

1950

Ruth Marie Basinger v. Standard Furniture Company, Zion's Co-Operative Mercantile Institution, Zion's Savings Bank and Trust Company, and Lois Greenwood : Brief of Appellant

Utah Supreme Court

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CASE No. 7418

IN THE SUPREME COURT
of the
STATE OF UTAH

RUTH MARIE BASINGER,
Plaintiff and Appellant.

vs.

**STANDARD FURNITURE COM-
PANY, a corporation; ZION'S
CO-OPERATIVE MERCANTILE
INSTITUTION,**

Defendants and Respondents,
**ZION'S SAVINGS BANK AND
TRUST COMPANY, and LOIS
GREENWOOD, doing business as
LOIS GREENWOOD,**
Defendants.

FILE

JAN 14, 19

CLERK, SUPREME COURT,

BRIEF OF APPELLANT

**APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT,
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH.
HONORABLE RAY VAN COTT, JR., Judge**

**DWIGHT L. KING and
WAYNE L. BLACK**
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and Appellant.*
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Salt Lake City, Utah**

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GREENWOOD, doing business as
LOIS GREENWOOD,

Defendants.

CASE No. 7418

BRIEF OF APPELLANT

STATEMENT OF CASE

PRELIMINARY STATEMENT

The parties will be designated as follows: plaintiff and appellant will be referred to as appellant; defendants and respondents, Standard Furniture Company, a corporation, and Zion's Co-operative Mercantile Institution,

will be referred to as respondents. The defendant, Zion's Savings Bank and Trust Company and Lois Greenwood, will be referred to merely as defendants.

All italics are ours.

STATEMENT OF THE FACTS

Appellant, on the 23rd of December, 1947 at 3:30 in the afternoon, was walking westward on the south side of South Temple Street. She was at that time accompanied by her four small children; three children were walking at her side and she carried her daughter Gloria, who was two years of age, in her arms. As she reached the west side of the driveway which enters into the rear of the Standard Furniture Company and Zion's Co-operative Mercantile Institution from South Temple Street she looked into the driveway and onto the street and then crossed over the driveway. As she reached the west side she caught her foot on a perpendicular ledge at the western edge of the driveway to the rear of the aforementioned business houses. At the point appellant caught her foot the driveway was about one and one-half inches lower than the City sidewalk immediately to the west. Mrs. Basinger fell forward heavily and as she fell she threw her daughter ahead of her so as not to fall on her and caught the full weight of her fall on her arms, shoulders and hands. Appellant suffered severe injuries to the muscles, ligaments and soft tissues of her shoulders, arms, back and neck. Ever since the accident appellant has suffered continuous dis-

ability. The disability was total for some time after her injuries and had progressively decreased to the time of trial, but even then she could not accomplish the usual and ordinary work of taking care of her family and her housework.

The case came on for trial on the 30th of June, 1949 before the Honorable Ray Van Cott, Jr. At the close of appellant's case all of the defendants made motions for nonsuit. The motions on part of each and every defendant were granted. The grounds for said rule was different as to the defendants, Zion's Savings Bank and Trust Company and Lois Greenwood. As to those defendants the basis of the court's ruling was that the evidence did not show that either the bank or Lois Greenwood ever used the driveway from South Temple Street into the rear of the Standard Furniture Company and Zion's Mercantile Institution. From those rulings the **appellant** does not appeal. The Court, however, nonsuited plaintiff as to the defendants who are respondents in this action on different grounds, and from his ruling this appeal is prosecuted.

The evidence demonstrated conclusively and without any conflict that there was a definite perpendicular ledge at the point where appellant fell which extended several feet along the western side of the driveway into the rear of Standard Furniture and Zion's Co-operative Mercantile Institution. Photographs of the ledge were introduced in evidence as exhibits. The photographs show the ledge as it appeared on the day that appellant

fell. They also show that the point where appellant fell was a low point in the driveway. These exhibits are marked as Exhibit "A", "B", and "1".

The manager of the Z.C.M.I. Tea Room, Sibyl Watts, testified that the mercantile institute received deliveries from delivery trucks through the Standard Furniture driveway and such deliveries averaged five or six a day. The trash and garbage was also removed from the back door of the tea room through the driveway, and that this use by Z.C.M.I. had continued for at least nine years to the witness's own knowledge. (R. 170-1-2).

Witness Smith testified that he had observed the respondent, Standard Furniture Company, using the driveway into the rear of their store for fifteen or twenty years and that he had also seen Sunfreeze delivery wagons go through the driveway to Z.C.M.I. (R. 200). He also testified that the vehicles he observed going into Standard Furniture Company were big furniture van trucks. (R. 201).

Witness Armstrong, manager of Standard Furniture Company, testified that the Standard Furniture Company had been in operation since November 9, 1909 and that ever since that time they had used the driveway and that their trucks and several other trucks not belonging to them had used it. At the time of trial the Standard Furniture Company had six trucks, two of

which were cab-over vans of a ton and a half designated tonnage. Armstrong testified further that the use had been constant over the twenty years of his association with Standard Furniture, the exact use depending on the amount of business transacted and the number of trucks which the Standard Furniture Company owned (R. 205-6). It was Armstrong's judgment that there would be fifty different trucks using the driveway serving the respondent Z.C.M.I.'s Tea Room and the Standard Furniture Company business. Armstrong also testified on cross-examination by Mr. Christensen, counsel for Standard Furniture Company, that the low point in the driveway had existed for as many years as he could remember and that as far as he knew during the twenty years of his association with Standard Furniture Company the driveway appeared as it is shown in Exhibit "A" (R. 211, 212). He further testified that Standard Furniture Company had made no effort whatsoever to correct the condition in the driveway.

ASSIGNMENT OF ERRORS

1. That there was sufficient substantial evidence from which a jury could find the respondents were both negligent and that their negligence was the proximate cause of appellant's injury and therefore the orders of the court granting respondents' motions for nonsuit were erroneous, depriving appellant of her right to a jury trial.

SUMMARY OF ARGUMENT

POINT I.

THERE IS SUBSTANTIAL EVIDENCE THAT RESPONDENTS PUT THE SIDEWALK TO AN UNUSUAL AND EXTRAORDINARY USE WHICH CAUSED THE DEFECT FROM WHICH APPELLANT RECEIVED HER INJURIES.

ARGUMENT

POINT I.

THERE IS SUBSTANTIAL EVIDENCE THAT RESPONDENTS PUT THE SIDEWALK TO AN UNUSUAL AND EXTRAORDINARY USE WHICH CAUSED THE DEFECT FROM WHICH APPELLANT RECEIVED HER INJURIES.

The Exhibits A, B, and 1, show that the point where the driveway was sunk below the adjoining sidewalk was a short portion of the driveway. They show that the cement block which was in the driveway was cracked and broken in an easterly-westerly direction. The pictures also show that the southernmost edge of the driveway and sidewalk are level with one another. From this evidence the jury might well find that the extraordinary use which had been imposed on the sidewalk by the respondents was the cause of the breaking of the cement blocks and the ledge along the western edge of the driveway. The pictures themselves might well be the basis for an inference that some extra-

ordinarily heavy use other than pedestrian and ordinary foot travel on the sidewalk caused the breaking of the cement slab in the driveway and the lowering of the driveway below the edge of the sidewalk to the west and in this way created the ledge which caused appellant to suffer her fall and injuries. The law of unusual and extraordinary uses of public sidewalks was thoroughly discussed by this court in the case of *Salt Lake City v. William Schubach, et al.*, 108 Utah 266, 159 P. 2d 149, 160 A.L.R. 809, 815, 819. There this court held that the person who put a public sidewalk to an extraordinary use is responsible for the maintenance, repair and upkeep of the sidewalk at the place where his unusual and extraordinary use occurs. The Schubach case places the liability for injuries to users of the sidewalk on the party negligent who creates or maintains a dangerous situation and whose failure to maintain the thing he has used for his own benefit or purpose causes the accident. The evidence in the present case clearly shows that both Standard Furniture Company and Z.C.M.I. put the public sidewalk to an extraordinary and unusual use, and the evidence is without conflict that the defect in the sidewalk had existed for a long time and that no attempt to repair or alleviate the defect had been made by either respondent.

The question of whether or not a defect is such as would constitute a dangerous and unsafe condition in the sidewalk is a question of fact which must be determined by a jury. In the case of *Ray v. Salt Lake City*, 92 Utah 412, 69 P. 2d 256, 119 A.L.R. 153, the actual differences

in elevations of adjoining sections of sidewalks was from three-quarters to seven-eighths of an inch on the north side and one-quarter to three-eighths of an inch on the south side. The Utah Court held that this elevation was sufficient to make a jury question of whether or not this elevation constituted a danger. The court stated its position in the following discussion:

“ * * * This court in discussing the matter in the case of *Shugren v. Salt Lake City*, 48 Utah, 320, 159 P. 530, 533, refused to follow what was then recognized as the numerical weight of authority, and followed what appears to be the only course that could be followed. It was there said: ‘This court is firmly committed to the doctrine that ordinarily the question of whether the maintenance of a particular defect in a street or sidewalk constitutes negligence on the part of the municipality is a question of fact for the jury.’

“The following cases are cited: *Jones v. Ogden City*, 32 Utah, 221, 89 P. 1006; *Bills v. Salt Lake City*, 37 Utah, 507, 109 P. 745; *Robinson v. Salt Lake City*, 40 Utah, 497, 121 P. 968; *Sweet v. Salt Lake City*, 43 Utah, 306, 134 P. 1167.”

The *Salt Lake City v. Schubach* case, *supra*, sets forth the general principles applicable to the case at bar. There the owner of the abutting property constructed in the sidewalk an entrance to his basement, the entrance being covered by iron or steel doors. The steel doors became out of repair and a pedestrian was injured. The pedestrian sued Salt Lake City, recovered

judgment against it and Salt Lake City brought the action here discussed against the tenant and abutting owner of the property for whose convenience the entrance way was constructed. This court held that the owner of the land was liable to the City for the amount of recovery by the pedestrian and stated the applicable principles in the following language:

“The ultimate liability is upon the author or continuer of the nuisance. When the owner installs such passageways, vaults or coal holes, it is presumably done for the benefit of his property. ‘Neither the public or other individuals can derive any possible advantage from such a use of the sidewalk, but it is solely for the defendant’s benefit, and he must see to it that he does not endanger the safety of others, and that he incommodes the public as little as possible.’ ”

The general principle set down was that any person who makes use of the public sidewalk for his own benefits, using it in an unusual or extraordinary manner, must exercise care that pedestrians are not endangered by the extraordinary use made of the sidewalk. The court set forth the principles succinctly in the following language:

“ * * * Clearly enough, as to the person injured the liability rests upon the party negligent, the party who creates, or maintains a dangerous situation, whose failure to maintain the thing he is using for his own benefit or purpose causes the accident.”

Many cases on facts similar to the *Salt Lake City v. Schubach*, supra, case have been decided where entrance ways, skylights and other unusual uses have been made of public sidewalks to benefit the adjacent property owners. A leading case in California on the matter is *Monsch v. Pellissier*, 187 Cal. 790, 204 P. 224. There the use made of the sidewalk was for the purpose of supplying light to defendant's basement. The skylight was allowed to get broken and out of repair. The California court applied the principles set forth in *Salt Lake City v. Schubach*, supra, and arrived at the conclusion that the person suffering injuries as a result of the failure of the owner of the abutting property was entitled to recover against the abutter. A later California case applying the same reasoning to a use by an abutting owner of the sidewalk for a driveway is *Granucci v. Claasen*, 204 Cal. 509, 269 P. 437, 59 A.L.R. 435, 439. The abutting owner constructed a driveway out of planks superimposed on the sidewalk in front of his premises. A spike in one of the planks became loose and plaintiff stumbled on the spike and suffered personal injuries. The California court citing *Monsch v. Pellissier*, supra, as authority held that the use of the sidewalk for a driveway was an unusual and extraordinary use and stated the duties imposed on the user in the following language:

“This driveway having been thus constructed and used not primarily for sidewalk purposes but for the benefit and convenience of the said defendants in connection with their adjacent property, and which use was one which was

independent of and apart from the ordinary and accustomed use for which sidewalks are designed, the duty was cast by law upon the defendants to exercise reasonable care and diligence in the keeping of said driveway at the point where it was superimposed upon said sidewalk in a proper and safe condition for the passage of pedestrians rightfully using said sidewalk and said driveway superimposed by defendants thereon. *Monsch v. Pellissier*, 187 Cal. 792, 204 Pac. 224; *Du Val v. Boos Bros. Cafeteria Co.*, 45 Cal. App. 383, 187 Pac. 767; 20 R. C. L. p. 77, Sec. 68; 13 R. C. L. p. 320; *Grand Forks v. Paulsness*, 19 N. D. 293, 40 L.R.A. (N.S.) 1158, 123 N. W. 878; *Ryder v. Kinsey*, 62 Minn. 85, 34 L.R.A. 557, 54 Am. St. Rep. 623, 64 N. W. 94; *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530; *Gray v. Boston Gaslight Co.* 114 Mass. 149, 19 Am. Rep. 324. The duty which was thus cast upon the defendant Mary J. Claasen, as owner of said premises, continued during the entire period of the presence and use of said driveway in connection therewith and said defendant could not relieve herself of such duty either by leasing the same to her codefendant or by contracting with him by the terms of said lease for the keeping of said premises and said driveway in a proper state of repair."

The uses to which the defendants had put the public sidewalk were almost the same use to which respondents had put the sidewalk to in the present case. The court describing the use stated as follows:

"From the evidence as thus far presented it appears conclusively, for the purposes of this appeal, that the said driveway at the point where

the plaintiff tripped and fell upon it was in a state of disrepair, which, if imputable to the negligence of said defendants, would suffice to entitle this plaintiff to maintain her action. The undisputed evidence disclosed that said driveway during the ten years of its existence, with the exception of a brief intermission, had been used and passed over daily by more or less heavy trucks and horsedrawn vehicles in connection with the use of said premises as a brewery and later as a coffee mill. During that entire period, according to the testimony both of the owner of said premises and of her son, the lessee thereof, the driveway had never been subjected to any sort of repair."

The California court treated the use of the sidewalk as a driveway into the premises of the abutting owner in exactly the same way as it treated the use of the sidewalk for a light well and other similar uses made by abutting owners of public sidewalks, and saw no difference between the different types of uses. Certainly all of the uses are unusual and extraordinary uses of the public sidewalk. In *Granucci v. Claasen*, supra, the court stated:

" * * * since the portion of said sidewalk upon which the defendants' driveway was superimposed was being used by said defendants, not as a sidewalk nor primarily for the use and convenience of the general public, but that the same had been constructed and was being used by the defendants primarily as a driveway into their said premises and for their private use, convenience and benefit. To such a state of facts the decision

of this court in the case of *Monsch v. Pellissier*, supra, has direct application.”

Appellant has discovered a number of cases covering unusual uses of public sidewalks and has been unable to find any case where it has not been held that the person putting the sidewalk to an unusual use is charged with the responsibility for injuries incurred when the use renders the sidewalk dangerous and unsafe for pedestrian travel. There are a number of cases which hold that using the public sidewalk as a driveway is an unusual and extraordinary use. These cases hold that the active negligence of the user of the public sidewalk is the basis upon which recovery should be based by the pedestrian suffering injury. A case setting forth the basic principle of law covering this is *Davis v. Tallon, et al.*, 96 N.J.L. 618, 103 Atl. 236, 237. The court stated the principles upon which the user of the sidewalk was held liable to a pedestrian for injuries created by the use of the sidewalk in unmistakable language:

“ * * * The plaintiff’s case was not rested upon any legal obligation of the owner to keep the sidewalk in repair, but upon the claim that defendants, by subjecting the sidewalk to a use not intended, that of use by ordinary pedestrians, created a nuisance which rendered them liable for injuries to persons lawfully using it. The case was submitted to the jury on this theory, who found for the plaintiff against the owners, and awarded her \$100, and in favor of the defendant Schreiber.”

the court holding that the broken condition of the flagstones of the sidewalk where the defendant had used it for egress and ingress to its premises would give raise to an inference that the defect was caused by such use, stated:

“ * * * With the broken condition of the flagstones existing, subject to the inference that the condition was caused by using the sidewalk for the passage of heavy carts from the street to the lot by prior tenants with the knowledge and implied participation therein by the owners, and the testimony of the defendant Schreiber that the flagstones were not broken by him, the jury might infer that the nuisance was created by the act of former tenants, and not by Schreiber, but his exoneration would not discharge the owners from liability for the acts of their other tenants in which they participated. Three causes of action are set out in the complaint: First that the owners negligently used the sidewalk so that it became dangerous, by which neglect the plaintiff was injured; and second, that the owners, for their own convenience and that of their lessees, created and maintained this dangerous condition. On one or the other of these causes the jury found, as they properly might, against the owners.”

Zak v. Craig, 5 N.J. Misc. R. 275, 136 Atl. 410, 411, is a later New Jersey case applying the principles of the Davis case to use by trucks. The ingress and egress there was into a garage which opened upon the public highway. The defendant argued that there was no legal duty on the part of the defendant to keep and repair

the sidewalk and that the defendant was not responsible for the acts of tenants on her property. The court affirming a verdict in favor of the plaintiff for the sum of \$3,000.00 stated the theory of liability as follows:

“The theory upon which the liability of the defendant was submitted to the jury was the maintenance of a nuisance in the public highway. There was plenary proof that the sidewalk did not become defective and unsafe from the ordinary use thereof by the general public, but it became broken up as the result of a use for which it was not normally designed, namely, the passage of heavy motor trucks over it to and from the defendant’s garage, leased to tenants, for the storing of motor trucks, and in which use the flagstones were broken, and a hole seven inches in diameter and six inches in depth was made in the sidewalk, making it unsafe and dangerous to the public having occasion to use it. The condition of the sidewalk constituted a public nuisance. The only question in the case was whether there was any evidence tending to establish that the defendant caused or maintained the nuisance.”

Further enlarging upon the inferences that could be drawn from the fact of damage to the sidewalk at the point where the extraordinary use was imposed upon it, the court stated what we consider to be an applicable principle:

“There was also testimony in the case which tended to show that, at the time of the expiration of the lease to the grocery company and the renewal thereof to it, such renewal impliedly arising from the fact that the defendant permitted

the grocery company to remain as tenant, the hole in the sidewalk existed and the flagstones were broken, and hence, as this condition constituted a nuisance, and did not have its origin from the ordinary wear and tear of a sidewalk, resulting from a normal use by the public, but, according to the testimony, was created by the extraordinary strain put upon the sidewalk by the tenants of the defendant, who were authorized by her to use the premises for a purpose which caused the sidewalk to be subjected to unusual pressure and strain, and for which use the sidewalk was not designed, that is, for motor trucks or other heavy vehicles to be driven over it, the defendant became answerable to respond to the plaintiff in damages for the injuries she sustained.

“The motions for a nonsuit and for the direction of a verdict for the defendant were properly refused.”

Other jurisdictions having passed upon the same proposition have reached like conclusions. An important case directly in point in the present suit is *Mullins v. Siegel-Cooper Co.*, 95 App. Div. 234, 88 N. Y. Supp. 737, 739, affirmed 183 N. Y. 129, 75 N.E. 1112. There the defendant crossed over the sidewalk into a lane leading to his place of business. The cross-over on the sidewalk was used by wagons hauling loads of stones and building materials into defendant's property and was also used by wagons hauling manure out of the defendant's stables, the use creating a defect in the sidewalk upon which plaintiff stumbled and suffered her injuries. The New York courts, applying the principles that the person

creating a defect in the sidewalk by his unusual and extraordinary use thereof will be held responsible for reasonable care to see that the sidewalk is not rendered unsafe or dangerous, held the defendant liable to the plaintiff for the injuries which she received when she fell. They also went on to set down a principle which the California courts in the *Granucci* case, *supra*, applied, namely, that there is no difference between the use of the public sidewalks for grates, coal chutes, etc., and a use of the sidewalk for a driveway, stating:

“We discover no difference in principle between this case and those dealing with grates, coal chutes, or holes in sidewalks. Such openings in the sidewalk are put there for the advantage of the owners, and for the benefit of the property. In the case at bar the stone was drawn in upon the premises of defendant for the purpose of building a wall to enhance the value of the property, and for the use and convenience of the defendant. It subjected the sidewalk in front of this lane to a use other than that involved in the right of the public to use the sidewalk, and was purely its own. No question arises that such use was unauthorized, for one may have access from his premises to the public street, even though he must cross the sidewalk; but under the doctrine we have cited, and under the maxim, ‘So use your own property as not to injure the rights of another,’ we believe that, as the injury to the walk was primarily caused by the drawing of the stone, and was enhanced by subsequent private use of the defendant, or for its benefit, it was liable for the result of the improper condition. The accident occurred several months after

the sidewalk was first put into this unsafe condition, which grew steadily worse.”

See also: *City of Topeka v. Central Sash & Door Co.*, 97 Kan. 49, 154 P. 232.

None of the cases above cited have been particularly concerned with a statute but, of course, statutory language fixing liabilities and duties of users of the public sidewalks would be helpful.

Section 36-1-18, Utah Code Annotated, 1943, sets forth the general duties of persons who encroach upon the sidewalks. The section reads as follows:

“SIDEWALKS—Encroachments by or on—Porches, Flumes, Pipes. It shall be unlawful to extend or construct any sidewalk so as to encroach upon any highway nearer to the center thereof than the curb line, or to encroach upon any sidewalk with any building, fence, wall, post or other thing nearer than the fence line, or so as to make the sidewalk narrower than the widths herein designated; and all platforms, porches or other similar things on sidewalks shall be at the grade thereof, and flumes, pipes or other similar things below the grade shall be covered to grade, and shall be kept in good repair by the person in whose interest constructed so as not to be dangerous to pedestrians or to impair the safe and ordinary use of the highway.”

While the above quoted statute does not specifically mention roadways or driveways over the sidewalk it sets down a general principle which would be applicable to such encroachments.

From the quoted cases and the statutory law of Utah it appears that respondents who were making an extraordinary use of the sidewalk in front of the Standard Furniture driveway incurred a duty to keep in repair the sidewalk at that point. This duty they failed to perform and as a result appellant suffered injuries. On every factual matter there was substantial evidence from which a jury could have resolved all the issues in appellant's favor, and the court erred in nonsuiting plaintiff.

CONCLUSION

It is respectfully submitted that the trial court's order nonsuiting appellant as against respondents, Standard Furniture Company and Zion's Co-operative Mercantile Institution, was erroneous and contrary to law, there being substantial evidence on all issues presented and if said order is allowed to stand it will deprive plaintiff of her right to a jury trial; that said order should be set aside and appellant granted a new trial.

Respectfully submitted,

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