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IN THE SUPREME COURT
OF THE STATE OF UTA

VENUS TRIPP,
Plaintiff and Appellant,

— vs. —

GRANITE HOLDING COMPA
and DOUGLAS OPTICAL
COMPANY
Defendants and Respo

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IN THE SUPREME COURT OF THE STATE OF UTAH

VENUS TRIPP,
Plaintiff and Appellant,

— vs. —

GRANITE HOLDING COMPANY and DOUGLAS OPTICAL COMPANY
Defendants and Respondents.

Case No. 11304

BRIEF OF RESPONDENT GRANITE HOLDING COMPANY

STATEMENT OF CASE

This case involves an action by plaintiff against defendants for personal injuries suffered by plaintiff when she fell on a city sidewalk abutting property owned by Granite Holding Company but leased by defendant Douglas Optical Company for the operation of the business of testing its customers' eyes and selling eyeglasses. Plaintiff had been on the premises leased by Douglas Optical and after transacting her business left the premises in company of another person and fell on a defect on the city sidewalk.

The question presented herein for determination as far as Granite Holding Company is concerned is whether

or not the owner of real property abutting a public sidewalk has a duty to his leasee's business invitees to keep and maintain the public sidewalk, which may or may not be in the inevitable course of ingress and egress to the entrance of the leased premises, free from defects and disrepair not caused or contributed to by the property owner.

DISPOSITION IN LOWER COURT

The Third Judicial District Court (Judge Stewart M. Hanson) granted defendants' Motion for Summary Judgment on the ground that neither defendant had a duty to Douglas Optical's business invitee for the repair and maintenance of the public sidewalk abutting the property owned by Granite Holding Company but leased Douglas Optical Company.

RELIEF SOUGHT

Defendant, Granite Holding Company, seeks to have the action of the lower court affirmed in granting this defendant's Motion for Summary Judgment against plaintiff.

STATEMENT OF FACTS

For the sake of clarity and convenience in this brief the parties will be referred to according to their respective designations in the lower court.

Defendant, Granite Holding Company, is the owner of real property consisting of a building and ground at

1096 East 21st South in an area known as Sugar House in Salt Lake City and which property is located on the Southwest corner of 21st South Street and 11th East Street. At all times pertinent to this action Douglas Optical Company leased a portion of premises described from Granite Holding Company for the purpose of operating an optical shop and where its customers' eyes were examined and where eyeglasses were sold (R. 16).

Inasmuch as the property owned by Granite Holding Company is situated on the southwest corner there are sidewalks on city owned property abutting defendants' property immediately on the north and east sides thereof.

Prior to March 31, 1967, the sidewalk abutting this defendants' property to the north fell into a state of disrepair by reason of weathering and the passage of time. Neither Granite Holding Company nor Douglas Optical Company through any action on their part caused or contributed to the condition of the sidewalk (R. 17).

Mr. William L. Hansen, president of Granite Holding Company, contacted the proper officials of Salt Lake City and requested permission to repair the sidewalk by completely covering the sidewalk abutting its property with a coating of asphalt. Salt Lake City refused permission to repair the sidewalk except according to its own specifications which called for the tearing up of the old sidewalk and the installation of a complete new concrete or cement sidewalk and unless completely new sidewalks were installed Salt Lake City refused to permit

Granite Holding Company to do any repair work (R. 17). Accordingly, the city sidewalk was not repaired by Granite Holding Company.

On March 31, 1967, at approximately 1:30 P.M. plaintiff, who had apparently been to Douglas Optical Company and had purchased a pair of eyeglasses, after leaving the premises referred to and while in company of a person who was supporting and assisting her, fell on the city sidewalk thereby allegedly sustaining the injuries complained of. The place on the sidewalk where plaintiff fell was not on property owned by either defendant but on property owned by Salt Lake City (R. 2, 17-18).

ARGUMENT

POINT I

THE OWNER OF REAL PROPERTY ABUTTED BY A PUBLIC SIDEWALK HAS NO DUTY TO MAINTAIN SAID SIDEWALK NOR REPAIR DEFECTS NOT CAUSED NOR CONTRIBUTED TO BY HIS OWN CONDUCT.

It seems to be well established that the primary responsibility for the maintenance and repair of sidewalks is that of the city and not that of the abutting property owner. *Safeway Stores* v. *Billings,* 335 Pac. 2d 636 (Okla.). A municipal corporation cannot, by its own act, devolve its duty of keeping sidewalks and streets onto abutting property owners so as to relieve itself from liability for injuries resulting to an individual by reason of

its failure to perform such duty. *King* v. *J. E. Crosby, Inc.*, 191 Okla. 525, 131 Pac. 2d 105.

Utah, like most other jurisdictions, has ruled on the duties of cities and landowners of property abutting public sidewalks and streets to pedestrians and other users of public ways and thoroughfares.

In *Spencer* v. *Salt Lake City*, 17 Utah 2d 362, 412 Pac. 2d 449 (1966) plaintiff sued Salt Lake City alleging that she suffered injuries when she tripped and fell on a defective sidewalk where tree roots had raised it about four to six inches in front of 463 Douglas Street. At the pre-trial the District Court granted the city's Motion to Dismiss plaintiff's complaint on the ground that (1) the claim was not filed by plaintiff within 30 days, and (2) the claim was insufficient in that it did not state the amount of damages claimed.

In vacating the lower court's Order of Dismissal and remanding the case for trial, the Supreme Court stated at page 363 of the Utah Reports:

> Our statutes impose upon the city the duty of maintenance of streets and sidewalks, and it is established that the city is liable for negligence in performing this duty; See Nyman v. Cedar City, 12 Utah 2d 45, 361 P. 2d 1114. . . .

Salt Lake City v. *Shubach et al.*, 108 Utah 266, 159 P. 2d 149 (1945) involved an action against defendants to determine the liability of a property owner and of a tenant of the property for damages suffered by the city due to injuries sustained by a pedestrian through a de-

fect in a trap door in the sidewalk installed and maintained for the benefit of the property.

The case confirmed the duty of the city to maintain public sidewalks within its limits in a safe condition for use in the usual mode by pedestrians thereon. However, the *Shubach* case differs from the instant case because in the former case a vault or chute had been placed under the public sidewalk for the use and convenience of the abutting landowner while in the latter the condition of the public sidewalk was not caused or contributed to by the acts of defendants.

Basinger v. *Standard Furniture Company et al.*, 118 Utah 107, 220 Pac. 2d 117 (1950) is a case more nearly akin factually to the case on appeal hereon. That was an action by plaintiff against defendant to recover for injuries sustained by her on stumbling over the ridge on a driveway which was used by defendant to unload merchandise from its warehouse to its retail store but which driveway went across and was part of a public sidewalk. The trial court granted a non-suit to all defendants and plaintiff appealed. The Supreme Court affirmed the lower court holding that the evidence failed to show that defendants caused the ridge to occur or that they had any obligation to correct it.

As part of its consideration of the matter the court quoted from the Schubach case, supra, at 159 P. 2d 149, 143 stating

> The ultimate liability is upon the author or continuer of the nuisance . . .

And at 159 P. 2d 149, 154 the court said:

> There exists no obligation on the part of an abutter to keep the sidewalk adjoining his premises in repair, nor is he liable for any state of disrepair. His obligation can only arise where he creates through use or otherwise some unsafe or dangerous condition. See *Daley* v. *Matthews,* 49 Cal. App. 2d 545, 122 P. 2d 81.
>
> . . . . .
>
> The evidence fails to show that the respondents caused the ridge to occur, or that they had any obligation to correct it. Their use of the driveway was within their general right of use thereof. The respondents were not making any extraordinary use of the sidewalk, nor doing anything which was in derogation of the rights of the public. Certain cracks appear across the driveway — from east to west — but they, be their cause from use or weathering, are not probative of any negligent use by defendants. It follows, that the trial court was correct in his ruling granting a judgment of non suit as against the plaintiff.

Some cases from other jurisdictions with the same or similar holdings are as follows:

Ellsworth v. *Colorado Beverage Company,* 150 Colo. 19, 370 P. 2d 159, in the absence of statute, the owner or occupant of adjoining property is under no obligation to repair the street in front of his premises and is not liable for an injury arising from a defect thereon not resulting from his affirmative act.

Major v. *Fraser,* 78 Nev. 14, 368 P. 2d 369, an abutting property owner or occupant who did not create a

defect in the sidewalk could not be held liable to a pedestrian on the theory of nuisance, or on the theory of breach of duty to repair for injuries sustained by the pedestrian when she fell after her heel caught in a crack in the sidewalk.

Jones v. *Western Auto Supply,* 370 P. 2d 562 (Okla. 1962), defendants who owned or occupied a building abutting a public sidewalk had no duty to keep the sidewalk in repair and were not liable for injuries sustained by pedestrian who stepped into a hole in the sidewalk where the defect was not created by defendants.

Since plaintiff does not disagree as to the law as it defines the duty of the owner or occupier of property abutting public sidewalks as that duty relates to pedestrians, defendant, Granite Holding Company sees no reason to argue extensively on this subject. Suffice to say that the law as it is now well established imposes no duty on either defendant to repair the defect on the public sidewalk at the place plaintiff fell and allegedly injured herself. This is so under the well established general rule of law and the facts of this case inasmuch as the defects on the sidewalk were not created or caused by the defendant.

POINT II

THE DUTY OF REPAIRING DEFECTS IN A PUBLIC SIDEWALK IN THE INEVITABLE AVENUE OF INGRESS AND EGRESS INTO DEFENDANTS ABUTTING PROPERTY, WHICH DEFECTS WERE NOT CAUSED OR CREATED BY DEFENDANTS, SHOULD NOT

BE IMPOSED UPON DEFENDANTS IN THIS CASE BECAUSE:

A. PLAINTIFF HAS AN ADEQUATE REMEDY AT LAW AND THEREFORE NO NEED DICTATES THE EXTENSION OF SUCH DUTIES.

B. THE TERMS "INEVITABLE AVENUE OF INGRESS AND EGRESS" ARE SO AMBIGUOUS THAT NO RULE CAN BE FORMULATED THAT WOULD REASONABLY SERVE AS GUIDELINES FOR THE DUTIES IMPOSED ON THE ABUTTING LANDOWNER IN THIS AND SIMILAR CASES.

C. ABSENT A DUTY TO DO SO, DEFENDANT LANDOWNER ATTEMPTED TO GET AUTHORITY TO REPAIR THE DEFECTS IN THE SIDEWALK IN ORDER TO MAKE IT SAFE BUT WAS REFUSED SUCH AUTHORITY BY THE CITY.

The elements which defendant, Granite Holding Company, urges, militates against extending the duties of an abutting landowner for the repair of defects on a public sidewalk not created by him, and as outlined will be discussed under Point II on the order presented above.

A. PLAINTIFF HAS AN ADEQUATE REMEDY AT LAW AND THEREFORE NO NEED DICTATES THE EXTENSION OF SUCH DUTIES.

The following code provisions are pertinent to the matter being discussed:

> Section 63-30-8, U. C. A., 1953, as amended: Immunity from suit of all governmental entities is waived for any injury caused by a defective, unsafe, or dangerous condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct or other structure located thereon.
>
> Section 63-30-11, U. C. A. 1953, as amended: Any person having a claim for injury to person or property against a governmental entity or its employees may petition said entity for appropriate relief including the award of money damages.
>
> Section 68-30-13, U. C. A., 1953, as amended: . . . any claim filed against a city or incorporated town under Section 63-30-8 shall be governed by the provisions of Section 10-7-77, Utah Code Annotated, 1953.
>
> The applicable provisions of Section 10-7-77, U. C. A., 1953 are:
>
> Every claim against a city . . . for . . . injuries . . . caused by the defective, unsafe, dangerous . . . condition of any . . . sidewalk . . . of such city . . . shall within thirty days after the happening of such injury . . . be presented to the . . . city council of such city . . . in writing, signed by the claimant. . . .

As indicated by the Utah Supreme Court in the case of *Spencer* v. *Salt Lake City,* supra, the state statutes impose upon the city the duty of maintenance of streets and sidewalks, and it is well established that the city is liable for negligence in performing that duty. Section 10-7-77, U.C.A., 1953, provides the means by which the claimant initiates and presents this claim for injuries to the city. In support of this, defendant cites and by reference adopts the cases discussed and cited in Point I.

Inasmuch as plaintiff has an adequate remedy at law against the tortfeasor in this action, necessity does not require that the law as it now is in relation to pedestrian and abutting property owners to city sidewalks be extended to give plaintiff a remedy not heretofore thought necessary by the accumulated legal and judicial wisdom up to this point in history. Rather than extend the duties of abutting landowners so that his duties as to pedestrian users of city sidewalks become harsh, burdensome, equitable, and impractical, let plaintiff look to the remedy provided for her by the state legislature for the injuries allegedly sustained by her.

B. THE TERMS "INEVITABLE AVENUE OF INGRESS AND EGRESS" ARE SO AMBIGUOUS THAT NO RULE CAN BE FORMULATED THAT WOULD REASONABLY SERVE AS GUIDELINES FOR THE DUTIES IMPOSED ON THE ABUTTING LANDOWNER IN THIS AND SIMILAR CASES.

Plaintiff seeks to have this court extend the doctrine of business invitor-invitee to non-owned premises of the property owner where such non-owned premises involve the inevitable avenue of ingress and egress to the owner's premises. Defendant, Granite Holding Company, of course, was not engaged in business at 1096 East 21st South so it did not invite plaintiff to its premises for business or any other purpose. Plaintiff was however, a business invitee of defendant, Douglas Optical Company, at the premises owned by Granite Holding Company.

This defendant contends that no relationship of business invitor-invitee existed between it and plaintiff. However, even if such a relationship could be construed to have existed, it would be meaningless to extend that relationship to premises not owned by this defenedant.

The word "inevitable" means according to *Black's Law Dictionary,* 4th Ed., p. 916:

> Incapable of being avoided; fortuitous; transending the power of human care, foresight, or exertion to avoid or prevent, and therefore suspending legal relations so far as to excuse from the performance of contract obligations, or from liability for consequent loss.

Defendant contends that the terms "inevitable avenue of ingress or egress" to its premises is so ambiguous that no rule can reasonably be set down to guide the property owner as to where his duty extends to his business invitee while on another's premises.

Suppose plaintiff lived ten miles from defendant's premises. She decided to leave her home and go to defendant's store. After leaving her home she walked on the sidewalk on her premises and after getting on city property immediately outside her property she fell because of a defect on the city sidewalk. Suppose further that there was no other way she could leave her property. Would the city sidewalk in front of her home, ten miles from defendant's store, be an inevitable avenue of ingress to defendant's property? Certainly she could not avoid passing over that portion of the sidewalk to get to her destination so in that sense it would be an inevi-

table avenue of ingress. Surely it would be ridiculous to extend defendant's duty to plantiff as that duty relates to repairing defective sidewalks in front of plaintiff's home and yet miles from defendant's premises.

Consider a closer case. Should defendant be given the duty of repairing defects on a city sidewalk in front of a store or other premises adjacent to his? If so, which avenue is the inevitable avenue of ingress and egress to defendant's premises. Is the city sidewalk that runs from the corner to the south the inevitable avenue, or is the sidewalk that runs from the corner to the west the inevitable avenue, or is the cross walk that runs to the east across Highland Drive the inevitable avenue or is the cross walk that runs north from the corner across 21st South the inevitable avenue of ingress or egress to defendant's premises? What is an inevitable avenue of ingress and egress? Where does such an avenue run in relation to defendant's property. Can there be more than one such avenue? How far from defendant's premises does it extend?

It seems apparent to defendant because of the difficulties involved in attempting to formulate a reasonable concept and rule on this regard that reason, equity, and practicability dictate against such an extension of the rule as advocated by plaintiff.

C. ABSENT A DUTY TO DO SO, DEFENDANT LANDOWNER ATTEMPTED TO GET AUTHORITY TO REPAIR THE DEFECTS IN THE SIDEWALK IN ORDER TO MAKE IT

SAFE BUT WAS REFUSED SUCH AUTHORITY BY THE CITY.

The law as discussed in this brief amply demonstrates that Granite Holding Company had no duty to protect pedestrians on a public sidewalk by repairing defects thereon when the sidewalk abutted the property owned by defendant and when defendant did not cause or create the defects.

However, in an attempt to improve the corner on which its property is located both as to looks as well as safety, defendant contacted the proper authorities of Salt Lake City and requested permission to place an asphalt layer or coating on the sidewalk where it abutted defendant's property. The city agreed to permit defendant to repair the sidewalk thus relieving it of its obligation to do so but insisted that the sidewalk be completely replaced. This, of course, defendant refused to do because of the cost involved in doing as the city desired.

The point here is that this defendant went beyond what the law and reasonableness required of it in even desiring to repair the sidewalk in the first place. Plaintiff would now have the court penalize Granite Holding Company for not doing what the law did not require it to do and for not doing what it did not have to do in a manner that extreme caution and reasonableness would and could not demand. Defendant believes that the inequity of such a situation is apparent without further comment.

CONCLUSION

Based upon the foregoing facts, argument and authorities cited, defendant Granite Holding Company, urges the court to affirm the judgment of the lower court in granting defendant's Motion for Summary Judgment.

Respectfully submitted,

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