

1967

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 Appellant

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In the Supreme Court of the State of Utah

MARGARET McALLISTER,

Plaintiff and Appellant,

vs.

LAMAR BYBEE, CARVEL MATTS-
SON, Administrator of the Estate of
Odell Watson, Deceased,

CALIFORNIA - PACIFIC UTILITIES
COMPANY, a corporation, and
KANAB CITY, UTAH, A Municipal
Corporation,

Defendants and Respondents.

Case No. 10726

UNIVERSITY OF UTAH

MAR 31 1967

BRIEF OF APPELLANT

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AS APPEALED FROM THE JUDGEMENT OF THE
SIXTH JUDICIAL DISTRICT COURT

FOR KANE COUNTY, UTAH

HONORABLE FERDINAND ERICKSON, JUDGE

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Clerk, Supreme Court, Utah

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CALIFORNIA - PACIFIC UTILITIES
COMPANY, a corporation, and
KANAB CITY, UTAH, A Municipal
Corporation,

Defendants and Respondents.

BRIEF OF APPELLANT

NATURE OF THE CASE

This is an action brought by the plaintiff-appellant for damages for injuries received by the plaintiff-appellant and the damages resulting therefrom, on the 16th day of September, 1963, at approximately 9:15 in the morning, when the plaintiff-appellant tripped over obstructions in what is sometimes called the parking area, between the curb and the sidewalk proper, in Kanab, Kane County, Utah. The defendant, Kanab City, Utah, a Municipal Corporation, was the municipality involved; the defendants LaMar Bybee and Carvel Mattsson, as Administrator of the estate of Odell Watson, deceased were the owners of the property in front of which said obstructions were located, and California-Pacific Utilities Company, a Corporation, the other defendant, was a tenant of the same property, and was an exclusive tenant.

DISPOSITION IN LOWER COURT

The case was tried before a jury in Kanab, Kane County, Utah, commencing 4 May, 1966, and running until the 5th day of May, 1966. At the conclusion of the plaintiff's case, and in response to motions by each of the defendants for dismissal for failure to prove a prima-facie cause of action, these motions were verbally granted, under provisions of Rule 41-B, Utah Rules of Civil Procedure, upon the ground that on the facts presented by the plaintiff and the law applicable thereto, plaintiff had shown no right to relief as against any of the defendants. A written judgment of dismissal, dated the 10th day of May, 1966, was entered by the Clerk of the Court on the 16th day of May, 1966. A motion for a new trial was filed, and argued on the 2nd day of August, 1966. Although no written order was entered on that date, the Honorable Ferdinand Erickson, District Judge, announced that he was overruling and denying the motion for a new trial. Thereafter, this matter has come to an appeal on the appeal of the plaintiff and appellant.

RELIEF SOUGHT ON APPEAL

The plaintiff-appellant seeks a reversal of the judgment of dismissal and of the order overruling and denying the motion for a new trial, and desires that the Supreme Court order the matter to be remanded and tried before a jury.

STATEMENT OF FACTS

The plaintiff and appellant believes that the facts are as follows: That prior to the 16th day of September, 1963, the plaintiff-appellant was steadily employed as a cook in the Trail's End Cafe, in Kanab, Kane County, Utah, and was making \$12.00 a day. That on the 16th day of September, 1963, at approximately 9:15 in the morning, the plaintiff, accompanied by a daughter, a grandchild, and a son, in a vehicle driven by the son, went to the Kanab Branch of the First State Bank of Salina. That this bank is housed in a building adjacent to the property in question, being east of the property in question. That there was an alley between the building in which California-Pacific Utilities Company was housed, being the property in question, and the Kanab Branch of the First State Bank of Salina, and this prop-

ty was owned by the defendants LaMar Bybee and Carvel Mattsson, the Administrator of the Estate of Odell Watson, deceased, which gave the exclusive possession of the property owned by the defendants LaMar Bybee and Carvel Mattsson, Administrator of the Estate of Odell Watson, deceased, to California-Pacific Utilities Company, and placed on California-Pacific Utilities Company a duty of care and maintenance of the area on which said building was located. In approaching the bank, the son of the plaintiff drove down the street going from East to West, the bank being located on the north side of the street, and parked the vehicle in which the plaintiff and her companions were riding directly in front of the California-Pacific Utilities Company offices which are in the building on the property in question and in Kanab, Utah. The son of the plaintiff parked the vehicle parallel, and within an inch or two of the curb. The plaintiff, in approaching this area, was riding in the right front seat of the vehicle. Her son was driving. Her daughter and the grandchild were in the rear seat. The vehicle was a station wagon. LaMar Bybee and Odell Watson, now deceased, had purchased this property several years prior thereto, in approximately 1957, and at the time of their purchase, there was a canopy extending over the sidewalk to the curb, that had been used to house a service station. The uprights were adjacent to the street, and rested upon two cement blocks which extended above the curbing approximately six inches, and said blocks were approximately 18 inches in each direction. The vehicle stopped approximately between the two blocks. At the time of the trial, said blocks had been removed by the defendant Lamar Bybee. In relation to the curb there was the customary four to six-inch lip on the curb, and the blocks were against this cement lip of the curb, and north thereof, toward the building. There had also been a water pipe that came up immediately adjacent to the east side of the east block in approximately the center thereof, and after purchasing said building, the defendant LaMar Bybee, and Odell Watson, now deceased, removed the canopy for their purposes and left the blocks. The water pipe was cut off approximately the height of the blocks, or slightly lower. On the 16th of September, 1963, at the time of the injury, these blocks and water pipe were in this condition and had been there for several years.

The plaintiff left the automobile by the right front door, turned and shut the door, and stepped toward the bank in a diagonal direction, and stumbled and fell, and became unconscious, and the injuries resulted. After the accident, plaintiff determined she had fallen over the east of said blocks, or the water pipe in connection therewith, and did not at the time of the accident have any idea what she had fallen over. Permanent injuries and damage have resulted and there are considerable doctor bills and loss of wages, in addition to pain and suffering. Within thirty days of this accident, a damage claim was duly submitted to Kanab City in accordance with Title 10-7-77, Utah Code Annotated 1953, same being dated 3 October, 1963. In addition attempts were made to serve same on Mr. Bybee, and eventually he was served, although not within any 30-day period. On October 22, 1963, a special meeting of Kanab City Council was held, at which the notice that was later served upon the plaintiff, stated that notice was given and that a quorum was present. The notice dated 24 October, 1963, stated that at said meeting the claim of Margaret McAllister date October 3, 1963, was rejected on the grounds that Kanab City was not negligent; that any injuries that were received by the plaintiff were the sole and exclusive result of the negligence of the plaintiff and that without admitting negligence on the part of Kanab City, if any such negligence could be found, the contributory negligence of the plaintiff precluded her recovery.

ARGUMENT

Point 1

EACH OF THE DEFENDANTS OWED A DUTY TO MAKE PREMISES SAFE TO PLAINTIFF AND OTHER PEOPLE CROSSING SAID AREA.

It goes without saying that Kanab City owes a duty to all people to keep its streets and sidewalks free from unsafe, dangerous, defective and obstructive conditions. Authority for this statement starts with Utah Code Annotated 1953 in Section 10-8-8, giving the city authority to lay out, establish, open, alter, widen, narrow, extend, grade, pave, or otherwise improve streets, alleys, avenues, boulevards, sidewalks, parks, airports, public grounds, and may vacate the same or any parts by ordi-

nance, and is extended in Section 10-8-11, Utah Code Annotated, 1953, pertaining to streets, encroachments, lighting, sprinkling and cleaning:

"They may regulate the use of streets, alleys, avenues, sidewalks, crosswalks, parks, and public grounds prevent and remove obstructions and encroachments thereon, provide for the lighting, sprinkling and cleaning of same."

This is a question of a duty of a city to its citizens or any other persons to make the streets safe and remove obstructions. There is a long history of cases and judgments against cities in the state of Utah. There is a comprehensive discussion of liability of a city to remove obstructions and to keep its streets free from unsafe, dangerous, defective or obstructive conditions, in the case of *Niblick vs. Salt Lake City*, 111 P. 2d 800, 100 Utah 573. While this particular case held that the statute did not pertain to negligence of its employees in driving vehicles and items of that nature, there is a tremendous amount of authority quoted pertaining to obstructions and negligence in keeping this condition from coming into existence. This case cites the two statutes cited above, and in addition the statute requiring a claim to be presented, as being the basis of cities' liability in cases of this nature. In this case, the case of *Alder vs. Salt Lake City* is cited, 231 P. 1103, 64 Utah 568.

"There is a well-recognized exception to the general rule of immunity in cases involving the maintenance of care of public streets, and it is generally held that municipalities are liable for negligence in failing to keep the avenues of public travel in safe condition and repair. It is argued that a similar exception should be made in the case of the maintenance of public parks, playgrounds, etc. The exception in the case of streets is founder upon public policy and expediency, and is recognized in this state by legislative act."

The case of *Niblock vs. Salt Lake City*, cited above, then goes on to a considerably comprehensive discussion by the Utah State Supreme Court setting forth the duties of a city in keeping its public ways clear, and cites a great many other cases as authority, including, but not limited to *Brown vs. Salt Lake City*, 33 Utah 222, 93 P. 570, *Morris vs. Salt Lake City*, 101 P. 373, 35 Utah 474, and no end of cases from other jurisdictions.

Next comes the question as to whether or not the

duty of a city to keep a street free from obstructions extends to the area between the curb and the sidewalk, which is often referred to as the parking, in which the cement blocks and the pipe referred to above were located. The inclusion of this area has been very definitely defined as part of the city's liability in the case of *Hunt vs. Tooele City*, 334 P. 2d 555, 8 Utah 2d 323. In this instance, a judgment for damages was sustained by the Utah State Supreme Court against Tooele City for injuries received in stumbling on a slight break in a curbing, where there was an unusual defect and rise between the curbing and the parking area. In this particular case, as to the liability of the city for negligence of leaving an item of this nature, Utah State Supreme Court quotes Section 10-7-77, Utah Code Annotated 1953, which has been cited above, and in addition quotes the *Niblick vs. Salt Lake City* cited above; also the case of *Salt Lake City vs. Schubach*, 159 P. 2d, 149, 108 Utah 266, and in quoting the case of *Bills vs. Salt Lake City*, 109, P. 745, 37 Utah 507, makes the following statement:

"A person using a public street has no reason to apprehend danger, and is not required to be vigilant, to discover dangerous obstructions, but he may walk or drive in the daytime or nighttime, relying on the assumption that the corporation whose duty it is to keep the streets in a safe condition for travel have performed that duty, and that he is exposed to no danger from its neglect."

And in relation to a contributory negligence question arises makes the following statement:

"What is meant is that he needs exercise ordinary care only to detect and avoid obstructions or defects that are obvious, and that may and ought to be detected, and hence avoided by the exercise of ordinary care"

Consideration of the *Hunt Vs. Tooele City* case very definitely should deter one from any thought that the parking is not included in the streets, and that the duty of the city does not cover the parking as well as the sidewalk and the street proper.

Pertaining to the landowner and the tenants, there is no question as to their liability for maintaining a hazard of this nature. In the first place, this hazard was created by the affirmative act of the landowner, as set forth in the testimony of Mr. Bybee, beginning on Page

143 of the transcript on Line 19, and running to Page 146, Line 18. This testimony through this portion shows that at the time the alterations were made and the canopy was taken down, Bybee and Watson owned the building and California-Pacific Utilities Company was in possession of it, under a 10-year lease from 1959 to 1969, the lease having been entered in evidence as exhibit 7, and the taking it down was paid for by Watson and Bybee, was requested by the City and the State Road Commission in making street alterations, and that the premises were under a lease requiring the tenant to take care of the area. When a trap of this nature was created at that time under a lease agreement in existence at that point, there is no question that all three defendants were participants in and parties to creating the trap that caused the damage to the plaintiff. In addition, the Revised Ordinances of the City of Kanab, 1959, adopted by the City Council of Kanab, Utah, on the 8th day of September, 1959, which were in effect in 1963 at the time of the injury, contains the following paragraph:

"18-1. Obstruction of Sidewalks. It shall be unlawful for any person owning, occupying or having control of any premises, to place, or permit to be placed, upon the half of the sidewalk of the half of the street next to such premises:

"1. Any broken ware, glass, filth, rubbish, refuse matters, ice, water, mud, garbage, ashes, tin cans or other like substances.

"2. Any vehicle, lumber, wood, boxes, fencing building material, dead trees, tree stumps, merchandise or other thing which shall obstruct such public street or sidewalk or any part thereof, or the free use and enjoyment thereof, the free passage over and upon the same, or any part thereof, without the permission of the City Council."

Certainly the cement blocks come under the all-inclusive item, "or other thing". Certainly the duty is placed not only upon the property owner, but upon the occupant as well, or anyone else having control.

The State Supreme Court has taken the attitude in the past that after a city has been liable on an obstruction of this nature, under circumstances where a building is under control of an occupant or a tenant, the city may collect its damages from the person having control

of same, in the case of Salt Lake City vs. Schubach, 159 P. 2d 149, 108 Utah 266. This was a situation in which a person had been injured by catching a heel in a grating that was normally in the sidewalk for the purpose of covering a hole for putting merchandise into the basement of a building. The Schubach defendants were tenants of a portion of the building only, but apparently had control of this particular obstruction. The individual that was injured had collected from Salt Lake City. In this particular instance, the Supreme Court of Utah upheld a judgment against the tenant Schubach for maintaining this obstruction, with the statement that anyone who obstructs a sidewalk in such a manner that it is not for the benefit of the city or any other individual, must do so in such a manner that he incommodes the public as little as possible, with the further provision that he shall excavate and install such structures on the condition that he "shall use more than ordinary care." In addition, the court holds,

"This duty is a continuing one, appurtenant as it were to the land, and liability for failure in duty cannot be delegated, nor can it be terminated except by transfer of the land or surrender of the privilege of maintaining the structure."

In the case at hand, the lease transfers the duty of maintaining the structure, but certainly under this case of Salt Lake City vs. Schubach, it carries with it the additional duty of maintenance of the adjoining sidewalk and street premises. Also, in the case at hand, we have not only a question of negligence in maintaining the structure, but gross negligence in removing a portion of the structure and leaving an item that should have been removed at the time the structure was removed. In the Schubach case there is no end of authority holding similar conclusions. In the Schubach case, the city had paid a judgment to one Sabey, the person who had been injured, and the issue was whether or not it could be recovered from the owner of the abutting property or the tenant. The Supreme Court of the State of Utah allowed recovery from the tenant in this particular instance, intimating that it was based upon the exclusive use and control of the item that caused the damage, and indicating that had the use and control not been passed on in a manner by agreement and practice, the property owner would have been liable. However, the court also

made a finding that if the defects causing the injury existed at the time of making the lease, the owner does not thereby escape liability, but simply allowed the liability to be passed on through the owner to the tenant because of the nature of the use and control.

Many cases hold that violation of a law or ordinance is negligence in itself and there is no question that an ordinance of Kanab City was violated by all defendants except Kanab City and that Kanab City tolerated the violation. In *Skerl vs. Willow Creek Coal Co.*, 69 P.2d 502, 92 Utah 474, this was set out and has been amplified by many other cases. In the *Skerl vs. Willow Creek Coal Company* case there are quoted several other cases as follows: "When a standard of duty or care is fixed by law or ordinance, and such law or ordinance has reference to the safety of life, limb, or property, then, as a matter of necessity, a violation of such law or ordinance constitutes negligence."

In this Kanab case we have the ordinance and the violation and the condonation of the violation. Of course, the defendants will claim that the ordinance was not passed for the benefit of the plaintiff. However, this is not true. For what reason would such an ordinance be passed except to make the streets safe for everyone who used them, including the plaintiff?

Also, see the recent case of *Klafta vs. Smith*, 404 P.2d 659, 17 Utah 2d 65, in which a similar situation was ruled negligence as a matter of law and the only issue to be tried was damage and the action of the trial court in so ruling was upheld by the Utah Supreme Court.

Point II

EACH OF THE DEFENDANTS FAILED TO PERFORM SAID DUTY AND THIS WAS NEGLIGENCE ON THE PART OF EACH OF SAID DEFENDANTS.

It goes without saying that it is admitted by all parties that at the time of the accident, the blocks were still in the position that they had been in when Mr. Bybee had removed the canopy at the request of the City and the State Road. Also, plaintiff's exhibit No. 1, which shows as having been received in evidence on Page 14 of the transcript, was admitted without objection by any defendant, and was identified as a picture taken a few days after the 16th of September, 1963, and on Page 13, Line 12 of the transcript is identified as correctly repre-

senting the area that he was photographing at the time the picture was taken, and that it was taken shortly after the 16th of September, 1963, in front of the California-Pacific Utilities office. There is no question as to the representations of the photograph being correct. Under these conditions, there can be no argument as to the existence of the hazard at the time of the accident.

Point III

PLAINTIFF WAS INJURED AS A DIRECT AND PROXIMATE RESULT OF FAILURE OF DEFENDANTS TO PERFORM SAID DUTY.

There can be no question that the plaintiff was injured as a result of the fall in the area on the 16th day of September, 1963. By the time the claim was filed with Kanab City, which was 3 October, 1963, plaintiff had been back to the area and concluded that she had fallen over the cement block or the pipe, and the claim so states. 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, and as to leaving the car and closing the door, her testimony is to the effect that her back was turned, and that she turned and fell as she started toward the bank, which would have been in a diagonal direction from the car. In cross-examination, the plaintiff very definitely stated that she did not know what she fell over, and has never made any other statement at anytime, including depositions and any other item. Under these conditions, the claim to Kanab City, which was offered in evidence as an exhibit by the defendants and which was admitted in evidence by the plaintiff, regardless of the notes of the transcript, and which was received in evidence, one must conclude that she determined after the fall, the item that caused her to fall. After all, the lady was unconscious and was in the hospital for several days.

This raises the question as to whether or not a person can go back to a scene after several days and determine what he fell on, and then claim damages as a result of same when he did not know what he fell on at the time. The Supreme Court of the State of Utah has in several instances indicated not only that a person can go back and determine what he fell on, but that a reasonable assumption of what caused damage can be collected upon.

A most interesting case has recently been decided in this field by the Utah State Supreme Court, and which may come before the State Supreme Court again. This is the case of *Spencer vs. Salt Lake City*, 412 P. 2d 449, 17 Utah 2d, 362, in which a claim against Salt Lake City was thrown out by a trial judge on a city's motion to dismiss claim because the claim that had been presented to the city was insufficient by its failure to state the amount of damage which was claimed. The action of the trial judge was reversed by the State Supreme Court on March 18, 1966, holding that the only thing the claim lacked was the amount of damages claimed, and that since the city was given the essential facts which would enable it to make a proper investigation, the claim was satisfactory. This case was later tried before a jury in Salt Lake County and during the early summer of 1966, a Salt Lake County jury awarded damages in the amount of \$29,347.78. In the jury trial of this item, a special form of verdict was submitted as follows:

"Question No. 1. Did Frances Spencer trip over a defect in the sidewalk. Answer — Yes.

"Question No. 2. If she did, was she negligent in not seeing the defect? Answer — No.

"Question No. 3. If so, was the negligence a principal cause of the injury to her? Answer — Not answered.

"Question No. 4. If it was not or she was not negligent, what amount of money would fairly and adequately recompense Frances Spencer for any and all injuries and damages she sustained as a result of her tripping over the defect in the sidewalk. Answer — \$29,437.78."

During the trial of this particular matter, it developed that Frances Spencer did not know what she had fallen on at the time she fell, and went back to the same place at a later date and determined that she had fallen over a defect in the sidewalk. Of special significance is the case of *Hunt vs. Tooele City* preciously cited as 334 P. 2d 555. 8 Utah 323. In this particular matter, in a dissenting opinion, Justice Henroid quotes a cross-examination to the effect that at the time the lady fell, she was watching, but she didn't see the hole that she put her foot in, and that after she had fallen she looked back and determined what had tripped her, and in this particular instance, the Supreme Court of the State of

Utah, with one dissent, endorsed the damages that were paid. In the Utah Report of the Hunt vs. Tooele City case, on page 327 in 17 Utah 2d, there is a picture of the hole in Tooele City that Mrs. Hunt stepped in. A comparison of the two photographs, to-wit, the Hunt vs. Tooele City photograph, and the photograph of the cement blocks in the case now at hand, same being Exhibit "1", shows that if hazards can be comparative, the hazard in Kanab was much greater. Also, in the Supreme Court Reports, on Tom vs. Days of '47, Inc, 401, P.2d 946, 16 Utah 2d 386, there is not even a definite finding as to what caused the plaintiff, Frank Bill Tom, to fall off the grandstand. He had been a participant in a rodeo and went to participate but got there too late, and they let him and his wife and children in for nothing. Mr. Tom and two teen age sons took seats in the top row of the bleacher section. The wife and the younger children were two or three rows below them. During the performance a Brahma bull broke through a fence that was later determined to be unsatisfactory under the use to which it was being put, and charged into the crowd, and Mr. Tom was found injured at the bottom of the area he had been sitting on:

"Although there was no direct evidence as to what caused plaintiff to fall, there was evidence that when the bull charged, the crowd stampeded; that plaintiff was not drunk at the time! that he was seated on top of the bleachers; that the top of the bleachers had no back support; that plaintiff was found lying unconscious on the ground, his head evidently having struck concrete. The circumstances outlined above were sufficient from which the jury could reasonably conclude and find the plaintiff's fall was caused by the surge of the frightened crowd as it tried to escape when the bull charged the fence."

When I compare this statement with the admitted fact situation of Mrs. McAllister returning to the scene and determining that she had fallen over these cement blocks or pipe, and the Hunt vs. Tooele City, and the Spencer vs. Salt Lake City cases, there is no question that the matter should have been submitted to a jury,

and that if a jury had found for the plaintiff, they would have been justified in doing so.

Point IV

THE TRIAL COURT ERRED IN TAKING CASE FROM THE JURY.

This case was taken from the jury by the trial court at the end of plaintiff's case without evidence being offered by the defendants. The question of contributory evidence was not considered by the court, and had it been, the cases are legion that this is a question for the jury to consider. The language of the judgment Dismissal is, " . . . upon the ground that on the facts presented by plaintiff, and the law applicable thereto, plaintiff had shown no right to relief as against any of the defendants . . . ". Under these conditions, and in the light of the cases quoted above, and in view of the court's duty to take the plaintiff's uncontested evidence, and give it the strongest possible import, there is no question that there was sufficient evidence presented to go to the jury on the question of proximate cause and damages. Under these conditions, the court very definitely should have put the defendants on their proof and allowed the case to go to the jury.

CONCLUSION

In conclusion the plaintiff-appellant claims that the trial court has erred and shown bias and prejudice in dismissing the case under the circumstances, inasmuch as giving the strongest possible construction to the plaintiff's testimony, in view of the cases that have been cited above, there was more than sufficient evidence to go to a jury, and a great deal more evidence than in many of the cases that have been upheld by the Utah Supreme Court in judgments for plaintiffs; and that the matter should be remanded to the trial court with instructions to enter a new trial. This is especially true when we consider that we allow people to be convicted of criminal acts on the basis of circumstantial evidence; when we consider that we have allowed the collection by Frank Bill Tom, where no one knows how he got pushed off the bleachers — whether the crowd did it or whether he went to sleep and fell off, and when we consider that in both the case of Spencer vs. Salt lake City

and Hunt vs. Tooele City, they were similar types of actions against a city for defective sidewalk and curb conditions, and that in each case after the injury the plaintiff ascertained what caused the fall.

Respectfully submitted,
Patrick H. Fenton,
Attorney for Plaintiff
and Appellant.