

FILE COPY

Record No. 5147

In the
Supreme Court of Appeals of Virginia
at Richmond

**ELIZABETH RIVER TUNNEL
DISTRICT, ET AL.**

v.

LOUISE BEECHER

FROM THE COURT OF HUSTINGS FOR THE CITY OF PORTSMOUTH

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.

IN THE
Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 5147

VIRGINIA:

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

ELIZABETH RIVER TUNNEL DISTRICT, ET AL.,
Plaintiffs in Error,

against

LOUISE BEECHER, Defendant in Error.

From Court of Hustings for the City of Portsmouth

Upon the petition of Elizabeth River Tunnel District, a political subdivision of the Commonwealth of Virginia, and Virginia Transit Company a writ of error and *supersedeas* is awarded them to a judgment rendered by the Court of Hustings for the City of Portsmouth on the 6th day of November, 1959, in a certain motion for judgment then therein depending wherein Louise Beecher was plaintiff and the petitioners were defendants.

And it appearing to the court that a *supersedeas* bond in the penalty of twelve thousand, five hundred 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

* * * * *

page 78 } THE COURT OF HUSTINGS FOR THE CITY
OF PORTSMOUTH
VIRGINIA

October 26, 1959.

Messrs. Breeden, Howard and
MacMillan
Attorneys at Law
National Bank of Commerce Building
Norfolk, Virginia

Messrs. Bangel, Bangel and Bangel
Attorneys at Law
Law Building
Portsmouth, Virginia

*Re: Louise Beecher v. Elizabeth River Tunnel Com-
mission and the Virginia Transit Company.*

Gentlemen:

I am very grateful to all counsel in this case for their excellent briefs and able oral arguments. Not only have they been invaluablely helpful but they lightened the Court's burden immeasurably. Bearing in mind that "the primary object of a court is to achieve an acceptable solution of the particular controversy, which contending litigants have placed before it, and not to present a technically perfect exercise in logic," I have formed the following opinion in this case.

In this case the plaintiff seeks to recover of the Elizabeth River Tunnel Commission and the Virginia Transit Company damages for a consequential injury to herself as the result of alleged negligence of defendants. The defendants jointly filed their special plea. The Tunnel Commission asserts it "is a governmental entity, a political subdivision and arm of the State of Virginia and is immuned from suit in this action and may not be sued except with the consent of the State"; that the General Assembly authorized it to operate "bus facilities for the transportation of passengers through or over such tunnel or bridge if the commission deemed it expedient

to acquire such facilities"; that the commission has deemed it expedient so to do; and both defendants contend that the Virginia Transit Corporation is only acting as an agent of the Tunnel Commission in assisting the commission in page 79 } the operation of the said governmental function and hence the immunity from suit enjoyed by the commission extends to the Transit Company.

The plaintiff on the other hand contends that the immunity from suit does not apply in this case because:

1. The Commission has exceeded its authority in operating buses over the streets of the City of Portsmouth, when the authority extended only "through or over such tunnel or bridge." (Acts 1942, p. 169)

2. That the operation of buses for pay is a private function and not a governmental function.

3. That the act of the General Assembly creating the commission waives any immunity from suit which the commission may have had and the act gives the State's consent to be sued.

4. That the Transit Company is an independent contractor and not the agent of the commission.

The parties to this suit offered considerable evidence to support their respective pleas and contentions.

The oral testimony together with the written contract between the commission and the Transit Company and exhibits filed herein, show that the buses are owned solely by the commission; that no State licenses are required; that the gasoline used by the buses is tax free; that all fares are collected and handled by it; that it determines the route through the city; and that it makes all rules and regulations pertaining to schedules and other matters of operation of the buses; that the Transit Company supervises the operations, repairs the vehicles, and performs certain other duties as set forth in the "contract of agency."

page 80 } After considering all the evidence, the Court believes and so holds that the Transit Company is an agent of the commission and is not acting as an independent contractor, as it does not have that degree of control and management of the operations of the buses as to qualify and classify it as such, nor has the Tunnel Commission surrendered its power of control.

The commission has ample authority to procure an agent to assist in the operation of the buses. *Richmond-Greyhound Lines v. Davis*, 200 Va. 147.

It is next insisted that if the commission is immune from

suit then its agent likewise cannot be sued. 17 Michie's Jur., "States," par. 26.

..In *Sayers v. Bullar*, 180 Va. 222, 22 S. E. (2d) 9, the following language appears:

"A state cannot be sued except by permission, and even if the suit, in form, be against the officers and agents of the State, yet if, in effect, it be against the State, it is not maintainable."

This principles seems to be well established by the authorities.

It is also well settled by most authorities, including Virginia, that the immunity from suit which the State and its public commissions created by the Legislature to do a particular thing, such as building and operating bridges, turnpikes, tunnels, etc., (the purpose of the commission being within the legal ambit of Section 185 of the Constitution of Virginia) does not extend to them if they exceed their authority and jurisdiction that is to say, if their acts are *ultra vires*.

The plaintiff asserts that the act of the General Assembly creating the Elizabeth River Tunnel Commission (Acts 1942, p. 168) authorizes the commission to build and page 81 } maintain the "project" which shall mean "a tunnel or tunnels under the Elizabeth River * * * and all properties, rights, easements and franchises relating thereto * * * and may also include bus facilities for the transportation of passengers through or over such tunnel or bridge if the commission shall deem it expedient to acquire such facilities."

The evidence shows that the Portsmouth exit and terminus of the tunnel is the corner of Bart and Washington Streets, and the Portsmouth entrance to the tunnel is the plaza on Clifford Street, between Court and Washington Streets. The buses carrying passengers who boarded them in Norfolk make a loop through the downtown business area of Portsmouth traversing the perimeter of sixteen and one-half city blocks from their exit from the tunnel back to the plaza. At seven different spots along this route the buses stop for the purpose of discharging the passengers that boarded the bus in Norfolk and for the purpose of "picking up" Portsmouth passengers desiring to go to Norfolk. The Norfolk end of this project is a bridge across the southern branch of the Elizabeth River, from three points of which vehicular traffic may leave the bridge. All three of these points are on public streets of the City of Norfolk. However, the tunnel buses

leave the bridge on City Hall Avenue and make a loop through a part of the downtown business section of the City of Norfolk, where passengers from Portsmouth alight and where passengers for Portsmouth board the buses.

It is contended that since the Act creating the commission provides that the commission may provide "bus facilities for transportation of passengers *through* or *over* such tunnel or bridge" it is authorized to "run" the buses only from portal to portal, that is, from the foot of the bridge on City Hall Avenue in Norfolk to the end of the tunnel on Washington Street in Portsmouth, and there, by some device the buses must be turned about faced for the return trip.

page 82 } Thus the plaintiff says the commission has exceeded its authority and jurisdiction in operating the buses over the city streets, and it would be liable for the negligent conduct of the drivers of its buses upon the streets of this city.

In *Almond v. Day*, 199 Va. 1, Chief Justice Eggleston speaking for the Court held that the operation of bus facilities over the Hampton Roads project, which is almost an identical operation with the Elizabeth River Tunnel project, was a governmental function, and the commissioner had authority to operate the buses. The evidence in that case showed the proposed bus operation would "extend a distance of from six to nine miles, depending upon the location of the Norfolk terminal. The location of these terminals will afford passengers using the bridge-tunnel project access to the local transit systems." In this case it appears that High Street is the main business thoroughfare of Portsmouth and that practically all the local buses of the Transit Company stop at or near the same points as the tunnel buses. It is almost a necessity for the tunnel buses to run to High Street in order to connect with the local bus lines. Be that as it may, the Tunnel Commission and the proper local authorities agreed upon the route of the buses (whether necessary for the proper movement of traffic in the city or for the convenience of the passengers is immaterial), and the buses are certainly using a route under authority of law, and the commission is not exceeding its authority. In fact, the commission, no doubt, has implied authority under the Act to operate the buses over a necessary route.

The next and basic question in this case is whether the Tunnel Commission enjoys an immunity from suit for the tortious acts of its agents.

The doctrine and rule of law giving the State immunity from suits for consequential damages was established by the Courts at an early date. It is not a rule established by legis-

lative enactment unless by implication the right to sue the State *ex contractu* may be construed as a prohibition. } page 83

The Virginia courts have consistently and repeatedly followed the rule that the State cannot be sued for its torts or the torts of its agents. The first case was *Sayre v. Northwestern Turnpike Road* 10, Leigh (37 Va.) 454; followed by *Maia v. Eastern State Hospital*, 97 Va. 507; *Wilson v. Com.*, 174 Va. 82; *Com. v. Chilton M. Co.*, 154 Va. 28; *Sayers v. Bullar*, 180 Va. 222; *Hicks v. Anderson*, 182 Va. 195, *Eriksen v. Anderson*, 195 Va. 655. See also *Nelson County v. Loving*, 126 Va. 283 and *Boyd v. Mahone*, 142 Va. 690 and possibly others.

In the case of *Sayre v. Northwest Turnpike Road*, *supra*, the Court said: "An action will not lie against the president and directors of the Northwestern Turnpike Road; the company being composed exclusively of officers of the government, having *no personal interest in it*, or in its concerns, and only acting as an organ of the Commonwealth in effecting a great public improvement." The commission or corporation was created by the General Assembly and its officers and Directors were the Governor, Treasurer, Attorney General, and the Second Auditor, with the power to sue and be sued, plead and be impleaded and to hold lands, etc., and the same to sell, dispose of, or improve, in trust for the Commonwealth.

The ruling in this case was later modified. In *Dunningtons v. Northwestern Turnpike Road*, 6 Gratt. (47 Va.) 160, the Court after stating that no reasons had been given by the Court in the *Sayre v. Northwestern Turnpike Road*, *supra* (the same defendants were in these cases) asked counsel to re-argue the case giving their views on what was the basis of the *Sayre* decision. Justice Allen stated at page 771: "It was not decided in the case of *Sayre v. The N. W. Turnpike Road*, 10 Leigh 454 that no action will lie against this corporation; all that was decided was that the action would not lie against this company for the injury there complained of. * * * The reasons which governed the Court, in holding that an action for such an injury could not be maintained against this company, are not given. The case was probably considered as falling under the influence of the cases of Governor and Co. of the *British Cast Plate Manufacturers v. Meredith*, 4 TR 794; *Boulton v. Crowther*, 9 Eng. C. L. R. 227 and *Lansing v. Smith*, 8 Cow. R. 146; in which it was held that commissioners are trustees, acting under authority of law to effect a public improvement for public purposes, in which they have no direct private interest, and who do not exceed their jurisdiction, are not liable to an

action for a consequential injury resulting from an act they are authorized to do.”

The writer should like to call particular attention to the case of *Boulton v. Crowther* cited by Justice Allen above. That case was an action for damages caused by the raising of the level of a street against trustees appointed by an act of parliament. The judge of the trial court directed the jury to find for the plaintiff, if they were of the opinion that the trustees acted arbitrarily, oppressively or *carelessly*. The Court cited the *Plate Glass Co. v. Meredith*, and re-affirmed the doctrine of non-liability, if the trustees or commissioners acted in accordance with their authority. But Holroyd J. said “The act done, being itself lawful, can only become unlawful in consequence of the mode in which it is carried into execution.”

Littleday J. concurred in the result and also in the Court’s instruction, citing *Jones v. Bird*, 5 Barnwell & Alderson 837 7 C. L. R. 277 in which it was decided that the commissioners of sewers for Westminster were liable for making and altering certain sewers in so negligent, incautious, unskillful, improvident and improper manner as to cause plaintiff’s house to fall down.

I have cited these cases solely to show that the judicial doctrine of immunity from suit was not as broad in early times as it appears now.

Referring again to the case of *Dunningtons v. The N. W. Turnpike Road*, *supra*, the Court out of considerations of justice as well as of convenience decided a remedy should be afforded to those who had contracted with the page 85 } commissioners. Thus the rigid rule of no suits against governmental agencies was relaxed as to contractual obligations. Sections 8-752 and 8-757 have given legislative sanction to this principle. But the Virginia rule as shown by the cases cited in the defendant’s brief and referred to above is still that for the torts of the State and its agents the loss is *damnum absque injuria*. This doctrine as applied to the states was judicially adopted in the pre-industrial era of our times and in Virginia was declared long before the motorized age.

At the present time the states by legislative act authorize various corporations and/or commissions to perform particular functions which are sometimes called governmental functions but which have little or nothing to do with the the *legislative, executive or judicial* functions of the government, upon which the doctrine of immunity from suit rests. These functions should really be called functions legally authorized

to be performed by governmental agents. This may lead to a logomachy, but there is a difference in the meaning.

Now the Tunnel Commission is performing a *legal* function in operating the buses over the routes shown in the evidence. This is a work of internal improvement authorized under the exceptions contained in Section 185 of the Constitution, *Almond v. Day, supra*. In order to protect the public from the negligent or tortious acts of its bus drivers the commission carries a liability or indemnity policy of insurance in accordance with the best modern business practices. It is contended the premium on the policy is less because of the governmental immunity, but why should liability insurance be carried at all if the commission is immune from suit?

From the evidence in this case, it clearly appears that the Tunnel Commission, in operating the buses and charging a 10¢ fare for each passenger, is performing not a *public governmental function* with immunity from suit, but is performing a legally authorized function with all the attributes of a private corporation. Therefore it should be subject to liability for the torts of its agents to the same extent as a common carrier.

page 86 } In 49 Am. Jur., "States, etc.", par. 101, page 317
it is said: "Where such corporation exercises both public and private functions, it is said to be immune from suit so far as suit is based upon the exercise of its public functions, but subject to suit so far as a suit may be based upon the exercise of private functions." Citing 83 L. ed. 804.

It is very true that the provision in the Act creating the commission stating that the commission "may sue and be sued" does not in any manner create a common law liability or any other liability for that matter against the commission, but it cannot claim there is no authority for it being sued.

Again in 49 Am. Jur., "States, etc.", par. 102, page 318 it is stated: "Assuming that a corporation which is created or owned by a state is engaged in such activity as to render it immune from suit unless such states consents to be sued or waives its immunity, it seems that where such corporation is authorized in effect to 'sue or be sued,' this is a sufficient consent to suit or waiver of immunity from suit." Citing in the Note Fed. L. *Bank v. Priddy*, 295 U. S. 229, 79 L. ed. 1408, 55 S. Ct. 705, rehearing denied May 20, 1935; *Bank of U. S. v. Planters' Bank*, 9 Wheat (U. S.) 904, 6 L. ed. 244 and Anno: 83 L. ed. 807.

This Court is of the opinion that no public agency of the State should be allowed to operate what amounts to a commercial undertaking for compensation and with the same rights as a private enterprise, without commensurate liabil-

ities. Otherwise our citizens would be subject to enormous injuries without any remedy. This does not conform to what should be justice. Of course if the business of the government in the exercise of its legislative, executive or judicial functions should cause inconvenience to some individuals, the interests of the individuals must give way to accommodation of the public. But this is not the case at bar.

page 87 } In conclusion I should like to say that it does not make sense to say that the Portsmouth Transit Company in transporting passengers, maybe the same passengers, over the same route and streets as the Tunnel Commission and performing the same services (both for pay) should be required to respond in damages for the negligence of its bus drivers and the commission not. Such a decision would leave individuals who might be injured by neglect of the commission's drivers without remedy or redress. It would be grievously unjust that the commission should be clothed with an immunity, and there is no sufficient reason for supposing that the legislature ever intended to confer such immunity from suit upon this commission. It is more conceivable that the General Assembly by providing for suits by and against the commission intended that its immunity from suit be waived.

Therefore the special pleas of the Tunnel Commission and the Transit Company in so far as they relate to immunity from suit are denied and rejected.

Respectfully,

ROBT. F. McMURRAN, Judge.

RFM:mvw

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ORDER.

This day again came the parties on the Special Plea of Governmental Immunity filed herein, on the evidence heard *ore tenus*, on the briefs filed, and on the oral arguments heard;

It appearing to the Court for the reasons stated in its written opinion dated October 26, 1959, that the Special Plea filed by the defendants should be denied and rejected, the

Court doth hereby deny and reject said Special Plea and doth direct that said defendants file their answers to said Motion for Judgment on or before November 4th, 1959, to all which action of the Court the defendants, and each of them, do hereby except and object.

Enter 11/5/59.

R. F. M., Judge.

* * * * *

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3.

The Court instructs the jury that even if you believe the accident, if any, complained of involved an Elizabeth River Tunnel Commission bus, but said plaintiff, Mrs. Beecher, was negligent in the slightest degree and said negligence proximately caused or contributed to said accident, if any, your verdict shall be in favor of the defendants, Elizabeth River Tunnel Commission and Virginia Transit Company.

Refused.

R. F. M.

* * * * *

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C.

The Court instructs the jury that there is no contributory as a matter of law.

Granted.

R. F. M.

* * * * *

page 101 } Virginia:

At the Court of Hustings for the City of Portsmouth held on the 6th day of November, 1959.

* * * * *

This day came the parties with their attorneys and thereupon, came a jury, to-wit: C. W. Lumber, Francis T. Nagle, Carl Teague, Chester Hardy McDonald, Huie E. Benson, John W. Baker, and Chas. K. Outton, who being duly sworn, the truth to speak, upon the issue joined, and having fully heard the evidence and argument of counsel, retired to their room to consult of their verdict, and after sometime returned into Court, having found the following verdict: "We, the jury, find for the Plaintiff against the defendants and fix her damages at the amount of \$10,000.00. Francis T. Nagle, Foreman;" whereupon, the defendants, by counsel, moved the Court to set aside the verdict of the jury and grant them a new trial on the grounds that the said verdict is contrary to the law and evidence, which motion being fully heard, is overruled, to which action of the Court the defendants except, and judgment is entered for the plaintiff; it is therefore considered by the Court that the plaintiff re-
page 101 } cover of the defendants the sum of Ten Thousand Dollars (\$10,000.00) with interest thereon to be computed after the rate of six per cent per annum from the 6th day of November, 1959, till paid and her costs by her about her suit in this behalf expended; and a stay of execution is granted the defendants for sixty (60) days, and the appeal bond is set at Twelve Thousand Five Hundred Dollars (\$12,500.00).

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

Pursuant to Rule 5 of the Rules of the Supreme Court of Appeals of Virginia, the defendants, Virginia Transit Company and Elizabeth River Tunnel Commission, give notice of their intention to appeal from all orders and judgments entered in the above cause.

The errors assigned by these defendants are as follows:

William Toliver.

1. The Court erred in denying and rejecting the defendants' Special Plea of governmental immunity and in requiring defendants to answer and defend said action.

2. The Court erred in refusing to allow the defendants to demonstrate to the jury the construction and mechanical operation of the bus doors which allegedly caused the plaintiff's injuries.

3. The Court erred in refusing to permit the defendants' medical expert to be present during the testimony of plaintiff's physician.

4. The Court erred in overruling defendants' Motion to Set Aside the Verdict as contrary to the law and the evidence, and to grant a new trial.

5. The Court erred in granting plaintiff's Instruction #C and in denying defendants' Instruction #3.

VIRGINIA TRANSIT COMPANY
and ELIZABETH RIVER
TUNNEL COMMISSION
By BREEDEN, HOWARD &
MacMILLIAN
Their Attorneys
612 Bank of Commerce Building
Norfolk 10, Virginia.

* * * * *

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page 1 }

* * * * *

Stenographic transcript of the testimony introduced and proceedings had upon the trial of the above entitled cause in said Court on July 17, 1959, before the Honorable Robert F. McMurran, Judge of said Court.

* * * * *

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WILLIAM TOLIVER,
called as a witness on behalf of the defendants,

William Toliver.

having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Breeden:

Q. Will you state your name, sir?

A. William Toliver.

Q. And what is your position with Elizabeth River Tunnel Commission?

A. Assistant manager and comptroller.

Q. And as such do you keep the various accounting records of the expenditures made by the Elizabeth River Tunnel District and the purpose for which those expenditures are made?

A. I do.

Q. And did you also in that capacity handle all claims for tax revenues when properly made?

A. I do.

Q. And you also function as the, I believe you said assistant manager of the project?

Vol. I A. That is right.

7/17/59 Q. Are you familiar with the operation of the page 8 } buses that are the silver and green colored buses that operate through it, over the project, and through the tunnel between the cities of Norfolk and Portsmouth?

A. I am.

Q. Those buses are the property of what entity?

A. The Elizabeth River Tunnel District.

Q. When those buses were purchased was any tax paid to the federal government on them?

A. No taxes were paid.

Q. They bear certain license plates. Will you tell the Court what those license plates read?

A. "Government Owned."

Q. Is any fee or sum of money or compensation of any kind paid the state of Virginia for those plates?

A. No, sir.

Q. They are given to the Tunnel Commission to identify its buses?

A. They are issued by the state.

Q. Is there in existence, or was it necessary to obtain any authority, franchise or permit from the State Corporation Commission or the city of Portsmouth or County of Norfolk, is there any such paper or permit in existence?

William Toliver.

- A. No, sir.
- Vol. I Q. Now, the driver of that bus, who pays him?
7/17/59 A. The Elizabeth River Tunnel Commisison.
page 9 } Q. I say "that bus." I mean all of the buses that
are operated by the Elizabeth River Tunnel District.
- A. They are paid by the Elizabeth River Tunnel Commission.
- Q. The Elizabeth River Tunnel Commission is the governing body of the Elizabeth Tunnel District, is that correct?
- A. That is correct.
- Q. Now, with respect to the fuel that is burned in the buses, what fuel is used by the way?
- A. Diesel oil.
- Q. Does the state of Virginia cause the Tunnel District to pay any of the fuel tax or is that tax refunded to the Elizabeth River Tunnel District?
- A. That tax is refunded by the State.
- Q. How about the tires that are used on the buses, who buys those tires?
- A. The Elizabeth River Tunnel Commission.
- Q. And is the federal tax collected on the tires?
- A. No, sir, the taxes are exempt.
- Q. Who pays for repairs and servicing of the buses?
- A. The Elizabeth River Tunnel Commission.
- Q. The fuel and motor oil that I referred to is paid for tax free by the Elizabeth River Tunnel Commission?
- Vol. I A. That is correct.
7/17/59
page 10 } Q. The operation of the buses, that is the schedule that they follow, who determines that?
- A. The Elizabeth River Tunnel Commission.
- Q. And the routing of the bus, who determines that?
- A. The Elizabeth River Tunnel Commission.
- Q. Who sets the fare for riding on the bus?
- A. The Tunnel Commission.
- Q. And to whom is the money remitted—
- A. To the Tunnel Commission.
- Q. —that comes into the fare box?
- A. The Tunnel Commission.
- Q. It is taken into the plaza in Berkley and deposited in the safe of the Elizabeth River Tunnel Commission?
- A. That is correct.
- Q. If a driver is unsatisfactory who determines that he shall no longer drive a tunnel bus?
- A. The Tunnel Commission.

William Toliver.

Q. Does the Virginia Transit Company furnish advice and acts as a consultant with respect to the operation of the tunnel?

A. It does.

Q. And further, is there any contract in existence between the Elizabeth River Tunnel Commission and the Virginia Transit Company?

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page 11 } Mr. Bangel: We call for that contract which is the best evidence.

The Court: I think if there is any evidence of that it would have to be produced.

Mr. Breeden: I withdraw the question. If your Honor please, it is our position that what occurred is controlling. Here is a copy of the contract. We don't want to hide it from the Court. It is an agreement that was reached for the Virginia Transit Company furnishing its services in the operation of the buses, and I submit it. In fact I will just go ahead and offer it in evidence then. This is a copy of the original with signatures affixed. I will ask Mr. Toliver—

By Mr. Breeden:

Q. Is that a copy of the contract that exists between the Virginia Transit Company and the Elizabeth River Tunnel District?

(Document shown to the witness for examination.)

Vol. A. It is.

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page 12 } The Court: Have you seen it, Mr. Bangel?

Mr. Bangel: No, sir, I have not. Do you have an extra copy?

Mr. Breeden: No, I don't.

The Court: Do you want me to mark it first?

Mr. Breeden: We will offer that in evidence, and I will go so far in saying, Your Honor, if Mr. Bangel—I know he can't go over it in detail—he may withdraw it from the evidence and look at it at your leisure, then put it back in because I just don't have another one available at the moment.

The Court: We will mark it Tunnel Exhibit Number 1 for the sake of the record.

(Received and marked in evidence by the Court as Tunnel Exhibit Number 1.)

William Toliver.

By Mr. Breeden:

Q. Mr. Toliver, is there any provision for pedestrians to go through the tunnel?

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7/17/59 } The Court: You mean other than an automobile?
page 13 } Mr. Breeden: Other than in an automobile.

Well, no, they would not be pedestrians.

The Court: They would not be pedestrians then.

By Mr. Breeden:

Q. In other words for individuals to get through the tunnel between Norfolk and Portsmouth is it necessary for them to ride in a vehicle?

A. It is.

Q. And the converse of that is there is no provision for pedestrians, or walking passengers or walking patrons?

A. No provision for walking patrons.

Q. Is such use of the tunnel prohibited by the regulations of the Elizabeth River Tunnel District?

A. It is.

Mr. Breeden: You have seen these in the regulations, Mr. Bangel?

Mr. Bangel: No, I haven't seen that document.

(Documents handed to opposing counsel for examination.)

Vol. I } Mr. Bangel: If your Honor please, I haven't
7/17/59 } had a chance to read the paper writing that Mr.
page 14 } Breeden now offers, or that he intends to offer to
the Court as evidence and entitled "Rules and
Amendments to the Elizabeth River Tunnel Commission."

I am going to have to ask your Honor to give me an opportunity at some later time, if necessary, to be heard.

The Court: All right, we will admit it in evidence subject to your examination.

Mr. Bangel: And objection.

The Court: Of course, this is on a special plea, if he is attempting to establish a special plea at this time.

Mr. Bangel: Yes, sir.

The Court: Do you want me to mark that?

Mr. Breeden: Off the record.

(An off-record discussion took place, after which the following occurred:)

William Toliver.

The Court: You are not questioning the authenticity. Exhibit Number 2.

(Received and marked in evidence by the Court as Tunnel Exhibit Number 2.)

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page 15 } By Mr. Breeden:

Q. Mr. Toliver, I hand you a paper writing which the Court has marked as Tunnel Exhibit Number 2, and ask you to look at Section 10 and state what is the provision of that section with relation to pedestrian traffic.

(Exhibit handed to the witness for examination.)

A. It restricts pedestrians from the use of the tunnel.

Q. Are the police under the control of the Elizabeth River Tunnel District?

Mr. Bangel: If your Honor please, there is a special Act which gives them the right to have appointed police officers, special police officers who must be sworn, and I am not raising the question about any police. This does not involve any act of the police officers, whether he be special or general, we are not raising that point.

Mr. Breeden: Well, Mr. Bangel, that wasn't the purpose of the incompleated question. I was simply going to ask as to the rules whether or not the police officers of the Commission were instructed to prohibit pedestrians. In other words that is the rule and I was going to show that it was enforced.

By Mr. Breeden:

Q. In other words, the special police, do they enforce the prohibition against pedestrian walking into or through the tunnel?

A. They do.

Q. Mr. Toliver, you are familiar with the Hampton Roads Tunnel between Willoughby Spit and Old Point?

Mr. Bangel: If your Honor please, we object to that as being irrelevant and immaterial. We are dealing with an act of the Elizabeth River Tunnel Commission that exists between

William Toliver.

Norfolk and Portsmouth, and not between Norfolk and Hampton.

Mr. Breeden: Now, if your Honor please, it is merely a matter of furnishing the Court with descriptive evidence, evidence of the physical nature of the tunnel between Hampton Roads Tunnel, so-called, and the Elizabeth River Tunnel, that they are one and the same, they are the same type of construction. Because the supreme Court of Virginia has said in commenting on the method of handling pedestrian traffic in the Hampton Roads Tunnel, the fact that its function was governmental, that the nature of the project did not permit pedestrians using it, and we simply want to show that the same physical circumstances exist with relation to the Elizabeth River Tunnel.

The Court: Now, I don't know. We will go ahead with it. You can offer it, go ahead.

Mr. Bangel: Your Honor, you understand we save the point?

The Court: Yes, sir.

By Mr. Breeden:

Q. Mr. Toliver, are you familiar with the physical layout of both the Elizabeth River Tunnel and the Hampton Roads Tunnel?

A. I am.

Q. Are they both constructed of the same design?

A. They are.

Q. And particularly with relation to the vehicular facility or roadway furnished and the fact that there is no passenger or pedestrian, I meant, walkway in either of these facilities?

A. That is correct.

The Court: Anything else, gentlemen?

Mr. Breeden: That is all.

The Court: All right.

CROSS EXAMINATION.

By Mr. Bangel:

Q. Mr. Toliver, the Elizabeth River Tunnel Commission owns the tunnel that extends from Portsmouth into Norfolk, that is true, is it not?

A. From Portsmouth to Norfolk.

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Q. It does not own or control or have anything to do with the streets in the city of Portsmouth, does it?

Mr. Breeden: Your Honor, that may be a legal question.

The Court: Well, he can ask him whether the Tunnel Commission has any control over the streets if he knows the answer.

A. They have no control over the Portsmouth-owned streets.

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By Mr. Bangel:

page 19 } Q. Yes, sir. And Washington and South Streets are streets that are owned by the City of Portsmouth?

A. So far as I know.

Q. And it is used by the pedestrians and residents of the city of Portsmouth?

A. That is correct.

Q. As well as automobiles traveling in and around that area in the city of Portsmouth?

A. That is correct.

Q. Does the Tunnel Commission have anything to do with the repairing the streets at the point that I have indicated?

A. (Pause) No, sir.

Q. The buses that are used to travel to and from Norfolk from Portsmouth through the tunnel, that bus, when it leaves the tunnel on the Portsmouth side, it leaves the property of the Elizabeth River Tunnel Commission, does it not?

A. Going to Norfolk, yes, sir.

Q. Well, now, coming from Norfolk, the people are permitted to board the tunnel bus on City Hall Avenue?

A. That is correct.

Q. And then it leaves there and travels along the streets of the city of Portsmouth—Norfolk to Granby

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Street?

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A. That is correct.

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Q. That would be in a westerly direction?

A. That is correct.

Q. And then it goes along Granby in a southern direction until it gets to Plume Street, does it not?

A. That is correct.

Q. And then it travels along the streets of the city of Nor-

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folk in an easterly direction to Bank Street where it permits passengers to get on or off the bus?

A. On the corner of Bank and Plume.

Q. And in the city of Norfolk?

A. In the city.

Q. From that point it continues its course along the streets of the city of Norfolk to Church Street, does it not?

A. That is correct.

Q. And at that point persons are permitted to get off and on?

A. No, sir.

Q. They are not permitted to get off the bus?

A. Not permitted to get off the bus.

Q. Well, what would stop them from getting off the bus?

A. (Pause) They are not allowed to get off.

Vol. I Q. Who would stop them from getting off?

7/17/59 A. The city of Norfolk.

page 21 } Q. Well, does The tunnel Commision have anything to do with that?

A. We try to stop it.

Q. In what way?

A. We tell anyone who wants to get off that they are not allowed off.

Q. Well, isn't it true that when that bus stops at that point that I have just stated on Church Street the front and back doors are opened?

A. No, sir.

Q. They are not opened at all?

A. No, sir. The front door is opened.

Q. From that point then it continues along Church Street until it gets to City Hall Avenue, isn't that correct?

A. That is correct.

Q. And then it turns into an easterly direction towards the tunnel itself?

A. That is correct?

Q. And when it enters the tunnel it then continues on through the tunnel and comes to a stop on Washington and South Streets?

A. That is correct.

Vol. I Q. Now, when—after you leave the tunnel and
7/17/59 you enter Washington Street you then are on the
streets of the city of Portsmouth, are you not?

page 22 } A. That is correct.

Q. And when you get to Washington and South

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Streets the front and back doors are opened, are they not, and people are permitted to get on and off, are they not?

A. Yes, sir.

Q. And from that point it continues to a northerly direction along Washington Street until it reaches another point between King and High.

A. That is correct.

Q. At that point the front and back doors open so as to permit passengers off and on?

A. That is correct.

Q. At that point the front and back doors open. That part of the city of Portsmouth, is it not, and a street in the city of Portsmouth?

A. That is correct.

Q. From that point on does the bus then go into High Street and travel in an easterly direction until it gets to Court?

A. Yes, sir.

Q. And on High and Court Streets aren't the front and back doors opened so as to permit passengers to get off and on?

Vol. I A. That is correct.

7/17/59 Q. Is that in the city of Portsmouth?

page 23 } A. In the city.

Q. Is it in the city of Portsmouth?

A. Yes, sir.

Q. In an easterly direction on High Street for a distance of two blocks and turns into Crawford Street where the bus comes to a stop and passengers are permitted to get off and on, are they not?

A. That is correct.

Q. Is that part of the streets of the city of Portsmouth?

A. Part of it.

Q. And continues along Crawford Street until it gets to County Street?

A. That is correct.

Q. That is two blocks distant?

A. That is correct.

Q. And at that point aren't passengers allowed to get on and off?

A. Yes, sir.

Q. And then it continues in a southerly direction along Crawford Street until it reaches South Street, which is a dis-

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tance of two blocks and turns in a westerly direction along
South Street

Vol. I A. That is correct.

7/17/59 Q. And it continues then until it gets to a point
page 24 } on Washington Street which is east of the tunnel
 entrance?

The Court: They don't go to Washington, Mr. Bangel, it comes to Court. Doesn't it come around South Street and into Court?

Mr. Bangel: I'm sorry, that is right. I'm glad you interrupted.

By Mr. Bangel:

Q. It turns into South Street, South on Court Street?

A. That is correct.

Q. And it comes to a stop at the point indicated on Dinwiddie Street before getting to the tunnel entrance. It makes another stop when it gets to the tunnel entrance, is that correct? Don't it make a stop on Court Street and then it goes, turns then in a westerly direction?

A. That is correct.

Q. Towards the tunnel entrance and comes to a stop before entering the tunnel?

A. That is correct.

Q. Now, with reference to the streets that I have mentioned in the city of Norfolk or in the city of Portsmouth, does the Elizabeth River Tunnel Commission own any parts or have any control or make any repairs to the streets of

Vol. I Portsmouth?

7/17/59 A. Not to the streets of Portsmouth.

page 25 } Q. Or to the streets of Norfolk?

A. Not to the streets of Norfolk.

Q. Now, you say that there is no permit given to the Elizabeth River Tunnel Commission to travel along the streets of the city of Norfolk or the city of Portsmouth?

A. (Pause)

Q. Aren't you mistaken in that, Mr. Toliver?

A. I don't remember making that statement.

Q. All right. Then in order to operate buses along the streets of the city of Portsmouth, Virginia, it is necessary to obtain the consent of the municipal authorities?

Mr. Breeden: Now, your Honor, that is entirely a question of law whether or not you have to have a permit from the city

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of Portsmouth to operate a tunnel bus on the streets of the city of Portsmouth. I submit it is a question of law and I know the record somewhat on that score.

The Court: I am sure you do, Senator, but I think for the sake of the record on this plea it ought to be in the evidence.

Mr. Breeden: All right, sir, if Mr. Toliver knows the circumstances.

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page 26 } Mr. Bangel: Well, I assume he does. He is assistant manager; he should know.

By Mr. Bangel:

Q. Mr. Toliver, isn't it true that before those buses can be operated on the streets of the city of Portsmouth, Virginia, you have to enter into an agreement or a permit with the city before you are permitted to operate those as a common carrier for passengers in the city of Portsmouth on the city of Portsmouth streets; isn't that true?

A. (Pause) We have a permit from the City of Portsmouth.

Q. Where is that permit?

A. (Pause).

Q. May I see that permit please, sir?

A. I don't have it with me.

Q. Well, you are not permitted then to operate those buses—

Mr. Breeden: Your Honor, let me—Mr. Toliver is not a lawyer, and if there is some ordinance that the city of Portsmouth passed—apparently Mr. Bangel is talking about that, its legal effect. I have no objection to his putting it in evidence here, and the Court will, in due course, pass

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page 27 } upon whether it is a requirement or not and whether or not if it is a requirement whether it has any bearing on the basic question.

It is my position and I intend to argue to the Court that the Elizabeth River Tunnel Act requires as part of the governmental function of the Commission that it operate buses if it is found that such is in the public interest and are needed, which has been done.

The buses have been purchased and have been operated. Now, if in the course of operating buses an impasse ever occurred between either of the municipalities and the Commission says you can't run your bus on the city streets then we would meet in a head-on collision on the authority to actually operate on the streets.

It has been my position, and I have taken it up with the

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municipal authorities that we came to a conflict there of authority and there was a reasonable solution of it, namely, that they could not prohibit the operation of the tunnel buses on the streets of either city as long as they operated in keeping with the general requirements.

In other words, if there was a one-way street they could not expect to swim upstream on a one-way street or if they had load limits you could not expect they would go and damage the street and violate it the same as any other governmental vehicle. The city of Portsmouth or the city of Norfolk certainly could not prohibit the Highway Department from running one of its trucks through Portsmouth or certainly could not prohibit the Department of Agriculture from having one of its pest control vehicles to come and put down or control these things that they put out to catch insects and any other number of functions of the state government, that the driver, if the driver was going up a one-way street I suppose that that certainly would be a violation on his part but that the function

of that arm of the state government just as the Elizabeth River Tunnel Commission is the function of government, and that in carrying out that function it needs no permit from a municipality to carry out the functions that the Commonwealth has said you shall perform, and that the law will bear me out on that.

The Court: I didn't understand he was offering that evidence for that purpose. I thought he was trying to offer that the Tunnel Commission asked the city of Portsmouth permission to use its streets.

Now, what is required—he asked whether an ordinance *have* been passed fixing the route and giving permission. Whether it is required is not in and of itself a legal matter. You are asking him if it had been done?

Mr. Bangel: Yes, sir.

Mr. Breeden: If Mr. Toliver has any evidence. I don't know how he can produce the ordinance or could produce any written request for it, which I don't think was ever made. I don't think the record will bear that out that would be of any evidential value of this plea. It can have the Court's consideration but to ask Mr. Toliver's opinions as to whether or not it was

done—

The Court: But he can testify as to what actually was done, not as to the legality of it.

Mr. Breeden: I have no objection to that.

William Toliver.

By Mr. Bangel:

Q. Was a permit granted to the Tunnel Commission to operate its buses along the streets of the city of Portsmouth in the routes that I have just indicated; was it granted to the Tunnel Commission?

A. (Pause) It was.

Q. All right, sir. Now, the route of the buses, was that not also determined by the governing body of the two municipalities?

Mr. Breeden: Would you repeat that, Mr. Bangel?

By Mr. Bangel:

Q. The routing of these buses along the streets of the two cities, weren't they also determined by the governing bodies of the two municipalities?

Vol. I A. With request of the Tunnel Commission.

7/17/59 page 31 } Q. Yes, sir, but their consent was obtained before it could be used, that is correct, isn't it?

A. (Pause) That is correct.

Q. Now, Mr. Toliver, I notice in this contract between the Tunnel Commission and the Virginia Transit Company that it provides that the Company, that is, the Virginia Transit Company, agrees to furnish all bus operators required in connection with rendering the bus service herein contemplated, and all such operators shall be employees of the Company and not of the Commission. Isn't that contrary to what you just said a moment ago?

A. The employees of the Tunnel Commission on the Tunnel Commission buses.

Q. Well, isn't this the contract that exists between the Tunnel Commission and the Virginia Transit Company?

A. That is the contract between the two.

Q. Well, aren't you operating these buses along the streets of the city of Portsmouth as well as through the tunnel under this contract with the Virginia Transit Company?

A. That is correct.

Q. You are not attempting to tell this Court that there has been a variance of this contract by you or any member of the Commission or the Virginia Transit Company are you?

A. I am not.

Vol. I Q. And a further reading of the same para-
7/17/59 graph, Commission agrees to reimburse the Com-
page 32 } pany for such services at the average hourly
labor cost of the Company for operators, the

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average together for all of the Companies, for the Norfolk bus operation and for the bus operation under this agreement. Then what you are doing is you are paying to the Elizabeth—to the Virginia Transit Company the bill that they submit to you which covers the cost of furnishing the operators and, of course, maintaining the buses and what not, isn't that correct?

A. We pay the operators' salary.

Q. Who do you pay it to?

A. To the Virginia Transit.

Q. You pay it to the Virginia Transit Company, do you not?

A. That is correct.

Q. As well as the cost of maintaining those buses in good condition?

A. That is correct.

Q. Now, you also in your contract provide as follows in paragraph Number 4 of your contract, subsection 11: "Public liability insurance as provided by the provisions of the standard automobile policy for public carriers in the amount of \$50,000.00 as to any one person, and \$500,000.00 as to any one accident and property damage insurance in the amount

of \$5,000.00 as to each accident insuring the Company against claims by third parties in or about 7/17/59 all operations of the Commission buses whether page 33 } in revenue service or not other than on property of the Company. A certificate of such insurance shall be filed with the Company by the Commission. The insurance required hereunder shall not affect or limit the Commission or the Company to each other otherwise provided for under the terms of this contract but shall operate as a sole additional protection for the parties thereto."

Well, now, did the Virginia Transit Company in compliance with the requirement of your agreement have issued a policy of liability insurance in the amount of \$50,000.00 for any one person and \$500,000.00 for any one accident?

A. The Tunnel Commission does.

Q. Well, is there outstanding a policy of liability insurance as required by this provision?

A. There is a liability policy.

Q. Yes, and that is issued by the Tunnel Commission?

A. That is.

Q. "By" or "to?"

A. To the Tunnel Commission.

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Q. Issued to the Tunnel Commission as well as the Virginia Transit Company?

A. The Virginia Transit Company is an additional insured.

Vol. I Q. Who pays the premium on that?

7/17/59 A. The Tunnel Commission.

page 34 } Q. Well, why would the Tunnel Commission go to the expense of paying the premium for that amount of insurance?

Mr. Breeden: We object to the "why."

The Court: I sustain the objection as to that.

Mr. Bangel: If your Honor please, for the purpose of the record, if it goes up, the Court would want to know the answer, and for the purpose of furnishing this information to the Court of Appeals.

The Court: You can ask him if they do have one.

Mr. Breeden: You've got to get the Commission and ask them why they have done so.

Mr. Bangel: I am dealing with the assistant manager.

Mr. Breeden: But he doesn't know why his boss has done something.

By Mr. Bangel:

Q. But such a policy is in existence?

Q. And the policy is paid for by the Commission?

A. It is.

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page 35 } Mr. Breeden: And the premium is fixed according to the risk.

Mr. Bangel: Well, if my friend wants to testify, I have no objection, but I think he ought to take the witness stand.

Mr. Breeden: I don't care to have that in the record. I was just saying that to you.

The Court: All right, sir, it is not in the record.

By Mr. Bangel:

Q. Mr. Toliver, when you speak of the Tunnel Commission paying the repairs to the buses you mean that the Virginia Transit Company who operates, these buses from one point in the city of Norfolk to another point in the city of Portsmouth and through the tunnel, they make the repairs and you all reimburse them, isn't that correct?

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A. We pay for the repairs.

Q. Well, now, let's not hedge on it. I think the question is plain. Isn't it true that they do the work, they pay the money out and you reimburse them. When I say "you" I mean the Tunnel Commission?

Vol. I A. We pay Virginia Transit for it, yes, sir.

7/17/59 Q. Now, with reference to the diesel oil that you
page 36 } use, isn't that equally true as to the oil that's used,
Virginia Transit Company loads the gas tanks or
the tanks of the buses and at the end of the month bill the
Tunnel Commission?

A. That is correct.

Q. Now, going back to your contract again, and I see paragraph "D"—"The Company—" speaking of the Virginia Transit Company—"agrees to render the following services to the Commission: The supervision of the operation of buses including employment, training, dispatching, supervision and discipline of operators and provision for supervision of crews." Is that still in existence?

A. Yes, sir.

Q. Was it in existence on the day this accident occurred when Mrs. Beecher was injured?

A. It was.

Q. The contract further provides that the Virginia Transit Company was required to report any accident or claim that arises out of the use and the operation of those buses to the Tunnel Commission whether it took place on the tunnel or whether it took place on the streets of either city, that is correct, isn't it?

A. Right.

Q. Now, in addition to paying them for the monies that they had advanced for the Tunnel Commission in payment of salaries of the em-
page 37 } ployees—and you say that that was done, you were
advanced the monies and you reimbursed them?

A. It was.

Q. And in addition to that, in addition to paying the Virginia Transit Company for the fuel, the cost of repairing the buses, keeping them in good order and storing them you pay the Virginia Transit Company a certain amount on the gross profits or the gross income of the Tunnel Commission?

A. We haven't.

Q. Well, now, what is that 4½ percent to be paid them of the gross revenue under the contract?

A. It would be if we had earned it.

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Q. Oh, I see, the contract provides—you mean the Virginia Transit Company does not get anything out of this service that they rendered in furnishing operators to operate those buses?

A. They get something out of it.

Q. What do they get?

A. The contract says 4½ percent of the gross. The contract says \$25,000.00 a year.

Q. I see, not to exceed twenty-five or not less than twenty-five?

A. If they go over it they do.

Q. I see, \$25,000.00 a year in addition to it, do they?

Vol. I 7/17/59 page 38 } A. That is correct.

Q. Is the city paid anything for the use and operation of the buses along the streets of the city?

A. No, sir.

Q. They do not?

A. No, sir.

Q. Has the city been informed by the Commission, by the Elizabeth Tunnel Commission that if one of their citizens was struck, seriously injured or probably killed that the Elizabeth River Tunnel Commission and the Virginia Transit Company could not be held liable?

The Court: What is the materiality of whether the city has been informed or not, Mr. Bangel, whether the city knows it or not wouldn't make any difference as to the *liability*.

Mr. Bangel: No, sir, I don't think it would except I was just wondering whether the city had discussed that phase of it with the Elizabeth River Tunnel Commission and with the Virginia Transit Company, and whether that matter ever came up for discussion.

Mr. Breeden: What difference would it make if it had or had not?

Vol. I 7/17/59 page 39 } The Court: I sustain the objection.

Mr. Bangel: The difference is this. I do not believe that the city of Norfolk or Portsmouth would permit the Virginia Transit Company or any other company to operate along the streets of the city of Portsmouth and Norfolk and endanger the lives of their citizens without giving them some protection, and I am wondering if they had.

The Court: That is not a legal question. I think that is a matter to be addressed to the Council.

Mr. Bangel: We save the point.

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Mr. Breeden: Or properly legislated.

Mr. Bangel: I don't want to labor the point, but for the purpose of the record—

By Mr. Bangel:

Q. Is there any agreement between the Elizabeth River Tunnel Commission or the Virginia Transit Company in which they have agreed that in the event some person in the city of Portsmouth was struck and injured as a result of the operation of one of these buses along the streets of the city that there would be a waiver of any immunity, if any existed?

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page 40 } Mr. Breeden: I object to that. The Commission cannot waive its immunity. If it has any immunity it cannot waive it.

Mr. Bangel: I don't admit there is any immunity, but we know the city of Portsmouth has caused to be issued various policies of liability insurance and that one of the conditions of that policy is that they would not invoke the immunity granted to a municipality by law as to the people operating these garbage collections.

Mr. Breeden: That is an entirely different problem.

The Court: I sustain the objection. I will permit Mr. Bangel to ask if there is a policy which contains a clause in which the Company agrees not to plea governmental immunity.

By Mr. Bangel:

Q. Now, Mr. Toliver, you heard the question and the statement made by the Court. What is your answer?

A. None that I know of.

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page 41 } Mr. Bangel: All right, sir.

The Court: Is that all?

Mr. Bangel: Yes.

The Court: This is off the record.

(An off-record discussion took place, after which the following occurred:)

Mr. Bangel: If your Honor please, there is one question I overlooked.

William Toliver.

The Court: All right, go ahead.

By Mr. Bangel:

Q. Mr. Toliver, are people transported along the streets of the city of Portsmouth then into the tunnel, and through the tunnel onto the streets of the city of Norfolk free or are they required to pay for that?

A. They are required to pay.

Q. How much?

A. Ten cents.

Q. Each person is required to pay ten cents as he enters the bus and the method of collecting that is the same method used on the Virginia Transit Company in the operation of its buses, namely, that the passengers drop the coin in the receptacle there or a box, is that right?

Vol. I A. That is correct.

7/17/59 Q. And the people who are traveling from one page 42 } part of the city through the streets of the city, through the tunnel to some part in the City of Norfolk are paying passengers, are they not?

A. That is correct.

Mr. Bangel: That is all, sir.

The Court: I haven't read the contract. Off the record.

(An off-record discussion continued after which the testimony proceeded as follows:)

RE-DIRECT EXAMINATION.

By Mr. Breeden:

Q. You were asked by Mr. Bangel about the method of collection of fares by the Elizabeth River Tunnel bus and buses of the Virginia Transit Company. Are the same collection procedures used in both instances?

A. Yes, but the Tunnel Commission controls its own money.

Q. Now, let us follow that ten-cent fare. It is deposited in a change box or collection box at the door of the

Vol. I bus, is that correct?

7/17/59 A. That is correct.

page 43 } Q. On a Virginia Transit Company bus, does the driver have a mechanical device that he cranks and gets the money into his hand and uses it to make change with and finally settles, I suppose, with the Transit Company?

A. None that I know of.

William Toliver.

Q. You don't know the method then that the Virginia Transit Company uses. Do you tell us that you do not know, or not?

Mr. Bangel: He says he doesn't know.

A. The driver has no control over the money.

Mr. Breeden: I am not talking—

Mr. Bangel: That is his answer. Don't you like the answer? I think he said the Tunnel Commission didn't have any.

Mr. Breeden: No, sir, he didn't say that. Keep quiet, Mr. Bangel, and I will ask the questions.

The Court: Just a minute, gentlemen. What I wanted to know is does the bus driver turn the accounts over to the Tunnel Commission or does he turn it into the Transit Company and they remit to the Tunnel Commission.

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page 44 } By Mr. Breeden:

Q. Can you answer that? What is the answer to that, Mr. Toliver?

A. The driver has no control of the money. The Tunnel Commission withdraws the profits out of the box and the Tunnel Commission gets the dimes.

By the Court:

Q. But no agent of the transit company takes that money?

A. No agent of the transit company gets it.

Q. You don't report to the Virginia Transit Company the amount collected each day?

A. No, on a monthly basis we do.

The Court: All right.

By Mr. Breeden:

Q. Mr. Toliver, let me see if we can't get it perfectly clear. The box that is on the Tunnel Commission bus does not permit the money that is deposited on the bus to be used for change, is that true?

A. That is true.

Q. It is a locked box and there is no way that the driver has

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access to the container that is in the base of the box and into which the money goes, is that true?

Vol. I A. That is true.

7/17/59 Q. Does it take a key for it to be removed?

page 45 } A. It does.

Q. Who has the key?

A. The Tunnel Commission.

Q. And is that employee the one and only one that goes to the box when the bus passes the plaza of the Tunnel Commission and takes the money out?

A. That is correct.

Q. What does he do with the box when he takes it out?

A. He puts it in the Tunnel Commission vault.

Q. And who counts the money?

A. The Tunnel Commission banking room.

Q. And who deposits the money and into what account is it deposited?

A. Into the bank account of the Elizabeth River Tunnel Commission, and the Tunnel Commission deposits the money.

Q. Now, the other question which Mr. Bangel garbled for me related to the Virginia Transit Company. He asked you the similarity. Do you know the method on that that they use on their own buses, the red buses?

A. They have the same method.

Q. Now, that money is handled directly by the Virginia Transit Company?

Vol. I A. They have a key and they pull their own box.

7/17/59 Q. But I mean nothing that the Elizabeth River
page 46 } Tunnel Commission has anything to do with?

A. That is correct.

Q. Now, with respect to the questions relating to people getting on and off the bus, does the Elizabeth River Tunnel District conduct a transportation service for intra—from one point to another point within the city of Norfolk?

A. State that again.

Q. Does the Elizabeth River Tunnel District conduct a transportation service from one point to another point within the city of Norfolk?

A. No, they do not.

Q. And the same question, Mr. Toliver, with relation to the city of Portsmouth?

A. They do in the city of Portsmouth.

Q. Do you mean that you—

William Toliver.

Mr. Bangel: Wait a minute. If your Honor please, this is your witness, I submit.

The Witness: Let me clarify it, Mr. Bangel.

Mr. Breeden: Mr. Bangel, don't you want the facts?

Mr. Bangel: Yes, sir, and I think I understand the facts. I know them pretty well. I have ridden the tunnel bus.

Vol. I 7/17/59 page 47 } The Court: Gentlemen, let him ask the question. Make your objections to the Court.

Now, the question—what was the question?

Mr. Bangel: May I make this observation, if your Honor please. Counsel asked his witness a question. The witness answered it. Now counsel is again pressing it with suggestive questions, and I submit—

Mr. Breeden: No, that is not true, and the record should show that he jumped down his throat before he opened his mouth again to explain what he meant, and I don't know what his explanation will be, but I do know that the Tunnel Commission has no authority and does not operate an intracity service.

Mr. Bangel: I don't know what you know.

The Court: Ask the question, Mr. Breeden.

Vol. I By Mr. Breeden:

7/17/59 page 48 } Q. Mr. Toliver, does the Elizabeth River Tunnel District undertake to haul people within the city of Portsmouth from point to point?

A. No, sir.

Mr. Bangel: If your Honor please, we submit, if your Honor please, that is a conclusion. He can say what they do and then the Court can conclude whether that constitutes—

The Court: If he knows whether they—

By the Court:

Q. Do you know if a man can get on at one spot, pay his fare and ride to another spot in Portsmouth?

A. They are not allowed.

The Court: He said they are not allowed, but whether they don't or not, I don't know; but he can say they are not allowed to.

Mr. Breeden: All right, sir.

William Toliver.

By Mr. Breeden:

Q. You were questioned by Mr. Bangel, Mr. Toliver, about opening the rear door of the bus at a time when there would be no passengers on the bus from whence it had come.

Mr. Bangel: If your Honor please—

Vol. I

7/17/59 By Mr. Breeden:

page 49 } Q. Namely—

Mr. Bangel: Go ahead.

By Mr. Breeden:

Q. —is the rear door opened in Norfolk when there are Portsmouth passengers that have not yet alighted?

Mr. Bangel: If your Honor please, we say that is calling for a conclusion and not a fact.

Mr. Breeden: Well, it is just what you asked him.

Mr. Bangel: I think he answered it. I think the record gave us a clear and plain answer. I think he has answered it fully.

Mr. Breeden: Well, I want to show, if your Honor please, that as a practical matter the rear door of the bus is opened only in City A when there were still passengers from City B and *vice-versa*, but because of the nature of the route in Portsmouth that there are always passengers on the bus that are going to the most distant point in the city of Ports-

mouth and, therefore, it is necessary to open the rear door, and if Mr. Bangel contrary to the provisions of the law elects to put ten cents in the box then jumps off out of the rear door of the bus, then

it is impossible to apprehend that. It can be counseled against it and advised not to do it and explain that you should not do it, but we all know people are not going to be restrained to stay on the bus if they say I got on but I am going to get off it.

The Court: Well, Senator, he has explained the matter as fully as he can. I don't think there is anything in the record to indicate to the contrary.

Mr. Bangel: Yes, sir. If your Honor please, as I understand it, and I think he so testified, there can be no question about it in my mind that a person can get on at Washington and South Street. The front and back doors of that bus are

William Toliver.

Vol. I
7/17/59 } opened when one wants to get off. It will go to Washington Street and High Street where the doors are opened back and front so if a person wanted to travel from Washington and South Streets to High and Dinwiddie he can get on that street and get off at the other. They can get on the bus at that point and go down to Court Street. The doors are opened at both places, and that is true as to every place it stops in the city of Portsmouth.

Mr. Breeden: Do you want to be sworn?

Mr. Bangel: And I think he has testified to that.

The Court: Gentlemen, if I understand what this witness said along that line, if the bus is coming from Norfolk and it has passengers on, that will discharge passengers that came from Norfolk at any one of the stops in the city of Portsmouth that got on at Norfolk; but he has testified if I understand him correctly, and if I am incorrect I would like you gentlemen to correct me, that if a person gets on

Vol. I
7/17/59 } at any stop in Portsmouth he is not to be discharged at any other stop in the city of Portsmouth, but if he wants to get off they can't stop him from getting off.

Mr. Bangel: If your Honor please, I think as it stands it don't go quite far enough in that there is no rules, no regulations, no posting of any kind on that bus to indicate to anyone—it is known only to the Virginia Transit Company and known to the Tunnel Commission but not known to the public who become passengers for hire and reward on that bus, and if there is any doubt about it I will ask him about it.

RE-CROSS EXAMINATION.

By Mr. Bangel:

Q. Mr. Toliver, is there anything on that bus which would indicate that a person—I mean any written matter or anything else on that bus—that would indicate to a person who boards that bus as a paying passenger at Washington and High Street saying that you cannot alight at the tunnel bus entrance before going into the tunnel? Is there anything on that bus of any kind—?

A. No, sir.

Donald H. James.

The Court: Anything else?

Mr. Breeden: That is all.

Mr. Bangel: That's all.

Mr. Breeden: I am going to call Mr. James.

MR. DONALD H. JAMES,

called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

Vol. I By Mr. Breeden:

7/17/59 Q. Will you state your name, sir?

page 54 } A. Donald H. James.

Q. Now, Mr. James, you are the manager of the Portsmouth Transit Company, are you not?

A. Operating manager, yes, sir.

Q. And you are the assistant to Mr. Womack, the manager of the Virginia Transit Company?

A. I am, sir.

Q. Are you as such familiar with the operation of the Virginia Transit or the Portsmouth Transit buses in the respective cities?

A. I am, sir.

Q. Are you also familiar with the operation of the buses of the Elizabeth River Tunnel Commission?

A. Yes, sir.

Q. Are passengers taken on the bus in one city for discharge at another point in that city, and if they are not will you tell us what is done to try to carry out that decision; that ruling.

A. They are not taken on with the knowledge of the operator of the vehicle.

Mr. Bangel: If your Honor please, unless there
Vol. I is a posted notice on the buses itself, I submit, if
7/17/59 your Honor please, this is something within the
page 55 } exclusive knowledge of the Transit Company. If
any such ruling exists it is within the exclusive
knowledge of the Tunnel Commission. I submit that that
would be improper.

The Court: If they had instructions that were given to

Donald H. James.

the bus drivers about that, I think that would be admissible.
Mr. Bangel: Then we save the point.

By Mr. Breeden:

Q. What is done to carry out those instructions with respect to the operation?

A. In the city of Norfolk there are no problems because all passengers are discharged from Portsmouth before; they are taken off to go back to Portsmouth so there isn't any intermingling of passengers. In Portsmouth, because of the physical layout of the loop that is impossible to do, so the operators are instructed to the utmost that they try to observe passengers who may be trying to ride intracity rather than intercity.

Mr. Bangel: We object to that answer on the grounds it is self serving.

The Court: I overrule your objection.

Vol. I

7/17/59 By Mr. Breeden:

page 56 } Q. Mr. James, with relation to that particular type of travel in the city of Portsmouth now, does the Portsmouth Transit Company have an exclusive franchise from the city of Portsmouth for conducting that transportation?

A. It does, sir.

Q. And it pays the city of Portsmouth for that franchise a percentage of gross receipts?

A. We do, sir.

Q. Based upon your familiarity with the operation of the Elizabeth River Bus, does it pay any part of its revenues to the city of Portsmouth for a franchise to carry on an intracity transportation?

Mr. Bangel: If your Honor please, this witness, unless he knows he can't answer, and I submit his office would be such that he wouldn't know from what he testified his occupation was.

Mr. Breeden: Well, I asked him based upon his knowledge.

A. As far as to my knowledge there is no such payment made.

Donald H. James.

Mr. Bangel: You have no knowledge or you have knowledge?

Vol. I The Witness: I certainly have no knowledge of
7/17/59 anything or ever heard of it.

page 57 } Mr. Bangel: Well, it wouldn't come through
you anyway; as the operating manager it wouldn't
come through you?

The Witness: As a matter of information it may.

Mr. Bangel: But only as a matter of information. It would
come from some other source.

We object to it, if your Honor please.

The Court: I sustain the objection.

Mr. Breeden: I won't pursue that if he doesn't know.

By Mr. Breeden:

Q. Now, Mr. James, with respect to the driver of the bus,
is that bus driver relieved of his duties—and I use the word
“discharged” in the sense that he is no longer *permitted* to drive
a tunnel bus—if the Elizabeth River Tunnel Commission says
they don't want the man any more, is he thereafter allowed
to drive one of those buses?

Mr. Bangel: If your Honor please, we object to
Vol. I the question on the grounds that it tends to vary
7/17/59 the terms of a written contract.

page 58 } The Court: I sustain the objection to that.

Mr. Bangel: It is just a matter of policy and
not a contractual relationship. It may be the policy of the
Virginia Transit Company but not necessarily contractual.

Mr. Breeden: Your Honor, I make this point now. But
first, that is a fact, and I think that it is a very important
fact because it shows that the control of the operation has
not been surrendered.

The reason I do not feel that that contract has anything to
do with the case is because if, in carrying out its function
the Elizabeth River Tunnel Commission enters into an agree-
ment to accomplish that function, then it is the measure of
compensation of the agent-employee service and so forth.

It is a mode of operation to accomplish its governmental
purpose, and I submit that if the Commission has
Vol. I retained control of these people, which it has, they
7/17/59 would not dare to let a man drive the bus. If the
page 59 } Commission said, “We don't want Joe Blow any-
more,” why then he doesn't drive the bus anymore.

The method of accomplishing it between the parties in-

Donald H. James.

cluding the question of insurance of which I knew Mr. Bangel was going to make something of or attempt to, is the method of operation that has been decided upon by the Commission as a good method, or a workable method or a workable yardstick for measuring the service. But the actual service that is rendered is what occurs between the bus driver and the public, and certainly if the bus driver did something, Mr. Bangel would be the last one to say that "You are limited to the contract," and I will not, nor would I think, be permitted to show something that was factual and truthful. We would be limited by the contract. Well, of course, that is not the case.

Vol. I If these bus drivers are retained under the con-
7/17/59 trol of the Commission with respect to who shall
page 60 } operate and who shall not operate—and I think
 that the record has already shown it, and simply
I have corroborative evidence from Mr. James, then that is something that is very important, I think, in passing on this special plea.

The Court: Well, maybe I am misconstruing something, but I understand your position was that if the Tunnel Commission itself operated these buses that under the immunity of the state not being sued for tort or *anything* else that you would contend that the Tunnel Commission could not be sued for any negligence of an agent on one of the buses if the Tunnel Commission was operating it, is that your position?

Mr. Breeden: Yes, sir.

The Court: All right. Now, if the Tunnel Commission has procured someone else to *fullfill* those duties of operating those buses which are necessary as a part of the highway system, is it your contention that immunity goes over to that person that is procured to do that?

Vol. I goes over to that person that is procured to do
7/17/59 that?
page 61 } Mr. Breeden: My position is not quite maybe
 in the way that the Court has accomplished that transition.

I say that the state had a function to perform and it created the Elizabeth River Tunnel Commission to perform that function.

The passengers that used to ride the ferry no longer had a ferry to ride, so therefore he had to be taken care of, and this was considered the best method to accomplish that.

Now, in turn the agency that was created to accomplish that purpose has used this relationship to carry it—to bring it about. They are merely the servant of the Commission.

Donald H. James.

They are for the time being the Commission. It is the doctrine of *pro hac vice*.

The Court: You mean it is for the time being.

Mr. Breeden: Yes, it steps in its shoes. It is the method of carrying on that function.

Vol. I 7/17/59 } As Mr. MacMillan just said to me, that the page 62 } distinction is between whether they contracted to carry out this service or whether this is merely the method of accomplishing the agency through which it is accomplished.

As I was trying to bring out the driver is subject to removal at the will of the Commission, and I think that should form a part of this record, which it already does. This question is merely one of corroboration.

Mr. Bangel: I want to be clear so I can pursue my cross-examination. If I understand Senator Breeden now, he says that if any immunity exists, which I violently dispute, that would exist not only through the tunnel from entrance to entrance but it would extend through the streets of every city that it may see fit to drive on, and that it carries not only immunity to the Tunnel Commission if it exists but

Vol. I 7/17/59 } to any independent operator, of the driver or any-

page 63 } Mr. Breeden: Well, in the first place, Mr. Bangel, you used it "anywhere they operate."

Mr. Bangel: Well, let's limit it to the city of Portsmouth streets, my favorite city and my home town.

The Court: I think you have to operate within the scope of that.

Mr. Breeden: Mr. Bangel, your favorite city and the County of Norfolk and the city of Portsmouth is the Elizabeth River Tunnel District, and—

Mr. Bangel: You mean all the streets?

Mr. Breeden: The geographical limits of what I described

Mr. Bangel: Maybe I don't follow you.

Mr. Breeden: Well, just read the Act, sir, and don't follow me, Mr. Bangel. Please let me say one complete sentence without your interrupting me. It is a little difficult to

Vol. I 7/17/59 } even think much less say what you think. By the page 64 } time I say something you bound up.

In the first place, your Honor, Mr. Bangel is incorrect in trying to create it is without limit. It is delineated by the Act. It says that it has created this district and what the district is. It is a district in the same

Donald H. James.

sense that the municipal corporation of the city of Portsmouth is a mythical subdivision of the state for carrying on one function of the government or many governments rather, and we have other things like we have drainage districts in rural areas. That is a function of government for carrying on a particular service, and in this case the Elizabeth River Tunnel is a function of government within certain geographical limits for carrying on another function of government. So it isn't without limit. It has very definite limits and very definite purposes.

Now, on the other hand Mr. Bangel has said, and obviously that is the way his mind is working on this problem, that the Virginia Transit Company is an independent contractor carrying out some service to the Commission. That is not the case at all. It is carrying out the Commission's own efforts and endeavors in the performance of its governmental function. It is the tool of accomplishing that purpose. It is the hand of the Commission in accomplishing that purpose and as such it has no independence whatsoever. It is under the control and domination of the Commission in the performance of that work.

The Court: All right, go ahead.

Mr. Bangel: Are you through, Senator, with him?

Mr. Breeden: No, I want him to answer the question if the Court will permit him to.

The Court: What was the question? Read the question.

By Mr. Breeden:

Q. Whether or not Mr. James, a driver is removed from the bus if the Tunnel Commission wants him removed.

A. He is so removed, yes, sir.

Vol. I 7/17/59 Q. Does the Tunnel Commission establish what schedules are to be filled and how many runs are to be established in the performance of the service?

A. It is, sir.

Q. Do they fix the fares?

A. They do, sir.

Q. Do they collect the fare and deposit it in the bank and have complete control of it?

A. Yes, sir, the operator never touches it.

Q. Never touches it?

A. That is correct.

Mr. Breeden: That's all.

Donald H. James.

CROSS EXAMINATION.

By Mr. Bangel:

Q. Mr. James who employs the men who drive those buses?

A. They are employees of the Virginia Transit Company.

Q. All right, sir. And who hires them?

A. The Virginia Transit Company.

Q. Who pays them?

A. They are paid through the Virginia Transit Company.

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page 67 } Q. And who discharges them, the various employees where you get tired of them and don't want them; who fires them or when they are doing their work well. Who fires them?

A. If they are doing their work well we don't fire them.

Q. Well, who has the right to fire them?

A. The Virginia Transit Company, if—

Q. All right. Now, they are—

Mr. Breeden: He didn't finish that, Mr. Bangel.

Mr. Bangel: What did you say?

Mr. Breeden: He was about to say something else with respect to those who work for the tunnel.

The Court: He didn't finish what he wanted to. Have you finished your answer?

By Mr. Bangel:

Q. I am asking you about who hires and fires them, who pays them and you answered that. Now, these people—

Mr. Breeden: Now, your Honor, I know that is a clear approach to it, but the man was about to enlarge on the answer that he had given and Mr. Bangel wants

Vol. I to cut it off so he can point to the record—

7/17/59

page 68 } Mr. Bangel: He said he fired them unequivocally, and without any—

The Court: Go ahead. I don't know what the man was going to say. Have you finished it?

The Witness: No, sir. I just wanted to expound a little. If there was cause for them to be fired. We don't indiscriminately pick someone. There has to be a reason.

By Mr. Bangel:

Q. You are speaking of the Virginia Transit Company employees?

Donald H. James.

A. Yes, sir.

Q. Now, the people who board that bus, they pay, do they not, and that bus is a common carrier for hire and reward, isn't that true?

Mr. Breeden: Now, your Honor, that is what we are trying to determine.

The Court: I think the evidence already shows that, Mr. Bangel. You need not repeat that.

By Mr. Bangel:

Vol. I
7/17/59 } Q. Now, you say that the Virginia Transit Com-
page 69 } pany has exclusive franchise to operate buses in
the city of Portsmouth?

A. No, sir, they don't.

Q. Well, I thought I understood you to say—well, do they have an exclusive franchise to operate city buses in the city of Portsmouth?

A. No, sir.

Q. Who else has a franchise to operate buses as a common carrier of passengers for hire and reward from the city of Norfolk to the city of Portsmouth?

The Court: You mean intra-buses?

By Mr. Bangel:

Q. Yes, sir, intra-buses, intracity buses?

A. Sir, the Virginia Transit has no franchise to operate in the city of Portsmouth. It's Portsmouth Transit.

Q. And, of course, that is owned by the Virginia Transit, is it not?

A. No, sir it is not.

Q. There is a difference between the Portsmouth Transit and the Virginia Transit?

A. Yes, sir.

Q. Well, now. Then, of course, Virginia Transit gets \$25,000.00 a year, and, of course, there is no scrap between them and the Tunnel Commission about operating along the streets of Portsmouth. You know that, don't you?

Vol. I
7/17/59 } A. Repeat that, will you please, sir?

page 70 } Q. Well, the bus operates, that is the buses
going through the tunnel, those buses travel along
the streets of the city of Portsmouth, they pay
for the furnishing of men, the fixing of their equipment to

Donald H. James,

the Virginia Transit, and they pay them an additional \$25,000.00 minimum, isn't that correct?

A. That is correct.

Q. Well, it is to the interest of the company not to object to them picking up passengers from place to place, isn't it?

A. It is up to the Portsmouth Transit to object to them picking up passengers from place to place.

Q. Actually, who is the claim agent for the Virginia Transit?

A. Who is the claim agent?

Q. Yes, sir.

A. P. C. Bradley.

The Court: I sustain the objection. You are trying to show they are one and the same company?

Mr. Bangel: That is the way I understand it.

Mr. Breeden: Your Honor, I object to it.

Vol. I The Court: I sustain the objection.

7/17/59 } If you want to ask who the directors and so
page 71 } forth are, I will permit you to show that they have
the same people and that they are all in one.

Mr. Bangel: If your Honor please, if you will permit the answer to go in to show just who it is.

By Mr. Bangel:

Q. What is your answer? Who is the claim manager for the Portsmouth Transit?

A. P. C. Bradley.

Q. The same man who investigates for the two companies that you speak of; the same man for both companies?

A. That is correct.

Q. Are the same office used by both?

A. Yes, sir.

Mr. Breeden: Your Honor, is it understood that the same objection goes to the whole line?

The Court: Yes.

By Mr. Bangel:

Q. And those employees get one check for both services?

A. They do.

Mr. Bangel: All right, that's all.

William B. Taliaferro.

* * * * *

Before: The Hon. R. F. MacMurrin, Judge, Portsmouth, Virginia, September 30, 1959.

* * * * *

Vol. II
9/30/59

page 2 } WILLIAM B. TALIAFERRO,
called as a witness on behalf of the defendants,
having been first duly sworn, was examined and testified as
follows:

DIRECT EXAMINATION.

By Mr. Breeden:

Q. Are you the same person as the person called in the testimony of July 17th, whose name was spelled "Toliver" in the record?

A. Yes.

Q. What is the correct spelling of your name?

A. T-a-l-i-a-f-e-r-r-o. My initials are W. B.

Mr. Bangel: To save some time I have no objection to counsel merely making the change in the original record.

Mr. Breeden: We are objecting to it on the grounds it is immaterial and irrelevant. I can't say where it can possibly be of any help to the parties.

I am merely clarifying something Mr. Bangel Vol. II inquired of the witness about on July 17th.

9/30/59 The Court: I overrule the objection.

page 3 } Mr. Breeden: We save the point.

By Mr. Breeden:

Q. On July 17th you testified on your examination by Mr. Bangel at Page 26 of the record wherein you said in part:

"We have a permit from the City of Portsmouth.

"Q. And where is that permit?

"A. (Pause).

"Q. May I see that permit, please, sir?

"A. I don't have it with me."

William B. Taliaferro.

By Mr. Breeden:

Q. The paper to which you refer called "Permit," is that this document I hand you which has been certified by the City Clerk of the City of Portsmouth and taken from the official records?

A. It is.

Mr. Breeden: We offer this in evidence.

Vol. II Mr. Bangel: We are objecting to it, if Your
9/30/59 Honor please.

page 4 } The Court: I will mark it "Exhibit, Tunnel Ex-
hibit #3."

Mr. Bangel: We save the point as to its introduction for the reasons heretofore stated.

By Mr. Breeden:

Q. Now, Mr. Taliaferro, on July 27th, you made an affidavit with respect to certain signs at bus stops in the City of Portsmouth relating to buses operated by the Tunnel Commission.

For the sake of brevity, I hand you the original of that affidavit and ask you to read it and advise us whether or not that is a true statement of fact.

Mr. Bangel: We object to it on the grounds it is irrelevant and immaterial, and that is not the controversy.

Mr. Breeden: Answer the question.

Mr. Bangel: We object to the introduction of the affidavit of the witness. The witness ought to testify of his own knowledge without reference to any paper he has made.

By Mr. Breeden:

Vol. II Q. Will you state to the Court the circumstances
9/30/59 and facts relating to certain signs that are posted
page 5 } at bus stops in the City of Portsmouth, and I think
it is permissible for you to refer to the affidavit.

Mr. Bangel: I don't think it is admissible at all. The witness cannot undertake to prepare a statement outside of Court and come to the Court room and say, "I am reading a statement I made outside."

The Court: He can look at the affidavit and testify what the signs are.

Mr. Bangel: We save the point.

William B. Taliaferro.

By Mr. Breeden:

Q. The Court is going to permit you to testify. State whether or not there are signs displayed at all bus stops of the Elizabeth River Runnel Commission in the City of Portsmouth at various places where busses stop?

A. There are.

Q. Those bus signs advise passengers as to what transportation service is offered?

A. Yes, sir.

Q. Are you familiar with the physical set-up sufficiently to state whether or not there is a bus stop sign at South and Washington Streets where busses stop?

A. There is.

Vol. II Q. Is there a similar sign at all other bus stops
9/30/59 in the City of Portsmouth?

page 6 } A. Yes, and at the terminal.

Q. At the terminal?

A. Yes.

Q. The terminal being a point on Clifford Street?

A. And the Plaza.

Q. The bus at that point is continuously on the tunnel's property until it reaches some point in the City of Norfolk?

A. That is correct.

Q. Can you state what information is on each front of those signs? What is the size of the signs?

A. 24 by 30.

Q. Is that 24 inches by 30 inches?

A. Correct.

Q. Will you tell us what is on each front of those signs?

A. Yes.

Tunnel
Bus
Stop

For
Berkley
and
Norfolk
Only

Fare
10¢

William B. Taliaferro.

Vol. II Q. Is that sign visible in one or two directions?
9/30/59 A. Visible in two directions.
page 7 } Q. What is the color of the sign, is it a distinctive
color relating to the Norfolk and Portsmouth Tun-
nel Commission?
A. Distinctive.
Q. What is the color?
A. Silver and green.

Mr. Breeden: You may inquire.

CROSS EXAMINATION.

By Mr. Bangel:

Q. Mr. Taliaferro, you referred to a paper writing which purports to be a contract between the City of Portsmouth and the Elizabeth River Tunnel Commission.

Mr. Bangel: I would like to examine him as to that without waiving my objection.

By Mr. Bangel:

Q. Mr. Taliaferro, how much money does the Elizabeth River Tunnel Commission pay the City of Portsmouth for the use of its streets?

Vol. II Mr. Breeden: We object to that. There is
9/30/59 nothing in the contract about the use of the streets.
page 8 } Mr. Bangel: He is on cross examination.

Mr. Breeden: You are deceiving the witness. You are holding a paper up here purporting to show it is in there and it is not.

By Mr. Bangel:

Q. I am asking you, Mr. Taliaferro, how much money is paid to the City of Portsmouth, a municipal corporation, for the use of the streets by the busses operated by the Virginia Electric & Power Company—the Virginia Transit Company?

Mr. Breeden: He must be referring to this contract, and Mr. Taliaferro should have the paper.

The Court: Is there anything in there about that?

Mr. Bangel: In part.

The Court: I don't know whether the witness would know.

William B. Taliaferro.

By Mr. Bangel:

Vol. II Q. Does the Tunnel Commission maintain the sur-
9/30/59 face of the Streets over which the busses run in
page 9 } the City of Portsmouth?

A. They don't.

Q. Who does it, if you know?

A. I assume the City of Portsmouth.

Q. What monies, if any, are paid the City of Portsmouth for that service, and by whom?

Mr. Breeden: The witness said he didn't know who did it. The Commission didn't.

The Court: What is the question?

(The question was read as follows):

"Q. What monies, if any, are paid the City of Portsmouth for that service, and by whom?"

Mr. Breeden: The witness said he didn't know.

The Court: He may answer that if he knows.

A. Let me understand it again.

By Mr. Bangel:

Q. You say busses operate along the streets of the City of Portsmouth, Washington Street, High Street, Crawford, South Street to Court Street. Who keeps the surface of those streets in good condition?

Mr. Breeden: If you know.

A. I don't know.

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9/30/59

page 10 } By Mr. Bangel:

Q. You say you don't know?

A. I don't know.

Q. What is your official position with the Tunnel Commission?

A. Assistant Manager and Comptroller.

Q. As such, would you be familiar with whether or not it is maintained by the Tunnel Commission or the Virginia Transit Company?

William B. Taliaferro.

Mr. Breeden: He said he didn't know, but the Tunnel Commission didn't.

By Mr. Bangel:

Q. What money, if any, is paid to the City of Portsmouth for the use of the streets by the Tunnel Commission or the Transit Company in operating busses of the Tunnel Commission over the streets of the City of Portsmouth?

Mr. Breeden: We object to that. Here is a contract you have put in evidence. Mr. Bangel knows Mr. Taliaferro could not vary the terms of it. It speaks for itself.

If they made any other payments, Mr. Taliaferro would know, I suppose. You have to show we made
Vol. II payments different from those shown in the con-
9/30/59 tract.

page 11 } Mr. Bangel: It is not my understanding of the
law. All they can do is to put in the paper writing
matters that can be correctly interpreted.

All we have to show is there may have been a silent agreement between the parties not in the contract.

Mr. Breeden: If you ask that maybe it will be proper.

By Mr. Bangel:

Q. This paper writing that has been offered in evidence marked Exhibit 3, dated July 1st, 1953, refers to a loading and unloading point at the corner of Court and King Streets in the City of Portsmouth. Look at it.

Is there any such place as that being used for loading or unloading passengers by the commission?

A. Not now.

Q. So there has been a change in the paper writing?

A. No.

Q. It says:

“That for and in consideration of the monthly
Vol. II payment of the sum of One Hundred Dollars
9/30/59 (\$100.00) to be made on the first day of each and
page 12 } every month from the Elizabeth River Tunnel Com-
mission to the City of Portsmouth, said City of
Portsmouth does set aside for use by the Elizabeth River
Tunnel District for the purpose of maintaining and operating
a shuttle bus terminus in said City on the west side of Court
Street at King Street.”

William B. Taliaferro.

Do the Elizabeth River Tunnel Commission busses being driven by operators of the Virginia Transit Company take on and put passengers off at certain places?

A. They do.

Q. You mean they could get off at the tunnel and then get on another bus and get back on your bus in the City of Portsmouth?

A. They cannot.

Q. You are not maintaining a shuttle bus, are you? You are operating one bus all the way through?

Mr. Breeden: That is a shuttle bus from Norfolk to Portsmouth.

Mr. Bangel: Do you call that a shuttle bus? I am going to ask my friend to take the witness stand if he doesn't stop interrupting.

By Mr. Bangel:

Vol. II Q. Is it a shuttle bus?

9/30/59 A. Yes.

page 13 } Q. Even though it shuttles from South Washington Street to a point on High Street and Washington Street to Court Street, and Crawford Street and County Street, you call it a shuttle bus?

A. It is a shuttle bus all through.

Q. Let's go a step further:

"Operating a shuttle bus terminus in said city on the west side of Court Street at King Street."

Do you have any such place as that?

A. We don't.

Q. When was the contract changed?

A. It has not been changed. Read on further.

Q. All right.

"And on street at curb adequate area north and/or south of the intersection of said Court and King Streets for the purpose of said Tunnel District's buses standing and/or loading and unloading passengers at such terminal point;

Mr. Breeden: "And in addition thereto."

William B. Taliaferro.

By Mr. Bangel:

Q. You read it.

Vol. II A. "And in addition thereto, the nonexclusive
9/30/59 right of such bus stops along its routes over the
page 14 } streets of the City of Portsmouth as may be from
 time to time required and approved by the City
Manager."

By Mr. Bangel:

Q. Before you can start stopping at a given point in the City of Portsmouth, I take it it must be approved by the proper officer of the City of Portsmouth?

A. In accordance with the agreement.

Q. Is that the correct agreement?

A. It is the only one that has been executed.

Q. You are depending on that?

A. Yes.

Q. Is there any other agreement with the City of Portsmouth not incorporated in the paper writing?

A. Not to my knowledge.

Q. That is the only one you know of?

A. That is the only one I know of.

Q. At whose request was the terminus of the point indicated as terminus on Court and King Streets sought?

A. I believe the Commission.

Q. You were told by the City Manager that you could not use that point as a starting point, or for loading

Vol. II or unloading?

9/30/59 A. That is right.

page 15 } Q. In what other particular has the City Manager changed the contract that you refer to?

A. He hasn't changed it to my knowledge.

Q. Can the busses operate over the streets of the City of Portsmouth at any given point without first obtaining the consent and approval of the City Manager of the City of Portsmouth, Virginia?

Mr. Breeden: That is a legal question. There is nothing in this contract about the right to use the streets. It is the decision of the City Manager with reference to stops, and he is pressing the witness on matters concerning which he has no knowledge.

William B. Taliaferro.

The questions are purely legal ones and it is improper and this should not be pursued.

The Court: I don't know whether he is in position to state whether it is legal.

Mr. Bangel: I am asking him whether they have to get his consent. I think we can show it is *ultra vires*.

Mr. Breeden: If he can prove it is *ultra vires*, Vol. II the people of the City of Portsmouth will not take 9/30/59 advantage of it. The Tunnel Commission is not page 16 } going to do any illegal act.

Mr. Bangel: If I am successful in that, then I will have served a good purpose for every person in Portsmouth. They may go to West Norfolk or somewhere else tomorrow or next day.

The Court: Are you going to try to show they asked permission of the City and got permission from the City?

Mr. Bangel: Yes, sir.

The Court: To use the City streets without paying?

Mr. Bangel: I want to show what they have to do, that they have to get consent of the City to get permission.

Mr. Breeden: The Tunnel Commission is trying to have the closest personal relationship with the two entities. The reason they put buses down Washington Street is because the people wanted it to run down there and it was assented to by the Seaboard-Airline Railroad which had its operations in that area.

Mr. Bangel: Suppose I went there and took a bus and ran into a man and killed him, they can't sue them?

The Court: Let's get back on the point.

Mr. Breeden: That is a legal question.

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page 17 } By Mr. Bangel:

Q. Are the busses operated over the streets of the City of Portsmouth with the consent and approval of the City Manager, or the City of Portsmouth authorities?

A. They operate in accordance with this agreement.

Q. The agreement does not set forth the various stops that can be made for the purpose of passengers boarding and leaving the busses.

Can you tell me why it is silent on that?

A. It says to have the approval by the City Manager.

Q. Before busses use this area for the purpose of loading and unloading, it is done after obtaining consent of the au-

William B. Taliaferro.

thorities of the City of Portsmouth. Am I correct in that?

A. Under those terms, yes.

Q. Before you establish another point at which passengers may board or alight, do you then take it up with the City Manager?

The Court: If he wants to change his route?

Mr. Bangel: Yes, sir.

A. We take it up with the City Manager.

Vol. II
9/30/59 } Q. It has been changed since this contract was
page 18 } made dated July 1st, 1957?

A. Yes, as directed by the City Manager.

Q. You have enlarged the number of streets you travel over, the number of stops you make, for permitting passengers to board and alight; is that true?

A. I don't understand that.

Q. Since the contract was made, dated July 1st, 1957, you have enlarged the number of points that the busses are permitted to stop for the purpose of passengers getting on and off?

A. Yes.

Q. Do you know how many more places or streets have been extended since this contract was made?

A. Two more stops.

Q. Are they for the purpose of boarding and alighting?

A. Yes.

Q. Will you give us those stops?

A. Crawford and from High around the corner on Crawford.

Q. Those are streets within the City of Portsmouth and not on any of the property which is operated by the Elizabeth River Tunnel Commission?

A. That is correct.

Q. Has there been any change in the contract so far as the amount of money that is to be paid to the City for the use of its streets?

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page 19 } Mr. Breeden: Your Honor, there is nothing in
the contract about the use of streets. If he asks
that question, it implies it is in the contract and it is not
there.

William B. Taliaferro.

Mr. Bangel: What is the \$100.00 a month paid for to the City?

Mr. Breeden: For the use of stops.

The Court: If you attempt to vary the contract, I will sustain the objection.

Mr. Breeden: He is asking him about the payment of money for the use of streets, and it is not in there. It was an agreement reached with the City of Portsmouth in connection with taking care of the stops. It is improper examination of the witness.

Mr. Bangel: I think the witness was very vague on some points. He is a witness, or not. He is handed a paper writing and says he doesn't know anything about it.

The Court: He can't testify to anything that would vary the terms of the contract.

Mr. Bangel: Unless it has been varied.

Vol. II The Court: I think he said the route was
9/30/59 changed in accordance with the terms of the con-
page 20 } tract.

Mr. Bangel: I am asking him whether there has been a change in the amount of money paid to the City of Portsmouth recited in this paper writing?

A. No change under the terms of this contract.

By Mr. Bangel:

Q. Has there been a subsequent contract that has increased or decreased the amount of money paid to the City?

A. No.

Q. Do you know the reason for the payment of the \$100.00 to the City of Portsmouth per month?

Mr. Breeden: Your Honor, I hate to keep on objecting.

The Court: Is it in the contract?

Mr. Bangel: It is ambiguous. I am attempting to clarify it by the witness.

Mr. Breeden: The witness cannot vary the terms of this contract.

The Court: What is it in there?

Mr. Bangel: He doesn't read it the way my friend does.

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page 21 } "That for and in consideration of the monthly
payment of the sum of One Hundred Dollars

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(\$100.00) to be made on the first day of each and every month from Elizabeth Tunnel District to the City of Portsmouth, said City of Portsmouth does set aside for use by the Elizabeth River Tunnel District for the purpose of maintaining and operating a shuttle bus terminus in said City on the west side of Court Street at King Street, and on street at curb adequate area north and/or south of the intersection of said Court and King Streets for the purpose of said tunnel districts' busses standing and/or loading and unloading passengers at said terminal point; and in addition thereto, the nonexclusive right of such bus stops along its routes over the streets of the City of Portsmouth as may be from time to time required and approved by the City Manager."

The Court: Isn't it clear it says they are paid \$100.00 per month for the privilege of stopping the busses and loading and unloading them?

Vol. II 9/30/59 page 22 } Mr. Bangel: Your Honor, they are going beyond that. They are not stopping there, but designating points for passengers to get on and off.

By Mr. Bangel:

Q. Am I correct?

A. They stop there to permit passengers to get on and off.

Q. Do your busses going south on Washington Street remain there until they make the return trip or solely for passengers to board and alight?

A. They stand there for the purpose of picking up and unloading passengers.

Q. When it gets to Washington and High Streets does it stop there to wait for a certain schedule or for the purpose of allowing passengers to board and alight?

A. For passengers to be discharged and pick up passengers.

Q. When it leaves that point and goes to High Street, does it stop there and wait for a certain hour or minute to start a return trip or only for the purpose of allowing passengers to board and alight?

A. To discharge and pick up passengers.

Vol. II 9/30/59 page 23 } Q. When it gets to Crawford Street, does it stop there for a certain time solely for parking or for passengers to board and alight?

A. It picks up and discharges passengers.

Q. Then it goes to Crawford & County Streets. Does it

William B. Taliaferro.

stop there solely for the purpose of permitting persons to board and alight?

A. To discharge and pick up passengers.

Q. When it leaves there and goes to South Street out near the market, does it stop there?

A. It doesn't now.

Q. When did it discontinue stopping there for the purpose of permitting passengers to board and be discharged?

A. I believe about a week.

Q. Does it stop there for the purpose only and solely for permitting passengers to board and alight?

A. To discharge and pick up passengers.

Q. From there it goes to Clifford Street. Does it stop there solely for the purpose of picking up and discharging passengers?

A. Discharging and picking up passengers.

Q. From there it goes to the tunnel of the Elizabeth River Tunnel Commission where it comes to a stop until it is time to begin its return trip?

A. Yes.

Vol. II
9/30/59 } Q. Does the Tunnel Commission own any property along the streets I have indicated except when page 24 } it goes in the tunnel?

A. That is all. The stop at County and Crawford has been changed.

Q. When was that changed?

A. Maybe about a week ago.

Q. You spoke of signs being posted along the streets of the City of Portsmouth at various points you designated as being points at which passengers may board and alight.

You described the signs as being 24 by 30 inches. Am I correct?

A. Yes.

Q. You didn't tell us the size of the letters on those signs. How large are the letters used for the tunnel bus signs, stop signs?

A. I believe they are three and a half inches.

Mr. Breeden: If you don't know you don't have to answer.

The Witness: I don't know for sure.

Mr. Breeden: I want to let you know that if you don't know how large those letters are I don't think you have to answer it.

Mr. Bangel: My friend insists on giving him the answers.

William B. Taliaferro.

Mr. Breeden: If he doesn't know I wanted to
Vol. II tell him he didn't have to answer.
9/30/59 Mr. Bangel: He said he didn't know. •
page 25 } Mr. Breeden: You are badgering the man.

By Mr. Bangel:

Q. Take the words, "Tunnel Bus Stop For Berkley and Norfolk Only." How large are the letters in those words? Are they very, very small?

A. I don't know.

Mr. Bangel: That is all, sir.

Mr. Breeden: Your Honor, could I go across the street and measure them for Mr. Bangel? It is only a few feet from this Court house.

He has tried to imply that the signs could not be read. They can be read by anyone, even with poor eyesight.

Can Mr. Taliaferro go across the street and measure them and come back?

The Court: I think it might be well.

Mr. Breeden: Mr. Taliaferro, go over there and measure them and come back, please.

(The witness was excused to go across the street and measure the signs and subsequently returned to the witness stand).

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page 26 } By Mr. Breeden:

Q. You were being questioned by Mr. Bangel as to the size of certain letters on the signs relating to the tunnel busses between Norfolk and Portsmouth, being the signs that you had testified to in your examination in chief.

At my request you went across the street where there is such a bus stop and measured the letters, did you not?

A. I did.

Q. Will you state the size of the letters on the bus sign, tunnel bus stop?

A. "Tunnel Bus Stop," two and one half inches and "For Berkley And Norfolk Only," three inches, and "Fare 10¢," two and one half inches.

Mr. Breeden: That is all.

Louise Beecher.

By Mr. Bangel:

Q. Now, Mr. Taliaferro, the operators of those busses are regularly employed operators of the Virginia Transit Company, are they not, and belong to the union of operators of the Virginia Transit Company, do they not?

A. They are regular operators?

Q. Yes. Aren't they regular employees of the Virginia Transit Company, and aren't they members of the union of the bus operators and employees of the Virginia Transit Company?

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page 27 }

A. They are employees of the Virginia Transit Company. I don't know whether they are members of the union, or not.

Q. The operators assigned to the various busses are assigned by the Virginia Transit Company out of its large personnel of bus drivers?

A. That is correct.

Mr. Bangel: That is all.

* * * * *

Stenographic transcript of the testimony introduced and proceedings had upon the trial of the above entitled cause in said Court on November 6, 1959, before the Honorable Robert F. MacMurrin, Judge of said Court, and jury.

* * * * *

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11/6/59
page 6 }

* * * * *

LOUISE BEECHER,

the plaintiff, called as a witness on her own behalf, having been first duly sworn, was examined and testified as follows:

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DIRECT EXAMINATION.

By Mr. S. Bangel:

Q. State your name, please?

A. Louise Beecher.

Q. Where do you live, Mrs. Beecher?

Louise Beecher.

A. 530 DeKalb Avenue.

Q. How old are you?

A. Thirty years old.

Q. Mrs. Beecher, were you injured on the 23rd day of January, 1959?

A. I was.

Q. About what time were you injured?

A. Approximately 5:20.

Q. Where had you been?

A. Home.

Q. Where were you going?

A. To Norfolk.

Q. How did you get from your home to where you were when this injury took place?

A. By Community Motor Bus.

Q. Where did the injury take place?

Vol. III A. At South and Washington.

11/6/59 Q. And you rode from your home to South and page 8 } Washington Street by Community Motor Bus?

A. Yes.

Q. After you got off the Community Motor Bus at South and Washington Street what did you do?

A. I went to board the Elizabeth River Tunnel Bus, and I waited approximately about four minutes before it came.

Q. Where were you standing?

A. I was standing at the corner of South and Washington at a grocery store.

Q. Is that at the regular tunnel bus stop?

A. Yes, sir.

Q. Did the tunnel bus come there belonging to the Elizabeth River Tunnel Commission operated by the Transit Company?

A. Yes, sir.

Q. What happened when that bus came there?

A. Well, it was loaded with people in the bus. They were standing also in the back and front door and the people had to get off to let the others that was getting off the bus get off. And I waited till those people got back on the bus so I could get on. And when they got on they were getting up in the bus, I reached my arm up in the door and got hold

Vol. III of the bar, and he closed the door and I ran along 11/6/59 beside the bus and hollered that he had me locked in page 9 } the bus.

Q. Where did he have your arm?

A. Right here (indicating).

Q. What was holding your arm there?

Louise Beecher.

A. The door.

Q. All right. What did you do when he locked your arm?

A. I run along with the bus and I hollered that he had me in the bus, and I seen that he wasn't going to stop and I jerked my arm out and I fell to the street.

Q. How far were you pulled alongside the bus there?

A. Approximately ten feet.

Q. When you finally released your arm from this bus, what happened to you?

A. I fell on the street, and there was a man came to me and he asked me could he help me in any way, and he helped me get up and walk to the street, and I was scared and upset, and I told him I would be all right. He says "Let me help you up against the wall." So I stood there for awhile until I got to myself, and I went to the nearby drug store and I showed my arm to the doctor. He immediately told me to go to the hospital.

Vol. III Q. Were you in any pain?

11/6/59 A. Yes, sir, I was in terrific pain in my shoulder, page 10 } my arm, and my arm was burning.

Q. Were you taken to the hospital?

A. Yes, sir.

Q. What hospital did you go to?

A. Portsmouth General.

Q. When you got to Portsmouth General Hospital did they examine you?

A. Yes, sir; and they admitted me in the hospital.

Q. What was your condition at that time?

A. I was in terrific pain.

Q. Where was your pain, Mrs. Beecher?

A. It was in my shoulder, in my arm and back, through my chest, and my arm here (indicating).

Q. Describe your arm to the jury.

A. My arm was from where the door closed and where it had me there that was blistered and had big bumps all over it; and I was hurting in my shoulder, through my back and in my chest.

Q. You say they admitted you to the hospital?

A. Yes, sir.

Q. Were you treated by a doctor?

Vol. III A. Yes, sir.

11/6/59 Q. Who was that doctor?

page 11 } A. Dr. Ward.

Q. How long did you remain in the Portsmouth General Hospital?

Louise Beecher.

A. Till Monday afternoon.

Q. When you left the hospital where were you carried?

A. I was carried home.

Q. When you got home what did you do?

A. I stayed in the bed.

Q. What was your condition at that time?

A. I was in terrific pain in my shoulder and arm, all through my back here.

Q. Were you still under the doctor's care?

A. Yes, sir.

Q. How did that affect you?

A. It affected me in my nerves and in my shoulder. It hurts me quite a bit and it affected me in my nerves quite a bit.

Q. How many times have you had to see the doctor from the injuries you received in this accident?

A. At first I have seen him twice a week, and I see him now approximately every eight to ten days.

Q. And you have been under the doctor's care constantly since this accident?

A. Yes, sir, I have.

Q. And that is Dr. Ward, is it?

A. Yes, sir.

Q. What kind of treatment have you been receiving?

A. I received shots and medicine for pain, and I take hot baths three times a day in the tub for my arm.

Q. Is that in accordance with the doctor's instructions?

A. Yes, it was.

Q. Did you have physio-therapy treatment at the hospital?

A. Yes, sir, I did.

Q. Now, Mrs. Beecher, were you employed before this accident?

A. Yes, sir.

Q. What type of work do you do?

A. I am a beauty operator.

Q. Prior to this accident how much money did you make a week?

A. Well, I was making approximately \$60.00 a week.

Q. When was it before you were able to go back to work?

A. It was twenty weeks.

Q. Do you remember the date approximately when you went back to work?

A. Approximately around the 13th of June.

Q. Of this year?

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page 13 }

Louise Beecher.

A. Yes, sir.

Q. Now, after you went back to work were you able to do your work as you could before?

A. No, sir, it hurt me. My arm and shoulder hurt me, and it still hurts me.

Q. How much have you been able to make a week since you have been back to work?

A. Well, approximately thirty, thirty-five.

Q. Now, why can't you make as much now as you could before?

A. Well, my arm hurts me, and my shoulder and all in my back hurts me when I work.

Q. What was your health before this accident, Mrs. Beecher?

A. It was good.

Q. Since this accident what effect did it have on you?

A. It had affected my nerves. I am awfully nervous and tense and little things upset me.

Q. How about your ability to sleep, has it affected that?

A. Yes, it does. I don't sleep well at all at night.

Q. Tell these gentlemen what you experienced as a result of the accident as far as your ability to sleep is concerned.

A. The only way I can get any rest was by taking some medicine for the pain from Dr. Ward that he has prescribed for me, taking three tablets a day so that I could rest and sleep at night.

Q. How much have you spent in medications, for pills?

A. Approximately \$150.00.

Q. What kind—how many pills did you say you take a day?

A. I take three pills a day.

Q. And how much do those pills alone cost?

A. \$4.90.

Q. Have you had any other types of medicine besides those pain pills?

A. Yes, sir, I have shots, too, for pain.

Q. How often have you received shots, Mrs. Beecher?

A. Each time I go to Dr. Ward.

Q. Do you know how much your hospital bill was?

A. \$73.98.

Q. Did you have an X-ray bill in addition to that?

A. Yes, sir.

Louise Beecher.

Q. How much was that?

A. \$25.00.

Q. Has your shoulder and arm gotten any better since this accident?

A. Yes, sir, it has got some better.

Q. How about now. Are you able to move your arm freely without pain?

A. Yes, sir, I can move my arm up to there (illustrating), but up further it gives me terrific pain in my shoulder and through my back and in my chest.

Q. Well, now, were you examined by Dr. Psimas at the request of the defendants in this case?

A. Yes, sir, I was.

Q. Did you voluntarily go up there?

A. Yes, sir, I did.

Q. And did he move your arm all around?

A. Yes, sir, he did.

Q. The next day what effect did it have on you?

A. I had to go back to Dr. Ward for treatments
Vol. III for shots.

11/6/59 Q. You mean the movement of the arm all
page 16 } around—

A. Yes, sir.

Q. Why did you have to go back to Dr. Ward?

A. For pain; to get something for pain in my shoulder.

A. I see.

A. He twisted my arm around and took something and beat on my elbow with it.

Q. Well, now, let me ask you this: Who did your work and your washing and ironing at home before this accident?

A. I did it myself.

Q. How about since this accident?

A. My husband does part of it.

Q. How about your ironing?

A. I iron with my left hand.

Q. How about the heavy washing, who does that?

A. My husband.

Q. Who did it before this accident?

A. I did.

Q. Mrs. Beecher, do you know if the defendants in this case were notified shortly after this accident?

A. Yes, sir, they were. They were notified that
Vol. III night after I was in the hospital. My husband
11/6/59 called from the Portsmouth General Hospital and
page 17 } notified the man that was in there.

Q. And did they send someone to that hospital

Lowise Beecher.

the very next day to see you?

A. Yes, sir, they did; the next morning at approximately eight o'clock there was a man at my hospital room talking to me.

Q. And he was from the defendants in this case?

A. He said he was from the Elizabeth River Tunnel Commission and the Transit Company.

Q. That was before you had retained any lawyer?

A. That's right.

Mr. Bangel: You may inquire, gentlemen.

CROSS EXAMINATION.

By Mr. Breeden:

Q. You would have told that man the same thing whether you had a lawyer or not, wouldn't you?

Vol. III A. No, sir.

11/6/59 Q. If you had a lawyer you might have told him page 18 } something differently, is that the idea?

A. No, sir. I was under the influence of dope when he came; he woke me up.

Q. Well, did you tell him something that was not true?

A. No, sir, I did not tell him anything that wasn't true. The only thing he asked me was to sign a statement and I would not.

Q. But the fact that you had or had not employed a lawyer wouldn't have made any difference in what you said, would it?

A. No, sir, it wouldn't.

Q. You would not. Well, I just could not understand your counsel making that point.

Mr. A. A. Bangel: He told you in his opening statement.

The Court: Now, gentlemen, let's not have side remarks. Let us try to get along with the evidence.

Mr. A. Bangel: But may I make an observation? Counsel in his opening statement told the jury that they Vol. III did not know anything about it until they got a let- 11/6/59 ter from counsel. And now he is complaining that page 19 } he can't understand his remark.

The Court: Go ahead, gentlemen.

By Mr. Breeden:

Q. Mrs. Beecher, did you get off the Community bus at the

Louise Beecher.

same stop where you intended to board the Elizabeth River Tunnel bus?

A. Yes, sir, I did.

Q. In other words you did not move off of that corner of South and Washington Streets?

A. No, sir, I did not.

Q. Is it not true that the bus comes up at exactly the same spot, both of them stopping at the same point?

A. They both stop at South and Washington.

Q. Now, when you started to board this bus after the adjustment of the passengers getting off had occurred, did you step from the ground or were you still on the ground when the door was closed?

A. I was standing on the curb. I wasn't on the ground; I was on the curbing.

Q. On the curbing?

A. Yes, sir.

Vol. III Q. But you had both feet still on the curbing?

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A. I reached with this arm to get in the bus, to catch hold of the bar, and I started with my foot up in the door, and he closed the door on my arm.

Q. But it did not touch any other part of your body?

A. No, sir, he did not.

Q. Now, where was the bar that you grabbed; which bar did you grab?

A. It was the one that goes straight down.

Q. Straight down?

A. Yes, sir.

Q. At what point with relation to the doorway of the bus is that rod?

A. It's at the front of the door.

Q. At the front door hinge?

A. No, sir, I don't think it is at the hinge.

Q. Well, where was this particular rod?

A. Well, it is the rod—in all of them they all have the same rod. There was one that runs from the box that you put your money up to this one that runs down.

Q. In other words there is a rod that goes up and down at the box, the money box?

Vol. III A. Yes, sir, there is one there and one over to the one that goes straight down.

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page 21 }

Q. That's up near the forward part of the bus?

A. Yes, sir, it's up toward the forward part of the bus.

Q. Well, now, the door of that bus hinges so that when it

Louise Beecher.

closes there are two doors that meet to close the bus; is that not correct?

A. Yes, sir.

Q. When the door closed did you still have your hands on the rod?

A. I reached my hand up to catch hold of the rod and I started to step my foot up and he closed the door.

Q. Well, now, did you still have your hand on the rod when the door closed?

Mr. S. Bangel: She did not say she had a hold of it.

The Court: She is on cross examination, Mr. Bangel.

A. I reached up to catch hold of it. I did not have my hand on it. I reached up to catch hold of it and started to step my foot up in it and he caught my arm with the door. He closed the door on my arm.

Q. In other words you never touched the rod?

A. I reached up to—no, sir, I never did get hold of the rod.

Vol. III Q. Never got hold of the rod. And you were
11/6/59 standing there then, if I may illustrate, with both
page 22 } feet on the curb (illustrating to the witness)?

A. Yes, sir.

Q. And putting your right arm forward (demonstrating)?

A. Unh-hunh.

Q. And you never touched the rod to step up?

A. No, sir.

Q. It was when your arm was in this—

A. I was standing—I was just reaching like this (demonstrating), just reaching to step.

Q. You were facing the side of the bus, were you not?

A. I was approximately about an inch from the middle of the door there.

Q. Facing the doorway just as I am facing the door to the Judge's chamber?

A. Yes, sir, I was.

Q. And the bus would be moving in a direction which would be the way I am now pointing to my right?

A. It would be moving in this direction this way.

Q. Well, the bus is in—the door is in the side of the bus,
Mrs. Beecher?

Vol. III A. Yes, sir.

11/6/59 Q. And you would be facing that side to get
page 23 } aboard?

A. Yes, sir.

Louise Beecher.

Q. And as you face the door as I do here, would you mind stepping down? Maybe both of us would be headed in the same direction.

A. (Witness complied and stepped down from the witness stand.)

Q. In other words if the Judge's door was the door to the bus you would be facing as I am now?

A. Yes, sir.

Q. And show me now. You put your hand up.

A. I was standing just like this waiting for the bus, and I started to reach my foot up when he closed the door.

Q. Did you get your foot up to the step?

A. No, I didn't. I had it up as if to step.

Q. You were fixing to but you had not taken your feet off the ground?

A. No, sir. I had not.

Q. Now, the bus would be going in the direction of the Judge?

A. Like I was fixing to step this way, and the bus would be going directly this way.

Vol. III Q. If this is the door to the bus the bus would be
11/6/59 going in this direction?
page 24 }

A. Yes, it would.

Q. And you were standing like this to get aboard?

A. Yes, sir.

Q. Now, when the bus started off did you start running backwards?

A. No, sir, I started—the bus pulled out and I ran along and hollered "You have me in the bus," and I couldn't make him hear me, so I jerked my arm right quick. That's when I fell.

Q. Well, you started running forward?

A. Yes, sir. I was.

Q. Well, the bus was going?

A. Yes, sir, I was going with the bus.

Q. Well, wouldn't you be going backwards when you did that?

A. Why would I be going backwards?

Q. He was going that way but you had your right hand in the bus. It would seem to me—and you have told me the bus was going in the direction of the Judge, that if you put your hand up like this reaching for the rod and the bus started in this direction, you would have to run backwards.

Louise Beecher.

Vol. III A. He was going like this with me, and I was
11/6/59 going like this to the side with it (demonstrating).
page 25 } Q. Now you are going sideways with the bus?
 A. No, sir.

 Q. Were you running forward or backward?
A. I was going towards my side this way (demonstrating).
I was running with my feet that way.

Q. I see. Now, it must have been a very lapse of time before
you pulled your arm back, is that correct?

A. Well, he had time to go approximately ten feet before I
jerked my arm out.

Q. Would it be fair to say that as you now recall it, that the
bus did not start until it attempted to close the door?

A. No, sir, he closed the door and started right of.

Q. I say—you say he closed the door and then started off—

A. Yes, sir.

Q. —is that correct?

A. Yes, sir.

Q. Why didn't you then remove your arm when he closed
the door?

A. He had done caught my arm in the door when the door
closed and he started right off.

Vol. III Q. And you could not get it out, is that your tes-
11/6/59 timony?
page 26 } A. No, sir, I couldn't.

 Q. Was that due to the fact—that you could not
get it out, was it due to the fact that you were excited?

A. Well, it was due to the fact that he had my arm caught in
there and I couldn't get it out without jerking it.

Q. Without jerking? How were you dressed at that time?

A. I had a skirt and blouse, and I had a short sport coat
thrown over my shoulder.

Q. In other words you had your arm in a coat and a
sweater?

A. No, sir, my arm—I had on a shortsleeved black sweater.

Q. You had a shortsleeved sweater?

A. And I had my coat over my shoulders.

Q. Like you have that sweater on now?

A. Yes, sir.

Q. And this was in January?

A. Yes, sir, it was warm, one Friday afternoon. It was very
warm that Friday afternoon.

Q. What do you mean "warm?"

Louise Beecher.

Vol. III A. Well—
11/6/59 Q. Would thirty degrees be warm?
page 27 } A. No, it was approximately forty to forty-five
 degrees.

Q. You think it was 40 to 45 degrees?

A. Yes, sir.

Q. And you don't wear a coat in that temperature?

A. I just got off the Community Motor Bus, and I had my coat over my shoulders.

Q. You were standing there for four or five minutes, I believe you said, waiting for a bus and you did not bother to have your arms—

A. I had my arms down beside me.

Q. You had your arms down beside you. Now, Mrs. Beecher, after you disengaged yourself from the bus and you were helped to your feet, I believe, by some gentleman who was—

A. Yes, sir.

Q. —who was standing nearby—

A. Yes, sir?

Q. And you don't know who he was?

A. No, sir, he said he just got off the bus.

Q. I see. And you haven't been able to locate him, of course?

A. No, sir, I did not ask him his name.

Q. Now, you went in a drug store nearby. Is that
Vol. III the drug store up on the corner of High and Wash-
11/6/59 ington
page 28 } A. High and Court. I walked up to High and

Court, right here.

Q. You walked up to High and Court?

A. Yes, sir.

Q. Is that the drug store on the diagonal corner of this court house?

A. Yes, sir.

Q. And who did you see there?

A. The druggist.

Q. What is his name?

A. I don't know.

Q. And you went there, from there to the hospital?

A. Yes, sir.

Q. Did you telephone your husband?

A. They did from the hospital.

Q. How did you go from the drug store to the hospital?

A. I rode the Naval Hospital bus.

Q. The Naval Hospital bus?

A. Yes, sir.

. *Louise Beecher.*

Q. And got off at the hospital and presented yourself at the emergency room?

Vol. III A. Yes, sir.

11/6/59 Q. And when did Mr. Beecher come to the hos-
page 29 } pital?

A. Well, he was working that night, and it was approximately 9:30 when the Norfolk County Police got him off his run and sent him to the hospital.

Q. What business is Mr. Beecher in?

A. He drives a bus. He drives a Community Motor bus.

Q. He drives a Community Motor bus?

A. Yes.

Q. As a matter of fact, Mrs. Beecher, a Community Motor bus and the Tunnel bus are both gray, are they not?

A. Yes, sir, they are both gray but the Tunnel bus has a green stripe around it, and up over the window it has got black letters saying "Elizabeth River Tunnel Commission," and anyone can tell—

Q. It was dark when this occurred, was it not?

A. It was not plumb dark. It was getting dark.

Q. It was just about sundown, wasn't it, in January at 5:20 or thereabouts. I believe you say?

A. Yes, sir.

Vol. III Q. Do you know what time the sun sets on Jan-
11/6/59 uary the 23rd?

page 30 } A. No, sir.

Q. But you do know that it was twilight or dusk at the time?

A. Yes, sir.

Q. Who engaged Dr. Ward. your husband?

A. No, sir, the doctor at the hospital that examined my arm asked me who my family doctor was.

Q. And Dr. Ward had treated you before?

A. Yes, sir.

Q. And so they called him for you, I suppose?

A. Yes, sir.

Q. What time did Dr. Ward get to the hospital?

A. I don't know exactly the time, but he came right straight on from his office right to the hospital to see me.

Q. And then you stayed in the hospital overnight?

A. I stayed until Monday afternoon.

Q. And this happened on what day of the week, Friday?

A. Friday.

Q. A Friday, and you stayed until Monday afternoon. This

Louise Beecher.

Vol. III \$150.00 for medicines, does that include medicines
11/6/59 given you by Dr. Ward or medicines that you
page 31 } bought to administer to yourself at home?
A. It was medicine Dr. Ward give me prescrip-
tions for me to take.

Q. I understand they are medicines that you bought from a
drug store. They are the pills; they are not the shots?

A. No, they are the pills.

Q. The shots were given to you?

A. Dr. Ward's nurse.

Q. By Dr. Ward's nurse. Mrs. Beecher, I suppose you
would have—if you had a receipt you would have produced it
already, but we might clear that up. Do you have receipts for
those medicines?

A. No, sir, I don't.

Q. What drug store did you—

A. Irwins Drug Store in Deep Creek Boulevard.

Q. Irwins?

A. Yes, sir.

Q. Now, the hospital bill of \$73.78, that has been paid?

A. Yes, sir.

Q. Do you have a statement of it?

A. Yes, sir, Mr. Bangel has a statement of it.

Vol. III Q. Well, I notice there this includes an X-Ray of
11/6/59 \$150.00. What other X-ray did you have?

page 32 } A. They sent me back to take an X-Ray of my
spine.

Q. To take an X-Ray of your spine?

A. Yes, sir.

Mr. Breeden: Do we have that X Ray bill?

Mr. A. A. Bangel: Yes, I think so.

(Document handed to opposing counsel.)

By Mr. Breeden:

Q. I notice that this bill has six-seventy-five for medicine.
Does that include—is that included in your \$150.00 statement?

A. No, sir.

Q. Is this the bill for the X-Ray that you went to on Feb-
ruary the 17th?

A. Yes.

Mr. Breeden:: Do you want to put these in?

Mr. A. A. Bangel: Yes, sir, put them both in evidence.

Louise Beecher.

The Court: These will be marked as Plaintiff's Exhibits 1 and 2.

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11/6/59 (Received and marked in evidence as Plaintiff's page 33 } Exhibits 1 and 2.)

By Mr. Breeden:

Q. Now, neither of those bills have been paid, have they?

A. Yes, sir, my hospital bill has been paid.

Q. That is an unreceipted copy of it then, is that it?

Mr. A. A. Bangel: Yes, sir.

Mr. Breeden: I thought you said the second bill was billed to you because the other bill hadn't been paid?

Mr. A. A. Bangel: I tried to tell counsel that Mrs. Beecher's bill was billed to my firm because the hospital said that because of her financial condition they did not want to incur the obligation of taking this X-Ray, so I said charge it to her and we will guarantee the payment of it out of anything she might receive. That is exactly what we have done,

Vol. III so, they billed it to us but to her name. That is 11/6/59 why it is billed to her name. It has not been paid page 34 } because we told them we would guarantee it out of anything she might receive.

Mr. Breeden: Your Honor, I object

The Court: I sustain the objection. Gentlemen of the jury, disregard that statement.

By Mr. Breeden:

Q. Now, Mrs. Beecher, for whom did you work from which you got \$60.00 a week?

A. I worked for myself.

Q. For yourself?

A. Yes, sir.

Q. How long have you maintained a beauty parlor in your home, is that what I understand?

A. Yes, sir.

Q. How long have you maintained a beauty parlor in your home?

A. I started right around Christmas.

Q. You started around Christmas?

A. A little before Christmas.

Louise Beecher.

Vol. III Q. Of 1958?
11/6/59 A. Yes, sir.
page 35 } Q. In other words you started before Christmas
of '58, and on January the 23rd you tell us you
sustained an injury that prevented your continuing
with that business?

A. Unh-huh.

Q. Is the answer "yes?"

A. Yes, sir, I was working. I had a little shop of my own?

Q. Do you have equipment there that you have purchased?

A. I had equipment.

Q. You had equipment?

A. Yes, sir. I had the drier and one chair.

Q. And one chair?

A. Yes, sir.

Q. Do you have that now?

A. No, sir.

Q. Well, where have you earned, you said, approximately
thirty to thirty-five dollars a week as a beauty operator since?

A. I worked for Lougenia's Beauty Shop.

Q. I see. Are you employed at the present time?

A. No, sir.

Vol. III Q. Mrs. Beecher, this \$60.00 a week estimate
11/6/59 that you gave us is based upon a relatively short
page 36 } period of operation, is it not?

A. Yes, sir.

Q. With holidays intervening?

A. I worked holidays and all.

Q. You say what?

A. I worked holidays and all.

Q. You worked Christmas?

A. No; sir, I didn't work Christmas. I worked Christmas
Eve.

Q. You have been employed elsewhere though, have you
not?

A. Yes, sir.

Q. And you have from time to time drawn unemployment
compensation, have you not?

Mr. A. A. Bangel: We submit that is highly improper,
your Honor.

The Court: It depends on when it was, Mr. Breeden.

Mr. Breeden: Well, I will tell you why I want to ask the
question.

Louise Beecher.

Mr. A. A. Bangel: I don't want him to tell. I would like to be heard in chambers.

Vol. III Mr. Breeden: Well, your Honor, it is simply
11/6/59 this: That the lady has testified on direct-exam-
page 37 } ination of her rate of income of \$60.00 a week.
 which was certainly offered for the purpose of
creating in the minds of the jury that if you took \$60.00 a
week and multiplied it by 52 weeks that she would have had an
income of around \$3,000.00.

I want to show that the record of Mrs. Beecher would not sustain that. It certainly would be legitimate cross examination.

Mr. A. A. Bangel: I would like to be heard on that.

The Court: All right, sir.

Mr. A. A. Bangel: I don't think it is proper.

Mr. Breeden: Do you contend—

Mr. A. A. Bangel: I contend that the question is improper, and I don't know what her answer would be if it was asked her.

(Whereupon the Court and counsel for both sides retired in chambers, after which the trial continued as follows:)

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page 38 } By Mr. Breeden:

Q. Mrs. Beecher, for how long prior to opening this beauty parlor in your private residence had you been unemployed?

A. Well, I will say approximately four months.

Q. Four months?

A. Yes, sir.

Q. And prior to that where had you been employed?

A. Well, I worked for Rental Uniform Service for awhile.

Q. Rental Uniform Service for awhile?

A. Yes, sir.

Q. And prior to that where had you worked?

A. I worked for a printing company in Norfolk.

Q. And—

A. At Teagle and Little.

Q. A Printing company in Norfolk, Teagle and Little?

A. Yes, sir.

Q. Now, would you mind telling us when you worked for Teagle and Little?

Louise Beecher.

Vol. III A. I think it was in 1944 or '45, if I am not mis-
11/6/59 taken.

page 39 } Q. '44 or '45?

 A. I wouldn't say for sure.

 Q. Is that the year in which you terminated your
work there?

 A. Yes, sir, I think it was '44 or '45. I wouldn't say for
sure.

 Q. That you stopped working there; and then you worked
for this uniform company for awhile?

 A. Yes, sir.

 Q. I frankly don't know what you mean "for awhile."

 A. I worked there about eight months.

 Q. About eight months?

 A. Yes, sir.

 Q. And then you were unemployed for four months?

 A. Yes.

 Q. Did you go to one of those beauty schools to learn?

 A. Yes, sir, in New York City.

 Q. New York City. How long ago was that?

 A. I went to school in 1949.

 Q. In 1949. And in December, 1958, you decided that you
would get a chair and drier?

Vol. III A. And whatever else it takes.

11/6/59 Q. And whatever else it takes and start out a
page 40 } business in your own home?

 A. And I worked for Joseph's in New York for
awhile.

 Q. Joseph's. How long was that?

 A. I worked for him.

 Q. When was that, Mrs. Beecher?

 A. I worked for him in 1958, I think it was.

 Q. 1958, you think?

 A. Yes, sir.

 Q. For how long?

 A. I worked for him for about four months, I think it was,
three and a half or four months.

 Q. Three and a half to four months?

 A. And before Christmas I worked for Modernistic Beauty
Salon.

 Q. Modernistic Beauty Salon?

 A. Yes.

 Q. I see. Now, how long did you work there?

 A. I worked there for a month and a half. I worked when
one of the girls was out sick.

Louise Beecher.

Q. That is in the year 1958?

A. Yes, sir.

Q. Last year?

Vol. III A. Unh-huh, before Christmas.

11/6/59 Q. Before Christmas. Then do you recall what
page 41 } period that was? I am getting a bit confused be-
cause you said you started out on your own around
Christmas of 1958.

A. I started out on my own about a week before Christmas.

Q. And before that you had worked for this other beauty
parlor?

A. Yes, sir.

Q. And before that you had been unemployed for four or
five months?

A. Yes, sir.

Q. And then you had worked for this uniform service?

A. Yes, sir.

Q. What was your rate of compensation with the uniform
service?

A. I worked on piece work and made approximately forty-
eight to fifty dollars a week.

Q. Would you give us the name of that company?

A. Rental Uniform Service on Victory Boulevard.

Q. On Victory Boulevard? And you said that you made
around \$45.00 a week to \$50.00?

A. Unh-huh.

Vol. III Q. What were you, a seamstress there?

11/6/58 A. Yes, sir.

page 42 } Q. Have you worked or applied for work as a
waitress since?

A. No, sir, I have not.

Q. Since, ma'm?

A. No, sir.

Q. I did not mean this time, Mrs. Beecher. I mean since this
accident?

A. No, sir.

Q. Let me ask you the question first so the record will be
clear. Since January the 23rd, 1959 have you worked or ap-
plied for work as a waitress at any place?

A. At the Virginia Employment Service when my arm was
hurting and I had to go back to work, they said they wanted
me to go to the Navy Yard and work at the Officers Club.

Q. That is what I had reference to.

A. And he said in my shape I could not do that kind of
work.

Louise Beecher.

Q. Who said that?

A. The man in the Officers Club.

Q. So you did go there to work there, did you not?

A. No, sir.

Vol. III Q. How could the man in the Officers Club say
11/6/59 that if you did not go—

page 43 } A. I went over and talked with him.

Q. And you told him about your arm and he said well, if you feel that way—

A. Well, no, they knew at the Employment Office. They told me I should tell him when I went over, and I did.

Q. How long has Dr. Ward been your physician?

A. Well, I went to him about a year before I got hurt when I have colds or anything like that; I would go to Dr. Ward.

Q. He had been your doctor, you think, once or twice during—

A. No, sir.

Q. —your prior life?

A. I have been three times to him when I had the flu or the cold or something like that.

Q. Mrs. Beecher, have you examined an Elizabeth River Tunnel bus since your accident to see how the doors worked and how you would face the door and what would happen if your arm was hit or anything of that kind?

A. No, sir, I have not.

Q. Are you certain, Mrs. Beecher, that it was an Elizabeth Tunnel bus and not another Community Bus?

Vol. III A. Yes, I am.

11/6/59 Q. Where were you going at Norfolk at 5:20
page 44 } on January 23rd?

A. I was going—it was Friday afternoon. I was going to do some shopping. I had to go and get my husband a jacket.

Q. You were going where?

A. I was going to Penny's department store.

Q. Penny's?

A. Yes, sir.

Mr. Breeden: Thank you, Mrs. Beecher.

Mr. S. Bangel: You may come down

Call Dr. Ward.

Mr. Breeden: Just a minute. There was one thing I wanted to ask you and failed to do so.

The Court: Come back up here, Mrs. Beecher.

The Witness: All right.

Dr. C. F. Ward.

By Mr. Breeden:

Q. Can you tell us what trees, poles, signs or other obstructions are at or about the curb at the bus stop on South and Washington Streets?

Vol. III
11/6/59 } A. Yes, sir. There is a telephone pole there, then page 45 } these signs tacked on there that says "Elizabeth River Tunnel" where the bus stops. There is a pole with a big green sign.

Q. Where was that pole with relation to your movement when the bus started?

A. I never paid any any attention to the pole, sir.

Mr. Breeden: All right.

Mr. S. Bangel: Thank you, Mrs. Beecher, come down.

The Court: Call Dr. Ward, please.

DR. C. F. WARD,

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

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page 46 } DIRECT EXAMINATION.

By Mr. S. Bangel:

Q. State your name, please?

The Court: Just a minute.

Mr. Breeden: Your Honor, we were looking for Dr. Psimas. We would like to have Dr. Psimas to hear Dr. Ward. They will be talking about the same thing in giving their respective professional views.

The Court: Has Dr. Psimas come yet?

Mr. A. A. Bangel: It would not make any difference anyway.

The Court: Come up here, gentlemen.

(A side-bar conference took place, out of the hearing of the jury, after which the following occurred:)

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11/6/59

page 47 } Mr. Breeden: Your Honor, suppose we have the stenographer note that now, or later?

The Court: You can do it now, if you choose.

Dr. C. F. Ward.

Do you want to take the stenographer back in there?

Mr. Breeden: If we could do it a little later on.

Mr. A. A. Bangel: That is agreeable with me.

The Court: Very well, proceed.

By Mr. S. Bangel:

Q. State your name, please?

A. Dr. C. F. Ward.

Q. What is your occupation?

A. Physician.

Q. Dr. Ward, what medical school did you graduate?

A. Medical College of Virginia.

Q. Where did you intern?

A. At Boston.

Q. Where did you serve your residency?

A. In Boston.

Vol. III Q. What with in Boston?

11/6/59 A. Lakeside Hospital.

page 48 } Q. Dr. Ward, you are licensed to practice medicine in this state?

A. Yes, sir.

Q. When were you so licensed?

A. 1940.

Q. Doctor, what medical societies do you belong to?

A. Norfolk County, the Seaboard, Virginia, and the American Medical Association.

Q. Are you associated with any hospitals?

A. Maryview and Portsmouth General.

Q. Are you on the staff of those hospitals?

A. Yes.

Q. Doctor, did you have occasion to see Mrs. Louise Beecher and treat her for injuries she received in an accident which occurred on the 23rd day of January, 1959?

A. Yes, sir.

Q. Where did you see her?

A. At Portsmouth General Hospital.

Q. When did you see her?

A. The evening of the accident?

Q. Will you tell these gentlemen of the jury what history she gave you, Doctor?

Vol. III A. The patient stated that she was injured while
11/6/59 boarding a bus and her arm was caught in the door
page 49 } of the bus, and as the bus took off she snatched her
arm back through the door.

Dr. C. F. Ward.

Q. Doctor, did you see her arm?

A. Yes, sir.

Q. Describe to the jury what the examination revealed both subjectively and objectively.

A. The patient was injured on 1/23/59, was admitted to Portsmouth General Hospital, and gave a history of severe pain of the right shoulder, right side of the chest and back and right side of the neck posteriorly.

Q. "Posteriorly" would be where, Doctor?

A. Behind the back of the neck (illustrating).

Q. Would you point on your body the places she was complaining of pain, Doctor?

A. (Witness complied:) Here (indicating).

Q. Where else?

A. The shoulder, her entire right arm (indicating.)

Q. All right, sir.

A. The neck posteriorly—headache, nervous and extreme pain the length of the entire right arm. Examination revealed a highly nervous individual and acute pain. The anterior and posterior chest muscles were tender.

Vol. III Q. What do you mean by "anterior and pos-
11/6/59 terior chest muscles?"

page 50 } A. This side and the back side of the chest.

Q. All right, sir. This is what your examination revealed?

A. That's right.

Q. Go right ahead, Doctor.

A. The back, the right side. The muscles were tender and deep breathing slightly increased the pain. Motion of her neck increased the pain. Patient was holding her right arm in a fixed position. Acutely tender over the right shoulder. Motion of right arm in any direction increases pain. Right arm from the shoulder to the tip of the fingers were swollen.

Q. Will you point that out to the jury?

A. Right here, down to the tip of her fingers there was some swelling (indicating.)

Q. Yes, sir.

A. Every part of the arm is tender down to the finger tips. Motion of any joint were extremely painful in the right arm. X-Rays of the chest—

Q. Doctor, before you leave there, as to her arm, will you describe to these gentlemen of the jury what her arm looked like just above the elbow down?

A. It was slightly enlarged. It was larger than the other

Dr. C. F. Ward.

arm and extremely painful to touch in any area,
Vol. III and motion of any joints were painful.

1/16/59 Q. What was the color of the skin and so on?

page 51 } A. The color of it at that time was normal.

Q. Did it change color?

A. Later.

Q. Now, Doctor, what about the surface of it, was it irregular, lumpy or what?

A. It was lumpy.

Q. Describe those lumps to the jury.

A. Small areas from just above the elbow down practically to the wrist showed little ridges of swelling on both sides of the arm.

Q. Ridges of swelling right down the arm?

A. Yes, sir.

Q. Known as hematomas down the arm, Doctor?

A. That's right.

Mr. Breeden: Let the Doctor use those big words, Mr. Bangel.

By Mr. Bangel:

Q. Now, go right ahead Doctor. Tell us, was she admitted to the hospital?

A. Yes, sir, she was. She was sedated and treated symptomatically for the night and X-Rays the following morning of her chest including her rib and shoulder were

Vol. III negative for fracture.

11/6/59 Q. In other words she did not have any broken
page 52 } bones?

A. That's right.

Q. All right, sir.

A. The following day the entire arm and below the shoulder to the tip of the fingers were swelled and blackened with hematomas or hemorrhages under the skin had formed.

The patient was complaining of acute pain. Patient was kept under sedatives and ice packs through the day. Condition of patient remained the same but her nerves became so involved that it was decided to discharge her on the 26th of January. Patient was followed in the office. Her progress was slow. Hematomas finally disappeared after four weeks and the swelling was practically gone.

Motion of the shoulder was limited and continued to produce pain. Shoulder and right arm remained very painful through March. The symptoms began to subside over the

Dr. C. F. Ward.

acute stage. She has complained since of the arm tiring after a short amount of work. She is able to raise the arm about the level of her head but full extension produces soreness in the shoulder joint.

She suffered a traumatic bursitis of the right
Vol. III shoulder, hematoma and sprain of the entire right
11/6/59 arm, hand, and a sprain of the thoracic and cervical
page 53 } muscles on the right side.

Q. Doctor, you say your diagnosis was that of a traumatic bursitis. One of the things which was wrong with the—

Mr. Breeden: Your Honor, I object to Mr. Bangel testifying. The doctor is very competent to get all those words.

By Mr. S. Bangel:

Q. Doctor, will you tell us what is traumatic bursitis? You mentioned that was one of the things that was wrong with her.

A. Bursitis, due to a blow, is a very tender inflammation around the tendons and ligaments in the shoulder joint. This inflammation right around those tendons. That is bursitis.

Q. What was the next thing that was wrong with her?

A. The hematoma and sprain of the entire right arm and hand. Sprain of the thoracic and cervical muscles on the right side.

Q. Now, Doctor, "sprain of the thoracic and cervical muscles on the right side." Where is the thoracic
Vol. III and cervical muscles?

11/65/9 A. That includes your rib cage that runs from
page 54 } the first rib down to your 12th rib.

Q. And how about the cervical muscle?

A. That would run from just above the chest up to the base of the skull.

Q. Those muscles were strained?

A. That's right.

Q. "Sprained?"

A. That's right.

Q. Doctor, when those muscles are sprained in there, will you tell the jury what this is, a sprain?

A. A sprain is usually due to a violent jerking, pulling or a blow, or the muscles are congested immediately with blood and becomes inflamed. It's swollen.

Q. Doctor, it becomes congested with blood. Is that where the muscles are frayed and torn in there?

Dr. C. F. Ward.

Mr. Breeden: Your Honor, I object to that.

The Court: Sustain the objection.

Mr. Breeden: Just let the Court rule.

The Court: I have sustained the objection.

By Mr. S. Bangel:

Vol. III Q. What causes it, Doctor, to become congested
11/6/59 with blood?

page 55 } A. Any sudden blow, jerking, any abnormal in-
jury or any type of a blow that hits the arm or
body, wherever it may be.

Q. How does that heal, Doctor?

A. It heals through a process of repair through the blood stream, which takes the course of time, I mean where eventually the acute inflammation subsides to sub-acute. The swelling gradually goes to a chronic stage.

Q. Doctor, do you have any scar tissue there?

A. Not in this muscle, no.

Q. Where would you have any scar tissue?

A. You can get adhesions in a connective surface, the tissue in the joint space where ligaments are involved.

Q. I see. Were these lady's ligaments involved?

A. Of her right shoulder.

Q. Well, tell us about her ligaments in her right shoulder, if you will.

A. Well, that is what traumatic bursitis is. Due to the sudden jerking of the arm, the swelling and the inflammation that took place in these ligaments are the things that caused the acute pain in her right shoulder.

Vol. III Q. Now when you—

11/6/59 A. Which inhibited her motion.

page 56 } Q. When you say "acute pain," what do you
mean?

A. Pain of violence; severe.

Q. Now, how does the tearing of the ligaments heal?

A. The same way, through a process of your blood supplying—I mean it repairs over from the acute stage to sub-acute into your chronic stage.

Q. Does it leave any scar tissue?

A. If there is enough congestion it will leave scar tissue there.

Q. Is that permanent?

A. It is.

Mr. Breeden: He hadn't said it could in this case here.

Dr. C. F. Ward.

By Mr. S. Bangel:

Q. Doctor, in your opinion, in this situation have this lady's ligaments been torn and bled?

A. Yes, sir.

Q. And that bleeding heals how, with scar tissue?

A. That's right.

Q. And is that scar tissue permanent?

A. Yes.

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11/6/59 } Mr. Breeden: If your Honor please, I think
page 57 } that the Doctor should tell us whether it exists in
this case first.

Mr. S. Bangel: He has answered it.

Mr. Breeden: No, he has not. He has gone from the specific to the hypothetical. I don't know what the answer is, but Dr. Ward can tell us whether it exists here.

The Witness: I did not go to the hypothetical. I said it did exist.

The Court: He said it did exist.

Mr. Breeden: In Mrs. Beecher?

The Witness: That's right.

Mr. Breeden: I see. All right.

By Mr. S. Bangel:

Q. Doctor, is that scar tissue permanent?

A. Scar tissue is permanent.

Q. Now, Doctor, tell—

Vol. III

11/6/59 } The Court: Are you asking in every case or in
page 58 } this case?

By Mr. S. Bangel:

Q. In this case?

A. Yes, sir.

Q. Doctor, you said you had to give her sedation. What did you mean by that?

A. They are drugs in the narcotic line to ease the person's pain.

Q. Has it been necessary that she have a lot or a little of that?

A. She had quite a bit of it.

Q. Doctor, has this lady been under your care since she left the hospital?

A. Yes, sir.

Q. Is she still under your care?

Dr. C. F. Ward.

A. Yes, sir.

Q. Has she been seen by you frequently or infrequently?

A. For the first five months following the accident she was seen quite frequently. Since then, I mean, it has varied from ten days to two weeks

Q. Doctor, how much is your bill for services rendered to Mrs. Beecher to date?

Vol. III A. \$460.00.

11/6/59 Q. I'm sorry—?

page 59 } A. \$460.00.

Mr. S. Bangel: You may inquire.

CROSS EXAMINATION.

By Mr. Breeden:

Q. Doctor, getting to that scar tissue, can you see scar tissue?

Mr. S. Bangel: Excuse me, let me ask just one more question.

Mr. Breeden: Surely.

By Mr. S. Bangel:

Q. Doctor, what does the future hold for this lady?

The Court: What is the question? I didn't get it.

By Mr. S. Bangel:

Q. What does the future hold for this lady in reference to her injury?

A. It is indefinite. I mean that is hard to say.

Vol. III

11/6/59 Mr. Breeden: I move that that be stricken page 60 } out.

The Court: I sustain the objection.

Mr. S. Bangel: All right, you may cross-examine.

By Mr. Breeden:

Q. Doctor, we had something in your testimony about scar tissue in a case of an injury such as we have had described here. Can you see that scar tissue?

A. No, sir.

Dr. C. F. Ward.

Q. I believe you have testified that these X-Rays and there were two sets of X-Rays, were there not?

A. That's right.

Q. Were both *negative*?

A. That's right.

Q. Meaning that nothing was shown by X-Ray that would reveal an injury?

A. It would only show the bone.

Q. I understand, but the answer to that is—?

A. No.

Q. No. All right.

Vol. III Mr. S. Bangel: I did not hear the doctor, Judge,
11/6/59 in answer to that question.

page 61 } The Court: He said—what was it?

The Witness: He wanted to know if the X-Rays showed any injury to the shoulder. Is that correct?

By Mr. Breeden:

Q. Yes, sir; or any other part of the body. And the answer was no.

A. No, not to any other part of the body. I do not answer to any other part of the body. We are speaking of the shoulder.

Q. Well, the X-Rays revealed no injury?

A. Negative for fracture.

Q. Negative in every respect so far as reading those X-Rays are concerned?

A. That is what I stated on that report.

Q. We are stating it in Court now. Is the answer, no; is it not?

A. That is right.

Q. We made that point. Fine. Now, these pills that you are talking about were narcotics, right?

A. Yes, sir.

Q. Would they require a prescription each time
Vol. III to fill them the second time?

11/6/59 A. Sure.

page 62 } Q. How many times did you order a dozen of these pills that cost \$4.90 a dozen?

A. I couldn't answer that for you.

Q. Sir?

A. I couldn't answer that for you.

Q. Your record doesn't show how many times?

Dr. C. F. Ward.

A. No. As the patient needs it we pick up the 'phone and order it for them.

Q. It is done by telephone?

A. Certainly.

Q. And you don't recall how many times you did that, your record doesn't show it?

A. No, sir.

Q. That plays no part in fixing your charges?

A. No, indeed.

Q. Incidentally, that \$460.00, how is that broken down anyway?

A. Yes, sir—

Q. Could you give me the breakdown?

A. No, sir. I did not bring that with me.

Q. Does that include your appearing here today and testifying?

A. No, sir.

Vol. III 11/6/59 Q. Could you tell me how it is made up, Doctor, is it so much a visit?

page 63 } A. The amount of time we spend with the patient, just like anyone else makes a charge. The amount of time we spend with the patient in treating them.

Q. Don't you charge so much a visit?

A. No, not necessarily, absolutely not.

Q. In other words an office call with you isn't a certain amount?

A. No, indeed.

Q. In other words I might come to you and you may charge me \$3.00, \$5.00, or you might charge me \$25.00?

A. That's right; that's right.

Q. No part of this bill has been paid, has it, Doctor?

A. No, sir.

Q. Sir?

A. No, sir.

Q. Is Mrs. Beecher a patient of yours of long standing?

A. No, sir.

Q. She is not. Never treated her before?

A. I never saw the lady until she was injured in this accident.

Q. I see.

A. No, sir.

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page 64 } Mr. Breeden: That is all.

Dr. C. F. Ward.

RE-DIRECT EXAMINATION.

By Mr. S. Bangel:

Q. Doctor, can you give us an idea or an estimate of approximately how many times you have had to see her?

A. It would run approximately, I'd say, forty-five to fifty times or more.

Q. Now, Doctor, you say you have never seen Mrs. Beecher before this accident. Do you recall when you treated her—

Mr. Breeden: Now, your Honor—

The Court: I sustain the objection.

Mr. Breeden: We've got that covered.

By Mr. S. Bangel:

Q. Doctor, would you recall all of your patients you may have treated for a cold?

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page 65 } Mr. Breeden: It is of no consequence there.

The Court: I sustain the objection.

By Mr. S. Bangel:

Q. Mrs. Beecher is still under your treatment, is she not?

A. Yes, sir.

Mr. S. Bangel: Thank you, Doctor.

Mr. Breeden: Dr. Psimas is here now, as I understand it. Could we call him?

Mr. A. A. Bangel: I have no objection.

The Court: You have no objection to Dr. Psimas being called now?

Mr. S. Bangel: No.

Thank you, Doctor.

The Court: You may go, Doctor. Thank you, sir.

Mr. S. Bangel: Doctor, one more question.

Vol. III The Court: All right.

11/6/59

page 66 } (Witness resumed witness stand.)

By Mr. S. Bangel:

Q. He spoke of X-Rays. Would an X-Ray show any other injury other than bone injury?

A. Yes, sir.

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Q. Would it show the type of injury this woman had other than the bone injury?

A. No.

Q. It would not?

A. No, sir.

Mr. S. Bangel: Thank you, Doctor.

DR. GEORGE N. PSIMAS,
Vol. III called as a witness on behalf of the defendants out
11/6/59 of order, having been first duly sworn, was ex-
page 67 } amined and testified as follows:

DIRECT EXAMINATION.

By Mr. Breeden:

Q. Will you state your name, Doctor?

A. Dr. George N. Psimas.

Q. Dr. Psimas, what is your medical training?

A. I am an orthopedic surgeon.

Q. And where did you graduate in medicine?

A. University of Virginia.

Q. And what internship residency have you had served?

A. Well, I spent my internship and residency at the University of Virginia hospital.

Q. Were you a resident there in orthopedic work?

A. I worked there as a resident.

Vol. III Q. And residency, that is a specialty, is it not?

11/6/59 A. That is a concentrated period of training in
page 68 } this particular field.

Q. And does that deal with bones and ligaments and the like?

Mr. A. A. Bangel: We object to leading, if it please the Court.

The Court: I think it is not material, but go ahead.

By Mr. Breeden:

Q. Tell us then, Doctor, what part or phase of the human body that concentration refers to.

A. Well, in my residency it was in reference to orthopedic surgery, and orthopedic surgery is that field that has to do with the treatment of the motor skeletal disorders, injuries, infections, tumors, and so forth.

Dr. George N. Psimas:

The motor skeletal refers to the bony structures and the soft tissues.

Q. Muscles?

A. Muscles, ligaments and so forth.

Q. Now, what medical societies are you a member of?

A. Well, I am a member of the American Board of Orthopedic Surgeons, the American Academy of Orthopedic Surgeons, the American Fracture Association, and I am a fellow of the American College of Surgeons.

Vol. III
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page 69 } Q. And then you also belong to what I might term, the run of the mine—of Norflok County, state and American medical groups, do you not?

A. Yes, sir, I do.

Q. Doctor, when did you examine Mrs. Beecher, the plaintiff in this case?

A. I examined Mrs. Beecher on 3/20/59—March 20th, 1959.

Q. Will you tell the Court and jury the—describe that examination, its nature and your findings.

A. Well, I examined Mrs. Beecher in reference to an injury reported to have been sustained on January 23rd, 1959. Following the examination I checked certain films obtained at Portsmouth General Hospital. I also checked the reports of those films. My examination consisted of examination in reference to her head, neck and upper extremities.

I found no evidence of any significance, bony injury or muscular injury at that time.

Q. Did you put her through any tests with respect to positioning her body, her arm in anyway?

A. Yes, sir, I did. I checked her blood pressure. It was 110 over 80. Her heart sounds were right; her pulse was 80.

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page 70 } She was a well developed, well nourished white female. She was not in acute pain on the day of examination.

page 70 } Examination of the head and neck revealed no loss of motion nor was there any evidence of pain on deep palpation, nor was there any evidence of muscle spasm.

Q. Doctor, can I ask you to be more specific about that. When you say on "deep palpation," can you see a muscle spasm, if you have created one, due to pain in the body?

A. Well, let me put it this way: Muscle spasm is the tightness of the muscle. There are two ways that you can detect it. One is by feeling with your fingers. You can feel the muscle on one side. You can note that, and if it is in spasm

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it is tight; it feels tight. You feel a normal muscle on the other side it has some give to it. It is not tight. You can see muscle spasm in certain areas, depending on the place involved.

For example, if the muscle spasm in the neck is very, very severe the head would be actually rotated to one side. So, you can detect muscle spasm by feeling and by seeing. In her case I felt her neck. I could not feel any difference in the muscle by comparing the right side with the left side, nor was I able to see any muscle spasm.

Q. Thank you, sir. Go ahead. I just wanted to Vol. III have a little more detail on that point.

11/6/59 A. I checked the rotation of her head and neck page 71 } and lateral bending; that is, meaning bending the head to the right and to the left, and they appeared to be complete. I checked the area in the neck on either side above the *colar* bones here for tenderness over the nerve structures there, and there was no unusual tenderness noted.

I then checked the right and left upper arms and measured the right biceps and the left biceps. There was a slight difference here, but this difference is consistent in a right-handed person which she was.

I measured the right forearm and the left forearm and they showed some slight difference, which again is consistent with a right-handed person.

I then checked sensation and what we call vibration sense in the extremities to determine whether there was any nerve loss and found no difference here.

Q. Doctor, was there any phase of your examination that would the next day have caused Mrs. Beecher to be sore and suffering great pain and have to go back to Dr. Ward?

Mr. A. A. Bangel: We object to that, because the Doctor examined her more than two months afterwards. Vol. III He cannot testify as to what may have happened 11/6/59 more than two months before.

page 72 } Mr. Breeden: No, that wasn't it.

The Court: That wasn't the question.

Mr. Breeden: The question was—Mrs. Beecher said that this Doctor treated her in such a manner that she had to go back to the other doctor the next day and—

Mr. A. A. Bangel: She said she had pain the next day.

The Court: He asked him if his examination—well, go ahead, reframe your question.

Dr. George N. Psimas.

By Mr. Breeden:

Q. Doctor, was your examination a normal examination for the injuries that Mrs. Beecher complained of?

A. This is the kind of examination where one would want to determine the extent of the injuries that the patient has sustained, injuries of the type she described. I might add this: Sometimes when you feel normal muscles even the next day there may be some soreness.

Q. Well, Doctor, what I want you to answer was Vol. III did your examination in your opinion as a physi-
11/6/59 cian, did you examine this lady in such a way that
page 73 } it would require medical attention for her the next
day?

A. I would not think so. I hope not.

Q. Doctor, did you find from that examination any evidence of injury existing at that time or that in your opinion as a doctor would be a permanent injury to this lady's body?

A. No, I did not.

Mr. Breeden: Answer Mr. Bangel:

CROSS EXAMINATION.

By Mr. S. Bangel:

Q. Doctor, you saw Mrs. Beecher several months after the injury occurred?

A. March 20th.

Q. Yes, sir. And the injury she—she was injured on January 23rd?

A. That is correct.

Q. You saw her at the request of the defendants Vol. III in this case?

11/6/59 A. I did.

page 74 } Q. You saw her one time?

A. I saw her one time.

Q. At the time that you saw her she was complaining of pain in her shoulder, was she not?

A. (Witness referring to file) She complained of pain in the right upper *extremity*.

Q. Which would be in that area, would it not (indicating)?

A. Yes.

Q. And she told you frankly that she did not feel like her grip in the right hand was as good as the left?

A. That is correct.

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Q. She told you that she was not able to use her right side as well as she could the left side?

A. That is correct.

Q. She told you further that her arm went to sleep at night?

A. Yes, she did.

Q. And it got cold at times?

A. Yes, she did.

Q. And she complained at times of stiffness and soreness in her neck up through this area (indicating)?

A. Yes, sir.

Vol. III Q. Now, Doctor, the shoulder is constructed with
11/6/59 what bones?

page 75 } A. Well, the shoulder girdle is made up of several bones. The shoulder blade, which is located behind the collar bone, if I may use these terms so that they will be clear. The *colar* bone is located in the front and the humerus or upper arm is located here on the right.

Q. The humerus joins the scapula and glenoid fossa. collar bone?

A. The humerus joins the scapula and glenoid fossa.

Q. The glenoid fossa is the shoulder joint?

A. Yes.

Q. And they are joined with ligaments, are they not?

A. Yes.

Q. They are joined with numerous ligaments and structures up there, is that right?

A. That is correct.

Q. Now, Doctor, they have ligaments and they have blood vessels, muscles and a lot of soft tissue in that area?

A. That is correct.

Q. They also have a bursa there, do they not?

Vol. III A. That is correct.

11/6/59 Q. Now, that bursa serves what purpose, Doc-
page 76 } tor?

A. Well, this is the sub-deltoid bursa that he is referring to, and it acts as a sac which purpose it is to protect the bony prominences over which muscles usually ride.

Q. Well, now, Doctor, the deltoid muscle goes over the top of the acromion or the end of the shoulder joint?

A. The deltoid muscles have attachments to the acromion.

Q. And the bursa separates that muscle from that area?

A. The subdeltoid bursa is a sac beneath this deltoid muscle

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which is this large expanse of muscle that you see here (indicating).

Q. And that fits over the top of the bone?

A. It usually lies over the top of certain bony prominences. In the case of the subdeltoid bursa it lies over the rotative joint close to where certain shoulder muscles attach to the humerus, this bone, in order to produce this kind of motion (illustrating).

Q. That's right. So that if there was an act drawing on this area that muscle is pulled down on top of that bursa, would it not?

Vol. III 11/6/59 page 77 } A. (Pause) Any act of falling, pulling or what have you could conceivably pull this muscle over the bursa but it normally does it any way when you do this (illustrating).

Q. Yes, sir. It has a tendency, when you pull away like that (demonstrating) to mash away just as a fall would on it?

A. Yes, it could.

Q. Now, Doctor, if after this accident Mrs. Beecher's shoulder was swollen and very painful, what would cause that swelling?

A. Well, of course, I obtained the history from her when I checked her, and she gave me the history of the pain and soreness, swelling and discoloration.

Q. Yes, sir.

A. I would assume that most of that was due to bleeding in the soft tissues from injury.

Q. That would be the ligaments and cartilage in that area, is that right?

A. To the adjacent structures. I don't know which ones.

Q. Which would be the ligaments, the cartilages and the muscles and the nerves in that area, is that right, Doctor?

A. To those structures, to some of those structures.

Vol. III 11/6/59 page 78 } Q. Now, in order for those structures to bleed they must be torn, isn't that true?

A. Not necessarily. You could just contuse a blood vessel. It could rupture and bleed. It is more often due to torn tissue.

Q. Tearing of it, yes. Now, how would that heal; how would the tearing of a ligament heal?

A. Like any injury of that sort, by absorption usually of these red blood cells; and there might be some scarring

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formed in the soft tissues if the hemorrhage is severe. It depends on the extent of the original injury.

Q. Now, is that scarring permanent, Doctor?

A. (Pause) I saw no scarring in her case, but scarring in the way you reported it, I think it would be permanent.

Q. Well, now, Doctor, could you actually see with your eyes scarring in the shoulder joint?

A. Well, for it to be significant I would expect to be, say, with limitation of motion. You could not see it, no.

Q. You wouldn't be able to see it?

A. You might be able to feel it or you might be able to detect it by loss of motion, which she did not have;

Vol. III no.

11/6/59 } Q. Well, you took her arm, did you not, and
page 79 } moved it with your hand in various directions?

A. I asked her to put the arm through a range of motion.

Q. And you moved it yourself in various motions?

A. That is called passive motion. The other is active.

Q. Now, Doctor, a person who has had a sprain of the shoulder, a tearing of the ligaments and scar tissue formation will have cases when they have good days and when they are worst?

A. I will say yes to that.

Q. And this lady was cooperative, was she not, fully cooperative?

A. Yes, she was fully cooperative.

Q. And when you saw her and after her arm was moved around, would it be unusual that it would be sore the next day because of movements which she had not been accustomed to? That would not be unusual, would it, Doctor?

A. Well, I will just say this. I have done this type of examination hundreds of times and I have not produced any soreness following that type of thing.

Q. I am not trying to say that you produced any, I am saying this: That the movements in an area which

Vol. III have been injured would cause pain, would it not?
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page 80 } A. If you move an extremity through an ex-
} essive range or do it a large number of times it
} might produce some soreness.

Q. I understand that. Well, I am not trying to say that you permanently hurt this woman, Doctor, in any way: but I am saying this: that an examination of that kind where the arms are moved could cause pain to be present the next day, could it not?

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A. (Pause) It could.

Q. Now, Doctor—

Mr. Breeden: Your Honor, I think he has answered the question as one of possibility when, in fact, I think what we would seek here today, because we are talking about Mrs. Beecher, not just anybody anytime, is the probability if any part of this examination resulted in her being in the condition that she said she was in the next day.

The Court: I overrule the objection.

Mr. S. Bangel: Thank you.

Mr. Breeden: We note an exception.

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page 81 } By Mr. S. Bangel:

Q. Doctor, on the day that you examined her you said you found no acute pain, is that right?

A. No acute pain.

Q. Now, tell these gentlemen of the jury what do you mean by "acute pain."

A. Well, you might say that there are three kinds of pain. Acute pain, which is severe pain, such as you would have following, say a fracture, in which the pain is severe. It comes on and lasts as an acute thing. It just starts at that time. Chronic pain would be one in which the pain is of long duration; it may vary in intensity. And subacute pain is something in between there.

Q. And you found no acute pain?

A. No evidence of acute pain.

Q. No evidence of acute pain. Doctor, let me ask you this. A person who sees a person who has received an injury immediately after receiving the injury, and treats that person over a long period of time is in a better position to make a diagnosis than one who sees that person once some months later?

A. I will say this. That a person that sees an injured person immediately can see the effects of the injury more vividly than that individual who sees this same person, say three months later. I can see that readily.

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Mr. S. Bangel: Thank you, Doctor, no further questions.

Dr. George N. Psimas.

RE-DIRECT EXAMINATION.

By Mr. Breeden:

Q. Doctor, you said that you put Mrs. Beecher through certain tests. Did you have her rotate her arm passively and also actively; did she do both?

A. Yes, sir.

Q. And did she do each equally well?

A. I thought so.

Q. Now, with respect to your examination as a doctor, is there any probability that the next day Mrs. Beecher would have suffered any pain or discomfort from that examination that would have required her to seek medical assistance?

A. I wouldn't think so.

Q. Doctor, when you examined this lady three
Vol. III days short of two months after her alleged injury,
11/6/59 did she—strike that. When you examined Mrs.
page 83 } Beecher on March 20th would your examination
have revealed to you her condition as a like
examination made by the doctor that had seen her from the
date of her alleged injury?

A. I would think so. I am reporting all that I saw then.

Q. I am certain you are.

Mr. Breeden: Thank you, Doctor.

RE-CROSS EXAMINATION.

By Mr. S. Bangel:

Q. Doctor, you made a statement before that you can examine a person and you can take a normal uninjured muscle and cause it to be sore the next day; didn't you make that statement?

A. You can make a normal uninjured muscle sore the next day by—if you are not used to cutting wood just go out and cut wood, and the next day you will be sore.

Q. I say from your examination you can make a
Vol. III normal muscle sore?

11/6/59 A. By examining the patient?

page 84 } Q. Yes, sir?

A. I cannot conceivably see why the simple type of examination done should make a person sore. I can not really see it.

E. F. Chauncey.

The Court: Is that all?

Mr. S. Bangel: Thank you.

Mr. Breeden: Thank you, Doctor.

The Court: Gentlemen, we are going to take a recess.

Mr. Breeden: Excuse me just a moment, Doctor, I want to confer with my associate.

Thank you, Doctor, that is all right.

The Court: All right, gentlemen, we will take a five minute recess.

(The Court recessed at 12:00 o'clock noon for five minutes after which the trial continued as follows:)

Vol. III The Court: Call your next witness.

11/6/59 Mr. S. Bangel: Call Reverend Chauncey
page 85 } please.

E. F. CHAUNCEY,

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

DIRECT EXAMINATION.

By Mr. A. Bangel:

Q. State your name, please, sir?

A. E. F. Chauncey.

Q. And you are pastor of the 4th Street Baptist Church, are you not?

Vol. III A. Yes, sir.

11/6/59 Q. And you have been for how many years?

page 86 } A. Twenty years.

Q. Do you know Mrs. Louise Beecher?

A. Yes, sir.

Q. Is she a member of your church?

A. Yes, sir.

Q. How long have you known her?

A. About eight years.

Q. Do you know her general reputation in the community in which she lives for truth and veracity?

A. Very good.

Q. Is it very good?

A. Yes, sir.

Mr. Breeden: Your Honor, we have not made any attack on this lady's reputation for truth and veracity.

James Beecher.

Mr. A. A. Bangel: You have indirectly.

Mr. Breeden: Do I have it in the record?

The Court: Come up here, Mr. Breeden.

Vol. III (A side-bar conference took place outside of
11/6/59 the hearing of the jury, after which the following
page 87 } occurred:)

The Court: All right, you may stand aside, Mr. Chauncey.

All right, gentlemen of the jury, at this time the character of the plaintiff is not in issue and therefore the testimony that has just been offered should not have been presented to you, and I ask you gentlemen to disregard the testimony of Reverend Chauncey.

Mr. Bangel: Call Mr. Beecher.

JAMES BEECHER,

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as

Vol. III follows:

11/6/59

page 88 } DIRECT EXAMINATION.

By Mr. S. Bangel:

Q. State your name, please?

A. James Beecher.

Q. How old are you, Mr. Beecher?

A. Twenty-nine.

Q. You are the husband of Louise Beecher, the plaintiff in this case?

A. That's right.

Q. Where do you live?

A. 530 DeKalb Avenue.

Q. With her?

A. Yes, sir.

Q. How was her health before January the 23rd, 1959?

A. Good.

Mr. Breeden: Your Honor, now we got to be careful that this gentleman does not attempt to give medical testimony.

Vol. III He can tell whether she got up and did her house-
11/6/59 work and things like that, but the question of
page 89 } health and the like or trying to give testimony
on that point, he is not competent.

The Court: We haven't come to that point yet.

James Beecher.

Mr. Breeden: I know, but I can just see how we are headed.

The Court: Well, I can't rule on it until we get there, Mr. Breeden.

By Mr. S. Bangel:

Q. Mr. Beecher, since this accident how has your wife reacted from what you could see?

A. The reaction has not been good on her.

Mr. Breeden: That is a conclusion, your Honor.

The Court: I sustain the objection.

By Mr. S. Bangel:

Q. Tell us what effect it has had on her; tell the jury.

A. Well, she has been nervous. She has been irritable and she is easily to get upset and she—well, that's about it.

Q. Well, how has it affected her ability to sleep, Vol. III did it effect that?

11/6/59 A. Yes, sir, it has.

page 90 } Q. Well, tell these gentlemen how it affected that.

A. She couldn't sleep at all like she did before the accident. She wakes up during the night complaining with her arm and shoulder hurting, and she rolls and tumbles in the bed at night; and she didn't do it before.

Q. What did she take for it?

A. Takes medicine.

Q. Has she been under the doctor's care since this accident?

A. Yes, sir.

Q. Who has she been under the treatment of?

A. Dr. Ward.

Q. Before this accident how were her nerves?

A. Her nerves were good.

Q. After she left the hospital where did she go?

A. She went home.

Q. Was she able to use her arm?

A. No, sir.

Vol. III Mr. Breeden: Now, your Honor, I think he
11/6/59 means that she did not use it. Whether she was
page 91 } able to use it is a matter that Mrs. Beecher herself
may know, or her doctor may know, but he doesn't
know because he is not competent to tell the difference be-

James Beecher.

tween whether or not she could use it. He would have to come to a conclusion.

The Court: He can testify if she did not use it.

Mr. Breeden: He said she couldn't.

By Mr. S. Bangel:

Q. Did she use her arm?

A. She could use it a little, not much.

Q. Why couldn't she use it?

A. Because she complained it hurt her shoulder.

The Court: I sustain the objection.

Mr. A. Bangel: As I understand it, and maybe I am mistaken, but as I understand the law a husband and
Vol. III wife can testify as to whether or not they suffer
11/6/59 pain because they lived with each other and they
page 92 } know. Just like a mother can say about her child
I know my child is in pain because of the close
association and the contact they have with each other. And
this man is testifying now about his wife as to whether or
not he could observe her condition to be such that she was
suffering pain.

The Court: I think that is an exception. I was not sustaining the objection, I was overruling it. That is what he was testifying to but that is not what he has attempted to testify.

Mr. Breeden: And also, your Honor, there is a difference between a child and the rule for a child rests upon the basis
Vol. III of a child's immature years and its inability to do
11/6/59 other than act in a—well, inexperienced way.

Mr. A. Bangel: I don't agree with him on that.

page 93 } Mr. Breeden: It is naive, in other words.

The Court: Mr. Bangel, what is your next question?

By Mr. S. Bangel:

Q. Mr. Beecher who did the washing before this accident?

A. Before the accident?

Q. Yes, sir.

A. My wife.

Q. Who did it since the accident?

A. I have did most of it since the accident.

Q. How about the ironing?

A. Well, I do some of it. My wife does. She did some of it after the accident. Not right after the accident but, in other words I did the ironing and the washing. In other words the

James Beecher.

housework after the accident until she got to where she could do some of it. But she still can't do it all. I still do the biggest part of the housework.

Q. Did you see your wife the evening after this accident in the hospital?

A. Yes, sir.

Vol. III Q. Did you make any 'phone call or communicate
11/6/59 with anybody about this accident?

page 94 } A. Yes, sir. I did.

Q. Who did you communicate with and report it?

A. The Tunnel Commission.

Mr. S. Bangel: Witness is with you.

CROSS EXAMINATION.

By Mr. Breeden:

Q. You did that by telephone, didn't you?

A. Yes.

Q. What day did you do that?

A. I can't remember exactly the date.

Q. Was it that evening or the next day?

A. It was that afternoon.

Q. Well, now, could it have been that afternoon, because when did you see your wife that evening of the accident; what time?

A. What time did I see her?

Vol. III Q. Yes, sir.

11/6/59 A. Around eight o'clock. I would say seven or
page 95 } eight o'clock.

Q. Did you call that night the Tunnel Commission office?

A. Yes, sir.

Q. That night?

A. That night, I did.

Q. Who did you talk to that night?

A. I don't remember who it was I talked to, but he told me that the Tunnel Commission would have to get in touch—

Q. Now, wait a minute. We don't want to go into anything anybody else told you. I am trying to find out who you called.

A. Yes, I called.

Q. That night. Now, when did you talk to Mr. Bangel,

James Beecher.

because he wrote the letter the next morning; do you know when you saw him?

A. Yes, sir.

Q. When did you see Mr. Bangel?

A. I saw Mr. Bangel the same day.

Q. The same evening?

A. Yes, sir.

Q. Where did you see him, at the hospital?

Vol. III A. No, sir, at his office.

11/6/59 Q. That night?

page 96 } A. No, sir.

Q. At what time?

A. I saw Mr. Bangel the next day.

Q. The next day?

A. Yes, sir.

Q. What day was that?

A. I can't remember what day it was.

Q. I see. Well, I am a little confused about that. All right, sir. Do you drive a Community Motor bus?

A. I did.

Q. You did. You don't drive it now?

A. No, sir.

Q. What route did you drive?

A. Simonsdale out in Glens Park.

Q. Does your wife ever ride your bus?

A. Yes, sir.

Q. Did she ride your bus that day?

A. What day was that?

Q. The day of this accident.

A. The day the accident happened?

Q. Yes, sir.

A. No, sir—yes, sir, I beg your pardon. She

Vol. III did.

11/6/59 Q. She did, didn't she?

page 97 } A. Yes, sir. Wait a minute now, let me get it straight, you're kind of confusing me.

Q. No, I am not confusing you. I am just asking you whether your bus carried Mrs. Beecher as a passenger that day, that's all.

A. The day of the accident you are speaking of?

Q. I think that is what I asked you, Mr. Beecher.

A. Yes, sir, I believe—no, she didn't go by bus.

Q. You change that. I asked you if she rode the bus and you said yes, and now you say no.

James Beecher.

Mr. S. Bangel: He said yes and then he said no.

By Mr. Breeden:

Q. You said, no?

A. Yes, sir.

Q. In each case your second answer is the correct one you want us to have?

A. Unh-huh.

Q. How does the door close on the bus that you drove?

Vol. III Mr. A. Bangel: If your Honor please, that
11/6/59 is immaterial in this case. We object.

page 98 } The Court: I sustain the objection.

Mr. Breeden: All right, sir, that is all.

RE-DIRECT EXAMINATION.

By Mr. S. Bangel:

Q. Do you know that after your telephone conversation of that evening to the Tunnel Commission whether or not your wife was seen the very next day, the very next morning by somebody waking her up?

Mr. Breeden: Now, your Honor, if he was there.

The Court: If he was there he could testify. Otherwise. . . .

By Mr. S. Bangel:

Q. Do you know—

Vol. III Mr. Breeden: Were you there?

11/6/59 The Witness: Yes, sir, I was there.

page 99 } Mr. S. Bangel: Come down.

RE-CROSS EXAMINATION.

By Mr. Breeden:

Q. What day was that, Mr. Beecher, do you know?

A. No, sir.

Q. You don't know?

A. No, sir.

Mr. Breeden: All right, fine, thank you.

The Court: Call your next witness.

Mr. A. A. Bangel: May we approach the bench?

Paul Bradley.

Vol. III A. A side-bar conference was held by the Court
11/6/59 with counsel for both sides out of the hearing of
page 100 } the jury, after which the following occurred:)

Mr. A. A. Bangel: Would you recess for lunch?

The Court: No, I don't want to recess. Try to get along.
It is too early to recess for lunch.

Go ahead and see if you can complete your case. Do you
want to wait?

Mr. A. A. Bangel: Yes, sir.

The Court: You all may smoke, gentlemen, it will be at
least three minutes.

(The Court recessed at 12:20 o'clock P.M. for three
minutes, after which the trial continued as follows:)

The Court: I understand that with the exception of pos-
sibly one witness you rested your case?

Mr. A. A. Bangel: Yes, sir.

Vol. III The Court: I understood that when that wit-
11/6/59 ness comes we will permit him to be put on at
page 101 } that time.

All right, gentlemen, call your first witness.

Mr. MacMillan: Mr. Bradley, your Honor.

PAUL BRADLEY,

called as a witness on behalf of the defendants, having been
first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. MacMillan:

Q. Would you state your name, please?

A. Paul Bradley.

Vol. III Q. For whom are you employed?

11/6/59 A. By the Virginia Transit.

page 102 } Q. What is your position with that company?

A. I am claim agent for the company.

Q. Are you familiar with the type of buses used by the
Tunnel Commission?

A. Yes, sir, I am.

Q. Referred to as "tunnel buses?"

A. Yes, sir.

Q. Are you familiar with the type of *door* that are on the
front of those buses?

Paul Bradley.

A. Yes, sir.

Q. Would you describe the door to the jury, and describe the width of the opening and how they close and details about those doors?

A. Well, the door on these buses is constructed in four parts. There is two on either side of the center. When they are in a closed position and open, they open to the inside. Two halves fold together. When they close they close likewise; they will come to the center. Do you want the full details as to the construction of the door?

Q. Well, what is that overall width when the doors are fully opened?

A. The door is approximately thirty inches wide; that is, the opening of the complete door.

Q. And that thirty-inch door, you say, is made up of four panels?

A. Four panels; that is true.

Q. And the panels fold just like if it were a panel door, which it is; it folds back?

A. That is true; that is right.

Q. Now, when the doors are in a closed position what is the gap, if any, between the four panels or the two outboard panels?

A. When the door is in a closed position there is a distance of four and a quarter inch gap between the doors; that is, the panels of the door. And there is a soft rubber finish which, of course, keeps the air out; but the space in between the halves of the door is four and a quarter inches.

Q. Well, now, so that the jury might understand, do you have any picture that would indicate the way the doors look?

A. Yes, I do.

(Photographs were produced by the witness and handed to opposing counsel for examination.)

Mr. S. Bangel: We would like to be heard in chambers on these pictures, if your Honor please.

The Court: All right.

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page 104 } (The Court and counsel for both sides retired in chambers where the following occurred:)

Mr. Breeden: I wish to state an objection and exception to the ruling of the Court wherein at an earlier time in the trial we asked that Dr. Ward's testimony be deferred until Dr. Psimas arrived.

Dr. Psimas had examined the plaintiff on behalf of the defendants, and the purpose of such request being that Dr. Psimas' testimony could best be given and his expert opinion offered if he had the knowledge of Dr. Ward's testimony, and how and when and under what conditions he had examined the plaintiff, what he had found, immediate signs, prescriptions, treatments, diagnosis and prognosis as the attending physician.

It was agreed at that time that this exception
Vol. III could be stated at the first break in the testimony,
11/6/59 and hence it is stated, and here stated after the
page 105 } fact.

Mr. A. Bangel: If your Honor will recall, the defendants asked that the witnesses be excluded and among all the witnesses put out was, of course, the doctor who treated the plaintiff, and he cannot ask that our witnesses be excluded and his be permitted to remain in the court room, especially so when the doctor who is being called examined the plaintiff at some prior time.

The Court: And it was stated by counsel for the defendants that Dr. Psimas was not testifying solely as an expert but was testifying from the examination that he made of the plaintiff, and the Court had denied their request to permit Dr. Psimas to remain in the court room or the trial be deferred until Dr. Psimas came so he could be present.

Mr. Breeden: That is correct.
Vol. III Now the defendants offer in connection with the
11/6/59 testimony of Mr. Bradley now on the stand four
page 106 } photographs of a tunnel bus, of the front door, and
offers to prove that all the tunnel buses have
exactly the same door, and that Mr. Bradley tested the doors
in the manner illustrated by these photographs and that the
photographs are intended to demonstrate such tests that he
made and help clarify his testimony, his oral testimony.

Mr. A. Bangel: We object to the introduction of the photographs, if your Honor please, because they are posed photographs. We do not object to any photograph that they may offer which shows the bus in its condition with the door closed or open, but not with the posed photograph, especially

Paul Bradley.

Vol. III where the conditions are not the same and could
11/6/59 not be the same.

page 107 } Mr. Breeden: Well, of course, we make the
 } point that the conditions are the same because they
 } are permanent and unchanging conditions relating
to a mechanical door, all of which are exactly alike on all the
buses, although the defendants do not know on which bus
this allegedly occurred, if at all.

The Court: The Court refuses to admit the photographs
for the reasons stated in the objection, and also for the
reason that the photographs show that the witness has made
tests out of the presence of the Court and without cross
examination of counsel for the plaintiff, and does not feel that
the pictures as offered should go to the jury under those
conditions.

But the Court will state now that if the defendants desire
to view a bus, they will bring a bus to the court room and I
will permit them to see a bus.

Vol. III Mr. Breeden: Well, without waiving our ob-
11/6/59 jection we will therefore proceed to examine Mr.
page 108 } Bradley with respect to the mechanical operation
 } of the bus without the aid of the pictures, and at
the conclusion of his testimony we will determine whether we
think in view of the Court's ruling it is necessary to have a
physical bus here for examination.

(Whereupon, the Court and counsel for both sides returned
into the Court room and the trial continued as follows:)

Mr. MacMillian: Will the court reporter read the last
question we had?

(The reporter read the last question as follows:)

“Question: Well, now, so that the jury might understand,
do you have any picture that would indicate the way the doors
look?”

By Mr. MacMillian:

Vol. III Q. You have stated, I believe, that the overall
11/6/59 width of the front door of the tunnel bus is thirty
page 109 } inches. is that correct?

A. Yes, sir.

Q. And would that be true on each of the tunnel buses?

A. Yes, it is.

Paul Bradley.

Q. Is there any distinction between the door on the various buses owned by the Tunnel Commission?

A. No.

Q. Using this door to the Judge's chamber as an illustration, would you come down where the jury can see?

(Witness complied and left witness stand.)

Q. Now, would you describe to the jury, imagining that this section of the door is how the panels are made up and where the center of the door is and what material makes up the center portion of the door when the door comes to a close?

A. Well, the door is constructed in four panels. There is two on either side of the center. Now, there is a hinge the length of either panel on either side of the center, and when the door is in open position those panels fold—this panel folds back and this one would come to it so it's a flat surface when it is on open on either side.

Vol. III Now, when it is closed there is a gap between
11/6/59 the panels and, of course, that is put there for a
page 110 } purpose, and that is covered. Either side of that
 door has a soft rubber foam pad to keep the
 weather, the dust, and especially if a person might have his
 hand there it would not tend to catch or hold. That is the
 reason the gap is in there. It is in four panels. This hinges
 here and this hinges here and they are bolted to the side and,
 of course, when it is closed they come in together in the middle.

Q. Well, now, for the purpose of illustrating to the jury, if this is a panel and this is a panel, and this is the edge of the metal door that you described, and if this is the panel and if this is a panel and this is the edge of the other door—?

A. Yes, sir?

Q. —what is in this space right there?

A. That is a soft rubber—it's, well, it's just there as a cover.

Q. Is it one rubber?

A. It's two, one on either side of the door.

Q. Can you describe it to the jury where the rubber fixes?

A. The rubber fixes to either side of this panel and it folds over and is fixed to the other side. It is a fold-over affair, and when the door is in closedover position that rubber comes together in the middle.

Vol. III Q. Do I understand then there is rubber on
11/6/59 either side and the only thing that touches are
page 111 } the two pieces of rubber in the middle?

Paul Bradley.

A. That is true.

Q. And what is the gap, what is the width of the gap between the metal portions of the door on each side?

A. Four and a quarter inches.

Q. In other words there is nothing but rubber for the last four and a quarter inches between those two panels, is that correct?

A. That is correct.

Q. I might ask you another question. Looking at the door vertically, does the rubber run from the top to the bottom of the door?

A. It runs from the top to the bottom all the way.

Q. All the way?

A. All the way.

Q. Is the door itself broken up in any panel? I mean by that in any vertical—?

A. The panels run from the top to the bottom and the rubber runs from the top to the bottom.

Q. And the gap between is four and a quarter inches from the top to the bottom?

Vol. III A. From the top to the bottom.

11/6/59 Q. What is the relationship of the panels to
page 112 } the side of the skin of the bus, is it—I mean is the
door inside of the bus or where is it?

A. It is hinged to the skin of the bus at the opening of the door.

Q. What are you talking about when you use the word “skin?” I think I used the word “skin.”

A. I mean the door, the side of the door. The door is hinged to the inside of the door frame.

Q. Right. Well, when the door is closed does the side of the bus just constitute one complete side, the door of which is also part of the side?

A. The door is in slightly. It doesn't come right flush with the outside.

Q. I see. How much is that inserted? I mean have you taken that measurement?

A. I did not take that measurement. It is very little.

Q. Well, when the door is closed are the steps which lead up to the bus inside the closed door or outside the closed door?

A. They are inside the closed door.

Q. So that the door completely covers the opening and the steps are inside?

A. That is true.

Paul Bradley.

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page 113 } Mr. A. Bangel: Are you through?

By Mr. MacMillan:

Q. Can you describe to the jury the manner in which the doors close and how they are closed, and how the closing of the door is mechanically operated?

A. Well, when the door is in open position, of course, it is opened by the driver. He has a control there that he uses to open or to close the door.

Now, when he closes the door he puts the lever in a position. Now, the door after that is controlled by air. That holds the door closed and which closes it. It is so constructed by a valve which lets the air in gradually, and the door comes to a closed position and it opens the same-way.

Q. Can you describe to the jury the speed, if any, with which the door closes?

A. Oh, I—the door doesn't—

Mr. A. Bangel: Unless he made a test, I mean I—

The Witness: I have made a test.

Mr. Breeden: He said he made a test.

Mr. A. Bangel: All right.

Vol. III

11/6/59

page 114 } A. (Continuing) The door doesn't come to like that (demonstrating). That is the reason for the control valve which is on the air line going to the door. The air is turned on with the valve and it comes to and closes. It is never ever constructed to close quickly and it is not constructed to close too slowly; but it does close with a minimum amount of speed. There is nothing quick about it.

By Mr. MacMillan:

Q. Now, when it comes to a close what touches? What portion of the door touches?

A. Just the two center portions which are of rubber construction on the edge of the door.

Q. What are the panels of the door constructed of?

A. Well, mostly plywood construction, and where the windows are they have a metal frame to hold the glass, but mostly of three-quarter plywood.

Paul Bradley.

Q. Well, does any portion of the plywood on the right panel of the door ever touch any portion of the plywood making up the left panel of the door?

A. Absolutely not. There is that gap between them.

Vol. III Q. And that is the four and a quarter inch gap
11/6/59 you have already described?

A. That is correct.

page 115 } Q. Now, is the rubber—what is the construction
of the rubber, is it loose or pliable or hard or firm
or what?

A. The rubber, to describe it, is about like a inner tube in an automobile. It might be a little heavier but it is thin. It is flexible. It moves with ease one way or the other.

Q. Can you demonstrate how the rubber is attached to the door?

A. As I said before, if you should take, well say this is the edge of your door. You would take a sheet of paper and you can fold it. It is attached to either side of the door, and you would have this opening in between that rubber.

Q. And you are illustrating what?

A. That is the rubber; this would be the rubber and this would be the rubber.

Q. Show us how that rubber gasket—will it move?

A. Oh, yes, it will move any way you take your hand and twist it or move it.

Vol. III Q. Can you press the rubber gasket in such a
11/6/59 manner that you can touch the plywood?

A. You can push it up to it, of course, like that.

page 116 } Q. But it will also have some rubber touch-
ing?

A. That's right.

Q. Now, have you ever conducted a test to insert your arm or hand in the door?

Mr. A. Bangel: One moment. If your Honor please, we object to that. It requires certain conditions and has to be under similar conditions at the time the plaintiff was hurt, and not the way he may have done it, which is entirely different when the bus starts off with your hand and one standing still. I submit that his test would be improper.

Mr. Breeden: Your Honor, we certainly are entitled to show what the condition of this bus door is and what its mechanical features are.

The Court: If he conducted these experiments as she con-

Paul Bradley.

tends under similar conditions that she had at the time of the accident, I think he could testify to it.

Vol. III Mr. MacMillan: All right, sir.

11/6/59

page 117 } By Mr. MacMillan:

Q. Tell us what you have done in regard to placing your arm between the panels which you have described.

Mr. A. Bangel: We object to that, if your Honor please, unless he can show that test was made under like and similar conditions as was plaintiff.

Mr. Breeden: We have shown that both buses are alike and when the bus door was closed the man could pull his arm out, that's all.

Mr. S. Bangel: If he wants to bring a bus down here and let somebody put their arm in the door and let the bus start off we have no objection.

The Court: I think, Mr. Bangel, that will not place it in the same position in the street, I mean on the same elevation, because she wasn't down below, she was on the sidewalk on the curbing.

Vol. III If the test was run under like and similar
11/6/59 conditions he can testify, otherwise he couldn't.

page 118 } Mr. Breeden: Well, your Honor, the difference between—I don't know whether he was standing that much higher than the surface of the bus or not, but it would be a question whether that affects it. The testimony shows that the rubber runs from top to bottom. It would seem to me that it would be inconsequential.

The Court: It might or might not. Let's get on, what does the witness say about it?

By Mr. MacMillan:

Q. Have you inserted your arm in the gasket which you have described?

A. Oh, yes.

Q. And did you do it while standing on a raised surface or on a surface on which the bus was on the same level?

A. Well, I did it standing on a level surface, but as to it, I don't think it would make any difference.

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The Court: I overrule your objection.

Mr. A. Bangel: We note an exception.

Paul Bradley.

By Mr. MacMillan:

Q. Well, would it make any difference?

The Court: He said it would not make any difference.

By Mr. MacMillan:

Q. It would not make any difference?

A. I can't see any. It has the same opening from top to bottom whether you are up six inches or down six inches. It would be the same thing.

Q. In other words whether you are a tall person or a short person it wouldn't make any difference as far as that gasket is concerned?

A. None at all.

Q. And works the same mechanically from the top to the bottom?

A. That is correct.

Mr. S. Bangel: If your Honor please, is he testifying he tried it from the top to the bottom at different levels on that bus?

Vol. III The Witness: I did not testify to it but I did
11/6/59 do it.

page 120 } Mr. S. Bangel: At different levels?

The Witness: At different levels.

Mr. S. Bangel: All right, go ahead, Mr. MacMillan.

The Witness: Let me explain that. I testified that I was standing on a level surface when I stuck my arm in, but you can reach down here and up here (demonstrating), and that is what I did.

By Mr. MacMillan:

Q. Now, what effect did the door have on your arm?

Mr. A. Bangel: One moment. We object to that, if your Honor, please, it is not the effect it may have on a person's arm who sticks it in there and try to close it. It is what effect it would have on a person who was getting on that car and the door closes and starts off, which is an entirely different situation than what—

Vol. III Mr. MacMillan: Well, I am to show—
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page 121 } Mr. A. Bangel: No, sir, unless you can show that it was done under like and similar conditions, we submit it is improper.

The Court: I overrule the objection.

Paul Bradley.

Mr. A. Bangel: We save the point.

Mr. S. Bangel: We would like to further state for the record, we respectfully submit, that the test made was not where a person is not expecting something and entirely taken by surprise, and were under conditions which are somewhat different. For that reason the test should not be received.

The Court: You can redevelop that on cross-examination.

Mr. S. Bangel: We save the point.

By Mr. MacMillan:

Vol. III Q. Now, you say you did place your arm in this
11/6/59 gap?
page 122 } A. Yes, sir.

Q. Now, tell us what effect it had on your arm as to your ability to insert your arm or withdraw it?

A. It did not affect it by putting it in or pulling it out.

Q. In other words the gap is sufficiently large?

Mr. A. Bangel: If your Honor please, we object to him leading the witness.

The Court: I sustain the objection, Mr. MacMillan, on leading the witness.

Mr. MacMillan: I will ask it this way.

By Mr. MacMillan:

Q. What effect did it have on your arm and your ability to move your arm when you inserted it in the gap?

Mr. A. Bangel: If your Honor please, the same objection. If your Honor is ruling the same way could it be understood our objection goes throughout this line

Vol. III so we won't have to stand up and object each
11/6/59 time?
page 123 } The Court: All right, sir.

The Witness: I could answer the question this way: I inserted my arm through the gap straight with the door, from either side at an angle, and you can push your arm in there at an angle back of the door if you could reach it. It is perfectly sufficient space there to push any part of your arm up as far as you can get it in there.

By Mr. MacMillan:

Q. Now, what were you wearing at the time you did that?

A. I had on a sport coat, which was a heavy wool coat.

Paul Bradley.

Q. Could you stand up and hold your arm out so the jury can see your arm?

(Witness complied.)

Q. Have you held your arm in this door and had the door close on your arm?

A. Yes, sir, I have.

Vol. III Q. Tell us what effect it had on your arm when
11/6/59 you did that.

page 124 } A. Well, you could hold your arm in a position where the door would close on it. You could put it to either side of the door, right or left, and the door is so constructed that when it closes it pushes your arm, your arm would go to the center. That is where the opening is. That is where the rubber is, and the rubber is there to protect just such a thing as that. It would push it to the center of the door.

Q. Could you then remove your arm when the door was closed upon it?

A. Oh, yes.

Q. Do other buses go down the route of South and Washington Streets where this intersection—

Mr. S. Bangel: We object to that, it is immaterial.

The Court: I think it has already been testified to, but you go ahead and ask him.

A. To my knowledge the Community buses go by there.

By Mr. MacMillan:

Q. Do any other company operate buses there?

Vol. III A. The Portsmouth Transit Company operates
11/6/59 along that route also.

page 125 } Q. Do you know what time the sun set on the
date this accident allegedly occurred?

A. According to the weather bureau it was 5:20.

Mr. A. Bangel: We object to it as hearsay.

Mr. Breeden: The Court can take judicial notice—

The Court: If he has got a report direct from the Weather Bureau.

The Witness: It was 5:20 P.M.

By Mr. MacMillan:

Q. What, 5:20?

A. 5:20.

Q. Do you have any record of the weather conditions on that day?

Paul Bradley.

Mr. A. Bangel: The same objection.

The Court: I overrule the objection.

By the Court:

Q. Did you get it from the Weather Bureau?

Vol. III A. I got it from the Weather Bureau. And the
11/6/59 temperature was cold, and it was a clear day.

page 126 }

Mr. A. Bangel: If your Honor please, that is highly improper.

The Court: Of course the best evidence would be the record itself, but I permitted it to save time.

By the Court:

Q. I presume you could get it upon calling?

A. It was 35 degrees.

Mr. S. Bangel: He is expressing an opinion.

Mr. Breeden: He said it was 35 degrees.

Mr. S. Bangel: At what time?

The Witness: It was 35 degrees about noontime.

Mr. S. Bangel: If your Honor please, we object to that as the rankest type of hearsay.

The Court: I agree. I sustain the objection.

By Mr. MacMillan:

Q. Now, when you learned that this accident had occurred did you make any investigation to determine

Vol. III whether or not an accident had occurred, or
11/6/59 not?

page 127 } A. Yes, I did.

Q. Were you able to determine whether or not an accident had occurred from your investigation?

Mr. S. Bangel: Don't answer that.

If your Honor please, that would be the rankest type of hearsay.

The Court: I sustain the objection.

Mr. Breeden: Well, your Honor, it is sometimes difficult to prove a negative fact. We got a report, he investigated it, and he came to a dead end. How could we be sure? We can't bring anybody in to prove it other than we followed the normal procedures. Can't we put that into evidence?

The Court: Well, ask him in the proper way, but not—

Paul Bradley.

Mr. A. Bangel: He testified he made an investigation, and that is as far as he can go.

Vol. III Mr. MacMillan: We have a right to ask him
11/6/59 as to what facts he found as a result of his
page 128 } investigation or the absence of it.

Mr. S. Bangel: If he does that is the rankest way of getting hearsay in.

Mr. Breeden: Well, I don't know how else you can prove a negative fact.

Mr. A. Bangel: I don't think it is up to us to tell him, and I don't think it is up to the Court to tell him how to proceed. They are both very able, and I don't think we should tell him anything or the Court should tell him anything.

Mr. Breeden: Well, I submit that is the right way to do it, Mr. Bangel.

By Mr. MacMillan:

Q. Do I understand that you proceeded with your normal investigation?

A. Yes, sir, I did.

Q. Did you find any facts that indicated that an accident had occurred?

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Mr. A. Bangel: We object.

page 129 } The Court: I sustain the objection. He can tell what he did.

By Mr. MacMillan:

Q. What investigation did you make?

A. Well, my first knowledge of the alleged accident was when I received a copy of Mr. Bangel's letter that he represented Mrs. Beecher. I checked my records which if there was any accident involving the bus it would have come to my office. I checked my record and I did not have any record. So I immediately checked the schedule and secured the names of each man who was working on the tunnel bus on that day, and at that time had each one to come to my office and each one said—

Mr. S. Bangel: We object to that as the rankest hearsay.

The Court: I sustain the objection.

A. (Continuing) There was no record.

Paul Bradley.

By Mr. MacMillan:

Q. There was no record. All right. Did you find any evidence of an accident?

A. I did not.

Vol. III Mr. A. Bangel: Now, if your Honor please, he
11/6/59 is trying to get in—
page 130 } The Court: I sustain the objection.

By the Court:

Q. You may say from your records.

A. No report of any accident from our records. That, of course, included talking to all the drivers.

The Court: You cannot tell what they said.

By Mr. MacMillan:

Q. My understanding is that you had no report of an accident?

A. That is true.

Mr. MacMillan: Answer Mr. Bangel.

CROSS EXAMINATION.

By Mr. S. Bangel:

Q. Mr. Bradley, you testified that you are claim agent for the Virginia Transit Company, and you are also the in-

Vol. III Commission for accidents happening to buses?
11/6/59 A. No, I am not the investigating agent for

page 131 } accidents on the tunnel buses. We handle—

Q. Now, did you check with the Elizabeth River Tunnel Commission and ascertain whether or not the night of the accident Mr. Beecher, the husband of the plaintiff, had called there and reported an accident to his wife?

A. I did not know anything about that.

Q. You did not do that. Well, did you know that some representative had been to see Mrs. Beecher at eight o'clock the morning following the night of the accident?

A. Not till I heard it mentioned in Court today.

Q. You never had bothered to check that?

A. I did not know anything about it.

Paul Bradley.

Q. All right, sir. Now, Mr. Bradley, you speak of a thirty-inch gap. Is there any gap there at all where the wind can go through or the elements can go through or anything like that?

A. On the door?

Q. Yes, sir.

A. I testified that the door has a thirty-inch opening.

Q. Well, you don't mean to tell the jury that when these two doors are closed there is a thirty-inch opening between those two doors, do you?

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page 132 }

A. I didn't say that.

Q. Or four and a quarter inches?

A. There is a four and a quarter inch opening from the door construction, but not from the construction as far as this rubber moulding which is on the door which comes to a closed position and comes together.

Q. So there is on either side the door a rubber that you described as similar to an inner tube of an automobile that come together when the door closes?

A. That is true.

Q. Well, an inner tube, Mr. Bradley, unless it's got air in it, will fold up and crumble, wouldn't it?

A. Well, this rubber construction on these doors is of very light material, if it is any thicker than an ordinary inner tube. It's soft and it's flexible.

Q. You mean to tell this jury that that is soft and pliable as an inner tube?

A. Well, it's not much harder. It's soft.

Q. All right, sir. Now—so it closes, and I understood you to say that the reason that rubber is on the door is that when these bus drivers close the doors and catches a person's arm in it it would give them an opportunity of getting it out?

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page 133 }

A. I—no, I didn't say when the door closed. I said—

Q. Why is it on there?

Mr. MacMillan: Now, wait a minute. Let him answer, Mr. Bangel:

By Mr. S. Bangel:

Q. Why is it on there?

A. It is constructed that way simply for a safety feature.

Q. What safety is required of this rubber attached to this door?

Paul Bradley.

A. Well, it could be applied to a person if she should happen to have an arm or a foot in the door so it wouldn't hold them.

Q. Well, isn't that the only reason it is put on there?

A. I know it's there for a safety feature. If it is for another feature I am not aware of it.

Q. And the only thing you can think of would be so as to give a person the opportunity, who is standing there and the bus driver closes the door on their arm, to get their arm out before the bus starts?

A. I am sure they can pull that out all right.

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Q. I didn't ask you that.

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page 134 } Mr. S. Bangel: (To the reporter) Read the question back to him.

(The reporter read the question to the witness.)

A. I think I testified to the fact that it was put there for a safety purpose and if there is another purpose for it, I don't know.

By Mr. S. Bangel:

Q. Well, what safety purpose do you have in mind particularly?

A. Well, a person, certainly you wouldn't want a door with any kind of sharp edge. It is covered. It is so constructed so if a person would fall against it or if a person should have their arm in it or a foot in it then the door would be closed so they could take it out.

Q. Well, the doors are folded to either side and has a piano hinge on it. If you fell against it you would fall against the side of the door, wouldn't you?

A. Suppose you fell from the outside, then you would fall against it.

Q. Well, that does—does that extend out beyond the side of the bus?

A. No, it does not.

Vol. III Q. Well, how would you fall against it unless
11/6/59 you fell against the side of it—rather the edge
page 135 } of it?

 A. If a person fell in the door they could very easily hit it if something wasn't there to protect them.

Paul Bradley.

Q. So that is one of them. What other safety feature would it have?

A. Well, I don't know how many safety features that it was put there for. I know it is put there and constructed as a safety feature on the door, and certainly there might be numerous.

Q. Who told you it was put there for a safety feature if you don't know the safety features?

A. Well, I know about the construction of the bus.

Q. Who told you it was put there for a safety feature?

A. I have had numerous people tell me that it was put there—

Q. You mean the manufacturer?

A. I have had representatives of the manufacturer tell me so.

Q. Did they tell you what those safety features were?

A. To prevent, as I just explained them, if a person had their arm extended it would be so they could take it out without being hemmed in, or it might be a foot on the step at times or something like that.

Vol. III 11/6/59 page 136 } Q. You testified that you put your arm in the doorway and the doors closed on them?

A. Yes.

Q. And you testified that at that time you had on what kind of garment?

A. I had on a wool sport coat.

Q. A wool sport coat and, of course, you did not try ramming your hand through that door and getting it up to your shoulder, did you?

A. Yes, sir.

Q. What effect did it have on your wool garment?

A. It didn't have any effect on it. It just went up to my wrist, and I just stuck it right on in up to my shoulder.

Q. And you mean the sleeve of your coat did not go back at all?

A. It didn't move, no. It went right on through.

Q. You mean the garment and all?

A. Yes, sir.

Q. You could push your hand through it, and your coat wouldn't go back?

Vol. III 11/6/59 page 137 } A. There is some photographs that will prove it if you want to show them to the jury.

Q. Mr. Bradley, you know better than that, don't you?

Paul Bradley.

The Court: That's all right.

By Mr. S. Bangel:

Q. You say your coat didn't go in beyond your wrist?

A. I didn't say it didn't go beyond my wrist. It will go in with your arm. There is sufficient space there.

Q. Well, is your wrist as large as your arm?

A. I don't think so, no, sir.

Q. Which is larger?

A. I would say the upper part of my arm is larger.

Q. You knew your hand was going in there, didn't you?

A. Yes, sir.

Q. And the bus was perfectly still, was it not?

A. At one time, yes, sir.

Q. And you told the bus driver to close the door so you could get your hand in it?

Vol. III . A. Well, the door was closed at the time.

11/6/59 } Q. Well, did he open the door and close it for
page 138 } you?

A. Oh, yes.

Q. And you were there and you saw him open the door and you knew he was going to open the door, didn't you?

A. Naturally I knew.

Q. You were not taken by surprise, were you?

A. I think—

Q. I asked you whether or not you were taken by surprise.

Mr. Breeden: Well, he was about to answer you.

Mr. MacMillan: Let him finish.

The Court: He can finish it.

A. If you are making a test I am sure you are not taken by surprise.

By Mr. S. Bangel:

Q. So you knew they were closing the door on your arm?

A. That's right.

Q. And then, of course, you told him when to open it?

Vol. III . A. Well, I could take my arm out of that
opening.

11/6/59 } Q. Did you tell him to open it?

page 139 } A. No; he opened it, but I didn't tell him.

Q. Well, now, when you speak about the mechanism of that door, you have a lever there that opens the door and pulls them open, did you not, the bus driver?

Paul Bradley.

A. The lever, when you work the lever it furnishes air pressure to open or close the door.

Q. Tell us how much pressure is required to open that door.

A. That bus has a control valve.

Q. How much pressure does it take to make—

Mr. MacMillan: Let him answer the question. He is doing the best he can.

The Court: Let him answer it if he can.

A. These buses are constructed, of course, so the door opens and closes by air pressure.

By Mr. S. Bangel:

Q. How much air pressure is required to open or close that door?

A. Let me answer it this way.

Mr. S. Bangel: Suppose, if your Honor please, suppose he answers the question, then he can explain
Vol. III it.

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page 140 } By the Court:

Q. Do you know how much it takes?

A. There is no exact amount of air pressure to open or close the door. I would like to—

By Mr. S. Bangel:

Q. So you don't know what it is?

Mr. MacMillan: He says he wanted to—

By Mr. S. Bangel:

Q. You say you don't know. Go ahead.

A. I didn't say I didn't know.

Q. Tell us what it takes.

Mr. Breeden: He says there wasn't any exact amount.

Mr. Bangel: I asked him how much air pressure does it require to open or close that door.

The Court: Go ahead.

A. The door does not have a determined amount of pounds of air pressure to open or close the door. The bus carries so much air pressure. It might vary at times from a certain

Paul Bradley.

amount according to whether the pump is working overtime.

Vol. III But all of it does not go to that door. There is a
11/6/59 control valve which eases the air in to the mech-
page 141 } anism of that door which closes the door.

Now, when the door gets in a closed position it is closed and remains closed. There is so much air pressure on it. When it is closing there wouldn't be that much because it hadn't had time to build up. That is another safety feature.

By Mr. S. Bangel:

Q. How much air does it take to close it before it gets completely closed?—

A. Well, if there is any air on the bus it will close the door. It will be ten lbs. whatever there is on there.

Q. And, of course, that varies with each bus and at different hours of the day?

A. It doesn't vary any—well, it might vary some; very little.

Q. Well, how much pressure is there on the door once it is closed?

A. I don't think anybody can answer that.

Q. And does that vary also with different buses?

A. How's that?

Q. Does that vary with each bus?

Vol. III A. These buses are all similar. I don't think—
11/6/59 certainly there will be some variation to any me-
page 142 } chanical piece of machinery, but it would be very
little. They are all manufactured and should be
the same.

Q. All right, sir. Now, getting back to my original question. I asked you whether or not you were taken by surprise and caught unexpectedly when the man closed the door on your arm at the time you said you made the test.

A. No, I was not taken by surprise.

Q. Have you witnessed a person who was suddenly caught with their arm between that door and the door pulling off?

A. No, I have not.

Q. Do you know what the reaction of a person is who suddenly finds her arm caught between this door and the bus moving at the same time?

A. I could only answer for my own.

Q. And when you are speaking of yourself, you never made that test yourself when the bus suddenly closed the

Paul Bradley.

door when you did not expect it and the bus started off and your arm in it. Have you ever made any such test as that?

A. It would be impossible for me to make a test and stick my arm in the door and not know something about it.

Vol. III Mr. S. Bangel: All right.

11/6/59 The Court: Anything else, gentlemen?

page 143 } Mr. MacMillan: I have no other.

The Court: Gentlemen of the jury, we are going to recess now until two-thirty. During your lunch hour do not discuss this case with anyone nor permit anyone to discuss it with you. If anyone says anything to you about this case or tries to talk to you, tell them you are on the jury and cannot discuss it. If they persist on talking report that matter to the Court when you return.

Do not discuss this matter amongst yourselves during the lunch hour. Come back at two-thirty.

(The Court recessed for lunch at 1:20 o'clock P.M.)

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AFTERNOON SESSION.

(The trial continued as follows:)

The Court: We understand there are not to be experiments performed by anybody at the bus. We will discuss that a little later.

Has the plaintiff got any other witnesses?

Mr. S. Bangel: I would like to call Dr. Ward.

The Court: I understand this is not rebuttal. This is the witness you wanted to recall and reserved the right to put on this morning?

Mr. Breeden: This is the witness, Dr. Ward, you say?

Mr. S. Bangel: Yes, sir. We sent him home and found it necessary to recall him.

Mr. Breeden: Your Honor, we would like to consult the Court about this.

The Court: All right, sir.

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page 145 } (The Court and counsel for both sides retired in chambers where the following took place:)

Mr. Breeden: Judge, here is a receipt in the name of Mrs.

James Beecher, which is for \$5.00, and purports to be in 1956, and they have recalled Dr. Ward to the stand to impeach what he said.

This does not say that woman was sick. He got \$5.00 from her. It doesn't mean—

The Court: Well, I think that Dr. Ward would have a right, if he finds he made a mistake, to come back here and correct his mistake before the jury had retired. I will permit it.

Mr. Breeden: Could I inquire, so we would not make undue confusion, do you all purport to ask Dr. Ward if that is his receipt?

Mr. S. Bangel: Frankly, here is what it is. Dr. Ward at my request checked his records hastily and found out she had been in on one occasion in 1957, in June '57, and I sent my client, who checked her receipts, at home at the luncheon recess, and she came back with this receipt showing she had been to him in '56.

In addition I want to ask Dr. Ward whether he recognizes this as a receipt from his office.

The Court: Well, off the record.

(An off-record discussion took place, after which the following occurred:)

Mr. Breeden: We object and except to the ruling of the Court on the ground that it permits Dr. Ward to impeach his own testimony as he had testified this morning clearly and emphatically that not merely that he had not previously treated the plaintiff, but that he had never seen her before in his life, and it is a material part of the testimony and should not now be permitted to testify to something he believes is revealed by his records but which he has said on his oath the facts were contrary.

Mr. S. Bangel: If your Honor please, we feel that we should allow her, since she went home during lunch and found this receipt, to come back on the stand and show that this doctor had treated her previously.

Mr. Breeden: We object to that because no one has contradicted that testimony. We never questioned her about whether or not that was true or false.

Mr. S. Bangel: She is trying to clarify a statement—

The Court: I understood, gentlemen, this morning that the

Dr. C. F. Ward.

plaintiff had rested its case with the understanding that he wanted to put a witness on to show that Dr. Ward had treated this woman previously, and I understood counsel Vol. III said it was satisfactory to go ahead with the trial 11/6/59 of the case rather than to adjourn. page 148 } Mr. Breeden: We do not have any objection to the order of presentation.

The Court: Now, this is considered as being presented as being part of his main case, not in rebuttal.

Mr. Breeden: That's right.

The Court: I will permit him to show that since counsel was notified this morning that was the purpose of the continuance.

Mr. Breeden: Well, let me state this into the record.

We wish to make it very clear that we have no objection to the order in which the evidence is presented. It is not considered by us as other than evidence in chief, but the objection goes to the propriety of admitting this type of evidence after the witness has testified to the contrary.

Vol. III The Court: I will permit Dr. Ward to cor- 11/6/59 rect his mistake if he found that he had made page 149 } one.

(The Court and counsel for both sides whereupon returned into the court room and the trial proceeded as follows:)

Mr. S. Bangel: Dr. Ward, please.

DR. C. F. WARD,

recalled as a witness on behalf of the plaintiff, having been previously sworn, was examined and testified as follows:

Vol. III DIRECT EXAMINATION (Rec.).

11/6/59

page 150 } By Mr. S. Bangel:

Q. State your name, please?

A. Dr. C. F. Ward.

Q. Dr. Ward, you have previously testified today in this case?

A. Yes, sir.

Q. You previously testified that you had not seen Mrs. Beecher prior to treating her for the injury she received in this accident?

Dr. C. F. Ward.

A. That's right.

Q. Did you at my request check your records and found you were in error in that?

A. Yes, sir.

Q. Did you check them?

A. Yes, sir.

Q. Have you seen her?

A. Yes, I have.

Q. Did you check what date you did see her previously?

A. The only date that I could recall, I mean when we checked, was June 14, 1957.

Q. Now, Doctor, your records, that was thoroughly checked? Or did you merely do it—?

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11/6/59 } Mr. Breeden: I hope he did it thoroughly.

page 151 } The Court: I sustain the objection. He is your witness, Mr. Bangel.

By Mr. S. Bangel:

Q. Do you recognize this also?

(Document shown to the witness for examination.)

A. Yes, sir.

Q. What is that?

A. That is a receipt from my office for \$5.00 on 11/10/56.

Mr. Breeden: Well, now, your Honor, we contend, of course, that Dr. Ward had testified otherwise; then he takes the stand and says he checked his records and found only one and it was 1957. Now he is being questioned about a piece of paper, and I don't know if was the physician attending Mrs. Beecher or whether she simply made a payment and got a receipt for it.

The Court: He has not testified as to what it is yet; he testified it was a receipt signed in his office.

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11/6/59 } By Mr. S. Bangel:

Q. Dr. how many times, at least, have you seen Mrs. Beecher from your information prior to this accident?

A. From the evidence here, twice.

Mr. S. Bangel: Thank you, Doctor.

Dr. C. F. Ward.

CROSS EXAMINATION.

By Mr. Breeden:

Q. From the evidence here, what?

A. Twice.

Mr. S. Bangel: Twice.

By Mr. Breeden:

Q. Twice. Doctor, when you are called to attend a patient don't you look up the medical record that that patient has with you in carrying on subsequent treatment?

A. Yes, sir.

Q. Did you do that in this present case with Mrs. Beecher?

Vol. III A. May I clarify and qualify that answer?

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page 153 } The Court: Well, you can answer the question first and then explain it.

The Witness: Repeat your question.

By Mr. Breeden:

Q. Did you, when you were called—who called you to attend Mrs. Beecher?

A. She came to my office.

Q. She came to your office?

A. That's right.

Q. For this injury to her arm?

A. We are not speaking of that. I thought you were referring to the records.

Q. No, sir. Who called you to attend her for her arm injury?

A. She did.

Q. She called you herself?

A. That's right, from the hospital.

Q. From the hospital?

A. That's right.

Q. Did she then say anything about the fact that you had previously attended her?

Vol. III A. People never state that.

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page 154 } Q. Well, let's don't worry about other people.

A. I am speaking of Mrs. Beecher, and generally with everyone.

Q. Well, if you don't mind we will just talk about Mrs.

Dr. C. F. Ward.

Beecher. You tell us that Mrs. Beecher telephoned you, she being a total stranger?

A. She didn't telephone me. The hospital telephoned me.

Q. You just told me she called you.

A. All right, let's make it the hospital notified me of her admission. She requested that I be notified that she was admitted to the hospital.

Q. Who did that calling?

A. The nurse on the floor.

Q. The nurse called you?

A. That's right.

Q. And said "Dr. Ward, I'm Miss X and we got a patient here that wants you to see her," is that correct?

A. That is correct.

Q. Had she been admitted to the hospital as a patient before having a doctor order her admission?

A. No.

Q. Who had ordered her admission?

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A. The emergency room.

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Q. Well, what doctor ordered her admission?

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A. I couldn't tell you the house physician on call at the time.

Q. Well, we haven't gotten all the medical testimony here then today. She was treated by some other doctor before you saw her?

A. Are you asking me or is that answering it?

Q. I thought I was asking the questions trying to get answers.

A. No, you said she was treated by some other doctor.

Q. I say from what you tell me she was admitted to the hospital as a patient at the direction of another doctor.

A. The house physician of the hospital.

Q. Now who was that doctor?

A. I couldn't tell you. They rotate around. They are on call at different times.

Q. So it is a fact that some other doctor other than you, Dr. Ward, saw this lady for her alleged injury before you did?

A. That's right.

Q. The you don't know who that is?

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A. That's right.

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Q. And her chart and medical records did not

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come to her attention?

A. What do you mean her chart and record?

Q. As her attending physician, Dr. Ward, would you not have referred to all of her medical, prior medical record in

Dr. C. F. Ward.

that hospital when you were treating her for this arm condition?

A. No, indeed, I would not, because it would be entirely irrelevant to the injury. Her entire past medical history with the cold and flu has nothing to do with it whatsoever.

Q. Doctor, you misunderstood me.

A. No, I did not. You stated your question to me, and I answered it.

Mr. Breeden: Judge, may I ask the question?

The Court: Go ahead.

By Mr. Breeden:

Q. I said, Dr. Ward, and I will now try to be more specific.

A. Excuse me. But you didn't say that. You said her prior medical record.

Q. Well, I won't quibble.

Vol. III The Court: Let's see if we can't understand
11/6/59 each other now. Suppose you repeat the question.

page 157 } By Mr. Breeden:

Q. Dr. Ward, when you were called to see Mrs. Beecher—

A. Yes, sir?

Q. —had she or had she not been attended for this arm injury by another doctor?

A. She had not been attended. She was just seen in the emergency room by the resident physician who said "Admit her and notify Dr. Ward of the admission. He will do the treating."

Q. Then it is true that doctor whose name, I believe, you don't know—

A. That is correct.

Q. —would have examined her?

A. He would have looked at her arm and he would have seen immediately there was enough to admit her.

Q. And you don't even know what he did?

A. What he did, I don't know. But it is very easy to find out who he was.

Q. Well, you are the one telling me. Doctor.

A. Well, you are asking me and I am answering you.

Louise Beecher.

Vol. III Q. I certainly do not have access to it.
11/6/59 A. We have access to it.
page 158 } Q. You did not refer to that record though,
} whoever that doctor was that made it?
A. No, sir.

Q. I see.

A. I never do.

Q. You say you never refer to any prior record in your office?

A. No, sir.

Q. You paid no attention to the fact that this was an old client, an old patient that had called you. You thought you were just treating a new patient?

A. I don't think that has anything in the world—

Q. I didn't say—maybe I'm wrong. I don't practice medicine, but the point is you did not pay any attention—

A. Now, you are putting words in my mouth, that I did not pay any attention to her prior medical history. I am not going to answer that yes or no.

Mr. Breeden: All right, don't answer it at all, that will do.

Mr. S. Bangel: Thank you, Doctor.

Vol. III The Court: Come down.

11/6/59 Mr. S. Bangel: Mrs. Beecher, please.

page 159 } The Court: Come up, Mrs. Beecher.

LOUISE BEECHER,

the plaintiff, recalled as a witness on her own behalf, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION (Rec.).

By Mr. Bangel:

Q. Your name is Mrs. Louise Beecher?

A. Yes, it is.

Vol. III Q. At my request did you go home to see
11/6/59 whether you had any receipt showing your prior
page 160 } treatment?

A. Yes, I did.

Q. I hand you a receipt dated November 10th, 1956, and ask you whether this was for one of the treatments that you spoke of?

(Document shown to the witness for examination.)

Louise Beecher.

A. Yes, sir, it was. I had the flu and I went to Dr. Ward for treatment.

Q. And this is the receipt—?

A. Yes, sir, it is. I paid him \$5.00 and the secretary gave me that receipt.

Q. And that was on November, 1956?

A. Yes, sir.

Mr. A. Bangel: Thank you. We ask that be introduced.

The Court: Very well.

(Received and marked in evidence by the Court as Plaintiff's Exhibit Number 3.)

Vol. III CROSS EXAMINATION.

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page 161 } By Mr. Breeden:

Q. Mrs. Beecher, that was at the rate of \$5.00 for one visit?

A. Yes, sir, it is. I had to take a shot of penicillin.

Q. You went to his office?

A. He gave me medicine. I had a real bad cold.

Q. And Dr. Ward gave you the medicine and gave you the shot?

A. The nurse gave me the shot. He looked at me.

Q. And charged you \$5.00?

A. Yes, sir.

Q. Has he been charging you a higher rate this time than before?

Mr. A. Bangel: How would she know, Judge?

A. I don't know.

By Mr. Breeden:

Q. You got a bill of four hundred and some dollars?

A. I have no bill, sir, yet. I don't even know what I owe.

I don't know what he charged me when I was going to him.

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page 162 } Mr. Breeden: All right.

The Court: All right.

Mr. S. Bangel: That is all.

The Court: That is the case, gentlemen?

Mr. S. Bangel: We rest, your Honor.

Mr. Breeden: May we be heard out of the hearing of the jury?

The Court: All right.

Mr. Breeden: Judge, except the view of the bus.

The Court: I thought we would have the instructions and discuss that.

Mr. Breeden: We will take them up in the Judge's chambers?

The Court: We can take them up in there.

(The Court and counsel for both sides retired into chambers where the following occurred:)

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page 163 } Mr. Breeden: Judge, I want to take up and get in the record first the basis upon viewing the bus.

On behalf of the defendants we offer a view of a bus of the exact kind, nature and construction and mechanical door operation as the bus alleged to have been involved in this case. It is our understanding that the Court will permit such a view?

The Court: That is correct.

Mr. Breeden: We also ask permission to have Mr. Bradley, the witness that has testified as to certain mechanical and physical facts regarding the door operation, to demonstrate that when the bus is viewed in the same manner, that he could demonstrate any mechanical apparatus involved in the accident where the mechanical apparatus is of such size, shape and dimensions that it could be operated in a court

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room, and we urge that this be done for the further reason that we know that such a demonstration of these features will show that a man of the size and arm girth of Mr. Bradley, which is obviously in excess of similar measurements on the plaintiff—

Mr. A. Bangel: I don't agree with that.

Mr. Breeden: —could remove his arm from the door because of the safety features to which he has testified without any ill effect; and further, that the door can be closed on the arm of any person without injury thereto under any circumstances, and that we further urge that this be done, because in the presence of the jury Mr. Stanley Bangel has stated that what Mr. Bradley was testifying to was not adequate and that he suggested that it would not apply if the bus door was actually closed on his arm and the bus started off; and we

Vol. III therefore now offered to meet that challenge which
 11/6/59 was made in the presence of the jury, and if we do
 page 165 } not comply it may leave in the minds of the jury
 as a fact that this statement of Mr. Bradley was
 erroneous. And lastly when we *proffered* certain
 pictures showing these facts to which Mr. Bradley has testified
 the Court excluded those photographs on the basis that the
 physical bus itself was the best evidence, and that these were
 merely posed pictures.

We therefore submit for the reasons stated that the Court
 should at the view which is to be had permit Mr. Bradley to
 demonstrate his testimony in the manner set forth which
 would merely have the effect of doing exactly what would be
 done without question in a court room where the instrumental-
 ity were of sufficient size to admit it to the court room.

Mr. A. Bangel: Of course, we object, if your Honor please,
 because that would not be a true condition. You
 Vol. III have got to make the test under similar and like
 11/6/59 circumstances. It would not be admissible. It is
 page 166 } not like starting up the bus with someone's arm
 in it, being excited and the doors being closed. It
 is entirely different when you know when the door is going to
 be closed. Such a test as Mr. Breeden has suggested is highly
 improper and should never be allowed.

And furthermore the weather conditions are far different.
 The temperature today is 57 and the evidence of the tempera-
 ture of the weather at that time was thirty to forty-five de-
 grees. And the Court will take judicial notice of the fact that
 heat on rubber will make it more pliable than in cold weather.

Mr. Breeden: Your Honor, I wish to make a further mo-
 tion in urging that this be permitted, and that is counsel has
 changed his position, because at the morning session they are
 urging the demonstration as I have stated, but
 Vol. III during the lunch hour Mr. Bangel admitted that
 11/6/59 he personally examined one of those buses and
 page 167 } now changed his mind.

Mr. A. Bangel: We have no objection to the
 jury looking at a bus, if that is what they want, but we submit,
 if your Honor please, that no tests should be made nor should
 any examination of it be made by any of the jurors because as
 pointed out the weather conditions are entirely different and
 the test would not be a true test at all and, therefore, that is
 not proper.

The Court: Gentlemen, I have stated that I will permit the
 jury to look at the bus if they want to look at it. I am going to
 ask the jury if they feel they would like to see the bus. But
 if they do I will not permit any experiments. The purpose of

looking at the bus is just for the purpose of making it clear to them the testimony already adduced at the trial
Vol. III so they will be able to apply the facts as they have
11/6/59 heard them as to what they might see by look-
page 168 } ing at the bus. I will not permit any experiments
to be conducted by the jury.

Mr. Breeden: Well, we note an exception to the ruling of the Court, if your Honor please, for the reasons stated.

Now, may we make a further inquiry, Judge? Can the jury be invited to examine the fabrication of the door closure because, I submit that that invitation should be extended because to see it, Judge, you can't possibly tell by sight alone the pliability of the material. It could easily be an illusion and it would not be the same.

Mr. A. Bangel: We submit that is improper because the weather conditions and everything else has a great thing to do with the conditions.

Mr. Breeden: There is no evidence of that,
Vol. III your Honor.

11/6/59 The Court: I will permit them to look at the
page 169 } bus just as it is without performing any experi-
ments.

Mr. Breeden: We note our further objection and excep-
tion.

The Court: If the jury says they do not want to see a bus I am not going to make them.

Mr. A. Bangel: Do they want to have the jury see a bus?

Mr. Breeden: Yes, we want them to see a bus.

The Court: But if the jury says they don't want to see it, then I say there is no necessity of it.

OBJECTIONS AND EXCEPTIONS TO INSTRUCTIONS.

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11/6/59 Mr. S. Bangel: If your Honor please, we note
page 170 } an exception to the Court's granting Instruction 1
on the grounds that there is no evidence to sup-
port it whatever. The only evidence which the defendants
advocate supports this instruction is that Mr. Bradley, the
claim agent, did not receive any report of the accident from
the bus driver.

Mr. Bradley admits that he checked with the Tunnel Commission. The positive and uncontradicted evidence is that the Tunnel Commission was notified the very evening of the occurrence, and the very next morning at eight o'clock they sent a representative there to question Mrs. Beecher.

Further, the instruction is improper because the instruction

is erroneous. It is not a question of whether the jury believes the plaintiff was attempting to board the bus at the time and place in her testimony, because the jury could believe the exact minute or hour of time is not material. The question that is material is whether or not she was injured while attempting to board the tunnel bus.

The plaintiff objects and excepts to the Court refusing to grant Instruction D as it correctly states the law and is applicable to the facts in this case. The Court's amendment of Instruction D does not permit the jury to pass on a diminution of earning capacity of the plaintiff, and the evidence amply supports that; and further, the instruction does not permit them to pass on the inconvenience and discomfort that will be caused hereafter, and there is ample evidence to justify that.

Mr. MacMillan: The defendants except to the Court's granting Instruction C on the grounds that it precluded the jury from finding that plaintiff was guilty of contributory negligence on her own testimony, as the facts show clearly that any person under any circumstances could withdraw their arm from the four and a quarter inch gap in the door, and that the door did not close with sufficient force to hold her arm or prevent the withdrawal of same.

The same objection is made to the Court's refusal to grant Defendants' Instruction Number C which would have instructed the jury properly on the question of the plaintiff's contributory negligence.

(The Court and counsel for both sides then retired into the court room; the Court read the instructions to the jury, after which the Court made the following inquiry:)

The Court: Gentlemen, I was wondering if you would like to look at a bus. You cannot perform any experiments. Just go over and look at it without performing any experiments or tests. Do you think it would help you at all in this case? If you do not think it is necessary we won't. Do any of you feel that you would like to see a bus just to look at it? Do you think it would help you at all in this case? I take it then you are satisfied from the evidence that you can pass on it without any further instructions.

All right, gentlemen.

(Counsel for the respective sides then made their arguments to the jury during which the following occurred:)

Mr. Breeden: It might surprise you, but I never saw the man until today in Court, but I would not hesitate, if I am any judge of the proficiency of a man—

Mr. A. Bangel: One moment, if your Honor please, I submit that is highly improper.

The Court: I agree with you.

Vol. III Mr. Breeden: I do not mean, your Honor, to
11/6/59 give testimony. I am simply saying that I believe
page 175 } it is a fair inference to draw from his testimony
 } that you could fairly put yourself in his hands
 } as a man capable of dealing with this particular area of diffi-
 } culty.

The Court: All right, but you can't give your opinion.

Mr. Breeden: I know.

The Court: All right, sir.

(Counsel for both sides concluded their arguments after which the jury retired to consider their verdict and returned with the following:)

“We, the jury, find for the plaintiff against the defendants and fix her damages in the amount of \$10,000.00.

(Signed) Francis T. Nagle,
Foreman.”

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page 176 } (Counsel for defendants made a motion to set
 } aside the verdict of the jury as contrary to the
 } law and the evidence and asked for a new trial; the motion
 } was overruled by the Court to which action counsel for de-
 } fendants excepted.)

A Copy—Teste:

H. G. TURNER, Clerk.

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