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SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

SUPREME COURT OF VIRGINIA

TOWN OF HILLSVILLE, a
Municipal Corporation

Appellant,

vs.

BEULAH E. NESTER,

Appellee,

RECORD NO.
730533

APPEAL FROM THE
CIRCUIT COURT OF
CARROLL COUNTY

APPENDIX

Philip M. Sadler
Gilmer, Sadler, Ingram, Sutherland & Hutton
Midtown Professional Building
Pulaski, Virginia 24301

Attorney for Appellant

TABLE OF CONTENTS

		App. Page
1.	Motion for Judgment, Filed September 5, 1972	1-3
2.	Grounds of Defense, Filed September 19, 1972	4-6
3.	Excerpts From Reporter's Transcript of Proceedings:	
	Testimony of Malcolm Long	7
	Testimony of Tim Clary	7-8
	Testimony of Beulah Nester	8-19
	Testimony of Vergie Jones	19-24
	Testimony of Mayor Raleigh M. Cooley	25-26
	Testimony of Barnard Martin	26
	Motions by Mr. Sadler	27
4.	Order Affirming Verdict, Filed March 12, 1973	28-30
5.	Notice of Appeal and Assignments of Error, Filed April 6, 1973	31-32

VIRGINIA: IN THE CIRCUIT COURT OF CARROLL COUNTY

BEULAH E. NESTER,

Plaintiff

vs. MOTION FOR JUDGMENT

TOWN OF HILLSVILLE, a
Municipal Corporation

Defendant

TO: THE HONORABLE JACK M. MATTHEWS, JUDGE OF SAID COURT:

Now comes the plaintiff, Beulah E. Nester, and files this Motion for Judgment against the defendant, Town of Hillsville, a Municipal Corporation, in the amount of THIRTY THOUSAND DOLLARS ($30,000) plus costs and respectfully states that she has been injured by the defendant by reason of the following wrongs:

1. That on Tuesday, February 22, 1972, at approximately 4:30 P.M., plaintiff was walking on a sidewalk adjacent to Main Street, in the Town of Hillsville, said sidewalk being controlled and maintained by the municipal authorities as a public sidewalk and open as such to the public, when she fell by reason of the sidewalk being defective and injured her person, causing great pain and mental anguish.

2. That prior to the date in question, the Town of Hillsville had notice, both active and constructive, that said sidewalk was in a defective condition and further that individuals using said sidewalk had been injured as a result thereof.

3. That immediately before and at the time in question, your plaintiff was exercising ordinary care and caution for her own safety.

4. That immediately before and at the time in question, it was the duty of the Town of Hillsville to properly care for, maintain, and repair defective sidewalks, particularly so when the defendant had knowledge of its defective condition and injuries to others as a result thereof. That notwithstanding this duty, the defendant was negligent in operating, maintaining, and failing to repair said defective sidewalk, and as a result thereof, plaintiff was injured in that she received injuries to right arm, right knee, multiple contusions about the face, severe tendinitis due to trauma of her fall, aggravation of previous arthritic condition, injuries to her nervous system, pain and numbness in her limbs, injury to her left shoulder, from all of which injuries the plaintiff has incurred hospital and medical expense; loss of wages, and has been permanently injured, disfigured and disabled.

WHEREFORE, plaintiff moves this Court for judgment against the above-named defendant in the amount of $30,000 plus costs.

Respectfully,

BEULAH E. NESTER

By /s/ Richard W. Davis
Of Counsel

RICHARD W. DAVIS
Attorney at Law
Radford, Virginia

Filed 9-5-72

GROUNDS OF DEFENSE

For its answer and grounds of defense to the plaintiff's Motion for Judgment, the defendant, Town of Hillsville, a Municipal Corporation, comes by counsel and says:

(1) It denies that it is indebted to the plaintiff for the amount alleged in the Motion for Judgment or for any sum whatever.

(2) It denies that it violated any legal duty owed the plaintiff.

(3) It denies that it was guilty of the acts of negligence alleged in the Motion for Judgment.

(4) It alleges that the plaintiff was guilty of negligence which was the sole proximate cause of the accident in question.

(5) While denying that it was guilty of any negligence which contributed to the accident, it alleges that even if it were guilty of such negligence, plaintiff was guilty of negligence, or contributory negligence, which likewise contributed to the accident, and it will bar plaintiff from recovery herein.

(6) It alleges that plaintiff assumed the risk of that which was open and obvious.

(7) It denies that the plaintiff was injured and damaged as alleged and calls upon the plaintiff for strict proof of each and every item

of alleged injury and damage.

(8) All allegations in the Motion for Judgment which say, or tend to say or infer, that plaintiff was injured as a direct and proximate result of any negligence or omission on the part of this defendant, and not hereinbefore denied, are hereby specifically denied.

(9) All allegations in the Motion for Judgment not expressly admitted herein are denied.

And now having fully answered, this defendant prays to be hence dismissed with its costs in this behalf expended.

Respectfully,

TOWN OF HILLSVILLE,
A Municipal Corporation

By Counsel

Gilmer, Sadler, Ingram, Thomas,
Sutherland & Hutton
Midtown Professional Building
Pulaski, Virginia

By /s/ Philip M. Sadler
Of Counsel

CERTIFICATE OF MAILING

I, Philip M. Sadler, counsel for the defendant, Town of Hillsville, a Municipal Corporation, do hereby certify that a copy of the foregoing grounds of defense was mailed to R. W. Davis, Esquire, Box 3310,

First Street Station, Radford, Virginia, counsel of record for the plaintiff, this 18th day of September, 1972.

/s/ Philip M. Sadler

Filed 9-19-72

App. 7

EXCERPTS FROM REPORTER'S TRANSCRIPT

* * *

(T-2) Malcolm Long

Q. At the outset if you could would you please identify these two pictures, please, Mr. Long? (handing pictures to witness)

A. I believe that is the sidewalk in front of the Hillsville Cleaners.

Q. Is this another picture, same thing except a wider angle?

A. Yes, sir.

MR. DAVIS: Your Honor, I would like to introduce these.

MR. SADLER: No objections.

(Pictures marked Exhibits Nos. 1 and 2 for Plaintiff)

(T-6-7) Tim Clary

Q. How long has the sidewalk, Mr. Clary, been in the condition that it is at the present time?

A. I guess three or four years, at least that long, I would say so, maybe longer, maybe not quite that bad.

* * *

(T-8)

Q. Mr. Clary, let me show you another photograph and will ask if this also shows the walk in front of your place of business?

A. Yes, sir.

Q. I am referring to Exhibit No. 2 and I believe you said you did recognize that as being right in front of your business?

A. Yes.

Q. Would you for the benefit of the jury on the photograph mark a ring around where this is on this photograph, the approximate location with a circle?

(Witness drew the circle)

Q. Is that about right?

A. That is about where it is.

Q. Let me draw lineup from that and ask you to put your initial on the margin so that we can identify it?

(Witness initialled the photograph)

MR. SADLER: We would like to introduce this as Defendant's Exhibit No. 1.

(Received and marked as Defendant's Exhibit No. 1)

* * *

(T-19) Beulah E. Nester

Q. State your full name, please, Mrs. Nester?

A. Beulah Elizabeth Nester.

Q. Where do you live, Mrs. Nester?

A. Dugspur.

Q. How old are you, Mrs. Nester?

A. Fifty-six.

Q. Do you have a family?

A. Yes, sir.

Q. Can you tell us about your family?

A. I have four boys at home, one single girl, she doesn't stay at home.

Q. Mr. Nester still living?

A. Yes, sir.

Q. How many at home, Mrs. Nester?

A. Four boys and me and my husband.

Q. How old are they?

(T-20)A. The oldest twenty-five, the next one seventeen, then one fifteen and the baby is thirteen.

Q. On February 22nd of this year, Mrs. Nester, were you employed?

A. Yes, sir.

Q. By whom were you employed?

A. Mayville Company.

Q. And what was your job with the Mayville Company?

A. Machine operator.

Q. Would you describe to us what a machine operator does?

A. I was setting the insert pockets. They would come in two to six dozen and you put them over behind your machine and you had a rope that you tied them off. Then you would get up and crossed a little aisle and laid them on the table.

Q. Is that also known as a seamstress?

A. Yes.

Q. How long had you been employed at the Mayville Company?

A. Eight months.

Q. Prior to that had you been employed?

A. Yes, I had worked at Floyd Garment about eight years.

Q. You had been working at Mayville eight months or something like that?

A. Yes.

Q. On the 22nd of February of this year how did you get to

(T-21) work on that particular day?

A. I drove.

Q. Was that normal and usual for you to drive?

A. I had drove part of the time but most of the time I rode

with Juanita Carter.

Q. Did she pick you up at home?

A. No, the service station in sight of my house.

Q. Would there be others coming to work with you?

A. Yes, Aleta Walkers and Vergie Moles and Goldie Dalton part of the time.

Q. All of you were employed at Mayville Company?

A. Yes.

Q. Where would you park?

A. At the dry cleaners. Sometimes she would stop to go to some of the stores and I would walk on down in front of the courthouse and cross the street at the pool hall and on across.

Q. There is a parking lot across from Mayville Company?

A. Yes, a lot of them park there, it is a place below Sears Roebuck.

Q. On this particular day you drove yourself?

A. Yes.

Q. Why did you drive on this particular day?

A. Juanita, I don't know whether she was sick or looking after

(T-22) her mother or mother-in-law.

Q. What time did you get to work?

A. Eight o'clock.

Q. Where did you park?

A. On that particular day I parked down by Guynn's Hardware.

Q. Did that necessitate your walking down by the cleaners?

A Yes.

Q. Leaving at that point and taking back up, what time did you get off from work?

A. 4:30.

Q. Would you tell us about how you and the other employees leave, is there a bell or whistle?

A. It is a bell. I worked down the middle of the plant. Some had checked out. I would say there was eight or ten, two or three feet in front of me and a bunch behind me and I caught my toe in the sidewalk and I caught at the cleaners but it gave me a throw and my head hit the sidewalk and broke my glasses and knocked this tooth loose and tore up my face and knees and I have been under doctors treatment ever since it happened.

Q. Let's get back to you and other employees leaving, how

many employees were ahead of you on this occasion?

A. I would say eight or ten.

Q. Where were they walking?

A. In front of me.

(T-23)

Q. Had you reached the street at that time?

A. Yes.

Q. How far were the people in front of you as you walked up the street?

A. Two or three feet.

Q. Were there other people behind you?

A. Yes, some behind me and some across the street.

Q. Were you aware of the defect in the sidewalk?

A. No, I had never noticed it.

Q. On your normal occasions when you ride with Mrs. Carter did you come by that sidewalk?

A. Part of the time she would park maybe at the postoffice and I would walk on down the sidewalk and cross at the pool hall and go straight over to Mayville Company.

* * *

(T-35) * * *

Q. So then you were alert and not under the influence of any medication that day, were you real tired when you got off from work?

A. No, sir.

Q. With your glasses on and you can see with your glasses on alright?

A. Yes.

Q. Before you fell was anybody yelling at you, did you look aside?

A. No, just going up the street as I usually did. I don't recall anybody even speaking to me.

Q. You said some people maybe ahead of you three feet and some people behind you about the same distance?

A. I couldn't tell you how far they were behind me. I didn't

(T-36) look to see.

Q. No one walking beside you?

A. No.

Q. Wasn't raining, pretty sunny day?

A. Yes, nice day.

Q. I believe Mr. Davis showed you this Exhibit No. 2, is this the part of the concrete where you fell?

A. (Looking at Exhibit No. 2) I was walking right along here because I was close enough I can remember throwing my hand up against the dry cleaners and trying to catch.

Q. Would you mind marking about where you were walking?

A. Yes. (Marking on Exhibit-photograph)

Q. This is about where you think you hit?

A. Yes.

Q. I am going to make a mark and ask you to put your initial on the edge?

(Witness initialled photograph)

Q. That is about where your toe hit?

A. Yes.

Q. Let me show you this picture and ask you if you recognize this as being the general area where you were walking?

A. It doesn't look as much like it, but I believe this is the Mayville window right here. I couldn't say that is the same.

MR. DAVIS: We will stipulate that for Mr. Sadler.

(T-37)

Q. Mr. Davis recognizes it. I will ask if this is not the window of the Mayville Company?

A. I believe this is the window at Mayville.

Q. When you left your work you were walking along this walk?

A. Yes.

Q. You can recognize the place where you hit your toe there?

A. If this is it it would be in here.

Q. Let's let you mark it, put a ring around the place where you hit your foot?

(Witness drew ring on photograph)

Q Now initial that if you would?

A (Initialling photograph) The reason I am marking it I knew I was close enough I threw my hand up.

MR. SADLER: If it please the Court, we would like to introduce these as Defendant's Exhibit 1 and Defendant's Exhibit 2.

THE COURT: Let them be marked.

Q. Mrs. Nester, I believe you told Mr. Davis you had never seen this place before where you tripped your toe?

A. No, I had never noticed it.

Q. How many times had you been past this place?

A. Several occasions.

Q. As a matter of fact you went by it daily, twice a day?

A. When I rode by myself I parked below Sears-Roebuck and Juanita Carter sometimes parked in town and I walked on down

(T-38)

the street and across at the pool hall.

Q. This day, that morning you had crossed over this sidewalk?

A. Yes.

Q. Lots of other rough places along there?

A. Yes, looks like there are.

Q. Who did you ride with most of the time?

A. What time I didn't drive I rode with Juanita Carter.

Q. Where did she park?

A. When she could get a place she parked there near the cleaners, I parked on a different side of the street.

Q. Would that make any difference whether you parked at Guynn's, you all still go in the front door and pass over this walk?

A. Yes.

Q. You did this when she would park at the cleaners?

A. Yes, when I rode with her and she didn't stop in town.

Q. You had been working there how long?

A. Eight months.

Q. That would be approximately 160 days?

A. I don't know.

Q. Wouldn't you say that you had used this same direction in and out from the factory at least a hundred times?

A. Possibly.

Q. Twice a day for 160 days would be 320 times that you had been in and out of work and you had been over this place at least

(T-39)

a hundred times?

A. The best I have noticed since this happened it is worse over next to the building. I guess maybe on out near the street it isn't as bad.

Q. You didn't think about walking out there?

A. I did, you know just going down the sidewalk you are not going to crowd anybody.

Q. You said there wasn't anybody around you?

A. No, but going in and out.

Q. You knew it was rough? You knew you had to watch out?

A. No, I never noticed I had to watch out.

(T-52) Vergie Jones

Q. You are Vergie Jones?

A Yes sir.

Q. Where do you live, Mrs. Jones?

A. Out here in Hillsville.

Q. Are you employed?

A. Mayville Company.

Q. I believe you are a co-employee of Mrs. Nester?

A. Yes.

Q. Did you go back and forth to work on occasion with Mrs. Nester?

A. No.

Q. Do you ride with Mrs. Nester?

A. No.

Q. So you have your own way to get to and from work?

A. I have my car.

Q. What kind of work are you doing there at the Mayville Company?

A. I press.

Q. Would you give us a description of where the different people work in the plant, who is in front?

A. Seamers.

Q. Who is in the middle?

(T-53)A.

A. Seamers.

Q. And who is in the back?

A. Pressers.

Q. So you were in the back of the company?

A. Yes.

Q. On February 22nd of this year were you at work on that day?

A. Yes.

Q. How did you leave work, did they notify you at 4:30?

A. Yes.

Q. Did you come out ahead of Mrs. Nester or even with her?

A. Behind her.

Q. How far behind her?

A. Three or four feet.

Q. How many people were with you?

A. We were in groups, I guess there were nine or ten.

Q. Behind you?

A. In front and behind.

Q. How many were in front?

A. I couldn't say exactly but several.

Q. Where were they walking?

A. Right in front of us.

Q. Which way were they walking?

A. We come out of the line, we go right.

Q. Did you see Mrs. Nester fall?

(T-54)

A. Yes.

Q. Would you tell us about that?

A. She was in front of me, fell in front of me. I seen her when she tripped and she was going forward and she was trying to catch but she didn't and she hit the side of the laundry as she went down, skinned her face and her arms and legs. I helped her up and this guy pulled up in a truck and he helped us.

Q. Were you the first to see her at the scene?

A. Yes, there were several there.

Q. What injuries did you see?

A. Whole side of her face was torn up, this hand, her arms and legs were bruised and skinned real bad.

Q. What did you do with reference to the injuries she received?

A. Not anything after I got her up. We offered to take her home and she said she believed she could make it and someone else drove her home.

Q. Did you have anything further to do with it?

A. No.

* * *

(T-55)

Q. I will show you some photographs and will ask if you recognize this as being the place approximately where Mrs. Nester tripped?

A. (Looking at photographs) Yes, right there and she hit.

Q. I am referring to Plaintiff's Exhibit No. 2. She has marked about where she tripped, is that about right?

A. Yes.

Q. And this, Defendant's Exhibit 1, has got a circle about where that place is in relation to the whole walk, is that right?

A. Yes, sir.

Q. Do you recognize that as being the building you work in, the Mayville Company?

A. Yes.

Q. And you all come out a door and go this way?

A. Yes.

Q. And Mrs. Nester has marked where she tripped?

A. Yes.

Q. And you have been going there how long?

A. Seven years.

Q. Do you go over this place on the sidewalk everyday to and from work?

A. Yes.

Q. How long has it been there?

(T-56)

A. Ever since I have been there.

Q. Has this crack been there the same way?

A. Yes.

Q. And the walk is about the same condition it was when you first started working?

A. That's right.

* * *

(T-59)

MOTION BY MR. SADLER: If it please the Court, now that the plaintiff has rested, the defendant by Counsel respectfully moves the Court to strike the evidence of the plaintiff and enter up judgment for the Town of Hillsville on three different points . . .

(T-60) * * *

The most serious part in our motion is that by Plaintiff's own evidence, the Plaintiff herself says that she had gone over this same area at least a hundred times going to and from work, other witnesses say the condition has been there eight or ten years. The photographs taken show this is an open and obvious place. We think as a matter of law if it is a dangerous area the Plaintiff did not have to go over it. She is guilty of contributory negligence as a matter of law.

* * *

(T-65) Mayor Raleigh M. Cooley

* * *

Q. Had there been any changes made out there, say for eight or nine months prior to the day Mrs. Nester fell that you know of?

A. No, to my knowledge that walk is like it has been for a considerable length of time.

Q. The jury saw it. Has there been any change to your knowledge since she fell and the way it is today?

(T-66)

A. No.

Q. I show you Defendant's Exhibits 1 and 2 and Plaintiff's Exhibits 1 and 2 and will ask you to look at those and tell the jury whether or not these pictures show the area there as it has existed for a long time?

A. (Looking at photographs) To my knowledge this walk has been similar to this for many years. Insofar as I know there hasn't been anything done to it but I couldn't say for a fact there has been anything done since I have been in office.

Q. Showing you Plaintiff's Exhibit 2 which shows where a

slab of concrete evidently has sunk lower than another slab leaving a raised edge on one slab of two to two and a half inches, the Plaintiff herself has drawn a circle on that showing about where she thinks she tripped. Has that crack been there for several years so far as you know?

A. To my knowledge it has been there for a considerable length of time. I couldn't say how long but it has been in terms of two or three or four years, maybe longer than that.

* * *

(T-77) Barnard Martin

* * *

Q. In referring to Plaintiff's Exhibit No. 2 and Defendant's Exhibit No. 2, plaintiff made a ring around where she hit her toe, hit a crack. Are you familiar with the crack that has been there for several years?

A. Yes.

* * *

(T-78)

* * *

Q. The only thing you know that the big two and a half inch step off has been there for two or three years, is that right?

A. Yes.

(T-87)

MOTION BY MR. SADLER: If it please the Court, at the conclusion of all the evidence the Town of Hillsville respectfully moves the Court to strike the evidence of Mrs. Nester and enter up judgment for the defendant on the grounds assigned at the end of plaintiff's evidence.

(The Court took the motion under advisement.)

* * *

(T-89)

* * *

MOTION BY MR. SADLER: If it please the Court, the Town of Hillsville would respectfully move the Court to set aside the verdict of the jury and render up a verdict for the Town on the grounds heretofore assigned and states frankly to the Court that if the jury had followed the Court's instructions it would not have rendered a verdict for the Plaintiff. The Plaintiff did not even attempt to bear the burden at all of the slab where this lady fell.

The Court took the motion under advisement and Counsel are to file written authorities.

ORDER

THIS ORDER affirming the verdict of the jury in favor of the plaintiff, Beulah E. Nester, is entered this date after due consideration of the Court upon memorandums of law and argument of counsel previously filed by the parties with this Court in connection with the jury verdict rendered for the plaintiff, Beulah E. Nester, against the Town of Hillsville, in the amount of $10,000., on December 18, 1972.

The Court, having maturely considered the memorandums of law filed by counsel and upon due consideration given to the evidence presented by the parties at the trial and having duly noted the exceptions of the defendant as set forth in an Order entered by this Court of record in Law Order Book 36, Page _____, in the Clerk's Office of the Circuit Court of Carroll County, doth overrule all motions of the defendant as cited therein and affirm the verdict of the jury in favor of the plaintiff, Beulah E. Nester, as rendered by the jury on December 18, 1972, to which action of the Court the defendant, the Town of Hillsville, doth duly except.

On Motion of the defendant, all testimony of the witnesses and other incidents of the trial are herewith made part of the record.

The defendant, Town of Hillsville, by its counsel, having indicated to the Court that it intends to apply to the Supreme Court of Appeals of Virginia for a Writ of Error to the action of the Court herein, and upon motion for the suspension of the execution of the Judgment in this case by the defendant, until the Supreme Court of Appeals of Virginia has acted on the defendant's petition for a Writ of Error, or, if the same be granted until an opinion rendered by that Court, it is ADJUDGED and ORDERED that if the defendant duly files his petition for a Writ of Error in accordance with the Rules of the Supreme Court of Appeals of Virginia, execution of the judgment is suspended until the Supreme Court of Appeals has acted upon such petition, and, if the Writ of Error is granted in this case, it is further ADJUDGED and ORDERED that execution of the judgment be suspended until an opinion has been rendered by the Supreme Court of Appeals of Virginia.

Leave is hereby granted to the defendant for a period of 20 days for the purpose of filing a suspension bond.

We have seen this Order:

/s/ Richard W. Davis
Counsel for Plaintiff

/s/ Philip M. Sadler
Counsel for Defendant

ENTER: 3-12-73

/s/ Jack M. Matthews
Judge

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

NOTICE OF APPEAL

Notice is hereby given that Town of Hillsville appeals from a final judgment rendered by this Court in this cause on the 12th day of March, 1973, and announces its intention to apply for a Writ of Error and Supersedeas to The Supreme Court of Virginia.

ASSIGNMENTS OF ERROR

1. At the end of the evidence the trial court erred in refusing to strike the plaintiff's evidence and enter summary judgment for the defendant on the following grounds:

* * *

(c) The plaintiff was guilty of negligence to a degree that would bar recovery by her as a matter of law because the crack where she tripped and fell was open and obvious and should have been seen by the plaintiff if she had been keeping any lookout at all for her own safety.

Respectfully

/s/ Philip M. Sadler
Of Counsel for Defendant

Gilmer, Sadler, Ingram, Thomas, Sutherland & Hutton
Midtown Professional Building
Pulaski, Virginia

Counsel for Defendant

CERTIFICATE

I, Philip M. Sadler, of counsel for the defendant, hereby certify that I have served a copy of this Notice of Appeal and Assignments of Error on the plaintiff by mailing a true copy hereof to Richard W. Davis, attorney of record, at his Post Office Box No. 3310, First Street Station, Radford, Virginia, this 5th day of April, 1973.

/s/ Philip M. Sadler

Filed: 4/6/73