

1955

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

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Rawlings, Wallace, Roberts & Black; John L. Black; Counsel for Respondent;

Recommended Citation

Brief of Respondent, *DeWeese v. J. C. Penney Co.*, No. 8347 (Utah Supreme Court, 1955).
https://digitalcommons.law.byu.edu/uofu_sc1/2370

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

FEB 21 1955

P347
Case No. 100917LAW LIBRARY
U. of U.

IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

SARAH MARGARET DEWEESE,

DEC 17 1955

Plaintiff and Respondent,

Clerk, Supreme Court, Utah

— vs. —

J. C. PENNEY COMPANY, a
Corporation,*Defendant and Appellant.*

BRIEF OF RESPONDENT

RAWLINGS, WALLACE,
ROBERTS & BLACK
JOHN L. BLACK

Counsel for Respondent

530 Judge Building
Salt Lake City, Utah

TABLE OF CONTENTS

	<i>Page</i>
STATEMENT OF FACTS.....	1
A. PRELIMINARY STATEMENT	1
B. THE FACTS	2
STATEMENT OF POINTS	12
ARGUMENT	13
POINT I. THE EVIDENCE PRESENTED A JURY QUESTION AS TO DEFENDANT'S NEGLIGENCE.	13
POINT II. THE EVIDENCE PRESENTED A JURY QUESTION AS TO PLAINTIFF'S CONTRI- BUTORY NEGLIGENCE.	25
POINT III. THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR IN ADMISSION OF EVIDENCE.	27
(a) The Evidence of Custom and Usage Ad- mitted by the Trial Court was Proper.....	27
(b) Defendant was Not Prejudiced by Admis- sion of Evidence Conceded by Defense Counsel to be "Perfectly Admissible," and Stipulated to be True.	32
POINT IV. DEFENDANT IS FORECLOSED FROM OB- JECTING TO ADMISSION OF LOCAL CUS- TOM AND USAGE EVIDENCE BY COUN- SEL'S FAILURE TO EXCEPT TO SUCH EVIDENCE AND BY HIS FAILURE TO REQUEST A LIMITING INSTRUCTION.	34
CONCLUSION	37

AUTHORITIES CITED

Bankhead v. First Nat. Bank in St. Louis, Mo.....	25
Barker v. Silverforb	25
Becker v. David.....	25
Brigham Young University v. Lillywhite.....	30

TABLE OF CONTENTS

(Continued)

	<i>Page</i>
Brody v. Albert Lifson & Sons, Inc.....	18, 31
Cardall v. Shortenberg's Inc.....	23
Deschamps et al. v. L. Bamberger.....	24, 31
Erickson v. Walgreen Drug Co.....	13, 18, 23
Gordon Ray dba Ray Transp. Co. v. Consolidated Freightways	26
W. T. Grant Co. v. Karren.....	13, 22, 26
Indemnity Ins. Co. of North America v. Hinkle.....	25
Lindsay v. Eccles Hotel Co.....	13
Picariello et al. v. Linares & Rescigno Bank.....	25
Royer v. Najarian.....	31
Schofield v. Zion's Co-op Mercantile Institute.....	33
Sears-Roebuck & Co. v. Johnson.....	22
State v. Green.....	36
State v. Olsen.....	33
Williamson v. Derry Electric Co.....	25

TEXTS CITED

Restatement of the Law of Torts, Sec. 343.....	15, 21
Wigmore on Evidence, Para. 461.....	31
Wigmore on Evidence, Vol. 1, p. 300, Para. 13.....	35

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.

Case No.
100917

BRIEF OF RESPONDENT

STATEMENT OF FACTS

A. PRELIMINARY STATEMENT

The parties will be referred to as in the Court below.

All italics are ours.

Appellant's statement of facts is characterized by misinterpretation of the evidence, and by unwarranted inferences. This is true even though plaintiff as the prevailing party is entitled to a consideration of the evidence and inferences in a light most favorable to her. We, therefore, deem it necessary to restate the facts.

B. THE FACTS

Sarah Margaret DeWeese brought this action for personal injuries received from slipping and falling on the terrazzo entranceway to defendant's store at 213 South Main Street on November 30, 1953. At that time the DeWeese family lived at 1275 Emerson Avenue and had lived in Salt Lake City for a little over a year (R. 17, 70). On the evening of November 30, 1953, Mrs. DeWeese went to town in order to do some shopping and meet her husband after work. Her husband was the Assistant Manager of the W. T. Grant store. He was scheduled to get off work at between 9:15 and 9:30 P.M. (R. 17). Mrs. DeWeese caught a bus at 13th East and Emerson Avenue. Emerson Avenue is located between 13th and 17th South Streets. Plaintiff boarded the bus at around 8:00 P.M. She stated that after the bus had traveled from one to one and a half blocks, it started to snow, with large flakes melting as they hit the ground (R. 18). She dismounted from the bus at Second South and State. It was still snowing at that time. She stated that it usually takes the bus from fifteen to twenty minutes to take her to town (R. 34). Mrs. DeWeese, after getting off the bus, walked from State Street to Main Street and turned South on Main Street, proceeding to defendant's store. As she walked from State Street to J. C. Penney's she noticed that the sidewalks were damp and wet to the point where, although water was not running off the sidewalk in a heavy flow, there would be puddles in breaks in the sidewalk

(R. 18, 35). Plaintiff was holding her hand over her hair to keep it dry and it still got wet (R. 37). She noticed as she started in the entranceway that there was an incline and that the terrazzo was damp and wet (R. 19). When she had walked from two to five feet on the terrazzo, her right foot suddenly slipped forward, and she fell straight down with her left leg folded under (R. 20). When plaintiff fell, she noticed that there were some muddy streaks on the surface of the terrazzo, apparently tracks of people walking in and out (R. 39). There were customers standing around in the entranceway, one of whom helped her up. She then limped into the store. There were muddy stains on her leg, slip and the inside lining of her coat and dress (R. 21). Inside the store, plaintiff told the girl at the glove counter of her fall and asked to use the telephone. She called her husband at Grant's and he immediately came up to Penney's. As Mr. DeWeese left Grant's and proceeded to J. C. Penney's, he noticed that it was snowing large flakes, which were not sticking and that the sidewalk was wet (R. 79). As he entered the entranceway of Penney's on the terrazzo "pretty fast," he almost slipped and fell himself, "it was that slick" (R. 80). Mr. DeWeese noticed that there was no rubber mat on the surface of the terrazzo (R. 82). Jack Davies, an employee of defendant, approached Mrs. DeWeese and asked her if there were rubber mats on the entranceway, and she answered in the negative (R. 21, 83). Davies then went to the front door and looked out. He came back past Mr. and Mrs. DeWeese, went into a closet and came back with a bucket

filled with a white powdery substance known to Mr. DeWeese as feldspar, took it out to the terrazzo and spread it on the surface (R. 22, 84). While this was going on, Mr. and Mrs. DeWeese were at the glove counter just inside the door (R. 82).

From this fall Mrs. DeWeese suffered a severe injury to the lumbosacral area of her back. The medical evidence is that as a result of her injuries it will be necessary for her to undergo a spinal fusion operation (R. 57).

Terrazzo surfaces become slippery when wet

Frank Caffall had been employed as a tile contractor in Salt Lake City for some forty-three years. During that time he had done quite a few jobs of laying terrazzo surfaces. He testified that terrazzo is made of cement, marble chips and a suitable color, and is laid in a plastic form. After it is set, it is ground with carborundum stones with electric machines, using a finer grit as the grinding proceeds to give it a smooth surface and a polish (R. 93, 94). Caffall testified that terrazzo without non-slip material such as carborundum and London grit is very slick and that the addition of non-slip material will make it less slick. He further stated that water or moisture on the surface of terrazzo with grit will make the surface more slippery. A small amount of water will make the surface slicker than a large amount of water for the reason that a small amount of water will not clean off the film of mud or other impurities which increase slipperiness (R. 95, 97, 103, 104). Mr. Caffall stated at R. 103:

“Then, when the terrazzo is combed down smooth and it has these grits in there, the grits, of course, are exposed to your feet as you walk across them, and when they get damp, of course, they get more slick. The material is more slick.”

Further, Caffall testified that ordinary wear and use of a terrazzo surface over a long period of time makes the surface smoother and also wears smoother any grit material in the terrazzo (R. 99, 102). Caffall testified that although other surface materials such as cement may be as slippery when wet as terrazzo, the slipperiness when wet will increase with the smoothness of the finish (R. 100, 101, 103).

On cross examination, Caffall testified (R. 101):

“Q. You know, from what you have gathered that a cement sidewalk and terrazzo surface have approximately the same coefficient of friction when wet?

* * * *

A. Well, I can't answer that 'yes' or 'no', depends upon the smoothness of it and how it has been ground down. Cement can be—can be ground down very smooth and be very slippery, same as terrazzo. Either one of them can be left rough with abrasive in them and be more non-slick.”

Peter Evans had been employed by W. T. Grant Company for 24 years performing duties in maintenance of building and equipment. During this time he observed the terrazzo surfaces of the entranceway of Grant's and

other stores in downtown Salt Lake. From such observations he was well acquainted with the general propensities of terrazzo (R. 91, 92). Evans testified at R. 92:

“Q. Now, based upon your experience and your observations with respect to terrazzo, generally, can you state what, if any, effect water or wetness has on a terrazzo surface?

A. Makes it slippery.”

Prior to coming to Salt Lake City in October of 1952 as Assistant Manager, Mr. DeWeese had worked for W. T. Grant Company as a trainee manager and assistant manager at Roanoke, Virginia, Greensboro, North Carolina, Richmond, Virginia, Williamsburg, Virginia, Winchester, Virginia, Newport News, Virginia, and Atlanta, Georgia. At the time of trial he was Manager of the W. T. Grant store at Bellflower, California. At these various stores Mr. DeWeese had become acquainted with terrazzo surfaces as a part of his duties and stated that water or moisture on these surfaces makes them slick.

Rubber Mats and/or anti-slip compounds in common use will eliminate slipperiness of wet terrazzo surfaces

Peter Evans testified as to the means and measures generally used to reduce slipperiness of terrazzo surfaces caused by wetness. He stated that the means he had become acquainted with were putting out rubber mats and using an anti-slip compound known as “feldspar.” Feldspar is a gritty granulated substance made of ground granite. He stated that this substance acts as a brake on slipperiness (R. 92, 93).

Caffall testified that he had had occasion to make a general survey of the business establishments on Main Street and that about 85 percent had terrazzo entrances (R. 94).

Mr. DeWeese testified from his experience that rubber mats or abrasive anti-slip compounds were available for use on terrazzo surfaces to correct any slickness caused by moisture or water, that these devices were in common use and would make it next to impossible to slip (R. 77). He stated that the two most commonly used compounds are "feldspar" and "Never Slip." From his experience in Salt Lake City, both before and after his wife was injured, DeWeese observed that most business establishments on Main Street between South Temple and Third South used rubber mats in inclement weather (R. 78). He stated that the W. T. Grant Company used both rubber mats and feldspar on its terrazzo entrance-way during the time that he was employed there.

The custom and practice at J. C. Penney Company was to use rubber mats and/or non-slip compound on its terrazzo in inclement weather. This is indicated by Davies' words and actions immediately following Mrs. DeWeese's fall. One of the first questions Davies asked Mrs. DeWeese was if the rubber mats were out (R. 21, 83). Then Davies proceeded out to see the terrazzo and went back to a closet, where he obtained a bucket filled with a white powdery substance, which Mr. DeWeese recognized as "feldspar." Davies took the bucket out to

the terrazzo and spread "feldspar" on the entranceway (R. 84). Davies was not called as a witness by defendant nor were any other of defendant's employees called to testify. Furthermore, Defendant in its brief (P. 19, 20) admitted that J. C. Penney Company had such a custom.

Defendant's terrazzo entranceway was wet and slippery at the time plaintiff was injured

Mrs. DeWeese testified as to her fall, as follows (R. 20):

"Q. Will you state exactly what happened as you proceeded into the north entrance-way there?

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.

Q. Will you describe how you came to fall?

A. Well, I landed more or less like a parachute; everything I had went out.

* * * *

Q. Will you describe exactly how you fell?

A. My right foot went forward and my left leg folded under me.

Q. And how did you land?

A. Flat."

And on cross examination (R. 38) :

“Q. Mrs. DeWeese, you say your right foot slipped?

A. That’s right.

Q. It went forward?

A. That’s right.

Q. Not to the rear?

A. Went forward.

Q. And what happened to your left leg?

A. It folded under me.”

Mrs. DeWeese noticed that the terrazzo surface was damp and wet. After she had fallen, she noticed some muddy streaks on the surface (R. 39).

Both Mr. and Mrs. DeWeese testified that there was no rubber mat on the terrazzo (R. 21, 82).

Mr. DeWeese, a few minutes after the fall, proceeded into the southern part of the main entrance of Penney’s “pretty fast” and “I almost fell down myself, it was that slick.” (R. 80).

Mrs. DeWeese testified that there was an incline from commencement of the terrazzo up to the door (R. 19). She stated at R. 30 :

“Well, it is high enough, I noticed I was going up an incline.”

Mr. DeWeese testified as to the slope of the terrazzo (R. 80) :

“A sloping incline, noticeable to the naked eye.”

It was stipulated in Court by counsel that the slope of the terrazzo at the point where Mrs. DeWeese slipped was four inches in ten feet from the sidewalk up towards the door, and that the sidewalk in front of Penney's sloped downward to the south at a rate of 5.5 inches in ten feet (R. 29). As a result, Mrs. DeWeese proceeded from one slope to another as she stepped from the sidewalk on to the terrazzo.

Mr. DeWeese stated that a slope on wet terrazzo surface, as far as footing is concerned, makes it “hard to walk on” (R. 81).

Evidence was offered and received of an answer to an interrogatory that the terrazzo at J. C. Penney Company was installed in the year 1936 (R. 86, 87). Caffall testified that terrazzo surfaces become smoother with wear and that grit materials also wear down (R. 99).

The entranceway in question had been remodeled some time before trial and a different surface is now on said entranceway (R. 98, 99). Caffall examined a border around the new surface. He stated that this appeared to be an old surface. He felt this surface and it was “quite smooth” (R. 100). He could not detect any London grit. He stated that it would be difficult to detect carborundum because the surface was black in color, as is carborundum (R. 99).

Misstatements in the Brief of Appellant

At page 7 of the Brief of Appellant counsel states that Mr. Caffall testified that "terrazzo when wet was just about as slippery as a sidewalk." Caffall made no such statement. He testified that cement could be as slippery if it was ground and polished to the same degree (R. 101).

On page 8 defendant claims as fact that terrazzo is less slippery when worn. It is true that defendant's paid expert slanted some answers in that direction (R. 114) even though he made no categorical statement that this terrazzo would be less slippery when worn. Plaintiff's witness, on the other hand, stated that wear and use of a terrazzo surface makes it more slippery regardless of the presence or absence of carborundum (R. 99, 102) and the jury was entitled to and did believe plaintiff's evidence on this issue.

On page 9, defendant states that Mrs. DeWeese "categorized" the precipitation as a "mist." This statement is utterly false. Mrs. DeWeese stated that the precipitation was a snow that was melting before or as it hit the ground. The only mention made of a mist was by counsel for defendant when he was taking plaintiff's deposition and was questioning her as to how wet the sidewalks were and she stated: "More than just being like mist or something like that." Counsel then asked plaintiff what she interpreted a mist to be. At trial when counsel was cross examining Mrs. DeWeese by reading from

the deposition, he omitted to read his question as to what she interpreted a mist to be. When this remarkable omission was called to his attention, he inserted the question in the record (R. 36). It can easily be seen from the deposition and the record that Mrs. DeWeese in no way "categorized" the precipitation as a mist. This was strictly counsel's own doing.

STATEMENT OF POINTS

POINT I.

THE EVIDENCE PRESENTED A JURY QUESTION AS TO DEFENDANT'S NEGLIGENCE.

POINT II.

THE EVIDENCE PRESENTED A JURY QUESTION AS TO PLAINTIFF'S CONTRIBUTORY NEGLIGENCE.

POINT III.

THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR IN ADMISSION OF EVIDENCE.

(a) THE EVIDENCE OF CUSTOM AND USAGE ADMITTED BY THE TRIAL COURT WAS PROPER.

(b) DEFENDANT WAS NOT PREJUDICED BY ADMISSION OF EVIDENCE CONCEDED BY DEFENSE COUNSEL TO BE "PERFECTLY ADMISSIBLE", AND STIPULATED TO BE TRUE.

POINT IV.

DEFENDANT IS FORECLOSED FROM OBJECTING TO ADMISSION OF LOCAL CUSTOM AND USAGE EVIDENCE BY COUNSEL'S FAILURE TO EXCEPT TO SUCH EVIDENCE AND BY HIS FAILURE TO REQUEST A LIMITING INSTRUCTION.

ARGUMENT

POINT I.

THE EVIDENCE PRESENTED A JURY QUESTION AS TO DEFENDANT'S NEGLIGENCE.

Two cases establish the Utah law where terrazzo surfaces are involved. They are *Erickson v. Walgreen Drug Co.*, (1951) U., 232 P. 2d 210, and *W. T. Grant Co. v. Karren*, C.C.A. 10th (1951), 190 F. 2d, 710. Counsel for defendant in his brief has attempted to side step these cases and to fit the case at bar into the clearly distinguishable "puddle of water" or "foreign substance" type of case. This court specifically distinguished the two in the Erickson case when it stated at 232 P. 2d 212:

"This is not the case of a business visitor slipping on some foreign substance such as oil, which had carelessly been spilled on the floor only a short time prior to the accident."

Defendant further cites the recent case of *Lindsay v. Eccles Hotel Company*, 3 U. 2d 364, 284 P. 2d 477, as authority when the court specifically held it to be a "foreign substance" case.

The facts in the case at bar are almost identical with the facts of the Erickson case. Here, as in the Erickson case, there was testimony that terrazzo surfaces become slippery when wet. In both cases there was testimony that any grit material in terrazzo loses its effectiveness

to prevent slipping with wear. The terrazzo in the case at bar had been in use for approximately 14 years. In both cases there was evidence of a custom existing in Salt Lake City on Main Street for stores having terrazzo entrances to use rubber mats and/or non-slip aggregates. In the Erickson case, there was a slope of only $1/16$ of an inch to the foot, or $5/8$ of an inch in ten feet. In the case at bar, the slope was four inches in ten feet, or nearly seven times as great. In the Erickson case there was no evidence of a custom of using rubber mats or non-slip aggregate at the Walgreen store entrance. In the case at bar there was evidence by the actions of defendant's employee of such a custom at J. C. Penney's. Furthermore, counsel for defendant in his brief, on page 19 states:

"Admittedly the defendant, J. C. Penney Company used mats and Feldspar during inclement weather, * * *"

Defendant maintains that there was no evidence that defendant's terrazzo was slick and slippery at the time of Mrs. DeWeese's fall. This remarkable contention ignores the testimony of Mrs. DeWeese that she slipped on this floor, that her foot slipped right out from under her, and of Mr. DeWeese that he slipped and almost fell on the same terrazzo on his way in shortly after Mrs. DeWeese's fall, and his further testimony that this terrazzo surface was slick. Certainly Davies would not have performed the useless act of throwing feldspar on a dry non-slippery surface. It will be remembered that this

surface was removed and replaced some time prior to trial. Counsel for defendant did not offer to bring a piece of it to court or explain why he did not. In fact, the only witness produced by defendant was Dr. Harris, who performed laboratory tests on the terrazzo at a different time and under different circumstances and without taking account of the slope or the problems of a person walking. As far as the record shows, Dr. Harris merely placed weights on various shoes and pushed them along the surface. The jury was not required to give any weight to such testimony. The original border of the terrazzo remained. Caffill examined it and stated that it was "quite smooth" and that he could detect no carborundum. Defendant offered no testimony as to any carborundum or non-slip aggregate being a component of the terrazzo.

These facts provided the jury with a solid foundation for finding as fact the elements required in Section 343 of the American Law Institute's *Restatement of the Law of Torts*:

"A possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereon if, but only if, he

(a) knows, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them, and

(b) has no reason to believe they will discover the condition or realize the risk involved therein, and

(c) invites or permits them to enter or remain upon the land without exercising reasonable care

(i) to make the condition reasonably safe, or

(ii) to give a warning adequate to enable them to avoid the harm * * *."

Defendant is charged with knowledge that its terrazzo entranceway was ground to a smooth finish, that it was on a slope, and that when it became damp or wet the surface became dangerously slick and slippery. Defendant also knew that large numbers of its invitees could be expected at all times during business hours to be using its entranceway. Under these circumstances defendant owed a duty of alert, attentive, watchfulness for signs of inclement weather as well as for inclement weather, so it could put out the mats and feldspar in plenty of time to avoid danger. Taking the evidence most favorable to plaintiff it had been raining and snowing approximately twenty minutes before plaintiff dismounted from the bus at State Street and Second South.

It had started to rain and snow when the bus had gone about a block or a block and a half and it usually took the bus fifteen to twenty minutes to make the trip to town. It probably took plaintiff another five or ten minutes to walk the block and a half to defendant's store.

During this twenty-five to thirty minutes customers were continuously walking into the store with the dampness and wetness on their feet, hair and clothing. The store had its usual employees at the front as well as the rear of the store. They could see out the windows. Under such circumstances the jury was unquestionably justified in finding that defendant by the exercise of reasonable care could have discovered the dangerous condition existing at its entranceway. It would have taken less than a minute to bring out the mats and/or sprinkle the entrance with feldspar, or to warn patrons of the dangerous condition.

Defendant had no reason to believe that invitees would discover or realize the risk involved in walking on the terrazzo entranceway. Slickness is not a thing that can always be seen. It is something that is felt. Wet terrazzo is deceptively innocent in appearance and dangerous in character. There was no evidence that plaintiff would have had any reason to discover that this entranceway was slick in time to avoid her injury. Plaintiff was entitled to believe that the entranceway surface was safe for use unless and until a reasonably prudent person under like circumstances and with like opportunity for observation would have concluded otherwise.

Defendant's doors were open. The invitation to cross its entranceway was extended to one and all. It was a busy shopping time, yet defendant made no effort what-

soever to use readily available means to eliminate the danger apparent to it but not apparent to its invitees. Neither did defendant make any effort to give warning of the danger that existed.

The facts of the Erickson case as stated on page 215 in the dissenting opinion show that Walgreen Drug Company had approximately thirty minutes in which to apprise itself of the situation and remedy it. It was stated:

“On September 25, 1948, plaintiff left her home at approximately 2:30 P.M., at which time it was beginning to rain. She arrived at Second South and Main Streets at approximately 3:00 P.M. The streets were wet and it was still raining.”

In the case of *Brody v. Albert Lifson & Sons, Inc.*, N.J. (1955), 111 A. 2d 504, the court recognized the difference in principle between the terrazzo case and the slippery foreign substance case. The court pointed out that in the puddle of water or foreign substance case the dangerous condition is ordinarily equally open to discovery by both the store owner and the invitee for the reason that the slipperiness is caused by the puddle of water or foreign substance with the floor surface not having anything to do with the dangerous condition whereas in the terrazzo type of case the dangerous condition is created by the combination of a surface having the propensity to be slick and slippery when wet and an expect-

able action of nature. The court in the Brody case cited both the Erickson and the Karren cases in affirming a verdict for the plaintiff.

In the Brody case the plaintiff slipped and fell on defendant's terrazzo entrance after business hours. She had gone into defendant's lighted entranceway to see the display windows. The floor surface of the entranceway was terrazzo with a slope of $\frac{3}{8}$ of an inch to the foot, or $3\frac{3}{4}$ inches in 10 feet. Plaintiff's expert testified that the floor was considerably slippery when wet and that the standard practice in wet weather was to use rubber mats. The fall occurred on the evening of June 4, 1951, a warm summer night. There was conflict in the testimony as to when the incident occurred and when the rain began. Plaintiff testified that she fell at about 8:00 P.M., that the sky was cloudy while she had been in Newark (happened in Elizabeth), and that there had been showers in Newark from 7:00 P.M. on. A meteorologist testified that rain began in Elizabeth at 8:30 P.M., but this report came from Union County Park Commission. The Chief of the Union County Park Police testified that rain started at 8:10 P.M., and would be reported on the half hour. An Elizabeth police officer testified that the accident was reported at 8:47 P.M. Plaintiff testified that the surface of the terrazzo was wet and slippery. Defendant asserted that it did not have sufficient notice. In answer to this assertion, the court stated at page 507:

"In the Bohm case, *supra*, we held that the duty existing, frequently the result has turned upon notice of the defective condition, direct or imputed by proof of adequate opportunity to discover the defective condition * * *. It is this principle that is invoked in the present case by the defendant. This case, however, is not subject to unqualified application of that philosophy. We have not, in the circumstances here presented, a defective condition arising either suddenly or by wear over a period of time, nor an uncommon accumulation of water.

"The present matter lies within the confines of the rule that a negligent act may be one which 'creates a situation which involves an unreasonable risk to another because of the expectable actions of the other * * * or a force of nature.'

"In the present case there was evidence from which a jury could reasonably infer that the construction of the floor rendered it peculiarly liable to become slippery by virtue of introduction of water thereon and that defendant omitted precautions which would have been practical or reasonable under the circumstances of this case.

* * * *

" * * and in the present case the alleged cause is the intrinsic quality of the material used or condition created by the defendant when exposed to normal weather conditions. This is an intrinsic substance case, not a foreign substance case. Therefore, it is not ruled by the 'waxed floor', 'pool of water', 'grease spot' or 'defective or worn tread' cases, where the foreign substance or extra-normal condition of the premises is alleged to be the cause of an injury."*

In the notice aspect of the case, the New Jersey Court relied on the theory set out in paragraph 302(b) of the American Law Institute Restatement of Torts:

“A negligent act may be one which:

* * * *

“(b) creates a situation which involves an unreasonable risk to another because of the expectable action of the other, a third person, an animal *or a force of nature.*”

The case at bar deals with the expectable actions of a force of nature. It is common knowledge that throughout the year in this part of the country there will be rain and snow. Wetness and a terrazzo surface when combined cause an unusually dangerous slipping hazzard. This hazzard is increased considerably when the terrazzo surface is sloped in a different direction than the sidewalk approach thereto. Defendant had a duty being the owner of this entranceway to know these facts, and is charged with such knowledge. On the other hand, this condition would not be apparent to the plaintiff and defendant is also charged with this knowledge. Under these circumstances defendant owed a duty to maintain its entranceway at all times in a safe condition. The means for keeping its entranceways safe were readily available. First, defendant could remain at all times alert to weather conditions. Second, defendant could by proper use of mats and/or feldspar prevent a slick and slippery condition from ever existing or in the alternative warn its customers of any dangerous condition that may exist. The dictates of ordinary care may very

well require under the facts of this case that rubber mats be left on the terrazzo entranceway at *all* times.

The Karren case contains an interpretation by the Tenth Circuit Court of Appeals of the Erickson case. The Court stated at 190 F. 2d 711:

“Here the appellee’s own testimony establishes that it knew of the slippery condition of such floors when wet and that it instructed its porter to put additional non-skid material on the entranceway under such condition. Under the decision of the Supreme Court of Utah, we think it became a question of fact for the jury’s determination whether under the existing conditions appellant exercised reasonable care for the safety of its invitees.”

The Karren case was not even cited by defendant in its brief, and yet defendant cited an earlier case from the Tenth Circuit which involved an inside stairway and in which there was not even evidence of a wet surface, *Sears-Roebuck & Co. v. Johnson*, 91 F. 2d, 332 (1937).

In describing the scope of defendant’s duties, this court in the Erickson case stated at page 212:

“While there is no evidence of any incident occurring which would have put the appellant on notice that the terrazzo was slippery when wet, such evidence is not necessary to establish liability on the part of the appellant. The latter was in the actual possession of the building and had a duty to search out defects in the premises in order that they be reasonably safe for the presence of business visitors.”

In the Erickson case, this court cited the case of *Cardall v. Shortenberg's Inc.*, R.I. (1943) 69 R. I. 97, 31 A. 2d 12, as authority for its holding. The Cardall case was also cited by the New Jersey court in the Brody case. In the Cardall case there was a terrazzo surface which had been laid a month or so prior to plaintiff's fall. This surface had a slope upward from the sidewalk to the door of from 3½ to 4 inches in 10½ feet, less than in the case at bar. Also there was a slight slope sideways which is also indicated in the case at bar by the slope of 5½ inches in 10 feet of the sidewalk sloping south. The evidence as to the amount of abrasives in the terrazzo varied from 4% to 40%. The plaintiff testified that the terrazzo was wet and slippery at the time she fell. An expert testified that the terrazzo would become more slippery with water. The court in the Cardall case held that there was a jury question as to whether or not the terrazzo surface was dangerous in wet weather and whether or not defendant was negligent in failing to have a rubber mat or other protection on the terrazzo at the time of the injury.

The dissent in the Erickson case in distinguishing that case from the Cardall case stated at page 218:

“It might be that the case at bar could be distinguished from the Rhode Island case because of the difference in the slope of the entranceway or the time of the year.”

It should be pointed out that the slope in the Cardall case was less than the slope in the case at bar. The Cardall case occurred on February 19 and the case at bar on November 30. It is clear that the facts in the case at bar are stronger in every detail than were the facts in the Erickson case.

In regard to the slope situation in the case at bar, defendant appears to believe the fact that the sidewalk slopes down to the south with a slightly greater slope than exists on the terrazzo, inures to its favor. This situation, which defendant must be charged with knowing, made the terrazzo entranceway even more hazardous and dangerous for this gives a customer two slopes instead of one to deal with. It can be seen that a person walking south on the sidewalk and entering Penneys would be walking downhill and stepping from a downhill slope to an uphill slope to the east. This situation requires even greater care on defendant's part to avoid injuries to its customers.

There are several cases which support and strengthen the law as laid down in the Erickson, Karren, Brody and Cardall cases.

The case of *Deschamps et al v. L. Bamberger*, N.J. (1942) 27 A. 2d 3, involved a marble floor with a slope of $7\frac{1}{4}$ inches in about 15 feet with *no water present*. The court there held there to be a jury question of defendant's negligence in failing to have a mat or other type of covering.

See also the following cases where the questions of negligence and contributory negligence were held to be for the jury. *Barker v. Silverforb*, Mo. (1947), 201 S.W. 2d 408 (inherent quality of terrazzo floor considered significant coupled with other factors); *Becker, et al. v. David*, C.A.D.C. (1950), 182 F. 2d 243 (hallway level floor made slippery with water tracked in); *Indemnity Insurance Co. of North America v. Hinkle*, C.A. 5th (1942), 127 F. 2d 655 (sloping tile surface on foyer floor, no water or foreign substance); *Bankhead v. First Nat. Bank in St. Louis*, Mo. (1940), 137 S.W. 2d 594 (marble steps inside bank, slippery from water tracked in); *Picariello et al. v. Linares & Rescigno Bank*, N.J. (1941), 21 A. 2d 343 (level terrace floor inside bank made slippery by water tracked in); *Williamson v. Derry Electric Co.*, N.H. (1938), 196 A. 265 (freshly waxed level floor in office made more slippery by water tracked in.)

POINT II.

THE EVIDENCE PRESENTED A JURY QUESTION AS TO PLAINTIFF'S CONTRIBUTORY NEGLIGENCE.

The only evidence that defendant relies on in stating that plaintiff was guilty of contributory negligence as a matter of law is that she was walking normally, that she noticed the floor was wet but didn't know it was slippery, and that her husband knows of the propensities of terrazzo.

In the Karren case in reply to the same contention made by the defendant the court stated (P. 711) that

plaintiff was familiar with the entranceway in question and no doubt had been in and out of the store on numerous occasions. The court then went on to state:

“* * * but there is no evidence in the record supporting a finding that she was familiar with terrazzo floors; that she had any knowledge as to their peculiar characteristics, or knew or had reason to know that they were unduly slippery when wet. The evidence is that she walked in an ordinary way in approaching and entering appellant's store.”

The evidence in the case at bar is practically identical to that in the Karren case. There is also the added factor in this case that as far as the record shows plaintiff had never been in the J. C. Penney entranceway prior to the injury. It will be remembered that she had only lived in Salt Lake about one year prior to the injury. There was no evidence that Mrs. DeWeese knew anything about the propensities of terrazzo surfaces.

As to defendant's burden of proof on the issue of contributory negligence see the recent case of *Gordon Ray, doing business under the name Ray Transportation Company v. Consolidated Freightways* (Nov. 2, 1955) 298 P. 2d 196. In speaking of the refusal of the trial court to find a plaintiff contributorily negligent as a matter of law this court stated at P. 201:

“It would only be when such refusal did such violence to common sense as to convince the court that no fact trier acting fairly and reasonably would refuse to make such finding that it would be reversed.”

POINT III.

THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR IN ADMISSION OF EVIDENCE.

(a) THE EVIDENCE OF CUSTOM AND USAGE ADMITTED BY THE TRIAL COURT WAS PROPER.

Counsel for defendant, at page 19 of his brief, makes the following statement:

“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 condition of W. T. Grant stores in various localities in the United States as well as at Salt Lake.”

Counsel is utterly mistaken when he infers that evidence of a custom and practice of W. T. Grant stores outside Salt Lake City of using rubber mats and/or feldspar in inclement weather on terrazzo surfaces was admitted in evidence in this case. No such evidence is in the record. Counsel has apparently confused the evidence that Mr. DeWeese had been employed by W. T. Grant Company at various of its stores throughout the country and that these stores had terrazzo surfaces with evidence of a custom and practice. The evidence concerning Mr. DeWeese's experience and familiarity with terrazzo surfaces was introduced for the purpose of showing that he had a background of practical experience and knowledge with respect to the propensities and characteristics of terrazzo surfaces. He was applying

this experience when he testified that terrazzo surfaces have the propensity of becoming extremely slick and slippery when wet. His background of experience with terrazzo was clearly proper evidence which laid a foundation for his later testimony.

The record further reveals that counsel for defendant asked for no cautionary instructions, made no indication to the court that he felt he was prejudiced by any offer of such evidence in the presence of the jury, and made no motion for mistrial. As an afterthought counsel now makes some vague complaint of prejudice.

Counsel makes the following statement at page 19 of his brief:

“The beginning question was categorized by counsel as ‘preliminary’ and then boldly asserted to be admissible as a standard of care.”

Counsel then quotes the following statement by Mr. Black as support for his contention:

“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.”

Counsel for plaintiff never suggested to court or jury that the customs and practices of other business establishments in Salt Lake City, with respect to placing mats and/or feldspar on terrazzo surfaces in inclement weather was an absolute standard of care. It was *evi-*

dence which the jury could consider in determining first, whether rubber mats and/or feldspar were practical for use in preventing slickness and slipperiness and, second, whether rubber mats and/or feldspar were readily available to defendant for the accomplishment of such purpose.

Evidence as to the customs and practices of W. T. Grant store and other stores in Salt Lake City of using rubber mats and/or feldspar on terrazzo surfaces in inclement weather was introduced. Counsel for defendant at the time of trial was much more magnanimous about this evidence than he appears to be in his present brief. At Record 73 he states as follows :

“We think it perfectly permissible to show that, in this community, if he desires, we would be glad to stipulate that mats and feldspar are used on terrazzo during inclement weather. Certainly, we have no concern about that, but we don’t feel we should be tied to the standard of care of that particular store, nor do we think that the acts of one particular store, if they put them out sooner or later—and we are talking probably of a matter of minutes—that that thereby puts notice that J. C. Penney’s would be negligent, I don’t think that is possible.”

The Court made the following statement outside the presence of the jury as to the theory under which he was admitting the foregoing evidence (R. 72) :

“THE COURT: — might take this, Miss Reporter; I think plaintiff may show the nature of terrazzo floors, its slickness, its tendency to

be slicker as it is wetter, if they want to; anything with respect to the slope of it, as it affects the risk or danger of slickness. I think he may show what may be done, if it is slick, to safeguard against it. I think he may show what steps are taken in this community—and, as far as that goes, that may cover the State of Utah—as protection against slipping. I think he may offer as evidence of that what is done in this vicinity by others, as typical or illustrative. I don't think you can show what the policy of Grant is, let us say, outside of Utah—

“MR. BLACK: All right, Judge.

“THE COURT: — or what the practice generally is outside of Utah, except as it might tend to show that a rubber mat or feldspar or something else is a safety protection, like a snow tire on a car or a chain on a car or gravel, sand, or cinders or salt on a hill that's a case of lessening the danger or guarding against it. I think that's in the proper realm of inquiry.

“MR. AADNESEN: Yes, your Honor, I think—”

In *Brigham Young University v. Lillywhite*, C.C.A. 10th, 118 F. 2d 836, 841, the court stated:

“It is admissible merely as some evidence of the nature of the thing in question because it indicates what is the influence of the thing on the ordinary person in that same situation.”

In both the Erickson and the Karren cases, *supra*, there was evidence of the customs and practices of other stores in Salt Lake City having terrazzo entranceways.

Also, such evidence was introduced in the case of *Brody v. Albert Lifson & Sons, Inc.*, supra.

In the case of *Royer v. Najarian*, supra, plaintiff's expert testified that it was a common thing in Rhode Island and everywhere to have terrazzo entranceways covered with rubber mats and that there was a sloping terrazzo floor in the passageway of the New Industrial Trust Building and that he had seen mats on that floor after a storm when the inside was wet. This evidence was allowed.

In the case of *Deschamps et al. v. L. Bamberger & Co.*, supra, exception was taken to the trial court allowing evidence over defendant's objection of the use of mats on the floors of the vestibules in similarly constructed places in the vicinity on the theory that such facts were not in issue under the pleadings, or the plaintiff's theory of liability. The court held that where the complaint charged defendant with maintaining a dangerous floor, the evidence concerning mats was proper.

The theory of admissibility of evidence of the voluntary conduct of others is expressed in *Paragraph 461, Wigmore on Evidence*. Wigmore cites as examples, a person indoors observing whether or not passers by have their umbrellas lifted to determine if it is raining; a person, in ascertaining if a hill is too icy to attempt it in his car without tire chains observing whether or not other cars lacking chains are skidding; a person observ-

ing workmen in a powder factory wearing felt shoes inferring that the tendency of the powder was to explode from the concussion or friction of ordinary shoes. So in the case at bar the conduct of other store owners in the vicinity with regard to their terrazzo entranceways in wet weather tends to show the propensity of terrazzo surfaces to become slick when wet and that rubber mats and feldspar are practical and available ways in which to obviate the dangerous condition.

(b) DEFENDANT WAS NOT PREJUDICED BY ADMISSION OF EVIDENCE CONCEDED BY DEFENSE COUNSEL TO BE "PERFECTLY ADMISSIBLE", AND STIPULATED TO BE TRUE.

Counsel for defendant states in his brief at page 19:

"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. Grant."

Furthermore, counsel stated during the trial "We think it perfectly admissible to show that, in the community if he desires, we would be glad to stipulate that mats and feldspar are used on terrazzo during inclement weather."

Also the evidence as to the custom and practice of other stores in this community was elicited from the various witnesses without objection by defense counsel. Such evidence was offered in evidence in support of plaintiff's contention that J. C. Penney's Co. should like-

wise have such a custom and practice. When counsel conceded that J. C. Penney's Co. did have such a custom and practice any possible prejudice to defendant from custom and practice evidence vanished. The ultimate fact had been admitted. There remained only the question of whether defendant had negligently failed to follow its own custom and practice, and whether this failure was the proximate cause of plaintiff's injuries.

In *State v. Olsen*, (1945) 160 P. 2d 427, 108 U. 377, defendant was being prosecuted for manslaughter. The evidence was that defendant had fallen asleep at the wheel of an automobile. Defendant admitted all the facts of the accident. On appeal defendant complained of the allowance in evidence of a map containing testimonial statements, said document having been prepared by one of the witnesses. This court stated:

“Because all of the facts of the accident in question were admitted by defendant we can see no prejudicial error in the use of this map and for this reason shall not enter into an academic discussion of the rules governing the use of maps and other testimonial documents.”

Another Utah case is *Schofield v. Zion's Co-op Mercantile Institute*, (1934) 39 P. 2d 342, 85 U. 281. This was a suit for pension under an agreement between defendant and plaintiff. At the trial plaintiff introduced letters from defendant as to the allowance of the pension. On appeal defendant complained of the allowance of such letters in evidence. This court held that the letters

were admissible and further stated that since there was no dispute in the record of the facts recited in the letters that no prejudice could result to the defendant.

Defendant in the case at bar is in the anomalous position of complaining about evidence concerning custom and practice in this community when defendant admits that it had such a custom in its own store. The evidence of the rapid inquiry made by Mr. Davies as to whether or not the rubber mats were out and his frantic effort to get feldspar on the terrazzo indicate that someone had failed to discharge his responsibility and that defendant had failed to follow its own custom. In the face of defendant's admissions and the undisputed evidence defendant could not possibly have been prejudiced by the admission in evidence of the customs and practices of other stores in the community.

POINT IV.

DEFENDANT IS FORECLOSED FROM OBJECTING TO ADMISSION OF LOCAL CUSTOM AND USAGE EVIDENCE BY COUNSEL'S FAILURE TO EXCEPT TO SUCH EVIDENCE AND BY HIS FAILURE TO REQUEST A LIMITING INSTRUCTION.

At page 19 of his brief counsel for defendant states:

“Mr. DeWeese was both directly and indirectly allowed to set a standard of care by comparison.”

In his next breath counsel admits that 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."

Counsel then states at page 21 of his brief:

"The testimony admitted in evidence was **not** explained by the court as to its purpose nor was it commented on in the instructions."

Counsel for defendant at no time suggested to the trial court that the purpose of the evidence of custom and practice should be limited. At the conclusion of the evidence he submitted no requested instruction concerning such evidence. But now he states that the evidence was not limited to a specific purpose. If the evidence was admissible for any purpose it was proper and if counsel for defendant wished the evidence to be limited to a specific purpose it was his duty to so indicate to the court both at the time the evidence was admitted and later when he submitted his requested instructions. Counsel for defendant took neither of these expedients. Furthermore, counsel has never quite determined even yet just how the concededly admissible evidence of custom and practice should have been limited.

In *Wigmore on Evidence*, Vol. I, page 300, paragraph 13, it is said:

"In other words, when an evidentiary fact is offered for one purpose, and becomes admissible by satisfying all the rules applicable to it in that capacity, it is not inadmissible because it does not satisfy the rules applicable to it in some

other capacity and because the jury might improperly consider it in the latter capacity. This doctrine, though involving certain risks, is indispensable as a practical rule:

* * * *

“Here the only question can be what the proper means are for avoiding the risk of misusing the evidence. It is uniformly conceded that the instruction of the court suffices for that purpose; *and the better opinion is that the opponent of the evidence must ask for that instruction; otherwise, he may be supposed to have waived it as unnecessary for his protection:*”

(Citing numerous cases including *State v. Greene*, 33 U. 497, 94 P. 987).

The Utah law is set forth in *State v. Greene*, 33 U. 497, 94 P. 987. That case involved a prosecution for adultery. The Court admitted in evidence over objection a deed wherein defendant and Grace D. Greene were grantors with an acknowledgment stating “personally appeared before me Webster Greene and Grace D. Greene, husband and wife, the signers of the above instrument.” The objection was to the use of the evidence for any purpose. The defendant made no request for an instruction to limit the use that the jury could make of the evidence. This court conceded that this evidence was inadmissible as a declaration of Grace D. Greene but held that it was admissible as an admission by defendant. The court states at P. 988:

“‘It follows that an objection to evidence, where a part is competent and part incompetent, may be overruled without available error, in cases where counsel interposes the objection to all the evidence.’ * * * And furthermore, the rule as declared by the great weight of authority seems to be that evidence which is competent for certain purposes, and is incompetent for other purposes, but is admitted generally, it is incumbent upon the party objecting to its reception, if he desires to have the effect of such evidence limited to the specific purpose for which it is admissible, to ask the court to inform the jury by appropriate instructions as to the purpose for which they may consider the evidence, and, if he fails to make the request, he cannot afterwards be heard to complain.” (Citing numerous cases.)

CONCLUSION

The evidence presented jury questions as to defendant's negligence and plaintiff's contributory negligence. The jury with the approval of the trial court resolved these issues in plaintiff's favor. The record reveals that no improper testimony was admitted in evidence by the court, and no exceptions to the complained of evidence were taken by defense counsel. Furthermore, counsel for defendant has utterly failed to discharge his burden of showing that defendant was prejudiced by any act or ruling of the trial court. Counsel made no such complaint

of prejudice at the time of trial, and asked for no instruction limiting the use of any evidence. Under the foregoing circumstances it is respectfully submitted that the Erickson and Karren cases should be reaffirmed by the sustaining of plaintiff's verdict.

Respectfully submitted,

RAWLINGS, WALLACE,
ROBERTS & BLACK
JOHN L. BLACK

Counsel for Respondent

530 Judge Building
Salt Lake City, Utah