

1953

# Michael V. Maloney v. Salt Lake City : Brief of Appellant

Utah Supreme Court

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Clyde & Mecham; Frank J. Allen; Attorneys for Appellant;

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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MICHAEL V. MALONEY,

*Plaintiff and Appellant,*

— vs. —

SALT LAKE CITY, a corporation,

*Defendant and Respondent.*

Clerk Supreme Court, Utah

Case No.  
7926

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## Appellant's Brief

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CLYDE & MECHAM  
FRANK J. ALLEN

*Attorneys for Appellant*

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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MICHAEL V. MALONEY,  
*Plaintiff and Appellant,*

— vs. —

SALT LAKE CITY, a corporation,  
*Defendant and Respondent.*

Case No.  
7926

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## Appellant's Brief

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This is an action to recover damages for personal injuries suffered when a section of the city sidewalk collapsed, causing the Appellant to fall. The case was tried to a jury. The verdict was in favor of the plaintiff. However, the court nullified the verdict by granting the defendant's motion for a directed verdict, and the plaintiff appeals.

## STATEMENT OF FACTS

The accident in question happened at approximately 105 East South Temple Street, in front of the Eagle Gate Apartments. This is on the north side of South Temple just a short distance east of the intersection of South Temple and State Street. At this point the city maintains a sidewalk which runs east and west. Parallel to the city walk and adjoining it on the north the Eagle Gate Apartments maintain a strip of concrete. A section of the city sidewalk was fissured and cracked and had subsided, leaving a difference in elevation between the city sidewalk and the private walk, with the private walk being the higher of the two.

There is no dispute concerning the fact that the city sidewalk was fissured, cracked and weakened at the point in question, (Ex. A, B and C). There is also no dispute concerning the fact that there was a large cavity under the sidewalk at this point. The cavity was approximately three feet across and fourteen inches deep, (R. 97, 98 and Ex. No. 4). Appellant sustained injuries when this section of the city's sidewalk collapsed under his right foot, causing him to fall heavily on the pavement while his foot was still caught in the hole, (R. 40). The extent of his injuries is not an issue on appeal.

Before the matter went to the jury, the city made a motion for a directed verdict which the court took under advisement. The matter was then submitted to the jury. The jury returned a verdict for the plaintiff for \$1,000.00 special damages, but awarded no general

damages. Thereafter, the court granted the motion for a directed verdict. In view of the fact that the main issue on appeal is the sufficiency of the evidence to sustain the verdict, we will forego a detailed discussion of the evidence here and discuss the evidence in connection with the argument.

## SPECIFICATIONS OF ERROR

1. The court erred in directing a verdict for the defendant in (a) that there was sufficient evidence that a dangerous defect existed in Respondent's sidewalk to submit the issue of negligence to the jury; (b) there was sufficient evidence that the defect had existed for a long enough period of time to constitute notice to the city of the defect; and (c) there was sufficient evidence to show that the defect of which the city had notice was the proximate cause of the injury.

2. The court erred in refusing to grant a new trial in view of the jury's failure to make an award of any general damages.

## ARGUMENT

POINT NO. I. THE COURT ERRED IN HOLDING THAT THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE JURY'S VERDICT.

(a) The jury could reasonably have believed that Respondent's walk had subsided and that the subsidence had resulted in a substantial difference in elevation between the city walk and the private walk adjoining on the north.

In view of the favorable verdict and the court's granting of a directed verdict, plaintiff is entitled to the most favorable view of the evidence. Therefore, where there was a conflict, only that evidence favorable to plaintiff will be noted. There is evidence that the walk in the area of the collapse had been in general disrepair for many years before November 21, 1952, the date of the accident. Mr. Smith, Respondent's witness, testified there were "quite a number of cracks apparent in the concrete", and they had "been there for years", (R. 61). Mr. Turner, Respondent's witness, testified that there had been no essential change in the condition of the walk for six years, (R. 67). He testified particularly about a "wide crack", apparent before the collapse, (R. 66). Mr. Jongejan remembered cracks before the accident which had been there "ever so long", (R. 70). Appellant's Exhibits A, B and C are pictures of the general area and the hole into which appellant's foot dropped. They show a number of cracks around the hole of the kind Respondent's witnesses remember as having existed for many years before the accident. Appellant testified that the pictures fairly represented the condition, (R. 22). The jury could (and since it decided for plaintiff, we must assume it did) conclude that, except for the cavity, Exhibits A, B and C reflected the condition of the walk before the accident.

Mr. Novak, an engineer, stated definitely that the cracks now observable in the city walk and shown on the pictures (Ex. A, B and C) are at least four years old. He also testified that there was a general slope or decli-

nation of the surface areas toward and under a patch which was placed after the accident in repairing the hole, (R. 52-55). It is obvious from Exhibits A, B and C that when the cracks occurred they permitted or caused a general sloping of Respondent's walk on all sides toward the point of eventual collapse. The jury had an opportunity to form first-hand impressions about the slope of the walk approaching the patch through visiting the scene.

Appellant testified that on the Monday after the accident, there were differences in elevation between Respondent's walk and the private walk, varying from a half inch on one end of the hole to an inch on the other end, (R. 24, 25). Plaintiff is corroborated by Exhibits A, B and C, which definitely show the slab to the north to be higher. Even Exhibit 2, taken at such an angle as to minimize it, shows the difference. The differences were presumably even greater at the point of maximum depression within the section which collapsed, because Novak, the engineer, testified that the general slope of the area around the hole declined toward the hole, (R. 52-55).

The jury could have found that the difference in elevation testified to by Appellant existed before the accident. First, the pictures taken by Respondent were taken only minutes after the accident, (R. 75). They show from slightly different angles the exact thing shown by Appellant's pictures. In all the pictures a difference in elevation can be seen. The crack appears old and



there is nothing to indicate a recent change in elevation. At the trial counsel for the city showed the pictures to the jury and unsuccessfully argued that the pictures taken by the city and those offered by the Appellant showed that a decided change took place between the time the city's pictures and the Appellant's pictures were taken. We ask the court to carefully examine the pictures. We submit that they are photographs of an identical condition. The light down into the hole gives prominence to different things, but any close examination will reveal that no change took place after the city's pictures were taken. The difference in elevation clearly appears in Exhibits A and 2.

Secondly, all of the evidence given was to the effect that the cracks were old. Novak said that they were at least four years old, (R. 52-55). Mr. Turner said there had been no essential change in the walk for six years, (R. 67). Mr. Smith said there were a lot of cracks that had been there for years, (R. 61). Mr. Jongejan remembered cracks that had been there "ever so long", (R. 70). Also, attention has already been called to Mr. Turner's testimony that before the accident there was a wide crack in the pavement about "a half inch wide or so", (R. 66). He was Respondent's witness and he so testified on direct examination. There are only two cracks he could have been talking about, the crack marked X—X on Exhibit B, or the one marked Y—Y on Exhibit C. He testified that the "half-inch" crack was between two cement blocks (which crack X—X is not) and that it was not the crack (X—X) running from the

steps of the apartment house out toward the street. He must, therefore, have been referring to a half-inch crack between Respondent's walk and the private walk, (crack Y—Y). This, of course, is the crack referred to by Appellant as causing the difference in elevation. In this regard it might also be noted that while the city sought to meet this evidence by witnesses who had not noticed any difference in elevation (see Turner's testimony), *no witness testified that the difference in elevation noted by Appellant (R. 24-25) was a recent condition arising only after the accident.*

Third, Novak testified concerning the appearance of old cracks and how they differed in appearance from new cracks. The jury, thus informed, saw the crack in question as it sloped downward, (R. 100) into the cement patch. The jury also saw the pictures.

There is thus evidence from which a jury could have found that Respondent's walk had subsided many years before the accident, resulting in a substantial difference in elevation along about two feet of the joinder line between the city and the private walk. There is credible evidence that the difference was as much as an inch on one end of the hole and one-half inch on the other, (R. 24-25). The difference occurred because of a breaking and subsidence of the city walk, (R. 52), and not because of a defect or elevation of the private walk.

There are many Utah cases holding that it is a question for the jury whether a particular defect in a street or sidewalk is reasonably safe or dangerous for travel.

They are cited and the rule is stated in *Ray v. Salt Lake City*, 92 Utah 412, 119 A.L.R. 153. Among them are *Jones v. Ogden City*, 32 Utah 221; *Bills v. Salt Lake City*, 37 Utah 507; *Robinson v. Salt Lake City*, 40 Utah 497, and *Sweet v. Salt Lake City*, 43 Utah 306. In *Ray v. Salt Lake City*, Julia A. Ray tripped over a raised portion of sidewalk located opposite No. 115 on Kelsey Avenue. The difference in elevation between the cement sections there under consideration varied from  $\frac{1}{4}$  to  $\frac{7}{8}$  inches. This court said:

“We can not say that the specified difference in elevation is so slight that a careful or prudent person might not reasonably anticipate danger from its existence”, and “we think a particular defect in a street or sidewalk is reasonably safe or dangerous for travel depends not always upon the matter of difference of elevation or depression, but upon all the surrounding circumstances.”

What are the surrounding circumstances which may be important in determining whether or not a defect is dangerous? In *Johnson v. City of Ilwaco*, 229 P. (2d) 878, the Washington court, citing *Ray v. Salt Lake City*, supra, and concerning itself with this question said:

“The exact extent of the offset is not the only factor to be considered. The nature and character of the sidewalk, its location, the amount of travel over it by pedestrians, the extent to which its presence would ordinarily be seen or observed by travelers on the sidewalk, and many other conditions which might exist, all have to be taken into consideration.”

In the case at bar, the defect was located, according to the stipulation of the parties, (R. 99), near the intersection of two of Salt Lake City's busiest streets. It was immediately in front of a large apartment house, (Ex. 1). There was thus constant pedestrian traffic over the defective area.

Looking at the evidence in the light most favorable to the Appellant, therefore, it is evident that the negligence question is much more definitely for the jury in the instant case than it was in the *Ray* case. There is evidence here that the offset was greater than that in the *Ray* case— $\frac{1}{2}$ " to 1" here as compared to  $\frac{1}{4}$  inch to  $\frac{7}{8}$  inch there. The defect was on busy South Temple Street near State Street, as compared with Kelsey Avenue. It was directly in front of a large apartment. The jury reasonably decided that the defect was dangerous, and that, in the exercise of ordinary care the Respondent should have repaired it. On the question of the existence of a dangerous defect there was evidence sufficient to sustain the jury's verdict. We next turn to the question of notice.

- (b) The existence of the defect for a number of years at a location on one of Respondent's busy thoroughfares constituted notice to Respondent of the defect and its dangerous character.

One of the main issues presented to the court below was the issue of notice to the city of the defect. The city took the position that it had to have notice that there was a cavity under the sidewalk, and that if it did not

have such notice, it was not guilty of negligence. The Appellant took the position, and still does, that it was not necessary to his recovery that the city have either actual or constructive notice of the cavity. The crux of the Appellant's case in this regard involves the fact that the sidewalk was fissured, cracked and weakened at the point where the collapse occurred. There was, as is pointed out above, adequate evidence to support the jury's verdict to the effect that there was a difference in elevation of up to one inch on one of the cracks and that such a difference in elevation on one of the city's busiest streets created a dangerous condition. There is also adequate evidence, as is pointed out above, that this dangerous condition had existed for more than four years, which under the cases cited below is sufficient in point of time to give the city constructive notice of the existence of the crack. We are not contending that one can impute notice of one defect from the existence of a separate and independent defect. That is not the issue involved here. The defect of which the city had notice through the passing of time *was a crack* in the city sidewalk.

The crack in question created a dangerous situation. The danger from a broken walk is not confined to tripping. A person may also turn his ankle and fall. He may lose his balance because the broken part tilts. He might also have, as happened here, a collapsing of the broken section. Thus the same identical crack which presented a patent, visible danger, also caused the sidewalk to be weakened and contributed directly to its collapse. It is,

therefore, not a problem of attempting to impute notice of one defect from the existence of another. The defect here which caused the accident was a substantial crack in the sidewalk. This crack existed for over four years and the city, in the exercise of ordinary care, should have known of its existence.

The cases are clear that a jury can properly find that a city has notice of a defect if it exists on a main, heavily travelled street for a substantial period of time. In this regard, it is not necessary to go to cases from other jurisdictions. The problem has been presented to the Utah Supreme Court in many cases. In a recent Utah case, *Pollari v. Salt Lake City*, 111 Utah 25, 176 P. (2d) 111, this court said:

“The question of whether the city exercised proper vigilance to discover defects depends on the element of time, the nature and extent of the defect, its prominence in location and other factors bearing on what could reasonably be expected of a reasonably acting person charged with the duty of supervising miles of streets and sidewalks. We think under the facts and circumstances of this case the question of constructive notice was a question for the jury.”

In that case the defect had existed for approximately two years in a residential district of the city and was a small hole, “at most five inches by three inches by one and one-half inches deep”, located on the edge of the main walk. In the instant case the defect had existed, as the jury could reasonably have found, for twice as

long, was at least equally noticeable, and was located in an area of heavier pedestrian traffic.

The problem of notice was also presented to this court in *Scoville v. Salt Lake City*, 11 Utah 60, 39 P. 481, wherein the court said:

“The question of notice to Appellant was one of fact for the jury to determine, and not a question for the court (citing authorities). In Wisconsin where a defect in a sidewalk existed one day, and in Massachusetts, where a defect in a highway existed 13 hours, and in Connecticut a few hours from frozen water, it was held that it was for the jury to determine whether that constituted sufficient notice (citing cases). This defect and accumulation of ice was on the most travelled walk in the city. The question of notice is not alone determined from the length of time a defect has existed, but was from the nature and character of the defect, the extent of the travel, and whether it is in a populous or sparsely settled part of the city.”

See also *Jones v. Ogden City*, 32 Utah 221, 89 P. 1006, wherein the court quoted from the *Scoville* case with approval and held that a defect which had existed for three days had existed long enough to permit the case to go to the jury on the issue of notice.

It is, therefore, respectfully submitted that there is evidence from which the jury could have, and presumably did, find that the walk was generally fissured and cracked, and that these cracks had existed for more than four years. The jury also could have, and presumably

did, find that the crack which presented this difference in elevation also was one of the main cracks which caused the weakening of the sidewalk permitting a collapse. It is respectfully submitted that the general fissuring, cracking and subsidence which resulted in a difference in elevation of up to one inch and also caused a weakening of the sidewalk would support the jury's verdict as to the existence of a defect. The evidence that the defect had existed on a busy street for over four years would support the jury's verdict as to the issue of notice. Permitting a defect of this kind to exist four years or more is, under the cases, sufficient to support a jury verdict on the issue of negligence. The next issue relates to proximate causation.

POINT NO. II. IT IS NOT NECESSARY TO THE DOCTRINE OF PROXIMATE CAUSE THAT RESPONDENT'S NEGLIGENCE BE THE SOLE CAUSE, OR THAT APPELLANT'S INJURY OCCUR IN A MANNER WHICH MIGHT HAVE BEEN FORESEEN OR ANTICIPATED.

The record does not reflect the trial judge's reasons for directing a verdict. We believe, however, that he did so because the cavity was one of the causes of the sidewalk collapse, and there was little to indicate on the surface that the cavity existed. We confess that the cavity was *one* of the causes. We also confess that were the cavity the *sole* cause, we could only recover by showing that the city knew or should have known that the cavity existed. Here, however, the cavity was only one



of two causes—the other being the cracking and fissuring of the cement.

The city had notice of the dangerous crack. Its greatest danger was that it might cause people to trip and fall. But it was not *necessary* that a crack cause the injury only by tripping. The sidewalk failed along this very crack. The city would now escape liability, because the crack caused a fall through a collapse of the sidewalk, instead of by tripping the Appellant. The negligence of the city is in permitting this crack to go unrepaired for four years. This unrepaired crack was one of the main and direct causes of the sidewalk failure. The cavity was not the sole cause. By itself it would never have caused the injury. Cement in proper repair will support the weight of a man walking normally down the street. So long as the cement remains firm and unbroken, it will not collapse even though there is a fourteen inch cavity under it. It is thus fundamentally wrong to say that the cavity was the only cause of the collapse. It was the fissuring and cracking which weakened the cement so that it would not support the weight of a pedestrian. Apparently the cavity itself was old. The cement had supported the traffic without breaking. The immediate cause of the collapse was the cracking of the cement.

The law has always been that the negligence of the defendant need be only one of the concurring or contributing causes. It is not necessary for us to show that the cracking and fissuring of the sidewalk was the sole

cause of the injury. In the very recent Utah case, *Charcoz v. Bonneville Irrigation District*, 235 P. (2d) 780, the trial court instructed the jury that if an act of God be the primary cause of damage, there could be no recovery, irrespective of negligence that may have concurred with it in producing damage. The court held that this instruction was erroneous, that it is well settled that one is accountable if his negligence concurs with an act of God or with the negligence of a stranger in effecting damage. Here the cavity which was caused by persons or reasons unknown concurred with the fissuring, cracking and weakening of the sidewalk in causing the plaintiff to fall. This proposition that the negligence of the defendant need not be the sole cause is uniformly recognized by the cases. See, for a general text statement, 38 Am. Jur. 715, Negligence, Section 63.

The conclusion is thus unescapable. The city was negligent, because it permitted the cracked sidewalk to go unrepaired on one of the city's busiest streets for over four years. This unrepaired crack weakened the cement so that it would not support the weight of the appellant. This weakening, (added to the cavity) caused the walk to collapse. It was certainly one of the direct, contributing causes of the injury. Therefore, negligence and proximate cause were shown, and the verdict of the jury should have been sustained.

The cases, we believe, fully sustain our position that it is not necessary that the city be able to foresee the exact manner in which this dangerous, long-existing

crack would cause injury. It is only necessary that the city be able to foresee that this crack would in some manner cause injury. Respondent can cite many cases to the effect that a collapse in a walk where nothing about the surface of the walk suggests the possibility of injury is not actionable. None of the cases cited in the court below by Respondent or found by us in research is a case where there did exist on the surface at the point of collapse a visible defect which was dangerous and which also contributed to the collapse. It is Appellant's position that, once Respondent's negligence has been established, Respondent is liable for all injuries directly attributable to its negligence whether or not the manner of injury was to any extent foreseeable.

A very distinct variance in the approach to legal cause is evident in the cases and among the writers. Some say foreseeability of harm should be considered only in determining whether the defendant was negligent with reference to the plaintiff. Others say liability should be limited, even where negligence is proven, to those consequences which are to some degree foreseeable. A landmark case illustrating the first approach is *In Re Polemis and Furness & Co.*, (1921 (U.A.) 3 KB 560, 90 LJKB 1353. It there appeared that charterers of a ship were carrying, among other things, a quantity of petrol. There had been some leakage so that there were fumes in the ship's hold. In removing the petrol a plank was negligently knocked into the hold, and a resultant spark destroyed the ship. It was found that sparking could not reasonably have been anticipated under the circum-

stances, although some damage could have been. In affirming an award, the court said:

“What a defendant ought to have anticipated as a reasonable man is material when the question was whether or not he was guilty of want of due care under the circumstances. . . . Given the breach of duty which constitutes the negligence and given the damage as a direct result of that negligence, the anticipations of the person whose negligent act has produced the damage appear to me irrelevant.”

Many English and American cases state the *Polemis* view, and it is supported by a formidable group of text writers.<sup>1</sup> Enough heat has been generated about the problem so that arguments are frequently stated. Professor F. H. Bohlen, 40 Am. L. Reg. (N.S.) 80, says:

“It may be hard to mulct the wrongdoer in damages for results which the normal man would not anticipate, but it is more unjust that the person injured by the breach of duty imposed for his protection should not recover for all the loss which has, in the ordinary course of nature, been caused him by the wrong because the wrongdoer could not foresee the full effect of his act.”

Jeremiah Smith thoroughly considered the problem and pointed up the injustice of making foreseeability an element of legal cause in three Harvard Law Review articles (Legal Cause in Actions of Tort, 25 H.L.R. 103, 223, 303). Among his statements are:

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<sup>1</sup> Street Foundations of Legal Liability 116; 1 Bevan on Negligence (Third Edition) 88-90; Jeremiah Smith, as quoted; F. H. Bohlen, as quoted.

“In the first place, it is not the law that, to constitute an action negligent the connection must be such that a particular injury could have been foreseen. If injury in some form would be the natural sequence of the negligence, the party guilty of the negligence is warned of the danger of his course, and that is all the warning to which he is entitled under the law.” Ill. Central v. Creighton, 63 Ill. App. 165.

“The test is whether conditions which lead to an extraordinary or even unprecedented accident were such that no reasonably prudent proprietor would have suffered to exist. The particular manifestations of the result of careless conditions is not infrequently quite out of the usual experience, but if the conditions possess elements of negligence, the person responsible for them may also be held responsible for the result.” Dulligan v. Barber Asphalt Paving Company, 87 N.E. 567.

Most jurisdictions in the United States have adopted one view or the other with reference to the legal cause controversy. The Utah court made its position very clear in the case of *Stone v. Railroad*, 32 Utah 185, 89 P. 715. In that case the Union Pacific Railroad had operated a freight engine from which steam was escaping in such quantities as to obscure the vision of the engineer. Because of the steam and the fact that the engineer was mis-informed that a passenger train travelling in the opposite direction would be an hour and 50 minutes late, a collision occurred. The court admitted that the jury could have found that an injury of the kind which did occur (collision with another train) was a foreseeable consequence of the defendant's sending a defective

engine, but it did not place its decision on that ground. Whether or not collision with another train could have been anticipated, injury of some kind was foreseeable if such an engine (leaking steam) were allowed to operate. The court said at page 205:

“If the act is one which the party in the exercise of ordinary care could have anticipated as likely to result in injury, then he is liable for any injury actually resulting from it, although he could not have anticipated the particular injury which did occur.”

This statement, so definitely an adoption of the view of Bohlen, Smith, etc., has been repeated by the Utah court in *Wilcox v. Wunderlich*, 272 P. 215; *Hess v. Robinson*, 163 P. (2d) 510, and *Furkovich v. Bingham Coal and Lumber*, 143 P. 121.

It is, therefore, respectfully submitted that the jury could have and did find that the city permitted a crack to exist for four years or more; that the crack presented a difference in elevation of up to one inch; that such a difference in elevation was dangerous to pedestrians; that this same identical crack caused the sidewalk to be weak and incapable of supporting the weight of a pedestrian; that because of this crack the sidewalk collapsed, causing the plaintiff to suffer injuries. It clearly is not important that there was another contributing cause (the cavity) which the city could not see from the surface. It is not necessary in tort law that the city's negligence be the sole cause. Here the unrepaired crack was one of the direct and proximate causes. The *Ray v. Salt Lake*

*City* case squarely held that a difference in elevation less than that involved here on a street less heavily travelled, created a condition which the jury could properly find was dangerous and negligent. In the *Pollari* case and the other cases cited above, this court held that defects existing from three days to two years have existed for a sufficient length of time to permit a jury to find that the city was negligent in not discovering them.

It is clear also from the cases that it is not necessary that the unrepaired crack should cause injury only by tripping. This crack caused the sidewalk to become weakened and to collapse. Negligence and proximate causation were proved and the jury resolved the issues on negligence, notice and causation in plaintiff's favor. The verdict should have been allowed to stand.

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POINT NO. III. THE COURT ERRED IN REFUSING TO GRANT A NEW TRIAL BECAUSE THE JURY IMPROPERLY RENDERED ITS VERDICT AWARDING SPECIAL DAMAGES WITHOUT ANY AWARD FOR GENERAL DAMAGES.

A verdict was returned by the jury in the amount of \$1,000.00 designated special damages. The evidence clearly sustains an award of special damages in the amount of \$1,000.00. Appellant's loss of earnings alone amounted to \$1050.00. No award for general damages was made. The uncontradicted evidence shows that Appellant suffered painful injuries, was confined to his

bed for a period of time and thereafter had continuing pain and inconvenience. He is entitled to an award of some general damages. Appellant, therefore, requests the court to reverse the order directing a verdict against plaintiff; to enter an order re-establishing the award of special damages in the amount of \$1,000.00 and permitting a new trial on the question of general damages.

Respectfully submitted,

EDWARD W. CLYDE

FRANK J. ALLEN

*Attorneys for Appellant*