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Clerk, Supreme Court of Appeals
Richmond, Va.

201 Va 109

Record No. 4955

In the Supreme Court of Appeals of Virginia at Richmond

CERTIFIED T. V. AND APPLIANCE COMPANY, INCORPORATED

v.

CATHERINE HARRINGTON

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

RULE 5:12—BRIEFS.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

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

NOTICE TO COUNSEL

This case probably will be called at the session of court to be held.

APR - 1959

You will be advised later more definitely as to the date.

Print names of counsel on front cover of briefs.

Howard G. Turner, Clerk

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 4955

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 13th day of October, 1958.

CERTIFIED T. V. AND APPLIANCE COMPANY, INCORPORATED, Plaintiff in Error,

against

CATHERINE HARRINGTON, Defendant in Error.

From the Court of Law and Chancery of the City of Norfolk

Upon the petition of Certified T. V. and Appliance Company, Incorporated, a writ of error and *supersedeas* is awarded it to a judgment rendered by the Court of Law and Chancery of the City of Norfolk on the 4th day of June, 1958, in a certain motion for judgment then therein depending wherein Catherine Harrington was plaintiff and the petitioner was defendant.

And it appearing from the certificate of the clerk of the said court that a suspending and *supersedeas* bond in the penalty of fifteen thousand dollars, conditioned according to law has heretofore been given in accordance with the provisions of sections 8-465 and 8-477 of the Code, no additional bond is required.

RECORD

* * * * *

MOTION FOR JUDGMENT.

To: Certified T. V. and Appliance Company, Incorporated,

TAKE NOTICE, that the undersigned hereby moves the Court of Law and Chancery of the City of Norfolk, Virginia, at the courthouse thereof, for a judgment and award against you in the sum of Twenty-Five Thousand Dollars ($25,000.00), plus interest and costs incident to this proceeding, for this, to-wit:

1. That on or about the 9th day of March, 1957, the undersigned Plaintiff as a business customer was lawfully and properly standing in the place of business at 1121 E. Little Creek Road, Norfolk, Virginia, owned, operated and controlled by the Defendant, CERTIFIED T. V. AND APPLIANCE COMPANY, INCORPORATED,

2. That it became and was the affirmative duty of the Defendant, CERTIFIED T. V. AND APPLIANCE COMPANY, INCORPORATED, to use ordinary care, foresight and prudence to render, maintain and keep the premises in a safe condition for the protection of the undersigned Plaintiff from harm and injury.

3. That at the aforesaid time and place the Defendant, CERTIFIED T. V. AND APPLIANCE COMPANY, INCORPORATED, breached such duty and negligently failed to use such due and proper care and foresight, and knew, or by the exercise of care, should have known, that the premises were in an unsafe condition in that wall display shelves supporting television sets did collapse and fall on the Plaintiff thereby subjecting said Plaintiff to great and serious injury.

page 2 } 4. That as a direct and proximate result of the Defendant's aforesaid negligence, and in disregard for the safety of the Plaintiff, the Plaintiff was permanently and seriously injured.

5. That the said injuries sustained by the Plaintiff were through no negligence, fault or failure of her own.

6. That at the aforesaid time and place the Plaintiff was pregnant and that these injuries to the Plaintiff and the shock resulting from the incident, have caused and are continuing to cause, and will cause in the future to the Plaintiff great pain and suffering, both mental and physical. The

said injuries have required the Plaintiff to be cared for in a hospital and expend large sums of money for medical treatment, said injuries are continuing to cause and will in the future cause the Plaintiff to expend large sums of money to effect a cure. Some of said injuries will have a permanent effect on Plaintiff's health and have caused her to be sick, sore, lame, disabled and disfigured for a long time, and probably for the rest of her life she will continue to be maimed, disabled and disfigured and will suffer great physical pain and mental anguish. Said injuries will continue to permanently disable her from all other activities normally associated with her person and station in life.

WHEREFORE, the Plaintiff moves the Court for judgment against the Defendant in the sum of Twenty-five Thousand Dollars ($25,000.0.) with interest and costs aforesaid.

CATHERINE HARRINGTON,
By ROBERT S. COHEN
Of Counsel.

Filed in the Clerk's Office the 31 day of May, 1957.

Teste:

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

* * * * *

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* * * * *

PROOF OF SERVICE.

Virginia:

In the Court of Law and Chancery of the City of Norfolk,

Catherine Harrington

v.

Certified T. V. and Appliance Company, Inc.

Returns shall be made hereon, showing service of Notice

issued May 31st, 1957 with copy of Motion for Judgment filed May 31st, 1957, attached.

Executed on the ..... day of ....., 19 ...., in the City of ....., Virginia, by delivering a true copy of the above mentioned papers, attached to each other, to ..... in person.

.....
Sergeant, City of ....., Va.
By ....., Deputy Sergeant.

(Use the space below if a different form of return is necessary).

Executed 1st June 1957 by delivering a copy of the above mentioned papers attached to each other to Zeke Landres Vice President Certified T. V. and Appliance Co. Inc., a Corporation in the City of Norfolk, Virginia, wherein the said Corporation is doing business.

HUGH L. BUTLER, JR.,
City Sergeant
Norfolk, Va.
By G. T. SHAFFER, Deputy.

Returned and filed the 3rd day of June, 1957.

W. L. PRIEUR, JR., Clerk.
By W. L. STOVALL, D. C.

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* * * * *

ANSWER AND GROUNDS OF DEFENSE.

Now comes the defendant, Certified T. V. and Appliance Co., Inc. and states it will rely upon the following as its Answer and Grounds of Defense to the Motion for Judgment of Catherine Harrington, Plaintiff.

1. Defendant denies each and every allegation of its negligence contained in the Motion for Judgment.
2. Defendant states the accident and injuries, if any, resulting therefrom were due to the negligence of Maddrey B. Jordan, an independent contractor, who installed the shelving

in a negligent manner which defects, resulting therefrom, were neither obvious, known or ascertainable using the degree of reasonable care owed to the plaintiff by the defendant.

3. Defendant has no knowledge of the alleged injuries, treatment therefor nor cost thereof and calls for strict proof thereof.

4. Defendant denies it is indebted to the plaintiff in the sum of $25,000.00 or any other sum.

5. Defendant reserves the right to rely upon any defense which becomes available to it whether before, during or after trial hereof.

CERTIFIED T. V. AND
APPLIANCE CO., INC.
By ROBERT G. WINTERS
Of Counsel.

Filed 6-20-57.

H. L. STOVALL.

* * * * *

page 9 } Virginia:

In the Court of Law and Chancery of the City of Norfolk, on the 3rd day of June, 1958.

Catherine Harrington, Plaintiff,

v.

Certified T. V. and Appliance Co., Inc., Defendant.

ORDER.

This day came the parties, the plaintiff in person and by counsel, and came as well the defendant, by counsel, and thereupon came a jury, to-wit: Geoffrv Myers, Russell L. Gould, Ruth Cooper, James Edward Paul, H. W. McDermott, Samuel D. McKown and Oscar L. Gilbert, Jr., who upon being duly sworn the truth to speak upon the issue joined and having heard a part of the evidence at 5:00 P. M. o'clock, were adjourned until tomorrow morning at 10:00 A. M. o'clock.

A Copy—Teste:

W. L. PRIEUR, JR., Clerk
By H. L. STOVALL, D. C.

* * * * *

page 14 } INSTRUCTION NO. P1.

The Court instructs the Jury that the plaintiff in this case, while in the defendant's store as a prospective customer, was an invitee, and it was, therefore, the defendant's duty to exercise reasonable care for the plaintiff's safety and to exercise reasonable care to have its premises in a reasonably safe condition for the plaintiff's visit.

Granted.

J. H. T.

page 15 } INSTRUCTION NO. P2.

The Court instructs the Jury that if you find from the evidence that the defendant guilty of negligence in maintaining and keeping the premises in question in a reasonably safe condition, and that such negligence was the proximate cause of the injuries sustained by the plaintiff then you should find for the plaintiff.

Granted.

J. H. T.

page 16 } INSTRUCTION NO. P3.

The Court instructs the Jury that the plaintiff had the right to assume, until the contrary appeared or should of appeared in the exercise of reasonable care that the premises were reasonably safe for her visit.

Granted.

J. H. T.

page 17 } INSTRUCTION NO. P4.

The Court instructs the Jury that if you believe from the

evidence in this case that Catherine Harrington, the plaintiff is entitled to recover, then it is your duty to award her such damages as would be fair and just compensation for the loss she has sustained, not to exceed the amount sued for, and you are instructed that in fixing said damages you may properly consider the extent of the injuries suffered by her and their probable duration and permanency. You may also consider the physical pain and suffering that she has endured as the result of this accident. You may further consider the mental anguish and nervous shock which she has suffered and will probably suffer in the future as the result of this accident. In considering the extent of the injuries you may properly consider such sums as have been reasonably expended or will probably be reasonably expended by her in future in an endeavor to be cured if shown by the evidence.

Granted.

J. H. T.

page 18 } INSTRUCTION NO. P5.

The Court instructs the Jury that if you believe from a preponderance of the evidence that the defendant's store was unsafe and that the defendant then and there knew, or in the exercise of reasonable care should have known that fact, within a reasonable time prior to the accident and that its failure to repair same or to warn the plaintiff of said condition was the proximate cause of the injuries sustained by her then you should find for the plaintiff.

Granted.

J. H. T.

page 19 } INSTRUCTION P6.

The Court instructs the jury that it is your duty to determine the creditability of the witnesses and in so doing you may consider their demeanor on the stand their bias, prejudice or relationship to the parties, if any has been shown.

Granted.

J. H. T.

page 20 } INSTRUCTION 1.

The Court instructs the jury that there is no presumption arising from the happening of an accident that Certified T. V. and Appliance Co. Inc. was negligent. On the other hand the law presumes Certified T. V. and Appliance Co. Inc. to have been free from negligence and this presumption remains as a bar to any recovery by Catherine Harrington, the plaintiff, throughout the entire proceedings until such time as Catherine Harrington establishes by a preponderance of all of the evidence that Certified T. V. and Appliance Co. Inc. was negligent and that such negligence was a proximate cause of the accident. Mere suspicion, or the probability of such negligence, or even that it is just as likely that Certified T. V. and Appliance Co. Inc. was negligent as that he was not negligent, is not sufficient to sustain a verdict for Catherine Harrington. If after considering all the evidence, you find that Catherine Harrington has failed to establish that the negligence of Certified T. V. and Appliance Co. Inc., which was a proximate cause of the accident, by a preponderance of the evidence, then you must find for the defendant, Certified T. V. and Appliance Co. Inc.

Granted.

J. H. T.

page 21 } INSTRUCTION 6.

The Court instructs the jury that Certified T. V. and Appliance Co., Inc. in any event would not be liable, if liable at all, for anything other than damages actually caused by the accident in question, and it is not sufficient to prove that Catherine Harrington has suffered from causes which may have possibly resulted from the accident. Catherine Harrington can only recover, if recovery be had, for damages which are shown by the preponderance of the evidence to have resulted from the accident.

Granted.

J. H. T.

page 22 } INSTRUCTION 2.

The Court instructs the jury that if you believe from the

evidence that Maddray B. Jordan was employed to build a shelf, among other things, without restriction as to the means to be employed and he employed his own labor and undertook to do the work according to his own ideas or according with plans suggested by Certified T. V. and Appliance Co., Inc. and that Certified T. V. and Appliance Co., Inc. looked to Maddray B. Jordan only for results, even though Certified T. V. and Appliance Co., Inc. reserved the privilege of supervising the work, and making changes in the plans,

Then Maddray B. Jordan was an independent contractor.

Refused.

J. H. T.

page 23 } INSTRUCTION 3.

The Court instructs the jury that if you believe from the evidence that Certified T. V. and Appliance Co., Inc. used reasonable care in the selection of Maddray B. Jordan, Independent Contractor, to construct the shelves which injured the plaintiff, then you shall find for the defendant even though you further believe Maddray B. Jordan was guilty of negligence, which proximately caused plaintiff's injuries.

Refused.

J. H. T.

page 24 } INSTRUCTION 4.

The Court instructs the jury that if you believe from the evidence that Maddray B. Jordan, the independent contractor, was negligent in the construction of the shelf, which injured Catherine Harrington, creating a dangerous condition which was not known and could not be ascertained by use of reasonable care by the defendant, even though completed and accepted and such negligence was the sole proximate cause of Catherine Harrington's injury then you shall find for the defendant, Certified T. V. and Appliance Co., Inc.

Refused.

J. H. T.

page 25 } INSTRUCTION 5.

The Court instructs the jury that proximate cause does not necessarily imply closeness or nearness in point of time or physical sequence of events but rather closeness or nearness in point of causal connection;

The Court further instructs the jury that if you believe from the evidence that Maddray B. Jordan negligently constructed the shelf, which in the usual course of events was likely to collapse and injure customers of Certified T. V. and Appliance Co., Inc. and you further believe Certified T. V. and Appliance Co., Inc. was free of negligence then you shall find for the defendant.

Refused.

J. H. T.

page 26 } INSTRUCTION 7.

The Court instructs the jury that the defendant, Certified T. V. and Appliance Co., Inc. cannot ask that Maddray B. Jordan be made a defendant in this suit even though the negligence of Maddray B. Jordan be the sole proximate cause of the accident.

The Court further instructs the jury that the plaintiff had the sole right to join Maddray B. Jordan as a defendant in this action.

Refused.

J. H. T.

page 27 } Virginia:

In the Court of Law and Chancery of the City of Norfolk, on the 4th day of June, 1958.

Catherine Harrington, Plaintiff,

v.

Certified T. V. and Appliance Company, Incorporated, Defendant.

ORDER.

This day came again the plaintiff, in person and by Counsel, and came as well the defendant, by Counsel, and thereupon pursuant to adjournment came again the jury, to-wit, Geoffry Myers, Russell L. Gould, Ruth Cooper, James Edward Paul, H. W. McDermott, Samuel D. McKown and Oscar L. Gilbert, who now having heard all the evidence and argument of counsel returned a verdict in the following words and figures, "We the jury find for the plaintiff in the amount of Twelve Thousand Five Hundred Dollars, ($12,500.00)," thereupon the defendant by its counsel, moved the Court to set aside the verdict of the jury and grant a new trial upon the grounds that the said verdict is contrary to the law and the evidence, which motion after having been fully heard and maturely considered by the Court, is overruled, to which action of the Court, the defendant, by counsel, duly excepts.

Whereupon it is considered by the Court that the plaintiff recover of the defendant, Certified T. V. and Appliance Company, Incorporated, the sum of Twelve Thousand Five Hundred, ($12,500.00), Dollars, with interest thereon to be computed after the rate of six per centum per annum from the 4th day of June, 1958, until paid, together with her costs about her suit in this her behalf expended.

To which action of the Court, the defendant, by counsel duly excepted.

page 28 } And thereupon the said defendant having signified its intention of *persenting* to the Supreme Court of Appeals of Virginia, a petition for a writ of error and *supersedeas* to the judgment herein, it is Ordered that execution upon said judgment be suspended for a period of sixty days upon the said defendant or someone for it entering into and acknowledging a proper suspending bond, conditioned according to law, before the Clerk of this Court, in the penalty of Fifteen Thousand Dollars, ($15,000.00), with security to be approved by said Clerk.

A Copy—Teste:

W. L. PRIEUR, JR., Clerk
By H. L. STOVALL, D. C.

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* * * * *

NOTICE OF APPEAL.

Now comes the defendant, Certified T. V. and Appliance Company, Inc. and gives notice that it intends to appeal the final judgment entered against it by the Court of Law and Chancery of the City of Norfolk, Virginia on the 4th day of June, 1958.

CERTIFIED T. V. AND APPLIANCE CO., INC.
By GEO. PILCHER, JR.
Of Counsel.

Filed 7-25-58.

L. M. CALBERT, D. C.

* * * * *

page 30 }

* * * * *

ASSIGNMENTS OF ERROR.

Pursuant to the rules of the Supreme Court of Virginia the defendant does hereby designate the Assignments of Error in this action, as follows:

1. The Court erred in refusing instruction Number 2 offered by the defendant which is as follows:

"The Court instructs the jury that if you believe from the evidence that Maddray B. Jordan was employed to build a shelf, among other things, without restriction as to the means to be employed and he employed his own labor and undertook to do the work according to his own ideas or according with plans suggested by Certified T. V. and Appliance Co., Inc. and that Certified T. V. and Appliance Co., Inc. looked to Maddray B. Jordan only for results, even though Certified T. V. and Appliance Co., Inc. reserved the privilege of supervising the work, and making changes in the plans,

Then Maddray B. Jordan was an independent contractor to which action of the Court the defendant, by counsel, excepted.

2. The Court erred in refusing instruction Number 3 offered by the defendant which is as follows:

"The Court instructs the jury that if you believe from the evidence that Certified T. V. and Appliance Co., Inc. used reasonable care in the selection of Maddray B. Jordan, Independent Contractor, to construct the shelves which injured the plaintiff, then you shall find for the defendant even though you further believe Maddray B. Jordan was guilty of negligence, which proximately caused plaintiff's injuries,"

to which action of the Court the defendant, by counsel, excepted.

3. The Court erred in refusing instruction Number 4 offered by the defendant which is as follows:

"The Court instructs the jury that if you believe from the evidence that Maddray B. Jordan, the independent contractor, was negligent in the construction of the
page 31 } shelf, which injured Catherine Harrington, creating a dangerous condition which was not known and could not be ascertained by use of reasonable care by the defendant, even though completed and accepted and such negligence was the sole proximate cause of Catherine Harrington's injury then you shall find for the defendant, Certified T. V. and Appliance Co., Inc."

to which action of the Court the defendant, by counsel, excepted.

4. The Court erred in refusing instruction Number 5 offered by the defendant which is as follows:

"The Court instructs the jury that proximate cause does not necessarily imply closeness or nearness in point of time or physical sequence of events but rather closeness or nearness in point of causal connection;

"The Court further instructs the jury that if you believe from the evidence that Maddray B. Jordan negligently constructed the shelf, which in the usual course of events was likely to collapse and injure customers of Certified T. V. and Appliance Co., Inc. and you further believe Certified T. V. and Appliance Co., Inc. was free of negligence then you shall find for the defendant."

to which action of the Court the defendant, by counsel, excepted.

5. The Court erred in refusing instruction Number 7 offered by the defendant which is as follows:

"The Court instructs the jury that the defendant, Certified T. V. and Appliance Co., Inc. cannot ask that Maddray B. Jordan be made a defendant in this suit even though the negligence of Maddray B. Jordan be the sole proximate cause of the accident.

"The Court further instructs the jury that the plaintiff had the sole right to join Maddray B. Jordan as a defendant in this action."

to which action of the Court the defendant, by counsel, excepted.

6. The Court erred in granting instruction Number P-4 offered by the plaintiff, as amended which is as follows:

"The Court instructs the jury that if you believe from the evidence in this case that Catherine Harrington, the plaintiff, is entitled to recover, then it is your duty to award her such damages as would be fair and just compensation for the loss she has sustained, not to exceed the amount sued for, and you are instructed that in fixing said damages you may properly consider the extent of the injuries suffered by her and their probable duration and permanency. You may also consider the physical pain and suffering that she has endured as the result of this accident. You may further consider the mental anguish and nervous shock which she has suffered and will probably suffer in the future as the result of this accident. In considering the extent of the injuries you may properly consider such sums as have been reasonably expended or will probably be reasonably expended by her in future page 32 } in an endeavor to be cured if shown by the evidence."

to which action of the Court the defendant, by counsel, duly excepted.

7. The Court erred in overruling the defendant's motion to prohibit plaintiff's use of the blackboard in the summation argument and on which were improper suggestions of the items of evaluation of plaintiff's injuries to be considered by the jury in assessing damages.

8. The Court erred in not granting the defendant's motion for a new trial on the grounds that the said verdict is contrary to the law and the evidence as the plaintiff failed to prove, under her theory of the case, that the defendant failed

to warn the plaintiff of the condition of the shelves in question even though the defendant knew or in the exercise of reasonable care should have known that the store and/or shelves were unsafe, to which action of the Court the defendant, by counsel, duly excepted.

CERTIFIED T. V. AND APPLIANCE COMPANY, INC.
By GEO. PILCHER, JR.
Of Counsel.

Filed 7-25-58.

L. M. CALVERT, D. C.

* * * * *

page 33 } I, W. L. Prieur, Jr., Clerk of the Court of Law and Chancery of the City of Norfolk certify that Suspending and *Supersedeas* Bond in the penalty of $15,-00.000 has been duly executed and I deem the security sufficient.

Teste:

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

* * * * *

page 3 }

* * * * *

JOSE F. HARRINGTON,
called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Examined by Mr. Cohen:
Q. State your name, please.
A. Jose F. Harrington.
Q. Your address.
A. 612 Poplar Street, Lakehurst, New Jersey.
Q. Are you related in any manner to the plaintiff in this action?

Jose F. Harrington.

A. (No answer.)
Q. Did you hear my question?
A. No, I didn't.
Q. Are you related to the plaintiff in this action?
A. She is my wife.
Q. I direct your attention to the 9th day of March, 1957, and ask you whether or not you were in the Certified T. V. and Appliance store on that day?
page 4 } A. Yes, I was.
Q. The store on Little Creek Road?
A. Yes, I was.
Q. Will you please tell the jury what happened on that day while you were in the store?
A. I went in to purchase a television set.
Q. At or about what time was that?
A. Approximately 5:00 P.M.
Q. Continue.
A. I went in to purchase a television set. I was talking to the salesman. We were looking at different models. We worked our way down to the very end of the store. We were holding a conversation. It seemed like that out of the corner of my eye, like an optical illusion, the shelf looked like it weaved. I said, "That shelf is loose." He said, "Oh, that is all right. It has been like that. We are getting it fixed."
Q. Who was that?
A. Mr. Landres.

By The Court:
Q. Who is he?
A. He is the man that I was talking to, one of the owners of the store. He had no sooner finished his conversation when the shelf collapsed.

By Mr. Cohen:
Q. What was it that Mr. Landres said?
page 5 } A. He said that the shelf had been like that, and they were going to get it fixed. He said, "That is all right. It has been like that." He just started to swing back to the conversation on the television, and the shelf toppled down.

By The Court:
Q. What happened then?
A. I saw it coming down and I tried to hold it up to keep from hitting my wife and little boy. It was in two sections. It

was too heavy to hold, anyhow, and it came down on top of them. It pinned my wife down and my little boy. I could not find him in the wreckage. He was out of my sight. My wife was screaming. She was hollering for me to, "Find Matthew."

Q. That is the little boy?

A. Yes, sir. So, we got them out from under the wreckage. I told someone to call an ambulance. They called an ambulance. They put my wife in a chair. The police emergency squad arrived about that time and they took my little boy off in one car and my wife and myself in another ambulance.

By Mr. Cohen:

Q. Did you hear any conversation between this Mr. Landres and the police officer who investigated?

A. I overheard him—

page 6 } Mr. Winters: I object to that, Your Honor. We don't know when, or anything about it.

The Court: The only objection that I see you could have is as to Mr. Landres' authority. That will have to be established later. He said that he is one of the owners, or something like that. Of course, that is a corporation. Are you in a position to show that Mr. Landres is an officer of the corporation?

Mr. Cohen: Yes, sir.

The Court: I overrule the objection.

By Mr. Cohen:

Q. Answer the question.

A. Just as the police were getting ready to take us off I heard him say, "That shelf has been loose like that."

By The Court:

Q. Did he say how long?

A. He said a few weeks. He said, "It has been like that for a couple of weeks." He said that he was planning on having it fixed.

The Court: Ladies and Gentlemen, I am going to ask you to step out in the hallway, if you please.

(The jury was excluded, and an off-the-record discussion

was held, after which the trial was resumed in the presence of the jury.)

page 7 } By Mr. Cohen:

Q. Would you describe the condition of the stock that was on this shelf prior to its collapse?

A. It was mostly large table-model television sets and portables. There were some portable and some 17 and 21 inch big table models, all sitting on this shelf.

Q. About how many sets were on this shelf, approximately?

A. Approximately I would say 10 to 15, at least.

By The Court:

Q. You say that some were portables and some were table sets?

A. Yes, sir; large table sets.

Q. Do you know what struck your wife; whether the shelf struck her or the television sets?

A. When I picked her up, it was the shelf itself that was on top of her.

By Mr. Cohen:

Q. Were the television sets on top of this portion of the shelf that struck your wife?

A. Yes, sir.

Q. Did you or did you not go with your wife to the hospital?

A. Yes, sir, I did. I rode in the same ambulance with her.

page 8 } Q. What hospital was that?

A. DePaul.

Q. Do you know whether she received any emergency treatment?

A. Yes, she did. Dr. John Vann treated her. He X-rayed her right foot and put her in a cast—put her right foot in a cast.

Q. Was your wife pregnant at the time of this accident?

A. Yes, she was, about five months' pregnant.

By Mr. Winters:

Q. I did not hear that.

A. About five months' pregnant.

By Mr. Cohen:

Q. Do you know of your own personal knowledge whether she had any complications with this pregnancy?

Jose F. Harrington.

Mr. Winters: I object, Your Honor.
The Court: I sustain the objection.

By Mr. Cohen:
Q. Was your wife able to walk from the hospital on that day?
A. No. We had to carry her. I carried her to the car.
Q. When was she first able to walk by herself?
A. By herself, without crutches or anything?
page 9 } Q. Yes.
A. She was on crutches from that day on for about—(Pause)—about 10 or 15 weeks, I guess. 10 or 12 weeks I would say she was on crutches.
Q. Did you have to offer any aid to her while she was on these crutches?
A. I had to carry her. We lived upstairs, and I had to carry her down to the bottom of the stairs, and then from there I would have to go back up and get my little boy and bring him down. He was in a cast. At the beginning of the first week I would have to carry her almost always to the car, because the strain from the crutches was bothering her.

By The Court:
Q. We are trying your wife's case now. What happened to the little boy would not be material.

By Mr. Cohen:
Q. Where were you living at this time?
A. Lansdale Gardens.
Q. Did there come a time when you moved from Lansdale Gardens?
A. Upon my separation from the Service.
Q. When was that?
A. June 12, 1957.
Q. Did your wife move with you at that time?
A. Yes, she did.
page 10 } Q. To what location?
A. To Lakehurst, New Jersey.
Q. Did your wife receive medical attention in Lakehurst, New Jersey.
A. Yes, she did.
Q. By whom?
A. By Dr. Sidney Alpert.
Q. Did your wife have a cast on during this period that she was using crutches?

Jose F. Harrington.

A. Yes.
Q. Answer Mr. Winters, please.

CROSS EXAMINATION.

By Mr. Winters:
Q. Who was the salesman that waited on you?
A. Mr. Landres.
Q. Did Mr. Hettrick wait on you?
A. Not that I recall.
Q. Would you then deny that the salesman who waited on you was Mr. Hettrick?
A. Yes, I would.
Q. The only person then that you had any conversation in the store with was Mr. Landres. Is that your story?
page 11 } A. I may have spoken to someone else when I first walked in, but when the accident occurred I was talking to Mr. Landres.
Q. You deny then that Mr. Hettrick was the salesman who was waiting on you?
A. Yes, sir.
Q. Who was present at the time Mr. Landres was supposed to have had this convessation with the police officer?
A. The police officer and Mr. Gibbons.
Q. I am sorry.
A. The police officer, himself, and Mr. Gibbons; and, there were some other people standing around, but I was concerned in getting my wife and little boy and myself to the hospital. Actually we were on our way out when the conversation began.
Q. Do you know Mr. Hettrick?
A. No.
Q. Mr. Elmer Hettrick?
A. No.
Q. Are you sure that the person who is alleged to have made these statements concerning the shelf was Mr. Landres?
A. Yes, sir.
Q. I believe you said that there were 10 or 15 television sets on the shelf at the time immediately prior
page 12 } to its collapsing?
A. Yes.
Q. Some were table-model television sets and some were portables?
A. Small portables—hand portables.

Harry Polay.

Q. Do you recall approximately how many there were of each?

A. No, I don't. I did not count them. I wasn't interested in them. I wanted a console. I happened to look up and see them as I walked in, looking at different models.

Q. You heard someone state that the shelf had been loose for a couple of weeks and that they were going to have it fixed. Is that correct?

A. Yes.

Q. Was that the salesman who waited on you?

A. Mr. Landres.

Q. And you identify him as Mr. Landres?

A. That is right.

Q. You also deny that you ever talked with Mr. Hettrick?

A. Not that I recall.

Q. You deny that he was the salesman who was waiting on you?

A. That is correct.

page 13 } Mr. Breit: May it please the Court, for the purpose of my next question I would like to call Mr. Hettrick and Mr. Landres in and have him point to them.

The Court: Call Mr. Landres and Mr. Hettrick.

(Mr. Landres and Mr. Hettrick entered the courtroom, after which the following occurred:)

By The Court:

Q. Which one was the gentleman?

A. The heavy set one with the light coat and glasses.

Q. What?

A. The heavy set one with the light coat and glasses—Mr. Landres.

By Mr. Cohen:

Q. Step down, Mr. Harrington.

HARRY POLAY,

called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Examined By Mr. Breit:

Q. Mr. Polay, you are an officer of the defendant corporation, Certified T. V. and Appliance Company?

Richard M. Gibbons.

A. Yes, sir.

Q. What is Mr. Landres' position with that
page 14 } corporation?

A. He is the vice-president.

Q. Is Mr. Landres on the Board of Directors?

A. Yes, sir.

Q. Is Mr. Landres a one-third stockholder in that corporation?

A. Yes, sir.

Q. On the night of March 9, 1957, was Mr. Landres in charge of your store at Little Creek Road?

A. Yes, sir.

Mr. Breit: No further questions.

The Court: Do you wish to ask Mr. Polay any questions at this time?

Mr. Pilcher: I think it would be better to ask him later.

RICHARD M. GIBBONS,
called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Examined By Mr. Cohen:

Q. State your name, please.

page 15 } A. Richard M. Gibbons.

Q. And your address?

A. 285-E Married Enlisted Men's Quarters, Amphibious Base, Little Creek.

Q. Were you with the plaintiff, Catherine Harrington, and her husband on March 9, 1957, in the Certified T. V. and Appliance Company store on Little Creek Road?

A. Yes, I was.

Q. Did you observe anything unusual occur on that date?

A. The accident involving—

By Mr. Cohen:

Q. Speak up a little louder.

A. The accident involving Catherine and Jose and the child when the television sets apparently fell over and hit them.

Q. Did you see this happen?

A. No, I did not see it happen.

Q. Were you there immediately after it happened?

A. Yes, I was.

Richard M. Gibbons.

Q. Were you in the store when it happened and were just not looking, or were you not there when it happened?
A. I wasn't there when it happened.

By Mr. Cohen:
Q. Where were you at this time?
page 16 } Mr. Pilcher: I object. He wasn't in the store. I don't care where he was.
The Court: Overruled.
A. I was in the adjoining building.

By The Court:
Q. How did you happen to come in the store? Did you hear the accident, or hear of it or what?
A. I was summoned by Mr. Harrington.

By Mr. Cohen:
Q. What did you observe when you then came into the store?
A. Catherine was laying on the floor, and the place was in quite a state of disorder. The shelf and televisions had fallen, which created quite a mess in there.
Q. Were they lying on Mrs. Harrington?
A. Not when I came in, no.
Q. Did you hear any statements made by Mr. Landres at that time?

Mr. Winters: I object, Your Honor. He has not identified Mr. Landres.

By The Court:
Q. Do you know Mr. Landres?
A. I believe so, Your Honor.

page 17 } Mr. Cohen: I will reword the question.

By Mr. Cohen:
Q. Did you hear any conversation or any statement made by Mr. Landres at the time you arrived at the scene?
A. Yes. He was talking to a police officer, I believe. He stated the fact that the shelf was not properly supported, that he was going to have it repaired.

The Court: Excuse me, Gentlemen. As I understand it, your objection was directed to the fact that we do not know

that this gentleman knows who Mr. Landres is. If you wish, I will have all the witnesses step in here and ask him which gentleman he heard make that statement.

Mr. Cohen: That will be all right.

Mr. Winters: Yes.

(The witnesses entered the courtroom, after which the following occurred:)

By The Court:

Q. Which one of these gentlemen did you hear make the statement?

A. I believe it was the gentleman with the glasses on.

Q. Two of them have glasses on.

A. The gentleman with the light coat and glasses.

The Court: For the purpose of the record he identified Mr. Landres as the gentleman who has heretofore
page 18 } identified himself as Mr. Landres.

(The witnesses were excluded.)

By Mr. Cohen:

Q. Would you repeat what Mr. Landres said, please?

Mr. Winters: I think he has already stated that.

The Court: I sustain the objection.

By Mr. Cohen:

Q. Answer Mr. Winters.

CROSS EXAMINATION.

By Mr. Winters:

Q. Who was present at the time of this alleged conversation?

A. There was a police officer, Mr. Harrington, the child, and Catherine and I. I believe there was someone else in there. I could not say who it was.

Q. Do you know the name of the police officer who was present at the time this conversation is alleged to have taken place?

A. No, I don't.

Q. You had previously been in Certified T. V. and Appliance, had you not, prior to the time of the accident?

A. Yes, I had.

page 19 } Q. Approximately how long before the accident occurred?

A. Approximately ten minutes or fifteen minutes.

Q. At that time did you see or observe any condition about the shelf which indicated it might fall?

Mr. Breit: Objection. It is immaterial whether he saw it or not. He is not the defendant.

The Court: He can ask him whether or not he saw it, though.

By The Court:

Q. Did you observe any such condition?

A. No, Your Honor.

Q. Were you looking for any such condition?

A. No.

By Mr. Winters:

Q. The shelf was not tilted, was it?

Mr. Cohen: He said that he wasn't looking for any such condition.

The Court: That is a matter that goes to the weight of his testimony; not as to the admissibility of the question.

By Mr. Winters:

Q. The shelf was not tilted, was it?

A. Not that I observed.

Q. You were looking at television sets, yourself,

page 20 } were you not?

A. No, not particularly.

Q. Did you just go in with the Harringtons?

A. Yes, sir.

Mr. Winters: No further questions.

OFFICER NELSON B. DAVIS,

called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Examined By Mr. Cohen:

Q. State your name, please.

A. Nelson B. Davis.

Q. Are you employed by the Norfolk Police Department?

Officer Nelson B. Davis.

A. Yes, sir.
Q. How long have you been so employed?
A. Four and a half years.
Q. Did you make an investigation of the incident that occurred on March 9, 1957, involving the plaintiff, Mrs. Catherine Harrington?
page 21 } A. Yes, sir, I did:
Q. Describe what you found when you arrived at the scene.
A. When I arrived at the scene I heard a baby screaming and hollering. At that time I did not see Mrs. Harrington. I picked up the baby. Another police car pulled up. I picked up the baby and jumped in the police car and immediately started to DePaul Hospital.

Mr. Pilcher: I object, may it please the court, as to what happened to the baby. It is not a part of this case.
The Court: It is inevitable that it is going to come out, because it all happened at one time.
Ladies and Gentlemen, you understand that we are not trying the case of the child. This is a suit brought by Mrs. Harrington for damages that she allegedly sustained by virtue of the accident.

By The Court:
Q. Go ahead, Officer.

By Mr. Cohen:
Q. Continue.
A. I arrived at DePaul Hospital with the child and turned it over to one of the nurses and doctors.

Mr. Pilcher: May it please the court, what happened to the child at DePaul Hospital hasn't anything to
page 22 } do with Mrs. Harrington's injuries.
The Court: I agree with you, but he is giving the case in chronological order as to what happened.

By The Court:
Q. Go ahead.
A. Then I waited outside the emergency room door for the ambulance with Mrs. Harrington. I assisted in bringing Mrs. Harrington into the emergency room where Dr. Gregory examined her and the child. Then I questioned them to find out what happened.

Officer Nelson B. Davis.

Q. You questioned whom?
A. Mrs. Harrington.
Q. Don't say what she stated to you.
A. Yes, sir. I also questioned Officer Jernigan as to what happened.
Q. You can't say what Officer Jernigan said.

By Mr. Cohen:
Q. Did you also talk to anyone else?
A. Yes, sir. After I made my report of the injuries to the complaint clerk I went back to 1121 East Little Creek Road, to Certified T. V. and Appliance Company, and questioned Mr. Landres. At the same time I looked at the situation, at the T. V. sets.
Q. What was Mr. Landres' response to the question.

Mr. Winters: I object, Your Honor, until such
page 23 } time as we know what the question is.
The Court: Overruled.

By The Court:
Q. What did he say?
A. I recall Mr. Landres making the statement to me that the shelving had been loose for sometime and it had not been fixed.

By Mr. Cohen:
Q. Answer Mr. Winters, please. Just a moment.

Mr. Cohen: I would like for the officer to identify Mr. Landres, if you feel that is necessary.
The Court: Bring in two or three of them.

(Witnesses entered the room, after which the following occurred:)

By The Court:
Q. The man that you questioned, that you understood was Mr. Landres, was who?
A. The gentleman in the right-hand side with eyeglasses and a brown tie.

The Court: For the purpose of the record he identified as Mr. Landres the gentleman who has heretofore identified himself as Mr. Landres.

Officer Nelson B. Davis.

By Mr. Cohen:
Q. Answer Mr. Winters, please.

page 24 } CROSS EXAMINATION.

By Mr. Winters:
Q. Who else was present at the time you had this alleged conversation with Mr. Landres?
A. At that time there were quite a few present. There had been a crowd that had gathered by the time I got back. The T. V. sets and shelf were laying on the floor. Quite a few sets were damaged.
Q. But Mrs. Catherine Harrington was not present at that time, was she?
A. Mrs. Harrington had been taken to DePaul Hospital and transferred to the Naval Hospital.
Q. Was Mr. Gibbons there?
A. Mr. Gibbons—I believe you are referring to the salesman? There was another gentleman there. I did not question him.
Q. Do you know who that gentleman was?
A. No, sir.
Q. But you are positive that Mrs. Harrington was not present at the time of this alleged conversation?
A. Mrs. Harrington was in DePaul Hospital.
Q. Was Mr. Harrington there?
A. Mr. Harrington, I did not see him for approximately an hour later at the DePaul Hospital. I don't know
page 25 } whether Mr. Harrington was present or not.
Q. Would you deny that Mr. Harrington was there?

The Court: If he does not know whether he was present or not, clearly that question would not help us a bit. Ask the next question.
Mr. Pilcher: I would like to have him identify Mr. Gibbons.
The Court: What do you want to do?
Mr. Pilcher: I want to see if he can recognize Mr. Gibbons as having been there.
The Court: Bring him in.

(Mr. Gibbons entered the courtroom, after which the following occurred:)

Catherine Harrington.

By Mr. Pilcher:
Q. Was this the gentleman who was there?
A. I could not positively say.

By Mr. Winters:
Q. When did you first receive a call to go to Certified T. V.?
A. 5:45 P. M., the third month, the ninth day.
Q. Approximately at what time did you arrive?
A. I arrived there, I would say, approximately in five minutes or three minutes. I was in the Ocean View area at that time. I was driving a stretcher wagon.
Q. How long did you remain there?
page 26 } A. I only remained there a matter of minutes the first time, just long enough to pick up the child and take it to the hospital, made my report, returned to the scene of the accident and investigated further there, and checked over the shelving and the T. V. sets—the damage that was done.
Q. When did you return the second time?
A. After I left the hospital.
Q. How long was that afterwards?
A. Approximately an hour and a half, or maybe an hour and fifteen minutes.
Q. Approximately what time would you say that was?
A. That would have been around 7:00 o'clock.

Mr. Winters: No further questions.

* * * * *

page 27 } CATHERINE HARRINGTON,
the plaintiff, having been first duly sworn, testified as follows:

Examined By Mr. Cohen:
Q. State your name, please.
A. Catherine Harrington.
Q. Will you speak up quite a bit so the jury can hear you?
A. Catherine Harrington.
Q. State your address, please.
A. 612 Poplar Street, Lakehurst, New Jersey.
Q. On March 9, 1957, were you a customer in the Certified T. V. and Appliance store on Little Creek Road?
A. Yes, I was.
Q. Approximately what time of the day was that?

Catherine Harrington.

A. It was around 5:15-5:20; no later than 5:20.

Q. Will you tell the Court and jury what happened at that time, please?

A. My husband and child and I went in to purchase a T. V. set. My husband was at the other end of the store talking to one of the salesmen. I had my little boy by the hand. I was going to the other end of the store to look at a different color T. V. Out of the side of my eye I looked up and saw the shelf weaving.

By The Court:

Q. I could not understand.

page 28 } A. I glanced up and I saw the shelf weaving. I thought, "Well, that is going to fall," so I grabbed my little boy to get him out of the way. When I did, the shelf collapsed and knocked me down and knocked my little boy down. The only thing I could think of right then was my little boy, so I screamed for my husband to get him. I said, "He is hurt. Get him out of the wreckage." Right after my husband came up and took my little boy out, and they picked me up and put me in a chair. I sat there for a few minutes. Someone went, I imagine, and called the doctor.

The ambulance came for me. They said, "Can you get up and walk?" When I tried to stand up I could not stand on my foot, so they put me on a stretcher and they took me to the hospital. Then they X-rayed my foot, and other doctors examined me. Dr. Vann came in and examined my foot, too, and put a cast on it. Then they had to carry me home. My husband carried me out and they took me on home.

By Mr. Cohen:

Q. Were you given any aid by the doctor to allow you to walk?

A. The pain was so bad for a few days that all I could do was lay down. Dr. Vann gave me some kind of prescription to deaden the pain. I took that for quite awhile,

page 29 } because it seemed like I just could not stand it. Then my husband went out and bought me a pair of crutches. I was pregnant at the time.

By The Court:

Q. Talk a little louder if you can.

A. I was pregnant. When I started to use those crutches, I couldn't. Every part of my body seemed to hurt me. So, I just sat down most of the time.

Catherine Harrington.

Q. What part of your body was struck by the shelf, or by the contents of the shelf?
A. When the shelf came down it caught my foot.
Q. Which foot?
A. My right foot. It broke it or fractured it across here (indicating). It also bruised the top part of my leg.

Mr. Pilcher: I object as to the foot being fractured.
The Court: Disregard that, Ladies and Gentlemen. I am sure there will be doctors to testify.

By The Court:
Q. You say that it also bruised the top part of your leg. I assume you mean your right leg?
A. That is right.

By Mr. Cohen:
Q. What portion of the right leg was injured?
page 30 } A. Right above the instep, and rignt underneath my knee. It was just a little bruised under the knee.
Q. Speak up.
A. It was bruised under my knee, but my instep was the part that hurt the most.
Q. Is there any injury to the right leg at the area which you have just pointed out that now exists?
A. Yes, there is.

Mr. Pilcher: I object to that question.
The Court: Overruled.
Mr. Pilcher: She can testify if it hurts her, but she cannot testify if there is any injury. That is up to the doctors to testify to any injury.
The Court: I think if it hurts, the jury would have a right to assume that it is injured. Go ahead.
A. Right now I can't hardly stand on my one leg. If I stand more than two hours it bothers me. I have to sit down. I can't wear high heels at all because—

Mr. Winters: Your Honor, I can't hear her.

A. I can't wear high heels. I tried and tried and tried, and everytime I do my foot swells and I must take them off.

Catherine Harrington.

By Mr. Cohen:

Q. Did you have this condition prior to March
page 31 } 9, 1957?

A. No.

Q. Had you ever had any difficulty wearing high-heel shoes prior to March 9, 1957?

A. No.

Q. Did you ever have any previous condition as to your right knee prior to March 9, 1957?

A. No.

Q. About how many months pregnant were you at the time of this accident?

A. Almost four months.

Q. Was the baby delivered without any complications?

A. Yes. I was worried for five months. I almost lost him. I thought he might be born crippled, but he was normal. He is normal right now. I did not have much trouble delivering him.

Q. Did you have to engage a practical nurse to care for you for any period of time as a result of this accident?

A. Yes. My husband could not get time off. He did get some time off, but could not get enough time off to help. I could not walk and my little boy could not walk, and I could not cook for us or do anything for him, so I asked Mrs. Barbara Gibbons to come and help us, to at least cook us some meals.

By The Court:

Q. What did your husband do?

page 32 } A. He was in the Navy at the time. They allowed him two weeks off, and for the rest of the time he could not get off at all.

By Mr. Cohen:

Q. How much did you pay Mrs. Gibbons for this service?

A. About $35.00 a week.

Q. For how many weeks?

A. For eight weeks.

Q. Eight weeks?

A. Yes.

Q. What floor were you living on during this time?

A. The second floor apartment.

Q. How did you get about?

A. I could not get out unless someone carried me down the steps, and carried me up.

Catherine Harrington.

Q. By what doctors were you treated for your injuries?
A. Dr. Vann and Dr. Shoenfeld in Norfolk here. Then I had the baby in Toms River Maternity Hospital in New Jersey.
Q. I am only interested in your treatment. Were you treated in any other city other than Norfolk?
A. Yes; in New Jersey.
Q. By whom?
A. By Dr. Alpert in Lakewood, New Jersey.
page 33 } Q. Were you ever treated by Dr. Russo for the injuries that you sustained in this accident?

Mr. Pilcher: May it please the Court, he is asking an awful lot of leading questions.
The Court: It is leading.

By The Court:
Q. By whom were you treated in connection with the accident?
A. Dr. Vann, Dr. Shoenfeld, Dr. Russo in the Toms River Maternity Hospital—and one time I did mention to him the fact that my foot was bothering me—and Dr. Alpert in Lakewood who took care of me for my leg injury.

By Mr. Cohen:
Q. You testified that you had to use crutches?
A. Yes.
Q. For how long a period of time did you have to use them?
A. About seven and a half weeks. The first week I could not walk at all. So, about seven and a half weeks I used them.
Q. Were you in a cast at any time after this accident?
A. Yes. I was in a cast for about eight weeks.
Q. When this cast was removed were you able to walk at that time?
A. No. I had to wear a woolen sock and no
page 34 } shoe. I had to walk on my heel and hold on until I started going. I could not put my regular shoes on for at least three to four weeks later. I had to wear a pair of sneakers because my foot was swollen and the shoes would not fit.
Q. Will you describe what you feel in your leg at this time—your right leg at this time—on the basis of whether it pains?

Mr. Winters: I did not hear the question.

By Mr. Cohen:

Q. Will you describe the pain in your right leg at this time on the basis of whether it aches?

A. On a damp day it has an ache to it. The only kind of ache I can describe is like a toothache. It is painful right underneath the knee. When I stand, I stand with all of my weight on the left leg.

Q. Do you have any feeling across the metatarsal area of your right foot?

A. Yes. I get a sharp pain in it on a damp day. If I try to stand too long, right under here—I can show you exactly where the spot is—it bothers me.

Q. How old are you, Catherine?

A. Twenty-eight.

Q. Did you have any expenses as a result of this injury other than the doctors expenses?

A. Just prescriptions.

page 35 } By the Court:

Q. How about the crutches?

A. And the crutches. Also paying Mrs. Gibbons to come in and help me.

By Mr. Cohen:

Q. Did you have to purchase any elastic stockings in regard to this accident?

A. Yes.

Q. How much were they?

A. They ran—

Mr. Pilcher: These are leading questions, Your Honor.

The Court: They are to a certain extent leading. But, on the other hand, he asked as to the expenses, and if he realizes that some were left out he can bring those out. Let's go on.

A. I had to purchase a pair of elastic stockings, because when I finally stepped down I felt something give in my leg, and these veins from what I understand—I don't know what happened to them, but the doctor told me that if I wore elastic stockings it would take the pressure away and help it.

Catherine Harrington.

By Mr. Cohen:
Q. Do you know the price of those stockings?
A. They ran $32.00 or $30.00.
page 36 } Q. How much did the crutches cost?
A. $4.98.

By the Court:
Q. How much?
A. $4.98.

By Mr. Cohen:
Q. Do you know the approximate amount of the prescriptions that you had to purchase?

Mr. Pilcher: I object to that, may it please the Court. I am not interested in the approximate amount of anything.

By the Court:
Q. Do you know the exact amount?
A. No, sir.
Q. Do you know the approximate amount?
A. No, sir. My husband bought them.

By Mr. Cohen:
Q. Answer Mr. Winters, please.

By the Court:
Q. You did not say how much it cost for the practical nurse.

The Court: Didn't she say that she had a practical nurse?
Mr. Cohen: She did testify that it was $35.00 a week for eight weeks.
page 37 } Mr. Pilcher: For Mrs. Gibbons, but she was not a practical nurse.

A. Her mother and the whole family are all registered nurses. She has had training from her mother.

Mr. Pilcher: I object to that statement and ask that the jury be instructed to disregard it. He can ask Mrs. Gibbons to state what her qualifications are. We don't know what the qualifications of Mrs. Gibbons are.
The Court: Who is Mrs. Gibbons?

Catherine Harrington.

Mr. Breit: She is the lady that cared for this woman for eight weeks.

By the Court:
Q. She is no kin to you?
A. No.
The Court: I will allow it.

By the Court:
Q. You say that it was for eight weeks at $35.00 a week?
A. Yes.

By Mr. Cohen:
Q. Do you know the amount of the bill at DePaul Hospital for the emergency treatment that you were given there?
A. No, I don't.
page 38 } Q. Answer Mr. Winters.

CROSS EXAMINATION.

By Mr. Winters:
Q. Mrs. Harrington, you testified that you were walking toward the front of the store when this shelf collapsed. Is that correct?
A. Yes.
Q. And that you were holding your little boy by the hand?
A. Yes.
Q. On which side of you was your little boy?
A. On my left side.
Q. He was on your left side?
A. That is right.
Q. Was that the side that the shelf was on?
A. Yes.
Q. You stated that you looked up?
A. Yes.
Q. And observed the shelf. How high did you have to look to see that shelf weaving?
A. I could show you.

page 39 } By the Court:
Q. Stand up and show us.
A. (Stands) I looked up, and the shelf was about that high (indicating).

Catherine Harrington.

By the Court:
Q. It was from 8 to 10 inches above your head?
A. Yes.

By Mr. Winters:
Q. How tall are you?
A. Five foot, five or six.
Q. That would be that these television sets were approximately six feet above the floor?
A. I don't know for sure.
Q. That would be approximately correct?
A. Yes. It was higher than my head.
Q. That is, the shelf was higher than your head?
A. Yes.
Q. Mrs. Harrington, immediately following the accident did you have any discussion with any police officer?
A. No, sir.
Q. Did you see any police officer?
A. Just the one that took me in the ambulance to the hospital.
Q. Do you know Mr. Landres?
A. No. I recognize him now, but I would not
page 40 } know who he was. I thought he was a salesman.
Q. At that time did you see the gentleman that you recognize as Mr. Landres engaged in any conversation with the police officer?
A. No, sir. All I was worried—

The Court: You mean after the accident?
Mr. Winters: After the accident.

A. After the accident all I was worried about was what happened to my little boy.

By Mr. Winters:
Q. Could you say that you were present at the time Mr. Landres is alleged to have stated that the shelf was defective, loose, and about to fall?
A. I think I was in the hospital, because all I remember—
Q. Were you present at the time?
A. At the time the shelf was supposed to have fallen?
Q. No; that Mr. Landres is alleged to have stated that the shelf was loose and about to fall?
A. I don't know.

Catherine Harrington.

Q. You did not hear him make that statement, did you?
A. No, I didn't.
Q. Mrs. Harrington, who was treating you for your pregnancy prior to this accident?
A. I did not go to a doctor.
page 41 } Q. Did you have any swelling of your legs as a result of the pregnancy?
A. You mean after I had the baby?
Q. Prior to the accident did you have some swelling of your legs?
A. Yes. Most pregnant women do, don't they?

By the Court:
Q. I haven't the slightest idea what you said. I can't hear you. What did you say?
A. I said yes, I did; that most pregnant women do swell.

By Mr. Winters:
Q. Mrs. Harrington, between the time you observed this shelf wabbling, I believe you stated, or weaving, and the time the shelf actually fell, how long a period of time was that?
A. I looked up and it was swaying, and I thought, "This thing is going to collapse," and all I wanted to do was to get out of the way and get my little boy, and that is just what I did. I did not waste any time. I knew that it was going to fall.
Q. How long would you say the interval was between the time you observed it and the time it fell?

The Court: Now I can't hear you, Mr. Winters.
Mr. Winters: I am sorry.

page 42 } By Mr. Winters:
Q. How long was it between the time you observed the shelf wabbling and the time the shelf actually fell?
A. I saw it wabbling, and it was just a second after that. How long would it take me to grab him and go?
Q. You are referring to your right side for your little boy, and I believe you testified that he was on your left side. On which side was he?
A. He was on my left side, and I grabbed him like this and went.
Q. Were you running?

A. He was on my left side. We were on our way out. I saw the shelf going and I grabbed him like this (illustrating), and turned and went this way.

Q. Which way did you turn and go?

A. To the left.

Q. You went to your left?

A. That is right.

Q. In other words, you ran into the shelf?

A. No, I did not run into the shelf.

The Court: She illustrated that she swung to the left away from the shelf.

A. I had to go to the left to get the little boy.

By Mr. Winters:

page 43 } Q. When I asked you the question originally you reached to your right. Was that where the little boy was, on your right?

A. He was on my left side; he had to be.

Q. I believe you testified that you were treated by Dr. James Russo of Toms River, New Jersey?

A. That is right. He is a maternity doctor.

Q. Did you say that he was a maternity doctor?

A. Yes.

Q. You were also treated by Dr. Alpert, I believe you said?

A. That is right.

Q. Were you treated by Dr. Shoenfeld following this accident for your pregnancy?

A. I started to bleed and I thought I was going to have a miscarriage.

Q. You went to see Dr. Shoenfeld about that condition?

A. That is right.

Mr. Winters: No further questions.

* * * * *

page 80 } EZRA LANDRES,

called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Examined by Mr. Winters:

Q. Will you state your name and place of residence?

Ezra Landres.

A. Ezra Landres; 3601 Omohundro Avenue, Norfolk.

Q. Are you an officer of the Certified T. V. and Appliance Company, Incorporated?

A. I am.

Q. What is that?

A. Vice-president.

Q. On March 9, 1957, were you present at the Little Creek store of Certified T. V.?

A. I was.

Q. On that particular day did you observe Mr. and Mrs. Harrington and their son enter your store?

A. I did.

Q. At that particular time were you engaged, or were you able to wait on them?

A. No, I was not.

Q. You were not what?

A. I had another customer that I was waiting on.

Q. Do you know whether or not there was another salesman present to wait on them?

A. There was.

page 81 } Q. Who was that salesman?

A. Mr. Hettrick.

Q. Do you know his full name?

A. Elmer Lee Hettrick.

Q. Did Mr. Hettrick wait on them?

A. He did.

Q. Did you at any time wait on the Harringtons?

A. I don't think I did, but it is very hard for me to remember. I may have been called in at the end of the sale to give a price.

Q. Was Mr. Hettrick empowered to make a price?

A. He was.

Q. All right. On this particular occasion prior to the entry of the Harringtons in the store did you observe any condition regarding the shelf which indicated that it was faulty?

A. No.

Q. Did you, yourself, place any merchandise or remove any merchandise from that shelf on that day, or prior to that day?

A. Prior to that day I had.

Q. How long had you been at that store?

A. Well, the store had been there for two years, but I had only been working at that store for about six weeks prior to that date.

page 82 } By the Court:

Q. How long had you personally been there?

A. I was personally working in that store for six weeks prior to that date.

By Mr. Winters:

Q. Prior to your coming to the store, which one of the officers had been working in the store?

The Court: Officers of what?

Mr. Winters: Certified T. V. and Appliance.

A. One or the other, myself or Mr. Polay, had been going back and forth to that store. I had been in that store before, but not on a full-time basis.

By Mr. Winters:

Q. During that period of time, from the time the store opened until the time this incident occurred, state whether or not you observed any condition which indicated to you that the shelf needed repairing?

A. No.

Q. You stated that you had placed television sets on the shelf. Is that correct?

A. I have, or had.

Q. At the time you placed those televisions on the shelf was there any movement or any noise, or anything, which would have indicated its coming loose?

Mr. Breit: I object.

page 83 } The Court: I sustain the objection. It is leading.

A. I had not.

By Mr. Winters:

Q. Will you state whether or not you had ordered any repairs to be made to that shelf?

A. I had not.

Q. Did you consider that any repairs were necessary?

Mr. Breit: I object.

The Court: I sustain the objection.

Ezra Landres.

By Mr. Winters:
Q. Were any repairs necessary?

Mr. Breit: Objection again.
The Court: It is bound to be an opinion. He can state what he observed, but not his opinion, unless he is qualified as an expert carpenter. Then I will allow him to answer that question.

By Mr. Winters:
Q. Did you observe any change in the condition of the shelf?
A. No.
Q. At the time the shelf fell where were you?
A. We have two small offices to the rear of the store. Facing the front of the store the shelf would be on my left.
I was in the left-hand office on the same side as
page 84 } the shelf is located, in the rear of the store.
Q. Were you facing the front of the store?
A. I was.
Q. At that particular time did you observe where Mrs. Harrington was?
A. I think I sensed it rather than observed it, because I know Mr. Harrington was at the end of the shelf closest to me with Mr. Hettrick. It is difficult for me to say, but Mrs. Harrington was further away from him or from me, which means further toward the front of the store.
Q. Do you know where Matthew Harrington was at that time?
A. I did not see him, because he was pretty small.
Q. Do you know what first attracted your attention to the falling of the shelf?
A. I noticed a movement above where I was sitting that wasn't supposed to be there. I saw things start to fall.
Q. Did you observe the movement of Mr. Harrington at that time?

The Court: Who?
Mr. Winters: Mr. Harrington.

A. I did.

By Mr. Winters:
Q. What did he do?
page 85 } A. At the time the movement started he tried to stop it.

Ezra Landres.

Q. What did Mr. Hettrick do?
A. He helped him, or tried to.
Q. At that particular time did you observe where Mrs. Harrington was?
A. At that time Mrs. Harrington was moving away from me toward the front of the store.
Q. Where was Matthew Harrington?
A. I would imagine—

Mr. Breit: I object.

A. I don't know.

By Mr. Winters:
Q. At the particular time that you entered into negotiations for the rental of this particular building where your store is located on Little Creek Road, did you all need certain improvements, or was the building suitable for your use as it was?
A. We did need improvements.
Q. What sorts of improvements were needed for you?
A. Well, the store was a shell—four walls, a front and a back. We needed to put up offices, floor the store, put additional electrical wiring and fixtures in, and make platforms and shelves.

Q. At the time you began negotiations for this
page 86 } store was it a completed building, or was it under
construction?

A. The building itself was completed, but the front and inside were not.
Q. Did you conduct any of the negotiations concerning the erections of shelves?
A. I did not.
Q. Do you know who did?
A. Mr. Polay did, my partner.
Q. Did you at any time have any discussion with a person employed to do those repairs concerning the way in which those improvements were to be made?
A. I don't remember. I don't think so.
Q. Do you recall any such conversation?
A. No, I do not.
Q. Following the incident what did you do?
A. The first thing I did was to get up, and I ran toward—well, I had to run around, because I was sitting at a desk and the entrance was to my right. I ran through the en-

trance and toward the front of the store, or toward Mr. Harrington who I could see. I did not see Mrs. Harrington or the baby until I got to where the aisle is which leads to the front of the store. I saw that the child was lying on the floor and Mr. Harrington was kneeling over him, and I ran to them.

Q. At that time did you observe any television
page 87 } sets or any of the shelf?

A. There were all kinds of things on the floor. I did not notice anything resting upon anybody directly.

Q. Following that did you have any discussion with Mrs. Harrington concerning the accident?

A. With Mrs. Harrington?

Q. Yes.

A. Mrs. Harrington appeared to me to be pretty well upset from it. I don't think we discussed anything about the accident at all.

Q. Did you talk to Mr. Harrington immediately following the accident?

A. I think at that point all we were interested in doing was getting the baby Harrington out of the store into a hospital as quickly as possible, and that was what we tried to do first.

Q. Did you call the police?

A. I did not personally, no. I was up in the front of the store trying to make Mrs. Harrington comfortable. I brought a chair to her. We picked the baby up off the floor. Some gentleman had come in from next door and brought some pillows and put the baby on them. I asked Mr. Hettrick to try to get a doctor who was very close. I happened to remember his name. We called that doctor and he was unavailable. I said, "Try somebody else close."
page 88 } We tried the second doctor, and when we could not get the second one I suggested that the fastest way would be to call the police, which he did.

Q. Did the police come?

A. Very shortly after that.

Q. How soon after the injury?

A. It is difficult to say exactly, but I would say within 10 to 15 minutes after the accident occurred.

Q. How long did they remain?

A. Not very long at all. They just came in with a stretcher and took the baby out and left within five or ten minutes.

Q. Did you have any discussion with any of the officers

who arrived at that time concerning the way in which this accident occurred?

A. I did not.

Q. Did you have any conversation with any police officer indicating that you knew that the shelf was loose and needed to have repairs made?

A. No.

Q. You deny that?

A. I do.

Q. To Mr. Harrington did you make any statement that the shelf—

Mr. Breit: May it please the Court, he is con-
page 89 } tinuously leading the witness.

The Court: As I recall it, you gentlemen brought up the subject about leading awhile ago.

By Mr. Winters:

Q. Would you state whether or not you had any conversation with Mr. Harrington following the accident?

By the Court:

Q. What conversation, if any, did you have with him?

A. We did not talk much about anything, sir. All we were interested in doing was getting the baby taken care of. Immediately upon the police leaving, Mr. Harrington left with them or right after them. We did not talk about anything.

The Court: That covers it.

Mr. Pilcher: May it please the Court, we want to contradict the specific statement which Mr. Harrington alleges was made.

The Court: He has contradicted it as clearly as he could.

Mr. Pilcher: We want to use the same language that Mr. Harrington has used.

The Court: You can say that it was testified Mr. Harrington said so and so and so and so. Did you or did you not say that?

Mr. Pilcher: That is what he was going to
page 90 } ask.

The Court: No. He said: Did you tell him so and so? Go ahead.

Ezra Landres.

By Mr. Winters:

Q. Mr. Harrington has previously testified that you stated in his presence to a police officer that the shelf was loose and that it had been like that for a couple of weeks. Did you or did you not make any statement like that?

A. I did not.

Q. Mr. Gibbons has previously testified that you made the statement, in talking to the police officer, that the shelf was loose before the accident. Did you or did you not make that statement?

A. I did not.

Q. Officer N. B. Davis has testified that you told him the shelving had been loose for sometime and had not been fixed. Did you or did you not make that statement?

A. I did not.

Q. Officer Davis testified that he returned to the store at or approximately 7:00 P. M. Were you present at the time of Officer Davis' return?

A. I was not.

Q. Did Officer Davis return to the store after taking the Harringtons to the hospital, to your knowledge?

Mr. Breit: Objection. He could not possibly know. He just said before that he wasn't present.

page 91 } The Court: Sustained.

By Mr. Winters:

Q. At what time did you close the store that evening?

A. Between 6:45 and 7:00 o'clock.

Q. Were you the one who locked up the store?

A. I was.

Q. Was anyone present at the time you closed the store?

A. Yes.

Q. Who was that?

A. Mr. Braun. Mr. Hettrick, and one or two of our service men.

Mr. Winters: That is all.

CROSS EXAMINATION.

By Mr. Breit:

Q. Mr. Landres, you are an officer of the corporation that is the defendant in this suit. Is that correct?

A. I am.

Ezra Landres.

Q. You were operating the store on this particular night of the occurrence?
A. I was.
Q. And you had been doing so for some six
page 92 } weeks before that?
A. I was.
Q. Your firm had been in that store for approximately two years, I believe, before the accident occurred?
A. More than two.
Q. More than two? When the shelves were built they were put in when you first moved into the store. Isn't that correct?
A. Sure.
Q. From the day those shelves were put into the store until the date of the accident your corporation not once had that shelf inspected by a competent carpenter for defects?

Mr. Winters: I object, Your Honor. It is a question which the gentleman cannot answer.
The Court: If he cannot answer it he should say, "I don't know." That is not objectionable.
Mr. Winters: It calls for things which he may not have knowledge of.
The Court: You are objecting to it on the ground that he may not be able to answer it?
Mr. Winters: My objection is, sir, that it should be more clearly stated, to limit it to things within his knowledge.
The Court: I have no way of knowing what he
page 93 } knows in advance. Rephrase the question.

By Mr. Breit:
Q. To your knowledge, Mr. Landres, did you or your corporation from the day that shelf was built ever have it inspected by a carpenter until the date it caved in?

Mr. Winters: I object.
The Court: Overruled. Go ahead.

A. Not to my knowledge.

Mr. Winters: I note an exception.

By Mr. Breit:
Q. You certainly did not call anyone in to examine it?
A. I did not.

Ezra Landres.

By the Court:

Q. He said "by a carpenter." Did you have it examined by anyone to determine its strength or stability?

A. The only thing I can say, sir, is that it was being used for over two years.

Q. You know what "examine" is. Answer the question and then you can state anything else that you want.

A. Not to my knowledge.

Q. Now you can say whatever you want.

By Mr. Breit:

Q. When that shelf was first built, it was built on a cost-plus basis, was it not?

page 94 } A. I don't know.

Q. You don't know that? You are not familiar with what the corporation paid for the building of the shelf?

Mr. Winters: If Your Honor please, he has already testified that he does not know.

The Court: First he asked him if it was on a cost-plus basis, and he said he did not know. Then he asked him what did it cost. He might know what he paid for it, but not the basis. Go ahead.

A. I don't know what we paid for it.

By Mr. Breit:

Q. You did not discuss it with the other corporate officers concerning the remodeling and construction of that building?

A. I think I will have to answer that question a little differently, if I may.

By the Court:

Q. Go ahead.

A. There are three of us in the corporation, each of which does a separate job. My job does not have to do with the building of shelves.

By Mr. Breit:

Q. Whose job was it in the corporation to check the shelves periodically?

A. Mr. Polay would have had to do with the

page 95 } building of the shelves.

Q. Whose job was it to inspect those shelves to

see that they were reasonably safe—anybody?

Mr. Winters: Your Honor, I object. I don't know that there is any requirement or any duty.

The Court: Overruled.

By the Court:

Q. Answer the question.

A. We had two salesmen in that store from the day we opened it until the time the accident occurred. If those shelves would have needed to be fixed, it would have been the duty of the salesmen in the store to notify one of us.

By Mr. Breit:

Q. Was Mr. Hettrick one of those salesmen?

A. No, sir, he wasn't.

Q. Mr. Hettrick was a salesman in that store, was he not?

A. He was a part-time salesman.

Q. How long had he been working for your firm?

A. Approximately six or eight months before that time.

Q. He was working at the Little Creek store during all of that time?

A. No. He was working in one of the other stores until the time I started working in that store.

Q. So he was working in your store six to eight
page 96 } weeks before this happened?

A. That is correct.

Q. Do I understand you correctly in saying that if any of the salesmen felt that anything was unsafe, they should have told you about it?

A. That is correct.

Q. Now, Mr. Landres, you say that you don't recall the terms under which those shelves were built, is that right, but to your knowledge you never inspected them or had anyone else ever inspect them?

A. I don't know if anybody else inspected them. I know that I did not inspect them.

Q. Do you sign the checks for your corporation?

A. Two of the three of us sign the checks.

Q. So some of the checks may have been signed without your knowledge?

A. That is correct.

Q. Of your own knowledge do you recall ever signing a

check payable to any carpenter, or any other person, for building the shelves?

A. I don't recall.

Q. You do recall, do you not, that the man who built the shelves was paid for them?

A. That I know.

Q. And he was paid within thirty days after
page 97 } they were built. Is that correct?

A. He was paid probably right after they were built.

Q. And no complaint had ever been raised by you to this man concerning the construction of those shelves. Isn't that correct?

A. Not by me personally.

Q. And, to your knowledge, not by anybody in your corporation. Isn't that correct, sir?

A. That is correct.

Q. In fact, it was some two months after the shelf caved in that you contacted Mr. Jordan, the builder of them, to say anything about defects. Isn't that correct, sir?

A. I don't believe I contacted him two months after.

Q. So you have never contacted him?

A. That is correct.

Q. Do you know whether or not anybody else in your firm contacted him?

A. I don't know.

Q. Now, this shelf held television sets?

A. That is correct.

Q. The sets were moveable; isn't that correct?

A. That is correct.

Q. They would constantly be taken off to demonstrate to customers, or replaced or sold, and new ones put on the shelf in their place?

page 98 } A. On occasions they would be removed and replaced.

Q. In front of them there were rods that ran vertically from the ground. Isn't that correct?

A. No. There was a platform directly under that, and there were steel poles running from the platform to the shelf.

Q. And those poles had little nuts on them so that they could be removed?

A. No, sir. Those poles were permanent.

Q. The poles were permanent?

A. Yes, sir.

Q. You are quite certain of that?

Ezra Landres.

A. I would not swear to my life that they were. I am of the opinion that they were screwed permanently to the bottom and the top shelf.

Q. Mr. Landres, you are under oath, so we want to get it exact. Do you know whether or not those poles are moveable or not?

A. I will have to answer that question: I don't know.

Q. That is because you have not examined them closely; isn't that correct, sir? Surely if you had examined them closely you would have known, wouldn't you?

A. I have never examined them closely.

Q. As a matter of fact, you have never examined either those rods or the remainder of the shelf closely,

page 99 } have you?

A. Since the accident occurred I have examined it.

Q. But prior to the acrident, for some two and a half years, you had not?

A. That is true.

Q. Now, Mr. Landres, isn's it also true that parttime salesmen do not have authority in your store to set prices on T. V. sets?

A. They don't have the authority to set a final price, but they do have the authority to—

Q. —start talking?

A. To negotiate on the floor.

Q. Before any negotiations are closed you or Mr. Polay or Mr. Braun, one of the corporate officers, sets the final price?

A. That is correct.

Q. That is particularly true of the part-time salesmen?

A. That is true.

Q. So in this case, as in every case, you did speak to the customer?

A. No, that is not true. If the salesman was able to close the sale without our help, it wasn't necessary for him to call us.

Q. You are not prepared to deny under oath that you talked to Mr. Harrington on this night, are you?

page 100 } A. I did talk to Mr. Harrington. I don't know if I talked to Mr. Harrington directly. It is hard for me to remember. I do know, or I seem to remember, that I was called to give a price in this particular case. Now, I do remember that I was busy with another customer during the time that Mr. and Mrs. Harrington were in the store.

Ezra Landres.

At which point I was called it is hard for me to recollect, although I would say it was before the accident occurred.

Q. You also said that you were not there when the officer came back after taking the people to the hospital?

A. The store was closed. We left the store and closed it. The officer had not come back at that time.

Q. But when the officer was there you were present. Is that correct?

A. At the original time that he came to the store to take the people to the hospital.

Q. You do recall discussing with the officer the occurrence, do you not?

A. I don't think that we discussed it. It was pretty well self-explanatory as to what happened. The television sets and the shelf were laying on the floor, and the baby had a bruise on his leg, and Mrs. Harrington was a little hysterical, and Mr. Harrington was very upset. When the call was made to the Police Department they were told that an accident had occurred and that an ambulance was

page 101 } needed. To my knowledge, the policemen came into the store and saw what had happened. In fact, they came in with a stretcher. I don't believe I even said anything to them.

Q. You do not recall talking to the officers?

A. Not at all.

Q. Are you prepared to deny that you spoke to that officer?

A. If you phrase it that way, I would have to deny it.

Q. You deny talking to the officer?

A. That is correct.

Q. At that time Mr. Hettrick was in the store with you?

A. That is true.

Q. Who else was in the store?

A. Mr. and Mrs. Harrington and the little baby Harrington. I am not sure, but I think maybe one or two of the salesmen from the store next door were there, also. There was a customer there who I was in the process of selling a television set to, and his child.

Q. And they were all present when the police officer was there?

A. Yes.

Q. If, in fact, you had talked to the police officer, they would have been present then, too?

page 102 } A. I am quite sure they were.

Q. Who was in charge of the store, Mr. Landres?

A. At the time any of the three of us that would have been in the store. Whichever one of the three of us in there would have been in charge of it.

Q. Isn't there somebody generally in charge at all times, regardless of who is in the store, itself?

A. You mean if there would have been a particular person responsible if one of us were not responsible for being there physically?

Q. Yes.

A. Not necessarily.

Q. Do you recall the placing of tile on the floor of the platform?

A. There was tile on the floor of the platform.

Q. Isn't it true, sir, that that tile was laid on that platform after the rods had been placed and the shelf had been built?

A. I don't know.

Q. You do not know? Didn't you inspect it periodically when the shelf was being built?

A. No. If I remember correctly, I was right busy at the other store. Mr. Polay was the one who was handling that job.

Mr. Breit: No further questions.

page 103 } RE-DIRECT EXAMINATION.

By Mr. Winters:

Q. Mr. Landres, you had occasion to observe this shelf from a time approximately six weeks prior to the accident until the date of the accident. Is that correct?

A. I saw it when coming in and out of the store maybe a thousand times a day.

Q. I believe you also testified that you placed and removed televisions from the shelf?

A. I had removed television sets from the shelf.

Q. At the time did you observe any change in the condition of the shelf?

A. I believe I have answered that "No."

Q. I believe you testified that Mr. Polay is the gentleman who made the arrangements for the erection of the shelves?

A. And the building of the shelves.

Mr. Winters: That is all.

page 104 } ELMER LEE HETTRICK,

called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Examined by Mr. Winters:

Q. Will you state your name and residence, please?

A. Elmer Lee Hettrick; 5773 Don Drive, Norfolk 13, Virginia.

Q. On March 9, 1957, were you employed by Certified T. V. and Appliance?

A. Yes, I was.

Q. What was your capacity with them at that time?

A. As a part-time relief salesman, evenings and week ends.

Q. Are you presently employed by Certified T. V. and Appliance?

A. No, I am not.

Q. Were you present in the store on March 9, 1957, when Mr. and Mrs. Harrington entered the store?

A. Yes, I was.

Q. Did you wait on them?

A. Yes, I did.

Q. From the time they entered the store until the time of the accident, of your own knowledge do you know whether or not they had any conversation with Mr. Landres?

A. I don't know for sure.

page 105 } Q. Do you recall any such conversation?

A. No, I do not.

Q. Were you conducting them through the store and showing them merchandise at the time?

A. Yes, I was—Mr. Harrington.

Q. Where was Mrs. Harrington at that time, if you know?

A. At what time?

Q. At the time you were showing Mr. Harrington through?

A. The best I recall, she was with her husband at times, and at other times she was wandering about the store.

Q. What attracted your attention, if anything, to the collapsing of the shelf or the falling of the shelf?

A. At the instant the shelf came down my back was turned away from the shelf. I was facing Mr. Landres. Mrs. Harrington either screamed or hollered or shouted, which diverted my attention and I looked in her direction, and at that instant the shelf was collapsing, or was in a position of collapsing.

Q. At that particular moment where was Mr. Harrington?

A. At that same instant he was directly behind me, because when I turned I bumped into him, and then the two of us

jumped or leaped in one motion to try to prevent the shelf from coming down. We managed to catch the page 106 } extreme end of the shelf, and a T. V. set that was on top of the shelf, preventing that section from collapsing all in one instant. Our hands, the two of us combined, were more or less pressing on top of each other's.

Q. At that particular time do you know where Mrs. Harrington was?

A. At that time she was in between two rows or appliances.

Q. Where was that?

A. Approximately in the middle of the store.

Q. How long did you work for Certified T. V. and Appliance prior to this accident?

A. Approximately a year.

Q. How long had you worked there at the Little Creek store?

A. On and off they rotated me between the three stores; most of the time between the two stores: 39th Street and Little Creek store.

Q. State whether or not you observed any change in the condition of the shelf which collapsed or fell away from the wall during that period of time?

A. I was there only in the evenings and on week ends. I had nothing to do with loading the shelf or unloading the shelf, other than at the time I was there if a customer looked at them. I would explain the sets on top of the page 107 } shelf. I had no knowledge of the shelf's construction, or any part or phase of it. In other words, I did not load or unload the shelf, or do anything to the shelf, so I would not know about the construction of the shelf.

Q. Approximately how many sets were up there on the evening that this occurred?

A. Maybe fifteen. I don't know how many sets you could put up there, to tell you the truth. There were a number of portable sets which would take up less room than table model sets. There were perhaps ten or twelve or fifteen sets.

Q. Do you know who called the police?

A. I called the police.

Q. Were you present when the police arrived?

A. I went out in front of the store to direct the police into the store so there would be a minimum time to elapse.

Q. Do you know whether or not Mr. Landres had any

conversation with any of the police officers after their arrival?

A. I have no knowledge of it.

Q. Did you see him talking to any of them?

The Court: I am not going to allow you to cross examine the witness.

page 108 } By Mr. Winters:

Q. Will you state whether or not Mr. Landres made a statement in your presence that the shelf was loose—

Mr. Breit: Objection, if Your Honor please. There is no allegation that it was made within this man's presence.

The Court: Start the question again. You did not finish it.

By Mr. Winters:

Q. Will you state whether or not in your presence on that evening Mr. Landres stated to one of the police officers—

The Court: How can he state it more clearly? He doesn't know whether Mr. Landres spoke to a police officer. How can he say what he said or didn't say to a police officer? That is obvious, I think.

By Mr. Winters:

Q. What was the purpose of your talking with Mr. Landres at the rear of the store?

Mr. Breit: I object as immaterial.

The Court: What was the purpose of what?

Mr. Winters: His conversation with Mr. Landres at the rear of the store.

The Court: I sustain the objection.

Mr. Pilcher: May it please the Court, they
page 109 } testified that Mr. Landres was the one who waited on this customer. We want to show—

The Court: A conversation between this man and someone other than the plaintiff?

Mr. Pilcher: All right, you win.

Elmer Lee Hettrick.

CROSS EXAMINATION.

By Mr. Breit:

Q. Mr. Hettrick, you had no authority to set any price on T. V. sets. Is that correct?

A. That is correct.

Q. You had always called one of the bosses in order to close a deal?

A. That is correct.

Q. I believe you said that you have no knowledge of the construction of the shelf; that you did not move the T. V. sets that were on it?

A. Very rarely did I ever touch them other than to explain them to a customer.

Q. So if the shelf moved or gave in any way from these sets being removed or placed on there, you would have no knowledge of that, would you?

A. Would you mind stating that question page 110 } again?

Q. If a T. V. set were placed on that shelf or taken off, and in the process of doing it the shelf shook, you would not know about it, would you?

A. If I did not put them up there or take them down, I would not know anything about it.

Q. These shelves were display shelves, and the T. V. sets were kept at the front of the shelves, were they not?

A. I think they were placed on it about in the middle, in depth, to be divided between the back wall and the forward edge.

Q. When the shelf gave way it did not collapse, but rather pulled away from the wall and fell like that (illustrating). Isn't that correct?

A. As I remember, the first instant that I glanced at the shelf, the entire length and breadth of the shelf came away from the wall; but, it seemed to come away in the middle, falling inward rather than the ends releasing themselves.

By the Court:

Q. The shelf pulled out of the wall?

A. That is right. In other words, the shelf fell out into the aisle, but it did not fall from the ends. It fell from the middle. The shelf was in two sections. It collapsed, just like my hands are collapsing (illustrating).

Harry Polay.

page 111 } By Mr. Breit:

Q. So the middle gave way first? Did the whole shelf eventually fall down?

A. The whole shelf came down. Even pushing against it, it still came down.

Q. Do you know whether or not in your presence during the time you were working in the store the shelf was ever inspected by anyone for stability?

A. I have no knowledge of it.

Q. In your presence was it ever done?

The Court: He said that he has no knowledge of it.

By Mr. Breit:

Q. I understand that when the police officers arrived you stepped outside to direct the police officers into the store. Is that correct?

A. I called the police.

By the Court:

Q. When they came what did you do?

A. Before they came I was outside waiting for them.

By Mr. Breit:

Q. When they arrived where were you?

A. I was still in the front, directing them into the inside.

Mr. Breit: No further questions.

page 112 } HARRY POLAY,

being recalled on behalf of the defendant, having been first duly sworn, testified as follows:

Examined by Mr. Winters:

Q. Would you state your name and residence?

A. Harry Polay; 320 Maycox Avenue, Norfolk.

Q. Would you state your position with Certified T. V. and Appliance on March 9, 1957?

A. I am secretary-treasurer of the corporation.

Q. You were at that time?

A. Yes.

Q. Prior to March 9, 1957, would you state whether or not you conducted any negotiations concerning the erection of certain improvements at the Little Creek store?

A. Prior to what was that?

Harry Polay.

Q. Prior to the date of the accident?

A. Yes, we did. When we contracted with Mr. Weinberg for the occupancy of the premises during the construction period, we wanted to make some additions to the building, and got his permission to do so for our occupancy.

We had conferred with Mr. Jordan, who was the general contractor on the job, and he agreed to make these additions for us, which consisted of two offices and platforms for refrigerators, to keep them off the base floor, and page 113 } also T. V. sets—to put them on a platform with the shelf high enough to hold table model sets, above the console models. In other words, both of the base shelves were similar, and the shelves above the T. V. sets, the consoles, were to be for table model T. V. sets just on one side of the store.

Mr. Breit: May it please the Court, I would like to know when this was.

By the Court:

Q. When was this?

A. This was during the construction of the premises, which was, I would say, approximately October of 1954.

Mr. Breit: May it please the Court, I move that all of this be stricken.

The Court: Overruled. Go ahead.

Mr. Breit: We have a case which I submit is in point on this very subject.

The Court: Overruled.

Mr. Breit: I note an exception.

By Mr. Winters:

Q. At the particular time that you discussed this with Mr. Jordan, will you state what your directions were—what your specific directions were at that time?

A. We were basically occupying the store, and it was our obligation to add what was feasible for us in page 114 } order to operate our business. Part of that was the erection of a base platform, approximately four inches off the floor, along the walls—both the left and right walls. The left side was for refrigerators, to keep them off the floor. The right side was for console T. V. sets, to keep them off the floor. Above the right wall shelf we wanted erected there an additional shelf, or platform-type

Harry Polay.

shelf, to hold table model television sets which would not require any tables.

Q. Will you state whether or not you furnished Mr. Jordan with any measurements as to the height of that shelf?

A. The thing that we told him was that we had to have a little clearance for the console sets. I believe we had measured some of the console sets that we had which showed that we should have a little clearance above that for the spacing of the shelf in between the upper and the lower one.

Q. Will you state whether or not you furnished him with any instructions as to the length of the shelf?

A. I believe it was to go up to where the offices were to come, where the base platform makes a bend, and to hold approximately 10 or 15 television sets.

Q. Would you state whether or not you advised Mr. Jordan as to the weight of the television sets?

Mr. Breit: Your Honor, I object.

The Court: I sustain the objection. Ask him page 115 } what he told Mr. Jordan.

By Mr. Winters:

Q. What further instructions did you give Mr. Jordan, if any, in regard to the construction of the shelf?

A. Just as far as the height goes, and that it was to be able to hold these television sets that we wanted to put up.

Q. Did you furnish any material?

A. None, whatsoever.

Q. Did you ever have any conversation with Mr. Jordan concerning any materials to be used in this particular shelf?

A. None, whatsoever.

Q. Will you state whether or not following the completion of the shelves you inspected them?

A. Did I what?

Q. Following the completion of this shelf did you inspect it? Did you look at it, see it?

A. Not specifically, no, sir.

Q. Would you state whether or not you were in charge of the store at that time?

A. Yes, I was.

Q. Do you recall when the shelf first came into use? Do you recall the date?

A. Yes. It was the day that we opened up business, the

same day that they finished laying the floor. We
page 116 } started moving merchandise into the store, and
we put sets on the bottom platform as well as on the top platform, or the shelf.

Q. Did you personally place any merchandise on the shelf?

A. Yes. On many occasions I placed it on there and took it off.

Q. What period of time did that cover?

A. At least two years.

Q. During that period of time did you observe any change in the shelf, itself?

A. None, whatsoever.

Q. Could you tell me the value of the televisions that were resting on that shelf at the time of the accident?

Mr. Breit: I object.

The Court: Sustained.

By Mr. Winters:

Q. At the time you began negotiations with Mr. Jordan—I believe you stated that he was constructing the store next door?

A. No. He was putting up the building for Mr. Weisberg, who was the principal at the Modern Day Furnitnre Company.

Q. Did that construction include yours?

A. Yes.

page 117 } Q. Approximately how big was that overall structure?

Mr. Breit: Objection, Your Honor.

The Court: Overruled.

A. Our particular section was approximately 28 by 80.

By Mr. Winters:

Q. How big was the part for Modern Day Furniture Company?

A. I don't know.

Q. Was it larger than yours?

A. Yes, it was.

Q. After furnishing the instructions to Mr. Jordan did you rely upon him to construct the shelf in a safe and proper manner?

A. Yes, sir.

Harry Polay.

Mr. Breit: Objection.

The Court: Sustained. Disregard that, Ladies and Gentlemen.

Mr. Winters: No further questions.

CROSS EXAMINATION.

By Mr. Breit:

Q. Mr. Polay, you were the man in charge of seeing that these shelves were built for the corporation?

page 118 } A. Yes, sir.

Q. One of the primary concerns was the fact that you wanted to build in a hurry so that you could open the store. Isn't that true?

A. I don't know that you would call it building in a hurry. But, I think they were on the job about six weeks or maybe eight weeks.

Q. Weren't you constantly prodding Mr. Jordan, the contractor, to get it through more quickly so that you could open your store?

A. This wasn't with the shelves. This was as to the overall construction. We were hoping that it would be done with a minimum of delay.

Q. That included of course the shelves?

A. It probably included everything.

Q. And a second concern of yours was the fact that he was building these shelves for you on what is known as a cost-plus basis. Isn't that true?

A. Yes, sir.

Q. You had no contract with him—a dollar contract—saying how much it would cost to do this construction?

A. No, sir.

Q. And the cheaper he built the shelves, the cheaper it would have been for you. Isn't that right?

Mr. Winters: I object. I do not think that

page 119 } is material.

The Court: I sustain the objection, because it is obvious that when you do anything on a cost-plus basis, you want to build it as cheaply as possible. I do not see any reason for asking the question twice.

By Mr. Breit:

Q. Mr. Polay, after the shelves were constructed the tile was laid on the floor. Isn't that true?

A. Yes, sir.

Q. Isn't it also true that these shelves have rods running vertically on the fronts of them?

A. Yes.

Q. Didn't you tell the contractor that when he put those rods up you wanted a moveable rod so that if ever you had to put a set in that was too large, you could take off the rod and place the set in there?

A. It is not a moveable rod. These steel rods come through the front of it and support the front of the shelf. They fit into a metal fitting with a big flange on it to prevent any sway. These could be moved at any time by anyone by just removing the screws of the fittings to put them into a different position, but we had never at any time moved them. They were placed so that you could always put the console models underneath the shelf.

page 120 } Q. They were placed so that if you wanted to move them it was just a matter of unscrewing the flange and removing the rod?

A. I imagine that could be done.

Q. Wasn't that what you told him you wanted done?

A. No. The only way you can secure the flanges to the wood would be by the screws.

Q. Weren't they removed when the tile was laid so that they could put a piece of tile wherever your rod would normally go?

A. If they were, I don't know about it.

Q. It is my understanding that after the job was completed, the man who did the work was paid?

A. Yes.

Q. Did you not inspect the workmanship of this job before you paid the man?

A. I don't know what you would call "inspecting the workmanship." We saw that the work was done, and the merchandise was placed on it.

Q. So you were satisfied with the job being done at the time?

A. Yes, I think we were.

Q. And you accepted it and paid for it?

A. Yes.

page 121 } Q. And you used it for some two and a half years without complaint, until this accident occurred?

A. Yes, sir.

Q. And during that two and a half years you did not call

Harry Polay.

him back for any repairs or maintenance to the shelves, did you?

A. No, sir.

Q. Nor did you call any other competent carpenter to examine or inspect the shelves?

A. There was no need to.

Q. There was no need to? To your knowledge, none of the other corporate officers inspected or had any competent person inspect the shelving for stability?

A. To my knowledge they had not.

Q. For the last six or eight weeks I believe Mr. Landres ran the store?

A. That is approximately correct.

Q. So what happened in the last six or eight weeks you are not prepared to say?

A. I was there on occasions when I relieved Mr. Landres. If anything had occurred, it certainly was not mentioned to me. I had never seen anything occur.

Q. After the shelf collapsed did you contact Mr. Jordan?

A. No, I didn't.

Q. Did you think it was his duty to repair
page 122 } these shelves for you?

Mr. Pilcher: I object.

The Court: I sustain the objection.

Mr. Breit: May it please the Court—

The Court: I don't care what he thought. That is the basis of my ruling. I am not interested in what this gentleman thinks, or anybody else for that matter. It is what was done.

Mr. Breit: I note an exception.

By Mr. Breit:

Q. Have you ever called Mr. Jordan back after the shelf caved in?

Mr. Pilcher: I object to that.

The Court: I will allow that.

By the Court:

Q. Did you?

A. I don't think so.

Mr. Breit: No further questions.

Mr. Pilcher: That is all.

page 123 } W. S. HAYMAN,

called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Examined by Mr. Pilcher:

Q. Mr. Hayman, will you state your name, please?

A. Winifred S. Hayman.

Q. What is your occupation?

A. I am an officer in the General Supply Company. We sell building materials.

Q. Will you state to the jury your background for building materials and construction?

A. Well, subsequent to the war I went into the building material business. During the first few years we built approximately twenty-seven or twenty-eight houses. Since that time we have been primarily engaged in selling building supplies.

Q. Are you familiar with estimating materials?

A. For jobs, yes, sir.

Q. Are you familiar with the construction of interiors of stores and buildings? State what your general background is in regard to that.

A. Of course, there are quite a few different methods of construction. I would say that I am fairly well versed in them.

Q. How long have you been in the building
page 124 } supply business?

A. Eleven years.

Q. Were you requested to go to Certified T. V. and Appliance store on Little Creek Road last March, the 9th or 10th or 15th, somewhere around that time?

A. Approximately, yes.

Q. Did you go to that store?

A. Yes.

Q. Did you make an inspection of where a shelf had been?

A. Yes, sir.

Mr. Breit: May it please the Court, I object to Mr. Hayman testifying as an expert in this regard.

By the Court:

Q. How are you employed, Mr. Hayman?

A. I am an officer in the General Supply Company at the present time. We sell all types of building materials.

Q. How long have you been engaged in this type of business?

W. S. Hayman.

A. A little better than eleven years, sir.

Q. Are you in a position to state from your inspection what weight a shelf of the construction this shelf was could normally or properly be expected to hold?

A. No, sir, I could not tell you without accurate computations.

page 125 } The Court: I sustain the objection.

Mr. Pilcher: May it please the Court, he knows how this shelf was constructed.

The Court: It is the weight that we are interested in, whether or not it was overloaded.

Mr. Pilcher: We also want to know whether or not the shelf was put up there with proper materials, too.

The Court: The secretary-treasurer of the company said the shelf was constucted to hold from 10 to 15 television sets. I, myself, don't know what 10 or 15 television sets weigh.

By The Court:

Q. Do you, Mr. Hayman?

A. I am not familiar with the weight of television sets.

The Court: I asked him whether, from what he could see of the shelf during his inspection, it was constructed in such a manner as it should properly and reasonably be expected to hold from 10 to 15 television sets, and I understood him to say he wasn't in a position to say.

By The Court:

Q. Did you or did you not?

A. Well, sir, the way it was constructed, it would hold 10 or 15 ordinary small television sets. I don't
page 126 } know what was up there, Judge. I did not see the sets that were on the shelf.

Q. How much would 10 or 15 small television sets weigh?

A. In my opinion, sir, they would weigh probably 80 to 90 pounds each.

Q. That is a right wide range. What weight would you say that this shelf should reasonably be expected to hold?

A. I think that shelf would carry a thousand pounds, sir, easily.

The Court: I will allow that.

A. Distributed properly.

The Court: I will allow that.

Mr. Breit: May it please the Court, the purpose of my objection to this man's testimony is that this man is a building material salesman, rather than an engineer.

Mr. Pilcher: He has also testified that he is a contractor; that he has built houses and other buildings.

The Court: I will allow him to testify as an expert. The weight will be attached to his testimony considering his experience. That is a question for the jury to determine.

Mr. Breit: I note an exception.

page 127 } By The Court:

Q. You said it was around a thousand pounds?

A. Yes, sir, I believe so.

By Mr. Pilcher:

Q. I hand you a picture and ask you if you can identify that picture?

A. Yes, sir. This is the base plate which was holding one of the rods supporting the shelf above.

Mr. Pilcher: I can tie these pictures in, may it please the Court.

A. I saw those broken ones when I made my inspection.

Mr. Pilcher: I introduce this.

The Court: This is subject to your tying it in. Defendant's Exhibit 4.

(Received and marked.)

By Mr. Pilcher:

Q. I hand you a picture and ask you to tell the jury if you can identify those holes in the wall?

A. Yes, sir.

Q. Can you tell us approximately what that hole is?

A. That is the nail hole that was pulled out of the plaster.

By The Court:

Q. Nail?

A. A hole where the nail was pulled out, and

page 128 } tore the plaster.

W. S. Hayman.

Mr. Pilcher.: I wish to introduce this.
The Court: Defendant's Exhibit 5.

(Received and marked.)

By Mr. Pilcher:
Q. I hand you another picture and ask you if you can identify the holes in the plaster wall there?
A. Yes, sir. I would say they were close to the others—the same situation.

Mr. Pilcher: I wish to introduce this.
The Court: Defendant's Exhibit 6.

(Received and marked.)

By Mr. Pilcher:
Q. I hand you another picture and ask you if you can identify that picture?
A. In my opinion, sir, I guess it is the same place. It is a hard picture to identify.
Q. Did you observe that nail when you made your inspection?
A. No, sir, I would not say that I observed that nail. I saw the hole, but I can't remember that nail in the wall.

Mr. Cohen: I object.
The Court: I sustain the objection.

By Mr. Pilcher:
Q. What size nail is that in the picture?

page 129 } Mr. Breit: I object.
The Court: I will allow him to answer on the assumption that Mr. Pilcher is going to have the picture properly identified.
Mr. Pilcher: I have the photographer here.

By The Court:
Q. What is the size of the nail?
A. That nail, sir, it looks like a sixpenny nail.

By Mr. Pilcher:
Q. Is this a sixpenny nail?
A. Yes, sir, I believe it is.

W. S. Hayman.

Mr. Breit: If Your Honor please, I submit that from the picture itself it is impossible to tell the size of the nail. The picture could be blown up forty times.

The Court: He is testifying as an expert. You can argue to the jury just what you are telling me. I am merely passing on the relevancy or the materiality or admissibility of the testimony.

I have taken the nail and placed it into the picture. I will mark this "Defendant's Exhibit 7," to be withdrawn if it is not properly identified later.

By Mr. Pilcher:

Q. Mr. Hayman, is that the proper size nail in your opinion to have used to fasten a shelf against the wall?

page 130 } Mr. Breit: Objection, if Your Honor please, on the ground that he is not qualified to testify, not having constructed a T. V. shelf.

The Court: Overruled. It will be understood that your objection to him as an expert goes throughout his entire testimony.

What was the question now?

By Mr. Pilcher:

Q. Is that the proper size nail to have used to fasten that shelf to the wall?

By The Court:

Q. A shelf that will bear a thousand pounds' weight?

A. Well, sir, in my opinion the weight of the shelf was not carried by the nail itself, but more by the pipes that were supporting the shelf. The pipes were in the forward part of the shelf, the weight being on the pipes primarily.

Q. As I understand, the shelf was up against the wall like this book. What bears the weight back there?

A. There was a two by four, lengthwise this way, down against the wall, and the nail was driven through the two by four.

By Mr. Pilcher:

Q. Was that the proper length nail to have used?

A. In my opinion, sir, had I been constructing
page 131 } that, I believe I would have used a larger nail.

Q. How much larger nail?

A. Anywhere from—

W. S. Hayman.

Mr. Breit: I object again. The answer was not responsive to the question.

The Court: He stated that in his opinion it should have been a larger nail. I overrule the objection.

By Mr. Pilcher:

Q. What size nail would you have used, Mr. Hayman?

A. Since that nail is two inches long, at least an inch to an inch and a half longer nail than that.

Q. What size nail would that have been?

A. A twelve to sixteenpenny nail.

Q. I have a nail here. I don't know what the size is. Can you tell me what size that nail is?

A. I don't have a ruler with me. I am sorry, sir.

Q. You would use a nail an inch to an inch and a half longer than the nail that you have identified which is now in one of the exhibits?

A. Had I been constructing it, sir, I woud have.

Q. Are you familiar with the flange that was on the floor?

A. I saw it, yes, sir.

Q. Is it a flange similar to this flange that I
page 132 } hand you?

A. Yes, sir, similar. That is not one of them, because they were damaged.

Q. It was a similar flange?

By The Court:

Q. What do you mean by "similar?" Was it an identical one or of the same shape? I don't know what you mean by "similar." Was it similar in construction or similar in stability? I don't know what you mean.

A. Judge, this seems to be a stamped flange, and stamped flanges are rather flimsy. That was the type that was used in the construction to hold the pipes up.

Mr. Pilcher: I will use this, may it please the Court.

Mr. Breit: We object unless they have the originals here.

The Court: The originals are available. I sustain the objection. Why are you objecting?

Mr. Breit: I submit that they ought to have the originals here.

The Court: It is your privilege.

By Mr. Pilcher:

Q. Would you have used the type of flange that you observed if you had been constructing the shelf?

W. S. Hayman.

Mr. Breit: Your Honor, I object.

page 133 } The Court: I sustain the objection. It is not a question of what he would have used. It is a question of what a reasonable man would have used.

By Mr. Pilcher:

Q. Was it reasonable to have used that type of flange in the construction of that shelf?

A. The type of flange that was used?

Q. Yes, sir.

A. Well, sir, I can only answer that in this manner. Sometimes these carpenters or contractors will use things that they should not. It is easily possible for somebody to have used that one, or else none at all, or a better one.

Mr. Breit: If Your Honor please, I move that the answer be stricken.

The Court: I don't understand the answer. I will strike it. Nobody understands it.

By Mr. Pilcher:

Q. Would you have used that type of flange?

Mr. Breit: I object.

The Court: I sustain the objection.

By The Court:

Q. In your opinion would that have been a reasonably safe type of construction?

A. No, sir.

page 134 } By Mr. Pilcher:

Q. I hand you a flange and ask you if this type of flange would have been reasonable to use?

Mr. Breit: Objection.

The Court: I sustain the objection. I want the flange that was used.

Mr. Pilcher: May it please the Court, he has observed the flange that was used.

The Court: Which he said was flimsy. We will have to get the flange that was used. I sustain the objection.

Mr. Pilcher: May it please the Court—

The Court: You will have to prove that this is an identi-

cal flange, the same weight and type, and that it could withstand the same stress.

Mr. Pilcher: That is a subsequent question.

The Court: I am not going to let it be subsequent.

By Mr. Pilcher:

Q. What size flange woud you have used?

Mr. Breit: I object.

The Court: I sustain the objection.

By Mr. Pilcher:

Q. Mr. Hayman, if you had constructed those shelves would it have been reasonable to have used the flange that was used?

page 135 } The Court: It does not matter whether he had constructed them or not. Ask him whether or not the flanges that he observed at the scene of the accident were in his opinion reasonably proper, considering the use for which the shelf was intended.

A. I think in my opinion, Judge, that there should have been stronger flanges than were actually used.

By Mr. Pilcher:

Q. Did you observe the rods or pipes that were used in the construction of the shelf?

A. Yes, sir.

Q. Was it reasonable to have used rods in the construction of those shelves to carry the weight of the television sets?

A. Yes, sir. The rods were not deformed in any way. The flanges were bent. Apparently when the shelf went over the rods did not bend. The flanges gave way at the top and bottom.

By The Court:

Q. Should nails have been used or should screws have been used?

A. Judge, I expect they are going to object. I will answer it.

Q. I asked the question.

page 136 } Mr. Pilcher: We can't object when the Court asks a question.

By The Court:

Q. What is your answer to the question.

A. I think there should have been screws.

By Mr. Pilcher:

Q. Mr. Hayman, you have testified that the flanges were improper and the nails were improper. Could a reasonable inspection on behalf of the officers of Certified T. V. disclosed this defect?

A. I am not in a position to answer that, sir. I don't know.

Q. Were the nails visible? Were the nails that you saw protruding from the wall visible?

A. I don't follow you. Would they have been visible where?

Q. Would the nails that you saw on the wall have been visible if driven through a two by four?

A. No, sir. unless you looked very closely, because the nails had been set through the two by four with a nail set until they were into the studs behind the plaster.

Q. They were countersunk?

A. Yes, sir.

Q. Could you have told what nail was in that?

A. Well, it would have been hard to tell what size nail was in there.

page 137 } By The Court:

Q. You could tell whether it was a nail or a screw?

A. You could see that it was a nail, but you could not tell what size until you actually pulled it out.

Mr. Pilcher: That is all.

CROSS EXAMINATION.

By Mr. Breit:

Q. Mr. Hayman, I understand that for the last eleven years you have been selling building materials, and not in the construction business as such. You are not a contractor?

A. Well, we were contracting for approximately four years when we started in this business.

Q. In that four-period did you ever have occasion to build shelving for a television store?

W. S. Hayman.

A. No, sir.

Q. Since that time, in the last eleven years, have you ever built a shelf in a television store?

A. No, sir.

Q. Have you ever built a shelf—

Mr. Pilcher: May it please the Court, I object. It is not necessary for him to have built a television shelf.

page 138 } The Court: Of course it is not, but it is reasonable cross-examination. It is admissible.

By Mr. Breit:

Q. So you have not in fact constructed a television shelf? Did you know, Mr. Hayman, that the particular shelf that you were called upon to examine had withstood the weight of these television sets for some two and a half years before you were called in?

A. No, sir, I wasn't advised of that.

Q. You did not know how long the shelves had been up?

A. No, sir.

Q. Did you ever actually see the nails that were used in the shelf?

A. Yes, sir.

Q. You saw the nails?

A. Yes, sir.

Q. Where are those nails?

A. You mean now? Where are they now?

Q. Yes; the nails that were originally in that wall, do you know?

A. I could not say. When I inspected the shelf it had been taken out of the showroom and was in a stock or supply room in the back.

Q. You never actually saw the scene until some

page 139 } days after it had caved in. Is that right?

A. I could not say, sir. I don't know when the accident happened.

Q. I see. Do you know the date that you examined the shelf?

A. I believe it was March 13th.

Q. March 13th?

A. Yes, sir.

Q. Were the nails in the shelving in the back room?

A. Yes, sir.

Q. As to the flanges that were on the floor, how were they bolted to the floor?

A. There were two screws in each one, to the best of my recollection.

Q. They were screwed to the floor?

A. Yes, sir.

Q. You told the Judge before that you thought it would have been better to have put a screw in the back wall to hold it rather than a sixpenny nail, did you not, sir?

A. Yes, sir.

Q. In answer to Mr. Pilcher's question you said that you thought a nail should have been used that was an inch and a half longer. If it was proper to use a screw, would you want to change your answer to Mr. Pilcher's question?

A. I will answer it this way: either a screw or
page 140 } a nail the size that I recommended.

Q. Either one?

A. Either one.

Q. You said that the primary weight or support was not the nail, but rather was the rods and the flanges. Is that correct?

A. In my opinion, yes, sir. That carried the weight.

The Court: Excuse me one minute. Dr. Duncan is here. He has to go to two places. I am going to stop this examination for a moment, and then you can put the witness back on the stand.

• • • • •

page 144 }

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W. S. HAYMAN,
being recalled, further testified as follows:

Examined By Mr. Breit:

Q. Mr. Hayman, as I understand it, the flanges were bolted to the platform?

A. Screwed.

page 145 } Q. In those flanges was a bar of some sort to the ceiling?

A. Yes, sir.

Q. Were they removable?

A. There was a chrome bar on the outside, I would think,

for appearance. Then there was a standard steel or iron pipe on the inside of the chrome bar for support-strength.

Q. It was a matter of merely unscrewing those if they wanted to move a bar to any location along in front of that shelf?

A. They would have to take the screws out of the flanges and move the flanges and bars together, I presume.

Q. It is my understanding that the bar, itself, was not bent as far as you could see?

A. I examined them, sir, and the bars were not bent.

Q. Isn't it true, Mr. Hayman, that if too heavy equipment were used to support it against the wall—a plaster wall—it might also give way and cave in?

A. You mean if the shelf were too heavy? Do I understand you correctly?

Q. If the supports on the back, as well as the shelf, were too heavy, they would have given way?

A. You mean the two by four on the back of the shelf?

Q. Yes.

page 146 } A. Well, it is possible if you placed enough weight up there. The shelf I believe was about 26 or 27 inches wide. Two by fours were along the back against the wall. They had cross-bracing in them, with three-quarter inch sheathing nailed on top. They were, themselves, pretty heavy, and they will carry a right heavy load—the same as a roof on a building would carry.

Q. Mr. Hayman, the shelf in and of itself, without any television sets on it, was stable and in your opinion ample enough to stay there indefinitely, was it not?

A. I saw it when it was on the floor. How long it had been there I don't know, sir.

Q. You expressed your opinion as to the construction of the shelf. I ask for your opinion as to the construction of the shelf provided there were no heavy T. V. sets?

Mr. Winters: Your Honor, I object.

Mr. Breit: We are trying to show, Your Honor, that the constant moving of the television sets was what caused it to give way; that the shelf in and of itself did not give way.

The Court: If the shelf had not been used it would have stood there, yes. Is that what you mean?

By The Court:

Q. Is that right?

page 147 } A. Yes, sir, I think so.

W. S. Hayman.

By Mr. Breit:

Q. Mr. Hayman, the shelf that gave way, which you inspected, is it more probable than not that before that shelf would have given way and caved in, as it did, that there would have been signs of its weakening, such as a slight movement of the shelf when other T. V. sets were placed on it?

A. Well, sir, that is possible. It depends, I think, on quite a few situations. If there were a lot of traffic going by, vibration might have caused it to loosen. If the weight were distributed in a certain manner, that could have caused it. There are quite a few things that I can think of which would cause it to become loose.

By The Court:

Q. How wide was the shelf?

A. 27 inches, I believe, sir.

Q. How wide were the televisions? You don't know?

A. I don't know, sir. I did not see those.

By Mr. Breit:

Q. The point I am trying to make, Mr. Hayman, is: Would that shelf in your opinion be perfectly solid in one instance and then cave in in the next instance, or would it have been more probable that the loosening of the shelf was gradual?

page 148 } Mr. Pilcher: Your Honor, I object to the question.

The Court: On what ground?

Mr. Pilcher: On the ground that there is no evidence here to support it.

The Court: Is that your only ground?

Mr. Pilcher: Yes, sir.

The Court: Overruled.

Mr. Winters: We note an exception.

By Mr. Breit:

Q. Would you answer that?

(The question was read by the reporter.)

A. Well, sir, in my opinion it is possible both ways. It could have happened from a sudden jolt, or else the movement of television sets could have caused a gradual loosening of the holdings in the back, and then a slight jar of some

kind or vibration would have caused the whole shelf to have come down. I cannot say definitely.

The Court: Disregard that then, Ladies and Gentlemen.

By Mr. Breit:

Q. Assuming, Mr. Hayman, that there was no sudden jolt at the time it caved in, then what in your opinion is the answer to the previous question?

A. Well, sir, I can't say what made it come down. I wasn't there.

page 149 } Q. You have qualified as an expert, haven't you, Mr. Hayman?

The Court: He has. Go ahead.

By Mr. Breit:

Q. Do you know what was wrong with the shelf?

A. I only testified, sir, as to what I saw there, and how the shelf was constructed. As to what made it come down, I am only assuming that there were television sets on it, having heard that there were television sets on the shelf.

Q. Then you are assuming that the television sets made it come down?

A. I would not know, sir. I had never been in the place before I saw the shelf in a position broken in the storeroom in the back.

Mr. Breit: No further questions.

Mr. Pilcher: I believe Mr. Hayman can explain a little bit more as to the length and height and depth of the shelves. I would just like for him to explain that.

Mr. Breit: He has gone into that. That is not rebuttal.

The Court: This is redirect examination. Go ahead.

page 150 } RE-DIRECT EXAMINATION.

By Mr. Pilcher:

Q. How long were the shelves?

A. There were two sections of shelves, each 16 feet long, 27 inches wide or out away from the wall. The pipes or rods supporting them were approximately 48 inches from the floor.

Q. You said the floor. Was that from the bottom of the rod?

A. From the bottom of the rod. May I correct that? I meant that it was 48 inches from the flange on the bottom, and I believe there was a little step there that was maybe three or four inches. But, I was not counting that in the 48 inches.

Q. How many of those pipes were there?

A. There were eight pipes. There were two sections of shelves.

Q. Did you count the nail holes in the wall?

A. There were four nails in each section—two sections.

Q. A total of eight nails?

A. Eight nails.

Mr. Pilcher: That is all.

page 151 } TAYLOR LEWIS.

called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Examined By Mr. Pilcher:

Q. Will you state your name?

A. Taylor Lewis.

Q. Mr. Lewis, I hand you Defendant's Exhibits 4, 5, 6 and 7. Disregarding the nail, can you identify those pictures as to when you took them and where you took them?

A. Yes. sir. I shot them at the Certified T. V.—

Q. Speak louder.

A. —at Certified Television or Certified T. V., at the intersection of Little Creek and Military Highway.

By The Court:

Q. When?

A. 3/13/57.

By Mr. Pilcher:

Q. You were the photographer who took these pictures?

A. I was.

Mr. Breit: I object to them.

The Court: On what ground?

Mr. Breit: On the ground that they have not established that that was the appearance of the store after the occurrence.

The Court: Exactly. You can put somebody

page 152 } on the stand after this gentleman gets off to establish that.

Mr. Breit: I have no questions.

EZRA LANDRES,
being recalled, further testified as follows:

Examined By Mr. Winters:

Q. Mr. Landres, were you present on March 13, 1957, when Mr. Taylor Lewis took the pictures that he has identified?

A. These were pictures that were taken at our store.

Q. Between the date of the occurrence and the date that those pictures were made were there any changes made in the condition insofar as relates to the matters shown in those pictures?

A. The wall is exactly the way it was when we took the shelf off the floor and put it in the back of the store.

By The Court:

Q. Did that nail stay in the wall? Did the wood pull right through the head?

A. Yes, sir.

page 153 } By Mr. Pilcher:

Q. Answer this gentleman.

Mr. Breit: No questions.

IRVING BRAUN,
called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Examined By Mr. Winters:

Q. Would you state your name and residence, please?

A. Irving Braun; 8027 Chesapeake Boulevard.

Q. On March 9, 1957, were you an officer of Certified T. V. and Appliance?

A. Yes, I was.

Q. On March 9, 1957, were you present at the Little Creek store at the time of the accident?

A. No, I was not present at the time of the accident. I got there about 15 minutes after the accident.

Q. Upon your arrival please state the condition that you found.

page 154 } A. When I walked into the store on Little Creek Road none of the injured were there, nor

were there any policemen there. Television sets were laying all over the floor. It was quite a mess.

Q. After your arrival there what did you do, Mr. Braun?

Mr. Breit: May it please the Court, I submit that is immaterial.

The Court: I would think so. What is the materiality? The accident had happened.

Mr. Pilcher: He was there until they closed the store. We want to ask him about that.

The Court: Go ahead.

A. I cleaned up the mess that was there. Mr. Landres and the salesmen, we all left the store at the same time and closed for the night.

By Mr. Winters:

Q. Between the time you arrived and the time you departed from those premises did a or several police officers arrive at your store?

A. There were no police officers that came to the store from the time I got there, which was approximately five minutes after 6:00, until the time I left, which was approximately 7:00 o'clock.

Q. At the time that you departed was there
page 155 } anyone who remained in the store?

A. There was nobody in the store, and there was nobody outside.

By The Court:

Q. Did you yourself lock the door?

A. I watched Mr. Landres lock the door.

By Mr. Winters:

Q. Do you recall the cost of construction that you had done by Mr.—

Mr. Breit: Objection.

The Court: Sustained.

Mr. Winters: I think that is material, Your Honor.

The Court: I feel otherwise.

Mr. Winters: I note an exception.

By Mr. Winters:

Q. From the time that Certified T. V. and Appliance occu-

pied the premises on Little Creek Road until the date of the accident would you state whether or not you personally observed the shelf in question?

A. I personally observed the shelf in question every day, because it was my duty to pick up papers at that particular store. I specifically inspected that particular shelf approximately a year prior to the accident, because at that time I had to wire television antenna wires to each set page 156 } on the shelf. At that time I had men crawling all over the tops of the shelves and below. I would swear or state under oath that at that time those shelves were solid.

Q. From the time of that particular inspection until the date of the accident, was there any change in the condition that you observed of the shelf?

A. There were no alterations made to the shelf. There were no changes that I know of outside of taking sets off and putting them back on as the models would change.

Q. Did you give any instructions to Mr. Maddray B. Jordan as to the way in which he was to construct it or the materials to be used?

A. I have never spoken to Mr. Jordan.

CROSS EXAMINATION.

By Mr. Breit:

Q. Did I understand, Mr. Braun, that a year before the accident happened you made it a point to carefully inspect this shelf?

A. That is not what I said. I said that a year prior to the accident it was my job to wire that particular shelf for antenna wires, and at that time I observed the condition of the shelf because I had men crawling over the top page 157 } of it.

Q. And since then you have not observed it?

A. I have not had occasion to, except to walk past it every day.

Q. You heard Mr. Hayman, your witness, testify that that shelf was defectively constructed. Did you notice that a year before this accident?

A. I am not a construction man.

Q. At any rate the shelf was solid a year before the accident?

A. It withstood the weight of a man on top of it.

Q. It was solid from the time it was built by Mr. Jordan,

some two and a half years before the accident, isn't that correct, until the time you observed it?

A. Yes, sir.

Q. And after that you did not have occasion to observe it?

A. As to its solidity?

Q. Yes.

A. No, sir.

Q. To your knowledge you never employed anyone to do just that?

A. No, sir.

Q. To your knowledge, none of the other men in your organization or corporation had occasion to hire anybody to inspect the shelving?

page 158 } A. No, sir.

Q. I believe you and Mr. Polay and Mr. Landres are the only officers and directors of the corporation?

A. That is correct.

Q. And you all have been the only officers and directors of the corporation from the time it was formed until the time of the accident?

A. That is correct.

Q. So if one of you three had not done it, nobody else would have done it?

A. That is correct.

Mr. Breit: That is all.

* * * * *

page 159 } Norfolk, Virginia, June 4, 1958.

Met pursuant to adjournment of the preceding day, with the same appearances as heretofore noted.

(During the argument the following occurred:)

Mr. Pilcher: The defendant objects to the use of the blackboard by the plaintiff in its summation argument, on which blackboard there is listed the items of special damages, as well as suggested amounts for future pain and suffering and future damages. The blackboard discloses Dr. Shoenfeld's bill of $40.00, Dr. Vann's bill of $110.00, Dr. Alpert's bill of $255.00, Mrs. Gibbons' bill of $280.00, past and future hospitalization ($1,200.00), $463.00; crutches, stockings $36.-98; future medical $1,000.00, permanent phlebitis $5,475.00,

traumatic arthiritis at 50 cents—$5,475.00, mental anguish, re: pregnancy, five months—$750.00, seven weeks on crutches at $10.00 daily—$490.00, inability to wear shoes, dance, et cetera—$5,000.00, 20 percent permanent disability—$10,000.-00—making a total of $29,374.98.

The objection, among other things, is specifically called to the Court's attention as to permit a per diem
page 160 } valuation of pain, suffering and disability would plunge the already subjective determination into absurdity by demanding accurate mathematical computation of the present worth of an amount reached by guesswork. Suggestions of this sort constitute an unwarranted intrusion into the domain of the jury. The suggestions of valuation and compensation factors, pain and suffering, have no foundation in the evidence. They import into the trial elements of sheer speculation on a matter by which universal understanding is not susceptible of a valuation on any such basis. It instills in the minds of the jurors impressions, figures and amounts not founded or appearing in the evidence.

The Court: Overruled; but I will insist upon counsel for the plaintiff turning his blackboard away from the jury except during his argument.

Mr. Pilcher: I except to the action of the Court.

page 161 } EXCEPTIONS TO INSTRUCTIONS.

Mr. Pilcher: The defendant excepts to the instruction offered by the plaintiff as P-4 as granted, amended, in that it permits a recovery for the mental anguish and nervous shock, which she will probably suffer in the future as a result of this accident. There is no evidence of any future mental anguish and nervous shock, all medical testimony being that she has had a normal recovery.

Mr. Winters: The defendant excepts to the action of the Court in refusing the instruction it offered, designated "No. 2." The evidence establishes that Maddray B. Jordan was employed as an independent contractor to perform the work, and there was sufficient evidence upon which the jury could find that Maddray B. Jordan was an independent contractor, and it should have gone to the jury.

Mr. Winters: The defendant excepts to the action of the Court in refusing the instruction it offered, designated "No. 3." There was evidence in the record that Certi-
page 162 } fied T. V. and Appliance Company, Incorporated, employed Maddray B. Jordan to perform the construction of the interrior work when Maddray B. Jordan was

constructing the building, itself, as a general contractor. We submit this is sufficient evidence for the jury to consider and determine whether or not the defendant, Certified T. V. and Appliance Company, used care in the selection of Maddray B. Jordan to construct the shelf which collapsed resulting in the injury.

Mr. Winters: The defendant excepts to the action of the Court in refusing the instruction of the defendant, designated "No. 4," as there was evidence in the record to disclose that Maddray B. Jordan was an independent contractor and was negligent in the construction of the shelf, which negligence created the dangerous condition; and, further, there was evidence that such a defect could not have been discovered at the time of the completion and acceptance of the shelf by the defendant.

page 163 } Mr. Winters: The defendant excepts to the action of the Court in refusing its instruction designated "No. 5." The instruction is a true and correct statement of the law, and there was evidence to support the instruction that Maddray B. Jordan negligently constructed the shelf, and there was evidence that he knew it was to be used for the purpose for which it was used; and, further, that the construction was likely to collapse and injure the customers of Certified T. V. and Appliance Company, Incorporated; and, further, there was evidence for the jury to consider and determine as to wehther or not the defendant was free of negligence.

Mr. Winters: The defendant excepts to the refusal of the Court to grant its Instruction No. 7, as the defendant believes that it is a necessary element for the jury to consider that the defendant is not making a facetious argument, but is unable to bring in the person it believes to be responsible for the accident, as that right rests solely with the plaintiff.

page 164 } Mr. Winters: The defendant excepts to the action of the Court in amending its instruction designated "No. 6," wherein the Court added the words "a preponderance of," as the defendant states that the instruction as offered in that regard has previously been passed upon and has been approved by the Court, and it is correct to that extent.

The defendant further excepts to the action of the Court in amending its instruction by substituting the word "have" for the words "be the direct," as the statement contained in the instruction as offered by the defendant is a true and

correct statement, having been heretofore approved by the Court.

Mr. Breit: The plaintiff objects to the Court's refusal to permit her to add to Instruction P-4 the following words: "You may also consider any loss of earnings which may in the future result as a result of such injuries," on the ground that there was evidence to sustain a finding that there will be a probable loss of future earnings; and, further, that the pleadings of the plaintiff seek compensation for such loss.

page 165 } JUDGE'S CERTIFICATE.

I, J. Hume Taylor, Judge of the Court of Law and Chancery of the City of Norfolk, Virginia, do hereby certify that the foregoing is a true and correct transcript of the testimony and proceedings of the case of Catherine Harrington *v.* Certified T. V. and Appliance Company, Incorporated, tried in said court on the 3rd and 4th days of June, 1958, and includes all the testimony offered, the motions and objections of the parties, the rulings of the Court, and the exceptions of the parties, and all other proceedings of said trial.

I further certify that the exhibits offered in evidence, as described by the foregoing record, and designated as Defendant's Exhibits 1 to 7, inclusive, are all of the exhibits offered upon said trial, and the originals thereof have been initialed by me for the purpose of identification.

I further certify that said transcript was presented to me for certification and signed within sixty days after the final order in said cause, and that the attorneys for the plaintiff had reasonable notice in writing of the time and place at which the same would be tendered for certification.

Given under my hand this 25th day of July, 1958.

J. HUME TAYLOR, Judge.

page 166 } CLERK'S CERTIFICATE.

I, W. L. Prieur, Jr., Clerk of the Court of Law and Chancery of the City of Norfolk, Virginia, do hereby certify that the foregoing transcript of testimony and other proceedings of the trial of the case of Catherine Harrington *v.* Certified T. V. and Appliance Company, Incorporated, duly certified by the Judge of said court, together with the original exhibits introduced upon the trial of said case, identified by the initials

of said judge, were filed in my office on the 25th day of July, 1958.

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

A Copy—Teste:

H. G. TURNER, Clerk.

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RULE 5:12—BRIEFS

§1. Form and Contents of Appellant's Brief. The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

§2. Form and Contents of Appellee's Brief. The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate references to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this Court, giving his address.

§3. Reply Brief. The reply brief (if any) of the appellant shall contain all the authorities relied on by him not referred to in his opening brief. In other respects it shall conform to the requirements for appellee's brief.

§4. Time of Filing. As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) If the petition for appeal is adopted as the opening brief, the brief of the appellee shall be filed in the clerk's office within thirty-five days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. If the petition for appeal is not so adopted, the opening brief of the appellant shall be filed in the clerk's office within thirty-five days after the date printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office, and the brief of the appellee shall be filed in the clerk's office within thirty-five days after the opening brief of the appellant is filed in the clerk's office.

(b) Within fourteen days after the brief of the appellee is filed in the clerk's office, the appellant may file a reply brief in the clerk's office. The case will be called at a session of the Court commencing after the expiration of the fourteen days unless counsel agree that it be called at a session of the Court commencing at an earlier time; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) With the consent of the Chief Justice or the Court, counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

§7. Effect of Noncompliance. If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.

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