

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 Defendant Respondent California Pacific
Utilities Company

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In the Supreme Court of the State of Utah

MARGARET McALLISTER,

Plaintiff and Appellant,

- VS -

LAMAR BYBEE, CARVEL MATT-
SSON, Administrator of the Estate of
O'Dell Watson, Deceased, CALI-
FORNIA-PACIFIC UTILITIES COM-
PANY, a corporation, and KANAB
CITY, UTAH, a municipal corporation,

Defendants and Respondents.

Case No.
10726

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MAR 31 1967

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BRIEF OF DEFENDANT-RESPONDENT
CALIFORNIA PACIFIC UTILITIES COMPANY,
a corporation

Appeal from the Judgment of the
District Court of Kane County, Utah
Honorable Ferdinand Erickson, Judge

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FILED

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Clerk Supreme Court Utah

TABLE OF CONTENTS

	<i>Page</i>
NATURE OF THE CASE.....	1
DISPOSITION IN LOWER COURT.....	1
STATEMENT OF FACTS	2
STATEMENT OF POINTS	6
POINT I:	
THE RESPONDENT, CALIFORNIA-PACIFIC UTILITIES COMPANY, IS NOT LIABLE FOR CONDITIONS EXISTING ON A PUBLIC HIGHWAY WHICH IT DID NOT CREATE OR MAINTAIN FOR ITS OWN BENEFIT.	6
POINT II:	
THE FINDINGS OF FACT WHICH ARE ESSENTIAL TO THE APPELLANT'S RECOVERY MUST BE BASED UPON SPECULATION AND CONJECTURE.....	6
POINT III:	
THE APPELLANT'S CLAIM IS BARRED BECAUSE, AS A MATTER OF LAW, SHE WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AND VOLUNTARILY ASSUMED A KNOWN RISK.	6
ARGUMENT	7
POINT I:	
THE RESPONDENT, CALIFORNIA-PACIFIC UTILITIES COMPANY, IS NOT LIABLE FOR CONDITIONS EXISTING ON A PUBLIC HIGHWAY WHICH IT DID NOT CREATE OR MAINTAIN FOR ITS OWN BENEFIT.	7

TABLE OF CONTENTS

	<i>Page</i>
POINT II:	
THE FINDINGS OF FACT WHICH ARE ESSENTIAL TO THE APPELLANT'S RECOVERY MUST BE BASED UPON SPECULATION AND CONJECTURE.....	17
POINT III:	
THE APPELLANT'S CLAIM IS BARRED BECAUSE, AS A MATTER OF LAW, SHE WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AND VOLUNTAR- ILY ASSUMED A KNOWN RISK.	23
CONCLUSION	29

CASES CITED

<i>Basinger v. Standard Furn. Co.</i> , 118 Utah 121, 220 P.2d 117, 119 (1950)	8, 9, 18
<i>Black v. Southern Pacific Co.</i> , 12 P.2d 981 (Calif. 1932).....	15
<i>Cole v. Kloepper</i> , 123 U. 452, 260 P.2d 518 (1953)	26
<i>Daly v. Matthews</i> , 122 P.2d 81 (Calif. 1942).....	16
<i>Devine v. Cook</i> , 3 U.2d 134, 279 P.2d 1073 (1955).....	21
<i>Esernia v. Overland Moving Co.</i> , 115 U. 519, 206 P.2d 621 (1949)	28
<i>Ferguson v. Jongsma</i> , 10 U. 2d 179, 350 P.2d 404 (1960).....	28
<i>W. T. Grant Co. v. Casady</i> , 188 P.2d 881 (Colo. 1948).....	16

TABLE OF CONTENTS

	<i>Page</i>
<i>Hunt v. Tooele City</i> , 8 U. 323, 334 P.2d 555.....	22
<i>King v. J. E. Grosbie</i> , 131 P. 2d 105 (Okla. 1942).....	16
<i>O'Keefe v. Berry</i> , 42 N.E. 2d 267 (Mass. 1942).....	18
<i>Otten v. Big Lake Ice Co.</i> , 270 N.W. 133 (Minn. 1936).....	14
<i>Salt Lake City v. Schubach</i> , 108 Utah 266, 159 P. 2d 149, 151-152 (1945)	7, 9, 10, 14, 19
<i>Spencer v. Salt Lake City</i> , 17 U.2d 362, 412 P. 2d 449.....	22
<i>Sumsion v. Streator-Smith, Inc.</i> , 103 U. 44, 132 P.2d 680 (1943)	21
<i>Tom v. Days of '47, Inc.</i> , 16 U.2d 386, 401 P.2d 946.....	23
<i>Tremelling v. Southern Pacific Co.</i> , 51 U. 189, 170 P. 80 (1917) and 70 U. 72, 257 P. 1066 (1927).....	19, 21
<i>Whitman v. W. T. Grant Co.</i> , 16 U. 2d 81, 395 P. 2d 918 (1964)	27
<i>Wightman v. Bettilyon's, Inc.</i> , 15 U. 2d 200, 390 P.2d 120 (1964)	27
<i>Wold v. Ogden City</i> , 123 U. 270, 258 P.2d 453 (1953).....	29
<i>Woodson v. Metropolitan Street Railway Co.</i> , 123 S.W. 820 (Mo. 1909)	7

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Case No.
10726

BRIEF OF DEFENDANT-RESPONDENT
CALIFORNIA PACIFIC UTILITIES COMPANY,
a corporation

NATURE OF THE CASE

This is an action for damages for personal injuries allegedly sustained by plaintiff when, after alighting from a car at the curb, she fell as she was attempting to walk from the curb to the public sidewalk on the main street of Kanab, Utah.

DISPOSITION IN LOWER COURT

The trial court dismissed the action as against all defendants at the close of plaintiff's evidence and, after her motion for new trial was denied, plaintiff appealed.

STATEMENT OF FACTS

Appellant's Statement of Facts is incomplete and it is not supported by citations to the pages of the record, as required by Rule 75 (p) (2), Utah Rules of Civil Procedure. Therefore, respondent California-Pacific Utilities Company, herein called for convenience "Pacific," sets forth the following statement of the facts, with supporting citations to the numbered pages of the transcript of testimony.

Plaintiff claimed she sustained injuries in a fall which occurred in Kanab, Utah, on the morning of September 16, 1963, just after she alighted from the passenger side of her car, parked parallel to the curb, and began to walk across the area between the curb and the public sidewalk toward the bank where she intended to make a deposit. The car was facing west, on the north side of the street, and in front of property owned by respondents Bybee and Watson (Ex. A, Tr. 31, 32).

The bank building was east of the car, so that appellant was intending to walk in a northeast direction. Between the Bybee-Watson property and the street there was a public sidewalk, a wide curbing or parking strip and the curb and gutter, all of which was public property, owned by respondent Kanab City (Tr. 139).

There was a building, immediately north of the sidewalk, which had been leased by Bybee and Watson to Pacific, and which is described in the record as the "light company office" (Ex. 7, Tr. 31). East of this building, and between it and the bank, was a 14-foot vacant lot, also owned by Bybee and Watson (Tr. 146).

When Bybee and Watson acquired their property in 1955, there was a canopy extending from the south side of the building, out over the sidewalk to the street line. A service station business had formerly been conducted in the building and there had been gasoline pumps under the canopy (Tr. 139). The canopy had been supported by pillars, resting on concrete blocks about 18 inches square. When the street was widened, the authorities required the building owners, Bybee and Watson, to remove the canopy and pillars. They did so, leaving the concrete bases intact, near the curb. These are the concrete blocks, which were six or eight inches high, and which are mentioned throughout the record (Tr. 143, 144, 151).

There was a small pipe, projecting slightly above the ground, just east of the easternmost cement block. This pipe, described as a water pipe, apparently had been used in the service station business. It was in place prior to the time the building was leased to Pacific and, like the cement block, was surrounded by public land owned by the City of Kanab (Tr. 145, 146).

Appellant had worked for 16 years in a cafe diagonally across the street from the point where this incident occurred. She had seen the cement block many times as she passed by, walking to work. She had good eyesight and she was watching where she was going (Tr. 43, 50). Nothing occurred in the immediate area to distract her attention as she began to walk from her car to the bank (Tr. 51, 52).

In attempting to describe what had occurred, appellant testified she got out of the car, closed the door, started to walk "and I fell over something, but I don't know what it was" (Tr. 32). She did not know how many steps she had taken. It might have been one step or it might have been more. She did not know which foot had encountered an object that caused her to stumble and admitted she did not know whether her foot "hit the cement block or the pipe or some other object in the area" (Tr. 56). There was "a lot of grass around there" and she did not know whether there was a rock "hidden in the grass or weeds" that she might have stumbled over (Tr. 56).

She admitted that in her deposition, taken 14 months after the incident, and about 18 months before trial, she had testified that she wasn't sure whether she had safely negotiated the curb or not. Her statement then is found on page 17 of the deposition, quoted at page 46 of this record:

“Well, I stepped on it and I don’t know whether it was right on the curb or I stepped out to step up on the curb, but I stepped out and then I stepped up and brought my other foot forward and then I went over and that’s all I know and all I can tell you.”

Although appellant had read and signed her deposition, she had not corrected this statement. However, upon trial, she claimed to be more sure of what occurred and testified she was “very much more sure” that she had safely reached the top of the curb and had not stumbled over it (Tr. 47).

Appellant had no memory of what she had actually done and she had gone back to the scene and had reconstructed what had occurred, as is shown by the following testimony which concluded her cross-examination:

“Q. All right, now you went back and looked at this area afterwards and then you have reasoned from that that you must have hit one of these things that we’ve talked about; isn’t that true?

A. Yes.

Q. But so far as having an actual memory that you can tell this jury and this judge, you cannot say what happened; isn’t that true, an actual memory that you can actually call on your mind, you can’t tell us, can you?

A. No.” (Tr. 47, 58.)

At the conclusion of plaintiff's evidence, the court granted defense motions for involuntary dismissal, upon the ground that plaintiff had shown no right to relief as against any of the defendants.

Plaintiff filed a timely motion for new trial and upon its denial, this appeal followed.

STATEMENT OF POINTS

POINT I.

THE RESPONDENT, CALIFORNIA-PACIFIC UTILITIES COMPANY, IS NOT LIABLE FOR CONDITIONS EXISTING ON A PUBLIC HIGHWAY WHICH IT DID NOT CREATE OR MAINTAIN FOR ITS OWN BENEFIT.

POINT II.

THE FINDINGS OF FACT WHICH ARE ESSENTIAL TO THE APPELLANT'S RECOVERY MUST BE BASED UPON SPECULATION AND CONJECTURE.

POINT III.

THE APPELLANT'S CLAIM IS BARRED BECAUSE, AS A MATTER OF LAW, SHE WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AND VOLUNTARILY ASSUMED A KNOWN RISK.

ARGUMENT

POINT I.

THE RESPONDENT, CALIFORNIA-PACIFIC UTILITIES COMPANY, IS NOT LIABLE FOR CONDITIONS EXISTING ON A PUBLIC HIGHWAY WHICH IT DID NOT CREATE OR MAINTAIN FOR ITS OWN BENEFIT.

The duties imposed by law for the maintenance and care of the sidewalk also apply to the parking strip between the sidewalk and the curb; the parking strip is treated as part of the sidewalk for this purpose. *Woodson v. Metropolitan Street Railway Company*, 123 S.W. 820 (Mo. 1909). The primary duty of maintaining the sidewalk rests upon the City of Kanab. In *Salt Lake City v. Schubach*, 108 Utah 266, 159 P.2d 149, 151-152 (1945), this Court stated:

“That the city is charged with the duty of maintaining the sidewalks within its limits in a safe condition for use in the usual modes by pedestrians thereon is so well established as to need no citations of authority.”

The evidence in the instant case establishes that the concrete block and the small pipe which the appellant now believes might have caused her fall were located on public property located on the street side of the sidewalk and owned by Kanab City (Tr. 158-159, 160-161).

The liability for the condition of a public sidewalk is imposed upon a private person only when such person creates the danger. In *Basinger v. Standard Furniture Co.*, 118 Utah 121, 220 P.2d 117, 119 (1950), this Court held:

“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.”

The evidence here demonstrates the fact that the cement block and the pipe located on the parking strip where the appellant fell were not constructed by respondent Pacific but existed at the time of the lease. Moreover, the removal of the pillars and canopy which exposed the concrete block was undertaken solely by the respondents Bybee and Watson, at the insistence of Kanab City, without any participation by Pacific. The evidence establishing these facts is found in the testimony of respondent Bybee, who testified he and Watson acquired the large piece of property in 1955 and leased a portion of it, on which the Pacific office was located, in 1959. The canopy and pillars were in place at the time of the lease but they were not part of the leased property and when the city requested they be removed, the building owners complied, without notice to, consent by, or participating payment from, Pacific (Ex. 7, Tr. 143, 144, 161, 162).

This evidence establishes that respondent Pacific in no way created the alleged hazards, and thus, under the holding of the *Basinger* case cannot be held responsible for any injury caused by the presence of the objects on the parking strip.

In *Salt Lake City v. Schubach*, *supra*, the Court indicated another possible way that liability might shift from a city to a private person. Although such person may not have created the hazardous condition on a public sidewalk, he may still be subject to liability if he receives control of the hazard and maintains it for his benefit. The Court clearly defined the circumstances necessary for such a shift of liability. The *Schubach* case involved an action in indemnity by the city against the property owner and the tenant to recover the amount of a judgment rendered against the city in favor of the injured party. The Court held the property owner liable on the theory of implied contract; he was allowed to construct a sidewalk elevator, which added to the enjoyment of his land, in consideration for his implied promise that he would properly construct and maintain it.

Applying the *Schubach* rule to the facts of the present case, it is clear that the owner of the property, at the time the canopy was constructed and the cement foundations and pillars were installed on city property, undertook the duty of insuring they presented no unreasonable risk of harm to the public. The Court in the *Schubach* case then went on to define the conditions

under which this obligation could be transferred. "Only by conveying the land, or by leasing it in entirety, so that the lessee is then in the shoes of the owner, may he escape liability." (Page 157) From this, it is seen that, in this case, the obligation undertaken by the owner who constructed the canopy passed to the respondents LaMar Bybee and O'Dell Watson when they purchased the property. The obligation remained with them and existed at and after the time of the lease to Pacific in 1959.

The Court in the *Schubach* case then went on to define the circumstances under which such an obligation would pass to a lessee and a judgment in favor of the city and against the tenant was reversed because there was no showing that the tenant specifically undertook the obligation imposed on the owner who constructed the sidewalk elevator, nor was there implied acceptance of the obligation, since there was no showing that the tenant had control of the sidewalk elevator.

Applying the *Schubach* decision to the present case, it is clear that the tenant in the instant case, respondent Pacific, did not have, nor did it undertake, any obligation concerning such hazard as might exist by reason of the cement blocks or the pipe on the public parkway; it had no control over that ground or the objects imbedded in it, nor did it agree to undertake any obligation concerning them. In fact, the respondents Bybee and Watson specifically retained control and any obli-

gation arising therefrom. This is established by the testimony of Mr. Bybee and by the terms of the lease. The canopy and the land beneath it were not included in the lease; only the building, from the front wall where the canopy began, to the rear wall, was leased to Pacific. The lease excluded all surrounding property, as is shown by the following description of the leased premises:

“That certain building situated on the north side of Center Street in Kanab, Utah, on Lot 22 of Block 2, Kanab Townsite Survey, said building having a frontage of approximately 20 feet and a depth of approximately 30 feet. Together with the right to use the existing driveway on the west side of the building and with the right to the use of parking and unloading space of approximately 30 square feet to the rear of said building.” (Ex. 7)

In this regard, the lessor and respondent, LaMar Bybee, testified upon cross-examination as follows:

“Q. Mr. Bybee, the property that you are renting to California-Pacific is actually just a building itself, is it not?

A. That's right.

Q. All right. Now . . . the front and south part of the building that they rented stopped north of the main sidewalk line, isn't that true?

A. That's true, yes.

.

Q. And the area that we've been concerned with here, the blocks and the pipe you say that was adjacent to the blocks is south of there, of the property that California-Pacific rented; isn't that right — south by several feet?

A. South.

Q. Out towards the street in other words?

A. Yes.

Q. It's across the public sidewalk, south of your property line and on public property?

A. That's right.

Q. And when the city gave notice to you and the highway department to take out the canopy in the first place, you did that without requiring California-Pacific to do any part of it, isn't that true?

A. That's right.

Q. That was your affair, not theirs, isn't that true? Yours as distinguished from California-Pacific?

A. Yes.

Q. And they also had nothing to do with the concrete blocks? They didn't take those out, did they?

A. No.

Q. You never gave them any notice to do that, did you?

A. No, I did not (Tr. 160-162)."

The testimony of Mr. Bybee further established that he and Watson owned the land immediately west, north and east of the building leased to Pacific and that the building is therefore "on front center of a bigger rectangular piece" they owned (Tr. 162).

Pacific, as lessee, undertook no duty of maintaining the building. That obligation, by the terms of the lease, remained with Bybee and Watson, as is shown by the ninth clause of the lease:

"The lessors promise and agree to maintain said building and premises at a reasonably good state and condition at all times during the terms of this lease." (Ex. 7)

The actions of the respective parties subsequent to the lease illustrate their intent that Pacific should have absolutely no control over the canopy and the concrete blocks. The testimony from the record, as quoted above

from pages 160-162, establishes that the removal of the canopy and the later removal of the concrete blocks was accomplished without any consultation, notice or consent by Pacific.

This Court in the *Schubach* case further held that any obligation in regard to the sidewalk elevator arose as a *quid pro quo* of the benefit conferred upon the owner by its existence. There is no evidence in the instant case that the canopy or the pipe in any way benefitted Pacific or was used by it in its business operation.

The removal of the canopy and pillars exposed the cement blocks, which created a more dangerous condition than the pillars, since the blocks were not as easily observed. Further, the removal of the pillars made access to the pipe easier, and thus increased the likelihood of a pedestrian using the parking strip to trip over the pipe. The fact that the canopy and pillars were removed at the request of the city is a very significant fact.

In *Otten v. Big Lake Ice Company*, 270 N.W. 133 (Minn. 1936), an ice company was engaged in hauling ice across the highway to various delivery points in the area. The county desired to make the highway safer, and paid the defendant ice company to construct a tunnel under the highway to use in hauling its ice. The plaintiff, while walking along the highway, fell into the excavation which comprised part of the completed tunnel.

The court held that the ice company was not liable for the dangerous condition created by the tunnel because it was the county's project and they alone were liable for the safety of the highways.

In *Black vs. Southern Pacific Company*, 12 P.2d 981 (Calif. 1932), a city widened the street, but the railroad company failed to widen, to the same extent, the space between its signal devices at a railroad crossing located on the street. The plaintiff collided with a signal device while traveling along the widened portion of the street. The court held the railroad company was not liable for the injury since the condition was created by a project of the city, even though the injury involved a device belonging to the railroad. The court stated:

“And while in the present case the condition in which the street was left after the improvements were made was likely to mislead travelers as to the width of the crossing, this condition was not created by the railroad company or upon its property, and it was under no duty to warn of the danger of deviating from the established crossing; nor as between the company and the plaintiffs was there any duty to fence its right of way along the newly paved portion of the highway.”
(Page 986)

In the present case, any danger that was created was incident to a city project, was created at the request of the city, existed on property owned by the city, and thus was the city's responsibility. It most certainly was

not the responsibility of respondent Pacific, which was merely a tenant of a building on the other side of the public sidewalk.

Appellant cites Kanab City Revised Ordinances, Sec. 18-1, in an attempt to persuade this Court to use it as a measure of the respondents' conduct. There are several reasons why the ordinance is inapplicable to respondent Pacific.

First, the ordinance, by its terms, applies only to one who places or permits the placement of the items mentioned. The testimony previously quoted establishes that Pacific did not place the pipe or cement blocks on the parking, nor did it have control of the canopy so as to permit their placement or removal.

Secondly, the ordinance applies only when the items are placed on the sidewalk without the permission of the city. The above-quoted testimony establishes that the exposure of the cement blocks was not only permitted, but requested by the city.

Thirdly, it is usually held that such ordinances are not to be used as a standard of care. *Daly v. Matthews*, 122 P.2d 81 (Calif. 1942); *W. T. Grant Co. v. Casady*, 188 P.2d 881 (Colo. 1948); *King v. J. E. Grosbie*, 131 P.2d 105 (Okla. 1942).

POINT II.

THE FINDINGS OF FACT WHICH ARE ESSENTIAL TO THE APPELLANT'S RECOVERY MUST BE BASED UPON SPECULATION AND CONJECTURE.

The facts necessary to the appellant's recovery are not supported by solid evidence, but only upon speculation and conjecture. She does not know how far she had walked when she fell; she may not have even been in the vicinity of the block or the pipe. She does not know what she fell over, whether it was a rock, a rut or incline, a cement block, or the pipe or a combination of these.

In addition to her testimony, quoted earlier in this brief in the Statement of Facts, there are numerous instances in the record indicating the uncertain and speculative nature of appellant's evidence. For example, she was shown a photograph of the area, Exhibit A, and was then asked:

"Q. And I presume you do not know where you fell?

A. No, I don't." (Tr. 43)

Although she had been uncertain of it upon deposition, appellant concluded at the trial that she had safely negotiated the curb, but she did not know what happened from that point, saying:

“... I stepped out onto the curb and then I stumbled over something, but I don't know what thing” (Tr. 44).

She could not state at what point she stumbled after closing the car door:

“Q. But from there on out you don't know whether you took one step, or five steps from the car, or however many in between; isn't that true?

A. Right.

Q. And you don't know whether it was your left foot or your right foot or whatever it was you did; isn't that true?

A. Yes.” (Tr. 57)

The possible alternative causes of the appellant's fall have varying legal effects. If she tripped over a rock, there is no liability on the part of any of the respondents, *O'Keefe v. Berry Co.*, 42 N.E. 2d 267 (Mass. 1942); if she tripped over a rise or rut in the parking strip, then the only possible liability would be upon the city, *Basinger v. Standard Furniture Co.*, *supra*.

Moreover, the placement of liability would vary, depending on whether the appellant tripped over the cement blocks or the pipe, since the pipe in no way bene-

fited the property to give rise to an obligation on the part of the owner in favor of the city, under the ruling in the *Schubach* case, whereas there may have been such a benefit in regard to the canopy. However, in neither event would there be responsibility upon Pacific, the tenant here.

As a further indication of the speculative nature of appellant's proof as against this respondent, there is some question as to whether the pipe (if that was what, in fact, appellant stumbled over) was even located on the land abutting the front of the building Pacific had leased. There is testimony indicating it was east of an extension of the east wall of the building and, if so, it would have been on land abutting the vacant lot owned by respondents Bybee and Watson (Tr. 146).

This Court has held that in cases where there are alternative theories of what caused an accident, and no rational basis upon which to choose between them, so that liability varies depending on the alternatives, recovery must be denied. In the case of *Tremelling v. Southern Pacific Co.*, 51 U. 189, 170 P. 80 (1917), appeal after remand, 70 U. 72, 257 P. 1066 (1927), the plaintiff's intestate was riding on a train as a brakeman, and was later found dead, lying next to a car on an adjacent track. His death had been caused by a severe skull fracture. The plaintiff alleged that the skull fracture was caused by the deceased striking his head against

a steel car on the adjacent track, and that the car had been negligently left in that position by the defendant. The defendant contended that the plaintiff's allegation was based on pure conjecture, that it was possible that the deceased's skull had been fractured by his falling and striking the frozen ground. This Court held that the plaintiff must fail since there was no rational basis upon which the jury could choose between the two alternatives. It said:

“ . . . The rule is well established that where an accident occurs through an alleged negligence of one person which results in injury or damage to another, and the injured person seeks to recover damages, and it is made to appear that the accident may have been occasioned by one of two or several causes, and that the person complained of is responsible only for one of them, then the burden is on the plaintiff to show that the accident and resulting damages were produced by the cause for which the person complained of is responsible, and in case of a failure to establish such a fact, the plaintiff must fail in the action. In 29 Cyc. 625, it is said: ‘The evidence must, however, do more than merely raise a conjecture or show a probability as to the cause of the injury, and no recovery can be had if the evidence leaves it to conjecture which of two probable causes resulted in the injury, where defendant was liable for only one of them.’ ” (170 P. at 83)

In the same case, on appeal after remand, the Court quoted the above statement again and added:

“Respondent quotes from numerous adjudicated cases, all more or less in point, to the effect that no legitimate inference can be drawn that an accident happened in a certain way by simply showing that it might have happened in that way, without further showing that it could not reasonably have happened in any other way. Tested by this rule plaintiff in the instant case failed to prove defendant’s liability for the accident.” (257 P. at 1074.)

The doctrine of the *Tremelling* case was reaffirmed in *Sumsion v. Streater-Smith, Inc.*, 103 U. 44, 132 P.2d 680 (1943), and *Devine v. Cook*, 3 U 2d 134, 279 P.2d 1073 (1955). Thus, appellant failed to establish a case and the trial court’s ruling was correct because appellant presented possible alternative causes of her injury without any basis in the evidence to choose between one or the other.

The appellant argues that an injured plaintiff may go back to the scene of the accident and there reconstruct the events and conclude how her injury occurred. However, it is difficult to see how, in this case, that would in any way decrease the speculative nature of the cause of the appellant’s injury. Since the appellant has no idea of how far she walked before she fell or any recollection of the object over which she fell, there is no way to reconstruct the chain of events to permit even a calculated guess as to the cause of her injury. If the appellant does not know how far she traveled before she

fell, admits the positive existence of two objects either of which could have caused her fall, admits the possible existence of other objects often found on parking strips which could have caused her fall, it is impossible to determine, outside of pure speculation, the cause of her fall.

Several cases are cited in support of appellant's theory that she may return to the scene of the accident and speculate as to the cause of her fall. The appellant first makes a general reference to the entire record of the trial on remand in the case of *Spencer v. Salt Lake City*, 17 U. 2d 362, 412 P. 2d 449. However, the record does not support the appellant's argument. The record establishes that the plaintiff in that case went back to the scene of the accident, but her visit was not to ascertain the cause of her fall. On the contrary, there is no indication in the record that she was in doubt as to the cause of her fall and, instead, there is affirmative evidence in the record that she ascertained the cause of her fall at the time it occurred: "I don't remember seeing any raised sidewalk *until I tripped.*" (Emphasis added.) (*Record, Spencer v. Salt Lake City*, p. 98.)

The appellant also cites *Hunt v. Tooele City*, 8 U. 2d 323, 334 P.2d 555, as supporting her argument. However, after reading that opinion, this respondent has failed to find any support for the appellant's argument. The object over which the plaintiff fell in that case

was ascertained at the time she fell, and there was absolutely no evidence nor was there even a hint that she went back to the scene and made the determination.

Finally, the appellant cites *Tom v. Days of '47, Inc.*, 16 U. 2d 386, 401 P.2d 946. This case likewise does not support the appellant's argument. In the *Tom* case, there was evidence, based upon expert testimony, upon which the finder of fact could reasonably exclude one of the two alternative causes of the accident involved in that case. There is no such evidence in the instant case.

POINT III.

THE APPELLANT'S CLAIM IS BARRED BECAUSE, AS A MATTER OF LAW, SHE WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AND VOLUNTARILY ASSUMED A KNOWN RISK.

The judgment of the trial court should be upheld because the appellant, as a matter of law, was guilty of contributory negligence or voluntarily assumed a known risk. The evidence establishes that she was well aware of the existence of the cement block and the pipe, the objects which she now is sure she tripped over. She testified as follows:

“Q. Mrs. McAllister, this was clear, bright day, was it?

A. Yes, it was.

Q. And I suppose you had occasion to go to the bank many times in the years preceding this accident, haven't you?

A. Yes.

Q. As I recall, I think you told us that the accident happened about 9:15 in the morning?

A. Yes.

Q. And you had seen those concrete blocks there before, haven't you?

A. Yes. (Tr. 43)

. . .

“Q. And you knew the cement block was there. You had seen that lots of times, hadn't you?

A. Yes.

Q. And there was no reason you knew of why you didn't see it. There's nothing to keep you from seeing it?

A. No.” (Tr. 50)

Despite the appellant's knowledge of the obstacles in the parking strip, she nevertheless chose to cross over them instead of walking around them. Furthermore, her eyesight was such that she admitted she could “see per-

fectly well without glasses so far as walking is concerned." (Tr. 50, lines 22-24.) There was nothing to distract her attention as she crossed over these known dangers:

"Q. Was there anything in the street that distracted you, Mrs. McAllister?

A. No.

Q. Any noise?

A. No.

Q. Any little kids running down the street?

A. No.

Q. And how about the sudden noise of an automobile horn, did you hear that?

A. No.

Q. Anybody yell at you, wishing you good morning?

A. No, not that I know of.

Q. Not a single reason why you couldn't have concentrated on the business of walking from your car diagonally over to the bank; is that true?

A. (No answer.)

Q. Did you understand that question?

A. Yes.

Q. Is there any reason you know of now why you could not have kept your attention on the business of getting from your car, out of your car, across the area to the door of the bank?

A. No." (Tr. 51-52)

Despite the appellant's adequate eyesight and the absence of any distractions, she obviously was not watching out for the known dangers since she has no idea of where she was in relation to these dangers when she fell or whether she fell over these known dangers or some other object.

In such circumstances, this Court has repeatedly found contributory negligence as a matter of law. The case of *Cole v. Kloepfer*, 123 U. 452, 260 P.2d 518 (1953), involves facts very similar to those in this case. The defendant caused several large cement blocks to protrude about three inches above the surface of the sidewalk. The plaintiff lived near the area where this existed and, having occasion frequently to pass over it, was well aware of its existence. Nevertheless, the plaintiff chose

to cross over the defect and was injured by tripping over the protruding cement blocks. It was held that since the accident occurred in broad daylight and there was nothing which substantially distracted her attention from the known danger, she was contributorily negligent as a matter of law.

The *Cole* case is even stronger against appellant's position because, in that case, plaintiff at least had some explanation for diverting her attention from where she was going whereas, here, as has been demonstrated, there was absolutely no such element.

In the recent case of *Wightman v. Bettlyon's, Inc.*, 15 U. 2d 200, 390 P.2d 120 (1964), the plaintiff was injured when she fell over vegetation which covered the surface of the sidewalk. The court held that she was negligent as a matter of law since she was well aware of the existence of the weeds over the sidewalk but nevertheless chose to encounter them.

In *Whitman v. W. T. Grant Co.*, 16 U. 2d 81, 395 P.2d 918 (1964), the Court stated:

"The plaintiff is confronted with the basic proposition that where there is a hazard which is plainly visible, ordinarily one is charged with the duty of seeing and avoiding it. And 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. . . . In order to justify holding that a jury question as to negligence exists, where injury has resulted from an observable hazard, it is essential that there be something which could be regarded as tending to distract the plaintiff's attention or to prevent him from seeing the danger, thus providing some reasonable basis for a finding that even though he exercised due care, he could be excused from seeing and avoiding it." (P. 920)

In *Esernia v. Overland Moving Co.*, 115 U. 519, 206 P.2d 621 (1949), which was a case dissimilar on its facts but similar on principle, this Court held that where the evidence shows that a plaintiff knows of a specific danger, and has a chance to avoid it, but chooses not to avoid it, he is contributorily negligent as a matter of law.

Moreover, the facts of this case establish that the appellant voluntarily assumed a known risk and thus her recovery should be barred. In *Ferguson v. Jongsma*, 10 P. 2d 179, 350 P.2d 404 (1960), this Court stated:

"Assumption of risk requires knowledge by plaintiff of a specific defect or dangerous condition caused by defendant's negligence or lack of due care which plaintiff could have, but voluntarily and deliberately failed to avoid and thereby assumed the risk of the injuries he sustained."

The actions of the appellant in the instant case fall precisely within this definition of assumption of risk.

The Court further stated that both assumption of risk and contributory negligence follow as a matter of law if:

“... the evidence was so conclusive on those questions that a finding otherwise would be unreasonable.”

In *Wold v. Ogden City*, 123 U. 270, 258 P.2d 453 (1953), the plaintiff was aware of a large trench which existed in the street in front of his home. Nevertheless, he voluntarily chose a path over it and then straddled the trench to help his wife over it. The sides of the trench gave way, causing him to fall and sustain injury. This Court affirmed a dismissal, entered after the opening statement by plaintiff's counsel, on the grounds that the plaintiff was guilty of contributory negligence and he voluntarily assumed a known risk, both of which were apparent as a matter of law.

CONCLUSION

To hold respondent Pacific liable in this case would be the equivalent of the imposition of strict liability for conditions on public sidewalks and parking strips between sidewalks and curbing. The creation of the instrumentalities that may have caused the appellant's fall and the alteration of these instrumentalities which made them more hazardous were solely the work of the prior owner of the property and of the other respondents.

Pacific was in no way involved. Responsibility, if any, should lie upon those who create the hazard, not upon an unassociated third party.

The lower court's judgment should be affirmed because the appellant did not sustain her burden of proof. She attempts to leave the cause of her fall to speculation and conjecture. The record contains no evidence upon which a jury could properly ascertain the cause of her fall and the possible alternatives vary the possible liability.

Regardless of possible alternative causes, appellant should be barred from recovery against all respondents because the evidence clearly establishes, as a matter of law, that her own negligence contributed to her injury, and she voluntarily assumed a known risk.

There was, therefore, ample basis for the trial court's ruling and it should be affirmed.

Respectfully submitted,

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