# 07/03/53 FIRST NAT'L BANK & TRUST CO. RACINE v. S.

59 N.W.2d 445 (1953) | Cited 0 times | Wisconsin Supreme Court | July 3, 1953

Action to recover damages for personal injuries sustained by Francis J. Lang in a fall caused by a broken curbstone. He died before trial and the action was continued by his administrator. Judgment was for plaintiff, holding the property owner primarily liable and the city of Racine secondarily liable. The only appeal is that of the property owner.

Francis J. Lang lived on the south side of Sixteenth Street in the city of Racine. On the day of the accident he went to his automobile which he had parked across the street from his home in front of the property of defendant S. C. Johnson & Sons, Inc. Standing on the north side of his car he removed the cushion from the front seat, to take it to his home. Then, as he was stepping down from the curb to recross the street, his foot caught in an opening where the curb had disintegrated and he fell to the street, breaking his hip.

The street and cement curb were laid by the city in 1927. In 1941 defendant S. C. Johnson & Sons, Inc. employed a contractor to make a driveway leading into the corporation's property. To do this the contractor broke out a section of the city's 6-inch curb, laid the driveway which had a 3-inch curb, and joined this curb to the 6-inch city curb. Defendant had this work done without obtaining a permit from the city, as required by ordinance, and without complying with specifications approved by the city for such construction.

Grass did not grow between the city curb and the sidewalk and defendant S. C. Johnson & Sons, Inc. spread gravel in this area, leaving the gravel lower than the curb level so that it would not be kicked into the street. This was not satisfactory and in 1944 it covered the gravel with an asphalt material whose surface was also below the level of the curb. At that time the curb showed no deterioration but between then and the date of the accident, November 2, 1950, much decay appeared and, in particular, the city curb went to pieces at the place where it joined the Johnson driveway curb. Such defects were noticed by an officer of defendant a year before the accident. At that point the asphalt surfacing laid by S. C. Johnson & Sons, Inc. is depressed about 3 1/2 inches below the curb. It was here where Lang caught his foot in a notch between the disintegrated city curb and the intact Johnson curb.

Plaintiff tried the action on the theory that defendant S. C. Johnson & Sons, Inc. had created and maintained a public nuisance, and that defendant city had failed to perform its duty to keep its streets in repair in violation of sec. 81.15, Stats.

The jury found that at the time and place of the accident the sidewalk area was unsafe and dangerous

for travel with respect to the curb and the asphalt portion and that this condition was the proximate cause of plaintiff's injuries; that the dangerous condition was caused by S. C. Johnson & Sons, Inc. in the construction already described and had existed for so long a time that the defendant knew or ought to have known of it. There were other findings against defendant S. C. Johnson & Sons, Inc. pertinent to the question of its negligence which were struck out by the trial court because negligence was not material when the creation and maintenance of a public nuisance was established.

BROWN, Justice.

On its appeal S. C. Johnson & Sons, Inc. contends, first, that the opening in the curb in the middle of the block was not an actionable defect. For authority it relies on Kuchler v. City of Milwaukee, 1917, 165 Wis. 320, 162 N.W. 315. The trial court in that case directed a verdict against a plaintiff who was injured when he stepped into a hole in a curb about 3 1/2 feet distant from the crosswalk, on the ground that the hole was so far from either the crosswalk or the sidewalk that the pedestrian could not get into it without leaving the travelled portion of the thoroughfare. We consider that the Kuchler case, supra, is actually strongly against defendant's contentions. There we said that when an imperfection is so near the public way for travel or so connected with it that the place for travel is not reasonably safe, then there is an actionable defect. We noted that the appellate court should not reverse merely because it might, ordinarily, reach a result -- different from that of the trial court, saying:

'* * * Such dignity is to be accorded the opinion of the Circuit Judge that it must be regarded as right unless the contrary clearly appears * * *' Kuchler v. Milwaukee, supra, 165 Wis. at page 323, 162 N.W. at page 315, And

'* * * Taking the entire situation into consideration we are unable to reach a Conclusion that the trial court was clearly wrong in applying the logic of that case [Snyder v. Superior, 1911, 146 Wis. 671, 132 N.W. 541] and rendering judgment for the defendant upon the ground that the break in the curbstone, in view of its location, did not constitute an actionable defect in the way prepared for public travel.' 165 Wis. at page 326, 162 N.W. at page 317.

One cannot read the Kuchler case, supra, without realizing that if the trial Judge had ruled that there was an actionable defect, or at least a jury question, such ruling would have been more easily affirmed than the one which this court was called upon to sustain. The evidence, however, made it possible to sustain him and he was sustained. The case at bar comes here with the prestige of a trial Judge's ruling that the question was for the jury and both the ruling and the verdict are supported by stronger facts than appeared in Kuchler v. City of Milwaukee, supra.

There has been a great increase since 1917, when the Kuchler case was decided, in automobile traffic and in the use automobilists legally make of the space from the curb to the sidewalk for leaving or reaching parked automobiles. It is common knowledge that on busy streets that area is in constant

public use. Quite apart from such judicial notice, the testimony in this case is that this curb was much used for parking and that grass would no longer grow between the sidewalk and the curb so, first, the defendant S. C. Johnson & Sons, Inc. filled that space with crushed stone and later with an asphalt surface. The evidence is very strong that this area was adapted to use by the public going to and from their automobiles and was so used. If the trial Judge was not clearly wrong we would have to sustain him. Kuchler v. City of Milwaukee, supra. We consider that the jury's findings upon this subject are supported by evidence and on the facts in this case the trial court was clearly right in denying defendant's motions to change them.

Next, defendant S. C. Johnson & Sons, Inc. submits that it is not liable because there is no evidence that it created this defect or is responsible for it. The evidence is that the curb laid by the city was broken up on the order of S. C. Johnson & Sons, Inc. for its own purposes, exposing the unfinished, rough interior, after which a union with the curb of defendant's driveway was made. This union left 3 inches of the interior of the city curb still exposed to the weather. There was further evidence that the asphalt poured by defendant S. C. Johnson & Sons, Inc. made a basin of which the two curbs formed a rim. This rim prevented the escape of water except by evaporation or by seeping into the ground and thence into the unsurfaced part of the city curb, or by directly seeping into the unsurfaced part of the city 6-inch curb which defendant's 3-inch curb had exposed. Cement construction experts testified that the moisture so admitted to the interior of the city curb would freeze and expand in cold weather causing the curb to break up in the way it actually did. They testified that in their expert opinion it was this freezing, so produced, which caused the defect in question. Defendant suggested that the city curb might have been injured by heavy blows or by the city snow scraper. The only heavy blows known to have occurred at this place were those delivered under defendant's orders when it shattered the city curb to put in its own. The experts testified that the deterioration experienced was not characteristic of damage caused by snow scrapers.

We conclude that the findings that the defect in the city curb was caused by defendant's activities in building its own curb and in asphalting the former grass strip are supported by evidence and are not speculative.

With it established that defendant S. C. Johnson & Sons, Inc. caused an unsafe, defective condition of a travelled portion of the public thoroughfare, that defendant must fail in its contention that it is not liable for the consequences.

'Abutting lot owners who obstruct or interfere with a road or sidewalk in such a way as to create a dangerous and defective condition are guilty of maintaining a nuisance.' Holl v. Merrill, 1947, 251 Wis. 203, 28 N.W.2d 363, (headnote).

The party so interfering is primarily liable to a party injured because of the defect and the municipality which has the duty of keeping the highway free from such obstructions or defects is secondarily liable, under sec. 81.17, Stats. Holl v. Merrill, 203 Wis. at page 207, 28 N.W.2d 363.

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We have examined the verdict and are unable to agree with defendant S. C. Johnson & Sons, Inc. that it is inconsistent or perverse. We conclude that the judgment should be affirmed.

Judgment affirmed. The brief of respondent exceeds fifty pages and it has applied for an allowance of the entire cost of printing, as permitted by Rule 10. Such cost is hereby allowed.