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Sarah Margaret DeWeese v. J. C. Penney Company : Brief in Support of Petition for Rehearing

Utah Supreme Court

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

IN THE SUPREME COURT
of the
STATE OF UTAH

SARAH MARGARET DE WEESE,
Plaintiff and Respondent,

- vs -

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

Case No.
8347

BRIEF IN SUPPORT OF PETITION FOR REHEARING

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THE COURT HAS ERRONEOUSLY ASSUMED A HAZARDOUS CONDITION EXISTED IN THE ENTRANCEWAY OF DEFENDANTS STORE.

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POINT I.

THE COURT HAS ERRONEOUSLY ASSUMED A HAZARDOUS CONDITION EXISTED IN THE ENTRANCEWAY OF DEFENDANT'S STORE.

The dissenting opinion of Mr. Justice Henroid correctly characterizes the majority opinion when he says:

> "I am of the opinion that in allowing recovery under the facts of this case, we approach a rule of absolute insurability on the part of merchants whenever it storms and persons use their entrances, if a mat is not placed therein—a circumstance which, in my opinion, may or may not be evidence of negligence, and which may or may not be an exercise of greater care than that which such merchants need exercise."

The dissenting opinion of Mr. Justice Worthen very ably substantiates and amplifies this.

We respectfully submit that the majority opinion both amends and ignores the facts in the record and in

addition supplements the record by facts not found therein. We do not quarrel with the proposition stated by the Court that:

> "We are only required to determine whether there was any legitimate basis in the evidence upon which reasonable minds could believe that the defendant failed to meet its standard of reasonable care under the circumstances for the safety of its customers."

But we do quarrel, however, with the use of generalizations not properly supported by the evidence.

It appears from the opinion that this Court has assumed that terrazzo when wet has the characteristic of being slippery *in excess* of that of other substances, such as cement. Perhaps this has occurred as a result of what the court and others have assumed to be a fact. In the record before this Court, it stands as undisputed and not merely assumed that the terrazzo in the entranceway of defendant's store was not any more slippery when wet than the sidewalk in front. Every day experience illustrates that many things we assume to be factual are found not to be so when subjected to scientific measurement. The record shows without contradiction that in the instant case, the average coefficient of friction as scientifically measured of the terrazzo in the entranceway was greater than that of the sidewalk in front of the store or was just about identical when wet (R. 110-119).

Can it not be said that the majority opinion can now be used to provide a standard of care and allow recovery against any person, firm or corporation, including the City of Salt Lake, when sidewalks or cement walks are wet? Or must storekeepers be held to extraordinary care

in cases admittedly not of the foreign substance type? For example, if Mrs. DeWeese had fallen on the sidewalk and had brought suit against the City, would it not be correct to say from the reasoning of the majority opinion and the facts contained in the record that the City must have known of the characteristics of cement to become slippery when wet and since it is the custom of stores with terrazzo entranceways, which also become slippery when wet, to use mats or grits to prevent slipperiness during stormy weather, that a jury question was posed as to whether the City had discharged its duty to use reasonable diligence and watchfulness for storms and to take such measures as the exercise of reasonable care under the circumstances would dictate?

The only conclusion that can be reasonably taken from the opinion is that storekeepers have adopted more than the ordinary care by the use of mats and grits, and must therefore be held to that standard even though their terrazzo entranceways are not any more slippery when wet than the sidewalk in front of the store. Contrary to the holding of this Court in the recent case of *Gaddis v. Ladies Literary Club,* 4 Utah (2) 121, 288 P. (2) 785, we are now faced with a rule of law insuring the safety of business invitees in a store above and beyond that required in all other instances.

The foregoing presentment of a case against the City of Salt Lake becomes even stronger when one considers that the sidewalk is directly exposed to the weather, but the terrazzo becomes damp only because of a few minutes traffic by customers.

The majority opinion chooses part of the facts from the record and asserts the following:

> "The evidence clearly shows that the defendant knew of the characteristic of terrazzo to become slippery when wet, and that it was its custom, and the custom of other stores with similar surfacing to use rubber mats or grit to prevent slipperiness during stormy weather. In view of this a jury question was posed as to whether the defendant discharged its duty to use reasonable diligence and watchfulness for storms, and to take such measures as the exercise of reasonable care under the circumstances would dictate."

We respectfully submit that this paragraph should be reworded and to properly reflect the evidence should state that the evidence clearly shows that both the defendant and plaintiff knew of the characteristics of terrazzo and of cement sidewalks and that both became slippery when wet. Further that terrazzo is used by some eighty-five per cent of the stores in Salt Lake City for entranceways and does not in itself create a hazardous condition even when wet. That reasonable care in the use of terrazzo in an entranceway is exhibited when abrasives are present in the terrazzo to reduce slipperiness, and that in addition thereto, it was the custom to use rubber mats or grits to prevent slipperiness during stormy weather, but that it was not negligence to fail to use them unless the terrazzo had been improperly constructed and was in fact smoother than a sidewalk in front of a store due to wear or some other reason.

If the majority opinion measures the standard of care for storekeepers higher than that of any other persons, firms or corporations where invitees may be confronted with a surface more slippery when polished, or more slippery when wet, or more slippery when clean, then the

rule of law in this State indeed becomes unique. This is even more apparent when one asks what advice counsel for storekeepers can give their clients to protect their interests, since they are distinctly marked as a class against whom the rule heretofore governing recovery for slipping and falling cases is relaxed. A cursory review of the court calendars and the appellate decisions by number will indicate a great increase in such cases, and the majority opinion in the instant case in effect provides a new rule of law not unlike the doctrine of *res ipsa loquitur* as far as the storekeeper is concerned. The dissenting opinion of Mr. Justice Worthen ably and fully expresses the overwhelming weight of authority in the United States and the rule of law as it existed in this jurisdiction prior to the majority opinion in the instant case.

We also desire to point out that if terrazzo is in such common use by stores for entranceways, that in itself should be indicative of a compliance with a standard of care rather than a violation thereof.

POINT II.

THE RECORD DOES NOT SUPPORT THE MAJORITY OPINION WHEREIN IT IS STATED THAT THE EVIDENCE IS IN SHARP DISPUTE BOTH AS TO THE AMOUNT OF PRECIPITATION AND THE TIME THAT HAD ELAPSED.

Plaintiff herself introduced a weather report. That report showed precipitation beginning at 8:12 P.M. and ending at 8:34 P.M. The plaintiff also testified that there was no precipitation until she was on the bus and on her

way to town. If the Court can recognize "that in this mountain valley storms are sometimes spotty and irregular as to the time and place of starting, duration and amount of precipitation," it should be said that the Court must recognize, in view of the absence of testimony to the contrary, that precipitation began in town in front of defendant's store at 8:12 P.M. By plaintiff's weather report, the "storm" lasted twenty-two minutes. It appears from the figures, or those used by the majority opinion, possibly twenty-five to thirty minutes after the storm began the accident occurred, so by plaintiff's own evidence the storm must have ended before her arrival at the scene of her fall.

The precipitation referred to by the Court as a "storm" is given a dignity which the evidence cannot support. The official weather report calls it "a trace," "an amount too small to measure." Plaintiff testified as well that there was no great amount of water nor any snow on the sidewalk. Further the "storm" was not of a sufficient intensity to give plaintiff concern about rubbers or galoshes for her feet, and yet the Court finds that the storm was sufficient to require rubber mats or feldspar to be placed in the entranceway by the defendants. If it is recognized that storms are spotty and irregular in this valley, it would seem that such would more properly indicate no precipitation occurring at the downtown level until the time reported by the weather bureau. If assumptions must be made and facts unsupported by the record recognized, then we respectfully submit that since the question of notice or knowledge of precipitation is based upon the elapse of such a very few minutes, it must be also recognized that some of that time would be un-

doubtedly required within which the store officials could notify personnel and have the mats placed in position.

POINT III.

THE COURT ERRONEOUSLY EXCUSED THE ADMISSION OF CERTAIN EVIDENCE.

The majority opinion has informed the defendant that it is doubtful that defendant is in a position to complain of certain evidence being admitted purportedly because of a failure to move to strike certain questions and answers. Since the Court set out that certain testimony and then declared:

> "However, we need not concern ourselves with niceties with respect thereto for reasons presently to be stated."

we feel this calls for comment, and we again set out the questions and answers cited by the Court, together with part of its comment:

> "Q. Did you observe whether the substance had an abrasive in it—that terrazzo surface at W. T. Grant's?"
> Mr. Aadnesen, defendant's counsel: "Object to that as immaterial."
> The Court: "That may be answered 'yes' or 'no.' "
>
> * * * * *
>
> "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."

After a further question and answer,

> Mr. Aadnesen: "May the record show that my objection goes to this entire line as to what W. T. Grant has?"

to which the Court answered: "Yes." Upon the next question pertaining to the surfacing at Grant's, an objection that it was immaterial was sustained."

Of course, the first question could only be answered "yes" or "no" but it was still inadmissible. No opinion was being sought to which an objection had to be made after the "yes" or "no" answer was given. The subsequent question designated with a "Q" only because of the form used by the court reporter was not a question at all, but an explanation of the original question and the original objection precluded it. Perhaps we do not need to concern ourselves with the niceties of this testimony. The Court has set it out in rather full measure, and certainly the entire question, whether answered "yes" or "no" or whether explained was still inadmissible, and for the Court to now say that it can be excused because a motion to strike should have been made seems completely erroneous. The very statement by the Court that the question could be answered "yes" or "no" would indicate that the objection, timely made, was overruled.

Further the intent behind all of the testimony, including these questions and answers, unmistakably appears as an attempt to compare W. T. Grant's store and J. C. Penney's. The Court has properly set out the rule, and then appears to have ignored it:

> "There can be no doubt that it would not have been proper to use the procedure of any particular individual, or of the W. T. Grant Co. store, either generally, or in connection with this particular storm, as a standard of care upon which to determine whether the Penney Company was negligent."

CONCLUSION

The court has erroneously assumed a hazardous condition existed in the entranceway of defendant's store. This assumption is unsupported by the evidence in the record and creates a higher standard of care for storekeepers than the law should and heretofore did require. The evidence introduced by plaintiff herself negates the possibility of precipitation for a period of time prior to her fall sufficient to support a finding of knowledge, constructive or actual, and also requires a higher standard of care for the storekeeper than for the customer. The evidence admitted was properly objected to and the intent and import thereof was unmistakably an attempt to use the procedure of W. T. Grant Company as a standard of care upon which to determine whether the defendant, J. C. Penney Company, was negligent.

We request that defendant's petition for rehearing be granted.

Respectfully submitted,

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