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In the Supreme Court of the State of Utah

RHEA D. HINDMARSH,
Plaintiff and Respondent,

vs.

O. P. SKAGGS FOODLINER,
Defendant and Appellant.

CASE NO. 11160

Brief of Defendant and Appellant, O. P. Skaggs Foodliner

STATEMENT OF THE KIND OF CASE

This is an action for personal injuries sustained by plaintiff when she fell after slipping on an accumulation of ice and snow alleged to have been on the driveway entrance leading to defendant's parking lot and place of business.

DISPOSITION IN LOWER COURT

The case was tried to a jury. From a Verdict and Judgment for the plaintiff, the defendant appeals.

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RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the plaintiff's Judgment and Judgment in its favor, or that failing, a new trial.

STATEMENT OF FACTS

Defendant, a partnership, operates a grocery store on the Southwest corner of the intersection of 200 West Street and 100 North Street, Provo, Utah. As is evident from plaintiff's exhibits numbered 1 through 5 the North side of the store building is adjacent to the sidewalk on the South side of 100 North Street; there is an entrance to the store on the East side at the Northeast corner of the building and an entrance on the South side at the Southeast corner of the building; a private sidewalk runs immediately along the East side of the store building and between this sidewalk and the public sidewalk on the West side of 200 West Street there is a driveway exiting onto 100 North Street with parking on either side; the first building immediately to the South of the store building is what is designated as Pete's T.V., along the North wall of which there are parking stalls for use of defendant's patrons and immediately to the North of which there is an entrance-exit from 200 West Street running in an East-West direction along the South side of the defendant's store building and between the parking stall areas along the North wall of Pete's T.V. and similar parking stalls along the South side of defendant's store building; and the Craghead's store building is shown to be on the East side of 200 West Street almost directly East of Pete's T.V. (TR. 6-18).

Plaintiff, Rhea B. Hindmarsh, a woman in her mid-fifties, resides with her husband at 3235 North Canyon Road, Provo, Utah. During the afternoon of December

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31, 1964, a cold clear day, plaintiff rode as a passenger in an automobile driven by her husband from their home in North Provo to the defendant's store for the purpose of purchasing groceries and transacting other business in town (TR. 77). Plaintiff's husband entered defendant's parking lot from 200 West Street and parked the car in one of the parking stalls immediately to the North of Pete's T.V. Repair building and toward the West end thereof. Plaintiff got out of the right side of the car, walked around to the rear of the same and walked along the back end of the family car and several others parked immediately to the North of Pete's T.V. Repair Easterly to the sidewalk on the West side of 200 West Street, then went to do some shopping in several stores along Center Street and then came back along the East side of 200 West Street to Craghead's Plumbing and Heating Company where she went in to get a calendar. Plaintiff then proceeded West across 200 West Street towards the entrance to defendant's parking lot (TR. 78-79) According to the testimony given by the plaintiff at the trial, when she was some eight or nine feet West of the West line of the public sidewalk running along the West side of 200 West Street and walking toward the South entrance to defendant's store building and while on the driveway immediately North of the parking stalls on the North side of Pete's T.V. Repair building, and while watching for cars in the area, she felt her foot slip and she fell to the ground whereupon she experienced a severe pain in the area of her left hip (TR. 80). Plaintiff testified that as she was walking toward the defendant's store just immediately prior to falling she was not watching the ground in front of her but was watching for cars in the parking lot area (TR. 80). She then testified that after

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she had been helped to her feet by some boys and was standing in the area where she had fallen, she looked down and saw a mound of ice with snow on it which mound was two or three inches thick and about five or six inches wide (TR. 81). Plaintiff then testified that she made her way into the defendant's store where she was later joined by her husband. After doing some shopping she and her husband returned to their home where she immediately went to bed because of the great pain she was experiencing in the area of her left hip (TR. 84). Plaintiff testified that she stayed in bed for several weeks thereafter and finally on or about the 27th of February, 1965, went to see Doctor Eugene Chapman because her injuries did not seem to be improving and she was experiencing a great deal of pain at that time (TR. 86).

Doctor Chapman diagnosed a fracture of the left femoral neck and a slight formation of cystic areas on the femoral head (TR. 34).

When plaintiff's condition did not materially improve Doctor Chapman recommended an operation, and on December 14, 1965, he performed a cup arthroplasty on the plaintiff at the Utah Valley Hospital (TR. 42).

On cross-examination at the time of the trial plaintiff testified that after she got out of the family car at defendant's parking lot she observed that there was snow everywhere all over the parking lot and that there were ruts in the snow (TR. 92). She then proceeded East along the rear of the parked cars through the snow to the sidewalk on the West side of 200 West Street where there was no snow (TR. 94). Plaintiff then went down town on the public sidewalk on which there was no snow; came back on the East side of 200 West Street on the public sidewalk

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on which there was no snow; crossed 200 West Street on which there was no snow; proceeded across the sidewalk on the West side of 200 West Street on which there was no snow; and entered upon the driveway into defendant's parking lot, which entrance way and parking lot were completely covered with snow and full of car ruts (TR. 94-95). Plaintiff testified that she could not see any blacktop through the snow in the area of the entrance way and the parking lot (TR. 95), but that she nevertheless walked onto the snow without looking down at her feet to see where she was going because she was looking for cars in the parking lot area (TR. 95-96). She did not recall seeing any cars moving towards her or behind her in the area, and she was looking for them rather than looking down to see where she was placing her feet (TR. 96, 98, 99). Plaintiff testified that she just kept walking through the snow without looking at her feet, watching for cars, until she fell (TR. 97). It was not until after she had fallen and had been helped to her feet that she looked down and saw a mound of ice with snow on it some two or three inches high and five or six inches wide (TR. 97).

The plaintiff further testified on cross-examination that she had not been at the defendant's store area from December 31, 1964, until the month of June, 1967, at which time she and her husband went back to the premises and pinpointed the spot at which she had fallen, said point being in the middle of the entrance way to defendant's parking lot and approximately eight feet West of the West line of the public sidewalk running along the West side of 200 West Street (TR. 98-99).

In the deposition taken of plaintiff on April 14, 1967, the plaintiff testified she fell at a point which was closer to

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the south door of defendant's store than to the sidewalk (TR. 102) and that in the area behind the place where her husband had parked the car "it was wet, and it was slick, and there was snow" (TR 103). Plaintiff said that she saw the mound of snow and ice, which was a pretty good sized one, before she stepped on it and that as she stepped on the top of the mound her foot slipped down the side of it and she fell to the ground (TR. 104).

STATEMENT OF POINTS

POINT I

PLAINTIFF WAS NEGLIGENT AND HER NEGLIGENCE WAS A PROXIMATE CAUSE OF HER INJURIES.

POINT II

PLAINTIFF BY HER ACTIONS ASSUMED THE RISK OF ANY INJURIES SUSTAINED BY HER.

POINT III

THE COURT IN FAILING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 6 TO THE JURY ERRED THEREBY IN THAT THE JURY WAS NOT PROPERLY INSTRUCTED ON THE PLAINTIFF'S DUTY TO EXERCISE DUE CARE FOR OWN SAFETY.

POINT IV

THE COURT IN FAILING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 35 TO THE JURY ERRED THEREBY IN THAT THE JURY WAS NOT PROPERLY INSTRUCTED REGARDING THE FACT THAT THE DEFENDANT WAS UNDER NO DUTY TO

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WARN THE PLAINTIFF AS A BUSINESS VISITOR OF AN OBVIOUS DANGER.

POINT V

DEFENDANT'S MOTIONS FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT SHOULD HAVE BEEN GRANTED.

ARGUMENT

POINT I

PLAINTIFF WAS NEGLIGENT AND HER NEGLIGENCE WAS A PROXIMATE CAUSE OF HER INJURIES.

It is the position of the defendant that the evidence in this case conclusively shows plaintiff was guilty of negligence herself as a matter of law, which negligence was a proximate cause of her alleged injuries. It is recognized that for the purposes of this appeal, a jury verdict in favor of the plaintiff having been entered in the court below, the evidence must be taken most favorably to the position of the plaintiff. However, whether the Court considers the evidence and testimony of the plaintiff given at the trial or as given in her deposition, it appears that the most favorable interpretation of the same is that plaintiff knew that the parking lot was covered with snow and full of ruts and was slick; that the public sidewalks and street running alongside of the parking lot was dry and free of snow and ice; that the day was clear; that the plaintiff was a woman in her mid-fifties with no physical disabilities; and that plaintiff consciously entered upon the snow and ice in the parking lot without watching where she was putting her

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feet because she claimed she was looking for traffic moving in the parking lot, although she did not see any traffic moving in the area for some 20 minutes after she had fallen.

It is the defendant's contention that the case of **McALLISTER VS. BYBEE, 19 Utah 2d 40, 425 P.2d 778** is determinative of this case. In the **McALLISTER** case, the plaintiff, according to her testimony, tripped over a cement obstruction she had know about for years, and that the same was in plain sight on a clear day and was there to see if anyone had but looked. In its decision, this Honorable Court cited the case of **WHITMAN VS. GRANT, 16 Utah 2d 81, 395 P.2d 918,** and quoted the following language:

> "The plaintiff is confronted with the basic proposition that when there is a hazard which is plainly visible, ordinarily one is charged with the duty of seeing and avoiding it. And if he fails to do so, it is concluded that he was negligent either in failing to look or in failing to heed what he saw."

Mr. Chief Justice Crockett in commenting on the above language made observations to the effect that the quotation as set out was not complete in that the **GRANT** case (supra) further held that **"ordinarily one is charged with such a duty."** Chief Justice Crockett observed,

> "But as was explained in that opinion following the quoted language, if there are extenuating circumstances so that a person in the exercise of due care might fail to see or heed the hazard, it may be found that his conduct was not negligent."

In the case now before the Court, the plaintiff would excuse her failure to see and look where she was walking

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by the fact that she claims she was watching for traffic in the area. However, by her own testimony at the trial, there was no traffic moving and although she knew the parking lot was rutted, covered with snow and slick, she nevertheless failed to watch where she was stepping at all, and it was not until after she had fallen that she bothered to look specifically as the place where she had been stepping. Defendant contends that the language of the **GRANT** case (supra) does not extend so far as to excuse the plaintiff from the consequences of deliberately walking on an area which she knew to be dangerous without paying close attention to what she was doing.

In the **GRANT** case (supra) a Motion for Summary Judgment on the ground of contributory negligence was granted and affirmed where it appeared that the plaintiff, who had delivered merchandise to a department store, was directed to go down stairs and out the door to return to his truck and who went to the first door he saw, opened it and stepped off backwards into an elevator shaft without taking a precautionary glance beyond the door. This Court in considering whether the plaintiff could be guilty of negligence for failing to see that which was evident, used the following language:

> "In order to justify holding that a jury question as to negligence exists, where injury has resulted from an observable hazard, it is essential that there be something which can be regarded as tending to distract the plaintiff's attention or to prevent him from seeing the danger, thus providing some reasonable basis for a finding that even though he exercised due care he could be excused from seeing and avoiding it. For example, in the recent case of **CAMPBELL VS. SAFEWAY STORES (15 Utah 2d 113, 388 P.2d 409)** the plain-

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> tiff stumbled over a box in the aisle of the defendant's store which she ordinarily should have seen. However, she was a woman of somewhat advanced years, physically inflicted with impaired eyesight, and most importantly, was preoccupied as she reasonably could be expected to be in searching the shelves for a certain item of food."

In the present case, the plaintifff, according to her testimony at the trial, while claiming to watch the area for moving cars, the presence of which could have been determined at a glance, nevertheless failed to observe at all the area where she was walking even though she knew that the area was dangerous and slick by her own testimony.

In the case above referred to **CAMPBELL VS. SAFEWAY STORES** (supra) where the plaintiff fell over the small box in the aisle of the store where she was shopping, the Court in commenting upon the matter of contributory negligence used the following language:

> "We agree that ordinarily one is guilty of contributory negligence which will preclude recovery if she fails to see and give heed to a danger which is plain to be seen. However, as we have held on a number of occasions, this rule is not applicable where there are extenuating circumstances which impair the ability to see the hazard. They were present in the instant case in that plaintiff's daughter was going ahead of her with the grocery cart, and that plaintiff was preoccupied in searching the shelves for certain merchandise. There is the further fact that it would not be unreasonable for one to proceed with at least some degree of assurance that these aisles are clear of impediments. Under such circumstances it is our opinion that a jury question existed as to whether the

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plaintiff was observing the standard of care of an ordinary reasonable and prudent person for her own safety."

Such case differs from the present one in that under the evidence in this case, the plaintiff knew that the danger was in front of her; that the parking lot was full of ruts and was slick with ice and snow; and she nevertheless without even so much as a glance as to where she was walking, proceeded into the area and consequently slipped and fell.

Further, in this case, the diversion claimed by plaintiff was more imaginary than real. She was merely looking for traffic, which by her own testimony was non-existent at the time. As held by this Court in the case of **EISNER VS. SALT LAKE CITY, 120 Ut. 675, 238 P.2d 416:**

> "Plainly, according to the authorities, the cause diverting a pedestrian's attention from a known danger must be unexpected and substantial . . ."

In this case there really was no diversion at all. When the plaintiff chose to walk onto the snow packed, rutted and slick parking lot, plainly visible, and its condition known to her, she either saw the condition before her or she did not. If she looked she must have seen it and deliberately or negligently stepped onto it. If she did not look she neglected her duty in traversing the parking lot entrance way. **ROTH V. VERONA BOROUGH, 316 Pa. 279, 175 A. 689.** Either action on the part of plaintiff was negligence and a proximate cause of her injuries. **MILLIGAN VS. CAPITOL FURNITURE CO., 8 Ut. 2d 383, 335 P.2d 619.**

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POINT II

PLAINTIFF BY HER ACTIONS ASSUMED THE RISK OF ANY INJURIES SUSTAINED BY HER.

On the question of assumption of risk, reference is made to the case of **CLAY VS. DUNFORD, 121 Utah 177, 239 P.2d 1075,** wherein this Court stated and approved the following language:

> "The doctrine of assumption of risk is confined to cases where the plaintiff not only knew and appreciated the danger, but voluntarily put himself in the way of it and that the essential elements of assumed risk are knowledge, actual or implied, by the plaintiff of a specific defect or dangerous condition caused by the negligence of a defendant in the violation of some duty owing to the plaintiff, together with the plaintiff's appreciation of the danger to be encountered and his voluntary exposure of himself to it."

In the instant case the plaintiff knew full well that the parking lot was rutted, snow covered, slick and by her own testimony dangerous, but she nevertheless chose to walk upon it without taking any precaution whatsoever to look at her feet as to where she was going, choosing rather to be looking about for cars in the area which might be moving, although none were evident and that fact could have been determined by a very cursory glance, so that plaintiff could have easily watched where she was walking without endangering herself to being hit by moving traffic in the area. Certainly traffic moving in the area would be moving very slowly and would not constitute nearly so much danger to her as would falling upon the slick and rutted surface.

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Reference is made to the California case of **LEWIS VS. COUNTY OF CONTRA COSTA, 278 P.2d 756,** which is cited as an authority in the **JURY INSTRUCTION FORMS FOR UTAH, page 59,** in which case it was held that a mail carrier who in crossing a street in the middle of a block jumped over a mud-filled gutter onto a mud-covered sidewalk which he knew would be slippery when he could have avoided the muddy area by retracing his steps 100 feet or so, assumed the risk of injury or was contributorily negligent in so jumping and therefore was not entitled to recover for injuries sustained when he slipped and fell on the mud-covered walk. The California court commented as follows:

> "The facts demonstrate that plaintiff actually knew or must have known of the hazard. He testified that he knew of the presence of mud in the gutter and on the sidewalk and that mud was slippery. Yet, instead of going beyond the point of hazard or of retracing his steps a mere 100 feet or so to a point where he had last crossed the street without difficulty, he took a chance and jumped with the untoward results already narrated. In explanation he said he did not at the time know how thick the mud on the sidewalk was, suggesting that in the absence of such knowledge he was not fully aware of the hazard. We do not see the logic of that argument. He was thoroughly aware that mud covered the sidewalk and it was slippery. That would seem sufficient to put any adult person upon actual notice of the hazard. Where the facts are such that plaintiff must have had knowledge of the hazardous situation it is equivalent to actual knowledge."

Another feature of the doctrine of assumption of risk is that the assumption of risk must be voluntary. Refer-

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ence is made to the **JURY INSTRUCTION FORMS FOR UTAH, Form 17.3 at Page 60,** which states:

> "Before assumption of risk will bar recovery it must be voluntary. To be voluntary these two factors must be present: First, the person in question must have actual knowledge of a danger or the conditions must be such that she would have such knowledge if she exercised ordinary care. Second, she must have freedom of choice. This freedom of choice must come from circumstances that provide her a reasonable opportunity, without violating any legal or moral duty to safely refuse to expose herself to the danger in question."

In the present case the plaintiff testified that she did know of the existence of the danger from the snow and ice which was on the parking lot. She had the freedom of choice in that by her own testimony the public sidewalk was free and clear of snow so that she could have easily entered the north door of defendant's store by walking along the dry public sidewalk without exposing herself to any of the hazards of the snow and ice which she described as being present upon the parking lot which she chose to cross.

Defendant contends that the evidence is uncontradicted to the effect that the plaintiff voluntarily put herself in a position of danger of which she was aware when she had another alternative which was easily available to her and which would have been completely safe for her to pursue.

POINT III

THE COURT IN FAILING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 6 TO THE JURY

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ERRED THEREBY IN THAT THE JURY WAS NOT PROPERLY INSTRUCTED ON THE PLAINTIFF'S DUTY TO EXERCISE DUE CARE FOR OWN SAFETY.

The plaintiff in this case testified that she knew of the existence of the snow and ice which she claimed to be on defendant's parking lot and that the same was slick and dangerous. It is defendant's contention that under such circumstances the obligation and duty of the plaintiff to exercise ordinary care for her safety is greater than would be the case if the plaintiff were not aware of the existence of such dangerous circumstances. Defendant requested the following instruction:

No. 6 (R68)

"You are instructed that inasmuch as the amount of caution used by the ordinary prudent person varies in direct proportion to the danger known to be involved in her undertaking, it follows that in the exercise of ordinary care, the amount of caution required will vary in accordance with the nature of the act and the surrounding circumstances. To put the matter in another way, the amount of caution required by the law increases as does the danger that reasonably should be apprehended. Thus in this case if you find that the plaintiff knew or in the exercise of reasonable care should have known that the area over which she was traveling was slick, the standard of care imposed by law upon the plaintiff for her safety would be increased proportionately."

The Court gave the following instruction, No. 16, to the jury: (R31)

"The plaintiff in this case had a duty to make a reasonable observation along the path she moved at the time she passed from the sidewalk and stepped into

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the path she chose to take and if you find from the evidence in this case that the plaintiff did not make a reasonable observation of the premises as she moved along and that she knew or should have known of the peril that there existed, and by the exercise of due care she could have avoided the peril of her falling, but failed to exercise due care to avoid said peril, then the plaintiff was negligent."

The instruction requested by the defendant was taken from **JURY INSTRUCTION FORMS FOR UTAH, No. 15.3, page 48,** and the court's refusal to give such instruction as requested was excepted to by the defendant (TR. 165).

Since the plaintiff testified that she was aware of the existence of the snow and ice on the parking lot and that it was slick, defendant feels that it was entitled to an instruction which specifically called the attention of the jury to the fact that the obligation of a person under such circumstances is greater than ordinarily would be the case and that the obligation to exercise ordinary care for one's safety increases in direct proportion to the danger known to be involved. In this case the plaintiff knew of a dangerous condition and consequntly her obligation to exercise due care for her own safety was patent.

POINT IV

THE COURT IN FAILING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 35 TO THE JURY ERRED THEREBY IN THAT THE JURY WAS NOT PROPERLY INSTRUCTED REGARDING THE FACT THAT THE DEFENDANT WAS UNDER NO DUTY TO

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WARN THE PLAINTIFF AS A BUSINESS VISITOR OF AN OBVIOUS DANGER.

In this case the plaintiff was a business visitor to the premises of the defendant. By the testimony of the plaintiff herself the entrance way and parking lot of the defendant's premises over which the plaintiff would be obliged to travel if she were to enter the south door of the store building were covered with snow and ice, were rutted and were slick. The defendant requested instruction No. 35 (unnumbered page in the record between pages 97 and 98) asking the court to instruct the jury in part as follows:

> "However, the responsibility of one having control of the premises is not absolute. It is not that of an insurer. If there is danger attending upon the entry to the premises, the owner is entitled to assume that a business visitor will perceive that which would be obvious to her upon the ordinary use of her own senses. There is no duty on the part of an owner to give a businss visitor notice of an obvious danger."

This instruction was taken from **UNIFORM JURY INSTRUCTIONS FOR UTAH, Form 43.10, page 119,** and the refusal of the court to give this instruction was duly excepted to by the defendant (TR. 166).

The court below gave its instruction No. 12 (R. 28) to the jury as follows:

> "You are instructed that the plaintiff in this case was a business visitor upon the premises occupied by the defendant. You are instructed one who extends to a business visitor an invitation, express or implied,, is obliged to refrain from acts of negligence and to exercise ordinary care to keep the premises in a condition reasonably safe for the business of the visitor. In

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the absence of appearances that would otherwise caution a reasonable prudent person in a like position to the contrary, a business visitor has the right to assume that the premises which she was invited to enter are reasonably safe for the purposes for which the invitation was extended and to act on that assumption. You are instructed that the employees of the defendant have a duty to warn the plaintiff of danger of which they were aware of which the plaintiff had no knowledge."

The evidence is clear from the testimony of the plaintiff herself that she in fact did know of the danger that existed upon the parking lot and by her description of the situation the condition was perfectly obvious so that the court's instruction to the jury to the effect that the defendant was under a duty to warn the plaintiff of danger of which the plaintiff had no knowledge was inappropriate and it was error for the court to refuse to instruct the jury as requested by the defendant that the defendant was not under any duty to warn the plaintiff of the existence of the obvious danger which she described and of which she actually was very much aware.

POINT V

DEFENDANT'S MOTIONS FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT SHOULD HAVE BEEN GRANTED.

At the conclusion of the plaintiff's evidence the defendant, pursuant to Rule 50(a) of the **UTAH RULES OF CIVIL PROCEDURE,** moved the court for a directed verdict on the grounds that the evidence of the plaintiff showed as a matter of law that the plaintiff was negligent and that

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such negligence was a proximate cause of her injury and further that the plaintiff by undertaking to walk in the parking lot area without watching where she was placing her feet, assumed the risk of injury by reason of her knowledge of the dangerous condition therein existing according to her own testimony. Defendant's motion was denied by the court (TR. 111).

At the close of all of the evidence the defendant again renewed its motion for a directed verdict on the same grounds, which motion was denied by the court (TR. 125).

Thereafter and within ten days after the reception of the verdict the defendant moved the court pursuant to Rule 50(b) of the **UTAH RULES OF CIVIL PROCEDURE** for a judgment notwithstanding the verdict in its favor on the grounds hereinabove referred to and as therein stated (R. 109).

Defendant believes that these motions should have been granted and that the court erred in failing to do so for the reason that the plaintiff was negligent as a matter of law which was a proximate cause of her injuries and that the plaintiff further assumed the risk of injuries by reason of her conduct in entering upon the parking lot and entrance way of the defendant without watching where she was placing her feet, knowing of the dangerous condition thereon existing and an alterative route being available to her which would have been safe and free from danger.

The arguments set forth in Points I and II above are hereby refrred to and adopted as a part hereof.

CONCLUSION

Considering all evidence and testimony in the light most favorable to the plaintiff, such evidence and testi-

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mony nevertheless shows as a matter of law that the plaintiff was negligent and that such egligencn was a proximate cause of her injuries and that the plaintiff further assumed the risk of injury by reason of her conduct in entering upon the parking lot of the defendant under the conditions which existed. The court below erred in failing to direct a verdict in favor of the defendant and in failing to grant the defendant's motion for judgment notwithstanding the verdict.

The judgment below should be reversed and judgment of no cause of action should be granted by this Court, in favor of the defendant, O. P. Skaggs Foodliner.

Respectfully submitted,

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