

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 Respondents

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

RUTH MARIE BASINGER

Plaintiff and Appellant,

vs.

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

Defendants and Respondents,

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

Defendants.

FILE

FEB 3 19

Clerk, Supreme Court

BRIEF OF RESPONDENTS

**Appeal from the Third Judicial District Court,
in and for Salt Lake County, State of Utah,
Honorable Ray Van Cott, Jr., Judge**

**MORETON, CHRISTENSEN &
CHRISTENSEN**

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Company,*

**HOMER HOLMGREN
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*Attorney's for Zion's Co-operative
Mercantile Institution.*

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RUTH MARIE BASINGER
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STANDARD FURNITURE COM-
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Defendants and Respondents,

ZION'S SAVINGS BANK AND
TRUST COMPANY, and LOIS
GREENWOOD doing business as
LOIS GREENWOOD,

Defendants.

Case No.
7418

BRIEF OF RESPONDENTS

This action was brought by plaintiff against all of the above named defendants. The action is one for damages for personal injuries received by plaintiff when she stumbled and fell while walking west on the sidewalk on the south side of South Temple Street, about 22 East, at a point where a driveway crosses the sidewalk and

runs into the rear of the Zions Savings Bank & Trust Company's building. The West edge of this driveway was lower than the sidewalk to the west at the point where plaintiff fell.

As the basis for the charge of negligence on the part of the defendants, plaintiff alleges (see Amended Complaint, paragraph II and IV, R.p. 18) first that defendants constructed and maintained said driveway, second used it as a means of egress and ingress to the rear entrances of their business establishments; and third that as a result of the use thereof by heavy trucks and other vehicles hauling various articles to and for defendants the driveway was caused to sink below the level of the sidewalk to the west of the driveway, and, as a result of such sinking, there was a perpendicular ledge about 3 inches high along the west edge of the driveway, which created a dangerous nuisance to pedestrians using the sidewalk. That plaintiff caught her foot on said raise and fell, thereby sustaining injuries.

At the trial, and after plaintiff had rested, plaintiff's counsel moved the court to dismiss the action with prejudice as to defendant Lois Greenwood. This motion was granted (R. p. 221). The other defendants made separate motions for nonsuit. The grounds stated in these motions were substantially as follows:

1. The evidence failed to show that the defendant had committed any unlawful act or was guilty of any negligence of any kind.

2. There is no evidence to show that the driving of the trucks of the defendant, or anyone else, or the use made of the driveway by defendant, caused the defect in the sidewalk; there is no evidence to show whether the sidewalk went up west of the driveway or the driveway went down, the evidence showing only a difference in elevation.

3. There is no evidence that the defect in the sidewalk did not exist before the defendant began using the driveway.

4. There is no evidence of ownership of the driveway by the defendant or any right to the use thereof by defendant.

As to the defendant Zion's Savings Bank the further ground was stated that there was no evidence of any use of the driveway by or for the said bank.

Each motion was granted and the action dismissed as to all defendants. Plaintiff's notice of appeal filed herein shows that the appeal is taken from the judgment of dismissal as to all defendants, except Lois Greenwood. In her brief, however, plaintiff states (p. 3) that she is not appealing from the judgment of dismissal in favor of the Zion's Savings Bank, and confines her appeal to the dismissal as to defendants Standard Furniture Company and Z. C. M. I. We take it, therefore, that the appeal is abandoned by plaintiff as to the defendant Zion's Savings Bank, and so this brief is confined to, and is filed by, Standard Furniture Company and Z. C. M. I.

only. Whenever the word "defendants" is used hereafter in this brief it will be deemed to refer only to the Standard Furniture Company and the Z. C. M. I.

STATEMENT OF FACTS

That the sidewalk to the west as it adjoined the driveway at the point where plaintiff fell was about 1½ inches higher than the driveway is not in dispute. We further admit that trucks of various sizes up to 1½ ton capacity have used the driveway for many years to haul merchandise to and from the rear entrances of the defendants' places of business. What we do dispute is that there is any evidence showing that the use of the driveway by the defendants, or either of them, caused this difference in elevation. We confidently assert that the evidence not only fails to show that the use of the driveway by trucks and vehicles caused the driveway to sink, but affirmatively shows that the difference in elevation between the driveway and the sidewalk to the west was created by constructing the sidewalk higher than the driveway. So that there will be no chance for a mistaken conclusion we quote the testimony of plaintiff's own witness, James M. Armstrong, the only witness who testified on this point:

Mr. Armstrong started to work for the Standard Furniture Company as a steady employee October 1, 1928 (R. 215). He had worked for the company before that as a boy (R. 210). The following is his testimony beginning on page 210 of the Record and continuing to page 212.

Q. Do you recall that some years back the sidewalk from the driveway west was rebuilt?

A. Yes, I recall that.

Q. And the sidewalk from the driveway, including the driveway and east wasn't rebuilt at that time?

A. There has nothing been done to that driveway east, to my knowledge, since I have been there, but I do recall this west part.

Q. Now do you recall and did you observe that when the sidewalk was built west from the driveway that it was built a little higher than the driveway?

A. Yes, I recall that very markedly. There isn't a great deal of a raise there but there is a raise and it has always been there.

Q. Since the sidewalk was built on the west side of the driveway?

A. Yes.

Q. And you observed that from going in and out there all these years?

A. Yes, sir. It is approximately an inch up and has been as long as I can remember.

Q. And did you observe on the east side of the driveway, where the sidewalk wasn't changed it is the same elevation?

A. Yes, sir. I would say it is the same elevation. There is nothing there that has been changed at all. It appears comparatively flat. When you figure the years it has been in service there, from weather cracks and so on. But this part over here east of where

- Q. East of the driveway?
- A. East of the driveway is shattered really worse than the driveway itself.
- Q. How many years has it been shattered that way, that you can recall.
- A. I don't remember when it wasn't shattered.
- Q. And that would be how many years?
- A. Twenty years ago.

On re-direct examination Mr. Armstrong testified as follows:

- Q. Mr. Armstrong, how old were you—or I will ask you first if this cement work to the east (west) of the driveway was done before you became a steady employee of Standard Furniture?
- A. It was done after I was steadily employed there.
- Q. Within the last twenty years, is that right?
- A. I would say so. I will give you the exact date when I started there—October 1st of 1928. That makes twenty years, doesn't it?
- Q. In October. Now Mr. Armstrong, I show you what has been marked plaintiff's Exhibit B, and I will ask you if you know when the crack in the foreground of that picture which runs east and west, appeared in that driveway?
- A. This large crack?

Q. Yes.

A. We have been familiar with that particular crack and this one over here as long as I can remember.

Q. And you don't know when that appeared there?

A. It has been there as long as I can remember.

The witness was then shown Exhibit A, marked on the reverse side, and was asked if the driveway and the sidewalk to the west were not on a level at the corner of the Lois Greenwood store. The witness then indicated that from the point marked "Y" on the exhibit northward the sidewalk and the driveway were not on the same level. He then testified that two or three years ago tar surfacing was placed on the driveway. Counsel then tried to get the witness to say that Exhibit "B" shows a dip in the driveway at the point "X," but the witness said he could not say as he could not recall what the driveway looked like before it was resurfaced. The foregoing is contained in the transcript pages 216-218. This resurfacing was not done by the Standard Furniture Company, but presumably by the city (R. p. 219).

The witness testified that the work of rebuilding the sidewalk to the west of the driveway was done in 1930 or 1931. The whole thing was torn up for quite some time and he presumed it was new all the way through (R. p. 220).

ARGUMENT

THE DEFENDANTS WERE ENTITLED TO A NONSUIT AND DISMISSAL AS THE PLAINTIFF FAILED TO PRODUCE ANY EVIDENCE WHATSOEVER TO SUSTAIN HER CHARGE OF NEGLIGENCE ALLEGED IN HER AMENDED COMPLAINT.

I.

PLAINTIFF FAILED TO PROVE THAT DEFENDANTS CONSTRUCTED OR MAINTAINED SAID DRIVEWAY.

There is absolutely no evidence to show that these defendants, or any one else, constructed and maintained this driveway. The only maintenance shown in the record was the re-surfacing of the entrance to the driveway from the street, done, presumably, by the city. (R. p. 219). Furthermore, there is no evidence at all as to the ownership of the alleyway. The plat, introduced in evidence as Exhibit "E," shows the property of the Zions Savings Bank, 45 feet by 165 feet, and shows an arrow extending into this alleyway or right of way. But Willard R. Smith, the vice president of the bank, testifying on behalf of the plaintiff, stated very definitely that the bank did not own this alleyway—all it owned was a piece 45 feet wide on Main Street and 165 feet long on South Temple Street (R. p. 196). The only connection which the evidence shows these defendants have with this

alleyway is that defendant Standard Furniture Company leases premises, and the defendant Z. C. M. I. owns premises, which abut at some point on this alleyway and that they use, and have used, this alleyway to deliver goods to and take away goods from their places of business. We have either quoted or referred to all the evidence which in any manner relates to the construction and maintenance and ownership of this alleyway and respectfully submit that there is no evidence whatever to sustain the plaintiff's allegation that these defendants constructed and maintained the same.

II.

USE OF THE ALLEYWAY BY THESE DEFENDANTS IS ADMITTED.

That these defendants have used this alleyway, and were using it at the time of plaintiff's accident, as a means of ingress and egress to and from their respective places of business is shown by the evidence. But there is an absolute vacuum in the evidence as to the legal basis upon which such use is founded, whether under legal right or adverse use. We mention this phase simply to make it clear that there is, under the evidence, no duty on the part of either defendant to keep the alleyway and driveway in repair because of or as an incident to ownership thereof, or any claim of ownership.

III.

PLAINTIFF'S RIGHT OF ACTION, IF SHE HAS ONE, MUST REST ENTIRELY ON THE ALLEGATION THAT THE USE MADE BY THESE DEFENDANTS OF SAID DRIVEWAY AND ALLEYWAY IN RUNNING TRUCKS AND OTHER VEHICLES OVER THE SAME CAUSED THE DRIVEWAY TO SINK BELOW THE LEVEL OF THE SIDEWALK TO THE WEST, LEAVING A PERPENDICULAR LEDGE ABOUT 3 INCHES HIGH ALONG THE WEST EDGE OF THE DRIVEWAY.

We remind the court again that we have quoted and referred to all the evidence in the record that could have any bearing upon this point. We shall proceed to analyze it.

There is absolutely no evidence that at some time in the past said driveway was on a level with the sidewalk to the west. There is definite evidence that it is now, and for 20 years has been on a level with the sidewalk to the east. See statement of Mr. Armstrong R. 212, quoted in our Statement of Facts and see photo Exhibit 1. Unless it is shown that at some time prior to plaintiff's accident the driveway was on a level with the sidewalk to the west how can it be said that at some time prior to plaintiff's accident it sunk below the sidewalk level? It might be assumed, of course, that the driveway, as originally constructed, was level with the west sidewalk as then constructed, the same as it is on the east side. If the evidence were that there had been no change in the sidewalk to the west and that it is still the original sidewalk and that it originally was on a level with the

driveway there might be room for an inference that the driveway had settled or sunk, providing, of course, there was no room for an inference that the sidewalk had raised by reason of the action of the elements.

There would also be the difficulty of finding anything in the evidence to show that the trucks or vehicles used by or for either or both of these defendants caused this sinking. There is not a shred of evidence to show that. All that appears is this: There is a difference in elevation between the west edge of the driveway and the adjacent sidewalk of about $1\frac{1}{2}$ inches at the point where plaintiff claims she fell, the lowest point along the entire west edge. So we must conclude or permit the jury to infer that it was the trucks of the defendants that caused that difference in elevation. There is no evidence that this driveway was not used by others than these two defendants. There is no evidence to show that the settlement might not have occurred from natural causes. The photos, exhibits A, B and 1, show the west part of the driveway to be entirely intact, except for the crack running east and west shown on exhibit B, and there appears to be no difference in elevation between the two sides of this crack. The whole driveway must have settled, and such settlement is as readily attributable to the weather conditions or to the manner of the original construction as it is to the use by defendants' trucks.

Again, how can either defendant be held liable without proof that it was its trucks that caused the sinking? Suppose it was the trucks of just one of the defendants

that caused the sinking. Could the other defendant then be held liable? Are we to assume that the trucks of both defendants caused the sinking? If there was a sinking it could have been caused by the weight of one extra heavy truck going over the driveway once. That truck could have belonged to or have been servicing either of the defendants, or it could have belonged to or have been servicing neither of them. It is apparent that to charge both, or either of the defendants with having caused the sinking through use by their or its trucks is to indulge, not in any legitimate inference, but in pure speculation. If the driveway sank after its construction, why didn't it sink on the east side as well as on the west side? The testimony above quoted, and exhibit 1, show that it is on a level with the sidewalk to the east even though that sidewalk was "shattered really worse than the driveway and has been shattered for 20 years." (R. p. 212). What caused the shattering of the sidewalk to the east? That cannot be credited to the use of the driveway by trucks. It is entirely possible that the cracks in the driveway also occurred from causes other than passage of trucks over the driveway.

Fortunately we are not left to speculation, nor is there any basis even for indulging in inferences, as to how this difference in elevation between the west edge of the driveway and the adjacent sidewalk occurred. *It was built that way when the sidewalk to the west was rebuilt in 1930 or 1931.* This is the definite, positive testimony of plaintiff's own witness, James M. Armstrong, from his own personal knowledge of the fact.

He testified that the sidewalk to the west of the driveway was reconstructed in 1930 or 1931 (R. p. 220). He further testified as follows:

Q. Now do you recall and did you observe that when the sidewalk was built west from the driveway that it was built a little higher than the driveway?

A. Yes, I recall that very markedly. There isn't a great deal of raise there but there is a raise and it has always been there."

Q. Since the sidewalk was built on the west side of the driveway?

A. Yes.

In view of such testimony where is there any room for inferring that the use of the driveway by trucks caused the difference in elevation between the driveway and the sidewalk to the west? The cause of the difference in elevation is thus fully and definitely accounted for. The walk was constructed that way, and these defendants had nothing whatsoever to do with that construction.

IV.

AN ABUTTING OWNER OR OCCUPIER IS NOT RESPONSIBLE FOR MAINTAINING THE SIDEWALK IN FRONT OF HIS PREMISES.

Section 15-7-47, U.C.A. 1943, provides as follows:

"The foregoing provisions of this Article [relating to special assessment for street con-

struction] shall apply to the repaving of streets and sidewalks, but not to repairs thereon. The governing body shall, by ordinance, define what constitutes repaving, what repairs and what extraordinary repairs. The cost of ordinary repairs shall be born by the municipality, and the governing body may levy and collect special taxes upon the abutting property for the purpose of defraying the cost of repairs defined to be extraordinary without previous notice of intention, or any right of the property owners to protest.”

Under the foregoing statute, and under the authorities generally, the abutting property owner or occupier has no obligation or duty to keep the sidewalk in front of his property in repair. This is true even though the property owner constructed the sidewalk, and it was taken over by the city after construction. See *Wright v. Hines*, 235 SW 831; *Carney v. Proctor*, 237 Mass. 203, 129 NE 605; *Birchfield v. Diehl*, 189 SW 845.

V.

THERE IS NO LIABILITY ON THE PART OF AN ABUTTING OWNER OR OCCUPIER UNLESS HE DOES SOMETHING AFFIRMATIVE TO CREATE THE DEFECT.

Atkinson v. Sheriff Motor Co., 203 Iowa 195, 212 NW 484.

The defendant maintained a sales office and service station. A driveway crossed the sidewalk to a side entrance and was used by automobiles and trucks. Such use caused a depression in the sidewalk 6 to 12 inches

wide, 2 feet long and 1½ inches deep. Plaintiff stepped one foot in this depression and fell and was injured. The verdict was directed for defendant. The court held the duty to repair rests with the city, saying:

“It is a general rule, almost universally recognized, that an owner or tenant in the occupancy of a building abutting upon a public sidewalk or street, who, by some affirmative act or perhaps by some act of negligence constituting a nuisance, is liable to persons injured in consequence thereof. (citing cases.)

“It is either conceded or clearly shown by the evidence that the depression in the sidewalk of which plaintiff complained was several years in forming, and that it resulted from the passage of automobiles and trucks from and to the street over the same. It did not result from the affirmative act of the servants or agents of defendant, nor was it the result of negligence on its part.

“Appellee (defendant) did nothing affirmatively to cause the depression in the walk, which was attributable solely to the use made thereof, which was lawful.”

Adams v. Crapotte, 69 SW 2nd 460. Tex.

Defendant leased a garage facing St. Mary's Street. There was an abrasion in the sidewalk at the place where customers and others drove into and out of defendant's place of business. The evidence showed that the use of the driveway by cars going in and out made the hole deeper after defendant's occupancy. Plaintiff fell by stepping into the hole. The jury found defendant negli-

gent in causing this condition to exist, in permitting it to exist and in failing to repair the hole. The plaintiff theory was that defendant was enjoying some kind of special privilege in the sidewalk by using the same as an integral part of his business, for which reason the duty devolved upon him, as the proprietor of the business, to keep the sidewalk in repair.

“It would scarcely seem necessary to cite authorities in support of the proposition that sidewalks are a part of the street, that the duty to exercise ordinary care to maintain them in a reasonably safe condition for the use of the public rests upon the city, and that the abutting owner owes no duty in that regard.

“Plaintiff seeks to hold the tenant liable on the ground that he contributed to this condition by inviting his customers to use the drive in way over the sidewalk. Her theory is based essentially upon the assumption that appellant was making a wrongful use of a portion of the public thoroughfare. Is the assumption correct? We think not. Access to a public highway is an incident to the ownership of land abutting thereon, and the right of such access is private property passing to the lessee. That right cannot be taken for public purposes or destroyed without adequate compensation being made therefor. 26 SW 250; 36 L.R.A. (NS) 662; Ann. Cas. 1913 E 870; 153 NE 325; 47 A.L.R. 897; 13 RCL p. 142, Sec. 126; 44 C.J. Sec. 3711, p. 943.” The court quotes from *Shudder v. Schroth*, 146 Cal. 437, 80 p. 624, as follows:

“ ‘The use of a sidewalk by the owner of a lot for purposes of communication with the street

is equally legitimate, and equally an ordinary use, as that of passing longitudinally along it.' "

"In its last analysis the judgment in the instant case can be upheld alone upon the ground that it is the duty of abutting owners, and likewise of their lessees, to repair the public thoroughfare adjoining their premises. That duty does not exist, but rests exclusively on the municipality, and where there is not duty there can be no negligence."

Home Brewing Co. v. City of Indianapolis, 123 NE 721. (Ind.)

This city was sued for damages by a Mrs. Crawford who fell because of a hole in the sidewalk. The hole was in front of the Brewing Co's premises and was about six inches west of an elevator in the sidewalk used to take beer into and out of the company's basement. In delivering kegs the company would allow them to roll down from the wagon onto a mat and then roll over to the elevator. The effect of the deliveries and uses of the sidewalk was to create the hole which was 2 feet long, 1½ feet wide and 3 inches deep. The city paid the judgment and sued the company to recover the amount it was forced to pay. The court denied judgment saying:

"In order that the city may recover it must appear that the unsafe condition of the sidewalk has been brought about by the wrongful act or omission of such alleged injuring party; and such alleged injuring party will not be estopped from showing that he was under no obligation to keep the street in a safe condition, and that it was not

through his fault that the accident occurred. There is no charge in the complaint that the appellant had made any wrongful use of the sidewalk. It was engaged in a business that at the time was lawful, and it had a right under the law to deliver to its customers its merchandise over and upon the sidewalks of the city. There is no violent or improper act charged. The use of the sidewalk for the purpose of delivering its merchandise was in common with a similar use of the sidewalk made by a number of other persons. The defect was not a result of any affirmative wrongful act on the part of appellant, but was the result of the continuous use thereof for 4 years, or more, by appellant and others, including the general public walking over such sidewalk, which continuous use for 4 years resulted in the defect complained of. All of these uses made of the sidewalk were proper and legitimate and such uses produced the gradual wear which resulted in the defect complained of.

“The duty of repairing streets and sidewalks is upon the city, and not upon the abutting owners, or upon the persons using such streets or sidewalks in a legitimate way and such abutting property owners and such persons so using the street are not liable to a person injured by such uses, unless such uses were wrongful and unlawful.”

Volke v. Otway, 181 A. 156.

Plaintiff sued the owner and tenant of premises abutting a sidewalk for injuries received when she caught her foot in a depression in the sidewalk near an iron door covering the stairway to the cellar of the building.

The plaintiff's theory was that trucks backed up onto the sidewalk, merchandise in heavy parcels were thrown upon the sidewalk next to this iron door and such use caused the depression. There was no testimony as to how long the depression had existed, though it was observed as early as 1918 by one witness. The tenant entered upon the premises in 1934. There was no proof as to what created the depression. The court affirmed a judgment of nonsuit, saying:

“The trial court when passing on the motion to nonsuit was bound to accept as an undisputed fact, with no proof as to its cause, that the depression in the sidewalk which caused the plaintiff's injuries, existed in 1918. The mere happening of an accident, and the fact that a sidewalk has been in a defective and dilapidated condition for several years, to an extent that it constitutes a nuisance, does not in itself render an abutting owner liable to the injured party. The burden is on the plaintiff to show that the owner or his predecessor in title participated in the creation of the nuisance. It is entirely settled in this state that the owner owes no duty to maintain the sidewalk in front of his premises, and is not responsible for any defects therein which are not caused by his own wrongful act.”

There was nothing unlawful, or even extraordinary, in the use of the driveway across the sidewalk under the evidence in this case. The Z.C.M.I. used it to receive merchandise for its tea room and to take out the garbage resulting therefrom. The Standard Furniture Co. used it to take furniture in and out. The law is well settled

that an abutting owner or occupant has a right of access from the street to his property. The rule is stated in 25 Am. Jur. p. 448, Sec. 154, Highways, as follows:

“The right of access to and from a public highway is one of the incidents of the ownership or occupancy of land abutting thereon. Such right is appurtenant to the land and exists when the fee title to the way is in the public as well as when it is in private ownership. It is a property right of which the owner cannot be deprived without just compensation.”

To the same effect is 44 C.J. p. 943, Sec. 3711, applying the rule specifically to city streets, citing *Davis v. Midvale City*, 56 Utah, 1, 189 P. 74, and *Hague v. Juab County Mills, etc., Co.*, 37 Utah 290, 107 P. 249.

Den Braven v. Public Service Electric & Gas Co., 115 N. J. L. 543, 181 A. 46. Here the court, sustaining a demurrer to plaintiff's complaint said:

“It is not alleged that the use of the sidewalk was in improper one, in that vehicles were not proper to be so used or that the crossing itself was not a lawful one and suitable for the purpose. The use, therefore, by the company was that use which every occupant of premises with a driveway therefrom crossing the sidewalk into the public highway exercises, each differing in degree, perhaps. It was the same lawful use, though different in kind, that the pedestrian exercises when he travels the sidewalk longitudinally or in crossing.

“In the present day of the prevalence of the automobile it is perhaps the exceptional dwelling

or business place that does not have for the use of its owner or occupant a crossing from the vehicle portion of the highway into its premises crossing the sidewalk, usually over paving built specially for the purpose. Such construction and use, however, are recognized as normal and lawful ones. If the law were as contended for by the appellant, it would follow that an owner of property could not so construct or use the sidewalk, usually the only means of access, without incurring an obligation to correct the slippery condition to which his vehicles had contributed, and incurring liability to any one who happened to slip thereon."

VI.

THE AUTHORITIES CITED BY PLAINTIFF ARE NOT IN POINT UNDER THE FACTS OF THE INSTANT CASE.

Bearing in mind that in the case at bar there is in the record no evidence at all that these defendants, or either of them, constructed or maintained the driveway in question, and there is not only no evidence that the use made of the driveway by either defendant caused it to sink, or that there has ever been any sinking, but the evidence affirmatively shows that the sidewalk to the west was rebuilt in 1930 or 1931 and was then rebuilt higher than the driveway, we shall show that plaintiff's authorities have no application to this case.

Salt Lake City v. Schubach, 108 Utah 266, 159 P. 2nd 149. In this case the abutting owner and occupant were using for their own business purposes a well in the sidewalk with iron doors to receive goods into the

basement. This was an extraordinary use of the sidewalk and involved a structure placed in the sidewalk by the owner, which structure was not kept in proper repair. There was no right in the first place to install and maintain the structure. But, as already shown, an abutting owner or occupant has the legal right to drive into and out of his property over the sidewalk.

Granucci v. Claasen, 204 Cal. 509, 269 P. 437, 59 ALR 435. This case likewise involved the placing of a structure over the sidewalk that was for the sole benefit of the abutting owner or occupant, a wooden structure superimposed upon the sidewalk used for a driveway. This case is referred to and distinguished upon its special facts in the case of *Daly v. Mathews*. (Cal. App.) 122 P. 2nd 81, where the court says:

“Under the common law there is no liability upon the part of an adjacent landowner for injuries occurring on a public sidewalk. Likewise in this state there is no obligation of the abutting landowner to keep the sidewalk in front of his premises in repair or in a safe condition for public travel, in the absence of statute or ordinance imposing such a duty upon him. Where a portion of a sidewalk is used for the particular benefit of the adjacent landowner, such as grates, or glass therein for light, or sidewalk elevators or heavy planked driveways, it has been held that the abutting landowner is liable for negligent

construction or maintenance which proximately causes personal injury to a pedestrian. No case, however, has gone so far as to charge an abutting landowner with liability for the condition of a driveway, whether used by him or not, *unless he personally created, through use or otherwise, some unsafe condition therein.*

“The case of *Granucci v. Claasen*, 204 Cal. 509, 269 P. 437, 59 ALR 435 . . . is not contra to what we have said. In that case the abutting property owner had constructed, with the permission of the city, a special type of driveway for her exclusive benefit; and so it was held that she was directly liable to a pedestrian for an injury caused by her failure to keep the driveway in repair. The case is an exception to the rule and its doctrine does not cover the case before us nor should it be extended to it.”

The case of *Monsch v. Pellister*, 187 Cal. 790, 204 P. 224, involved a skylight structure in the sidewalk and so has no application to the present case.

The cases of *Davis v. Tallon*, 96 NJL 618, 103 A. 236, and *Zak v. Craig*, 5 NJ Misc. 275, 136 A. 410, are referred to and explained in *Volke v. Otway* (NJL), 181 A. 156, hereinbefore cited and quoted as follows:

“Both decisions held that there was sufficient proof from which the jury might infer that the landlord leased the land and sidewalk for a use not consistent with the purpose for which it was

constructed, which is not the fact in the case now under consideration.”

It appears in both cases that a regularly constructed driveway was not involved, but the use was over the sidewalk as such and that the unauthorized use over it by heavy vehicles broke the sidewalk and made it dangerous to pedestrians. In the Davis case the court says:

“The jury might infer from the evidence that the appellants leased the land and sidewalk for a use not consistent with the purpose for which the walk was constructed . . . and that such use might, and probably would, create a nuisance by obstructing the safe use thereof by pedestrians.”

In the Zak case the court says:

“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 a result of a use for which it was not normally designed, namely, the passage of heavy motor trucks over it to and from plaintiff’s garage, and in which the flagstones were broken and a hole 7 inches in diameter and 6 inches in depth was made in the sidewalk.”

Without further comment, we submit it is patent that these cases can be of no assistance in deciding the instant case.

Mullins v. Siegal Cooper Co., 95 App. Div. 234, 88 NYS 737 aff. 183 NY 129, 75 NE 1112, likewise is not in point. There was no constructed driveway there involved. The sidewalk was constructed of flagstones. The stable was built out to or very near the sidewalk line. On one side of this building there was a lane leading to the rear to another stable. "During the summer of 1902, some months before the accident to plaintiff, the flagstone in front of the lane became disturbed out of position by reason of heavily laden wagons and trucks passing back and forth over the same on entering and leaving said premises." A flagstone became loose so it rocked when stepped on and was raised above the adjoining stone $2\frac{1}{2}$ to 3 inches. Here was definite proof that the defendant, or his contractor, in going over the sidewalk with vehicles laden with rock or manure caused the defect complained of. It is evident therefor, that the decision in that case can have no authority in the case at bar.

CONCLUSION

We respectfully submit the plaintiff produced no evidence of any negligent act or omission on the part of either of these defendants. There is no proof that either defendant caused the difference in elevation between the driveway and the sidewalk to the west, over which elevation plaintiff stumbled and fell. The evi-

dence shows that this difference in elevation resulted from a reconstruction of the sidewalk to the west. There is no showing that either of these defendants had any duty to correct that construction. We respectfully submit that the trial court committed no error in entering a non suit and dismissal and that its action in so doing should be sustained.

Respectfully submitted.

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