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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.

RESPONDENT'S B

Appeal from Judgment of the Fourth Ju
Utah County, State of U
The Honorable Joseph E. Nels

S. REX
HOWARD
Delphi Buil
120 East
Provo, Ut
Attorn
Re

CULLEN Y. CHRISTENSEN, for;
CHRISTENSEN, PAULSON AND TA
55 East Center Street
Provo, Utah
Attorneys for Defendant-
Appellant

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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

RESPONDENT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is an action for personal injuries sustained by plaintiff in consequence of defendant's negligent maintenance of its business premises.

DISPOSITION IN LOWER COURT

The case was tried to a jury which returned a verdict and judgment for plaintiff.

RELIEF SOUGHT ON APPEAL

Respondent seeks to have the judgment of the trial court affirmed.

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STATEMENT OF FACTS

Respondent agrees with appellant's statement of facts as set forth in appellant's brief, except that respondent does not agree that plaintiff stated in her deposition taken April 14, 1967, that she saw the mound of snow and ice, on which she slipped, before her fall (R. 104-105). Plaintiff's language in the deposition is susceptible of being understood as a statement that she was watching generally where she was going without seeing specifically the mound of snow and ice on which she fell. The jury apparently so understood it.

ARGUMENT

POINT I

PLAINTIFF WAS NOT CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW: THERE WAS ADEQUATE EVIDENCE TO SUPPORT THE JURY FINDING OF NO CONTRIBUTORY NEGLIGENCE.

It is beyond dispute that the finding of a jury on the issue of contibutory negligence is entitled to the greatest respect and may not be set aside "unless the matter is so clear as to be free from doubt and reasonable minds would not differ thereon." DeWeese v. J. C. Penney Co., 5 Utah 2d 116, 279 P.2d 898, 902 (1956); accord, Coombs v. Perry, 2 Utah 2d 381, 275 P.2d 680 (1954).

There is ample evidence in the record from which the jury could have found the following:

1. Plaintiff did see and was aware of the generally snow-covered condition of the parking lot (R. 194).

2. Plaintiff did not see and was unaware of the particular hazard on which she slipped and fell—an irregular mound of ice variously described as from two to six inches

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thick and from five inches to two feet wide (R. 180-181, 203-205).

3. The mound of ice was snow-covered and tended to blend into the general background and to be indistinguishable therefrom except on close inspection (R. 181).

4. The hazard of risk of injury from the concealed mound of ice was substantially greater than the risk of injury from the generally snow-covered condition of the parking lot.

5. Plaintiff was only some three or four steps (eight feet) onto the snow-covered parking lot from the clear sidewalk when she fell (R. 197, 199).

6. During the time it took to take those three or four steps, plaintiff was reasonably occupied in looking about for approaching traffic (R. 180-181, 195-97, 205).

With reference to the foregoing facts, the decisions of this Honorable Court establish the following applicable rules of law:

1. Failure to see and avoid a plainly visible hazard is contributory negligence as a matter of law. McAllister v. Bybee, 19 Utah 2d 40, 425 P.2d 778 (1967); Whitman v. W. T. Grant Co., 16 Utah 2d 81, 395 P.2d 918 (1964); Eisner v. Salt Lake City, 120 Utah 675, 238 P.2d 416 (1951).

2. However, a jury question exists as to contributory negligence where there is

> ". * * * something which could 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."
>
> Whitman, supra, 395 P.2d 920.

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3. Temporary giving of one's attention to another and distracting hazard is a defense to contributory negligence:

> "In the nature of things, one entering a store must give at least part of her attention to watching where she is going to avoid other persons or obstacles. She obviously is not required and likely in due care cannot, give her entire attention to any one hazard such as possible extraordinary slipperiness of the floor, which she has no particular reason to anticipate."
> De Weese, supra, 279 P.2d 902.

4. The rule of McCallister, Whitman and Eisner is specifically distinguishable from those cases in which "the defect was concealed by snow." Eisner, supra, 238 P.2d 417.

It is clear from the facts and law as here stated that plaintiff was not guilty of contributory negligence as a matter of law because she was not aware of the particular hazard. There was adequate evidence from which the jury could conclude that plaintiff was excused from seeing and avoiding the mound of ice either (a) because in the exercise of reasonable care and prudence she was momentarily occupied with avoiding the risk of injury from another source (automobile traffic) or (b) because the hazard was concealed by snow and was not visible in the exercise of reasonable care and prudence.

The authorities cited by defendant to the contrary are distinguishable because in each of them either one or both of these factors (distraction or concealment) is missing. McCallister; Whitman; Eisner; supra.

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POINT II

PLAINTIFF DID NOT AND COULD NOT AS A MATTER OF LAW ASSUME THE RISK OF INJURY FROM A CONCEALED HAZARD.

The relationship between the defenses of contributory negligence and assumption of risk has been articulated by this Honorable Court as follows:

> "This further should be said in regard to the defense of assumption of risk. It is not identical with it but is closely related to contributory negligence. To invoke it and preclude recovery there must be a voluntary assumption of the risk of a known danger where one has a reasonable opportunity to make an alternative choice."
>
> Evans v. Stuart, 17 Utah 2d 308, 410 P.2d 999, 1002 (1966), accord, Johnson v. Maynard, 9 Utah 2d 268, 342 P.2d 884 (1959).

Mere reason to know of the risk "in the exercise of ordinary care" is insufficient to support the defense of assumption of risk. Lewis v. County of Contra Costa, 130 Cal. App. 2d 176, 278 P.2d 756, 758 (1955).

Thus it was held in Clay v. Dunford, 121 Utah 177, 239 P.2d 1075 (1952) that instructions on assumption of risk constituted prejudicial error where plaintiff did not know of and voluntarily expose himself to the "specific defect" which caused his injuries. 239 P.2d 1076.

Since plaintiff was unaware of the specific defect which caused her injuries (R. 180-181, 203-205), since she did not even have reason to know of the defect because it was concealed by snow, she could not possibly have assumed the risk of injury therefrom.

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POINT III

THE JURY WAS ADEQUATELY INSTRUCTED AS TO PLAINTIFF'S DUTY OF CARE FOR HER OWN SAFETY.

It is a well established principle of law that, in the absence of statute to the contrary, there are no "degrees" of care or negligence, that ". . . no more and no less than ordinary care under the circumstances of the case is required." 38 Am.Jur. 689, Negligence § 43 (1941).

Citing Prosser as follows with respect to circumstances of unusual danger:

> "What is required is merely the conduct of the reasonable man of ordinary prudence under the circumstances, demanding a greater amount of care."

the Court in Patterson v. Cushman, 394 P.2d 657, 6 A.L.R.3d 421, 430 (Alaska, 1946) then observed:

> "Under this view that there are no degrees of care as a matter of law and in the absence of any statute to the contrary, the trial judge need only instruct the jury that the defendant is required to exercise toward the plaintiff ordinary care under the circumstances."

Patterson held that failure to instruct as to the presence of small children or the particular degree of care required under such circumstances was unobjectionable where general instructions had been given to the effect that

> "Negligence means the want of ordinary care; that is, the want of such care as an ordinarily reasonable and prudent person would exercise under like circumstances." 6 A.L.R.3d 431; accord, Hughes v. MacDonald,

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133 Cal. App. 2d 74, 283 P.2d 360, 365 (1955); cf. Alvarez v. Paulus, 8 Utah 2d 283, 333 P.2d 633, 634 (1959).

Such a general instruction was given in this case (Instruction No. 6) and, as in Hughes, defendant's requested general instruction "would not have added anything of practical value" since the dangers of the "situation and the degree of care required must be clear to any juror and instructions could do little good." 283 P.2d 365.

In short, defendant's argument on this point is hypertechnical and without merit.

POINT IV

THE SCOPE OF DEFENDANT'S DUTY TO WARN PLAINTIFF OF EXISTING DANGER WAS CORRECTLY STATED BY THE TRIAL COURT IN ITS INSTRUCTION NO. 12.

Defendant's argument with respect to Instruction No. 12 misconceives the facts of this case.

Defendant contends that the hazard was obvious and that the Court should therefore have instructed to the effect that "there is no duty on the part of an owner to give a business visitor notice of an obvious danger," (defendant's requested Instruction No. 35) rather than instructing, as it did, that "the employees of the defendant have a duty to warn the plaintiff of danger of which they are aware of which the plaintiff had no knowledge." (Instruction No. 12).

The factual premise is in error. As demonstrated above (see argument under Point I, supra), the particular hazard, the concealed mound of ice, was not obvious (R.

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181). Its condition, however, indicated its existence in the parking lot for a sufficient length of time that defendant, in the exercise of ordinary care, must have known of it and should either have removed it or warned plaintiff of the danger.

Instruction 12 thus correctly stated the law as applied to the facts of this case.

CONCLUSION

Defendant's entire argument on this appeal hinges on the erroneous factual premise that the particular hazard responsible for plaintiff's injury was the generally snowy condition of the parking lot rather than the mound of ice on which she slipped and fell. Since this is demonstrably not the case, plaintiff respectfully submits that the relief sought on appeal should be denied and the judgment of the trial court affirmed.

Respectfully submitted,

S. REX LEWIS, for:
HOWARD AND LEWIS
120 East 300 North
Provo, Utah
Attorneys for Plaintiff-
Respondent

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