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Clerk, Supreme Court of Appeals
Richmond

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Record No. 5157

In the Supreme Court of Appeals of Virginia at Richmond

MARY E. JOHNSON

v.

J. S. BELL, JR., & COMPANY, INC., ET AL.

FROM THE COURT OF LAW AND CHANCERY OF THE CITY OF NORFOLK

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three 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 nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 5157

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 2nd day of March, 1960.

MARY E. JOHNSON, Plaintiff in Error,

against

J. S. BELL, JR. & COMPANY, INC., ET AL., Defendants in Error.

From the Court of Law and Chancery of City of Norfolk

Upon the petition of Mary E. Johnson a writ of error is awarded her to a judgment rendered by the Court of Law and Chancery of the City of Norfolk on the 19th day of November, 1959, in a certain motion for judgment then therein depending wherein the said petitioner was plaintiff and J. S. Bell, Jr. & Company, Inc., and others were defendants; upon the petitioner, or some one for her, entering into bond with sufficient security before the clerk of the said Law and Chancery Court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

* * * * *

MOTION FOR JUDGMENT.

In accordance with the hereto attached notice, the plaintiff, Mary E. *Jones,* by her attorneys, Goldblatt & Lipkin, hereby moves the Court for a judgment against the defendants, J. S. Bell, Jr. & Company, Inc., Norfolk Redevelopment & Housing Authority, and City of Norfolk, a municipal corporation, in the sum of $35,000.00, with interest thereon from date of judgment and the costs of this proceeding, which said sum is justly due the plaintiff for the following, to-wit:

1. That the defendant, Norfolk Redevelopment & Housing Authority, is and was on and before December 22, 1958, owner of a certain lot or parcel of land on the southeast corner of Chapel Street and Brambleton Avenue, both paved streets in the City of Norfolk, Virginia.

2. That the defendant, J. S. Bell, Jr. & Company, Inc., did on and for a long period of time before December 12, 1958, lease and rent said lot or parcel of land from the defendant, Norfolk Redevelopment and Housing Authority, for use in connection with its business as a parking lot.

page 2 } 3. That the defendant, City of Norfolk, being a municipal corporation, is under a duty and obligation to use reasonable care to keep and maintain its sidewalks at all times in reasonably safe condition and free from obstructions and hazards so as not to injure or endanger persons walking thereon.

4. That by virtue of the ordinances of the City of Norfolk, for such cases made and provided, it became the duty of the defendants to remove and clear away, or cause to be removed and cleared away snow from the sidewalks fronting on and abutting on said lot.

5. That it was the duty of the defendants to use reasonable care to keep the sidewalks fronting on and abutting on said lot free from ice and snow and in a safe condition so as not to injure or endanger persons walking where they had a right to walk or being where they had a right to be.

6. That notwithstanding said duties the defendants negligently and carelessly and in violation of the aforesaid ordinances of the City of Norfolk failed to remove and permitted to remain on the sidewalk on Chapel Street, a paved

street in the City of Norfolk, Virginia, snow and ice and allowed said sidewalk to be in an unsafe and hazardous condition.

7. That this condition was known to the defendants at the time of the accident hereinafter set out and had existed for a sufficiently long time to come to the knowledge of the defendants so that the defendants should have known the danger.

8. That on the 12th day of December, 1958, at about 11:15 P. M., while walking on the sidewalk on the east side of Chapel Street near Brambleton Avenue in the City of Norfolk, Virginia, said sidewalk fronting on and abutting on the lot or parcel of land owned by the defendant, Norfolk Redevelopment and Housing Authority, and rented and leased by the defendant, J. S. Bell, Jr. & Company, Inc., the plaintiff slipped and fell due to the accumulation of ice and snow negligently and unlawfully permitted by the defendants to remain on said sidewalk.

page 3 } 9. That as a direct, proximate result of the negligence of the defendants, the plaintiff suffered a fracture of her right ankle, was hospitalized, has incurred divers hospital, doctor and medical bills in treatment and in an endeavor to be cured, has suffered great physical pain and mental anguish, has lost large sums of money in wages, has become permanently disabled and will in the future be required to expend great sums of money in medical treatment and will lose wages in the future.

10. That a written notification of this claim, pursuant to and in accordance with Section 8-653 of the Code of Virginia, was duly filed with the City Attorney of the City of Norfolk by letter dated December 17, 1958, within sixty days from the date of the accident.

WHEREFORE, judgment is asked against the defendants at the time and place stated in the hereto attached notice.

MARY E. JOHNSON
By PAUL M. LIPKIN
Of Counsel.

Filed in the Clerk's Office the 11 day of June, 1959.

Teste:

W. L. PRIEUR, JR., Clerk
L. M. CALVERT, D. C.

* * * * *

page 5 }

* * * * *

DEMURRER.

Now comes Norfolk Redevelopment and Housing Authority, by counsel, and demurs to the motion for judgment against it filed herein by Mary E. Johnson for the reason that the said motion for judgment, insofar as it pertains to this defendant, is not sufficient in law. As grounds for the said demurrer this defendant says:

1. That the allegations contained in the foregoing motion for judgment, insofar as they pertain to this defendant, do not constitute a cause of action upon which the plaintiff is entitled to recover damages.

NORFOLK REDEVELOPMENT
AND HOUSING AUTHORITY
By FRANCIS W. CRENSHAW
Of Counsel.

Filed 6-29-59.

H. L. STOVALL, D. C.

* * * * *

page 7 }

* * * * *

DEMURRER.

Now comes J. S. Bell, Jr. & Company, Inc., by counsel, and demurs to the motion for judgment filed herein against it by Mary E. Johnson for the reason that the said motion for judgment, as it pertains to this defendant, is not sufficient in law.

As grounds for said demurrer, this defendant says:

1. That the allegations contained in the foregoing motion for judgment, insofar as they pertain to J. S. Bell, Jr. &

Company, Inc., do not constitute a cause of action upon which the plaintiff is entitled to recover damages.

J. S. BELL, JR. & COMPANY, INC.
By JOHN W. WINSTON
Of Counsel.

Filed 7-1-59.

H. L. STOVALL.

* * * * *

page 16 }

* * * * *

October 29, 1959.

Mr. John W. Winston, Jr.
Seawell, McCoy, Winston & Dalton
Wainwright Building
Norfolk, Virginia

Dear Mr. Winston:

Replying to yours of the 27th instant relative to the above case, as you know, at Mr. Lipkin's request, I am reserving my determination of the question of whether the failure of a landlord or tenant to comply with the requirements of the ordinance in question creates a liability against said landlord or tenant in favor of a person injured by reason of such failure.

However, I do not believe that it may be contended that the defendant J. S. Bell, Jr. & Company, Inc. was under no obligation to remove snow from the "foot pavement fronting the * * * lots * * * occupied" by it as tenant and used as a parking lot. The ordinance imposes this duty upon "every person, incorporated society or public institution * * * using or occupying in any manner or for any purpose any * * * tenement of any kind * * *"

Black's Law Dictionary defines the word "tenement" as follows:

" 'Tenement' is a word of greater extent than 'land,' *including not only land,* but rents, commons, and several other

rights and interests issuing out of or concerning land." (Italics supplied)

In 86 C. J. Sec. 596 it is said:

"* * * the word 'tenement' signifies everything, provided it is of a permanent nature, which may be holden, and includes every species of realty, both corporeal and incorporeal."

In *Re*: Handley's Estate, (Pa.) 57 Atl. 755, 757, the court said:

"The most comprehensive words of description applicable to real estate are 'tenements' and 'hereditaments' as they include every species of realty, as well corporeal as incorporeal."

page 17 } In *Kirshler* v. *Albanesius*, (N. J.) 178 Atl. 568, 570, the court said:

"The word 'tenements' means property held by a tenant, including rents and profit a prendre * * *."

Very truly yours,

J. HUME TAYLOR, Judge.

JHT:meg
CC: Mr. Paul M. Lipkin

page 18 } November 11, 1959.

Mr. Paul M. Lipkin
Goldblatt & Lipkin
Bank of Commerce Building
Norfolk, Virginia

Mr. H. M. Woodward
Woodward & Ward
Citizens Bank Building

Mr. John W. Winston
Seawell, McCoy, Winston & Dalton
Wainwright Building
Norfolk, Virginia

* * * * *

Dear Sirs:

In the above case it is the opinion of the court that the demurrers filed by the defendants herein must be sustained. In addition to the authorities appearing in memorandum filed by Mr. Woodward, the court is relying upon the annotation appearing in 24 A. L. R. 388, supplemented in 28 A. L. R. 360, it is stated therein:

"Accordingly, it is uniformly held that an ordinance requiring lot owners to keep the sidewalks free from snow and ice, and imposing a penalty for the neglect or failure to do so, does not relieve the municipality of this primary duty with respect to the care of its public streets, and does not impose a civil liability on the lot owner in favor of a third person injured by reason of its violation."

The above annotation contains many cases in support thereof, including cases from Massachusetts, Connecticut, Michigan, Maryland, Ohio and New York.

Since this annotation was published, the Supreme Court of West Virginia has on two occasions decided that a violation of this ordinance would create a liability on the tenant or landowner in favor of a third person injured by reason thereof. The intermediate appellate court of Pennsylvania has indicated that it would so find in a proper case. However, the great majority of jurisdictions hold otherwise.

Very truly yours,

J. HUME TAYLOR, Judge.

JHT:meg

page 19 }

* * * * *

This day came again the plaintiff by her attorney and came also the defendant, J. S. Bell, Jr. & Company, Inc., by its attorney and Norfolk Redevelopment & Housing Authority, defendant, by its attorney. Whereupon, the demurrers filed herein by the defendants, J. S. Bell, Jr. & Company, Inc. and Norfolk Redevelopment & Housing Authority, having

been fully argued and considered by the court, it is now ORDERED that said demurrers be and the same are hereby sustained and said action dismissed as to said defendants, J. S. Bell, Jr. & Company, Inc. and Norfolk Redevelopment & Housing Authority, with prejudice.

To which ruling and action of the court in sustaining said demurrers and dismissing said action as to said defendants the plaintiff by counsel duly excepted.

Enter Nov. 19, 1959.

J. H. T., Judge.

We ask for this:

H. M. WOODWARD
WOODWARD and WARD,
Counsel for Norfolk Redevelopment & Housing Authority.

JOHN W. WINSTON
SEAWELL, McCOY, WINSTON & DALTON
Counsel for J. S. Bell, Jr. & Company, Inc.

Seen and objected to:

PAUL M. LIPKIN
GOLDBLATT & LIPKIN, p. q.

* * * * *

page 20 }

* * * * *

NOTICE OF APPEAL.

Notice is hereby given that the plaintiff, Mary E. Johnson, will appeal against the defendants, J. S. Bell, Jr. & Company, Inc. and Norfolk Redevelopment & Housing Authority, from the order entered herein on November 19, 1959, sustaining said defendants' demurrers to the Supreme Court of Appeals of Virginia.

ASSIGNMENTS OF ERROR.

Plaintiff, Mary E. Johnson, assigns the following errors, to-wit:

1. That the court erred in sustaining the demurrers of the defendants, J. S. Bell, Jr. & Company, Inc., and Norfolk Redevelopment & Housing Authority.
2. That the court erred in holding that the violation of Section 42-27 (now Section 45-30) of the Code of The City of Norfolk (ice and snow ordinance) does not constitute negligence *per se.*

MARY E. JOHNSON
By PAUL M. LIPKIN
Of Counsel.

Filed 11-30-59.

H. L. STOVALL, D. C.

* * * * *

PLAINTIFF'S EXHIBIT 1

Plaintiffs Exhibit 1 in connection with leaving in demurrer.

J. H. T.

EXCERPT FROM NORFOLK CITY CODE OF 1950.

* * * * *

Sec. 42-27. Removal of snow.

It shall be the duty of each and every person, incorporated society or public institution using or occupying in any manner, or for any purpose whatsoever, any house, store, shop, stable, building or tenement of any kind, and of persons having charge of churches and public buildings of any description, and of owners of unoccupied houses and unimproved lots, situate on any paved street, lane or alley in the city, within three hours after the fall of any snow shall have ceased (except when the snow shall have ceased to fall between the hours of 3:00 P. M. and 7:00 A. M., in which case it shall be

removed before 11:00 A. M. the following morning) to remove and clear away, or cause to be removed and cleared away, the same from the foot pavements fronting the respective houses, stores, shops, stables, churches, buildings or lots so used, occupied or owned by them or under their charge, in such manner as not to obstruct the passage of the water in the gutters.

Any person violating any provision of this section shall be subject to a fine of five dollars, and in addition thereto shall pay the expense of cleaning the same away. (1944, § 368.)

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

INDEX TO RECORD

	Page
Writ of Error Awarded	1
Record	2
Motion for Judgment	2
Demurrer	4
Demurrer	4
Letter to Counsel from Court—October 29, 1959	5
Letter, opinion—November 11, 1959	6
Judgment—November 19, 1959	7
Notice of Appeal and Assignments of Error	8
Plaintiff's Exhibit 1	9