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June Singleton v. George v. Alexander and William J. Green, A Copartnership dba Carefree Laundry : Brief of Respondents

In the Supreme Court of the State of Utah

JUNE SINGLETON,

Plaintiff and Appellant,

-vs.-

GEORGE V. ALEXANDER and WILLIAM J. GREEN, a copartnership, d/b/a CAREFREE LAUNDRY,

Defendants and Respondents.

Case No. 10780

BRIEF OF RESPONDENTS

Appeal from Judgment of the Second Judicial District Court in and for Weber County, The HONORABLE CHARLES G. COWLEY, presiding

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STATUTES

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In the Supreme Court of the State of Utah

JUNE SINGLETON,

Plaintiff and Appellant,

-vs.-

GEORGE V. ALEXANDER and WILLIAM J. GREEN, a copartnership, d/b/a CAREFREE LAUNDRY,

Defendants and Respondents.

Case No. 10780

BRIEF OF RESPONDENTS

STATEMENT OF KIND OF CASE

This is a personal injury action arising out of plaintiff-appellant's slipping and falling in water from an overflowing public toilet in defendant-respondents' self-service laundromat.

DISPOSITION IN LOWER COURT

The Trial Court granted defendant-respondents' motion for summary judgment and costs.

RELIEF SOUGHT ON APPEAL

Defendant-respondents pray that the judgment be affirmed and that they be awarded their costs on appeal.

STATEMENT OF FACTS

Defendants cannot agree with plaintiff's statement of facts and her brief fails to properly cite the record herein. Therefore, defendants will restate the facts. Deposition citations below refer to plaintiff's own testimony.

Plaintiff, as a business invitee, entered defendants' self-service laundry, knowing it was a self-service laundry (Depo., p. 5, l. 8). No employee was present while plaintiff was in the premises but employees are customarily not present in self-service laundries and customers run the coin-operated machines themselves. (Depo., p. 6, l. 10; R-8, para 4). Defendants' employee, Wilma G. Alexander, inspected the premises within one-half to one hour before plaintiff was injured and specifically inspected the floor and public toilet, finding all in order. She left and went home (R-8, para. 7). Plaintiff was on defendants' premises for approximately one-half hour (Depo., p. 11, l. 22). Other customers entered while she was there (Depo., p. 18). When she entered, she saw a small spot of water approximately one foot in diameter in one corner (Depo., p. 13, l. 5). Wilma Alexander's

telephone number was posted in a conspicuous place on the premises with notice to telephone her in the event of an emergency, but no one advised her of any defect in the premises and she did not learn of the water on the premises until after plaintiff fell on leaving the premises (R-8, para. 6-7). While plaintiff was on the premises, some unknown customer or member of the public, but not an employee, put too much toilet paper in the public toilet and it overflowed (R-8., para. 8), leaving water one-fourth to one-half inch deep around the exit from the premises (Depo., p. 14, l. 30). Plaintiff started to walk out of the premises following her daughter, carrying a large laundry basket (Depo., p. 17-18). Because of the basket she could not see the floor as she walked, could not see her feet at all (Depo., p. 16, l. 18), could not see where she was walking, and was not making any particular effort to look to see where she was walking, but was looking straight ahead (Depo., p. 22). She did not see the water that had overflowed from the toilet, took three steps into it, (Depo., p. 17, l. 21) felt the water through her shoes (Depo., p. 20, l. 4), said "be careful" to her daughter and slipped and fell in the water (Depo., p. 16, l. 24), causing her injury. When plaintiff fell, Wilma G. Alexander was called on the telephone. She came immediately to the premises, inspected, and found that the water on the floor was caused by an excessive amount of toilet paper clogging the toilet which caused it to overflow (R-8, para. 7-8).

Plaintiff testified she did not know how the water got there (Depo., p. 15, l. 6), how long it had been there (Depo., p. 20, l. 1), or whether any of defendants or their employees knew of it (Depo., p. 22, l. 26). Plaintiff was given opportunity to produce additional facts when her deposition was taken but did not do so (Depo., p. 48, l. 13-18).

As the sole basis for negligence, plaintiff's amended complaint, paragraph 4, alleges:

> "... *Defendants* and each of them, *negligently* and carelessly and without due regard for the safety of their patrons, and the public *permitted a slippery and foreign substance to be present on the floor* of defendants' Laundromat, ..." (R-4) (Emphasis added).

Based upon that sole allegation of negligence in the complaint, plaintiff's deposition, the Alexander affidavit (R-8) and plaintiff's notice of readiness for trial (R-7), defendants moved for summary judgment (R-9).

Plaintiff filed no responsive affidavits. The motion was published and the case taken under advisement to permit the filing of briefs, although defendants had already filed their brief (R-10). Not until September 27, 15 days after hearing of the motion, did plaintiff file an affidavit stating only "there is no drain facility in the public bathroom located on the premises."

The Trial Court granted defendants' motion for summary judgment and awarded defendants judgment in their favor and costs (R-14). Plaintiff appealed.

Incidentally, plaintiff's brief in its statement of facts, page 3, claims Mrs. Alexander contradicted herself, saying she said in her affidavit the premises had a telephone with her number listed on a card near it, but in her answers to interrogatories she admitted there was no telephone on the premises. Plaintiff is wholly inaccurate. The Alexander affidavit (R-8, para. 6) says:

> "*On the coin changers* located in a conspicuous place on the premises appears a sign which gives either dependent's telephone number or Mrs. Greer's telephone number. . . . On November 14, 1963, affiant's name and telephone number were so posted."

ARGUMENT

POINT I. RES IPSA LOQUITUR IS NOT APPLICABLE.

62 ALR 2d 57, says:

> "It is *universally held* that the res ipsa loquitur doctrine is *inapplicable* to suits against business proprietors to recover for injuries sustained in falls on floors within the business premises which are alleged to have been rendered slippery by the presence thereon of water, or mud, snow, etc." (Emphasis added)

61 ALR 2d 58 says exactly the same thing with regard to litter and debris. Thirty cases from ten jurisdictions are cited by the two annotations.

The res ipsa elements which must be present are:

> "(1) That the accident was a kind which, in the ordinary course of events, would not have happened had due care been observed; (2) that it happened irrespective of any participation by the plaintiff; and (3) that the cause thereof was something under the management or control of the defendant, or for which it is responsible." *Wightman v. Mt. Fuel Supply Co.*, 5 Ut. 2d 373, 302 P.2d 471.

The doctrine is not applicable here. First, plaintiff has not shown toilets overflow without any negligence. Second, plaintiff did participate, for she walked in the water. Third, plaintiff has not shown the toilet was exclusively in defendants' control; it was instead a public toilet, used and operated by the public. Finally, defendants have explained and rebutted any possible inference of negligence by showing that the water came from an overflowing toilet overstuffed by someone other than defendants or their employees.

In *Barnhill v. Young Electric Sign Co.*, 13 Ut.2d 347, 374 P.2d 311, plaintiff claimed res ipsa, but this Court said:

> "Where it is clear that it is at least equally probable that the negligence was that of another,

> the court must instruct the jury that the plaintiff has not proved his case. The injury must be traced to a specific instrumentality or cause for which defendant was responsible."

Welch v. Sears Roebuck Co., (Cal. 1950) 215 P.2d 796, stressed at page 4 of plaintiff's brief, is scarcely in point. There a roll of linoleum fell on plaintiff after defendant's clerk had unrolled it, snapped it back into the roll, and left to answer the telephone. That is a classical res ipsa situation, for things normally don't usually fall without negligence by persons in control. Here it was plaintiff who fell, so if res ipsa applies at all, it is to plaintiff's contributory negligence.

Knowles v. Hillside Lounge, Inc., 137 N.W.2d 361, and *Bell v. Koch, Inc. vs. Stanley,* 375 S.W.2d 696, cited by plaintiff's brief, page 7, are distinguishable because they involve a collapsing chair and a falling stack of dry-wall sheets, respectively. Chairs don't usually break and things don't usually fall without negligence by persons in control. Public toilets do overflow without negligence by the landowner.

Barca v. Daitch Crystal Dairies, Inc., 256 N.Y.S.2d 14, cited at page 7, is not a decision of the highest court of New York, and while its dicta takes a view of the applicability of res ipsa to supermarkets which is contrary to that taken by any other court, the case is actually decided on other grounds. The case says:

> ". . . aside from any question of res ipsa, the proof of the condition of the spilled sugar — numerous foot tracks through it, etc. — presented a question of fact on the issue of constructive notice and was not an absence of notice as a matter of law case, as the trial court indicated."

Sanone v. J. C. Penney Co., 17 Ut.2d 46, 404 P.2d 248, cited at page 7, is not in point. There plaintiff caught her foot in an escalator while halfway down it. The Court held res ipsa applied, saying:

> "Nor does it depart from reason to draw the inference that if an escalator is so used (in the manner intended) and that an injury occurs there was something wrong either in the construction, maintenance, or operation of the escalator. . . .
>
> Inasmuch as the escalator was under the exclusive control of the defendant, the test for the application of the doctrine is fulfilled."

Had plaintiff there slipped on water on the escalator, res ipsa would not have applied.

Thus, it is clear res ipsa is not applicable against landowners in the case of toilets operated and used by the public, because the public may cause them to overflow.

POINT II. THE COURT DID NOT ERR IN FINDING AS A MATTER OF LAW DEFENDANTS WERE NOT NEGLIGENT.

The discovery tools and affidavits properly before the Court clearly show that defendants reasonably exer-

cised their duty of inspection and had no notice of the existence of the water on which plaintiff fell. They show the condition was created by someone other than defendants or their employees. They show that plaintiff has no knowledge of and cannot show how the water got on the floor, by whom it was deposited, how it arrived there or that defendants had knowledge of its presence. Since plaintiff testified she was in the premises for about one-half hour and that the condition did not exist when she entered, the record affirmatively shows that the condition existed for something less than one-half hour. Absent evidence to the contrary, the condition could have been created only seconds before plaintiff fell and speculation as to when it was created is prohibited.

In *Lindsay v. Eccles Hotel Co.*, 3 Ut.2d 364, 284 P.2d 477 (1955), plaintiff, after dining in defendant's coffee shop, slipped on a small quantity of water which somehow got on the floor some time after she was seated. This Court affirmed a directed verdict for defendant in the absence of evidence "as to how the water got onto the floor, by whom it was deposited, exactly when it arrived there, or that defendant had knowledge of its presence."

Erickson v. Walgreen Drug Co., 120 U. 31, 232 P.2d 210 (1951) and *DeWeese v. J. C. Penney Co.*, 5 Ut.2d 116, 297 P.2d 898 (1956), distinguish situations of conditions

created by landowners, where plaintiff need not show defendant's notice, from situations involving transitory hazards, as here, when plaintiff must show defendant knew or should have known of the hazard and had reasonable opportunity to correct it.

In *Hampton v. Rowley,* 10 Ut.2d 169, 350 P.2d 161 (1960) plaintiff slipped on a loose stone on the doorstep of defendant's store. This Court said:

> "In regard to a transitory condition of the character here involved, the instruction given is consistent with established law that in order to find the defendants negligent, it must be shown that they either knew, or in the exercise of reasonable care should have known, of any hazardous condition and had a reasonable opportunity to remedy the same."

In 61 A.L.R. 2d 125-6, the annotator says:

> "In contrast with the rule applicable to a floor condition resulting from the act of the proprietor or his employees, it is held that where it appears that a floor in a store or similar place of business has been made dangerous by the presence thereon of an obstacle and the presence of the obstacle is traceable to persons for whom the proprietor is not responsible, proof that the proprietor was negligent in relation to the floor condition requires a showing that he had actual notice thereof, or that the condition existed for such a length of time that in the exercise of reasonable care he should have known of it."

In *J. C. Penney, Inc. v. Kellermeyer* (Ind. 1939) 19 N.E.2d 882, 22 N.E.2d 899, plaintiff claimed defendant was negligent in maintaining a foreign object on the floor of its store. A verdict for the plaintiff was reversed as a matter of law on the ground that there was no evidence that the object was on the floor for any length of time whatever or that defendant or its servants knew it was on the floor, or, because of the length of time it was there, in the exercise of reasonable care, defendants should have known about it.

In *Robinson v. Great Atlantic and Pacific Tea Co.* (N.C. 1941), 147 S.W.2d 648, a verdict for plaintiff was reversed as a matter of law when it appeared that a box over which plaintiff tripped in defendant's grocery store was not in the passageway when plaintiff entered the store some 10 to 15 minutes before she fell, the court saying that the box was not in the passageway for sufficient length of time to charge defendant with constructive notice of the obstruction.

In *Gargaro v. Kroger Grocery and Baking Co.* (Tenn. 1938) 118 S.W.2d 561, it was held the trial court did not err in dismissing plaintiff's suit, saying that proof that the basket over which plaintiff tripped had remained in the aisle of the store from 20 to 30 minutes prior to plaintiff's accident was not sufficient to charge defendant with notice that the basket was in the aisle so that defendant's failure to remove it could be considered negligence.

Lindsay v. Eccles Hotel, J. C. Penney v. Kellermeyer, Robinson v. Great Atlantic and Pacific Tea Co. and Gargaro v. Kroger Grocery, supra, all hotel, department store or supermarket cases, as opposed to this self-service laundry, hold that absence of evidence as to how long the transitory condition existed, or evidence that it existed for 15 minutes, or 30 minutes, will not charge defendant with failure to discover within a reasonable time *as a matter of law.*

Here involved is a self-service laundry where employees are not customarily present. The overflowing water could not have existed for longer than one-half hour. Plaintiff cannot show it existed even that long; it might have been only seconds. There can be no question that, as a matter of law as established by the foregoing cases, defendant did not unreasonably fail to discover the water.

Plaintiff's brief, page 10, claims plaintiff's deposition at page 15 presents evidence that the water came from the plumbing beneath the toilet instead of from overflow. Not only is this gross conjecture; it is incompetent hearsay. The deposition, page 15, reflects that plaintiff didn't know where the water came from, that some unidentified person *told* her it came from the bottom of the toilet and plaintiff and her counsel said:

"A. That's hearsay.

MR. HUGGINS: That's right."

Such is hardly a showing "made on personal knowledge" of "facts as would be admissible in evidence" by an affiant "competent to testify" thereto as required by Rule 56(e), U.R.C.P. If plaintiff really wanted to claim water came from below the toilet, she should have presented a counter-affidavit in proper form to rebutt the Alexander affidavit that after learning of the accident and the water on the floor, "Affiant then inspected the premises and found that the toilet had overflowed because an excessive amount of toilet paper had plugged up the bowl."

Plaintiff's brief makes no effort to distinguish the applicable Utah cases, although they were cited in defendants' memorandum to the Trial Court (R-60). The cases from other jurisdictions cited by plaintiff, while not controlling, are all distinguishable.

Plaintiff's brief, page 10, cites *Newman v. United States*, 248 Fed. Supp. 669. It is not in point. It involves negligent installation by defendant of a water line. As indicated by the Utah cases cited, supra, when defendant or its employees actively create the condition complained of, plaintiff need not show that defendant knew or should have known of the condition and had a reasonable opportunity to remedy it, for defendant's knowledge is presumed. The summary judgment is here based upon the

grounds that the water was a transitory condition and plaintiff cannot show any evidence that defendants created it, knew of it or had a reasonable opportunity to remove it. Absent such evidence, summary judgment is proper. The *Newman* case does not even reach this point.

Robinson v. Park Central Apartments, (DDC. 1965) 248 F.Supp.6321, cited at page 10 of plaintiff's brief, is not in point for there defendants' employees had been clearing away snow on the approach to the hotel but stopped, and so defendants were shown to have known of the condition. Here plaintiff cannot show defendants' knowledge.

Likewise, in *Control Hardware Co. v. Statler,* 180 So. 2d 205, page 11, plaintiff's brief, defendant actively created the condition complained of by placing a mat with a defective edge on the sidewalk and not adequately lighting it. Since the owner created the condition, plaintiff need not show defendant's knowledge of the condition.

Moore v. Winn-Dixie Stores, Inc., 173 So.2d 603, cited page 11, plaintiff's brief, is not in point. There plaintiff presented evidence that the janitor improperly cleaned the supermarket floor and further showed that defendant employees improperly inspected the floor two hours before the accident by failing to discover the presence of the drying banana peel. Here, there is no evi-

dence of improper inspection and indeed, there is affirmative evidence showing inspection about one-half hour before plaintiff fell and showing that the condition complained of was caused by a third party and not by defendants' employees. Finally, the case at bar involves a self-service laundromat where employees are customarily not present rather than a supermarket where employees are constantly present. In any event, *Lindsay v. Eccles Hotel Co., supra,* is controlling.

Guidani v. Cumerlato, (Ill., 1965) 207 N.E.2d 1, cited page 11, plaintiff's brief, is distinguishable. There the Court expressly holds that, because bowlers make a running and sliding approach in bowling, the foreseeable risk of injury is great, and a bowling alley proprietor has a higher duty of inspecting and the reasonable length of time for discovering defects is shorter than in the common passageway of a retail store. Further, there was evidence in that case to indicate that the wet floor had existed for more than one hour. In the case at bar it cannot be determined how long the floor had been wet, but it was less than a half-hour.

Harvey Building, Inc. v. Halley, (Fla. 1965) 175 So.2d 780, cited at page 11, is distinguishable. There, it was raining and plaintiff, who slipped on the marble floor in the office building, offered affidavits in opposition to defendant's motion for summary judgment stating "the floor was of marble construction and was wet,

causing it to be slippery." Summary judgment was there denied, because defendants' knowledge of the condition could be implied from knowledge of the rain itself and that marble becomes particularly slippery when wet. Here, there is no way constructive knowledge of the overflowing toilet can be imputed to defendants, particularly when it cannot be shown when the toilet overflowed. The case actually supports defendants, for it says:

> "To defeat a motion (for summary judgment) which is supported by evidence which reveals no genuine issue, it is not sufficient for the opposing party merely to assert that an issue does exist. (It is a) pretrial motion for a directed verdict."

The court disapproved a lower court's holding that "summary judgment should not be granted if it could be inferred from the evidence that the plaintiff could prove at trial that defendant was negligent," and approves another lower holding taking the opposite view that the opposing party "must come forward with facts contradicting those submitted by the movant and demonstrating a real issue between the parties." Here plaintiff has so failed.

Murphy v. El Dorado Bowl, Inc., (Ariz. 1965) 407 P.2d 57, cited page 12, plaintiff's brief, is distinguishable as a bowling alley case, considering the higher duty of care of bowling alleys owners. See *Guidani v. Cumerlato*,

supra. Further, the case involved a construction defect (a step) for which notice need not be shown rather than a transitory condition created by a third party.

General Electric v. Salcidio, Ariz. 408 P.2d 42, cited page 12, plaintiff's brief, is distinguishable solely upon the quotation from plaintiff's brief that "plaintiff does not have to prove actual or constructive notice of defective floor condition, where defect is created by defendant or his servants."

Garrett v. American Air Lines, Inc. (C. A. 5th, 1964) 332 F.2d 939, cited page 13, plaintiff's brief, is not applicable. The case acknowledges that normally the carrier has "no liability unless (a) the carrier has put the zipper bag on the floor, or (b) the carrier knew it was on the floor, or (c) it had been there so long that the carrier was charged with knowledge of its presence and consequent duty to remove it." The case adds a fourth basis for finding liability in holding that the carrier must take reasonable cognizance of the habits and practices generally followed by its customers. In that case, the carrier "acknowledged that passengers *frequently* put baggage on the floor in front of their feet." Here, there is no evidence that patrons might *frequently* cause the toilet to overflow, and indeed the Court can take judicial notice that such does not often happen. Further, the case is distinguishable because of the highest standard of care attributable to

carriers rather than the duty of reasonable care attributable to landowners, as here. The case actually supports defendants' motion, for here there is no evidence that defendants put the water on the floor, knew that it was on the floor, or that it had been there so long that defendants were charged with knowledge of its presence.

Deniswich v. Pappas (R.I. 1964) 198 A.2d 144, cited page 14, plaintiff's brief, is distinguishable. The case arose when the trial court sustained defendant's demurrer to the complaint in spite of an allegation that defendants breached the alleged custom of parking lot owners to build barriers in the parking lot. The case involves an active construction defect by defendant, for which notice need not be shown. Here, there is no construction defect shown and no evidence that defendants breached any custom.

Bozza v. Vornado, Inc. (N.J., 1964) 200 A.2d 777, cited page 14, plaintiff's brief, is not in point and is contrary to Utah law as stated in *Lindsay v. Eccles Hotel Co., supra.* In *Bozza,* plaintiff fell in litter on a cafeteria floor, and the Court said:

> "When plaintiff has shown that the circumstances were such to create the *reasonable probability* that the dangerous condition would occur, he need not also prove actual or constructive notice of the specific condition. Factors bearing on the existence of such reasonable probability

> would include the nature of the business, the general condition of the premises, a pattern of conduct or recurring incidents. . . . Once plaintiff introduces evidence which raises an inference of negligence, defendant may then negate the inference by submitting evidence of reasonable care."

Here there is no evidence of reasonable probability that the toilet would overflow, or how long the condition existed, and here defendants did show evidence of reasonable care in inspecting the premises a half-hour before plaintiff fell. Finally, in considering whether plaintiff must here prove actual or constructive notice of the specific condition is to be considered the fact that this is a self-service laundry where employees are not normally present, as opposed to the cafeteria in *Bozza* where they are present.

The same distinction can be made of *Mahoney v. J. C. Penney Co.* (N.M., 1962), 377 P.2d 663, cited plaintiff's brief, page 15. Plaintiff paraphrased the language of the court and left out the language which hurts her position. The actual quotation paraphrased is:

> "Where the dangerous condition is *not an isolated one, but is foreseeable* because of a pattern of conduct, a recurring incident, a general condition, or a continuing condition, then . . . *absent a showing of due care,* plaintiff need not prove that defendant had actual or constructive

> knowledge of the specific item *forming part of that pattern of conduct, recurring incident, etc.*" (Emphasis added)

Here, there is no showing that the overflowing toilet was not isolated, or was foreseeable because of the pattern of conduct, a recurring incident, a general condition, or a continuing condition. In fact, the showing by defendants is to the contrary. Further, there is an affirmative showing of inspection, and hence, due care, on part of defendants.

Plaintiff claims a jury might find defendants negligent in leaving the self-service coin-operated laundry unattended. This is not material in absence of showing by plaintiff as to how long the water had been on the floor, so as to show that had the premises been attended the overflow could have been discovered. Further, Mrs. Alexander did inspect one-half to one hour before she learned plaintiff fell (R-8), so lack of an attendant cannot matter. Speculation as to how long the water existed is prohibited, for the toilet could have overflowed just as plaintiff left. Since the water wasn't there when plaintiff went in and she was there only one-half hour, it could not have been there longer than one-half hour. It is interesting that plaintiff herself was attending the premises and she didn't discover the water. Plaintiff testified other patrons entered the premises about five minutes before she fell (Depo., p. 18) and plaintiff still did not learn of the water. If it had been there long

wouldn't someone have mentioned it? Hence, the reasonable probability is that the toilet did overflow just as plaintiff left and therefore the presence of an employee would have made no difference.

Plaintiff's brief quarrels with the Alexander affidavit that employees are customarily not present in self-service laundries (R-8), saying the evidence is incompetent. Again, the customary absence of employees in self-service laundries is a matter of common knowledge of which the Court can take judicial notice, if the custom is not shown purely by definition of "self-service laundry". Further, who is more competent to so testify than one in the self-service laundry business. If plaintiff disputed the affidavit showing the custom, she should have filed a counter-affidavit to create an issue of fact.

Ramsey v. Mellon National Bank (W.D. Pa. 1966), 251 F. Supp. 646 cited by plaintiff's brief, page 9, is distinguishable on the same ground that court distinguished the prior holding in *Yearsly v. American Stores Co.* (1929) 97 Pa. Super. 275. In *Ramsey* there was conflicting evidence as to the business custom (customary size of holes in floor mats) but in *Yearsly,* plaintiff failed to show the grating in which she caught her heel had unusually large holes and was non-suited. So here, as in *Yearsly,* plaintiff failed to show any competent evidence of a custom of having employees present at all times in self-service laundries and thus failed to contra-

dict defendants' affidavit. *Colligan v. City of Monongahela* (Pa. 1922) 115 A. 869, cited at page 9 of plaintiff's brief, has nothing at all to do with the issues here.

This all comes down to a simple proposition. In cases of transitory conditions, such as water overflowing from toilets, in Utah, a plaintiff is required to present evidence, quoting from *Lindsay v. Eccles Hotel, supra,* "as to how the water got onto the floor, by whom it was deposited, exactly when it arrived there, or that defendant had knowledge of its presence." Plaintiff testified on deposition she did not know the answers to those four questions. On defendants' motion for summary judgment, her sworn testimony alone that she did not know those answers would necessitate her producing other affidavits to answer the questions to avoid summary judgment. She did not present such affidavits. Instead, defendants went a step further and affirmatively showed the water came from a toilet caused to overflow by a patron and defendants' employees did not know of its presence.

In light of that record and the controlling Utah cases of *Lindsay v. Eccles Hotel* and *Hampton v. Rowley, supra,* it is clear the Trial Court did not err in holding there was no genuine issue of material fact, that as a matter of law defendants were not negligent and in granting summary judgment.

POINT III. THE COURT DID NOT ERR IN FINDING AS A MATTER OF LAW PLAINTIFF WAS NEGLIGENT.

The record affirmatively shows from plaintiff's own deposition that the water of which she complains was large, open and obvious. It was a fourth to a half-inch deep around the exit (Depo., p. 14). Plaintiff's brief (page 4) calls it an "extensive inundation." As plaintiff walked, she carried a basket which she knew prevented her from seeing her feet or the floor (Depo., p. 16). She had seen some water on the floor when she entered (Depo., p. 13). Even though she had seen that water and even though knew she could not see her feet or the floor, she testified she looked straight ahead and made no particular effort to see where she was walking (Depo., p. 22). Although plaintiff's brief argues plaintiff had no notice of the water and is therefore excused, to the contrary, she testified she took three steps into the water, and then told her daughter "be careful." Therefore she was then aware of the hazard and having thus acquired notice of the condition she slipped and fell. Hence, she was contributorily negligence as a matter of law, first in not watching where she was walking when she knew she could not see the floor, second, in entering the clearly visible large area of water, and third, in not using reasonable care to avoid falling after she was aware of the hazard.

In *Whitman v. W. T. Grant Co.*, 16 Ut.2d 81, 395 P.2d 918 (1964), the granting of summary judgment on

the ground of contributory negligence was sustained when a deliveryman (an invitee, Restatement of Torts 2d §332), in returning to his truck, opened the first door he saw and stepped off backwards into an elevator shaft without taking a precautionary glance beyond the door. This Court said:

> "The plaintiff is confronted with the basic proposition that where there is a hazard which is plainly visible, ordinarily one is charged with the duty of seeing and avoiding it. And if he fails to do so, it is concluded that he was negligent either in failing to look, or in failing to heed what he saw. . . . In order to justify holding that a jury question as to negligence exists, where injury has resulted from an observable hazard, it is essential that there be something which could be regarded as tending to distract the plaintiff's attention or to prevent him from seeing the danger, thus providing some reasonable basis for a finding that even though he exercised due care, he could be excused from seeing and avoiding it.

Here, there is no evidence by plaintiff of any distraction. Plaintiff cannot say the basket prevented her from seeing the hazard, for she knew that she could not see the floor but made no effort to see around the basket. Further, carrying the basket was her own act; it cannot be said that defendants or any outside agency prevented her from seeing.

In *Moore v. Kroger Co.,* (Ga. 1953) 74 SE.2d 481, plaintiff tripped over a push cart in the aisle in defendant's self-service grocery store, her vision having been obscured by a large sack of groceries which she was carrying in her arms. A general demurrer to the petition was sustained, the court holding that the proximate cause of plaintiff's injuries was her failure to exercise ordinary care for her own safety in looking ahead in the direction in which she was walking.

Plaintiff's brief, page 16, argues that defendants knew or should have known the customers will carry baskets and that it is foreseeable that a customer will not see temporary hazards in his way. It certainly isn't foreseeable that customers will not make *any* effort to see around their baskets to observe clearly visible hazards. If the risk is foreseeable for defendants, it is equally foreseeable for plaintiff. The record is clear that plaintiff, notwithstanding foreseeability, was not making any effort to look to see where she was walking though she knew she could not see where she was walking or see the floor (Depo., page 22). Such evidence does not make a question for the jury as a matter of law. Thus, plaintiff is in exactly the same position as was plaintiff in *Whitman v. W. T. Grant Co.,* and in *Moore v. Kroger Co., supra,* both of which held plaintiff was negligent as a matter of law.

Plaintiff makes no effort to distinguish the controlling *Whitman* case. The cases cited by plaintiff, while not controlling, are all distinguishable.

Plaintiff's brief, page 16, cites *Kreiss v. Altuna Laundry, Inc.,* (Ga., 1963), 133 So.2d 602. The case is not in point, for the issue there was whether plaintiff selected the proper route. Here defendants do not claim plaintiff used an improper route, but that she failed to look where she was walking.

Safeway Stores, Inc. v. Stephens (D.C., 1964), 197 A.2d 849, cited at page 16, is distinguishable from this case on the same grounds that the court there distinguished its prior holding in *Safeway Stores, Inc. v. Fenney* (1960) 163 A.2d 624. In *Stephens,* plaintiff testified she was proceeding in a careful manner, although hurriedly, whereas in *Fenney,* plaintiff encountered the danger "automatically and in an absent-minded and forgetful manner." Here, plaintiff was contributorily negligent as a matter of law, as in *Fenney,* in failing to observe a plainly visible hazard. There is no evidence here that plaintiff was proceeding carefully, as in *Stephens;* the evidence here is that she could not see the floor or where she was walking and was not making any particular effort to see, as in *Fenney.*

Dever v. Theriot's, Inc. (La., 1964), 159 So.2d 602, is improperly paraphrased in plaintiff's favor at page 17 of her brief. The omissions from the sentence show the distinction. The actual quotation paraphrased is that plaintiff, who fell in a supermarket, was not guilty of contributory negligent "in failing to observe *inconspicuous* particles or substances in the aisle," and it was not

necessary to make "a specific observation of floor conditions before taking each step, *especially* in view of the storekeeper's presumed intention and knowledge *that the customer will devote the major portion of his attention to inspecting the merchandise* deliberately displayed to attract it." Here, the hazard was not inconspicuous, and this was an accident in a self-service laundromat, where the record is devoid of evidence of displays or any other distractions.

Plaintiff's brief, page 17, cites *Garofoli v. Salesianum School, Inc.,* (Del. 1965) 208 A.2d 308. The case is distinguishable on the same grounds that the Court distinguished its prior holding in *Freileck v. Homeopathic Hospital Association,* 150 A.2d 17. In *Garofoli* there was evidence that plaintiff was proceeding carefully, and hence a jury question existed. In *Freileck,* plaintiff was held negligent as a matter of law in falling over a chain on a foggy night where "there was nothing to indicate that plaintiff had been watching carefully where she was going." Here, the only evidence affirmatively shows that plaintiff was not watching carefully where she was going, so *Freileck,* not *Garofoli,* applies. Further, in *Garofoli,* there was evidence of poor lighting not here present.

Plaintiff's brief, page 17, cites *Robinson v. Park Central Apartments,* (D.C. 1965) 248 F.Supp. 632. There as plaintiff stepped from a taxi, he slipped on ice cover-

ing the sidewalk left after defendant cleared snow. The United States District Court, a single judge, said "I do not believe he was under any duty to look down on the street before he got out of the taxicab and ascertain the *exact state* of the street. It looked *clear because there was no snow piled on it.*" (Emphasis added) The case is distinguishable because there plaintiff looked but could not see the hazard and was held not bound to ascertain the exact state of the hazard, but here plaintiff did not look at all to see what was clearly visible and though she knew she could not see the floor, she stepped forward anyway.

Plaintiff's brief, page 18, cites *Blackburn v. Tombling,* (Colo., 1965) 407 P.2d 337. That case is distinguishable because there plaintiff's view of the step between the hotel door and street level was obstructed by the door and the lighting. The court said, "one fully exercising due care could fail to observe the difference between the hotel and street levels." In *Blackburn,* plaintiff was prevented from seeing by conditions created by defendant, that is, the door and the poor light. Here the hazard was large and clearly visible; nothing but plaintiff's own basket prevented her from seeing, and plaintiff here did not exercise due care.

The recalling of the Court's attention to *Whitman v. W. T. Grant Co., supra,* a Utah 1964 case, which plaintiff has not attempted to distinguish, and the preceding distinctions of defendants' cases are sufficient

answer to plaintiff's brief, page 18, that "the cases cited by defendants in support of their contributory negligence allegation are, as is obvious, old cases, not in point, and at the present time not good law."

Clearly, plaintiff was negligent as a matter of law and the Trial Court did not err in so ruling.

POINT IV. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT.

The sole ground of negligence alleged in the amended complaint is that "defendants . . . negligent and carelessly . . . permitted a slippery and foreign substance to be present on the floor of defendants' laundromat. . . ." (R-4, para 4). Plaintiff filed notice of readiness for trial and her counsel certified therein he had interviewed all known witnesses he might call on trial, that all use of rules of discovery as necessary had been completed, that he was ready for trial and that he "requests the court to act in reliance thereon."

At that point, the verified discovery tools before the Court showed that plaintiff claimed the slippery substance on the floor was water in great quantity (Depo., p. 9), that she didn't know how it go there, how long it had been there or whether any of defendants' employees knew of it (Depo., p. 15, 20, 22). The water wasn't there when plaintiff went in and she was there

only one-half hour (Depo., p. 11). Defendants' affidavit showed they inspected the premises one-half to one hour before plaintiff was injured and all was in order, that no employee was present while plaintiff was present, that no employee knew of the water and that the water came from a toilet which overflowed because a customer put too much paper in the toilet (R-8). The record affirmatively showed the water was not caused by defendants but by a member of the public, that defendants did not know of it, that it was transitory condition and that defendants did not unreasonably fail to discover it.

All this showed plaintiff could not prove "defendants . . . negligently . . . permitted a slippery and foreign substance to be present on the floor," as alleged and affirmatively showed defendants were not negligent and plaintiff was.

Based on that record and plaintiff's notice of readiness for trial, defendants moved for summary judgment. Plaintiff filed no counter-affidavits before hearing of the motion but fifteen days after hearing served and filed an affidavit that there was no drain facility in defendants' bathroom. Though plaintiff's amended complaint alleged only that defendants negligently permitted a foreign substance to exist and though plaintiff submitted the motion to the Trial Court on that theory, plaintiff now argues in her brief, page 3:

> ". . . nor has defendant introduced any information that the water on the floor was being properly eliminated by the drain installed on defendants' premises."

Thus plaintiff, on appeal, attempts on the basis of her untimely affidavit to shift her theory from negligence in permitting water on the floor to exist to negligence in installing and maintaining the plumbing, and says the Court erred in granting summary judgment. Plaintiff's argument fails in a number of respects.

Rule 56(c), U.R.C.P., requires that opposing affidavits be served prior to the day of hearing of motions for summary judgment. Plaintiff's affidavit was 15 days late, and plaintiff failed to obtain leave to file it. The affidavit thus should not be considered by the Court. See *Surkin v. Charteris* (C.A. 5th, 1952), 197 F.2d 77.

The mere fact of no drain in the bathroom does not, of itself, constitute negligence, for there is no evidence that the standard of care requires such. "The whole purpose of summary judgment would be defeated if a case could be forced to trial by a mere assertion that an issue exists." *Leininger v. Sterns-Roger Mfg. Co.* (1965) 17 Utah 2d 37, 404 P.2d 33. *Scapecchi v. Harold's Club* (Nev., 1962) 371 P.2d 815, 818, holds:

> ". . . it was not shown what caused (persons) to slip and no evidence was presented to show

> that a terrazzo surface is inherently slippery when wet. The mere unverified allegations regarding the characteristics of a terrazzo surface did not present factual issues which would preclude a summary judgment."

Plaintiff must present some evidentiary material to contradict defendants case or specify in an affidavit why she cannot do so. *Dupler v. Yates* (1960) 10 Utah 2d 251, 351 P.2d 624, specifically says:

> "Where, as in the instant case, the materials presented by the moving party are sufficient to entitle him to a directed verdict and the opposing party fails either to offer counter-affidavits or materials that raise a credible issue or to show that he has evidence not then available, summary judgment may be rendered for the moving party."

In *Heathman v. Fabian & Clendenin,* 14 Ut.2d 60, 377 P.2d 189, (1962), the granting of summary judgment in a fraud case was sustained, the Court saying:

> "The evidence clearly shows that the trial judge carefully gave Heathman every opportunity to show that he had been mistreated, or that there had been fraud or undue influence asserted in the Hatch case."

Here, plaintiff might as well have said in her affidavit the laundromat had no fireplace or that the floor

was asphalt tile. Neither statement, by itself, creates an issue of fact as to negligence; neither does the lack of a floor drain in the bathroom. Indeed, the Court can take judicial notice that seldom do bathrooms have floor drains, as that is a matter of common knowledge. *Little Cottonwood Water Co. v. Kimball,* 76 Ut. 243, 267, 289 P. 116. The lack of a floor drain cannot be causative, for plaintiff would still have fallen in water running to it.

Rule 56(e), U.R.C.P., as amended, effective October 1, 1965, provides:

> "When a motion for summary judgment is made and supported as provided in this rule, and adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, *shall* be entered against him." (Emphasis added)

Lindberg v. Backman (1959) 9 Ut.2d 58, 337 P.2d 433, upon which plaintiff relies, page 19, was decided before Rule 56(e) was amended to provide as above. The rule now requires that plaintiff, facing defendant's affidavit (R-8) and her own deposition, furnish by affidavit or other verified discovery tools evidence that the lack of an overflow drain in the bathroom constitutes

negligence, or that there was something wrong with the toilet or existing drain. She may not rely on her complaint.

The moving party on summary judgment is not required to negative every possible matter of defense. *Best v. Burch* (Cal., 1955) 283 P.2d 262. Plaintiff submitted the case on the theory that defendants negligently permitted the water to be present and submitted no affidavits or other materials to show that there was anything wrong with the plumbing. No issue has ever been raised on that point. Plaintiff then argues on appeal that because there was no floor drain in the bathroom there could have been something wrong with the plumbing itself. Mere assertions or conjecture by plaintiff's counsel do not suffice. *Dupler v. Yates, Leininger v. Sterns-Rogers Mfg. Co., supra.*

Plaintiff's brief, page 19, says "nothing has been adduced or offered by defendants to indicate plaintiff could not sustain her burden of proof." On the contrary, plaintiff testified she did not know how the water got there, where it came from, who put it there or how long it had been there. That shows plaintiff cannot sustain her burden of proof, and on motion for summary judgment, she must then come forward with affidavits or other discovery tools showing a genuine issue of fact. She failed and the summary judgment is proper.

Plaintiff's brief, page 19, says "Questions of fact remain unanswered. What caused the hazard?" Facing defendants' affidavit of the cause, it is plaintiff who must answer that question to create an issue of fact, and failing to so do, summary judgment is proper.

Plaintiff's brief, page 19, says "nothing indicates those questions, and others, could not be reasonably answered in plaintiff's favor at trial, and the record indicates the availability of evidence which supports plaintiff's allegations." The record is in fact devoid of anything save counsel's conjecture. Plaintiff's brief, page 20, complains plaintiff was prevented from cross-examining. On the contrary, plaintiff did submit interrogatories (R-3) and plaintiff certified in notice of readiness for trial that all discovery had been completed (R-7). Plaintiff's argument flies in the face of Utah cases cited, supra, and 35B C.J.S., Fed. Civ. Pr., §1198, p. 617:

> "An affidavit of the party opposing summary judgment which merely suggests that a trial on the merits might develop facts from which the court might reach a particular conclusion does not raise a genuine issue of fact or indicate the existence of a substantial controversy; and assertion by a party in his affidavits that at the trial he might produce further evidence does not preclude granting of summary judgment on motion of the other party.

> "Defendant cannot successfully oppose plaintiff's motion for summary judgment by asserting by his attorney's affidavit his right and need for cross-examination of plaintiff's witnesses on trial and credibility tests of witnesses of plaintiff on trial to develop his evidence to defeat plaintiff's complaint under the issues of the case, in the absence of showing that defendant had made a good faith earnest effort to present competent evidence of the fact, depositions, and exhibits in his possession or available to him by appropriate procedure and discovery action or reasonable investigation. The failure of plaintiff, against whom summary judgment was entered, to make use of discovery procedure was destructive of his contention that he had not a sufficient opportunity to test the veracity of facts stated in the supporting affidavits."

Plaintiff's brief, page 20, suggests two inconsistencies in the Alexander affidavit, but plaintiff is dead wrong on both. First, as previously explained, the Alexander affidavit does not say there is a phone on the premises, it says her phone number was posted on a coin changer. Second, the mere reading of paragraphs 7 and 8 of the Alexander affidavit (R-8) shows that on learning of the water on the floor, affiant "inspected the premises and found the toilet had overflowed." That clearly shows the water source. If plaintiff claims any other source, where is her affidavit supporting the claim?

It seems that the entire reason for this appeal is revealed on page 20 of plaintiff's brief, which says:

> "The mere fact that an affiant states that she did examine the premises within thirty minutes prior to the accident, and that they were perfectly normal, and that some unknown person came in and stuffed the toilet is not sufficient evidence to disprove any allegation of negligence or to prevent plaintiff from cross-examining as to whether or not the facts stated in the affidavit were in fact true."

Defendants submit that Rule 56(e), U.R.C.P., *Lindsay v. Eccles Hotel,* and *Hampton v. Rowley, supra,* show plaintiff is wrong and that summary judgment is here proper.

Clearly, there is no basis on which summary judgment can now be granted to plaintiff, for every case cited by plaintiff, even though distinguishable, says only that a jury question exists as to negligence and contributory negligence.

CONCLUSION

Apparently plaintiff agrees that the specific facts presented by affidavit and deposition merit the conclusion that defendants were not negligent and that plaintiff was, for page 21 of plaintiff's brief says:

> "The law governing Summary Judgment cannot be that a party may by affidavit, swear that he was not negligent, and by affidavit state that the opposing party was negligent, and have the Court accept this as competent, binding evidence."

Defendants did not swear they "were not negligent" or that plaintiff "was negligent." Their affidavit merely recites the facts and plaintiff makes her own conclusion above quoted. Defendants agree with plaintiff's conclusion.

The verified discovery materials and affidavits before the Court not only show plaintiff cannot meet her burden of proving defendants were negligent, they also affirmatively show no negligence on the part of the defendants, and negligence on the part of the plaintiff. Plaintiff has testified she does not know how long the condition she complains of existed or how it was created. There is no evidence that defendants failed within a reasonable time to discover the transitory condition created by third parties. Plaintiff testified she was not making any particular effort to see where she was walking, although she knew she could not see her feet and the floor and as a result she failed to see and walked right into a large and obvious transitory condition. Plaintiff has not even attempted distinctions of the controlling Utah cases. Every single case cited by plaintiff, all from other jurisdictions, is distinguishable. Plaintiff has failed to set forth specific facts by affidavit, or as otherwise provided in Rule 56, U.R.C.P., showing a genuine issue on any material fact.

The trial court's granting summary judgment in favor of defendants, no cause of action, should there-

fore be affirmed and defendants should be awarded their costs on appeal.

Respectfully submitted,

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