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Record No. 6263

In the
Supreme Court of Appeals of Virginia
at Richmond

LANGHORNE ROAD APARTMENTS, INC.

v.

FREDERICK J. BISSON

FROM THE CORPORATION COURT OF THE CITY OF LYNCHBURG

RULE 5:12 BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

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

HOWARD G. TURNER, Clerk.

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

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

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Record No. 6263

VIRGINIA:

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

LANGHORNE ROAD APARTMENTS, INCORPORATED, Plaintiff in error,

against

FREDERICK J. BISSON, Defendant in error.

From the Corporation Court of the City of Lynchburg
O. Raymond Cundiff, Judge

Upon the petition of Langhorne Road Apartments, Incorporated, a writ of error and *supersedeas* is awarded it to a judgment rendered by the Corporation Court of the City of Lynchburg on the 11th day of March, 1965, in a certain motion for judgment then therein depending wherein Frederick J. Bisson was plaintiff and the petitioner was defendent; upon the petitioner, or someone for it, entering into bond with sufficient security before the clerk of the said corporation court in the penalty of eighteen thousand dollars, with condition as the law directs.

RECORD

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page 60] Virginia: At Lynchburg Corporation Court, January 20, 1965.

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This day came the parties by their attorneys, and the defendant having heretofore filed its grounds of defense and its plea of the contributory negligence of the plaintiff, to which the plaintiff replies generally, and prays that the same be inquired of by the country, and the defendant likewise, and said parties demanding a jury, there came a jury to-wit. Roger E. Allen, Roy R. Burnett, J. C. Coates, Jr., William G. Cothran, Aubrey E. Quick, Raymond C. Reynolds and Harry C. Sublett, who having been duly summoned, selected, tried and sworn according to law, and having heard the plaintiff's evidence, the defendant by its attorneys moved the Court to strike said evidence, on the ground that said evidence shows that the plaintiff was guilty of contributory negligence as a matter of law, which would bar a recovery by him against the defendant, which motion the Court doth overrule, and said defendant by its attorneys excepted, and thereupon the evidence being further heard and the jury aforesaid having heard all of the evidence, the defendant by its attorneys renewed its motion to strike the plaintiff's evidence, on the ground that said evidence is not sufficient to support a verdict for the plaintiff against the defendant, which motion the Court doth overrule, and said defendant by its attorneys excepted, and the jury aforesaid were adjourned until tomorrow morning at nine-thirty o'clock.

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page 62] Virginia: At Lynchburg Corporation Court, January 21, 1965.

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This day came again the parties by their attorneys, and the jury sworn on yesterday for the trial of this controversy, appeared according to their adjournment, and having heard all of the evidence and argument of counsel, and having received the instructions of the Court, were sent to their room

to consult and consider of their verdict, and after some time returned into court and presented their verdict, written on a blank sheet of paper in the words and figures following, to-wit, "We the Jury, on the issue joined, find for the Plaintiff and fix his damages at the sum of Fifteen Thousand and 00/100 Dollars ($15,000.). R. E. Allen, Foreman."

Thereupon the defendant by its attorneys moved the Court to set aside said verdict and grant it a new trial, on the ground that said verdict is contrary to the law and the evidence and on the further ground of errors of the Court in admitting certain evidence and failing to admit certain other evidence over the objection of the defendant, in the giving of certain instructions for the plaintiff over the objection of the defendant, and refusing certain instructions for the defendant, and for refusing to strike the plaintiff's evidence on the ground of contributory negligence, and said motion being argued, and the Court not being advised of its judgment to be given in the premises, takes time to consider thereof.

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OPINION

This memorandum of opinion is written after due consideration of the memoranda filed on behalf of the plaintiff and defendant in consideration of the motion made by the defendant to set aside the jury's verdict for the plaintiff.

Since the verdict was for the plaintiff the evidence must be considered in the light most favorable to the plaintiff and all conflicts of evidence and inferences therefrom shall be resolved in favor of the plaintiff.

The evidence shows that the accident happened on January 13, 1964, shortly before 11 o'clock p. m. on the private cement walkway of the Langhorne Road Apartments, which is used as a common approach and leads from the city sidewalk to the plaintiff's and other apartments. That the plaintiff was a tenant of the Langhorne Road Appartments and was returning from work to his apartment when the fall occurred. It had snowed with an accumulation of four inches on the ground the preceding day and had stopped around 10 o'clock a. m. on the morning of January 13th. That the temperature that day never rose above 28° at the airport which is located some three or four miles from the place where the accident occurred. The plaintiff testified that he

left his apartment for work about 11:30 a. m.
page 64] on January 13 and that the employees of the apartment building were in the process of cleaning the walks by means of a snow plow and shovel at the time he left. That when he returned after closing his store at approximately 10:30 that night, he could see that the walks had been cleaned and that there were spots of snow and ice on the walk; that he proceeded, wearing rubber sole shoes, walking slowly and in his words: —

"Q. Were you walking slow or fast?
A. Slow.
Q. Why were you walking slow?
A. Well, I was watching where I was going. It is my custom in bad weather to usually be pretty careful to avoid a fall if possible and also this sidewalk has a downgrade to it and I wasn't walking very slowly, I was walking, I would say, a little slower than I normally walk due to the grade to the sidewalk and the fact it might be slippery." (Testimony Page 18).

That he had travelled approximately 50 or 60 feet when his feet suddenly went out from under him and he fell receiving the injuries complained of. It was further testimony that there was no salt or chemicals of any kind used on the walks at this particular time. However, after his fall chemicals and salt were customarily used. This particular walk was in a shady place and was slightly downgrade.

There were two questions on which the defendant urged the Court to set the verdict aside. The first, that there was insufficient evidence of negligence on the part of the defendant to submit the question to the jury. The negligent act here alleged was the failure to remedy the dangerous condition which resulted after the snow; that is, not using reasonable care to make the premises reasonably safe within a reasonable time after the snow had ceased falling. This principle of law was set forth in the recent case of
page 65] *Walker* vs. *The Memorial Hospital,* 187 Va. 5, at page 13, in which the court stated: "The authorities are in substantial accord in support of the rule that a business establishment, landlord, carrier, or other inviter, in the absence of unusual circumstances, is permitted to await the end of the storm and a reasonable time thereafter to remove ice and snow from an outdoor entrance walk, platform, or steps. The general controlling principle is that changing conditions due to the pending storm render it inexpedi-

ent and impracticable to take earlier effective action, and that ordinary care does not require it." This accident occurred over twelve hours after the snow had stopped falling.

The Court is of the opinion that the landlord owed the tenant the duty to use reasonable care to keep the premises in a safe condition for the use of the tenants and that the landlord should within a reasonable time after the snow had ended take the necessary measures to clean the snow, use chemicals or ashes as reasonably necessary to render the walk in a safe condition for the use of its tenants. According to testimony offered on behalf of the plaintiff the walk was not cleaned free of *anow* and ice, no chemicals or ashes were used, although over twelve hours had elapsed since the snow had ceased falling.

The Court granted at the request of the plaintiff, Instruction 1A, which was taken from Virginia Jury Instructions, (Doubles, Emrock and Merhige), § 24:21, which submits this question to the jury, taking into consideration the question of contributory negligence and assumption of risk by the plaintiff. The Court is of the opinion that the evidence presented a jury question as to whether the defendant exercised reasonable care after the snow had ceased falling and same was submitted to the jury under instructions of the Court.

The second question raised by the defendant is whether the plaintiff was guilty of contributory negligence or assumed the risk as a matter of law raises the question as

page 66] to whether or not there was sufficient evidence to submit these issues to the jury for its determination. The defendant relies heavily on the case of *Ward* vs. *Clark,* 163 Va. 770, in which the Court held that the plaintiff was guilty of contributory negligence as a matter of law. In the *Ward* case the plaintiff was injured by a fall while leaving her apartment on the way to church in the day time while the janitor was cleaning the ice from the stairs, and she requested the janitor to help her down and did not wait for his help and there was another exit which she could have used but she chose not to. The Court is of the opinion the case before the Court at this time is distinguished from the *Ward* case on several facts; there was no necessity in the *Ward* case to use the icy steps, (here there was no evidence of any other safe entrance); it was not necessary for the plaintiff to go to church, (here plaintiff was returning home to go to bed and it was necessary to proceed); in the *Ward* case the janitor would have helped plaintiff down the stairs had she waited, (here there was no one to aid the plaintiff); in the *Ward* case it was day light and plaintiff saw that it

was slippery and dangerous; (in the present case it was night time, poorly lighted, and plaintiff testified it was only snow and ice in *spots,* in fact, he had proceeded 50 or 60 feet before his fall). The Court is of the opinion that there are many factual differences in the present case and the *Ward* case which do not make the rule of that case applicable to the one before the Court.

Neither counsel have cited any other Virginia cases which appear similar to the facts in the case before the Court. There is an annotation in *26 ALR 2d* beginning at page 610 in which the similar questions are fully discussed. On page 631, § 7, it is stated:

"While one using the common outside steps of a multiple-tenancy building can recover against the defendant landlord for his negligence in allowing the steps to be covered with a dangerous accumulation of ice or snow only where the plaintiff was exercising due care for his own safety at page 67] the time, it has generally been held that the mere fact that the plaintiff knew that there was ice or snow on the steps is not enough, standing alone, to charge him with negligence in using the steps, the courts ordinarily holding that this knowledge is merely a circumstance to be considered by the trier of fact in determining whether the manner of use was proper."

In the case of *Hebb* vs. *Gould,* 314 Mass. 10, 49 NE 2d 450, the Court stated that although the plaintiff saw the icy condition of the common stairs before she started down them, fell and was injured, the question of her contributory negligence was one of fact. Also see *Miller* vs. *Burk* (1952), a *Massachusette* case, 104 N. E. 2d, 163, in which the court reached the same opinion.

In a New Hampshire case of *A. Hearn* vs. *Roux* (1949) 96 New Hampshire 71, 69 A 2d 701, the plaintiff knew the steps and handrail were coated with ice it was held that she could not be charged with contributory negligence as a matter of law. The Court took notice that the steps in question were the sole means of ingress and egress for the plaintiff. The court said that although in using the steps in the icy condition, the plaintiff undertook some risk, she was attempting to avoid the known danger by walking in a cautious manner and watching her steps presented a jury question as to her negligence.

In the case of *Readon* vs. *Shimalman,* 102 Conn. 383, 128 A 705,

"It was held to be error to direct a verdict for the defendant where a social guest of one of the defendant's tenants, leaving the premises by a walk used as a common approach, fell on the ice and snow covering the walk, the evidence showing that the ice and snow extended for a considerable space over the walk, was in spots smooth and in others lumpy, but no sand or ashes had been scattered over it, that these conditions had existed for some days, and that the defendant's agent in charge of the premises passed close by the spot in question in going to and from her own apartment and could see it as she sat at one of her windows." *Reardon* v. *Shimelman* (1925) 102 Conn. 383, 128A 705, 39 ALR 287.

In 26 ALR 2d 339, § 9, the general rule is stated:

"Mere knowledge on the plaintiff's part of the presence of ice and snow on the common walks or drives of the defendant's premises has been held insufficient to re-
page 68] quire a finding of contributory negligence or assumption of risk, the courts holding that this *circumstances* raised only an issue of fact as to whether the manner of use of the walk was negligent."

In reviewing the annotation in which numerous cases are cited it appears that in those cases in which contributory negligence or assumption of risk constituted negligence as a matter of law presented a different factual situation from the case before the Court at the present time. It has been stated by our Virginia Court of Appeals time and time again that questions of negligence and contributory negligence ordinarily are questions for the jury unless reasonably fair minded men may not differ as to the conclusions to be arrived from the evidence.

The Court cannot say as a matter of law that the compelling necessity of the plaintiff to use this walk for ingress and egress and the fact that he proceeded cautiously and slowly, wearing rubber sole shoes, on the walkway, which had only spots of snow and ice constituted contributory negligence or assumption of risk as a matter of law. The Court is of the opinion that these questions constitute a factual one to be presented to the jury. The Court granted at the request of the defendant, Instructions D, E and F, which instructions submitted to the jury the question of contributory negligence and assumption of risk on behalf of the plaintiff.

The Court is of the opinion that the issues constituted a jury question and same was submitted to the jury for its de-

termination. The jury having resolved the issue in favor of the plaintiff the Court is of the opinion that its verdict is amply supported by the evidence and that the motion to set aside the verdict should be overruled and judgment entered on the jury's verdict for the plaintiff in the amount of $15,-000.00.

It is ORDERED that this opinion be filed and made a part of the record in this case.

O. RAYMOND CUNDIFF
Judge

Filed: Mar 5—1965

GEO. W. MARTIN
Clerk

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This day came again the plaintiff and the defendant, by counsel, and the Court having maturely considered the motion heretofore made by the defendant to set aside the jury's verdict, doth overrule the same, to which action of the Court, the defendant, by counsel, objected and excepted. It is therefore considered by the Court that the said plaintiff, Federick J. Bisson, recover against the defendant, Langhorne Road Apartments, Incorporated, the sum of $15,000.00, the amount of the damages by the jury in their verdict ascertained and assessed, with legal interest thereon from the 20th day of January, 1965, until paid and his costs by him about his Motion for Judgment in this behalf expended, to which action of the Court the defendant, by counsel, excepted.

At the instance of the defendant, by its attorney, which intimated its intention to apply for a writ of error and *supersedas,* the Court doth order that execution of the foregoing judgment be suspended for ninety days from this day, upon condition that the said defendant or some one for it give a proper suspending bond in the penalty of $500.00, conditioned according to law, with surety approved by the Clerk of this Court.

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Enter 3/11/65
ORC Judge

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

Notice is hereby given, pursuant to Rule 5:1, Section 4, of the Rules of the Supreme Court of Appeals of Virginia, that Langhorne Road Apartments, Incorporated, the defendant in the above action, hereby appeals to the Supreme Court of Appeals of Virginia from the final judgment entered in this action on March 11, 1965.

Pursuant to the aforesaid Rule, the aforesaid defendant makes this its assignments of error and alleges that the Court erred as follows:

1. The Court erred in refusing to strike the evidence of the plaintiff and enter judgment for the defendant on the ground that the plaintiff was guilty of contributory negligence.
2. The Court erred in refusing to strike the evidence of the plaintiff and enter judgment for the defendant on the ground that the plaintiff assumed the risk in walking on the slippery walkway.
3. The Court erred in refusing to strike the evidence of the plaintiff and enter judgment for the defendant on the ground that no negligence was shown on the part of the defendant and that no duty of the defendant was shown to be violated.

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4. The Court erred in refusing to set aside the verdict and enter judgment for the defendant for the failure of the Court to strike the evidence because the verdict was contrary to the law and the evidence, that there was no negligence shown on the part of the defendant, and that the plaintiff was guilty of contributory negligence as a matter of law and assumed the risk which would bar his recovery.

E. MARSHALL FROST
925 Church Street
Lynchburg, Virginia,
Of Counsel for the Defendant,
Langhorne Road Apartments,
Incorporated

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Now, can it be stipulated that all of these pictures correctly portray the conditions at the time other than the snow being on them and it being summertime instead of wintertime?

Mr. Johnson: We stipulate they can come in. I have these other documents. Can we put them in now and stipulate as to those?

Mr. Frost: We have agreed on the weather report. I think Mr. Johnson will agree that as the crow flies the airport is six miles from the scene of the accident and the airport is outside the City Limits.

The Court: Mr. Frost, Mr. Johnson has offered this for introduction, the weather report.

Mr. Frost: We agree to that and it will go to the jury. I want to write on here that from the scene of the accident to the airport is six miles as the crow flies and that the airport is without the City Limits.

page 8] Mr. Johnson: I will stipulate that is a fact but I don't want to put it on there because it would make it appear that it is a part of the Weather Bureau's report.

Mr. Frost: I think if you put up at the top, "Counsel agree that the airport is six miles from the scene of the accident and is without the City of Lynchburg" that that would be all right.

Mr. Johnson: I would rather we put that on a separate sheet of paper.

The Court: Why not just stipulate that and just tell the jury that it is six miles from the scene of the alleged accident to the airport and that the airport is not within the city?

Mr. Frost: All right.

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The Court: Do you want to stipulate that the pictures marked "A, B, C and D" will be received in evidence?

Mr. Johnson: Yes, sir.

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FREDERICK J. BISSON,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Johnson:
Q. Will you state your full name?
A. Frederick Joseph Bisson.
Q. Where do you live, Mr. Bisson?
A. 2706 Thirtieth Street, Washington, D. C.
Q. Are you employed there in Washington?
A. Yes, sir.
Q. What do you do?
A. I work in the advertising department of Peoples Drug Store.

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Q. Where were you living on January the 13th, 1964?
A. At 2134 Carrington Road, Lynchburg, Virginia.
Q. Was that in what is known as the Langhorne Road Apartments?
A. Yes, sir.
Q. And that is where you and your family were living at that time. Is that right?
A. Yes, sir.
Q. Where were you working at that time?
A. Working for Peoples Drug Store at Pittman Plaza as assistant manager.
Q. First of all, how long had you been with Peoples?
A. I had been with Peoples going on to four years.
Q. And before this injury how long had you been assistant manager of the Peoples store?

page 15] A. At Pittman Plaza?
Q. Yes.
A. I came there in August or September, I believe.

Frederick J. Bisson

Q. And you were injured the following January?
A. That is right.
Q. You had been there about four or five months?
A. Yes, sir.

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Q. Now, the particular night that you sustained this injury will you just tell the gentlemen of the jury what happened, beginning with say when you went to work that morning?
A. Yes, sir.
Q. What time did you go to work?
A. I left about approximately 11:30 or quarter to 12:00. I left a little earlier than usual and at the time I left it was not snowing.
Q. Had it been snowing?
A. Yes, sir.
Q. When did it stop snowing?
A. I don't know. I know it was snowing that night but what time it stopped I don't know.
Q. What night was it snowing?
A. The 12th.
Q. The night before the 13th?
page 20] A. Yes, sir.
Q. And you say you left about what time?
A. 11:30 or quarter to 12:00.
Q. About noon. Was it snowing then?
A. No, sir.
Q. Did it snow any more to your knowledge on the 13th after that?
A. No, sir, to my knowledge it did not. I went to lunch at approximately 5:00 o'clock, I think a little before 5:00, and it was not snowing then and I usually ate at Peoples but sometimes we go to the cafeteria which was in Pittman Plaza or go down the road and have our lunch at a little hamburger place on the corner near Pittman Plaza. It was not snowing then.
Q. It didn't snow any more after you left home?
A. No, sir.
Q. Now, tell the jury what happened.

A. Well, we closed up at 10:00 and it was approximately 10:15 or 10:20 before we left, had to check the money and so forth, sort of a routine policy, and I got home and parked my car in front of the apartment and got out and walked down the sidewalk and truthfully I didn't pay particular attention to the ice and snow that was on the

page 21] sidewalk because it was not to an extreme.

Q. That is on the city's sidewalk you are talking about?

A. Yes, sir, and I walked down a series of steps, I don't remember exactly how many.

Q. Come over here in front of the jury and look at these photographs. Let's take Defendant's Exhibit C. Can you look at that and show the jury where that walk is? First of all, where is your apartment or the apartment you had then?

A. My apartment is right here.

Q. Was that both up and downstairs?

A. Yes, sir.

Q. I believe it is one unit, upstairs and down.

A. Yes, sir.

Q. In this corner here?

A. Yes, sir.

Q. Now, what sidewalk would you take going to that?

A. This sidewalk right here.

Q. That is the sidewalk from the city's sidewalk into the apartment, is that correct?

A. Yes, sir.

Q. Is that sidewalk level or is there any grade?

A. It is a downgrade.

page 22] Q. Downgrade in which direction?

A. Down this way.

Q. The way you were walking?

A. Yes, sir.

Q. Now, on Defendant's Exhibit B would you point out your apartment and the sidewalk?

A. This would be my apartment right there and this would be the sidewalk.

Q. That is the sidewalk to the apartment?

A. Yes, sir.

Q. Where is the city's sidewalk?

A. This is the city's sidewalk and this would be the steps, I believe, right here.

Q. Can you show on there where you parked your car? You referred to parking your car.

Frederick J. Bisson

A. Approximately right in here, kind of in a straight line almost with the apartment in which I lived.

Q. On the side of Carrington Road?

A. Yes, sir.

Q. Now, I believe this is Defendant's Exhibit E, can you point out the same sidewalk?

A. It would be this one right here.

page 23] Q. That is the sidewalk?

A. Yes, sir.

Q. And you were walking in this direction going down here?

A. Yes, sir.

Q. Now, on Defendant's Exhibit A would you show the jury exactly how you walked, where you went and so forth?

A. I came out of my car and came down these steps.

Q. First you came down the city's sidewalk.

A. Yes, sir, the city's sidewalk and came down these steps, I don't remember how many steps there were, and went down this way. This would be my apartment right here.

Q. What is the approximate distance from these steps down to your front door, do you know, just approximately?

A. I wouldn't know.

Q. Is it further or less far than the length of this courtroom?

A. I would say farther.

Q. You don't have an estimate?

A. No, sir.

Mr. Frost: We will agree it is approximately fifty or sixty feet and that is just a guess on my part.

page 24] The Witness: At least that far.

By Mr. Johnson:

Q. It is further than the length of this courtroom?

A. Yes, sir.

Q. Tell the jury what happened.

A. I walked down this way and I fell. In other words, it seemed to me my feet went out from under me and I fell on my back.

Q. What caused you to fall? What brought it about?

A. The condition of the sidewalk.

Q. What was the condition of the sidewalk?

A. There was ice spots on the sidewalk and there was some snow, small accumulation of snow, not the entire walk

but there were spots of snow on the sidewalk and there was ice.

Q. These spots of snow, can you describe them further? Did they appear to be any particular size?

A. No, sir, just looked like snow over top of the ice.

Q. Then there was both ice and snow on the sidewalk. Is that correct?

A. Yes.

Q. Now, at that time was there water standing on the walk?

page 25] A. Not to my knowledge.

Q. Did you see any water?

A. No.

Q. When you left at about 11:30 that morning was there water accumulated on the sidewalk?

A. No.

Q. According to the Weather Bureau report which we have agreed to come in as evidence this shows that the highest temperature that day was twenty-eight degrees at the airport. What is your recollection?

A. I have no idea.

Q. Do you recall whether or not you noticed the temperature?

A. No.

Q. But I understood you to say you didn't see any melted snow when you left that morning.

A. No, I didn't.

Q. When you came back that night did you see any trace of snow having melted or anything as far as you could tell?

A. No.

Q. How about any chemical such as salt or anything that looked like salt, did you see anything like that on the walk?

page 26] A. No, sir, I did not.

Q. Did you see anything that looked like salt?

A. No.

Q. Did you see anything on the walk at all other than snow and ice?

A. No, sir.

Q. When you left there in the morning, you said I believe about 11:30, did you see any chemical or anything on the walk at that time?

A. No, sir.

Q. You had lived there about five months roughly. Had

it snowed previously while you were living there?

A. I believe it did — I am not quite sure. I know it did after my fall.

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By Mr. Johnson:

Q. Mr. Bisson, on this particular day did you at any time see any salt or any material on the walk?

A. No, sir.

Q. Now, tell the jury again just exactly what happened as you started down the walk. Just tell us exactly what happened.

A. I started down the walk and when I was I would say approximately halfway down the walk my feet seemed to come out from under me and I fell on my back.

Q. Were you or were you not looking where you were going as you walked along?

A. I think I was, yes, sir.

Q. Did you see either before you fell or after you fell, did you see at any time what you fell on?

A. No, sir.

Q. Did you see what was on that area of the walk?

A. Yes, sir, it was ice.

page 28] Q. Anything besides ice?

A. A little snow on top of the ice.

Q. Did you see this walk being cleaned that day yourself?

A. That particular walk, no, sir. I knew they were out cleaning the walks.

Q. What did you see any walks being cleaned with there at the Carrington Apartments — I mean the Langhorne Road Apartments?

A. Well, I saw one man had a shovel, I remember that, and they were way on the other side of the apartments development.

Q. You are limiting this to the particular day you fell?

A. Yes, sir, this was the day I fell when I was going to work and they were using this plow, I believe it is called, some type of motor machine they ride on.

Q. Is this kind of like a riding lawn mower?

A. I believe so, yes.

Q. Who did you see using that?

A. James Abrams.

Q. Is that the same James Abrams who is sitting in the center over here?

page 29] A. Yes, sir.

Q. Was he sort of custodian caretaker there?

A. I believe he is head custodian. I am not sure of his title.

Q. So, as I understand, you saw him operating this little lawn mower. Did it have any attachment on it or could you see that?

A. I couldn't tell. This was all some distance away and it looked like to me they were working to the area where I lived.

Q. And you saw one other man with a shovel?

A. Yes, sir.

Q. And where was he?

A. He was with James at that time at the other side.

Q. You say your feet suddenly went out from under you. Did you fall backwards or fall forwards?

A. Backwards.

Q. What did you land on? Did you land on your posterior?

A. Well —

Q. What part of your body struck?

A. I thought when I ended up I had fallen on my hip but I could have fallen on my back, I am not sure,

page 30] but it was the back part.

Q. Anyhow, it was in the area of your hips?

A. Yes, sir.

Q. Now, tell the gentlemen of the jury just what happened. What did you do after that? Did you feel any pain or anything?

A. I felt sore. I didn't feel any sharp pain when I fell. I picked myself up and went into the house and told my wife I had fallen and I said, "It is very slippery out there." At night when I got home it wasn't my custom to eat that late at night because I had to be at work early the next morning. The schedule was to work at night and open up the next morning. I sat down and watched TV late news and had several cups of coffee, which was a custom I had when I worked late, and I went upstairs to bed. I had no real sharp pains then, just still a kind of dullness, a numb and sore sensation. Upon getting into bed I found the pressure began

Frederick J. Bisson

to suddenly get worse and worse and I was unable to get comfortable, unable to lie comfortably, so I wound up by sitting up in bed that night rather than being able to lay down. I got up on numerous occasions, felt better standing up than I did sitting down or lying down.

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page 52]

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Q. Mr. Bisson, just one or two things further. First of all, when you fell that night was there any other witness, anyone around at all?

A. No, sir, not to my knowledge.

Q. To the best of your knowledge who saw you?

A. No one.

Q. Who did you first tell about it?

A. My wife.

Q. Did you tell her as soon as you got in the house about it?

A. Yes, sir.

Q. And this did happen then on the walk that you point out in those pictures and is that in the City of Lynchburg?

A. Yes, sir.

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page 55]

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Q. You have pointed out where you lived. I am going to get you to mark, if you don't mind, on Exhibit A a cross mark where you lived there.

Note: The witness does as requested.

Q. And put another one right there where the accident happened.

A. It was approximately right there.

Q. How far would you say that was from the

page 56] steps to your apartment?

A. About from here to the desk.

Mr. Frost: Could the Court tell us what that is?

The Court: Ten or twelve feet. Your guess is as good as mine.

Mr. Frost: I just wanted the authority of the Court.

Mr. Johnson: Mr. Frost, you are going to put those photographs in evidence?

The Court: They are already in evidence. It was stipulated.

By Mr. Frost:

Q. As I understand, on the morning of the 13th you went from your home to the drug store at Pittman Plaza.

A. Yes, sir.

Q. Snow was on the ground then, was it?

A. Yes, sir.

Q. And you walked on up and got in the car and drove over to Pittman Plaza?

A. Yes, sir.

Q. Now, you said something about lunch. You did not come home to lunch that afternoon, you got your lunch

page 57] over at Pittman Plaza.

A. Yes, sir.

Q. And did not come back until that night.

A. Yes, sir.

Q. And when you came back you drove your car down Murrell Drive and then back in front of your home.

A. I am not sure about the streets.

Q. Anyway you parked your car on Carrington Road.

A. Yes, sir.

Q. And that was opposite that walkway down there?

A. Yes, sir.

Q. And you got out of the car and walked down the walkway. Now, you said you were not paying any particular attention to ice and snow when you were walking. Is that correct?

A. I was paying attention to where I was walking. What I meant to say when I said I wasn't paying particular attention. I was accustomed to the snow being on the ground.

Q. You saw it was snow on the ground?

A. Yes, sir.

Q. Were you paying any attention to where you were walking?

A. Yes, sir.

page 58] Q. Did you see this ice and snow that you claim you slipped on before you got to it?

A. I saw spots of it, yes, sir.

Q. Before you got to it?

A. It was all the way down the walk, not just in that one particular area.

Q. In other words, there was ice and snow, I understand you say snow on top of the ice.

A. Well, it wasn't heavy snow on the ice. It seemed like it had a snow covering to the ice — in other words, the ice wasn't shining.

Q. As I understand, that was all the way from the steps down to your house, that same condition. Is that right?

A. Yes, sir.

Q. So you walked on down there and when you got down to where you put your mark there about ten or twelve feet from the steps then you slipped on it?

A. Yes, sir.

Q. You knew it was slick, didn't you?

A. Yes, sir.

Q. Knew it was slick when you started down the walk, did you not?

page 59] A. Yes, sir.

Q. Now, about the chemicals, you weren't in position to tell whether it had chemicals, is that right?

A. No, sir, I didn't see them put any down.

Q. But you couldn't tell whether any chemicals had been put down, could you?

A. No, sir.

By The Court:

Q. Was the walk lighted there? Could you see the snow? Could you see the snow and ice?

A. Yes, sir. We had a porch light.

Q. And that gave you plenty of light to see the walk?

A. Not entirely, no, sir.

Q. Was there any other light other than the porch light?

A. No, sir, excepting the street light.

By Mr. Frost:

Q. The street light gives you some light there but it was light enough for you to see the snow and ice, wasn't it?

A. On that particular corner during the day it stayed shady continuously and at night it seems to be a lot of shadows of darkness in that particular area more so than it was

facing around on the other side of the apartment.

page 60] Q. I understood you to say there was snow on top of the ice all the way down the walk.

A. In spots.

Q. And you continued to walk on down there?

A. Yes, sir.

Q. And you knew it was slippery?

A. Yes, sir.

Q. Do you recall exactly how you fell?

A. No, sir, I can't. I remember I fell backwards this way, going backwards and hitting the lower part of my back.

Q. And you think you fell on your hip?

A. I am not sure. I know I fell on my back.

Q. You don't know how you fell?

A. No, sir. I do remember falling backwards but I don't remember exactly the position when I hit.

Q. Were you walking slowly at the time?

A. Yes, sir.

Q. What kind of shoes did you have on that night?

A. I had on regular shoes with rubber soles and rubber heels.

Q. Leather soles and rubber heels?

page 61] A. I had on regular shoes with rubber soles and rubber heels.

By The Court:

Q. Were you walking slow or fast?

A. Slow.

Q. Why were you walking slow?

A. Well, I was watching where I was going. It is my custom in bad weather to usually be pretty careful to avoid a fall if possible and also this sidewalk has a downgrade to it and I wasn't walking very slowly, I was walking, I would say, a little slower than I normally walk due to the grade to the sidewalk and the fact it might be slippery.

By Mr. Frost:

Q. You say you knew the walk was slippery?

A. Yes, sir.

Q. Why didn't you walk over on the snow?

A. It was pretty deep over there and I didn't have boots.

Q. I believe the weather man at the airport said the snow was four inches deep but you could have walked down the snow beside the walkway, couldn't you?

A. Yes, sir.
Q. And you were going home then?
A. Yes, sir.
page 62] Q. You fell. When you fell did you get right up and go on home?
A. I would say in a very few seconds, yes, sir. I didn't immediately jump up, I pushed myself up and immediately went in the house, walked the rest of the way to the house.
Q. Did you look back at the walk after you fell?
A. No, sir.
Q. Didn't look to see what you fell on?
A. No, sir.
Q. Just continued on into the house?
A. Yes, sir.
Q. Is this mark you made between the entrances of two other twin houses? Is that where you fell? Here is an entrance to a twin house and here is an entrance here of a twin house, is that mark in between those two entrances there?
A. Yes, sir.
Q. I believe this picture here shows it better than any of the rest of them. Will you mark that?

Note: **The witness does as requested.**

Q. Had you slipped any before you got to the place you fell?
A. No.
page 63] Q. But you did know it was slippery?
A. Yes, sir.

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page 89] LEOTA BISSON,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Johnson:
Q. Would you please state your name?
A. Mrs. Leota Bisson.
Q. Are you the wife of the plaintiff, Mr. Frederick Bisson?
A. Yes, I am.
Q. Mrs. Bisson, where do you live at the present time?
A. I live with my mother and father at St. Paul, Virginia.

Leota Bisson

Q. I believe you and your children are living there with your parents.

A. Yes, sir.

Q. In your own words will you tell the jury about what happened the night your husband fell?

A. I didn't see him fall but he came in and had snow all over his coat and he said he fell outside, and it was awfully slippery out there.

Q. Did he tell you what he fell on?

A. He said he fell on the sidewalk but he didn't

page 90] say exactly where — just said it was slippery.

I asked him if he had hurt himself and he said he was sore and that was all. Then when we went to bed he couldn't sleep at all and it got worse. He took aspirin and Bufferin and things like that. I think I rubbed his back with some liniment but I am not sure.

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page 95]

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Q. Now, in regard to this walkway, Mrs. Bisson, did you notice the condition of the walk or anything about it on that day? Did you pay any attention to it?

A. No, the only thing I saw was James cleaning it off and the reason I noticed that my little boy always watched James and he told me he was out there and we looked out and he was coming down the street with this plow or whatever you call it.

Q. And that is all that you saw?

A. That was late in the evening, about 3:00 or 3:30.

Q. Now, do you see James Abrams in the courtroom?

A. Yes, sir.

Q. Was he the only one you saw out there at the time?

page 96] A. Yes, sir, he is the only one I saw.

Q. From where you were looking at him with this thing could you tell how successful he was being in getting up the snow?

A. No, sir.

Q. So you really don't know?

A. No. I was just standing there with the little boy watch-

ing him.

Q. Did you have occasion to go out and look at the walk that afternoon?

A. No, sir. I went out on the back porch and from the steps up it was ice so I didn't go down them. I was going down but I didn't.

Q. You say the back steps were icy?

A. Yes.

Q. Is that also a part of the private walkway furnished by Langhorne Road Apartments? Are the steps and walk connected together, in other words?

A. Well, it is back from the main sidewalk that goes around all the apartments. The steps came up on all apartments.

Q. And this was for the use of tenants?

A. That is true.

page 97] Q. When you saw the ice and all on the steps did you see any chemical or salt or anything like that on it?

A. No, sir.

Q. Was there anything on there other than the ice on the steps?

Mr. Frost: That has nothing to do with the walkways.

Mr. Johnson: She said the steps were connected with the walkway.

Mr. Frost: She is talking about the steps in the back of the apartment.

The Witness: The front steps and the porch, two units joined together, they never swept the porches off and those steps because we would get out there when it would snow, my next-door neighbor and all of us, and have to sweep our own porches off and sidewalks.

By Mr. Johnson:

Q. On those steps you say there was ice?

A. The back steps.

Q. How about the front steps?

A. There was just snow on the steps and porch

page 98] but that was swept off.

Q. By you?

A. My next-door neighbor and myself got out and swept the porches off.

Q. Regardless of where it was, anywhere, on any steps, walk or anything, did you see any chemical of any sort?

A. No, sir.

Q. You didn't go back out that night after your husband came in?

A. No, sir, I didn't.

Q. One more thing, Mrs. Bisson, will you tell the jury if you can exactly what he said when he came in that night after his fall?

Mr. Frost: If your Honor please, I object to that.

The Court: She has already testified to that. She said he fell.

Mr. Johnson: I was asking for his exact words but I am not going to press it.

The Court: Don't go over it again.

Mr. Johnson: I think that is all. Your witness.

page 99] CROSS EXAMINATION

By Mr. Frost:

Q. Mrs. Bisson, as I understand, the front steps and the front porch you and your neighbors always cleaned that off.

A. Yes, sir.

Q. But the sidewalk is the one you thought James scraped?

A. Yes, sir.

Q. And you stated that your husband said when he came in, "It is slippery" and he said that he had fallen on the sidewalk?

A. Yes, sir.

Q. And he had snow all over his coat?

A. Yes, sir.

Q. Did he have some back trouble before this?

A. No, sir. I mean when he would lift a lot of things his shoulders would get sore and maybe every two or three months he would complain of his back if he did a lot of lifting.

Q. Don't you know Mr. St. John Coleman who works out there as a maintenance man, this gentleman sitting right over here?

A. I don't know his name. He is a painter.

Q. Didn't you tell him in discussing your hus-
page 100] band that his back never was any good?

A. No, sir, I never said that.

Q. You never said that?

A. No, sir. I didn't even speak to him, I don't know him

that well. I talked to James, I know him.

Q. You were talking about this particular walkway when you saw James scraping it, were you not?

A. Yes, sir, the one going down to our apartment.

Q. This is Exhibit A. This is Carrington Road going down to your apartment and the walkway you talk about is the one between the street and your apartment.

A. This is the one I saw him cleaning.

Q. And is this the one you see in Exhibit D?

A. Yes, sir, the one going down to the house.

Q. You saw him cleaning that?

A. Yes.

Mr. Frost: That is all.

The Witness stands aside.

Mr. Johnson: That is the evidence for the plaintiff, your Honor. I would like to reserve the right to recall Mr. Bisson later about custom and so forth.

page 101] The Court: If that evidence comes in you can call him in rebuttal.

Mr. Frost: If your Honor please, I would like to make a motion out of the presence of the jury.

The Court: All right. Gentlemen, retire to the jury room, please.

(JURY OUT)

Mr. Frost: If your Honor please, we move the Court to dismiss this case on the ground that the plaintiff by his own testimony is guilty of contributory negligence as a matter of law. I can't conceive of any case that could be more in line with the ruling that it is contributory negligence as a matter of law, and also he assumed the risk. He testified he knew the walk was slippery. He testified he saw the ice and snow on it. He testified that he could have gotten over in the four-inch snow and walked around it but didn't want to get his shoes wet or didn't have on boots, or some-

page 102] thing to that effect, and it seems to me that his own testimony shows that he was just taking a chance of getting down the walkway.

The Court: How would he have gotten home that night, Mr. Frost? How could he have gotten home if he hadn't

used the walkway that night?

Mr. Frost: I asked him if he couldn't have gotten over in the snow — I don't mean walk down the actual walkway but walk down the snow which was on each side of the walkway. He said he didn't want to do it because he didn't have his boots on but he was going straight home so he could have taken off any wet shoes he had.

The Court: He could have fallen if he had gotten in the snow and he could have had the same injuries as if he had fell on the walk.

Mr. Frost: I don't think a four-inch snow would be as slippery as the place he described. He didn't give that as his reason for not getting in the snow, he gave as the reason the fact he didn't have on his boots.

The Court: He said it was snow and ice in spots.

page 103] Mr. Frost: He testified the whole walkway was slippery and he knew it was slippery.

The Court: My recollection is that he testified in spots it was slippery. He said in spots there was ice and there was snow over the ice; that he had on rubber shoes and that he walked slowly and I think reasonable men may disagree as to whether or not he used that degree of care a reasonable prudent person would have used under the same or similar circumstances and I think it is a jury question as to whether or not he was guilty of contributory negligence so I overrule your motion.

Mr. Frost: We except to the ruling of the Court.

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page 104] EVIDENCE FOR THE DEFENSE

J. E. McCAUSLAND,

having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Frost:

Q. Will you please state your name and age?

A. J. E. McCausland, age forty-three.

Q. Are you in any way connected with the defendant company here?

A. I am secretary-treasurer of the Langhorne Road Apartments.

James Abrams

Q. How long have you had that job?
A. Four years.
Q. When was it that you first knew about this alleged accident?
A. The first I knew of it was when we received Mr. Johnson's letter.
Q. What was the date of that letter?
A. March 6th, 1964.

Mr. Frost: That is all.

page 105] CROSS EXAMINATION

By Mr. Johnson:
Q. How many people work in that office that you are in? You are with Snead-Payne, aren't you?
A. I am with Snead-Payne Company.
Q. How many people work in that office?
A. We have a total, including the salesmen, of nine people.
Q. And they all work in there at one time or another?
A. Yes, sir.

Mr. Johnson: Thank you.

The Witness stands aside.

JAMES ABRAMS,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Frost:
Q. Your name is James Abrams?
A. That is right.
Q. Talk real loud so all these people can hear
page 106] you, James. How old are you?
A. Sixty-one.
Q. What is your employment?
A. I am a janitor.
Q. And who employs you?
A. Snead-Payne?
Q. Do you do any work at the Langhorne Road Apartments?
A. Yes, sir.

Q. Do you give all your time to that work?

A. That is right.

Q. Now, this accident is alleged to have happened on January 13th, 1964, about a year ago.

A. That is right.

Q. Mr. Bisson is supposed to have slipped on some ice and snow. Did you clean the walks off that day?

A. Yes, sir.

Q. Will you tell the Court and jury what procedure you followed on that day?

A. On the morning of the 13th I got the snow plow out and started to clean the snow. I run the plow and have three or four men sometimes to come around with shovels and clean the walks off.

page 107] Q. Let me interrupt you a second. Mr. Johnson keeps talking about riding the plow, do you ride it when you have snow?

A. No, sir, I don't have no riding mower, I just have a great big Gravely tractor.

Q. You know what horsepower it is?

A. Seven horsepower.

Q. You say you have three or four men with shovels?

A. Yes, sir.

Q. Take it up from there.

A. They clean and put down chemicals as they clean along. Then in the afternoon before we leave we always see that the walks have got chemicals on them before we leave. We got around to this place where Mr. Bisson was living around about 10:00 o'clock that day, finished up, and then I always double back and put down the chemicals which me and Mr. Coleman takes care of all the putting down of chemicals.

Q. Was Mr. Coleman with you that morning on that walkway?

A. With me all the time.

Q. You remember that walkway particularly?

A. Yes, sir, we pay particular attention to that walk.

Q. Why do you pay particular attention to that walk?

page 108] A. Because it's a downgrade walk there.

Q. When you scraped the snow or ice or whatever it was what was the condition of the walkway after you finished the scraping?

A. Well, it was clean. It gets pretty much all off unless there is some ice and sometimes the plow would skip over

ice.

Q. Did I understand you to say chemicals were put on the walkway after you scraped it?

A. Yes, sir, that is right.

Q. Did you put any more chemicals on it?

A. That is right.

Q. When was that?

A. In the afternoon.

Q. So you put chemicals on there twice that day?

A. That is right.

Q. Do you remember how many men were helping you on that particular job?

A. I think we had four that day.

Q. What did the men do with the shovels?

A. They clean off steps and porches and along the walk where the plow won't get.

page 109] Q. Do you happen to know what kind of chemical you used?

A. I don't remember what we were using at that time.

Q. How long have you been working there?

A. Fifteen years.

Q. Have you ever had any complaints?

A. No complaints.

Q. About snow being on the sidewalk?

A. That is right. I thought I made a good job of getting the ice off at that time. I always try to see that the walks were clear before we leave.

Mr. Frost: You can take the witness.

CROSS EXAMINATION

By Mr. Johnson:

Q. You say you never had any complaints before?

A. No, sir.

Q. Had you always cleaned them in the same way?

A. That is right.

Q. Now, you said when you went along with the tractor it's one you don't ride yourself?

A. No, sir.

page 110] Q. But it is a seven horsepower tractor?

A. Yes, sir.

Q. It's fairly large, isn't it?

A. Yes, sir.

Q. But you actually walk behind it?

A. That is right.

Q. Except for the fact you are walking instead of riding it is the same thing, isn't it?

A. Yes, sir.

Q. Now, you said you paid particular attention to this walk?

A. Yes.

Q. You know then when it is snowing and sleeting this is a particularly dangerous walk, isn't it?

A. Well, yes, sir. It's downgrade.

Q. So you realized this walk deserved a little more attention than the other walks out there?

A. I can't say that because we have a whole lot of them that are downgrade.

Q. Haven't you really said so already?

A. Yes. We always start there because it's on a shady side, the sun never hits it.

page 111] Q. It's down there in a lower area and the sun doesn't hit it, does it?

A. In the morning.

Q. It didn't hit it in the afternoon, did it, that lower part right down in here? I am looking at Defendant's Exhibit C. Right in this area the sun doesn't actually hit that in the afternoon, does it?

A. Yes, sir, it does. The sun shines in there.

Q. Are you sure of that?

A. I am sure of it in the morning.

Q. You say the sun shines there in the morning?

A. Yes, in the morning, gets some sunshine in the morning and later on in the afternoon it is shady.

Q. It is shady in the afternoon but it does get some sun early in the morning. Is that right?

A. Yes, sir.

Q. Would that be maybe before 10:00 o'clock in the morning?

A. Around 10:00.

Q. But it doesn't get any sun after that, does it?

A. Yes, it does. It gets sun up until around 11:00 and then it begins to get shady in that particular spot you

page 112] showed me just then.

Q. You think it gets some sun until 11:00 o'clock. Is that correct?

A. That is correct.

James Abrams

Q. You said when you scraped this walk that you looked and it was pretty clean.

A. Yes, sir.

Q. You weren't putting down the chemicals yourself, were you?

A. I helped after I finished with the plow.

Q. But you did the plowing on this?

A. Yes.

Q. And this other gentleman was coming along putting down the chemicals?

A. Yes, sir, he was with a bunch of men and they cleaned and he was putting down chemicals. He carried the chemicals with him.

Q. He put down the chemicals where you hadn't been able to clean it off?

A. Yes, sir.

Q. If it was pretty clean he wouldn't put down the chemicals because there was no need to?

page 113] A. That is right.

Q. You say you don't remember what kind of chemical this was?

A. Salt or THAWSIT.

Q. THAWSIT is really just a commercial salt, isn't it?

A. No, sir, it's much higher than salt, it's expensive.

Q. What does it look like?

A. It's little round balls.

Q. Little round balls?

A. Yes, sir, kind of fine but it does real good work.

Q. Are you sure this is the kind of chemical you were putting down this particular day?

A. Yes, sir, I am sure.

Q. Awhile ago you said you didn't remember.

A. It has come to me.

Q. It has suddenly come to you?

A. Yes, sir.

Q. Haven't you been over all this with Mr. Frost, this gentleman over here?

A. Yes, sir.

Q. You have talked about what you were going to testify to and all?

page 114] A. No, I didn't.

Q. You didn't discuss it with him.

A. With Mr. Frost, yes, sir. I discussed it with Mr. Frost.

Mr. Frost: You are not implying I put the words in his mouth, are you?

Mr. Johnson: I am letting him do the implying. I asked him if he talked with Mr. Frost.

Q. When you were answering Mr. Frost's questions you didn't tell him that you used this THAWSIT.

A. I don't think he asked me directly the name of the chemical.

Q. You were asked a few moments ago on the stand what chemical was used and you told him you didn't remember but now you tell me you suddenly remember.

A. I couldn't remember the name at the time but it come to me.

Q. He asked you what kind of chemical you used and you told him you didn't remember what you were using then.

A. Well, it came to me.

Q. Did you speak with Mrs. Bisson shortly after this fall there at her apartment?

page 115] A. Mrs. Bisson came to my office on the morning of the fall.

Q. On the morning of what?

A. The morning after her husband fell and she called the drug store or she asked me to call the drug store and I did. I didn't know direct that he fell on the ice and hurt himself until they called me, Mr. Mayhew, I think it was from the office.

Q. But she told you he had fallen?

A. No, she said he was sick and couldn't go to work. She didn't tell me he had fallen.

Q. How did you know it was the morning after the fall?

A. She came in and wanted to use the telephone.

Q. How do you know that was the morning after the fall?

A. She said he was sick.

Q. Are you saying now that you remember the morning by the day of the month rather than the morning she came to see you and talk to you?

A. She came to use my telephone on the morning of the 13th and said her husband couldn't go to work.

Q. On the morning of the 13th. You remember that definitely?

page 116] A. Yes, sir.

Q. He didn't fall until the night of the 13th.

A. Then it must have been the 14th. She said he couldn't

go to work but I still didn't know he had fell on the ice and hurt himself.

Q. You knew he had fallen, didn't you?

A. No.

Q. You didn't know he had fallen?

A. Not until I got it from the office and then I told Mr. Coleman.

Q. What is that?

A. That was March, I think.

Q. You didn't know he had fallen until then?

A. No.

Q. Do you remember talking to her around the clothesline when he was in the hospital?

A. No.

Q. Do you remember asking her if a representative of Snead and Payne had come out and talked with her?

A. No.

Q. You don't remember that?

A. No.

page 117] Q. Would you remember it if it happened?

A. I don't know nothing about it.

Q. You don't remember coming to her door and asking her about that and talking further?

A. No.

Q. Do you remember telling her that you thought you had gotten the walk clear but since that fall they had told you to put down chemicals and you were going to do that from now on?

A. No, oh, no.

Q. You are sure?

A. I am sure — I am postive.

Q. Are you as sure of that as you are the fact she first came and said he was sick on the morning of the 13th?

A. I am positive I did not say that.

Q. So if she says you did she is wrong?

A. That is right.

Q. Now, you say you got to this walk that morning about 10:00 o'clock?

A. Yes.

Q. How many walks did you clean before you got to his?

A. I usually start on the lower road and come on around.

Q. How long had you been cleaning before

page 118] you got to this place?

A. Since 8:00 o'clock.

James Abrams

Q. You remember this very well, is that right?

A. Yes.

Q. Had it quit snowing or sleeting when you started at 8:00 o'clock.

A. No, it was still snowing some when we started.

Q. Do you usually wait until the snow or sleet stops before you start cleaning or do you start ahead of time?

A. That depends. Sometimes I start before it stops.

Q. You did that on this morning. Is that right?

A. Yes.

Q. Actually if you got to his walk about 10:00 o'clock it really hadn't finished snowing then, had it?

A. No, but you see that is what I said awhile ago, we checked the walks back in the afternoon.

Q. And you put the chemical on in the afternoon?

A. No, the men were behind me with the shovels and Mr. Coleman had the salt coming along.

Q. But you say he wouldn't have put that down unless you had missed something; that if it was pretty clean he wouldn't put the chemical down.

page 119] A. He just put it down where it was needed.

Q. If you were there about 10:00 o'clock and it was still snowing there would have been some snow behind you even after you pushed it off because it still snowed for a little while.

A. Well, yes, it would have been some behind me.

Q. And you, yourself, didn't go back there until just before you left there that afternoon when you say you checked to see if it needed any chemicals anywhere.

A. That is right, we checked again that afternoon.

Q. Just one other thing. You say you and Mr. Coleman do this cleaning on the walk and the other men you sometimes use they clean the porches and steps. Is that right?

A. We are with them. We all work along together.

Q. They don't work on the walks?

A. No unless there is ice and then they do.

Q. Do you clean the front porches?

A. Sometimes.

Q. And the back porches?

A. The first we clean is the front.

Q. Do you also clean the back?

A. We clean the back but we get the front first.

James Abrams

Q. Did you clean the back porch of this apart-
page 120] ment unit on that day?

A. Well, I guess we did.

Q. You guess you did?

A. Yes, sir, because I remember we got all the way around that day, the snow wasn't heavy. We got all the way around.

Q. I believe you want to be fair, don't you, in your testimony?

A. Yes, sir.

Q. And you want to be truthful?

A. That is right.

Q. Now, you say you guess you did. Really you don't remember actually cleaning that particular walk, do you?

A. Well, I know I went down it with the plow.

Q. And that is about all you really know for sure?

A. Mr. Coleman had the men on behind me and he can tell you about what he did.

Q. That is really about all you know, thank you.

page 121] RE-DIRECT EXAMINATION

By Mr. Frost:

Q. Do you remember whether he put any chemical on the walk?

A. Yes, sir.

Q. Did you say the name of the chemical came to you?

A. Yes, sir, THAWSIT.

Q. Can you look at this folder and see if that is what you are talking about?

A. Yes, sir, THAWSIT.

Mr. Frost: I want to introduce this as an exhibit.

By The Court:

Q. What happened to the snow the plow took off of the walk?

A. It throws it to the side.

Q. Piles it up on each side?

A. I set the plow at an angle and it throws it off to one side.

Q. Then that would make the snow on the side of the walk higher than the ordinary snow on the side?

A. Yes, sir.

page 122] By Mr. Frost:

Q. Does it throw it on one side or both sides?

A. I can throw it on either side.

Q. What actually happened?

A. I can set it at any angle.

Q. I understand that but the question is when you have it set does it throw it on one side or both sides?

A. One side.

Mr. Frost: That is all.

★ ★ ★ ★ ★

page 123] January 20th, 1965
Afternoon Session

ST. JOHN COLEMAN,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Frost:

Q. Will you please state your name and occupation?

A. My name is St. John Coleman and I am maintenance supervisor for Langhorne Road Apartments.

Q. How long have you held this position, Mr. Coleman?

A. Since June 1, 1953.

Q. You have been sitting in the courtroom and you know that this case involves an accident that is supposed to have happened on January 13th, 1964. Were you on duty that day?

A. Yes, sir.

Q. Can you just tell the Court and jury what you know about any activities in regard to clearing or not clearing the walks going from Carrington Road down to 2134 apartment?

A. You mean the time of day?

Q. Were you over there at that sidewalk, the
page 124] walkway leading from the public street down to 2134 Carrington Road, that day?

A. Yes, sir.

Q. Will you tell us what, if anything, was done about clearing the snow?

A. James Abrams, our janitor, ran the snow plow over that sidewalk. Three other men came along with me with shovels and I had a bucket of chemicals carrying them along

and the reason I wasn't shoveling snow that day was because I hadn't been very long out of the hospital with a lung operation and my boss had told me to take it easy so I was putting down chemicals that day and just using a broom for sweeping off porches. James went over that sidewalk in question with a snow plow at approximately 10:00 o'clock or 10:30, somewhere between 10:00 and 11:00 o'clock, with some of the other men going along with shovels and I was going along with the broom and the bucket of chemicals to put down chemicals wherever the plow had missed snow and ice would not come up and I scattered that over there by hand myself. I went over that that morning and that afternoon around 4:00 o'clock James Abrams and I went back to that sidewalk and put more chemicals on it. Both of us used a bucket of chemicals that evening. I sprinkled that place and

page 125] three other places besides.

Q. When you put it on do you broadcast it?

A. Broadcast it by hand, yes, sir.

Q. What time in the afternoon did you say you went back again?

A. I said between 4:00 and 4:30.

Q. When did you first hear about this accident?

A. Around in March. I don't remember the date.

Q. March of '64?

A. Yes, sir.

Q. Did you ever have any other complaints about snow not being off of the *sidwalks* or off of this walk?

A. No, sir.

Q. What type power mower did you use?

A. Seven or seven an a half horsepower Gravely tractor.

Q. Was James sitting on the tractor?

A. No, sir, it is impossible to sit on it.

Q. How long have you been using chemicals on the walks?

A. We have been using some type of chemical ever since I have been there every winter.

Q. Have you used it on this walkway every winter since you have been there?

page 126] A. Yes, sir.

Q. Now, did you have a conversation with Mrs. Bisson about her husband's back trouble?

A. Yes, sir.

Q. Will you relate to the Court and jury what that conversation was?

A. I was sitting in my office, the janitor and I use the same

office, and we have a telephone in there. Mrs. Bisson came down to use the telephone and I asked her how her husband's back was getting on. She had been in there before and used the telephone and I knew Mr. Bisson had had trouble with his back but I did not know that he had fell, had no information that he had fell at Langhorne Road Apartments. I asked her how her husband was getting along and she said he wasn't doing too good and didn't know if he would ever be able to work again and as for that matter his back never had been none too good noway.

Mr. Frost: Take the witness.

page 127] CROSS EXAMINATION

By Mr. Johnson:

Q. Mr. Coleman, I understood James Abrams to say he was in charge of this work. You say you are in charge. Who is actually in charge?

A. I am maintenance supervisor.

Q. Your job is primarily painting and repairs?

A. My job is doing anything at Langhorne Road Apartments that needs to be done.

Q. What is his job?

A. His job is almost the same as mine. We work together in the same office. Both of us take our orders from the same men.

Q. You say you are in charge and he says he is in charge.

A. We work together.

Q. I want to ask you about this. You say it was you, James Abrams and three other men that were working on this particular walk. Is that right?

A. That is what I say, yes, sir.

Q. You heard James Abrams testify this morning that he pushed the plow; that you came along with salt and the other men didn't work on this walk but they worked

page 128] on the steps and porches.

A. I am only telling you what I know. The other men shoveled the walks as we went along. We all go along together.

Q. You heard him say that this morning, didn't you?

A. I don't recall exactly what he said.

Q. Did you hear him say you put down the chemical and he didn't mention anything about anybody coming along

with a shovel?

A. I think he said other people come along with a shovel.

Q. On that walk?

A. I don't know if he especially mentioned that walk but I know the procedure we use out there.

Q. You say three men came along with shovels. You came along with the bucket and something else. What else was it?

A. A broom.

Q. James Abrams went along with the tractor, three men went along with shovels and this walk is only about three foot wide, isn't it?

A. Yes, sir.

Q. And all three of them were working along there together getting up spots of snow?

A. On that particular walk there was three
page 129] double porches and three sets of steps to be cleaned.

Q. You said all three men were coming along with shovels working on the walks where he missed spots.

A. We go along behind the plow and we take the porches in as we get to them. One will take one porch and one the next porch and if either one of use see some snow he has left we try to get it up with the shovel.

Q. Mr. Coleman, you know I am referring to this particular walk. You started out referring to it and didn't you say three men went along behind him with shovels cleaning up the parts he missed?

A. I did say that and three men did come along.

Q. On that walk?

A. On that walk, yes, sir.

Q. And if he says just he came along with the tractor and you came along behind him with the chemicals he is mistaken?

A. If he can't remember what he did I can't help it.

Q. Now, he also said that he had got this walk pretty clean so it wasn't necessary for you to put down chemicals on this particular one. Is that correct?

A. I say we put chemicals on it.

Q. You say you did?

page 130] A. Yes, sir.

Q. You say you first heard about this in March?

A. I first heard about Mr. Bisson falling in March.

Q. But it was before that that his wife was in your office, wasn't it?

A. Yes, sir.

Q. And at that time you asked her, "How is your husband's back getting along?"

A. Yes, sir, I asked her how her husband's back was getting along.

Q. James Abrams testified he thought her husband was just sick but you knew it was his back. Is that right?

A. Yes, sir, I knew it was his back and it was giving him trouble because I had talked to him and he told me his back was giving him trouble.

Q. And he also told you how it happened?

A. No, sir, he never opened his mouth to me about falling.

Q. And you say this lady here told you her husband had always had trouble with his back?

A. Yes, sir, said his back was hurting him.

Q. Are you sure that is what she said?

A. Yes, sir, I am sure of that.

page 131] Q. When did this conversation take place?

A. It happened after the 13th of January.

Q. When?

A. I don't know exactly what date it was. It was one morning when she was in the office using the telephone.

Q. Was anybody else there?

A. I don't know whether James was in there or not. Sometimes he was in there when she came to use the telephone and sometimes he was not.

Q. Was it while her husband was in the hospital?

A. I don't remember whether he was at home or whether he was in the hospital.

Q. You did know that he was in the hospital.

A. I know he has been to the hospital. I know now he has been to the hospital.

Q. You knew then, didn't you?

A. I knew then he had been in the hospital but I don't remember right at the point at the very times she was using the telephone whether he was in the hospital or at home.

Q. You knew he was in the hospital and knew his back was bothering him and you took it upon yourself to ask his wife if his back was still bothering him.

page 132] A. Yes.

Q. And you say she told you it was giving him a lot of trouble and she didn't think he would ever be all right again?

A. Yes, sir.

Q. And she said further it always had given him trouble?

A. She said his back had never been too good.

Q. Did you say she said his back had never been too good or never was any good? Which did she say?

A. It may have been one or the other.

Q. About all you know is she said something about him having trouble with his back.

A. It never had been any good.

Q. You heard testimony from him that he never had any trouble with his back.

A. I heard the testimony this morning and I heard him say his back had given him trouble before and she said he had trouble before with his back too. If I am not mistaken I think I heard both of them say it right in the chair here today.

Q. And you say you remember this particular day, this particular walk, and exactly how you all cleaned this walk?

A. I remember exactly how we cleaned those walks and the general procedure every time we cleaned them.

page 133] Q. How many walks are out there, Mr. Coleman?

A. I haven't exactly counted each walk.

Q. Give us an idea.

A. I can't do it because some of the walks have eight apartments, some don't have but one, some five and some six and I never have counted them.

Q. It sounds like an average of about five apartments to a walk.

A. I would say an average of about five.

Q. And there are ninety-seven apartments which would make it about nineteen walks.

A. I would say maybe an average of nineteen walks or something like that.

Q. You tell this jury you remember the 13th, you remember the time you got to this particular walk, the way you did this particular walk, exactly how many men there were and James Abrams is wrong about being just you and him. Is all that correct?

A. I don't say James was wrong.

Q. If he said it was just him pushing the plow and you coming with the chemicals he is wrong, isn't he?

A. I don't know whether he is wrong or not.

page 134] That is what you say he said.

Q. If he said that you say he is wrong?

A. I didn't hear him say it.

Mr. Johnson: That is all, Mr. Coleman.

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page 152] REBUTTAL EVIDENCE

LEOTA BISSON,

recalled in rebuttal, testifies as follows:

DIRECT EXAMINATION

By Mr. Johnson:

Q. Mrs. Bisson, did you have occasion to talk with James Abrams in any way regarding this fall after the fall occurred?

A. Yes, sir, I did.

Q. About when was the conversation?

A. Well, my sister from Washington came and took us home for a week-end in February but I don't know the date. Then we came back.

Q. How soon after your husband got out of the hospital?

A. It must have been three or four weeks, and he asked me, James did, he asked me if a man from Snead and Payne had been up to talk to us.

Q. About what?

A. About my husband falling.

Q. Where did this conversation take place?

page 153] A. Well, it was at the house. I was either out on the back porch or down in the yard, I can't remember. I believe I was on the back porch somewhere.

Q. He came to your place, is that right?

A. Yes, sir.

Q. All right, what is the rest of the conversation?

A. He asked me if they had talked to me. He said they had come and talked with him about it, you know, and that they asked him if he had scraped the walk and he told them yes, that he scraped the walk and they asked him if it was possible that it could have gotten ice on it and James told me that he told them it was possible but they had scraped them.

Q. He said that they asked him if it could have gotten ice on it. Did he say how it could have gotten ice on it?

A. You know water or something, he just said was it possible for ice to have frozen.

Leota Bisson

Q. Or it could have melted and refrozen?

A. Yes, sir.

Q. And he told them what?

A. He told them that it was possible but that they had scraped them; that it was possible, you know, it could have been frozen.

Q. Was there any more to that conversation,
page 154] anything about what he was going to do from then *or* or anything?

A. Put chemicals on it.

Q. What was said about that?

A. That they better put chemicals on it, that is the way they put it, as I remember it.

Q. Did he say that he thought he had better put it down or did he say somebody told him to?

A. Somebody told him they had better put chemicals down, told James.

Q. Now, in regard to what Mr. Coleman has testified about you coming into his office and saying something about this, did you have such a conversation with Mr. Coleman?

A. Well, I used their phone quite often and everybody knew about my husband falling, knew about it the next day, so when I went out, it wasn't the day he fell because he was in the hospital — I mean the day when he went to the hospital, and I used my neighbor's phone sometimes but she was gone, and I went out and used the phone and he asked me how my husband's back was but I didn't tell him his back hadn't ever been any good.

Q. From what he asked you and so forth was there anything that indicated that he knew what was wrong with his back?

page 155] A. He knew because I told him and James both about it the same time I called Snead and Payne.

Q. Did you call Snead and Payne?

A. Yes, sir.

Q. Do you know who you talked to there?

A. No, it was a man and that is all I know.

Q. When was that?

A. It was the day he went into the hospital because I called my mother and I called Snead and Payne either because our rent wasn't paid or we weren't going to pay it that Friday and I called Snead and Payne and told them of this thing and I talked to this man and told him my husband was in the hospital and I didn't know when we would get to pay

the rent. He asked what happened and I told him he fell on the sidewalk out in front of the house.

Q. And that was someone who answered the phone at Snead and Payne's?

A. Yes, sir, and they said they were very sorry to hear it and if they could be of any help to contact them. I think we gave them $20.00 was all.

Q. On the rent?

A. Yes.

page 156] Q. Did you explain why you couldn't pay it all?

A. Yes, sir, I told him he was in the hospital and I didn't know how long he would be in there or when he would be able to go back to work and they said it would be all right; that they were very sorry.

Mr. Johnson: Your witness.

CROSS EXAMINATION

By Mr. Frost:

Q. You say you had a conversation with James. Are you positive when that conversation was?

A. It was some time in February but I am not sure.

Q. The latter part of February?

A. Yes, sir.

Q. And he asked you if a man had come to see you from Snead-Payne, is that the way it was?

A. Yes, sir.

Q. What was said about scraping the walk?

A. He said the man from Snead and Payne had asked him if he had scraped the walk that afternoon and he told him he had. The man asked him if it was possible the

page 157] snow had melted and frozen again and James told me he told him it was quite possible.

Q. Then did I understand you to say that the man told him to put chemicals on it?

A. That they better put chemicals down.

Q. Didn't you know for a fact they had been putting chemicals down every time it snowed?

A. I have seen them scraping but I have never seen them put any chemicals down.

Q. When you called Snead-Payne what day was that?

A. The 15th day of January.

Q. And you do not know who you talked to?

A. No, it was a man who answered the phone and I called from my neighbor's that lives right beside us.

Q. And you called to tell why you couldn't pay the rent, is that what you called about?

A. Yes, sir.

Q. Not to report the accident but because you couldn't pay the rent?

A. To tell about the rent and why it would be late.

Mr. Frost: That is all.

The Witness stands aside.

page 158] FREDERICK J. BISSON,
recalled in rebuttal, testifies as follows:

DIRECT EXAMIANTION

By Mr. Johnson:

Q. Mr. Bisson, before your fall and injuries I believe you testified this morning according to your recollection there had been at least one previous snow that winter.

A. Yes.

Q. Had you ever seen any chemicals put down up there before your fall?

A. No, sir.

Q. Had you seen any chemicals put down while it was snowing or sleeting the day before on the 12th before your fall?

A. No.

Q. Had you on any occasion before you fell seen any chemicals on the walk?

A. No, sir.

Q. Are you generally familiar with that THAWSIT or things of that type?

A. No, sir, I am not.

Q. But it is in small round pellets or grains or
page 159] something. If there had been anything like that on the walk would you have noticed it?

A. I believe so, yes, sir.

Q. Now, after your fall had you noticed while you were still there whether they had used anything?

A. Yes, sir.

Q. They did after your fall?

A. Yes, sir, and also came up on the back porch, which they never did before, and cleaned those off in the back. They would clean up to the front porch and put salt on it and they never did that before.

Mr. Johnson: Your witness.

CROSS EXAMINATION

By Mr. Frost:

Q. Mr. Bisson, you came to Langhorne Road Apartments in September of '63.

A. Yes, sir.

Q. As a matter of fact, there wasn't any snows to amount to anything between then and January, was it?

A. I believe there was a snow but I don't think
page 160] it amounted to very much.

Q. Very few snows before the first of the year last year, wasn't it?

A. My recollection is there were some but I don't know how deep they were.

Q. You had no opportunity really to judge whether they put any chemical down or not, did you?

A. No, sir, other than just coming home from work.

Q. I know you are not a pharmacist but you know that chemicals dissolve snow, don't they?

A. Yes, sir. It all depends on the thickness you put it down. I have noticed the way we use it in front of the store a small bit of it will be there the next day or the day after and we have to sweep it off.

Q. It is supposed to dissolve the snow or ice?

A. Yes, sir, it is supposed to but it doesn't always do it.

Q. Do you think you could have seen any chemicals the night you came home had any been put down?

A. No, sir.

Q. What did you say about you could have seen chemicals?

A. I could have seen it probably in the daytime
page 161] but I don't believe I could have seen it at night with no light.

Mr. Frost: That is all.

The Witness stands aside.

Mr. Johnson: That is all of our evidence in rebuttal.
Mr. Frost: I want to recall James Abrams.

SURREBUTTAL EVIDENCE

JAMES ABRAMS,

recalled in surrebuttal, testifies as follows:

DIRECT EXAMINATION

By Mr. Frost:
Q. James, did you hear Mrs. Bisson testify about a conversation she said she had with you?
A. Yes, sir, I did.
Q. Do you remember talking with her?
A. No, I don't.
page 162] Q. Do you remember whether or not you told her that some man said you had better start putting chemicals down on the walkway?
A. No, I don't.
Q. Had you put chemicals down on the walkway before this accident?
A. Ever since I have been there and I have been there fifteen years, we have been using chemicals.
Q. On the walkways?
A. On the walkways.
Q. Any question in your mind about that?
A. No, sir.

Mr. Frost: That is all.
Mr. Johnson: No questions.

The Witness stands aside.

page 163] HARRY MAYHEW,
having been first duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Frost:
Q. What is your name?
A. Harry Mayhew.
Q. What is your occupation?

Harry Mayhew

A. Salesman for Snead-Payne Company for the Langhorne Road Apartments.

Q. Have you any connection with Langhorne Road Apartments, Incorporated?

A. Yes, sir, we manage it.

Q. Do you yourself have anything to do with it?

A. Yes, sir.

Q. Do you live out there?

A. Yes, sir.

By The Court:

Q. You live in the Langhorne Road Apartments?

A. Directly in front of the Bisson apartment.

By Mr. Frost:

Q. Do you have anything to do with ordering the chemicals?

page 164] A. Yes, we do. Originally we used salt for some years and then we switched to this chemical called THAWSIT which we did order from Richmond, Virginia and in the last year or two we did switch to Calcium Chloride and each year we do have to buy a supply of chemicals for that property, along with other properties.

Q. Do you know of your own knowledge whether chemicals have been put down on the walkways prior to January 13, 1964?

A. I don't know when it was applied but there are areas that probably indicate they will be slippery and we do apply it where it is necessary.

Q. I mean are the chemicals used out at Langhorne Road Apartments?

A. Yes, sir, we will use two or three hundred pounds.

Mr. Johnson: We object unless he can say whether or not they were used there on this walk at this place at that time and whether or not he knows they were used.

The Court: I think that is what he is trying to ask him.

By Mr. Frost:

Q. Were they used on this particular walk, Mr. Mayhew?

page 165] A. We watch that particular walk because there is a shady area there and it is difficult at times and that is where ice forms. We use it there, along with other

areas in the project.

Mr. Frost: That is all.

CROSS EXAMINATION

By Mr. Johnson:

Q. What you mean to tell us is that you told James Abrams or Mr. Coleman to pay particular attention to that walk?

A. No, any slick spots, not that particular one, no, sir — any area where there may be an indication of being slick or shady.

Q. I believe your words were "We pay particular attention to that walk because that is a shady spot."

A. I didn't say that, I beg your pardon. I didn't tell him to put it there but that is one place.

Q. When you say, "We pay particular attention to that area" what do you mean?

A. In the period of time there has been ice that has formed in that area, along with other locations.

page 166] Q. What I am getting at, Mr. Mayhew, you say, "We pay particular attention to that." Who is "we?"

A. I am referring to whoever was cleaning the walk. James in most instances does.

Q. What you mean to say is you have emphasized to James, or whoever is cleaning, to pay attention to that?

A. To that, along with any other walk where probably there would be a slippery area.

Q. But after you told him what you did you don't know whether he followed your instructions or not, do you?

A. No, sir.

Mr. Johnson: All right.

The Witness stands aside.

Mr. Johnson: The plaintiff rests.

(IN CHAMBERS)

Mr. Frost: The defendant, by counsel, moves the Court to strike the evidence of the plaintiff on the following grounds:

That there has been no duty shown by the
page 167] plaintiff requiring the defendant to remove the snow or ice on the sidewalk;

That there has been no negligence shown;

That there has been no proper notice given of an unusual condition existing; and

On the further ground that the plaintiff by his own testimony is guilty of contributory negligence as a matter of law and could not recover and also that the plaintiff had assumed the risk and should not recover.

The Court: On the grounds previously stated, the Court is of the opinion it constitutes a jury question whether or not he acted as a reasonable person under the same or similar circumstances would have acted and therefore is going to submit it to the jury on proper instructions. I overrule your motion.

Mr. Frost: I except to the action of the Court in overruling my motion to strike the evidence.

page 168] INSTRUCTIONS

The Court: We will now consider instructions offered by the plaintiff. Mr. Frost, do you have objection to Instruction No. 1?

Mr. Frost: The defendant, by counsel, objects to Instruction No. 1 offered by the plaintiff on the ground that there is no common law duty or statutory duty requiring the defendant under the circumstances of this case to clean the sidewalk from natural accumulation of snow and ice; on the further ground, assuming there was such a duty, the duty would be to maintain a reasonably safe condition on the said walkway.

The Court: The Court is going to give Instruction No. 1 as offered. Apparently it is taken verbatim from the Instruction Book of Doubles, Emroch and Merhige and also from the language of the case of *Walker* versus *Memorial Hospital* in 187 Virginia, Page 5. The Court is of the opinion this is sufficient authority to grant this instruction so therefore will give it as offered.

page 169] Mr. Frost: The defendant, by counsel, objects and excepts to the action of the Court in giving Plaintiff's Instruction No. 1 for the reasons stated.

Note: On the morning of the second day of the trial of this case the following ensued in regard to Instruction No. 1.

Mr. Frost: In order to save time, I wonder if your Honor would like to dictate in the record you are refusing Instruction No. 1 for the plaintiff.

The Court: In further considering Instruction No. 1 for the plaintiff it appears that it is a finding instruction and does not include the theory of the assumption of risk on which the defendant has offered an instruction and which the Court is going to give so therefore the Court is going to refuse Instruction No. 1 and I understand from Mr. Johnson, representing the plaintiff, he is offering Instruction 1 as presented and does not desire to change Instruction No. 1 to include the assumption of risk so I am going to refuse it because it does not include that theory of the case and the Court is going to give Instruction 1-A which will include the theory of assumption of risk. I understand Mr. Frost has an objection to Instruction 1-A but I will let Mr. Johnson object to refusing No. 1.

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Mr. Johnson: The plaintiff, by counsel, objects and excepts to the refusal of the Court to give Instruction 1 as offered by the plaintiff and to the action of the Court in giving instead Instruction 1-A on the ground that there is no evidence in this case upon which an instruction involving assumption of risk can be predicated. There is no evidence of assumption of risk and the plaintiff, by counsel, objects and excepts to the giving of any instruction in this case in regard to assumption of risk.

Plaintiff's Instruction No. 1 (Refused):

"The Court instructs the jury that it was the duty of the defendant, Langhorne Road Apartments, Incorporated, to exercise reasonable care to remove the ice and snow from the outdoor entrance walk herewith concerned within a reasonable time after the snow had ceased falling.

"And if you believe from a preponderance of the evidence, that the defendant violated the foregoing duty then the defendant was guilty of negligence, and if you further believe from a preponderance of the evidence that any such negligence of the defendant was a proximate cause of the plaintiff's injuries, then, unless the plaintiff was guilty of negligence which proximately contributed to cause his injuries, you shall find your verdict in favor of the plaintiff."

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The Court: Now, Mr. Frost, do you have any objection to instruction No. 1-A given in lieu of No. 1?

Mr. Frost: The defendant, by counsel, makes the same objection to Instruction 1-A as he did to Instruction 1 and excepts to the ruling of the Court in giving Instruction 1-A.

The Court: Mr. Frost, don't you think the instruction should include the theory of assumption of risk?

Mr. Frost: I agree with the Court.

The Court: I am going to give it on that theory that it should be a part of it. You do not object to the addition of the assumption of risk?

Mr. Frost: I do not object to the insertion of
page 172] the assumption of risk but object and except to the giving of the instruction on the general view that it does not express the law applicable, as set forth before.

Plaintiff's Instruction No. 1-A (Given):

"The Court instructs the jury that it was the duty of the defendant, Langhorne Road Apartments, Incorporated, to exercise reasonable care to remove the ice and snow from the outdoor entrance walk herewith concerned within a reasonable time after the snow had ceased falling.

"And if you believe from a preponderance of the evidence, that the defendant violated the foregoing duty then the defendant was guilty of negligence, and if you further believe from a preponderance of the evidence that any such negligence of the defendant was a proximate cause of the plaintff's injuries, then, unless the plaintiff was guilty of negligence which proximately contributed to cause his injuries or assumed the risk, you shall find your verdict in favor of the plaintiff."

page 173] The Court: Do you have any objection to Instruction No. 2?

Mr. Frost: I have no objection to Instruction No. 2.

The Court: The Court will give Instruction No. 2.

Plaintiff's Instruction No. 2 (Given):

"The Court instructs the jury that the plaintiff, Frederick J. Bisson, is not required to prove his case beyond a reasonable doubt but that the plaintiff is only required to prove his case by a preponderance or greater weight of the evidence."

The Court: Do you have any objection to Instruction No. 3?

Mr. Frost: I have no objection to Instruction No. 3.

page 174] Plaintiff's Instruction No. 3 (Given):

"The Court instructs the jury that if the defendant, Langhorne Road Apartments, Incorporated, relies upon contributory negligence of the plaintiff, Frederick J. Bisson, as a defense in this case, then the burden is upon the said defendant to prove such contributory negligence of the plaintiff by a preponderance of the evidence, unless such contributory negligence is disclosed by the plaintiff's evidence or can be fairly inferred from the circumstances."

The Court: Mr. Frost, do you have any objection to Instruction No. 4 offered for the plaintiff?

Mr. Frost: The defendant, by counsel, objects to the giving of Plaintiff's Instruction No. 4 in that sub-section 2 is improper and is cumulative and stresses bodily injuries and sub-section 4 deals with humiliation or embarrassment and there is no evidence to support this provision of the instruction.

The Court: The Court is going to give Instruction No. 4 as offered. It has been approved in the Instruction Book of Doubles, Emroch and Merhige and also in the
page 175] case of *Norfolk and Western Railway* versus *James* in 147 Virginia at Page 178.

Mr. Frost: The defendant, by counsel, objects and excepts to the action of the Court in giving Instruction No. 4.

Plaintiff's Instruction No. 4 (Given):

"The Court instructs the jury that if from the evidence and the other instructions of the Court you find your verdict in favor of the plaintiff, Frederick J. Bisson, then in assessing the damages to which he is entitled you may take into consideration such of the following items as may be shown by a preponderance of the evidence to have proximately resulted from the defendant's negligence, or which with reasonable certainty in the future may proximately result from such negligence, namely:

"1. Any bodily injuries sustained and the extent and duration thereof;

"2. Any effect of any such injuries upon his health according to its degree and probably duration;

"3. Any physical pain and mental anguish suffered by him in the past, and any which may be reasonably ex-
page 176] pected to be suffered by him in the future;

"4. Any disfigurement or deformity resulting to him and any humiliation or embarrassment associated there-

with;

"5. Any inconvenience and discomfort caused in the past and any which will probably be caused in the future;

"6. Any doctor's, hospital, nursing and medical expenses incurred;

"7. Any loss of earnings or income in the past by reason of being unable to work at his calling;

"8. Any loss of earnings or income and/or lessening of earning capacity which he may reasonably be expected to sustain in the future;

and from these as proven by a preponderance of the evidence your verdict should be for such sum as will fully and fairly compensate the plaintiff for the damages sustained by him as a result of the negligence of the defendant, if any, but your verdict shall not exceed the sum sued for."

The Court: Instruction No. 5 was withdrawn. Do you have any objection to Instruction No. 6?

Mr. Frost: I have no objection to Instruction No. 6.

page 177] Plaintiff's Instruction No. 6 (Given):

"The Court instructs the jury that one who is liable for negligently inflicting personal injuries on another is responsible for all the ill effects which, considering the condition of health in which the plaintiff was when he or she received the injury, naturally and necessarily follow such injury. A defendant's liability is in no way lessened or affected by reason of the fact that the injuries would not have resulted had the plaintiff been in good health, or that they were aggravated and rendered more difficult to cure by reason of the fact that he or she was not in good health."

The Court: Now we will consider instructions offered by the defendant. Mr. Johnson, do you have any objection to Instruction A?

Mr. Johnson: No, sir, no objection.

The Court: Instruction A will be given.

page 178] Defendant's Instruction A (Given):

"The Court instructs the jury that the mere happening of an accident places no responsibility on the defendant and raises no presumption of negligence on its part.

"For the plaintiff, Frederick J. Bisson, to recover he must himself be free of negligence which contributed to the ac-

cident and must prove by a preponderance of the evidence negligence on the part of the defendant.

"If the plaintiff fails to prove that the defendant was guilty of negligence, or even though he prove it, yet if it further appears that he, himself, was guilty of negligence proximately contributing to the injuries complained of, the plaintiff cannot recover, and you must find for the defendant."

The Court: Do you have any objection to Instruction B?
Mr. Johnson: No, sir, no objection to Instruction B.
The Court: Instruction B will be given.

page 179] Defendant's Instruction B (Given):

"The Court instructs the jury that reasonable care is such as an ordinarily prudent person would have exercised in a like situation."

The Court: Is there any objection to Instruction C?
Mr. Johnson: No, sir, no objection to Instruction C.
The Court: Instruction C will be given.

Defendant's Instruction C (Given):

"The Court instructs the jury that there was no duty resting upon the defendant to anticipate or foresee and make provision to safeguard against all accidents that might happen.

"Its duty in this respect is limited to using reasonable care to take and make such precautions to safeguard against any conditions that it could reasonably anticipate or foresee might likely or probably cause injury to the plaintiff."

page 180] The Court: Is there any objection to Instruction D?
Mr. Johnson: No, sir, no objection to Instruction D.
The Court: Instruction D will be given.

Defendant's Instruction D (Given):

"The Court instructs the jury that the defendant owed the plaintiff the duty of exercising reasonable care to keep its premises in a reasonably safe condition, and even though the jury may believe from the evidence he was injured on the defendant's premises, the defendant cannot be held liable for the plaintiff's injuries unless such injuries were proxi-

mately caused by the defendant's negligence and the plaintiff himself was not guilty of contributory negligence, which proximately contributed to his injuries."

The Court: Is there any objection to Instruction E?
Mr. Johnson: No, sir, no objection
The Court: Instruction E will be given.

page 181] Defendant's Instruction E (Given):

"The Court instructs the jury that even if you believe from a preponderance of the evidence that the defendant Company was negligent, yet if you further believe that Frederick J. Bisson, the plaintiff, knew, or, in the exercise of ordinary care, should have known that there was snow or ice or both on the walkway at the place of the accident, and that he failed to use reasonable care under all existing circumstances, as shown by the evidence, to act on such knowledge and the accident occurred, then Federick J. Bisson was guilty of negligence and if you further believe that such negligence proximately contributed to the accident, you must find for the defendant Company, regardless of any negligence on the part of such Company, and this is true even though you may believe from a preponderance of the evidence that the degree of negligence of the defendant Company was greater than that of the plaintiff."

The Court: Do you have any objection to Instruction F?
Mr. Johnson: Yes, sir, I object to that instruction in that it makes no provision at all for the necessity of
page 182] this man to cross this walk to go to his home. It simply allows the jury to find that if these conditions existed then the jury can on that consideration alone find him to have assumed the risk without even allowing the jury to consider the fact he had to go across this walk.
The Court: The Court is going to give Instruction F as offered. This is also supported from the Instruction Book of Doubles, Emroch and Merhige and also in the case of *Walker* versus *Memorial Hospital* and the language is very similar.
Mr. Johnson: We except to the giving of that instruction.

Defendant's Instruction F (Given):

"The Court instructs the jury that if you believe from a preponderance of the evidence that by reason of the weather conditions the walkway leading from the sidewalk to the

plaintiff's apartment was slippery as the result of ice or snow on the said walkway, that these conditions were obvious to the plaintiff, or, in the exercise of reasonable care, should have been obvious to the plaintiff, and that the page 183] plaintiff proceeded to walk on the said walkway, and if you further believe from a preponderance of the evidence that he assumed the risk of injury in so walking then he cannot recover against the defendant in this action for damages from his fall on the said walkway."

The Court: Instruction G was withdrawn. Is there any objection to Instruction H?

Mr. Johnson: I have no objection to Instruction H.

The Court: The Court will give Instruction H.

Defendant's Instruction H (Given):

"The Court instructs the jury that the burden of proof is on the plaintiff to prove by a preponderance of the evidence the injuries sustained in the accident, the extent thereof and the damages sustained."

The Court: Is there any objection to Instruction J?

Mr. Johnson: I have no objection to Instruc- page 184] tion J. I understand Instruction I was withdrawn.

The Court: The Court will give Instruction J as offered.

Defendant's Instruction J (Given):

"The Court instructs the jury that you must consider this case solely upon the evidence before you and the law laid down in the instructions of the Court. A verdict cannot be based in whole or in part upon conjecture, surmise or sympathy, but must be based solely upon the evidence in the case and the instructions of the Court."

Note: The jury having returned its verdict for the plaintiff in the sum of $15,000.00 the following ensued:

The Court: Any motions?

Mr. Frost: The defendant, by counsel, moves the Court to set aside the verdict of the jury on the following grounds:

For admitting evidence over objection of the page 185] defendant;

For failure to admit evidence presented by the

defendant;

For giving instructions of the plaintiff over the objection of the defendant;

For failure to give instructions offered by the defendant;

For failure to strike the evidence and because the verdict is contrary to the law and the evidence and that there is no negligence shown;

That the plaintiff was guilty of contributory negligence as a matter of law and assumed the risk which would bar his recovery; and

For the objections and exceptions made during the trial.

The Court: Mr. Johnson, do you have anything to say?

Mr. Johnson: No, sir, other than to say it is purely a jury question in my humble opinion. The matter has been properly submitted to the jury under proper instructions and it was purely a jury question.

The Court: I would like to have an opportunity page 186] to study more closely the case of *Walker* versus *Memorial Hospital*. I will not ask you gentlemen to file any briefs unless you so desire but the Court wants an opportunity to give that case a thorough reading and consideration because I think that is the crux of the plaintiff's case under that instruction given as a basis for that case.

Mr. Martin, don't enter up judgment for the time being, the Court not being advised, and will take the matter under advisement.

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A Copy—Teste:

H. G. TURNER, Clerk.

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