and for
said county of Clearfield, the Commonwealth of Pennsylvania, duly commissioned and qualifi-
ed; to all of whose acts as such, full faith and credit are and ought to be given, as well in Courts
of Judicature, as elsewhere, and that the said record, certificate and attestation are in due form
of law and made by the proper officer.

PRESIDENT JUDGE

Commonwealth of Pennsylvania, }
County of Clearfield } SS.

I, Archie Hill, Prothonotary of the Court of Common
Pleas in and for said county, do certify that the Honorable John A. Cherry by whom the
foregoing attestation was made and who has thereunto subscribed his name, was at the time of
making thereof and still is President Judge of the Court of Oyer and Terminer, Quarter Sessions
and General Jail Delivery, Orphans' Court and Court of Common Pleas, in and for said county,
duly commissioned and qualified; to all whose acts, as such, full faith and credit are and ought
to be given, as well in Courts of Judicature as elsewhere.

In Testimony Whereof, I have hereunto set my hand and
affixed the seal of said Court, this 3rd
day of March, A. D. 19 66.

PROTHONOTARY

No. 250 West Term, 1961

versus

Exemplified Record

From Clearfield County

Debt - - - \$

Int. from

Costs

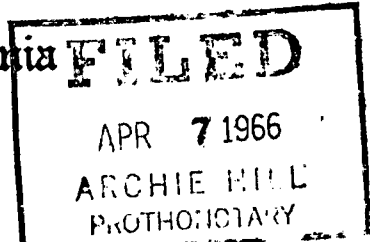
Entered and filed 19

PROTHONOTARY

Supreme Court of Pennsylvania

Eastern District

PATRICK N. BOLSINGER
PROTHONOTARY
GEORGE W. DUNN, JR.
DEPUTY PROTHONOTARY



PHILADELPHIA 19107

March 30, 1966

Ervin S. Fennell, Jr., Esq.,
Maine and Fennell,
228 DuBois Deposit National Bank Building,
DuBois, Pennsylvania 15801

In Re: James L. Smith, Appellant v. M. P. W. Realty
Company, Inc.
No. 257, January Term, 1966

Dear Mr. Fennell:

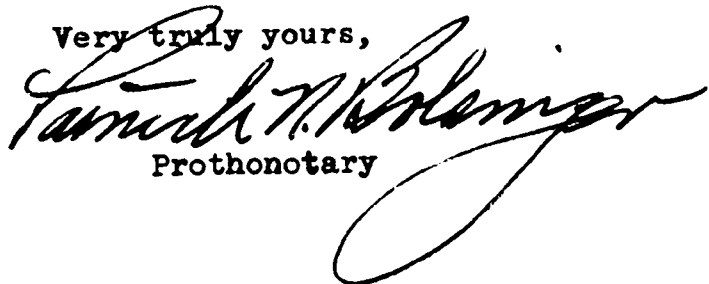
This is to advise that the following Order has been
endorsed on the Petition for Continuance on behalf of the
Appellant, with Joinder of opposing counsel, filed in the above
captioned case:

"3/28/66. Petition granted.

Per Curiam."

Pursuant to the above Order, this appeal will be on
the Argument List for the Session of this Court commencing Monday,
September 26, 1966 at Pittsburgh. Enclosed herewith is an invoice
in the amount of \$3.00 to cover the transfer fee. Please remit
by return mail.

Very truly yours,


Prothonotary

PNB:ENT
Enclosure

cc: Joseph J. Lee, Esq.,
26 South 2nd Street,
Clearfield, Pennsylvania