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Margaret Mcallister v. Lamar Bybee, Carvel Mattsson, Administrator of the Estate of O'Dell Watson, Deceased, California Pacific Utilities Company, a Corporation, and Kanab City, Utah : Brief of Defendant-Respondent Kan Ab City, Utah

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CASES CITED

In the Supreme Court of the State of Utah

MARGARET McALLISTER,

Plaintiff and Appellant,

- vs -

LAMAR BYBEE, CARVEL MATTSSON, Administrator of the Estate of O'Dell Watson, deceased, CALIFORNIA-PACIFIC UTILITIES COMPANY, a corporation, and KANAB CITY, UTAH, a municipal corporation,

Defendants and Respondents.

Case No. 10726

BRIEF OF DEFENDANT-RESPONDENT
KANAB CITY, UTAH
A Municipal Corporation

NATURE OF THE CASE

This is an action to recover for damages allegedly sustained in Plaintiff's fall on a street or sidewalk in Kanab, Utah.

DISPOSITION IN THE LOWER COURT

The trial court non-suited the Plaintiff under Rule 41(b) at the end of her case. (R.6).

RELIEF SOUGHT ON APPEAL

Respondent Kanab City seeks affirmation of the dismissal.

STATEMENT OF FACTS

For the reason that the trial court could not have found otherwise than that the Plaintiff not only failed to establish the cause of her fall but also conclusively proved her own contributory negligence, Respondent Kanab City submits that questions examining duty to remove obstructions, responsibility for the area of Plaintiff's fall, and determination of whether or not the conditions were negligently contrived or maintained are subjunctives with which this Court need not deal.

The remaining fact statements of the Defendants and Respondents California-Pacific Utilities Company, LaMar Bybee, and Carvel Mattsson, Administrator of the Estate of O'Dell Watson, deceased, accurately and comprehensively reflect the record and Respondent Kanab City concurs therein.

To save time and space this Respondent will not repeat those statements of fact except to summarize that the Plaintiff had traveled this way before and was familiar with the area and the conditions (Tr. 43, 50); she was not distracted (Tr. 50-52) or limited in vision or by visibility (Tr. 43, 50); did not know what, if anything, she fell over (Tr. 32, 55, 56, 57, and 58) but whatever it may have been it could have included rock, grass, or weeds (Tr. 56, Exhibit 1) but her fall could have been — and most likely was — attributable to her failure to step up over the curb (Tr. 46, 47, Disposition P. 17).

It is obvious that if any hazard existed, Plaintiff failed to prove she encountered it, but did prove she failed to see and avoid it.

STATEMENT OF POINTS

POINT I.

THE TRIAL COURT DID NOT ERR IN GRANTING A JUDGMENT OF DISMISSAL WHERE APPELLANT FAILED TO ESTABLISH THE CAUSE OF HER INJURY.

POINT II.

THE APPELLANT WAS EITHER CONTRIBUTORILY NEGLIGENT OR ASSUMED THE RISK OR BOTH, AS A MATTER OF LAW.

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT ERR IN GRANTING A JUDGMENT OF DISMISSAL W H E R E APPELLANT FAILED TO ESTABLISH THE CAUSE OF HER INJURY.

The statement of Plaintiff is accurate where at Page 10 of her brief she concedes:

> There is also no question that at the time of the fall, Plaintiff did not know what she fell over but made a determination at a later date as to the cause of her fall ***

There is no foundation for the conclusions made in that later reconstruction of the cause of Plaintiff's fall.

First, Plaintiff's testimony is that she did not know how many steps she had taken from the car (Tr. 56) nor does she know which foot may have struck an impediment (Tr. 56) although she claimed she was watching where she

was going (Tr. 50). Her deposition discloses that she did not know at that time whether or not she had negotiated the curb (Tr. 47, Deposition P. 17).

No specific location of the vehicle laterally along the curb is fixed with such particularity as would dictate the Plaintiff's fall on or near any specific objects.

The authorities cited by the other respondents all conclude in denial of liability where a determination of the cause is based upon conjecture or speculation. Tremelling vs. Southern Pacific Company, 51 Utah 189, 170 P. 80 (subsequent opinion 70 Utah 72, 257 P. 1066); Sumsion vs. Streator-Smith, Inc., 103 Utah 44, 132 P2d 680; Devine vs. Cook, 3 U2d 134, 279 P2d 1073.

POINT II.

THE APPELLANT EITHER WAS CONTRIBUTORILY NEGLIGENT OR ASSUMED THE RISK OR BOTH, AS A MATTER OF LAW.

Plaintiff knew of the cement blocks, (Tr. 50) having gone by them many times on her way to the bank (Tr. 43); there were no limitations on her vision or visibility (Tr. 43, 50) and she was not distracted (Tr. 50-52). Whitman vs. W. T. Grant Co., 16 U2d 81, 395 P2d 918, holds that if a hazard is visible a person is charged to see and avoid it and as a matter of law

> * * * if he fails to do so, it is concluded that he was negligent either in failing to look, or in failing to heed what he saw * * *

Where injury resulted from an observable hazard, the Whitman case holds that to present a jury question there must either be a distraction or a condition obscuring, or preventing Plaintiff from seeing, the danger.

The Plaintiff, knowing the condition by past experience, assumed any risk which might have existed. Ferguson vs. Jongsma 10 U2d 179, 350 P2d 404; Johnson vs. Maynard 9 U2d 268, 342 P2d 884; Clay vs. Dunford 121 Utah 177, 239 P2d 1075; Wold vs. Ogden City 123 U 270, 258 P2d 453.

CONCLUSION

The trial court correctly dismissed the action because the Plaintiff, as a matter of law, had no right to recover both for failure to establish the legal cause of any injuries and for her contributory negligence and assumption of the risk.

Respectfully submitted,

OLSEN AND CHAMBERLAIN
76 South Main Street
Richfield, Utah

Attorneys for Defendant-Respondent
Kanab City, a Municipal
Corporation