

1955

Sarah Margaret DeWeese v. J. C. Penney Company : Brief of Appellant

Utah Supreme Court

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Ray, Quinney & Nebeker; Grant C. Aadnesen; Attorneys for Defendant and Appellant;

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IN THE SUPREME COURT
of the
STATE OF UTAH

SARAH MARGARET DeWEESE,
Plaintiff and Respondent,

vs.

J. C. PENNEY COMPANY,
a corporation,
Defendant and Appellant.

FILED
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Clerk, Supreme Court, Utah
Case No. 8347

BRIEF OF APPELLANT

RAY, QUINNEY & NEBEKER,
GRANT C. AADNESEN,
Attorneys for Defendant
and Appellant.

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IN THE SUPREME COURT of the STATE OF UTAH

SARAH MARGARET DeWEESE,
Plaintiff and Respondent,

vs.

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Defendant and Appellant.

Case No. 8347

BRIEF OF APPELLANT

STATEMENT OF FACTS

Plaintiff brought this action to recover damages for a fall in the entranceway of the J. C. Penney store at 213 South Main Street in Salt Lake City on November 30, 1953. The case was tried before a jury in the Third Judicial District Court, in and for Salt Lake County, State of Utah, with the Honorable Martin M. Larson presiding. After plaintiff had introduced her evidence and rested, the court reserved its ruling on defendant's motion for an involuntary dismissal. After defendant had introduced its evidence, the court reserved its ruling on defendant's motion for a directed verdict. The case

was submitted to the jury, a verdict in favor of the plaintiff and against the defendant was returned by them in the amount of \$10,000.00, and judgment was entered accordingly. Thereafter, defendant moved the court for a new trial or, in the alternative, to set aside the verdict and enter judgment in accordance with its motion for a directed verdict theretofore reserved by the court. These motions were both denied by the court.

Sarah Margaret DeWeese was 27 years old at the time of the trial. On November 30, 1953, she left her home at 1275 Emerson Avenue in Salt Lake City to go to town to do some shopping and to meet her husband who was scheduled to get off work between 9:15 and 9:30 P.M. Her husband, Hugh DeWeese, was Assistant Manager of the W. T. Grant store located at 241 South Main Street in Salt Lake City. She was wearing regular winter apparel but was not wearing any galoshes or overshoes. (R. 17). She caught the bus at 13th East and Emerson Avenue at 8:00 P. M. and at that time the weather was fair, with no precipitation. After she had traveled about one block or maybe a block and one-half snow began to fall in large flakes, melting before it hit the ground. She got off the bus at 2nd South and State Streets and the weather was the same but there was no snow on the ground. The sidewalks were damp and wet but not wet enough for any water to be running on them (R. 18) and there were no puddles unless there was a break in the sidewalk. (R. 35) She went directly to the J. C. Penney store.

The floor of the entrance to the store consisted of terrazzo and she entered from the north side. (R. 19-20) She noticed the floor was wet and muddy and footprints

or streaks from people walking in and out. (R. 20, 39) There was no water puddled or running (R. 42) but she never thought about it being slick or anything of that nature. (R. 20) She was not looking up or down. (R. 30) The entrance was lighted and she could see where she was going. (R. 28) She was from two to five feet from the sidewalk when her right foot went forward and her left leg folded under her and she fell. A customer helped her up and she went into the store. She called her husband at the W. T. Grant store and he came to defendant's store immediately. A Mr. Davies, an employee of the store, arrived and asked her if there were any mats in the entrance. She told him no and he went out to the entrance, returned and got a bucket and went outside and put what appeared to be Feldspar on the entranceway. The accident occurred around 8:15 or 8:20 P.M. She was in the J. C. Penney store approximately 15 to 20 minutes and went from there to W. T. Grant's store. (R. 21-22) When she went out of the store there were no mats in the entranceway.

The entranceway where plaintiff fell had a slope of 4 inches to 10 feet. The sidewalk in front of the store had a slope of 5.5 inches to 10 feet. (R. 29) She left W. T. Grant's store with her husband between 9:15 and 9:30 and the weather and the sidewalks were about the same as when she fell.

Over objection of the defendant, plaintiff's husband was allowed to testify that he married plaintiff on November 4, 1950 in Roanoke, Virginia. He had been raised there and was first employed in Postal Service at the age of 18, subsequently going to the U. S. Army, attending college and then returning to the Post Office, after which

he went to work as a Trainee Manager for W. T. Grant Company. (R. 66-67) With W. T. Grant Company he had duties to perform in connection with the maintenance and upkeep of the entrances to the store, which were of terrazzo. Thereafter he worked for the same company in Greensboro, North Carolina, Richmond, Virginia, Williamsburg, Virginia, Winchester, Virginia, Newport News, Virginia, Atlanta, Georgia and Salt Lake City, at all of which places they had terrazzo entranceways and he had duties relative to the upkeep and maintenance of the same. (R. 67-70)

On the 30th day of November, 1953, the following precipitation amounting to .02 inches was received in Salt Lake City:

“Light rain started at 8:12 P.M., ended at 8:34 P.M.
Very light rain started at 9:15 P.M., ended at 9:31 P.M.

Light rain started at 9:31, ended at 10:59 P.M.
Light snow started at 10:45 P.M., ended at 11:00 P.M.

Very light rain started at 10:59 P.M., ended at 11:35 P.M.

Very light snow started at 11:05 P.M., ended at 11:36 P.M.” (Exhibit 4-P).

The temperature on November 30th was a maximum of 62 and a minimum of 39, which maximum tied the previous record for this day and was the warmest November since records began in 1874. On the 30th of November, 1953 there was only a trace of precipitation at 9 o'clock and a trace is an amount too small to measure. (Ex. 5-D)

STATEMENT OF POINTS

POINT I.

THERE WAS INSUFFICIENT EVIDENCE ADDUCED AT THE TRIAL TO SUPPORT THE VERDICT OF THE JURY.

POINT II.

PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW.

POINT III.

THE TRIAL COURT ERRED IN ADMITTING IMPROPER EVIDENCE AT THE TRIAL.

POINT I.

THERE WAS INSUFFICIENT EVIDENCE ADDUCED AT THE TRIAL TO SUPPORT THE VERDICT OF THE JURY.

Plaintiff predicated her right to recover solely upon the following two allegations of negligence contained in the complaint:

“(a) That defendant constructed the entranceway to its store with a terrazzo surface and on an inclining plane at a time when it well knew, or should have known, that said surface had the propensity of becoming slick and slippery when wet.

“(b) Defendant failed and neglected to place any abrasives or rubber matting on said entranceway at a time when it well knew, or should have known, that said entranceway had become slick

and slippery as a result of inclement weather.”
(R. 2)

There was no evidence introduced at the trial in support of the first allegation and the court did not submit such a question to the jury. The mere fact that an incline or slope existed cannot sustain any charge of negligence. However, the only evidence introduced at the trial showed that the slope was in fact less than that of the sidewalk itself in front of and adjoining the entranceway. The general rule is well stated in *Shearman & Redfield on Negligence*, Revised Edition, Vol. 4, Sec. 798, page 1824:

“But there is no inherently dangerous construction merely because the marble floor of an entranceway to a store has a slanting or sloping surface.”

One of plaintiff's witness also testified that this type of entrance was in common use to the extent of approximately 80% of the business establishments on Main Street.

The duty of care controlling in this case has been fully set out by this court. In *Jenson v. S.H. Kress & Company*, 87 Ut. 434, 49 P.2d 958 (1935), this court held that a storekeeper's duty was to exercise ordinary care and diligence to provide and maintain a reasonably safe place of business for its customers and to exercise the same degree of care and diligence to prevent injury to them and to their property while they are lawfully in its place of business or on the premises. This court also held that a storekeeper is not an insurer of the safety of its customers. This rule of law has been reaffirmed by this court in the case of *Erickson v. Walgreen Drug Co.*,

----- Ut. -----, 232 P.2d 210, 31 A.L.R.2d 177, where the court said:

“* * * In the instant case the appellant can only be liable if the terrazzo floor when wet subjected business visitors to an unreasonable risk and the appellant either knew or by the exercise of reasonable care could have discovered that such a condition existed. * * *”

Viewing all the evidence in a light most favorable to plaintiff, we respectfully submit that reasonable minds could not differ that the floor upon which plaintiff fell did not subject her to an unreasonable risk and that the defendant did not know, and by the exercise of reasonable care could not have discovered, that any hazard existed.

First and foremost, the record does not support the charge that the entranceway had become slippery. Mrs. DeWeese stated:

“A. I was just walking along normally, minding my own business, and I noticed the floor was wet, but never thought about it being slick or anything like that.

“Q. And what happened?

“A. And the next thing I knew, I was down after I had gone two or three feet inside the entrance.” (R. 20)

Mr. Caffall, one of the plaintiff's witnesses, testified that he did not test the terrazzo at J. C. Penney's for slipperiness when it was wet. (R. 100) He also testified that a lot of differences existed in various terrazzo (R. 95) and that terrazzo when wet was just about as slippery as

the sidewalk. All of plaintiff's evidence introduced in an attempt to show possible slipperiness was related to the terrazzo in front of W. T. Grant's store or in the W. T. Grant's stores in Roanoke, Virginia, Greensboro, North Carolina, Richmond, Virginia, Williamsburg, Virginia, Winchester, Virginia, Newport News, Virginia and Atlanta, Georgia. As will be hereinafter pointed out, the terrazzo or its condition in the entranceways to these other stores was inadmissible and had no probative value relative to the terrazzo in front of the defendant's store. Admittedly, Mr. DeWeese testified that he almost fell, but he was in a hurry and he was not walking in a normal manner nor as his wife had been walking, nor in the same place.

The only affirmative evidence introduced relevant to the terrazzo in the entranceway of defendant's store was by the defendant, whose witness, Dr. Harris, testified from actual measurements made of the static and kinetic coefficients of friction of the terrazzo where Mrs. DeWeese fell. This testimony was to the effect that, first, it was not more slippery when wet than dry; second, it was less slippery when worn, and, third, it was about as slippery when wet as the sidewalk in front of the store. (R. 110-119)

Reasonable minds cannot differ in concluding that defendant did not know, nor by the exercise of reasonable care could it have discovered, any alleged hazardous condition.

The time element in this case is startling. This accident, by plaintiff's own testimony, happened around 8:15 or 8:20 P.M. Her husband corroborated this by his testimony. After plaintiff had fallen, been helped up, had

gone into defendant's store and then called her husband at W. T. Grant's store, he arrived at J. C. Penney's store between 8:15 and 8:30 P.M. Plaintiff also introduced the weather report, showing: "Light rain started at 8:12 P.M., ended at 8:34 P.M." (Ex. 4-P)

Plaintiff's testimony that it had begun to snow shortly after she boarded the bus at 13th East and Emerson, is not inconsistent, for this court can take judicial notice that precipitation could have begun at the higher elevation of 13th East before any precipitation began in town. The only evidence of any precipitation in town other than the weather report was plaintiff's testimony of precipitation during the time it took her to walk from 2nd South and State Streets to defendant's store, less than a block and a half away.

The month of November had been the warmest November since weather records began in 1874. No precipitation had fallen during the previous five days, and, in fact, only five days out of the entire month showed any precipitation at all. (Ex. 5-D) The uncontroverted evidence is that on the evening Mrs. DeWeese fell precipitation began at 8:12 P.M., with just a trace falling from that time until 8:34 P.M. The weather report shows all precipitation to be very light and intermittent, and Mrs. DeWeese properly categorized it as a "mist," (R. 36) certainly not enough to cause the sidewalks to run water or collect puddles, and the only moisture in defendant's covered foyer was placed there during a period of not less than three nor more than eight minutes prior to plaintiff's fall and consisted of streaks or marks from people's feet. These did not extend into the store beyond where Mrs. DeWeese fell.

We submit that to hold a store owner to a standard of care imposing constructive notice or knowledge of a purportedly but not proven slippery condition in a covered entranceway, which could not have been in existence for more than approximately five minutes, is unreasonable and would in effect require that defendant be an insurer of its customers' safety. Such a rule is contrary to the law in this state and the overwhelming rule of law in the United States. *Jenson v. S. H. Kress Co.*, supra; *Erickson v. Walgreen Drug Co.*, supra.

The Supreme Court of Washington in *Knopp, etal. v. Kemp & Hebert*, 74 P.2d 924, (S.Ct. Washington, 1938), in affirming a judgment on a directed verdict for the defendant department store, declared:

"* * * At any event, there is evidence that the sidewalk in front of the store was wet and some of the slush or water had slopped over on the terrazzo floor where it joined the cement sidewalk. As Mrs. Knopp stepped on the terraza [sic.], she slipped and fell on her right side, seriously injuring her upper right arm and her right shoulder."

"The decisions of this court, as well as the decisions of other courts, have very generally denied recovery in cases where persons have fallen on smooth floors even when they are made slippery by the presence of wax or water. A great many of these cases are collected and discussed in *Shumaker v. Charada Investment Co.*, 183 Wash. 521, 49 P.2d 44. Among the cases there cited is *Kresge Co. v. Fader*, 116 Ohio St. 718, 158 N. E. 174, 175, 58 A.L.R. 132, from which we quote as follows: 'It is a fact known to all that many stores in all branches of trade have an inside door or passageway into the store, usually in the middle of the front.

On each side of this passageway is a display window. The passage then extends back ten or twelve feet or more to the entrance door to the store. This passage usually has a slight slope from the door to the sidewalk, at which line there is no door. This slope is to carry away the rain that may blow into the passageway. The passageway is in fact practically a part of the sidewalk, but at the same time it is within the front line of the store, and under control of the store. Would any one contend that, if a person walked into such passageway when it was raining, and there slipped and fell, he could recover damages because there was moisture on the floor of the passageway? Manifestly not. Everybody knows that, when people are entering any building when it is raining, they will carry some moisture on their feet, which will render the floor near the door on the inside damp to some extent, and every one knows that a damp floor is likely to be a little more slippery than a dry floor. In this instance Mrs. Fader knew that her own shoes were wet when she went in there out of the rain-storm, and after walking on the wet sidewalk. Two of her companions who preceded her crossed the same wet spot as she did, and did not fall, and the one of them who testified in the case said that he did not turn and warn her about the wet spot, as there was nothing about it to indicate to him that it presented any danger—a very frank and a very natural statement.’

“See, also, *Cornwell v. S. S. Kresge Co.*, 112 W. Va. 237, 164 S.E. 156; *Picman v. Higbee Co.*, 54 Ohio App. 55, 6 N.E.2d 21; *Anderson v. Seattle Park Co.*, 79 Wash. 575, 140 P. 698; *Mullen v. Sensenbrenner Mercantile Co.*, Mo. Sup., 260 S.W. 982, 33 A.L.R. 176.

“Walking, although it becomes automatic by long practice and use, is, after all, a highly compli-

cated process. The body balance is maintained by the co-ordination of many muscles, and their operation is controlled by an intricate system of motor nerves, the failure of any of which for a split second, on account of advancing age or for some other reason, may cause a fall. It is common knowledge that people fall on the best of sidewalks and floors. A fall, therefore, does not, of itself, tend to prove that the surface over which one is walking is dangerously unfit for the purpose."

To the same effect the Circuit Court of Appeals of the Tenth Circuit, in the case of *Sears Roebuck & Co. v. Johnson*, 91 F.2d 332, reversed a judgment for the plaintiff, who had slipped on an allegedly wet and therefore slippery floor of defendant's store, saying:

"From the record, it appears that when it is raining in said city, some water is usually carried into stores by parties going in and out, and that those coming in from without on a wet day have wet shoes.

"It is just as reasonable to infer that plaintiff slipped because of wet shoes as on account of a damp floor.

"Under either theory, the evidence is insufficient to make an issue as to negligence on the part of defendant. The conditions complained of were not shown to have existed for any length of time. Whilst there is evidence that it was raining around 9:30 and 10 o'clock in the morning, its extent is not stated although plaintiff should have been able to state the extent.

"As to what period during the rain it was sufficient to wet the streets so that the shoes of persons entering the store would carry in water or

mud, if at all, is not disclosed. The rain in the beginning may have been merely a drizzle and have gradually increased. So you cannot point out with any reasonable certainty as to when or how long, if at all, that floor was sufficiently wet as to place the defendant on notice that it should receive attention by mopping or otherwise.

"There was no evidence on part of plaintiff that her shoes were not wet, and that information was peculiarly within her knowledge."

"The fact that invitee may have slipped on the floor of the store did not shift to defendant burden of establishing that accident did not occur through its negligence, nor create presumption of negligence. The presumption is that defendant exercised reasonable care, as respects liability for injury to plaintiff on account of slipping on floor. Defendant was not an insurer against accidents to persons entering the store for making purchases or otherwise on invitation."

In *Parsons v. H. L. Green Co.*, 10 N.W.2d 40, the defendant store was charged with a slippery and unsafe condition due to water, slush, snow and mud being allowed to collect and which condition defendant knew or should have known existed. In affirming a directed verdict for the defendant store the Supreme Court of Iowa stated:

"* * * We cannot say that a failure to follow and remove immediately every deposit of snow that is brought into a building can reasonably be held to be a breach of duty which the inviter owes to an invitee and so constitutes negligence. Such is not the holding of the courts where this question has arisen. To so require would demand an exercise of such extra-ordinary care as to be unreasonable."

“* * * In order that there shall be liability, there must be some evidence of notice of the existing condition, either actual or constructive, and in such time that the defendant in the exercise of ordinary care could have remedied it. *Snipps v. Minneapolis & St. L. R. Co.*, 164 Iowa 530, 146 N.W. 468, and cases cited. No evidence of such knowledge appears in the record.”

In *Brunet v. S. S. Kresge Co.*, 115 F.2d 713, the Circuit Court of Appeals for the Seventh Circuit reaffirmed the foregoing general rule:

“We think the facts as proved by appellee fail to disclose such a lack of reasonable and ordinary care in the maintenance and supervision of the premises as to render appellant liable for her accident. In the words of the Circuit Court of Appeals for the Tenth Circuit in another case involving a fall on rather dark stairs wet from tracked-in water:

“‘If what was shown in this case was sufficient to permit recovery, it would require store owners to have a mopper stationed at the doors on rainy days for the sole purpose of mopping up after every customer entering or leaving the premises. Every store owner would be required to be an insurer against such accidents to public invitees who came in on rainy days with wet shoes.’ *Sears, Roebuck & Co. v. Johnson*, 91 F.2d 332, 339.”

Also, in *Gallagher v. Children's Aid Soc. of Pennsylvania and Philadelphia*, 23 A.2d 452, the Supreme Court of Pennsylvania, in affirming a nonsuit, where the plaintiff fell due to wet condition in defendant's office building, said:

"The case falls within the familiar rule that negligence cannot be inferred from the mere happening of an accident. *Hulmes v. Keel*, 335 Pa. 117, 119, 6 A.2d 64. The mere happening of an accident does not show that one party or the other was at fault. *McAvoy v. Kromer*, 277 Pa. 196, 120 A. 762. Plaintiff's proofs were also deficient in that she failed to show that the condition of which she complained had existed for an unreasonable length of time so that defendant was put on notice. *MacDonald v. Gimbel Bros., Inc.*, 321 Pa. 25, 183 A. 804; *Bremer v. W. W. Smith, Inc.*, 126 Pa.Super. 408, 411, 191 A. 395; Restatement, Torts, Sec. 343."

See also: *Montgomery Ward & Co. v. Lamberson*, 144 F.2d 97, (C.C.A. 9th, 1944); *Lander v. Sears Roebuck & Co.*, 44 A.2d 886 (S.Ct. Me., 1945); *Dudley v. Montgomery Ward & Co.*, 192 P.2d 617 (S.Ct. Wyoming, 1948); *Bersch v. Holton Street State Bank*, 19 N.W.2d 175 (S.Ct.Wis., 1945); *Spaulding v. Christakos*, 68 N.E. 2d 55 (Ct. of App., N.Y., 1946); *Grace v. Jordan Marsh Co.*, 59 N.E.2d 283 (S.Ct., Mass., 1945).

A general rule of law is stated by *Shearman & Redfield on Negligence, Revised Edition, Vol. 4, Sec. 798* at page 1826:

"Water, slush and mud, tracked in upon a floor by reason of weather conditions outside, although it renders the floor wet, dirty and slippery, does not ordinarily create an actionable situation. A wet and sloppy condition of the floor may be necessarily incidental to the business or activity in question."

This court has distinguished the case of *Erickson v. Walgreen Drug Co.*, *supra*, in the case of *Lindsay v. Ec-*

cles Hotel Company, ----- Ut. -----, 284 P.2d 477:

“* * * In other words, there was no evidence as to how the water got onto 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. A reading of plaintiff’s authority makes obvious the factual differences between that case and its inapplicability to the one here.” (Italics ours)

There is no probative evidence in the record sufficient to establish that defendant knew or should have known of any condition alleged by plaintiff to have existed, or that such a condition had existed for such an unreasonable length of time that defendant was put on notice thereof.

POINT II.

PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW.

Plaintiff testified that when she walked into the entranceway of defendant's store,

"A. I was just walking along normally, minding my own business, and I noticed the floor was wet, but never thought about it being slick or anything like that.

"Q. And what happened?

"A. And the next thing I knew, I was down after I had gone two or three feet inside the entrance." (R. 20)

The foyer was lighted. As pointed out above, there was no affirmative evidence of any condition existing in the entranceway. Any contention that the entranceway was slippery, because common knowledge is alleged to provide the information that terrazzo is slippery when wet, charges plaintiff with that knowledge as equally as the defendant. She was married to an Assistant Manager of a store, who professed to know the propensities of terrazzo and who testified that W. T. Grant's terrazzo in all of the stores he worked was slippery when wet. The plain fact is that she didn't think it was wet enough to be dangerous (and it wasn't) and yet she seeks to hold J. C. Penney for what they should have known was dangerous. If she maintains that a reasonable, prudent person would or could have recognized a dangerous condition, she thereby excludes herself from such a reasonable, prudent category and convicts herself of contributory negligence. She wore no galoshes, she recognized that

precipitation did not begin until she was on her way to town and that the sidewalks were damp only, with no water in puddles or running on it. What she demands is knowledge of or notice to defendant, should also be knowledge or notice to herself. See *Brunet v. S. S. Kresge, supra*, where the Circuit Court of Appeals for the Seventh Circuit stated:

“ ‘From the testimony of the plaintiff it is apparent that the danger, if any, was clearly evident to her, as well as the defendants, and that she was aware of the condition and of the possibility of sustaining a fall before she undertook to pass over and along the floor space of the vestibule.

“ ‘The condition described by the witnesses is one that is not only not unusual, but is customarily to be found on such days as described in the testimony, in vestibules of this character and the sidewalks and the premises surrounding entrances to public places. * * *

“ ‘In the case at bar the plaintiff was as well apprised of the condition existing in the vestibule as the defendant, and should be held to as high a degree of care for her own safety as would be required of the defendant.’ ”

POINT III.

THE TRIAL COURT ERRED IN ADMITTING IMPROPER EVIDENCE AT THE TRIAL.

The record reveals that plaintiff sought to influence the jury by a constant and persistent line of questions and testimony relating to the practice, custom and conditions of W. T. Grant stores in various localities in the United States as well as Salt Lake. The beginning question was categorized by counsel as "preliminary," and then boldly asserted to be admissible as a standard of care:

"MR. BLACK. If your Honor, please, this has to do with a standard of care—this is evidence of a standard of care in connection with maintenance and upkeep of terrazzo entrance-way.

"MR. AADNESEN: Just a minute, I object—

"THE COURT: Just a minute, no argument—

"MR. AADNESEN: —object to the speech.

"THE COURT: It may be evidence of a standard of care that W. T. Grant takes, but I don't see how it could be anything else." (R. 71)

In spite of some adverse rulings of the court and much discussion regarding the objectionable nature of the questions, the line of questioning persisted until the pattern and effect became clearly prejudicial to the defendant. Mr. DeWeese was both directly and indirectly allowed to set a standard of care by comparison. Admittedly the defendant, J. C. Penney Company, used mats and Feldspar during inclement weather, just as they were used

by other stores on Main Street, including W. T. Grants. But the implication arose that if W. T. Grants store had placed mats in their entranceway at any given time, the defendant J. C. Penney store was negligent in not having also placed mats or used Feldspar in its entranceway. This in effect was an attempt to charge the defendant, J. C. Penney store, with constructive knowledge of a condition existing on the premises of the W. T. Grant store. There was no showing of similarity of conditions, which might have provided some small glimmer of relevancy or materiality of such evidence. Rather, Mr. Caffall testified that the terrazzo at the W. T. Grant store was different in composition than that at the defendant's store. The fact that defendant's entrance was a covered foyer, while W. T. Grant's entranceway might have been quite as fully exposed as the sidewalk to inclement weather (which casual observance reveals), was not considered nor proffered.

It is evident from the complaint filed by the plaintiff and from the evidence introduced by her, that the defendant's store was not charged with failure to possess mats or Feldspar or to accede to any custom or usage thereof—but with failure to put such out at a time the defendant's store purportedly knew or should have known such were required. To attempt to establish such a standard of care by comparison is contrary to the law of this state and the overwhelming general rule of law in the United States. Such a standard is a substantive rule of law to be determined by the court. This is well stated by the Circuit Court of Appeals for the Tenth Circuit in the case of *Brigham Young University v. Lillywhite*, 118 F.2d 836:

"If the evidence is admitted and the jury is admonished, either at the time it is admitted or by proper instruction in connection with its admission, that it was admitted merely to show what precautions were generally taken in such cases as bearing upon the degree of care enjoined upon the defendant by his relationship to the plaintiff, we think the evidence is admissible for this purpose. *Pence v. California Mining Company*, 27 Utah 378, 75 P. 934. *To this extent it is not admitted for the purpose of showing a custom or to establish a rule of conduct by comparison.*" (Italics ours)

"* * * If the introduction of the testimony would result in a confusion of issues, or inject many new controversial points collateral to the issues, or if it would tend to generate surprise, or undue prejudice disproportionate to the usefulness of the evidence, it should not be admitted."

The testimony admitted in evidence was not explained by the court as to its purpose, nor was it commented on in the instructions. The foregoing standard of care is discussed by the court in *Chesapeake & O. Ry. Co. v. Bryant's Admr.*, 114 S. W.2d 89, at page 92:

"* * * The standard is a matter of law, not of fact. If the presence or absence of a duty to the plaintiff were left to the judgment of a jury, no defendant could be held to know in advance the duties required of him.

"Holmes points out that the law has not only fixed general standards, but, where the courts have felt themselves on safe ground, specific standards for particular circumstances. He continues:

“If, now, the ordinary liabilities in tort arise from the failure to comply with fixed and uniform standards of external conduct, which every man is presumed and required to know, it is obvious that it ought to be possible, sooner or later, to formulate these standards at least to some extent, and that to do so must at last be the business of the court. It is equally clear that the featureless generality, that the defendant was bound to use such care as a prudent man would do under the circumstances, ought to be continually giving place to the specific one, that he was bound to use this or that precaution under these or those circumstances. The standard which the defendant was bound to come up to was a standard of specific acts or omissions, with reference to the specific circumstances in which he found himself. If in the whole department of unintentional wrongs the courts arrived at no further utterance than the question of negligence, and left every case, without rudder or compass, to the jury, they would simply confess their inability to state a very large part of the law which they required the defendant to know, and would assert, by implication, that nothing could be learned by experience. But neither courts nor legislatures have ever stopped at that point.

“From the time of Alfred to the present day, statutes and decisions have busied themselves with defining the precautions to be taken in certain familiar cases; that is, with substituting for the vague test of the care exercised by a prudent man, a precise one of specific acts or omissions. The fundamental thought is still the same, that the way prescribed is that in which prudent men are in the habit of acting, or else is one laid down for cases where prudent men might otherwise be in doubt.’”

Testimony admitted at the trial and persisted in by

questions which imported the purpose therefor, appears in such abundance in the record that it would unduly encumber this brief to duplicate it here. Specifically, the thirteen pages of testimony of Hugh DeWeese, from pages 66 to 79 in the record, illustrate the pattern of the questions and contain the objectionable questions and answers. This pattern is further illustrated by the testimony of Frank Caffall on pages 97 and 98 of the record:

"Q. Have you made a particular examination at my request of the terrazzo entrance-way to W. T. Grant and Company?

"A. Yes.

"Q. Can you state, from your observation of that entrance-way whether there is carborundum and a London grit in that?

"MR. AADNESEN: Object to it as immaterial.

"THE COURT: He may answer that with a 'yes' or 'no'. Doesn't ask him whether there is or not.

"Q. Did you make an observation on that?

"A. Yes.

"Q. What did your observation reveal?

"MR. AADNESEN: Object to it, your Honor, as immaterial.

"A. Do you mean as to the—

"MR. AADNESEN: My objection—just a moment—

"THE COURT: I think the question is objectionable in the form it is asked.

"Q. Did you observe whether that substance had an abrasive in it—that terrazzo surface at W. T. Grant's?

"MR. AADNESEN: Object to it again as immaterial.

"THE COURT: He may answer that.

"Q. Will you answer, please?

"A. The material that is in there—

"THE COURT: That may be answered with 'yes' or 'no'.

"A. Oh, 'yes' or 'no'?

"Q. Did you make that observation?

"A. Yes.

"Q. What did that observation reveal?

"MR. AADNESEN: That's what my objection goes to, your Honor.

"THE COURT: He may answer that.

"A. The floor that is in there now has carborundum on it; the border—

"Q. You are talking about J. C. Penney's entrance now, aren't you?

"A. Yes.

"Q. I am talking about W. T. Grant—entrance to Grant's store at the present time, Mr. Caffall.

"A. Oh, yes, that has London grits in it.

"Q. How much does it have in it?

"A. I couldn't tell the percentage—quite a lot of it.

"MR. AADNESEN: May my record show that my objection goes to this entire line as to what W. T. Grant has?

"THE COURT: Yes.

"Q. Did you make an observation of that surface to determine the effect that water or moisture would have on it.

"MR. AADNESEN: Objected to as immaterial.

"THE COURT: That objection will be sustained."

CONCLUSION

There was insufficient evidence adduced at the trial to support the verdict for the plaintiff. No affirmative evidence of a slippery condition was introduced and even an inference is fairly rebutted by the scientific measurements and evidence indicating that the terrazzo where Mrs. DeWeese fell corresponded in slipperiness to that of the sidewalk in front of the store. Further, reasonable minds could not differ that the short period of time elapsing from the beginning of precipitation and the fall of the plaintiff was not of sufficient duration nor intensity to put defendant upon notice of the existence of any condition which might have been hazardous to the plaintiff. In fact, all the circumstances, conditions and times are so limited that the trial court was required to grant either defendant's motion for an involuntary dismissal or defendant's motion for a directed verdict. In like manner, if any negligence could possibly have been held to have existed on the part of the defendant, the trial court should have held plaintiff guilty of contributory negligence as a matter of law.

The persistent and constant attempt by the plaintiff to set up the purported actions, customs and conditions of W. T. Grant's store in order to establish a standard of care by comparison, was highly prejudicial to defendant. The error in admitting such evidence was sufficient to grant defendant a new trial, even though it appears that without such evidence there exists no other evidence of

probative value sufficient to support a verdict for the plaintiff.

Respectfully submitted,

RAY, QUINNEY & NEBEKER
GRANT C. AADNESEN

*Attorneys for Defendant and
Appellant.*