IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 1825

IDA M. TYLER, PLAINTIFF IN ERROR

v.

CITY OF RICHMOND, DEFENDANT IN ERROR

CITY OF RICHMOND,
By Counsel.

JAMES E. CANNON AND
ORDWAY PULLER, *Counsel*

CLYDE W. SAUNDERS & SONS, INC., PRINTERS AND PUBLISHERS, RICHMOND, VA.

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STATEMENT

In this brief, the plaintiff in error will be referred to as the plaintiff and the defendant in error will be referred to as the defendant. The statement of facts in the petition is inaccurate and misleading. Especially is this true of that portion of the concluding sentence of the first paragraph on page 2 of the record: "This tongue was placed in its position in the sprinkler and refitted and new chains attached to it by the City of Richmond and allowed to remain there obstructing the sidewalk." In order to avoid repetition, these inaccuracies will be pointed out in the argument when we come to analyze the testimony.

ARGUMENT

The learned trial judge was right in striking the evidence of the plaintiff both because the record fails to show

that the defendant had notice, actual or constructive, of the dangerous position of its sprinkler at the time of the accident, and because the plaintiff is convicted of contributory negligence out of her own mouth.

A. THE RECORD FAILS TO SHOW NOTICE TO THE DEFENDANT

In the "Charter Notice" (R., p. 13), plaintiff stated that she was walking eastwardly on Littlepage Street between Coalter Street and Bryan Street when her foot became entangled with the chain of the sprinkler *just a short distance eastwardly of the alley which runs approximately parallel with Bryan Street.* The importance of the italicized language will become apparent when we consider the evidence of plaintiff's witness, Corker.

This "Charter Notice" also stated that plaintiff met with her accident on Wednesday, July 10, 1935, which was confirmed by her own testimony (R., p. 22).

The plaintiff's husband, William E. Tyler, testified (R., pp. 29 and 30) that the sprinkler was put on *his lot* about two weeks before the accident and was brought back there about five or seven days before the accident and that the defendants fitted a new tongue to the sprinkler on Monday, July 8, 1935. This witness further testified (R., p. 32) that, when the new tongue was being fitted, the sprinkler was sitting very near to the sidewalk on his lot about twelve or fifteen feet from the alley line in the rear of his vacant lot. And further:

> "I didn't pay any attention to it because I thought probably they knew what they was doing and thought probably they might come there that afternoon and get it and carry it away."

The testimony of this witness fails to show that he saw anything more of the sprinkler after the morning of July 8th.

Thomas J. Corker (R., pp. 36 and 37) testified that shortly after five o'clock of the afternoon of Tuesday, July 9th, the sprinkler was *in the alley with no tongue in it,* but that the tongue was in the sprinkler twenty-four hours later. His exact words were:

> "The 9th I come in the alley and the sprinkler was in the alley with no tongue in it and July 10th when I come in I taken notice it was a tongue in it and newly painted with chains hanging down the end of it."

It is to be noted there is no conflict in the testimony of any of these witnesses. The plaintiff's uncontradicted testimony is that she fell on Wednesday, July 10th. The uncontradicted testimony of her husband is that defendant's employees fitted a new tongue to the sprinkler on his lot on the morning of July 8th and left it protruding over the sidewalk, though he thought probably they would come back and remove it that afternoon. And the uncontradicted testimony of the witness, Corker, is that the sprinkler was *in the alley on the afternoon of July 9th with no tongue in it.*

Under these circumstances the argument of plaintiff's counsel falls to the ground. It is utterly untenable to say that the defendant created the condition which resulted in the plaintiff's accident. Certainly the record does not show it.

We do not know who replaced the tongue in the sprinkler and removed it from the alley to the lot of plaintiff's husband between the afternoon of July 9th and the evening of July 10th, nor was the defendant called upon to supply the missing evidence. The fact remains that some one did replace the tongue and did move the sprinkler, and the burden rested upon the plaintiff to place the responsibility at the door of defendant.

In the case of *Portsmouth* v. *Houseman,* 109 Va. 557, 560, this court approved the following instruction:

> "The court instructs the jury that to entitle the plaintiff to a verdict in this action, she must not only prove that the iron cover on the catch basin was removed sufficiently for her to have fallen in the hole and that she did fall into the hole, but they must further believe from the evidence that the said iron plate was removed by the defendant or with its knowledge, actual or constructive; and by such constructive knowledge is meant that the said hole was so open and notorious for such a length of time before the injury that the defendant, by its proper officers, exercising reasonable diligence, should have acquired knowledge of it."

In the *Houseman Case,* the accident happened upon one of principal streets of the city and there was evidence tending to prove that the lid on the catch-basin was out of place for a period of nine hours between 12 o'clock noon and 9 P. M., which this court held was not sufficient to constitute constructive notice. In the case at bar, the accident happened in a sparsely settled outlying district of the city, as evidenced by a dirt sidewalk overgrown with grass and weeds, and the record is silent as to just *when* the tongue was replaced in the sprinkler, except that the witness, Corker, says he saw it about 5:15 in the afternoon of July 10th, while the accident happened about 10:30 of the night of the same day.

In *Erle* v. *Norfolk,* 139 Va. 38, the plaintiff stepped into a hole in the concrete sidewalk in one of the principal streets of the city. Plaintiff's theory was that the defect was of long standing occasioned by the gradual wearing away of the concrete and relied upon the rule of constructive notice. There was no affirmative evidence as to how or when

the hole was made and the trial court set aside a verdict in plaintiff's favor and entered judgment for the city. On writ of error, this court affirmed the judgment and stated, p. 43, that the case was controlled by the *Houseman Case.*

It is therefore submitted that the court below was right in terminating the case by striking the evidence instead of allowing it to go to the jury, when the court would have been bound to set aside a verdict adverse to the defendant and to enter judgment in its favor.

B. PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE

It is conceded that travelers along the public streets are not bound to keep their eyes glued to the ground, but they are required to use ordinary care to avoid danger. On the occasion of this accident, the night was dark and the plaintiff was walking along a dirt sidewalk which was overgrown with grass and weeds. On direct examination (R., p. 21) she was asked if she was looking where she was walking, to which she replied: "No, sir, I was just coming along walking like I always did."

As an afterthought, counsel suggest that the "No, sir" part of this answer was a slip of the tongue. If so, it is inexplicable that they did not give plaintiff the opportunity to correct this slip. This one answer constitutes the entire evidence on the question of plaintiff's negligence, and we submit it would be just as improper for the court to ignore the "No, sir" as it would be to ignore the rest of the answer.

It is evident from this answer that the plaintiff was in the habit of walking "by faith," as was said in a Pennsylvania case presently to be considered.

In *Staunton* v. *Kerr,* 160 Va. 420, the plaintiff while walking in the daytime fell in a depression in the sidewalk of an average depth of one inch, the greatest depth being one and one-half inches. This court reversed the judgment of the trial court and found that the plaintiff was guilty

of contributory negligence as a matter of law. In the course of the opinion your Honors quoted liberally from the opinion in *Lerner* v. *Philadelphia*, 221 Pa. 294. We here reproduce a portion of this quotation:

> "We have gone very far in holding municipalities liable for injuries received in consequence of defective pavements, but never yet so far as to excuse the pedestrian using the pavement from the duty of exercising ordinary care. When one abandons the use of his natural senses for the time being, and chooses to walk over a pavement by faith exclusively, and is injured because of some defect in the pavement, he has only himself to blame. * * * One is not required in walking along a *traveled highway* (italics supplied) to keep his eyes fastened upon the ground continually to discover points of possible danger, nor is it necessary that he should in order to avoid exposed pitfalls lying directly in the path before him; but the law does require that he be observant of where and how he is going, so as to avoid dangers which ordinary prudence would disclose."

CONCLUSION

In the case of *Roanoke* v. *Sutherland*, 159 Va. 746, which overruled *City of Richmond* v. *Rose*, 127 Va. 772, reference was made to the case of *Richmond* v. *Schonberger*, 111 Va. 168, for the purpose of stressing the point "that this court did not hesitate to substitute its own judgment upon a given state of facts for that of the verdict of the jury and the judgment of the court below." Your Honors also quoted with approval from *Bohlkin* v. *Portsmouth*, 146 Va. 340:

> "It should be remembered that the duty of the trial judge to set aside a verdict of the jury where the same is not justified by the law and the evidence is just as imperative as is the duty to sustain the verdict where a contrary condition exists."

The sprinkler in this case, while unquestionably the property of the defendant, was in no sense under its control at the time of the accident, and the defendant was not bound to introduce any evidence unless and until the plaintiff's evidence should raise a presumption of negligence against it. It follows that the court below was right in striking the evidence and in telling the jury that there was no evidence upon which to rest a verdict.

Respectfully submitted,

CITY OF RICHMOND,
By Counsel.

JAMES E. CANNON AND
ORDWAY PULLER, *Counsel*