

203 Va 13
Record No. 5287

**In the
Supreme Court of Appeals of Virginia
at Richmond**

**SAFEWAY STORES,
INCORPORATED**

v.

DORIS TOLSON

FROM THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

RULE 5:12—BRIEFS.

§5. **NUMBER OF COPIES.** Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. **SIZE AND TYPE.** Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE
Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 5287

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 12th day of January, 1961.

SAFEWAY STORES, INCORPORATED, Plaintiff in Error,

against

DORIS TOLSON,

Defendant in Error.

From the Circuit Court of Prince William County

Upon the petition of Safeway Stores, Incorporated, a writ of error and *supersedeas* is awarded it to a judgment rendered by the Circuit Court of Prince William County on the 25th day of July, 1960, in a certain motion for judgment then therein depending wherein Doris Tolson was plaintiff and the petitioner was defendant.

And it appearing that a suspending and *supersedeas* bond in the penalty of eleven thousand dollars, conditioned according to law, has heretofore been given in accordance with the provisions of sections 8-465 and 8-477 of the Code, no additional bond is required.

RECORD

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Filed in the Clerk's Office the 21 day of October, 1959.

Teste:

WORTH H. STORKE, Clerk
BETTY THROSTOSI, D. C.

MOTION FOR JUDGMENT.

Comes now the Plaintiff and moves the Court to grant her judgment against the Defendant for the sum of \$50,000.00 as damages resulting from injuries to Plaintiff caused by the negligence of Defendant and as grounds therefor respectfully represents unto the Court as follows:

1. That the Defendant is a corporation and on February 5, 1958 was the operator of a retail grocery store located on Center Street in the Town of Manassas, Prince William County, Virginia, and said Defendant corporation held out said store as a retail grocery store or supermarket for the purpose of sales of grocery items and other produce to the public, and said Defendant further held out an invitation to the public, including the Plaintiff, to enter said store and to make purchases therein.

2. That on said date and at the place aforesaid the Defendant had a duty to maintain said store in a safe condition for the use of its customers and potential customers.

3. That on the aforesaid date the Plaintiff did enter said store for the purpose of purchasing groceries.

page 3 } 4. That on the aforesaid date and at the aforesaid place the Defendant did negligently permit a foreign substance to be on the floor of said store in the aisle thereof where Plaintiff was walking, which said foreign substance made said floor slippery and dangerous for the public to use, and which said foreign substance and the danger therefrom was not readily noticeable by a careful and prudent person in the normal use of said premises for the selection and purchasing of groceries. The identity of said foreign substance

is unknown to Plaintiff but it was in the nature of sawdust or sand.

5. That while on said premises as an invited customer of the Defendant, without negligence on her part, and as a result of said foreign substance being on the floor of said premises, the Plaintiff did slip and fall to the floor.

6. That as a result of said fall, caused solely and proximately as a result of the negligence of the Defendant as aforesaid, the Plaintiff was severely, painfully, and permanently injured, suffering bruises and a severe injury to her back; that, as a result of said injuries, the Plaintiff has been caused to undergo much pain and suffering, has been caused to expend large sums for medical treatment, has been forced to expend large sums for special clothing and equipment, has been required to expend large sums for domestic help because of her inability to perform her household duties, has lost time from her employment, has been unable to engage in normal marital relations with her husband without suffering extreme pain and discomfort, and because of her inability to wear normal female clothing has been caused to suffer much embarrassment and mortification; and because of the permanency of said injuries, the Plaintiff will in the
page 4 } future be forced to undergo much pain and suffering,
will be caused to expend large sums for medical treatment, will be forced to expend large sums for special clothing and equipment, will be required to expend large sums for domestic help because of her inability to perform her household duties, will be forced to lose time from her employment, will be unable to engage in normal marital relations with her husband without suffering extreme pain and discomfort, and because of her inability to wear normal female clothing will be caused to suffer much embarrassment and mortification.

WHEREFORE, the Plaintiff moves the Court that she be granted judgment against the Defendant for the sum of \$50,000.00 together with the costs of this action.

DORIS TOLSON.

LEIGH, KINCHELOE & SWART
By FRANK D. SWART
Counsel for Plaintiff.
P. O. Box 374
Fairfax, Virginia.

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Filed Nov. 6th, 1959.

WORTH H. STORKE, Clerk.

ANSWER OF DEFENDANT.

COMES NOW the defendant, Safeway Stores, Incorporated, by counsel, and denies that it is indebted to the plaintiff herein in the amount of FIFTY THOUSAND DOLLARS (\$50,000.00), or any other amount, and says:

1. The defendant admits the allegations set forth in the first paragraph of the Motion for Judgment.

2. The defendant denies that it breached any duty to the plaintiff in this case, or to its customers or potential customers as alleged in said Motion for Judgment.

3. This defendant, while denying each and every act of negligence charged against it by the plaintiff in her Motion for Judgment, alleges that the plaintiff was, herself, guilty of negligence, in failing to use that degree of care required of the average prudent person, and that her negligence in this regard was a proximate cause of the injuries and damages alleged in her Motion for Judgment.

4. While denying each and every act of negligence as aforesaid, this defendant is not advised as to the nature and extent of plaintiff's alleged injuries and calls upon her for strict proof of same.

5. This defendant will avail itself of any and all defenses available under the general issue and of any defenses which may develop from the evidence in the course of the trial of this case.

Respectfully,

SAFEWAY STORES, INCORPORATED
By JAMES ASHBY, JR.
Of Counsel.

GOOLRICK, ASHBY & WHITTICAR, p. d.
Post Office Box 358
Fredericksburg, Virginia.

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page 8 } INSTRUCTION NO. 1.

The Court instructs the jury that it is the duty of a store-keeper to use reasonable care to maintain the premises of the store, including the floor, in a safe condition for the benefit of the public, including Plaintiff, using same, and a failure to exercise such care constitutes negligence.

page 9 } INSTRUCTION NO. 2.

The Court instructs the jury that in ascertaining the damages to which plaintiff is entitled, if any, they may consider the nature, extent, and permanency of plaintiff's injury and how far said injury is calculated to disable the plaintiff from engaging in the employment for which she would otherwise be qualified, and also the physical and mental suffering to which she has been subjected by reason of said injury, and the physical and mental suffering to which she may be subjected in the future, in addition to such sums actually expended by plaintiff for extra help employed as a direct result of her injuries; but the amount recovered shall not exceed the amount sued for.

page 10 } INSTRUCTION NO. 3.

The Court instructs the jury that if they believe from the evidence that the floor of the Defendant's store was slippery and dangerous or unsafe and that the Defendant knew, or in the exercise of reasonable care should have known that fact, and failed to correct such condition within a reasonable time thereafter, and that the condition of the floor was the sole proximate cause of Plaintiff's injury, then they should find for the Plaintiff.

page 11 } INSTRUCTION NO. 4.

The Court instructs the jury that knowledge by employees of Defendant's store of the condition of the floor is imputed to defendant corporation.

page 45 }

THIS DAY CAME the Defendant, by counsel, and moved the Court to set aside the verdict of the jury and memoranda of argument was submitted by counsel.

AND IT APPEARING to the Court after carefully viewing the evidence and due consideration of the memoranda of argument and briefs submitted by counsel in support thereof, that the issues in dispute are questions of fact and exclusively for the jury's determination thereof and that judgment should be entered on the verdict;

IN CONSIDERATION WHEREOF, it is ADJUDGED and ORDERED that the Plaintiff, Doris Tolson, do have judgment against and recover from the Defendant, Safeway Stores, Incorporated, the sum of TEN THOUSAND (\$10,000.00) DOLLARS, to which action of the Court, Safeway Stores, Incorporated, by counsel, excepts;

AND COUNSEL for the defendant having indicated his intention to make application for an appeal or apply for a writ of error to the Supreme Court of Appeals of Virginia, it is ADJUDGED AND ORDERED that the execution of this order be and the same is hereby suspended for a period of 120 days, and thereafter until his petition is acted upon by the

Supreme Court of Appeals, if notice of appeal and page 46 } assignments of error are filed as required by rules of Court and such petition is filed within the time specified by law, and thereafter during the pendency of this cause in the Supreme Court of Appeals of Virginia, provided that within 21 days, the defendant, Safeway Stores, Incorporated, shall execute a suspending bond with surety approved by the Clerk of this Court in the penalty of \$11,000.00 conditioned as the law directs or at the election of the defendant, said bond may be executed in the form of a *superedeas* should it so desire, and in accordance with the statute.

Enter.

HARRY L. CARRICO, Judge.

Date July 25th, 1960.

We ask for this:

LEIGH, KINCHELOE & SWART
By FRANK D. SWART
Counsel for Plaintiff.

Seen and excepted to:

GOOLRICK, ASHBY & WHITTICAR
By JAMES ASHBY, JR.
Counsel for Defendant.

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

The defendant, SAFEWAY STORES, INCORPORATED, hereby gives notice of appeal from an order entered July 25, 1960 by the Circuit Court of Prince William County, Virginia in the above styled case and sets forth the following assignments of error:

(1) The Court erred in denying the motion of the defendant to strike plaintiff's evidence at the conclusion of plaintiff's evidence and at the conclusion of all of the evidence in the case.

(2) The Court erred in granting, at the request of the plaintiff and over the objections of the defendant, any instructions for the plaintiff, namely Instruction Nos. 1, 2, and 3.

(3) The Court erred in denying the motion of the defendant to set aside the verdict of the jury and enter up summary judgment for the defendant.

SAFEWAY STORES, IN-
CORPORATED
By JAMES ASHBY, JR.
Of Counsel.

Doris Tolson.

GOOLRICK, ASHBY & WHITTICAR, p. d.

Post Office Box 358
Fredericksburg, Virginia.

Filed Sept. 15, 1960.

LEDA S. THOMAS, Clerk.

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page 2 }

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The Court: Gentlemen, paragraph one, to which Mr. Swart makes reference, of the motion was admitted by the defendant in its pleadings; therefore, the allegations of that paragraph require no proof.

The allegations of that paragraph are:

“That the defendant, *Safeway* Stores, Incorporated, is a corporation, and on February 5, 1958, was the operator of a retail grocery store located on Center Street in the Town of Manassas, Virginia, for the purpose of sales of
page 3 } grocery items and other produce to the public, and
the said defendant further held out an invitation to the public, including the plaintiff, to enter upon its premises.”

MRS. DORIS TOLSON,
a witness in her own behalf, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Swart:

Q. Tell the jury your name.

A. Doris Tolson, Clifton, Virginia.

Q. Did there come a time on February 5, 1958, when you entered the Safeway Store in Manassas?

A. Yes, I did.

Q. For what purpose did you go in that store?

A. To buy groceries.

Q. And while you were in the store did anything unusual happen?

A. Yes, I slipped and fell.

Doris Tolson.

Q. Tell us exactly how that happened?

A. I had made my purchases and we were getting ready to check out, my daughter and I, and she wanted some preserves and I walked over from the check-out counter to the counter where the preserves were and on my way over I slipped and fell, I landed on my left hip, falling quite severely, and I sat there and the produce man saw me fall and I believe he called the manager and the two of them came over and one of them helped me up, and my daughter was also called and she came over; I was still sitting on the floor at the time.

Q. Now, did this going from the check-out counter to the preserves counter necessitate any turn?

A. The accident occurred right at the turn of the counter; I hadn't made the turn.

Q. And you state that the manager of the store came over?

A. Yes, sir.

Q. Was that Mr. Cannon, who is sitting at the far end of the table?

A. Yes, sir, Mr. Cannon.

Q. Did he inquire as to what happened?

A. Yes, he did.

Q. Did you tell him?

A. Yes, sir.

Q. Did you find any substance on the floor in that area?

A. After one of the men helped me up Mr. Cannon and I looked at the floor and we discovered or I discovered particles of sawdust on the floor. Mr. Cannon at that time took his foot and rubbed it over the floor and he said that to him it felt like sand; he also looked at my shoes.

Q. This sawdust substance, which you refer to, have you ever seen a substance of a similar type used in stores before?

A. I have seen it in stores like this before.

Q. What is it used for?

A. Well, I believe it is used for cleansing the floor.

Q. Was that substance noticeable prior to the time you fell?

A. It wasn't noticeable by me in my touring around to pick up my groceries; it was noticeable when I was sitting down like this. ✓

Q. Was it over the whole floor of the store or just in certain parts of it?

A. Well, it seemed quite prevalent in areas.

Doris Tolson.

Q. How about the area where you fell?

✓ A. There was sawdust where I fell and there was quite a bit underneath the ledge of the counter; I noticed it was more prevalent and thicker there, but it wasn't that much right where I fell.

Q. Did that substance cause you to slip?

✓ A. I believe it did.

Q. Do you have the shoes you were wearing at that time?

A. Yes, sir.

Q. Do you have them with you?

A. Yes, sir.

Q. Would you produce them, please?

page 6 { A. (Note: Here the witness produced a pair of shoes)

Q. Are these the shoes you had on at the time you fell?

A. Yes, sir.

Mr. Swart: I would like to offer these as Plaintiff's Exhibit 1.

The Court: Is there any objection

Mr. Ashby: I assume that the shoes have not been changed.

Mr. Swart: I would like to offer them any way, and I will ask her about that.

Q. Did you continue to wear these shoes after this accident?

A. Yes, at the time I would judge they were about three or four weeks old. Mr. Cannon looked at them at the time of my fall.

Q. Have any repairs been made to them?

A. No.

Q. Then, they are the same today as they were on that date, except for normal wear and tear?

A. Yes, sir.

Q. Have you had any other falls from wearing these shoes?

A. No.

Q. What type of floor is in the Safeway Store?

page 7 { A. It is blocked, it is some type of composition floor, it looked like to me.

Q. Is that floor slippery in its normal condition, that is when it is clean?

✓ A. It seemed to be.

Q. You say you landed on your hip, I believe?

A. Yes, sir.

Doris Tolson.

Q. And I believe you stated that the produce man and Mr. Cannon came over to where you were?

A. Yes, sir.

Q. Tell us what happened after that?

A. One of the two men helped me up and we stood there quite a little while, and then we walked back to the check-out counter. Mr. Cannon asked me if I felt I should go to the doctor right then and there and at the time I didn't feel I should, I thought I was just shaken right badly and nothing else was the matter at that time; however, I had voided and thought may be something had broken a loose and I talked to the check-out girl and she suggested that I go back and check and which I did.

Q. You went home that afternoon?

A. Yes, sir.

Q. Did you drive the car home?

A. Yes, I did.

Q. Did you eventually go to a doctor?

A. Yes, I did.

page 8 } Q. How long afterwards?

A. It was Monday, I believe, of the next week.

Q. What day did the accident happen, do you remember?

A. It happened on Friday February 5, 1958, on a Wednesday around four o'clock.

Q. I understand you to use in your answer both words, Friday and Wednesday?

A. Yes.

Q. Which day did the accident happen on?

A. Wednesday.

Q. And you went to the doctor on Monday?

A. Yes.

Q. What doctor did you go to?

A. Dr. Ringler.

Q. Did he give you any treatment of any kind?

A. Well, when I went in there, at that point I was just a wreck, I was just all to pieces and in severe pain, the pain had been gradually getting worse, I had hoped it would subside and that each day it would get better, but it didn't, it got worse instead of better.

Dr. Ringler examined me and x-rayed me; he suggested that I stay off of my feet as much as I possibly could flat on my back in bed.

Q. Were you able to remain in bed?

A. I stayed in bed most of that week.

Doris Tolson.

Q. At the time, were you employed by someone?

page 9 } A. I was teaching school.

Q. What were your hours?

A. My hours were nine to twelve; I was teaching kindergarten.

Q. Just three hours a day?

A. Yes, sir.

Q. Were you able to return to work?

A. I returned to work the following week but I couldn't carry on with my normal activities as a school teacher.

Q. How about during the remainder of the school year until June, did you continue your work?

A. I went to school but Mrs. Worley, the owner of the school had her daughter come in and help me with the more active activities in the school room.

Q. All right, during this same period did you go to any other doctor besides Dr. Ringler?

A. Yes, he suggested that I go to Dr. Romness or referred me to him.

Q. Did Dr. Romness take x-rays of you?

A. Dr. Romness, I would say has x-rayed me three or four times.

Q. Now, how about your symptoms, the pain, etc., did that subside?

A. No, the pain has never subsided.

Q. It has continued to this day?

page 10 } A. It has continued.

Q. Has it improved?

A. It has not improved.

Q. Can you describe this pain to the jury?

A. Well, it is like—it is just like a toothache that you just cannot get rid of and it is with you all the time; it is down in the lower part of the back, and, of course, your activities, depending on what you do, makes it worse.

Q. Do your household duties affect it?

A. A great deal and there are few things I can do without severe pain—without worse pain than I have normally.

Q. What type of work affects it most?

A. Any bending over, making the beds, washing my hair; any bending over activities, scrubbing floors, waxing floors, or any type of work like that affects it a great deal.

Q. As a result have you had to have any help in doing your household work?

A. Yes, sir, I did; I still have help.

Q. How much help do you have to have?

Doris Tolson.

A. Prior to the accident I had help once a week and since I have had help in three days a week until I had to give my job up and then I had to cut back to two days a week.

Q. How much does this extra help cost you?
page 11 } A. \$1.00 an hour.

Q. How many hours does she normally work a day?

A. She works around six a day.

Q. How long did the twice a week continue?

A. You mean three times a week?

A. Twice extra, three times in all.

A. It continued until I had to give my job up in the fall—I mean spring. Excuse me.

Q. The spring of '58?

A. Yes, sir.

Q. And since that time it has been one extra day a week?

A. Yes, sir.

Q. Did your injury cause you to wear any special equipment?

A. Yes.

Q. What special equipment did you wear?

A. Dr. Ringler had me to get a heavy garment, it wasn't an orthopedic garment and it didn't fit too well, and so when I went to Dr. Romness it didn't fit well and he said that I would have to be refitted by an orthopedic specialist, which I did.

Q. You were refitted and outfitted with a new one?

A. Yes, sir, and this has steel bands to go down the back.

page 12 } Q. Do you have it with you?

A. Yes, sir.

Q. Could we see it please? The one that fits.

A. Yes. (here the witness produces the garment referred to)

Q. Can you remove the steel things and show them to the jury, or one of them?

Mr. Ashby: Is that the first one or the second one?

Mr. Swart: The second one. The first one she said it didn't fit.

A. (Note: Here the witness removes the stay from the garment)

They are bent to go with the conformation of your back.

Doris Tolson.

Mr. Swart: I would like to offer this as Plaintiff's Exhibit 2.

The Court: Is there any objection?

Mr. Ashby: No objection.

The Court: It will be received.

A. That still isn't very comfortable.

Q. How much did you have to wear this?

A. Well, I wore it until Dr. Romness said that he didn't want me to depend on it full time, he wanted me to wear it and try not to wear it for a few days and see if
page 13 } my back might strengthen, which I did and if I was going to do any housework or anything I felt would strain the back I wore it.

Q. When did you stop wearing it full time?

A. I cannot answer that because I don't know what visit I went to see him, the visit he told me not to wear it too much; I have any idea it was early summer.

Q. Of '58?

A. Yes.

Q. After you stopped wearing it full time how much did you wear it part time?

A. I have worn it part time since, I would judge may be two days a week because I would put it on a little each day to do my household duties and then I would take it off.

Q. Do you still wear it?

A. Oh, yes.

Q. Did this have any effect on the clothes which you had?

A. Yes, it did.

Q. What effect did it have?

A. Well, my clothes wouldn't fit over it, it was so bulky.

Q. Did that necessitate your getting some new clothes?

A. Yes, I did buy a few clothes, I had some that
page 14 } I could wear over the garment but I did buy some new clothes to wear over it.

Q. Could you give us some idea what you bought initially to fit over this?

A. I bought a couple of skirts—wrap around skirts—and I bought a suit—a two piece suit—and I bought a couple of dresses, and then I bought a couple of dresses in the summer also, and that was all.

Q. Were you able to wear evening clothes with this?

A. No, I didn't wear them.

Q. Did this injury cause any difficulty in your marital relations with your husband?

Doris Tolson.

A. Yes, it has.

Q. Tell the jury what they were?

A. Well, it is quite uncomfortable and painful and I do suffer more than usual afterwards.

Q. Has that continued from the time of the accident up to the present time?

A. It has continued, in fact at one point—at one time right before I went to the doctors I couldn't move over, I couldn't move in the bed at all, I had literally to be moved.

Q. Mrs. Tolson, I would like for you to tell me again, if you would, or clarify as to what Mr. Cannon said, that is the manager of the Safeway, when he came over to where you had fallen?

page 15 } A. Mr. Cannon rubbed his foot over the area in which I fell and he said that it felt like sand to him.

Q. Did you look at the stuff on the floor?

A. There were particles, just little shavings like, they were little shavings. ✓

Q. Did it appear to you to be the sweeping compound?

A. I would say yes, I would definitely say yes.

Mr. Swart: That is all.

CROSS EXAMINATION.

By Mr. Ashby:

Q. The day on which you went to the store was a Wednesday, was it not?

A. Yes, sir.

Q. The 5th of February, 1958?

A. Yes.

Q. And you went to the check-out counter with your groceries in a little push cart?

A. Yes, sir.

Q. And your daughter was with you?

A. Yes.

Q. Now, at that time which one of the check-out counters did you go to? Approximately what location to the front of the store?

A. I was in the very last one on the right, the one I always go to.

page 16 } Q. The one on your right going from the inside of the store or from the outside of the store?

A. On my right looking into the store.

Doris Tolson.

Q. So that if you—Should we have a view of this and the jury be taken out there, as you look out of the store you went to the extreme left check-out counter?

A. Yes, sir, Of course, since—

Q. For our purposes we might refer to it as the north.

The Court: It would be more east may be.

Q. The eastern end, and the preserves counter is on the western side or westerly end of the store, isn't it?

A. Yes, sir.

Q. Toward the other end. Did you check out before you went back to get your groceries?

A. No, sir, I hadn't checked out, they did go ahead and do it in the process of all this.

Q. Did you push your cart back with you to get the preserves?

A. No.

Q. You left it at the check-out counter?

A. Yes, sir.

Q. And went back and intended to exchange the jar of preserves, your daughter wanted *sometime* different?

A. Yes, sir.

Q. In doing that you proceeded inside of the page 17 } check-out counters from the front of the store?

A. Yes, sir.

Q. Between the check-out counter and the various rows of merchandise?

A. Yes.

Q. And it was at what point that you say you fell in this aisle?

A. It was before I made the turn left to the counter that I wanted to go.

Q. Before you made the turn?

A. In other words, this was the counter, I came down here and I had gotten just about the corner of it.

Q. Were you planning to make a left turn or a right turn?

A. I was making a left turn.

Q. A left turn?

A. Yes, sir.

Q. Which way did you come around to the counter? Are you sure—

A. I was coming down this aisle, the counter was here, and had gotten about this point and I was going to make a left turn, the preserves I wanted were about in here.

Doris Tolson.

Q. If we may use this as simple an example. Your check-out stand was over here?

A. Yes, sir.

Q. And you were coming down this aisle and page 18 } the rows of merchandise were back here and you were coming down this way to get to the preserves stand. Didn't you have to make a right turn?

A. No, this was a special counter they had set up.

Q. One that is not there now?

A. No, I don't believe it is there now, it is a special counter they sometimes set up for different articles, specials, I believe.

Q. At the time you were still in this aisle?

A. Yes, sir.

Q. And you hadn't actually turned?

A. No.

Q. Now, with regard to the substance. I notice in your counsel's pleading, which he has referred to in his opening statement, and also has used in examining you, that is referred to as sawdust or sand, I believe.

Mr. Swart: I believe it is a substance in the nature of sawdust or sand.

Mr. Ashby: I stand corrected.

Q. Then is that what your testimony is that it was something in the nature of either sawdust or sand?

A. Yes, sir.

Q. And when you testify that you saw sawdust on the floor, you don't mean that, you mean something in page 19 } the nature of either sawdust or sand?

A. Yes, sir.

Q. And when you testify that you saw sawdust on the floor, you don't mean that, you mean something in the nature of sawdust or sand?

A. To me it looked like it was sawdust; I didn't see the sand, I saw the particles of sawdust.

Q. This was out in the center?

A. Well, this is the produce counter, and this is the special counter, so there wasn't a large aisle in there at all.

Q. You mentioned a moment ago with regard to the corset your wore that you had one initially that didn't fit. Was that the same type corset? I mean it had the lighter narrower stays?

Doris Tolson.

A. It was one Dr. Ringler had told me to get, it was a larger one and it didn't give me the support that one gave.

Q. Was it commercial or othopedic?

A. It was commercial. I have it.

Mr. Ashby: That is all right.

Q. After the fall one of the young men in the store, Mr. Cornwall, I believe, helped you to your feet, is that correct?

A. One of the two men helped me.

Q. And Mr. Cannon came over and when you
page 20 } were talking about what you had fallen on, he
rubbed his feet around over the area?

A. Yes, sir.

Q. Weren't his words that it was grit?

A. No, sir, he said it felt like sand; they were his exact words.

Q. And he did do it in this manner, by rubbing his feet over the floor in that area?

A. Yes.

Q. Now, the weather at that time had been inclement for some little while, hadn't it?

A. I cannot answer that.

Q. It was February 5, 1958?

A. Yes, sir.

Q. And you recall that we had a little spell, similar to that we have had this time but not as severe, the sidewalks and every area you walked on inside in the winter time was somewhat similar, I don't mean from the standpoint of snow, but from dust and dirt and grit was somewhat similar to what it is now?

A. I am sorry I don't remember that.

Q. You say these were the shoes you were wearing?

A. Yes, sir.

Q. And, of course, they were newer?

A. They were about three weeks old. Mr. Can-
page 21 } non and I looked at them to see the condition of
them.

Q. And you say that you haven't had any heels put on these?

A. No, sir, I have not had any heels put on them.

Q. And you haven't had this little strip replaced?

A. No, sir, I have shined them.

Q. How long did you wear them, Mrs. Tolson?

A. Well, I wore those shoes most every day to school be-

Miss Dale Tolson.

cause I couldn't wear any high heels teaching little people, and plus the fact that I cannot wear high heels at all any more because it just hurts my back so severely.

Q. Didn't you state on an occasion after this fall that you had that you were wearing a new pair of loafers and that they had leather heels and leather soles?

A. Yes.

Q. And is that correct?

A. They were, as far as I am concerned they are leather.

Q. They are leather heels as well as leather soles?

A. I believe they are leather heels. I haven't looked that closely, but I believe they are leather heels.

Mr. Ashby: I believe that is all.

RE-DIRECT EXAMINATION.

By Mr. Swart:

Mrs. Tolson, have you been in the Safeway within the past two weeks?

page 22 } A. Yes.

Q. Has the area around the counter where you were going to get the preserves been changed since the time of the accident?

A. Yes.

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page 25 }

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MISS DALE TOLSON,
another witness for the plaintiff, being first duly sworn, was
examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Swart:

Q. Tell the jury your name please?

A. Dale Tolson.

Q. You are the daughter of Mrs. Doris Tolson?

A. Yes, sir.

Q. Were you with her on the day she fell in the Safeway Store?

Miss Dale Tolson.

A. Yes, sir.

Q. Can you tell the jury what you observed on that day?

A. Well, I had gone to the check-out counter and Mama had left the basket with me and she had walked—she was going back to exchange these preserves and the
page 26 } lady at the check-out counter she had seen Mama on the floor and she told me about it and so I went over there where she was.

Q. Do you know where the counter was that she was going to?

A. Yes, sir.

Q. Can you tell us where she was in relation to that counter and the check-out counter?

A. Well, she was just a little ways from the counter where the food was; she was more toward the counter—the food counter—than the check-out counter.

Q. She was more toward the food counter than the check-out counter?

A. Yes, sir.

Q. Didn't she walk behind the check out counter as she left you?

A. Yes, sir.

Q. Which way did she have to turn to get to the counter where she was going?

A. To her left.

Q. Where was she in relation to that turn?

A. I don't know.

Q. Did you see the substance on the floor?

A. Yes, sir.

Q. What did it look like to you?

A. More like sawdust.

✓
page 27 } Q. Has your mother ever had any trouble with her back prior to the time she fell?

A. Do you mean before?

Q. Yes, before she fell.

A. No, sir.

Q. Has she had any other injury, other than the fall in the Safeway, since that time?

A. No, sir.

Q. Have you been able to observe her and to tell whether or not she suffers pain?

A. Yes, sir.

Q. Does she?

A. Yes, sir.

Mr. Swart: That is all.

Miss Dale Tolson.

CROSS EXAMINATION.

By Mr. Ashby:

Q. Miss Tolson, did you stay at the check-out stand when your mother went back to get the preserves?

A. Yes, sir, I stayed with the basket.

Q. You stayed with the basket while she went back to exchange some preserves. I believe she got one kind and you wanted another one, is that right?

A. Yes, sir.

Q. How old were you then?

A. I was probably eleven or twelve.

page 28 } Mr. Swart: He asked you now?

A. Now, I am thirteen.

Q. You are thirteen now. When is your birthday?

A. June.

Q. So you were eleven then and you are thirteen now?

A. Yes, sir.

Q. How many brothers and sisters do you have?

A. I have two sisters, no brothers.

Q. Are you the oldest or the youngest?

A. The oldest.

Q. How old are the others?

A. Tippy is twelve and Donna is ten, I think—ten or nine.

Q. Any way there are three children, and they are your mother's? You are full sisters?

A. Yes, sir.

Q. When your mother fell the lady at the check-out stand told you about it and you went over where she was?

A. Yes, sir.

Q. Was she on her feet at the time you went over?

A. No, sir.

Q. She was being picked up then?

A. Yes, sir.

Q. It was in the center of the aisle or near the center of the aisle, if you take the side next to you—the
page 29 } side of this lane next to you as the back of the
check-out booths or alleys, and the side away from
you or the side closest to me as the edge of the food displays,
your mother was proceeding up that aisle, wasn't she, or
did you see her fall?

A. I didn't see her fall so I couldn't tell you.

Miss Dale Tolson.

Q. So then, actually you don't know what part of the aisle she was walking in at the time she fell?

A. I don't know what part of the aisle she was walking in.

Q. You know where she was when you saw her but you don't know what section of the aisle she was walking in?

A. No.

Q. And you don't know actually what part of the aisle?

A. Yes, I do, I know that because I know where she fell.

Q. No, but if you were asked to identify the section of the aisle in which her foot actually slipped, you didn't see it?

A. I didn't see her fall but I know where she fell, I could identify that.

Mr. Ashby: No further questions.

RE-DIRECT EXAMINATION.

By Mr. Swart:

Q. Miss Tolson, do you know whether or not
page 30 } these are the shoes your mother had on at the
time?

A. Yes, they are.

Q. What position was your mother in when you saw her
after the fall?

A. She was sitting on the floor being picked up.

• • • • •

page 35 }

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Note: Thereupon, the Court and counsel retired to chambers where the following proceedings were had out of the presence of the jury.

Mr. Ashby: May it please the Court, counsel
page 36 } for the defendant respectfully moves the Court to
strike the plaintiff's evidence at this time on the
grounds that there is no evidence before the Court showing
that any substance, whether it be of a sawdust nature or sand
nature, was there where it should have been observed by the
manager of the store, and in fact, the plaintiff has testified
that it was not observed by her, and further in her plead-
ing it will be noted that under paragraph 4 it is alleged

that on the aforesaid date and at the aforesaid place that the defendant did negligently permit a foreign substance to remain upon the floor of its premises, which said foreign substance made said floor slippery and dangerous for the public to use and was not readily observed by a careful and prudent person, and the identify of said foreign substance is unknown to plaintiff, but it was in the nature of sawdust or sand.

It is the contention of the defendant that the only pleading and the only evidence that has been presented in this case; that it doesn't make out a case indicating that the defendant could have or should have knowledge of the con-
page 37 } dition that existed there, and, therefore, there is no case of negligence on the part of the defendant, and we respectfully move the Court to strike out the evidence of the plaintiff at this time.

Mr. Swart: In answer to that, your Honor, I would like to point out that the plaintiff has said it was a slippery floor and there was a substance which caused her to slip, and which she said caused her to fall in her opinion.

Now, the defendant operating the store where the public is invited to come is under a duty to use due care to keep that floor safe. I think the evidence, at least if you accept the plaintiff's evidence, shows that the floor was dangerous. That makes a prima facie case; it can be rebutted by the defendant coming in and saying they had not knowledge of it and that they used due care to keep it clean.

Therefore, I think his motion should be denied.

Mr. Ashby: There is one point, if your Honor will recall the testimony of the plaintiff, herself: she
page 38 } has never testified what caused her to fall. In response to the question by Mr. Swart that this is what caused her to fall—

The Court: She said I believe it was.

Mr. Ashby: The strongest statement was "I believe it caused me to slip."

I didn't understand her testimony to say the floor was slippery except insofar as at the very point she fell.

The Court: He asked the type of floor it was and she said it was in blocks.

Mr. Swart: And I asked her whether or not it was slippery where there was no substance on the floor and she said, "Yes."

The Court: It is a close point but I am going to deny the motion at this time and let you go forward with your evidence.

Carleton Alvin Cannon.

Mr. Ashby: I will renew my motion at the conclusion of the evidence and I will except to the ruling of the Court.

Note: Thereupon, the Court and counsel returned to the Court Room where the following proceedings were had in the presence of the jury:

page 39 } CARLETON ALVIN CANNON,
a witness for the defendant, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Ashby:

Q. Will you please state your full name, age, residence and occupation?

A. Carleton Alvin Cannon, age 55, occupation store manager.

Q. In what business are you presently engaged and is it the same position in which you were engaged on February 5, 1958?

A. The same.

Q. What is that position?

A. Store Manager.

Q. Store manager?

A. Yes, sir.

Q. Store manager for whom?

A. Safeway Stores, Incorporated.

Q. How long have you been so engaged?

A. Do you mean in this store?

Q. Yes, sir, in this store in Manassas.

A. Thirty-two years.

Q. You have been in this store thirty-two years?

A. No, thirty-two years in all, twenty-two years here.

Q. Mr. Cannon, what is the procedure with regard to the cleaning of the floors in your store?

I am referring now to the procedure for cleaning and waxing or whatever that might be?

✓ A. The procedure is that we mop our floors on Saturday Night and wax them with non-slip wax.

Q. When do you do it, again?

A. We don't do it again until the following Saturday Night.

Q. Were you following this same procedure in February of 1958?

Carleton Alvin Cannon.

A. Yes, sir.

Q. Prior to the 5th of February, 1958?

A. Yes, sir.

Q. Are you following the same procedure now?

A. Yes, sir.

Q. You are following the same procedure in March of 1960 and specifically was the same procedure followed on the Saturday Night last?

A. Yes, sir.

Q. Is the same type of material being used on the floor?

A. Yes.

Q. That is the type of non-skid cleaner or waxer?

A. That is right.

Q. Did you see Mrs. Tolson fall in your store on the 5th of February, 1958?

page 41 } A. No, sir.

Q. Did you have occasion to go to the location where she had fallen?

A. Yes, sir, I went to the location when she fell and I made my report.

Q. What, if anything, did you determine with regard to the surface of the floor where she fell?

A. Well, there was a little grit, it was no more than normal during a traffic period; it is there and it is something you have to cope with. ✓

Q. There was a little grit.

A. A little grit, a little dust, you can call it a little sand if you want, it was all the same.

Q. What was your sweeping procedure at that particular time with regard to the cleaning of that sand or grit off the floor?

A. Well, we sweep the floor, I would say as it is necessary two or three times a day; if it is necessary, it is not necessary all the time. ✓

Q. At this particular time what was your procedure with regard to sweeping the floor?

A. Well, it is a little far for me to say, I cannot say; it was two years ago and I cannot remember whether the weather was bad or what, but normally we sweep the floor when it is necessary.

page 42 } Q. What was the condition of your floor with regard to being clean or dirty at the time Mrs. Tolson fell?

A. Well, there was a little grit, dust or sand, whatever you ✓

Carleton Alvin Cannon.

✓ want to call it. It was all over the whole floor, and it was from normal traffic.

Q. Was there any substance on that floor in the area in which she fell, which had been placed there for the purpose of cleaning floors?

A. No, sir.

Q. Did you observe any sawdust in that location?

A. No, sir.

✓ Q. Do you use sawdust for your regular cleaning of the floors?

A. No, sir.

Q. Where, in regard to the aisle of the store, did this thing take place, if you recall?

A. As far as I can remember and I think I am right, going in the store it would be the last gondola to the left entering the store from East Center Street.

Q. For these gentlemen of the jury that don't know, will you state what a gondola is?

A. That is the shelves, we call it a gondola.

Q. That is the merchandise display shelf?

A. Yes, sir. It was right at the end of it, between that and the vegetable rack.

page 43 } Q. Did you have any conversation with Mrs. Tolson at the time regarding her fall?

A. Yes, sir. I examined the area, which I have to make a report with regards of what it is, and I think, if I am not mistaken, that we were at the desk in the back room when I asked her—it says on the report—it asks for high heel shoes or the nature of the shoes; that is when I asked her about her shoes, if I am not mistaken, that is my normal procedure any way if anybody falls, because it is on that report, the condition of the shoes.

Q. And she told you what the condition was at that time?

A. Yes, sir.

Q. And what was that?

A. I don't recall right now, it has been so long I can't recall it.

Q. You heard her testimony this morning that the shoes were recently purchased?

A. Yes, sir; I couldn't tell you whether they were or weren't I don't know.

Mr. Ashby: That is all, witness with you.

Carleton Alvin Cannon.

CROSS EXAMINATION.

By Mr. Swart:

Q. Mr. Cannon, you have no doubt these are the shoes do you?

A. Yes, sir.

page 44 } Q. Do you mean you do have doubts?

A. Yes, sir. I don't know, I didn't examine them that close. Remember this was over two years ago.

Q. Are you saying you don't know whether they are the shoes or that these are not the shoes?

A. That is exactly what I am saying.

Q. You are saying you don't know?

A. Yes, sir.

Q. How many times was this store swept on February 5 '58?

A. I couldn't tell you.

Q. Do you mean you don't know, Mr. Cannon?

A. No.

Q. Didn't you make a report of this accident?

A. Sure.

Q. And you go into such detail to determine what type of shoes they were and you don't go into any detail as to when or how many times the floor has been swept?

A. No, sir, not on that particular day, no, sir. It has been two years and three months.

Q. Is that called for on your report?

A. It is not in my report.

Q. Don't you think that something should have been in your report about that?

A. The only thing in that report is the condition of the floor.

Q. I am asking you about the number of times it was swept on that day or when it was swept. Don't you think that is something that should have been in that report? ✓

A. It is not in my report.

Q. I didn't ask you that. I asked you don't you think it should be in there?

A. I don't know.

Q. You have made other report of things like that, haven't you?

A. Yes, sir.

Q. I take it that you have made a number of them?

A. I wouldn't say I have made a number of them.

Q. How many?

Carleton Alvin Cannon.

A. I don't remember that, I suppose five or six.

Q. I take it that you have had other falls?

A. We make a report on everything, I have made them on cut fingers.

Q. I think you testified that you have been manager of this store for twenty-two years, you don't mean in this particular building, do you?

A. Oh, no.

Q. How long have you been in this particular building?

A. I would say about twelve years, may be longer, may be less; I couldn't give it to you exactly.

page 46 } Q. I understand your procedure was to mop it over the week end?

A. Saturday Night, the men start about nine o'clock.

Q. By mop, do you mean that you use water?

A. They use water with a solution in it to cut the dirt.

Q. Do you know whether or not that was done on Saturday before this fall?

A. Yes, sir.

Q. How come you can remember that so well?

A. Because that is normal procedure.

Q. That is the only reason you say it now?

A. It is normal procedure.

Q. You don't remember them doing it, do you?

A. They do it; it is normal procedure.

Q. Isn't the reason you say it was done now because it is your normal procedure?

A. It is the procedure—normal procedure.

Q. You didn't put that in your report, did you?

A. It is not on there.

Q. You say you normally sweep as necessary two or three times a day?

A. Yes, sir.

Q. Was it necessary on February 5th?

A. I cannot tell you, I don't remember the nature of the weather; you have to do it more in bad weather.

Q. In 1958, we had a rather big snow storm in February, didn't we?

A. That is what you tell me.

Q. Don't you remember it?

A. I don't know whether it was in February or not.

Q. Don't you know it was after the middle of February?

A. I don't know that.

Q. You don't know?

Carleton Alvin Cannon.

A. No, sir.

Q. You aren't contending that it took place before February 5th, are you?

A. I am not saying when it took place, I don't know; it could have been after February, or it may be like you say.

Q. Do you know what the weather was on February 5, 1958?

A. No, sir.

Q. Is that in your report?

A. No, sir.

Q. You have seen this report recently, have you not?

A. The one I made?

Q. Yes. Have you?

A. No, sir.

Q. Have you seen a copy?

A. No, sir.

page 48 } Q. You knew you were coming here to testify today?

A. Yes, sir.

Q. And you didn't read over a copy of your report?

A. No, sir.

Q. Do you use sweeping compound on your floors?

A. No, sir.

Q. You don't use any?

A. No, sir, we have a big mop, I will say it is about this big (indicating), and it is just the same as a scrub mop almost, only it has shorter cords.

Q. Are you talking about the Saturday Night procedure?

A. I am talking about what I sweep my floor with.

Q. That is more like a broom, isn't it?

A. I say it is like a mop with shorter cords.

Q. That is more like a broom, isn't it?

A. I say it is like a mop with shorter cords.

Q. It has a long handle, doesn't it?

A. Why sure.

Q. And then a cross piece on the bottom of the handle?

A. No.

Q. You describe it then?

A. I think I had better.

Q. What is on the end of the handle?

A. Here is your handle and then you have a piece here—

Q. Isn't that a cross piece?

A. Yes, sir.

page 49 } Q. Made out of wood?

A. No, it is aluminum

Carleton Alvin Cannon.

Q. What sticks out of that cross piece?

A. Cotton; that is sprayed the night before to hold the dust down.

Q. Sprayed with what?

A. With a compound.

Q. To hold the dust down?

A. Yes, sir.

Q. You gather up the dirt by pushing that broom or mop along the floor?

A. Yes, sir.

Q. And there is no moisture coming from that mop?

A. That is right.

Q. So, we will assume that after Saturday Night the floors stay dry?

A. That is right.

Q. I understand on the Wednesday after the accident happened there was something you call grit or sand and you said it is something you have to cope with?

A. It is something you have to cope with from normal traffic.

Q. There was grit or sand on the floor?

A. A small amount, there was no sawdust.

Q. There was enough to make you put it in your page 50 } report, wasn't there?

A. I don't think I put it in my report; I haven't seen it.

Q. Did you put in your report that there was any such substance on the floor?

A. I don't think so.

Q. Let me get this straight: In the report you put the condition of her shoes?

A. That is put on the report.

Q. But you don't put how long ago it has been since the floor was swept or whether you swept it that day?

A. Oh no, the only thing you put on there is the condition of the floor.

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page 51 }

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FLOYD M. CORNWALL,
another witness for the defendant, being first duly sworn,
was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Ashby:

Q. Will you please state your name?

A. Floyd M. Cornwall.

Q. Your age?

A. Thirty-seven.

Q. And your present occupation?

A. Produce manager, Safeway Stores.

Q. How long have you been so employed?

A. Since '41.

Q. Have you been located in Manassas all that time?

A. No, I have been in Manassas ten years.

Q. Going back to February 5, 1958, when Mrs. Tolson there came to your store, state whether or not you recall a fall, which she sustained in the Safeway Store?

A. Yes.

Q. Where were you at the time that she fell, sir?

A. I was working nearby at the produce stand.

Q. Did you actually see her fall?

page 52 } A. Yes, as well as I remember, it has been so long ago, I was working there and I observed Mrs. Tolson and the first I knew about it she was laying in the floor, she had slipped and fell, and as well as I remember I assisted in helping her up.

Q. Did you have occasion to look at the floor around where she fell?

A. Yes, the floor, as well as I remember, I would say was normally clean.

Q. Was there any foreign substance on that floor that you could discern from looking at it at the time you helped pick her up?

A. No.

Q. Was there anything there that caused you to slip at the time you picked her up?

A. No, I didn't see anything.

Q. Was there anything there that you could observe that may have been unusually hazardous to anyone coming into the store from the standpoint of slipping?

A. Nothing unusual, no.

Mr. Ashby: That is all.

Floyd M. Cornwall.

CROSS EXAMINATION.

By Mr. Swart:

Q. What is your name?

A. Floyd M. Cornwall.

Q. Do you still work for Safeway?

page 53 } A. Right.

Q. Did you make a report of this accident?

A. No, sir.

Q. Do you know how many times the floor was swept that day?

A. No, I couldn't say.

Q. Do you know whether or not it was swept at all that day?

A. I know it was swept that day when we closed it, if not before.

Q. The only thing you know is that it was swept when it was closed?

A. I sweep around my area two or three times a day, I keep around my area clean.

Q. This particular accident didn't occur in your area, did it?

A. May be that is the reason I looked at the floor to see whether a piece of lettuce or a string bean or something like that was on the floor.

Q. Was there some sand and sawdust?

A. No, sawdust, just normal dirt that would track in on people's feet.

Q. Did you hear Mr. Cannon make the remark "it feels like sand to me"?

page 54 } A. Yes, but grit off your feet would feel like sand I would say.

Q. You heard him say that, didn't you?

A. Yes.

Q. You have seen Mrs. Tolson since that time, haven't you?

A. Yes, I think so.

Q. And haven't you asked her on occasions how she felt?

A. Yes, I believe I did.

Q. But you don't know her other than being a customer of Safeway?

A. That is right.

page 55 }

Note: Thereupon, the Court and jury took a view of the premises of the Safeway Store in the presence of counsel for the respective parties.

And, thereupon, the jury was adjourned for lunch, and the Court upon reconvening retired to chambers with counsel for the respective parties, where the following proceedings were had:

Mr. Ashby: The defendant having rested, I renew the motion to strike the evidence in this case for the reasons previously assigned and for the further reasons that the plaintiff, herself, and her daughter, the only two witnesses, who have been heard, do not sustain the burden, which is necessary for her to carry the issue to the jury in a case of this nature; and, to reiterate in part, there is no evidence of any foreign substance existing on the floor of the store at the time of the fall suffered by the plaintiff, which could have been or should have been known by the defendant in the exercise of the care required of an operator of a store place where the public is invited to trade.

Mr. Swart: Of course, we still rely on the fact that the plaintiff, herself, said the floor was slippery and in addition we now have the evidence of the store manager and all the evidence must be considered on this motion, who merely states that it was his practice to sweep the floor when necessary. He made a report of the incident but failed to say when the floor was last swept or how many times it had been swept that day and he couldn't give any evidence of when or how often the floor had been swept and it was his *duty* to keep the premises in a safe condition, and the plaintiff says it was not safe.

Therefore, we think we have sustained the burden of proof and the motion should be denied.

Mr. Ashby: My only reply is that the store manager testified that he did not include something in his report that was not called for.

The Court: It seems to me that the only purpose of that would be to go to his credibility.

It seems to me that we have a more serious page 57 } question of fact at this point that we had at the conclusion of plaintiff's case. The plaintiff says there was sawdust on the floor and the defendant comes along and says there was no sawdust but that there was some grit or sand on the floor.

Mr. Swart: I think there was no doubt that there was something on the floor.

The Court: There was something. The thing that bothers me is whether it was something that ought not have been there and it became negligence for the defendant to permit it to remain there.

It seems to me that is the crux of the case.

Mr. Swart: That is the whole point in the case and that is the question to be determined by the jury and whether or not it was negligence for it to be there.

The Court: The thing I expected Mr. Cannon to be asked was as to whether or not he made any inspection of the floor to determine when it became necessary to sweep the floor.

Mr. Ashby: May I comment on that? The page 58 } question I asked Mr. Cannon was to the effect that it was nothing but a gritty substance, which had been tracked in by the same conditions in that area as existed in other areas of the store.

The Court: Suppose the jury believes, though, that there was other material than gritty material, to-wit, sawdust or a substance of the nature of sawdust. I guess the woman finally said it was sawdust, though.

Mr. Ashby: She said it looked to her like sawdust, and you will recall I read from her pleading and she said it looked to her like sawdust or some cleaning material.

Even, your Honor, if that is a fact and you take her testimony at face value, her testimony—the value of her testimony is still to the effect “I believe that is what I slipped on.” There is no positive statement that she did slip on it, and that is as strong as the plaintiff's case can possibly rise.

Mr. Swart: On this motion to strike you must take and accept the plaintiff's evidence in its best light. page 59 } She has said the floor was slippery and she believes she slipped on this substance. The manner in which she states it is as important as the words. You can say it in several different tones. The Court has heard her manner in stating it and that becomes a question of fact and in the province of the jury.

The Court: I am inclined to think so; I am going to let it go to the jury. Your motion is denied.

Mr. Ashby: We except to the ruling of the Court:

Note: Thereupon, the Court considered the instructions offered by the plaintiff and defendant and the only exception taken to the granting or refusal of any instruction is as follows:

Mr. Ashby: Counsel for the defendant objects and excepts to the giving of any instruction on behalf of the plaintiff or for any other party in this case and excepts to the action of the Court in giving such instructions on the grounds that there is no evidence upon which the case can properly page 60 } be presented to the jury, the plaintiff not having borne the burden of proof that there was any foreign substance upon the floor of defendant's store, which its agents could or should have observed and have removed therefrom for the safety of its patrons; and, further that the evidence of the plaintiff, herself, is based upon her belief that the substance on the floor was the cause of her fall; and, further for the action of the Court in denying defendant's motion to strike.

A Copy—Teste:

H. G. TURNER, Clerk.

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