John H. Cole

1767

179-13

Record No. 2462

In the Supreme Court of Appeals of Virginia at Richmond

EVELYN KNIGHT

v.

FOURTH BUCKINGHAM COMMUNITY, INC.

FROM THE CIRCUIT COURT OF ARLINGTON COUNTY, VIRGINIA

RULE 14.

¶5. NUMBER OF COPIES TO BE FILED AND DELIVERED TO OPPOSING COUNSEL. Twenty copies of each brief shall be filed with the clerk of the court, and at least two copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

¶6. SIZE AND TYPE. Briefs shall be printed in type not less in size than small pica, and shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed records. The record number of the case shall be printed on all briefs.

The foregoing is printed in small pica type for the information of counsel.

M. B. WATTS, Clerk.

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INDEX TO PETITION.

(Record No. 2462)

Cases Cited

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 2462

EVELYN KNIGHT, Petitioner,

versus

FOURTH BUCKINGHAM COMMUNITY, INCORPORATED, A CORPORATION, Respondent.

PETITION FOR WRIT OF ERROR.

To the Honorable Judges of the Supreme Court of Appeals:

Your petitioner, Evelyn Knight, respectfully represents that she is aggrieved by a judgment in the Circuit Court of Arlington County, Virginia, entered against her on the 30th day of December, 1940.

A transcript of the record of the said cause is presented herewith, and as a part of this petition, from an inspection of which the following facts hereinafter assigned and complained of are made apparent:

1. On November 4, 1940, your petitioner filed a Notice of Motion for Judgment against Fourth Buckingham Community, Incorporated, a corporation, in which said Notice of Motion (R., pp. 1-2) your petitioner set forth the facts that on February 15, 1939, the Fourth Buckingham Community, In-

corporated, a corporation, leased an apartment to Andrew Knight, husband of petitioner, and in order to enter this apartment it was necessary for petitioner to use the common entrance and stairway, which was maintained by respondent, and between the 15th day of February, 1939, and November 6, 1939, the respondent assumed the obligation of maintaining the hallways and stairways in a good and sufficiently lighted condition, but that on November 6, 1939, when petitioner arrived at the apartment house the lights were out and that the petitioner guided herself up the stairway by the
2* handrail on the *right-hand side, and, on reaching the top, it was necessary for her hand to leave the handrail, and as she started toward the door of her apartment she missed the top step and fell down the stairs, and was injured as set forth in the said notice.

2. To this Notice of Motion there was filed a motion for Bill of Particulars, which Bill of Particulars was filed and appears on Page Five of the record, and an Amended Demurrer was filed to the Notice of Motion and Bill of Particulars, and on the 30th day of December, 1940, the Court sustained the Demurrer upon the authority of *Baker* v. *Butterworth,* 119 Va. 402, 89 S. E. 849, and your petitioner indicated her intention of applying to the Supreme Court of Appeals for a Writ of Error, and the operation of the order of December 30, 1940, was suspended for the period of sixty days upon the filing of a bond in the penalty of One Hundred Dollars ($100.00), which said bond was filed.

ASSIGNMENT OF ERRORS.

1. The Court erred in sustaining the Demurrer to the Notice of Motion and Bill of Particulars.

2. The Court erred in holding that petitioner's Notice of Motion and Bill of Particulars indicated as a matter of law that your petitioner was guilty of contributory negligence which was the proximate cause of her injury.

ARGUMENT.

The facts as they now exist in the record will show that your petitioner had been using this stairway from February 15, 1939, up to and including November 6, 1939, and that during that period of time the owners of the apartment house had assumed the obligation of keeping a sufficient light on these premises, and that on this particular night your petitioner

arrived at the apartment house and found the light unlighted, and, knowing the premises very well because of the time she had lived on the premises, endeavored to go to her apart-
3* ment without the benefit *of the light. The Court had the benefit of its knowledge of the premises operated by the respondent, which was a number of two-story houses divived into four apartments each, two on the lower floor and two on the top floor, and which were operated from a central office, and which covered a number of acres of ground, in fact an entire community, and it is believed that this Court will also take judicial notice of these facts, and the question presented is whether or not a person of ordinary prudence would have endeavored to go to the apartment under the same circumstances, or whether such an act was so negligent, in and of itself, that a Court may be permitted to say, as a matter of law, that your petitioner was guilty of such contributory negligence which would prevent her recovery.

The Court felt that it was bound by the decision of this Court in the case of *Baker* v. *Butterworth,* 119 Va. 402, 89 S. E. 849, which was a case where the plaintiff, a hotel guest, desiring to use the toilet, followed the instructions in her room, and walked down an unlighted hallway, which apparently she was not familiar with, she having first arrived at the hotel at eight o'clock and was assigned to this particular room, which she went to about eleven o'clock, and fell down a back stairway, and based her claim against the defendants on the ground that they had failed to provide a light in the said hallway, and the Court said:

"The allegation is the Declaration that plaintiff was especially directed by the placard posted in her room to use the hallway in order to get to the toilet room is not sufficient to justify her in attempting to do so under the conditions set out. No request and refusal of light is alleged, nor does there appear any condition absolving the plaintiff from making such a request. No charge is made of negligence in the construction and location of the stairway down which plaintiff fell, even if that fact were pertinent, nor that a rear stairway is unusual in such a building. In the absence of a request and refusal of lights, or some condition absolving the plaintiff from making such a request, or justifying her use of the hall in 'complete' and 'utter darkness,' the Declaration plainly shows a total disregard of her duty to exercise ordinary
4* care *for her own safety, which constitutes contributory negligence on her part, and she cannot recover for her injury."

It is the contention of the petitioner that this case is not analogous with the instant case, for the reason that your petitioner was familiar with, and had knowledge of, the stairway, having lived on the premises for approximately nine months, and, while your petitioner misjudged the last step on the stairway, it could not be said, as a matter of law, that such misjudgment could be considered such contributory negligence that fairminded men might not differ, or that a reasonably prudent person might not have endeavored to reach their apartment under the same circumstances.

In *Payne* v. *Brown,* 133 Va. 222, 112 S. E., 833, this Court said:

"It must be remembered, however, that what is ordinary care in a given case is always a question to be determined by the jury, if the facts are such that fair-minded men might reasonably differ upon the question. What would a man of ordinary prudence have done under the circumstances of this case? * * * "

The question of contributory negligence was gone into very fully by the Supreme Court of the United States in the case of *Mosheuvel* v. *District of Columbia,* 191 U. S., 247, and while this decision is not binding upon this Court, nevertheless, the statement contained therein is very persuasive and should be considered.

The facts briefly are that there was a water-box in the sidewalk at the bottom of three steps which led from a brick-paved landing at the front of plaintiff's house, and the box was so situated about midway of the steps that, in order to go from the lowest step to the sidewalk, it was necessary to go either to the right or to the left, which it would have been safe to do, or to take an unusually long step in order to step over the box and clear it. It had been in such condition
5* for at least nine *months prior thereto and was known by the plaintiff, and on this particular day she endeavored to step over the box but her step was not long enough and she put her foot in the hole and was thrown, with the result that she suffered serious injury. The Supreme Court of the District directed a verdict for the defendant and this was affirmed by the Court of Appeals for the District and a writ of error was granted. The Court said:

"We think the law in a case of this kind is, that only when the nature of the obstruction is such that the court can say that

it is not consistent with reasonable prudence and care that any person having knowledge of the obstruction should proceed to pass over it in the manner attempted, can the court rule that such knowledge prevents the plaintiff from maintaining his action; and that the nature of the obstruction in this case, as shown by the exceptions, was such that it ought to have been submitted to the jury to determine whether the plaintiff, even if he knew the condition of the sidewalk at the time he attempted to pass over it, was under the circumstances, in the exercise of reasonable prudence and due care in attempting to pass over it in the manner he did."

and again at Page 265 the Court said:

"Concluding, as we do, that the fact that the plaintiff, when she elected to descend the steps from her residence to reach the sidewalk, had knowledge of the existence of the uncovered water-box at the foot of the steps, was not alone sufficient to charge her with contributory negligence as a matter of law, it follows that the judgment below was erroneous if it rested upon such theory. But as the knowledge of the existence of the defective water-box would have been sufficient to impute contributory negligence *per se,* as a matter of law, if the hazard resulting therefrom to one seeking to pass over it from the steps was so great that no reasonably prudent person would have made the attempt, it remains only to consider the case in that aspect. Of course, from that point of view the question is, Did the facts proved as to the situation of the water-box and the attempt of the plaintiff to step across it from the stoop so conclusively give rise to the inference of a want of ordinary care in making the attempt, that no reasonable mind could draw a contrary conclusion? This question is readily answered when it is seen that the undisputed fact was that the water-box at its outer edge was only about four inches from a line drawn from the tread of the step
6* nearest *the sidewalk to the ground. Whilst it is true that the undisputed proof was that the plaintiff was aware of a danger from the box when she sought egress from her residence, and judged that a longer step than usual would be required to cross over it, it cannot be in reason said that all reasonable minds must draw the conclusion that contributory negligence, necessarily, as a matter of law, resulted from the act of attempting to step over the box to the sidewalk. This is especially so in view of the undisputed testimony given by the plaintiff that she was keeping the water-box in mind and was exercising all possible care, and had on previous occa-

sions safely stepped over the box. This condition of proof, we think, made a case proper to be passed upon by the jury."

The Court must bear in mind the distinction that exists between *Baker* v. *Butterworth* case and the instant case, in that the plaintiff in the Baker case apparently was not familiar with the place where she was walking, and the Court could very well say that she was guilty of contributory negligence in doing what she did, but where a person has actual knowledge of all the surrounding conditions, it is your petitioner's contention that under such circumstances the fact that she endeavored to make use of the stairway should be presented to the jury on the question as to whether or not it was the negligence of the respondent in failing to maintain its light on the premises or whether or not it was her acts which were the proximate cause of her injury.

In the case of *Stathos* v. *Bunevich, et al.*, 107 N. J. Law, 269, 153 Atl. 572, plaintiff, Stathos, rented and occupied with his family the second floor apartment, and his wife, Agnes Stathos, fell down the stairway and suffered injuries. The gravamen of the plaintiff's complaint was that the defendants had assumed to light the stairs and failed in the performance of that duty, and the question of the negligence of the defendants in that respect was submitted to the jury, and the defendants appealed on the ground that the Court erred
7* in *refusing to grant a motion for a non-suit, and a motion for a direction of verdict for the defendants. In the syllabus by the Court is the following:

"If a landlord of an apartment house assumes the duty of providing and maintaining a light upon the common stairway, it continues thereafter to be his duty to exercise reasonable care to maintain a light there until notice of its discontinuance has been given, and failure to perform such duty is negligence, for which the wife of a tenant who is injured because of such negligence, and whilst herself in the exercise of due care, is entitled to recover."

In the case of *Rhodes* v. *Fuller Land Co.*, 92 N. J. Law, 569, 106 Atl. 400, the plaintiff resided in an apartment house owned by the defendant, and she left her apartment to go to a storeroom, located in the basement, which had been provided for her use in connection with the apartment. To reach this room it was necessary for her to use a common stairway leading from the first floor to the basement. While she was trying to get down the lower of two flights of steps of this stairway she lost her footing, by reason of the absence of a light, which

was usually maintained by the landlord at the foot of the stairs, and fell, sustaining very serious injuries. There was a verdict for the plaintiff, and the defendant appealed and the judgment was affirmed, and the Court said, in part:

"We think the true rule is that if a landlord assumes the duty of providing and maintaining a light upon a stairway, it continues thereafter to be his duty to exercise reasonable care to maintain a light there until notice of its discontinuance has been given, and failure to perform such duty is negligence, and a tenant who is injured because of such negligence, whilst himself in the exercise of due care, is entitled to recover. * * *

"In the present case it was open to the jury to find, if they saw fit, from the evidence, that the defendant company assumed the duty of providing and maintaining a light on those stairs, because it realized that their use was likely to be dangerous, even in the daytime, without a light, and that its failure to do so was the proximate cause of Mrs. Rhodes' injury.

"We think, too, that the question of the contributory
8* *negligence of Mrs. Rhodes was for the jury. This stairway which she was obliged to use to reach the basement consisted of three steps leading from the main hallway to a landing, then a sharp turn to the left, and then nine steps, at the foot of which the defendant had assumed to provide and maintain a light. The evidence tended to show that Mrs. Rhodes was familiar with the stairway; that she got down the first flight and across the landing safely, and had grasped the handrail which was provided at the lower flight and 'was trying to get down the lower steps from the landing' when she noticed that the light was out, lost her footing, and fell. In view of the fact that she was familiar with the stairway, and that she was halfway down before she noticed, or could have noticed, the absence of the light, and in view of the fact that there was no one present to whom she could have applied to make a light, we think it must be conceded that fair-minded men might honestly consider that her conduct was that of a reasonably prudent person. This being so, it was for the jury, and not for the court, to pass upon the question of her negligence."

Your petitioner alleges the duty on the part of the respondent to light the hallway based upon its assumption of doing it over a period of the nine months she resided in the apartment house, which would bring her case clearly within the New Jersey cases cited above, and there is definitely a duty on the part of the respondent based upon the implied contract to properly light the stairway, and the mere fact that

she endeavored to use the stairs was not, in and of itself, such a dangerous or negligent act which would prevent her from having a jury pass upon the question as to the proximate cause of the injury she sustained.

It is prayed that a writ of error may be awarded her to the said judgment and that the same may be reviewed, reversed and remanded to the Circuit Court of Arlington County for trial on its merits.

It is the desire of your petitioner to state orally the reasons for reviewing this decision, and, in the event a writ of error be awarded, to adopt this petition as her brief.

A copy of this petition being forwarded by Registered
9* Mail *to Gardiner L. Boothe, Esquire, 108 North St. Asaph Street, Alexandria, Virginia, this 24th day of February, 1941.

Respectfully submitted,

EVELYN KNIGHT, Petitioner.
By CORNELIUS H. DOHERTY, Atty.

CORNELIUS H. DOHERTY,
4719 Rock Spring Road,
Arlington, Virginia,
Attorney for Petitioner.

I, the undersigned counsel, practicing in the Supreme Court of Appeals of Virginia, do hereby certify that in my opinion there is an error apparent on the face of the record of the judgment in this case, for which the same should be reviewed and reversed.

CORNELIUS H. DOHERTY,
Attorney for Petitioner.

Received February 25, 1941.

M. B. WATTS, Clerk.

April 28, 1941. Writ of error awarded by the court. Bond $300.

M. B. W.

RECORD

In the Circuit Court of Arlington County, Virginia.

Filed Nov. 4, 1940.

Evelyn Knight
v.
Fourth Buckingham Community, Inc., a corporation

No. .....

NOTICE OF MOTION FOR JUDGMENT.

To: Fourth Buckingham Community, Inc., a corporation, 313 North Glebe Road, Arlington, Virginia.

You are hereby notified that on Monday, December 9, 1940, that being the first day of the October Term of the Circuit Court for Arlington County, Virginia, the plaintiff will move the Court for judgment against you in the sum of Fifteen Thousand Dollars ($15,000.00), for this, to-wit, that on, to-wit, February 15, 1939, you leased Apartment #2, 1208 North Trenton Street, Arlington, Virginia, to Andrew Knight, the husband of the plaintiff, and in order to enter this apartment it was necessary for the plaintiff to use the common entrance and stairway to the apartment building, which was maintained by you; that between the 15th day of February, 1939, and the 6th day of November, 1939, you assumed the obligation of maintaining the said entrance, hallways and stairways in a good and sufficiently lighted condition, but plaintiff says that on the 6th day of November, 1939, while plaintiff was still the wife of the lessee, Andrew Knight, and while plaintiff was still a tenant in the premises above described, on her page 2 } arrival to the apartment house no lights were burning in the accustomed places, and the hall and stairway was in a darkened condition, and plaintiff endeavored to go to her apartment, but due to your failure to exercise reasonable care in maintaining a good and sufficient lighting equipment in the said apartment house, as you had assumed to do, and in permitting the lights in the hallway and the stairway to remain unlighted, and knowing that plaintiff would use such hallway and stairs, as she had a right to do, plaintiff missed her footing and fell and sustained a laceration of the forehead and a fracture of the head of the fifth metacarpal of

the left hand, and the laceration of the forehead was an irregular, jagged laceration, which will leave a permanent scar, and plaintiff further sustained a concussion of the brain and shock to her central nervous system, and plaintiff has been permanently disabled, and by reason of which injury plaintiff has been required to expend a large sum of money for medical and other expenses incident to these injuries.

Plaintiff further says that she was employed as a hostess in a night club, and by reason of the injuries sustained by her she has lost numerous opportunities for advancement in her profession.

WHEREFORE, plaintiff sues the defendant and claims damages in the sum of Fifteen Thousand Dollars ($15,000.00), besides costs.

EVELYN KNIGHT.
By CORNELIUS H. DOHERTY,
DORSEY K. OFFUTT,
Attorneys for Plaintiff.

page 3 } MOTION FOR BILL OF PARTICULARS—FILED NOVEMBER 25, 1940.

Now comes the defendant and moves for more specific information of the details of the plaintiff's claim than is contained in the Notice of Motion for Judgment, and particularly asks information as to the following points:

1. At what time during the day of February 15, 1939, the alleged accident occurred?
2. At what place in the apartment house the alleged accident occurred?
3. Was the alleged accident caused by a fall on the floor of the apartment house or by a fall down the stairs, or at some other point in said apartment house?

FOURTH BUCKINGHAM COMMUNITY, INC.
By.....,
Attorney.

page 4 } AMENDED DEMURRER—FILED DECEMBER 28, 1940.

Now comes the defendant and files this amended demurrer, and grounds for demurrer states:

1. That neither the Notice of Motion for Judgment nor the Bill of Particulars filed at the request of the defendant shows that the plaintiff has a legal cause of action.
2. That from the Notice of Motion for Judgment and the Bill of Particulars it appears that the defendant is not liable to the plaintiff for the injuries which she alleges she sustained on the 6th day of November, 1939, between 2:15 and 2:30 A. M. on that day.
3. That the Notice of Motion for Judgment discloses that the injuries sustained by the plaintiff were not proximately caused by any negligence of the defendant.
4. That the Notice of Motion for Judgment discloses on its face that the plaintiff was guilty of such contributory negligence as to bar a recovery for her alleged injuries.

GARDNER L. BOOTHE,
Attorney for Defendant.

page 5 } BILL OF PARTICULARS—FILED DECEMBER 30, 1940.

In accordance with the motion of the defendant for more specific information of the details of the plaintiff's claim, plaintiff states as follows:

1. The accident occurred on the 6th day of November, 1939, between two-fifteen and two-thirty A. M.
2. The accident occurred at the top of the stairs of the second floor of the apartment house at which plaintiff resided.
3. When plaintiff arrived at the apartment house the lights lighting the stairway to the second floor, where plaintiff's apartment was located, were unlighted, and plaintiff guided herself up the stairway by the hand-rail on the right-hand side, and on reaching the top it was necessary for her hand to leave the hand-rail and as she started toward the door of her apartment she missed the top step and fell down the stairs.

CORNELIUS H. DOHERTY,
DORSEY K. OFFUTT,
Attorneys for Plaintiff.

page 6 } ORDER—ENTERED DECEMBER 30, 1940.

THIS DAY came the parties by their Attorneys and this cause was argued by counsel on the notice of motion for judg-

ment, the bill of particulars filed at the request of the Defendant and demurrer filed on behalf of the Defendant and the Court after consideration doth sustain the demurrer and Counsel for Plaintiff having stated that he did not desire to amend his pleadings, the Court doth dismiss this suit.

AND Counsel for Plaintiff having indicated his intention to apply to the Supreme Court of Appeals for a writ of error the Court doth suspend the operation of this order for 60 days from this date on the Plaintiff or some one in her behalf entering into bond in the penalty of $100.00 within ten days from this date, conditioned as the law directs.

WALTER T. McCARTHY, Judge.

page 7 } NOTICE OF APPLICATION FOR TRANSCRIPT OF RECORD—FILED JANUARY 21, 1941.

To: Gardner L. Boothe, Esquire
108 North St. Asaph Street
Alexandria, Virginia

Please take notice that on Tuesday, January 21, 1941, at ten o'clock A. M., I will apply to the Clerk of the Circuit Court of Arlington County, Virginia, for a transcript of the record in the above entitled cause, with a view to applying for a writ of error, and will ask the Clerk to make the following papers a part of such transcript, to-wit:

1. Notice of Motion for Judgment.
2. Motion for Bill of Particulars.
3. Bill of Particulars.
4. Amended Demurrer.
5. Order sustaining Demurrer and dismissing cause of action.
6. This notice.

CORNELIUS H. DOHERTY,
Attorney for Plaintiff.

Copy of the foregoing notice acknowledged this 16th day of January, 1941.

GARDNER L. BOOTHE,
Attorney for Defendant.

I, C. Benj. Laycock, Clerk of the Circuit Court of Arlington County, Virginia, the same being a Court of Record, do hereby certify that the foregoing copies are true copies of the originals on file and of record in my office, in the case of Evelyn Knight *v.* Fourth Buckingham Community, Inc., a corporation; that they constitute the transcript of record in accordance with the notice of Cornelius H. Doherty, Attorney for the Plaintiff and accepted by Gardner L. Boothe, Attorney for the Defendant, and that the suspending bond was given January 8, 1941 in accordance with the order entered December 30, 1940.

GIVEN under my hand this 29th day of January, 1941.

C. BENJ. LAYCOCK,
Clerk, Circuit Court, Arlington
County, Virginia.

A Copy—Teste:

M. B. WATTS, C. C.

INDEX TO RECORD