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IN THE SUPREME COURT OF THE STATE OF UTAH

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ELMER O. ALLEN,
Plaintiff and Appellant,

— vs. —

FEDERATED DAIRY FARMS, INC., and ALBERTSON'S, INC.,
Defendants and Respondents.

Case No. 13894

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

RESPONDENTS' BRIEF

Appeal from Summary Judgments of the District Court of Weber County, the Honorable Ronald O. Hyde, Judge

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FILED
APR 17 1975
Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

ELMER O. ALLEN,
Plaintiff and Appellant,

— vs. —

FEDERATED DAIRY FARMS, INC., and ALBERTSON'S, INC.,
Defendants and Respondents.

Case No. 13894

RESPONDENTS' BRIEF

STATEMENT OF KIND OF CASE

This is an action brought by the Plaintiff-Appellant, Elmer O. Allen against Respondents, Federated Diary Farms, Inc., and Albertson's, Inc., for injuries arising from a slip and fall accident involving cottage cheese on a floor in Albertson's store.

DISPOSITION IN LOWER COURT

The District Court for Weber County, the Honorable Ronald O. Hyde, presiding, granted to both Defendant-Respondents, their respective motions for summary judgments and judgment was entered in favor of each Defendant-Respondent upon the grounds that there was no evidence of negligence on the part of either

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Federated Dairy Farms or Albertson's and that there was no evidence of how the cottage cheese got on the floor, by whom it was deposited, how long it had been there, or that either Defendant knew of its presence before the accident and that the facts, established by the depositions of the Appellant, and Appellant's wife, an employee of Albertson's, and an employee of Federated Dairy Farms, fall directly within the Utah Supreme Court cases of *Long vs. Smith Food King and Cream O'Weber Dairy,* ..... Utah 2d ....., (filed October 4, 1973), 531 P.2d 360; *Koer vs. Mayfair Markets,* 19 Utah 2d 339, 431 P.2d 566; *Howard vs. Auerbach Company,* 20 Utah 2d 355, 437 P.2d 895, and *Lindsay vs. Eccles Hotel Company,* 3 Utah 2d 364, 284 P.2d 447.

RELIEF SOUGHT ON APPEAL

Respondents seek an affirmation of the Trial Court's decision granting their respective motions for summary judgment.

STATEMENT OF FACTS

Appellant's statement of facts does not fully set forth the facts established by the depositions of the Appellant, the Appellant's wife and others, and, furthermore, leaves out vital testimony of the Appellant and his wife having a bearing upon this case.

Respondents jointly submit this brief and the following statement of facts:

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On March 3, 1973, between two o'clock and three o'clock p.m., Appellant and his wife entered Albertson's store to shop and had been in the store approximately thirty minutes (R.42, pp.5-6) when Appellant allegedly slipped and fell on some cottage cheese which was on the floor.

Before the fall, the Appellant and his wife had walked up and down every aisle within the store and neither had seen any cottage cheese on the floor (R.43, p.4, 6; R.42, pp.9-10, 15 with Exhibit "A" — diagram at end of deposition).

Neither the Appellant nor his wife know how the cottage cheese got on the floor (R. 42, p.15; R.43, p.7).

Neither the Appellant nor his wife know how long the cottage cheese had been on the floor before the fall (R.42, p.15; R.43, p.7).

The employee of Federated Dairy, Nadine Blanchard, who was handing out samples of cottage cheese, regularly checked the floors and never saw any cottage cheese on the floor prior to the accident, and did not see the cottage cheese in question before the accident (R.46, Blanchard Dep. p.19, 22). The said employee did not see the Plaintiff fall but was looking in the opposite direction at the time (R.46, Blanchard Dep., p.14).

The employee of Albertson's, Mr. Sage, saw no cottage cheese anywhere on the floor of the store on the day of the accident prior to the Appellant's fall (R.46, Sage Dep., p.18, 26). He did not see the cottage cheese

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in question before the accident and does not know how the same got upon the floor (R.46, Sage Dep., p.28).

The Appellant does not know of anyone who saw the cottage cheese on the floor before he fell (R.42, p.15).

On the day of the accident, small samples of cottage cheese were being given away to those customers of the store who desired them. The samples consisted of a small amount of cottage cheese placed upon a cracker measuring approximately one inch square (R.46, Blanchard Dep., p.12).

The employee of Albertson's does not know the source of the cottage cheese upon which the Appellant allegedly slipped and fell. It could have been dropped by a customer who obtained the same from the dairy case or from the demonstration area. He does not know how the cottage cheese got upon the floor or how long it had been there (R.46, Sage Dep., p.28, 29-30).

Appellant's brief at page 3 leaves an erroneous impression that unwanted samples of cottage cheese were found in the store after the accident. However, the record shows the contrary to be true. No cottage cheese was found in the store subsequent to the accident (R.46, Sage Dep., p.23, line 21-24).

Appellant's brief at page 3 claims there was no procedure for inspection and clean-up, however the record indicates otherwise. It was uncommon for people to spill on the floor (R.46, Blanchard Dep., p.5-6), but in

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any case she walked around the store three or four times during the shift to check the floor (R.46, p.19) and at no time saw any cottage cheese upon the floor (R.46, Blanchard Dep., p.22).

ARGUMENT

POINT I

THERE IS NO EVIDENCE OF NEGLIGENCE ON THE PART OF THE RESPONDENTS.

The law is well-established in Utah, as it is in most other jurisdictions, that an injured Plaintiff who slips and falls on substance on a commercial floor, must establish either that the defendant placed the substance upon the floor, or that the substance was on the floor for such a length of time that the defendant knew of or reasonably could have discovered and removed it.

The Utah Supreme Court case of *Long vs. Smith Food King and Cream O'Weber Dairy,* ..... Utah 2d ..... (filed October 4, 1973), 531 P.2d 360, is directly in point and nearly identical to the case at bar. In that case, a Cream O'Weber Dairy demonstrator was handing out samples of pumpkin pie and whipped cream on one inch square butter pads. The Plaintiff slipped and fell upon pumpkin pie and whipped cream in the Smith Food King store. The Plaintiff had been shopping with his wife and both testified that they had seen no other pumpkin pie on the floor before the fall. Neither the Plaintiff nor his wife knew how the pie got upon the

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floor or how long it had been there. The demonstrator did not see the pie on the floor before the accident. The Trial Court granted summary judgment upon the ground that there was no evidence as to how the pie got on the floor, by whom it was deposited, when it arrived there or that the Defendants had any knowledge of its presence. The Plaintiff appealed to the Utah Supreme Court which affirmed the summary judgments holding that the basic rules of *Howard vs. Auerbach Company, Koer vs. Mayfair Markets,* and *Lindsay vs. Eccles Hotel Company, supra,* should apply. The Supreme Court further held that the giving away of samples was an essential part of the operation of super markets and a well-known and widely practiced method of merchandising and that the same rules should apply as to the other operations of the super market.

In *Howard vs. Auerbach Company,* 20 Utah 2d 355, 437 P.2d 895, a customer slipped on some oil on the escalator in the store and fell injuring herself. Summary judgment in favor of Auerbach's was affirmed by the Utah Supreme Court which stated:

> . . .the record is devoid of any indication who put any oil on the steps of the escalator or, if so, it was for such a time that the store people reasonably could have discovered and removed it.

The Court further stated that the *Auerbach* case fell directly within the law enunciated in *Koer vs. Mayfair Markets, supra.*

In *Koer vs. Mayfair Markets,* 19 Utah 2d 339, 431 P.2d 566, a customer slipped and fell on a grape on the

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floor of the store. The customer alleged that the store manager had passed by the spot where the accident occurred just prior to the accident and, therefore, either had actual knowledge or constructive notice of the presence of the substance on the floor and should have removed it. The Trial Court granted a judgment not withstanding the verdict which was affirmed by the Utah Supreme Court. The Supreme Court stated:

> We concede that the grape on the floor was a dangerous condition and that the plaintiff slipped and fell by reason of such condition. But we are not able from the evidence to find any support for the further and necessary inference that this condition was caused by an act of the defendant, or that the defendant had actual or constructive knowledge of it. We just cannot ignore the fact that the grape was only seen after the fall occurred. From these circumstances alone a jury could not be justified in inferring that the grape had been there for such a period of time that, had the defendant exercised reasonable care, he should have known of its presence. Furthermore, there was testimony at trial that others were shopping in the aisle. It is quite possible that one of them dropped the grape on the floor after the manager passed by. There may have been any number of reasons, including legitimate preoccupation with other problems than whether there was a grape on the floor, or that other shoppers may have blocked his view, as to why the manager did not see it. It seems unfair to permit even a jury with its admittedly broad prerogatives, to conclude on the one hand that it was the manager's duty and that he must have seen it, but on the other, that it was not the plaintiff's duty and she was excused from doing so.

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The Court in the *Koer* case recognized and followed the rule set down in *Lindsay vs. Eccles Hotel Company,* 3 Utah 2d 364, 284 P.2d 477. In that case, a coffee shop patron slipped and fell on water which was present on the floor of the coffee shop. The Supreme Court held that the coffee shop owner would not be liable to a patron in absence of showing how or when water got on to the floor or that the owner had knowledge of its presence.

The Court stated:

> . . .although the evidence indicated that a waitress delivered water in glasses to plaintiff and her companion, there is no evidence as to whether the waitress, the plaintiff, her companion, other patrons or persons spilled the water on the floor, or exactly when it was spilled, or whether the management knew of its existence. In other words, there was no evidence as to how the water got on the floor, by whom it was deposited, exactly when it arrived there or that the defendant had knowledge of its presence. Under such circumstances, a jury cannot be permitted to speculate that the defendant was negligent.

In *Morgan vs. American Meat Company,* 46 N.E.2d 669 (Ohio 1942), samples of olives were being given away to customers in defendant's store. One customer slipped on an olive and fell injuring herself. There was no evidence that the storekeeper knew the olive was on the floor or how long it had been there and the Court granted defendant a directed verdict.

In the course of its decision, the Court in the above case stated:

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> The giving away of articles of food in grocery stores, as samples, has long been a recognized method of advertising and there is no rule of law which will charge the merchant with knowledge that the customers will dispose of what remains of the sample in such a way as to make the store dangerous to other customers.

In the case at bar, the Appellant and his wife, before the accident, had been in the store thirty minutes, including the area where cottage cheese samples were being given away, and the Appellant and his wife had walked up and down every aisle within the store and at no time did they see any cottage cheese on the floor. The only cottage cheese ever observed by anyone was that small portion upon which the Appellant claims he slipped, and this was after the fall. And, it is unknown how that particular portion got on to the floor, or how long it had been on the floor before the fall.

The demonstrator did not see any cottage cheese at any time before the accident.

The employee of the store did not see any cottage cheese on the floor on the day of the accident.

The particular cottage cheese in question could have been dropped by any customer merely seconds before the Appellant fell.

There is no evidence as to how the cottage cheese got on the floor, by whom it was deposited, when it arrived there or that the Respondents had any knowl-

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edge of its presence. Under such circumstances, a jury cannot be permitted to speculate that the Respondents were negligent. It would be impossible for a jury to determine whether or not there was negligence on the part of either Respondent without such speculation and this would be contrary to the well-established laws of this state.

The Appellant has cited as authority several cases from other jurisdictions which have no application here. For instance, Appellant cites *Jasko vs. Woolworth,* 494 P.2d 839 (Colorado) where pizza was sold for consumption on the premises. However, the facts there indicated that there was constant debris on the floor where the pizza was sold and this constant debris was known to the manager before the accident. In our case, there was no cottage cheese any place in the store or even by the demonstration table before the accident and nothing to put the Respondents on notice of the particular cottage cheese upon which Appellant fell.

Appellant also cites *Maugeri vs. Great Atlanta and Pacific Tea Company,* 357 F.2d 202 (New Jersey, 1966) where a customer in a grocery store fell on vegetable leaves located in front of the produce counter which had slanted racks wherein the Court found that the actions of the store owner in the manner in which he displayed vegetables caused a dangerous condition on the floor of which he should have been aware. However, in the case at bar there is no evidence of any actions on the part of the store owner or the demonstrator which caused

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cottage cheese to be upon the floor. In fact, the contrary is true. No cottage cheese was seen any place upon the floor in this store on the day of the accident.

The only other case cited by the Appellant was *Little vs. Butner,* 186 Kansas 75, 348 P.2d 1022 (1960) a case involving meat samples given to customers which actually created a slippery condition upon the floor which the Kansas Court held was such that the store owner knew of the condition or should have known. However, in the case at bar, we have no such slippery condition. In fact, the contrary is true. Both the Appellant and his wife testified that they walked up and down every aisle in the store for one-half an hour before the accident and saw no cottage cheese or crackers any place upon the floor. The floor was clean. And, the demonstrator and store employee both testified that they saw no cottage cheese on the floor on the day of the accident. The only cottage cheese ever seen on the floor was that which the Appellant claims he slipped on and that could have been dropped by a customer seconds before the Appellant arrived at that spot.

It is respectfully submitted that there is no evidence of negligence on the part of either Respondent and that the Trial Court's decision granting both motions for summary judgment should be affirmed.

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POINT II

THE GRANTING OF A MOTION FOR SUMMARY JUDGMENT IS PROPER WHERE THERE IS NO GENUINE ISSUE OF ANY MATERIAL FACT.

The depositions of the Appellant, the Appellant's wife, the store manager and the cottage cheese demonstrator have been taken and all parties have had an opportunity of full cross-examination. There are no other known witnesses or other evidence to shed light upon this matter. All available facts are now before the Court and clearly indicate that there are no genuine issues of any material fact remaining to be tried and that the summary judgment was proper.

All witnesses and parties agree that it is unknown how the cottage cheese got on to the floor or how long it had been there before the accident. All witnesses and parties agree that no cottage cheese was seen any place on the floor of the store before or after the accident except for that small amount upon which Appellant slipped.

Rule 56 (c) of the Utah Rules of Civil Procedure concerning summary judgment provides:

> . . .The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . .

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CONCLUSION

It is respectfully submitted that there is no evidence of any negligence on the part of the Respondents and that the Trial Court did not err in granting both Respondents' motions for summary judgment and that the same should be affirmed.

Respectfully submitted,

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HEREBY CERTIFY that I mailed in the United tates Postal Service, copies of the foregoing ESPONDENTS' BRIEF this 17th day of April, 1975, o the following parties:

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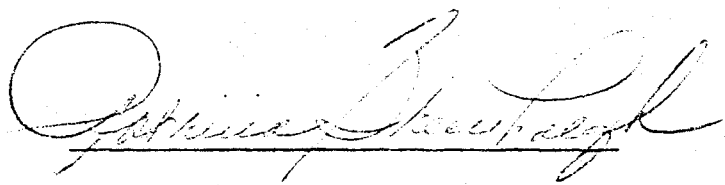

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