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Record No. 6173

In the Supreme Court of Appeals of Virginia at Richmond

CATHERINE BUSCH

v.

JOSEPH GAGLIO, ET AL.

FROM THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND

RULE 5:12—BRIEFS

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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. 6173

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 14th day of June, 1965.

CATHERINE BUSCH, Plaintiff in Error,

against

JOSEPH GAGLIO, MARY ANN GAGLIO, FRANCES GAGLIO AND MARIA GAGLIO, Defendants in Error.

From the Law and Equity Court of the City of Richmond
Alexander H. Sands, Jr., Judge

Upon the petition of Catherine Busch a writ of error is awarded her to a judgment rendered by the Law and Equity Court of the City of Richmond on the 10th day of February, 1965, in a certain motion for judgment then therein depending wherein the said petitioner was plaintiff and Joseph Gaglio 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 Equity Court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

* * * * *

page 20 }

* * * * *

In the Law and Equity Court of the City of Richmond, the 13th day of October, 1964.

* * * * *

This day came again the parties, by counsel, and came also the jury sworn in this case pursuant to their adjournment on yesterday, and having fully heard the argument of counsel, were sent out of Court to consult of a verdict, and after some time returned into Court with a verdict in the words following, to-wit: "We, the jury, on the issues *joines* find the defendant Joseph Gaglio guilty of negligence and assess the damages at $6,500.00. We find in favor of the defendants Mary Ann Gaglio and Frances Gaglio".

Thereupon the defendant Joseph Gaglio, by counsel, moved the Court to set aside the verdict of the jury and enter final judgment in his favor on the ground it is contrary to the law and the evidence and without evidence to support it, or in the alternative to set the verdict aside and sustain the motion to strike the plaintiff's evidence as to him on the grounds as stated in the reporter's transcript of the evidence or to award a new trial on all issues on the ground of misdirection of the jury by the Court, which motions the Court doth continue for argument thereon.

Therefore, it is considered by the Court that the plaintiff recover nothing of the defendants Mary Ann Gaglio, Frances Gaglio and Maria Gaglio, but that the defendants, Mary Ann Gaglio, Frances Gaglio and Maria Gaglio recover of the plaintiff their costs by them about their defense in this behalf expended.

* * * * *

page 21 } INSTRUCTION NO. 1-A.

The Court instructs the jury that if you believe from a preponderance of the evidence that the plaintiff came upon the property known as 532 Granite Avenue, Richmond, Virginia, at the invitation either express or implied of the Gaglio

sisters or either of them for a purpose directly or indirectly connected with the making or altering of dresses or other sewing or business purposes, there being either express or implied agreement that services of either of the Gaglio sisters were to be rendered for pay, then as to the sisters Gaglio, the plaintiff occupied the position of "invitee" while on the property. Otherwise her status at the time was that of a social guest who in law would be a licensee.

G.

A. H. S., JR.

page 22 } INSTRUCTION NO. 2-A.

The Court instructs the jury that as owner of the premises at 532 Granite Avenue, Joseph Gaglio had the right to effect improvements thereon including the installation of guards to protect his lawn from encroachment by vehicles. In effecting such improvements or erecting such installations, however, he was under a duty not to erect an installation which by reason of its characteristics or location upon the premises constituted a dangerous condition to persons lawfully upon the property.

If, therefore, you believe from a preponderance of the evidence that the pipe which caused injury to plaintiff because of its characteristics and location constituted a dangerous hazard to persons lawfully upon the property and that such fact was known to Joseph Gaglio or in the exercise of reasonable care should have been known to him, then Joseph Gaglio was negligent in its erection and if you further believe that such negligence, if any, was the proximate cause of the plaintiff's injury, and that the plaintiff was herself free of negligence efficiently contributing to her injury, you must find your verdict in favor of the plaintiff against Joseph Gaglio and assess her damages in accordance with instructions herein on damages.

G.

A. H. S., JR.

page 23 } INSTRUCTION NO. 3-A.

The Court instructs the jury that immediately before and at the time and place that the plaintiff, Catherine Busch, became injured while on the property at 532 Granite Avenue,

Richmond, Virginia, the defendants Mary Ann and Frances Gaglio, being the occupiers thereof, owed the plaintiff the following duty:

2. To warn the plaintiff of any unsafe condition if such existed which was or should have been known to them and unknown to the plaintiff, unless the existence of such condition was open and obvious.

If you shall believe from a preponderance of the evidence that the defendants, Mary Ann and Frances Gaglio, failed to perform such duty and further that such failure was the proximate cause of the occurrence or efficiently contributed to the occurence whereby the plaintiff was injured and that the plaintiff was free from negligence efficiently contributing to the aforesaid occurence, then you will find your verdict for the plaintiff against the defendants Mary Ann Gaglio and Frances Gaglio, and assess her damages in accordance with instructions herein on damages.

G.

A. H. S., JR.

page 24 } INSTRUCTION NO. F.

The Court instructs the jury that in this case the burden rests upon the plaintiff to prove by a preponderance of the evidence that the defendants were guilty of negligence which was the sole proximate cause of her injury. By preponderance of the evidence is meant the greater weight of the evidence, or such measure of proof as the jury may find satisfactory and convincing. You are the sole judges of the weight of the evidence and of the credibility of the witnesses. In evaluating the weight of the evidence of any witness, you may consider the opportunity of the witness to have known or seen the things about which he speaks, his interest, if any, in the outcome of the case, any bias or prejudice he may show for or against either party, and his attitude and demeanor while testifying. You may also consider such physical facts as may have been proven, and accord to them such weight as you deem proper.

And the court further instructs you that your verdict must be based entirely upon the weight of the evidence and upon the instructions of the court. You may not rest your verdict in whole or in part upon surmise or conjecture, or upon sympathy for or prejudice against either litigant.

If upon the whole case the plaintiff has failed to bear the

burden of proof as above *outline,* or if upon the whole case the weight of the evidence is evenly balanced, with that of neither side preponderating, then your verdict must be in favor of the defendants.

G.

A. H. S., JR.

* * * * *

page 26 } INSTRUCTION NO. E.

The Court instructs the jury that it was the duty of the plaintiff in going upon the premises at 532 Granite Avenue to exercise reasonable care to keep a proper lookout for objects or conditions in her path, and if you believe from a preponderance of the evidence that the plaintiff knew, or in the exercise of reasonable care for her own safety should have known, of the presence of the pipe over which she allegedly fell, and failed to avoid it, then the Court tells you that under such circumstances the plaintiff would be guilty of contributory negligence and in such event your verdict must be in favor of all of the defendants.

G.

A. H. S., JR.

* * * * *

page 28 } INSTRUCTION NO. A-1.

The Court instructs the jury that unless you believe from a ponderance of the evidence the pipe because of its physical characteristics and location created a dangerous hazard to persons lawfully upon the premises at 532 Granite Avenue and that Joseph Gaglio knew, or in the exercise of reasonable care should have known this to be the situation, then the plaintiff cannot recover against Joseph Gaglio and your verdict must be in favor of such defendant.

G.

A. H. S., JR.

page 29 } INSTRUCTION NO. B-1.

The Court instructs the jury that if you believe from a preponderance of the evidence that at the time of this accident the plaintiff was a social guest of the defendants, Frances Gaglio and Mary Ann Gaglio, and was not a business invitee, as heretofore defined, upon the premises at No. 532 Granite Avenue, Richmond, Virginia, then you must find your verdict in favor of the defendants Mary Ann Gaglio and Francis Gaglio.

G.

A. H. S., JR.

page 30 } INSTRUCTION NO. 5-A.

The Court instructs the jury that if you find for the plaintiff, Catherine Busch, it is your duty to determine the amount of damages to be awarded her, and in determining same, you should fix the amount at such sum as from a preponderance of the evidence, to you seems a fair and just compensation for the injuries she received but not to exceed the amount sued for; and in arriving at the amount of damages, you may take into consideration any of the following items or elements of damages:

A. Any bodily injuries sustained and the extent and duration of same.

B. Any physical pain or mental anguish suffered by her in the past and any which will be suffered by her in the future.

C. Any limitation of use of portions of plaintiff's body endured by her in the past and such limitation of use as will be endured by her in the future by reason of such injuries.

D. Any disfigurement endured by her in the past and that disfigurement which will be endured by her in the future by reason of such injury.

E. Any inconvenience and discomfort that she has already sustained or will likely sustain or with reasonable certainty will hereafter sustain.

F. Any expense incurred for doctors, medicines, hospitals, nurses, and all expenses incurred as a result of the occurance and injury.

G. The reasonable value of all personal property damaged or destroyed as a result of the injury.

G.

A. H. S., JR.

* * * * *

page 33 } INSTRUCTION NO. A.

The Court instructs the jury that the defendant, Joseph Gaglio, was the landlord of the premises at 532 Granite Avenue, and the other defendants were tenants of the said premises.

* * * * *

R.

A. H. S., JR.

page 34 } INSTRUCTION NO. H.

The Court instructs the jury that the defendant, Joseph Gaglio, under the evidence in this case, extended no invitation, express or implied, to the plaintiff to come upon his premises. As to Joseph Gaglio the plaintiff was, at the most, a bare licensee or permittee, to whom Joseph Gaglio owed only the duty to refrain from action endangering her safety, after he was or should have been aware that she was on the premises.

R.

A. H. S., JR.

* * * * *

page 50 }

* * * * *

LAW AND EQUITY COURT
of the
CITY OF RICHMOND
Richmond, Virginia

November 24, 1964

Edward A. Marks, Jr., Esq.
Attorney at Law
315 American Building
Richmond, Virginia

Edward E. Lane, Esq.
Attorney at Law
718 East Franklin Street
Richmond, Virginia

Hunter W. Martin, Esq.
Attorney at Law
1002 Mutual Building
Richmond, Virginia

Re: Busch *v.* Gaglio, et al.

Gentlemen:

This case tried to a jury resulted in a verdict in favor of the two Gaglio sisters, Frances and Maria, and against Joseph Gaglio in the amount of $6,500.00. Judgment was entered on the verdict as to the Gaglio sisters but vacated within 21 days after rendition and the matter is now pending before the Court upon plaintiff's motion to set aside the verdict in favor of the Gaglio sisters and enter final judgment against them along with Joseph Gaglio and upon motion of the defendant Gaglio to set aside the verdict against him and enter a final judgment in his favor, or in the alternative, to set aside the verdict against him and award a new trial upon all issues.

It is felt that as to the Gaglio sisters the issues were properly submitted to the jury and that the verdict in their favor should not be disturbed.

As to Joseph Gaglio, the issue of his liability was submitted to the jury under Instruction 2-A, which predicated liability of Joseph Gaglio upon (1) creation upon his property of a condition dangerous to persons lawfully upon the

(1) See *Smith* v. *Payne*, 153 Va. 746; *Va. Iron, etc., Co.* v. *Dickenson*, 143 Va. 250; *Clark* v. *Harry*, 182 Va. 410.

premises and (2) which was or should have been known to the defendant. Whether or not this was the cor-
page 51 } rect standard of care or whether it was too high a standard to be imposed upon defendant under the evidence adduced at trial is the question to be determined by the Court in consideration of this motion.

The first conclusion which must be reached in answering this question is the relationship existing between Joseph Gaglio and plaintiff or rather, what was the status of plaintiff upon the premises at the time *quoad* Joseph Gaglio. Under any view taken of the evidence the plaintiff could be but a licensee as to the defendant and, indeed, no other theory as to Joseph Gaglio was submitted to the jury. The correlative duties and rights as between Joseph Gaglio and plaintiff might stem from (1) Landlord and Tenant relationship between Joseph Gaglio and his sisters, or (2) property owner and member of-the-public relationship direct between plaintiff and Joseph Gaglio. It is extremely doubtful whether there was any true landlord—tenant relationship existing at all between Joseph Gaglio and his sisters under the evidence in this case (1) but if such were the situation, the case could not have gone to the jury at all as to Joseph Gaglio for plaintiff's rights could have then risen no higher than those of the Gaglio sisters in whose shoes she would have stood (2) and the sisters testified positively that they knew of the pipe and were fully aware of the dangerous nature thereof. Plaintiff, indeed, recognized this fact and did not attempt to hold Joseph Gaglio liable in his capacity of Landlord under the applicable rules of landlord and tenant law but rather upon the independent concept that aside from any liability or freedom therefrom as landlord, Joseph Gaglio's liability could be predicated, under the general law of Negligence, upon his erecting and maintaining upon his premises a dangerous hazard to persons lawfully upon the premises. This was the concept embodied in Instruction 2-A.

We must assume on this motion (1) that the pipe was a dangerous instrumentality posing a threat to third persons on the premises in the immediate vicinity of the pipe, (2) that this fact was known or should have been known to Joseph Gaglio, and (3) that plaintiff neither knew nor was she, in the exercise of reasonable care, chargeable with knowing of its existence, these facts having been established by the jury's verdict. We must also assume, for the evidence conclusively establishes it to be a fact, that plaintiff, *quoad* Joseph Gaglio

(2) *Smith* v. *Wolsiefer*, 119 Va. 247.
(3) *Tugman* v. *Riverside Mills*, 144 Va. 473.

was a licensee upon the premises.

page 52 } This brings us to the next consideration, i.e., what is the general rule as to the duty owned by an owner of property to a licensee (and as to Joseph Gaglio plaintiff was a bare licensee) and does the *Tugman case*(3) either modify the general rule or constitute an exception thereto?

The general rule as to the duty owed a bare licensee by a landowner is almost universally, and certainly in this jurisdiction, stated to be that a bare licensee takes the premises as he finds them and as to such licensee the owner owes no duty of prevision or preparation being only chargeable with the duty of not intentionally or wantonly injuring such licensee.(4) The landowner's duty is different where he is actually present at the time of the occurrence and sees, or in the exercise of reasonable care should see the licensee's danger(5), but this is not the situation at bar; here we are concerned only with prevision and preparation.

It is plaintiff's contention that under the principles enunciated in the *Tugman case*(6), however, that an exception to the general rule is created where the owner *negligently erects or maintains* a dangerous instrumentality upon the premises which, because of its characteristics or location or both, he knows or should know is liable to inflict injuries upon a person lawfully upon the premises. Plaintiff argues that this exception envisions an affirmative act of commission rather than a passive act of omission upon the part of the owner and that where it is shown (1) that owner *creates* a condition upon his land, (2) which he knows or should know will be hazardous to persons who *might* come on his land that this constitutes negligence which will support a recovery by a licensee injured thereby. The Court, at the time the instructions were argued followed this line of reasoning and as a result overruled Joseph Glagio's motion to strike plaintiff's evidence and gave Instruction 2-A setting forth this theory.

page 53 } Upon analysis, however, it does not appear that *Tugman* supports this theory. We are concerned in the case at bar with the owner actually in full control of his premises, control over which he has not relinquished in the slightest degree for the Gaglio sisters and Mrs. Gaglio were

(4) 13 Mich. Jur. #17; *Thalhimer Bros.* v. *Casci,* 160 Va. 439; *Ingle* v. *Clinchfield R. Co.,* 169 Va. 131; *N. & W. R. Co.* v. *Wood,* 99 Va. 156; *Lunsford* v. *Colonial Coal Co.,* 115 Va. 346.

(5) *Walker* v. *Potomac, etc., R. Co.,* 105 Va. 226. For example of situation justifying application of this rule see *Seaboard, etc. Ry.* v. *Joyner,* 92 Va. 354.

(6) 144 Va. 473.

themselves but licensees under the undisputed evidence.(7) *Tugman,* on the contrary was concerned with an owner who was *out* of control of the premises. While it is true that the Court in *Tugman* based the owner's liability upon his act of negligence independently of any landlord—tenant relationship, *as such,* his negligence arose from acts of misfeasance in connection with work he was doing on the premises *after* he had relinquished control and *during the term of the lease of the property to another.* Where the act in question is performed by the owner *when in full control* and *outside of a lease period,* the doctrine of *Tugman* has no application.(8) In the case at bar, as heretofore stated, the evidence supports no finding of leasehold.

There is, however, an exception to the general rule that a landowner in possession owes no duty to licensees other than not to harm him intentionally or wantonly. The rule is thus stated: "If a person knows that people are using property as a right of way, and have been using same for such length of time that the presence of persons upon the same is to be expected, then it is his duty in making excavations across such pathway, *or putting obstructions thereon,* to exercise reasonable care and not negligently injure persons so in the habit of using such pathway."(9) This exception has been approved in Virginia.(10)

If the facts as established by the evidence in the case at bar are sufficient to support the application of this exception to the general rule of non-liability of owner to licensee, then Instruction 2-A as given properly presented the issue of Joseph Gaglio's negligence to the jury. Were page 54 } there any testimony that persons frequently cut across the lawn from the driveway entrance to the porch rather than use the sidewalk and walkway and that such situation was known or should have been known to Gaglio or if the pipe were in such close proximity to the regular walkway, sidewalk or to the driveway as to have snagged plaintiff while using walkway, sidewalk or driveway, the verdict would be supported under the above exception. But the record is completely devoid of any such testimony. It is the frequent and customary use of a path or right of way which

(7) *Forbes* v. *Forbes,* (N. J.) 46 A.(2) 62; *Colbert* v. *Ricker,* 314 Mass. 138, 46 N. E. (2) 459; *Thompson* v. *Thompson,* (Ill.) 103 N. E. (2) 607; C. J. S. Landlord and Tenant, sec. 6.

(8) *Oliver* v. *Cashin,* 192 Va. 540, at page 544.

(9) *Bennett* v. *Railroad Co.,* 102 U. S. 577, 26 L. Ed. 235; *Henry* v. *Disbrow Mining Co.,* (Mo.) 128 S. W. 841.

(10) *Norfolk, etc., Ry.* v. *DeBoard,* 91 Va. 700; *C. & O. Ry.* v. *Corbin,* 110 Va. 700; *Nesbit* v. *Webb,* 115 Va. 362.

supports this exception and there is no scintilla of evidence in the case at bar of any such use. Had plaintiff elected to use the sidewalk and walkway method of ingress from the driveway to the house the unfortunate accident would not have happened.

Under the circumstances Instruction 2-A was erroneously given as it placed too high a standard of care upon the owner Gaglio towards the licensee, the plaintiff, and the verdict must, therefore. be set aside.

Were there any evidence from which a jury could find Gaglio guilty of wantonly or intentionally injuring plaintiff, a new trial would be awarded and this issue submitted to the jury under proper instruction.

Under the evidence of this case, however, there is no theory upon which a jury could impose liability upon Joseph Gaglio and the Court, therefore, erred in not having sustained this defendant's motion to strike the evidence made at the close of plaintiff's case in chief and renewed after all of the evidence was in.

The verdict against Joseph Gaglio will, accordingly be set aside and final judgment entered in his favor. As stated, judgment will be entered upon the verdict in favor of the Gaglio sisters.

Counsel may present sketch for order to this effect.

Yours very truly,

Alex H. Sands, Jr., Judge.

AHSjr:jh

page 55 }

* * * * *

ORDER.

The Court having considered the motion of the defendant, Joseph Gaglio, to set aside the verdict of the jury rendered herein on October 13, 1964, and to enter final judgment in his favor herein, together with certain alternative motions, all as appears in transcript of motions heretofore filed herein, and having likewise considered the motion of the plaintiff to set aside the verdict of the jury in favor of Mary Ann Gaglio and Frances Gaglio, for misdirection of the jury and other errors during the trial, and being of opinion for the reasons stated in opinion dated November 24, 1964, made a part of

the record herein, that the motion of the said Joseph Gaglio should be granted, and that the motion of the plaintiff should be denied;

page 56 } On consideration whereof it is Ordered that the verdict of the jury in favor of the plaintiff against Joseph Gaglio, for damages in the sum of Six Thousand Five Hundred Dollars be and it is hereby set aside, and it is Ordered that the plaintiff recover nothing of the said Joseph Gaglio, but that he recover of the plaintiff his costs; and it is further Ordered that the verdict of the jury in favor of the defendants, Mary Ann Gaglio and Frances Gaglio, be sustained, and that the plaintiff recover nothing of said defendants, and said defendants recover of the plaintiff their costs; to all of which action of the court the plaintiff saved due exception on all grounds heretofore relied upon in support of her position, and any other grounds which may subsequently appear to plaintiff.

We ask for this:

EDW. A. MARKS, JR.
Counsel for Joseph Gaglio.

HUNTER W. MARTIN
Counsel for Frances Gaglio
and Mary Ann Gaglio.

Seen and exception noted:

R. HUGH RUDD, JR.
Counsel for plaintiff.

Enter Feb. 10, 1965.

A. H. S., JR.

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page 57 }

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NOTICE OF APPEAL AND ASSIGNMENT OF ERROR.

Plaintiff hereby notes an appeal from the judgment entered in this action on February 10, 1964, and hereby signifies her intention of filing a petition for writ of error with the Clerk

of the Supreme Court of Appeals of Virginia or with one of the Justices of that Court within the time prescribed by law.

Plaintiff assigns as error:

1) The action of the Court in setting aside the verdict of the jury rendered in this case on October 13, 1964, for the plaintiff against the defendant, Joseph Gaglio, in the amount of SIX THOUSAND FIVE HUNDRED DOLLARS ($6,-500.00).

2) The entry of judgment for the Defendant Joseph Gaglio.

3) The failure of the Court to enter judgment for the Plaintiff on the verdict.

CATHERINE BUSCH
By EDWARD E. LANE
Of Counsel.

Filed Mar. 26, 1965.

Teste:

LUTHER LIBBY, JR., Clerk.

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page 59 }

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Defendant, Joseph Gaglio, assigns cross-error in the above case as follows:

1. The court erred in denying defendant's motions to strike the plaintiff's evidence made at the conclusion thereof and renewed at the conclusion of all of the evidence.

2. The court erred in giving over objection of the defendant instructions as follows:

Instruction No. 2-A
Instruction No. A
Instruction No. A-1
Instruction No. 5, paragraphs (c) and (e)

3. The court erred in refusing Instruction H offered by defendant.

Frances Gaglio.

4. The court erred in granting any instruction permitting the jury to find a verdict in favor of the plaintiff against this defendant.

Respectfully,

JOSEPH GAGLIO
By Counsel.

Received and filed Apr. 7, 1965.

Teste:

LUTHER LIBBY, JR., Clerk
By EDW. G. KIDD, D. C.

* * * * *

TRANSCRIPT of the evidence and other incidents of the above when heard on October 12 and 13, 1964 before Honorable Alexander H. Sands, Jr., Judge, with a jury.

* * * * *

FRANCES GAGLIO,
upon being called by Mr. Lane as an adverse witness, first being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Lane:

* * * * *

page 5 }

* * * * *

Q. Were you home when Mrs. Busch came?
A. Yes. I was home just a few minutes before she came in.
Q. Who was at the house at that time?

Frances Gaglio.

A. Just my mother.
Q. Nobody else but your mother and you?
A. No. No, just my mother. Nobody home. Just
page 6 } my mother.
Q. Was your sister there?
A. No. She was with me.
Q. Pardon?
A. She was with me, to see my nephew.
Q. I mean when this happened.
A. Oh, when this happened we were all at home. My sister —we had just come in. See, we went to see my nephew, then we came home.

* * * * *

page 10 }

* * * * *

Q. Mr. Gaglio is your brother, Mr. Joseph Gaglio?
A. Yes, he is.
Q. He lets you all live in that property, is that correct?
A. That's right.
Q. Mr. Gaglio put the pipe in?
A. Yes, he did.
Q. When did he put that pipe in?
A. When?
Q. Yes.
A. I don't remember the date. But I think it was soon as we move in the house.
Q. Mr. Gaglio does the outside repairs on the house, does he not? The heavy repairs?
A. He does everything. The house is his house, so he just lets us stay. That's all.
page 11 } Q. He does everything in connection with the outside repairs?
A. That's his house.
Q. Your answer is yes he does?
A. Yes.

* * * * *

JOSEPH GAGLIO,
upon being called by Mr. Lane as an adverse witness, first being duly sworn, testified as follows:

DIRECT EXAMINATION.

page 12 } A. Joseph Gaglio, fifty years old. I live 8401 Three Chopt Road.

Q. You own this property out on 532 Granite Avenue, do you not, sir?

A. Yes, sir.

Q. When did you acquire this property?

A. I don't remember. Three or four years. Three years and a half. Something like that.

Q. Mary Ann Gaglio and Frances Gaglio are your sisters, and Maria Gaglio is your mother, is that right?

A. Yes, sir.

Q. They live on this property, you allow them to live in the property at 532 Granite Avenue?

A. Yes, sir.

Q. You do not charge them anything for that, do you?

A. Nothing.

Q. And you keep the property up yourself?

A. Yes.

Q. Don't you do the repairs and maintenance to the property?

A. I'm a contractor, so I don't know—no use to pay somebody else to do the job.

Q. You actually put this iron pipe in the ground yourself, did you not?

page 13 } A. Yes, sir.

Q. What did you use to hammer it in the ground with?

A. Sledge hammer.

Q. A metal sledge hammer?

A. Yes.

Q. The pipe became elongated at the top, in other words, jagged at the top, did it not?

A. Little bit, yes, sir.

Q. What do you mean by a little bit?

A. Well, not—not as much as it should because I used the sledge hammer, the flat part instead of using it from the—

Patricia Kennedy.

Q. Was it a hollow pipe?
A. Yes.
Q. How much of it was protruding up above the ground?
A. It was over twenty inches.
Q. Over twenty inches?
A. Yes, sir. Little bit more, I think.

* * * * *

page 14 }

* * * * *

Q. Do you know whether or not your sister did sewing for other people?
A. No.
Q. Did she have a sewing machine at home?
A. Well, everybody has a machine, sewing machine. Yes, she has one.
page 15 } Q. She does have a sewing machine at home?
A. My wife has one, too. I brought it to her. It that's mine.

* * * * *

page 16 }

PATRICIA KENNEDY,
introduced in behalf of the plaintiff, first being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Lane:

Q. Do you know the Gaglios? Did you at that time?
A. Not until that night, no.
Q. Will you tell the jury, please, what happened on that night?
A. Well, Mary Ann had made a dress for my sister, and she is a fusspot. Everything has to be just so. So she had called to see if it was all right to come over. So she told Mrs. —she told Mrs. Gaglio that we were coming over. She wanted to have an appointment to have this dress straightened out.

Patricia Kennedy.

Mr. Marks: If Your Honor please, unless this lady heard these things herself, I am going to object to it.

The Court: Yes. Mr. Lane, the objection is sustained, unless she actually heard the arrangements.

A. I did, sir. I was there when she—my sister had called.

Q. Tell us what you heard. Go ahead.

A. So we left. It was dark. We had gotten over there. So my sister had gotten out of the one side of the

page 17 } car and we got out the right side. And it's a two-door Falcon. So I held the seat for my daughter to get out. And, and as I was doing that, I heard my sister screaming, Mother of God help me. Mother of God help me.

I ran to her. And I thought her stocking was caught on something sharp. I didn't know what it was at the time. But it was very sharp. I was trying to loosen her stocking when I realized her leg was through the pipe.

Q. You mean her leg was through the pipe?

A. That's right. So I—I felt the flesh over it. So I pulled it—all I could think was pull it out.

So I told my daughter, run inside quick and get some help. So, I thought surely they would be out because of her screams. So they came out, and the place was covered with blood.

Q. What place?

A. The Gaglio's front lawn and pavement and in the home, also. The blood was a mess.

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page 19 }

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Q. What happened after that?

A. Well, then when Dr. Decker got there, he—he took over then. He had asked me—he took care of the leg first. He asked me what did she fall over? I said I don't know. I know it was something sharp. When I put my hand on it to release her stocking I could feel the sharpness around the pipe. I didn't know it was a pipe at the time.

So then Dr. Decker took a flashlight and he went out with the flashlight. When he came in he had told me it was a pipe with a sharp edge on it.

Patricia Kennedy.

Well then he said we have to take her down to my office right away. We have to stitch it. So we went out. And as we were going out I saw Mr. Gaglio picking the pipe out of the lawn, and he threw it alongside the house there.

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page 20 }

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Q. How long did you stay with Mrs. Busch?

A. Well, I was there for—I was there eleven days after—eleven days longer than I should have been. I had called my boss and asked him if I could get an extra week off. I told him what had happened, and he said, yes, I could have it.

Q. What was Mrs. Busch's condition during that week, can you tell the jury?

A. Well, she was in bad shape. Her nerves had gone to pieces. So I kept doing for her all I could do.

Q. How was the wound? How did that appear?

A. That was terrible. I had to keep putting applications on it all the time.

Q. Have you been back since that time?

A. Back to Richmond?

Q. To Richmond, yes, other than today? Between that time and now have you been back to Richmond?

page 21 } A. No. I have been sick myself. I was in the hospital.

Q. Has your daughter been to Richmond?

A. Yes. She was here all summer.

Q. Why was she here?

A. She was here on her vacation.

Q. Mrs. Kennedy, have any of the Gaglios done anything for you at any time?

A. Mrs. Joseph Gaglio. That was a couple months after we had—my sister had moved down here. I hadn't been able to work for a year, because I haven't been too well. So I had to move down here with her. And she needed a seamstress, somebody to do some sewing for her. So she had gone to a hairdresser. She got to talking to someone in the beauty shop. She asked—because we don't know anyone at the

Patricia Kennedy.

time—if she knew of any seamstress. And she happened to mention Mrs. Gaglio. So she did fix one dress for me, and she done several things for my sister—hemming and—

Mr. Lane: All right. That is all.

CROSS EXAMINATION.

By Mr. Marks:

Q. When, Mrs. Kennedy, did Mrs. Joseph Gaglio sew for you?

A. In 1957.

page 22 }

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Q. Directing your attention to the night this accident occurred, tell us something about the area in which the accident happened. Is it well lit?

A. There was no lights at all.

Q. It was dark, was it not?

A. There was no porch light.

Q. Was it real dark?

A. Yes, sir, it was.

Q. I take it that you had difficulty seeing what
page 23 } had happened since you say you had to feel the situation with your fingers and not see it with your eyes?

A. That's right.

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page 24 }

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Q. Don't you know? You say you imagine. Do you know how far into the driveway you got?

A. We were right behind Frances' car. I'm sure we weren't out on the road there.

Q. Where was the pipe with reference to the property line then?

Patricia Kennedy.

A. Well, it would have been—

Q. Don't you know where it was?

A. As my sister stepped out of the car she must have stepped right toward the pipe.

Q. All right. Well now, wasn't the pipe out very close to the street?

A. No, sir, it was not, not that close.

Q. How far from the street would you say it was?

A. I don't know how far from the street, because we were-
n't near the street. But from the driveway it
page 25 } would have been about three feet.

Q. How far was it from the walkway in front of the house?

A. Well, it was quite a distance from the walkway.

Q. To the pipe?

A. (Nodding head indicating yes)

Q. I am not talking about the walk that goes straight into the front steps. I am talking about the walkway along Granite Avenue.

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page 26 }

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Q. What I am trying to find out, Mrs. Kennedy, I understand she did. Did she go toward the back of the car, go toward the front of the car, go straight—

A. As quick as it happened she certainly must have *went* straight because it happened like a flash.

Q. So that you then say that the door of the car was opposite the location of the pipe.

A. As she closed the door, as she went to walk she must have walked—she walked right into the pipe.

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page 27 }

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JOHN BUSCH,
introduced in behalf of the plaintiff, first being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Lane:

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page 29 }

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A. Yes, sir. I was with her nearly every time she visited there. except possibly three or four times. She went in the evenings and it was very dark. I didn't like for her to be over there in the dark by herself at night especially.

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Q. Do you know who made these dresses for her?
A. Mary Ann made them for her, yes.
Q. Do you know whether or not she paid for those dresses?
A. She did. She paid $15.00 for one, $14.00 for one and $15.00 for another. In fact, the reason I remember so well, it struck me as odd that the one dress that was lined, they charged less to make than the dress that wasn't
page 30 } lined, and I had expected that unlined dress would be less expensive but it wasn't.

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page 31 }

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A. Well, when I got there—I had gone over there many times at night when it was dark, and it was pitch dark. When I got there the porch, or the light outside of the door was on and I saw our car standing in the drive. And I saw the grass was all wet. The sidewalk, the walk leading up to the house was all wet. There were several people standing around that I didn't know.

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John Busch.

page 32 }

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Q. Where was your car parked, tell the jury that?

A. Our car was parked in the drive in back of Miss Gaglio's car. The end of it was near that walk, that little dirt lane going along the side of the street.

Q. Did you see the pipe?

A. I saw the pipe when I got there, yes, sir.

Q. Did you see it before or after you went in?

A. Before I went in I could see it because the light was on.

Q. All right.

A. And that was wet, too, and it was glistening. I saw what it was. I saw it was flattened down at the top and the edges, you know, jagged out.

Q. Talk to the jury.

A. I'm sorry. And there were jagged edges on it. You could see that.

Q. Do you recall how high it was out of the ground?

A. Well, at night, trying to judge distances, I thought it was about a foot, maybe a foot and a half. Something like that.

page 33 } Q. Do you remember approximately where it was?

A. It was to the left of the car. And the car was in the drive. So it had to be exactly, well not exactly but just at the edge of the grass and that dirt walkway. The reason I say that, the girl said it was placed there to keep the cars from driving onto the lawn.

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page 35 }

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Q. What was her condition at home for the period of the next week or so?

A. Well, she was in pretty bad shape, because she kept re-living this thing.

He had given her sedatives to take to calm her and, of course, she also had antibiotics for to ward off infection. I forgot to tell you he gave her a tetanus shot at the office because she hadn't had one since she was a child and, of course,

John Busch.

he had to give her a full shot. He was afraid to do it. He was afraid she would get a reaction. Fortunately she did not.

So she had the antibiotics, and the sedatives at home. And also the pain was bad. She would get some sort
page 36 } of prescriptions to dull the pain or kill the pain. And that went on for quite some time, because it was very sore and very tender, very painful.

Q. Would you state whether or not she was bedridden?

A. She was in bed practically all the time. She had—in fact we used bedpans and everything else there. It wasn't until weeks after that she was able to hobble with help to the bathroom or to wash herself. Most of the time she spent in bed.

Q. How long was she confined in bed, do you know that?

A. The exact time I couldn't tell you. It was—it was a number of months, I know that. In fact, the first time she ever got out at all was to go for the X-rays. And that was when it was—that must have been October. Because it had been warm and it turned cold just the day she went out.

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page 37 }

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Q. Now, Mr. Busch, what about the situation at home? Will you state whether or not Mrs. Busch could do her housework?

A. She couldn't. She couldn't stand on her foot at all. Because in the first place the doctor forbid her to stand because the wound was not healed. After the stitches were out, the edges opened, as you can see in the picture, and they stayed like that for a long time. It was very, very gradually that it closed up and closed over with a scab on there.

Q. Do you know when it closed over with a scab?

A. No, I don't know the length of time it actually closed over.

Q. Do you know whether or not your wife had nurses?

A. I do know it closed over with a scab after Dr. Warthen came in. And he had a technique of drawing the edges together with adhesive and closing it like that for a while. And that seemed to help because before that it didn't seem to get any smaller. It seemed to stay the same all the time.

John Busch.

As far as the nurses, yes, from the time my niece left in August, August the twenty-third. She had to go back to school around—probably before Labor Day. And the 26th is when we employed this Miss Atkinson, a prac-
page 38 } tical nurse. And she started there. And then she was with us off and on until February the third. In the beginning it was five days a week, and then finally it went down to three days, two days, once a week, and it ended up that way, once a week. It was a total of sixty-nine days that she spent in the house. That's from nine o'clock in the morning until five o'clock at night.

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Q. What is the situation with regard to your wife's injury at the present time?
page 39 } A. Well, she is quite limited to what she can do. She used to love to wash, because we lived up north. We never had any place where she could wash. She used to get such a kick out of it down here, hanging clothes out instead of putting them in a dryer. She can't do that at all by any means. Going down a long flight of steps and up again. She can't do it. Her leg won't take it. And if she is on her feet too much now the right leg swells. Fluid gathers there.

For instance, when we started out this morning she put the bandage on, put it on real loose. She could work her fingers underneath. By the time—well, by now it's probably tight. By the time we go home we will probably have to put a new bandage on because the leg would have swollen so much. She had to buy shoe stretchers to keep the right shoe stretched so that she could go out of the house. She uses that regularly.

And as far as the work around the house is concerned, well, she does what she can, but there again she just goes so far and she has to stop and rest. And I try to help her all I can, but, of course, I'm working every day.

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page 41 }

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Q. I see. All right. Now, I am interested in the location

John Busch.

of your car when you reached the scene on the night of the accident. Where was it with reference to the sidewalk or walkway along the side of the road?

A. As close as I can recall the car was just about clearing or possibly a little on that little dirt walkway, because I noticed there were two cars in the driveway and the driveway didn't appear to be that long.

Q. How far back from the little walkway would you say the house sits?

A. The walkway?

Q. Yes.

A. Fifteen or twenty feet, possibly.

Q. How long is your car?

A. Fifteen feet.

Q. I believe you said there was a car in front of yours?

A. Yes. But this was on the side. This—I'm talking about the walk. Fifteen or twenty feet.

Q. How long do you think the little driveway is?

page 42 } A. The driveway itself isn't long, but when Frances said that if she would—when she knew they were coming over she would drive the car up farther so we could get up on it.

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A. Frances had told her once before that if she ever calls up and Frances isn't there, only the mother, or the mother and Mary Ann, neither—both of whom speak no English—she wouldn't be gone long. She never stayed away long when the two of them were home alone because they couldn't make themselves understood. That's why she called, to find out when she must come over. They told her Frances would be home in a little while.

Q. All right. Now, Mr. Busch, that night where was your car sitting with respect to the pipe?

A. The pipe was to the left of the car.

Q. All right. Whereabouts, looking at the car from front to back—

page 43 } A. Near to the back of the car, I would say. Very close to the back.

Q. Very close to the back of the car?

A. Yes.

Q. How close to the left side of the car would it have been?

A. When I saw it, it seemed like it wasn't any more than three or four, maybe five feet. It's possible that it could have

Dr. Henry Chesley Decker.

been a little more than that, or even a little closer than that. I don't know. Because I just saw it as I was walking across and walking across the grass. I noticed it there right as I was going by.

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Q. You mentioned several times that it was very dark over in that area.

A. Yes, sir.

Q. That was more or less the usual customary situation, was it not?

A. All the neighborhood around there, all those back streets are black. You can't see anything except when the people put their porch lights on or there may be a light

page 44 } at the end of the walk.

Q. There was nothing unusual about it having been dark this particular night then?

A. (Shaking head indicating no) Quite common.

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DR. HENRY CHESLEY DECKER,

introduced in behalf of the plaintiff, first being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Lane:

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page 46 }

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I asked her how the accident ocurred. She stated that as she got out of her automobile and walked across the lawn her right lower leg came engaged with the top of a sharp pipe, and at first she hung on this pipe, couldn't get off, and her sister assisted her. And then they took her into the house, where the people in the house helped to put on this emergency bandage.

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Dr. Henry Chesley Decker.

Before I left the house I wanted to see the object that had cut her leg. So I went to the northeast corner of the front lawn, and inspected this steel pipe which was sticking up, straight up in the ground approximately four feet. Excuse me. Approximately one foot from the surface of the ground. The diameter of the pipe would be approximately one inch. The pipe was rusty. The lip of the pipe was battered as if some heavy object had been used to pound it in the ground, and a section of the lip or the end of the pipe was projecting upward in a curved, hook-like fashion. And I as-
page 47 } sumed this was the thing that had gripped into the skin and caused the original wound.

At the office we went ahead with treatment, first the area was cleansed with Hydrogen Peroxide. Xylocaine, an anesthetic was injected into the tissue to deaden the nerves. And then the wound itself was thoroughly cleansed with Hydrogen Peroxide.

Now the wound itself was a deep, triangular wound about one and a half inches wide in its greatest width. It was located on the inner surface of the right lower leg just above the ankle. The wound was quite deep, extending down to the surface of the bone. Under sterile technique I ran my gloved finger up and down the surface of the bone, but it felt perfectly smooth. I could not see any object in the wound. Therefore the wound was closed with ten silk sutures, and antibacterial ointment was placed on the surface of the wound, and then bandages, including a two-inch ace elastic bandage.

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page 48 }

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I failed to mention at the beginning that she also received an acute sprain of the proximal joint—that is this joint here of the right thumb—when she fell. This was bandaged and dressed at home.

She was seen at approximately three times per week. She was instructed in the use of the wet dressings which were used for approximately two hours per day. Because after the sutures were removed, the wound began to open up.

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Dr. Henry Chesley Decker.

page 49 }

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By September the first the niece of the patient had to return to her home in Pennsylvania. The niece had been a tremendous help to the patient, helping to prepare the wet dressings and changing the bed linen and doing other little odds and end jobs around the house. But because she was leaving I felt that it was important that a nurse be hired. And in this particular case I felt that a practical nurse was in order. I think it important to note here that I have been this woman's family doctor since 1957 and I have seen her through two major surgical procedures, and that she is a highly emotional nervous person, and the sight of an open wound and blood and so on are very repulsive to her.

The patient had become highly nervous as a result of this accident. She was having nightmares. So I felt that I would have to have someone during the day to be with her. So five days a week we had this practical nurse, and then

page 50 } on the week ends, of course, her husband could look after her.

By September the 19th I was becoming quite discouraged about the slowness of the wound healing, and I requested Dr. Harry Warthen, a general surgeon, to see the patient in consultation. He had previously operated on Mrs. Busch.

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page 52 }

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Q. Doctor, how many times have you seen Mrs. Busch over all for this condition?

A. I have seen her a total of ninety-eight times for this particular injury. Most of these times she was seen in the home.

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page 53 }

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Dr. Henry Chesley Decker.

Q. Doctor, how did this injury affect that condition, or *vice versa* how did that condition affect this injury?

A. Well, I think that that certainly accounts for this unusually prolonged healing. Ordinarily a wound like this you would estimate a healing time of something like six weeks. And, of course, the wound is still not completely well even at this date. We know that people who have vein disease, we know that the circulation of blood in those legs are not as good. We also know that there is a relative-
page 54 } ly thin area of tissue over the shin bone, and even in well people this is many times a difficult place to heal. But in her case, because of this previously vein and arterial difficulty, I think that was one of the main reasons why this thing took so long. Of course the wound itself was a very deep one and a very ragged one, had a lot to do with the healing, too.

Q. Doctor, will you state whether or not she will have any residual from this the rest of her life?

A. I think that she will. We have noted that the right leg has been swelling more than the left leg since the accident, and prior to the acident it was reverse of this. How long the scab is going to stay on this wound I don't know. I have made so many predictions and was wrong so many times so far trying to predict when this scab was coming off, I have more or less given up. I have seen some areas like this in which they will keep scabs on it for years, or if one will break off from a minor injury or brushing against a piece of furniture, they will develop a small bleeding place and new scab will form. So she may have some problem there in the future similar to that. I think that you would have to say that she will have some permanent defect as a result of this. Certainly this area is highly vulnerable to further injury. A good blow to this area would cause the whole thing to break down again.

page 55 } Q. Doctor, will you state whether or not that would affect her employability?

A. Very much so. I do pre-employment physicals for a number of large companies in town, and this is one of the main things we look for, and such a leg as this I would certainly reject.

Q. Doctor, when you say it would affect her employability, just state how would it affect her employability? Would it make her—I don't want to lead you, but—

A. Well, she certainly wouldn't be able to do any type of

standing work at all, and possibly she could do work in which she was seated most of the day, but—such as selling in department stores, that would be certainly impossible with her leg.

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page 61 }

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CATHERINE BUSCH,

the plaintiff herein, first being duly sworn, testified in her own behalf as follows:

DIRECT EXAMINATION.

By Mr. Lane:

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page 68 }

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So I called Frances and I told her, I told her what happened the last two times I was over. And she said, I don't know why you parked down there. She said, the page 69 } the next time you come over you park in the driveway. But that was the first time she told me. And I wouldn't do it unless she did give me permission. And she said, if I'm not there you pull in because you know I will be home. Because she told me always to call before I came over and if—see, her mother didn't understand, Mary Ann didn't understand, and they say Frances home 9:00 o'clock. That meant that I should come over.

So I—that night when we pulled—when I came over that night about, well, I'm getting ahead of myself. I'm sorry.

Q. That is all right. You go right ahead. You were talking about the night of the 25th now.

A. So that then I had called her, told her what had happened, and she said when I come over again not to park on the street, park in the driveway.

Q. All right.

A. Because she use to come stand on the sidewalk until I

Catherine Busch.

got down on the other side of the street to make sure I got there all right.

Q. All right. Now, when was this?

A. That was, well, every time I went over when I parked on the street.

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page 71 }

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Q. All right. Now, what happened before you went over there on the night of the 25th?

A. I had called and Mrs. Gaglio answered the phone and she said, Frances no home. No home 9:00 o'clock. That meant that I was to go over. Frances didn't know I was
page 72 } going over. I guess anybody that was coming that Frances had arrangements with because the women, when they got a hold of the mother, they didn't understand her and she didn't understand them.

Q. Did that mean that you were to go over there at 9:00 o'clock?

A. Yes. Because she had done that before, and so did Mary Ann. That is all they would understand.

Q. All right. Now, as a result of that, did you go over there at 9:00 o'clock?

A. Yes. My sister, my niece and I, and I told my husband I would be back in a few minutes.

But on account of the flannel dress—that was spotted in the front, too, and the white sharkskin had two spots. So I didn't want to leave it because I knew that she had so much sewing to do that I knew I would never get it back for the rest of the summer. I just wanted to make an appointment. I knew it wasn't much work, I mean just the shoulder raised and the zipper fixed in the back properly. It pulled to the one side.

Q. Did you go over there on the 25th?

A. Yes, sir.

Q. About what time?

A. It was about a few minutes after 9:00 o'clock.

Q. Would you tell the jury what happened as
page 73 } you went over there? First of all, where did you park?

A. Well, I came down Patterson Avenue. I did—That's the

first time I ever parked in the driveway. I drove in the driveway. And I stepped out of the car. I closed—I mean I turned off the lights and ignition and I stepped out of the car. And I turned around, and I told my sister and my niece to be careful. And I—I might have taken a few steps but I don't remember anything, because—the next thing I knew I went through—(crying) and I tried so hard. And I couldn't get my leg out. And I took both of my hands and I tried and I couldn't get it out. (Crying)

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page 76 }

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Q. You got in the car then and then you went down to the doctor's office, is that correct?

A. Yes, sir.

Q. All right.

A. And when I came out I saw Mr. Gaglio throwing something, but I didn't know what it was because I never saw the pipe to this day.

Q. Had you ever seen the pipe before this?

A. No, sir. I never saw it, yet.

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page 84 }

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CROSS EXAMINATION.

By Mr. Marks:

Q. Mrs. Busch, will you look at these and tell us what they are?

A. They are cards.

Q. Have you ever seen them before?

A. Yes, sir.

Q. Where did you see them before?

page 85 } A. My niece brought them from Pennsylvania.

Q. You had them with you the night you went over to the Gaglio house, did you not?

Catherine Busch.

A. Yes, sir. I didn't have them, my niece had them.

Q. What else did you have with you that night?

A. A box of candy that she had got for Mrs. Gaglio, because the year before when she was here and I was going to take her home after her vacation they had bought her a half slip as a gift, you know, little half slip. And so when Donna wrote and asked me what she could bring them down this year, I told her that I had been—when I had been over one day Frances had tried the blue dress on me. It was a nephew's or somebody's birthday. And Frances had bought a card, and Mrs. Gaglio didn't like the card. And Frances just laughed, says she never suits her mother with cards. So I asked Donna to—she asked me what she could bring as a gift, and I said bring a box of birthday cards and a box of get-well cards because they have very pretty cards in their religious store.

Q. You had cards then and you had candy, what else did you have?

A. Yes, sir. Donna then wanted a box of—the cards was for each of the girls. And she didn't want to go over without something for Mrs. Gaglio because she liked her very much.

page 86 } Q. All right. Now, will you answer the question, please, ma'am? I asked you, you said you had two boxes of cards, and a box of candy, what else did you have with you?

A. My sister, Donna, and I. Donna wanted to get her a box of candy. She asked me what kind to get. I said she said she likes chocolate nuts. So she went in Fanny Farmer's and got them. I think it was Fanny Farmer's. We sat down in the bottom of the car, my sister and I, and Donna went in and got the candy.

Q. Did you have anything else with you in the way of tangible property, books, boxes, whatever, except the candy and two boxes of cards?

A. No, sir. Not that I know of.

Q. All right. Now, tell us again what the purpose of your trip over there was?

A. For that white dress.

Q. Where was the white dress?

A. No. I didn't have the white dress with me. I wanted to make an appointment to have it fixed, because I—there was so much sewing there, Mary Ann had so much sewing that when she went to—that if I left it there I would never got it back.

Catherine Busch.

Q. You did not take it there with you that night, did you?

page 87 } A. No, sir. I stopped—I wore it on Saturday night to the John Marshall Hotel. I wore it to church the next morning. I stopped after church on Sunday morning and nobody was home. And I went to the door. Nobody was home. I wanted to show her the dress then.

Q. All right.

A. I had it on and I figured that way she could tell.

Q. All right. Now, tell us, you say you talked with someone by telephone that night?

A. Mrs. Gaglio. I didn't talk to her. It was—I had asked for Frances. Frances no home. They always said that. I mean when nobody was home. Usually Mary Ann was home. She would say the same thing.

Q. Did you tell Mrs. Gaglio, that is the elderly lady, is it not?

A. Yes, sir.

Q. That you were coming over that night?

A. Yes, sir.

Q. Do you know whether she understood you?

A. No. She said Mary Ann no home.

Q. So, so far as you know, nobody over there knew you were coming, is that right?

A. No, sir. That was always when I went over.

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page 88 }

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Q. As a matter of fact, you knew those pipes were there, did you not?

A. I never saw them as God is my judge.

Q. All right. You never saw them. Weren't you told specifically that Joe had put them there to keep people from driving up on the lawn?

A. No, sir. Nobody ever told me. I never saw them.

Q. No one ever told you that?

A. No, sir. Nobody.

Q. All right. Now—

A. Why would they tell me? I never went in that way before.

Catherine Busch.

Q. All right. Now, that particular night then, so far as you know, neither Frances nor Mary Ann knew you were coming?

A. No, sir. Well, that was because when, I mean, when I had called before that's what they would tell me.

page 89 } Q. All right. Now, let me ask you this: You had been over there socially on quite a number of occasions, had you not?

A. Not socially. Two or three times I had stopped in. Once when I came from the hospital. They had sent me flowers. And I bought—I bought two boxes of powder and I think some cologne and I took it over.

Q. Didn't you go over and call on Mrs. Maria Gaglio, the elderly lady, once at least, and perhaps oftener?

A. When she was sick.

Q. Yes.

A. Frances had called me up and asked me would I pay her a visit, that she was seriously ill.

Q. And you went over there, did you not?

A. Yes, I did. She asked me to. I gave her—she asked me for the picture of the Sacred Heart that I had when I went to the hospital.

Q. I believe you also arranged to have mass said for the elderly Mrs. Gaglio, did you not?

A. Yes, I did. I know what it is to be sick, and I appreciate everybody else that is sick.

Q. You frequently sent greeting cards at various—

A. All the time she was sick.

Q. —At various times over there, did you?

A. All the time that she was sick.

page 90 } Q. And also at other times, on holidays and other times, did you not?

A. Yes. And she sent them to me.

Q. Actually you considered the elder Mrs. Gaglio at least to be a friend, did you not?

A. Just like I would respect my own mother. I liked the woman very much . But I didn't understand her. But I did like her very much.

Q. And you thought of the two girls in substantially the same way, did you not?

A. Yes, sir. And I thought they felt the same way about me.

Q. And on this particular occasion you had your niece and your sister with you, and you had some religious cards, two

boxes of them, and a box of candy, and that is all you had, and you were going over there to see the Gaglios, is that right? That is right, is it not?

A. No, it is not. I went over to see about the white dress. I didn't want to leave it again, because there were two spots on it before I wore it that night it had never been touched since that night. I had it cleaned. I tried to get the spot off myself with energine and I couldn't get it off I had to put a turkish towel under it. I had to use soap and water. And the two spots are in the front. And the wrinkle is still there where I tried to get it out.

page 91 } Q. You went over there to see about getting an appointment to have something done to the dress?

A. That's right.

Q. But, incidently, you went over there to see the Gaglios and take the cards and the candy, did you not?

A. Well, Donna had—as long as I was going, Donna went with me.

Q. Now, Mrs. Busch, you say this was the first time you had ever parked in the driveway.

A. Yes, sir, because the week before Frances had told me to do that.

Q. When you arrived there, how much room was there left in the driveway?

A. She told me if that—if I got there and her car wasn't in I was to pull in. If her car was, to pull in—I was to pull up behind her. I wouldn't do it otherwise.

Q. How far into the driveway was your car after you got in and stopped?

A. I pulled in as close as I could see without bumping her.

Q. How far into the driveway were you at that point? Where was the rear of your car?

A. I don't remember now where it was. I pulled in off the street as far as I could pull in without bumping into her.

page 92 } Q. When you got out of the car where were you with reference to the walkway along the side of Granite Avenue, the little gravel pathway? Did you get out towards the pathway or did you get out up toward the house from the pathway?

A. No. I think it was up a little bit further towards the house.

Q. Where were you going? Were you going back out to the street or were you cutting across the front yard to get to the house?

A. No. I was cutting across the front grass. I hadn't—I

Catherine Busch.

wasn't familiar with that section. I wasn't walking backwards because I didn't, I mean I—It's not paved there. And I figured it would be safer on the grass.

Q. You thought it would be safer on the grass than it would be on the sidewalk?

A. We, I didn't—I mean I had never been that way before. I always parked on the other side of the street.

Q. You knew there was a walk across in front of the house on Granite Avenue, did you not?

A. Yes, sir, but then I would have had to walked down to the car—down from the car and over—

Q. How far would you have had to walk?

A. Maybe about a yard or so.

Q. All right.

page 93 } A. And then I would have to walk over to the entrance to the house.

Q. Then walk up the front walk?

A. Yes, sir.

Q. Which was the way you were accustomed to going?

A. That was the only way I had ever gone.

Q. It was dark out there that night?

A. Yes, sir.

Q. How dark would you say it was, real dark, slightly dark?

A. It was dark to me. I didn't see—I couldn't see anything. There was no light on in front of the place.

Q. You had been—

A. There isn't any light around there.

Q. Well, was it real good and dark?

A. It was dark to me.

Q. Had you ever been over there in the real dark before?

A. Yes, sir, but I had parked on the other side of the street.

Q. So you were then taking a route in real dark conditions that you had never taken before, at the time you were hurt?

A. That's right.

* * * * *

page 96 } Q. When you got out of the car you spoke to your niece and your sister and told them to be careful, right?

A. (Nodding head indicating yes)

Q. What were you afraid might happen to them, that they would have to be careful about?

Catherine Busch.

A. I didn't know, because my sister had never been over there before.

Q. Was it because it was so dark?

A. I don't know why.

Q. Or was it because you were afraid she might not be able to see where she was going?

A. I don't know. God gives me premonitions about things, but I didn't know it was me.

Q. You didn't know there was a need for them to be careful.

A. I didn't know—

Q. Pardon me?

A. I didn't know.

Q. You thought there was anyway?

A. I always do. I always think of everybody but myself.

Q. I see. You did not think that there was any need for you to be careful?

A. Well, I tried to be careful. I mean I just took a few steps, and how can you anticipate anything like that?

page 97 } Q. Where were you looking when you took the few steps?

A. I just started to walk across the grass, and that's the only thing I remember.

Q. You were progressing forward at the time?

A. That's right.

Q. Not backward?

A. Not backward.

* * * * *

page 100 } In Chambers:

Mr. Marks: On behalf of the defendant Joseph Gaglio the same motion is made, the ground thereof being that under the evidence his sole connection with this transaction is the fact that he is the owner of the premises, at some time remote from the date of the accident created a condition which ultimately, after a period of time, resulted in the injury. There is no connection of Joseph Gaglio at all shown by the evidence with any enterprise being conducted on the premises on the part of any of them.

As I understand the law under the case of *Eason* v. *Rose* (183 Va. 359) and *Hanks* v. *Price* (27 Gratt 107), he occupies the status of landlord, and the occupants of the premises are tenants either at will or by sufferance. Under *Smith* v. *Wolf-*

siefer (119 Va. 247) and *Oliver* v. *Cashin* (192 Va. 540) and *Luedtke* v. *Phillips* (190 Va. 207), this lady, if she is entitled to recover at all, must recover from the right of the tenant, and the same state of facts which would enable a tenant to recover would be necessary as to him.

There is no possibility on the evidence before the Court but that the tenants, those that have testified, knew of the presence of the pipe. They told you when it was page 101 } put in. They said it had been there ever since they were at the premises. As I view the law, and I think the cases bear me out without much question, the landlord under those circumstances is not liable to an invitee of the tenant.

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page 107 }

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The Court: All right. I overrule your motion at this time.

Mr. Marks: We save the exception.

* * * * *

Mr. Marks: I also make the same motion on behalf of the two sisters, the other two defendants, on the ground that the plaintiff's own evidence discloses want of ordinary care on her part. We believe that should also be applied to the—

The Court: Motion for the brother, Mr. Gaglio?

Mr. Marks: Yes, sir.

The Court: All right.

Mr. Marks: Her own testimony, of course, being that it was very dark out there and she was not in a place where she was accustomed to being; she knew that care was necessary since she warned her sister and niece; she cut across the yard instead of following the walk, and certainly that page 108 } contributed to her own fall.

The Court: All right. That motion is overruled, also.

Mr. Marks: We save the exception on that.

The Court: All right.

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JOSEPH GAGLIO,

upon being called by Mr. Marks, first having previously been duly sworn, testified further as follows:

DIRECT EXAMINATION.

By Mr. Marks:

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page 109 }

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Q. You own this property over there at 532 Granite Avenue?

A. Yes, sir.

Q. How long have you owned it, Mr. Gaglio?

A. Between three and four years.

Q. Who lives there?

A. My mother and two sister.

Q. Have you ever lived there?

A. No, sir.

Q. Calling your attention to the physical layout of the land out there, Mr. Gaglio, if I may I would like to get you to look at a picture and come over here in front of the jury with me.

Note: At this point the witness walks before the jury.

page 110 } Q. I have Plaintiff's Exhibits 1, 2 and 3. Have you at my request measured the distance in this little drive in?

A. Yes, sir.

Q. When did you measure it?

A. Just now.

Q. Is it any different now from the way it was last June?

A. No, sir.

Q. Where did you measure from? Show on the pictures the two points you measured from.

A. From this corner to the house is twenty-five feet. From the bushes to this corner is twenty feet.

Q. How far is it from the house to the end where the grass grows up to the gravel?

A. Ten feet.

Joseph Gaglio.

Q. Hold it around so the jurors can see it. Now, Mr. Gaglio, you say then, as I understand it, tell us again exactly how far it is from where to where?

A. It is twenty-five feet from the brick wall to the—my corner means my property.

Q. The sidewalk?

A. Yes, sir. To the sidewalk.

Q. All right.

A. From the bushes to the sidewalk is twenty feet.

Q. All right.

A. From the grass to the bush to the corner is
page 111 } fifteen feet.

Q. Fifteen feet?

A. Yes, sir.

Q. Will you show on the picture to the members of the jury just where this pipe was?

A. One was here about eighteen inches in from the grass. And a little bit in from here to—to give you a chance to go around with the car, because you come from here to go around with the car. One foot in this way and eighteen inches in this way is the pipe the lady fell on.

The Court: Could you put a mark on there?

Q. Here is my pen, Mr. Gaglio. As close as you can mark on Exhibit—I guess it is clearer on Exhibit No. 1 where that pipe was located.

A. Right here.

Q. Stick a hole right through it.

A. (Doing so)

Q. Put a circle on the back around the hole.

A. (Doing so)

Q. Were there any other pipes out there?

A. Was on the other side but you can't see it from here.

Q. On the other side of the lawn?

A. Yes, sir.

page 112 } Q. How far is it, Mr. Gaglio, from the place where your driveway entrance goes in here to the front walk?

A. I would say eighteen feet, just guessing.

Q. What kind of walkway is this?

A. Granite. Crushed little, crushed stone.

Q. Crushed stone walkway?

Joseph Gaglio.

A. The city did that.

Q. You say it is eighteen feet from here over to the front walk?

A. Yes, sir.

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Q. Now, Mr. Gaglio, prior to the twenty-fifth day of June, 1963, which is the day this accident happened at about 9:00 o'clock at night, so I understand, when had you last been at the property personally?

A. Before that?

Q. Yes.

A. Before that it was a week. I go there two, three times a week. Sometimes more. Sometimes less. All depend on how busy I am.

page 113 } Q. What did you do the last time you went there before the accident?

A. Visit my mother.

* * * * *

Q. When had those pipes been put down?

A. Those pipes, it was a long ago I put there at least—at least I say six months before the accident happened. At least.

Q. At least that?

A. Yes, sir. The policeman suggested me that because they were parking in my lot.

Q. All right. Now, Mr. Gaglio, what kind of pipe were they?

A. It was a water pipe, galvanized, and I drove in the one. I drove in the grass, the ground was soft. It went easy in. That is why it was not too—it was a little bit what you say lipped in the top, but that's all.

Q. Did it have any jagged edges on it that you observed?

A. I don't get you.

Q. Did it have any jagged edges on it that you observed?

A. Little bit. It had some.

Q. Did your sisters and your mother know that

page 114 } the pipes were there?

A. Well, they knew, but they could not object because only I am in the—I put it there. They say no. I wanted it because they was ruining my property.

Q. Who was ruining your property?

A. People going there, either friends go there, mine, all

Joseph Gaglio.

people goes there. My nephew, my niece, they go there, park anywhere.

Q. Now, the night of this accident, did you know Mrs. Busch was going there before you heard about the fact that the accident happened?

A. No, sir.

Q. Did you know Mrs. Busch before the accident?

A. Sometime I met her.

Q. Where did you meet her?

A. By my mother.

Q. What was going on when you met her over there?

A. She paid visit to my mother. I saw her when my mother was sick most of the time.

Q. What was she doing over there when your mother was sick, having clothes made, dressmaking work done?

A. Visit my mother. At that time no somebody take care of anything. My mother was dying almost.

Q. Do I understand correctly that you bought this property and you let your mother and your sisters live

page 115 } there rent free?

A. They was the first one to move in, and they never given me a penny for it. Even the furniture in it is mine. I furnished it.

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Q. Did your mother live with you before she moved in there?

A. Yes, sir.

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page 118 } Q. What kind of car does your sister drive?

A. Falcon. '62, I think. It's white.

Q. Did you notice that night where that was parked?

A. Yes. It was not parked all the way to the bushes. And I remember that it was even room between my sister's car and Mrs. Busch's car that you can pass by.

Q. Where was the back end of the Busch car?

A. Well, it was in the street, really. It was in the street.

Q. Was it over the sidewalk line?

A. Yes, sir. We can prove it. We can go there and prove it that it was in the street.

Q. How long is your sister's Falcon about?

A. Fifteen feet. Exactly fifteen feet.

Joseph Gaglio.

Q. What is it, a station wagon, sedan, or what?
A. It's a car, two-door car.
Q. Two-door car?
A. It's fifteen feet. I just measured it.
Q. Do you know what kind of car Mrs. Busch had over there that night?
A. No. It was an old car, but I can't recall what type of car it was.

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page 119 }

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Q. Did you look at the pipe?
A. I looked at the pipe. But the—I can't give my opinion. The pipe was so high that I don't think Mrs. Busch could reach this part here to that pipe.
Q. How high was the top of the pipe from the ground?
A. It was over twenty inches for sure.
Q. Did you ever measure it?
A. Yes, sir. It's over twenty inches for sure. Because I know below eighteen inches cannot be put anything.
Q. So you know it was over eighteen inches?
A. Yes, sir.

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CROSS EXAMINATION.

By Mr. Lane:

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page 120 }

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Q. You heard the doctor testify about the jagged edges and the little hook that was protruding out from the pipe?
A. Yes. It's no jag. It's a little bit of a lip, when you hammer it has a little bit of a lip, yes.
Q. When you say it is illegal to have a post less than eighteen inches, what do you mean by that?

Joseph Gaglio.

A. Because the people has to see it. If you go
page 121 } too low they can't see. If it's high the eye has to
go on it.

Q. If it is less than eighteen inches it would be more dangerous, isn't that right?

A. Sure. Sure.

Q. All right, sir. Now. what color was this pipe, Mr. Gaglio?

A. Galvanized.

Q. Galvanized? You heard them say it was rusty?

A. The rusty was the top part where the pipe had lipped.

Q. And if the pipe was below eighteen inches it would be dangerous to the people?

A. Sure. Sure it would be.

Q. And I believe you said it was just one foot off of the driveway, one foot or less off the driveway?

A. Something like that, yes.

Q. And I believe you testified that your sister and mother did not object to the pipe because it was your property?

A. Sure.

Q. You heard the doctor describe the jagged edges; you say the doctor is wrong about his description?

A. I think so, yes.

Q. All right, sir.

A. His memory is not correct.

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page 122 }

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Q. What was the purpose of that pipe?

A. Not let the others park in the grass, on top of the grass.

Q. Let the automobiles?

A. Yes.

Q. Would that stop an automobile?

A. It could stop the way it was after my sister
page 123 } would park the car, because they could go in the
other direction toward the front door even if the car was parked there and park in on the lawn.

Q. If an automobile hit the pipe, would the pipe stay up?

A. No, it would stay up. It would bent a little bit.

Q. It would not stop an automobile, would it?

Frances Gaglio.

A. No. It would bend it. That was another reason because it was high so with an automobile if it's very low you don't see it.

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page 124 }

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REDIRECT EXAMINATION.

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page 126 }

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By Mr. Marks:

Q. After you bought the Granite Avenue house, your mother and sisters moved from the Patterson Avenue address over there?
A. Yes, sir.

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page 128 } FRANCES GAGLIO,
upon being called by Mr. Marks, having previously been duly sworn, testified further as follows:

DIRECT EXAMINATION.

By Mr. Marks:

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page 130 }

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Q. Did Mrs. Busch come to see you all socially?
A. Yes. Many times.
Q. For what purpose?
A. Just—

Frances Gaglio.

Q. On what occasions?

A. Because many occasions she just come over to visit. She just come in. Like one night she say John has to work this night. I don't want to stay home by myself so I come to see you.

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page 133 }

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Q. What had she told you a week before?

A. She told me my sister is coming. My sister Pat and I want you to meet my sister. So then that night she called to bring her sister, or let us meet her sister. But she knew we were not home.

Q. All right.

A. And she came in to bring these cards, because she—she was in the hospital sick and I sent her some cards. you know, how you call it?

Q. Get well cards?

A. Yes. Because she—I do not have any time because I work real hard. I could not have the time to try to find so many religious cards. So she said, why you not don't send religious cards? Because when my mother was sick she sent almost every day religious card. I said, I know—I work. I cannot find—she wrote to her sister. When she came in she brought a box of cards and a box of candy for my mother.

Q. Did you ever charge Mrs. Busch for any dressmaking work or alterations or anything of that kind that you did for her?

A. No, because we do not have any business. We did because my sister beg us to do that. We no want to do nothing for nobody because we no have any time.

page 134 } Q. Did you talk with Mrs. Busch on the phone periodically or not?

A. Yes. She was calling real often. Sometime I was tired and I told my sister to answer nobody—my sister not home. That's all.

Q. How often would you talk with her on the phone?

A. She was calling most every night.

Q. What did she talk about when she called. when you did talk?

A. Nothing. How are you, what are you doing, just really

Frances Gaglio.

nothing like that. She had nobody, just like we had. See, that's why we offered her the same love her the same thing.

Q. Did you ever say anything to her as to where she should park?

A. No, because I don't know, she just a park across the street when she was by herself, when she came in the house. She came daytime, nighttime, she was park in my yard when she park in the summertime, you know. That's where I was parking. And we park like this. So I told her anybody, even her, it was—My brother was mad about that everybody was parking on the grass on the property.

Q. What did you tell her about where to park?

A. Everybody parking there, my brother put a pipe.

Q. When did you tell her that?

page 135 } A. As soon as he put it there, the pipe.

Q. What did you ask her to do about where she parked?

A. Nothing.

Q. All right. Now, had she ever been there in the daytime?

A. Yes.

Q. How often had she been there in the daytime?

A. Quite a few times, well, she knew I was home.

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page 138 }

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Q. Did she ever send any candy over there or anything like that?

A. Sure. She did and I did. I sent some to her. That's why was she sent to me, and I sent to her.

Q. So you would accept the candy and the cards?

A. Yes. Because I, we, we wasn't like—we were like relatives. We love her. She sent to me and I sent to her back.

Q. And then you did sew something for her, too?

A. Just a little bit. Just a few things to fix. That's all.

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page 139 }

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Mary Ann Gaglio.

A. She brought candy on occasions when like, when my mother was sick. Or another time because she knew my mother doesn't like any cream candy. She brought a box of candy, there were two boxes of candy the night she came in one night before, and—how you call it, almonds covered with chocolate? She knew that's what my mother liked.

Q. And you were glad for her to bring your mother candy?

A. No. We don't need it. We have plenty at home. Nobody eats.

Q. Did you know the pipe was out there?

A. Yes.

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page 141 }

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MARY ANN GAGLIO,

upon being called by Mr. Marks, first being duly sworn, testified as interpreted by Lena Gaglio as follows:

DIRECT EXAMINATION.

By Mr. Marks:

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page 143 }

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Q. Has she ever made a complete dress for Mrs. Busch?

A. Just alterations, little alterations to be done.

Q. Has she ever had Mrs. Busch come to visit in the place she lives?

A. Yes.

Q. How often?

A. She doesn't recall how often. She was there often.

Q. Ask whether or not Mrs. Busch has ever been there to see Mrs. Maria Gaglio?

A. Yes. When she was sick, my mother-in-law—

Q. Did she ever come there other than for dressmaking and alterations?

A. Yes.

Mary Ann Gaglio.

Q. Has this lady ever visited Mrs. Busch in Mrs. Busch's home?

A. Yes.

Q. How often?

A. Few times. About two or three times.

page 144 } Q. What was the purpose of those visits?

A. She was sick.

Q. Did she ever participate or join with anyone in giving gifts to Mrs. Busch?

A. Yes.

Q. Did she ever receive any gifts from Mrs. Busch?

A. Yes. She exchanged gifts.

Q. What kind of gifts?

A. Talcum powder, you know, boxes of cards, perfumes, things like that, and the candy.

Q. Did she know that the pipe was in the front yard?

A. (Nodding head indicating yes)

Q. How long had it been there?

A. She doesn't remember exactly the time when it was put there.

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page 145 }

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CROSS EXAMINATION.

By Mr. Lane:

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Q. Would you ask her to give some description of the type of alterations that she has done for Mrs. Busch?

A. Just on the shoulders, you know, picking up, raising up the shoulders and the hems. She means raising up the shoulders of her dresses.

Q. Ask her if she remembers doing some alterations on the hem of this coat?

A. (Shaking head indicating no) No.

Q. She said that she did some alterations on one of these dresses, is that right?

A. Yes.

Q. Would you ask her to tell what that was?

page 146 } A. The shoulders and the zipper part.

Catherine Busch.

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page 148 }

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CATHERINE BUSCH,
upon being recalled in rebuttal by Mr. Lane, having previously been duly sworn, testified further as follows:

DIRECT EXAMINATION.

By Mr. Lane:

Q. Mrs. Busch, will you state whether or not anyone ever told you anything about any pipe?

A. No, sir. I didn't know anything about it. I never saw it. I never heard anything about it.

Q. All right. You heard some testimony that the Gaglios deny that you paid anything.

A. Yes, sir. But that isn't true. Nobody sews for strangers for nothing, and I never knew the girls before, so why would they sew for me for nothing?

Mrs. Gaglio had given me their number to call, and I asked them would they sew for me. And Mary Ann did make these dreses, because she was the one that tried them on. In the front bedroom they have a long mirror, and that's where she would take me when she tried the dresses on, page 149 } and measured them. And there is a little back room where she had the sewing machine, and she has stuff piled up real high on a chair that she still had to do. They worked in there. No matter—I could only go over at night because she didn't get home until after six, so that is when I really had to go over to have anything tried on, really. And they—I was there one time she was pin-fitting a blue dress. She had a dress waiting for somebody to come and pick up. And she said—Frances was angry. She said she wanted it in such a hurry and she still hadn't come and picked it up.

And I met people going in and out, and I had to wait until they were finished, that went out with the clothes. And they had come in with clothes right before that, right before I came, and they were leaving when I came in.

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page 150 } JOHN BUSCH,

upon being recalled in rebuttal by Mr. Lane, having previously been duly sworn, testified further as follows:

DIRECT EXAMINATION.

By Mr. Lane:

Q. Will you state whether or not you saw Mr. Gaglio take the pipe out on that particular night?

A. I saw him pull it out of the ground and throw it toward the side of the house. I think there is a porch on the right hand side. He threw it over along the ground there on the side.

Q. Did he measure it?

A. I didn't see him do it. He pulled it out and threw it over along the ground there on the side.

Q. How high was this pipe out of the ground?

A. I judge it was a foot or foot and a half, thereabouts. I couldn't tell. It was dark, and that was the first time I had ever seen it. If it was there I never noticed it before.

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page 152 }

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CROSS EXAMINATION.

By Mr. Marks:

Q. Could that pipe have been twenty inches long above the ground?

A. I couldn't tell. It was at night. There was light shining from the building, and it was not close to the pipe. It is strictly a guess.

Q. You say it appeared to you to be a foot or eighteen inches somewhere in that neighborhood?

A. I say just at a fast glance going by it I thought that that's about what it was. I didn't try to measure it.

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page 154 }

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In Chambers.

Mr. Marks: On behalf of the defendant Joseph Gaglio motion is made to strike the plaintiff's evidence and enter up summary judgment on behalf of that defendant on grounds as follows:

(1) That under no theory of the case could the plaintiff have qualified as an invitee of of Joseph Gaglio;

(2) He had no present knowledge of the fact that she would go upon the premises at the time and place and under the circumstances she did, therefore could have been under no duty or obligation to warn her of any condition thereon;

(3) He has not been shown to have been guilty of any negligence, or to have had any connection with
page 155 } any business which may have been operated on the premises by his sisters, existence of which is denied;

(4) His duty, if any duty there was, ran only to the tenants in his premises, who were his mother and his sisters. They were fully apprised of the existence of the pipe in its location and under the circumstances it was placed there.

The plaintiff cannot recover as their invitee, whether social or business, except in the same right the tenant would have had under the circumstances, and there is no possibility under the circumstances shown in this evidence that the mother or sisters, had they come in contact with the pipe, would have been able to recover from Joseph Gaglio;

(5) On the ground that as a matter of law the owner of premises is entitled to engage thereupon in all lawful activities. He is not required, in the absence of notice, to presume that persons will come upon his premises unbidden by him, unless he divests himself of control over that in favor of a tenant, and in this instance the tenants are fully apprised of any hidden danger or defect, and it was their duty, if anybody's duty. to pass that information on to their invitees.

(6) The evidence establishes that the particu-
page 156 } lar visit on the occasion on which this accident occurred was not directly connected with any business activity being carried on on the premises. It was a visit to arrange, let us say. an appointment, if we take the plaintiff's version, which was a mixed social and business affair, since the evidence is plain that they carried gifts to the elder Mrs. Gaglio at the time, and the cards to the girls.

Lastly, on the ground that the plaintiff's own testimony indicates that she, knowing she was in a place she had never been before, she elected to cut across the yard instead of go-

ing out to the gravel walk and going from there to the front porch, which is the place for normal and usual pedestrian travel; and, in the process, knowing the need to be careful because of the condition of darkness—having warned her sister and niece to be careful—proceeded without due care, on her own admission, and received her injury.

I might add that there is a further thought in that connection, this is a static situation, if Your Honor please. This is not a situation in which there is any active negligence in process at the time, if we concede that there may have been negligence on Mr. Gaglio's part in putting the pipe

page 157 } where he put it. It is certainly, under this evidence, a long-standing situation—equally long-standing to the front steps that the landlord mishandled in the Cashin case—and that his negligence, if he was negligent, is bound to be a remote cause creating a condition, rather than anything active and in operation at the time.

I think the Tugman case can readily be distinguished, because they are workmen belonging to the employment of the land owner in one of these mill developments where the houses were supplied to mill hands, who went out there and dug some postholes in an area that was full of children, in an area in which they knew children were running around. They put one post in a hole, left the second hole open with a post sitting beside it lying on the ground, and went off. The hole filled with water, and one of the infant children that lived in the housing area fell into the hole and was hurt. That is an entirely different sort of situation there. The negligence was active and continuing rather than something that was static, that had been there a long while.

I might point out further, if Your Honor please, that as I view the law, and I am satisfied that the law

page 158 } is plain on the point, I have a duty to warn, true, my guests of conditions that are not readily visible to the human eye, but there is no law which says that I cannot have those conditions on my premises, and there is no evidence to establish that this was not on Mr. Gaglio's premises. That is all.

Then, of course, on behalf of the two girls, that portion of the motion dealing with the lack of gross negligence in a social situation, and the contributory negligence of the plaintiff, are relied upon.

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page 159 }

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The Court: As to your motions, Mr. Marks, I have gone over all the cases that you cited, except the ones you gave me as to the relationship of landlord and tenant. I think that it is pretty patent in this case that regardless of whether they are in there without pay or not, I do not think that makes any difference. This is going to be my ruling on your two motions—

Mr. Marks: Before you rule, may I make this suggestion to you. I do not know what your ruling is going to be; in any event, I want to point out to the Court these facts: (1) The only reason this thing was dangerous at all to anybody was the nighttime. Had this been a daytime accident this would certainly have come under the open and obvious situation, would it not?

The Court: Well, it might, depending upon the circumstances.

Mr. Marks: If somebody is out there in the daytime and a pipe is sticking up out of the ground right
page 160 } square in the wide open spaces, which is all the evidence shows here, it is bound to be an open and obvious situation, is it not?

The Court: What I had in mind is this—that wasn't the situation—I can see, where this pipe was located, how a car could have driven up for the first time, with a person not ever having been there before, and perhaps looking at traffic and pedestrians and driving up into this area that was meant for parking, open the door, having parked close to the edge, got out and hung his leg on that pipe as he stepped out. It might be a question here of contributory negligence, but certainly that proposition could very easily have happened. However, be that as it may, this was a nighttime accident.

Mr. Marks: I understand that. The law seems to me to be perfectly plain under all the decisions, that the essential nature of a defect in the premises, if this is a defect, and I deny that it is, of course, is not changed by the forces of nature, by the coming of darkness and things of that kind. Secondly, I want to point out—this is the other thought I had—What is the status of the plaintiff *quo ad* Joseph Gaglio? Certainly she could never have been an in-
page 161 } vitee of his under the evidence in this case, at the most she would be a bare licensee of his because he permits his family to have guests upon the premises. All right. Now if she is a bare licensee of his, his only duty is to refrain from conduct, after he knows or should know that she is on the premises, which is calculated to injure her

or may injure her, and that is the law one hundred per cent.

The Court: I think that is true.

Mr. Marks: I just picked this out of Michies just to show you what I am talking about here: A trespasser or bare licensee takes the situation as he finds it. He occupies the same status as a trespasser. The duty to each is the same. No prevision is required. No duty is imposed upon the owner or occupant to keep his premises in safe and suitable condition for the use of the licensee and the owner or occupant is only liable for any wanton injury that may be done to him.

The Court: That is right. The way I see it, I think you have two approaches. One is the approach of the responsibilities under the law of landlord and tenant, and the other is the approach completely unrelated to the duty of landlord and tenant.

page 162 } Mr. Marks: What I am dealing with now, what I just read to you is not connected with the landlord-tenant theory. It has to do with the duty of the owner or occupant owed to a licensee.

The Court: I think, gentlemen, that you have presented the law fully, and right or wrong I have come to this conclusion, and I am going to rule accordingly.

First as to the motion to strike as to the defendant Joseph Gaglio, the owner of the premises. After viewing the cases as cited by counsel it is my belief that this case falls under the doctrine of *Tugman* v. *Riverside,* and that the general law of negligence rather than the law of landlord and tenant governs the duties and responsibilities as between Joseph Gaglio and the plaintiff.

The testimony presents a somewhat unusual situation according to the Gaglio sisters. Their brother put them and their mother in the premises rent free, but they had no control over the maintenance or upkeep of the property, which was handled exclusively by Joseph. This was also his testimony.

As to the pipe in question, the sisters say that they would not have had the power to remove it had they so

page 163 } desired, since their brother Joseph did all the repair work on the property. After the Gaglio sisters had been put in possession, though not in absolute control of the premises, Joseph Gaglio installed the pipe in question. The act was at his sole instance, done during the tenancy under the right which he undoubtedly had of making any alterations in the premises he desired. The only issues as to Joseph Gaglio, therefore, would be (a) whether his act of installation was negligence, and (b) whether it proximately caused plaintiff's mishap.

There is ample evidence that the pipe was hazardous as to its height and ragged characteristics. The purpose of the driveway was for the off-street parking of vehicles. The location of the pipe, though not in the walking area, was at a point directly between the point where passengers would leave the vehicles and entrance to the house. There is evidence here upon which the jury could find negligent installation. This, and the question of causation, should be left to the jury. This motion is therefore overruled.

On the motion to strike as to the sisters Gaglio, there is ample evidence upon which the jury could find plaintiff quo ad sisters Gaglio an invitee. If the jury believed
page 164 } this to be the status, they could find against the sisters Gaglio. There is no evidence, however, upon which the jury could find gross negligence as to the sisters. This distinction will have to be covered by proper instructions to the jury. This motion is likewise overruled.

The issue of plaintiff's contributory negligence, which is one of the grounds for each of the above motions, is believed one for the jury, so I am going to overrule both motions to strike, both as to Joseph and as to the two sisters.

Mr. Marks: We respectfully except on all the grounds urged in oral argument. In order that the record may be complete, I should like to state them at this time.

(1) That under no circumstances does the plaintiff qualify as an invitee of Joseph Gaglio upon the premises;

(2) That she at the most would be a bare licensee of Joseph Gaglio to whom he owed only the duty to refrain from conduct which was calculated to impose danger to her after he knew or should have known she was upon the premises;

(3) That a landowner does not owe the duty
page 165 } of prevision to a trespasser or a bare licensee upon the premises;

(4) He has no duty to keep his premises in a safe condition for the use of a licensee;

(5) The pipe itself, located as it was, is an open and obvious condition. The nature of which is not changed be the mere fact that the plaintiff went upon the premises in darkness.

(6) That the condition was one of long-standing; and even if it can be classified as a defect in the premises, it is certainly not such a defect as comes under the general classification of a trap, or a spring gun or a concealed defect;

(7) The plaintiff cannot be classified as a member of the general public since she was on the premises, under her testimony, as a business invitee, and, under the testimony of the

occupants of the premises as a social guest, in neither of which categories did she bear any such relation to the defendant Joseph Gaglio;

(8) The fact that Joseph Gaglio voluntarily went upon the premises for the purpose of installation of the pipe after his mother and sisters moved therein, does not impose upon him any duties with respect thereto, other than page 166 } to call the results of his operations to the attention of the occupants of the premises in whose right the plaintiff, if she recovers at all, must recover against him.

Lastly, and with respect to the issue of contributory negligence on the part of the plaintiff, the plaintiff herself testified that the condition of light and darkness at the premises was well known to her; that she knew that she was required to exercise care under the circumstances then existing, since she warned her sister and niece. She did not stay upon the portion of the premises delineated for pedestrian activity or for vehicular traffic but, under her own testimony, attempted to cut across the yard of the premises upon which the pipe was located and was therefore not upon any portion of the premises to which any licensee or other permissive use on the part of Joseph Gaglio could under the law extend; and for all other reasons assigned in the course of argument.

On behalf of the sisters Gaglio the same exceptions are taken with respect to the question of contributory negligence, which is the only basis on which their motion to strike is made and overruled, plus the open and obvious nature of the defect.

page 167 } HERE BEGIN THE OBJECTIONS AND EXCEPTIONS TO THE INSTRUCTIONS

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page 168 }

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INSTRUCTION NO. 5.

Mr. Marks: The defendants except to the ruling of the Court in granting over the objection of the defendants that portion of Instruction No. 5 consisting of paragraph (c) and (e) on the ground that paragraph (c) is included in Paragraphs (a) and (b) and (e) is likewise included in paragraphs (a) and (b), the two additional elements so-called of

damage being merely a reiteration of what has previously been covered in (a), (b) and (d), and serves to unduly emphasize considerable portions of the damage.

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page 169 }

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Mr. Marks: The defendants object and except to the granting of any instruction which would permit the jury to find against Joseph Gaglio for all the reasons stated in support of the motion to strike, and upon all the grounds heretofore relied upon in argument; and further the granting of any instruction which would permit the plaintiff to recover against the Gaglio sisters on the ground that under the evidence the plaintiff was contributorily negligent as a matter of law as the first ground, and second because the defect was open and obvious as a matter of law and the existence of darkness upon the premises did not certainly change the legal premises applicable.

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page 170 }

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INSTRUCTION NO. 2-A.

Mr. Marks: The defendant objects and excepts to the action of the Court in giving over the objection of the defendant Joseph Gaglio Instruction No. 2-A upon all the grounds relied upon in support of the motion to strike urged by Joseph Gaglio; second, because under the law of negligence a property owner has no duty to maintain his premises free from defects *quo ad* persons upon the premises in the general sense of the term. There is no essential difference between the particular instrumentality involved in this case and any type of barricade or barrier having a sharp edge or point.

The instruction in the terms as given ignores
page 171 } the law with regard to the duties of the owner
of the property to persons lawfully upon such property in that the plaintiff quo ad Joseph Gaglio was not upon the premises lawfully or otherwise. She was there on the express or implied invitation, either social or business,

of the occupants of the premises; did not have any permission from him; and as to her he had no duty with respect to the care and maintenance of the premises.

In view of the fact that she was using a portion thereof among other things not set apart and delineated for use of occupants or guests upon the premises. The Court in giving Instruction 2-A is confusing the principles of law applicable to the factual situation and combining what might be called a duty to the general public with a duty to a person on the premises in the right of another.

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page 172 }

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INSTRUCTION NO. 2-A.

Mr. Marks: The defendant also in excepting to the action of the Court in granting Instruction No. 2-A, assigns as an additional ground under the evidence in this case there is no evidence sufficient to enable the jury to deter-
page 173 } mine that by reason of its characteristics the location of the pipe constituted a dangerous condition to persons upon the premises who were exercising reasonable care for their own safety. In that connection I reiterate the fact that the mere operation or courses of nature in the going down of the sun and the darkness which necessarily and ordinarily follows and is known to the plaintiff in this case, changes the essential and fundamental nature of any object or improvement upon the premises.

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page 175 }

INSTRUCTION NO. A.

Mr. Marks: In view of Your Honor's prior ruling, of course, on the question that the landlord-tenant relationship has no bearing to the duties of Joseph Gaglio to invitees of the occupants of the premises, my exception to this instruction in the form in which the Court has indicated it will give it without waiving my theory of the case as embodied in Instruction No. A is only that the instruction permits the jury to find that the pipe because of physical characteristics and

location created a dangerous hazard to persons lawfully upon the premises, when under the evidence in this case there is no evidence to support such theory. Secondly, the page 176 } instruction as prepared and written ignores the fact that this so-called dangerous hazard was open and obvious to any person using reasonable care for his own safety and as previously stated in exceptions to other instructions the mere operation of natural forces to create darkness at the time and place of this particular accident does not operate to change the nature of the situation.

As we view the matter, the presence of this piece of pipe wholly and completely upon the premises owned by Joseph Gaglio is no more of a hazard than any other obstruction over which a person might stumble in the dark.

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page 177 }

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INSTRUCTION NO. A-1.

Mr. Marks: I might add to my exception also the fact that there was nothing hidden about this pipe. It was not overgrown, it was not concealed in any way other than by darkness, and it is of such a type thing the Court should take judicial notice that it is customarily and frequently used in this area for similar purposes.

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page 179 }

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INSTRUCTION NO. H. (Refused)

Mr. Marks: The defendant, Joseph Gaglio, excepts to the ruling of the Court in refusing Instruction No. H in the form tendered since there are only two conceivable theories under which the plaintiff could in law have any rights whatsoever against Joseph Gaglio. One would be in the event that the landlord-tenant relationship controlled the relative rights and duties of the parties, and the other is if the common law relationship of property owner and person upon the premises controls. Under the evidence in this case the plaintiff

could only occupy one of these two relative legal
page 180 } statuses. In view of the fact the Court has ruled
that the plaintiff is not affected by the landlord-tenant relationship, and that the duties owed to her or the plaintiff are the owner of land, then Instruction No. H correctly states the legal principles applicable to such a situation, and is fully warranted by the authorities in Virginia. I make specific reference to Section 17 of Michies Jurisprudence under the chapter heading of Negligence in Volume 13 of the work at Page 523 in which statement of law laid down that a trespasser or bare licensee takes the situation as he finds it. He occupies the same statute as a trespasser. The duty to each is the same. No prevision is required. No duty is imposed upon the owner or occupant to keep his premises in safe and suitable condition for the use of the licensee and the owner or occupant is only liable for any wanton injury that may be done to him. On the following page: But a licensee can recover for injuries resulting from the subsequent actual negligence of the defendant while the licensee is on the premises. The owner of premises must not intentionally or wilfully injure a licensee on the premises, but he
owes him the active duty of protection only after
page 161 } he knows of his dangers, or might have known of
it and voided it by the use of ordinary care. And the authorities cited in support thereof.

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Mr. Marks: I would like the Court, if the Court will, to
rule definitely on what status the Court feels the
page 182 } evidence establishes the plaintiff occupied quo
ad Joseph Gaglio, whether invitee, or trespasser, or licensee, or whether a member of the general public, or what?

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The Court: I do not see that there is any evidence in this case that this woman was a trespasser. I mean that is completely out. So the answer to your question, Mr. Marks, the only categories that she could fall in in this case, there being no evidence under which she could, under any circumstance, be held a trespasser, therefore the only classes she could fall into are those either of an invitee or a licensee. I think for the purposes of the theory on which I am letting it go to the jury as to Joseph Gaglio that it would not make any difference whether she were an invitee or licensee. Under the in-

structions that I have given, I think that it would make no difference to the jury as to which classification she fell in, because Instruction No. 2-A, under the theory
page 183 } that I have adopted, tells them exactly under what circumstances they can find against Joseph Gaglio. I do not think that it is necessary for this case for me to determine as to Joseph Gaglio whether or not she is a licensee or invitee.

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Mr. Marks: On behalf of Joseph Gaglio, the defendant excepts as follows to the ruling of the Court: That there is no evidence from which the jury might find that this pipe in its situation as located and condition as shown by the
page 184 } evidence was in fact a dangerous instrumentality or a nuisance or a trap.

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page 185 }

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The Clerk: We, the jury, on the issue joined find the defendant Joseph Gaglio guilty of negligence and assess the damages at $6,500.00. Jesse J. Whitley, Foreman.

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page 186 }

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Note: Whereupon the Court corrected the verdict to read as follows: We, the jury, on the issue joined find the defendant Joseph Gaglio guilty of negligence and assess the damages at $6,500.00. We find in favor of the defendants Mary Ann Gaglio and Frances Gaglio. And asked the jury whether or not the verdict, as corrected, was their verdict, to which they all answered in the affirmative. On the motion of the defense, by counsel, the jury was polled as to said verdict and they each replied individually that it was.

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After the jury was discharged, the defendant, Joseph Gaglio, by counsel, moved the Court to set aside
page 187 } the verdict of the jury for the following reasons, to wit:

Mr. Marks: If Your Honor please, the defendant Joseph Gaglio moves the Court to set the verdict aside and enter final judgment in his behalf on the ground that it is contrary to the law and the evidence and has no substantial evidence to support it.

As an alternative and without waiving his first motion, the defendant Joseph Gaglio moves the Court to set the verdict of the jury aside at this time and sustain his motion to strike the plaintiff's evidence as to him made at the conclusion of the plaintiff's case and at the conclusion of all the evidence, upon all the grounds therein urged; and, finally, and without waiving either of the other two motions, the defendant Joseph Gaglio moves the Court to set the verdict aside and order a new trial from misdirection of the jury by the Court in the giving and refusing of certain of the instructions.

I should like, if Your Honor please, to submit authority on that.

A Copy—Teste:

H. G. TURNER, Clerk.

INDEX TO RECORD

	Page
Writ of Error Awarded	1
Record	2
Judgment—October 13, 1964	2
Instructions	2, 60
Letter, Opinion	8
Order—February 10, 1965	12
Notice of Appeal and Assignments of Error	13
Assignments of Cross-error	14
Proceedings	15, 40, 55
Witnesses:	
Frances Gaglio	15, 48
Joseph Gaglio	17, 42
Patricia Kennedy	18
John Busch	23, 54
Dr. Henry Chesley Decker	28
Catherine Busch	32, 53
Mary Ann Gaglio	51
Verdict of Jury	65